



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JER HUDSON GP XXI LLC and HUDSON HOUSING TAX CREDIT FUND XXI LP,

Plaintiffs,

v.

DLE INVESTORS, LP,

Defendant.))))))) C.A. No. 2021-0478-MTZ

OPINION

Date Submitted: January 6, 2022 Date Decided: May 2, 2022

James P. Hughes, Melanie K. Sharp, Craig D. Gear, and Richard J. Thomas, YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware; Jessica Ragosta Early, Emily A. Robey-Phillips, HOLLAND & KNIGHT LLP, Boston, Massachusetts; Attorneys for Plaintiffs JER Hudson GP XXI LLC and Hudson Housing Tax Credit Fund XXI LP.

Christopher Viceconte, GIBBONS P.C., Wilmington, Delaware; Louis E. Dolan, NIXON PEABODY LLP, Washington, DC, Laura B. Bacon, NIXON PEABODY LLP, Chicago, IL; Attorneys for Defendant DLE Investors, LP.

ZURN, Vice Chancellor. For over three decades, the federal government has created tax subsidies to promote the development and maintenance of affordable rental housing. Under this program, tax credits are allocated to each state, which in turn allocate the tax credits to qualified affordable housing projects. The tax credits are passed along to investors in those projects, thereby incentivizing investment in affordable housing.



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

Affordable housing projects in this program are typically held by a limited partnership. The investors purchase limited partnership interests, and a general partner manages the partnership and the property. Investors claim the tax credits allocated to the property in which they invest over a period of ten years. After that period expires and the investors have received their tax credits, the investors frequently sell their limited partnership interests for much less than they paid for them. The program has additional mandates and features that support keeping the property as affordable housing for an additional twenty years, including a means of transferring the property to a qualified affordable housing nonprofit at a below-market price.

Recently, a new type of buyer discounted limited partnership interests. It purchases a limited partnership stake from the initial investor after the investor harvested the tax credits. As a new limited partner, the buyer engages in a now-nationally-familiar pattern of tactics to prevent the property from being transferred to the nonprofit. Around the country, about half a dozen courts have weighed in on the propriety of those strategies under the federal tax subsidy program. This precedential opinion contributes to that body of law through the lens of fiduciary duties and the internal affairs of Delaware limited partnerships.

The plaintiffs here are the partnership and general partner; the defendant is the new limited partner. The new limited partner repeatedly sought either a sale of the



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

property or a buyout of its partnership interests at what it considered fair market value. When the general partner would not go along, the limited partner claimed the amounted to a

breach of fiduciary and contractual duties under the limited partnership agreement.

The limited partner attempted to remove the general partner for cause, as is its right under that agreement. The general partner seeks a declaratory judgment that it was not validly removed. The limited partner asserts counterclaims for breach of fiduciary duty, breach of contract, and declaratory relief that the removal was valid.

This post-trial opinion finds in favor of the general partner and the partnership

partnership

agreement. The general partner has modified fiduciary duties, but the limited partner

failed to prove the general partner breached them. The limited partner also failed to

prove the general partner breached the limited partnership agreement. Therefore,

the limited partner lacked cause to remove the general partner. The removal is invalid, the general partner remains in its role as the general partner, and the general

partner is not liable for any breach. The limited partnership agreement dictates that

the general partner receive fees and expenses for surviving an unwarranted removal attempt.

I. BACKGROUND 1

is a limited

partnership that holds indirect interests in other limited partnerships, each of which



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

in turn holds an affordable housing property developed under the federal

Low-Income Housing Tax program. 2 The other plaintiff, JER

1 Counterclaims, available at D.I. 24. Stipulated Facts that are Admitted and Require No Proof in Joint Pre-Trial Stipulation and Order, available at D.I. 163 from pages 12 through 30. Citations in the form Tr. to the trial transcript, and citations in the form of the identified witness, available at D.I. 179 and D.I.

refer to joint trial exhibits. C Fund LPA of the Amended and Restated Agreement of Limited Partnership of Hudson Housing Tax Credit Fund XXI LP dated September 30, 2002, Assignment and Assumption Agreement Initial Fund and First Amendment to Amended and Restated Agreement of Limited Partnership [Hudson Housing Tax Credit Fund XXI LP] dated December 31, 2007), available at JX009 HUDSON00018177 238 and HUDSON00018158 74,

respectively. Citations in the alone, at JX009 HUDSON00018158 74. Citations Property LPA to the Amended and Restated Agreement of Limited Partnership and Amendment to Amended and Restated Agreement of Limited Partnership, available at JX007 HUDSON00018375 463 and HUDSON00018360 65, respectively. -Trial Tr. Post-Trial Oral Argument Transcript, available at D.I. 195. 2 PTO ¶¶ 2, 12 14. , is t (together with the

. 3 The Fund was created in 2002. 4 Defendant DLE Investors, LP

is one of s. DLE became a Fund limited partner

in 2007. 5 The Fund distributed all tax credits flowing from one particular property

to its investors by 2015. 6 The partners projected that between 2020 and 2021, that

property would be transferred to a nonprofit for a below-market price pursuant to

the LIHTC program and the partnership agreement of the entity holding the

property. 7

By 2020, new owners had taken control of DLE. 8 Under new management,

DLE sought either a sale of the property or a buyout of its Fund interest at fair market

value. 9 Fund GP declined both transactions. The partnership holding the property,



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

3 Id. ¶¶ 1, 14. 4 Id. ¶ 16. 5 Id. ¶ 17. 6 Id. ¶ 41; Trane Tr. 522; Macari Tr. 33, 87. 7 JX014 at DLE_0007799 801; JX058 at DLE_0002308. 8 Chiusano Tr. 388 89; Kagey Tr. 483 84; Trane Tr. 522 23. 9 JX062 at DLE_0002407; JX075 at DLE_0002601. DLE objected to the admissibility of JX062 in a footnote in its post-trial answering brief. D.I. 188 at 31 n.10. That objection is waived: DLE failed to object to JX062 on the Joint Exhibit List. D.I. 169 at 4. Under the Joint Pre-Trial Stipulation and Order, in which the Fund held indirect limited partner interests, proceeded to transfer the

property to an affordable housing nonprofit as contemplated by the LIHTC program

and that 10 Fund GP sought the advice of counsel

and concluded it would not challenge the transfer. 11 In response, DLE purported to

remove Fund GP as general partner of the Fund, asserting its inaction was a breach

of fiduciary and contractual duties . 12 Fund

GP contends it breached no such duty and was improperly removed. 13

Having weighed the evidence and evaluated the credibility of the witnesses, I

find that the The following facts

Objections to exhibits shall be noted on the Joint Exhibits List or made at trial (if an exhibit is sought to be admitted into evidence at trial). Unless specifically raised during trial, any continuing objections to exhibits on the Joint Exhibit List shall be briefed in post-trial briefing or be deemed waived. All exhibits on the Joint Exhibit List to which an objection is not raised in accordance with this paragraph shall be deemed admitted into evidence. D.I. 163 at 39; see also Trial THE COURT: [A] contemporaneous objection needs and then, in

10 PTO ¶ 55; JX168. 11 See PTO ¶ 58; JX203 . DLE objected to my consideration of the Holland & Knight Memorandum as hearsay under Delaware Rules of Evidence 801 and 802. D.I. 169 at 11; Trial Tr. 145. The Holland & Knight Memorandum is a summary of legal advice Plaintiffs received from Holland & Knight. Plaintiffs indicated at trial that the Holland & Knight Memorandum is not being admitted for the truth of the matter asserted. Trial Tr. 145 46. It is therefore not hearsay under Rule 801(c)(2). Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., Inc., 866 A.2d 1, 21 (Del. 2005); D.R.E. 801(c)(2). . 12 PTO ¶ 60; JX218. 13 PTO ¶ 62; JX220. were proven by a preponderance of the evidence presented at trial or are drawn from

judicially noticeable authority. 14



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

A. The Low-Income Housing Tax Credit Program

More background about the LIHTC program may be helpful context. The

LIHTC program is designed to encourage new construction and rehabilitation of

existing buildings as affordable rental housing. ¹⁵ It is set forth in Section 42 of the

¹⁴ See D.R.E. 202. ¹⁵ 26 U.S.C. § 42. Since the Wagner-Steagall Act of 1937, the federal government has experimented with a wide variety of methods to address home insecurity. E.g., United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (codified as amended in scattered sections of 42 U.S.C.). Methods include: (i) financed, publicly-owned housing starting in the 1930s (public housing); (ii) publicly-financed, privately-owned housing starting in the 1950s . . . ; (iii) vouchers starting in the 1970s; and finally, (iv) tax Brandon M. Weiss, Residual Value Capture in Subsidized Housing, 10 HARV. L. & POL Y REV. 521, 524 (2016) Residual Value Capture (citations omitted). As set forth in Section 42, the LIHTC program is a federal subsidy program specifically designed to promote the nationwide development and preservation of rental housing that is affordable to low and moderate income households. The LIHTC program subsidizes low- -income -for-dollar income tax reduction; and (2) permitting institutional investors with large,

providing capital necessary to develop the project. ¹⁶

The Supreme Judicial Court of Massachusetts has described the LIHTC program as

. . . across the

17

¹⁶ Opa-Locka Cmty. Dev. Corp. v. HK Aswan, Inc., 2020 WL 4381624, at *3 (Fla. Circ. Ct. July 7, 2020) (ORDER) (citing U.S. GOV T ACCOUNTABILITY OFF., GAO-17-285R, LOW INCOME HOUSING TAX CREDIT: THE ROLE OF SYNDICATORS 1, 4 (Feb. 16, 2017)), . Assocs., LLC v. Opa-Locka Cmty. Dev. Corp., Inc., 2021 WL 4190914 (Fla. Dist. Ct. App. Sept. 15, 2021). ¹⁷ , 99 N.E.3d 744, 748 (Mass. 2018) (he] LIHTC program now provides more affordable rental units than are provided in public housing or with Section 8 housing vouchers[.] (citing Rental Housing: Expanding Options for Diverse and Growing Demand, JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., 32 33 (2015), https://www.jchs.harvard.edu/sites/default/files/media/imp/America%27s%20Rental%20Housing%202015_WEB.pdf)); accord Low Income Housing Tax Credit Program, 2018 2019 Qualified Allocation Plan, MASS. DEPT. OF HOUS. & CMTY. DEV. 6,

<https://www.mass.gov/doc/2018-2019-qap/download> (explaining that since 1987, the LIHTC program has helped finance over 67,000 affordable rental units in Massachusetts and almost 3 million



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

nationwide); Residual Value Capture at 524 25 At an annual cost of approximately eight billion dollars, the LIHTC program is by far the predominant source of government investment in rental housing development for low-income households. (citing JOINT COMM. ON TAX N, JCX-97-14, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2014 2018 26 (2014))). The LIHTC program is built on federal allocations of tax credits to state

housing finance agencies in all fifty states. 18 The state agencies award tax credits to

real estate developers who win a competitive application process to develop

affordable housing. 19 The nonrefundable tax credits are valuable to large financial

institutions with significant federal tax liabilities. 20 Those i contributions provide necessary equity to develop the qualified affordable housing

property. 21]developers the tax credits to private investors, usually through

a syndicator, in exchange for an equity investment in the housing 22 Those

syndicators connect investors to affordable housing projects offering tax credits. 23

18 Residual Value Capture at 534. 19 Id. 20 Id. 21 Id. at 534 35. 22 Acevedo v. Musterfield Place, LLC, 98 N.E.3d 673, 675 (Mass. 2018) (Jill Khadduri, Carissa Climaco, & Kimberly Burnett, What Happens to Low Income Housing Tax Credit Properties at Year 15 and Beyond?, U.S. DEPT. OF HOUS. & URB. DEV. 2 (2012), https://www.huduser.gov/publications/pdf/what_happens_lihtc_v2.pdf); see also Residual Value Capture at to develop as institutional investors began to understand the asset class, the housing tax credit program was made permanent, and syndicators quickly came to prefer institutional capi 23 See, e.g., In re Mun. Mortg. & Equity, LLC, Sec. & Deriv. Litig., 876 F. Supp. 2d 616, 626 for developers to construct low-income rental housing. Frequently, low-income housing developers find it advantageous to sell these tax credits to a syndicator. The syndicator s low-income housing projects. The syndicator will assemble a group of investors to invest in the LIHTC Equity, LLC, 744 F.3d 874 (4th Cir. 2014); Residual Value Capture at

process typical - The syndicators form partnerships to develop and hold LIHTC-eligible properties, and to facilitate investment in exchange for tax credits. 24 Syndicators and

investors often partner in several partnerships holding several affordable housing

projects. 25 The partnerships have the purpose of acquiring, financing, developing,

and managing the affordable housing. 26 The syndicator is usually the general



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

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24 See, e.g., *Opa-Locka*, 2020 WL 4381624, at *3. 25 E.g., *CED Cap. Hldgs. 2000 EB, L.L.C. v. CTCW Berkshire Club, L.L.C.*, 2020 WL 6537072, at *2 (Fla. Cir. Ct. Nov. 3, 2020). 26 See, e.g., *Riseboro Cmty. P ship Inc. v. SunAmerica Hous. Fund 682*, 482 F. Supp. 3d 31, 33 (E.D.N.Y. 2020), as corrected Partnership has been organized exclusively to acquire the Apartment Complex and to develop, rehabilitate, finance, construct, own, maintain, operate and sell or otherwise dispose of the Apartment Complex, in order to obtain long-term appreciation, cash income, [LIHTC Program tax credits,] and tax The [operative partnership] Agreement requires that the Apartment Complex be in a manner which satisfies, and shall continue to satisfy, all restrictions, including tenant income and rent restrictions applicable to projects generating [LIHTC Program tax]; *SunAmerica Hous. Fund 1050 v. Pathway of Pontiac, Inc.*, 2021 WL 391420, at *2 (E.D. Mich. Feb. 4, 2021) According to the Agreements recitals section, the Partnership was formed to acquire, rehabilitate, own, maintain and operate a 150-unit apartment complex intended for rental to elderly persons of low and moderate income, known as Presbyterian Village North, and located in Pontiac, Michigan. Section 3.01, however, entitled Purpose of the Partnership, goes on to clarify that the Partnership was organized exclusively to acquire, finance, rehabilitate, own, maintain, operate and sell or otherwise dispose of the [Property], in order to obtain long-term appreciation, cash income, [tax credits under the LIHTC Program,] and tax losses. , appeal filed, *SunAmerica Hous. Fund 1050 v. Pathway of Pontiac, Inc.*, No. 21-1243 (6th Cir.); *Opa-Locka*, 2020 WL 4381624, at *1 OLCDC joined Banc of America Community Development Corporation (BACDC) in forming the Company for the purpose of acquiring, developing, and operating Aswan Village as affordable housing, and to finance those activities through participation in the Low Income Housing Tax Credit (LIHTC) program ; *Senior Hous. Assistance Gp. v. AMTAX Hldgs. 260, LLC (SHAG I)*, 2019 WL 687837, at *3 (W.D. Wash. Feb. 19, 2019) The seven Limited Partnership Agreements have . . . two stated partner, and it will often receive fees for its role. 27 The general partner has discretion

and control over the partnership , subject to certain enumerated

restrictions. 28 Institutional investors seeking tax credits invest as limited partners

with only a few enumerated consent rights. 29

Through this framework, Section 42 advances the deliberate policy choice to

replace a typical equity investors expectations of economic cash flow or

appreciation from the apartment complex with a comparable or better return on

investment almost solely derived from tax benefits. 30 The receipt



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

baseline

purposes: (1) to develop, operate, and otherwise deal with the projects; and (2) to enter into operating use lease agreements with SHAG to ensure favorable treatment under federal and state tax laws ; , 99 N.E.3d at 74 partners in a limited partnership formed for the purpose of rehabilitating and operating an

id. 743 he limited partnership here was formed for the purpose of participating in the LIHTC program id. The purpose of the partnership, as stated in section 2.5.A of the partnership agreement, is to invest[] in real property and . . . provi[de] . . . low income housing. . 27 See, e.g., Mun. Mortg., 876 F. Supp. 2d at 627; Residual Value Capture at 529 n.155 .

28 E.g., SHAG I, 2019 WL 687837, at *3; Pathway of Pontiac, 2021 WL 391420, at *3; Riseboro, 482 F.Supp.3d at 35; s Rehab, 99 N.E.3d at 746; CED Cap. Hldgs., 2020 WL 6537072, at *2. 29 E.g., SHAG I, 2019 WL 687837, at *3 4; Pathway of Pontiac, 2021 WL 391420, at *3; Opa-Locka, 2020 WL 4381624, at *3; Riseboro, 482 F.Supp.3d at 35; CED Cap. Hldgs., 2020 WL 6537072, at *2. 30 Opa-Locka, 2020 WL 4381624, at *3 (internal quotations and emphasis omitted). ten-year incentive to maintain the housing as affordable. 31 To keep those tax credits

from being clawed back, the partnership must adhere to LIHTC program

requirements, including rental rate restrictions, for another five years (together with

the Credit Period, the fifteen- 32 And even after the end

of the Compliance Period, project owners allocated tax credits after 1989 must

continue to comply with the program for an additional fifteen years, known as the

. 33 ten years of tax credits results

in thirty years of affordable housing.

The program is designed to keep the housing affordable even longer. 34 At the

end of the Compliance Period, the partnership can convey the property to a certified

nonprofit under the terms of a right o -market price

31 Id. 32 Macari Tr. 13; see also CED Cap. Hldgs., 2020 WL 6537072, at *2; Pathway of Pontiac, 2021 WL 391420, at *1; Opa-Locka, 2020 WL 4381624, at *3. 33 Pathway of Pontiac, 2021 WL 391420, at *2;



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

Opa-Locka, 2020 WL 4381624, at *3. 34 Opa-Locka, 2020 WL 4381624, at *3 s aim of creating and preserving low-income housing does not end at thirty years. Rather, the LIHTC program seeks to preserve low-income housing in perpetuity by creating a special role for nonprofits, like OLCDC, whose missions are not to profit from a sale of the low-income housing project, but to continue to develop and preserve the low-income housing in ; see also, e.g. he Project must meet the provisions of [Section 42] regulations during each of 15 consecutive years in order to remain qualified to receive the [tax] credits. In addition, the Partnership entered into an Extended Use Agreement, which requires the utilization of the Project pursuant to Section 42 for a minimum of 35 years after the compliance period, even if the Partnership disposes set by statute. 35 The ROFR is designed to facilitate the nonprofit

the complex as continued affordable housing. 36 This conveyance opportunity is structured as a ROFR to ensure the tax credits flow to the partnership rather than the nonprofit. 37 It is not unusual for the purchasing nonprofit to be affiliated with a member of the partnership. 38 The general partner may be authorized to exercise the ent. 39

B. The Partnership Structure Implementing The LIHTC Framework

The Fund LIHTC partnership in most respects. The general partner, Fund GP, is a subsidiary of a syndicator, Hudson Housing Capital LLC ; holds management rights; 40 and collects fees and a fractional percentage of the available tax credits. 41

The great majority of the tax credits go to the investor limited partners who contribute capital to the endeavor. As in most LIHTC limited partnerships, the

35 Opa-Locka, 2020 WL 4381624, at *3. 36 Id.; Rehab, 99 N.E.3d at 754. 37 Riseboro, 482 F.Supp. at 34 35; , 99 N.E.3d 744 at 754. 38 E.g., SHAG I, 2019 WL 687837, at *2; Pathway of Pontiac, 2021 WL 391420, at *1. 39 E.g., Pathway of Pontiac, 2021 WL 391420, at *6 (concluding the limited partner Plaintiff was not required to form an intent to sell the Property for Presbyterian to exercise . 40 See generally Fund LPA at Art. VI. 41 Id. § 6.8D; id. § 5.1B; which holds a . limited partners hold certain enumerated consent rights. The consent rights



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

relevant here are designed to account for the fact that the Fund has not one, but two

limited partners. 42 Under the 2002 limited partnership agreement Fund

LPA , the sole limited partner was , a JPMorgan Chase affiliate. 43

In 2007, First Chicago sold part of its

interest, creating DLE as a second limited partner but still staying on as a limited

partner. 44 The Fund

LPA was amended to accommodate a second limited partner: it provides DLE and

Fund LP hold consent rights as one voice, as the Investor Limited Partners. 45 Their

fifty percent (50%) of the Percentage Interests held by all of the Investor Limited

46 47 This

means Fund LP can give Consent of the Investor Limited Partners without DLE, and

42 First Amendment at HUDSON00018162 (amending the Initial Fund LPA definition of and amending the Initial to include both limited partners). 43 Fund LPA at HUDSON00018181. 44 See generally First Amendment; JX023 at DLE_0004979; Macari Tr. 16; PTO ¶ 14. 45 First Amendment at HUDSON00018162. 46 Id. 47 Id. at HUDSON00018162 (amending the Initial Fund LPA definition . DLE can never, alone, give that Consent. 48 When the Fund LPA requires

Percentage Interests held by all of the Investo 49

for Supermajority Consent. 50

The Fund is unique from other LIHTC partnerships showcased in recent

litigation in that it does not hold the affordable housing complexes itself: it has held

indirect interests in up to five partnerships, each of which held or holds a property. 51

Each holding constructed, rehabilitated or acquired by a Property Partnership, which property is

52



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

48 Chiusano Tr. 389 90. 49 First A Initial Fund LPA); id. at HUDSON00018167 69 (amending the Initial

Fund LPA Section 6.3 to add Section 6.3B); Fund LPA § 6.3B(viii). 50 owned by such Limited Partner . . . The current limited partners are DLE,

which holds a 49.0000995% interest in the Fund, and [Fund LP], which holds a

51 In December 2007, the Fund was the sole member of five limited liability companies that each held a 99.98% limited partnership interest in a corresponding property partnership. First Amendment at HUDSON00018158. As of December 2017, the Fund held indirect interests in three of those five property partnerships. Macari Tr. 20. By August 2020, only two LLC- portfolio Meadow LLC (Country Meadow Residences, L.C.). Id. 50. 52 Fund LPA at Partnership, that are limited partners in each holding partnership. 53 When DLE entered the

partnership in 2007, the Fund owned interests in five Intermediate Entities that each

held a 99.98% limited partnership interest in a corresponding property partnership. 54

This case centers on a LIHTC-eligible 108-unit

housing complex known as Kates Trace Apartments in Newport News, Virginia

55 The Property is held by Partnership (the

, a Virginia partnership. 56 The Fund invests in the Property

Partnership via

), which is the limited partner in the Property Partnership. 57

T Property LP, implemented the LIHTC model by facilitating the flow of capital from

investors. Property LP conveyed Fund capital to the Property Partnership, which

used the funds to build, operate, and maintain the Property. 58 In exchange for

developing and maintaining an affordable housing project, the Virginia state

53 Id. First Amendment at HUDSON00018158. 54 First Amendment at HUDSON00018158. 55 PTO ¶ 13; Property LPA at HUDSON00018376. Elsewhere in the record, the Property is referenced as



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

having 104 units. See, e.g., JX168 at HUDSON00008086. 56 PTO ¶ 32. 57 Id. ¶ 35. 58 Id. ¶ 39. government allocated a predetermined schedule of tax credits to the Property

Partnership. 59

The partners repeatedly created forecasts reflecting this exchange. Fund LPA

Section 3.3A(ii) requires that when an investor makes a capital contribution, the

investor and the general partner must and confirm a financial forecast

describing the economic and tax benefits that are projected to be generated by the

Fund with respect to its investment (directly or indirectly through an Intermediate

Entity) in the Property Partnership to which such Subscription Agreement relates for

60 A set of 2004 projections forecasted \$5,910,636 in tax

credits from the Property from 2005 through 2015. 61 In 2007, when DLE entered

59 See Property LPA at Art. II (defining Agency); JX004 at HUDSON00018773. DLE objected to my consideration of JX004 under Delaware Rules of Evidence 401, 402, 403, 602 and 901. D.I. 169 at 1; Trial Tr. 25 27. Rules 401, 402, and 403 relate to any tendency to make a fact more or less probable than it would be without the evidence; [] (b) the fact is of

outweighed by a danger of . . . unfair prejudice, confusing the issues, . . . undue delay,

conclude JX004 is admissible under Rules 401, 402, and 403 because it is relevant to the expectations of the original parties to the Fund LPA, and its probative value is not outweighed by any of the factors listed in Rule 403. JX004 is admissible under Rule 602 because Joseph Macari has personal knowledge about JX004, as a signatory thereto and original party to the Fund LPA. D.R.E. 602; Macari Tr. 25. JX004 is also admissible under Rule 901 because it was introduced by a witness with personal knowledge. D.R.E. 901(b)(1); Macari Tr. 25. 60 Fund LPA § 3.3A(ii). 61 JX004 at HUDSON00018773; Macari Tr. 29. the partnership, the Fund LPA compelled the creation of another forecast for each

property partnership. 62 The price DLE paid for its interest was based off of its

projected tax benefits through 2020. 63



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

the partnership forecasted \$2,275,559 in tax credits from the Property from 2008 through 2015, tax benefits through 2020, and no cash flows or positive income. 64

And the Property LPA enumerated the projected credits applicable to the Property through 2015. 65 The forecasted 2019 or 2020 end to the tax benefits aligned with

62 Fund LPA § 3.3A(ii). 63 Trane Tr. 521 22. 64 JX011 at DLE_0005420; Trane Tr. 520 22 (confirming the JX011 projections were attached to the Fund LPA when DLE acquired its interests and what they projected); receive

id. id. projected that the Fund would receive no cash flow through at id. id. , is it your testimony that no cash flow has

65 Projected Credits will be 2015); id. § 4.01(q). the end of the Compliance Period and the predicted exercise of the ROFR. 66

internal projections also modeled the ROFR and a disposition in 2020 or 2021. 67

The Property Partnership distributed the tax credits, doling out 99.98% to

Property LP. 68 Property LP conveyed those tax credits to the Fund, and the Fund

distributed them to its partners commensurate with their interest; the limited

partner(s) received over 99% of the remaining tax credits, and Fund GP received

0.01% of the tax credits. 69 By the end of the Credit Period in 2015, DLE and Fund

LP received atherially all projected tax credits. 70

66 of the compliance period. And the expectation when this investment was made was that

JX004 at HUDSON00018773; JX011 at DLE_0005420; JX014 at DLE_0007799.

67); JX014 at DLE_0007800

schedule that shows the amount of liabilities the fund will accrue from 2017 to the year in which the final property is expected to be disposed of, I think this is around 2020 or . . JX058 at DLE_0002308 (-profit GP has a non-profit ROFR beginning in 2020 at that results in at DLE_0001819 Chiusano Tr.



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

390, 392 94; 400 01, 405 06, 410 11 Property Partnership Interests). 68 Property LPA § 5.01(b)(ii). 69 PTO ¶¶ 9, 14; Fund LPA § 5.1B. 70 PTO ¶ 41; Trane Tr. 522; Macari Tr. 33, 87. The Property Partnership has other stakeholders alongside the Fund. The

s Trace Housing Corporation

. 71 Property GP is a subsidiary of AHC, Inc.

affordable housing developer. 72 The Syndicator is represented at the Property

Partnership level through its subsidiary, JER Hudson SLP LLC ,

partner. 73 The Fund limited

partners do not have direct representation in the Property Partnership.

The organizational structure of the Fund and the Property Partnership is

reflected in the diagram below:

71 PTO ¶ 34. 72 Id. 73 PTO ¶¶ 33, 36. The Property limited partnership agreement (the Property

LPA mandates that Property GP maintain the Property and the Property

Partnership in accordance with the LIHTC program. 74 And it implements the

feature of a ROFR to a designated affordable housing nonprofit. Five

years after tax credits are exhausted, i.e. after the fifteen-

year Compliance Period, the Property LPA grants Property GP

74 See, e.g., Property LPA §§ 3.02(i), 4.01(p) (q), (z), 4.02(j). non-profit to have a ROFR debt and taxes attributable to the sale. 75

After a post-Compliance Period offer to

purchase the Property, the designated nonprofit may exercise its ROFR and purchase

the Property for the statutory below-market price.



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

C. Post-Compliance Period Investors Pursue Higher Returns.

At the end of the Credit Period, the investor has reaped all the tax credits it can from its investment and typically exits the partnership by selling its limited partner interests, either to the general partner or to a third party.⁷⁶ The value of those interests is much lower than it was at the beginning of the Credit Period, as the tax credits have been harvested. Purchasers of these cheaper limited partner interests were typically not involved in the partnership when it was created, when it purchased the affordable housing project, or when it distributed the tax credits.⁷⁷

⁷⁵ PTO ¶ 11; Property LPA § 8.02(e) (citing 26 U.S.C. § 42(i)(7)). ⁷⁶ See SHAG I, 2019 WL 687837, at *1; Opa-Locka, 2020 WL 4381624, at *2; Rehab, 99 N.E.3d at 744 45. ⁷⁷ CED Cap. Hldgs., 2020 WL 6537072, at *2 3; see also Brandon M. Weiss, Clarifying Nonprofit Purchase Rights in Affordable Housing, 48 FORDHAM URB. L. J. 1159, 1168 (2021) Clarifying Nonprofit Purchase Rights however, a new trend in the field has emerged, leading to burgeoning disputes around the

country. As a growing number of LIHTC developments have reached the end of their initial compliance period, various financial entities began to see an opportunity at this critical m . Entry of a certain type of new limited partner after the Credit Period has

proven to introduce tension between that new limited partner and the general partner.

ustry in which certain entities, like Hunt [Capital

Partners], are acquiring limited partner interests in LIHTC partnerships known as

Aggregators who then attempt to extract value out of such interests that were not

intended by the original ⁷⁸

⁷⁸ CED Cap. Hldgs., 2020 WL 6537072, at *5; accord id. have come into LIHTC partnership agreements and attempted to extract value or proceeds that is not otherwise permitted under the operative contracts like the Partnership Agreement (collecting cases)); id. at *6 (referring to a financial benefit to Hunt that was not otherwise intended by the original tax credit investor); id. at *6 (describing the aggregato id. Partnership and refusing to consent to a refinance of the Permanent



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

Loan, as explained

above in connection with its efforts to extract a larger than negotiated residual value upon its exit from the Partnership, were in direct conflict with the original tax credit investor's financial expectations and entitlements (emphasis added)); Opa-Locka, 2020 WL Defendants recognize that, because of the ROFR, they have real in the Company and Aswan Village and have value except through operating cash Accordingly, when Defendants consummated the aforementioned transaction to acquire [Bank of America] position in the Company, they paid no more than \$400,000 because ROFR preserved all of Aswan equity for OLCDC, which is precisely its intent of the ROFR and consistent with the policy goals and objectives of Section 42 and LIHTC program in general (emphasis added)); Full Circle Villagebrook GP, LLC v. Protech 2004-D, LLC, 2021 WL 4061744, at *1 (N.D. Ill. Sept. 7, 2021) (describing aggregators as entities acquire[] interests in LIHTC affordable housing partnerships and upon the conclusion of the 15-year compliance period required by Section 42 (the Compliance challenge[] the contractual transfer rights associated with those Clarifying Nonprofit Purchase Rights at 1168 investor limited partner interests in nonprofit-developed LIHTC partnerships with projects

approaching year 15.A. Davenport, Year 15: Facing off with the Over the last several years, [] a new trend in the field has emerged, leading to burgeoning disputes around the country. As a growing number of LIHTC developments have reached the end of their initial compliance period, various financial entities began to see an opportunity at this critical moment in the life of the project to extract value. Investors in these disputes use a variety of tactics to pressure nonprofits for example, refusing to consent to applications for financing to conduct necessary capital improvements. . . . Other efforts focus on removing the nonprofit general partner from the partnership, for example, via claims of breach of fiduciary duties. With control of the project, an investor can attempt to eliminate the extended rent and income restrictions on the property through a technical procedure known as the qualified contract process. Alternatively, investors can simply wait until the extended use restrictions expire and convert the property to market-rate use or sell to a third party that sees long-term upside value. In all cases where a nonprofit holds a Section 42 ROFR, these various investor efforts can only succeed if the nonprofit cannot successfully acquire the property pursuant to the ROFR. 79

When the general partner does not accede to the new limi fiduciary duties and the terms of the governing partnership agreement, and litigation

follows. 80 In some instances, new limited partners have sought to leverage

Aggregator Newcomers Try to Toss Partnership Intent Out the Window, TAX CREDIT ADVISOR, 27 (May 2019))). 79 Clarifying Nonprofit Purchase Rights at 1168 69 (citations omitted). 80 Id. at 1169; Nonprofit Transfer Disputes in the Low Income Housing Tax Credit Program: An Emerging Threat to Affordable Housing, WASH. STATE HOUS. FIN. COMM N 5 (Sept. 2019),



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

<https://www.wshfc.org/admin/Reporton15YearTransferDisputes.pdf> (In recent years, project-transfer rights and disrupt the normal exit process in hopes of selling the property at market value. . . . take advantage of legal ambiguities, resource disparities, and economies of scale to

. partnership liabilities in order to secure a profitable buyout and cash return. 81 In

other instances, that tension has come to a head through the ROFR. 82

New limited partners have attacked the exercise of the ROFR

based on the legitimacy of the triggering offer, whether the partnership was a willing

seller, and other mechanical issues. 83 The plaintiffs in those cases have also asserted

a general partner breached its fiduciary duties by permitting the exercise of a ROFR

81 E.g., CED Cap. Hldgs., 2020 WL 6537072, at *5 CTCWs actions in refusing to exit the Partnership and refusing to consent to a refinance of the Permanent Loan were orchestrated by Hunt and were designed to drive a cash return, ultimately to Hunt, that was never intended by the original tax credit investor or anyone originally involved in the ; Opa-Locka, 2020 WL 4381624, at *5. 82 E.g., Opa-Locka, 2020 WL 4381624, at *5. 83 E.g., Centerline Hous. I, L.P.-Series 2 v. Palm Cmtys. (Centerline I), 2021 WL 2493255, at *2, *4 (C.D. Cal. Apr. 26, 2021) (ruling on a case where an alleged

that the Offer was not bona fide, and therefore that the right of first refusal was not triggered ; Pathway of Pontiac, 2021 WL 391420 appeal filed, SunAmerica Hous. Fund 1050 v. Pathway of Pontiac, Inc., No. 21-1243 (6th

Cir.); Riseboro, 482 F. Supp. 3d 31 (challenging the ROFR for lack of a willing seller and a third-party bona fide offer); Opa-Locka, 2020 WL

4381624, at *12 the nonprofit); , 99 N.E.3d at

758 R can only be triggered by a - be inconsistent with the statutory scheme of § 42 and with the specific terms of the SHAG I, 2019 WL 1417299, at *1, *7 (deciding a case where defendant . or otherwise thwarting the goals of a new limited partner. 84 This matter is one of

several such cases. 85 of those

cases. 86

By 2015, the Credit Period had ended and the Investor Limited



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

Partners had captured all of the tax credits. 87 Thereafter, between 2015

and 2020 original investors exited DLE, and Hunt Capital Partners

84 E.g., *Centerline Hous. v. Palm Cmtys. (Centerline II)*, 2022 WL 247951, at *7 8 (C.D. Cal. Jan. 12, 2022) (trigger and exercise of the ROFR breached its fiduciary duties to the limited partners), appeal filed *Centerline Hous. I, L.P.-Series 2 v. Palm Cmtys.*, No. 22-55367 (9th Cir.); SHAG I, 2019 WL 687837, at *8 (denying fiduciary duty counterclaim against the nonprofit plaintiff and general partners for the

. 85 *CED Cap. Hldgs.*, 2020 WL 6537072, at *10 (collecting cases). 86 E.g., *id.* at *3 (considering a suit brought by a limited partner controlled by Hunt Capital Mr. Kagey is Hunts Chief Financial Officer and he provided testimony at the aforementioned bench trial, testimony that was evasive and often by the

Option ; *Senior Hous. Assistance Gp. v. AMTAX Hldgs. 260, LLC (SHAG II)*, 2019 WL

properties). Kagey and Trane testified in this matter. Kagey Tr. 468 98; Trane Tr. 498 555. forwarding counsel here represents limited partner defendants or appellants in

SunAmerica Housing Fund 1050 v. Pathway of Pontiac, Inc., 2021 WL 391420 (E.D. Mich. Feb. 4, 2021), (currently on appeal before the United States Court of Appeals for the Sixth Circuit, No. 21-1243 (6th Cir.)), *AMTAX Holdings 227, LLC v. Tenants Development II Corp.*, 15 F.4th 551 (1st Cir. 2021), and *Riseboro Community Partnership Inc. v. SunAmerica Housing Fund* 682, 482 F.Supp.3d 31 (E.D.N.Y. 2020). 87 PTO ¶ 41; Trane Tr. 522; Macari Tr. 13, 33, 87. interest and the right to manage DLE. 88 When Hunt

became owner and manager, it stepped into the expectation that material tax

benefits from the Property would end, and the ROFR would be exercised around the

end of the Compliance Period. Indeed, the Compliance Period ended

December 31, 2020, and DLE received all of its projected tax benefits from the

Property. 89 By then, the Fund retained an interest in only two of the original five

Intermediate Entities Property LP and Hudson Country Meadow LLC, which held

Property Partnership Interests in Country Meadow Residences, L.C. 90



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

But DLE seeks more, and has made its desires known at various touchpoints.

In late 2017, First Chicago sought to liquidate its stake in Fund LP before the

88 At the end of 2015, DLE was sold to a fund in which Bank of America, Merrill Lynch

JX023 at DLE_0005055; Macari Tr. 16; Chiusano Tr. 388 89; Kagey Tr. 483 84. In late 2017, Hunt
Companie LIHTC management portfolio and became managing agent of DLE. Chiusano Tr. 388 89.

About a year later, Hunt Companies transferred that responsibility to its affiliate, Hunt. Chiusano Tr.
388. In 2020, one or DLE. Kagey Tr. 483 84; Trane Tr. 522 23. They were obligated to do so, including
DLE,

Kagey Tr. 484; Trane Tr. 522 23. 89 PTO ¶¶ 40 41; Trane Tr. 522; JX015 . . Kates Trace ; Macari Tr. 32.
90 Compare Macari Tr. 50, with First Amendment at HUDSON00018158. Between December 2007
and December 2017, the Fund sold or disposed of its interest in Hudson Channel Island LLC
(Steadfast Channel Island, L.P.) and Hudson/Overton LLC (Overton Square, L.P.). Compare Macari
Tr. 20, and JX030 at HUDSON00005166, with First Amendment at HUDSON00018158. Between
December 2017 and August 2020, the Fund sold or disposed of its interest in Hudson/Tidwell LLC
(Fountains at Tidwell, Ltd.). Macari Tr. 20. Compliance Period ended in December 2019. 91 required
under

the Fund LPA, and Hunt was at helm. 92 Fund GP explained the availability

93

At the time, contended that despite the ROFR,

the possibility that some value could flow to the Fund upon a disposition ev because, he claimed, a
designated nonprofit might be unable or unwilling to exercise

the ROFR. 94 At trial, conceded that in almost a decade in the

LIHTC industry, he has never seen that happen. 95 Eventually, in December 2017, a

subsidiary of the Syndicator, called HHC Investments LLC purchased First

Chicago in Fund LP. 96

As the end of the Compliance Period grew near, DLE began



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

agitating for a way to avoid the ROFR and force either a sale of the Property or a

91 JX025 at HUDSON00000467; JX026 at HUDSON00000474; JX030 at HUDSON00005166; Macari Tr. 30 32 (explaining the projected end of the Compliance Period was December 31, 2019). 92 Fund LPA § 6.3A(xiii); First Amendment at HUDSON00018163 (defining ; [First Chicago] interest requires the . 93 JX025 at HUDSON00000467. 94 JX028 at DLE_0000507. 95 Chiusano Tr. 394 98 (testifying This

96 See Macari Tr. 20; JX031 at DLE_0005509; PTO ¶ 14. Whether DLE consented to First Developer buyout of stake . 97 Over the course of 2019

and 2020, the Developer made three offers to in the

Property Partnership. 98 Fund GP brought all three offers to DLE. 99 Fund GP

repeatedly advised that the ROFR meant the Fund was unlikely to see any value

. 100 The third offer

97 See, e.g., JX062 at DLE_0002407 Year 16 Force Sale Rights / Execution of the Qualified Contract provision. . . . An ideal, but highly unlikely, outcome would be to stay in the deal until year 16 hoping that the SLP forces a Compliance Termination Sale. The property is comprised of 108 units in Newport News, VA. Theoretically, there could be value in a [qualified contract] sale, but getting that outcome given the [ROFR] rights in the JX075 at DLE_0002601 (describing a process by which its rights and be able to sell the property at the fair market

given the ROFR on [the Property], which implies \$350k for the [Property] interest. A realistic full FMV LP value for [the Property] is about \$2M. An alternative approach would be to go out at about \$800k for fund LP interest, which would imply about \$1M for the [Property] interest (midpoint of full FMV LP value). My gut tells me to start at the \$800k. [Macari] 98 Macari Tr. 33 34; JX042 at DLE_0002254 ; JX052 at HUDSON00000262 interests ; sponsor has asked about purchasing

JX135 at HUDSON00017092 (describing the repeated buyout offers); JX142 the Developer] ha[s] offered to purchase the limited partnershi . 99 Macari Tr. 33 38. 100 JX042 [T]he sponsor has a ROFR; hence, Fund XXI unlikely to see any economic value ; notion of buying back the interests. Given the ROFR and a positive capital account, in

theory they could be entitled to repurchase for -0- the sponsor has a ROFR which would result in zero proceeds with the purchase of the

property (emphasis omitted)) account is -0- Hence, any exercise of the ROFR would result in a



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

sale of the asset for

-0- and fee structure, and

allocating 100% of the proceeds to DLE even though it owned fewer than 50% of

101 In other words, that buyout would have paid only DLE and

not Fund GP or Fund LP.

DLE rebuffed each offers as too low. 102 Again,

that DLE or Hunt had been involved with other

projects where a fund received value despite similar ROFR language; again, at trial,

he admitted he has never actually seen a fair market value sale despite a Section 42

ROFR. 103 As to the third offer in particular, DLE responded to Fund GP with a

broker opinion of value

101 the Developer] ha[s] offered to purchase the limited partnership interests for \$200,000. As you know, you would ordinarily be entitled to only a portion of this amount per the upper tier waterfall (i.e., ownership is less than 50%, a Disposition Fee would be due, etc attached, a spreadsheet that estimates Macari Tr. 36 38; Fund LPA § 6.8E. 102 prioritize this transaction this year if we are not ; second offer with a buyout proposal for \$800,000); JX147 offer as undervaluing the property); the

Developer . 103 Compare JX0 and were not able to approve the transaction (which allocated essentially no value to the Fund interest) given that we have been involved with transactions with similar ROFR , with Chiusano Tr. 394 98. property value of \$9.65M (\$89k/unit). This property value results in approximately

\$2.0M to [DLE] (and additional proceeds if the high value is achieved). 104

In 2020, Property GP sought Property SLP consent to refinance. 105 Investor

Fund

GP (which is, as a reminder, under common ownership with



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

Property SLP) 106 DLE rejected Property

refinancing proposal and instead proposed the Syndicator Fund interests for \$787,000. 107

This figure purportedly

under the Property

and the other remaining Fund investment, Country Meadow. 108 When the

104 JX147; JX146 at DLE_0002038; JX150; JX027. 105 JX086 at HUDSON00016323; JX135 at HUDSON00017092. 106 Property LPA § 8.02(b)(vi) [Property GP] shall not, without the Consent of the Special Limited Partner, have any

authority to: . . . ; id. at Art. II); Fund LPA §§ 6.3B(x), 6.9A, 12.2; First Amendment at HUDSON00018162; First Amendment at HUDSON00018167 69 (adding 6.3B to the Initial Fund LPA); see also supra note 49 and accompanying text. 107 . . . id.at

DLE_0004126

DLE objected to the admissibility of JX108 in a footnote in its post-trial answering brief. D.I. 188 at 31 n.10. DLE failed to object to JX108 on the Joint Exhibit List. D.I. D.I. 163 at 39; Trial Tr. 89. 108 JX104 at HUDSON00013378 (Hudson XXVIII: Acacia Meadows No proceeds to LP[.] Hudson XXI: Trace Estimated Property value of \$7.4M applied to the waterfall results in \$2.0M+ to the ILP[.] Country Meadow[] Greystone BOV of \$7.38M Syndicator declined, DLE no reason to approve the refi unless they

want to use the 109 The Developer

consent right to alter other terms and conditions of the Partnership

110

around the end of the

Compliance Period resembles the actions taken by other post-Credit Period limited

partners in LIHTC projects. 111

D. The Disposition



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

With the Compliance Period complete, the Property could be transferred to a nonprofit through the ROFR. In November 2020, Property GP endeavored to solicit a purchase offer from a , with the aim of triggering the statutory ROFR. 112 This plan was executed in spring 2021. 113

applied to the waterfall results in about \$750k to the ILP. Fund XXI Waterfall: Trace: \$1M (discount to FMV)[;] Country Meadow[: \$750k[:] Assets less liabilities (including dispo fees): (\$110k)[;] Total Cash Available: \$1.64M[.] 97% to LP: \$1.59M[.] 49.49% to TC Fund I: \$787k (formatting altered)). The Country Meadow compliance period ended in 2019. JX015. 109 JX108 at DLE_0004126. 110 JX135 at HUDSON00017094 95. 111 See supra notes 79 85, and accompanying text. 112 White Tr. 427 28. Such solicited offers appear to be part of the LIHTC playbook for partnership general partners and nonprofits, and whether they can validly trigger the ROFRS is a question underlying many post-challenging the exercise of the ROFRs. See, e.g., Pathway of Pontiac, 2021 WL 391420; Rehab, 99 N.E.3d 744.

113 JX168 at HUDSON00008101 02. On April 7, Property GP designated Section 8.02(e). 114

Lee Gardens is a subsidiary of the Developer, and therefore an affiliate of Property GP. 115 Property GP and the Designated Nonprofit entered into a ROFR agreement date 116 By letter dated

April 8, NHT offered to purchase the Property. 117 Property GP informed the

118 In a separate letter

dated April 9, the Designated Nonprofit notified Property GP and NHT of its intent to exercise its ROFR and purchase the Property. 119 Property GP was willing to sell the Property. 120

Property GP conveyed the Property to the Designated Nonprofit by a deed that was dated April 9, but signed April 7 . 121 The Designated



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

114 Id. at HUDSON00008086 87. 115 PTO ¶ 34; Macari Tr. 12, 90 91. 116 JX168 at HUDSON00008089 95. 117 Id. at HUDSON00008101 02. 118 Id. at HUDSON00008099. 119 Id. at HUDSON00008103. 120 Id. at HUDSON00008086; Webdale Tr. 439 40. 121 Compare JX215 at HUDSON00018762 th day of April, 2021 . . . , with id. at HUDSON00018765 . Nonprofit paid the statutorily predetermined purchase price of \$4,197,015.09. 122

Property GP did not seek consent from Fund GP, Fund LP, Property LP, or Property

SLP in connection with the Disposition. 123

Fund GP attaching a

transferred the Property to the Designated Nonprofit that day. 124 This surprised Fund

GP. 125

E. Fund GP Investigates The Disposition And Seeks Advice From Counsel.

In response to the Disposition Notice, on or about April 12, Fund GP retained

Holland & Knight LLP, which Fund GP -income

housing tax credit business. 126 Fund GP gave Holland & Knight the Disposition

Notice, its internal notes regarding the Disposition Notice, and the Property LPA. 127

122 JX168 at HUDSON000008096; (citing 26 U.S.C. § 42(i)(7)); Refusal

id. at HUDSON000008096 (showing a chart of components that make up the purchase price); actually a little bit higher than the minimum purchase price required under Section 42(i)(7), because the purchase price required, in addition, amounts owed to the limited partners at

123 Macari Tr. 85 86, 150; PTO ¶¶ 52 54. 124 JX168. 125 Macari Tr. 56 57, 137. 126 JX181; Macari Tr. 60 61. 127 Macari Tr. 63 64; JX177. It asked Holland & Knight to in particular, language

around right of first refusal, to determine whether the Developer entitled to do what they did, and if not, . . . to advise [Fund GP] as to what steps [it]

128

Holland & Knight completed a memorandum dated April 20 with its advice



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

to the Fund . 129 Fund GP forwarded the

Holland & Knight Memorandum to DLE. 130 Based on its interpretation of the

Property LPA, Holland & Knight concluded: (i within the scope of authority granted to it under the [Property LPA] by designating

[the Designated Nonprofit] as having a right of first refusal and subsequently causing

the [Property] Partnership to enter into the ROFR [Agreement] with [the Designated

128 Macari Tr. 59 partnership agreement, in particular, language around right of first refusal. Again, the

initial thoughts were, was [the Developer] entitled to do what they did, and if not, you id. make sure [Holland & Knight] parsed through the [Property LPA] very, very carefully so that we had a thorough understanding of what had happened, was [the Developer] entitled to do what they did, and what steps we should take going forward id. [Holland & Knight] to, you know, look at everything they thought they should look at and

consider to give us some advice, but, specifically, to examine, was [the Developer] entitled to do what they did 129 Holland & Knight Memorandum; PTO ¶ 58. 130 PTO ¶ 58. . . . this interpretation would, as a

practical matter, render Section 8.02(e) of the [Property LPA] virtually

and (iii)

pears

unlikely that a court would conclude that the intent of the parties was to subject the

consummation of a sale pursuant to the ROFR to the Consent of the Special Limited

131 It went on to state even if a court were to accept the counterargument,

132

information provided, we do not recommend challenging the authority of [Property

GP] to consumm 133 The Fund only had



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

approximately \$200,000 in cash reserves. 134

minimal. So, you know, why spend \$200,000? And in addition to the \$200,000

131 Holland & Knight Memorandum at HUDSON00000230. 132 Id. 133 Id. 134 Macari Tr. 71
\$200,000. . . . Fund would have paid for that litigation cost; correct? A. So what I remember from my

what I remember from my deposition was that I said there was some cash on hand, a couple hundred
a couple hundred thousand . . . there still remained an asset to be managed [the indirect interest in
Country

Meadow] 135

F. DLE Demands Fund GP Reverse Or Prevent The Disposition; Fund GP Refuses; And DLE
Attempts To

DLE sent a letter dated April 27 to Fund GP in response to the Holland &

Knight Memorandum, demanding ;

; respond to the Disposition Notice;

it was transferred, . 136 At this point,

DLE had already hired counsel and confirmed the Disposition on its own. 137 Fund

GP responded with a letter dated May 3. 138 In reply, DLE sent Fund GP a Notice of

135 Macari Tr. 71 72. 136 JX208 at HUDSON00008588 90; PTO ¶ 59. 137 Trane Tr. 530 property
disposition notice back in

remember the exact timing, but I think it was -- it was shortly -- shortly after receiving the confirmed
within a few days of receiving the disposition ; JX201 (emailing with Nixon Peabody on April 19,
2021). 138 JX213; PTO ¶ 59. in an effort to remove Fund GP as

general partner under Fund LPA Section 7.2A. 139

limited partners can remove Fund GP. 140

It provides:



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

[DLE] shall, by a written Notification, have the right at any time to remove the General Partner, effective immediately upon notice to the General Partner, for any of the reasons described in (i) through (viii) of this Section 7.2A (each constituting case Notification of the alleged existence of Cause shall first be given to the General Partner, describing the basis for such allegation with particularity, and the General Partner shall be given 30 days to cure such alleged Cause (or such shorter period as is necessary to protect the essential interests of the Fund as determined by [DLE]);

...

139 JX218; PTO ¶¶ 60-61. 140 Fund LPA § 7.2A. (ii) Any breach of fiduciary duty in the performance of its duties and obligations as General Partner under this Agreement, or any act outside the scope of the duties and obligations as General Partner pursuant to this Agreement that has a material adverse effect on the Fund, or any action or inaction by the General Partner, or any of its related entities, that would qualify as an event of removal or withdrawal with respect to such General Partner under the Act;

(iii) Failure by the General Partner in any respect to comply with its representations or warranties, which failure has a material adverse effect on the Fund, or violation by the General Partner in any material respect of any other provision of this Agreement, of any agreement between the General Partner and the Investor Limited Partner or of the Act[.] 141

DLE alleged Cause under Sections 7.2A(ii) and (iii) by claiming Fund GP breached

its fiduciary and contractual duties,

142 DLE claimed Fund GP breached its fiduciary duties and Fund LPA Sections

6.3 and 6.4 by its Consent of the Investor Limited

Entity, in its capacity as a partner of the [Property] Partnership, to the sale of the

its in the Fund and failing to

. 143

141

Id. §§ 7.2A(ii) (iii); id. Act Partnership Act as in effect in the State of Delaware and as amended from time to time and . 142 JX218 at HUDSON00008228. 143 Id. at HUDSON00008228. the Investor Limited Partners and the failure to both timely investigate and contest



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

fid 144

With the Default Notice, DLE purported to remove Fund GP as

if Fund GP did not

. 145

Fund GP responded May 14, rejecting the Default Notice as invalid. 146

G. Litigation Ensues.

On June 1, Plaintiffs filed suit in this Court seeking declaratory judgments

pursuant to 6 Del. C. § 17 110, 6 Del. C. § 17 111, and 10 Del. C. § 6501 that: (a)

the Default Notice is invalid because it fails to provide sufficient particularity and

time to cure; (b) the Default Notice was invalid under the terms of the Fund LPA;

(c) DLE lacks Cause to remove Fund GP; and (d) Fund GP has the right to continue

to be general partner of the Fund. 147 On June 18, DLE filed its answer and

counterclaims. 148 DLE brought two counts seeking declarations pursuant to 6 Del.

C. § 17 110, 6 Del. C. § 17 111, and 10 Del. C. § 6501 that: (a) Fund GP breached

its fiduciary and contractual duties; (b) the Default Notice is valid; (c) DLE may

144 Id. 145 Id. at HUDSON00008228 29. 146 JX220. 147 Compl. ¶¶ 117 29. 148 See generally Countercl. validly remove Fund GP as general partner of the Fund; (d) Fund GP is no longer

general partner of the Fund; and (e) Fund GP should ensure that Fund LP cooperates

with DLE in appointing a successor general partner. 149 DLE also brought a direct

claim for breach of fiduciary duty, a derivative claim for breach of fiduciary duty,

and a direct claim for breach of contract. 150



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

I held trial November 3 and 4 with nine witnesses and 274 joint exhibits. 151

The parties submitted post-trial briefing and I held post-trial argument on January 6,

2022. 152 On January 11, I sent a letter indicating that trial showed that DLE never

validly removed Fund GP as general partner of the fund, and that Fund GP is not

liable for breach of fiduciary duty or breach of contract. 153 That letter promised a

post-trial opinion setting forth more detailed findings of fact and conclusions of law;

this is that opinion.

II. ANALYSIS

Limited partnerships are creatures of both statute and contract. 154 The

149 Id. ¶¶ 79 116. 150 Id. ¶¶ 117 35. 151 D.I. 176; D.I. 179; D.I. 180. 152 D.I. 188; D.I. 189; D.I. 194; D.I.

195. 153 D.I. 193. 154 See, e.g., Cantor Fitzgerald, L.P. v. Cantor, 2001 WL 1456494, at *5 (Del. Ch.

Nov. 5, 2001) fundamental principle of freedom of contract. 155 As an enabling statute, DRULPA

provides default provisions subject to modification by limited partnership

agreements. 156 DRULPA contains relatively few mandates, and it explicitly assures

that contractual arrangements will be given effect to the fullest permissible extent. 157

Although DRULPA provides default and gap-filling provisions, 158 the limited

affairs

159 thus, the provisions of

the partnership agreement define the rights and responsibilities of those who are

parties to the agreement and are afforded significant deference by the Courts 160

155 See 6 Del. C. § 17 1101(c). 156 MARTIN I. LUBAROFF, PAUL M. ALTMAN, SRINIVAS M.

RAJU & JOSHUA J. NOVAK, DELAWARE LIMITED PARTNERSHIPS § 1.02 at 1-3 (Supp. 2022)

DELAWARE LIMITED PARTNERSHIPS [DRULPA]s basic approach is to permit partners to have



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

the broadest possible discretion in drafting their partnership agreements and to furnish answers only in situations where the partners have not expressly made provision in their partnership). 157 6 Del. C. § 17 1101(c) It is the policy of this chapter to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements. . 158 See Achaian, Inc. v. Leemon Fam. LLC, 25 A.3d 800, 803 n.10 (Del. Ch. 2011) Like the LLC Act, the LP Act is an enabling statute whose default rules are designed to fill gaps in the limited partnership agreement. (citing DELAWARE LIMITED PARTNERSHIPS § 1.02 at 1 3)); Cantor Fitzgerald limited partnership agreement and the statute merely provides the fall-back or default

159 6 Del. C. § 17 101(14); El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff (El Paso Pipeline)

160 Cantor Fitzgerald, 2001 WL 1456494, at *5. 161 and fundamentally regards

and enforces the limited partnership agreement as a contract. 162 Our courts construe

such agreements as any other contract, 163

At trial, the parties have the burden of proving their respective claims by a

preponderance of the evidence. 164 165

when compared to the evidence opposed to it, has the more convincing force and

makes you believe that something is more likely true than not. By implication, the

161 ESG Cap. P rs II, LP v. Passport Special Opportunities Master Fund, LP, 2015 WL 9060982, at *9 (Del. Ch. Dec. 16, 2015). 162 Norton v. K-Sea Transp. P rs L.P., 67 A.3d 354, 360 (Del. 2013). 163 Id.; see also Sonet v. Timber Co., L.P., 722 A.2d 319, 323 (Del. Ch. 1998) (Once authorized by law, the decision to adopt and operate under a particular limited liability structure is the sort of fundamental business decision that courts routinely protect. As a general matter, courts should be, and are, reluctant to import jurisprudence from one area of the law which is loaded with notions of efficiency and fairness that are well developed for that particular context into a separate area of the law where many procedural and substantive aspects present in other legal regimes are only optional defaults. Mindful of that caution, I decline to rely unnecessarily on this traditional analyses involving fiduciary duties in the corporate). 164 Martin v. Med-Dev Corp., 2015 WL 6472597, at *10 (Del. Ch. Oct. 27, 2015). 165 Id. (internal quotation marks omitted) (quoting Agilent Techs., Inc. v. Kirkland, 2010 WL 610725, at *13 (Del. Ch. Feb. 18, 2010)). preponderance of the evidence standard also means that if the evidence is in



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

DLE claims Fund GP breached its fiduciary and contractual duties by failing to stop, cure, rescind, or unwind the Disposition, which DLE contends was improper for a host of reasons. 167 This decision concludes that Fund GP did not have a fiduciary or contractual duty to sue either Property GP or the Designated Nonprofit regarding the ROFR exercise and Disposition, or to otherwise block the Disposition, Second, DLE claims direct and indirect consent rights. DLE argues the Property LPA required Property GP to seek Property S consent to the Disposition, and that in turn, the Fund LPA required DLE to join in a Fund LPA the Property LPA,

. I find DLE has failed to demonstrate Fund GP breached its contractual duties in this regard, to the extent it owed them at all. DLE did not have Cause to remove Fund GP as general partner for breach of contract.

166 Id. (internal quotation marks and footnotes omitted) (quoting Agilent Techs., Inc., 2010 WL 610725, at *13, and then quoting OptimisCorp v. Waite, 2015 WL 5147038, at *55 (Del. Ch. Aug. 26, 2015)). 167 Countercl. ¶¶ 7, 10, 72, 74, 85, 101, 110; D.I. 184 at 30 31. In the absence of a breach, it follows that DLE did not have Cause to remove

Fund GP as general partner. The Default Notice is invalid under the terms of the Fund LPA. Fund GP Fund GP is also

exculpated for all breaches that do not materially adversely affect the Fund. Because DLE tried and failed to remove Fund GP as general partner, Fund GP is contractually



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

entitled to a penalty, damages, and fee shifting. My analysis follows.

A. DLE Failed To Either Make A Demand On Fund GP Or Plead Demand Futility.

comply with demand requirements. Before a limited partner brings a derivative partnership who have the authority to bring the action unless such a demand would

168 A limited partner seeking to pursue derivative claims on behalf of the

secure initiation of the action by a general partner or the reasons for not making the

169

168 DELAWARE LIMITED PARTNERSHIPS § 10.03 at 10-20. 169 Fannin v. UMTN Land Dev., L.P., 2020 WL 4384230, at *27 (Del. Ch. July 31, 2020) (internal quotation marks omitted) (quoting 6 Del. C. § 17 1003), cert. denied, 2020 WL 5198356 (Del. Ch. Aug. 28, 2020), and appeal refused sub nom. Etter v. Fannin, 238 A.3d 193 (Del. 2020); see also Ct. Ch. R. 23.1(a). DLE failed to do so. While DLE brought Counterclaim Counts I, II, and IV

derivatively, the Counterclaim does not plead demand futility with particularity, and

DLE did not make any demand arguments at trial. In the absence of such a showing,

the derivative claims of Counterclaim Counts I, II, and IV are dismissed.

B. DLE Failed To Demonstrate Cause For Removal Under Fund LPA § 7.2A(ii) Because Fund GP Owed Only Enumerated Fiduciary Duties Limited By The Fund LPA , And Fund GP Did Not Breach Them.

I begin by considering whether DLE had

Cause to remove Fund GP for breach of fiduciary duty. This analysis starts with a

that, unless limited by the partnership agreement, the general partner has the

fiduciary duty to manage the partnership in its interest and in the interests of the

170 Delaware law presumes general partners owe these fiduciary

duties unless they are explicitly and unambiguously disclaimed. 171 And Delaware



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

170 Sonet, 722 A.2d at 322 (emphasis omitted) (citing Boxer v. Husky Oil Co., 429 A.2d 995, 997 (Del. Ch. 1981)). 171 Id.; see, e.g., , 2001 WL 1045643, at *8 (Del. Ch. Sept. 6, 2001); , 2018 WL 2095241, at *6 (Del. Ch. May 7, 2018). courts presume general partners act on an informed basis and in the honest belief

that they acted in the best interest of the partnership and the limited partners. 172

The parties conducted this litigation as if Fund GP owed traditional, default,

and unbounded fiduciary duties to the Fund and its limited partners. But as with

every partnership, the duties are circumscribed by the

purpose. And the Fund LPA expressl Fund GP only owes

a specific fiduciary duty, and is only empowered to act within the scope of the enumerated purpose. 173

falls

outside the purpose of the Fund, , and the

enumerated fiduciary duty. It is not, and cannot be, a breach of fiduciary duty.

1. Fund GP Cannot Owe A Fiduciary Duty To Act

A partnership is fundamentally a creature of agency: the limited partners

appoint the general partner as their agent only for the purpose they all set for the

partnership. 174 172

Zoren v. Genesis Energy, L.P., 836 A.2d 521, 528 (Del. Ch. 2003). 173 intentions as set forth therein, regardless of how those parties interpret their contract at

trial. See Salamone v. Gorman, 106 A.3d 354, 368 69 (Del. 2014); E.I. du Pont de Nemours & Co., Inc. v. Shell Oil Co., 498 A.2d 1108, 1113 (Del. 1985). The Court is also

law. See D.R.E. t in this State must take judicial notice of the . . . common law . . 174 See, e.g., DELAWARE LIMITED PARTNERSHIPS § 1.02 at 1- virtually unfettered discretion to define contractually their business understanding, and duties: a general partner owes fiduciary duties to the



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

partnership and the limited

partners because it is their agent. 175 Because a limited partner links arms with a general partner for a specific purpose, the general partner only has the authority to limited partner fiduciary duties to act in pursuit of that purpose. A limited purpose circumscribes the authority, and therefore the duties, of its general partner.

The Delaware Uniform Partnership Law makes plain that a purpose delineates a general grant of agency authority. It states that partner is an agent of the partnership for the purpose of its business, purposes or activities. 176 partner has authority to bind the partnership only with respect to acts the partner performs within the ordinary course of the partnership then, provides assurance that their understanding will be enforced in accordance with the

175 In re El Paso Pipeline L.P. Deriv. Litig., 132 A.3d 67, 83 n.5 (Del. Ch. 2015), rev'd sub nom. on other grounds El Paso Pipeline GP, 152 A.3d 1248; 6 Del. C. § 17 403(a); 6 Del. C. § 15 301(1); Sonet, 722 A.2d at 322.

176 6 Del. C. § 15 301(1). So too for general partners: DRULPA Section 17 403(a) states as provided in this chapter or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership that is governed by the Delaware Uniform Partnership 6 Del. C. § 17 403(a); Kan. RSA 15 Ltd. v. SBMS RSA, Inc., 1995 WL 106514, at *2 (Del. Ch. Mar. 8, 1995) (stating that a limited powers are the same as those of [] partners of a general (citing 6 Del. C. § 17 403)); see also Fund LPA § 6.2B (General Partner shall, except as otherwise provided in this Agreement or in [DRULPA], have all the rights and powers and be subject to all the restrictions of partners in a partnership without limited). 177 n act of a partner which is not apparently for the carrying on of

the business of the partnership in the usual way does not bind the partnership unless authorized by the other 178 Because the general partners powers are the



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

same as those of [] partners of a general partnership . . . , the general partner may not bind the partnership to a transaction is not apparently for the carrying on of the business of the partnership in the usual way 179 For contractarian alternative entities, like limited partnerships, the ultra vires doctrine remains a meaningful limitation on agent authority. 180

177 Rudnitsky v. Rudnitsky, 2000 WL 1724234, at *5 n.15 (Del. Ch. Nov. 14, 2000) (noting the Delaware Uniform Partnership Act, Delaware Revised Uniform Partnership Act, and hornbook law provide agency law is the bedrock of partnership authority and quoting 6 Del. C. § 15 301); accord Miller v. Gilbert, 1979 WL 2709, at *8 (Del. Ch. May 11, 1979) every partner is an agent for the business and the act of every partner for apparently carrying on in the usual way the business of the partnership binds the partnership. Conversely, acts which are not for apparently carrying on the business of the partnership . 178 DELAWARE LIMITED PARTNERSHIPS § 4.16 at 4-35 (citing 6 Del. C. § 1509(b) (repealed by the 1999 Delaware Revised Uniform Partnership Act and reappearing in 6 Del. C. § 15 301(2))); accord 6 Del. C. § 15 301(2) An act of a partner which is not apparently for

carrying on in the ordinary course the partnerships business, purposes or activities or business, purposes or activities of the kind carried on by the partnership binds the partnership only if the act was authorized by the other partners . 179 Kan. RSA 15, 1995 WL 106514, at *2 (emphasis omitted) (citing 6 Del. C. § 17 403 and quoting 6 Del. C. § 1509(b) (repealed by the 1999 Delaware Revised Uniform Partnership Act and reappearing in 6 Del. C. § 15 301(2))). 180 See, e.g., Symbiont.io, Inc. v. Ipreo Hldgs., LLC, 2021 WL 3575709, at *43 & n.25 (Del. Ch. Aug. 13, 2021) (collecting cases). For ultra vires doctrine is largely a relic of the past because the Sciabacucchi v. Salzberg, 2018 WL 6719718, at *19 n.119 (Del. Ch. Dec. 19, 2018), grounds, 227 A.3d 102 (Del. 2020); 8 Del. C. conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act . . . , but such lack of capacity or Se. Pa. Transp. Auth. v. Volgenau, 2012 WL 4038509, at *2 (Del. Ch. Aug. 31, 2012) Section 124[] focus[es] on the validity of corporate acts . . . to prevent both corporations and those contracting with them from avoiding contracts that could be classified as outside the scope of the authorized powers. . . . Section 124 does not bar all challenges to the acts it covers. It merely provides that certain acts may not be set aside because they are ultra vires. A act, through its directors, may be deemed valid and effective, but the act may nevertheless constitute a breach of fiduciary (alterations and internal quotation marks omitted) (quoting David A. Drexler et al., Delaware Corporation Law and Practice, § 11.05 (2011)), , 91 A.3d 562 (Del. 2014); Carsanaro v. Bloodhound Techs., Inc., 65 A.3d 618, 648 54 (Del. Ch. 2013) (discussing the largely outdated concept of or and its relationship to the ultra vires doctrine within the context of Section 124), abrogated on other grounds by El Paso Pipeline GP, 152 A.3d at 1264 n.83. Thus, where alternative entity fiduciaries can be restrained to pursue only a - term purpose



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

from the business judgment rule. Compare *Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv. of Cincinnati, Inc.*, 1996 WL 506906, at *13 (Del. Ch. Sept. 3, 1996) (holding the general responsibility is to manage the Partnership in accordance with its and the general partner under no fiduciary obligation to abandon that), with, e.g., , 571 A.2d to appraise and evaluate

the relative merits of a long-term versus a short- and id. Directors are not obliged to abandon a deliberately conceived corporate

plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate and *Air Prod. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 124 25 (Del. Ch. 2011) (course of action has been clearly recognized under Delaware law: when acting deliberately, in an informed way, and in the good faith pursuit of corporate interests, may follow a course designed to achieve long-term value even at the cost of immediate value (quoting , 1989 WL 79880, at *19 (Del. Ch. July 14, A corporation nevertheless retains the ability to impose limitations on (and create uncertainty about) its capacity or power by including provisions in its charter that forbid it from entering into particular lines of *Sciabacucchi*, 2018 WL 6719718, at *19 n.119. Because partnerships are creatures of contract, the partnership

purpose clause can offer particularized boundaries on the general

authority. 181 Delaware limited partnership is permitted to carry on any lawful

business, purpose or activity, whether or not for 182 But a partnership

agreement . . . has a description of the purposes of the limited

partnership, the powers of the limited partnership and the restrictions on particular

limited partnership 183 The partnership agreement may also specifically

enumerate the rights, powers, and restrictions of the general partner. 184 in

determining if a particular Delaware limited partnership has the partnership power

to engage in a particular business activity, . . . an analysis must be made of the

partnership agreement of such limited partnership. 185 A purpose clause that places

limits on what an entity can do deprives the entity of the authority to engage in

activities that otherwise would be permissible under default principles of law. 186



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

181 See Cincinnati Bell, 1996 WL 506906, at *13. 182 DELAWARE LIMITED PARTNERSHIPS § 3.11 at 3-33. 183 Id. at 3-34. 184 Id. § 4.16 at 4-36 (citing Kan. RSA 15., 1995 WL 106514); 6 Del. C. § 15 301(2). 185 DELAWARE LIMITED PARTNERSHIPS § 3.11 at 3-34; see also U.S. W., Inc. v. Time Warner Inc., 1996 WL 307445, at *9 (Del. Ch. June 6, 1996) (stating the in determining the scope of a rights and obligations to attempt to fulfill, to the extent possible, the reasonable shared expectations of the parties at the time they . 186 Symbiont.io CompoSecure, L.L.C. v. CardUX, LLC, 206 A.3d

807, 816 17 (Del. 2018) (holding that when an operating agreement contains plain ecause if the proposed

transaction is itself within the purpose of the partnership th[e]n, of course, the

general partner may lawfully authorize and effectuate the transaction. 187

purpose. In addition, the Court may consider the partnerships stated purposes, the

precedent set by the partnerships prior custom or course of dealing and the

general custom of analogous partnerships. 188 A sensible interpretation of

precedent is that the purpose clause is of primary importance, but other evidence of

189

n a case where the

stated purpose of a partnership was to own and operate a building, a contract to

compensate a third party for services in finding investors for a partnership, was not

its

inapplicable); 6 Del. C. § 17 106(b) limited partnership shall possess and may exercise all the powers and privileges granted by this chapter or by any other law or by its partnership agreement, together with any powers incidental thereto, including such powers and privileges as are necessary or convenient to the conduct, promotion or attainment of the business, purposes or activities of the limited 187 Kan. RSA 15, 1995 WL 106514, at *2. 188 Rudnitsky, 2000 WL 1724234, at *6 (citing 59A Am Jur.2d, Partnership § 264 (1987), and Abt v. Harmony Mill Ltd. 1992 WL 380615, at *3 (Del. Ch. Dec. 18, 1992)). 189 Meyer Nat. Foods LLC v. Duff, 2015 WL 3746283, at *4 (Del. Ch. June 4, 2015). carrying on the business of the partnership within the meaning of



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

6 Del. C. § 1509(b). 190 In another example, where the purpose was to own and operate a building, mortgaging that building to procure funds for unrelated purposes did not fall within the ordinary course of the business, and therefore was invalid. 191 And even actions that the partnership agreement facially contemplates the general partner can pursue are not feasible if they conflict with the purpose. 192

The and therefore

circumscribes its fiduciary duties.

193 Because a general partner only has the authority to act in furtherance of the 190

Rudnitsky, 2000 WL 1724234, at *6 (citing Abt, 1992 WL 380615, at *3). As explained, 6 Del. C. § 1509(b) was repealed by the 1999 Delaware Revised Uniform Partnership Act and reappears in 6 Del. C. § 15 301(2). 191 Rudnitsky, 2000 WL 1724234, at *6. 192 Schwartzberg v. CRITEF Assocs. , 685 A.2d 365, 366, 375 77 (Del. Ch. 1996) (precluding a general partner from exercising information rights in the partnership p in interests of the Partnerships and is an improper purpose from the point of view of the

; cf. Nero v. Littleton, 1998 WL 229526, at *4 (Del. Ch. Apr. 30, 1998) that Respondent breached the fiduciary duties he owed to her by expending partnership assets for purposes unrelated to the . 193 Restatement (Third) Of Agency § 8.09(1) (Am. L. Inst. 2006); see also id. § 2.02 cmt. e id. § 2.02 cmt. c, illus. 22 (circumscribing

- . inconsistent with that purpose. 194 Where a partnership agreement sets forth a specific purpose for the partnership, and grants the general partner powers in furtherance of that purpose, the general partner has no authority to take an act contrary to that purpose, and so failure to take that act cannot be a breach of fiduciary duty. 195



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

This Court has held that because a purpose limits a general fiduciary duties, a failure to take an ultra vires act cannot be a breach of fiduciary duty. In *Cincinnati Bell Cellular Systems Co. v. Ameritech Mobile Phone Services of Cincinnati, Inc.*, plaintiff and limited partner Cincinnati Bell Cellular Systems sued defendant and general partner Ameritech Mobile Phone Services of Cincinnati alleging the general partner committed gross negligence and breached its fiduciary duties by failing to sell the partnership. 196 The limited partner argued,

194 Id. An agent has a duty to take action only within the scope of the agents id. § 2.02(1) (or implied in the principals manifestations to the agent and acts necessary or incidental to achieving the principals objectives, as the agent reasonably understands the principals manifestations and objectives when the agent determines how to act ; see also *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 662 (Del. Ch. 2012) (For Section 17 1101(d) to say that fiduciary duties can be restricted or eliminated [t]o the extent that . . . a partner or other person owes fiduciary duties acknowledges these situationally specific possibilities and recognizes that epistemological questions about the extent to which a partner or other person owes duties will be answered by the role being played, the relationship to the entity, and the facts of the case. . 195 Cincinnati Bell, 1996 WL 506906, at *13. 196 Id. at *1. among other things: (1) the purpose of the partnership was to economic

(2) the general partner owed a duty to sell the partnership to fulfill the partnerships purpose; and (3) the general partner breached that purported duty by failing to sell and not fulfilling the purported purpose. 197

Then-Vice Chancellor Chandler rejected those arguments. 198 The limited partnership agreement stated the purpose was fund, establish and provide Cellular in the specified geographic area; the purpose was not to generate economic returns. 199 general partner is given broad powers in furtherance of this purpose to market, sell and maintain cellular services in the



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

limited geographic area for which the Partnership is licensed. In a fundamental sense, selling the business would be contrary to the stated

200 Under the partnership agreement, the general partner had no right or authority to sell the assets with anything less than unanimous consent. 201 The Court held:

197 Id. at *5, *9. 198 Id. at *7, *9 13. 199 Id. at *5. 200 Id. at *10. 201 Id. at *10 11. Unless it is not reasonably practicable to carry on the business in conformity with its purpose or unless all the partners agreed to a dissolution of the business, [the general partner] is under a duty to carry out the purpose as expressed in the Partnership Agreement. If a partner does not share [the general vision of the Partnerships viability in the cellular market, that partner retains the right under the Partnership Agreement to cash out its interest in the Partnership or to withdraw from the Partnership. 202

The Court concluded the general is to manage the

Partnership in accordance with its purpose, and so the general partner did not have a fiduciary obligation to abandon that purpose and sell the business because one limited partner Cincinnati Bell believes it would be in its own strategic business interest to do 203

Here, the Fund was formed as a limited partnership. 204 The Fund LPA specifies the purpose:

202 Id. at *13. 203 Id. 204 PTO ¶ 2; Fund LPA at 2, Recitals. The purpose and character of the business of the Fund is to offer and sell Units and to acquire, hold, sell, dispose of and otherwise deal (directly or indirectly through an Intermediate Entity) with Property Partnership Interests in Approved Property Partnerships, including all activities necessary or incidental to the foregoing. 205

means a limited partner interest in the Fund representing a Capital

Contribution of \$1 206 Partnership are limited partner

or member interests of the Fund in Property Partnerships, which in turn are



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

formed to own a 207 means an affordable housing property

constructed, rehabilitated or acquired or to be constructed, rehabilitated or acquired

by a Property Partnership, which property is or is planned to be eligible for Tax

208 And are Section 42 tax credits. 209 Applying these nested

definitions, the purpose is to sell stakes in, and hold interests in, partnerships

that in turn hold affordable housing properties that are or are planned to be eligible

for Section 42 tax credits. 210

205 Fund LPA § 2.3; see also Limited Partners, but subject to Section 6.3.B hereof, [Fund GP] shall not: . . . (xxvi)

at HUDSON00018167. 206 Fund LPA at Art. I. 207 Id. 208 Id. 209 Id. 210 DLE points to the Property -term E.g., Post-Trial Tr. 101 02; The [Property] Partnership has been organized exclusively to acquire the Land and to develop, finance, construct, own, maintain, operate and sell or otherwise dispose of the [Property], in order Other evidence supports that the purpose was to syndicate the

exchange of capital for tax credits. 211 First, the many Fund and Property forecasts

reflect the reasonable shared expectations for the partnership: (1) the

Credit Period for Trace would end around 2015; (2) the Compliance Period

for Trace would end around 2020; (3) the Section 42 ROFR went into effect

in 2020 at the minimum purchase (4) the Section 42 ROFR would

result in a disposition of the Property; and (5) the Section 42 ROFR in no

value to Property LP, the Fund, or the partners. 212 In 2004, the

original partners created a forecast for Trace Apartments providing for

\$5,300,917 in investor contributions, and \$7,488,306 in total investor tax benefits,

including credits and losses, with the Compliance Period ending on December 31,



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

to obtain for the Partners long-term appreciation, cash income, and tax benefits consisting Partnership or party to the Property LPA, and therefore, is owed no duties under the

Property LPA. Abt arty whose rights are affected by a

211 Meyer Nat. Foods, 2015 WL 3746283, at *4; Rudnitsky, 2000 WL 1724234, at *6. 212 JX004 at HUDSON00018773; JX011 at DLE_0005420; JX014 at DLE_0007799 801; JX058 at DLE_0002308; JX037 at DLE_0004085; JX089 at DLE_0001819; Chiusano Tr. 390, 392 98; 400 01, 405 06, 410 11; Trane Tr. 520; Hickey Tr. 242 43; PTO ¶ 40; Fund LPA § Partner acknowledge

thereof, of the future performance of the Fund . . . ; Macari Tr. 32, 62. 2019. 213 Net operating income was forecasted to be \$342,319 per year, 214 and cash

flows were projected to total \$1,204,733 in 2020; 215 these operations resulted in tax

losses, as intended. 216 Income was not included on the Benefits

which reflects only tax losses and tax credits. 217 This forecast is consistent with the

Fund pronouncement that the purpose of the partnership was to facilitate the

exchange of investment for tax benefits; income from operating the Property was

not in the black. The forecast ended at the end of the Compliance Period, reflecting

the intended disposition of the Property to a designated nonprofit. 218

As an Investor Limited Partner, forecasts, projections, and analyses

reflected these same expectations. In 2008, forecast projected tax credits

through 2015, and and After Tax

through 2020. 219 forecast predicted a loss each year from 2008 through 2020,

and zero income in 2007 and 2021 through 2025; the forecast never projected

213 JX004 at HUDSON00018773, HUDSON00018790 91 (forecasting the tax credits through 2015). 214 Id. at HUDSON00018775. 215 Id. at HUDSON00018780 81. 216 Id. at HUDSON00018790. 217 Id. at HUDSON00018791. 218 Macari Tr. 30, 32, 62; JX014 at DLE_0007799 801; JX015; JX058 at DLE_0002308. 219 JX011 at DLE_0005420; Trane Tr. 520. positive taxable income. 220 In 2016, DLE



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

created an or Fund-level,

forecast reflecting its understanding that Compliance Period ended

in 2020 and it was subject to a ROFR. 221 A 2019 internal

excerpts annotated text from the Property LPA Sections 8.02(b) (e), Fund LPA

Section 6.3A, Trace Limited Partnership Financial Statements, 222 and Code

Section 42(i)(7)(B) evidencing anticipation of a Section 42 disposition under Section

8.02(e). 223 And a July 2020 Detailed Analysis included an

agenda item stating Trace lower tier GP has ROFR at debt plus

which is the Section 42 price. 224 internal evaluations, including those created

after Hunt assumed its ownership and management, evidence a consistent

understanding and expectation that Trace would be sold under the ROFR, and

that no value would flow to DLE after the Compliance Period. This progressive

220 JX011 at DLE_0005420; Trane Tr. 520 21. This progressive decrease in value is reflected in the discounted price at which DLE purchased its interests in the Fund. 221 JX015. 222 JX066; see also id. Each Building of the Project must meet the provisions of [Section 42] regulations during each of 15 consecutive years in order to remain qualified to receive the [tax] credits. In addition, the Partnership entered into an Extended Use Agreement, which requires the utilization of the Project pursuant to Section 42 for a minimum of 35

223 Id. 224 JX087. decrease in value as the ROFR date grew nearer is also reflected in the discounted price at which DLE purchased its interests in the Fund in 2007. 225

evidence at

trial illustrated that Fund GP mission was to preserve the Property as affordable

housing under the LIHTC program. 226 Fund representative testified:



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

I think it was always the expectation -- industry practice, that at the end of the day, these properties with

nonprofits end up in the hands of the nonprofit who developed the property. 227

The course of conduct through the end of the Compliance

Period was consistent with its stated purpose: it exchanged investor dollars for tax

credits, and its original investors exited the Fund once the tax credits were

distributed. 228 the Property Partnerships offered no Section 42 value to investors, so the Fund could

no longer sell million-dollar Units to investors. 229 And, fundamentally, the Fund is

225 Compare projected capital contributions before the end of the Credit Period), with JX011 at DLE_0005420 (showing a \$2,571,381 purchase price in 2007, before the end of the Credit Period). 226 Macari Tr. 112; JX040; JX114 at HUDSON00013635 position is as I feared, an aggregator without consideration of the . 227 Macari Tr. 62. 228 Fund LPA § 2.3. 229 See JX004 at HUDSON00018773 capital contributions before the end of the Credit Period); JX011 at DLE_0005420 a LIHTC partnership: its source of value and reason for formation is to participate

in the LIHTC program, which features the ROFR as a means of extending the

viability as affordable housing beyond the Compliance Period. 230

In sum, the purpose was to offer and sell limited partner interests, and

to hold interests in Property Partnerships that in turn hold properties that are or are

planned to be eligible for tax credits. In so many words, t

syndicate the exchange of capital for tax credi is to invest in

231 not

properties that are no longer eligible for tax credits.

(showing a \$2,571,381 purchase price in 2007, before the end of the Credit Period); Trane

the Credit Period). 230 Opa-Locka, 2020 WL 4381624, at *3 s aim of creating and preserving



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

low-income housing does not end at thirty years. Rather, the LIHTC program seeks to preserve low-income housing in perpetuity by creating a special role for nonprofits, like OLCDC, whose missions are not to profit from a sale of the low-income housing project, but to continue to develop and preserve the low-income housing in perpetuity for the betterment of the public and the community in which project ; see also, e.g. provisions of [Section 42] regulations during each of 15 consecutive years in order to remain qualified to receive the [tax] credits. In addition, the Partnership entered into an Extended Use Agreement, which requires the utilization of the Project pursuant to Section 42 for a minimum of 35 years after the compliance period, even if the Partnership disposes . 231 Fund LPA at Art. I This purpose, syndicating investment for tax credits, circumscribes Fund

authority and fiduciary duties. As a matter of contract and of agency principles,

Fund GP lacks authority to act inconsistently with the purpose. 232 Fund GP

is an agent of the Fund for the purpose of its business, purposes or activities. 233

The Fund LPA authorizes Fund GP only to take actions to, or in

connection with, the accomplishment of the purposes of the 234 It specifies

that Fund GP lacks authority to cause the Fund to invest in anything other than

Property Partnership Interests (tied to a Property that is or will be eligible for tax

credits). 235 And it requires specific consent from the Investor Limited Partners to

cause the Fund to participate in the development, leasing, operation or disposition

232 Symbiont.io, 2021 WL 3575709, at *43; Restatement (Third) Of Agency § 8.09(1) (Am. L. Inst. ; Cincinnati Bell, 1996 WL 506906, at *10 (The general partners power

to market, sell, operate and maintain the cellular service system is necessary for carrying out the Partnerships business purpose promoting and providing cellular services to subscribers. Based on the terms of the Partnership Agreement, I conclude as a matter of law that Ameritech, as the general partner, has no authority to sell the Partnerships business.). 233 6 Del. C. § 15 301(1). 234 Fund LPA § 6.2A(xi); cf. id. another to employ, such funds or assets in any manner except for the exclusive benefit of

. 235 Id. § 6.3A(xxi); id. Property Partnership Interests or member interests of the Fund (directly or indirectly through an Intermediate Entity) in



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

Property property constructed, rehabilitated or acquired or to be constructed, rehabilitated or acquired by a Property Partnership, which property is or is planned to be eligible for Tax of a Property, except as required to exercise the rights of the Fund under the Property

Partnership Agreements[.] 236 Fund GP does not have authority as general partner

to participate in the disposition of a Property unless the Property LPA or the limited

partners specifically consent. Otherwise, Fund GP only has the authority to act

consistently with the purpose of syndicating investment for tax credits. Fund

GP cannot and did not owe a duty to act inconsistently with that purpose. 237

2. The Fund LPA Further Restricts The Scope Of .

In addition to being circumscribed by the general

expressly modified by the limited partnership

agreement. DRULPA Section 17

provisions in the partnership

agreement. 238 The exercise of determining the nature and scope of a general

fiduciary duties is a contractual exercise, requiring the Court to consider

236 Fund LPA § 6.3A(xxiv). 237 Restatement (Third) Of Agency § 8.09(1) (Am. L. Inst. An agent has a duty to take action only within the scope of Cincinnati Bell, 1996 WL 506906, at *13 (Unless it is not reasonably practicable to carry on the business in conformity with its purpose or unless all the partners agreed to a dissolution of the business, Ameritech is under a duty to carry out the Partnerships purpose as expressed in the). 238 6 Del. C. § 17 1101(d); Ryan v. Buckeye P rs, L.P., 2022 WL 389827, at *9 (Del. Ch. Feb. 9, 2022). the reasonable shared expectations of the parties at the time they contracted 239

Where a limited partnership agreement does not clearly and unequivocally eliminate

or limit fiduciary duties, the general partner owes default fiduciary duties. 240

[expand, restrict, or eliminate fiduciary duties] clearly,



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

and should not be incentivized to obfuscate or surprise investors by ambiguously

241 An expanded

or restricted contractual fiduciary duty is a fiduciary duty (1) the scope of which

is established by contract; or (2) compliance with which is measured by a contractual

242

The Fund LPA contractually restricts the scope of Fund GP

It enumerates a particular fiduciary duty, and expressly and repeatedly states that

only that duty is owed. Section 6.4F provides:

239 U.S. W., Inc. Of course, the nature and scope of the rights and obligations created will often be the primary issue to resolve. The ultimate guide in determining those legal entitlements is to attempt to fulfill, to the extent possible, the reasonable shared expectations of the parties at the time they contracted ; see also *Cont'l Ins. Co. v. Rutledge & Co.* (reasonable expectations at the time of contract formation determine the reasonableness of) (citing *Schwartzberg*, 685 A.2d at 376)). 240 *Feeley*, 62 A.3d at 662. 241 *Largo Legacy Gp., LLC v. Charles*, 2021 WL 2692426, at *17 (Del. Ch. June 30, 2021) (internal quotations omitted) (quoting *Ross Hldg. & Mgmt. Co. v. Advance Realty Gp., LLC*, 2014 WL 4374261, at *15 (Del. Ch. Sept. 4, 2014)). 242 *Wenske v. Blue Bell Creameries, Inc.*, 2018 WL 3337531, at *14 (Del. Ch. July 6, 2018) (citing *Allen v. El Paso Pipeline GP Co., L.L.C.*, 2014 WL 2819005, at *19 (Del. Ch. June 20, 2014)). The General Partner shall have fiduciary responsibility for the safekeeping and use of all funds and assets of the Fund, whether or not in its immediate possession or control. The General Partner shall not employ, or permit another to employ, such funds or assets in any manner except for the exclusive benefit of the Fund. 243

The Fund LPA does not enumerate any other fiduciary duties. Section 6.4J confirms

that the duty in Section 6.4F replaces default fiduciary duties:

To the extent that, at law or in equity, the General Partner or its Affiliates has duties (including fiduciary duties) and liabilities relating thereto to the Fund or to the Partners, the General Partner and its not be liable to the Fund or to any Partner for its good faith reliance on

the provisions of this Agreement except to the extent of their gross negligence, willful misconduct or breach of fiduciary duty. The provisions of this Agreement are agreed by the Partners to replace such other duties and liabilities of such Person. 244



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

With this, Fund GP owes only the fiduciary duties expressly provided in

Section 6.4F. 245

Other provisions in the Fund LPA acknowledge this limitation fiduciary duties. Several merely as
, including the provision governing removal of

243 Fund LPA § 6.4F. 244 Id. § 6.4J (emphasis added). 245 See , 72 A.3d 93, 95, 100 01 (Del. 2013)
(affirming the law fiduciary duties with a contractually adopted fiduciary duty of subjective good
faith, so owe the fiduciary duties expressed in the LPA; . the general partner for [a]ny breach of
fiduciary duty in the performance of its

duties and obligations as General Partner under this Agreement. 246 Otherwise,

General Partner [has] the full, complete and exclusive discretion and authority to

247 . . . to perform and fulfill its obligations under each

Property Partnership Agreement of each Property Partnership 248

And so, under the Fund LPA, Fund GP owes only a fiduciary duty toward the

. . . . for the exclusive benefit

249

default fiduciary duties as general partner of the Fund. 250 Fund GP does not owe the

default duties of loyalty and care.

246 Fund LPA § 7.2A(ii) (emphasis added); id. id. . 247 Id. § 6.1A. 248 Id. § 6.2A(vi). 249 Id. § 6.4F. 250
See Kahn v. Icahn, 1998 WL 832629, at *3 (Del. Ch. Nov. 12, 1998) (holding that limited partners could
not bring a duty of loyalty claim where the partnership agreement 746 A.2d 267 (Del. 2000); see also
supra note 171. 3. Fund GP Did Not Breach Any Fiduciary Duties And So, Was Not Validly Removed
For Such A Breach.

With fiduciary duties, I

DLE asserts Fund GP breached its



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

duty under Section 6.4F, sets of the Fund, not

after what DLE

asserts was an invalid exercise of the ROFR. 251 DLE claims that the Property is

worth approximately \$9.65 million, and asset as it had

unrealized equity value as well as ongoing tax and other economic benefits by virtue

, 252 DLE claims

Fund GP failed to protect investment by declining to challenge the

Disposition considering contrary position as to the potential long

term value of holding the [Property] 253 DLE contends Fund GP should have used

251 D.I. 165 at 28; Countercl. ¶¶ 7, 10, 72, 74, 85, 101, 110; D.I. 184 at 30 31. DLE asserted

investigate such that it is a second breach. See Countercl. ¶ 63; D.I. 165 at 28; D.I. 184 at 43 48; D.I. 188 at 6 9, 36, 39. Because I conclude Fund GP owed no duty to stop the Disposition, the quality of its investigation also cannot be the source of a breach. 252 D.I. 165 at 49. 253 D.I. 184 at 1, 18, 49; D.I. 188 at 39; JX150 at HUDSON00000099 (valuing the Property between \$9,300,000 and \$10,000,000 in a BOV for DLE); see also

Fund]? A: Hunt Capital Partners is the a approximately \$200,000 in cash reserves to conduct an additional or

different investigation into the Disposition, and to sue Property GP or one of its

affiliates following the Disposition. 254 By not stopping Property GP from

transferring the Property to the Designated Nonprofit, DLE argues, Fund GP failed

to safeguard the assets of the Fund, in breach of Fund LPA Section 6.4F.

is not an asset of the Fund, so Fund GP owes no duty to safeguard the Property.

Second, while Fund GP has a duty to safeguard the value of Property Partnership



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

Interests as Fund assets, that value is based on tax benefits and credits; the duty to safeguard that value does not extend to maximizing or chasing other sources of fundamentally inconsistent to do so. Fund GP the safekeeping and use of all funds and assets of the Fund 255

As an initial matter, the Property itself is an asset of the Property Partnership, not the Fund. Fund assets include cash and interest in Property LP and

254 Macari Tr. 71 72; D.I. 184 at [T]he Fund had approximately \$250,000 cash at the time of the [Disposition]. That was more than enough to conduct an investigation into the underlying facts. (internal citations omitted) (citing Trane Tr. 541, 546 47)). 255 Fund LPA § 6.4F. the other Property Partnership Interests. 256 But Fund assets do not include Property

257 Indeed, Fund GP is prohibited

from participating in Property management as required to exercise the rights of the Fund under the Property Partnership 258 Compare the Property

Partnership, which was created develop, construct, own, maintain and

Trace, and to the Land and to develop, finance, construct, own,

maintain, operate and sell or otherwise dispose of the Apartment 259 Its

definition of is Trace, as and operated . . . by

the [Property] 260 The Property LPA also contains representations

about the title and the Property ownership of the

Property. 261

256 Id. id. §§ 6.3A(i), (vii), (viii), (xii) (xiv).

257 See id. § 6.8E (indicating the Fund owns Property Partnership Interests indirectly through an Intermediate Entity,



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

Property). 258 Id. § 6.3A(xxiv). 259 Property LPA at HUDSON00018376 (emphasis added); id. § 3.01 (emphasis added); id. own, sell, convey, assign, mortgage, rent or lease any real estate and any personal property necessary to the .

260 Id. 261 Id. §§ 4.01(e), (n). The parties intentionally created a two-tier structure with an upper-level partnership (the Fund) to indirectly hold the Property Partnership Interests, a series

of lower-level partnerships (the Approved Property Partnerships) to hold the

LIHTC-eligible properties, and corresponding Intermediate Entities to connect the

two levels. 262 263 The Property is

an asset of the Property Partnership, in which Property LP holds an interest and over

which 264 Fund GP has

neither the authority, nor the fiduciary duty, to interfere with the Property. 265

Though the Property itself is not a Fund asset over which Fund GP owes a

duty, DLE points out Property Partnership Interests, and therefore contends Fund GP owed a duty to

safeguard that value. DLE is corr

duty is over the ing of

266 I conclude that duty the Property

262 See First Amendment at HUDSON00018158; Macari Tr. 14. 263 NAMA Hldgs., LLC v. Related WMC LLC, 2014 WL 6436647, at *26 (Del. Ch. Nov. 17, 2014); accord Allied Cap. Corp. v. GC Sun Hldgs., L.P., 910 A.2d 1020, 1038 idea that the separate legal existence of corporate entities should be respected even when those separate corporate . 264 Property LPA § 8.01(a). 265 Fund LPA §§ 6.3A(xxiv), 6.4F. 266 Id. §§ 6.4F, 6.4J. Partnership Interest value contemplates preserving tax credit value but does not

contemplate pursuing equity value after the Compliance Period. My conclusion is

based on



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

The key phrase of Section 6.4F safekeeping and use of all funds and assets of the Fund imposes a duty to guard, preserve, and distribute presently held value, i.e., tax benefits. [t] guardianship

267

application or employment of something; esp[ecially], a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished

268 The

plain meaning of imposes on Fund GP a

fiduciary responsibility to preserve and

in a manner consistent with their intended purpose as informed by the Fund LPA. I

interpret Section 6.4F as charging Fund GP with the

cash and value from tax credits in its possession, to prevent them from being, for

example, commingled, abandoned, entrusted to a party or entity

267

Safekeeping, (11th ed. 2019). 268 Use, (11th ed. 2019). of any entity other than the Fund. 269 does not impose a duty

on Fund GP to maximize or chase new value.

Chasing value over and above tax credits

authority and duty. The Fund

LPA provides that

distribute tax credits from it, so long as those tax credits existed. 270 Fund



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

investment authority is cabined to Property Partnership Interests in an entity that owns a Property that or is planned to be eligible for Tax 271 After the Fund completed its exchange of capital for tax credits at the end of the Compliance Period, the parties understood that the Property would not generate additional tax credits or tax benefits, or any income at all. 272 The forecast DLE created when it became an Investor Limited Partner did not project any Fund-level income or tax

269 See, e.g., *Cargill, Inc. v. JWH Special Circumstance LLC*, 959 A.2d 1096, 1125, 1127 28 (Del. Ch. 2008) (finding defendant stated a counterclaim that the Managing Owner

terparty with cf. *In re Stull*, 985 A.2d 391 (Del. 2009) (TABLE) (finding the respondent violated his ethical duty to ch negative client balances and by commingling funds). 270 Fund LPA § 2.3; id.

271 Id. § 6.3A(xxi); id. at Art. I (,

272 JX004 at HUDSON00018773; JX011 at DLE_0005420; Fund LPA § 3.3A(ii); Trane Tr. 520. benefits from the Property after the Compliance Period. 273 other than tax credits. 274

The Fund succeeded: DLE and Fund LP received all projected

tax credits and benefits from the Property, and the Property received the Fund

275 After the Compliance Period, when the model of

syndicating investment in exchange for tax credits had sunset, Fund decision

to stick with that model is consistent with its authority, obligations, and duties. 276

Disposing of the Property by transferring it to a Designated Nonprofit at the end of

273 JX011 at DLE_0005420; Trane Tr. 520. 274 Compare D.I. 165 at 2, 49, and Trane Tr. 510 14, and Chiusano Tr. 394, and D.I. 184 at 6 7, 49, and D.I. 188 at 31, with JX011 at DLE_0005420, and Trane Tr. 520 22, and JX037 at DLE_0004085, and JX058 at DLE_0002308, and JX089 at DLE_0001819, and Chiusano Tr. 390, 392 94; 400 01, 405 06, 410 11. 275 Trane Tr. 522; Macari Tr. 33, 87; PTO ¶ 41. 276 *Cincinnati Bell, 1996 WL 506906*, at *13; *Kan. RSA 15, 1995 WL 106514*, at *2; see also *Ironworkers Dist. Council of Phila. & Vicinity Ret. & Pension Plan v. Andreotti*, 2015 WL 2270673, at *31 (Del. Ch.



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

May 8, 2015) (finding even if a principal disagrees with her that a business plan or system has failed is not the same as demonstrating an actionable breach of fiduciary , sub nom. Ironworkers Dist. Council of Phila. v. Andreotti, 132 A.3d 748 (Del. 2016). While a federal court applying California law recently held that a fund general partner breached its fiduciary duties in connection with a disposition, the reasoning of that case is not rooted in Delaware fiduciary jurisprudence. See Centerline II, 2022 WL 247951, at *8. the Compliance Period for the Section 42 price purpose. 277

Challenging that Disposition, as DLE demands, is beyond the scope of, and

. The Fund LPA did

not authorize Fund GP to invest in properties that were not eligible for tax credits. 278

More broadly, Fund GP cannot bind the Fund with an act that is not in furtherance

of the business the usual way. 279 Challenging a Section 42 ROFR

disposition is not in the or of this, or any, LIHTC

277 Fund LPA § 2.3; id. § 10.3F (requiring Fund GP to provide Property financial reports to the Investor Limited Partners only through the end of the Compliance Period); Property 26 U.S.C. § 42(i)(7)); id. at Art. II id. § 4.01(q) (projecting tax credits through 2015); id. § 4.01(z) (representing to Property partners, including Property LP, that Complex or manage the Partnership which is not consistent with the award of points

for Reservation, except with the prior approval of the Agency and the Special Limited ; id. to the business and property of the Partnership which is not reasonably related to the accord id. § 8.01(a) (same); id. § 8.03 (same). 278 Fund LPA § 6.3A(xxi); id. Interests,

279 Abt, 1992 WL 380615, at *3 (quoting 6 Del. C. § 1509(b) (repealed by the 1999 Delaware Revised Uniform Partnership Act and reappearing in 6 Del. C. § 15 301(2))); 6 Del. C. § 15 301(2); Rudnitsky, 2000 WL 1724234, at * partner has authority to bind the partnership only with respect to acts the partner performs within the ordinary course of the partnership business. Cincinnati Bell, 1996 WL 506906, at *13; DELAWARE LIMITED PARTNERSHIPS § 4.16 at 4-35. partnership. 280 Stopping, reversing, or rescinding the Disposition would be outside

of the The Property has already distributed its allocated tax credits, 281

so retaining investments in a property that is no longer eligible because a limited

partner believes it would be in its own strategic business interest to do would



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

not be usual 282 After the Compliance Period expired and the Property was no longer eligible for tax credits, pursuing other sources of value from the Fund GP did not have the authority to challenge the Disposition. 283

And so, Fund GP did not owe a duty to challenge the Disposition.

fiduciary duties do not extend to the Property itself because the Property is a Property Partnership asset, not a Fund asset, over which the Fund LPA precludes Fund GP from exercising plenary authority. 284 And while the Property is the source of tax benefits and credits for the Property Partnership Interests, Fund GP does not have a

280 See Rudnitsky, 2000 WL 1724234, at *6 s business, the Court may consider the partnership

281 Trane Tr. 522; Macari Tr. 13, 33, 87; PTO ¶ 41. 282 Cincinnati Bell, 1996 WL 506906, at *13. 283 participate in the Disposition or initiate any lawsuit. Fund LPA §§ 6.3A(v), (xxiv); Macari Tr. 87. 284 Fund LPA §§ 6.3A(xxiv), 6.4F. duty to squeeze that Property for post-Compliance Period value. 285 Neither the Fund

LPA nor the

This is so even if limited partner DLE disagrees with the purpose, goals, or the timing of executing those. 286 As this Court held in Cincinnati Bell, a general duty and is to manage the Partnership in accordance the purpose as expressed in the Partnership Agreement, and so the general partner under no fiduciary obligation to abandon that purpose and [take contrary action] because one limited partner. . . believes it would be in [the



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

limited own strategic business interest to do so. 287 Fund GP does not owe

DLE any duty to pursue goal of obtaining fair market value for the Property,

because that goal exceeds and diverges from the purpose. It also does not

have a duty to use its cash 285

Cf. Cincinnati Bell purpose of a partnership where the limited partnership agreement does not include evidence

performance); id. accordance with its purpose of establishing and providing cellular services in the Cincinnati, Columbus and Dayton region. Ameritech is under no fiduciary obligation to abandon that purpose and sell the business because one limited partner Cincinnati Bell

286 JX114 at HUDSON00013635; see Cincinnati Bell If a partner does not share Ameritechs vision of the Partnerships viability in the cellular market, that partner retains the right under the Partnership Agreement to cash out its interest . 287 Cincinnati Bell, 1996 WL 506906, at *13. 288

A fiduciary cannot breach a duty

it does not owe. 289

And so, because Fund GP did not breach any fiduciary duties in connection

with the Disposition, DLE lacked Cause to remove Fund GP as General Partner

under the Fund LPA. The Default Notice purported to remove Fund GP for Cause

under Section 7.2A(ii) for breach of fiduciary duty in the performance of [Fund

under [the Fund LPA], or any act

outside the scope of duties and obligations as General Partner pursuant

to [the Fund LPA] that has a material adverse effect on the Fund. 290 With respect

to Counts I and II and Counterclaim Counts I, II, and III, I conclude Fund GP did

not breach its fiduciary duties by failing to challenge the Disposition because it did



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

not owe a duty to do so. Accordingly, DLE did not have Cause to remove Fund GP

as general partner of the Fund under Fund LPA Section 7.2A(ii), and the Default

Notice is invalid due to the lack of Cause under that section.

288 Fund LPA § 6.4F; Cincinnati Bell, 1996 WL 506906, at *13. 289 See Lonergan v. EPE Hldgs., LLC, 5 A.3d 1008, 1024 25 (Del. Ch. 2010) (finding no the Holdings LP Agreement eliminates all fiduciary duties 290 Fund LPA § 7.2A(ii). C. DLE Failed To Demonstrate Cause For Removal Under Fund LPA § 7.2A(iii) Because DLE Failed To Prove Fund GP Breached The Fund LPA.

I and V assert Fund GP breached the Fund

LPA. 291 The Fund LPA is governed by Delaware law. 292 Under Delaware law, the

elements of a breach of contract claim are (i) a contractual obligation, (ii) a breach

of that obligation by the contractual party; and (iii) causally related harm to the

counterparty. 293 It is undisputed the Fund LPA is a valid and enforceable written

contract. 294

295

296 291

Countercl. ¶¶ 106, 129 35. 292 PTO ¶¶ 2, 18; Fund LPA § 13.2. 293 Bandera Master Fund LP v. Boardwalk Pipeline P rs, LP, 2021 WL 5267734, at *51 (Del. Ch. Nov. 12, 2021) (citing WaveDivision Hldgs. v. Millennium Digit. Media Sys., L.L.C., 2010 WL 3706624, at *13 (Del. Ch. Sept. 17, 2010)). 294 Countercl. ¶ 130; Counterclaim Against JER Hudson GP XI LLC and Nominally Against Hudson Housing Tax Credit Fund XXI, LP, ¶ 130. 295 Bandera, 2021 WL 5267734, at *51 (quoting Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d 728, 739 (Del. 2006)). 296 Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp., 206 A.3d 836, 846 (Del. 2019). 297

plain and clear on its face, i.e., its language conveys an unmistakable meaning, the

298 A written

299



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

When

an agreement is plain and clear, the C

as reflected in the four corners of the agreement, construing the agreement as a whole

300

be that which would be

301 Contract terms themselves

reasonable person in the position of either party would have no expectations

302

297 Salamone, 106 A.3d at 368 (internal quotation marks omitted) (quoting GMG Cap. Inv., LLC. v. Athenian Venture , 36 A.3d 776, 779 (Del. 2012)). 298 City Investing Co. Liquidating Tr. v. Cont'l Cas. Co., 624 A.2d 1191, 1198 (Del. 1993). 299 Sassano v. CIBC World Mkts. Corp., 948 A.2d 453, 462 (Del. Ch. 2008). 300 In re Viking Pump, Inc., 148 A.3d 633, 648 (Del. 2016) (internal quotations omitted) (quoting Salamone, 106 A.3d at 368). 301 Osborn ex rel. Osborn v. Kemp, 991 A.2d 1153, 1159 (Del. 2010) (footnotes and internal quotation marks omitted) (quoting , 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005)). 302 Eagle Indus., Inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228, 1232 (Del. 1997). 1. Fund GP Did Not Breach Fund LPA Section 6.8D Because It Did Not Owe A Contractual Duty Under That Section.

DLE claims Fund GP breached its contractual obligations under Fund LPA

Section 6.8D, which explains the fees to be paid to Fund GP for its management

services. 303 Section 6.8D states, in pertinent part:

After all other expenses of the Fund are paid, the Fund shall pay to the General Partner or an Affiliate of the General Partner designated by the General Partner an annual fee (the Asset Management Fee) for services in connection with the oversight of the performance of the Approved Property Partnerships and the compliance by the Property General Partners and managing agents thereof with the provisions of the Property Partnership Agreements, management agreements, regulatory agreements and applicable laws. 304

ultimately the 305



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

and that this breach supports

303 Countercl. ¶¶ 39-46; D.I. 165 at 49 The Fund GP also breached other provisions of the Fund LPA, namely (1) the prohibition on giving consent of the Fund to the sale of the Apartment Complex without the consent of DLE (Sections 6.3A(ii) and 6.9A), and (2) the duty to ensure that the Property GP and its managing agent ([the Developer]) comply with); D.I. 184 at 33; D.I. 188 at 5. 304 Fund LPA § 6.8D; id. § 6.8 . 305 D.I. 184 at 33. As an initial matter, it is not clear that any Fund GP breach of Section 6.8D

(ii) and (iii).

F capacity as a partner of the F 306

That issue aside, Section 6.8D simply does not impose any duties on Fund GP

that could support a breach. The plain meaning of Section 6.8D imposes a duty on

itself impose any oversight obligation on Fund GP. Specifically, it does not impose

a duty on Fund GP to ensure Property GP complies with the Property LPA.

Section 307

The fee is calculated by, and payable upon, Property

Partnership Interests and capital contributions particular services or oversight. 308

In context, Section 6.8D lists the management

fee among other Section 6.8 306

Fund LPA § 6.8F. 307 See id. § 6.8D the Fund shall pay to the General Partner . . . for services. . . (emphasis added); see also id. The obligation of the Fund to pay the Asset Management

Fee with respect to a given Approved Property Partnership shall begin to accrue on the date the Fund acquires the Property Partnership Interest with respect to such Approved

308 Id.; s s. Investco, LLC, 2022 WL 34688, at *15-16 (Del. Ch. Jan. 4, 2022) (finding a provision compelling the payment of a fixed annual management fee not to be duties). Partner, including Organization and Offering Expense Reimbursement, an



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

Acquisition Fee, a Disposition Fee, compensation for providing financing, and construction oversight fees. 309 Section 6.8D also prioritizes the management fee and quantifies it. 310 In contrast,

311 I conclude the language in Section

6.8D that DLE relies on but itself imposes no duty. Once again, Fund GP cannot breach a duty it does not

owe: Fund GP cannot have breached Section 6.8D. 312

2. Fund GP Did Not Breach Any Consent Provisions.

DLE asserts a broad claim that the Fund LPA obligated Fund GP to obtain the to the Disposition

breached the Fund LPA 313 DLE has

309 Fund LPA §§ 6.8B C, E, G H. 310 Id. § 6.8D. 311 Id. 312 See, e.g., *Brown v. Dover Downs, Inc.*, 2011 WL 3907536, at *4 n.38 (Del. Super. Aug. 30, 2011), *aff'd*, 38 A.3d 1254 (Del. 2012); *Lonergan*, 5 A.3d at 1024 25 (finding no breach where the limited partnership the defendant did not owe a duty). 313 See, e.g., *Countercl.* ¶¶ 50 51, 56 58, 64 66; D.I. 165 at 4, 29, 49; D.I. 184 at 36 37. DLE also argued its lack of consent, or outright resistance, to the Disposition means the Property Partnership was not a While this argument has been a central feature of other LIHTC suits brought by new limited partners, see *supra* note 83, it is not dispositive here and so I do not reach it. failed to consistently specify which provisions Fund GP breached by not seeking

314 Contemporaneous documents and trial testimony prove DLE

understood

process 315 belief that the Fund LPA requires its

consent to the Disposition appears to have been inspired by litigation. All the same,

I have reviewed the Fund LPA and conclude Fund GP did not breach any of its

consent provisions.



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

The Fund LPA and Property LPA contain nested consent requirements that

Disposition. Explaining why requires stepping through first the Fund LPA and then the Property LPA

Property LPA affirmatively granted Property GP the authority to appoint a nonprofit to hold and exercise a Section 42 ROFR.

314 DLE has variously alleged Fund GP breached Fund LPA Sections 6.3, 6.3A(ii), 6.3B(viii), and 6.9A. See, e.g., JX218 at HUDSON00008228; D.I. 165 at 49; D.I. 184 at 35-37. Other times, like in Counterclaim Count V, it has failed to point to a specific Fund LPA section. See, e.g., Countercl. ¶¶ 129-35; D.I. 184 at 33 (failing to point to a Fund or the Property LPA, which DLE 315 JX074 at DLE_0002593; Chiusano Tr. 406-07 (confirming his July 2020 understanding that

consent was not required). DLE objected to the admissibility of JX074 in a footnote in its post-trial answering brief. D.I. 188 at 31 n.10. DLE failed to object to JX074 on the Joint Exhibit List. D.I. D.I. 163 at 39; Trial Tr. 89. I begin with the Fund LPA. Section 6.3A lists several actions by the General

Partner requiring As a reminder,

under the Fund LPA, Fund LP can give Consent of the Investor Limited Partners

without DLE, but DLE can never, alone, give that Consent. 316 Turning to the items

requiring such Consent, Fund LPA Sections 6.3A(ii) and (xxiv) are relevant here:

316 First Amendment at HUDSON00018162-63; Fund LPA § 12.2; Chiusano Tr. 389-90. Without the Consent of the Investor Limited Partners, but subject to Section 6.3.B hereof, the General Partner shall not: 317

...

(ii) [] give the consent of the Fund or an Intermediate Entity in its capacity as a partner of a Property Partnership to any action proposed to be taken by such Property Partnership or the Property General Partner which, under the provisions of its Property Partnership Agreement, requires the consent of an Intermediate Entity or the Fund as a partner; or to take or cause [Property SLP] to take any action that is permitted to be taken by the Fund, the applicable Intermediate Entity or [Property SLP] under such Property Partnership Agreement; 318



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

...

(xxiv) manage and operate the Fund as an operating company or cause the Fund to participate in the development, leasing, operation or disposition of a Property, except as required to exercise the rights of the Fund under the Property Partnership Agreements[.] 319

In so many words, these sections ,

subject to Section 6.3B, for Fund GP to: give the consent of Property LP at the

Property Partnership level; take action through Property SLP at the Property

317 First Amendment at Initial Fund LPA] Without the Consent of the Invested Limited Partners, but subject to Section 6.3.B hereof,

318 Fund LPA § 6.3A(ii); First Amendment at HUDSON00018167 69 (amending the Initial Fund LPA to add Section 6.3B); Fund LPA at Art. I

319 Fund LPA § 6.3A(xxiv). Partnership level; or interfere with the operation and management or disposition of

the Property. 320

Section 6.3B(viii) in turn provides:

Notwithstanding any provision herein to the contrary, without the Supermajority Consent of the Investor Limited Partners, the General Partner shall not: . . . (viii) cause the Fund to sell, transfer or assign the [Property LP] or give the consent of the Fund or an Intermediate Entity [Property LP], in its capacity as a partner of a Property Partnership, to the sale of a Property or a Property Partnership Interest[.] 321

Supermajority Consent to

reach over sixty-six percent of those limited partner interests. 322

The Disposition did not trigger Fund LPA Section 6.3B(viii)

Consent requirement. The Dispo

320 In keeping with Section 6.3A(ii), Fund LPA Section 6.9A reiterates the requirement for Investor Limited Partner Consent for any action by the Property SLP: [Property SLP] shall not take any action



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

or exercise any consent, voting or other rights pursuant to a Property Partnership Agreement of any Property Partnership without the Consent of the Investor Limited Partner[s]. The Investor Limited Partner shall have the right to cause [Property SLP] to take any action or exercise any consent, voting o[r] other rights pursuant to the Property Partnership Agreement of any Property Partnership. Fund LPA § 6.9A; First Amendment at HUDSON00018162. As explained, Fund GP does not have the authority or duty to interfere with the . One reading of Section 6.3A(xxiv) crystallizes this, requiring the Investor Limited P before Fund GP has authority to interfere with the Disposition. Id. § 6.3A(xxiv). 321 First Amendment at HUDSON00018168 (emphasis added). 322 Id. at HUDSON00018163. Property LP or the Property Partnership Interests. And Fund GP did not give Fund

or Property LP consent to the Disposition. Property GP did not seek consent from

Fund GP, Property LP, or Property SLP in

connection with the Disposition. 323 It did not have to under the Property LPA. 324

I turn to the Property LPA to explain why that is so. Article VIII of the

Section y

LPA. 325 Section 8.02(a) enumerates five actions Property GP cannot take, and

Section 8.02(b) enumerates fourteen actions Property GP cannot take without

consent substantially all of the assets of the [Property Partnership]. 326

And then

Section 8.02(e) addresses a Section 42 disposition:

323 Macari Tr. 85 86, 150; PTO ¶¶ 52 54. 324 consent was required at the time. ; Chiusano Tr. 406 07 (confirming that understanding).

325 Property LPA § 8.01(a). 326 Id. §§ 8.02(a), (b), (b)(i). Notwithstanding anything to the contrary contained herein, commencing on the fifteenth (15 th) anniversary of the first day of the first taxable year of the applicable Tax Credit compliance period, the non- t time, as having the right of first refusal

to purchase the [Property] subject to the Extended Use Agreement for the minimum price established in accordance with Section 42(i)(7) of the Code, plus any outstanding amounts owed to the



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

[Property SLP] and [Property LP] pursuant to this [Property LPA] including any federal income tax liability incurred by the Limited Partners as a result of the payment of amounts pursuant to this clause. 327

at trial, that Property GP had to seek consent for the

Disposition

hinges on the interplay between Property LPA Sections 8.02(e) and 8.02(b). DLE

contends Section 8.02(e) is still subject to Section and that Section 8.02(e) does not encompass a final ROFR disposition. Plaintiffs

argue Section 8.02(e) controls entirely, permitting Property GP to designate a

nonprofit to hold and exercise the ROFR. I conclude

broader consent requirements, authorizes Property GP to appoint a designated

nonprofit to hold and exercise a Section 42 ROFR wi

consent. 328

327 Id. § 8.02(e). 328 The Supreme Judicial Court of Massachusetts construed a similar set of provisions the same way. See *Rehab*, 99 N.E.3d at 760 As stated, the partnership agreement confers broad powers on the general partner, while circumscribing the powers of the limited partners. The partnership agreement identifies only a few actions that the Resolving this dispute over the interpretation of the Property LPA requires

construing it in accordance with the laws of the Commonwealth of Virginia. 329

giving terms their ordinary meaning

unless some other meaning is apparent from the context. 330 The guiding light in

the construction of a contract is the intention of the parties as expressed by them in

the words they have used, and courts are bound to say that the parties intended what

the written instrument plainly declares. 331



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

general partner cannot take without the consent of the special limited partner. Of relevance here, section 5.5.B(iv) prohibits the general partner from all or any portion of the property, with the Consent of the Special Limited This prohibition is to the provisions contained in Section which grant the general partner the authority to sell or substantially all of the assets of the Partnership; provided, however, that except for a sale pursuant to the Option Agreement, the terms of any such sale . . . must receive the Consent of the Special Limited Partner before such transaction shall be binding on the The limited partners concede that, under section 5.4, the special limited partner need not consent to the terms of a sale if the sale is pursuant to the option agreement, for example where the nonprofit developer has exercised its right of first

329 Property LPA at HUDSON00018376; Va. Code Ann. § 50-73.84(b) (West) (The law of this Commonwealth shall govern relations among the partners and between the partners and the partnership, and the liability of partners for debts, obligations and liabilities chargeable to the partnership, in a partnership that has filed a statement of registration as a

330 Schuiling v. Harris, 747 S.E.2d 833, 836 (Va. 2013) (citing *Virginian Ry. Co. v. Hood*, 146 S.E. 284, 285 (Va. 1929)). 331 Id. at 836 (quotation marks and citation omitted) (quoting *Wilson v. Holyfield*, 313 S.E.2d 396, 398 (1984)). The parties dispute the meaning and effect of Section 8.02(e)

which contrary contained herein . . . 332

DLE contends the means the clause applies only to the same

paragraph Section 8.02(e), thereby preserving consent

requirements for the ROFR exercise. 333 DLE other language that could have been chosen, like notwithstanding anything to the

contrary contained in this Agreement. 334 Alternatively, DLE argues the prefatory

clause is ambiguous and so, citing Delaware law, any inference must be drawn in

335 Plaintiffs argue Section 8.02(e) not only to the granting of a Section 42 ROFR, but also to its exercise

336 Virginia

: refers to Article VIII and

not merely Section 8.02(e).



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

332 Property LPA § 8.02(e). 333 Post-Trial Tr. 81 82. 334 Id. 82 (internal quotation marks omitted) (citing Tygon Peak, 2022 WL 34688, at *17); id. 105 (citing Property LPA § 7.07). 335 D.I. 184 at 4, 38 (citing Bandera, 2021 WL 5267734, at *71); D.I. 188 at 27, 30. This

rule of law or legal decisions that would require interpretation of any ambiguity in this Agreement against the party that has drafted it shall not apply and are he TM Delmarva Power, L.L.C. v. NCP of Va., L.L.C.,

557 S.E.2d 199, 200 (Va. 2002). Elsewhere, DLE has affirmed [t]he plain language of the Partnership Agreements is not ambiguous and constitutes the best evidence of the D.I. 184 at 12. 336 D.I. 185 at 9; D.I. 189 at 36. I find these provisions of the Property LPA are unambiguous and so, I

construe them according to their plain meaning. 337 Applying Virginia law, I cannot

treat any word or phrase as meaningless if a reasonable meaning can be given to it. 338

Virginia law also gives specific guidance on clause: courts must locate a contrary provision or provisions to give

meaning to the clause. In Shepherd v. Davis, the Virginia Supreme Court interpreted

a lease agreement granting the lessee both a fixed-price purchase option and a right

of first refusal. 339 The lessee attempted to invoke the fixed-price option instead of

exercising its right of first refusal, so the Virginia Supreme Court considered de novo

[o] -price option. 340 The right of

first refusal provision co Notwithstanding anything

contained in this Agreement to the contrary . . . 341 Giving that unambiguous

language its plain and ordinary meaning, the court found:

337 See *Golding v. Floyd*, 539 S.E.2d 735, 736 (Va. 2001). 338 See *Dominion Savings Bank, FSB v. Costello*, 512 S.E.2d 564, 567 (Va. 1999). 339 574 S.E.2d 514, 516 (Va. 2003). 340 Id. at 516 18; id. at 519 (s interpretation of a contract because we have the same opportunity as the chancellor to consider the contract language). 341 Id. at 517. [T]he prefatory language modifies the fixed-price option and gives the right of first refusal precedence. The fixed-price option is the only s right of first refusal. We agree with the Davises



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

means irrespective of the fixed-price option. To read this phrase as Shepherd suggests would render meaningless not only the prefatory language but also two other sentences found in Paragraph 23.11, which created the right of first refusal. 342

With this guidance, I look for contrary terms in the Property LPA to give

Section 8.02(e) meaning. There is nothing contrary to

Section 8.02(e) within Section

something broader. One need not look far: Article VIII offers a contrary term in

This broader meaning is consistent with how the Property LPA uses

The Property LPA uses

seven times,

times, and

. 343 In reading the

Property LPA as a whole and interpreting terms within the context in which they are

342 Id. at 520 (alterations omitted). 343 Compare Property LPA §§ 4.01(l)(i), 5.01(c)(iii), 8.01(b), 8.02(e), 8.08(c), 12.03, 15.06, with id. §§ 8.02(c), 8.12(b), 12.07(e), and id. § 4.02(t), and id. § 7.07(a). Section 11.02(b) Id. § 11.02(b). used, 344 to refer to the

paragraph or subsection in which the proviso is found; 345 wrote ing

; 346 and wrote

between, and at a minimum the article in which the provision appears. 347 In the

specific conte , in which

. Accordingly, I conclude

Section 8.02(e) authorizes Property GP to designate a nonprofit to hold the ROFR,

This is consistent with the



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

344 See *Schuiling*, 747 S.E.2d at 836 (citing *Virginian Ry.*, 146 S.E. at 285). 345 Property LPA § 8.02(c) (option, also in Section 8.02(c),); id. § 8.12(b) (

determination that the General Partner sha); id. § 12.07(e) (

and reimburse the Tax Matters Partner Notwithstanding the foregoing, the provisions on liability and indemnification of the General Partner set forth in Section 8.07 . . . shall be). 346 Id. § 7.07(a). 347 E.g., id. must be completed no later than February 8 th ; see also

id. § y SLP, notwithstanding

Section 8.02(b)(i) which permits alterations to the Property under \$50,000 without Property 348

f authority is

Section 8.02(b) determine the scope of that grant of authority. Upon a designation, Section 8.02(e)

bakes in the timing and price of the disposition, to be the fifteenth

(15 th) anniversary of the first day of the first taxable year of the applicable Tax Credit

Section 349

And it describes t to

this clause, which can logically only occur upon an exercise of the ROFR and

subsequent disposition.

requires including a disposition in Section

Section 8.02(e) to a designation alone would mean Section requirement would still apply to a disposition, such that nothing in the Property LPA

would be Section meaningless. The R

. 350 Finally, Virginia law requires interpreting

348 Property LPA § 8.01(a). 349 Id. § 8.02(e) (citing 26 U.S.C. § 42(i)(7)). 350 Id. a right of first refusal in consideration of its purpose to benefit the party who has the



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

right of first refusal, here the Designated Nonprofit. 351 That principle supports an efficient designation and disposition under singular authority.

And so, I conclude Section 8.02(e) grants Property GP authority to unilaterally designate a nonprofit to hold a Section 42 ROFR, which can then exercise that ROFR in a disposition. Section 8.02(b) consent requirements do not apply to Property designation of a Section 42 ROFR, or to the exercise of or disposition under that ROFR. That means Sections 6.3A(ii) and 6.3B(viii), are not triggered by a Property LPA ROFR designation. Property GP had the authority to dispose of the Property to the Designated Nonprofit under Section 8.02(e) without Consent from Property SLP, Fund GP, or Fund LP, and without Supermajority Consent from DLE.

In conclusion, DLE has not demonstrated that Fund GP breached any Fund LPA consent provision. Therefore, DLE has not demonstrated that Fund GP violated as is required to constitute Cause for

removal under Section 7.2A(iii). With respect to Counts I and II and Counterclaim

351 See *Cities Serv. Oil Co. v. Estes* refusal is inserted in a lease for the benefit of the lessee, we must interpret it with that

First Nat. Exch. Bank v. Roanoke Oil Co., 192 S.E. 764, 770 (Va. 1937))). Counts I and V, I find: (i) Fund GP did not breach any contractual duties; 352 (ii) the

Default Notice is invalid as to Fund LPA Section 7.2A(iii); and (iii) DLE did not have Cause to remove Fund GP as general partner of the Fund under Fund LPA Section 7.2A(iii).

D. Fund GP Is Not Liable For Breaches That Do Not Have A Material Adverse Effect On The Fund.



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

DLE not only seeks declaratory judgments seeking removal of Fund GP, but also asserts breach claims seeking to hold Fund GP liable. As explained, Fund GP has not breached the Fund LPA or its fiduciary duties. Further, liability is precluded by the Fund LPA

Fund LPA Section 6.7A, Limitation on Liability of General Partner, requires that any breach of fiduciary duty or breach of contract have a material adverse effect on the Fund in order for Fund GP to be liable. 353 Fund GP would only be liable to DLE for a breach if the breach materially affects the entire Fund. This is a high

352 While DLE has alleged a breach of Section 6.4F as a breach of contract, and a potential Cause for removal under Section 7.2A(iii), this opinion treats the claim as a breach of fiduciary duty. 353 Fund LPA § 6.7A. Plaintiffs raised Section 6.7A once in their Complaint and once in their pretrial brief. Compl. ¶ 36; D.I. 168 at 9. While the parties did not focus on this limitation of liability, I must read the Fund LPA as a whole. See *Salamone*, 106 A.3d at 368; *E.I. du Pont*, 498 A.2d at 1113; s , 102 A.3d 205, 219 20, 249 (Del. Ch. 2014) (explaining that the Court considered exculpation bar. 354 As the claimant, DLE bears the burden to prove that Fund GP is not

exculpated. 355 DLE has wholly failed to brief this element of its liability case.

At the risk of straying from my task, I will share that I do not believe that a failure to sue over an improperly exercised ROFR can cause a material adverse effect on the Fund after the Compliance Period. As explained, Fund GP duties to safeguard the funds and assets of the Fund encompass the Property Partnership Interests and cash reserves, but not the Property itself. 356 As explained, Fund GP is authorized and charged to protect those interests only as consistent with the purpose of the Fund. And as explained, under that purpose, Property Partnership Interests have always been valued as sunseting with a ROFR disposition. Because



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

the partners understand and intend the Property Partnership Interests will terminate

with a ROFR disposition, it seems to me that an improperly exercised ROFR does

Property Partnership Interests, and so cannot

constitute a material adverse event on the Fund. Consequently, failure to correct or

354 See *Abry Partners V, L.P. v. F & W Acq. LLC*, 891 A.2d 1032, 1064 (Del. Ch. 2006) (finding the Buyer may not escape the contractual limitations on liability by attempting to show that the Seller acted in a reckless, grossly negligent, or negligent manner *AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC*, 268 A.3d 198, 216 (Del. 2021) (characterizing a material adverse effect as a high bar); *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 738 (Del. Ch. 2008)

355 See *Rural/Metro*, 102 A.3d at 252. 356 Fund LPA §§ 6.4F, 6.8E. rescind an improperly exercised ROFR would be exculpated due to the absence of a

material adverse effect on the Fund.

DLE theorizes there is other value that can only be realized if DLE can stop

the exercise of the ROFR, and in turn the Disposition. 357

and admissions at trial belie this trial, particularly combined

with the projections called for by the Fund LPA. 358 And I analyzed the consent

requirements and concluded DLE does not have an applicable or meaningful consent

right on the context of a ROFR disposition, so it cannot impose its unwillingness to

sell on the Property Partnership.

The decision not to challenge the Disposition, even if it were a breach, is

exculpated because that decision did not, and perhaps cannot, create a material

adverse effect on the Fund.

E. Upon A Final Judgment Not Subject To Appeal, Fund GP Will Be Entitled To Damages, Costs, A



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

Fund GP will be entitled to damages and all reasonable costs and expenses, including

357 See Clarifying Nonprofit Purchase Rights at a Section 42 ROFR, these various investor efforts can only succeed if the nonprofit cannot

successfully acquire the property 358 Fund LPA § 3.3A(ii); JX004 at HUDSON00018773; JX011 at DLE_0005420; Trane Tr. 520 22; JX037 at DLE_0004085; JX089 at DLE_0001819; JX014 at DLE_0007799 801; Chiusano Tr. 390, 392 98; 400 01, 405 06, 410 11. part:

[I]f it shall thereafter be determined by a final judgment not subject to appeal or the execution of an agreement by the General Partner and the Investor Limited Partner [who sought removal] that no Cause for such removal existed, then the Investor Limited Partner shall be obligated to pay to the General Partner an amount equal to the sum of (i) the fair applicable court), (ii) any and all damages determined by the applicable

court to be due to the General Partner from the Fund or the Investor Limited Partner as a result of such wrongful removal by the Investor Limited Partner and (iii) all reasonable costs and expenses (including attorney fees) incurred by the General Partner in connection with such removal. 359

Fund GP successfully challenged a purported removal by DLE where no Cause for

such removal existed. 360 For the same reasons, DLE is not entitled to damages under

Section 7.2B. Upon a final judgment, DLE must expenses, costs, and fees.

Pursuant to my July 9, 2021 Order, this matter is bifurcated with respect to

damages. 361 entry of a final judgment not subject to appeal. 362

I invite either a stipulated

implementing order reflecting a designation of this opinion as a partial final

359 Fund LPA § 7.2B. 360 D.I. 168 at 9; D.I. 185 at 57. 361 D.I. 47. 362 Fund LPA § 7.2B. judgment under Rule 54(b), or a motion for such designation. 363 After the time for

appeal has passed or a final and nonappealable judgment is

entered, the parties should confer as to the manner in which they would like to

award under Fund



JER Hudson GP XXI LLC, et al. v. DLE Investors, LP

2022 | Cited 0 times | Court of Chancery of Delaware | May 2, 2022

LPA Section 7.2B, and inform the Court by joint letter how, and on what timeline, they propose to proceed.

III. CONCLUSION

For the reasons stated above, I find for Fund GP on all counts and counterclaim counts. DLE lacked Cause to remove Fund GP as general partner because DLE failed to demonstrate Fund GP breached its fiduciary or contractual duties. The Default Notice is invalid, and Fund GP remains the general partner of the Fund. Fees are contractually shifted in favor of Fund GP; this Court will determine any remaining damages after entry of a partial final judgment not subject to appeal.

363 Ct. Ch. R. 54(b).

