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COURT OF APPEALS  
STATE OF NEW YORK

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AUDTHAN,

Appellant-Respondent,

-against-

NO. 30

NICK & DUKE,

Respondent-Appellant.

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20 Eagle Street  
Albany, New York  
March 12, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Chrishanda Sassman-Reynolds  
Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 Audthan v. Nick & Duke.

3 MR. DOBBS: Good afternoon. May it please the  
4 Court. Elan Dobbs for Audthan, LLC. I'd like to request  
5 five minutes for rebuttal.

6 CHIEF JUDGE WILSON: Sure.

7 MR. DOBBS: I want to emphasize up front that the  
8 decision on appeal arises from a motion to dismiss where  
9 the allegations in the complaint are presumed to be true,  
10 and where my client, Audthan, was entitled to all  
11 reasonable inferences.

12 The Appellate Division majority did not  
13 faithfully apply this standard. With this firmly in mind  
14 and in this procedural posture, the question before the  
15 court is whether the landlord's June 2021 letter was a  
16 repudiation of the lease. And make no mistake, when the  
17 landlord said in June 2021, for the first time and in the  
18 future tense, that it will not and will never sign a cure  
19 agreement - - -

20 JUDGE TROUTMAN: Does the court get to interpret  
21 what that letter meant or didn't mean?

22 MR. DOBBS: To the extent the court can interpret  
23 what is not in the four corners of that letter, it must do  
24 so in a way that makes all inferences in favor of Audthan.  
25 And one of the things that happened - - -

1 JUDGE TROUTMAN: So you're saying it was okay for  
2 the Appellate Division to interpret the letter at the 3211  
3 stage?

4 MR. DOBBS: Not in the way it did. It - - - I  
5 believe that the Appellate Division said that in the letter  
6 the landlord reiterated its previous reasons for refusing  
7 to sign a cure agreement in 2015. That's not so; the  
8 letter does not say that.

9 JUDGE TROUTMAN: Couldn't the letter be - - -  
10 couldn't the letter, in fact, have more than one meaning  
11 and it's up to a fact-finder?

12 MR. DOBBS: That may be the case. I don't  
13 believe - - - and that's - - - our - - - this is the reason  
14 why our allegations about that letter are presumed to be  
15 true. And our allegations about that letter or that  
16 landlord's statement should be taken at face value, which  
17 is that it - - - according to it, at that moment, no cure  
18 was warranted.

19 JUDGE TROUTMAN: At least at the stage - - - at  
20 the motion stage where you were?

21 MR. DOBBS: Correct. At the motion stage where  
22 we were. And it may be that at a future time, at trial or  
23 at summary judgment - - - probably at trial, where  
24 credibility determinations are at issue, what was really in  
25 the landlord's mind may be something for the trier of fact,

1 the - - - the judge, to determine, and it was error for the  
2 Appellate Division to sort of make a whole host of  
3 inferences in the landlord's favor about what it meant and  
4 what it was really - - - really had in mind when it wrote  
5 that letter in 2021.

6 CHIEF JUDGE WILSON: Let me just ask you - - -

7 JUDGE CANNATARO: Are you saying - - -

8 CHIEF JUDGE WILSON: Sorry. Go ahead.

9 JUDGE CANNATARO: I'm sorry. I just want to know  
10 whether your position is that the courts below couldn't  
11 look at what was happening in - - - I think it was 2015  
12 when the landlord first said, you know, that they didn't  
13 want to enter into the cure agreement as drafted, whether  
14 they weren't allowed to look at that and view that as - - -  
15 as the beginning of the breach that you're now complaining  
16 of?

17 MR. DOBBS: Because it was a 3211 motion, the  
18 court is confined to the allegations of the complaint and  
19 the documentary evidence that was properly before it. And  
20 so to the extent there are allegations in the complaint  
21 about what happened in 2015 - - -

22 JUDGE CANNATARO: Yes.

23 MR. DOBBS: - - - as framed in the complaint, the  
24 well - - - those well-pled allegations are entitled to the  
25 presumption of truth. To the extent that the - - - the

1 court engaged in a bit of psychoanalysis about what was in  
2 the landlord's mind in 2021 when it wrote the letter vis-a-  
3 vis its previous conduct in 2015, that's a bridge too far.

4 JUDGE CANNATARO: I guess my issue, though, is  
5 this distinction between a breach and an anticipatory  
6 breach. The - - - the court is aware, because of the  
7 pleadings of the 2015 activity, which they viewed as  
8 arguably a - - - a breach of the contract, and that what  
9 happened in 2021 is just a continuation of that same  
10 breach. Isn't that their - - - their - - - their line of  
11 reasoning to justify what they did here?

12 MR. DOBBS: That is their line of reasoning, but  
13 it's not borne out by the facts that are pled in the  
14 complaint. In 2015, what the landlord did was - - - my  
15 client tendered a cure agreement to the landlord. The  
16 landlord said, no, we're not going to sign this. Why are  
17 we not going to sign this? Because it contains - - - it  
18 provides for more affordable housing - - - more square  
19 footage of affordable housing than the lease requires a  
20 cure agreement to contain. And so therefore, the cure  
21 agreement that you gave us does not comply with the terms  
22 of the lease.

23 In 2021, shortly after having been enjoined by  
24 Supreme Court from attempting to terminate the lease any  
25 more, the landlord embarked on a new path. It started

1 writing letters to HPD, falsely accusing my client of  
2 committing fraud. And when HPD rebuffed its attempts to  
3 get it to rescind its blessing on that cure agreement that  
4 had been circulated in 2015, the landlord wrote its June  
5 2021 letter. And what it said in that letter is that not -  
6 - - that no cure agreement was warranted, that it will  
7 never sign one.

8 CHIEF JUDGE WILSON: So let me - - - let me ask  
9 you this.

10 MR. DOBBS: Go ahead.

11 CHIEF JUDGE WILSON: Let me change this up a bit  
12 and let me - - - let me ask whether this is a possible  
13 reading of the agreement that you have. And I'm just  
14 looking at the contract itself. I don't worry about who  
15 said what afterwards, just the contract. You've got  
16 somebody who owns a piece of land. They don't really know  
17 how to - - - to maximize it to develop it properly, and  
18 there's some regulatory issues around it. Your client  
19 knows how to develop the land and is going to put up a much  
20 bigger building. And the uncertainty is what is HPD going  
21 to do? So you enter into an agreement that provides for a  
22 forty-eight and then - - - forty and forty-eight years - -  
23 - so basically a hundred-year lease, right? With the idea  
24 that you'll develop it if you can, and they'll turn it over  
25 to you for that period of time, and they'll get it back at

1 the end of that. And what you agree to is that given the  
2 uncertainty around what HPD might do, if either of you  
3 refuses to go forward with signing what's necessary, the  
4 only thing you can do is to try and compel specific  
5 performance; damages are not available to you. Why is that  
6 not a reasonable interpretation of the contract?

7 MR. DOBBS: Well, it's not a reasonable  
8 interpretation of the contract because the section that  
9 you're talking about, the damage limitation provision,  
10 Section 3309 - - -

11 CHIEF JUDGE WILSON: Yeah.

12 MR. DOBBS: - - - applies when a party - - - a  
13 party has a right of approval or consent, which may not be  
14 unreasonably withheld. Now, that's a concept that is very  
15 well-worn in landlord-tenant law and in contract law  
16 generally. So well-worn, in fact, that the parties used it  
17 twenty-two separate times in the lease. We listed those on  
18 page 22 of our brief.

19 CHIEF JUDGE WILSON: Right. And - - - but the  
20 question is if it's unreasonably withheld. And in fact,  
21 that provision itself says wrongfully I think, right?  
22 Which is even stronger, I think, than unreasonably - - -  
23 that your remedy is limited to specific performance?

24 MR. DOBBS: But the parties used the - - - the -  
25 - - the - - - the - - - the limitation applies specifically

1 in instances where there is a requirement of approval or  
2 consent - - -

3 CHIEF JUDGE WILSON: That's wrongfully withheld.

4 MR. DOBBS: - - - wrongfully withheld. Now, in  
5 section 14.01, which - - -

6 CHIEF JUDGE WILSON: I'm sorry. But isn't that  
7 what you're saying happened here? They wrongfully withheld  
8 their consent to sign the HP - - - they didn't?

9 MR. DOBBS: It is not at all. The - - - the - -  
10 - in signing the agreement, the landlord agreed that a cure  
11 was necessary and that it would cooperate in executing the  
12 documents.

13 CHIEF JUDGE WILSON: But some - - - some cure was  
14 necessary.

15 MR. DOBBS: No. But it's - - - it's more than  
16 that. It specifically says it provides what the contours  
17 of that agreement are going to be: a 58,000 square foot  
18 building that provides for approximately 15,000 square  
19 feet. This was - - -

20 CHIEF JUDGE WILSON: And so - - -

21 MR. DOBBS: - - - by signing - - -

22 CHIEF JUDGE WILSON: - - - and so how - - -

23 MR. DOBBS: - - - by signing the lease.

24 CHIEF JUDGE WILSON: Correct. I understand  
25 that's in the contract. So how - - - give me an example of



1 how you would wrongfully refuse to sign that?

2 MR. DOBBS: The land - - - the - - - the contour  
3 gives you an - - -

4 CHIEF JUDGE WILSON: HPD comes up with a  
5 proposal. Maybe it's not 15,000 square feet, maybe it's  
6 16.5 or maybe it's 14.1; maybe neither of those is  
7 wrongful.

8 MR. DOBBS: That's not the - - - the bargain that  
9 the parties struck.

10 CHIEF JUDGE WILSON: Okay.

11 MR. DOBBS: The bargain that the parties struck  
12 is if the - - - if the cure agreement complies with what  
13 the lease says the cure agreement should be - - -

14 CHIEF JUDGE WILSON: Yeah.

15 MR. DOBBS: - - - which is that it contains  
16 approximately 15,000 and the - - -

17 CHIEF JUDGE WILSON: Then you have to sign.

18 MR. DOBBS: - - - there's a mixed-use building -  
19 - -

20 CHIEF JUDGE WILSON: Then you have to sign.

21 MR. DOBBS: - - - you have to you have to sign  
22 it.

23 CHIEF JUDGE WILSON: And if you don't sign, if  
24 you wrongfully refuse to sign it, you are limited to  
25 specific performance.



1 MR. DOBBS: But that's not what the contract  
2 says.

3 CHIEF JUDGE WILSON: Isn't it?

4 MR. DOBBS: It does not.

5 CHIEF JUDGE WILSON: Okay.

6 MR. DOBBS: Because twenty-two separate times in  
7 the contract, but not in the obligation where the - - - the  
8 landlord must sign the cure agreement, Section 14.01, it  
9 does not use the words the landlord has the right and the  
10 discretion to consent to or - - - or approve of this. The  
11 landlord, by signing the lease, approved of a cure  
12 agreement that contained the following items. In other  
13 words, that it provided for approximately 15,000 square  
14 feet of affordable housing in a mixed-use building of  
15 58,000 square feet.

16 And the parties waived money damages in other  
17 instances where the lease requires consent or approval that  
18 shall not be wrongfully withheld.

19 CHIEF JUDGE WILSON: That's - -

20 MR. DOBBS: And - - -

21 CHIEF JUDGE WILSON: - - - so the twenty-two  
22 examples?

23 MR. DOBBS: Yes. There are twenty-two examples,  
24 but not in section 14.01 - - -

25 CHIEF JUDGE WILSON: But I don't understand - - -



1 MR. DOBBS: - - - and in those examples - - -

2 CHIEF JUDGE WILSON: - - - then I don't

3 understand what 3309 reads on.

4 MR. DOBBS: 3309 tracks a well-worn concept.

5 CHIEF JUDGE WILSON: I understand. What

6 obligation in the contract does that apply to?

7 MR. DOBBS: It applies to the twenty-two separate

8 instances that reference - - -

9 CHIEF JUDGE WILSON: But not 14.01?

10 MR. DOBBS: - - - but not 14.01 because the  
11 parties knew how to reference that concept and the - - -  
12 the twenty-two instances are things that may arise in the  
13 future going forward over the course of this eighty-eight-  
14 year lease. What are they? They are approval of a lender,  
15 approval of a sublessor, whether or not there can be a  
16 leasehold mortgage on the property and under what  
17 circumstances, the cure, and the contours of a cure. What  
18 it would entail were pre-baked in but also - - - and - - -  
19 and acknowledged. If you look at the language of section  
20 14.01, the parties acknowledge that a cure is necessary.  
21 The parties - - -

22 JUDGE HALLIGAN: Is the reason - - - to - - -  
23 just to focus on the language of 1401. So is the reason  
24 you say it's distinct from the other provision, is it that  
25 the words, "cooperate in good faith" and in executing any

1 documents, et cetera - - - I'm paraphrasing the last piece  
2 - - - that that's materially different from the words used  
3 in 3309?

4 MR. DOBBS: Yes, that's correct. And - - -

5 JUDGE HALLIGAN: And so what's the remedy for a  
6 breach of 1401 under your theory then?

7 MR. DOBBS: Then the remedy - - - all - - - all  
8 remedies at - - - available at common law for breach of  
9 that provision are available because to limit a common law  
10 remedy, like a - - - a - - - a - - - a right to damages,  
11 requires specific, directly - - -

12 JUDGE HALLIGAN: So - - -

13 MR. DOBBS: - - - on point language.

14 JUDGE HALLIGAN: - - - so if the parties wanted  
15 to - - - I - - - subject 1401, if you think that it, as  
16 drafted, it's not subject to 3309; what would they have  
17 needed to say differently in order to be clearer, in your  
18 view, that it was subject to 3309's restriction?

19 MR. DOBBS: They would have, like they did  
20 elsewhere in the lease, track the language and said that  
21 when presented with a cure agreement the landlord has the  
22 discretion to approve or disapprove so long as that  
23 approval is not unreasonably withheld.

24 JUDGE HALLIGAN: Okay. So the words "execute"  
25 and - - - "cooperate in good faith" and "execute" are - - -

1 are materially distinct? You - - - you - - - your - - -

2 MR. DOBBS: Yes, they are. There - - - there - -  
3 - there's this obligation to cooperate in executing the  
4 agreements. And to - - - to - - -

5 JUDGE RIVERA: So could - - - could you - - - I'm  
6 sorry. Over here. Could you - - - I - - - I thought I  
7 understood in your brief that you made the argument that  
8 the injunctive relief is nonsensical because it's no relief  
9 at all for this particular type of breach; or did I  
10 misunderstand the argument?

11 MR. DOBBS: The argument is that if there - - -  
12 if the - - - if this was in fact a material breach that  
13 gave Audthan the right to terminate the agreement - - - and  
14 we believe that clearly was, that to the extent that  
15 Audthan was able to terminate the agreement and declare it  
16 at an end, a - - -

17 JUDGE RIVERA: Um-hum.

18 MR. DOBBS: - - - a sole remedy of injunctive  
19 relief of specific performance would be no remedy at all.  
20 And in particular, here, where the landlord has said we'll  
21 never sign a cure agreement, what that means is that in  
22 order to get specific performance you have to go and  
23 negotiate with HPD. You have to obtain new drawings and  
24 engineering and environmental studies and all of the tens  
25 of millions of dollars it would take to come up with a new

1 cure agreement, present it to them, but the landlord said  
2 I'm not going to sign it.

3 CHIEF JUDGE WILSON: I thought you moved to  
4 compel them to sign it?

5 MR. DOBBS: We moved them to compel them to sign  
6 an agreement.

7 CHIEF JUDGE WILSON: Could you not have pursued  
8 that?

9 MR. DOBBS: We did in 2015.

10 CHIEF JUDGE WILSON: Oh, no. Could you not have  
11 continued to pursue that even in the face of their letter?

12 MR. DOBBS: We were - - - in the face of their  
13 letter that was an option that we had, but we also had the  
14 option to terminate.

15 CHIEF JUDGE WILSON: I understand. But so that's  
16 an election you made?

17 MR. DOBBS: Correct. And the lower court held  
18 that - - -

19 CHIEF JUDGE WILSON: You probably - - -

20 MR. DOBBS: - - - we did not have that election.  
21 And so - - -

22 CHIEF JUDGE WILSON: And so why - - - why did the  
23 lower court said you had - - - did not have that election?

24 MR. DOBBS: Because they held that it was a mere  
25 continuation of the behavior that had taken place in 2015.

1 And it was new behavior, what the landlord had done on - -  
2 - quite obviously, the landlord went out to HPD. It - - -  
3 it - - - it's - - - it - - -

4 CHIEF JUDGE WILSON: Oh, no. That's on the  
5 anticipatory breach.

6 MR. DOBBS: Correct.

7 CHIEF JUDGE WILSON: But I think you withdrew  
8 your claim for injunctive relief to compel them to sign.  
9 Right?

10 MR. DOBBS: That was already pending in 2015.

11 CHIEF JUDGE WILSON: Right.

12 MR. DOBBS: And so what - - - because what the  
13 landlord did in 2021 was fundamentally different. It said  
14 we will never sign any cure agreement. And the cure - - -

15 CHIEF JUDGE WILSON: Okay. So what is it that  
16 stopped you from pursuing to conclusion your request for an  
17 affirmative injunction requiring them to sign the existing  
18 HPD agreement?

19 MR. DOBBS: Because prior to that point the  
20 landlord had continuously taken the position that it would  
21 sign a cure agreement that did comply with the terms of the  
22 lease, that did contain - - - we had been litigating  
23 effectively - - -

24 CHIEF JUDGE WILSON: I understand that.

25 MR. DOBBS: - - - over whether 15 - - - over what



1 15,000 - - - approximately 15,000 square feet.

2 CHIEF JUDGE WILSON: You're not saying the court  
3 lacked the power to compel them to sign?

4 MR. DOBBS: No, of course not. But let's take  
5 the counterfactual. Let's say that the trial court said,  
6 you know what? Landlord is, right. There's - - - this is  
7 too many square feet and it doesn't comply with the terms  
8 of the lease. Go redesign a cure agreement. But in 2021,  
9 they've said, we're not going to - - -

10 CHIEF JUDGE WILSON: It just means you might  
11 lose. But I mean - - -

12 MR. DOBBS: No, no, no.

13 CHIEF JUDGE WILSON: - - - that's true of anyone.

14 MR. DOBBS: But in 2021, in their June letter,  
15 they said, we're never - - -

16 CHIEF JUDGE WILSON: I understand they said that.  
17 People say things - - - things in litigation all the time.  
18 That doesn't mean you can't go to a court and ask them to  
19 say they're wrong and we're right.

20 MR. DOBBS: Respectfully, I think we're very far  
21 afield of the 3211, the scenario where this arose. All of  
22 these things are things that the landlord can - - -

23 CHIEF JUDGE WILSON: And I think this relates - -  
24 -

25 MR. DOBBS: - - - assert at trial.





1 CHIEF JUDGE WILSON: - - - we're not far afield,  
2 I think. I think this relates to the question that Judge  
3 Rivera was asking you earlier about why you were saying  
4 that there's actually no relief available to you at all.  
5 And what I'm trying to probe at is whether there wasn't a  
6 form of full relief available to you in the form of  
7 specific forms that you affirmatively decided not to  
8 pursue.

9 MR. DOBBS: The question is that if the right of  
10 termination arises, then it basically means that you're  
11 exercising that right without the possibility of a remedy  
12 and that divests you of a remedy - - - of a common law  
13 remedy, that - - - that appears nowhere in the contract.  
14 And so - - -

15 CHIEF JUDGE WILSON: All right. So what I  
16 understand you to be saying is, if I have the right to  
17 terminate an agreement or to compel specific performance,  
18 because I don't want specific performance, I have no real  
19 remedy?

20 MR. DOBBS: That's correct.

21 CHIEF JUDGE WILSON: Okay. I understand where  
22 you are.

23 MR. DOBBS: Okay.

24 MR. TURKEL: Good afternoon. May it please the  
25 Court, Jeffrey Turkel for the cross-appellant. I'd like to

1 reserve three minutes for rebuttal, please?

2 CHIEF JUDGE WILSON: Yes.

3 MR. TURKEL: I'd like to start with the sole  
4 remedy provision, 3309, which this court has repeatedly  
5 talked about. The Supreme Court and all five Appellate  
6 Division justices correctly found that 3309 applies to the  
7 particular breach alleged here with respect to the cure  
8 agreement. Where the courts went wrong was - - - and - - -  
9 and let me just say what that - - - that agreement says.  
10 3309, it says, "Under this provision, whenever" - - - very  
11 broad - - - "a party unreasonably withholds consent or  
12 approval required under the lease, the other party waives  
13 to the fullest extent by - - - permitted by law, any right  
14 to damages, and that such party's sole remedy for any  
15 wrongfully" - - -

16 JUDGE HALLIGAN: How do you respond to your  
17 adversary's argument as I understand it, that the  
18 differences in the text of 1401 and 3309 mean that 1401 is  
19 not subject to 3309?

20 MR. TURKEL: As this court knows from U.S.  
21 National Bank and Nomura and Ambac, it's kind of a cottage  
22 industry out there to try and evade sole remedy provisions  
23 when they rebound against you. 1401 speaks of - - - in  
24 terms of cooperation. So what does cooperation mean under  
25 this lease? Well, we go to 3310 which is captioned



1 "cooperation". And 3310 says that, "Both parties agree to  
2 cooperate with the other party in executing any and all  
3 documents necessary or appropriate under this lease, where  
4 requested by other such party, and otherwise give its  
5 approval to" document - - - "such documents as may be  
6 requested by the other party." So the concept of approval  
7 is part of the larger concept of cooperation. We get that  
8 from 1401, and then 1401 refers us to 3310.

9 JUDGE HALLIGAN: But I think he's arguing, if - -  
10 - if I understand, that the language in 3309 is, is almost  
11 like a term of art, right? And - - - and that if the  
12 parties intended to have it applicable to 1401, then either  
13 on 1401 or perhaps in 3310 that those words would have been  
14 recited. And so I'm interested in your response to that.

15 MR. TURKEL: Well, as I said, cooperation is a  
16 term that is used in 1401. Cooperation is defined in 3310  
17 as encompassing approval. So I just don't think that it's  
18 that much - - - I mean, I think if you - - - if you have to  
19 cooperate and execute, then you've previously already  
20 consented and approved. I think they're all melded within  
21 each other.

22 The court has consistently talked about, well,  
23 why not go to Supreme Court and get the sole remedy that  
24 was given to you? And they did. And when they did - - -  
25 when they moved for injunctive relief eight years ago, they

1 sought an order directing the landlord to approve and  
2 execute the cure agreement, or in the alternative, to  
3 review and approve the cure agreement. So they are on  
4 record for at least eight years in this case, as saying  
5 that the gravamen of our complaint is you didn't approve  
6 the cure agreement that was put in front of you, and that  
7 puts us into 3309.

8           Once we're in 3309, what do we have? We have a  
9 provision that gives them absolutely perfect relief. We  
10 don't want to sign. And if they're right that it was  
11 unreasonable, they go to court and they did. They go to  
12 court and they say, your honor, it's unreasonable, and then  
13 the court decides. In this particular case, the court said  
14 that there was a question of fact. If I were representing  
15 Audthan, I'd be pursuing that injunctive remedy with  
16 everything that I had because if it turned out that it was  
17 unreasonable, they'd have their cure agreement. And if it  
18 turns out that it was reasonable, the refusal to consent  
19 and approve, then they'd know they had to go back to the  
20 drawing board.

21           JUDGE CANNATARO: Counsel, to get to your  
22 adversary's, you know, larger point in his argument, this  
23 is not just a refusal to cooperate. It - - - it's a - - -  
24 it's a - - - the statement that they're pointing to is a  
25 statement that this - - - this provision will never be

1 realized because we will never sign that cure agreement,  
2 which they say elevates it to a much higher level. A - - -  
3 a repudiation of the entire contract. And what's most  
4 impactful to me in that argument is that this is getting  
5 decided at the pleading stage.

6 MR. TURKEL: Understood, Your Honor.

7 JUDGE CANNATARO: What gives the courts below -  
8 the Appellate Division here - the right to do that sort of  
9 substantive analysis of what the meaning of the 2021 letter  
10 is in the context of a motion to dismiss?

11 MR. TURKEL: There is federal authority - - -  
12 it's cited in our brief - - - for the proposition that a  
13 court can decide a - - - a matter of law where the alleged  
14 repudiation is in writing. So we have a written record.  
15 This is not he said, he said; we have a written record of  
16 all the correspondence that went back and forth between  
17 HPD. I think what's more important is that when you look  
18 at a - - - a - - - well, let me make one other point. The  
19 question here is, was this a breach that falls in 3309? We  
20 say it is. If it is a breach that falls in 3309, then 3309  
21 applies and the sole remedy provision applies. It doesn't  
22 matter whether the breach is material, nonmaterial, total,  
23 partial, or anticipatory. A breach is a breach. Now, an  
24 anticipatory breach would give them the right of election  
25 but that's not really involved in this case. So a breach

1 is a breach whether we call it anticipatory or not. The  
2 last thing that I want to say is that - - -

3 CHIEF JUDGE WILSON: Well, can we send it back to  
4 - - - for them to pursue their specific performance remedy?

5 MR. TURKEL: Their specific performance remedy is  
6 moot. They moved. They vacated. That's it. It's over.  
7 It's - - - would just be an advisory opinion.

8 JUDGE HALLIGAN: You mean they vacated the  
9 premises?

10 MR. TURKEL: They vacated the premises. They - -  
11 - they can't be put back in. They're gone. 30 - - - when  
12 courts talk about anticipatory repudiation, they talk about  
13 an unequivocal and final refusal to perform. 3309 does not  
14 give the landlord that - - - that ability to refuse to  
15 perform. As Judge Wilson repeatedly said, go to court, use  
16 your sole remedy, get your injunction, and if they direct  
17 the landlord to sign, then you've got everything that you  
18 wanted. You've got the - - -

19 JUDGE HALLIGAN: So is your position there can be  
20 no repudiation as a matter of law for that reason?

21 MR. TURKEL: Yes, yes. I think when an - - - an  
22 anticipatory repudiation is - - -

23 JUDGE HALLIGAN: Seems like that's a big carve-  
24 out of what we think of viable repudiation claims. That  
25 would mean that any time someone says, I refuse to do X

1 despite my promise in a contract, that there's no  
2 repudiation because the other party can go to court and  
3 compel you to do it?

4 MR. TURKEL: Well, it's not that the other party  
5 can go to court and compel you, it's that this contract had  
6 a specific sole remedy provision that said that is your  
7 remedy.

8 CHIEF JUDGE WILSON: But you're not - - - are you  
9 disputing that if they had - - - let's suppose they could  
10 prove that you repudiated the contract. Right? Let's  
11 suppose they could - - - let's take that for granted.  
12 Let's say you did repudiate it, right? Would that give  
13 them the right to walk away from the contract?

14 MR. TURKEL: No.

15 CHIEF JUDGE WILSON: Oh, it wouldn't?

16 MR. TURKEL: No. Their sole remedy - - - again,  
17 it doesn't matter whether it's an anticipatory breach,  
18 material breach, partial breach, their sole remedy they  
19 gave away - - -

20 CHIEF JUDGE WILSON: What - - - what if they  
21 don't - - -

22 MR. TURKEL: - - - what they're seeking.

23 CHIEF JUDGE WILSON: - - - what if they don't  
24 want a remedy? That is - - - to put it differently - - -  
25 let's say that they decide enough time has passed, and this

1 is you guys are just horrible people to deal with, and they  
2 just don't want to go forward and they just drop their  
3 lawsuit. Can you sue them for not going forward - - -

4 MR. TURKEL: It didn't happen. And I don't know  
5 if we - - -

6 CHIEF JUDGE WILSON: - - - and ask for specific  
7 performance? Because you can't ask for damages under your  
8 theory.

9 MR. TURKEL: No. I - - - I think we would have  
10 let them go.

11 CHIEF JUDGE WILSON: Well, you didn't, so what -  
12 - - I'm not really asking what you would have done, but  
13 what you could have done? I mean, it would seem to me that  
14 if a - - - somebody repudiates a contract that gives them  
15 the right to walk away from it, if they - - - if the other  
16 party the right to walk away from it.

17 MR. TURKEL: I - - - I would disagree. I would  
18 say that an - - - an - - - if you have a sole remedy  
19 provision that says you have to get injunctive relief, the  
20 fact that a breach is anticipatory rather than material or  
21 partial or whatever, doesn't take 3309 out of the contract.  
22 You're - - - they waived their right to seek contract  
23 damages, which is what they're doing here - - - which is  
24 what they're before the court here.

25 JUDGE HALLIGAN: So you're saying they also





1           waived - - - I think, you're saying they also waived the  
2           right to effectively repudiate? So I guess it would be  
3           helpful - - - what's the best case support for that  
4           proposition? I take it what you're saying is that where  
5           you have a provision like 3309, you essentially can't  
6           repudiate because your sole remedy is to go to court under  
7           a provision like 3309 and seek specific performance. So if  
8           we're going to - - - if you're suggesting repudiation is  
9           contoured in that way or there's a bite out of it that way,  
10          what's the best support for that?

11                   MR. TURKEL: I think the best support is Nomura,  
12           U.S. Bank and Ambac; those were sole remedy provisions.  
13           And in each of those cases, the plaintiff thought of some  
14           very clever and inventive way as to why that sole remedy  
15           provision to which they agreed, should not apply.

16                   JUDGE HALLIGAN: If I recall, not specifically,  
17           and - - - and I might be remembering those cases wrong, but  
18           not specifically with respect to whether repudiation was  
19           available in the face of a provision like 3309.

20                   MR. TURKEL: Well, Your honor, in Noble Lowndes,  
21           that was a repudiation case, and the court enforced the  
22           limitation of remedies provision.

23                   JUDGE RIVERA: Okay. So - - -

24                   MR. TURKEL: It was against consequential  
25           damages.

1                   JUDGE RIVERA: - - - if I'm - - - if I'm  
2                   understanding you - - - your view, based on your responses  
3                   to both Chief Judge and Judge Halligan is that they could  
4                   have sought and they did, injunctive relief, but then they  
5                   walked away from that and they walked away from the  
6                   agreement; they picked up and left the premises. And so at  
7                   that point, they don't get to say we've suffered financial  
8                   damages as a result of your anticipatory breach, and we're  
9                   - - - we're going to pursue that in court. You're saying  
10                  they don't get to do that, because all they could do is  
11                  request that we comply with the agreement as written, which  
12                  is we had to sign off documents, not withhold our  
13                  cooperation, approve, et cetera, and so forth. But if - -  
14                  - if they walk away, regardless of whether or not they're  
15                  seeking damages against - - - against you - - - monetary  
16                  damages, you could have chosen not to pursue an action  
17                  against them? As you said before, we would have let them  
18                  go.

19                  MR. TURKEL: We - - - we would always have that -  
20                  - - that remedy. That's correct, Your Honor.

21                  JUDGE RIVERA: So just to kind of clarify what  
22                  you see as the actions before you?

23                  MR. TURKEL: I mean, I think what we have to look  
24                  at is what was the intent of the parties at the time that  
25                  this lease was signed? Okay? The idea was that if there

1 was a dispute as to consent and approval, and let's face  
2 it, even though the clause is mutual it's obviously  
3 weighing heavily - - - more heavily on the landlord,  
4 because the landlord is going to be asked to consent and to  
5 approve for various documents. The landlord did not want a  
6 case where there was a question about whether a refusal to  
7 give consent was unreasonable enough. Because if you could  
8 get money damages for that, in a development deal that's  
9 almost one hundred years old, the damages could be  
10 absolutely astronomical. The landlord did not want to get  
11 involved in that. So there's a provision in there, and  
12 they said that we waive damages. We waive money damages to  
13 the fullest extent allowed by law. And you don't get to  
14 evade that by saying, well, it's an anticipatory breach  
15 instead of a material breach instead of a partial breach.  
16 3309 means what it says. This is freedom to contract.  
17 3311 - - -

18 JUDGE TROUTMAN: It's bad faith - - -

19 MR. TURKEL: - - - specifically - - - I'm sorry?

20 JUDGE TROUTMAN: - - - in - - - if there is  
21 allegations of bad faith, does that come into play or  
22 impact it in any way?

23 MR. TURKEL: No, it doesn't, Your Honor. That's  
24 where 60 litigation - - - 60 Put-Back litigation comes in.  
25 In Kalisch-Jarcho the court said we're not going to force

1           exculpatory clauses that purport to insulate a party for  
2           their bad acts or gross negligence. And in 60 Put-Back the  
3           court said, well, let's take a look at that. And its  
4           analysis was the first thing we have to do before going  
5           into the issue of gross negligence or bad acts, is  
6           determine whether we really have an exculpatory clause  
7           because the public policy relates to exculpatory clauses.

8                    JUDGE GARCIA: That's your argument here,  
9           Counsel. Was that your argument below?

10                   MR. TURKEL: Well, we've always argued that 3309  
11           applies and limits the remedy - - -

12                   JUDGE GARCIA: No. This bad faith argument. Did  
13           you make - - -

14                   MR. TURKEL: Well - - -

15                   JUDGE GARCIA: - - - that argument below that  
16           this just doesn't apply here?

17                   MR. TURKEL: Yes. Under Noble Lowndes, we  
18           certainly did, because Noble Lowndes says - - -

19                   JUDGE GARCIA: I thought your argument was you  
20           didn't engage in bad faith below?

21                   MR. TURKEL: No. We - - - we certainly argued  
22           Noble Lowndes and we said that under Noble Lowndes, if  
23           there is an element of economic self-interest to the  
24           conduct that is alleged to be bad faith, then that doesn't  
25           constitute the kind of bad faith or willful act that would

1           cause a - - - a court not to enforce a provision between  
2           two sophisticated parties that's unambiguous. So that was  
3           definitely argued below.

4                   JUDGE GARCIA: That part of your argument was?

5                   MR. TURKEL: Yes. That is - - - s that is there  
6           below. I see my time is up.

7                   CHIEF JUDGE WILSON: You have your rebuttal.

8                   MR. TURKEL: Thank you.

9                   JUDGE GARCIA: Counsel, could you start on this  
10          preservation issue? Was - - - was that an accurate  
11          recounting of - - - in your view of what the arguments were  
12          below?

13                   MR. DOBBS: No, I don't believe it was. The  
14          economic self-interest argument goes to the Kalisch-Jarcho  
15          framework of whether there are allegations that a - - - a  
16          counterparty engaged in conduct that would vitiate an  
17          exculpatory clause, and then the issue of 60 Put-Back,  
18          which was not raised in the Appellate Division and was not  
19          raised until the briefing before this court, is whether  
20          that framework applies in the - - - in the context of an  
21          exclusive remedy provision for them. And so that was not  
22          raised or briefed below.

23                   JUDGE GARCIA: In fact, it was almost conceded, I  
24          think, that it did.

25                   MR. DOBBS: The framework under which the parties

1 argued was under the Kalisch-Jarcho and - - - and which the  
2 - - - the courts below rendered their decisions was there.  
3 And so the - - - they didn't - - - they didn't raise the  
4 argument, they raised it here for the first time. And it's  
5 substantively different argument to say I had a financial  
6 economic self-interest, and this is a - - - a sole remedy  
7 clause, not an exculpatory clause.

8 JUDGE HALLIGAN: Counsel, where in the record do  
9 we see that? Are you - - - are you saying that this was  
10 just generally the way it was teed up, or is there a - - -  
11 a specific concession somewhere in the record to that  
12 effect?

13 MR. DOBBS: We cited to the parties' briefs below  
14 in our - - - in our brief here - - - in our reply brief.  
15 So the court can look at those briefs and see that it  
16 wasn't, in fact, argued in that way. And of course, the  
17 way the courts below decided the question was without  
18 reference to 60 Put-Back and this - - -

19 JUDGE HALLIGAN: But it sounds like it's  
20 implicit, if I'm understanding you. And my reading of the  
21 briefs was that it's implicit in the way the issue was  
22 argued, as opposed to an affirmative statement along the  
23 lines of what you're identifying; is that fair or no?

24 MR. DOBBS: I'm not sure I follow you, to be  
25 honest. I - - - I think that the - - - the 60 Put-Back

1 argument, let's call it, is an argument that this is a sole  
2 remedy provision and therefore the analysis under Kalisch-  
3 Jarcho does not apply. That was not an argument that they  
4 made below. The argument that they made below was you  
5 haven't alleged sufficient - - -

6 JUDGE HALLIGAN: Right.

7 MR. DOBBS: - - - bad faith.

8 JUDGE HALLIGAN: But - - - but my question was  
9 the inverse was not stated; is that right? That 60 Put-  
10 Back does not apply? In other words, that as a - - - as a  
11 doctrinal matter, that it's irrelevant?

12 MR. DOBBS: No. They made their motion to  
13 dismiss and we responded to it.

14 JUDGE HALLIGAN: Okay. Thank you.

15 MR. DOBBS: I want to get back to something my  
16 friend on the other side said, which is that - - - which  
17 was sort of taken as a given that Section 3309 applies, and  
18 that therefore the intent of the parties was a waiver of  
19 the right to seek damages. Now, of course, it's  
20 blackletter law that the intent of the parties is best  
21 defined by the language that they used. And in order to  
22 get to where the other side is going here, that section  
23 33.09 applies to section 14.01, you have to move around a  
24 whole bunch to different places in the agreement. You  
25 don't have to do that with respect to the twenty-two

1 separate places in which the specific language - - - the  
2 term of art, as Judge Halligan mentioned it - - - applies.  
3 It would have been very easy to do that in section 14.01,  
4 and the parties did not do that. And they didn't do that  
5 because the contours of and the need for - - - first, the -  
6 - - the section 14.01 begins with, the parties acknowledge  
7 that a harassment finding has been made, that a cure  
8 agreement is needed, that no development can happen without  
9 such an agreement. It was by signing the lease, the  
10 landlord consented and approved of a cure agreement, and  
11 what it did in 2021 was say, I'm not - - - that obligation  
12 doesn't apply to me anymore. And in their brief, they say  
13 - - - they come out and say what we were trying to do was  
14 to obviate our contractual obligation.

15 JUDGE CANNATARO: Counsel, what are we to make of  
16 the fact that prior to 2021, with respect to the - - - to  
17 the obligations that are incurred under 14.01, you were  
18 seeking injunctive relief? The very remedy that is  
19 referenced in 3309.

20 MR. DOBBS: We were seeking injunctive relief  
21 because what landlord had done, it didn't say, I will never  
22 sign a cure agreement. It didn't say no cure is warranted.  
23 No cure is warranted is a rejection of the fundamental  
24 purpose of the lease, which is that you have to get a cure  
25 to develop this agreement and to make a declaration of



1           condo. What we thought we were litigating about was, does  
2           the cure agreement that we tendered have the appropriate  
3           amount of square footage? After which the landlord said,  
4           you know, if - - - if a - - - a redesigned cure agreement  
5           will sign it. A re - - - one that doesn't take away the  
6           couple hundred square feet that - - - that maybe you've  
7           gone over here. We'll sign that agreement. And what they  
8           did in 2021 was say, no, no, no, the cure isn't warranted  
9           anymore because of these accusations that I'm now making  
10          against my client and its principals. And that's a  
11          fundamentally different thing. That went to the core  
12          purpose of the lease. What the landlord did in 2015 was  
13          say, you know what? I think this agreement may not - - -  
14          may be giving away too much. And we were litigating about  
15          what, approximately, 15,000 square feet means. And that's  
16          a very different thing than the landlord coming back and  
17          saying, we'll never do this.

18                   JUDGE CANNATARO: Are you saying that up until  
19          that point you were in 3309 prior to the 2021 letter, but  
20          the 2021 letter so fundamentally changes the nature of the  
21          breach that you're released from your obligations under  
22          3309?

23                   MR. DOBBS: No. I'm not saying that at all. In  
24          30 - - - in - - - in - - - 3309 simply doesn't apply. In  
25          2000 - - - we have a common law right to seek - - -



1 JUDGE CANNATARO: So you just elected a - - -

2 MR. DOBBS: - - - a - - - no. We selected - - -  
3 we - - - we elected to seek specific performance and an  
4 injunction compelling them to sign and money damages for  
5 the delay occasioned by the - - - by the refusal to sign  
6 that agreement. Because the refusal to sign that agreement  
7 would - - - meant that we were carrying the costs of this  
8 building: paying rent, doing all sorts of things, keeping  
9 employees on staff. And lo and behold, that actually  
10 amounted to a great deal of money because the landlord kept  
11 attempting to terminate the lease and to prolong the  
12 litigation over six years.

13 JUDGE RIVERA: So is that - - -

14 MR. DOBBS: So there were substantial money  
15 damages.

16 JUDGE RIVERA: - - - is that a refusal to  
17 cooperate, consent, or approve; or all of the above?

18 MR. DOBBS: It was a refusal to cooperate in  
19 executing an agreement, we said. We said that the - - -  
20 the refusal to sign was pretextual and - - - and - - - and  
21 - - - and - - - and wrong - - - and wrongful. And there  
22 was an issue of fact as to whether that was the case.

23 JUDGE RIVERA: But just to be clear, are you also  
24 saying that - - - let me put it this way. Under - - -  
25 under your view of the case, who had to approve that HPD

1 cure? HPD? The parties? Who - - - who have to approve?  
2 Since you're saying all they had to do is cooperate, so who  
3 had to approve?

4 MR. DOBBS: By signing the agreement, they  
5 approved of a cure that provided for the development of a  
6 58,000-square-foot building and a permanent creation of  
7 15,000 square feet. Once those two conditions are  
8 satisfied, then we comply with the terms of the lease and  
9 the landlord has to sign it. The landlord doesn't get to -  
10 - - to page through it and say, you know, I - - - I have a  
11 problem with - - - with a provision. The only thing that -  
12 - - the only reason that they could refuse to sign was it  
13 didn't do what the lease said it had to do in section 14.

14 JUDGE RIVERA: I - - - I think I now fully  
15 appreciate your argument. You're saying they've already  
16 approved the cure, and most of the terms of that cure, so  
17 they could never not approve because they've already  
18 approved?

19 MR. DOBBS: That's correct.

20 JUDGE RIVERA: And that's why it doesn't fit  
21 under - - -

22 MR. DOBBS: It is the central - - -

23 JUDGE RIVERA: - - - this provision?

24 MR. DOBBS: - - - it is the central purpose of  
25 the lease, both as acknowledged in section 14 of the lease

1 and as in - - - alleged in the complaint. Whereas, in the  
2 consents and approval land, getting a sublessor is not the  
3 most important thing that my client is going to do.

4 JUDGE RIVERA: So - - - I'm sorry. So since  
5 they've already approved, however, when they commit the  
6 alleged first brief, what - - - they're - - - they're  
7 simply not cooperating? That's what you call that?

8 MR. DOBBS: They're not cooperating in executing  
9 the agreement in the rubric of the lease - - -

10 JUDGE RIVERA: Okay. Even - - -

11 MR. DOBBS: - - - in the blackletter.

12 JUDGE RIVERA: - - - even even though cooperation  
13 refers to documents, not the agreement?

14 MR. DOBBS: They're supposed to cooperate in  
15 executing documents that comply with the terms of the  
16 lease.

17 JUDGE RIVERA: Correct.

18 MR. DOBBS: And so the only grounds under which  
19 they could refuse to sign an agreement, which is - - - was  
20 if it did not comply with the terms of the lease. And  
21 here, with respect to a cure agreement, the - - - the  
22 reasons - - - the - - - the - - - to comply with the lease,  
23 it had to provide for a condominium of a certain number of  
24 square feet and a square footage of affordable housing that  
25 was approximately 15,000. And landlord, unlike the places

1 where their consent or approval could not be unreasonably  
2 withheld, didn't have any discretion there. Because as you  
3 say, Judge Rivera, their approval and consent was baked in  
4 when they signed the lease. This was pre-negotiated - - -

5 CHIEF JUDGE WILSON: Thank you, Counsel.

6 MR. DOBBS: - - - unlike the other things.

7 MR. TURKEL: I'll be extremely brief, Your Honor.  
8 There's no concept of pre-approval in this lease. Any time  
9 a cure agreement was submitted - - -

10 JUDGE RIVERA: What did you agree to?

11 MR. TURKEL: I'm sorry?

12 JUDGE RIVERA: What did you agree to?

13 MR. TURKEL: We agreed to sign - - - or we agreed  
14 to not unreasonably withhold consent or approval to any  
15 document. But we had the right to refuse to do so if we  
16 believed that it was inconsistent with the lease, and  
17 that's the position that we took since 2016. They went to  
18 court. They said it's within the lease. We said it's  
19 contrary to the lease. I wish we would have gone to court.  
20 I wish they would have pursued it. I wish we would have  
21 found out eight years ago, but unfortunately we didn't.  
22 Counsel says in his brief, and he just said that if you  
23 look at the record we always said, well, if they give us a  
24 good one, we'll sign it, we'll sign it, we'll sign it.  
25 There's nothing in the record that says that. Absolutely

1 nothing. Check the record cites.

2 JUDGE RIVERA: Well, what - - - what were you  
3 communicating to them the first time - - -

4 MR. TURKEL: We were saying we're not signing  
5 this because you're asking for more square footage for non  
6 - - - for low - - -

7 JUDGE RIVERA: Affordable housing?

8 MR. TURKEL: Affordable. Thank you. Affordable.  
9 Then that's permitted. We were absolutely willing to  
10 litigate that and they never pursued it, and if they had  
11 pursued it we would be in a totally different posture here.

12 JUDGE RIVERA: And the flip side of that isn't,  
13 and if you took care of that, we have no other problem with  
14 this document? If that's the only problem you identified,  
15 and they went about the business of resolving that, would  
16 you have to sign?

17 MR. TURKEL: If the court ruled that it wasn't  
18 contrary at that point, we would have had to sign; that's  
19 correct. We didn't know about the serial harassment at  
20 that time in 2006.

21 JUDGE RIVERA: No. I understand you think you've  
22 got a different basis for the - - - what they claim is the  
23 second alleged breach - - - anticipatory breach, however  
24 you want to call it. You said any breach is a breach, so  
25 I'll go with that for the moment. But then, once you make

1 a different statement, aren't they then able to read that  
2 statement - - - for purposes of the motion to dismiss in  
3 their complaint - - - as now it is not a question of  
4 whether or not we can resolve the dispute but this is  
5 completely off the table, which is contrary to the  
6 arrangement we entered into? Which is that they would  
7 cooperate with the documents as long as it fit whatever  
8 categories you all agreed to. Right?

9 MR. TURKEL: Right.

10 JUDGE RIVERA: Is that not an inference that can  
11 be made? It's a motion to dismiss.

12 MR. TURKEL: Not - - - not if we give 3309 its  
13 due and its effect.

14 JUDGE RIVERA: Okay.

15 MR. TURKEL: A breach is a breach is a breach.  
16 They're saying we're refusing to consent and approve,  
17 whether it's this one or forever and ever, we're - - - that  
18 is where this falls in their sole remedy.

19 JUDGE RIVERA: But you - - - you - - - would you  
20 not agree that there are - - - yes. A breach may be a  
21 breach, but the substance of the breach is what you're  
22 debating. Right?

23 MR. TURKEL: Your Honor, what - - -

24 JUDGE RIVERA: The first breach is you're not  
25 agreeing to this or you're not cooperating. But they're

1           arguing it satisfies all the requirements, you have no  
2           basis not to cooperate. The second one is you've  
3           absolutely taken cooperation off the table. You will never  
4           sign off on this. There's nothing we can do to get you  
5           there.

6                       MR. TURKEL: I think the statement - - -

7                       JUDGE RIVERA: It does seem substantively  
8           different. No?

9                       MR. TURKEL: I think the - - - if - - - if - - -  
10          if one ignores the fact that statement that we will never  
11          sign it, is absurd in view of 3309, which gives them the  
12          right to go to court and get us to sign. And even if we  
13          refuse to sign, at that point, the court would have deemed  
14          it signed. They had a perfect remedy under a clause that  
15          gave them perfect relief. They decided not to exercise it,  
16          and they decided to seek damages that they waived to the  
17          fullest extent of the law. Thank you.

18                      CHIEF JUDGE WILSON: Thank you.

19                      (Court is adjourned)

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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Audthan LLC v. Nick & Duke, LLC, No. 30 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

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Date: March 16, 2024

