MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

LAW DOCKET NO. BCD-24-1172

GENERAL HOLDINGS, INC. and
PRESERVATIONS HOLDINGS, LLC

Plaintiffs – Appellees

v.

U.S.A, METROPOLITAN TAX CREDIT FUND II, L.P.

U.S.A. INSTITUTIONAL TAX CREDIT FUND, IV, L.P.

and EIGHT PENN PARTNERS, L.P.

Defendant – Appellant

ON APPEAL FROM BUSINESS AND CONSUMER COURT

BRIEF OF APPELLANT EIGHT PENN PARTNERS, L.P.

John S. Campbell – Bar No. 2300
Campbell & Associates, P.A.
60 Mabel Street
Portland, ME 04103
(207)775-2330

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Pages**

STATUTES AND RULES OF PROCEDURE

OTHER AUTHORITIES

APPELLANTS' BRIEF

I. INTRODUCTION

This case involves a claim by two legal entities controlled by Rosa Scarcelli seeking declaratory and injunctive relief from the Court after Scarcelli hostilely took over control of virtually all of Scarcelli's mother's (Pamela Gleichman's) portfolio of affordable housing projects. Scarcelli's entities asked that Maine's courts grant them equitable relief reversing a 2018 sale of the limited partner interests ("LP interests") in four limited partnerships owning four Pennsylvania housing projects. The sale was completed over five years ago between a willing seller and a willing buyer that paid $13,000 for the interests. The purchase and sale took place after the required approval of the individual general partner, Ms. Gleichman was obtained. The equitable owners of the buyer are Gleichman's husband, two sons and a long-time loyal employee.

Scarcelli's claim is that her entities had the right to veto the limited partners' sales of their interests in the projects. She has made this claim even though she had no ownership in any aspect of any of the four projects when the projects were commenced and was never granted permission to become involved as a partner in any of the four projects. Instead, Scarcelli took over control of the corporate general partner, that is, General Holdings, Inc., by conducting a creditor auction of her mother’s shares – resulting in 100% of those shares being obtained by the Plaintiff – Preservation Holdings, LLC. Gleichman had been the 100% owner of that company (previously named “Gleichman & Co., Inc”) which had served as her co-general partner in all four projects. Scarcelli had purchased debt owed by her mother and others and had foreclosed on her mother's company using that debt.

But when she took over control of General Holdings, Scarcelli had failed to obtain the required consents to become a general partner in any of the projects. She had failed to seek or obtain the consents of the limited partners in the four projects and had failed to obtain the consent of the individual general partner (Ms. Gleichman). Each partnership agreement forbade any transfers of greater than 50% ownership in the corporate general partner unless that transfer was consented to in writing by all of the other partners.

On April 1, 2022 the Superior Court denied a summary judgment motion filed by Eight Penn, concluding that the partnership agreements were ambiguous as to whether the consent requirements applied to <u>involuntary</u> as well as <u>voluntary</u> transfers of control over the corporate general partner.

The Superior Court conducted a bench trial on February 14 and 15, 2024 at which the only witnesses were Scarcelli and her husband (Thomas Rhoads) and Gleichman and her husband (Karl Norberg). In its post-trial decision issued March 29, 2024 the Superior Court concluding that despite the 100% change in ownership of General Holdings without having obtained any consents, the sale of the LP interests nevertheless had to meet with the approval of the unapproved corporate GP taken over by Scarcelli's entity. The Superior Court found that the provisions protecting the partnership from being taken over were applicable only to voluntary transfers – not to transfers occurring by way of a creditor taking majority control of the corporate general partner.

This appeal seeks de novo review of the Superior Court's construction of the partnership control provisions. If given their plain meaning, those provisions applied to both voluntary as well as creditor–promoted, involuntary transfers. This appeal seeks to vacate the order declaring the sale to be void since consent was not required from Scarcelli's entity. In addition, equitable relief should have been denied to Scarcelli's entities in light of her abuses in connection with her mother's entities which weighed heavily against any appeal to equity. Finally, this brief addresses the error in providing incomplete relief since the lower court made no provision requiring the return of the $13,000 that Eight Penn paid for the interests that the Court was invalidating. The Superior Court failed to address the fact that the selling entities had both been liquidated as of the time of trial and were not required to reimburse the funds or take back the LP interests. Instead, based on Scarcelli's post-trial brief assertion that it was withdrawing its claim for injunctive relief (Count II), the Superior Court determined that it would issue only a declaration that Eight Penn was not a limited partner, stating "the parties can implement the mechanics to give effect to the judgment". Order in Favor of Plaintiffs Following Bench Trial at 15.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. THE FOUR PROJECTS AND THE INVESTOR TAX CREDIT FUNDS.

The four affordable housing projects which are the subject matter of this case ("the Four Pennsylvania Projects") were built or acquired in the 1990's by Pam Gleichman after she formed a limited partnership for each project.[1] See Joint Exhibits 1 - 4. Each of the Four Pennsylvania Projects (like 75 plus other projects that Gleichman built and developed and managed over her career) was structured with Pam Gleichman personally serving as one of two general partners - along with her wholly-owned Maine corporation, Gleichman & Co., Inc., serving as the other general partner. See Exhibit 72 - Deposition of Rosa Scarcelli at 6:11 – 13 and 8:16 -21; and 15:19 to 16:20. See Exhibit 73 - Deposition of Pam Gleichman at 21:8 - 17 Trial Transcript (Day 1) at 199:6-24.

[1] Gleichman formed the first of the four partnerships in 1990; that project was the Curwensville Park Associates limited partnership. Three years later she formed the other three limited partnerships (that is, for the Roaring Springs Commons limited partnership, the McConnellsburg Commons limited partnership and the Patton Terrace Commons limited partnership). Maine's Secretary of State's records reflect the filing of a "Limited Partnership Agreement and Certificate" for each of the Four Projects. See Exhibit 62 (Affidavit of John S. Campbell ¶¶2-3, 7 and Exhibits. A, B, C and D).

Development funds for each of the four projects were raised through Richman Asset Management - a highly respected "tax credit investment firm" that obtained equity to invest in affordable housing projects by purchasing limited partnership interests, raising the funds through two tax credit funds – that is, U.S.A. Metropolitan Tax Credit Fund, II, L.P. ("MTCF II") and U.S.A. Institutional Tax Credit Fund, IV, L.P. ("ITCF IV"). Exhibit 72 - Deposition of Rosa Scarcelli at 6:18 to 7:1; 16:4 – 20; See Exhibit 74 - Deposition of Pam Bower at 6:9 to 7:7. The investments made in the four Projects ranged from $400,000 to $600,000 – made in conjunction with additional loans from USDA. See Joint Exhibits 1 – 4 - Amended and Restated Agreement of each project, pages 84-85 and page following 81 for Curwensville. See Exhibit 72 - Deposition of Rosa Scarcelli at 40:3 - 6.

MTCF II invested in three of the projects, and ITCF IV invested in one of the projects - with Richman Asset Management executing the Amended and Restated Agreement for each limited partnership. Gleichman obtained those investments to build a total of 206 apartments; that is, she re-habbed one building (Roaring Springs Commons) in order to create 58 units, and re-habbed another (McConnellsburg) to create another 60 units and re-habbed a third (Patton Terrace) to create another 60 units – followed by building 28 units at Curwensville Park.

B. THE PROVISIONS OF THE PARTNERSHIP AGREEMENTS LIMITING CHANGES OF ORIGINAL GENERAL PARTNERS.

Consistent with the business plan of establishing all of the projects with Pam Gleichman as one partner and her 100% owned entity (Gleichman & Co., Inc.) as the other, when MTCF II and ITCF IV purchased their respective interests in each of the four projects in 1995 and 1996, the General Partners in each were Pam Gleichman and Gleichman & Co., Inc.[2]

Each of the four Amended and Restated Limited Partnership Agreements executed in 1995 and 1996 contained provisions that limited the ability of either general partner to withdraw or transfer her or its interest in the partnership (in the case of the entity partner by limiting its ability to any change in control over the entity. In Article VI of each Agreement – under the section governing "CHANGES IN PARTNERS" – subsection 6.01, captioned "Withdrawal of a General Partner", provided as follows:

> "6.01. Withdrawal of a General Partner
>
> "(a). A General Partner may withdraw from the Partnership or sell, transfer or assign his or its Interest as a General Partner (or a controlling interest in the General Partner) only with the prior Consent of the Investment Partnership, and of the Agency and/or the Lender, if required, and only after being given written approval by the necessary parties as provided in Section 6.01 of the General Partner(s) to be substituted for him or it or to receive all or part of his or its Interest as General Partner."

---

[2] See Joint Exhibits 1 – 4 page 1 (whereas clause) and page 8 (definition of "General Partners") and signature pages of each document. Three of the Amended and Restated Limited Partnership Agreements also had an attached "General Partners Certification" executed by the two general partners and the fourth Amended and Restated Limited Partnership Agreement had attached to it an Amended and Restated Cross Default Agreement which was executed by Pamela Gleichman individually as "Guarantor". See Joint Exhibits 1 – 4 . See also Exhibit 72 - Scarcelli deposition 25:5 to 26:13.

In each agreement the term "Investment Partner" was defined as being the investing tax credit fund[3].

Therefore, section 6.01 provided to each of the two Tax Credit Funds a veto power to prevent either of the original General Partners from being replaced or from being taken over through a change in control. Neither change could take place without the limited partner's prior consent (i.e. "only after" the consent was given). Absent such prior written consent[4] from the limited partner, any individual purporting to be a general partner, or any outside party having gained control over the corporate GP, would not in fact be treated as a general partner. See Sections 6.01(a) and 6.02 of the four limited partnership agreements; Deposition of Rosa Scarcelli at 26:14 to 27:14 and 28:20 to 29:3.

The provisions of each of the four limited partnership agreements also required the consent of the individual general partner (Gleichman) to any transfer

[3] The term "Limited Partner" is defined in each of the four agreements as being the "Investment Partnership" (meaning either MTCF IV or ITCF IV).

[4] The word "Consent" in section 6.01 of each of the Limited Partnership Agreements is defined so as to require written consent. The term "Consent" "means the prior written consent or approval of the Investment Partnership and/or any other Partner, as the context may require, to do the act or thing for which the consent is solicited. See Definitions (page 6 of Curwensville Limited Partnership Agreements). Each agreement also set forth the procedure to be used in order to obtain a "Consent" – that is, the General Partners "shall give the Limited Partners Notice of any proposal or other matter required by any provision of this Agreement," see section 15.01 at page 73, and the written consent has to have been "received by the General Partners at or prior to the doing of the act or thing for which the Consent is solicited". See Section 15.01 at page 73.

of a controlling interest in the corporate general partner. Section 6.01 incorporated the requirements of section 6.02 in each the four limited partnership agreements. See Joint Exhibits 1 - 4 - Sections 6.01(a) and 6.02(a) of the four limited partnership agreements.

Gleichman testified that based upon her decades of involvement operating housing limited partnerships, the intent of the change in control provisions involved in this case was to assure that if there were to be a change in control of more than 50% of the stock ownership of a general partner, the take-over person or entity was required to first approach the limited partners and request their permission to become a general partner. Trial Transcript (Day 1) at 232:16 to 233:5. She testified that the limited partners did not have to seek removal of the corporate general partner that had been unilaterally taken over by an outsider; instead, without the required consent, "you are not a general partner, So there's no removal issue… You're not a partner. You don't somehow automatically become a partner because you buy [control of the corporate general partner]". Trial Transcript (Day 1) at 233:1-5

C. IN 2014 SCARCELLI'S ATTORNEYS AUCTIONED TO SCARCELLI'S ENTITY 100 PER CENT OF GLEICHMAN'S SHARES IN GLEICHMAN & CO, INC.

In 2008 Norberg and Gleichman gave Scarcelli a 51% interest in their property management company – Stanford Management; this involved only the right to manage projects owned by Gleichman and her 100% owned co-GP

(Gleichman & Co, Inc.). Trial Transcript (Day 1) at 141:17 – 144:5 and 211:15 to 212:14

Shortly after gaining control over the management company, Scarcelli began causing problems in the companies and withholding financial information and funds that she was required to pay to her mother and stepfather; Scarcelli admitting to others that she did so because she did not want her mother to have the resources with which to challenge in court Scarcelli's fiduciary breaches. Trial Transcript (Day 1) at 145:1 –12 and 151:3-18 and 237:4 to 238:12; Trial Transcript (Day 2) at 7:9 – 10:1 and 13:21 to 15:9

In March of 2014 Preservation Holdings, LLC (the entity which Scarcelli formed in order to purchase creditor claims against her mother) purchased for $10,000 at an auction conducted at the Norman Hanson law firm 100% of the stock in the entity Gleichman & Co., Inc. Trial Transcript (Day 1) at 225:15-18. As a result of that auction control over the corporate general partner in each of the four partnerships changed from Gleichman to Scarcelli. See Deposition of Rosa Scarcelli at 4:13 to 6:10 and 16:21 to 17:20; Deposition of Pam Gleichman at 21:10-17. Trial Transcript (Day 2) at 13:21 to 15:9. At the time of the auction in 2014, Scarcelli owned no part of any of her mother's projects and no interests in any of her mother's limited partnerships.; rather she had only a 51% ownership of the company that managed the projects - Stanford Management, LLC.

D. SCARCELLI UNILATERALLY TAKES OVER CONTROL OF THE CORPORATE GENERAL PARTNER POSITIONS WITHOUT OBTAINING THE REQUIRED CONSENTS.

The auction of Gleichman's shares effected a change in "control" over the corporate general partner, Gleichman & Co., Inc, but that change was not preceded by Scarcelli obtaining the consent of her mother or either of the two limited partners – i.e. the Tax Credit Funds - MTCF II and ITCF IV. Deposition of Pam Gleichman at 106:21 to 107:5 and 109:16-20. Through the auction the controlling interests over the corporate general partner – General Holdings, Inc. f/k/a Gleichman & Company, Inc. - were taken involuntarily away from Pamela Gleichman and assumed by Scarcelli's entity, Preservation Holdings, LLC. The Limited Partners were not informed of the change nor asked to consent. The individual general partner, Pam Gleichman,[5] was not asked to consent and gave no consent to that transfer of control. See Deposition of Rosa Scarcelli at 6:14 -17; 17:17-24. See also Deposition of Pam Bower at 72:2 to 73:9 and 74:4 to 76:6 and

[5]Despite creditor actions taken to foreclose on Pam Gleichman's economic interests in her projects, she remained a General Partner in all four of the Limited Partnerships involved in this as of the time of Richman's transfers to Eight Penn Partners. The Promenade Trust and Preservation Holdings sued Gleichman in Illinois to enforce Maine charging orders and obtained a judgment in 2018 based upon purchased debt claims that were use to obtain charging orders against Gleichman's economic interests in her projects. That order in no respect altered Gleichman's management rights in her projects – nor did she ever withdraw as a General Partner. See Exhibit 72 - Deposition of Rosa Scarcelli at 58:8 - 21; Exhibit 73 - Deposition of Pam Gleichman at 101:15 – 25; Exhibit 74 - Deposition of Pam Bower at 52:21 to 7:7. Trial Transcript (Day 1) at 225:19 to 228:10. Likewise, the Tax Credit Funds never agreed to the removal of Pam Gleichman as the individual general partner in the four projects in which they were involved or agree to her being replaced by any person.

77:5 – 22; 81:8 to 82:22 and 91:21 to 93:15. Trial Transcript (Day 1) at 225:19 to 226:15. Scarcelli conceded that she did not "have any reason to disagree with" the testimony of the limited partners' representative (Pam Bower of Richman Asset Management) that Richman Asset Management had never consented to the 2014 change in control over the corporate general partner in each of the four projects (i.e. Gleichman & Co). See Deposition of Rosa Scarcelli at page 4, line 13 to 6 line 10; Deposition of Pam Bower at 72:2 to 73:9 and 74:4 to 76:6 and 77:5 – 22; 81:8 to 82:22 and 91:21 to 93:15.

E. ENTITIES PROVIDING EQUITY FINANCING BY OBTAINING LIMITED PARTNER POSITIONS RELY UPON THE INTEGRITY OF THE PARTNERSHIP RECORDS IDENTIFYING THE GENERAL PARTNERS THEY ARE ADVANCING MONEY TO.

Richman official Pam Bower testified that it is standard in her business (that is, it is "the letter of the law" and "how we roll") for the limited partner to have veto power over any proposed change in the ownership of a corporate general partner. She testified that a person or entity taking over control of a corporate general partner will not be recognized by the limited partner if the person or entity did not obtain from the limited partner an advanced written consent. Ms. Bower based her testimony in this regard upon her experience with 1,500 or 1,600 limited partnership investments that she had overseen since 1987. See Exhibit 74 - Deposition of Pam Bower at 72:2 to 73:9 and 74:4 to 76:6 and 77:5 – 22; 81:8 to 82:22; 91:21 to 93:15; Exhibit 73 - Deposition of Pam Gleichman at 105:9 –

107:15. Bower therefore considered that in dealing with the only general partner they had agreed to do business with - Pam Gleichman – they had complied with the contract requirements to sell their limited partner interests. See Exhibit 74 - Deposition of Pam Bower at 90:21 to 91:5; Exhibit 73 - Deposition of Pam Gleichman at 106:12-19 and 109:16-20. When the Tax Credit Funds invested with Gleichman, they did so on the understanding that they would be avoiding situations involving general partner disputes because they were aware that the second general partner was 100% owned by Gleichman. Trial Transcript (Day 1) at 228:11-25 and 233:6-22.

F. TAX CREDIT FUNDS SOLICITED GLEICHMAN TO PURCHASE THEIR LP INTERESTS; EIGHT PENN PAYS $13,000

On February 13, 2018 Pam Bower from Richman Asset Management wrote to Pam Gleichman advising her that "the Funds" (that is, MTCF II and ITCF IV) were dissolving and therefore were seeking to sell their interests "in the local partnerships," suggesting they could be purchased by paying the Funds the accrued "unpaid minimum distributions" while granting the Funds a right of first refusal on any future re-syndications. It was common for investment limited partners to want to sell their LP interests back to the founders of the company at the end of their use of the tax credits. Gleichman had purchased into her family the LP interests from numerous other investors in the past. Trial Transcript (Day 1) at 153:4 -21; Trial Transcript (Day 1) at 229:18 to 232:15.

In 2018 Karl Norberg arranged to establish the limited partnership - Eight Penn Partners LP (Exhibit 63) which consisted of Norwind LLC (Exhibit 64) and the Norwind Irrevocable Trust (Exhibit 65). Trial Transcript (Day 1) at 137:15 to 138:19 and 152:4-23. The beneficial owners of Eight Penn Partners were five persons – that is, Pam Gleichman, Karl Norberg, their two sons - Hillman Norberg and Luigi Scarcelli and a long-term, loyal employee - Gunnar Falk - with the benefits being spread evenly such that each had 20%.[6] Trial Transcript (Day 1) at 196:9 to 197:7. Karl Norberg paid approximately $13,000 (plus substantial transactional and legal fees) for the four limited partnership positions.

G. FEBRUARY, 2020 SETTLEMENT AND AGREEMENT TO CEASE LITIGATION.

Many outstanding disputes between Scarcelli and Gleichman and Norberg were resolved on February 11, 2020 during a judicial settlement conference in case #BCD 17- 11 which case involved numerous breaches of fiduciary duties by Scarcelli over the course of years in misusing her position at Stanford Property Management to keep Gleichman from accessing funds that were owed to her.

---

[6]Eight Penn Partners, LP is a Pennsylvania limited partnership formed October 1, 2018. NorWind, LLC is the General Partner of Eight Penn. Karl Norberg is the sole Member and Manager of NorWind, LLC.

Among the issues resolved in that case were claims arising from Scarcelli's actions in cutting off her mother from desperately needed (and promised) funds while Pam and Karl were in Morocco and otherwise withholding funds that were owing to her mother in order to prevent Pam and Karl from retaining counsel to challenge her breaches in court. After lengthy negotiations in the Courthouse just before the trial was set to begin, Scarcelli and her entities agreed to settle the claims by paying Pam and Karl $1 million by March 31, 2020 - along with a payment of $200,000 on March 31, 2021 plus at that same date in 2021 the first of five annual payments of $125,000 to be made that same date each subsequent year. See Exhibit 61.[7] Scarcelli agreed that the initial payments (and the five annual payments) would be followed by ten annual payments of $150,000 per year. Thus, the total amount that Scarcelli agreed to pay was $3,950,000 – that is, $1.2 million plus $625,000 (five payments) plus $1.5 million (i.e. ten payments of $150,000 each). Trial Transcript (Day 1) at 151:13 – 18 and 155:25 to 156:6.

Apart from agreeing to pay approximately four million dollars, Scarcelli and Stanford also agreed to cease litigating with Pam and Karl, see Settlement Agreement ¶ 12 (Covenant Not to Sue). This was a vital provision for Gleichman

[7] Scarcelli also agreed at that time to make annual payments to Hillman Norberg and Luigi Scarcelli of at least $90,000 each per year for a period of 15 years ($2.7 million) starting with calendar year starting January 1, 2020.

who wanted no further battles with her daughter. Trial Transcript (Day 2) at 20:3 - 15. The Settlement Agreement did not provide for any LP interests to be quitclaimed by Eight Penn. See Settlement Agreement ¶ 8. While identifying Eight Penn in the agreement as being an entity that could not be used to interfere with the management of Stanford, the 2020 settlement agreement did not require Eight Penn to disclaim or convey back to the Tax Credit Funds or any other person or entity the LP interests that it had purchased in 2018 – and contained no provision suggesting or implying that the LP issue that all parties were aware of would or could be a subject for future litigation. Compare with Settlement Agreement ¶7, last sentence (reserving out the fraudulent transfer case).

H. IMMEDIATE THREATS OF LITIGATION OVER EIGHT PENN ISSUES AFTER 2020 SETTLEMENT

Despite the "no further litigation" provisions of the 2020 agreement, Scarcelli immediately after entering into the settlement began threatening more litigation. Trial Transcript (Day 2) at 21:18 to 25:15. A week after the settlement Scarcelli contacted Attorney Carlucci and Richman asking for their "cooperation" in "walking back" the sale of "the four LP interests". See Exhibit 59, page 2 ("My client reached out to both Richman and Mr. Carlucci ,… last week). Two weeks after the settlement - on February 27, 2020 - Scarcelli's attorney insisted that Gleichman and Norberg were obligated to cause Eight Penn Partners, LP to void the equity interests that Scarcelli knew had been purchased by Eight Penn long before the settlement was reached, threatening that if the Plaintiffs failed to provide "assistance and cooperation" in "undoing the purported sale of the four LP interests," they would be deemed to have "interfered" with Stanford's management of projects. See Exhibit 59 (letter of John Geismar to John Campbell) and Exhibit 60 (letter of John S. Campbell dated March 2, 2020).

III. STATEMENT OF THE ISSUES FOR REVIEW

A. WHETHER A CORPORATE GENERAL PARTNER THAT IS TAKEN OVER BY A CREDITOR WITHOUT OBTAINING THE CONSENTS OF OTHER PARTNERS AS REQUIRED BY THE PARTNERSHIP AGREEMENTS MAY BLOCK TRANSFERS OF INTERESTS BY A PROPERLY ADMITTED LIMITED PARTNER.

B. WHETHER THE SUPERIOR COURT WAS CLEARLY IN ERROR IN GRANTING A DECLARATORY JUDGMENT VOIDING A SALE THAT OCCURRED FIVE YEARS AGO WITHOUT PROVIDING FOR THE REIMBURSEMENT OF THE BUYER'S PAYMENTS FOR THE INTERESTS BEING TAKEN FROM APPELLANT AN IN VIEW OF THE UNCLEAN HANDS AND INEQUITABLE CONDUCT BY THE APPELLEES.

IV. SUMMARY OF ARGUMENT

The decision of the Superior Court was the result of an erroneous construction of: A) the consent provisions governing whether to allow into the partnership a new or a substitute general partners and B) the removal or dissociation provisions of the four limited partnership agreements governing removal of those who are recognized partners. Scarcelli's entity - Preservation Holdings, LLC – which was not involved in any of Gleichman's projects, but merely a creditor - obtained 100% control of the corporate general partner – but never obtained the consent of the other general partner - Pam Gleichman – nor the consent of the limited partners. The approval of the limited partners was required under the agreements before any general partner could be replaced – meaning in the case of the corporate partner whenever that corporate partner was in essence "removed and replaced" by having more than 50% of its ownership interest taken over by an outside party.

When the limited partners were contemplating closing the funds in 2018, they sold their interests to an entity that they knew Pam Gleichman had agreed they could sell to; and they obtained her written consent. They did not get approval from the Appellees who they did not recognize as legitimate general partners. Most of this brief is directed toward establishing that the Appellees violated the partnership agreement provisions requiring them to obtain consents in order to have the continued authority to act as a general partner. It demonstrates that the contract prohibitions against unconsented "new partners" (i.e. interlopers) have a rich history in the common law (assuring that partners can choose whom they wish to associate) and that they apply to both voluntary transfers of interests as well as involuntary transfers. In addition, this brief establishes that a foreclosing creditor who has assumed - without consent - control over a corporate GP (i.e. after it has become an interloping – unapproved - general partner) does not have to be removed under the dissociation provisions - but instead, that those provisions are addressed to recognized partners who have engaged in wrongdoing. Interloping creditors cannot exercise authority of a partner without first being approved as such by all other partners – and they do not gain that status until such time as the limited partner successfully removes the interloping GP.

Apart from the interpretation issues surrounding the unconsented take-over of a general partner by a creditor, this brief establishes that the Superior Court was clearly in error in granting equitable relief to parties who had acted inequitably in regard to the limited partner in various ways – including by settling a related matter in 2020 – suggesting by disclaiming any more litigation that they would allow the interests to remain with Eight Penn, and delaying for years any action to invalidate the 2018 sale such that the limited partners had been liquidated by the time of trial. In this connection, the relief granted was also clearly in error since it did not provide for the reimbursement to Eight Penn of the substantial funds paid by Eight Penn for the limited partner interests which the Court declared were not conveyed.

V. STANDARD OF REVIEW

In cases involving the interpretation of the language of a contra, this Court's standard of review depends on whether the contract language at issue is ambiguous, which the Court determines on a de novo basis. See Testa's, Inc. v. Coopersmith, 2014 ME 137, ¶ 11, 105 A.3d 1037. "Contract language is ambiguous when it is reasonably susceptible of different interpretations." Am. Prot. Ins. v. Acadia Ins., 2003 ME 6, ¶ 11, 814 A.2d 989 (quotation marks omitted). If a contract is ambiguous, the Law Court reviews the lower court's interpretation for clear error by the fact finder. See Villas by the Sea Owners Ass'n v. Garrity, 2000 ME 48, ¶ 9, 748 A.2d 457; see also Testa's, Inc., 2014 ME 137, ¶ 11, 105 A.3d 1037. If a contract is unambiguous, this Court reviews its language de novo. See Spottiswoode v. Levine, 1999 ME 79, ¶ 25, 730 A.2d 166; see also Testa's, Inc., 2014 ME 137, ¶ 11, 105 A.3d 1037.

VI. ARGUMENT

A. A CORPORATE GENERAL PARTNER THAT IS TAKEN OVER BY A CREDITOR WITHOUT OBTAINING THE CONSENTS OF OTHER PARTNERS AS REQUIRED BY THE PARTNERSHIP AGREEMENTS MAY NOT BLOCK TRANSFERS OF INTERESTS BY A PROPERLY ADMITTED LIMITED PARTNER.

Partnership agreements are construed in accordance with ordinary contract law principles. In the absence of ambiguity, an agreement is interpreted according to the plain meaning of its provisions. Green v. Lawrence, 2005 ME 90, ¶ 7, 877 A.2d 1079. When language is ambiguous, the factfinder may consider extrinsic evidence which casts light on the intentions of the parties to the agreement, Hilltop Community Sports Ctr., Inc. v. Hoffman, 2000 ME 130, ¶ 21, 755 A.2d 1058, always viewing the agreement as a whole and construing it so as not to "render any particular provision in the contract meaningless." McCarthy v. U.S.I Corp., 678 A.2d 48, 52

(Me. 1996). All parts and clauses must be considered together so that it may be "seen if and how one clause is explained, modified, limited or controlled by the others." *Am. Prot. Ins. Co. v. Acadia Ins. Co.*, 2003 ME 6, ¶ 11, 814 A.2d 989.

Applying these rules of construction to the facts in this case leads to the conclusion that General Holdings, after the 100% change in control, did not have the authority to act as a general partner of the four partnerships involved in this case for purposes of vetoing decisions to sell made by the limited partners. The plain meaning of the language used in partnership agreements is that prior written consent must be obtained from the LP when more than 50% of the corporate GP is transferred to an outside party.

Section A below addresses the fact that the contract prohibitions against unconsented "new partners" (i.e. interlopers) apply to both involuntary transfers (that is, they do not apply to creditor auctions) and voluntary transfers. Section B below addresses Scarcelli's alternative contention that the foreclosing creditor who has assumed - without consent - control over a corporate GP (i.e. after it has become an interloping – unapproved - general partner) can retain that status and exercise full authority without ever having been approved as a general partner – and remain as such until such time as the limited partner successfully removes that interloping GP under the general GP removal provisions contained in section 8.13 of each partnership agreement.

1) PARTNERSHIP AGREEMENT SECTION 6.01 FORBIDS BOTH VOLUNTARY AND INVOLUNTARY TRANSFERS OF CONTROL OVER A CORPORATE GENERAL PARTNER WITHOUT ADVANCED WRITTEN CONSENT FROM THE LIMITED PARTNERS

The Superior Court found that there was ambiguity within the partnership agreements as to whether consents are required when the interests of a general partner that are being transferred are involuntarily transferred – that is, when the transfers are the result of creditor actions. The Court wrote in its summary judgment decision dated April 1, 2022 as follows:

> Section 6.01 provides that "[a] General Partner may withdraw from the Partnership or sell, transfer or assign his or its Interest as General Partner (or a controlling interest in the General Partner) only with [the relevant prior consents and approvals]." This language is ambiguous, however, because it is susceptible to two reasonable interpretations. On the one hand, Section 6.01 can be construed as applying solely to voluntary transfers, reading "may" as permissive. Pursuant to this reading, Section 6.01 would not apply to the auction sale in this case. That would mean General Holdings remained a GP with standing to pursue this complaint after the forced sale of Gleichman's shares at auction. On the other hand, Section 6.01 can be interpreted to apply to all transfers, reading "may" as declarative. Because of the ambiguity, the Court will need extrinsic evidence to discern the intent of Section 6.01. The summary judgment record is insufficient for this level of analysis, and thus there is a genuine dispute of material fact regarding the intent of Section 6.01.

Eight Penn's position is that there is no ambiguity and that summary judgment should have been granted. Even if the use of the word "may" were considered to create an ambiguity, under the evidence presented at trial and viewing the clauses in light of the overall purpose of these provisions and the definitions of the word "transfers" in the limited partnership act and in commercial law generally, any such ambiguity should be resolved in favor of a conclusion that all transfers are covered.

First of all – as to the plain meaning of the partnership agreements, the pertinent provisions of the agreements contain nothing that suggests an intent to require consent when a voluntary transfer of interest was contemplated as opposed to when an "involuntary" transfer was to occur. In fact, there is no logical reason why the drafters of such a partnership agreement would desire to treat creditors in a manner more favorable than the manner in which the agreement dealt with voluntary transfers – that is, in a manner that made it easier for the creditor to take over management of a partnership. Logic suggests that the founders of an entity such as this have a great interest in protecting the entity from creditor attacks.

The language used in section 6.01 contains broad, non-limiting language. It covers the human partner (Gleichman) as well as the entity partner – as reflected in the reference to "its Interest as General Partner" as well as the reference to the transferring of "a controlling interest in the General Partner". And section 6.01 is a section which is addressed to any partner withdrawals or any assigning of, or transferring of, the interests of general partner interests, not addressed only to voluntary assignments or transfers, but rather to any withdrawal of a general partner and any sale, transfer or assignment of "his or its Interests as General Partner (or a controlling interest in the General Partner)". See Joint Exhibits 1 - 4 - Sections 6.01(a) of each of the four limited partnership agreements.

Several sources make it clear that in commercial law the use of the word "transfer" reflects an intent to cover both voluntary transfers as well as involuntary transfers. Most significantly, Maine's Uniform Limited Partnership Act defines the word "transfer" as including "involuntary transfers." Section 1302(21) of Maine's Uniform Limited Partnership Act provides that the word "transfer" includes a "transfer by operation of law." 31 M.R.S.A. section 1302(21). A transfer through an auction of ownership interests in a corporation – i.e. an auction sale of stock certificates – constitutes a transfer made "by operation of law". The definition of terms contained in Maine's Limited Partnership Act should be considered compelling in interpreting a Maine limited partnership agreement.

Black's Law Dictionary also defines of word "transfer" as including both voluntary and involuntary transfers, defining the terms as follows:

> The sale and every other method, direct or indirect, of disposing of or parting with property or with an interest therein, or with the possession thereof, or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, payment, pledge, mortgage, lien, encumbrance, gift, security or otherwise * * *.

Black's Law Dictionary 1497 (6th ed.1990) (emphasis added).

And Maine's fraudulent transfer act also defines of word "transfer" as including both a voluntary and an involuntary transfer, with the following definition:

> `Transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance."...

14 M.R.S.A. § 3572(12). See also Bank Midwest v. Lipetzky, 674 N.W.2d 176 (Minn. 2004).

Apart from the plain meaning of the word "transfer" as including both voluntary and involuntary transfers, general principles of partnership law call for a construction that protects all existing partners from interference through creditor action. Under well-established common law principles, partnership membership is not ordinarily assignable in the absence of the other partners' consent. In re Schick, 235 B.R. 318, 324 (Bankr. S.D.N.Y. 1999). Partners are entitled to choose with whom they wish to be associated.[8] The principle that a partnership need not accept

[8] The statutory and contractual proscriptions barring non-consensual assignments of membership interest in partnerships is based upon the principle of *delectus personarum* (or *delectus personae*), meaning the choice of person. "At the heart of the partnership concept is the principle that partners may choose with whom they wish to be associated." *Gelder Med. Group v. Webber*, 41 N.Y.2d 680, 363 N.E.2d 573, 577, 394 N.Y.S.2d 867 (N.Y. 1977); *accord Dawson v. White & Case*, 88 N.Y.2d 666, 672 N.E.2d 589, 591-92, 649 N.Y.S.2d 364 (N.Y. 1996). A partnership is often an intimate business relationship which has been likened to a marriage or a family. Lawrence J. La Sala, *Partner Bankruptcy and Partnership Dissolution: Protecting the Terms of the Contract and Ensuring Predictability*, 59 Fordham L. Rev. 619, 637-38 (1991); *see In re Sovereign Group, 1984-21 Ltd.*, 88 B.R. 325, 329 (Bankr. D. Colo. 1988). The assignment of economic rights does not violate the principle of *delectus personarum*, "but it would be violated by the admission of a new speaking and voting member into the closely knit arrangement that typifies the general partnership." I Alan R. Bromberg & Larry E. Ribstein, *Bromberg & Ribstein on Partnership* § 3.05(c)(4), at 3:86 (1999)("*Bromberg & Ribstein*"). The restriction on the transfer of membership has been part of the limited partnership laws since the promulgation of the original Uniform Limited Partnership Act in 1916, *see* Unif. Limited Partnership Act § 19(3), 6A U.L.A. 397 (1995), and as noted, continues under the revised act.

a member with whom it does not wish to associate has long been basic partnership law and is all the more compelling when it is a creditor of a general partner that is taking unwelcome action in asserting control over business operations and the inter-relationships among partners.

The construction of the partnership agreement that would preclude all unconsented changes in the general partner best comports with this common law; it also best comports with the intent and the real world experiences of the parties in this case. The only evidence that was presented at trial established that involuntary transfers were intended to be covered. The uncontroverted testimony of the two persons who had many years of experience operating under these sorts of agreements (Gleichman and Bower) made it clear that the intent of these provisions was to provide partners with certainty as to the identity of who their long-term business partners were to be, giving the original partners veto power to reject creditors or others who might attempt to become involved in the partnerships. They testified that limited partners advance funds for use in developing real estate based upon assurances that no creditor or unwelcome party can lawfully become involved in the project without first obtaining the consent of all of the business partners. These consent requirements serve to protect the long term survival of the entities – preventing disruptions of business operations. This same goal is just as vital when a GP <u>voluntarily sells</u> as when he or she or it owes money to a creditor and <u>the</u>

creditor takes action to obtain control over a corporate GP. There is no logical reason why protection of the business entity should be of any less a concern when it is a creditor that wishes to become the new partner as opposed to the situation in which some friend of the original GP wishes to become the new partner. If anything, there is more reason for an LP to have consent veto rights when it is a creditor of a GP that is attempting to arrogate control.

Finally, Eight Penn's interpretation of the agreements is further bolstered by the expressed public policy of the State of Maine as set out in the provisions of Maine's Limited Partnership statutes. Those statutes express the policy that creditors of persons holding rights of general partners in a limited partnership can only obtain charging orders to collect the debts owed by a general partner – and while they can foreclose on a charging order, they in no event are allowed to obtain any management interests of the partnership. All that such a creditor may obtain are the "economic interests" that the general partner was entitled to. The provisions of Maine's Limited Partnership statutes preclude creditors from participating in the management of the entity; they are not allowed to assume control over the management of the limited partnerships through the foreclosure on the charging order.[9] The foreclosure of a charging order against a partner in a limited partnership does not allow the foreclosing party to "participate in the management or conduct of the limited partnership's activities." See 31 M.R.S.A. § 1383 and 1302(22).

---

[9] The These provisions of Maine's limited partnership act are contained in section 1382 and 1383 of Title 31; section 1382 making it quite clear that a transfer of a partner's interest will not convey any management rights; it provides as follows:

§1382. Transfer of partner's transferable interest

1. **Transfer.** A transfer, in whole or in part, of a partner's transferable interest:

A. Is permissible;

B. Does not by itself cause the partner's dissociation or a dissolution and winding up of the limited partnership's activities; and

C. Does not, as against the other partners or the limited partnership, entitle the transferee to participate in the management or conduct of the limited partnership's activities, to require access to information concerning the limited partnership's transactions except as otherwise provided in subsection 3 or to inspect or copy the required information or the limited partnership's other records.

This section read with section 1383 provides that creditors can foreclose on charging orders – but they can obtain only economic rights – not management rights. Section 1383 provides as follows:

§1383. Rights of judgment creditor of partner or transferee

1. **Court order charging transferable interest; rights of transferee.** On application to a court of competent jurisdiction by any judgment creditor of a partner or transferee, the court may charge the transferable interest of the judgment debtor with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of a transferee. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership and make all other orders, directions, accounts and inquiries the judgment debtor might have made or that the circumstances of the case may require to give effect to the charging order.

Since it is the clear public policy of the State of Maine to preclude foreclosing creditors from taking over limited partnerships, that policy should weigh heavily against allowing Scarcelli to utilize the claims of a creditor to auction her mother's stock and thereby in essence substitute herself for her mother as being one of the two general partners in these four partnerships. She should not be allowed to do indirectly that which cannot be done directly. The consent language in the

---

> **2. Charging order a lien; foreclosure; rights of transferee.** A charging order constitutes a lien on the judgment debtor's transferable interest. The court may order a foreclosure upon the interest subject to the charging order at any time. <u>The purchaser at the foreclosure sale has the rights of a transferee.</u>

The term "transferable interest" is defined in 31 M.R.S.A. § 1302(22) and means "a partner's right to receive distributions".

Thus, only the rights of a transferee are acquired - that is, the right to receive distributions. If one foreclosed upon a party's interests in a limited partnership, the purchaser at such a foreclosure sale would obtain only "the rights of a transferee" - that is, the foreclosing entity is not entitled "to participate in the management or conduct of the limited partnership's activities." 31 M.R.S. section 1382(1)(C). <u>See also</u> <u>Sand Creek Partners, Ltd. v. Am. Fed. S&L Ass'n</u> 2015 U.S. Dist. LEXIS 176671 (U.S.D.C. D. Nev.) (granting a charging order against all of Bortles' transferable interests in two limited partnerships; the order grants "the judgment creditor only the rights of a transferee," not the rights of a manager or partner; the court charges only <u>the transferable interest</u> of the judgment debtor with payment of the unsatisfied amount of the judgment).

partnership agreements should be read in harmony with these statutes so as prevent creditors from interloping and interfering with business management simply because they have a debt owed by a general partner.

2) **<u>THE GENERAL PROHIBITION AGAINST UNCONSENTED CHANGES OF THE GENERAL PARTNERS PREVAILS OVER THE PROVISIONS IN SECTION 8.13 REGARDING THE REMOVAL OF PROPERLY ADMITTED GENERAL PARTNERS</u>**

The Superior Court alternatively premised its decision on the view that the Tax Credit Funds had a burden, upon learning of the change in control of the corporate general partner, to take affirmative action to remove that entity from its position as a general partner. Since the limited partner had not taken that action, in the Superior Court's view, it was bound to accept the unilateral change in the ownership of the general partner and therefore to accept the veto by the interloping creditor. <u>See</u> Order Following Bench Trial at 13-14.

The view that the limited partner must accept the veto power exercised by an entirely changed corporate general partner, a party that the limited partner never accepted into the partnership, is not in accord with the plain meaning of the partnership agreements nor with the principle that all portions of, and clauses of, agreements must be considered together so as to be meaningful as a whole. Under the lower court's view, the control provisions would be rendered meaningless in keeping creditors out of the entity's management – and provide little assurance of removing or deterring interlopers from interfering in the management of limited partnerships.

Scarcelli's argument is that under Section 8.13(a) of the Partnership Agreements, the limited partners had the burden to seek the removal of General Holdings as a general partner. The reasoning is that the limited partners should have to assert that the unconsented entry constitutes a violation of the agreement and therefore must invoke the dissociation procedures of section 8.13(b) of the partnership agreements in order to remove the interloping entity. But an interloping creditor never gains the rights of a general partner or at least should be estopped from exercising any such rights. Keeping interlopers out is not a matter that the dissociation provisions were designed to address.

First, examining the plain meaning of the partnership provisions that are involved here makes it clear that the Tax Credit Funds were not obligated to first successfully remove the corporate general partner before proceeding to sell their limited partner interests. There are no provisions of the partnership agreements suggesting that removal of the general partner is the proper or the only method for enforcing the partnership consent provisions. In fact, the removal provisions would be entirely ineffectual in preventing interference by creditors.

The provisions of section 8.13 govern the removal of individuals or entities <u>that have been properly accepted into the partnership</u>. To allow a creditor to take control of a general partner and veto a decision to allow a limited partner to sell its interests would in effect grant partnership authority to the unwelcome creditor. This would render meaningless the clear prohibitions on unconsented take-overs of general partner positions by creditors. Contract provisions specific to a situation such as the admission of new or replacement partners must govern over general provisions such as removal.

A construction that would allow a creditor of a corporate general partner to buy that entity's stock at auction and thereby become a partner (only subject to defeasance through dissociation - assuming that could be accomplished under section 8.13) would render meaningless the very important consent provisions discussed above aimed at avoiding business disruptions – particularly by creditors. The creditor /interloper would be given a mantel of authority (at least until any removal proceedings were invoked and completed). Maine's partnership statutes and the partnership agreements themselves reflect a strong public policy of preventing such disruptions by creditors.

The foreclosing creditor taking control without required consent should not be allowed to exercise rights of a creditor for any period of time. It has no lawful authority and certainly no right to direct whether other actual partners can exercise their rights to transfer their interests as they wish. There should be no need to dissociate an entity that has disregarded the basic provisions governing how to become general partner. An interloping – unapproved - general partner never gains true authority and should not be allowed to exercise any authority without having been approved as a general partner under the rules of the partnership. It should not be assumed to have such authority until such time as the limited partner successfully removes that interloping GP under the general GP removal provisions contained in section 8.13 of each partnership agreement.

The plain language of section 6.01 of the partnership agreements provides that the transfers become effective "only if" the various consents are obtained. A creditor is not allowed to become a partner (and cannot exercise the authority of a general partner) immediately upon gaining control over a general partner without obtaining the required consents. Section 6.01 explicitly provides that a transfer of the interests of a general partner may occur only if done with the "prior consent" of the limited partner and the other partners. Allowing an immediate arrogation of authority would contradict the only if provision and would create chaos within limited partnerships. To place the limited partner in a position where it must remove a creditor or otherwise have to recognize that creditor as its new partner places the onus on the wrong party. The plain language of section 6.01 suggests the burden lies with the party who must prove that written consents were obtained. The blameless limited partner need not accept the legitimacy of the invading creditor for any period of time or for any purposes such as for conducting removal proceedings.

The plain meaning of the language in section 8.13 runs contrary to the position that a limited partner must challenge the authority of an unconsented-to general partner through the procedures set out in section 8.13. Section 8.13 does not incorporate (nor even refer to) violations of section 6.01. Section 8.13(d) <u>explicitly states</u> that the remedies under that section are <u>not</u> the sole remedies open to the Limited Partner "in connection with [the General Partners'] undertakings and responsibilities under this Agreement". Furthermore, the language of section 8.13 makes it clear that it was <u>not designed</u> to cover situations involving disputes as to who might be a new or substitute partner, but instead was designed for the removal of persons or entities that were properly admitted – either at the outset or subsequently accepted as substitute partners.

Fatal to the Superior Court's view of section 8.13 is the fact that any proceeding commenced under that section <u>would not</u> lead to the exclusion of an un-invited outsider. Applying the plain meaning of that section would allow the exclusion of the outsider <u>only if</u> there were proof that the outsider's involvement had a materially adverse effect on the partnership or that it had breached its fiduciary duties as a partner. If a limited partner proceeded under section 8.13 to remove a general partner, it would come to a roadblock where it would have to establish that the new entity taking over a management position had engaged in "intentional misconduct" or negligence in the discharge of duties.[10]

Therefore, an interloping creditor could unilaterally gain control over a partnership in clear derogation on the delectus personarum principle which guaranties partners the right to choose with whom they wish to associate.[11] Applying section 8.13 in this way would allow the new partner to stay in that position until such time as there is evidence of a materially adverse impact. That could be years of unconsented partnership involvement in total disregard of the clear intent that such a creditor never be involved in management – regardless of any provable adverse impact.

Granting an unconsented-to corporate general partner management authority (subject to defeasance under section 8.13) would violate the rule of construction that agreements should be construed as a whole so as not to "render any particular

[10] Section 8.13 in each agreement governs removal of a general partner by a limited partner "for any intentional misconduct or any failure to exercise reasonable care with respect to any material matter in the discharge of their duties and obligations…".

[11] The consequence of adopting Scarcelli's position would be that transfers of GP control without LP consent could freely occur under section 8.13 as long as they do not have a material adverse effect. But the strict prohibition in section 6.01 should allow for no such situation. The consent provision exists in order to protect LPs that do not want an original general partner to be removed and who want assurances that they can continue doing business with the trusted persons they began business with. See also Eureka VIII LLC v. Niagara Falls Holdings LLC, 899 A.2d 95, 99-100, 109-110 (Del. Ch. 2006) (discussing the important interest in giving the initial venturers the right to veto any transfers to outsiders/"strangers"; "courts "require intent to waive a contractual provision be evidenced by clear and convincing evidence.")

provision in the contract meaningless." McCarthy v. U.S.I Corp., 678 A.2d 48, 52 (Me. 1996). To require a limited partner to commence proceedings under section 8.13 to remove an entity that has taken over control of a corporate general partner would render meaningless the fundamental provisions that the original partners have the right to prevent creditor or predator takeovers; it would deprive the original parties of the right to protect the integrity of the "team" put together at the outset. It would require a limited partner to engage in a lengthy and uncertain - if not pointless - process (controlled by a non-party to the original partnership) before it could obtain permission to sell its limited interests – a right it was supposed to be allowed to freely undertake.[12] That reading of the partnership agreement would impose on the limited partner the obligation of dealing with an outside entity that the partner never agreed to do business with. Such a construction would encourage creditor takeovers and a disregard of the very important consent requirements. The removal provisions should not be allowed to trump (and render meaningless) the important general prohibitions precluding unconsented-to invasions by creditors

[12] Allowing a creditor to interfere with a limited partner's right to sell its interest would also be at odds with the rule of construction that courts should adopt wherever possible "the interpretation that least restricts the free use of property" – that is, that least restricts Gleichman and the Tax Funds from freely carrying out the transfer that they both wanted to carry out. See Doyon v. Fantini, 2020 ME 77, 234 A.3d 1222, (2020); Boehner v. Briggs, 528 A.2d 451, 453 (Me. 1987) (stating the rule of construction that ambiguities are "resolved in favor of less restrictive uses of the property"). Limited partners are to be allowed to freely sell their interests and even a legitimate general partner is not allowed to withhold consent without good reason. See Section 9.02(a) of the partnership agreements.

and others who were not part to the original group that built these projects. Many cases have recognized that the purpose of these consent prerequisites is to prevent the limited partners' investment from falling into the hands of an unknown or unwanted general partners.[13]

Finally, to the extent that parole evidence is required, the uncontradicted evidence in the record established that investors in limited partnership interests desire to have certainty as to the nature of the entity they are buying into and that they rely heavily upon the integrity of the partnership consent provisions to assure that they get to choose who their partners are and thus avoid any split ownership arrangements which often lead to costly and debilitating battles between factions wrestling for control.[14]

---

[13] The clear intent of the consent provisions is to provide the limited partners with the right to guaranty that they will be dealing with familiar persons or entities unless they first agree to deal with other new entities or persons. The rationale of protecting a partner's interest in remaining with familiar parties is just as great in the <u>involuntary take-over situation</u> as it is in the situation where a general partner is <u>voluntarily selling</u> its interests or selling control over a corporate GP. The purpose of consent provisions such as those incorporated in sections 6.01 and 6.02 is to prevent the limited partners' investment from falling into the hands of an unknown or unwanted general partner. <u>Wasserman v. Wasserman</u>, 7 Mass.App. 167, 386 N.E.2d 783, 788, 6 A.L.R.4th 1268 (1979)(concerns the addition of another general partner). <u>See also Obert v. Environmental Research and Development Corp</u>., 752 P.2d 924, 51 Wn.App. 83 (Wash. App. 1988).

[14]<u>See</u> Deposition of Pam Bower at 72:2 to 73:9 ("until we get a consent request for a change in general partner, there is nothing to do"; this is "standard protocol") and 74:4 to 76:6 ("I did not have a consent request for a change in general partner"; "I was not asked for consent"; we have to be asked "to consent to any change to any partnership interest"); and 81:8 to 82:22 ("I was never asked"; "I did not receive any request of any kind for consent" and it is standard that limited partners have the right to "consent to any change in the control of any of the general partners" – testifying from experience with between 1,500 and 1,600 partnerships involving housing projects over the 34 year time period from 1987 to the deposition date in September of 2021; we are "not obligated to treat anybody else as a general partner" unless we approved a

B. THE SUPERIOR COURT WAS CLEARLY IN ERROR IN GRANTING A DECLARATORY JUDGMENT VOIDING A SALE THAT OCCURRED SIX YEARS AGO IN VIEW OF THE UNCLEAN HANDS AND INEQUITABLE CONDUCT BY THE APPELLEES AND THE FAILURE TO PROVIDE REIMBURSEMENT TO THE BUYER OF THE SUMS THAT THE APPELLANT HAD PAID FOR THE INTERESTS DECLARED TO HAVE NOT BEEN CONVEYED

Apart from the errors in construction of the partnership agreements, the Superior Court should in any event have exercised its discretion to deny the relief sought due to the unclean hands of the Appellees and their inequitable conduct in connection with Eight Penn and its purchase of limited partner interests.

The Law Court wrote as follows about the unclean hands doctrine in <u>Hamm v Hamm</u>, 584 A.2d 59, 61-62 (Me. 1990):

> It is an elementary principle of equity jurisprudence that "whenever a party who as actor seeks to set the judicial machinery in motion and obtain some remedy, *has violated conscience or good faith, or other equitable principle in his prior conduct,* then the doors of the court will be shut against him <u>in limine</u>; the court will refuse to interfere on his behalf, to acknowledge his right or to award him any remedy." *Id.* (quoting 1 Pomeroy, *Equity Jurisprudence* § 397 (3d ed. 1905)) (emphasis added). Application of the clean hands doctrine is within the sound discretion of the court. *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, <u>324 U.S. 806, 815, 65 S. Ct. 993, 89 L. Ed. 1381 (1945)</u>. "The touchstone of determining whether the [court] has properly exercised its discretion is whether in a given case that discretion is exercised 'in furtherance of justice.'" *Gagne v. Cianbro*

change) and 91:21 to 93:15 ("we were not asked for consent"; "There was no consent sent. That's the bottom line. All this doesn't matter it's – to say this five different ways, but there was no request for consent. Until there was a request for consent, he [Mr. Rhoads] writes emails, fine. It's not a consent request"). Ms. Bower testified that she had never received a consent request to allow any change in the ownership of the corporate general partner and that "the general partners remain[ed} as initially agreed to absent consent to a change. Bower at 72:24 to 76:29.

> *Corp.*, 431 A.2d 1313, 1318 (Me. 1981) (quoting *Fitch v. Whaples*, 220 A.2d 170, 173 (Me. 1966)). Where, as here, the evidence makes it "manifest that a plain and unmistakable injustice" has occurred, the court has abused its discretion. *Higgins v. Higgins*, 370 A.2d 670, 674 (Me. 1977).

Hamm v Hamm, 584 A.2d at 61-62. The Court wrote that the fundamental conception of equity was crystallized in the maxim. "He who comes into a court of equity must come with clean hands."

Equity should not support voiding arm-length sales which were completed five years ago - particularly where the belatedly protesting party never obtained the required approvals to become a partner and where the partnership agreement requires that deference be given limited partners as who they wish to sell their interests – that is, consent to a proposed sale could not be "unreasonably withheld" under the provisions of the agreements. Nor should the doors of an equity court be open to parties that filed this lawsuit immediately after concluding a settlement under which millions of dollars were to be paid to Gleichman and Norberg - along with assurances by all that litigation would cease. A party that has used the threat to terminate all of those payments as a cudgel to force the "walking back" of the long-concluded sales to Eight Penn should not be awarded any equitable relief. The settlement left the Eight Penn sales where they stood at the time of the 2020 settlement - and Scarcelli did not suggest in any way that she was preserving any claim to pursue this case. And there would seem to be nothing "equitable" about forcing the persons who built the family wealth in over eighty projects (Pam

Gleichman and her husband Karl Norberg) to disregard the interest of others in Eight Penn and "walk back" those completed transactions and attempt to hand the partnership interests back to two tax credit funds which are owned entirely outside of the Gleichman family – funds which had been liquidated at the point of trial such that they did not even exist as legal entities.

The Superior Court's order erroneously declared the limited partner rights to have not been transferred to Eight Penn Partners – and – in any event - erroneously failed to provide for the return of the substantial funds paid by Eight Penn for the interests.

IV. CONCLUSION

The principle that one has the right to choose with whom one wishes to do business is the overriding principle in this case and should prevail on the contract interpretation issues. The Tax Credit Funds were allowed to dispose of their interests despite the views of the interloping, unapproved general partner. General Holdings either lacked the veto authority as a result of being taken over – or it should be estopped from asserting such authority in each of these four limited partnerships. The two Limited Partners could and did validly transfer their interests by getting the approval of the only person that served with lawful authority at that point as general partner in each of the four limited partnerships – that is, Pam Gleichman. The Judgment of the Business Court must be reversed.

Dated this 24th day of July, 2024, at Portland, Maine.

Respectfully submitted,

/s/ John S. Campbell
John S. Campbell, ME Bar No. 2300
Attorney for Eight Penn Partners, L.P.

CAMPBELL & ASSOCIATES, P.A.
60 Mabel Street
Portland, Maine 04103
(207) 775-2330
John@mainestatelegal.com