SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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HNA HOLDINGS 422 FULTON (GP) LP, HNA HOLDINGS 422 FULTON LP

Plaintiffs,

- v -

TSCE 2007 422 FULTON GP, L.L.C., HNA INVESTMENT HOLDING CO., LTD.,

Defendants.

INDEX NO. 651573/2020

MOTION DATE 06/10/2024, 06/11/2024

MOTION SEQ. NO. 007 008

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 639, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 789, 790, 791, 792, 793, 794, 795, 892, 893, 894, 895, 896, 897, 898

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 796, 797, 798, 799, 800, 801, 892, 893, 894, 895, 896, 897, 898

were read on this motion for SUMMARY JUDGMENT.

Contracting parties may choose to emphasize the primacy of a particular contractual provision by stating that it applies "notwithstanding anything to the contrary contained elsewhere in the Agreement," or words to that effect. This case demonstrates the risks of having multiple provisions in a single agreement containing such language, particularly when at least two of them appear to be in conflict (or at least in tension). It requires the Court to determine the intended hierarchy of the provisions and whether and how they can be harmonized to give each meaning. Fortunately, there is sufficient guidance in the agreement at issue in this case to permit a reasoned decision on what is necessarily a question of law rather than fact.

All parties move for summary judgment on the claims and counterclaims that are the subject of this action. For the following reasons, the motions are granted in part and denied in part. In sum, Plaintiffs' motion for summary judgment is **granted** with respect to the HNA Partners' First Cause of Action (breach of contract), insofar as the Court finds that Defendant breached the partnership agreement by making Major Decisions without Plaintiffs' consent, with damages (if any) and remedy deferred to trial, and dismissing Defendant's First (breach of contract) and Third (attorneys' fees with respect to the Guaranty) Counterclaims.

Defendant's motion for summary judgment is **granted** with respect to its Second Defense to the HNA Partners' First Cause of Action insofar as TSCE cannot under the terms of the LPA be held liable for damages for breach of the LPA other than (potentially) with respect to conduct relating to the Whittle School Lease transaction (as to which a question of fact as to gross negligence is presented that must be resolved at trial), and otherwise Defendant's motion is **denied**.

Background

Plaintiffs HNA Holdings 422 Fulton (GP) LP ("HNA GP") and HNA Holdings 422 Fulton LP ("HNA LP," together with HNA GP, the "HNA Partners") and Defendant TSCE 2007 422 Fulton GP, L.L.C. ("TSCE") entered into a Limited Partnership Agreement ("LPA") on or around September 15, 2016 (NYSCEF 256). The purpose of the partnership was to "redevelop . . . approximately 622,000 rentable square feet of new office space" to be located at 422 Fulton Street in downtown Brooklyn (the "Property," the redevelopment of which is the "Project") (*id*. at 1, 19, J-1). Concurrently, HNA Investment Holding Co., Ltd. (the "HNA Guarantor," with the HNA Partners, "HNA") executed a guaranty of certain obligations under the LPA (NYSCEF 257).

The partnership was known as 422 Fulton HNA JV, L.P. (the "Project JV") (*id.* at 1). The Project JV would accomplish the business plan by acquiring "80.08% of the issued and outstanding common units held by 422 Fulton HNA REIT, L.L.C. [the 'HNA REIT']" (*id.*). HNA GP and TSCE each held a 0.1% interest in the Project JV, and HNA LP held a 99.8% interest (*id.*). At the time the LPA was signed, it recognized the HNA REIT was "the sole member and manager of 422 Fulton JV GP, L.L.C. [the 'Project JV GP']" (*id.*). The HNA REIT also held a 100% limited partner interest in the Project JV itself, which in turn was the sole member of 422 Fulton Senior Mezz, L.L.C. (the "Project JV Subsidiary"), which in turn was the sole member of 422 Fulton Owner, L.L.C. (the "Property Owner") (*id.*).

The Key LPA Terms

Article III of the LPA sets forth the requirements for the partners to make Capital Contributions. Under Section 3.02, capital contributions were mandatory when the Managing General Partner—TSCE—made capital calls for certain funding expenses (*id.* § 3.02). Section

3.02(c) provided that any partner that "fail[ed] to timely contribute its Required Share of any Mandatory Capital Contributions [i.e., a 'Non-Funding Partner']" would, after a notice period and time to cure, be subject to TSCE pursuing "any available legal remedies against the Non-Funding Partner and its Affiliates . . . to collect its Required Share and any other actual losses suffered by the Partnership" or its subsidiaries or partners (*id.* § 3.02 [c]). TSCE could also "allow each of the Funding Partners or its Affiliates . . . to . . . make a loan to the Non-Funding Partner for all or part of the amount of such funds which the Non-Funding Partner failed to contribute," which was called a "Default Loan" (*id.*). The LPA further provided that "[e]ach Default Loan shall be a non-recourse obligation of the Non-Funding Partner, secured by the Non-Funding Partner's Partnership Interest," and the interest rate would be "equal to the lesser of (i) twenty percent (20%) per annum, compounded quarterly on the first day of each calendar quarter and (ii) the maximum rate allowable under applicable law" (*id.*).

Section 3.02(e) provided the following penalty for failing to make a required contribution:

> **Notwithstanding anything herein to the contrary**, if a Non-Funding Partner (1) fails to contribute its Required Share of any Mandatory Capital Contributions within ten (10) Business Days following receipt of a Default Notice pursuant to Section 3.02(c) above, and (2) fails to contribute to the Partnership, within nine (9) Business Days following the expiration of such ten (10) Business Day period, an amount . . . [called the "Default Loan Repayment Amount," as defined in the LPA], then **such Non-Funding Partner shall permanently lose all of its rights (if any) to (i) vote on or approve any matters that would otherwise require its approval pursuant to this Agreement, (ii) remove the Managing General Partner and/or appoint a New Managing General Partner pursuant to, and in accordance with, Section 6.07, (iii) terminate the Asset Management Agreement, or (iv) appoint a director (or director(s)) to the board of directors of a REIT Subsidiary** . . . .

(*Id.* at 71 [emphases added].) Section 3.02(e) provided a process by which a Partner could essentially claim hardship to avoid its loss of rights (*id.* § 3.02 [e]). Section 3.03 covered Optional Capital Contributions (*id.* § 3.03).

Separately, Article VI of the LPA set forth TSCE's powers as Managing General Partner. TSCE would manage the "business and affairs of the Partnership" and would not be liable to the Partnership or Partners for "losses" unless TSCE's "action or determination constitutes a Bad Act," (*id.* §§ 6.01 [a], 6.02 [a]) defined as "fraud, gross negligence or willful misconduct" (*id.* Article II at 4).

Significantly, Section 6.01(e) provided certain core consent rights for the benefit of HNA GP, which was the primary funding source for the project but which had no direct involvement in management of the venture:

> **Notwithstanding anything to the contrary contained in this Agreement, without the prior written consent of HNA GP**, the Managing General Partner (1) shall not have the authority to do, and shall not cause or permit the Partnership or any Subsidiary to do, directly or indirectly, any of the following . . . (each of the actions and decisions identified below being sometimes referred to in this Agreement as a "Major Decision") . . . .

(*Id.* at 89 [emphasis added].) "Major Decisions" included, *inter alia,* (1) executing, amending, or modifying any or all Affiliate Agreements or waiving defaults by counterparties under such agreements, (2) modifying the Development Budget or Business Plan, (3) approving expenditures outside the Development Budget, Business Plan, or Syndication Plan, subject to exceptions; (4) modifying Operating Budgets; (5) approving accountants other than one of the "Big Four" accounting firms; and (6) taking liquidation, dissolution, merger, or consolidation actions (*id.* § 6.01 [e][i]-[xxii]). Affiliate Agreements meant "any agreement or contract between

(i) the Partnership or any of its Subsidiaries, on the one hand, and (ii) TSCE GP [or its Affiliates], on the other hand" (*id.* at 11).

Section 6.08(c) further provided that:

> **Notwithstanding anything to the contrary contained in this Agreement**, . . . (i) decisions with respect to the management of any Subsidiary that elects to be treated as a REIT . . . shall be controlled by a board of directors appointed by [TSCE]; provided, that **so long as the HNA Partners have not lost this right under Section 3.02(e) above**, the TSCE Parties shall cause at least one such director to be a person selected by the HNA Partners, and (ii) [TSCE] shall have the right to appoint and/or remove any or all of the directors . . . of any Subsidiary that elects to be treated as a REIT; provided further, that [TSCE] shall not, and shall cause the TSCE Parties not to, remove a director selected by the HNA Partners except upon the written direction of the HNA Partners, **except to the extent the HNA Partners shall have lost their right to select a director pursuant to Section 3.02(e)**, in which case the TSCE Parties shall be permitted to remove and replace the director(s) selected by the HNA Partners without the consent of any HNA Partner.

(*Id.* § 6.08 [c] [emphases added].)

Article VI further provided that the partners would not be liable to each other except for Bad Acts, and "to the fullest extent permitted by applicable law" had no fiduciary duties to the Partnership, other Partners, or their Affiliates or creditors (*id.* § 6.02 [a][i]). The Partnership indemnified the Partners and their agents "from and against any and all losses, claims, damages, liabilities, expenses (including legal fees and expenses), judgments, fines, settlements and other amounts . . . arising from any and all claims, demands, actions, suits or proceedings . . . in which any Indemnitee may be involved" (*id.* § 6.02 [b]). Again, Bad Acts were not indemnified (*id.* § 6.02 [c]).

The Guaranty Terms

On the same date, the HNA Guarantor signed a guaranty (the "Guaranty") under which it agreed, *inter alia*, to pay "to [TSCE] and the [Project JV] the obligations of [HNA] to fund [] its Required Share of all Mandatory Capital Contributions to the Partnership subject to and in accordance with the terms of the [LPA]" (NYSCEF 257 ¶ 2). HNA Guarantor's obligations were unconditional (*id.* ¶ 4), and it waived "any defense which may arise by reason of . . . lack of authority [of] . . . any person or persons" (*id.* ¶ 5). The Guaranty was governed by New York law (*id.* ¶ 17).

The Initial Capital Calls

TSCE issued Mandatory Capital Contribution Notices to the Partners on September 19, 2016; April 3, 2017; and June 20, 2017, which HNA funded without objection (NYSCEF 797 ¶ 57). Sometime thereafter, HNA began experiencing financial issues which affected its ability to contribute to the Project (*id.* ¶ 58). By email in June and July 2017, HNA representatives indicated their understanding that failure to fund capital calls would result in "default" and "breach of contract," seeking postponements (NYSCEF 311, 323). According to HNA, it was "struggling to finance the [] Project 'due to regulatory restraints and our own financial condition'" (NYSCEF 797 ¶ 60). As early as November 27, 2017, a representative at the HNA Partners communicated an understanding that the HNA Partners were in default under the contract, though TSCE had agreed not to issue a default notice at that time for the capital call in question (NYSCEF 365, at 7; NYSCEF 797 ¶¶ 65-70). The HNA Partners only partially funded that capital call, and did not fund the remainder demanded by TSCE (NYSCEF 797 ¶¶ 65-73).

Between September 2017 and June 2018, TSCE extended funding deadlines and revised payment schedules to provide the HNA Partners with leniency on their funding obligations

(NYSCEF 330; NYSCEF 333; NYSCEF 340; NYSCEF 342; NYSCEF 344-48; NYSCEF 350-52). It is undisputed that TSCE reminded the HNA Partners that defaults would (or did) cause the loss of their approval rights under Section 3.02(e) of the LPA, though TSCE's General Counsel testified that Major Decision consent rights were not, to his recollection, specifically mentioned in any written communications (NYSCEF 797 ¶ 63; NYSCEF 292, at 26:4-27:10, 114:2-115:12). Even so, the HNA Partners corresponded internally in grave terms about the "severe consequences" of potential default and stating they would "lose all [thei]r rights" (NYSCEF 326; NYSCEF 361; NYSCEF 362). Further, Julian Wang, a representative of the HNA Partners (*see* NYSCEF 124:6-8), first testified at deposition that his understanding was that the consequences of a default on capital calls would be that the HNA Partners "would lose the veto right," but then clarified that was not *his* understanding, but what TSCE told the HNA Partners, to which the HNA Partners objected (NYSCEF 321, at 65:10-66:13).

The HNA Partners Default

On January 12, 2018, TSCE issued a Mandatory Capital Contribution Notice requiring the HNA Partners to pay more than $18 million, due March 14, 2018 (NYSCEF 797 ¶ 74). The same day, TSCE also sent a follow-up notice containing, in part, a payment schedule, setting forth four installment payment deadlines between February and May 2018 (*id.* ¶ 75). The January 2018 follow-up notice also indicated the consequences of the HNA Partners' failures to fund, including default, liability for default and Default Loans, and approval rights under the LPA (*id.* ¶¶ 76-77). TSCE sent a Default Notice on February 7, 2018, making an accommodation to "reinstate all voting and other rights that may have been lost by the HNA Partners by operation of Section 3.02(e) under the LP[A]" if the funding was made on or before June 29, 2018, along with interest (at a reduced rate of 10%) on any Default Loans (*id.* ¶¶ 79-

80). Between March 2018 through January 2020, TSCE issued further default notices to the HNA Partners (NYSCEF 355-58).

It is undisputed that the HNA Partners did not pay the amount set forth in the January 2018 follow-up notice and February 2018 default notice until March 2019 (thus missing the June 29, 2018 deadline to restore their "voting and other rights" lost in the default), despite TSCE conditionally agreeing to restore the HNA Partners' voting rights if it made the payments set forth in the February 2018 default notice (and subsequent default notices) (NYSCEF 797 ¶¶ 81, 86). TSCE apparently then continued operating the Project JV under its understanding that it no longer needed prior written consent from the HNA Partners to take Major Decisions under Section 6.01 (*id.* ¶ 83).

The Alleged Default Loans and the March 2019 Repayment Agreement

Between March and May 2018, as Managing General Partner of the Project JV, TSCE Vice President and Secretary Michael Benner sent a notice to TSCE requesting it make Default Loans in an aggregate total amount of $37,414,970 to cover the HNA Partners' missed installment payments (*id.* ¶¶ 87-88; NYSCEF 381; NYSCEF 384; NYSCEF 386; NYSCEF 388).

In March 2019, by agreement (the "March 2019 Agreement"), the HNA Partners repaid their outstanding balance on the Default Loans, with agreed-upon reduced interest, totaling $42,833,902.42 (NYSCEF 258). It is undisputed that, after making that payment, the HNA Partners had not reached their capital commitment ceiling of 105% under the LPA and original Development Budget, which was in effect in March 2019 (NYSCEF 797 ¶ 91; *see also* NYSCEF 256 § 3.02 [a]). On the other hand, the January 2018 follow-up notice indicated that, if HNA Partners met their obligations under the original schedule, they would have been considered fully funded with "zero equity contributions remaining" (*id.*; NYSCEF 348).

The March 2019 Agreement also provided that it would not "restore any rights of HNA [GP] or HNA [LP] that have been lost pursuant to Section 3.02(e) of the [LPA] as a result of the Outstanding Default Loans" (NYSCEF 797 ¶ 129). The March 2019 Agreement contains no reference to whether Major Decision consent rights under Article VI of the LPA were impacted by the default.

The Whittle Lease

From 2017 to 2019, TSCE worked to identify nearly 200 prospective tenants for the Project (NYSCEF 797 ¶ 135). In 2018, it saw the Whittle School as a potential tenant, and communicated it was one of two "top" prospects, the other being National Grid, to the HNA Partners in December of that year (*id.* ¶¶ 137-38). Christopher Whittle, principal of the Whittle School, had been enjoined from operating a school in New York until November 2018 (NYSCEF 654 ¶ 71). The Whittle Lease was executed on or around January 31, 2020 (NYSCEF 797 ¶ 155). TSCE informed the HNA Partners on February 3, 2020 that it had been executed (*id.* ¶ 156). TSCE's affiliates received development fees under agreements in connection with the Whittle Lease, and were due to receive additional leasing commissions (NYSCEF 654 ¶¶ 33, 37).

The Whittle School never took possession of the premises and defaulted on their obligations, resulting in a termination of the Lease (*id.* ¶¶ 76-78). Afterward, TSCE drew down a $43 million letter of credit posted by the Whittle School (*id.* ¶ 79). St. Francis College eventually leased a portion of the space at a rate "[s]ignificantly less" than would have been obtained under the Whittle Lease, and the remainder of the premises remained vacant at the time the motions were filed (*id.* ¶¶ 81-82). TSCE did not pursue any other claims against the Whittle School (*id.* ¶ 83).

TSCE Changes the Business Plan and Development Budget

On December 9, 2019, TSCE was readying the space for the Whittle School. In connection with that process, TSCE requested $10,039,733 to be paid by the HNA Partners by December 17, 2019 (NYSCEF 393; NYSCEF 797 ¶ 95). The Notice expressly identified that the "equity [wa]s required by the Project to fund construction and carry costs in January 2020 . . . as it pursues the potential Whittle Lease, potential office leasing and refinancing on a parallel track" (NYSCEF 393). It is undisputed that the HNA Partners did not pay that amount on or before December 17, 2019, and that TSCE issued a default notice for the failure to fund (NYSCEF 797 ¶ 100). Again, on January 7, 2020, Benner requested TSCE to make a default loan to cover the HNA Partners' end (NYSCEF 409).

On January 22, 2020, TSCE sent the HNA Partners a new Business Plan (the "New Business Plan") and new Development Budget (the "New Development Budget") (NYSCEF 797 ¶¶ 44-47; NYSCEF 296). TSCE did not seek or obtain the HNA Partners consent, although both actions constituted Major Decisions under the LPA (NYSCEF 797 ¶¶ 103-08; NYSCEF 256 § 6.01[e][ii]; [vi]).

Concurrently with sending the New Business Plan and New Development Budget, on January 22, 2020, TSCE requested $6,760,267 from the HNA Partners (NYSCEF 296; NYSCEF 797 ¶¶ 106). TSCE subsequently indicated it would extend the deadline for HNA Partners to send any outstanding funding to February 7, 2020 (NYSCEF 797 ¶ 110). It is undisputed that HNA did not pay these amounts (*id.* ¶ 111). On December 22, 2020, TSCE again requested $8,046,556 from the HNA Partners, to be paid by December 31, 2020, which again was not paid by the deadline (*id.* ¶¶ 113-14). On January 4, 2021, TSCE issued a default notice, and the HNA Partners did not pay the amount given (*id.* ¶¶ 114-15).

Procedural History

The HNA Partners commenced this action in March 2020 (NYSCEF 1-2). TSCE filed an Answer with Counterclaims on January 19, 2021, adding HNA Guarantor as a named party (NYSCEF 25). The Court dismissed with prejudice the fiduciary duty and conversion claims brought by the HNA Partners (NYSCEF 20), leaving only the First Cause of Action for breach of contract, and denied HNA's motions to dismiss TSCE's three counterclaims (NYSCEF 59). Thus, the only remaining claims are the HNA Partners' claim with respect to TSCE's alleged breaches of contract (asserting that TSCE took Major Decisions without HNA's consent in breach of Article 6.01(e) of the LPA) (NYSCEF 2 ¶¶ 53-167), TSCE's First Counterclaim for breach of contract against the HNA Partners (for failing to make Mandatory Capital Contributions) and HNA Guarantor (for breach of the guaranty with respect to the Guaranteed Obligations, which included the HNA Partners' Mandatory Capital Contributions), and TSCE's Second (costs and expenses related to the LPA claims) and Third Counterclaims (costs and expenses related to the Guaranty), including attorneys' fees (NYSCEF 25 ¶¶ 173-190).

On June 10 and 11, 2024, after the conclusion of discovery, the parties filed competing motions for summary judgment (NYSCEF 248; NYSCEF 507). The Court heard oral argument on January 28, 2025 (NYSCEF 893, 894).[1]

[1] The Court also held a hearing on TSCE's proposed order to show cause with a request for temporary restraining order on Motion Sequence 10, in which TSCE sought an order of attachment, on February 3, 2025 (the "TRO Hearing") (NYSCEF 895 [hereinafter "TRO Hearing Tr."]). At the TRO Hearing, the Court requested further letters addressing issues related to the guaranties (TRO Hearing Tr. at 40:19-41:9, 42:15-43:17), which the parties obliged (NYSCEF 892, 896-98). The order of attachment was denied (NYSCEF 918).

Discussion

A motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212 [b]). The moving party must make a prima facie showing that they are entitled to a judgment as a matter of law (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]). "If the moving party fails to meet this initial burden, summary judgment must be denied 'regardless of the sufficiency of the opposing papers'" (*id.* [citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). However, if the moving party makes this showing, the burden shifts to the opposing party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]). Finally, in determining a moving party's entitlement to summary judgment, the Court views the facts "'in the light most favorable to the non-moving party'" (*Vega*, 18 NY3d at 503 [citing *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]]).

The claims in this case arise under two agreements: (a) the LPA and (b) the Guaranty.

A. The LPA

"Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language" (*Eagle Indus., Inc. v DeVilbiss Health Care, Inc.*, 702

A2d 1228, 1232 [Del 1997]).[2] "When there is uncertainty in the meaning and application of the terms of the contract, [Delaware courts] will consider testimony pertaining to antecedent agreements, communications and other factors which bear on the proper interpretation of the contract" (*Pellaton v Bank of New York*, 592 A2d 473, 478 [Del 1991]). "However, if the instrument is clear and unambiguous on its face, neither [the Delaware Supreme] Court nor the [Delaware] trial court[s] may consider parol evidence 'to interpret it or search for the parties' intent[ions]'" (*id.* [citing *Hibbert v Hollywood Park, Inc.*, 457 A2d 339, 343 [Del 1983]] [fourth alteration in original]).

1. The "Notwithstanding" Clauses

As presaged in the opening paragraph of this decision, the threshold interpretative issue presented in this case arises from the use of multiple "notwithstanding" clauses throughout the LPA. Although there may be other potential conflicts created by the many references to "notwithstanding anything to the contrary" elsewhere in the LPA, the only two that are raised by the instant dispute are those contained in Sections 3.02(e) and 6.01(e), each of which reference "approval" or "consent" rights and each of which purports to apply "notwithstanding" other provisions.

There is, to be sure, a tension between the two provisions and thus some uncertainty as to which controls. On the one hand, Section 6.01(e) broadly prohibits TSCE as Managing General Partner from taking any Major Decision without HNA GP's "prior written consent." Most importantly for present purposes, the section provides that its prohibition – plainly a material protection for the HNA Partners as the principal source of funding for the project – applies

[2] The parties agree the LPA is governed by Delaware law (*see* NYSCEF 256, § 12.10).

"[n]othwithstanding anything to the contrary contained in this Agreement," a phrase that undoubtedly includes Section 3.02(e). HNA thus argues that HNA GP's Major Decision consent rights are inviolable.

On the other hand, Section 3.02(e) provides, among many other things, that in the event of an uncured failure to make a Mandatory Capital Contribution the Non-Funding Partner (here, HNA GP) "shall permanently lose all of its rights (if any) to (i) vote on or approve any matters that would otherwise require its approval pursuant to this Agreement…." The preamble to Section 3.02 provides that its provisions apply "notwithstanding anything herein to the contrary," which TSCE argues includes (and thus supersedes) any approval/consent rights conferred by Section 6.01(e).

A trial is not necessary to resolve the parties' conflicting legal positions with respect to these provisions. Using recognized tools of construction, the Court concludes that HNA GP's consent rights under Section 6.01(e) are not subject to diminution under Section 3.02(e). Moreover, even if the Court were to conclude that there is some ambiguity as to that question, there would still be no need for a trial because the purported extrinsic evidence offered by TSCE is not at all helpful in resolving such ambiguity. The Court would still be left with the task of discerning which party's reading of the text is the more reasonable, which is a question of law not a question of fact. And under that analysis, HNA's reading would prevail.

(i) Applying recognized tools of construction, HNA GP did not forfeit its Major Decision consent rights.

"'Where there is an inconsistency between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provisions'" (*Sonitrol Holding Co. v Marceau Investissements*, 607 A2d 1177, 1184 [Del 1992] [quoting *Stasch v Underwater*

Works, Inc., 158 A2d 809, 812 [Del Super Ct 1960]]). Additionally, "unequivocal language controls over qualified language" (*Katell*, 1993 WL 205033, at *4).

A contractual provision beginning with the phrase "[n]otwithstanding anything to the contrary contained in this Agreement" "provides that it is paramount to all other provisions in the" contract, including (for example) a separate provision providing its effect "[n]otwithstanding any of the foregoing" (*see Katell v Morgan Stanley Grp., Inc.*, 1993 WL 205033, at *3 [Del Ch Ct 1993]). Indeed, "'the use of such a "notwithstanding" clause clearly signals the drafter's intention that the provisions of the "notwithstanding" section override conflicting provisions of any other section'" (*In re Estate of Crist*, 863 A2d 255, 258 [Del Ch Ct 2004] [quoting *Cisneros v Alpine Ridge Grp.*, 508 US 10, 18 [1993] [interpreting the clause "[n]otwithstanding any other provisions of this Contract . . . ."]]). Together, these principles of construction favor the primacy of Section 6.01(e) over the more indefinite (or at the very least less precise) language contained in Section 3.02(e) – "[n]otwithstanding anything *herein* to the contrary" – which could be limited to language within other provisions of Article III of the LPA rather than the entirety of the LPA (*see* Black's Law Dictionary [12th ed. 2024], definition of "herein" ["In this thing (such as a document, section, or paragraph) . . . . This term is inherently ambiguous."].

The survival of HNA's rights under Section 6.01(e) is further supported by the different language used in the two provisions. Section 3.02(e) provides for the "loss" of "rights (if any)" to "vote on or approve any matters that would otherwise require its approval pursuant to this Agreement." The consent rights set forth in Section 6.01(e) use none of those words. Instead, it operates as a limitation on the power of the Managing General Partner, which is required to obtain "prior written consent" rather than approval. Further, the fact that Section 3.02(e) refers

to "rights (if any)" suggests an uneasy fit with an intention to obliterate the expressly defined consent rights contained in Section 6.02(e).

Next, the absence in Section 6.01(e) of any cross-reference to Section 3.02(e) is revealing. By contrast, Section 6.08(c), which contains the same broad "notwithstanding anything to the contrary contained in this Agreement" language as Section 6.01(e), includes an express proviso "that *so long as the HNA Partners have not lost this right under Section 3.02(e) above*, the TSCE Parties shall cause at least one such director to be a person selected by the HNA Partners" [emphasis added]. Clearly, the parties knew how to address a situation in which Section 3.02(e)'s narrower "notwithstanding" clause would trump a broader provision such as that contained in 6.01(e) and 6.08(c). Their decision not to do so in Section 6.01(e) – which covers some of the most important decisions described in the LPA – further supports that it was the parties' intention that HNA's Major Decision consent rights are not subject to permanent forfeiture under Section 3.02(e). The fact that Section 6.01(e) itself contains a reference to Section 6.08(c) makes the contrast all the more stark. In the absence of a clause in Section 6.01(e) making the HNA GP's Major Decision consent rights "subject to Section 3.02(e)," "[i]t is not the court's role to rewrite the contract between sophisticated market participants" (*Wal-Mart Stores, Inc. v AIG Life Ins. Co.*, 872 A2d 611, 625 [Del Ch Ct 2005], *aff'd in part, rev'd in part on other grounds*, 901 A2d 106 [Del 2006]).[3]

[3] Sections 9.03 ("Right of First Offer") and 9.09(b) ("Investment by TSCE Parties") of the LPA also expressly reference that the rights they describe apply "so long as none of the HNA Partners has permanently and irrevocably lost its rights under Section 3.02(e)," and Section 9.11 ("Investment by HNA Partners") contains a similar cross-reference to Section 3.02(e) to address the possibility that TSCE might be the party whose rights were lost for failing to make a Mandatory Capital Contribution. Although those sections do not contain separate "notwithstanding" clauses, and thus are less probative than Section 6.08(c), they nevertheless

Next, TSCE's reading would eviscerate the "notwithstanding" clause in Section 6.01(e) by subjugating it entirely to Section 3.02(e), leaving it without any force or effect going forward. By contrast, HNA's reading preserves the viability of Section 3.02(e), which would continue to apply to other approval rights throughout the LPA. Delaware law recognizes "the cardinal rule of contract construction that, where possible, a court should give effect to all contract provisions" (*Sonitrol Holding*, 607 A2d at 1184 [citing *E.I. du Pont de Nemours and Co., Inc. v Shell Oil Co.*, 498 A2d 1108, 1113 [Del 1985]]). HNA's reading is faithful to that principle, while TSCE's is not.

Finally, HNA's reading of the contract is consistent with overall structure of the LPA and the economics of the project. Delaware courts "'look at the transaction from a distance' to ensure that neither side's arguments are 'in direct conflict with the spirit of the overall transaction'" (*Schneider Nat'l Carriers, Inc. v Kuntz*, 2018 WL 6705618, at *2 [Del Ch 2018] [citing *Heartland Payment Sys., LLC v. inTeam Assocs., LLC*, 171 A3d 544, 557 [Del 2017]]). Here, it is undisputed that the HNA Partners contributed virtually all of the equity investment in the project but had no substantive role in management *other than* the Major Decisions provision, which role is spelled out in great deal and with a broad "notwithstanding" clause to boot. Yet TSCE's reading would require a belief that the HNA Partners agreed to *permanently* forfeit that core consent right in the event of a default on a single Mandatory Capital Call under a subpart of a complex provision many pages earlier in the agreement. While it is conceivable that such a super-majority investor would agree to such a punishing default provision in favor of a manager that had little equity stake, it is reasonable to suspect that such a forfeiture, if truly intended,

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show that the parties were not shy about including cross-references to Section 3.02(e)'s forfeiture provisions when they wanted to avoid doubt as to their application.

would have been spelled out clearly in the text rather than lost amidst the fog of dueling "notwithstanding" provisions.

Accordingly, the Court concludes the "notwithstanding" clauses of Section 6.01(e) and Section 3.02(e) do not contain an ambiguity warranting trial. Harmonizing those clauses using settled principles of contract construction, the Court finds that HNA retained its Major Decision consent rights despite failing to make Mandatory Capital Contributions.

(ii) The proffered extrinsic evidence is equivocal.

Although the foregoing is sufficient to warrant the conclusion, based on the text and structure of the LPA, that HNA did not forfeit its Section 6.01(e) Major Decision consent rights, the Court has considered the extrinsic evidence proffered by TSCE and finds that it is equivocal at best and not sufficient to warrant a trial. TSCE relies principally on a term sheet (*see* NYSCEF 271, at 5-6) in which the Major Decision provision did not include a "notwithstanding" provision as well as post-default internal HNA Partners communications expressing concern that failure to make the Mandatory Capital Contribution would result in a loss of "all" rights (NYSCEF 326; NYSCEF 361; NYSCEF 362).

The Court finds that evidence unconvincing. The fact that the parties *added* a "notwithstanding" provision in the actual agreement after agreeing in principle on the terms of the LPA, if anything, supports the HNA Partners' position that it was significant to do so. And the fact that lay witnesses in China, reacting to threats from TSCE, expressed concern about dire consequences years after the drafting of the LPA does not shed light on the intention of the parties at the time the LPA was signed.

In sum, HNA GP retained its Major Decision consent rights set forth in Section 6.01(e) of the LPA. Accordingly, the Court turns to the dueling claims for breach of contract by both the HNA Partners and TSCE.

2. The Parties' Alleged Breaches

To prove a breach of contract, a party must demonstrate (1) the existence of the contract; (2) the breach of an obligation under the contract, and (3) the damage resulting to the party (*Kuroda v SPJS Holdings, L.L.C.*, 971 A2d 872, 883 [Del Ch Ct 2009]). "A party is excused from performance under a contract if the other party is in material breach thereof" (*BioLife Solutions, Inc. v Endocare, Inc.*, 838 A2d 268, 278 [Del Ch Ct 2003]). On the other hand, the general rule that "[s]ubstantial failure to live up to the material terms of a contract nullifies that contract" cannot be applied in a situation where the nonbreaching party "on the one hand[] preserve[s] or accept[s] the benefits of a contract, while on the other hand[] assert[s] that contract is void and unenforceable" (*DeMarie v Neff*, 2005 WL 89403, at *4-5 [Del Ch Ct 2005]).

Having concluded that the HNA Partners did not forfeit their Major Decision consent rights guaranteed under the LPA, the Court finds that TSCE breached the contract each time it took a Major Decision without HNA's prior written consent. These breaches include the following: (a) the New Business Plan adopted unilaterally by TSCE; (b) the New Development Budget adopted unilaterally by TSCE; (c) the Whittle School Lease transaction; (d) the debt refinancing with Bank OZK; (e) Capital Contribution Calls beginning in December 2019; (f) the unilateral modification of the Development Agreement with Tishman Speyer Development, L.L.C. (the "Developer") and 422 Property Owner, L.L.C. (the "Owner"); and (g) Fundamental Decisions taken unilaterally to waive purported breaches by TSCE under the HNA REIT Agreement (NYSCEF 2 ¶¶ 63-167).

Each of these individual actions constituted a breach because they were Major Decisions undertaken without the required prior written consent from HNA. Moreover, the Court's ruling that the Major Decisions provision (Section 6.01(e)) takes precedence over Section 3.02(e) forecloses TSCE's contention that its breaches of the former are excused by the HNA Partners' breaches of the latter.

i. TSCE's breaches were not excused by the HNA Partners' breaches.

It is undisputed that the HNA Partners breached their obligations when they were in default, beginning at the latest in February 2018, and failed to cure within the requisite period.[4] However, the breach was not material. A "material breach is a failure to do something . . . so fundamental to a contract that the failure to perform [the] obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform" (*Prime Victor Int'l Ltd. v Simulacra Corp.*, 682 F Supp 3d 428, 447 [D Del 2023] [internal quotation marks omitted] [quoting *Tektree, LLC v Borla Performance Indus., Inc.*, 2013 WL 5230705, at *4 [Del Com Pl Ct 2013]).

The LPA provided both the procedure and the remedies for what happened in an event of a failure to honor capital calls—procedures which TSCE acknowledges following in the wake of the breaches (instead of, for example, filing an action for breach of contract). The breach did not defeat the purpose of the LPA or render TSCE's performance impossible. Indeed, throughout this litigation, TSCE has insisted on its purported right to continue conducting business (albeit unilaterally with respect to taking Major Decisions). The Court has concluded that TSCE was

[4] The March 2019 Agreement, however, forecloses any argument that those prior breaches survive to the present. And, given the Major Decision consent rights were not lost, the HNA Partners do not dispute they lost other approval rights contained in the LPA.

incorrect with respect to its interpretation, but in any event, TSCE cannot claim that a material breach excused their performance and, at the same time, claim it had a right to continue (and did continue) taking all actions in furtherance of the partnership. Accordingly, TSCE breached the LPA by undertaking Major Decisions without HNA GP's prior written consent, and those breaches were not excused by the HNA Partners' failures to make capital calls.

ii. The HNA Partners' funding of capital contributions after TSCE began taking unilateral Major Decisions was excused.

On the other hand, TSCE's breaches – taking unilateral Major Decisions without HNA GP's prior written consent – were, by definition, material. The purpose of a Major Decisions provision is to identify material decisions requiring HNA GP's consent. In this case, breaches of the Major Decisions provision undermined core protections afforded to HNA Partners to oversee (and have a say in) material decisions affecting its investment in the project. Without consent, TSCE created a substantially different Business Plan than the parties agreed upon, with an accompanying Development Budget. That was a material breach that excused HNA Partners' from the requirement to pay Mandatory Capital Contributions to fund such Major Decisions. To the extent TSCE alleges breaches of the LPA after it took unilateral Major Decisions without HNA Partners' prior written consent, TSCE's First Counterclaim for breach of contract is **dismissed**.

3. The Exculpation Clause

Having concluded that Section 6.01(e) prevails over Section 3.02(e), and that TSCE therefore breached the LPA by making Major Decisions without HNA's prior written consent, there remains the question of remedy. The Exculpation Clause in the LPA provides that the partners would not be liable to each other for losses "except to the extent [the Partner's action]

constitut[es] a Bad Act" as determined in a final court judgment (NYSCEF 256, § 6.02). A "Bad Act" requires a showing of "fraud, gross negligence, or willful misconduct" (*id.*, Article II (Certain Definitions), at 4).

Delaware's Revised Uniform Limited Partnership Act ("DRULPA") provides that

> To the extent that, at law or in equity, a partner or other person has duties . . . to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement, the partner's or other person's duties may be expanded or restricted or eliminated by provisions in the partnership agreement; provided that the partnership agreement may not eliminate the implied contractual covenant of good faith and fair dealing.

(Del Code Ann TI 6 § 17-1101[d]).

"The [DRULPA] gives 'maximum effect to the principle of freedom of contract,'" which, under Section 17-1101(d), includes eliminating fiduciary duties and "displac[ing] them with contractual terms" (*Dieckman v Regency GP LP*, 155 A3d 358, 366 [Del 2017]). Thus, Delaware Courts have enforced exculpation clauses which limit liability for partners to cases of fraud, willful misconduct, gross negligence (*see Dieckman v Regency GP LP*, 2021 WL 537325, at *36-43 [Del Ch Ct 2021]; *see also Cincinnati Bell Cellular Sys. v Ameritech Mobile Phone Serv. of Cincinnati, Inc.*, 1996 WL 506906, at *18-20 [Del Ch Ct 1996]).

Although the Court has concluded, *supra*, that TSCE's was incorrect in its interpretation of certain provisions of the LPA to permit it to make Major Decisions without HNA's consent, there is no evidence that TSCE's interpretation, by itself, involved fraud, gross negligence, or willful misconduct. TSCE had non-frivolous arguments for why it read the LPA in the way that it did, given the dueling "notwithstanding" provisions in the contract, to which all parties agreed. Accordingly, to the extent HNA's claims are based solely on there being a Major Decision

without HNA's consent, and do not *also* submit sufficient evidence to show that the improperly taken Major Decision involved "fraud, gross negligence, or willful misconduct," such a claim cannot be pursued for damages in light of the Exculpation Clause.

Based on the summary judgment record, HNA has provided evidence sufficient to withstand summary judgment on Bad Acts (and on that, only with respect to gross negligence) only with respect to TSCE's decision to pursue and sign a lease with the Whittle School. For example, there is evidence in the record that TSCE was or should have been aware that the Whittle School principal had a checkered history, including a judgment restraining the principal from operating a school until November 2018 (NYSCEF 654 ¶¶ 69-71). Accordingly, with respect to Major Decisions that both breached Section 6.01(e) *and* involved or depended upon the Whittle School lease transaction, HNA may pursue a claim for its "losses," if any, notwithstanding the Exculpation Clause. In opposition, TSCE is free to present evidence that its pursuit of the Whittle School was not a Bad Act (including that HNA personnel expressed support for the Whittle School decision) or that some of the Major Decisions it unilaterally undertook with respect to the Whittle School transaction would have been undertaken regardless of whether it pursued the Whittle School or another tenant.

B. The Guaranty

A party seeking to enforce a guaranty "must prove the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty" (*Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]). The guarantor's liability "accrues only after default on the part of the principal obligor" (*Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 30 AD3d 1, 10 [1st Dept 2006] [citing *Brewster Tr. Mix Corp. v McLean*, 169 AD2d 1036, 1037 [1st Dept 1991]]). It is true that "[l]iability of [a] guarantor may be broader than and exceed the

scope of that of the principal where the guarantee, which is a separate undertaking, is, by its unqualified language, enforceable against the guarantor" (*Raven Elevator Corp. v Finkelstein*, 223 AD2d 378, 378 [1st Dept 1996]). A guarantor "can be liable, despite the principal's escape from liability, if the guarantee contains language through which the guarantor expressly waives a right or defense" (*County of Greene v Chalifoux*, 127 AD3d 1316, 1318 [3d Dept 2015]).

For the reasons discussed in connection with the claims asserted by and against HNA Partners (the primary obligor), TSCE cannot prove the existence of the underlying debt or that HNA Guarantor's arguments constitute a waived defense. TSCE's reliance on *Cooperative Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro* (25 NY3d 485 [2015] ["*Rabobank*"]) to suggest a different result is misplaced.

In *Rabobank*, the guarantor sought "to avoid liability under an 'unconditional and absolute' guaranty in favor of plaintiff, on grounds that the default judgment against him, which constitutes the subject underlying debt, was obtained by plaintiff's collusion" (*id*. at 487). The Court of Appeals held that such a "defense" (sounding in fraud) was barred by the express language of the guaranty which broadly waived such defenses (*id*.). The court did not conclude, as TSCE insinuates, that guarantors who have waived their defenses can never challenge the validity of the underlying debt. Rather, it tethered the result to the particular facts (*id.* at 492 ["[O]n the facts of this case and the record presented, [defendant's] allegations of collusion cannot overcome his 'absolute and unconditional' liability."]), and concluded that the guarantor's challenge to the validity of the underlying debt in that case merely restated the claims of fraud and collusion (*id.* at 495).

Here, the correct interpretation of the LPA conclusively determines that the primary obligor did not have an obligation to make certain Mandatory Capital Contributions for which

the HNA Guarantor is being sued. This interpretation is a critical threshold issue to determining the validity of the underlying debt and did not require the HNA Guarantor (or the HNA Partners) to raise a waived defense of fraud or misconduct analogous to that raised by the guarantor in *Rabobank*. Moreover, the guaranteed obligations in this case were, by the express terms of the Guaranty, "subject to and in accordance with the terms of the [LPA]" (NYSCEF 257 ¶ 2).

Accordingly, HNA Guarantor is entitled to summary judgment on TSCE's First (breach of contract) and Third (attorneys' fees under the Guaranty) Counterclaims, and the Court **dismisses** those causes of action in full.

C. Attorneys' Fees

To the extent the parties seek to recover their attorneys' fees, the Court denies their motions without prejudice to moving for such relief at the conclusion of the case.

Conclusion

Accordingly, it is

ORDERED that HNA's motion for summary judgment is **granted in part** with respect to (1) the HNA Partners' First Cause of Action (breach of contract), insofar as the Court finds that TSCE breached the LPA by making Major Decisions without HNA GP's consent (thus excusing the HNA Partners' failure to make capital contributions to fund such Major Decisions), with damages (if any) and remedy deferred to trial, and (2) dismissing Defendant's First (breach of contract) and Third (attorneys' fees with respect to the Guaranty) Counterclaims. HNA's motion is otherwise **denied** (including with respect to attorneys' fees, which is **denied without prejudice**). A trial will proceed to determine (1) whether TSCE's conduct involving or depending upon the Whittle Lease transaction constituted a Bad Act, and, if so, what damages (if

any) the HNA Partners suffered; and (2) what other remedies, if any, are available to the HNA Partners for TSCE's breaches of the LPA; it is further

ORDERED that TSCE's motion for summary judgment is **granted** with respect to its Second Defense to the HNA Partners' First Cause of Action insofar as TSCE cannot under the terms of the LPA be held liable for damages for breach of the LPA other than (potentially) with respect to conduct relating to the Whittle School Lease transaction (as to which a question of fact as to gross negligence is presented that must be resolved at trial), and otherwise TSCE's motion is **denied**, and it is further

ORDERED that the parties appear for an initial pre-trial conference **on April 28, 2025, at 2:30 p.m.**

This constitutes the decision and order of the Court.

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3/26/2025
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**