

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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, as

Plaintiff,

-against-

Index No. 158055/2023

(Justice Joel M. Cohen)

JARED CHASSEN and FIRST REPUBLIC BANK,

Defendants.

Motion Seq. No. ____

JARED CHASSEN, 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,

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.

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**MEMORANDUM IN SUPPORT OF MOTION
TO (A) TERMINATE JARED CHASSEN FROM JJ ARCH LLC, AND (B)
RESTORE JJ ARCH AND JEFFREY SIMPSON AS THE MANAGING MEMBER OF
ARCH REAL ESTATE HOLDINGS LLC.**

Plaintiffs Jeffrey Simpson (“Simpson”) and JJ Arch LLC (“JJ Arch”) submit this Memorandum of Law in support of their motion for an Order to Show Cause seeking (1) permission from the Court to terminate Jared Chassen (“Chassen”) from JJ Arch pursuant to the terms of the JJ Arch Operating Agreement; and (2) modification of the Court’s November 22, 2023 Order (NYSCEF No. 418) under N.Y.C.P.L.R. § 6314, to appoint JJ Arch as Managing Member of Arch Real Estate Holdings LLC (“AREH”) with full authority to restructure the AREH-managed real estate investments subject to any contractual right by 608941 NJ Inc. (“Oak”)¹ or any other party to consent to “Major Decisions.”

PRELIMINARY STATEMENT

The JJ Arch Operating Agreement that governs Chassen’s contractual relationship with JJ Arch provides no less than four separate and independent grounds that give Simpson the right to terminate Chassen from JJ Arch, all of which are detailed below. These are terms that Chassen agreed to at the time that he signed the JJ Arch Operating Agreement, and he is not entitled to the benefit of different bargain. Perhaps even more important, however, is that the actions of Chassen over the past two months since the Court entered its Order on November 22, 2023 (“November Order”) have mandated that Simpson and JJ Arch re-approach the Court and seek relief as Chassen is engaging in acts that are harmful not only to Simpson and JJ Arch, but to all of AREH’s investors. Over the past two months, Chassen’s conspiracy with Oak has crystallized into verifiable evidence of clear harm to the investors that are owed a fiduciary duty by AREH. Far from the saviors that they portrayed themselves as to the Court at the November 3, 2023

¹ 608941 NJ Inc. is a subsidiary company of 35 Oak Holdings Ltd. (“35 Oak”).

Hearing, it is now painfully clear that Chassen, working hand-in-hand with Oak, has destroyed AREH since they took the reigns together less than two months ago. Despite its assurances in open court that it would fund AREH's operations and get the furloughed employees "back working as soon as possible," Oak, with Chassen sitting by in approval, has, as set forth below, (1) failed to sufficiently capitalize AREH; (2) failed to pay AREH's outstanding payables including to its contractors, lawyers and accountants despite some explicit promises to the contrary; (3) shuttered AREH's offices; (4) fired AREH's employees and not replaced those that quit; (5) failed to provide adequate supervision to certain active construction sites in New York City; (6) dismantled AREH's portfolio and investment management system, preventing investors from accessing information about their investments including tax information; and (7) failed to fund required capital calls, creating further distress for the investments. Stated otherwise, it appears that Oak, without any objection from Chassen, has broken every material promise that it made (or perhaps worse yet, misrepresented its intentions) to convince this Court to enter the November Order, which put Oak in place of JJ Arch as the Managing Member of AREH despite the clear language of the AREH Operating Agreement to the contrary.

But this is not just about broken promises or possible misrepresentations. It is about Oak's and Chassen's inherent insurmountable conflicts and their conspiracy to protect Oak at all costs – a conspiracy that currently threatens the interests of the approximately 125 other investors who combined have approximately \$100 million at risk in AREH-managed investments ("Non-Oak Investors") and requires immediate action. (*See* Oct. 2, 2023 Affidavit of Jeffrey Simpson ¶ 15 (NYSCEF No. 160) ("Oct. 2, 2023 Simpson Aff."); *see also* Exhibit 29 to the Affirmation of Steven Altman ("Altman Aff."), spreadsheet demonstrating that as of first quarter 2023, approximately \$100,000,000 at risk from non-Oak investors (with Non-Oak

Investor identities un-expanded to protect confidentiality.) Oak's primary goal is simple – to get releases from its guarantor liability on the conditional recourse, carry, and construction completion guarantees for all of the individual AREH-managed investments. It makes sense that this is Oak's primary goal. After all, Oak faces significant nine-figure risk with respect to those guarantees in an amount that far exceeds its risk as an equity investor in the AREH-managed investments. But Oak is not the only equity investor in these investments. In May and June of 2023, upon information and belief, Oak realized that as long as Simpson controlled AREH, AREH would properly fulfill its fiduciary duties to all investors and not unfairly prioritize Oak's desire for releases to the detriment of the Non-Oak Investors. Upon information and belief, Oak then became determined to oust Simpson and take control of AREH, in part, so that it could eliminate its guaranty exposure.

To effectuate its plan to oust Simpson from control in violation of the AREH Operating Agreement, Oak secretly conspired with Chassen, who, without any authority, locked Simpson out of his office (*see* Altman Aff., Exhibit 7, July 20, 2023 email from Chassen to Berg and Dayon), his e-mail (*see id.*, Exhibit 21, December 17, 2023 automatic reply email stating “Jeffrey Simpson is no longer managing Arch Companies”), the AREH systems and the AREH bank accounts (*see* August 11, 2023 letter from First Republic Bank (NYSCEF No. 6).) When that failed, Oak and Chassen entered into a written agreement that, upon information and belief, provides Chassen with indemnity and concocted allegations that Simpson acted improperly in an effort to fabricate a basis for removal for cause. All the while, Oak worked with Chassen to financially starve AREH by refusing to honor its commitment to fund AREH (despite clear promises to the contrary). (Altman Aff., Exhibit 1, Dec. 20, 2022 email from van Biesen.) When AREH no longer had funds to make payroll, Simpson was left with no choice other than to

furlough several of the corporate employees and sought to enforce Oak's obligation to fulfill the capital calls. (Email from Scott A. Griffin to Leslie Thorne (NYSCEF No. 302).) Oak seized upon the dire situation that it had constructed with Chassen and together they used that temporary furlough decision to convince this Court that AREH's only hope of survival was to install Oak as the Managing Member (with Chassen alone providing consent for JJ Arch for Major Decisions) so that it would be in a position to fund AREH. To ensure Simpson would be completely cut-off (and that they could continue to disparage him freely), Oak and Chassen also cut-off Mr. Simpson's access to his AREH email address and replaced it with an automated response that states that Mr. Simpson was removed from management of AREH "pursuant to court order." (*See* Altman Aff., Exhibit 21, December 17, 2023 automatic reply email stating "Jeffrey Simpson is no longer managing Arch Companies".) Oak also removed Simpson's access to AREH Dropbox folders, where essential managerial documents are stored. (*See id.*, Exhibit 17, Dec. 5, 2023 email from Jeffrey Simpson stating he does not have access to Dropbox.)²³

Oak and Chassen's actions during the two months since this Court's November 22, 2023 Order was issued have been telling. In addition to Oak's immediate actions to wind-down AREH in clear contrast to its representations to the Court at the November 3, 2023 hearing, Oak and its employee Chassen have been using the unchecked control that the November Order granted to them, to attempt to engineer for Oak self-serving releases from its personal guaranties to the detriment of the Non-Oak Investors. No longer a mere hypothetical conflict, in the past two months, Simpson and Non-Oak Investors have witnessed Oak's attempts to prioritize its release as guarantor on multiple transactions including with respect to the Myrtle Point and Columbia deals – all with Chassen's consent and as set forth below.

³ Simpson's Dropbox access was later reinstated, but only in part. (Jan. XX, 2024 Simpson Aff. ¶ 25.)

And there is more. The Non-Oak Investors now find themselves bound by a court-ordered “change of control” that not only puts the conflicted Oak in control with the consent of its yes-man Chassen, but it deprives them of Simpson, the specific manager who is described as “committ[ed] to push[ing] for the most accretive outcomes for real estate investments” that many of them intentionally chose to manage their investments. (Affidavit of Tristan Last (NYSCEF No. 132) (“Last Aff.”) ¶ 9.) Instead, their significant investments in these now-distressed real estate assets are being “managed” by two brothers from Canada who lack experience in complicated distressed real estate restructuring and Chassen, who is described as uninvolved and uninterested in real estate deals. (*See* Last Aff. ¶¶ 48, 50.) And, the very fact of the “change of control” initiated by Oak and Chassen has already had (and will continue to have) another devastating impact on Non-Oak Investors because lenders are taking the position that the change itself violates loan provisions. For example, on January 11, 2024, the lender to an AREH-managed property put a \$6.9 million loan on that property into default on the basis that Oak’s purported October 31, 2023 removal of JJ Arch as the Managing Member of AREH violated a contractual “change of control” provision. (Altman Aff. Exhibit 26, Jan. 11, 2024 letter from Shipman.) The lender now views the Non-Oak Investor that guaranteed that loan as personally liable for full payment of the \$6.9 million loan. Given that like “change of control” provisions exist in other loan documentation for AREH-advised properties, this example of the harm caused by Oak’s self-interested bid for control, confirmed by the November Order, is likely to be repeated.

In sum: if it is maintained in force without modification, the November Order will continue to result in perceived “change of control” defaults on loans, which will likely result in foreclosure. It will also allow the inexperienced Oak and Chassen to control AREH and dispose

of and restructure assets to benefit their own interests, without any checks and balances and in breach of Oak's fiduciary duty and to the detriment of the Non-Oak Investors. We are confident that the Court would not have entered the November Order if it had fully understood the extent of Oak's and Chassen's conflict, the inherent risk to the Non-Oak Investors, the triggering of perceived loan defaults due to contractual change of control prohibitions in the loan agreements, and Oak's failure to carry through on the promises that it made this Court in support of its motion to gain control of AREH.

STATEMENT OF FACTS

AREH and JJ Arch were founded (together, with their affiliates, the "Arch Companies") in December 2017, with the intention of Simpson leading a vertically integrated real estate owner, operator, and developer. (August 14, 2023 Affidavit of Jeffrey Simpson (NYSCEF No. 11) ("Aug. 14, 2023 Simpson Aff.") ¶ 12.) According to AREH's Managing Director, Tristan Last, Chassen's work ethic was "middling" and his role at AREH was primarily "schmoozing" and "administrative," including "ordering coffee supplies and snacks for the office." (Last Aff. ¶¶ 20, 35, 38.) Last found that Chassen had "virtually no involvement" or "interest" "in the actual process of analysis and negotiating" the terms of the AREH real estate deals and "was apathetic towards the actual work necessary for Arch to succeed." (*Id.* ¶ 46.) By contrast, Last characterizes Simpson as exuding "intelligence and business savvy," as working long hours, engaged "in constant communications" with the "Arch team and outside parties" and "with his fellow team members" and "committ[ed] to push[ing] for the most accretive outcomes for real estate investments." (*Id.* ¶¶ 9, 12, 38-39, 55.)

More importantly, and something that has remained consistent in my dealings with [Jeffrey Simpson] throughout my career, I was impressed with Jeff's mastery of details, his ability to pivot from big picture issues to intensely granular details, his skill at creative problem solving when issues with business plans arose, and a

knowledge of the industry and its many facets (e.g. construction, finance, lending, capital sourcing) that was remarkably wide and deep.

(*Id.* ¶ 10.) She added:

He is also able to craft highly creative solutions and approaches for complex real estate transactions and issues. In my estimation, Jeff has built a business and career in identifying and executing on solutions to problems that have eluded others.

(*Id.* ¶ 56.)

Under Simpson's leadership, by 2022, the Arch Companies' real estate investment and development portfolio – which included office space, multifamily dwellings, retail and hotel buildings – had grown to include more than \$1 billion worth of assets under management across fourteen active investments in nine states, including \$500 million worth of real estate assets in New York. (Aug. 14, 2023 Simpson Aff. ¶ 20.) By that point, approximately *one hundred twenty five (125) unique investors had collectively invested approximately \$101 million in AREH managed properties*. Oak, meanwhile, had invested approximately \$50 million. (*Id.* ¶ 15.) As of August 14, 2023, the Arch Companies employed approximately 100 people. (*Id.* ¶ 22.) Arch's construction entity, Arch Builders, LLC, alone employed approximately seventy people.

AREH has two members: JJ Arch, the "Managing Member" with an 80% interest, and Oak, the "Investor Member" with a 20% interest. (See AREH Operating Agreement, dated December 11, 2017, §§ 6.1-6.2. (NYSCEF No. 2).) Pursuant to section 7.1.1 of the AREH Operating Agreement, Simpson through JJ Arch, as Managing Member, has "full, exclusive and complete discretion" with respect to the management of AREH's "business, affairs and assets," "the unilateral power and authority acting in good faith to make and implement all decisions with respect to all matters," and the ability to "conduct, manage and control the affairs and business"

of AREH. (*Id.* § 7.1.1.-7.1.1.(i).) By contrast, Oak's contemplated role as Investor Member is to provide capital contributions to fund AREH's general and administrative expenses, and to satisfy costs associated with due diligence into real estate investments, up to \$3 million. (*Id.* § 3.1.) The Operating Agreement also provided exclusivity to Oak with respect to investment opportunities up to five years after the date of the operating agreement, which expired on December 11, 2022.⁴ (*Id.* § 7.2.2.) At Section 7.1.3 of the AREH Operating Agreement, JJ Arch and Oak agreed that both parties would be required to consent to any "Major Decision" undertaken by AREH, including, for example, any decision to "acquire any direct or indirect interests in any real property" or to file for bankruptcy. The AREH Operating Agreement does not disclaim any fiduciary duties of its members.

JJ Arch, in turn, has two members: Simpson (the Managing Principal and Co-Founder of the Arch Companies⁵) with a 50.1% interest, and Chassen, (the Principal and Co-Founder of the Arch Companies) with a 49.9% interest.⁶ (*See* JJ Arch Operating Agreement, dated December 11, 2017, § 1.1 (NYSCEF No. 3), as amended by Amendment No. 1 dated May 22, 2021 (NYSCEF No. 4).) The JJ Arch Operating Agreement provides that Simpson has the power to "conduct, manage and control the affairs and business of the Company," including with respect to its position as "a direct or indirect controlling entity of an Investment Entity," which is defined

⁴ Section 7.2.2 of the AREH Operating Agreement applies prior to the Investment Expiration Date or at such time that Oak's Maximum Expense Capital Contribution has been funded, and Oak elects not to make an Expense Contribution. According to Section 13.1.1 of the Agreement, the "Investment Expiration Date" means "the earlier of (i) the fifth anniversary of the date hereof; (ii) at such time as there are five Rejected Eligible Assets; (iii) the date on which none of Michael Wiener, William Wiener or Kevin Wiener controls Investor Member unless waived in writing by Managing Member; (iv) the date on which Jeffery Simpson no longer controls Managing Member unless waived in writing by Investor Member; or (v) the date on which the Investor Member and its Affiliates have made aggregate capital contributions, without giving effect to a return of any capital contributions, to the Company and its Subsidiaries equal to \$50,000,000.00."

⁵ Consistent with the terms of the Operating Agreement, the Arch Companies website identifies Simpson as the "Managing Principal, Co-Founder and Member of the Executive Committee" for the Arch Companies. Chassen, meanwhile, is identified as "Principal, Co-Founder, and Member of the Executive Committee." See website, available at <https://archcorealestate.com/our-team/>.

⁶ These percentages were diluted by the August 31, 2023 Member Loan and Default Loan from Simpson to Chassen.

to include AREH. (Amendment No. 1 § 3.1; *see also* JJ Arch Operating Agreement § 1.1.) Accordingly, the parties agreed that Simpson, in his position of Managing Member of JJ Arch, was to have operational control over the vast majority of the actual investment decisions of AREH. (Aug. 14, 2023 Simpson Aff. ¶ 32.) Chassen, meanwhile, has limited individual authority under the JJ Arch Operating Agreement and its Amendment; this made perfect sense considering his mostly administrative role. (*See* JJ Arch Operating Agreement § 3.1(a) (stating that Simpson has “exclusive and complete discretion” over “the business, affairs and assets of the Company”); *see also* Aug. 14, 2023 Simpson Aff. ¶¶ 24-29; Last Aff. ¶ 34.)

AREH, an operating company, does not own any real estate itself. Instead, it operates wholly owned subsidiaries that provide low-cost vertical services to real estate within other AREH affiliate Investment Entities’ portfolios. Such services include construction (Arch Builders), construction staffing (Construction Services and Solutions), asset and property management (Arch Asset Management), staffing for property management services (Ore Living), development services in South Florida (Arch Developers), and an advisory company (Arch Advisors). (Aug. 14, 2023 Simpson Aff. ¶ 21.) Certain other AREH affiliate Investment Entities hold real property for the purpose of investment, management, development, and sale. (*Id.* ¶ 2.) Each property sits within a complex organizational structure with numerous contract relationships to various entities.

As an operating business, AREH has cumulative profits or losses from its subsidiaries except for acquisition fees and promotes, and therefore it sustains its operating costs through either (1) temporary capital calls from AREH or (2) income passed through from its subsidiary companies. On average, AREH’s and affiliates operating budget was five to ten million dollars over a five-year period with expenses typically ranging between two to three million dollars per

year. (See Oct. 2, 2023 Simpson Aff. ¶ 19.) At least through 2022, AREH (including affiliates) was generally able to meet its operating costs through these funding sources.

I. The Downturn in the Real Estate Market

The AREH success story began to turn in 2022 with the sharp increase in interest rates that affected the entire real estate industry. By December 2022, it was apparent that an infusion of capital was needed to cover AREH. Accordingly, Simpson requested that Oak provide additional capital contributions, consistent with its obligations under Section 3.2 of the AREH Operating Agreement. This obligation to fund AREH was separate and apart from Oaks' obligation to fund capital calls in connection with the individual AREH-managed real estate investments. Initially, Oak agreed to provide that additional funding and more. On December 20, 2022, Frank van Biesen, Oak's Chief Financial Officer, represented to Simpson and Chassen: "I expect we could have as much as \$15-\$20 million available over the coming year." (Altman Aff. Exhibit 1, Dec. 20, 2022 email from van Biesen.) Oak, however, did not ultimately contribute funds anywhere near that level. Oak also failed to contribute necessary capital at the Investment Entities level. In May through July 2023, Simpson worked transparently with Oak and the lenders to the Investment Entities to restructure the investments that were becoming more and more distressed. But Oak refused to fulfill its capital obligations and unreasonably demanded that it be released from its guaranties as the top priority without providing any additional funding that would allow the construction projects to be completed. For example, Oak refused to provide additional funding for an AREH property, One Brown, as it faced imminent foreclosure. On June 19, 2023, Oak emailed Simpson that Oak had "decided that our [Oak's] sole interest in this project is now just being released from any liability." (Altman Aff. Exhibit 4, June 19, 2023 email from van Biesen.) Oak felt it was not in their "best interest" to "pursue any [] aggressive strategies" proposed by Simpson, but rather "let the lender know we are going to give them the

keys and in return we [Oak] would like a release from the guaranties. . . .” (*Id.*) The property was eventually foreclosed. (*See id.*)

II. Oak and Chassen Hatch a Plan to Oust Simpson from Control of AREH

By the summer of 2023, with Oak in breach of its obligation to provide funding, AREH did not have sufficient funds to continue to sustain its operating costs, or those of its affiliates, including payment of service providers such as legal counsel. Simpson forecasted this projection to Oak and advised that August was the end of the line. (Jan. 28, 2024 Simpson Aff. ¶ 17.) Each month from December 2022 to August 2023, he continued to alert Oak to the impending financial crisis. (*Id.* ¶ 18.) Simpson thus sought to secure bankruptcy protections for AREH and the underlying investment vehicles. (*Id.* ¶ 19.) Oak’s principals told Simpson they would not consent to filing for bankruptcy, however, because they believed that any such filing might trigger certain personal guarantees they had signed in connection with several of the AREH portfolio properties. (*Id.*)

In an effort to stave off financial ruin, Simpson took immediate efforts to try to reduce the overhead of the AREH companies. These efforts included attempting to reach an agreement with Chassen to reduce his salary along with other key employees. Chassen refused, however, and Chassen and Simpson’s 10-year relationship began to sour. (Oct. 2, 2023 Simpson Aff. ¶ 38; October 13, 2023 Affidavit of Jared Chassen (NYSCEF No. 189) (“Oct. 13, 2023 Chassen Aff.”) ¶ 8.)

Around the same time, beginning as early as July 2023 if not earlier, Chassen began plotting with Oak to take over AREH and throw out Simpson. On information and belief, secret meetings were held between Chassen and the Wieners at Chassen’s cousin’s business offices, and Chassen instructed an AREH junior partner, Michelle Miller, not to tell Simpson. (*See* Simpson Reply Aff. (NYSCEF No. 134), ¶ 33.)

On July 19, 2023, counsel for Oak sent counsel for JJ Arch a proposal that required Simpson to “immediately step[] away from active day-to-day management of Arch and its subsidiaries and relinquish[] authority to act on behalf of Arch and its subsidiaries” and required an amendment of the JJ Arch Operating Agreement “such that Jared [Chassen] has sole control over JJ [Arch].” (July 19, 2023 email from Andrew Silverstein, Esq. at Haynes and Boone, LLP to Len Breslow, Esq. at Breslow & Walker, LLP (NYSCEF No. 170).)

Chassen forwarded Oak’s proposal to his counsel, Jeffery Dayon, and his cousin, David Berg, a partner at Infinity Collective, an investor in some of the AREH properties. (*Id.*, Altman Aff. Exhibit 7, July 20, 2023 email from Chassen to Berg and Dayon.) Therein, Chassen requested that Dayon “give [him] comments on the chassen/simpson [JJ Arch property] separation, *i want to sign that before the relationship sours.*” (*Id.* (emphasis added).) This statement alone is ample evidence of Chassen and Oak’s collusion. Chassen’s prediction that the relationship between himself and Simpson would deteriorate reflects that he already knew about the planned actions to wrest control of JJ Arch away from Simpson by locking him out of the Arch bank accounts and information technology systems.

By early August 2023, a deal between Chassen and Oak was apparently struck, and a conspiracy was formed to dream up false justifications to remove Simpson from JJ Arch and AREH. For example, on August 7, 2023, Chassen emailed the Wieners stating, “Boys, need to speak in morning, need to work on cause event backup together.” (Aug. 8, 2023 email from Chassen to Wieners (NYSCEF No. 447).) The following day, Chassen asked the Wieners for “some guidance” on how to handle questions raised by Simpson’s personal accountant “so it does not affect me with a damage claim that somehow I messed up those properties or businesses.” (Aug. 8, 2023 email from Chassen to Wieners requesting guidance (NYSCEF No.

448).) Moreover, on August 10, 2023, Chassen asked Oak for “a company line and what I am saying when backup questions arise.” (Aug. 10, 2023 email from Chassen requesting company line from Oak’s counsel (NYSCEF No. 452).)

Most damning, however, is evidence that Oak has agreed to indemnify Chassen for his legal fees in connection with Chassen’s cooperation with Simpson’s ouster. In an email dated August 13, 2023, Chassen requested that Oak pay his legal fees. (Aug. 13, 2023 email from Chassen to Wiener requesting \$250k for legal fees (NYSCEF No. 454).) Oak appears to have agreed to pay those fees, and, a few days later, Chassen’s counsel was openly communicating with the Wieners without Simpson’s knowledge at the time. (Aug. 17, 2023 email from Wiener to Fried Frank (NYSCEF No. 456).) Notably, Chassen has admitted to defrauding Oak and other investors in an affidavit to the Court – something he presumably would *not* have done without assurances from Oak. (*See* Sept. 18, 2023 Chassen Aff. ¶ 19 (NYSCEF No. 96) (“Simpson and team members including myself were forced to pitch grossly under budgeted projects and promised unrealistic returns on investment to induce investors, such as 35 Oak and many others to contribute additional capital without ever disclosing risks.”).) Simpson denies that he was involved in any such wrongful acts.

Chassen and Oak even recruited AREH’s Director of Human Resources, Karolina Bortko, in their disloyal plans – asking her to “please provide all the emails you have implicating Jeff into the drobpox.” (Aug. 9, 2023 email from Chassen to Bortko (NYSCEF No. 450).) Not surprisingly, Bortko requested a “formal assurance of protection” from Oak for any legal fees she might incur for cooperating with them. (Aug. 9, 2023 email from Bortko to Chassen (NYSCEF No. 451).) On information and belief, Oak provided such assurances.

III. Key Events Leading Up to the November 22, 2023 Order

By early August 2023, Simpson and Chassen had exchanged termination letters (a fact which has been briefed at length before this Court and therefore will only be summarized here). In short: Simpson planned to terminate Chassen from JJ Arch for “Cause,” pursuant to the JJ Arch Operating Agreement, due to – among other reasons – Chassen’s refusal to agree to a reduction in his salary, in contravention of his fiduciary duty. (Oct. 2, 2023 Simpson Aff. ¶ 38.) On August 4, 2023, meanwhile, unbeknownst to Simpson, Chassen heard a rumor that Simpson was going to terminate him, and thus asked First Republic Bank – a banking institution with which the Arch Companies maintain approximately 150 bank accounts – to remove Simpson as a signatory for the Arch Companies. (see Aug. 11, 2023 letter from First Republic Bank (NYSCEF No. 6).) Simpson subsequently sent Chassen the notice of termination on August 5, 2023. (Aug. 5, 2023 email from Simpson to Chassen (NYSCEF No. 17).) Chassen responded by sending Simpson a termination notice on August 6, 2023. (Aug. 6, 2023 letter from Chassen to Simpson (NYSCEF No. 399).) Around the same time, Chassen shut off Simpson’s access to the Arch Companies’ computer network, Dropbox, and email account, and deactivated Simpson’s physical office access pass. (Aug. 14, 2023 Simpson Aff. ¶ 4.)

Simpson thus commenced this action on August 14, 2023 and sought emergency relief from this Court to restore his access to the Arch Companies’ accounts. This Court swiftly responded and imposed an Interim Order maintaining the pre-August 5, 2023 status quo, and holding:

JJ Arch shall be managed in accordance with Section 3.1 of the Limited Liability Company Operating Agreement of JJ Arch LLC, dated December 11, 2017, as amended by Amendment No. 1 dated May 22, 2021 (the “JJ Arch Operating Agreement”). **Specifically, the business, affairs, and assets of JJ Arch shall be managed by Simpson, subject to the limitations set forth in Section 3.2 of the JJ Arch Operating Agreement,** which provides among other things that any Company Major Decision, as defined in the JJ Arch Operating Agreement, shall be undertaken only with the prior written consent of Chassen. Simpson and

Chassen shall cooperate with each other in good faith to facilitate the effective exercise of their respective roles and responsibilities under the JJ Arch Operating Agreement and related agreements[.]

(Aug. 21, 2023 Interim Order (NYSCEF No. 36) (emphasis added).) This Interim Order is still in effect. (Nov. 28, 2023 Order (NYSECF No. 419).) Indeed, at the hearing on Simpson’s preliminary injunction motion, the Court emphasized its desire to maintain the status quo and enforce the JJ Arch Operating Agreement as written, making the following statements (among others):

THE COURT: “Your client [Chassen] has a circumscribed set of consent rights and other than that, Mr. Simpson is in charge . . . But just basic principles, your client does not have a contractual right to be anything other than having his consent rights as a member in my opinion” (Tr. 23:7-17.)

THE COURT: “You know what series of orders [I] can [] issue. Courts are not, as Mr. Bailey I think rightly put it, we are not comfortable with this role of trying to micromanage companies, which is why the purpose of my order was to just say look, you have an agreement. Follow it.” (Tr. 35:14-19.)

THE COURT: “But I think the way the contract works, you know, substantive decisions are up to Mr. Simpson. Unless something happens where something that trips a corporate right to remove Mr. Simpson, that’s the way it is.” (Tr. 54:15-19.)

THE COURT: “. . . I think the short answer to your question is under this agreement, subject to the consent rights and to the investor members’ rights, whatever they may be, Mr. Simpson calls the shots.” (Tr. 55:7-10.)

(Sept. 29, 2023 Hearing Transcript (NYSCEF No. 224).)

Thwarted in its attempt to oust Simpson by having Chassen lock him out AREH, on October 10, 2023, Oak brought a complaint against Simpson, JJ Arch, and AREH in a separate proceeding in New York State Court, in which it sought a temporary restraining order and preliminary injunction “restraining Defendants from initiating a bankruptcy action in respect of AREH or any entity subject to the AREH LLC Agreement” and “a declaration that no bankruptcy action may be initiated for any entity subject to the AREH LLC Agreement without [Plaintiff’s] consent.” (NYSCEF Index No. 158119-2023.) Defendants removed that case to the

United States District Court for the Southern District of New York. (S.D.N.Y. Case No. 23-cv-8966.) Three days later, Oak filed an emergency motion asking the district court to remand the case or to enjoin Simpson, JJ Arch, and AREH from taking any bankruptcy action. On October 13, 2023, the district court judge granted the temporary restraining order pending a hearing on the preliminary injunction.

With that motion pending, on October 17, 2023, Oak intervened in the instant action and moved to appoint a temporary receiver for JJ Arch with support from Chassen. On Wednesday, October 25, 2023, JJ Arch, as Managing Member of AREH, issued a capital call to Oak due to a severe liquidity crisis that included AREH not having sufficient funding to meet its payroll obligations. Simpson sought \$300,000 in emergency funding for payroll and employee benefits by Monday, October 30, 2023.(Oct. 25, 2023 email from Simpson to va Biesen and the Wieners regarding October 24, 2023 Capital Call (NYSCEF No. 301).) With no response from Oak, on Friday, October 27, 2023, counsel for Simpson [and JJ Arch] followed up with counsel for Oak, stressing the “severe liquidity issue” and the upcoming Monday payroll deadline. (Oct. 27, 2023 email chain between counsel for Simpson and counsel for Oak (NYSCEF No. 302).) Despite its contractual obligation to provide the funding, Oak tried to capitalize on the cash crisis it had created by conditioning the funding of payroll on, among other things, an “[e]xtension of TRO/commitment not to file any bankruptcy petition without consent.” (*Id.*)

Also on October 27, 2023, the Court issued an Interim Order directing the parties to “comply with their existing obligations” under the AREH Operating Agreement. In addition, the Court prescribed a number of supervisory procedures setting the method and schedule by which JJ Arch was required to provide books, records, analysis and status updates to Arch. (October 27, 2023 Interim Order (NYSCEF No. 292).) The Court also opined, in a footnote, that “the

Major Decision consent rights contained in the AREH LLC Agreement with respect to Bankruptcy Actions are enforceable.” (*Id.* at 3 n.3.)

It was then clear to Simpson that, with no bankruptcy relief on the table, no funds flowing to AREH through the subsidiary entities, and no money imminently being provided by Oak, that it would not be possible to continue to meet payroll for all of AREH’s employees. Later that night, through counsel, Simpson alerted Oak that it would be furloughing certain employees. (Oct. 27, 2023 email chain between counsel for Simpson and counsel for Oak (NYSCEF No. 302).)

Seizing upon this furlough (an emergency of Oak’s own creation), on October 31, 2023, Oak took action to remove JJ Arch as the managing member of AREH under Section 7.1.4 of the AREH Operating Agreement. (October 31, 2023 Removal Notice by Oak to Simpson (NYSCEF No. 303).) On November 1, 2023, Simpson responded that the Removal Notice was invalid due to there being no Cause Event, and stating that “AREH’s real problem is simple: it needs, but has not been provided with, necessary funding.” (November 1, 2023 letter from Simpson to M. Wiener (NYSCEF No. 304).)

On November 3, 2023, Oak moved for a temporary restraining order and preliminary injunction “setting forth unequivocally that JJ Arch has been removed as Managing Member and Oak is now the Managing Member of AREH.” (Oak’s Memorandum of Law in Support of Order to Show Cause Seeking TRO and Preliminary Injunction (NYSCEF No. 297).) In its motion, Oak asked the court to appoint Oak as AREH’s Managing Member (or in the alternative, appoint a receiver). Later the same day, the Court ruled that while the motion was pending, Oak would “serve as acting managing member of AREH, owing all applicable duties to AREH and its Members.” (November 3, 2023 Order (NYSCEF No. 321).)

On November 22, 2023, the Court granted Oak's motion and ordered that during the pendency of the present action, "Oak shall continue to act in their [JJ Arch's] stead as AREH's sole managing member in accordance with Section 7.1 of the Limited Liability Operating Agreement of AREH (the "Operating Agreement"), owing all applicable duties to AREH and its member." (November 22, 2023 Order (NYSCEF No. 418).) The Court also ordered that Simpson and JJ Arch were 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)." (*Id.*)

In addition, on November 28, 2023, the Court ruled, among other things, that during the pendency of this litigation, "Simpson and Chassen are enjoined from unilaterally seeking to terminate or force the resignation of the other member without permission of the Court[.]" (November 28, 2023 Order (NYSCEF No. 419).)

A. Oak Is Appointed Managing Member of AREH Based on Broken Promises

Oak's promises to the Court during the November hearings as to its intentions with AREH were, at best, promptly broken and, at worst, misrepresentations. As reflected below, despite Oak's constant reassurances to the Court that its focus was on getting AREH employees paid and "back to work," the reality is, as described above, that Oak has instead been focused on reducing its own exposure. *See supra* at 2-3.

Oak represented to the Court that its primary motivation for its request to be installed as Managing Member of AREH was to determine to what extent additional funding was necessary to ensure continued operation of AREH and its affiliates. For example, the Court noted that AREH's finances were at an "immediate crisis point" with respect to unpaid payroll and asked Oak's counsel if Oak would provide funding if made Managing Member, to which Oak's

counsel replied, “*Yes, we would.*” (Nov. 3, 2023 Hearing Transcript (NYSCEF 374), 21:3-11.)

But, it is now clear that Oak has not honored that commitment. Instead, Oak has allowed invoices to go unpaid, shuttered AREH’s offices, left AREH with only a handful of employees, and otherwise failed to adequately fund AREH to meet its obligations. Oak’s mismanagement since its appointment as Managing Member includes:

- Failing to pay outstanding legal bills in excess of \$750,000 (*see* Altman Aff. Exhibit 23, Dec. 18, 2023 email from Simpson to Wieners);
- Failing to pay invoices for security services at an AREH property totaling approximately \$141,000 causing a cancellation of services on Nov. 20, 2023 (*see id.* Exhibit 14, Nov. 20, 2023 email from vendor to AREH);
- Failing to pay invoices for security, landscaping, and utility services at another AREH property totaling approximately \$111,000 (*see id.* Exhibit 22, Dec. 4, 2023 email from A. Talan to Simpson falsely stating that Simpson was obstructing the payment);
- Failing to pay invoices for security at another AREH property (*see id.* Exhibit 12, Nov. 11, 2023 email from Simpson to K. Wiener);
- Failing to pay invoice for security at another AREH property (*see id.* Exhibit 2, Jan. 4, 2023 email from vendor to AREH);
- Failing to pay invoices totaling \$17,822.84 for critical portfolio management software causing deactivation of AREH’s accounts (*see id.* Exhibit 10, Nov. 7, 2023 email from vendor to AREH);
- Failing to pay invoice for QuickBooks accounting software totaling \$156.78 (*see id.* Exhibit 15, Nov. 24, 2023 email from vendor to AREH);
- Terminating the lease for AREH’s office at 88 University, despite the fact that AREH did not have a policy sanctioning work-from-home and Oak’s representations to this Court that it would bring AREH employees back to work. This lease termination was to the detriment of AREH and to the direct self-serving benefit of Oak who was the guarantor on AREH’s office lease per Section 7.6.1 (ii) of the AREH Operating Agreement and consistent with Oak’s attempt to advantage itself with respect to the 88 University investment as a whole; (*see id.* Exhibit 20, Dec. 15, 2023 email from K. Wiener to Simpson);
- On information and belief, failing to hold any investor meetings regarding AREH properties;
- On information and belief, leaving AREH with no accounting staff; and
- On information and belief, failing to fill key positions following the resignation of employees.

In sum, Oak has quickly learned what Simpson has known all along: AREH is in financial peril due to Oak’s consistent failures to adequately fund AREH according to its

obligations. As Managing Member, Oak has continued these failures to adequately fund AREH despite its empty promises to the Court.

B. Oak Obtains Complete Control by Locking Up JJ Arch's Consent Rights

With the November Order in place, Simpson's only modicum of control over AREH came in the form of JJ Arch's Major Decisions consent rights. JJ Arch's consent rights are illusory, however, because Oak does not need Simpson's consent as long as it has Chassen's. (See November Order at 2 (providing that "either JJ Arch member may convey consent" for Major Decisions proposed by Oak".)) Securing Chassen's consent has been and will be no trouble for because he and Oak conspired to oust Simpson from AREH and JJ Arch. In doing so, as detailed below, Oak has taken control over Chassen. In exchange, Oak alone now controls AREH.

As detailed above, there is ample evidence on the record that Chassen conspired with Oak to fabricate Cause Events under the JJ Arch and AREH Operating Agreements to force Simpson's resignation/removal in exchange for Oak's agreement to indemnify and compensate Chassen. Indeed, Chassen and Oak sent letters to Simpson *on the same day*, August 6, 2023, notifying him of such fabricated Cause Events, none of which had ever been raised previously. (See Chassen letter to Simpson (NYSCEF No. 399); Oak letter to JJ Arch and Simpson (NYSCEF No. 398, Ex. 9).) Oak's counsel admits that Oak is compensating Chassen "for any services he performs for AREH's benefit." (Jan. 18, 2024 letter from Leslie Thorne at 2 (NYSCEF No. 484).)

The conspiracy is further supported by Oak's favoritism of Chassen. For example, on November 30, 2023, Oak unilaterally terminated Simpson and his family's health insurance. Simpson only learned of the cancellation after his wife sought medical treatment. Oak does not deny it terminated the health insurance without notice, but falsely claims, without any evidence,

that Simpson “obscure[d]” the health insurance costs and that Simpson was a “non-employee, who should never had received these benefits in the first place” (*Id.*) Oak’s flimsy justification is nonsensical given that, on information and belief, Chassen (also a “non-employee” of AREH) remains the beneficiary of virtually identical health insurance coverage for himself and his family through AREH.

Apparently, Oak can exercise its “managerial discretion” to cut-off Simpson’s “gratuitous” insurance benefits, but in the same breath justify Chassen’s continued coverage simply because “there is no requirement that Chassen go uncompensated.” (*Id.*) It is not clear why JJ Arch was not entitled to exercise the same “managerial discretion” for years to pay for Simpson and Chassen’s insurance coverage that Oak now uses to justify continuing compensation of Chassen, including health insurance.

Of course, Oak did not cancel Simpson’s health insurance out of a genuine concern about cutting AREH’s costs or the exercise of “managerial discretion.” Simpson, as the Managing Member of JJ Arch, was entitled to certain “Guaranteed Payment” pursuant to Section 7.3.1 of the AREH Operating Agreement:

7.3.1. Guaranteed Payment. As compensation for its various undertaking and capital commitments hereunder, Managing Member [JJ Arch] shall be entitled to a monthly guaranteed payment from the Company [AREH] equal to the amount set forth in the Annual Budget as “Managing Member Guaranteed Payment” which shall be payable by the Company in advance.

According to Oak’s counsel, Simpson “obscure[d]” his (and Chassen’s) health insurance costs within this “Guaranteed Payment.” (Jan. 18, 2024 letter from Leslie Thorne at 2 (NYSCEF No. 484).) Simpson is currently owed, however, more than \$400,000 in “Guaranteed Payment” from AREH, but Oak has refused to cause AREH to pay those monies to Simpson. This is despite the fact that there is nothing in the AREH Operating Agreement which permits Oak to

withhold or offset the Guaranteed Payment against any purported claims against him. Oak cannot claim that the cancellation of Simpson's insurance coverage was within Oak's "managerial discretion" while at the same time refusing to pay the monthly "Guaranteed Payment" at all. Oak's cancellation of Simpson's insurance coverage was nothing more than an act of vengeance designed to cause further financial and emotional distress to Simpson, his wife and their two children.

By way of further example, Oak cut-off Simpson's (but not Chassen's) access to his Arch email account and replaced it with an automated response that states that Simpson was removed from management of AREH "pursuant to Court order." (*See* Altman Aff., Exhibit 21, December 17, 2023 automatic reply email stating "Jeffrey Simpson is no longer managing Arch Companies.") And with this backdrop, it is curious that, on information and belief, some time after March 2023 Chassen purported to transfer ownership of his equity interest in JJ Arch to an unknown entity. (*Id.*, Exhibit 27, Jan. 22, 2024 email from A. Schwartz.) When counsel for Chassen was asked for further information with respect to any agreements Chassen had entered into, however, Chassen's counsel would not substantively respond. At bottom, the evidence shows that Oak and Chassen are working in concert to keep Simpson powerless and in the dark, and Oak has secured JJ Arch's consent rights by lining Chassen's pockets. Discovery will only unearth further evidence of Oak and Chassen's collusion.

C. Oak's Lack of Sophisticated Experience in Complex Real Estate

The Court has now put Oak – that is, brothers, Michael Wiener and Kevin Wiener – at the helm of a complex United States-based real estate investment company despite their complete lack of expertise in the complex distressed real estate industry. Unlike Simpson – who is a highly sophisticated real estate professional with "a deep, horizontal understanding of the [real estate] industry's many facets from construction to the fine details of a loan agreement and

deal structures” (Last Aff. ¶ 57), who was soon to become CEO of Greystone Development – Michael Wiener began his career in 2010 in his family’s electric business in Canada. (M. Wiener Aff. (NYSCEF No. 241 ¶ 9.) The Wiener family also invested some of its wealth from that business in the cannabis industry and real estate – primarily in Canada – with a focus on purchasing property in neighborhoods before increases in property value. (M. Wiener Aff. ¶ 6.) Though M. Wiener was involved in managing the family’s real estate investments (in addition to working in the electronic business and investing in the cannabis industry⁷), this type of portfolio is vastly different from AREH’s complex distressed portfolio of United States-based properties. Indeed, when Oak was looking to expand its real estate investments to the United States, Oak looked to “get[] some staff with expertise in US real estate.” (M. Wiener Aff. ¶ 20.)

In July 2023, Kevin Wiener joined Oak as in-house counsel. K. Wiener has even less experience managing real estate investments than his brother. He graduated from university in 2015 and has spent most of his professional career practicing as an immigration attorney. (K. Wiener Aff. (NYSCEF No. 227), ¶¶ 2–6, 8.)

To be sure, with limited exception, the Non-Oak Investors signed on because they trusted Simpson’s real estate expertise, not the Wieners. Simpson was known by investors to be directly involved in all aspects of the business – including “business development, sourcing new deals and capital, investment management, debt and equity negotiations, and overseeing and closely monitoring the construction and investment aspects of AREH’s portfolio.”(Last. Aff. ¶ 42.)The Wieners are not remotely capable of running AREH at this level. Indeed, as set forth above, Oak has not been able to sustain AREH’s operations, has begun to shutter many of its subsidiary businesses, and has identified no new investment opportunities. The AREH investors likely

⁷ On November 17, 2023, M. Wiener and 35 Oak Holdings Ltd. filed a complaint in the Ontario Superior Court of Justice against IMC Cannabis Corp and its board of directors and officers claiming that IMC made misrepresentations and seeking damages of approximately \$15 million. <https://cannabisproonline.com/news/im-cannabis-announces-receipt-of-court-action/>

never would have signed on had they known the fate of their investments was to be solely in Oak's hands.

D. Oak's Conflicted Dual Role as Managing Member of AREH and Guarantor Precludes It From Exercising Its Fiduciary Duty

In addition to its lack of experience, Oak is undeniably deeply conflicted as Managing Member of AREH due to its role as guarantor to most of the loans on the investment properties. As background, AREH affiliates typically finance real estate investments by obtaining loans through specially formed LLCs ("Borrower LLCs"). (Jan. XX, 2024 Simpson Aff. ¶ 35.) In consideration for issuing the loans, the lenders require guarantors, who would be responsible for paying back any outstanding amounts due under the loan in the event of default or other enumerated circumstances. (*Id.* ¶ 36.) Any amounts owed to the guarantor by the borrower are subordinated to the satisfaction in full of the amounts owed to the lender. (*Id.*) Oak (either 608941 NJ Inc. or 35 Oak Holdings Ltd.) or related entities and individuals are among the guarantors on twelve (12) loans in connection with AREH controlled properties, but other entities and individuals are also guarantors, including Simpson and Chassen. (*Id.*; see Altman Aff. Ex. 28, Schedule.) While Oak was not a guarantor on loans for two AREH properties, those properties have already been foreclosed upon. (Jan. XX, 2024 Simpson Aff. ¶ 37 (explaining that the 1010 Bushwick and 1351 Dekalb properties were foreclosed upon).)

This clear conflict is not simply hypothetical; the situation is now urgent and dire. In the past two months since this Court issued the November Order, it has become clear that Oak is not fulfilling its fiduciary duties to AREH and to its investors as it tries to escape its position as guarantor on the underlying loans. For example:

- **Myrtle Point:** An AREH affiliate entity took out a construction loan in the amount of \$106.2 million from Madison Realty Capital ("Madison") for a mixed-

use development in Ridgewood, New York (the “Myrtle Point Transaction”). Oak is a guarantor on the loan. Interest payments of approximately \$1 million a month have not been paid on the loan since May 1, 2023. (*See* Altman Aff., Exhibit 3, May 5, 2023 Default Notice.) Further, in July 2023 there was approximately \$9.5 million owed to subcontractors on the project. (*See* Altman Aff. Exhibit 6, July 13, 2023 email from G. Sammarco to Chassen and Simpson.) AREH has been in negotiations with Madison since June 2023 on a forbearance agreement whereby Oak would provide funding to true-up the unpaid interest. At that time, Oak’s proposal was that they would provide the funding in exchange for being released from the guaranty to the extent construction was completed and the property was at 75% occupancy by the end of the forbearance period. (*See* Altman Aff. Exhibit 5, June 28, 2023 email from Jerry Feuerstein.) That agreement was never finalized and AREH was left helpless to satisfy its obligations under the loan without further funding from Oak. Despite taking over as Managing Member of AREH per the Court’s Order, Oak has allowed the project and loan to continue to languish. On December 11, 2023, K. Wiener emailed Simpson seeking preliminary consent regarding a planned forbearance agreement with Madison whereby Oak would be released from its guaranty in exchange for funding only \$3 million in capital. (*See id.* Exhibit 19, Dec. 14, 2023 email from J. Simpson.) In the event of further default on the loan, Madison would simply record a deed in the box. (*Id.*) Meaning, Madison would take over ownership of the property. Such a proposal was a nonstarter given that the remaining amount of undrawn funds on the loan was insufficient to pay the outstanding obligations to AREH’s subcontractors and to complete construction of the project, which is only approximately 80% completed, within the proposed forbearance period. The only party that would benefit from such an arrangement is Oak, because it would allow Oak to dodge tens of millions of dollars in guaranty exposure for the nominal amount of \$3 million. If Oak were acting in accordance with its fiduciary duties to AREH and other investors, not to mention the subcontractors which remain unpaid for their work, filing for bankruptcy with respect to the property would be the obvious solution. Instead, Oak is acting in its own self-interest to avoid its guaranty obligations and hand the keys to Madison. Oak’s focus on its own guaranty exposure is plainly detrimental to other investors on the Myrtle Point Transaction. Indeed, the largest equity holder in the Myrtle Point Transaction, Douglas Propp, believes Oak is conflicted and that Oak’s intended agreement with Madison “would be inconsistent with the fiduciary duties [Oak] owes to [him] as a member/investor.” (Declaration of Douglas Propp, dated January 23, 2024 (“Propp Decl.”) ¶ 9.) Moreover, Oak has ignored Mr. Propp’s requests for current financial information and documentation for the purported agreement. (*Id.* ¶ 8.) Further, Oak has not sought Mr. Propp’s consent for or kept Mr. Propp informed regarding the proposed agreement with Madison, despite his consent being required under the agreements underlying the transaction. (*Id.* ¶ 10.)

- **Columbia:** An AREH affiliate entity invested in four multifamily properties in Columbia, South Carolina. This project involved a \$35 million loan, for which

Oak served as a guarantor (and, upon information and belief, continues to serve as guarantor). On December 12, 2023, K. Wiener emailed Simpson and Chassen requesting that one of them provide consent, on behalf of JJ Arch, for AREH to enter into an agreement with the lender to “get approximately \$600k of funding to pay outstanding payables on the property, cover payroll, and allow sufficient time for the new property manager to get put in place.” (Altman Aff. Exhibit 24, Dec. 12, 2023 email from K. Wiener.) Certain of these funds – two months’ worth of accounts payable – would be directed not to the properties, but to Oak. (Altman Aff. Exhibit 16, Draft December 2023 Letter Agreement at 2.) Simpson replied, voicing a number of objections to this plan based on Simpson’s expertise, including Oak’s plan to hire a third-party property manager. (Altman Aff. Exhibit 24, Dec. 12, 2023 email from J. Simpson (“Hard properties like this need extreme attention to details, micro-management of expenses and motivation for the staff to succeed. None of this is aligned for the 3rd party property manager to do.”).) Simpson presented other solutions to the cash flow issue, but received no response from K. Wiener. (*See id.* Exhibit. 19, Dec. 14, 2023 email from J. Simpson.) On January 2, 2024, K. Wiener emailed again seeking JJ Arch’s consent to cause the borrower entities to enter into the protective advance agreement. (*Id.* Exhibit 24, Jan. 2, 2024 email from K. Wiener.) Again, Simpson objected to the solution as it would be “essentially giving the keys to the lender since there is no remedy for anything that could have gone wrong . . . or potentially what will go wrong in the future.” (*Id.*, Jan. 2, 2024 email from J. Simpson.) In essence, Oak was asking for a protective advance where monies were to be reimbursed to 35 Oak, to the detriment of the property and its equity investors.

IV. Chassen Continues to Violate the JJ Arch Operating Agreement

As set forth in prior briefings, JJ Arch has investments in the following four properties in New York that are not affiliated with AREH: (1) 225 Head of Pond Road, Water Mill; (2) 1640 Montauk Highway, Water Mill; (3) 550 Metropolitan Ave Retail, Brooklyn; and (4) 146 East 89th Street, Manhattan.⁸

A. Chassen’s Default on His Member Loan and Improper Distributions

As of August 1, 2023, Chassen confirmed, through a spreadsheet that he created, that there was an imbalance of \$670,730.93 plus a \$500,000 Letter of Credit in the JJ Arch Capital

⁸ JJ Arch solely owns and controls these properties through subsidiary companies, including (a) 225 HPR LLC, (b) 550 Metropolitan Ave Holdings LLC, (c) 1640 Montauk LLC, (d) 1640 Motors LLC, and (e) the LLCs that relate to 146 E. 89th Street in Manhattan. Oak and the Wiens have no ownership interest in these companies whatsoever. Matters involving these companies and properties solely involve Simpson and Chassen

Accounts in favor of Simpson, which related to business transacted in the non-AREH JJ Arch properties. (See Chassen Schedule of JJ Arch Capital Accounts (NYSCEF No. 460).) The balance later increased to over \$1.2 million when Chassen was unable to repay his portion of a \$1 million credit line. (See Altman Aff. Exhibit 8, Aug. 31, 2023 letter to Chassen from JJ Arch LLC re: Capital Call for Ongoing Operations and Demand Letter.) On August 31, 2023, therefore, Simpson made a Capital Call to Chassen pursuant to Section 4.2(b) of the JJ Arch Operating Agreement. (*Id.*) Chassen failed to meet that Capital Call.

By operation of Section 4.2(c) of the JJ Arch Operating Agreement, the unpaid Capital Call was deemed to be a Member Default Loan. Further, under Section 4.2(d), the Default Loan is secured by a “security interest,” meaning, the “Non-Contributing Member’s Company Interest including, without limitation, the Non-Contributing Member’s right to distributions hereunder.” And “such security interest may be foreclosed upon . . . in the event that during the period in which a Default Loan is outstanding, distributions are paid to the Non-Contributing Member prior to payment in full of all amounts (including interest) owed under the Default Loan.”

Chassen has continued to make distributions to himself while the Default Loan has been outstanding, in violation of Section 4.2(d). This has included distributions that would have otherwise been impermissible, notwithstanding the outstanding Default Loan—using JJ Arch funds to pay his personal cell phone bills and car insurance. (See, e.g., NYSCEF Nos. 462, 463, excerpts of JJ Arch bank records for the periods August 1, 2023 to September, 24, 2023, and September 29, 2023 to December 23, 2023.)

B. Chassen’s Other Violations of the JJ Arch Operating Agreement

In addition, as this Court has recognized, the oversight and management of the properties are subject to the JJ Arch Operating Agreement, which provides that Simpson controls the “conduct, manage[ment] and control [of] the affairs and business of the Company.”

(Amendment No. 1 to JJ Arch Operating Agreement § 3.1.) Chassen, however, refuses to acknowledge Simpson's decision-making authority under Section 3.1 of the JJ Arch Operating Agreement and continues to interfere with management decisions.

For instance, with respect to 225 Head of Pond Road, Chassen had been renting out the property via Airbnb, with the help of a third-party property manager. Since August 2023, Chassen has flouted Simpson's decision to remove the property from Airbnb and terminate the agreement with the property manager. (*See* Altman Aff. Exhibit 9, J. Chassen Oct. 11, 2023 email (stating that the property manager would "continue to operate the property."))

In addition, Simpson seeks to sell 225 Head of Pond Road to address urgent cash flow needs and to alleviate a \$1.2 million member loan that Chassen owes to Simpson. (Jan. XX, 2024 Simpson Aff. ¶ 30.) The sale of the property constitutes a Major Decision under Section 3.2 of Amended JJ Arch Operating Agreement, which requires Chassen's consent. That Chassen has not granted consent is telling. Chassen's unreasonable withholding of consent is starving Simpson of liquidity while Chassen collects his salary from AREH.

Further, Chassen is harming investors in the properties. For example, regarding 146 East 89th Street, Chassen's failure to provide consent to an investor's loan modification request resulted in the lender commencing a foreclosure action against the property. Adam and Jonathan Peldman are the largest equity holders in the 89th Street Property, investing more than \$1.8 million. (Jan. XX, 2024 Simpson Aff. ¶ 32.) Chassen, in comparison, invested approximately \$175,000. (*Id.*) The property was also funded by a loan from ConnectOneBank. (*Id.*) In Fall 2023, JJ Arch did not have enough funds to stay current on the ConnectOneBank loan, and

ConnectOneBank sold the loan to Hirshmark Capital.⁹ (*Id.* ¶ 33.) Adam Peldman then sought to save his investment by proposing to refinance the loan and then sell the property. (*Id.*) Both Chassen and Simpson were required to consent to the loan amendment as it was a Major Decision under the JJ Arch Agreement. On December 20, 2023, Peldman sent the deal terms to Chassen and Simpson, and the other investors, stating, “I need everyone to respond that they are OK with this[.]” (Altman Aff., Exhibit 25, email re: 146 E 89 - Owners Thread.) Simpson consented immediately. (*Id.*) Chassen did not respond. Peldman followed up on December 27, December 29, and again on January 2, stating, “Jared I have reached out to you numerous times via email phone and text . . . Continuing to delay this process is not in the best interest of the project nor its investors.” (*Id.*) Though Chassen eventually replied on January 3, he still has not consented to the refinance. (*See id.*; Simpson Aff. ¶ 34.) On January 11, 2024, Hirshmark commenced a commercial foreclosure action against the property. (*Id.*)

ARGUMENT

V. The Court Should Grant Simpson Permission to Terminate Chassen from JJ Arch Pursuant to the Clear Terms of the JJ Arch Operating Agreement

Simpson is permitted to terminate Chassen from JJ Arch under Section 1.1 of the JJ Arch Operating Agreement for his recent conduct with respect to the non-AREH properties. Under both the AREH Operating Agreement and the JJ Arch Operating Agreement, members may be removed, on certain enumerated grounds, through a process that is initiated by the occurrence of a “Cause Event.” The AREH Operating Agreement lists eight acts, the commission of which by the managing member serves as a “Cause Event.” (AREH Operating Agreement § 1.1.) The JJ

⁹ Efforts were also made to replace the loan, with Simpson serving as guarantor, but the December 3, 2023 Real Deal article (“Judge boots Jeffrey Simpson from his own firm”) caused the lender to back out. (Altman Aff., Exhibit 18, Dec. 13, 2023 email from Layla Capital Management, LP.)

Arch Operating Agreement extends this definition of “Cause Event” to any member of JJ Arch. (JJ Arch Amended Operating Agreement § 1.1.) The acts constituting “Cause Event[s]” include, but are not limited to, “willful misconduct in relation to the business or affairs of [AREH] or a Subsidiary,” “breach of fiduciary duty in relation to the business or affairs of [AREH] or a Subsidiary,” “misappropriation of [JJ Arch] funds or property,” and “any breach of a material provision of this Agreement which is not cured within 30 days of notice of such breach.” (AREH Operating Agreement § 1.1.) Under the JJ Arch Operating Agreement, a member in JJ Arch is required to resign if a Cause Event has occurred with respect to such member, and the other member has delivered written notice thereof to that member. (JJ Arch Amended Operating Agreement § 1.1.) The Court issued an order on November 28, 2023, however, holding that during the pendency of this litigation, “Simpson and Chassen are enjoined from unilaterally seeking to terminate or force the resignation of the other member without permission of the Court.” Simpson therefore seeks the Court permission to terminate Chassen.¹⁰

Where, as here, the “parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms.” *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). “That rule imparts ‘stability to commercial transactions.’” *Id.* Courts routinely apply this tenant to the interpretation and enforcement of contractually provisions providing for the termination of a director or employee. *See id.*

As set forth above, Chassen’s collusion with Oak in an effort to take over AREH, failure to meet Capital Calls duly delivered to him, and administration of distributions to himself while failing to pay his Member Default Loan clearly constitute Cause Events of “willful misconduct,” “breach of fiduciary duty,” and “misappropriation of funds or property” under the JJ Arch

¹⁰ Plaintiffs note that while the JJ Arch Operating Agreement does require “notice” of a “Cause Event” under its “Resignation” provision, it does not require a cure period. (*See* JJ Arch Amended Operating Agreement § 1.1.)

Agreement. In addition, Chassen has also breached his fiduciary duty owed to the investors in 146 East 89th Street – including the majority investors Adam and Jonathan Peldman – and should be terminated on that basis as well. In order to save the \$1.8 million that he and his brother invested into the property, A. Peldman sought to refinance the loan and sell the property. But Chassen ignored A. Peldman’s urgent emails, phone calls and text messages relating to the proposed loan amendment, knowing full well that Chassen’s response, and consent, was required to finalize the amendment and to prevent the property from going into foreclosure. Chassen still has not provided his consent and the lender has commenced a foreclosure action, jeopardizing the Peldmans’ entire investment.

Further, Chassen has materially breached the JJ Arch Operating Agreement and should therefore be terminated. Since August 2023, Chassen has refused to acknowledge Simpson’s authority under Section 3.1 to “conduct, manage and control the affairs and business of the Company,” with “full, exclusive and complete discretion” which includes the ways in which the properties are managed. With respect to 225 Head of Pond Road, Chassen continues to breach Section 3.1 by failing to adhere to Simpson’s decision to remove the property from Airbnb and directing the third-party property manager to continue working despite Simpson’s decision to terminate that agreement. Simpson has put Chassen on notice that any action in contravention of this decision is violative of the JJ Arch Operating Agreement. (Altman Aff. Exhibit 13, Nov. 14, 2023 email from J. Simpson (“Jared, you have continued to go against the JJ Arch LLC and 255 HPR LLC agreement with short term leasing this house . . . without my explicit consent which has been denied for several months now.”).) This serves as a Cause Event for termination.

Of course, the personal dynamics between the parties since August 2023 have significantly affected the ways in which the parties interact with each other. But that does not

mean Chassen can rewrite the JJ Arch Operating Agreement such that he can disregard Simpsons' role as managing principal. JJ Arch simply cannot function for the duration of this litigation with one party not abiding by the Operating Agreement. The reality is that the Chassen has materially breached the agreement and should no longer be a member.

VI. The Court Should Modify Its November 22, 2023 Order

On November 22, 2023, the Court ordered that during the pendency of this action, "Oak shall continue to act in their stead as AREH's sole managing member in accordance with Section 7.1 of the Limited Liability Operating Agreement of AREH (the "Operating Agreement"), **owing all applicable duties to AREH and its member.**" (November Order (NYSCEF No. 418) (emphasis added).) The Court also ordered that Simpson and JJ Arch were 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).**" (*Id.* (emphasis added).)

The Court should modify its November Order pursuant to N.Y.C.P.L.R. § 6314, to appoint JJ Arch as Managing Member of AREH with full authority to restructure the AREH-managed real estate investments subject to any contractual right by Oak or other party to consent to "Major Decisions."

Legal Standard

A defendant that is enjoined by a preliminary injunction may move at any time, with notice to the plaintiff, to vacate or modify the preliminary injunction. N.Y.C.P.L.R. § 6314. A preliminary injunction may be vacated when, *inter alia*, (1) the injunctive relief no longer serves any of the objectives the restraint is designed to achieve or there is no danger of irreparable

harm; or (2) a balancing of equities favors the defendant. *See Copake Lake Dev. Corp. v. Zasuly*, 27 A.D.2d 810, 810 (1st Dep’t 1967); *CanWest Global Commc’ns Corp. v. Mirkaei Tikshoret Ltd.*, 804 N.Y.S.2d 549, 568 (Sup. Ct. N.Y. Cty. 2005). The vacatur of a preliminary injunction is left to the sound discretion of the court. *See Wellbilt Equip. Corp. v. Red Eye Grill, L.P.*, 308 A.D.2d 411, 411 (1st Dep’t 2003).

A. The Court Should Appoint JJ Arch as Managing Member of AREH

The Court should modify the November Order to appoint JJ Arch as Managing Member of AREH with full authority to restructure the AREH-managed real estate investments. Compelling circumstances exist that make it inequitable for Oak to remain Managing Member of AREH. Specifically, (1) Oak has not acted in accordance with its fiduciary duties to AREH or Non-Oak Investors because Oak is a guarantor on the loans underlying all of the at-risk investments; (2) Oak has not kept its promises to the Court regarding its management of AREH; and (3) Oak’s appointment as Managing Member of AREH is a change in control that has constituted or may constitute an Event of Default under various loan agreements.

Courts have granted motions to modify or vacate preliminary injunctions where, as here, the continuance of the preliminary injunction threatens the complete destruction of the business of enjoined party. *See Copake*, 27 A.D.2d at 810 (modifying preliminary injunction to allow defendant to be appointed as receiver of plaintiff corporation because “the injunction granted may have a crippling and destructive effect on the continued operation of the business”). At a minimum, modification of a preliminary injunction is within the Court’s sound discretion where changed circumstances affect the balance of equities that previously supported the issuance of the injunction. *See Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 3 A.D.3d 335, 335-36 (1st Dep’t 2004) (vacating preliminary injunction tolling defendant’s time to renew lease when it

became clear that defendant's failure to satisfy conditions precedent to lease were the result of business judgment making equitable relief "inappropriate"), *aff'd*, 4 N.Y.3d 839 (2005).

Here, the Court's objective in appointing Oak as the Managing Member of AREH was "to right the ship." (Transcript of Nov. 20, 2023 Hearing (NYSCEF No. 417) at 63:15-16.) It has become clear, however, that the Court's appointment of Oak as Managing Member will not lead to that result. Instead, AREH and the approximately 125 Non-Oak Investors have been, and continue to be, actively harmed by Oak's conduct. Oak has already shuttered AREH in most respects and now threatens to completely destroy the remaining equity in the AREH-managed investments. The destruction of AREH, in turn, threatens Simpson's livelihood, the personal investments of himself and his family and the real estate investment business Simpson has spent the last five years building from the ground up. Modification of the November Order is now the only path available "to right the ship."

1. Oak as Guarantor

Since being appointed Managing Member, Oak, has acted in its own self-interests at the expense of AREH. As a guarantor on most of the loans used to finance AREH's investments, Oak has an interest in dealing with lenders that favor Oak alone. As detailed above (*supra* 24-26), Oak is a guarantor on twelve (12) loans underpinning AREH's real estate investments and developments. (See Altman Aff. Exhibit 28, Schedule.) At bottom, Oak's status as guarantor incentivizes Oak to negotiate with lenders to release Oak from its guaranty obligations even if that means the certain loss of the investments made by the approximately 125 other investors in AREH's projects. In total, Oak is a guarantor on loans with principal amounts totaling over \$383 million. (See *id.*) Oak's potential exposure as a guarantor on these loans far exceeds Oak's investment of approximately \$50 million in AREH to date.

Indeed, Oak has already taken steps to cut its losses at the amount of its investment and escape its far riskier guaranty obligations. For example, with respect to the Myrtle Point Transaction, interest payments of approximately \$1 million per month have not been paid on the loan since June. (Jan. XX, 2024 Simpson Aff. ¶ 39.) Madison, in turn, has refused to give AREH undrawn funds under the loan forcing it to halt construction with approximately \$9.5 million already owed to subcontractors on the project. (*Id.*) Rather than simply funding the interest payments to bring the loan in balance and finishing construction, Oak has focused its efforts on negotiating a forbearance agreement with Madison to *release it from its guaranty obligations* for the paltry sum of \$3 million. (See Altman Aff. Exhibit 19, Dec. 14, 2023 email from J. Simpson.) Simpson refused to consent to Oak's proposed forbearance agreement because the remaining undrawn funds under the loan were not enough to pay the subcontractors and finish construction within the time allotted – meaning Madison would take control of the property with virtual certainty.¹¹ (Jan. XX, 2024 Simpson Aff. ¶ 40.)

Oak's focus on escaping its guaranty obligations on the Myrtle Point Transaction has only caused AREH's financial position to deteriorate further. Unpaid interest payments and penalties have continued to accrue and further delays in construction could lead to liability from prospective commercial tenants of the property.¹² (*Id.* ¶ 41.) Oak has been yet unable to negotiate a forbearance agreement with Madison on terms favorable to AREH and the other investors. Each passing day there is an increasing risk that Madison may exercise its rights under the loan agreement to foreclose on the property. (*Id.* ¶ 42.)

¹¹ Oak's forbearance agreement proposal also demonstrates Oak's lack of understanding of the status of construction at Myrtle Point and other AREH properties – which was principally managed by Simpson.

¹² For example, the property is meant to include stores including big box anchors Target and Burlington Coat Factory, for which construction was required to meet certain specifications required by the leases for those retail operations. AREH investment affiliates have contractual obligations with these companies to complete construction by certain dates. Meeting those dates becomes less likely with each passing month of default on the loan.

The only remaining and sensible solution for properties like Myrtle Point is to have the AREH affiliate holding the loan file for bankruptcy, which would halt any foreclosures and may pressure lenders to come to the table with more favorable terms. Oak, of course, will never seek bankruptcy protection because it leaves Oak on the hook as guarantor of the loans.

Oak's conflicting interests have become apparent with respect to other properties as well. With respect to the Columbia property, Oak again has focused its efforts on reaching agreement with the lender, over Simpson's objections, to Oak's own benefit, the practical result of such agreement being handing the keys to the lender. (*See supra* 26.)

In sum, there are compelling reasons for the Court to modify its November Order to appoint JJ Arch as Managing Member of AREH for transactions where Oak is a guarantor of the underlying loan, giving JJ Arch the power to take necessary actions in the interest of AREH and its investors, even if such actions are not ideal to Oak as a guarantor on the loans. No other course of action will "right the ship." Moreover, swift modification of the November Order is necessary now to prevent irreparable harm – namely AREH's survival as an ongoing enterprise. Soon AREH will be crippled by the accrual of millions in unpaid interest payments and penalties or the foreclosure of its properties by their respective lenders.

2. *Oak's Broken Promises*

Next, Oak made promises to the Court that it did not (and knew it could not) keep. Oak led the Court to believe Simpson was running AREH to the ground and that Oak, if appointed Managing Member, would do everything in its power to keep AREH afloat. Not so. Instead, Oak has (1) shuttered AREH's office; (2) failed to hold investor meetings; (3) made only limited capital infusions insufficient to cover AREH's expenses; and (4) stood by as AREH dwindled down to only a skeleton staff of four employees. (*See supra* 17.) Oak's singular focus has been on reducing its personal guaranty exposure, not on ensuring AREH's survival.

Oak's broken promises are a further reason that the Court should modify the November Order. Oak has proven that it cannot or will not do what is necessary to save AREH – the very objective animating the Court's appointment of Oak as Managing Member. Under these circumstances, it is appropriate to modify the November Order and reinstate JJ Arch as Managing Member of AREH. *See Nobu Next Door, LLC*, 3 A.D.3d at 335-36.

3. *Defaults on Loans*

It has also become clear that lenders are taking the position that the appointment of Oak as Managing Member of AREH likely violates change-in-control restrictions in various loan agreements, placing such loans immediately into default. Accordingly, it would be inequitable for Oak to remain as Managing Member of AREH, and this is reason alone to modify the November Order.

On January 11, 2024, AREH received a Notice of Default (Cambridge Default Notice) from a lender on a \$6.9 million loan given to AREH-affiliated investment vehicles. (Altman Aff., Exhibit 26, Jan. 11, 2024 Letter from Shipman.) The Cambridge Default Notice explains that the Loan Agreement “prohibits transfers (including involuntary transfers) of direct or indirect legal or beneficial interests in any Restricted Party.” (*Id.*) It identifies AREH as a non-member manager of a Sponsor under the Loan Agreement, making it a Restricted Party. (*Id.*) Accordingly, the removal of JJ Arch as Managing Member of AREH constituted a prohibited transfer and an Event of Default under the Loan Agreement causing the loan to become full recourse to both the borrower entities and the guarantors to the Loan, which are Oak and another investor, Yeheskel Frankel.¹³ (*Id.*) While the Cambridge Default Notice identifies Oak's

¹³ Oak never informed Simpson of the Notice of Default, and it is unclear if Oak has notified Mr. Frankel that the \$6.9 million loan is in full recourse to him personally.

October 31, 2023 notice of removal of JJ Arch as Managing Member of AREH (*id.*), it is clear that the Court's November Order has an identical effect of placing the loan in default.

Likewise, on November 10, 2023, a different lender on a \$15.8 million loan sent a Default Notice and Demand for Payment (the "Melrose Default Notice") giving notice that the appointment of Oak as "acting manager" of AREH was an Event of Default under the applicable Loan Agreement. (Altman Aff., Exhibit 11, Nov. 10, 2023 Letter from White and Williams LLP.) Accordingly, the lender gave notice to the borrower entities and the guarantor, Oak, that "all amounts outstanding under the Loan Agreement and the Loan Document are due and owing, and the Lender hereby demands immediate repayment in full." (*Id.*) The Melrose Default Notice explicitly cites this litigation and Oak's request to be appointed as Managing Member of AREH as triggering the default. (*Id.*)

The loans financing other AREH investments contain similar or identical change-in-control provisions that could be triggered by the November Order. (*See, e.g., id.* Exhibit 28, Schedule.) As AREH's financial prospects worsen, more lenders will become desperate to secure repayment and will turn to the provision as an obvious means to place the loans in default. It goes without saying that AREH is unable to immediately and simultaneously pay all amounts outstanding on its loans and survive as an ongoing enterprise.

Accordingly, good cause exists to modify the November Order and restore Simpson's rights under the unambiguous terms of the JJ Operating Agreement. Modification of the injunction is appropriate here because the objective of the Court's Order was to have Oak "right the ship" – Oak has proven it cannot or will not do that. *See Nobu Next Door, LLC*, 3 A.D.3d at 335-36.

CONCLUSION

For the foregoing reasons, Simpson and JJ Arch respectfully request that the Court grants its motion to (1) permit Simpson to terminate Chassen from JJ Arch pursuant to the terms of the JJ Arch Operating Agreement; and (2) modify the Court's November 22, 2023 Order (NYSCEF No. 418) under N.Y.C.P.L.R. § 6314, to appoint JJ Arch as Managing Member of AREH with full authority to restructure the AREH-managed real estate investments subject to any contractual right by Oak or any other party to consent to "Major Decisions."

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