SUPERIOR COURT OF NEW JERSEY

JONATHAN CHRISTODORO, individually and on behalf of Attessa Properties, LLC,

Plaintiff-Appellee,

v.

FRANK ZISA, PETER ZISA and ATTESSA PROPERTIES, LLC, as nominal defendant,

Defendants-Appellants.

APPELLATE DIVISION
DOCKET NO. A-000410-23

Civil Action

ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, BERGEN COUNTY

Docket No.: BER-C-229-19; BER-C-243-18

Sat Below:

Hon. Edward A. Jerejian, P.J.Ch.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT FRANK ZISA

Of Counsel and on the Brief:

Wendy F. Klein, Esq.
(Atty ID 032321993)
Eric T. Vissichelli, Esq.
(Atty ID 078722013)

Date Submitted: February 9, 2024

COLE SCHOTZ P.C.
25 Main Street
P.O. Box 800
Hackensack, NJ 07602-0800
wklein@coleschotz.com
evissichelli@coleschotz.com
(201) 489-3000

Attorneys for Defendant-Appellant Frank Zisa

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PRELIMINARY STATEMENT

The trial court made numerous reversible errors in this several-year business dispute regarding Attessa Properties, LLC ("Attessa"), an LLC formed by Defendant-Appellant Frank Zisa ("Defendant") and Plaintiff-Appellee Jonathan Christodoro ("Plaintiff") to own real estate investment properties, culminating in its erroneous Final Order dated August 24, 2023 ("Final Order"). The trial court misapprehended the parties' business relationship, even admitting in its oral decision its confusion as to how the venture was supposed to work. Ultimately, the trial court's scant factual findings and legal conclusions were not supported by sufficient credible evidence, and its final relief constitutes abuse of the trial court's discretion and offends the interests of justice. The trial court then refused to correct its errors despite its multiple opportunities to do so.

In 2011, the parties jointly purchased the first of 20 dilapidated properties, which they renovated and rented out. After operating as a de facto partnership for six years, Defendant and Plaintiff formed Attessa at Plaintiff's behest and signed an operating agreement in August 2015 providing that each held a 50% membership interest in the company. The two contributed 12 jointly owned properties to the entity, with one remaining in Plaintiff's name. The parties always understood that Defendant would oversee each rental property project from purchase to stabilization, his primary contribution to the venture being the

investment of time, effort, and expertise in the form of "sweat equity." Plaintiff's expected contribution to the venture was to provide all capital needed to acquire and renovate the investment properties. After Plaintiff repeatedly defaulted on his obligations by failing to contribute or allow Attessa access to the capital needed to fund renovations and investments, this litigation ensued.

Following a lengthy bench trial, the trial court issued an oral opinion on July 27, 2022 ("July 27 Opinion") and entered an Order on July 28, 2022 ("July 28 Order"), which granted judgment in favor of Plaintiff on some of his claims and dismissed Defendant's counterclaims. The July 28 Order: (i) ordered repayment to Plaintiff of a $1,198,220 so-called "loan" to Attessa; (ii) reduced Defendant's ownership interest in Attessa from 50% to 40%, and (iii) afforded Plaintiff the first right to buy out Defendant's interest in Attessa. The July 27 Opinion, however, lacks adequate factual findings to support those rulings and instead consists of rambling musings on each side's positions without making actual factual findings or tying them to the legal conclusions reached or remedies imposed. Instead of digging into the evidence presented, which demonstrated: that pre-entity formation contributions would be wiped clean; the parties' contributions would not be treated as loans with priority to equity; and the parties agreed their contributions would always be treated equally, the trial court commented repeatedly that the parties' business arrangement "makes no

sense." *E.g.*, 24T43:12-13, 46:20-24. Furthermore, the trial court arbitrarily reduced Defendant's equity in the entity from 50% to 40% in contravention of statutory requirements and the settled principle under New Jersey law that "equity abhors a forfeiture." The court then compounded its error by ordering a buyout instead of dissolution, providing the buyer a windfall since the entity's only assets are real properties and given the significant tax impacts on the compelled seller which the trial court acknowledged but refused to consider because he is "not a tax judge." 25T114:10-11.

The parties each moved for reconsideration and filed additional motions regarding the relief in the July 28 Order. The trial court issued an oral opinion on August 23, 2023 ("August 23 Opinion"), followed by the Final Order on August 24, 2023, which denied Defendant's motions and granted in part Plaintiff's motion. That decision was erroneous because, inter alia, the trial court failed to apply the correct standard and ignored its July 28 Order. The trial court, moreover, refused to address Defendant's requests to clarify the Final Order. The trial court's error-riddled rulings provide Defendant with only a fraction of the value of the company he spent years developing. Accordingly, the trial court's decisions should be reversed, and the matter remanded for a new trial to avoid a miscarriage of justice.

PROCEDURAL HISTORY

On September 11, 2018, Plaintiff commenced this action alleging Defendant had mismanaged Attessa properties, misappropriated Attessa funds, and breached his fiduciary duties. Da1. Defendant and Attessa filed a Counterclaim on November 1, 2018 alleging Plaintiff had violated his contractual, statutory, and fiduciary duties to Attessa and its members by failing to contribute necessary capital to Attessa. Da19. In late 2018 and 2019, the trial court entered orders appointing various third-party professionals, including a forensic accountant, property manager, Special Fiscal Agent, and Special Discovery Master (the "SDM").[1] Da138; Da140; Da144; Da146.

On December 6, 2019, Plaintiff filed an Amended Verified Complaint in which he recharacterized his claims as both individual and derivative on behalf of Attessa. Da37. Defendant filed a Verified Answer and Counterclaim on January 21, 2020. Da75. Throughout 2020 and 2021, the parties engaged in discovery and filed multiple discovery motions. In connection with those motions, the SDM entered several orders addressing discovery disputes among the parties, including an order on October 4, 2021 precluding Defendant from

[1] On August 16, 2019, the trial court entered a consent order dismissing the matter without prejudice, with all rights and remedies of the parties preserved and all prior orders remaining in full force and effect and granting the parties' leave to refile their respective claims. Da1850.

providing certain evidence at trial demonstrating he used funds from his personal home equity line of credit ("HELOC") to acquire Attessa properties. Da159.

A bench trial before Hon. Edward A. Jerejian, P.J.Ch. commenced on October 12, 2021, and proceeded on various dates through January 2022.[2] On the first day of trial, the trial court entered an order denying Defendant's motion to appeal and vacate the SDM's October 4, 2021 Order. Da241. On December 20, 2021, the trial court entered an order precluding Defendant's expert from testifying that any HELOC funds were used for Attessa business purposes despite evidence to the contrary. Da243.

Following trial and the parties' submission of proposed findings of fact and conclusions of law, the Court issued its July 28 Order entering judgment in favor of Plaintiff on certain of his causes of action and dismissing others,

[2] References to trial transcripts are as follows: October 12, 2021 (1T); October 13, 2021 (2T); October 14, 2021 (3T); October 18, 2021 (4T); October 19, 2021 (5T); October 20, 2021 (6T); October 21, 2021 (7T); October 25, 2021 (8T); October 27, 2021 (9T); November 1, 2021 (10T); November 1, 2021 (Vol. 2) (11T) (transcript rejected as partially duplicative of 10T); November 3, 2021 (12T); November 16, 2021 (13T); November 18, 2021 (Vol. 1) (26T); November 18, 2021 (Vol. 2) (14T); November 29, 2021 (15T); November 30, 2021 (16T); December 1, 2021 (17T); December 2, 2021 (18T); December 9, 2021 (19T); December 21, 2021 (20T); December 22, 2021 (21T); January 4, 2022 (22T); and January 5, 2022 (23T). The trial court rendered oral decisions on July 27, 2022 (24T) and August 23, 2023 (25T).

dismissing Defendant's counterclaims, and crafting equitable relief regarding the parties' membership interests in Attessa. Da245. Specifically, the trial court entered judgment in Plaintiff's favor on his dissolution, breach of fiduciary duty, unjust enrichment, conversion, breach of contract, and implied covenant counts and dismissed Plaintiff's remaining counts with prejudice. With respect to remedies, the July 28 Order provides Plaintiff shall receive $1,198,220.00 off the top of the net (value minus liens) of Attessa's properties. Da245. It further provides that the remaining net shall be divided sixty percent (60%) to Plaintiff and forty percent (40%) to Defendant and Plaintiff shall have the initial right to buy out Defendant's interest. Id. Additionally, the July 28 Order provides for the liquidation of the Attessa portfolio and division of the proceeds, if the parties cannot agree on a buyout or division of properties. Id. In its July 27 Opinion, the trial court repeatedly criticized the parties for their imprudent business decisions and conduct through the litigation, expressed confusion about their business relationship, and recited the parties' respective arguments, but made virtually no findings of fact to support the legal conclusions in the July 28 Order. See generally 24T.

On August 17, 2022, Plaintiff filed a motion seeking reconsideration of the trial court's July 28 Order. Da247. Meanwhile, Harris Appraisals 1 LLC ("Harris") began preparing updated appraisals for each of the Attessa properties.

The final appraisal, of 263 Sutton Avenue, is dated November 8, 2022. Based on the updated Harris appraisals, the total appraised value of the properties was $7,850,000, and the total net equity value of Attessa's portfolio was $4,713,900.77, using mortgage amounts as of August 1, 2022. Da1077.

On December 17, 2022, Defendant filed opposition and a cross-motion for reconsideration of the July 28 Order, including his certification ("Reconsideration Certification"). Da254. In his cross-motion, Defendant asserted the trial court erred in awarding Plaintiff a $1,198,220 "off the top" repayment of contributed capital that the Court viewed as a loan and in granting Plaintiff a 60% interest in the remainder of Attessa's assets. Id. Defendant demonstrated the $1,198,220 was inaccurate as it failed to account for funds Plaintiff received back and included funds contributed before the formation date. Id.

On February 15, 2023, Plaintiff's counsel sent a letter to SFA Strasser to "advise that [Plaintiff] intends to buy out Mr. Zisa's interests as expressly authorized by Decretal Paragraph 1 of the [July 28] Order." Da1073. The February 15 letter further requested that SFA Strasser calculate the buy-out amount. Id. By letter dated February 22, 2023, SFA Strasser provided the parties with the requested preliminary calculations and concluded that Plaintiff could buy out Defendant's interest for $1,406,272.31. Id. SFA Strasser concluded: "In

the event the parties desire to exercise the buyout as contained in the Court's Order, please advise and I will obtain updated figures relating to any and all current outstanding professional fees." Id. Following the SFA's February 22 letter, Plaintiff took no steps whatsoever to exercise the buyout. Da1075. Thus, although Plaintiff had initially expressed his intention of buying out Defendant's interest in the February 15 letter, he failed to timely exercise that option. Defendant was not afforded the right to purchase, and Plaintiff did not otherwise agree to a distribution of the undisputed percentage of the gross property value despite efforts to do so. Id.

On June 6, 2023, Defendant filed a motion seeking to enforce and modify the trial court's July 28 Order on the basis that Plaintiff's time to exercise his right under the July 28 Order to buy Defendant's interest in Attessa had expired. Da1066. On June 30, 2023, Plaintiff opposed Defendant's motion and filed a cross-motion to enforce the buyout provision of the July 28 Order and schedule briefing of Plaintiff's application for attorneys' fees, costs, and interest. Da1092. Plaintiff filed his application for attorneys' fees, costs and interest on July 28, 2023. Da1105.

The trial court set forth its oral opinion on the record on August 23, 2023 ("August 23 Opinion") and entered its Final Order on August 24, 2023. T25; Da1566. The trial court denied Plaintiff's request to strike portions of

Defendant's cross-motion for reconsideration, denied both parties' motions for reconsideration, denied Defendant's motion to enforce and modify the July 28 Order, granted Plaintiff's cross-motion to enforce the buyout provision of the July 28 Order, and awarded Plaintiff $77,072.50 in attorneys' fees. Da1566. The Final Order provides as follows with respect to the buyout procedures:

> 5. Plaintiff will be permitted to exercise the option to buy out Defendant's interest in accordance with paragraph 1 of the July 22 [sic], 2022, order within ten (10) days of the date of this order. If Plaintiff does not exercise the option to buy out the Defendant's interest within ten (10) days, then Defendant may then exercise the option to buy out Plaintiff's interests in accordance with Paragraph 1 of the July 27 [sic], 2022, Order within ten (10) days. If the option to exercise the buyout is made by either party, then the SFA shall calculate the distribution of proceeds pursuant to Paragraph 4 of this Order. If either party exercises the option to buy out the other, then as of the date of this order, they shall be responsible for any further management fees and carrying costs of the properties and shall bear the costs and expenses of transferring title to the property and refinancing the loans.
>
> 6. If neither Plaintiff nor Defendant exercises the option to buy out the other party, then the SFA shall in accordance with Paragraph 1 of the July 27 [sic], 2022, Order be authorized to obtain a realtor and have the properties sold and, after the customary closings costs are paid and, similarly, any fees owed to the court-appointed professionals are paid, then the proceeds of the sale shall be divided sixty percent (60%) in favor of the Plaintiff and forty percent (40%) in favor of the Defendant, with the subtraction of the attorney fee award of $77,072.50, pursuant to Paragraph 4 of this Order, from Defendant's proceeds. If either party exercises its option as stated above, they will be solely responsible for the property management fees begging [sic] as the [sic] date of this order.
>
> [Da1566].

Like the July 27 Opinion, the August 23 Opinion was largely devoid of factual findings, let alone factual findings to support the conclusions in the Final Order. See generally T25.

On September 1 and October 6, 2023, respectively, Defendant filed letters requesting clarification of the Final Order. Da1569; Da1572. On October 10, 2023, the Court advised the parties via email that it did not intend to amend or otherwise clarify the Final Order. Da1586. This appeal followed. SFA Strasser thereafter filed motions seeking (i) approval to sell an Attessa property and (ii) authorization to effectuate the buy-out under the Final Order. Defendant opposed those motions and cross-moved to remove SFA Strasser as Attessa's special fiscal agent, including for his failures in properly applying the Court's Final Order. As of the filing of this brief, those motions remain pending.

STATEMENT OF FACTS

A. History of the Parties' Business Model and Relationship

In or around 2010, Plaintiff approached Defendant, whom he knew had an extensive real estate background, about entering into business together to acquire distressed real estate properties that were in despair, add value through renovating the properties, rent the properties and then refinance the properties to recycle cash. 13T19:1-25, 20:1-13, 21:14-25, 22:1-25. Defendant agreed to partner with Plaintiff based on Plaintiff's representations that Plaintiff would

provide all funding for the venture and leverage his connections in the financial world. 13T43:7-25, 44:1-15. In return Defendant would contribute his time and real estate expertise in locating properties and overseeing the properties until they were renovated and stabilized. Id. The parties agreed that, once tenants were secured, they would share in the cash flow and hire a third-party manager to manage the properties. 13T21:14-25, 22:1-25, 46:16-25, 47:1-9. The parties further agreed and understood that the properties they acquired would be held for the full 20-year amortization period. 13T22:20-23.

Between April 2011 and July 2015, Plaintiff and Defendant acquired 12 properties. 13T50:7-11. Consistent with their agreement, Plaintiff and Defendant operated as a de facto partnership and owned the properties 50/50 as tenants in common, with both of them appearing on the deeds and mortgages. 13T46:9-15. Plaintiff provided the capital to acquire and renovate the properties. 13T25:3-9. Defendant would identify what renovations were needed at a particular property prior to purchase and included this information in initial investment models which were shared with Plaintiff. 13T54:2-25, 55:1-29, 54:22-25, 55:1-19, 61:3-25. Post-acquisition, Defendant oversaw extensive renovations that increased the value of the properties so the parties could attain higher rents and refinance the properties freeing up capital to continue. 3T62:19,

66:8, 70:23-72:5, 75:16-93:10; see 4T4:22-25, 5:1-23, 19:5-14, 22:20-25, 23:1-7, 24:13-17.

1. The Port Imperial Property

In 2011, the parties acquired a parcel located at 24 Avenue at Port Imperial, Unit 412, West New York, New Jersey ("Port Imperial Property"). 15T24:25-26:23. Although title to the Port Imperial Property was placed in Plaintiff's name, the parties had agreed the property would be owned jointly after Plaintiff decided he would not live there. Defendant located the property back in 2010 just after Plaintiff started discussing going into business with Defendant. Id. Like the other properties the parties subsequently purchased together, Defendant located the property, negotiated the purchase, interacted with the lender, attended the appraisal and home inspection, repaired the property, marketed the property to tenants, drafted the terms of the lease, and communicated with the tenant and property management team with the expectation that he would own the property jointly with Plaintiff. 15T29:20-30:23, 31:7-32:2, 39:13-40:12. Plaintiff, however, never added Defendant to the deed as they had agreed. 15T26:24-27:19. Nevertheless, Plaintiff delegated responsibility for all communications with the tenant and management company to Defendant, who took on these responsibilities as he did with the other properties in the portfolio because he understood it to be a joint property.

15T29:20-30:23, 31:7-32:2, 39:13-40:12. Plaintiff, however, later refused to acknowledge his agreement with Defendant that the Port Imperial Property was to be jointly owned. 15T32:16-22, 34:4-35:10.

2. The Formation of Attessa Properties LLC

In or around August 2015, Plaintiff—worried about his credit and professional reputation as a public figure in the finance world—requested the parties form an entity so he could shelter his property ownership interests from the public and avoid personal liability. 26T68:10-71:8. The parties retained counsel to form an LLC and prepare an operating agreement to provide to the refinancing lenders. See Da1600. Plaintiff and Zisa each received a 50% ownership interest in the company, with Plaintiff getting equity for his financial contributions and Zisa getting equity for his management and operational contributions; critically, the parties intended and understood that any prior outstanding financial obligations to either partner would be forgiven and title in all 12 jointly owned properties would be transferred to the entity. 26T71:22-72:1. Each party executed the Operating Agreement for Attessa on August 31, 2015, so that the scheduled refinancing closings could occur. 26T71:15-18; Da1600. The jointly-owned properties were then transferred to Attessa. 20T73:14-75:3; Dca349.

After the Operating Agreement was executed, the parties' initial business model of purchasing distressed real estate properties, renovating them, renting and then refinancing and holding them for the full amortization period was to remain in place. 13T21:14-25, 22:1-25; 5T17:24-19:15. Similarly, the parties' respective obligations were to remain the same. 13T43:7-44:3; 19T17:24-19:15.

3. The Post-Attessa Formation Period

After forming Attessa, the parties purchased two additional properties in September and December 2015. See Da1599. One of these properties required Defendant to contribute his own personal funds because Plaintiff began withholding capital days before the closing and after the parties were already committed to the transaction. 14T133:1-134:14. From March to September 2016, the parties purchased an additional five properties, some of which required Defendant and his parents to provide capital. See Da1599.

During this period and through 2017, Plaintiff began to deviate from the parties' business plan as he started to fail to contribute the additional capital needed to renovate the properties. 5T55:17-56:13; 15T18:23-19:15, 22:12-23:3. As a result, in November 2017, Defendant provided Plaintiff with resolutions to refinance certain properties so that the entity could generate cash to complete outstanding renovations. 15T17:17-20:4; see Da2497. Defendant also had discussed with Plaintiff refinancing certain pre-formation properties that had

increased in value to generate the much needed cash for the company due to Plaintiff's actions. 15T21:12-22:4. Ultimately, Plaintiff refused to refinance these properties resulting in significant damages to the company as it began to incur rent losses. 15T22:12-20.

B. The Formation of Attessa Served as a "Reset" of the Parties' Obligations.

When Attessa was formed on August 31, 2015, any obligations to either member were wiped clean and no loans were outstanding to Plaintiff. 26T75:12-16, 76:17-23; see also Da1601. At that time, after receiving back through the various refinancings most of the money he had contributed, Plaintiff had contributed unreturned capital of roughly $349,000.00. 20T81:12-83:6; Dca354-Dca355. Defendant, who was a highly qualified, experienced residential real estate investor with professional experience, was not compensated for his management and operational services. Id. If he had been, based on the understanding between the parties in 2011, Defendant's salary for the four-year pre-formation period would have been $544,000.00, which was $195,000.00 more than the unreturned funds to Plaintiff. Id. As such, wiping the outstanding pre-formation funds contributed by Plaintiff was consistent with the parties' understanding and Operating Agreement, since each provided roughly the same value to the entity. Id.; 19T17:24-18:14. This equivalence of contributions is further demonstrated by the tax accounting capital accounts, which were

identical to each other. 26T76:6-78:12; 20T82:5-13. While a "non-recourse loan" is shown on Attessa's tax returns, and was being written down to zero over time, it is not listed as due to Plaintiff in lines 7a or 19a, where such loans to partners would be reflected. The 2015 and 2016 filed Attessa tax returns reduce the amount of non-recourse loans from $713,000 in 2015 to $524,997 in 2016 and the draft 2017 return reduces it to $457,682, and all returns leave blank the line item on the return for "loans from partners," demonstrating there were no loans due to Plaintiff or Defendant. 26T76:6-77:16; Dca16, Dca141; Da2012; 26T77:17-78:14. The parties' mutual understanding is further reinforced by the absence of any promissory notes or any other formal loan document between Plaintiff, Defendant and/or Attessa setting forth the loan terms, loan amount, the interest rate, or any other paper that would ordinarily accompany a loan from a partner. 4T88:16-20; 12T88:15-23, 12T89:18-22; 20T26:23-28:9.

C. Amounts for Which Defendant Went Unreimbursed

In his management role, Defendant was not reimbursed for operating costs he incurred that are ordinary and necessary for a real estate entity owning multiple properties. 14T171:8-20. Specifically, Zisa incurred mileage expenses associated with driving from property to property and traveling to pick up supplies needed for renovations and repairs. Dca358. Zisa also was not reimbursed for other ordinary business expenses such as tolls, providing office

space, utilities, technology necessary for Attessa operations, such as his cell phone, computer, printer, internet, utilities, office supplies, and Zisa's professional fees associated with his real estate license. Id. Moreover, Zisa was not compensated for handling maintenance at the properties, legal matters, and leasing, which, importantly, were services provided by Zisa above and beyond his day-to-day responsibilities. Id. Finally, as a function of Plaintiff filing this lawsuit and naming Attessa as a separate defendant, Defendant, as the managing member of Attessa, was required to retain counsel for Attessa, as well as a professional accountant to defend against Plaintiff's allegations dating back to 2018. Da1906; Dca358; 20T:134:15-135:10. Defendant expended his own personal funds to retain a lawyer and a forensic accountant for Attessa. Id. Defendant also incurred significant costs assisting Plaintiff with a real estate venture in California for which he went unreimbursed. Dca360; 14T149:17-150:13, 148:13-149:16.

D. Defendant Maintained Financial Records for Attessa

During the course of their business relationship, Defendant shared documents regularly with Plaintiff through an online communal Dropbox portal. 15T4:21-5:9. The Dropbox contained several documents, including jointly-developed monthly portfolio models which listed all the properties and detailed the date the property was acquired, the closing costs, the income generated once

rented, the expenses, loan information, calculated monthly appreciation increases, amortization pay downs, and the equity in each property calculated in terms of the market value. 15T6:2-24.

Among one of the most important documents shared through the Dropbox was the parties' tax worksheet in the form of the parties' Schedule E tax return and which the parties relied on in filing their own individual tax returns. 15T7:2-14. The tax worksheet was updated by Defendant on a nearly weekly basis and contained individual line items for each specific property such as the insurance, mortgage interest, real estate taxes, repairs, supplies, taxes, and utilities. 19T11:1-8; Dca308. The tax worksheet also listed for each property the amount capitalized yearly due to renovations. 13T70:3-22; Dca308. Plaintiff, a highly sophisticated financier, never once objected to the accounting or recordkeeping employed by Defendant. 4T15:16-17:10; 15T9:12-13:20; Dca308, Da2511-Da2514, Da2518-2625, Da2798.

E. The Expenses of Attessa Were Reasonable and Resulted in Significant Returns.

The expenses of Attessa were consistent with other similarly situated real estate entities as the majority of its expenses were mortgage payments, which constituted close to 70% of the expenses, and items such as insurance, taxes, utilities, repairs and maintenance costs. 20T42:8-44:5, 45:12-46:12; Dca343. Particularly, when comparing Attessa to other similarly situated real estate

entities, Attessa's expenses and the percentages allocated to certain categories were consistent with the industry norms. 20T51:12-52:12.

The rental income for Attessa increased consistently each year under Defendant's management from 2017 through 2019. 20T42:20-44:5; Dca342. More specifically, based on the income growth of Attessa coupled with the fact that most of the expenses were documented, no mismanagement of Attessa's assets was demonstrated. 20T129:25-130:16.

As documented in the Harris appraisals, the improvements were reasonable business expenses that contributed to the increase in value of the properties in Attessa's portfolio. Id.; Da1077. Pursuant to those April 2019 appraisals, the total fair market value of the properties in Attessa's portfolio as of that date was approximately $7,481,199.99. 20T100:21-101:25; Dca357. By contrast, the entire Attessa portfolio was purchased for a total of only $5,175,836 - a difference of $2,305,363.99. Da1600. Given the significant returns and property appreciation under Defendant's management, there was no record support for a finding that Attessa assets were mismanaged. 20T114:3-115:6. Indeed, the trial court complimented Zisa in this regard. 24T22:2-7, 47:6-9.

LEGAL ARGUMENT

I. THE TRIAL COURT FAILED TO MAKE APPROPRIATE FACTUAL FINDINGS TO SUPPORT THE JULY 28 ORDER AS REQUIRED BY RULE 1:7-4(A) (Da245; Da1566; 24T; 25T).

The trial court erred by failing to make sufficient findings of fact to support its July 28 Order. Rule 1:7-4(a) provides "[t]he court shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon in all actions tried without a jury . . . ." To comply with Rule 1:7-4(a), "the court must articulate factual findings and correlate them with the principles of law." Edelglass v. Pogorzhelsky, A-0418-18T3, 2020 WL 1845536, at *3 (N.J. Super. Ct. App. Div. Apr. 13, 2020) (citation omitted); Heinl v. Heinl, 287 N.J. Super. 337, 347 (App. Div. 1996). "[A] trial judge's findings in a bench trial should be sufficient to enable the reviewing court 'to evaluate what elements the judge considered . . . to determine legal error.'" State ex rel. H.M., A-3079-10T4, 2012 WL 2308457, at *5 (N.J. Super. Ct. App. Div. June 19, 2012) (citations and internal quotations omitted). "When that is not done, [the Appellate Division's] review is impeded, and a remand is necessary." Edelglass, 2020 WL 1845536, at *3 (citation omitted).

In Edelglass, the Appellate Division reversed and remanded with the instruction that the trial court make factual findings and legal conclusions to support its rulings. The Appellate Division reasoned that "[t]he trial court here did not adequately explain its reasons for dismissing plaintiff's complaint with prejudice," noting the court's failure to make a credibility assessment or address the significance of any testimony and exhibits. Edelglass, 2020 WL 1845536, at

*3. The Appellate Division further explained that the trial court "merely made conclusory statements that plaintiff failed to prove her case by a preponderance of the evidence." Id. On that basis, the Appellate Division determined it was "constrained to vacate the [trial] court's two orders and remand the case to the trial court to make findings of fact and conclusions of law consistent with [its] opinion and Rule 1:7–4(a)." Id. Here, because the July 28 Order was unaccompanied by the required factual findings to support the legal conclusions memorialized therein, remand is similarly warranted. The July 27 Opinion is a rambling, disconnected piece, largely devoid of factual findings, and certainly does not take the necessary step of correlating any factual findings with the principles of law upon which the trial court based its decisions, which are likewise mostly unidentified. Neither the Final Order nor the August 23 Opinion remedies the absence of factual findings to support the conclusions in the July 28 Order. In the July 27 Opinion, the trial court repeatedly acknowledged the parties' competing proffers relating to critical issues but declined to adopt one or the other as its own findings of fact as required by Rule 1:7–4(a). 24T37:23-38:2, 32:17-24, 29:11-13. In other words, unwilling to grapple with the extensive testimony and complicated record, the trial court threw up its hands. Instead of arriving at specific factual findings by weighing the record evidence and analyzing the elements of the parties' claims based on those findings, the

trial court made wholly conclusory rulings with respect to the parties' respective causes of action. The court summarily dismissed all of Defendant's counterclaims with no explanation whatsoever. See 24T28:11-29 (reciting each count of Defendant's counterclaim and stating, "I considered all that carefully, and there is no facts [sic] in my mind to support by a preponderance of the evidence that any of these have merit"). That failure alone constitutes grounds for remand.

The trial court's discussion in the July 27 Opinion of Plaintiff's affirmative claims fares no better. See 24T39:4-41-3, 51:6-24. With respect to the counts on which the trial court entered judgment in Plaintiff's favor, the court supported its rulings with a conclusory explanation. 24T51:6-16. The trial court did not even identify the elements of the subject claims under New Jersey law, much less specify any facts supporting its apparent conclusion that Plaintiff had proved each such element by a preponderance of the evidence. Like the trial court in Edelglass, the trial court here, "without specifically indicating its credibility assessment of the parties' testimony or the significance of any testimony and exhibits, merely made conclusory statements[.]" Edelglass, 2020 WL 1845536, at *3. Such statements do not satisfy the standard under Rule 1:7–4(a) as a matter of law.

Without meaningfully analyzing the parties' claims or finding facts to support Plaintiff's claims or a lack of facts supporting Defendant's claims, the trial court imposed equitable relief that was divorced from the realities of the parties' business relationship and grossly inequitable, as discussed at length in section II, infra. The absence of underlying factual findings or analysis as to the counts on which the trial court entered judgment in Plaintiff's favor is particularly problematic because the trial court seemingly crafted its equitable remedies by considering Defendant's liability on those counts. For example, and without limitation, the July 28 Order provides that "[t]he remaining net [of Attessa equity] shall be divided sixty percent (60%) to Plaintiff and forty percent (40%) to Defendant (the difference being compensatory damage)." Da245, ¶ 1. The trial court never found that any damages were suffered by Plaintiff or the entity. Furthermore, the trial court's decision to afford Plaintiff the first option to buy out Defendant's interest in Attessa appears to be attributable to its rulings with respect to Plaintiff's Counts 3, 5, 6, 7, 10, 12, 15, and 16. That the parties and this Court are left to guess at the particulars of the trial court's findings and rulings demonstrates reversible error. Moreover, the trial court's failure to issue sufficient findings of fact to support its entry of judgment on those counts implicates all aspects of the July 28 Order and the Final Order, which is premised on the unsupported conclusions in the July 28 Order. Accordingly, this

Court should vacate the July 28 Order and Final Order and remand the case for further proceedings based on the trial court's noncompliance with Rule 1:7-4(a).

II. THE JULY 28 AND FINAL ORDER ARE BASED ON A FUNDAMENTAL MISUNDERSTANDING OF THE PARTIES' BUSINESS MODEL AND RELATIONSHIP (Da245; Da1566; 24T; 25T)

The rulings in the July 28 Order and Final Order not only lack adequate supporting factual findings, they are based on a fundamental misunderstanding of the parties' business model and relationship contrary to the record evidence. The sparse factual findings and the legal conclusions of the trial court were so "wide of the mark" as to require this Court to ignore them and reverse. Llewelyn v. Shewchuk, 440 N.J. Super. 207, 214 (App. Div. 2015).

Critically, in its July 28 Opinion, the trial court expressed confusion on several occasions regarding the parties' relationship, specifically as to why they would agree to a business plan under which Defendant would not be compensated. For example, the trial court noted: "So you have a business plan where you are going to do all this, but the person running it and basically turning it into a job, is not going to be compensatated. It is obviously going to cause problems." 24T12:4-7. The trial court further stated: "So I don't know what these two were thinking. I guess Mr. Zisa sits down and says, all right, I work for free from 2011 to '15, so I guess now I will sign up to keep working for free. You know, it makes no sense." 24T46:20-24; see also 24T18-22; 46:3-7. The

trial court overlooked the record evidence establishing that there was a mutual understanding, since day one, that Defendant would earn and maintain his 50% interest, which would appreciate over time, by acquiring, developing, and managing the properties, while Plaintiff would earn and maintain his 50% interest through his continued financial contributions. 26T71:22-72:1. They also understood that once the properties were stabilized, the parties would have hired a third-party property manager. Id. The rulings memorialzed in the July 28 Order and the Final Order were unsupported by adequate, substantial, credible evidence, and the trial court's attempt to do rough justice by disrupting the arrangement reached by two sophisticated parties through arms-length dealings was a clear abuse of discretion as explained further below.

A. The Trial Court Erred by Concluding Plaintiff Should Be Repaid His "Trapped Capital" (Da245; 24T50:11-16)

The trial court's award to Plaintiff of an "off the top" payment in the amount of $1,198,220.00 was necessarily predicated on two incorrect assumptions: first, that Plaintiff would receive not only his 50% equity interest in the company in return for his financial contributions, but would also be repaid those amounts in their entirety, and second, that Defendant's contributions - whether financial, time, or otherwise - would not be valued in any separation of the partners. The trial court's factual findings in this regard are not "supported

by sufficient credible evidence in the record." State v. Mohammed, 226 N.J. 71, 88 (2016) (quoting State v. Gamble, 218 N.J. 412, 424 (2014)).

The record is devoid of evidence that the parties intended to treat Plaintiff's contributions to the venture, whether pre- or post-formation of Attessa, as loans with priority to equity. By contrast, there is substantial record evidence, which the trial court disregarded, establishing that the parties always intended and understood that their respective interests would remain 50/50. 14T71:22-72:1. Indeed, undisputed documentary evidence - including emails, the Attessa operating agreement, and tax returns - confirms this mutual understanding. 14T71:15-18; Da1600. As Plaintiff conceded during his trial testimony, there are no writings or any agreements, such as promissory notes or any other formal loan documents setting forth the alleged loan terms, loan amount, the interest rate, or any other paper that would ordinarily accompany a loan from a partner. 14T76:6-77:16; Dca16; Dca141; Da2012; 14T77:17-78:14. It is of no consequence that the parties' business model involved discretionary repayments to Plaintiff when the properties were refinanced, as Plaintiff's contributions lacked the fundamental traits of a loan under New Jersey law. See Tiernan v. Carasaljo Pines, 51 N.J. Super. 393, 404-05 (App. Div. 1958) (loan characterized by "an advancement of money by the lender at the time of agreement, and a stipulation or agreement to repay it and generally with interest,

at a future date, by the borrower"). Moreover, in the refinancings it was also anticipated that Defendant would be paid monies. 20T81:12-83:6; Dca354-Dca355.

Even if there were a valid basis to construe certain of Plaintiff's contributions as "loans" or "trapped capital," the trial court arbitrarily and without explanation failed to properly calculate that amount or to allocate any value to the financial contributions or work performed by Defendant, both pre- and post-formation of Attessa, in a similar fashion. Pursuant to the parties' original agreement and course of dealing, and as the trial court acknowledged, Defendant would be the person "on the ground" running the projects from purchase to stabilization, while Plaintiff would be the "money guy" providing all capital needed until the respective projects were refinanced. 24T31:7-9. Plaintiff was aware of and agreed to the sweat equity model for the purpose of compensating Defendant, and Defendant was largely responsible for the success and current value of Attessa. 13T19:1-25, 20:1-13, 21:14-25, 22:1-25, 43:7-25, 44:1-15. Additionally, Defendant was working as consideration not only for his equity interest in this entity, but to realize the appreciation, gains, and profits from this entity as a long-term investment, including taking monies out on refinancings. Id. The trial court failed to account for this fundamental premise of the parties' business relationship.

The trial court's rulings also inexplicably disregard evidence of amounts owed to Defendant for expenses he incurred for the benefit of Attessa. During the course of Defendant's management role, Defendant was not reimbursed in full for advancing operating costs that are ordinary and necessary for a real estate entity owning multiple properties, including overhead, mileage, and other business expenses. 14T171:8-20; Dca358. Nor did the trial court account for the lack of any compensation to Defendant for overseeing the renovations of the properties, which were services provided by Defendant above and beyond his day-to-day responsibilities. Dca358. In addition, the trial court failed to account for the substantial expenses Defendant incurred in connection with Plaintiff's California venture. 14T149:17-150:13.

At bottom, the Court departed from the business model agreed to by the parties and calculated an arbitrary award in favor of Plaintiff that ignored entirely Defendant's side of the ledger upon a separation of the parties. Accordingly, because Plaintiff's entitlement to a priority payment of $1,198,220 was unsupported by sufficient credible evidence—and in fact is contrary to the record evidence and based on miscalculations[3]—the trial court erred in awarding

[3] Putting aside the trial court's error arising from its misapprehension of the parties' business model, the trial court also committed reversable error by using demonstrably inaccurate calculations to arrive at the $1,198.220.00 figure. At a minimum, that calculation did not account for two checks received by Plaintiff (continued…)

Plaintiff that amount without crediting Defendant for the work he performed and his other contributions to the company.

B. The Trial Court Abused Its Discretion in Arbitrarily Awarding Plaintiff Twenty Percent (20%) of Defendant's Interest in Attessa (Da245;24T48:19-24)

The trial court exceeded its authority and erred in taking the extraordinary action of reallocating Attessa equity interests from the agreed upon 50/50 ownership between the members to 60/40 in favor of Plaintiff. The trial court's order directs that, after Plaintiff receives $1,198,220.00 off the top of the net value of the properties, "The remaining net shall be divided sixty percent (60%) to Plaintiff and forty percent (40%) to Defendant (the difference being compensatory damages)." Da245. No explanation was provided for this award of so-called "compensatory damages." By divesting Defendant of 10% of the ownership interest in Attessa (valued at approximately $800,000), the trial court's decision deprives Defendant of the fruits of his labors, thwarts the parties' expectations, and violates their operating agreement. The trial court's exercise of its equitable authority in this manner constitutes an abuse of

---

totaling $5,144, among other payments received by Plaintiff that the trial court failed to consider. Da1569. Thus, even assuming arguendo that an "off the top" payment to Plaintiff were warranted (it is not), the amount calculated by the trial court was plainly inaccurate.

discretion subject to reversal. In addition, reversal is warranted because the trial court did not support the transfer of ownership interest "by reference to any precise figures or calculations rooted in the evidence." Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp., 100 N.J. 166, 174 (1985).

First, the trial court failed to identify a valid legal basis supporting a reduction of Defendant's equity interest, much less in the amount of 20%. The trial court's determination was not attributable to any identified expenses or other payments that the trial court found were unaccounted for, nor was it made on account of any specifically identified misconduct. Rather, the trial court's ruling was nothing but an arbitrary, and very significant, reallocation of equity in an entity that the parties always intended and agreed would be owned 50/50. The relief fashioned by the trial court contravenes the parties' contractual arrangement and runs afoul of the well-settled legal principle in New Jersey that "equity abhors a forfeiture." Brunswick Bank & Tr. v. Heln Mgmt. LLC, 453 N.J. Super. 324, 330 (App. Div. 2018) (quoting Dunkin' Donuts, 100 N.J. at 182).

In Dunkin' Donuts, the Supreme Court of New Jersey addressed the limits of a Chancery Division judge's equitable powers, holding there was no legal basis for the judge to interfere with the parties' contractual relationship on the basis of "equitable considerations." 100 N.J. at 175. The same principles hold

true here and require reversal of the trial court's arbitrary transfer of Attessa membership interests among the parties. Like the Chancery Division judge in Dunkin' Donuts, the trial court here acted beyond its equitable authority by "molding [a] creative remedy" that wholly disregarded the parties' agreement - memorialized in the Operating Agreement and elsewhere - that they each hold a 50% interest in Attessa. Id. Similarly, the trial court improperly "eschewed strict enforcement" of the Attessa Operating Agreement and improperly modified the contractual positions of the parties. Id.; see also Namerow v. PediatriCare Associates, LLC, 461 N.J. Super. 133 (Ch. Div. 2018). The trial court's decision should be reversed for these reasons as well.

Second, putting aside the error of the trial court's arbitrary transfer of Defendant's ownership interest in Attessa, its decision to impose that relief should be reversed for the additional reason that Plaintiff's conversion claim was not supported by substantial credible evidence.[4] Although the Court apparently based its ruling on a finding that Defendant had misappropriated funds from Attessa, absent from the July 27 Opinion is any reference to evidence of specific misappropriation that occurred or the value of it. Indeed, throughout its oral ruling, the Court repeatedly acknowledged that the record was bereft of

[4] Significantly, the trial court dismissed with prejudice Plaintiff's Count 2, which sought a declaration that Defendant's interest in Attessa had been diluted. Da245.

evidentiary support in this regard (see, e.g., 24T31:25-32:2 ("So we had these direct and indirect transactions. And they are really impossible to pin down.")), and even noted that Plaintiff had failed to satisfy his burden in establishing his claim for conversion by indicating that the amount of funds was unknown (see, e.g., 24T32:22-24 ("Do I know how much did [go out the window] and how much didn't? I don't know how you could. That is one of the problems.").[5] Yet, the trial court somehow still decided to reduce Defendant's ownership share in the company from 50% to 40%, at least in part on the basis that the Court "think[s] there was some conversion." 24T51:13. Respectfully, a finding that the trial court "thinks" there was some conversion, of some unidentified assets of Attessa, in some impossible to know amount, does not equate to a determination that Plaintiff has proved by a preponderance of the evidence his conversion claim or damages in the amount of $800,000 (the approximate value of a 10% interest in Attessa). Accordingly, the trial court's ruling in Plaintiff's favor on his conversion claim and its reduction of Defendant's ownership interest in Attessa from 50% to 40% was an abuse of discretion and must be reversed.

[5]In making this determination, the trial court incorrectly opined that there were no receipts for expenses. See 24T27:4-7; Dca351; Dca364; Dca366-Dca367.

C. The Trial Court Abused Its Discretion by Awarding Plaintiff a Buy-Out Right (Da245; 24T21:21-23, 22:2-17, 47:8-9)

The buy-out procedures the trial court fashioned provide Plaintiff with a priority right to buy out Defendant's interest in a company that Defendant spent nearly a decade developing based on the mutual understanding that the properties would be held for the full 20-year amortization period, and even though Plaintiff himself sought dissolution. Despite the trial court's praise of the "crown jewel" portfolio Defendant developed, the Orders stripped Defendant of his well-earned 50% ownership interest in those real properties, along with the significant tax and other investment benefits associated with holding real estate assets long term. See 24T21:21-23, 22:2-17, 47:8-9. The Orders should be reversed to prevent unquantifiable damage to Defendant and an unjustified windfall for Plaintiff. See Citibank, N.A. v. Errico, 251 N.J. Super. 236, 247 (App. Div. 1991) (equity courts have "inherent power to prevent a potential . . . windfall").

Though not expressly stated by the trial court, the buy-out procedures set forth in the July 28 Order the Final Order presumably arise from the trial court's decision to enter judgment in favor of Plaintiff on his claim for dissolution pursuant to N.J.S.A. 42:2C-48. Even assuming the trial court had articulated an adequate factual basis for entering judgment on that count, a forced buy-out

would not be the proper remedy under the circumstances. N.J.S.A. 42:2C-48b permits a forced sale of a party's interest only "if the court determines in its discretion that such an order would be fair and equitable to all parties under all of the circumstances of the case." Cf. Musto v. Vidas, 281 N.J. Super. 548, 561 (App. Div. 1995) (forced buy-out warranted only where it would be "fair and equitable to all parties").

Here, considering all the circumstances of this case, it is not fair and equitable to deprive Defendant of the benefits associated with holding a long-term real estate investment, and the trial court abused its discretion by ordering a buyout, as opposed to dissolving the entity and distributing its assets to the owners. The record is clear that Defendant contributed years of his life, financial resources, and expertise into building Attessa's real estate portfolio, near his home and resources. See, e.g., 3T62:19, 66:8, 70:23-72:5, 75:16-93:10; 4T4:22-25, 5:1-23, 19:5-14, 22:20-25, 23:1-7, 24:13-17; Dca338. To avoid the inequitable outcome of depriving Defendant of his ownership interest in that portfolio and providing a windfall to Plaintiff, the trial court should have instead ordered a dissolution of the entity and distributed the properties in accordance with the parties' respective ownership interests.

The error of the forced buy-out remedy is amplified by the fact that the Operating Agreement is silent as to an exit mechanism in the event of deadlock

between the equal members. See Fisk Ventures, LLC v. Segal, No. CIV.A. 3017-CC, 2009 WL 73957, at *4, *7 (Del. Ch. Jan. 13, 2009), aff'd, 984 A.2d 124 (Del. 2009) (noting if deadlock "cannot be remedied through a legal mechanism set forth within the four corners of the operating agreement, dissolution becomes the only remedy available as a matter of law"). Although the Operating Agreement allows either party to leave voluntarily, it provides no insight regarding who should retain the LLC if both parties seek to buy the other out, and neither party desires to sell. Da1600. Nowhere in the Operating Agreement does Plaintiff have the right to force a buy out because of his disapproval of Defendant. Id. Because Defendant was not on notice of the possibility of a forced buyout of his interest in the company he developed for nearly a decade, the trial court exceeded its authority in granting that relief. See generally Dunkin' Donuts, 100 N.J. 166 (Chancery judges' equitable powers are constrained by parties' contractual expectations).

The inequitable nature of the trial court's remedy is compounded by the adverse tax ramifications faced by Defendant because of the forced buyout. Most significantly, the decision will potentially result in capital gains or ordinary income tax to Defendant (effectively decreasing Defendant's interest further), while Plaintiff remains protected due to the tax benefits associated with long-term real estate investments such as the availability of section 1031

exchanges and step up in basis on death. The trial court acknowledged the likelihood of these consequences generally but refused to engage with the issue; rather, the court admitted that it was not taking them into account in rendering his decision. 25T114:10-11. Considering the disadvantages to Defendant associated with a buy out of his interest, the trial court abused its discretion in implementing a forced buyout that was not fair and equitable to all parties, as opposed to a division of the properties to the parties.

III. THE TRIAL COURT ERRED IN DISMISSING COUNT ONE OF DEFENDANT'S COUNTERCLAIM REGARDING THE PORT IMPERIAL PROPERTY (Da245; 24T30:9-15)

In its July 28 Order, the trial court dismissed Count I of Defendant's counterclaim, which alleged Plaintiff breached his agreement to co-own the Port Imperial Property with Defendant. The trial court apparently based its decision on the premise that Defendant did not establish by a preponderance of the evidence that such an agreement existed. See Goldfarb v. Solimine, 245 N.J. 326, 338 (2021) (breach of contract plaintiff must prove "the parties entered into a contract containing certain terms"). The trial court's decision, however, was unsupported by the record evidence and, as such, should be reversed. As discussed, the record evidence establishes an agreement between Plaintiff and Defendant that the Port Imperial property would be jointly owned by the parties like all properties in the portfolio. Dca368; 15T29:20-30:23, 26:24-27:19, 31:7-

32:2, 32:16-22, 34:4-35:10, 39:13-40:12. In short, the evidence demonstrates that the partnership, through Defendant's efforts, supported the Port Imperial property fully. Because the trial court's decision dismissing Defendant's breach of contract claim asserting his interest in the Port Imperial property was not supported by substantial credible evidence, this Court should reverse that decision.

IV. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CROSS-MOTION FOR RECONSIDERATION (Da1566; 25T124:14-15)

Given the trial court's fundamental misapprehension of the parties' business relationship and the errors in the July 28 Order, Defendant cross-moved for reconsideration of that interlocutory order pursuant to Rule 4:42-2. In deciding Defendant's motion, the trial court committed reversable error by failing to apply the proper standard, which apparently led to its decision to not "give . . . any weight" to the Reconsideration Certification in support of Defendant's cross-motion for reconsideration. 25T124:14-15.

Rule 4:42-2 provides that interlocutory orders, such as the July 28 Order, "shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice." A motion for reconsideration under Rule 4:42-2 does not require a showing that the challenged order was "palpably incorrect," "irrational," or based on a

misapprehension or overlooking of significant material presented on the earlier application. Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021). Only "sound discretion" and the "interest of justice" guide the Court. Id. A trial court "has complete power over its interlocutory orders and may revise them when it would be consonant with the interests of justice to do so." Id. (quoting Ford v. Weisman, 188 N.J. Super. 614, 619 (App. Div. 1983)). Here, the trial court applied the standard under Rule 4:49-2 applicable to motions for reconsideration of final orders. See 25T129:10-16 ("Now, it's also been argued by [counsel] that the interest of judgment [sic] standard should apply because there hasn't been a final order. I don't really agree with that because we had a trial, we had a trial judgment, and, you know, there also could be no new motions filed and then it could be looked at as interlocutory."); see also id. at 25T128:2-129:9 (reciting at length standards under Rule 4:49-2 for reconsideration of a final order). That determination was erroneous because the June 28 Order did not address the issue of attorneys' fees, rendering the June 28 Order interlocutory as a matter of law. See Peterson v. Faizarano, 6 N.J. 447, 452-53 (1951) (holding an order should be deemed final only if it disposes of all issues of all parties).[6]

[6] Notably, Plaintiff agreed at the trial court that Rule 4:42-2 rather than Rule 4:49-2 applied to the parties' motions seeking reconsideration of the June 28 Order. See Da248.

Moreover, based on that improper legal conclusion, the trial court committed a further error of law by declining to even consider Defendant's Reconsideration Certification in support of his cross-motion for reconsideration. Even in the context of a motion for reconsideration of a final order under Rule 4:49-2, "if a litigant wishes to bring new or additional information to the Court's attention which it could not have provided on the first application, the Court should, in the interest of justice (and in the exercise of sound discretion), consider the evidence[.]" Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Where the even more flexible reconsideration standard under Rule 4:42-2 applies, see Lawson, 468 N.J. Super. at 134, the court should consider all evidence in its effort to reach a decision consonant with the interests of justice. See Town of Phillipsburg v. Block 1508, Lot 12, 380 N.J. Super. 159, 175 (App. Div. 2005) (reconsideration proper if "there is good reason for it to reconsider new information"). The Supreme Court has explained that when an interlocutory order is appealed the trial judge "is not constrained . . . by the original record." Lombardi v. Masso, 207 N.J. 517, 536-37 (2011). The Lombardi Court further reasoned:

> We presume that judges ordinarily will not be required to second guess themselves because most attorneys will advance the best case possible the first time around, thus obviating later theoretical or evidential surprises. But where that does not occur, for whatever reason, and the judge later sees or hears something that convinces him that a prior ruling is not consonant with the interests of justice,

> he is not required to sit idly by and permit injustice to prevail. In such an exceptional case, the judge is empowered to revisit the prior ruling and right the proverbial ship.
>
> [Id. (internal citation omitted).]

Here, although the trial court suggested it "considered both standards" and found that Defendant's cross-motion would be denied even under the "interests of justice" standard, 25T129:16-20, the court did not meaningfully apply that standard because it admittedly did not give Defendant's Reconsideration Certification "any weight" and stood strictly on the trial record. That certification was material to the trial court's determination of Defendant's cross-motion for reconsideration because, without considering it, the trial court could not know if it needed to revise its decision "consonant with the interests of justice." In fact, that certification highlighted critical materials admitted at trial and identified certain additional materials intended to correct the trial court's misapprehension of the parties' business relationship. See generally Da261. Rather than considering whether Defendants' certification would convince the court that its July 28 Order was not consonant with the interests of justice, however, the trial court "s[a]t idly by and permit[ed] injustice to prevail." Lombardi, 207 N.J. at 537. Thus, because the trial court applied the wrong reconsideration standard and failed to even consider Defendant's certification, its denial of Defendant's cross-motion for reconsideration was erroneous.

V. THE TRIAL COURT'S DECISIONS ON THE PARTIES' REPSECTIVE MOTIONS TO ENFORCE WERE ERRONEOUS (Da1566; 25T115:23-116:7)

After Plaintiff's right under the July 28 Order to buy out Defendant's interest had long elapsed, Defendant filed his motion to enforce and modify that order. Da1066. The trial court erred in denying that motion and declining to: (i) enforce the July 28 Order by finding that the parties' buy-out rights had lapsed, and (ii) modify that order to prevent the liquidation of Attessa's entire real estate portfolio - an outcome Plaintiff had conceded was not in the best interests of either party. The trial court explained its reasoning in the August 23 Opinion: "[Defendant's request is] just not practical in my mind and hopefully there are some tax solutions, but at some point there has to be a buyout." 25T115:23-116:3. In denying Defendant's motion on this basis, the trial court skirted its obligation to enforce the terms of the July 28 Order and ignored its own order by denying Defendant a right that was afforded to him. No stay of that order was ever requested, obtained, or entered, and no automatic stay resulted from the filing of the parties' respective motions for reconsideration or otherwise. Cf. Jarwick Developments, Inc. v. Wilf, A-5752-13T3, 2018 WL 2449169, at *4 (N.J. Super. Ct. App. Div. June 1, 2018) ("[A] party's obligation to perform under a trial court order is not automatically stayed by the filing of an appeal."). Additionally, by taking the initial steps to exercise his buy-out option under the

July 28 Order, see Da1072, Plaintiff waived any right to either seek a stay of the deadlines set forth in that order or argue they were stayed by operation of law. See Cole v. Jersey City Med. Ctr., 215 N.J. 265, 277 (2013) ("[A] party need not expressly state its intent to waive a right; instead, waiver can occur implicitly if the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference." (citation and internal quotations omitted)). Therefore, the trial court erred as a matter of law by refusing to conclude that Plaintiff's and Defendant's buyout options both lapsed under the terms of the July 28 Order. Because Plaintiff's time to exercise his buyout elapsed as a matter of law, the trial court's decision to nevertheless set a schedule for a buyout by Plaintiff of Defendant's interest in Attessa was erroneous.

VI. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING PLAINTIFF ATTORNEYS' FEES (Da1566; 25T122-123)

The trial court granted $77,072.50 in attorneys' fees to Plaintiff because (1) $27,000.00 was ordered by the SDM, and (2) in the initial period of the case (a different, dismissed case), the trial judge "th[ought] there was some bad faith." 25T122:6-7; 25T123:11-13. New Jersey has a strong public policy against the shifting of attorneys' fees, and the Supreme Court has embraced that policy by adopting the "American Rule," which prohibits recovery of counsel

fees by the prevailing party against the losing party except in very limited circumstances. In re Niles, 176 N.J. 282, 293-94 (2003) (citations omitted). The specific exceptions to this general rule are codified in Rule 4:42-9 and, in pertinent part, include "(8) in all cases where attorney's fees are permitted by statute." Here, because none of the exceptions set forth in Rule 4:42-9 applies, the trial court erred in awarding Plaintiff attorneys' fees.

A. Plaintiff Is Not Entitled to Attorneys' Fees Under the Revised Uniform Limited Liability Company Act (Da1566; 25T122-123)

While Plaintiff asserted he was entitled to an award of counsel fees under two provisions of the Revised Uniform Limited Liability Company Act (RULLCA) - N.J.S.A. 42:2C-72 (addressing derivative actions) and N.J.S.A. 42:2C-48(c) (addressing claims for dissolution) - neither of these applies to the this matter, nor were they cited by the trial court as the basis for its decision. First, under N.J.S.A. 42:2C-72(b), "[i]f a derivative action under section 68 of this act is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees and costs, from the recovery of the limited liability company." Although Plaintiff's claims were styled as "derivative" in nature, they were advanced in support of his own interests—not those of the LLC, of which Plaintiff and Defendant are the only members. In fact, nothing was awarded to Attessa as a result of Plaintiff's

claims. At its core, this was a dispute between the two principals of Attessa. Where "the real nature of the case has been found to be a dispute between the two principals rather than a derivative action on behalf of the corporate entity," no award of attorneys' fees should be granted. 68th St. Apts., Inc. Lauricella, 142 N.J. Super. 546, 566 (Law. Div. 1976), aff'd, 150 N.J. Super. 47 (App. Div. 1977). Further, the trial court referenced only Defendant's so-called "bad faith" in rendering its decision to award attorneys' fees, see 25T122:6-7; 25T123:11-13, which suggests that the trial court's award of attorneys' fees was punitive in nature, rather than to compensate Plaintiff under N.J.S.A. 42:2C-72(b).

Second, under N.J.S.A. 42:2C-48(c), "[i]f the court determines that any party to a proceeding brought under paragraph (4) or (5) of subsection a. of this section has acted vexatiously, or otherwise not in good faith," it has the discretion to award reasonable attorneys' fees to the injured party. A fee award under this provision is only available if the trial court orders dissolution. Marra v. Berlant, A-0149-15T3, 2017 WL 5171863, at *8 (N.J. Super. Ct. App. Div. Nov. 6, 2017). Moreover, it is self-evident that it must be the conduct underlying the claim for dissolution that is "vexatious" or "not otherwise in good faith" to trigger a right to fees under N.J.S.A. 42:2C-48(c). Here, even though the trial court purported to enter judgment on Plaintiff's dissolution count, it did not order a dissolution. Rather, the July 28 Order and the Final Order contemplate a

buyout of membership interests in Attessa. In any event, the trial court based its decision on the mere fact that Defendant had acted in "bad faith" but did not explain nor otherwise support that conclusory statement. The record is therefore insufficient for this Court to determine the propriety of the trial court's fee award, much less conclude that it was predicated on conduct related to Plaintiff's dissolution claim. Thus, the trial court's decision to issue an arbitrary $50,000 award of attorneys' fees to Plaintiff was erroneous.

B. No Common Law Exception to the American Rule Applies (Da1566; 25T122-123)

The New Jersey Supreme Court has "created limited categories as exceptions to the principle that each party should bear its own costs, including only those instances involving claims against attorneys (for malpractice, misconduct, or malfeasance by way of a breach of fiduciary duty), or when an executor or trustee has committed 'the pernicious tort of undue influence.'" In re Est. of Vayda, 184 N.J. 115, 123 (2005). None of these claims nor circumstances is present in this case. In In re Niles, 176 N.J. 282 (2003), the Court distinguished cases involving business dealings between two sophisticated parties - as is the case here - from a case in which "the fiduciary . . . psychologically overpowered" a disabled plaintiff. Id. at 298. Here, by contrast, Plaintiff and Defendant are two highly educated businessmen who voluntarily engaged in what the trial court described as a "flawed business plan

from the beginning." See 24T10:10-24. As noted above, the trial court granted $77,072.50 in attorneys' fees to Plaintiff, in part because in the initial period of the case, the trial judge "th[ought] there was some bad faith." 25T122:6-7; 25T123:11-13. However, in In re Est. of Vayda, our Supreme Court declined to create another exception to the American Rule for matters involving the removal of a non-attorney executor for, among other things, breach of a fiduciary duty and bad faith against co-beneficiaries. 184 N.J. at 123. If the New Jersey Supreme Court declined to carve out an exception for bad faith actors in the context of an executor-beneficiary relationship in which there is a fiduciary duty owed, then there should be no such exception applied in this case, which involves vague allegations of bad faith in the context of a business relationship and discovery issues. The circumstances of the instant case form an "insufficient impetus to warrant a further exception to the American Rule, one to which [the New Jersey Supreme Court] ha[s] repeatedly averred as 'a well-established feature of our jurisprudence.'" Id. at 124 (citations omitted).

C. No Further Fee Shifting Relating to Discovery Was Warranted (Da1566; 25T122-123)

The trial court also erred in awarding attorneys' fees for alleged discovery misconduct because the issue was already addressed in the SDM's June 17, 2022 Order, which awarded Plaintiff $27,072.50. Plaintiff's application leading to that order was predicated on three of the SDM's four discovery orders, which

are dated June 17, 2020, October 29, 2020, and February 1, 2021. However, in his application for attorneys' fees, Plaintiff failed to demonstrate any conduct beyond what had already been considered by the SDM. As a result, the trial court awarded an additional $50,000.00 for the same acts in the early stages of litigation that had already been addressed by the $27,072.50 awarded by the SDM. Such "double dipping" should not be permitted. In addition, the trial court, in awarding Plaintiff counsel fees based on Defendant's alleged bad faith conduct, did not account for Plaintiff's bad faith conduct, which included (i) heavily redacting, selectively disclosing, and hiding information during the discovery process, (ii) improperly contacting and lobbying Court-appointed professionals directly, and (iii) physically threatening Mr. Zisa during a deposition, resulting in an order precluding Plaintiff from physically sitting in on any further depositions of Defendant. Da1531. For the foregoing reasons, the trial court's order awarding Plaintiff attorneys' fees should be reversed, or at a minimum, reversed in part such that the additional $50,000.00 award is stricken.

VII. THE TRIAL COURT ERRED IN FAILING TO ENFORCE AND CLARIFY ITS FINAL ORDER AND THE JULY 28 ORDER (NOT ADDRESSED BELOW)

The trial court erred by failing to address Defendant's requests for enforcement of the July 28 Order and the Final Order and for an amended Final Order, thereby refusing to confirm and clarify certain provisions of the Orders

without any explanation whatsoever. See Da1569; Da1572. As Defendant explained to the trial court, Defendant's applications were requests for clarification of the Orders and an opportunity for the Court to address certain gaps in the Final Order. Id. By declining to even address Defendant's request, the trial court committed reversable error.[7]

VIII. THE TRIAL COURT ERRED IN ENTERING THE HELOC ORDER AND DECEMBER 20 ORDER (Da241; Da243; 1T59:3-69:5; 19T95:21-113:17)

Finally, the trial court abused its discretion by denying Defendant's motion to appeal the SDM's October 4, 2021 Order ("HELOC Order") relating to the HELOC funds used by Defendant to acquire properties owned by Attessa and certain financial transfers that occurred thereafter. Da41; 1T59:3-69:5. The trial court similarly erred by entering an order ("December 20 Order") precluding Defendant's expert from testifying that any HELOC funds were used for Attessa business purposes despite evidence of such use. Da243; 19T106:15-113:17. As discussed above, the SDM's denial of Defendant's reconsideration motion improperly precluded Defendant from proffering evidence at trial establishing that Defendant contributed funds to Attessa from his personal

[7] Certain issues raised in this section are likewise subject to the motions currently pending before the trial court. Defendant reserves his appellate rights with respect to the trial court's rulings on such motions and does not waive any arguments in that regard.

HELOC. The trial court went further to disallow evidence in the record relating in any way to Defendant's HELOC funds. But at the same time, the trial court permitted testimonial evidence that was highly prejudicial to Defendant, which was also erroneous. 19T95:21-106:14.

The HELOC Order is an interlocutory order and, as such, Defendant's motion for reconsideration of that order was governed by Rule 4:42-2 and the "interests of justice" standard. Lawson, 468 N.J. Super. at 134. The trial court misapplied that standard in denying Defendant's appeal because the interests of justice required that the parties have a full and fair opportunity to have their credibility judged with a full and complete recitation of the facts. See Plaza 12 Assocs. v. Carteret Borough, 280 N.J. Super. 471, 477 (App. Div. 1995) ("The discovery rules are not to be used…to preclude a party from presenting its case when the evidence neither surprises, misleads [nor] prejudices the opposing party."). Although Defendant's discovery responses were initially incomplete and unclear, that was not a valid basis to preclude testimony and other evidence at trial as to how Defendant used the HELOC funds and for what purpose, particularly considering that Plaintiff knew Defendant's position since January 2021 that he had contributed monies to Attessa that came from the HELOC and repaid himself those monies. See Da162. Thus, Plaintiff would have suffered no prejudice whatsoever if the evidence were permitted. Yet, the trial court denied

Defendant's appeal and precluded this evidence, which resulted a gap in the record because monies for at least three of the properties in the portfolio came from HELOC funds. In the interests of justice, the trial court should have permitted Defendant to introduce this highly substantive and material evidence and make a record on the issue, as it went to the heart of the case and should have been presented to allow for a full and fair adjudication of the merits of the dispute. Thus, the trial court's denial of Defendant's appeal of the SDM's Order and entry of the December 20 Order constitute reversable error.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests this Court reverse the trial court's July 28 Order, Final Order, HELOC Order, and December 20 Order, and remand the matter for a new trial.

COLE SCHOTZ P.C.
Attorneys for Defendant-Appellant, Frank Zisa

By: */s/ Wendy F. Klein*
Wendy F. Klein

DATED: February 9, 2024

JONATHAN CHRISTODORO, individually and on behalf of Attessa Properties, LLC, Plaintiff-Respondent, v. FRANK ZISA, PETER ZISA, and ATTESSA PROPERTIES, LLC, LLC, as a nominal defendant, Defendants-Appellants.	**SUPERIOR COURT OF NEW JERSEY** **APPELLATE DIVISION** **CIVIL ACTION** **On appeal from a final judgment of the Chancery Division dated July 28, 2022** **A-000410-23** **BER-C-229-19** **SAT BELOW:** **HON. EDWARD A. JEREJIAN, P.J.CH.**

BRIEF OF PLAINTIFF-RESPONDENT JONATHAN CHRISTODORO

COHN LIFLAND PEARLMAN HERRMANN & KNOPF LLP
Park 80 West - Plaza One
250 Pehle Avenue, Suite 401
Saddle Brook, New Jersey 07663
(201) 845-9600
Attorneys for Plaintiff-Respondent Jonathan Christodoro

On the Brief:
Joshua P. Cohn, Esq. (jpc@njlawfirm.com)
No. 019951987
Matthew F. Gately, Esq. (mfg@njlawfirm.com)
No. 025452009
Christina N. Stripp, Esq. (cs@njlawfirm.com)
No. 239692017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

Rules and Statutes

TABLE OF JUDGMENTS, ORDERS AND RULINGS

PAGE

PRELIMINARY STATEMENT

The Trial Court went out of its way to give Defendant-Appellant Frank Zisa the benefit of every doubt in conjunction with the disposition of this intensely-litigated business dispute. Rather than accept this bounty, Mr. Zisa insists on pursuing this ill-conceived appeal.

For example, even though the entirety of Mr. Zisa's interest in the disputed entity should have been wiped out (i.e., diluted to zero) in accordance with the terms of the applicable agreement, the Trial Court salvaged more than $1.4 million for him. Similarly, even though Mr. Zisa should have been held to account for almost a million dollars which, during his watch, disappeared from the company coffers without any corresponding documentation, the Trial Court limited Mr. Zisa's accountability to a fraction of that amount. And, even though Mr. Zisa should have been held to account for Mr. Christodoro's legal fees (which have surpassed one million dollars), as well as for the ever-mounting fees of the Court-appointed professionals, the total fee award was limited to $77,000.

Notwithstanding the fact that, in many respects, the Trial Court let Mr. Zisa "off the hook," Mr. Christodoro was prepared to abide by the ruling rather than continue with the litigation in the Appellate Division. However, given that Mr. Zisa has insisted on pursuing his ill-conceived appeal, Mr. Christodoro

is obliged to point out on a cross-appeal that: (1) the contractual dilution provisions in the relevant agreement make it clear that Mr. Zisa's stake in the company should have been zeroed out; and (2) Mr. Zisa should have been held to account for the full measure of the losses he inflicted.

STATEMENT OF FACTS

A. The "Pre-Attessa" Period.

At some point after the real estate market collapse in 2008-09, Plaintiff-Respondent Jonathan Christodoro and Defendant-Appellant Frank Zisa began discussing the possibility of forming a business relationship for the purpose of acquiring real estate in Northern New Jersey. (1T120:2-121:3; 13T21:4-22:23).[1] Initially the parties operated as a de facto partnership without any documentary memorialization as to the scope of their business relationship. During this period, the parties purchased twelve properties (primarily multi-family residential units) each of which was owned in a joint tenancy by the parties. (Da1599).

The basic premise behind purchasing these properties was that the money would be fronted by one of the parties (usually Mr. Christodoro) to purchase and renovate a property and then, upon the refinance of that property, the purchase

[1] All references to trial transcripts herein are as set forth in Footnote 2 to Mr. Zisa's Brief. However, there are three additional transcripts, including: November 8, 2021 (27T), filed on June 7, 2024; March 24, 2023 (28T), filed on March 25, 2024; and February 15, 2024 (29T), filed on June 25, 2024.

money would be returned to the party who had posted it, thus freeing up that money to buy another property. This concept is known as "recycling capital" and it was pivotal to the parties' business relationship. (1T120:18-123:20; 1T123:24-124:5). Notwithstanding the parties' initial arrangement about recycling capital, the amount of Mr. Christodoro's capital which became "trapped" in the business venture ballooned over time, resulting in roughly $800,000 being owed to him from the period 2011 to 2015. (Da2008-2093; 1T135:10-18).

B. The Formation of Attessa Properties, LLC.

To insulate themselves from undue risk and liability, Attessa Properties LLC was formed by the parties on or about August 31, 2015 pursuant to the terms of an Operating Agreement. (Da1600-1607; 2T31:9-18; 13T20:18-20). In conjunction with the formation of Attessa, the parties transferred all twelve of the properties to Attessa such that the parties, in effect, traded their direct interest in the individual properties for an ownership interest in shares of Attessa. (20T165:8-14; 17T37:7-14).

In addition to the twelve transferred properties, another seven properties were purchased by Attessa in the following years.[2] From a legal and analytical perspective, and as even acknowledge by Mr. Zisa, there exists a clear distinction in

[2] The nineteen properties acquired by, or transferred to, Attessa are collectively referred to herein as the "Properties."

the nature of the business relationship between the parties during the "pre-formation of Attessa" and "post-formation of Attessa" periods. (26T79:14-25). Specifically, Mr. Zisa testified under oath that the monies contributed prior to Attessa's formation were loans, whereas monies contributed post-formation of the company were capital contributions. (Pa388-389).[3]

C. Mr. Zisa Breached the Operating Agreement.

Throughout the entirety of their business relationship, Mr. Zisa would provide Mr. Christodoro with only summary-level projections and synopses of the enterprise's finances. When Mr. Christodoro would try to "drill down" on certain issues, Mr. Zisa would respond by stringing Mr. Christodoro along with promises of additional detail to be provided later. (2T112:22-114:9; Da1643; 15T120:15-122:18). And while the Operating Agreement formalized Mr. Zisa's obligation to provide Mr. Christodoro with additional information (e.g., Article XII required Mr. Zisa to enter every transaction "properly and completely" into the books and to provide yearly financial statements), Mr. Zisa, who kept no semblance of any formal records whatsoever, continued to dodge all of Mr. Christodoro's requests for information. (2T112:22-114:9; Da1643). For example, at trial Mr. Zisa admitted that

---

[3] This deposition excerpt, and all other direct references to Mr. Zisa's deposition testimony, was introduced into evidence by Mr. Christodoro at trial, without objection, as a deposition read-in. (8T18:15-21:5). Copies of the transcript excerpts were submitted along with Mr. Christodoro's Findings of Fact and Conclusions of Law. (Pa375-413).

Mr. Christodoro repeatedly requested--but was never provided with--backup documentation to support the numbers in the acquisition models and portfolio models. (15T120:15-122:18). Mr. Zisa also flouted the simplest of obligations, such as seeing that all withdrawals were made by check (Article XI)--not by way of ATM or window teller--for which there was no accountability.

In early 2017, Mr. Christodoro continued to press Mr. Zisa for additional detail regarding renovation and repair expenses. He did not believe Mr. Zisa's responses were candid and he grew concerned over Mr. Zisa's evasive conduct. (2T135:10-137:23). As such, Mr. Christodoro told Mr. Zisa in April 2017 that he would personally take over the repairs and renovations. (Da1662; 2T138:19-141:2). Around the same time, Mr. Zisa acknowledged in text messages to a third party that, in effect, Mr. Christodoro had been kept in the dark as to Attessa's actual operations. (Da1901-1904).

Mr. Zisa became increasingly hostile as the scrutiny intensified and, as early as the autumn of 2017, Mr. Zisa believed that he and Mr. Christodoro could be headed to litigation. (15T178:7-179:4). In an effort to reach an understanding going forward, Mr. Christodoro spoke at length to Mr. Zisa in September 2017. Mr. Zisa's response to Mr. Christodoro's attempt at conciliation was nothing short of combative: he deluged Mr. Christodoro with a slew of self-serving resolutions that would have authorized Mr. Zisa to refinance or sell almost half of the Properties.

(Da2498-2499; 15T17:15-18:25; 17T131:8-23). Mr. Christodoro was--justifiably--uncomfortable providing Mr. Zisa with unchecked authority to engage in transactions in which hundreds-of-thousands of dollars would pass through Mr. Zisa's control. Indeed, Mr. Christodoro made clear via email sent on November 3, 2017 that he was not sanguine with Mr. Zisa's attempted "power grab" and, instead, suggested that third parties ought to handle any sales. (Da1663; 2T143:21-146:3).

Suffice it to say, in the midst of this impasse, over the next several months, Attessa did not purchase any new properties and Mr. Christodoro became increasingly concerned for the well-being of Attessa.

STATEMENT OF PROCEDURAL HISTORY

A. Pleadings & Discovery.

With the parties at an uneasy stalemate and the viability of Attessa hanging in the balance, on September 11, 2018, Mr. Christodoro filed a verified complaint and order to show cause under Docket No. C-243-18 alleging mismanagement and defalcation by Mr. Zisa and seeking to enjoin him from taking certain actions related to Attessa and the Properties. (Da1-18). Mr. Christodoro also alleged claims against Peter Zisa, Mr. Zisa's father. (Ibid.).[4]

[4] There is no disrespect intended by referring to Mr. Peter Zisa by his first name, rather this is merely a convention to differentiate between Frank Zisa (son) and Peter Zisa (father).

On September 13, 2018, the Trial Court entered the order to show cause, temporarily restraining Mr. Zisa and Peter Zisa from: (1) spending money except in the ordinary course; (2) making major alterations to any Property without Mr. Christodoro's written consent, including any repairs over $5,000; (3) transferring any Attessa Property; and (4) making payments over $5,000 to anyone without Mr. Christodoro's written consent. (Pa1-4).

The Trial Court heard argument on the substantive relief requested in Mr. Christodoro's order to show cause on October 26, 2018, and on November 2, 2018, the Trial Court entered an order which: (1) appointed an appraiser for the Properties; (2) appointed Stephan Chait, CPA, as the Court's independent forensic accountant to examine Attessa books and records; and (3) appointed the Honorable Robert P. Contillo (P.J.Ch.) (ret.) as mediator. (Pa15-16).

On October 22, 2018, Mr. Zisa filed an answer (Pa5-14), and on November 1, 2018, he filed counterclaims against Mr. Christodoro, which were answered on January 30, 2019. (Da19-36; Pa17-24).

From the very outset of the litigation, Mr. Zisa embarked upon course of obstructive conduct which necessitated the entry of an order on January 22, 2019 which, inter alia, directed Mr. Zisa to cooperate with various requests from the Court-appointed accountant, Mr. Chait, for basic financial documentation regarding Attessa's operation. (Da1031-1034; Da2986-2988).

This was followed by the entry of an Order on April 5, 2019 in which the Trial Court: (1) allowed Mr. Christodoro to file an amended complaint; (2) directed that Mr. Chait was to take control over all bank accounts in Attessa's name, segregate security deposits as required by law, and prepare and file Attessa's tax returns for 2017 and 2018; (3) ordered Mr. Zisa and Peter Zisa to cease making any ATM withdrawals from Attessa bank accounts; and (4) denied motions filed by Mr. Zisa to quash certain subpoenas issued by Mr. Christodoro seeking records from banks and other entities related to Attessa. (Da140-143).

Mr. Christodoro filed his Amended Verified Complaint on April 12, 2019. (Pa25-54). On April 24, 2019, Mr. Christodoro filed a motion seeking to disqualify Mr. Zisa's attorneys to the extent that they also represented Attessa Properties, the company that Mr. Zisa was being accused of looting. (Pa56). However, this motion was rendered moot by the resignation of Mr. Zisa's counsel on May 7, 2019. On May 14, 2019, in a pivotal decision, the Trial Court entered an Order appointing William I. Strasser, Esq., as independent counsel for Attessa. (Pa55-58).

On June 7, 2019, Mr. Zisa (having retained alternate counsel) filed an answer to the Amended Verified Complaint, and also reasserted his counterclaims against Mr. Christodoro. (Pa59-91). In an effort to "reset" this litigation in light of the impending one-year mark, on August 16, 2019, the Trial Court entered a trio of orders: (1) dismissing the matter without prejudice on consent and providing that

Mr. Christodoro would file a new complaint, and also providing that "all prior rulings and orders shall remain in full force and effect" (i.e., the case "Reset Order") (Pa92-93); (2) granting Mr. Chait oversight over Attessa's primary operating account, and requiring any Attessa expense in excess of $1,000 to be approved by Mr. Chait (Da144-145); and (3) granting Mr. Christodoro's motion to compel Mr. Zisa (who had resisted all previous attempts to do so) to produce certain bank records to Mr. Chait. (Pa94-96).

On August 26, 2019, in accordance with the Reset Order, Mr. Christodoro re-filed his Amended Verified Complaint under Docket No. C-229-19. (Pa97-126).

In response to Mr. Zisa's ongoing obstructive behavior, on September 23, 2019, the Trial Court granted Mr. Strasser's motion seeking to appoint a property manager for the Properties. (Da146-151). The Trial Court appointed Gilsenan & Company, ordered that the parties were to turn over all necessary documentation to the new property manager, that the parties were not to interfere with the property manager, and that the property manager was to turn over all rent monies collected to Mr. Chait. (Ibid.).

On October 9, 2019, Mr. Christodoro filed a motion seeking leave to file an amended verified complaint, in part to properly style the action as a derivative complaint. (Pa127-128).

On November 5, 2019, Mr. Strasser filed a motion seeking to be appointed as the Special Fiscal Agent for Attessa Properties, citing ongoing attempted interference by Mr. Zisa with his decisions on behalf of Attessa in his role as the Court-appointed attorney. (Pa129-148). On November 14, 2019, Mr. Christodoro filed an order to show cause seeking to enjoin Mr. Zisa from interfering with Mr. Strasser's role as Court-appointed attorney and to remove Mr. Zisa as managing member of Attessa. (Pa149-151). On November 22, 2019, the Trial Court entered two orders: (1) appointing Mr. Strasser as Special Fiscal Agent for Attessa (Da152-154); and (2) removing Mr. Zisa as managing member of Attessa. (Pa152-153).[5]

On December 6, 2019, the Trial Court granted Mr. Christodoro's motion to file an amended complaint. That day, Mr. Christodoro filed a Second Amended Verified Complaint--the operative pleading on which trial ultimately tried. (Da37-Da76).

On that same date, December 6, 2019, the Trial Court entered an order which appointed Honorable Robert R. Contillo, P.J.Ch. (ret.) as Special Discovery Master ("SDM"). (Pa157-158). The Trial Court gave the SDM complete authority over the discovery process, including the power to rule on disputes regarding written

[5] Mr. Zisa had also launched an independent attack on Mr. Strasser by filing a complaint alleging legal malpractice. (Da1560-1561). Needless to say, this ill-conceived complaint was withdrawn shortly after Mr. Zisa was deposed as Attessa's Managing Member.

discovery, document production, and depositions. (Ibid.). Furthermore, if a party did not appeal a particular order issued by the SDM to the Trial Court "within five (5) business days of the ruling . . . the ruling shall be deemed final and non-appealable." (Ibid.).

Over the two years following Judge Contillo's appointment, it became necessary for him, as the SDM, to become involved in numerous discovery disputes between the parties--primarily to compel Mr. Zisa's compliance with his discovery obligations. During Judge Contillo's tenure as SDM, five separate discovery motions were adjudicated, including:

(1) On June 17, 2020, Judge Contillo granted Mr. Christodoro's motion to compel Mr. Zisa to provide full and complete discovery responses. (Pa159-203; Da1564-1565).

(2) On October 29, 2020, Judge Contillo granted Mr. Christodoro's second motion to compel more responsive discovery from Mr. Zisa, and precluded Mr. Zisa from introducing evidence contrary to his assertions that certain documentation did not exist pursuant to a certification of completeness. (Da181-194).

(3) On February 1, 2021, Judge Contillo granted Mr. Christodoro's third motion to compel more responsive discovery from Mr. Zisa (including as it related to Mr. Zisa's refusal to produce discovery as to a certain HELOC taken out by Mr. Zisa) and Judge Contillo also allowed Mr. Christodoro to file an application for attorneys' fees. (Ibid.; Da197-206; Pa205-206). Notably, during oral argument before Judge Contillo, Mr. Zisa's then-counsel affirmed the existence of a prior defense stipulation that "all proceeds of the Greater Alliance [HELOC] were utilized by Mr. Zisa for personal purposes, not business purposes." (Pa204). Judge Contillo's February 1, 2021 Decision memorialized Mr. Zisa's stipulation:

> **Mr. Zisa is precluded, both now and in the future, from asserting that any funds from the Greater Alliance HELOC were used for Attessa business purposes.** Mr. Zisa stipulated, which the [SDM] confirmed in an email to counsel on November 16, 2020, that "all proceeds of the Greater Alliance HELOC were utilized by Mr. Zisa for personal purposes, not business purposes." Discovery has proceeded — to the extent it has proceeded — on the basis of that stipulation Accordingly, Mr. Zisa must disclose all sums paid from Attessa to Greater Alliance. He may not argue that those sums were for reimbursements for prior business expenditures on behalf of Attessa.
>
> [(Da205) (emphasis added)].

(4) On April 26, 2021, Judge Contillo denied Mr. Christodoro's fourth and final motion to compel more responsive discovery from Mr. Zisa. (Pa207). Judge Contillo accepted Mr. Zisa's representations and certifications that all relevant records had been produced but noted that: "Whether Mr. Zisa's representations are truthful - a proposition repeatedly attacked by Mr. Christodoro in his papers - is a distinct issue, one that may feature in the trial of this action to the extent permitted by the Trial [Court]." (Pa210). Furthermore, Judge Contillo commented that "[Mr. Zisa's] responses may be viewed as evasive, contradictory and implausible, but the veracity of the responses is beyond the purview of my authority and resides within the authority of the factfinder at trial." (Pa211).

(5) On October 4, 2021, on the eve of trial, Judge Contillo entered his final discovery order, in which he granted Mr. Christodoro's motion to preclude a "last-minute document dump" by Mr. Zisa and denied Mr. Zisa's cross-motion to reconsider the stipulation as to the Greater Alliance HELOC funds. (Da167-180). Specifically, Judge Contillo found that the last-minute document dump was contrary to Mr. Zisa's prior claims that there were no additional records and it would "cause impossible eve-of-trial burdens" and "acute prejudice" to Mr. Christodoro. (Da173-174). And with regard to Mr. Zisa's belated challenge to the HELOC stipulation, Judge Contillo found that the "stipulation was voluntary, and its meaning unambiguous, and served the purpose of blunting [Mr. Christodoro's] otherwise wholly valid discovery demands regarding

> that account." (Da179). Furthermore, Judge Contillo recognized that the stipulation "went to the heart of Mr. Zisa's core claim as to how much of his personal funds were used for Attessa's benefit" and that "he effectively took the HELOC funds out of that equation, almost a year ago." (Ibid.). Lastly, Judge Contillo pointed out that Mr. Zisa never sought timely recourse from the Trial Court pursuant to the clearly memorialized process for appealing his decisions. (Da180).

On October 8, 2021, Mr. Zisa, albeit belatedly, brought the matter of the HELOC stipulation to the Trial Court, in an appeal from the SDM's October 4, 2021 decision. (Da159-239). At oral argument--which happened to occur on the first day of trial, October 12, 2021--Mr. Zisa's counsel admitted (after being asked point-blank by the Trial Court if a stipulation had been made) "yes, there was a proffer. And my papers Judge, you want to use the word stipulation, that is fine with me" but then counsel contended that he could take one position in discovery and, regardless of any reliance by Mr. Christodoro, change that position at trial. (1T37:7-38:17). Counsel also claimed that despite the vintage of the stipulation, he had purposefully waited to appeal it until the eve of trial, stating that "it is an evidentiary ruling" (1T40:17-25), but that the statement made to Judge Contillo was a mistake made by his client "obviously [giving him] the wrong information" which was then represented to the SDM. (1T43:21-22).[6]

[6] Suffice it to say, during the tenure of this litigation, a clear pattern emerged: Mr. Zisa has a very casual relationship with the truth, often changing his story to suit his purpose at the moment.

On October 12, 2021, the Trial Court denied Mr. Zisa's attempt to wriggle out from under the stipulation that none of his HELOC funds were used for Attessa business purposes. (Da241-242). The Trial Court, after noting Mr. Zisa's history of attempting to stymie discovery (1T59:18-60:9), agreed with the findings of the SDM that the stipulation was "voluntary, it was unambiguous, and served the purpose of blunting discovery." (1T67:1-69:5).

B. The Trial.

At that, the trial commenced, with the parties giving their opening arguments on October 12, 2021. (1T83:11-113:16). The Trial Court heard testimony over the course of twenty-one days. (1T; 2T; 3T; 4T; 5T; 6T; 7T; 8T; 9T; 10T; 11T; 12T; 13T; 14T; 15T; 16T; 17T; 18T; 19T; 20T; 21T; 22T; 23T). Mr. Christodoro's expert, Thomas Reck, CPA, of Withum Smith & Brown, PC, was a critically important trial witness and he testified to the following salient points regarding the various calculations, on which the Trial Court ultimately relied:

- Mr. Christodoro was owed the amount of $804,464 at the time of Attessa's formation (Da2014; 9T23:9-31:1) and as Mr. Christodoro was repaid $290,000 after Attessa's formation, the outstanding loan balance was reduced to $514,464.[7] (9T38:5-39:14; Da2015).
- Prior to Attessa's formation, Mr. Zisa had directly taken $117,818 in net distributions from the enterprise's bank accounts. (Da2014; Da2047-2048), and that Mr. Zisa had also benefitted from enterprise funds being

[7] Notably, this is essentially the same amount that Mr. Zisa had represented Mr. Christodoro was owed in preparing the 2015 tax returns. (Da1656; Dca23)

removed via ATM and teller withdrawals, spent on his credit cards, or on other personal expenses, to the tune of $275,593. (Da2015-2017).

- After Attessa's formation, Mr. Zisa received net distributions of $415,436 from the company. (Da2054). Meanwhile, Mr. Reck calculated that Mr. Christodoro had made net contributions to Attessa of $683,756. (Da2045). Mr. Reck concluded, based solely on contributions and distributions (i.e., not including any other "ancillary damage" claims), the capital accounts of the two partners had shifted such that Mr. Zisa's interest had been entirely diluted. (Da2021).[8]

- Mr. Zisa had benefitted from Attessa funds being removed via ATM and teller withdrawals, spent on credit cards, paid to "employees" such as Peter Zisa or Sweeney, on Peter Zisa's legal fees, or on other personal expenses, to the tune of $568,648. (Da2026).

Trial testimony concluded on January 5, 2022. (23T45:4-46:8). The parties waived oral closings.

*C. **Post-Trial Proceedings.***

On January 12, 2022, Mr. Christodoro provided his exhibit binders to the Trial Court. (Pa212-213). On January 13, 2022, Mr. Zisa provided his exhibit binders to the Trial Court. (Pa214).[9]

---

[8] Adding the pre-formation-of-Attessa loan balance owed to Mr. Christodoro (i.e., $514,464) with his post-formation-of-Attessa unreimbursed capital contributions (i.e., $683,756) yields the $1,198,220 in total "trapped capital"--which is the amount adopted by the Trial Court for the "off the top" payment to Mr. Christodoro.

[9] Included with the exhibits Mr. Zisa submitted to the Trial Court was Mr. Petrucelli's expert report, D48, despite the fact that this document had not been entered into evidence at trial (and, in fact, the record citation included in Mr. Zisa's appendix to support it [5T143-144:4-6] makes no reference whatsoever to the expert

On April 18, 2022, the parties simultaneously exchanged written Findings of Fact and Conclusions of Law to the Trial Court. (Pa215-417; Pa418-469).

On July 27, 2022, the Trial Court rendered its oral decision on the record in the presence of the parties. (24T). On July 28, 2022, the Trial Court entered an order memorializing its oral rulings in favor of Mr. Christodoro as to several of his causes of action,[10] and dismissing the entirety of Mr. Zisa's counterclaim. (Da245-246). In its post-trial Order, the Court crafted a multi-faceted remedy:

- First, the Court-appointed SFA was to oversee the collection of updated appraisals and to update all liens on the Properties as of the date of the judgment so as to provide a calculation of Attessa's current equity.
- Second, the SFA was to: (1) deduct from this amount a $1,198,220 "off the top" payment to Mr. Christodoro to repay his trapped capital;[11] (2) calculate the total amount of outstanding "fees and costs" owed to all Court-appointed professionals; and (3) deduct the total "fees and costs"

---

report). Because it contained HELOC information in violation of the HELOC rulings by the Trial Court and Judge Contillo, the parties agreed to meet and confer to propose redactions to the report before it was admitted into the trial record. (20T120:25-123:9; 22T50:18-22; 22T54:24-55:5; 22T56:3-9). Despite this agreement on the record, Mr. Zisa failed to meet and confer with Mr. Christodoro, and instead unilaterally decided to submit the unredacted exhibit to the Trial Court and, subsequently, to this Court.

[10] Specifically, Mr. Christodoro prevailed on the following eight claims in his Final Complaint: Count III (Dissolution of Attessa); Count V (Mr. Zisa's Breach of fiduciary duty of loyalty); Count VI (Mr. Zisa's breach of fiduciary duty of care); Count VII (Mr. Zisa's breach of statutory duty of good faith and fair dealing); Count X (unjust enrichment as to Mr. Zisa); Count XII (Conversion by Mr. Zisa); Count XV (Mr. Zisa's Breach of Contract--the Operating Agreement); and Count XVI (Mr. Zisa's Breach of the implied covenant of good faith and fair dealing).

[11] See, supra, fn. 8 (explaining how this amount was calculated).

from the remaining equity. This would generate the "net" equity figure, which would be divided 60% to Mr. Christodoro and 40% to Mr. Zisa.

- Third, the SFA would supervise the "buyout and/or division" as follows:

    1) Mr. Christodoro would be permitted the right to buy out Mr. Zisa's remaining interest in Attessa by paying him the amount calculated as his 40% interest based upon the preceding calculations (which would also include an offset for attorney's fees, costs of suit and interest);[12]

    2) If Mr. Christodoro decided not to exercise his right of first refusal, Mr. Zisa then had a secondary option to buy out Mr. Christodoro by paying Mr. Christodoro the amount calculated as his 60% interest based upon the preceding calculations; and

    3) If neither party exercised the buyout, a realtor would be appointed to liquidate the portfolio and then the SFA would divide what remained after liquidation on a 60%-40% basis in favor of Mr. Christodoro.

Twenty days following the entry of the foregoing Order, Mr. Christodoro filed a concise, seventeen-page motion for reconsideration in which he urged the Trial Court to reconsider the virtually unchallenged determination by his forensic expert that Mr. Zisa's interest in Attessa had been wiped out, or in the alternative, that the Court at least reduce the buyout amount based on the expert's unrebutted calculations as to the "excess" distributions Mr. Zisa took for himself but which were

---

[12] By Order of June 17, 2022, (Da1098-1099), Judge Contillo, in his capacity as SDM, ordered Mr. Zisa to pay Mr. Christodoro $27,072.50 in attorney's fees due to Mr. Zisa's "persistent" discovery violations. Subsequently, the Trial Court tacked on an additional $50,000 fee award (Da1566)--bringing the total fee award to $77,072.50.

not charged to him by the Trial Court. (Da247-253). Timely adjudication of that reconsideration motion was thwarted because Mr. Zisa, yet again, engaged in gamesmanship and improper litigation tactics. Namely, after terminating his relationship with the attorneys who tried the case on his behalf, Mr. Zisa retained new counsel, who requested a several-month extension to file a response to Mr. Christodoro's straightforward reconsideration motion.

On December 18, 2022, Mr. Zisa filed his "opposition and cross-motion for reconsideration." (Da254-988; Dca4; Dca8; Dca11). However, instead of responding to Mr. Christodoro's motion and perhaps raising a few discrete issues of his own for reconsideration based upon the evidence presented at trial and the legal theories and conclusions advanced in his proposed conclusions of law, new counsel for Mr. Zisa filed a thousand-page tome (including a seventy-five-page certification accompanied by eighty-three exhibits--many of which had never even been produced in discovery, let alone never introduced at trial) purporting to be a "reconsideration" motion but which was, in fact, Mr. Zisa's attempt to relitigate many aspects of this case.

Mr. Christodoro objected to the submission of Mr. Zisa's gargantuan "reconsideration" motion. (Pa484-493). Ultimately, Mr. Christodoro filed an order to show cause seeking to strike Mr. Zisa's motion, or at least the portions of it which had never been produced in discovery and/or introduced at trial. (Da990-1004). The Trial Court entered the order to show cause on March 2, 2023. (Da1005-1006). After

briefing, (Da1007-1040; Da1041-1058; Pa494-529), and oral argument on March 24, 2023 (28T), the Trial Court denied Mr. Christodoro's request without prejudice and directed him to file an opposition to the motion for reconsideration (28T27:19-32:24; Da1059), which Mr. Christodoro did on May 26, 2024. (Da1060-1065).

During the pendency of the reconsideration motions, and in an effort to "keep the ball rolling" with regard to the implementation of the Trial Court's buyout ruling, on February 15, 2023, counsel for Mr. Christodoro wrote to the SFA confirming that Mr. Christodoro did, in fact, intend to exercise his right to buy out Mr. Zisa's interest in Attessa. (Da1072-1073). On February 22, 2023, the SFA issued his letter with the preliminary buyout calculations. (Da1074-1077).

Subsequently, on June 6, 2023 (while reconsideration was still pending), rather than seeking to stay the Trial Court's July 28, 2022 Order--indeed, quite to the contrary--Mr. Zisa actually filed a motion seeking to "modify" the Trial Court's Order to his benefit (i.e., to declare that he could buy out Mr. Christodoro's interest) and to enforce--albeit in modified form--the July 28, 2022 Order. (Da1066-1091).[13]

As memorialized in the August 24, 2023 Final Order of the Trial Court (Da1566-1568), after argument on August 23, 2023, the respective motions for reconsideration were denied as was Mr. Zisa's motion to modify and enforce the

[13] Mr. Christodoro was left with no option but to file a countervailing cross-motion to enforce the Trial Court's July 27, 2022 Order. (Da1092-1104).

court's July 28, 2022 Order. On the other hand, Mr. Christodoro's cross-motion to enforce the July 28, 2022 Order was granted--thereby finally paving the way for Mr. Christodoro to buy out Mr. Zisa's interest in Attessa.

Following the entry of the Trial Court's Final Order on August 24, 2023, Mr. Zisa did not immediately seek a stay and Mr. Christodoro, in reliance on that fact, began to undertake the time, energy, and expense of moving forward with the buyout of Mr. Zisa's interest in Attessa. (Pa530). In recognition thereof, by letter of September 26, 2023 (Pa548-549), the SFA issued revised buyout calculations, taking into account the Trial Court's August 24, 2023 Final Order. In the meanwhile, in September and October of 2023 Mr. Zisa persisted in his attempts to sidetrack the proceedings by way of "informal" requests to "clarify" the Trial Court's July 28, 2022 Order. (Da1569-1577; Pa531-551). By e-mail of October 10, 2023 (Da1586-1587), the Trial Court, in an effort to staunch the flow of nuisance correspondence from Mr. Zisa, indicated categorically that it was not going to amend its Final Order.

On October 10, 2023, Mr. Zisa filed the instant appeal. (Da1580).[14]

---

[14] The motions filed before the Trial Court and the Appellate Division subsequent to the filing of Mr. Zisa's notice of appeal, such as those belatedly seeking a stay and Mr. Zisa's motion trying, again, to oust the long-serving SFA, are not germane to this appeal, and will not be addressed herein, except to note that there were such proceedings, and that no stay was granted.

LEGAL ARGUMENT

POINT I
THE TRIAL COURT MADE SUFFICIENT FACTUAL FINDINGS, AND THE JULY 28, 2022 ORDER SHOULD BE AFFIRMED

Mr. Zisa argues that the Trial Court erred in failing to make sufficient findings of fact to support its July 28, 2022 Order, and that on this basis alone, the matter should be remanded back to the Trial Court. (Db19-24). However, a review of the Trial Court's oral decision, especially in the context of the trial testimony, present a record more than sufficient to support the Trial Court's findings in favor of Mr. Christodoro on Counts III, V, VI, VII, X, XII, XV & XVI of the Final Complaint and to support implementation of the Trial Court's carefully crafted remedies.

Rule 1:7-4(a) requires a judge presiding over a bench trial to issue a decision either orally or in writing which "find[s] the facts and state[s] its conclusions of law . . . ." However, trial judges have wide discretion in how to accomplish this task. In re Tr. Created by Agreement Dated Dec. 20, 1961, by & between Johnson & Hoffman, Lienhard & Perry, 399 N.J. Super. 237, 253 (App. Div. 2006); Homann v. Torchinsky, 296 N.J. Super. 326, 340 (App. Div.), certif. denied, 149 N.J. 141 (1997).

The purpose of the rule is to make sure that the trial court makes its own determination of the matter. In re Trust, 399 N.J. Super. at 254 (citation

omitted). In other words, any decision of a trial court which informs the parties of the rationale underlying its decision, and which allows an appellate court the opportunity to review that rationale, fully satisfies the scope of the rule. See Monte v. Monte, 212 N.J. Super. 557, 564-65 (App. Div. 1986).

Here, the Trial Court made ample findings in its oral decision rendered on July 27, 2022, and through these findings rendered crystal clear its determination of the matter in which it ruled unequivocally in favor of Mr. Christodoro on eight counts in the Final Complaint. The Trial Court framed its ruling at the outset by explaining the process by which it arrived at the decision:

> So this case has a voluminous record, we know that. I've reviewed everything, and I am going to decide this case based on the testimony that I heard, including judging credibility, examining the exhibits, which there was many reports and letters and e-mails and appraisals, and applying the law and making what I deem is a just and equitable decision.

(24T7:21-8:2). Notwithstanding Mr. Zisa's assertions to the contrary, the Trial Curt arrived at a carefully thought-out decision based on the entirety of the matter before it--including, of course, the lengthy trial over which it assiduously presided. In re Trust, 399 N.J. Super. at 254; see also Concerned Citizens of Princeton, Inc. v. Mayor & Council of Borough of Princeton, 370 N.J. Super. 429, 450 (App. Div. 2004) (recognizing that the judge had "summarized the facts underlying her decision to grant summary judgment in favor of defendant, and fully analyzed the context of those facts pertinent to the legal issues presented"

and therefore satisfied the requirements of Rule 1:7-4(a)).

A. The Trial Court's July 27, 2022 Decision Contains Comprehensive Findings.

The Trial Court's decision, which spans more than fifty-three transcript pages, (24T4:23-58:6), consists of a comprehensive summary of: (1) the parties' history (24T9:8-10:15); (2) the history of the litigation (including Mr. Zisa's persistent discovery shenanigans) (24T8:9-11; 24T17:12-19:3); (3) Mr. Christodoro's affirmative claims (24T26:11-28:10; 24T10:20-17:5; 24T39:4-40:9); (4) Mr. Zisa's counterclaims (24T22:20-26:10; 24T10:20-17:5), and (5) the calculations and numbers proposed by each side. (24T12:23-16:16).

Moreover, the Trial Court's decision is chock full of findings, including:

- Finding that there were two distinct phases in the parties' business relationship, by stating that: "I am going to decide this case based on the pre and post-Attessa period." (24T21:7-8).
- Finding that each of the parties played different roles in their business arrangement, and further clarifying this finding by stating that: "There is no doubt in my mind that Mr. Christodoro was began as the money man, and the other was the one doing the work on the ground." (24T31:7-9).
- Finding that Mr. Christodoro had reason to be suspicious of the lack of communication from Mr. Zisa. (24T36:8-15).
- Recognizing that the basic concept of dilution by reciting Article VI of the Operating Agreement. (24T34:5-14).
- Finding that it was probable that Mr. Zisa had diverted funds to his own use (i.e., for "other things") and also finding that, based on the atrocious record keeping, it was impossible to know exactly how

much money was taken by Mr. Zisa but finding that some adjustment had to be made to account for this likelihood. (24T32:17-33:8). As noted below, the Court expanded further on this issue.

- Reiterating the finding that: "Mr. Zisa failed to maintain original documents. There [are] all these expenses, all these expenditures. But we don't have almost a single receipt. We don't know what went for what." (24T27:4-7).

- And further finding that: "The recordkeeping was absolutely atrocious, if nonexistent." (24T26:13-14); and finding that "there was really no system, no notion, nothing." (24T31:10-11).

- Finding that there was no proof to support Mr. Zisa's claim that Port Imperial was intended to be a jointly-owned property. In the absence of any competent documentary proof, the Court was left to determine this issue based on the relative credibility of the respective witnesses. (24T29:14-30:15).

- Expressly rejecting Mr. Zisa and Mr. Petrucelli's "equity variance adjustment" theory. (24T43:1-3).

- Rejecting Mr. Zisa's counterclaim for unjust enrichment, stating that "Mr. Zisa shouldn't be compensated because the operating agreement indicates that. I don't think there is any, any dispute as to that." (24T43:25-44:2).

- Finding the existence of a non-recourse loan to Mr. Christodoro which, notwithstanding Mr. Zisa' assertions to the contrary, survived Attessa's formation. (24T37:18-38:2).

- Finding that the Attessa 2015 tax returns included the pre-formation non-recourse loans to Mr. Christodoro and to Mr. Zisa's parents and that the loans would be written down over time. (24T38:14-20).

- Embracing the calculations proffered by Mr. Christodoro and Mr. Reck for the amount of direct and indirect distributions taken by Mr. Zisa. (24T14:12-21).

- Finding as to the amounts calculated by Mr. Christodoro for each

category of Mr. Zisa's defalcation, both those which were pre-Attessa and those which were post-formation. (24T45:6-18).

- Finding that Mr. Christodoro had monies owed to him from both pre-formation contributions and then from post-formation contributions, totaling $1,198,220. (24T15:18-16:1).

- Finding a basis for the transfer of ten percent of Attessa's net value from Mr. Zisa to Mr. Christodoro in light of the finding of the former's defalcation: "You know, again, I recognize that some of this money--maybe more than some of this money--made it into his pockets or made it into the other jobs or made it into this job . . . . So I thought about this long and hard, and I decided that the remaining net will be divided 60 percent to the plaintiff and 40 percent to the defendant." (24T48:4-7 and 19-22).

- Finding the equitable basis for this ten percent transfer: "I took into consideration that some of those monies and those indirect and whatever, direct, didn't go into this. And that's why it's not 50/50" (24T50:17-19).

- Establishing the structure where Mr. Christodoro would have the first option to buy out Mr. Zisa's interest, then Mr. Zisa would have the opportunity if declined by Mr. Christodoro, and if neither opted to buy out the other, then Attessa would be dissolved "under Count Three." (24T48:23-49:24).[15]

The Trial Court also made statements setting forth the law it was to apply. (24T19:23-20:20). And, as importantly, the Trial Court made it clear that it was considering the testimony--and the credibility--of each of the witnesses from whom it heard during the twenty-one days of trial, including, most notably, Mr.

[15] Suffice it to say, in light of Mr. Christodoro's election to buy out Mr. Zisa's interest in Attessa, there is no need to invoke Count III's contingent "nuclear option" *vis-à-vis* the total dissolution of Attessa.

Christodoro's expert, Mr. Reck. (24T43:18-19).

Furthermore, the Trial Court considered 105 exhibits entered into evidence by Mr. Christodoro at trial, including an expert report authored by Mr. Reck. (Da2009-2093). Mr. Zisa introduced fifty exhibits into evidence at trial, including an expert report authored by Mr. Petrucelli. (Dca338-658). [16] Therefore, in addition to its findings as set forth above, the record on which the Trial Court expressly relied is rife with further support for its decision.

B. The Trial Testimony Supports the Claims on Which Mr. Christodoro Prevailed.

Review of the trial record reveals extensive support for all aspects of the Trial Court's decision. For instance, as to all of the affirmative claims on which Mr. Christodoro prevailed (i.e., Counts III, V, VI, VII, X, XII, XV & XVI), the Trial Court heard credible testimony from multiple witnesses.

As to Count III (Dissolution of Attessa), the Trial Court heard testimony from Mr. Christodoro (2T37:19-39:1; 2T43:3-44:17), and most importantly, Mr. Petrucelli gave testimony which supported the Trial Court's decision on this count:

- Mr. Petrucelli
    - Opined that a liquidation was the only reasonable outcome, "we know that they are not going to continue as partners"; and

[16] Although, as noted above and below, Mr. Zisa technically failed to move into evidence a properly redacted version of Mr. Petrucelli's report.

repeatedly referenced the Revised Uniform Partnership Act, despite the fact that Attessa is an LLC. (20T107:11-17)

As to Count V (Mr. Zisa's Breach of fiduciary duty of loyalty) and Count VI (Mr. Zisa's breach of fiduciary duty of care), in support of its decision on these counts the Trial Court heard extensive testimony from Mr. Christodoro (1T126:21-12; 1T128:13-129:20; 1T131:22-132:24; 1T134:7-17; 1T137:8-23; 1T137:24-139:5; 2T4:22-9:11; 2T10:2-11; 2T11:9-12; 3T74:21-75:14, 3T76:3-77:18; 5T42:14-18; 3T74:21-75:14, 76:3-77:18); Mr. Reck (9T89:5-90:21; 9T91:6-13; 12T107:3-10; 23T17:3-9); Mr. Chait (6T48:13-21, 49:7-11; 6T55:14-24; 6T63:14-23; 6T77:25-78:12; 6T79:7-15; 6T80:5-10; 6T82:22-83:4; 6T83:5-16; 6T83:5-16; 6T157:19-25); and Ms. Gilsenan (10T9:10-11:15; 10T11:25-13:11 ; 10T18:3-19:14; 10T19:15-29:7; 10T31:8-32:25 ; 10T33:1-18; 10T36:2-6). Perhaps most tellingly, Mr. Zisa and Mr. Petrucelli also gave testimony which supported the Trial Court's decision in favor of Mr. Christodoro on these counts:

- Mr. Zisa
    - Admitted that "you need to have a record that money was spent." (15T138:19-24).
    - Admitted that several of his PowerPoints were nothing more than projections rather than any actual accounting. (15T153:5-16).
    - Admitted that not all Attessa monies were deposited into Attessa bank accounts, that not all transactions were done by check, and that the operating agreement did not allow ATM withdrawals. (16T45:13-46:1).

- Admitted that no document(s) exist which set forth on a line-by-line basis how Attessa's money was spent and on which property. (16T48:4-10).

- Admitted that he created an account to reimburse himself with funds for the use of his vehicle, and that he transferred Attessa monies from other Attessa accounts for this purpose. (16T152:5-14).

- Admitted that there are no records to show what happened to business relationship money between the time that the first property was purchased in June of 2011 and the first bank account was opened in September of 2012. (16T159:20-160:6).

- Admitted that no documents were ever produced by him to "tie" cash spending to any particular property or project. (16T164:8-168:3).

- Acknowledged that he structured his credit card payments from Attessa's bank accounts in amounts less than $1,000 after the Court order requiring Mr. Chait's authorization for any expenditure over $1,000. (17T125:18-24).

- Admitted that he deposited sixteen checks belonging to Attessa into his personal bank account. (18T4:3-14).

- Admitted that he deposited checks payable to both Mr. Christodoro and himself into his personal bank account. (18T13:19-23).

- Admitted that he knew that a check made out to him and Mr. Christodoro would have to be endorsed by Mr. Christodoro as well, lending credence to allegations of intentional misconduct. (18T14:19-25).

- Stated that had no recollection of Mr. Christodoro signing any check that went into Mr. Zisa's personal account. (18T16:19-24).

- Admitted that he paid $10,000 towards his personal credit cards with Attessa money. (19T25:1-7).

- Mr. Petrucelli
    - Testified that he was hired to "create a set of books under the direction of the managing member," whom he knew was being accused of defalcation. (20T149:13-22).
    - Acknowledged that, while he was putting together books and records for Attessa at Mr. Zisa's request, he was simultaneously preparing an analysis at Mr. Zisa's request to defend him against allegations of mismanagement or theft of Attessa assets. (20T163:9-14).
    - Agreed that someone lying about the use of funds belonging to the company might mean that there are other larger frauds out there, and "you would have to continue to explore and prove that allegation beyond a reasonable doubt" (21T94:16-95:4).
    - Acknowledged that he wrote a book stating that direct proof of fraud is rarely available, but can be shown by "deceptive behavior, misrepresentation of material facts, false or altered documents, and/or evasion" (21T96:3-12).
    - Agreed that Mr. Zisa, as the managing member of Attessa, had a heightened fiduciary duty and had a duty to account for his actions and to demonstrate the propriety of the expenditures that occurred while managing member. (21T111:18-112:4).
    - Agreed with Mr. Chait's poor opinion of Mr. Zisa's recordkeeping and stated that: "you could not audit these books or you could not even do a review. You couldn't do a compilation." (21T116:7-24).
    - Acknowledged that he wrote a book which included the statement that an indicia of fraud is failure to maintain records and original documents. (21T120:4-16)
    - In response to a direct question posed by the Trial Court, stated that if the fiduciary couldn't justify any particular expense, it should be disallowed (i.e., charged to the fiduciary). (21T128:17-129:6).

- Agreed that Mr. Zisa, as the managing member of Attessa, had a heightened fiduciary duty and had a duty to account for his actions and to demonstrate the propriety of the expenditures that occurred while he was managing member. (21T111:18-112:4).
- Acknowledged that he wrote a book stating an indicia of fraud is altering documents and that fraudsters will often "delay, cause confusion, or develop manipulating responses when called to explain his or her questionable actions." (21T121:16-122:11).

As to Count VII (Mr. Zisa's breach of statutory duty of good faith and fair dealing), Count XV (Mr. Zisa's Breach of Contract--the Operating Agreement); and Count XVI (Mr. Zisa's Breach of the implied count of good faith and fair dealing), the Trial Court heard testimony from Mr. Christodoro (1T120:18-123:20; 1T123:24-124:5; 1T124:6-10; 1T135:10-18); Mr. Reck (22T73:5-74:4); Mr. Socrates Tsamutalis (the original Attessa accountant) (8T12:12-25; 8T8:19-9:16; 8T13:12-14:7); and Mr. Chait (6T104:11-105:3)--all of whom support the Court's decision. Moreover, once again, Mr. Zisa and Mr. Petrucelli also gave testimony which supported the Trial Court's decision on these counts:

- Mr. Zisa
  - Acknowledged the concept and understanding of recycled capital. (13T4-24).
  - Acknowledged that "right before Attessa was formed, Mr. Christodoro had about seven to 800,000 in the company." (17T24:4-7).
  - Admitted that he and Mr. Christodoro had talked about how all money prior to formation was a loan. (18T41:22-42:18).

- Admitted that he was the one who prepared the tax documents to go to the company accountant, Mr. Tsamutalis, which recognized the money owed by his parents and Mr. Christodoro. (18T54:17-55:1).
- Acknowledged that he paid back his parents the money they were owed. (18T57:25-58:1).
- Acknowledged that he told the accountant that the amount of unsecured loans to Mr. Christodoro was $572,788 as of the end of 2015, that his parents were owed $140,780, and that the two numbers added together was $713,568, which was the amount of non-recourse loans reported on the tax returns. (18T65:24-67:18).

- Mr. Petrucelli
  - Agreed that Mr. Christodoro would need to be paid back his $563,000 first, and after that "they would share equally" (21T22:5-19).
  - Disagreed that Mr. Zisa had taken the position that Mr. Christodoro shouldn't be paid back his pre-formation contributions. (21T23:18-24:5).
  - Agreed that the $713,568 on the tax returns was the money contributed by Mr. Christodoro and Mr. Zisa's parents, and furthermore that Mr. Zisa's parents were repaid in full. (21T82:5-16).

As to Count X (unjust enrichment as to Mr. Zisa) and Count XII (Conversion by Mr. Zisa), in support of its decision on these counts the Court heard testimony from Mr. Christodoro (3T19:6-35:2); Mr. Reck (12T49:3-8; 12T102:5-17); and Mr. Chait (6T115:6-15, 116:12-20; 6T120:1-6). The Trial Court also heard testimony from Mr. Petrucelli which further supported its decision on these counts:

- Agreed that Mr. Zisa had deposited business relationship money into his personal account. (21T136:10-14).

- Agreed that if a check was made out to both Mr. Christodoro and Mr. Zisa, both had to endorse it. (21T136:19-22).
- Agreed that if Mr. Zisa had endorsed Mr. Christodoro's name without his knowledge, authorization and consent, it would be malfeasance. (21T136:23-137:11).

Finally, as part of Mr. Christodoro's case-in-chief, the Trial Court also heard testimony from witnesses such as Mr. Albert Zaccone (a prior employer of Mr. Zisa), who testified as to Mr. Zisa's dubious credibility, (23T34:10-41:8), and Daniel Komyati, who testified in his capacity as Mr. Christodoro's tenant in 24 Port Imperial. (23T23:21-33:24).

All in all, therefore, the trial record over which the Court presided contains ample support for its decision on the claims for which it ruled in favor of Mr. Christodoro.

C. The Trial Testimony Supports the Dismissal of Mr. Zisa's Counterclaims.

The grant of Mr. Christodoro's claims implicitly, if not explicitly, necessitated the dismissal of most, if not all, of Mr. Zisa's counterclaims. Nonetheless, in addition to being rife with support for Mr. Christodoro's claims, the trial record is equally rife with information sustaining the Trial Court's dismissal of all of Mr. Zisa's counterclaims, of which there were ten in total.[17]

[17] Mr. Zisa's Counterclaim Counts V (Dilution) and VI (Dissociation) sought similar--albeit inverse--relief to the relief sought by Mr. Christodoro and, as noted

As to Counterclaims Count I (Breach of Contract) and Count II (Breach of the Implied Covenant of Good Faith and Fair Dealing), the Trial Court heard testimony from Mr. Christodoro (4T55:17-25; 1T125:25-126:2; 4T55:17-25; 1T125:25-126:2; 17T131:19-132:17; 17T137:8-23), and from the tenant residing in Port Imperial (23T24:16-22; 23T26:9-10:1) supporting the dismissal of these counterclaims. The Trial Court also heard testimony from Mr. Zisa and Mr. Petrucelli which supported the dismissal of these counterclaims:

- Mr. Zisa
    - First testified that Port Imperial was included with the properties that were purchased jointly with Mr. Christodoro pre-formation, but then testified that all of the pre-formation properties were refinanced, which Port Imperial never was. (15T16:15-18).
    - Testified that when Port Imperial was acquired and then Mr. Christodoro told him that he wanted to live there, that they would "basically let this one go." (15T27:2-12).
    - Acknowledged Mr. Christodoro personally received the rent and paid the mortgage for Port Imperial. (15T40:6-8).
    - Agreed that at the time of formation, twelve properties were owned as tenants in common, making no mention of Port Imperial, and agreed that all of the "business enterprise properties" were transferred from joint ownership to Attessa. (17T35:9-23).
    - Acknowledged that there is no written agreement where Mr. Christodoro conveyed any interest in Port Imperial to him or agreed to do so in the future. (17T89:25-91:14).

---

below, if either of these remedies (i.e., dilution or dissociation), are properly applied, Mr. Zisa's interest in Attessa would be minimized, if not eliminated entirely.

- Acknowledged the email exchange with Mr. Christodoro calling Port Imperial "his condo." (Da2355; 17T96:16-24).
- Acknowledged that he had the funds necessary to make the repairs for Poplar & Pulaski but did not do so. (17T137:8-23).

- Mr. Petrucelli
  - Agreed that there is no signed writing conveying any interest or promise of a future interest in Port Imperial, and that their position on that is solely based on Mr. Zisa's representations. (21T147:13-148:18).
  - Agreed that Mr. Zisa had enough money to make the repairs on Poplar and Pulaski, but that he didn't do so. (21T162:2-20).

As to Counterclaims Count III (fraudulent inducement), Count IV (Breach of Duty of Care and Loyalty); Count VII (unjust enrichment), and Count VIII (quantum meruit), the Trial Court heard testimony from Mr. Christodoro (2T14:14-20; 2T14:14-20) and, again, also from Mr. Zisa and Mr. Petrucelli which supported its dismissal of all of these counterclaims:

- Mr. Zisa
  - Testified that he was not spending 100% of his waking hours working on Attessa, stating that "once you buy a property, it doesn't take a lot of effort" (17T102:21-103:3).
  - Admitted that that the $7,500 payment to Guagliardi & Meliti, LLP was to retain the firm to represent him in the litigation. (14T170:1-4).

- Claimed that the payment to Lexis was for "excess mileage" charges he incurred because of using the car for business purposes. (14T168:24-169:14).[18]

- Mr. Petrucelli

  - Acknowledged that Article XI of the Operating Agreement stated that neither Mr. Zisa nor Mr. Christodoro was to be paid a salary. (21T40:10-16).

  - Agreed that, in order to accept Mr. Zisa's mileage calculation, the Trial Court would have to assume that Mr. Zisa was driving 75.6 miles a day for 365 days per year. (22T11:2-9).

  - Conceded that he conducted no analysis to determine whether any reimbursement was due for any payments made to prior counsel Ditkas Gillen. (21T146:25-147:4).

Finally, as to Counterclaims Count IX (Indemnification and Contribution), and Count X (Mr. Zisa's Claim for Attorneys' Fees), the Trial Court heard testimony from Mr. Petrucelli that supported its dismissal of these counterclaims:

---

[18] However, Mr. Zisa's initial attempts to justify his purported expenditures at trial were disastrous and were quickly abandoned thereafter. For example, Trial Exhibit P-40 was a $11,393.94 check from a business account payable to Lexis Financial, which was used to pay off Mr. Zisa's luxury SUV. (Da1855). Mr. Zisa claimed that this payment was for "excess mileage" charges he incurred because of using the car for business purposes. (14T168:24-169:14). The only evidence offered at trial to justify these automotive costs is Mr. Zisa's testimony, in which he claimed, *inter alia*, that he had to personally drive to Manasquan to pay a mortgage on one of the Properties. (14T169:4-9; 14T170:17-171:7). This testimony was contradicted by Attessa's bank statements showing that in 2017, Mr. Zisa made electronic payments to Manasquan for eleven of the twelve months. (Da2357-2364; Da2365-2367; Da2368-2383).

- Mr. Petrucelli stated that they based their calculations of how much Mr. Christodoro was supposed to contribute to Mr. Zisa's fees for his prior attorneys based on his presumed ownership of Port Imperial. (20T111:11-16).

- Mr. Petrucelli admitted that he was opining on the reasonableness of fees that he was charging for work done allegedly on behalf of Attessa. (20T145:7-19).

D. During Trial the Court Repeatedly Questioned Mr. Zisa's Testimony.

Furthermore, during the course of the trial, the Trial Court made repeated comments in real time which indicated that it was skeptical of many of Mr. Zisa's assertions--and, presumably, cast doubt as to Mr. Zisa's credibility. For instance, the Trial Court:

- Acknowledged Mr. Zisa testified to not keeping records. (13T129:7-8).
- Asked "All these properties were refi'd with all this money. You know, where did the money go? I didn't really hear that yet." (26T65:6-18).
- Stated "There's a fiduciary obligation to conduct yourself a certain way." (18T35:18-20).
- Stated "This is Mr. Zisa testifying and he's the managing member of Attessa and he's potentially engaging in transactions which are untoward." (18T25:10-13).
- Stated "So I'm not sure what he's doing unbeknownst to Mr. Christodoro and whatnot, if it is somehow a violation of both. Potentially it's a duty to Attessa and also as a broker." (18T26:1-5).
- Acknowledged that Peter Zisa set up the LLC for Northern New Jersey Construction, one of the entities into which Mr. Zisa controlled the flow of Attessa funds. (9T115:5-9).

- Stated that it would not ascribe "a lot of weight on Mr. Zisa now saying, well, this is a business document" about the PowerPoints. (15T182:8-11).
- Acknowledged the connection between Northern New Jersey Construction and the Zisas, the amount of checks out of Northern New Jersey Construction's bank account, and Peter Zisa 's selective memory regarding the entire New Jersey Construction issue. (27T77:11-20).
- Stated that Mr. Zisa has "very selective memory, and it's not going to bode well when I have to decide this case." (17T18:11-16).
- Acknowledged that Mr. Zisa's inability to remember items which happened to be inconvenient for him "goes to the credibility that I have to give." (15T70:19-23).

Based on the foregoing, it is clear that the Trial Court carefully considered all of the evidence and that it rendered a decision in keeping with Rule 1:7-4(a).

POINT II
THE TRIAL COURT'S FINDINGS AS TO MR. ZISA'S WRONGDOINGS JUSTIFIED THE EQUITABLE REMEDIES IT FASHIONED

"The scope of an appellate court's review of a Trial Court's fact-finding is a limited one. Trial court findings are ordinarily not disturbed unless they are so wholly unsupportable as to result in a denial of justice, and are upheld wherever they are supported by adequate, substantial and credible evidence." Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 475 (1988) (internal citations and quotations omitted).

A. The Court Properly Ordered that Mr. Christodoro's "Trapped Capital" be Repaid.

Mr. Zisa's current argument that Mr. Christodoro should not be repaid any of

his trapped capital (i.e., both pre-formation loans and post-formation capital contributions) is not what Mr. Zisa argued at trial. In this appeal, Mr. Zisa now claims that the parties understood and agreed that some of Mr. Christodoro's capital would forever remain trapped in the entity and that the $290,000 in repayments made to Mr. Christodoro were merely "discretionary." At trial, however, Mr. Zisa asserted that the parties' relationship was premised on the "recycling" of capital such that any money Mr. Christodoro invested would be "paid back through refinancing." (Pa425; Pa427; Pa430). Indeed, on cross-examination, Mr. Zisa testified that the parties always understood that Mr. Christodoro's capital would be recycled and, in the absence of recycling, the parties would have an unequal interest in that property. (17T20:12-21-12; see also Dca1; 13T29:9-19; 13T 88:17-19).

Based upon the foregoing concessions, at trial Mr. Zisa did not challenge Mr. Christodoro's entitlement to a return of at least some of the trapped capital, instead drawing a distinction between what was contributed prior to, and after, Attessa's formation. As to post-formation capital, Mr. Petrucelli's report conceded that Mr. Christodoro should be repaid these funds. (Dca353).

Mr. Zisa did, however, argue at trial that Mr. Christodoro waived the $804,464 of capital that was trapped in the business as of the date Attessa was formed.[19] Both

[19] On page 15 of his brief, Mr. Zisa claims that the amount owed to Mr. Christodoro as of Attessa's formation was $349,000, supposedly citing to Mr.

at trial and on appeal, the only "evidence" upon which Mr. Zisa relies to try to justify this recharacterization of Mr. Christodoro's loans to the pre-Attessa enterprise as a *de facto* "contribution" to Attessa is his self-serving testimony--which is contradicted by the extrinsic evidence. First, after Attessa was formed, Mr. Zisa continued tracking the amount of pre-formation funds that Mr. Christodoro had contributed but which had not yet been repaid. Specifically, the 2015 "worksheet" that Mr. Zisa provided to Attessa's accountant, Mr. Tsamutalis, included a "2015 Year End Balance Sheet," which included a category entitled "Attessa Properties Unsecured Loans for Properties." (Da1650; 8T12:12-25; 21T85:22-86:2). As a result of Mr. Zisa continuing to track pre-formation loans, Attessa's 2015 tax return includes $713,568 in nonrecourse loans on line 18 of Attessa's Schedule L. (Dca23).[20]

Clearly, Mr. Zisa knew that this "2015 Year End Balance Sheet" would be fatal to his contention that Mr. Christodoro's loan was "forgiven" because he went

---

Petrucelli's report. The report actually provides, however, that Mr. Christodoro's total "Adjusted Capital Balance" was $678,821. (Dca355). Furthermore, Mr. Petrucelli himself admitted at trial that Mr. Reck's $804,464 pre-formation trapped capital calculation includes transactions that he failed to consider (21T76:11-14; 21T79:20-25) and that if those transactions were included, his calculation would be the same as Mr. Reck's. (21T76:15-18; 21T80:5-13).

[20] Likewise, it should be noted that Trial Ex. P-9 also includes a $140,780 loan from Mr. Zisa's parents, which was undisputedly repaid in full. (21T82:14-16). Mr. Zisa never explained the discordant positions whereby his family's loan should be repaid in full, while Mr. Christodoro's loan should be wiped out.

so far as to withhold that page from the version of the worksheet he produced in this litigation. Specifically, Trial Ex. P-9 with the "smoking gun" worksheet was obtained from Mr. Tsamutalis's accounting firm, not from Mr. Zisa. (Da1650-1657; 2T86:19-89:7; 8T12:12-13:6). Conversely, the version of 2015 tax return worksheet that Mr. Zisa produced as part of Trial Ex. D-2 does not contain the critical page that tracked the loan balances. (Da2049).

As Mr. Zisa had already been confronted with Trial Ex. P-9 at his deposition, he knew that he would have to explain the existence of the year-end Balance Sheet at trial--and, yet, the best excuse he could muster was to claim that the loan was being "written down over time" as some sort of accounting trick devised by Mr. Tsamutalis. Of course, Mr. Tsamutalis--who testified at trial--offered no such testimony. In fact, he testified to the contrary, explaining that it was Mr. Zisa who provided him with the year-end non-recourse loan figures. (8T9:10-16). Likewise, even though a well-coached Mr. Petrucelli also parroted Mr. Zisa on this point (i.e., that the treatment of these loans was Mr. Tsamutalis's idea), Mr. Petrucelli admitted during cross-examination that he never actually spoke to Mr. Tsamutalis about this issue. (21T85:7-9).

Second, Mr. Zisa's claim that these loans were somehow forgiven is contradicted by the fact that within the first two weeks of Attessa's existence, Mr. Zisa caused Mr. Christodoro to be repaid $290,000 for pre-formation loans made on

properties that were refinanced after formation. (Da2015; see also Pa399-400). Moreover, Mr. Zisa is estopped from challenging the loan's validity by the fact that Mr. Zisa continued acting as if the loan survived Attessa's formation and Mr. Christodoro relied upon Mr. Zisa's actions. See Knorr v. Smeal, 178 N.J. 169, 178 (2003).

During the course of trial, Mr. Petrucelli offered conflicting testimony about these pre-formation loans. Early in his direct examination, Mr. Petrucelli stated that no one was claiming that these monies were wiped out at formation or that Mr. Christodoro would not be repaid these monies; indeed, he conceded it would have been unfair if Mr. Christodoro were not repaid. (21T23:3-19; see also Dca351; 7T33:17-21). After a break in the trial, however, Mr. Petrucelli did a complete 180-degree turn and offered "new" testimony adopting the "party-line" that these monies were purportedly wiped out when the parties signed the Operating Agreement. (22T36:23-37:24). This led to cross-examination in which Mr. Petrucelli admitted to the accuracy of a question and answer from his deposition wherein he had testified that Mr. Christodoro was entitled to be paid back his capital investments. (21T29:19-30:4).[21]

In short, the trial record is replete with sufficient basis for the Trial Court to

[21] The court-appointed forensic accountant, Mr. Chait, also believed all trapped capital should be returned. (7T33:17-21).

have determined whether, and how much of, Mr. Christodoro's capital contributions should have been repaid to him, and the Trial Court's decision that Mr. Christodoro was entitled to be repaid total pre- and post-formation loans "off the top" in the amount of $1,198,220 should not be disturbed.

B. Mr. Zisa's Claimed "Offsets" Lack Merit.

Alternatively, Mr. Zisa argues that when the Trial Court ordered Mr. Christodoro's trapped capital to be returned, the Court purportedly erred by failing to accord him a countervailing "offset" by refusing to "allocate any value to the financial contributions or work performed by Defendant, both pre- and post-formation of Attessa, in a similar fashion." Db27.

1. Mr. Zisa Was Already Compensated for His Labor in the Form of an Initial Ownership Interest.

Interestingly, Mr. Zisa does not provide any record citations or legal authority supporting the proposition that his labor should be separately valued. Mr. Zisa cannot rely upon Attessa's Operating Agreement, because Article IX makes clear that any such labor/services cannot be treated as "sweat equity." (Da1602). Even Mr. Petrucelli concedes in his report that, under Article IX, Mr. Zisa was no longer entitled to any post-formation "sweat equity" and an ownership interest in Attessa could only be acquired through capital contributions. (21T40:14-16; Dca362).

To be clear, Mr. Zisa was being "compensated" for his labor by way of his initial equity share of the business. All that Mr. Zisa would have had to do (either

under the pre-Attessa arrangement or under the Attessa Operating Agreement) to preserve his 50% share was to return Mr. Christodoro's capital to him and not defalcate company funds. Mr. Zisa's contention that he should now receive a separate credit for his labor (on top of his default equity interest) is improper double-counting. Also, assuming for a moment that Mr. Zisa was correct that: (1) he should get a capital contribution allocation in the form of a $95,000 "annual salary credit"; (2) all of Mr. Christodoro's capital was returned; and (3) Mr. Zisa did not defalcate any funds, this would lead to the absurd result where Mr. Zisa would suddenly have a larger ownership interest in Attessa than Mr. Christodoro.[22]

2. Mr. Zisa Submitted No Evidence to Justify his Unreimbursed Expenses.

Mr. Zisa's decision to argue on appeal that the Trial Court failed to take into consideration alleged unreimbursed business expenditures is jaw-dropping because, at trial, it was shown that Mr. Zisa had, in fact, repeatedly defalcated business funds.

At the outset, most of Mr. Zisa's vague references to broad categories of unreimbursed expenses (office space, cell phone bills, *etc.*) should be disregarded

---

[22] Mr. Zisa asserts that "in the refinancings it was also anticipated that Defendant would be paid monies." Db27. To the extent Mr. Zisa is now claiming for the first time that the parties agreed that Mr. Zisa would be "paid monies" following a refinancing, this theory was not advanced at trial and directly contradicts Article IX of the Operating Agreement (Da1602), a proposition to which even Mr. Petrucelli concedes in his expert report. (Dca362).

by the Appellate Division because no invoices, bills, or other similar documents were produced in discovery (let alone presented at trial) to demonstrate any such expenditures.[23] Indeed, the only unreimbursed expenses set forth in Mr. Zisa's proposed findings of fact and conclusions of law were $40,528.00 in professional fees rendered on his behalf in conjunction with the litigation. (Pa468).

As to the professional fees that Mr. Zisa did seek in his post-trial submission, the Trial Court properly rejected these claims. For example, Mr. Zisa admitted that that the $7,500 payment to Guagliardi & Meliti, LLP was to retain the firm to represent him in this litigation (14T170:1-4) and Mr. Petrucelli conceded no analysis was conducted to determine whether any reimbursement was due for any payments made to prior counsel Ditkas Gillen (21T146:25-147:4). As to "forensic accounting" fees, these fees were for Mr. Petrucelli (Mr. Zisa's own expert witness), the reimbursement of which would be especially improper because the Trial Court had appointed Mr. Chait to serve as Attessa's forensic account and Mr. Strasser to serve

---

[23] In fact, as a matter of law this issue is not even properly before this Court. "It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the Trial Court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the Trial Court or concern matters of great public interest." Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (internal quotations omitted). The jurisdiction of the Appellate Courts is "rightly is bounded by the proofs and objections critically explored on the record before the trial court by the parties themselves," and therefore these issues are not properly before the Court. State v. Badr, 415 N.J. Super. 455, 474 (App. Div. 2010) (citations omitted).

as the entity's Special Fiscal Agent.

Finally, Mr. Zisa's attempt to have the Appellate Division analyze, in an "appellate vacuum," his reimbursement claims for his purported labor and/or his expenditures is improper, as it ignores why Mr. Zisa's actions were being scrutinized in the first place. Mr. Zisa did not advance these arguments to seek separate remuneration from Mr. Christodoro or the entity, but instead he has conjured those arguments on appeal in a vain effort to offset his misappropriation. For the reasons set forth below, there was more than substantial--and often completely unchallenged--evidence that Mr. Zisa defalcated company funds.

C. Mr. Zisa Should Not Object to the 10% Equity Shift, as it Only Reduces the Damage Award Against Him.

In Section II(B) of his brief, Mr. Zisa makes two distinct arguments: (1) he contends that there was no factual basis for the Trial Court to find that he converted/defalcated business funds and/or to otherwise hold him responsible for unexplained/unjustified business transactions; and (2) in the alternative, he asserts that even if there was such evidence, the Trial Court exceeded its authority when choosing to remedy the forgoing by way of adjusting the buyout price (i.e., the amount Mr. Zisa will be paid by Mr. Christodoro) by way of a 10% equity shift.

As to Mr. Zisa's factual challenge, the Trial Court was presented overwhelming evidence proving that not only did Mr. Zisa defalcate business funds, but he took active steps (both prior to and during the litigation) to conceal his

wrongdoing. For starters, both Mr. Chait and Mr. Petrucelli agreed that there were "questionable expenditures" under Mr. Zisa's watch (Da1909-2003; 21T119:22-120:2).

Moreover, the Trial Court was presented with clear-cut unrebutted instances of Mr. Zisa's defalcation. For example, Trial Ex. P-18 constitutes sixteen joint or Attessa checks that Mr. Zisa deposited directly into his personal bank account. (Da1710-1733; 21T135:17-136:14).[24] As Mr. Chait explained, if Mr. Zisa did not then transfer the funds from his personal account back into an Attessa account (and, of course, there was no evidence of any such transfers), this would be malfeasance--and potentially theft. (6T110:3-16; 6T120:1-6; 6T122:2-14).

Separately, seven of the sixteen checks Mr. Zisa deposited into his personal TD Bank account (totaling $16,144.42) were made payable to both Mr. Zisa and Mr. Christodoro. (Da1710-1733). There is no dispute that for two-payee checks like these, both Mr. Christodoro and Mr. Zisa were required to endorse each check. (21T136:19-22). Mr. Petrucelli further conceded that if Mr. Zisa endorsed Mr.

---

[24] Of the sixteen checks he deposited into his personal bank account, Mr. Zisa only attempted to offer a justification as to one: the $5,750 check made payable to Attessa by the tenant of 46 Pine Lake, which he deposited on October 8, 2016. (14T160:10-20). Mr. Zisa testified that there was nothing untoward with him depositing this check into his bank account because he later wired $3,000 to Mr. Christodoro. (Dca337; Da2395-2423). But, on cross-examination, it was revealed that Mr. Zisa then transferred back from Attessa to himself another $3,000, meaning that Mr. Zisa did, ultimately, retain the entire $5,750 for himself. (Da2424-2439).

Christodoro's name on any of these checks without Mr. Christodoro's knowledge, authorization, or consent, this action would constitute malfeasance, and this would change the conclusions in his report. (21T136:23-137:11). Mr. Christodoro's testimony at trial that he did not endorse these checks and that Mr. Zisa deposited them into his personal bank account without Mr. Christodoro's knowledge, authorization, or consent, was unrefuted. (3T19:6-35:2). In other words, the uncontroverted evidence is that Mr. Zisa's actions may have crossed the line from civil liability to criminal wrongdoing.

While there can be no question that Mr. Zisa defalcated some quantum of company funds, he (perhaps intentionally) made quantifying his defalcation complicated in two ways: (1) by failing to maintain records; and (2) by taking active steps to hide his defalcation.

1. Mr. Zisa's Failure to Maintain Records.

While Mr. Zisa dedicates an entire section of his appellate brief to suggest he "maintained financial records for Attessa," this contention is refuted by simply looking at his expert's own testimony, where Mr. Petrucelli admitted that "you could not audit these books or you could not even do a review. You couldn't do a compilation." (21T116:13-24; 21T118:2-7). The Court-appointed forensic accountant, Mr. Chait, also concluded that Mr. Zisa "failed to maintain proper controls over accounting records" and that Attessa's records were not sufficient to

demonstrate Attessa's income and expenses. (Da1909-2003; 7T55:14-24).

Not only was this a violation of Article XIII of the Operating Agreement, but it also violates Mr. Zisa's legal fiduciary obligations as the managing member. See N.J.S.A. 42:2C-39 (establishing the duties owed by a member of a member-managed limited liability company to the company and to the other members); Heller v. Hartz Mountain Indus., Inc., 270 N.J. Super. 143, 151 (Law Div. 1993) (". . . where a managing partner controls the partnership's business, that partner is held to the strictest possible obligation to his or her co-partner since the affairs of all partners are delegated to the manager without interference or monitoring on the part of the non-managing partners.") (quotations omitted); Glick v. KF Pecksland LLC, 2017 Del. Ch. LEXIS 806, at *47 (Del. Ch. Nov. 17, 2017) (a managing member's "failure to maintain [] basic corporate records is egregious and suggestive of gross negligence that would sustain a breach of the duty of care, and perhaps bad faith") (Pa554-574); Restatement (Third) of Trusts § 83 (2007) ("Implicit in the duty to provide information to beneficiaries . . . is the duty stated in this Section requiring a trustee to maintain an adequate set of books and records.").

2. Mr. Zisa's Efforts to Conceal His Wrongdoing.

Mr. Zisa went to great lengths during the course of the litigation to conceal many of his transactions. For example, regarding the $115,045 in real estate commissions that Mr. Zisa paid himself but did not disclose to Mr. Christodoro

(Da2092), this Court only need look as far as page 7 of Trial Ex. P-26, a document that was produced in response to Judge Contillo's order due to Mr. Zisa's ongoing refusal to comply with his discovery obligations. (15T51:12-53:8). Page 7 is a copy of a December 5, 2017 check for $14,327.58 from REMAX to Mr. Zisa. (Da1794). The memo line of this check is blank. This same check was also produced in response to a subpoena to TD Bank--with one notable difference, it does not contain a blank memo line. Instead its memo line reads "100 Winston # EC5, Cliffside." (Da1796).[25]

A comparison of the altered and unaltered checks reveal that Mr. Zisa did not just redact the memo line, but he also drew in a new memo line after the original memo note about 100 Winston had been "erased" and replaced it with a blank memo line to try to hide the fact that he had altered the document. (Compare Da1794 with Da1796).[26]

Mr. Zisa went to the trouble of forging evidence because 100 Winston is an

---

[25] The 100 Winston commission check is not the only manipulated document to be found. Trial Ex. P-26 contains only one other check, a $1,261.40 commission check from REMAX to Mr. Zisa dated April 5, 2018. (Da1795). As he had done with the 100 Winston commission check, Mr. Zisa also altered this check by removing the real memo line and drawing in a new--and blank--memo line to try to cover up this manipulation. (Compare Da1795 with Da2311)

[26] Lest there be any question, it is clear that a doctored memo line was drawn onto the check because the line is at a different height and is a different length than the "real" memo line.

Attessa property, meaning that this check proves that Mr. Zisa received a real estate commission paid with Attessa's own funds, in direct violation of the Operating Agreement. Not realizing that Mr. Christodoro received an unaltered copy of the check from the bank, Mr. Zisa originally claimed at his deposition that he did not receive a commission for the 100 Winston sale. Even when he was shown an internal REMAX document that listed Mr. Zisa as the associate on the deal (Da2309), Mr. Zisa still denied that he had received the commission for 100 Winston. (15T64:6-20). Having dug his own grave, Mr. Zisa was then confronted with the unaltered check. Mr. Zisa compounded his lie--not only denying any knowledge as to the check's doctoring, but in fact claiming the check might have been altered by somebody else before he put it into his file. (15T96:11-97:13). However, this testimony had to be false because Mr. Zisa later produced the unaltered copy of the check from his physical file, meaning that Mr. Zisa had to have manually edited the electronic image file of the check after Judge Contillo ordered its production. (Da2310; 15T97:10-98:17).

Another example of Mr. Zisa's deception was his improper payment of his personal credit cards using Attessa funds. Specifically, on June 7, 2019, the Trial Court ordered Mr. Chait to supervise Attessa's bank accounts and required him to approve any expenditure of more than $1,000. (Da144-145; Da1850-1851). Prior to the entry of this order, Mr. Zisa had been making monthly payments on his personal

credit cards with Attessa funds in amounts that each exceeded $1,000. After entry of the order imposing the $1,000-approval threshold, Mr. Zisa did not stop using Attessa funds to pay his personal credit cards, but instead, simply structed the payments so that each payment was less than $1,000 and would slip under Mr. Chait's radar. (Da2066-2068; Da2387-2388; Da2389-2390). For example, in both August 2019 and September 2019, Mr. Zisa caused Attessa to pay a total of $1,500 to his Chase Bank card. The only difference between the two months was that he made a single $1,500 payment in August but he made two separate $750 payments to Chase Bank in September. (Da2066-2068; Da2004-2005). Mr. Zisa did not obtain Mr. Chait's authorization. (6T136:13-24).

3. The Quantification of Mr. Zisa's Wrongdoing.

Because Mr. Zisa did not generate corporate books or maintain company records, Mr. Christodoro's forensic accounting expert, Mr. Reck, had to turn to Attessa's bank records to try to uncover the extent of Mr. Zisa's wrongdoing. As detailed in his report and in his testimony, Mr. Reck divided his transaction-by-transaction analysis into two categories of transactions: (1) the "direct transfers", which constituted transfers of company funds between company bank accounts and Mr. Zisa's personal bank account; and (2) the "indirect" expenditures, which were a limited category of transactions including ATM withdrawals, bank teller withdrawals, payment of personal expenses and credit cards, and the receipt of

commissions.

As to the "direct" transfers, hundreds of thousands of dollars were transferred both to and from Mr. Zisa's personal account from/to company bank accounts. The total net of these "direct" transactions was as follows: (1) prior to Attessa's formation, Mr. Zisa transferred to himself a net of $117,818;[27] and (2) post-formation, Mr. Zisa transferred a net of $415,436 to himself.[28] (Da2048; Da2054). As such, before even considering the challenged "indirect" expenditures, the evidence before the Trial Court was that the amount owed by Mr. Zisa back to the enterprise would be at least **$533,254**.[29]

As to the "indirect expenditures," Mr. Reck again was able to use the business's bank records to conduct a transaction-by-transaction analysis of each

---

[27] Mr. Zisa and Mr. Petrucelli claimed that at the time of Attessa's formation, Mr. Christodoro, in addition to agreeing to explicitly walk away from the $804,464 in trapped capital he was owed, also implicitly forgave Mr. Zisa for the $117,818 that records now show went missing from the company--even though Mr. Christodoro only learned of this defalcation several years later during discovery in this matter. No competent evidence was ever adduced by Mr. Zisa to support this outlandish "loan forebearance" assertion.

[28] Mr. Petrucelli agreed that, in theory, to the extent there was a 'delta' between the post-formation transfers between Mr. Zisa's personal accounts and the company accounts, that amount should be rectified. Mr. Petrucelli, however, concluded that Mr. Zisa was purportedly owed $4,237, a conclusion which is totally inaccurate because Mr. Petrucelli only looked at transactions involving one of Mr. Zisa's accounts, while Mr. Reck considered all known transactions. (Dca0347).

[29] As will be noted below, the Trial Court never held Mr. Zisa to account in this regard.

expenditure of bank funds. Putting aside whether Mr. Christodoro could have demanded that Mr. Zisa justify every one of the thousands of transactions, he did not do so. In fact, Mr. Christodoro did not challenge the vast majority of transactions (such as mortgage, property tax, and insurance payments). Similarly, Mr. Christodoro did not challenge payments to third-party contractors (who just as easily could have been doing work on any of the dozen other homes that the Zisa family owns separate and apart from Attessa).[30]

Instead, with regard to these "indirect transactions," Mr. Christodoro limited his challenge to the types of transactions that other courts have previously recognized as suspect and for which fiduciaries would be personally accountable if they could not to meet their burden of justifying the expense. See Technicorp Int'l II, Inc. v. Johnston, 2000 WL 713750, at *16 (credit card charges/payments), *20 (cash withdrawals) (Del. Ch. May 31, 2000) (Pa575-625); CanCan Dev., LLC v. Manno, 2015 Del. Ch. LEXIS 144, at *17 (payment of family member's salary), *17-20 (individuals performing both individual and company services), *20-22 (cash withdrawals), *23-25 (payment of personal expenses) (Del. Ch. May 27, 2015) (Pa626-652).

---

[30] The only "contractor" payments challenged by Mr. Christodoro were those made to Northern New Jersey Construction, an entity essentially controlled by the Zisas and about which both Mr. Zisa and Peter Zisa repeatedly perjured themselves. (See 27T65:1-66:12; Pa305-310).

In total, Mr. Christodoro challenged **$844,242** in purported--but undocumented--company expenditures. (Da2017; Da2026).

As to certain entire categories of indirect expenditures (ATM and teller withdrawals), not only did Mr. Petrucelli admit that there is no backup documentation tying any withdrawal to a specific project, property, or vendor (20T124:6-9), he also conceded that Mr. Zisa had the legal obligation to justify all of these withdrawals (20T128:11-14). Most tellingly, however, in response to a direct question from the Trial Court, Mr. Petrucelli admitted that any unsupported withdrawal should be held against Mr. Zisa. (21T128:17-129:7).

4. The "Equity Shift" is an Appropriate Remedy.

In the face of the foregoing, the issue confronting the Trial Court was how to craft an equitable remedy when dealing with a fiduciary who had defalcated funds, failed to maintain records and then went to great lengths to conceal the amount of damages so as to make it impossible to quantify the exact quantum of misappropriation.

As a matter of long-standing statutory and common law, the burden shifts to the fiduciary (i.e., Mr. Zisa) to explain the fate of all funds placed under his control and, failing that, all of the "gaps" in the accounting should be held against the fiduciary. See, e.g., In re Brueck's Estate, 124 N.J. Eq. 62, 63 (1938) ("But it is elementary that the executor is under a peremptory duty to account for the assets . .

. and if, through failure of the fiduciary duty, he is unable so to do, he is chargeable with their full value."); Midler v. Heinowitz, 10 N.J. 123, 131–32 (1952); see also Hollander v. Breeze Corp., 131 N.J. Eq. 585, 606 (Ch. 1941), decree aff'd sub nom. Hollander v. Breeze Corps., 131 N.J. Eq. 613 (1942); see also Technicorp Int'l II, Inc., 2000 WL 713750, at *25 (Pa575-625); see also Hardy v. Hardy, 2014 Del. Ch. LEXIS 135, at *36 (Del. Ch. July 29, 2014) (Pa653-675);.

In other words, as to each challenged expenditure for which he cannot satisfactorily account as a valid business expense (i.e. on a transaction-by-transaction basis), Mr. Zisa would be required to remit that amount back to Attessa. At trial, Mr. Zisa's expert, Mr. Petrucelli, agreed that this burden-shifting paradigm applies in this case. (21T111:22-112:4). This point was so important that the Trial Court interjected and directly asked Mr. Petrucelli to confirm his position. (21T128:11-129:7).

Moreover, the law is clear that Mr. Zisa's own self-serving testimony is insufficient to satisfy the burden to justify expenditures. See Technicorp Int'l II, Inc., 2000 WL 713750, at *2 (". . . where (as here) corporate fiduciaries cause the corporation to pay moneys to themselves or third parties, and the fiduciaries cannot document any legitimate business purpose for the expenditures, is the Court required to accept the fiduciaries' uncorroborated and self-serving testimony of business purpose? The answer, again repeated at many different points, is clearly no."). Mr.

Petrucelli admitted that he has testified in other breach of fiduciary duty cases that a fiduciary cannot rely on his or her own statements about how money was spent to justify the expenditure. (21T114:2-13).

Instead, Mr. Petrucelli posited that a fiduciary could rectify his/her initial failure to properly document expenditures by hiring a forensic accountant to go back and recreate the books and records for that period. (20T12/21/21; 21T118:11-17). There was no dispute, however, that Mr. Petrucelli, himself, never went back to 2011 to conduct this analysis on behalf of Mr. Zisa. (21T118:18-21; see also 22T7:21-8:17; 21T98:21-99:5, 21T104:16-23).[31]

In summary, Mr. Zisa/Mr. Petrucelli did not dispute that Mr. Zisa had the burden of justifying the challenged expenditures, Mr. Petrucelli admitted he did not actually go back and review any business records to determine if there was any fraud and Mr. Zisa did not offer evidence in the form of underlying documents (receipts, invoices, etc.) that could have perhaps resolved certain challenged transactions.

---

[31] Even absent a fiduciary relationship, general damages principles hold that where the defendant has made it impossible to quantify damages with exactitude, damages do not need to be proved to the penny. Instead, a reasonable estimation of damages may be awarded. See, e.g., Hoppe v. Ranzini, 158 N.J. Super. 158, 166 (App. Div. 1978) ("it is certain that some damage has resulted, mere uncertainty as to the amount need not preclude the right to recovery. In that event, it is left to the good sense of the jury, as reasonable men, to determine from the evidence the best estimate that can be made under the circumstances of the amount of compensatory damages"); accord Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265; see also Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 261 (3d Cir. 1995).

Accordingly, all of the unexplained expenditures for which Mr. Zisa could not account should have been held against him (i.e., $844,242) (Da2017; Da2026). According to Mr. Strasser's buyout calculation of September 26, 2023 (Pa548-549), a 10% stake in Attessa was worth approximately $370,000--which is substantially less than the "wayward" expenditures for which Mr. Zisa is actually responsible.

In the end, however, rather than hold Mr. Zisa accountable for the entirety of the unsustained expenses from Attessa's coffers, the Trial Court ordered that there would be a ten percent equity shift, such that Mr. Christodoro would have sixty percent of Attessa, and Mr. Zisa would have forty percent of Attessa.[32]

D. The Court Properly Determined that Mr. Christodoro Should Be Permitted the Right to Buy Out Mr. Zisa's Interests in Attessa.

Mr. Zisa argues that it was error for the Court to award Mr. Christodoro the right to buy out his interest in Attessa. (Db33-36). Yet, he himself requested the right to dissociate Mr. Christodoro from Attessa in Count VI of his Counterclaim; and, even more significantly, Mr. Zisa himself filed an application, albeit a misguided one, to enforce his purported right to buy out Mr. Christodoro (Da1066). In other words, Mr. Zisa does not challenge the propriety of the buyout remedy itself, he

---

[32] Ironically, notwithstanding Mr. Zisa's contentions on appeal that this was arbitrary and erroneous, the result is not far removed from the result advocated by his own expert, Mr. Petrucelli, at trial. (20T118:10-13; 22T15:8-11 (where Mr. Petrucelli testified that his calculations showed he would grant fifty-nine percent of Attessa to Mr. Christodoro and forty-one percent to Mr. Zisa).

merely gripes at the fact that he did not get to avail himself of this remedy (See Point V, infra.).

Aside from the fact that Mr. Zisa is essentially estopped from challenging the buyout, in light of the foregoing, it cannot be said that the remedy crafted by the Trial Court was "so wholly unsupportable as to result in a denial of justice" such that it should be disturbed on appellate review. Meshinsky, 110 N.J. at 475.

POINT III
THE TRIAL COURT PROPERLY DISMISSED COUNT ONE OF DEFENDANT'S COUNTERCLAIMS, REGARDING PLAINTIFF'S PORT IMPERIAL PROPERTY

Mr. Zisa claims that the Trial Court erred in rejecting the first count of his counterclaim, which alleged that he was entitled to a 50% property interest in the property located at 24 Port Imperial. For the reasons that follow, this Court should not disturb the findings of the Trial Court on this issue.

A. Any Claim to an Interest in Port Imperial is Time Barred.

In New Jersey, breach of contract actions are governed by a six-year statute of limitations. N.J.S.A. 2A:14-1. Assuming for the sake of argument that the statute of limitations began to run upon the purchase of the Port Imperial condo on July 15, 2011, the statute of limitations for any potential claim held by Mr. Zisa for an alleged agreement related to the ownership of Port Imperial had expired by no later than July 15, 2017. Therefore, as a matter of law, any claim made by Mr. Zisa for an ownership interest in Port Imperial is time-barred.

B. Any Claim by Mr. Zisa to an Interest in Port Imperial is Barred by the Statute of Frauds.

Furthermore, in addition to the procedural defect of Mr. Zisa's claim to Port Imperial, the claim was also fatally flawed under the New Jersey Statute of Frauds because pursuant to N.J.S.A. 25:1-13, an agreement to "transfer an interest in real estate or to hold an interest in real estate for the benefit of another" is unenforceable unless:

> a. a description of the real estate sufficient to identify it, the nature of the interest to be transferred, the existence of the agreement, and the identity of the transferor and transferee **are established in a writing signed by or on behalf of the party against whom enforcement is sought**; or
>
> b. a description of the real estate sufficient to identify it, the nature of the interest to be transferred, the existence of the agreement and the identity of the transferor and the transferee **are proved by clear and convincing evidence**.

(emphasis added). The statute of frauds covers alleged oral agreements to purchase land as joint tenants and/or to transfer an interest in land. Presten v. Sailer, 225 N.J. Super. 178, 193–94 (App. Div. 1988); see also De Marco v. Estlow, 18 N.J. Super. 30, 33 (Ch. Div.), aff'd, 21 N.J. Super. 356 (App. Div. 1952).

Here, Mr. Zisa did not introduce any evidence of a writing signed by Mr. Christodoro which satisfies subsection (a) of the Statute of Frauds. In fact, Mr. Petrucelli testified specifically to the non-existence of any such writing. (21T147:19-148:18). When Mr. Zisa testified, he could not identify any evidence of a signed writing either. (17T89:25-90:19).

Nor was the Trial Court presented with any other evidence under subsection (b) of the Statute of Frauds which would establish, by clear and convincing evidence, the existence of an agreement to transfer any interest in Port Imperial. In fact, the parol evidence introduced at trial shows that, years after Mr. Christodoro initially acquired Port Imperial, Mr. Zisa considered it to be solely Mr. Christodoro's property. For example, Mr. Zisa rejected Port Imperial as an investment property. (Da2355). Likewise, in an email from November 13, 2015, in which Mr. Zisa provided Mr. Christodoro with an analysis of 24 Port Imperial, Mr. Zisa referred to the Property as "your condo." (Da2356). While the document discusses Mr. Christodoro reaping certain profits if he sold the unit, nothing in the document suggests Mr. Zisa was entitled to share in any of those monies. (17T98:16-19).[33]

Based on the foregoing, any claim made by Mr. Zisa for an ownership interest in Port Imperial is both procedurally time-barred and substantively barred by the Statute of Frauds.

---

[33] Even the tenant living at Port Imperial, Mr. Dan Komyati, testified that Mr. Zisa told him that any questions would have to be run past Mr. Christodoro--who was the owner of the condominium unit. Furthermore, Mr. Komyati testified that Mr. Zisa always referred to Mr. Christodoro as the sole owner of the condo and that he told Mr. Komyati that he was just helping out his friend, Mr. Christodoro. (23T 24:16-22; 23T26:9-10:1).

POINT IV
THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION FOR RECONSIDERATION

Mr. Zisa claims that the Trial Court erred in denying his cross-motion for reconsideration of the July 28, 2022 Order following the trial.

It is axiomatic that the Appellate Division reviews "a trial court's denial of a motion for reconsideration under the abuse of discretion standard." Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021); Gold Tree Spa, Inc. v. PD Nail Corp., 475 N.J. Super. 240, 245 (App. Div. 2023).

Here, Mr. Zisa's so-called "reconsideration motion" went far beyond the bounds of propriety in that it sought to put before the Trial Court documents that not only were not part of the trial record, but many of which were never even produced in discovery--an undertaking which consumed several years and the constant involvement of a SDM.

Of the eighty-three tabbed exhibits in Frank Zisa's reconsideration certification, six were "intentionally omitted" without explanation, leaving seventy-seven "actual" exhibits. (Da997-998). Of these remaining exhibits, only sixteen were culled from the trial--meaning that sixty-one of Mr. Zisa's reconsideration exhibits were not part of the trial record. (Da997-998). Even more shockingly, thirty-six of Frank Zisa's reconsideration exhibits were never produced in discovery. (Da993; Da997-998).

Before the Trial Court, Mr. Zisa attempted to distinguish the respective standards for expanding the record on reconsideration under Rule 4:42-2 (interlocutory orders) instead of Rule 4:49-2 (final orders). But Mr. Zisa conceded that regardless of which standard applied, new information should only be considered "if there is good reason." Therefore, regardless of which reconsideration standard was utilized by the Trial Court to assess Frank Zisa's attempted introduction of "new evidence," Mr. Zisa was entirely unable to show even the barest modicum of "good reason" to support the introduction of the surfeit of new documents upon which his reconsideration application is based--especially since he offered no cogent explanation as to why the documents were never produced in discovery (let alone not introduced at trial). See, e.g., Fusco v. Bd. of Educ. Of City of Newark, 349 N.J. Super. 455, 463 (App. Div. 2002) (cautioning that permissive admission of new documents on reconsideration might encourage improper litigation tactic of holding back documents to bolster potential reconsideration application).

In the end, even if the Trial Court considered the new information improperly provided by Mr. Zisa, it was not confronted with any information to "convince [it] that either: 1) it has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that [it] either did not consider, or failed to appreciate the significance of probative, competent evidence." Kornbleuth v. Westover, 241 N.J. 289, 301 (2020).

Mr. Zisa's reconsideration motion was nothing more than his attempt to "relitigate" the issues or "get a second bite at the apple," and it was well within the discretion of the Trial Court to deny that application. Conforti v. Cty. of Ocean, 255 N.J. 142, 169 (2023); D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

POINT V
THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION TO ENFORCE AND CORRECTLY GRANTED PLAINTIFF'S CROSS-MOTION TO ENFORCE

Mr. Zisa argues that it was error for the Trial Court to deny his motion to enforce the July 28, 2022 Order, claiming that "Plaintiff's time to exercise his buyout elapsed as a matter of law." (Db41-42). However, it is well established that "[i]n fashioning relief, the Chancery judge has broad discretionary power to adapt equitable remedies to the particular circumstances of a given case." Marioni v. Roxy Garments Delivery Co., 417 N.J. Super. 269, 275 (App. Div. 2010); see also Matejek v. Watson, 449 N.J. Super. 179, 183 (App. Div. 2017). This is also true when it comes to the enforcement of its own orders. See N. Jersey Media Grp., Inc. v. State, Office of Governor, 451 N.J. Super. 282, 299 (App. Div. 2017) (applying the abuse of discretion standard when evaluating the actions taken by the Law Division to enforce its own order).

Here, the Trial Court did not abuse its discretion, and Mr. Zisa's enforcement application can best be described as "sour grapes"--in that Mr. Zisa is clearly

dissatisfied that the Trial Court granted Mr. Christodoro's cross-motion when it denied his motion to enforce. (Da1566-1568). Paradoxically, Mr. Zisa's motion sought to both enforce and to modify the Court's July 28, 2022 Order at the same time. (Da1066-1067). Yet, Mr. Zisa (in arguing that Mr. Christodoro had waived his right to elect the buyout) has ignored the fact that: (1) both parties had filed reconsideration motions that had the potential to impact the calculation of the buyout price; (2) at that point, the Special Fiscal Agent had not provided the necessary final buyout calculation; (3) Mr. Zisa could not even articulate when his secondary buyout right commenced; and (4) perhaps most importantly, giving no heed to the caveat which was included in the Order following the reference to the 90-day buyout period specifically stated that this period could be "enlarged by either good cause shown or by consent of the parties." (Da246).

To be sure, on August 23, 2023, the Trial Court appropriately exercised its discretion, enforced the provisions of its own order which allowed it to enlarge the applicable timeframes, and accorded Mr. Christodoro ten days to serve notice of the exercise of his buyout right. And Mr. Christodoro promptly did so, by way of letter dated August 25, 2023. (Pa530). Mr. Zisa cannot show that the Trial Court abused this discretion and this decision should not be disturbed on appeal.

POINT VI
THE TRIAL COURT PROPERLY AWARDED PLAINTIFF ATTORNEYS' FEES

As part of its Final Order, the Trial Court's award of $77,072.50 in attorneys' fees to Mr. Christodoro had two parts: (1) an affirmation of the SDM's June 17, 2022 opinion and fee award of $27,072.50 (Da1099; Pa470-481); and (2) the bestowal of an additional award of $50,000 in fees. (Da1566-1568). Mr. Zisa argues that this was reversible error.

Generally, the Appellate Division "will only disturb an award of attorneys' fees upon a clear abuse of discretion" subject only to an examination to determination whether "the judge misconceive[d] the applicable law, or misapplie[d] it to the factual complex." Tarta Luna Props., Ltd. Liab. Co. v. Harvest Rests. Grp. Ltd. Liab. Co., 466 N.J. Super. 137, 154 (App. Div. 2021) (citations omitted). Here, there is no abuse of discretion, and the Trial Court both understood and correctly applied the relevant law.[34]

A. The $27,072.50 Awarded by Judge Contillo.

To try to escape liability for any amount of attorneys' fee award, Mr. Zisa engages in a rhetorical shell game where he combines both attorneys' fee awards (even though they were awarded at different times and by different tribunals) and

[34] To be clear, while Mr. Christodoro believes that the Trial Court did not err in awarding him fees, he disagrees with the quantum of fees awarded to him, as discussed in Point XII infra.

then launches into general legal arguments against attorneys' fees (i.e., that, purportedly, attorneys fees are not appropriate under the Revised Uniform Limited Liability Company Act ["RULLCA"] or the fiduciary exception to the American Rule). Challenging the $27,072.50 fee award on these grounds is nonsensical, however, as SDM Contillo did not award fees on either basis. Instead, attorneys' fees were awarded by Judge Contillo under Rules 4:23-2 and 4:42-9.

Mr. Zisa only addresses Rule 4:23-2(b) in Section VI(C) of his brief. He, however, does not challenge the $27,072.50 fee award, but instead argues only that the subsequent $50,000 award by Judge Jerejian was an inappropriate "double dipping" by awarding fees for the same conduct that led to Judge Contillo's initial $27,072.50 fee award. See also Abtrax Pharms. v. Elkins-Sinn, 139 N.J. 499, 513 (1995) ("A trial court has inherent discretionary power to impose sanctions for failure to make discovery, subject only to the requirement that they be just and reasonable in the circumstances.")

Because Mr. Zisa does not actually challenge the propriety of Judge Contillo's award of $27,072.50 pursuant to Rule 4:23-2(b), that part of the final order should not be disturbed.

B. The $50,000 Fee Award.

The trial court's award of counsel fees was permitted under two separate

sections of the RULLCA.[35]

1. Fees Under N.J.S.A. 42:2C-72.

N.J.S.A. 42:2C-72 provides for the reimbursement of "reasonable expenses, including reasonable attorney's fees and costs, from the recovery of the limited liability company" when a derivative action "is successful in whole or in part." The vast majority of Mr. Christodoro's claims were derivative in nature and the Trial Court found for Mr. Christodoro on the ten of the nineteen counts filed: Count One (obtaining access to the books and records and securing the appointment of a forensic accountant--decided as part of the original order to show cause); Count Three (dissolution of Attessa); Count Four (securing the appointments of a special fiscal agent and a property manager--decided in November 2019); Count Five (breach of the duty of loyalty); Count Six (breach of the duty of care); Count Seven (breach of the duty good faith and fair dealing under N.J.S.A. 42:2C-39(d)); Count Ten (unjust enrichment); Count Twelve (conversion); Count Fifteen (breach of contract); and Count Sixteen (breach of the implied covenant of good faith and fair dealing).

---

[35] Article XX of the Operating Agreement also provides that if a member violated the terms of the Agreement, he would "keep and save harmless the Company property and shall also indemnify the other members from any and all claims, demands and actions of every kind and nature whatsoever which may arise out of or by reason of such violation of terms and conditions of this Operating Agreement." (Da1606).

Indeed, Mr. Reck's entire analysis of the members' ownership interests benefited the company by rectifying Mr. Zisa's failure to maintain separate capital accounts. Likewise, Mr. Reck's calculations of how much Mr. Zisa owed to Attessa by way of reimbursement due to his improper "expenditures" benefited, in the first instance, the entity, as those monies were owed to the entity, not directly to Mr. Christodoro.

Separately, the fact that--due to Mr. Zisa's ongoing wrongdoing--the Trial Court had to appoint Mr. Strasser to serve as Special Fiscal Agent, and then Mr. Strasser had to then undertake affirmative steps to defend Attessa from Mr. Zisa's continued wrongdoing,[36] belies Mr. Zisa's contention that the entity was merely a passive player in this dispute. Mr. Christodoro incurred significant costs in connection with, *inter alia*: (1) Mr. Chait's appointment; (2) ensuring that Mr. Chait received the entity's bank documents, despite Mr. Zisa's best efforts to prevent this, so that Mr. Chait could complete his Court-ordered mandate; (3) Mr. Strasser's initial appointment as attorney for Attessa; (4) expanding Mr. Strasser's responsibilities to include the role as Special Fiscal Agent when Mr. Zisa tried to interfere with his mandate; (5) the appointment of Gilsenan as property manager; (6) stopping Mr. Zisa from interfering with Gilsenan; and (7) removing Mr. Zisa as managing member

[36] In fact, as noted above, Mr. Zisa went so far as to sue Mr. Strasser for legal malpractice during the pendency of this action. (Da1560-1561).

of Attessa. Every one of these actions was necessitated by Mr. Zisa's continued wrongdoing and obstructionist behavior; and all these actions benefitted the entity as a whole, in that the value of Attessa was preserved during the many years pendency of this matter--throughout which Mr. Zisa vigorously asserted his ongoing membership in Attessa. Indeed, these remedies significantly benefited Mr. Zisa because, by protecting the value of Attessa, the Court-ordered "buyout" payment to him has also been protected.

N.J.S.A. 42:2C-72, establishing derivative actions, exists for precisely these circumstances. The sole case cited by Mr. Zisa is 68th Street Apartments, Inc. v. Lauricella, 142 N.J. Super. 546 (Law Div. 1976). The Lauricella decision, however, is inapposite because this opinion involved a dissolution sought pursuant to the New Jersey Business Corporation Act (which was enacted in 1968) and not the RULLCA (which was enacted in 1993). By definition, N.J.S.A. 42:2C-72--pursuant to which Mr. Christodoro proceeded (and which did not exist in the 1970's)--could not have been considered when the Law Division Judge in Lauricella penned his opinion in 1976.

2. Fees Under N.J.S.A. 42:2C-48(c).

N.J.S.A. 42:2C-48(c) provides that when a party brings a claim under N.J.S.A. 42:2C-48(a)(4) or (a)(5) (regardless of whether the company is dissolved or even if a less drastic remedy is ordered pursuant to N.J.S.A. 42:2C-48(b)), attorneys' fees

and costs should be shifted when a party "has acted vexatiously, or otherwise not in good faith." The plain text of this statute thus makes clear that Mr. Zisa's argument that the Trial Court erred by considering Mr. Zisa's bad faith (Db44) when deciding to award fees is absurd, as this statute mandates this is exactly what a court must consider.

In his efforts to stave off the fee award under this section of the RULLCA, Mr. Zisa relies upon the unpublished opinion in Marra v. Berlant, 2017 N.J. Super. Unpub. LEXIS 2778 (N.J. Super. Ct. App. Div. Nov. 6, 2017) (Pa676-652),[37] for the proposition that attorney's fees cannot be awarded under subsection 48(c) absent a dissolution order. On its face, this proposition, as extracted from Marra v. Berlant, is not applicable here because the remedy ordered by the court in that case did not, in any respect, include dissolution. In this case, however, dissolution is an alternative remedy expressly ordered by the Trial Court if neither member decides to complete a buyout of the other. Indeed, the Trial Court found for Mr. Christodoro on his dissolution count (Count III) but not for his disassociation count (Count Fourteen).

Further, it is respectfully submitted that the appellate court in Berlant misread that section of the Act, and that the correct interpretation as to the interplay of N.J.S.A. 42:2C-48's various subsections can be found in Carfagna v. Carfagna

[37] As Mr. Zisa failed to include any of his unpublished cases in his appendix, as is required by Rule 1:36-3, a copy of this unpublished opinion (and all others relied upon by Mr. Christodoro) has been provided by Mr. Christodoro.

Family, LLC, 2015 N.J. Super. Unpub. LEXIS 2678 (N.J. Super. Ct. Ch. Div. Nov. 17, 2015) (Pa684-921). There, the court properly recognized that under the construction of Section 48 of the RULLCA, the act of dissolution itself is not a requirement for the consideration of whether to award fees. Rather, the prerequisite to awarding fees under Section 48(c) is whether a dissolution proceeding was brought (i.e., initiated) under paragraph (4) or, as applicable in this case, paragraph (5) of Section 48(a) whereby it is alleged that the manager or member in control of the LLC: (1) has acted, is acting, or will act in a manner that is illegal or fraudulent; or (2) has acted or is acting in a manner that is oppressive and was, is or will be directly harmful to the fee applicant. See Carfagna, 2015 LEXIS 2678, at *26-27.[38]

Limiting attorneys' fees to events of complete dissolution is inconsistent with Section 48(b), which provides that, when an action of dissociation is brought pursuant to subsections (a)(4) and (a)(5), a party may alternatively seek and/or a court may alternatively order a less harsh remedy that dissolution. Subsection (b)'s inclusion in the statute demonstrates the legislature knew, and intended, that a party might obtain relief other than a dissolution under subsections (a)(4) and (a)(5). The fact that the Legislature then, in the very next subsection (subsection (c)), again expressly refers to subsections (a)(4) and (a)(5) clearly supports the Legislature's

[38] Count Three of the Final Complaint expressly invokes this language of N.J.S.A. 42:2C-48(b)(5). (Da54-55).

intent that fee awards were never meant to be limited to those circumstances in which dissolution is actually ordered. Instead, the most logical reading of this statute shows that the Legislature intended that the prerequisite for a fee award was not the nature of the remedy, but rather a finding that the offending party acted vexatiously or not in good faith in conjunction with dissolution proceedings.

In sum, the only requirements for awarding fees under N.J.S.A. 42:2C-48(c) are: (1) the party seeking fees must have brought an application under 42 N.J.S.A. 42:2C-48(a)(4) or (a)(5); and (2) the other party acted vexatiously or in bad faith. As both of the actual requirements of the statute have been met here, an award of fees under this statute was appropriate.

C. Attorneys' Fees May be Awarded Against a Fiduciary Who Engaged in Wrongdoing.

The award of counsel fees to Mr. Christodoro was also justified by the "common law exception to the American Rule that defies ready description, but may be titled loosely as fiduciary malfeasance cases." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 405 (2009).

Essentially, when a fiduciary creates harm to those to whom it owes a duty, "an exception to the American Rule is created that permits the [beneficiary of the fiduciary relationship] to be made whole by an assessment of all reasonable counsel fees against the fiduciary that were incurred by the [beneficiary of the fiduciary relationship]." In re Niles Tr., 176 N.J. 282, 298-99 (2003).

Here, Mr. Zisa owed fiduciary duties to both Mr. Christodoro and Attessa, and the Trial Court found him to be in breach of those duties. While Mr. Zisa tries to pigeonhole In re Niles as a one-off decision that permits fee shifting in fiduciary duty cases only when a trustee exercises undue influence over a disabled person, the Supreme Court later made clear that Niles was but one decision in a line of factually distinct cases that stands for the proposition that when a fiduciary misuses his powers, fee-shifting is appropriate. See, e.g., Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 405 (2009). Likewise, In re Estate of Vayda 184 N.J. 115 (2005), is inapplicable because in that case there was a court rule that expressly dealt with the reimbursement of fees arising from the conduct at issue.

As to Mr. Zisa's factual challenge (that he was an innocent party who engaged in wrongdoing), the record proves the contrary.

D. Additional Discovery Sanctions Pursuant to Rule 4:23-2(b) Were Appropriate.

Mr. Zisa does not actually offer a challenge to the Trial Court's ability to shift fees pursuant to Rule 4:23-2(b). Instead, he offers a factual challenge, contending that all his discovery violations had already been addressed by the SDM and thus any separate fee award from the Trial Court was duplicative.

The record reveals otherwise. Judge Contillo was not appointed as SDM until December 6, 2019, meaning that the case had been pending for more than a year at the time of his appointment as SDM. As such, there is no way that the SDM could

have ruled on Mr. Zisa's initial discovery violations. Second, even after the SDM was appointed, there were several discovery motions that were heard by the Trial Court--Judge Contillo never ruled on any fee petitions relating to conduct occurring before the Superior Court (nor would he have had the authority to do so). Third, Judge Contillo's fee award relating to his February 1, 2021 decision could not, by definition, include fees for Mr. Zisa's subsequent wrongdoing. Fourth, even after Judge Contillo ruled on issues, Mr. Zisa's refusal to comply with those orders required subsequent intervention by the Trial Court. For example, even though the SDM issued multiple rulings on the HELOC, the Trial Court still had to adjudicate a last-ditch effort by Mr. Zisa to circumvent those rulings.

And finally and perhaps most importantly, in the Fee Application submitted on behalf of Mr. Christodoro to the Trial Court, (Da1109-1124) the line item for the $27,072.50 fee award by Judge Contillo was segregated a one of nine phases of this matter expressly to ensure that it would not be double counted in any fee award ordered by the Trial Court. (Da1120). Accordingly, the Fee Application was clearly constructed so as to enable the Court to select whichever phases of the case it deemed appropriate of the fee award.

POINT VII
THE TRIAL COURT DID NOT ERR IN REFUSING TO "CLARIFY" ITS ORDERS

Mr. Zisa argues that that by "declining to address" his repeated requests to

"enforce" and "clarify" the July 28, 2022 order, and by refusing the issue an "amended Final Order," the Trial Court supposedly committed reversible error. At the outset, as this matter was not addressed below, "[i]t is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the Trial Court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the Trial Court or concern matters of great public interest." Nieder, 62 N.J. at 234 (internal quotations omitted).

Here these matters were never properly placed before the Trial Court by way of a motion on notice to all parties. As such, the Trial Court was never under any obligation to oblige Mr. Zisa's demands for "clarification." Moreover, even if considered on its merits, a motion for clarification of an order is treated as a motion for reconsideration or a motion to vacate, see Zavodnick v. Leven, 340 N.J. Super. 94, 99 (App. Div. 2001), and it is well established that "a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

Aside from complaining about being ignored by the Trial Court in connection with his clarification demand, Mr. Zisa did not point to any fact to show that the Trial Court acted in an arbitrary fashion; instead, his informal letters to the Trial

Court asked for substantive relief which had not been raised below. (Da1569-1570). As such, it was well within the discretion of the Trial Court to disregard these improper attempts at an end-run around the formal motion process.

POINT VIII
THE TRIAL COURT DID NOT ERR IN DECIDING THE ORDERS RELATED TO THE "HELOC" FUNDS

Mr. Zisa argues that it was error for the Trial Court to enter the October 12, 2021 Order denying his appeal from the October 4, 2021 Order issued by the SDM, precluding him from offering testimony and written submissions that Greater Alliance Home Equity Line of Credit ("HELOC") funds were used for Attessa business purposes. (Db48; Da241-242.) Furthermore, Mr. Zisa argues that it was also error for the Trial Court to issue an evidentiary ruling during trial, memorialized in the December 20, 2021 Order, which reinforced its October 12th Order precluding Mr. Zisa from offering testimony and written submissions through his expert, Mr. Petrucelli, which advanced the theory that HELOC funds were used for business purposes. (Da243-244) For the reasons that follow, these orders should not be disturbed as they were firmly within the Trial Court's discretionary powers to make decisions regarding discovery and the evidence to be presented at trial.

It is well settled that "a trial court's evidentiary rulings are 'entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear

error of judgment.'" State v. Brown, 170 N.J. 138, 147 (2000) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)). A similarly deferential standard is applied to a trial court's discovery rulings. See Capital Health Sys. v. Horizon Healthcare Servs., 230 N.J. 73, 79-80 (2017) (". . . appellate courts are not to intervene but instead will defer to a trial judge's discovery rulings absent an abuse of discretion or a judge's misunderstanding or misapplication of the law."). As such, "an appellate court should not substitute its own judgment for that of the Trial Court, unless the Trial Court's ruling was so wide of the mark that a manifest denial of justice resulted." Ibid. (quoting Marrero, 148 N.J. at 484).

Here, the situation involved an amalgamation of the two: an evidentiary ruling based on the outcome of a prior discovery dispute. After Mr. Zisa failed to produce HELOC records in discovery, on June 17, 2020, the SDM ruled that these records were responsive and Mr. Zisa had to produce them. (Pa171). When Mr. Christodoro continued to seek the HELOC records, in a calculated decision to block the records' production, Mr. Zisa entered into a factual stipulation that would render discovery of the documents no longer necessary. As Judge Contillo noted, "Mr. Roberts [] represented on behalf of his client Fran[k] Zisa that all proceeds of the Greater Alliance HELOC were utilized by Mr. Zisa for personal purposes, not business purposes." (Pa204). By admitting that all payments from the HELOC were

for personal expenditures, the only relevant fact relating to the HELOC account became the total amount paid to the HELOC by Attessa. And because Mr. Christodoro already had documents showing how much was paid to the HELOC by Attessa, Mr. Zisa's stipulation rendered nugatory any need for further discovery on this issue. In short, Mr. Christodoro relied upon this stipulation, and did not seek additional relevant discovery (such as deposition testimony) about the HELOC. Furthermore, the calculations in Mr. Christodoro's expert report relied upon this stipulation.

On February 1, 2021, the SDM memorialized the stipulation in its ruling that "Mr. Zisa is precluded, both now and in the future, from asserting that any funds from the Greater Alliance HELOC were used for Attessa business purposes." (Da205). Procedurally, if Mr. Zisa had wanted to challenge the SDM's orders, he had five days to appeal the decision to the Trial Court. (Da1456-1457). He chose not to do so, and instead waited seven months before filing a new application in September of 2021, mere weeks before the start of trial, to file a new motion before the SDM, which was subsequently denied (Da159), from which Mr. Zisa appealed to the Trial Court (Da160-239), and which the Trial Court also denied. (Da241-242). Now, Mr. Zisa would like this Court to overturn this whole chain of events.

The Trial Court rejected this position, holding that the SDM's prior ruling on the matter would stand: "The rulings were because it was stipulated to" and

that it was "not going to let Petrucelli now come in and testify contrary to that ruling." (19T109:3-16; Da243-244). Mr. Zisa has not shown that this ruling was an abuse of discretion.

In civil cases, parties are bound by their pretrial stipulations. See Jersey City v. Realty Transfer Co., 129 N.J. Super. 570, 572 (App. Div.), aff'd, 67 N.J. 104 (1974) (affirming trial court's adherence to pretrial stipulation). There is no dispute that Mr. Zisa stipulated that the HELOC funds were not used for Attessa business purposes. Eventually, after direct inquiry by the Trial Court, Mr. Zisa's counsel conceded the stipulation's existence. (1T38:10-12). Then, in the same breath, Mr. Zisa's counsel tried to undermine the stipulation: "The fact of the matter, is, people are allowed to take positions in discovery and change their positions." (1T38:15-17). This simple exchange goes to the heart of the matter: Mr. Zisa's disregard for the rules and his proclivity to change his story depending on his aims at the time.

Mr. Zisa's renewed attack on his stipulation should fail under the doctrines of both judicial estoppel and legal estoppel. As to the former, "Judicial estoppel is an equitable doctrine precluding a party from asserting a position in a case that contradicts or is inconsistent with a position previously asserted by the party in the case or a related legal proceeding." Tamburelli Properties Ass'n v. Borough of Cresskill, 308 N.J. Super. 326, 335 (App. Div. 1998). While the doctrine is often

applied when a party tries to change positions in a second litigation, judicial estoppel also prevents a party from changing its position in the same litigation when the party "was allowed by the court to maintain the position." Cummings v. Bahr, 295 N.J. Super. 374, 387 (App. Div. 1996). For the doctrine to apply, it need not be shown that the wrongdoer received some benefit from the Court adopting its position or that the innocent party was prejudiced. Ibid. Instead, the only requirement is that the representation at issue "helped form the basis of a judicial determination." Ibid. Clearly, Mr. Zisa's stipulation formed the basis for several of the determinations made by both the SDM and the Trial Court: a text-book case of judicial estoppel.

Separately, Mr. Zisa's attempt to escape from his prior stipulation must be barred by the doctrine of equitable estoppel. The doctrine of equitable estoppel "is designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment." Knorr v. Smeal, 178 N.J. 169, 178 (2003) (citation omitted). "To establish a claim of equitable estoppel, the claiming party must show that the alleged conduct was done, or representation was made, intentionally or under such circumstances that it was both natural and probable that it would induce action. Further, the conduct must be relied on, and the relying party must act so as to change his or her position to his or her detriment." Miller v. Miller, 97 N.J. 154, 163 (1984). The doctrine of equitable estoppel also applies. Mr. Christodoro did not subpoena Greater Alliance for documents, inquire

as to this topic at Mr. Zisa's deposition, etc., all based upon this stipulation. Allowing Mr. Zisa to renege on his voluntary, knowing stipulation at the eve of trial would clearly prejudice Mr. Christodoro, as he relied on the premise that the HELOC was a non-issue.

MR. CHRISTODORO'S CROSS-APPEAL

POINT IX
THE TRIAL COURT FAILED TO ENFORCE THE DILUTION PROVISION OF THE PARTIES' AGREEMENT
(Raised Below at Da247)

Even though Mr. Christodoro was willing to accept the Final Judgment of the Trial Court, given that Mr. Zisa has insisted on proceeding with this appeal, Mr. Christodoro just wants this Court to know that, as a matter of law, the Trial Court should have enforced the unambiguous provisions of the Operating Agreement to calculate each member's ownership interest.[39] It is well established that issues of contract interpretation are "subject to de novo review by an appellate court" and the

[39] Should this Court agree that the Trial Court should have applied the dilution provision contained in the Operating Agreement, there is no need for a remand for further proceedings in the Trial Court. As previously stated, Mr. Reck and Mr. Petrucelli agreed on the methodology to be used to calculate the capital account balances. (9T75:14-80:4; 21T50:2-13). As for the numbers to be used as inputs in that calculation, Mr. Petrucelli conceded that he did not account for any distribution made to Mr. Zisa or Mr. Christodoro post-formation (21T21:8-18), and also did not take into consideration Mr. Christodoro's contributions post-formation (21T31:12-32:15). As such, Mr. Reck's calculations were (and still are) essentially unrefuted and, as discussed below, even giving Mr. Zisa every benefit of the doubt, the calculations yield the result that Mr. Zisa is totally diluted.

trial court's interpretation is given no special deference, as the Appellate Division looks "at the contract with fresh eyes." Kieffer v. Best Buy, 205 N.J. 213, 222-23 (2011) (citing Jennings v. Pinto, 5 N.J. 562, 569-70 (1950)).

A. Articles V & VI of the Operating Agreement Govern.

At trial, there was no dispute that Exhibit J-2, the Attessa Operating Agreement, is the operative document governing the parties' relationship. The method for determining each member's ownership interest in the entity is unambiguously set forth in Articles V and VI of the Operating Agreement. (Da1600-1607). See Karl's Sales & Serv., Inc. v. Gimbel Bros., 249 N.J. Super. 487, 493 (App. Div. 1991) ("The court has no right to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently. Nor may the courts remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of the other.").

Article V of the Operating Agreement does two things. First, it establishes that, at the time of formation, each member received a 50% interest in Attessa. Second, it establishes that this ownership interest came with a cost. Specifically, the members agreed to share in "all post-formation capital contributions" (emphasis added). In other words, regardless of what the parties' arrangement was in 2011, it

is undisputed that by signing the Operating Agreement, Mr. Zisa had "equal responsibility for capital calls." (Dca362; 17T39:7-40:24; 21T150:5-11).

However, Article VI of the Operating Agreement is a "safety valve" to Article V's mandate that all post-formation capital contributions must be shared. Article VI permits each member to opt out of his obligation to contribute capital but sets forth a consequence for doing so: the member who contributes the capital receives a corresponding increase in his ownership interest. In short, Article VI established a system of "dynamic ownership," wherein each member's initial 50% ownership interest would shift (increasing one member's ownership interest while diluting the other member's) based upon each member's respective capital contributions/distributions.

The fact that Article VI creates a system wherein ownership interests change as a result of unequal capital contribution is reinforced by Article VII, which provides in part: "Each of the members shall own an interest in the Company as set forth in paragraph V, entitled 'Capital Contributions,' **except as the same may hereafter vary or change as provided in paragraph VI**, entitled 'Additional Capital Contributions.'" (J-2, Art. VII) (emphasis added). To track the members' respective ownership interests, Article VII makes clear that a capital account must be established for each member. The meaning of these terms, taken together, is unambiguous. See Hardy v. Abdul–Matin, 198 N.J. 95, 103 (2009) (A "fundamental

principle of contract interpretation is to read the document as a whole in a fair and common sense manner.").

Indeed, other courts that have examined nearly identical "dilution" provisions have interpreted these provisions exactly how they are written. For example, in Addy v. Myers, the Supreme Court of North Dakota held that language in an operating agreement "provided a remedy for a member refusing to make additional capital contributions by permitting the member to refuse to contribute any or all of the member's share of additional capital and incur a proportionate decrease in ownership in the company." 616 N.W.2d 359, 362–63 (N.Dak. Supr. Ct. 2000). The language analyzed by the court in Addy was nearly identical to the language found in the Attessa Operating Agreement:

Addy v. Myers, 616 N.W.2d at 363	**Attessa Operating Agreement (Art. VI)**
The owners may contribute in proportionate amounts any additional capital deemed necessary for the operation of the Company, provided, however, that in the event that any member deems it advisable to refuse or fails to contribute his share of any or all of the additional capital, then the other members or any one of them may contribute the additional capital not paid in by such refusing member and shall receive therefore an increase in the proportionate share of the ownership or interest in the entire company in direct	The members may contribute in proportionate amounts any additional capital deemed necessary for the operation of the Company, provided, however, that in the event that any member deems it advisable to refuse or fails to contribute such members share of any or all of the additional capital, then the other members or any one of them may contribute the additional capital not paid in by such refusing member and shall receive therefor an increase in the entire Company in direct proportion to the said additional capital

proportion to the said additional capital contributed. Unless otherwise agreed, the right to make up additional capital contributions of a refusing member shall be available in the same order as the right to purchase in the case of withdrawal or death of a member, as set forth in Paragraphs XV and XVI.	contributed. Unless otherwise agreed, the right to make up additional capital contributions of a refusing member shall be available in the same order as the right to purchase in the case of withdrawal or death of a member, as set forth in paragraphs XV and XVI.

See also Black Water Mgmt. LLC v. Sprenkle, 2015 U.S. Dist. LEXIS 114104, at *18 (E.D. Va. Aug. 27, 2015) ("Assuming *arguendo* that Plaintiff's allegation is true, then [defendant's] proportional membership interest could be reduced to zero percent to reflect the amount of capital he actually contributed.") (Pa692-699); see also Flores v. Murray, A-0145-06T5 (N.J. Sup. Ct. App. Div. Oct. 19, 2007) (where the Appellate Division rejected the exact "equity abhors a forfeiture" argument upon which Mr. Zisa essentially hangs his hat on appeal) (slip op. at 38) (Pa700-711).

To be clear, there is nothing unusual or novel about calculating ownership in an LLC using capital account balances. For example, in OM Enterprises V LLC v. Tandon, another court was required to determine the ownership interests of an LLC when the managing member "failed to keep accurate records of the members' capital accounts and had made several hundred thousand dollars in unauthorized payments from company funds." 2014 Wash. App. LEXIS 1315, at *1, *3 (2014) (Pa712-718). In Tandon, similarly to Mr. Zisa in this matter, the managing member had distributed more to himself than he contributed, thereby reducing his capital account balance to

zero. Id. at *1. Notably, even though the trial court in Tandon concluded that improper distributions by the defendant should not impact his capital account balance (as did the Trial Court here), the Washington Court of Appeals reversed, concluding that the proper method to calculate capital account balances was by "adding all contributions made by the member and subtracting any payments made to on behalf of that member." Id. at *5. The court further concluded that unauthorized payments made to the defendant should be treated as reductions in his capital account balance, as not doing so would result in him receiving a windfall. Id. at *5, *7. Ultimately, because the defendant in Tandon had distributed to himself more than he contributed, the court concluded he had reduced his capital account balance to $0. Id. at *1.

This outcome is also consistent with New Jersey jurisprudence addressing the dynamic quality of capital account balances in partnership agreements. In fact, in Sebring Associates v. Coyle, the Appellate Division was called upon to determine the fate of a defaulting partner in a closely held real estate venture. 347 N.J. Super. 414, 427 (App. Div. 2002). The appellate panel went on to endorse the trial court's conclusion that because the partnership agreement prohibited compensation, "it was appropriate to treat payments to partners as withdrawals from their capital accounts." Ibid. Indeed, the Appellate Division pointed out that the defaulting partner had accrued a negative capital balance of (-$341,640). Ibid.

In its decision here, the Trial Court recognized that Article V established an initial 50/50 ownership, that Article VI established a capital contribution system, and that these provisions led into Article VII's requirement that a capital account be established for each member. (24T33:12-14, 24T34:1-19). Because Articles V and VI are unambiguous, the Trial Court was required to calculate the members' respective ownership interests by comparing their capital account balances. The Trial Court declined to do so, however, because—as detailed below—enforcing these provisions would result in Mr. Zisa's ownership interest having been completely diluted to zero percent. (See 24T41:10-14; 24T53:18-19).

In this case, the Trial Court imposed its own version of "fairness"--contrary to well-established law--in an effort to salvage some of Mr. Zisa's stake in Attessa, even though the unambiguous contractual language called for complete dilution of Mr. Zisa.

In his appellate brief, Mr. Zisa asks this Court to apply the Supreme Court's analysis in Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp., 100 N.J. 166 (1985), to this matter. That case, however, only confirms that the Trial Court's refusal to enforce Articles V and VI--apparently due to the concern that those provisions would result in Mr. Zisa's complete dilution (and instead crafting an equitable remedy that would ensure Mr. Zisa walked away with something)--violates binding precedent and constitutes a reversible error of law.

In Dunkin' Donuts, the defendant franchise tried to stave off termination of its franchise agreement after it was caught underreporting gross sales and failing to maintain appropriate business records. Id. at 171. Turning to the question of remedy, the franchise agreements provided that the penalty for such a violation would be that "the rights of the Licensee [franchisee] shall cease." Id. at 173 (alteration in original). Notwithstanding the express language in the franchise agreements, which would mean that the defalcating franchisee walked away with nothing, the trial court decided to "replace the 'disproportionally harsh' legal remedies set forth in the agreements" and instead crafted a remedy that permitted the defendant to walk away with something--i.e., a buyout in which the franchisor would have to pay the defendant franchisee $115,000 for the transfer of the franchise locations back to the franchisor. Id. at 173-74. This court-imposed buyout would prevent what the trial court viewed as an "inappropriate windfall" to the franchisor if the franchise agreements were enforced as written. Id. at 175. The Appellate Division affirmed.

The Supreme Court reversed. The Court turned to general common law principles (the same principles that govern here) to determine whether the Chancery Court exceeded its authority by ignoring the parties' contractual agreement to craft a "well-intentioned" remedy that would essentially compensate the defendant for the work he put in to build two successful franchises. Id. at 182. The Supreme Court expressly rejected the invocation of the phrase "equity abhors a forfeiture" as a valid

basis to "ignor[e] legal rights," noting "if parties choose to contract for a forfeiture, a court of equity will not interfere with that contact term in the absence of fraud, accident, surprise, or improper practice." Ibid. Moreover, because the defendant was the one who had engaged in fraud, the Court stated that the doctrine would simply be inapplicable because "equitable relief against forfeitures should *not* be granted to a party whose own knowing fraudulent conduct is itself the cause of the forfeiture." Ibid. Because there was not any fraud against the defendant, nor any accident or mistake, the Supreme Court held that it was reversible error for the trial court to ignore the express terms of the parties' agreement for the purpose of crafting an equitable remedy that would permit the defendant to receive some compensation for the effort he had put into developing the two franchise locations. Id. at 183-85.

The parallels to this case are obvious. There is no dispute that Da1600-1607 is the Operating Agreement for Attessa Properties, LLC, that this is the operative document governing the parties' relationship and that Articles V and VI set forth how to calculate the members' respective ownership interests. As such, the trial court's refusal to enforce these provisions because their enforcement would result in Mr. Zisa's complete dilution was a reversible error of law.

B. The Parties Understood Articles V and VI Established Dynamic Ownership.

To the extent the parties' subjective understanding is relevant to understanding Articles V and VI, Mr. Zisa and his current counsel argue on appeal that, at least to

his understanding, the parties had agreed on a "static" ownership model wherein the parties' ownership interests in Attessa were permanently stuck at 50/50, even if Mr. Christodoro contributed to Attessa—and Mr. Zisa distributed to himself from Attessa—hundreds-of-thousands of dollars. Db30 ("the parties always intended and agreed [Attessa] would be owned 50/50").

The trial record demonstrates, however, that Mr. Zisa's "understanding" as to whether ownership was dynamic or static changed throughout the parties' relationship and the litigation. Indeed, at trial, Mr. Zisa and his expert, Mr. Petrucelli, advocated different positions (with Mr. Zisa conceding ownership was dynamic in his direct examination and Mr. Petrucelli contending that ownership was static). Compare 26T72:17-73:4 with 21T35:6-36:3).[40]

Mr. Zisa's understanding as to the applicability of the concept of dilution is reflected in his pre-litigation assertion that the Operating Agreement imposed dilution on non-contributing members. (See Da1903; Da1666-1681). Similarly, Mr.

---

[40] During cross examination, it was demonstrated that Mr. Petrucelli had previously submitted a sworn certification to the Court in which he stated under penalty of perjury that ownership interests were dynamic and had changed over the course of the business relationship. (See Da2460-2478, ¶ 19). Moreover, there was additional trial testimony from both Mr. Zisa (17T49:6-50:1; 17T56:15-7), and Mr. Petrucelli (20T29:9-13; 20T78:22-79:3; 20T118:10-13; 22T15:8-11; 20T166:13-18; 20T167:6-23; 21T12:7-18; 21T15:3-12; 21T21:8-18; 21T31:12-32:15; 21T45:4-8), which supported the conclusion that they understood that dilution was an appropriate outcome under the Attessa Operating Agreement.

Zisa admitted he was tracking the parties' capital account balances during their relationship. (See also 17T63:12-15). Even several years into the litigation, Mr. Zisa continued to acknowledge that ownership interests were fluid. For example, at trial, without objection, Mr. Zisa's prior sworn testimony was read into the record in which he admitted that he had understood that Article VI expressly included the concept of dilution. (Pa383-384; Pa388-389). Elsewhere in his cross-examination, Mr. Zisa conceded that it was his understanding that either member could have "made up" for past missed contributions during the next capital call and this was, in fact, what happened when Mr. Christodoro contributed several hundred thousand dollars in March 2016 (because Mr. Zisa believed that prior to that contribution, he was actually ahead of Mr. Christodoro in terms of contributed capital). (See 17T72:9-18).

Indeed, any remaining doubt that Mr. Zisa believed that ownership interests were dynamic is resolved by simply examining Count V of Mr. Zisa's verified counterclaim, which sought a determination of membership interests on the theory that Mr. Christodoro had been diluted. In fact, the Trial Court noted in its decision that Mr. Zisa was "arguing the operating agreement and dilution theory," (24T29:1-4), but still refused to enforce it. (24T35:19-23).

Based on all of the foregoing, the Trial Court should have enforced Articles V and VI (and the attendant concepts of dilution within the Attessa Operating Agreement).

C. Calculating the Parties' Ownership Interests.

As referenced above, the Trial Court's decision to ignore Articles V and VI of the Operating Agreement stemmed from the fact that when these provisions were applied to the facts (i.e., the parties' contributions and distributions post-formation), the result was Mr. Zisa being completely diluted, such that the value of his interest in the entity was zero--in terms of both percentage and dollars.

There was no dispute that the methodology called for by Articles V and VI to calculate ownership interests was a two-step process. First, the member's initial capital account balances must be determined. (9T75:14-80:4). Second, each capital account balance would then be adjusted based upon that member's post-formation contributions and distributions. (9T75:14-80:4) Once the final capital account balances had been calculated, the respective ownership interests could be determined by comparing the "final" capital account balances. (9T75:14-80:4). For example, if Mr. Christodoro had a capital account balance of $80 and Mr. Zisa had a capital account balance of $20, Mr. Christodoro would own 80% (80/100) and Mr. Zisa would own 20% (20/100). Cross-examination revealed that Mr. Petrucelli agreed

that Mr. Reck's methodology (set forth above) was the right way to calculate ownership interests in Attessa. (21T50:2-13).

Mr. Reck set forth his calculations of the parties' respective capital account balances in his expert report. (Da2008-2094). In the end, Mr. Reck came to the conclusion that, after considering all contributions, direct distributions to the parties, and unexplained expenses made by Mr. Zisa, Mr. Zisa was diluted down to zero percent.

As noted above, prior to the end of trial, the Trial Court made abundantly clear that, notwithstanding the foregoing unambiguous contract provisions and unrebutted calculations, it simply did not want to enter an order that would result in Mr. Zisa walking away with nothing (let alone having to repay his negative capital account balance). Although well intentioned, this show of altruism for Mr. Zisa was reversible error.

POINT X
THE TRIAL COURT SHOULD HAVE GIVEN CREDIT TO MR. CHRISTODORO IN THE BUYOUT CALCULATION FOR THE MONIES TAKEN BY MR. ZISA
(Raised Below at Da247)

In the alternative, even if the dilution provisions of the Operating Agreement are not enforced so as to wipe out the entirety of Mr. Zisa's interests in Attessa, Mr. Zisa should nonetheless be held to account for the fact he took out from Attessa (by way of direct transfers from Attessa accounts into his own

accounts) significantly more than he ever contributed. Specifically, as explained by Mr. Reck, even leaving aside the claims for defalcation, Mr. Zisa took out $117,818 more than he contributed in the pre-formation period and he took out $415,436 more than he contributed in the post-formation period--for a total of $533,254, which under the Trial Court's methodology should have been treated as a loan from Attessa to Mr. Zisa that needs to be repaid. (Da2048; Da2054).

Therefore, by employing this "loan" approach, just like Mr. Christodoro was entitled to be repaid his loan to Attessa "off the top," Mr. Zisa should be compelled to repay his loan to Attessa off the top--lest he otherwise reap a windfall in the guise of a forgiven loan. This repayment can easily be accounted for by reducing the buyout amount that Mr. Zisa receives. Given that the Court salvaged 40% of Mr. Zisa's interest in Attessa, the buyout amount that Mr. Christodoro has to pay Mr. Zisa should be reduced by 60% of the $533,254 loan--or $319,952.40.

POINT XI
JUDGMENT SHOULD HAVE BEEN ENTERED FOR MR. CHRISTODORO ON HIS DISSOCIATION CLAIM
(Raised Below at Da247)

Even though the Trial Court entered judgment in favor of Mr. Christodoro on his claim for dissolution (Count III of the Second Amended Verified Complaint), it did not find in his favor on his dissociation claim (Count XIV).

Furthermore, the Court's July 28, 2022 Order (Da245) provides a process whereby Mr. Christodoro, in the first instance was given the right to buy out Mr. Zisa's interest in Attessa; and then Mr. Zisa was accorded the reciprocal opportunity if Mr. Christodoro did not exercise his buy out right; and, if neither party bought out the other, then Attessa was to be dissolved. Clearly, the Court understood that Attessa could not continue in its current two-member form and, as such, it accorded Mr. Christodoro that which was tantamount to the right of first refusal of dissociating Mr. Zisa from Attessa. Accordingly, as a matter of housekeeping, this Court should reverse the Trial Court's Order and enter judgment for Mr. Christodoro on count XIV.

POINT XII
THE TRIAL COURT ERRED IN LIMITING MR. CHRISTODORO'S ATTORNEYS' FEES AWARD & BY DENYING THE APPLICATION FOR PRE- AND POST-JUDGMENT INTEREST
(Raised Below at Da1109)

As more fully set forth in Point VI, supra, the Trial Court had full authority to enter an award of attorneys' fees and costs in favor of Mr. Christodoro. However, the Trial Court erred in reducing Mr. Christodoro's fee application seeking payment of $1,095,824 in fees (Da1120) to an award of $50,000 (Da1567). Furthermore, the Trial Court erred in denying Mr. Christodoro's request for $24,509.91 in costs (Da1122; Da1567), and for pre- and post-judgment interest. (Da1122-1123; Da1567).

Generally, the Appellate Division "will only disturb an award of attorneys' fees upon a clear abuse of discretion" subject only to an examination to determination whether "the judge misconceive[d] the applicable law, or misapplie[d] it to the factual complex." Tarta Luna Props., Ltd. Liab. Co. v. Harvest Rests. Grp. Ltd. Liab. Co., 466 N.J. Super. 137, 154 (App. Div. 2021) (citations omitted). Here, although the Trial Court acknowledged the standards to be applied when considering a fee application, the record does not support the decision to award a $50,000 fee on an application in excess of one-million dollars in fees. (25T123:16-22). This is especially confounding considering the extent of Mr. Christodoro's ultimate success, in that he was awarded relief pursuant to ten of his nineteen claims.

The Trial Court's denial of Mr. Christodoro's application for the costs of suit was reversible error because the trial court made no finding of some "special reason" to rebut the presumption that costs should be awarded to the prevailing party. See Schaefer v. Allstate N.J. Ins. Co., 376 N.J. Super. 475, 487 (App. Div. 2005). Indeed, the Trial Court did not make any findings to explain its denial of this issue at all. (25T121:11-13).

Next, the Trial Court's denial of pre-judgment interest was error because Mr. Zisa did not challenge Mr. Christodoro's entitlement to pre-judgment interest on any "off the top payment" he received. Indeed, a case upon which Mr. Zisa relies, Marra v. Berlant, 2017 WL 5171863, (App. Div. Nov. 6, 2017), suggests that awarding

interest on Mr. Christodoro's trapped capital should not even be viewed as "prejudgment interest," but could instead be categorized as an underlying damage award. Id. at *15-17 (affirming the trial court's award of $162,605 in interest on top of a judgment amount of $632,068 based on the prevailing party's "trapped capital" for the years in question).

Furthermore, the Trial Court erred in failing to hold Mr. Zisa wholly responsible for the $414,319.31 paid to the third-party professionals who were appointed to oversee and manage Attessa as a direct result of Mr. Zisa's actions--i.e., the Court-appointed accountant, Mr. Chait; the Court-appointed SFA, Mr. Strasser; and the Court-appointed property manager, Ms. Gilsenan (25T121:14-19; Da1123; Da1567). This amount was a direct harm to Attessa because it forced the entity to incur unnecessary costs for several court-appointed professionals in connection with this litigation. Mr. Zisa should be solely accountable for these costs.

POINT XIII

THE TRIAL COURT SHOULD HAVE GRANTED MR. CHRISTODORO'S ORDER TO SHOW CAUSE SEEKING TO STRIKE MR. ZISA'S RECONSIDERATION CERTIFICATION

(Raised Below at Da990)

The centerpiece of Mr. Zisa's reconsideration motion was a seventy-five page certification accompanied by eighty-three exhibits. (Da254-988). Despite three years of discovery and four different motions to compel discovery, many of the

exhibits attached to Mr. Zisa's reconsideration motion had never been produced in discovery. Even worse, Mr. Zisa made no attempt whatsoever to identify which of those documents were seeing the light of day for the first time in this case. Troubled by Mr. Zisa's attempt to relitigate this matter after trial and, at a minimum, try to supplement the record which would be considered on appeal with a plethora of documentation which ought not be part of the record, Mr. Christodoro filed an Order to Show Cause seeking to strike these improperly submitted documents. (Da990-1004).

After first entering the Order to Show Cause (Da1005-1006), at oral argument the Trial Court denied without prejudice the application to strike. (Da1059). Notwithstanding the discretion accorded to a trial court in reviewing denials of injunctive relief, see Bubis v. Kassin, 353 N.J. Super 415, 425 (App. Div. 2002) (regarding abuse of discretion standard), this discretion is "never absolute." Mernick v. McCutchen, 442 N.J. Super. 196, 204 (App. Div. 2013) (citations omitted).

In this case, the Trial Court recognized the impropriety of the contents of Mr. Zisa's reconsideration application:

> And now to say that after this full trial, after three years where your client had repeatedly been found of discovery violations, now comes forward with all sorts of new charts and graphs and things that were never disclosed, and you mix them in and mish mash them with other things, **is highly improper in my opinion**.

(28T28:8-13 (emphasis added)). And even though the Court denied Mr. Zisa's reconsideration application in its entirety (Da1566), the Court nonetheless allowed the improper information to remain in the record. Although perhaps only a "housekeeping" detail, this decision should be reversed and the offending information should be stricken from the record.

CONCLUSION

As noted at the outset of this brief, Mr. Zisa was afforded a tremendous break by the Trial Court. If there is to be any modification of that judgment, any such modification ought to be in Mr. Christodoro's favor as set forth in his cross-appeal--including the finding that the entirety of Mr. Zisa's interest in Attessa has been zeroed out.

Respectfully submitted,

COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
Attorneys for the Plaintiff-Respondent, Jonathan Christodoro

/s/ Joshua P. Cohn
Joshua P. Cohn

Dated: July 22, 2024

Matthew F. Gately, Esq.
Christina N. Stripp, Esq.
Of Counsel and On the Brief

SUPERIOR COURT OF NEW JERSEY

JONATHAN CHRISTODORO, individually and on behalf of Attessa Properties, LLC,

Plaintiff-Appellee,

v.

FRANK ZISA, PETER ZISA and ATTESSA PROPERTIES, LLC, as nominal defendant,

Defendant-Appellant.

APPELLATE DIVISION
DOCKET NO. A-000410-23

Civil Action

ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, BERGEN COUNTY

Docket No.: BER-C-229-19; BER-C-243-18

Sat Below:

Hon. Edward A. Jerejian, P.J.Ch.

OPPOSITION/REPLY BRIEF OF DEFENDANT-APPELLANT FRANK ZISA

Of Counsel and on the Brief:

Wendy F. Klein, Esq.
(Atty ID 032321993)
Gianna L. Zapata, Esq.
(Atty ID 411972022)

Date Submitted: November 1, 2024

COLE SCHOTZ P.C.
25 Main Street
P.O. Box 800
Hackensack, NJ 07602-0800
wklein@coleschotz.com
gzapata@coleschotz.com

Attorneys for Defendant-Appellant Frank Zisa

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Plaintiff has failed to demonstrate why Zisa's appeal should not be granted. Specifically, Christodoro has failed to sufficiently counter: Defendant's demonstration that the trial court failed to make appropriate factual and legal findings pursuant to Rule 1:7-4(a) to support its decision, as embodied in the July 28 Order or, even assuming the trial court could be viewed as having made sufficient factual and legal findings, that those findings were supported by credible evidence on the record. Plaintiff also has failed to counter Defendant's demonstration that the trial court abused its discretion in violation of the applicable dissolution statute in awarding Plaintiff a buyout right when such an award was neither fair nor equitable to the parties, **as required by the statute**. Plaintiff similarly has failed to counter Defendant's arguments that the trial court erroneously reduced Defendant's equity interest in the entity and failed to follow its own orders.

Furthermore, Plaintiff has not come forward with any adequate response to Defendant's showing that the trial court applied the incorrect standard and then erroneously denied Defendant's reconsideration motion or that the trial court incorrectly entered the HELOC and December 20 Orders, which barred Defendant from presenting evidence at trial, even using alternative methods such as settlement statements or bank records that were of record. Plaintiff also has failed to counter

Defendant's showing that the trial court's fee award was not properly supported and that the trial court erred in failing to clarify its orders.

Indeed, instead of substantively responding to any of Defendant's arguments, Plaintiff has taken the opportunity to rehash its legally meaningless grievances against Zisa. Plaintiff's failure to substantively refute (and, in some cases, even acknowledge) Zisa's legal arguments should be seen for what it is – a concession that the law and facts favor Defendant.

Plaintiff's cross-appeal is similarly baseless. Christodoro asks this Court, as he asked the trial court, to dilute Zisa's interest in Attessa to 0%, allegedly as enforcement of the Operating Agreement, but neither the facts nor the law support such dilution. As found by the trial court, such dilution simply did not make sense in light of the parties' Operating Agreement and course of dealing. Christodoro has provided no basis for the Appellate Division to disturb the factual findings and legal conclusions of the trial court in this regard, and, therefore, his appeal must be denied.

Christodoro's other appellate arguments are similarly baseless. Christodoro's request that Zisa "pay back" Attessa for various expenditures is unwarranted, as the trial court failed to find any basis for that. In any case, Zisa has expended far more on Attessa than he received in return and such an award would essentially be a double recovery for Christodoro. Furthermore, it is incorrect for Christodoro to claim that he is entitled to an award of dissociation as a matter of "housekeeping"—

dissociation is a separate legal standard that Christodoro does not even attempt to demonstrate that he had met. Christodoro also has failed to demonstrate an entitlement to additional attorneys' fees, costs, prejudgment interest, or full compensation for Attessa's third-party professionals. Such trial court decisions are subject to an abuse of discretion standard, and Christodoro has offered no rationale as to how the trial court abused its discretion in denying those requests.

Christodoro's final appellate ground is also a non-starter. The trial court did not abuse its discretion in refusing to strike Zisa's reconsideration certification, (which the trial court then said it ignored in ruling on the reconsideration motion). Christodoro has failed to advance an argument as to why the trial court's refusal to strike the reconsideration motion constituted an abuse of discretion; in fact, Christodoro does not cite to a single authority supporting its argument why the certification should have been struck in the first place. This argument also fails.

For all of these reasons, as detailed in Defendant's initial brief and herein, this Court should grant Zisa's appeal and deny Christodoro's cross-appeal.

LEGAL ARGUMENT

REPLY IN FURTHER SUPPORT OF ZISA'S APPEAL

I. PLAINTIFF HAS FAILED TO ADEQUATELY REFUTE THE TRIAL COURT'S FAILURE TO MAKE APPROPRIATE FACTUAL FINDINGS TO SUPPORT THE JULY 28 ORDER AS REQUIRED BY RULE 1:7-4(A) (Da245; Da1566; 24T; 25T).

Christodoro cannot and has not demonstrated that the trial court made the appropriate factual findings mandated by Rule 1:7-4(a) in support of its July 28 Order. In an attempt to pad the clearly insufficient factual findings of the trial court, Christodoro spills much ink about the various testimony and exhibits that were submitted over the course of the trial, but he fails to counter the fact that the trial court does not cite to those items or support its decision with any sufficient findings of fact. This failure violates the requirements of the Court Rules. See Rule 1:7-4(a) ("[t]he court shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon in all actions tried without a jury . . . ."); Edelglass v. Pogorzhelsky, 2020 WL 1845536, at *3 (N.J. Super. Ct. App. Div. Apr. 13, 2020) (citation omitted) (holding that to comply with Rule 1:7-4(a), "the court must articulate factual findings and correlate them with the principles of law"); State ex rel. H.M., 2012 WL 2308457, at *5 (N.J. Super. Ct. App. Div. June 19, 2012) ("[A] trial judge's findings in a bench trial should be sufficient to

enable the reviewing court 'to evaluate what elements the judge considered . . . to determine legal error.'") (internal citations omitted).

Christodoro points out that the trial court stated that:

> I've reviewed everything, and I am going to decide this case based on the testimony that I heard, including judging credibility, examining the exhibits, which there was many reports and letters and e-mails and appraisals, and applying the law and making what I deem is a just and equitable decision.
>
> [See 24T7:21-8:2]

However, this statement does not change the fact that even if the trial court did "judg[e] credibility, examin[e] the exhibits…. and apply[] the law," its actual oral decision, the July 27 Opinion, does not reflect any of that. In fact, in its oral decision, the trial court failed to state the elements of any cause of action on which Defendant has appealed, failed to provide any analysis of the facts regarding same, and only provided conclusory statements as to its final decisions, which Christodoro attempts to recast as "findings." See generally 24T. While Christodoro sets out a laundry list of the trial court's supposed "findings," (see Pb24-25),[1] such alleged findings are little more than a potpourri of miscellaneous statements, most of which were

[1] References to Plaintiff's brief are defined as "Pb" and Defendant's brief are defined as "Db" pursuant to Rule 2:6-8.

irrelevant to the actual causes of action being decided, and none of which is sufficient to reach the standard required by Rule 1:7-4(a).

For instance, Plaintiff fails to cite to a single alleged "finding" by the trial court in which it determines it would be fair and equitable to the parties to grant Plaintiff the first option to buyout Defendant. Plaintiff fails to cite to a single alleged "finding" where the court determined the amount of alleged distributions to Defendant that were not used for the business. Instead, Plaintiff resorts to misrepresenting the oral decision, saying the trial court "embraced" the calculations offered by Plaintiff, citing to 24T14:12-21. In fact, in that section of the oral decision, the trial court is merely reciting the allegations of Plaintiff, 24T14:9, 24T14:12, and then concludes "the numbers get skewed in every which direction," and "you could play with these numbers all day," and "the numbers aren't necessarily constant depending on how you look at them." 24T14:24; 24T15:2-3; 24T15:8-9.

Given such inconclusive statements by the trial court, Plaintiff is unable to demonstrate the trial court sufficiently supported its July 28 Order. Instead, his strategy is to inundate this Court with no fewer than ***eleven*** pages of assorted quotes from the duration of the trial (Pb26-37) (including instances where the trial court allegedly questioned Zisa's testimony) in an attempt to convince the Court that in the face of such voluminous trial testimony, the trial court must have made sufficient

findings in its oral decision to support the July 28 Order. However, the opposite is true—even in the face of days of trial testimony and numerous exhibits, the trial court failed to support its decision with the required fact-finding and demonstrated confusion regarding aspects of the parties' business arrangements. In spite of Christodoro's struggles to paint it otherwise, it is clear that the trial court did not provide sufficient findings of fact to support its July 28 Order. As such, the parties and this Court must resort to speculation, making it impossible for this Court to determine and apply the appropriate standard of review, and requiring remand. See Edelglass, 2020 WL 1845536, at *3 (citation omitted) ("When that is not done, [the Appellate Division's] review is impeded, and a remand is necessary.").

II. EVEN IF THE ORAL DECISION AND JULY 28 ORDER COULD BE VIEWED AS CONTAINING SUFFICIENT LEGAL AND FACTUAL FINDINGS, PLAINTIFF HAS FAILED TO DEMONSTRATE THAT THE TRIAL COURT'S JULY 28 ORDER IS SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD

A. Plaintiff Has Not Demonstrated The Trial Court's Decision To Award Plaintiff His "Trapped Capital" Is Supported By Sufficient Credible Evidence (Da245; 24T50:11-16)

The trial court erred in awarding Christodoro payment for his alleged "trapped capital" in addition to his equity interest in Attessa, when such a decision was not supported by credible evidence. Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) ("Reviewing appellate courts should 'not disturb the factual findings and

legal conclusions of the trial judge' unless convinced that those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'") (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). Here, the trial court's factual "findings" regarding payment are not "supported by sufficient credible evidence in the record." State v. Mohammed, 226 N.J. 71, 88 (2016) (quoting State v. Gamble, 218 N.J. 412, 424 (2014)). In a desperate attempt to hold on to his windfall, Christodoro makes much ado about various testimony and exhibits (including an alleged "smoking gun" spreadsheet, which is ultimately meaningless, as discussed infra), but fails to acknowledge the proverbial elephant in the room – **there are no formal loan documents regarding any alleged loans between Christodoro and Attessa**.

As a preliminary matter, Plaintiff is incorrect when he states that Zisa's appellate position regarding the 'trapped capital' is inconsistent with Zisa's trial court position regarding same. The concept of "recycling" capital referred to Attessa's business model in which money contributed to purchase a property would be returned as part of a refinancing, and could then be used to acquire another property. 17T20:12-21-12. Zisa's explanation of this business model has no impact on his position that the capital Plaintiff contributed was never meant to function as a loan entitled to priority repayment upon a dissolution or buyout—Plaintiff is

attempting to conflate two separate things in order to create an *ad hominem* attack of inconsistency against Zisa.

Furthermore, as Plaintiff conceded during his trial testimony, there are no agreements, such as promissory notes or any other formal loan documents, setting forth the alleged loan terms, loan amount, the interest rate, or any other paper that would ordinarily accompany a loan from a partner. 14T76:6-77:16; Dca16; Dca141; Da2012; 14T77:17-78:14. The spreadsheet Plaintiff references may have referred to Christodoro's capital infusion as a "loan" but that does not make it so—the absence of any formal documents regarding such a loan renders this spreadsheet nothing more than a red herring. Christodoro was not a "lender"; he was an owner whose contribution was use of his capital. Thus, it is of no consequence that the parties' business model included discretionary repayments to Plaintiff when the properties were refinanced, as Plaintiff's contributions lacked the fundamental traits of a loan under New Jersey law. See Tiernan v. Carasaljo Pines, 51 N.J. Super. 393, 404-05 (App. Div. 1958) (characterizing a loan as "an advancement of money by the lender at the time of agreement, and a stipulation or agreement to repay it and generally with interest, at a future date, by the borrower").

To the extent that the trial court decided that Christodoro should be repaid his capital contributions to Attessa, while also maintaining his equity interest in the entity, the trial court erred by failing to similarly credit Zisa for his contributions

upon the division of these members. As a threshold matter, it is both incorrect and prejudicial for Christodoro to state that "at trial, it was shown that Mr. Zisa had, in fact, repeatedly defalcated business funds." Pb43. Notably, Christodoro does not cite to any transcript references, exhibits, or anything at all in support of this baseless contention—and this Court should disregard it entirely. Furthermore, it is entirely inconsistent for Christodoro to claim that Zisa receiving a separate credit for his labor, on top of his equity interest, is "improper double-counting," but Christodoro receiving a separate credit for his capital infusion, on top of his equity interest, is just and proper. Id. Finally, it is false to state that "Article IX makes clear that any such labor/services cannot be treated as 'sweat equity.'" Pb42. Article IX of the Operating Agreement states as follows:

> Except as herein provided no member shall be separately compensated on a **salaried basis** for service performed in carrying out the operation of the Company. **No salaries or individual compensation** shall be otherwise payable, without consent of the Company, for the normal management, although the Company may from time to time employ one or more managers or other representatives at a designated salary.

Da1602 (emphases added). Article IX addresses salaries, not equity and in no way bars Zisa from receiving a credit for his contributions in the form of work for the Company in the same way Christodoro received a credit for his capital contributions. Zisa spent years of his life working 100% on the entity, for which he was not paid

salary, but upon separation of the parties he should have received an equivalent credit for that work above and beyond the equity interest he already had.

Christodoro also mischaracterizes the expenses that Zisa is seeking reimbursement for. Zisa is not seeking reimbursement for professional fees rendered on his behalf in conjunction with this litigation. Rather, Zisa is seeking reimbursement credit for expenses he incurred for the benefit of Attessa, including but not limited to: (i) advancing operating costs that are ordinary and necessary for a real estate entity owning multiple properties, including overhead, mileage, and other business expenses. 14T171:8-20; Dca358; (ii) overseeing the renovations of the properties, which were services provided by Defendant above and beyond his day-to-day responsibilities. Dca358; and (iii) the substantial expenses Defendant incurred in connection with Plaintiff's California venture. 14T149:17-150:13.

This is not a "vain effort to offset [Zisa's alleged] misappropriation" (Pb45) – rather, Zisa is fairly pursuing recognition for the costs and expenditures he put out, in addition to his time, that the trial court refused to consider in allocating credits in separating the parties and determining what any member was owed. The trial court's rulings inexplicably disregarded evidence of amounts owed to Defendant for expenses he incurred for the benefit of Attessa. See supra 14T171:8-20; Dca35; 14T149:17-150:13. Such a decision is therefore not supported by credible evidence and must be vacated and remanded.

B. Plaintiff Cannot Dispute The Error In The Trial Court's Arbitrary Reduction Of Defendant's 50% Interest In Attessa To 40% And Award To Plaintiff Of That 10% Interest (Da245;24T48:19-24)

Once again, Christodoro is attempting to supplement the July 27 Opinion with facts, analysis, and decisions that are not there in an attempt to justify the windfall he received. In changing the equity interests of the parties in Attessa from 50/50 to 60/40, the trial court apparently based its ruling on a conclusory finding that Defendant had misappropriated funds from Attessa, although such a finding cannot be found in the July 27 Opinion. Christodoro spends a significant portion of his appellate brief attempting to prove Zisa had misappropriated those funds with a myriad of references to the trial transcript and exhibits regarding same. Pb45-54. However, what Christodoro fails to grapple with is that the subject July 28 Order, and the attendant July 27 Opinion, **do not reference any factual support for a finding that Zisa misappropriated funds from Attessa nor do they assign a monetary value to this alleged misappropriation to support the equity reduction**. As such, the trial court's findings are not supported by sufficient credible evidence in the record, and the July 28 Order should thus be overturned. See Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015).

In fact, throughout its oral ruling, the Court repeatedly acknowledged that the record was bereft of evidentiary support in this regard (see, e.g., 24T31:25-32:2 ("So

we had these direct and indirect transactions. And they are really impossible to pin down.")), and even noted that Plaintiff had failed to satisfy his burden in establishing his claim for conversion by indicating that the amount of funds was unknown. See, e.g., 24T32:22-24 ("Do I know how much did [go out the window] and how much didn't? I don't know how you could. That is one of the problems.").[2] In spite of the admitted lack of evidentiary support, the trial court not only improperly granted Christodoro's claim for conversion, but appears to have premised the equity shift from 50/50 to 60/40 on it.

Given that the trial court was unable to conclusively state that conversion had occurred or in what amount, it is palpably improper for the trial court to make any decisions premised on that un-proven conversion, including reducing Defendant's equity interest. Indeed, at the time the trial court made that reduction it did so without knowledge of the value of such a reduction and without finding damages in any particular amount. Such an arbitrary decision cannot be sustained on appeal. Here, the trial court's legal conclusion to reduce Defendant's equity is not only "'manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice,'" but arbitrary and

[2]In making this determination, the trial court incorrectly opined that there were no receipts for expenses. See 24T27:4-7; Dca351; Dca364; Dca366-Dca367.

capricious. Griepenburg v. Twp. Of Ocean, 220 N.J. 239, 254 (2015) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)).

This Court should not be persuaded by Christodoro's "throw everything against the wall" approach. Christodoro is using his appellate brief to re-litigate his conversion claim and try to suggest the trial court made findings it did not in an attempt to bolster the trial court's decision to shift the parties' equity, for which there is no support in the record. Such re-litigation of an un-appealed claim is palpably improper. See W.H. Indus., Inc. v. Fundicao Balancins, Ltda, 397 N.J. Super. 455, 458 (App. Div. 2008) ("It is clear that it is only the orders designated in the notice of appeal that are subject to the appeal process and review.").

Furthermore, Christodoro fails to address the fact that the trial court's reduction in Zisa's equity was beyond the scope of its power. Christodoro instead points to Zisa's alleged "defalcation" as a sufficient basis for the trial court's improper equity reduction. But even a court of equity cannot simply reallocate ownership interests contrary to the parties' agreement and course of dealing. See Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp., 100 N.J. 166, 174 (1985) (holding trial court acted beyond its equitable authority by "molding [a] creative remedy" that wholly disregarded the parties' agreement). Christodoro's failure to substantively brief this point should be seen as a waiver. Sklodowsky v. Lushis, 417

N.J. Super. 648, 657 (App. Div. 2011) ("an issue not briefed on appeal is deemed waived").

Accordingly, the trial court's arbitrary reduction of Defendant's ownership interest in Attessa from 50% to 40% must be reversed.

C. Plaintiff Has Not Demonstrated That The Trial Court's Dismissal Of Count One Of Zisa's Counterclaims Was Supported By Credible Evidence (Da245; 24T30:9-15)

Christodoro alleges the trial court properly dismissed Count I of Defendant's counterclaim regarding the Port Imperial property because it is: (i) time-barred; and (2) barred by the Statute of Frauds. Both of these arguments fail.

First, the statute of limitations only arises upon a ***breach*** – not when the parties first enter into a contract. See Metromedia Co. v. Hartz Mt. Assocs., 139 N.J. 532, 535 (1995) ("For purposes of determining when a cause of action accrues so that the applicable period of limitation commences to run, the relevant question is when did the party seeking to bring the action have an enforceable right."); Hoppaugh v. McGrath, 53 N.J.L. 81, 85 (1890); see also Sodora v. Sodora, 338 N.J. Super. 308, 313 (Ch. Div. 2000) ("A breach of contract claim 'accrues at the moment when the breach occurs.'"). There is no reason as to why the statute of limitations would begin to run upon the purchase of the Port Imperial condo as opposed to when the breach occurred regarding their agreement to jointly own the property by transferring ownership from Christodoro's sole name. Given that the breach occurred at the

earliest in 2015 when the Operating Agreement was signed and Christodoro refused Zisa's demand to transfer half the ownership interest and contribute the property to their jointly owned entity, Da1601, and given that Zisa brought his first counterclaim on November 1, 2018, which mentions the property held solely by Christodoro, Da0019, and his amended counterclaim on January 31, 2020, Da103, he was well within the statute of limitations for his claims.

Second, the Statute of Frauds allows for a transfer of "an interest in real estate or to hold an interest in real estate for the benefit of another" where such an interest can be "proved by clear and convincing evidence." Morton v. 4 Orchard Land Tr., 180 N.J. 118, 126 (2004) (holding that "clear and convincing evidence" of an oral agreement is sufficient under the Statute of Frauds). It is incorrect for Christodoro to claim that the "Trial Court [was not] presented with any other evidence under subsection (b) of the Statute of Frauds which would establish, by clear and convincing evidence, the existence of an agreement to transfer any interest in Port Imperial." Pb60. The record evidence establishes an agreement between Plaintiff and Defendant that the Port Imperial property would be jointly owned by the parties like all properties in the portfolio. 15T29:20-30:23; 26:24-27:19; 31:7-32:2; 32:16-22; 34:4-35:10; 39:13-40:12; 35:25-36:7 (Q: "[D]id you have discussions . . . about transferring the property of Port Imperial into Attessa?" A: "We did. Many times. . . . [T]he intention was that all the investment properties of the partnership were to

be in our joint names"). The documentary evidence that Christodoro points to is unavailing—Zisa referred to the Port Imperial property as "[Christodoro's] condo" because he was led to believe that Christodoro would live there (see 15T26:24-27:19), and Christodoro's other citations do not reference Zisa's involvement in Port Imperial, but do not refute it.

Defendant's counterclaim was thus not barred by either the statute of limitations or the Statute of Frauds, and for all of the reasons set forth in Defendant's initial appellate brief, the trial court erred in not recognizing Defendant's interest in the Port Imperial property.

III. PLAINTIFF HAS FAILED TO DEMONSTRATE THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION

A. The Trial Court Abused Its Discretion By Awarding Plaintiff A Buyout Right (Da245; 24T21:21-23, 22:2-17, 47:8-9)

Christodoro fails to substantively respond to Zisa's contention that the trial court's award of a buyout was an abuse of discretion because it rested on an impermissible basis. "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021) (quoting State v. R.Y., 242 N.J. 48, 65 (2020)). Specifically, while N.J.S.A. 42:2C-48b (the apparent statutory authority for the trial court's remedy) permits a forced sale of a party's interest in a dissolution action, such a sale is only proper "if the

court determines in its discretion that such an order would be fair and equitable to all parties under all of the circumstances of the case." Cf. Musto v. Vidas, 281 N.J. Super. 548, 561 (App. Div. 1995) (forced buyout warranted only where it would be "fair and equitable to all parties"). In fact, the trial court never made such a determination and never even valued Attessa or the parties' interest therein; it just had the properties Attessa owned appraised (24T16-50:25), seemingly because it was always contemplated that the properties would be divided upon a dissolution.

As discussed in Zisa's initial appellate brief, such a forced sale is not fair or equitable here when compared to a dissolution of the entity because here the company simply owns real properties that were rented out. A much fairer, equitable remedy would have been to distribute those properties to the members and, if there were monies owed one way or another, award damages. Instead, awarding Plaintiff a buyout right deprived Defendant of the benefits associated with holding a long-term real estate investment and took far more value from him than a distribution would, all without any finding as to what "damages" Plaintiff was entitled to. The record is clear that Defendant contributed years of his life, 100% of the time, financial resources, and expertise into building Attessa's real estate portfolio, near his home and resources. See, e.g., 3T62:19, 66:8, 70:23-72:5, 75:16-93:10; 4T4:22-25, 5:1-23, 19:5-14, 22:20-25, 23:1-7, 24:13-17; Dca338. To avoid the inequitable outcome of depriving Defendant of his ownership interest in that portfolio and

providing a windfall to Plaintiff, the trial court should have instead ordered a dissolution of the entity and distributed the properties in accordance with the parties' respective ownership interests, and awarded defined monetary damages, if it so found one way or the other.

Furthermore, the Operating Agreement did not provide Plaintiff with the unrestrained right to force a buyout—Defendant was not on notice of the possibility of a forced buyout of his interest in the company he developed for nearly a decade. Finally, adding insult to injury, the forced buyout exposed Defendant to several adverse tax ramifications, including the potential of realizing capital gains and depreciation recapture, that Defendant would have otherwise been protected from by virtue of the Attessa real estate investments. See Db35-36. Christodoro does not advance a single argument in support of the buyout being fair or equitable—or point to a determination by the trial court where it considered all circumstances and found a buyout, as opposed to a dissolution, fair and equitable to Zisa. Instead, Plaintiff attacks Zisa for exercising his rights as a party to this action at the trial level.

It is immaterial that Zisa requested dissociation and a related buyout in his initial pleadings, or that Zisa attempted to enforce the buyout provision at the trial level—Zisa was and is entitled to zealously advocate for his rights at both the trial level and on appeal. Zisa was responding to outright attacks on the entity he was trying to hold together despite defaults by Plaintiff as to what he promised and their

course of dealing. This does not change the myriad procedural, factual and legal issues with the trial court's forced buyout remedy, none of which Christodoro responded to, and all of which are laid out at length in Zisa's initial appellate brief.

As such, Plaintiff has not disputed that the trial court abused its discretion is awarding Plaintiff a buyout right as opposed to ordering a dissolution and distribution of Attessa's assets, and the July 28 Order should be reversed.

B. The Trial Court Abused Its Discretion In Denying Zisa's Motion For Reconsideration

Christodoro has failed to adequately dispute that the trial court abused its discretion when it applied the incorrect standard to Zisa's motion for reconsideration. Instead, Christodoro makes much ado about the alleged "impropriety" of Zisa's motion for reconsideration. However, such an argument fails to address the true issue, namely that the trial court failed to apply the appropriate standard to Zisa's motion for reconsideration. As stated supra, a court abuses its discretion when its decision is made "without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021) (quoting State v. R.Y., 242 N.J. 48, 65 (2020)). See also Horizon Blue Cross Blue Shield Of New Jersey v. Avolio, No. A-3737-09T3, 2010 WL 5348786, at *3 (N.J. Super. Ct. App. Div. Oct. 22, 2010) (holding that trial judge abused his discretion by applying the wrong standard to the subject motion).

To the extent that Christodoro argued that the standard applied was irrelevant because both standards only consider information "if there is good reason," such a contention is inaccurate. Where the even more flexible reconsideration standard under Rule 4:42-2 applies, see Lawson, 468 N.J. Super. at 134, the court should consider all evidence in its effort to reach a decision consonant with the interests of justice. If the trial court had applied the correct standard, it would have considered the evidence Zisa submitted in support of its motion for reconsideration, cleared up some of the confusion the trial court noted it had (24T46:20-24), and could have granted the motion.

While Christodoro conclusively states that even if the trial court had considered the new evidence, the outcome would be the same, such a contention is devoid of any factual or legal support. It is clear that the trial court abused its discretion in applying the incorrect standard on Zisa's motion for reconsideration, and the order denying same must therefore be vacated and remanded. See e.g., Sadeeshkumar v. Venugopal, 478 N.J. Super. 25, 41 (App. Div. 2024) (reversing the trial court's order denying a motion for reconsideration because the "motion judge applied the incorrect legal standard . . . because he relied on the non-interlocutory Rule 4:49-2 standard" instead of "applying the 'far more liberal approach' under Rule 4:42-2").

C. Plaintiff Has Failed To Demonstrate That The Trial Court Did Not Abuse Its Discretion In Awarding Plaintiff Attorneys' Fees (Da1566; 25T122-123)

Christodoro has failed to substantively dispute that in its award of attorney's fees, the trial court misconceived the applicable law and misapplied it to the factual complex. Tarta Luna Props., Ltd. Liab. Co. v. Harvest Rests. Grp. Ltd. Liab. Co., 466 N.J. Super. 137, 154 (App. Div. 2021) (citations omitted) (holding that the Appellate Division "will only disturb an award of attorneys' fees upon a clear abuse of discretion" subject only to an examination as to whether "the judge misconceive[d] the applicable law, or misapplie[d] it to the factual complex."). The trial court misconceived the applicable law and/or misapplied it to the facts when it: (i) awarded Christodoro attorney's fees pursuant to RULLCA, when his claims were not actually derivative; (ii) awarded attorney's fees without an order of dissolution or any showing of bad faith, thus precluding any award pursuant to N.J.S.A. 42:2C-48(b)); (iii) allowed an exception to the American Rule when Zisa's conduct did not fit any recognized exception; and (iv) issued an additional award of $50,000.00 in attorney's fees stemming from discovery conduct, which award was duplicative of the original award of $27,072.50 in attorney's fees granted by the discovery master. As such, the trial court's award of attorney's fees should be vacated and remanded.

1. Plaintiff's Action Was Not Truly Derivative and Therefore He Cannot Receive Attorney's Fees Pursuant to N.J.S.A. 42:2C-72

While Christodoro labeled his claims as derivative, that does not make it so. To determine whether a claim presents an individual cause of action or a derivative claim belonging solely to the entity, "courts examine the nature of the wrongs alleged in the body of the complaint, not the plaintiff's designation or stated intention." Delray Holding, LLC v. Sofia Design & Dev. at S. Brunswick, LLC, 439 N.J. Super. 502, 510, 110 A.3d 115, 119 (App. Div. 2015) (internal citations omitted).

Christodoro focuses on how the analysis of the members' ownership interest, calculation of fees Zisa allegedly owed Attessa, and appointment of SFA Strasser and Gilsenan allegedly benefitted Attessa (although he later claims only Zisa should pay their fees). However, the fact remains that nothing was awarded to Attessa in response to Christodoro's claims – the only beneficiary of Christodoro's claims was Christodoro himself. He was awarded repayment of his alleged loan against facts to the contrary, he was awarded an additional equity interest, and he was awarded the right to buyout Zisa at a discount without adherence to the law. Furthermore, the appointment of the SFA in and of itself does not render an action derivative; it just prohibited either party from acting on behalf of the entity they equally owned.

Finally, it is irrelevant that N.J.S.A. 42:2C-72 did not exist at the time of the Lauricella decision. The holding in Lauricella is that where "the real nature of the case has been found to be a dispute between the two principals rather than a derivative action on behalf of the corporate entity," no award of attorneys' fees should be granted under the auspices of a derivative action. The fact that N.J.S.A. 42:2C-72 did not exist does not change the import or significance of the Lauricella decision – the statute does not define a derivative action, nor does it address the gap between actions that are labeled derivative and actions that are truly derivative. Any argument otherwise is disingenuous.

2. The Trial Court's Failure to Grant Dissolution or Find That Zisa Had Acted in Bad Faith Precluded an Award of Fees Pursuant to N.J.S.A. 42:2C-48(c)

As a preliminary issue, Christodoro has failed to rebut Zisa's contention that without an order of dissolution, attorney's fees cannot be awarded. Christodoro's one and only support is a trial court Chancery Division decision, which simply states as follows:

> The court declines to find that that Plaintiff has acted in bad faith and therefore declines to find that Defendants are entitled to reasonable attorney's fees. Under N.J.S.A. § 42:2C-48(c), when a member of an LLC brings an application to dissolve the LLC:
>
> > If the court determines that any party to a proceeding brought under paragraph (4) or (5) of subsection a. of this section has acted vexatiously,

> or otherwise not in good faith, it may in its discretion award reasonable expenses, including counsel fees incurred in connection with the action, to the injured party or parties.
>
> While Plaintiff's arguments were unavailing, and hypertechnical, they do not rise to the level of unreasonable or vexatious, or so lacking in good faith to justify invocation of the statutory exception to the American Rule.

Carfagna v. The Carfagna Family, LLC, No. BER-C-246-14, 2015 WL 7571615, at *26-27 (N.J. Super. Ch. Nov. 17, 2015). Pa684, Pa691. At no point does the court in Carfagna state that dissolution is not a prerequisite to awarding fees under Section 48(c)—rather, the court there declines to award fees on the basis that no bad faith or vexatious behavior existed, and simply cites to the plain language of the statute.

In contrast, the court in Marra v. Berlant, A-0149-15T3, 2017 WL 5171863 (N.J. Super. Ct. App. Div. Nov. 6, 2017), actually discussed the exact issue as to whether dissolution is required to grant an award pursuant to N.J.S.A. 42:2C-48(b) and held that it was. See id. at Pa676, Pa682 ("Defendants, on the other hand, contend that N.J.S.A. 42:2C–48(c) is only applicable in cases of dissolution, which did not happen here. We agree with defendants."). To the extent that Christodoro argues that the trial court did order dissolution as a potential alternative remedy, such an argument is entirely unavailing—the trial court unfortunately ordered a buyout (Da245). While it provided for the alternative of dissolution as a contingent remedy should neither party buyout the other, the court failed to recognize that remedy even

when Defendant moved to enforce the court's order and requested dissolution and distribution. Da1066.

Furthermore, even if dissolution was not a prerequisite, the trial court failed to make a finding that Zisa acted in bad faith, and thus an award of attorney's fees pursuant to N.J.S.A. 42:2C-48(c) was not warranted. Zisa does not argue that a trial court cannot consider a party's bad faith. He argues that any determination that a party acted in bad faith must be supported by factual findings and credible evidentiary support. The record here is devoid of such factual findings and therefore insufficient for this Court to determine the propriety of the trial court's fee award, much less conclude that it was predicated on conduct related to Plaintiff's dissolution claim. Thus, the trial court's decision to issue an arbitrary $50,000 award of attorneys' fees to Plaintiff was erroneous.

3. Plaintiff Has Failed to Demonstrate that the American Rule Should Not Apply

Plaintiff has not demonstrated that Zisa's conduct fit a recognized exception to the American Rule. Christodoro's primary support for his proposition is In re Niles Tr., 176 N.J. 282, a case where a trustee exercised undue influence over a disabled person—worlds away from any conduct by Zisa, even as alleged by Christodoro, and certainly from any conduct found by the trial court. Christodoro attempts to claim that "Niles was but one decision in a line of factually distinct cases

that stands for the proposition that when a fiduciary misuses his powers, fee-shifting is appropriate," and cites to Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 405 (2009), in support of same. However, Litton says nothing of the sort. As a preliminary matter, Litton only discusses Niles in the concurrence, rendering it a legal nullity from a precedential standpoint. Furthermore, Litton's concurrence describes Niles as a case demonstrating "a tightly circumscribed common law exception to the American Rule," 200 N.J. at 405, making it clear that any exception is meant to be extremely narrow. As such, for the reasons elaborated on in Zisa's initial appellate brief, the trial court erred in awarding attorney's fees to the extent they were premised on Zisa's breach of fiduciary duties.

4. Plaintiff Has Failed to Demonstrate Why He Should be Entitled to Double Recovery for the Same Conduct

Once again, Christodoro fails to grapple with the actual issue at hand, choosing instead to try and obfuscate. Plaintiff's application for attorneys' fees is the subject document here. Plaintiff's application for attorneys' fees failed to demonstrate any conduct warranting an award of attorneys' fees beyond what had already been considered by the SDM. There were no additional alleged discovery violations included in Plaintiff's application and, therefore, they were not considered by the trial court in awarding attorney's fees. Pb72-Pb74. Christodoro does not point to any specific language or phrasing of his application to demonstrate that the

conduct he moved upon was beyond what had already been considered by the SDM. As such, the trial court erred in awarding attorney's fees as duplicative to the extent they were based on the same discovery conduct.

D. The Trial Court Abused Its Discretion In Failing To Enforce And Clarify Its Final Order And The July 28 Order (Not Addressed Below)

Zisa properly presented his requests for clarification to the trial court by filing letters on the docket. Christodoro cites to no authority for the proposition that only a motion is considered a 'presentation' to the trial court and, thus, fails to counter Zisa's argument. Pb75. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229 (1973) (holding appellate courts will decline to consider issues not properly presented to the trial court when opportunity for such presentation is available but not limiting presentation to motions, as opposed to filed letters). The trial court acted unreasonably when it refused to respond to Zisa's requests for clarification, as such response would have clarified: (1) that updated valuations were necessary and no entity valuation was ever conducted (even to account for funds in the bank for instance); (2) whether Zisa's interest being purchased included his interest in Attessa beyond the value of the properties; (3) whether Plaintiff, as the buyer of Attessa, was now solely responsible for the outstanding mortgages as the letter of the Final Order stated; (4) that the undisputed $5,144 should be deducted from the $1,198,220

awarded; and (5) whether post-judgment interest should only begin to run after the date of the closing. Da1569, Da1572.

E. The Trial Court Abused its Discretion in Entering The HELOC Order And December 20 Order, Which Were Premised On The Incorrect Standard (Da241; Da243; 1T59:3-69:5; 19T95:21-113:17)

Once again, Christodoro is attempting to re-litigate the subject orders, rather than respond to the arguments on Defendant's appeal. Zisa is appealing the HELOC Order, and the December 20 Order that confirmed it, because the trial court abused its discretion and applied the incorrect standard to Zisa's evidentiary and reconsideration motions. See Horizon Blue Cross Blue Shield, No. A-3737-09T3, 2010 WL 5348786, at *3 (holding that trial judge abused his discretion by applying the wrong standard to the subject motion).

As interlocutory orders, Defendant's motion for reconsideration and motion that his expert be allowed to testify regarding the HELOC were governed by Rule 4:42-2 and the "interests of justice" standard. Lawson, 468 N.J. Super. at 134. The trial court abused its discretion and misapplied that standard in denying Defendant's application and precluding Defendant's evidence because the interests of justice required that the parties have a full and fair opportunity to have their credibility judged with a full and complete recitation of the facts. "The discovery rules are not to be used…to preclude a party from presenting its case when the evidence neither

surprises, misleads [nor] prejudices the opposing party." Plaza 12 Assocs. v. Carteret Borough, 280 N.J. Super. 471, 477 (App. Div. 1995). Here, the trial court did just that by preventing evidence of Zisa's use of HELOC funds, even in the presentation of simple math or settlement statements. 1T67:1-7.

Christodoro does not address this misapplication of the necessary standard. Instead, Christodoro focuses on the procedural background leading up to Zisa's HELOC appeal, and why Zisa should be punished for seeking to supplement his initial discovery posture, all while baselessly invoking the doctrines of judicial and equitable estoppel. This is not an instance of 'inconsistent' positions—rather, this is the commonplace situation where a party amends its discovery posture as it encounters new information during the discovery process. Once Zisa determined that the exact source of subject funds was from the HELOC, he subsequently amended his responses and produced relevant documents within the Court-mandated discovery deadlines. Db49-Db50. It is axiomatic that a party should not be punished for complying with its continuing discovery obligations. If Christodoro truly needed additional discovery based on this admission, Christodoro could have obtained it. There is thus no basis to apply judicial or equitable estoppel here.

Christodoro's arguments here are nothing more than proverbial red herrings. Christodoro has not demonstrated that the trial court applied the correct review to

either the HELOC or the December 20 Order, and therefore for the reasons asserted in Defendant's initial appellate brief, those orders must be vacated and remanded.

IV. PLAINTIFF HAS FAILED TO DEMONSTRATE THAT THE TRIAL COURT DID NOT ERR IN ITS DECISIONS ON THE PARTIES RESPECTIVE MOTIONS TO ENFORCE (DA1566; 25T115:23-116:7)

Christodoro cannot demonstrate the trial court was correct in failing to enforce its own order. As a preliminary issue, Christodoro applies the incorrect appellate standard of review. Christodoro cites to N. Jersey Media Grp., Inc. v. State, Office of Governor, 451 N.J. Super. 282, 299 (App. Div. 2017), in support of the contention that this Court should apply the abuse of discretion standard when evaluating the actions taken by the trial court to enforce its order. However, the Appellate Court in that case applied the abuse of discretion standard to the trial court's failure to consider the violations of its unambiguous previous order, not to the trial court's interpretation of its order. If the trial court here had failed entirely to consider Christodoro's violations of its past order, the abuse of discretion standard would apply. However, here, the trial court *considered* Christodoro's violations of its past order and chose to apply an incorrect interpretation of its prior order so that those violations would not be material. Interpretations of law are reviewed *de novo*. See Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)) ("A trial court's interpretation of the law and the legal consequences that flow from established facts

are not entitled to any special deference.") The interpretation of a trial court order is an interpretation of law, and therefore the trial court is not owed any deference.

The plain language of the July 28 Order had mandated time constraints – the order provided the parties "ninety (90) days after the updated appraisals," to effectuate a buyout. The last updated appraisal (263 Sutton Avenue) was dated November 8, 2022, so the parties had until February 6, 2023, at the latest, to effectuate the buyout, with Christodoro having the first right to exercise the buyout option, followed by Zisa. See Da1069, Da1071, Da246. Failure to complete the buyout meant that, as per the plain language of the July 28 Order:

> If the parties cannot agree on a buyout or division [of properties based on current valuations within ninety (90) days after the updated appraisals, **the court will appoint a realtor, have the property sold, and the proceeds divided sixty percent (60%) to Plaintiff and forty percent (40%) to Defendant after professional fees and customary closing costs are paid, unless the time is enlarged by either good cause shown or by consent of the parties.**

Da246 (emphasis added). It is undisputed that no buyout occurred by February 6, 2023. As such, the trial court erred in refusing to enforce its own order. It is immaterial that there were pending reconsideration motions (there was no stay in place then or at any time) or that the SFA had also failed to comply with the July 28 Order, and it is further irrelevant that the July 28 Order allowed for the buyout period to be "enlarged by either good cause shown or by consent of the parties"—there was

no consent, and Christodoro failed to articulate to the trial court any basis for "good cause."

Even if Christodoro is correct that an abuse of discretion standard should apply, that would not change the correct outcome here. The trial court inexplicably decided not to enforce its own order for the following reason: "[Defendant's request to enforce the July 28 Order is] just not practical in my mind and hopefully there are some tax solutions, but at some point there has to be a buyout." 25T115:23-116:3. This statement is far from a rational explanation, and is an inexplicable departure from the trial court's own prior order. See State v. Chavies, 247 N.J. 245, 257 (2021) ("A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'").

As such, regardless of which standard of review this Court applies, the trial court erred in denying Zisa's motion to enforce the plain language of its own order, and that decision should be vacated and remanded.

V. PLAINTIFF'S CROSS-APPEAL SHOULD BE DENIED

A. Christodoro's Claim That Zisa's Membership Interest In Attessa Should Have Been Diluted To Zero Lacks All Merit

Christodoro contends the trial court should have awarded him the entirety of Attessa without any buyout because Zisa failed to make capital contributions to

Attessa, and thus, pursuant to Articles V and VI of the Operating Agreement, Zisa's ownership in Attessa should have been diluted to zero. This argument is unavailing.

As a preliminary matter, Christodoro applies the incorrect appellate standard. This is not a pure issue of law such that *de novo* review applies. Rather, this is an issue as to which the trial court made factual findings regarding the relation of the parties to the Operating Agreement and business model. See e.g., 24T31:1-6; 33:9-36:7; 37:23-38:4; 43:22-44:14. As such, the deferential standard regarding factual findings should apply. See Mohammed, 226 N.J. at 88 (quoting Gamble, 218 N.J. at 424) ("A reviewing court must accept the factual findings of a trial court that are 'supported by sufficient credible evidence in the record.'"). Where, as here, the trial court's findings regarding the Operating Agreement (which constituted some of its only actual factual findings), are supported by credible evidence on the record, the decision should not be disturbed.

The trial court's decision not to dilute Zisa's equity interest to zero is supported by its findings and the evidence on the record. First, the trial court found that when Plaintiff and Defendant formed Attessa, they executed the Operating Agreement and transferred the existing properties from themselves to Attessa and each owned it fifty percent. 24T44:3-7. Because it was clear from the conduct of the parties that they never intended for the Operating Agreement to allow for a 0% dilution based on failure to make capital contributions, the trial court found that

"looking at the operating []agreement in the manner in which it was formulated," the trial court could not put all the damages to one party. 24T41:8-13. The purpose of the venture was for Christodoro to contribute the capital for the venture including the acquisition of properties while Zisa's contribution was to manage the day-to-day operations. 13T43:7-25-44:15. As a result of this arrangement and their equal contribution of the 12 properties they jointly owned, each was given a 50% percent interest in Attessa. There was never any intention for Zisa to make capital contributions to maintain his interest—his 50% interest in Attessa was maintained by his contribution of his jointly owned properties and his labor and it was always reflected that way on their tax returns. Id.; Da279-Da280; 24T31:7-9. Second, the Operating Agreement was not a document that was truly negotiated or considered – the Operating Agreement was created within days to accommodate the request of the bank prior to previously scheduled refinancings. Da283; 24T34:20-24. Finally, it is incorrect to state that the trial court refused to dilute Zisa down to zero out of some "misguided" sense of fairness. The reality is the trial court found both sides to have issues with both credibility and calculations. "But I still have problems with it, you know? We are piecing things together after the fact. Like how does any of this make sense? So in 2015 they decided, well now they both will be the money guy, but Mr. Zisa will do all the work for no pay. So that is the business model. And as

a result, now Mr. Zisa should fork over probably 4 million dollars or more and give all the properties to Mr. Christodoro. It makes no sense." 24T35:24-36:6.

The trial court weighed the credible facts and evidence on the record, and correctly determined that diluting Zisa to zero on the basis of his alleged failure to make capital contributions was not something which the parties ever intended, was not support by the facts on the record, and would not have been the correct legal outcome. "It is alleged that [Plaintiff] has contributed all the capital and [Defendant] has not contributed any capital, that his membership has increased in direct proportion. So it [the second count] is under this dilution theory." 24T40:19-22. "And playing with those numbers and looking at the operating … agreement in the matter in which it was formulated, as I said at the outset, in good conscience to say that we are going to put all these damages on to one party and lose all the properties, I don't think that would be a fair outcome." 24T41:8-13. Such a decision based on the trial court's factual findings should thus not be disturbed.

Even if Zisa is correct as to the applicable appellate standard, this argument still fails. A *de novo* review of the Operating Agreement leaves Christodoro in the same place—Christodoro cannot enforce the "dilution" provision because he failed to follow the procedure set forth in the Operating Agreement. Da1601. Article VI of the Operating Agreement states as follows:

> The members may contribute in proportionate amounts any additional capital deemed necessary for the operation

> of the Company, **provided, however, that in the event that any member deems it advisable to refuse or fails to contribute** such member's share of any or all of the additional capital, then the other members or any one of them may contribute the additional capital not paid in by such refusing member and shall receive therefor an increase in the entire Company in direct proportion to the said additional capital contributed. **Unless otherwise agreed, the right to make up additional capital contributions of a refusing member shall be available** in the same order as the right to purchase in the case of withdrawal or death of a member, as set forth in paragraphs XV and XVI.

Id. (emphasis added).

It is clear that Article VI of the Operating Agreement contemplated a demand for capital, to which any member may then refuse. Id. Christodoro has failed to cite to any demand to Zisa as required under Article VI of the Operating Agreement, let alone a written demand requesting that he needs to contribute capital and that if he did not do so that his interest in Attessa would be diluted. Similarly, Christodoro has also failed to demand a capital call from Zisa to fund the operations of the Company as required under the Article VI. Moreover, Zisa never refused to meet a capital call as required under Article VI. Further, even if Christodoro did follow this procedure and Zisa refused to contribute capital, Zisa had the right to cure any purported refusal and make up additional capital contributions. Da1601. The reality as to why Christodoro never followed this procedure is because dilution was never discussed or contemplated by the parties as each were equal 50 percent members in Attessa in

exchange for the specific contributions they provided and the trial court found that Plaintiff's position to the contrary "makes no sense." 24T36:6.

Furthermore, it is irrelevant as to whether the parties understood that Articles V and VI established "dynamic" ownership – the ownership of Attessa was never changed in such a way to create anything other than a 50/50 split. Article V provided for an initial 50/50 split. Article VI provided that the interest split could change should the parties follow the capital contributions procedure. It is undisputed that the parties did not. See Db26. What the parties "understood" is therefore nothing more than an academic exercise.

It is therefore an improper characterization to say that the "unambiguous contractual language called for complete dilution of Mr. Zisa" (Pb87)—the contractual language called for Christodoro to first demand capital, and then allow Zisa the ability to "make up" any refusal of same. Dunkin Donuts is completely inapplicable in this context—the trial court here did not craft an equitable remedy in the face of the Operating Agreement. Rather, if Zisa was noncompliant with the Operating Agreement, Christodoro was too. Strict enforcement of Article V and VI would not change anything.

Regardless of which standard is applied, it is clear that the trial court did not err in refusing to dilute Zisa to zero. For this reason, Christodoro's appeal on this ground should be denied.

B. Defendant Contributed More Money Than He Allegedly Took Out

As a preliminary matter, Christodoro once again fails to identify the applicable standard of review. To the extent that this was a factual finding, i.e., that Christodoro was not entitled to additional payments from Zisa for the money Zisa allegedly 'took out' from Attessa, the deferential standard regarding factual findings should apply. See Mohammed, 226 N.J. at 88 (quoting Gamble, 218 N.J. at 424) ("A reviewing court must accept the factual findings of a trial court that are 'supported by sufficient credible evidence in the record.'"). If the trial court's decision is supported by credible evidence in the record (which it is, see infra), it should not be disturbed. To the extent that this was an equitable remedy (25T109:10-14 ("I took into account all which was presented here today, you know, including this 533 number and the direct and the indirect and it was, and it was impossible to get an exact amount, **so I did what was equitable**.")) (emphasis added), the standard of review is even more deferential—the Appellate Division reviews the denial of equitable remedies for an abuse of discretion. See Sears Mortg. Corp. v. Rose, 134 N.J. 326, 354, 634 A.2d 74, 88 (1993) (applying abuse of discretion standard of review in reviewing trial court's equitable remedy). No abuse of discretion or decision unsupported by credible evidence in the record can be found here—it is clear that: (1) Christodoro failed to submit adequate evidence that Zisa withdrew $533,254 from Attessa for personal or improper purposes; and (2) Zisa contributed

far more to Attessa than he allegedly withdrew, and that this fact served as the rational basis for the trial court's decision denying Christodoro further monies from Zisa. Da285-Da287.

Christodoro offers a series of conclusory statements as to the amounts Zisa allegedly withdrew from Attessa pre- and post-formation, citing only to his own expert in support of same. Christodoro completely ignores the fact that his expert simply totaled the expenses for various categories and made the self-serving statement that those expenses were somehow improper. Pb93-Pb94. However, Christodoro offers this Court no analysis or examples as to why these expenses were improper or unrelated to Attessa. Id. The fact is that Christodoro failed to provide the trial court with sufficient evidence to issue a decision that Zisa must 'pay back' these alleged expenses. Thus, there is no reason, under either possibly applicable standard, for this Court to vacate and reverse the trial court's decision.

Moreover, even if as alleged by Plaintiff, Zisa withdrew $117,818 in the pre-formation period, and $415,436 in the post-formation period, Zisa contributed far more to Attessa in expenditures that he was not compensated for. 14T171:8-20 (Zisa was not reimbursed for operating costs that are ordinary and necessary for a real estate entity owning multiple properties, including overhead, mileage, and other business expenses); Dca358 (Zisa did not receive compensation for overseeing the renovations of the properties, which were services provided by Defendant above and

beyond his day-to-day responsibilities); 14T149:17-150:13 (Defendant was not compensated for the substantial expenses Defendant incurred in connection with Plaintiff's California venture). Forcing Zisa to "pay back" $533,254 would not be correcting a windfall—it would be allowing Christodoro a double recovery. Thus, there is no basis to reduce Zisa's buyout amount on appeal.

C. Plaintiff Was Not Entitled To Dissociation

It is not a mere matter of "housekeeping" to find that Christodoro was entitled to dissociation. While Christodoro, once again, does not identify the relevant standard of review, this is a finding of fact and subsequent legal conclusion that Plaintiff seeks to overturn (*i.e.*, whether Plaintiff was entitled to the legal remedy of dissociation on the facts on the record), and thus the deferential standard regarding factual findings should apply. See Mohammed, 226 N.J. at 88 (quoting Gamble, 218 N.J. at 424) ("A reviewing court must accept the factual findings of a trial court that are 'supported by sufficient credible evidence in the record.'").

It is disingenuous for Christodoro to present the issue of his alleged entitlement to dissociation as ministerial, or a foregone conclusion. Christodoro states that "[e]ven though the Trial Court entered judgment in favor of Mr. Christodoro on his count for dissolution . . ., it did not find in his favor on his dissociation claim." Pa94. It seems that Christodoro is arguing that a judgment in his favor regarding his dissolution claim requires the same conclusion on his

dissociation claim – essentially, that because he was awarded one, he should also be awarded the other. Christodoro cites to no factual, legal, or equitable basis for this argument, and, in fact, there is none—dissolution and dissociation are two different remedies. Because the trial court failed to determine that Defendant engaged in any conduct warranting dissociation, Plaintiff was not entitled to that remedy and the trial court's dismissal of that claim should be preserved. Christodoro has advanced no argument whatsoever to demonstrate that the trial court's finding that he was not entitled to dissociation is unsupported by sufficient credible evidence in the record.

In fact, Christodoro advances no argument as to why he is entitled to dissociation at all, outside of it being a matter of "housekeeping." Christodoro appears to be relying heavily on the fact that the trial court provided him with the first buyout option—however, this is immaterial. It is incorrect for Christodoro to state that the trial court "accorded Mr. Christodoro that which was tantamount to the right of first refusal of dissociating Mr. Zisa from Attessa" (Pa95) in providing Christodoro with the first buyout option. If the trial court felt there was sufficient evidence demonstrating that Zisa was engaging in "conduct relating to the company's activities which makes it not reasonably practicable to carry on the activities with the person as a member," it stands to reason that the trial court would not have allowed for the possibility of Zisa becoming the full owner of Attessa. The very fact that the trial court found that either Christodoro or Zisa could

be the ultimate owner of Attessa, albeit giving Christodoro the first option, demonstrates the trial court did not find any of the necessary bases to dissociate Zisa from the company. Christodoro is not entitled to dissociation, and the trial court did not err in refusing same.

D. The Trial Judge Appropriately Exercised Its Discretion In Denying Additional Attorneys' Fees, Costs, Interest, And Third-Party Professionals' Costs Retained For Attessa's Benefit

Christodoro's attempt to treat Zisa as a piggy-bank must not be countenanced by this Court, just as it was rejected by the trial court.

1. Christodoro Fails to Demonstrate How the Trial Court Abused Its Discretion in Its Attorney's Fees Award

As acknowledged by Christodoro, the Appellate Division "will only disturb an award of attorneys' fees upon a clear abuse of discretion" subject only to an examination as to whether "the judge misconceive[d] the applicable law, or misapplie[d] it to the factual complex." Tarta Luna Props., Ltd. Liab. Co. v. Harvest Rests. Grp. Ltd. Liab. Co., 466 N.J. Super. 13 7, 154 (App. Div. 2021) (citations omitted). Christodoro points to no misconception or misapplication of law here and, therefore, there is no abuse of discretion warranting reversal of the fee award.

2. Christodoro Fails to Demonstrate How the Trial Court Abused its Discretion in Denying Impermissible Costs

With regard to the denial of costs, the award of costs is discretionary and must be supported by sufficient proof of costs. R. 4:42-8(c) ("A party entitled to taxed costs shall file with the clerk of the court an affidavit stating that the disbursements taxable by law and therein set forth have been necessarily incurred and are reasonable in amount, and if incurred for the attendance of witnesses, shall state the number of days of actual attendance and the distance traveled, if mileage is charged."). The bulk of Plaintiff's costs stem from deposition expenses ($22,637.91 out of a total of $24,509.91 (Da1122)), which are generally not allowable as part of taxed costs absent extraordinary circumstances. See Greenfeld v. Caesar's Atl. City Hotel/Casino, 334 N.J. Super. 149, 156, 756 A.2d 1096, 1100 (Law. Div. 2000) ("There is a general recognition that the expense of depositions should not normally be included in taxed costs."); In re Est. of Stockdale, No. A-4037-10T4, 2013 WL 322508, at *8 (N.J. Super. Ct. App. Div. Jan. 29, 2013) quoting Pressler & Verniero, *Current N.J. Court Rules,* comment 3.1 on R. 4:42–8 (2013) ("where fraud or other reprehensible conduct on the part of the losing party is involved or there are other extraordinary circumstances in the cause of action or conduct of the litigation, deposition costs may be properly allowable by court order.") None of those extraordinary circumstances was present or demonstrated here, and Christodoro does

not make any claims otherwise in support of his request for costs. Thus, Christodoro has failed to explain how the trial court abused its discretion in denying costs and his appeal on that issue should be denied.

3. Christodoro Is Not Entitled to Pre-Judgment Interest

Christodoro fails to cite or even reference a single basis as to why he should be entitled to pre-judgment interest on the return to him of his "trapped capital," nor does he point to a single reason as to why or how the trial court abused its discretion in refusing to award same. See Nelson v. Elizabeth Bd. of Educ., 466 N.J. Super. 325, 344, 246 A.3d 802, 813 (App. Div. 2021) ("[T]he award of prejudgment interest and the rate at which prejudgment interest is calculated is within the sound discretion of the trial court.").

In fact, it is not clear that Christodoro is even asking for pre-judgment interest—halfway through his brief argument, he suddenly suggests that awarding interest on his 'trapped capital' should be viewed as a damages award, not prejudgment interest. It is therefore entirely unclear as to what Christodoro's argument here is, outside of Christodoro attempting to, yet again, extract more financial gain to Zisa's detriment. The purpose of pre-judgment interest is meant to be equitable—not only is equity not on Christodoro's side, Christodoro advances no argument in support of same. See George H. Swatek, Inc. v. N. Star Graphics, Inc., 246 N.J. Super. 281, 288 (App. Div. 1991).

This Court should thus not disturb the trial court's refusal to award pre-judgment interest, as Christodoro has failed to demonstrate that the trial court abused its discretion in its decision.

4. Christodoro Is Not Entitled to Have Zisa Pay for the Third-Party Professionals

Finally, it is wholly illogical for Christodoro to argue that Zisa should be solely responsible to pay the third-party professionals who were appointed to oversee and manage Attessa as a result of this litigation. As a threshold issue, the deferential standard regarding the trial court's fact finding applies—Christodoro advanced a purely factual argument before the trial court on this issue, without raising a single point of law (Da1123). Therefore, this Court can only disturb this decision if is not supported by credible evidence in the record. See Mohammed, 226 N.J. at 88 (quoting State v. Gamble, 218 N.J. 412, 424 (2014)) ("A reviewing court must accept the factual findings of a trial court that are 'supported by sufficient credible evidence in the record.'"). Christodoro has failed to demonstrate or put forth a single argument how the trial court's decision that both parties should be responsible for Attessa's third-party fees is unsupported by the evidence on the record. For this reason alone, Christodoro's appeal on this issue must be denied.

Furthermore, Christodoro is the party who brought this action—he is the reason that any third-party professionals were appointed at all. To the extent the third-party professionals added value to the entity prior to the Final Order, it stands

to reason that their costs should be equally split by the members. Christodoro and Zisa, who were both Attessa members at the time those costs were incurred, but were denied the ability to perform actions on behalf of the entity, were deemed by the trial court to be equally responsible for those fees up until the time Christodoro exercised the option the trial court granted him to purchase Zisa's interest in Attessa, at which time Christodoro became solely responsible. Christodoro has not set forth any basis why the trial court's denial of his request to hold Zisa solely responsible for the professionals' costs should be disturbed and his request to do so should be denied.

E. The Trial Court Appropriately Exercised its Discretion in Refusing to Strike the Reconsideration Certification

Christodoro's argument that this Court should reverse the trial court's denial of his request to strike Zisa's reconsideration certification is without basis. As stated supra, a court abuses its discretion when its decision is made "without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021) (quoting State v. R.Y., 242 N.J. 48, 65 (2020)). Christodoro acknowledges that this abuse of discretion standard applies, and then fails to point out how the trial court's decision to not strike the reconsideration certification "inexplicably departed from established policies or rested on an impermissible basis." Id.

Christodoro points to no case or authority for the proposition that Zisa's certification should have been struck, and, therefore, cannot demonstrate how or why the trial court's refusal to do so was irrational, in contravention of established policies, or premised on an impermissible basis. The crux of Christodoro's argument appears to be that the trial court should have struck Zisa's certification because Christodoro asked it to. Such an argument is not a sufficient reason for this Court to vacate a decision, particularly a decision that is governed by the abuse of discretion standard. For these reasons, this appeal should be denied.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests this Court reverse the trial court's July 28 Order, Final Order, HELOC Order, and December 20 Order, deny Plaintiff's cross-appeal, and remand the matter for a new trial.

COLE SCHOTZ P.C.
Attorneys for Defendant-Appellant, Frank Zisa

By: */s/ Wendy F. Klein*
Wendy F. Klein

DATED: November 1, 2024

Cohn Lifland
Pearlman Herrmann & Knopf LLP

Park 80 West-Plaza One
Suite 401
250 Pehle Avenue
Saddle Brook, NJ 07663

(201) 845-9600 Main
(201) 845-9423 Fax

Attorneys at Law

njlawfirm.com

Joshua P. Cohn, Esq.
jpc@njlawfirm.com

November 19, 2024

VIA E-COURTS
Superior Court of New Jersey
Appellate Division
P.O. Box 006
Richard J. Hughes Justice Complex
Trenton, NJ 08625-0006

Re: Jonathan Christodoro v. Frank Zisa, et al.

Superior Court – Appellate Division
Civil Action, On Appeal from a Final Judgment of the Chancery Division - General Equity

Sat Below: Hon. Edward A. Jerejian, P.J.Ch.
Chancery Docket No. : C-229-19

Our File No.: 40,163-3
Appellate Docket No.: A-000410-23T4

Honorable Judges of the Appellate Division:

We represent the Plaintiff/Respondent/Cross-Appellant Jonathan Christodoro in the above-referenced appeal and, pursuant to Rule 2:6-2(b), we submit this letter brief in lieu of a formal brief in reply to that portion of Defendant/Appellant Frank Zisa's brief which was submitted in opposition to the cross-appeal.

TABLE OF CONTENTS

Cohn Lifland
Pearlman Herrmann & Knopf LLP

Docket No. A-000410-23

Cohn Lifland
Pearlman Herrmann & Knopf LLP

Docket No. A-000410-23

TABLE OF JUDGMENTS, ORDERS AND RULINGS

PAGE

Cohn Lifland
Pearlman Herrmann & Knopf LLP
njlawfirm.com

Docket No. A-000410-23

PRELIMINARY STATEMENT

Frank Zisa wants to have it both ways: in his appeal he contends that the Trial Court did not make a record worthy of its findings and then, in his opposition to Mr. Christodoro's cross-appeal, Mr. Zisa argues that the Trial Court made numerous factual findings--supported by the trial record--which are entitled to deferential review by this Court. To be clear, Mr. Christodoro concurs that there is an ample record.

Rather, the essence of the cross-appeal is merely that the Trial Court, in an unwarranted exercise of judicial altruism, went too far out of its way to salvage a vestigial interest in Attessa Properties, LLC for Mr. Zisa--despite the fact that he was not entitled to it. Nonetheless, but for the fact that Mr. Zisa refused to accept his good fortune, Mr. Christodoro was prepared to accept the judgment of the Trial Court and move on.

REPLY STATEMENT OF FACTUAL PROCEDURAL HISTORY

Mr. Christodoro relies upon the factual and procedural history set forth in his opening brief (Pb at 2-20) and incorporates them by reference herein.

Cohn Lifland
Pearlman Herrmann & Knopf LLP
njlawfirm.com

Docket No. A-000410-23

LEGAL ARGUMENT

POINT I

THE TRIAL COURT SHOULD HAVE ENFORCED THE DILUTION PROVISION OF THE PARTIES' AGREEMENT

(Raised Below at Da247)

The only case cited by Mr. Zisa to support his contention that a *de novo* review standard should not apply is State v. Mohammed, 226 N.J. 71 (2016), a criminal case that, by definition, does not speak to what standard of review should be applied to matters of contractual construction. Our Supreme Court has repeatedly made clear that: "In determining the meaning or validity of a contract, our review is *de novo*." GMAC Mortg., LLC v. Willoughby, 230 N.J. 172, 183 (2017) (citation omitted); see also Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 190 (App. Div. 2008) ("Interpretation and construction of a contract is a matter of law for the court subject to *de novo* review.") (citation omitted).

Regardless of which standard applies, however, the Trial Court's bestowal of any interest in Attessa to Mr. Zisa, while perhaps well-intentioned, was contrary to the dilution provisions of the Attessa Operating Agreement. As set forth in greater detail in Mr. Christodoro's cross-appeal, in choosing to read the dilution provisions out of

Articles V and VI of the Operating Agreement, the Trial Court did not properly consider:

- The unambiguous terms of Articles V and VI;
- Other portions of the Operating Agreement, such as Article VII, which recognize that ownership interest is dynamic;
- The decisions of other courts that have expressly recognized the validity of dilution provisions virtually identical to those in the Attessa Operating Agreement. See, e.g., Addy v. Myers, 616 N.W.2d 359, 362–63 (N.D. 2000);
- Mr. Zisa's pre-litigation understanding of the Operating Agreement, as evidenced by documents such as Da1903;
- Mr. Zisa's understanding early in the case that ownership interests were dynamic as reflected in Count V of his Counterclaim; his deposition testimony (Pa383-384) (17T72:9-18); as well as his expert's sworn certification (Da2464, ¶ 19);
- Mr. Zisa's direct testimony at trial (26T72:16-73:3); and
- The Court's own independent forensic accountant's understanding of the dilution provisions. (Da1909, n.3).

It is a basic principle of contract construction that where, in a case such as this, if "the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written." Karl's Sales & Serv., Inc. v. Gimbel Bros., 249 N.J. Super. 487 493 (App. Div. 1991). More

importantly, it is a bedrock principle of contractual law that our courts "cannot make for the parties a better contract than the parties made for themselves." See, e.g., Model Jury Instruction 4.10(H).[1]

In his attempt to bolster the Trial Court's improvident nullification of the dilution provisions of Attessa Operating Agreement, Mr. Zisa insists that because he and Mr. Christodoro started out as equal partners (a fact expressly recognized in Article V of the Operating Agreement), this initial ownership equilibrium somehow renders nugatory the rest of the Agreement in which these initial ownership interests are expressly subject to fluctuation. And, contends Mr. Zisa, even if the respective capital contributions do affect proportional ownership interest under the terms of the Agreement, he was nonetheless exempt from these provisions--despite the absence of any contractual provision saying so--simply because of his efforts as the Managing Member of Attessa.

[1] As such, Mr. Zisa's contention that it is "irrelevant as to whether the parties understood that Articles V and VI established 'dynamic' ownership" is spurious. (DOppB. at 38). Hereinafter "DOppB" shall be used to refer to the brief filed by Mr. Zisa's in reply to his appeal and in opposition to Mr. Christodoro's cross-appeal.

Mr. Zisa's additional attacks on the dilution provisions are even less compelling. He asserts that just because it may have been a relatively standard (i.e., "off the shelf") agreement, somehow this ubiquity translates into unenforceability.[2]

Mr. Zisa's fallback argument that dilution would only be triggered when one member makes a "formal written capital call"--even though the specifics of "formality" are nowhere referenced in the Operating Agreement--is directly contradicted by Mr. Zisa's repeated position throughout the litigation of this matter that all capital contributions of the parties are material for purposes of the determination of their respective capital accounts. (Pa383; Pa385-386; Pa387; DCa346; 17T46:24-47).

Moreover, notwithstanding Mr. Zisa's professed "ignorance" as to the concept of dilution, it is clear that, until it no longer suited him, Mr. Zisa repeatedly evidenced his understanding that the Operating Agreement established dynamic ownership. See Model Jury Instruction 4.10(H) ("The conduct of the parties, however, after they

[2] And, finally, Mr. Zisa highlights the Trial Court's distaste for the fact that the proper application of the dilution provision would, in effect, wipe out Mr. Zisa's interests--which is, of course, the essence of this cross-appeal, and, as noted below, exactly the type of judicial intervention of which our Supreme Court has disapproved for many years.

entered into the contract and before they discovered that they disagreed with one another, can be significant evidence of their agreed intent.").[3]

While it may be true that the Trial Court eschewed contractual enforcement of the dilution provisions of the Operating Agreement out of some well-intentioned attempt to "protect" Mr. Zisa from his own agreement, our Supreme Court has long held that placing a "well-intentioned" remedy above the parties' actual agreement is reversible error. Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp., 100 N.J. 166, 182 (1985).

And, perhaps, most tellingly, nowhere in Mr. Zisa's opposition to the concept of dilution does he ever address the decision of the Court in Addy v. Myers, 616 N.W. 2d 359, 363 (N.D. 2000), in which a sister state's highest court analyzed a virtually identical dilution provision and expressly recognized that any member who did not contribute their share of additional capital would "incur a proportionate decrease in ownership in the company[.]"

[3] Indeed, the fact that Mr. Zisa contends that he has the right to "make up" for any missed capital calls, (DOppB. at 37) is, of course, a tacit--if not express--recognition of the existence of dilution.

POINT II

MR. ZISA FAILED TO MEET HIS BURDEN THAT HE PURPORTEDLY CONTRIBUTED MORE TO ATTESSA THAN HE TOOK FROM IT

(Raised Below at Pa317-324; Da247).

The Trial Court's decision not to hold Mr. Zisa accountable for both the "direct and indirect" expenditures of Attessa was based upon the incorrect legal determination that the burden was on Mr. Christodoro to prove which of the disputed transactions were legitimate business expenses and which constituted defalcation. As a matter of law, however, the burden rests squarely on a fiduciary to explain the fate of all funds placed under his control. (See Pb at 54-55). Thus, the Trial Court's misapplication of the burden of proof is an error of law subject to *de novo* review. Grassano, Lempel & Co., LLC v. Homsany, 2006 N.J. Super. Unpub. LEXIS 2069, *13 (". . . our determination about whether the trial judge incorrectly shifted the burden of proof and persuasion to the defendants is a question of law that we address de novo."). (PRa1-7).

Mr. Zisa's argument that "Mr. Christodoro failed to submit adequate evidence that Mr. Zisa withdrew $533,254 from Attessa for personal or improper purposes"

[DOppB. at 39] is, therefore, entirely at odds with the fact that it was he, in the first instance, who had the burden of justifying Attessa's expenditures.[4]

Mr. Zisa's only remaining argument is that it would be improper for him to be required to pay back the $117,818 he took in the pre-formation period and the $415,436 in the post-formation period because he claims--without providing a shred of quantitative proof--that he "contributed far more to Attessa in expenditures that he was not compensated for."[5] On the other hand, Mr. Christodoro's forensic expert, Thomas Reck, C.P.A., carefully calculated that Mr. Zisa's unaccounted-for distributions to himself exceeded his contributions during these period by a total of $533,254. However, under the rubric of the Trial Court's decision, Mr. Zisa was never held to account for these funds and his buyout payment should have been reduced accordingly.

---

[4] Even if Mr. Christodoro was required to make a *prima facie* showing of wrongdoing, he certainly did so at trial. (See Pb. at 45-51).

[5] Needless to say, not only is Mr. Zisa's appellate filing bereft of quantitative proof of any such so-called "contribution"--but the trial record is equally barren in this regard.

POINT III

MR. CHRISTODORO WAS ENTITLED TO JUDGMENT ON HIS DISSOCIATION CLAIM

(Raised Below at Da247)

Mr. Zisa claims that whether Mr. Christodoro was entitled to the remedy of dissociation is a question of fact and is therefore ought to be examined under a deferential standard by this Court. But dissociation is a legal remedy available to members of New Jersey LLCs pursuant to N.J.S.A. 42:2C-46, and questions of statutory interpretation are reviewed *de novo*. Libertarians for Transparent Gov't v. Cumberland Cty, 250 N.J. 46, 55 (2022).

However, even assuming *arguendo* that Mr. Zisa is correct that a deferential standard of review applies, a review of the Trial Court's July 28, 2022 Order (Da245) shows that it ordered that which was tantamount to a conditional dissociation: specifically, Mr. Christodoro was give the first right to dissociate Mr. Zisa by buying him out. By the same token, in ruling in Mr. Christodoro's favor under Count III (dissolution), that remedy, too, was ordered on a conditional basis in that it was only to be implemented as a last resort if neither party bought out (i.e., dissociated) the other. Accordingly, as a matter of housekeeping consistency with

regard to the Trial Court's ruling in Mr. Christodoro's favor as to Count III (dissolution), Mr. Christodoro was entitled to a similar conditional judgment under the dissociation count (Count XIV) of the Complaint.

POINT IV

THE TRIAL COURT ERRED IN THE MANNER BY WHICH IT REVIEWED MR. CHRISTODORO'S FEE REQUEST

(Raised Below at Da1109).

A. The Reduction of Mr. Christodoro's Fee Petition to an Award of $50,000 was Incorrect

Contrary to Mr. Zisa's opposition, Mr. Christodoro does not argue on his cross-appeal that the Trial Court misapplied the law: rather Mr. Christodoro merely points out that the Trial Court's decision to bestow upon Mr. Christodoro a fee award less than five percent of the amount he sought does not make sense when considering his relative success on the merits (i.e., he was successful on ten of his nineteen claims). Moreover, Mr. Christodoro provided a carefully segmented fee certification with breakdowns as to each phase of this litigation. Thus, while Mr. Christodoro appreciates the Trial Court's determination that he was a prevailing party entitled to a fee award, in this cross-appeal Mr. Christodoro merely points out that the Trial Court never availed itself of the opportunity to look at each of the "trees" (i.e., the various components of the fee

petition) rather than just looking at the "forest" (i.e., the totality of the fee award) to the extent that a "tailored" fee award was in order.

B. Mr. Christodoro Should Receive the Costs of Suit

Mr. Zisa advances the theory that it is impermissible for a litigant to seek deposition costs. However, "N.J.S.A. 22A:2-8 must contemplate that in certain cases justice will require that the losing party bear the expense of depositions taken during the course of the proceedings." Finch, Pruyn & Co. v. Martinelli, 108 N.J. Super. 156, 159-60 (Sup. Ct. 1969). For instance, where there exists "fraud or other reprehensible conduct on the part of the losing party," deposition costs can be shifted. Pressler & Verniero, Current N.J. Court Rules, comment 3.1 on R. 4:42-8 (2025).

Here, during the course of Mr. Zisa's deposition several stunning facts were painstakingly unearthed--including the facts that Mr. Zisa had altered checks, that he had misled a prior employer, and that he had likely forged Mr. Christodoro's signature on certain conveyance documents. Moreover, Mr. Zisa's efforts to obfuscate these facts dragged out the deposition process to the extent that it took six days in all. This alone augers in favor holding Mr. Zisa accountable for the costs of his deposition. See Schaefer v. Allstate N.J. Ins. Co., 376 N.J. Super. 475, 487 (App. Div. 2005) (noting

that trial court should have explained "special reason" to rebut presumption that prevailing party is entitled to an award of costs).

Furthermore, many courts have held that depositions can be taxable costs when "necessarily obtained for use in the case," such as when they are "actually introduced in evidence or used at trial for impeachment purposes[.]" Beck v. Lampf, Lipkind, Prupis & Petigrow, P.C., 273 N.J. Super. 462, 466 (Law Div. 1993). Here, Mr. Zisa's deposition provided a trove of material on which he was impeached at trial multiple times and, on top of that, several deposition excerpts were read into evidence. (Pa375-413).

C. Mr. Christodoro is Entitled to Pre-Judgment Interest

There is nothing unclear or confusing about Mr. Christodoro's argument regarding prejudgment interest. Mr. Christodoro was awarded an off-the-top reimbursement of his "trapped capital" in the amount of $1,198,220 and he is entitled to interest on his money. Mr. Zisa's reliance on Marra v. Berlant, 2017 N.J. Super. Unpub. LEXIS 2778 (N.J. Super. Ct. App. Div. Nov. 6, 2017) (Pa676-652) is fatal to his opposition to the award of prejudgment interest in these circumstances. Marra specifically notes that an award of prejudgment interest on trapped capital is appropriate because it could be categorized as an underlying damage award. Id. at *15-

17. Mr. Zisa's only remaining objection, that "equity [is] not on Mr. Christodoro's side," completely ignores the trial record, which is replete with instances of Mr. Zisa's wrongdoing.

D. Mr. Zisa Should be Responsible for the Costs Paid to Third Party Professionals

Mr. Zisa argues he should not be responsible for the monies Attessa expended on third-party professionals during this litigation because Mr. Christodoro "is the reason that any third-party professionals were appointed at all." (Pb. at 46). Of course, this argument ignores the fact that the only reason Mr. Christodoro had to file this litigation was because Mr. Zisa was defalcating funds and running Attessa into the ground. To be sure, these professionals were appointed to undo and/or identify Mr. Zisa's wrongdoing as well as to preserve Attessa's value during the pendency of the litigation.

Specifically, Mr. Chait was appointed as a forensic accountant to examine Attessa's books and records. (Pa15-16). Likewise, Mr. Strasser was first appointed as independent counsel for Attessa because Mr. Zisa had insisted on having the same attorneys represent him and the company that he was in the midst of looting. (Pa55-58). Mr. Strasser was later appointed Special Fiscal Agent because Mr. Zisa had repeatedly attempted to obstruct Mr. Strasser from acting in his then-role as Court-

appointed counsel. (Pa152-153). Finally, a property manager (Gilsenan) was ordered only after Mr. Zisa continued to engage in obstructive behavior which impeded Mr. Chait and Mr. Strasser from doing their jobs. (Da146-151).

POINT V

THE TRIAL COURT ERRED BY DENYING MR. CHRISTODORO'S APPLICATION TO BAR MR. ZISA FROM IMPROPERLY SUPPLEMENTING THE RECORD WITH NEVER-BEFORE-SEEN DOCUMENTS ON RECONSIDERATION

(Raised Below at Da990)

First of all, Mr. Zisa had the audacity to submit a "reconsideration" application that consisted of nearly one thousand pages--and many documents which, inexplicably, had never been produced in discovery or introduced at trial. Even more audacious was Mr. Zisa's refusal, to this day, to identify which of the more-than-eighty exhibits accompanying this so-called reconsideration application were, in fact, new to the case. Despite finding this practice "highly improper," the Trial Court allowed Mr. Zisa to, in effect, supplement the post-trial record with documents that were new to this case and never subjected to the rigors of discovery or cross-examination--so, yes, Mr. Christodoro renews his request to strike these "highly improper" documents from the record.

Cohn Lifland
Pearlman Herrmann & Knopf LLP
njlawfirm.com

Docket No. A-000410-23

CONCLUSION

For the foregoing reasons, if there is to be any modification of the Trial Court's judgment, any such modification ought to be in Mr. Christodoro's favor as set forth in his cross-appeal--including the finding that the entirety of Mr. Zisa's interest in Attessa has been zeroed out.

Respectfully submitted,

COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
Attorneys for the Plaintiff-
Respondent, Jonathan Christodoro

/s/ Joshua P. Cohn
JOSHUA P. COHN

Submitted: November 19, 2024