APL-2017-0005

Court of Appeals

State of New York

ROBERT CONGEL, BRUCE A. KENAN and JAMES A. TUOZZOLO, as the Executive Committee of POUGHKEEPSIE GALLERIA COMPANY, a general partnership, on behalf of the POUGHKEEPSIE GALLERIA COMPANY,

Plaintiffs-Respondents,

-against-

MARC A. MALFITANO,

Defendant-Appellant.

BRIEF OF *AMICI CURIAE* THE REAL ESTATE ROUNDTABLE, BUILDING OWNERS AND MANAGERS ASSOCIATION, CRE FINANCE COUNCIL, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS, NATIONAL MULTIFAMILY HOUSING COUNCIL, NEW YORK STATE ASSOCIATION OF REALTORS and THE REAL ESTATE BOARD OF NEW YORK, IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. § 500.1(f), proposed *amici* The Real Estate Roundtable, Building Owners and Managers Association, CRE Finance Council, National Association of Home Builders, National Association of Real Estate Investment Trusts, National Multifamily Housing Council, New York State Association of Realtors and The Real Estate Board of New York, hereby state that they have no corporate parents, subsidiaries or affiliates.

Proposed amicus International Council of Shopping Centers states that it has the following corporate subsidiaries and affiliates, none of which is publicly held:

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ICSC Foundation Canada
International Council of Shopping Centers/Europe LLC
ICSC Mexico Y Centro America, S.C.
ICSC Asia-Pacific, LLC
International Council of Shopping Centers, Inc. Beijing Representative Office
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

INTEREST OF AMICUS CURIAE 2

ARGUMENT 7

I. PARTNERSHIP AGREEMENTS SHOULD BE ENFORCED IN ACCORDANCE WITH THEIR EXPRESS TERMS 8

A. Section 62 of the Partnership Law Yields To Comprehensive Dissolution Provisions In An Agreement 10

B. Operating and Managing Specific Property Constitutes a Particular Undertaking 15

C. Policy Considerations Disfavor Allowing a Minority Partner to Dissolve a Partnership Without Consequence In Contravention of the Partnership Agreement 18

II. APPLICATION OF MARKETABILITY AND MINORITY DISCOUNTS IS APPROPRIATE WHEN VALUING THE INTEREST OF A PARTNER WHO WRONGFULLY WITHDRAWS 22

III. THE LOWER COURTS PROPERLY EXCLUDED PGC'S GOODWILL IN VALUING APPELLANT'S INTEREST IN RECOGNITION OF THE FACT THAT SHOPPING CENTERS CAN HAVE GOODWILL 28

CONCLUSION 32

NY 76670451

TABLE OF AUTHORITIES

Page(s)

Cases

Anastos v. Sable,
443 Mass. 146 (2004) 24

BPR Grp. Ltd. P'ship v. Bendetson,
453 Mass. 853 (2009) 11

In re Century/ML Cable Venture.,
294 B.R. 9 (Bankr. S.D.N.Y. 2003) 13

In re Friedman v. Beway Realty Corp.,
87 N.Y.2d 161 (1995) 25

Gelman v. Buehler,
20 N.Y.3d 534 (2013) 15, 16

Giaimo v. Vitale,
101 A.D.3d 523 (1st Dept. 2012) 25

Haberle Crystal Springs Brewing Co. v. Clarke,
30 F.2d 219 (2d Cir. 1929), *rev'd on other grounds*, 280 U.S. 384 (1930) 28

Lanier v. Bowdoin,
282 N.Y. 32 (1939) 8, 21

MedImmune, LLC v. Bd. of Trustees of Univ. of Massachusetts,
223 Md. App. 777 (2015) 13

Metro. Nat. Bank v. St. Louis Dispatch Co.,
149 U.S. 436 (1893) 28

Murphy v. U.S. Dredging Corp.,
74 A.D.3d 815 (2d Dept. 2010) 25

Prudential Ins. Co. of Am. v. Hilton Hotels Corp.,
No. 95 CIV. 5575 (KMW), 1996 WL 340002 (S.D.N.Y. June 19, 1996) 13

Vick v. Albert,
47 A.D.3d 482 (1st Dept. 2008) 26

Statutes

N.Y. Partnership Law § 62 .... passim

N.Y. Partnership Law § 69 .... passim

Other Authorities

Crane and Bromberg on Partnership (1968) 8

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https://www.irs.gov/pub/irs-soi/soi-a-copa-id1612.pdf 7

James Edward Harris, *Valuation of Closely Held Partnerships and Corporations: Recent Developments Concerning Minority Interest and Lack of Marketability Discounts*, 42 Ark. L. Rev. 649 (1989) 24

Todd P. Siebeneck and Albert H. Yoon, *Gross Domestic Product by State* (Jan. 2017), *available at*
https://faq.bea.gov/scb/pdf/2017/01%20January/0117_gdp_by_state.pdf; https://esd.ny.gov/international/investny.html 7

William S. McKee, et al., Federal Taxation of Partnerships and Partners (Thomson Tax & Accounting et al. eds.,4th ed. 2007) 7

PRELIMINARY STATEMENT

Proposed *amici curiae* are a diverse consortium of nationally recognized organizations encompassing a broad range of the real estate industry, including home builders, realtors, commercial and residential owners, managers, developers, investors, lenders and brokers. All urge affirmance of the decision of the Appellate Division, Second Department, dated May 18, 2016, which unanimously found that the express terms of the Poughkeepsie Galleria Company's ("PGC") partnership agreement precluded a minority partner's unilateral dissolution of the partnership – and that the dissolution was, therefore, wrongful.

Amici submit this brief because the issues raised on this appeal have profound and far-reaching consequences in New York and across the country for all sectors of the real estate industry using the partnership structure to operate. *Amici* are deeply concerned about the consequences of reversal, which would undermine the primacy of the partnership agreement that is a hallmark of partnership law and would needlessly constrain the flexibility needed by partnerships to tailor their agreements to their particular needs. Moreover, if Appellant's argument is accepted and a minority partner could dissolve a partnership in contravention of both the terms of the partnership agreement and the clear intention of the partners, it could wreak havoc in the industry: partners will be unable to rely on their fellow partners to meet their continuing obligations to the

venture; lenders, investors and other third parties who rely on the integrity of the entity with which they contract will be wary to involve themselves in projects – particularly those involving numerous minority partners; and new and pending projects will likely be stalled or cancelled while all of the parties involved assess and/or re-evaluate their expectations. In short, allowing a minority partner to deviate from the express terms of the partnership agreement in his dealings with the partnership poses a significant threat to the stability and viability of real estate partnerships across the entire real estate industry throughout New York State – and the country.

Amici also seek to express their collective views that when, as here, the business continues following a partner's wrongful withdrawal, the valuation of his interest should take into account customary valuation discounts, including lack of control and lack of marketability discounts, in addition to the statutory exclusion of goodwill.

INTEREST OF *AMICUS CURIAE*

The Real Estate Roundtable (the "Roundtable") brings together leaders of the nation's top publicly-held and privately-owned real estate ownership, development, lending and management firms with the leaders of major national real estate trade associations to jointly address key national policy issues relating to real estate and the overall economy. By identifying, analyzing and coordinating

policy positions, the Roundtable's business and trade association leaders seek to ensure a cohesive industry voice is heard by government officials and the public about real estate and its important role in the global economy. Collectively, Roundtable members' portfolios contain over 12 billion square feet of office, retail and industrial properties valued at more than $1 trillion; over 1.5 million apartment units; and in excess of 2.5 million hotel rooms. Participating trade associations represent more than 1.5 million people involved in virtually every aspect of the real estate business.

Building Owners and Managers Association International ("BOMA") is a federation of 90 U.S. associations and 18 international affiliates. Founded in 1907, BOMA represents the owners and managers of all commercial property types, including nearly 10.5 billion square feet of U.S. office space that supports 1.7 million jobs and contributes $234.9 billion to the U.S. GDP. BOMA's mission is to advance a vibrant commercial real estate industry and it serves as a primary source of information on all aspects of building management and operations and industry trends.

CRE Finance Council (the "CREFC") is the trade association for the $3.8 trillion commercial real estate finance industry. More than 300 companies and 9,000 individuals are members of CREFC. Member firms include balance sheet and securitized lenders, loan and bond investors, private equity firms, servicers and

rating agencies, among others. CREFC members play a critical role in the financing of office buildings, industrial and warehouse properties, multifamily housing, retail facilities, hotels, and other types of commercial real estate that help form the backbone of the American economy.

International Council of Shopping Centers ("ICSC"), was founded in 1957 and is the global trade association of the shopping center industry. Its more than 70,000 members in over 100 countries include shopping center owners, developers, managers, investors, retailers, brokers, and others with an interest in the shopping center industry. Shopping centers are a significant job creator, driver of GDP, and critical revenue source for the communities they serve through the collection of sales taxes and the payment of property taxes. Shopping centers are also integral to the social fabric of their communities and provide support to local philanthropic and other community endeavors and events.

ICSC has 4,725 members in New York. At least 285 of these members are affiliated with entities incorporated as partnerships. ICSC members own 3,551 shopping centers in New York, employing over 774,140 people. New York shopping centers generate approximately $4.9 billion in sales tax revenue.

National Association of Home Builders ("NAHB") is a federation of more than 700 state and local associations, representing more than 140,000 members, of which over 2,000 operate in the State of New York. These members include home

builders and remodelers, and those working in closely related specialty areas, including, but not limited to, sales and marketing, housing finance, manufacturing, and building materials. Each year, NAHB's members construct about 80% of the new homes built in the U.S. In short, NAHB serves as the voice of America's housing industry.

National Association of Real Estate Investment Trusts ("NAREIT®") is the worldwide representative voice for REITs, or Real Estate Investment Trusts, and publicly-traded real estate companies with an interest in U.S. real estate and capital markets. NAREIT® represents a large and diverse industry. Its members are REITs and other businesses throughout the world that own, operate and finance income-producing real estate and those that service those businesses. REITs and REIT investment each play an important role in job creation and economic growth and U.S. REITs collectively own nearly $3 trillion of real estate assets.

National Multifamily Housing Council ("NMHC") is a national association representing the interests of the leaders of the apartment industry. Its members are the principal officers of firms engaged in all aspects of the rental apartment industry, including ownership, development, management and financing.

New York State Association of REALTORS® ("NYSAR") is a not-for-profit trade organization representing more than 53,000 of New York State's real

estate professionals, who are involved in a wide range of the real estate business, including brokerage, appraising, management and counseling.

The Real Estate Board of New York, Inc. ("REBNY") is a not-for-profit trade association whose more than 17,000 members participate in New York State's real estate industry as commercial and residential property owners and builders, as well as other entities with an interest in New York real estate, including developers, attorneys, financial service companies, utilities, managers, architects, designers, appraisers and brokers. As a recognized representative of one of the State's largest industries, with unique knowledge and perspective, REBNY regularly participates in legislative and judicial proceedings that are of importance to New York's real estate industry. REBNY frequently appears before public agencies to present the views of the industry to public officials and the public, and, as here, participates as a party or an *amicus* in litigation involving matters of statewide and public importance.

ARGUMENT

The partnership model has been and remains a favored form for holding and operating real property, principally because of certain tax advantages partnerships offer, including: the avoidance of taxes at the entity level; the partner's ability to include his share of partnership debt in his basis; greater flexibility in allocating income and loss; and no restrictions on the number or type of partners that can participate. William S. McKee, et al., Federal Taxation of Partnerships and Partners (Thomson Tax & Accounting et al. eds.,4th ed. 2007). Based on the most recent pertinent data published by the Internal Revenue Service's Statistics of Income Division, in 2014, real estate partnerships (including the rental and leasing sectors) comprised more than one-half of all partnerships and more than one-quarter of all partners. IRS, *Statistics of Income Bulletin* (Fall 2016) at 1, *available at* https://www.irs.gov/pub/irs-soi/soi-a-copa-id1612.pdf. Given that New York State is a major center of commerce, with the nations' third largest economy (*see* Todd P. Siebeneck and Albert H. Yoon, *Gross Domestic Product by State* (Jan. 2017), *available at* https://faq.bea.gov/scb/pdf/2017/01%20January/0117_gdp_by_state.pdf; https://esd.ny.gov/international/investny.html), the decision in this case could have a profound impact on a significant number of partnerships that are located in the State. Moreover, given this Court's and New York's continuing role as leaders in

the area of commerce, this Court's decision will likely have a profound impact on partnership jurisprudence in other states.

I. PARTNERSHIP AGREEMENTS SHOULD BE ENFORCED IN ACCORDANCE WITH THEIR EXPRESS TERMS

The Court should affirm the finding that Appellant's dissolution was wrongful so as to give effect to the comprehensive and unambiguous terms of the PGC partnership agreement. If partnerships are to operate effectively, partners must be able to rely on the terms of their governing agreements and they must be able to hold their fellow partners to their contractual promises all partnership issues, such as the delegation of management responsibilities, restrictions on transferability, capital calls and even dissolution. Indeed, the freedom and flexibility to contract is central to the partnership model:

> (t)he agreement, whatever its form, is the heart of the partnership. One of the salient characteristics of partnership law is the extent to which partners may write their own ticket. Relations among them are governed by common law and statute, but almost invariably can be overridden by the parties themselves. As one court has long put it, the agreement is the law of the partnership.

Crane and Bromberg on Partnership § 5, at 43 (1968). *See also Lanier v. Bowdoin*, 282 N.Y. 32, 38 (1939) ("If complete, as between the partners, the agreement so made controls").

Partnership agreements throughout the real estate industry contain provisions that address dissolution in the manner that best suits the particular

business, often by limiting the ability to dissolve the entity to delineated circumstances. These provisions serve to ensure and protect the long-term stability of the partnership, which in the real estate sector, often involve large-scale projects for the development and management of property. Often, these projects are expected to operate for decades or more. These partnerships often involve substantial financing with long-term obligations by the partnership and other long-term commitments with third parties, such as tenant leases, debt service, capital expenditure plans, and contracts ranging from facilities management to building security. Stability of the projects is vital, as is protecting the partnerships from unilateral dissolution so as to be able to fulfill their stated purpose and meet their obligations.

The PGC partnership provides a typical example. The partnership was formed more than 30 years ago to acquire, manage and operate a portion of the Poughkeepsie Galleria, a 1.2 million square-foot shopping center located in Dutchess County. B 24. Financing for the project extended out 25 years. B 562. This project (like many involving the development or management of real property) is designed to continue long-term by its very nature and magnitude. It is no surprise, therefore, that the partnership agreement took great pains to ensure the concern's continuity by limiting the ability to dissolve the partnership to two specified circumstances. Yet the arguments advanced by Appellant would make

those efforts a nullity, by reading the agreement's specific dissolution provisions as an expansion of, rather than a limitation on, the dissolution events provided in the default rules of the Partnership Law. This unreasonable and unintended result should not be sanctioned.

A. Section 62 of the Partnership Law Yields To Comprehensive Dissolution Provisions In An Agreement

In his reply brief (but not his opening brief) Appellant finally acknowledges that Partnership Law § 62 (McKinney's 2017) is merely a default rule that partners can contract around. App. Reply Br. at 6. Yet, while paying lip service to partners' freedom to contract, Appellant nevertheless asks this Court to adopt a rule that subjects partnerships to a standard that unreasonably constrains partners' freedom to contract around those rules.

The PGC agreement deliberately and specifically defined the circumstances under which the partnership would dissolve and makes clear that the partnership was not intended to be terminable at the will or whim of a single partner. Instead, the agreement specifically provides that the partnership would continue "until it is terminated ***as hereinafter provided***." B 98, § 2.3 (emphasis added). Thereafter, the agreement sets forth those permissible means of dissolution:

> 12. <u>Dissolution of the Partnership.</u>
>
> 12.1 The Partnership shall dissolve upon the happening of any of the following events:

> (a) The election by the Partners to dissolve the Partnership; or
>
> (b) The happening of any event which makes it unlawful for the business of the Partnership to be carried on or for the Partners to carry it on in Partnership.

B 140, § 12. As written, the agreement plainly contemplates dissolution only in the two instances specified and leaves no room for other means of dissolution.

Notwithstanding the clear and undeniable terms of the PGC agreement limiting dissolution, Appellant claims that those terms are in addition to the Partnership Law's dissolution provisions, not instead of them. *See, e.g.*, Appellant's Reply Br. at 9. The basis for this audacious claim is that the agreement did not explicitly state that "withdrawal of a partner will not cause a dissolution" (*id.* at 7), or did not use phrases such as "exclusively" or "only" in the agreement. *Id.* at 8, 10. Appellant's insistence on the invocation of these terms or other "magic words" is nothing but an exaltation of form over substance that negates the plain protections that the parties specifically contracted for in the partnership agreement and ignores the clear expression of the parties' agreement.

BPR Grp. Ltd. P'ship v. Bendetson, 453 Mass. 853 (2009) is instructive. Quite like the PGC agreement, that partnership agreement provided that the partnership would continue until terminated "as hereinafter provided" in the agreement and thereafter identified four dissolution events. *Id.* at 856–57. In

determining whether the dissolution provisions of Massachusetts' version of the UPA still applied in the face of the dissolution provisions in the agreement, the Court recognized that:

> analysis under [the statutory provision] is inapposite. The UPA applies only 'when there is either no partnership agreement governing the partnership's affairs, the agreement is silent on a particular point, or the agreement contains provisions contrary to law.' Where an agreement addresses a particular issue, the terms of the agreement control, and the rights and obligations of the parties are determined by reference to principles of contract law. ***Thus, an agreement specifying the circumstances under which a partnership may be dissolved is not at will.***

Id. at 863–64 (internal citations omitted) (emphasis added). Because the agreement provided that it would continue until dissolved as provided in the agreement, and because none of the delineated dissolution events occurred, the Court found a wrongful dissolution. *Id.* at 864.

BPR cannot meaningfully be distinguished from the facts of this case and Appellant's attempt to do so is unavailing. App. Reply Br. at 10. The *BPR* agreement provides that the partnership shall continue and not be dissolved "except as hereinafter provided." 453 Mass. at 856. The PGC agreement frames the very same idea affirmatively: "the Partnership . . . shall continue until it is terminated as hereinafter provided." B. 98, § 2.3. Appellant's suggestion that the use of the term

"except" somehow changes the meaning and import of these two identical provisions is specious.[1]

Appellant's interpretation also cannot be reconciled with the agreement's specific adoption of § 62.3 as a permitted means of dissolution. *Compare* B 140, § 12.1(b) (providing for dissolution upon "any event which makes it unlawful for the business of the Partnership to be carried on or for the Partners to carry it on in Partnership") *with* NYPL § 62.3 (dissolution is caused "[b]y any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership."). Under Appellant's interpretation, there would be no need to specifically incorporate this provision into the partnership agreement, as it would apply in parallel to the agreement. That the partners did expressly include it underscores that the agreement serves – and was intended to serve – as the entire agreement on the issue of dissolution, with no room for the Partnership Law to expand on those terms.

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[1] The other cases cited by Appellant are fact-specific and do not compel a contrary result. For example, in *In re Century/ML Cable Venture*, the Bankruptcy Court found that the terms of the agreement unequivocally limited dissolution to the circumstances listed. 294 B.R. 9, 26 (Bankr. S.D.N.Y. 2003). *Prudential Ins. Co. of Am. v. Hilton Hotels Corp.*, No. 95 CIV. 5575 (KMW), 1996 WL 340002, at *3 (S.D.N.Y. June 19, 1996) addressed judicial dissolution, where the stated policy justifications for dissolution – to allow partners to sever business relationships deemed "intolerable" – are absent here, particularly given the express exit provisions contained in the PGC agreement. *Id.* at, *4. *MedImmune, LLC v. Bd. of Trustees of Univ. of Massachusetts*, 223 Md. App. 777 (2015), is an unreported decision not properly cited as precedential or persuasive authority. *See id.*, fn 1; Md. Rule 1-104. In any event, the facts of that case are inapposite, most notably because the agreement was devoid of a provision that linked the "term" of the agreement to the specified termination events, unlike the PGC agreement that specified that the partnership would continue until terminated in accordance with the agreement.

Nor does Appellant's attempt to re-write the partnership agreement to incorporate § 62.1(b) make sense in light of the detailed provisions in the agreement addressing the transferability of partnership interest. It would make no sense for the partnership to include provisions detailing the parameters of a permissible withdrawal from the business if a partner could simply dissolve the entity and be paid his share of the business.

Reading the entirety of the PGC agreement, it is plain that the partners committed to a long-lasting venture that could be terminated only under specific, limited circumstances. These provisions lead to the inescapable conclusion that the agreement overrides the Partnership Law. These clear provisions were drafted deliberately to protect the partnership (and partners) and should not be read to fall so readily based on differences in word choices, when the meaning and intent is undeniable.

By urging that the default rules of the Partnership Law still apply notwithstanding contrary terms of the partnership agreement, Appellant threatens to de-stabilize a vast number of real estate partnerships involved in significant long-term development, construction, or management projects that depend on the enforceability of the contractual terms specifically negotiated to govern their businesses. Characterizing a partnership as dissolvable "at will," despite the clear

expression of the partners that it is dissolvable under specified circumstances wholly upends the force and reliability of the partners' agreement.

B. Operating and Managing Specific Property Constitutes a Particular Undertaking

Appellant relies heavily on *Gelman v. Buehler*, 20 N.Y.3d 534 (2013), for the proposition that a partnership is "at will" notwithstanding unambiguous provisions in the partnership agreement demonstrating a contrary intent. But *Gelman* hardly supports the sweeping proposition that the detailed provisions in a partnership agreement that fully address dissolution are not enforceable.

Significantly, unlike the partnership agreement in *Gelman* (which was devoid of any dissolution provisions) the PGC agreement included explicit dissolution provisions as well as procedures to exit the partnership. That the particular partnership agreement in *Gelman*, which did not address dissolution, was deemed "at will" should have no bearing on the PGC agreement, which specifically addresses the circumstances under which the partnership is permissibly dissolved. To the contrary, the unambiguous and comprehensive dissolution provisions agreed to by the partners should end the inquiry as to whether Appellant's dissolution was in contravention of the agreement.

Nevertheless, even if the PGC agreement were silent on dissolution, *Gelman* still does not compel a finding that PGC lacked a particular undertaking. As highlighted by this Court, the oral agreement in *Gelman* concerned an

"unidentified business in an unknown business sector or industry" in which the partners hoped to "secure additional capital investments" and run the undetermined business until an unspecified "liquidity event would hopefully occur." *Id.* at 538. This Court found these terms "amorphous," and the partnership's objectives "fraught with uncertainty" and not "definitive" enough to constitute a particular undertaking. *Id.*

This description of the partnership in *Gelman* hardly characterizes the PGC agreement, or the myriad real estate partnerships like it that could be affected by this Court's expansion of *Gelman* to this case. Real estate partnerships such as PGC are often complex, multi-million dollar ventures whose agreements are extremely detailed and carefully drafted. PGC, for example, was formed as part of a large-scale development of a large indoor shopping mall. As provided in the partnership agreement, PGC's purpose is to "acquire and hold title to, and to lease, manage, and operate the Property [specifically defined elsewhere in the agreement] in accordance with this Partnership Agreement." B 98, § 2.4. "Leasing," "operating," and "managing" such a significant venture is not readily susceptible to a defined termination date or event. Nevertheless, the particular undertaking of the PGC partnership agreement is clear and definitive, albeit not one susceptible of being accomplished at a specific time: to acquire, lease, manage and operate a

specific parcel of real property identified in the agreement, on which the Poughkeepsie Galleria shopping center was developed. B 98, § 2.4.

The same is true for the many real estate partnerships that operate, manage or lease property. Indeed, given the substantial investment required to acquire and develop properties, it often takes considerable time for real estate partnerships to begin to show profits. However, the absence of an identified completion event from this project does not mean that the partnership lacks a particular undertaking, or that the partners did not agree that they were bound by the agreement's terms for its duration. While the phrase "definite term" in Partnership Law § 62 embraces a temporal element, nothing about "particular undertaking" implies a similar interpretation. To the contrary, it would make little sense to interpret the two independent criteria of § 62(b) as both being durational, particularly given the statutory use of the disjunctive, "or." Rather, the phrase "particular undertaking" should be understood in accordance with its plain meaning as referring to specificity in defining the partnership's scope and purpose. The clear and specific terms of the partnership should not be disregarded because of the anticipated longevity of the partnership, nor should that longevity convert a partnership with a clearly identified scope of purpose into one that is merely at will.

Under Appellant's construction, the only way for a partnership to avoid being deemed "at will" is to specify a fixed term of years or to identify as its stated

purpose an objective capable of being completed at a certain time. Few shopping centers or other real estate entities would meet the impractical standard proffered by Appellant. As noted, many real estate partnerships, including PGC, expect and desire to operate for extended periods, without an identifiable end point and without a single, discrete task that can be concluded. Requiring these partnerships to include an arbitrary termination date that has no operational purpose is hardly a result that the Partnership Law could have sought to encourage. Similarly, interpreting "particular undertaking" rigidly, as being tethered to the completion of a defined project, rather than the performance of a specified objective, also serves no legitimate purpose of the Partnership Law and instead, might frustrate real estate partnerships' legitimate business objectives; at a minimum, it certainly undermines partners' freedom of contract.

C. Policy Considerations Disfavor Allowing a Minority Partner to Dissolve a Partnership Without Consequence In Contravention of the Partnership Agreement

A finding that PGC is an "at will" partnership despite its contractual provisions is likely to reverberate throughout the real estate industry, destabilizing partnerships that were believed to be contractually protected against unilateral dissolution, but that nevertheless could be vulnerable to dissolution by the Court's decision.

In addition to introducing uncertainty as to the continuation of the partnerships themselves, a reversal in this case could significantly undermine the business opportunities of the partnerships, including their ability to obtain financing (or to obtain it on advantageous terms). Lenders and other third parties may be wary of doing business with a real estate partnership – even one with a clear and unequivocal partnership agreement like PGC's – that is now potentially dissolvable "at will." Similarly, prospective investors might be unwilling to involve themselves with a venture that carries the risk – a risk wholly outside their control – that a minority partner will dissolve the entity. Existing partners may be reluctant to commit to financing arrangements and other long term contracts if they know their partners can so readily disrupt the business through unilateral dissolution, potentially breaching those contracts and exposing the partners to personal liability.

For example, where a majority partner in an special purpose entity partnership that holds a single real estate asset has executed a personal guarantee to support a large financing, the unilateral – and wrongful – dissolution by a minority partner like Appellant could trigger personal liability for that majority partner under the guarantee. When a partner assesses the risks of a real estate investment, having no control over a significant risk like the triggering of liability under a

personal guarantee will certainly create disincentives to invest in major projects, like PGC.

Moreover, a finding that PGC is dissolvable "at will" despite its explicit dissolution provisions creates strategic opportunities for minority partners to undermine or even exploit the partnership. For example, real estate partnerships typically contain "capital call" or "cash call" provisions requiring partners to contribute additional capital in accordance with their partnership shares. Partnerships rely on these provisions to ensure that adequate capital will be available for the partnership when necessary. This is especially true for many real estate partnerships that tend to be capital intensive. Yet under Appellant's interpretation, a partner receiving a cash call could avoid his contractual obligation to contribute to the partnership simply by dissolving the partnership, and at no personal penalty – a result which would wreak havoc for real estate partnerships across this state and nationwide.

Additionally, Appellant's position leaves partnerships and their constituent partners vulnerable to exploitation by opportunistic minority partners, who could demand various concessions by threatening dissolution. Even in the face of contractual provisions that leave a minority partner with no management role, that partner could hold the partnership hostage to his demands under pain of dissolution. These pernicious scenarios could result from declaring a partnership

"at will" despite the partners' express agreement that it is *not* dissolvable "at will." Ultimately, such an interpretation turns the partnership agreement on its head and subverts the bedrock principle of partnership law that partners, "as between themselves, may include in the partnership articles any agreement they wish concerning the sharing of profits and losses, priorities of distribution on winding up of the partnership affairs and other matters." *Lanier*, 282 N.Y. at 38.

No public policy is advanced by disregarding the specific dissolution provisions of a partnership agreement and construing the partnership as "at will." This is particularly true where the agreement makes allowances for the partnership to terminate by agreement and for individual partners to exit the partnership. The agreement's allowance for dissolution when the partners holding a majority interest in the partnership elect to do so, for any reason (B 120-140, §§ 6, 12) ensures that those partnership need not remain in existence if it becomes unprofitable or otherwise undesirable to continue. Yet the partnership agreement also provides options for an individual partner to exit the venture. The agreement contains common provisions permitting transfers to a defined group and permitting a sale of the partnership interest to the other partners and to third parties (subject to the partners' right of first refusal). These express provisions in the PGC agreement demonstrate that no partner is trapped into remaining a partner throughout the partnership's expected lifespan. But, there is no policy or other reason that the

specific dissolution provisions of the partnership agreement should be disregarded in contravention of well recognized principles that provide commercial business partners the flexibility to define for themselves the terms and parameters of their business relationship.

Highly sophisticated parties such as Appellant who elect to join a partnership formed to operate a large scale commercial project such as PGC surely do so with knowledge of the agreement's terms and with eyes wide open. Where, as here, a partnership agreement thoroughly addresses the means and manner of dissolution, any unilateral acts to unwind the entity in contravention of those provisions should be recognized for what they are: a breach of the partnership agreement and a wrongful dissolution, with repercussions on any subsequent valuation on that partner's interest.

II. APPLICATION OF MARKETABILITY AND MINORITY DISCOUNTS IS APPROPRIATE WHEN VALUING THE INTEREST OF A PARTNER WHO WRONGFULLY WITHDRAWS

A wrongfully withdrawing partner's interest should be valued, as in the ordinary course, by its market value; *i.e.*, by what a buyer would be willing to pay for that interest on the open market, which necessarily includes customary discounts for lack of control and lack of marketability. Where, as here with PGC, the partnership business continues following a wrongful dissolution, discounting is appropriate to avoid providing the departing partner with a windfall for having

breached the terms of the partnership agreement. Similarly, aggrieved partners confronted by a wrongful dissolution should not have to pay a premium over actual market value for a breaching partner's interest in the business. Accordingly, *amici* firmly support affirmance of the Second Department's approval of a discount for lack of marketability, as well as its application of a minority discount in valuing Appellant's interest under NYPL § 69. B 12.

Specifically, NYPL § 69 sets forth different provisions relating to the valuation of a partner's interest when dissolution is caused in contravention of the partnership agreement – one for when the business of the wrongfully dissolved partnership continues and one for when it does not. It states, in pertinent part:

> 2. When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:
>
> . . .
>
> (c) A partner who has caused the dissolution wrongfully shall have:
>
> (I) ***If the business is not continued*** under the provisions of paragraph (b) of subdivision two of this section all the rights of a partner under subdivision (1), subject to clause (II) of paragraph (a) of subdivision two, of this section.
>
> (II) ***If the business is continued*** under paragraph (b) of subdivision two of this section the right as against his copartners and all claiming through them in respect of their interest in the partnership, to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the

> court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered.

N.Y. Partnership Law § 69(2)(c)(I), (II) (McKinney's 2017) (emphasis added). In other words, when the partnership business does not continue, the wrongfully dissolving partner receives what all partners receive: his proportionate share of the surplus after partnership assets are used to satisfy its liabilities – though the breaching partner will also be liable for damages. However, when the partnership business continues, the breaching partner is entitled under § 69 to only "the value of his interest in the partnership . . ." Thus, a fair reading of § 69 is that the breaching partner is only due the true market value of his interest in the ongoing business. *Cf. Anastos v. Sable,* 443 Mass. 146, 152 (2004) (where remaining partners elected to continue business following wrongful dissolution, use of going concern value, rather than liquidation value was appropriate to determine breaching partner's interest). Under standard market valuation practices, discounting for lack of control and lack of marketability is appropriate to arrive at this amount. *See generally* James Edward Harris, *Valuation of Closely Held Partnerships and Corporations: Recent Developments Concerning Minority Interest and Lack of Marketability Discounts*, 42 Ark. L. Rev. 649 (1989) (asserting that empirical data supports application of substantial discounts for lack of marketability and for minority interests).

Where, as here, the interest is in a closely held entity and illiquid, discounting is appropriate to reflect the absence of a ready market for that interest. *See Murphy v. U.S. Dredging Corp.*, 74 A.D.3d 815, 818 (2d Dept. 2010); *Giaimo v. Vitale,* 101 A.D.3d 523 (1st Dept. 2012).[2]

Where the interest in question is a minority interest, discounting is similarly appropriate to reflect the reduced value of an interest that lacks the power to control the entity. *Amici* are aware that this Court has rejected the use of minority discounts when shareholders exercise their rights under the Business Corporation Law for a judicial determination of fair value of their shares (*e.g., In re Friedman v. Beway Realty Corp.,* 87 N.Y.2d 161 (1995)); however, that determination was driven by equitable and remedial principles underlying fair value proceedings. *Id.* at 169. Even so, the Court recognized that "fair value is not necessarily tied to market value" and acknowledged that the "financial reality" that minority interests are worth less may be an appropriate consideration when valuation is performed for purposes other than determining fair value under the BCL. *Id.* at 167. The Appellate Division correctly recognized that the concerns addressed in *Friedman* with respect to fair value are not present in the context of valuing the interest of a

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2 *Amici* understand that Appellant challenged the amount of the marketability discount, but did not preserve a challenge to the propriety of applying a marketability discount. *See* Resp. Br. at 46. Regardless, the arguments presented herein apply equally in favor of applying a marketability discount as they do for discounting due to lack of control, both of which are customarily used to arrive at the true market value of a fractional share.

partner who wrongfully dissolves the partnership. *Cf. Vick v. Albert*, 47 A.D.3d 482, 483 (1st Dept. 2008) ("A partnership minority discount would not contravene the distinctly corporate statutory proscription (Business Corporation Law § 501[c]) against treating holders of the same class of stock differently, or undermine the remedial goal of the appraisal statutes to protect shareholders . . .").

From a practical perspective – particularly in the commercial real estate context – discounting a minority partnership interest makes perfect sense given the lack of control appurtenant to that position. Sophisticated commercial real estate players recognize the benefit – and premium – that comes from maintaining a controlling interest in a partnership. Conversely, those same sophisticated real estate partners recognize the risks associated with holding only 3.08 percent of the enterprise (like Appellant's interest here) and not having any ability to direct the day-to-day operations of the business. Prospective partners recognize these differences in their respective positions and value the interests accordingly. So too, they understand that if they sought to sell their minority interest, the potential purchasers would also recognize the limitations and restrictions that come from a lack of control and would factor that into their valuation of the marketed interest. Thus, the Second Department's finding here that a minority discount applies conforms with the practical realities of the commercial real estate market.

Further, application of a minority discount here is consistent with the plain terms of the "Transferability of Partnership Interests" provisions in PGC's agreement. B 126-135. Those provisions dictate a specific procedure pursuant to which a selling partner could sell her partnership interest either (1) first, to another partner, or (2) to a bona fide third party, subject to a right of first refusal by the remaining PGC partners. *Id.*, §§ 9.2- 9.3. As noted above, any third party offer would undoubtedly reflect a lesser value that accounts for the minority discount and the "right of first refusal" guarantees that the remaining partners could buy the exiting partners' interest for the same, discounted price. It is incongruous that a wrongful dissolver could achieve a windfall and obtain a premium for his interest through a wrongful dissolution. Section 69 should not countenance a valuation model that allows partners to subvert the explicit terms of the partnership agreement and end up in a better financial position than if they had complied with the terms governing the sale of their minority interests.

Accordingly, *amici* respectfully submit that the decision of the Second Department holding that a minority discount should be applied to Appellant's interest should be affirmed.

III. THE LOWER COURTS PROPERLY EXCLUDED PGC'S GOODWILL IN VALUING APPELLANT'S INTEREST IN RECOGNITION OF THE FACT THAT SHOPPING CENTERS CAN HAVE GOODWILL

Amici, and in particular, the International Council of Shopping Centers, vigorously dispute Appellant's claim that the PGC partnership lacked goodwill as a matter of law. The PGC partnership owns the Poughkeepsie Galleria, which, like most shopping centers, is certainly capable of possessing goodwill.

Goodwill can be understood simply as the expectancy of continued customer patronage. *See, e.g., Metro. Nat. Bank v. St. Louis Dispatch Co.*, 149 U.S. 436, 446 (1893) (defining goodwill as 'the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessity, or even from ancient partialities or prejudices."); *Haberle Crystal Springs Brewing Co. v. Clarke*, 30 F.2d 219, 221–22 (2d Cir. 1929), *rev'd on other grounds*, 280 U.S. 384 (1930) (". . . in an established business that has won the favor of its customers, the tangibles may be expected to earn in the future as they have in the past. The owner's privilege of so using them, and his privilege of continuing to deal with

customers attracted by the established business, are property of value. This latter privilege is known as good will.").

There are several ways in which shopping centers create goodwill and foster customer loyalty and continued patronage. One significant way is through their tenant mix, comprised of key "anchor" tenants – major department stores – smaller retail tenants, and possibly leased office space and other establishments, such as food courts and other specialized attractions. The particular tenants and the tenant mix can create a unique ambience or cachet of a particular mall. This character or "feel" helps establish a particular shopping center's customer base and entice its customers to return to that venue. Moreover, a mall's demonstrated success and its history and experience with magnet tenants can also contribute to its goodwill.[3]

Goodwill also results from shopping centers' involvement in philanthropic and communal activities. Shopping centers are an essential part of social, civic and economic vibrancy of communities throughout New York and throughout the country, providing jobs, economic growth, and tax revenue. Shopping centers also engage with their communities by hosting or sponsoring local or community events and providing a venue and other support for local philanthropic, cultural and other

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[3] *Amici* do not suggest that all shopping centers possess the same characteristics. Rather, in response to Appellant's claim that goodwill does not exist here as a matter of law, *Amici* identify various factors that contribute to the creation of goodwill. In this case, of course, the trial court already made the factual determination that PGC had goodwill from the Poughkeepsie Galleria, which determination was affirmed on appeal. B 12-13, 35.

public activities. *See e.g.*, B 323 ("In addition, there's common spaces, and they [the Galleria] run the common spaces. They promote the shopping center. There is probably, you know, not a high school band in the area that hasn't played at the Poughkeepsie Galleria bringing in people to the Poughkeepsie Galleria.").

Examples of other shopping centers in New York increasing their visibility and engendering positive public opinion through communal involvement include the annual Bikers for Bini fundraising event hosted by the Staten Island Mall. The event features a motorcycle run, classic car show, vendors, rides and games, food, and live musical performances. It has raised over $200,000 for the local charity it benefits and attracts thousands of members of the community to participate. *See* http://www.silive.com/news/index.ssf/2016/10/post_1470.html. Additionally, Brookfield Place in Manhattan created the "Love Wins Letter Project" in June 2016 in honor of Pride Week. This ten-day event and visual installation generated considerable media coverage, increased social engagement by 115% and raised over $40,000 for various charitable organizations. *See generally*, http://www.prnewswire.com/news-releases/brookfield-place-partners-with-top-organizations-to-honor-nyc-pride-week-with-love-wins-letter-installation-300284488.html. Similarly, in August 2016, the Westfield World Trade Center held its Grand Opening. The event drew thousands of visitors and included ceremonies paying tribute to the heroes and victims of 9/11 as well as community-

wide celebrations. http://wwd.com/business-news/retail/westfield-world-trade-center-reveals-opening-day-events-10504679/.

Contrary to Appellant's claim, the added value of a shopping center, established, *inter alia*, through reputation and customer base, inures to the shopping center itself (even if the management company contributes to the development of goodwill and derives its own goodwill as a result). The very nature of a shopping center can create value to its owner that is more than simply the sum of its tangible property, just as the lower court recognized with this particular shopping center: "[a] potential purchaser of the Poughkeepsie Galleria would more than likely pay more for an established going concern that already has tenant retail stores that attract a loyal customer base. Thus, that purchaser would pay extra for the acquisition of goodwill." B 35.

CONCLUSION

Wherefore, proposed *amici* respectfully submit that the Court should affirm the decision of the Appellate Division, Second Department.

Dated: New York, New York
June 30, 2017

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WORD COUNT CERTIFICATION

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Index No. APL-2017-0005

Court of Appeals

ROBERT CONGEL, BRUCE A. KENAN and JAMES A. TUOZZOLO, as the Executive Committee of POUGHKEEPSIE GALLERIA COMPANY, a general partnership, on behalf of the POUGHKEEPSIE GALLERIA COMPANY

Plaintiffs-Respondents,

-against-

MARC A. MALFITANO

Defendant-Appellant.

NOTICE OF MOTION FOR LEAVE TO FILE *AMICUS CURIE* BRIEF and AFFIRMATION OF CLAUDE G. SZYFER IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICUS CURIE* BRIEF

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Dated:

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