*To be Argued by:*
RACHAEL KIERYCH, ESQ.
*(Time Requested: 15 Minutes)*

# New York Supreme Court

## Appellate Division—First Department

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,*

**Appellate Case No.: 2023-05964**

**BRIEF FOR PLAINTIFFS-RESPONDENTS**

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Plaintiff Karoline Molberg as Executor of the Estate of Erik Molberg, 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") (collectively, "Plaintiffs-Respondents"), by and through their undersigned counsel, respectfully submit this answering brief (the "Answering Brief") to Defendants Phoenix Cayman Ltd. ("Phoenix Cayman" or the "Former General Partner") and Vishal Garg ("Garg"), (collectively referred hereinafter as "Defendants") appeal of the lower court's decision and order denying their motion to dismiss (the "Appeal").

## PRELIMINARY STATEMENT

Defendants' Appeal seeking to reverse the lower court's refusal to grant their motion to dismiss is a last-ditch effort to delay the inevitable: the removal of Defendant Phoenix Cayman—and its principal, Defendant Vishal Garg—as general partner (the "General Partner") of the Partnership pursuant to the written resolution of a 78% supermajority (the "Supermajority") of the Partnership's limited partners (the "Limited Partners"). As they attempted below, Defendants seek to dismiss this Action by confusing the Court with a manufactured narrative about a related action pending in New York State Supreme Court, New York County, *Black et al. v. Phoenix Cayman Ltd, et al.*, Index No. 652460/2020 (the "Black LP Action"). That action was brought by a subset of the Supermajority and asserted various claims

under Cayman and New York law arising from Defendant Garg and his affiliates' misconduct, including but not limited to, their fraudulent misrepresentations, conversion of Partnership property, and self-dealing at the expense of the Partnership and its Limited Partners. Defendants would have this Court believe that the instant action is an extension of the Black LP Action plaintiffs' allegedly improper attempt to obtain additional monies from Garg and his affiliates. But other than a number of overlapping parties, and the common set of relationships among the Partnership, and the General Partner, Garg, and his affiliates, the Black LP Action, has nothing to do with the instant matter, which is a straightforward removal action that the Limited Partners are entitled to bring under the plain language of the LP Agreement. Indeed, the LP Agreement: (1) permits the Partnership's Limited Partners to remove the Partnership's General Partner for "Cause" by resolution of the Supermajority; and (2) divests the Former General Partner of its rights under the LP Agreement upon removal.

As the Complaint sets forth in detail, the Supermajority was compelled to exercise its contractual removal rights because of (1) Garg's recent threats to siphon off at least $5M of the Partnership's money to his cohorts and himself, (2) the Former General Partner's distribution of audit opinions that the Partnership's auditors disclaimed, rendering the financial information therein useless, (3) Phoenix Cayman's continued refusals to distribute contractually mandated financials, and (4)

Phoenix Cayman's failure to cure (let alone acknowledge) its breaches. Importantly, the Supermajority did not act precipitously. Indeed, for nearly six months leading up to the Removal Resolution, numerous Limited Partners sent emails and notices to the Former General Partner stating, among other things, that the Black LP Action "does not stop the GP from carrying out its duties and fiduciary obligations to distribute annual financials to the Partnership" and that "the failure to circulate these financials to the LPs is a breach of the LPA and another dereliction in your duty as GP." A-462. (the notices sent in January 2023 hereinafter defined as the "January 2023 Notices"). Further, one of the Cayman Islands' oldest and most reputable law firms, Appleby Global, proctored the removal process that led to the Removal Resolution. At bottom, Defendants had every opportunity to cure their breaches but instead chose to willfully ignore each of the notices and demands.

Despite these clear and uncontestable facts, and facing the prospect that he will lose the ability to siphon off millions of more dollars from the Partnership, Garg now characterizes the "LPs'"[1] Removal Resolution and this lawsuit as a scheme to

[1] Defendants' loose definition of ("LPs") as "Ms. Molberg and other limited partners" to describe the facts of this case is careless considering the Partnership is comprised of fifteen different Limited Partners (A-196-211) that have played different roles in this matter and the Black LP Action. Plaintiffs are thus constrained to correct the inaccuracies and misleading arguments about the facts plaguing Defendants' brief. To ensure a correct record, Plaintiffs submit that: (i) only four of the Limited Partners are parties to the Black LP Action (A-51); (ii) twelve Limited Partners voted in favor of the Removal Resolution (A-249-273); and (iii) only Ms.

circumvent the Black LP Action—even though eight of the Limited Partners who voted to remove Phoenix Cayman are not parties to the Black LP Action. But as Defendants are well aware as a signatory to the LP Agreement and the parties responsible for drafting that agreement, there is no devious "scheme." Because the Removal Resolution was both procedurally and substantively proper, Phoenix Cayman and Garg are divested of any claims to the Partnership's assets. Indeed, the LP Agreement is clear that upon the General Partner's removal, it shall:

> . . . have no further right, title or interest in the Partnership (including without limitation any distributions as provided for in Section 5.1 and Section 10.2 that accrue after the date of removal or withdrawal of the departing General Partner). A-180 (Section 6.1(d)(3)).

In short, the Supermajority has spoken, and the Limited Partners resoundingly support Ms. Molberg in her pursuit of the meritorious derivative claim to finally extricate the Partnership from Garg and put an end to his *carte blanche* control of the Partnership's operations and finances, as well as misconduct and outright disregard for his obligations to the Partnership. *See* A-452 (letters of support); A-707 (Berthold Affirmation dated September 27, 2023 ("Berthold Aff.")); A-709 (Amore Affirmation dated September 29, 2023 ("Amore Aff."); A-711 (Khan

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Molberg and Rodger Sargent (representative for Limited Partner Andrew Black) control Plaintiff Blue Bear Ltd. (Defendants incorrectly allege Blue Bear is "controlled by the LPs" without any citation to the record). Defendants were aware of these facts prior to filing their misleading and inaccurate brief.

Affidavit dated September 28, 2023 ("Khan Aff."); A-739 (Bungarten Affirmation dated September 29, 2023 ("Bungarten Aff.")).

In the face of the contractual language undeniably conferring on the Limited Partners the right to remove the General Partner, Defendants now resort to attacking the technical notice requirements under the removal provisions in the LP Agreement. As set forth below, and as the lower court found, these arguments lack merit:

First, Defendants' claim that the notice served by Plaintiff Molberg (the "April 28 Notice") is defective because it is not from the "Partnership" is belied by the plain language of the April 28 Notice, which makes clear that the breach and demand are for the benefit of the Partnership and expressly incorporates the January 2023 Notices that indisputably gave notice to Defendants that the Former General Partner must carry out its duties and fiduciary obligations to distribute annual financials to "the Partnership." A-224 & A-462.

Second, Defendants' contention that the April 28 Notice was inadequate because it did not sufficiently identify the existence of a breach of the LP Agreement and that it was effectively a document request is equally unavailing. Defendants cannot reasonably transform the April 28 Notice into a "document demand" to avoid their rightful removal as the Partnership's General Partner, as the plain language of the April 28 Notice: (i) stated certain financials "must be prepared by the General Partner and distributed to the Limited Partners"; (ii) cited the specific provision and

language from the LP Agreement governing the Former General Partner's obligation to distribute such financials; (iii) incorporated the January 2023 Notices that specifically referred to Defendants' breach; and (v) specified that the Former General Partner denied that the contractually obligated financials demanded in the January 2023 Notices. Thus, the Former General Partner—consisting of sophisticated actors including a lawyer and CEO of a public company—cannot now feign ignorance as to the reasonable notice of their unequivocal breach.

For these reasons and those discussed herein, Plaintiffs-Respondents respectfully request that the Court affirm the lower court's decision and order denying Defendants' motion to dismiss.

## COUNTER-QUESTIONS PRESENTED

**1.** Whether the April 28 Notice and January 2023 Notices provided the Former General Partner with adequate notice that they were sent for the benefit of the Partnership?

ANSWER: Plaintiffs-Respondents respectfully submit that the Court answer this question affirmatively.

2. Whether the April 28 Notice and January 2023 Notices provided the Former General Partner with adequate notice of the existence of a breach under the LP Agreement sufficient to trigger the cure period?

ANSWER: Plaintiffs-Respondents respectfully submit that the Court answer this question affirmatively.

## COUNTER-STATEMENT OF FACTS

This action arises out of Plaintiff Molberg's late father's and other Limited Partners' investment in Phoenix Holdco, a Cayman Islands limited partnership. The Limited Partners—retired or mostly retired individuals—are oppressed minority investors in the Partnership which Defendants run.

### A. Garg Solicits the Limited Partners' Investment and The Parties Execute the LP Agreement

By way of brief background, which is set forth in more detail in the Complaint, the Partnership is an outgrowth of Defendant Garg and his associates' need to raise capital necessary to close on a transaction in 2011 with ICP Asset Management ("ICPAM") to buy ICPAM's assets, including (1) equity in three collateralized debt obligations, the Triaxx CDOs[2], which together held some $5.6 billion of underperforming residential mortgaged backed securities ("RMBS"); (2) ICPAM's right to certain Subordinate Management Fees and Incentive Fees (the "Equity Residual") generated from servicing the Triaxx CDOs as their collateral manager; and (3) ICPAM's services agreements with the Triaxx CDOs. A-32-26.

[2] Triaxx Prime CDO 2006-1, Ltd. ("Triaxx 2006-1"), Triaxx Prime CDO 2006-2, Ltd. ("Triaxx 2006-2), and Triaxx Prime CDO 2007-1, Ltd. ("Triaxx 2007-1" and together with Triaxx 2006-1 and Triaxx 2006-2, collectively, the "Triaxx CDOs").

While the foregoing assets were expected produce income over the long-term, the transaction also contemplated immediate revenues from administrative fees ("Due Diligence/Activist Fees") that the Triaxx CDOs would pay for due diligence and "activist strategy" services to optimize the performance of the Triaxx CDOs' underlying RMBS pools. A-24, ¶27 (Complaint). As noted above, to close the transaction, Garg needed capital from investors to fund the purchase of ICP Asset Management assets, as well as a corporate structure to take in the investment capital and consummate the purchase of ICPAM's assets and services agreements with the Triaxx CDOs. *Id.,* ¶28.

To that end, in early 2011, Garg with the help of others, created an offshore corporate structure comprised four entities domiciled in the Cayman Islands. *Id.*, ¶29. Garg also solicited a total of $5,299,960 from fifteen investors (including retirees as part of their retirement portfolios) by making several salient representations about the alleged lucrative nature of the opportunity. *Id.,* ¶30. Among other things, Garg represented to the prospective investors that significant management fees (*i.e.* cash flows from the Equity Residual) would be due through January 2039, representing a total investor cash flow of $46,781,899 for the "Residual Economics." A-485. Regarding the Due Diligence/Activist Fees, Garg represented that an entity within the Partnership would enter into a services agreement with the Triaxx CDOs that would provide immediate revenues for the

Partnership as the management fees were contemplated in the long-term. A-520. The Due Diligence/Activist Fees were contemplated to generate monthly income for the Partnership (and in fact did). *Id.*

Relying on these representations, on March 22, 2011, Plaintiff Molberg's late father and the other Limited Partners, entered into the LP Agreement, which memorialized many of the representations Garg made in connection with solicitation efforts, including the promise that investors' "return on capital" would be "paid out monthly" (*see* Section 5.1) and a purpose of the LP Agreement was to acquire and own the Triaxx CDOs' management fees (*see* Section 2.4). A-166. Moreover, among other contractually bargained for rights, the LP Agreement contained certain protections to the Limited Partners, including transparency into the finances and operations of the Partnership (Article VIII) and the ability to remove the general partner for Cause[3] (Section 6.1(d)). *Id.*; A-26, ¶34, 66, 67.

[3] "Cause" under the LP Agreement 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. A-214. Sub-section (c) is relevant to this litigation.

### B. Garg Abuses His Authority And Breaches His Obligations As a Director of the General Partner.

Unfortunately, Garg deceived the Limited Partners. Rather than distribute funds as required under the terms of LP Agreement, Garg instead used the Partnership's funds to enrich himself and capitalize his other business ventures. A-26, ¶63. Considering the improper flow of Partnership funds at critical times into Garg and his affiliated entities' coffers, it is not surprising that Garg has run the Partnership under a veil of secrecy with a lack of transparency into the operations and financial affairs of the Partnership.

Indeed, as the signatory of the LP Agreement on behalf of the Former General Partner, Garg was cognizant of the general partner's duties under the LP Agreement, including its obligation to operate the Partnership with financial transparency. *Id.*, ¶33. Nonetheless, Garg and the Former General Partner (controlled by Garg) have persistently refused to disclose the Partnership's operations and finances, flouting their obligations under the LP Agreement requiring the general partner to, among other things, maintain books and records, retain accounting professionals, and permit inspection of the Partnership's books, records, and financial condition. *Id.*, ¶¶33-35.

### C. All of The Former General Partner's Prior Officers and Directors Have Disassociated Themselves From the Defendants.

At the outset of the Partnership, the officers and directors of the Former General Partner included Vishal Garg, Raja Visweswaran, Raza Khan, and Michael

Balboa. A-715. At that time, Messrs. Garg, Visweswaran, Khan, and Balboa also each held a 25% indirect equity interest in the Former General Partner. A-711 (Khan Aff, ¶5), A-717 (Balboa Aff., ¶2).

In or around 2012, after a fallout between Garg and Mr. Khan over Garg's management of their various business ventures (including Garg's conversion of millions of corporate funds, failure to file taxes, and misappropriation of corporate assets), Garg removed Mr. Khan as an officer of the Former General Partner without any notice. A-711 (Khan Aff, ¶4). In addition to his wrongful removal, Garg also punished Mr. Khan by withholding distributions on account of his equity stake even though the Former General Partner had received millions of dollars from the Partnership, and Garg issued distributions to himself and Visweswaran. *Id.*, ¶6. Garg also subsequently removed Michael Balboa as an officer of the Former General Partner.[4]

Notably, in 2016 and 2017, Balboa and Khan challenged the propriety of Garg's operations and use of the Partnership's.[5] *See e.g.*, A-727. Then, in July 2020,

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[4] Defendants will claim that Mr. Balboa was removed as a result of his issues with the SEC. While this may or may not be true, the Court should note that both Visweswaran and Garg submitted letters of support to the court in those proceedings. A-721.

[5] Garg's other business partners and numerous institutional investors have sued him, asserting similar allegations of financial mismanagement. For example, the former Chief Operating Officer of Garg's current company, Better.com, resigned

the Former General Partner's only remaining officer and director aside from Garg—Raja Visweswaran—sent an email to counsel expressing similar concerns about Garg stating, in relevant part:

> 2. In the past few weeks, I have been looking at the books and records of the firm and have a few observations
>
> a. Vishal has given himself a loan of over $1.5 Million that hasn't been approved by me nor informed the LPs
>
> b. There are unexplained cash flows including around $8 Million that haven't been properly accounted for
>
> c. There are many transfers through the holding company (Phoenix Cayman) – I have bank statements to prove that I didn't receive any money from these companies
>
> d. There are many other gaps. A-525 (the "Visweswaran Email").

Subsequently, on September 22, 2023, after Plaintiffs-Respondents commenced this litigation, Visweswaran resigned from all entities affiliated with the Partnership, including the Former General Partner. A-513.

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and filed suit alleging, among other things, that Garg had a history of providing misleading financial statements and information to investors. *See* A-529 (*Pierce v. Better Holdco, Inc. et. al.*, 22-CV-04748 (SDNY). Moreover, established financial institutions such as Pacific Investment Management Company ("PIMCO"), Goldman Sachs, US Bank, and Citigroup Global Markets have sought over $38M in damages against PRES (while under Garg's operation and control) and his other entity Triaxx Asset Management LLC arising from alleged improper billing practices. A-584 & A-640 (*US National Bank Association vs. Triaxx Asset Management, LLC et. al.*, 18-cv-04044 (SDNY, Moses, B.) (the "Trustee Action")

### D. A Supermajority of the Limited Partners Exercise Their Contractual Right to Remove the Former General Partner Following the April 28 Notice.

After the Visweswaran Email became public, certain Limited Partners sent emails to the Former General Partner requesting the financials required under the LP Agreement. A-26, ¶¶48-51; A-462. On January 23, 2023, for example, Limited Partner Dr. Henry Balboa sent a request to Phoenix Cayman, Defendant Garg, and Raja Visweswaran to provide copies of the annual reports containing the audited financial statements for the Fiscal Years 2020 and 2021. Defendants denied this request. A-26, ¶48; A-465.

On January 29, 2023, Limited Partner Celestino Amore made a further request to the Former General Partner to provide copies of the annual reports containing the audited financial statements for the Fiscal Years 2020 and 2021, and Amore reminded Defendants that the Black LP Action "does not stop the GP from carrying out its duties and fiduciary obligations to distribute annual financials to the Partnership." A-26, ¶49; A-464. Rather than provide the contractually mandated annual reports, Defendant Garg again refused to furnish the requested financials, and again, improperly blamed the Black LP Action for Defendants' breach of their obligations under the LP Agreement (Dr. Balboa's and Mr. Amore's emails collectively the "January 2023 Notices"). A-26, ¶50; A-464.

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." A-26, ¶50; A-462-464. In that same email, Plaintiff Molberg also reiterated that the Limited Partners who are not named parties in the Black LP Action deserved transparency from 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 PRES experienced a litigation recovery in that matter, Garg intends to take the monetary award and pay himself and his inner circle $5M in bonuses, rather than issue distributions to the Partnership. A-26, ¶¶6, 53.

Thus, concerned by Garg's sworn testimony, the Partnership's state of affairs, and Defendants' refusal to provide the required financial statements, Plaintiff Molberg, for the benefit of the Partnership, properly served Phoenix Cayman a formal written notice of breach and demand on April 28, 2023. *Id.* ¶55. Notably, the April 28 Notice: (i) stated certain financials "must be prepared by the General Partner and distributed to the Limited Partners"; (ii) cited the specific provision and

language from the LP Agreement governing the Former General Partner's obligation to distribute such financials; (iii) incorporated the January 2023 Notices; and (v) identified that the Former General Partner denied the notices of breach and demand in the January 2023 Notices. A-224.

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. A-26, ¶57.[6] 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. *Id.* ¶64. To date, Defendants have still failed to produce an audit for FY 2021 and are also now in breach of their obligation to provide an audit for FY 2022. A-450 (Molberg Aff., ¶7).

Thus, exhausted with Defendants' continued refusal to comply with their obligations under the LP Agreement, their hollow excuses, Garg's testimony from the Trustee Action that he intended to siphon off the Partnership's assets to himself

[6] After the time to cure had passed, Defendants sent some bank statements and a few balance sheets that beg more questions than provide answers (*e.g.*, reflecting monies owed to Garg for an unsubstantiated million dollar "loan" even though Garg uncontestably owes the Partnership millions, including for money he directly transferred out of PSCIL). *See e.g.* A-410-411.

and his inner circle, and Defendants' failure to produce the financials demanded in the April 28 Notice and the January 2023 Notices within the 30-day cure period, certain Limited Partners chose to exercise their right to remove Phoenix Cayman as general partner pursuant to the terms of the LP Agreement. A-26, ¶64. Indeed, 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 Removal Resolution for the removal and replacement of Phoenix Cayman as the general partner of Phoenix Holdco. After receiving the Removal Resolution, a Supermajority of over 78% of the Limited Partners (which included 12 different individuals) resolved to remove Phoenix Cayman as the general partner of Phoenix Holdco ("Removal Resolution") and appointed Plaintiff Blue Bear Ltd. as the incoming general partner.[7] *Id.* ¶68; A-244.

[7] Defendants' statement that 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" and "[t]he General partner, by contrast, has a 75% interest" is either grossly misleading or a negligent reading of the LP Agreement. Section 5.1 of the LP Agreement refers to the distribution waterfall which includes a 75/25 distribution allocation after the Limited Partners received a return of their capital contribution + a preferred return (defined as 8% of their capital contribution). A-174-175. Section 5.1 does not refer to the capitalization of the Partnership.

### E. The Lower Court Recognized That The April 28 Notice Was Adequate and Denied Defendants' Motion to Dismiss.

Notwithstanding the Removal Resolution, the Former General Partner refused to respect the Partnership's internal corporate governance and the will of the Supermajority by unilaterally declaring the Removal Resolution "null and void." A-26, ¶72. As a result, Plaintiffs-Respondents commenced this action on August 9, 2023. A-26.

On September 22, 2023, Defendants moved to dismiss this action, alleging that the April 28 Notice was inadequate. A-274. Justice Ostrager correctly 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." A-12. 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.*

Unable to accept that their days of *carte blanche* control of the Partnership's operations and finances are coming to an end, and to further stall and delay their rightful ejection from Phoenix Holdco, Defendants filed the instant meritless Appeal.

## ARGUMENT

### POINT I: THE APPELLATE STANDARD OF REVIEW FOR A MOTION TO DISMISS

This Court's review of the Defendants' motion to dismiss is *de novo. See Kolchins v Evolution Mkts., Inc.,* 31 N.Y.3d 100 (2018).

Defendants ask the Court to dismiss Plaintiffs-Respondents' Complaint under CPLR 3211(a)(1) & (7). Regardless of which subsection might apply on a motion to dismiss, the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). Thus, Defendants face a high burden in establishing that dismissal under the CPLR is warranted.

Indeed, a motion to dismiss under CPLR § 3211(a)(1) based upon documentary evidence "should only be granted when the documentary evidence utterly refutes plaintiffs' factual allegations, conclusively establishing a defense as a matter of law." *Greenapple v. Capital One*, N.A., 92 A.D.3d 548, 550 (1st Dep't 2012) (quotation marks omitted).). Furthermore, "a motion for dismissal pursuant to CPLR 3211 (a) (7) 'must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law'" *Siegmund Strauss, Inc. v E. 149th Realty Corp*., 104 AD3d 401,

403 (1st Dep't 2013) (citing *511 W. 232nd Owners Corp. v Jennifer Realty Co*., 98 NY2d 144, 152, (2002)).

As discussed below, Defendants cannot meet their burden under either of these CPLR provisions.

## POINT II: THE LOWER COURT CORRECTLY DETERMINED THAT THE APRIL 28 NOTICE PROVIDED THE FORMER GENERAL PARTNER ADEQUATE NOTICE OF ITS BREACH

Defendants challenge the Removal Resolution by arguing that the April 28 Notice (or "Molberg Letter" as tactically defined by the Defendants) failed to provide adequate notice of the Former General Partner's breach of the LP Agreement because: (1) it was not from the Partnership; and (2) and it did not contain language indicating that there was a "knowing, willful, and material breach" of the LP Agreement. Defendants' arguments fail, as the April 28 Notice and January 2023 Notices provided sufficient notice to Defendants as a matter of law.

### A. The April 28 Notice is for the Benefit of the Partnership

First, Defendants' reliance on cherry-picked portions of the April 28 Notice taken out of context to support their argument that it was not "from the Partnership" is decidedly unpersuasive. The April 28 Notice speaks for itself:

- The re: line indicates that the notice is being sent on behalf of Phoenix Holdco LP: "Re: Phoenix Holdco LP-Demand for Audited Financials from Phoenix Cayman Ltd. ('Phoenix Cayman' or the 'General Partner')". A-224.

- The first paragraph identifies the purpose of the notice as related to the Partnership: "I write regarding the books, records, financial statements and other reports of Phoenix Holdco LP (the 'Partnership')" *Id.*

- The second paragraph quotes the books and records provision of the LP Agreement and informs the Former General Partner of its obligation to circulate the financials of the Partnership to all Limited Partners: "Pursuant to Article VIll of the Limited Partnership Agreement dated March 22, 2011, certain financials must be prepared by the General Partner and distributed to the Limited Partners." *Id.* [8]

The April 28 Notice then goes on to reference and incorporate the January 2023 Notices that demanded the production of financials for the benefit of the Partnership, and set forth the allegations reflecting a breach of the Former General Partner's obligations under the LP Agreement:

> On 23 January 2023, a request was made to the General Partner to provide copies of the audited accounts for the 2020 and 2021 Fiscal Years, and such request was denied by the General Partner. Subsequently, on 28 January 2023, a further request was made to the General Partner to provide copies of the audited accounts for the 2021 Fiscal Year and this request was again denied by the General Partner. *Id.*

[8] Defendants' argument at the pleadings stage that Plaintiff Molberg was "presumably [ ] try[ing] to hide the letter's "true" and "hidden" purpose and manufacture a purported uncured breach of the LP Agreement" is nonsensical. First, the Former General Partner cannot reasonably contest it breached its obligation to distribute the Partnership's books and records following the January 2023 Notices and the April 28 Notice. There simply was no breach to "manufacture." Second, it would make no sense for Plaintiff Molberg to knowingly send a defective notice if the General Partner were to be removed for Cause.

Indeed, Mr. Amore's email in the January 2023 Notices was clear that the requested financial information was for the benefit of the Partnership, the party harmed by the Former General Partner's failure to distribute such information was the Partnership, and Defendants were breaching their obligations by failing to comply the Limited Partners' request. *See e.g.*, A-464 ("The pending lawsuit does not stop the GP from carrying out its duties and fiduciary obligations to distribute annual financials to the Partnership").

Defendants now appear to proffer a nonsensical reading of the term "Partnership" to support its view that the April 28 and January 2023 Notices were not sent on behalf of the Partnership. Specifically, Defendants argue that the January 2023 Notices and April 28 Notice could not be from the Partnership because they were each sent and signed by an individual Limited Partner, and therefore, must be viewed as a notice sent only in that Limited Partner's individual capacity. Taken to its logical conclusion, Defendants' argument means that an individual Limited Partner could never give notice on behalf or for the benefit of the Partnership. But the preamble of the LP Agreement clearly defines the term, "Partnership" as "ARAM Phoenix Holdco LP," (A-169), which is a legal entity comprising all individual Limited Partners. Thus, it is perfectly reasonable—as the lower court concluded—that a notice from a single Limited Partner advising the General Partner of its breach against the entire Partnership, which is what the April 28 Notice and

January 2023 Notices so advise, is being sent on behalf of and for the benefit of the Partnership. Notably, nothing in the LP Agreement's notice provision (§12.1) requires any specific and express language indicating that it is being sent by or on behalf of the Partnership in order for the notice to be deemed from the Partnership. A-190.

Defendants' narrow view that individual Limited Partners cannot provide notice on behalf of the Partnership would suggest that only the officers and directors of Phoenix Holdco LP—consisting of Vishal Garg and Raja Visweswaran (prior to his resignation)—could serve notice on the Former General Partner—which also consists of Vishal Garg and Raja Visweswaran (prior to his resignation). In other words, as a practical matter, the same individuals who refused to produce the Partnership's books and records would have to serve a notice for "Cause" on themselves for their own breaches. Defendants cannot reasonably dispute that the service of such a notice on themselves would be an exercise in futility. *See Wender v GA Global Mkts., LLC,* 147 AD3d 663, 663 (1st Dep't 2017) ("Because any written notice of cause as a condition precedent to termination would have been futile, [aggrieved party] was relieved of that obligation").[9]

[9] Defendants' reliance on *Siegel v Kentucky Fried Chicken, Inc*., 67 NY2d 792 (1986) is entirely misplaced. That matter addressed a lease default and termination wherein the governing contract set forth a very specific definition of "Landlord" as "only the owner, or mortgagee in possession, for the time being." *Id.* Here, the term,

Accordingly, Defendants' self-serving declaration that the April 28 Notice was defective because it was not for the benefit of the Partnership, and that the Removal Resolution is thus invalid rings hollow. Plaintiffs-Respondents respectfully submit that Defendants' request for dismissal on this basis should be denied.

### B. The April 28 Notice Provided Adequate Notice of Defendants' Breach.

Second, Defendants' attempt to magically transform the April 28 Notice and January 2023 Notices into document demands from a notice of Defendants' breach is equally without merit. Again, the documents speak for themselves.

The January 2023 Notices—from no less than three different Limited Partners to the Former General Partner exercising their contractual right to the Partnership's financials—unequivocally put the Former General Partner on notice that it had breached its obligations under the LP Agreement.[10] A-26, ¶¶48-51; A-462. But

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"Partnership" is defined as "ARAM Phoenix Holdco LP." As the Second Department observed, "Siegel is limited to the ""factual peculiarities"" of the lease in that case." *Matter of QPII-143-45 Sanford Ave., LLC v Spinner*, 108 AD3d 558, 559 (2d Dep't 2013). *Luxottica Group S.p.A. v Bausch & Lomb, Inc*., 160 F Supp 2d 545 (SDNY 2001) is also inapplicable here. In *Luxottica Group S.p.A,* the notice failed to comply with the service provisions, failed to serve all required individuals, and failed to permit the breaching party time to cure.

[10] Assuming that the April 28 Notice did not put the Defendants on notice of their breach—which it did—Defendants nonetheless misread the definition of "Cause" as a condition precedent. Under New York law, ""[a] condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused,

rather than respond in any meaningful way to the January 2023 Notices, Garg instead gratuitously lodged hollow accusations or flat out ignored each of the Limited Partners' efforts to get the Former General Partner to comply with its obligations under the LP Agreement. *Id.* For example:

- On January 23, 2023, Dr. Henry Balboa sought the Partnership's financials for the Limited Partners: "Dear Vishal, 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 accountants (per the LPA), 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; *see also,* A-26, ¶48.

- That same day, even though Dr. Balboa sought the books and records for all Limited Partners, Defendant Garg responded speciously citing the Black LP Action and denying Dr. Balboa's valid request: "I am sorry Dr. Balboa, you are currently in litigation with the partnership. Litigation which is both frivolous and has cost

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must occur before a duty to perform a promise in the agreement arises." *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC,* 171 AD3d 189, 194-195 (1st Dep't 2019) (*citing Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690, (1995). "In determining whether a given clause makes an event a condition, doubtful language should be interpreted as a promise rather than an express condition, especially where a finding of express condition would increase the risk of forfeiture by the obligee." *Id.* ""[T]o the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange." *Id.* The LP Agreement's definition of "Cause" does not contain any conditional language, let alone "unmistakable" conditional language such as "if," "unless and until," or "null and void." *Id.* Had the Defendants intended to include a condition precedent in the definition of "Cause" they certainly could and would have done so, particularly since the removal provision in Section 6.2 contains an express condition precedent. *See* A-165 ("the General Partner may . . . be removed with Cause upon the affirmative act of a Supermajority in Interest.")

the partners a lot of money. Please direct your query through your lawyers. Thank you, Vishal." *Id.*

- On January 28, 2023, Celestino Amore informed Defendant Garg that the Former General Partner had violated its obligations to the Partnership: "Dear Vishal, The pending law suit 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, with the auditor disclaiming an opinion. We have also recently learned that there may have been a "cash flow of some $9 Million" that was released in 2020. See the attached email. This would be good news for the Partnership and should be reflected in the financials we are requesting. Again, please advise when, per the terms of the LPA, we will receive validly audited accounts for 2020 and 2021." *Id.* (emphasis added); *see also*, A-26, ¶49.

- On January 29, 2023, Defendant Garg responded again, refusing to distribute the financials to all Limited Partners in the Partnership and speciously blaming the Black LP Action: "Thanks Celestino, I don't believe there is any cash distribution of $9mm to [P]hoenix in 2019. If there was I wouldn't be lending the partnership money to pay its legal bills. We have $13mm that is owed to phoenix stuck in a trust account with the cdo on account of the pimco lawsuit, partially due to the sheer idiocy of the Black suit and it's completely unfounded and bogus claims. That is what we are working to get out for the benefit of all the LPs and those who are owed money by the partnership - those who are not sitting around throwing frivolous lawsuits at the people who actually work to save this entire deal from the train wreck it was destined to become post the collapse of ARAM. Anyway, Celestino you are a party to the Black lawsuit and therefore adverse to the non litigating LPs and the partnership. You are partially the cause of the frivolous and wasteful lawsuit - so pls communicate via your counsel. Thanks, Vishal" *Id.*; *see also,* A-26, ¶50.

- Then, on February 16, 2023, Plaintiff Molberg circulated the Partnership's financials for FY 2020 contemporaneously advising Defendants that the Former General Partner had breached its obligations under the LP Agreement: "Dear Vishal, I write on behalf

> of my father's interest in Phoenix, and in response to your prior emails to the LPs. Attached for the benefit of all LPs who may, or may not, have already received them, are the 2020 year end financials for Phoenix Holdco. I note, the failure to circulate these financials to the LPs is a breach of the LPA and another dereliction in your duty as GP." *Id.*; *see also,* A-26, ¶51.[11]

Because Defendants ignored Ms. Molberg's February 16, 2023, email, on April 28, 2023, Ms. Molberg sent the formal notice of breach and demand—*i.e.* the April 28 Notice. And as discussed above, the April 28 Notice provided Defendants with adequate notice of their breach by: (i) stating certain financials "must be prepared by the General Partner and distributed to the Limited Partners"; (ii) citing the specific provision and language from the LP Agreement governing the Former General Partner's obligation to distribute such financials; (iii) incorporating the January 2023 Notices which specifically stated, among other things, that "the failure to circulate these financials to the LPS is a breach of the LPA and another dereliction in your duty as GP"; and (v) identifying the default insofar as the Former General Partner denied the demand for financials in the January 2023 Notices. A-224.

Thus, Defendants cannot, and do not, contest receipt of the April 28 Notice. Nor can they reasonably claim any prejudice considering their refusal to produce the Partnership's financials and comply with their obligations under the LP Agreement. Indeed, to date, Defendants have still yet to distribute the FY 2021 annual financials,

[11] Plaintiff Molberg's February 16, 2023, email is part of the same email chain as the January 2023 Notices.

and they have now also breached their obligation to distribute the FY 2022 annual financials. A-449 (Molberg Aff., ¶7). "Strict compliance with the contract's notice provisions [is] not required, for defendants do not claim that they did not receive actual notice or that they were in any way prejudiced as a result of this minimal deviation." *Baker v Norman*, 226 AD2d 301, 304 (1st Dep't 1996) (*citing Dellicarri v Hirschfeld,* 210 A.D.2d 584 (3d Dep't 1994); *see also, Abax, Inc. v. Lehrer McGovern Bovis, Inc*., 8 A.D.3d 92, 93 (1st Dep't 2004) (holding that since claims were the subject of sufficient correspondence to put the defendant on notice, "complete technical compliance with the notice of claim requirements was not necessary"); *see also, Leitner v BBG, Inc.*, 2018 NY Slip Op 31375[U], *9-10 (Sup. Ct. N.Y. Cnty. 2018) ("Once it becomes clear that one party will not live up to the contract, the aggrieved party is relieved from the performance of futile acts, such as conditions precedent.").

### C. The Lower Court Properly Relied on the Attendant Circumstances Standard in Denying Defendants' Motion to Dismiss.

Finally, the Lower Court correctly relied on the "attendant circumstances" standard articulated in *D.K. Property, Inc. v. Mekong restaurant Corp.,* 187 Misc.2d 610 (1st Dep't 2001) in determining that the April 28 Notice sufficiently notified Defendants that the contractual cure period was triggered. In contending that that *D.K. Property, Inc.* is inapposite because it arises in the context of lease-related notices in landlord-tenant disputes, Defendants ignore that courts often apply an

"attendant circumstances" analysis in other notice contexts and there is no jurisprudence restricting its application to the partnership dispute here. *See e.g. Morris Park Contr. Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, PA,* 33 A.D.3d 763 (2d Dep't 2006) (looking to "attendant circumstances" when analyzing the contractual obligations of an insured to provide notice of claim); *Girrbach v Levine*, 132 A.D.2d 41 (3d Dep't 1987) (giving due regard to the attendant circumstances in analyzing whether notice was constitutionally adequate in the tax sale of real property).

Regardless, Defendants' attack on the lower court's reliance on *D.K. Property, Inc.* is of no moment. Both the law on the sufficiency of notices cited in Sections B and C above and the attendant circumstances standard that the lower court applied dictate the same outcome: the April 28 Notice was not defective, and Defendants were sufficiently put on notice of their breach. Simply put, Defendants were aware and put on notice that they breached their contractual obligation to distribute financials to the Limited Partners. Accordingly, the lower court properly denied Defendants' motion to dismiss.

## CONCLUSION

For the forgoing reasons, Plaintiffs-Respondents respectfully submit that the Court affirm the lower court's Order.

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