



IN THE

Supreme Court of the State of Delaware

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DV REALTY ADVISORS LLC,
Defendant Below, Appellant,
v.

POLICEMEN'S ANNUITY AND BENEFIT
FUND OF CHICAGO, ILLINOIS;
MUNICIPAL EMPLOYEES' ANNUITY AND
BENEFIT FUND OF CHICAGO; LABORERS'
AND RETIREMENT BOARD EMPLOYEES'
ANNUITY AND BENEFIT FUND OF
CHICAGO; RETIREMENT PLAN FOR
CHICAGO TRANSIT AUTHORITY
EMPLOYEES' TRUST; AND PUBLIC
SCHOOL TEACHERS' PENSION AND
RETIREMENT FUND OF CHICAGO,

Plaintiffs Below, Appellees.

No. 547, 2012

COURT BELOW:

COURT OF CHANCERY OF
THE STATE OF DELAWARE,
C.A. No. 7204-VCN

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NATURE OF PROCEEDINGS

This appeal is taken from a declaratory judgment, entered after trial pursuant to 6 *Del. C.* § 17-110(a), declaring that based on the evidence presented the appellee limited partners validly removed “without Cause” the appellant general partner (the “Managing Partner”) of a Delaware limited partnership (the “Limited Partnership”). The five limited partners (the “Limited Partners”), which collectively owned 95.1% of the Limited Partnership, unanimously consented to remove the Managing Partner without Cause. The sole issue tried and decided by the Court of Chancery, and appealed from by the Managing Partner, was whether, under the terms of the governing Limited Partnership Agreement (the “LPA”), “the Limited Partners determined, in good faith, that removal of the Managing Partner was necessary for the best interest of the Limited Partnership.” Post-Trial Op. at 32.¹

After holding a two-day trial in April, the Court of Chancery on August 16, 2012 issued a detailed 56-page Memorandum Opinion finding that the Limited Partners in good faith determined that the removal of the Managing Partner was, in accordance with the terms of the LPA, necessary for the best interest of the Limited Partnership and, as such, valid. *Id.* at 1, 35, 39, 41, 44, 47, 52. In particular, the Court of Chancery found that “the Limited Partners met the standard of good faith provided for in Section 3.10(a)(ii)” of the LPA, because they “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.” *Id.* at 35-36. The Court of Chancery further found that based upon the evidence, “it [was] *objectively reasonable* [for the Limited Partners] to believe that [it was] necessary in the best interest of the limited partnership to replace that general partner.” *Id.* at 46-47 (emphasis added).

To implement its Memorandum Opinion, on September 7, 2012, the Court of Chancery entered an Order and Partial Final Judgment under Court of Chancery Rule 54(b). The Court of Chancery has retained

¹ The Court of Chancery’s Post-Trial Opinion was included as Exhibit A to the Corrected Opening Brief of Appellant DV Realty Advisors LLC. Citations to the Post-Trial Opinion in this brief are in the form “Post-Trial Op. at ____.”

jurisdiction to consider certain “follow-on” disputes flowing from the removal of the Managing Partner, including anticipated disputes concerning the calculation and distribution of the Managing Partner’s capital account and any disputes arising out of the implementation of the Court of Chancery’s Post-Trial Opinion. On October 5, 2012, the Managing Partner timely filed its notice of appeal from the Court of Chancery’s declaratory judgment.

SUMMARY OF ARGUMENT

1. Denied in part. The Court of Chancery correctly found that the Limited Partners met the contractual standard for removal of the Managing Partner “without Cause” set forth in Section 3.10(a)(ii) of the LPA: the Limited Partners “in good faith determine[d] that such removal [was] necessary for the best interest of the [Limited] Partnership.” A252. Respectfully, the Court of Chancery ruled incorrectly that as used in the LPA, “good faith” includes both subjective good-faith—“honesty in fact”—and an element of objectivity— “reasonable commercial standards of fair dealing.” Post-Trial Op. at 35. The proper standard called for by the LPA is a purely subjective one. Nevertheless, based upon its weighing of the evidence at trial, the Court of Chancery correctly found that the Limited Partners’ determination that the removal of the Managing Partner “[was] necessary for the best interest of the [Limited] Partnership” was both “an honest belief” and “objectively reasonable.” *Id.* at 45-47. As a result, the Court of Chancery’s decision should be affirmed regardless of which legal standard applies.

2. Denied. The Managing Partner offers no basis for its assertion that “the Court of Chancery misapplied the standard of good faith that it held was applicable,” Corrected Opening Brief of Appellant at 3, and the Managing Partner does not otherwise offer any basis to support the conclusion that the Court of Chancery’s findings are “clearly erroneous,” *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972). Despite the Limited Partners’ repeated written and oral objections, the Managing Partner repeatedly breached its obligation under Section 11.5(a) of the LPA to deliver to the Limited Partners audited financial statements annually, by April 30 following the close of each year. The audited financial statements for 2008 were delivered 173 days late (on October 20, 2009); the audited financial statements for 2009 were delivered 313 days late (on March 9, 2011); and the audited financial statements for 2010 were 337 days late as of the time trial commenced (April 2, 2012). Given these undisputed facts, the Court of Chancery correctly found that the Limited Partners “have shown that the Managing Partner’s continuous failure to have the Limited Partnership’s audited [f]inancial 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.” Post-Trial Op. at 39. As the Court of Chancery explained, “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 [it] is necessary in the best interest of the limited partnership to replace that general partner." *Id.* at 46-47 (emphasis added). As the Court of Chancery correctly found, the Managing Partner's assertion that the timely issuance of audited financial statements would result in the auditor's "going concern" qualification did not excuse the Managing Partner's failure to timely provide audited financial statements, as required by the LPA. *Id.* at 39-40.

3. Denied. In the proceedings below, the Limited Partners identified certain key events, or "Red Flags," that, in their view, gave specific context to the Managing Partner's perennial failure to timely provide audited financial statements. These Red Flags underscored the need for timely audited financial statements. However, having found that the Managing Partner's "continuous failure" to timely provide audited financial statements itself provided a sufficient basis for the Limited Partners' "good faith" removal determination, the Court of Chancery chose to address certain of the Red Flags only "[i]n the interest of completeness." *Id.* at 39. The Court of Chancery's finding that certain of the Red Flags lent additional support to the Limited Partners' "good faith" determination is readily supported by the evidence and does not amount to clear error.

STATEMENT OF FACTS²

I. The Limited Partnership

DV Urban Realty Partners I L.P., Nominal Defendant below, is a Delaware limited partnership with its principal place of business in Chicago, Illinois. It is a closed, opportunistic real estate fund specializing in urban real estate investments in emerging Chicago neighborhoods. Post-Trial Op. at 2. Specifically, the Limited Partnership was formed in 2006 to invest in residential and commercial real estate in emerging and transitional Chicago neighborhoods with the stated investment goal of “generating attractive risk-adjusted rates of return.” *Id.*

A. The Limited Partners

Appellee-plaintiffs are all five limited partners of the Limited Partnership. *Id.* at 3. They comprise the following Chicago-based public pension funds: (i) Public School Teachers’ Pension and Retirement Fund of Chicago (“Teachers’ Fund”); (ii) Policemen’s Annuity and Benefit Fund of Chicago, Illinois (“Policemen’s Fund”); (iii) Municipal Employees Annuity and Benefit Fund of Chicago (“Municipal Fund”); (iv) Laborers’ and Retirement Board Employees’ Annuity and Benefit Fund of Chicago (“Laborers’ Fund”); and (v) Retirement Plan for the Chicago Transit Authority Employees’ Trust (“CTA Fund”). *Id.*

² The Limited Partners are mindful that under Supreme Court Rule 14(b)(v), the “[a]ppellees’ counterstatement of facts need not repeat facts recited by appellant.” Here, it is necessary for the Limited Partners to submit their own supplemental Statement of Facts because the Managing Partner’s Statement of Facts does not comply with Rule 14(b)(v), as it is incomplete and inappropriately argumentative in certain material respects, and contrary to the facts as found by the Delaware Court of Chancery. *See, e.g.*, Corrected Opening Brief of Appellant at 7 (“However, as the case progressed, the Limited Partners’ alleged good faith bases for removal shifted. They abandoned some of their initial bases and raised new ones.”); *id.* at 11 (“The Limited Partners did not produce any evidence that DV Realty could have done something more (or different) to speed up the loan extension process”); *id.* at 21 (“As pre-determined, on May 26, 2011, Townsend delivered to the Teachers’ Fund the removal recommendation that it wanted. . . . It did not say that removing DV Realty was ‘necessary for the best interests of the Partnership.’”).

“The business and affairs of each of the Limited Partners are ultimately directed by a board of trustees.” *Id.* In addition, “[e]ach 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.” Post-Trial Op. at 3. Specifically, the Executive Directors of the respective Limited Partners at all relevant times were: (i) John Gallagher (Policemen’s Fund); (ii) James Mohler (Municipal Fund); (iii) James Capasso (Laborers’ Fund); (iv) John Kallianis (CTA Fund); and (v) Kevin Huber (Teachers’ Fund). *Id.* at 3-4. All five of these individuals were deposed in discovery and testified live at trial.

In 2006, the Limited Partners collectively invested \$66.5 million in the Limited Partnership. Together, they own 95.1% of the Limited Partnership. *Id.* at 3. The remaining 4.9% of the Limited Partnership is owned by the Appellant Managing Partner. *Id.* at 2.

B. The Managing Partner

Appellant DV Realty Advisors LLC (“DV Realty Advisors” or the “Managing Partner”), Defendant below, has been the Managing Partner of the Limited Partnership since its formation in 2006. *Id.* at 2. Initially, under the LPA, the business and affairs of the Limited Partnership were managed by co-general partners: (i) DV Realty Advisors, which was designated as the “Managing Partner; and (ii) Occam-DV, LLC (“Occam-DV”), which was designated the “Co-General Partner.” Post-Trial Op. at 1, 3. Occam-DV was managed by an experienced real estate executive and attorney, Robert Vanecko. *Id.* In June 2009, a few weeks after the Limited Partners received federal grand jury subpoenas concerning the Limited Partnership’s affairs, Occam-DV withdrew from the Limited Partnership, leaving DV Realty Advisors as the Limited Partnership’s sole general partner. *Id.* at 9.

C. Protections Granted to the Limited Partners Under the LPA

The Limited Partners are passive investors, prohibited under the LPA from “tak[ing] part in the management or operation of the [Limited] Partnership. . . .” A246 at § 3.1(a). In light of their passive investor status, the Limited Partners secured certain contractual protections in the LPA, including the following: (i) Section 11.5(a) required the Managing Partner to deliver to the Limited Partners audited financial statements annually, by April 30 following the close of each year on December 31, so

the Limited Partners would be assured of the financial condition of the Limited Partnership, A273-74; (ii) Section 4.1(b) prohibited the Managing Partner from paying any “finder’s fee” to any third party, in order to avoid use of such fees in “pay for play” or kickback scenarios, A254; (iii) Section 6.1(a) required the Managing Partner to maintain a three-person Advisory Committee to approve self-dealing transactions by the Managing Partner, because the Managing Partner, through its affiliates, also functioned as developer and property manager with respect to the Limited Partnership’s real estate assets, A266; (iv) Section 3.2(a)(ix) and (b) prohibited the Managing Partner from incurring partnership-level recourse debt without approval of the Advisory Committee or the Limited Partners, as a firewall against creditors for one property seizing another property in the event of a default, A247; and (v) Section 3.10(a)(ii) authorized the Limited Partners to remove the Managing Partner, “without Cause,” if the Limited Partners “in good faith determine[d] that such removal [was] necessary for the best interest of the [Limited] Partnership,” A251-52.

II. The Managing Partner Repeatedly Failed to Deliver Timely Audited Financial Statements.

It was undisputed that even though audited financial statements were due by April 30 following the close of the years 2008, 2009 and 2010, the Managing Partner never timely delivered audited financial statements for these years. To the contrary, the audited financial statements for 2008 were delivered 173 days late on October 20, 2009, Post-Trial Op. at 11; the audited financial statements for 2009 were delivered 313 days late on March 9, 2011, *id.* at 19; and the audited financial statements for 2010 were 337 days late as of the time trial commenced on April 2, 2012, *id.* at 21.

The Limited Partners were frustrated by these delays, to which they repeatedly objected orally and in writing. *See, e.g., id.* at 8 (describing June 2009 meeting between the Limited Partners in which they discussed “their frustrations regarding the outstanding audited financial statements); *id.* at 8-9 (describing Limited Partners’ subsequent email request for Managing Partner to “‘immediately’ notify the Limited Partners when [the overdue audited financial] statements would be completed”); *id.* at 9 (describing Limited Partners’ August 25, 2009 letter “reminding” Managing Partner about long-overdue audited financials and advising Managing Partner that its “‘continued failure’” to address these

issues “may prompt the limited partners to seek remedies available within the limited partnership agreement”); *id.* at 12-13 (describing Limited Partners’ letter to Managing Partner requesting its “immediate attention” to the late 2009 audited financials).

The Managing Partner’s only offered excuse for these undisputed contractual defaults was that timely audited financial statements would contain a “going concern” qualification, and this might make it difficult for the Limited Partnership to obtain or extend real estate loans. See Corrected Opening Brief of Appellant at 10-13. The Managing Partner offered no lender testimony or lender document to back its “going concern” excuse, nor did the Managing Partner offer any testimony explaining why, year after year, it did not proactively manage the underlying conditions giving rise to the supposed “going concern” justification.

III. Other “Red Flags” Underscored the Managing Partner’s Failure to Provide Timely Audited Financial Statements.

Meanwhile, while the Limited Partners were continually lacking timely financial reporting about the Limited Partnership, several other “Red Flags” heightened the Limited Partners’ concerns. Among these Red Flags were the following:

- Federal Grand Jury Subpoenas: In May 2009, each of the Limited Partners received Federal Grand Jury Subpoenas regarding their investments in the Limited Partnership. Post-Trial Op. at 8. In particular, the Federal Grand Jury Subpoenas compelled production of, among other things “any and all information relating to investments and/or considerations of investments made . . . [in the Limited Partnership].” *Id.*
- Co-General Partner’s Resignation: Just weeks after receiving the Federal Grand Jury Subpoenas, the Limited Partners learned that the co-general partner of the Limited Partnership, Occam-DV, and its manager, Vanecko, had withdrawn from the Limited Partnership. Post-Trial Op. at 47. Vanecko was viewed by the Limited Partners as “an asset to the Limited Partnership.” *Id.* at 48.
- The Dysfunction of the Advisory Committee: The three-person Advisory Committee provided for in the LPA “appear[ed] to be a

valuable governance tool that the Limited Partners could have relied upon,” *id.* at 49, but it “had never been properly constituted after July 2007,” *id.*, and completely ceased functioning by late 2009 or early 2010, *id.* at 11.

- The Dudek Litigation: In April 2010, Michael Dudek sued the Limited Partnership, the Managing Partner, and all five Limited Partners, “alleging that he is entitled to a finder’s fee as a result of the Limited Partners’ investment in the Limited Partnership.” Post-Trial Op. at 11-12. “[T]here 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.” *Id.* at 50. This written agreement conflicts with Section 4.1 of the LPA and, as a result, provides “evidence that the Managing Partner either breached the LPA or came very close to breaching the LPA.” *Id.*

IV. The Removal Decision

On November 10, 2010, the Executive Director of the Teachers’ Fund organized a meeting of all of the Limited Partners. *Id.* at 18. A real estate consultant from the Townsend Group also attended this meeting, at which he made a presentation to the Limited Partners “outlining the pros and cons” of removing the Managing Partner. *Id.* at 18-19. In January 2011, the Limited Partners collectively engaged the Townsend Group to evaluate the Limited Partnership and “review certain alternative courses of action with regard to the Managing Partner,” including its removal. Post-Trial Op. at 19. On May 26, 2011, the Townsend Group issued its report to the Limited Partners, recommending removal of the Managing Partner for several reasons, 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;’ (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.” *Id.* at 19-20 (citation omitted).

By the end of 2011, all five Limited Partners had decided to remove the Managing Partner. *Id.* at 20. They did so in reliance on the report given to them by the Townsend Group, *id.* at 37, a report which provided the Limited Partners with the good faith belief that removal of

the Managing Partner was necessary, *id.* at 39. The Limited Partners thereafter executed a written consent, effective January 30, 2012, removing the Managing Partner. Post-Trial Op. at 20-21.

V. The Court of Chancery's Post-Trial Opinion

On August 16, 2012, the Court of Chancery issued its Post-Trial Opinion upholding the removal of the Managing Partner. After weighing the evidence before it, the Court of Chancery concluded that the Limited Partners had properly removed the Managing Partner “without Cause” in accordance with Section 3.10(a)(ii) of the LPA. In particular, the Court of Chancery found that “[t]he 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.” *Id.* at 35-36; *see also id.* at 35 (“The conduct of the Limited Partners in this case does not approach the sort of unreasonable conduct that is necessarily undertaken in bad faith.”).

ARGUMENT

I. The Court of Chancery Correctly Found that the Limited Partners Met the Requirements of Section 3.10(a)(ii) for Removal of the Managing Partner Without Cause.

A. Question Presented:³

When the Limited Partners decided to remove the Managing Partner, did they do so reasonably and in subjective good faith? The Limited Partners presented this issue at, *inter alia*, B50-53; B65-66; B75-90.

B. Scope of Review:

This Court must uphold the Court of Chancery’s factual findings in favor of the Limited Partners unless they are not sufficiently supported by the record or the product of an orderly and logical deductive process: “It is only when the findings below are clearly wrong and the doing of justice requires their overturn that [this Court is] free to make contradictory findings of fact.” *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972); *see also SV Inv. Partners, LLC v. ThoughtWorks, Inc.*, 37 A.3d 205, 210 (Del. 2011) (“We will not set aside the Court of Chancery’s factual findings

³ In its opening brief, the Managing Partner has framed the “Question Presented” as follows:

[W]as it objectively reasonable for the Limited Partners to conclude that it was necessary for the best interests of the Limited Partnership to have the annual audits completed by the deadline set by the LPA even though the audits would not be “clean” and would contain a “going concern” qualification, which would make it more difficult for the Limited Partnership to extend existing loans and obtain replacement loans?

Corrected Opening Brief of Appellant at 24. The Managing Partner has not provided a “clear and exact reference to the pages of the appendix where [it] preserved each question in the trial court” as required by Supreme Court Rule 14(b)(vi)A.1. The question is also improperly argumentative.

‘unless they are clearly wrong and the doing of justice requires their overturn.’”) (quoting *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005)).

The Managing Partner argues that the applicable standard of review in this appeal is *de novo*, but it has not identified any question of law for review. Rather, conceding “[t]he relevant facts are not in dispute,” the Managing Partner simply argues that the Court of Chancery misapplied the Court of Chancery’s definition of “good faith.” Corrected Opening Brief of Appellant at 24. The Court of Chancery’s purported “misapplications” of legal definitions to the facts, as the Managing Partner expressly argues here, inherently challenge the Court of Chancery’s evaluation of evidence presented to it and are properly evaluated under the clearly erroneous standard.

C. Merits of the Argument:

1. After a two-day trial that included live testimony by seven witnesses and more than 200 joint exhibits, the Court of Chancery issued a detailed, 56-page post-trial opinion replete with factual findings. Among these factual findings, the Court of Chancery determined that “the Limited Partners met the standard of good faith provided for in Section 3.10(a)(ii)” of the LPA, because they “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.” Post-Trial Op. at 35-36. The Court of Chancery further found that the “Managing Partner’s continuous failure to have the Limited Partnership’s audited [f]inancial statements completed in the time prescribed . . . provided the Limited Partners with a good faith belief that the Managing Partner needed to be removed for the best interest of the Limited Partnership.” *Id.* at 39.

Good faith arises in many contexts and is an inherently factual determination that is owed substantial deference on appeal. *See, e.g., Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 600 (Del. 2010) (deferring to Court of Chancery’s “factual finding that the Board acted in good faith reliance on the advice of experts”); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1174 (Del. 1995) (describing as a “factual finding” the Court of Chancery’s determination that directors were “motivated in good faith to achieve . . . the best available transaction” and noting that where factual finding is not contested on

appeal, it becomes law of the case); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 958 (Del. 1985) (showing substantial deference to Court of Chancery’s finding that directors’ decision was made in good faith); *see also* *Acierno v. Worthy Bros. Pipeline Corp.*, 693 A.2d 1066, 1069 (Del. 1997) (“The Superior Court’s finding that the dispute was not a bona fide dispute based on mutual good faith is factual.”); *Bartley v. Davis*, 519 A.2d 662, 668 (Del. 1986) (“The question of whether Oberly acted in good faith is essentially a factual issue.”).

Likewise, the Court of Chancery also found that the Limited Partners acted reasonably in response to the lack of timely audited financial statements. Post-Trial Op. at 46 (finding that the Limited Partners “observed reasonable commercial standards of fair dealing when they consented to remove the Managing Partner”); *id.* at 52 (“[T]he decision to remove the Managing Partner was consistent with reasonable commercial standards of fair dealing.”). In fact, the Court of Chancery concluded that “[t]he conduct of the Limited Partners in this case *does not approach* the sort of unreasonable conduct that is necessarily undertaken in bad faith.” *Id.* at 35 (emphasis added). Reasonableness, like good faith, is an inherently factual determination and is owed substantial deference. *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1207 (Del. 1993) (holding, in the context of interpreting discretionary actions under a limited partnership agreement, that reasonableness is “a factual matter” and “a question of fact”); *see also* *SmithKline Beecham Pharms. Co. v. Merck & Co.*, 766 A.2d 442, 448 (Del. 2000) (holding that “whether Merck took reasonable precautions . . . is a question of fact” to be “reviewed for a determination of whether it is supported by substantial evidence and is not clearly erroneous.”); *Corrado Bros., Inc. v. Twin City Fire Ins. Co.*, 562 A.2d 1188, 1192 (Del. 1989) (holding that Superior Court’s findings that party acted “in good faith” and “with reasonable care” are factual findings not to be disturbed “if they are sufficiently supported by the record and if they are the product of an orderly and logical deductive process”).

The Managing Partner does not expressly contend that any of these factual findings are clearly erroneous. In fact, the Managing Partner does the opposite: it acknowledges that “[t]he relevant facts are not in dispute,” and it advocates a *de novo* standard of review, thereby conceding that it does not dispute any factual findings. Corrected Opening Brief of Appellant at 24. The Managing Partner argues instead that the Court of

Chancery incorrectly applied the legal standard to the facts. *Id.* (“The issue in dispute is the Court of Chancery’s legal conclusion that the Limited Partners acted in good faith.”). But regardless of the legal standard to be applied to the facts, for the reasons discussed above, the Court of Chancery’s determinations that the Limited Partners acted reasonably and acted in good faith are factual findings that are no longer subject to dispute on this appeal. *See Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, __ A.3d __, 2012 WL 2783101, at *1 n.2 (Del. July 12, 2012) (“The facts recited here are as found by the Court of Chancery in its 138 page, post-trial Opinion Although [the appellant] purports to dispute some of those facts in its briefs, it does not claim that any adjudicated facts are clearly wrong and should be overturned.”).

The Managing Partner offers no basis for this Court to overturn as clearly erroneous the Court of Chancery’s numerous, undisputed and ultimately correct factual findings. The Managing Partner has elected to forego in its opening brief on appeal any challenge to the Court of Chancery’s factual findings that the Limited Partners acted reasonably and in good faith. *See Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) (any challenge to the Court of Chancery’s factual findings, “having been omitted from the text of [Appellant’s] opening brief, has been waived”); *accord Cinerama*, 663 A.2d at 1174 (where factual finding is not contested on appeal, it becomes law of the case). As a result, these findings stand, because they are supported by substantial evidence as detailed by the Court of Chancery, and because the Managing Partner does not contend they are clearly erroneous and should be overturned.

Moreover, these findings are fatal to the Managing Partner’s claims on appeal, notwithstanding the parties’ dispute in the proceedings below as to whether a purely subjective standard applies, as the Limited Partners argued at trial, or whether the standard has subjective and objective components, as the Managing Partner contended. Indeed, whether the standard is subjective, objective, or both, the Court of Chancery has found, and the Managing Partner has not properly challenged, that as a matter of fact the Limited Partners acted in subjective good faith and in an objectively reasonable manner in deciding to remove the Managing Partner, principally because of its failure to provide timely audited financials.

2. The Limited Partners argued below and contend on appeal that “good faith,” as used in Section 3.10(a)(ii) of the LPA, imposes a subjective standard merely requiring proof of a foundation in fact for the Limited Partners’ removal determination and the absence of a bad motive. B43-49; B62-65. Indeed, as the Limited Partners argued below, the words and structure of Section 3.10(a)(ii) do not permit any other meaning, as the parties could have chosen an objective reasonableness standard but did not. B43; *see also Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, 1999 WL 743479, at *11 (Del. Ch. Sept. 10, 1999) (“[U]nder the rule of *expressio unius est exclusio alteris*, ‘[i]f one subject is specifically named, and there are no general words to show that other subjects of that class are included, it may reasonably be inferred that the subjects not specifically named were intended to be excluded.’”) (quoting Arthur L. Corbin, 3 *Corbin on Contracts* § 552 at 206 (1960)).⁴

The Court of Chancery ruled that the LPA was unclear as to whether “the parties intended to adopt a wholly subjective standard of good faith” or whether they “intended to impose an objective requirement,” rendering the term “good faith” ambiguous. Post-Trial Op. at 32-33. The Court of Chancery noted that “[t]he common law definition of good faith as applied 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.” *Id.* at 33-34. The Court of Chancery therefore imported the good faith definition of the Uniform Commercial Code—“honesty in fact and the observance of reasonable commercial standards of fair dealing”—in glossing Section 3.10(a)(ii) of the LPA. *Id.* at 35 (quoting 6 *Del. C.* § 1-201(20)).

⁴ In particular, the Limited Partners argued that the adverbial phrase “in good faith” modifies the verb “determine,” and is a commonly understood, subjective standard that requires honesty of purpose or a lack of ill will toward the General Partner. B43; *see also Desert Equities*, 624 A.2d at 1208 n.16 (“‘[B]ad faith’ is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.”) (quoting Black’s Law Dictionary 72 (5th ed. 1983)).

By so doing, the Court of Chancery held the Limited Partners to a higher standard than the purely subjective one that the LPA expressly calls for. Of course, it is well settled that this Court can affirm on any ground argued below, even if not relied upon by the Court of Chancery. See *Haley v. Town of Dewey Beach*, 672 A.2d 55, 58-59 (Del. 1996). Here, the Managing Partner concedes that the Limited Partners met the subjective component of the standard. See Corrected Opening Brief of Appellant at 24 (“Specifically, the question presented here is: was it objectively reasonable for the Limited Partners to conclude that it was necessary for the best interests of the Limited Partnership to have the annual audits completed by the deadline set by the LPA even though the audits would not be ‘clean’ and would contain a ‘going concern’ qualification . . .”). The Court of Chancery so found. See Post-Trial Op. at 35-36 (“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 . . .”); *id.* at 45 (finding that that the Limited Partners “held an honest belief that removal of the Managing Partner was necessary for the best interest of the Limited Partnership”). Accordingly, this Court may affirm the Court of Chancery’s decision below on this alternative legal basis—namely, that the “without Cause” removal standard in the LPA is purely subjective, which standard the Managing Partner concedes has been met.

But even under the Court of Chancery’s more demanding subjective-objective standard, the Court of Chancery had no difficulty finding in favor of the Limited Partners’ “without Cause” removal decision. As noted in the preceding paragraph, the Court of Chancery found that the Limited Partners met the subjective component of the standard. *Id.* at 35-36 (“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 . . .”). Likewise, the Court of Chancery found that the Limited Partners met the objective component of the standard as well: “The conduct of the Limited Partners in this case does not approach the sort of unreasonable conduct that is necessarily undertaken in bad faith.” *Id.* at 35. In particular, the Court of Chancery found that the Limited Partners’ determination that removal was “necessary for the best interest of the Limited Partnership” was “objectively reasonable” based upon the Managing Partner’s failure to provide timely audited financial statements:

Annual audited financial statements provide significant value to a business. 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 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).

Id. at 46-47 (emphasis added).

3. The Managing Partner argues that the Court of Chancery "misapplied" the definition of "good faith" to the facts. Corrected Opening Brief of Appellant at 23. Specifically, the Managing Partner argues that the Court of Chancery erred "[b]ecause an objectively reasonable person would not have concluded (and could not have concluded) that DV Realty's business decision to delay issuance of the audits until the 'going concern' condition was resolved made it necessary for the best interests of the Limited Partnership to remove DV Realty." *Id.* at 30.

But this tortures the language of the LPA and the relevant inquiry. The Limited Partners do not have to prove that any specific business decision made removal necessary, as argued by the Managing Partner, *id.* at 29, 30, 32, 33; they merely have to prove that in their good faith belief, a change in the leadership of the Limited Partnership was necessary for the entity's best interest.

Moreover, the Court of Chancery found that the Managing Partner's "going concern" excuse amounted to a simple disagreement with the Limited Partners that offered no support for the Managing Partner's argument that the Limited Partners' removal determination was not made in good faith. Post-Trial Op. at 39-40. The Court held:

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. 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. Moreover, because the Managing 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. 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. 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.

Id. at 40-41 (citations omitted).

The Managing Partner’s “going concern” excuse thus ignores the importance of the Limited Partners’ bargained-for right to have timely audited financial statements. There is no “going concern” exception in Section 11.5 of the LPA; subsumed in its unqualified language is the parties’ *ex ante* allocation of risks and responsibilities. When the “going concern” issue arose, the Managing Partner chose to breach Section 11.5; it did so at its peril. The Court of Chancery correctly declined the Managing Partner’s invitation to error—a ruling that the Managing Partner does not challenge on appeal other than by way of attacking the Court of Chancery’s purported misapplication of law to the facts.

Now on appeal, the Managing Partner apparently misapprehends an important aspect of the Court of Chancery’s factual findings on this very issue. The Managing Partner argues that “[t]he Court of Chancery held that the Executive Directors disagreed with that business decision, but did not cite any testimony or evidence for that finding.” Corrected Opening Brief of Appellant at 28-29. But, in fact, the Court of Chancery found that “[a]lthough 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.” Post-Trial Op. at 40. And despite the Managing Partner’s insistence to the contrary, in support of that finding in its Post-Trial Opinion, the Court of Chancery cited three documents and trial testimony from five witnesses. *See id.* at 40 n.113.

* * * * *

The parties do not dispute, as a matter of fact, that the Managing Partner consistently failed to provide timely audited financial statements for the Limited Partnership, as required by the LPA. Based upon this, the Court of Chancery found, as a matter of fact after trial, that when the Limited Partners consented to remove the Managing Partner, they did so reasonably and in good faith. The Managing Partner does not challenge these findings on appeal. As a result, whether the legal standard to be applied is subjective, objective, or both, the Court of Chancery’s decision must be affirmed.

II. The “Red Flags” Provided Additional Support for the Removal of the Managing Partner Without Cause.

A. Question Presented:

Did the identified “Red Flags” provide additional support for the Limited Partners’ removal decision? The Limited Partners presented this issue at, *inter alia*, B18-41; B88-90.

B. Scope of Review:

The Court of Chancery’s factual findings are not to be overturned unless clearly erroneous. *Levitt v. Bouvier*, 287 A.2d at 673; *see also SV Inv. Partners, LLC v. ThoughtWorks, Inc.*, 37 A.3d at 210.

C. Merits of the Argument:

The Managing Partner does not specifically identify its “Question Presented” on page 31 of its Corrected Opening Brief. Nor does the Managing Partner provide a “clear and exact reference to the pages of the appendix where [it] preserved” such question. *See* Sup. Ct. R. 14(b)(vi)A.(1). The best indication of the question presented, though not containing any record reference indicating that the question was preserved, is stated by the Managing Partner as follows:

[T]he Court of Chancery erred when it afforded the [R]ed [F]lag issues any weight for the Limited Partners’ removal decision (Op. at 48, 49, 50), because the undisputed facts establish that the Limited Partners could not have held a good faith belief that the [R]ed [F]lag issues necessitated removing DV Realty for the best interests of the Limited Partnership.

Corrected Opening Brief of Appellant at 31.

Although they were not essential to the Court’s findings that the Limited Partners acted reasonably and in good faith, for “completeness,” the Court of Chancery addressed certain of the Red Flags identified by the Limited Partners. Post-Trial Op. at 39; 47-51. The Court of Chancery correctly found that, in conjunction with the lack of timely audited financial statements, these Red Flags collectively supported the Limited Partners’ removal determination. *Id.*

As the Court of Chancery found, each and every year, the Limited Partners did not receive the audited financial statements of the Limited Partnership on time. Rather, they experienced substantial and ever-increasing delays. Their concerns about the lack of transparency were heightened by what they did receive each and every year: Red Flags indicative of potential fiduciary misconduct and breaches of the LPA by the Managing Partner. *See, e.g., id.* at 48 (accepting testimony that Limited Partners counted on the “financially savvy” Vanecko as an asset to the Limited Partnership and finding that Occam-DV’s resignation could have been viewed as favoring, if only slightly, the Limited Partners’ removal decision); *id.* at 49 (finding that the Advisory Committee could have been a valuable governance tool if it functioned as designed); *id.* at 50 (holding that the Dudek lawsuit was indicative of the Managing Partner having breached or very nearly breached the LPA). The Managing Partner’s attempt to divide and conquer thus wrongly discounts the totality of the circumstances besetting the Limited Partners and guiding their evaluation of the Managing Partner’s conduct as it related to their beliefs concerning the best interests of the Limited Partnership in making their good faith removal decision.⁵

⁵ Subsequent revelations about the Managing Partner’s conduct confirmed the wisdom of the Limited Partners’ removal decision. *See Davenport Grp. MG, L.P. v. Strategic Inv. Partners, Inc.*, 685 A.2d 715, 722-23 (Del. Ch. 1996) (permitting limited partners to rely on after acquired evidence in removing a general partner for breaching its fiduciary duties). Specifically, the Managing Partner failed to inform the Limited Partners until after its receipt of the removal notice that Deloitte & Touche, the Limited Partnership’s longtime auditor, had resigned. *Post-Trial Op.* at 51 n.132. As the Court of Chancery found, this fact, among others, was unknown to the Limited Partners at the time of their removal decision. *Id.* And while the Court of Chancery declined to afford that fact weight in its good faith analysis, Deloitte’s resignation—and the Managing Partner’s failure to disclose it—are nonetheless indicative of the Managing Partner’s demonstrated lack of transparency and confirm, with the benefit of hindsight, the correctness of the Limited Partners’ collective judgment.

CONCLUSION

The Managing Partner challenges a fact-based post-trial decision of the Court of Chancery in which the Court of Chancery held that the Limited Partners determined that removal of the Managing Partner was necessary for the best interest of the Limited Partnership. Despite the Limited Partners' argument to the contrary, the Court of Chancery held, as a matter of law, that the LPA removal standard had an objective component in addition to its subjective one.

Yet more importantly, the Court of Chancery found, as a matter of fact, that the Limited Partners' decision was *both* (1) made with subjective good faith and (2) objectively reasonable. The Managing Partner does not seek to overturn either of these factual findings, which are owed substantial deference. Accordingly, and for the foregoing reasons, the judgment of the Court of Chancery should be affirmed.

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