To be Argued by:
MICHAEL J. ANTONGIOVANNI
(Time Requested: 15 Minutes)

New York County Clerk's Index No. 653038/14

New York Supreme Court
Appellate Division – First Department

Appellate Case Nos.: 2018-5752 2019-4839

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.

(For Continuation of Caption See Reverse Side of Cover)

REPLY BRIEF FOR PLAINTIFF-APPELLANT AND INTERVENOR-DEFENDANT-APPELLANT

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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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PRELIMINARY STATEMENT

West Harlem's brief serves only to highlight the glaring issues of fact and credibility presented on this appeal.[1] If its brief makes one thing clear, it is that the issue of whether the Limited Partnership was restructured cannot be decided on this record, as the lower court erroneously did. The trier of fact will ultimately have to hear the testimony and the starkly different versions of events of this decade-old dispute, and assess the credibility of the witnesses, including, especially, that of Notice and Anderson, who both orchestrated the Restructured Ownership in 2004 on behalf of the two general partners they represented and now incredulously claim it was all a "fantasy" created by Mr. Fendt.

By asking this Court to believe that the Restructured Ownership was a fantasy, West Harlem is asking it to ignore a decade's worth of hard evidence left behind by Notice and Anderson, reflecting that they, on behalf of the partners, effectuated it. This includes such evidence as creating the new partners that were substituted into the Limited Partnership, representations made by both Notice and Anderson to the bank confirming the partner substitutions, the filing of tax returns reflecting New LP as limited partner and new percentage interests consistent with the Amendment, and Anderson acquiring his fellow members' interests in the outgoing limited partner,

[1] The defined terms herein bear the meanings ascribed to them in appellants' main brief.

Former LP, with the understanding by all that the Restructured Ownership had been implemented.

The fact that the signed Amendment has not surfaced does not mean it was not on the table at the 2004 Closing. Indeed, the few facts that are undisputed here suggest that this is very likely the case. While Notice and Anderson *claim to speculate* that all of the sophisticated parties and law firms involved with the 2004 Closing must have accepted an unsigned Amendment in extending a multi-million dollar loan and assumed it would later be signed and "backdated," the more plausible scenario is that the Amendment was either (a) brought to the closing already executed or (b) executed at the closing by Notice and Anderson, and then left with one of them at its conclusion.

Whichever the case it does not matter because, contrary to West Harlem's assertions, the law provides that, even in the absence of a signed amendment, an agreement may be modified by the parties' course of conduct and such conduct may supply any consent, written or otherwise, which may be required. Here, the evidence in the record raises an issue of fact as to whether Notice and Anderson's undeniable conduct modified the 1999 Agreement by way of the Amendment and supplied the consent for the partner substitutions.

Ironically, much of West Harlem's brief focuses on advancing implausible explanations for Notice's and Anderson's conduct. It also argues the factually

disputed issues concerning the formation of the Limited Partnership and the financial contributions of the Former LP. Furthermore, it relies on improper hearsay between its counsel of record and HPD for its argument that HPD did not consent to the Restructured Ownership (as discussed below, HPD's consent was not required because its restrictions expired before the 2004 Closing). All this does is highlight the issues of fact and credibility that pervade the record.

As one final gasp for air, West Harlem even attempts to argue for the first time on this appeal that New LP lacks standing to litigate the Restructured Ownership claim and that the lower court made such finding in the Order. This is incorrect. As a party affected by the outcome of the claim, of course New LP has standing.

In sum, as the briefing of this appeal highlights, West Harlem's motion was predicated on disputed factual issues, hearsay and improper speculation. As such, summary judgment was improperly awarded.

ARGUMENT

I.

WEST HARLEM IS INCORRECT THAT THE PARTNERS' COURSE OF CONDUCT DOES NOT ESTABLISH THE RESTRUCTURED OWNERSHIP

West Harlem is incorrect that course of conduct may not modify a written partnership agreement and supply the consent necessary for such modification. It cites no authority for this assertion. The 1999 Agreement does *not* provide that it

may only be amended by a writing and it is settled law that a written agreement, regardless of whether it is a partnership agreement or not, may be modified by the parties' course of conduct. R.55-58. *See Ficus Investments, Inc. v. Private Capital Mgmt., LLC*, 61 A.D.3d 1, 11, 872 N.Y.S.2d 93, 100–101 (1st Dep't 2009); *see also Rao v. Intern. Licensing Industry Merchandisers' Ass'n,* 2015 WL 4467751 *1; *see also Chase v. Skoy*, 146 A.D.2d 563, 564, 536 N.Y.S.2d 512, 513 (2d Dep't 1989); *see also Echevarria v. 158th St. Riverside Drive Hous. Co.*, 113 A.D.3d 500, 501, 979 N.Y.S.2d 294, 295 (1st Dep't 2014); *see also Giblin v. Sechzer,* 97 A.D.2d 833, 468 N.Y.S.2d 719 (2d Dep't 1983). Indeed, the *Ficus* case involved an operating agreement (much like a partnership agreement), and this Court held that "[p]arties to a contract are able to alter or waive portions of an agreement by their course of conduct … and the parties appear to have done so here." *Ficus*, 61 A.D.3d at 11, 872 N.Y.S.2d at 100.

Here, West Harlem and Anderson's course of conduct before, during and after the 2004 Closing evidences that they consented to and implemented the Restructured Ownership on behalf of the partners. R.672-679. As Notice and Anderson denied this course of conduct in the motion below, that denial created issues of fact that the lower court erroneously overlooked. Not only was the lower court's Order based on disputed facts, but West Harlem's motion relied heavily upon alleged hearsay and speculation, which is improper for summary judgment.

A. Notice and Anderson's Course of Conduct Evidences That They Implemented The Restructured Ownership

Though West Harlem claims that the Restructured Ownership is all a "fantasy" of Mr. Fendt, there is a trail of very real evidence in the record reflecting that (i) the 1999 Agreement was modified by way of the Amendment and (ii) the partner substitutions occurred. Respondents' brief, dated December 10, 2019 ("Resp. Br."), at 1. West Harlem and Anderson simply cannot escape this evidence.

Indeed, though Notice claims on West Harlem's behalf that it did not know about the Restructured Ownership or the Amendment, the evidence shows that it (i) permitted Former WH GP to dissolve and (ii) hired independent counsel to form New WH GP 8 days before the scheduled 2004 Closing. R.673, 715-718. This occurred the very same day that Anderson formed New LP. R.673, 719-720. It is no coincidence that these two new entities that Notice and Anderson formed were the same entities that were to be substituted as the Limited Partnership's new partners consistent with the Amendment. R.66.

It is also no coincidence that 8 days after forming the new partners consistent with the Amendment, Notice and Anderson sat at the closing table, used the Amendment as the operative partnership agreement and signed loan documentation on behalf of the newly substituted partners, representing to the bank, unequivocally, that the new partners were then the partners of the Limited Partnership consistent with the Amendment, and obtained millions of dollars in financing. R.673-674, 745-

875. Notice claims that this affirmative conduct was simply a "mistake" and that the documents he signed on behalf of New WH GP making such representations should not be chargeable against Former WH GP. R.51 ¶ 20. Resp. Br. at 46. This is not believable. WHGA is the sole shareholder of New WH GP and Former WH GP, and Notice is the executive director in charge of all three entities. R.44. So, West Harlem is essentially asserting that Notice's left hand did not know what his right hand was doing. The argument is not credible.[2]

Furthermore, as if Notice's credibility were not in question enough, he claims he made another "mistake" a decade later when he judicially admitted in a sworn affidavit, as director of WHGA and on behalf of intervening-defendants, Former WH GP and New WH GP, that the partner substitutions did, in fact, occur. R.678, 1127-1128 ¶ 13. West Harlem has an explanation for this too, of course: Its counsel was rushing and did not get the facts straight. R.255-256 ¶ 8. This is an absurd explanation. Notice is head of one of the two general partners of the Limited Partnership expressly charged with the management of the partnership's affairs, and West Harlem wants this Court to believe that he made a mistake when he admitted to a pivotal event concerning partner substitutions. R.81 ¶ 5.03, 56 ¶¶ 10 and 11.

[2] The fact that an earlier "12/17/04 draft" of the Amendment was reportedly found by Anderson's counsel in the Limited Partnership's attorney's files during the course of this litigation shows the Amendment was part of a negotiated process, which culminated in its final version, dated December 22, 2004, which was used at the 2004 Closing. R.269-323. At the very least, it creates another issue of fact.

Not so coincidently, Anderson, like Notice, also judicially admitted in 2015 that the limited partner substitution occurred consistent with the Amendment. R.678-679, 1148-1149 ¶ 21.

These judicial admissions are admissible evidence that the partner substitutions did occur consistent with the Amendment, which the lower court erroneously disregarded in granting summary judgment. *See Matter of Liquidation of Union Indem. Ins. Co. of New York*, 89 N.Y.2d 94, 103, 651 N.Y.S.2d 383, 387 (1996).

B. The Limited Partnership's Tax Returns Are Additional, Compelling Evidence That the Restructuring Occurred

It would be difficult for Anderson *not* to have made such admission, however. After all, on the day of the 2004 Closing and again several months thereafter, Anderson emailed the Limited Partnership's accountant, Joanne Cottone, confirming the substitution of New LP and change in tax percentage interests of the partners entirely consistent with the Amendment (aside from a misplaced decimal). R.674-677, 640-642. Anderson then signed off on the Limited Partnership's tax returns each year following the Amendment (tax years 2004-2013), all of which reflect the substitution of New LP and change in tax percentage interest allocation in accordance with the Amendment. R.677, 945-1120.

West Harlem claims that Anderson's admissions in the emails concerning the limited partner substitution and change in tax percentage interests consistent with

the Amendment should not be chargeable to it. Resp. Br. at 52. While Notice may not have sent the email himself, the first email was sent the day of the 2004 Closing at which Notice, on behalf of West Harlem, relied on the Amendment to obtain financing for the partnership, and it is consistent with all of the other evidence at that precise time demonstrating that West Harlem and Anderson were implementing the Restructured Ownership. R.640, 672-673.

West Harlem also attempts to shift the blame to Mr. Fendt regarding the returns, claiming that Mr. Fendt's "agents" prepared them. R.52 ¶ 21. It is a facially incorrect argument to assert because the Limited Partnership's independent accounting firm prepared the returns at Anderson's direction (not Mr. Fendt's or anyone in his employ). R.675-679. In any event, all this bald assertion does is raise yet another issue of fact.

The evidence demonstrates that Anderson signed off on the returns as "Tax Matters Partner" on behalf of the general partners in charge of the affairs of the Limited Partnership, and such returns were relied upon by the members of New LP each year as evidence of their derivative ownership interest in the Limited Partnership. Thus, the tax returns are additional compelling evidence that the lower court incorrectly overlooked in awarding summary judgment. R.677, 945-1120. *See Wenger v. L.A. Wenger Contracting Co.*, 30 Misc. 3d 1201(A), 958 N.Y.S.2d 649 (Sup. Ct., Suff. Co., 2010), *aff'd as modified*, 114 A.D.3d 694, 979 N.Y.S.2d 692

(2d Dep't 2014), *and aff'd as modified*, 114 A.D.3d 694 (2d Dep't 2014).

Understanding the gravity of this additional evidence against it, West Harlem resorts to its *ostrich defense*. Notice claims West Harlem (i) did not, itself, send the emails to the Limited Partnership's accountant and (ii) did not notice "mistakes" in the tax returns because they were issued to a non-existent West Harlem entity and the Limited Partnership never turned a profit. R.52-53. Resp. Br. at 52. It also claims the returns do not treat tax losses precisely in accordance with the Amendment because losses were allocated to New LP, resulting in a negative capital account. Resp. Br. at 51. These explanations are nonsensical. The error in the West Harlem general partner's name in the tax returns was occurring well-before the restructuring. R.677, 885-944. So were the errors in the tax loss treatment (according to the 1999 Agreement, all losses were to be allocated to the Former LP, but they were not). R.56 ¶ 8, 885-944. Yet, Notice claims that, because of these errors, West Harlem, one of the two general partners expressly charged with managing the Limited Partnership, never "caught the mistakes" in the returns. R.81 ¶ 5.03, 56 ¶¶ 10 and 11. That is an unbelievable explanation.

C. Anderson Acquired the Former LP Members' Membership Interests Based on the Understanding By All That the Restructured Ownership Had Occurred and New LP Substituted for Former LP

Equally unbelievable is Anderson's assertion that, though he was designated "Tax Matters Partner" and signed off on the returns, he, too, did not notice the

partner substitution and new tax percentage interests specified therein because no profit was recorded. R.638 ¶ 29. This is what Anderson says now. But in 2005, shortly after the 2004 Closing, Anderson acquired his fellow members' interests in Former LP with the understanding by all that the substitution of New LP for Former LP as limited partner had occurred. R.667-668, 709-712. All of the members of Former LP became the members of New LP. R.667-668. As noted above, New LP received K-1s each year reflecting that it was the limited partner of the Limited Partnership and with a percentage allocation consistent with the Amendment. R.677, 945-1120.

D. Because West Harlem Cannot Escape the Hard Evidence Reflecting It Consented to and Implemented the Restructured Ownership, It Resorts, Instead, to Arguing Disputed Issues of Fact and Relying on Alleged Hearsay

In the face of this mountain of admissible evidence reflecting that it consented to the Restructured Ownership, West Harlem resorts to arguing the disputed issues of fact concerning how much money the members of the limited partner contributed to the project and whether West Harlem's decision to consent to the Amendment and change of percentage interests, in retrospect, was a good business decision on its part. Such arguments represent a large portion of West Harlem's brief, but are an improper basis for summary judgment.

(1) The Reason for the Amendment and Change in Percentage Interests Is a Disputed Issue of Fact

Among the sharply contested factual issues on the motion below is the partners' original understanding of the ownership interests of the Limited Partnership and why the 67-32-1 allocation was included in the 1999 Agreement in the first place. West Harlem spends a considerable amount of its brief arguing this factual dispute. As the record reflects, the parties' submissions on the motion below represent starkly different factual views on this issue barring summary judgment as a matter of law. *Rao v. Intern. Licensing Industry Merchandisers' Ass'n*, 2015 N.Y. Slip Op. 31281(U), 2015 WL 4467751, * 4 (N.Y. Sup. Ct, N.Y. Co., 2015) (noting that a *prima facie* case for summary judgment requires a showing of an absence of any material issues of fact).

As Mr. Fendt explains in his affidavit, West Harlem partnered with Anderson and Mr. Fendt in 1998 for purposes of forming the Limited Partnership and developing the Buildings. It was agreed at that time that the ownership split would be 51% (WHGA) and 49% (A&F Builders), as reflected by both the 1998 Letter-Agreement and the Confirmatory Memorandum memorializing a conversation between Anderson and Notice. R.688-689, 695. Notice denies (i) ever seeing the 1998-Letter Agreement, (ii) agreeing to such an ownership split and (iii) the veracity of the Confirmatory Memorandum that was faxed to the Limited Partnership's

attorney in 1999. R.1341-1342. Resp. Br. at 9. As such, this is a disputed issue of fact.

Mr. Fendt further affirms his understanding that the 67-32-1 allocation was required by HPD as part of the 2001 financing on the construction loan. R.663. Anderson in his affidavit agrees with Mr. Fendt that HPD was involved in setting the percentage interest. R.632. Mr. Fendt further affirms that it was the partners' understanding that they would always honor the original 51-49% split despite HPD's requirement. R.663-664. The fact that HPD imposed requirements on the ownership interest allocation is consistent with the control it was evidently asserting over the governance of the Limited Partnership up until the Certificates of Completion for the work was issued in 2004, as reflected by paragraph 20 of the 1999 Agreement. R.58. West Harlem disputes these facts and claims it reflects an intention on Mr. Fendt's part to "defraud" HPD. Resp. Br. at 28.

The problem with West Harlem's argument, however, is that it was Anderson and Notice – not Mr. Fendt – who were dealing with HPD. R.660-665. Mr. Fendt oversaw the construction-end of the venture. R.660-665. So it would have been Anderson and Notice who would have decided when and how to handle HPD's requirements and restrictions in light of the business arrangement between the partners. When HPD released its control over the partnership's affairs right before the 2004 Closing (the Certificates of Completion for the project were issued at that

point), Anderson and Notice decided that it was the right time to formally reset the partnership agreement in order to memorialize the original 51-49% agreement *but with a modification* in order to credit Former LP for the substantial and unanticipated additional funding it was required to contribute to the construction project. R.665-670, 698-706.

Because West Harlem cannot deny that the Amendment and its related partner substitutions were used by Notice and Anderson at the 2004 Closing (there is undisputable documentary evidence reflecting they were), West Harlem, instead, argues that the changes in percentage interests reflected by the Amendment are not justified and, thus, the Amendment does not make sense economically for West Harlem. Resp. Br. at 2-3. West Harlem's arguments, however, rest squarely on disputed facts – none of which may serve as a foundation for summary judgment.

Simply put, there is an issue of fact concerning whether Former LP's contributions to the Limited Partnership's project between 2001 and 2004 is valued at $1,662,108, as Mr. Fendt maintains, or $556,375, as West Harlem argues.[3] R.665-

[3] The contributions were made by the Former LP's members through the Former LP. R.663, 665-667. As the members of the Former LP were all the same members of A&F Builders, which generated the income for purposes of investment in various projects that the members were involved in, any contribution that was made by A&F Builders were attributed to Former LP. R.663, 665-668. Thus, for example, when Former LP members waived payments owed by the Limited Partnership to A&F Builders for work performed under the construction contract in the amount of $762,534 (as reflected by Anderson's spreadsheet), the waiver of that monetary contractual obligation was credited by the partners as a financial contribution of Former LP. R.665-667, 707.

667, 1342. Each side disputes each other's interpretation of documentation prepared by Anderson at the time. Essentially the dispute is over whether contributions listed in Anderson's letter to HPD, dated March 30, 2004, amounting to $1,611,375 are included in Anderson's spreadsheet showing equity amounting to $1,105,733 or they are in addition thereto. R.190-191, 707. Mr. Fendt asserts they are in addition to the $1,105,733 figure as evidenced by the fact that the spreadsheet does not ascribe any value to several of the items listed in the letter (*e.g.*, the (i) $227,882 in "maintenance & operation" overages and (ii) "hard cost" overages related to the "commercial space" amounting to $669,405 ($152,223 plus $517,182) listed in the letter have "$0" ascribed to them in the $1,055,000 additional equity column of the spreadsheet – meaning they do not make up part of the $1,105,733 figure). R. 665-667, 190-191, 707. West Harlem disagrees. R.1342.

Regardless, the documents themselves are not self-explanatory and the submissions by the parties are in conflict as to what the figures mean. The relevant point is that it is undisputed that Former LP made substantial contributions to the project beyond what was anticipated, and that served as an impetus for the partners' agreement to modify the original understanding of the 51-49% split. R.665-667. Contrary to West Harlem's assertion, the modification of the percentage interests was not a result of an involuntary dilution of West Harlem's interest in the partnership due to the contributions made by the Former LP's members. Resp. Br.

at 13. It was an agreed upon adjustment made by the partners in order to recognize Former LP's financial contributions. R.665-667.

West Harlem's claim that "the general partners never authorized a capital contribution or a dilution of capital" is simply nonsensical and misleading. Resp. Br. at 13. The project would not have been completed and the permanent financing extended unless the Former LP made the financial contributions necessary to move the project to completion prior to the permanent financing in 2004. R.665-667. Moreover, this statement is belied by Notice's admission that he was aware of the contributions made by the Former LP specified in Anderson's March 30, 2004, letter to HPD (upon which Notice is copied). R.1342. (Additionally both the 1998-Letter Agreement and 1999 Agreement contemplate the Fendt-Anderson side of the partnership contributing capital or equity for the project. R.688, 56.)

On this point, it must be emphasized, again, that the change in West Harlem's interest was not as great as West Harlem feigns. West Harlem likes to advance the notion that its interest was reduced to .051% -- a "de-equitization" as it likes to call it -- which is clearly incorrect. Resp. Br. at 31. As reflected by the Amendment, there are two percentage interest allocation schemes: one for the allocation of losses/profits (there were never any profits) and one for the distribution of capital proceeds. R.92 § 7.02; R.95 § 8.02; R.115. Under the Amendment, the actual percentage interest allocations of the two schemes are as follows: (a) New WH GP

– 25% (capital proceeds) and 0.051% (losses), (b) A&F GP -- 25% (capital proceeds) and 0.049% (losses) and (c) New LP -- 50% (capital proceeds) and 99.99% (losses). R.92 § 7.02; R.95 § 8.02; R.115. Thus, through the Amendment, West Harlem agreed to reduce its percentage for the distribution of capital proceeds from 51% stated in the 1998 Letter-Agreement to 25% under the Amendment -- a 26% reduction. R.688, R.95 § 8.02. Its continued suggestion that it was a total "de-equitization" is simply a *red herring*.

(2) West Harlem's Alleged "Facts" Regarding HPD Relies on Speculation and Purported Hearsay Between Counsel of Record and Non-Party Witnesses That Are Improper for Summary Judgment

Another *red herring* is West Harlem's assertion that HPD would have had to approve the Restructured Ownership and that HPD neither (i) knew about the restructuring nor (ii) provided its consent. Not only does the evidence in the record establish that HPD's consent was *not required*, but West Harlem relies on pure speculation and impermissible hearsay between West Harlem's counsel of record and non-party HPD witnesses to supposedly support its arguments. R.266, 1305-1306. Such hearsay is not properly considered in support of a motion for summary judgment. *Bergmann v. Spallane*, 129 A.D.3d 1193, 1197, 10 N.Y.S.3d 670, 675 (3d Dep't 2015) ("inadmissible hearsay cannot support a motion for summary judgment").

On the motion below, West Harlem's counsel claims to have had numerous conversations with several employees of HPD. Counsel cites this alleged hearsay as if it were admissible evidence, including for the purported proposition that HPD has no documents showing it "knew of or consented to" the substitution of the limited partner or change in percentage interests. R.266. Resp. Br. at 31. Notably, none of the alleged witnesses provides an affidavit to substantiate any of West Harlem's counsel's allegations.

Moreover, the hearsay that West Harlem does cite is based on pure conjecture, having no relevance on the motion. Even if HPD did not know about the Restructured Ownership as West Harlem alleges without any evidentiary basis, there is nothing in the record establishing that, by the 2004 Closing, HPD was required to consent. Indeed, the evidence in the record actually demonstrates that once the Certificates of Completion were issued prior to the 2004 Closing, HPD's restrictions on the Limited Partnership's corporate governance, including on such matters as the substitution of general partners and assignment of any interest in the 1999 Agreement, expressly no longer applied, per the 1999 Agreement. R.698-706; R.58, 1999 Agreement ¶ 20 ("After the issuance of the HPD Certificates of Completion, the restrictions contained in this paragraph shall not apply").

While HPD may have maintained regulatory oversite over the Buildings after 2004, according to paragraph 20 of the 1999 Agreement it became *hands-off* when

it came to imposing any restrictions on partner substitutions and the affairs of the partnership itself. R.58, 1999 Agreement ¶ 20. Moreover, while West Harlem cites to the EAB 2001 loan agreement, claiming that prior consent was necessary under that agreement, the fact is that that loan was paid-off at the 2004 Closing and EAB ceased to have any involvement with the Limited Partnership following the 2004 Closing (in any event, at most this would have been is a potential default under the loan agreement, which, to this date, has never been enforced by any interested party). R.665-667. Resp. Br. at 33.

Again, at the end of 2004, clearly Notice and Anderson were aware of the lifted restrictions and believed that they were cleared to proceed with implementing the Restructured Ownership. R.668-679. Their chosen timing was no coincidence.

E. Even With This Mountain of Evidence Demonstrating That It Consented to the Amendment and Partner Substitutions, West Harlem Still Insists It Is Entitled to Summary Judgment Because a Signed Writing Has Not Materialized

West Harlem argues that the lower court was correct in deciding that the partner substitutions and modification of the 1999 Agreement did not occur because no written consent by West Harlem has materialized. West Harlem is incorrect. As noted in appellants' main brief, the lower court incorrectly relied on the lower court's 2015 Order "as law of the case," even though in its April 2016 order the lower court had clarified that the 2015 Order did not embody a dispositive holding on the ownership issue. R.1161. The lower court should have, instead, applied the

summary judgment standard of review and reviewed the record for the glaring issues of fact.[4]

Moreover, as noted above, parties to a contract may modify its terms through their conduct and their conduct may supply any consent that may be required. *See, generally, Rao v. Intern. Licensing Industry Merchandisers' Ass'n*, 2015 WL 4467751 at *1 ("Consent to contract modification may be shown by the parties' conduct"). As highlighted above, Notice and Anderson, who at all times were respectively acting on behalf of the two general partners of the Limited Partnership (Anderson was also acting on behalf of the limited partner), engaged in conduct that evidences the partners' consent and, at the very least, creates an issue of fact as to whether it does. R.657, 672-679. Indeed, in the case, *Giblin v. Sechzer*, 97 A.D.2d 833, 833, 468 N.Y.S.2d 719 (2d Dep't 1983), the court there held that the partners, who *did not* sign the *partnership agreement*, were, nevertheless, bound to it because, as is the case here, *their "course of conduct demonstrated ratification of and compliance with the agreement."*

[4] West Harlem's contention that the issue was decided on the record during oral argument for an injunction on March 21, 2016, and in the April 7, 2017, order deciding a motion to dismiss in a related action is also inaccurate. Resp. Br. at 36. During the March 21, 2016 oral argument, the lower court was not deciding or hearing evidence on the issue, and was simply repeating Anderson's counsel's assertion, which was inaccurate. R.461-462. The April 7, 2017, order also did not decide the issue but instead dismissed the subject claims as duplicative of the intervenor claims in this action. R.625-627.

With respect to the partner substitutions, it is worth highlighting again that *written* consent was not required under the 1999 Agreement or the limited partnership act. RLPA § 121-704 defers to the partnership agreement, providing, in pertinent part, that "An assignee of a partnership interest, including an assignee of a general partner, may become a limited partner … *(iii) to the extent that the partnership agreement so provides.*" Thus, this provision, on its face, does not require written consent.

Turning to the 1999 Agreement, paragraph 19 thereof requires only consent – *not written consent* – as follows:

> Assignment by Limited Partner: *Subject to the 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 the partners (except the assignor) *consent thereto*. Otherwise, the assignee is only entitled to receive the share of the profits to which his assignor would be entitled.

R.57 ¶ 19 (emphasis added).

As such, no "written" consent was required. Notice and Anderson's course of conduct supplied any "consent" that was required by the 1999 Agreement for the substitution of the partners. And, to the extent West Harlem is arguing that a *written assignment* of the partnership interests was required, it provides no legal support for that contention either. Resp. Br. at 35. In any event, the assignments were *fully performed*. *See, e.g., 310 S. Broadway Corp. v. Barrier Gas Serv.*, Inc., 224 A.D.2d

409, 410, 637 N.Y.S.2d 765, 765 (2d Dep't 1996) (performance is an exception to statute of frauds). West Harlem and Anderson, on behalf of the Limited Partnership, (i) used the Restated Agreement in connection with the closing, R.672-673; (ii) formed the new partners 8 days before the 2004 Closing, R.673, 715-720; (iii) permitted Former WH GP to dissolve prior to the 2004 Closing, R.673, 718; (iv) represented to the bank in writing at the 2004 Closing that the new partners were the new partners of the Limited Partnership, R.673, 745-748; (v) signed closing documents on behalf of the new partners, R.748-875; (vi) issued Anderson's emails to the Limited Partnership's accountant confirming the limited partner substitution and new percentage interests, R.674, 640-642, 681-685; (vii) issued tax returns to the New LP reflecting New LP as the limited partner and new percentage interests consistent with the Amendment, R.677, 945-1120; and (viii) judicially admitted to the substitutions, R.1127-1128 ¶ 13, 1148-1149 ¶ 21. Also, Anderson, in 2005, acquired his fellow members' ownership interests in Former LP based on the understanding by all members that West Harlem and Anderson had substituted New LP for Former LP in 2004. R.668, 709-712.

Even if a written consent were required, however, as West Harlem claims RLPA § 121-110(c) requires for a change in partnership percentage interests, equitable principles such as course of conduct, performance, equitable estoppel and waiver may satisfy such requirement. *See, e.g., Estate of Kingston v. Kingston*

Farms P'ship, 130 A.D.3d 1464, 1465, 13 N.Y.S.3d 748, 750 (4th Dep't 2015) ("[T]he law is abundantly clear in New York that, even where a contract specifically contains . . . a provision stating that it cannot be modified except by a writing, it can, nevertheless, be effectively modified by actual performance and the parties' course of conduct"); *see also, 310 S. Broadway Corp. v. Barrier Gas Serv., Inc.*, 224 A.D.2d 409, 410, 637 N.Y.S.2d 765, 765 (2d Dep't 1996) ("These leases are therefore governed by the Statute of Frauds (see, General Obligations Law § 15-301 [1]). Without a written agreement signed by the plaintiffs, the appellants must prove an exception to the Statute of Frauds such as waiver, estoppel, or partial performance").

Here, Notice and Anderson's course of conduct on behalf of the Limited Partnership's partners satisfied any required consent (written or otherwise) for the partner substitutions and modification of the 1999 Agreement by way of the Amendment. Again, at the very least, the evidence on the motion below created an issue of fact as to whether it did.

F. Discovery Is Necessary to Develop the Factual Record for a Proper Adjudication

In light of the sharply disputed facts, discovery is necessary in order to develop the factual record. The lower court should have denied West Harlem's motion based on the factual disputes and permitted the parties to proceed with discovery, which had been derailed by a confluence of factors, including third-party

and intervenor practice, extensive motion practice on ancillary issues, discovery disputes and a partial settlement. R.1169-1172.

Anderson and Notice need to be examined about the governance of the partnership, what occurred at the 2004 Closing and their course of conduct. So, too, do the relevant non-parties, including NYCB, HPD representatives and 2004 Closing attorneys, including Karen Sherman, Esq., involved with the financing. Only then may there be a proper adjudication of this matter on the evidence and merits.

II.

WEST HARLEM IS INCORRECT THAT THE LOWER COURT HELD THAT NEW LP LACKED STANDING TO OPPOSE WEST HARLEM'S INTERVENOR CLAIM AND MOTION REGARDING THE RESTRUCTURED OWNERSHIP, AND TO ASSERT ITS OWN COUNTERCLAIM FOR SUCH RELIEF

West Harlem mischaracterizes the lower court's Order to assert incorrectly that New LP lacked standing to (i) oppose West Harlem's intervenor claim and motion concerning whether the Amendment modified the 1999 Agreement and (ii) assert its own counterclaim for similar relief (*i.e.*, that the Amendment is the operative partnership agreement). This is an argument that West Harlem is raising for the first time on this appeal.

Contrary to West Harlem's mischaracterization, the lower court *did not* issue such a holding. R.31. Rather, the lower court decided West Harlem's intervenor claims concerning the validity of the Restructured Ownership and Amendment

without any reference to New LP's standing whatsoever. R.31. Clearly New LP has standing to oppose such claim as it is directly affected by a decision on such issue and has a direct stake in the outcome. *See, generally, Silver v. Pataki*, 96 N.Y.2d 532, 539, 730 N.Y.S.2d 482, 487 (2001) (noting that a party has standing if it has an "actual legal stake in the matter being adjudicated").

In fact, the lower court even considered and decided A&F GP's and New LP's similar first counterclaim for a declaration that the Amendment was the operative partnership agreement without any reference to standing. R.31. Again, they both are directly affected by the decision on such claim and, thus, have standing. *Id.*

Indeed, the lower court made it clear that it only considered standing with respect to A&F GP's and New LP's *second counterclaim* against West Harlem for damages to the Limited Partnership based on a breach by West Harlem of its fiduciary duty in acquiescing to the mismanagement of Anderson and Urban Green. R.31. It was in the context of deciding that second counterclaim, *and only that second counterclaim*, that the lower court found that New LP lacked standing to assert a derivative claim because it found that the 1999 Agreement was not amended and New LP was not substituted as a partner. R.31. According to the lower court, *based on that finding*, New LP did not have an interest in the Limited Partnership to assert such claim.

In the context of the *second counterclaim*, the lower court went on to hold that *Mr. Fendt* lacked standing to sue derivatively on behalf of *A&F GP* and assert the *second counterclaim* for damages to the partnership because, in its view, Mr. Fendt lacked standing to assert a "double derivative" claim through A&F GP. R.31. *This finding has nothing to do with New LP and its first counterclaim or West Harlem's intervenor claims concerning the validity of the Amendment.* R.31.

In any event, the lower court erred by holding that *Mr. Fendt* lacked standing to assert a "double-derivative" claim through A&F GP. The guiding consideration for double-derivative standing is whether the alleged wrongdoers maintain such control over the subject entities so as to prevent an aggrieved shareholder from vindicating the rights of an entity that was harmed by the wrongdoers. *Kaufman v. Wolfson*, 1 A.D.2d 555, 558, 151 N.Y.S.2d 530 (1956); *see also Pessin v. Chris-Craft Indus., Inc.*, 181 A.D.2d 66, 72, 586 N.Y.S.2d 584 (1st Dep't 1992) ("[s]ince the putative wrongdoers cannot be counted upon to sue themselves, there would otherwise be nobody with a valid interest in correcting the damage done to the minority or to the subsidiary"). Here, Mr. Fendt fits this justification.

Mr. Fendt has asserted derivative claims against both West Harlem and Anderson for harm to the Limited Partnership (in 2015, Mr. Fendt re-pled the Limited Partnership's direct claims against Anderson and Urban Green as derivative claims through A&F GP after the lower court found that they could not be

maintained as direct claims on behalf of the Limited Partnership under the Amendment, R.333, 345). R.383-384. Mr. Fendt and Anderson own A&F GP equally. R.662 ¶ 20. Thus, obviously Anderson would not authorize A&F GP to sue him derivatively through the Limited Partnership. Nor, for that matter, would Anderson permit A&F GP to authorize the Limited Partnership to sue him directly (it had equal say in management). R.81 ¶ 5.03, R.56 ¶ 10. West Harlem, similarly, would not authorize a direct action by the Limited Partnership against it for the derivative counterclaim asserted against it (the second counterclaim), which is related to the claims against Anderson. As such, both West Harlem and Anderson exercise enough control over the Limited Partnership to prevent a direct claim or derivative claim from being asserted against them for wrongs to the partnership. Thus, a double-derivative claim is viable in order for Mr. Fendt to assert the claims that would have otherwise been blocked by Anderson and West Harlem by virtue of their control over the Limited Partnership.

In sum, West Harlem's assertion is incorrect. The lower court did not hold that New LP lacked standing to litigate the issue of the Restructured Ownership. New LP, of course, had standing to both oppose and assert claims concerning the validity of the Amendment and Restructured Ownership as it is directly affected by a decision on such issues and has a stake in the outcome. *Id.*

III.

THE LOWER COURT ORDER GRANTING ANDERSON'S AND URBAN GREEN'S MOTION FOR SUMMARY JUDGMENT SHOULD BE REVERSED FOR THE REASONS STATED IN MR. FENDT'S MAIN BRIEF

As Anderson and Urban Green have failed to serve and file a brief on this appeal, the lower court's order granting them summary judgment should be reversed for the reasons set forth in Mr. Fendt's appellate brief.

CONCLUSION

In sum, the lower court erroneously granted West Harlem summary judgment. This highly fact-intensive dispute is riddled with disputed issues of material fact, making it improper for summary determination. The issues of fact surrounding whether West Harlem and Anderson's conduct and admissions evidence that the parties intended to, and did, implement the Restructured Ownership in 2004 consistent with the terms of the Amendment should be tried by a finder of fact. Such issues most certainly should not have been decided on a motion for summary judgment given the conflicting evidence and inconsistencies in the record.

The lower court should have permitted depositions of the parties (Anderson, Notice and Mr. Fendt) and essential non-parties (WHGA, HPD and the closing attorneys) to proceed so that the factual record could be fully developed. The matter should have then been tried for a proper adjudication on the merits. Deciding the matter, instead, on the papers was improper and premature.

For all of the foregoing reasons, it is respectfully requested that this Court reverse the lower court's Order in all respects, remand the matter for discovery and further proceedings and award Mr. Fendt and A&F HHC Equities, LLC costs on this appeal as against respondents.

Dated: Garden City, New York
January 17, 2020

Respectfully submitted,

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