SECOND INNING 1, L.L.C., **Plaintiff-Appellant,** **v.** **RELAP L.L.C., MARCEL Z. ANTAKI, ESTATE OF LILIANE ANTAKI, ALAN ANTAKI, ROGER ANTAKI AND NICHOLAS ANTAKI,** **Defendants, Respondents/Cross-Appellants.**	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-129-23** **ON APPEAL FROM THE CHANCERY DIVISION: MORRIS COUNTY, DOCKET NO. C-94-18 (Sat Below: Hon. Stephan C. Hansbury)** **Civil Action**

APPEAL BRIEF OF PLAINTIFF/APPELLANT SECOND INNING 1, L.L.C.

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PRELIMINARY STATEMENT

Second Inning 1, L.L.C. ("Second Inning" or "SI") is an adult day care center located in Hanover Township caring for elderly and disabled clients. Second Inning and defendant Relap, L.L.C. ("Relap") had entered into several leases at the location where Second Inning's adult day care center is located. The initial lease was entered into in 2008 and provided that Second Inning was to obtain all municipal and governmental approvals for its center. The parties also entered into a number of other leases including the Third Lease Amendment (also referred to as "Third Lease" and "TLA") for expansion of its center which is at issue in this case. The Third Lease Amendment amended the initial lease and provided that Second Inning only had to obtain permits for the work to be done under the Third Amendment. Further, the Third Lease included an Exhibit B which was designated an integral part of the lease where Relap specifically leased color-coded parking spaces to Second Inning as well as other tenants in the building. The Third Lease also included an Exhibit C which set forth all the work to be performed by Second Inning which no longer included obtaining approvals.

Significantly, Marcel Antaki, Relap's managing partner, represented to Second Inning that all the municipal court approvals for the expansion had already been obtained by Relap before Second Inning signed the Third Lease. Further, Mr. Antaki also acknowledged that he had striped the parking spaces set forth in the Third Lease and had also installed signs on those spaces with Second Inning's name and that Second Inning was using those spaces before the parties

signed the Third Lease Amendment. As it turned out, his representation that the approvals were in place was false as approvals had not been obtained and Second Inning could not expand its center to its detriment and the detriment of its clientele. Mr. Antaki pled guilty to a municipal court summons for assigning spaces to SI without prior municipal approval. Second Inning sued for breach of contract, fraudulent inducement, negligent misrepresentation, fraud, tortious interference with its prospective economic benefit, conversion, and related claims.

The Hon. Stephan Hansbury, egregiously erred by entering judgment in favor of defendants. The judgment was contrary to his own decision where Judge Hansbury expressly found as a matter of fact that "plaintiffs testified and the court accepts as true that Marcel Antaki told them when they entered into the Third Lease Amendment that the Planning Board had approved the parking set forth in the lease." Thus, based on his own findings of fact, the trial court should have entered judgment in favor of Second Inning. The trial Judge erred by holding that Second Inning had the obligation to obtain approvals for the parking which was also contrary to Judge Hansbury's additional finding of fact that Relap filed for site plan approval for the parking spaces. It is also contrary to Mr. Antaki's admission that he was the one who erred by assigning the spaces to Second Inning notwithstanding his knowledge that a prior 2000 site plan approval restricted the parking spaces allocated to the adult day care center as well as the other tenants on the premises.

Judge Hanbury's decision was also directly contrary to the parties' conduct. Mr. Antaki was the only one who applied for site plan exemptions to the Planning Board, which were all denied, and very significantly, Relap did file the site plan with the Planning Board, as the Court itself found, thus confirming that Relap was responsible for obtaining the requisite parking. In that site plan, Relap sought to eliminate Second Inning's overnight parking of its vans on the premises which would have seriously jeopardized its operations. Relap had also illegally sought to terminate Second Inning's third lease and sought to cancel the parking spaces assigned to Second Inning. The Hon. Maritza Berdote Byrne entered a preliminary injunction enjoining these illegal actions and enjoined defendants from proceeding with their site plan because it eliminated the overnight parking. In another egregious ruling, the trial court reversed our most basic equitable principles and placed the onus on the victim, Second Inning, and held that it had to seek to remove the ban on overnight parking, while that was the responsibility of defendants, who were the wrongdoers and the ones who filed the site plan. The trial court also failed to recognize that additional parking spaces were required for all the tenants on the building, including a company owned by defendants, thus further confirming that only Relap as the owner had the responsibility to obtain the requisite approvals.

Finally, the trial court erred by imposing sanctions and fees against Second Inning and its counsel, despite the fact that Judge Berdote Byrne had entered a preliminary injunction granting Second Inning relief from all the defendants.

PROCEDURAL HISTORY[1]

Second Inning filed a Complaint and Order to Show Cause on September 12, 2018 against defendants for breach of Second Inning's Third Lease Amendment. Second Inning sued for breach of contract, fraud in the inducement and negligent misrepresentation based on defendants' representation that all approvals were in place for the expansion, tortious interference with prospective economic advantage and contractual relations, breach of the implied covenants of good faith and fair dealing, breach of the covenant of quiet enjoyment, conversion, and unjust enrichment. (Pa54-83) The Hon. Maritza Berdote Byrne entered a Temporary Restraining Order on September 14, 2018 and a Preliminary Injunction against all the defendants on October 22, 2018 finding that Plaintiff Second Inning met the standards for a preliminary injunction including probability of success on its claims and enjoined all of the defendants from continuing their breaches of the lease. (P-87, Pa256-258) Relap's managing partner, Marcel Antaki[2], repeatedly violated and refused to comply with Judge

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[1] Pursuant to R. 2:6-8, references to transcripts are as follows: 1T: January 20, 2022 hearing on motions for summary judgment; 2T: August 8, 2022 trial; 3T: Aug. 9, 2022 trial; 4T: August 11, 2022 trial; 5T: August 29, 2022 Trial; 6T: August 30, 2022 trial; 7T: September 1, 2022 trial; 8T: September 6, 2022 trial; 9T: September 8, 2022 trial; 10T: September 13, 2022 trial; 11T: September 15, 2022 trial; 12T: September 22, 2022 trial; 13T: October 6, 2022 trial; 14T: October 25, 2022 trial; 15T: March 20, 2023 hearing on motions for sanctions.

[2] References in this Brief to "Mr. Antaki" will be to the managing member, Marcel Antaki.

Berdote Byrne's Orders and was cavaliere about his non-compliance, stating that he had no intention of complying with Judge Berdote Byrne's orders and that he will "eventually" comply with the orders, but only if rendered by "another court". (7T95:1-96:2) Thus, for example, the Court's Preliminary Injunction Order enjoined all the defendants from interfering with SI's overnight parking. Despite this Order, on the very next day after entry of the Order, Marcel Antaki as the managing partner of Relap signed two municipal court summonses against both of Second Inning's two owners to have them fined for overnight parking. (P-31; P-32; P-33; Pa452-455; 3T36:8-42:4; 7T84:4-18) Nor did defendants comply with the Court's Order to return Second Inning's parking spaces. (3T43:18-44:19) Nor did they comply with the Court's order to post signs with SI's names and not to let other tenants use SI's spaces. (3T44:20-51:19; P-37, P-38, P-39, P-40, Pa456-463) The Court issued additional Orders on December 19, 2018, on March 12, 2019 and again on May 28, 2019 finding that defendants violated the Court's orders and further ordered defendants to comply with the prior Orders, and these Orders were also violated. (P-88 at ¶3; P-89 at ¶¶1-5, 8-9; P-90 at ¶¶ 3-4; Pa259-290; 3T39:8-51:19)

Defendants also changed the locks on SI's utilities room and also barricaded the utilities room, despite the fact that SI had paid for its own separate utilities room. That caused several months of power outages including outages in the nursing station, social worker's office and other areas of the adult day care

center. (3T145:6-152:1; 8T128:12-130:1; P-68; P-69, Pa469-476) Defendants did not timely provide SI with keys to their utilities room as directed by the Court in its March 12, 2019 Order at ¶6. (P-89, Pa267; 3T151:13-152:1) Defendants also did not timely comply with the Court's Orders ordering that they provide SI with a key to the premises. Mr. Antaki admits, that to the contrary, he barricaded the door of SI's expansion space. (P-87 at ¶A., Pa257; 7T105:22-25) It was not until late 2019, when Mr. Antaki was replaced as the manager, that defendants complied with some, but not all the provisions of the Court's Orders, including their failure to return all the spaces. As of the date of the trial, defendants were still in violation of provisions of the Court's Orders. (3T51:6-17; 156:4-11; 158:17-19; P-93, Pa464-468)

SI filed its Second Amended Complaint on October 13, 2021. (Pa203-236) After all discovery was completed, Defendants filed motions for summary judgment seeking dismissal of all of the counts in Second Inning's Second Amended Complaint which were denied (except for one individual defendant) by Judge Berdote Byrne by decision and Order dated February 25, 2022. (Pa295-312) In denying defendants' motions, Judge Berdote Byrne ruled that Second Inning's claims "are substantiated by the evidentiary record." (Id. at 10, Pa 304)

This case was tried before Judge Hansbury on 13 trial days commencing on August 8, 2022 and ending on October 25, 2022. The trial court first ruled on several motions in limine at the beginning of the trial. The court allowed

admission of extrinsic evidence in the interpretation of the TLA. (2T46:10-12) As Judge Hansbury stated: "It's pretty clear to me that there was conduct of the defendant which contradicts the integrated lease such as we heard from Mr. Kyreakakis. . . . and there is an issue of fraud, too, which would allow some of the parol evidence rule to be overcome." (2T46:20-25) During the arguments on defendants' motions in limine, Judge Hansbury categorically rejected defendants' position that they should prevail in their position that SI was responsible for obtaining the approvals based on the terms of the Third Lease Amendment. As the Court stated:

> Let me ask both of you, Mr. Dolan and Mr. Baldassare, if there were as simple as you say, you look at the lease, you make a decision -- bingo. How did we get four years down the road with no decision? . . . I have to tell you, that wasn't helpful. I only say that because if it's as simple as Mr. Dolan says, you read the lease, it's clear, you make a decision -- bingo. That would have been decided by motion months, years ago. [2T32:10-33:10]

Over the objection of SI, by Order entered on August 12, 2022, the court excluded evidence of Marcel Antaki's physical assault on Second Inning's administrator which required her to immediately go to the hospital which diagnosed her with a chest contusion. (Pa38-39; 2T52:22-55:16; P-74; P-75; P-76, Pa481-490) The trial court also excluded Mr. Antaki's racist remarks against SI's clients. (Pa38-39; 2T51:21-52:21, 56:23-61:16; P-70; P-71; P-72; P-73, Pa 477-480)

On November 15, 2022 the trial court entered an Order granting defendants' involuntary dismissal motions and dismissed the counts in Second Inning's Complaint against several defendants. (Pa35-37) On the same day, the trial court also entered its judgment and decision dismissing all of the remaining counts in Second Inning's Complaint against the remaining defendants (Pa26-34), notwithstanding the Court's finding that Relap's managing partner had falsely represented to Second Inning's principals at the time they entered into the Third Lease that the Planning Board had already approved the parking set forth in the Third Lease. (Pa30)

On December 2 and 5, 2022, defendants filed motions for sanctions and attorneys' fees against Second Inning and its counsel who filed their opposition on December 28, 2022. On March 28, 2023 the trial court granted two of the defendants' motions to impose sanctions on Second Inning and its law firm and ordered defendants to file certifications with an itemization of their fees and ordered Second Inning and its law firm to file their objections to the proposed fees and ordered defendants to file their reply. (Pa40-45) On September 11, 2023 the court entered an Order with a Statement of Reasons awarding two defendants fees against Second Inning and its law firm in the total amount of $56,393.95. (Pa46-53)

STATEMENT OF FACTS

Second Inning is an adult day care center which takes care of elderly clients

who suffer from various maladies, including dementia, high blood pressure, diabetes and other conditions. Many of them use wheelchairs and canes for walking. The center is open for two shifts from 9 am to 1:30 pm and 1:30 pm to 7 pm and provides two meals a day to its clientele. There are numerous employees on staff including nurses and an activities director. The clients are kept active with several different activities including bingo, shopping trips, games and religious activities. SI also takes the clients to their doctors' appointments. (2T161:15-163:12; 3T13:12-20; 8T101:4-104:12)

SI and Relap entered into several leases on property owned by Relap at 155 Algonquin Parkway in Whippany, New Jersey. The first lease was entered into on April 1, 2008 and was for 6,1115 square feet and provided for 14 parking spaces. (P-2, Pa316-340) It was prepared by Relap's attorney. (5T87:12-88:6) That lease provided that SI would be responsible for obtaining zoning and municipal approvals from the township. Notwithstanding this provision, Mr. Antaki told SI that it only needed 14 parking spaces and those had already been approved and SI then received its certificate of occupancy. (2T160:6-161:14; 8T154:3-8; P-10, Pa363) The lease also had a quiet enjoyment clause. (P-2 at 18, Pa333) A Second Lease Amendment ("Second Lease") was entered into on May 15, 2013 and provided for 16 parking spaces. (P-4, Pa344-348) Marcel Antaki prepared the Second Lease. (2T177:10-12) Again, Mr. Antaki told SI that approvals for these parking spaces were already in place. (2T168:1-170:16;

8T154:23-155:17) Under that lease, SI expanded its facility by 1,050 square feet to increase its clients from 78 in number to 100. SI received state approvals for that expansion and also retained a contractor who constructed the expansion. (8T154:23-158:22) Within only a few weeks, the clientele increased to 100 clients in the first shift. (2T182:22-183:8)

Marcel Antaki was the manager of Relap during all three leases. (7T6:7-21) SI never engaged in any communications with the Township as to parking under any of its leases. (2T243:4-10) Only Marcel Antaki dealt with the Township to obtain SI's Certificates of Occupancy. (3T17:16-18:10) Mr. Antaki obtained the municipal approvals for SI's first and second leases. (8T200:1-17) In the first and second leases, Marcel Antaki advised SI that all parking approvals were in place, and they can proceed to obtain the permits which SI did, and then SI received its Certificates of Occupancy under both leases. (2T240:20-243:14; 4T192:3-193:23; P-10; P-11, Pa363-364.)

On July 1, 2016, SI entered into a Third Lease Amendment which is at issue in this case. (P-5, Pa349-357) Mr. Antaki prepared that lease, including the exhibits to that lease. (7T135:15-17; 2T177:5-12; 193:17-194:23) SI was not represented by counsel. (2T177:5-15) The lease ran to July 2025. (2T225:6-10, Pa 350) The rent and CAM charges for the additional space under the Third Lease was approximately $5,000 per month and SI remained current on its rent payments, right through the trial. (2T227:2-5; P-5 at 2, Pa350) The TLA

expanded the space of the center an additional 3,819 square feet. (P-5, Pa349) Mr. Antaki advised SI before it signed the lease that 44 spaces were required under that expansion and that he had already obtained approval from Hanover Township for this additional parking. (2T182:2-4; 183:17-184:2; 192:4-9; 8T159:10-20) The Third Lease removed the language in the initial lease that required SI to obtain zoning and municipal approvals and instead provided that SI only had to obtain the permits for the renovation. (2T201:24-202:19; P-5 at 1, Pa349). Jagat Mehta, one of SI's principals, explained that that language had been changed because the "zoning authority is done" as Mr. Antaki told them before SI signed the TLA that the Township had already approved the parking spaces in the Third Lease. (2T183:17-184:2; 201:24-202:19) Judge Hansbury understood this testimony and stated on the record that "the zoning okays were done so that the language wasn't there." (2T203:11-13) Mr. Antaki included an Exhibit B to the lease which was a color-coded diagram showing, by different colors, the specific spaces allotted to SI, as well as the spaces allotted to two other tenants, Little Genius Academy ("Little Genius"), a child day care center, and Marli Shipping, Inc. ("Marli"), a company which was owned by Marcel Antaki and thereafter by his goddaughter. (6T133:18-25, Pa355) The color-coded Exhibit B included the 44 spaces to SI for which Mr. Antaki had told SI that he had already obtained approval from the Township before SI signed the TLA. (2T181:14-182:24; 184:3-192:7) He also included an Exhibit C to the lease,

entitled "Works to Be Done by Tenant at Tenant's Sole Expense" which set forth all the work to be performed by SI under this lease and none of that included obtaining approvals for the parking. (Pa356-357) Mr. Antaki prepared Exhibit C and told SI that he had obtained approval from the Township to do that work and once that was completed SI would receive its CO. (2T193:17-194:23; 8T164:3-9) The Third Lease designated that Exhibits B and C to the Lease both "form an integral part of this Amendment." (Pa350) Further, both Mr. Antaki and SI's principals testified that before SI signed the Third Lease, Mr. Antaki had striped the spaces assigned to SI in the Third Lease and had put up signs on those parking spaces stating for SI's use only. (2T193:9-16; 5T113:16-19; 7T10:21-11:4; 8T159:15-160:9) Further, both Mr. Antaki and Mr. Mehta both testified that SI had already been using those spaces before SI signed the Third Lease. (5T17:2-3; 117:2-5; 7T11:5-9; 8T160:11-13) And Mr. Antaki testified that SI continued to use the spaces after the lease was signed. (6T64:21-25)

SI sought to expand its space in the Third Lease to service substantially more clients, a total of 170 for each shift. It had 140 registered clients for the first shift but could only service 100 at a time under its prior state approvals. (3T166:2-167:4) SI's clientele would therefore have immediately increased to the full 140 registered clients once the center was renovated and opened. (3T167:25-168:7) And it was estimated that SI would reach the new 170 clientele capacity for the first shift within 3 months. (3T168:8-169:3) The clients in the

first shift were of Indian descent. As many as 85 clients had registered for the second shift but many of them left because the facility had Hindu décor and they wanted a more Americanized setting. (4T6:17-10:3; 8T116:16-118:14) SI was going to renovate the expansion space under the Third Lease to a more neutral setting to attract more clients in its second shift. (4T9:16-10:3; 8T116:16-119:2) It was estimated that the clients would quickly increase from the present level of 25-28 clients in the second shift to 80 to 90 clients in the second shift once it completed the renovation. (8T117:2-5, 122:1-23) Insurance companies were sending SI clients they could not take because of its limited approved capacity and the lack of a neutral décor for the second shift whom SI would be able to service once the expansion was completed. (3T168:24-169:8; 2T196:17-197:4; 4T6:17-13:25; 8T122:8-23)

SI had a key competitive advantage over the other adult day care providers as it is the only adult day care center in Morris County which is approved by all 5 HMO insurance companies who pay for the clients. (3T168:8-171:20) Two of these insurance companies put a future moratorium on servicing adult day care centers, but they still serviced SI's clients. (4T11:23-12:14) Another competitive advantage SI had was that it was the only facility in Morris County which catered to Hispanics, Afro Americans and Caucasian clients in its second shift. The other facilities in Morris County catered to Hindu and Chinese clientele. (8T122:14-123:22)

SI received state approval to increase its center to 170 clients per shift, including approval of the architectural plans. (2T208:23-213:24; P-12; P-13; P-14, Pa365-405) SI advised Marcel Antaki of the state approvals and they were all excited, including Mr. Antaki. (2T214:1-215:10) If the zoning had been in place as Marcel Antaki had represented, SI would have immediately proceeded with the renovation. (4T169:6-10) SI had entered into an agreement for the renovation to be done by the same contractor who renovated the additional space under the Second Lease. (P-15, Pa406-411; 2T215:14-216:3; 222:16-223:3) The contract price for the renovation was $296,875 and SI had the funds in place to pay for this renovation. (8T165:4-24) It would have taken only 3 months to complete the renovation. (5T40:22-41:10)

SI is required by state regulation N.J.A.C. 10:164-1.4(b) to pick up its clients from their homes and to transport them back to their homes. (8T106:7-16; P-105, Pa438-439) SI has a fleet of vehicles, including one 35-passenger bus, two 25-passenger buses, five 15-passenger sprinters, vans, minivans and compact cars to transport its clients from and to their homes. (8T107:5-13; 2T165:24-166:8) SI parked its vehicles overnight on the parking lot of their adult day care center without any problem from the inception of its initial 2008 lease with Relap until September 2018 when defendants unilaterally eliminated SI's overnight parking, without any prior discussion or notice. (8T177:9-16; P-23, Pa421-424) Marcel Antaki had advised SI from the first lease that they could park their

vehicles overnight. (8T177:9-16) Mr. Antaki admitted that he never objected to SI's overnight parking until September 2018. (7T59:23-60:18; 8T177:12-16) Under all the leases, there is only one space that is restricted as to the hours when SI can park there, as conceded by Mr. Antaki at the trial. (2T174:2-14; 5T107:24-108:10; P-4 at ¶6, Pa344)

SI cannot operate its adult day care center without overnight parking. (2T165:5-12; 8T173:3-18) The township ordinances require that any overnight parking must be on the premises where the building is located. (Hanover Tp. Ordinance § 166-124, "Outdoor Storage", Sections A. (1), (2), (3), (5), and (7), P-27, Pa444-445) Sean Donlon, the zoning officer for Hanover Township, confirmed that an adult day care center is a permitted use in Hanover Township's industrial zone and that under the Township's ordinances overnight parking must be on the premises of the building where the tenant has its business. (8T57:22-59:14; 73:16-22) Mr. Donlon testified that the governing ordinance requires that the overnight parking has to be on the side and/or rear yard of the building where the tenancy is located. (8T60:4-11; P-27, Section A.(5), Pa445). Mr. Donlon also testified that overnight parking is allowed by Township ordinance if it is included in a site plan filed with the Planning Board. (8T57:12-58:9; P-27, Section A.(7), Pa445) He testified that whether overnight parking will be allowed is controlled by the owner, in this case, Relap and the defendants who own Relap. (8T61:17-21; P-65, Pa591-596; P-80, Pa615-616) Mr. Donlon also confirmed

that only Relap filed a site plan with the Planning Board, and not SI. (8T50:3-12; P-65, Pa591-596, P-66, Pa597-609)

The State would not approve SI's day care facility without overnight parking. (2T165:5-12) Even if SI could park its vehicles overnight at another location, that would be cost prohibitive due to the substantial rent that would be required for those vehicles and the increased expense for the additional hours its employees would have to expend to go back and forth to park and pick up vehicles at another location. (8T173:3-174:5) SI's insurer also required that the transport vehicles be parked on the site or otherwise the insurance would skyrocket. (4T166:9-24) If SI knew that defendants would unilaterally void SI's right to park overnight which existed since the inception of its tenancy, it would have requested a substantial decrease in the rent before signing. (4T196:5-10) Every adult day care center known by the SI principals and their administrator has overnight parking on the premises of the building where the center is located. (2T164:16-18; 8T9/6:108:16-21) Mr. Mehta explained that "[w]e would be completely out of business" if SI did not have overnight parking. (3T34:25-35:4)

After entering into the Third Lease upon Mr. Antaki's representation that the Planning Board had approved the parking in the Third Lease, SI's builder was denied a permit to perform the renovation. The denial was due to insufficient parking which was contrary to Mr. Antaki's representation to SI that all approvals were in place and contrary to the spaces expressly leased to SI in the TLA.

(2T228:19-230:18, 236:23-237:16). Mr. Antaki filed several site plan exemption applications with the Township to allow for the parking spaces required by all three tenants on the premises without having to go to the Planning Board. (P-51; P-117; Pa623-629) One of the applications Mr. Antaki filed was for 92 parking spaces required for all three tenants. (P-117, Pa623-627) However, they were all rejected because the parking was insufficient for the uses being made on the premises by all three tenants. (6T26:14-27:3; P-116; P-118, Pa621-622, 630-631) Mr. Antaki agreed that the parking was not sufficient for the uses made on the premises by all three tenants. (7T25:20-26:15) Mr. Antaki testified that he always knew that the parking was insufficient for the three tenants. (7T25:20-26:15) Second Inning was unaware of these site plan exemption filings by Mr. Antaki who did not copy SI on them. (5T27:20-28:19, P-51, P-117) SI thought that the approvals were already in place based on Mr. Antaki's representations before they signed the TLA that the approvals were already done and based on the fact that the parking spaces were included in the TLA and were striped with SI's names on signs on those spaces and SI was already using those spaces before execution of the TLA. (5T28:14-23; 113:16-19; 117:2-5; 2T193:9-16). Sean Donlon, the township zoning official, testified that all his communications and meetings as to the site plan exemptions were solely with Marcel Antaki and not with SI. (8T7:20-9:20; 24:13-15)

Instead of fulfilling his promises, Mr. Antaki terminated SI's Third Lease, took away the parking spaces set forth in the Third Lease, cancelled its overnight parking, reduced its hours of operation which would have eliminated its second shift, ceased SI's operation on Saturdays which was sometimes required on a holiday week, and locked SI out of its premises. (2T244:21-245:11; 247:9-248:10; 259:5-13; 263:3-12; 272:24-274:8; 3T13:12-17:15; 6T63:12-65:14; 72:16-74:11; P-16, P-20, P-21, P-23, P-24, P-25, Pa417-418, 421-429) This was in violation of the Township's having previously allowed daily operations for the adult day care center from 7 am to 7 pm. (4T156:6-8) Mr. Antaki knew that his restrictions on the daily hours would eliminate the second shift as he was often present at the time of the second shift. (8T112:7-13)

SI also discovered from an OPRA request that defendants had submitted a site plan to the Hanover Planning Board, but they had eliminated SI's overnight parking in that plan, despite the fact that the Planning Board gave defendants an option to have overnight parking. (P-28, P-29, P-66, Pa448-450, 597-609; 3T31:24-34:24) Mr. Antaki warned SI that there would be "ZERO Tolerance" if they did not comply with his demands, they would be assessed a fine, their vehicles would be immobilized and towed away, and they would be in store for a "lot of unpleasant surprises" and that he would also arm himself with a gun. (2T265:14-276:14; 6T72:16-73:24; P-23, P-24, P-25, Pa421-427) Mr. Antaki admitted that since 2008, he never before wrote to SI eliminating their overnight

parking, decreasing their daily hours nor eliminating Saturday sessions. (7T59:18-60:18; 6T72:16-74:20, 82:14-17, 90:18-91:19)

It was discovered after SI's counsel filed its OPRA requests, that Mr. Antaki had assigned parking spaces to SI under the Third Lease and also assigned parking spaces under Relap's lease with Little Genius which violated a July 24, 2000 site plan. (P-54; P-55, Pa561-562) Under that plan, there were only 47 approved spaces for all of the tenants: SI was limited to 15 spaces; the child care center was limited to 28 spaces, and Colonial, the defendants' company, was limited to 4 spaces. (6T121:24-122:6; P-108, Pa617-620) Mr. Antaki admitted that he was aware of those parking limitations and had a copy of the 2000 approved site plan in his possession when he illegally assigned the spaces to SI in its TLA and to Little Genius in its lease. (5T156:8-18) He knew that the 2000 plan limited the adult day care center to 15 spaces when he prepared Exhibit B to SI's Third Lease Amendment which assigned SI many more spaces than allowed by the 2000 plan. (5T156:11-18, 6T121:24-122:6, P-108, Pa617-620) When he was asked whether he knew that Exhibit B was not in compliance with the 2000 plan, Mr. Antaki responded: "Sure, correct." (5T135:18-21) In a clear acknowledgement that he had indeed assigned the 44 spaces to SI in the third lease, he stated that he was culpable of "exceeding my authority . . . my jurisdiction," (5T136:22-141:4; 156:11-18) In yet another acknowledgment that he had told SI that he had leased the additional 16 spaces in the TLA, he admitted:

"And based on my, how you call it, ignorance of the law, I assigned them the 16 [additional] spaces [in the TLA]." (5T141:1-4.) He also admitted that he had assigned two spaces in SI's Second Lease beyond the parking spaces allocated in the 2000 site plan and acknowledged: "That was my decision." (5T107:19-23) In another major admission, Mr. Antaki stated in a September 18, 2017 letter that he had deviated and violated the 2000 plan in assigning spaces to the tenants on the premises under Relap's leases with SI and Little Genius. As he wrote in that letter to Little Genius: "Such deviations . . . were, in fact, in violation of the terms of the Planning Board's resolution for operation of your demised premises". (6T33:18-34:20; 45:9-15; P-52, Pa524) Mr. Antaki was issued summonses by Sean Donlon, the zoning officer for Hanover Township for changing the configuration of the parking lot in violation of the 2000 plan to which he pleaded guilty. (6T61:21-63:11; 155:22-156:4; 8T6:17-7:9; 12:18-25; 14:12-21; P-119, P-131, Pa632-640) Mr. Antaki admitted: "I am the responsible guy and I am the guilty guy." (6T62:23-63:1) He pleaded guilty and also paid a fine of $789. (6T62:19-63:4, P-119, Pa639-640) Mr. Antaki was then ordered by Mr. Donlon to re-sign the parking spaces to conform to the 2000 plan which he had violated. (5T163:5-6; 8T21:24-22:8)

Mr. Antaki penalized SI for his illegal actions and took away its parking spaces and gave them to Little Genius because Mr. Antaki had not allocated enough parking spaces to Little Genius under its lease with Little Genius as

required by the 2000 site plan and Little Genius was in jeopardy of losing its license. (5T159:2-11; 164:23-165:8; P-48; P-109; P-110, P-111, P-112, P-52, Pa514-521, 524-560) Mr. Antaki himself removed SI's signs from its TLA parking spaces and put-up signs making those spaces exclusive to Little Genius. (6T6:6-17; 8T126:12-18, 128:1-11; P-36, Pa435-436) As a result, SI was left with only 1 drop-off pick up spot which made it very difficult for its elderly clientele who were on wheelchairs and strollers to be removed from the transport vehicles. (2T271:3-14; 8T169:9-19) Mr. Antaki's response to this untenable situation was: "This is their problem." (5T171:2-12) In order to cover up his illegal assignment of parking spaces, Mr. Antaki admitted that he had instructed Little Genius to "destroy" the initial lease in which he had violated the allocation in the 2000 plan and to replace it with a new lease. Little Genius refused to engage in this coverup and did not sign the substitute lease. (6T59:1-21; P-52, Pa524-560)

On July 9, 2016, about the same date of the Third Lease, one of the companies on the premises owned by defendants, Marli Shipping, Inc., filed an application with Hanover Tp. to convert its space from warehouse to office space, which would require at least 17 spaces. (P-58, Pa563-579) Under the township ordinance, office space required substantially more parking than warehouse space. (6T113:9-114:2; 116:15-17, 120:10-18; 9T27:25-29:2; Ordinance §166-155, P-59, Pa580-582) Mr. Antaki admitted that under the applicable ordinance,

additional parking would be required for Marli when it applied to convert its warehouse space to office space. (6T120:10-18) Susan Blickstein, AICP/PP, a Professional Planner, testified that Marli would actually need a total of 23 parking spaces for its conversion of warehouse space to office space. (9T50:5-12) This was substantially greater than the 4 spaces allotted in the 2000 approved site plan to Marli's predecessor. (P-108, Pa617-620; 3T142:12-19) Marli had been allocated about 20 parking spaces in Exhibit B of the Third Lease which was well beyond the 4 allowed under the 2000 plan. (3T140:10-141:8) Mr. Antaki admitted that he knew that the spaces he allocated to Marli in the TLA were in violation of the 2000 plan which allocated only 4 spaces to Marli's predecessor. (6T121:24-122:10) The trial judge recognized that if Marli received more parking spaces, that would be to the detriment of the other tenants. (6T111:7-11)

Mr. Donlon, the Township code enforcement officer, testified that a new site plan was required, not only for SI's use of its expanded adult day care center but also for the use being made by Marli (which was owned by defendants' family) of its space which it was converting from warehouse to office space and also the use being made by Little Genius of its child day care center. (8T50:19-52:9; 37:20-38:22; 41:8-43:10) Mr. Donlon testified that Marli's conversion from office to warehouse space would require a total of 23 spaces, 19 more than what was previously approved in the 2000 site plan. (8T50:19-52:9)

Mr. Antaki received several estimates for the reconfiguration of the parking

lot which ranged from $450,000 to $1 Million. (7T112:3-18) Both Little Genius and SI refused to pay for the reconfiguration as that was not their obligation under their respective leases since Relap had already assigned those spaces in SI's Third Lease and, as the trial court found, represented to SI that the approvals were already in place before SI signed the lease. (3T19:7-19; 25:5-13) Mr. Antaki admitted that the cost of the reconfiguration was not a common charge under the leases. (6T146:15-147:6) Mr. Antaki also admitted that none of Relap's tenants had ever paid at any time any part of the cost for any parking or the cost for reconfiguring the parking spaces on the site. (7T113:13-114:19) Mr. Antaki also authored a letter to SI in which he confirmed that Relap is responsible for providing each tenant with parking spaces in proportion to the space they occupied. (P-8, Pa360-361) After the TLA, SI occupied 11,000 square feet which constituted ½ of the building space of 22,000 square feet. Mr. Antaki's letter, sent to SI in his capacity as Relap's manager, further confirms that Relap was responsible to provide SI with the 44 spaces set forth in the TLA. (P-8; 5T88:7-8; 8T196:22-25)

Mr. Antaki testified that "I knew sooner or later" that "the reconfiguration" had to be done "to conform with the different parking plan." (6T161:2-162:9) He conceded that Relap was going to proceed to implement the reconfiguration of the parking so that Second Inning can receive its permits to expand its facility, thus again confirming that Relap was responsible for implementing the parking.

(7T21:11-24; 112:20-113:3)

In recognition by defendants that it was their obligation to file a site plan for the parking required under its leases with the tenants, on November 29, 2017, Relap filed an application for a preliminary and final major site plan approval signed by Liliane Antaki. (6T151:1-154:17; P-65, Pa591-596) The application listed the owners of Relap, with their percentages of ownership as follows: Lilliane Antaki, 40%; Alan Antaki, 20%; Roger Antaki, 20%; and Nicholas Antaki, 20%. (Id.) Relap also paid for an engineering company to prepare the site plan. (7T26:22-28:5; P-64, Pa583-590) In November 2017 Relap filed a site plan with Hanover Township and filed a revised plan in February 2018 and a further revised plan in July 2018 in which it applied for the following number of spaces for each of the three tenants: 23 for Marli; 44 for Second Inning; and 30 for Little Genius. (9T49:7-50:17; P-29, Pa449-450; P-66, Pa597-609) Mr. Antaki admitted that it was Relap which filed the site plan. (6T123:22-24; 7T27:21-28:5, 28:12-30:1; 9T28:19-29:2, P-29, P-66, Pa449-450, 597-609) Mr. Antaki admitted that the site plan submitted by Relap thus requested a total of 92 spaces, an increase for all the tenants. (6T139:10-22; P-29; P-66, Pa Pa449-450, 597-609) Mr. Antaki acknowledged that that these additional spaces on the site plan were required for the uses being made by all three tenants, including for Marli, the company owned by defendants' family. (6T13:7-15; 123:25-125:8; 139:5-140:11) He admitted that that the plan included increasing the parking

spaces for his family's company, Marli, from 4 spaces to 23 spaces. (6T139:5-14)

Marcel Antaki testified based on his experience, he was almost 100% certain that the site plan Relap filed for additional parking spaces for all three tenants would have been approved by the Planning Board. (6T148:20-25) Susan Blickstein, the Professional Planner, testified that an adult day care center is a permitted use in Hanover Township and that the site plan to expand all of the tenants' spaces would have been approved as it fulfilled the criteria set forth in the Township's ordinances. (9T32:2-5; 46:25-47:8) She testified that it would have taken 6 or more months for the plan to be approved after it was put on the initial agenda. (9T53:24-:55:16) Ms. Blickstein further emphasized that the proposed expanded use being made by all the tenants, not just by SI, triggered the requirement of submission of the site plan. (9T62:13-63:3) She testified that one of the key factors driving the need for the additional parking was defendants' company's Marli's conversion from warehouse to office space which would have required 23 spaces. (9T71:22-72:2) She testified that when all the tenants require additional parking, the owner is the one who must file the site plan. (9T65:21-25; 74:3-20)

The Planning Board asked Relap if it wanted to include overnight parking on the premises for its tenants, but Relap rejected overnight parking. (7T63:10-22; P-28; P-29; P-66, Pa448-450, 597-609) Mr. Antaki agreed that defendants

could have allowed overnight parking to SI. (7T65:2-5) Mr. Antaki admits that defendants deliberately decided to omit overnight parking from the site plan they filed with the Township. (7T70:22-71:2) Mr. Antaki was asked at the trial, "you knew that by prohibiting overnight parking that you would be destroying Second Inning's ability to operate its adult day care center, correct?" He responded: "I don't care whether it is correct or not. That is not my responsibility." (7T72:17-22) SI's Verified Complaint in this matter alleged at paragraph 65 that: "Despite the Township's authorization to Relap to include overnight parking in its site plan, which is necessary for Second Inning's use of the premises, and would otherwise put Second Inning out of business, Relap deliberately omitted such overnight parking in the site plan they submitted to the Township where Relap stated there will be no overnight storage of vehicles." (7T73:24-75:16; P-84, Pa239-240) Defendants' sworn answer was: "Defendant admits, it is his right to place that condition." (7T75:18-20; 79:1; P-84, Pa243) Defendants thus admitted in their sworn response that taking away SI's overnight parking would have destroyed SI's adult day care operation. At no time did defendants ever offer to remove their prohibition of overnight parking from the plan they submitted to the Planning Board, including when other defendants such as Roger and Alan Antaki replaced Marcel Antaki as the manager of Relap. (4T35:21-37:2; 5T45:18-21; 8T177:17-21) Alan Antaki testified that he took over as manager in October or November 2019 and learned at that time that Judge Berdote Byrne had entered an

Order on October 22, 2018 enjoining defendants from obstructing or interfering with SI's overnight parking. (13T198:14-199:18; 200:25-201:3) He testified that he also learned that Relap had submitted a site plan that prohibited overnight parking but did nothing as manager to remove that provision. (13T201:4-8; 209:1-19; 213:8-214:2)

Defendants also perpetrated additional frauds on SI, including having SI sign an estoppel certificate for defendants to obtain a $1.75 Million loan which they said would be used to pay for the parking reconfiguration. Liliane and Roger advised that Roger would take over as manager. (8T179:14-180:25) After defendants obtained the loan, they reneged on their agreement and diverted the funds to Alan and Roger. (8T89:16-90:14) They then reinstated Marcel as the manager and Liliane transferred her majority ownership interest to him and told SI that they must hereafter answer to Marcel Antaki. (8T80:20-81:19; 82:5-25; 85:9-21; 86:3-7; 181:1-25; P-106; Pa611-613; 7T42:23-43:14; 48:9-49:6; P-78, Pa614) Roger was the manager for only about 6 weeks during the time of the estoppel certificate and loan. (7T202:24-203:4) Roger Antaki admitted that his father Marcel could have handled obtaining the bank loan. (8T79:23-80:1) Marcel Antaki admitted that Roger "had no experience whatsoever" and that "Roger had no idea whatsoever of the property", thus confirming their scheme was to install him as a sham manager to defraud SI. (7T49:12-13; 6T140:25-141:11) Similarly, Alan Antaki also engaged in this fraud, as he admitted that

Roger was dependent on his advice and thus Alan was in effect the managing partner of Relap during Roger's tenure. (7T195:23-197:10) Alan was aware that defendants asked SI to sign an estoppel certificate but testified that there was never any intention to use those funds to configure the parking lot – thus confirming that Liliane and Roger had lied to SI. (7T201:4-16) The record thus confirms that the members' ownership interests and management authority of Relap was manipulated by defendants to commit various fraudulent schemes on SI.

Second Inning's forensic accountant, Rebecca Fitzhugh, CPA, of Sobel Co., provided testimony over several trial dates detailing the damages sustained by SI as a result of defendants' breaches. This included lost net profits of $4,055,477 through the end of 2022 from the lost net revenue which would have been generated from the new clientele who would have attended SI under the increased enrollment. The damages also included the rent and CAM charges SI paid for the expanded space under the Third Lease which SI was not able to use for its intended purpose which amounted to $368,936 as of the end of the trial. (11T72:9-12; 74:11-12)

ARGUMENT

POINT I: THE COURT'S NOVEMBER 15, 2022 JUDGMENT MUST BE REVERSED AND VACATED AND JUDGMENT SHOULD BE ENTERED BY THE APPELLATE DIVISION IN FAVOR OF SECOND INNING AND AGAINST DEFENDANT RELAP BASED ON THE TRIAL COURT'S FINDINGS OF FACT (Raised Below: Pa26-34, 314-315)

As set forth above, in his decision granting defendants' judgment, the trial court found as a fact that the managing partner of Relap had represented to SI's principals that he had obtained approvals for the parking spaces set forth in the Third Lease before they signed the TLA. Judge Hansbury expressly found as a matter of fact that "plaintiffs testified and the court accepts as true that Marcel Antaki told them when they entered into the Third Lease Amendment that the Planning Board had approved the parking set forth in the lease." (November 25, 2022 Decision at 3, Pa30 , emphasis added) It is undisputed that this was a false statement. Marcel Antaki admitted at the trial that his representation was false as he knew that Second Inning was restricted to only 15 spaces under the 2000 plan when he assigned the 44 spaces to SI in the TLA. (5T135:18-21; 156:8-18, P-108, Pa617-620) He admitted that by assigning 44 spaces to SI in the Third Lease he was "exceeding my authority . . . my jurisdiction" and that he knew that it was in violation of the 2000 site plan and that he had committed "deviations" from that plan. (5T136:22-141:4; 156:11-18; P-52, Pa524) Mr. Antaki admitted that he allocated spaces to all the tenants with knowledge that it was not allowed under the 2000 plan. (5T135:18-21; 156:11-18; 6T121:24-122:10) Marcel Antaki also

instructed Little Genius to destroy their lease and replace it with another one in order for it to conform to the 2000 plan, but Little Genius refused to engage in this coverup. (6T59:1-21, P-52, Pa524-560)

The Court's finding of fact establishes liability under the counts in SI's Second Amended Complaint for negligent misrepresentation (Sixth Count), fraud in the inducement (Fourth Count) and fraud (Fifth Count). The elements of a negligent misrepresentation claim in New Jersey are: (1) the defendant negligently made an incorrect statement; (2) the plaintiff justifiably relied on the defendant's statement; and (3) the plaintiff was injured as a consequence of relying upon that statement. Carroll v. Cellco Partnership, 313 N.J. Super. 488, 502 (App. Div. 1998); See also Rosenblum v. Adler, 93 N.J. 324, 334 (1983). The elements of fraud in the inducement are: (1) misrepresentation of a material fact; (2) knowledge or belief by defendant of its falsity; (3) intent that the other party rely on it; and (4) detrimental reliance thereon by the other party. Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (citing Jewish Center of Sussex County v. Whale, 86 N.J. 619, 625 (1981)). Second Inning also fulfills the elements of legal fraud against Mr. Antaki which include: (1) a material misrepresentation of a presently existing or past fact, (2) knowledge or belief by the defendant of its falsity, (3) an intention that the other person rely on it, (4) reasonable reliance thereon by the other person, and (5) resulting damages." Banco Popular N. Am. v. Gandi, 184

N.J. 161, 172-73 (2005). Accord, Allstate New Jersey Ins. Co., v. Lajara, 222 N.J. 129, 147 (2015); Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610, (1997).

Under settled law, Relap is liable for its managing partner's misrepresentation to Second Inning that the parking had been approved by the Planning Board before the Third Lease was signed. As set forth in Russo v. Creations by Stefano, Inc., 2020 WL 4873188 at *6 (App. Div. 2020) (Pa694-700):

> As for the entity's liability for its agent's wrongs, "[a] corporation ... like a natural person, is bound only by the acts of an agent done within the scope of his authority." Budelman v. White's Exp. & Transfer Co., 49 N.J. Super. 511, 521 (App. Div. 1958). The same is true of an LLC under our limited liability statute, which follows the Revised Uniform Limited Liability Act. "LLCs formed under this act and corporations are subject to the same principles for attributing to the entity the conduct of those who act or purport to act on the entity's behalf." Unif. Ltd. Liab. Co. Act, § 301 cmt. to subsec. (a) (amended 2013). "An LLC may be held liable under general agency law or the provisions of LLC statutes for wrongful acts of members or managers in the scope of the business or their employment." 1 Ribstein and Keatinge on Limited Liability Companies § 11:13 (2020). As Realty's managing member, Simone was vested with broad authority to act for the company. In general, when an LLC opts to be managed by one or more managing members, the managing member "exclusively" decides "any matter relating to the activities of the company." N.J.S.A. 42:2C-37(c). Thus, Realty acts through Simone and, when he commits a tort while acting in the scope of his authority as managing member, or in furtherance of Realty's business, then Realty is liable. [At Pa698]

Thus, based on the trial court's finding of fact, Relap is liable to Second Inning for the torts committed by its managing partner in falsely representing that the Planning Board had already approved the parking before execution of the Third Lease. To permit the court's judgment dismissing these counts to stand notwithstanding this finding of misrepresentation would be the epitome of injustice and would establish an untenable legal precedent. Under this ruling, a party would be allowed to falsely state to another party that certain conditions in their contract had already been met before signing the agreement and when that turned out to be false, the party making that misrepresentation would suffer no consequences and all the detriment would fall on the innocent party to whom the false statement was made.

"A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference" and our appellate courts review such a judgment de novo. Manalapan Realty, L.P. v. Comm. of Manalapan, 140 N.J. 366, 378 (1995); Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019). A Chancery Division judge's decision will be reversed where the court fails to apply established legal principles to his findings of fact. As set forth in Marioni v. Roxy Garments Delivery Co., Inc., 417 N.J. Super. 269, 275-276 (App. Div. 2010), a trial court will be reversed where the "judge's conclusions prove inconsistent with his own findings of fact."

In the present case, Relap's manager's misrepresentation to SI that the Planning Board had approved the parking set forth in the Third Lease parking before SI signed the TLA is an established fact, as found by Judge Hansbury. However, the trial court then failed to correctly apply the law to this established fact. As this Court held in Walid v. Yolanda for Couture, Inc., 425 N.J. Super. 171, 185 (App. Div. 2012), fraud in the inducement of a contract establishes the right "to prosecute a separate action predicated upon the fraud." Judge Hansbury's finding that defendants' manager represented to SI that the Planning Board had approved the parking in the TLA before SI signed the TLA, which was false, thus established defendants' liability under SI's fraud claims.

If not reversed, the trial court's ruling would allow for the following absurd and unjust result in this case: Defendants can misrepresent critical facts to Second Inning before it signed the Third Lease; Second Inning would then be liable to file a site plan and pay for up to $1 Million in reconfiguration costs for the parking lot to conform with the Township ordinances which it was told was already approved; and Second Inning would have had no opportunity to renegotiate the Third Lease had it known up front that the parking approvals were not in place before it signed the lease. Judge Hansbury's own findings of fact compel judgment in favor of Second Inning and against defendants under SI's causes of action. It is therefore respectfully submitted that the Appellate Division should vacate the judgment in favor of defendants and should enter judgment in

favor of Second Inning and award damages for the rents paid under the TLA and remand for assessment of compensatory damages to another judge as set forth in Point VI below.

POINT II: RELAP IS ALSO LIABLE FOR BREACH OF CONTRACT AND THE IMPLIED COVENANTS OF GOOD FAITH AND FAIR DEALING AS IT HAD THE OBLIGATION TO OBTAIN THE PARKING APPROVALS BASED ON THE TERMS OF THE THIRD LEASE AMENDMENT, THE TRIAL COURT'S FINDINGS OF FACT, THE CONDUCT OF THE PARTIES AND MARCEL ANTAKI'S ADMISSIONS (Raised Below: 2T94, 124-125; Pa26-34, 314)

As set forth in Point I above, the trial court's judgment must be vacated and reversed and judgment should be entered on behalf of Second Inning, based on its finding of fact that defendants' manager had represented to Second Inning before it signed the Third Lease that approvals for the parking set forth in Exhibit B to the lease had already been obtained, and judgment should be entered in favor of Second Inning.

The trial court also committed reversible error in interpreting the terms of the Third Lease as placing the obligation on Second Inning to obtain the approvals for the parking spaces. Under established law, the Appellate Division owes no deference to the trial court's interpretation of a contract since the interpretation of a contract is a matter of law, subject de novo review by an appellate court. Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998). As our Supreme Court held in Kieffer v. Best Buy, 205 N.J. 213, 223 (2011): "Accordingly, we pay no special deference to the trial court's

interpretation and look at the contract with fresh eyes." The trial court's decision must be reversed based on the terms of the Third Lease, the trial court's findings, the conduct of the parties and the admissions of Relap's managing partner.

First, the terms and exhibits to the Third Lease make it clear that Second Inning was assigned the spaces set forth therein. Second, all of the conduct by the parties confirms that Relap had the obligation to obtain the approvals. Third, Mr. Antaki acknowledged that he had assigned the spaces to Second Inning in the TLA and that he acted illegally and knowingly in violation of the previous 2000 site plan. Fourth, the trial court itself found that Relap filed the site plan for approval of the parking, thus confirming that it was Relap's responsibility under the TLA to obtain the approvals.

The Third Lease amended the initial lease in several material ways. First, it no longer required Second Inning to obtain municipal approvals and instead substituted the following language: "Whereas Tenant desires to start applying for the necessary permits to expand his [its] operation from various Municipal and Governmental Departments and Authorities . . .". (emphasis added). (P-5, Pa349) Our courts hold that such recital clauses in a contract provide evidence as to the obligations of the parties. As set forth in Genovese Drug Stores, Inc. v. Conn. Packing Co., 732 F. 2d 286, 291 (2d Cir. 1984): "[A]n expression of intent in a 'whereas' clause of an agreement between two parties may be useful as an aid in construing the rights and obligations created by the agreement". This

clause significantly revised the terms of the initial lease which required Second Inning to obtain approvals plus the permits which read: Second Inning "shall diligently pursue, at its sole cost and expense, all necessary approvals and permits from the Township . . . including but not limited to any necessary . . . zoning approvals, construction permits . . . necessary for the Tenant to utilize the Demised Premises for the Permitted Use." (emphasis added) (At page 1 of the initial lease, P-2, Pa316)

Second, the Third Lease, which had been prepared by Mr. Antaki, assigned specifically designated spaces to Second Inning and included a color-coded diagram as Exhibit B which showed, by color, the specific spaces leased to Second Inning, as well as the spaces allotted to the other two tenants with different colors for their spaces. (Pa355) The Third Lease Amendment specifically provides that Exhibit B, the "Parking Lot Arrangement", forms "an integral part of this Amendment". (At 2, Pa350) Third, the TLA also included an attached Exhibit C entitled "Works to be Done By Tenant at Tenant's Sole Expense" which set forth in 10 numbered paragraphs the only obligations that Second Inning had under the Third Lease Amendment. The only item related to parking is set forth in paragraph 4 entitled "Filling the Docks' Pits" which provides as follows: "Tenant shall fill the Docks' Pits and restore an even floor with the rest of the parking lot." (Pa356) This further makes it clear that Second Inning's responsibility with respect to parking was limited to filling the docks'

pits and Second Inning had no further obligation under the Third Lease Amendment with respect to the parking spaces. The Third Lease Amendment also designates Exhibit C as constituting an "integral part" of the lease. (At 2, Pa350) In sum, it is clear by the terms of the lease that the responsibility for obtaining the approvals for the parking spaces specifically assigned to Second Inning in the Third Lease Amendment was Relap's alone.

In addition to the terms of the lease, the parties' conduct also confirms that only Relap was responsible for obtaining the approvals for the parking. As set forth in Hungerford & Terry, Inc. v. Geschwindit, 24 N.J. Super. 385, 397 (Ch. 1953), aff'd, 27 N.J. Super. 515 (App. Div. 1953): "The interpretation of the contract given by the parties themselves, as shown by their conduct, such as their acts in partial performance, will be adopted by the courts." And as the Appellate Division held in Joseph Hilton & Associates, Inc. v. Evans, 201 N.J. Super. 156, 171 (App. Div. 1985), certif. den. 101 N.J. 326 (1985): "the conduct of the parties after execution of the contract is entitled to great weight in determining its meaning." After execution of the TLA, Marcel Antaki filed site plan exemption applications on behalf of Relap with Hanover Township requesting approval for the parking spaces set forth in the Third Lease for all three tenants. (P-51, P-117, Pa623-629) Mr. Antaki did this on his own, without notifying Second Inning and without even copying Second Inning on his applications, thus showing that he recognized that Relap alone had this obligation. Sean Donlon testified that Mr.

Antaki's applications were rejected because of the insufficient parking spaces for the uses being made by all three tenants on the premises. (8T37:20-38:22; P-116, P-118, Pa621-622, 630-631) Mr. Donlon also testified that only Marcel Antaki filed the site plan exemptions and that Mr. Donlon only communicated with Relap's manager on the parking issue, and not with Second Inning. (8T; 9/6:8:5-9:16; 24:2-15) The fact that Second Inning did not submit any of these applications and did not communicate with Hanover Township with respect to the parking spaces and the fact that such applications and communications were solely between Relap's manager and the Township further confirm that it was Relap's responsibility alone to obtain the municipal approvals for the expansion space.

And, as detailed above, Marcel Antaki admitted that he had assigned these spaces to Second Inning in the Third Lease, thus conceding that it was Relap's responsibility to obtain approval for these spaces. He admitted that what he had done was "exceeding my authority . . . my jurisdiction" and that he knew that it was in violation of the 2000 site plan and that he had committed "deviations" from that plan. (5T136:22-141:4; 156:11-18; 6T45:9-15; P-52, Pa524) Mr. Antaki admitted at the trial that he allocated spaces to the tenants in the TLA with knowledge that it was not allowed under the 2000 plan. (5T135:18-21; 156:11-18; 6T122:4-10) Marcel Antaki also instructed Little Genius to destroy their lease and replace it with another one in order for it to conform to the 2000 plan,

but Little Genius refused to engage in this coverup. (6T59:1-21, P-52, Pa524-560) Mr. Donlon issued a summons to Mr. Antaki for illegally reconfiguring the parking lot to which he pleaded guilty and paid a fine. (P-119, Pa639) As he testified: "I am the responsible guy and I am the guilty guy." (6T62:23-63:11) All these admissions confirm that Mr. Antaki did lease these spaces to SI, and that he acted illegally in doing so.

Most tellingly, Relap filed for an application with the Hanover Planning Board for filing a site plan, retained an engineering firm to prepare the site plan, and then actually filed the site plan to obtain approvals for the parking spaces in SI's TLA. (P-29, P-64, P-65, P-66, Pa449-450, 583-609) Thus, based on its own conduct, there is no issue but that Relap was the party responsible to obtain the approvals. And in its decision the trial court itself found as a matter of fact that Relap had obtained a proposal for professional services to submit the site plan with Hanover Township and had filed a preliminary and final site plan application with the Township which "was deemed complete" – thus demonstrating that it was Relap's responsibility to obtain the approvals. (Decision at 3, Pa30) As Judge Hansbury held in his decision: "On July 17, 2017 Marcel Antaki received a proposal for professional services to submit the plans for additional parking to Hanover Twp. (P-64). The preliminary and final site plan application was filed by Relap on February 20, 2018, (P-65) and August 15, 2018 (P-30) it was deemed complete." (At 3, Pa30)

Defendants are thus in breach of the Third Lease Amendment and the implied covenants of good faith and fair dealing as they assigned parking spaces for SI's expansion space which were not approved by the Township, contrary to the express provisions in the Third Lease and the express representations of the managing partner. All of the elements of Second Inning's counts for breach of contract and breach of the implied covenants of good faith and fair dealing claim are fulfilled in this case. See, for example, Coyle v. Englander's, 199 N.J. Super. 212, 223 (App. Div. 1985), holding that a prima facie case for a breach of contract is established where there is "a valid contract, defective performance by the defendant, and resulting damages." Defendants' conduct also was in breach of the implied covenant of good faith and fair dealing in the parties' Third Lease, the Second Count in SI's Second Amended Complaint. "[E]very contract in New Jersey contains an implied covenant of good faith and fair dealing." Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997). "[N]either party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Wilson v. Amerada Hess Corp., 168 N.J. 236, 245 (2001).

The trial court committed a great injustice by ignoring its own findings of fact and all of this overwhelming and undisputed evidence and Mr. Antaki's admissions and held that Second Inning was responsible for obtaining the approvals under the terms of the TLA. The trial court looked at one phrase in the

Third Lease which stated that some of the spaces "will be assigned" and held in his decision that this connotes in the future. (At 5, Pa32) However, the trial court ignored the uniform testimony of both Marcel Antaki and the principals of Second Inning that these parking spaces had already been striped and Second Inning signs had been placed on those spaces by the landlord and Second Inning was using those spaces before Second Inning signed the Third Lease and was also using the spaces after the lease was signed. (4T197:11-20; 5T17:2-3; 113:16-19; 117:2-5; 7T10:21-11:9; 8T159:21-160:13; 6T64:21-25) Thus Judge Hansbury's reference to "future" use is categorically belied by the uniform testimony of both sides as those spaces were already being used before execution of the Third Lease. The trial court also ignored its own finding of fact that Relap's manager had represented to SI's principals that the Planning Board had approved the parking spaces before SI signed the Third Lease. And the trial court also inexplicably ignored its additional finding of fact that Relap had filed for site plan approval of the additional parking.

Finally, the trial court ignored the undisputed fact that the uses being made on the premises by all three tenants required additional parking spaces for all three tenants, not just Second Inning. This included additional parking spaces for Marli, a company owned by the defendants' relative, and additional parking for Little Genius. In the site plan, Relap applied for a total of 97 spaces as follows: 23 for Marli, 30 for Little Genius and 44 for Second Inning. (P-29, P-66, Pa449-

450, 598) This further confirms that it was Relap's obligation to file and implement the site plan for these additional parking spaces for all three tenants. The logic of the trial court's decision would require Second Inning to obtain approval and incur the inordinate expense of up to $1 Million to pay for the additional parking not only for itself but also for Little Genius and Marli (a company owned by defendants) – something that Second Inning never agreed to do. Thus, based on the terms of the Third Lease, the conduct of the parties, the admissions of Relap's managing partner, the trial court's own findings, and the need to obtain approval for additional parking required by all three tenants, there is no question that Relap was responsible to obtain the parking approvals.

It is therefore respectfully submitted based on this overwhelming record, that Judge Hanbury's interpretation of the agreement should be vacated and judgment should be entered by the Appellate Division in favor of Second Inning and against defendants for breach of contract and breach of the implied covenant of good faith and fair dealing and the rent and CAM charges should be awarded to SI and this case should be remanded to another trial judge to award damages to Second Inning for its lost profits as further elaborated in Point VI below.

POINT III: DEFENDANTS ARE ALSO LIABLE FOR CONVERSION AND UNJUST ENRICHMENT (Raised Below: 2T143, 127; Pa315)

Judge Hansbury's finding that Marcel Antaki represented to SI that all the approvals were in place before SI signed the Third Lease also confirms that

defendants are liable to SI under the Seventh Count of its complaint for conversion. "The common law tort of conversion is defined as the intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." Bondi v. Citigroup., Inc., 423 N.J. Super. 377, 431 (App. Div. 2011), certif. den. 210 N.J. 478 (2012). The elements of conversion are: (1) "the property and right to immediate possession thereof belong to the plaintiff" and (2) "the wrongful act of interference with that right by the defendant." First Nat'l Bank v. North Jersey Trust Co., 18 N.J.Misc. 449,452 (1940).

Under our law, a conversion claim is not limited to seeking the return of chattel or a specific fund of monies. To the contrary, a party is entitled to file a conversion claim for rents and CAM charges - - exactly what Second Inning is seeking under the Seventh Count of its Amended Complaint. As set forth therein, Relap is liable for conversion because it has received rental monies for the expansion space even though it is not entitled to such funds because it failed to obtain the requisite approvals for that expansion space and assigned parking spaces to Second Inning under the Third Lease Amendment which it had no authority to do, as it now concedes. See, by way of example, Rose v. Bernhardt, 107 N.J.L. 501 (E.& A. 1931), where the Court held that a party can be held liable for "conversion of rents".

The individual defendants are also liable for conversion since they were all owners of Relap and thus recipients of SI's rent payments. See V & S Investments, LLC v. Two B's Bev., Inc., 2012 WL 670712 at *2 (App. Div. 2012) (Pa701-703) ("owners of the company and therefore liable for the conversion of the goods.") (Pa702) The trial court's finding also confirms that defendants are liable under SI's Eighth Count for unjust enrichment where: (1) defendant has received a benefit from the plaintiff; and (2) the retention of that benefit without payment, or return of the rents, would be unjust. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 544 (1994).

It is therefore respectfully submitted that the trial court's dismissal of the conversion and unjust enrichment counts in Second Inning's Complaint should also be vacated and judgment for conversion and unjust enrichment be entered by the Appellate Division in favor of SI and that damages for conversion of SI's rents and CAM payments under the Third Lease should be awarded to SI as set forth in Point VI below.

POINT IV: THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FINDING THAT SECOND INNING FAILED TO MITIGATE DAMAGES AND FAILED TO RECOGNIZE THE LAW GOVERNING THE STANDARDS FOR ENTRY OF A PRELIMINARY INJUNCTION ORDER INCLUDING A FINDING OF A PROBABILITY OF SUCCESS ON THE MERITS AND REINSTATING THE STATUS QUO AND INSTEAD PLACED THE BURDEN ON THE PLAINTIFF/VICTIM TO RECTIFY THE WRONGDOING OF THE DEFENDANTS/PERPETRATORS (Raised Below: 14T9:6-105:19; Pa26-34)

The trial court also egregiously erred by holding that Second Inning failed to mitigate damages by not seeking to remove defendants' prohibition against overnight parking in Relap's filed site plan. (Decision at 6, Pa33) The trial court failed to recognize that the purpose of a preliminary injunction is to reinstate the position of the parties. A party cannot obtain a ruling on the merits at the preliminary injunction stage but must await for trial to obtain the ultimate relief. At the preliminary injunction stage, a party can only seek to preserve the status quo as it existed before the defendants' wrongdoing. Thus, as set forth in McCran v. Public Service Ry. Co., 95 N.J. Eq. 22 (Ch. 1923): "A preliminary mandatory injunction will issue to compel the restoration of a status quo ante in aid of a suit at law where irreparable damage would result from its being withheld." (emphasis added). As recently reiterated in Aulert v. Mayor and Township Committee of Brick, NJ, 2019 WL 6522204 at *4 n.5 (App. Div. 2019) (Pa704-711): "An order to show cause 'may properly be utilized where a party seeks some form of ... interim relief such as the preservation of the status quo pending final hearing of the cause.'" (Pa711, emphasis added) And as this Court held in Jones v. Hayman, 418 N.J. Super. 291, 304 (App. Div. 2011): "The preliminary injunction merely represents a ruling to maintain the status quo and not a ruling on the merits of the action."

That is exactly what Second Inning and Judge Berdote Byrne did. The preliminary injunction entered by Judge Berdote Byrne reinstated the status quo

including returning the parking spaces to Second Inning, ordering defendants to return the space under the Third Lease in the same condition as before defendants' took over and to provide SI with a key to access the premises; precluding defendants from curtailing Second Inning's days and hours of operation, allowing SI's to park its transport vehicles overnight and enjoining the site plan to proceed due to the prohibition of overnight parking. (P-87, Pa256-258)

Indeed, Judge Hansbury in his decision granting judgment acknowledged that the only reason defendants' site plan was enjoined was due to Relap's eliminating Second Inning's overnight parking which is crucial to its operation:

> The court accepts that the application by Relap stated no overnight parking and that would have meant plaintiff could not park its transportation vehicles on site overnight.
>
> When plaintiff learned of the application, it initiated this litigation by Order to Show Cause on September 12, 2018 which resulted in the issuance of a preliminary injunction to stop any construction (B) and inter alia stop Relap from proceeding before The Planning Board (H). (P-87) the motivation to stop The Planning Board application was to prevent the approval which prohibited overnight parking. [At 4; Pa31]

This finding by the trial court further reveals the fatuousness of its judgment which transposed the defendants' wrongdoing to Second Inning, the victim of defendants' wrongdoing. Under the express terms of the Preliminary Injunction, it was the obligation of Relap and the other defendants to eliminate the prohibition of overnight parking. The court enjoined all the defendants from

"[o]bstructing or interfering with Second Inning's overnight parking." (P-87, par. F, Pa258). Throughout the course of this multi-year litigation, defendants never offered to remove their overnight parking prohibition. As Mr. Donlon testified, the landlord, and not the tenant, controlled the issue of whether there would be overnight parking on its site. (8T61:17-21) The trial court thus reversed our most fundamental equitable doctrines by holding that the victim, Second Inning, is liable to correct the perpetrator's wrongdoing, which Second Inning could not do. A ruling as to which party was responsible to file the site plan and reconfigure the parking which could cost as much as $1 Million would be a ruling on the merits, and would have to be decided at the trial. The trial court's decision that Second Inning failed to mitigate damages is simply yet another unfounded holding and belied by the record. Since defendants were the ones who filed a site plan in which they deliberately omitted SI's overnight parking, which they could have included, the onus was on them as the wrongdoer to correct that wrongdoing after Judge Berdote Byrne issued the Preliminary Injunction. Judge Hansbury reversed this fundamental equitable principle, and instead put the onus of the victim to correct the perpetrator's wrongdoing. Indeed, in a telling statement at the trial, Judge Hansbury acknowledged that in light of Judge Berdote Byrne's order prohibiting defendants from obstructing or interfering with overnight parking, the defendants should have removed that prohibition. As Judge Hansbury stated on the record: "There was an injunction issued against the

proceeding before the planning board. . . . And it seems to me all the defendant had to do was to modify the application to remove the prohibition of overnight parking and proceed. I don't know why that didn't happen." [13T92:23-93:4; emphasis added]

Further, the trial court simply ignored the undisputed fact that defendants consistently failed to comply with Judge Berdote Byrne's Orders. Marcel Antaki, Relap's managing partner, took actions in direct contravention of the Court's initial Order including filing summonses against the two principals of SI the very next day after entry of the Preliminary Injunction in contravention of the Court's Order in which he sought to interfere with SI's overnight parking. He continued to fail to comply with other provisions in the Court's Order, compelling Judge Berdote Byrne to issue three further orders to try to enforce compliance and to sanction defendants in its May 28, 2019 Order. (P-87, P-88, P-89, P-90, Pa256-290) Despite these sanctions, defendants continued to fail to comply with the Court's Orders, and up to the time of trial, had not fully complied with the Court's Orders. (3T156:4-11; 158:17-19) Thus, for Judge Hansbury to hold that SI was somehow at fault for not seeking to compel defendants to eliminate the overnight parking prohibition and compel defendants to proceed to pay up to $1 Million for the parking reconfiguration before the trial even occurred when the defendants had so contemptuously defied the prior Judge's Orders requiring much simpler actions is the epitome of injustice and a perversion of our law.

In addition, by not complying with the Court's Orders, the defendants were culpable of unclean hands which precludes them from arguing that SI should have obtained yet additional orders requiring the type of major relief which can only be awarded at the trial when they were not even complying with the Court's original orders requiring simple actions of compliance. This Court's holding in Bolds-Davis v. Davis, 2020 WL 1900489 (App. Div. 2020) (Pa712-715), is directly on point that the flouting of the court's orders establishes unclean hands:

> the record is clear that plaintiff spent substantial time and effort to list the property and procure prospective buyers. She also was unnecessarily forced to expend legal fees on several occasions due to defendant's unwarranted lack of cooperation and his repeated flouting of the judge's orders. It is axiomatic under the doctrine of unclean hands that "[h]e who comes into equity must come with clean hands." A. Hollander & Son, Inc. v. Imperial Fur Blending Corp., 2 N.J. 235, 245 (1949). "[A] judge should not grant equitable relief to a party who is a wrongdoer with respect to the subject matter of the suit." Pellitteri v. Pellitteri, 266 N.J. Super. 56, 65 (App. Div. 1993). [Pa714]

The trial court also unfairly punished Second Inning in its decision granting judgment for defendants for seeking damages at the trial instead of having the Court order Relap and the other defendants to proceed with the site plan approval but with the elimination of the prohibition of overnight parking. (At 6, Pa33) First, Second Inning did request in its pleadings as part of its relief that defendants be ordered to proceed with the site plan, but with the elimination of the prohibition to its overnight parking, which defendants never agreed to do. (See

initial Verified Complaint, pars. D and H at 27, Pa 80 ; Amended and Second Amended Complaint, at par. M at 31, Pa170 and 233) Second Inning also requested compensatory damages in its pleadings, including the rents and CAM charges it paid under the third lease and the loss of revenues from the clients it would have serviced in the expanded center. (Verified Complaint, par. I, at 27, Pa80; and Second Amended Complaint, par. P, at 32, Pa 234) Second Inning had the absolute right to request both or either of those remedies at trial.

The trial court failed to recognize the obvious. By the time the case was tried, between August and October 2022, more than 6 years had passed from the date of the July 1, 2016 Third Lease Amendment. Second Inning's Third Lease expires in July 2025. (Pa 350) If the court ordered Relap at the trial to proceed with its site plan approval without the overnight parking prohibition, it would have taken substantial time before that plan could be implemented. Ms. Blickstein testified that it would take at least 6 months to have the site plan approved. Defendants would then have to expend funds to reconfigure the parking area to comply with the plan which would have taken substantial time to accomplish. Further, renovating the leased space for the expanded adult day care center would take at least three more months and would cost several hundred thousand dollars. Thus, it made no economic sense for Second Inning to spend that much money when its lease would soon be ending in July 2025. This is just another example of how the trial court victimized Second Inning and held Second

Inning responsible for defendants' wrongdoing. If Relap's representation to Second Inning that the Planning Board had approved the parking before Second Inning signed the Third Lease was accurate, then Second Inning would have been able to renovate and open its expanded center many years before the trial which would have made economic sense at that time. However, by the time of the trial, that option was no longer economically feasible, but Second Inning certainly had the right at the trial to seek damages for defendants' wrongdoing, including return of the rent and CAM payments under the Third Lease and compensatory damages for the loss of income.

POINT V: THE INDIVIDUAL DEFENDANTS ARE ALSO PERSONALLY LIABLE TO SECOND INNING (Raised Below: 2T57, 88, 123, 128; Pa35-37, 315)

Personal liability can be imposed against the members and owners of a corporation or a limited liability company under the "tort participation theory" enunciated by the Supreme Court in Saltiel v. GSI Consultants, 170 N.J. 297, 309 (2002). As set forth in the Saltiel case, the "essential predicate for application of the [tort participation] theory is the commission by the corporation of tortious conduct, participation in that tortious conduct by the corporate officer and resultant injury to the plaintiff." Id. Under the tort participation doctrine, corporate officers, employees and members and owners of a business entity could be individually liable for their affirmative acts of wrongdoing. Id.

The Saltiel Court held that "the essence of the participation theory is that a corporate officer can be held personally liable for a tort committed by the corporation when he or she is sufficiently involved in the commission of the tort." Id. at 303. The Saltiel Court also held that the officers of a corporation or similar entity are personally liable based on their wrongful participation even if their acts were performed for the benefit of the corporation and without profit to the officer personally. Id at 304. The Appellate Division in Breglia v. Norman & Luba, LLC, 2005 WL 3338295 (App. Div. 2005) (Pa 716-721), held that the participation tort theory applies to members of a limited liability company. In Breglia, the court entered liability against both the limited liability company and personal liability against a member of the limited liability company based on the tort participation theory. Id. at *2 and *6.

A plethora of cases have held individual defendants liable under the tort participation theory. See e.g. Charles Bloom & Co. v. Echo Jewelers, 279 N.J. Super. 372, 382 (App. Div. 1995) (holding defendants personally liable for alleged conversion even when acting in corporate capacity); Robsac Indus., Inc. v. Chartpak, 204 N.J. Super. 149, 156 (App. Div. 1985) (reversing summary judgment for defendant corporate officer charged with malicious interference with contract, fraudulent misrepresentation, and defamation); Van Dam Egg Co. v. Allendale Farms, Inc., 199 N.J. Super. 452, 457 (App. Div. 1985) (declining to dismiss fraud complaint against corporate officer in absence of allegation of

personal benefit); McGlynn v. Schultz, 95 N.J. Super. 412, 417 (App. Div.), certif. den, 50 N.J. 409 (1967) (finding corporate officers personally liable for knowingly acquiescing in and ratifying alleged conversion).

Second Inning presented ample evidence proving the personal liability of the defendants in this matter. The trial court's finding that Marcel Antaki misrepresented to SI that the Planning Board had approved the parking in the lease before the TLA was signed established his liability under SI's fraud counts, as set forth in Point I above. Indeed, he even incorporated in the Third Lease Amendment a specific parking chart at Exhibit B which designated by color coding the specific spaces which were assigned to Second Inning and represented to them that this is what was required by the Township for their expansion space and that it had been already approved.

Mr. Antaki acknowledged that he was well aware of the 2000 site plan approval and knew that SI was restricted to only 15 spaces under the 2000 plan when he assigned the 44 spaces to SI in the TLA. He also testified that he had that site plan in his possession at the time that he prepared and presented the Third Lease Amendment with the allotted parking spaces to Second Inning. He admitted that he violated the prior 2000 site approval and committed "deviations" from the plan; that he "was exceeding my authority" when he assigned the parking without prior approval; that he was "the guilty party"; and that he tried to cover up his fraud by asking Litle Genius to "destroy" their lease which did not conform

with the 2000 plan. Marcel Antaki is therefore personally liable to Second Inning under the negligent misrepresentation (Sixth Count), fraud in the inducement (Fourth Count) and fraud (Fifth Count) counts in SI's complaint.

The trial court's finding also confirms that defendants are liable under the Ninth and Tenth Counts for tortious interference with contract and with prospective economic advantage in New Jersey. Under established law, a plaintiff must simply show the existence of a contract or a reasonable expectation of economic advantage and that the defendants interfered with that contract or expectation and that the harm was inflicted intentionally and with malice and the interference caused a loss of the amount in the contract or a loss of the expected advantage. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 751-752 (1989). The term "malicious" does not mean "ill will toward the plaintiff" but simply means that "the harm was inflicted intentionally and without justification or excuse." Id. at 751. Thus, defendants' conduct squarely falls within the ambit of these claims which are set forth in the Ninth and Tenth Counts of Second Inning's Second Amended Complaint.

Defendants then further pursued their injurious conduct against Second Inning by specifically including a provision in the site plan that they submitted on the reconfiguration of the parking spaces which expressly eliminated Second Inning's overnight parking. This was a particularly malicious act on the part of defendants as they knew that Second Inning could not conduct its operations

without its overnight parking which it had since the beginning of its lease in 2008. Liliane Antaki signed the application for the preliminary site approval and Roger, Nicholas and Alan, along with Liliane, are listed as the owners of Relap at that time. (P-65; Pa591-596) In their sworn Answer filed on behalf of all the defendants, they admit that they recognized that SI's business would be destroyed by their elimination of the overnight parking. (P-84, Pa239-240, 243)

Defendants' wrongdoing thwarted the expansion of Second Inning's adult day care center and interfered with its contractual relations with its clients and with its prospective economic advantage with clients. This has resulted in substantial losses in revenues that would have been generated by the increased clientele which Second Inning would have been able to service since the number of clients it could service with the 3,800 square foot expansion space increased from 100 to 170 clients per shift as approved by the State. Second Inning would have immediately increased its income since it already had 140 registered clients for its first shift. In addition, Second Inning's inability to use the expansion space prohibited Second Inning from changing the décor for that space to a more Americanized setting which would have increased the number of clients who attended the second shift. Second Inning presented the expert testimony of Rebecca Fitzhugh, CPA detailing these substantial damages.

Defendants also defrauded SI by asking them to sign an estoppel certificate to obtain a $1.75 Million loan from a bank in return for their promise to replace

Marcel Antaki with Roger Antaki as the manager of Relap and a promise to use those funds to reconfigure the parking lot. SI agreed and signed the certificate but once the defendants distributed those funds to each other they then reinstated Marcel as the manager and transferred the majority interest to him. The record thus confirms that the members' ownership interest and management authority of Relap was manipulated by defendants to commit various fraudulent schemes on SI.

POINT VI: THE APPELLATE DIVISION SHOULD AWARD SECOND INNING DAMAGES FOR RETURN OF ITS RENTS AND CAM CHARGES PAID ON THE EXPANSION SPACE AND REMAND THE CASE TO ANOTHER JUDGE FOR ASSESSMENT OF COMPENSATORY AND PUNITIVE DAMAGES (Raised Below: (Raised Below: 11T72:9-12; 74:11-12)

Second Inning presented expert testimony from its forensic accountant seeking two categories of damages. The first category of damages is the monthly rent and CAM charges paid by Second Inning for the expansion space under the Third Lease since Second Inning has not been able to use that space for its intended purpose due to defendants' breaches – to increase and service additional clientele. It is therefore respectfully submitted that based on these undisputed facts, this Court should enter judgment against the defendants for the monthly rent and CAM charges SI has paid to defendants from the commencement of the TLA up to the time of trial amounting to $368,936 plus additional monthly rent and CAM charges paid by SI under the TLA through the date of the Appellate

Division's decision and for an order precluding Second Inning from having to pay any future rent for this space through the end of its lease term which will terminate in July 2025. SI had paid $368,936 in rent as of the time of the trial and has continued to pay that rent through the present.

Second Inning also sustained substantial damages in lost net profits from clients it would have been able to add and service in the expanded space. Second Inning's expert calculated those damages to be several millions dollars through the time of trial. Because the trial court improperly granted judgment to the defendants, the trial judge never addressed SI's lost net income claim. It is therefore respectfully submitted that the lost damages claim and claim for punitive damages should be remanded to another trial judge to assess these damages. See Entress v. Entress, 376 N.J. Super. 125, 133 (App. Div. 2005), where the case was remanded to a new judge "to avoid the appearance of bias or prejudice based upon the judge's prior involvement with the matter".

POINT VII: THE TRIAL JUDGE ALSO ERRED BY VIOLATING THE LAW GOVERNING THE FILING OF A FRIVOLOUS LAWSUIT AND AWARDING FEES TO TWO OF THE DEFENDANTS (Raised Below: Raised Below: 15T27:3-68:19; Pa40-53)

The trial court also committed reversible error by finding that Second Inning and its counsel filed frivolous claims against two of the defendants, Nicholas Antaki, and the Estate of Liliane Antaki. The trial court improperly

assessed frivolous lawsuit fees in the amount of $56,552.95 against both Second Inning and its counsel.

Under governing law, sanctions can only be assessed for a frivolous claim under Rule 1:4-8 and N.J.S.A. 2A:15-59.1 when that claim is filed with malice and in bad faith with no support in fact or law. Bove v. Akpharma Inc., 460 N.J. Super. 123, 150-151 (App. Div. 2019), certif. den. 240 N.J. 7 (2019). Our courts hold that frivolous lawsuit claims under both Rule 1:4-8 and the Frivolous Litigation Statute, N.J.S.A. 2A:15-59.1, are "interpreted restrictively." Id. at 151. As the Appellate Division held in First Atlantic Federal Credit Union v. Perez, 391 N.J. Super. 419, 432-433 (App. Div. 2007): "The nature of conduct warranting sanctions under Rule 1:4–8 has been strictly construed, . . . and "the term 'frivolous' should be given a restrictive interpretation" to avoid limiting access to the court system." A motion for sanctions is only granted in "exceptional cases" where a party's pleading is based on "bad faith." Bove v. Akpharma Inc., supra, 460 N.J. Super. at 151. Our courts hold that the "burden of proving that the non-prevailing party acted in bad faith is on the party that seeks fees and costs." Id.

In the present case, the Hon. Maritza Berdote Byrne entered a preliminary injunction enjoining all of the defendants, including Nicholas Antaki and Liliane Antaki, from taking illegal action against Second Inning, including taking away its parking spaces and its overnight parking, dispossessing SI from its leased

premises, and other wrongdoing. (P-87, Pa256-258) The trial court failed to recognize that a preliminary injunction will only be rendered where there is a probability of success on a plaintiff's claims. As set forth by our Supreme Court in Crowe v. DeGioia, 90 N.J. 126, 133 (1982), an injunction will only be issued when the Court finds that no material facts exist and a plaintiff has made a "preliminary showing of a reasonable probability of ultimate success on the merits". Accord, Matter of City of Newark, 469 N.J. Super. 366, 378 (App. Div. 2021) ("to obtain preliminary injunctive relief, the Unions were required to show that they had a reasonable probability of ultimate success on the merits, which generally also includes a showing that most of the material facts are not in dispute.") Thus, the granting of the preliminary injunction against both Nicholas and Liliane Antaki as a matter of law precluded any claim by either of them of a frivolous lawsuit.

Similarly, the trial court also ignored governing Appellate Division law which has held that when a party files a summary judgment motion and that motion is denied, then there cannot be a finding of a frivolous lawsuit claim since the denial of the motion for summary judgment demonstrates the existence of a material issue of fact. In this case, the Estate of Liliane Antaki filed a motion for summary judgment on all claims which was denied on all counts. (P-91, Pa295-312) As the Appellate División held in United Hearts, L.L.C. v. Zahabian, 407 N.J. Super. 379, 394 (App. Div. 2009), certif. den. 200 N.J. 367 (2009):

> a pleading cannot be deemed frivolous as a whole nor can an attorney be deemed to have litigated a matter in bad faith where, as in this case, the trial court denies summary judgment on at least one count in the complaint and allows the matter to proceed to trial. We therefore conclude that the trial court erred by finding that Epstein violated Rule 1:4-8.

The trial judge again violated governing law and created an unpalatable legal precedent reversing established law controlling a frivolous lawsuit claim. It is therefore respectfully submitted that the trial court's frivolous lawsuit award should be reversed and vacated.

CONCLUSION

It is therefore respectfully submitted that the Appellate Division should reverse and vacate the trial court's judgment and enter judgment in favor of Second Inning on several counts in its Complaint and award to Second Inning return of the rent and CAM damages it has paid under the Third Lease. It is also respectfully submitted that this Court should remand this case to another judge to assess Second Inning's compensatory damages for lost profits and punitive damages. It is further respectfully submitted that the trial court's decision awarding a frivolous lawsuit fee award should also be reversed and vacated.

Respectfully submitted,

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Andrew J. Kyreakakis

Dated: January 3, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-129-23

SECOND INNING 1, L.L.C.,	:	CIVIL ACTION
Plaintiff-Appellant,	:	On Appeal from the Superior Court of New Jersey,
v.	:	Chancery Division, Morris County
RELAP L.L.C., MARCEL Z. ANTAKI, ESTATE OF LILIANE ANTAKI, ROGER ANTAKI, AND NICHOLAS ANTAKI,	:	Docket No. Below: MRS-C-94-18
	:	Sat Below:
Defendants-Respondents.	:	Hon. Stephan C. Hansbury, J.S.C.
	:	
	:	

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT/CROSS-APPELLANT MARCEL Z. ANTAKI IN OPPOSITION AND IN SUPPORT OF CROSS-APPEAL

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PRELIMINARY STATEMENT

Respondent and Cross-Appellant Marcel Z. Antaki offers three organizing and thematic points in the hopes of aiding the Court.

First, this is a landlord/tenant dispute, plain and simple. That point has been obvious since the beginning of the case. Indeed, nearly five years ago, Judge Martiza Berdote Byrne stated this clearly and succinctly: "This matter involves a dispute between a tenant, Second Inning LLC and its landlord, Relap LLC." The case was tried and decided as a landlord/tenant dispute. Despite that, Appellant Second Inning attempts to cast its now failed allegations as a great civil injustice. Second Inning claims it was "victimized" and "punished" by Judge Stephen C. Hansbury, a well-respected jurist. And, trying to miscast this case as "egregious," Second Inning asks this Court to remand and reassign the matter to a different judge or, in one of Second Inning's greatest overreaches, to have this Appellate Court rule on the merits and enter judgment in its favor.

Second, and in aid of the preceding point, Second Inning unleashes a torrent of words and arguments untethered to its own allegations, its positions at trial and the law. Merely by way of example, Second Inning presents a hodge podge of arguments regarding its theory of the case. Second Inning relies on the contract, except when it does not. Sometimes the Second Inning demands money on the contract; however, it also demands redress (based on the same

factual allegations) for equitable claims that, as this Court will readily know, are not available in a contract case. Second Inning hopes that clear and well-settled legal principles will be lost in its 60-page brief.

Similarly, Second Inning repeatedly seizes on one statement by the lower court, while ignoring the context of the statement, again aiming to obfuscate the real meaning of a lone sentence. Based on that one sentence, Second Inning invites this Appellate Court to decide the case on the merits. Fortunately, the transcript thwarts that tactic quickly and decisively.

Lastly on this strategy, Second Inning lumps all Defendants together throughout its brief, even though it is clearly wrong from the factual, legal and procedural history of the proceedings below. For example, Second Inning seems to press the contract claims against Marcel Antaki despite withdrawing and consenting to the dismissal of those claims just before the trial began. This is how Second Inning deploys the word "Defendants," confusing the basis for its appeal throughout the brief.

Third, Second Inning's strategy to have this case decided upon anything *but* the merits is clear by its arguments regarding mitigation of damages. This Court should bear in mind that, as the court below found, Second Inning never mitigated damages, never sought its own approval, and never went to the courts seeking a modification of the site plan. To put it colloquially, Second Inning

"sat on its hands" and hoped to wrack up millions of dollars in damages. Of course, the law does not permit that type of gamesmanship. Second Inning also claims – as an obvious non sequitur – that it was not required to mitigate damages because it claimed, but failed to prove, that Marcel Antaki had unclean hands.

In the following Sections, Marcel Z. Antaki expands on these points to establish that Appellant's complaints are without merit, while his cross-appeal of summary judgment can and should be decided quickly and easily in his favor.

STATEMENT OF FACTS[1]

Defendant RELAP, L.L.C. ("RELAP"), is a New Jersey limited liability company with offices at 155 Algonquin Parkway, Whippany, New Jersey 07981 ("the property"). During the relevant time period, RELAP was owned by Liliane Antaki, now deceased, Alan Antaki ("Alan") and Nicholas Antaki ("Nicholas"). 7T52:13 to 53:2. During the course of the litigation the ownership percentages of RELAP's owners did not change. 7T52:13-53:2. Roger Antaki ("Roger") is a former member of RELAP. 8T78:3-10. Alan was the manager of RELAP from 1993 to around 2007 or 2008, then became the manager again in October 2019 after Marcel Antaki ("Marcel" or "Mr. Antaki") relinquished his managerial authority in RELAP. 13T183:2-13; 7T175:9-179:16; 204:2-207:15; 4T140:8-23; 4T141:1-142:9; Pa616. Marcel, Liliane's husband and Alan and Roger's father, worked in some capacity as general manager of RELAP from 2008 until October 7, 2019. 7T178:7-10.

Plaintiff Second Inning 1, L.L.C. ("Second Inning"), is a New Jersey limited liability company located at 155 Algonquin Parkway, Whippany, New Jersey and is owned by Sandeep Patel ("Patel") and Jagat Mehta ("Mehta"). 4T60:14-16. Second Inning leases space in a building at 155 Algonquin

[1] To the extent it is not inconsistent with the statements and arguments raised in this brief, Marcel Antaki incorporates and relies upon the statements and arguments made by his co-defendants.

Parkway from RELAP. Pa316. There, Second Inning operates an adult daycare facility that transports its clients to and from its facility via vehicles owned by Second Inning, employing drivers with commercial driver's licenses to operate 25 passenger buses. 8T107:9-13.

Second Inning operates two shifts. The first shift operates from 9:00 am until 2:00 pm and is limited by the State to 100 clients, while the second shift runs from 2:30 pm to 6:30 pm and has 28 clients. 8T102:12 to 103:17; 158:16-21; 4T8:24.

On April 15, 2008, Second Inning and RELAP entered into a two year, three month Lease Agreement for a portion of the premises located at 155 Algonquin Parkway, comprising 6,150 square feet of space. Pa316. The Lease included both rent and monthly operation charges for common area maintenance ("CAM"). Pa337. The leased space was to be used as a medical adult day care facility, and a medical adult day care facility had previously occupied the same space. 13T194:1-11.

The Lease contained a provision that stated:

> **The Tenant** shall diligently pursue, at its sole expense, all necessary approvals and permits from the Township of Whippany, New Jersey, including but not limited to any necessary Whippany zoning approvals, construction permits, and approvals of the New Jersey State Division of Health and Human Services, and from any other governmental instrumentality, board or

> bureau having jurisdiction thereof, necessary for the Tenant to utilize the Demised Premises for Permitted Use.
>
> [Pa316 (emphasis added).]

The Lease was signed by Patel on behalf of Second Inning on April 22, 2008, and Marcel on behalf of RELAP, with Mehta signing as a witness for Patel's signing. Pa338. Patel's initials are visible on each page of the Lease. 4T:60-17-23.

The parties entered into the First Lease Amendment on August 1, 2010, in order to extend the original Lease by 5 years, ending July 31, 2015. Pa341. The First Lease Amendment states:

> Except as expressly provided herein, all other terms, conditions, covenants, and agreements set forth in the Lease remain unchanged and in full force and effect.
>
> [4T70:1-9; Pa342.]

The First Lease Amendment was signed by Patel on behalf of Second Inning, and Marcel on behalf of RELAP. Pa345.

Second Inning and RELAP entered into a Second Lease Amendment expanding Second Inning's square footage to 7,200 square feet and increasing the allotted parking spaces from 14 spaces to 16 spaces. Pa344. An additional two parking spaces were granted "on a temporary basis," which could be

withdrawn by the landlord "at its sole discretion." Pa345. The Second Lease Amendment also contained a provision that stated:

> Except as expressly provided herein, all other terms, conditions, covenants, and agreements set forth in the Lease remain unchanged and in full force and effect.
>
> [Pa345; 4T73:3-8.]

The Second Lease Amendment was signed by Patel on behalf of Second Inning, and Marcel on behalf of RELAP. Pa345.

On July 1, 2016, Second Inning and RELAP entered into a Third Lease Amendment, which expanded Second Inning's leased space by an additional 3,819 square feet (the "expansion space"). Pa349. The Third Lease Amendment provided, "Whereas Tenant desires to start applying for the necessary permits to expand his operation from various Municipal and Governmental Departments and Authorities, with the hope that it will able [sic] to successfully obtain same by or before February 1st 2017[.]" Pa349. The Amendment further provided that an additional 16 parking stalls "will be assigned" to the expansion, shown in blue on Exhibit B to the Third Lease Amendment. Pa349. The Third Lease Amendment provided that:

> Tenant will perform ALL JOBS pertaining to the modifications of its premises, and those jobs outside its premises that are caused by such modifications, in particular those described in EXHIBIT 'C', at its sole expense, and to the satisfaction of the Landlord.

> [Pa356-357.]

The Third Lease Amendment also states:

> All conditions and stipulations in the abovementioned Lease and the First Lease Amendment and Second Lease Amendment are valid unless explicitly amended or cancelled in this Third Lease Amendment[.]
>
> [Pa349.]

The Third Lease Amendment was signed by Patel on behalf of Second Inning and Marcel on behalf of RELAP. Pa351.

On July 28, 2016, Second Inning and RELAP entered into a Fourth Lease Amendment setting forth the total rent payment and CAM charges for the entire space Second Inning leased from RELAP. Pa359. This lease runs from August 1, 2016 until July 31, 2025. Pa359.

* * * *

Second Inning has parked its vehicles overnight on RELAP's property since the beginning of its lease in 2008. Second Inning never made any attempts to store its vehicles elsewhere, nor has it ever inquired about storing vehicles elsewhere. Second Inning's owners never made any efforts to inquire whether this overnight parking was permitted by Hanover Township or whether their parking was in compliance with municipal code. Marcel, as building manager, had been cited for violations of Hanover Township Municipal Ordinance due to Second Inning's overnight parking. 8T71:14 to 72:10.

The initial Lease signed in 2008 contained a provision that required Second Inning to obtain "necessary approvals and permits from the Township of Whippany, New Jersey including but not limited to . . . zoning approvals, construction permits, and approval from the New Jersey State Division of Health and Human Services, and from any other governmental instrumentality, board or bureau having jurisdiction thereof necessary for Tenant to utilize the Demised Premises for the Permitted Use." Pa316.

The most recent approved site plan for 155 Algonquin Parkway is dated July 24, 2000. Pa617. On February 20, 2018, Marcel, on behalf of RELAP, submitted an Amended Site Plan to Hanover Township in an attempt to assist Second Inning with the required approvals for their expansion. 13T185:5-18. Second Inning filed an injunction enjoining RELAP from proceeding with the Amended Site Plan Application. 4T94:20 to 97:18. Second Inning never sought approvals from the Hanover Township Planning Board related to its expanded use of the premises or parking. 4T146:6-13. Even if parking was sufficient for Second Inning's use of the expansion space, zoning approval would have still been necessary for Second Inning's proposed renovation.

PROCEDURAL HISTORY

Marcel relies upon the procedural history set forth in the brief of his co-defendants for all procedural events occurring before his motion for summary judgment. On November 20, 2020, Marcel moved for summary judgment on all counts before the Honorable Judge Maritza Berdote Byrne, Presiding Judge of the Chancery Division in Morris County. Pa297. On the same day, RELAP, Alan, Liliane, Roger, and Nicholas also moved for summary judgment. Pa297. On December 8, 2020, Second Inning filed an opposition to Marcel's and the other Defendants' motions for summary judgment. Pa297. On December 15, 2020, Marcel and all other Defendants filed reply briefs in further support of their respective motions for summary judgment.

On January 20, 2021, over a month after the filing of reply briefs, Second Inning filed an unpermitted sur-reply to Defendants' reply briefs. Marcel and the other Defendants submitted letters arguing that such practice was improper given that over a month had passed since the close of briefing and sur-replies were generally disallowed under New Jersey Court Rules. All parties submitted further argument on this matter; however, the court never decided the propriety of Second Inning's sur-reply or subsequent pages and pages of argument.

On June 29, 2021, the court issued an order noting that because Ms. Liliane Antaki was deceased, Second Inning was required to amend the

Amended Complaint to implead the Estate of Ms. Antaki, and that the parties should then refile their summary judgment briefs to be considered by the court. Da56. After amendment, the Estate of Liliane Antaki, then represented by separate counsel, submitted its own motion for summary judgment. Pa297.

On January 20, 2022, the court held oral argument on the summary judgment motions. Pa297. On February 25, 2022, the court issued an order and written decision denying without prejudice all of the motions for summary judgment with the exception of that filed by defendant Nicholas Antaki. Pa295-312. Marcel now cross-appeals the denial of summary judgment.

Trial on the case commenced on August 8, 2022 before the Honorable Judge Stephan C. Hansbury, and was conducted virtually over the course of 13 days ending October 25, 2022. *See generally* 2T to 14T. At the onset of the trial, Judge Hansbury considered and ruled on several motions *in limine*.

Marcel, joined by other defendants, moved to limit parol evidence as it related to the Lease agreements. After argument, Judge Hansbury ruled that he would not limit all parol evidence but would rule on specific objections as the trial progressed. 2T46:20 to 47:22. Marcel, joined by other defendants, moved to preclude evidence of an alleged altercation between Marcel and Second

Inning's administrator.[2] After argument, Judge Hansbury ruled that the "altercation is not relevant and it is not an element of damages. So, under Rule 401 as well as 403, there's no basis to present this at trial." 2T55:12-15. Marcel, joined by other defendants, also moved to exclude evidence of alleged harassment of Second Inning's customers.[3] After argument, Judge Hansbury ruled that the alleged harassment was not relevant stating: "it has been clearly established during oral argument no damage evidence was ever presented regarding nine clients. It's simple enough to do a calculation to provide a report, but it was not." 2T61:4-9. Further, Judge Hansbury admonished Second Inning for their attempt to seek punitive damages on this issue stating "you cannot obtain punitives without compensatory." 2T61:10-11.

Marcel, joined by other defendants, also moved to require Second Inning's proofs to hew closely to what is alleged in the pleadings. After argument, Judge Hansbury granted the motion, essentially closing off Second Inning's attempts to assert causes of action not pled in the Complaint. In so ruling, Judge Hansbury stated:

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[2] Second Inning's characterization of this disputed event as an "assault" is improper argument and has no place in the fact section. Pb7.

[3] Second Inning's brief characterizes this allegation as "Mr. Antaki's racist remarks[.]" Pb7. Given that the court excluded such allegations as irrelevant, Second Inning should retract this statement as it is not factual and constitutes argument.

> To me this is the easiest motion because it's a fundamental principle that you put people on notice of causes of action in the complaint. And if you don't amend your complaint as the case goes on then you do -- you don't do that at your own peril, so of course I am going to limit the proofs to the causes of action. Now, this may result in argument down the road, and I get that, but there's really no option here. If you pled it you get to prove it. If you didn't plead it you don't get to prove it. The fact that a letter was sent and some other discussion in a summary judgment motion doesn't cut the mustard. You've got to put it in your complaint. You have every right to file an amendment throughout the course of litigation, as is often the case. So in terms of limiting proofs to the causes of action in the complaint, of course I am going to do that, so the answer is yes, it's granted.
>
> [2T73:24 to 74:16.]

Finally, Marcel Antaki, joined by the other defendants, moved for Second Inning to specify which defendants were being sued under which counts, given that Second Inning had generally asserted "claims against all defendants in each of the counts," (2T88:2) despite the fact that, for example, Marcel Antaki was not a party to the contract at issue in the claim for Breach of Contract in Count One. After argument on this issue, Second Inning ultimately conceded that contract relief could not possibly be sought against individual defendants on claims arising out of contract.

> THE COURT: So, Mr. Kyreakakis, are you in agreement that Counts 1, 2 and 3 involve only the corporation?

> MR. KYREAKAKIS: Well, the first count, Judge, breach of contract, yes. The second count is breach of implied covenant of good faith and fair dealing, yes. The third count is breach of covenant of quiet enjoyment, where I think we might have some individual claims, Judge, like against Mr. Marcel Antaki.
>
> MR. BALDASSARE: Judge, our position is that's a contract claim.
>
> THE COURT: How could it not be a contract claim?
>
> MR. KYREAKAKIS: All right, Judge. I'll agree on the third count. Again, I'm trying to be fair.
>
> THE COURT: Of course. All right. So, in terms of the motion, the individual defendants are not defendants in Counts 1, 2 and 3, only the corporation is. Okay.
>
> [2T94:3-23.]

This concession by Second Inning and the ruling by the court's ruling resulted in the dismissal of the contract claims against Marcel, which is set forth in a November 14, 2022 Order. Pa35.

At the conclusion of Second Inning's case-in-chief, Marcel and his co-defendants made a motion for directed verdict pursuant to Rule 4:37-2(b) based on Second Inning's failure to present a *prima facie* case.

First, defendants sought dismissal of Count Nine for tortious interference based on alleged harassment of Second Inning's clients. 12T136:4-11.[4] Marcel argued that there had been no evidence presented regarding harassment of

[4] For ease of reference, the dismissal of these counts is discussed in the order they appear in the transcript.

clients, and there was no evidence of damages related to the alleged harassment. 12T136:18 to 137:11. Given the absence of any evidence related to that count, the court dismissed. 12T139:17-21.

Next, defendants sought dismissal of Count Ten for tortious interference with economic advantage based on failure to received parking spaces. 12T140:5-8. Marcel argued that that claim was essentially a contract claim couched as a tort claim and Second Inning had failed to properly present damages on this issue. 12T140:9 to 141:13. Initially, the court considered withholding judgment as to Marcel on this claim (12T171:21 to 172:3), but later granted when the court considered that Marcel could not have provided parking spaces in his individual capacity. 13T:56:7-10.

Defendants sought dismissal of Count Eight for unjust enrichment, which the court granted on the basis that Second Inning did not present any evidence that any individual defendants, including Marcel, were unjustly enriched. 12T178:4-21. On Count Seven for conversion, counsel for Second Inning conceded that the claim was not viable (12T182:16-23) and the court dismissed that claim for substantially the same reasons as it dismissed Count Eight. 12T182:24 to 183:13.

Defendants sought dismissal of Count Six for negligent misrepresentation, with Marcel arguing that Second Inning had not presented evidence of an

independent duty or other elements necessary to maintain a claim based on negligence and that Second Inning's expert had opined that Second Inning would have received an approved site plan if they had applied. 12T183:22 to 184:5. The court dismissed as to Marcel after referencing established New Jersey case law and precedent stating "there is no established independent duty that [Marcel] has so I'll dismiss the claim as to him[.]" 12T191:1-2.

Finally, defendants sought dismissal as to Counts Four and Five for fraud and fraud in the inducement respectively. In dismissing Counts Four and Five as to Marcel, the court honed in on the fact that none of the alleged misrepresentations were made in his personal capacity. 13T45:21. "[H]e wasn't saying anything personal that would cause personal liability to him. He was clearly acting on behalf of the corporation. So the application as to him is granted." 13T45:22-25.

On November 15, 2022, the trial court entered an Order granting involuntary dismissal as to Marcel on all counts, with reasons stated on the record. Pa35-37.

STANDARD OF REVIEW

Appeals from the denial of summary judgment are reviewed *de novo*. *Davis v. Brickman Landscaping, Ltd.*, 219 N.J. 395, 405 (2014). Thus, this Court applies the same standard as the trial court. *Townsend v. Pierre*, 221 N.J. 36, 59 (2015). In doing so, the court views the evidence in the light most favorable to the non-moving party. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 523 (1995). Summary judgment is properly granted when the record establishes "there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *Davis*, 219 N.J. at 405-06 (quoting *R.* 4:46-2(c)); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 259 (1986) (holding summary judgment is appropriate where the evidence "is so one-sided that one party must prevail as a matter of law").

ARGUMENT IN SUPPORT OF RESPONDENT MARCEL ANTAKI'S CROSS-APPEAL

POINT I

THE TRIAL COURT ERRED WHEN IT IGNORED BINDING PRECEDENT AND FAILED TO GRANT SUMMARY JUDGMENT IN FAVOR OF MARCEL ANTAKI WHO WAS NOT A PARTY TO THE LEASE AT ISSUE. (Pa299-Pa305)

Marcel moved for summary judgment on all claims against him. Of the 16 pages of written decision, the denial of Marcel's motions is found in the last two pages of that decision under the heading "The Individual Antaki Defendants." Pa310-311. The decision does not address the fact that Marcel is not a party to the contract and accordingly could not be liable on Counts One, Two and Three. *See generally* Pa297-312. Those three counts seek contract remedies, and as Marcel is not a party to the lease (a contract between RELAP and Second Inning), summary judgment in his favor is proper.

It is axiomatic that "an action on a contract cannot be maintained against a person who is not a party to it," *Comly v. First Camden Nat'l Bank & Tr. Co.*, 22 N.J. Misc. 123, 127 (1944); *see also F.D.I.C. v. Bathgate*, 27 F.3d 850, 876 (3d Cir. 1994) (applying the same rule to a claim of breach of the duty of good faith and fair dealing). "The obligation of contracts is, in general, limited to the parties making them." *Aronsohn v. Mandara*, 98 N.J. 92, 101 (1984). The trial

court failed to apply this well settled principle of law in denying summary judgment with respect to Counts One through Three.

At no point during summary judgment did Second Inning contend that Marcel had signed the Lease or any of the amendments thereto in his individual capacity. Marcel's undisputed statement of material facts in support of summary judgment provides that Marcel signed on behalf of RELAP for the initial Lease (Da90, ¶ 22), the First Lease Amendment (Da91, ¶ 24), the Second Lease Amendment (Da91, ¶ 31), and the Third Lease Amendment (Da93, ¶ 39). Second Inning's "Responding Statement to the Statement of Undisputed Material Facts Filed By Marcel Z. Antaki" admits to all these paragraphs as undisputed. (Da370, ¶¶ 22, 24; Da372, ¶ 31; Da375, ¶ 39).

The court's denial of summary judgment on these counts was not predicated upon any sort of individual liability that could be imposed on Marcel. The Lease, which Second Inning embraced, contained a "Non-Liability of Landlord" provision which stated:

> Neither the Landlord nor any partner of the Landlord shall be under any personal liability to the Tenant with respect to any provision of this Lease.
>
> [*See* Da7/Pa323, Lease, at 7(a).]

Second Inning asserted three contract claims broadly against all defendants: breach of contract, breach of the implied covenants of good faith

and fair dealing, and breach of the covenant of quiet enjoyment. In its breach of contract claim (First Count), Second Inning alleges that "Relap is in breach of its Lease and Lease Amendments with Second Inning." Pa160, ¶ 85. While this Count appears to be directed at Defendant RELAP, LLC, exclusively, it is not entirely clear from the allegations that this is so. Indeed, as discussed *supra,* Second Inning proceeded to trial on the contract claims against all defendants and it was only under the court's questioning that Second Inning's counsel finally conceded that the individual defendants could not be liable on the contract claims. Thus, to the extent this Count is asserted against Mr. Antaki personally, the trial court should have entered summary judgment in his favor because he is not a signatory to the Lease or any of the Amendments. As a non-signatory to the contract at issue – the Lease and its Amendments – Mr. Antaki cannot be held liable for a breach of that agreement.

Summary judgment should likewise have been entered in Mr. Antaki's favor with respect to Second Inning's claim of breach of the covenant of good faith and fair dealing. Given that the covenant of good faith and fair dealing is implied in every contract under New Jersey law, *see Sons of Thunder, Inc. v. Borden, Inc.,* 148 N.J. 396, 420 (1997), this claim is inextricably linked to the Lease and its Amendments. Because Mr. Antaki is not a party to the Lease Agreement or its Amendments, that claim was not viable against him. *See*

F.D.I.C., 27 F.3d at 876. Accordingly, the court should have entered judgment in his favor on this count as well.

Finally, the court should have entered summary judgment in favor of Mr. Antaki on Plaintiff's Third Count, *i.e.*, its claim for breach of the covenant of quiet enjoyment. In setting forth this claim, Second Inning expressly relied upon the "quiet enjoyment" provision contained in the original Lease. *See* Pa161, ¶ 96 ("The parties' April 15, 2008 Lease contains a Quiet Enjoyment provision[.]"). As with the foregoing contract claims, Mr. Antaki cannot be found liable for breach of the quiet enjoyment provision of the Lease because he is not a party to the Lease or its Amendments. Therefore, Mr. Antaki is entitled to summary judgment as a matter of law on the Third Count.

POINT II

THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT SUMMARY JUDGMENT IN FAVOR OF MARCEL ANTAKI WITH RESPECT TO THE FOURTH, FIFTH, AND SIXTH COUNTS BECAUSE SECOND INNING'S CLAIMS ARISE OUT OF THE LEASE AND PLAIN TEXT OF THE LEASE BARS SECOND INNING'S RECOVERY. (Pa305-Pa308)

The court should have entered summary judgment in Mr. Antaki's favor on Second Inning's claim of fraud in the inducement (Fourth Count). In order to establish the tort of fraudulent inducement, a plaintiff must prove:

> (1) a misrepresentation of material fact;
> (2) knowledge or belief by the defendant of its falsity;
> (3) intent that the other party rely on it; and
> (4) detrimental reliance thereon by the other party.

Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (citing *Jewish Center of Sussex County v. Whale*, 86 N.J. 619, 625 (1981)). "Fraud is never presumed, but must be established by clear and convincing evidence." *Weil v. Express Container Corp.*, 360 N.J. Super. 599, 613 (App. Div. 2003) (citing *Albright v. Burns*, 206 N.J. Super. 625, 636 (App. Div. 1986)).

In support of its fraud in the inducement claim, Second Inning alleges:

> At the time of entering the Third Lease Amendment on July 1, 2016 for the expansion of the adult day care health center, Relap represented to Second Inning that Relap had the requisite parking spaces for such use of the leased premises and assigned specific parking

> spaces to Second Inning under the Third Lease Amendment.
>
> [Pa163, ¶ 102.]

Plaintiff further alleges that the foregoing representations were:

> "knowingly false statements and omissions of material facts because the defendants knew before the execution of [the Amendments] that Relap did not have the requisite parking spaces for Second Inning's expanded adult day care health facility under the July 24, 2000 site plan approval … and also knew that their application for an exemption to the parking space requirements had been denied by the construction official and zoning officer of Hanover Township."
>
> [Pa163, Second Amend. Compl., Fourth Count.]

Second Inning cannot sustain its fraudulent inducement claim against Mr. Antaki for at least three reasons. First, any representations made by Mr. Antaki in connection with the Third and Fourth Amendments to the lease were undertaken on behalf of the Landlord, Defendant RELAP, LLC, and not on behalf of himself individually. Accordingly, even assuming for the sake of argument that those representations were inaccurate, Mr. Antaki should not be held personally liable as a result of any of those statements.

Second, Second Inning's fraudulent inducement claim is barred by New Jersey's economic loss doctrine. Under New Jersey law, a plaintiff typically may not recover in tort for damages caused by a breach of contract. *See Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 580 (1985) (holding

that "as among commercial parties … contract law … provides the more appropriate system [as compared to tort law] for adjudicating disputes arising from frustrated economic expectations."). *See also Dean v. Barrett Homes, Inc.*, 204 N.J. 286, 295 (2010) (noting that the economic loss doctrine "evolved as part of the common law, largely as an effort to establish the boundary line between contract and tort remedies").

Courts have made clear that "only those pre-contractual misrepresentations that are *extraneous* to the parties' contract may be brought alongside a breach of contract claim." *Montclair St. Univ. v. Oracle USA, Inc.*, Civ. Action No. 11-2867, 2012 WL 3647427, at *4 (D.N.J. Aug. 23, 2012) (emphasis in original) (dismissing fraudulent inducement claim because the alleged misrepresentations related to the defendant's performance of the terms set forth in the agreement) (Da878). As in *Montclair*, Plaintiff's fraud in the inducement claim is not viable because the alleged misrepresentations made by Mr. Antaki are not extraneous to the Lease. Rather, they are directly addressed in – and contradicted by – the language of the Lease and its Amendments.

Indeed, the allegations regarding the "knowingly false" statements about the requisite parking spaces are belied by the text of both the original Lease and Third Lease Amendment. The original Lease, entered into on April 15, 2008, states in relevant part:

> The Tenant shall diligently pursue, at its sole cost and expense, all necessary approvals and permits from the Township of Whippany, New Jersey including but not limited to **any necessary Whippany zoning approvals**, construction permits, and approval of the New Jersey State Division of Health and Human Services, and from any other governmental instrumentality, board or bureau having jurisdiction thereof necessary for the Tenant to utilize the Demised Premises for the Permitted Use. In the event that the Tenant fails to obtain such approval and permits aforesaid within 90 days of the date of this Lease, the Landlord may, in its sole discretion, declare this Lease null and void.
>
> [Pa316/Da3, Lease.]

And, notably, the Third Lease Amendment states:

> Whereas Tenant desires to start applying for the necessary permits to expand his operation from various Municipal and Governmental Departments and Authorities, with the hope that it will successfully obtain same by or before February 1st, 2017….
>
> ****
>
> All conditions and stipulations in above mentioned Lease and First Lease Amendment and Second Lease Amendment are valid unless explicitly amended or cancelled in this Third Lease Amendment ….
>
> ****
>
> Sixteen (16) Parking Stalls **will be** assigned to present expansion, as shown in blue in Exhibit "B," in addition to the Fourteen (14) stalls shown in orange already assigned to it.
>
> [Pa349 (emphasis added).]

As demonstrated by the passages quoted above, the onus falls squarely upon Second Inning, not RELAP or Mr. Antaki, to obtain all of the necessary zoning approvals and permits in order for Second Inning to operate its expanded business at the leased property. Moreover, the provision regarding the "sixteen parking stalls" is future-looking, *i.e.*, it states that the parking spots "**will be** assigned," indicating that such assignment is contingent upon Second Inning securing the necessary approvals. Therefore, even if Mr. Antaki made the representations alleged in the Amended Complaint, those representations cannot form the basis of a fraud in the inducement claim in the face of directly contrary language in the Lease and the Third Amendment. Accordingly, summary judgment should have been entered in Mr. Antaki's favor on Second Inning's fraud in the inducement claim.

Third, the integration clause contained in the Lease bars Second Inning's fraudulent inducement claim. *See, e.g., Filmlife, Inc. v. Mal "Z" Ena, Inc.*, 251 N.J. Super. 570, 575 (App. Div. 1991) (dismissing fraud claims in the face of an integration clause). *See also RNC Systems, Inc. v. Modern Technology Group, Inc.*, 861 F. Supp. 2d 436, 455 (D.N.J. 2012) (holding that integration clause required dismissal of fraudulent inducement claims). Here, the Lease's integration clause states in relevant part:

> This Lease contains the entire agreement between the parties. No representative, agent or employee of the Landlord has been authorized to make any representations or promises with reference to the within letting or to vary, alter or modify the terms thereof. No additions, changes or modifications, renewals or extensions hereof shall be binding unless reduced to writing and signed by the Landlord and the Tenant.
>
> [Pa335/Da22, Lease.]

In light of this language, it is clear that Second Inning should not have been allowed to proceed with its fraudulent inducement claim, which relied upon verbal representations allegedly made by Mr. Antaki regarding topics directly addressed by the Lease and its Amendments. *See Filmlife*, 251 N.J. Super. at 575 (fraudulent inducement claims survive integration clauses only "when the fraudulent misrepresentation inducing the signature is as to a thing not dealt with at all in the agreement").

For this reason as well, the court should have entered summary judgment in Mr. Antaki's favor on Second Inning's fraud in the inducement claim.

For the same reasons, Second Inning's common law fraud claim, Count Five, against Mr. Antaki should not have survived summary judgment. The elements of common-law fraud are "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." *Allstate New Jersey*

Ins. Co. v. Lajara, 222 N.J. 129, 147 (2015) (quoting *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 172–73 (2005)) (internal quotation marks omitted). "A misrepresentation amounting to actual legal fraud consists of a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment." *Jewish Center of Sussex County*, 86 N.J. at 624 (citing *Foont-Freedenfeld v. Electro-Protective*, 126 N.J. Super. 254, 257 (App. Div. 1973)).

Second Inning alleges that the "material misrepresentations include but are not limited to defendants' promises and representations to Second Inning that Relap had the requisite number of parking spaces on its site to allow Second Inning to operate its adult medical day care center on the premises set forth in the parties' leases." Thus, Count Five rests upon the same alleged misrepresentations as Second Inning's fraud in the inducement claim. For all of the reasons discussed, *supra*, Second Inning's legal fraud claim is not legally viable and judgment should have been entered in Mr. Antaki's favor.

Likewise, the court should have granted summary judgment with respect to Count Six because Second Inning failed to allege that Marcel engaged in a negligent misrepresentation. In order to prove a claim of negligent misrepresentation under New Jersey law, the plaintiff must prove (1) the

defendant negligently made an incorrect statement; (2) the plaintiff justifiably relied on the defendant's statement; and (3) the plaintiff was injured as a consequence of relying upon that statement. *Carroll v. Cellco Partnership*, 313 N.J. Super. 488, 502 (App. Div. 1998); *see also Rosenblum v. Adler*, 93 N.J. 324, 334 (1983).

According to the Second Amended Complaint, Second Inning's negligent misrepresentation claim rests upon the same alleged misrepresentations regarding parking spaces as all other related fraud claims. In denying summary judgment on this point, the court pointed to an allegation that Marcel was briefly removed from management to induce Second Inning to sign a certification for RELAP to obtain a bank loan in 2019, well after the signing of the Third Lease Amendment in 2016. Pa311. Such an allegation does not include any cognizable damages for Second Inning nor does that allegation appear anywhere in the Second Amended Complaint, with respect to Count Six. Accordingly, there was no basis to deny summary judgment with respect to Count Six as to Marcel.

POINT III

THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT SUMMARY JUDGMENT IN FAVOR OF MARCEL ANTAKI ON THE SEVENTH COUNT FOR CONVERSION AND THE EIGHTH COUNT FOR UNJUST ENRICHMENT BECAUSE THE ALLEGED DAMAGES ARISE OUT OF A CONTRACTUAL RELATIONSHIP TO WHICH MARCEL ANTAKI IS NOT A PARTY. (Pa308-Pa309)

Marcel moved for summary judgment on Count Seven, Conversion, and Count Eight, Unjust Enrichment, on the grounds that Second Inning's alleged monetary damages arise out of a contractual relationship, and conversion and unjust enrichment are equitable remedies. With respect to Marcel, the trial court's decision did not address these arguments, instead focusing exclusively on the relationship between RELAP and Second Inning. Pa308-309.

In denying summary judgment on the Count Seven for Conversion, the court stated "to the extent Second Inning's allegations are post-contractual, if it can demonstrate conversion not related to the contractual rights and obligations of the parties, it may be successful in proving conversion." Pa308. However, in the Second Amended Complaint, Second Inning explicitly pointed to "rents and CAM charges collected by Relap from Second Inning **under the Third and Fourth Lease Amendments**[.]" Pa229. Second Inning sought no relief related to conversion arising outside of the contract. Accordingly, the court erred when

it failed to grant summary judgment on this Count, apparently pointing to "conversion not related to the contractual rights" that had never been alleged.

Defendant Marcel also moved for summary judgment on the Count Eight (unjust enrichment) because, as stated by the Appellate Division, when there is an "express contract, there is no basis or need for plaintiff to pursue a quasi-contractual claim for unjust enrichment." *Winslow v. Corporate Express, Inc.*, 364 N.J. Super. 128, 143 (App. Div. 2003). Far from claiming there is no contract or, for that matter trying to avoid the presence of a binding contract, Second Inning repeatedly, expressly and explicitly embraces the contract as the document upon which all of Second Inning's rights flow. Second Inning has sued under the contract, making the Lease and its Amendments the centerpiece of its Complaint. *See, e.g.*, Pa205 (stating that on "April 15, 2008, Second Inning entered into a Lease Agreement with Relap"). Over the course of numerous pages in the Second Amended Complaint, Second Inning details the contract and its amendments alleging that it has "complied with all the terms of its lease and lease Amendments with Relap." Pa209, ¶ 31. Accordingly, the court should have granted summary judgment with respect to Marcel on the Eighth Count.

POINT IV

THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT SUMMARY JUDGMENT IN FAVOR OF MARCEL ANTAKI ON THE NINTH COUNT FOR TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS BECAUSE THE COURT FAILED TO EVEN ADDRESS THIS POINT AS IT RELATES TO MARCEL ANTAKI. (Pa309)

In its written decision, with respect to Tortious Interference with Contract, the trial court merely stated: "Defendant Relap does not seek summary judgment on this count and has excluded it from its motion." Pa309. The court stated nothing about Marcel on this Count. In support of its claim for tortious interference, Second Inning asserted that "Defendants have tortiously interfered with Second Inning's contractual relations and agreements with its clients by harassing and also making racist comments against them." Pa231, ¶ 137.

On this count, to overcome summary judgment, Second Inning needed to come forth with evidence regarding four elements: (1) a protected interest; (2) malice – that is, defendant's intentional interference without justification; (3) a reasonable likelihood that the interference caused the loss of the prospective gain; and (4) resulting damages. *MacDougall v. Weichert*, 144 N.J. 380, 404 (1996) (emphasis added).

Mr. Antaki's basis for moving for summary judgment on this count was simple and straightforward: Second Inning admitted that it had never quantified

damages related to loss of current or prospective patients. Indeed, at the time of summary judgment, neither principal of Second Inning was able to testify regarding these damages and had not calculated such damages. Second Inning's expert report, provided to the court on summary judgment, likewise offered no information whatsoever regarding an alleged loss of existing or prospective clients. Da415, attaching Exhibit T: Expert Report of Rebecca Fitzhugh, CPA (Pa642). Accordingly, absent any factual information on this issue, summary judgment should have been granted in favor of Marcel. Similar to the Ninth Count, on summary judgment, the court did not independently address Marcel, despite the fact that the alleged harms of which Second Inning complains flow from the contract. Like the Ninth Count, Second Inning had failed to quantify damages, and accordingly, summary judgment should have been granted on this claim.

OPPOSITION TO SECOND INNING'S APPEAL[5]

POINT I

SECOND INNING FUNDAMENTALLY MISUNDERSTANDS AND MISUSES THE COURT'S FACTUAL FINDING.

Second Inning repeats ad nauseum the factual finding that "plaintiffs testified and the court accepts as true that Marcel told them when they entered into the Third Lease Amended that the Planning Board had approved the parking set forth in the lease." Pb29 (citing Pa30). Second Inning's use of this single fact amidst a slew of mitigating and militating factual and legal findings is particularly troublesome for Second Inning, especially in a case where the court ultimately determined that a contract controlled the case. Such a factual finding can easily be squared with the simple and straightforward findings contained in the court's November 25, 2022 Decision, namely that despite what Marcel said regarding site plan approval "[t]hat assurance is not in the lease. The additional parking is stated as 'will' not 'is.' In fact, when [RELAP] applied to the

[5] Second Inning's table of Orders, Judgments and Rulings appealed includes the trial court's decision on motions in limine to exclude evidence of harassment and an altercation, however, the brief contains no legal argument on this issue. As a result, Second Inning's alleged appeal of the trial court's rulings to exclude evidence of alleged harassment and an altercation between Mr. Antaki and a Second Inning employee is waived. *State v. Shangzhen Huang*, 461 N.J. Super. 119, 125 (App. Div. 2018), aff'd, 240 N.J. 56, 56 (2019) (issues not briefed on appeal are deemed abandoned).

Planning Board, [Second Inning] obtained an injunction to stop it." Pa33 (November 25, 2022 Decision).

All claims against Marcel were dismissed by Order dated November 11, 2022 (Pa35), after the court had had the opportunity to hear most if not all, of the evidence regarding Marcel. Given the unique role of the court in an equity trial, sitting as both fact finder and judge, it is clear from the record that Judge Hansbury considered the facts presented in reaching his decisions of involuntary dismissal.

Despite this, Second Inning's argument rests upon a single fact, incorrectly assuming that if Marcel stated that the parking was approved, it follows that Second Inning is victorious on all counts. However, Second Inning ignores the fact that notwithstanding this finding, the court found that Second Inning failed to establish essentially every element of each and every one of its claims.

With respect to Counts One, Two and Three, the claims stemming from the Lease Agreement, the court dismissed such claims on the basis that Marcel was not a party to the lease. 2T94:3-23.

With respect to Counts Four and Five, the court stated:

> There is evidence by which I could conclude that Marcel made some misrepresentations, but I also find and I do find that he did so on behalf of the corporation. Whatever he said was not his own personal -- he wasn't

> saying anything personal that would cause personal liability to him. He was clearly acting on behalf of the corporation. So the application as to him is granted.
>
> [13T:45:18-25.]

Further, despite the court's reasoning that there may have been *some* evidence of potential misrepresentations, the court correctly relied upon "a clear and convincing standard," stating:

> And although the plaintiff is entitled to -- the burden of proof is obviously on the plaintiff to meet clear and convincing evidence of fraud, he's entitled to reasonable evidence – reasonable inferences.
>
> But if you look at the facts here, there's almost nothing that's clear and convincing about anything in this case.
>
> [13T48:14-22.]

At best, Second Inning's continued reliance upon a single factual statement set forth in the November 25, 2022 Order points to what the court called "evidence to support a claim of fraud in the inducement as to RELAP, but it's not clear and convincing." 13T49:14-16. In dismissing this claim, the court relied upon Second Inning's failure to show falsity of the statement (13T48:2-5), failure to show intent to deceive (13T48:6-13), and failure to show justifiable reliance (13T48:14-20).

In dismissing Count Six, the court pointed to the fact that Second Inning's claim for negligent misrepresentation requires an independent duty to maintain an action in tort. 12T187:17-18. When pressed, Second Inning could point to

no independent duty, but merely reiterated the legal standard for negligent misrepresentation. 12T:190:15-19. Relying on binding precedent from the New Jersey Supreme Court, the trial court dismissed the claim reasoning "[s]o there is no established independent duty that Mr. Marcel Antaki has so I'll dismiss the claim as to him also." 12T190:24 to 191:2.

Likewise, when the court held argument on Marcel's motion to dismiss Count Seven for conversion, Second Inning conceded that, based on the court's ruling with respect to the Count Eight for Unjust Enrichment, the conversion claim was more akin to a contract claim. 12T182:15-23. On Count Eight, the court had slightly earlier ruled:

> All right. I'm going to dismiss this count for the following reasons. First as to the individuals, there's no evidence that they were unjustly enriched so that's certainly appropriate. In terms of the RELAP, if you're obligated to pay rent under a lease and you don't get the benefit of what you're paying, in theory that constitutes a breach of contract claim. It's not unjust enrichment because you paid what you were legally obligated to pay and didn't seek an opportunity to short cut it, to mitigate, whatever. But the lease required certain payments including the ones that are part of this unjust enrichment claim. Well, you can't have it both ways. You can't sue somebody for under the breach of contract and also for unjust enrichment. It doesn't mean the amount of money that was paid goes away. It doesn't go away. But it's included in a breach of contract claim against RELAP.
>
> [12T178:4-21.]

With respect to Count Nine, the court had ruled on a motion in limine excluding evidence of alleged harassment of Second Inning's clients because there were no alleged damages associated with such incidents. 2T61:4-9. Second Inning later conceded that given this ruling, it had presented no evidence to make out a case for Tortious Interference with Contractual Relations. 12T139:6-16. In dismissing Count Nine, the court stated, "there's an absence of testimony and perhaps more significantly, no testimony as to any damages which arise out of any of the allegations in the ninth count so I will dismiss." 12T139:18-21

The trial court also properly dismissed Count Ten as to Marcel. In so ruling, the court considered the language in the Complaint and concluded the alleged actions could not possibly impose liability on Marcel because "RELAP is the only one that could have provided those parking spaces." 13T56:2. The court also noted that when the Second Amended Complaint states that defendants "'have tortiously interfered with the prospective advantage of Second Inning by its action' – it refers to an entity, not to people." 13T55:18 to 56:10 (quoting the Second Amended Complaint and noting other instances where Count Ten referenced "it"). Given that Second Inning's allegations in support of Count Ten did not truly reference Marcel, and because he could not have provided what Second Inning sought, the court dismissed Count Ten.

Despite Second Inning's frequent citation to a single finding of fact, the totality of the court's decisions indicates that such a fact is insufficient to turn the tide of the court's decisions. That fact, at best, weighs toward a single element of causes of action where Second Inning failed to show *any* element by clear and convincing evidence.

After taking a shotgun approach to pleading and failing to mitigate damages, Second Inning complains that "the trial court victimized Second Inning." Pb50. It should be noted that despite this litigation going on for several years, Second Inning never amended its complaint to add causes of action, plead additional facts, or sought to clarify its causes of action. Instead, Second Inning broadly alleged "all defendants" were liable for "everything" without actually pleading its tort participation theory nor any sort of piercing the corporate veil. Such a decision is not surprising given that Second Inning essentially did nothing once the litigation was started, content to sit back and hope damages would accrue, never making any effort to mitigate damages either by seeking alternative overnight parking or else by moving to have the prohibition on overnight parking removed so the site plan could proceed according to its alleged wishes.

POINT II

SECOND INNING IS NOT ENTITLED TO RELIEF AGAINST MARCEL ANTAKI BECAUSE HE IS NOT A PARTY TO THE CONTRACT.

As has been the case throughout this dispute, Second Inning's brief lumps all defendants together, making it unclear against whom relief is sought, and making Mr. Antaki's response all the more difficult. This issue has plagued the litigation to such a degree that Mr. Antaki moved for relief on this issue during *in limines,* requesting that Second Inning specify which Defendant was being sued under each count in the Second Amended Complaint because the Complaint generally alleged all claims against all defendants. 2T:81-25. After argument on this point, counsel for Second Inning conceded that the first three counts could not reasonably be asserted against individual defendants:

> THE COURT: So, Mr. Kyreakakis, are you in agreements that Counts 1, 2 and 3 involve only the corporation?
>
> MR. KYREAKAKIS: Well, the first count, Judge, breach of contract, yes. The second count is breach of implied covenant of good faith and fair dealing, yes. The third count is breach of covenant of quiet enjoyment, where I think we might have some individual claims, Judge, like against Mr. Marcel Antaki.
>
> MR. BALDASSARE: Judge, our position is that's a contract claim.
>
> THE COURT: How could it not be a contract claim?

> MR. KYREAKAKIS: All right, Judge. I'll agree on the third count. Again, I'm trying to be fair.
>
> THE COURT: Of course. All right. So, in terms of the motion, the individual defendants are not defendants in Counts 1, 2 and 3, only the corporation is. Okay.
>
> [2T94:3-23.]

Despite this clear concession by Second Inning that Counts One, Two, and Three are not viable against individual defendants, Second Inning's appellate brief takes no lessons from the *in limines*. It repeatedly uses language that ignores basic contract law, stating, "**Defendants** are thus in breach of the Third Lease Amendment and the implied covenants of good faith and fair dealing[.]" Pb40 (emphasis added). The brief is rife with such statements, by way of imprecision in drafting, or else due to a lack of understanding of basic contract law.

For example, Point I of Second Inning's brief points to the "November 15, 2022 Judgment" stating that the Appellate Division should enter judgment "in favor of Second Inning and against Defendant RELAP." Pb29. Second Inning's brief cites to the court's November 15, 2022 Order and the attached statement of reasons accompanying that order. *See* Pb29 (citing Pa26-24). Marcel's motions for Involuntary Dismissal had already been granted orally at the time of that Order (*see, e.g.*, 13T56:7-10), and were memorialized in a different

November 15, 2022 Order. *See* Pa35-37 granting Marcel's Motions for Involuntary Dismissal.

Despite citing to the Order dismissing only as to RELAP, however, Second Inning still lumps together all defendants, for example arguing that it "established **defendants'** liability under SI's fraud claims[,]" and "the Appellate Division should vacate judgment in favor of **defendants** and should enter judgment in favor of Second Inning." Pb33-34 (emphasis added). "Second Inning also fulfills the element of legal fraud against Mr. Antaki[.]" Pb30.[6]

As has become all too common, Second Inning mixes requests for relief, and conflates all defendants despite the fact that individual defendants and corporate defendant are differently situated especially when it comes to issues of contract. Second Inning relies on cases that do not support its arguments. For example, in arguing generally for "defendants' liability under SI's fraud claims" Second Inning points to *Walid v. Yolanda for Couture, Inc.*, 425 N.J. Super. 171 (App. Div. 2012), arguing that "fraud in the inducement of a contract establishes [a] right to prosecute a separate action predicated upon the fraud." Pb33 (internal quotations omitted). *Walid* stands for no such proposition. There, sellers of a business "listed 'annual sales of $582,500 and operating profit

[6] It is not entirely clear which "Mr. Antaki" Second Inning makes this statement against, as Second Inning conjunctively sued four individuals who could be "Mr. Antaki" under its fraud claims.

of $289,445'" when the actual figures were much lower and the defendant had "fraudulently represented the gross revenues of" the business. *Id*. at 178. In that action, "material misrepresentations were made to plaintiffs respecting the income of the business they were purchasing and then, in an effort to escape later liability for such misrepresentations, a contract was prepared with a general integration clause." *Id*. at 186. The Appellate Division ruled that "introduction of extrinsic evidence to prove fraud in the inducement is a well-recognized exception to the parol evidence rule." *Id*. at 186 (citing *Ocean Cape Hotel Corp. v. Mansefield Corp.*, 63 N.J. Super 369, 377-78 (App. Div. 1960)).

However, Second Inning's cause is not advanced by this general proposition of law, especially where the trial court allowed parol evidence to be admitted (2T46:20 to 47:22), and still dismissed the fraud claims. In *Walid*, plaintiffs "proved by clear and convincing evidence that they justifiably relied upon misrepresentations of income which induced them to enter into the contract." *Id*. at 186. On this issue, Second Inning ignores the fact that the court specifically found that evidence regarding justifiable reliance was not "clear and convincing." In ruling on Counts Four and Five, the court stated:

> And reliance. Is there justifiable reliance? Boy, I have to tell you, if I were looking -- if I were the plaintiff and somebody said to me all the parking places are just fine, no problem whatsoever, and it was a critical issue, I

> might very well verify it. Again, I might not. Again, is that clear and convincing evidence? No, it's not.
>
> [13T14-20.]

Point II of Second Inning's argument likewise confusingly lumps Marcel with the other defendants, despite the fact that, as has become a frequent refrain, Marcel is not a party to the contract at issue. This point states, "Relap is also liable for [Contract Claims]." Pb34. The point cites to a portion of the transcript where counsel for Second Inning *conceded* that contract claims are not viable against individual parties who are not parties to the contract, (Pb34 (citing 2T:94)), a portion of the trial brief where Plaintiff conjunctively refers to "Defendants" (Pb34 (citing Pa314)) and the Order and statement of reasons dismissing the case as to RELAP. Pb34 (citing Pa26-24). Despite this, Second Inning states:

- "**Defendants** are thus in breach of the Third Lease Amendment and the implied covenants of good faith and fair dealing" Pb40 (emphasis added).
- "[J]udgment should be entered by the Appellate Division in favor of Second Inning and against **defendants** for breach of contract and breach of the implied covenant of good faith and fair dealing" Pb42 (emphasis added).
- "**Defendants'** conduct also was in breach of the implied covenant of good faith and fair dealing[.]" Pb40 (emphasis added).

As set forth *supra*, and as properly recognized by the trial court, Marcel is not a party to the contract between RELAP and Second Inning. Accordingly, despite the fact that Point II of Second Inning's brief appears to argue for liability on contract claims as to *all defendants*, such a proposition is legally infirm and not viable under New Jersey contract law. Second Inning's claim that "Mr. Antaki did lease these spaces to SI" only compounds the problem. *See* Pb39. As set forth throughout the trial, and throughout this submission, Marcel individually did not and could not assign the spaces under the lease because he is not a party to the contract with Second Inning. Marcel did not have an ownership interest in RELAP and while he may have signed the Third Lease Amendment, he did so on behalf of RELAP.

POINT III

SECOND INNING'S ARGUMENT REGARDING CONVERSION AND UNJUST ENRICHMENT IGNORES BASIC PRINCIPLES OF LAW.

In Point III, Second Inning argues that RELAP is liable for conversion and unjust enrichment because Second Inning paid money and CAM charges on the expansion space under the lease, but failed to get the proper approvals to use that space. Pb42. Second Inning was not prevented from using that space, rather they failed to use the space precisely as they allegedly wanted because of their own failure to obtain the appropriate approvals.

Second Inning's argument on this issue is fatally flawed with respect to Marcel, as Judge Hansbury recognized in granting involuntary dismissal on that claim. Unjust enrichment is a "quasi-contractual recovery for services rendered when a party confers a benefit with a reasonable expectation of payment" and "entitles the performing party to recoup the reasonable value of services rendered." *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 437-38 (1992). To establish a claim for unjust enrichment, "a party must demonstrate that the opposing party 'received a benefit and that retention of that benefit without payment would be unjust.'" *Thieme v. Aucoin-Thieme*, 227 N.J. 269, 288 (2016) (quoting *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 110 (2007)). A plaintiff must additionally "show that it expected remuneration from the defendant at the

time it performed or conferred a benefit on [the] defendant and that the failure of remuneration enriched [the] defendant beyond its contractual rights." *Id.* (internal quotation marks omitted) (quoting *Iliadis*, 191 N.J. at 110).

As Mr. Antaki has stated throughout this brief, the dispute between RELAP and Second Inning is governed by a contract. Conversion is an equitable remedy that is, by and large, aimed at specific property or chattel. *Chicago Title Ins. Co. v. Ellis*, 409 N.J. Super. 444, 454 (App. Div.) (quoting Restatement (Second) of Torts § 222A(1) (1965)), *certif. denied*, 200 N.J. 506 (2009). New Jersey "courts have restricted its [conversion's] application to money to avoid turning a claim based on breach of contract into a tort claim." *Chicago Title Ins. Co.*, 409 N.J. Super. at 455.

Second Inning seeks to avoid those basic legal principles by relying on the contract as the basis for a conversion claim. The Seventh Count claims conversion occurred regarding "rents and CAM charges collected by RELAP from Second Inning under the Third and Fourth Lease Amendments" and other fees and costs associated with the lease. *See* Pa229-230 (Second Amend. Compl. at ¶ 124-29). Demonstrating its attempt to fit a patchwork of grievances into well-settled law, Second Inning mixes apples (a demand for equitable relief) and oranges (reliance upon a contract, *i.e.*, redressable at law) in the Seventh

Count. For these straightforward reasons, the court properly granted dismissal on the Seventh Count as to Marcel.

Second Inning's argument regarding unjust enrichment fares no better. An equitable claim for unjust enrichment is not viable in the face of an express contract when the alleged damages flow from the contract. As the Appellate Division stated, when there is an "express contract, there is no basis or need for plaintiff to pursue a quasi-contractual claim for unjust enrichment." *Winslow*, 364 N.J. Super. at 143.

> If a contract exists between the parties, unjust enrichment is inapplicable, *Shalita v. Twp. of Wash.*, 270 N.J. Super. 84, 90-91 (App. Div. 1994), and the parties must seek damages for breach of the contract, *Nat'l Amusements, Inc. v. N.J. Tpk. Auth.*, 261 N.J. Super. 468, 478 (Law Div.1992), aff'd, 275 N.J. Super. 134 (App.Div.1994).
>
> [*D'Agostino v. Appliances Buy Phone, Inc.*, A-2005-13T1, 2015 WL 1043472, at *7 (App. Div. Mar. 8, 2016).]

In *Century 21-Main Street Realty, Inc. v. St. Cecelia's Church*, A-2506-15T2, 2017 WL 3880454 (App. Div. Sept. 6, 2017) (Da858), the court demonstrated the powerful preclusive effect a contract has on a tag-along claim of unjust enrichment. In *Century 21*, the court affirmed dismissal of an unjust enrichment claim based on the face of the pleading, because there was an express contract at issue. The court reasoned:

> Century's alternative claim for unjust enrichment was also properly dismissed. If a contract exists between the parties, unjust enrichment is generally inapplicable. *Shalita v. Twp. of Washington,* 270 N.J. Super. 84, 90-91 (App. Div. 1994) ("[G]enerally, the parties are bound by their agreement, and there is no ground for imposing an additional obligation where there is a valid unrescinded contract that governs their rights."); *see also Caputo v. Nice–Pak Prods., Inc.*, 300 N.J. Super. 498, 507 (App. Div.) (stating "unjust enrichment is an equitable remedy resorted to only when there was no express contract providing for remuneration"), certif. denied, 151 N.J. 463 (1997). Instead, Century is confined to its contractual remedies.
>
> [*Century 21*, 2017 WL 3880454, at *5 (Da862).]

Here, by claiming unjust enrichment, Second Inning seeks relief that is not available under New Jersey law, *i.e.*, an implied contract that is more favorable than the written one. As the Supreme Court stated, courts will not "make a better contract for either of the parties than the one which the parties themselves have created" or "supply terms to contracts that are plain and unambiguous." *Maglies v. Estate of Guy*, 193 N.J. 108, 143 (2007) (citing *Kampf v. Franklin Life Ins. Co.*, 33 N.J. 36, 43 (1960); *Graziano v. Grant*, 326 N.J. Super. 328, 342 (App. Div. 1999)).

Specifically, far from claiming there is no contract or, for that matter trying to avoid the presence of a binding contract, Second Inning repeatedly, expressly and explicitly embraces the contract as the document upon which all of Second Inning's rights flow. Just as Second Inning's unjust enrichment

claims against RELAP are infirm, they likewise cannot reasonably reach Marcel. Second Inning seeks the very relief contemplated by the lease, *i.e.*, rent and CAM charges, and no argument asserting personal liability to owners or managers of RELAP can overcome that fact.

Second Inning's use of and reliance upon *Rose v. Bernhardt* for "conversion of rents" is puzzling given that this prohibition-era case has nothing to do with a claim regarding a commercial lease. Pb43 (citing *Rose v. Bernhardt*, 107 N.J.L. 501 (E&A 1931). In *Rose*, the adverse parties were not landlord and tenant, rather the defendant was a corporation that sought a mortgage and agreed that if it defaulted, the mortgage holder had the right to collect rents. *Rose*, 107 N.J.L. at 502. The corporation defaulted on the mortgage, but the corporate officers, working through an agent, collected rents due to the mortgage holder and used them for the benefit of the corporation. *Id*. at 502. There, the jury found that there was an "unlawful and fraudulent conversion by the corporation." *Id*. at 504.

Similarly, Second Inning's use of *V & S Investments, LLC v. Two B's Bev., Inc.*, 2012 WL 670712 at *2 (App. Div. 2012) does not support its argument. Pa701-703 In that unpublished case, a beverage supplier sued for payment on beverages that were delivered to a company, but never paid for. Pa701. There, the court ultimately did not find individual liability because "plaintiff did not

present evidence establishing that [defendants] were 'owners of the company and therefore liable for conversion of the goods.'" Pa702. The present case has a similar issue regarding Marcel. Even assuming that Second Inning could establish the elements of conversion, which it cannot, it failed to ever establish that Marcel was an owner of RELAP, LLC, or that any of the allegedly converted assets flowed to Marcel. At the time of the site plan exemption, Marcel was not listed as an owner of RELAP. *See* Pb24, Statement of Facts. Despite Second Inning's claim, Liliane Antaki had no ability to unilaterally transfer her ownership interest to Marcel, and in fact an uncontroverted certification from Alan Antaki states "RELAP is a New Jersey Limited Liability Company which is currently comprised of three members, the Estate of Liliane Antaki (which owns 60%); Alan Antaki (who owns 20%) and Nicholas Antaki (who owns 20%). … During the relevant periods of this litigation Marcel was not a member of RELAP." Pa616.

Nor does *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539 (1994) support Second Inning's argument as the Supreme Court in *VRG* considered the narrow issue of whether liability for real estate broker commissions flows with a general assignment of leases from buyer to seller. Despite the cited text of *VGR* pointing back to contract rights, Second Inning omits the Court's articulation that "[t]he unjust enrichment doctrine requires that plaintiff show that it

expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant *beyond its contractual rights*." *Id.* at 554 (emphasis added).

Even beyond Second Inning's inadequate legal analysis on this point, the relief they request is not proper. Second Inning requests that the Appellate Division enter judgment in favor of Second Inning with respect to the Seventh and Eight Counts, rather than remand on this point. Given that these issues did not proceed to the fact finder and were dismissed prior to the court's factual findings, it would be improper for an appellate court to enter judgment without the benefit of full factual record on these issues and without the trial court's assessment of credibility.

POINT IV

SECOND INNING FAILED TO MITIGATE DAMAGES AND INCORRECTLY APPLIES THE CONCEPT OF UNCLEAN HANDS.

In Point IV, Second Inning confusingly suggests they were under no obligation to mitigate damages because "defendants" had unclean hands. Pb44. Second Inning misuses and misunderstands the concept of unclean hands. "A suitor in equity must come into court with clean hands and ... keep them clean after his entry and throughout the proceedings." *Borough of Princeton v. Bd. of Chosen Freeholders*, 169 N.J. 135, 158 (2001). In order to recover in equity, a party "must be with clean hands." *Heuer v. Heuer*, 152 N.J. 226, 238 (1998). The unclean hands doctrine provides, "a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit." *Faustin v. Lewis*, 85 N.J. 507, 511 (1981). Unclean hands focuses on the conduct of a party *seeking* affirmative relief and bars them from recovery, it is not a sword to be used as Second Inning asserts preventing a party from asserting a defense.

> [The unclean hands doctrine] does not repel all sinners from courts of equity, nor does it apply to every unconscientious act or inequitable conduct *on the part of the complainants*. The inequity which *deprives a suitor* of a right to justice in a court of equity is not general iniquitous conduct unconnected with the act of the defendant which *the complaining party* states as his ground or cause of action; but it must be evil practice or wrong conduct in the particular matter or transaction in respect to which judicial protection or redress is sought.

> [*Heuer*, 152 N.J. at 238 (quoting *Neubeck v. Neubeck*, 94 N.J. Eq. 167, 170 (E.&A. 1922)) (emphasis added).]

In this case, Second Inning, not Marcel, is the party seeking affirmative relief in equity and therefore, not subject to the unclean hands doctrine.

Second Inning's citation to *Bolds-Davis v. Davis* does not support its argument, as there the party with "unclean hands" sought affirmative relief from the court. In *Davis*, plaintiff and defendant were engaged in a marriage dissolution and their settlement agreement provided that their real property was to be sold and profits divided. Pa712 (*Bolds-Davis v. Davis*, A-4662-18T3, 2020 WL 1900489 (N.J. App. Div. April 7, 2020). Defendant refused to cooperate in the sale of the property despite repeated court orders, and then filed a cross-motion seeking to buyout plaintiff's interest in the property. Pa712-713. The court ruled and the Appellate Division agreed that defendant was barred from seeking affirmative relief regarding the sale of the property on account of his unclean hands in the transaction and refusing to comply with court orders. Pa714-715.

Marcel does not concede that he was in defiance of the court's orders, however, such a determination need not be reached to resolve this issue. Whether or not Marcel was culpable of unclean hands with respect to the court's order, he did not seek affirmative relief from the court at trial and accordingly

Second Inning's confusing assertion of an unclean hands "defense" to failure to mitigate damages is meritless.

Second Inning complains that it was "unfairly punished" by the court because Second Inning failed to seek the appropriate remedy and the "trial court victimized Second Inning." Pb49-50. Such hyperbole is juxtaposed to the fact that Second Inning brought a suit in 2018 and essentially did nothing for years to mitigate damages or otherwise resolve what they perceived to be an issue for their business.[7]

[7] Second Inning makes much of the court's determination that Second Inning failed to mitigate damages (Pb47), despite the fact that this is essentially a non-issue as the court ultimately dismissed all of Second Innings claims.

POINT V

THE TORT PARTICIPATION THEORY AND PIERCING THE CORPORATE VEIL ALLEGATIONS ARE INAPPLICABLE AND WERE NEVER PLED.

In Point V, Second Inning attempts to assert personal liability against Marcel on the basis of the tort participation theory. Notwithstanding that, as discussed above, Marcel is not an owner of RELAP, Second Inning's argument fails for additional reasons.

Second Inning's use of the tort participation theory is inapplicable as set forth in the very case Second Inning cites, *Saltiel v. GSI Consultants*, *Inc.*, 170 N.J. 297 (2002). There the New Jersey Supreme Court considered whether individual corporate officers can be held personally liable for allegedly tortious conduct under the participation theory. *Id*. at 297. "The conduct at issue arose after the corporate defendant entered into a contract with plaintiff pursuant to which it was to design and prepare specifications for the turfgrass to be used on two athletic fields at a New Jersey university." *Id*. Plaintiff alleged the corporation and its officers negligently prepared the turfgrass specification resulting in substantial financial loss to plaintiff, and "sought to recover in tort against the officers personally based on the participation theory of liability." *Id.*

In *Saltiel*, the Court rejected the use of the tort participation theory in that instance, clarifying that that appropriate inquiry was "whether a cause of action sounds in tort or contract." *Id*. at 315.

> Nonetheless, because we are convinced that plaintiff has not pled and supported a cause of action sounding in tort, and has failed to establish that either GSI or defendants Indyk and Caton owed an independent duty to plaintiff outside the scope of the contract, the theory cannot be applied to the facts in this record.
>
> [*Id*. at 315.]

In so ruling, the Court looked at the dispute between the parties. "Plaintiff's complaint alleged causes of action based on negligent design and negligent misrepresentation. Irrespective of the terminology used in the complaint, however, we are persuaded that this case is essentially a basic breach of contract case, and that plaintiff, through her tort allegations, simply is seeking to enhance the benefit of the bargain she contracted for with defendant GSI." *Id*. "Under New Jersey law, a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law. In this transaction, we are unable to discern any duty owed to the plaintiff that is independent of the duties that arose under the contract." *Id*. at 316 (citations omitted). The Court pointed to independent duties that the law imposes, such as those on attorneys, agents, brokers, and doctors. *Id*. at 317.

Meanwhile, Second Inning fails anywhere in its brief to point to an alleged independent duty beyond the contractual landlord-tenant relationship imposed by the lease, let alone any independent duty owed by Marcel to Second Inning. *See generally* Pb51-56.

Second Inning points to *Breglia v. Norman & Luba, LLC*, a case that does not involve a contract between parties, but rather the potentially fraudulent sale of real property during foreclosure proceedings in violation of a settlement order. Pa716 (*Breglia v. Norman & Luba, LLC*, C-328-03, 2005 WL 3338295 (N.J. App. Div. Dec. 9, 2005)). *Breglia* was remanded for further proceeds on, among other things, whether a corporate officer participated in a fraud. Pa720. *Breglia* states nothing regarding the interplay between contract claims and torts involving a duty of care.

Other cases cited by Second Inning likewise fails to support its argument, especially when compared with the facts of the present case where a valid, not rescinded contract governs the dispute. Pb52-53 (citing cases). In *Charles Bloom & Co. v. Echo Jewelers*, 279 N.J. Super. 372, 382 (App. Div. 1995), plaintiff consigned diamonds which defendants sold without permission, and the dispute between the parties involved claims of conversion. *Id*. at 385. In *Robsac Indus., Inc. v. Chartpak*, 204 N.J. Super. 149, 156 (App. Div. 1985), defendants, a manufacturer and its president, sent a letter to a mutual client advising that

plaintiff falsely represented the nature of certain goods and that the client should no longer deal with plaintiff. *Id*. at 151-52. The *Robsac* dispute was not governed by contract, but tort. Likewise, in *Van Dam Egg Co. v. Allendale Farms, Inc.*, 199 N.J. Super. 452, 457 (App. Div. 1985), plaintiff sued alleging a defendant corporate agent knew his assurances that the corporation would pay for eggs delivered on credit was false. *Id*. at 199. In *Van Dam Egg*, it was not alleged that the dispute was governed by a contract. Similarly, the dispute in *McGlynn v. Schultz*, 95 N.J. Super. 412, 417 (App. Div. 1967) sounded solely in conversion, not contract.

Second Inning proceeds to cherry pick what it believes are "bad facts" bereft of context. As discussed *supra*, Second Inning's claim regarding a single line of a multipage decision does not "establish [Marcel's] liability under the fraud counts" where Second Inning failed to establish the element of fraud by clear and convincing evidence, and where Second Inning failed in its attempts to convert a breach of contract case into a fraud case. Second Inning's claim regarding a parking chart "incorporated into the Third Lease Amendment" are plainly a breach of contract claim because on its face, the chart was allegedly incorporated into the contract at issue. *See* Pb53.

Further, Second Inning's claims regarding Counts Nine and Ten are in no way supported by the trial court's findings. Notwithstanding Second Inning's

argument of what it must "simply show" in order to succeed in a claim for interference with prospective economic advantage and contract (Pb54), Second Inning failed to show any "loss in the amount in the contract or loss of the expected advantage." Accordingly, Counts Nine and Ten were properly dismissed as to Marcel.

Regarding the Tenth Count (tortious interference with prospective economic advantage), Second Inning needed to demonstrate a reasonable expectation of economic advantage, which was lost as a direct result of Marcel's malicious interference, and that it suffered losses thereby. *Baldasarre v. Butler*, 132 N.J. 278, 293 (1993). Causation is shown where there is "proof that if there had been no interference there was a reasonable probability that the victim of the interference would have received the anticipated economic benefits." *Leslie Blau Co. v. Alfieri*, 157 N.J. Super. 173, 185–86 (App. Div. 1978). Second Inning failed to present proofs to meet the elements of that standard.

Likewise, with respect to the Ninth Count for Tortious Interference with Contractual Relations, as set forth in Marcel's cross-motion appealing the denial of summary judgment, Second Inning alleged harassment of its clients, but at trial failed show it had actually lost any clients or revenues. With respect to the Tenth Count for Tortious Interference with Prospective Economic Advantage, Second Inning alleged harassment of potential clients, but never identified the

loss of such clients. Likewise, Second Inning's other allegation regarding this point, that failure to provide Second Inning with the requisite parking spaces interfered with its expansion, is a claim actually stemming from its contract with RELAP, as Marcel had no independent ability or obligation to provide parking spaces to Second Inning.

Second Inning's further allegations seem to just be thrown in as a catch all which were never specifically pled and have no bearing on the case or the decision of the court. Pb55-56.

CONCLUSION

For the reasons set forth above, the Appellate Division should reverse the decision of the trial court and grant summary judgment to Marcel Antaki on all counts. In the alternative, the Appellate Division should uphold the decision of the trial court granting dismissal as to Marcel Antaki on all counts.

Respectfully,

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Dated: April 1, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-129-23

SECOND INNING 1, L.L.C.,	:	CIVIL ACTION
Plaintiff-Appellant/Cross-Respondent,	:	On Appeal from the Superior Court of New Jersey,
	:	Chancery Division, Morris County
v.		
RELAP L.L.C.,	:	Docket No. Below: MRS-C-94-18
MARCEL Z. ANTAKI, ESTATE OF LILIANE ANTAKI,	:	
ALAN ANTAKI, ROGER ANTAKI, AND		Sat Below:
NICHOLAS ANTAKI,	:	
		Hon. Stephan C. Hansbury, J.S.C.
	:	
Defendants-Respondents/Cross-Appellants.	:	

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS/CROSS-APPELLANTS RELAP LLC, ESTATE OF LILIANE ANTAKI, ROGER ANTAKI, ALAN ANTAKI AND NICHOLAS ANTAKI IN OPPOSITION AND IN SUPPORT OF CROSS-APPEAL

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PRELIMINARY STATEMENT

This matter is a landlord tenant dispute between Appellant/Cross-Respondent/Plaintiff Second Inning LLC ("**SI**") and a former manager of Respondent/Defendant RELAP LLC ("**RELAP**"), Respondent/Cross-Appellant/Defendant Marcel Antaki ("**Marcel**"), that spiraled out of control. SI commenced this initially seeking primarily equitable injunctive relief arising out of SI's individual members' petty personal disputes with Marcel. After obtaining preliminary injunctive relief and resolving said disputes in 2019, SI tried to extract damages from RELAP and all its individual members without a basis in law, pursuant to a flawed interpretation of the parties' respective obligations under their integrated arms-length commercial lease. SI asks this court to reverse the opinion of a respected Chancery Division Judge who heard testimony over the course of a thirteen-day trial before reaching his well-reasoned decisions. SI's arguments on appeal are unavailing and similar to the scattershot approach SI applied before the Trial Court.

SI's first argument is that the Court should reverse the Trial Court and enter judgment against RELAP because Judge Hansbury's November 25, 2022 written decision found Marcel told SI a parking plan attached to the parties' Third Lease Amendment (the "**Third Lease Amendment**") was approved by the Hanover Township Planning Board. SI claims this "establishes liability"

under Counts Four (fraud in the inducement), Five (legal fraud) and Six (negligent misrepresentation) of the Second Amended Complaint (the "**SAC**"). However, SI fails to address Judge Hansbury's thorough analysis in dismissing Counts Four and Five where Judge Hansbury outlined why SI failed to meet its burden of establishing each of the elements of Counts Four and Five by clear and convincing evidence. (13T47:10-49:18). As to Count Six, SI does not explain any duty RELAP had to SI outside of the parties' integrated Lease or why Judge Hansbury was wrong to conclude New Jersey's economic loss doctrine precludes this claim. (12T183:14-191:4).

SI's second argument is that Judge Hansbury erred in dismissing Counts One (breach of contract) and Two (breach of the implied covenant of good faith and fair dealing) because the parties' Third Lease Amendment amended the undisputed provisions set forth in the parties' integrated Lease that carried over into each of the amendments. As Judge Hansbury found though, this argument is belied by the plain terms of the Lease and Third Lease Amendment itself. (Pa034).

SI's third argument on appeal fails too. SI seeks the entry of judgment against all the defendants for rents paid under the Lease on a conversion or unjust enrichment basis. As Judge Hansbury rightfully concluded, these are contract claims barred by the economic loss doctrine and the individual

defendants never actually received those rents and cannot be liable to return them as a matter of law. (T12:167:19-183:13).

SI's fourth argument argues Judge Hansbury should not have held SI failed to mitigate its damages but does not explain what this has to do with SI's request for reversal. Since no damages were awarded, mitigation is irrelevant. In any event, Judge Hansbury correctly found SI could have applied for the municipal approvals required to operate but chose instead to sit on its rights in the hope of a multi-million dollar damage award.

As to SI's fifth argument on appeal, the Trial Court correctly held SI did not present any evidence to support any claims against the individual defendants. Judge Hansbury felt so strong about this that he awarded attorneys' fees and costs to Nicholas Antaki and the Estate of Liliane Antaki because SI and its counsel were informed and knew that SI's claims were frivolous but proceeded anyway. For this same reason, Alan Antaki, Roger Antaki and the Estate of Liliane Antaki should have been dismissed at summary judgment too. SI's Point VI essentially seeks a remand based on Points I-III and Point VII argues that the claims against Nicholas Antaki and the Estate of Liliane Antaki were not frivolous but does not bother to argue why SI thinks the Trial Court's reasoning was wrong.

COUNTER-PROCEDURAL HISTORY

A. The Complaint and Request for Preliminary Injunctive Relief

On September 12, 2018, SI filed a Complaint and Order to Show Cause against Respondents/Defendant RELAP LLC ("**RELAP**") and Nicholas Antaki ("**Nick**") along with Respondents/Cross-Appellants/Defendants Marcel Z. Antaki ("**Marcel**"), Liliane Antaki ("**Liliane**"), Alan Antaki ("**Alan**") and Roger Antaki ("**Roger**") (collectively referred to as the "**Defendants**")[1]. (Pa54a). The Complaint predominantly sought relief related to various disputes foisted on Marcel, an elderly non-native English speaker, by the individual members of SI (7T135-14); (Pa54). The Complaint alleged without evidence that "Defendants" (plural) made misrepresentations with respect to the number of parking spaces required for Second Inning to operate an adult day care center. (Pa74-75). The Complaint further sought, among other things, "[i]njunctive relief against defendants from proceeding with Relap's Site Plan to the Hanover Township Planning Board." (Pa80).

On September 14, 2018 the Hon. Maritza Berdote Byrne, J.S.C. entered a Temporary Restraining Order and on October 22, 2018 a Preliminary Injunction,

[1] This firm represents RELAP, Alan, Roger, Nick and the Estate (collectively the "**RELAP Defendants**") on Appeal and, as a result, will only be addressing SI's arguments related to the RELAP Defendants and not those applicable solely to Marcel. However, RELAP Defendants have jointly prepared a defense appendix with Marcel cited to as "(Da___)" throughout.

all primarily relating to the personal bickering vis-à-vis Marcel and SI. (Pa250-256). The Preliminary Injunction Order included SI's request that RELAP not proceed with its pending site plan before the Hanover Township Planning Board. (Pa256).

After a period of initial discovery, on June 12, 2019, Judge Berdote Byrne entered an Order allowing SI to file an Amended Complaint and scheduling trial for October of 2019. (Da46). On July 15, 2019, SI filed an Amended Complaint. (Pa140). On August 12, 2019, Defendants filed an Answer to the Amended Complaint. (Pa174).

B. The Substitution of Counsel, Resolution of Landlord Tenant Issues and Extension of Discovery

From the outset, all defendants were represented by Mr. Allen Marra, Esq. (Pa174); (Pa237). On September 19, 2019, Liliane passed away and shortly thereafter Alan, Nick and Roger learned for the first time of the underlying litigation. (7T218:1-219:3); (Da47). On October 7, 2019, Marcel agreed to relinquish any ownership or continuing managerial authority in RELAP. (7T163:14-19; 175:9-179:5) (Da131).

On October 9, 2019, Meyner and Landis LLP ("**M&L**") wrote to Judge Berdote Byrne to advise that, although "represented," Alan and Nick were not informed about this underlying litigation and they needed a continuance of the trial, among other things. (Da47). On October 10, 2019, M&L substituted in as

counsel for Alan, Nick, Roger and RELAP (the "**Initial RELAP Defendants**") but not Liliane (who was then deceased) or Marcel. On October 30, 2019, the parties entered into a Consent Order which, among other things, addressed all of the still outstanding landlord tenant related issues, adjourned the pending trial date and allowed additional time for discovery. (Da53)[2]. After the Consent Order was issued in 2019, essentially all of the landlord "interference" related issues were resolved. (7T204:2-207:15); (4T140:8-23); (4T141:1-142:9).

On November 8, 2019 and thereafter, Alan, Nick and Roger demanded SI dismiss them from the Amended Complaint on the basis that the claims against them were frivolous and in violation of R. 1:4-8. (Da685; 690; 697). On August 6, 2021, the Estate of Liliane Antaki (the "**Estate**") (which was substituted in for Liliane via the SAC) demanded SI dismiss the Estate. (Da677). SI refused to do so.

C. The Second Amended Complaint and Motions for Summary Judgment

All defendants other than Liliane filed Motions for Summary Judgment on November 20, 2020. (Pa297). On June 29, 2021, the court issued an Order

[2] The Consent Order was initially entered on October 30, 2019 but thereafter amended and filed on November 13, 2019.

stating that because Liliane was deceased, SI was required to amend the Amended Complaint to implead the Estate of Ms. Antaki. (Da56). On October 13, 2021, SI filed the SAC which only substituted the Estate for Liliane. (Pa203).

Thereafter, Initial RELAP Defendants and Marcel re-filed their prior Motions for Summary Judgment (which the Court directed to be filed without change from the prior filings) and the Estate represented by Counsel filed its own Motion for Summary Judgment as well. (Da85; 289; 361). Judge Berdote Byrne dismissed Nick but, without any record evidence supporting the claims under the SAC, found there were triable issues of fact to keep in the remaining Initial RELAP Defendants (which included the Estate) on each and every count of the SAC. (Pa295- 312).

D. Trial – Defendants' Motions in Limine

Trial took place before the Honorable Stephan C. Hansbury, J.S.C. between August 8, 2022 and October 25, 2022. At the beginning of the Trial Judge Hansbury heard several Motions in limine. See generally (2T10:1-103:18). Judge Hansbury granted an application to exclude evidence of an altercation between Marcel and Ms. Soto pursuant to N.J.R.E. 401 and 403. (2T55:16). Judge Hansbury also granted an application to exclude evidence of the alleged harassment of SI's customers because SI never produced any evidence of damages related to this claim. (2T61:3-16; 57:11-60:25). Although

SI claimed it lost clients entitling it to damages due to the purported harassment Judge Hansbury held "it has been clearly established during oral argument no damage evidence was ever presented regarding nine clients. It's simple enough to do a calculation to provide a report, but it was not." (2T61:4-9)[3]

Judge Hansbury also granted an application to limit SI's proofs to what had been pled under the SAC. (2T61:17-74:16). This application was made in response to certain claims against the individual defendants that SI made for the first-time during summary judgment, including a claim for "fraud" related to the execution of a tenant estoppel certificate – an issue that was never pled under the SAC and the parties did not conduct discovery on. (2T66:14-67:12). Although SI claimed it raised these issues earlier, SI never moved to amend the SAC.

SI also conceded prior to Trial during Motions in limine that Counts One through Three should not have been pled against the individual defendants in the first instance and SI consented to withdraw those:

[3] SI's table of Orders, Judgments and Rulings being appealed purports to appeal the Trial Court's decision on Motions in limine to exclude evidence of harassment and an altercation but SI's brief does not include any legal argument on this issue. As a result, SI's appeal of the Trial Court's rulings to exclude evidence of alleged harassment and an altercation between Marcel and Ms. Soto should be deemed waived. State v. Shangzhen Huang, 461 N.J. Super. 119, 125 (App. Div. 2018), aff'd o.b., 240 N.J. 56, 56 (2019) (issue not briefed on appeal is deemed abandoned).

> THE COURT: So, Mr. Kyreakakis, are you in agreement that Counts 1, 2 and 3 involve only the corporation?
>
> MR. KYREAKAKIS: Well, the first count, Judge, breach of contract, yes. The second count is breach of implied covenant of good faith and fair dealing, yes. The third count is breach of covenant of quiet enjoyment, where I think we might have some individual claims, Judge, like against Mr. Marcel Antaki.
>
> MR. BALDASSARE: Judge, our position is that's a contract claim.
>
> THE COURT: How could it not be a contract claim?
>
> MR. KYREAKAKIS: All right, Judge. I'll agree on the third count. Again, I'm trying to be fair.
>
> THE COURT: Of course. All right. So, in terms of the motion, the individual defendants are not defendants in Counts 1, 2 and 3, only the corporation is. Okay.

[(2T94:3-23)].

E. Trial – the Motions for Judgment

After the conclusion of SI's case-in-chief, on September 26 and October 6, 2022, the Court heard Motions for a directed verdict pursuant to R. 4:40 and 4:37-2(b) based on SI's failure to make out a *prima facie* case. (12T136:4-191:4; 13T7:2-91:6).

Defendants' first Motion sought to dismiss SI's Count Nine for tortious interference based upon the alleged harassment of SI's clients. (12T136:4-11); (Pa231). Alan, Roger and the Estate argued, in part, that Mr. Mehta testified during Trial SI had not suffered any damages related to a loss of clients and

likewise testified that SI did not suffer any damages as a result of anything Alan, Roger or Liliane did individually. (12T138:10-139:4); (4T108:9-113:4); (4T105:21-106:3). Judge Hansbury granted the Motion dismissing Count Nine because there was "no testimony as to any damages which arise out of any of the allegations in the ninth count." (12T139:17-21).

The second Motion heard was a Motion to dismiss Count Ten for tortious interference with economic advantage. (Pa231a); (12T139:22-140:8). Defendants argued Mr. Mehta testified SI did not suffer any damages as a result of Alan, Roger or Liliane and that Count Ten against RELAP was barred by the economic loss doctrine because this was really a contract claim governed by the Lease. (12T141:15-144:1); (4T105:21-106:3); (12T151:7-19). Judge Hansbury stated that "[y]ou can either go contract or tort but you can't, if you're going to proceed in a contract claim, you can't also proceed on the same elements of the cause of action and then call it a tort." (12T167:19-168:2). Counsel for SI conceded this point, stating: "I don't disagree, Judge, that maybe the breach of contract would be RELAP all the damages can flow from that." (12T168:17-19).

Judge Hansbury dismissed Count Ten on the basis that SI did not present any evidence against Alan, Roger or the Estate to support a claim for tortious interference with economic advantage and as to RELAP, Judge Hansbury held

SI could not state a claim for both breach of contract and tortious interference arising under the same set of facts. (12T11-20); (12T172:4-10).

As it relates to Count Eight for unjust enrichment, Judge Hansbury found again that SI did not present evidence any of the individual Defendants were unjustly enriched. (12T178:4-21); (Pa230a) As it relates to RELAP, Judge Hansbury held SI could not state a claim for unjust enrichment because the facts giving rise to that claim all arise under the contract – the Lease – and SI could not have it both ways, choosing to remain in the space and pay rent under the Lease but also seeking a return of those rents paid on an unjust enrichment theory. (12T178:4-21).

On Count Seven for Conversion (Pa229), SI's counsel conceded he did not have a basis for the claim (12T182:16-23) and Judge Hansbury dismissed the claim for largely the same reasons he dismissed SI's Count Eight for unjust enrichment. (12T182:24-183:13).

Count Six was for negligent misrepresentation. (Pa228). On Count Six Judge Hansbury found again that there was no evidence Alan, Roger or Liliane made any representations to SI at all. (12T189:2-9). As to RELAP, Judge Hansbury found Count Six was barred by the economic loss doctrine and the holding in Saltiel v. GSI Consultants, Inc., 170 N.J. 297 (2002) which precludes a tort remedy in "a contractual relationship unless the breaching party owes an

independent duty imposed by law." Saltiel, 170 N.J. at 316-17 (holding that "the existence of duties that are specifically imposed by law in New Jersey… can be enforced separately and apart from contractual obligations."). (12T189:9-191:4).

Counts Four and Five were for Fraud and Fraud in the Inducement. (Pa226-228). Judge Hansbury dismissed Counts Four and Five as to Alan, Roger and the Estate because Judge Hansbury found SI did not present any evidence, let alone clear and convincing evidence that Alan, Roger or Liliane made any misrepresentations. (13T45:1-17). Judge Hansbury also dismissed Counts Four and Five as to RELAP. (13T47:10-49:18). Judge Hansbury found based on the testimony elicited on SI's affirmative case SI failed to present clear and convincing evidence that: (1) a statement regarding parking was made; (2) the statement was false; (3) there was an intent to deceive; and (4) SI justifiably relied on that statement. (13T47:10-49:18). Based on the foregoing, the testimony of the parties and even giving SI all reasonable inferences, Judge Hansbury held SI failed to establish a *prima facie* case for fraud. (Id.).

Next, RELAP moved to dismiss Count One for breach of contract but this was denied. (Pa222-226); (13T56:23-83:13). RELAP then moved to dismiss Count Three for a breach of the covenant of quiet enjoyment. (13T83:21-86:10). In opposition, SI focused entirely on the future assignment of parking spaces

and did not make mention of any other "interference" supporting SI's claim for a breach of the covenant of quiet enjoyment arising under the Lease. (13T86:12-87:25). Judge Hansbury granted RELAP's Motion to dismiss Count Three because SI conceded during argument that SI was proceeding on Count Three based only on a failure to provide parking spaces which claim arises under SI's breach of contract count. (13T90:13-91:6). SI did not argue during this Motion that RELAP was liable for the "interference" by Marcel that was previously resolved. Nor did SI argue it was also seeking some type of permanent injunctive relief. SI confirmed at Trial it was solely seeking damages under Count Three because SI needed municipal site plan approval before it could use the Expansion Space as an adult day care rather than warehouse.

After the conclusion of SI's affirmative case, the individual Defendants had all been dismissed and only Count One for Breach of Contract and Count Two for a Breach of the Implied Covenants of Good Faith and Fair Dealing against RELAP remained. This was memorialized in a November 15, 2022 Order. (Pa035-Pa037).

F. Trial – the Judgment and Dismissal of the Remaining Counts of the Second Amendment Complaint

On November 15, 2022 the Trial Court entered an Order and Judgment (the "**Order and Judgment**") dismissing the remaining Counts One and Two against RELAP (Pa26-34). Judge Hansbury found based on the plain terms of

the Lease (as amended) and all of the testimony elicited from the parties during Trial that "the obligation to seek all municipal approvals was by contract the obligation of [SI]." (Pa034).

G. The Motions for Sanctions

Following the dismissal, Alan, Roger, Nick and the Estate filed Motions for Sanctions. (Da676; 679); (Pa041). The Court granted this relief as to Nick and the Estate on March 28, 2023, finding, among other things, that SI and SI's counsel pursued the claims against Nick and the Estate in bad faith, solely for the purpose of harassment, delay or malicious injury and that SI and SI's counsel knew or should have known the claims were frivolous. (Pa041). Judge Hansbury made a number of important findings on these issues including that: (1) there were "no facts, whatsoever, to back up any conclusion that Liliane was liable" at the summary judgment stage or trial (15T71:25-72:13); (2) Nick was sued only "because he was a stockholder", there was "not a single fact pled" against him individually (15T72:20-73:1); and (3) SI and SI's counsel named these individuals only because they were stockholders and without any reasonable good-faith basis for doing so under the law. (15T73:2-21). On September 11, 2023, the court entered an Order and Statement of Reasons awarding the Estate and Nick a total of $56,393.95 in fees. (Pa047-053).

COUNTER-STATEMENT OF RELEVANT FACTS

A. Second Inning Background

SI is a limited liability company owned jointly by Sandeep Patel ("**Mr. Patel**") and Jaghat Mehta ("**Mr. Mehta**") which operates an adult day care facility located at 155 Algonquin Parkway, Hanover Township (the "**Property**"). (5T131-9); (2T128:23-129:6); (4T6014-16); (Pa316). Mr. Mehta and Mr. Patel are "sophisticated businessmen." (13T48:9). Mr. Mehta and Mr. Patel own and operate multiple highly regulated adult day care businesses around the State of New Jersey along with a liquor store and restaurant. (4T37:21-38:7; 41:20-42:5); (8T187:1-23).

B. RELAP Background

RELAP is a New Jersey Limited Liability Company with owners whose ownership interests varied over time between Liliane, Alan, Nick, Roger and Marcel. (8T77:8-78:21); (7T42:12-43:6). During the course of the litigation, the ownership percentages of RELAP's owners did not change. (7T52:13-53:2). Roger is a former member of RELAP. (8T78:3-10). Alan was the manager of RELAP from 1993 to around 2007 or 2008 then became the manager again in October of 2019 after Marcel agreed to relinquish his managerial authority in RELAP. (13T183:2-13); (7T175:9-179:16; 204:2-207:15); (4T140:8-23);

(4T141:1-142:9). Marcel is Liliane's husband and a former manager of RELAP. (7T176:9-13).

C. SI's Initial Approvals and the Initial Lease

Prior to SI another adult day care called "Daughters of Israel" operated out of SI's leased space. (13T194:1-11). Daughters of Israel filed for and obtained site plan approval in 2000 prior to using what was formerly warehouse space as an adult day care facility. (13T194:12-195:25); (Pa617). During their tenancy Daughters of Israel did not park any vehicles at the property overnight. (7T21411-19).

On January 23, 2008 SI executed and submitted to the Township of Hanover a Site Plan Exemption Committee Request (the "**SPEC Request**") in order to obtain municipal approvals prior to entering into the initial lease with RELAP at the Property. (Da28); (4T43:12-44:4). The SPEC Request provides at the top of page one that SI:

> is requesting to the Township of Hanover to confirm a use variance for Adult Day Care at 155 Algonquin pkwy since it was Adult Day Care and was permitted by the Zoning Board few years ago. Second Inning 1 LLC will not do and not required to do any renovations either from inside or outside. We are attaching the site plan from the former adult day care when it was approved and received a C/O from the Township of Hanover.

[(Da29) (errors in original)].

The SPEC request also attached the still applicable approved 2000 site plan. (7T:134-15). After submitting the SPEC Request, on or about April 22, 2008, Second Inning entered into a lease agreement with RELAP (the "**Lease**") to occupy 6,150 square feet of space on the Property (the "**Leased Premises**"). (4T59:22-61:2); (Pa316). The Lease term commenced on May 1, 2008 and was for an initial term of two years and three months with two five year renewal term options. (Pa316). The fifth paragraph of the Lease provides in pertinent part:

> **Tenant shall diligently pursue, at its sole cost and expense, all necessary approvals and permits from the Township of Whippany[4], New Jersey, including, but not limited to, any necessary Whippany zoning approvals**, construction permits, and approval of the New Jersey State division of Health and Human Services, and from any other governmental instrumentality, board or bureau having jurisdiction thereof necessary for Tenant to utilize the Demised Premises for the Permitted Use.

[(Pa316; Da3[5]) (emphasis added)].

SI understood pursuant to the fifth paragraph of the Lease that SI was responsible for obtaining all necessary approvals to use the demised premises for adult day care use. (4T62:7-17).

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[4] The Property is located in the Whippany section of Hanover Township.

[5] SI's scanned copy of the Lease attached to its appendix is hardly legible. As a result, any references to the Lease will cross-cite to the jointly prepared Defendants' Appendix including a more legible copy of the Lease as well.

Article 1 of the Lease entitled "Acceptance of Demised Premises" provides in pertinent part:

> **Tenant acknowledges that it is familiar with the Demised Premises and hereby agrees to accept the Demised Premises in its present condition, AS IS**, including, but not limited to, the major systems being in good working order and the structure of the Demised Premises being in good and sound condition, except for work to be performed by Tenant, at Tenant's sole cost and expense, in accordance with Exhibit "B" attached hereto and made a part hereof (hereinafter "Tenant's Work Letter")….**Tenant agrees to be solely responsible for obtaining all necessary governmental approvals and all costs related thereto**….Tenant further acknowledges that neither Landlord nor anyone on Landlord's behalf has made any representations or warranties with respect to the condition of the Demised Premises.

[(Pa316; Da3) (emphasis added)].

Article 16(b) of the Lease provides in pertinent part:

> During the Term of this lease, tenant, at tenant's sole cost and expense, shall promptly comply with all present and future laws, ordinances, orders, rules, regulations, and requirements of all Federal, State, and Municipal Governments…which may be applicable to the use or manner of use of all or any part of the Demised Premises

[(Pa323; Da10)].

SI understood that pursuant to Article16(b) of the Lease SI agreed to comply with all municipal ordinances, including requirements relating to zoning approvals, at its sole cost and expense. (4T66:25-67:11).

Article 41 of the Lease provides in pertinent part:

> This lease contains the entire agreement between the parties. No representative, agent, or employee of the landlord has been authorized to make any representations or promises with reference to the within letting or to vary, alter, or modify the terms thereof. No additions, changes, or modifications, renewals or extensions hereof shall be binding unless reduced to writing and signed by the landlord and the tenant.

[(Pa335; Da22)].

SI understood pursuant to Article 41 that any changes to the Lease are not binding unless reduced to writing and signed by RELAP and SI. (4T68:19-34). SI also understood that the Lease contains the entire agreement between the parties. (4T178:7-9).

D. The Lease Amendments

1. The First Lease Amendment

On or about August 1, 2010, Second Inning and RELAP entered into an amendment to the Initial Lease (the "**First Lease Amendment**") which, *inter alia*, extended the Initial Lease for an additional five (5) year renewal term. (Pa341). The First Lease Amendment provides at paragraph 9 as follows: "[e]xcept as expressly provided herein, all other terms, conditions, covenants, conditions and agreements as set forth in the lease remain unchanged and in full force and effect." (Pa342). SI understood that except as set forth within the First

Lease Amendment, all of the terms and conditions of the Lease would remain in full force and effect. (4T70:1-15).

2. The Second Lease Amendment

On or about May 14, 2013, Second Inning and RELAP entered into a second amendment to the Lease (the "**Second Lease Amendment**") which, *inter alia*, extended the Initial Lease period to July 31, 2025 and increased the square footage of the Leased Premises from 6,150 to 7,200 square feet. (Pa344). The Second Lease Amendment increased SI's allotted parking spaces from 14 spaces to 16 spaces. (Pa344). An additional two parking spaces were granted "on a temporary basis," which could be withdrawn by the landlord "at its sole discretion." (Pa345).

The Second Lease Amendment provides at paragraph 1 that "[a]ll conditions and stipulations in above mentioned Lease and First Lease Amendment are valid unless explicitly amended or cancelled by this Second Lease amendment." (Pa344). SI understood that except as set forth within the Lease, First Lease Amendment and Second Lease Amendment, all of the terms and conditions of the Lease would remain in full force and effect. (4T73:9-13).

3. The Third Lease Amendment

On or about July 1, 2016, Second Inning and RELAP entered into a third amendment to the Lease (the "**Third Lease Amendment**") (the Initial Lease,

the First Amendment, the Second Amendment and the Third Lease Amendment are hereinafter collectively referred to as the "**Amendments**") (the Initial Lease and the Amendments are hereinafter collectively referred to as the "**Lease**"). (Pa349-357). Marcel, whose first language is French, prepared the Third Lease Amendment without the assistance of counsel. (7T135:12-17).

The Third Lease Amendment, *inter alia*, expanded the Leased Premises an additional 3,819 square feet (the "**Expansion Space**") to approximately 11,000 square feet of leased space. (Pa349); (4T74:13-75:1). The Expansion Space consisted of warehouse space that SI desired to convert to part of its adult daycare. (4T75:20-76:6).

The Third Lease Amendment provides at paragraph one that: "[a]ll conditions and stipulations in above mentioned Lease and First Lease Amendment and Second Lease Amendment are valid **unless explicitly amended or cancelled** in this Third Lease Amendment." (Pa349) (emphasis added). This is not in dispute. (Pa059, ¶25) ("[a]ll conditions and stipulations in the [Initial] Lease and the Amendments thereto remained valid unless expressly amended or cancelled."). SI confirmed the Lease, First Lease Amendment and Second Lease Amendment continued to control unless explicitly amended or canceled in the Third Lease Amendment. (4T75:11-16). SI understood at the time of entering

into the Third Lease Amendment that SI would need to obtain a Certificate of Occupancy for the Expansion Space. (4T76:18-22).

Exhibit "C" under the Third Lease Amendment required Second Inning to perform certain exterior site work as a condition of utilizing the Expansion Space which exterior site work included, *inter alia*, removing overhead doors, closing wall openings, removing asphalt, filling loading dock pits, reconnecting an underground storm water drainpipe, installing fire walls and replacing an HVAC unit at the Leased Premises (the "**Site Work**"). (4T80:4-84:4); (Pa356-357).

The Third Lease Amendment also made distinctions between certain immediate and future events as it provided SI would complete the Site Work in the future and certain parking spaces "**will be** assigned" to SI later upon the expansion as well. (4T171:24-176:18); (Pa349); (Pa32). Second Inning never completed the Site Work, did not ask the Township what permits would be required to complete the Site Work and never even obtained an estimate to complete the Site Work. (4T80:21-83:21).

The Third Lease Amendment *did not* "explicitly alter or amend" the undisputed obligation on the part of SI to obtain zoning and municipal approvals which obligation carried forward from the Lease. When Mr. Mehta was asked about this by his own counsel at trial SI could not explain how, exactly, the

Third Lease Amendment "explicitly altered or amended" SI's obligation to obtain approvals set forth under the Lease. (2T202:11-203:15).

SI testified that it uses the Expansion Space for storage. (4T5-15). SI never vacated or returned the Expansion Space to RELAP. (4T101:19-102:15). SI also testified that although it had not filed for or obtained site plan approval to use the Expansion Space for adult day care use, since November of 2019 SI had been using the parking spaces as assigned under the Third Lease Amendment without any issues. (4T142:1-4).

E. The Disputed Representations Prior to Entering Into the Third Lease Amendment

During trial Mr. Mehta testified that prior to entering into the Third Lease Amendment, Marcel told him parking spaces to be assigned under the Third Lease Amendment were already "approved." (2T183:17-184:2). Marcel testified that he did not tell Mr. Mehta or Mr. Patel the parking was "approved." (7T119:18-121:6). Marcel testified that he showed Messrs. Mehta and Patel what had been approved in the past and advised that he thought they could obtain the additional approvals needed. (7T123:13-125:20). Marcel testified that Mr. Patel understood the risk SI might not obtain municipal approval. (7T127:15-128:4). There is no motive for Marcel to have intentionally lied to the plaintiffs and, in fact, the motive is contrary. (7T133:6-16).

F. The Site Plan Filed by RELAP

By letter dated July 23, 2018, Marcel attempted to cancel the Lease on the basis that SI had failed to obtain "all necessary approvals and permits from the township of Whippany." (Pa31); (Pa417). Thereafter, in a gratuitous effort to assist SI, on February 20, 2018, Marcel, on behalf of RELAP, filed an application for an Amended Site Plan (the "**Amended Site Plan Application**") to increase parking at the Property and obtain corresponding approvals for the Expansion Space. (13T185:5-18). Since the Amended Site Plan Application did not request approval for overnight parking, SI filed an application for and obtained an injunction enjoining RELAP from proceeding on the Amended Site Plan Application. (Pa256). Marcel testified that the Amended Site Plan Application did not include a request for overnight parking because that would run the risk of the application being denied. (7T65:2-22).

G. SI Could Have Applied to the Hanover Township Planning Board and Likely Would Have Obtained Approvals but Never Did

SI claimed the Township of Hanover denied SI's construction permits as a result of insufficient parking on site but never received anything in writing confirming this. (4T94:6-14). Likewise, SI never contacted the municipality and asked what it might need to obtain approvals for the Expansion Space. (4T99:8-19). SI never filed a zoning application itself because SI thought it was RELAP's "problem" and SI did not want to "spend the money." (4T146:6-13). Perhaps

most importantly, even if parking was "sufficient" for SI's use of the Expansion Space, zoning approval would have still been necessary for SI's proposed renovation – which remained SI's obligation as that obligation was never "explicitly amended or cancelled" under the Third Lease Amendment.

After obtaining the injunction enjoining RELAP from proceeding with the Amended Site Plan Application, SI never went back and sought to revise the preliminary injunction Order to allow RELAP to proceed on an amended application. (4T94:20-97:18).

According to SI's expert planner, Susan Blickstein, if the Amended Site Plan Application was considered by the Hanover Township planning board it would have been approved. (9T49:15-50:4, 68:11-14). According to Ms. Blickstein, SI could have made the application for site plan approval itself. (9T65:7-66:18). Ms. Blickstein also testified that SI could have avoided constructing the additional parking as proposed under the Amended Site Plan Application by applying for variance relief. (9T70:21-73:21). The Township zoning official, Sean Donlon, likewise agreed that SI could have filed for site plan approval and variance relief itself. (8T67:25-68:20; 75:6-9). Thus, SI could have during the course of the litigation either sought an Order compelling RELAP to move forward with its Amended Site Plan Application or filed its own application, both of which were likely to be approved.

H. The Summonses Issued by Hanover Township Were as a Result of SI Illegally Parking Overnight in Addition to SI's Intention to Use the Expansion Space and To-Be Assigned Parking Spaces in Connection with its Adult Day Care use Which Required Site Plan Approval

SI misleadingly claims Marcel was issued two summonses for re-configuring the parking lot in violation of a 2000 Site Plan. (Pb20). However, as Mr. Donlon, the Hanover Township zoning official testified, one of the summonses was issued because SI had been storing large vans on the property overnight and in order to store large vans overnight SI needed site plan approval. (8T71:14-72:10). The other Summons was issued because an amended site plan approval was required since the most recent site plan approval from Daughters of Israel was only for fifteen total parking spaces. (8T13:23-14:20). This issue is a red herring though because it was always SI's obligation to obtain all necessary municipal approvals necessary for SI's adult day care use.

I. SI Did Not Present Any Evidence of Damages Besides Damages Based on SI's Failure to Obtain Site Plan Approval to Use the Expansion Space for Adult Day Care Use

During trial Mr. Mehta testified that SI did not suffer any monetary damages as a result of anything Roger or Alan did. (4T105:21-106:3). Mr. Mehta also testified that SI had not calculated any losses as a result of clients allegedly abused by Marcel. (4T108:9-109:21). Mr. Mehta testified that SI has not calculated any losses, other than the losses set forth in SI's expert report related

to an inability to use the Expansion Space due to a failure to obtain site plan approval. (4T110:6-10; 113:1-4).

LEGAL ARGUMENT

I. Standard of Review

The trial court's fact-findings are entitled to substantial deference and "should not be disturbed" as they are not "so wholly insupportable as to result in a denial of justice":

> [T]he appellate court should exercise its original fact finding jurisdiction sparingly and in none but a clear case where there is no doubt about the matter... Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence.... our appellate function is a limited one: we do not disturb the factual findings. of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice...

[Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)].

Determinations of questions of law, however, are reviewed *de novo*. Manalapan Realty v. Township Committee, 140 N.J. 366, 378 (1995).

II. The Trial Court Correctly Dismissed Counts Four, Five and Six Because SI Did Not Establish the Elements of Fraud by Clear and Convincing Evidence and Because SI's Claim for Negligent Misrepresentation is Barred by the Economic Loss Doctrine

SI argues that because Judge Hansbury's November 15, 2022 Order found Marcel told SI the Hanover Township Planning Board had approved the to-be assigned parking plan as set forth in the Third Lease Amendment then this "establishes liability under the counts in SI's Second Amended Complaint" for Negligent Misrepresentation (Count Six), Fraud (Count Five) and Fraud in the Inducement (Count Four)[6]. (Pb30). SI's argument on this point is incorrect and circular because even if Marcel made such a statement, Judge Hansbury held SI did not establish each of the elements of fraud by clear and convincing evidence and that SI's negligent misrepresentation claim is barred by the economic loss doctrine. SI completely overlooks and fails to address any of this in its moving brief on appeal.

A. The Trial Court's Dismissal of Counts Four and Five was Proper Because SI failed to Establish a Prima Facie Case for Fraud or Fraud in the Inducement

Both fraud and fraud in the inducement require a plaintiff to prove by clear and convincing evidence: (1) a material misrepresentation; (2) knowledge

[6] Both before the Trial Court and still on Appeal SI does not differentiate between the various defendants. SI sloppily argues "all defendants" were liable for "everything." As a result, it is unclear whether SI claims that this representation also "establishes liability" against Alan, Roger, Nick and the Estate. However, as the Trial Court correctly concluded below, there was absolutely no evidence these parties made any representations related to parking at all. (12T189:2-9). SI filed its claims against Alan, Roger, Nick and the Estate merely because they were members of SI in bad-faith.

or belief by the defendant of its falsity; (3) intent that the other party rely; (4) and reasonable reliance. Albright v. Burns, 206 N.J. Super. 625, 636 (App. Div. 1986) ("Fraud of course is never presumed; it must be clearly and convincingly proven."); Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (citing Jewish Center of Sussex Cnty. v. Whale, 86 N.J. 619, 625 (1981)); Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997).

At Trial, Judge Hansbury dismissed Counts Four and Five as to Alan, Roger and the Estate because Judge Hansbury found SI did not present any evidence, let alone clear and convincing evidence, that Alan, Roger or Liliane made any misrepresentations at all. (13T45:1-17). Judge Hansbury also dismissed Counts Four and Five as to RELAP. (13T47:10-49:18). Judge Hansbury found based on the testimony elicited and even after giving SI all reasonable inferences that SI failed to establish: (1) a statement regarding parking was made; (2) the statement was false; (3) there was an intent to deceive; and (4) SI justifiably relied on any statement made. (13T47:10-49:18). As it relates to the intent to deceive and justifiable reliance elements, Judge Hansbury stated as follows:

> Did he intend to deceive? Well, that's an even trickier question, because he -- I -- there's a possibility that the plaintiff was given the 2000 site plan. They're sophisticated businessmen. This is a very significant issue to them, because they want to do an expansion. So, again, is there clear and convincing evidence that

> he intended to deceive? Again, maybe, maybe not. And reliance. Is there justifiable reliance? Boy, I have to tell you, if I were looking -- if I were the plaintiff and somebody said to me all the parking places are just fine, no problem whatsoever, and it was a critical issue, I might very well verify it. Again, I might not. Again, is that clear and convincing evidence? No, it's not.

[(13T48:6-2)].

SI's argument on appeal is, essentially, that to prevail on a claim for fraud SI only needs to show by a preponderance of the evidence that a misrepresentation was made. SI completely overlooks and fails to address the remaining elements of fraud though which Judge Hansbury held SI did not establish by clear and convincing evidence at Trial.

Further, by not addressing these issues in its moving papers, SI is precluded from doing so on reply. Hopwood v. Benjamin Atha & Illingsworth Co., 68 N.J.L. 707, 713 (1903) (grounds of appeal not raised on appeal are deemed waived or abandoned); State v. Shangzhen Huang, 461 N.J. Super. 119, 125 (App. Div. 2018), aff'd o.b., 240 N.J. 56, 56 (2019) (issue not briefed on appeal is deemed abandoned); Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011). If SI thought the Trial Court committed reversible error concluding that SI failed to establish all the elements to state a claim for fraud by clear and convincing evidence, SI was required to make this argument in its moving brief.

Finally, SI misstates the standard of review on appeal. Judge Hansbury's findings of fact on the elements of fraud based on the testimony of the parties is entitled to "substantial deference" and should "only be disturbed if they are 'manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence.'" Crespo v. Crespo, 395 N.J. Super. 190, 193–94 (App. Div. 2007) (quoting Rova Farms Resort, Inc., supra, 65 N.J. at 484). This is not a *de novo* standard of review.

Since the Trial Court found based on the testimony elicited at Trial that SI failed to establish each of the elements of fraud or fraud in the inducement by clear and convincing evidence, Counts Four and Five were properly dismissed.

B. The Trial Court's Dismissal of Count Six was Proper Because it is Barred by the Economic Loss Doctrine and SI Failed to Establish Justifiable Reliance

SI's argument with respect to Count Six for negligent misrepresentation is similarly circular. Judge Hansbury's later observation that Marcel may have made a representation related to parking prior to entering into the Third Lease Amendment does not, standing alone, "establish liability" for negligent misrepresentation.

As Judge Hansbury found, Count Six is precluded by the economic loss doctrine and the Supreme Court's holding in Saltiel v. GSI Consultants, Inc.,

170 N.J. 297, 310 (2002) which precludes a tort remedy in "a contractual relationship unless the breaching party owes an independent duty imposed by law." Saltiel, 170 N.J. at 316-17 (holding that "the existence of duties that are specifically imposed by law in New Jersey…can be enforced separately and apart from contractual obligations."); (12T189:9-191:4).

New Jersey courts routinely apply the economic loss doctrine to preclude plaintiffs from suing in tort when their claims arise from the breach of a contract and involve economic damages. Wasserstein v. Kovatch, 261 N.J. Super. 277, 286 (App. Div. 1993). The rationale behind this doctrine is that tort principles are better suited for resolving claims involving accidental or unanticipated injuries, and contract principles are more appropriate for determining claims for consequential damage that parties have or could have addressed in their agreement. See e.g. Alloway v. Gen. Marine Indus., L.P., 140 N.J. 620, 631 (1997); Spring Motors Distribs., Inc. v. Ford Motor Co., 98 N.J. 555, 672 (1985).

Negligent misrepresentation claims are barred by the economic loss doctrine where a plaintiff has not identified a duty owed independent of the contractual relationship. See Perkins v. Washington Mutual, FSB, 655 F. Supp. 2d 463, 471 (D.N.J. 2009) (finding that the economic loss doctrine barred a negligence claim brought by a plaintiff mortgagor against a defendant mortgagee, because both were parties to the mortgage contract and there was no

other duty owed); New Jersey-American Water Co., Inc. v. Watchung Square Assoc., LLC, A-3208-13T1, 2016 WL 3766243, at *9 (App. Div. July 15, 2016) (affirming Judge Hansbury's dismissal of a negligence claim due to an absence of an independent duty owed by the defendant). Indeed, "[u]nder New Jersey law, a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law." Saltiel, 170 N.J. at 316. The mere failure to fulfill obligations encompassed by the parties' contract, including the implied duty of good faith and fair dealing, is not actionable in tort. Id. at 316–17.

On appeal SI does not even attempt to explain why the Trial Court committed reversible error in finding RELAP did not owe an independent duty to SI outside of the parties' contract. Like the fraud counts, SI's failure to address this constitutes a waiver. Sklodowsky, supra, 417 N.J. Super. at 657.

Tellingly, during the parties' argument on the dismissal of Count Six, Judge Hansbury asked counsel for SI "what's the duty?" to which counsel responded only with the elements of a negligent misrepresentation claim, still failing to state a duty RELAP had to SI outside the scope of the integrated Lease. (12T187:17-199:1). Since the obligations of the parties related to municipal approvals and parking were set forth under the terms of the parties' integrated Lease, RELAP did not owe an independent duty to SI and Count Six for

negligent misrepresentation was properly dismissed by the court below as precluded by the economic loss doctrine.

Although not part of the Trial Court's ruling below, an added reason to dismiss Count Six should have been because SI could not establish justifiable reliance on any statement made. To sustain a cause of action based on negligent misrepresentation, a plaintiff must establish that the defendant negligently made an incorrect statement of a past or existing fact, that Plaintiff justifiably relied on it, and that his reliance caused a loss or injury. Masone v. Levine, 382 N.J. Super. 181, 187 (App. Div. 2005); Karu v. Feldman, 119 N.J. 135 (1990). A negligent misrepresentation constitutes "an incorrect statement, negligently made and justifiably relied on which results in economic loss." McClellan v. Feit, 376 N.J. Super. 305 (App. Div. 2005) (citing Kaufman v. I-Stat Corp., 165 N.J. 94 (2000). As Judge Hansbury held with respect to Counts Four and Five, the principals of SI were "sophisticated businessmen" and should have verified any statement made by Marcel, especially one so important to them. (13T48:6-2). Although a different standard (preponderance vs. clear and convincing) Judge Hansbury already found SI could not have justifiably relied on any statements made by Marcel which is dispositive on Count Six in and of itself. SI could have also mitigated its damages by either filing for the required municipal

approvals itself or moving out of the Expansion Space and not paying further rent but SI failed to do so.

C. The Trial Court Should Have Also Dismissed Counts Four and Five Because They Relied Solely on Parol Evidence that Directly Contradicted the Terms of the Parties' Integrated Lease

During Trial defendants argued that Counts Four and Five should be dismissed because they relied on statements that directly contradicted the terms of the integrated Lease. (13T40:9-42:13). Pursuant to Filmlife, Inc. v. Mal "Z" Ena, Inc. "[f]raudulent inducement claims survive integration clauses only 'when the fraudulent misrepresentation inducing the signature is as to a thing not dealt with at all in the agreement.'"). Filmlife, Inc. v. Mal "Z" Ena, Inc., 251 N.J. Super. 570, 598 (1991) (quoting Schlossman's v. Niewinski, 12 N.J. Super. 500 (App. Div. 1951) ("Fraudulent inducement claims survive integration clauses only 'when the fraudulent misrepresentation inducing the signature is as to a thing not dealt with at all in the agreement.'"). Although unpublished, the Appellate Division decision in Miranda v. MarineMax, Inc. is instructive on this issue. A-4186-11T4, 2013 WL 5508045, at *5 (N.J. Super. Ct. App. Div. Oct. 7, 2013).

In Miranda, the plaintiff had engaged in discussions with the defendant, a boat retailer, to purchase a used boat. Miranda, 2013 WL 5508045, at *1. During negotiations for the sale plaintiff had a survey prepared by a third-party that

included certain repair recommendations, one of which was to troubleshoot and repair the "check engine" light. Id. The plaintiff then sent this report to defendant's salesman and claimed that the salesman assured him defendant would fix the "check engine" light problem. The plaintiff testified that if defendant had refused, plaintiff would not have bought the boat. Id. at *2. Thereafter, plaintiff agreed to purchase the boat for $57,009.60 and entered into a purchase agreement that included certain disclaimers including that the boat was being sold "as is" and that the purchase agreement represented the entire agreement between the parties. Id. at *2-3. After the purchase, a separate company determined that the "check engine" light was illuminated due to an engine gasket failure and proposed to repair the problem for $36,166, which the defendant refused to pay for. Id. at *3.

After defendant refused to pay for the engine repair, the plaintiff filed a suit alleging, among other things, breach of contract and consumer fraud based on the alleged misrepresentation by defendant prior to entering into the purchase agreement. Miranda, 2013 WL 5508045, at *4. The trial court in Miranda dismissed the plaintiff's claims holding that the parol evidence rule precluded plaintiff from introducing extrinsic evidence to contradict the express "as is" language of the purchase agreement, even to show that defendant fraudulently induced plaintiff to enter into the purchase agreement. Id. at *4.

On appeal, this Court affirmed, holding that although parol proof of fraud in the inducement can sometimes be used to indicate an instrument is by reason of the fraud void or voidable, there "'is a distinction between fraud regarding matters expressly addressed in the integrated writing and fraud regarding matters wholly extraneous to the writing.'" Miranda, 2013 WL 5508045, at *5 (quoting Filmlife, Inc., supra, 251 N.J. Super. at 573). "Even when a party asserts fraudulent inducement, the parol evidence rule precludes the party from introducing extrinsic evidence that contradicts the express terms in an integrated agreement." Ibid. Since the fact allegedly misrepresented, that the defendant would repair the problem related to the "check engine" light, was addressed in the purchase agreement which stated the boat was being sold "as is" and because the purchase agreement included an integration clause, then the plaintiff could not introduce parol evidence that directly contradicted the terms of the integrated agreement. Id. at * 5-6.

Here, similar to Miranda, the Lease expressly provides that Second Inning agreed to accept the Demised Premises "AS IS" and, even further, the Lease explicitly required Second Inning to obtain all necessary municipal approvals for Second Inning's desired adult day care use. (Pa316; Da3). The Lease also contains an integration clause which provides that the Lease constitutes the entire agreement among the parties and that "no representative, agent, or

employee of the landlord has been authorized to make any representations or promises with reference to the within letting or to vary, alter, or modify the terms thereto." (Pa335; Da22).

The fraud exception to the parol evidence rule does not apply to oral representations that directly contradict the express terms of a contract and the intent of the parties as set forth therein. See Filmlife, Inc., supra, 251 N.J. Super. at 575 (emphasis added) (Fraudulent inducement claims survive integration clauses only "when the fraudulent misrepresentation inducing the signature **is as to a thing not dealt with at all in the agreement**."). Since the alleged oral representations giving rise to the claims for fraud, fraudulent inducement and negligent misrepresentation all concern a thing "dealt with" under the integrated Lease then those representations should be barred by the parol evidence rule and cannot form the basis of a claim for fraud, fraudulent inducement or negligent misrepresentation.

III. THE TRIAL COURT CORRECTLY DISMISSED COUNTS ONE AND TWO BASED ON THE PLAIN TERMS OF THE LEASE AND THIRD LEASE AMENDMENT

The Order and Judgment starts by quoting directly from the Lease which provides, among other things, that SI "shall diligently pursue, at its sole cost and expense all necessary approvals and permits from the Township of Whippany (Hanover Township) New Jersey including but not limited to any necessary

Whippany zoning approvals….for [SI] to utilize the demised premises for the permitted use." (Pa028); (Pa316). The Order and Judgment then confirmed, as SI conceded at trial, that pursuant to the Third Lease Amendment "[a]ll conditions and stipulations" in the Lease, First Lease Amendment and Second Lease Amendment remained "valid unless explicitly amended or cancelled" in the Third Lease Amendment. (Pa029); (Pa349).

The terms of the initial Lease and obligations on the part of SI thereunder were not disputed at trial and are not disputed now – the sole issue was whether the Third Lease Amendment "explicitly amended or cancelled" SI's prior obligation to obtain all municipal approvals necessary for its intended use. (4T61:20-62:17); (Pb35) ("The Third Lease amended the initial lease in several material ways. First, it no longer required Second Inning to obtain municipal approvals….").

On appeal, SI argues the Trial Court committed reversible error by rejecting SI's theory that language in a recital clause related to SI's "desire to start applying for permits" explicitly amended or cancelled SI's obligation to obtain zoning approvals for its desired adult day care use. (Pa031); (Pb35-36). SI also argues that because "Exhibit C" to the Third Lease Amendment included only outside site work, then this "makes it clear that [SI]'s responsibility with respect to parking was limited to filling the docks' pits and [SI] had not further

obligation under the Third Lease Amendment with respect to the parking spaces." (Pb36-37). SI further claims it was reversible error for the Trial Court to reject SI's argument that RELAP assumed the obligation to obtain zoning approvals by Marcel filing the Amended Site Plan Application and stating in the Third Lease Amendment that certain parking spaces would be assigned to SI in the future. (Pa032); (Pb37-41). For the following reasons though, the Trial Court correctly found that "the duty to apply for site plan approval was clearly the plaintiffs pursuant to the initial lease which was not explicitly altered by subsequent leases or actions of the defendant." (Pa033).

A. A Recital Clause Under the Third Lease Amendment Did Not "Explicitly Cancel or Amend" the Parties' Obligations Under the Lease

When interpreting the meaning of a contract "the terms of a contract must be given their plain and ordinary meaning" and the court "should not torture the language of [a contract] to create ambiguity." Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997) (internal quotations omitted). "A contract is not ambiguous simply because both parties disagree over the construction of the terms in the contract." In re Combustion Engineering, Inc., 366 F. Supp. 2d 224, 230 (D.N.J. 2005). Rather, an ambiguity exists only when it appears that the terms of the contract "are susceptible to at least two reasonable alternative interpretations." Nester, 301 N.J. Super. at 210 (quoting Kaufman v. Provident

Life & Cas. Ins. Co., 828 F. Supp. 275, 283 (D.N.J. 1992)), aff'd, 993 F.2d 877 (3d Cir. 1993)). "When the terms of the contract are not ambiguous, the construction and effect of that agreement is a matter of law which must be resolved by the court and not the jury." Cedar Ride Trailer Sales, Inc. v. Nat'l Community Bank of New Jersey, 312 N.J. Super. 51. 62-63 (App. Div. 1998).

The Third Lease Amendment (like the prior amendments before it) provides at paragraph one that "[a]ll conditions and stipulations in above mentioned Lease and First Lease Amendment and Second Lease Amendment are valid unless explicitly amended or cancelled in this Third Lease Amendment". (Pa349). This was not disputed at Trial.

No reasonable interpretation of the phrase "Whereas, Tenant desires to start applying for the necessary permits to expand [its] operation from various Municipal and Government Departments and Authorities…" can lead to the conclusion that it "explicitly amended or cancelled" the language of the Lease that states the Leased Premises is being leased "AS IS" and which requires SI to obtain all necessary governmental approvals necessary to utilize the Leased Premises for its adult medical day care use at its sole cost and expense. (Pa316; Da3); see also Domanske v. Rapid-American Corp., 330 N.J. Super. 241 (App. Div. 2001) (Affirming grant of summary judgment enforcing the terms of a contract (settlement agreement) and stating that "[u]nder long-settled principles,

the secret, unexpressed intent of a party cannot be used to vary the terms of an agreement.").

Even if there was some possible ambiguity related to the import of the Recital Clause, SI's arguments on this point should still fail because recitals of intent in a "whereas" clause "cannot create any right beyond those established by the operative terms of the contract." High Point at Lakewood Condo. Ass'n, Inc. v. Twp. of Lakewood, 442 N.J. Super. 123, 139 (App. Div. 2015) (quoting Genovese Drug Stores, Inc. v. Conn. Packing Co., 732 F.2d 286, 291 (2d Cir.1984) ("[A]n expression of intent in a 'whereas' clause of an agreement between two parties may be useful as an aid in construing the rights and obligations created by the agreement, but it cannot create any right beyond those arising from the operative terms of the document.")); Electra Realty Co. Inc. v. Kaplan Higher Educ. Corp., 825 Fed. Appx. 70, 73 (3d Cir. 2020) ("A Recital Clause, though it may provide background information or serve as an interpretative aid, does not control over the operative terms of a contract.").

While it is surely expedient for SI to claim the parties "explicitly amended or cancelled" the obligation on the part of SI to obtain all required governmental approvals necessary to utilize the leased premises for adult day care use under the Third Lease Amendment, the Recital Clause in the Third Lease Amendment

and the filing of an Amended Site Plan Application by Marcel cannot, as a matter of law, control over the express operative terms of a contract.

In this case, there were numerous factual disputes related to the interpretation of the contract and the parties' intentions. Judge Hansbury considered all of the testimony of the parties and rejected SI's arguments that the recital clause under the TLA amended the obligations of the parties under the initial Lease – this is entitled to deference on appeal. Kieffer v. Best Buy, 205 N.J. 213, 222, fn. 5 (2011) (citing Jennings v. Pinto, 5 N.J. 562, 569–70 (1950) (resolution of factual disputes requires a deferential standard of review). Even on a *de novo* review though, there is no basis to overturn the Court's findings below.

B. The Designation of Certain Parking Spaces under the Third Lease Amendment and the Tenant Works Identified Under Exhibit "C" did not Explicitly Cancel or Amend the Obligation of Second Inning to Obtain all Required Governmental Approvals for its Permitted Use

In addition to the Recital Clause, SI claims that because certain parking spaces to be assigned to SI were designated exclusively for Second Inning's use under the Third Lease Amendment and because Exhibit "C" to the Third Lease Amendment entitled "Works to be Done by Tenant at Tenant's Sole Expense" includes certain outside site work to be completed by SI, then that too "explicitly

amended or cancelled" SI's obligation obtain any required municipal or other governmental approvals for its use of the Expansion Space.

It is not the position of the Court to give SI a better deal than they negotiated after the fact. Here, it is undisputed SI agreed to accept the Leased Premises "AS IS" and remain responsible (just like the prior adult day care, Daughters of Israel) for all municipal approvals necessary to utilize the Leased Premises for adult day care use. Further, the identification of certain outside construction work SI was required to complete prior to using the Expansion Space and the designation of parking spaces to be assigned exclusively for the use of SI (which SI had been using (4T142:1-4)) has absolutely nothing to do with SI's independent agreement and obligation under the Lease to obtain all required governmental approvals necessary to complete the its required construction work and begin using the Leased Premises for SI's desired use. (Pa316;Da3) ("Tenant agrees to be solely responsible for obtaining all necessary governmental approvals and all costs related thereto….") and (Tenant shall diligently pursue, at its sole cost and expense, all necessary approvals and permits from the Township of Whippany, New Jersey, including, but not limited to, any necessary Whippany zoning approvals… necessary for Tenant to utilize the Demised Premises for the Permitted Use").

To the extent the parking spaces to be assigned under the Third Lease Amendment were insufficient for 11,000 square feet of adult medical day care use, then SI had an obligation to apply for site plan approval or a variance, which SI could have done but never did. The Trial Court rightfully concluded that the assignment of certain parking spaces in the future, the leasing of the Expansion Space and the agreement on the part of SI to complete certain construction work to the interior and exterior of the Leased Premises did not "explicitly amend[] or cancel[]" SI's obligation to obtain all required governmental approvals in order to convert the Expansion Space from warehouse to adult day care use. As a result, the Trial Court correctly dismissed Counts One and Two of the Complaint.

C. Marcel's Course of Conduct Including his Gratuitous Attempts to Assist SI Obtain Approvals did not Alter the Unambiguous Terms of the Lease

Marcel's gratuitous attempt to assist SI by filing the Amended Site Plan Application after SI failed to comply with its obligations under the Lease does not alter the Lease terms either. SI misleadingly cites Hungerford & Terry, Inc. v. Geschwindit, 24 N.J. Super. 385, 397 (Ch. 1953), aff'd, 27 N.J. Super. 515 (App. Div. 1953) for the proposition that the filing of the Amended Site Plan Application alone "confirms that only Relap was responsible for obtaining the approvals…." (Pb37). But in Hungerford & Terry, Inc., the Appellate Division

confirmed "where the meaning of the contract is plain, there cannot be a contrary construction by the acts of the parties." Hungerford & Terry, Inc., supra, 24 N.J. Super. at 397.

Even if the Lease was ambiguous Marcel's submission of the Amended Site Plan to the Township after SI did not comply with its obligations under the Lease (Pa30-31; Pa417) does not mean that "RELAP was the party responsible to obtain the approvals." (Pb39). Further, while Marcel may have been the point of contact with the Township, SI completed the initial SPEC Request sent to the Township prior to even entering into the Lease (Da28); (4T43:12-44:4) and Marcel's various dealings with the Township on behalf of RELAP and its tenants is common for a manager of a commercial property and does not establish or prove anything. This is especially true because SI agreed RELAP's failure to strictly enforce any Lease covenants is not a waiver of RELAP's rights later. (Pa334; Da31) ("The various rights, remedies, options and elections of the Landlord, expressed herein, are cumulative, the failure of the Landlord to enforce strict performance by the Tenant of the conditions and covenants of this Lease or to exercise any election or option…in any one or more instances, shall not be construed or deemed to be a waiver or a relinquishment for the future by the Landlord of any such conditions and covenants, options, elections or remedies, but the same shall continue in full force and effect.").

D. Implied Covenants of Good Faith and Fair Dealing Cannot Override the Explicit Terms of the Lease

Under New Jersey law, "[a] covenant of good faith and fair dealing is implied in every contract[.]" Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001) (citing Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997)). This means "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract[.]" Sons of Thunder, 148 N.J.at 420 (citing Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 130 (1965)). However, the implied covenant of good faith and fair dealing cannot override an express term in a contract. Wade v. Kessler Inst., 172 N.J. 327, 341 (2002) (citing Wilson, 168 N.J. at 244); Sons of Thunder, Inc. v. Borden, 148 N.J. 396, 419 (1997) ("the implied covenant of good faith and fair dealing cannot override an express termination clause"). This is because using an implied covenant to override or contradict an express term of the contract violates Wilson's mandate that the "fruits" being examined must be "reasonably expected . . . under the contract." Wilson, 168 N.J. at 251.

SI's Count Two based on a breach of the implied covenants of good faith and fair dealing was properly dismissed because those covenants cannot override the contractual terms under the Lease and Third Lease Amendment. As the Trial Court rightfully found, SI always had the obligation to obtain all required municipal approvals for its the use of the Expansion Space.

In short, throughout this entire case and still now on appeal, SI conflates the future assignment of parking spaces under the Third Lease Amendment with the requirement on the part of SI to obtain all necessary governmental approvals, including zoning approvals necessary for SI's intended use. SI claims that this obligation shifted to RELAP notwithstanding the plain language of the Lease and its corresponding amendments. However, SI's argument relies on a strained interpretation of the Third Lease Amendment and completely contradicts the plain meaning of the Lease and its amendments.

IV. THE TRIAL COURT CORRECTLY DISMISSED COUNTS SEVEN AND EIGHT FOR CONVERSION AND UNJUST ENRICHMENT

As it relates to Counts Seven and Eight for conversion and unjust enrichment, Judge Hansbury correctly concluded that SI did not present evidence any of the individual defendants were unjustly enriched or converted anything. (12T178:4-21; 182:24-183:13); (Pa230). SI oddly cites V & S Investments, LLC v. Two B'S Bev., Inc., A-3222-10T2, 2012 WL 670712, at *2 (N.J. Super. Ct. App. Div. Mar. 2, 2012) for the proposition that employees can be held liable for a conversion which benefits their employer but does not explain what evidence was presented before the Trial Court that Judge Hansbury overlooked on this point. SI did not present any evidence the individuals converted anything or had been unjustly enriched by rent payments paid by SI to RELAP under its Lease. SI did not present any evidence, for example, that

the individuals received those rents directly or even indirectly through membership distributions.

Judge Hansbury was also correct to conclude that RELAP could not be liable on a conversion or unjust enrichment basis because of the existence of the parties' Lease. See Winslow v. Corporate Express, Inc., 364 N.J. Super. 128, 143 (App. Div. 2003) (when there is an "express contract, there is no basis or need for plaintiff to pursue a quasi-contractual claim for unjust enrichment").

On appeal, SI cites to Rose v. Bernhardt, 107 N.J.L. 501, 503 (1931) for the proposition that RELAP can be liable for a "conversion of rents." Rose v. Bernhardt is completely inapposite though as that case involved parties that allegedly fraudulently continued to collect rents after expiration of an assignment of leases and rents. This is, obviously, quite different from RELAP accepting rent payments paid by SI as a tenant as required under its Lease during the term of the Lease.

RELAP did not exercise dominion or control over RELAP's "income and assets" nor has RELAP been unjustly enriched by continuing to accept rents for the Expansion Space Second Inning continues to use pursuant to the parties' arms-length, bargained for commercial Lease agreement. Since a contract exists which defines the rights between the parties, SI's claims for conversion and

unjust enrichment simply cannot lie. Shalita v. Twp. of Wash., 270 N.J. Super. 84, 90-91 (App. Div. 1994).

V. THE TRIAL COURT'S HOLDING REGARDING MITIGATION IS IRRELEVANT BECAUSE SI'S CLAIMS WERE DISMISSED BUT THE TRIAL COURT'S HOLDING SI FAILED TO MITIGATE ITS DAMAGES SHOULD BE AFFIRMED

SI's next argument on appeal is that the Trial Court committed reversible error holding SI failed to mitigate its damages by not seeking to remove defendants' prohibition against overnight parking in the Amended Site Plan Application.[7] Similar to SI's other arguments though, this argument is misleading. This is because SI misstates the second reason why the Trial Court held SI failed to mitigate – SI had the opportunity and duty under the law to file for its own site plan application but refused to do so. Indeed, as Judge Hansbury and SI's own expert acknowledged, SI could have applied for site plan approval itself but failed to do so. (Pa034a); (9T65:7-66:18). SI never filed a zoning application itself because SI thought it was not SI's "problem" and SI "did not want to spend the money." (4T146:6-13).

Judge Hansbury was also correct to find SI could have and should have obtained an Order compelling RELAP to amend the site plan and proceed. (12T169:21-171:10). SI filed multiple Motions related to Marcel's initial non-

[7] This argument is perplexing in the sense that this finding by the Trial Court is irrelevant in light of the fact that SI's claims were all dismissed.

compliance with the preliminary injunction early on but, tellingly, never filed anything to compel RELAP to proceed with a second amended site plan application and obtain approvals. This is because SI never had any intention of expending the substantial costs to build out the Expansion Space and was content to sit on its heels and hope to obtain a significant damage award with little to no effort or risk. This type of behavior is not permitted under New Jersey law.

"The doctrine of "avoidable consequences," otherwise known as the duty to mitigate damages, is based on the premise that a plaintiff may not recover damages for injuries which he may have avoided. Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 108 (1996) (internal quotation omitted). Under that doctrine, recovery for harm is diminished due to the injured person's actions and failure to exercise reasonable care to avoid the consequences of a wrongful action. Id. (citing Restatement (Second) of Torts, § 918, cmt. a (1977)).

The Trial Court correctly held that SI failed to mitigate its damages by not seeking to amend the preliminary injunction so RELAP could proceed to obtain approval (if it were Relap's contractual obligation to do so, which of course it was not) and by not applying for the approvals to use the Expansion Space itself. SI admitted at Trial that it never filed a zoning application itself because SI

thought it was RELAP's "problem" and SI did not want to "spend the money." (4T146:6-13). Judge Hansbury's holding that SI failed to mitigate its damages precluding a damage award against RELAP is amply supported by the testimony of the parties, and SI's own expert. That holding is also entitled to substantial deference and should not be reversed.

VI. THE TRIAL COURT'S HOLDING THAT SI FAILED TO PRESENT ANY EVIDENCE TO SUPPORT ANY CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS SHOULD NOT BE DISTURBED[8]

SI's next argument on appeal is that the lower court should have held each of the individual defendants liable based on a "tort participation theory of liability." SI argues that because Liliane signed off on the Amended Site Plan Application that did not provide for overnight parking and because Roger, Liliane and Alan were owners of RELAP over the years then somehow Alan, Roger and the Estate are liable for tortiously interfering with SI's economic advantage with clients or contractual relations. (Pb55). SI also argues that SI was defrauded by executing a tenant estoppel certificate[9] but does not explain

[8] Since SI has not appealed the Summary Judgment decision SI has conceded to the dismissal of its claims against Nick.

[9] Alan testified during Trial that RELAP obtained the loan proceeds prior to SI's execution of the tenant estoppel letter and they were primarily used for purposes of refinancing a prior loan on the property. (7T1973:3-202:23). SI's arguments related to the alleged Mortgage refinancing "fraud" are a red-herring, precluded by the Court's Order prior to Trial that SI was bound only by the claims as pled under the SAC and not borne out by the record evidence.

where this claim was pled under the SAC (it was not), how SI relied on anything that anyone said, or damages suffered as a result. (Pb55-56).

In much the same pattern as SI's other arguments above, SI does not even bother to address the parties' arguments or Judge Hansbury's analysis in dismissing the individuals (where he held that SI did not produce any evidence to support a claim against Alan, Roger or the Estate). (12T171:11-20). Judge Hansbury heard substantial testimony along with argument from the parties prior to this dismissal but still rejected SI's various arguments, including those regarding the "tort participation theory" of liability. (12T136:4-172:3). Most of SI's caselaw cited in support is also completely distinguishable and does not include claims sounding in contract. Saltiel, supra, 170 N.J. at 315.

Notably too, SI has not sought to reverse Judge Hansbury's ruling on the Motion in limine that limited SI's proofs at trial to what was pled under the SAC and which Motion was filed in response to SI's "tort participation theory" of liability raised for the very first time via summary judgment briefing. Nor did SI move to amend the SAC at Trial. This is a further reason to reject SI's argument that the Court should now find, without any evidence, that Alan, Roger and the Estate are directly liable to RELAP based on an unpled tortious interference or fraud theory of liability related to the execution of a tenant

estoppel certificate for a Mortgage refinancing and because some of them were members of RELAP when the Amended Site Plan Application was filed.[10]

The filing of the Amended Site Plan Application (which RELAP was enjoined from proceeding on) does not, standing alone, establish liability on the part of the individual members of RELAP for anything. Likewise, disputed representations related to the execution of a tenant estoppel certificate in connection with a refinancing, without more, cannot establish liability for fraud (especially when this purported "fraud" was not pled under the Complaint and raised by SI for the first-time during summary judgment briefing). For those reasons and the reasons further set forth in the Trial transcripts, there is no basis to reverse the Trial Court's decision to dismiss all of the claims against Alan, Roger and the Estate.

VII. SINCE ALL OF SI'S CLAIMS WERE PROPERLY DISMISSED THERE IS NOT A BASIS TO AWARD DAMAGES ON APPEAL

SI's sixth point on appeal seeks damages in the form of rents paid by SI for the Expansion Space SI is using for storage purposes in addition to lost

[10] SI wrongly claims too that all of the defendants admitted that in the absence of overnight parking, SI's business would be destroyed. (Pb55). This is completely inaccurate as this issue was addressed during Trial and the prior adult day care, Daughters of Israel, never parked its vehicles overnight. (13T60:23-61:3; 197:9-11) (7T76:9-16). Further, the Verified Answer SI refers to was signed only by Marcel and was signed prior to Alan and Nick even being aware of the existence of the litigation. (Pa243).

profits that SI claims it could have earned had it obtained the municipal approval to operate it never applied for. This argument fails for all the reasons above – there is no basis to reverse the Trial Court's dismissal of SI's claims and SI failed to mitigate its damages precluding a damage award even if SI prevailed. Even if there was a basis to award damages though, the speculative nature of SI's damages was not addressed by the Trial Court (because the Trial Court did not need to reach this issue) and the issue should be remanded. There is no basis though to remand to another Judge as SI requests.

VIII. THE AWARD OF ATTORNEYS' FEES TO NICK AND THE ESTATE WAS PROPER BUT FEES SHOULD HAVE BEEN AWARDED TO ROGER AND ALAN TOO

Frivolous litigation sanctions are governed by the dual provisions of Rule 1:4-8, which permits sanctions against attorneys and N.J.S.A. 2A:15-59.1, which does the same for parties. Both provisions are motivated by the same purpose: "deterrence of frivolous litigation and compensation for those having to suffer the consequences of frivolous litigation behavior." Toll Bros., Inc. v. Twp. of W. Windsor, 190 N.J. 61, 65 (2007). The Appellate Division has held that "a claim will be deemed frivolous or groundless when no rational argument can be advanced in its support, when it is not supported by credible evidence, when a reasonable person could not have expected its success or when it is completely untenable." Belfer v. Merling, 322 N.J. Super. 124, 144 (App. Div.

1999). The Court has the discretion to and has imposed sanctions when it was determined that there is no legal or factual basis for a claim. Gooch v. Choice Entertaining Corp., 355 N.J. Super. 14, 20 (App. Div. 2002); see also Debrango v. Bancorp, 328 N.J. Super. 219, 227-228 (App. Div. 2000) (imposing sanctions of reasonable attorney's fees unto plaintiff who continued a claim despite receiving evidence that the claims were unsupported).

The focus should be on the "objective reasonableness of the action of a party under the circumstances." Ellison v. Evergreen Cemetery, 266 N.J. Super. 74, 85 (1993). The determination of whether the suit is frivolous should be "based on the record already made in the matter, thus precluding routine collateral evidential forays into states of mind and non-record facts and circumstances." Id.

Nick was dismissed at summary judgment. (Pa295). At trial, the Trial Court acknowledged there was no factual or legal basis for a claim against Alan, Roger or the Estate, and entered an Order on November 15, 2022, dismissing the claims against them *with prejudice* pursuant to R. 4:37-2(b)[11]. (Pa35). Dismissal pursuant to R. 4:37-2(b) is appropriate where a plaintiff has failed to

[11] There is a typo in the dismissal order as it reflects the dismissal was made pursuant to R. 4:37-2(a) (failure to comply with court rule or order) but should have stated R. 4:37-2(b) (At Trial – Generally).

present a *prima facie* case and where "no rational [factfinder] could conclude from the evidence presented that an essential element of the plaintiff's case is present." ADS Assoc. v. Oritani Sav. Bank, 219 N.J. 496, 510 (2014) (quoting R. 4:37-2(b)). Under Rule 4:37-2(b), a trial judge will grant a motion for a directed verdict only if, accepting the non-moving party's facts and considering the applicable law, "no rational jury could draw from the evidence presented" that the non-moving party is entitled to relief. Pitts v. Newark Bd. of Educ., 337 N.J. Super. 331, 340 (App. Div. 2001). By dismissing the Estate, Alan and Roger at Trial pursuant to R. 4:37-2(b) and finding that no evidence was presented to support any claims against them, the Court confirmed that the claims were made without a rational basis and frivolous as a matter of law.

On Appeal, Second Inning first claims that the initial entry of a preliminary injunction serves as an absolute bar to a later finding that the claims against the individuals were frivolous but this theory is not supported under the law and does not make logical sense. We are not aware of and Second Inning does not cite to any caselaw holding a party is foreclosed from seeking sanctions and fees where a preliminary injunction is entered against some or all of the defendants at the inception of a case.

By November of 2019 Second Inning and its counsel were informed and knew that the direct claims against Alan, Nick and Roger were not warranted by

existing law but instead were frivolous, harassing and unsupported by the factual record. (Da685). Prior to trial, SI was informed of this by the Estate as well. (Da677). There was never any factual or legal basis to maintain a direct cause of action in this case against Alan, Nick, Roger or the Estate. Discovery did not reveal any factual basis to pierce the corporate veil (which requires, among other things, clear and convincing evidence of corporate dominance along with a fraud or injustice intended to circumvent the law) and there was never any evidence adduced during discovery of any direct involvement by Alan, Nick, Roger or the Estate sufficient to state any of the claims as pled under the SAC.

The preliminary injunctive relief improperly entered against all the defendants at the inception of this matter has absolutely no bearing on Second Inning's continued prosecution of its claims against Alan, Nick, Roger and the Estate after Second Inning was informed of and knew that those claims were frivolous. As Judge Hansbury properly found, Liliane "did nothing here to justify personal liability" and there was "not a single fact pled" against Nick – he was "sued simply because he was a stockholder." (15T71:14-73:9).

SI cites to United Hearts, LLC v. Zahabian, 407 N.J. Super. 379, 389 (App. Div.), certif. denied, 200 N.J. 367 (2009) for the proposition that a Complaint is not frivolous against a party where at least some claims against that party survive summary judgment. Clearly this argument does not apply to

Nick who was dismissed at Summary Judgment. However, as it relates to Alan, Roger and the Estate, United Hearts, LLC is distinguishable because in that case the matter proceeded to trial and no Motion was made (or granted) for involuntary dismissal pursuant to R. 4:37-2(b). Motions for involuntary dismissal pursuant to R. 4:37-2(b) are considered on a standard similar to summary judgment and require a finding that, among other things, "no rational jury could conclude from the evidence that an essential element of the plaintiff's case is present." See Pressler, N.J. Court Rules, Comment 2.1 on R. 4:37-2 (Gann 2021). Here, all of the claims were dismissed against Alan, Roger and the Estate during the course of Trial based on SI's failure to make out a *prima facie* right to relief. As a result, Judge Hansbury rightfully found United Hearts, LLC is not an absolute bar to an award for sanctions.

The Court should find SI's continued pursuit of Alan, Roger and the Estate with knowledge that SI lacked sufficient evidence to present even a *prima facie* case was frivolous, a violation of R. 1:4-8 and the Frivolous Litigation Statute as a matter of law. As a result, this Court should affirm the award of fees and sanctions to Nick and the Estate but reverse the Trial Court's decision to not

enter sanctions against SI related to SI's baseless claims against Alan and Roger too.[12]

RESPONDENTS' CROSS-APPEAL[13]

I. SUMMARY JUDGMENT SHOULD HAVE BEEN ENTERED IN FAVOR OF ALAN, ROGER AND THE ESTATE

Appellate courts review motions for summary judgment by the same standard used by the Trial Court and apply the *de novo* standard of review. Henry v. New Jersey Dept. of Human Services, 204 N.J. 320, 330 (2010). When the facts are not contested and the Trial Court's decision turns on a question of law, the Trial Court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special

[12] SI has not appealed the amount of the fee awards, only the award of the fee itself. However, in the event this Court reverses as to Alan and Roger, the Court should either enter relief for each of Alan and Roger's one-fourth shares of the fees paid (which the Trial Court found reasonable as to Nick) or remand for a determination of reasonableness as this was not determined by the Trial Court. (Da736).

[13] Respondents' Cross-Appeal also seeks to reverse Judge Hansbury's decision to deny Alan and Roger attorneys' fees based on SI's pursuit of frivolous claims against them. For the sake of brevity, this argument is addressed in the prior Section VIII which addresses SI's appeal seeking to reverse the award of attorneys' as to the Estate and Nick. Likewise, to avoid duplication, Respondents' rely on the Counter-Procedural History and Counter-Statement of Facts in Support of Respondents' Cross-Appeal. This was raised below at Pa40; 15T70-75.

deference, and under such circumstances, an appellate court's review of a grant or denial of summary judgment is *de novo.* Dempsey v. Alston, 405 N.J. Super 499, 509 (App. Div. 2009). The ultimate question in a summary judgment motion is whether, upon a review of the pleadings, deposition testimony and other competent evidence presented, in a light most favorable to the non-moving party, a rational fact-finder could resolve the alleged disputed issue in favor of the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Thus, when the evidence is so one-sided that one party must prevail as a matter of law, the Trial Court should not hesitate to grant summary judgment. Id. For all the reasons the Trial Court dismissed the individual defendants at the conclusion of SI's affirmative case, Alan, Roger and the Estate should have been dismissed on summary judgment too. Alan, Roger and the Estate should have also been dismissed because the Lease contained a "Non-Liability of Landlord" provision which stated:

> Neither the Landlord nor any partner of the Landlord shall be under any personal liability to the Tenant with respect to any provision of this Lease.

[Pa320].

SI made only two arguments with respect to Alan, Roger and the Estate's liability at the summary judgment stage of this case.

First, SI argued for the first time on summary judgment it was fraudulently induced by Roger with the knowledge of Liliane and Alan to enter into a tenant

estoppel letter in connection with a mortgage refinancing. However, SI did not include this claim or any allegations related to it in any of its prior pleadings and, as a result, the parties never had an opportunity to conduct discovery into it.[14] The Trial Court should have completely disregarded SI's new theory of the case on this basis alone. Stewart v. New Jersey Tpk. Auth./Garden State Parkway, 249 N.J. 642, 657 (2022) (affirming summary judgment based on new theory of the case raised for the first time on summary judgment); Bauer v. Nesbitt, 198 N.J. 601, 610 (2009) (quoting R. 4:5-7) ("Although '[a]ll pleadings shall be liberally construed in the interest of justice,' the fundament of a cause of action, however inartfully it may be stated, still must be discernable within the four corners of the complaint."). SI's failure to plead any allegations against Alan, Roger, Nick or Liliane related to the purported mortgage refinancing fraud should have been dispositive on this issue.

Notably, SI also failed to present any evidence on Summary Judgment with respect to how this purported "fraud" damaged SI. Just the opposite, the principals of SI testified during their depositions that they were not aware of any

[14] The foregoing allegations related to the refinancing were not pled under the SAC but even if they fell under the umbrella of Count Five for fraudulent inducement (which only included allegations related to Marcel) then the remainder of the Counts under the SAC should have been dismissed.

damages suffered as a result of anything Alan and Roger did at all. (Da311; Da353-354; Da368-372).

Second, SI argued that Alan, Roger and Liliane should be held liable under a "tort participation theory of liability" but SI likewise failed to plead how or why Alan, Roger or Liliane participated in any of the torts SI was seeking relief for under the SAC and failed to identify evidence of their purported participation in those torts on summary judgment. In fact, SI failed to plead or otherwise cite to any alleged misrepresentations on the part of Alan, Roger and Liliane whatsoever. Besides the introduction section of the SAC, their names were not even mentioned under the DAC. Similar to the foregoing, even assuming *arguendo* this "tort participation theory of liability" was viable – it was not pled under the SAC, SI did not move to amend and the newly raised allegations should have been disregarded by the Trial Court on this basis alone. Stewart, supra, 249 N.J. at 657.

Further, during the depositions of the principals of SI, Mr. Mehta and Mr. Patel could not explain why the individual defendants besides Marcel were named in the suit. (Da353-354; Da368-372). It was not until Summary Judgment briefing that SI conjured up the imaginative fraud claims related to the refinancing of the Mortgage and even accepting those claims as true (which they are not) they still would not be sufficient to state a claim related to any of the

claims pled under the SAC as they transpired after Second Inning had already entered into the Third Lease Amendment and SI only pled and produced evidence of damages for lost profits related to SI's failure to obtain municipal approval to operate. Since there was no genuine issue of material fact in dispute related to any claim against Alan, Roger or Liliane individually, each of them should have been dismissed on summary judgment.

A. Alan, Roger and the Estate Should Have Been Dismissed on Summary Judgment Because SI Agreed Under the Lease that They Could not be Personally Liable for Anything (Pa305-308; 310-312)

The Lease provides at Paragraph 7(a) that no "partner of the Landlord shall be under any personal liability to the Tenant with respect to any provision of this Lease." (Pa320; Da7). The Trial Court should have dismissed Alan, Roger and the Estate because they were partners of SI and not personally liable to SI with respect to any provision of the Lease.

B. The Trial Court Erred When it Failed to Dismiss Counts One Through Three Because Those are Contract Claims SI Conceded it Should not Have Filed Against the Individuals in the First Instance and Should Have been Dismissed on Summary Judgment (Pa299-305; 310-312)

As discussed supra, at the beginning of Trial counsel for SI conceded that Counts One through Three should never have been filed against the individual defendants in the first instance. (2T94:3-23). This is because it is undisputed Alan, Roger and Liliane were not parties to the Lease. It is also axiomatic that

"an action on a contract cannot be maintained against a person who is not a party to it," Comly v. First Camden Nat'l Bank & Tr. Co., 22 N.J. Misc. 123, 127 (1944). Nor were there any facts, let alone allegations pled under the SAC, that Alan, Roger and Liliane interfered with SI's right to quiet enjoyment under the terms of the Lease. Summary Judgment should have been granted against Alan, Roger and Liliane on Counts One through Three because they cannot be found liable for a breach of the Lease or for interfering with SI's right to quiet enjoyment where Alan, Roger and Liliane were not individually parties to the Lease or its amendments.

C. The Trial Court Erred When it Failed to Dismiss Counts Four, Five and Six as to Alan, Roger and the Estate Because SI did not Plead any Claims Against Them Based on Fraud, Fraudulent Inducement or Negligent Misrepresentation and Because the Claims are Barred by the Economic Loss Doctrine (Pa305-307; 310-312)

The Trial Court should have likewise dismissed Counts Four, Five and Six as to Alan, Roger and the Estate. Counts Four, Five and Six under the SAC alleged that Marcel made representations to SI regarding the sufficiency of parking spaces. (Pa226-229). However, for the very first time on Summary Judgment, SI argued that RELAP installed Roger on a temporary basis to obtain refinancing under a Mortgage Loan, after the parties' Third Lease Amendment and this could form the basis of a new claim.

Putting aside the lack of allegations or claims pled under the SAC regarding the newly fabricated refinancing issue, SI did not include on Summary Judgment evidence of damages as a result of the refinancing and did not include evidence Alan did anything at all besides the fact that he was involved in the business at that time. This was fatal to SI's claims because fraud and negligent misrepresentation both require an injury and there were absolutely no facts of any such injury presented to the Trial Court on Summary Judgment. Allstate New Jersey Ins. Co. v. Lajara, 222 N.J. 129, 147 (2015); Carroll v. Cellco Partnership, 313 N.J. Super. 488, 502 (App. Div.1998).

D. The Trial Court Erred When it Failed to Dismiss Counts Seven for Conversion and Count Eight for Unjust Enrichment Because Alan, Roger and the Estate Did not Convert Anything and Were not Unjustly Enriched (Pa308-312)

SI did not present any evidence at the summary judgment stage (or at Trial) that Alan, Roger or the Estate converted anything. Moreover, the allegations under the SAC solely related to rents and CAM charges paid under the parties' Lease. There was no evidence any rents and CAM charges were paid to Alan, Roger or Liliane. This same analysis applies to SI's Count Eight for Unjust Enrichment. There was absolutely no evidence of any monies received by Alan, Roger or Liliane at any time.

Further, as Judge Hansbury found at Trial, when there is an "express contract, there is no basis or need for plaintiff to pursue a quasi-contractual claim

for unjust enrichment." Winslow v. Corporate Express, Inc., 364 N.J. Super. at 143. SI's entire case relies on the terms of the integrated Lease. Accordingly, the court should have granted Summary Judgment with respect to Alan, Roger and the Estate on Counts Seven and Eight.

E. The Trial Court Erred When it Failed to Dismiss Counts Nine and Ten for Tortious Interference Because There were no Allegations or Evidence of Interference on the Part of Alan, Roger or Liliane (Pa309-312)

Count Nine for tortious interference with contractual relations claimed that the "defendants" (plural) tortiously interfered with SI's contractual relations by harassing clients. (Pa231). SI argued under Count Ten that the "defendants" (plural again) tortuously interfered with its prospective economic advantage by harassing clients and failing to provide SI with "the requisite parking spaces" and, thereby, preventing Second Inning from expanding its adult day care facility. (Pa231) Neither Count Nine nor Count Ten had anything to do with Alan, Roger or Liliane and no evidence was submitted in Summary Judgment that suggested otherwise.

Count Ten should have also been dismissed on Summary Judgment because SI's claim is really just a recast of SI's breach of contract claim, which New Jersey courts have not permitted in the past. See New Mea Constr. Corp. v. Harper, 203 N.J. Super. 486, 494 (App. Div. 1985) (finding that defendant's failure to use construction material specified in the parties' contract was a type

of conduct "not ordinarily alleged in a tort case," and could not give rise to a separate claim by "[m]erely nominally casting [the] cause of action").

F. The Trial Court Erred by Suggesting on Summary Judgment There was a Genuine Issue of Material Fact in Dispute with Respect to SI's Attempt to Pierce the Corporate Veil (Pa310-312)

It is well settled New Jersey law that "a corporation is a separate entity from its shareholders . . . and that a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise." State Dep't. of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 500 (1983). The protection of limited liability applies equally to members of New Jersey limited liability companies. N.J.S.A. 42:2B-23.3.[15] No evidence was presented on Summary Judgment that created a genuine issue of material fact as to whether or not the court should pierce the corporate veil. Ventron Corp., 94 N.J. at 500 (finding that veil piercing is appropriate where an individual uses a corporation as his or her alter ego and abuses the corporate form to defeat the ends of justice, perpetuate a fraud, accomplish a crime, or otherwise evade the law).

[15] N.J.S.A. 42:24-23 provides in pertinent part that "the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member, manager, employee or agent of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company . . . by reason of being a member, or acting as a manager, employee or agent of the limited liability company.

Under Ventron, a Plaintiff must establish two prongs – (1) that the parent or owner so dominated the subsidiary that it had no separate existence but "was merely a conduit for the parent;" and (2) that the parent or owner has abused the business form to perpetrate a fraud, injustice, or otherwise circumvent the law." Ventron Corp., 94 N.J. at 501 (citing Mueller v. Seaboard Commercial Corp., 5 N.J. 28, 34 (1950); Sean Wood, L.L.C. v. Hegarty Grp., Inc., 422 N.J. Super. 500, 517 (App. Div. 2011) ("An individual may be liable for corporate obligations if he was using the corporation as his alter ego and abusing the corporate form in order to advance his personal interests."). A plaintiff must establish that the parent or owner so dominated the subsidiary that it had no separate existence but "was merely a conduit for the parent." Ventron Corp., 94 N.J. at 501 (citing Mueller v. Seaboard Commercial Corp., 5 N.J. 28, 34 (1950) (demonstrating dominance and control of a subsidiary evidences mere instrumentality).

Second, the plaintiff must prove that "the parent has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law." Ventron Corp., 94 N.J. at 501. In order to prevail on a piercing the corporate veil claim both prongs of the veil piercing test must be proven by clear and convincing evidence. Canter v. Lakewood of Voorhees, 420 N.J. Super. 508, 519 (App. Div. 2011).

SI did not present evidence creating a genuine issue of material fact on either criterion above. SI failed to cite to any evidence, let alone clear and convincing evidence, that the individuals used RELAP as their alter ego such that the corporate form was rendered a "legal fiction" or "merely a conduit" to advance their personal interests. SI knew at all times it was dealing with RELAP – not Alan, Roger or Liliane who SI had little to no dealings with. See Marascio v. Campanella, 298 NJ Super. 491, 502 (App. Div. 1997) (reversing and remanding trial court order piercing the corporate veil where, *inter alia*, plaintiff knew or should have known he was doing work on behalf of a company). Nor was there any evidence offered on Summary Judgment that the individuals were misappropriating and commingling corporate funds, failing to maintain corporate procedures or otherwise neglecting to observe corporate formalities. There was no evidence (let alone allegations) that RELAP was undercapitalized.

In SI's Counter-Statement of Undisputed Material Facts on Summary Judgment, SI claimed the owners' membership interests and management authority was "manipulated by defendants to commit various fraudulent schemes" but SI failed to actually present any such evidence. (Da438). The best SI came up with in opposition to Summary Judgment were allegations that management of RELAP changed over time. See e.g. (Da437). There was no

actual evidence during discovery or presented in opposition to Summary Judgment that the membership interests in SI were changed or manipulated.

Second Inning failed to identify at summary judgment any evidence (let alone clear and convincing evidence) that the RELAP Members abused the corporate form to engage in some form of misrepresentation, fraud or deceit. Second Inning's alleged acts of "fraud" consist of Roger allegedly representing that Marcel would no longer have management authority while working out a mortgage refinancing and Marcel trying to devise a resolution to SI's failure to act and municipal approval problem via the filing of the Amended Site Plan Application. Managers of limited liability companies (especially those run by families) change all the time - this does not mean that the individuals were using RELAP as a "conduit" for their own personal interests. These acts, which do not even meet the basic elements for "fraud" have nothing to do with the corporate form of RELAP, do not suggest that the individuals were abusing the corporate form and are not illegal.

SI did not meet its burden to demonstrate a genuine issue of material fact on Summary Judgment with respect to its unpled claim to pierce the corporate veil because SI did not conduct discovery into and did not present any evidence that the defendants used RELAP as their alter ego to commit a fraud or injustice. See (Da403). SI's failure to present evidence sufficient to create a genuine issue

for trial on this issue should have resulted in the dismissal of the individuals at Summary Judgment. Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523 (App. Div. 2004).

CONCLUSION

For all the foregoing reasons it is respectfully submitted that this Court affirm the Trial Court's dismissal of the claims against the RELAP Defendants along with the award of frivolous litigation sanctions as to Nick and Liliane. However, this Court should reverse the denial of Summary Judgment as to Alan, Roger and the Estate and reverse the Trial Court's decision denying an award of frivolous litigations sanctions to Alan and Roger as well.

Respectfully submitted,

MEYNER AND LANDIS LLP

By: */s/ Matthew P. Dolan*
Matthew P. Dolan

DATED: April 9, 2024

SECOND INNING 1, L.L.C., **Plaintiff-Appellant,** **v.** **RELAP L.L.C., MARCEL Z. ANTAKI, ESTATE OF LILIANE ANTAKI, ALAN ANTAKI, ROGER ANTAKI AND NICHOLAS ANTAKI,** **Defendants, Respondents/Cross-Appellants.**	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-129-23** **ON APPEAL FROM THE CHANCERY DIVISION: MORRIS COUNTY, DOCKET NO. C-94-18 (Sat Below: Hon. Stephan C. Hansbury)** **Civil Action**

REPLY AND OPPOSITION APPEAL BRIEF AND REPLY APPENDIX OF PLAINTIFF/APPELLANT SECOND INNING 1, L.L.C.

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REPLY APPENDIX

PRELIMINARY STATEMENT

Both sets of defendants try to downplay this Appeal by arguing that this case is a simple landlord-tenant dispute. However, it is far more than that as it involves important commercial relations between parties including an adult day care center which is regulated by the State and takes care of our elderly, disabled senior citizens. This case also implicates fundamental legal issues including the construction of contracts which the trial court emasculated, and its rulings must be corrected in order to maintain these vital legal principles. Both sets of defendants take the position that Second Inning's primary, if not exclusive, legal claim is a breach of contract claim against Relap LLC ("Relap"). However, they fail to recognize that, even under their own position, the evidence and law are overwhelming that Relap is in breach of contract and thus liable to Second Inning 1, L.L.C. ("Second Inning" or "SI") for damages. That overwhelming and undisputed evidence includes the following:

1. The specific terms of the parties' Third Lease Amendment ("TLA") removed any obligation on the part of Second Inning to obtain Township approvals, and specifically assigned the parking spaces to SI in a color-coded section of the Lease which was designated as an "integral" part of the Lease.
2. Relap's managing partner represented to Second Inning before the entry of the third lease agreement that all Township approvals including the parking spaces for Second Inning's expansion were already in place – a finding of fact

made by the trial court itself. Further, both SI's principals and Relap's managing partner testified that those spaces had been striped and signed with SI's name on them and that SI was already using those spaces before SI signed the TLA.

3. Relap's managing partner admitted that he acted illegally when he assigned the parking spaces in the Third Lease Amendment because he knowingly violated the prior zoning approvals which were in place.
4. Relap's conduct confirms that it was responsible for obtaining the Township approvals for the expansion space and parking – including Relap's numerous attempts, through its managing partner, to obtain site plan exemptions for the expansion. Second Inning did not file for any such exemptions and was not even copied on Relap's site plan exemption applications and all communications for such exemptions were solely between Relap and Hanover Township, with no participation by SI.
5. Upon failure to obtain a site plan exemption, Relap filed an application for preliminary and final site plan approval with the Hanover.
6. Relap retained and paid for an engineer to prepare the site plan with the Township.
7. And to leave no doubt that Relap was responsible for obtaining approvals for the expansion – upon its failure to obtain a site plan exemption, Relap, and

not Second Inning, prepared and filed the site plan for zoning approval of the expansion space with the Hanover Township Planning Board, as found by the trial court and as admitted by defendants.

Any one of these numerous categories of evidence alone confirms that Relap was responsible for the zoning approvals and is in breach of contract. But taken together, there can be no conclusion other than the fact that Relap breached the Third Lease Amendment and is liable for damages to SI. Defendants are also liable on SI's other claims and they miscite the facts and law on these claims and also incorrectly argue that the Hon. Maritza Berdote Byrne should have granted their motions for summary judgment on several counts.

Defendants also fail to raise any serious issue with the law and facts cited in SI's appeal requiring reversal of the trial court's decision awarding frivolous action attorneys' fees. It is respectfully submitted that the Appellate Division should order the return to SI of its rent and CAM payments under the TLA and a remand to a different judge for the assessment of SI's compensatory damages. As set forth in detail in SI's initial Brief, and as further elaborated below, the trial court committed numerous legal and factual errors amounting to a grave miscarriage of justice which should be reversed on appeal.

ARGUMENT

SECOND INNING'S REPLY IN FURTHER SUPPORT OF ITS APPEAL

POINT I: THE OVERWHELMING, UNCONTRADICTED EVIDENCE AND THE TRIAL COURT'S FINDINGS OF FACT CONFIRM THAT RELAP IS IN BREACH OF CONTRACT (2T94, 124-125; Pa26-24, 314)

The uncontradicted evidence is overwhelming that Relap is in breach of contract and liable to SI for damages. Of course, a breach of contract claim only requires a preponderance of the evidence, or a "more probable than not" standard, which is readily fulfilled by the voluminous one-sided evidence in favor of SI's breach of contact claim. Globe Motor Co. v. Igdalev, 225 N.J. 469, 484 (2016). The interpretation of a contract is a matter of law, subject to de novo review by the Appellate Division. Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998). As our Supreme Court held in Kieffer v. Best Buy, 205 N.J. 213, 223 (2011): "Accordingly, we pay no special deference to the trial court's interpretation and look at the contract with fresh eyes."

A. The Integration Clause in the Initial Lease Allowed the Parties to Amend the Terms of the First Lease Which is What the Parties Did in the TLA

Defendants either fail to recognize (in the case of Marcel Antaki) or gloss over the fact (in the case of the Relap Defendants) that the express terms in the integration clause in the initial lease allowed the parties to amend their agreement going forward. The integration clause in the initial lease specifically provides, at paragraph 41: "No additions, changes, or modifications, renewals or extensions hereof shall be binding unless reduced to writing and signed by the Landlord and Tenant." (emphasis added; Pa335; also cited by the Relap Defendants in their Brief at 19)

Indeed, the Relap Defendants acknowledge that any changes to the initial Lease are "binding" when "reduced to writing and signed by Relap and SI." (Relap Brief at 19). That is exactly what the parties did in their Third Lease Amendment. As specifically allowed and provided by the integration clause in the initial lease, Relap and Second Inning amended the initial lease in a subsequent writing signed by both parties to provide dramatically different provisions in the TLA. Thus, the integration clause is not a bar to Second Inning's claims as the express terms of the TLA leave no doubt that Second Inning had no responsibility for obtaining municipal approvals for the expansion space and parking as its responsibilities were expressly limited to the specific work itemized therein and the TLA already assigned the parking spaces to SI.

Our case law is clear that the terms of an integrated agreement can be altered by a subsequent agreement signed by the parties. As set forth in Van Dusen Aircraft Supplies v. Terminal Const. Corp., 3 N.J. 321, 327 (1949), an integration clause does not preclude changing the provisions of a contract by the execution by the parties of a new contract. As this case held: "where a written contract purports to contain the whole agreement and it is not apparent from the writing itself that something is left out to be supplied by extrinsic evidence, parol evidence to add to its terms is not admissible, nevertheless a written contract may be altered or changed by a subsequent agreement if based on proper consideration". Id. (emphasis added). As

further set forth in Sodora v. Sodora, 338 N.J. Super. 308, 312 (App. Div. 2000): "the [parol evidence] rule does not bar proof of a subsequent agreement or, for that matter, of a modification of an existing agreement even if the agreement itself prohibits . . . an oral modification." Defendants simply ignore the language in the integration clause which expressly provides that the provisions in the initial lease can be amended as the parties did in the TLA. The Supreme Court in Lewis v. Travelers Ins. Co., 51 N.J. 244, 253 (1968), also made it clear that parties are not barred by an integrated contract from later entering into a new contract with different terms. As the Court held regarding a prior integrated agreement: "the parties did not thereby disable themselves from amending, supplementing or replacing the contract by a later agreement made orally or by conduct objectively manifesting a new understanding."

B. Relap Is In Breach of Contract Based on the Terms of the Third Lease Amendment

SI readily meets the elements of its breach of contract claim and the implied covenant of good faith and fair dealing against Relap. SI has established its breach of contract claim, as it has demonstrated "a valid contract between the parties, the opposing party's failure to perform a defined obligation under the contract, and a breach causing the claimant to sustain damages." Nelson v. Elizabeth Board of Education, 466 N. J. Super. 325, 343 (App. Div. 2021).

The Relap Defendants point to several provisions in the initial lease, none of

which support their defenses. For example, they point to Article 37 which reads "the failure of the Landlord to enforce strict performance by the Tenant of the conditions and covenants of this Lease . . . shall not be construed or deemed to be a waiver . . . of any such conditions or covenants". (Pa334) Similarly, defendants cite to an "as is" provision in the initial lease. (Pa316) However, these provisions are not applicable because SI and Relap had entered into a new agreement and Relap's managing partner had advised SI before signing the TLA that the approvals had already been obtained as further confirmed by the terms of the TLA as elaborated below and as found by Judge Hansbury.

The fatal flaw in the Defendants' Opposition Briefs is their reliance on provisions in the initial April 15, 2008 lease which were amended in the July 1, 2016 Third Lease Amendment. Second Inning's liability and damages claims set forth in its Second Amended Complaint relate to the Third Lease Amendment, and not the prior leases. (Pa203-236) The Third Lease Amendment amended the prior lease provisions and specifically removed any obligation by Second Inning to obtain approvals for its expansion space from Hanover Township.

Fundamental rules of contract interpretation require that an agreement must be reviewed in its entirety. Cumberland County Improvement Authority v. GSP Recycling Co., Inc., 358 N.J. Super. 484, 497 (App. Div. 2003), certif. den. 177 N.J. 222 (2003) (under "basic precepts of contract construction" an agreement "must be

read as a whole, in 'accord with justice and common sense.'") A review of the Third Lease Amendment in its entirety confirms that Second Inning had no responsibility under that substantially amended lease to obtain approvals for the parking spaces. The initial April 15, 2008 lease provided in pertinent part that Second Inning "shall diligently pursue, at its sole cost and expense, all necessary approvals and permits from the Township of Whippany, New Jersey including but not limited to any necessary Whippany zoning approvals, construction permits . . . necessary for tenant to utilize the Demised Premises for the Permitted Use." (emphasis added) (At page 1 of the initial lease, Pa316). Defendants fatally fail to recognize that the Third Lease Amendment "explicitly amended or cancelled" this language and now provided that Second Inning was only responsible to obtain permits under the Third Lease Amendment: "Whereas Tenant desires to start applying for the necessary permits to expand his [its] operation from various Municipal and Government Departments and Authorities . . .". (Second "Whereas" clause, Pa349, emphasis added) Jagat Mehta, one of SI's principals, explained that that language had been changed because the "zoning authority is done" as Mr. Antaki told them before SI signed the TLA that everything had been approved by the Township for the expansion space including the parking and SI only had to obtain the permits for the construction work. (4T:84:18-85:11; 5T:17:6-18:3)

Similarly, the first "Whereas" clause in the TLA, which defendants ignore,

makes it clear that Second Inning was to perform "modifications to the building" "to expand his [its] Demised Premises", and references to three attached exhibits showing those modifications. (Page 1 to TLA, emphasis added, Pa349) Our courts have pointed to such "Whereas" clauses as guides in ascertaining the intention of the parties to an agreement: "[A]n expression of intent in a 'whereas' clause of an agreement between two parties may be useful as an aid in construing the rights and obligations created by the agreement". Genovese Drug Stores, Inc. v. Conn. Packing Co., 732 F. 2d 286, 291 (2d Cir. 1984). And see Wyeth Pharmaceuticals, Inc. v. Borough of West Chester, 126 A.3d 1055, 1062 (Pa. Comm. Ct. 2015), holding, "[a] background recital . . . 'will be looked to in construing the contract.'" New Jersey jurisprudence has long held that "parties to a deed or contract are estopped from contradicting or disputing these recitals, and they must be taken as true so far as they may aid and assist in the interpretation of the contracts, or in establishing liability thereunder, and that a contract must be interpreted by reference to all its parts." Monks v. Provident Inst. for Savings, 64 N.J.L. 86, 89 (Sup. Ct. 1899). This is especially so where the recitals are consistent with the remainder of the contract, as is the case here. Id. at 91-92.

Defendants also ignore the other provisions of the TLA which further demonstrate that Second Inning was not responsible for obtaining municipal zoning approvals for the parking, in addition to the cited "Whereas" clauses. The Third

Lease Amendment was very specific as to the entirety of the work that was to be performed by SI. The TLA included a diagram labelled as "Exhibit A1", "Detailed Dimensions" showing the "modifications being described in detail" which were to be performed in the expansion space. (Pa349, 353). In addition, the TLA included Exhibit C labelled "Works to be Done at Tenant's Sole Expense and Responsibility" which set forth the remaining specific work to be performed by SI on the inside and outside of the building for its new expansion space. (Pa350, 356-357).

The only specified work for SI to perform related to the parking lot was: "Tenant shall fill the Docks' Pits and restore an even floor with the rest of the parking lot." (Par. 4 to Ex. C. to TLA, Pa356) The TLA also provides that all the "exhibits form an integral part of this Amendment." (At 2, Pa350). The TLA specifically states in describing Exhibit C that those are "Works to be done at Tenant's sole expense and responsibility", thus further making it clear that the Relap Defendants were responsible for obtaining zoning approvals. (At 2, Pa350, emphasis added)

Further, the TLA already granted specific parking spaces to Second Inning. Those specifically designated parking spaces were carved out in a color-coded diagram attached as Exhibit B to the TLA. Exhibit B also shows, again by color designation, which spaces defendants assigned to Second Inning, which spaces defendants assigned to the Little Genius Child Day Care Center, and which spaces defendants assigned to Relap -- thus confirming that Exhibit B was an all-inclusive

diagram showing the spaces assigned to each of the three tenants, and not just SI. (Pa355) The Third Lease Amendment specifically provides that Exhibit B, the "Parking Lot Arrangement", forms "an integral part of this [Third Lease] Amendment". (At bottom of page 2, Pa350) Thus, under the express and specifically itemized terms of the TLA, Second Inning was no longer tasked with any responsibility to obtain municipal zoning approvals for its parking. Thus, the TLA "explicitly amended or cancelled" the terms of the initial lease. (Pa349, ¶1) Indeed, defendants acknowledge that SI's claim regarding the "parking chart 'incorporated into the Third Lease Amendment' are plainly a breach of contact claim because on its face, the chart was allegedly incorporated into the contract at issue." (Antaki Brief at 59) In telling testimony, Mr. Antaki admitted at the trial that there is no provision in the TLA which required SI to obtain site plan approval for the parking spaces assigned to SI in Exhibit B. (7T:153:18-154:8)

These express terms explicitly amended or cancelled the terms of the initial lease and now control. Thus, contrary to defendants' flawed position, the provision in paragraph 1 of the Third Lease Amendment which provides that "[a]ll conditions and stipulations in above mentioned Lease and First Lease Amendment and Second Lease Amendment are valid unless explicitly amended or cancelled in this Third Lease Amendment" actually supports Second Inning's breach of contract and other claims. By its terms, the Third Lease Amendment removed any obligation for SI to

obtain Township approvals and limited Second Inning's responsibilities to the construction work delineated therein.

Thus, by its terms, the TLA "explicitly amended or cancelled" the terms of the initial lease. The TLA explicitly removed or cancelled the obligation of SI to obtain zoning and any other township approvals and explicitly limited SI's obligations to obtain the construction permits and renovate the expansion space and to perform only the work explicitly itemized in Ex. C. Under our law, parties do not have to use the terms "explicitly amend" to remove prior obligations in a revised agreement. See Pagano Co. v. 48 South Franklin Turnpike, LLC, 198 N.J. 107, 116-117 (2009), referencing the Supreme Court's decision at VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 544-45 (1994), where the Supreme Court found that the parties had "explicitly amended" their agreement without using the words "explicitly amended" in their contract. Also see Continental Cas. Co. v. Gamble, 2007 WL 1657107 at *5 (D.N.J. 2007), where the court found that an endorsement to an insurance policy "explicitly amends" the terms of the policy without the parties expressly stating that the policy was "explicitly amended." (Pra7)

It is undisputed that Marcel Antaki prepared the TLA as admitted by Mr. Antaki in his trial testimony and as acknowledged by defendants' counsel in their appeal brief. (7T:135:15-17; 2T177:5-12; 193:17-194:23; Relap Defendants' Brief at 21) Even if there was any ambiguity as to any terms of the TLA, which there is

not given its clear terms, such ambiguity would be construed against the drafter, in this case Relap and its managing member who prepared the TLA. Malick v. Seaview Lincoln Mercury, 398 N.J. Super. 182, 187 (App. Div. 2008) ("ambiguous terms are generally construed against the drafter of the contract").

Judge Berdote Byrne had the same contractual terms and evidence before her during the summary judgment stage when all the discovery had been completed, and she readily ruled that this evidence demonstrated Relap was in breach of contract:

> Defendant Relap reiterates its position Second Inning, not Relap, was responsible for obtaining zoning approvals for the parking spaces and site plans, but the contract does not substantiate this claim. . . . Plaintiff has raised an issue of material fact given the assignment of parking spaces contemplated by the lease never occurred and was contradicted by the alleged actions of Marcel Antaki. Id. These claims are not simply self-serving allegations but are substantiated by the evidentiary record. (Court's Decision at 9-10, Pa303-304).

The only reason SI could not proceed with the renovation of the expansion space and the work in Exhibit C was due to its contractor's inability to obtain permits because of the insufficient parking due to Relap's breach of contract. (2T:228:19-230:18; 8T:166:12-23) Contrary to defendants' inaccurate statements in their submissions to this Court, the testimony is undisputed that SI would have immediately proceeded to renovate the expansion space and perform the limited work under Exhibit C if Relap had not breached its contract by failing to provide the agreed-upon parking which would have allowed SI to obtain the permits to do this

work. (8T:166:12-23; 2T:228:19-230:18) SI had already entered into a contract for the renovation of the expansion space and some of the work in Exhibit C and had obtained a quotation for the remaining work to be done pursuant to Exhibit C. (8T:165:4-10; 5T:11:23-25, 52:5-53:17; P-15, Pa406-416) SI would have proceeded with the inside renovation and also with the work in Exhibit C if Relap had not breached its contract by failing to provide the agreed-upon parking. SI had the funds in place to do the renovation of the expansion space and the outside work set forth in Exhibit C. (8T:165:16-24; 5T:12:4-9) It is uncontested that the only reason the work permits were not granted was due to insufficient parking. (2T:247:1-8; 8T:166:24-167:4) SI had previously expanded its leased space under the Second Lease Amendment and thus there was no issue as to its ability to do so. SI used the same contractor for expanding its space under the TLA as it had previously used under the Second Lease Amendment and that renovation was completed and fully paid for by SI and increased SI's clientele from 78 to 100 in a matter of a few weeks. (8T:157:5-158:19; 165:11-15; 182:19-183:8; 2T:215:14-216:3; 222:16-223:3) It would have taken only 3 months to complete the renovation. (5T40:22-4:10)

C. Defendants' Sole Defense to Relap's Breach of Contract Ignores the Unanimous Testimony of Second Inning's Principals and Relap's Managing Partner

The Defendants' sole defense to Second Inning's breach of contract claim is to point to language in the TLA which states that 16 of the parking spaces "will be

assigned". The trial court cited to these 3 words and ignored all the other provisions in the TLA and all the other overwhelming uncontradicted evidence, including its own findings of fact, in support of its inexplicably erroneous conclusion that those 3 words meant that SI had the obligation to obtain municipal approval for the parking (Pa32-33), a conclusion contradicted by Judge Berdote Byrne's ruling. However, that sole defense is utterly decimated by the unanimous testimony of both Second Inning's principals and Marcel Antaki, the managing partner of Relap, that all the spaces set forth in the TLA and assigned to SI in Exhibit B of the TLA were striped and signed with Second Inning's name on each space by Relap before entry of the TLA and that those spaces were already being used by SI before and after the TLA was signed. (2T193:9-16; 5T113:16-19; 6T64:21-25; 7T10:21-11:4; 8T159:15-160:9; 5T17:2-3; 117:2-5; 7T11:5-9; 8T160:11-13). Thus, the sole basis for the trial court's conclusion that SI was responsible for obtaining site plan approval is belied by the unanimous testimony of both sides of this litigation.[1]

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[1] It appears that the trial court's numerous reversible factual and legal errors were caused at least in part by the court's reversal of its initial ruling that the parties were to submit post-trial written briefs including specific citations to the trial record and to applicable law pertaining to the trial evidence. On the September 13, 2022 trial date, all counsel and the trial court had agreed to such post-trial written submissions. However, the defendants' counsel then reneged on their agreement and now opposed filing post-trial briefs and the trial court shockingly reversed its prior ruling and no longer required such written submissions, over the objection of SI's counsel. (10T:5:24-12:11; 61:18-72:5). In reversing itself, the trial court stated: "I really

Further, the trial court misconstrued that language which simply states that "Sixteen (16) Parking Stalls will be assigned to present expansion" – making it clear that once SI completes the construction of the expansion space then those 16 spaces will be formally part of the expansion space. (At par. 4, Pa349) Indeed, Relap in its Brief agrees that the term "will be assigned" refers to completion of the expansion space. (At 22) There is nothing in the quoted language that places the obligation on SI to obtain planning board approvals, especially since the TLA removed that obligation as confirmed by the trial court's finding that Relap's manager represented to SI that those approvals were already in place before SI signed the TLA. (See Section D., infra.)

D. The Trial Court Made a Finding of Fact that Relap's Manager Had Represented to Second Inning's Principals that the Township Approvals for the Parking Were Already in Place Before They Signed the TLA Which Is Consistent with the Terms of the TLA

Jagat Mehta and Sandeep Patel, Second Inning's principals, testified that Marcel Antaki had represented to them before they signed the TLA that Relap had already obtained municipal approvals for the parking spaces assigned to Second Inning in the TLA and all the related work on the expansion space and in Exhibit C. (5T:16:15-18:3) Judge Hansbury agreed and expressly found as a matter of fact

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don't want to be sitting down with 200 pages of briefs in January. In fact, in January I'm starting a 20-day trial so that's not going to work out too well, so I don't know when you'd get a decision frankly if I hold to that." (10T:72:1-5)

that "plaintiffs testified and the court accepts as true that Marcel Antaki told them when they entered into the Third Lease Amendment that the Planning Board had approved the parking set forth in the lease." (November 25, 2022 Decision at 3, Pa30)

There could be no stronger proof than this factual finding as to the meaning of the terms of the lease and that Relap had agreed to undertake the responsibility to obtain approvals for the parking. This finding of fact is consistent with the terms of the TLA set forth above that Relap agreed that it was responsible for obtaining the approvals and indeed that it has already obtained those approvals and assigned the parking to SI in the TLA – which turned out to be false. As noted in SI's initial Appeal Brief, a limited liability company is liable for its managing partner's misrepresentations and other misconduct. As set forth in Russo v. Creations by Stefano, Inc., 2020 WL 4873188 at *6 (App. Div. 2020) (Pa694-700):

> As Realty's managing member, Simone was vested with broad authority to act for the company. In general, when an LLC opts to be managed by one or more managing members, the managing member "exclusively" decides "any matter relating to the activities of the company." N.J.S.A. 42:2C-37(c). Thus, Realty acts through Simone and, when he commits a tort while acting in the scope of his authority as managing member, or in furtherance of Realty's business, then Realty is liable. [At Pa698]

Judge Hansbury found that Marcel Antaki made misrepresentations to SI and those misrepresentations are attributable to Relap: "There is evidence by which I could conclude that Marcel made some misrepresentations . . . and I do find that he did so

on behalf of the corporation. . . . He was clearly acting on behalf of the corporation." (13T:45-18-24; cited in Marcel Antaki Brief at 35-36).

Mr. Antaki's oral representation was admissible as it is consistent with the terms of the TLA. Prior oral statements are inadmissible only in instances where the oral statement contradicts the terms of the agreement, which is not the case here. Filmlife, Inc. v. Mal "Z" Ena, Inc., 251 N.J. Super. 570, 575 (App. Div. 1991). As noted, the terms of the agreement assigning the parking spaces to SI were further buttressed by the actions of the parties including Relap's filing the site plan with Hanover Township.

Mr. Antaki also confirmed to Second Inning in a letter he sent to SI that Relap is the party that is financially responsible to ensure that Second Inning has the number of parking spaces proportional to the total area leased by Second Inning. In his position as general manager of Relap, Mr. Antaki authored a letter in evidence dated March 17, 2009 to Mr. Sandeep Patel, one of Second Inning's principals, in which he stated as follows:

> Landlord, at his sole discretion, may make changes to the Landlord Rules on Usage of the Parking Lot including the location or number of parking spots, without any obligation to compensate any Tenant as long as the number of assigned spots both for drop off/pick up and parking remain proportional to the total area of the building which is leased by each Tenant. [P-8, Pa361, emphasis added]

Marcel Antaki thus confirmed to SI that Relap was responsible to provide SI with its proportional share of parking spaces. (3T:11:21-13:5) Under the Third

Lease Amendment, Second Inning leased 11,019 square feet which comprises approximately one half of the total area of 22,800 square feet of the building, thus entitling Second Inning to one half of the parking spaces as acknowledged by Mr. Antaki. (5T88:7-8; 8T:196:22-25). The site plan submitted by Relap in 2018 to the Hanover Township Planning Board indicates that the total parking spaces required for all the tenants is 92 spaces, thus entitling Second inning to at least half of those spaces. Consistent with Mr. Antaki's letter, the site plan submitted by Relap allocated 44 spaces to Second Inning. (P-66, Pa598).

E. Relap's Conduct in Filing Several Site Plan Exemptions Further Confirms that Relap Is in Breach of Contract

The fact that it was defendants' obligation to obtain the approvals is further confirmed by defendants' conduct subsequent to the execution of the Third Lease Amendment on July 1, 2016. As set forth in Hungerford & Terry, Inc. v. Geschwindit, 24 N.J. Super. 385, 397 (Ch. 1953), aff'd, 27 N.J. Super. 515 (App. Div. 1953): "The interpretation of the contract given by the parties themselves, as shown by their conduct, such as their acts in partial performance, will be adopted by the courts."

On behalf of Relap, Marcel Antaki submitted a host of different site plan exemption applications to the Township seeking to obtain approval for the parking spaces that Relap had assigned to Second Inning in its Third Lease Amendment as well as the parking spaces that it had assigned to Little Genius Academy of

Whippany in Relap's lease with Little Genius and spaces Relap assigned to Marli Shipping, Inc. ("Marli Shipping"), a company owned by defendants' family. (6T13:13-15) Those site plan exemption applications were submitted solely by Relap, and never by SI and SI was never copied on them. (P-51; P-117, Pa623-629) SI did not know that Marcel was filing the site plan exemptions and found out for the first time that he had done so when they filed their OPRA request in 2018. (5T:27:23-31:4) Sean Donlon, Hanover Township's zoning officer, testified that all communications regarding the site plan exemption applications were solely between Mr. Antaki as Relap's managing partner and the Township and that none of those communications occurred with SI. (8T7:20-9:20; 24:13-15, Pa621-631) The fact that Second Inning did not submit any of these applications and did not communicate with Hanover Township with respect to the parking spaces and the fact that such communications were solely between Relap and the Township without SI's knowledge further confirms that it was Relap's responsibility alone to obtain the municipal approvals for the expansion space.

F. Relap's Conduct in Filing a Site Plan Application for Preliminary and Final Site Plan Approval and Thereafter the Site Plan with the Hanover Township Planning Board Proves Beyond Any Doubt that Relap Was Responsible for Obtaining the Zoning Approvals for the Expansion Space

Relap (and not Second Inning) filed an application for Preliminary and Final Site Plan Approval for the expansion and parking with Hanover Township on

November 29, 2017. (P-65, Pa591-596) Relap also paid for an engineering company to prepare the site plan. (P-64, Pa583-590). Relap thereafter filed the Preliminary and Final Site Plan with the Township for the expansion space. (P-66, Pa597-609).

Sean Donlon, Hanover Township's Construction Official and Zoning Officer, also confirmed that only Relap filed a site plan with the Planning Board, and not SI. (8T50:3-12) Mr. Antaki also admitted that it was Relap which filed the site plan. (6T123:22-24; 7T27:21-28:5, 28:12-30:1; 9T28:19-29:2, P-66, Pa597-609) And in its decision the trial court itself found as a matter of fact that Relap had obtained a proposal for professional services to submit the site plan with Hanover Township and had filed the preliminary and final site plan which "was deemed complete" – thus demonstrating that it was Relap's responsibility to obtain the approvals. (Decision at 3, Pa30) Defendants also admit in their Appeal Briefs that: "On February 20, 2018 Marcel [Antaki], on behalf of Relap, submitted an Amended Site Plan to Hanover Township" and further admit that Second Inning never sought such approvals, thus confirming in defendants' own words that Relap was responsible for and undertook its agreement to obtain the approvals. (Marcel Antaki Brief at 9). Also see the Relap Defendants' Brief also admitting that the Amended Site Plan Application and Amended Site Plan were both filed by Relap's managing partner. (At 43, 46).

This is telling and dispositive evidence. The trial court found as a matter of fact that Relap was the party that filed the site plan with the Planning Board, as admitted by both sets of defendants in their Briefs. There thus can be no doubt that Relap was responsible for obtaining approvals from the Township since Relap was the only party which actually filed the site plan for approval of the expansion and parking spaces. While Defendants now argue that was SI's responsibility, the contemporaneous events show that it was only Relap that filed the site plan with Hanover Township, thus acknowledging its sole responsibility to obtain the zoning approval. There can be no greater conclusive evidence that Relap was the party under the parties' agreement responsible for obtaining township approvals for the expansion space and parking since it alone filed a site plan seeking such approvals from the Township.

Contrary to Relap's Appeal Brief at 25 and Antaki's Brief at 9, Relap's site plan was a complete plan for the uses being made by all three tenants on the premises, including the additional parking needed for each of the tenants, site preparation plan, layout and dimensioning plan, construction details, construction plans, landscape plan, lighting plan, soil erosion plan, and other plans as well. (P-66, Pa 597-609). Further, Marcel Antaki had represented to SI that all approvals including parking <u>were already in place</u> for the expansion space when SI signed the TLA and the TLA also assigned the parking to SI. (4T:84:18-85:11; 5T:17:6-18:3;

2T183:17-184:2; 201:24-202:19) Moreover, the record is uncontested that the only reason SI could not obtain the permits to proceed to construct its expansion space and perform the work in Exhibit C was due to the insufficient parking. (2T:228:19-230:18; 8T:166:12-23) Since it turned out that those parking approvals were not in place, Relap is liable for breach of contract and misrepresentation.

G. The Fact that Relap Needed Parking for the Uses Being Made By All the Tenants Further Confirms It Was Relap's Responsibility to Obtain the Approvals

The trial court and the defendants totally ignore the additional dispositive fact that additional parking spaces were required by each of the three tenants for the uses being made on the property by each of the tenants. Thus, Marli Shipping, the company owned by defendants' family, sought to convert its warehouse space into office space, which required additional parking spaces. (8T50:19-52:9) Similarly, Little Genius Academy required additional parking spaces so that it could fulfill Township requirements. (8T44:7-9; 50:19-52:9; 37:20-38:22; 41:8-44:11) The site plan filed by Relap shows that additional parking spaces were required for all the tenants – not just for SI. (P-29, P-66, Pa449-450, 597-609) Mr. Antaki admitted that the site plan submitted by Relap required a total of 92 spaces, an increase for each of the tenants. (6T139:10-22; P-29; P-66, Pa449-450, 597-609) Marcel Antaki acknowledged that these additional spaces on the site plan were required for the uses being made by all three tenants, including Marli Shipping. (6T13:7-

15; 123:25-125:8; 139:5-140:11) He admitted that the plan included increasing the parking spaces for Marli Shipping, from 4 spaces to 23 spaces. (6T139:5-14)

Obtaining approvals for all the tenants' different uses of their respective leased premises – all of which required additional parking spaces -- would be Relap's sole responsibility since it would make no sense to require SI to expend its limited resources to obtain additional parking spaces for Relap's two other tenants for which it bears no responsibility and for which it would gain no benefit. SI's expert planner testified that when all the tenants require additional parking, the owner is the one who must file the site plan. (9T65:21-25; 74:3-20).

It is important to point out that Judge Hansbury totally ignored this dispositive point and nowhere does he address it in his judgment and decision. The fact that all tenants needed additional parking including Marli Shipping which is owned by defendants' family further confirms that it was Relap's responsibility to obtain site plan approval for the disparate uses being made by all three tenants.

H. The Admissions of Relap's Managing Partner Leave No Doubt That Relap Had Agreed that It Was Responsible for Providing the Parking Spaces to SI and Had Represented in that Agreement that Those Spaces Were Already Approved

Marcel Antaki, the manager of Relap, could not have been clearer in his trial testimony that the intention of the parties was exactly what the TLA states -- that Relap assigned to Second Inning parking spaces which Relap represented to Second

Inning were already approved by Hanover Township. Defendants revealingly ignore these dispositive admissions. Mr. Antaki testified that he acted illegally when he granted Second Inning the parking spaces in the Third Lease Amendment admitting that he was "exceeding my authority . . . my jurisdiction". (5T136:22-141:4; 156:11-18). In another major admission that Relap did indeed assign SI the parking spaces in the TLA, Marcel Antaki testified: "And based on my . . . ignorance of the law, I assigned them the 16 [additional] spaces [in the TLA]." (5T141:1-4). Mr. Antaki further admitted at the trial that he granted parking spaces to SI in the TLA with the knowledge that it was not allowed under the prior July 24, 2000 site plan and that he had this site plan approval in his possession when he entered into the Third Lease Amendment with Second Inning. (5T135:18-21; 156:8-18; 6T122:4-10) When asked if he knew about the 2000 site plan when he assigned these parking spaces to Second Inning, he responded: "Sure, correct." (5T135:18-21).[2]

Further, Marcel Antaki pleaded guilty to a summons issued by Hanover Township for violating the Township's Certificate of Occupancy Ordinance for

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[2] The Relap Defendants refer to a January 30, 2008 application for site plan exemption committee request at 16-17 of their Brief. Mr. Mehta testified that the 2000 site plan was not attached to that document. (5T:77:18-23) Indeed this document does not have the plan attached to it, consistent with Mr. Mehta's testimony. (Da28-39; 5T:77:24-78:2) Mr. Mehta testified that Mr. Antaki brought this document to him and Mr. Antaki filed it with the Township. (5T:77:18-20, 78:3-11) The first time SI saw the 2000 plan was in response to SI's counsel's OPRA request in 2018. (5T:23:7-16)

granting Second Inning the expansion space and additional parking without prior approvals and paid a fine for his violation. (P-119, Pa639-640) As Mr. Antaki testified: "I am the responsible guy and I am the guilty guy." (6T62:23-63:1)

I. Relap's Manager's Conduct in Seeking to Destroy and Change Little Genius' Lease Also Confirms that Relap Through its Manager Had Assigned Spaces to Little Genius and SI

Further confirming that Relap through its managing member had assigned these spaces to Second Inning in the TLA is the fact that Marcel Antaki tried to alter Little Genius' lease to conceal his having acted fraudulently in assigning some of the spaces to be shared by Second Inning and Little Genius in contravention of the 2000 site plan. Mr. Antaki admitted at the trial that he instructed Little Genius to "destroy" their initial lease with Relap and to replace it with the altered lease. (6T59:1-21, P-52, Pa524-560). Little Genius, however, refused to engage in that fraud. (Id.) As set forth in Judge Berdote Byrne's February 25, 2022 Order and Decision denying defendants' motions for summary judgment: "Moreover, Marcel Antaki allegedly attempted to conceal his actions by requesting Little Genius Academy spoliate evidence and doctor their lease to make it seem as though the parking spaces belonged to it." (At 9-10, Pa303-304)

In another major admission, Mr. Antaki stated in a September 18, 2017 letter that he had deviated from and violated the prior 2000 approved site plan in assigning spaces to the tenants on the premises under Relap's leases with SI

and Little Genius. As he wrote in that letter to Little Genius: "Such deviations . . . were, in fact, in violation of the terms of the Planning Board's resolution for operation of your demised premises". (6T33:18-34:20; 45:9-15; P-52, Pa524) Mr. Antaki thus again clearly acknowledged in his letter to Little Genius that he had indeed granted these parking spaces to the tenants in their leases, although illegally. Incredibly, the trial court simply ignored all of Mr. Antaki's dispositive admissions.

POINT II

MARCEL ANTAKI AND THE OTHER DEENDANTS ARE PERSONALLY LIABLE ON SI'S CLAIMS (2T57, 88, 123, 128; Pa35-37, 315)

A. Marcel Antaki is Personally Liable

There can be no issue under the established facts and the trial court's findings of fact that Marcel Antaki is personally liable under several of SI's causes of action including fraud in the inducement, fraud and negligent misrepresentation. Marcel Antaki's action meets the elements of fraud in the inducement which are: (1) misrepresentation of a material fact; (2) knowledge or belief by defendant of its falsity; (3) intent that the other party rely on it; and (4) detrimental reliance thereon by the other party. Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (citing Jewish Center of Sussex County v. Whale, 86 N.J. 619, 625 (1981)).

Second Inning also meets the elements of legal fraud against Marcel Antaki which include: (1) a material misrepresentation of a presently existing or past fact,

(2) knowledge or belief by the defendant of its falsity, (3) an intention that the other person rely on it, (4) reasonable reliance thereon by the other person, and (5) resulting damages." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 172-73 (2005). *Accord,* Allstate New Jersey Ins. Co., v. Lajara, 222 N.J. 129, 147 (2015); Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610, (1997).

Mr. Antaki's conduct also fulfills the elements of a negligent misrepresentation claim in New Jersey are: (1) the defendant negligently made an incorrect statement; (2) the plaintiff justifiably relied on the defendant's statement; and (3) the plaintiff was injured as a consequence of relying upon that statement. Carroll v. Cellco Partnership, 313 N.J. Super. 488, 502 (App. Div. 1998); See also Rosenblum v. Adler, 93 N.J. 324, 334 (1983).

Further, under established law, individual defendants can also be held personally liable for breach of contract and related claims. As set forth by the New Jersey Supreme Court in Pennington Trap Rock Co. v. Pennington Quarry Co., 22 N.J. Misc. 318, 321 (Sup. Ct. 1944): "The executive officers of a corporation who induce it to enter upon a wrongful course of action become subject to personal liability, and they also incur individual and personal liability for wilfully and maliciously inducing their company to breach its contract with another corporation." Also see Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631, 129 S. Ct. 1896, 1902 (2009), holding that "'traditional principles' of state law allow a contract to be

enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.'" And see Hojnowski v. Vans Skate Park, 375 N.J. Super. 568, 576 (App. Div. 2005), aff'd, 187 N.J. 323 (2006): "[N]on-signatories of a contract ... may ... be subject to arbitration if the nonparty is an agent of a party or a third-party beneficiary to the contract."

Marcel Antaki admitted in his trial testimony that he was fully aware of the limitations placed on the parking restrictions under the prior 2000 site plan approval and that he knowingly violated those restrictions when he assigned the spaces to SI in the TLA. (5T135:18-21; 156:11-18; 6T122:4-10) And the trial court specifically found as a matter of fact that: "plaintiffs testified and the court accepts as true that Marcel Antaki told them when they entered into the Third Lease Amendment that the Planning Board had approved the parking set forth in the lease." (November 25, 2022 Decision at 3, Pa30, emphasis added)

Defendants argue that Mr. Antaki's wrongdoing was not proven by "clear and convincing" evidence. The trial court waffled on this issue and acknowledged that the evidence may have met this standard: "is there clear and convincing evidence that he intended to deceive? Again, May be, maybe not." (Cited in Relap Brief at 29-30). Despite the trial court's waffling, by any objective analysis, one cannot conceive of any stronger evidence of Mr. Antaki's deception that clearly meets the

"clear and convincing standard" than Mr. Antaki's admitting that he knowingly violated the 2000 site plan when he granted the parking spaces to SI in the TLA. (5T:135:18-21) Further, SI's negligent misrepresentation claim only requires a preponderance of evidence, as conceded by the Relap Defendants in their Brief at 34, which also was clearly established by these proofs. Finderne Management Co., Inc. v. Barrett, 2008 WL 4979937 *24 (App. Div. 2008), certif. den. 199 N.J. 542 (2009). (Pra27)

B. The Other Defendants Are Also Personally Liable

The other individual defendants are also personally liable based on the facts and the law referenced in SI's initial brief and the law set forth above, which are incorporated herein. Defendants incorrectly argue that these causes of action are precluded by the economic loss doctrine. However, contrary to defendants' position, the most recent pronouncement by the Appellate Division in JD James Construction, LLC v. PDP Landscaping LLC, 2020 WL 5587439 (App. Div. 2020), held that the economic loss doctrine does not bar a party from simultaneously suing for breach of contract and for fraud. As set forth by the Appellate Division:

> While New Jersey courts have applied the economic loss doctrine in the strict liability and negligence contexts, see e.g. Alloway v. Gen. Marine Indus., L.P., 149 N.J. 620 (1997), Spring Motors Distribs., Inc. v. Ford Motor Co., 98 N.J. 555 (1985), "[n]o New Jersey Supreme Court case [has held] that a fraud claim cannot be maintained if based on the same underlying facts as a contract claim." Gleason v. Norwest Mortg., Inc., 243 F.3d 130, 144 (3d Cir. 2001). [At *6, Pra38]

The Appellate Division's holding in JD James Construction is followed in many other jurisdictions. The Court in Kayser v. McClary, 875 F. Supp. 2d 1167, 1176 (D. Idaho 2012), aff'd, 544 Fed. Appx. 726 (9th Cir. 2013), provided a succinct overview of the case law in other states holding that the economic loss doctrine does not preclude the filing of other claims simultaneously with a breach of contract claim:

> ...other jurisdictions have ruled the Economic Loss Doctrine does not necessarily bar the recovery of compensatory tort damages. See Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865, 875-76 (9th Cir. 2007) (citing and quoting Grynberg v. Questar Pipeline Co., 70 P3d 1, 11 Utah 2003) ("[T]orts such as fraud and conversion exist to remedy purely economic losses.") (emphasis added); United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd., 210 F.3d 1207, 1226 (10th Cir. 2000) (refusing to apply Economic Loss Doctrine because, under Colorado law, "the economic loss rule applies only to tort claims based on negligence, and only to some negligence claims.") (emphasis in original); EED Holdings v. Palmer Johnson Acquisition Corp., 387 F. Supp 2d 265, 278-79 (S.D.N.Y. 2004) (allowing fraud claim to go forward because New York law permits recovery of economic loss on claims of fraud and fraud in the inducement even "in tandem" with contract claims); Indem. Ins. Co. of North America v. American Aviation, Inc., 891 So. 2d 532, 543, n.3 Fla, 2004((noting that "[i]ntentional tort claims such as fraud, conversion, intentional interference, civil theft, abuse of process, and other torts requiring proof of intent generally remain viable" despite Economic Loss Doctrine); Huron Tool & Eng'g Co. v . Precision Consulting Servs., Inc., 209 Mich. App. 365, 532 N.W. 2d 541, 544 (Mich. Ct. App. 1995) (noting that torts outside the Economic Loss Doctrine's scope include defamation, misrepresentation, intentional misrepresentation, tortious interference with prospective economic advantage, intentional interference with contractual relations, and certain fraud in the inducement claims)); see also Santucci Constr. Co. v. Baxter & Woodman, Inc., 151 Ill. App. 3d 547, 104 Ill. Dec. 474, 502 N.E. 2d 1134, 1139 (Ill App. Ct. 1987) (holding that claim for intentional interference with contract not barred by Economic Loss

> Doctrine because "the very interest protected by the torts of intentional interference with contractual relations and prospective advantage is the reasonable expectation of economic advantage, [therefore] economic losses are the damages recoverable.").

Judge Berdote Byrne rejected defendants' position in her February 25, 2022 Decision and held that the economic loss doctrine does not preclude SI's fraud and other personal liability claims against defendants. (At 13, Pa307)

Defendants argue that "[t]here are no allegations in the SAC [Second Amended Complaint] regarding piercing the corporate veil." (Antaki Brief at 11). Defense counsel fails to recognize that "piercing the corporate veil" and also "the tort participation theory", which counsel does not even address, are remedies for finding personal liability but are not separate legal causes of action. As set forth by the Appellate Division in Verni v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 199 (App. Div. 2006): "Piercing the corporate veil is not technically a mechanism for imposing 'legal' liability, but for remedying the 'fundamental unfairness [that] will result from a failure to disregard the corporate form.'" And as the Appellate Division further held in Paulus, Soklowski & Sartor, LLC v. Darden, 2015 WL 6456124 *6 (App. Div. 2015): "Veil piercing is not a separate cause of action. Rather, it is an equitable remedy, 'not . . . a mechanism for imposing legal liability.'" (Pra47) In short, the legal bases for finding personal liability are remedies imposed by our Courts and are not separate legal causes of action.

A defendant can be found personally liable either under the piercing of the

corporate veil doctrine or under the tort participation theory. Our Courts will "pierce the corporate veil" when a corporation or limited liability company is being used "to defeat the ends of justice" or to perpetrate a fraud. Gross v. The Ferry Binghamton, Inc., 2015 WL 3843589 at *3 (App. Div. 2015), certif. den. 223 N.J. 282 (2015) ("'in cases of fraud, injustice, or the like,' piercing the corporate veil is appropriate"). (Pra50) The Gross case, like the present one, involved the breach of a commercial lease where the Court held that it would not allow the individual owner "to use the corporate structure to shield himself from personal liability" because that "would defeat the ends of justice." Id.

The piercing of the corporate veil doctrine also applies to a limited liability company. As set forth in Brown - Hill Morgan, LLC v. Lehrer, 2010 WL 3184340 at *11 (App. Div. 2010), certif. den. 205 N.J. 183 (2011): "We can perceive no reason in logic or policy why the principle [of piercing the corporate veil] should not be fully applicable in the context of a limited liability company". (Pra60) Personal liability can also be imposed against the members and owners of a limited liability company under the "tort participation theory" enunciated by the Supreme Court in Saltiel v. GSI Consultants, 170 N.J. 297, 309 (2002). As set forth in the Saltiel case, the "essential predicate for application of the [tort participation] theory is the commission by the corporation of tortious conduct, participation in that tortious conduct by the corporate officer and resultant injury to the plaintiff." Id. at 309.

Under the tort participation doctrine, corporate officers, employees and members and owners of a business entity could be individually liable for their affirmative acts of wrongdoing. Id. And they can be personally liable based on their wrongful participation even if they did not personally profit. Id. at 304.

The Appellate Division in Breglia v. Norman & Luba, LLC, 2005 WL 3338295 (App. Div. 2005), held that the tort participation theory also applies to members of a limited liability company. In Breglia, the court entered liability against both the limited liability company and personal liability against a member of the limited liability company based on the tort participation theory. (Pa 716-721, at *2 and *6.)

As our Courts have made clear, a defendant can also be held to be personally liable based on the tort participation theory alone and Second Inning has presented substantial evidence to hold defendants personally liable based on the tort participation theory alone. As the Court held in Reliance Ins. Co. v. The Lott Group, Inc., 370 N.J. Super. 563, 579-580 (App. Div. 2004), certif. den. 182 N.J. 149 (2004):

> Cucinotti next contends that the trial court erred in holding him personally liable. He points out that Reliance rested its theory of personal liability on several grounds, each of which was essentially abandoned in favor of the participation theory as articulated by the Supreme Court in its decision in Saltiel v. GSI Consultants, Inc. 170 N.J. 297, 788 A.2d 268 (2002), a decision released while the Reliance summary judgment motion was pending. While there are other reported decisions that hold that corporate officers who participate in fraud or conversion can be held personally liable for the losses occasioned thereby, see e.g. Charles Bloom & Co. v. Echo Jewelers, 279 N.J.

> Super. 372, 382, 652 A.2d 1238 (App. Div. 1995) (holding defendants personally liable for alleged conversion even when acting in corporate capacity); Robsac Indus., Inc. v. Chartpek, 204 N.J. Super. 149, 156, 497 A.2d 1267 (App. Div. 1985) (reversing summary judgment for defendant corporate officer charged with malicious interference with contract, fraudulent misrepresentation, and defamation); Van Dam Egg Co. v. Allendale Farms, Inc., 199 N.J. Super. 452, 457, 489 A.2d 1209 (App. Div. 1985) (declining to dismiss fraud complaint against corporate officer in absence of allegation of personal benefit); McGlynn v. Schultz, 95 N.J. Super. 412, 417, 231 A.2d 386 (App. Div.) (finding corporate officers personally liable for knowingly acquiescing in and ratifying alleged conversion), certif. denied, 50 N.J. 409, 235 A.2d 901 (1967), because the motion judge based his determination on the participation theory and because of the apparent election by Reliance to forgo consideration of alternate theories of personal liability, we need not reach these alternate grounds. Rather, we consider only the motion judge's application of the Saltiel decision.

The Breglia decision also held that the tort participation theory holding members of a limited liability company personally liable for their participation in the wrongdoing does not rely on the factors for personal liability required by the "piercing the corporate veil" theory. As held by the Appellate Division:

> In such cases [where the tort participation theory is applicable] personal liability for the torts of officers does not depend on the same grounds as "piercing the corporate veil,", i.e. inadequate capitalization, use of the corporate form for fraudulent purposes, or failure to comply with the formalities of corporate organization. [Id. at *6]

Defendants state that some of the specific facts proving their fraudulent conduct such as their fraud relating to execution of Relap's estoppel certificate are not set forth in detail in SI's Second Amended Complaint. (Relap Brief at 8) However, they fail to advise the Appellate Division that these facts were all

established during the extensive discovery taken in this case and were all laid out in great detail in SI's Responding Statements and Counter Statement of Material Facts. (Da401-402 at ¶5; Da435-439, at ¶¶ 211-239). Judge Berdote Byrne recognized this law and these established facts when she denied defendants' motions for summary judgment with respect to their personal liability:

> Plaintiff alleges Marcel Antaki allegedly made promises with respect to the parking approvals to induce Second Inning to sign the TLA, only to subsequently engage in a cover up to remove the parking space assignments. Liliane Antaki, though now deceased, allegedly submitted the site plan to Hanover Township, based upon an appended signature thereto, wherein defendants removed Second Inning's overnight parking privileges, despite township ordinances allowing certain small vans for overnight parking . . . Plaintiff claims there was no reason other than bad faith to take this action.
>
> Additionally, Second Inning alleges Relap installed Roger Antaki as a sham manager on a temporary basis to obtain Second Inning's good will when Relap applied for a $1.75 million loan from M&T Bank, because the litigation had commenced and the relationship had purportedly soured between Marcel and plaintiffs at that time. Furthermore, Marcel was allegedly reinstalled without explanation as manager after the loan was received. Pl.'s Opp. Br., 31. Alan Antaki admitted at deposition he served as an unofficial adviser to all of Relap's internal moves during this time. . . . there are triable issues of fact as to . . . the Antaki individuals with respect to what extent, involvement, and intent each had when carrying out alleged bad faith actions substantiated by plaintiff's proofs. (Decision at 17, Pa311)

Defendants try to hide behind clause 7(a) of the initial lease. However, that clause must be read in conjunction with the verbiage in the surrounding sentences in that paragraph section which refer to damages caused from the "failure, breakage, leakage or obstruction" of the "water", "plumbing", "sewer", "pipes, "conveyor",

"refrigeration", "sprinkler", "air conditioning", "heating", "elevator" and other systems on the premises, "or by reason of the elements", "or resulting from acts, conduct or omissions on the part of the Tenant", "or attributable to any interference with, interruption of or failure, beyond the control of the Landlord, of any services to be furnished or supplied by the Landlord." That section does not anywhere exculpate the Landlord or its members from the type of damages suffered by Second Inning based on the improper conduct in breaching a subsequent lease between the parties by misrepresenting their authority to assign the specific parking spaces set forth in the TLA and other fraudulent conduct. Jagat Mehta testified SI was not represented by counsel in the lease and that this clause was prepared by Marcel Antaki. Mr. Mehta thought its terms sought to relieve defendants from liability for something that happened in the facility but never understood that its terms relieved defendants from fraudulent conduct. (4T:190:21-191:9)

At best for defendants, ambiguity exists as to the meaning and reach of clause 7(a) of the initial lease. As noted above, both Marcel Antaki and Second Inning's principals agree that Marcel Antaki prepared the TLA, including section 7(a) in the initial lease. (4T190:7-191:9; 2T157:7-9) It is settled law that "[a]ny doubts or ambiguities as to the scope of the exculpatory language must be resolved against the drafter of the agreement and in favor of affording legal relief." Gershon v. Regency Driving Center, Inc., 368 N.J. Super. 237, 247 (App. Div. 2004).

Moreover, such exculpatory clauses are strictly construed against their validity. Defendants ignore the settled principle that: "The law does not favor exculpatory agreements because they encourage a lack of care." Gershon v. Regency Driving Center, Inc., 368 N.J. Super. 237, 247 (App. Div. 2004). "For that reason, courts closely scrutinize liability releases and invalidate them if they violate public policy." Hojnowski v. Vans State Park, 187 N.J. 323, 333 (2006). As the Appellate Division held in Lucier v. Williams, 366 N.J. Super. 485, 491 (App. Div. 2004): "courts have not hesitated to strike limited liability clauses that are unconscionable or in violation of public policy."

The New Jersey Supreme Court has categorically held in Hojnowski, supra, 187 N.J. at 333, that: "It is well settled that to contract in advance to release tort lability resulting from intentional or reckless conduct violates public policy." That holding is directly on point here and precludes defendants from hiding behind paragraph 7(a) of their initial lease to try to disclaim personal liability. Since their fraudulent conduct against Second Inning was intentional and malicious, this clause violates public policy pursuant to the holding in Hojnowski and Second Inning has the right to hold defendants personally liable.

POINT III. THE TRIAL COURT ERRONEOUSLY HELD THAT SECOND INNING HAD THE DUTY TO MITIGATE DAMAGES (14T92:6-105:19; Pa26-34)

The trial court misconstrued the principle of mitigation in finding that SI failed

to mitigate its damages which it invoked in dismissing SI's breach of contact claim. (Decision at 6, Pa 33) As set forth above, it was Relap's responsibility to file the site plan and obtain zoning approval for SI's and the other tenants' parking. The court erroneously ruled and defendants erroneously argue that SI should instead have undertaken the major cost of filing the site plan itself. However, mitigation of damages does not mean that one party has to perform the other party's obligations under the parties' contract. As set forth in Ingraham v. Townbridge Builders, 297 N.J. Super. 72, 83 (App. Div. 1997): "The duty to mitigate damages is not applicable where the party whose duty it is primarily to perform the contract has equal opportunity for performance and equal knowledge of the consequences of the performance."

Further, the expenses for obtaining site plan approval and reconfiguration of the parking were extremely high – Marcel Antaki testified that the estimates he obtained to do this work, were as high as $1 Million. (7T112:3-8). Again, it is not "mitigation" for one party to a contract to spend up to $1 Million to perform the other party's contract obligations. A party is not required to mitigate where it would be too burdensome to do so. Id. at 83. And, as noted, only Relap filed the site plan, confirming it was its obligation to do so. Thus, the trial court's ruling that SI had the "duty" to mitigate damages by "filing its own site plan application" was directly contrary to governing law since that was Relap's responsibility as confirmed by the

terms of the TLA and Relap's acknowledgment of its responsibility by filing the site plan with the Hanover Township Planning Board. (Pa33) The trial court also held that, alternatively, SI had the duty to mitigate damages by seeking to obtain site plan approval "through the courts." (Pa33). Incredibly, the trial court failed to recognize that that is exactly what SI sought to do in this very lawsuit tried before this trial judge. Indeed, SI expressly sought such relief in its Second Amended Complaint where SI filed for: "A mandatory injunction compelling the defendants to submit a new site plan on behalf of Relap which provides for overnight parking for Second Inning". (At 31, par. N, Pa 233).

Relap also argues that SI should have mitigated damages by moving out of the expansion space and stop paying rent. (Brief at 34-35) However, it is not mitigation for SI to abandon its legal rights to enforce its contract with Relap. Judge Hansbury and defendants also erroneously maintain that SI did not mitigate damages because it enjoined the site plan from going forward because defendants prohibited overnight parking in their site plan. (See court's decision at 6, Pa33) Here, too, both the court and defendants are improperly placing the blame and burden on SI for defendants' wrongdoing. As set forth in SI's Appeal Brief, SI cannot operate its adult day care center without overnight parking and SI is required by municipal ordinances to park its overnight vehicles on the premises. (See Hanover Tp. Ordinance §166-124, P-47, Pa 442-447 and citations at SI's initial Brief at 15-16)

Thus, contrary to Marcel Antaki's Brief at 39, SI could not seek "alternative overnight parking" since such parking by ordinance must be on the premises.

Defendants maliciously removed SI's overnight parking, knowing that would destroy SI's adult day care center. SI's Verified Complaint in this matter alleged at paragraph 65 that: "Despite the Township's authorization to Relap to include overnight parking in its site plan, which is necessary for Second Inning's use of the premises, and would otherwise put Second Inning out of business, Relap deliberately omitted such overnight parking in the site plan they submitted to the Township where Relap stated there will be no overnight storage of vehicles." (7T73:24-75:16; P-84, Pa239-240) Defendants' sworn answer was: "Defendant admits, it is his right to place that condition." (7T75:18-20; 79:1; P-84, Pa243) Defendants thus admitted in their sworn response that taking away SI's overnight parking would have destroyed SI's adult day care operation. At no time did defendants ever offer to remove their prohibition of overnight parking from the plan they submitted to the Planning Board, including when other defendants such as Roger and Alan Antaki replaced Marcel Antaki as the manager of Relap. (4T35:21-37:2; 5T45:18-21; 8T177:17-21) Alan Antaki testified that he took over as manager in October or November 2019 and learned at that time that Judge Berdote Byrne had entered an Order on October 22, 2018 enjoining defendants from obstructing or interfering with SI's overnight

parking. (13T198:14-199:18; 200:25-201:3) He testified that he also learned that Relap had submitted a site plan that prohibited overnight parking but did nothing as manager to remove that provision. (13T201:4-8; 209:1-19; 213:8-214:2)

Again, it is undisputed that the only reason SI sought an injunction to the site plan was due to defendants' inclusion of a provision prohibiting SI's overnight parking. As Judge Hansbury found: "The court accepts that the application by Relap stated no overnight parking and that would have meant plaintiff could not park its transportation vehicles on site overnight. . . . the motivation to stop The Planning Board application was to prevent the approval which prohibited overnight parking." (Decision at 4; Pa31). Judge Berdote Byrne's Preliminary Injunction Order specifically ordered defendants to cease "obstructing or interfering with Second Inning's overnight parking." (Pa258) Thus, it was the defendants (and not SI's) responsibility once that order was entered to remove the prohibition against overnight parking and proceed with the site plan. Judge Hansbury recognized this fact at the trial when he stated: "There was an injunction issued against the proceeding before the planning board. . . . And it seems to me all the defendant had to do was to modify the application to remove the prohibition of overnight parking and proceed. I don't know why that didn't happen." (13T92:23-93:4, emphasis added) As set forth above, in its Second Amended Complaint, SI sought

a mandatory injunction compelling defendants to proceed with the site plan but with overnight parking. (Pa 233)

Further, Judge Hanbury and the defendants totally ignored another dispositive fact which requires a reversal of his judgment. Relap's managing partner, Marcel Antaki, immediately violated Judge Berdote Byrne's Order that defendants remove the prohibition against overnight parking by filing two summonses against SI's principals with the Township the very next day seeking to prohibit overnight parking – in direct violation of the court's order. (Pa452-455) And defendants continued to violate subsequent court orders and continued to interfere with the overnight parking. (Pa259-290) By Order and Decision dated March 12, 2019, Judge Berdote Byrne ruled that defendants continued to violate its orders, including their improper filing of municipal court complaints seeking to further prohibit SI from overnight parking. The Court found that defendants have "willfully refused" to comply with its orders. The Court admonished defendants for their "repeated and persistent violations of the court's Orders." (Pa 274). Judge Berdote Byrne further ordered at paragraph 5 of the March 12, 2019 Order and Decision that "Defendants shall immediately cease obstruction and interfering with Second Inning's overnight parking pursuant to Paragraph F of the Court's October 22, 2018 Order and shall withdraw the summons and complaints filed on October 23, 2018 against Sandeep Patel and Jagat Mehta with the Hanover Township Municipal Court." (Pa266). In

its subsequent Order and Decision dated May 28, 2019, the Court found that defendants were still in violation of its orders including their failure to dismiss the pending complaints in the Hanover Court "as required by paragraph 5 of the March 12 Order." The Court found that the defendants "are willfully refusing" to comply with its Orders. (Pa287). Thus, defendants cannot argue on the one hand that SI should have mitigated damages by seeking to have the site plan go forward without the prohibition of overnight parking when at the same time they were continuing to violate the Court's Orders enjoining Relap from interfering with the overnight parking.

POINT IV. THE APPELLATE DIVISION SHOULD AWARD SECOND INNING RETURN OF ITS RENT AND CAM PAYMENTS AND REMAND THIS CASE TO ANOTHER JUDGE FOR AWARD OF COMPENSATORY DAMAGES (11T72:9-12; 74:11-12)

In a breach of contract case, the goal in awarding damages is "to put the injured party in as good a position as . . . if performance had been rendered." Nelson v. Elizabeth Board of Education, 466 N. J. Super. 325, 343 (App. Div. 2022). As a result of defendants' wrongdoing, Second Inning has sustained substantial compensatory damages and the loss of its CAM and rental payments as set forth in the expert damages reports and trial testimony of Rebecca Fitzhugh, CPA. (11T72:9-12; 74:11-12).

There is no real issue that Second Inning sustained substantial damages by its inability to operate its expansion space due the defendants' wrongdoing. The

expansion would have allowed Second Inning to increase its clientele in both shifts from a maximum of 100 clients to 170 clients. Second Inning had 140 registered clients for the first shift but could only service 100 at a time under its prior state approvals. (3T166:2-167:4) SI's clientele would therefore have immediately increased to the full 140 registered clients once the center was renovated and opened. (3T167:25-168:7) And it was estimated that SI would reach the new 170 clientele capacity for the first shift within 3 months. (3T168:8-169:3) When SI expanded its facility under its Second Lease Amendment, the clientele increased from 78 to 100 clients in only a few weeks. (2T182:22-183:8)

In addition, the expansion space in the TLA would have allowed Second Inning to decorate part of its adult day care center with a more Americanized décor which would have again substantially increased the clientele in its second shift. Second Inning's first shift is decorated with Indian décor as the first shift consists of Indian clients. SI had a key competitive advantage over the other adult day care providers as it is the only adult day care center in Morris County which is approved by all 5 HMO insurance companies who pay for the clients. (3T168:8-171:20) SI lost millions of dollars of compensatory damages in net profits. (11T72:9-12) Second Inning also sustained damages in that it paid substantial rent and CAM payments for the expansion space which it was not able to utilize for its intended purpose, i.e., as an expanded adult day care center. SI paid $368,936 in

rent and CAM charges through the end of 2022. (11T72:9-12; 74:11-12) As Judge Hansbury himself held, Second Inning is entitled to all of its damages under its breach of contract claim alone, without the need to prove damages under its other claims. (12T178:4-21, cited at 37 of Antaki Brief).[3] Mr. Antaki also concedes in his Brief that damages for SI's rent and CAM charges constitute "the very relief contemplated by the lease". (At 50 of Antaki Brief)

It is respectfully submitted that the Appellate Division should award SI a return of its rental and CAM payments for the expansion space through the date of its decision, with interest, as there is no issue as to the amount of those payments as they are governed by the express terms of the TLA. It is also respectfully submitted that this case should be remanded to another neutral judge to assess compensatory damages. Both SI and defendants presented extensive evidence including expert testimony, on the record on SI's compensatory damages. Thus, the assessment of such damages can be readily ruled upon by another judge since the proofs are already on record.

POINT V. JUDGE HANSBURY'S AWARD OF FRIVOLOUS LAWSUIT FEES SHOULD BE REVERSED AND VACATED (15T27:3-68:19; Pa40-53)

Judge Hansbury's orders assessing frivolous lawsuit fees should be reversed

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[3] Judge Hansbury held: "You can't sue somebody for under the breach of contract and also for unjust enrichment. It doesn't mean the amount of money that was paid goes away. It doesn't go away. But it's included in a breach of contract claim against Relap." (12T178:4-21, cited at 37 of Antaki Brief).

for the reasons set forth in Point VII of SI's initial Brief at 57-60. Defendants simply ignore the fact that Judge Berdote Byrne had granted a preliminary injunction against each and every one of the defendants in this mater. They fail to even address the dispositive legal point that a preliminary injunction can only be granted if SI showed a probability of success on its claims – thus confirming beyond any doubt that the claims were not frivolous but had substantial merit. Crowe v. DeGioia, 90 N.J. 126, 133 (1982).

Defendants and Judge Hansbury also ignore the dispositive holding by this Court in United Hearts, L.L.C. v. Zahabian, 407 N.J. Super. 379, 394 (App. Div. 2009), certif. den. 200 N.J. 367 (2009), that denial of summary judgment on even one claim confirms that the lawsuit is not frivolous. The fact that the trial court subsequently granted some (but not all) involuntary dismissal motions does not change the fact that under the controlling decision of United Hearts, L.L.C. v. Zahabian, SI's claims were not frivolous once defendants' motions for summary judgment were denied. Further, the facts, law and defendants' admissions in this case as set forth in detail in SI's initial and reply Appeal Briefs leave no doubt as to the merits of SI's lawsuit requiring reversal of the Court's Judgment and Orders.

OPPOSITION TO DEFENDANTS' CROSS-APPEALS

POINT I. DEFENDANTS' CROSS-APPEALS SHOULD BE DENIED

Defendants' cross-appeals can only be categorized as frivolous. Under the

standard governing motions for summary judgment, such a motion must be denied where a material issue of fact exists. In opposition to defendants' motion for summary judgment, SI presented a plethora of material facts demonstrating that defendants' motions must be denied. SI had filed a 263-paragraph Counter-Statement of Material Facts (Da403-442) and three Responding Statements (Da364-402) detailing those material facts, which are included in defendants' Reply Appendix. SI also submitted Certifications from Jagat Mehta and counsel with voluminous exhibits in opposition to their motions. (Da443-660) Contrary to defendants' allegations, the facts confirming defendants' personal liability including their fraudulent conduct are detailed in all those submissions, which are incorporated herein. Defendants fail to recognize that a party is not limited by the bare bones of its complaint but a litigant has the right to adduce facts obtained during discovery to prove its case and to also oppose a defendant's summary judgment motion. Rule 4:46-2(c) (in summary judgment motions, the court will review "the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits").[4] Those facts were so strong that Judge Berdote Byrne specifically ruled that they "are substantiated by the evidentiary record". (Court's Decision at 9-10,

[4] Contrary to the inaccurate statement in the Appeal Brief of Marcel Antaki at 10, SI's counsel sought leave from the Court below to file a sur-reply brief in further opposition to defendants' motions for summary judgment and the Court granted this request. See Second Inning's Notice of Motion seeking leave to file a sur-reply and Email from Judge Berdote Byrne's Chambers granting this request at Pra1-3.

Pa303-304).

As further set forth in SI's initial Appeal Brief, which is incorporated herein, and this Reply Appeal Brief, there are numerous material facts, coupled with defendants' admissions, and governing law, which support denial of summary judgment. And, as also set forth in detail in SI's two Appeal Briefs, the undisputed evidence at the trial was so strong that SI is entitled to a reversal of the trial court's judgment and orders and the entry of a judgment against Relap and the other defendants in this Appeal, further demonstrating the validity and wisdom of Judge Berdote Byrne's decision and order denying summary judgment to defendants.

CONCLUSION

It is difficult to fathom a stronger case requiring reversal of the trial court's judgment and orders and awarding SI its damages. The trial court's errors were numerous and egregious and represent a grave miscarriage of justice. As demonstrated in SI's Appeal Briefs, the trial court below sanctioned defendants' many wrongdoings including their misrepresentations which the court itself found as a matter of fact. The court excused defendants' seeking to destroy SI's adult day care center by eliminating its overnight parking and also excused defendants' repeated and flagrant violations of court orders. The trial court rewarded the perpetrator defendants and prejudiced the plaintiff victim. The trial court reversed our sacred legal principles and required plaintiff to perform defendants' contractual

obligations and required SI to comply with orders issued against defendants, and not against SI. To add insult to injury, the court sanctioned SI's counsel notwithstanding the overwhelming merit of SI's claims.

It is therefore respectfully submitted that this Court should reverse the trial court's judgment dismissing SI's claims and should hold that Relap has breached the parties' lease and its implied covenant of good faith and fair dealing. The trial court's orders dismissing the claims against the other defendants should also be reversed.

It is respectfully submitted that this Court should award a return of SI's rent and CAM payments for the expansion space through the time of its decision and should remand the case to another judge for computation of SI's compensatory damages. The trial court's award of fees against SI and its counsel should also be reversed and vacated. Finally, defendants' cross-appeals should be denied in their entirety.

Respectfully submitted,

WEINER LAW GROUP LLP
Attorneys for Plaintiff/Appellant
Second Inning 1, L.L.C.

By: /s/Andrew J. Kyreakakis
Andrew J. Kyreakakis

Dated: June 17, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-129-23

SECOND INNING 1, L.L.C.,	:	CIVIL ACTION
Plaintiff-Appellant/Cross-Respondent,	:	On Appeal from the Superior Court of New Jersey,
	:	Chancery Division, Morris County
v.		
RELAP L.L.C., MARCEL Z. ANTAKI, ESTATE OF LILIANE ANTAKI, ALAN ANTAKI, ROGER ANTAKI, AND NICHOLAS ANTAKI,	:	Docket No. Below: MRS-C-94-18
	:	Sat Below:
	:	Hon. Stephan C. Hansbury, J.S.C.
Defendants-Respondents/Cross-Appellants.	:	

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS/CROSS-APPELLANTS RELAP LLC, ESTATE OF LILIANE ANTAKI, ROGER ANTAKI, ALAN ANTAKI AND NICHOLAS ANTAKI IN REPLY TO THE OPPOSITION TO CROSS-APPEAL

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PRELIMINARY STATEMENT

Defendants-Respondents/Cross-Appellants Relap LLC, Estate of Liliane Antaki (the "**Estate**" or "**Liliane**"), Roger Antaki ("**Roger**") and Alan Antaki ("**Alan**") (collectively the "**RELAP Defendants**") filed the within cross-appeal appealing the trial court's denial of Alan and Roger's Motion for Sanctions (the "**Sanctions Motion**") and denial of the Motion for Partial Summary Judgment filed by the Estate, Roger and Alan (the "**Motion for SJ**").

Plaintiff-Appellant/Cross-Respondent Second Inning LLC ("**SI**") filed a fifty-page opposition and reply brief, raising a number of new arguments for the first time on reply but the brief dedicates only one page and a half to directly opposing the cross-appeal. Notably, SI's opposition does not even directly address the cross-appeal on the Sanctions Motion, which means this aspect of the cross-appeal is arguably unopposed. If the Court considers it as being addressed in opposition though, the Sanctions Motion should have been granted because the claims against Alan and Roger were frivolous and filed in bad faith. Even SI's own principals testified that they did not know why the Estate, Alan and Roger were named in this lawsuit. (Da353-354; Da368-372). In fact, Mr. Mehta testified that it was his understanding the individuals other than Marcel Antaki ("**Marcel**") were all named as defendants simply because they were involved with RELAP. (Da354). Just like the claims against Liliane and

Nicholas Antaki, the claims filed against Alan and Roger were also filed in bad faith and for an improper purpose, which should have resulted in an award of fees to Alan and Roger too.

As it relates to the Motion for SJ, SI argues that the Estate, Roger and Alan could have been liable under a tort participation or piercing the corporate veil theory of liability. However, there were no facts before the trial court on summary judgment that even suggested Liliane, Roger or Alan participated in any of the torts pled under the Second Amended Complaint (the "**SAC**"). Tellingly too, even now on appeal, SI never explains what tort pled under the SAC Liliane, Roger or Alan participated in. SI claims it "has presented substantial evidence to hold defendants personally liable based on the tort participation theory alone" but does not explain what tort or torts SI is referring to. (Prb34). Nor does SI explain how this theory might extend to SI's contract claims (this is because it does not) and why SI's tort claims (save possibly for fraud) are not all precluded by the economic loss doctrine. The only "tort" implicating Liliane, Roger or Alan that SI made reference to during the Motion for SJ was a red-herring based on a purported misrepresentation regarding the execution of a tenant estoppel letter required as part of a refinance. This was not a tort pled under the SAC, transpired after the parties entered into the Third Lease Amendment and even if it was an actual tort pled under the SAC, SI did

not allege it was damaged in any way as a result of that purported misrepresentation – a necessary element of any tort claim.

As Judge Hansbury acknowledged, Liliane's signature on a site plan application filed on behalf of RELAP does not equate to her participation in a tort. Nor were there any facts that rose anywhere near the clear and convincing standard required to pierce the corporate veil. There was never any evidence of commingling, a failure to maintain corporate formalities or undercapitalization. At best, SI alleged that the managers of RELAP had changed over time – but this did not create a genuine issue of material fact sufficient to preclude the entry of summary judgment. And notwithstanding all the foregoing – SI agreed under Article 7(a) of the Lease that no "partner of the Landlord shall be under any personal liability to the Tenant with respect to any provision of this Lease." (Pa320; Da7). This clause is not ambiguous.

Since SI could not even make out a *prima facie* case for liability against the Estate, Alan or Roger, and because there was likewise no evidence rising anywhere near the level required to pierce the corporate veil, the trial court erred in denying the Motion for SJ as to the Estate, Alan and Roger. The trial court further erred in not awarding Alan and Roger fees as a result of SI's frivolous claims.

LEGAL ARGUMENT

SI opposes the cross-motion based on the following two arguments – (1) that there were facts in the record on the Motion for SJ suggesting the Estate, Roger and Alan could have been liable based on a tort participation theory of liability; or (2) that there were facts in the record on the Motion for SJ to create a genuine issue of material fact with respect to the court's ability to pierce the corporate veil. Neither of these arguments hold water.

I. THE TRIAL COURT ERRED IN HOLDING THERE WAS A GENUINE ISSUE OF MATERIAL FACT WITH RESPECT TO LILIANE, ROGER AND ALAN'S PARTICIPATION IN THE TORTS PLED UNDER THE SAC BECAUSE THERE WAS NO EVIDENCE THEY PARTICIPATED IN ANY TORTS AND BECAUSE THE TORTS SHOULD HAVE ALL BEEN DISMISSED PURSUANT TO THE ECONOMIC LOSS DOCTRINE

As it relates to the tort participation theory of liability – imposition of individual liability upon corporate officers is the exception, not the rule, and requires "sufficient evidence of the officer's involvement in the tortious conduct" along with a "'finding that the corporation owed a duty of care to the victim, the duty was delegated to the officer and the officer breached the duty of care by his own conduct.'" Metuchen Sav. Bank v. Pierini, 377 N.J. Super. 154, 162 (App. Div. 2005) (quoting Saltiel v. GSI Consultants, Inc., 170 N.J. 297 (2002)).

During the Motion for SJ and still now, SI does not explain which tort pled under the SAC[1] Liliane, Roger or Alan participated in and does not explain how SI was damaged as a result. For example, Count Nine for tortious interference with contractual relations claimed that the "defendants" (plural) tortiously interfered with SI's contractual relations by harassing clients. (Pa231). SI argued under Count Ten that the "defendants" (plural again) tortuously interfered with its prospective economic advantage by harassing clients and failing to provide SI with "the requisite parking spaces." (Pa231) These torts as pled under the SAC have absolutely nothing to do with Liliane, Roger and Alan. Likewise, there was no evidence before the court at any time that Liliane, Roger and Alan converted anything or received any payments (Counts Seven and Eight). There was also no evidence before the court suggesting there was some question of fact related to Liliane, Roger and Alan's liability under Counts Four, Five and Six because those counts all involved allegations of misrepresentations by Marcel concerning the sufficiency of parking spaces. (Pa226-229).

In issuing his opinion on the Sanctions Motion, the Honorable Stephan M. Hansbury, J.S.C. succinctly explained why the Estate should have been dismissed on the Motion for SJ:

[1] "SAC" refers to the Second Amended Complaint. (Pa20).

> [T]he only time that Ms. Liliane's name was mentioned was that she signed the document that went to the planning board that could have, had it been approved, resulted in the loss of parking. That's it. That does not, per se, mean she's part of a fraud or anything else. It means, she simply signed a document in her capacity at the time, as majority stockholder. Judge Berdote Byrne had no facts, whatsoever, to back up any conclusion that she, therefore, was liable, nor could she because if she did have those facts, she probably would have ruled otherwise.

[15T71:14-72:3].

Judge Hansbury all but confirmed that the trial court erred by not dismissing the Estate on the Motion for SJ. This same line of reasoning applies to Roger and Alan too though. There were no facts before Judge Berdote Byrne suggesting that Alan did anything besides potentially serve as an advisor to his family. The sole allegation against Roger was disputed but that dispute was immaterial on the Motion for SJ as SI did not present any evidence it was damaged based on a purported misrepresentation related to the removal of Marcel as a manager (nor was this claim ever actually pled).

The torts pled under the SAC should have also been dismissed during the Motion for SJ based on the economic loss doctrine. In opposition, SI includes a block quote from a Ninth Circuit case initially arising out of the United States Federal District Court for the District of Idaho and claims that based on the analysis of the court there, SI can bring claims for breach of contract in

conjunction with separate tort claims flowing from the parties' contract. (Prb 31-22). However, this is not the law in New Jersey which categorically precludes a tort remedy in "a contractual relationship unless the breaching party owes an independent duty imposed by law." Saltiel, 170 N.J. at 316-17.

SI also claims that in JD James Construction, LLC v. PDP Landscaping LLC, 2020 WL 5587439 (App. Div. 2020) this Court "held that the economic loss doctrine does not bar a party from simultaneously suing for breach of contract and for fraud." (Prb 30). However, SI's characterization of the Court's holding completely misses the mark. In JD James Construction, LLC the Appellate Division merely acknowledged that although the economic loss doctrine has been applied in strict liability and negligence contexts, "'[n]o New Jersey Supreme Court case [has held] that a fraud claim cannot be maintained if based on the same underlying facts as a contract claim.'" JD James Constr., LLC, A-4903-18T3, 2020 WL 5587439, at *6 (quoting Gleason v. Norwest Mortg., Inc., 243 F. 3d 130, 144 (3d Cir. 2001)). The Court did not address, let alone make "clear" that the economic loss doctrine does not "bar a party from simultaneously suing for breach of contract and for fraud." In fact, in JD James Constr., LLC this Court acknowledged that the New Jersey Federal courts make a distinction between fraud in the inducement and fraud in the performance of a

contract with the latter types of claims being precluded by the economic loss doctrine.

Although it appears this issue has not been resolved in a published New Jersey state court opinion, this Court should hold that the economic loss doctrine precludes the types of tort claims made by SI in this case because the claims do not arise based on an independent duty. Instead, SI's claims are all grounded in SI's rights under its contract and, therefore, simply a recast of SI's claims for breach of contract, which New Jersey courts have prohibited in the past. See New Mea Constr. Corp. v. Harper, 203 N.J. Super. 486, 494 (App. Div. 1985) (finding that defendant's failure to use construction material specified in the parties' contract was a type of conduct "not ordinarily alleged in a tort case," and could not give rise to a separate claim by "[m]erely nominally casting [the] cause of action" as a tort claim).

II. THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT SUMMARY JUDGMENT IN FAVOR OF THE ESTATE, ROGER AND ALAN BASED ON ARTICLE 7 OF THE LEASE

Article 7 of the Lease entitled "Non-Liability of Landlord" provides in pertinent part that "[n]either the Landlord nor any partner of the Landlord shall be under any personal liability to the Tenant with respect to any provision of this Lease." (Pa320; Da7). Pursuant to Article 7, which was not later explicitly amended or cancelled under any subsequent amendment, Second Inning

explicitly agreed and therefore waived any right to hold RELAP or any partners of RELAP personally liable with respect to any provision of the Lease. See Spaeth v. Srinivasan, 403 N.J. Super. 508, 514 (App. Div. 2008), certif. granted, 212 N.J. 198 (2012) (quoting Shebar v. Sanyo Bus. Sys. Corp., 111 N.J. 276, 291 (1988) ("Waiver under New Jersey law 'involves the intentional relinquishment of a known right and thus it must be shown that the party charged with the waiver knew of his or her legal rights and deliberately intended to relinquish them.'").

In opposition, SI argues that although Article 7(a) is not ambiguous – the Court should assume it only relates to mechanical failures and other building related issues mentioned in Article 7. (Prb 36-37). However, the *in para materia* doctrine is an aid in interpretation and applicable only in the face of an ambiguity. Troise v. Extel Commc'ns, Inc., 345 N.J. Super. 231, 240 (App. Div. 2001), aff'd, 174 N.J. 375 (2002). There is nothing ambiguous with the sentence "[n]either the Landlord nor any partner of the Landlord shall be under any personal liability to the Tenant with respect to any provision of this Lease." (Pa320; Da7). Further, while exculpatory clauses for claims like fraud may be unenforceable, SI's claims under the SAC are all related to the faulty premise that RELAP somehow breached the Lease and/or the Third Lease Amendment by failing to obtain municipal approvals required for SI to operate its adult day

care business – an issue directly addressed under the terms of the parties' contract[2]. Since SI expressly agreed to waive the right to recover against RELAP or any partners of RELAP based on any provision of the Lease, the trial court should have dismissed the claims against the Estate, Roger and Alan on the Motion for SJ.

III. THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT SUMMARY JUDGMENT IN FAVOR OF THE ESTATE, ROGER AND ALAN BASED ON A SUGGESTION THERE WAS A GENUINE ISSUE OF MATERIAL FACT WITH RESPECT TO SI'S ABILITY TO PIERCE THE CORPORATE VEIL

It is well settled New Jersey law that "a corporation is a separate entity from its shareholders…and that a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise." State Dep't. of Envtl. Prot. v. Ventnor Corp., 94 N.J. 473, 500 (1983). Only under extraordinary circumstances will a court pierce the corporate veil and attach liability to the members or shareholders of an entity. See Ventron Corp., 94 N.J. at 500 (finding that veil piercing is appropriate where an individual uses a corporation as his or her alter ego and abuses the corporate form to defeat the

[2] The SAC also included claims that Marcel interfered with SI's operations in various ways but there was not even an allegation that Liliane, Roger or Alan participated in this purported interference. Further, at Trial SI conceded that it had not calculated any damages related to this purported interference. (4T108:9-109:21; 110:6-10; 113:1-4).

ends of justice, perpetuate a fraud, accomplish a crime, or otherwise evade the law).

In opposition, SI cites to an unpublished Appellate Division decision, Gross v. Ferry Binghamton, Inc., as a purportedly analogous case involving a shareholder who was held individually liable in connection with a commercial lease. Gross v. Ferry Binghamton, Inc., A-3718-13T3, 2015 WL 3843589, at *2 (N.J. Super. Ct. App. Div. June 23, 2015); (Prb 33). However, Gross is inapposite to the facts here as the Court in Gross found the defendant had co-mingled assets, acted in a fraudulent manner by taking corporate funds for his personal use and did not maintain proper corporate procedures or observe corporate formalities. Gross 2015 WL 3843589, at *2. During the Motion for SJ, and still now, SI has not identified any evidence that the defendants were misappropriating and commingling corporate funds, failing to maintain corporate procedures or otherwise neglecting to observe corporate formalities. There was no evidence (let alone allegations) that RELAP was undercapitalized.

SI did not meet its burden to demonstrate a genuine issue of material fact on summary judgment with respect to its ability to pierce the corporate veil because SI failed to present any evidence of corporate domination or that the corporate form was abused in some manner in order to perpetrate a fraud or injustice. State Dep't. of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 500 (1983);

see (Da403). As a result, the Motion for SJ by the Estate, Roger and Alan should have been granted.

IV. THE TRIAL COURT ERRED WHEN IT DENIED ROGER AND ALAN'S MOTION FOR SANCTIONS

As aforementioned, SI's opposition to the cross-appeal does not directly address Roger and Alan's cross-appeal appealing the denial of their Motion for Sanctions meaning SI has arguably waived opposition to this point. Pressler & Verniero, Current N.J. Court Rules, Comment 5 on R. 2:6–2 (Gann 2023); see also Gormley v. Wood–El, 422 N.J. Super. 426, 437 n. 3 (App. Div. 2011). However, in the event the Court considers the remainder of SI's reply brief as its "opposition," SI fails to explain what good faith basis SI had to pursue litigation against Roger and Alan. Just like Nick and Liliane, the only reason Roger and Alan were named as defendants in this lawsuit was because they were individual partners or members of RELAP. Besides the introduction of the SAC, neither Roger nor Alan were named again anywhere under the SAC. Further, during depositions, neither member of SI could articulate why exactly Roger or Alan were named. Naming Alan and Roger as defendants was nothing more than a bad-faith litigation tactic. "[U]nder Rule 1:4-8, an assertion is deemed 'frivolous' when 'no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable.'" United Hearts, LLC v. Zahabian, 407 N.J. Super. 379, 389 (App. Div. 2009) certif. den.

200 N.J. 367 (2009) (quoting First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 432 (App. Div. 2007)). The trial court erred because it should have recognized that no rational argument could be advanced in support of any claims against Roger and Alan - SI named Roger and Alan as defendants simply because they were partners or members of RELAP and not because they actually committed any torts or did anything wrong.

SI argues in support of its reply that pursuant to United Hearts, L.L.C. "SI's claims were not frivolous once defendants' motions for summary judgment were denied." (Prb 47). However, United Hearts, L.L.C. did not involve a case where defendants were dismissed at Trial pursuant to R. 4:37-2(b) and the Court in United Hearts, L.L.C. did not go so far as to hold that a party who prevails on summary judgment can never be sanctioned.

Part of the public policy behind an award of fees and the imposition of sanctions is punishment for improper behavior, "deterrence of frivolous litigation and compensation for those having to suffer the consequences of frivolous litigation behavior." Toll Bros., Inc. v. Twp. of W. Windsor, 190 N.J. 61, 71 (2007). Motions for involuntary dismissal pursuant to R. 4:37-2(b) are considered on a standard similar to summary judgment and require a finding that, among other things, "no rational jury could conclude from the evidence that an essential element of the plaintiff's case is present." See

Pressler & Verniero, Current N.J. Court Rules, Comment 2.1 on R. 4:37-2 (Gann 2023). A claim is frivolous when "no rational argument can be advanced in its support, when it is not supported by credible evidence, when a reasonable person could not have expected its success or when it is completely untenable." Belfer v. Merling, 322 N.J. Super. 124, 144 (App. Div. 1999). A determination that a claim is "frivolous" under N.J.S.A. 2A:15-59.1(b)(1) & (2) requires a finding that either: (1) the claim "was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury"; or (2) "[t]he non-prevailing party knew, or should have known, that the [claim] was without any reasonable basis in law or in equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." R. 1:4-8, which permits sanctions against attorneys, requires similar findings and precludes the joinder of defendants known to have no liability and for whose joinder there is no legitimate purpose. Port-O-San Corp. v. Teamsters Local Union No. 863 Welfare & Pension Funds, 363 N.J. Super. 431, 439 (App. Div. 2003).

Since SI could never advance any rational argument in support of the claims under the SAC against Nicholas, the Estate, Roger and Alan and because SI's principals admitted during depositions and at trial that they did not know

why the foregoing individuals were named in this action, the trial court erred by not granting the Sanctions Motion as to Roger and Alan.

CONCLUSION

It is respectfully submitted that this Court affirm the trial court's dismissal of the claims against the RELAP Defendants along with the award of frivolous litigation sanctions as to Nick and Liliane. However, this Court should reverse the denial of Summary Judgment as to Alan, Roger and the Estate and reverse the trial court's decision denying an award of frivolous litigations sanctions to Roger and Alan as well.

Respectfully submitted,

MEYNER AND LANDIS LLP

By: */s/ Matthew P. Dolan*
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DATED: July 1, 2024

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The Estate of Marcel Z. Antaki

SECOND INNING 1, L.L.C.,

Plaintiff-Appellant,

v.

RELAP L.L.C., MARCEL Z. ANTAKI, ESTATE OF LILIANE ANTAKI, ALAN ANTAKI, ROGER ANTAKI, AND NICHOLAS ANTAKI,

Defendants-Respondents/ Cross-Appellants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-129-23

ON APPEAL FROM:
SUPERIOR COURT OF NEW JERSEY CHANCERY DIV.: MORRIS COUNTY DOCKET NO. MRS-C-94-18

Sat Below:
Hon. Stephan C. Hansbury, J.S.C.

DEFENDANT-RESPONDENT/CROSS-APPELLANT ESTATE OF MARCEL Z. ANTAKI'S BRIEF IN FURTHER SUPPORT OF CROSS-APPEAL

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PRELIMINARY STATEMENT

Plaintiff Second Inning 1, LLC's ("Plaintiff") opposition brief is wrong on both the law and the appellate record. As detailed in the following Sections, Plaintiff frequently relies on cases that do not apply, stand for the opposite proposition for which they are cited, and/or are obviously and materially distinguishable. Further, Plaintiff makes pure argument without – as required by the law and common sense at this appellate proceeding – providing any citations to the record. And, in a true surprise, Plaintiff advances an entirely new legal theory, notwithstanding years of litigation, a full trial, and briefing on Plaintiff's appeal. For all these reasons, relief should be granted in its entirety in favor of Defendant Marcel Antaki ("Marcel Antaki") and his estate.

LEGAL ARGUMENT[1]

In opposition to Marcel Antaki's Cross-Appeal for summary judgment, Plaintiff asserts that there were facts in the case sufficient to hold Marcel Antaki, a non-party to the lease agreement, personally liable under that contract to which, it is undisputed, he is not a party. Plaintiff further argues that there existed material facts sufficient to deny summary judgment and impose personal liability. Both of those arguments are flawed.

A. The law does not support Plaintiff's arguments regarding Marcel Antaki's personal liability.

Plaintiff argues that Marcel Antaki should be "personally liable" on Second Inning's claims, with specific reference to fraud in the inducement, legal fraud, negligent misrepresentation, and quizzically, contract claims. Prb[2] at 27-28. In support of this argument, Plaintiff merely recites the elements of these claims and then cites several cases that are readily distinguishable from the present case. Essentially, Plaintiff attempts to cobble together law from inapplicable and

[1] This brief is filed on behalf of the Estate of Marcel Antaki. Marcel Antaki passed away on June 15, 2024. Pursuant to Rule 4:34-1, a motion has been filed to substitute the Estate of Marcel Antaki for Marcel Antaki. At the time of filing, that motion is pending. The Estate of Marcel Antaki incorporates all prior arguments made on behalf of Marcel Antaki so long as they are not inconsistent with the position of the Estate of Marcel Antaki.

[2] "Prb" refers to Plaintiff Second Inning 1, LLC's Reply and Opposition Appeal Brief, filed June 17, 2024.

sometimes contradictory cases because Plaintiff's position is unsupported by precedent and is, in fact, contrary to current law on the subject.

Plaintiff cites *Pennington Trap Rock Co. v. Pennington Quarry Co*., an 80-year-old case that was decided before the 1947 New Jersey Constitution and before the "Supreme Court" designation meant a court was the highest appellate court in New Jersey. And, of course, that case does not mean that employees of corporations do not have protections; in fact, it states that employees are "absolved from a suit" when they act in good faith. 22 N.J. Misc. 318, 321 (Sup. Ct. 1944). There, the Court explained:

> Of course it has been held that an employee or officer of a corporation who acts in good faith and believes that what he does is for the best interests of the corporation in seeking to have the corporation breach its contract with a third party should be absolved from a suit of this character but the actions of the individual must be with justification.
>
> [*Pennington Trap Rock*, 22 N.J. Misc. at 321.]

Thus, Plaintiff's case actually supports the contention that Marcel Antaki should be absolved from personal liability related to a breach of contract claim.

Nor does *Arthur Anderson LLP v. Carlisle* support Plaintiff's contention that Marcel Antaki should be liable on contract claims; that case dealt with the narrow issue of whether "a litigant who was not a party to the relevant arbitration agreement may invoke § 3 if the relevant state contract law allows him to enforce

the agreement." 556 U.S. 624, 632 (2009). Given that no arbitration agreement is at issue, and no party has sought a stay under 9 U.S.C. § 3, this case in wholly inapplicable. *Hojonowski v. Vans Skate Park* is likewise inapplicable because it dealt with whether an arbitration provision was enforceable against a minor child injured in a skatepark when the minor's parent signed a waiver on behalf of the minor. 375 N.J. Super 568, 576 (App. Div. 2005). Accordingly, these cases provide no support for Plaintiff's argument seeking to hold Marcel liable on a contract between RELAP and Second Inning.

B. The trial court erred when it failed to grant summary judgment in favor of Marcel Antaki because Plaintiff's claims were barred by the economic loss doctrine.

Plaintiff's claims arise out of its contract with Defendant RELAP.[3] Under New Jersey law, a tort remedy is not available in "a contractual relationship unless the breaching party owes an independent duty imposed by law." *Saltiel*, 170 N.J. at 316-17.

Plaintiff cites *JD James Construction LLC v. PDP Landscaping LLC*, 2020 WL 5587439 (App. Div. 2020), an unpublished case that merely recognized that "no New Jersey Supreme Court case has held that a fraud claim cannot be maintained if based on the same underlying facts as a contract claim." Prb at 30

[3] Plaintiff also included claims that Marcel Antaki interfered with Plaintiff's business operations; however Second Inning failed to calculate damages regarding these causes of actions. 4T108:9 to 109:21; 110:6-10; 113:1-4.

(citing *JD James*, at *6). However, in that case, the Appellate Division determined that the two claims were based on conduct separate from mere failure to perform under the contract because "the trial judge determined that defendant's unlawful conduct extended far beyond mere failure to perform under the sub-contract. The judge specifically found defendants liable for 'fraud in the receipt of payment, fraud in the ability not to pay, [and] misuse of the money.'" *Id*. at *16.

Plaintiff also relies on a federal case from Idaho, which summarizes how other courts regard the economic loss doctrine. *See* Prb at 31-32 (citing *Kayser v. McClary*, 875 F. Supp. 2d 1167, 1176 (D. Idaho 2012)). Putting aside that these other cases are decided in far-ranging jurisdictions, many of which have different foundational precedent from New Jersey, the citation alone does not support Plaintiff's contention. Many of the parentheticals in Plaintiff's citation include claims that could be extraneous to a contract claim, for example defamation and abuse of process. However, in the instant case, all of Plaintiff's claims arise out of the contract, and the entire lawsuit is an attempt to gain what Plaintiff claims it is due under the Leases. Accordingly, Plaintiff's attempt to get multiple bites at a contract claims by dressing it up as a tort claim are meritless.

C. Plaintiff failed to allege sufficient facts at summary judgment to support piercing the corporate veil or the tort participation theory with respect to Marcel Antaki.

Despite failing to sufficiently plead facts regarding either the tort participation theory or piercing the corporate veil, Plaintiff argues that it should be able to maintain an action holding Marcel Antaki personally liable.

Under the tort participation theory of liability, "a corporate officer should not be so liable unless there is sufficient evidence of the officer's involvement in the tortious conduct." *Metuchen Sav. Bank v. Pierini*, 377 N.J. Super 154, 162 (App. Div. 2005) (citing *Saltiel v. GSI Consultants, Inc.*, 170 N.J. 297 (2002)). Even then, "[a] predicate to liability is finding that the corporation owed a duty of care to the victim, the duty was delegated to the officer and the officer breached the duty of care by his own conduct." *Saltiel*, 170 N.J. at 303.

When it comes to corporate entities, courts "begin with the fundamental proposition that a corporation is a separate entity from its shareholders." *State Dep't. of Envtl. Prot. v. Ventnor Corp.*, 94 N.J. 473, 500 (1983).

> Except in cases of fraud, injustice, or the like, courts will not pierce a corporate veil. *Lyon v. Barrett*, 89 N.J. at 300. The purpose of the doctrine of piercing the corporate veil is to prevent an independent corporation from being used to defeat the ends of justice, *Telis v. Telis*, 132 N.J.Eq. 25 (E. & A.1942), to perpetrate fraud, to accomplish a crime, or otherwise to evade the law, *Trachman v. Trugman*, 117 N.J.Eq. 167, 170 (Ch.1934).
>
> [*Ventnor*, 94 N.J. at 500.]

However, even at the summary judgment stage, veil piercing was not an available remedy as to Marcel Antaki. As set forth in Marcel Antaki's Statement of Undisputed Material Facts, he was not a shareholder in RELAP at that time. Da88 at ¶¶ 5-7. In response, Plaintiff pointed to its own Counterstatement of Facts and generally claimed "defendants transferred ownership and management of Relap in order to commit a fraud." Plaintiff's Response to Marcel Antaki's Statement of Undisputed Material Facts, Da365, at ¶¶ 5-7. However, Plaintiff's Counterstatement contains no specific citations regarding the ownership of RELAP such that piercing the corporate veil would have been viable at the summary judgment stage. *See* Second Inning's Counterstatement of Facts, Da403-442, ¶¶ 211-239. Pursuant to Rule 4:46-2(b), when opposing summary judgment, specific citations are required, otherwise a material fact is deemed admitted. Because Plaintiff failed to provide evidence on Summary Judgment sufficient to argue that Marcel Antaki was an owner of RELAP, piercing the corporate veil could not form the basis for any theory of liability. Thus, to the extent Plaintiff sought to hold Marcel liable under a veil piercing theory, the court should have entered summary judgment.

Plaintiff's reliance upon *Gross v. The Ferry of Binghamton, Inc.*, 2015 WL 3843589 (App. Div. June 23, 2015) is misplaced. There, the court found the defendant had "co-mingled assets and acted in a fraudulent manner by taking

corporate funds for his personal use" and thus "lost the corporate shield of personal protection." *Id*. at *6. No analogous facts are present or were alleged in the present case. Indeed, Plaintiff does not even try to provide a citation to the record.

D. The trial court erred by failing to grant summary judgment because Article 7 of the Lease precludes Marcel Antaki from being held liable.

Article 7 of the lease contains a "Non-Liability of Landlord" provision. Pa320, Da7. This provision was not amended by any later Lease Amendments. Article 7 states "[n]either the Landlord nor any partner of the Landlord shall be under any personal liability to the Tenant with respect to any provision of this Lease." Da7. Plaintiff now, for the first time, after years of litigation and a trial, claims that Article 7 is ambiguous and violates public policy. Prb at 37-38. Plaintiff is wrong.

In opposition, Plaintiff argues that Article 7(a) only applies to mechanical failures of the building. Prb36-37. In support of this, Plaintiff argues for reading the surrounding paragraphs of the lease, and altering the interpretation of Article 7(a), despite the unambiguous language. Analyzing the surrounding portions of a contract provision is only necessary when the provision at issue is ambiguous. Whether a contract term is clear or ambiguous amounts to a question of law. *Nester v. O'Donnell*, 301 N.J. Super. 198, 210 (App. Div. 1997). Contract terms

must be given their plain and ordinary meaning. *Nester*, 301 N.J. Super at 210. Courts should not "torture the language of [a contract] to create ambiguity." *Stiefel v. Bayly, Martin & Fay, Inc.*, 242 N.J. Super. 643, 651 (App. Div. 1990).

Article 7(a) is not ambiguous and it does not violate public policy. Plaintiff's claims arise out of breach of contract regarding the Leases and who was responsible for obtaining municipal approvals for Plaintiff to operate its adult daycare business. Accordingly, the waiver in Article 7(a) is not violative of public policy and prevents Plaintiff from reaching Marcel Antaki in his individual capacity.

E. Plaintiff improperly attempts to back into liability using argument in the appeal briefs as a "dispositive evidence."

Plaintiff's brief includes new arguments, untethered to the controversy at issue in the case. Plaintiff points to arguments contained within appeal briefs as "telling and dispositive evidence." Prb at 22. Specifically, Plaintiffs argue that because the parties stated *in their appeal briefs*, that RELAP filed a site plan with the town, this somehow changes the ultimate facts of the case. Instead, the cited portions of the appeal briefs are merely factual recitations of events, not concessions regarding the ultimate issue in the case and which parties bore responsibility. Argument and factual recitation in briefs written years after the events at issue cannot be "dispositive evidence" of facts and legal issues. *See*

Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 1:6-6 (2022) ("The function of briefs is the written presentation of legal argument based on facts already of record."). Accordingly, Plaintiff's argument on this point is due little consideration.

F. Plaintiff cherry picks narrow testimony and attempts to apply it to broad issues and disputes.

Plaintiff points to portions of the trial transcript to make Marcel Antaki appear as though he committed malfeasance and admitted "guilt." Prb at 25-26. Plaintiff cites to a narrow line in the trial transcript in which Marcel testified that he pled guilty to an ordinance, stating "In front of the government, I am the responsible guy and I am the guilty guy." 6T62:23 to 61:1. However, Marcel further stated that the ordinance was issued because "Second Inning was performing a lot of things which were not allowed in the warehouse and Sean Donlon saw it in front of the government eyes … the manager was responsible for all infractions to the rules and all breaches to the certificate of occupancy." 6T62:6-18. Far from admitting responsibility under the contract, as Plaintiff seems to imply, Marcel was merely testifying regarding the fact that the law looked to him as the then-manager to maintain compliance with the occupancy ordinance. Plaintiff's argument incorrectly attempts to use a narrow line of questioning on a specific ordinance, and twist it to appear to be an admission of liability. Marcel

pleading guilty to an ordinance has no bearing on the broader issue of who was responsible for obtaining the municipal approvals for Plaintiff's to run their business.

CONCLUSION

For the reasons set forth above, the Appellate Division should reverse the decision of the trial court and grant summary judgment to Marcel Antaki on all counts. In the alternative, the Appellate Division should uphold the decision of the trial court granting dismissal to Marcel Antaki on all counts.

Respectfully,

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