To be Argued by:
DANIEL GOLDBERG
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

A&F HAMILTON HEIGHTS CLUSTER, INC., derivatively on behalf of HAMILTON HEIGHTS CLUSTER ASSOCIATES, L.P., PLEASANT AVENUE ASSOCIATES, L.P., FAM PLEASANT AVENUE LLC, AFF-PSA BRONX 9-D, INC. and TAF ALEXANDER AVE. INC.,

Plaintiffs,

– and –

JAMES FENDT, derivatively on behalf of A&F HAMILTON HEIGHTS CLUSTER, INC.,

Plaintiff-Appellant,

– against –

URBAN GREEN MANAGEMENT, INC. and ERIC ANDERSON,

Defendants-Respondents,

– and –

HAMILTON HEIGHTS CLUSTER ASSOCIATES, L.P., A&F HAMILTON HEIGHTS CLUSTER, INC., PLEASANT AVENUE ASSOCIATES, L.P., FAM PLEASANT AVENUE LLC, AFF-PSA BRONX 9-D, INC. and TAF ALEXANDER AVE., INC.,

Nominal Defendants.

Appellate Case Nos.: 2018-5752 2019-4839

(For Continuation of Caption See Inside Cover)

BRIEF FOR INTERVENORS-PLAINTIFFS-RESPONDENTS

OFFIT KURMAN P.A.
Attorneys for Intervenors-Plaintiffs-Respondents
10 East 40th Street, 35th Floor
New York, New York 10016
(212) 545-1900
digoldberg@offitkurman.com

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URBAN GREEN MANAGEMENT, INC., and ERIC ANDERSON, derivatively on behalf of AFF-PSA BRONX 9-D, INC., and FAM PLEASANT AVENUE LLC,

Third-Party Plaintiffs,

– against –

JAMES FENDT, ALEX ABREU and YASMIN ROSADO,

Third-Party Defendants,

– and –

AFF-PSA BRONX 9-D, INC. and FAM PLEASANT AVENUE LLC,

Nominal Third-Party Defendants.

WHGA HAMILTON HEIGHTS CLUSTER, INC. and WEST HARLEM HAMILTON HEIGHTS CLUSTER, INC.,

Intervenors-Plaintiffs-Respondents,

– against –

HAMILTON HEIGHTS CLUSTER ASSOCIATES, L.P., A&F HAMILTON HEIGHTS CLUSTER, INC. and A&F EQUITIES, LLC,

Intervenors-Defendants,

– and –

A&F HHC EQUITIES, LLC,

Intervenor-Defendant-Appellant.

SAFEGUARD REALTY MANAGEMENT, INC., TENDY LAW OFFICE, SHEILA TENDY, ESQ. and KATHERINE DANIELS, ESQ.,

Non-Party Respondents.

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Intervenors-Plaintiffs-Respondents WHGA Hamilton Heights Cluster, Inc. ("GP-1"), one of two general partners of the Hamilton Heights Cluster Associates, LP (the "Partnership") and West Harlem Hamilton Heights Cluster Associates, Inc. ("New GP-1," and together with GP-1 the "West Harlem Entities"), file this brief in response to Appellants' appeal of Judge O. Peter Sherwood, J.S.C.'s Decision, Order and Judgment, dated November 2, 2018 (the "SJ D/O"), granting GP-1 summary judgment and declaring that "the only operative governing document of [the Partnership] is the [Signed] Limited Partnership Agreement dated as of October 1, 1999, . . . and the draft unsigned amendment is neither effective, applicable to the Partnership, nor binding upon GP-1 or New GP-1." (R. 9-36).

PRELIMINARY STATEMENT

The lower court did not err, as James Fendt's (collectively referring to Appellants, as he asserted all claims derivatively) alleged restructuring is a fantasy – which is neither supported by the law, nor the facts. Fendt's appeal must be dismissed, because he does not have standing to the maintain the double-derivative claims he asserted in this litigation. And, Sections 121-110(c), together with Paragraph 19 of the Signed Limited Partnership Agreement, and Section 121-704 of the RLPA require that (a) any substitution of the limited partner have the consent of the other partners, and (b) any amendment like the Draft Unsigned Amendment, which seeks to affect fundamental rights of the partners, have the written consent of

the those adversely affected. By Fendt's own admission, he cannot satisfy this legal standard.

After more than forty-two (42) months of litigation, Fendt is unable to produce evidence of the limited partner's alleged assignment of its interest, let alone GP-1's assignment of its interest, or any of the other partners' consents to such assignments. None exists. As for the signed written consents required by Section 121-704 of the RLPA to amend the Signed Limited Partnership Agreement – Fendt admits that none exist. Not surprisingly, Judge Sherwood's SJ D/O reached the very same conclusion arrived at by two separate Supreme Court Justices in no less than three prior decisions and orders, that: (a) the limited partner of the Partnership was never substituted, and (b) GP-1 never consented in writing to the Draft Unsigned Amendment. (R. 30-31).

Thus, Fendt is left with the ridiculous argument, that: (a) the limited partner's members' purported contributions, and (b) the closing documents and K-1s, prepared by others, and Anderson's statements -- all somehow transposed the Signed Limited Partnership Agreement into the Draft Unsigned Amendment. No court has ever recognized such arguments, and neither estoppel, nor equity can rescue Fendt's claims.

Fendt's alleged restructuring would have the perverted result of transferring nearly all of the Partnership's equity (valued at roughly $15 Million) for alleged

advances totaling less than $600,000. That makes no sense – particularly given that the general contractor's alleged advances don't constitute "contributions" by the limited partner. In addition, the 2004 NYCB closing documents do not constitute either assignments, or signed written consents to the Draft Unsigned Amendment. Further, as the K-1s were prepared by Eric Anderson, not the West Harlem Entities, they do not prove GP-1's ownership in the Partnership, and as Anderson's statements were made unilaterally and not on behalf of GP-1, they cannot bind GP 1.

QUESTIONS PRESENTED

1. Whether Fendt has standing to assert claims in this action.

Answer: The lower court answered this in the negative.

2. Whether, as a matter of law, (a) the limited partner of the Partnership was not substituted, (b) the Signed Limited Partnership Agreement was not amended, and (c) Fendt cannot prove the adoption of the Draft Unsigned Amendment through estoppel or equity.

Answer: The lower court answered this in the affirmative.

3. Whether the general contractor's alleged advances, the closing documents, K-1s prepared by and statements made by Anderson raise a genuine issue of fact as to the applicability of the Signed Limited Partnership Agreement.

Answer: The lower court answered this in the negative.

STATEMENT OF FACTS

The Early Stages of the Partnership and its Redevelopment Efforts – WHGA Acquires the Properties and Plans for Redevelopment

West Harlem Group Assistance, Inc. ("WHGA"), which just celebrated it 48th anniversary, was founded in 1971 as a community-based development and low-income housing corporation to revitalize under-invested West and Central Harlem communities. (R. 46). WHGA is recognized by the Internal Revenue Service as a tax-exempt charitable organization, pursuant to Section 501(c)(3) of the Internal Revenue Code. (R. 46). As the West and Central Harlem communities have become revitalized over the past several decades, WHGA has shifted its focus to the development and preservation of affordable-housing. (R. 46). WHGA now works to provide its low-to-moderate income constituency with safe, affordable and quality housing. (R. 46).

In the 1980s and 1990s, WHGA (through wholly controlled Housing Development Fund Corporations ("HDFCs")) acquired six (6) buildings (the "Buildings") on properties (the "Properties") with ninety-four (94) units from the City of New York – all of which are now owned by the Partnership. (R. 46). The Buildings contained low income restrictions. (R. 46-47). During that period, WHGA invested monies into the Buildings and Properties. (R. 47).

In or about 1998, WHGA agreed to partner with Fendt and Anderson, owners of A&F Equities, LLC ("A&F Equities"), in the rehabilitation of the Buildings and

Properties. (R. 47, 631). Fendt and Anderson had affordable housing construction and management experience. (R. 47, 631). They created A&F Hamilton Heights Cluster, Inc. ("A&F HHC, Inc.") as a special purpose entity to be responsible for the redevelopment of the Buildings and Properties, while its sister entity A&F Community Builders, LLC was to be responsible for the construction work. (R. 47, 631).[1] WHGA, Fendt and Anderson planned to create a partnership (of which A&F HHC, Inc. would be one partner) that would own the Buildings and Properties and seek financing from the City of New York's Participation Loan Program ("PLP") – which contemplated public and private financing for rehabilitation of real estate like the Buildings and Properties. (R. 47, 631). Any such rehabilitation would need to satisfy the low-income restrictions which would remain on the Buildings and any restrictions imposed in connection with PLP funds. (R. 47).

WHGA's Formation of the Partnership

On or about December 16, 1998, years before WHGA contributed the Buildings and Properties to the Partnership in March 2001, WHGA Hamilton Heights Cluster, Inc. ("GP-1") filed a Certificate of Formation – creating Hamilton

[1] Appellant asserts A&F Community Builders, LLC ("A&F Community Builders") later became A&F Commercial Builders, LLC ("A&F Commercial Builders," App. Brf., P. 6), but there is no documentation to this effect, and whereas HPD's 2001 Sponsor Review Report (R. 565-66) identifies A&F Community Builders as the general contractor, the 2001 Restated EAB Commitment Letter and the 2004 NYCB Amended Commitment Letter identify A&F Commercial Builders as the general contractor. Hence, the general contractor is hereinafter referred to as "A&F Builders."

Heights Cluster Associates, L.P. (the Partnership), and identifying GP-1 as the general partner, and A&F HHC, Inc. as the limited partner. (R. 47, 116-119). The original Certificate of Formation indicates that GP-1 owns 1% and A&F HHC, Inc. owns 99% of the Partnership's equity. (R. 631). This was an agreed-upon temporary ownership structure pending WHGA's work towards securing financing for the redevelopment. (R. 632).

Upon such work by WHGA (and in anticipation of its contribution of the Buildings and Properties) and further in order to allow an entity other than A&F HHC, Inc. to capture the Partnership's tax losses, the parties entered into the Signed Limited Partnership Agreement on October 1, 1999 (R. 54-58) – which removed A&F HHC, Inc. as the limited partner and made it a general partner ("GP-2"), and substituted A&F Equities as the new limited partner. (*See* diagram at R. 54). As reflected in Paragraphs 19 and 20, New York City's Department of Housing Preservation and Development ("HPD") approved the terms of the Signed Limited Partnership Agreement. (R. 47). On or about October 5, 2000, the Partnership filed a Certificate of Amendment (with the State of New York) conforming the Partnership's Certificate to the previously executed Signed Limited Partnership Agreement. (R. 48, 120-122).

Together, the Signed Limited Partnership Agreement, and the Certificate of Amendment confirm that GP-1 and A&F HHC, Inc. are general partners, and that

A&F Equities is the limited partner of the Partnership, with ownership interests, as follows:

(a)	GP-1 (general partner)	67% Ownership
(b)	A&F HHC, Inc. (general partner)	32% Ownership
(c)	A&F Equities (limited partner)	1% Ownership

(R. R. 48, 55).

Paragraph 8 provides that net profits shall be credited to each partner in accordance with their interest, but that all partnership losses shall be debited from the limited partner's capital account. (R. 55). Paragraph 19 of the Signed Limited Partnership Agreement provides that, "[s]ubject to HPD restrictions regarding assignment, a limited partner may assign his interest in the partnership, and the assignee shall have the right to become a substituted limited partner and entitled to all the rights of the assignor if all of the partners (except the assignor) consent thereto. Otherwise, the assignee is only entitled to receive the share of the profits to which the assignor would be entitled." (R. 57). Thus, a limited partner's assignment of its interest required an assignment consented to by all other partners. (R. 48).

Despite admitting in the Court below and on this appeal that he agreed to the ownership structure reflected in the Signed Limited Partnership Agreement because it was mandated by HPD (R. 261, 500, 632, 663, App. Brf. P. 12), Fendt nevertheless relies upon an unsigned alleged joint venture letter, dated September 18, 1998, in

support of his claim that WHGA agreed to a 51%/49% Partnership ownership split with A&F HHC, Inc. (App. Brief, P. 10, R. 688-689). The letter does not contemplate Fendt's signature, and he does not claim to have prepared it -- yet he offers it in support of his revisionist history as to the ownership of the Partnership. (R. 688-89, App. Brief, P. 10). Neither WHGA, nor Anderson agreed to Fendt's fictionalized ownership structure premised on his expressed intention of falsely representing to HPD the Partnership's true ownership, and the unsigned letter does nothing to support Fendt's claim. (R. 632, 1341).

Regardless, the document contradicts Fendt's attempted treatment of the limited partner's members' alleged advances as increasing the limited partner's ownership interest in the Partnership or the right to distributions of income. The letter states: "Any cash invested in the project by either of the partners shall be repaid to that party as a return of capital before any funds are distributed to the parties as profits." (R. 688). So, the very letter Fendt relies upon in support of the structure of the Partnership confirms that none of the limited partner's members' alleged advances would have increased the limited partner's ownership interest. Instead, the letter would have treated the alleged advances as a loan or preferential return of capital – before any other capital or income is distributed.

Fendt further relies upon a fax cover sheet, dated August 1, 1999, that one of his colleagues allegedly sent to one of his attorneys in advance of the October 1,

1999 Signed Limited Partnership Agreement, as evidence that WHGA agreed to a 51%/49% ownership split. (App. Brief, P. 10, R. 695). But, the fax cover sheet was never sent to, nor received by WHGA and WHGA never agreed to such an ownership split. (R. 695, 1341). Moreover, the fax was allegedly sent by Fendt's colleague – who failed to offer any evidence as to its origin or authenticity. (R. 695).

The 2001 EAB Financing

Upon the Court's prior approval (pursuant to New York Private Housing Finance Law and the Not-for-Profit Corporation Law), on or about March 14, 2001, WHGA's HDFCs deeded the Buildings and Properties to the Partnership. (R. 48). On or about March 28, 2001, the Partnership closed on building and project loans from the European American Bank (EAB) in the amount of $1,528,597 and HPD in the amount of $1,522,604, and a federal HOME Funds grant in the amount of $2,921,709. (R. 48-49, 664). In addition, the Partnership received a Federal Home Loan Grant ("FHL Grant") in the amount of $430,00. (R. 570, 664).

The HPD loan documents (in particular the bottom right corner of HPD's 2001 Restated EAB Commitment Letter (the "2001 Commitment Letter") and the Mortgage Schedule attached thereto) confirm that, contrary to Fendt's specious claim that A&F Builders contributed 100% of the equity (App. Brf., P. 10), WHGA contributed the Buildings and Properties, valued at $430,000. (R. 570, 607, 615). The Partnership was only able to secure public financing for this project, because

WHGA was the not-for-profit sponsor and contributed the Buildings and Properties. In addition, A&F HHC, Inc.'s (GP-2) contribution to the Partnership was valued at $239,556 in equity – for a total of $669,556 in equity. (R. 570, 615). Section 5.02(v) of the EAB Building Loan Agreement, which based upon EAB's administration of all of the referenced loans and grants governed same, restricts ANY material change in the partners or ownership of the Partnership, without prior written approval, and Section 6.01(q) treats such a change as a default. (R. 160 and 164).

The 2004 NYCB Refinancing and Alleged Advances

On or about December 30, 2004, the Partnership refinanced the its existing EAB debt by way of a new loan in the amount of $2,750,000 from New York Community Bank ("NYCB"). (R. 49). By that time, A&F Builders had allegedly gone over-budget by $1,611,375. (R. 190-91). Fendt asserts that, in addition to the $239,556 A&F HHC, Inc. contributed as of the original financing with EAB in 2001, as of the 2004 financing with NYCB, *the members of limited partner A&F Equities* advanced an additional $1,105,733 for unspecified purposes, and a further $1,611,375 (R. 190-91) in cost overages and maintenance and operation expenses. (App. Brf., P. 16).[2]

[2] This is different from Fendt's claim in the court below, where he asserted that "the Former LP [A&F Equities], either by itself or from funds of its related entity, A&F Commercial Builders, contributed . . . ." (R. 666).

Fendt claims that, based upon the above phantom contributions, his and Anderson's wish to separate their business interests (discussed *infra*), and the expiration of certain HPD restrictions (having nothing to do with a general partner's assignment of its interest to a limited partner, or the consent of partners necessary for the substitution of a limited partner (R. 57-8)), the partners purportedly agreed to a new ownership structure, allocations of capital, income and loss, substitution of a limited partner and changes to the rights of the partners, as reflected in the Draft Unsigned Amendment. (App. Brf., P. 14-20).

The Draft Unsigned Amendment purports to radically alter the terms of the Signed Limited Partnership Agreement by substitution New GP-1 for GP-1 as general partner of the Partnership, and further substituting A&F HHC Equities for A&F Equities as limited partner (R. 50). Fendt claims that GP-1's ownership interest in the Partnership was erased, and that the partners' interests were reallocated, as follows:

(a) New GP-1 .051% ownership interest

(b) A&F HHC, Inc. .049% ownership interest

(c) A&F HHC Equities 99.99% ownership interest

(R. 59, 60-115).[3]

[3] Fendt contends that the limited partner's interest is 99% and New GP-1's is .51%, even though the Draft Unsigned Amendment represents GP-1's interest as .051%. (R. 50).

Fendt's claims notwithstanding, even he concedes that there is *no* written agreement reflecting (a) either the assignment of GP-1's interest or A&F Equities' interest, or (c) signed consents by GP-1, GP-2 or A&F Equities to the Draft Unsigned Amendment. (R. 50).

There is further no dispute that, both HPD's 2004 NYB Amended Commitment Letter ("2004 Amended Commitment Letter") (R. 612), and the spreadsheet allegedly prepared by Anderson and upon which Fendt relies for his claim as to $1,105,733 in advances (R. 707) identify that sum as the **Partnership's** total equity, NOT the limited partner A&F Builders or A&F HHC, Inc.'s equity. The $1,105,733 figure includes the $430,000 FHL Grant in recognition of GP-1's contribution of the Buildings and Properties, as well as GP-2's original contribution of $239,556. (R. 612, 707). As the spreadsheet contains entries for both the expanded scope of work and maintenance and operations (third and last line on first column titled "cost," respectively), being paid out of the proceeds of the 2004 NYCB financing (fifth column titled "NYCB Mortgage"), the $1,105,733 is clearly the Partnership's total equity *after* financing. (R. 707). So, Fendt's attempts to claim the $1,105,733 as the limited partner's equity, and to add to that the $239,556 GP-2 already contributed (and included in the $1,105,733 figure) is nothing short of "alternative" math and is belied by even the Draft Unsigned Amendment which

purports to represent A&F HHC Equities' contribution as only $600,000. (R. 115, 1310).

As part of the refinancing, HPD permitted the Partnership to borrow more than required to pay down the existing EAB loan. (R. 49). Fendt admits that, as a result of the refinancing, $1,055,000 was repaid to him and Anderson (App. Brf., P. 16), reducing the $1,611,375 allegedly advanced by members of A&F Equities (R. 190-91) to $556,375 in overages and maintenance and operations expenses. Fendt has failed to provide any evidence for his claim that the alleged advances were made by members of A&F Equities. (R. 190-191).

Moreover, the Signed Limited Partnership Agreement does NOT provide for compulsory capital contributions. (R. 55-58). Rather, pursuant to Paragraph 6, the limited partner may only make contributions "on such terms as the general partners deem necessary to carry on the business of the partnership." (R. 56). The general partners never authorized a capital contribution or a dilution of capital. (R. 51, 1342).

In addition, neither Fendt, nor Anderson put the West Harlem Entities on notice that they sought to treat the $556,375 in overages and unpaid maintenance and operation expenses as capital contributions. (R. 1342). This further deprived the West Harlem Entities of the opportunity to even avoid the alleged dilution resulting from the limited partner's members' alleged contribution. (R. 1311). Thus,

if any person or entity made any advances, he/she/it did so voluntarily and without any agreement that such advances would be treated as capital contributions. (R. 1311). They were, at best, an account payable.

The Draft Unsigned Amendment

Contrary to Fendt's assertion, the Draft Unsigned Amendment was not used to *obtain* the 2004 NYCBA financing. Instead, as discussed below the Draft Unsigned Amendment was circulated in connection with Fendt and Anderson's decision to separate their business interests, and the financing was procured based upon the Signed Limited Partnership Agreement. (R. 633). Fendt and/or Anderson exchanged a draft amended partnership agreement sometime in late 2004. (R. 633). Since other than the Partnership, WHGA was not involved with Fendt and Anderson -- it was not a party to those discussions or the exchange of the draft amendment. (R. 633). Ultimately, Fendt and Anderson did not even finalize any portion of their business divorce until March 2005, *after* the closing on the NYCB refinance. (R. 635). As part of that partial separation, Anderson's company, Urban Green Management, took over the management of the Partnership. (R. 635).

In December 2004, Fendt and Anderson communicated to NYCB that they were working on an amended partnership agreement and sent a then current draft – even though it was incomplete, not agreed upon and not ready for signature. (R. 635-36). In the spring of 2005, Anderson's attorney obtained a copy of the closing

binder prepared by NYCB's attorney (Farrell Fritz, P.C.) and provided to the Partnership's attorney (Karen Sherman, Esq.). (R. 254). The closing binder contained *both* the Signed Limited Partnership Agreement and a "DRAFT 12/17/04" version of the draft amendment. (R. 254, 262, 269-323, 635). The "DRAFT 12/17/04" iteration of the draft amendment is incomplete on its face as to certain terms, unsigned by anyone, and is materially different from and appears to predate the draft upon which Fendt relies.[4]

This explains NYCB and the Partnership's attorney's use of the "DRAFT 12/17/04" draft amendment in preparing the loan-related documents and relevant resolutions and consents; they assumed that an amended partnership agreement would eventually be reached that reflected the terms in the draft. (R. 636).

At the time of the closing, NYCB only had the Signed Limited Partnership Agreement and the "DRAFT 12/17/04" version of the draft amendment. (R. 636). The closing binder does not include any notes or memoranda explaining the Draft Unsigned Amendment and, as of both the spring 2015 and August 2016, Ms. Sherman had no recollection as to the partners agreeing to restructure their

[4] The "DRAFT 12/17/04" version contains a multitude of terms which are different from the version relied upon by Fendt, including terms related to: definitions of "Appraised Value," "Management Agent," "Partnership Management Fee," Right to Mortgage 4.01(b), Indemnification 5.07(f)(f), Covenants of the General Partner regarding loans 5.11(l), Operating Deficit Contributions 5.14, Distribution of Capital Proceeds 8.02(b), Distribution of Partnership Assets 12.02(c), Exhibit B, and Capital Contributions. (R. 254, 635-36, *compare* R. 59-115, App. Brf., P. 7 (relied on by Fendt) and R. 269-323 (the "DRAFT 12/17/04" version)).

ownership interests, or as to any version of the Draft Unsigned Amendment. (R. 255, R. 263). Farrell Fritz (NYCB's attorneys), which prepared the closing binder, had only the unsigned version of the Draft Unsigned Amendment, and could not offer anything further on the subject. (R. 262, 552-553).

One thing is for sure: none of the parties had agreed upon the terms of any amendment. (R. 636). Ultimately, Fendt and Anderson did not even partially finalize their divorce until March *2005 (after the 2004 NYCB refinancing)*, when Fendt and Anderson signed an agreement to split up two "A&F" entities (A&F HHC, Inc. and A&F Equities) they had jointly owned and operated. (R. 635). By that time, they failed to notice that they had not reached an agreement on or executed a final draft amended partnership agreement – much less obtained the absolutely necessary written consents of all partners and HPD. (R. 636). To be clear, the draft amendment upon which Fendt relies differs from the version in the closing binder. (R. 636). Donald Notice, WHGA's Executive Director since 1999, never signed or agreed to the terms of the Draft Unsigned Amendment upon which Fendt relies, does not know who drafted the Draft Unsigned Amendment, and has no recollection of ever seeing or becoming aware of the Draft Unsigned Amendment until this litigation. (R. 50, 333, 336).

The Closing Documents and K1s

As part of the NYCB refinance, the Partnership was represented by Ms. Sherman, Esq., but none of the West Harlem Entities was represented by separate counsel. (R. 51). NYCB apparently prepared the loan documents based upon an incorrect assumption that the Draft Unsigned Amendment would *ultimately* be executed. (R. 636). Without realizing it, Mr. Notice inadvertently signed a Resolution of the Partnership and Partner's Consent, a Resolution of a General Partner of the Partnership, a Restated and Amended Consolidated Mortgage Note, and a spreader agreement – all on behalf of New GP-1. (R. 51-52). This was a mistake that he did not catch, but the closing documents were not prepared by anybody representing the West Harlem Entities. (R. 52). Contrary to Fendt's baseless assertion, though Reginald Long, Esq. incorporated New GP-1 – he did not represent GP-1 and never advised GP-1 on the closing. (R. 1342).

Regardless, none of the documents carries out any change in ownership interests in the Partnership, and none of the documents changes the fact that neither New GP-1 was properly substituted for GP-1 as a general partner of the Partnership, nor was A&F HHC Equities properly substituted for A&F Equities as the limited partner of the Partnership – by written assignments with written consents. (R. 52).

A review of the partnership's tax returns from 2004 through 2013 shows that, regardless of whether the Signed Limited Partnership or the Draft Unsigned

Amendment upon which Fendt relies was in effect -- the returns were prepared incorrectly.

Up until in or about the end of 2004, Fendt was the managing agent of the Partnership and relied upon his accountant Stuart E. Minsky & Co., P.C. to prepare the Partnership's tax returns. (R. 52, 637). Minsky prepared the returns (including the K-1s) and Fendt signed the tax returns as the Tax Matters Partner. (R. 891-92, 911-12, 932-33). The 2001 - 2003 K-1s were improperly issued to WHGA Hamilton Heights Cluster Associates ("WHGA Assoc.") -- an entity which did not and never has existed. (R. 905-906, 926-927). Those K-1s identify WHGA Assoc. as a general partner with a 67% interest and, contrary to Paragraph 8 of the Signed Limited Partnership Agreement, allocated profits *and losses* to it in accordance with that interest. (905-906, 926-927).

When Urban Green took over management in 2005, Anderson continued to rely on Minsky to prepare the returns (including the K-1s), and Anderson signed them as the Tax Matters Partner for 2004-2007. (R. 951-52, 971-72, 993-94, 1012-13). Beginning in 2004, Fendt followed the mistake Minsky had previously made and again issued a K-1 to WHGA Assoc., but this time identified it as a limited partner with a .51% interest and, again contrary to the Signed Limited Partnership Agreement and Fendt's *interpretation* of the Draft Unsigned Amendment, allocated profits and losses to it in accordance with that interest. (R. 945-946). Then,

beginning in 2009 and continuing through 2013, Anderson both prepared and signed them as the Tax Matters Partner. (R. 1035-37, 1056-1058, 1077-79, 1093-95, 1111-1113). The erroneously prepared K-1s continued for years. (R. 965-1120). But WHGA never caught the mistakes until this litigation, because the K-1s were issued to a non-existent entity designated as a limited partner, not a general partner, and during that period of time the Partnership failed to earn any reportable income. (R. 53).

To the extent the K-1s were supposed to reflect GP-1's interest in the Partnership, they were and remain absolutely incorrect – as they fail to properly represent GP-1's interest and allocations of profits and losses under both the Signed Limited Partnership Agreement, and Fendt's *interpretation* of the Draft Unsigned Amendment. (R. 52, App. Brf., P. 20-22).

Anderson's Independent Communications
Regarding the Capital Accounts

Fendt relies upon a December 2004 and April 2005 e-mail exchange that Anderson, alone, had with Joan Cottone, of Minsky's office, in support of his claim that the Draft Unsigned Amendment governs the Partnership. (App. Brf., P. 24). As part of a December 30, 2004 e-mail exchange, Anderson provided Ms. Cottone with his understanding as to the agreed allocation of losses – *not* the ownership – of the Partnership. (R. 638). Both Ms. Cottone and Anderson agreed that GP-1 (and not New GP-1) was the entity through which WHGA owned its interest in the

Partnership. (R. 638,). Anderson specifically stated in his e-mail that: "The 'economics' of the project [meaning the equity] will be captured entirely by the GP's. (R. 638). The LP will enjoy tax benefits." (R. 638, 640). This was a true and accurate statement regarding both the existing Signed Limited Partnership Agreement and the draft amendment that they were discussing. (R. 638).

On April 6, 2005, Ms. Cottone e-mailed Anderson regarding the identity of the Partners of the Partnership. (R. 638). While she indicated ownership interests of various parties, her question was: "I have conflicting information as to who the partners are of Hamilton Heights Cluster Associates, LP as of 12/31/04." (R. 638). Because she did not ask about ownership percentages, Anderson simply confirmed the general partners – which included GP-1 (and not New GP-1) as the entity through which WHGA owned its interest in the Partnership. (R. 638, 641-42). The West Harlem Entities were not parties to any of these communications.

The Beginnings of the Litigation

This litigation arises out of claims James Fendt purported to authorize the Partnership (through alleged limited partner A&F HHC Equities) to bring against Anderson and Urban Green. (R. 326-328). Fendt claimed that that his former business partner, Anderson, by and through managing agent Urban Green Management, Inc. ("Urban"), was engaged in mismanagement of the Partnership. (R. 45). In order to support his claimed right to commence this litigation (the "2014

Action"), Fendt was forced to make the wild and insupportable claim that A&F HHC Equities was both substituted for and in place of A&F Equities, and that a phantom amended partnership agreement, which was never signed by the partners, was nevertheless adopted by the Partnership. (R. 45, 326-328).[5]

Between September 2014, just before the 2014 Action was commenced in October 2014, and the Spring of 2015, Fendt and his attorneys repeatedly attempted to secure the West Harlem Entities' support in taking *ultra vires* actions as part of Fendt's claims against Anderson and Urban Green. (R. 53). When the West Harlem Entities questioned Fendt and his attorneys about the authority of the limited partner to act on behalf of the Partnership -- the alleged limited partner purported to remove New GP-1 (as the alleged substituted general partner) from the Partnership and redeem its interest. (R. 53). This was clearly unlawful and left the West Harlem Entities with no alternative, but to move to intervene in the 2014 Action and seek a declaratory judgment (described *infra*.) to protect their ownership interest in the Partnership. (R. 53, 254).

The West Harlem Entities Seek to Intervene in the 2014 Action

By motion, dated June 2, 2015 (Dkt. #110), the West Harlem Entities moved to: (a) intervene in the 2014 Action, (b) dismiss the Complaint, as it relates to claims

[5] Notably, as the Court points out in the July 8, 2015 D/O, Fendt took the position before that Court that he was acting both on behalf of A&F Equities (of which he is no longer a member) and A&F HHC Equities – which is not a partner (limited or otherwise) of the Partnership.

brought by Fendt without authority on behalf of the Partnership, (c) file a complaint declaring the Signed Limited Partnership Agreement is the one and only agreement which binds and controls the Partnership, and the Partners' interests in the Partnership, and that the Draft Unsigned Amendment relied upon by Fendt and A&F HHC Equities is neither effective, applicable to the Partnership, nor binding upon GP-1 or New GP-1, and enjoining A&F Equities and A&F HHC Equities from purporting to take any further action on behalf of the Partnership, and (d) disqualify Sheila Tendy, Esq. and her law firm from simultaneously purporting to represent both Fendt and A&F HHC Equities and the Partnership. (R. 255).

The West Harlem Entities were forced to act quickly -- before they and their attorney had access to or sorted through all of the facts. (R. 255). As a result, in preparing Mr. Notice's June 10, 2015 affidavit in support of Intervenors' motion, *counsel* mistakenly prepared an affidavit for Mr. Notice -- erroneously stating that GP-1 was substituted by New GP-1. (R. 255, 1314). This error was made at the infancy of this litigation and has never since been repeated. (R. 255). It was based upon counsel's reliance upon the closing documents which improperly identified the partners, and a lack of access to all relevant information. (*Id*.)

The Court's July 8, 2015 Order

By Decision and Order, dated July 8, 2015 ("July 8, 2015 D/O") (R. 325-345), the Court granted West Harlem Entities' motion – including disqualifying Tendy

from purporting to represent both Fendt and A&F HHC and the Partnership. (R. 325-345, 337, 339).

The Court found, among other things, in the July 8, 2015 D/O that:

a. Fendt and the limited partner (whether A&F Equities or A&F HHC Equities) were without authority to bring claims on behalf of the Partnership ("The motions by defendants and the intervenors to dismiss the action insofar as it is on the behalf of the Partnership are granted because documentary evidence proves that there was no authority to bring the action on its behalf." (R. 338);

b. the Draft Unsigned Amendment is ineffective, as "there is no formal documentation demonstrating the GP's written agreement to the Unsigned Amendment" (R. 336);

c. A&F Equities never assigned anything to A&F HHC Equities ("No sworn statement or document supports the claim that the LP's [A&F Equities] interest in the Partnership was assigned to the New LP [A&F HHC Equities] prior to Fendt's withdrawal [from A&F Equities]" (R. 333, FN 4);

d. New GP-1 never substituted for GP-1, as there are no documents reflecting such an action, and the certificate of limited partnership was never duly amended. (R. 333);

e. "Changes in percentages for taxes and distributions required written consent of the GPs under the Agreement and RLPA Section 121-110(c)." (R. 332);

f. since 2005, Fendt has had no interest in the original limited partner -- A&F Equities (R. 331);

g. the purported removal of New GP-1 was legally ineffective (R. 335), and

h. the K-1s do not "prove conclusively that the Unsigned Amendment is binding because K-1s cannot substitute for a written, signed

> agreement of the partners. . . . [and] the K-1s name a non-existent entity." (R. 335).

On the issue of A&F Equities never assigning anything to A&F HHC Equities, the Court specifically wrote in the July 8, 2015 D/O that:

> It [the original (AND ONLY) signed Limited Partnership Agreement, dated October 1, 1999] provides that the LP [A&F Equities] "may assign his interest in the partnership, and the assignee shall have the right to become a substituted limited partner and entitled to all the rights of the assignor if all the partners (except) assignor consent thereto." Otherwise, the assignee is "only entitled to the share of the profits to which his assignor would be entitled." No assignment of the LP's interest to a New LP [A&F HHC Equities] is in the record.

(R. 330). Fendt never filed a Notice of Appeal of the July 8, 2015 D/O.

The Court was not fooled. It determined that Fendt was without authority to terminate Urban Green as the managing agent or purport to remove GP-1 and New GP-1, and "even if it [the Draft Unsigned Amendment] were effective, it would not have empowered the LP [A&F Equities] or the new limited partner it named [A&F HHC Equities] to bring the action." (R. 332-333, 336). By separate Order, dated July 8, 2015 (the "Appointment Order"), the Court granted Anderson's motion to appoint a receiver and removed Safeguard Realty Management, Inc. (previously appointed by the Court at the request of Fendt) as the managing agent. (R. 351-55).

The Intervenors' Declaratory Judgment Complaint

Intervenors-Plaintiffs-Respondents the West Harlem Entities filed a Declaratory Judgment Complaint on or about September 11, 2015 ("Intervenor DJ

Complaint"), seeking a judgment that the Signed Limited Partnership Agreement is the one and only agreement which binds and controls the Partnership, and the partners' interests in the Partnership, and that the Draft Unsigned Amendment, is neither effective, applicable to the Partnership, nor binding upon GP-1 or New GP-1, as well as a claim for an accounting. (R. 356-71). Intervenor-Defendant-Appellants filed an Answer, Affirmative Defenses and Counterclaims (the "Answer & Counterclaims") on or about October 1, 2015, asserting that the Draft Unsigned Amendment is valid and enforceable, and that the ownership interests are as set forth in that ineffective document. (R. 373-386). Pursuant to the Court's July 8, 2015 D/O, Fendt filed the Answer & Counterclaims derivatively on behalf of A&F HHC, Inc., A&F HHC Equities and A&F Equities, and A&F HHC, Inc. derivatively on behalf of the Partnership. (*Id*.)

Fendt's Attorneys Admit that they Cannot Locate an Executed Copy of the Draft Unsigned Amendment

From the beginning (October 2014), Fendt and his attorneys have been unable to find a signed copy of the Draft Unsigned Amendment. (R. 259). After more than forty-two (42) months of litigation – Plaintiffs have failed to produce and, indeed, effectively admitted at a November 13, 2017 Court Conference that such a written agreement does not exist. (R. 257). At the same time, although they knew of the existence of the Signed Limited Partnership Agreement – they concealed its existence to the Court or any party with an interest in the litigation. (R. 259).

At a hearing on an Order to Show Cause presented to the Court on October 14, 2014, when questioned as to the existence and location of the Signed Limited Partnership Agreement, Katherine Daniels, Esq., of Sheila Tendy's office which then represented Fendt, replied "Well, we wish we knew. We did the best we could with what we had," and then she proceeded to falsely assert that "we've been told by the defendants they don't have copies of the [Signed Limited Partnership] agreements that *were* signed, either." (R. 396-409, 400-01). Neither the West Harlem Entities, nor Mr. Anderson made such a statement. (R. 259). Ms. Daniels then admitted in open court that the Draft Unsigned Amendment "is not signed and we have not been able to locate a signed copy." (R. 401). Despite this, they have continued to masquerade the Draft Unsigned Amendment as the effective and operative document. (R. 259).

As part of Anderson's attorney's review of Safeguard Management Company's (the managing agent Fendt installed as part of his coup) records on November 18, 2015, he discovered the "DRAFT 12/17/04" version of the draft amendment among two copies of the Signed Limited Partnership Agreement. (R. 254, 259, 269-323). The files confirm Anderson's Urban Green's December 2004 transmittal of both the Signed Limited Partnership Agreement *and* the "DRAFT 12/17/04" draft amendment to NYCB. (R. 635). Thus, Fendt and his counsel, who were directing Safeguard, had the Signed Limited Partnership Agreement in their

possession and control from the very beginning of this litigation, but intentionally and deceitfully failed to disclose its existence to the Court. (R. 260).

Later, when the Court queried Ms. Tendy on February 29, 2016 on the issue of whether there was any signed partnership agreement other than the Signed Limited Partnership Agreement, she admitted the following in open court:

The Court: Is there a partnership agreement beyond the one submitted? [meaning the beyond the Signed Limited Partnership Agreement]

Ms. Tendy: We do not have one. But, that is not the point.

(R. 415-458, 427-428).

Then, at a hearing on March 21, 2016, the Court repeated over and over again its finding that A&F HHC Equities is not a limited partner of the Partnership.

The Court: I have already found that this entity does not exist [in reference to A&F HHC Equities] . . . . There is a whole decision on this stating that the entity itself, A&F HHC Equities LLC, in my decision I found that there was no signed agreement even giving them an interest.

* * * * * *

The Court: [T]hey [Eric Anderson] are trying to stop you from bringing a dissolution action on behalf of an entity which this Court Specifically stated in its July opinion, in its decision, does not, is not part of this, part of the group [the Partnership] it is trying to dissolve.

* * * * * *

The Court: [Y]our notice specifically says, and it's for an entity, which the court has found does not exist, ... [T]he purpose of the special meeting . . . will be to discuss a resolution [proposed by A&F HHC Equities] to authorize the [that] company, and the company's [is] A&F HHC

> Equities LLC, which this Court found does not own a piece of the LP . . . . So, . . . it flies in the face of what this court has already found . . . .
>
> * * * * * *
>
> The Court: I'm a little appalled that a dissolution action would be brought on behalf of an entity which this court has ruled, has found to be not an entity that has any, any interest in the LP that owns the buildings.

(R. 459-490, 466, 468, 472, 484).

Fendt Commences a New Action in an Attempt to Resuscitate his Claims

In a last-ditch effort to breathe life into Fendt's dead claims, on or about April 22, 2016, Fendt and individuals purporting to be members of A&F HHC Equities commenced a new action bearing Index No. 652188/2016 (the "2016 DJ Action") against, among others, the West Harlem Entities. (R. 491-522). Fendt admits at Paragraph 34 of the 2016 DJ Action that the parties agreed to the ownership structure reflected in the Signed Limited Partnership Agreement, because it was necessary to "meet the requirements of affordable housing programs from which the Partnership intended to seek financing." (R. 500). Fendt's portrayal is, amazingly, based upon his expressed intention to defraud HPD as to the "true" ownership of the Partnership. (App. Brf., P. 12). The West Harlem Entities moved to dismiss. (R. 261). At oral argument on July 27, 2016, Judge Kornreich asked whether there are any documents reflecting (a) HPD's alleged consent to an assignment by A&F Equities to A&F HHC Equities, or (b) HPD's alleged consent to the proposed restructuring and de-equitization of GP-1's interest in the Partnership. (R. 523-551, 545).

Specifically, Judge Kornreich asked: "Is there any proof HPD had any inkling that the 67 percent all of a sudden was [allegedly] reduced to half a percent?" (R. 542). Ms. Tendy, unbelievably, countered on behalf of Plaintiffs that she did not know this issue would come up. (R. 543). Wisely, the Court noted that, "frankly, there was no signed amendment which makes me wonder if it was done. So, I would like to see proof of it." (R. 543). And, "[g]iven what is going on in this case, I don't believe that [Plaintiffs' contentions] unless I see it." (R. 545).

HPD Confirms that there is NO Record of A&F Equities Assigning Anything to A&F HHC Equities, or the Partnership's Alleged Restructuring

Following oral argument on West Harlem's motion to dismiss the 2016 DJ Action, the West Harlem Entities' counsel reached out to HPD. HPD's Legal Affairs Department for Contracts and Real Estate confirmed that HPD's 2004 NYCB closing binder contained only the unsigned version of the Draft Unsigned Amendment. (R. 554-557). In addition, HPD's Assistant Commissioner of Preservation Finance confirmed that this was not a tax-credit deal, but was part of the Participation Loan Program (which was a public-private funding mechanism), and that there would not have been any reason for the Partnership's ownership interests to be restructured. (R. 263).

By letter, dated August 16, 2015, the West Harlem Entities made a formal Freedom of Information Law ("FOIL") request for:

(a) the HPD file relating to the original 2001 financing by Hamilton Heights Cluster Associates, LP (the "Partnership") with EAB Bank; and

(b) the HPD file relating to the December 2004 refinancing by the Partnership with New York Community Bank.

(R. 558-560).

HPD responded by cover letter, dated September 20, 2016, transmitting the only three documents that were even remotely responsive to the West Harlem Entities' request: (a) the Sponsor Review Report, dated March 14, 2001, (b) the 2001 Commitment Letter, and (c) the 2004 Amended Commitment Letter. (R. 263-64, 563-614). The Sponsor Review Report, dated March 14, 2001, covers the Partnership, WHGA (the sole owner of GP-1 and identified as the majority owner), A&F Equities and A&F Builders. (R. 565-66). The 2001 Commitment Letter, which contemplates not only the 2001 financing for the rehabilitation work, but also the planned subsequent permanent financing, describes the Partnership, as follows: "The borrower shall be a limited partnership whose general partners are A&F Hamilton Heights Cluster, Inc. (32%), WHGA Hamilton Heights Cluster, Inc. (67%) and whose limited partner is A&F Equities, LLC (1%) (the "Borrower" or "your")." (R. 569).

Mr. Hoffman explained in a September 2016 telephone call that, while the 2001 Commitment Letter contemplated that the Partnership would fund its permanent financing through the New York City Housing Development Corporation

(R. 572), the builder on the project went over-budget, and both the Partnership and HPD agreed to use NYCB for the permanent financing loan when the debt was refinanced in 2004. (R. 265). The 2001 Commitment Letter and the HPD Mortgage Schedule attached thereto reflect GP-1's equity as $430,000 and A&F, Inc.'s equity as $239,556 for a total of $669,556 in equity. *(*R. 570, 615). Moreover, the appraised value of the completed project was $6,6930,000. (R. 615).

HPD issued the 2004 Amended Commitment Letter in order to address the new permanent lender and the new loan amount. (R. 266). Significantly, the 2004 Amended Commitment Letter does NOT re-define the Borrower or indicate a change in the ownership of the Partnership. (R. 266). Indeed, the third page of the 2004 Amended Commitment Letter specifically sates: "Unless otherwise stated in or indicated by this Amendment, all other terms and conditions of this Commitment [referring to the 2001 Commitment Letter] remain." (R. 613).

Mr. Hoffman represented to the West Harlem Entities' counsel in their September 19, 2016 telephone call that there were NO documents in HPD's program files indicating that that HPD (a) knew of or consented to either A&F Equities' alleged transfer of its interest to A&F HHC Equities or (b) any alleged change in the ownership of the Partnership and de-equitization of GP-1, let alone the transfer of all but .51% of GP-1's 67% interest in the Partnership. (R. 266). Mr. Hoffman

clearly stated that, if such phantom events had occurred – they would have been reflected in the 2004 Amended Commitment Letter. (R. 266).

Order Dismissing the 2016 DJ Action as Against the West Harlem Entities

By Decision and Order, dated April 7, 2017, the Court dismissed the 2016 DJ Action as against the West Harlem Entities as duplicative of counterclaims asserted in response to the West Harlem Entities Intervenor Declaratory Judgment Complaint in the 2014 Action. (R. 616-628). In doing so, the Court affirmed the July 8, 2015 D/O holding that "[A&F] HHC Equities was never substituted as the limited partner, because such a substitution, along with the change in ownership percentages contemplated by the restructuring, would have required written consent of Old GP-1 and A&F Hamilton Heights, under both the partnership agreement and pursuant to Partnership Law Section 121-110(c)." (R. 621). Fendt never filed a Notice of Appeal of the April 7, 2017 Decision and Order.

The West Harlem Entities' Motion for Summary Judgment

In January 2018, the West Harlem Entities moved for summary judgment granting their declaratory judgment claim that the Signed Limited Partnership Agreement is the one and only agreement which binds and controls the Partnership and the partners' interests in the Partnership, and that the Draft Unsigned Amendment is neither effective, applicable, nor binding. (R. 40-42). (Anderson

simultaneously moved for summary judgment dismissing Fendt's derivative claims against him and Urban Green). (R. 1364-1366).

As part of their motion, the West Harlem Entities' counsel consulted with HPD, which again confirmed that it did NOT have any knowledge of, authorize, or consent to the limited partner's alleged de-equitization of the West Harlem Entities' interest in the Partnership. (R. 1305). Pursuant to the March 14, 2001 Home Written Agreement ("HWA") the Partnership entered into with HPD, the Partnership agreed to maintain the Buildings' residential units for affordable housing for a period of fifteen years, *commencing* with issuance of the Certificates of Completion (which Fendt alleges occurred in 2004). (R. 1319-1335). Thus, contrary to Fendt's suggestion, HPD maintained regulatory oversight of the Partnership at the time of the 2004 NYCB refinancing. (*Id*.) In this regard, HPD referred the West Harlem Entities' counsel to the EAB Building Loan Agreement for consents needed for the purported changes reflected in the Draft Unsigned Amendment. (R. 1305). As set forth above, the EAB Building Loan Agreement requires prior written consent (Section 5.02(v), discussed, *surpa*) before there is a change in the partners or ownership of the Partnership. (R. 160, 164, 1306).

Judge Sherwood's SJ D/O granted GP-1 summary judgment – ruling the Signed Limited Partnership Agreement is the Partnership's "only operative governing document," and the Draft Unsigned Amendment nugatory. (R. 9-36).

LEGAL ARGUMENT

POINT I

FENDT LACKS STANDING TO MAINTAIN HIS CLAIMS AND DEFENSES OR APPEAL THE SJ D/O

Fendt lacks standing. Pure and simple. Fendt filed the Answer & Counterclaims to the West Harlem Entities' Intervenor DJ Complaint derivatively on behalf of A&F HHC, Inc., A&F HHC Equities and A&F Equities, and A&F HHC, Inc. derivatively on behalf of the Partnership. (R. 373-386). Thus, he filed double-derivative claims. Fendt was only a 50% shareholder of GP-2 (A&F HHC, Inc.), which in turn was a 37% partner of the Partnership. (R. 694).

Judge Sherwood relied upon a well-established legal basis in holding that "Fendt lacks standing to bring a double derivative claim because GP-2 is a minority unitholder in the Partnership (*see Pessin v. Chris-Craft Industries, Inc.*, 181 A.D.2d 66, 72 [1st Dept 1992])." (R. 21). *Pessin* and its progenitors *Kaufman v. Wolfson*, 1 A.D.2d 555 (1st Dep't. 1956) and *Breswick & Co. v. Harrison-Rye Realty Corp.*, 280 A.D. 820 (2d Dep't. 1952), set forth the legal principle, that "a double derivative action may not be maintained by a shareholder of one corporation that merely owns stock in the allegedly wronged corporation where the first does not control the second." *Pessin, supra*, at 72. Thus, GP-2's lack of control of the Partnership vitiates Fendt's claims. Remarkably, Fendt failed to address the SJ D/O's ruling on

this point and has, therefore, forever waived his right to challenge the lower court's determination that he lacks standing.

POINT II

THE COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT, BECAUSE AS A MATTER OF LAW A&F HHC EQUITIES, LLC IS NOT AND CANNOT BE A PARTNER, LIMITED OR OTHERWISE, OF THE PARTNERSHIP

In granting summary judgment, Judge Sherwood held that A&F HHC Equities was not substituted for A&F Equities, because there is no assignment or consent by the partners – as required by Sections 121-704 of the RLPA, and Paragraph 19 of the Signed Limited Partnership Agreement. (R. 29-31).

Section 121-704 of the RLPA provides:

> An assignee of a partnership interest, including an assignee of a general partner, may become a limited partner if (i) the assignor gives the assignee that right in accordance with authority granted in the partnership agreement, or (ii) all partners consent in writing, or (iii) to the extent that the partnership agreement so provides.

Paragraph 19 of the Signed Limited Partnership Agreement specifies that, subject to the "HPD Restrictions" at Paragraph 20, a limited partner may only assign his interest with the effect of the assignee becoming substituted as the new limited partner if all of the partners (except the assignor) consent to the assignment.

Together, the RLPA and the Signed Limited Partnership Agreement require that **ALL** partners consent to an assignment (*eg*. substituting A&F HHC Equities for A&F Equities) in order for it to be effective, but after more than forty-two (42)

months of litigation Fendt is unable to (a) even proffer any evidence of an actual *assignment* or *substitution*, written or otherwise, let alone (b) any evidence of consent to such an assignment by GP-1 and GP-2. No written *assignment* exists and no consent was given.

In addition to making the above finding, Judge Sherwood reviewed the Court's prior rulings, which repeatedly held that A&F HHC Equities was not substituted for A&F Equities. (R. 30). The Court held in the July 8, 2015 D/O that "[no] assignment of the LP's interest to a New LP [A&F HHC Equities] is in the record." (R. 330). On March 21, 2016, the Court reiterated its determination in the July 8, 2015 D/O that there was no evidence of a signed agreement giving A&F HHC Equities any interest in the Partnership, and that A&F HHC Equities has no existence as it relates to the Partnership. (R. 459-490, 466). Then, again, by Decision and Order, dated April 7, 2017, the Court held that A&F HHC Equities was never substituted as the limited partner, because both the Signed Limited Partnership Agreement and partnership law required the written consent of GP-1 and GP-2 (of which there is none) in order to substitute the limited partner. (R. 621). Regardless, Judge Sherwood did not "blindly" follow the at least three rulings by two separate Supreme Court Judges. Rather, he analyzed them and expressed: "This court agrees." (R. 30).

In particular, Judge Sherwood addressed Fendt's claim that Judge Korneich's April 11, 2016 Decision and Order (R. 1157-65) "clarified" that the July 8, 2015 D/O only ruled that Fendt and A&F HHC Equities lacked authority *at the time* to bring an action on behalf of the Partnership. (App. Brf., P. 1, 29, 35). Fendt's lack of authority was based upon a finding that the limited partner was never substituted – leading to the ineluctable conclusion that the alleged restructuring never occurred and the Draft Unsigned Amendment was never adopted. (R. 1161). But, Judge Sherwood further found that "[i]n the years since that decision was rendered, plaintiffs [Fendt] have had ample opportunity to bring forth material evidence in admissible form to support their claim of a change of ownership but have failed to do so." (R. 30). On that basis, Judge Sherwood concluded that, though there may have been "issues of fact surrounding the Unsigned [Draft] Amendment that would benefit from discovery" *in April 2016*, "none of the remaining issues of fact are material." (R. 31).

Fendt argues that, pursuant to Paragraphs 19 and 20 of the Signed Limited Partnership Agreement, once the Certificates of Completion were issued, the partners were free to transfer ownership interests among themselves without HPD approval. That is a false assertion and the quintessential "red herring." None of the allegedly *expired* restrictions at Paragraph 20 relate to a general partners' alleged assignment of its interest to a limited partner or a limited partner's substitution. (R.

57-58).[6] In particular, the restrictions at Paragraph 20(b) of the Signed Limited Partnership Agreement having nothing to do with a general partner's assignment of its interest, the substitution of a limited partner, or the consent of partners necessary for same, but instead relate solely to the substitutions of general, not limited, partners. (*Id*.)

Regardless, the simple fact that certain restrictions allegedly expired upon the purported issuance of Certificates of Completion in December 2004 did not allow and would not have allowed Fendt's claimed restructuring to have proceeded without regard to the requirements set forth at Paragraph 19 of the Signed Limited Partnership Agreement and Section 121-704 of the RLPA. The alleged expiration of restrictions would further not have allowed Fendt's claimed restructuring to have proceeded in the absence of *other* applicable authorizations required by HPD or EAB.[7]

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[6] Paragraph 20 states, in pertinent part: "HPD Restrictions: Until the issuance of the Certificate of Completion for the Project . . . (a) Without the prior written approval of HPD, there shall not be any voluntary dissolution . . ., merger of consolidation of the Partnership with any other entity; (b) No partners of the Partnership shall have the authority . . . without the prior written approval of HPD, to withdraw or to substitute a new person or entity for the general partners of the Partnership or to cause any other person or entity to be admitted as a general partner of the Partnership; (c) No distribution of the capital of the Partnership shall be made to any partner, . . . (d) No assignment, mortgage or transfer of any interest in the Project or this Agreement will take place except as provided by this Agreement; (e) The provisions of the Partnership Agreement referred to in clauses a, b, c and d above shall not be amended without the prior written approval of HPD; (f) After the issuance of the HPD Certificate of Completion, the restrictions contained in this paragraph shall not apply.

[7] Of course, Paragraph 20 does NOT address the critical issues (discussed, *infra*) of altering ownership interests, the allocations of capital and income, the rights of a partner of a limited

As HPD's supervision of the Partnership pursuant to the HWA did not end, but *commenced* for a period of 15 years with the issuance of Certificates of Completion, HPD clearly had oversight of the Partnership at the time of the 2004 NYCB refinancing. And, as Mr. Hoffman noted, HPD did NOT have any knowledge of, authorize, or consent to the limited partner's alleged de-equitization of the West Harlem Entities' interest in the Partnership. According to Hoffman -- despite the expiration of the restrictions in Paragraph 20 of the Signed Limited Partnership Agreement, in addition to complying Paragraph 19 of the Signed Limited Partnership Agreement and Section 121-704 of the RLPA, Fendt's claimed restructuring required EAB's (administering on behalf of HPD) prior written approval, which was never obtained.

POINT III

THE COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT, BECAUSE AS A MATTER OF LAW THE SIGNED LIMITED PARTNERSHIP AGREEMENT WAS NOT AMENDED

Without signatures, the absence of which Fendt concedes, the Draft Unsigned Amendment has no meaning or effect and is a legal nullity. Section 121-110(c) of the RLPA law could not be clearer: "The partnership agreement of a limited partnership may be amended; provided, however that, except as may be provided

partnership – all of which are necessarily subject to the written consent requirements of Section 121-110(c) of the RLPA.

otherwise in the partnership agreement, without the written consent of each partner adversely affected thereby, no amendment of the partnership agreement shall be made which . . . (ii) alters the allocation for tax purposes of any items of income, gain, loss, deduction or credit, (iii) alters the manner of computing the distributions of any partner, (iv) alters . . . the voting or other rights of any limited partner."

Whereas the Signed Limited Partnership Agreement confirms GP-1's interest as 67%, GP-2's interest as 37% and A&F Equities' interest as 1%, the Draft Unsigned Amendment purports to turn those allocations upside-down by setting New GP-1's interest as .051%, GP-2's interest as .049% and A&F HHC Equities' interest as 99%. (R. 54-5, 59, 115). And, whereas the Signed Limited Partnership Agreement credits partnership profits to each partner in accordance with their interest, and debits partnership losses solely from the limited partner's capital account and makes distributions in accordance with same, Sections 7.02(a) and 7.03(d)[8] of the Draft Unsigned Amendment together purport to credit the limited partner with Partnership profits until its alleged capital has been returned, and then to allocate profits and losses in accordance with each partner's interest, but that no losses shall be allocated to the limited partner to the extent that such losses result in

[8] Section 7.03(d) states: "No Net Losses, Losses or Partnership deductions for any taxable year shall be allocated to the Limited partner to the extent such allocation would cause or increase an Adjusted Capital Account Deficit with respect to such Partner, and such Net Losses, Losses or Partnership deductions shall instead be allocated to the General Partner."

a negative capital account, and to make distributions accordingly, pursuant to Section 8.01. (R. 56, 92-3, 95). Section 8.02 of the Draft Unsigned Amendment purports to further alter a return of capital to the partners, by allocating to New GP-1 25%, GP-2 25%, and A&F HHC Equities 50%. (R. 95). Finally, Section 9.02 of the Draft Unsigned Amendment seeks to curtail many of the rights reserved for the general partners at Paragraphs 10 and 12 of the Signed Limited Partnership Agreement by, for example, purporting to give the limited partner under certain circumstances the extraordinary right to remove a general partner and/or a managing agent and further designate a successor to each. (Compare R. 56, 96-98).

Judge Sherwood observed, "Respondents seek to have the Disputed Amendment [Draft Unsigned Amendment] affecting fundamental changes in the corporate structure, including change of ownership percentages, stripping the majority unity owner of virtually all of its equity without compensation and removing of the general partners, all without a signed writing by any of the parties to the Partnership Agreement." (R. 29). Thus, the Draft Unsigned Amendment could not have amended the Signed Limited Partnership Agreement unless it was signed by GP-1 and GP-2, as the adversely affected partners. Given that Fendt concedes no signed version exists (App. Brf., P. 7), the Draft Unsigned Amendment is a legal nullity.

In addition, Judge Sherwood reviewed the Court's prior rulings, and noted that the doctrine of "law of the case" applies to "various states of the same action or proceeding with the purpose of avoiding the reinjection of issues already determined within it." *Citing* Section 448 Law of the Case, Siegel, N.Y. Prac. Section 448 [6th ed.] (R. 30). On that basis, Judge Sherwood further held that "[t]his court previously held that a writing is required to make changes to the Partnership Agreement contemplated by the Disputed Amendment." (R. 31). In any event, regardless of whether A&F HHC Equities was substituted for A&F Equities (or for that matter, whether New GP-1 was substituted for GP-1), the Draft Unsigned Amendment did not and could not amend the Signed Limited Partnership Agreement.

POINT IV

THERE IS NO LEGAL PRECEDENT FOR, AND THE FACTS DO NOT SUPPORT FENDT'S CLAIM THAT THE WEST HARLEM ENTITIES' AND ANDERSONS' CONDUCT COULD HAVE RESULTED IN THE ADOPTION OF THE DRAFT UNSIGNED AMENDMENT

Fendt is left with one non-legal argument, that: (a) the limited partner's members' purported contributions, and (b) the closing documents and K-1s, prepared by others, and Anderson's statements -- all somehow morphed the Signed Limited Partnership Agreement into the Draft Unsigned Amendment.

Fendt argues that, estoppel or equity requires recognition of the ownership structure reflected in the Draft Unsigned Amendment, including the fundamental and underlying purported assignment or substitution of A&F HHC Equities for A&F

Equities – as to which Fendt is incapable of producing any evidence. Thus, Fendt seeks to not only prove GP-1's alleged consent by estoppel, but remarkably also seeks to prove A&F Equities' very own alleged assignment through estoppel. There simply is no precedent for this.

Fendt advances this argument blindly ignoring Paragraph 19 of the Signed Limited Partnership Agreement, Sections 121-704 and 121-110(c) of the RLPA and Judge Sherwood's SJ D/O ruling, that "the questions of whether a written, signed agreement is necessary to amend the Partnership Agreement, and whether the K-1s could substitute for such an agreement, have been resolved [in the negative]." (R. 31).

Not surprisingly, none of the cases Fendt cites recognize the amendment of a signed partnership agreement, which as here purports to change the fundamental rights of the partners, without a signed written consent by the party adversely affected. *See eg. Estate of Kingston v. Kingston Farms P'ship*, 13 N.Y.S.2d 748 (4th Dep't. 2015) (merely recognizing the ability of partners to a partnership to change by practice the date on which partners met to establish the partnership's valuation; NOT a matter covered by either Sections 121-704 or 121-110(c) of the RLPA). Ironically, Fendt cites *Nassau Tr. Co. v. Montrose Concrete Prod. Corp.*, 451 N.Y.S.2d 663 (1982), which makes clear that the doctrine of estoppel is contingent upon the party asserting same having relied and changed his position upon the act of

another, but Fendt fails to explain how A&F Equities "relied" upon the Draft Unsigned Amendment – as by his own allegations, the purported "contributions" were not made by the limited partner, in the first place, and were made well before the existence of the Draft Unsigned Amendment or the NYCB closing. The reliance, if any, was upon representations by and between and as to the withdrawal and substitution of members A&F Equities and A&F HHC Equities, and had nothing to do with the West Harlem Entities or the Partnership, itself. (App. Brf., P. 4-5).

A&F Builders' Alleged Advances Don't Constitute "Contributions" by the Limited Partner, or Support the Alleged Divestiture of GP-1's Equity

A&F Builders' alleged advances don't constitute "contributions" by the limited partner, because: (a) the alleged work advances were made by A&F Builders, NOT A&F Equities, as the limited partner; (b) at best the unpaid work advances totaled $556,375, not the wildly absurd $1,901,664 Fendt claims; (d) pursuant to Paragraph 6 of the Signed Limited Partnership Agreement, except as authorized by the general partners -- the limited partner was neither compelled, nor permitted to make contributions, or treat A&F Builders' alleged advances as contributions, and certainly did not have authority to cause such alleged advances to dilute GP-1's interest, without notice or opportunity to make additional contributions to avoid the alleged dilution; and (e) the September 18, 1998 unsigned letter contradicts Fendt's treatment of the limited partner's alleged capital contributions as increasing the

limited partner's ownership interest in the Partnership, or its right to distributions of income.

For perspective, Fendt argues that advances allegedly made by A&F Equities' members in the amount of $556,375 resulted in its interest increasing from 1% to 99%, and the substitution of A&F HHC Equities for A&F Equities. Those numbers belie the actual valuations of the Buildings and Properties in 2004. According to the 2001 Commitment Letter, the appraised value of the completed project was $6,6930,000. (R. 568-609, 607). And, a recent valuation by Marcus & Millichap estimated the Buildings and Properties are valued at $15-$20 million. (R. 51). So, according to Fendt – A&F Builders' advances in the amount of a half a million dollars constituted a phantom capital contribution by the limited partner – giving A&F HHC Equities 99% of the Partnership equity. That just does not add up.

The Closing Documents Do Not Support an Amendment

In the absence of a written assignment or a signed amendment, Fendt contends that the NYCB closing documents prepared by an attorney who did not represent the West Harlem Entities and were only signed by New GP-1, not GP-1, support the Draft Unsigned Amendment's purported restructuring. But, the closing documents do not satisfy the requirements of Sections 121-704 of the RLPA, regarding the assignment and substitution of parties, or 121-110(c), regarding amendments and changes affecting the rights of partners. GP-1 did not sign the closing documents.

(R. 745-753). Instead, New GP-1 did, which cannot legally bind GP-1. (*Id*.) The closing documents, at best, reflect an assignment and substitution of partners. Given that GP-1 and New GP-1 never saw, reviewed, consented or agreed to the Draft Unsigned Amendment or any of the terms contained therein, the closing documents cannot substitute for the statutory requirements of the RLPA.

A review of each and every case Fendt cites for the proposition that the closing documents somehow morphed the Signed Limited Partnership Agreement into the Draft Unsigned Amendment – are inapplicable because they do not concern the amendment of a signed partnership agreement.[9] And, while *Giblin v. Sechzer*, 458 N.Y.S.2d 719 (2d Dep't. 1983) holds that a partner's conduct may constitute consent to an otherwise binding and enforceable partnership agreement among the other partners to a partnership, it does NOT hold that a party's conduct can constitute

[9] *See eg. Ficus Investments, Inc. v. Private Capital Management*, LLC, 872 N.Y.S.2d 93 (1st Dep't. 2009) (holding plaintiff's statements as to the classification of an employee as an officer, while not determinative of the employee's status, entitle the employee to advancement of costs under the applicable operating agreement), *Rao v. Intern. Licensing Industry Merchandisers' Ass'n.*, 2015 N.Y. Misc. LEXIS 2615 (Sup. Ct. NY Co. 2015) (holding that a principal's prior conduct in paying certain of agent's fees and expenses could, potentially, modify the terms of an agreement with its agent, and bind the principal), *Chase v. Skoy*, 536 N.Y.S.2d 512 (2d Dep't. 1989) (cited by Fendt and specifically holding "[w]here the language of a contract is clear and unambiguous [as with the Signed Limited Partnership Agreement], the intent of the parties must be determined in accordance with that language."), *Echevarria v. 158th St. Riverside Drive House Co.*, 878 N.Y.S.2d 294 (1st Dep't. 2014) (holding that landlord's prior conduct in repairing door could, potentially, alter its obligations going forward).

consent to amend a signed partnership agreement among partners in violation of Section 121-110(c) of the RLPA.

While immaterial to the prosecution of these claims, and never argued on the motion below and further not addressed by the lower court's SJ D/O, the Court's July 8, 2015 D/O already held that "GP-1 and New GP-1, although dissolved by proclamation for failure to file franchise tax returns, may prosecute the claims they seek to assert because the relief they request will preserve and marshal their general partnership interest, which is an asset." (R. 337).[10] And, the dissolution is not evidence of an intent to substitute GP-1 for New GP-1, but rather is evidence of the consequence of K-1's being issued to the improper entity and, therefore, WHGA not even learning of the dissolution until this litigation. (R. 363)

Fendt drones on and on about the West Harlem Entities' counsel's mistaken identification of the West Harlem Entities' interest being held by New GP-1, but as explained – Fendt's unlawful attempted removal of the West Harlem Entities' interest in the Partnership forced him and the West Harlem Entities to act quickly and erroneously identify New GP-1 as holding that interest.[11] In any event, the

[10] Unlike the plaintiff in *Metered Appliances, Inc v. 75 Owners Corp.*, 225 A.D.2d 338, 638 N.Y.S.2d 631 (1st Dep't. 1996) (citing by Fendt), which commenced an action seeking relief in the form of an ejectment action, in this action the West Harlem Entities' had no choice but to (defensively) intervene to preserve and protect their assets.

[11] Never since the July 8 D/O has Mr. Goldberg or the West Harlem entities taken the position that the New GP-1 was the general partner of the Partnership.

statement was not a binding admission as to the Draft Unsigned Amendment. *See, e.g., Rahman v. Smith,* 836 N.Y.S.2d 489 (Sup. Ct. Queens Co. 2005) (finding that counsel's statements in summation that there was "liability on both sides" did not qualify as a statement of fact that qualifies as a judicial admission). At best, the Court might, based upon the authority upon which Fendt relies, treat Mr. Notice's statement as "evidence," which is "not conclusive" but only if "the facts were inserted with his knowledge, or under his direction, and with his sanction" – which they clearly were not. *See In re Mich. Natl'l. Bank Oakland,* 651 N.Y.S.2d 383, 387 (1996), *Morgenthow & Latham v. Bank of New York Co., Inc.*, 305 A.D.2d 74, 79, 760 N.Y.S.2d 438, 442 (1st Dep't. 2003).[12]

Regardless, this drafting error is of little significance, because (a) in four separate rulings by three separate Supreme Court Judges, including Judge Sherwood, the Court has determined that New GP-1 did not substitute for GP-1 (R. 30, 330, 466, 621), and (b) even if GP-1 had agreed to be substituted by New GP-1 – one thing is indisputably clear: GP-1 never saw, reviewed, or consented to by signature the Draft Unsigned Amendment or any of the terms contained in the Draft Unsigned Amendment – specifically the reallocation of ownership and attempt to de-equitize the West Harlem Entities' interest. (R. 256, 1314).

[12] Cited by Fendt as *Matter of Liquidation of Union Indem. Ins. Co. of N.Y.*

The K-1s Are Not Binding and Do Not Support Amendment

As set forth above, Judge Sherwood held that the Court has already ruled in the July 8, 2015 D/O, that tax documents do not and cannot establish ownership, but instead at best offer limited evidentiary value: "Nor do the K-1s prove conclusively that the Unsigned Amendment is binding because K-1s cannot substitute for a written, signed agreement of the partners. Moreover, the K-1s name a non-existent entity." (R. 335).

Fendt cites a number of cases in support of the evidentiary value of K-1s, *as against the party who prepared or was responsible for preparing same*.[13] But, he fails to cite any authority which overturns the rule set forth in *Beacher v. Estate of Beacher*, 756 F.Supp.2d 254, at 274 (E.D.N.Y. 2010) (*citing Ehrensperger v. Commissioner*, T.C.M. 1994-279, 1994 WL 269153 (T.C. 1994)), that tax documents prepared by a third-party cannot bind or estop a recipient (like GP-1) of those documents. For precisely this reason, Fendt's authority, including *Mahoney-Buntzman v. Buntzman*, 881 N.Y.S.2d 369 (2009) and *Man Choi Chiu v. Chiu*, 4

[13] *See Capizola v. Vantage International, Ltd.*, 770 N.Y.S.2d 395 (2d Dep't. 2003) (holding that, where plaintiff proved he had provided consideration for his interest in the corporation, and stock certificate was delivered to him, *corporation* was estopped from claiming he was not a shareholder, *and corporation's preparation and issuance of tax returns and K-1s* was further evidence supporting plaintiff's claim that he was a shareholder), *Wenger v. L.A. Wenger Contr. Co.,* 958 N.Y.S.2d 649 (Sup. Ct. Suffolk Co. 2008) (holding that father and purported 100% owner of businesses, *who prepared corporate tax returns and K-1s* for a multitude of entities over a period of at least nine years, when taken in consideration with his actions in settling cases affecting such entities and his estate planning through GRATS, in which he sought to gift his son interests in the businesses, was estopped from arguing that his son did not have such interests).

N.Y.S.3d 279 (2d Dep't. 2015), wherein the Court of Appeals and Appellate Division, respectively, held that it will not permit a party to take a position contrary to a position that very party took in a sworn tax filing, is inapplicable. None of the West Harlem Entities ever had any involvement in, or control over the preparation of the Partnership's tax returns or K-1s. Instead, as the Tax Matters Partners, Fendt and Anderson were solely responsible for preparation of the tax returns (including the K-1s), and their actions cannot bind or estop the West Harlem Entities.

Fendt disingenuously attempts to impute Anderson's preparation of the K-1s to GP-1, noting that Mr. Notice was the head of "one of the two general partners charged with managing the Limited Partnership," but Paragraph 12 of the Signed Limited Partnership Agreement explicitly barred WHGA from serving as the managing agent. (R. 56, App. Brf., P. 17). And, WHGA failed to pick up the errors, because the K-1s were issued to a non-existent entity designated as a limited partner, not a general partner, and during that period of time the Partnership failed to earn any reportable income. (R. 53).

Beyond the legal precedent which bars Anderson's prepared K-1s from estopping GP-1, because they were not properly prepared in accordance with either the Signed Limited Partnership Agreement, or Fendt's *interpretation* of the Draft Unsigned Amendment -- they prove nothing, other than that they were improperly prepared.

Further, Fendt's claimed intention to allocate losses to the limited partner as the "primary reason" for the Draft Unsigned Amendment (Ap. Brf., P. 22) ignores the fact that, although the K-1s were not properly prepared between 2001 and 2013, the Signed Limited Partnership Agreement allocates all losses to the limited partner's capital account. (R. 56, 945-1120). In any event, contrary to his assertion that Section 7.02(a) of the Draft Unsigned Amendment allocates losses to the limited partner, even a casual reading of Section 7.02(a) reveals that while, in the first instance, income and losses are allocated in accordance with the partners' percentage ownership interests – Section 7.03(d)[14] modifies that by specifying that losses shall not be allocated to the limited partner to the extent that such losses result in a negative capital account. (R. 93). So, whereas the Signed Limited Partnership Agreement in fact allocates all losses to the limited partner, the Draft Unsigned Amendment allocates income to the limited partner, but only losses to the extent they don't result in a negative capital account – defeating Fendt's claimed basis for the Draft Unsigned Amendment as clearly pretextual. (R. 93).

[14] Section 7.03(d) states: "No Net Losses, Losses or Partnership deductions for any taxable year shall be allocated to the Limited partner to the extent such allocation would cause or increase an Adjusted Capital Account Deficit with respect to such Partner, and such Net Losses, Losses or Partnership deductions shall instead be allocated to the General Partner."

Anderson's Communications Are Not Binding

Anderson's e-mails in responses to questions by the Partnership's outside accountant are not binding upon either GP-1 or New GP-1 or determinative of either GP-1 or New GP-1's interest in the Partnership. It is well established that "statements made by an authorized agent of an individual may be introduced as admissions against interest of that individual provided the agent was designated with authority to speak on behalf of the individual." *Miller ex rel. Miller v. Lewis*, 39 Misc.3d 1216(A) *1, *3 (Sup. Ct. Kings Co. 2013) (*citing Loschiavo v. Port Authority of New York and New Jersey*, 58 N.Y.2d 1040 (1983)). But, Anderson was not an agent for GP-1 or New GP-1 and Fendt fails to cite any authority in support of the argument that Anderson's statements could possibly bind the West Harlem Entities to their detriment – rendering his statements a legal nullity as they relate to GP-1 and New GP-1.

POINT V

FENDT HAS FAILED TO DEMONSTRATE THE NEED FOR DISCOVERY

Although Fendt relies upon the allegedly incomplete discovery on its appeal of the lower court's SJ D/O granting Anderson and Urban Green's motion for summary judgment, to be clear – Fendt never articulated, pursuant to Section 3212(f) of the CPLR, what discovery, if any, he needed. (R. 1317, 1336). He failed to identify in opposition to the motion for summary (and on this appeal), what specific

information he needed/needs, what effort he has made to obtain that information, what discovery he intends to complete, and how that might have beared upon the West Harlem Entities' motion for summary judgment.[15] There is, therefore, is no basis for overturning Judge Sherwood's SJ D/O based upon the trope that additional discovery is needed.

CONCLUSION

For all of the foregoing reasons, Intervenors-Plaintiffs-Respondents request an Order denying Appellant's appeal, together with such other and further relief as the Court deems just and reasonable.

Dated: New York, New York
December 10, 2019

OFFIT KURMAN

By: Daniel I. Goldberg
Daniel I. Goldberg, Attorneys for
Intervenors-Plaintiffs-Respondents
WHGA Hamilton Heights Cluster, Inc.
10 East 40th Street,
New York, New York 10016
347-589-8542

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[15] *See eg. Ward v. New York City Housing Authority*, 795 N.Y.S.2d 568 (1st Dep't. 2005) (summary judgment may not be defeated on ground that more discovery is needed, where side advancing such argument has failed to ascertain facts due to its own inaction), *Richards v. Burch*, 18 N.Y.S.3d 87 (2d Dep't. 2015) (motion for summary judgment in personal injury action was not premature, where driver did not demonstrate what information he hoped to discover at pedestrian's deposition that would relieve him of liability in the case), *Jannetti v. Whelan*, 17 N.Y.S.3d 455 (2d Dep't. 2015) (prospective purchaser of real property was not entitled to continuance for additional discovery before trial court ruled on vendors' motion for summary judgment, where prospective purchaser failed to indicate what evidence further discovery might uncover, or to explain how information concerning his financial ability to close on or before deadline stated in purchase agreement was not already in his possession).

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