Message

**From**: Ivanka Trump [/O=TRUMP ORG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=ITRUMP]
**Sent**: 8/23/2012 8:01:12 PM
**To**: Jared [jkushner@observer.com]
**Subject**: FW: Vornado
**Attachments**: Agreement of Limited Partnership of Hudson Waterfront Associates I, L.P..pdf; Judge Lowe Decision on Motion.pdf; image001.gif; Appellate Decision.pdf


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**From:** Maria Lagani <mlagani@trumporg.com>
**Date:** Thursday, August 23, 2012 3:55 PM
**To:** Ivanka Trump <itrump@trumporg.com>
**Cc:** Allen Weisselberg <weisselberg@trumporg.com>, Alan Garten <agarten@trumporg.com>
**Subject:** RE: Vornado

Hi Ivanka,

Attached are the Decision on Motion, the Appellate Decision and the Agreement of Partnership - this is 1 of 6 identical agreements.

Please let me know if you need anything else regarding this matter.

Best,
Maria


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PX-1213
Index No. 452564/2022 (AFE)

# AGREEMENT OF LIMITED PARTNERSHIP

# OF

# HUDSON WATERFRONT ASSOCIATES I, L.P.

08424-00013/252761.1

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AGREEMENT OF LIMITED PARTNERSHIP

OF

HUDSON WATERFRONT ASSOCIATES I, L.P.

AGREEMENT dated as of November 30, 1994 by and between HUDSON WATERFRONT I CORPORATION, a Delaware corporation having an address at 32/F, New World Tower, 16-18 Queen's Road Central, Hong Kong (hereinafter called the "General Partner"), and DONALD J. TRUMP, an individual, having an address at 725 Fifth Avenue, New York, New York 10022 (hereinafter called "Trump") and HUDSON WESTSIDE ASSOCIATES I, L.P., a Delaware limited partnership, having an address at 32/F, New World Tower, 16-18 Queen's Road Central, Hong Kong (hereinafter called "Westside") (Trump and Westside collectively referred to herein as "Limited Partners" and individually as a "Limited Partner").

RECITALS

A. The Partners wish to form the Partnership pursuant to the terms of the Limited Partnership Act for the purposes set forth in Section 2.2 below.

B. On June 30, 1994 Hudson Waterfront Associates, L.P. ("Waterfront") acquired fee title to the real property described in Exhibit A attached hereto (the "Penn Yards") from Penn Yards Associates pursuant to that certain Purchase Agreement (the "Purchase Agreement") dated as of June 30, 1994 between Penn Yards Associates and Waterfront.

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C. Waterfront desires to transfer fee title to specific parcels to this Partnership and other specific parcels to each of the other Owner Partnerships (hereinafter defined).

D. Waterfront will retain ownership of all portions of the Penn Yards other than the parcels being transferred to this Partnership and the Owner Partnerships (the "Common Areas") and the Waterfront Partnership Agreement (defined below) will be amended and restated to, among other things, admit the Partnership and the other Owner Partnerships as limited partners of Waterfront.

E. Waterfront currently contemplates that title to the Common Areas may be transferred to a private owners' association formed pursuant to a declaration filed with the appropriate governmental authorities and with some or all of the Common Areas being eventually dedicated to the City of New York.

F. Simultaneously with the formation of the Partnership, the Partnership will acquire fee title to parcels D, E, F and G (the "Designated Parcels") constituting a portion of the Penn Yards as designated in the Declaration (defined below) and as more particularly described on Exhibit A attached hereto and other assets and rights relating thereto, including, without limitation, certain rights pursuant to the Purchase Agreement (and related documents) and the Waterfront Partnership Agreement and certain obligations of Penn Yards Associates and/or Trump pursuant to the Purchase Agreement (and related documents) and the Waterfront Partnership Agreement.



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G. The Partners wish to enter into this Agreement to set forth their agreements with respect to the Partnership, the Designated Parcels, the Penn Yards and the other matters set forth herein.

H. Capitalized terms used but not otherwise defined above shall have the meaning ascribed to them in Article 1 below.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and in consideration of the mutual covenants herein contained, the Partners hereby agree as follows:

## ARTICLE 1.

## CERTAIN DEFINITIONS

Unless the context otherwise specifies or requires, the terms defined in this Article 1 shall, for the purposes of this Agreement, have the meaning herein specified. Unless otherwise specified, all references herein to Articles or Sections are to Articles or Sections of this Agreement.

"Accountant" -- As defined in Section 12.3.

"Additional Contributions" -- With respect to any Partner, the amounts, if any, of cash, or the Gross Asset Value of any property, contributed or deemed contributed to the Partnership by or on behalf of such Partner subsequent to the date hereof.

"Adjusted Capital Account Deficit" -- With respect to any Partner, the deficit balance, if any, in such Partner's



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Capital Account as of the end of the relevant Fiscal Year, after giving effect to the following adjustments:

(i) Credit to such Capital Account any amounts which such Partner is deemed to be obligated to restore to the Partnership pursuant to the penultimate sentences of Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5), and

(ii) Debit to such Capital Account the items described in Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6).

Except as otherwise modified herein, the foregoing definition of Adjusted Capital Account Deficit is intended to comply with the provisions of Section 1.704-1(b)(2)(ii)(d) of the Regulations and shall be interpreted consistently therewith.

"Adjusted Capital Contribution" -- With respect to any Partner, an amount equal to such Partner's Capital Contributions adjusted as follows: (i) increased by the amount of any Partnership liabilities which, in connection with distributions pursuant to Section 9(b) hereof, are assumed by such Partner or are secured by any Partnership Property distributed to such Partner, and (ii) reduced by the amount of cash and the Gross Asset Value of any Partnership Property distributed to such Partner pursuant to Section 9(b) hereof and the amount of any liabilities of such Partner assumed by the Partnership or which are secured by any property contributed by such Partner to the Partnership. In the event a Partner transfers (in the manner



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herein provided) all or any portion of its Partnership Interest, the transferee shall succeed to the Adjusted Capital Contribution of the Partner to the extent it relates to the transferred Partnership Interest.

"Agreement" -- This Agreement of Limited Partnership, as amended, supplemented or otherwise modified from time to time.

"Allocable Share" -- The ratio, expressed as a percentage, that the aggregate initial release prices of the Designated Parcels owned by the Partnership provided for in the Existing Mortgages (and recited in Section 7.1(d) hereof) bears to $88,800,000.

"Amended and Restated Waterfront Partnership Agreement" -- That certain Amended and Restated Agreement of Limited Partnership of Waterfront dated of even date herewith, as further amended, supplemented or otherwise modified from time to time.

"Applicable Rate" -- The Prime Rate plus one percent (1%), but in no event more than nine and one-half percent (9.5%) per annum.

"Assigned Benefits" -- As defined in Section 14.2(b).

"Assignment Agreement" -- That certain Assignment Agreement of even date herewith between Waterfront and the Partnership pursuant to which the Partnership acquired fee title to the Designated Parcels and was assigned an interest in the Assigned Benefits.

"Available Interest" -- As defined in Section 4.3(b).

"Broker" -- As defined in Section 18.14.



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"Budget" -- The applicable budget, prepared from time to time, by or on behalf of the General Partner, indicating those costs and expenses which may be incurred by the Partnership during the period covered by such budget.

"Building Permit" -- As defined in Section 14.3.

"Building Permit Approval Date" -- As defined in Section 14.3.

"Business Plan" -- The business plan developed by the Partnership for the development of the Designated Parcels.

"Capital Account" -- The Capital Account maintained for each Partner pursuant to Section 5.3.

"Capital Contributions" -- With respect to any Partner, the amount of cash and the initial Gross Asset Value of any other property contributed or deemed contributed to the capital of the Partnership by or on behalf of such Partner (including, without limitation, Additional Contributions).

"Cash Available for Distribution" -- For each Fiscal Year or other period, (a) all cash received by the Partnership from any source (including borrowings by the Partnership, Capital Contributions and proceeds of the sale, exchange or other disposition of all or substantially all of the Partnership Assets) less (b) cash expended, reserved or required for debts, costs, obligations, liabilities and expenses, in connection with, related to or incurred in the operation and/or development of the Partnership, the Designated Parcels or the Common Areas, whether for operating expenses or capital expenditures, previously

incurred or anticipated to be incurred in the foreseeable future (including, without limitation, loans made by, or fees owed to, Partners and Related Entities of Partners and future anticipated development costs), interest and principal payments on any indebtedness, capital expenditures, taxes, fees or other requirements of the Partnership, in each case as determined by the General Partner in its sole discretion.

"Code" -- The Internal Revenue Code of 1986, as amended from time to time (or any corresponding provisions of succeeding law).

"Common Areas" -- As defined in the Recitals hereto.

"Controlled Trust" -- A trust which is at all times for, and only for, the benefit of the spouse and/or lineal descendants of Trump, provided that Trump is a trustee thereof and as such Trump (for so long as he shall be alive and mentally competent) has the sole right to exercise all rights under this Agreement on behalf of such trust.

"Declaration" -- That certain Restrictive Declaration dated December, 17, 1992, recorded in Reel 1934 at Page 0001 of the New York City Registers Office on January 6, 1993.

"Depreciation" -- For each Fiscal Year or other period, an amount equal to the depreciation, amortization or other cost recovery deduction allowable for Federal income tax purposes with respect to an asset for such Fiscal Year or other period; provided, however, that if the Gross Asset Value of an asset differs from its adjusted basis for Federal income tax purposes



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at the beginning of such Fiscal Year or other period, Depreciation shall be an amount which bears the same ratio to such beginning Gross Asset Value as the Federal income tax depreciation, amortization, or other cost recovery deduction for such Fiscal Year or other period bears to such beginning adjusted tax basis; provided further, that if the Federal income tax depreciation, amortization, or other cost recovery deduction for such Fiscal Year is zero, Depreciation shall be determined with reference to such beginning Gross Asset Value using any reasonable method selected by the General Partner.

"Designated Parcels" -- As defined in the Recitals hereto.

"ERISA" -- The Employee Retirement Income Security Act of 1974, as amended from time to time. A reference to a section of ERISA shall be deemed to include a reference to any amendatory or successor provision thereto.

"Event of Withdrawal" -- As defined in Article 11.

"Existing Mortgages" -- The notes and related mortgages which secure the obligations under the notes and which create liens upon the Penn Yards, including the Designated Parcels and the Common Areas, originally held by The Chase Manhattan Bank, N.A., which have been modified and restated to indicate an aggregate principal amount due and owing of $88,800,000 and assigned to Related Entities of the General Partner or Westside and/or other persons or entities.

"Fiscal Year" -- With respect to the Partnership, the taxable year of the Partnership for Federal income tax purposes.

"Foreign Person" -- Any person or entity that is not a "United States person" within the meaning of Code Section 7701(a)(30).

"General Partner" -- As defined in Section 4.1.

"Gross Asset Value" -- With respect to any asset, the asset's adjusted basis for Federal income tax purposes, except as follows:

(i) The initial Gross Asset Value of any asset contributed by a Partner to the Partnership shall be the gross fair market value of such asset at the time of contribution, as determined in good faith by the General Partner in its sole discretion;

(ii) The Gross Asset Value of all Partnership Assets shall be adjusted to equal their respective gross fair market values, as determined in good faith by the General Partner in its sole discretion, as of the following times: (a) the acquisition of an additional interest in the Partnership by any new or existing Partner in exchange for more than a de minimis Capital Contribution; (b) the distribution by the Partnership to a Partner of more than a de minimis amount of property as consideration for an interest in the Partnership; and (c) the liquidation of the Partnership within the meaning of Regulations Section 1.704-1(b)(2)(ii)(g); provided, however, that

adjustments pursuant to clauses (a) and (b) above shall be made only if the General Partner determines that such adjustments are necessary or appropriate to reflect the relative economic interests of the Partners in the Partnership and shall not be made solely by reason of any contributions to the Partnership by the Partners pursuant to Section 5.1;

(iii) The Gross Asset Value of any Partnership Asset distributed to any Partner shall be the gross fair market value of such asset on the date of distribution determined in good faith by the General Partner in its sole discretion; and

(iv) The Gross Asset Values of Partnership Assets shall be increased (or decreased) to reflect any adjustments to the adjusted basis of such assets pursuant to Code Section 734(b), or Code Section 743(b), but only to the extent that such adjustments are taken into account in determining Capital Accounts pursuant to Regulations Section 1.704-1(b)(2)(iv)(m).

If the Gross Asset Value of an asset has been determined or adjusted pursuant to this provision, such Gross Asset Value shall thereafter be adjusted by the Depreciation taken into account with respect to such asset for purposes of computing Profits and Losses.

"Initial Investment" -- An amount equal to the sum of (i) $28,881,627.96, (ii) all other amounts contributed or loaned



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by the General Partner, Westside and/or any Related Entity of either of them to the Partnership on or prior to June 30, 1995 for working capital purposes, including, without limitation, amounts necessary to pay real estate taxes, attorneys' fees, accountants' fees, architect and engineering fees, fees of other consultants and experts, survey charges, expenses of operating the Partnership and maintaining the Designated Parcels and the Common Areas, governmental fees, the Project Management Fee, but excluding costs of construction of infrastructure and improvements incurred in connection with the development of the Designated Parcels and the Common Areas, and (iii) an amount equal to the Partner Priority Return on Adjusted Capital Contributions or the Applicable Rate with respect to loans for the purpose of funding any item covered by clauses (i) and (ii) above (in each case, compounded semi-annually). In determining the amount of the Initial Investment outstanding at any time, any repayments of such amounts from Capital Contributions, Additional Contributions or loans from Partners or any Related Entity of any Partner (other than Trump) shall not be deemed to be a return of the Initial Investment.

"IRS" -- The Internal Revenue Service or such other governmental agency which performs the functions that are performed as of the date of this Agreement by the Internal Revenue Service.

"Limited Partner" -- As defined in Section 4.2.



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"Limited Partnership Act" -- The Delaware Revised Uniform Limited Partnership Act. 6 Del C. § 17-101 et seq., as amended, and any successor statute. A reference to a section of the Limited Partnership Act shall be deemed to include a reference to any amendatory or successor provision thereto.

"Losses" -- As defined in the definition of Profits.

"Material Breach" -- As defined in the Purchase Agreement.

"Measuring Group" -- As defined in Section 20.8.

"Nonrecourse Deductions" -- As defined in Regulations Section 1.704-2(b)(1).

"Nonrecourse Liability" -- As defined in Regulations Section 1.704-2(b)(3).

"Notice" -- As defined in Section 20.2.

"Owner Partnerships" -- The collective reference to the Partnership, Hudson Waterfront Associates II, L.P., Hudson Waterfront Associates III, L.P., Hudson Waterfront Associates IV, L.P. and Hudson Waterfront Associates V, L.P.; and "Owner Partnership" means any one of them.

"Owner Partnership Agreements" -- The collective reference to this Agreement and each of the Agreements of Limited Partnership, each of even date herewith, of Hudson Waterfront Associates II, L.P., Hudson Waterfront Associates III, L.P., Hudson Waterfront Associates IV, L.P. and Hudson Waterfront Associates V, L.P.; and "Owner Partnership Agreement" means any one of them.



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"<u>Partner Nonrecourse Debt</u>" -- As defined in Regulations Section 1.704-2(b)(4).

"<u>Partner Nonrecourse Debt Minimum Gain</u>" -- An amount, with respect to each Partner Nonrecourse Debt, equal to the Partnership Minimum Gain that would result if such Partner Nonrecourse Debt were treated as a Nonrecourse Liability, determined in accordance with Regulations Section 1.704-2(i)(3).

"<u>Partner Nonrecourse Deductions</u>" -- As defined in Regulations Section 1.704-2(i)(2).

"<u>Partner Priority Return</u>" -- With respect to each Partner (other than Trump), a sum equal to the Applicable Rate per annum, determined on the basis of a year of 365 or 366 days, as the case may be, for the actual number of days in the period for which the Partner Priority Return is being determined, taking into account changes in the Prime Rate during such period, cumulative and compounded semi-annually, of the average daily balance of such Partner's Adjusted Capital Contribution from time to time during the period for which the Partner Priority Return relates, commencing on the first date such Partner is admitted to the Partnership. In amplification of the foregoing and without duplication thereof, in order to reflect semi-annual compounding of the unpaid Partner Priority Return any unpaid Partner Priority Return shall be added to the Partner's Adjusted Capital Contribution.

"<u>Partners</u>" -- The General Partner and the Limited Partners.

"Partnership" -- Hudson Waterfront Associates I, L.P., the Delaware limited partnership governed by this Agreement.

"Partnership Assets" -- The assets and property, whether tangible or intangible and whether real, personal, or mixed, at any time owned by or held for the benefit of the Partnership, including, without limitation, all right, title, and interest, if any, held and owned by the Partnership in other entities.

"Partnership Interest" -- As to any Partner, all of the interest of that Partner in the Partnership including, without limitation, such Partner's (i) right to an allocable share of the profits and losses and/or distributions of cash flow of the Partnership, (ii) right to a distributive share of Partnership Assets and (iii) rights as a Partner, if, and to the extent, provided for in this Agreement or the Limited Partnership Act.

"Partnership Minimum Gain" -- As defined in Regulations Section 1.704-2(d).

"Pending Litigation" -- As defined in Section 14.2(a).

"Penn Yards" -- The real property described in Exhibit A attached hereto.

"Penn Yards Project" -- The entire Penn Yards and all development and improvements thereon.

"Percentage Interests" -- As defined in Section 5.6.

"Pledgee" -- As defined in Section 10.5(b).

"Prime Rate" -- The fluctuating annual rate of interest publicly announced by The Chase Manhattan Bank, N.A. from time to

time in New York City as its "prime rate," which rate may not be the lowest rate of interest charged by the bank to customers..

"Profits" and "Losses" -- For each Fiscal Year or other period, an amount equal to the Partnership's taxable income or loss for such Fiscal Year or period, determined in accordance with Code Section 703(a) (for this purpose, all items of income, gain, loss, or deduction required to be stated separately pursuant to Code Section 703(a)(1) shall be included in taxable income or loss), with the following adjustments:

(i) Any income of the Partnership that is exempt from Federal income tax or excluded from Federal gross income and not otherwise taken into account in computing Profits or Losses pursuant to this Section shall be added to such taxable income or loss;

(ii) Any expenditures of the Partnership described in Code Section 705(a)(2)(B) or treated as Code Section 705(a)(2)(B) expenditures pursuant to Regulations Section 1.704-1(b)(2)(iv)(i), and not otherwise taken into account in computing Profits or Losses pursuant to this Section, shall be subtracted from such taxable income or loss;

(iii) In the event the Gross Asset value of any Partnership Asset is adjusted pursuant to any provision of this Agreement in accordance with the definition of Gross Asset Value, the amount of such adjustment shall be taken into account as gain or loss from the



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disposition of such Asset for purposes of computing Profits or Losses;

(iv) Gain or loss resulting from any disposition of any Partnership Asset with respect to which gain or loss is recognized for Federal income tax purposes shall be computed by reference to the Gross Asset Value of the property disposed of, notwithstanding that the adjusted tax basis of such Asset differs from its Gross Asset Value;

(v) In lieu of the depreciation, amortization, and other cost recovery deductions taken into account in computing such taxable income or loss, there shall be taken into account Depreciation for such Fiscal Year or other period, computed in accordance with the definition of Depreciation; and

(vi) Notwithstanding any other provision of this Section, any items which are allocated pursuant to Section 8.3 shall not be taken into account in computing Profits or Losses.

"Project Management Agreement" -- That certain agreement dated as of June 30, 1994 relating to the development and management of the Designated Parcels between the Partnership and the Project Manager, as same may be amended, supplemented or otherwise modified from time to time.

"Project Management Fee" -- As defined in Section 7.3(b).

"Project Manager" -- Trump/New World Project Management, L.P., a Delaware limited partnership.

"Purchase Agreement" -- The agreement dated as of June 30, 1994 between Penn Yards Associates and Waterfront pursuant to which Waterfront acquired the Penn Yards and other assets relating thereto from Penn Yards Associates.

"Regulations" -- The Income Tax Regulations promulgated under the Code as such regulations may be amended from time to time (including Temporary Regulations).

"Related Entity" -- With respect to any Partner, any other Partner, or any corporation, partnership, entity or person directly or indirectly controlled by, controlling or under common control with such Partner.

"RSPC" -- Riverside South Planning Corporation, a New York not-for-profit corporation.

"Securities Act" -- The Securities Act of 1933, as amended.

"Tax Distribution" -- As defined in Article 9.

"Transfer" -- As defined in Section 10.1(a).

"Unavoidable Delays" -- Delays resulting from only the following: (a) acts of God, civil commotion, war or governmental moratoria on construction applicable to the entire "west-side" of the Borough of Manhattan, New York, New York and (b) willful, bad faith and malicious acts taken by the Partnership, the General Partner, any other Owner Partnership, Waterfront or any Related Entity of any of them, for the purpose of hindering, frustrating

or delaying the timely completion or satisfaction of any event or requirement of a Partner; provided, however, that as used herein it shall be considered and deemed to be willful, bad faith and malicious if the Partnership, the General Partner, any other Owner Partnership, Waterfront or any Related Entity of any of them shall (i) be grossly negligent in regard to actions necessary to obtain the Building Permits or (ii) takes actions which patently lead to a delay in obtaining the Building Permits, in both cases for a period which will cause delays in obtaining the Building Permits for sixty (60) days or more. Trump agrees to promptly notify the Partnership and the General Partner of any event which he deems may constitute an Unavoidable Delay.

"Waterfront" -- As defined in the Recitals hereto.

"Waterfront Partnership Agreement" -- That certain Agreement of Limited Partnership of Waterfront dated as of June 30, 1994.

"Withdrawing General Partner" -- As defined in Article 11.

"Withholding Funds" -- As defined in Section 20.9.

## ARTICLE 2.

## NAME, PRINCIPAL OFFICE; PARTNERS, PURPOSE

### Section 2.1. Name and Principal Office; Partners

The name of the partnership formed pursuant to this Agreement is Hudson Waterfront Associates I, L.P. The Partnership shall have its principal office c/o Robinson Silverman Pearce Aronsohn & Berman, 1290 Avenue of the Americas,

New York, New York 10104 or at such other place as the General Partner shall select. The Registered Agent (as defined in the Limited Partnership Act) for the Partnership shall be Prentice-Hall Corporation System, Inc. The Registered office (as defined in the Limited Partnership Act) of the Partnership shall be 32 Loockerman Square, Suite L-100, Kent County, Delaware 19904.

Section 2.2. Purpose

Subject to and in accordance with this Agreement, the purposes of the Partnership shall be solely as follows:

(a) To investigate and analyze development opportunities and formulate development plans (including the Business Plan) for the Designated Parcels and, in conjunction with the other owners of the other parcels comprising the Penn Yards, for the Common Areas;

(b) To enter into the Assignment Agreement and pursuant thereto to acquire fee title to the Designated Parcels and an interest in the Assigned Benefits as contemplated therein;

(c) To enter into the Amended and Restated Waterfront Partnership Agreement and to acquire a limited partnership interest in Waterfront and to enter into one or more operating agreements with Waterfront and the other Owner Partnerships with respect to the

development and/or operation of the Penn Yards Project and the Common Areas;

(d) To (i) acquire, rezone, develop, construct, own, manage, operate, improve, maintain, repair, finance and otherwise deal in or with the Designated Parcels (including interests therein and rights appurtenant thereto) and the Common Areas and (ii) sell, transfer, exchange, dispose of, lease, mortgage or otherwise encumber the Designated Parcels, any interest the Partnership may have in the Common Areas, any other Partnership Assets or any portion of any of the foregoing, or any interests therein or rights appurtenant thereto, and, in connection therewith, to accept, collect, hold, sell, exchange, mortgage or otherwise dispose of evidences of indebtedness or other property received pursuant thereto (collectively, the "Partnership Property");

(e) To incur indebtedness, whether secured or unsecured, for any of the foregoing purposes;

(f) To convert portions of the Partnership Assets prior to or following development to cooperative and/or condominium ownership or to transfer any Partnership Assets, or to have Waterfront transfer any of assets held by it, to an owners' association and/or dedicate any Partnership Assets to the City of New York; and

(g) To conduct such other lawful activities consistent with this Agreement as may be necessary or appropriate in connection with the foregoing.

Section 2.3. Statutory Compliance

The Partnership shall exist under and be governed by the Limited Partnership Act. The General Partner and the Limited Partners, as the case may be, shall execute, and the General Partner shall file and/or publish on behalf and at the expense of the Partnership, all appropriate certificates required by law to be filed and/or published in connection with the matters described in Section 2.1 above.

## ARTICLE 3.

## TERM

The term of the Partnership shall continue until December 31, 2044, on which date the Partnership shall dissolve, unless sooner dissolved upon the occurrence of any of the events specified in Section 17.1.

## ARTICLE 4.

## GENERAL AND LIMITED PARTNERS

Section 4.1. General Partner

The General Partner shall be Hudson Waterfront I Corporation, its permitted successors and assigns who are admitted as a General Partner pursuant to this Agreement, and such additional or substitute persons or entities that become General Partners from time to time in accordance with the



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provisions of this Agreement. Notwithstanding anything to the contrary contained herein, provided the Percentage Interest (and economic interest) of Trump immediately after such admission is not less than that of Trump immediately prior to such admission, the General Partner shall have the right, at any time, and from time to time, in its sole discretion without the consent of the Limited Partners, to admit one or more additional or substitute General Partners to the Partnership. The General Partner shall give Trump written notice of the name of, and contact person at, any General Partner admitted to the Partnership pursuant to this Section 4.1.

Section 4.2. Limited Partners

The Limited Partners shall be Trump, Westside and their permitted successors and assigns who are admitted as a Limited Partner pursuant to this Agreement, and such additional or substitute persons or entities that become Limited Partners from time to time in accordance with the provisions of this Agreement. Notwithstanding anything to the contrary contained herein, provided the Percentage Interest (and economic interest) of Trump immediately after such admission is not less than that of Trump immediately prior to such admission, the General Partner shall have the right, at any time, and from time to time, in its sole discretion without the consent of the Limited Partners, to admit one or more additional or substitute Limited Partners to the Partnership.

Section 4.3. Withdrawal of a Partner

(a) No Partner may withdraw from the Partnership or assign or transfer its Partnership Interest in whole or in part, except as provided in Articles 10 and 11 hereof.

(b) Notwithstanding the foregoing, in the event of the death, permanent incapacity, bankruptcy or dissolution of a Limited Partner, the legal representatives or successors of such Partner shall succeed to such Partner's right to receive Profits, Losses and Cash distributions in respect of its Partnership Interest, but shall not be admitted as a substitute Partner without the prior written consent of the General Partner, which consent may be given or withheld in its sole discretion.

Section 4.4. <u>Other Business Ventures of the Partners</u>

No Partner or Related Entity shall be prohibited from owning, leasing, operating, selling, developing, financing, brokering or investing in, either directly or indirectly, any interest in any entity or real property, either in the State of New York or elsewhere, or securities with respect thereto, or from engaging or possessing an interest in other businesses of any nature or description, independently or with others, whether or not similar to or in competition with the Partnership or the Project in any of such cases, and the other Partners shall not have any rights by virtue of this Agreement in respect of such other businesses or securities or the income or profits derived therefrom. The General Partner shall be required to devote only so much of its time to the business and affairs of the Partnership as the General Partner shall determine in its sole

and absolute discretion to be reasonable and necessary to perform its obligations under this Agreement.

## ARTICLE 5.

## CAPITAL CONTRIBUTIONS

Section 5.1. Initial Contributions of the General and Limited Partners

On or prior to the date hereof, the Partners have contributed (or are deemed to have contributed) to the capital of the Partnership certain cash amounts paid to or property transferred to the Partnership in the amounts set forth on the annexed Schedule 5.1 under the caption "Funded to Date."

Section 5.2. Additional Financing

(a) The Partners shall make Additional Contributions at such time and in such amounts as the General Partner shall determine in its sole discretion; provided, however, that except as described in clauses (b) and (d) below and in Sections 14.2(b) and 14.3, no Partner shall be obligated to make any Additional Contributions to the Partnership unless such Partner consents in writing thereto (it being understood and agreed that payments required to be made by Trump pursuant to Section 14.5 shall not be deemed Additional Contributions hereunder), which consent may be granted or withheld in the sole discretion of such Partner.

(b) Except as otherwise provided herein, the General Partner and Westside shall be responsible for providing and/or obtaining all financing which the General Partner, in its sole discretion, shall determine to be necessary in connection with



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the operation of the Partnership and the development of the Partnership Assets. Any such financing shall be at such times and in such manner as determined by the General Partner in its sole discretion; it being understood and agreed by the Partners that no Partner or any Related Entity of a Partner shall have the obligation to make any Additional Contribution or loans to the Partnership. Such financing may be obtained by the Partnership (i) in the form of debt or equity, (ii) by way of Additional Contributions or loans from the General Partner, Westside and/or a Related Entity of either of them, (iii) through the incurrence of indebtedness by the Partnership, secured or unsecured, with financial institution third parties or other parties not a Related Entity of a Partner on such terms and conditions as the General Partner shall determine in its sole discretion, (iv) through the sale or issuance of Partnership Interests in the Partnership and/or (v) by any combination of any of the foregoing or otherwise in any other manner the General Partner shall determine in its sole discretion. In connection with any financing of the Partnership, the General Partner shall have the right, without the consent of the Limited Partners, to grant to an Institutional Lender (as defined in Section 10.5(b)) which is not a Related Entity of any Partner a participation in the profits of the Partnership, the appreciation in the value of the Partnership Assets or other economic interest in the Partnership or the Partnership Assets; provided, however, that the General Partner shall not have the right to admit such Institutional



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Lender as a Partner of the Partnership or otherwise provide such Institutional Lender with the rights of a Partner. Notwithstanding the foregoing, the General Partner shall have the right, at any time, and from time to time, in its sole discretion without the consent of the Limited Partners, to admit one or more lenders as a Partner, General or Limited, to the Partnership, provided the Percentage Interest (and economic interest) of Trump immediately after such admission is not less than that of Trump immediately prior to such admission.

(c) In exercising its discretion pursuant to Section 5.2(b) hereof, the General Partner shall evaluate (utilizing its sole discretion) such factors as it shall deem relevant or appropriate, which shall include market conditions and economic conditions and the then intended plan of development of the Designated Parcels and the Penn Yards Project (which development plans and any modifications thereto shall be determined in the sole discretion of the General Partner acting on behalf of the Partnership). No Partner shall have any claim or cause of action against the General Partner, Westside or any Related Entity of either of them for any financing obtained or provided by the General Partner, Westside or a Related Entity of either of them, the determination by the General Partner not to provide and/or obtain financing or that financing is not required or desirable.

(d) The General Partner agrees to make an Additional Contribution to the Partnership immediately prior to the liquidation of the Partnership pursuant to Article 17 hereof in

an amount equal to the lesser of (i) the deficit balance in its Capital Account and (ii) the excess of 1.01% of the aggregate Capital Contributions of all of the Limited Partners over the aggregate Capital Contributions of the General Partner.

(e) Notwithstanding anything to the contrary in this Agreement, in the event that the rate of interest payable under any mortgage encumbering the Designated Parcels or any portion thereof (including, without limitation, the Existing Mortgages) for any fiscal year exceeds one percent (1%) over the fluctuating annual rate of interest publicly announced by The Chase Manhattan Bank, N.A. from time to time in New York City as its "prime rate," then the General Partner and Westside shall contribute cash to the Partnership, pro rata, in accordance with their respective Percentage Interests, in the amount of such excess, and any deduction for such excess interest (or other tax benefit therefor in the event such interest is required to be capitalized) shall be specially allocated to the contributing Partners in accordance with their respective Percentage Interests. Any such payments shall not be deemed a Capital Contribution or Additional Contribution by the Partner making such payment.

Section 5.3. Capital Accounts.

(a) The Partnership shall establish and maintain a separate Capital Account for each Partner in accordance with the following provisions:

(i) To each Partner's Capital Account there shall be credited such Partner's Capital Contributions, such Partner's distributive share of Profits and any items in the nature of income or gain which are allocated to such Partner pursuant to Section 8.1, and the amount of any Partnership liabilities that are assumed by such Partner or that are secured by any Partnership Assets distributed to such Partner.

(ii) To each Partner's Capital Account there shall be debited the amount of cash and the Gross Asset Value of any Partnership Asset distributed to such Partner pursuant to any provision of this Agreement, such Partner's distributive share of Losses and any items in the nature of expenses or losses which are allocated to such Partner pursuant to Section 8.2, and the amount of any liabilities of such Partner that are assumed by the Partnership or which are secured by any property contributed to the Partnership by such Partner.

The foregoing provisions and the other provisions of this Agreement relating to the maintenance of Capital Accounts are intended to comply with Regulations Section 1.704-1(b), and shall be interpreted and applied in a manner consistent with such Regulations. In the event the General Partner shall in good faith determine that it is prudent to modify the manner in which the Capital Accounts, or any debits or credits thereto, are computed in order to comply with such Regulations, the General



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Partner may make such modifications, provided that it is not likely to have a material effect on the amounts distributable to any Partner pursuant to Section 17.2 upon the dissolution of the Partnership. Any questions with respect to a Partner's Capital Account shall be resolved by the General Partner in good faith in its sole discretion, applying principles consistent with this Agreement.

(b) Any transferee of a Partnership Interest or a portion thereof shall succeed to the Capital Account relating to the Partnership Interest transferred or the corresponding portion thereof.

Section 5.4. Negative Capital Accounts

Except as provided in Section 5.2(d), no Partner shall be required to pay to the Partnership or to any other Partner any deficit or negative balance which may exist from time to time in such Partner's Capital Account.

Section 5.5. Return of Capital; No Interest on Amounts in Capital Account

Except upon dissolution of the Partnership or as may be expressly set forth in this Agreement, no Partner shall have the right to demand or receive the return of its Capital Contribution or any part of its Capital Account or be entitled to receive any interest on its outstanding Capital Account balance.

Section 5.6. Percentage Interests

(a) The "Percentage Interests" of the Partners as of the date of this Agreement are as set forth in Schedule 5.6 annexed hereto. Any change in the Percentage Interest of any



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Partner in accordance with the provisions of this Agreement shall be reflected in an amendment to such Schedule 5.6 which is executed by all Partners, except for any such change resulting from the application of Article 14 which may be executed by the General Partner alone.

(b) The provisions of Article 14, relating to the reduction of Trump's Percentage Interest, are intended to comply with the provisions of Sections 17-306 of the Limited Partnership Act. The Partners mutually acknowledge that the obligations of Trump set forth therein are critical to the Partnership's business; that the interests of the Partners may be at risk by reason of the failure of Trump to meet his obligations thereunder; that the Partners may be forced to borrow funds or invade other assets to meet such obligations; that the extent of the risk and the damage and loss to the Partners resulting from any such default is impossible to foresee or predict at this time, but that such risk, damage and loss could imperil the entire Project; and that in view of the serious consequences that could arise from a Partner's default thereunder, the provisions of Article 14, relating to such a default are reasonable.

## ARTICLE 6.

## LIMITATION OF LIABILITY

(a) Except as provided by applicable law or in this Agreement or in agreements entered into by the Limited Partner pursuant to this Agreement, no Limited Partner shall be liable for any debts, liabilities or obligations of the Partnership and

no Limited Partner shall have to make any contributions or deliver any other property. Nothing in this Agreement shall be construed as making any Limited Partner liable for any losses or debts of the Partnership in excess of such Limited Partner's capital contributions. No Limited Partner with a negative balance in its Capital Account shall be obligated to any other Partner or to the Partnership to restore said negative balance.

(b) No Related Entity of any Partner shall have personal liability for the obligations of such Partner hereunder, except as provided in a written guaranty executed by such Related Entity.

## ARTICLE 7.

## MANAGEMENT OF THE PARTNERSHIP

Section 7.1. Responsibility

(a) The General Partner shall have the full control over the management, operation and activities of, and dealings with, the Partnership Assets and the Partnership's properties, business and affairs and shall have all rights and powers generally conferred by law and necessary, advisable or consistent in connection with the purposes of the Partnership, and the Limited Partners shall not take part in the management of the business or affairs of the Partnership or control the Partnership business. The Limited Partners may under no circumstances sign for or bind the Partnership. The Partners acknowledge that the Partnership shall have the right to become a party to the Project Management Agreement with the Project Manager to assist the

Partnership in connection with the management of the Partnership Assets, subject to and pursuant to the terms of such agreement. Upon termination of the Project Management Agreement, the Partnership shall have the right to enter into one or more new project management agreements with such a project manager(s) as shall be selected by the Partnership on such terms as the General Partner shall determine necessary or appropriate in its sole discretion, and for project management fees not in excess of the greater of (i) the then commercially reasonable and competitive fees, as determined by the General Partner in its sole discretion, of project managers for development projects of the size and scope of the Penn Yards Project or (ii) $1,100,400 or such other amount as the Owner Partnerships shall determine so long as the aggregate project management fees for all of the Penn Yards payable by the Owner Partnerships to the project manager does not exceed $4,000,000 per annum; provided, however, that the General Partner shall have the right to pay project management fees to any Partner or any Related Entity of a Partner which are in excess of commercially reasonable and competitive fees if Trump is compensated or other arrangements at such times and in such manner as Trump would have received distributions of Cash Available for Distribution pursuant to Section 9 hereof so that the economic interest of Trump in the Designated Parcels and the Partnership Assets is not adversely affected (other than in a de minimis manner) from the economic interest of Trump had the Partnership not agreed to pay such excess management fees. The



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General Partner shall have the exclusive authority to act for and on behalf of the Partnership, and no third party shall ever be required to inquire into the authority of the General Partner to take such action on behalf of the Partnership. In addition to the foregoing, the General Partner shall have the rights, authority and powers of general partners with respect to the Partnership business and the Partnership Assets as set forth in or pursuant to the Limited Partnership Act. Without limiting the generality of the foregoing, except as expressly provided for to the contrary in this Agreement, the General Partner shall be authorized to (i) cause the Partnership to enter into the Amended and Restated Waterfront Partnership Agreement, the Assignment Agreement, any operating agreements for the development and/or operation of the Penn Yards Project and the Project Management Agreement, (ii) admit additional Partners to the Partnership and grant participation interests in the Partnership and/or the Partnership Assets to any Person without the consent of the other Partners, so long as such action otherwise complies with the terms of this Agreement and so long as such action does not reduce the Percentage Interest (or otherwise materially adversely affect the economic interests in the Partnership Assets) of Trump and (iii) manage, operate, develop, enter into agreements, sell, lease transfer, finance, mortgage, encumber, dispose of, exchange, convert to condominium ownership and otherwise deal in and with the Partnership and the Partnership Assets, including, without



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limitation, transferring title to all or any portion of the Common Areas to an owners' association or dedicating same to the City of New York.

(b) The General Partner on behalf of the Partnership and without the consent of the Limited Partners shall have the right but not the obligation:

(i) subject to clause (c) below, to transfer any Partnership Assets in complete or partial satisfaction of a creditor's claims, including the holder of any mortgage or other lien on Partnership Assets, by executing and delivering a deed in lieu of foreclosure, bill of sale or otherwise;

(ii) subject to clause (c) below, to confess a judgment;

(iii) subject to clause (c) below, not to contest any foreclosure action commenced with respect to Partnership Assets or any other action claiming a default under any mortgage or other lien on any Partnership Assets; and

(iv) to commence a voluntary case or other proceeding seeking reorganization or other relief with respect to the Partnership or its debts under any bankruptcy, insolvency or other similar law seeing the appointment of a trustee, receiver or custodian of the Partnership..

(c) Notwithstanding the provisions of clauses (b)(i) and (b)(iii) above, until June 30, 1996, the General Partner agrees that it shall take all reasonable actions to contest any

foreclosure action claiming a default under any mortgage or other lien on any Partnership Assets.

(d) The Partners acknowledge that the purchase price incurred by the Partnership to acquire each Designated Parcel is as follows: (i) Parcel D, $7,044,555.53; (ii) Parcel E, $8,367,378.22; (iii) Parcel F, $9,795186.80; and (iv) Parcel G, $3,674,507.37. The purchase price is payable $4,452,747.96 in cash or promissory note and the balance by the Partnership taking title to each Designated Parcel subject to the lien of all of the Existing Mortgages, with such Existing Mortgages having been modified to provide that the Partnership may obtain a release of the lien of the Existing Mortgages affecting a Designated Parcel by payment of the following release prices: (1) Parcel D, $5,958,480; (2) Parcel E, $7,077,360; (3) Parcel F, $8,285,040; and (4) Parcel G, $3,108,000.

Section 7.2. Related Entities

Except as otherwise specifically provided in this Agreement, the General Partner shall have the right to cause the Partnership to enter into contracts or otherwise deal with any Partner or Related Entity of any Partner in any capacity, including, without limitation, in connection with the business and operations of the Partnership, except that the terms of any such arrangement shall be commercially reasonable and competitive with amounts that would be paid to third parties on an "arms-length" basis; provided, however, that the foregoing limitations shall not apply to dealings between the Owner Partnerships.

Without limiting the generality of the foregoing, and notwithstanding the commercial reasonableness or competitiveness thereof, the General Partner shall have the right to cause the Partnership to borrow money from any Partner or any Related Entity of any Partner and pay a rate of return on such funds equal to the Applicable Rate per annum, cumulative and compounded semi-annually, and shall be authorized to cause the Partnership to enter into the Assignment Agreement, one or more operating agreements for the development and/or operation of the Penn Yards Project and the Project Management Agreement, and to take actions on behalf of the Partnership thereunder. The General Partner shall endeavor to advise Trump of any dealings by the Partnership with Related Entities to any Partner other than Trump; provided, however, that the failure by the General Partner to provide any such notice shall not create any liability on the part of the General Partner nor prevent the General Partner from entering into or continuing such arrangement.

Section 7.3. Compensation to the Partners

(a) No fees shall be payable to any Partner or any Related Entity of a Partner for performance of services to or on behalf of the Partnership, except (i) as may be approved pursuant to this Section 7.3, (ii) such fees as shall be determined by the General Partner to be commercially reasonable and competitive with amounts that would be paid to third parties on an "arms-length" basis, provided, however, that the General Partner shall have the right to pay fees to any Partner or any Related Entity

of a Partner which are in excess of commercially reasonable and competitive rates if Trump is compensated or other arrangements made so that the economic interest of Trump in the Partnership Assets is not adversely affected (other than in a de minimis manner), or (iii) to the extent such payment of fees shall not adversely affect the economic interest of Trump in the Partnership (other than in a de minimis manner).

(b) Pursuant to the Project Management Agreement, the Partnership shall pay to the Project Manager an annual project management fee (the "Project Management Fee") in the manner and as set forth therein. If the IRS determines that such Project Management Fees should be characterized as other than fees, then the allocation and distribution provisions of this Agreement shall be modified so as to provide a result to the Partners that is the same (or as close thereto) as that result which would have occurred under this Agreement if the IRS had not such determination.

(c) The General Partner shall be reimbursed for all reasonable and necessary direct expenses, disbursements and advances incurred or made by it in connection with the management and operation of the Partnership and the Partnership Assets, including without limitation, accounting expenses, insurance premiums, legal fees and other direct costs. Any out-of-pocket expenditure made by the General Partner and eligible for reimbursement pursuant to this Section 7.3(c) shall not be treated as a Capital Contribution or otherwise result in a credit



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to such Partner's Capital Account and any reimbursement of such expenditure shall not be treated as a partnership distribution to such Partner or otherwise result in a debit to such Partner's Capital Account.

Section 7.4. Loans to Partners and Related Entities

The General Partner shall have the right, in its sole discretion, to cause the Partnership to lend money to any Partner or any Related Entity of any Partner at a rate of interest equal to the Applicable Rate per annum, cumulative and compounded semi-annually.

Section 7.5. Riverside South Planning Corporation

In the event that the Partnership shall have the right to designate a member of the Board of Directors of RSPC, either alone or in conjunction with the other Owner Partnerships, the General Partner shall have the right to designate such person (which need not be a Partner of the Partnership) as it shall determine in its sole discretion to serve as a member of the Board of Directors of RSPC; provided, however, that the General Partner agrees to designate, or cause Waterfront to designate (which shall be deemed to be a designation by the Partnership), Trump to serve as such director until the first to occur of (i) the termination of the Project Management Agreement (or of any replacement thereof in which Trump Project Management Corp., a New York corporation of which Trump is the 100% shareholder, is the new project manager or a partner of the new project manager), (ii) the Duties Reallocation Date (as defined in the partnership

agreement of the Project Manager) or (iii) a failure by Trump to act, make any determination or cast any vote in the manner directed by the General Partner, or other breach by Trump of his agreement with the Partnership in any material respect or if Trump acts in a willful, bad faith and malicious manner. At the request of the General Partner, any person designated to serve, either by this Partnership or by Waterfront or any other Owner Partnership, as a member of the Board of Directors of RSPC shall, as a condition to such person's designation, enter into a written agreement with the Partnership pursuant to which such person shall agree (a) to keep the General Partner, or such other person as the General Partner shall designate, advised of all scheduled meetings of the Board of Directors of RSPC and the contents thereof and (b) prior to taking any action, making any determination or casting any vote as a director of RSPC or otherwise, to consult with the General Partner and act, make any determination or cast any vote in the manner directed by the General Partner. In the event that any person who serves as the Partnership's designated director of RSPC fails to act, make any determination or cast any vote in the manner directed by the General Partner, or otherwise breaches his or her agreement with the Partnership or acts in a willful, bad faith and malicious manner, then such person shall be personally liable to the Partnership for any loss, damage, cost, expense or liability to the Partnership arising from such failure or breach; provided, however, that if such person is a Partner of the Partnership,



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then his or her personal liability shall be limited to his or her Partnership Interest in the Partnership. The Partnership shall indemnify and hold harmless the Partnership's designated director of RSPC from and against any and all claims, costs, losses, damages and expenses, to the extent of any liability or damages incurred by such person in furtherance of his responsibilities pursuant to, and to the extent performed in compliance with, Section 7.5 hereof, including, without limitation, reasonable attorneys' fees.

Section 7.6. Exculpation and Indemnification

(a) None of (i) a General Partner, (ii) any Related Entity of a Partner retained to provide services to the Partnership, nor (iii) any officer, director, shareholder, individual employed by the General Partner or such Related Entity retained by the Partnership, acting on behalf of the Partnership in connection with any business or activity of the Partnership and in good faith for a purpose which it reasonably believed to be authorized by the General Partner or otherwise authorized pursuant to this Agreement and in the Partnership's best interest, shall be liable to the Partnership or to any Partner for any loss arising out of or in connection with the management, operation or conduct of the Partnership's business and affairs, except by reason of willful misconduct, fraud, gross negligence or disregard of duties and obligations under this Agreement. The Partnership shall indemnify and hold harmless the General Partner, any Related Entity and their respective officers,



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directors, shareholders, agents, employees, successors, heirs and personal representatives (each, an "Indemnified Person") from and against any and all claims, costs, losses, damages, expenses (including, without limitation, the expense of defending, investigating or preparing to defend any claim) or liabilities (including, but not limited to, reasonable attorneys' fees) suffered or sustained by them by reason of any acts performed or omitted to be performed by the General Partner, Related Entity or their agents, employees or independent contractors or on behalf of the Partnership or in furtherance of the interest of the Partnership, provided that the Indemnified Person did not act (or fail to act) in bad faith, fraudulently or with willful misconduct or gross negligence, in respect of the matter on which the claim is based.

(b) No claim, action or proceeding, or any appeal therefrom which is subject to the provisions of Section 7.4(a), shall be settled on behalf of the Partnership without the consent of the General Partner, Related Entity or employee, as the case may be, affected thereby, which consent shall not be unreasonably withheld, unless the settlement of such claim, action or proceeding requires solely the payment of money in which event no consent shall be required, but if the Partnership is also a defendant in any such claim, action, proceeding or appeal, the Partnership may enter into any settlement for itself without the consent of any other defendant.

## ARTICLE 8.

## ALLOCATIONS OF PROFITS AND LOSSES

Section 8.1. Profits

After giving effect to the special allocations set forth in Section 8.3 hereof, Profits for any Fiscal Year shall be allocated in the following order and priority:

(a) First, to the General Partner to the extent of the excess, if any, of (i) the cumulative Losses allocated to it pursuant to Section 8.2(b) hereof for all prior Fiscal Years, over (ii) the cumulative Profits allocated to it pursuant to this Section 8.1(a) for all prior Fiscal Years;

(b) Second, to the Partners in proportion to and to the extent of the excess, if any, of (i) the cumulative Losses allocated to each such Partner pursuant to Section 8.2(a)(iii) hereof for all prior Fiscal Years, over (ii) the cumulative Profits allocated to such Partner pursuant to this Section 8.1(b) for all prior Fiscal Years;

(c) Third, to the Partners in proportion to and to the extent of the excess, if any, of (i) the sum of (A) the cumulative Partner Priority Return of each such Partner from the commencement of the Partnership to the last day of such Fiscal Year, plus (B) the cumulative Losses allocated to such Partner pursuant to Section 8.2(a)(ii) hereof for all prior Fiscal Years, over (ii) the cumulative Profits allocated to such Partner pursuant to this Section 8.1(c) for all prior Fiscal Years; and



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(d) The balance, if any, among the Partners in proportion to their Percentage Interests.

Section 8.2. <u>Losses</u>

After giving effect to the special allocations set forth in Section 8.3 hereof, Losses for any Fiscal Year shall be allocated as set forth in Section 8.2(a) below, subject to the limitation in Section 8.2(b) below.

(a) Losses for any Fiscal Year shall be allocated in the following order and priority:

(i) First, to the Partners in proportion to and to the extent of the excess, if any, of (1) the cumulative Profits allocated to each such Partner pursuant to Section 8.1(d) hereof for all prior Fiscal Years, over (2) the cumulative Losses allocated to such Partner pursuant to this Section 8.2(a)(i) for all prior Fiscal Years;

(ii) Second, to the Partners in proportion to and to the extent of the excess, if any, of (1) the cumulative Profits allocated to each such Partner pursuant to Section 8.1(c) hereof for all prior Fiscal Years, over (2) the cumulative Losses allocated to such Partner pursuant to this Section 8.2(a)(ii) for all prior Fiscal Years; and

(iii) The balance, if any, 1% to the General Partner and 99% to Westside.

(b) To the extent any Losses otherwise allocable to Westside pursuant to Section 8.2(a) hereof would cause Westside to have an Adjusted Capital Account Deficit at the end of any



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Fiscal Year, any such Losses shall instead be allocated to the General Partner.

Section 8.3. <u>Special Allocations</u>

The following special allocations shall be made in the following order:

(a) (i) Minimum Gain Chargeback. Notwithstanding any other provision of this Article 8, if there is a net decrease in Partnership Minimum Gain during any Fiscal Year, then, except as otherwise provided in Regulations Section 1.7042(f), each Partner shall be specially allocated items of Partnership income and gain for such Fiscal Year (and, if necessary, subsequent Fiscal Years) in an amount equal to such Partner's share of the net decrease in Partnership Minimum Gain, as determined in accordance with Regulations Section 1.704-2(g). Allocations pursuant to the previous sentence shall be in proportion to the respective amounts required to be allocated to each Partner pursuant thereto. The items to be so allocated shall be determined in accordance with Section 1.704-2(j)(2) of the Regulations. This Section 8.3(a)(i) is intended to comply with the minimum gain chargeback requirement in Section 1.704-2(f) of the Regulations and shall be interpreted consistently therewith.

(ii) Partner Minimum Gain Chargeback. Notwithstanding any other provision of this Article 8, if there is a net decrease in Partner Nonrecourse Debt Minimum Gain attributable to a Partner Nonrecourse Debt during any Fiscal Year, then, except as otherwise provided in Regulations Section



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1.704-2(i)(4), each Partner who has a share of the Partner Nonrecourse Debt Minimum Gain attributable to such Partner Nonrecourse Debt, determined in accordance with Regulations Section 1.704-2(i)(5) shall be specially allocated items of Partnership income and gain for such Fiscal Year (and, if necessary, subsequent Fiscal Years) in an amount equal to such Partner's share of the net decrease in Partner Nonrecourse Debt Minimum Gain attributable to such Partner Nonrecourse Debt, determined in accordance with Regulations Section 1.704-2(i)(4). Allocations pursuant to the previous sentence shall be made in proportion to the respective amounts required to be allocated to each Partner pursuant thereto. The items to be so allocated shall be determined in accordance with Regulations Sections 1.704-2(i)(4) and 1.704-2(j)(2). This Section 8.3(a)(ii) is intended to comply with the minimum gain chargeback requirement in Section 1.704-(2)(i)(4) of the Regulations and shall be interpreted consistently therewith.

(b) Qualified Income Offset. In the event a Limited Partner unexpectedly receives any adjustments, allocations, or distributions described in Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (5) or (6), items of Partnership income and gain shall be specially allocated to such Limited Partner in an amount and manner sufficient to eliminate, to the extent required by the Regulations, the Adjusted Capital Account Deficit of such Limited Partner as quickly as possible, provided that an allocation pursuant to this Section 8.3(b) shall be made only if



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and to the extent that such Limited Partner would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article 8 have been tentatively made as if this Section 8.3(b) were not in the Agreement;

(c) Partner Nonrecourse Deductions. Any Partner Nonrecourse Deductions for any Fiscal Year or other period shall be specially allocated to the Partner who bears the economic risk of loss with respect to the Partner Nonrecourse Debt to which such Partner Nonrecourse Deductions are attributable in accordance with Regulations Section 1.704-2(i)(1).

(d) Section 754 Adjustments. To the extent an adjustment to the adjusted tax basis of any Partnership Asset pursuant to Code Section 734(b) or Code Section 743(b) is required, pursuant to Regulations Section 1.704-1(b)(2)(iv)(m), to be taken into account in determining Capital Accounts as a result of a distribution to a Partner in complete liquidation of its Interest, the amount of such adjustment to the Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis) and such gain or loss shall be specially allocated to the Partners in accordance with their interests in the Partnership in the event Regulations Section 1.704-1(b)(2)(iv)(m)(2) applies, or to the Partner to whom such distribution was made in the event Regulations Section 1.704(b)(2)(iv)(m)(4) applies.

(e) Curative Allocations.



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(i) The allocations set forth in Section 8.3(a), 8.3(b), 8.3(c), 8.3(d) and 8.3(e) hereof (the "Regulatory Allocations") are intended to comply with certain requirements of the Regulations. It is the intent of the Partners that, to the extent possible, all Regulatory Allocations shall be offset either with other Regulatory Allocations or with special allocations of other items of Partnership income, gain, loss, or deduction pursuant to this Section 8.3(f). Therefore, notwithstanding any other provision of this Section 8 (other than the Regulatory Allocations), the General Partner shall make such offsetting special allocations of Partnership income, gain, loss, or deduction in whatever manner it determines appropriate so that, after such offsetting allocations are made, each Partner's Capital Account balance is, to the extent possible, equal to the Capital Account balance such Partner would have had if the Regulatory Allocations were not part of the Agreement and all Partnership items were allocated pursuant to Section 8.1 and 8.2.

(ii) If the Capital Account balances of the Partners, determined on a tentative basis (after giving effect to all contributions, distributions and allocations for all periods), differ from the amounts that would be distributed to them upon the liquidation of the Partnership if all distributions in liquidation were governed by the provisions of Article 9, then notwithstanding anything to the contrary herein, items of income, gain, loss and deduction shall be specially allocated among the Partners for the Fiscal Year in which the dissolution of the

Partnership occurs (and, if necessary, the prior Fiscal Year), in order to reconcile the Capital Account balances of the Partners with the amounts that would be distributed to them upon the liquidation of the Partnership if all distributions in liquidation were governed by the provisions of Article 9.

Section 8.4. <u>Other Allocation Rules</u>

(a) For purposes of determining the Profits, Losses, or any other items allocable to any period, Profits, Losses, and any such other items shall be determined on a daily, monthly, or other basis, as determined by the General Partner using any permissible method under Code Section 706 and the Regulations thereunder.

(b) Except as otherwise provided in this Agreement, all items of Partnership income, gain, loss, deduction, and any other allocations not otherwise provided for shall be divided among the Partners in the same proportions as they share Profits and Losses, as the case may be, for the Fiscal Year.

(c) Notwithstanding anything contained in this Agreement to the contrary, if the Partnership recognizes any income from the cancellation of indebtedness or otherwise in connection with the acquisition of the Existing Mortgages by Hudson Westside Associates, L.P., as of June 30, 1994, or a reduction in the amount payable thereunder to $88,800,000, then all such income, as well as any related tax benefits to the Partnership (but only to the extent of such income) including without limitation any increase in Partnership tax attributes



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including any increase in the basis of Partnership assets, shall be allocated solely to Trump; provided, however, in no event shall the amount of such income allocated to Trump exceed the excess of (i) the largest amount under the Existing Mortgages (including principal and accrued and unpaid interest thereon) payable immediately prior to the execution of the Waterfront Partnership Agreement over (ii) $88,800,000.

(d) The Partners are aware of the income tax consequences of the allocations made by this Article 8 and hereby agree to be bound by the provisions thereof in reporting their shares of Partnership income and loss for income tax purposes.

Section 8.5. Tax Allocations: Code Section 704(c)

In accordance with Code Section 704(c) and the Regulations thereunder, income, gain, loss, and deduction with respect to any property contributed to the capital of the Partnership shall, solely for tax purposes, be allocated among the Partners so as to take account of any variation between the adjusted basis of such property to the Partnership for Federal income tax purposes and its initial Gross Asset Value.

In the event the Gross Asset Value of any Partnership Asset is adjusted pursuant to any provision of this Agreement in accordance with the definition of Gross Asset Value, subsequent allocations of income, gain, loss and deduction with respect to such Partnership Asset shall take into account any variation between the adjusted basis of such Partnership Asset for Federal income tax purposes and its Gross Asset Value in the same manner

as under Code Section 704(c) and the Regulations thereunder. The Partnership shall use any permissible method, as determined in the sole discretion of the General Partner, to eliminate disparities between book and tax items as set forth in Regulations Sections 1.704-3(a).

Any elections or other decisions relating to such allocations shall be made by the General Partner in a manner that reasonably reflects the purpose and intention of this Agreement. Allocations pursuant to this Section 8.5 are solely for purposes of Federal, state, and local taxes and shall not affect, or in any way be taken into account in computing, any Partner's Capital Account or share of Profits, Loses, other items, or distributions pursuant to any provision of this Agreement.

## ARTICLE 9.

## DISTRIBUTIONS OF CASH

Subject to Section 17.2, Cash Available for Distribution shall be distributed by the Partnership from time to time as determined by the General Partner (but no less frequently than annually) in the following order of priority:

(a) First, to the General Partner and Westside, until the General Partner and Westside have each received an amount equal to the excess, if any, of (i) their respective cumulative Partner Priority Return from the inception of the Partnership to the end of the calendar month preceding such distribution over (ii) the aggregate amount of all prior distributions to them, respectively, pursuant to this Section 9.1(a), such amounts to be



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distributed to the General Partner and Westside in proportion to their respective excess amounts;

(b) Second, to the General Partner and Westside, until the General Partner and Westside have each received an amount equal to the excess, if any, of (i) their respective Capital Contribution over (ii) the aggregate amount of all prior distributions to them, respectively, pursuant to this Section 9.1(b), such amounts to be distributed to the General Partner and Westside in proportion to their respective excess amounts;

(c) Third, to Trump until he has received an amount equal to the excess, if any of (i) Trump's Capital Contribution over (ii) the aggregate amount of all prior distributions to Trump pursuant to this Section 9.1(c); and

(d) The balance, if any, to the Partners pro rata in proportion to their Percentage Interests.

(e) Notwithstanding anything to the contrary contained in this Article 9, for each taxable year other than a taxable year in which the Partnership liquidates, on the date which is 90 days after the close thereof (the "Distribution Date"), provided that the General Partner, Westside and/or any Related Entity (other than the other Owner Partnerships) of either of them shall have received an amount equal to the Initial Investment, through this Partnership and/or the Partnership's Allocable Share of the Existing Mortgages, whether by distribution of Cash Available for Distribution pursuant to this Agreement or amortization of the Partnership's Allocable Share of the Existing Mortgages or other



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indebtedness of the Partnership, but only to the extent of Cash Available for Distribution by the Partnership, there shall be distributed to each Partner an amount (the "Tax Distribution") equal to the product of (i) the highest marginal Federal, state and local income tax rate for an individual resident of New York City for such taxable year and (ii) the amount of the excess, if any, of any Profits allocated to such Partner for such taxable year pursuant to Article 8 hereof over any Losses allocated to such Partner for such taxable year pursuant to Article 8 hereof (such allocations of Profits and Losses to be taken into account, however, only to the extent they apply for federal income tax purposes (taking into account Sections 8.3, 8.4 and 8.5)), less any distributions to such Partner pursuant to Section 9(d) hereof during such period. For the purposes of determining Cash Available for Distribution to make the Tax Distribution, the amount of any Capital Contributions or borrowings from Partners and/or Related Entities shall not be included in the determination of Cash Available for Distribution and the amount of reserves used in such determination shall be reasonable in the sole judgment of the General Partner. Any Tax Distributions to a Partner shall reduce the amount of any subsequent distributions to such Partner pursuant to Article 9.



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## ARTICLE 10.

## TRANSFER OF PARTNERSHIP INTERESTS

Section 10.1. Prohibited Transfers

(a) Except in accordance with, and as permitted by, Sections 10.2, 10.3 and 10.4, a Partner may not, directly or indirectly, sell, assign, transfer or otherwise dispose of (collectively, "Transfer") all or any part of its Partnership Interest (including, without limitation, the right to receive allocations of income, profits and losses and/or distributions of cash flow), whether voluntarily or by foreclosure, assignment in lieu thereof or other enforcement of a pledge, hypothecation or collateral assignment, without the prior written consent of the General Partner, which consent may be granted or withheld in the sole discretion of the General Partner.

(b) Except in accordance with and as permitted by Section 10.5, no Partner shall pledge, hypothecate or collaterally assign all or any portion of its Partnership Interest (including, without limitation, the right to receive income, gain, Losses and/or distributions of cash flow) without the prior written consent of the General Partner, which consent may be granted or withheld in the sole discretion of the General Partner.

(c) For purposes of this Agreement, any sale, assignment, transfer or other disposition of the capital stock or other equity interest in any Partner or any partner, stockholder or other equity owner of any Partner shall constitute a Transfer;



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provided, however, that until such time as the General Partner shall notify a Partner in writing any such Transfer (other than a Transfer by Trump) shall, subject to the other provisions of this Article 10, be deemed consented to by the General Partner.

Section 10.2. Permitted Transfers by Partners

Notwithstanding the provisions of Section 10.1, but subject to the other provisions of this Article 10 (including without limitation Section 10.4(g)), from and after June 30, 1999, Trump may, without the consent of the other Partners, Transfer his Partnership Interest or any portion thereof to a Controlled Trust, provided that the trustees of such Controlled Trust agree in writing on behalf of the Controlled Trust to be bound by all of the obligations and restrictions of Trump hereunder, including, without limitation, the pledge of Trump's Partnership Interest to the Partnership pursuant to Section 10.5(c) hereof and the obligation of Trump to pledge his Partnership Interest to secure Partnership obligations pursuant to Section 10.5(d) hereof. Prior to any such Transfer, and from time to time at the request of the General Partner, Trump shall be required to provide the General Partner with a certification, attested to by Trump, that the transferee trust complies with the requirements for a Controlled Trust under this Agreement, and such other documentation as the General Partner shall require to evidence that such Transfer will be or is in compliance with this Section 10.2 and the other provisions of this Article 10.



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Section 10.3. Effective Date of Transfers

(a) No Transfer of all or any part of the Partnership Interest of a Partner permitted to be made under this Agreement shall be binding upon the Partnership unless and until a duplicate original of such assignment or instrument of transfer, duly executed and acknowledged by the assignor or transferor, in form satisfactory to the General Partner, has been delivered to the Partnership, and such instrument evidences the written acceptance by the assignee of all of the terms and provisions of this Agreement and represents that such assignment was made in accordance with all applicable laws and regulations.

(b) For financial and tax reporting purposes, every voluntary sale, assignment or other transfer (as distinguished from the original issuance) of any Partnership Interest or portion thereof shall be deemed to have occurred, and shall have no prior effect, as of the close of business on the day on which such event shall have in fact occurred, and every involuntary sale, assignment or transfer (whether by bequest, operation of law or any other method) of any Partnership Interest shall be deemed to have occurred, and shall have no prior effect, as of the close of business on the day on which the Partnership shall have received evidence of such transfer.

Section 10.4. Conditions Applicable to Transfers

(a) Compliance with Laws, etc.

Notwithstanding any provisions hereof to the contrary, unless otherwise approved by the General Partner:



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(i) no Transfer of a Partnership Interest may be made to an entity exempt from Federal income tax under Code Section 501(a); and

(ii) no Transfer shall be permitted if it would impose fiduciary responsibility on any Partner or Related Entity under ERISA.

Neither a Partner's request for such consent to a proposed Transfer nor the giving of such consent shall obviate the necessity of complying with the other provisions contained in this Article 10.

(b) Instruments of Transfer.

Notwithstanding anything to the contrary contained in this Agreement, no change in ownership of the Partnership Interest of any Partner shall be binding upon the other Partners or the Partnership unless and until (i) true copies of the instruments of transfer executed and delivered pursuant to or in connection with such Transfer shall have been delivered to the General Partner, (ii) the transferee shall have delivered to the General Partner an executed and acknowledged assumption agreement, in form and substance reasonably satisfactory to the General Partner, pursuant to which the transferee assumes from and after the date of the Transfer all the obligations of the transferor hereunder, whether theretofore accrued or thereafter accruing, makes all representations, warranties and covenants as were made pursuant to Article 14 by the transferor, and agrees to be bound by all the provisions of this Agreement, (iii) the



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transferee shall have executed, acknowledged and delivered any instruments required under the Limited Partnership Act or the laws of any State in which the Partnership is authorized to do business to effect such Transfer and its admission to the Partnership and (iv) to the extent required by the General Partner, the Partnership shall have received an opinion of counsel as provided in Section 10.4(c). Upon the execution and delivery of such agreement, the transferor shall have no further obligation hereunder thereafter accruing except that the transferor shall remain primarily liable for all accrued obligations (as of the date of Transfer) of the transferor under this Agreement notwithstanding any Transfer pursuant to this Article 10.

(c) Opinion of Counsel.

(i) Prior to any proposed Transfer, the transferring Partner shall give a notice to the Partnership setting forth the material terms and conditions of such Transfer, the name of the proposed transferee and the name of its and/or the transferee's counsel (which counsel shall be satisfactory to the General Partner), and the following provisions shall apply:

To the extent required by the General Partner in its sole discretion, there shall be delivered to the Partnership an opinion of counsel to the transferring Partner or transferee, satisfactory in form and substance to the General Partner with respect to any one or more of the following matters: (1) that the proposed Transfer shall not

result in the violation of the Securities Act or any other applicable federal or state laws or the order of any court having jurisdiction over the Partnership or require registration of the Partnership Interest to be transferred under the Securities Act as then in force or the taking of any similar action under any similar Federal or state law then in force; (2) that the proposed Transfer shall not be a breach, violation or default under, or give rise to an unwaived right to accelerate any indebtedness of the Partnership under any agreement which the Partnership has provided to such counsel; (3) that the proposed Transfer shall not result in or create a prohibited transaction under ERISA, or cause the Partnership to become a "party in interest" as defined in Section 3(14) of ERISA, or otherwise result in the holder of any interest in the Partnership or the assets of the Partnership being subject to the provisions of such statute; (4) that the proposed Transfer shall not result, directly or indirectly, in the termination of the Partnership under Code Section 708; (5) that the proposed Transfer shall not cause the Partnership to become "publicly traded" for purposes of Code Section 7704; (6) that the proposed Transfer shall not cause the classification of the Partnership as a partnership for purposes of the Code to be lost or adversely affected; (7) in the case of a Transfer pursuant to Section 10.2 hereof, that the transferee is a Controlled Trust within the meaning provided

for in this Agreement and is otherwise permitted by and in accordance with this Article 10; or (8) such other matters as the General Partner shall request.

(ii) The transferring Partner and the transferee shall pay to the Partnership all costs incurred by the Partnership as a result of such Transfer, and shall indemnify the Partnership (in a manner which is satisfactory to the General Partner) for any such costs which are or may be incurred by it thereafter as a result of such Transfer.

(d) Transferees by Operation of Law.

(i) In the event of the death of a Limited Partner, the executor, administrator or trustee, legal representative of the deceased Limited Partner or beneficiaries, or if such Partner is adjudged incompetent or insane, the committee, guardian or conservator, or, if such Partner becomes bankrupt, the trustee or receiver of the estate, shall have all the right, title and interest of the deceased Limited Partner to receive allocations of Profits and Losses and distributions of Cash Available for Distribution but shall have no right to become a substituted Limited Partner except with the prior written consent of the General Partner pursuant to Section 10.4(g) hereof and otherwise in accordance with the terms of this Article 10. The Partnership shall not be dissolved or terminated by reason of the death, insanity, bankruptcy, incapacity, removal, withdrawal, dissolution or admission of any Limited Partner.

(ii) If any party or entity acquires all or any part of a Partnership Interest in violation of this Article 10 by operation of law or judicial proceeding, the holder(s) of the affected interest shall have no right to take action under this Agreement, and the Partner whose interest was affected shall be subject to the restrictions provided for in Section 10.6.

(e) Acceptance of Prior Acts. Any person who becomes a Partner, by becoming a Partner, accepts, ratifies and agrees to be bound by all actions duly taken pursuant to the terms and provisions of this Agreement by the Partnership prior to the date it became a Partner and, without limiting the generality of the foregoing, specifically ratifies and approves all agreements and other instruments as may have been executed and delivered on behalf of the Partnership prior to said date and which are in force and effect on said date.

(f) Survival of Obligations and Benefits. Any transferee of a Partnership Interest or portion thereof shall succeed to all the rights, and be subject to all the obligations, of the transferor Partner under this Agreement. Such rights and obligations include, without limitation, (i) with respect to a transferee of the General Partner or Westside, rights to receive a Partner Priority Return and (ii) with respect to a transferee of Trump, all of Trump's obligations, covenants, and agreements hereunder.

(g) Substituted Limited Partner. Notwithstanding anything in this Agreement to the contrary, no permitted

transferee of a Partnership Interest of a Limited Partner shall be admitted to the Partnership as a substituted Limited Partner without the prior written consent of the General partner, which may be granted or withheld in the sole discretion of the General Partner.

Section 10.5. Pledges of Partnership Interest

(a) Loans Secured by Pledge. Notwithstanding the prohibitions against a Partner pledging its Partnership Interest as set forth in Section 10.1, after the later to occur of (x) the date both the General Partner, Westside and/or any Related Entity of either of them (other than the other Owner Partnerships) shall have received an amount equal to the Initial Investment, through this Partnership and/or the Partnership's Allocable Share of the Existing Mortgages and (y) June 30, 1999, Trump may voluntarily pledge all or part of its rights to distributions of Cash Available for Distribution under Article 9 hereof to a "Pledgee" (as hereinafter defined in Section 10.5(b)) to secure a loan made to Trump by the Pledgee pursuant to an agreement which is expressly subject to the provisions of this Section 10.5. Any such pledge by Trump shall be subject to the prior written consent of the General Partner, which consent shall not be unreasonably withheld or delayed; provided, however, that the General Partner will be deemed to have acted reasonably if, in connection with any pledge by Trump, the General Partner requires the Pledgee to agree to subordinate its lien to the pledges (i)



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made by Trump under Section 10.5(c) and (ii) to be made by Trump under Section 10.5(d).

(b) Permitted Pledgees and Institutional Lenders. For purposes of this Agreement, the term "Pledgees" or "Institutional Lenders" shall mean (i) a savings bank, commercial bank, savings and loan association or trust company (whether acting individually or in a fiduciary capacity), (ii) an insurance company or insurance fund, (iii) a welfare, pension or retirement fund or system of a state or municipality, (iv) a state, county or municipal employees retirement system, or a teachers or public employees retirement system, (v) any of the Teachers Insurance and Annuity Association, The New York State Teachers' Retirement System, The New York State Employees' Retirement System, in each case, provided such entity has a net worth of at least $50,000,000 and is commonly engaged in the business of making loans.

(c) Pledge by Trump to Secure Obligations. Notwithstanding anything to the contrary contained herein, Trump hereby pledges, transfers, assigns and grants a continuing security interest to the Partnership as collateral security for the payment and performance of all of the obligations of Trump (i) under that certain guarantee of dated as of June 30, 1994, among other things, the obligations of Penn Yards Associates under the Purchase Agreement and of Trump Project Management Corp. under the partnership agreement for the Project Manager (ii) under this Agreement and (iii) under each of the other Owner



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Partnership Agreements, all of his right, title and interest in and to his Partnership Interest. Trump agrees to execute and deliver to the Partnership such documents, agreements, certificates and financing statements as the Partnership shall reasonably require to effectuate the provisions of this subparagraph (c), including, without limitation, a pledge agreement or a collateral assignment agreement.

(d) <u>Pledge by Partners to Secure Partnership Obligations</u>. Each Partner agrees that in the event that the General Partner shall determine that it is necessary or desirable for all of the Partners to pledge, assign or grant a security interest in their Partnership Interest in the Partnership or the Partnership's interest in Waterfront and/or the Common Areas to an Institutional Lender which is not a Partner or a Related Entity of a Partner as collateral security for the obligations of the Partnership in connection with a financing by the Partnership with such Institutional Lender, then each Partner (including Trump) agrees to pledge, assign and grant a security interest in its or his Partnership Interest to such Institutional Lender (and in the case of a pledge by the Partnership of its interest in Waterfront and/or the Common Areas, the Partners hereby consent to such pledge, assignment and/or grant of security interest by the Partnership) as collateral security and execute and deliver all documents, agreements, certificates and financing statements which may be required by such Institutional Lender in connection therewith.



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Section 10.6. Transfers Void

Any attempted withdrawal, sale, assignment, pledge, transfer, encumbrance, mortgage or other disposition, or substitution of a Partner, made in violation of this Agreement shall be automatically void *ab initio*. If any Partner makes or attempts to make a withdrawal, sale, assignment, pledge, transfer, encumbrance, mortgage or other disposition or substitution in violation of this Agreement, all of such Partner's rights hereunder to vote for or participate in Partnership decisions shall be suspended until such violation is cured or is waived by the remaining Partner.

## ARTICLE 11.

## DISSOLUTION, RESIGNATION OR BANKRUPTCY OF THE GENERAL PARTNER

Section 11.1. Dissolution, Resignation or Bankruptcy of General Partner

In the event of the dissolution, resignation or bankruptcy of the General Partner (collectively, a "Terminating Event"), the Partnership shall be dissolved and terminated, except as otherwise provided in Section 11.2.

Section 11.2. Continuation of Partnership

No later than 90 days following the Terminating Event, Westside (or, if Westside shall not have a majority-in-interest, then a majority-in-interest of the Limited Partners) if it or a Related Entity agrees to become a General Partner in the place and stead of the General Partner, shall determine whether to continue the Partnership and shall, within such 90 days, give



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written notice of such determination to the then Limited Partners and to the General Partner. If Westside shall so determine to continue the Partnership, the Interest of the General Partner shall become that of a Limited Partner in the Partnership, with the same Capital Account, the same Percentage Interest, and the same interest in the Partnership profits, losses, and distributions of all kinds, as were previously possessed under such General Partner's Interest in the Partnership, subject, however, to the limitation of liability afforded by law to a limited partner with respect to transactions or occurrences on and after the date on which the General Partner's Interest so becomes that of a Limited Partner hereunder. If Westside agrees to become a General Partner in the place of the General Partner pursuant to this Section 11.2, and to continue the Partnership, the Limited Partners hereby consent to Westside's substitution and admission as a General Partner and to Westside becoming Tax Matters Partner.

## ARTICLE 12.

## ACCOUNTS AND RECORDS; ACCOUNTANTS

Section 12.1. Fiscal Year

The taxable year of the Partnership for Federal income tax purposes shall be the calendar year or such other year as may be selected by the General Partner in accordance with the rules of the Code.

Section 12.2. Records

(a) The General Partner shall maintain, or cause to be maintained, complete and accurate records of all transactions of the Partnership.

(b) All books, records and accounts of the Partnership, together with an executed copy of this Partnership Agreement and any amendments hereto shall, at all times, be kept at the principal office of the Partnership (if located in the New York City metropolitan area) or otherwise in a location in the New York City metropolitan area, and shall be open for the inspection and examination (and making copies) by the Partners or their authorized representatives during regular business hours.

Section 12.3. Accountants; Income Tax Returns

The accountant for the Partnership (the "Accountant") shall be Arthur Anderson & Co. or such other certified public accounting firm as the General Partner may select or a successor to any thereof. The Accountant shall annually audit the Partnership's books and records and prepare all applicable tax returns, including any schedules or additional information reasonably required by any Partner in order to file its tax returns, all of the foregoing at the expense of the Partnership. The Partnership shall deliver to each Partner a copy of the Partnership's tax returns not less than ten (10) days prior to filing; provided, however, that such delivery shall not be construed to provide any Partner with any consent, approval or other rights with respect to such tax return or any part thereof,



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and each Partner hereby expressly waives any rights to stay, restrain or otherwise enjoin the Partnership from filing such tax return in the form, and containing such information, matters, positions or elections, determined by the General partner in its sole discretion. The General Partner shall use its reasonable efforts to timely file such tax returns, subject to its right to so file an extension. The General Partner shall timely determine, with respect to any income tax return, any required or permitted election of the Partnership, including, without limitation, elections with respect to the useful life and depreciation rates of the assets of the Partnership, and the Partnership shall make such elections in accordance with such determination; provided, however, that at the request of any Partner the Partnership shall make the election to adjust its basis in its assets pursuant to Code Section 754.

## ARTICLE 13.

## STATEMENTS, INFORMATION AND TAX MATTERS

Section 13.1. Reporting

(a) The General Partner shall use its reasonable efforts to deliver to each Partner within 120 days after the end of each Fiscal Year a statement with respect to the Partnership, prepared or reported on by the Accountant, which statement shall include, as of the end of and for such Fiscal Year, the following:



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(i) financial statements prepared in accordance with generally accepted accounting principles, together with the Accountant's audit report thereon;

(ii) an analysis of the capital contributions and the distributions and payments under Articles 5, 9 and 17; and

(iii) the then current balances in the Capital Accounts of each Partner.

(b) The General Partner shall use its reasonable efforts to deliver to the Partners within 90 days from the end of each Fiscal Year any information necessary for the preparation by the Partners of their Federal and state and local income or other tax returns and shall deliver to the Partners any other information required to be furnished to the Partners by law within the time period for furnishing such information.

(c) The cost of all such reporting shall be paid by the Partnership as a Partnership expense. Each Partner shall have such rights to review the books and records of the Partnership as shall be provided generally to partners of a partnership by applicable law. Notwithstanding the foregoing, if the books and records so kept by the Partnership or the financial statements so prepared are challenged by any Partner, former Partner or any legal representative thereof (individually, a "<u>Challenging Party</u>"), the entire cost and expense to the Partnership of all additional outside accounting work (including the out-of-pocket outside accountants' fees incurred by the



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Challenging Party) resulting from such challenge shall be paid and borne by the Challenging Party, unless a material adjustment in the Partnership's books and records or in the Partnership's financial statements is made as a result of such challenge, in which event the expense of the additional outside accounting work shall be borne by the Partnership.

(d) Notwithstanding anything to the contrary herein. the obligation of the General Partner to deliver financial statements and other reports to the Partners will be subject to the General Partner's receipt of information on a timely basis from the Project Manager under the Project Management Agreement.

Section 13.2. Tax Matters

(a) The General Partner, as long as it is a General Partner, shall act as the Tax Matters Partner of the Partnership, as provided in the regulations pursuant to Section 6231 of the Code. Each Partner hereby approves of such designation and agrees to execute, certify, acknowledge, deliver, swear to, file and record at the appropriate public offices such documents as may be deemed necessary or appropriate to evidence such approval. To the extent and in the manner provided by applicable Code sections and regulations thereunder, the Tax Matters Partner (a) shall furnish the name, address, profits interest and taxpayer identification number of each Partner to the IRS, and (b) shall inform each Partner of administrative or judicial proceedings for the adjustment of Partnership items required to be taken into account by a Partner for income tax purposes.

(b) The Partnership will reimburse the Tax Matters Partner for all third party expenses reasonably incurred by it in connection with any administrative or judicial proceeding with respect to the tax liabilities of the Partners.

## ARTICLE 14.

## REPRESENTATIONS, WARRANTIES, COVENANTS AND EVENTS

### Section 14.1. Representations, Warranties and Covenants by Each Partner

Each Partner represents and warrants to, and covenants and agrees with, the other Partners as follows:

(a) Its Partnership Interest has been acquired under this Agreement for its own account, for investment, and not with a view to, or for sale in connection with, any distribution thereof, nor with any present intention of distributing or selling such Partnership Interest, and that it will not make or offer to make a transfer of its Partnership Interest in violation of the Securities Act or any other applicable federal or state law.

(b) (i) It is not acquiring its Partnership Interest with funds of a pension plan subject to ERISA, and (ii) its acquisition of its Partnership Interest pursuant to this Agreement does not result in or create a prohibited transaction under, or result in the Partnership becoming a "party in interest" as defined in Section 3(14) of ERISA, or otherwise result in any other holder of a Partnership Interest or the Partnership Assets being subject to such statute.



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(c) (i) The execution and delivery of this Agreement by each Partner will constitute the valid and binding agreement by it or him enforceable in accordance with its terms.

(ii) The execution and delivery of this Agreement and its performance hereunder will not conflict with, or breach or result in a default under, any laws or any agreement to which it or he is bound.

(d) Trump does not have any interest (other than his Partnership Interest in this Partnership or his partnership interests in the other Owner Partnerships and or indirectly in Waterfront through his partnership interest in this Partnership and the other Owner Partnerships), directly or indirectly, in any real property located in the Penn Yards or any right or option to acquire any such interest.

(e) No consent, approval or other authorization, except for such as have been obtained or waived on or prior to the date hereof, is required in connection with the execution and delivery by such Partner of this Agreement or the performance by such Partner of its obligations hereunder.

Section 14.2. Additional Representations by Trump

(a) (i) Trump represents to the other Partners that, as of June 30, 1994, the only pending litigation which challenged the zoning for the proposed development of the Penn Yards Project was the action entitled Coalition Against Lincoln West, Inc. et al. v. City of New York, et al., Index No. 109439/93, Supreme Ct., New York County (the "Pending Litigation").

(ii) In the event that there is a breach of the representation contained in subparagraph (i) above, Trump shall be obligated to make an Additional Contribution to the Partnership in cash in an amount equal to 5% of the Initial Investment. The parties acknowledge and agree that the obligation of Trump to make the Additional Contributions required by this Section 14.2 (or upon failure by Trump to make any such required Additional Contribution, in lieu thereof reduce the Percentage Interest of Trump as provided for in this Agreement) is a material inducement to the Partnership and the Partners (other than Trump) entering into this Agreement and acquiring the Existing Mortgages and the Partnership Assets.

(b) Trump acknowledges that pursuant to the Assignment Agreement all of the representations, covenants, agreements and obligations of Trump pursuant to (i) the Purchase Agreement, that certain guarantee of the Purchase Agreement by Trump dated as of June 30, 1994 and any other documents executed in connection therewith and (ii) the Waterfront Partnership Agreement, the Agreement of Limited Partnership of the Project Manager, the Collateral Assignment and Pledge Agreements, each dated as of June 30, 1994, with respect to Trump's (or affiliated entities of Trump) partnership interests in Waterfront and the Project Manager and any other documents executed in connection therewith (collectively, the "Assigned Benefits"), have been ratably assigned to the Partnership and the other Owner Partnerships so that Waterfront, the Partnership and each of the Owner Partnerships are the beneficiaries of the Assigned Benefits on a

pari passu basis. Trump hereby agrees the Partnership and the other Owner Partnerships shall be entitled to rely on all of his representations, covenants, agreements and obligations comprising the Assigned Benefits as if made directly to the Partnership herein or to the other Owner Partnerships in their respective Owner Partnership Agreements.

Section 14.3. Certain Additional Events

(a) In the Waterfront Partnership Agreement Trump agreed with the other partners of Waterfront that upon the happening of certain events Trump would be required to make Additional Contributions to Waterfront and/or his interest in Waterfront would be reduced and/or other obligations on the part of Trump would arise, which obligations on the part of Trump comprise a portion of the Assigned Benefits. Trump hereby agrees with the other Partners as follows, the parties acknowledging and agreeing that obligation of Trump to make the Additional Contributions as required by this Section 14.3 (or upon failure by Trump to make any such required Additional Contribution, in lieu thereof reduce the Percentage Interest of Trump as provided for in this Agreement) is a material inducement to the Partnership and the Partners (other than Trump) entering into this Agreement and acquiring the Partnership Assets, as well as becoming subject to the Existing Mortgages:

In the event (i) a Building Permit (which Building Permit shall be for the entire building and not just the foundation of the building) is not issued on or before the Building Permit Approval Date, for a building or buildings



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aggregating not less than 500,000 square feet of rentable area or (ii) on or before the July 1, 1996 (provided that in the event of an Unavoidable Delay due solely to an event described in clause (b) of the definition thereof, such date of July 1, 1996 shall be extended by the amount of delay caused by such Unavoidable Delay), there shall not be a final non-appealable judicial determination or final non-appealable settlement of the action entitled Coalition Against Lincoln West, Inc. et al. v. City of New York, et al., Index No. 109439/93, Supreme Ct., New York County (the "Pending Litigation") which confirms in all material respects the memorandum decision of the Supreme Court of the State of New York dated January 27, 1994 in the Pending Litigation, in each case, Trump shall be obligated to make an Additional Contribution to the Partnership in cash in an amount equal to 1% of the Initial Investment and from and after such date Trump shall be solely responsible for the payment of all legal fees and disbursements (after such date) which may be incurred by the Partnership in connection with the Pending Litigation. If there is a continuing failure to obtain such Building Permits, then for each full calendar month that elapses from the date of the required performance until the date such permits shall have been obtained, Trump shall be obligated to make additional monthly Additional Contributions to the Partnership in cash, within the first 20 calendar days of each month, in an amount equal to 1% of the Initial Investment. For example, if the Building Permit Approval Date is May 1, 1996 and the Building Permits are not obtained by August 30, 1996, then



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Trump shall make an Additional Contribution in cash in an amount equal to 4% of the Initial Investment. In addition, Trump shall, regardless of whether Trump makes the Additional Contributions required by this Section 14.3, pay all legal fees and disbursements which may be incurred in connection with the Pending Litigation from and after the date July 1, 1996.

(b) For the purposes of this Agreement: (i) "Building Permit" shall mean a permit, duly and validly issued by the Department of Buildings of the City of New York and by any other governmental agency having jurisdiction with respect thereto, permitting the construction of improvements of the initial 500,000 square feet of rentable area in the aggregate at one or more of the parcels D, E, F & G as designated in the Declaration (and as more particularly described in Exhibit A attached hereto) (or such other sites as shall be designated by one or more of the Owner Partnerships) in accordance with plans and specifications prepared and/or submitted by or on behalf of the Partnership or any of the other Owner Partnerships; and (ii) "Building Permit Approval Date" shall mean May 1, 1996, provided, however, in the event that at any time after the date hereof this Partnership or any of the other Owner Partnerships shall determine to change the site(s) and/or type(s) of the designation of the initial 500,000 square feet of rentable area in a manner which requires to the Partnership or the applicable Owner Partnership to make a new application to The City of New York for a Building Permit for the initial 500,000 square feet of rentable area or otherwise start the process of obtaining a Building Permit anew, then the



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Building Permit Approval Date shall be extended to the first day of the month which is 22 calendar months following the date of such redesignation; provided, further, that the dates and periods provided for above shall be extended by reason of Unavoidable Delay by the amount of delay in the Partnership's or other Owner Partnership's ability to obtain a Building Permit caused solely as a result of such Unavoidable Delay.

Section 14.4. Remedies for Failure by Trump to Make Additional Capital Contributions

(a) In the event that Trump fails to make the required Additional Contributions as set forth in Sections 14.2(a) and/or 14.3 hereof, the Percentage Interest of Trump shall be automatically and permanently reduced by a number of percentage points (including fractional points) that is equal in number to the percentage which Trump is required to contribute of the Initial Investment, and the Percentage Interest of Westside shall be increased by a like amount. For example, if Trump failed to make an Additional Contribution in an amount equal to 4% of the Initial Investment, then his Partnership Interest would be reduced from 30% to 26%.

(b) If the representation set forth in Section 14.2(a) hereof shall prove to be untrue or any event described in Section 14.3 hereof shall occur, then regardless of whether Trump shall make the required Additional Contributions, (i) the Partnership shall have the right, exercisable in the sole discretion of the General Partner, to terminate the Project Management Agreement with the Project Manager, and (ii) each of the other Owner Partnerships shall have the right, exercisable in the sole



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discretion of their respective general partners, to terminate its respective project management agreement with the Project Manager.

(c) This Section 14.4 shall be the sole and exclusive remedy of the Partnership or any Partner upon the occurrence of a breach of the representation contained in Section 14.2 or upon occurrence of such events described in Section 14.3 or for a failure by Trump to make any Additional Contribution required pursuant to Sections 14.2 and 14.3.

ARTICLE 15.

EXISTING MORTGAGES

Section 15.1. Foreclosure of Existing Mortgages

(a) The Partners acknowledge that the Partnership has taken title to the Designated Parcels subject to the Existing Mortgages originally held by The Chase Manhattan Bank, N.A. and assigned to Related Entities of the General Partner or Westside and/or other persons or entities. For so long as the initial assignees of the Existing Mortgages or any Related Entity of such assignees shall hold any of the Existing Mortgages, in the event of the foreclosure of any of the Existing Mortgages, and as a result thereof the Partnership shall no longer hold record or beneficial title to the Designated Parcels, the Partnership shall be deemed to make an offer to purchase all of Trump's Partnership Interest in the Partnership for a purchase price equal to the greater of $24,428,880 or the fair market value of Trump's Partnership Interest on the day immediately preceding any such foreclosure sale. For the purposes of this Article 15, "fair market value" of Trump's Partnership Interest shall mean that



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percentage of the fair market value of the Partnership Assets which Trump would have received had the Partnership Assets been sold in an arms' length transaction to an unrelated third-party and the Partnership thereafter liquidated after giving effect to (i) all Partnership liabilities and obligations, contingent or otherwise, including, without limitation, all costs, expenses, taxes (such as transfer taxes, gains taxes, income taxes, etc.) and legal and professional fees and expenses the Partnership would have incurred had the Partnership Assets been so sold and the Partnership liquidated, and (ii) all liabilities and obligations, contingent or otherwise, of Trump under this Agreement or any other agreement or document to which he is a party or by which he may be bound relating to the Partnership Assets.

(b) In consideration of the foregoing agreements by the General Partner and Westside, in the event that the rate of interest on all or any portion of the Existing Mortgages is less than the Applicable Rate, then the Partnership shall pay to Westside an amount equal to its Allocable Share of the difference between the effective rate of interest on the Existing Mortgages in the aggregate and the amount the Partnership would have been required to pay had the entire amount of the Existing Mortgages accrued interest at the Applicable Rate. Any such payment by the Partnership pursuant to this Section 15.1(b) shall be paid pari passu with, at such times as the Partnership shall pay, interest on the Existing Mortgages.

Section 15.2. Determination of Fair Market Value



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If within thirty (30) days after an event giving rise to an offer to purchase Trump's Partnership Interest pursuant to Section 15.1 hereof occurs, the Partnership and Trump have been unable to agree upon the fair market value of Trump's Partnership Interest in the Partnership, then the fair market value shall be determined by appraisal in accordance with the following procedures:

(a) Each of the Partnership and Trump shall select an appraiser (each an "<u>Appraiser</u>") within twenty (20) days after the expiration of the 30-day period provided for in clause (a) above. Each Appraiser shall be instructed to determine independently of the other the fair market value of Trump's Partnership Interest within thirty (30) days after the expiration of such 20-day period. If only one Appraiser shall have been so appointed within such 20 days, or if two Appraisers shall have been so appointed but only one such Appraiser shall have made such determination within such 30-day period thereafter, then the determination of such Appraiser shall be final and binding upon the parties.

(b) If the two Appraisers have been appointed and have made their determinations within the respective requisite periods set forth above and if the difference between the amounts so determined shall not exceed ten (10%) percent of the lesser of such amounts, then the fair market value shall be an amount equal to the midpoint between the amounts so determined.

(c) If the difference between the amounts so determined exceeds ten (10%) percent of the lesser of such



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amounts, then (a) such two Appraisers shall have twenty (20) days to appoint a third Appraiser; (b) if such Appraisers fail to do so, then either the party may request the American Arbitration Association or any successor organization thereto to appoint an Appraiser within twenty (20) days of such request and both parties shall be bound by any appointment so made within such 20-day period; and (c) if no such third Appraiser shall have been appointed within such 20 days, then either party may apply to any court having jurisdiction to make such appointment.

(d) Such third Appraiser, however selected, shall be jointly instructed by the parties to determine the fair market value within thirty (30) days after such Appraiser's appointment. The third Appraiser shall be instructed to select the appraisal of the one of the first two which is closest to the determination of third Appraiser. The determination of the third Appraiser shall be final and binding upon the parties as to fair market value.

(e) If the fair market value is determined pursuant to clause (b) above, then all fees and expenses incurred in any proceeding conducted pursuant to this Section 15.2 shall be borne equally by the parties except that each party shall pay the fees of the Appraiser selected by it or him. If a third Appraiser is selected, then the party whose appraisal is not selected by the third Appraiser shall pay all fees and expenses incurred in any proceeding conducted pursuant to this Section 15.2 (including, without limitation, the fees of all three of the Appraisers).

(f) The parties shall each have the right to submit such data and memoranda to each of the Appraisers (with copies to each other) in support of their respective positions as they may deem necessary or appropriate.

(g) Each Appraiser appointed pursuant to this Section 15.2 shall be a qualified member of the American Institute of Real Estate Appraisers (or any successor of such Institute, or if such organization or successor shall no longer be in existence, a recognized national association or institute of appraisers) having at least ten (10) years' experience in the valuation of properties which are similar in character to the property in question.

(h) It is expressly understood, and the Appraisers shall acknowledge and agree, that any determination of fair market value shall be based solely on the definitions of the same as set forth in Section 15.1 hereof. The Appraisers shall not have the power to add to, modify or change any such definitions or any other provisions of this Agreement, and the jurisdiction of the Appraisers is accordingly limited.

## ARTICLE 16.

## BANK ACCOUNTS

The cash capital contributions of the Partners and other funds of the Partnership shall be deposited in a segregated bank account or accounts which shall be specially opened and maintained by the General Partner. All withdrawals from any such account or accounts may be made only upon the signature of the General Partner by its officers or such other persons as the



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General Partner shall designate in its sole discretion. No funds of the Partnership shall be commingled with any other funds or placed in any other accounts of the Partners.

## ARTICLE 17.

## DISSOLUTION

Section 17.1. Events of Dissolution

The Partnership shall be dissolved upon the occurrence of any of the following events:

(a) the expiration of the term of the Partnership as provided in Article 3 hereof;

(b) a sale or other disposition of all or substantially all of the assets of the Partnership, unless within 10 business days thereafter the General Partner determines to continue the Partnership;

(c) (i) the filing by the Partnership of a voluntary petition for relief under Title 11 of the United States Code or any successor or amendatory provisions thereto, or (ii) 90 days after the filing of an involuntary petition against the Partnership for relief under Title 11 of the United States Code or any successor or amendatory provisions thereto, or (iii) 90 days after the appointment of a trustee or receiver of the Partnership or the assignment of the Partnership or any material part of the Partnership's assets for the benefit of creditors by, of, or with respect to the Partnership, unless any such event referred to in subsection (c)(ii) or (c)(iii) is remedied within 90 days of its occurrence or unless within 90 days after the occurrence of an event referred to in subsection (c)(i) or the

expiration of the 90-day period referred to in subsection (c)(ii) or (c)(iii) the General Partner shall determine to continue the Partnership;

(d) a dissolution of the Partnership pursuant to Article 11, unless the Partnership is continued as provided therein;

(e) the unanimous written consent of the Partners to dissolve the Partnership; or

(f) provided that the Partners retain the same economic interest in the Partnership Assets as they would have had pursuant to this Agreement, the determination of the General Partner to dissolve the Partnership.

Section 17.2. Liquidation of Partnership

(a) In the event of the dissolution of the Partnership, there shall be an orderly liquidation of the Partnership Assets, unless the remaining General Partner(s) determine that an immediate sale of all or part of the Partnership Assets would cause undue loss to the Partners, in which event (i) the liquidation may be deferred for a reasonable time except as to those assets necessary to satisfy the Partnership debts and the Partners shall be deemed to have elected to reconstitute the Partnership for such period, or (ii) all or part of the Partnership Assets may be distributed in kind, subject to the provisions of and in the same manner as cash under the applicable provisions of this Section 17.2. If Partnership Assets are distributed in kind, the Capital Accounts of the Partners shall be adjusted to reflect the gain or loss that would



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have been recognized by the Partnership if those assets had been sold for an amount equal to their fair market value as determined by the General Partner in its sole discretion at the time of distribution.

(b) Upon any dissolution of the Partnership, the Accountants shall prepare a statement setting forth the assets and liabilities of the Partnership as of the date of dissolution, and such statement shall be furnished to all Partners.

(c) In the event of liquidation of the assets, they shall be liquidated as promptly as possible, and the General Partner shall designate one of the Partners (which may be the General Partner) to supervise such liquidation (the "Liquidating Partner"), which shall be conducted in an orderly and business-like manner so as not to involve undue sacrifice, as the General Partner shall determine in its sole discretion. The proceeds thereof shall be applied and distributed in the following order of priority:

(i) for the payment of the debts and liabilities of the Partnership (including those of the Partners and Related Entities) and the expenses of liquidation;

(ii) to the setting up of any reserves which the General Partner reasonably may deem necessary for any contingent or unforeseen liabilities or obligations of the Partnership arising out of or in connection with the Partnership. Said reserves may be paid over by the Liquidating Partner to an attorney-at-law, as escrowee, to

be held by him for the purpose of disbursing such reserves in payment of any of the aforementioned contingencies and, at the expiration of such period as the Liquidating Partner shall deem advisable, to distribute the balance of such reserves to the Partners in accordance with Article 9 hereof; and

(iii) thereafter, to the Partners and their successors in accordance with the provisions of Article 9. In the event that the winding-up of the Partnership will not be completed within the Fiscal Year in which the Partnership is dissolved, the General Partner may revalue Capital Accounts pursuant to paragraphs 1(b)(2)(ii)(b) and 1(b)(2)(iv)(f) of Regulations Section 1.704.

(d) No dissolution of the Partnership shall release or relieve any of the Partners of their obligations under this Agreement.

Section 17.3. <u>No Recourse Against the General Partner</u>

The Limited Partners shall look solely to the assets of the Partnership for the return of their respective investments, and if the property of the Partnership remaining after the payment or discharge of the debts and liabilities of the Partnership is insufficient to return such investment after making all distributions to Partners pursuant to Articles 9 and 17 hereof, they shall have no recourse therefor (upon dissolution or otherwise) against the General Partner, or if there shall be none, a duly appointed trustee or liquidator, any of their Related Entities or any other Limited Partner.



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## ARTICLE 18.

## AMENDMENTS

Section 18.1. Amendments

Subject to Section 18.2, amendments may be made to this Agreement from time to time by the General Partner with the written consent of the Limited Partners; provided, however, that no such consent shall be necessary to the making by the General Partner of any such amendment entered into (i) to add to the duties or obligations of the General Partner, or surrender any right or power granted to the General Partner herein; (ii) to cure any ambiguity, to correct or supplement any provision herein which may inconsistent with any other provision herein, or to add any other provision necessary to clarify matters or questions arising under this Agreement which will not be inconsistent with the existing provisions of this Agreement; or (iii) to delete or add any provision of this Agreement required to be so deleted or added by any Federal agency or by a State "Blue Sky" commission or similar agency, which addition or deletion is deemed by such agency or commission to be for the benefit or protection of the Limited Partners; and provided further, that without the consent of the Partner to be adversely affected by the amendment, this Agreement may not be amended so as to (i) convert a Limited Partner's interest to that of a General Partner; (ii) modify the limited liability of a Limited Partner; (iii) alter the allocations set forth in Article 8, or the distributions set forth in Article 9; (iv) increase the obligations or decrease the rights of any Partner; or (v) effect any amendment or

modification to this Section 18.1, or to take any other action for which such consent is required hereunder. Any proposed amendment shall be adopted if the General Partner shall have received written approval thereof from the Limited Partners; provided, however, that failure by any Limited Partner to give written notice of disapproval within 30 days after the mailing of such proposed amendment shall be conclusively deemed to be approval thereof. A written approval or deemed approval may not be withdrawn or voided once it is received by the General Partner. A Limited Partner who objects to a proposed amendment may thereafter file a valid written approval. Any proposed amendment which is not adopted may be resubmitted, but if any proposed amendment is not adopted, any written approval or deemed approval received with respect thereto shall be void and shall not be effective with respect to any resubmission of the proposed amendment.

Section 18.2. Additional Limited Partners

If this Agreement shall be amended as a result of adding or substituting a Limited Partner, the amendment to this Agreement shall be signed by the General Partner and by the Person to be substituted or added, if a Limited Partner is to be substituted, and by the assigning Limited Partner. In making any amendments, there shall be prepared and filed for recordation by the General Partner such documents and certificates as shall be required to be prepared and filed.



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## ARTICLE 19.

## POWER OF ATTORNEY; RESTRICTIONS

Each Limited Partner, including each substituted Limited Partner, by executing this Agreement, hereby irrevocably constitutes and appoints the General Partner, with full powers of substitution, as his or her true and lawful attorney-in-fact, and empower and authorize such attorney, in his or its name, place and stead to make, execute, deliver, acknowledge, swear to, file and record in all necessary or appropriate places such documents as may be necessary or appropriate to carry out this Agreement, including but not limited to (a) all certificates and other instruments (including counterparts of this Agreement), and any amendments (including counterparts of this Agreement), and any amendment thereof, which said attorney-in-fact deems appropriate to form, qualify or continue the Partnership as a limited partnership (or a partnership in which the Limited Partners will have limited liability comparable to that provided by the Limited Partnership Act) in the jurisdictions in which the Partnership may conduct business or in which such formation, qualification or continuation is, in the opinion of said attorney-in-fact, necessary or desirable to protect the limited liability of the Limited Partners; (b) all amendments to this Agreement adopted in accordance with the terms hereof; (c) all amendments to the Certificate as now or hereafter amended, and such other certificates, instruments or documents that may be deemed appropriate by said attorney-in-fact or required to reflect (i) a change of name or the principal place of business of the



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Partnership or of the name or address of any Partner, (ii) any change in or amendment of this Agreement, (iii) the admission of additional General Partners or Limited Partners or substituted General Partners or Limited Partners or (iv) the redemption of the Interest of one or more Partners and/or the withdrawal of one or more Partners from the Partnership; (d) all agreements, documents, certificates and financing statements which said attorney-in-fact deems appropriate to effectuate and reflect the pledge or assignment of a Partner's Partnership Interest pursuant to Sections 10.5(c) and (d) hereof; (e) all conveyances and other instruments which said attorney-in-fact deems appropriate to reflect the dissolution and termination of the Partnership; and (f) any other further action, including furnishing verified copies of this Agreement and/or excerpts therefrom, which said attorney-in-fact shall consider necessary or convenient in connection with any of the foregoing, hereby giving said attorney-in-fact full power and authority to do and to perform each and every act and thing whatsoever requisite and necessary to be done in and about the foregoing as fully as the undersigned might or could do if personally present, and hereby ratifying and confirming all that said attorney-in-fact shall lawfully do or cause to be done by virtue hereof. The appointment by the Limited Partners of the foregoing power of attorney shall be deemed to be a power coupled with an interest and shall survive the bankruptcy, death, adjudication of incompetence or insanity of the grantor thereof and shall survive the delivery of an assignment of any Limited Partner of the whole or any portion of

his interest; except that, where the assignee thereof has been approved by said attorney-in-fact for admission to the Partnership as a substituted Limited Partner, the power of attorney shall survive the delivery of such assignment for the sole purpose of enabling the aforesaid said attorney-in-fact to execute, acknowledge, and file any instrument necessary to effect such substitution.

## ARTICLE 20.

## MISCELLANEOUS

Section 20.1. Recipient of Distributions

All distributions of cash or property to be made to the Partners pursuant to the provisions of this Agreement shall be made directly to the parties entitled thereto at the addresses set forth on the first page of this Agreement, or at such other address as shall have been set forth in a notice sent pursuant the provisions of Section 20.2.

Section 20.2. Notices, Etc.

Any offer, acceptance, election, approval, consent, request, waiver, notice or other document (collectively, "Notice") required or permitted to be given pursuant to any provisions of this Agreement, shall be deemed duly given only when in writing, signed by or on behalf of the person giving the same, and either (i) personally delivered (with receipt acknowledged), (ii) sent by telecopy (with appropriate confirmation of receipt) or (iii) sent by registered or certified mail, return receipt requested, postage prepaid, addressed to the person or persons to whom such Notice is to be given, in each



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case at the address set forth for such party on annexed Schedule 20.2, or at such other address as shall have been set forth in a Notice sent pursuant to the provisions of this Article, and to such other parties listed on annexed Schedule 20.2. Notwithstanding any provision herein to the contrary, any routine reports required by this Agreement to be submitted to the Partners at specified times may be sent by first-class mail. All Notices shall be deemed given (i) when received or receipt is refused, or (ii) upon failure of delivery because notice of such Partner's change of address has not been given in accordance with the terms of this Section 20.2. Any Partner may change its address and/or telephone number for the receipt of Notices at any time by giving Notice thereof to all other Partners; but no such Notice of change of address and telephone number shall be effective until received by the Partners, and any Partner which is prevented from giving any Notice pursuant hereto to any Partner on account of such Partner changing its address and/or telephone number without having given Notice thereof to all the other Partners shall nevertheless be deemed to have given such Notice in accordance with this Section 20.2 to such Partner, provided such Notice is sent to the most recent address of such Partner of which Notice has been given pursuant hereto.

Section 20.3. Binding Effect

The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective personal representatives, heirs, successors and permitted assigns.

Section 20.4. Modification, Waiver or Termination

No modification, waiver or termination of this Agreement, or any part hereof, shall be effective unless made in a writing signed by the party or parties sought to be bound thereby and no failure to pursue or elect any remedy or waiver with respect to any default under or breach of any provision of this Agreement shall be deemed to be a waiver of any other subsequent similar or different default, breach or provision, or of any election of remedies available in connection therewith. Receipt by any party of any money or other consideration due under this Agreement shall not constitute a waiver of any provision of this Agreement.

Section 20.5. Counterparts

This Agreement may be executed in any number of counterparts, all of which shall for all purposes constitute one Agreement binding on all of the parties hereto, notwithstanding that all of the other parties did not execute the same counterpart.

Section 20.6. Applicable Laws

This Agreement shall be governed by and construed and enforced in accordance with the internal laws of the State of Delaware without reference to any conflict of law or choice of law principles of such State that might apply the law of another jurisdiction. The Partners desire that such internal laws of the State of Delaware be applied to all matters regarding the relationship among the Partners and the interpretation of this Agreement, regardless of the location in which there is sitting a



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court, arbitrator or other tribunal before which a dispute is pending.

Section 20.7. Captions; Exhibits

Article, section and other titles or captions contained in this Agreement are inserted only as a matter of convenience and for reference, and shall not be construed in any way to define, limit, extend or describe the scope of this Agreement or the intention of the provisions thereof. All exhibits annexed hereto are herewith expressly made a part of this Agreement, as fully as though completely set forth herein.

Section 20.8. Prohibition Re Partition

The Partners each hereby waive and relinquish any and all rights they may have to cause the Designated Parcels or any other assets of the Partnership now existing or hereafter acquired to be partitioned so long as the Designated Parcels is held by the Partnership, it being the intention of each of the Partners to prohibit any Partner from bringing a suit for partition against the other Partners so long as the Designated Parcels is held by the Partnership. The effect of this Section 20.8 shall be limited to a period of time measured by the life of the person last surviving all of the persons in the Measuring Group (hereinafter defined), plus twenty-one (21) years. The "Measuring Group" shall mean, for purposes of this Section 20.8 all of the presently living lawful issue of the partners, as of the date hereof, of the law firm of Stroock & Stroock & Lavan.



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Section 20.9. Certain IRS Withholding Requirements

In the event any Partner is a Foreign Person, the Partnership shall comply with the terms and provisions of all Code Sections relating to the status of the Partner as a Foreign Person and shall execute and deliver to the IRS such information, returns, and statements as may be required pursuant thereto. In the event withholding is required pursuant to any Section of the Code on account of any Partner resulting from or in connection with allocations of Profits and Losses, distributions of cash flow or the disposition of the Designated Parcels or any portion thereof or any other Partnership Assets or pursuant to Code Section 1446 with respect to any Partner's share of Partnership income, (a) any and all amounts so withheld and paid to the IRS shall be treated as a cash distribution to the Partner from whom such amounts were withheld, and (b) if the amount required to be withheld in respect of such Partner exceeds the amount of such Partner's share of, in the case of Code Section 1445, all amounts available for distribution from such disposition of the Designated Parcels or any portion thereof, or, in the case of Code Section 1446, any Cash Available for Distribution that is available for distribution to such Partner with respect to the year in question, such Partner shall promptly fund the difference between the amount of such Partner's distributive share pursuant to Article 9 and the withholding requirement (such difference, the "Withholding Funds") to the Partnership or in the event the Partnership shall pay the Withholding Funds to the IRS, such Partner shall promptly reimburse the Partnership therefor. Any

payment by such Partner of the Withholding Funds to the Partnership shall constitute an Additional Contribution by such Partner offset by a deemed cash distribution to such Partner to the extent the Withholding Funds are paid to the IRS.

Section 20.10. Limitation on Rights of Others

No person or entity other than a Partner is, nor is it intended that any such other person or entity be treated as, a direct, indirect, intended or incidental third party beneficiary of this Agreement for any purpose whatsoever, nor shall any other person or entity have any legal or equitable right, remedy or claim under or in respect of this Agreement.

Section 20.11. Gender; Number

As used in this Agreement, the masculine, feminine or neuter gender, and the singular or plural number, shall be deemed to be or include the other genders or number, as the case may be, whenever the context so indicates or requires.

Section 20.12. Partnership Votes

Any reference in this Agreement to a decision to be made by the Partners shall be made by the Partners entitled, pursuant to this Agreement at the time of such decision, to participate therein in accordance with the provisions hereof.

Section 20.13. No Publicity

Without the consent of the General Partner, no Partner shall issue any press release or other item intended for publicity, except as may be required by law.

Section 20.14. Broker

(a) Trump, on behalf of himself and Penn Yards Associates, represents and warrants that he has not dealt with any broker or finder in connection with the formation of Waterfront or the Waterfront Partnership Agreement other than The Corcoran Group (the "Broker"), and Trump agrees to be solely responsible for the payment of all fees, commissions and other compensation payable to the Broker and to indemnify, defend and hold harmless the Partnership, each other Partner and its Related Entities from all claims or damages as a result of any claim by the Broker or this representation and warranty being false or incomplete.

(b) The General Partner and Westside each represents and warrants that it has not dealt with any broker or finder in connection with the formation of Waterfront or the Waterfront Partnership Agreement and to indemnify, defend and hold harmless the Partnership, each other Partner and its Related Entities from all claims or damages as a result of this representation and warranty being false or incomplete.

20.15. Invalidity. Every provision of this Agreement is intended to be severable. The invalidity and unenforceability of any particular provision of this Agreement in any jurisdiction shall not affect the other provisions hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provision were omitted.

20.16. Entire Agreement. This Agreement supersedes all prior agreements among the parties with respect to the

subject matter hereof (including that certain letter dated as of May 10, 1994 from Penn Yards Associates to Polylinks International Ltd. and Waterfront) and contains the entire Agreement among the parties with respect to such subject matter.



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TTO_02545429

IN WITNESS WHEREOF, the parties hereto have executed this Agreement of Limited Partnership of the Partnership as of the day and year first above written.

GENERAL PARTNER:

HUDSON WATERFRONT I CORPORATION

By: [signature]
Name: Chris Lam
Title: Secretary

LIMITED PARTNERS:

[signature]
Donald J. Trump

HUDSON WESTSIDE ASSOCIATES I, L.P.
By: Hudson Westside I Corporation,
its General Partner

By: [signature]
Name: Chris Lam
Title: Secretary

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

On this 30th day of November, 1994, before me personally appeared Chris Lam, to me known and known to me to be the individual mentioned and described in, and who executed the foregoing instrument, in his capacity as Secretary of Hudson Waterfront I Corporation, a Delaware corporation, and he duly acknowledged to me that he executed the same.

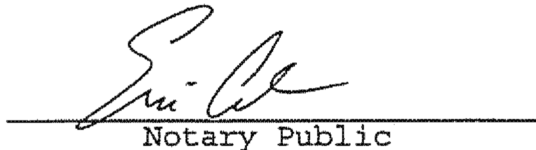
ERIC I COHEN
Notary Public, State of New York
No. 4967143
Qualified in New York County
Commission Expires May 29, 1996

Notary Public

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

On this 30th day of November, 1994, before me personally appeared Chris Lam, to me known and known to me to be the individual mentioned and described in, and who executed the foregoing instrument, in his capacity as Secretary of Hudson Westside I Corporation, a Delaware corporation, the general partner of Hudson Westside Associates I, L.P., a Delaware limited partnership, and he duly acknowledged to me that he executed the same.

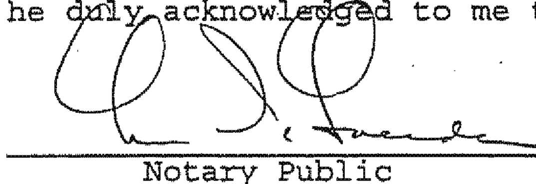
ERIC I COHEN
Notary Public, State of New York
No. 4967143
Qualified in New York County
Commission Expires May 29, 1996



Notary Public

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

On this 30 day of Nov, 1994, before me personally appeared Donald J. Trump, to me known and known to me to be the individual mentioned and described in, and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.



Notary Public

NORMA I FOERDERER
Notary Public, State of New York
No. 31-4743494
Qualified in New York County
Commission Expires Sept. 30, 1995

NORMA I FOERDERER
Notary Public, State of New York
No. 31-
Qualified in New
Commission Expires

SCHEDULE 5.1

CAPITAL CONTRIBUTIONS

| Name of Partner | Funded to Date |
| --- | --- |
| Hudson Waterfront I Corporation | $ 44,527.46 |
| Hudson Westside Associates I, L.P. | $ 4,408,220.50 |
| Donald J. Trump | $ 0 |

08424-00013/252761.1

## SCHEDULE 5.6

## PERCENTAGE INTERESTS

| Name of Partner | Percentage Interest |
|---|---|
| Hudson Waterfront I Corporation | 1% |
| Hudson Westside Associates I, L.P. | 69% |
| Donald J. Trump | 30% |

08424-00013/252761.1

SCHEDULE 20.2

ADDRESSES FOR NOTICES

To the General Partner or Westside:

32/F, New World Tower
16-18 Queen's Road Central
Hong Kong
Attn: Chris N. Lam

with a copy to

Robinson Silverman Pearce
Aronsohn & Berman
1290 Avenue of the Americas
New York, NY 10104
Fax: (212) 541-4630
Attn: Barry C. Ross, Esq.

To Trump:

c/o 725 Fifth Avenue
New York, NY 10022
Fax: (212) 755-3230
Attn: Mr. Donald J. Trump

with a copy to

Stroock & Stroock & Lavan
Seven Hanover Square
New York, NY 10004-2696
Fax: (212) 806-6006
Attn: Leonard Boxer, Esq.
Roger M. Roisman, Esq.

08424-00013/252761.1

LAW OFFICES OF
JAY GOLDBERG, P.C.

250 PARK AVENUE
FOURTEENTH FLOOR
NEW YORK, NY 10177-0077

TELEPHONE (212) 983-6000
FACSIMILE (212) 983-6008

**Facsimile Cover Sheet**

Date: February 25, 2009

To: Alan Garten

From: Jay Goldberg

LAW OFFICES OF
JAY GOLDBERG, P.C.

250 PARK AVENUE
FOURTEENTH FLOOR
NEW YORK, NY 10177-0077

TELEPHONE (212) 983-6000
FACSIMILE (212) 983-6008

CONTINUE FROM PREVIOUS PAGE 001

# Facsimile Cover Sheet

Date: February 25, 2009

To: Alan Garten

From: Elizabeth Hill

Fax No.: (212) 980-3821

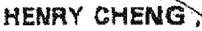
Number of pages (Including cover sheet): 72

Message: As requested.

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE ADDRESSEE AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED AND CONFIDENTIAL. IF YOU ARE NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY USE, COPYING OR DISSEMINATION OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY. THANK YOU.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. RICHARD B. LOWE, III PART 56 7
*Justice*



DONALD J. TRUMP,
Plaintiff,

-against-

HENRY CHENG,

Defendants.

INDEX NO. 602877/05

MOTION DATE ____

MOTION SEQ. NO. 011

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits ____ | |
| Replying Affidavits ____ | |

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
JUL 27 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/24/06

JUSTICE RICHARD B. LOWE, III
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE J.S.C.
DATED:

02/25/09 17:02 FAX 212 983 6008 LAW OFFICES ☑002

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56
------------------------------------X

DONALD J. TRUMP, individually and
derivatively on behalf of
HUDSON WATERFRONT ASSOC., L.P.,
HUDSON WATERFRONT ASSOC., I, L.P.,
HUDSON WATERFRONT ASSOC. II, L.P.,
HUDSON WATERFRONT ASSOC. III, L.P.,
HUDSON WATERFRONT ASSOC. IV, L.P.,
HUDSON WATERFRONT ASSOC. V, L.P.,

Plaintiff,

Index No. 602877/05

-against-

HENRY CHENG, VINCENT LO, CHARLES YEUNG,
EDWARD WONG, DAVID CHIU HUDSON
WATERFRONT CORP., HUDSON WATERFRONT I
CORP., HUDSON WATERFRONT II CORP.,
HUDSON WATERFRONT III CORP., HUDSON
WATERFRONT IV CORP., HUDSON WATERFRONT
V CORP., HUDSON WATERFRONT ASSOC., L.P.,
HUDSON WATERFRONT ASSOC. I, L.P.,
HUDSON WATERFRONT ASSOC. II, L.P.,
HUDSON WATERFRONT ASSOC. III, L.P.,
HUDSON WATERFRONT ASSOC. IV, L.P.,
HUDSON WATERFRONT ASSOC. V, L.P.,
HUDSON WESTSIDE ASSOC., L.P.,
HUDSON WESTSIDE ASSOC. I, L.P.,
HUDSON WESTSIDE ASSOC. II, L.P.,
HUDSON WESTSIDE ASSOC. III, L.P.,
HUDSON WESTSIDE ASSOC. IV, L.P.,
HUDSON WESTSIDE ASSOC V, L.P.,
JOHN DOE I and JOHN DOE II,

Defendants.
------------------------------------X

**RICHARD B. LOWE, III, J:**

Motion sequence numbers 011, 012 and 013 are consolidated for disposition.

This action involves a dispute over the sale price of, and the use of sale proceeds from,



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parcels of land that were developed by the parties in this action. The complaint, filed on August 10, 2005, asserted direct and derivative causes of action, including breach of fiduciary duty, aiding and abetting breach of fiduciary duty, conspiracy to breach fiduciary duty, tortious interference with fiduciary relationships, breach of contract, constructive trust, an accounting, dissolution of limited partnerships, access to books and records, and injunctive relief.

Trump served an amended complaint, dated January 13, 2006. The twenty-count amended complaint asserts causes of action under the same theories set forth in the original complaint. Defendants now move to dismiss the amended complaint for lack of jurisdiction, failure to state a cause of action, and based upon documentary evidence.

The facts of this case are stated in detail in this court's decision and order, *Trump v Cheng et. al.*, 9 Misc 3d 1120 (A) (Sup Ct, NY County 2005) (Order). Therefore, the facts will not be restated herein. To the extent that new facts are alleged in the amended complaint that are relevant to this decision, those allegations are stated in the discussion below. Unless otherwise indicated in this decision, defined terms in the Order shall have the same meaning herein.

For the reasons stated in this decision, the motions are granted, and the amended complaint is dismissed in its entirety as to the individual defendants, the Westside LPs and the Hudson Waterfront LPs. All but the eighteenth cause of action, for access to books and records, are dismissed as to the Hudson Waterfront Corps.

**DISCUSSION**

General Partners' Motion To Dismiss

Direct Claims

The Hudson Waterfront Corps move to dismiss the second, fourth, sixth, eighth,





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thirteenth, fifteen, and nineteenth causes of action, all of which are asserted as direct claims, arguing that these claims must be brought derivatively.[1] In opposition, Trump argues that his claims are direct.

These causes of action assert claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, conspiracy to breach fiduciary duties, tortious interference with fiduciary relationships, constructive trust, an accounting, and injunctive relief. Each of these claims is based upon the same alleged breaches of fiduciary duties. At the heart of these claims is Trump's assertion that the Properties were sold for approximately $1 billion less than their market value.

"[T]he laws of the jurisdiction under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners." Partnership Law § 121-901. The same rule applies to corporations, requiring the application of the laws of the state where the corporation was formed. *Hart v General Motors Corp.*, 129 AD2d 179 (1st Dept 1987). As it is undisputed that the Hudson Waterfront LPs are Delaware limited partnerships, and that the Hudson Waterfront Corps are Delaware corporations, Delaware law therefore applies to Trump's claims for breaches of fiduciary duties.

Under Delaware law, in order to determine whether plaintiffs' claims are derivative or individual, the

> court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be

[1] In motion sequence numbers 012 and 013, the Hudson Waterfront LPs, the individual Cheng Group defendants and the Westside LPs adopt and incorporate the general partners' arguments. Hudson Waterfront LPs' Mem. of Law, at 1; Individual Defendants' and Westside LPs' Mem. of Law, at 19-20.

> independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.

*Tooley v Donaldson, Lufkin, & Jenrette, Inc.*, 845 A2d 1031, 1039 (Del Supr 2004). Under *Tooley*, "[t]he analysis must be based solely on ... : Who suffered the alleged harm – the corporation or the suing stockholder individually – and who would receive the benefit of the recovery or other remedy[.]" *Id.* at 1035. Thus, under Delaware law, plaintiffs' individual claims must allege harm independent from the alleged injury suffered by the corporation.

Here, Trump's claims are based upon an alleged diminution of the value of the Hudson Waterfront LPs, due to the general partners selling the Properties for less than they were worth. Trump also avers that the Hudson Waterfront LPs' used the sale proceeds from the Properties to purchase commercial office buildings at excessive prices. However, these facts would result in injury to the Hudson Waterfront LPs, not Trump. Similarly, any constructive trust, accounting or injunction would be imposed on behalf of the Hudson Waterfront LPs, not Trump.

Citing *In re Cencom Cable Income Partners, L.P.* (2000 WL 130629 [Del Ch, Jan. 27, 2000]), and *Anglo Am. Sec. Fund, L.P. v S.R. Global Intl. Fund, L.P.* (829 A2d 143 [Del Ch 2003]), Trump argues that his direct claims are valid. In *In re Cencom Cable Income Parters, L.P.*, the court's decision was based on the fact that:

> the partnership's business is complete, the liquidation sale is over, and the only two parties to the partnership are now clearly adversaries. Further, the remaining claims only challenge the conduct of the general partner in the final sale transaction, not any ongoing conduct, and the claims have already survived one summary judgment motion. For those reasons, the purposes for classifying claims as derivative and, in particular, the reasons for its attendant demand rule, are not present here.



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*In re Cencom Cable Income Partners, L.P.*, 2000 WL 130629, at *4. The court stated that "[w]ith the partnership in dissolution the 'partnership' entity is simply an artifice representing the relationship between two legally juxtaposed parties and is no longer relevant as a distinct legal creature for the purpose of resolving the final claims between these parties." *Id.*, at *6. In other words, the court permitted plaintiffs to proceed on their direct claims, because the "partnership [was] in liquidation," and, therefore, there was "no need to push plaintiffs into pursuing intra-partnership remedies." *Id.*, at *5.

Here, conversely, the Hudson Waterfront LPs are not in liquidation. The term of these limited partnerships does not expire until December 2044. Accordingly, *In re Cencom Cable Income Partners, L.P.* is distinguishable on its facts.

In *Anglo Am. Sec. Fund, L.P.*, the court permitted direct claims, because the allegedly injured partners had withdrawn from the partnership, and, therefore, had no standing to sue derivatively. 829 A2d at 152-53. The court also determined that the current, newly admitted limited partners, who did have derivative standing, had suffered no injury. Rather, the injury was suffered by the former limited partners. Therefore, the new limited partners would have received a windfall if the injured plaintiffs were required to share their recovery.

Here, Trump remains a limited partner of the Hudson Waterfront LPs. Nothing contained in the amended complaint indicates that he would not share in any recovery to the Hudson Waterfront LPs in the event that he prevails in a derivative suit. Moreover, permitting Trump to sue directly would deprive the Westside LPs of any possible relief. Accordingly, *Anglo Am. Sec. Fund, L.P.* is distinguishable on its facts.

None of the other cases cited by Trump support a different result. For the foregoing





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reasons, the second, fourth, sixth, eighth, thirteenth, fifteenth and nineteenth causes of action of the amended complaint are derivative. Accordingly, the Hudson Waterfront Corps' motion to dismiss these claims is granted.

Derivative Claims

The Hudson Waterfront Corps next move to dismiss all of Trump's derivative causes of action, because Trump failed to make a demand on the general partners, and he failed to show that demand should be excused. Trump admits that he made no pre-suit demand. Amended Complaint, ¶ 72. In opposition, Trump argues that no demand was required, because the amended complaint alleges a reason to doubt the independence of the general partners, and the applicability of protection under the business judgment rule.

Under the Delaware Code, a limited partner may bring an action in the right of a limited partnership to recover a judgment "if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed." 6 Del C § 17-1001. "This requires that a plaintiff plead 'with particularity' those facts which warrant a suit. Those particular facts can be determined only through the analysis of business judgment, as in corporation law." *Litman v Prudential-Bache Prop., Inc.*, 1993 WL 5922, *3 (Del Ch, Jan. 4, 1993); *see also* 6 Del C § 17-1003 ("[i]n a derivative action, the complaint shall set forth with particularity the effort, if any, of the plaintiff to secure initiation of the action by a general partner or the reasons for not making the effort.").

"Plaintiffs must allege, with particularity, facts showing a conflict affecting the general partners' conduct which raises a reasonable question as to their disinterestedness, independence or business judgment." *Levine v Prudential Bache Prop., Inc.*, 855 F Supp 924, 940 (ND Ill



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1994) (applying Delaware law); *Aronson v Lewis*, 473 A2d 805, 814 (Del 1984).

> The key principle upon which this area of our jurisprudence is based is that the directors are entitled to a presumption that they were faithful to their fiduciary duties. In the context of presuit demand, the burden is upon the plaintiff in a derivative action to overcome that presumption. The Court must determine whether a plaintiff has alleged particularized facts creating a reasonable doubt of a director's independence to rebut the presumption at the pleading stage. If the Court determines that the pleaded facts create a reasonable doubt that a majority of the board could have acted independently in responding to the demand, the presumption is rebutted for pleading purposes and demand will be excused as futile.

*Beam ex rel. Martha Stewart Living Omnimedia, Inc. v Stewart*, 845 A2d 1040, 1048-49 (Del 2004).

> A director is considered interested where he or she will receive a personal financial benefit from a transaction that is not equally shared by the stockholders. Directorial interest also exists where a corporate decision will have a materially detrimental impact on a director, but not on the corporation and the stockholders. In such circumstances, a director cannot be expected to exercise his or her independent business judgment without being influenced by the adverse personal consequences resulting from the decision.

*Simon v Becherer*, 7 AD3d 66, 72 (1st Dept 2004) (applying Delaware law) (citation and quotation marks omitted).

Here, the amended complaint alleges that the Hudson Waterfront Corps abandoned their fiduciary obligations as general partners, and exercised no business judgment over the sale of the Properties. The pleading avers that these general partners acted at the behest of the Cheng Group, structuring the sale of the Properties to maximize the benefit to the Cheng Group at the expense of Trump and the Hudson Waterfront LPs.

The pleading claims that the directors and officers of the Hudson Waterfront Corps were





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"dominated, controlled, and beholden to the Cheng Group, which is the 100% owner of the general partners, and by Cheng, who appointed and controls the continued employment and compensation of the directors and officers." Amended Complaint, ¶ 69. According to the amended complaint, Cheng provided continued employment, and higher compensation, to Hudson Waterfront Corps' officers and directors in exchange for their willingness to follow the Cheng Group's directives.

The amended complaint avers that the Cheng Group owned 70% of the equity in the Hudson Waterfront LPs (69% as owners of the Westside LPs, and 1% as shareholders of the Hudson Waterfront Corps), whereas Trump owned only 30%. The pleading also claims that defendants pursued a divestiture plan in connection with the sale of the Properties, involving an offshore transaction as part of the Cheng Group's elaborate scheme of tax-avoidance and currency exchange.

The Cheng Group allegedly sought to receive undisclosed distributions, kickbacks and commissions, all to the exclusion of Trump. The Hudson Waterfront Corps allegedly reinvested the sale proceeds in overpriced rental properties without analyzing appropriate market appraisals, alternative replacement properties, and whether the partnership should have distributed sale proceeds or developed the Properties. Trump also claims that the general partners used their fiduciary positions to pressure him to provide the Cheng Group with a liability release.

As a preliminary matter, it is not clear to the court that Trump has identified all of the directors and officers of the general partners. The amended complaint claims that non-parties Paul Davis, Barry Gross and Chris Lam, directors and officers of the Hudson Waterfront Corps, were dominated and controlled by the Cheng Group and Cheng. However, it is not clear from



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the pleading whether these three individuals comprise a majority of the board of directors of the Hudson Waterfront Corps, and, therefore, the extent to which the alleged domination affected actions taken by the general partners.

In any event, allegations "that certain individual wrongdoers dominate and control the board, and that the director defendants receive director fees," are "conclusory boilerplate allegations of director interest," and, therefore, "do not provide a basis to excuse demand." *Spear v Conway*, 2003 WL 24012118, *5 (Sup Ct, NY County Oct. 17, 2003) (applying Delaware law), *citing Aronson v Lewis*, 473 A2d 805 (Del 1984) and *Brehm v Eisner*, 746 A2d 244 (Del 2000); *see also In re Baxter Intern., Inc. Shareholders Litig.*, 654 A2d 1268, 1269 (Del Ch 1995) (officers' alleged receipt of compensation as a result of the wrongful conduct was insufficient to excuse a demand); *and In re E.F. Hutton Banking Practices Litigation*, 634 F Supp 265, 271 (SD NY 1986) (construing Delaware law) (the receipt of directors' fees is not sufficient to show self-interest by a board member).

Furthermore, "[e]ven where the potential for domination or control by a controlling shareholder exists, the complaint must allege particularized allegations that would support an inference of domination or control." *In re Paxson Communication Corp. Shareholders Litig.*, 2001 WL 812028, *9 (Del Ch, July 12, 2001). "A stockholder's control of a corporation does not excuse presuit demand on the board without particularized allegations of relationships between the directors and the controlling stockholder demonstrating that the directors are beholden to the stockholder." *Beam*, 845 A2d at 1054.

In *Brehm* (746 A2d 244, *supra*), the Delaware Supreme Court rejected, as conclusory, the plaintiff's attempt to excuse demand based upon allegations that the defendant endorsed

corporate action in order to gain increased compensation. The Court stated that the plaintiff's allegations were counterintuitive and illogical, because the defendant's financial gain was tied to the success of the company. *Id.*, at 257.

Here, Trump fails to plead particularized allegations in support of his claim that the general partners were beholden to the owners of the Hudson Waterfront Corps. The amended complaint fails to plead, in any detail, the nature of the allegedly improper employment arrangement of the Hudson Waterfront Corps' officers and directors. Other than conclusory allegations of increased compensation, the pleading also fails to explain why these individuals are obligated to follow the directions of the Cheng Group. If anything, the pleading shows that Cheng concurred with the decision to sell the Properties, not that he, or the Cheng Group, dominated the board of the Hudson Waterfront Corps.

Trump's claim that the general partners lacked independence is based heavily upon his counterintuitive argument that the individual defendants, as 70% owners, who, therefore, had the largest interest in making the Hudson Waterfront LPs successful, sought to sabotage their multi-billion dollar investment by selling the Properties at an artificially low price, to the detriment of the Hudson Waterfront LPs. This claim is contradicted by the documentary evidence, submitted with the affidavit of Barry Gross (Gross), the vice president of the Hudson Waterfront Corps. Gross submits 22 appraisal reports, from two prominent appraisal firms, that were completed prior to the sale of the Properties. The evidence submitted by Gross shows that the Properties were sold for approximately $188 million *more* than the most recent appraisals of the Properties.



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Trump fails to rebut this showing.[2]

Trump argues that no pre-suit demand is required where the demanded suit includes claims against the Cheng Group, which is the 100% owner of the general partner, to whom the demand would be made. However, "the conclusory allegation that the general partners cannot be expected to sue themselves, as alleged in the Amended Complaint, ... is insufficient as a matter of law." *Litman*, 1993 WL 5922, at *4; *see also Dean v Dick*, 1999 WL 413400, *3 (Del Ch, June 10, 1999) ("[i]t is not sufficient to excuse demand ... to simply allege a director would be required to bring suit against himself").

In *Dean*, upon which Trump relies, the court found "persuasive that where the general partner is 100% owned by one person, and the general partner would be required to bring suit against that person, there is at least some doubt as to the disinterest of that person." *Id.* The amended complaint identifies Cheng himself as the individual who controlled the general partners' actions, because Cheng allegedly controlled the general partners' employment and compensation. However, the Hudson Waterfront Corps are owned by various individuals, not solely Cheng, thereby undermining Trump's argument that the Cheng Group (styled by Trump as the sole owner of the general partners), controlled the general partners. Trump fails to allege any factual basis for treating the individual defendants that comprise the Cheng Group as the sole stockholder of the general partners. Nor does Trump explain how Cheng controlled the Cheng Group, or how the individual defendants acted through Cheng. Therefore, *Dean* is distinguishable on its facts.

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[2] Trump fails to submit any appraisals, or any other evidence, to refute defendants' showing that the Properties were sold for $188 million more than their appraised value.



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Moreover, Trump admits that the purported divestment plan never materialized. Additionally, Trump concedes that the Hudson Waterfront LPs have continued the business of the partnerships by reinvesting the proceeds from the sale of the Properties in properties in the United States (Amended Complaint, ¶ 4), thereby negating any purported offshore divestment plan. As discussed in the Order, the 1031 Exchange reinvestment plan was expressly permitted under the partnership Agreements. The 1031 Exchange does not entitle defendants to *avoid* taxes, but rather, to defer them.

Furthermore, while Trump maintains that the alleged kickbacks were "far in excess" of Cheng Group's remaining financial interest in the Properties (Trump's Opp. Mem. of Law, at 21), these allegations are vague and conclusory. In addition, these claims are counterintuitive. If the Properties were sold for $1 billion below their market value, as Trump claims, defendants' share of the loss, as 70% owners, would be $700 million. Trump fails to explain what the alleged kickbacks were, how they were obtained, how they could have exceeded $700 million, and why defendants would forego $700 million in value.

In addition, also discussed in the Order, the Agreements did not obligate the general partners to distribute partnership assets or sale proceeds to Trump prior to the expiration of the term of the partnerships, in 2044. Thus, the general partners' alleged request for a release from Trump in exchange for distributing his portion of funds from the sale proceeds of the Properties was merely an accommodation to Trump, not something that Trump was entitled to under the Agreements. *In re Coleman Co. Inc. Shareholders Litig.*, 750 A2d 1202, 1211 (Del Ch 1999) (shareholders' relinquishment of right to seek appraisal, in exchange for monetary benefit, did not constitute coercion).



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The amended complaint avers that the general partners distributed nearly $20 million to the Cheng Group, through the Hudson Waterfront LPs, but failed to make any distributions to Trump, as required under the parties' Agreements. The general partners also allegedly released false financial statements to Trump, concealing these distributions in order to inflate the amount of sale proceeds due to the Cheng Group at Trump's expense.

However, Trump fails to plead with particularity any details concerning this allegedly fraudulent conduct, pursuant to CPLR 3016, which requires circumstances constituting a fraud to be stated in detail. Nor does Trump claim that he relied on any allegedly false financial statements. *WSFS v Chillibilly's, Inc.*, 2005 WL 730060, *12 (Del Super, March 30, 2005) (fraud claim requires showing that "action was taken in justifiable reliance upon a fraudulent representation"); *J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389, 390 (1st Dept 2005) (same).

Trump also claims that, at the closing of the sale of the Properties, Cheng received $35 million that was paid to an offshore entity, non-party Fineview Resources, Ltd. (Fineview), an entity allegedly owned by Cheng. However, while the amended complaint makes conclusory allegations that the Cheng Group received kickbacks, none of the allegations concerning the $35 million state that this was a kickback payment received by Cheng. In fact, the amended complaint does not claim that this alleged payment was improper.

Thus, Trump fails to explain the "the circumstances constituting the wrong" in detail to "sufficiently illuminate the transactions involved." *Block v Landegger*, 44 AD2d 671, 671 (1st Dept 1974), *citing* CPLR 3016 (b). Additionally, Trump fails to show how Cheng allegedly controlled Fineview. *Longo v Butler Equities II, L.P.*, 278 AD2d 97, 98 (1st Dept 2000) (fraud claim dismissed under CPLR 3016 [b] where plaintiff limited partner failed to identify investors





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who made allegedly worthless contributions, or to show how defendants controlled those investors); *In re JP Morgan Chase Sec. Litig.*, 363 F Supp 2d 595, 624 (SD NY 2005) (plaintiffs failed to "plead with requisite particularity that any of the defendants engaged in illegal behavior"; allegation that investment constituted a "kickback" for bank officers was conclusory where plaintiff offered no specific allegations that defendants acted corruptly).

In short, Trump fails to show that Cheng or the Cheng Group controlled the directors of the Hudson Waterfront Corps, or that the directors themselves were interested or lacked independence. Nor does Trump show that any of the defendants sought to destroy the value of their investment, or that they had an interest in obtaining anything other than an optimal price for the Properties. None of Trump's claims support the conclusion that defendants intentionally sought to sell the Properties for a price that was below their market value, or to reinvest the sale proceeds in overpriced rental properties.

For the foregoing reasons, the amended complaint fails to allege that the directors of the Hudson Waterfront Corps would receive a personal benefit not shared equally by the partners with respect to the sale of the Properties and the 1031 Exchange reinvestment plan. Nor does the pleading allege that the challenged actions would impact the general partners and their boards in a materially different way than the other partners. Accordingly, Trump's claim that the general partners were interested, and lacked independence, is unpersuasive.

Trump also argues that defendants' conduct falls outside the protections of the business judgment rule. Trump claims that the general partners abdicated control over the sale of the Properties, that the sale was not the product of minimal due care, and that the sale was made in bad faith or constitutes corporate waste.





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"It is a presumption that in making a business decision the directors ... acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the corporation." *Aronson v Lewis*, 473 A2d 805, 812 (Del 1984). However, the business judgment rule "has no role where directors have ... abdicated their functions." *Aronson*, 473 A2d at 813.

Under Delaware law, analyzed in the context of the application of the business judgment rule, fiduciaries selling a substantial partnership asset have a duty to maximize the value of that property. *Cede & Co. v Technicolor, Inc.*, 634 A2d 345, 367-70 (Del 1993). The exercise of the duty of care is not satisfied where, for example, the fiduciary fails to make a "prudent search for alternatives," fails to put the asset up for auction, causes a lock-up that impedes the emergence of information, and fails to "reach an informed decision in approving" the transaction. *Id.* at 369.

To prevail on a bad faith claim, Trump "must overcome the general presumption of good faith by showing that the board's decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests" (*White v Panic*, 783 A2d 543, 554 n 36 [Del 2001]), and that the "decision is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith" (*In re J.P. Stevens & Co., Inc. Shareholders Litig.*, 542 A2d 770, 780-781 [Del Ch 1988]).

> [Corporate] waste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade. Most often the claim is associated with a transfer of corporate assets that serves no corporate purpose; or for which no consideration at all is received. Such a transfer is in effect a gift. If, however, there is any substantial consideration received by the corporation, and if there is a good faith judgment that in the circumstances the transaction is worthwhile, there should be no finding of waste, even if the fact finder would conclude ex post that the transaction



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was unreasonably risky.

*Brehm*, 746 A2d at 263. "The burden is on the party challenging the decision to establish facts rebutting the presumption." *Aronson*, 473 A2d at 812.

As discussed above, Trump fails to show how the general partners were controlled by any of the defendants. The amended complaint fails to show that the general partners abdicated control over the sale of the Properties to Cheng or the Cheng Group. Moreover, the alleged divestment plan never occurred. Thus, for the same reasons stated above, the allegations supporting Trump's abdication claim are conclusory, vague and counterintuitive. Therefore, Trump's abdication argument is without merit.

Central to Trump's challenge to the business judgment exercised by the general partners, for lack of minimal due care, is his allegation that "[t]he general partners, like the Cheng Group, had no appraisals, valuations, analyses, or any other relevant market information to justify the sale or the $1.76 billion price." Amended Complaint, ¶ 37. Trump claims that the general partners failed to take "the most basic steps necessary to determine or secure the [Properties'] market value," that they were uninformed about the market value of the Properties, and that they ignored information that the Properties' value exceeded the sale price. Amended Complaint, ¶¶ 3, 34, 37, 65-70.

However, as discussed in the Order, Gross's affidavit was persuasive that the amount received for the Properties was a realistic and fair figure reached after investigation by the purchaser. According to Gross, and the documentary evidence, at the same time as the general partners were negotiating with Extell, they were also engaged in detailed negotiations with several other highly qualified real estate entities, including non-parties Vornado Realty Trust,



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The Related Companies and the Durst Organization. Gross stated that these negotiations culminated in real offers that were based on knowledge of the Properties, offers which were below the $1.76 billion sale price.

Gross stated that the expressions of interest of non-parties Colony Capital and Richard LeFrak were not based upon any knowledge of the complex realities of the Properties, information which formed the basis of the offers of Extell, Vornado Realty Trust, The Related Companies, and other potential buyers. According to Gross, the general partners sought to obtain the highest price for the Properties, and decided not to pursue Colony Capital and Richard LeFrak's expressions of interest due to the unlikelihood that either would become a real offer that exceeded the Extell offer of $1.76 billion, and because the general partners were concerned that the real estate market could collapse.

Moreover, as discussed above, the allegations of the amended complaint that challenge the general partners' business judgment are contradicted by the documentary evidence submitted by Gross with the general partners' current motion to dismiss. These documents show that the general partners conducted several appraisals, using two prominent appraisers. The sale of the Properties was discussed with at least four prominent real estate companies in New York City. Gross Aff., Ex. B. Having appraised and marketed the Properties, Trump fails to explain why the general partners were obligated to pursue any mere expressions of interest from purported purchasers.

Trump also fails to allege any facts showing that the general partners "were uniformed about the market value of the [Properties], and ignored information that the property value was far greater than the sales price." Trump Opp. Mem. of Law, at 14. To the contrary, the





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documentary evidence shows that the Properties were sold for approximately $188 million *more* than the most recent appraisals of the Properties. Trump fails to rebut this showing.[3]

Moreover, while Trump continues to argue that the Properties were sold for $1 billion below their value, as discussed above, he fails to rebut the appraisals submitted by the general partners. Other than conclusory allegations that other purchasers would have purchased the Properties for $1 billion more than the price at which the Properties were sold, and allegations of expressions of interest from purported purchasers, Trump fails to plead any facts showing that the Properties could have been sold for $2.7 billion.

Trump also argues that defendants failed to analyze whether the sale of the Properties was justified for the purpose of reinvesting in rental properties. However, other than conclusory allegations, Trump fails to show that the reinvestment plan was uninformed or prohibited under the Agreements, or that the Hudson Waterfront LPs overpaid for these properties.

Trump claims that the sale of the Properties was beyond the bounds of reasonable judgment, and must have been the product of bad faith or corporate waste, because three of the ten parcels being sold were appraised at $543 million, but after the sale these parcels were "flipped" for $816 million. 4/4/06 Tr., at 22. According to Trump, applying this differential to the entire $1.76 billion sale price demonstrates that the flipped Properties were re-sold at a 40% mark-up, a mark-up that presumably could have been enjoyed by the Hudson Waterfront LPs,

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[3] Tellingly, while Trump continuously asserts that the Properties were being sold for far less than their value, he never sought an order preventing the sale. Rather, Trump moved, by order to show cause, for an order of attachment of the proceeds from the sale. The only benefit to Trump from attaching the proceeds would have been the proceeds themselves, as opposed to the benefit of finding a buyer willing to pay a significantly higher price for the Properties, a claim that is at the heart of Trump's lawsuit.



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and by Trump. *Id.*, at 23.

However, Trump's selective arithmetic fails to explain how the value of the other seven parcels affected the three parcels identified by Trump. As discussed in the Order, Gross's unrebutted affidavit explained that the Properties are subject to many legal restrictions, encumbrances, zoning regulations, affordable housing requirements, infrastructure requirements, park contribution requirements and other restrictions that restrict the nature of the development that can be done on different parts of the Properties. Trump fails to explain the extent to which the three parcels he identified were burdened by the other seven parcels sold. In other words, Trump fails to explain what value the seven remaining parcels retained once the three parcels were flipped for $816 million, essentially failing to consider the value of the Properties as a whole.

The amended complaint fails to show bad faith, or that the sale of the Properties and the reinvestment plan cannot be attributed to a rational business purpose. Nor does the amended complaint allege any facts, other than conclusory allegations, showing that defendants were grossly negligent or failed to consider all material facts reasonably available.

Moreover, each of the Agreements expressly exculpates the general partners, and any entity or person controlling the general or limited partners, "for any loss arising out of or in connection with the management, operation or conduct of the Partnership's business and affairs, except by reason of willful misconduct, fraud, gross negligence or disregard of duties and obligations under this Agreement." Agreement, Gruenglas Aff., Ex. 2, § 7.6 (a), at 40. In any event, the amended complaint fails to show any such conduct by defendants.

For the foregoing reasons, Trump fails to show a reason to doubt the independence of the



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general partners, and the applicability of protection under the business judgment rule. Therefore, Trump fails to plead facts showing demand futility with respect to his derivative claims. Accordingly, the third, fifth, seventh, ninth, fourteenth, sixteenth and twentieth causes of action, all of which are asserted derivatively by Trump on behalf of the Hudson Waterfront LPs, are dismissed.

Breach of Contract

The Hudson Waterfront Corps next move to dismiss the eleventh cause of action for breach of contract, and breach of the implied covenant of good faith and fair dealing. Generally, this cause of action alleges that the Hudson Waterfront Corps breached the purpose of the Agreements by failing to operate and develop the Properties in the best interest of the partnerships, as required under the Agreements.[4]

Specifically, Trump claims that the Cheng Group breached the following sections of the Agreements: 2.1, 2.2., 4.1 and 7.1 - 7.6. Trump argues that the general partners' reinvestment of Trump's share of the proceeds from the sale of the Properties violates the parties' Agreements, and breaches the implied covenant of good faith and fair dealing. Trump also argues that the general partners failed to seek the best price for the Properties.

To state a cause of action for breach of contract, Trump must establish the existence of a contract, performance by plaintiff, breach by defendants, and damages sustained by plaintiff as a

[4] According to Trump's opposition papers, paragraph 64 of the amended complaint alleges that the defendants "were, by contract, partners of Trump in the partnership and under various partnership instruments, and were required, among other things, to operate and develop Trump Place in the best interest of the partnership." Trump Opp. Mem. of Law, at 22. However, this allegation is not contained in paragraph 64 of the amended complaint. The court was unable to identify this allegation anywhere in the 40-page, 146-paragraph pleading.



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result of the breach. *Furia v Furia*, 116 AD2d 694 (2d Dept 1986).

> In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance. This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. While the duties of good faith and fair dealing do not imply obligations inconsistent with other terms of the contractual relationship, they do encompass any promises which a reasonable person in the position of the promisee would be justified in understanding were included.

*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002) (internal quotation marks and citations omitted).

Trump fails to identify any provision of the Agreements that prevents the type of reinvestment allegedly sought, and undertaken, by the general partners. To the contrary, the express "Purposes" of the partnerships, as defined in the Agreements, contemplated the sale, transfer, exchange, disposition and encumbrance of the Properties, and any other partnership assets (Agreements, § 2.2 [d]), and "such other lawful activities consistent with this Agreement as may be necessary or appropriate in connection with the foregoing" (*id.*, § 2.2 [g]). Thus, the Agreements expressly permit the general partners to consummate a 1031 Exchange, thereby reinvesting the proceeds from the sale of the Properties. Therefore, section 2.2 of the Agreements undermines Trump's argument.

Section 2.1 of the Agreements states the name, principal office and registered agent of the limited partnerships. Sections 4.1 and 4.2 identify the general and limited partners, respectively. Article 7 describes the management of the partnership, granting the general partners full control over the management of the limited partnerships. Section 7.1 again expressly permits the general partners to "sell ... , mortgage, encumber, dispose of, exchange ... and otherwise deal in and with



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the Partnership and the Partnership Assets ... ." Agreements, § 7.1, at 33. Trump fails to allege a breach of any of these provisions.

Trump argues that his "allegation that the Cheng Group did not seek the best price in the sale of Trump Place plainly states a claim for breach of their express and implied obligations under the partnership agreement." Trump Opp. Mem. of Law, at 22-23. However, Trump fails to identify this allegation in the amended complaint. Nor does Trump identify any provision of the Agreements to this effect, and the court is unable to locate this allegation in the pleading or the Agreements.

Thus, Trump's claim is not that the general partners failed to obtain the "best" price for the Properties. Rather, the essence of his argument is that the general partners failed to sell the Properties "at a price even remotely close to [their] market value," and that they failed to examine whether "the plan to sell the property for the purpose of reinvesting in rental properties served the partnerships' financial interests." Amended Complaint, ¶ 68.

However, as discussed above, the documentary evidence shows that the Properties were sold for approximately $188 million *more* than the most recent appraisals of the Properties. Also discussed above, other than conclusory allegations, Trump fails to show that the reinvestment plan was uninformed or prohibited under the Agreements, or that the Hudson Waterfront LPs overpaid for these properties. Therefore, Trump's argument is unpersuasive.

Trump argues that the implied covenant of good faith and fair dealing prevents the general partners from acting contrary to Trump's interests, or contrary to the interests of the partnerships. However, Trump's argument is counterintuitive, because the general partners themselves stood only to lose by foregoing the best price for the Properties, or by reinvesting in



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rental properties that do not serve the partnerships' interests. Other than conclusory allegations, nothing contained in the amended complaint shows that the general partners acted in a manner that would deprive Trump of receiving the benefits of their agreement. In short, Trump's brief fails to analyze how the implied covenant of good faith and fair dealing might salvage this claim. For the foregoing reasons, the Hudson Waterfront Corps' motion to dismiss the eleventh cause of action, for breach of contract, is granted.

Books & Records

The general partners move to dismiss the eighteenth cause of action, arguing that Trump fails to explain how the general partners falsified book and records, and that the documentary evidence contradicts Trump's claims that Trump was refused access to, and inspection of, the Hudson Waterfront LPs' books and records. Trump does not respond to this argument.

The eighteenth cause of action claims that "the defendants have repeatedly refused to permit Trump to conduct any inspection or copying, refused to provide access to documents on request, and falsified other books and records to conceal their wrongdoing." Amended Complaint ¶ 139.

Section 12.2 (a) of the Agreements provides that "[t]he General Partner shall maintain, or cause to be maintained, complete and accurate records of all transactions of the Partnership." Schaeffer Aff., Ex. I, at 66. Section 12.2 (b) requires that the books and records be kept at the office of the Hudson Waterfront LPs, and that they "and shall be open for the inspection and examination (and making copies) by the Partners or their authorized representatives during regular business hours." *Id.*

As discussed above, Trump fails to show how the general partners falsified the Hudson





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Waterfront LPs' books and records. However, under the Agreements, the general partners were responsible for the books and records, and they were required to permit Trump to inspect and examine the books and records. The general partners submit documentary evidence of correspondence exchanged between Trump's lawyers, and the lawyers for the general partners and the limited partnerships. The general partners argue that this correspondence establishes that they remained "ready and willing to work out a protocol for the inspection of the Limited Partnerships' business records ... ." Gruenglas Aff., Exs. 13, 15, 17, 21-23. However, this correspondence, if anything, shows that the general partners disputed whether Trump was permitted to access the books and records, and sought to establish a "protocol" for inspection that was not contemplated in the Agreements. Moreover, to date, it appears that Trump has been denied access to the limited partnerships' books and records. Therefore, this documentary evidence fails to refute Trump's claim against the general partners for access to books and records. Despite this court's dismissal of all other causes of action, Trump is entitled to inspection of the books of records immediately. Furthermore, he is entitled to access to the books and records throughout the continued course of the partnership. Accordingly, the general partners' motion to dismiss the eighteenth cause of action is denied.

Motion of Individual Defendants and Westside LPs

Jurisdiction

The individual defendants Vincent Lo (Lo), Charles Yeung (Yeung), Edward Wong (Wong) and David Chiu (Chiu) move to dismiss the complaint for lack of personal jurisdiction, under CPLR 302 (a).[5] In opposition, Trump argues that jurisdiction exists as a result of these

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[5] Defendant Henry Cheng does not contest jurisdiction.



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defendants' membership in a New York partnership, independent from the partnership memorialized in the Agreements, whose purpose was the ownership and development of real estate in New York City.

"It is axiomatic that the essential elements of a partnership must include an agreement between the principals to share losses as well as profits." *Chanler v Roberts*, 200 AD2d 489, 491 (1st Dept 1994).

The amended complaint avers that, in 1994, the Cheng Group entered into an agreement with Trump, whereby they agreed to buy, develop and manage the Properties. According to the amended complaint, the agreement allocated responsibility for these undertakings to the Hudson Waterfront Corps, as general partners, and to Trump to oversee development, management and operations. The pleading alleges that this agreement is "confirmed by Lo's public acknowledgment that Trump and the Cheng Group agreed, among other things, 'to share profits from a sale' of the property." Amended Complaint, ¶ 25.

Conspicuously missing from Trump's pleading is any explanation of how this partnership was formed, or of any discussions among the principals that resulted in the partnership. Trump also fails to allege any facts showing that these principals agreed to share losses. The purported agreement, if anything, is merely an agreement to agree, which is unenforceable as a matter of law. *Lazard Freres & Co. v First Nat. Bank of Maryland*, 268 AD2d 294 (1st Dept 2000).

Citing *Penato v George* (52 AD2d 939, 942 [2d Dept 1976]), Trump argues that the "law will imply an agreement to share losses." However, *Penato* excused the failure to allege the sharing of losses only where "other elements of a joint venture are present" (*id.*), which Trump has not alleged in the amended complaint. Therefore, Trump's reliance upon *Penato* is misplaced.



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That the alleged agreement was merely an agreement to agree is further evidenced by the written Agreements subsequently entered into, each of which contains a merger clause. The merger clauses state that each Agreement "supersedes all prior agreements among the parties with respect to the subject matter hereof ... and contains the entire Agreement among the parties with respect to such subject matter." Schaeffer Aff., Ex. I, at 96-97, § 20.16.

Trump cites *Louis Dreyfus Corp. v ACLI Intern., Inc.* (52 NY2d 736 [1980]), arguing that the merger clauses in the written Agreements are irrelevant, because the individual defendants claim that they are not parties to those Agreements, and none of them is a partner in the limited partnerships. In *Louis Dreyfus Corp.*, the Court of Appeals recognized an "overarching oral partnership agreement" between two parent corporations to share profits under a partnership contract between their subsidiaries. *Id.*, at 739. The Court held that a merger clause in the written contract between the subsidiaries did not bar enforcement of the separate oral agreement between the parent companies, which contained material terms *not* encompassed by the written contract. *Id.*

Here, the amended complaint avers that the purpose of the oral partnership agreement "was and remains exclusively to buy, develop, and manage the property" (Amended Complaint, ¶ 26), which is exactly the same purpose as explicitly provided in the "Purpose" section of the written Agreements. Schaeffer Aff., Ex. I, at 19-21, § 2.2. Thus, "[p]laintiffs do not allege that an oral agreement differing in its terms from the [written] agreement existed between plaintiffs and defendants. Rather, they argue that the oral agreement was exactly the same as the [written] agreement and encompassed the same terms," but that different parties were involved. *Bross Util. Serv. Corp. v Aboubshait*, 618 F Supp 1442, 1446 (SD NY 1985). Under these circumstances,

*Louis Dreyfus Corp.* is inapposite. *Id.* For the foregoing reasons, the alleged oral partnership agreement is not a sufficient basis to confer jurisdiction over the individual defendants.

Trump next argues that the individual defendants are subject to jurisdiction pursuant to CPLR 302 (a) (1), (a) (2) and (a) (3). The court may exercise personal jurisdiction under CPLR 302 (a) (1) where the defendant, in person or through an agent, transacts any business within the state or contracts anywhere to supply goods or services in the state. CPLR 302 (a) (1) "is a 'single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 (1988).

Trump's first argument under CPLR 302 (a) is that the individual defendants are subject to jurisdiction under an agency theory. Establishing jurisdiction based upon an "agency" theory requires a showing that the alleged principal "exercised some control" over the agent's activities (*id.*), and that "the defendant was a 'primary actor' in the specific matter in question; control cannot be shown based merely upon ... conclusory allegations" (*Karabu Corp. v Gitner*, 16 F Supp 2d 319, 324 [SD NY 1998]).

Here, the amended complaint alleges that Cheng "represented and acted on behalf of the Cheng Group," that the Cheng Group "has acted and is acting (through Cheng) on behalf of itself and on behalf of a separate group of Chinese investors," and that Cheng acted "with the knowledge and consent of the Cheng Group." Amended Complaint, ¶¶ 10, 15, 30. The pleading avers that the Cheng Group instructed the general partners by communicating through Cheng. *Id.*, ¶¶ 37, 52. However, all of these allegations are conclusory, because they conclude that Cheng



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was the agent of the Cheng Group without explaining how the Cheng Group controlled Cheng.

Trump submits two letters from Cheng to Trump, which he claims establish that Cheng acted as the Cheng Group's agent for purposes of jurisdiction. The first letter, dated May 4, 2005, states that, "[a]fter careful consideration, our Hong Kong partners have agreed to accept the current offer and sell all the properties ... for $1.75 billion" (May 4th Letter). Bowe Aff., Ex. B. The second letter, dated May 25, 2005, states that "[w]e are in negotiations ... for the sale of significant portions of Riverside South" (May 5th Letter). *Id.*, Ex. A.

Both letter's copied defendant Lo. However, neither letter specifies who the "Hong Kong partners" are. More significantly, neither letter makes any showing that Cheng was controlled to any extent by the other individual defendants who comprise the Cheng Group, or that any of these individuals were primary actors with respect to the circumstances surrounding the sale of the Properties. Therefore, Trump fails to establish personal jurisdiction over the individual defendants under an agency theory.

Trump claims that "representatives of the Cheng Group traveled to New York from Hong Kong" to inform Trump of the sale of the Properties. Amended Complaint, ¶ 39. Trump also argues that Lo, in his affirmation, called Trump to discuss the sale of the Properties, and called non-party Richard LeFrak in New York to inquire about his interest in buying the Properties for $3 billion. However, Trump fails to identify which "representative" of the Cheng Group traveled to New York. Moreover, Lo's affirmation merely states that he returned Trump's telephone call, and that he attempted to call Richard LeFrak but was unsuccessful. These alleged calls are insufficient to confer jurisdiction. *Granat v Bochner*, 268 AD2d 365, 365(1st Dept 2000) ("making phone calls to this State are not, without more, activities tantamount to 'transacting



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business' within the meaning of the aforecited long-arm statute"). For the foregoing reasons, Lo, Yeung, Wong and Chiu are not subject to personal jurisdiction under CPLR 302 (a) (1).

CPLR 302 (a) (2) permits the court to exercise personal jurisdiction over a non-domiciliary who "commits a tortious act within the state ... ." The traditional view is that this provision requires "a showing that the nondomiciliary committed a tortious act *in this State*." *Longines-Wittnauer Watch Co. v Barnes & Reinecke, Inc.*, 15 NY2d 443, 464 (1965) (emphasis added); *Bensusan Rest. Corp. v King*, 126 F3d 25, 28 (2d Cir 1997) ("CPLR § 302 (a) (2) reaches only tortious acts performed by a defendant who was physically present in New York when he performed the wrongful act"); Practice Commentary C302:10 ("CPLR 302 (a) (2) ... has been narrowly construed to apply only when the defendant's wrongful acts are performed in New York").

However, some courts have resisted the traditional view in cases involving fraud, conspiracy, and other illegal activities. *See e.g. Banco Nacional Ultramarino, S.A. v Chan*, 169 Misc 2d 182 (Sup Ct, NY County 1996), *affd* 240 AD2d 253 (1st Dept 1997) (held that a defendant who converted funds on deposit in a New York bank did not have to be present in New York in order to fall within the reach of CPLR 302 [a] [2]).

Here, the amended complaint fails to show that Lo, Yeung, Wong and Chiu were present in New York at any relevant time. Moreover, other than conclusory allegations that lack any detail or particularity, and for the reasons stated in this decision, the amended complaint fails to plead any claim of fraud, conspiracy, or any other illegal or tortious activity against these individual defendants that would subject them to jurisdiction under CPLR 302 (a) (2).

CPLR 302 (a) (3) subjects a non-domiciliary to jurisdiction who:



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> commits a tortious act without the state causing injury to person or property within the state ..., *if* he
>
> (I) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce ... .

Trump argues that the amended complaint, and the May 4th and 5th Letters, show that Lo, Wong, Yeung and Chiu committed a tortious act by: participating in discussions and meetings with interested parties concerning the sale of the Properties; agreeing to accept the offer to sell the Properties for $1.76 billion; engaging in negotiations to sell portions of the Properties; and agreeing to give the buyer an exclusivity period in connection with the sale of the Properties. Trump Opp. Mem. of Law, at 19; Bowe Aff., Exs. A and B.

The amended complaint asserts tort claims for breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. Each of these claims relies upon the alleged oral partnership agreement between Trump and the individual defendants. However, as discussed above, there was no oral partnership agreement. Thus, no fiduciary duty arose. To the extent that Trump's tort claims do not rely upon the alleged oral partnership agreement, for the reasons stated in this decision, those claims fail to state a cause of action. Therefore, there was no tortious act. Accordingly, these defendants are not subject to jurisdiction under CPLR 302 (a) (3).

Trump argues that he has made a "sufficient start" to showing that jurisdiction may exist over Lo, Yeung, Wong and Chiu by piercing the corporate veil, because Cheng allegedly dominated the general partners and the Westside LPs for the benefit of the individual defendants, and with their knowledge and consent.



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"The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene." *Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 142 (1993).

Here, all of Trump's claims of domination involve actions undertaken by Cheng, not Lo, Yeung, Wong or Chiu. Other than conclusory allegations, Trump fails to show *any* facts of domination warranting piercing the corporate veil. *DaSilva v American Tobacco Co.*, 175 Misc 2d 424, 428 (Sup Ct, NY County 1997) (conclusory statements insufficient to pierce corporate veil).

Moreover, Lo, Yeung, Wong and Chiu's ownership interests in the New York entities are insufficient to establish jurisdiction. *Ferrante Equip. Co. v Lasker-Goldman Corp.*, 26 NY2d 280, 283 (1970); *see also Generale Bank, New York Branch v Choudury*, 776 F Supp 123, 124 (SD NY 1991) (investment in New York business venture insufficient to establish jurisdiction). Therefore, the court has no jurisdiction over Lo, Yeung, Wong and Chiu under a theory of piercing the corporation veil.

For the foregoing reasons, the court lacks personal jurisdiction over defendants Lo, Yeung, Wong and Chiu. Accordingly, the amended complaint is dismissed in its entirety as to these defendants.

<u>Failure to State a Cause of Action</u>

Cheng and the Westside LPs argue that Trump's tenth cause of action for breach of the alleged oral partnership agreement between Trump and the Cheng Group. As discussed above, there was no oral partnership agreement. Therefore, the Cheng Group's motion to dismiss the



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tenth cause of action is granted.

The Westside LPs move to dismiss the twelfth cause of action for breach of contract. This claim alleges that the Westside LPs breached section 6.1 of the Hudson Waterfront LPs' partnership Agreements, and the implied covenants of good faith and fair dealing. In opposition, Trump argues that the Westside LPs participated in the sale of Trump place as the alter egos of the individual defendants.

Section 6.1 provides that "the Limited Partners shall not take part in the management of the business or affairs of the Partnership or control the Partnership business." Schaeffer Aff., Ex. K, § 6.1, at 14. However, under the Agreements, the limited partners have no managerial powers. Moreover, Trump fails to identify any act taken by the Westside LPs in connection with the management or control of the Hudson Waterfront LPs. In addition, as discussed above, Trump's alter ego argument is without merit. Therefore, Trump has not alleged a breach of these Agreements.

Trump also has not alleged anything done by the Westside LPs which will have had the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Therefore, Trump's claim that the Westside LPs breach the implied covenant of good faith and fair dealing is without merit. Accordingly, the Westside LPs' motion to dismiss the twelfth cause of action is granted.

Cheng and the Westside LPs argue that the eighteenth cause of action, for access to the Hudson Waterfront LPs' books and records, should be dismissed, based upon the partnership Agreements. Trump does not respond to this argument.

As discussed above, under the Agreements, the general partner was responsible for the



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books and records, not Cheng or the Westside LPs. Accordingly, the eighteenth cause of action for access to books and records is dismissed as to Cheng and Westside LPs.

Cheng and the Westside LPs next argue that Trump fails to state any claims against them for breach of fiduciary duty, because, as limited partners, they had no control over the limited partnerships, and they owed no fiduciary duties to Trump. In opposition, Trump argues that the individual defendants and the Westside LPs owed fiduciary duties as affiliates of the general partners who have exercised control over the Hudson Waterfront LPs' property.

The amended complaint asserts breach of fiduciary duty claims against Cheng and the Westside LPs in the first, second and third causes of action.[6]

Under Delaware law, "a fiduciary is typically one who is entrusted with the power to manage and control the property of another." *Bond Purchase, L.L.C. v Patriot Tax Credit Properties, L.P.*, 746 A2d 842, 864 (Del Ch 1999). However, "in the absence of any provision in the Partnership Agreement engrafting fiduciary duties onto [a limited partner]," that limited partner "owes no fiduciary duties to the other limited partners ... ." *Id.*

"While mere ownership - either direct or indirect - of the general partner does not result in the establishment of a fiduciary relationship, those affiliates of a general partner who exercise control over the partnership's property may find themselves owing fiduciary duties to both the partnership and its limited partners." *Bigelow/Diversified Secondary Partnership Fund 1990 v Damson/Birtcher Partners*, 2001 WL 1641239, *8 (Del Ch, Dec. 4, 2001).

In *Bigelow*, the pleading sufficiently alleged fiduciary liability against the general partners'

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[6] The court notes that, for the reasons stated above, the second and third causes of action are already dismissed. In any event, for the reasons stated herein, these claim fail to state a cause of action.



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affiliates, where the affiliates allegedly "controlled the day-to-day operations and affairs of the Partnership." *Id.* The pleading also alleged specific examples of transactions involving "a long-term course of conduct by the [defendants] with the purpose of deterring a sale of the Partnerships' properties in order that [certain defendants] continue to receive fees." *Id.* Similarly, in *Wallace v Wood* (752 A2d 1175, 1180-82 [Del Ch 1999]), the court denied a motion to dismiss where the plaintiffs alleged that the defendants "personally caused the Limited Partnership to enter into self-interested transactions adverse to the interests of the Limited Partners."

Section 7.1 (a) of the Agreements grants the general partner "full control over the management, operation and activities of, and dealings with, the Partnership Assets and the Partnership's properties, business and affairs," and "all rights and powers generally conferred by law and necessary, advisable or consistent in connection with the purposes of the Partnership ... ." Agreements, Schaeffer Aff., Ex. I, § 7.1 (a), at 31. The Agreements expressly limit the powers of the limited partners, stating that "the Limited Partners shall not take part in the management of the business or affairs of the Partnership or control the Partnership business."[7] *Id.*

Thus, the Agreements vest exclusive control over the management of the Hudson Waterfront LPs in the general partners. Trump fails to identify any provision contained in the Agreements that imposes fiduciary duties upon the limited partners, or that provides the limited partners with any ability to manage or control the property of the Hudson Waterfront LPs. *Compare Cantor Fitzgerald, L.P. v Cantor*, 2000 WL 307370, *10 (Del Ch, March 13, 2000) (fiduciary duty imposed upon limited partner where partnership agreement expressly provided that

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[7] The Agreements expressly permit the general and limited partners to compete directly with the Hudson Waterfront LPs. *Id.*, § 4.4, at 23.





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"[e]ach Partner acknowledges its duty of loyalty to the Partnership and agrees to take no action to harm [or that would reasonably be expected to harm] the Partnership or any Affiliated Entity").

The amended complaint alleges that "[t]he Cheng Group owns and controls 100% of the defendant general partners directly or, alternatively, indirectly through their 100% ownership and control of the Westside Limited Partnerships and of the general partners of the Westside Limited Partnerships." Amended Complaint, ¶ 19. However, the amended complaint fails to show that either Cheng or the Westside LPs controlled the day-to-day operations of the Hudson Waterfront LPs.

Moreover, Trump admits in the amended complaint that the Westside LPs are owned by an "Investor Group," which the pleading defines as "a separate group of Chinese investors." *Id.*, ¶ 15. This separate group of Chinese investors, together with the Cheng Group, allegedly own their interests in the Properties through various offshore British Virgin Islands entities. *Id.* Therefore, based on the allegations of the amended complaint, the Cheng Group does not own 100% of the Westside LPs, but rather, the Westside LPs are owned, at least in part, by the Investor Group.

Nor does Trump show that Cheng, any of the individual defendants, or the Westside LPs personally caused the Hudson Waterfront LPs to enter into self-interested transactions adverse to the interests of Trump. As discussed above, the documentary evidence establishes that the sale of the Properties was not adverse to Trump. To the contrary, the Gross affidavit shows that the Properties were sold for approximately $188 million *more* than the most recent appraisals of the Properties. All of the parties stood to gain equally in proportion to their respective ownership interests.

Moreover, contrary to Trump's assertion, Delaware "[c]ourts have not found limited





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partners subject to default fiduciary duties in the absence of a fiduciary relationship." *Cantor Fitzgerald, L.P.*, 2000 WL 307370, at *20. Furthermore, as discussed above, Trump fails to plead alter ego liability. Therefore, Trump fails to show that the corporate veil could be pierced to reach Cheng or the Westside LPs. Trump fails to show that Cheng or the Westside LPs exercised control over the Hudson Waterfront LPs or the general partners. For the foregoing reasons, Trump's claims for breaches of fiduciary duties fail to state causes of action, and the first, second and third causes of action of the amended complaint are dismissed as to defendants Westside LPs and Cheng.

Defendants next move to dismiss Trump's fourth and eighth causes of action for aiding and abetting breach of fiduciary duty and tortious interference with fiduciary duty.[8]

To state a claim for aiding and abetting a breach of fiduciary duty, Trump must show: "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *Kaufman v Cohen*, 307 AD2d 113, 125 (1st Dept 2003); *In re Santa Fe Pacific Corp. Shareholder Litigation*, 669 A2d 59, 72 (Del 1995) (same). A claim for tortious interference with fiduciary duty consists of the same elements. *Hannex Corp. v GMI, Inc.*, 140 F3d 194, 203 (2d Cir 1998).

As discussed above, Trump fails to show that a fiduciary duty existed and was breached. To the extent that Trump's claim relies upon the alleged oral partnership agreement, the claim fails, because, as discussed above, Trump has not alleged the existence of such an agreement. Accordingly, the fourth and eighth causes of action are dismissed.

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[8] The court notes that these claims were already dismissed because they are derivative, rather than direct, claims. In any event, for the reasons stated herein, these claim fail to state a cause of action.



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Defendants next move to dismiss the sixth cause of action for conspiracy to breach fiduciary duties, arguing that neither New York nor Delaware recognize a separate cause of action for conspiracy. Trump concedes that conspiracy is not a separate tort.[9] In opposition, citing *Alexander & Alexander of N.Y., Inc.* (68 NY2d 968, *supra*), Trump argues that his allegations of conspiracy should be permitted "to connect the actions of separate defendants with an otherwise actionable tort." In this context, Trump claims that his conspiracy claim is based upon his allegation that the general partners committed a wrongful act by selling the Properties at a grossly deficient price, with the agreement of the remaining defendants.

In order for a conspiracy to be actionable, Trump must plead an agreement to do something that independently would constitute a tort. *Smukler v 12 Lofts Realty*, 156 AD2d 161, 163 (1st Dept 1989). Trump must allege, among other things, facts sufficient to constitute an agreement or common understanding, and a joint intent to tortiously injure. Conspiracy-Civil Aspects, 20 NY Jur 2d, § 19.

However, "a mere conspiracy to commit a [tort] is never of itself a cause of action." *Alexander & Alexander of N.Y., Inc. v Fritzen*, 68 NY2d 968, 989 (1986); *Nutt v A.C. & S. Co., Inc.*, 517 A2d 690, 694 (Del Super 1986) ("[c]ivil conspiracy is not an independent cause of action in Delaware, but requires an underlying wrong which would be actionable absent the conspiracy).

Moreover, as discussed above, the documentary evidence submitted with Gross's affidavit establishes that the Properties were not sold at a grossly deficient price. In any event, the

[9] The court notes that this claim was already dismissed because it is a derivative, rather than a direct, claim. In any event, for the reasons stated herein, these claim fail to state a cause of action.



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amended complaint fails to show an agreement among the defendants for an unlawful purpose, or a joint intent to tortiously injure Trump. The court considered Trump's allegations of conspiracy in connection with his tort claims, and, for the reasons stated in this decision, Trump's conspiracy allegations do not substantiate those claims. Therefore, Trump's argument is unpersuasive, and the sixth cause of action is dismissed.

Hudson Waterfront LPs Motion

The Hudson Waterfront LPs move to dismiss the seventeenth cause of action for dissolution, arguing that none of the Agreements trigger dissolution, and that Trump fails to show that it is not reasonably practicable for the partnerships to continue. In opposition, Trump argues that the partnership Agreements mandate dissolution, that defendants' breach of their fiduciary duties warrants dissolution, and that the purpose of the limited partnerships no longer exists.

Delaware's Limited Partnership Law requires a limited partnership to be dissolved and its affairs wound up upon the first to occur of the following circumstances:

> (1) At the time specified in a partnership agreement, but if no such time is set forth in the partnership agreement, then the limited partnership shall have a perpetual existence;
>
> ....
>
> (5) Upon the happening of events specified in a partnership agreement; or
>
> (6) Entry of a decree of judicial dissolution under § 17-802 of this title.

6 Del C § 17-801.

Section 17-802 provides that, "[o]n application by or for a partner the Court of Chancery may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry



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on the business in conformity with the partnership agreement." Under section 17-802, the test is "whether it is 'reasonably practicable' to carry on the business of a limited partnership, and not whether it is impossible." *In re Silver Leaf, L.L.C.*, 2005 WL 2045641, *10 (Del Ch 2005).

The amended complaint alleges that the Agreements do not permit the reinvestment of sale proceeds in rental properties. Amended Complaint, ¶¶ 56, 133-35. It also avers that, under the Agreements, the Hudson Waterfront LPs are required to distribute sale proceeds from a sale of substantially all of the partnerships' assets. *Id.*

Section 17.1 (b) of the Agreements provide that the partnership shall be dissolved upon "a sale or other disposition of all or substantially all of the assets of the Partnership, *unless within 10 business days thereafter the General Partner determines to continue the Partnership ... .*" (Emphasis added.) As stated in the Order, the express "Purposes" of the partnerships, as defined in the Agreements, contemplated the sale, transfer, exchange, disposition and encumbrance of the Properties, and any other partnership assets. *Id.*, § 2.2 (d).

Article 9 of the Agreements provides that "Cash Available for Distribution shall be distributed by the Partnership from time to time as determined by the General Partner (but no less frequently than annually) ... ." *Id.*, article 9, at 50. "Cash Available for Distribution" is defined as net cash after providing for cash reserved for debts, costs, obligations, liabilities and expenses,

> related to or incurred in the operation and/or development of the Partnership ... whether for operating expenses or capital expenditures, previously incurred or anticipated to be incurred in the foreseeable future (including, without limitation ... future anticipated development costs) ... or other requirements of the Partnership, in each case as determined by the General Partner in its sole discretion.

*Id.* at 6-7. The remainder of article 9 describes the priority of distribution, once Cash Available



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for Distribution is determined. It does not create any obligation to distribute sale proceeds, or any right in Trump to redeem his interest in the limited partnerships.

Thus, dissolution is not required upon a sale if the general partners determine to continue the partnership, which here they have done by virtue of the 1031 Exchange reinvestment plan. Trump fails to identify any provision in the Agreements to the contrary that would require dissolution upon the sale of the Properties, or a 1031 Exchange.

As this court already determined in the Order, the term of the Agreements expires on December 31, 2044, requiring dissolution of the partnerships. Agreements, art. 3, at 21, and art. 17 at 82. The Agreements do not obligate the general partners to distribute partnership assets or sale proceeds to the limited partners prior to this date, unless dissolution occurs under one of the events listed in section 17.1 of the Agreements, none of which are alleged here.

Moreover, nothing contained in the amended complaint shows that it would not be reasonably practicable to carry on the business of the Hudson Waterfront LPs in conformity with the partnership agreement. Trump admits in the amended complaint that the sale of the Properties "provided a very high return to Trump personally ... ." Amended Complaint, ¶ 40. Moreover, nothing contained in the amended complaint shows that there was a deadlock that prevented the Hudson Waterfront LPs from functioning pursuant to their Agreements.

In short, Trump fails to "point to specific facts on which this Court may determine that the business is no longer reasonably practicable to continue." *Cincinnati Bell Cellular Systems Co. v Ameritech Mobile Phone Service of Cincinnati, Inc.*, 1996 WL 506906, *9 (Del Ch 1996); *compare PC Tower Ctr., Inc. v Tower Ctr. Dev. Assoc. Ltd. Partnership*, 1989 WL 63901, *6 (Del Ch 1989) (dissolution ordered where business operated at substantial loss, and outstanding



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debt was without recourse and was far in excess of its value); *and Haley v Talcott*, 864 A2d 86, 89 (Del Ch 2004) (dissolution ordered where deadlock prevented business from functioning as provided in its LLC agreement). Therefore, the amended complaint fails to state a cause of action for dissolution pursuant to section 17-802 of Delaware's Limited Partnership Law.

Trump argues that dissolution is warranted because defendants breach their fiduciary duties. However, as discussed above, Trump fails to state any claim for breach of fiduciary duty. Nor does Trump show any "fiduciary misconduct" by any of the defendants (Trump Opp. Mem. of Law, at 8), or any violation of the partnership Agreements. Therefore, the Hudson Waterfront LPs' motion to dismiss the seventeenth cause of action is granted.

## CONCLUSION

Accordingly, it is hereby

ORDERED that motion sequence numbers 011, 012 and 013 are granted to the extent that the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteen, fourteenth, fifteenth, sixteenth, seventeenth, nineteenth and twentieth causes of action are severed and dismissed, and the complaint is dismissed in its entirety as to defendants Henry Cheng, Vincent Lo, Charles Yeung, Edward Wong, David Chiu, Hudson Waterfront Assoc., L.P., Hudson Waterfront Assoc., I, L.P., Hudson Waterfront Assoc., II, L.P., Hudson Waterfront Assoc., III, L.P., Hudson Waterfront Assoc., IV, L.P., Hudson Waterfront Assoc., V, L.P., Hudson Westside Assoc., L.P., Hudson Westside Assoc., I, L.P., Hudson Westside Assoc., II, L.P., Hudson Westside Assoc., III, L.P., Hudson Westside Assoc., IV, L.P., Hudson Westside Assoc., V, L.P., with costs and disbursements to these named defendants as taxed by the Clerk of the Court; and it



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is further

ORDERED that defendants Hudson Waterfront Corp., Hudson Waterfront I Corp., Hudson Waterfront II Corp., Hudson Waterfront III Corp., Hudson Waterfront IV Corp., Hudson Waterfront V Corp. are directed to serve an answer to the eighteenth cause of action of the complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 24, 2006

ENTER:

J.S.C.

FILED
JUL 27 2006
COUNTY CLERK'S OFFICE
NEW YORK





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SCANNED ON 10/3/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ______________ Justice

PART 56

Donald J Trump

INDEX NO. 602877/05

MOTION DATE 5/21/07

- v -

MOTION SEQ. NO. 016

Henry Cheng

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/3/07

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56
---------------------------------------------------------------------X

DONALD J. TRUMP, individually and
derivatively on behalf of
HUDSON WATERFRONT ASSOC., L.P.,
HUDSON WATERFRONT ASSOC., I, L.P.,
HUDSON WATERFRONT ASSOC. II, L.P.,
HUDSON WATERFRONT ASSOC. III, L.P.,
HUDSON WATERFRONT ASSOC. IV, L.P.,
HUDSON WATERFRONT ASSOC. V, L.P.,

Plaintiff,

Index No. 602877/05

-against-

HENRY CHENG, VINCENT LO, CHARLES YEUNG,
EDWARD WONG, DAVID CHIU, HUDSON
WATERFRONT CORP., HUDSON WATERFRONT I
CORP., HUDSON WATERFRONT II CORP.,
HUDSON WATERFRONT III CORP., HUDSON
WATERFRONT IV CORP., HUDSON WATERFRONT
V CORP., HUDSON WATERFRONT ASSOC., L.P.,
HUDSON WATERFRONT ASSOC. I, L.P.,
HUDSON WATERFRONT ASSOC. II, L.P.,
HUDSON WATERFRONT ASSOC. III, L.P.,
HUDSON WATERFRONT ASSOC. IV, L.P.,
HUDSON WATERFRONT ASSOC. V, L.P.,
HUDSON WESTSIDE ASSOC., L.P.,
HUDSON WESTSIDE ASSOC. I, L.P.,
HUDSON WESTSIDE ASSOC. II, L.P.,
HUDSON WESTSIDE ASSOC. III, L.P.,
HUDSON WESTSIDE ASSOC. IV, L.P.,
HUDSON WESTSIDE ASSOC. V, L.P.,
JOHN DOE I and JOHN DOE II,

Defendants.
---------------------------------------------------------------------X

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OCT 03 2007
NEW YORK
COUNTY CLERK'S OFFICE

**RICHARD B. LOWE, III, J:**

Motion sequence numbers 016, 017 and 018 are consolidated for disposition.

This action involves a dispute over the sale price of, and the use of sale proceeds from,

parcels of land that were developed by the parties in this action. The 20-count amended complaint asserted direct and derivative causes of action. Defendants moved to dismiss the amended complaint for lack of jurisdiction, failure to state a cause of action, and based upon documentary evidence. By decision and order dated July 24, 2006, this court granted the motions to dismiss, dismissing all of plaintiffs' claims except the eighteenth cause of action for access to books and records (7/24/06 Decision). Judgment was entered on September 19, 2006.

In motion sequence numbers 016 and 018, the Hudson Waterfront LPs and the Hudson Waterfront Corps move for summary judgment dismissing the eighteenth cause of action for access to books and records. In motion sequence number 017, Trump moves for summary judgment "compelling the inspection of records related to Fineview Resources, Ltd. in the possession of Defendants, including, but not limited to, correspondence and records between Defendants and Fineview Resources, Ltd., all related to the one transaction involving the sale of the Penn Rail Yards." Trump's 4/19/07 Notice of Motion.

The facts of this case are stated in detail in this court's decision and order, *Trump v Cheng*, 9 Misc 3d 1120(A) (Sup Ct, NY County 2005), and the 7/24/06 Decision. Therefore, the court presumes familiarity with the facts, and the facts will not be restated herein. Unless otherwise indicated in this decision, defined terms in the 7/24/06 Decision shall have the same meaning herein.

**DISCUSSION**

Books and Records

Trump's Motion for Summary Judgment (017)

Trump moves for summary judgment to compel the inspection of Fineview records in



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defendants' possession relating to the sale of the Properties. Defendants counter that all Fineview documents have either been produced or do not exist.

As stated in the March 14, 2007 decision and order of the Special Master (3/14/07 Order), "[i]f the documents do not exist, an order or judgment interpreting or compelling compliance with the agreement would be futile, a waste of judicial resources and nothing more than an advisory opinion, prohibited under New York law." 3/14/07 Order, 4/17/07 Gruenglas Aff., Ex. 16, at 2, citing *New York Public Interest Research Group, Inc. v Carey*, 42 NY2d 527 (1977).

In anticipation of the present summary judgment motions, in order to identify the universe of documents at issue, the Special Master permitted Trump to serve a single interrogatory "requesting identification of the categories of documents in the possession or control of the defendant limited partnership, with sufficient particularity to apprise plaintiff of the nature and approximate quantity of such documents but without disclosing the substance of the documents themselves ... ." *Id.* at 3.

On March 14, 2007, Trump served an interrogatory, asking defendants to:

> [d]escribe any and all documents relating to the brokerage and/or finders services rendered by Fineview with respect to the transaction involving the sale of property known as "Trump Place" in the form of a privilege log, with sufficient particularity as to the categories, types, and quantities of documents so that the Plaintiff will be apprised of the scope of the existing documents.

4/17/07 Gruenglas Aff., Ex. 17.

Defendants responded to Trump's interrogatory by producing a log listing "Categories of Documents Relating to the Brokerage and/or Finder's Services Rendered by Fineview with Respect to the Sale of Riverside South." *Id.*, Ex. 18. Defendants' response lists 17 categories of





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documents, their date ranges, and the number of documents in each category. *Id.* Defendants' interrogatory response is verified by Barry Gross, an officer of the limited partnerships' general partners.

On Trump's summary judgment motion and in proceedings before the Special Master, Trump's counsel concedes that Trump already has the documents identified in defendants' interrogatory response. 4/17/07 Goldberg Aff., ¶¶ 2, 28-31, 34; 5/8/07 Gruenglas Aff., Ex. 7, at 46-48 and Ex. 19. Trump's counsel also submits a memorandum that he submitted to the Special Master, affirmatively arguing that he "believe[s] there are no such records and that Fineview was a ruse." Goldberg Aff., Ex. T. Trump's counsel also concedes that James T. Galvin, an expert hired by Trump to review the financial documents of the limited partnership "has discovered no records between Fineview and [the Hudson Waterfront Corps] or [the Hudson Waterfront LPs]." Goldberg Aff., ¶ 29. Thus, it appears that Trump seeks documents that he admits do not exist. This is the precise situation that the Special Master appropriately described as futile and a waste of judicial resources.

Furthermore, Trump's argument is based upon an inference that he urges the court to draw from Section 14.1 of the Agreement of Sale and Purchase, dated June 17, 2005, between the Hudson Waterfront LPs and Extell, the purchaser of the Properties. Section 14.1 states that the Hudson Waterfront LPs and Extell will each "pay all fees and commissions payable" to Fineview "pursuant to separate written agreement[s] ... ." Goldberg Aff., Ex. S. This provision arises in the context of an indemnification clause with respect to payment of any outstanding brokerage commissions. In other words, this provision was designed to prevent the Hudson Waterfront LPs (as sellers) or Extell (as the purchaser) from being liable to Fineview for fees or



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commissions to which the other party may have obligated itself pursuant to a written agreement.

However, nothing contained in Section 14.1 indicates that a written agreement exists for either the Hudson Waterfront LPs or Extell. Nor does it state that any amount was payable to Fineview by the Hudson Waterfront LPs. Rather, the only evidence of a payment to Fineview was made by Extell, not the Hudson Waterfront LPs, and the limited partnerships were not a party to that transaction. Rather, the only evidence of a payment to Fineview is evidence of a payment made by Extell, not the Hudson Waterfront LPs, and the limited partnerships were not a party to that transaction.

Moreover, when the court heard oral arguments on Trump's motions for reargument and renewal on December 15, 2006, defendants' counsel represented to the court that "[t]here were no such fees paid by the LPs. There is no such contract." 12/15/06 Tr., at 43. In a letter to the Special Master dated December 19, 2006, prior to a status conference on the books and records claim, defendants' counsel also represented to the Special Master that documents concerning a $17.5 million fee paid by the Hudson Waterfront LPs to Fineview were not "turned over because they do not exist – the LPs paid no commissions to Fineview." 5/8/07 Gruenglas Aff., Ex. 17, at 15 (emphasis in original). At the actual status conference held on December 21, 2006, defendants' counsel again represented to the court that no agreement exists between the Hudson Waterfront LPs and Fineview and no brokerage or commission payments were made. *Id.*, Ex. 6, at 15-16, 27-28. Thus, if the limited partnerships never paid a finder's fee to Fineview, there is no reason why they should have documents evidencing such a payment. The limited partnerships have produced evidence of payment by Extell to Fineview, but have repeatedly represented that there are no documents evidencing payments made by the Hudson Waterfront LPs to Fineview.



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Trump argues that the court should infer that defendants' interrogatory response omitted responsive documents, because defendants asserted five general objections to the interrogatory. However, defendants represent that "all documents in any way relating to the brokerage and/or finders' services rendered by Fineview with respect to the sale of the Penn Yards were included in Defendants' interrogatory response." General Partners' Mem. of Law, at 13. Defendants also state that "[n]o such documents were omitted from the interrogatory response on the basis of the accompanying objections." *Id.* Counsel's representations are consistent with Trump's argument that he already possesses the documents catalogued in defendants' interrogatory response, and that the additional documents he seeks either do not exist or are not in defendants' possession. For the foregoing reasons, Trump's motion (motion sequence number 017) for summary judgment compelling the inspection of records relating to Fineview is denied.

Defendants' Motion for Summary Judgment Dismissal (016 and 018)

Trump's sole remaining cause of action, the eighteenth cause of action, seeks access to the limited partnerships' books and records in accordance with section 12.2 of the Agreements. The eighteenth cause of action alleges that "the defendants have repeatedly refused to permit Trump to conduct any inspection or copying, refused to provide access to documents on request, and falsified other books and records to conceal their wrongdoing." Amended Complaint, ¶ 139. Defendants argue that they have complied with Trump's requests for access to books and records, and that, therefore, this cause of action should be dismissed as moot. The parties also dispute the scope of the books and records provision.

"[T]he laws of the jurisdiction under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners." Partnership



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Law § 121-901. The same rule applies to corporations, requiring the application of the laws of the state where the corporation was formed. *Hart v General Motors Corp.*, 129 AD2d 179 (1st Dept 1987). As it is undisputed that the Hudson Waterfront LPs are Delaware limited partnerships, and that the Hudson Waterfront Corps are Delaware corporations, Delaware law therefore applies to Trump's claim for access to defendants' books and records.

Under Delaware law, contracts "are construed as a whole, to give effect to the intentions of the parties. Where the contract language is clear and unambiguous, the parties' intent is ascertained by giving the language its ordinary and usual meaning." *AT & T Corp. v Faraday Capital Ltd.*, 918 A2d 1104, 1108 (Del 2007) (internal quotation marks and citations omitted). "The fact that the parties disagree on the meaning of a term does not render that term ambiguous. 'Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings' [citation omitted]." *Id.*

Here, section 12.2 (a) of the Agreements provides that "[t]he General Partner shall maintain, or cause to be maintained, complete and accurate records of all transactions of the Partnership." Ross Aff., Ex. A, at 66. Section 12.2 (b) requires that "[a]ll books, records and accounts of the Partnership, together with an executed copy of this Partnership Agreement and any amendments hereto ... shall be open for the inspection and examination (and making copies) by the Partners or their authorized representatives during regular business hours." *Id.*

Under Delaware law, the phrase "'books and records[]' has a common and well-understood definition." *Arbor Place, L.P. v Encore Opportunity Fund, L.L.C.*, 2002 WL 205681, *3 (Del Ch 2002). The phrase "can readily be understood through ... 6 Del. C. §



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17-305" of Delaware's Revised Uniform Limited Partnership Act (LP Act). *Id.* at *3 n 3. Section 17-305 of the LP Act "provides limited partners with the right to inspect, among other things, 'information regarding the status of the business and financial condition of the limited partnership' and 'other information regarding the affairs of the limited partnership as is just and reasonable.'" *Madison Ave. Inv. Partners, LLC v America First Real Estate Inv. Partners, L.P.*, 806 A2d 165, 170 (Del Ch 2002), citing § 17-305 of the LP Act.

On March 9, 2006, while the motions to dismiss the amended complaint were sub judice, the parties appeared for a conference before the Special Master, who directed defendants to give Trump access to 20 categories of books, records and accounts of the Hudson Waterfront LPs. These categories included: the general ledger, income statements, balance sheets, cash flow statements, bank records, the check register, accounts receivable records, accounts payable records, records of partnership distributions, tax returns, audited financial statements, purchase and sale agreements, mortgages, leases, partnership agreements, governmental filings of the partnerships, appraisals, final offers, executed marketing agreements and records of amounts received in the transaction not reported on the general ledger in excess of $1 million. 4/17/07 Grinalds Aff., Exs. B and C.

Trump does not dispute defendants' assertion that, by June 12, 2006, the general partners had produced approximately 166,275 pages of books and records of the limited partnerships dating back to 1994. 4/17/07 Grinalds Aff., ¶ 8. Between August and October 2006, defendants produced additional documents (approximately 8,000 pages) accounting for the fiscal year ending March 31, 2006. Trump also does not dispute defendants' assertion that he has received the general ledgers, general journals, books of entry and the Penn Yards sale contract.



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At some point after the 7/24/06 Decision, Trump retained his new, current counsel to pursue the books and records claim. Counsel's expert, Galvin, reviewed the books and records produced by defendants. By letter dated November 13, 2006 to Trump's counsel, Galvin identified 21 books and records that he claimed were not produced. In an e-mail dated December 11, 2006, Trump's counsel informed defendants of his intention to obtain "every stitch of paper or electronically stored information" in the possession of the limited partnerships. 4/17/07 Gruenglas Aff., Ex. 8.

On December 21, 2006, the parties attended a status conference before the Special Master. The same day, in an e-mail to the Special Master, Trump's counsel stated his intention to obtain "all records in the possession of the General Partner, which it obviously holds for the benefit of the Limited Partners ..., this is without any limitation or restriction pursuant to the agreed-to provision of 12.2." 4/17/07 Grinalds Aff., Ex. O. Attached to this e-mail, Trump's counsel submitted a list of books and records that he claims were not produced by defendants. The Special Master directed defendants to produce books and records that were not in controversy by January 31, 2007.

On January 4, 2007, the Special Master issued a scheduling order for the production of books and records by January 31, 2007, and for discovery to proceed in February and March 2007 on the limited issues of defendants' compliance with the books and records production and the scope of books, records and accounts subject to inspection as intended by the parties under the Agreements. On January 16, Trump interjected an additional document request, and the Special Master extended defendants' time for production until February 13, 2007. Defendants responded on February 13th, indicating that many of the documents had already been produced or



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do not exist.

By the end of March 2007, Trump did not take any discovery in connection with the Special Master's January 4th scheduling order. However, by letter to the Special Master dated March 20, 2007, Trump claimed that defendants' February 13th response was inadequate, that additional documents remained outstanding, and he requested a conference. The parties appeared before the Special Master on March 28, 2007 for a meet and confer, where they discussed the alleged deficiencies in defendants' February 13th response and new alleged deficiencies. Defendants stipulated to the production of specific additional books and records sought by Trump, and the Special Master so ordered that stipulation (4/11/07 Stipulation). 5/8/07 Grinalds Aff., Ex. A.

The 4/11/07 Stipulation established a schedule for the general partners to respond to 16 document requests by April 13 and four document requests by April 30, 2007. Of the 20 requests for documents memorialized in the 4/11/07 Stipulation, many of the documents had already been produced or did not exist. Some of the requests required the general partners to obtain back-up documentation from banks, such as deposit slips, credit and debit memos, wire transfer communications and bank statements. The general partners' April 30th response included documents generated after the limited partnerships' initial production, such as bank records for the year ending March 31, 2007, which could not have been produced earlier.

By letter dated April 19, 2007 to the Special Master, Trump again claimed that defendants had not complied with his books and records requests. In a letter dated May 4, 2007, the general partners responded to Trump's April 19th letter and another letter request from Trump dated March 27, 2007. The general partners' May 4th letter indicates that many of the documents



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had already been produced, and attaches Trump's requested new, purportedly non-produced items as exhibits.

All together, defendants represent that they have produced over 180,000 pages of books and records over a 12-year period dating back to 1994. These documents include the limited partnerships' tax returns, purchase and sale agreements, mortgages, leases, governmental filings, and the general ledger, which defendants claim reflects all financial transactions by the Hudson Waterfront LPs. Trump does not dispute this claim, and, under Delaware law, the documents produced by defendants constitute books and records. *See e.g. Madison Ave. Inv. Partners, LLC*, 806 A2d at 173-74 (holding that partnership agreements with subsidiaries, partnerships' and subsidiaries' mortgage, loan, note and debt agreements, and financial statements and operating results relating to real estate held by the partnerships and their subsidiaries constituted "books and records" within the meaning of section 17-305 [a] [1] and [6] of the LP Act).

Moreover, Trump's counsel has acknowledged, and the documentary evidence demonstrates, that defendants have permitted inspection of, and access to, books and records, not refused it. 5/8/07 Grinalds Aff., ¶¶ 6-10; 5/18/07 Gruenglas Aff., Ex. 1 (Trump's counsel admitting that certain requested books and records had "been uncovered in one place or another - thanks to [defendants' counsel's] kind attention," and acknowledging "the courtesy and cooperation that is being showed in connection with responding to the information requested"). For the foregoing reasons, defendants' have made a prima facie showing refuting Trump's claim that they "have repeatedly refused to permit Trump to conduct any inspection or copying, and refused to provide access to documents on request." Amended Complaint, ¶ 139.

Trump counters that section 12.2 (a) should be read more expansively, because it requires



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the general partners to maintain "records of all transactions of the Partnership." The essence of Trump's rebuttal argument is that he is entitled to, and the general partners have refused to provide, "every stitch of paper or electronically stored information" in the possession of the limited partnerships, and that this right is "without any limitation or restriction" under section 12.2 of the Agreements. 4/17/07 Gruenglas Aff., Ex. 8; 4/17/07 Grinalds Aff., Ex. O.

The term "transactions" is not defined in the agreements. Giving the word its ordinary meaning, Merriam-Webster's Dictionary defines "transaction" as "something transacted; especially: an exchange or transfer of goods, services, or funds." Among the relevant definitions in Black's Law Dictionary are: "1. The act or an instance of conducting business or other dealings; esp., the formation, performance, or discharge of a contract. 2. Something performed or carried out; a business agreement or exchange. 3. Any activity involving two or more persons." Black's Law Dictionary (8th ed. 2004). None of these definitions includes transactions that never happened, such as drafts of contracts and transactions that were never consummated, and related e-mails and correspondence. The limited partnerships' document production goes beyond any of these definitions, and Trump fails to explain how the word "transactions" encompasses "every stitch of paper or electronically stored information" in the limited partnerships' possession, "without any limitation or restriction." Nor does Trump cite any authority in support of his argument. Therefore, Trump's argument is unpersuasive.

"Where ... there is uncertainty in the meaning and application of the terms of the contract the court will consider testimony pertaining to antecedent agreements, communications and other factors which bear on the proper interpretation of the contract." *Lillis v AT&T Corp.*, 2007 WL 2110587, *16 (Del Ch 2007) (citation and internal quotation marks omitted). Here, the plain





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language of section 12.2 is clear and unambiguous. However, even assuming for the moment that the phrase "records of all transactions of the Partnership" is susceptible to a different interpretation, the extrinsic evidence supports defendants' interpretation of section 12.2 of the Agreements. Roger Roisman (Roisman), Trump's lead attorney who drafted and negotiated the Agreements, testified that this phrase is synonymous with the phrase "books and records," and that the phrases "are used interchangeably." 4/17/07 Gruenglas Aff., Ex. 6, at 47. Roisman testified that the books and records provision is "boilerplate" and "customary," and does not require the limited partnerships to maintain records of transactions that were contemplated but never took place, or transactions where the limited partnership was not a party. *Id.* at 34, 38. Roisman also testified that the books and records provision does not require the limited partnerships to maintain copies of contract drafts, handwritten notes, communications, e-mails, calendar entries, or "every scrapbook paper" relating to a contract. *Id.* at 43-44. Roisman was unable to identify anything in section 12.2 (b) of the Agreements that expands inspection rights beyond the statutory rights. Barry Ross, the attorney who negotiated the Agreements on behalf of the general partners of the Hudson Waterfront LPs, agrees with Roisman's testimony.[1] Ross Aff., ¶¶ 1-11. Thus, the parties never intended to expand the scope of books and records

[1] The court notes that Trump submits the deposition testimony of Leonard Boxer (Boxer), who claims to have been the supervising attorney of Roisman's law firm at the time that the firm represented Trump. Boxer's testimony essentially seeks to broaden the scope of section 12.2 of the Agreements. However, Boxer admitted that he had only "general recollections," that he "really was not involved with the drafting of the documents," and that Trump's current attorney had merely asked him to offer an interpretation of the books and records provision. Goldberg Aff., Ex. O, at 10-11. Therefore, Boxer's testimony is not probative of the parties' intent. In any event, Boxer's testimony is consistent with Roisman's testimony and Ross's affidavit in that they all agree that a finder's fee agreement, if one existed, is subject to a books and records inspection. However, as discussed above, there was no such agreement.



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inspections beyond what is permitted under Delaware law, specifically, section 17-305 of the LP Act.

Furthermore, it would be unreasonable and lack business sense to require the limited partnerships to maintain "every stitch of paper or electronically stored information" until the partnerships terminate in 2044. *Hillman v Hillman*, 910 A2d 262, 270 (Del Ch 2006) (Delaware courts examine whether contract interpretation is "reasonable and makes business sense," and whether "the plain language of the contract creates [an] absurd result"); *State v Cooper*, 575 A2d 1074, 1076 (Del 1990) (stating that literal interpretations of statutory language that yielded absurd results should be avoided).

Moreover, while Trump argues that allegations of fiscal mismanagement broaden his inspection rights, the only fiscal mismanagement alleged relates to his dismissed causes of action. Thus, it appears that Trump is attempting to use his right to access the partnerships' books and records in order to obtain discovery on his dismissed claims. *See e.g.* Trump's 11/22/06 Reply Mem. of Law on Renewal Motion, ¶ 36 ("we made a *subpoena-like* demand ... for Fineview records possessed by the Limited Partnership – it being required ... under the Partnership Agreement to keep 'complete and accurate records of all transactions'").

The Delaware Supreme Court has made clear that discovery and books and records inspections "are not the same and should not be confused." *Security First Corp. v U.S. Die Casting and Dev. Co.*, 687 A2d 563, 570 (Del 1997). The right to inspection of books and records "is not an invitation to an indiscriminate fishing expedition." *Id.* at 565.

Notwithstanding defendants' production of thousands of documents for Trump's inspection, Trump next argues that the general partners failed to produce certain books and



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records in their April 13th response to the 4/11/07 Stipulation. 4/19/07 Goldberg Aff., Ex. D. Trump also claims, generally, that there are a "large quantity of records" that, to date, have not yet been produced and to which he is entitled. 4/19/07 Goldberg Aff., ¶ 6. All of the specific documents that Trump claims were not produced required the general partners to obtain supporting documentation from third parties, including Pricewaterhousecoopers, HSBC and Goldman Sachs. In their April 13th response, the general partners represent that they have requested the documents from the third parties, are awaiting responses, and, upon receiving the documents will produce them to Trump.

The defendants seem to have already produced voluminous amounts of the requested documents. However, Trump has successfully identified at least eight categories of documents that the general partners admittedly (in their April 13th response) did not produce, albeit because the defendants are awaiting responses from third parties. Furthermore, through the affidavit of his attorney, Trump purports that there is an additional "large quantity of records" that, to date, have not yet been produced and to which he is entitled. 4/19/07 Goldberg Aff., ¶ 6. This is enough to rebut defendants' prima facie showing.

For the foregoing reasons, a hearing will be held in order to determine specifically which books and records, if any, the general partners have not permitted Trump to inspect.[2] Therefore, defendants' motions (motion sequence numbers 016 and 018) for summary judgment dismissing the eighteenth cause of action are denied.

---

[2] The court also notes that, as a limited partner of the Hudson Waterfront LPs, Trump is entitled to continued access to the limited partnerships' books and records for the duration of the limited partnership. The court has been made aware of the parties' mutual agreement to appoint an interlocutor to mediate any future books and records disputes.



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Accordingly, it is hereby

ORDERED that defendants' motions (motion sequence numbers 016 and 018) for summary judgment are denied; and it is further

ORDERED that Trump's motion for summary judgment (motion sequence 017) is denied; and it is further

ORDERED that the parties appear on November 1, 2007 at 9:30 a.m. whereby a hearing will be held on Trump's claim for production of additional books and records by the Limited Partnership; and it is further

ORDERED that the remainder of the action shall continue.

Dated: October 1, 2007

ENTER:

J.S.C.

HON. RICHARD B. LOWE, III

FILED
OCT 03 2007
NEW YORK
COUNTY CLERK'S OFFICE



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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III Justice

PART 56

Trump

- v -

Cheng

INDEX NO. 602877/05

MOTION DATE 12/15/06

MOTION SEQ. NO. 015

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE MEMORANDUM DECISION ISSUED IN MOTION SEQUENCE 015.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED JAN 07 2009 NEW YORK COUNTY CLERK'S OFFICE

FILED JAN -7 2009 NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/6/09

HON. RICHARD B. LOWE, III J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56
-----------------------------------------------------------------X

DONALD J. TRUMP, individually and
derivatively on behalf of
HUDSON WATERFRONT ASSOC., L.P.,
HUDSON WATERFRONT ASSOC., I, L.P.,
HUDSON WATERFRONT ASSOC. II, L.P.,
HUDSON WATERFRONT ASSOC. III, L.P.,
HUDSON WATERFRONT ASSOC. IV, L.P.,
HUDSON WATERFRONT ASSOC. V, L.P.,

Plaintiff,

Index No. 602877/05

-against-

HENRY CHENG, VINCENT LO, CHARLES YEUNG,
EDWARD WONG, DAVID CHIU, HUDSON
WATERFRONT CORP., HUDSON WATERFRONT I
CORP., HUDSON WATERFRONT II CORP.,
HUDSON WATERFRONT III CORP., HUDSON
WATERFRONT IV CORP., HUDSON WATERFRONT
V CORP., HUDSON WATERFRONT ASSOC., L.P.,
HUDSON WATERFRONT ASSOC. I, L.P.,
HUDSON WATERFRONT ASSOC. II, L.P.,
HUDSON WATERFRONT ASSOC. III, L.P.,
HUDSON WATERFRONT ASSOC. IV, L.P.,
HUDSON WATERFRONT ASSOC. V, L.P.,
HUDSON WESTSIDE ASSOC., L.P.,
HUDSON WESTSIDE ASSOC. I, L.P.,
HUDSON WESTSIDE ASSOC. II, L.P.,
HUDSON WESTSIDE ASSOC. III, L.P.,
HUDSON WESTSIDE ASSOC. IV, L.P.,
HUDSON WESTSIDE ASSOC. V, L.P.,
JOHN DOE I and JOHN DOE II,

Defendants.
-----------------------------------------------------------------X

**RICHARD B. LOWE, III, J:**

Motion sequence numbers 014 and 015 are consolidated for disposition.

## BACKGROUND

This action involves a dispute over the sale price of, and the use of sale proceeds from, parcels of land that were developed by the parties in this action. The 20-count amended complaint asserted direct and derivative causes of action. Defendants moved to dismiss the amended complaint for lack of jurisdiction, failure to state a cause of action, and based upon documentary evidence. By decision and order dated July 24, 2006, this court granted the motions to dismiss, dismissing all of plaintiffs' claims except the eighteenth cause of action for access to books and records (the "7/24/06 Decision"). Judgment was entered on September 19, 2006.

Plaintiff Donald J. Trump ("Trump") now moves (in motion sequence number 014) to reargue the motions to dismiss pursuant to CPLR 2221 (d), and, upon reargument, for an order denying the motions. Trump also moves to renew his opposition to defendants' motions to dismiss pursuant to CPLR 2221 (e), and, upon renewal, for an order reinstating the causes of action and permitting plaintiffs to serve an amended complaint (motion sequence number 015). Alternatively, Trump sought relief from the judgment, pursuant to CPLR 5015.[1] The facts of this case were stated in detail in this court's decision and order, *Trump v Cheng* (9 Misc 3d 1120[A], 2005 NY Slip Op 51703[U] [Sup Ct, NY County 2005]), the 7/24/06 Decision, and this court's decision and order dated October 1, 2007 (on motion sequence numbers 016, 017 and 018). Therefore, the court presumes familiarity with the facts, and the facts will not be restated

[1] On the parties consent, these motions were held in abeyance while the parties engaged in settlement negotiations, which, it is the court's understanding, did not resolve the parties' dispute. Therefore, the court now addresses these motions.



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herein.[2]

## DISCUSSION

Motion for Reargument (mot seq 014)

Defendants argue that Trump's reargument motion is untimely, because it was made more than 30 days after Trump's service of a copy of the 7/24/06 Decision. In opposition, Trump argues that, under CPLR 2103, his reargument motion is timely, because he had five days from July 31st (which was August 5th), then another 30 days from August 5th, pursuant to CPLR 2221 (d) (3) (which, Trump claims, was September 5th). In other words, Trump argues that he gets the benefit of an additional five days because he served the order by mail, and that September 5th is 35 days from July 31st.

Under CPLR 2221 (d) (2), reargument "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." Section (d) (3), added to the statute in 1999, states that a motion for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry."

CPLR 2103 (b) (2) provides that "service by mail shall be complete upon mailing," and that "where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period." In interpreting the interplay between CPLR 2221 and 2103, the Practice Commentary to CPLR 2221 (d) (3) states as follows:

> When the order with notice of entry is served by mail, clearly an

[2] Unless otherwise indicated in this decision, defined terms in the 7/24/06 Decision shall have the same meaning when used herein.



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> extra five days under CPLR 2103 (b) (2) get added to the 30-day period when it is the winner who is serving the loser. But should that extra five days be added when the loser is doing the serving, in effect letting the loser extend its own time for acting by serving the objectionable order by mail?
>
> A 1999 amendment adding a subdivision (d) to CPLR 5513 says yes, specifically, but note that it applies only to the period in which to appeal. The new CPLR 2221 (d) (3) has no counterpart provision, suggesting that the loser who serves the papers should not rely on any extra time from CPLR 2103 (b) (5) for making the motion to reargue

(Siegel, 1999 Supp Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR C2221:8, 2008 Cumulative Pocket Part, at 126).

In other words, CPLR 5513 explicitly permits the loser to add the extra five days to the 30-day appeal period even when it is the loser who serves the order. No similar amendment was made for the motion to reargue pursuant to CPLR 2221, which was independently codified. Therefore, the statutory gift of the extra five days for the time to appeal does not apply to the time within which a motion for reargument must be made where the losing party serves notice of entry of the underlying order (*Thompson v Cuadrado*, 277 AD2d 151 [1st Dept 2000]). CPLR 2221 (d) (3) was not intended to enlarge Trump's time to move for reargument when he, as the losing party on the underlying motion, had possession of the order and himself mailed notice of entry. Accordingly, Trump had 30 days from July 31st, the date that he mailed a copy of the underlying order, to move for reargument.

Here, Trump entered the 7/24/06 Decision with the Clerk of Court on July 31, 2006. On the same day, he mailed notice of entry to all defendants, which completed service on July 31st. Thus, Trump had until August 30 to move to reargue. Trump moved to reargue on September 5, 2006, six days later. Therefore, Trump's reargument motion was untimely under CPLR 2221 (d).



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(3).

Moreover, even assuming for the moment that Trump has the benefit of the five-day extension under CPLR 2103 (b) (2), which he does not, this provision allows five days to be "added to the prescribed period," giving the moving party 35 days from service of notice of entry of the order. Thirty-five days from July 31st is September 4th, not, as Trump argues, September 5th. Thus, even with the benefit of the five-day extension, Trump's reargument motion is untimely.

Furthermore, the supplemental affirmation of Trump's counsel, John Nicholas Iannuzzi, submitted prior to defendants' submission of opposition papers, is dated September 15, 2006 (16 days late) and was received by defendants on September 21, 2006 (22 days late). For the foregoing reasons, Trump's motion for reargument, and his attorney's supplemental submission, are untimely (*Perez v Davis*, 8 AD3d 1086, 1087 [4th Dept 2004] [trial court erred in granting defendant's reargument motion, because motion was untimely made more than 30 days after service of a copy of the order granting underlying motion]).

Under certain circumstances, this court may exercise its discretion to look past the 30-day requirement to hear a technically untimely motion for reargument (*see e.g. Garcia v Jesuits of Fordham, Inc.*, 6 AD3d 163, 165 [1st Dept 2004] [holding that it was not an abuse of discretion for trial court to reconsider prior ruling despite 30 days passing from notice of entry of prior order, because an issue had arisen regarding plaintiff's claims due to the fact that plaintiff testified through a Spanish-speaking interpreter]; *see also Leist v Goldstein*, 305 AD2d 468, 469 [2d Dept 2003] [granting reargument was appropriate exercise of court's discretion where reargument motion "was made at the court's request and after [plaintiff's] filing of a notice of

appeal but prior to the perfection of the appeal"]).

Here, however, Trump fails to identify any circumstances to justify an extension of time, or any excuse for his untimely motion. Nor does Trump explain the even more untimely supplemental affirmation submitted by his counsel. Accordingly, pursuant to CPLR 2221 (d) (3), Trump's motion to reargue is denied as untimely (*Transport Workers Union v Schwartz*, Sup Ct, NY County, Aug. 31, 2005, Ramos, J., Index No. 600268/03 [reargument motion deemed untimely where made 16 days after 30-day deadline].

In any event, in reviewing the substance of Trump's motion, Trump argues that the court misapplied the applicable standards of review on the underlying motion. Specifically, Trump argues that the court failed to credit as true the pleading and opposition papers, improperly credited documents submitted by defendants, and improperly invoked the business judgment rule. However, Trump fails to identify any law or fact overlooked or misapprehended by the court in determining the prior motion. Moreover, many of Trump's arguments merely repeat arguments already rejected by the court on the underlying motion to dismiss, which is not the proper function of a motion to reargue (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] ["(r)eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (citation omitted) or to present arguments different from those originally asserted"]). Accordingly, Trump's reargument motion (motion sequence number 014) is denied for the additional reason that he fails to identify any law or fact overlooked or misapprehended by the court.

<u>Renewal & Relief from Judgment (mot seq 015)</u>

Trump seeks relief under CPLR 2221 (e) and 5015 (a) (2) based upon material allegedly

discovered after the 7/24/06 Decision. According to Trump, these new documents show that the Cheng Group dominated and controlled the boards of the general partner entities, causing the general partners to abdicate their corporate responsibilities. Trump claims that this evidence supports his argument that the general partners did not seek to obtain the highest price for the Properties. Specifically, Trump claims that his new evidence shows finder's fee "kickback" payments made to Fineview, an entity allegedly owned or controlled by Cheng; loans made in violation of the Agreements; and improper tax payments.

Under CPLR 2221 (e) (2), renewal "shall be based upon new facts not offered on the prior motion that would change the prior determination ... ." Renewal is appropriate "where new information arises which existed at the time the prior motion was made and is relevant to the moving party's claim, but which was unavailable or unknown to that party at the time of the original motion" (*Lee v Ogden Allied Maintenance Corp.*, 226 AD2d 226, 227 [1st Dept 1996]). Under CPLR 5015 (a) (2), "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, ... upon the ground of ... newly-discovered evidence which, if introduced ..., would probably have produced a different result and which could not have been discovered in time ... ."

As a preliminary matter, many of Trump's renewal arguments are duplicative of the arguments raised on the underlying motion and on his present motion for reargument. Moreover, for the following reasons, none of the purported newly-discovered evidence would have "change[d] the prior determination" (CPLR 2221 [e] [2]) or "would probably have produced a different result" (CPLR 5015 [a] [2]).

On the renewal motion, Trump submits evidence of a $17.5 million payment made by





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Extell (the purchaser of the Properties) to Fineview. In addition, with motion sequence number 019, dated approximately seven months after his renewal motion, Trump submitted additional purportedly newly-discovered evidence concerning Fineview. However, all of Trump's evidence concerning Fineview demonstrates that a payment was made to Fineview by Extell, not by the Hudson Waterfront LPs. Moreover, as discussed in this court's October 1, 2007 decision on Trump's summary judgment motion (motion sequence number 017), the Hudson Waterfront LPs had no agreement with Fineview and paid no fees to Fineview. Additionally, Trump's counsel admitted in court that the Fineview account does *not* name Cheng as the beneficial owner, but rather, names another individual as the owner of that account (6/8/07 Tr., at 22). Thus, Trump's purported new evidence concerning Fineview and finder's fee "kickbacks" is based upon the same speculation as Trump's previous allegations and submissions to the court. Therefore, this evidence would not produce a different result.

Trump argues that his new evidence shows that loans were made between the limited partnerships and entities related to Cheng and Lo at interest rates that violated provisions in the Agreements dealing with loans. Trump also argues that the limited partnerships made improper tax payments. Trump argues that the loans and tax payments show "a pattern, practice and routine" of misconduct that should excuse demand (Trump's 11/22/06 Reply Brief, at 8-9).

As discussed in the 7/24/06 Decision, the demand futility "analysis is fact-intensive and proceeds director-by-director and transaction-by-transaction" (*Khanna v McMinn*, 2006 WL 1388744, *14, 2006 Del Ch LEXIS 86 [Del Ch 2006]). Thus, the inquiry is not whether there is a pattern, practice or routine of misconduct, but whether the particular transaction at issue involves domination or director interest by a majority of the board. For example, in *Goldman v*



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*Pogo.com, Inc.* (2002 WL 1358760, 2002 Del Ch LEXIS 71 [Del Ch 2002]), the board of directors forgave a debt owed to the company by a director, and, immediately thereafter, the company received bridge loan financing. According to the plaintiff, the bridge loan enabled the company to forgive the director's debt, rendering that director interested in the decision to approve the loan. The plaintiff argued that this director was interested in subsequent loans because of the debt forgiveness on the initial bridge loan.

The Delaware Chancery Court refused to excuse demand relating to a subsequent loan, because the plaintiff failed to allege facts raising a reasonable doubt that a majority of the board lacked disinterestedness or independence concerning the later loan. The court stated:

> I have expressed in my analysis ... a fundamental uneasiness with the line of reasoning advanced by Plaintiff that a given board member's disqualifying interest or association in one transaction will *ipso facto* render that board member disqualified in perpetuity for future transactions. Because the Complaint alleges nothing more than [the director's] debt forgiveness prior to the First Bridge Loan, I find as a matter of law that Plaintiff has failed to set forth sufficient facts rebutting the presumption that [the director] acted independently and disinterestedly in approving the Third Bridge Loan

(*Id.* at *6).

Similarly, here, even assuming for the moment that the loan interest rates were not permitted under the Agreements, and that the limited partnerships made improper tax payments, Trump fails to allege that the loans or tax payments had anything to do with defendants forcing the limited partnerships to undersell the Properties, which is the transaction that is the subject of Trump's claims. In other words, none of the purported new evidence indicates that any of the defendants were interested in the sale of the Properties, lacked independence, or dominated the board with respect to the relevant transaction, that is, the sale of the Penn Yards. Therefore, this



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evidence would not produce a different result.

Moreover, with respect to the purported improper tax payments, Trump fails to explain why these payments were improper, and the Agreements expressly permit the general partners to pay taxes for the partners and to make tax distributions to meet each partner's tax liabilities (Agreements §§ 9 [e] and 20.9). Indeed, defendants submit documentary evidence showing that the limited partnerships distributed funds to Trump to cover his tax liabilities: $6,851,282 for fiscal year 2001-2002; $5,642,170 for fiscal year 2002-2003; and $12,976,086 for fiscal year 2003-2004 (11/17/06 Gross Aff., Exs. E, F and G). Thus, of the purported $50 million in improper tax distributions, Trump himself was the beneficiary of approximately $25.5 million in tax distributions, which, based upon defendants' documentary evidence, was permitted under the Agreements.

Trump also argues for the first time in his reply papers that the limited partnerships each had one director, Chris Lam (Lam), and one officer, Gross, both of whom were controlled by Cheng. Trump argues that "Lam is the nexus between the General Partner and Cheng" (11/22/06 Goldberg Aff., ¶ 1). However, defendants submit documentary evidence showing six directors and at least two officers, thereby undermining Trump's argument.

CPLR 5015 (a) (3) offers relief upon grounds of "fraud, misrepresentation, or other misconduct of an adverse party ... ." However, Trump fails to show that defendants withheld the purported newly-discovered evidence, or engaged in any fraud or misconduct with respect to this evidence. Trump also fails to show any impropriety in "the means by which the prior order was procured" (*Haber v Nasser*, 289 AD2d 200, 201 [2d Dept 2001]). For the foregoing reasons, Trump's motion (motion sequence number 015) for renewal and relief from judgment is denied.



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Accordingly, it is hereby

ORDERED that plaintiffs' motions (motion sequence numbers 014 and 015) for reargument, renewal and relief from judgment, are denied.

Dated: January 6, 2008

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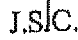

J.S.C.



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| Trump v Cheng |
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| 2009 NY Slip Op 05376 |
| Decided on June 30, 2009 |
| Appellate Division, First Department |
| Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. |
| This opinion is uncorrected and subject to revision before publication in the Official Reports. |

Decided on June 30, 2009
Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ. 935C-

935 935A 935B 936 936A 936B 602877/05

**[*1]Donald J. Trump, etc., et al., Plaintiffs-Appellants,**

**v**

**Henry Cheng, et al., Defendants-Respondents, John Doe I, et al., Defendants.**



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Dornbush Schaeffer Strongin & Venaglia, LLP, New York
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Hudson Westside Assoc. II, L.P., Hudson Westside Assoc. III,
L.P., Hudson Westside Assoc. IV, L.P. and Hudson Westside
Assoc. V, L.P., respondents.
Sullivan & Cromwell LLP, New York (Robert J. Giuffra, Jr.,
of counsel), for Hudson Waterfront Corp. I, II, III, IV and V
Corporations, respondents.
Bryan Cave, LLP, New York (Kristina Oliver of counsel), for
Hudson Waterfront Associates I, II, III, IV, and V, L.P.,
respondents.

Judgment, Supreme Court, New York County (Richard B. Lowe III, J.), entered September 19,


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2006, in an action arising out of the sale of certain real estate for an allegedly inadequate price brought by a minority limited partner against the majority limited partners and general partners of limited partnerships organized by the parties to develop the real estate, dismissing all but the 18th cause of action, and bringing up for review orders, same court and Justice, entered July 27, 2006, which, inter alia, granted defendants' motion to dismiss the amended complaint with the exception of that part of the 18th cause of action seeking access to certain books and records; order, same court and Justice, entered October 3, 2007, which denied plaintiff's motion for access to certain additional books and records; and order, same court and Justice, entered January 7, 2009, which denied plaintiff's motion to vacate the above judgment on the ground of newly discovered evidence, and, sub silentio, denied plaintiff's motion that the [*2]court



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recuse itself, unanimously affirmed, with costs. Appeals from the orders entered July 27, 2006 unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court did not abuse its discretion in refusing to recuse itself (*see People v Moreno*, 70 NY2d 403, 406 [1987]; *Robert Marini Bldr. v Rao*, 263 AD2d 846, 847-848 [1999]). With respect to the books-and-records claim, the court correctly construed section 12.2 of the partnership agreements as conferring a right of inspection no broader than that under Delaware's Revised Uniform Limited Partnership Act (6 Del Code) § 17-305, such that plaintiff had a right to inspect records of "transactions" consummated by the partnerships but no right to a full discovery of matters that did not involve partnership "transactions" (*see Security First Corp. v U.S. Die*


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*Casting & Dev. Co.*, 687 A2d 563, 570 [Del Sup Ct 1997]). Plaintiff's remaining claims were properly dismissed. His direct claims, in fact, are derivative claims (*see Tooley v Donaldson, Lufkin, & Jenrette*, 845 A2d 1031 [Del Sup Ct 2004]), and his derivative claims do not allege "with particularity" the reasons why a presuit demand on the general partners was not "likely to succeed" (6 Del Code § 17-1003, § 17-1001). In the latter regard, plaintiff's allegations are insufficient "to create a reasonable doubt either as to whether the directors are disinterested and independent or whether the transaction at issue resulted from a valid exercise of business judgment" (*Simon v Becherer*, 7 AD3d 66, 71-72 [2004]). The court also properly denied vacatur of the judgment based on newly discovered evidence as plaintiff failed to demonstrate that the purported new evidence was recently discovered or could not have been earlier


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discovered by the exercise of due diligence (*Nutmeg Fin. Servs. v Richstone*, 186 AD2d 58, 59 [1992]). We have considered plaintiff's other arguments, including that the court has personal jurisdiction over defendant Lo, and find them without merit.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 30, 2009

CLERK

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