To be argued by:
Jason H. Berland, Esq.
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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

APPELLATE NO.: 2023-05964

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

Plaintiffs-Respondents,

—against—

PHOENIX CAYMAN LTD. and VISHAL GARG,

Defendants-Appellants.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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

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Attorneys for Defendants-Appellants

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

PRELIMINARY STATEMENT

This Court should reject Plaintiffs' attempt to manufacture an uncured breach of the LP Agreement and thereby replace Phoenix Cayman as the General Partner because (i) Plaintiffs did not comply with the notice provision of the LP Agreement that protects against precisely this type of gamesmanship and (ii) the trial court erred in failing to strictly enforce that notice provision in accordance with well-establish law. Plaintiffs omitted from the Molberg Letter any language that would have put Defendants on notice that the Molberg Letter was meant to trigger the LP Agreement's 30-day cure period. With the dispositive defects in the Molberg Letter—and the trial court's associated findings—laid bare, Plaintiffs try to pretend the Molberg Letter was something that, on its face, it was not: a letter "from the Partnership" that contained language sufficient to put Defendants on notice that (i) Phoenix Cayman was being accused of a "knowing, willful and material breach" of the LP Agreement and (ii) Ms. Molberg was intending the letter to trigger the notice

[1] All capitalized terms have the same meaning as in Defendants' Opening Brief ("Br.").

provision's "30 day[]" "cure[]" period. *See* A-177 (LP Agreement, § 6.1(d)) A-214 (LP Agreement, "Cause" definition).

No amount of manipulation can change the fact that the Molberg Letter:

- does not purport to be from anyone other than its author (Ms. Molberg on behalf of her father's estate);
- makes a "demand" for financial statements without asserting that the prior non-provision of those financial statements constituted a "knowing, willful and material breach" of the LP Agreement; and
- conspicuously avoids using any of the terms that would have put Defendants on notice that the Molberg Letter was meant to trigger the cure period (such as "Cause," "removal," "Section 6.1(d)(i)(B)," "knowing," "willful," "material," "breach," "notice," "30 day," and "cure").

The Molberg Letter thus does not qualify as a "notice from the Partnership" sufficient to support a "Cause" removal of Phoenix Cayman as the General Partner.[2] Accordingly, the Order must be reversed and the Complaint dismissed.

Plaintiffs' Opposition is limited to five main arguments, none of which has

[2] As further described in the Opening Brief, Br. at 3, 11, Plaintiffs were motivated to manufacture an uncured breach of the LP Agreement so that they could, *inter alia*, improperly (i) stop Mr. Garg from causing the General Partner to pay incurred expenses and other fees that are due to him and individuals or entities associated with him for the money they invested and the work they performed in furtherance of the Partnership, which enabled the Partnership to obtain substantial returns; and (ii) stake claim to the Partnership's potential forthcoming recovery in a separate litigation.

merit. *First*, Plaintiffs assert that the Molberg Letter was sent "for the benefit of the Partnership." Plaintiffs' Opposition ("Opp.") at 19-23. But even if it was, a demand for financials by Ms. Molberg "for the benefit of the Partnership" is not the same thing as a demand "from the Partnership." In any event, the language to which Plaintiffs point in support of their argument fails even to clear Plaintiffs' fictional low bar of demonstrating that the Molberg Letter (which was sent by Ms. Molberg in her capacity as executor of her father's estate) was for the benefit of the Partnership (as opposed to her father's estate).

Second, Plaintiffs baselessly assert that Ms. Molberg could not have provided a "notice from the Partnership" because (i) the "Partnership" is defined in the LP Agreement as Phoenix Holdco and (ii) Ms. Molberg could not have caused Phoenix Holdco's "officers and directors" to give notice to Phoenix Cayman. Opp. at 21. Ms. Molberg's own prior conduct confirms the dispositive flaw in this argument. As she has done before, Ms. Molberg could have sent the Molberg Letter to Phoenix Cayman derivatively "on behalf of Phoenix Holdco," and thereby provided notice "from the Partnership." Indeed, when Ms. Molberg sent the Molberg Letter, she was litigating *Black* derivatively "on behalf of Phoenix Holdco"; when she filed this case, she filed it derivatively "on behalf of Phoenix Holdco"; and Ms. Molberg thus knew how to comply with the terms of the notice provision and draft the Molberg Letter so it was sent derivatively "on behalf of Phoenix Holdco." *See* A-

52; A-26. Ms. Molberg chose not to do so, presumably to avoid Defendants doing precisely what they did within days of receiving the Removal Resolution: take prompt action to address any suggestion that the non-provision of the demanded financials constituted a "knowing, willful and material breach" of the LP Agreement.

Third, Plaintiffs suggest that the Molberg Letter's failure to identify a "knowing, willful, and material breach" is somehow cured by its reference to two emails from January 2023. But as Defendants already made clear in their Opening Brief, those emails are substantively identical to the Molberg Letter and thus cure nothing. Like the Molberg Letter, the January 2023 emails (i) were sent by LPs who are plaintiffs in *Black*, (ii) made demands for financial statements without asserting that the prior non-provision of the financial statements constituted a "knowing, willful and material breach" of the LP Agreement or using any terms to suggest an intent to invoke the 30-day cure period, and (iii) received an appropriate response from Mr. Garg (who properly instructed the senders—plaintiffs in *Black*—to direct their requests through counsel). Plaintiffs rightly do not argue that the January 2023 emails contained language sufficient to trigger the cure period, and thus neither does the Molberg Letter. Plaintiffs also misleadingly refer to a third email that Ms. Molberg sent in February 2023, but the February 2023 email was not referenced in the Molberg Letter, does not address the financials at issue in

the Molberg Letter, addresses financials that Defendants already had produced in *Black*, and thus has no bearing on the analysis here of whether the Molberg Letter provided sufficient notice. Relatedly, Plaintiffs ignore that the trial court's Order cited case law *supporting* that the Molberg Letter lacked the components necessary for it to qualify as a valid notice.

Fourth, Plaintiffs make an argument that is disproved by the correspondence between the parties that Plaintiffs cite in their Complaint: that Plaintiffs' failure to comply with the notice provision should be excused because Defendants cannot establish that they were prejudiced by the lack of proper notice. Opp. at 26-27. To support their argument, Plaintiffs point to the fact that Defendants have not yet distributed "the FY 2021 . . . [or] FY 2022 annual financials." *Id.* Plaintiffs ignore, however, that (i) on June 6 and 14, 2023—*i.e.*, within days of receiving the Removal Resolution on June 5, 2023 (when Defendants first were put on notice that Plaintiffs were claiming that the prior non-provision of the demanded financials constituted a "knowing, willful and material breach" of the LP Agreement sufficient to sustain a "Cause" removal)—Defendants wrote to Plaintiffs explaining why the prior the non-provision of the financials could not possibly qualify as a "knowing, willful and material breach," and (ii) on June 7, 9, and 27, 2023, Defendants provided Plaintiffs with suitable substitute financials that, in fact, offered more financial information than required under the LP Agreement, A-

182—annual balance sheets and monthly bank statements for each of the Phoenix Entities for the period January 2020 through March 2023, *i.e.*, a period broader than that covered by the Molberg Letter (the "Substitute Financials"). *See* A-294-425. By providing those Substitute Financials, Defendants (i) eliminated any claim that the prior non-provision of the demanded financials constituted a "material breach," and (ii) also demonstrated that had the Molberg Letter provided adequate notice that the LPs were claiming that the prior non-provision of the financials constituted a "knowing, willful and material breach," Defendants would have acted swiftly, appropriately, and effectively to address the issue. The lack of proper notice thus plainly prejudiced Defendants.

Finally, Plaintiffs urge in conclusory fashion that the trial court's "attendant circumstances" standard was appropriate (even though they had not once referenced that standard in their papers below), Opp. at 27-28, but fail to meaningfully rebut Defendants' argument that even in consideration of the "attendant circumstances" articulated in the Order, A-13, the Molberg Letter cannot make out a valid notice pursuant to the controlling terms of the LP Agreement.

Because Plaintiffs' efforts to explain away the defects in the Molberg Letter and in the trial court's Order are unavailing, the Court should reverse the Order and dismiss the Complaint.

ARGUMENT

I. Plaintiffs' Opposition Concedes That The Molberg Letter Was Not "From The Partnership," As Was Contractually Required, And Instead Baselessly Contends That The Trial Court Appropriately Rendered The Molberg Letter Valid Because It Was "For The Benefit Of The Partnership"

Plaintiffs contend that the trial court did not err in disregarding well settled law demanding strict adherence to notice requirements, Defendants' Opening Brief ("Br.") at 15-16, because the Molberg Letter was "for the benefit of the Partnership." Opp. at 19. Ironically, Plaintiffs' position—which concedes that the Molberg Letter was not, as required under the LP Agreement, "*from* the Partnership"—further highlights the invalidity of the Molberg Letter and the trial court's mistaken application of law.

As set out in the Opening Brief, Br. at 16-20, nothing about the Molberg Letter can be read to suggest that it was "from the Partnership." It begins "I write"; is signed "Karoline Molberg, Executor of the Estate of Erik Molberg"; and contains no suggestion that it was sent from or on behalf of anyone other than Ms. Molberg on behalf of her father's estate. Ms. Molberg knows how to act on behalf of the Partnership—the complaints in both *Black* and this case were brought "derivatively on behalf of Phoenix Holdco LP" (*i.e.*, the Partnership). A-52; A-26. Had Ms. Molberg wanted, she could have sent a letter "from the Partnership," including by beginning the letter "I write on behalf of Phoenix Holdco" or signing

the letter "Karoline Molberg, Executor of the Estate of Erik Molberg, on behalf of Phoenix Holdco." Ms. Molberg chose not to do so, presumably to try to hide the letter's true purpose and manufacture a purported uncured breach of the LP Agreement.

Plaintiffs dance around this fatal defect by claiming that the Molberg Letter was sent "for the benefit of the Partnership"—notably, a conclusion the trial court did not even reach in determining that the Molberg Letter provided "sufficient[]" notice. A-13. But even if Plaintiffs' claim were true, that is not the contractual requirement for a valid notice. *See, e.g.*, *E. Empire Constr. Inc. v. Borough Constr. Grp. LLC*, 200 A.D.3d 1, 5 (1st Dep't 2021) (stating the well-settled principle that when "contracting parties agree on a termination procedure, the procedure will be enforced as written"). The LP Agreement requires that the notice be "from the Partnership," not for its "benefit." A-177; Br. 16-20. Setting aside the other defects in the Molberg Letter, to the extent that Ms. Molberg wanted a letter with a sole author to be "from the Partnership," she could and should have expressly stated somewhere in the letter that she was acting, or it was being sent, "on behalf of the Partnership."

In any event, even if a letter "for the benefit of the Partnership" could suffice, the language in the Molberg Letter to which Plaintiffs point does not meet even this lower, made-up standard. That the Molberg Letter's re: line states,

"Phoenix Holdco LP – Demand for Audited Financials from Phoenix Cayman," and that its first paragraph states, "I [*i.e.*, Ms. Molberg] write regarding the books, records, financial statements and other reports of Phoenix Holdco LP," Opp. at 19-20, does not suggest that Ms. Molberg was writing "for the benefit of the Partnership," as opposed to for the benefit of her father's estate. Both uses of "Phoenix Holdco" simply identify the entity whose records the Molberg Letter was requesting, not for whose benefit the letter was being sent. The other two portions of the Molberg Letter to which Plaintiffs point—"[t]he second paragraph['s] quote[] [of] the books and records provision of the LP Agreement" and the reference on the third page to the January 2023 Emails, Opp. at 20—are similarly unavailing. That the Molberg Letter block quotes the LP Agreement's books and records provision and references the January 2023 emails (which the Molberg Letter characterized exactly how Defendants read them, *i.e.*, as making "a request . . . [for] audited accounts"), A-225-26, does not signal that Ms. Molberg was intending to write a letter demanding financials "for the benefit of the Partnership" as opposed to for the benefit of her father's estate.

Having not sent a letter that could be construed as "from the Partnership," Plaintiffs pivot and try to argue futility, claiming (incorrectly) that Ms. Molberg could not have provided notice "from the Partnership" because the Partnership is defined in the LP Agreement as Phoenix Holdco, and therefore "the same

individuals [Vishal Garg and Raja Visweswaran] who refused to produce the Partnership's books and records would have to serve a notice for 'Cause' on themselves for their own breaches" on Phoenix Cayman. Opp. at 22. As set forth above, however, Ms. Molberg's own prior conduct refutes this argument. She could have sent—and knew exactly how to send—a notice "from the Partnership": by sending the Molberg Letter "on behalf of Phoenix Holdco."

Plaintiffs also cannot use *Wender v. GA Global Mkts., LLC*, 147 A.D.3d 663 (1st Dep't 2017), to justify their failure to provide proper notice because *Wender* is inapposite. In *Wender*, the notice provision "provided that defendant would give plaintiff written notice of the cause for termination and an opportunity to cure a failure, 'to the extent the failure is curable, *as determined by defendant in its sole discretion*.'" *Id.* at 663 (emphasis added). In other words, the agreement gave the defendant "sole discretion" to determine whether an alleged breach could be cured and consequently whether to give the plaintiff notice and an opportunity to cure. Here, the LP Agreement does not contain any analogous language giving the LPs "sole discretion" to determine whether to dispense with the notice provision. Moreover, the plaintiff's breach of the agreement in *Wender*—the plaintiff's prior disclosure of employer information to third parties—was objectively incurable. *See id.* Here, by contrast, the alleged breach was curable, including by the actions Defendants timely took upon receiving actual notice of Plaintiffs' breach claim:

i.e., by providing the Substitute Financials and thereby eliminating any possible claim of a "material breach."

Moreover, Plaintiffs' attempts to distinguish Defendants' cases establishing that the law demands strict compliance with notice provisions are specious. Opp. at n.9. The Court of Appeals' decision in *Siegel v. Kentucky Fried Chicken of Long Island* supports the key principle that when a party fails to abide by contractual notice requirements—however trivial (there, having the mandated signatory execute the notice)—the notice is invalid. 67 N.Y.2d 792, 792-94 (1986). That certain contractual definitions in that case immaterially differ from definitions in this case is irrelevant. Opp. at n.9. Defendants similarly cited *Luxoticca Grp. S.p.A. v. Bausch & Lomb Inc.* to support the proposition that New York courts demand strict adherence to contractual notice provisions. 160 F. Supp. 2d 545, 551 (S.D.N.Y. 2001); Br. at 17. That the specific contractual notice provisions in *Luxoticca* differ from those here does not make the decision "inapplicable." Opp. at n.9. Rather, *Luxoticca* also supports that Plaintiffs' failure to adhere to the LP Agreement's notice requirements, in all the ways Defendants have explained, renders the Molberg Letter an invalid notice.

For the foregoing reasons, even setting aside that the trial court failed to address that the Molberg Letter was not "from the Partnership," none of its reasoning in the Order plausibly supports that Plaintiffs complied with this key notice

requirement. The purported notice was not "from the Partnership," the purported Removal Resolution is thus defective and invalid, and—for this reason alone—this Court should reverse the trial court's Order and dismiss the Complaint.

II. Plaintiffs' Opposition Fails To Identify Anything In The Molberg Letter That Could Have Led The Trial Court To Conclude That It Provides Notice Of A "Knowing, Willful, And Material Breach"

In rebutting Defendants' contention that the Molberg Letter did not provide notice of a "knowing, willful and material breach" of the LP Agreement, Opp. 23-27, Plaintiffs point only to the extrinsic emails that Defendants already addressed in their Opening Brief. Br. 22-24. As Defendants explained there, those emails—like the Molberg Letter itself—merely request that Mr. Garg provide certain financial statements without asserting that the prior non-provision of the statements constituted a "knowing, willful and material breach" of the "commercially reasonable efforts" provision of the LP Agreement.

The first email, from Dr. Henry Balboa, states, "Dear [Mr. Garg], Can you please confirm to me (and the other LP's cc'ed) when the Phoenix accounts for FY2020 and FY2021, audited by a reputable firm of accounts (per the [LP Agreement]), will be completed and sent to LP's. I hope Phoenix is continuing to generate the significant returns for the GP and LP's that it now appears to have done." Opp. at 24; A-465. As the Opening Brief explained, the email from Dr. Balboa does not (i) suggest that the prior non-provision of the financials constituted

a "knowing, willful and material breach" of the LP Agreement, (ii) reference the "commercially reasonable efforts" standard, (iii) mention the cure period, or (iv) suggest that failure to provide the financials could result in a Cause removal of Phoenix Cayman as the General Partner. In light of Dr. Balboa's status as a plaintiff in *Black*, Mr. Garg responded appropriately by telling Dr. Balboa to direct his inquiry through counsel.

Similarly, in the second January 2023 email, Celestino Amore wrote in relevant part, "Dear [Mr. Garg], The pending lawsuit does not stop the GP from carrying out its duties and fiduciary obligations to distribute annual financials to the Partnership. The last financials we received were for FY 2019 . . . [P]lease advise when, per the terms of the [LP Agreement], we will receive validly audited accounts for 2020 and 2021." Opp. at 25; A-464. Like Dr. Balboa's email and the Molberg Letter, Mr. Amore's email did not suggest that Phoenix Cayman had committed a "knowing, willful and material breach" of the LP Agreement, reference the "commercially reasonable efforts" standard, or use language to suggest that the cure period had been triggered and that a failure to cure could lead to the loss of a contractual right (Phoenix Cayman's removal as the General Partner). Instead, the email merely reiterated Dr. Balboa's request for documents. Mr. Garg again responded appropriately by telling Mr. Amore to "pls communicate via your counsel." A-464.

Plaintiffs also point to a February 2023 Email from Ms. Molberg that—as Defendants explained in their Opening Brief, Br. n.7—is *not* referenced in the Molberg Letter and thus is irrelevant to whether the Molberg Letter satisfies the notice provision. The email also is irrelevant because it does not relate to the financial statements referenced in the Molberg Letter. Rather, it relates solely to 2020 financial statements, which, as Plaintiffs acknowledge, previously had been produced in *Black*, and already were in Ms. Molberg, Dr. Balboa, and Mr. Amore's possession when they wrote their January and February 2023 Emails). Opp. at 25; A-787 at ¶26.

Plaintiffs also argue in the Opposition that their failure to comply with the notice requirement should be excused because (i) Defendants have not yet distributed "the FY 2021 . . . [or] FY 2022 annual financials" and therefore (ii) Defendants cannot establish they were prejudiced by the lack of proper notice. Opp. at 26-27. This argument fails on both the facts and law.

First, with respect to the facts, within days of receiving the Removal Resolution on June 5, 2023 (*i.e.*, within days of receiving notice that Plaintiffs were claiming a "knowing, willful and material breach" of the LP Agreement), Defendants wrote to Plaintiffs explaining why the prior non-provision of the demanded financials could not possibly qualify as a "knowing, willful and material breach," and they also provided the LPs with suitable Substitute Financials—

annual balance sheets and monthly bank statements for each of the Phoenix Entities covering the full period of the demanded financials. *See* A-294-425. The provision of those Substitute Financials—which, notably, offered Plaintiffs *more* financial information than the LP Agreement requires, A-182—both (i) eliminated any claim that the non-provision of the demanded financials constituted a "material breach" and (ii) demonstrated that Defendants in fact were prejudiced by the Molberg Letter's failure to provide proper notice. Had the Molberg Letter provided proper notice, Defendants would have taken the same actions they took in response to the Removal Resolution in response to the Molberg Letter.

Second, with respect to the law, the cases on which Plaintiffs rely are inapposite because in each, "strict compliance" with a notice provision was deemed not required only because (unlike here at the time of the Molberg Letter) the party seeking to enforce the notice provision was already on notice that the counterparty intended to terminate the contract or otherwise act on the alleged breach. *See Baker v. Norman*, 226 A.D.2d 301, 304 (1st Dep't 1996) (excusing purchaser of property's failure to give notice of intent to terminate contract where seller was on notice that purchaser would terminate the contract if purchaser was unable to obtain funding); *Abax, Inc. v. Lehrer McGovern Bovis, Inc.*, 8 A.D.3d 92 (1st Dep't 2004) (excusing contractor's failure to give notice of intent to file claims where "documents . . . show that defendant was afforded sufficient notice

of the contractor's intention to file the claims").[3] Here, Defendants did not receive notice that the LPs believed Phoenix Cayman committed a "knowing, willful and material breach" of the LP Agreement sufficient to support a "Cause" removal and trigger the cure period—or that the LPs would seek Phoenix Cayman's removal if the demanded financials were not provided—until they received the Removal Resolution (at which time they promptly took curative action).

Finally, Plaintiffs have not rebutted—and thus appear to accept—Defendants' point that one of the merely two cases cited in the Order, *Filmtrucks, Inc. v. Express Industries and Terminal Corporation*, 127 A.D.2d 509 (1st Dept. 1987), actually *supports* Defendants' position that dismissal was appropriate because, *inter alia*, the Molberg Letter did not identify a "knowing, willful and material breach." As described in the Opening Brief, Br. at n.6, the Order cited to *Filmtrucks* to support its statement that "Defendants do not cite to any authority supporting the proposition that failure to specifically reference the 30-day cure period or the cure period provision in the LPA, on its own, is sufficient to invalidate a notice." A-13. While Defendants never actually advanced that proposition below, Br. at n.9, the *Filmtrucks* case—as reflected in the explanatory parenthetical set out *in the Order*—

[3] The other case on which Plaintiffs rely is inapposite because (unlike here) the agreement did not require notice, and the breach could not be cured. *See Leitner v. BBG, Inc.*, Index No. 652263/2018, 2018 WL 3201910, at *5 (N.Y. Sup. Ct. June 29, 2018) ("There are no notice or cure periods in . . . [plaintiff's] employment agreement.").

provides that a notice is invalid where "it included ambiguous and non-imperative language, it was not sent by the proper party pursuant to the terms of the contract, and it failed to advise of the cure period and/or relevant provision in the contract." A-13. As set forth in the Opening Brief and above, all of those circumstances are present here and Plaintiffs fail to adequately contest that. Marshaling the very case it cited to arrive at the opposite (and erroneous) conclusion, the trial court should have concluded that the Molberg Letter was an invalid notice and dismissed the Complaint.

Accordingly, the trial court improperly excused Plaintiffs' noncompliance with the LP Agreement's notice provision. The Court should therefore reverse the Order and dismiss the Complaint.[4]

III. Plaintiffs' Opposition Fails To Establish That Even If The Trial Court Could Have Properly Considered "Attendant Circumstances," Such "Attendant Circumstances" Could Render The Molberg Letter A Valid Notice Pursuant To The LP Agreement

Even if the trial court's "attendant circumstances" standard were

[4] Plaintiffs relegate to a footnote an additional meritless argument: that notice and an opportunity to cure is not a condition precedent to removal under the LP Agreement. Opp. at n.10. "Conditional language" is unnecessary here because the notice provision is phrased in *the past tense*: "'Cause' means the General Partner . . . *has committed* a knowing, willful and material breach of this Agreement that *is not cured* within 30 days after the *General Partner's receipt* of a notice from the Partnership with respect to such breach." A-214 (emphasis added). Plaintiffs' interpretation would render the contractual provision meaningless. *See Two Guys from Harrison-N.Y., Inc. v. S.F.R. Realty Assocs.*, 63 N.Y.2d 396, 403 (1984) ("[i]n construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless" and interpreting contract to avoid that result).

appropriate—which Defendants submit it was not, Br. at 18—Plaintiffs' Opposition fails to address adequately that the "attendant circumstances" considered, A-13, cannot render the Molberg Letter a valid notice "from the Partnership" that identified a "knowing, willful, and material breach."

First, regarding the extrinsic emails from January and February 2023, Plaintiffs' opposition does not make a viable showing that they impute into the Molberg Letter the necessary identification of a "knowing, willful and material breach." For the reasons discussed above and in the Opening Brief, they decidedly do not. *See supra* Section II; Br. at 22-24.

Second, regarding the Order's reference to the existence of the *Black* action, A-13, Plaintiffs have not at all addressed Defendants' argument that the *Black* action does *not* involve Plaintiffs' contrived claim here that the General Partner breached its obligation under the LP Agreement to provide the LPs with certain recent financial statements. Br. at 24. The LPs devised—but failed to provide proper notice of—that claim leading up to the commencement of *this* litigation, after realizing that their strategy in *Black* would not allow them to achieve their improper goals. Furthermore, looking to another litigation to identify the purported breach underlying this action only reinforces that the Molberg Letter is bereft of the contractual language necessary to trigger the cure period.

Third, regarding the Order's statement that the Molberg Letter demanded

documents and cited the basis therefor, A-13, Plaintiffs have not rebutted Defendants' contention that this only serves to underscore that the Molberg Letter is a document demand—not a notice containing an allegation of a "knowing, willful and material breach" of the LP Agreement that would trigger the "cure[]" period and from which a "Cause" removal could flow.

The trial court erred in disregarding well-settled law that parties to a contract must adhere strictly to that contract's notice provisions, Br. at 15-16, instead considering "attendant circumstances" that in any event do not create a plausible basis to deem the Molberg Letter a valid notice under the LP Agreement's notice provision.

CONCLUSION

The Court should reverse the trial court's Order and dismiss the Complaint with prejudice.

Dated: New York, New York
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1/0 CAPITAL, LLC

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

Attorneys for Defendants-Appellants