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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 27

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| MAURICE MANN, | DECISION |
| Plaintiff, | Index No. 600707/09 |
| -against- | PC No. 21701 |
| BROADWALL MANAGEMENT OF APTHORP LLC, JEFFREY FEIL, ANDREW RATNER, JOE NAKASH, ROBERT SPIEGELMAN, JON ESTERICH, AI APTHORP LLC, RICHARD MARIN and APTHORP MANAGEMENT, LLC, | |
| Defendants, | |
| -and- | |
| AREFIN TRS LLC, AREFIN US INVESTMENT LLC, ANGLO IRISH BANK CORPORATION PLC and ANGLO IRISH NEW YORK CORPORATION, | |
| Additional Necessary Party Defendants, | |
| -and- | |
| APTHORP ASSOCIATES LLC, APTHORP MEZZANINE LLC and APTHORP MANAGEMENT, LLC, | |
| Nominal Defendants. | |



**INTRODUCTION**

On March 17, 2009, I issued an oral decision and order on the record, adjudicating motion sequence nos. 001 and 002. The transcript of that oral decision and order was "so ordered" on March 19, 2009. In that decision and order I stated:

> I plan to issue a much more detailed and much longer written decision in this case.
>
> But, based upon the fact that we're under some time constraint, I decided to tell you how I am going to decide the motion and tell you to some extent why.
>
> But, when this written decision is issued I plan to recall this decision and substitute that one for this.

My oral decision is accordingly recalled, and the following is substituted in its stead. My oral order, set forth in that transcript, remains in place.

This action relates to a project (the "Project") involving the condominium conversion of a building known as the Apthorp, located at 79th Street and Broadway in Manhattan. Plaintiff Maurice Mann seeks a preliminary injunction (a) against defendants implementing, consummating or executing a restructured loan agreement without his consent; and (b) staying arbitration commenced by defendant AI Apthorp LLC as a counterclaim interposed in an arbitration commenced by Mann before the Bet Din of America. Defendants AI Apthorp LLC and Richard Marin cross-move for (a) summary judgment; (b) "a mandatory injunction against Plaintiff, if deemed necessary by the Court;" (c) an expedited, limited-issue and/or preliminary injunction hearing or, (d) "in the alternative, an order compelling the Plaintiff to participate in an arbitration he commenced before the Beth Din of America, which has set an expedited hearing date of March 11, 2009."

The proposed restructured loan agreement that is the central focus of this dispute is titled Omnibus Amendment and Reaffirmation of Loan Documents (the "Omnibus Agreement"), which would modify the present agreements governing the Project's Mezzanine Loan. Also at issue is the budget (the "Broadwall budget"), proposed by Defendant Broadwall Management of

Apthorp LLC ("Broadwall") in connection with the Omnibus Agreement. Mann contends that pursuant to a Settlement Agreement dated January 13, 2009 (the "Settlement Agreement"), the Omnibus Agreement may not be executed without his consent, and that he has the right under the Settlement Agreement to withhold his consent.

**BACKGROUND FACTS**[1]

The Project involves a complex set of entities and agreements, which include the following.

The Apthorp is owned by Apthorp Associates LLC. Apthorp Associates LLC is managed by Apthorp Management LLC, which is governed by the Operating Agreement of Apthorp Management LLC (the "Apthorp Management Operating Agreement"). A closely related entity is Apthorp Holdings LLC, which is governed by the Operating Agreement of Apthorp Holdings LLC (the "Holdings Operating Agreement"), which was amended by Amendment No. 1 (the "Holdings Amendment") to the Holdings Operating Agreement.[2]

AI Apthorp LLC is among the investors in the Project. Plaintiff Mann and defendants Jeffrey Feil, Joe Nakash and Jon Esterich, are investors in the project in their own name or by and through entities or nominees. Defendants Andrew Ratner and Robert Spiegelman are, respectively, the agents of defendants Feil and Nakash.

The Apthorp Management Operating Agreement designates Mann as the Manager.

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[1]The following background facts, adapted from the parties' papers, appear to be undisputed. To the extent there is any dispute about these background facts, the following recitation is not intended as an adjudication of any such dispute.

[2]Apthorp Holdings LLC is not named in the caption. Instead, Apthorp Management LLC is named in the caption twice.

Initially Mann served as the Manager. However, pursuant to the Settlement Agreement, he was replaced by Broadwall, which is an affiliate of the Feil Group.

Anglo Irish Bank Corporation PLC ("Anglo Irish Bank") is the Senior Lender and the Administrative Agent referred to in the Senior Loan Agreement. Anglo Irish Bank is not a party to the Settlement Agreement. Nor is it a proposed party to the proposed Omnibus Agreement, although its approval of that Omnibus Agreement would be required under the Senior Loan Agreement.

In addition to the financing provided pursuant to the Senior Loan Agreement, financing for the Project was obtained in the form of a "Mezzanine Loan" (the "Mezzanine Loan") pursuant to a Mezzanine Loan Agreement (the "Mezzanine Loan Agreement"). Apthorp Mezzanine LLC, is the Borrower under the Mezzanine Loan Agreement. AREFIN TRS LLC is the Agent for the mezzanine lenders. Defendant Richard Marin is a Vice President of AREFIN TRS LLC and is also Al Apthorp LLC's agent and its Designee on the Board of Apthorp Management LLC. The name AREFIN will be used herein to refer to both AREFIN TRS LLC and the Mezzanine Lenders.

The Senior Loan has been administered separately from the Mezzanine Loan. There is an Intercreditor Agreement, which, inter alia, acknowledges Anglo Irish Bank's senior position.

Mann issued certain guarantees. There are provisions for Mann's indemnification, though Mann asserts that the indemnitors are shell entities without sufficient assets.

**ARBITRATION**

The branches of the motion and cross motion relating to arbitration are deemed withdrawn.

**SAFE HARBOR CLAUSE**

The Settlement Agreement contains the following clause:

> The final terms and conditions of any modification of the loan documents shall be subject to the approval of Mann and Africa Israel, which shall not be unreasonably withheld,

immediately followed by the following (the "safe harbor" clause):

> It is expressly agreed by the parties hereto that Mann shall not be deemed to be unreasonably withholding his consent to modification of the loan documents which provides for any of the following:
>
> (i) any increase in Mann's liability under the existing guarantees to any of the lenders, beyond that which is expressly set forth in the existing guarantees as of the date hereof,
>
> (ii) a waiver of any permissible defenses to the enforcement of the guarantees again Mann,
>
> (iii) a release or waiver of any of the fees or other compensation payable to Mann or to any of Mann's Affiliates, including, but limited to this Agreement, the Agreements or the existing loan documents, including, but not limited to the balance of the Acquisition/Opportunity fee payable to Mann and Mann's rights with respect to the distribution of an apartment pursuant to the Agreements.

**GUARANTY**

As quoted above, one of the safe harbor provisions is

> "any increase in Mann's liability under the existing guarantees to any of the lenders, beyond that which is expressly set forth in the existing guarantees as of the date hereof."

Mann argues that the proposed Omnibus Amendment comes within the scope of this clause essentially on two grounds. First, he argues that the Broadwall budget and the proposed schedule make a default more likely. Second, he argues that the Broadwall budget is larger than

the budget that existed at the time the Settlement Agreement was executed, and that, therefore, his guaranty exposure is increased.

**Budget**

Contrary to Mann's contention, even if the modifications in project costs and scheduling increase the likelihood of a default, that circumstance is not within the scope of the safe harbor "guaranty" clause. Moreover, even if it were, since it appears that, in the absence of the execution of the Omnibus Agreement, default is imminent, he has not demonstrated that the "likelihood" of default will be greater if the Omnibus Agreement is executed.

**Greater Guaranty Exposure**

Nor has Mann demonstrated that the projected costs in the Broadwall budget are greater than those in the current budget. Mann's reliance on a December 2, 2008 letter from AREFIN is misplaced. While that letter indicates that the modified budget that Mann had proposed was "generally acceptable," the letter sets forth further steps that were required as a condition to any acceptance. Mann does not demonstrate that those further steps were completed.

To the extent that Mann's contentions relate to the approximately $17 Million for Phase 2 renovations, I note that AI Apthorp LLC and Marin represent that the "$17 million Phase 2 renovation cost is optional, and the lenders will agree to delete it from the Broadwall budget entirely." AREFIN similarly represents that "AREFIN has advised the Borrower that it would be amenable to excluding from the Proposed New Interim Budget the $17,000,000 of renovations planned for Phase II, with the understanding that these renovations may become part of the updated budget referenced above. A determination as to whether some or any of such renovations are to be included in Phase II would initially be made by the Borrower and

subsequently would be included in any proposal to the lenders for approval of the updated budget." I accept these representations as made with the intent of affecting my disposition of this motion and cross motion.

**OPPORTUNITY FEE**

As quoted above, the Settlement Agreement contains the following safe harbor:

> a release or waiver of any of the fees or other compensation payable to Mann or to any of Mann's Affiliates, including, but limited to this Agreement, the Agreements or the existing loan documents, including, but not limited to the balance of the Acquisition/Opportunity fee payable to Mann [emphasis added].

It is undisputed that the $3.75M Opportunity Fee was earned by Mann; that $250,000 has been paid; and that the balance of $3.5M, called "Deferred Fees," is owed to Mann and is subject to interest.

Mann asserts without contradiction that initially the payment of the Opportunity Fee to him was to be funded by a capital call to the investors, but that this was modified. Under the Holdings Amendment, the Deferred Fees are to be paid to Mann by Apthorp Holdings LLC from fund advancements referred to as Benchmark Advances, which are defined in section 2.1.3 of the Mezzanine Loan Agreement.

The Holdings Amendment provides as follows:

> (a) (i) The Company shall pay to Mann, an opportunity fee in the amount of $3.75 million (the "*Opportunity Fee*"), as follows:
>
> (A) Mann acknowledges receipt of $250,000 of the Opportunity Fee at the Closing;
>
> (B) The balance of the Opportunity Fee, in the amount of $3.5 Million Dollars, i.e., the Deferred Fees, shall be paid to Mann as provided in Section 6.2(a)(iii) below.

> (ii) The Company shall pay to Mann, interest at the rate of 9% per annum (without compounding), on the amount of the Deferred Fees which is outstanding, from time-to-time, during the period commencing on the Effective Date and ending on the date the Opportunity Fee is paid in full.
>
> Promptly after the receipt by the Company of Deferred Payments from the Mezzanine Lender, the Company shall apply said advance to pay any then outstanding Deferred Fees and any accrued and unpaid interest thereon. Notwithstanding anything to the contrary herein, the outstanding Deferred Fees and accrued and unpaid interest thereon shall be paid to Mann prior to the distribution of Available Cash to the Members pursuant to Section 4.1(b) of the Original Agreement. All payments under this Section 6.2(a)(iii) shall be applied first to pay accrued and unpaid interest on the Deferred Fees and the balance (if any) shall be applied to pay any Deferred Fee then outstanding [emphasis added].

The Benchmark Advances are defined and governed by the Mezzanine Loan Agreement as follows:

> "2.1.3 Benchmark Advances. Subsequent advances of the Loan ("***Benchmark Advances***") in the aggregate amount of up to $3,500,000 (the "***Benchmark Amount***") shall be made to Borrower by the Tranche B Lenders as set forth in clause (b) below; provided that, at the time of such advance [emphasis in original].

and proceeds to set forth a set of conditions, some general, and some specific to the particular Benchmark Advance.[3]

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[3]The clause continues as follows:

> no Event of Default shall have occurred;
>
> the representations and warranties contained in this Agreement, the Loan Documents and the Senior Loan Documents shall be true and correct;
>
> such advance shall be secured by the Loan Documents and

Borrower shall execute all instruments reasonably requested by Administrative Agent to evidence the same and Borrower shall have paid to Administrative Agent all reasonable costs and expenses actually incurred by Administrative agent in connection with such advance;

no change shall have occurred in the financial condition of Borrower, Guarantor or the Property, which would have, in Administrative Agent's judgment, a material adverse effect on the Loans, the Property or Borrower's or Guarantor's ability to perform its obligations under the Loan Documents; and no condemnation or adverse possession, as determined by the Administrative Agent, zoning or usage change proceeding shall have occurred or shall have been threatened against the Property; the Property shall not have suffered any damage by fire or other casualty which has not been repaired or is not being restored in accordance with this Agreement; no law, regulation, ordinance, moratorium, injunctive proceeding, restriction, litigation, action, citation or similar proceeding or matter shall have been enacted, adopted, or threatened by any governmental authority, which would have, in Administrative Agent's judgment, a material adverse effect on the Property, or Borrower's or Guarantor's ability to perform its obligations under the Loan Documents.

(b)The Benchmark Advances shall be made as follows: Thirty-three percent (33%) of the Benchmark Amount shall be advanced by the Tranche B Lenders upon Administrative Agent's receipt of evidence reasonably satisfactory to Administrative Agent that Owner has submitted the Condominium Documents for the approval of the Attorney General of the State of New York;

Thirty-three percent (33%) of the Benchmark Amount shall be advanced by the Tranche B Lenders upon Administrative Agent's receipt of evidence reasonably satisfactory to Administrative Agent that Owner has applied for the approval of the LPC with respect to the development of the Air Rights as set forth in Section 11.27 hereof; provided, however, in the event that Owner has elected not to apply for the approval of the LPC with respect to the development of the Air Rights, then thirty-four percent (34%) of the Benchmark Amount shall be advanced by the Tranche B Lenders upon Administrative Agent's receipt of evidence reasonably satisfactory to Administrative Agent that the

In addition, Section 5.45 of the Mezzanine Loan Agreement provides:

> 5.45 Fees. Except as set forth in the Management Agreement, neither Borrower nor Owner shall make any payments or pay any fees to any Affiliates of Borrower, Owner or Guarantor, or any of their respective principals, if applicable, without the prior written consent of Administrative Agent, other than the Benchmark Advances, which may be paid to Guarantor or as Guarantor shall direct.

Thus, under the current documents, Mann is entitled to Deferred Fees of $3.5M, which sum is owed to him and is subject to interest; Section 2.1.3 of the Mezzanine Loan Agreement defines and governs the making of the Benchmark Advances; Section 6.2(a)(iii) of the Holdings Amendment governs when Apthorp Holdings, LLC is to pay the Deferred Fees to Mann, as triggered by the receipt of the Benchmark Advances; and Section 5.45 of the Mezzanine Loan Agreement provides that, absent the consent of the Administrative Agent, the Deferred Fees may not be paid to Mann except from the Benchmark Advances. Under the current agreements, AREFIN's obligation to make the Benchmark Advances is subject to the specified conditions; so long as those conditions are satisfied, AREFIN must make the Benchmark Advance; and once it

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> Condominium Documents have been accepted for filing by the Attorney General of the State of New York.
>
> Notwithstanding the foregoing, in the event that Borrower provides Administrative Agent with invoices or other evidence reasonably satisfactory to Administrative Agent that of expenses actually incurred, then Administrative Agent, upon the satisfaction of the conditions set forth in clause (a) above, shall advance a portion of the Benchmark Amount in an amount equal to such expenses, and the portion of the Benchmark Amount advanced upon the achievement of the milestones set forth in (a) through (c) above shall be reduced accordingly.

does so, Mann is entitled to payment of the corresponding portion of the Deferred Fees.

The Omnibus Agreement makes significant modifications to this structure. It provides:

> Benchmark Advances. Notwithstanding any provision of the Loan Agreement to the contrary, the Lenders shall have no obligation to make the Benchmark Advances as provided for in Section 2.1.3 of the Loan Agreement whether or not the conditions precedent thereto are satisfied and any reference in the Loan Agreement or other Loan Documents to the Benchmark Advances shall be deemed deleted.[4]

Mann asserts:

> The other parties have thus negatively affected my entitlement to this fee because they have eliminated completely, and for all time, the vehicle to pay me what everyone has previously conceded I had earned [emphasis added].

That contention will be discussed below. First, however, I address defendants' contentions regarding section 4.1 of the Holdings Operating Agreement.

**"Cash Disbursement"**

Defendants contend that the payments to Mann of the Deferred Fees is subject to § 4.1 of the Holdings Operating Agreement. This contention is utterly lacking in merit

In his opposing affidavit, Marin states:

> The Holdings Agreement provides, though, that no distributions can be made, whether of an Opportunity Fee or Available Cash:. . . if making of such distributions would, in the reasonable judgment of the Manager, impair the business of the Company ..." [emphasis added].

This mischaracterizes the clause. On its plain face, the clause governs "distributions of

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[4]The parties provide differing interpretations of what appears to be the trade-off for the elimination of the Benchmark Advances. For the purposes of the present motion and cross motion, I need not determine that issue.

Available Cash," and makes no reference whatsoever to the Opportunity Fee. Rather, it provides:

> ARTICLE 4. DISTRIBUTIONS: ALLOCATIONS OF INCOME AND LOSS
>
> 4.1 Distributions - In General
>
> (a) The Manager shall make distributions of Available Cash to the Members quarterly or at such other times as the Manager shall determine; provided, however, that no distributions will be made by the Company if the making of such distributions would, in the reasonable judgment of the Manager, impair the business of the Company (which for this purpose includes, without limitation, furthering the purposes of the Company as set forth in Section 2.5, the satisfaction of the liabilities of the Company, AAL, AML, and AEL (including without limitation the satisfaction of the terms and conditions of the Senior Loan and Mezzanine Loan), the satisfaction of the Mann Reimbursement Obligation under Section 13.3 and the satisfaction of the Company's indemnification obligations under Section 5.9 and under the Management Agreement), or violate the Act, any restriction imposed by this Agreement, the Senior Loan Documents, the Mezzanine Loan Documents or any other loan agreement, debenture or promissory note or other material contract, agreement or instrument by which the Company is bound.
>
> (b) Except as otherwise provided in Section 4.1(c), distributions of Available Cash shall be made as follows [emphasis added and in original]:

and goes on to provide for cash distributions in proportion to the members' various tier percentages.

The Holdings Operating Agreement does not define the term "distribution." Therefore, "distribution" is defined by Limited Liability Company Law § 102(i), as follows:

> (i) "Distribution" means the transfer of property by a limited liability company to one or more of its members in his or her capacity as a member [emphasis added].

The clause must be read in the context of Limited Liability Company Law § 508(a),

which provides:

> A limited liability company shall not make a distribution to a member to the extent that, at the time of the distribution, after giving effect to the distribution, all liabilities of the limited liability company, other than liabilities to members on account of their membership interests and liabilities for which recourse of creditors is limited to specified property of the limited liability company, exceed the fair market value of the assets of the limited liability company. . . .

Thus, payment of the Opportunity Fee, which is unrelated to Mann's percentage ownership, is not a "distribution" within the scope of the clause. The fee is owed to Mann not in his capacity as a member, but in his capacity as a creditor, *see In re 37-02 Plaza LLC*, 387 BR 413 (BR ED NY 2008) (Debtor LLC "made those payments pursuant to its contractual obligation as a Maker on the Notes, not as a distribution to Tomasino 'in his ... capacity as a member' of the Debtor" [citing Limited Liability Company Law § 102(i)]).

Indeed, defendants' construction would lead to an absurd result. As quoted above, the Holdings Amendment provides:

> Promptly after the receipt by the Company of Deferred Payments from the Mezzanine Lender, the Company shall apply said advance to pay any then outstanding Deferred Fees and any accrued and unpaid interest thereon. Notwithstanding anything to the contrary herein, the outstanding Deferred Fees and accrued and unpaid interest thereon shall be paid to Mann prior to the distribution of Available Cash to the Members pursuant to Section 4.1(b) of the Original Agreement. All payments under this Section 6.2(a)(iii) shall be applied first to pay accrued and unpaid interest on the Deferred Fees and the balance (if any) shall be applied to pay any Deferred Fee then outstanding [emphasis added].

If the payment of the Deferred Fees to Mann constituted a "distribution of Available Cash" pursuant to section 4.1(b), this clause would mean that a distribution of Available Cash

pursuant to section 4.1(b) is to be made before a distribution of Available Cash pursuant to section 4.1(b) is made. That would be a nonsensical provision, further demonstrating that Mann's right to the Deferred Fees is not subject to this section. That defendants make this meritless argument lends credence to Mann's contention that the Omnibus Agreement is motivated by an intent to deprive him of the Opportunity Fee.[5]

**Analysis**

Regardless of any issue as to defendants' motivation, however, I conclude that the provisions in the Omnibus Agreement regarding the Benchmark Advances are not within the scope of the safe harbor clause.

As noted above, Mann argues that

> [t]he other parties have thus negatively affected my entitlement to this fee because they have eliminated completely, and for all time, the vehicle to pay me what everyone has previously conceded I had earned [emphasis added].

However, the Omnibus Agreement does not affect whether the Deferred Fees are owed to Mann. It affects only when and how the Deferred Fees will be paid to him. Therefore, the proposed elimination of the Benchmark Advances does not constitute a "release or waiver" "of any of the fees ... payable to Mann ... including, but limited to this Agreement, the Agreements or the existing loan documents, including, but not limited to the balance of the Acquisition/Opportunity fee payable to Mann" so as to come within the scope of the safe harbor clause.

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[5]Moreover, it is "improper to include in an affidavit argument on the facts and law," Carmody-Waite 2d § 4:38.

If the Benchmark Advance provisions of the current loan documents are eliminated, Mann will be entitled to some form of equitable relief to provide an appropriate provision for payment to him of the Deferred Fees.[6] For the purpose of the present motion and cross motion, it is unnecessary to determine the precise nature of the appropriate equitable relief. It is sufficient to conclude that defendants have shown a likelihood of success as to whether the elimination of the Benchmark Advances constitutes "a release or waiver of ... the balance of the Acquisition/Opportunity fee payable to Mann," and that it is, accordingly, not within the scope of the safe harbor clause.

In view of the foregoing, it is unnecessary to determine, at least at this juncture, whether the prerequisites for any of the Benchmark Advances have been met.

**APARTMENT**

As quoted above, the Settlement Agreement provides:

> Mann shall not be deemed to be unreasonably withholding his consent to modification of the loan documents which provides for any of the following:
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> ***
>
> (iii) a release or waiver of any of the fees or other compensation payable to Mann ... including, but not limited to ... Mann's rights with respect to the distribution of an apartment pursuant to the

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[6]For example, the elimination of "Benchmark Advances" leaves a gap in the last part of section 5.45 of the Mezzanine Loan Agreement, which would now read "neither Borrower nor Owner shall make any payments or pay any fees to [Mann] without the prior written consent of Administrative Agent, other than the _____, which may be paid to Guarantor or as Guarantor shall direct." That gap may be filled in by a court exercising equitable powers. Especially since the original intent appears to have been to pay Mann the Opportunity Fee with funds raised by a capital call, a capital call may well be one potential option.

The issues, addressed in the motion papers, as to whether the prerequisites for the Benchmark Advances were met and/or have been waived, will likely be a factor to be considered in determining when and how the Deferred Fees should be payable to Mann.

Agreements [emphasis added].

Section 5.39 of the Mezzanine Loan Agreement provides:

> Sale of the Units. Borrower shall not, and shall not cause Owner to (i) enter into any contract of sale for any Unit which is not an Approved Contract or (ii) materially modify, amend or terminate any contract of sale for any Unit without the consent of Administrative Agent; provided, however, that Borrower may cause Owner to sell (a) up to ten (10) Residential Units to Guarantor, Guarantor's Affiliates and the immediate family members of Guarantor for a purchase price that is five percent (5%) less than the then current price set forth in the Condominium Documents for such Residential Unit and (b) one (1) Residential Unit to Guarantor, Guarantor's Affiliate or an immediate family member of Guarantor at a purchase price equal to the cost to Borrower for such Unit (as determined based the price per square foot taking into account the total amount of the Loan, the Senior Loan and $110,000,000 of equity contributed by Borrower and/or Owner), provided that (x) the contract of sale for such Residential Units would otherwise be an Approved Contract hereunder but for the reduction in purchase price and (y) no brokerage fees shall be payable by Borrower or Owner in connection the sale [sic] of such Residential Units. Borrower shall not, and shall not cause Owner to, enter into any brokerage agreement or marketing agreement with respect to the Units without Administrative Agent's consent, which shall not be unreasonably withheld, conditioned or delayed, provided that such brokerage agreement or marketing agreement is upon market terms and conditions [emphasis added and in original].

Section 4.1(e) of the Holdings Operating Agreement provides:

> Special Distribution to Mann: Mann may elect at any time to cause the Company to make a distribution to Mann of one (1) residential condominium apartment unit at the building (other than a penthouse unit constructed by AAL) that does not exceed 3,000 square feet in size; provided, however, Mann must simultaneously contribute to the Company cash in an amount equal to the sum of the initial tax cost basis of the Property reasonably allocable to such apartment plus any renovation costs specifically attributable to such apartment as determined by the regular accountant for the Company. Prior to the distribution provided under this Section

4.1(e), Mann may elect at any time to cause the Company to lease to Mann one (1) residential apartment unit at the building that does not exceed 3,000 square feet in size; provided, however, Mann must pay to the Company rent for the term of such lease equal to the portion of the operating costs to the Company during the term of the lease reasonably allocable to such unit [emphasis added].[7]

Section 16 of the proposed Omnibus Agreement provides:

> Unit Sales. Section 5.39 of the Loan Agreement is hereby deleted in its entirety and replaced with the following:
>
> > "5.39 Sale of the Units. Borrower shall not, and shall not cause Owner to (i) enter into any contract of sale for any Unit which is not an Approved Contract or (ii) materially modify, amend or terminate any contract of sale for any Unit without the consent of Administrative Agent; provided, however, that Borrower may cause Owner to sell one Residential Unit to Guarantor, Guarantor's Affiliate or an immediate family member of Guarantor at a purchase price equal to the average square foot price for the first 25 Residential Units sold between now and September 16, 2009, less 6% of such price, provided that (x) the contract of sale for such Residential Unit would otherwise be an Approved Contract hereunder but for the reduction of purchase price and (y) no brokerage fees shall be payable by Borrower or Owner in connection with the sale of such Residential Unit. Borrower shall not amend or terminate the marketing agreement with Prudential Douglas Elliman or materially modify same without Administrative Agent's consent nor shall Borrower enter into any other brokerage agreement or marketing agreement with respect to the Residential Units without Administrative Agent's consent [emphasis added].

In his reply affidavit, Mann contends that the Omnibus Agreement would deprive him of

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[7]For purposes of this discussion, I assume, without deciding, that the price to be paid by Mann in the Mezzanine Loan Agreement is equivalent in amount to the cash contribution required of him pursuant to the Holdings Operating Agreement, i.e., at "cost."

his

> right to acquire an apartment in the Apthorp at the cost of acquisition of the building as I am entitled to under the organizational and original loan documents.

Preliminarily, I note that it is far from clear that the authorization in the Mezzanine Loan Agreement is consistent with Mann's rights under the Holdings Operating Agreement. The Mezzanine Loan Agreement authorizes a "sale" to Mann, while the Holdings Operating Agreement authorizes a "distribution" to Mann contingent on his making a cash contribution. The latter potentially implicates section 4.1 of the Holdings Operating Agreement and Limited Liability Company Law § 508(a). For present purposes, however, it is unnecessary to reach that issue, and I assume, without deciding, that, as between Mann, AREFIN, and Apthorp Holdings LLC, the present Mezzanine Loan Agreement authorizes the transaction contemplated as a "distribution" to Mann of an apartment at "cost."

At least given these assumptions, if the only contracts involved were the Mezzanine Loan Agreement, the Holdings Operating Agreement, and the proposed Omnibus Agreement, I might well conclude that the proposed Omnibus Agreement comes within the third safe harbor provision in that it constitutes a "release or waiver of any of the fees or other compensation payable to Mann ... including, but not limited to ... Mann's rights with respect to the distribution of an apartment pursuant to the Agreements."

However, Mann's rights to the apartment are also subject to the Senior Loan Agreement. The Senior Loan Agreement provides, in pertinent part:

> Section 6.27 Condominium Covenants. Regarding the condominium aspect of the contemplated development of the Premises and Improvements:

***

(g) not rent or lease any Unit without Administrative Agent's prior written consent (which consent shall not be unreasonably withheld, conditioned or delayed) other than as expressly set forth in the development plan for the Premises previously approved by Administrative Agent;

(h) not transfer or agree to transfer, the Premises or any part thereof other than in connection with the sale of Units pursuant to Approved Contracts in accordance with the terms of this Agreement, including Section 9.02;

(i) not enter into any contract of sale of any Unit for a sales price less than the minimum sales price set forth in Section 9.02 hereof;

(j) not enter into any contract of sale of any Unit to Borrower or any affiliate of Borrower, without Administrative Agent's prior written approval; provided, however, that (x) Borrower may sell up to ten (10) units to Guarantor, Guarantor's affiliates and the immediate family members of Principal at a 5% discount (inclusive of any discounted brokerage fee) off the then current offering price listed in the offering plan without Administrative Agent's consent, and (y) Borrower may sell the Commercial Units and/or the Garage Unit to an affiliate of Borrower, or to the indirect principals of Borrower, for a price which is not less than the greater of (i) the fair market price for said Units as determined on the date of such transfer by an updated Appraisal conducted by Administrative Agent or on Administrative Agent's behalf by an independent appraiser selected by it, which Appraisal shall be conclusive absent manifest error, as determined by Administrative Agent in its sole but commercially reasonable discretion, or (ii) $72,000,000 [emphasis added and in original].

As noted above, Anglo Irish Bank is both the Senior Lender and the Administrative Agent referred to in the Senior Loan Agreement. AREFIN is the Administrative Agent under the Mezzanine Loan Agreement, not under the Senior Loan Agreement.

Also as noted above, Anglo Irish Bank is not a party to the Settlement Agreement. Accordingly, Anglo Irish Bank is not bound by the terms of the Settlement Agreement, which, in

any event, does not purport to affect Anglo Irish Bank's rights under the Senior Loan Agreement or otherwise.

Thus, notwithstanding his right to an apartment at cost as between himself and the parties bound by the Holdings Operating Agreement and the Settlement Agreement, providing Mann with an apartment at cost, whether as a "sale" or as a "distribution," would violate the Senior Loan Agreement. If structured as a "sale," it would be subject to subsection (j) and require the consent of Anglo Irish Bank. If structured as a "distribution,"[8] it would be prohibited by subsection (h); since subsection (h) does not even provide for consent by Anglo Irish Bank, a "distribution" would require a waiver by Anglo Irish Bank. The sole transaction providing Mann with an apartment that would be permissible under the Senior Loan Agreement, other than a sale pursuant to the "Approved Contracts" provisions, would be a sale at a five percent discount. The proposed Omnibus Agreement permits a sale at a six percent discount.

Section 5.13 of the Apthorp Management Operating Agreement provides:

> 5.13 Prohibited Acts Notwithstanding any other provision of this Agreement to the contrary, unless consented to by the Manager or Directors in writing, no Member, Manager or Director shall take any action, or cause the Company, AAL, AML, AHL or AEL or an Affiliate of such Member to take any action which would result in the Company, AAL, AML, AHL or AEL to be in default under, or become subject to recourse liability under:
>
> (a) the Senior Loan Documents;
>
> (b) the Mezzanine Loan Documents; or
>
> (c) or any other loan agreement, debenture or promissory note or other material contract, agreement or instrument by which the Company is bound.

[8]I note that the safe harbor clause refers to Mann's rights to a "distribution" of an apartment.

Thus, assuming, without deciding, that the "sale" permitted by the Mezzanine Loan Agreement, and the "distribution" contemplated by the Holdings Operating Agreement, which potentially implicates section 4.1 of the Holdings Operating Agreement and Limited Liability Company Law § 508(a), are compatible, those rights cannot be exercised without the consent or waiver of the Senior Lender, since any such transaction would be prohibited by Section 6.27 of the Senior Loan Agreement. Such a transaction is therefore prohibited by Section 5.13 of the Apthorp Management Operating Agreement, which prohibits "any action which would result in the Company, AAL, AML, AHL or AEL to be in default under, or become subject to recourse liability under," inter alia, the Senior Loan Documents. Contrary to Mann's contention, the Senior Lender's consent to the Mezzanine Loan Agreement does not constitute a modification of Section 6.27 of the Senior Loan Agreement.

Thus, in the current context, Mann's right to an apartment at "cost" is unenforceable. If the Project is not completed because the loan goes into default, there will be no apartment to sell or distribute. If the Project is completed, there is still no enforceable right to an apartment at cost, since such a sale or distribution is prohibited by the Senior Loan Agreement. Therefore, at least in the absence of a waiver by the Senior Lender, which has not been provided, Mann's right to an apartment at cost cannot be enforced. I do not construe the safe harbor clause as encompassing a right that is otherwise unenforceable.

**RELEASE**

As quoted above, the safe harbor clause includes:

> (ii) a waiver of any permissible defenses to the enforcement of the guarantees again Mann.

The Omnibus Agreement is accompanied by a proposed release by, inter alia, Mann, of "claims" against the "lender parties" as therein defined. Contrary to Mann's contention, however, the release of "claims" does not constitute a release of "any permissible defenses." While facts that might be pleaded in support of a "claim" might also be pleaded in support of a "defense," I do not construe the release as precluding Mann from pleading or proving any such facts in support of any defenses. Since the release does not encompass any defenses, it is not within the scope of the safe harbor clause.

**BUDGET APPROVAL**

Mann contends that the Broadwall budget has not been approved by Apthorp Management LLC's Board of Directors and that he has not been provided with an opportunity to vote on it. This contention is unpersuasive.

**Role of the Manager**

Section 5.3(a) of the Apthorp Management Operating Agreement provides, in pertinent part:

> Except as specifically provided herein to the contrary, the Manager at the direction and/or authorization of the Board of Directors shall have the full, exclusive and absolute right, power and authority to manage and control the Company and its properties, assets, affairs and businesses, within the scope of and in furtherance of the Company's purposes as set forth in Section 2.5 (including, without limitation, the direction of the operations of AAL). Except as specifically provided herein to the contrary, the Manager shall have all of the rights, powers and authority conferred upon it by law or under the provisions of this Agreement [emphasis added].

The Apthorp Management Operating Agreement provides further:

> Section 5.7 Consent of the Members The Members hereby expressly acknowledge and agree that, by the execution of this

> Agreement, they consent to all of the rights, powers and authority of the Manager and the Board of Directors under this Agreement, to the free and unrestricted exercise thereof, subject to their responsibilities as Manager and Directors, as the case may be, and to any limitations to their rights, powers and authority hereunder, and to the doing of any act that the Manager or the Directors, as the case may be, have the right, power or authority to do under this Agreement.[9]

**The Board**

Section 5.1 of the Apthorp Management Operating Agreement provides:

> 5.1 Board of Directors
> (a) *General.* The business and affairs of the Company shall be managed by or under the direction of a Board of six (6) Directors (*"Board of Directors"*) designated as follows:
>
> (i) The Mann Group shall from time-to-time designate three (3) persons to be Directors (the *"Mann Group Directors"*). The initial Mann Group Directors are Mann, Braha and Nakash.
>
> (ii) The AI Group shall from time-to-time designate three (3) persons to be Directors (the "*AI Group Directors"*). The initial AI Group Directors are Rotem Rosen, Erez Meltzer and Ron Maor.
>
> (iii) A Group shall designate a new Director to fill a vacancy or replace a Director by a written notice to the members of the other Group signed by a majority of the members of the

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[9]It provides further, at § 5.6(b):

> (b) No Member, either for itself or derivatively for the Company, shall have the right to prevent, by legal proceedings or otherwise, the signing of any instrument or the taking of any action which a Manager proposes to sign or take for or in the name of the Company.

For purposes of the present motion and cross motion, it is unnecessary to determine whether this clause applies here to the extent that Mann's claims are based on contractual rights personal to him.

designating Group [emphasis added].

(b) *Group Designees.*

(i) The Mann Group shall from time-to-time designate one of the Mann Group Directors to be the *"Mann Group Designee."*

(ii) The AI Group shall from time-to-time designate one of the AI Group Directors to be the *"AI Group Designee."*

(iii) A Group may change its Designee by a written notice to the members of the other Group signed by a majority of the members of the designating Group.

(c) *Acts of Groups*

**(i)** The Designee of the Mann Group shall act in accordance with the vote of a majority of the Mann Group Directors.

(ii) The Designee of the AI Group shall act in accordance with the vote of a majority of the AI Group Directors.

(iii) Notwithstanding anything to the contrary in Section 5.1(c)(i) or (ii), each Group may adopt from time to time other procedures for the giving [sic] instructions to its Designee as to actions to be taken on behalf of the Group as shall be agreed upon by the members of the Group, without the consent of the other Group.

(iv) Each Group shall be entitled to rely upon the acts of the Designee of the other Group as duly authorized act of such other Group and shall be deemed final and binding as among the Groups. No Group shall be obligated to (A) inquire as to the authority of the Designee of the other Group to act on behalf of and in the name of such other Group or as to the signature of such Designee constituting conclusive evidence of such authority; or (B) recognize or otherwise acknowledge, with respect to another Group, the act of any person (including without limitation a member of such other Group) other than the Designee of such other Group.

(d) *Acts of the Board of Directors*. The affirmative vote of both the Mann Group Designee and the AI Group Designee shall constitute an act of the Board of Directors [emphasis added].

Section (e) contains provisions for a stalemate. Except as to disputes over the price for the sale of all or a portion of the property and other terms and conditions for lease of any non-residential portion of the property, disputes are to be resolved by a Bet Din rabbi.

**Mann Group Directors**

The Settlement Agreement provides:

> 3. From the date that this Agreement becomes effective, each of Apthorp Mann LLC and Apthorp Braha LLC shall have the right from time-to-time to designate one (1) of the three (3) Directors of Apthorp Management LLC to be designated by the Mann Group (as defined in the Apthorp Management LLC Operating Agreement) under the Apthorp Management LLC Operating Agreement. The third Director of the Mann Group shall be jointly designated from time-to-time by Apthorp Mann LLC and Apthorp Braha LLC.[10] Each of the Directors so designated to be the Directors comprising the Mann Group shall meet on a monthly basis, together with representatives of Feil, to discuss the Project and to determine matters to be addressed, and voted on, at Board of Directors meetings with the directors appointed by Africa-Israel. Such director decisions among the Mann Group Directors shall be made by majority vote, with each Director having one (1) vote. Each Director of the Mann Group (or its designee) shall be permitted to attend and vote at all Board of Directors meetings with Africa-Israel. A designee of Mann shall also be invited to attend and participate in (but not vote at) all Project meetings and check signings. Likewise, either Mann, or a designee of Mann, shall be invited to attend and to participate in all meetings and/or conference calls with Anglo-Irish and/or Apollo regarding the Project. This paragraph is not intended, nor shall it be deemed, to affect in any way any of the rights of Africa Israel [emphasis added].

In their counterclaim in the Arbitration, AI Apthorp LLC and Marin assert that Mann and Braha are the Mann Group directors, and that the third Mann Group directorship "remains vacant

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[10]This provision reflects that as of the execution of the Settlement Agreement, Nakash was no longer a Director.

to be filled by either Andrew Ratner or Jeffrey Feil."

Mann contends that Nakash was replaced as director by Morris Ades. He supplies a letter agreement dated January 16, 2009 between Mann and Braha, which states, in pertinent part:

> Under the Settlement Agreement dated January 13, 2009, we are each a director of the Mann Group of the Board of Directors of Apthorp Management L.L.C. and that acting jointly we have the right to jointly appoint the third director of the Mann Group. In this regard, we have jointly selected Morris Ades to serve as the third director.[11]

This letter agreement contains a signature line for Nakash under the word "Acknowledged," but the copy supplied does not contain Nakash's signature.

Mann has failed to establish that Morris Ades was a Mann Group director at the relevant time. Inter alia, he has failed to establish that there was a "written notice to the members of the other Group signed by a majority of the members of the designating Group" as is required by section 5.1(a)(3) of the Apthorp Management Operating Agreement to substitute Morris Ades as the replacement for Joe Nakash as a Mann Group director.[12]

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[11]That letter agreement provides further:

> You have agreed that in the future I [viz, Mann] shall have the sole right to select all of the directors of the Mann Group. Finally, you have agreed that while you are serving as a director you will vote as I shall direct unless such vote would constitute an intentional act of fraud, theft or embezzlement.

The issue whether this latter provision, which purports to restrict Braha's ability to exercise his own independent business judgment as a director, is enforceable, is not before me on this motion and cross motion. It appears that it may be the subject of a separate action commenced by Mann.

[12]Mann provides a unsworn "declaration" of Ades stating that he is on the Board, having been appointed in January 2009 to replace Nakash who was "resigning." That declaration states

**The Manager**

The provisions of the Apthorp Management Operating Agreement making Mann the Manager were deleted as part of the Settlement Agreement. The Settlement Agreement provides that

> The Feil Organization or affiliates of Feil ("Feil"), shall take control of the Project, including both the property management and the construction management, through its affiliate Broadwall Management Corporation....

**Board Meeting**

The Apthorp Management Operating Agreement contains no specific provisions regarding meetings of the Board of Directors. Section 403 of the Limited Liability Law provides only for annual meetings.

As quoted above, the Settlement Agreement "provides:

> 3. From the date that this Agreement becomes effective, each of Apthorp Mann LLC and Apthorp Braha LLC shall have the right from time-to-time to designate one (1) of the three (3) Directors of Apthorp Management LLC to be designated by the Mann Group (as defined in the Apthorp Management LLC Operating Agreement) under the Apthorp Management LLC Operating

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> I agreed to accept such designation and have served as director since January 16, 2009 when the agreement between Mann and Braha to put me on the board was finalized. I was fully familiar with and helped mediate and negotiate this agreement between my friends.

The declaration, contained in Mann's moving papers, states that it is unsworn because Ades did not have sufficient time to appear before a notary. However, no affidavit has been supplied in its place. Moreover, defendants supply inadmissible hearsay indicating that Ades has stated orally that he is not presently a director. In any event, Ades' conclusory statement that he "has served" as a director does not demonstrate that the required "written notice to the members of the other Group signed by a majority of the members of the designating Group" was ever given. Under the circumstances, I decline to accept Ades' unsworn declaration.

> Agreement. The third Director of the Mann Group shall be jointly designated from time-to-time by Apthorp Mann LLC and Apthorp Braha LLC. Each of the Directors so designated to be the Directors comprising the Mann Group shall meet on a monthly basis, together with representatives of Feil, to discuss the Project and to determine matters to be addressed, and voted on, at Board of Directors meetings with the directors appointed by Africa-Israel. Such director decisions among the Mann Group Directors shall be made by majority vote, with each Director having one (1) vote. Each Director of the Mann Group (or its designee) shall be permitted to attend and vote at all Board of Directors meetings with Africa-Israel. A designee of Mann shall also be invited to attend and participate in (but not vote at) all Project meetings and check signings. Likewise, either Mann, or a designee of Mann, shall be invited to attend and to participate in all meetings and/or conference calls with Anglo-Irish and/or Apollo regarding the Project. This paragraph is not intended, nor shall it be deemed, to affect in any way any of the rights of Africa Israel [emphasis added].

Thus, the Settlement Agreement requires that before the Mann Group may "determine matters to be addressed, and voted on, at Board of Directors meetings with the directors appointed by Africa-Israel," there be a meeting of the Mann Group's directors. Mann does not assert that any such meeting of the Mann Group directors occurred, or that any such majority vote ("Such director decisions among the Mann Group Directors shall be made by majority vote, with each Director having one (1) vote") occurred.

Nakash supplies an affidavit in his capacity as an investor, stating

> I am in favor of the proposed Omnibus Amendment to Loan Agreement between Apthorp Mezzanine LLC and Arefin TRS LLC as the Agent for certain lenders, as well as the project budget included in such amendment.

Braha, who is one of the Mann Group directors, supplies an affidavit stating:

> I support the proposed Omnibus Amendment to the Loan Agreement, as well as the Broadwall Budget (attached as Exhibits

H and G respectively to the affidavit of Richard A. Marin sworn to on March 9, 2009) submitted to and approved by the Lenders.

Thus:

a. the presentation of the Broadwall budget was within the scope of the authority of the Manager;

b. the Operating Agreement does not require a formal meeting to preapprove the Broadwall budget;

c. the prerequisites for the Mann Group regarding a Board Meeting were not complied with; and

d. Mann has failed to show that any director other than himself is opposed to the budget.

I conclude that Mann has failed to show that the Broadwall budget was not duly approved.

Nor has Mann demonstrated a likelihood of success as to whether a director's approval of the Broadwall budget would be inconsistent with reasonable business judgment.

**IMPLIED COVENANT**

Even if any of the provisions of the proposed Omnibus Agreement were within the scope of the safe harbor clause, that would not change the result. Mann's right to exercise his rights under section 4.1 of the Settlement Agreement are, like all contract rights, subject to the implied covenant of good faith and fair dealing. "The exercise of an apparently unfettered discretionary contract right breaches the implied obligation of good faith and fair dealing if it frustrates the basic purpose of the agreement and deprives plaintiffs of their rights to its benefits," *Hirsch v Food Resources, Inc.*, 24 AD3d 293 (1st Dept 2005).[13]

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[13] *See also Maddaloni Jewelers, Inc. v Rolex Watch U.S.A., Inc.*, 41 AD3d 269 (1st Dept 2007); *Outback/Empire I, Ltd. Partnership v Kamitis, Inc.*, 35 AD3d 563 (2d Dept 2006); *Tradewinds*

The two principles are not incompatible. The essential difference between a contractual right to withhold consent unreasonably, and the implied covenant of good faith and fair dealing, is that whether consent is reasonably withheld focuses on the self-interest of the actor: is his choice based on his own reasonable self-interest, *see e.g. Gleckel v 49 West 12 Tenants Corp.*, 52 AD3d 469 (2d Dept 2008); *8902 Corp. v Helmsley-Spear, Inc.*, 23 AD3d 316 (1st Dept 2005). Therefore, the right to withhold consent unreasonably means only that the withholding need not be based on reasonable self-interest. In contrast, the latter looks at the good faith of the actor and the effect on the other contracting party: is the discretionary conduct being exercised "in bad faith so as to frustrate the other party's right to the benefit under the agreement," *Richbell Information Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288 (1st Dept 2003).

Therefore, a consent might be reasonably withheld, because the motivation is the economic self-interest of the nonconsenting party (or because it is contractually deemed reasonable); while at the same time the withholding of the consent would breach the implied covenant, because the exercise of that right is in bad faith and deprives the other side of the anticipated and intended benefit of the contract.

Were I to reach the issue, I would most likely conclude that even if Mann had the right to withhold his consent based on the safe harbor clause, his withholding of consent in the present circumstances would violate the implied covenant. This conclusion is further supported by section 5.13 of the Apthorp Management Operating Agreement. As quoted above, it provides:

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*Financial Corp. v Refco Securities, Inc.*, 5 AD3d 229 (1st Dept 2004); *1-10 Industry Associates, LLC v Trim Corp. of America*, 297 AD2d 630 (2d Dept 2002) ("although the Letter Agreement did not contain a provision requiring Trim to act reasonably in approving or rejecting proposed relocation sites, Trim had an implied obligation to exercise good faith in reaching its determination.")

> 5.13 Prohibited Acts Notwithstanding any other provision of this Agreement to the contrary, unless consented to by the Manager or Directors in writing, no Member, Manager or Director shall take any action, or cause the Company, AAL, AML, AHL or AEL or an Affiliate of such Member to take any action which would result in the Company, AAL, AML, AHL or AEL to be in default under, or become subject to recourse liability under:
>
> (a) the Senior Loan Documents;
>
> (b) the Mezzanine Loan Documents; or
>
> (c) or any other loan agreement, debenture or promissory note or other material contract, agreement or instrument by which the Company is bound.

This underscores that the parties' intent and expectation was that a prime directive of their contractual relationship was to avoid any conduct that would result in a default. Here, there are indications that Mann's conduct is intended to exert pressure to obtain unwarranted concessions in Mann's sole favor in order to avert an otherwise imminent default.

**INJUNCTIVE RELIEF**

I conclude that Mann has failed to meet his burden to demonstrate his entitlement to a preliminary injunction, and that defendants AI Apthorp LLC and Marin have met their burden to demonstrate their entitlement to a preliminary injunction.

**Mandatory Relief; Status Quo**

While generally a preliminary injunction that is tantamount to an award of final relief will not be granted, that rule is not inflexible, and such an injunction may be granted in appropriate circumstances, *see Wilf v Halpern*, 194 AD2d 508 (1st Dept), *lv dismissed* 82 NY2d 846 (1993) (affirming grant of preliminary injunction directing defendant to execute, in writing, his personal

consent to the proposed refinancing of the partnership debt). While the typical function of a preliminary injunction is to preserve the status quo pending a resolution of the merits, here the status quo includes the continuing non-default status of the Mezzanine Loan. There is sufficient ground before me to conclude that the Mezzanine Loan faces imminent default absent the injunction sought by AI Apthorp LLC and Marin.

**Likelihood of Success**

For the reasons discussed above, I conclude that defendants AI Apthorp LLC and Marin have demonstrated a likelihood of success on the merits.

**Irreparable Harm**

AI Apthorp LLC and Marin have met their burden of showing irreparable harm. They have demonstrated a strong likelihood of a default in the absence of the execution of the Omnibus Agreement and release.

**Balancing of Equities**

AI Apthorp LLC and Marin have demonstrated the balancing of the equities in their favor. I am persuaded that there is a strong likelihood of a default, a result that would damage not only defendants' interests but Mann's as well.

**SUMMARY JUDGMENT**

The ad damnum clause of the complaint seeks the following relief:

> judgment declaring and adjudging the rights of the parties under the settlement agreement and such other and further relief as to the Court seems just and proper in the circumstances.

As noted above, the cross motion seeks summary judgment. The supporting affidavit clarifies that the cross motion seeks summary judgment dismissing the complaint.

Summary judgment dismissing the complaint is not warranted. Where a complaint seeks a declaratory judgment, and where the facts demonstrate that there is a dispute as to which a declaratory judgment is appropriate but the appropriate declaration is other than the declaration sought by the plaintiff, the appropriate remedy is not dismissal of the complaint, but a declaration of the parties' rights, *e.g. Daley v M/S Capital NY LLC*, 44 AD3d 313 (1st Dept 2007).

To the extent that the cross motion for summary judgment may be construed as seeking a declaratory judgment in favor of the cross-moving defendants, it is denied without prejudice to a renewed motion for summary judgment at an appropriate juncture. Summary judgment on Mann's complaint seeking a declaratory judgment would be premature in the absence of joinder of issue by the other potentially affected parties. Moreover, the cross-moving defendants have failed to meet their heavy burden to demonstrate, in their moving papers, the lack of a triable issue of fact so as to entitle them to a declaratory judgment in their favor as a matter of law. While I conclude that AI Apthorp LLC and Marin have a likelihood of success on the issue of whether the safe harbor clause permits Mann to withhold consent of the Omnibus Agreement, and as to whether Mann's withholding of consent is otherwise unreasonable, they have not met their burden to demonstrate, in their moving papers, the lack of a triable issue of fact. Inter alia, they have failed to demonstrate the lack of a triable issue of fact as to whether the proposed schedule is unworkable; and whether the Omnibus Agreement represents a good faith effort between AI Apthorp LLC and AREFIN to restructure the transaction without unduly burdening Mann by, inter alia, depriving him of any payment at any time of the Opportunity Fee. The latter

point is underscored by their contention that, as stated in the affirmation of their counsel, "[i]f the Benchmark Advances are not made by AREFIN to Holdings, then [Apthorp Holdings, LLC] has no obligation to pay Mann an Opportunity Fee [emphasis added], and the meritless contention, in Marin's affidavit, that the Opportunity Fee owed to Mann is a "Cash Distribution" subject to section 4.1 of the Holdings Operating Agreement. Nor do the present papers enable a determination of the nature of the equitable relief appropriate to compensate for the elimination of the Benchmark Advances.

This constitutes the decision of the court.

Dated: 4/16/09

JHO

IRA GAMMERMAN