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

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

- vs –

PHOENIX CAYMAN LTD. and VISHAL GARG

Defendants.

Index No. 653841 / 2023

Motion Seq. No. 003

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Plaintiff Karoline Molberg as Executor of the Estate of Erik Molberg, in her individual capacity and derivatively on behalf of Phoenix Holdco LP ("Phoenix Holdco" or the "Partnership"), and Blue Bear Ltd., in its capacity as the new general partner of the Partnership, ("Blue Bear" or the "New General Partner"), by and through their undersigned counsel, respectfully seeks summary judgment under CPLR § 3212 (the "Motion").

PRELIMINARY STATEMENT

This action is about Defendant Phoenix Cayman Ltd. ("Phoenix Cayman" or the "Former General Partner") and its director Vishal Garg's ("Garg" together with Phoenix Cayman, "Defendants") refusal to relinquish operational control of Phoenix Holdco—a Cayman Islands Partnership—after a supermajority of the Partnership's limited partners removed Phoenix Cayman by written resolution (the "Removal Resolution") pursuant to the terms of Phoenix Holdco's limited partnership agreement (the "LP Agreement"). As demonstrated below, the Court should grant summary judgment on Plaintiffs' claim for declaratory judgment against Defendants—a claim that is simple, straightforward, and beyond any legitimate dispute. Similarly, the Court should dismiss Defendants' declaratory judgment counterclaim because there is no dispute as to the validity of the Removal Resolution, and the balance of the relief sought is not ripe for adjudication.

Summary judgment in this matter is proper based on the plain language of the LP Agreement which mandates that the Former General Partner maintain financial reporting obligations to the limited partners ("Limited Partners" or "LPs") to, among other things: (i) prepare an annual report for the Partnership by KMPG (or a firm of similar recognition); and (ii) circulate a quarterly report containing income, expenses, and the financial position of the Partnership for

that quarter. Unfortunately, Defendants breached these unequivocal obligations even though they received notice of their breach and had ample opportunity to cure.

By way of brief background, on March 29, 2021, in the related *Black et al. v. Phoenix Cayman Ltd. et. al.* (652460/2020) (the "*Black Matter*"), the Hon. Justice Barry Ostrager ordered Phoenix Cayman to "complet[e] [ ] an accounting, including the production of all books and records of the partnership" as the Former Partner had failed to do so since 2014. NYSCEF 78. Following the Court's mandate, the auditor that Defendants engaged, Moore Cayman, disclaimed its opinion for the financial statements prepared for 2014-2019 based on, among other things, the inability to gather "sufficient and appropriate audit evidence" about all cash transactions, related party transactions, and inability obtain sufficient independent third-party confirmations as to the existence, completeness, and accuracy of amounts due from related parties. Molberg Aff., Ex. 8. Understandably, Moore Cayman's findings about the financial condition of the Partnership were deeply troubling for the Limited Partners.

Concerns about Phoenix Cayman's management of the Partnership only grew and culminated when Defendant Garg testified on April 19, 2023, in another related matter, *U.S. Bank National Bank Association vs. Triaxx Asset Management, LLC et. al.*, 18-cv-04044 (SDNY, Moses, B.) (the "Trustee Action"), that he intended to pay himself and his inner group of associates—Ziggy Jonsson, Mingsung Tang, Nicholas Calamari, and Dom Savino—a "discretionary bonus" in the aggregate of $5M from any litigation proceeds awarded to the Partnership's wholly-owned subsidiary, Phoenix Real Estate Solutions ("PRES"), instead of rightly disbursing such funds to the Limited Partners.

Consequently, on April 28, 2023, Plaintiff Molberg served a formal written notice for the benefit of the Partnership setting forth Phoenix Cayman's breaches of the LP Agreement for the

failure to provide the Limited Partners with books and records, including audited annual financial statements, and also demanded annual audited financial statements for the 2021 Fiscal Year, as well as quarterly reports for 2020, 2021, 2022, and the first quarter of 2023 (the "April 28 Notice"). Phoenix Cayman failed to provide the contractually required financials demanded within the thirty (30) day cure period in the LP Agreement.

Thus, on June 5, 2023, the Cayman Islands law firm Appleby Global, with the assistance of United Kingdom and New York counsel, proctored a vote by written resolution for the removal of the Former General Partner. A ***supermajority of over 78% of the cumulative shareholder interests, including twelve different individuals*** (the "Supermajority"), exercised their bargained-for contractual right under the LP Agreement to remove Phoenix Cayman for cause as the general partner of Phoenix Holdco. Despite Phoenix Cayman's undeniable breaches of the LP Agreement, the failure to cure those breaches, and the Supermajority's action to remove Phoenix Cayman and substitute it with a new general partner, Phoenix Cayman and its now sole Director Defendant Garg have refused to relinquish control of the operations of the Partnership, self-servingly declaring the Removal Resolution "null and void." As a result of the Defendants' obstruction and refusal to comply with straight-forward corporate governance, Plaintiffs were forced to file this action and defend against Defendants' counterclaim that is patently improper as a matter of both law and fact.

As discussed below, there are no triable issues of fact surrounding Defendants' breach of their undisputed obligations to produce the Partnership's financial statements. Nor are there any issues of fact as to Defendants' subsequent failure to cure those breaches. Accordingly, Plaintiffs respectfully submit they are entitled to summary judgment: (i) declaring the Removal Resolution

valid; (ii) awarding Plaintiff Molberg reasonable attorneys' fees and costs; and (iii) dismissing Defendants' declaratory judgment counterclaim.

FACTUAL BACKGROUND

A. Background to Phoenix Holdco.

This action arises out of the Limited Partners' investment in Phoenix Holdco, a Cayman Islands limited partnership.

Since 2011, Defendant Phoenix Cayman, Defendant Garg, and non-party Raja Visweswaran (until September 2023) [1] have operated and controlled the Partnership and its subsidiaries. Molberg Aff., ¶3. The Partnership has two wholly owned subsidiaries: (1) Phoenix Real Estate Solutions Ltd. ("PRES"), which serves at the operating entity and has been the sole source of the Partnership's revenue; and (2) Phoenix Structured Credit Investment Limited ("PSCIL"), which serves as a holding company for the Partnership's investments, including its equity interest in a series of collateralized debt obligations, *to wit* the Triaxx CDOs.

In 2011, Garg, working with his associates, solicited the Limited Partners' investment in Phoenix Holdco. *Id.* at ¶4. After hearing Garg's pitch about the purported lucrative investment opportunity, on or about March 22, 2011, the Limited Partners signed the Exempted Limited Partnership Agreement of Phoenix Holdco (the "LP Agreement"). *Id.* at Ex. 2. The total capital raise from the Limited Partners was $5,299,960. *Id.*

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[1] On or about September 22, 2023, following the Removal Resolution, non-party Raja Visweswaran resigned from all positions in the Phoenix Partnership. Molberg Ex. 16. At the inception of the Partnership, Phoenix Cayman maintained two directors (Defendant Garg and Mr. Visweswaran) and four officers (Messrs. Garg, Visweswaran, Raza Khan, and Michael Balboa). NYSCEF 64. Garg is the only remaining officer and director of Phoenix Cayman and other entities within the Partnership. Molberg Aff. ¶51.

B. The Plain Language of the LP Agreement Requires the General Partner to <u>Prepare an Annual Audit and Produce Quarterly Financials.</u>

A material provision to the LP Agreement is the requirement that Phoenix Holdco's general partner shall, among other things, maintain books and records, retain accounting professionals, and permit inspection of the Partnership's books, records, and financial condition:

> Section 8.1 <u>Books and Records</u>. The General Partner shall maintain at the General Partner's principal place of business separate books of accounts which shall show a complete and accurate record of the assets, liabilities, transactions and financial condition of the Partnership, including the costs and expenses incurred, all charges made, all credits made and received, and all income derived in connection with the conduct of, and transactions by, the Partnership and the operation of its business and affairs in accordance with (a) GAAP; (b) U.S. federal income tax accounting rules and (c) the reports prepared and provided by the General Partner. The accounting methods of the Partnership shall be consistently applied.
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> * * *
>
> Section 8.2 <u>Financial Statements and Other Reports</u>. The General Partner shall use commercially reasonable efforts to distribute to the Partners the following reports at the indicated times:
>
> <u>Tax Information</u>. As soon as practicable, but in any event within 90 days after the end of each Fiscal Year of the Partnership, such information concerning the Partnership (including Schedule K-l or successor schedule) as is necessary for a Partner to complete and satisfy its U.S. federal, state and local and foreign tax reporting requirements.
>
> <u>Financial Information</u>.
>
> (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. Such financial statements shall include (i) the assets and liabilities of the Partnership as of the end of such Fiscal Year; (ii) the net profit or net loss of the Partnership for such Fiscal Year; and (iii) each Limited Partner's closing Capital Account balance as of the end of such Fiscal Year.
>
> (ii) Within a reasonable time after the end of each quarter of a Fiscal Year of the Partnership, a report containing information regarding the quarterly income, expenses and financial position of the Partnership for, and as of, such quarter.

* * *

Section 8.4 Right of Inspection.

> (a) Each Partner, or the authorized representative(s) thereof, shall have access to and may inspect, photocopy and conduct audits of all relevant books, records, accounts and materials of the Partnership for any purpose reasonably related to such Limited Partner's interest as a limited partner in the Partnership. The exercise of the rights contained in this Section 8.4 shall be made at such times that may be reasonably arranged with the General Partner. Each Partner shall bear the costs and expenses related to that Partner's exercise of the rights provided under this Section 8.4 and Section 8.2(c), except as otherwise permitted by the General Partner in its sole discretion, provided that so long as such Partner is not a Competitor, the General Partner will not unreasonably refuse to permit the Partnership to incur a portion or all of such costs and expenses. An audit may be conducted by any Person or Persons that Partner selects at such Partner's cost with at least 30 days notice.

Id. But for these commercially standard protections and access rights, the LPs within the Supermajority would not have invested in the Partnership. *See* Johnson Aff. ¶6, Patterson Aff. ¶7, Khan Aff. ¶9, Witt Aff. ¶5, Molberg Aff. ¶8 (NYSCEF 96), Sargent Aff. ¶9 (NYSCEF 95), Berthold Aff. ¶6, (NYSCEF 94), Bungarten Aff. ¶6(NYSCEF 93), Amore Aff. ¶6 (NYSCEF 92), Gelber Aff., ¶6 (NYSCEF 91).

C. Defendants Breached Their Obligations to Prepare Annual Financials and Produce Quarterly Reports.

Despite the LP Agreement's clear terms, Defendants have flouted their obligations under the agreement by steadfastly refusing to disclose the Partnership's operations and finances. Of significance here, in January 2023, certain limited partners sent emails to the Former General Partner requesting disclosure of the financials required under LP Agreement. Molberg Ex. 9. For example, on January 23, 2023, Limited Partner Dr. Henry Balboa sent a request to Phoenix Cayman, Defendant Garg, and former director Visweswaran to provide copies of the annual reports containing the audited financial statements for the 2020 and 2021 Fiscal Years. Defendants refused. *Id.*

On January 29, 2023, Limited Partner Celestino Amore made a further request to the Former General Partner for copies of the annual reports containing the audited financial statements for the 2020 and 2021 Fiscal Years, reminding Defendants that the *Black Matter* "does not stop the GP from carrying out its duties and fiduciary obligations to distribute annual financials to the Partnership." (emphasis added). *Id.* Rather than send the contractually mandated annual reports, Defendant Garg again knowingly refused to provide the requested financials and improperly blamed the *Black Matter* for Defendants' breach of their obligations under the LP Agreement (Dr. Balboa's and Mr. Amore's emails collectively the "January 2023 Notices"). *Id.*

Because Defendants refused to provide the requested information to the Limited Partners, on February 16, 2023, Plaintiff Molberg circulated the 2020 year-end financials prepared by Moore Cayman to the Limited Partners and told the Former General Partner that ***"the failure to circulate these financials to the LPs is a breach of the LPA and another dereliction in your duty as GP."***[2] *Id.* In that same email, Plaintiff Molberg also reiterated that the Limited Partners who are not named parties in the *Black Matter* deserved transparency from the Phoenix Cayman into their investments in the Partnership. Defendants did not respond to Plaintiff Molberg's email. *Id.*

Then, to add insult to injury, in April 2023, Defendant Garg testified under oath in the Trustee Action that, in the event that the Partnership's only operating entity, PRES, experienced a litigation recovery in that matter, Garg intended to take that money for himself and his inner circle in the form of $5M in bonuses, rather than issue distributions to the Partnership. Molberg Aff., Ex. 10 (Tr: 582:20-586:20).

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[2] These financials were produced in the *Black Matter* and were not marked "Confidential." Regardless, they fall within the scope of documents that the Limited Partners are entitled to receive under the LP Agreement.

Thus, concerned by Garg's sworn testimony, the Partnership's state of affairs and Defendants' refusal to provide the required financial statements, Plaintiff Molberg properly served Phoenix Cayman a formal written notice of breach and demand on April 28, 2023, for the benefit of the Partnership (the "April 28 Notice"). *Id.* at Ex. 12. Notably, the April 28 Notice incorporated the other Limited Partners' notices of breach of demand set forth in the January 2023 Notices.

Although Phoenix Cayman sent two email responses to the Limited Partners after receipt of the April 28 Notice, those emails failed to include audited financial statements for the Fiscal Year 2021 or quarterly reports for 2020, 2021, 2022, and Q1 2023. *Id.* at Ex. 13.[3] Instead, the emails provided a litany of excuses for Phoenix Cayman's failure to provide the demanded information. *Id.* Thus, Defendants chose not to cure the breaches cited by the April 28 Notice and the January 2023 Notices within thirty days as required by the LP Agreement (the "Cure Period"). To date, Defendants have still failed to produce an annual report for Fiscal Year 2021 and are also now in breach of their obligation to provide an annual report for Fiscal Years 2022 and 2023. *Id.* at ¶66.

D. <u>Removal of Phoenix Cayman as General Partner.</u>

Tired of Defendants' continued refusal to comply with their obligations under the LP Agreement, the Limited Partners chose to exercise their right to remove Phoenix Cayman as the general partner of Phoenix Holdco. Section 6.1(d) of the LP Agreement permits the Limited Partners to remove the general partner for Cause, and upon such removal, the general partner is divested in its rights and interests to the Partnership, including distributions:

> (i) Notwithstanding anything contained herein to the contrary, the General Partner may (A) withdraw from the Partnership in accordance with the Act or (***B) be removed with Cause upon the***

3 Long after the January 2023 Notices and the time to cure from the April 28 Notice, Defendants sent some bank statements and a few balance sheets. Molberg Ex. 14.

> ***affirmative act of a Supermajority in Interest. Following such General Partner's removal or withdrawal, upon the affirmative act of a Supermajority in Interest, a new General Partner shall be appointed effective as of the date of such removal or withdrawal and the business of the Partnership shall be continued.*** Molberg Aff., Ex. 2.

A material breach of the General Partner's obligations under the LP Agreement—*i.e.,* failure to distribute the Partnership's books and records or prepare annual audited financial statements—falls within the scope of the definition of "Cause":

> "Cause" means the General Partner: (a) has been found by a court of competent jurisdiction in a non-appealable judgment to have committed an act of fraud, willful misconduct or misappropriation of funds with respect to the Partnership; (b) has been convicted of, or pleads nolo contendere to, a felony involving moral turpitude or any crime involving fraud, theft or dishonesty that has a direct, material and adverse impact on the business of the Partnership; or (c) ***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.*** *Id.* at Schedule 1.

On June 5, 2023, the Cayman Islands law firm Appleby Global, with the assistance of New York and UK counsel, proctored a vote by written resolution for the removal of Phoenix Cayman as the general partner of Phoenix Holdco (the "Removal Resolution"). *Id.* at Ex. 15. After receiving the Removal Resolution, ***a Supermajority of over 78% of the Limited Partners (which included twelve different individuals)*** resolved to remove Phoenix Cayman as the general partner of Phoenix Holdco. *Id.* at ¶43. The Supermajority also resolved to replace Phoenix Cayman with Blue Bear Ltd. *Id.*

E. Procedural History.

The Former General Partner, however, refused to respect the Partnership's internal corporate governance and the will of the Supermajority by unilaterally declaring the Removal

Resolution "null and void." *Id.* at ¶48. As a result, Plaintiffs were forced to commence this action on August 9, 2023. NYSCEF 2.[4]

On September 22, 2023, Defendants moved to dismiss this matter, alleging that the April 28 Notice was inadequate. NYSCEF 51. Justice Ostrager denied Defendants request for dismissal, holding, in relevant part, "[t]he April 28, 2023 communication sufficiently put defendants on notice that the LPA's thirty-day cure period was being triggered" and "[t]he April 28, 2023 Notice also sufficiently identified the existence of a breach of the LPA." NYSCEF 86.[5] The Court further held that, "[d]ismissal of the action would be premature because there are questions of fact in this case as to whether the purported breach identified in the April 28, 2023 Notice was "knowing, willful, or material" (i.e., whether plaintiffs had cause to remove the defendant General Partner)." *Id.*

The parties have since exchanged document discovery, with Defendants producing documents on June 13, 18, and 28, 2024. Kierych Aff., ¶13. Notably, none of Defendants' document productions yielded a single document reflecting "commercially reasonable efforts"

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[4] On August 22, 2023, Plaintiffs filed an Order to Show Cause seeking a preliminary injunction that would, among other things, change the status quo by permitting the New General Partner to assume the operations of the Partnership, and enjoin Defendants from further dissipating the Partnership's assets, including the imminent receipt of at least $11M from an escrow account in the Trustee Action. *See generally,* NYSCEF 12. A consent agreement was entered between the parties during the evidentiary hearing on November 6, 2023, whereby the parties agreed that Defendants would retain an auditor within 45 days, Plaintiffs would not unreasonably withhold consent to the designated auditor, and Defendants were not permitted to invade any of the $11M currently being held in escrow except to pay reasonable fees to service providers (and "in no events will any proceeds be paid to defendant Garg or any of his associates without further order of the court") (the "Consent Agreement"). NYSCEF 101. Defendants, however, failed to retain an acceptable auditor, despite Plaintiffs best efforts to work collaboratively with the Former General Partner through counsel, and remain in breach of the Consent Agreement. Molberg Aff. ¶60 & Kierych Aff., Exs. 2&3.

[5] Defendants' appeal of Justice Ostrager's order is set for the December Term.

taken by Defendants after receipt of the January 2023 Notices, the April 28 Notice, or during the Cure Period, to rectify the breaches of the LP Agreement cited in the April 28 Notice. Accordingly, as there is no dispute as to whether the breach cited in the April 28 Notice was "knowing, willful, or material," Plaintiffs respectfully move for summary judgment.

ARGUMENT

"It is well established that 'the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *Stonehill Cap. Mgmt. LLC v. Bank of the W.*, 28 N.Y.3d 439, 448 (2016) (quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). Upon such a showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Id.* (quoting *Alvarez,* 68 N.Y.2d at 324). "[O]nly the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment." *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978). "'A shadowy semblance of an issue is not enough to defeat the motion.'" S*.J. Capelin Assocs., Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 (1974) (citations omitted).

A. Plaintiffs Are Entitled to Summary Judgment Declaring the Removal Resolution of the Former General Partner as Valid.

1. Defendants Knowingly Breached the LP Agreement.

Under Cayman Law, which governs the LP Agreement, contracts are interpreted in accordance with their plain language without regard to "subjective evidence of any party's intentions." *See Ennismore Fund Mgmt. Ltd. v. Fenris Consulting Ltd* 2016 (1) CILR 282 (Kierych Aff., Ex. 4). The plain language of Section 8.2 of the LP Agreement is clear that "[t]he General

Partner shall use commercially reasonable efforts to distribute to the Partners the following reports at the indicated times . . . [w]ithin 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 [and]. . . [w]ithin a reasonable time after the end of each quarter of a Fiscal Year of the Partnership, a report containing information regarding the quarterly income, expenses and financial position of the Partnership for, and as of, such quarter." Molberg Aff., Ex. 2. There is no triable issue related to Defendants' knowledge of Section 8.2 as evidenced by the following undisputed facts:

- Garg[6] is the signatory on behalf of Phoenix Cayman to the LP Agreement. *Id.; see also,* NYSCEF 106, ¶33 (Defendants' Answer and Counterclaims).
- The failure to prepare annual audited financial statements for fiscal year 2021 was admitted by Phoenix Cayman's authorized representative and internal general counsel, Matthew Maron, during the November 6, 2023, evidentiary hearing in this matter.[7] NYSCEF 117 (48:25, 67:14-17).
- ***After*** the Removal Resolution had passed, Mr. Maron circulated some quarterly financials in the form of bank statements and balance sheets for the Partnership. Most recently, Mr. Maron has sporadically sent quarterly financials upon demand from the Limited Partners. Molberg Aff., Ex. 14.

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[6] Garg is the Chief Executive Officer of Better Mortgage, a public company. Kierych Aff. Ex. 9. Garg was previously the Chief Financial Officer of a separate public company, MRU Holdings, and responsible for certifying the financial filings with the SEC. *Id.* at Ex. 10. He cannot reasonably deny knowledge of the Former General Partner's financial reporting obligations.

[7] Defendants still have not provided the 2021 Annual Report to the Limited Partners. Molberg Aff., ¶66. Nor has the General Partner provided the Limited Partners with an Annual Report for Fiscal Years 2022 & 2023. *Id.*

Thus, Defendants cannot dispute they knew of their reporting obligations under the LP Agreement. Nor can they dispute that following receipt of the January 2023 Notices, and prior to the Removal Resolution, they did not prepare an annual report for Fiscal Year 2021, ***or*** produce quarterly reports for 2020, 2021, 2022, and Q1 2023 as required under Section 8.2 of the LP Agreement. Molberg Aff. ¶33.

2. Defendants' Breach Was Willful.

Similarly, there are no triable issues of fact related to the "willful" nature of Defendants' breach of the LP Agreement.

The Court of Appeal of the Cayman Islands has analyzed and defined "wilful" conduct as follows:

> An act, or an omission to do an act, is wilful where the person of whom we are speaking knows what he is doing and intends to do what he is doing. But if that act or omission amounts to a breach of his duty, and therefore to negligence, is the person guilty of wilful negligence? In my opinion that question must be answered in the negative unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty.

Goodman v. DMS Governance Ltd. [2020 (20) CILR 250] (citing *Peterson v. Weavering Macro Fixed Income Fund Ltd.* [2015 (1) CILR 45])(Kierych Ex. 7): *see also*, *De Beers UK Ltd. v. Atos Origin It Services UK Ltd.*, 2010 WL 5093996 [2010] EWHC3276 (Kierych Ex. 8)[8] ("Wilful misconduct refers to conduct by a person who knows that he is committing, and intends to commit a breach of duty, or is reckless in the sense of not caring whether or not he commits a breach of duty"); *see also, Manhattan Chrystie St. Dev. Fund, LLC v Witkoff Group LLC,* 79 Misc. 3d 1214[A], *4 (Sup. Ct. N.Y. Cnty. June 26, 2023) (adopting Delaware Chancery Court definition of willful misconduct "as an action that is voluntary and intentional, but not necessarily malicious.").

[8] Cayman courts follow English common law. *See e.g., Davis v Scottish RE Group Ltd.,* 2017 N.Y. Misc. LEXIS 13482 (Sup. Ct. N.Y. Cnty. July 19, 2017).

Here, Defendants cannot raise a triable issue of fact showing they were not "reckless in the sense not caring" whether the Partnership's financial statements were produced prior to expiration of the Cure Period.

Initially, Defendant Garg's response to the January 2023 Notices speaks for itself. Rather than make any overture or effort towards the production of the Partnership's financials, Defendant Garg instead chastised the Limited Partners for inquiring into the Partnership's finances and request for the books and records that they are contractually due and owed, and outright refused to comply with his obligations under the LP Agreement.[9] *See* Molberg, Ex. 9.

While Plaintiffs have expended significant time and effort trying to persuade the Former General Partner to comply with its obligations under the LP Agreement, the Removal Resolution and avoid judicial intervention, Defendants have instead tried to justify the Former General Partner's noncompliance with the LP Agreement with arguments that only reinforce that the breaches were willful. Indeed, as set forth below, none of the pretexts that Defendants have previously raised in this litigation under the guise of purportedly "commercially reasonable" efforts to distribute the Partnership's financials raise any material issue of fact as to the willful nature of the Former General Partner's breaches.

First, Defendants have routinely tried to sanitize their breach by contending that they have been unable to engage a new auditor, blaming such inability on their former auditor Moore Cayman's disclaimer of opinion in its audit of the Partnership's financial statements as of 2019. *See e.g.,* Molberg Ex. 13. Party document discovery, however, did not yield a single document

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[9] Courts have taken general partners to task for refusing to grant their limited partners access to books and records. *See e.g.* *Curley v. Brignoli Curley & Roberts Assocs*., 746 F. Supp. 1208, 1211 (S.D.N.Y.1989) (noting ""glaring misconduct"" by general partners and its CEO in denying limited partner access to books and records).

following receipt of the January 2023 Notices and prior to the Removal Resolution (let alone during the 30-day Cure Period), reflecting any commercially reasonable efforts used by Defendants to engage a new auditor. For example, there is no correspondence with prospective accounting firms inquiring about the preparation of an annual report during the Cure Period. Nor are there any internal emails discussing the need for an external accountant during this period.[10] There can be no dispute that had Defendants cared to cure their breach, they would have sent at least one email to an accounting professional seeking assistance with preparation of the Partnership's financials in the ***five-month*** period following receipt of the January 2023 Notices.

Second, any suggestion by Defendants that their breach was not willful as evidenced by their prior engagement of Moore Cayman to prepare audited annual financials rings hollow because (i) six years of audited annual financial statements were distributed simultaneously only after this Court issued an order mandating the production of the Partnership's books and records (*see Black Matter* NYSCEF 77); and (ii) those financials do not fall within the scope of the April 28 Notice. Molberg Aff., Ex. 12. Similarly, following judicial intervention in this matter, Defendants were able to retain the accounting firm Weaver & Tidwell ***after*** the preliminary injunction hearing and Consent Agreement in this matter in November / December 2023. Had Defendants intended or cared to comply with their financial reporting obligations, they would have engaged an accountant absent court intervention.

Third, Defendants' failure to commission a new external accountant after the January 2023 Notices or during the Cure Period neither excuses nor explains the failure to distribute quarterly

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[10] Production of documents from a non-party subpoena to Anchin (a firm Defendants purportedly tried to retain in February 2023 per Mr. Maron's sworn testimony—NYSCEF 98) categorically show that the Former General Partner did not attempt to retain the firm until October 2023, months ***after*** the Cure Period had expired. Molberg Ex. 17. Defendants did not produce these documents in party discovery.

reports, which is a streamlined process and does not require the wealth of resources associated with a full-blown audit. For example, preparation of a balance sheet or profit and loss statement for an entity that has been purportedly largely non-operational should not take more than a day, and downloading quarterly bank statements should not take more than an hour. Sargent Aff. ¶5. Similarly, document discovery did not yield any correspondence following receipt of the January 2023 Notices and before the Removal Resolution (let alone during the 30-day Cure Period), reflecting any effort (let alone commercially reasonable efforts) used by Defendants to prepare or distribute any quarterly financial statement. Kierych Aff., ¶13.

Fourth, Defendants admit that they chose to allocate the Partnership's limited available funds to paying lawyers in the Trustee Action rather than paying an auditor to prepare annual reports. Molberg Aff., Ex. 13. As discussed above, this is the same proceeding wherein Defendant Garg testified that he intends to reward himself and his inner circle with $1M discretionary bonuses in the event of a litigation recovery and did not anticipate any "surplus profit" from any litigation proceeds—*i.e.,* funds for distribution to the Limited Partners. *Id.* at Ex. 10 (582-586). Regardless, even if Defendants' payment prioritization to the Trustee Action lawyers was found "commercially reasonable," Defendants did not keep any reserves for the costs associated with the contractually mandated annual report, nor did they facilitate a capital call to cover such costs. Defendants simply had no intention to ensure that an auditor was retained.

At bottom, Defendants could have easily produced quarterly financial statements and engaged an auditor to prepare annual reports—however, they simply did not intend or care to do so.

3. Defendants' Breach Was Material.

Finally, there can be no dispute that Defendants' breach of their financial reporting obligations was material. Under Cayman Islands' law a material breach is one that "connotes a

breach of contract which is more than trivial but need not be repudiatory" and means a breach which is "substantial." *Compass Group UK and Ireland Ltd v Mid Essex Hospital Services NHS Trust* (2013) EWCA 200 Civ (Kierych Aff., Ex. 5). Here, the record is uncontestable that financial reporting was a substantial term to the Limited Partners' investment and the LP Agreement.

First, there is no dispute that financial reporting was a material term marketed to the Limited Partners during the solicitation period preceding their investment. Indeed, the Term Sheet preceding the Limited Partners' investment contained a specific "Reporting" provision:

> Limited partners will receive annual audited statements by a Top 5 global accounting firm [Currently expected to be KPMG] and will be notified of important developments concerning the LP and its business on an ongoing basis. Molberg Aff., Ex. 1.

Second, the importance of the Former General Partner's financial reporting obligations is confirmed by affidavits from the Supermajority attesting that they would not have invested in the Partnership but for the promise and assurance that they would be provided with annual audited financial statements and quarterly financial reports. *See* Johnson Aff. ¶6, Patterson Aff. ¶7, Khan Aff. ¶9, Witt Aff. ¶5, Molberg Aff. ¶8 (NYSCEF 96), Sargent Aff. ¶9 (NYSCEF 95), Berthold Aff. ¶6, (NYSCEF 94), Bungarten Aff. ¶6(NYSCEF 93), Amore Aff. ¶6 (NYSCEF 92), Gelber Aff., ¶6 (NYSCEF 91). To be sure, it is axiomatic that no accredited investor would blindly invest a significant sum into a high-risk opportunity (*i.e.,* an offshore limited partnership with its business model tied to CDOs following the RMBS crisis) without having a mechanism for insight into their investment.

Finally, the substantive need for financial transparency has only been heightened following receipt of Moore Cayman's six-years of disclaimed opinions based on, among other things, the inability to gather "sufficient and appropriate audit evidence" about all cash transactions, related-

party transactions, and inability to obtain sufficient independent third-party confirmations as to the existence, completeness, and accuracy of amounts due from related parties. Molberg Aff., Ex. 8.

Accordingly, Plaintiffs respectfully submit there are no triable issues of fact that Defendants' breach was material.

4. Defendants Were Rightfully Removed for Cause.

Thus, without question or dispute, Defendants were rightfully removed for "Cause" under the express language of the LP Agreement that allows for removal and replacement of the Partnership's general partner. Molberg Ex. 2 (Section 6.1(d) & Schedule 1). On the basis of the clear terms in the LP Agreement, and as discussed above, the Former General Partner was rightfully removed for "Cause" because it committed a "knowing, willful, and material breach" of the LP Agreement by failing to distribute annual audited financial statements for FY 2021 and quarterly reports for 2020, 2021, 2022, and the Q1 2023 as required under Section 8.2. *Id.* at § 8.2. *See Walnut Hous. Assoc. 2003 L.P. v MCAP Walnut Hous. LLC,* 2018 NY Slip Op 30544[U] (Sup Ct. N.Y. Cnty. Mar. 28, 2018) (granting summary judgment declaring validity of removal of general partner).

Accordingly, Plaintiffs respectfully submit that summary judgment declaring the Removal Resolution as valid is just and proper.

B. Defendants' Counterclaim for Declaratory Judgment Should Be Dismissed.

Defendants have counterclaimed seeking declaratory judgment as to: (i) Phoenix Cayman's rightful status as the current general partner of Phoenix Holdco; (ii) Phoenix Cayman's entitlement to 75% of the Partnership's Available Cash[11] to the extent such Available Cash is derived from

[11] Under the LP Agreement, Available Cash: "means all cash funds of the Partnership (other than in respect of Capital Contributions or amounts borrowed by the Partnership) from incentive, management or other fees, interest, asset sales or other sources at any particular time available for Distribution after the General Partner makes reasonable provision for, and to the extent necessary

money that PRES may receive from the Trustee Action; (iii) Messrs. Garg and Visweswaran's entitlement to repayment of the loans allegedly made to the Partnership (the "Purported Director Loans"); and (iv) the use of money that PRES may receive from the Trustee Action should be used to pay the Purported Director Loans, monies purportedly due to Garg related individuals / entities, and to the lawyers in the Trustee Action. NYSCEF 106. Each sub-count comprising Defendants' counterclaim is subject to summary dismissal as there are no triable issues of fact or legal basis to pursue such claims.

1. The Removal Resolution is Valid.

As discussed in detail above, no triable issues of fact exist as to the Former General Partner's removal for "Cause." *Supra*. Thus, the Court should dismiss Defendants' request for a declaration that Phoenix Cayman is the rightful general partner of Phoenix Holdco—sub-count (i).

2. Adjudication of Sub-Counts (ii)-(iv) Are Premature.

Defendants' request for declaratory judgment as to sub-counts (ii)-(iv) is improper as a matter of law and should be dismissed as premature. The law is clear that for declaratory relief to issue, '[a] dispute must be real, definite, substantial, and sufficiently matured so as to be ripe for judicial determination'" *AB Oil Servs., Ltd. v TCE Ins. Servs., Inc.*, 188 AD3d 624, 626 (2d Dep't 2020) (citations omitted). "Consequently, the request for a declaratory judgment is premature if the future event is beyond the control of the parties and may never occur." *Id.* "The threat of a hypothetical, contingent, or remote prejudice to a party does not represent a justiciable controversy." *Id.*

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a reasonable allocation of, (a) payment of all Operating Expenses of the Partnership as of such time, (b) payment of all outstanding and unpaid current obligations of the Partnership as of such time, (c) Reserves and (d) purchase of any Eligible Investments. The General Partner shall make all determinations regarding the amount of Available Cash (and its components) in its sole discretion." Molberg Ex. 2 (Schedule 1).

Here, Defendants' premature and hypothetical belief that Plaintiffs will not pay the Partnership's expenses, creditors, or comply with the terms of the LP Agreement is insufficient to form a justiciable controversy.

Although the Parties' Consent Agreement preliminarily enjoins Defendant Garg from using any funds won in the Trustee Action to pay himself and his related entities, the agreement includes a specific carveout for the payment of the Partnership's other ordinary expenses. Moreover, Plaintiff Molberg testified that she did not dispute or object to the payment of any Garg-related expenses upon proper verification of such expenses through a review of invoices and time sheets. NYSCEF 117 (26:9-33:24). Thus, until the New General Partner refuses to properly allocate the Partnership's funds for its confirmed liabilities or in accordance with the LP Agreement, no justiciable controversy exists.

Moreover, while Plaintiffs remain hopeful and optimistic that the Hon. Magistrate Judge Barbara Moses will award PRES damages in the Trustee Action and release the funds currently held in escrow, there is no guarantee the Her Honor will enter judgment in PRES' favor.

Accordingly, Defendants' sub-counts (ii)-(iv) are not ripe for adjudication and should be dismissed.[12]

3. Subcount (iii) Seeking Relief on Behalf of Mr. Visweswaran Fails Because Defendants Did Not Join Him as a Necessary Party.

"New York law has long required that a court must refuse to render a declaratory judgment in the absence of necessary parties." *185 W. End Ave. Owners Corp. v Freistat*, 67 Misc. 3d

[12] Assuming Defendants' claims were ripe, they are more appropriately addressed through an award of monetary damages in an action at law. A court may decline to hear a declaratory judgment matter "if there are other adequate remedies available." S*alamone v EIP Global Fund LLC*, 2020 NY Slip Op 32295[U], *7 (Sup Ct, NY Cnty. July 13, 2020) (citing *Morgenthau v Erlbaum*, 59 N.Y.2d 143, 148, 451 N.E.2d 150 (1983)).

1231[A], 2020 NY Slip Op 50694[U], *4-5 (Sup Ct. N.Y. Cnty., June 18, 2020). While sub-count (iii) seeks relief on behalf non-party Raja Visweswaran for the "Purported Director Loans," Defendants chose not to add him as a necessary party.[13] Accordingly, the Court should dismiss sub-count (iii) for this additional reason.

C. Plaintiff Molberg Should Be Awarded Reasonable Attorneys' Fees.

Section 12.9 of the LP Agreement provides as follows:

> In any legal or mediation proceedings, or other actions between the Partners to enforce any of the terms or conditions of this Agreement or of any other contract relating to the Partnership, or any action in any other way pertaining to Partnership affairs or this Agreement, the prevailing party, in addition to any other damages or compensation received, shall be entitled to recover that party's litigation or mediation costs, including reasonable attorney's fees, expenses and costs of any appeals. Molberg Aff., Ex. 2.

Under Cayman Islands law, "a successful plaintiff who recovers more than nominal damages against the defendant should in normal circumstances have an order for costs against the defendant." *Gupta v. Klito,* 1989 WL 650019 (1989) (Kierych Ex. 6). This resembles New York law requiring that a litigant: (i) "prevail on the central claims advanced," (ii) "receive substantial relief in consequence thereof." *Sykes v. RFD Third Ave. I Assoc., LLC*, 39 A.D.3d 279, 279-280 (1st Dep't 2007); *see also Cohen v. Bus. Payment Sys., LLC*, 92 A.D.3d 467, 469 (1st Dep't 2012) (awarding attorneys' fees pursuant to a prevailing party provision in contract).

Plaintiffs respectfully submit they are the prevailing party because they have established their *prima facie* case on their declaratory judgment claim, defeated Defendants' motion to dismiss before this Court, and similarly have established that dismissal of Defendants' counterclaim is

[13] Mr. Visweswaran moved for dismissal from the *Black Matter*, arguing that this Court lacked long arm jurisdiction over him. The Court agreed and dismissed him as a defendant from that case. *See Black Matter*, NYSCEF 248. But in this matter, Mr. Visweswaran seeks to avail himself of this Court by attempting to capitalize from Defendants' counterclaims.

proper. *Supra.* Thus, with the threshold test established, and taking into consideration Defendants' blatant disregard of their unequivocal obligations under the LP Agreement, this Court should exercise the discretion provided under Section 12.9 of the LP Agreement to issue an award of attorneys' fees and costs to Plaintiff Molberg. *See, e.g., Walnut Hous. Assoc. 2003 L.P.* at 33 (awarding attorneys' fees for former general partner's contest of proper removal).

Plaintiff Molberg therefore respectfully submits that an award of her reasonable legal fees and costs in prosecuting this unnecessary case is appropriate and warranted, and that an inquest be set to determine the amount due and owed.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant their Motion for summary judgment by: (i) declaring the Removal Resolution was valid; (ii) declaring Blue Bear Ltd. the General Partner of Phoenix Holdco LP; (iii) dismissing Defendants' counterclaim; (iv) awarding Plaintiff Molberg her reasonable attorneys' fees and costs, to be determined at an inquest; and (v) such other relief this Court deems just and proper.

Dated: New York, New York
October 22, 2024

Respectfully submitted,

By: /s/ *James P. Chou*

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WORD LIMIT CERTIFICATION

Pursuant to Rule 17 of the Rules of the Commercial Division of the Supreme Court, I hereby certify that the total number of words in this memorandum, excluding the caption, the table of contents, the table of authorities, and the signature block is 6,992.

/s/ *James P. Chou*