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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DV REALTY ADVISORS LLC, Defendant Below, Appellant, v. POLICEMEN'S ANNUITY AND BENEFIT FUND OF CHICAGO, ILLINOIS, MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND OF CHICAGO, LABORERS' AND RETIREMENT BOARD EMPLOYEES' ANNUITY AND BENEFIT FUND OF CHICAGO, RETIREMENT PLAN FOR CHICAGO TRANSIT AUTHORITY EMPLOYEES' TRUST, and PUBLIC SCHOOL TEACHERS' PENSION AND RETIREMENT FUND OF CHICAGO, Plaintiffs Below, Appellees, and DV URBAN REALTY PARTNERS I, L.P., Nominal Defendant Below, Appellee.	)	No. 464, 2016 CASE BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 7204-VCS

APPELLEES' ANSWERING BRIEF

CONNOLLY GALLAGHER LLP
Henry E. Gallagher, Jr. (#495)
Ryan P. Newell (#4744)
The Brandywine Building
1000 West Street, Suite 1400
Wilmington, Delaware 19801
Telephone: (302) 757-7300

Of Counsel:

Michael R. Levinson
SEYFARTH SHAW LLP
131 S. Dearborn Street
Suite 2400
Chicago, Illinois 60603
Telephone: (312) 460-5868

Attorneys for Nominal Defendant Below, Appellee, DV Urban Realty Partners I L.P.

ROSS ARONSTAM & MORITZ LLP
Bradley R. Aronstam (#5129)
S. Michael Sirkin (#5389)
100 S. West Street, Suite 400
Wilmington, Delaware 19801
Telephone: (302) 576-1600

Of Counsel:

John M. Murphy
Peter P. Tomczak
BAKER & MCKENZIE LLP
300 East Randolph Drive
Suite 5000
Chicago, Illinois 60601

Attorneys for Plaintiffs Below, Appellees Policemen's Annuity and Benefit Fund of Chicago, Illinois, Municipal Employees' Annuity and Benefit Fund of Chicago, Laborers' and Retirement Board Employees' Annuity and Benefit Fund of Chicago, Retirement Plan for Chicago Transit Authority Employees' Trust, and Public School Teachers' Pension and Retirement Fund of Chicago

Dated: November 23, 2016

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NATURE AND STAGE OF PROCEEDINGS

This dispute began on February 1, 2012, when Appellees – the five Limited Partners of DV Urban Realty Partners I, L.P. (the "Partnership") – filed a Complaint in the Court of Chancery. The Plaintiffs below/Appellees (collectively, the "Limited Partners") sought a declaration that their removal of Appellant DV Realty Advisors ("DV Realty") as the general partner of the Partnership was valid. Following a two-day trial in April 2012, the Court of Chancery found that, in accordance with the terms of the governing Limited Partnership Agreement ("LPA"), the Limited Partners had determined in good faith that the removal of DV Realty was necessary for the best interest of the Partnership and, as such, valid. *See* B142-154,[1] *Policemen's Annuity and Benefit Fund of Chicago, Ill. v. DV Realty Advisors LLC*, C.A. No. 7204-VCN, Mem. Op. at 35-47, 2012 WL 3548206 (Del. Ch. Aug. 16, 2012). DV Realty's appeal of that ruling was rejected by this Court, which affirmed the Court of Chancery's removal decision. *See DV Realty Advisors LLC v. Policemen's Annuity and Benefit Fund of Chicago, Ill.*, No. 547, 2012, 75 A.3d 101 (Del. 2013).

The Court of Chancery subsequently retained jurisdiction to adjudicate two follow-on issues: (1) whether DV Realty, after being removed as general partner, became a "Limited Partner" of the Partnership, with DV Realty's general partner

[1] Citations herein to pages of Appellees' Appendix are in the form "B__." Citations to pages of Appellant's Appendix are in the form "A__."

interest converting into a limited partner interest (the "Partnership Status Issue"), and (2) how DV Realty's Capital Account should be valued (the "Capital Account Issue"). On November 27, 2013, the Court of Chancery issued a Letter Opinion resolving the two follow-on issues and holding that DV Realty is not a "Limited Partner" of the Partnership, and that the LPA authorized the Partnership to adjust Capital Accounts to fair market value. B278-B291. In accordance with the Court of Chancery's opinion, the Partnership tendered a check to DV Realty for $199,007, representing 50% of DV Realty's Capital Account plus interest accrued from September 25, 2013. B307-310. DV Realty returned the Partnership's check. B311-312.

For years thereafter, DV Realty did nothing to pursue its current claims of limited partner status and a higher valuation of its Capital Account. The Partnership continued to conduct its real estate investment business with a new general partner and with the same Limited Partners as before. Meanwhile, a 2012 derivative suit filed by DV Realty against Appellees in the Circuit Court of Cook County, Illinois (*DV Realty Advisors, LLC v. Policemen's Annuity and Benefit Fund of Chicago, Illinois*, No. 12 CH 03696) (B13-B105), in which DV Realty claims that the Limited Partners breached their fiduciary duties in removing DV Realty, was and has remained stayed pending a resolution in this Delaware

proceeding of DV Realty's claim to limited partner status. B297 (5/28/15 Ltr. Op. at 4).

On August 10, 2016, the parties consented to the entry of a final order dismissing with prejudice all of DV Realty's claims asserted in this matter. B313-316. DV Realty now appeals from that order.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held that DV Realty is not, and did not become after its removal as general partner, a limited partner of the Partnership. The LPA neither states that DV Realty would become a limited partner upon its removal as general partner, nor provides for any process by which DV Realty would be admitted as a limited partner. As such, any admission of DV Realty as a limited partner would be governed by the statutory default rule set forth in the Delaware Revised Uniform Limited Partnership Act, 6 *Del. C.* §§ 17-101, *et seq.* ("DRULPA"). *See Hillman v. Hillman*, 910 A.2d 262, 271 (Del. Ch. 2006). Section 17-301(b)(1) of the DRULPA provides in pertinent part that "a person is admitted as a limited partner . . . if the partnership agreement does not so provide, upon the consent of all partners and when the person's admission is reflected in the records of the limited partnership." Here, there is no dispute that the Limited Partners never unanimously consented to DV Realty's admission as a limited partner of the Partnership, and that DV Realty has never been identified as a limited partner in the Partnership's records.

To avoid the default provisions of the DRULPA and their mandated result, DV Realty principally relies on select words contained in Section 3.10(a)(iii)(B)(1) of the LPA, which provides that, in the event a general partner is removed, then the general partner "shall" retain 100% of its Capital Account, with 50% of such

"Capital Account (including the Carried Interest calculated to the removal date) being maintained on the same basis as any other Limited Partner's Capital Account." A92. DV Realty seeks similar support for its claimed limited partner status in Section 3.10(a)(iii)(C) of the LPA, which addresses the calculation of Carried Interest for the Capital Account of the general partner in the event of its removal, and states as a proviso to that computation that "the removed General Partner's capital account shall remain fully subject to the profits and losses of the Partnership to the same extent as any other Limited Partner's Capital Account." A93.

But as the Court of Chancery correctly held below, DV Realty stretches too far in embracing these provisions. The clear and more sensible reading of Sections 3.10(a)(iii)(B)(1) and (C) of the LPA is that they address the economic rights of the removed general partner and not its status as a Limited Partner. This interpretation does not, as DV Realty asserts, render Sections 3.10(a)(iii)(B)(1) and (C) as mere surplusage. On the contrary, and putting aside alternative common dictionary meanings, the language relied upon by DV Realty addresses the calculation of Carried Interest and the Capital Account for purposes of and to comply with federal tax laws and regulations, which treat a removed general partner's capital account the same as a limited partner's capital account.

The Court of Chancery's ruling that DV Realty has not been admitted as and does not have the status of a limited partner should accordingly be affirmed.

2. Denied. The Court of Chancery correctly held that, pursuant to the LPA, including the definition of "Capital Account" and other provisions in the agreement, the Partnership was entitled to value DV Realty's Capital Account based on the fair market value of the Partnership's assets as of December 31, 2012. There is no support in the LPA for DV Realty's position that the Capital Account was required to be valued on a tax basis from 2011. Indeed, if DV Realty's position were adopted, it would result in a substantial and unjustified windfall for DV Realty at the expense of the Limited Partners. The Court of Chancery's ruling that DV Realty's Capital Account should be calculated based on the fair market value of the Partnership's assets as of December 31, 2012 should accordingly be affirmed.

STATEMENT OF FACTS

A. The Partnership

The Partnership, DV Urban Realty Partners I L.P., is a Delaware Limited Partnership founded in 2006 with its principal place of business in Chicago, Illinois. It is a closed, opportunistic real estate fund specializing in urban real estate investments in emerging Chicago neighborhoods. B109 (8/16/12 Mem. Op. at 2). The total appraised value of the Partnership's assets was approximately $6 million as of December 31, 2012. A148-9.

B. The Limited Partners

The Limited Partners are five Chicago-based public pension funds that in 2008 collectively invested $66.5 million into the Partnership. Together, the Limited Partners own 95.1% of the Partnership. B110 (8/16/12 Mem. Op. at 3).

C. DV Realty

DV Realty was the general partner of the Partnership at its formation in 2006. B109 (8/16/12 Mem. Op. at 2). Through a $3.4 million investment, DV Realty owns the remaining 4.9% of the Partnership. *Id.*

D. The Limited Partners' January 30, 2012 Notice to Remove DV Realty as General Partner of the Partnership

On January 30, 2012, the Limited Partners executed a written consent removing DV Realty "without Cause" pursuant to Section 3.10(a)(ii) of the LPA, effective January 30, 2012. This step was undertaken because, among other things,

DV Realty breached its obligations under the LPA by failing to obtain audited financial statements for the Partnership and failing to timely deliver financial information to the Limited Partners. B158-160. DV Realty did not accept the removal notice, step down, or cease operating as general partner until after September 7, 2012.

E. The Limited Partners' February 1, 2012 Complaint in the Court of Chancery

On February 1, 2012, the Limited Partners filed their Complaint in this action, seeking a declaration pursuant to Section 17-110 of the DRULPA that their removal of DV Realty was valid. B1-12.

F. The Parties' February 2012 Dispute on the Payment of 50% of DV Realty's Capital Account upon the Removal of DV Realty

Pursuant to Section 3.10(a)(ii) of the LPA, within 30 days of its removal, DV Realty was entitled to receive 50% of its Capital Account. A91-92. In light of the cause of DV Realty's removal, the Limited Partners lacked sufficient financial information to calculate the value of the Capital Account. Consequently, in a letter dated February 27, 2012, the Limited Partners conditionally offered to pay DV Realty $582,262 in consideration for 50% of DV Realty's Capital Account. A138. The $582,262 conditional offer was based on the only financial information the Limited Partners had at the time: the most recent unaudited financial statements, which related to the six-month period ending June 30, 2011. A138-139.

Notably, the Limited Partners' February 27, 2012 letter did not purport to value DV Realty's Capital Account under any specific methodology. *Id.* Recognizing that the Limited Partners lacked sufficient information to value the Capital Account, they expressly reserved all rights in the event that $582,262 exceeded the amount to which DV Realty was entitled. A139.

G. The Court of Chancery's August 16, 2012 Memorandum Opinion Declaring the Limited Partners' Removal of DV Realty to be Valid

After a two-day trial in April 2012, the Court of Chancery on August 16, 2012 issued a 56-page Memorandum Opinion holding that the Limited Partners had in good faith determined that the removal of DV Realty was, in accordance with the terms of the LPA, necessary for the best interest of the Partnership, and therefore valid. B142-154, *Policemen's Annuity and Benefit Fund of Chicago, Illinois v. DV Realty Advisors LLC*, C.A. No. 7204-VCN, Mem. Op. at 35-47, 2012 WL 3548206 (Del. Ch. Aug. 16, 2012).

H. The Court of Chancery's September 7, 2012 Retention of Jurisdiction to Address Certain "Follow-On" Issues

To implement its August 16, 2012 Memorandum Opinion, on September 7, 2012, the Court of Chancery entered an Order and Partial Final Judgment under Court of Chancery Rule 54(b), which provided in relevant part that DV Realty "is removed as the General Partner of the Partnership" and that the Court retained jurisdiction to consider certain "Follow-On Disputes" flowing from the removal of

DV Realty as general partner, including the disputes that are the subject of this appeal. B164-167. The Court of Chancery also entered a Status Quo Order on September 7, 2012 (B168-170), enjoining the Limited Partners and the Partnership from "[e]ngaging in any 'Major Partnership Decision' (as defined by the Partnership's Limited Partnership Agreement[)]," and other activities. B169. (Sept. 7, 2012 Status Quo Order).

I. The Limited Partners Seek to Pay to DV Realty 50% of Its Capital Account Pursuant to the LPA

Beginning in early October 2012, following resolution of DV Realty's removal, the Partnership corresponded with DV Realty regarding the payment of 50% of DV Realty's Capital Account. B237-238. The Partnership explained that it was unable to calculate DV Realty's Capital Account because it had not yet received from DV Realty the necessary financial information, including current financial statements, audited statements and tax returns for the years ending December 31, 2010, and December 31, 2011. B237. The Partnership further informed DV Realty that it may elect to value all Capital Accounts in accordance with Treasury Regulations Section 1.704(b)-1(b)(2). *Id*.

J. DV Realty's December 6, 2012 Amended Complaint in the Circuit Court of Cook County, Illinois

After the Court of Chancery decided its removal and during ongoing negotiations as to the payment of 50% of its Capital Account, DV Realty amended

its complaint in an action that it had earlier filed in Illinois state court, *DV Realty Advisors, LLC v. Policemen's Annuity and Benefit Fund of Chicago, Ill.*, No. 12 CH 03696 (Judge Moshe Jacobius) (the "Illinois Action"). B171-189. Previously, on February 1, 2012, shortly after the Limited Partners filed their Complaint in the Court of Chancery, DV Realty commenced the Illinois Action by filing its Verified Complaint for Declaratory and Injunctive Relief in the Circuit Court of Cook County, Illinois, naming as defendants the five Limited Partners and seeking, *inter alia*, a declaration that the Limited Partners' removal of DV Realty was invalid and ineffective. B13-105. On December 6, 2012, DV Realty amended its complaint in the Illinois Action to assert derivative breach of fiduciary duty claims against the Limited Partners for alleged mismanagement while, during the pendency of the Delaware removal proceeding, they purportedly acted as the "*de facto* general partner." B172. DV Realty's standing to bring derivative claims against the Limited Partners in the Illinois Action is premised on the DV Realty's assertion that "by virtue of [its] removal" as general partner, it "is now a limited partner" in the Partnership. B173.

DV Realty's derivative claims against the Limited Partners in the Illinois Action have been stayed since January 23, 2013, pending a determination by the Court of Chancery as to DV Realty's claimed status as a limited partner under the

LPA or until further Order of the Illinois court. *See* B297. The stay in the Illinois Action currently remains in place. *Id*.

K. The Parties' Continue Their Efforts to Resolve Their Dispute Regarding the Calculation and Payment of 50% of DV Realty's Capital Account

TCB Urban LLC ("TCB"), the successor general partner, had the Partnership's assets appraised as of December 31, 2012. B190-191 (McGavic Aff. at ¶3). As of December 31, 2012, the appraisal reports collectively valued the Partnership's assets, less contractual obligations, at approximately $6 million. *See* B195-232.[2] Consequently, the Limited Partners' 95.1% share of total Partnership assets as of December 31, 2012 was $5,706,000. *Id*. at B191, ¶4. DV Realty's 4.9% share of total Partnership assets as of December 31, 2012 was $294,000. *Id*.

As expressly permitted by the LPA and contemplated under Treasury Regulations Section 1.704(b)(2), TCB opted to value the Partnership's Capital Accounts to more accurately reflect the substantial decline in the value of the Partnership's assets and to avoid a windfall to any departing partner to the detriment of other partners. A149. In particular, TCB determined that DV Realty would receive an unwarranted windfall, at the expense of the Limited Partners,

[2] Appellees' Appendix includes, at pages B190-232, *et seq*., a partial copy of the Affidavit of Derrick E. McGavic, filed in the Court of Chancery on April 5, 2013. That affidavit, with all exhibits, comprises almost 1,000 pages. (See Del. Ch. Transaction ID 51557627, 51558872, 51559153.) In the interest of brevity, Appellees have included in their Appendix only excerpts from Exhibits 2 through 8 to the McGavic Affidavit.

unless its (and every other partner's) interest in the Partnership for purposes of the 50% capital account payout pursuant to LPA Section 3.10(a)(iii)(B) was calculated in this manner. *Id*.

In early 2013, the Partnership advised DV Realty that it had preliminarily calculated DV Realty's capital account based on the fair market value of the Partnership's assets. B240. The Partnership provided DV Realty with a summary of all capital contributions to the Partnership, along with copies of appraisal reports on each of the Partnership's real estate assets and preliminary financial statements. *See* B244.

In response, DV Realty filed its Motion for Determination of Its Capital Account. Specifically, DV Realty asked the Court of Chancery to declare that its Capital Account totaled $5,149,494, consisting of (1) $2,174,494 set forth in DV Realty's 2011 Schedule K-1, (2) a $2 million loan on which the Partnership and DV Realty are co-borrowers, and (3) $975,000 owed on another loan that one of the principals of DV Realty personally guaranteed. DV Realty also asked the Court to enter a judgment that the Partnership owed DV Realty $2,574,747, representing 50% of its Capital Account, plus interest accruing from October 7, 2012. That interest start date is 30 days after the Court of Chancery's order removing DV Realty as general partner.

L. This Court's August 26, 2013 Opinion Affirming the Court of Chancery's Ruling that DV Realty was Validly Removed as General Partner

While the parties continued to dispute the computation and payment of 50% of DV Realty's Capital Account, this Court on August 26, 2013 affirmed the post-trial judgment entered by the Court of Chancery declaring that DV Realty had been validly removed as the general partner of the Partnership. B252-277.

M. The Court of Chancery's November 27, 2013 Rulings on the Partnership Status Issue and the Capital Account Issue

On November 27, 2013, the Court of Chancery issued a Letter Opinion addressing the Partnership Status Issue and the Capital Account Issue.

As to the Partnership Status Issue, the Court of Chancery found that DV Realty is not, and did not become after its removal, a "Limited Partner" of the Partnership. B279-283, *Policemen's Annuity and Benefit Fund of Chicago, Ill. v. DV Realty Advisors LLC*, C.A. No. 7204-VCN, Ltr. Op. at 2-6, 2013 WL 6234202 (Del. Ch. Nov. 27, 2013). In so holding, the Court of Chancery rejected DV Realty's arguments that, under the LPA, it became a limited partner upon being removed. B283. The Court of Chancery characterized the LPA provisions relied upon by DV Realty as ones that "generally deal with economic rights," and reasoned that "it is unlikely that such a major issue in partnership governance would be handled through a maze of financial valuation or definitional provisions, especially when the LPA has specific provisions addressing how one becomes a

limited partner." B282. . Stated differently, "[i]f the removed General Partner had become a limited partner, then one would have expected that the LPA would have acknowledged that." *Id.* The Court of Chancery further recognized that DV Realty's argument would unavoidably allow it to be a Limited Partner that was not required to make any Capital contributions, and rejected DV Realty's position as "[n]othing in the LPA supports the notion that there are two types of limited partners: some who must make additional capital contributions and some who bear no such burden." B282-283. The Court further explained "the reasonable drafting explanation" to DV Realty's argument that its relied-upon contractual language would be rendered meaningless. B283. In particular, the Court of Chancery explained that "[s]omeone who holds an interest (not yet liquidated) as a former partner, under the revenue laws, must be treated the same as a partner for tax purposes." *Id.*

As to the Capital Account Issue, the Court of Chancery held that (i) the LPA authorized the Partnership to adjust capital accounts to fair market value, (ii) the end of 2012 was a reasonable date to measure that value, (iii) neither the $2 million loan on which DV Realty was a co-borrower, nor the $945,000 personal guarantee of DV Realty's principal could be added to DV Realty's capital account, and (iv) payment of 50% of DV Realty's capital account was due on September 25, 2013, thirty days after this Court's Opinion upholding DV Realty's removal as general

partner. B284-290 (11/27/15 Ltr. Op. at 7-13). The Partnership calculated DV Realty's capital account pursuant to the Court of Chancery's Letter Opinion and, on March 3, 2014, tendered a check to DV Realty for $199,007, representing 50% of DV Realty's capital account and interest from September 25, 2013. B304, 307-310. DV Realty returned the check. B-311-312.

On November 24, 2014, the Court of Chancery issued an Order implementing its November 27, 2013 Letter Opinion, retaining jurisdiction to consider "any disputes relating to the Partnership's calculation, pursuant to this implementing order and the November 27, 2013 Letter Opinion, of DV Realty Advisors' capital account." B292-293.

N. DV Realty's Failure to Take Discovery or Otherwise Request an Evidentiary Hearing with Respect to the Calculation of its Capital Account

DV Realty never sought discovery relating to the Partnership's calculation of the fair market value of DV Realty's Capital Account. Nor did DV Realty request an evidentiary hearing with respect to this calculation. Rather, on December 19, 2014, DV Realty moved the Court of Chancery to enter an order of partial final judgment under Court of Chancery Rule 54(b) that would allow DV Realty to take an interlocutory appeal from the Court of Chancery's rulings on the Partnership Status Issue and the Capital Account Issue.

On May 28, 2015, the Court of Chancery denied DV Realty's Rule 54(b) motion. B294-300, *Policemen's Annuity and Benefit Fund of Chicago, Ill. v. DV Realty Advisors LLC*, C.A. No. 7204-VCN, Ltr. Op. at 1-7, 2015 WL 3465814 (Del. Ch. May 28, 2015. In its letter opinion, the Court of Chancery reasoned:

> The Partnership Status Issue has been finally resolved, and there is nothing that is foreseeable in future proceedings before this Court that would moot an appeal. On the other hand, although additional proceedings required with respect to the Capital Account Issue are not likely to alter or moot the determinations the Court has already made, the Capital Account Issue has not been finally resolved. When [DV Realty] framed this issue, it sought judgment against the [Limited] Partnership for $2,574,747. Whether there will be future disputes regarding that number, based on, for example, various real estate appraisals, is uncertain, but [DV Realty] defined its claim as one for a specific sum and this proceeding has not yet advanced to the point where any particular number can be confirmed.

B296-297. Following this ruling, DV Realty did not engage in any discovery relating to the valuation of its Capital Account, including the Partnership's fair market valuation of its underlying assets. DV Realty took no steps to pursue its claims regarding either the Partnership Status Issue or the Capital Account Issue until February 1, 2016, when the Court of Chancery requested a status report from the parties. *See* A3, Dkt 122.

O. The Court of Chancery's Final Order

On August 10, 2016, pursuant to the parties' consent, the Court of Chancery entered its Final Order dismissing with prejudice all of DV Realty's claims,

including its claims relating to the Partnership Status Issue and the Capital Account Issue. B313-316. This appeal followed.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY DETERMINED THAT DV REALTY IS NOT A LIMITED PARTNER OF THE PARTNERSHIP AFTER BEING VALIDLY REMOVED AS GENERAL PARTNER.

QUESTION PRESENTED

Did the Court of Chancery correctly hold that DV Realty is not, and did not become after its removal as general partner, a limited partner of the Partnership?

SCOPE OF REVIEW

The Limited Partners agree with DV Realty that the above question presented is a question of law, and that the standard and scope of review is *de novo*. *See Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

MERITS OF THE ARGUMENT

A. The Court of Chancery Correctly Determined that Under the DRULPA, DV Realty Did Not Become a "Limited Partner" by Virtue of Its Removal as General Partner

The Partnership is a limited partnership formed under Delaware law. Accordingly, the DRULPA governs if and how someone is admitted as a Limited Partner into the Partnership. Section 17-101(8) of the DRULPA defines a "Limited Partner" as "a person who is admitted to a limited partnership as a limited partner as provided in § 17-301." Section 17-301 of the DRULPA provides:

> After the formation of a limited partnership, a person is admitted as a limited partner of the limited partnership:
>
> (1) In the case of a person who is not an assignee of a partnership interest, including a person acquiring a partnership interest directly

> from the limited partnership and a person to be admitted as a limited partner of the limited partnership without acquiring a partnership interest in the limited partnership, at the time provided in and upon compliance with the partnership agreement or, if the partnership agreement does not so provide, upon the consent of all partners and when the person's admission is reflected in the records of the limited partnership.

6 *Del. C.* § 17-301(b)(1). Here, the governing LPA is devoid of any language that addresses the admission of a Limited Partner, or sets forth a mechanism or process for becoming a Limited Partner. Therefore, the default rule supplied by Section 17-301(b)(1) of the DRULPA applies to and governs DV Realty's status as a Limited Partner in the Partnership. *See Hillman v. Hillman*, 910 A.2d 262, 271 (Del. Ch. 2006) ("In the event that a limited partnership agreement is silent, the DRULPA provides the initial fall-back or default provisions.").

Because the Limited Partners did not consent to the admission of DV Realty as a Limited Partner and DV Realty has never been listed in the Partnership's books and records as a Limited Partner, it is not a Limited Partner. *See also* A79 (LPA at 5) (defining "Limited Partners" as "the Persons listed from time to time in the books and records of the Partnership as Limited Partners"). This conclusion is corroborated by the treatment of DV Realty's Partnership interest, which has never been regarded as a limited partner interest of the Partnership either before or after DV Realty's removal as general partner.

DV Realty tellingly fails to identify any section of the LPA that provides that upon its removal as general partner, it will be admitted as a limited partner or that its general partner interest will convert into a limited partner interest. Nor does DV Realty point to any LPA provision that sets forth how the Limited Partners are to vote for or otherwise consent to DV Realty's admission as a limited partner, let alone one allowing DV Realty to elect itself as a limited partner. Indeed, the LPA recognizes only one way for a person to become a limited partner: by becoming a "substituted Limited Partner" in accordance with Section 9.2 of the LPA. A111. Section 9.2 provides that "[a]ny person to which an Interest is transferred with the consent of the General Partners as provided in Section 9.1 shall become a substituted Limited Partner"; in turn, Section 9.1(e) of the LPA prohibits any "Transfer" of an Interest without the general partner's consent. *Id*. It is undisputed that the successor general partner, TCB, has not consented to DV Realty becoming a limited partner.

B. The Court of Chancery Rightly Rejected DV Realty's Strained Interpretation of Section 3.10(a)(ii) of the LPA

To avoid the result mandated by the DRULPA's default provision, DV Realty resorts to the section of the LPA governing how the removed general partner's Capital Account and its Carried Interest should be calculated. That provision requires the Capital Account to be maintained "as any other Limited Partner's Capital Account" (A92, LPA, § 3.10(a)(iii)(B)(1)) and clarifies, in light

of how the Carried Interest on that Capital Account is determined by appraisers in the event of a dispute, that DV Realty's Capital Account "shall remain subject to the profits and losses of the Partnership to the extent as any other Limited Partner's Capital Account" (A92-93, LPA, § 3.10(a)(iii)(C)). DV Realty contends that these phases show that the parties intended "to convert a general partner to a limited partner post-Removal." DV Realty's Opening Brief ("OB") at 18. Notably, DV Realty does not argue that the terms of the LPA are ambiguous. *See* OB at 16.

"When the contract is clear and unambiguous, [this Court] will give effect to the plain-meaning of the contract's terms and provisions." *Estate of Osborn v. Kemp*, 991 A.2d 1153, 1159-60 (Del. 2010). Multiple dictionary definitions for a disputed term do not create an ambiguity where the plain meaning of the term is apparent to "a reasonable person in the position of the parties." *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co*., 616 A.2d 1192, 1196 (Del. 1992). Significantly, "Delaware adheres to the 'objective' theory of contracts, i.e., a contract's construction should be that which would be understood by an objective, reasonable third party." *Estate of Osborn*, 991 A.2d at 1159 (citing *NBC Universal, Inc. v. Paxson Commc'ns. Corp*., 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005)). "A court must accept and apply the plain meaning of an unambiguous term in the context of the contract language and circumstances, insofar as the parties themselves would have agreed *ex ante*." *Lorillard Tobacco*

Co. v. Am. Legacy Found., 903 A.2d 728, 740 (Del. 2006). "[T]he 'true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.'" *Id*. (citation omitted).

Consistent with these principles, the Court of Chancery considered and correctly rejected DV Realty's arguments as "unavailing." B282 (11/27/13 Ltr. Op. at 5). As the Court of Chancery held, when read in its proper context, the language of Section 3.10(a)(iii)(B)(1) and (C) referring to "any other Limited Partner's Capital Account" addresses how the value of DV Realty's Capital Account should be calculated. *Id.* ("[T]he provisions upon which DV Realty relies generally deal with economic rights"). These provisions answer financial questions that (i) inform the size of the payment to DV Realty upon being removed, which is equal to 50% of DV Realty's Capital Account, and (ii) clarify that DV Realty's Capital Account is "subject to the profits and losses of the Partnership" in light of how the Carried Interest on that Capital Account is determined by appraisers in the event of a dispute. A93. Like the independent sections of the DRULPA, these provisions of the LPA do not address DV Realty's purported status as a Limited Partner. *Compare* 6 *Del. C.* § 17-503 (Allocation of Profits and Losses) and 6 *Del. C.* § 17-604 (Distribution upon Withdrawal), *with* 6 *Del. C.* § 17-301 (Admission of Limited Partners).

This distinction is also apparent on the face of the language relied upon by DV Realty. In both instances cited by DV Realty, the modified noun is not "Limited Partner" but "Limited Partner's Capital Account." In addition, the words that precede the phrases relied on by DV Realty (*i.e.*, "being maintained on the same basis as any other Limited Partner's Capital Account," in Section 3.10(a)(iii)(B)(1), and "fully subject to the profits and losses of the Partnership to the same extent as any other Limited Partner's Capital Account," in Section 3.10(a)(iii)(C)) further reflect the economic context of the language from which DV Realty attempts to extrapolate its purported status as a limited partner. A92-93.

In short, as the Court of Chancery correctly reasoned, "[i]f the removed General Partner had become a Limited Partner, then one would have expected that the LPA would have acknowledged that." B282 (11/27/13 Ltr. Op. at 5). Limited Partners enjoy distinct and important rights under the DRULPA and the LPA, including the right to vote on certain Partnership matters and bring derivative actions to vindicate the Partnership's legal claims. *See, e.g.*, 6 *Del. C.* § 17-302 (voting by limited partners); LPA, § 3.2 (A86-87) (identifying Limited Partners' voting rights with respect to "Major Partnership Decisions," including removal of the general partner) (A86-87); 6 *Del. C.* § 17-1001 (right of limited partner to bring a derivative action); *Hillman*, 910 A.2d at 278 (discussing same). These important benefits arising from one's status as a Limited Partner are not reasonably

understood as having been implicitly addressed by provisions specifying how to calculate a capital account interest. DV Realty's contractual interpretation and structure engender unnecessary uncertainty into the significant issue of Limited Partner status as opposed to relying on the DRULPA's default rule.

Ultimately, as the Court of Chancery explained, "it is unlikely that such a major issue in partnership governance would be handled through a maze of financial valuation or definitional provisions, especially when the LPA has specific provisions addressing how one becomes a limited partner." B282 (11/27/13 Ltr. Op. at 5). (referring to Section 9.2 of the LPA, which states how a person to whom a Partnership interest is transferred may become a substituted Limited Partner). It would be incongruous for the Limited Partners to have policed the admission of a transferee of a Partnership interest by requiring the consent of the general partner(s), but to have waived any and all approval rights as against a general partner that the Limited Partners chose to remove without Cause. Indeed, rather than address Limited Partner status and important substantive rights by the indirect implications from language on how to value the removed general partner's Capital Account, the parties were silent, thereby accepting the DRULPA's statutory default.

Contrary to DV Realty's assertion, the Court of Chancery's interpretation of the LPA does not disregard or render "meaningless" references to the word "other" in Section 3.10(a)(iii)(B)(1) and (C) of the LPA. OB at 18-19. Again, the Court of

Chancery identified the "reasonable drafting explanation" for this language: "Someone who holds an interest (not yet liquidated) as a former partner, under the revenue laws, must be treated the same as a partner for tax purposes." B282 (11/27/13 Ltr. Op. at 6). For tax purposes, a removed general partner's capital account is treated the same as a limited partner's capital account, regardless of whether after its removal the general partner becomes an economic interest holder or a limited partner under state law. *See* 26 U.S.C. § 704(e)(1) (recognizing a person as a partner for income tax purposes if he owns a capital interest in a partnership); *id.* § 736 (providing, for tax purposes, that a retired partner is treated as a continuing partner until the § 736 liquidation process is complete, per I.R.S. Reg. 1.736-1(a)(1)(ii) and (a)(6)); *id.* § 761(d) (stating that "[f]or purposes of this subchapter, the term 'liquidation of a partner's interest' means the termination of a partner's entire interest in a partnership by means of a distribution, or a series of distributions, to the partner by the partnership"); I.R.S. Reg. § 1.761-1(d) (providing that, for tax purposes, a partner's interest is not liquidated until the final distribution has been made). These Internal Revenue Code sections and Treasury regulations make clear that, until fully liquidated, DV Realty's Capital Account is treated exactly the same as "any other Limited Partner's Capital Account" for important tax purposes.

Further, the plain definitions of the words "other" and "any other" are not so limited as to produce an unavoidable conflict in contractual language as DV Realty claims. For example, while Merriam-Webster defines "other" as meaning "additional," it also defines "other" to mean "being the one (as of two or more) remaining ***or not included***," and "being the one or ones ***distinct from that or those first mentioned or implied***." Merriam Webster Online Dictionary, *available at* http://www.merriam-webster.com/dictionary/other (last visited on November 23, 2016) (emphasis supplied). More specifically, the term "any other" is defined as being "used to refer to a person or thing that is not particular or specific but is not the one named or referred." Merriam Webster Online Dictionary, *available at* http://www.merriam-webster.com/dictionary/any%20other (last visited on November 23, 2016).

The phrase "any other" thus creates a generalized reference to limited partners that comports with the treatment of the removed General Partner's Capital Account for tax purposes.

Finally, DV Realty also argues that it must be a Limited Partner lest the language of Section 3.10(a)(iii)(B)(2) excusing DV Realty from future capital contributions be "meaningless surplusage." OB at 22. But DV Realty never explains how its position would not require the Court to rewrite the LPA and in so doing cause an absurd result. As noted by the Court of Chancery, there is

"[n]othing in the LPA [that] supports the notion that there are two types of Limited Partners: some who must make additional capital contributions and some who bear no such burden." B282-283 (11/27/13 Ltr. Op. at 5-6). Yet DV Realty, by stretching financial provisions to reach and decide its substantive status, asks this Court to rewrite the LPA and create differing classes of Limited Partners. *See Gertrude L.Q. v. Stephen P.Q.*, 466 A.2d 1213, 1217 (Del. 1983) ("Delaware follows the well-established principle that in construing a contract a court cannot in effect rewrite it or supply omitted provisions."). Moreover, the new class of Limited Partner advocated by DV Reality would be one available only to former general partners removed without cause, which despite their being removed would avoid the burdens of further capital contributions and expenses attributable to post-removal projects that are borne by the remaining Limited Partners. Clearly such an interpretation should be rejected. *See Estate of Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) ("An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract.").

* * *

In short, the LPA does not address or provide for the admission of a person as a limited partner or the conversion of a general partner interest into a limited partner one upon the general partner's removal. Sections 3.10(a)(iii)(B)(1-2) and (C), relied upon by DV Realty, do not overcome the LPA's silence on the critical

issues. These contractual provisions in the LPA concern the financial calculation of the Capital Account of a removed general partner, not the limited partner status of a removed general partner. Accordingly, the default rule provided by Section 17-301(b)(1) of the DRULPA applies to the admission of DV Realty as a limited partner. Because the clear conditions imposed by DRULPA Section 17-301(b)(1) have not been satisfied, DV Realty is not, and did not become, a limited partner upon its removal as general partner. The decision of the Court of Chancery on the Partnership Status Issue should accordingly be affirmed.

II. THE COURT OF CHANCERY CORRECTLY HELD THAT THE PARTNERSHIP WAS ENTITLED TO CALCULATE DV REALTY'S CAPITAL ACCOUNT BASED ON THE FAIR MARKET VALUE OF THE PARTNERSHIP'S ASSETS AS OF DECEMBER 31, 2012.

QUESTION PRESENTED

Did the Court of Chancery correctly hold that the Partnership was entitled to calculate DV Realty's Capital Account based on the fair market value of the Partnership's assets as of December 31, 2012?

STANDARD AND SCOPE OF REVIEW

The Court of Chancery's conclusions of law are reviewed *de novo* and its factual findings are entitled to a high level of deference and are reviewed for clear error. *DV Realty Advisors, LLC v. Policemen's Annuity Ben. Fund*, No. 547, 2012, 75 A.3d 101 (Del. 2013).

MERITS OF ARGUMENT

A. Under the LPA, DV Realty Is Not Entitled To The Windfall Payment It Seeks.

The LPA accords broad discretion to the general partner to determine capital accounts and to conduct the affairs of the Partnership and it specifically provides in that DV Realty be paid for its interest in the Partnership based on "the fair market value of all" Partnership property. *See* A76, LPA at 2, definition of "Asset Value," subsection (c). For the reasons discussed below, the Court of Chancery was correct on both the law and the facts in holding that the Partnership could pay DV

Realty 50% of its Capital Account based on the fair market value of Partnership assets as of December 31, 2012.

In contrast, DV Realty's claim to a payout of 50% of its Capital Account based on what it calls a "tax basis" as reflected in its 2011 Schedule K-1 is an attempt to garner a windfall for itself at the expense of the Limited Partners. Specifically, it is an attempt to foist onto the Limited Partners a disproportionate share of the nearly 90% decline in value of Partnership assets between August 2008, when the Partnership was formed, and October 2012, when DV Realty ceased acting as general partner. It also ignores declines in DV Realty's Capital Account in 2012 before its removal, when DV Realty ran the Partnership. In the words of the Court of Chancery, DV Realty's position "finds no support in either the text or the logic of the LPA." B288 (11/27/13 Ltr. Op. at 11).

1. "Capital Account," "Net Profits," "Net Losses" and "Asset Value"

The LPA definitions of "Capital Account," "Net Profits," "Net Losses" and "Asset Value" provide that the Partnership may value capital accounts based on the fair market value of Partnership Assets.

1. Capital Account.

The LPA defines "capital account" in relevant part as:

"Capital Account" shall mean an account maintained for each Partner in accordance with Regulations Sections 1.704-1(b) and 1.704-2 and to which the following provisions apply to the extent not inconsistent with such Regulations:

> (a) there shall be credited to each Partner's Capital Account: (1) such Partner's Capital Contribution; (2) such Partner's distributive share of Net Profits . . .
>
> (b) there shall be debited to each Partner's Capital Account (1) the amount of money and the Asset Value of any property distributed to such Partner pursuant to this Agreement; (2) such Partner's distributive share of Net Losses . . .
>
> (c) the Capital Account of any substitute Limited Partner shall include the appropriate portion of the Capital Account of the Limited Partner from whom the Interest was obtained. (A77, LPA at 3).

Thus, the Partnership's "Net Losses" are allocated among the Partners and each Partner's share of Net Losses is deducted from such Partner's Capital Account.

2. Net Profits and Net Losses.

The LPA defines "Net Profits" and "Net Losses" in relevant part as:

> an amount equal to the Partnership's taxable income or loss for such year or period determined in accordance with Code Section 703(a) and the Regulations thereunder with the following adjustments:
>
> * * *
>
> (d) in the event the Asset Value of any Partnership asset is adjusted, the amount of such adjustment shall be taken into account as gain or loss from the disposition of such asset for the purposes of computing Net Profits or Net Losses; (A77, LPA at 6).
>
> * * *

Thus, when the Asset Value of a Partnership asset is adjusted, that adjustment is treated as a gain or loss for purposes of computing "Net Profit" or "Net Loss." And, the "Net Profit" or "Net Loss" will either increase or decrease the Partner's Capital Account as described under the definition of Capital Account above.

3. Asset Value.

The LPA defines "Asset Value" in relevant part as:

"Asset Value" with respect to any Partnership asset shall mean:

* * *

> (c) the fair market value of all property at the time of the happening of any of the following events: . . . (B) the distribution of any asset distributed by the Partnership to any Partner as consideration for an interest in the Partnership;
>
> (d) the Basis of the asset in all other circumstances.

A77, LPA at 2. Thus, the Asset Value of Partnership property adjusts to fair market value when the Partnership distributes any asset to any Partner in exchange for an interest in the Partnership.

These definitions work in this case as follows. The Partnership paid or became required to pay DV Realty 50% of its Capital Account in cash. That cash represents an "asset distributed by the Partnership" to DV Realty "in consideration for its interest in the Partnership." As a result, the "Asset Value" of "all property at the time of" the payment adjusted to "fair market value." That adjustment was

"taken into account as a . . . loss" and thus "debited to each Partner's Capital Account," including DV Realty's Capital Account.

DV Realty cites the wrong part of the definition of "Asset Value" in asserting that its Capital Account must be calculated based on "the adjusted tax basis of its assets." OB at 25. That reference comes from subparagraph (d), which by its terms (as set forth above), applies in "all other circumstances," not in the circumstance of a partner being paid for its interest in the Partnership, which is specifically addressed in subparagraph (c).

The LPA, thus, specifically provides that the Partnership's payment for 50% of DV Realty's Capital Account be based on the fair market value of Partnership assets. DV Realty did not dispute below, and cannot therefore argue here, that the Partnership's fair market calculation was incorrect. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived."); *Delaware Elec. Co-op., Inc. v. Duphily*, 703 A.2d 1202, 1206 (Del. 1997) ("It is a basic tenet of appellate practice that an appellate court reviews only matters considered in the first instance by a trial court. Parties are not free to advance arguments for the first time on appeal.") As a result, the Court of Chancery's Letter Opinion should be affirmed.

2. The Definition of "Basis" and Section 5.14(b) of the LPA

Even if subparagraph "d" of the definition of "Asset Value" asserted by DV Realty did apply (which it does not, as discussed above), it makes no difference. That is because the LPA defines "Basis" as used in subparagraph "d" as follows:

> . . . with respect to an asset shall mean the **adjusted** basis from time to time of such asset for federal income tax purposes." (LPA at 3, emphasis added).

The LPA thus provides that the Asset Value of Partnership assets may be "adjusted" for federal income tax purposes. LPA Section 5.14(b), in turn, provides that "the Managing Partner may make, or refrain from making, any elections relating to or affecting the Partnership under the [Internal Revenue] Code." The Partnership invoked this provision when it elected to value every Partner's Capital Account pursuant to 26 C.F.R. § 1.704-1(b)(2)(iv)(f) ("the IRS Regulation"). B191 (McGavic Aff. ¶ 5).

DV Realty asserts that the Partnership did not meet the fourth requirement of the IRS Regulation. OB at 31-32. The fourth requirement is:

> The **partnership agreement requires that the partners' distributive shares** of depreciation, depletion, amortization, and gain or loss, as computed for tax purposes, with respect to such property be determined so as to **take account of the variation between the adjusted tax basis and book value of such property in the same manner as under section 704(c)** . . . (emphasis added).

But the second paragraph of LPA Section 5.15 requires exactly what the fourth requirement specifies:

> In the event the Asset Value of any Partnership asset is adjusted pursuant to paragraph (c) of the definition of Asset Value in Section 1.1 hereof, **subsequent allocations** of income gain, loss, and deduction with respect to such asset shall **take account of any variation between the adjusted basis of such asset for federal income tax purposes and its Asset Value in the same manner as under Code Section 704(c)** and the Regulations thereunder. (emphasis added).

Indeed, the highlighted language from LPA Section 5.15 is nearly identical to highlighted language from the IRS Regulation. Section 5.15 simply does not, as DV Realty asserts, "prohibit[]" what the fourth requirement requires; rather, it mandates that requirement.

To the extent DV Realty's argument is based on the first sentence of the first paragraph of LPA Section 5.15, which begins "[s]oley for federal income tax purposes and not with respect to determine any Partners' Capital Account . . . ," that paragraph does not apply. It pertains only to determining a partner's share of income, gain, loss or deduction "with respect to any property (other than money) contributed to the Partnership . . . ." DV Realty did not contribute "property" to the Partnership. Therefore, the first paragraph does not apply. And, even if it did, it is not contrary to the fourth requirement of the IRS Regulation, in any event. The fourth requirement mandates what the partnership agreement must provide "for tax purposes" and that is exactly what the first sentence of the first paragraph of LPA Section 5.15 also provides when it says "[s]oley for federal income tax purposes and not with respect to determine any Partners' Capital Account . . . ." In

other words, the exclusion for determining "any Partners' Capital Accounts" does not remove that first paragraph from the ambit of what the fourth requirement emulates.

3. Section 5.11 of the LPA

Section 5.11 of the LPA expressly allows DV Realty to "adopt reasonable conventions" for purposes of calculating "Capital Account balances:"

> 5.11 Certain Other Determinations by the Managing Partner. **For purposes of calculating Partnership Percentages, Capital Account balances**, calculating and allocating Partner Guaranteed Payments, the allocation of income and loss and distributions, **and for all other purposes**, all timely Capital Contributions shall be deemed to have been made on the same day and **the Managing Partner shall be permitted to adopt reasonable conventions for such purposes and any such determination by the Managing Partner shall be final and binding on the Partners**. Capital Accounts will not be adjusted by *de minimis* contributions or distributions of cash or other property. (LPA, § 5.11, emphasis added).

As the Court of Chancery held, "[a]djusting values to fair market value constitutes a reasonable convention. In light of the steep drop in value of the Partnership assets, such a revaluation is especially appropriate." B287 (11/27/13 Ltr. Op. at 10). DV Realty does not challenge the reasonableness of "adjusting values to fair market value." Nor does it challenge the Partnership's calculation of fair market value.

Instead, DV Realty asserts that LPA Section 5.11 does not apply because it "addresses just one issue," the timing of when a Capital Contribution is deemed to

have been made. OB Br. at 33. While the timing of when a Capital Contribution is deemed to have been made is one "purpose" for which DV Realty may adopt a reasonable convention under LPA Section 5.11, the Section explicitly allows the Managing Member to adopt reasonable conventions for multiple specified "purposes." The language in Section 5.11 highlighted above is clear that those multiple purposes are not limited to timing of capital contributions. Indeed, the last sentence of Section 5.11 has nothing to do with timing, providing that "Capital Accounts will not be adjusted by *de minimis* contributions or distributions of cash or other property." A102, LPA at § 5.11. Likewise, the title of Section 5.11 itself – "Certain Other Determinations by the Managing Member" – is again in the plural and not limited to timing of Capital Contributions.

The only reasonable construction of LPA Section 5.11 is that the clause "the Managing Partner shall be permitted to adopt reasonable conventions for such purposes" modifies the previously-specified determinations: "calculating Partnership Percentages, Capital Account balances, calculating and allocating Partner Guaranteed Payments, the allocation of income and loss and distributions and for all other purposes." *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1225 (Del. 2012) (applying the "canon of construction that requires all contract provisions to be harmonized and given effect where possible"); *Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1063 (Del. 2010) ("[T]he

controlling rule of construction is that where a contract provision lends itself to two interpretations, a court will not adopt the interpretation that leads to unreasonable results, but instead will adopt the construction that is reasonable and that harmonizes the affected contract provisions"). DV Realty's interpretation reads out of LPA Section 5.15 all of the various purposes for which the Partners agreed a Managing Partner could adopt reasonable conventions.

4. Section 12.15 of the LPA

Section 12.15 of the LPA grants the general partner broad authority to take action relating to the Partnership and the LPA:

> 12.15 Matters Not Provided For; Compliance with Law.
>
> (a) The General Partners shall be empowered to decide any question arising with respect to the Partnership or this Agreement, and to make such provisions as the General Partners deem to be in, or not opposed to, the interests of the Partnership, but which are not specifically set forth herein. (LPA, § 12.15(a)).

Thus even if DV Realty were correct (which it is not) that the various provisions cited above do not "authorize[]" the general partner to pay DV Realty for 50% of its Capital Account based on fair market value, Section 12.15 of the LPA allows the general partner to do so. OB at 27. *DV Realty Advisors LLC v. Policemen's Annuity & Ben. Fund of Chicago*, No. 547, 2012, 75 A.3d 101, 103 (Del. 2013) ("The LPA provides the General Partners, and DV Realty in particular, with broad discretion to manage the everyday affairs of the Limited Partnership.");

Cantor Fitzgerald, L.P. v. Cantor, C.A. No. 18101, 2001 WL 1456494, at *5 (Del. Ch. Nov. 5, 2001) (affirming the latitude and discretion exercised by the general partner under partnership agreement). Indeed, the Court of Chancery found and DV Realty does not dispute that it was manifestly in "the interests of the Partnership" to value all Partners' interests based on fair market value. Otherwise, DV Realty would reap a windfall at the expense of the Limited Partners "[i]n light of the steep drop in value of the Partnership assets . . . ." B287 (11/27/13 Ltr. Op. at 10).

5. The Court of Chancery Correctly Determined the Date of Removal for Valuing DV Realty's Capital Account

DV Realty concedes that its Capital Account should be valued "[c]ontemporaneously with the Removal" or, in the words of the Court of Chancery, "near the date of termination." OB at 34. "The removal process took some time." B287. (11/27/13 Ltr. Op. at 10). Upon being advised of its removal in January 2012, DV Realty did not step down. Instead, DV Realty contested its removal through a trial in the Court of Chancery and an appeal to this Court. That took over eighteen months, until August 2013. The Court of Chancery removed DV Realty as of September 7, 2012 and TCB was appointed as the new general partner thirty days later, but even then TCB was not able to fully exercise its authority due to the Status Quo Order. B168-170. As a result, DV Realty was not removed as general partner until October 7, 2012.

DV Realty asserts that it was removed on January 30, 2012, when the Limited Partners sent their notice. OB at 34. But that assertion elevates form over substance and ignores the facts.

DV Realty remained in charge of the Partnership as general partner during the entire time following its receipt and challenge of the notice of its removal in the Court of Chancery. It was not until thirty days after the Court of Chancery's September 7, 2012 Order that DV Realty ceased acting as general partner. Of the two valuation dates proffered to the Court of Chancery – December 31, 2011 and December 31, 2012, the latter date is much more "contemporaneous" with and "nearer" to DV Realty's actual removal. It simply makes no sense for the Partnership to redeem DV Realty's 50% Capital Account interest in consideration for its removal based on a valuation that occurred nearly ten months before it was removed. That is particularly true given the factual record and the factual findings made by the Court of Chancery.

The Partnership proffered evidence of how DV Realty's Capital Account, however calculated, changed in 2012, including the following:

- The Partnership incurred "net losses" which had the effect of reducing every partner's (including DV Realty's) capital account from the amounts reported on the 2011 Schedule K-1's. *See* B192. (McGavic Aff. ¶ 8).

- The Partnership's cash declined by approximately $2 million in 2012 and it incurred depreciation expenses of approximately $500,000.

B250 (Manning Aff. ¶ 4).

DV Realty did not challenge, much less address, this evidence below and it therefore stands undisputed. The Court of Chancery credited this evidence when it held that the end of 2012 "is the better choice [than the end of 2011] because it more accurately reflects the economic realities of the Partnership." B288 (11/27/13 Ltr. Op. at 11). There is nothing in the record to suggest that this finding is clearly wrong. *DV Urban*, 75 A.2d at 108 ("We will not set aside a court's factual findings unless they are clearly wrong and the doing of justice requires their overturn") (citations omitted).

DV Realty is mistaken in asserting that the Court of Chancery improperly used "developments years after the Agreement was struck to interpret its language *post hoc*." OB at 36. The Court of Chancery's finding that December 31, 2012 is the proper valuation date was a factual finding based on the evidence, not an "interpretation" of the LPA. If it were an interpretation of an issue on which the LPA is silent (as DV Realty asserts), then, pursuant to Section 12.15 of the LPA discussed above, the general partner TCB had the authority to determine that issue. (A118, LPA, § 12.15).

In sum, the LPA provides in several different sections for calculation of DV Realty's capital account based on the fair market value of the Partnership's assets. The LPA simply does not provide for calculation of the capital account on the so-called, undefined "tax basis" asserted by DV Realty. In no event can the date for valuing DV Realty's capital account be December 31, 2011, because that date was months before DV Realty was actually removed as General Partner, and it ignores declines in Partnership value, and hence every Partner's capital, that occurred in 2012, before DV Realty was removed. The Court of Chancery correctly determined, based on evidence that DV Realty did not challenge below, that December 31, 2012 was the most reasonable date for valuing DV Realty's capital account.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that the decisions of the Court of Chancery on the Partnership Status Issue and the Capital Account Issue be affirmed.

CONNOLLY GALLAGHER LLP

/s/ Henry E. Gallagher, Jr.
Henry E. Gallagher, Jr. (#495)
Ryan P. Newell (#4744)
The Brandywine Building
1000 West Street, Suite 1400
Wilmington, Delaware 19801
Telephone: (302) 757-7300

Of Counsel:

Michael R. Levinson
Seyfarth Shaw LLP
131 S. Dearborn Street
Suite 2400
Chicago, Illinois 60603
Telephone: (312) 460-5868

Attorneys for Nominal Defendant Below, Appellee, DV Urban Realty Partners I L.P.

ROSS ARONSTAM & MORITZ LLP

/s/ Bradley R. Aronstam
Bradley R. Aronstam (#5129)
S. Michael Sirkin (#5389)
100 S. West Street, Suite 400
Wilmington, Delaware 19801
Telephone: (302) 576-1600

Of Counsel:

John M. Murphy
Peter P. Tomczak
BAKER & MCKENZIE LLP
300 East Randolph Drive
Suite 5000
Chicago, Illinois 60601

Attorneys for Plaintiffs Below, Appellees Policemen's Annuity and Benefit Fund of Chicago, Illinois, Municipal Employees' Annuity and Benefit Fund of Chicago, Laborers' and Retirement Board Employees' Annuity and Benefit Fund of Chicago, Retirement Plan for Chicago Transit Authority Employees' Trust, and Public School Teachers' Pension and Retirement Fund of Chicago

CERTIFICATE OF SERVICE

The undersigned certifies that on the 23rd day of November 2016, copies of the foregoing were filed and served via LexisNexis File & Serve, on the following counsel of record:

Bradley R. Aronstam
S. Michael Sirkin
Seitz Ross Aronstam & Moritz LLP
100 S. West Street
Suite 400
Wilmington, DE 19801

Andrew D. Cordo
Toni-Ann Platia
Ashby & Geddes
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, DE 19801

/s/ Henry E. Gallagher, Jr.
Henry E. Gallagher, Jr. (#495)