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)

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

Plaintiff-Appellant James Fendt ("Mr. Fendt") and Intervenor-Defendant-Appellant A&F HHC Equities, LLC submit this brief in support of their appeal from the lower court's order, dated November 2, 2018 (Sherwood, J.), and related order, dated May 8, 2019 (collectively, the "Order"), which granted Intervenors-Plaintiffs-Respondents WHGA Hamilton Heights Cluster, Inc. and West Harlem Hamilton Heights Cluster, Inc.'s (at times, collectively referred to herein as "West Harlem") motion for summary judgment concerning the issue of whether the limited partnership Hamilton Height Cluster Associates, LP ("Limited Partnership") was restructured in 2004 consistent with a written amendment ("Amendment") to its limited partnership agreement.

In granting summary judgment, the lower court erroneously "reaffirmed" a prior order of the lower court, dated July 8, 2015 ("2015 Order"), as "law of the case," which granted a motion to dismiss the complaint on the ground that a signed copy of the Amendment had not materialized and, thus, it could not be relied upon by Mr. Fendt for purposes of maintaining a direct action on behalf of the Limited Partnership (the claims were subsequently re-plead derivatively). Years before issuing the Order, however, the lower court had already clarified that the 2015 Order did not decide the issue of whether the Amendment amended the partnership agreement. Thus, by relying on the 2015 Order, the lower court failed to correctly

apply the standard for summary judgment to the evidence before it on the motion. As shown on this appeal, a proper application of the summary judgment standard mandates a denial of West Harlem's motion because the record is teeming with disputed issues of material fact and serious questions regarding West Harlem's credibility – all of which were erroneously disregarded by the lower court, thus constituting reversible error.

There are plainly issues of fact warranting a trial on the issue of whether, in 2004, the partners restructured the Limited Partnership according to the Amendment, which, by its terms, had the effect of (i) substituting new partners and (ii) adjusting the percentage interests of the partners. Though a signed copy of the Amendment has not materialized, and without the benefit of complete discovery (none of the parties or relevant non-parties have even been deposed), there is ample evidence in the record that West Harlem and Defendant-Respondent Eric Anderson ("Anderson"), who are now denying the validity of the Amendment, engaged in a course of conduct that was absolutely consistent with the Amendment's terms. It is well-settled that such course of conduct may supply any consent that was required to adopt the Amendment and modify the original agreement.

Such course of conduct evidence included (i) using the Amendment to obtain financing for the Limited Partnership, (ii) representing to a bank that the partner substitutions occurred, (iii) forming the new partner-entities, (iv) dissolving the

outgoing general partner, (v) confirming the substitutions and change of percentage interests with the Limited Partnership's accountant and (vi) issuing partnership tax returns and K-1s for nearly a decade reflecting the partner substitutions and change in percentage interests – all consistent with the Amendment.

In addition to all this evidence raising issues of fact as to whether the partners intended to, and did, amend the partnership agreement and effectuate the restructuring, West Harlem's Executive Director, Donald Notice ("Notice"), and Anderson – the persons who controlled the management of the Limited Partnership -- also judicially admitted at the litigation's outset that the substitutions *did occur* in accordance with the Amendment. While they later attempted to retract their admissions on the motion below – as they did with all of their other conduct reflecting their consent to the Amendment -- their belated attempts to explain away such evidence only served to create additional issues of fact and credibility, which the lower court erroneously disregarded.

The lower court also incorrectly overlooked other important issues of fact that warranted a denial of summary judgment. For instance, a key purpose of the Amendment was to adjust the percentage interests of the partners in the event of a distribution of capital proceeds in order to account for the substantial financial contributions the members of the limited partner made to the partnership up until

2004. Though, on the motion below, West Harlem disputed the amount of the contributions, all that did was create an issue of fact.

The lower court also overlooked the fact that the members of the outgoing limited partner, in 2005, transferred their interests in the outgoing limited partner to Anderson in reliance on the partner substitutions having occurred consistent with the Amendment and belief that the new limited partner (of which they became members) substituted in as the new limited partner of the Limited Partnership. If the restructuring did not occur, as West Harlem and Anderson now contend, then the members of the limited partner that transferred their interests would be completely divested of their derivative interests in the Limited Partnership and Mr. Anderson will realize a windfall.

For all these reasons, West Harlem's motion for summary judgment should have been denied by the lower court. Likewise, Anderson and Defendant-Respondent Urban Green Management, Inc.'s ("Urban Green") motion for summary judgment on the derivative claims for misappropriation of Limited Partnership assets should have also been denied. On their motion, too, the lower court misapplied the standard for summary judgment and improperly relieved movants of their burden. Anderson and Urban Green failed to even submit an affidavit of a person with knowledge to establish a *prima facie* entitlement to summary judgment and an absence of issues of material fact. Though, as a result, the burden on the motion

never shifted to Mr. Fendt to establish the existence of disputed issues of fact, Mr. Fendt, nevertheless, did submit undisputed evidence reflecting Anderson and Urban Green's defalcation. The lower court incorrectly disregarded this evidence.

For these reasons, the lower court's Order should be reversed in all respects.

QUESTIONS PRESENTED

(1) Does a genuine issue of material fact exist warranting the denial of summary judgment on a disputed claim concerning whether a limited partnership agreement was modified consistent with an amendment (a signed copy of which has not materialized), where the evidence in the record reflects a course of conduct consistent with the amendment by those denying its validity, including (i) the formation of new entities to substitute as partners in the partnership; (ii) the dissolution of an existing general partner prior to the substitution; (iii) providing the amendment to a bank to obtain financing for the partnership; (iv) representing to the same bank that the partner substitutions occurred; (v) confirming the partner substitutions and changes to the partners' percentage interests with the partnership's accountant; (vi) filing nearly a decade's worth of tax returns for the limited partnership reflecting the partner substitutions and new percentage interests contained in the amendment; (vii) causing members of the limited partner to transfer their interests in the limited partner in reliance on the partner substitutions having occurred; and (viii) judicially admitting that the partner substitutions occurred.

Answer: The lower court answered the question in the negative.

(2) On a motion for summary judgment to dismiss derivative claims concerning misappropriation of assets, has a movant met its burden of establishing a *prima facie* entitlement to summary judgment and an absence of genuine issues of material fact where (i) the movant fails to submit an affidavit of a person with personal knowledge establishing that it did not misappropriate assets; (ii) the opponent on the motion submits undisputed evidence in admissible form, including affidavits of persons with knowledge and an expert report, that the movant did misappropriate assets; and (iii) at best, the movant is asserting that it did not receive certain discovery though the evidence on the motion proves otherwise.

Answer: The lower court answered the question in the affirmative.

STATEMENT OF FACTS

This matter involves events that transpired over the course of nearly two decades and issues of sharply disputed fact that were not proper for summary determination by the lower court. R.657. The Limited Partnership at issue was established in 1998 by two principal parties: (i) the non-profit West Harlem Group Assistance, Inc. ("WHGA"), which was headed by Notice, and (ii) the real estate development firm, AF&F Community Builders, LLC (which later became A&F Commercial Builders, LLC) (hereinafter, "A&F Builders"), controlled by Mr. Fendt

and Anderson. R.660-662. At all relevant times the structure of the Limited Partnership consisted of the following:

(i) Two General Partners – (a) a WHGA-controlled general partner and (b) an Anderson and Fendt-controlled general partner, and

(ii) One Limited Partner -- consisting of members of A&F Builders, including Mr. Anderson and Mr. Fendt (until, as discussed below, Anderson acquired the other members' interests in the limited partner). R.662-663, 55, 115.

At the core of West Harlem's claim is the issue of whether, in 2004, the partners amended the limited partnership agreement, dated October 1, 1999 ("1999 Agreement"), by way of an Amendment, dated December 22, 2004, a signed copy of which has not materialized. R.60-115. Mr. Fendt asserts that it was and that the Amendment reflects the partners' intent to restructure the partnership in the following way: Intervenor-Defendant-Appellant A&F HHC Equities, LLC ("New LP") replaced Intervenor-Defendant A&F Equities, LLC ("Former LP") as the limited partner; (ii) Intervenor-Plaintiff-Respondent West Harlem Hamilton Heights Cluster, Inc. ("New WH GP") replaced Intervenor-Plaintiff-Respondent WHGA Hamilton Heights Cluster, Inc. ("Former WH GP") as the WHGA-controlled general partner; and (iii) the 1999 Agreement was restated by the Amendment to reflect the partner substitutions and modify the partners' respective

percentage interests in order to credit Former LP (and, in turn, its successor-in-interest, New LP) for the substantial and unanticipated financial contributions its members made to the Limited Partnership between the years up to 2004. R.658, 665-679.

Pursuant to the terms of the Amendment, there are two different allocations of percentage interests: one for the distribution of capital proceeds and another for the allocation of losses. R.92 § 7.02; R.95 § 8.02; R.115. As such, according to Mr. Fendt, the Limited Partnership's ownership structure is as follows:

(i) General Partners -- (a) New WH GP – 25% (capital proceeds) and 0.051% (losses), and (b) A&F Hamilton Heights Cluster, Inc. ("A&F GP") -- 25% (capital proceeds) and 0.049% (losses); and

(ii) (ii) Limited Partner -- New LP -- 50% (capital proceeds) and 99.99% (losses) (at times, the partner substitutions and Amendment's restatement of the 1999 Agreement, including the changes in percentages interests therein, are collectively referred to herein as the "Restructured Ownership"). R.92 § 7.02; R.95 § 8.02; R.115.

By denying the Restructured Ownership, West Harlem claims that the Limited Partnership's ownership structure and percentage interests remained as stated in the 1999 Agreement:

(i) General Partners: (a) Former WH GP – 67%, and (b) A&F GP – 32%; and

(ii) Limited Partner: Former LP – 1%. R.658, 55-58.

The following is an overview of the background that led to this dispute and the contested issues of fact that the lower court overlooked.

A. The Origin of the Limited Partnership

By 1998, Anderson and Mr. Fendt had been working together for nearly a decade, each serving two separate functions. Anderson was the developer, who would plan the projects, secure financing and prepare the documentation for the deals. R.660. Once a deal closed and the construction loan was in place, Mr. Fendt would then oversee the construction. R.660.

Anderson and Notice, who were already friends at that time, began working on a deal together that would partner Notice's non-profit, WHGA, with Mr. Fendt and Anderson's company, A&F Builders. R.660. WHGA had previously acquired several buildings ("Buildings") in Hamilton Heights that were distressed and in desperate need of repair. R.660. As WHGA did not have the funds necessary to rehabilitate the Buildings it needed to partner with a developer that had financial resources. R.661.

So, Anderson and Notice worked out a deal whereby WHGA, on the one hand, and Mr. Fendt and Anderson's company, on the other, would form a limited

partnership. R.661. It was agreed that WHGA would own 51% of the limited partnership and Mr. Fendt and Mr. Anderson's company would own 49%, and assets would be distributed pursuant to this allocation. R.661. Furthermore, as WHGA did not have the capital necessary to contribute to the project, it was agreed that A&F Builders' company would contribute 100% of the project's equity. R.661.

This understanding was memorialized in a "joint venture" letter-agreement, dated September 18, 1998 ("1998 Letter-Agreement"), between Notice, on behalf of WHGA, and Anderson, on behalf of A&F Builders (only an unsigned copy of which has materialized). R.661. The 1998 Letter-Agreement provides, in pertinent part, as follows:

> The following shall govern referenced project to be completed in a joint venture arrangement between AF&F Community Builders ("AF&F") and West Harlem Group Assistance ("WHGA").
>
> AF&F and WHGA will form a partnership to develop, finance, rehabilitate, and manage the properties referenced.
>
> *A subsidiary of West Harlem Group Assistance (name to be determined) and a subsidiary of AF&F (name to be determined) will be General Partners of the Limited Partnership (LP) and they shall own 51% shall own [sic] 49% of the Limited Partnership ("LP"), respectively.* Cash flow is to be apportioned based on GP interest and all tax benefits to be enjoyed by the LP.
>
> *In the event that the Limited Partnership shall be terminated, all assets will be distributed proportionately according to the partnership interest.*

AF&F shall contribute 100% of projected equity.

R.688-689 (emphasis added).

Two months after the 1998 Letter-Agreement, WHGA formed the Limited Partnership. R.662, 690-692. By this time, Mr. Fendt and Mr. Anderson were already contributing funds to maintain the Buildings. R.666. Notice and Anderson were in the process of planning and obtaining financing for the rehabilitation under a New York City Housing Preservation and Development ("HPD") loan program, which provided a mixture of private and public loans and grants. R.661-662, 664.

B. The Origin of the 1999 Agreement and Issues of Fact Surrounding Why the Percentage Interests Therein Deviated from the 1998-Letter Agreement

A year later, in 1999, the Limited Partnership's 1999 Agreement was entered into. R.662, 55-58. According to the 1999 Agreement, the ownership structure of the Limited Partnership consisted of two general partners and one limited partner. R.55-58. The two general partners at the time were (i) the WHGA-controlled general partner, Former WH GP and (ii) the Fendt and Anderson-controlled general partner, A&F GP. R.55-58.

The limited partner was Former LP, which was owned by Fendt, Anderson and other owners of A&F Builders. R.662-663. Since A&F Builders typically contributed financially to the projects in which it was involved, making the Former

LP a limited partner permitted the owners of A&F Builders to participate in the ownership of the project. R.663.

Two months before the execution of the 1999 Agreement, Ms. Colleen Bonnicklewis, an employee of A&F Builders, sent a memorandum to the Limited Partnership's attorney, George Dellapa, Esq., who was working on the HPD deal, advising of a recent telephone conversation between Notice and Anderson wherein they again confirmed the 51% (WHGA) – 49% (A&F Builders) allocation of the 1998 Letter-Agreement ("Confirmatory Memorandum"). R.663-664, 695. Though WHGA and A&F Builders agreed to the 51%-49% percentage allocation in favor of WHGA and confirmed it two months before the execution of the 1999 Agreement, the 1999 Agreement provided instead for a percentage allocation of 67%-33% in favor of WHGA (*i.e.* Former WH GP – 67%, A&F GP 32% and Former LP 1%). R.55-58.

The reason for this change in allocation was the subject of much debate before the lower court, giving rise to a genuine issue of fact. Mr. Fendt, on the one hand, asserts that HPD required a 67%-32%-1% allocation for the Limited Partnership to obtain the construction loans for the project in 2001. R.663. WHGA, however, did not contribute any funds to the project that would justify an increase in its interest from the agreed upon 51% to 67% -- either during the two-month period between the Confirmatory Memorandum and the 1999 Agreement, or at all for that matter.

R.664-665. It did not transfer the Buildings to the Limited Partnership until 2001. R.664-665. Mr. Fendt further asserts that Notice and Anderson assured him at the time that the 1998 Letter-Agreement's 51%-49% percentage allocation would be honored notwithstanding HPD's 67%-32%-1% technical requirement. R.663-664.

On the motion below, Notice, on behalf of West Harlem, claimed that he "did not recall seeing" the 1998-Letter Agreement or the Confirmatory Memorandum (a familiar "ostrich" theme of Mr. Notice's that plays throughout the record) and that he never agreed to the 51% - 49% allocation. R.1341-1342. West Harlem claimed that its increase to 67% was attributable to a phantom financial contribution that it attempted to claim on the motion below but which Mr. Fendt disputes (discussed further herein). R.49.

For his part, Anderson, who had a falling out with Mr. Fendt years ago and has been aligned with his friend Notice throughout the litigation, acknowledged, at least, that A&F Builders "bargained" for a "49.9%" split, but that was "never approved by HPD." R.632, 667. This admission supports Mr. Fendt's version of events that the only reason the 1999 Agreement contained a 67%-33% allocation was because HPD's requirement played a role in it. R.663-664. Wanting to proceed with the project, the partners went along with HPD's requirement with the understanding that they would eventually reset the partnership documentation to

reflect the 51%-49% agreement that they intended to honor once the HPD restrictions became inapplicable. R.663-664.

C. The 2001 Closing and the Limited Partner's Members' Unanticipated And Substantial Financial Contributions to the Project

Another contested factual issue before the lower court was the amount of the financial contributions that the partners made to the Limited Partnership both before and after the March 2001 closing on the construction loan. Each party made conflicting claims, which raised yet additional issues of fact overlooked by the court below.

In March 2001, the Limited Partnership closed on its financing with HPD and a private lender, EAB Community Development Corporation ("EAB"). The financing included (i) a $1,528,591 construction loan from EAB, (ii) a $1,522,604 loan from HPD and (iii) a HOME funds loan of $2,921,709. The Limited Partnership also received a Federal Home Loan ("FHL") Grant in the amount of $430,000. R.664.

As noted above, even before the construction loans came through in March 2001, Anderson and Mr. Fendt contributed funds to maintain the dilapidated Buildings. Between 1998 and 2001, Anderson and Mr. Fendt contributed $239,556 to pay unpaid bills associated with the Buildings (water, sewer, tax liens, etc.). R.664. This figure is reflected as borrower equity in the "HPD Mortgage Schedule."

R.570, 607. The figure is also reflected as equity in a budget spreadsheet Anderson prepared prior to the closing in 2001. R.697.

On the motion below, West Harlem sought to take credit for the $430,000 FHL Grant as its own financial contribution because the HPD Mortgage Schedule contains that figure next to "WHGA" in an "Equity Distribution" column. R.49, 607. Mr. Fendt disputed that assertion and the document West Harlem relies on does not conclusively support West Harlem's position. R.664-665. The truth is that aside from contributing the distressed Buildings, WHGA did not contribute any funds to the Limited Partnership. R.664-665.

Following the closing in 2001, Mr. Fendt began overseeing the rehabilitation of the Buildings performed by A&F Builders. R.665. The Buildings consisted of residential units and commercial spaces. R.665. Unanticipated costs arose during the project that caused substantial overruns. R.665-667.

As a result, the loan proceeds were insufficient to cover all the project's costs and have enough equity in the project at the end to convert the construction loans into permanent financing in December 2004 ("2004 Closing"). As WHGA did not have funds to address this problem that endangered the project, the burden fell on the Former LP's members to cover the monetary deficit. R.665-667. The Former LP's members did so by (i) waiving payments owed to their company A&F Builders for the work on the Buildings and (ii) cash funding. R.665-667.

As confirmed by documentation prepared by Anderson at the time as well as correspondence between Anderson and HPD (on which Notice was copied), between the 2001 closing and 2004 Closing the Former LP's members made a financial contribution to the Limited Partnership valued at approximately $1,662,108. R.707, 190-191. Specifically, in his March 30, 2004, letter to HPD, Anderson reports that there were $1,611,375 in overages for (i) hard costs (*e.g.*, tenant relocation, repairs, commercial space improvements and additional scope of work for residential areas) amounting to $1,383,493 and (ii) maintenance and operation (*e.g.*, water, sewer, oil, violations, etc.) amounting to $227,882. R.190-191.

Additionally, Anderson's spreadsheet at the time indicates there was an additional amount of equity of $1,105,733 ($762,534 of which is construction contract payments waived by the Former LP's members on behalf of A&F Builders) (this additional equity is reflected in the HPD and NYCB commitment letter, dated December 9, 2004, as well). R.612, 707. The figures in Anderson's letter ($1,611,375) and his spreadsheet ($1,105,733) amount to $2,717,148. At the 2004 Closing, $1,055,000 was repaid to the members of the Former LP, bringing their total contribution to the Limited Partnership between the years 2001 to 2004 to $1,662,108 ($1,901,664 total when adding the $239,556 contributed between 1998 and 2001). R.668.

On the motion below, West Harlem disputed Mr. Fendt's assertion concerning the financial contribution and meaning of the Limited Partnership's documentation from 2004. Notice claimed that he "did not know of any other allegedly unpaid construction work by A&F Builders" aside from the $1,611,375 referenced in Anderson's letter. R.1342. He thus claimed that, with the $1,055,000 repayment at the 2004 Closing, Former LP's member's contribution was only $556,375. R.1342. While the HPD documents and Anderson's spreadsheet strongly suggest he is wrong (*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) are not included in the $1,055,000 additional equity column of the spreadsheet), it simply raises an issue of fact as to the value of the members of the Former LP's financial contribution between the years 2001 and 2004. R.707, 190-191.

D. The Partners' Decision to Use the 2004 Closing as an Opportunity to Amend the 1999 Agreement, Substitute Partners and Reset the Percentage Allocation

After construction was completed in 2003 and as the Limited Partnership was preparing to refinance the construction loan into permanent financing toward the end of 2004, Anderson and Notice used this time as an opportunity to implement the Restructured Ownership – *i.e.*, to substitute partners and amend the 1999 Agreement

to reflect their initial agreement of the 51%-49% percentage allocation reflected by the 1998 Letter-Agreement. R.667-668.

There were evidently several factors that influenced Anderson and Notice's decision to use this time to implement the Restructured Ownership. First, restrictions that HPD had placed on the Limited Partnership (and quite likely their requirement of the 67%-33% percentage allocation in favor of WHGA) became inapplicable by virtue of the completion of construction. R.665. Specifically, the 1999 Agreement reflects that HPD imposed several restrictions on the Limited Partnership at the time (in addition to the 67%-33% percentage allocation requirement), including on its ability to substitute new general partners, dissolve, merge and make distributions, and included them in the 1999 Agreement. R.663, 58 ¶ 20. According to paragraph 20 of the 1999 Agreement, these restrictions were effective only until a "Certificate of Completion" was issued ("After the issuance of the HPD Certificate of Completion, the restrictions contained in this paragraph shall not apply"). Toward the end of 2004, HPD had signed off on the work and the "certificates of completion" (and, where applicable, certificates of occupancy) referred to in the 1999 Agreement were issued. As such, the "HPD restrictions" were no longer applicable. R.665, 698-706.

Second, after over a decade of working together, Fendt and Anderson had a falling out and were parting ways. R.667. At the time, the Former LP held an

interest in the Limited Partnership and another project. R.667-668. In light of the separation, it was necessary to have an entity as limited partner dedicated solely to the Limited Partnership. R.668. Therefore, it was agreed that the New LP would be formed as Former LP's successor-in-interest, consisting of the very same members of the Former LP, and substitute as the new limited partner. R.668.

Lastly, as originally agreed, the partners sought to revise the 1999 Agreement to reflect their original agreement of a 51%-49% split now that the HPD restrictions had been rendered inapplicable. Their original understanding, however, had to be modified to account for the Former LP member's (who eventually became the members of the New LP) unanticipated financial contribution of $1,662,108 after the 2001 closing, which brought their total financial contribution to $1,901,664 (1998-2004). R.667-669. As the Limited Partnership was not expected to earn a profit as a result of affordable housing restrictions in place for approximately another 15 years, it was understood that their financial contribution would not be repaid any time soon. R.671. Indeed, the value of the Limited Partnership is to be recognized by the eventual sale of the Buildings once the affordable housing restrictions are lifted. R.671. Thus, a considerable concession had to be made to compensate the New LP's members for the approximate 15 or more years they would go without being repaid the $1,662,108 and any interest thereon. R.667-669. Accordingly, the partners agreed that WHGA's share would be reduced by 26% from the agreed upon

51% in order to compensate the New LP members for this significant financial contribution. R.668-670.

E. <u>The Amendment's Restructuring of the Limited Partnership</u>

Toward the end of 2004, Notice and Anderson modified the 1999 Agreement by way of the Amendment and implemented the Restructured Ownership in conjunction with their handling of the 2004 Closing. R.668-669. Towards that end, either Notice or Anderson, or both, evidently had the Amendment prepared on behalf of the Limited Partnership. R.669.

The Amendment confirms the partner substitutions as follows:

> Hamilton Heights Cluster Associates, L.P. (the *"Partnership")* was formed as a limited partnership under the Revised Limited Partnership Act of the State of New York pursuant to a Certificate of Limited Partnership dated November 20, 1998, which was filed with the State of New York Department of State on December 16, 1998, as amended on September 13, 2000, which was filed with the New York Department of State on October, 5, 2000. The Partnership has been operating pursuant to a written partnership agreement dated October 1, 1999, and is amended to include substitution of A & F HHC Equities, LLC for A & F Equities, LLC, located at 340 Pleasant Avenue, NY, NY, the principals of each entity are the same; and West Harlem Hamilton Heights Cluster, Inc. for WHGA Hamilton Heights Cluster, Inc., located at 1652 Amsterdam Avenue, NY, NY, the principals of each entity are the same; this is a mere change in form.

R.66.

The Amendment also reflects the 26% decrease in WHGA's interest from the original 1998 Letter-Agreement's allocation of 51%. Specifically, paragraph 8.02 of the Amendment provides as follows:

> 8.02 Distributions of Capital Proceeds
>
> Any Capital Proceeds other than net proceeds upon liquidation of the Partnership resulting from the sale of the Partnership Property, which shall be governed by Article XII, shall be distributed to and among the Partners in the following amounts and order of priority:
> (a) To the General Partner to repay any Operating Deficit Contribution;
> (b) A return of capital to the Partners in accordance with the capital accounts, after adding back any depreciation, amortization and any other non-cash deductions.
> (c) *The balance 50% to the General Partner [25% - WHGA and 25% A&F GP] and 50% to the Limited Partner [New LP]*.

R.95 (emphasis added).

While paragraph 8.02 of the Amendment provides that any capital proceeds will be shared on this 50% general partners and 50% limited partner basis, paragraph 7.02(a) provides that partnership profits (of which there have never been any) and losses will be allocated in accordance with the partners' "Percentage Interests." R.670-671. Paragraph 7.02(a) expressly provides as follows:

> After giving effect to the special allocations set forth in Section 7.03, the Net Profits, Net Losses, Loss of the Partnership shall be allocated in accordance with the Percentage Interests.

R.92.

Exhibit A of the Amendment states the Percentage Interests as:

- New WH GP 0.051%
- A&F GP 0.049%
- New LP 99.99%

R.115.

The primary reason for paragraph 7.02(a) is to permit the New LP to utilize virtually all the tax losses because WHGA, being a non-profit, could not utilize the them. R.671. Allocating all the losses to the limited partner while having a different percentage allocation for the distribution of capital proceeds was a carryover concept from the 1999 Agreement which also allocated all losses to the limited partner. R.671-672, 56 ¶ 8.

F. Notice and Anderson's Course of Conduct Confirms The Restructured Ownership Consistent With the Amendment

Notice and Anderson's conduct at the time of the 2004 Closing onward confirms that, in 2004, they caused (i) the substitution of partners and (ii) the 1999 Agreement to be restated by the Amendment. Karen Sherman, Esq. represented the Limited Partnership in connection with the 2004 Closing, which occurred on December 30, 2004. R.672. West Harlem claimed on the motion below that Anderson's counsel obtained Ms. Sherman's closing file during the litigation ("Sherman Closing File"). R.672. A review of the corporate records and 2004 Closing documents reveals that Notice and Anderson used the Amendment in

connection with the 2004 Closing and worked together to implement the Restructured Ownership consistent therewith. R.672-673. At the very least their conduct creates an issue of fact as to whether the partners implemented the Restructured Ownership.

Specifically, by the time of the 2004 Closing, WHGA had already let the Former WH GP dissolve. R.673, 718. Then, on December 22, 2004, the very day the Amendment is dated, WHGA incorporated New WH GP to substitute for Former WH GP as the new WHGA general partner of the Limited Partnership. R.673, 715-717. On the same day, the Limited Partnership's attorney formed New LP to substitute for Former LP as the limited partner. R.719-720. Curiously, while Notice affirmed on the motion below that WHGA was not represented by its own counsel in connection with the 2004 Closing, New WH GP's certificate of incorporation proves otherwise, reflecting that WHGA used the independent law firm of Love and Long, LLP to incorporate the New WH GP. R. 51, 715-717.

On December 30, 2004, both Notice and Anderson signed a Resolution on behalf of the Limited Partnership (i) certifying that a meeting of the New WH GP and A&F GP occurred, wherein they voted to authorize the loan, and (ii) representing and warranting that New WH GP, A&F GP and New LP were the "only general partners and limited partner" of the Limited Partnership. R.673, 745-748. Notice signed on behalf of the New WH GP and Anderson signed on behalf of the New LP

and A&F GP. R.748. All the other closing documentation included the names of the new partners, as well, and Notice signed such documentation on behalf of New WH GP. R.749-875.

Also on the morning of the 2004 Closing, Anderson emailed the Limited Partnership's accountant and confirmed (i) the substitution of New LP for Former LP and (ii) the new percentage interests for purposes of taxable loss allocation. Anderson's email is consistent with the Amendment aside from a couple of mistakes that he made (a misplaced decimal and the wrong WHGA general partner):

> *as of the conversion taking place today the breakdown looks like this:*
>
> Owner: Hamilton Heights Cluster Associates, LP (not Inc)
>
> General Partners: A&F Hamilton Heights Cluster, Inc. (S-corp is good: shareholders are as below)
> *Owns .049% of the project*
>
> WHGA Hamilton Heights Cluster, Inc (not LP) .
> *Owns .051% of the project*
>
> *Limited Partner: A&F HHC Equities, LLC - newly formed carp replacing A&F Equities*: shareholders are as below
> *Owns 99% of the project*
>
> WHGA Hamilton Heights Cluster, Inc. is a for profit entity entirely owned by West Harlem Group Assistance, Inc. (WHGA) a non-profit. The "economics" of the project will be captured entirely by the GP's. The LP will enjoy tax benefits.

> I'm sure it's all clear now. Am in the office if you want to discuss further.

R.674, 640 (emphasis added).

On April 6, 2005, Anderson again confirmed by email the substitution of partners and change in percentage interests with the accountant. R.676-677, 641. Thereafter, for tax years 2004 through 2013, the Limited Partnership issued tax returns and K-1s, signed off on by Anderson as "Tax Matters Partner," consistent with the Amendment, reflecting (i) New LP as the limited partner and (ii) the new percentage interests of 99% - .51% - .49% for tax losses (Anderson's mistake of the misplaced decimal point was carried over to the tax returns as they show a 99% - .49% -.51% allocation instead of the 99.9% - .049% - .051% allocation stated in the Amendment). R.677, 945-1120. The WHGA general partner continued to be erroneously listed as "WHGA Hamilton Heights Cluster Assoc." (an alleged non-existent entity), which was an error carried over from pre-2004 tax returns. R.677, 885-1120. The tax returns, like all the other evidence from the time, confirm the Restructured Ownership.

G. Notice and Anderson Admitted to the Partner Substitutions Only to Later Attempt to Retract the Admission on Summary Judgment

Notice and Anderson's course of conduct is powerful evidence that the parties intended to, and did, adopt the Amendment and effectuate the Restructured

Ownership in 2004. At the very least, it creates a genuine issue of material fact that the lower court incorrectly overlooked.

Notice and Anderson's confirmation of the Restructured Ownership did not stop there, however. Even in the early stages of this litigation in 2015, both Notice and Anderson were still confirming by way of judicial admissions that the partner substitutions occurred consistent with the Amendment. Specifically, in an affidavit in this action in 2015, Notice swore, in pertinent part:

> Several years later, on or about December 30, 2004, the Partnership refinanced the loan from EAB with a new loan from New York Community Bank. At the same time, West Harlem Hamilton Heights Cluster, Inc. (previously defined as WH Cluster 2) was substituted for and in place of WHGA Hamilton Heights Cluster, Inc. (previously defined as WH Cluster 1), and further A&F HHC Equities, LLC was substituted for and in place of A&F Equities, LLC (as set forth above, "Limited Partner" applies to both A&F Equities, LLC and A&F HHC Equities, LLC).

R.678, 1127-1128 ¶ 13.

Anderson, in 2015, similarly admitted the following in a related dissolution proceeding:

> A&F HHC EQUITIES, LLC ("A&F HHC LLC") is a New York limited liability company whose sole business is to serve as the limited partner in the aforementioned [Limited Partnership] …

R.678-679, 1148-1149 ¶ 21.

On the motion below, Notice and Anderson reversed course and asserted the opposite: that the substitutions did not occur. As with all the other course of conduct evidence reflecting their consent to the Amendment and Restructured Ownership, the lower court erroneously overlooked these admissions, which highlight Notice and Anderson's dubious credibility.

H. The Members of Former LP Transferred Their Interests to Anderson In Reliance on the Partner Substitutions

As noted above, Anderson and Mr. Fandt's separation in 2004 was the reason for the substitution of New LP for Former LP as limited partner. R.667-668. As part of their split, Anderson was to retain ownership of Former LP because it maintained an interest in an unrelated project that he was obtaining as part of the separation. R.667-668. As such, once New LP was formed, consisting of all of the same members of Former LP, and it was substituted for Former LP as limited partner in late-2004, a "Withdrawal Agreement," dated March 1, 2005 ("Withdrawal Agreement"), was entered into, wherein members of Former LP transferred their membership interest to Anderson in reliance on the Restructured Ownership having occurred. R.668, 709-712. Indeed, the Withdrawal Agreement provides specifically that the agreement does not affect the withdrawing members' interests in the New LP or the Limited Partnership. R.710 ¶ 2, 711. As noted above, for approximately a decade after transferring their interests to Anderson, the withdrawing members of

New LP received K-1s confirming the Restructured Ownership and that they owned a derivative interest in the Limited Partnership. R.677, 945-1120.

I. Anderson's Theft of Partnership Assets and the Road to the Lower Court's Issuance of the Order

Following the 2004 Closing, Anderson began managing the Limited Partnership's Buildings through his management company, Urban Green. R.676. In 2014, Mr. Fendt learned that Anderson was misappropriating Limited Partnership assets. R.677-678. Mr. Fendt promptly acted to protect the Limited Partnership by commencing this action and obtaining an injunction against Anderson. R.678. Not long thereafter, West Harlem, supported by Anderson, challenged the validity of the Amendment, and what began as a straightforward two-party derivative suit against Anderson and Urban Green quickly morphed into a complex, multi-party dispute over the ownership of the Limited Partnership. R.678, 1168-1172. Substantial motion, third-party and interpleader practice ensued, requiring extensions of discovery deadlines. R1168-1172, 1177-1195. At one point, a partial settlement was reached as to certain unrelated plaintiff-entities. R.1171. The matter was transferred through three justices. R1171-1172.

Over Mr. Fendt's objection that discovery was not complete and motions for summary judgment were, thus, premature (none of the parties or essential non-parties had been deposed), the lower court permitted respondents to move for summary judgment. R.1172, 1199. Through its Order on the motions, the lower

court incorrectly granted West Harlem's motion notwithstanding that genuine issues of fact and credibility exist, and discovery had not concluded. In so doing, the lower court incorrectly relied upon the 2015 Order as having already determined the issue of whether the Amendment is valid and failed to correctly apply the standard for summary judgment to the record before it. R.30-32. It did so even though a subsequent April 2016 order of the lower court clarified that the 2015 Order had not decided the issue and that the issue could benefit from discovery. R.1161. If the lower court had correctly applied the summary judgment standard, it would have taken notice of the material issues of fact, conflicting evidence, respondents' judicial admissions (which they attempted to retract on the motions) and Anderson's failure to put forth any evidence in support of his and Urban Green's motion – all of which legally precludes an award of summary judgment and mandates the matter be tried after discovery is completed.

For the reasons state herein, the lower court's order must be reversed.

ARGUMENT

I.

THE LOWER COURT ERRED IN AWARDING SUMMARY JUDGMENT ON WEST HARLEM'S MOTION AS THE RECORD IS RIFE WITH DISPUTED ISSUES OF MATERIAL FACT

The lower court erred in awarding summary judgment as the record is rife with disputed issues of fact that mandated the denial of West Harlem's motion. By relying on the 2015 Order as having already decided the issue of whether the 1999 Agreement was modified by the Amendment, the Court failed to correctly apply the summary judgment standard to the record and overlooked key evidence supporting that the partners' course of conduct modified the 1999 Agreement.

A. Notice and Anderson's Course of Conduct Confirmed the Restructured Ownership

On the motion below, West Harlem failed to carry its burden of demonstrating the absence of issues of fact. *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) ("The proponent of a motion for summary judgment 'must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'"). Despite West Harlem's allegations that the Restructured Ownership did not occur, the evidentiary record reveals that Notice and Anderson worked together during the 2004 Closing to accomplish the Restructured Ownership.

The fact that a signed Amendment has not materialized is not determinative of this claim. The 1999 Agreement does not provide that it may only be amended by a writing and it is settled law that a written agreement may be modified by the parties' course of conduct. R.54-58. *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) ("Parties to a contract are able to alter or waive portions of an agreement by their course of conduct"); *see also Rao v. Intern. Licensing Industry Merchandisers' Ass'n,* 2015 WL 4467751 *1 ("A written agreement can be changed by the parties' course of conduct"); *see also Chase v. Skoy*, 146 A.D.2d 563, 564, 536 N.Y.S.2d 512, 513 (2d Dep't 1989) ("Modifications of written contracts may be proved circumstantially by the conduct of the parties subsequent to the agreement"); *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) ("[p]arties to a contract are able to alter or waive portions of an agreement by their course of conduct"); *see also Giblin v. Sechzer,* 97 A.D.2d 833, 468 N.Y.S.2d 719 (2d Dep't 1983) (finding terms of partnership agreement are binding on plaintiffs, irrespective of whether plaintiffs signed the agreement, as their conduct demonstrated ratification of and compliance with the agreement).

Notice and Anderson's conduct, at the very least, raises an issue of fact as to whether the partners intended to, and did, effectuate the Restructured Ownership. Notice and Anderson were managing the Limited Partnership and acting on behalf

of the two general partners at the time. R.668. As of the 2004 Closing on December 30, 2004, Notice and Anderson (i) used the Restated Agreement in connection with the closing, R.672-673; (ii) formed New WH GP and New LP, R.673, 715-720; (iii) represented to the bank that New WH GP and New LP were partners, R.673, 745-748; (iv) signed closing documents on behalf of the new partners, R.748-875; and (v) on the morning of the closing, Anderson emailed the Limited Partnership's accountant to confirm the partner substitutions and new percentage interests, R.674, 640, 682-684. These actions were entirely consistent with the Amendment and Restructured Ownership.

Nearly a decade later in this litigation, Notice and Anderson reversed course and disavowed their past conduct. Yet, their attempts to explain away their conduct only serve to raise issues of fact. Indeed, for Notice to claim on the motion below that he "inadvertently" signed documents at the closing on behalf of New WH GP by "mistake" is simply not credible. R.51 ¶ 20. The documentary evidence shows that his actions were deliberate and consistent with effectuating the terms of the Amendment.

By the time of the 2004 Closing, WHGA had permitted the Former GP to dissolve. R.673, 718. On December 22, 2004, the very same day the Amendment is dated and eight days before Notice signed the closing documents, WHGA incorporated New WH GP to take its place in the Limited Partnership. R.673, 715-

717. These corporate actions reflect a conscious effort on WHGA's part to implement the Restructured Ownership and undermines the *head in the sand* "ostrich defense" Notice feigned on the motion below. Even his statement that "as part of the NYCB refinance, none of the West Harlem Entities was represented by separate counsel" was exposed as untrue by documentary evidence, which revealed WHGA used the independent law firm Love and Long, LLP to incorporate New WH GP. R.51 ¶ 20, 715-717.

Anderson's excuses concerning the 2004 Closing are equally unavailing. Though he does not claim, as Notice does, to have "mistakenly" executed all the documents on behalf of New LP at the closing, the affidavit Anderson submitted on the motion below contains a great deal of speculation and hearsay concerning the circumstances surrounding the Amendment. R.629-639. While Anderson admits that "his office" sent a "draft" of the Amendment to the bank in 2004, he proceeds to speculate that the bank prepared closing documents "on the assumption" that an agreement on the Amendment would be reached and "back dated" to the closing date. R.635-636 ¶¶ 19-20. He also suggests that the Amendment concerned only his separation from Mr. Fendt and was done in a vacuum apart from West Harlem. R.636.

Anderson's speculation is improper on a motion for summary judgment and, in any event, does not jibe with the evidence. There is no way the evidence supports

a finding that the Amendment was being prepared between Mr. Fendt and Anderson alone without WHGA's involvement. Again, it is no coincidence that WHGA dissolved Former LP and then incorporated New WH GP on December 22, 2004, the very same day the Agreement is dated. R.715-718. Nor is it a coincidence that Anderson formed New LP the very same day, too. R.719-720. Moreover, to allege that the bank would allow a multi-million dollar loan to close with a new partnership structure based on an alleged "assumption" that the Agreement would, after the closing, be signed and "back dated" is an extraordinary amount of speculation that Anderson and Notice advanced for purposes of obtaining summary judgment.

Furthermore, in addition to substituting the partners, the purpose of the Restructured Ownership was to credit Former LP (and, in turn, New LP by substitution) with the considerable financial contribution its members made to the partnership during the construction that ended in 2004 ($1,662,108 between 2001 and 2004, and $1,901,664 in total (1998-2004)). This was an issue that was not limited to the Fendt-Anderson separation. This issue involved all of the partners and revising the 1999 Agreement to give effect to their original understanding of a 51% (WHGA) - 49% (A&F Builders) split reflected by the 1998 Letter-Agreement and Confirmatory Memorandum while making adjustments to credit the members of the limited partner for the financial contributions. R.665-672. While West Harlem disputes the amount of Former LP's financial contribution and whether the resulting

26% decrease in West Harlem's percentage interest was fair in retrospect, all that does is raise an issue of fact. It certainly does not conclusively prove that the Restructured Ownership did not occur.

Another piece of evidence supporting Mr. Fendt's position that the Restructured Ownership was accomplished at the end of 2004 is the Withdrawal Agreement, which was entered into on March 1, 2005, several months after the 2004 Closing. R.668, 709-712. The Withdrawal Agreement expressly provides that it does not affect Mr. Fendt and Anderson's interest in New LP or the Limited Partnership. R.710 ¶ 2, 211. If New LP had not by the time of the Withdrawal Agreement already acquired its interest in the Limited Partnership, there would have been no reason to expressly state this fact.

In sum, instead of eliminating issues of fact, Notice and Anderson's "explanations" as to their course of conduct at the time of the 2004 Closing create more, as do their "explanations" as to what occurred thereafter with the partnership's tax returns.

B. The Limited Partnership's Tax Returns Evidence the Restructured Ownership

As noted above, on the morning of the 2004 Closing, Anderson emailed the Limited Partnership's accountant and advised her of the limited partner substitution and new percentage interest allocations "taking place today." R.674, 640, 681-685. In April 2005, he again confirmed it by mail with the accountant. R.676-677, 641,

681-685. While Anderson made a mistake in his email (a misplaced decimal and the wrong WHGA partner), his December 2004 and April 2005 emails are further evidence of the fact that the Restructured Ownership was implemented by Notice and Anderson as of the 2004 Closing. So, too, are the tax returns for tax years 2004-2013 that Anderson, thereafter, filed on behalf of the Limited Partnership as the designated "Tax Matters Partner." R.677, 945-1120.

On the motion below, Notice and Anderson similarly attempt to disavow Anderson's emails and the Limited Partnership's decade's worth of tax returns. Their attempts to explain away this evidence is likewise not credible and, again, only creates more issues of fact that warranted the denial of West Harlem's motion.

Courts afford great evidentiary weight to the positions parties take in tax returns. *See Capizola v. Vantage Int'l, Ltd.,* 2 A.D.3d 843, 770 N.Y.S.2d 395 (2d Dep't 2003) (finding that K-1 issued by a Subchapter S corporation contributed to the totality of the course of conduct evidence establishing petitioner as a 20% shareholder); *see also 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) (finding that tax returns and K-1s showing plaintiff as a 31% shareholder when combined with defendant's intent shown by defendant's actions, including his sworn statements to lenders of its corporate loans that plaintiff was a

shareholder, established plaintiff as a 31% shareholder of various LLCs and a Subchapter S corporation). Indeed, it has been held that "[a] party to litigation may not take a position contrary to a position taken in an income tax return." *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 422, 881 N.Y.S.2d 369, 373 (2009); *see also Man Choi Chiu v. Chiu,* 125 A.D.3d 824, 4 N.Y.S.3d 279 (2d Dep't 2015).

On this issue, Notice again assumed the *head in the sand* "ostrich defense." Though he was the head of one of the two general partners charged with managing the Limited Partnership, Notice claimed he never "caught" the "mistakes" concerning the percentage interests in the Limited Partnership's returns for tax years 2004 through 2013 because the Limited Partnership "failed to earn any reportable income" and because the K-1s listed a "non-existent" entity. R.52-53 ¶ 22. Notice inaccurately asserted to the lower court that the listing of the "non-existent" WHGA general partner "[began] with the K-1s Fendt and his agents [Yasmin Rosado, Alex Abreu and Stuart E. Minsky & Co., P.C.] prepared in 2004… ." R.52 ¶ 22.

First, as Mr. Fendt affirmed before the lower court, Yasmin Rosado, Alex Abreu and Stuart E. Minsky & Co., P.C. were never his "agents." R.675-676. Stuart E. Minsky & Co., P.C. was the Limited Partnership's independent accountant, which prepared its returns from 2001 until 2008. R.676. Abreu and Rosado worked for BAF Community Links Services Management, Inc. ("BAF"), which was the managing agent of the partnership's Buildings up until the end of 2004, and then, in

2005, worked for Anderson's company, Urban Green, which took over the management of the Buildings after 2004. R.676.

Second, Mr. Fendt affirmed that he did not prepare the partnership tax returns for tax year 2004 as Notice improperly alleged. R.675-677. They were prepared by the partnership's accountant with information supplied by Anderson on the morning of the 2004 Closing and in April 2005, and were signed off on by Anderson as "Tax Matters Partner." R.675-677.

Lastly, Notice's claim that the Non-Profit's general partner was correctly named in the returns for tax year 2003 is plainly incorrect. The evidence in the record shows that the "non-existent" entity is also listed as WHGA's general partner in the 2001 to 2003 returns. R.677, 885-944.

Like Notice, Anderson, too, assumes a *head in the sand* approach to the tax return issue. Anderson claims "since the Partnership never distributed any net income – only losses – we did not notice any mistakes in the names of the partners, or the mistakes in the allocations, until recently." R.638 ¶ 29. Anderson makes this incredulous statement even though he (i) emailed the tax information to the partnership's accountant, R.640-642, 682-686; and (ii) is the designated "Tax Matters Partner" who filed the returns for the Limited Partnership for tax years 2004 to 2013, R.677, 945-1120.

Anderson's attempt to explain away his emails before the lower court actually lends further support to the fact that the 1999 Agreement was restated by the Amendment. Anderson states that his email to the accountant on the morning of the 2004 Closing was meant to confirm the agreed "allocation of losses – not the ownership." R.638 ¶ 27. That statement aligns precisely with the terms of the Amendment as paragraph 7.02(a) of the Amendment provides that partnership losses will be allocated in accordance with the partners' "Percentage Interests," which Exhibit A thereto lists as (i) New WH GP - 0.051%; (ii) A&F GP - 0.049%; and (iii) New LP - 99.99%. R.92, 115. This is consistent with Anderson's emails (except for his mistakes regarding the decimal point and new WHGA general partner). R.640, 641-642.

In sum, the tax returns and K-1s are additional evidence demonstrating Notice and Anderson's consent to the Restructured Ownership. The "explanations" they advanced concerning the returns only raised more issues of fact mandating the denial of summary judgment.

C. Notice and Anderson's Attempts to Retract Their Judicial Admissions Created Additional Issues of Fact and Credibility

As noted above, both Notice and Anderson made judicial admissions in 2015 acknowledging that the partner substitutions of the Restructured Ownership did, in fact, occur only to later retract them on the motion below (West Harlem's counsel

claims that Notice's admission was a mistake, while Anderson just ignored it and assumed the contrary position). R.1127-1128 ¶ 13, 1148-1149 ¶ 21, 255-256 ¶ 8.

Notably, the WHGA-controlled general partner substitution makes sense because as of the 2004 Closing it had already permitted Former WH GP to dissolve. R.717-718. The dissolution has not been reversed by WHGA. As such, for the past 13 years – including at the time it intervened up through the time the lower court awarded it summary judgment -- it remained a defunct entity lacking capacity to assert its claims. R.717-718. *See Metered Appliances, Inc. v. 75 Owners Corp.*, 225 A.D.2d 338, 338, 638 N.Y.S.2d 631, 631 (1st Dep't 1996) (affirming dismissal of claim based on lack of capacity to sue due to dissolution for failing to pay franchise taxes and noting "While a corporate dissolution may not affect the corporation's right to carry on business for the purpose of winding up its affairs new business is prohibited absent reinstatement by payment of back taxes"). This was yet another defect in West Harlem's claim that the lower court overlooked in finding the defunct Former WH GP was still the general partner of the Limited Partnership – despite Notice's admission to the contrary and all facts suggesting otherwise.

"Informal judicial admissions are recognized as 'facts incidentally admitted during the trial or in some other judicial proceeding, as in statements made by a party as a witness, or contained in a deposition, a bill of particulars, or an affidavit.'" *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) (citations omitted). While they may not be conclusive, "they are 'evidence' of the fact or facts admitted." *Id.*; *see also Morgenthow & Latham v. Bank of New York Co., Inc.*, 305 A.D.2d 74, 760 N.Y.S.2d 438 (1st Dep't 2003).

These admissions and subsequent retractions create yet additional issues of fact and credibility that could not have been reconciled or weighed by the lower court. *Chase v. Skoy*, 146 A.D.2d 563, 564, 536 N.Y.S.2d 512, 513 (2d Dep't 1989) ("[t]he court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned").

D. Notwithstanding The Course of Conduct Evidence, West Harlem Incorrectly Insisted Before the Lower Court That Summary Judgment Should Be Awarded Absent a Signed Writing

On the motion below, West Harlem urged the lower court to disregard the compelling course of conduct evidence and award it summary judgment because a signed writing has not materialized to date. Toward that end, it misguidedly insisted that the 1999 Agreement and partnership law require (i) *written* consent of the partners to the partner substitutions and change in percentage interests and (ii) HPD's written consent to the limited partner substitution. R.647-650. West Harlem's position is incorrect because (i) *written* consent is not required for a substitution of partners under either the 1999 Agreement or applicable partnership law; (ii) any HPD restriction contained in the 1999 Agreement requiring HPD's

written consent to the partner substitutions was rendered inapplicable by the time of the 2004 Closing; and (iii) to the extent a writing was required for a change in percentage interests, the equitable principles of course of conduct, equitable estoppel and waiver may satisfy such requirement.

West Harlem argued below that § 121-704 of the Revised Limited Partnership Act (RLPA) and paragraph 19 of the 1999 Agreement require all partners to "consent in writing" to an assignment of the limited partner's interest in order for it to be effective. R.647-650. This is incorrect. RLPA § 121-704 defers to the partnership agreement, as follows:

> (a) 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.*

(Emphasis added.)

Paragraph 19 of the 1999 Agreement 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, ¶ 19. *Rao v. Intern. Licensing Industry Merchandisers' Ass'n*, 2015 WL 4467751 at *1 ("Consent to contract modification may be shown by the parties' conduct").

Moreover, West Harlem's related allegation that paragraph 19 required HPD's consent to approve the substitution is also baseless. To the extent an HPD restriction required HPD's written consent to the limited partner substitution, paragraph 20 of the 1999 Agreement provides that the HPD restrictions remain in effect only until a "certificate of completion" is issued. R.58 ¶ 20. At which time, the restrictions became inapplicable. R.58 ¶ 20. HPD issued all required certificates of completion prior to the 2004 Closing. R.665, 698-706. Accordingly, by the time of the partner substitutions in December 2004, the HPD restrictions had been rendered ineffective. Moreover, HPD would have been privy to the Restructured Ownership at the time as it agreed to subordinate its debt to that of the new lender. R.876-883. If it had had an objection to the Restructured Ownership at that time, it would have asserted it. It did not.

Even if a written consent was 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, 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 Nassau Tr. Co. v. Montrose Concrete Prod. Corp.*, 56 N.Y.2d 175, 184, 451 N.Y.S.2d 663, 667 (1982) ("An estoppel 'rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury' …. It is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought").

For instance, in an analogous situation, where the statute of frauds, General Obligations Law § 15-301(1), mandates that an agreement may only be modified by a signed writing, the equitable principles of course of conduct, equitable estoppel and waiver are recognized exceptions thereto. *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) ("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"); *see also Latham Four P'ship v. SSI Med. Servs., Inc.*, 182 A.D.2d 880, 881, 581 N.Y.S.2d 891, 893 (3d Dep't 1992) ("While General Obligations Law § 15–301(1) provides that a written agreement containing a provision that prohibits any oral change can be modified only by a writing signed by the party against whom enforcement is sought, the doctrine of equitable estoppel is one of the recognized exceptions to this rule").

Here, Notice and Anderson's course of conduct satisfied any requirement of a written consent that RLPA 121-110(c) may impose and, at the very least, created an issue of fact as to whether it did.

II.

THE LOWER COURT IMPROPERLY AWARDED ANDERSON AND URBAN GREEN SUMMARY JUDGMENT EVEN THOUGH THEY FAILED TO SATISFY THEIR BURDEN

The lower court erred by awarding Anderson and Urban Green summary judgment as they failed to satisfy their burden of establishing, as a matter of law, that they did not misappropriate the Limited Partnership's assets. *Rao v. Intern. Licensing Industry Merchandisers' Ass'n*, 2015 N.Y. Slip Op. 31281(U), 2015 WL 4467751 *1 (N.Y. Sup. Ct, N.Y. Co., 2015) ("The proponent of a motion for summary judgment 'must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any

material issues of fact'"). Only once that burden is satisfied does it then shift to the opponent to establish a genuine issue of fact.

On the motion below, Anderson and Urban Green failed to even submit an affidavit of a person with knowledge denying the claims against them. Rather, they relied on an affirmation of counsel to advance their primary argument that, in their opinion, discovery had ended, and Mr. Fendt had allegedly failed to produce discovery establishing his derivative claims. R. 1368-1377. While they are wrong on both counts (as discussed below), such submission does not satisfy their initial burden on the motion of establishing that they did not misappropriate assets. Rather, it improperly sought to shift the onus to Mr. Fendt to establish a genuine issue of fact. The lower court incorrectly overlooked the deficiencies in Anderson and Urban Green's initial moving papers and, thereby, relieved Anderson and Urban Green of their burden on the motion without it having been satisfied.

A. The Lower Court Overlooked That Anderson and Urban Green Failed to Carry Their Burden and That Evidence in the Record Established Their Defalcation

Summary judgment should have been denied simply because Anderson and Urban Green failed to meet their burden. The lower court's error was compounded, however, by the fact that it also overlooked that Mr. Fendt, in his opposition, proffered evidence that established his claims of misappropriation and that such

evidence was produced in discovery or otherwise was already in Mr. Anderson and Urban Green's possession.

Indeed, the record is clear that Mr. Fendt, during discovery, exchanged a sworn affidavit of his forensic accountant ("Affidavit"), James Lynch of Citrin Cooperman & Company, LLP, authenticating a forensic report ("Report"), which found that Anderson and Urban Green had diverted $634,422 in Limited Partnership assets consisting of: (i) $579,586 in excess management fees; (ii) $45,652 in improper "expenses"; and (iii) $9,184 in the Limited Partnership's funds from accounts at TD Bank. R.1173 ¶ 21, 1200-1229. As Mr. Lynch incorporated the Report into his Affidavit and "swears to it in its entirety," the Report was fully admissible evidence in opposition to Anderson and Urban Green's motion. R.1201 ¶ 6. *Pastabar Cafe Corp. v. 343 E. 8th St. Assocs., LLC*, 147 A.D.3d 583, 585, 47 N.Y.S.3d 305, 307 (1st Dep't 2017) ("the motion court properly considered the report from National Specialty's expert. Although the report was unsigned, it was incorporated into the expert's sworn affidavit, thus rendering it appropriate for consideration on National Specialty's motion").

The lower court overlooked the issues involving the improper expenses and theft of TD Bank funds, and focused solely on the management fee issue. R.34-35. This was an error. The same day as the Affidavit and Report were exchanged, Mr. Fendt's then-counsel served TD Bank account statements reflecting that

Anderson and Urban Green stole $9,184 from the Limited Partnership's account. R.1173-1174 ¶ 23, 1230-1242. Again, Anderson and Urban Green did not submit any evidence on the motion below -- in admissible form or otherwise -- refuting this evidence against them. *See Werdein v. Johnson*, 221 A.D.2d 899, 900, 633 N.Y.S.2d 908, 910 (4th Dep't 1995) ("affirmation by an attorney without personal knowledge of essential facts is insufficient to support the award of summary judgment"). While they belatedly attempted to supplement their deficient submission by attaching unauthenticated documents to their revised rule 19-a statement long after the motion was fully briefed, such effort was improper. R.1416-1648, 8.1.

The Report also referenced general ledger entries reflecting that Anderson and Urban Green caused the Limited Partnership to pay their own personal expenses unrelated to the partnership's business, amounting to $45,652. R.1212-1217. The pertinent sections of the general ledgers were reproduced in the Report itself and were already in Anderson and Urban Green's possession along with the tax returns referenced in the Report. R.1174 ¶ 24, 1212-1217. As with the theft of the TD Bank funds, Anderson and Urban Green did not proffer any evidence refuting this claim. The lower court erroneously overlooked this evidence, as well.

Similarly, Urban Green and Anderson failed to present any admissible evidence before the lower court establishing that they were entitled to charge management fees in excess of the market rate, which Mr. Lynch opines in the Report

is 3%. R.1208-1210. Their counsel argued in his affirmation that Urban Green should have been permitted to charge as high of a rate as 8% because the 1999 Agreement permits an 8% rate. R.1368. While that is true, the 1999 Agreement also required a written management agreement with the managing agent, and Urban Green did not produce one on the motion below. R.56 ¶ 12. As such, the lower court's reliance on the 1999 Agreement as its sole reason for dismissing this claim related to the management fee was incorrect.

This is also true because the 1999 Agreement was superseded by the Amendment. R.59-115. Part of the reshuffling that occurred at the end of 2004 ultimately included Anderson and his company Urban Green taking over the management of the Buildings from 2005 onward. R.676. Prior to that, BAF, an entity owned by Mr. Fendt, Anderson and Mrs. Bonnicklewis, managed the Buildings. R.676. The fact that no written management agreement with Urban Green exists permitting an above-market rate beyond 2005 suggests the partners' unwillingness to continue such rate with Urban Green. However, with no oversight over him after 2005, Mr. Anderson began pilfering the Limited Partnership, including by taking excessive "management fees" without a written agreement with the Limited Partnership.

B. The Motion Really Concerned Discovery, Which Had Not Concluded

Anderson and Urban Green's motion really concerned a gripe over discovery. While, contrary to Anderson and Urban Green's assertion, evidence of the misappropriation had been exchanged, discovery in the matter had not yet concluded in any event. Their argument that discovery has been completed because dates contained in the initial discovery schedule set forth in the preliminary conference order had passed is inaccurate. R.1369-1370. After the preliminary conference order was issued, the matter, which started as a simple two-party litigation, soon grew into a complex, multi-party litigation involving third-party practice, intervenor practice and many issues, motions, parties and claims. R.1169-1172, 1177-1195. The lower court modified the discovery schedule at times to adjust for the matter's growing complexity and was not compelling strict compliance therewith. R.1169-1172, 1177-1195. The case was subsequently transferred through three justices and eventually sent to mediation before summary judgment motions were filed. R.1169-1172, 1177-1195. Discovery, therefore, had not concluded. So, even if there was a legitimate gripe over discovery, the lower court should have resolved it as a discovery matter -- not as a basis for summary judgment.

As such, for these reasons, the lower court erred by not denying Anderson and Urban Green's motion.

CONCLUSION

In sum, the lower court erroneously granted the respondents 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.

Aside from a missing signed Amendment, all facts support that Notice and Anderson implemented the Restructured Ownership in 2004. They dissolved the outgoing general partner, formed the new partners, procured financing on behalf of the new partners, signed documents on behalf of the new partners at the closing, issued resolutions on behalf of the new partners certifying the new partnership structure, filed a decade's worth of tax returns consistent with the Amendment and judicially admitted to the partner substitutions. As shown above, under well-settled principles of law, this course of conduct may modify the 1999 Agreement by way of the Amendment and supply any consent that is required for the modification and substitution of partners. Notice and Anderson's attempts to disavow this conduct

and judicial admissions only served to create additional issues of material fact warranting the denial of West Harlem's motion.

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.

Anderson and Urban Green's motion for summary judgment likewise should have been denied in its entirety. Anderson and Urban Green failed to meet their burden on their motion of establishing their *prima facie* entitlement to summary judgment and the absence of issues of material fact. The lower court improperly relieved them of their burden and overlooked the fact that Mr. Fendt had produced evidence, both in discovery and on the motion below, of the damages the Limited Partnership sustained at the hands of Anderson and Urban Green, which, at the very least, created an issue of fact. Indeed, given the absence of any countervailing evidence by Anderson and Urban Green on the motion, the lower court could have even "searched the record" and awarded summary judgment in favor of Mr. Fendt and against Anderson and Urban Green.

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

Dated: Garden City, New York
June 13, 2019

Respectfully submitted,

MEYER, SUOZZI, ENGLISH & KLEIN, P.C.

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I hereby certify pursuant to 22 NYCRR § 1250.8(f) and (j) that the foregoing brief was prepared on a computer using Word.

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June 13, 2019

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STATEMENT PURSUANT TO CPLR 5531

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.

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.

(Caption Continued on Next Page)

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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1. The index number of the case in the court below is 653038/14.

2. The full names of the original parties are as above. There have been no changes.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about October 6, 2014, by the filing of a Summons and Complaint. The Answers were served thereafter.

5. The nature and object of the action involves a dispute over the ownership of a limited partnership and claims for misappropriation of partnership assets.

6. The appeal is from the orders of the Honorable Peter Sherwood, entered on November 7, 2018 and May 9, 2019.

7. This appeal is being perfected on a full reproduced record.