IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

POLICEMEN'S ANNUITY AND BENEFIT FUND OF CHICAGO, ILLINOIS, MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND OF CHICAGO, LABORERS' AND RETIREMENT BOARD EMPLOYEES' ANNUITY AND BENEFIT FUND OF CHICAGO, RETIREMENT PLAN FOR CHICAGO TRANSIT AUTHORITY EMPLOYEES' TRUST, and PUBLIC SCHOOL TEACHERS' PENSION AND RETIREMENT FUND OF CHICAGO,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 7204-VCN**
DV REALTY ADVISORS LLC,	:	
Defendant,	:	
and	:	
DV URBAN REALTY PARTNERS I L.P.,	:	
Nominal Defendant.	:	

MEMORANDUM OPINION

Date Submitted: June 5, 2012
Date Decided: August 16, 2012

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NOBLE, Vice Chancellor

I. INTRODUCTION

This post-trial opinion addresses whether the limited partners (the "Limited Partners") of DV Urban Realty Partners I L.P. (the "Limited Partnership") validly removed DV Realty Advisors LLC (the "Managing Partner") as the general partner of the Limited Partnership. The Limited Partnership's governing document, the Third Amended and Restated Agreement of Limited Partnership (the "LPA"), provides for two co-general partners (the "General Partners")—the Managing Partner and Occam-DV, LLC ("Occam-DV")—and provides a mechanism by which the Limited Partners may remove the General Partners without cause. After Occam-DV had resigned as a general partner, the Limited Partners purported to remove, without cause, the Managing Partner, the Limited Partnership's only remaining general partner. The Limited Partners seek a declaration that their removal of the Managing Partner was valid and an award of attorneys' fees. The Managing Partner opposes those requests for relief, contending that the Limited Partners failed to meet the express and implied requirements for without cause removal established by the LPA. For the following reasons, the Court finds that the Limited Partners complied with the LPA's requirements for without cause removal. The Limited Partners, however, are not entitled to an award of attorneys' fees. Therefore, the Court will, in due course, enter an order declaring that the

Managing Partner has been validly removed, and denying the Limited Partners' request for attorneys' fees.

II. BACKGROUND

A. *The Parties*

The nominal defendant Limited Partnership is a Delaware limited partnership with its principal place of business in Chicago, Illinois.[1] The Limited Partnership invests in residential and commercial real estate in Chicago, focusing on emerging and transitional neighborhoods, with a stated purpose of generating attractive risk-adjusted rates of return.[2]

The defendant Managing Partner has been a general partner of the Limited Partnership since the Limited Partnership's formation in 2006.[3] The Managing Partner has invested approximately $3.4 million in the Limited Partnership and owns 4.9% of the Limited Partnership's interests (the "Limited Partnership Interests").[4] Jared Davis ("Jared") is the manager of JCJ Family LLC, which is the sole member of the Managing Partner.[5] Jared's father, Allison Davis ("Allison"), is also active in the management of the Managing Partner.[6]

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[1] Joint Pre-Trial Stipulation and Order ("Pre-Trial Stipulation") at 5.
[2] *Id.*
[3] *Id.* at 4.
[4] *Id.* at 4-5.
[5] Joint Exhibit ("JX") 4 ("LPA") at 46.
[6] Because Jared and Allison have the same last name, it is more convenient to refer to them by their first names. No disrespect is intended.

Robert Vanecko was the manager of non-party Occam-DV when Occam-DV resigned as a general partner of the Limited Partnership.[7]

The Limited Partners are Plaintiffs Policemen's Annuity and Benefit Fund of Chicago, Illinois ("Policemen's Fund"), Municipal Employees' Annuity and Benefit Fund of Chicago ("Municipal Fund"), Laborers' and Retirement Board Employees' Annuity and Benefit Fund of Chicago ("Laborers' Fund"), Retirement Plan for Chicago Transit Authority Employees' Trust ("CTA Fund"), and Public School Teachers' Pension and Retirement Fund of Chicago ("Teachers' Fund"). Each of the Limited Partners is a public pension fund located in Chicago, Illinois.[8] Collectively, the Limited Partners have invested approximately $66.5 million in the Limited Partnership[9] and own 95.1% of the Limited Partnership Interests.[10] The business and affairs of each of the Limited Partners are ultimately directed by a board of trustees. Each of the Limited Partners also has an executive director who reports to its board of trustees and is responsible for directing and overseeing its investments. John Gallagher is the Executive Director of the Policemen's Fund. James Mohler is the Executive Director of the Municipal Fund. James Capasso is the Executive Director of the Laborers' Fund. John Kallianis is the Executive

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[7] LPA at 46.
[8] Pre-Trial Stipulation at 2-4.
[9] Verified Compl. for Relief Under Section 17-110 of the Del. Revised Uniform Limited Partnership Act ("Complaint" or "Compl.") ¶ 2; Answer to Verified Compl. for Relief Under Section 17-110 of the Del. Revised Uniform Limited Partnership Act ("Answer") ¶ 2.
[10] Pre-Trial Stipulation at 2.

Director of the CTA Fund. Kevin Huber is the Executive Director of the Teachers' Fund.[11]

B. *Relevant LPA Provisions*

As of August 25, 2008, the Limited Partners and the General Partners entered into the LPA "to provide for the governance and operation of the [Limited] Partnership."[12] The LPA provides the General Partners, and the Managing Partner in particular, with broad discretion to manage the everyday affairs of the Limited Partnership. But that discretion is subject to certain limitations. Moreover, the LPA imposes certain obligations on the General Partners and provides a mechanism through which the Limited Partners may remove the General Partners.

1. Obligations of the General Partners

The LPA imposes two obligations on the General Partners that are relevant to the parties' arguments in this action. First, Section 6.1 of the LPA requires that the General Partners establish an advisory committee and prescribes certain structural aspects of the committee:

> (a) To assist the General Partners in identifying and resolving potential conflicts of interest and other matters, the General Partners shall establish an advisory committee (the "Advisory Committee") composed of three individuals nominated by the General Partners and approved by a Majority Vote of the Limited Partners. . . . Any vacancy on the Advisory Committee may be filled by the General Partners in a matter determined by them. . . .

[11] *Id.* at 7.
[12] LPA at 1.

> (b) The General Partners shall consult with the Limited Partners concerning the membership of the Advisory Committee, and any changes to such membership, on an ongoing basis . . . .
>
> (d) Each Limited Partner shall have the right, from time to time, to call for meetings of the Advisory Committee . . . .
>
> (h) The Advisory Committee shall meet at least once a calendar quarter . . . . Two members of the Advisory Committee shall constitute a quorum and shall be sufficient to constitute a meeting under this Section 6.1.[13]

Second, Section 11.5 of the LPA provides that the Managing Partner is responsible for obtaining annual audited financial statements for the Limited Partnership by a specific date:

> (a) For each Fiscal Year, the Managing Partner shall cause to be prepared and furnished to each Limited Partner an annual report containing . . . audited financial statements for such Fiscal Year . . . .
>
> The audited financial statements for the Fiscal Year shall be furnished to each Limited Partner within 120 days after the end of each Fiscal Year.

The LPA defines "Fiscal Year" as the calendar year.[14] Therefore, under Section 11.5 of the LPA, the Managing Partner was required to have audited financial statements for a given year prepared by April 30 of the following year.

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[13] *Id.* at § 6.1 (bold omitted).
[14] *Id.* at § 1.1.

2. <u>Limitations on the General Partners' Discretion</u>

As mentioned above, the LPA provides the General Partners with wide discretion to manage the Limited Partnership. But the LPA does delineate certain limits on that discretion, and two of those limits are relevant to the parties' contentions here. First, Section 3.2 of the LPA states:

> (a) The Managing Partner shall supervise the day-to-day operations of the [Limited] Partnership. In so doing, the Managing Partner will consult with the Co-General Partner, but the Managing Partner will have ultimate authority over the operations of the [Limited] Partnership. While the Managing Partner shall have ultimate authority over the operations of the [Limited Partnership], . . . [certain] "Major Partnership Decisions" require the consent of both General Partners . . . , [including] incurring debt (other than non-recourse, property-level debt at or below 70% loan to value (the loan to value ratio to be determined based on the higher of the cost or fair value of each Project) or bridge financings . . . .
>
> (b) In addition to the consent of both General Partners, the Major Partnership Decisions . . . shall require either the approval of . . . [Limited Partners holding more than 50% of the Limited Partnership Interests held by all the Limited Partners] or the consent of the Advisory Committee, as the General Partners may determine.

Second, Section 4.1(b) of the LPA provides that "[n]o placement, finder's or other form of marketing or selling fee or commission has been or will be paid by the [Limited] Partnership, the General Partner[s] or any third party in respect of any Limited Partner's investment in the [Limited] Partnership."

3. <u>Mechanism for Removing the General Partners</u>

The final LPA provision relevant to this action is Section 3.10, which explains when the Limited Partners may remove the General Partners. The portion

of Section 3.10 specifically applicable to this action is Section 3.10(a)(ii), which provides:

> Both General Partners (and only both, not either General Partner individually) may be removed without Cause by an affirmative vote or consent of the Limited Partners holding in excess of 75% of the [Limited] Partnership Interests then held by all Limited Partners; provided that consenting Limited Partners in good faith determine that such removal is necessary for the best interest of the [Limited] Partnership.

C. *Factual Background*[15]

The Limited Partners invested in the Limited Partnership in 2006.[16] The Advisory Committee, contemplated by Section 6.1 of the LPA, initially consisted of: Blake Eagle, Tariq Malhance, and Steven Rogers.[17] On July 26, 2007, however, Rogers resigned as a member of the Advisory Committee.[18] There has been no suggestion that, after any member of the Advisory Committee resigned, he was ever replaced. Thus, the Advisory Committee appears to have consisted of, at most, two members after Rogers resigned.

From 2007 at least until the summer of 2009, the *Chicago Sun-Times* published stories speculating that Vanecko improperly used his relationship with his uncle, Richard M. Daley ("Daley"), the former mayor of the City of Chicago,

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[15] These are the relevant facts as the Court finds them following trial. A few facts are found elsewhere in this memorandum opinion.
[16] Compl. ¶ 14; Answer ¶ 14.
[17] JX 115.
[18] JX 122.

to influence the Limited Partners to invest in the Limited Partnership.[19] In May 2009, a grand jury in the United States District Court for the Northern District of Illinois issued each of the Limited Partners a subpoena, demanding "any and all information relating to investments and/or considerations of investments made . . . [in the Limited Partnership]."[20] Shortly after receiving the subpoenas (the "Grand Jury Subpoenas"), the Limited Partners produced the requested information and, since then, nothing public has happened with respect to the subpoenas.[21] The Limited Partners and the Managing Partner do not know who or what was the subject of the investigation underlying the subpoenas.

In June 2009, the Limited Partnership's audited financial statements for Fiscal Year 2008, which were due by April 30, 2009, were still outstanding, and Gallagher, Mohler, Capasso, Kallianis, and Huber (collectively, the "Executive Directors") met and discussed their frustrations regarding the outstanding audited financial statements.[22] On June 5, 2009, Mohler sent an e-mail on behalf of the Limited Partners to Jared, Allison, and Vanecko reminding them that, under the LPA, the Managing Partner was required to have the Limited Partnership's 2008 audited financial statements completed by April 30, 2009, and requesting that the

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[19] Dep. of Jared Davis ("Jared Dep.") at 71-73. *See* Pre-Trial Stipulation at 9 ("The parties agree that deposition transcripts are part of the record and may be used for any purpose in this action.").
[20] JX 5-9.
[21] Trial Tr. 200-01 (Huber), 433-34 (Kallianis).
[22] Trial Tr. 329 (Mohler), 408 (Kallianis).

General Partners "immediately" notify the Limited Partners when the statements would be completed.[23]

On June 8, 2009, Jared, Allison, and Vanecko sent the Limited Partners a letter explaining that, effective July 1, 2009, Occam-DV and Vanecko would cease involvement in the Limited Partnership. The letter explained that Vanecko was withdrawing because "[r]ecently, . . . [his] activities on behalf of our [Limited] Partnership have been mischaracterized as improper."[24] The letter further stated that Vanecko believed that his withdrawal "was the best way to further the important work of the [Limited] Partnership while minimizing unwarranted distractions from our core purpose."[25]

By August 25, 2009, the Limited Partnership's 2008 audited financial statements still had not been completed, and four of the Executive Directors, on behalf of the Limited Partners that they served, sent a letter to Allison again reminding the Managing Partner that the Limited Partnership's 2008 audited financial statements had yet to be completed.[26] The August 25, 2009 letter also requested information about the terms of Vanecko's severance and requested that the Managing Partner cooperate with the Limited Partner's respective consulting

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[23] JX 10 ("Limited Partners' June 25, 2009 E-mail").
[24] JX 234 ("Vanecko's Resignation Letter").
[25] *Id.*
[26] The letter was signed by Huber, Terrance Stefanski (who was Mohler's predecessor), Gallagher, and Capasso. Thus, the letter was signed on behalf of the Teachers' Fund, the Municipal Fund, the Policemen's Fund, and the Labor Fund. The letter was not signed on behalf of the CTA Fund.

firms in a review of the Limited Partnership's financial records. The letter concluded: "Please understand these unresolved issues and our request for access to financial schedules need to be addressed in a timely manner and that continued failure to do so may prompt the limited partners to seek remedies available within the limited partnership agreement."[27]

In his September 9, 2009 response to the Limited Partners' August 25, 2009 Letter, Allison explained:

> The issue which has held up the issuance of the 2008 audit is the "going concern" issue which stemmed from the near term expiration of two loans – a Bank of America loan for the Pulaski development and a First National Bank of Highland Park (FNBHP) which is secured by the 217 Jefferson property.[28]

The letter further stated that the delay was due, at least in part, to a position taken by the Limited Partnership's auditor, Deloitte & Touche LLP ("Deloitte"). "The Deloitte auditors' position has been that unless these loans were extended, our audit would have a 'going concern' note which is not desirable."[29] The letter then explained that "it is in our collective best interest to have an audit issued which does not have a 'going concern' note."[30] As to Vanecko, the letter stated that "[t]here is not one penny of any of the limited partners' money which has been or

[27] JX 12 ("Limited Partners' August 25, 2009 Letter").
[28] JX 13 ("Allison's September 9, 2009 Letter") at 1.
[29] *Id.*
[30] *Id.* at 2.

will be paid to Mr. Vanecko in connection with his resignation."[31] Finally, the letter assured the Limited Partners that the Managing Partner would cooperate with their respective consulting firms.

On October 14, 2009, the Limited Partnership's 2008 audited financial statements were completed, and on October 20, 2009, those statements were provided to the Limited Partners. Thus, the 2008 audited financial statements were provided to the Limited Partners 173 days after the due date set forth in Section 11.5 of the LPA. By late 2009 or early 2010, the Advisory Committee appears to have stopped meeting altogether. Moreover, sometime in 2010, Malhance resigned from the Advisory Committee, and in November 2011, Eagle, the last remaining member of the Advisory Committee, resigned.[32] Also in late 2009 or early 2010, Courtland Partners, Ltd., a consulting firm retained by the Policeman's Fund, suggested that Heitman LLC ("Heitman") be engaged to advise the Limited Partnership on weathering the then-current economic landscape; the Policemen's Fund agreed; and Heitman was retained.[33]

In April 2010, Michael Dudek filed a seven count complaint (the "Dudek Lawsuit") against the Limited Partnership, the General Partners, and all of the Limited Partners, alleging that he is entitled to a finder's fee as a result of the

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[31] *Id.*

[32] Trial Tr. 564 (Jared).

[33] *Id.* at 75 (Huber), 249-52 (Gallagher).

Limited Partners' investment in the Limited Partnership.[34] The Limited Partners and the Limited Partnership have been dismissed from the Dudek Lawsuit, but the suit is still pending against the Managing Partner.[35] Moreover, there is a written consulting agreement between Dudek and the Managing Partner (although it was executed by Vanecko, who may not have had authority to act on behalf of the Managing Partner), which purports to entitle Dudek to 2% of the capital raised from certain "Target Investors," including the Limited Partners.[36] If the consulting agreement is valid, it potentially conflicts with Section 4.1(b) of the LPA.

By May 2010, the Limited Partnership's 2009 audited financial statements had not been completed, and thus, the Managing Partner had again failed to have the Limited Partnership's audited financial statements completed in the time prescribed by Section 11.5 of the LPA. Moreover, the Heitman analysis, which had been conceived of months earlier had not even started because Heitman refused to perform any analysis until the Managing Partner signed a confidentiality agreement, which the Managing Partner had not done yet.[37] Thus, on May 26, 2010, the Limited Partners sent a letter to Jared, requesting his "immediate attention" to two items:

[34] JX 15.
[35] Trial Tr. 79-80 (Huber).
[36] JX 1.
[37] JX 20, 24, 25.

1. An audited financial statement for 2009 has yet to be delivered to the Funds, although it was to be delivered by April 30, 2010 pursuant to Section 11.5 of the Limited Partnership Agreement. We request delivery of the statements by June 14, 2010; and
2. We request that you cooperate promptly and fully with a portfolio review on behalf of the Funds by Heitman LLC. Your cooperation should commence with your prompt execution of the Confidentiality Agreement of January 26, 2010 negotiated by Courtland Partners Ltd. and Heitman LLC. Please provide to us by June 4, 2010 a copy of the Confidentiality Agreement signed by you.[38]

On June 3, 2010, the Managing Partner entered into a confidentiality agreement with Heitman. On June 9, 2010, Allison and Jared responded, via e-mail, to the Limited Partners' May 26, 2010 Letter, explaining that:

> The Financial Accounting Standards Board ("FASB") has proposed new Financial Accounting Standards which extend the time horizon over which an entity should evaluate its ability to continue as a going concern. . . . One going concern is debt maturities, and our auditors have interpreted the Standards (similarly to interpretations made by other auditors) to mean that any project debt maturing within one year of the report's issuance (vs. within one year of the end of the report period) would require a disclosure of doubt regarding the entity's ability to continue as a going concern.[39]

In June 2010, the Limited Partnership had three projects subject to loans that would mature within one year of the issuance of the Limited Partnership's 2009 audited financial statements. Thus, if each of those loans were not either extended or refinanced to provide for a later maturity date, Deloitte would raise a "going concern" issue in the Limited Partnership's 2009 audited financial statements,

[38] JX 24 ("Limited Partners' May 26, 2010 Letter").
[39] JX 26 ("Allison and Jared's June 9, 2010 E-mail").

which "would raise red flags with all of . . . [the Limited Partnership's] lenders and creditors."[40]

Allison and Jared's June 9, 2010 E-mail stated that "[o]ur goal is to have a 'clean' audit issued which does not impair our relationship with you, our lenders, creditors or third parties."[41] Therefore, according to Allison and Jared, the Limited Partnership's 2009 audited financial statements had yet to be completed by June 2010 because those statements could not, at that time, be completed without a "going concern" issue, and Allison and Jared thought it would be better to have a "clean" audit completed late rather than to have an audit with a "going concern" issue completed within the time prescribed by the LPA. The e-mail also stated that "having discussed this matter with Deloitte and met with Courtland Partners and Heitman, we collectively have agreed that August 1, 2010 is a realistic date by which time the audit will be complete and submitted to our limited partners."[42]

By September 14, 2010, the Limited Partnership's 2009 audited financial statements had still not been completed, and Allison informed Mohler that he (Allison) was going to have the Limited Partnership's accountant, RSM McGladrey, Inc. ("RSM") "prepare and deliver to you tomorrow a written statement which outline[s] the status of the audit, the delivery date of the audit and

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[40] *Id.*
[41] *Id.*
[42] *Id.*

why having a clean opinion (no going concern issue) is so important."[43] On September 15, a memorandum from RSM (the "RSM Memorandum") was delivered to each of the Limited Partners.[44] The RSM Memorandum explained that:

> [The Limited Partnership's] management team and RSM . . . have completed all audit requests that have been brought forth by the auditors except for the "going concern" documentation which is still in process waiting on certain of the properties' loan extensions. . . . Based on conversations with Deloitte, it appears that the only issue outstanding at this point is to obtain the information related to the loan extensions.[45]

The memorandum then went on to state that, based on requests made by Deloitte in a September 10, 2010 conference call, the Managing Partner must provide (presumably to Deloitte): (1) "an updated Debt Assessment Summary, outlining the current status of debt maturity on the portfolio;" (2) "a detailed property cash flow plan that clearly shows the expected sources and uses of cash for each of the respective properties;" and (3) "an assessment of agreements supporting the assertion that the debt instruments do not have fund level recourse or other 'going concern' implications."[46]

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[43] JX 30. At this time, RSM was the Limited Partnership's accountant and Deloitte was the Limited Partnership's auditor. It is not entirely clear why Allison asked RSM, the Limited Partnership's accountant, to opine on an audit issue.
[44] JX 31A-G.
[45] *Id.*
[46] *Id.*

The RSM Memorandum concerned Huber, and shortly after receiving it, he asked Rob Kochis, a member of the Townsend Group Inc. ("Townsend"), which, at the time, was a consultant to the Teachers' Fund that was hired to help oversee and manage the Teachers' Fund's real estate investments,[47] for his "take on the situation."[48] On September 24, 2010, Kochis prepared (but did not send) a letter to Huber with the subject line "DV Urban Realty Partners Fund I: recommended manager change."[49] The first line of that letter stated: "Per our recent discussion, Townsend recommends that investors in the . . . Limited Partnership . . . consider terminating and replacing the . . . [Managing Partner]."[50] On September 27, 2010, at a meeting of Townsend's advisory investment committee, Kochis discussed his recommendation that the Managing Partner be removed as a general partner of the Limited Partnership. Specifically, the minutes of that meeting provide:

> Rob [Kochis] presented his recommendation on DV Urban Realty Partner Fund I, which is an investment for Chicago Teachers under its minority program. Rob was critical of its poor performance, misuse of leverage, lack of transparency, etc. Rob is thus recommending to remove the manager and identify a new manager. Micolyn [another member of Townsend] asked if there are political ramifications of recommendation. Rob stated that the client had requested this recommendation and so he does not foresee any ramifications.[51]

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[47] Trial Tr. 13-14 (Huber).
[48] *Id.* at 94 (Huber). At this time, Townsend was a consultant to both the CTA Fund and the Teachers' Fund. *Id.* at 109 (Huber), 417 (Kallianis).
[49] JX 32 ("Kochis's September 24, 2010 Letter").
[50] *Id.*
[51] JX 181 ("Minutes from September 27, 2010 Townsend Meeting").

On October 1, 2010, Kochis drafted another version of his September 24, 2010 letter.[52] Kochis's October 1, 2010 Letter, which is the version of the letter that was actually sent to Huber, does not recommend removing the Managing Partner. Instead, it states, "We discussed recently whether grounds exist to terminate . . . [the Managing Partner] as General Partner of . . . [the Limited Partnership]. We [Townsend] believe grounds do exist."[53] Thus, Kochis's October 1, 2010 Letter suggests that Townsend was asked by Huber to determine whether grounds existed to remove the Managing Partner, while Kochis's September 24, 2010 Letter and his comments at the September 27, 2010 Townsend meeting suggest that Huber asked for a recommendation as to whether or not the Managing Partner should actually be removed.

At trial, Huber testified that he did not ask Kochis for a recommendation, in September or October 2010, that the Managing Partner be removed,[54] and that, during that time period, Kochis did not make that recommendation.[55] Huber further testified that, during September and October 2010, "Townsend and I were discussing potential options. Removal was an option, as was how we hold the

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[52] JX 34 ("Kochis's October 1, 2010 Letter").
[53] *Id.*
[54] *See* Trial Tr. 95 (Question: "Did you tell Mr. Kochis that you wanted Townsend to recommend the removal of the general partner?" Huber: "No, not at all.").
[55] *See id.* at 96 (Question: "Did Mr. Kochis recommend to you at this point, on or about October 1, that the general partner be removed?" Huber: "No.").

general partner more accountable."[56] Moreover, in discussing Kochis's October 1, 2010 Letter, Huber testified: "I think he [Kochis] validated our assertion that yes, removal was a potential option if we needed to exercise that clause of the partnership agreement."[57]

Kochis, like Huber, testified at trial that Huber did not request a recommendation in September or October 2010 that the Managing Partner be removed,[58] and that, during that time, he (Kochis) did not recommend that the Managing Partner be removed.[59] With regard to the September 27, 2010 Townsend meeting, Kochis testified:

> Well, what I told the committee was we were starting a process, we were evaluating DV. I thought termination could happen in this case. It was certainly likely. Grounds existed. But it was the start of the process, and I wanted to get the authority of our committee and their thoughts on the steps to go about, you know, evaluating the situation and ultimately giving a final recommendation.[60]

On November 10, 2010, Huber organized a meeting of the Executive Directors and representatives of Townsend.[61] At the meeting, Kochis made a

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[56] *Id.* (Huber).
[57] *Id.* (Huber).
[58] *See id.* at 504 (Question: "Did Mr. Huber instruct you to obtain a recommendation that the general partner be removed?" Kochis: "No.").
[59] *See id.* (Question: "When it [the minutes of the September 27, 2010 Townsend Meeting] says, 'Rob [Kochis] presented his recommendation,' what do understand that to mean?" Kochis: "Well, this was referring to my letter, my draft letter [Kochis's September 24, 2010 Letter]. That was Exhibit 32."); *id.* at 507 (Question: "Anywhere in the documents marked as Exhibit 32 and 33 did you recommend that the general partner be removed?" Kochis: "No.").
[60] *Id.* at 505-06 (Kochis).
[61] JX 187; JX 189; JX 190; JX 192.

presentation outlining the pros and cons of removal.[62] In January 2011, the Limited Partners collectively engaged Townsend to evaluate the Limited Partnership.[63] Townsend's engagement letter provided that Townsend would review certain alternative courses of action with regard to the Managing Partner, including "[m]anager replacement: [c]onduct a private search process to identify a replacement manager to assume investment management responsibilities for the . . . [Limited Partnership]."[64]

On March 9, 2011, approximately 313 days after the due date set forth in Section 11.5 of the LPA, the Limited Partnership's 2009 audited financial statements were completed.[65] Deloitte's notes to the 2009 audited financial statements revealed that during 2009 the General Partners received a $510,837 development fee (the "$510,837 Development Fee") in connection with an agreement to purchase property even though the Limited Partnership never purchased the property.[66] On May 26, 2011, Townsend issued a report to the Limited Partners (the "Final Townsend Report"), stating its recommendation that the "Limited Partner Boards should authorize their Executive Directors to take all

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[62] JX 35; JX 36 (collectively, with JX 35, "Kochis's November 10, 2010 Presentation Materials").
[63] JX 41A-C; JX 42 (collectively, with JX 41A-C, "Townsend's Engagement Letter"); Trial Tr. at 288 (Counsel for the Managing Partner: "We will stipulate he [Gallagher] signed it [the engagement letter with Townsend].").
[64] Townsend's Engagement Letter (bold omitted).
[65] JX 43.
[66] *Id.* at 19.

necessary steps to effect a transition in management of the Fund from the . . . [Managing Partner] to a successor General Partner."[67] The Final Townsend Report further recommended that Lincoln Advisory Group Ltd. ("Lincoln") be named the successor general partner. The recommendation of removal in the Final Townsend Report was based on several factors, including: (1) the Limited Partnership's poor financial performance; (2) the fact that "[b]oth quarterly and annual reporting from the Fund has routinely been late;"[68] (3) Vanecko's resignation; (4) the dysfunction of the Advisory Committee; (5) the Dudek Lawsuit; and (6) the Managing Partner's use of recourse debt in violation of the LPA.

Thereafter, the Executive Directors informed their boards of trustees of the contents and recommendations of the Final Townsend Report.[69] Before the end of 2011, each Limited Partner approved the removal of the Managing Partner.[70] The Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund all approved the removal through their respective board of trustees. The CTA Fund delegated authority regarding the Limited Partnership to Kallianis. Effective January 30, 2012, the Executive Directors, on behalf of the Limited Partners, executed a written consent (the "Written Consent") purporting to remove

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[67] JX 47A-E ("Final Townsend Report") at 1.
[68] *Id.* at 3.
[69] Trial Tr. 120-22 (Huber), 292-93, 309 (Gallagher), 346 (Mohler), 418 (Kallianis); JX 49 at 36; JX 50 at 6.
[70] JX 48 at 632; Trial Tr. 309 (Gallagher); JX 49 at 36; JX 50 at 6; JX 59 at 2-3; JX 62 at 3.

the Managing Partner.[71] On February 1, 2012, the Limited Partners filed the Complaint. As of May 2012, the Limited Partnership's 2010 and 2011 audited financial statements had yet to be completed, and there has been no suggestion that either has been completed since then.

If the Limited Partners are successful in removing the Managing Partner, the Executive Directors have suggested that the Limited Partners will elect Lincoln to serve as a general partner of the Limited Partnership. The Limited Partners have not asked Lincoln if it will be able to complete the Limited Partnership's audited financial statements in the time prescribed by Section 11.5 of the LPA,[72] nor have they asked Lincoln about how it plans to manage the Limited Partnership's assets.[73]

III. CONTENTIONS

The Managing Partner argues that the Limited Partners have the burden of showing that they met the express and implied requirements for without cause removal specified in Section 3.10(a)(ii) of the LPA. The Managing Partner further argues that those requirements include both the explicit requirement laid out in Section 3.10(a)(ii) that consenting Limited Partners "in good faith determine that . . . removal [of the General Partners] was necessary for the best interests of

[71] JX 67; Pre-Trial Stipulation at 5 ("The Written Consent is duly executed by a representative of each of the five Limited Partners.").
[72] Trial Tr. 368-69 (Mohler).
[73] *Id.* at 369 (Mohler), 397-98 (Capasso), 435 (Kallianis).

the [Limited] Partnership," as well as an implied requirement that the Limited Partners' decision be "objectively reasonable."[74] According to the Managing Partner, the implied covenant of good faith and fair dealing, which inheres to every contract, includes a requirement of objective reasonableness, and that requirement is applicable to Section 3.10(a)(ii) of the LPA.

The Managing Partner then argues that the Limited Partners have failed to show that they acted reasonably or in good faith when they removed the Managing Partner. The Managing Partner contends that in order for the Limited Partners to show that they acted in good faith, they were required to present testimony from their boards of trustees. The business and affairs of each Limited Partner are ultimately directed by its board of trustees and, with the exception of the CTA Fund, the decision to remove the Managing Partner was authorized by each Limited Partner's board. Thus, according to the Managing Partner, "[w]ithout th[e] testimony [of their trustees], the Limited Partners have not proven what determinations they made, much less that those determinations were made reasonably and in good faith."[75]

Even if the Limited Partners could prevail without testimony from their boards of trustees, the Managing Partner argues that they cannot do so here because even the evidence that the Limited Partners have offered does not suggest

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[74] Def.'s Post-Trial Answering Br. at 3.
[75] *Id.* at 8.

good faith or reasonableness. The Managing Partner contends that the evidence offered at trial shows that the Executive Directors wanted to remove the Managing Partner because the Managing Partner, due to its connections with Daley, was drawing unwanted media attention and complaints from the Limited Partners' constituents. According to the Managing Partner, the Limited Partners and their Executive Directors were annoyed by that unwanted attention, and thus, the Limited Partners purported to remove the Managing Partner even though it was doing a good (adequate) job of managing the Limited Partnership. But, so the story continues, the Limited Partners knew that their annoyance was not a sufficient reason for removal under the LPA. Therefore, the Executive Directors asked Townsend to provide them with a report recommending removal that they and their boards of trustees could rely upon as a basis for removal even though neither the Executive Directors nor the Limited Partners actually thought that removal of the Managing Partner would be in the best interest of the Limited Partnership.

The Limited Partners, in turn, argue that the Managing Partner has the burden of proving that they breached the terms of the LPA. Moreover, the Limited Partners argue that the only requirement imposed by the LPA, with regard to without cause removal, is the express requirement that the "Limited Partners in good faith determine that . . . removal is necessary for the best interest of the

[Limited] Partnership." The Limited Partners acknowledge that the implied covenant inheres to every contract, but they argue that if a contractual provision has no gaps, then the implied covenant will not have any effect as to that provision. According to the Limited Partners, Section 3.10(a)(ii) has no gaps, and thus, the implied covenant adds nothing.

The Limited Partners then contend that the Managing Partner cannot show that they acted in bad faith because a preponderance of the evidence offered at trial shows that the Limited Partners acted in good faith. According to the Limited Partners, they were not required to present testimony from their boards of trustees to show good faith:

> the . . . [Managing] Partner's position presumes that the only way to prove the Limited Partners' organizational good faith is through their Boards of Trustees. Delaware law does not impose any such specific requirement, and the General Partner cites none. The Limited Partners chose to prove their organizations' good faith through the relevant, admissible testimony of their Executive Directors, who were the witnesses with the most personal knowledge of all relevant events.[76]

Moreover, the Limited Partners contend that the evidence presented at trial shows that they elected to remove the Managing Partner because of the Managing Partner's lack of transparency. The Limited Partners argue that they were principally concerned with the Managing Partner's continuous failure to have the Limited Partnership's audited financial statements completed in the time

[76] Pls.' Post-Trial Reply Br. at 16 (citation omitted).

prescribed by Section 11.5. But the Limited Partners also argue that they were troubled by several "Red Flags," including the Grand Jury Subpoenas, Vanecko's resignation, the dysfunction of the Advisory Committee, the Dudek Lawsuit, the Managing Partner's failure to cooperate with Heitman, the Managing Partner's use of recourse debt in violation of the LPA, the RSM Memorandum, and the $510,837 Development Fee. According to the Limited Partners, the lack of transparency caused by the Red Flags and the Managing Partner's failure to have the audited financial statements completed on time was a sufficient basis for the Limited Partners to believe, in good faith, that the Managing Partner needed to be removed for the best interest of the Limited Partnership.

IV. ANALYSIS

A. *The Limited Partners Have the Burden of Proof*

"[I]n determining the allocation of the burden of proof in suits for declaratory judgment, 'the better view is that a plaintiff in a declaratory judgment action should always have the burden of going forward.'"[77] By the Complaint, the Limited Partners initiated this action, and the Complaint consists of one count—

[77] *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 739 (Del. Ch. 2008) (quoting *Those Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs.*, Inc., 2007 WL 4554453, at *6 (Del. Ch. Dec. 21, 2007)).

"Declaratory Judgment Under 6 *Del. C.* § 17-110."[78] Thus, under the general rule applicable to declaratory judgments, the Limited Partners have the burden of proof.

Moreover, evidence related to what motivated the Limited Partners to act is likely to be in the possession of the Limited Partners, and it is fairer to place the burden of proof on the party who can more readily access relevant evidence.[79] It is also generally the rule that the burden of proof lies with the party seeking to change the status quo.[80] Here, the Limited Partners seek to change the status quo by removing the Managing Partner, while the Managing Partner merely seeks to continue serving as a general partner as it has done for the past several years. Therefore, even if the general rule that the plaintiff has the burden of proof in a declaratory judgment action could be overcome in certain instances,[81] it has not

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[78] Compl. at 11.

[79] *See Nat'l Commc'ns Ass'n, Inc. v. AT & T Corp.*, 238 F.3d 124, 130 (2d Cir. 2001) ("[A]ll else being equal, the burden is better placed on the party with easier access to relevant information.") (citations omitted); *United States v. Santee Sioux Tribe of Neb.*, 254 F.3d 728, 733 (8th Cir. 2001) ("[W]hen true facts relating to a disputed issue lie peculiarly within the knowledge of one party, it is fair to assign the burden of proof to that party.") (citation omitted).

[80] *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Indus. Pension Fund*, 762 F.2d 1124, 1133 (1st Cir. 1984) ("In a normal civil suit, the burden is on the plaintiff, the one who wants to change the status quo by taking something from the defendant, to prove his entitlement to it in every way by a preponderance of the evidence."); *In re Rare Earth Minerals, Inc.*, 347 B.R. 802, 803 (Bankr. N.D. W. Va. 2006) ("[T]he burden of proof rests with the party who is attempting to change the status quo or is asserting the claim.") (citing 29 AM. JUR. 2d *Evidence* § 158 (2006)).

[81] As stated above, the rule in Delaware appears to be that "a plaintiff in a declaratory judgment action should always have the burden of going forward." *Hexion*, 965 A.2d at 739 (quoting *Those Certain Underwriters at Lloyd's, London*, 2007 WL 4554453, at *6). The parties to the LPA could have specified in the LPA who has the burden of proving that removal of the General Partners is necessary for the best interest of the Limited Partnership. *See id.* at n.60 ("Of course, the easiest way that the parties could evidence their intent as to the burden of proof would be to

been overcome here—the Limited Partners are the ones seeking to change the status quo and they can more readily access the relevant evidence. In sum, the Limited Partners have the burden of proving that their purported removal of the Managing Partner met the requirements of the LPA.

B. *The Limited Partners Only Have to Satisfy the Explicit Requirements of the LPA*

"Delaware adheres to the 'objective' theory of contracts, i.e. a contract's construction should be that which would be understood by an objective, reasonable third party."[82] "Clear and unambiguous language . . . should be given its ordinary and usual meaning."[83] Moreover, "[u]nder general principles of contract law, a contract should be interpreted in such a way as to not render any of its provisions illusory or meaningless."[84]

Section 3.10(a)(ii) of the LPA sets out when the Limited Partners may undertake removal:

> Both General Partners (and only both, not either General Partner individually) may be removed without Cause by an affirmative vote or consent of the Limited Partners holding in excess of 75% of the [Limited] Partnership Interests then held by all Limited Partners; provided that consenting Limited Partners in good faith

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contract explicitly on the subject."). Because they failed to do so, the Court must look to the default rule, which places the burden of proof on the Limited Partners.

[82] *Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (quoting *NBC Universal v. Paxson Commc'ns*, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005)).

[83] *Id.* at 1160 n.19 (quoting *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.,* 616 A.2d 1192, 1195 (Del.1992)).

[84] *Sonitrol Hldg. Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992) (citation omitted).

determine that such removal is necessary for the best interest of the [Limited] Partnership.[85]

The Managing Partner, relying upon *Wilmington Leasing, Inc. v. Parrish Leasing Co., L.P.*[86] and *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*,[87] argues that the Court should imply, in Section 3.10(a)(ii), a requirement that the Limited Partners must act reasonably if they exercise their discretion to remove the Managing Partner.

Wilmington Leasing, like this case, involved the purported removal of a limited partnership's general partner. The pertinent provision in *Wilmington Leasing* provided: "If the Limited Partners determine that the General Partner has failed or is unable to perform satisfactorily as General Partner, the Limited Partners shall have the right to remove the General Partner and elect a new general partner."[88] The Court in *Wilmington Leasing* determined that that provision provided the limited partners discretion to remove the general partner, but that the

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[85] The parties have not discussed the effect of Occam-DV's withdrawal on the Limited Partners' ability to remove the Managing Partner pursuant to Section 3.10(a)(ii). Read literally, Section 3.10(a)(ii) suggests that the Limited Partners cannot remove the Managing Partner individually. The parties appear to have presumed that because the Limited Partnership only has one remaining general partner, that general partner may be removed individually. That is probably the best reading of Section 3.10(a)(ii), and, in any event, the Managing Partner has failed to raise, and therefore, waived, any argument that the Limited Partners cannot, in this instance, use Section 3.10(a)(ii) to remove only the Managing Partner.

For the sake of convenience, when discussing removal under Section 3.10(a)(ii), the Court will refer to the Limited Partners' ability to remove the "Managing Partner" even though Section 3.10(a)(ii) itself is directed at "[b]oth General Partners (and only both, not either General Partner individually)."

[86] 1996 WL 560190 (Del. Ch. Sept. 25, 1996).

[87] 624 A.2d 1199 (Del. 1993).

[88] 1996 WL 560190, at *1.

provision did not provide how that discretion was to be exercised—"although . . . [removal] is generally addressed, the specific question presented here—the scope of discretion allowed to the limited partners in effecting the general partner's removal—is not. The disputed provision does not, for example, explicitly state that the limited partners' determination will be 'in their sole discretion.'"[89] Therefore, the Court in *Wilmington Leasing* determined that

> [i]n these specific circumstances, an implied requirement that the limited partners' discretion be exercised reasonably and in good faith is appropriate, for without that limitation, the contractual condition would be marginalized. For example, absent such an implied requirement, the limited partners could remove, maliciously or unreasonably, a general partner who was performing satisfactorily.[90]

In *Desert Equities*, our Supreme Court was presented with a limited partner's claim that it had been wrongfully excluded from making investments in the limited partnership. Section 5.04(b) of the relevant limited partnership agreement provided:

> A Limited Partner shall be excused and shall not be permitted to make all or a portion of any required Capital Contribution with respect to any LBO Investment if the General Partner delivers a written notice to such Limited Partner that the making of such Capital Contribution or portion thereof might have a Material Adverse Effect.[91]

The Supreme Court did not disturb this Court's determination that "while section 5.04(b) of the Partnership Agreement provides the General Partner

[89] *Id.* at *2.
[90] *Id.*
[91] 624 A.2d at 1202 n.4.

discretionary authority to exclude a limited partner from participation in an investment when participation would have a materially adverse effect, the General Partner is obliged to exercise that discretion in a *reasonable* manner."[92] This Court required that the discretion given to the general partner in *Desert Equities* be exercised reasonably because Section 5.04(b) listed specific examples of material adverse effects, and therefore, the Court could not interpret the discretion provided for in Section 5.04(b) "to mean unfettered discretion because such an interpretation would cause the specific examples of material adverse effects in § 5.04(b) to be entirely superfluous."[93]

Section 3.10(a)(ii) of the LPA, as with the portions of the limited partnership agreements at issue in *Wilmington Leasing* and *Desert Equities,* allows for discretion. Unlike in those cases, however, Section 3.10(a)(ii) provides how discretion is to be exercised—the Limited Partners must "in good faith determine that . . . removal [of the Managing Partner] is necessary for the best interest of the [Limited] Partnership."[94] When a contract provision states how a grant of discretion is to be exercised, there is no place for the implied covenant in that provision.[95] Even in *Wilmington Leasing*, a case on which the Managing Partner

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[92] *Id.* at 1206 (citations omitted).
[93] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, L.P.*, 1992 WL 181718, at *2 (Del. Ch. July 28, 1992).
[94] LPA § 3.10(a)(ii).
[95] *See Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) ("The implied covenant only applies to developments that could not be anticipated . . . .") (citation omitted); *Gerber v. Enter. Prods.*

relies heavily, the Court explained that it was implying obligations because the limited partnership agreement itself did not specify the scope of discretion.[96]

The Managing Partner is correct that when a contract provides discretion to one party and the scope of that discretion is not specified "the implied covenant requires that the discretion be used reasonably and in good faith."[97] But again, if the scope of discretion is specified, there is no gap in the contract as to the scope of the discretion, and there is no reason for the Court to look to the implied covenant to determine how discretion should be exercised. Although "even the most carefully drafted agreement will harbor residual nooks and crannies for the implied covenant to fill," "[e]xpress contractual provisions always supersede the implied covenant."[98] "The contract may identify factors that the decision-maker can

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Hldgs., LLC, 2012 WL 34442, at *13 n.58 (Del. Ch. Jan. 6, 2012) ("[I]f a contract has no gaps, then the implied covenant is not applicable to that contract. A limited partnership agreement may not validly state that 'the implied covenant is not part of this agreement,' but if a limited partnership agreement simply has no gaps, then the implied covenant will never apply to that agreement."); *Alliance Data Sys. Corp. v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, 770 (Del. Ch. 2009) ("[T]he implied covenant only applies where a contract lacks specific language governing an issue . . . ."); *Airborne Health, Inc. v. Squid Soap, L.P.*, 984 A.2d 126, 146 (Del. Ch. 2009) ("The doctrine thus operates only in that narrow band of cases where the contract as a whole speaks sufficiently to suggest an obligation and point to a result, but does not speak directly enough to provide an explicit answer.").

[96] 1996 WL 560190, at *1 ("[T]he specific question presented here—the scope of discretion allowed to the limited partners in effecting the general partner's removal—is not [addressed]. The disputed provision does not, for example, explicitly state that the limited partners' determination will be 'in their sole discretion.'").

[97] *Airborne Health*, 984 A.2d at 146-47 (citations omitted). *See also ASB Allegiance Real Estate Fund v. Scion Breckenridge*, 2012 WL 3027351, at *4 (Del. Ch. July 9, 2012) ("When exercising a discretionary right, a party to the contract must exercise its discretion reasonably") (citations omitted).

[98] *ASB Allegiance*, 2012 WL 3027351, at *4 (citations omitted).

consider, and it may provide a contractual standard for evaluating the decision."[99] Section 3.10(a)(ii) explicitly provides when the Limited Partners may exercise their discretion to remove the Managing Partner. Therefore, the Court will not imply any additional obligations into Section 3.10(a)(ii). In order to remove the Managing Partner without cause, the Limited Partners need to show that 75% of the Limited Partnership Interests held by all Limited Partners were voted to remove the Managing Partner after a determination, in good faith, that removal was necessary for the best interest of the Limited Partnership. Because the Limited Partners, who hold 100% of the Limited Partnership Interests held by all Limited Partners, duly executed the Written Consent,[100] the only issue to be decided with regard to Section 3.10(a)(ii) is whether the Limited Partners determined, in good faith, that removal of the Managing Partner was necessary for the best interest of the Limited Partnership.

The LPA, however, does not define good faith, and good faith can sometimes include objective, as well as subjective, elements.[101] Thus, the question becomes: What definition of good faith did the parties intend to place in the LPA? On the one hand, had the parties intended to adopt a wholly subjective standard of good faith, they could have easily placed the word "subjective" before the words

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[99] *Id.* (citations omitted).

[100] Pre-Trial Stipulation at 5.

[101] *See, e.g.*, 6 *Del. C.* § 1-201(20) ("'Good faith', except as otherwise provided in Article 5 [which deals with letters of credit], means honesty in fact and the observance of reasonable commercial standards of fair dealing.").

"good faith" in Section 3.10(a)(ii). On the other hand, had the parties intended to impose an objective requirement on the Limited Partners' ability to remove the Managing Partner, they could have also easily placed the words "and reasonably" after the words "good faith." Section 3.10(a)(ii), however, simply provides that the Limited Partners must act in "good faith." Therefore, it is ambiguous what definition of "good faith" exists in Section 3.10(a)(ii).

Because the LPA provides that it "is made pursuant to and shall be governed by the laws of the State of Delaware,"[102] the Court will presume that the parties intended to adopt Delaware's common law definition of good faith as applied to contracts. The common law definition of good faith, at least in the fiduciary context, was historically subjective,[103] but there has been some suggestion that that may no longer be the case.[104] The common law definition of good faith as applied

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[102] LPA § 12.14 (all capitals in original).

[103] *See Kahn v. Roberts*, 1995 WL 745056, at *4 (Del. Ch. Dec. 6, 1995) ("Chancellor Allen, in *Cinerama,* articulated three elements that comprise the business judgment rule: (1) a threshold review of the objective financial interests of the board whose decision is under attack (*i.e.,* independence); (2) a review of the board's subjective motivation (*i.e., good faith*); and (3) an objective review of the process by which it reached the decision under review (*i.e.,* due care).") (citing *Cinerama, Inc. v. Technicolor, Inc.*, 1991 WL 111134, at *8 (Del. Ch. June 24, 1991, revised June 24, 1991), *rev'd on other grounds,* 634 A.2d 345 (Del.1993)); *Ivanhone Partners v. Newmont Mining Corp.*, 533 A.2d 585, 607 (Del. Ch. 1987) ("In this context the entire fairness test is objective, that is, the fairness of the Board's response to the takeover threat is measured by its objective effect, not by the directors' subjective intent or good faith in adopting the response.") (citing *AC Acquisitions Corp. v. Anderson, Clayton & Co.,* 519 A.2d 103, 115 (Del. Ch. 1986)).

[104] *See In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006) ("The good faith required of a corporate fiduciary includes not simply the duties of care and loyalty, in the narrow sense that I have discussed them above, but all actions required by a true faithfulness and devotion to the interests of the corporation and its shareholders. A failure to act in good faith

to contracts is primarily subjective, but there is likely some conduct which is so unreasonable that this Court will necessarily determine that it could not have been undertaken in good faith. That may be because the common law definition of good faith as applied to contracts contains an objective element or it may be that, regardless of the evidence presented as to subjective intent, the Court will necessarily (almost always) find that certain conduct could not possibly have been undertaken in good faith.[105] Articulating with precision what specific conduct will fall into this category is not possible. Context matters—what is utterly unreasonable in one setting may be perfectly acceptable in another.

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may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties. There may be other examples of bad faith yet to be proven or alleged, but these three are the most salient.") (quoting *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 755 (Del. Ch. 2005)). *But see Desimone v. Barrows*, 924 A.2d 908, 951 n.97 (Del. Ch. 2007) ("Many advocates of the 'triad [],' believed that independent directors should be held responsible in damages when a fact-finder after the fact determines that the directors, if acting with reasonable diligence, could have prevented harm. Those advocates hoped that a free-standing duty of good faith could be a vehicle toward that purpose, as a way of maneuvering around the protections of § 102(b)(7) and reinstating a more *Smith v. Van Gorkom,* 488 A.2d 858 (Del. 1985)-like regime in the area of director monitoring, by terming a supposedly objectively-unreasonable lapse in monitoring to be an action 'not in good faith.' . . . By making clear that *Caremark* was good law and that damages liability for failures in monitoring required proof of scienter, *Stone* upheld the strong protection afforded to disinterested directors by § 102(b)(7) provisions."). In this case, the Court is not faced with an issue of whether a fiduciary acted in good faith, and thus, the Court is not opining on what is required of fiduciaries.

[105] *See Nelson v. Emerson*, 2008 WL 1961150, at *8 n.56 (Del. Ch. May 6, 2008) ("Nelson's argument that good faith in bankruptcy law only considers objective factors whereas good faith in Delaware fiduciary duty law considers subjective intent is misguided. . . . [T]he use of objective factors as a proxy for subjective intent makes sense.") (citing *Prod. Res. Group, LLC v. NCT Group, Inc.*, 863 A.2d at 772, 793 n.85 (Del. Ch. 2004)); *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) (explaining that conduct undertaken in subjective good faith may nonetheless be impermissible).

The conduct of the Limited Partners in this case does not approach the sort of unreasonable conduct that is necessarily undertaken in bad faith. A test is nevertheless required; the Limited Partners' conduct must be analyzed under some rubric. And, although defining good faith in the context of common law contracts as wholly subjective captures most of what that term encompasses, there is likely a little more to it or at least a gloss that comes into play when the Court is faced with conduct that is utterly unreasonable. 6 *Del. C.* § 1-201(20), which applies to contracts involving "goods," provides: "'Good faith', except as otherwise provided in Article 5 [which deals with letters of credit], means honesty in fact and the observance of reasonable commercial standards of fair dealing." The definition prescribed in 6 *Del. C.* § 1-201(20) is at least as broad of a definition of good faith as that applied to contracts at common law, and, as discussed below, the Limited Partners can meet the definition of good faith in 6 *Del. C.* § 201(20). Thus, the Limited Partners necessarily satisfy Delaware's common law definition of good faith as applied to contracts, which is the definition of good faith that the Court presumes was adopted in Section 3.10(a)(ii) of the LPA.

C. *The Limited Partners Determined in Good Faith that Removal of the Managing Partner was Necessary for the Best Interest of Limited Partnership*

For the reasons discussed below, the Court finds that the Limited Partners met the standard of good faith provided for in Section 3.10(a)(ii). The Limited Partners have shown that they honestly believed that the removal of the Managing

Partner was necessary for the best interest of the Limited Partnership, and that they observed reasonable commercial standards of fair dealing.

1. The Limited Partners May Show that they Acted in Good Faith Without Offering Testimony from their Boards of Trustees

The Limited Partners are not natural persons; they are pension funds. Whether a pension fund, or any other artificial entity, acts in good faith depends on the actions and intentions of the natural persons who have the ability to act on its behalf.[106] Each limited partner's board of trustees has the ultimate authority to act on its behalf, and, with the exception of the CTA Fund, each limited partner approved the removal of the Managing Partner through its board of trustees. Thus, testimony by the members of the boards of trustees about what they knew when they approved the removal of the Managing Partner, and what motivated their decision would certainly have been one way to show that the Limited Partners acted in good faith.

That is, however, not the only way. A resolution by a board of trustees outlining what motivated it, or minutes from a board meeting showing what the trustees knew and/or what they said would be relevant to the issue of, and perhaps sufficient to show, good faith by the entity under the direction of that board of trustees. Moreover, where evidence shows that a board of trustees relied on a third

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[106] *See, e.g.*, *Gerber*, 2012 WL 34442, at *11 n.46 ("The Court recognizes, however, that Enterprise Products GP is an artificial entity, and, thus, the actions that are deemed attributable to it are undertaken by the people who have authority to act on its behalf.").

party to provide it with information about a matter, testimony by the third party as to what it told the board, coupled with a showing that the board acted in reliance on what it was told by the third party, may be sufficient to show good faith. The Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund rely on this evidentiary theory to prove their case. The CTA Fund can prove its case through the testimony of Kallianis because Kallianis had the authority to decide whether to consent to remove the Managing Partner on behalf of the CTA Fund.

2. The Boards of Trustees of the Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund Relied on the Final Townsend Report in Approving the Removal of the Managing Partner

At trial, it was shown that the boards of trustees of the Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund relied on the Final Townsend Report in Approving the Removal of the Managing Partner.[107] Although, as discussed below, statements from each Limited Partner's executive director to its board of trustees corroborates the Final Townsend Report, that report was the principal document that the boards of trustees relied upon. Moreover, there was no admissible credible evidence that the boards of trustees considered any issues regarding the Limited Partnership that were outside the scope of the Final Townsend Report in making their removal decisions. Thus, on the

[107] JX 48 at 632; Trial Tr. 309 (Gallagher); JX 49 at 36; JX 50 at 6; JX 59 at 2-3; JX 62 at 3.

evidentiary record produced at trial, the only issues that the Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund could have possibly relied upon in deciding to remove the Managing Partner were the issues listed in the Final Townsend Report.

The Limited Partners argue that the principal basis for their decision to consent to remove the Managing Partner was the Managing Partner's continuous failure to have the Limited Partnership's audited financial statements completed in the time prescribed by Section 11.5. The Limited Partners also argue that several Red Flags influenced their decision. The recommendation of removal in the Final Townsend Report was based, in part, on the Managing Partner's failings with regard to the Limited Partnership's financial statements. As stated in the report, "[b]oth quarterly and annual reporting from the . . . [Limited Partnership] has routinely been late. For example, the manager did not release audited financial statements for calendar year 2008 until September 2009. The 2009 audit was released in February 2011."[108] The only Red Flags mentioned in the Final Townsend Report, however, are (1) Vanecko's resignation; (2) the dysfunction of the Advisory Committee; (3) the Dudek Lawsuit; and (4) the Managing Partner's use of recourse debt in violation of the LPA.[109] Thus, on the record currently

[108] Final Townsend Report at 3.
[109] The Final Townsend Report does not mention the Grand Jury Subpoenas, the RSM Memorandum, the $510,837 Development Fee, or the Managing Partner's alleged failure to

before the Court, those are the only Red Flags that the Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund could have possibly relied upon in deciding to remove the Managing Partner.

Ultimately, the Court determines that the Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund have shown that the Managing Partner's continuous failure to have the Limited Partnership's audited Financial statements completed in the time prescribed by Section 11.5 provided them with a good faith belief that the Managing Partner needed to be removed for the best interest of the Limited Partnership. In the interest of the completeness, however, the Court will also discuss the Red Flags mentioned in the Final Townsend Report. The Court concludes that those Red Flags provide modest additional support for the removal decisions of the Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund.

3. The Final Townsend Report Provided the Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund With the Good Faith Belief that They Needed to Remove the Managing Partner

The Executive Directors, who, for the most part, the Court found to be believable witnesses, all testified that one of their biggest concerns regarding the

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cooperate with Heitman. The Final Townsend Report does state that "[t]he investors previously sought an independent assessment from another manager (Heitman)," but the report does not say anything else about Heitman's analysis. Thus, the report does not even explain whether Heitman's analysis was completed, much less why it was not completed. In short, the Court does not view the Final Townsend Report as raising the Managing Partner's alleged failure to cooperate with Heitman as an issue to be considered by the Limited Partners.

Managing Partner was its consistent failure to have the Limited Partnership's audited financial statements completed in the time prescribed by Section 11.5 of the LPA.[110] Moreover, the documentary evidence supports that the Executive Directors held that position.[111] With regard to the Limited Partnership's audited financial statements for 2008 and 2009, the Managing Partner informed the Limited Partners that the reason those statements were not completed on time was that the Managing Partner took time to refinance certain loans before having the audit issued so that it could avoid a going concern opinion.[112] There is nothing inherently wrong with that stance. Perhaps it made good business sense.

The Executive Directors, however, disagreed. Although the Managing Partner viewed the avoidance of a going concern opinion in the annual audited financial statements as more important to the Limited Partnership than having those statements completed in the time prescribed by Section 11.5, the Executive Directors made the opposite determination.[113] Moreover, because the Managing

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[110] Trial Tr. 56 (Huber), 229, 267 (Gallagher), 326-27 (Mohler), 384 (Capasso), 404, 406 (Kallianis).

[111] Limited Partners' June 5, 2009 E-mail; Limited Partners' August 25, 2009 Letter; Limited Partners' May 26, 2010 Letter.

[112] *See* Allison's September 9, 2009 Letter at 1-2 ("The Deloitte auditors' position has been that unless these loans were extended, our audit would have a 'going concern' note which is not desirable," and that "it is in our collective best interest to have an audit issued which does not have a 'going concern' note."); Allison and Jared's June 9, 2010 E-mail ("Our goal is to have a 'clean' audit issued which does not impair our relationship with you, our lenders, creditors or third parties.").

[113] Limited Partners' June 5, 2009 E-mail; Limited Partners' August 25, 2009 Letter; Limited Partners' May 26, 2010 Letter; Trial Tr. 56, 67 (Huber), 241-42 (Gallagher), 332-33, 374 (Mohler), 383-84 (Capasso), 410 (Kallianis).

Partner viewed the avoidance of a going concern opinion as more important than the timely completion of the Limited Partnership's annual audited financial statements, the Managing Partner allowed those statements to be issued hundreds of days late so that a going concern opinion could be avoided. Those delays were a major issue for the Executive Directors because they viewed the timely completion of the annual audited financial statements as critical to the well-being of the Limited Partnership.[114] Moreover, the Executive Directors informed their respective boards of trustees that they viewed the timely completion of the Limited Partnership's audited financial statements as critical, and that they were concerned that the Managing Partner continually failed to have those statements completed on time.[115] Thus, the Court finds that the Executive Directors honestly believed that the removal of the Managing Partner was necessary for the best interest of the Limited Partnership—the Executive Directors viewed the completion of the Limited Partnership's annual audited financial statements as critical, and the Managing Partner continually failed to have those statements completed on time.

The Executive Directors' concern about the Limited Partnership's audited financial statements led them to retain Townsend on behalf of the Limited Partners. The Defendants challenge the Final Townsend Report as a preordained removal

[114] Trial Tr. 56, 69-70 (Huber), 241-42, 267 (Gallagher), 326-27, 374 (Mohler), 383-84 (Capasso), 405-06 (Kallianis).
[115] *Id.* at 120-21, 126-27 (Huber), 235 (Gallagher), 339 (Mohler), 381-82 (Capasso), 411 (Kallianis).

recommendation. The retention of Townsend does look somewhat like an attempt to paper over the Limited Partner's removal decision, and, to the extent the Executive Directors claim to have been undecided on the removal issue until they received the Final Townsend Report, the Court finds that claim inconsistent with the evidentiary record.

In the fall of 2010, Huber reached out to Kochis about Townsend's take on the Managing Partner. Both Kochis and Huber testified that, at that time, Huber did not ask for a recommendation that the Managing Partner be removed.[116] That may be technically true, but Kochis definitely understood Huber to be seriously interested in removal. On September 24, 2010, Kochis prepared (but did not send) a letter to Huber with the subject line "DV Urban Realty Partners Fund I: recommended manager change."[117] Then on September 27, 2010, Kochis informed Townsend's advisory committee that the Teachers' Fund had requested a removal recommendation.[118] Even Kochis's attempt, at trial, to explain away his comments on September 27, 2010, suggests that, during September 2010, Kochis understood removal to be a serious, if not the main, option: "Well, what I told the committee was we were starting a process, we were evaluating DV. I thought termination

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[116] *See id.* at 95 (Question: "Did you tell Mr. Kochis that you wanted Townsend to recommend the removal of the general partner?" Huber: "No, not at all."); *id.* at 504 (Question: "Did Mr. Huber instruct you to obtain a recommendation that the general partner be removed?" Kochis: "No.").
[117] Kochis's September 24, 2010 Letter.
[118] Minutes from September 27, 2010 Townsend Meeting.

could happen in this case. It was certainly likely. Grounds existed."[119] Then on October 1, 2010, Kochis sent Huber a letter stating that "[w]e discussed recently whether grounds exist to terminate . . . [the Managing Partner] as General Partner of . . . [the Limited Partnership]. We [Townsend] believe grounds do exist."[120] If Huber had not actually made up his mind on removal by October 1, he was at least very interested in that prospect.

By November 10, 2010, when Kochis made a presentation to all of the Executive Directors, the Court finds that they were all considering, and perhaps seeking, removal of the Managing Partner. Kochis's presentation outlined the pros and cons of removing the Managing Partner.[121] If a person listens to a presentation of the pros and cons of removal, then that person knows that removal is an option. Moreover, by the time the Limited Partners actually engaged Townsend in January 2011, the Court finds that the Executive Directors wanted to remove the Managing Partner. The engagement letter goes so far as to state that Townsend will "identify a replacement manager. . . ."[122] Thus, the Executive Directors intended to seek removal of the Managing Partner before they received the Final Townsend Report.

There is, however, nothing wrong with that. The fact that the Executive Directors suggest that they relied on the Final Townsend Report for more than they

[119] Trial Tr. 505-06 (Kochis).
[120] Kochis's October 1, 2010 Letter.
[121] Kochis's November 10, 2010 Presentation Materials.
[122] Townsend's Engagement Letter (bold omitted).

actually did, raises the spectre of misconduct, but the evidence produced at trial shows that there was nothing wrong with the Executive Directors' actions. The Executive Directors honestly believed that the Managing Partner needed to be removed because it was unable to have the Limited Partnership's audited financial statements completed on time. The Executive Directors could have advised their boards of trustees to remove the Managing Partner on that basis, and the boards of trustees could have, in subjective good faith, approved removal on that basis.

The Executive Directors, however, decided to take a different route; they hired Townsend. The Final Townsend Report, which was provided to the boards of trustees of the Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund, recommended that the Limited Partners remove the Managing Partner for several facially legitimate reasons, including the Limited Partnership's poor financial performance, and the fact that "[b]oth quarterly and annual reporting from the Fund has routinely been late."[123] The boards of trustees of the Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund then voted to remove the Managing Partner for the reasons outlined in the Final Townsend Report.[124] That, in and of itself, might not be sufficient to show that those boards of trustees acted in subjective good faith.

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[123] Final Townsend Report at 3.
[124] JX 48 at 632; Trial Tr. 309 (Gallagher); JX 49 at 36; JX 50 at 6.

The evidence in this case, however, goes further. Each board of trustees knew that its executive director viewed the timely completion of the Limited Partnership's audited financial statements as critical, and that its executive director was concerned that the Managing Partner continually failed to have those statements completed on time.[125] Thus, each board of trustees could independently corroborate the existence and importance of one of the issues raised in the Final Townsend Report, namely: the Managing Partner's failure to have the Limited Partnership's annual audited financial statements completed on time. That ability to corroborate independently suggests that the boards of trustees of the Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund did not just blindly accept the Final Townsend Report. Rather, it seems that the Final Townsend Report verified what those boards of trustees had already been told by their executive directors. Therefore, the evidence produced at trial suggests that when the boards of trustees of the Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund consented to remove the Managing Partner, on behalf of those Limited Partners, they held an honest belief that removal of the Managing Partner was necessary for the best interest of the Limited Partnership.

[125] Trial Tr. at 120-21, 126-27 (Huber), 235 (Gallagher), 339 (Mohler), 381-82 (Capasso), 411 (Kallianis).

Moreover, the Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund observed reasonable commercial standards of fair dealing when they consented to remove the Managing Partner. The Court has been persuaded that the principal basis for the Limited Partners' decision to remove the Managing Partner was the Managing Partner's consistent failure to have the Limited Partnership's annual audited financial statements completed on time. As discussed above, the Limited Partners viewed the timely completion of the annual audited financial statements as critical to the well-being of the Limited Partnership, and the Managing Partner's failure to have to have those statements completed on time was what caused the Limited Partners to execute the Written Consent. Annual audited financial statements provide significant value to a business.[126] Thus, when a limited partnership agreement places, on a general partner, the duty of having the limited partnership's audited financials completed by a specific time, and the general partner consistently fails to meet that duty, it is objectively reasonable to believe that is necessary in the best interest of the limited partnership

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[126] *See, e.g.*, *In re Am. Int'l Group, Inc.*, 965 A.2d 763, 821 (Del. Ch. 2009) ("[T]he outside auditor's fulfillment of its important gatekeeping duties is . . . important to ensuring that Delaware corporations comply with their legal duties and conduct their affairs in a way that advances their investor's interests. . . ."). Moreover, although, as stated above, the Court finds that the Limited Partners have not shown that they relied on the $510,837 Development Fee in deciding to remove the Managing Partner, that fee does illustrate why audited annual financial statements are so important. The Limited Partners only learned of the $510,837 Development Fee when they received the Limited Partnership's 2009 audited financial statements, and even if the $510,837 Development Fee was permitted under the LPA, any reasonable limited partner would still want to know that the general partner managing the limited partnership received, from the limited partnership, a $510,837 fee for walking away from a deal.

to replace that general partner. In sum, when the Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund consented to remove the Managing Partner, they met the standard of good faith established in Section 3.10(a)(ii).

4. The Red Flags Mentioned in the Townsend Report Provide Modest Additional Support for the Removal Decisions of the Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund

a. *Vanecko's Resignation*

Effective July 1, 2009, Vanecko and Occam-DV departed the Limited Partnership. During the summer of 2009, the *Chicago Sun-Times* published stories speculating that Vanecko had improperly used his relationship with Daley, his uncle, in connection with the Limited Partnership. It is clear to the Court that Occam-DV (and with it Vanecko) purported to resign because of the stories published in the *Chicago Sun-Times*. As explained in a letter sent to the Limited Partners: "Recently . . . [Vanecko's] activities on behalf of our [Limited] Partnership have been mischaracterized as improper."[127] To the extent the Limited Partners did not believe that explanation, or feared that there was some truth to the allegations in the articles, they waited over a year to take any action toward removing the Managing Partner. Moreover, there has been no suggestion that,

[127] Vanecko's Resignation Letter.

after Vanecko resigned, the Limited Partners received any information further substantiating the assertions made in the *Chicago Sun-Times*.

There was also testimony at trial that certain Limited Partners viewed Vanecko as an asset to the Limited Partnership. He apparently is financially savvy, and at least some Limited Partners expected him to be significantly involved in completing the Limited Partnership's annual audited financial statements.[128] The Court accepts that testimony, and the failure of the Limited Partnership to entice another general partner to serve with the Managing Partner provides some support for the Limited Partners' argument that they wanted to remove the Managing Partner and "start over." Timing, however, remains somewhat of an issue. If the Limited Partners were really that worried about Vanecko's withdrawal, why did they wait as long as they did to even begin the removal process? Nonetheless, Occam-DV's resignation was a factor that the Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund could have viewed in good faith as favoring (although probably only slightly) the removal of the Managing Partner.

b. *The Dysfunction of the Advisory Committee*

As an initial matter, the parties disagree as to the purpose of the Advisory Committee. The Managing Partner characterizes it as an entity that exists primarily, if not solely, for its benefit. Thus, the Managing Partner contends that

[128] Trial Tr. 59 (Huber).

any issues with the Advisory Committee should have very little, if any, relevance to a decision by the Limited Partners. The Limited Partners claim to have viewed the Advisory Committee as a valuable governance tool, and therefore, that they viewed its dysfunction and eventual demise as significant issues.

The Advisory Committee, as laid out in Section 6.1 of the LPA, does appear to be a valuable governance tool that the Limited Partners could have relied upon. In practice, however, the Advisory Committee never seems to have functioned as envisioned. Moreover, several of the Limited Partners were aware that the Advisory Committee never functioned properly as several of the Executive Directors attended many, if not most, of the Advisory Committee's meetings. Thus, for example, at least several of the Limited Partners knew that the Advisory Committee had never been properly constituted after July 2007.[129] Had the Advisory Committee functioned as envisioned, and then stopped functioning, the Limited Partners would likely be able to show that that fact influenced their decision. Here, however, there has been no suggestion that the Advisory Committee ever provided much real benefit, and the Limited Partners did not complain about that fact for years. Thus, the Court gives little weight to the argument that the Limited Partners viewed the dysfunction of the Advisory Committee and its eventual demise as serious issues.

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[129] *See* JX 122 (An Advisory Committee meeting attended by Mohler, Capasso, and Gallagher where the resignation of Rogers was announced).

c. *The Dudek Lawsuit*

In the Dudek Lawsuit, Dudek claims he is entitled to a finder's fee from the Managing Partner, and there is some evidence in Dudek's favor: namely, a written agreement, although perhaps not enforceable, between Dudek and the Managing Partner, which purports to entitle Dudek to 2% of the capital raised from the Limited Partners. Under Section 4.1(b) of the LPA, the Limited Partnership and the General Partners are prohibited from paying a finder's fee. Thus, the Limited Partners could in good faith have viewed the Dudek Lawsuit as evidence that the Managing Partner either breached the LPA or came very close to breaching the LPA. Moreover, the Dudek Lawsuit was filed in April 2010, which is only a few months before the Executive Directors' determined to seek the removal of the Managing Partner. Thus, the Dudek Lawsuit does provide some support for the removal decisions of the Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund.

d. *The Alleged Use of Recourse Debt*

The Final Townsend Report states that the Limited Partnership "has incurred substantial recourse debt obligations on 7 of 9 projects, and it does not appear that all such guarantees were approved by investors or the Advisory Committee as required . . . [by Section 3.2 of the LPA]."[130] The Limited Partners, however, do

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[130] Final Townsend Report at 3.

not focus on that statement in their post-trial briefing. Rather, the Limited Partners suggest that they did not learn that the Managing Partner was violating Section 3.2 until trial.[131] Because the Limited Partners do not appear to have relied on the portion of the Final Townsend Report discussing recourse debt, that portion of the report does not provide any support for the removal decisions of the Policemen's Fund, the Teachers' Fund, the Laborers' Fund, or the Municipal Fund. Moreover, the Limited Partners' discovery of the Managing Partner's use of recourse debt at trial cannot provide support for removal decisions made months *before* the trial.[132]

5. Kallianis, on Behalf of the CTA Fund, Consented to Remove the Managing Partner for the Reasons Listed in the Final Townsend Report

The CTA Fund authorized Kallianis "to take action to remove and replace the . . . [Managing] Partner of the [L]imited [P]artnership . . . ."[133] Kallianis signed the Written Consent on behalf of the CTA Fund, removing the Managing Partner. Kallianis credibly testified that he decided to remove the Managing Partner for several reasons, including the reasons listed in the Final Townsend Report.[134] As

[131] *See* Pls.' Post-Trial Opening Br. at 11 ("The Limited Partners would discover that the . . . [Managing] Partner violated . . . [Section 3.2] by causing the Limited Partnership to incur recourse debt with respect to several real estate properties held by the Limited Partnership.") (citing Trial Tr. 571 (Jared)).

[132] As a general matter, the Court finds that facts discovered by the Limited Partners after they had already decided to remove the Managing Partner are irrelevant to the question of whether their removal decisions were made in good faith. Thus, for example, the Court accords no weight to the fact that Allison refused to provide certain documents to the Limited Partners in December 2011, or that the Limited Partners learned that Deloitte stopped serving as the Limited Partner's auditor in January 2012.

[133] JX 59 at 2.

[134] Trial Tr. 410-19 (Kallianis).

stated above, the reasons for removal listed in that report, and in particular the Managing Partner's inability to have the Limited Partnership's annual audited financial statements completed on time, provide a subjective good faith basis to believe that removal of the Managing Partner was necessary in the best interest of the Limited Partnership. Also, as discussed above, the decision to remove the Managing Partner was consistent with reasonable commercial standards of fair dealing. Thus, when Kallianis, on behalf of the CTA Fund, consented to remove the Managing Partner, he had a good faith basis for removal that satisfied the requirements of Section 3.10(a)(ii) of the LPA.

The Managing Partner challenges the CTA Fund's ability to provide Kallianis with the authority to make the removal decision. Governing bodies, however, routinely delegate responsibilities, often significant ones, to their agents.[135] If the CTA Fund was not permitted, under law, to act as it did, then the Managing Partner should have pointed the Court to the law that prevented the CTA Fund from acting. The Managing Partner did not. Moreover, the CTA Fund's board of trustees only authorized Kallianis to remove the Managing Partner after

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[135] *See, e.g.*, *Grimes v. Donald*, 1995 WL 54441, at *8 (Del. Ch. Jan. 11, 1995), *aff'd*, 673 A.2d 1207 (Del. 1996) ("[G]iven the large, complex organizations through which modern, multi-function business corporations often operate, the law recognizes that corporate boards, comprised as they traditionally have been of persons dedicating less than all of their attention to that role, cannot themselves manage the operations of the firm, but may satisfy their obligations by thoughtfully appointing officers, establishing or approving goals and plans and monitoring performance.").

the board had received the Final Townsend Report. Therefore, the discussion above, explaining that the boards of trustees of the Policemen's Fund, the Teachers' Fund, the Laborers' Fund, and the Municipal Fund acted in good faith, is also applicable to the CTA Fund's board of trustees. In sum, all of the Limited Partners had a good faith basis for removal that satisfied the requirements of Section 3.10(a)(ii).

It is also important to note that the Limited Partners do not need to know that Lincoln will deliver the Limited Partnership's annual audited financial statements in the time prescribed by the LPA in order to be able to show that they removed the Managing Partner in good faith. The Limited Partners knew that the Managing Partner was not delivering the Limited Partnership's annual audited financial statements on time, and the Limited Partners believed that the timely completion of those statements was crucial to the Limited Partnership. Thus, the Limited Partners may, in good faith, replace the Managing Partner with another entity, and see whether that entity is able to comply with Section 11.5 of the LPA.

6. There is Little Evidence that the Limited Partners Removed the Managing Partner Because of its Connections with Daley, and Any Evidence that Does Exist is Outweighed by Evidence Suggesting that the Limited Partners Acted Because of the Delayed Financial Statements

The Managing Partner argues that the issues highlighted in the Final Townsend Report were not what motivated the Limited Partners' removal decisions. Instead, the Managing Partner argues, the Limited Partners wanted to

remove the Managing Partner because the Managing Partner was drawing unwanted media attention. As an initial matter, media attention began in 2007, was primarily related to Vanecko, and eased up after Occam-DV resigned as a general partner.[136] Thus, any impetus to remove the Managing Partner because of media reports seems essentially to have come and gone by the time either the Executive Directors or the Limited Partners started to consider removal seriously.

There is also evidence that at least some of the Limited Partners knew before they even invested in the Limited Partnership that Vanecko, because of his relationship with Daley, might attract unwanted attention.[137] Nonetheless, the Managing Partner has offered some evidence for its position that at least some of the Limited Partners did not like unwanted media attention or being associated with Daley. To the extent that evidence suggests that the Limited Partners

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[136] Jared Dep. 72 (Question: "And when did this press—the press you're referring to, when was that published generally speaking? Approximately." Jared: "My recollection is the majority of it came between sometime in 2007 culminating with his [Vanecko's] departure in 2009, but has continued on beyond that date until this very day.").

[137] *See* Trial Tr. 27 (Huber):

> The question was when I learned about Mr. Vanecko being the mayor's nephew. I learned in the fall of 2005. And at that point in time the DV Urban investment was well on its way to being closed. The contracts hadn't been signed yet, but the investment had been approved.
>
> So I informed the trustees, as well, just to make sure everyone knew that this indeed—Mr. Vanecko is very well qualified, very well qualified—was Mayor Daley's nephew and that, most likely, this would probably cause some publicity risk, and that they just needed to be aware of that and make sure that they wanted to proceed forward with the investment.
>
> And they did. At the next board meeting—I believe I let them know in an e-mail in September of '05—and at the October meeting there was no noise. The trustees were full steam ahead with that investment.

consented to remove the Managing Partner in order to avoid unwanted attention, it is outweighed by the evidence that the Limited Partners acted because of the issues raised in the Final Townsend Report, particularly the Managing Partner's inability to have the Limited Partnership's annual audited financial statements completed in the time prescribed by the LPA.

D. *A Quick Word on Attorneys' Fees*

The Limited Partners requested an award of attorneys' fees in the Complaint as well as in the Pre-Trial Stipulation. The Limited Partners do not seem to have made any argument in favor that request. Suffice it to say, this case does not present "extraordinary circumstances" warranting a deviation from the American Rule.[138]

V. CONCLUSION

For the foregoing reasons, the Limited Partners' request for a declaration that they validly removed the Managing Partner, DV Realty Advisors LLC, as a general partner of the Limited Partnership, DV Urban Realty Partners I L.P., is granted, and the Limited Partners' request for an award of attorneys' fees is denied.

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[138] *See Montgomery Cellular Hldg. Co., Inc. v. Dobler*, 880 A.2d 206, 227 (Del. 2005) ("Delaware follows the American Rule, whereby a prevailing party is generally expected to pay its own attorney's fees and costs. This Court has recognized limited equitable exceptions to that rule, including the exception for bad faith conduct during the litigation. Although there is no single, comprehensive definition of bad faith that will justify a fee-shifting award, Delaware courts have previously awarded attorneys' fees where (for example) parties have unnecessarily prolonged or delayed litigation, falsified records or knowingly asserted frivolous claims. The bad faith exception is applied in extraordinary circumstances as a tool to deter abusive litigation and to protect the integrity of the judicial process.") (citations and internal quotations omitted).

The parties have requested that the Court wait to issue an implementing order to allow them the opportunity to decide whether to request that the Court address issues regarding the Managing Partner's Capital Account.[139] The Court grants that request; an implementing order will be issued in due course.

[139] Letter from Richard L. Renck, Esq. to the Court, dated May 18, 2012.