SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – COMMERCIAL DIVISION

JEFFREY SIMPSON, individually and derivatively, as managing member of JJ ARCH LLC, suing derivatively as managing member of ARCH REAL ESTATE HOLDINGS LLC, and JJ ARCH LLC,

Plaintiff,

-against-

JARED CHASSEN and FIRST REPUBLIC BANK,

Defendants.

Index No.: 158055/2023

Mot. Seq.: 010

JARED CHASSEN, individually and derivatively on behalf of JJ ARCH LLC, as member, and derivatively on behalf of ARCH REAL ESTATE HOLDINGS LLC, as member of JJ ARCH,

Counterclaim Plaintiff,

-against-

JEFFREY SIMPSON and YJ SIMCO LLC,

Counterclaim Defendants,

-and-

JJ ARCH LLC and
ARCH REAL ESTATE HOLDINGS LLC,

Nominal Defendants.

608941 NJ INC.,

Plaintiff,

-against-

JEFFREY SIMPSON, JJ ARCH LLC and ARCH REAL ESTATE HOLDINGS LLC,

Defendants,

-and-
ARCH REAL ESTATE HOLDINGS LLC,

Nominal Defendant.

MEMORANDUM OF LAW IN SUPPORT OF 608941 NJ INC.'S MOTION TO DISMISS JJ ARCH LLC'S COUNTERCLAIMS

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608941 NJ INC. ("Oak") through its counsel, Haynes and Boone LLP, respectfully submits this memorandum of law in support of its Motion to Dismiss (the "Motion") JJ Arch LLC's ("JJ Arch") January 16, 2024 Counterclaims against Oak ("JJ Arch's Counterclaims")[1] pursuant to New York Civil Practice Law and Rules Section 3211(a)(1) and (7).

Preliminary Statement

JJ Arch's Counterclaims, which allege one count for breach of contract and one count for breach of fiduciary duty, are virtually identical to the January 5, 2024 counterclaims previously filed by Jeffery Simpson ("Simpson's Counterclaims" and "Simpson," respectively).[2] As a consequence, the legal and factual bases for dismissal addressed in this Motion overlap to a large extent with those addressed in Oak's January 15, 2024 motion to dismiss Simpson's Counterclaims. Like Simpson's Counterclaims, JJ Arch's Counterclaims are fatally flawed and must be dismissed.

The elements for breach of contract are not satisfied because JJ Arch's performance under the contract is not (and cannot be) pled, and the allegations regarding Oak's purported breaches are so vague and conclusory that they must be disregarded in any event. Even if the allegations of breach were properly pled, in each instance, the terms of the contract itself refute any claim to relief, which separately requires dismissal.

JJ Arch's breach of fiduciary duty claim also must be dismissed. A non-managing member of an LLC owes no fiduciary duty to the company, other members, or the other members' members, and nearly all allegations in support of this fiduciary duty claim predate Oak's assuming

[1] JJ Arch's Counterclaims are annexed as Exhibit A to the Affirmation of Leslie Thorne, dated February 22, 2024 ("Thorne Aff." or "Thorne Affirmation"), submitted herewith.

[2] A redline comparing the Simpson Counterclaims and JJ Arch Counterclaims is annexed as Exhibit B to Thorne Affirmation for this Court's reference. Apart from substituting "JJ Arch" for "Simpson" throughout, JJ Arch's Counterclaims contain exactly one additional paragraph of allegations, which, even if true, bring JJ Arch no closer to stating a claim for breach of contract or fiduciary duty.

the role of AREH's acting managing member. To the limited extent there are any allegations concerning post-TRO conduct, the allegations, even if true, do not amount to a breach. Indeed, apart from these incurable defects, the fiduciary duty claim rests on purported failures to perform under a contract (not actionable) or consists of conclusory statements of Oak's purported breach which fall far short of the heightened pleading standard for such a claim.

The allegations underlying JJ Arch's counterclaims have been raised numerous times throughout these proceedings—in support of Simpson's argument to remove Jared Chassen ("Chassen") back in August, in opposition to Oak's motions for a receiver or preliminary injunctive relief last fall, and most recently in Simpson's order to show cause last month effectively seeking to reargue the preliminary injunction motion. No matter the way these arguments are packaged or in what context they arise, whether in opposition to relief sought by another party or in support of a claim for relief on behalf of Simpson or JJ Arch, they are entirely unavailing. Here, these recycled accusations, pled as JJ Arch's Counterclaims against Oak, simply do not provide any basis for relief. For these reasons, JJ Arch's Counterclaims must be dismissed with prejudice.

Statement of Facts

The facts underlying these proceedings are well-documented. Therefore, for the purposes of this Motion, only an abbreviated recitation of facts is provided.

AREH's operations are governed by the December 17, 2017 Limited Liability Company Operating Agreement of Arch Real Estate Holdings LLC (the "AREH LLC Agreement").[3] *See* Thorne Aff., Ex. C at Preamble. Oak and JJ Arch are the two members of AREH and the only parties to the AREH LLC Agreement. *Id.* Oak, in turn, is denominated the "Investor Member" and JJ Arch, the "Managing Member." *See id.*, Section 1.1 at definition for "Managing Member."

[3] The AREH LLC Agreement is annexed as Exhibit C to the Thorne Affirmation, submitted herewith.

See also Thorne Aff., Ex. A at ¶ 4. The December 11, 2017 Limited Liability Company Operating Agreement of JJ Arch LLC (the "JJ Arch LLC Agreement") governs the operations of JJ Arch. *See* Thorne Aff., Ex. C at Preamble. Simpson and Jared Chassen ("Chassen") are JJ Arch's two members.

As this Court is aware, Oak is presently acting as AREH's managing member, pursuant to a series of orders entered by this Court in late 2023. More specifically, this Court granted a temporary restraining order on November 3, 2023 (the "TRO," NYSCEF No. 321), which "restrained and enjoined [Simpson and JJ Arch] from acting as the managing member of AREH" and ordered that "Oak will serve as acting managing member of AREH, owing all applicable duties to AREH and its members" from that date forward. Subsequently, on November 20, 2023, this Court granted a preliminary injunction in favor of Oak that extended the TRO and Oak's role as AREH's acting managing member (*see* NYSCEF No. 412). Then, on November 22, 2023, this Court entered its Amended Decision and Order on Motion (NYSCEF No. 418, the "PI"), providing that "during the pendency of this action and subject to further order of the Court, Jeffrey Simpson and JJ Arch LLC are enjoined from "[a]cting as (or holding themselves out to third parties to be) managing members of [AREH], and Oak shall continue to act in their stead as AREH's sole managing member in accordance with Section 7.1 of the [AREH LLC Agreement], owing all applicable duties to AREH and its members."[4] This Court reaffirmed as recently as February 8, 2024 that the PI "remains in full force and effect." *See* NYSCEF No. 604.

[4] The PI further provides that "Jeffrey Simpson and JJ Arch LLC are enjoined from [] [d]enying prompt consent to any Major Decision proposed by Oak as Managing Member under Section 7.1.3 of the Operating Agreement unless both JJ Arch members (Jeffrey Simpson and Jared Chassen) jointly agree to deny such consent (or alternatively, either JJ Arch member may convey consent)[.]"

Argument

A. Legal Standard

On a motion to dismiss made pursuant to CPLR 3211(a)(7), "the [C]ourt must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference." *EBC 1, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005). The Court's "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail[.]" *Polonetsky v. Better Homes Depot, Inc.*, 97 N.Y.2d 46, 54 (2001) (internal quotation marks and citation omitted). The facts alleged in the complaint must be accepted as true, and the plaintiffs accorded the benefit of every possible favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." *David v. Hack*, 97 A.D.3d 437, 438 (1st Dept. 2012).

Similarly, on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211(a)(1), the Court must accept as true the facts alleged in the complaint and afford plaintiff the benefit of every favorable inference. *Chapman, Spira & Carson, LLC v. Helix BioPharma Corp.*, 115 A.D.3d 526, 527 (1st Dept. 2014) (citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994)). But dismissal under CPLR 3211(a)(1) is warranted "when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law[.]" *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324, 865 N.E.2d 1210 (2007) (citations and quotations omitted).

B. JJ Arch Has Failed to State a Claim for Breach of Contract.

JJ Arch's breach of contract claim rests on four faulty grounds: (1) Oak failed to make contractually obligated capital calls pursuant to 3.2.1 and 3.2.2 of the AREH LLC Agreement; (2) Oak has not paid *Simpson* the "Guaranteed Payment" pursuant to 7.3.1 of the AREH LLC

Agreement; (3) Oak failed to indemnify Simpson and JJ Arch under 13.1 of the AREH LLC Agreement; and (4) Oak made extracontractual promises to pay for AREH's lawyers, which it then did not do. As addressed herein, dismissal is required because JJ Arch's Counterclaims fail to plead essential elements of the claim (which deficiencies cannot be fixed by repleading), and the terms of the AREH LLC Agreement roundly refute any claim to relief by JJ Arch.

1. The Elements for Breach of Contract are not Satisfied.

"To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages." *VisionChina Media Inc. v. S'holder Representative Servs., LLC*, 109 A.D.3d 49, 58 (1st Dept. 2013).

a. Performance Under the Agreement by the Plaintiff is Not (and Cannot Be) Alleged.

JJ Arch's Counterclaims contain no allegations establishing that JJ Arch performed its obligations under the AREH LLC Agreement.[5] As the Court well knows, JJ Arch (through the acts and omissions of Simpson, its managing member) has failed to perform its obligations pursuant to the AREH LLC Agreement, which failures formed the basis of Oak's previous request for a preliminary injunction, which was granted and restrained JJ Arch from acting as AREH's managing member for the pendency of this action. Among other things, Oak provided evidence that Simpson abused his position at JJ Arch to make extortionate demands of Oak purportedly to fund AREH's operations, misappropriate AREH's funds for JJ Arch's benefit (and ultimately for his own), and defraud investors into investing in a doomed 1031 rollover. *See* NYSCEF No. 234 (reflecting

[5] As a preliminary matter, JJ Arch's Counterclaims fail to clear the first element for a breach of contract claim, that a valid contract between the parties exists. Rather, JJ Arch's Counterclaims allege, "The AREH Operating Agreement is a valid contract between Mr. Simpson in his capacity as the Managing Member of JJ Arch and Oak." Thorne Aff., Ex. A at ¶ 41. Thus, only a contract between Simpson and Oak is alleged.

Simpson's demand for hundreds of thousands of dollars with no commitment as to their use); NYSCEF No. 254 (reflecting another urgent demand for capital and referencing Oak's guaranty liability); NYSCEF No. 160 (October 2, 2023 Affidavit of Jeffrey Simpson) at ¶ 21 (admitting that non-AREH employees are on the AREH payroll); NYSCEF No. 258 (correspondence regarding the 1031 rollover). Tellingly, JJ Arch's Counterclaims nowhere address how the urgent demands for capital complied with the AREH LLC Agreement provisions regarding Capital Calls (as these demands plainly did not comply) and offer only a bare denials of the allegations regarding misappropriation of AREH's funds (despite Simpson's admissions in his October 2 affidavit) and the 1031 rollover. *See* Thorne Aff., Ex. A at ¶¶ 43, 98 of "Specific Responses to the Allegations in Oak's Complaint"). In considering Oak's request for a preliminary injunction enforcing JJ Arch's removal, this Court stated its belief that "[Oak has] what I believe to be a substantial case in terms of likelihood of success on the merits of one or more cause events." Transcript of November 20, 2023 Proceedings ("Nov. 20 Tr."), NYSCEF No. 417, at 57:4-6. Thus, the absence of any allegations that JJ Arch duly performed its obligations under the AREH LLC Agreement requires dismissal of the breach of contract claim in its entirety. *See M & E 73-75, LLC v. 57 Fusion LLC*, 189 A.D.3d 1, 7 (1st Dept. 2020) (dismissing breach of contract claim for plaintiff's failure to plead its own performance of its contractual obligations). Moreover, the voluminous uncontradicted evidence precludes any possibility that JJ Arch performed, which independently warrants dismissal. *See David v. Hack*, 97 A.D.3d 437, 438 (1st Dept. 2012) (affirming dismissal of complaint under CPLR 3211(a)(1) where documentary evidence, including communications, refuted plaintiff's claim to relief).

b. Failure of a Condition Precedent Further Precludes Finding Any Breach.

In addition to JJ Arch's failure to allege performance (or indeed perform), the breach of contract claim is further defective because it is primarily premised on Oak's alleged failure to fund

"Capital Calls" (Thorne Aff., Ex. A at ¶ 44), but pursuant to the AREH LLC Agreement, there are several conditions precedent before any Capital Call (as defined in the AREH LLC Agreement) could be due. First, the "Managing Member" must determine that "additional funds are required by the Company (x) to meet its general and administrative expenses in connection with the Approved Budget exclusive of those related to a Permitted Investment or (y) to satisfy the costs associated with the Company's due diligence in connection with approved Eligible Assets. . ." Thorne Aff., Ex. C at § 3.2.1. Next, the "Managing Member shall deliver a written notice to Investor Member (a 'Capital Call Notice') setting forth the total amount of capital required (the 'Capital Call Amount') and the purpose of such Capital Call." *Id*. JJ Arch's Counterclaims fail to allege that any of these conditions precedent were met, which also requires dismissal of the breach of contract claim. *See xLon Beauty, LLC v. Day*, 656771/2016, 2018 N.Y. Misc. LEXIS 258 *9-10 (Sup. Ct., N.Y. County Jan. 2, 2018) (dismissing breach of contract claim where plaintiff failed to provide "written notice" and therefore "failed to satisfy a condition precedent for Defendant's performance").[6] Indeed, the undisputedly shows that Simpson, as JJ Arch's managing member, dispensed with these requirements altogether, making urgent demands for capital under the threat of AREH's imminent collapse and Oak's guaranty liability. *See*, *e.g.*, NYSCEF Nos. 234, 254.

c. The Allegations are so Vague and Conclusory as to Not Adequately Plead the Elements.

The contract claim further fails because the allegations underlying it are wholly conclusory. JJ Arch's Counterclaims consist entirely of vague allegations untethered to any specific conduct. The who, what, where and why are entirely missing. By way of example, the Counterclaims make

[6] Alternately, if these provisions were construed as contractual promises, as opposed to conditions precedent, then the breach of contract claim still fails because of JJ Arch's failure to plead its own performance. *See, e.g., Vibes Int'l Inc., SAL v. Iconix Brand Grp., Inc.*, No. 18-CV-11449 (JGK), 2020 WL 3051768, at *4 (S.D.N.Y. June 8, 2020) (dismissing breach of contract claim for plaintiff's failure to plead its own performance).

the following allegations in support of the claim that Oak failed to uphold its funding obligations under the AREH LLC Agreement: "Simpson made numerous Capital Calls to Oak pursuant to Section 3.2.1 of the AREH LLC Agreement," that "Oak's Unreturned Capital Contributions did not exceed its Member Maximum Capital Contributions as those terms are defined under the AREH Operating Agreement," and therefore, "Oak has materially breached the AREH Operating Agreement by failing to make those Capital Calls in accordance with Sections 3.2.1 and 3.2.2[.]" Thorne Aff., Ex. A at ¶¶ 42-44. As a threshold matter, this allegation is insufficient to state a claim, because pursuant to the AREH LLC Agreement, any such capital calls must be made by the "Managing Member," which is defined in the agreement as "JJ ARCH LLC"—not Simpson. Thorne Aff., Ex. C at § 1.1, 3.2.1. In any event, this pleading is also far too vague to put Oak on notice of the basis for the claim. Entirely missing from JJ Arch's Counterclaims are basic facts like when any such capital calls were made, by whom, how, for what amount, and for what reason. Given the ease with which this information could be obtained if valid capital calls had been made (and if Oak had not reached the funding cap), the absence of detail of any kind in support of the bare claim that "Simpson made numerous Capital Calls to Oak" leads to the opposite conclusion that no valid capital calls were made. In any case, in providing absolutely no information at all regarding the supposed capital calls or entirely unsupported assertion that "Oak's Unreturned Capital Contributions did not exceed its Member Maximum Capital Contributions" at some unspecified time, Oak is left to guess as to what JJ Arch is complaining about, which is insufficient to state a claim for relief. *See Nationstar Mortg., LLC v. Ocwen Loan Servicing*, LLC, 194 A.D.3d 490, 492 (1st Dept. 2021) (affirming dismissal of breach of contract claim where "Plaintiff's complaint provided bare and conclusory allegations and relied on over 500 pages of spreadsheets attached to it that did not identify the time period, amount or source of the alleged losses"); *Marino*

v. Vunk, 39 A.D.3d 339, 340 (1st Dept. 2007) ("Vague and conclusory allegations are insufficient to sustain a breach of contract cause of action.").

For the same reasons, the wholly conclusory allegation that "Oak's Unreturned Capital Contributions did not exceed its Member Maximum Capital Contributions," falls far short of notifying Oak of the basis for the claim against it. Thorne Aff., Ex. A at ¶ 43. The multiple opportunities that have come and gone to present a shred of evidence or any reasoning at all behind this assertion (including an express invitation from the Court to do so) make this conclusory assertion all the less worthy of any credit. *See* Nov. 20 Tr. at 38:9-10, 40:17-19 (remarking on the absence of evidence showing Oak had not met the funding cap, and further noting Simpson's ability to do so). Indeed, any notion that Oak did not meet its funding cap is contradicted by Simpson's prior communications, which plainly reflect his knowledge that the Member Maximum Capital Contribution of $3 million dollars had been met. *See* NYSCEF No. 234 (stating in an August 2023 urgent demand for capital, "We can talk about 3 million cap or not it is what it is. I cannot fund the overhead with the absence of the fees, and those are correlated to the cash imbalances at the properties.").

Thus, in offering nothing more than a conclusory assertion that Oak failed to meet its funding obligation, contradicted by its principal's own prior statements, JJ Arch has failed to satisfy the basic elements of this cause of action, warranting dismissal of this claim. *Kalter v. Hartford Ins. Co. of the Midwest*, 24 F. Supp. 3d 230, 235 (E.D.N.Y. 2014) (under federal standard, granting dismissal of contract claim where "Plaintiffs provide[d] no details as to specific dates; the nature of the occurrence that caused them to sustain property damage and/or losses; or what kind of property damage or losses they experienced").

2. The Allegations Regarding the "Guaranteed Payment" are Defective and Refuted by the Contract.

JJ Arch's Counterclaims allege that "Mr. Simpson as the Managing Member of JJ Arch was specifically entitled to certain 'Guaranteed Payment' pursuant to Section 7.3.1 of the AREH LLC Agreement." Thorne Aff., Ex. A at ¶ 45. As a threshold matter, the AREH LLC Agreement nowhere provides that Simpson personally is owed the Guaranteed Payment, nor is Oak the party obligated to pay such an amount. Rather, the AREH LLC Agreement provides that the "*Managing Member* shall be entitled to a monthly guaranteed payment from the Company equal to the amount set forth in the Annual Budget as 'Managing Member Guaranteed Payment' which shall be payable by *the Company* in advance." Thorne Aff., Ex. C at § 7.3.1. (emphasis added). The AREH LLC Agreement further defines "Managing Member" as "JJ Member"—*i.e.*, JJ Arch itself. Despite this, JJ Arch's Counterclaims exclusively refer to Simpson's purported right to the Guaranteed Payment, and provide no explanation as to how such a claim by Simpson translates to any right of JJ Arch, rendering the claim facially deficient. *See* Thorne Aff. Ex. A, ¶¶ 49, 50.

Irrespective of to whom any Guaranteed Payment would be owed, the AREH LLC Agreement is clear that any such "Guaranteed Payment" is due to be paid "from the Company." Thorne Aff., Ex. C at § 7.3.1. "Company" is defined as "Arch Real Estate Holdings LLC." Thorne Aff., Ex. C at First Whereas Clause. Thus, even if this provision were breached (which it has not been, as described below), Oak has no contractual liability for such a breach. *See Kagan v. HMC-New York, Inc.*, 94 A.D.3d 67, 69 (1st Dept. 2012) (dismissing breach of contract claim, because "[a]s a threshold matter, it is undisputed that the managers, HMC-NY, HMC Investors, and Harbinger Holdings, are not contractually obligated to the plaintiff with respect to the provisions allegedly breached. In each instance, the provisions specify that the obligation rests with the Company, that is, the Manager Entity."). Thus, without any further analysis required, from the face

of JJ Arch's Counterclaims and based on the unambiguous terms of the AREH LLC Agreement, no claim to relief for any Guaranteed Payment is stated.

The allegations regarding the Guaranteed Payment further fail because Section 7.3.1 entitles JJ Arch to "a monthly guaranteed payment from the Company *equal to the amount set forth in the Annual Budget*" (Thorne Aff. Ex. C, § 7.3.1 (emphasis added)) and AREH has undisputedly been operating without an Annual Budget since at least 2022. NYSCEF No. 314 (August 2023 email of Simpson admitting no annual budget had been prepared since 2022). JJ Arch's failure to prepare a Proposed Annual Budget violates Section 7.4, which expressly requires a new budget be prepared each year and only permits that line items from previous years carry forward where the Members fail to agree a line item in the Proposed Annual Budget. *See* Thorne Aff., Ex. C at 7.4. Thus, either due to JJ Arch's own breach of the AREH LLC Agreement or nonperformance of a condition precedent in failing to prepare an annual budget since 2022, no Guaranteed Payment is owed. *See xLon Beauty, LLC v. Day*, 656771/2016, 2018 N.Y. Misc. LEXIS 258 *9-10 (Sup. Ct., N.Y. County Jan. 2, 2018) (granting dismissal for failure to satisfy a condition precedent); *Ace Sec. Corp. Home Equity Loan Tr. v. DB Structured Prod., Inc.*, 5 F. Supp. 3d 543, 561 (S.D.N.Y. 2014) ("A plaintiff's entitlement to sue for breach of contract depends on whether it has performed its own obligations").

Finally, in addition to all the foregoing, to the extent the Guaranteed Payment was not paid prior to November 2023 (after which, there can be no argument any amounts accrued),[7] this was a decision Simpson made on behalf of JJ Arch and AREH, which he cannot now characterize as a "breach" by Oak (even if Oak, rather than AREH, were responsible for the payment). JJ Arch's

[7] Per Section 7.3.1, "The right of Managing Member to receive Managing Member Guaranteed Payment shall automatically terminate upon Managing Member no longer serving as the 'Managing Member' of the Company." Thus, no amounts payable to JJ Arch have accrued since the November 3, 2023 TRO. Section 7.3.1 further states that this payment "shall be payable by the Company *in advance*[,]" such that regardless of when amounts ceased to accrue, any payment obligation would have arisen before Oak assumed any duties as AREH's acting managing member. *See* Thorne Aff., Ex. C at 7.3.1 (emphasis added).

Counterclaims state, "Mr. Simpson was selflessly not taking distributions to which he was and is unconditionally entitled[,]" and Simpson's counsel has previously represented that as of August 2023, "Mr. Simpson had, at that time, not taken a distribution in four or five months." *See* Nov. 20 Tr. at 37:20-24. These statements raise issues of waiver, and coupled with the terms of the AREH LLC Agreement, which establish that no Guaranteed Payment amounts could have accrued or become payable since the November TRO, entirely relieve Oak of any possible responsibility in the matter.

3. Neither Oak (nor AREH) Has Any Obligation to Indemnify JJ Arch (or Simpson).

In support of the breach of contract claim, JJ Arch's Counterclaims contend "Oak is also liable to indemnify Mr. Simpson and JJ Arch under Section 13.1." Thorne Aff., Ex. A at ¶ 48. The AREH LLC Agreement is clear that "[t]he *Company shall indemnify*, defend and hold harmless each Member . . ." Thorne Aff., Ex. C at § 13.1.2 (emphasis added). This provision does not obligate *Oak* to do anything and therefore cannot form the basis for a breach of contract claim against Oak.[8] *See Kagan*, 94 A.D.3d at 69.

Moreover, the relevant provisions of the AREH LLC Agreement make clear that "willful misconduct or fraud"—the substance of the claims against Simpson, whose conduct is imputed to JJ Arch—are excluded. Section 13.1, which JJ Arch's Counterclaims specifically rely, provides:

> No Member…shall have any liability to the Company or to any other Member for any loss suffered by the Company or any other Member **unless such loss arises out of the willful misconduct or fraud of such Indemnifying Member**

Thorne Aff., Ex. C at §13.1. (emphasis added). The numerous and well-supported claims against Simpson and JJ Arch for breach of fiduciary duty and other willful misconduct, in addition to a

[8] Simpson has simultaneously represented that he has legal insurance covering the costs of this suit—the very remedy that he seeks in this case. *See* NYSCEF No. 546.

claim of fraud against Simpson, preclude the possibility that that Simpson or JJ Arch are entitled to indemnification, much less by Oak. *See* NYSCEF No. 319, Oak's Complaint, at ¶ 97-103).[9]

Even if the Simpson's actions are not determined to be willful misconduct or fraud, Simpson has not provided an undertaking—as required by the AREH LLC Agreement:

> "Expenses (including reasonable attorneys' fees and disbursements) incurred by an Indemnitee… shall, from time to time, be advanced …**upon receipt by the Company of an undertaking by or on behalf of the Indemnitee** to repay such amounts if it is ultimately determined that such Indemnitee is not entitled to indemnification[.]"

Thorne Aff., Ex. C at §13.1.2. (emphasis added). Simpson has not alleged that he has made—and AREH has not received—any undertaking from Simpson. Therefore, Simpson has not met an explicit condition precedent of the indemnification provision and is not entitled to reimbursement for his legal expenses. *See xLon Beauty, LLC,* 2018 N.Y. Misc. LEXIS 258 at *9-10.

Because the basis for the breach of contract claim is roundly contradicted by the contract itself, dismissal is therefore also warranted under CPLR 3211(a)(1). *See Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324, 865 N.E.2d 1210 (2007) (affirming dismissal of claims under CPLR 3211(a)(1) and (a)(7) where the terms of the terms of the contract contradicted plaintiff's basis for relief); *David v. Hack,* 97 A.D.3d 437, 438 (1st Dept. 2012) (affirming dismissal of complaint under CPLR 3211(a)(1) where documentary evidence, including communications refuted plaintiff's claim to relief).

[9] The exclusion for willful misconduct and fraud is further reinforced by Section 13.1.2, which provides: "The **Company** shall indemnify, defend and hold harmless each Member and/or its Affiliates, and any of their respective officers, directors, shareholders, partners, members, managers, employees or agents and each officer of the Company (each, an "Indemnitee") from and against any and all claims or liabilities of any nature whatsoever arising out of the business of the Company . . . arising out of or in connection with **any action** . . . **taken or omitted by it pursuant to the authority granted by this Agreement; provided, however, that no indemnification may be made to or on behalf of any Indemnitee if such Indemnitee's (or its Affiliate's) acts in connection with such claim for indemnification constituted fraud or willful misconduct."** *Id.* at §13.1.2. (emphasis added).

4. The Claim for Breach Premised on Alleged "Oral Promises" and "Other Written Promises" is Barred by the LLC Agreement.

To the extent JJ Arch's breach of contract claim depends on the allegation that "Oak has further breached the AREH LLC Agreement and oral and other written promises by failing to pay AREH's lawyers[10] for corporate and transactional work performed prior to the commencement of this action[,]" it must be dismissed pursuant to CPLR 3211(a)(1) because it is precluded by the AREH LLC Agreement. Thorne Aff., Ex. A at ¶ 49; *see Plaza PH2001 LLC v. Plaza Residential Owner LP*, 98 A.D.3d 89, 100 (1st Dept. 2012) ("A breach of contract claim should, of course, be dismissed under CPLR 3211(a)(1) if the contract itself precludes the claim.").

The AREH LLC Agreement—which is incorporated into JJ Arch's Counterclaims—contains no provision that requires Oak to pay for AREH's lawyers, and further excludes the possibility of liability for any breaches of unidentified "oral and other written promises." The AREH LLC Agreement provides:

> This Agreement sets forth the entire agreement between the parties relating to the subject matter hereof and all prior agreements relative thereto that are not contained herein or therein are terminated. Amendments, variations, modifications or changes herein may be made effective and binding upon the parties hereto by, and only by, a written agreement duly executed by all the Members, and any alleged amendment, variation, modification or change herein which is not so documented will not be effective as to any party hereto.

Thorne Aff., Ex. C at § 14.3.

"When a written contract provides that it may only be modified by a signed writing, oral modification of that agreement is unenforceable." *Grand Prize Network, LLC v. The Blu Mkt., Inc.*, 651799/2017, 2018 N.Y. Misc. LEXIS 1156, at *6-7 (Sup. Ct., N.Y. County Apr. 2, 2018).

[10] No explanation is provided why JJ Arch, rather than AREH, would have a claim for relief for a purported nonpayment of AREH's legal fees, regardless of the other incurable defects with this aspect of the breach of contract claim.

Here, JJ Arch's Counterclaims concede that the purported "oral and other written promises" overlap with the subject matter of the AREH LLC Agreement, as they claim Oak's supposed failure to pay the legal fees also constituted a breach of the AREH LLC Agreement, clearly implicating the contract's merger clause. *See* Thorne Aff., Ex. A at ¶ 49. Thus, no cause of action lies for any purported breach of any alleged extracontractual promises to pay AREH's legal fees.[11] *See Tierney v Capricorn Invs., LP*, 189 A.D.2d 629, 631 (1st Dept. 1993) (holding that plaintiff's cause of action for breach of contract should have been dismissed by the trial court because plaintiff pleaded facts inconsistent with the terms of the agreement, which contained a provision precluding oral modification (citing Gen. Obligations Law § 15-301(1); *Goodyear Publ. Co. v Mundell*, 75 A.D.2d 556, 557 (1st Dept. 1980)). *See also Guzovskiy v. Weingarten*, 650143/2018, 2019 N.Y. Misc. LEXIS 1160 at *9 (Sup. Ct., N.Y. County Mar. 15, 2019) (granting motion to dismiss where "Plaintiffs cannot rely on any purported oral agreement because it is barred by the integration clauses in the Notes"); *Oppman v. IRMC Holdings, Inc.*, 600929/2006, 2007 N.Y. Misc. LEXIS 117, at *12, 836 N.Y.S.2d 494, 494 (Sup. Ct., N.Y. County Jan. 23, 2007) ("Where a written contract contains a merger clause, negotiated at arm's length, inserted by sophisticated parties and stating that the written agreement constitutes the entire agreement of the parties, the parol evidence rule bars plaintiffs from introducing evidence of an oral contract between those parties.").

C. JJ Arch Has Failed to State a Claim for Breach of Fiduciary Duty.

To state a claim for breach of fiduciary duty, JJ Arch must allege that "(1) defendant owed [it] a fiduciary duty, (2) defendant committed misconduct, and (3) [it] suffered damages caused by that misconduct." *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 699-700 (1st Dept. 2011).

[11] Alternatively, these claim these claims should be dismissed pursuant to CPLR 3211(a)(7), because Simpson's pleading is impermissibly vague, since he merely references "oral and other written promises" without any detail. *See Marino*, 39 A.D.3d at 340. Finally, in addition to the merger clause and impermissibly vague allegations, Simpson fails to articulate how nonpayment of AREH's lawyers would cause Simpson any damage at all.

"A cause of action to recover damages for breach of fiduciary duty must be pleaded with the particularity required under CPLR 3016(b)." *Benjamin v. Yeroushalmi*, 178 A.D.3d 650, 653 (2nd Dept. 2019). JJ Arch fails to establish the elements of this cause of action, allege facts in support of this claim that are separate from a purported contractual obligation, or plead facts with sufficient particularity, providing at least three independent bases for wholesale dismissal.

1. JJ Arch Cannot Establish That Oak Owed It (or Anyone Else) a Fiduciary Duty.

The breach of fiduciary claim is doomed from the start because Oak owed no fiduciary duty to JJ Arch, foreclosing satisfaction of the first element for this claim. JJ Arch's Counterclaims allege in a wholly conclusory fashion that "Oak owed fiduciary duties to JJ Arch by virtue of its being the Investor Member in AREH." *See* Counterclaim at ¶ 52. But New York law specifically rejects this proposition. While managing members of LLCs undisputedly owe fiduciary duties to the LLC and the LLC's other members, the duty does not run in both directions, and non-managing members do not owe such fiduciary duties. *See Doeblin v. MacArthur*, 2023 NY Slip Op 30133(U), (Sup. Ct., NY County 2023) (granting pre-answer motion to dismiss breach of fiduciary duty claim to 40% member who was not alleged to have engaged in any management duties of the LLC), *Kalikow v. Shalik*, 43 Misc.3d 817, 824, 986 N.Y.S.2d 762, 768 (Sup. Ct. Nassau County 2014) (granting pre-answer dismissal and observing, "[n]oticeably absent from the Limited Liability Company Law, which expressly imposes a duty of good faith upon managers of an LLC, is any concomitant duty on a non-managing member" and quoting 1 N.Y. Prac., New York Limited Liability Companies and Partnerships § 1:8, which states, "a member who is not a manager does not owe a duty to the LLC or its members except to the extent he or it participates in the management of the LLC"); *Lester v. Capo*, 2016 NY Slip Op 30214(U) (Sup. Ct. NY County 2016) (granting pre-answer dismissal to non-managing member on breach of fiduciary duty

claims). Thus, prior to the TRO, Oak owed no duty to AREH's other member, JJ Arch. *Doeblin v. MacArthur,* 2023 NY Slip Op 30133(U); *Kalikow v. Shalik,* 986 N.Y.S.2d at 768; *Lester v. Capo*, 2016 NY Slip Op 30214(U).

2. The Fiduciary Duty Claim Is Duplicative of JJ Arch's Breach of Contract Claim.

As an independent issue with the fiduciary duty claim, it is almost entirely duplicative of the (also infirm) contract claim.[12] Under New York Law, a "breach of fiduciary duty claim is duplicative when it is based on allegations of fiduciary wrongdoing that are expressly raised in plaintiff's breach of contract claim," *Ohr Somayach/Joseph Tanenbaum Educ. Ctr. v. Farleigh Int'l Ltd.*, 483 F. Supp. 3d 195, 211–12 (S.D.N.Y. 2020). "For a breach of fiduciary duty claim to exist a plaintiff must demonstrate a legal duty separate from the duty to perform under the contract." *Id*.

Here, the breach of fiduciary claim is premised on the same allegations that form the basis of his breach of contract claim, and in fact expressly refers to the contract as the source of Oak's purported duty. Namely, JJ Arch's Counterclaims ground the fiduciary duty claim on allegations that (1) Oak failed to make contractually obligated capital calls pursuant to 3.2.1 and 3.2.2 of the AREH LLC Agreement; (2) that Oak has not paid Simpson his "Guaranteed Payment" pursuant to 7.3.1 of the AREH LLC Agreement and (3) that Oak failed to indemnify Simpson and JJ Arch under 13.1 of the AREH LLC Agreement. These are plainly breach of contract claims masquerading as breach of fiduciary claims, and therefore, must be dismissed. *See Perl v. Smith Barney Inc.*, 230 A.D.2d 664, 666, 646 N.Y.S.2d 678, 680 (1st Dept. 1996) ("plaintiff's causes of

[12] Simpson's breach of contract claim need not survive in order to dismiss the fiduciary duty claim as duplicative with the contract claim. The essential question is whether the fiduciary duty claim arises from a purported contractual obligation (as here, rendering it duplicative), and not whether the contractual claim is validly pled. *See Perl v. Smith Barney Inc.*, 230 A.D.2d 664, 666, 646 N.Y.S.2d 678, 680 (1st Dept. 1996) (dismissing breach of contract claim that was contradicted by the terms of the contract, and dismissing breach of fiduciary duty claim as duplicative with the breach of contract claim, among other infirmities).

action for common law fraud and breach of fiduciary duty merely duplicate the breach of contract claim and should have been dismissed on that ground also").

The sole allegation pled in support of the breach of fiduciary claim that is not expressly premised a purported contractual obligation is the claim that Oak "conspire[ed] with defendant Chassen to oust Mr. Simpson from JJ Arch and AREH in order to mask its efforts to hide its refusal to fund AREH's continued operations[.]" Thorne Aff., Ex. A at ¶ 53. *See also* Thorne Aff., Ex. A at ¶¶ 6, 23 (alleging that that Oak and Chassen "are carrying out their illicit plan . . . to oust Mr. Simpson from AREH and JJ Arch," and "plotting and planning . . . to take over AREH and throw Mr. Simpson out"). However, even these allegations in fact point back to the contract—specifically Section 7.1.4, which permits Oak to remove JJ Arch upon the occurrence of a Cause Event—rendering these allegations insufficient to state a claim. *See Braddock v. Shwarts*, 80 Misc. 3d 1221(A), 196 N.Y.S.3d 919, 2023 WL 6564005 (N.Y. Sup. Ct. 2023) (exercise of a contractual right to terminate a member from an LLC precludes breach of fiduciary duty premised on termination). *See also Seeking Valhalla Tr. v. Deane*, 182 A.D.3d 457, 458 (1st Dept. 2020) (affirming dismissal of fiduciary duty claim where "defendants complied with all terms of the operating agreement"). Moreover, this Court has repeatedly recognized that Chassen and Oak have both reason and right to communicate with each other (*see* October 19, 2023 Transcript of Hearing, NYSCEF No. 281, at 51:16-23 (expressing that "I'm not comfortable with what I've seen in terms of . . . attacking Mr. Chassen for having the audacity to talk to the investor member. It's antithetical to the relationship between a fiduciary and a minority member in an LLC")) and so the mere fact that they have done so is not actionable in any way. And this is borne out by the various communications quoted in JJ Arch's Counterclaims, which show nothing more than two parties working together to counteract the serious harm Simpson has undisputedly brought upon the

company. *See* Thorne Aff., Ex. A at ¶ (quoting Chassen communication regarding "cause event backup"). Accordingly, to the limited extent the fiduciary duty claim does not expressly depend on a purported breach of the AREH LLC Agreement, the allegations concern conduct authorized by it, precluding any claim.

3. The Fiduciary Duty Claim Fails to Meet the Heightened Pleading Standard.

In addition to the foregoing, Count II is devoid of any concrete facts that substantiate or support in any way the claim that Chassen and Oak have done anything more than attempt to rescue the business, and for this reason, Count II is separately infirm for falling short of the heighted pleading standard that applies to breaches of fiduciary duty claims.

CPLR 3016(b) requires a heightened pleading requirement for a cause of action "based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence." The heightened standard requires that "the circumstances constituting the wrong shall be stated in detail." *Id.* Courts have repeatedly held that a cause of action sounding in breach of fiduciary duty falls within the heightened pleading standard and must be pleaded with particularity. *See Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 808, 921 (2nd Dept. 2011); *See also Mann v. Sasson*, 186 A.D.3d 823, 824, (2020) ("A cause of action to recover damages for breach of fiduciary duty must be pleaded with the particularity required under CPLR 3016(b)"); *Swartz v. Swartz*, 145 A.D.3d 818, 823, (2nd Dept. 2016).

When the fiduciary duty allegations are held up to this exacting and heightened standard, it is clear they fall short. As addressed in Section B.1.c, to the extent this claim overlaps with purported breaches of the AREH LLC Agreement, the allegations do not even clear the ordinary standard for sufficient pleadings. In the sole instance of conduct that is not alleged to also breach a specific contractual duty—the conspiracy allegations—JJ Arch's Counterclaims are still impermissibly vague, consisting of bare assertions that "Oak has conspire[ed] with Chassen to oust

Mr. Simpson . . . to mask [Oak's] efforts to hide its refusal to fund AREH's continued operations." The bases for this claim are an assortment of emails that simply reflect Oak and Chassen navigating the predicament occasioned by Simpson's own wrongdoing, and acting fully in accordance with the contract, none of which is actionable. *See Seeking Valhalla Tr.*, 182 A.D.3d at 458. Thus, JJ Arch's Counterclaims are nothing more than accusations of "conspiring," which lack the requisite detail as to the conduct that substantiates the charge, rendering them conclusory assertions that Oak has breached a fiduciary duty, which this Court must disregard. *See David v. Hack*, 97 A.D.3d 437, 438 (1st Dept. 2012) (allegations are considered conclusory if they are "bare legal conclusions" without sufficient factual backing); *Caniglia v. Chicago Tribune–N.Y. News Syndicate*, 204 A.D.2d 233, 233–234, (1st Dept. 1994); *Benjamin v. Yeroushalmi*, 178 A.D.3d 650, 654, 115 N.Y.S.3d 60, 64 (2nd Dept. 2019) (dismissing breach of fiduciary claim where the cause of action "contained only bare and conclusory allegations, without any supporting detail").

Conclusion

For the foregoing reasons, Oak respectfully requests that the Court dismiss Simpson's Counterclaims in their entirety and grant Oak such other and further relief as the Court deems appropriate.

Dated: February 22, 2024
New York, NY

Respectfully submitted,

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CERTIFICATION OF WORD COUNT COMPLIANCE

I hereby certify pursuant to Rule 202.70.17 of the Commercial Division of the Supreme Court that the foregoing **MEMORANDUM OF LAW** was prepared on a computer using Microsoft Word.

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Dated: February 22, 2024
New York, NY

Respectfully submitted,

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