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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, et al., Plaintiffs Below, Appellees, and DV URBAN REALTY PARTNERS I, L.P., Nominal Defendant Below, Appellee.	§ § § § § § § § § § § § § § § § §	No. 464, 2016 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 7204

REPLY BRIEF OF APPELLANT DV REALTY ADVISORS, LLC

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PRELIMINARY STATEMENT

The theme of the Partnership's position on this appeal is that DV Realty proffers an absurd interpretation of the parties' Agreement to the end of receiving a payment on its Capital Account that amounts to an inequitable windfall, but it is the Partnership that advances a reading of the Agreement that is not supported by any of its language, and seeks to use a litigation-driven revaluation of Partnership assets based on alleged unrealized losses for the purpose of cashing out half of DV Realty's $3.4 million investment for pennies on the dollar, while trapping DV Realty in an undefined status with no apparent rights or protections.[1]

With respect to the Limited Partner Issue, DV Realty's interpretation of the Agreement as converting it into a Limited Partner upon the Removal gives effect to each of the Agreement's words—including those referring to DV Realty's Capital Account as being treated like that of "any other Limited Partner"—and makes its provisions operate as a cohesive whole. DV Realty's interpretation also makes business sense. Because DV Realty retains a Capital Account, and therefore a Partnership Interest, after the Removal, being a limited Partner affords DV Realty with rights and protections of an investor under the Agreement and Delaware law.

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[1] Capitalized terms and record citations are as defined in the Opening Brief of DV Realty (the "Opening Brief" or "OB") and the Appellees' Answering Brief (the "Answering Brief" or "AB"). For ease of reading, the Appellees, which include the Limited Partners and the Partnership, will be referred to collectively as the "Partnership" unless context requires a distinction between them.

The Partnership's contrary argument, on the other hand, is that DV Realty silently became an "economic interest holder," a status that is not mentioned in the Agreement or defined by our law, and applying which requires ignoring substantial language in the Agreement.

With respect to the Capital Account Issue, DV Realty's interpretation of the Agreement obligates the Partnership to pay DV Realty 50% of the value of its Capital Account after the Removal based on a valuation of the Capital Account that the Partnership itself acknowledged, and which the Agreement mandates, as of the time that the Limited Partners elected to carry out the Removal. The Partnership contends that it should be permitted to adopt a new valuation method not mentioned in the Agreement to decrease the amount of the payment it would otherwise have had to make on the basis of unrealized losses that allegedly occurred after the Limited Partners voted to remove DV Realty. In other words, the Limited Partners' complaint is that they do not like what the Agreement required them to do, and seek to use a different valuation method and payment date to get a better result. Nothing in the Agreement supports this interpretation.

For these reasons, the Opinion should be reversed.

ARGUMENT

I. DV REALTY IS A LIMITED PARTNER AFTER BEING REMOVED AS GENERAL PARTNER.

The Partnership's primary argument against the conclusion that DV Realty became a limited partner upon the Removal is that the Agreement is silent as to "the admission of a Limited Partner" and therefore the existing Limited Partners' consent was required before DV Realty could become a limited partner. AB at 20-21. However, as discussed at length in the Opening Brief, under settled principles of contract interpretation, Section 3.10(a)(ii) of the Agreement provides that DV Realty is a limited partner as a result of the Removal. That is, the Agreement is not silent on the subject, and therefore there is no reason to resort to the DRULPA.

To support its contrary reading of the Agreement, the Partnership misconstrues Section 3.10(a)(ii) as answering only "financial questions" such as the "calculation" of DV Realty's Capital Account. *Id*. at 23. Section 3.10, however, is broader than that: it addresses how a general partner is removed and what happens as a result. True, it specifies that one consequence of the Removal is that the Partnership owed DV Realty a cash payment for 50% of the value of its Capital Account. But the Agreement also says that DV Realty continues to maintain its Capital Account, and describes some of its rights and obligations going forward. There is not one word to the effect that DV Realty's status as a partner is terminated. As discussed in the Opening Brief, the upshot of this

language—and the only interpretation of it that makes sense in light of the Agreement as a whole—is that DV Realty is a limited partner post-Removal. *See* OB at 17-24.

The Partnership does not attempt to square its interpretation of the Agreement with any of that language; it does not explain, for instance, how DV Realty "shall retain" its Capital Account, "maintained on the same basis as any other Limited Partner's Capital Account," "fully subject to the profits and losses of the Partnership to the same extent as any other Limited Partner's Capital Account" without it remaining a Partner and continuing to hold a Partnership Interest. *See id.* at 21-22. Indeed, the Answering Brief offers no response to DV Realty's analysis of how Section 3.10(a)(ii) interacts with the full text of the Agreement.

The Partnership instead argues that the references in Section 3.10(a)(iii) to DV Realty's Capital Account being treated like that of "any other Limited Partner" means that the parties intended that DV Realty be treated as a Limited Partner solely for tax purposes because that treatment is required by federal tax law. AB at 26. This interpretation of the Agreement fails for two reasons. First, there is no tax-purposes-only limitation in the language of Section 3.10(a)(iii). The parties knew how to draft language when they wanted to limit something to just tax purposes. *See* Tab 6 at A105 § 5.15 ("Solely for federal income tax purposes and not with respect to determining any Partners' Capital Account. . ."). The choice

not to do so in Section 3.10(a)(iii) demonstrates that the parties did not intend to limit the treatment of DV Realty like "any other Limited Partner" to just tax purposes.

Second, there is no such federal tax law requirement. The four statutes and one regulation cited in the Answering Brief do not address the tax treatment of former general partners or any other relevant circumstances. *See* 26 U.S.C. § 704(e)(1) (discussing "the case of any partnership interest created by gift"); 26 U.S.C. § 736 (addressing "Payments to a retiring partner or a deceased partner's successor in interest"); 26 U.S.C. § 761(d) (defining "the term 'liquidation of a partner's interest' to mean the termination of a partner's entire interest in the partnership. . ."); 26 C.F.R. § 1.761-1(d) (same). DV Realty's Partnership Interest was not created by gift; DV Realty has not died or retired; its interest is not being entirely liquidated. Therefore, the cited provisions of the tax laws are irrelevant. In the absence of the purported federal tax law requirement, there is no basis for judicially inserting words into the Agreement limiting Section 3.10(a)(iii) to treating DV Realty as a limited partner only for tax purposes.

The dictionary definition of the phrase "any other" offered in the Answering Brief reinforces that the Agreement means that DV Realty is a limited partner. The cited part of the dictionary says, in full:

Definition of ANY OTHER

1 —used to refer to a person or thing that is not particular or specific but is not the one named or referred to <*Any other* day but tomorrow would be okay. There weren't *any other* children for us to play with.>

2 : in addition to the person or thing just mentioned <Does anyone have *any other* ideas?>

http://www.merriam-webster.com/dictionary/any%20other (last visited Nov. 30, 2016). As the examples illustrate, the words "any other" refer to a thing that is the same type as the one named. Thus, in the example "[a]ny other day but tomorrow would be okay," the words "any other" refer to something that is a day, just not the particular day named (tomorrow). So it is in Section 3.10(a)(iii): in the statement that DV Realty's Capital Account is "maintained on the same basis as any other Limited Partner," "any other Limited Partner" means a Limited Partner that is not the limited partner that is named in the sentence, DV Realty.

As discussed in the Opening Brief, Section 3.10(a)(iii)(B)(2) excuses DV Realty from the obligation that it would otherwise have as a Limited Partner to answer Capital Calls. *See* OB at 22. The Partnership argues, quoting the Opinion, that there is "nothing" in the Agreement creating two types of limited partners, those who are required to participate in Capital Calls and those who are not. AB at 27-28. Yet, the first sentence of Section 3.10(a)(iii)(B)(2) does just that. The Partnership does not explain what effect that language is supposed to have if, as it contends, DV Realty is not a Limited Partner.

And, contrary to the Partnership's assertion that this structure engenders absurdity, it makes business sense. While DV Realty was general partner, it potentially had to contribute to Capital Calls. *See* Tab 6 at A97 § 5.1 (referring to the obligations of "[e]ach Partner" in the event of a Capital Call). But after it involuntarily lost control over the Partnership's investment activities as a result of the Removal, and thus no longer enjoyed the right to control how its capital was deployed as it originally bargained for, the parties agreed to excuse it from funding its replacement's business decisions. However, it faces dilution by future Capital Calls in which it does not participate. (By way of contrast, DV Realty would not have been excused from participating in Capital Calls if it had been removed for cause. *See id*. at A92 § 3.10(a)(iii)(A).)

The Partnership's other two arguments based on the text of the Agreement also fail. First, the Partnership's invocation of the definition of Limited Partner as including only those listed as such in the Partnership's books and records begs the question. *See* AB at 20 (quoting Tab 6 at A79). The Partnership refuses to recognize DV Realty as a limited partner on its books and records because it denies that the Agreement requires it to do so.

Second, Section 9.1 of the Agreement, providing the mechanism by which one may become a "substituted Limited Partner," is inapplicable. *See* AB at 21 (quoting Tab 6 at A111). DV Realty does not contend that it became a Partner by

being the transferee of someone else's Partnership Interest; rather, by operation of Section 3.10(a)(iii) of the Agreement, DV Realty's existing Partnership Interest was converted into a limited partner interest upon the Removal. There is nothing incongruous, as the Partnership contends, *see id.* at 25, about the Agreement requiring consent before a *new* investor is admitted as a partner while DV Realty became a limited partner automatically upon Removal. The Limited Partners had already consented to admit DV Realty as their Partner—indeed, the *managing* partner—when they signed the Agreement.

* * *

The theme of the Partnership's argument is encapsulated by its reference to the Court of Chancery's statement that "one would have expected" the Agreement to "acknowledge" that DV Realty became a limited partner post-Removal. AB at 24 (quoting Opinion at 5). The Agreement *does* so "acknowledge" through the language used in Section 3.10(a)(iii) and the various other provisions discussed above and in the Opening Brief. What the Partnership (and the Opinion) seem to be saying is that the Agreement had to state explicitly that DV Realty became a limited partner as a result of the Removal. *See id*. at 24-25 (arguing against finding that limited partner status is "implicitly addressed" by the Agreement). Neither, however, cites any authority for that proposition. Nor could they, because Delaware law eschews requiring magic words in contracts, and instead reads them

to give effect to the parties' intent, however expressed. *Prairie Cap. III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 51 (Del. Ch. 2015) (contract "[l]anguage is sufficiently powerful to reach the same end by multiple means, and drafters. . . need not employ magic words").

Moreover, the Partnership's argument that interpreting the Agreement as making DV Realty a limited partner sows "uncertainty" cuts against it. *See* AB at 24-25. Although the Partnership refers several times to the DRULPA's "statutory default," *see id*., it points to nothing in the act that makes "economic interest holder" the default state for a general partner removed from that position or that defines the rights of an "economic interest holder" who maintains a Capital Account. Accepting the Partnership's interpretation would require concluding that the Agreement implicitly (to use the Partnership's word) stripped DV Realty of all of the "distinct and important" rights it enjoyed as a Partner under the Agreement and the DRULPA, and instead placed it in the far more uncertain position of being a holder of a nebulous "economic interest" with undefined rights.

In sum, the result the Partnership urges is not supported by the language or logic of the Agreement or the DRULPA.

II. THE PARTNERSHIP WAS NOT PERMITTED TO REVALUE DV REALTY'S CAPITAL ACCOUNT USING THE APPRAISAL METHOD AS OF A DATE AFTER THE REMOVAL PAYMENT CAME DUE UNDER THE AGREEMENT.

A. The Agreement Does Not Authorize the Partnership's Revaluation of DV Realty's Capital Account.

The Partnership was not permitted under the Agreement to utilize the Appraisal Method to determine the value of its assets in connection with cashing out half of DV Realty's Capital Account after the Removal.

1. The Partnership Offers No Argument That Section 5.14(b) of the Agreement Supports Using the Appraisal Method to Revalue DV Realty's Capital Account.

In the Opening Brief, DV Realty provided four independent reasons why the Partnership could not "elect" under Section 5.14(b) of the Agreement to revalue DV Realty's Capital Account pursuant to Treasury Regulation 1.704(b)(2)(iv)(f). OB at 29-31. Stated succinctly, the Regulation does not apply in these circumstances or have the effect that the Partnership contends that it does. The Opinion's reliance on Section 5.14(b) should be reversed for any one of those four reasons.

The Partnership did not respond to any of them, and has therefore waived any argument to the contrary. *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived."). Accordingly, it is undisputed that the Court of Chancery erred in permitting the Partnership to

employ the Appraisal Method as an election under Section 5.14(b) of the Agreement.[2]

2. Section 5.11 of the Agreement Does Not Support Using the Appraisal Method to Revalue DV Realty's Capital Account.

The pertinent language of Section 5.11 of the Agreement states that "(i) For [four specific purposes] and for all other purposes, (ii)(a) all timely Capital Contributions shall be deemed to have been made on the same day and (b) the Managing Partner shall be permitted to adopt reasonable conventions for such purposes. . . ." Tab 6 at A102 § 5.11 (romanettes added). The Partnership argues that clause (ii)(b) of the quoted language modifies clause (i) such that, in effect, the Partnership is permitted to adopt any convention for any purpose. AB at 38. The Partnership's reading of the Agreement ignores the language of clause (ii)(a). Clause (ii)—of which the subparts are not separated by commas—permits the Partnership to adopt "reasonable conventions" for implementing the mandate that timely Capital Contributions be deemed made on the same date. *See* OB at 32-33. Clause (i) provides that the timing effect of clause (ii) can apply to any purpose, not just the four named at the beginning of the sentence. It does not expand

[2] The Partnership did respond to a fifth argument, namely that, even if the Partnership could invoke Section 5.14(b) of the Agreement and the Regulation, it still has not satisfied the fourth "criteria" of the Regulation. *See* OB at 31; AB at 35-36. The Partnership's lack of response to any of DV Realty's other arguments renders this point academic.

Section 5.11 into *carte blanche* to adopt "conventions" to bring about any result the Partnership desires.

The Partnership's two other points about Section 5.11 of the Agreement are off base. *See* AB at 38. The second sentence of Section 5.11 addresses a separate subject—prohibiting *de minimis* adjustments to Capital Accounts—and therefore is irrelevant to interpretation of the first sentence. The use of the plural word "determinations" in the heading to the section also adds nothing to the analysis. Headings "are not to be considered in construing the terms and provisions of [the] Agreement," Tab 6 at A116 § 12.9, and in any event, Section 5.11 contemplates determinations about "all timely Capital Contributions" plural.

3. The Partnership Relies on an Inapplicable Definition of Asset Value.

The Partnership argues that it was entitled to revalue all of its property at fair market value under paragraph (c)(B) of the definition of Asset Value in the Agreement. *See* AB at 33. The referenced language of the Agreement states that the Asset Value of "any Partnership asset shall mean: . . . (c) the fair market value of all property at the time of . . . (B) the distribution of any asset distributed by the Partnership to any Partner as consideration for an interest in the Partnership." Tab 6 at A76. The Partnership contends that the cash payment after the Removal constitutes the transfer of an asset to a Partner in consideration of an interest in the

Partnership under this definition. The Partnership's argument fails because paragraph (c)(B) does not apply here.[3]

Section 3.10(a)(iii)(B)(1) of the Agreement states that, after the Removal, DV Realty retains 100% of its Capital Account although 50% of its value is to be distributed in cash. DV Realty is not selling back any of its 4.9% Partnership Interest in exchange for that payment. Therefore, the payment is not "consideration for an interest in the Partnership" within the meaning of paragraph (c)(B).

Moreover, read in context of the entire definition of Asset Value, the word "asset" does not mean "cash," and therefore paragraph (c)(B) of the definition of Asset Value is not implicated by a distribution of cash. Rather, the definition of Asset Value applies in the context of distribution (or acquisition) of a particular asset such as a piece of property. *See* Tab 6 at A76. Other definitions in the Agreement reinforce this interpretation. For instance, the definition of Capital Account distinguishes between "money" and the Asset Value of property. *See* Tab 6 at A77 ("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. . ."); *see*

[3] In making this argument, the Partnership appears to concede that DV Realty is a Partner. If DV Realty is not a Partner, and instead is being paid as the holder of an "economic interest" as the Partnership contends in connection with the Limited Partner Issue, then paragraph (c)(B) of the definition of Asset Value is not implicated.

also id. at A80 (referring, in the context of determining Net Profits and Net Losses, to the adjustment of the Asset Value accounting for gain or loss "from the disposition of such asset.").

Furthermore, if "asset" included cash in this context, then *every time* the Partnership makes a distribution—whether or not in connection with removing a general partner—there would be a mandatory revaluation of all of the Partnership's property to fair market value.[4] However, the Partnership offers no evidence that it was carrying out such a mandatory revaluation here, nor that it has ever done so in the past. Indeed, neither its February 27, 2012 letter to the Court consenting to DV Realty making the payment due on Removal or the post-Removal Form K1 delivered to DV Realty (and the IRS) make any reference to a mandatory revaluation of the Partnership's assets on account of the payment required by the Removal. *See* Tabs 14-15. Nor did the Partnership argue to the Court of Chancery that it had employed the Appraisal Method because it was required to do so by the definition of Asset Value. On the contrary, the Partnership represented that it had *chosen* to utilize the Appraisal Method under discretionary authority allegedly

[4] The revaluation would be mandatory based on the contrast in the language used in paragraph (b)(C), and that used in paragraph (b)(A), of the definition of Asset Value. The latter states that the Partnership's property would be revalued upon certain Capital Contributions "if the Partnership determines to make such adjustment at such times," while the former contains no qualification making the revaluation optional. Tab 6 at A76.

conferred by Sections 5.14(b) and 5.11 of the Agreement. *See* Tab 19 at A157, A159; *see also* Opinion at 7, 9. As discussed above, neither of those sections of the Agreement apply here, and the Partnership's reliance on part of the Agreement it did not actually employ to revalue the assets should be rejected.

4. The Partnership's Reliance on Section 12.15(a) of the Agreement is Misplaced.

The Partnership argues for the first time on appeal that it was permitted to adopt the Appraisal Method valuation under Section 12.15(a) of the Agreement. AB at 39. This argument is waived. *See Del. Elec. Coop., 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."). It is also without merit. Section 12.15(a) applies only to situations "not specifically set forth" in the Agreement. Tab 6 at A118. The Agreement contains provisions dealing with the consequences of the Removal, cashing out half of DV Realty's Capital Account, and determining the value of Partners' Capital Accounts. The Partnership's belated reference to this gap filler cannot override the express terms of the Agreement.

B. The Proper Valuation Date Is Not After the Removal Payment Was Due.

The Partnership does not dispute that the payment required by Section 3.10(a)(iii)(B)(1) of the Agreement was due 30 days after DV Realty was removed as general partner. The parties have put forth two dates to use for determining the amount due: December 31, 2011 or December 31, 2012. But for the fact that DV Realty contested the Removal—in good faith, in what the Court of Chancery called a close case, *see* OB at 35—the Partnership could not conceivably dispute that it was obligated under the Agreement to make the Removal payment by no later than the end of February 2012, thirty days after the Limited Partners voted to remove DV Realty effective immediately, as they acknowledged by letter to the Court of Chancery authorizing such payment on February 27, 2012. *See* OB at 4; B3 ¶ 5; Tab 14. Thus, under the Agreement, the former is the proper date to use. *See* OB at 34.

The Partnership seeks to use the existence of the litigation to change the valuation date under the Agreement to a date it finds more advantageous. That is, the Partnership seeks to drive down the amount of its payment obligation based on "preliminary" calculations of an unrealized decline in the value of the Partnership's assets that it alleges occurred *after* the Limited Partners elected to remove DV Realty as general partner. *See* AB at 42. That interpretation finds no support in the language of the Agreement.

Moreover, the Partnership asserts, without citation to the record, that DV Realty was not removed until October 7, 2012. AB at 40-41. Thus, even accepting *arguendo* that the date of the Removal was dependent on the litigation and the Partnership's date when the Removal occurred is correct, the Removal payment was payable under the Agreement by November 6, 2012. The Partnership offers no basis in the Agreement or in Delaware contract law for its contention that the proper date for determining the amount of the payment could be almost two months later. To the extent that the Court of Chancery's conclusion that December 31, 2012 was the appropriate date to use for determining the amount of the payment due is, as the Partnership argues, a factual finding, *see* AB at 42, it is clearly erroneous because it is contrary to the plain language of the Partnership's obligations under the Agreement.

In addition, the facts do not support the Partnership's claim that the value of the Partnership's assets dropped, much less that its obligations under the Agreement should change the basis of such a drop. As discussed in the Opening Brief, the Partnership's assertion that the value of the Partnership declined between 2011 and 2012 is an apples-to-oranges comparison of valuations conducted using two disparate methodologies. *See* OB at 35. The affidavits that the Partnership cites in the Answering Brief offer equivocal, forward looking testimony of "approximate" losses that "will likely" have an effect on then-undetermined

Capital Account values. *See, e.g.*, B250 ¶ 4. The Partnership repeatedly described its Appraisal Method calculations as "preliminary." *See, e.g.*, Tab 16 at A146; Tab 19 at A156-57. The Partnership never litigated the actual amount of the December 31, 2012 valuation that it contends should be used. *See* Tab 19 at A160-62, A165 (arguing only that December 31, 2011 should not be used as the date for determining the Removal payment, and asking the Court of Chancery to deny DV Realty's motion for determination of its Capital Account, but seeking no other relief).[5]

Finally, the Partnership's resort to the Agreement Section 12.15(a) gap filler, *see* AB at 42, is again waived because the Partnership did not cite Section 12.15 as relevant to the Capital Account Issue in the Court of Chancery. *See supra* at 15 (discussing waiver of an argument based on Section 12.15(a) not raised below).

CONCLUSION

For the foregoing reasons and those set forth in the Opening Brief, DV Realty respectfully requests that this Court reverse the Opinion and hold that: (i)

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[5] The Partnership's assertions that DV Realty did not dispute the preliminary December 31, 2012 valuations, AB at 34, 42, are incorrect. *See* Tab 20 at A188 ("The Limited Partnership has not asked the Court to find that its 'preliminary' appraisal figures are correct. In fact, other than providing 'preliminary' figures, the Limited Partnership has not even stated what it believes [DV Realty] must be paid. Therefore, [DV Realty] has no obligation at this time to challenge the Appraisal [Method valuation] or the Limited Partnership's preliminary calculations" (footnotes omitted)).

DV Realty became a Limited Partner of the Partnership after the Removal; and (ii) the Partnership was not permitted to revalue DV Realty's Capital Account using the Appraisal Method, and instead the Capital Account should be valued in accordance with the Agreement as of December 31, 2011 at $2,174,494.

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Dated: December 12, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on December 12, 2016, a copy of the foregoing Reply Brief of Appellant DV Realty Advisors, LLC was caused to be served upon the following counsel of record by File & Serve*Xpress*.

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