WARREN DIAMOND, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF 147 BROAD ST., LLC, Plaintiff/Respondent, v. SCOTT DIAMOND, Defendants/Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-000581-24 **On Appeal From:** SUPERIOR COURT OF NEW JERSEY LAW DIVISION DOCKET NO. MON-L-3090-18 Sat Below: Hon. Kathleen A. Sheedy, J.S.C.

BRIEF ON BEHALF OF INTERVENOR/APPELLANT 147 BROAD ST., LLC IN SUPPORT OF ITS APPEAL OF THE TRIAL COURT'S JUNE 30, 2024 JUDGMENT

GREENBAUM, ROWE, SMITH & DAVIS LLP
331 Newman Springs Road
River Centre Building 1, Suite 122
Red Bank, New Jersey 07701
(732) 476-2660
Attorneys for Intervenor/Appellant,
147 Broad St., LLC

Of Counsel and On the Brief:

Darren C. Barreiro, Esq. (047911998) – dbarreiro@greenbaumlaw.com

Joseph A. Natale, Esq. (275622018) – jnatale@greenbaumlaw.com

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PRELIMINARY STATEMENT

Due process of law is one of the most sacred guarantees afforded under both the United States and New Jersey Constitutions. To uphold the Trial Court's Judgment would be to mistake this essential right, for a mere technicality.

Intervenor/Appellant 147 Broad St., LLC ("147 Broad") is the undisputed 100% owner of the property located at 147 Broad Street, Red Bank, New Jersey (the "Property"), which was at the heart of the underlying litigation between Respondent/Plaintiff Warren Diamond ("Warren") and Respondent/Defendant Scott Diamond ("Scott"). Despite this crucial fact, at no point from the time that Warren commenced this case in 2018, through the time that it was tried in 2024, did he ever name 147 Broad as a party. To be clear, 147 Broad was never served with process, never subjected to the Trial Court's jurisdiction, never provided an opportunity to develop a defense in discovery and never afforded participation at trial.

Nor were all of 147 Broad's members impleaded below. Indeed, despite Warren's demonstrably false and self-contradictory contentions to the contrary, he is not, and never was, a member of 147 Broad. Instead, as the Trial Court correctly determined, 147 Broad is owned by: (1) Scott, who has a 99% membership interest; and (2) non-party Melissa Diamond ("Melissa"), who has a 1% membership interest.

Nevertheless, the Trial Court, following a ten-day bench trial, inexplicably entered a Judgment that, as an award of relief to Warren on his claims for conversion

and unjust enrichment against Scott, took the draconian measure of: (1) compelling the sale of non-party 147 Broad's Property; and (2) requiring that the sale proceeds be apportioned among Warren, Scott and non-party Melissa. The Trial Court's forced sale and partition of 147 Broad's Property, without first affording the entity any due process of law, was fatally unfair procedurally.

To make matters worse, it was also legally unsound. The Revised Uniform Limited Liability Company Act ("RULLCA"), N.J.S.A. 42:2C-1 et seq., which governs LLCs like 147 Broad, expressly states that the sole remedy that may be afforded to a judgment creditor of an LLC member is a court order charging that member's transferrable interest, and that the creditor shall have no right to interfere with the management or force the dissolution of the LLC. In complete disregard for this clear mandate of our Legislature, the Trial Court awarded Warren a judgment against Scott, as a member of 147 Broad, that compelled the sale of 147 Broad's principal asset and threatened its dissolution as a real estate holding company.

In addition to circumventing controlling statutes, the Trial Court also overlooked the terms of the parties' agreement, which provided Warren with only a future contingent interest in 147 Broad once Scott moved out of the Property. The Trial Court improperly awarded Warren relief that far exceeded that which was provided for in the parties' agreement and then failed to at all explain why it was departing from the terms of that agreement. Courts do not have carte blanche

authority to rewrite contracts however they see fit. Yet, that is precisely what, in effect, the Trial Court seems to have done here.

What is more, the Trial Court attempted to justify its action based on a finding that Warren and Scott were joint venturers relative to the Property. This ignores that, under New Jersey case law, joint venturers whose venture is coming to an end have only been granted a partition of their own property. Joint venturers are not entitled to a partition of property wholly owned by a separate entity. Furthermore, Warren never requested the forced sale or partition of the Property in his Complaint. In fact, he expressly requested the exact opposite – that any such sale be restrained. Thus, for the Trial Court to have fashioned this claim for relief *sua sponte* after the trial was completed and any opportunity to defend against the claim was extinguished, further underscores the untenable nature of the Judgment.

Put simply, the Judgment is replete with legal error. This Court, therefore, should reverse the Trial Court and vacate those portions of the Judgment that seek to compel the sale of 147 Broad's Property and distribution of its assets.

STATEMENT OF FACTS

A. Warren Assigned His Interest in the Contract of Sale for the Property to 147 Broad and 147 Broad Purchased the Property

In early 2013, Warren engaged in conversations with a real estate broker to inquire about a potential sale of the Property. T1[1] at 53:17-54:4. Ultimately, in or about June 2013, Warren entered into a contract of sale with All the Flowers, Inc., to purchase the Property. Ia69 – Ia78; T1 at 55:12 – 56:3; T4 at 91:7 – 16.

Approximately three months later, in September 2013, 147 Broad was formed as a New Jersey limited liability company. Ia79. The certificate of formation for 147 Broad identifies Scott as the company's sole registered agent. Id.

Shortly thereafter, in or about January 2014, Warren assigned his interest in the contract of sale to 147 Broad. T2 at 68:12 – 25; T2 at 201:10 – 13. As a result of this assignment, 147 Broad – an independent entity in which Warren is not a member – purchased the Property from All the Flowers, Inc. T6 at 136:9 – 14. In

[1] T1 refers to the transcript of proceedings on January 16, 2024.
T2 refers to the transcript of proceedings on January 17, 2024.
T3 refers to the transcript of proceedings on January 18, 2024.
T4 refers to the transcript of proceedings on January 22, 2024.
T5 refers to the transcript of proceedings on January 23, 2024.
T6 refers to the transcript of proceedings on January 24, 2024.
T7 refers to the transcript of proceedings on January 25, 2024.
T8 refers to the transcript of proceedings on January 31, 2024.
T9 refers to the transcript of proceedings on March 18, 2024.
T10 refers to the transcript of proceedings on March 19, 2024.

fact, the very purpose of 147 Broad is to serve as a real estate holding company to hold the asset of the Property. T7 at 129:24 – 25.

B. On the Eve of the Property Purchase, a 147 Broad Operating Agreement was Executed Confirming that Warren is Not a Member of That Entity

On or around November 1, 2013, approximately two months before 147 Broad purchased the Property, an Amended & Restated Operating Agreement of 147 Broad (the "Operating Agreement") was entered into. Ia109—Ia124. The Operating Agreement identifies only two members of 147 Broad: Scott, who owns a 99% interest in 147 Broad, and non-party Melissa, who owns a 1% interest in 147 Broad. Ia124. Warren did not sign 147 Broad's Operating Agreement, as he was not, and is not, a member of 147 Broad. T3 at 93:11 – 94:10.

In the Operating Agreement, the parties stipulated, in relevant part, that "the LLC Law [i.e., the RULLCA] will be controlling." Ia108. In addition, the parties agreed in Paragraph 11(A) of the Operating Agreement that 147 Broad "shall be dissolved upon . . . (iv) the sale of the Property and all or substantially all of the assets of the Company and the collection and distribution of the proceeds of such sale." Ia118.

C. The Parties Prepared Documents in Connection with the Purchase of The Property, Which Confirm that Warren Has No Interest in 147 Broad

On December 18, 2013, mere weeks prior to 147 Broad purchasing the Property, Scott drafted a Memorandum of Understanding, which memorialized the

parties' agreement as to the operations of 147 Broad and the identities of 147 Broad's members (the "Memorandum of Understanding"). Ia84 – Ia85. Although Warren received the Memorandum of Understanding, he did not respond, or otherwise reject its contents. In the Memorandum of Understanding, Scott specifically memorialized the parties' agreement, stating that Warren "will assign the contract [to 147 Broad] and [147 Broad] is 99 percent owned by [Scott] and one percent by Melissa." Ia84.

The fact that Warren was not a member of 147 Broad – as reflected in the Memorandum of Understanding – was not only Scott's understanding of the parties' agreement, but it was also Scott's requirement for entering into the agreement. T6 at 166:24 – 167:15; Ia86 – Ia87; T6 at 178:9 – 179:11. Stated differently, Scott would not have participated in any way in this real estate venture if Warren was going to be a partner of his in any entity acquiring the Property. Id. Indeed, as Scott was going to be a tenant of 147 Broad, Scott insisted upon avoiding circumstances where Warren would have the authority to act on behalf of the owner of the property where Scott lived. T6 at 167:16 – 168:5; T6 at 169:12 – 170:2.

On December 23, 2013 – after Scott confirmed the substance of the parties' agreement in the Memorandum of Understanding – Warren attempted to renegotiate the terms of the agreement, so as to grant himself an interest in 147 Broad. T4 at 77:23 – 80:12. When Warren attempted to renegotiate the terms of the agreement, Scott withdrew from the deal, because he did not want Warren to be a member of an

entity that served as the landlord for the property where Scott intended to live. T4 at 79:10 – 80:12; 80:13 – 82:20.

Another document prepared in connection with 147 Broad's purchase of the Property was the Limited Liability Company Resolution for 147 Broad (the "Resolution"). Ia88 – Ia90; T6 at 162:12 – 163:23. Like the Operating Agreement, the Resolution identifies only two members of 147 Broad: Scott and Melissa. Ia90. Warren did not sign the Resolution, as he was, and is, not a member of 147 Broad. Ia88 – Ia90. Warren neither objected to the Resolution at the time of closing, nor did he write to Scott to state that the Resolution was incorrect. T6 at 164:11 – 20.

D. In the Years Preceding this Lawsuit, Warren Repeatedly Confirmed That He Does Not Own any Membership Interest in 147 Broad

From the time that 147 purchased the Property in 2014 through the filing of this lawsuit in 2018, Warren had, on several different occasions, confirmed that he does not have any membership interest in 147 Broad.

For example, in e-mail exchanges between Scott and Warren, Warren acknowledged that he is not a member of 147 Broad and lacks the authority to act on behalf of 147 Broad. Specifically, on February 19, 2014, Scott wrote an e-mail to Warren, directing Warren to "discontinue representation that [Warren has] any capacity to act on behalf of or bind 147 Broad Street." T6 at 217:3 – 219:2. Two hours later, Warren responded to Scott: "You were not even going to be an owner of

the building until I decided to transfer my interest in the contract to you two days before closing[.]" T6 at 219:3 – 220:15.

A little over one year later, on July 8, 2015, Warren knew that he was not a member of 147 Broad, as Warren asked that Scott "put [him] back on the LLC so [Warren] can get the appropriate K-1." Ia98. Shortly thereafter, on October 31, 2015, Warren's accountants confirmed again that Warren was not a member of 147 Broad. Specifically, Warren's accountants drafted a document entitled "Warren Diamond Statement of Financial Condition October 31, 2015," which included a comprehensive schedule of closely held entities in which Warren held an ownership interest. Ia91 – Ia97.

Warren testified that, if he owned any interest in 147 Broad, his personal financial statements would reflect such interests. T3 at 23:21 – 25. Notwithstanding, the "Warren Diamond Statement of Financial Condition October 31, 2015," did not reflect any ownership interest in 147 Broad. Ia91 – Ia97. Warren's accountant, Steve Stolzenberg, again confirmed that Warren is not a member of 147 Broad, writing that "as it relates to 147 Broad, [Warren] is not an owner of 147 Broad." Ia98.

Then, some two years later, on November 7, 2017, Warren, as a judgment debtor in a separate action, provided sworn deposition testimony regarding the assets that he owned. In response to an information subpoena, Warren was asked to

identify all property with a value equal to or greater than $10,000, in which he has a direct, indirect, or fractional interest. Ia100 – Ia108. Warren responded to that information subpoena, under oath, and omitted any mention of 147 Broad, as property in which he has a direct, indirect, or fractional interest. Ia100 – Ia108; T3 at 55:8 – 15.

During that deposition, Warren was questioned as to why he did not list an ownership interest in 147 Broad as an asset that would be subject to execution. In response, Warren swore, under oath, that he does not own "an LLC interest" in 147 Broad. Instead, Warren admitted that his "interest" in 147 Broad is limited to "50 percent of the sales price and that [he is] owed monies on a mortgage." T10 at 234:2 – 235:16. Later in his sworn deposition, Warren again testified that he does not possess an ownership interest in 147 Broad, stating his belief that he had "an interest in the building" by virtue of having "a mortgage on the property," but was "not the property owner." T10 at 237:1 – 238:17. Thus, it was clear that, when Warren commenced this lawsuit the following year in 2018, he was barred from asserting any claims derivatively on behalf of 147 Broad.

E. Even After This Lawsuit Was Filed, Warren Confirmed That He Is Not a Member of 147 Broad

Even after Warren filed this lawsuit, he admitted that he is not a member of 147 Broad. Specifically, on or about February 3, 2020 – during the pendency of this litigation, where Warren claimed that he owns 49% of 147 Broad – Warren filed a

sworn affidavit with the United States District Court for the Southern District of Florida, in an unrelated lawsuit, entitled Warren Diamond et al. v. Scott Diamond, United States District Court, Southern District of Florida, West Palm Beach Division, Case No. 9:16-cv-81923-DLB (the "Florida Affidavit"). Ia125 – Ia144; T6 at 175:15 – 176:14.

In the Florida Affidavit, Warren certified that "[t]he property, 147 Broad Street, in which Scott Diamond owns a 99% interest in, has an approximate value of $2,500,000.00 with a mortgage on the property of $1,000,000.00." Ia127 at ¶ 11 (emphasis added). After being presented with the Florida Affidavit at trial, Warren testified that he owns the remaining 1% of 147 Broad, and that Melissa does not own any interest in 147 Broad. T4 at 15:3 –16:16. This is contradicted not only by the Operating Agreement for 147 Broad, but also by the allegations in Warren's Complaint, where, in 2018, Warren alleged that Melissa owns the remaining 1% of 147 Broad. Ia30 at ¶ 6.

F. Warren Attempted to Enforce an Alleged Agreement Pursuant to Which Scott Purportedly Transferred his Interest in 147 Broad to Warren

Prior to the instant lawsuit, Warren sought to enforce an alleged agreement between Warren, Scott, 147 Broad, and other entities (the "Alleged Agreement"), whereby Scott purportedly consented to transfer interest in 147 Broad to Warren.

T3 at 148:20 –161:13. For reasons that Warren did not explain at trial, the Alleged Agreement was declared to be "invalid."[2] T3 at 151:13 – 17.

Importantly, Warren neither attempted to introduce the Alleged Agreement at trial, nor did he offer testimony concerning the purported concessions that are set forth in the Alleged Agreement. See generally T1, T2 and T3. In this regard, Warren sought to avoid revealing to the trial court his prior attempts to unlawfully seize Scott's interests in 147 Broad.

G. Warren and Scott Negotiated and Executed the June 3, 2014 Agreement Merely Providing Warren with a Future Contingent Interest in the Property

At the time that 147 Broad purchased the Property in 2014, Scott did not have a significant amount of money that he was able to loan to 147 Broad. T6 at 40:18 – 41:8; T6 at 105:4 – 106:11. As a result of Scott's initial lack of funds, the parties agreed – and memorialized in the Memorandum of Understanding – that Warren would advance funds to cover 147 Broad's obligations to its lender, Amboy Bank, if the income that 147 Broad received from rent was insufficient to support both company operations and its debt obligation to its lender. Ia84 – Ia85. In other words, if all of 147 Broad's ordinary income was used to support the company's day-to-day

[2] The Alleged Agreement was deemed invalid because it was a forgery. The facts surrounding Warren's forgery and the false notarization that Warren obtained from his long time attorney, Ellen Dorfman, are reflected in the published decision in the matter of Matter of Tobak, 199 A.D.3d 99 (1st Dep't 2012), of which the Court should take judicial notice.

operations, Warren would loan money to 147 Broad, to satisfy the mortgage payments owed to Amboy Bank and avoid foreclosure. T6 at 28:9 – 29:16; T6 at 139:8 – 17.

On June 3, 2014, approximately five months after 147 Broad purchased the Property, Scott and Warren entered into an agreement, which was intended to resolve numerous disputes between them, including issues relating to 147 Broad (the "June 3 Agreement"). Ia80 – Ia83. In the June 3 Agreement, Scott and Warren agreed that, in light of various loans that Scott had provided to Warren in connection with other unrelated ventures, any loan that Warren made to 147 Broad would be credited half to Warren's loan account, and half to Scott's loan account. Ia80 – Ia83; T6 at 45:6 – 46:12. Stated differently, Warren agreed to transfer a portion of his loan receivables from 147 Broad to Scott, as compensation to Scott in connection with an unrelated transaction. Id.

At no point did Warren argue that: (1) he was coerced to enter into the June 3 Agreement; (2) that the transfer of Warren's loan receivables to Scott were unearned; or (3) that Scott was not entitled to receive a portion of Warren's loan account. See generally T1 through T10. Rather, Warren and Scott came to an agreement, with both Warren and Scott being fully informed of the circumstances surrounding their negotiation and execution of that agreement. Ia80 – Ia83; T6 at 45:6 – 46:12.

As set forth in the June 3 Agreement, in exchange for providing loans to 147 Broad, Warren was to receive: (1) the repayment of half the principal amount that Warren loaned 147 Broad; (2) a future contingent interest in 147 Broad, which will not vest until Scott moves out of the Property; and (3) 49% of all distributions made by 147 Broad. Ia80 – Ia83; T6 at 173:23 – 175:6; T10 at 120:14 – 123:4. Specifically, the June 3 Agreement confirmed that, "in consideration" for Warren loaning money to 147 Broad, "the parties agrees [sic] that when Scott no longer lives at 147 Broad St., Red Bank, NJ, Scott will transfer to Warren 49% of the membership interest in 147 Broad Street, LLC." Ia82.

Thus, the June 3 Agreement makes clear that Warren's loans to 147 Broad were made in consideration for a future contingent interest in the Property, but did not vest in him any present membership interest in 147 Broad or ownership interest in 147 Broad's Property. Ia80 – Ia83.

PROCEDURAL HISTORY

A. Warren Commenced This Lawsuit Against Scott Only

On August 24, 2018, Warren commenced this lawsuit against Scott. Ia29 – Ia39. Even though the facts demonstrate that Warren was never of a member of 147 Broad, the plaintiff in Warren's Complaint was identified as "WARREN DIAMOND, individually and derivatively on behalf of 147 Broad St., LLC." Ia29. The sole named defendant in Warren's Complaint is "SCOTT DIAMOND." Id.

Over the course of six years, Warren never named 147 Broad as a defendant to this litigation, and he never sought to amend his Complaint to name additional parties. As such, 147 Broad's sole "participation" in this lawsuit was based upon Warren's purported ability to assert claims derivatively, as a member of 147 Broad, on 147 Broad's behalf. Ia29 – Ia39. Indeed, because 147 Broad was never named as a defendant in this lawsuit, it was not served with a summons, did not file any pleadings, and was not represented by counsel, as would be required by R. 1:21-1(c).

Counts One through Five of Warren's Complaint were based upon claims arising under the RULLCA. See Ia33—Ia37. Among other relief requested under those Counts, Warren sought the entry of an order "restraining Scott Diamond from encumbering or selling the Property." See, e.g., Ia34.

In Count Six of his Complaint, Warren asserted a claim for conversion against Scott, alleging that "Scott Diamond has converted the funds and other assets of [147 Broad] for his own personal benefit." Ia38 at ¶ 61. Warren claimed that, as a result of Scott's alleged conversion of "funds and other assets of [147 Broad]," that "both the LLC and Warren Diamond have suffered damage." Ia38 at ¶ 62.

In Count Seven of his Complaint, Warren asserted a claim against Scott for unjust enrichment, alleging that Scott "has conferred benefits upon himself that are not deserved and has otherwise benefited himself at the expense of the LLC and Warren Diamond." Ia38 at ¶ 64.

In Counts Six and Seven alike, the sole relief that Warren requested of the Court was entry of a judgment: (1) "[a]warding compensatory and consequential damages; (2) "[a]warding Warren Diamond's attorney's fees, interest, and costs of suit"; and (3) "[a]ll other relief that the Court deems equitable and just." Ia37 – Ia38. Warren did not seek any other relief in those counts, including, among other potential relief, any request for a partition or compelled sale of the Property. Id. In fact, Warren sought the exact opposite of this in his Complaint. See Ia34 (seeking entry of an Order "restraining Scott Diamond . . . selling the Property").

B. The Trial Court Entered Judgment Requiring a Non-Party, 147 Broad, to Sell the Property and Distribute its Assets

On June 30, 2024, after ten days of trial, the Trial Court entered the Judgment, accompanied by a 21-page written decision. Ia6 – Ia28. In the written decision, the Trial Court held that "the Court finds that Warren was not a member of [147 Broad] and as such, has no standing to be granted the relief sought under [Counts I through V]." Ia21. Instead, the sole members of 147 Broad are: (1) Scott, who owns a 99% interest in 147 Broad; and (2) nonparty Melissa Diamond, who owns a 1% interest in 147 Broad. As a result, the Trial Court dismissed Counts One through Five of Warren's Complaint, with prejudice. Ia24.

With respect to Counts Six and Seven – alleging conversion and unjust enrichment – the Trial Court reached a different result. Specifically, the Trial Court found that "Scott has been unjustly enriched as he has conferred a benefit upon

himself that are not deserved and has otherwise unjustly benefitted himself at the expense of [147 Broad] and the future interest of Warren." Ia26. The Trial Court also found that Scott engaged in "conversion." Ia27.

Despite finding that Warren could not assert claims on 147 Broad's behalf, and that the harm was purportedly inflicted upon "the LLC and the future interest of Warren," the Trial Court ordered as relief for Counts Six and Seven that non-party 147 Broad sell its Property and distribute its assets. Ia6 at ¶ 3-4. This is despite that this remedy was neither requested by Scott nor Warren.

In fact, Warren has sought the opposite relief in his Complaint – namely, to enjoin and forbid any sale of the Property. Ia34 at ¶ B. Nevertheless, in disregard for the basic Constitutional rights of 147 Broad (and perhaps Melissa, for the matter), the Court required the "sale of the property located at 147 Broad Street, Red Bank, N.J." Ia6 at ¶ 3. The Trial Court further ordered that non-party 147 Broad distribute the proceeds of the sale – as opposed to reinvesting those funds into another real estate venture – such that 147 Broad, a real estate holding company, will be forced to cease operations altogether following the sale of the Property. Ia6 at ¶ 4.

C. Scott Appealed the Trial Court's Judgment

On July 15, 2024, Scott filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division, bearing Docket Number A-003523-23, appealing

the entirety of the Judgment. Ia145. To date, that appeal has been fully briefed, but no decision has yet been rendered.

D. The Trial Court Granted 147 Broad's Motion to Intervene and Stay Proceedings Pending Appeal, and this Appeal Followed

On July 24, 2024, 147 Broad filed in the Trial Court a motion to intervene and stay proceedings pending appeal. See Ia149 – Ia158. In that motion, 147 Broad principally argued that, as the owner of the Property that the Trial Court improperly directed the sale of in its Judgment, 147 Broad should be allowed to intervene in this litigation for the limited purpose of appealing the Judgment. Id. In addition to granting intervention, 147 Broad requested that the Trial Court stay proceedings pending the disposition of 147 Broad's contemplated appeal. Id.

On October 1, 2024, the Trial Court granted 147 Broad's motion, allowed 147 Broad to, without posting any bond, intervene in the case for the purpose of filing an appeal, and stayed the Trial Court proceedings pending the adjudication of said appeal. Ia149 – 150.

Shortly thereafter, 147 Broad initiated the within appeal. Ia1 – Ia5. As set forth in 147 Broad's Notice of Appeal, 147 Broad is appealing: (1) Paragraph 3 of the Judgement, in which the Trial Court ordered the sale of the Property as an award of relief in favor of Warren on Counts Six (Conversion) and Seven (Unjust Enrichment) of the Complaint; and (2) Paragraph 4 of the Judgment, in which the Trial Court ordered that, among the net proceeds from the sale of the Property, 1%

of the proceeds should be distributed to Melissa, 49% of the proceeds be distributed to Warren, and 50% of the proceeds be distributed to Scott. Id.

STANDARD OF REVIEW

Appellate "review of legal issues is de novo." Harvard v. State, Judiciary, Atl.-Cape May Vicinage, 460 N.J. Super. 433, 437 (App. Div. 2018). This includes such legal issues as "constitutional questions," State v. Galicia, 210 N.J. 364, 381 (2012), issues that involve "[s]tatutory interpretation," Saccone v. Bd. of Trs., of Police & Fireman's Ret. Sys., 219 N.J. 369, 380 (2014), and issues that "involve contract interpretation," Waskevich v. Herold Law, P.A., 431 N.J. Super. 293, 297 (App. Div. 2013). Indeed, a "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995).

When, as here, the trial judge acts as the fact finder in a bench trial, appellate courts "must accept the factual findings of" that trial judge, but only when those findings "are 'supported by sufficient credible evidence in the record.'" State v. Mohammed, 226 N.J. 71, 88 (2016) (citation omitted). Appellate courts do not hesitate to disturb the trial judge's factual findings when those findings are "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (citation omitted).

LEGAL ARGUMENT

POINT I

THE JUDGMENT SHOULD BE REVERSED BECAUSE THE TRIAL COURT DENIED NON-PARTY 147 BROAD ITS DUE PROCESS RIGHTS (Raised Below; Ia151—Ia152)

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, like Article 1, Paragraph 1 of the New Jersey Constitution, protects entities from deprivations of life, liberty, or property, without due process of law. See U.S. Const. Amend. 14; N.J. Const. art. 1, ¶ 1. "It is beyond question that any procedure which deprives an individual of a property interest must conform to the dictates of the Due Process Clause." Twp. of Montville v. Block 69, Lot 10, 74 N.J. 1, 8 (1977).

"Due process is a flexible concept that calls for such procedural protections as fairness demands." Mettinger v. Globe Slicing Mach. Co., Inc., 153 N.J. 371, 389 (1998). "Fundamentally, due process requires an opportunity to be heard at a meaningful time and in a meaningful manner." Doe v. Poritz, 142 N.J. 1, 106 (1995).

To this end, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Rosa v. Araujo, 260 N.J. 458, 463 (App. Div. 1992) (citation omitted). "At a minimum, due process

requires that a party [interested] in a judicial hearing receive 'notice defining the issues and an adequate opportunity to prepare and respond.'" H.E.S. v. J.C.S., 175 N.J. 309, 321 (2003) (citation omitted).

At no point from the commencement of this litigation, through the entry of the Judgment, was 147 Broad ever provided the basic due process rights afforded to it by the United States Constitution and New Jersey Constitution. 147 Broad was never served with a summons related to this lawsuit and was not provided any opportunity whatsoever to be heard at trial, much less afforded a "meaningful" opportunity to be heard, as is required for the most basic notions of due process. There can be no question, therefore, that the Trial Court erred when it forced 147 Broad to sell its Property and distribute its assets, without due process of law.

Indeed, on its face, the Judgment compels the immediate sale of 147 Broad's Property to an unaffiliated third party and directs 147 Broad to distribute its assets, such that 147 Broad, a real estate holding company, cannot continue its business operations in any capacity. Ia6 at ¶¶ 3 and 4. Thus, there can be no question that, by entering the Judgement, the Trial Court interfered with 147 Broad's property interests. It is equally clear that 147 Broad was never afforded any constitutionally sufficient procedures before the Trial Court ordered that its Property be sold and its assets distributed. 147 Broad was never provided with independent notice of these proceedings or an opportunity to be heard at trial.

Any contention by Warren that 147 Broad was afforded constitutional due process by him improperly attempting to assert derivative claims on behalf of the entity – an entity in which he never had any membership interest – is wholly without merit. N.J.S.A. 42:2C-69 states that a derivative action "may be maintained only by a person that is a member at the time the action is commenced and remains a member while the action continues." In other words, an individual that is not a member of the limited liability company cannot commence or maintain derivative litigation on behalf of that company.

As set forth in the Judgment, "Warren was not a member of [147 Broad] and as such, has no standing to be granted" relief predicated on his purported membership status. Ia21. Thus, because Warren is not, and was never, a member of 147 Broad, N.J.S.A. 42:2C-69 barred Warren from ever having maintained any derivative claims on behalf of 147 Broad. Given that 147 Broad never participated in this lawsuit in any legally supported fashion, it was denied its procedural due process rights before the Trial Court entered the Judgment.

Warren may also attempt to argue that non-party 147 Broad's Property could be sold because Warren and Scott were parties to an alleged joint venture that concerned the Property. Once again, Warren's argument fails, as it ignores the clear deprivation of 147 Broad's independent Constitutional rights. 147 Broad alone is the undisputed 100% owner of the Property. Moreover, one of the undisputed

members of 147 Broad – Melissa – was never a party to this litigation. Thus, even if the Court were to consider any arguments concerning a "joint venture" between Warren and Scott, that argument still fails based upon Warren's failure to provide both 147 Broad and Melissa with notice and an opportunity to be heard, prior to the entry of the Judgment.

Whether courts may be empowered to order a partition of real estate controlled by a joint venture is inapposite. Rather, whether it relates to this dispute, the question is whether 147 Broad – an independent entity that was not a party to this litigation – was afforded its due process rights before being deprived of its Property. As 147 Broad, and fewer than all of its members, were excluded from participation in this litigation prior to the entry of the Judgment, there can be no question that 147 Broad was denied its due process rights.

Accordingly, this Court should find that the Trial Court committed a reversible error when it deprived 147 Broad of its Constitutional rights, and vacate Paragraphs 3 and 4 of the Judgment.

POINT II

THE TRIAL COURT ERRED BY COMPELLING THE SALE OF 147 BROAD'S PROPERTY BECAUSE, UNDER N.J.S.A. 42:2C-43 OF THE REVISED UNIFORM LIMITED LIABILITY COMPANY ACT, WARREN HAS NO RIGHT TO ENFORCE HIS JUDGMENT AGAINST SCOTT, AS A MEMBER OF 147 BROAD, BY COMPELLING THE SALE OF 147 BROAD'S ASSETS OR INTERFERING WITH ITS BUSINESS OPERATIONS (Not Raised Below)[3]

As a New Jersey limited liability company, 147 Broad is governed by the RULLCA. In fact, the Operating Agreement, which governs the operations of 147 Broad, expressly provides that "the LLC Law [i.e., the RULLCA] will be controlling." Ia109. As the RULLCA makes clear, any general "principles of law and equity supplement [the RULLCA]," unless "displaced by particular provisions of [the RULLCA]." N.J.S.A. 42:2C-7.

Here, the Judgment granted Warren a judgment against Scott on Counts Six and Seven of Warren's Complaint. By virtue of this, Warren became a judgment creditor of a member of 147 Broad – namely, Scott. The rights of a judgment

[3] It is procedurally proper for the Court to consider this issue because 147 Broad had no opportunity to raise the issue prior to the entry of the Judgment, given that 147 Broad was not a party to the litigation at that time and intervened afterward. See, e.g., State v. Witt, 223 N.J. 409, 419 (2015) (citation omitted) (holding that appellate courts will generally only "decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available"). Further, the issue raises a question of law, which appellate courts always review de novo. See Smith v. Millville Rescue Squad, 225 N.J. 373, 387 (2016).

creditor of a member of a limited liability company, such as Warren in this instance, are expressly set forth in N.J.S.A. 42:2C-43.

Pursuant to N.J.S.A. 42:2C-43, "[o]n application by a judgment creditor of a member, a court may charge the transferable interest of the [LLC] member with payment of the unsatisfied amount of the judgment with interest." N.J.S.A. 42:2C-43. N.J.S.A. 42:2C-43 makes clear, however, that "[a] court order charging the transferable interest of a member pursuant to this section shall be the sole remedy of a judgment creditor, who shall have no right under [the RULLCA] or any other State law to interfere with the management or force dissolution of a limited liability company or to seek an order of the court requiring a foreclosure sale of the transferable interest." Id. (emphasis added).

Despite this clear mandate that a charging order under N.J.S.A. 42:2C-43 "shall be the sole remedy of a judgment creditor" of a member of an LLC, and that the judgment creditor "shall have no right" to "force dissolution of a limited liability company," the Trial Court circumvented this provision when it compelled the sale of the Property as remedy for Warren on the judgment he obtained against Scott on Counts Six and Seven of the Complaint. In fact, beyond granting a remedy that N.J.S.A. 42:2C-43 prohibits, the Trial Court did exactly what N.J.S.A. 42:2C-43 expressly provides that a judgment creditor of a member "shall have no right to do": threaten the forced dissolution of 147 Broad.

N.J.S.A. 42:2C-48 provides that "[a] limited liability company is dissolved" upon the occurrence of, among other things, "an event or circumstance that the operating agreement states causes dissolution[.]" N.J.S.A. 42:2C-48(a)(1). Paragraph 11(A) of the Operating Agreement states that 147 Broad "shall be dissolved upon . . . (iv) the sale of the Property and all or substantially all of the assets of the Company and the collection and distribution of the proceeds of such sale." In the Judgment, the Trial Court improperly authorized Warren, as a judgment creditor of Scott, to force the dissolution of 147 Broad by compelling the sale of 147 Broad's principal asset – the Property – and directing the collection and distribution of the proceeds of such sale.

Consequently, by way of the Judgment, the Trial Court granted to Warren relief that N.J.S.A. 42:2C-43 squarely prohibits. Moreover, because N.J.S.A. 42:2C-7 provides that any general "principles of law and equity" may only "supplement," not supersede, the particular provisions of the RULLCA, the Trial Court lacked any authority – statutory, equitable or otherwise – to compel the sale of the 147 Broad's Property and threaten its dissolution as a company. In this respect, the Judgment was both procedurally improper as it violated 147 Broad's basic due process rights, and substantively unsupported because it granted Warren relief that the RULLCA expressly prohibits him from receiving.

The RULLCA was not the remedy-limiting authority that the Trial Court overlooked. The Trial Court also overlooked the plain terms of the parties' June 3 Agreement. As set forth in the June 3 Agreement, in exchange for providing loans to 147 Broad, Warren was to receive: (1) the repayment of half the principal amount that Warren loaned 147 Broad; (2) a future contingent interest in 147 Broad, which will not vest until Scott moves out of the Property; and (3) 49% of all distributions made by 147 Broad. Ia80 – Ia83; T6 at 173:23 – 175:6; T10 at 120:14 – 123:4. Specifically, the June 3 Agreement confirmed that, "in consideration" for Warren loaning money to 147 Broad, "the parties agrees [sic] that when Scott no longer lives at 147 Broad St., Red Bank, NJ, Scott will transfer to Warren 49% of the membership interest in 147 Broad Street, LLC." Ia82.

In the Judgment, the Trial Court granted Warren the remedy of a compelled sale of 147 Broad's Property and distribution of its assets, without any of the conditions precedent from the June 3 Agreement yet having occurred. In effect, the Trial Court created "a better contract" for Warren than the one created by the parties, contrary to the legal principles found in cases such as McMahon v. City of Newark, 195 N.J. 526, 545 (2008) (citation omitted) (holding that "[c]ours cannot make contracts for parties," they "can only enforce the contracts which the parties have themselves made"); Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960) (holding that, when the terms of a contract "are clear, it is the function of a court to enforce it

as written and not to make a better contract for either of the parties"); and Lucier v. Williams, 366 N.J. Super. 485, 491 (App. Div. 2004) (citation omitted) ("[C]ourts will not rewrite contracts to favor a party, for the purpose of giving that party a better bargain."). Despite the language in the June 3 Agreement making clear that Warren would only receive a future contingent interest in 147 Broad once Scott moves out of the Property, the Trial Court awarded Warren relief far exceeding this mere future contingent interest, without any explanation of what it based this relief on or why it was varying from the terms of the June 3 Agreement.

At bottom, there is no legal basis for the relief that the Trial Court granted in Paragraphs 3 and 4 of the Judgment. The Trial Court, therefore, should be reversed.

POINT III

THE TRIAL COURT ERRED BY COMPELLING THE SALE OF 147'S PROPERTY BECAUSE, AS A MATTER OF LAW, JOINT VENTURERS WHOSE JOINT VENTURE IS COMING TO AN END ARE NOT ENTITLED TO A PARTITION OF PROPERTY THAT THEY DO NOT OWN (Not Raised Below)[4]

The Trial Court's fatal error cannot be saved by its finding that Warren and Scott were joint venturers. As a matter of law, joint venturers are only entitled to seek a partition of their own property when their joint enterprise comes to an end.

[4] It is procedurally proper for the Court to consider this issue for the same reasons set forth in Footnote 3, above.

Joint venturers are not, as occurred in the Judgment, entitled to obtain a partition of property that is owned by a wholly separate entity. This renders the Judgment all-the-more erroneous.

There exists a line of case law, primarily in the palimony space, providing that unmarried cohabitating persons "who have engaged in a joint venture to purchase property in which they reside, are entitled to seek a partition . . . of their property when their joint enterprise comes to an end." Connell v. Diehl, 397 N.J. Super. 477, 500 (App. Div. 2008) (citation omitted) (emphasis added); see also Mitchell v. Oksienik, 380 N.J. Super. 119, 127 (App. Div. 2005) (discussing the partition of the assets of a joint enterprise); Swartz v. Becker, 246 N.J. Super. 406, 410-11 (App. Div. 1991) (same); Crowe v. DeGioia, 203 N.J. Super. 22, 34 (App. Div. 1985) (same); Lipin v. Ziff, 53 N.J. Super. 443, 445 (Ch. Div. 1959) (same). None of these cases, however, support the contention that a trial court is empowered to force the sale of property that is owned by neither of the joint venturers and instead belongs to a separate entity.

Specifically, in Mitchell, Swartz and Crowe alike, the partitioned property at issue was owned by the defendant. See Mitchell, 380 N.J. Super. at 123 ("Title to the land was taken in defendant's name alone."); Swartz, 246 N.J. Super. at 406 ("Defendant appeals from an order granting summary judgment to plaintiffs ordering that the property owned by the parties should be partitioned through a sale and not

partitioned in kind"); Crowe, 203 N.J. Super. at 34 ("Nor do we view as meritorious De Gioia's claim that the purpose of the property in his own name precludes the conclusion that he promised to convey it to Crowe."). Similarly, in Lipin, the partitioned property at issue was owned in part, by the plaintiffs. Lipin, 53 N.J. Super. at 443 ("Plaintiffs sued to partition a tract of commercial real estate in which they owned a 1/12 interest.").

In this matter, unlike any of the cases discussed above, neither the plaintiff, Warren, nor the defendant, Scott, owns the Property. Rather, the Property is owned entirely by 147 Broad, a non-party entity that was forced to intervene after-the-fact. This being so, the Trial Court's determination in the Judgment to order the partition of 147 Broad's Property based on a finding that Warren and Scott were joint venturers, is unsupported by existing case law. This provides yet another basis by which to reverse the erroneous Judgment.

POINT IV

THE TRIAL COURT ERRED BY COMPELLING THE SALE OF 147'S PROPERTY AS AN AWARD OF RELIEF ON PLAINTIFF'S CLAIMS FOR CONVERSION AND UNJUST ENRICHMENT IN THE SIXTH AND SEVENTH COUNTS OF THE COMPLAINT BECAUSE PLAINTIFF DID NOT REQUEST ANY SUCH RELIEF IN THOSE COUNTS (Not Raised Below)[5]

For completeness, the Trial Court also erred by fashioning an award of relief on the Sixth and Seventh Counts of the Complaint – namely, the partition and forced sale of the Property – that Warren did not specifically request in his Complaint.

In the Judgment, the Trial Court, with respect to Warren's conversion claim in Count Six of his Complaint, "conclude[d] that the actions carried out by Scott amount to that of Conversion of funds supplied by Warren as a joint venturer in 147 Broad." Ia27. In addition, with respect to Warren's claim for unjust enrichment in Count Seven of the Complaint, the Trial Court found that Scott's "mismanaging of the property at 147 Broad has provided an ongoing benefit for himself while at the direct expense of Warren." Id.

Having found for Warren on Counts Six and Seven, the Trial Court stated that "the ongoing misappropriation of funds and manipulation of books and accounts in connection with the subject property warrant the forced sale of the property located

[5] It is procedurally proper for the Court to consider this issue for the same reasons set forth in Footnote 3, above.

at 147 Broad," and, "[a]s such, the Court shall compel the sale of the property and will require proceeds from the sale to be divided in accordance with the proportions set out within the [June 3 Agreement]." Ia28. In other words, based on its finding that Scott engaged in conversion and unjust enrichment against Warren – who the Trial Court found to be Scott's joint venturer – the Trial Court awarded Warren the forced sale and partition of 147 Broad's Property.

In Counts Six and Seven of the Complaint, however, Warren did not request any such relief. See Ia37 – Ia38. Instead, Warren merely requested a judgment: (1) "[a]warding compensatory and consequential damages; (2) "[a]warding [Warren's] attorney's fees, interest, and costs of suit"; and (3) "[a]ll other relief that the Court deems equitable and just." Id.

In fact, nowhere in the Complaint did Warren even: (1) allege that he and Scott were "joint venturers"; (2) assert a cause of action for partition; or (3) ask that the Court compel the sale of the Property. See generally Ia29 – Ia39. Emphatically, Warren asked the Court to do the complete opposite of this, by seeking a judgment "[r]estraining Scott Diamond from encumbering or selling the Property." Ia34.

When the Trial Court made the eleventh-hour decision to award Warren relief that he never requested (i.e., a forced sale of the Property), against a party that he never impleaded (i.e., 147 Broad), based on a novel legal theory that he never pursued (i.e., partition of joint venturer property), the Trial Court abused its

discretion. See, e.g., Stewart v. N.J. Tpk. Auth/Garden State Parkway, 249 N.J. 642, 657-58 (2022) (refusing to consider an "eleventh hour" change in theory of liability when the plaintiffs had "failed to mention anything regarding the [new theory] in their complaint or throughout discovery"); Schwarzwaelder v. BHC Mktg., Ltd., Nos. A-2362-22, A-2593-22, 2024 WL 3407804, at *8-9 (App. Div. July 15, 2024) (holding that the trial judge's decision to, "[a]fter the trial was over, with no notice to the parties . . . unilaterally impose[] and award[] damages based on a new theory of liability," was both "fatally unfair procedurally" and "legally unsound").

Indeed, there is no legal authority that would "permit the trial court to enter judgment against a party on a cause of action which is conceived of by the judge only after submission of the case to him [or her] for a decision, which comes as a complete surprise to all the litigants, and whose post-trial interjection in the case obviously prejudices the litigant who is accorded no opportunity to offer a factual or legal defense." R. Wilson Plumbing & Heating, Inc. v. Wademan, 246 N.J. Super. 615, 617-18 (App. Div. 1991) (citation omitted). This is consistent with the general policy that "[o]rdinarily, courts do not raise issues that the parties have not raised," and will only introduce new issues in the rare occasion "when the interests of justice require" and "the introduction will not prejudice the parties." State, Office of Emp. Rels. v. Commc'ns Workers of Am., AFL-CIO, 154 N.J. 98, 108 (1998) (citations omitted). On the other hand, where, as here, "there is not even the semblance of a

cause of action pleaded against a particular [party], there is no issue for determination and no basis for judgment against [it], unless the parties waive formal pleading of operative facts and by consent submit an issue to the court for determination." Sattelberger v. Telep, 14 N.J. 353, 363 (1954).

In this case, when the Trial Court decided to grant Warren the relief of a partition and compelled sale of 147 Broad's Property based on a joint venturer theory, without Warren having ever made any claim for this relief in his Complaint, much less impleaded 147 Broad at all, the Trial Court rendered a decision that was both fatally unfair procedurally and legally unsound. Indeed, particularly given that 147 Broad was a non-party to this litigation at the time that the Trial Court entered the Judgment awarding Warren this claim for relief *sua sponte*, 147 Broad never had a fair opportunity to address or prepare any defense to that claim. By any measure, therefore, the Judgment is legally unsustainable and should be reversed.

CONCLUSION

For the reasons set forth herein, this Cout should reverse the Trial Court below and vacate Paragraphs 3 and 4 of the Judgment.

Respectfully submitted,

GREENBAUM, ROWE, SMITH & DAVIS LLP
Attorneys for Intervenor/Appellant,
147 Broad St., LLC

By: _____*/s/ Darren C. Barreiro*_____
DARREN C. BARREIRO

Dated: February 25, 2025

Timothy C. Moriarty (027822004)
tmortmoriarty@andersonkill.com
ANDERSON KILL P.C.
One Gateway Center, Suite 1500
Newark, NJ 07102
Tel: (973) 642-5858
Attorneys for Plaintiff/Respondent, Warren Diamond, individually and derivatively on behalf of 147 Broad St., LLC

WARREN DIAMOND, individually and derivatively on behalf of 147 BROAD ST., LLC, Plaintiff/Respondent, v. SCOTT DIAMOND, Defendant/Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-000581-24 On Appeal from an Order of the Superior Court of New Jersey, Law Division, Monmouth County Sat Below: Hon. Kathleen A. Sheedy, J.S.C. Docket No. Below: MON-L-3090-18

BRIEF OF PLAINTIFF/RESPONDENT WARREN DIAMOND

Of Counsel and on the Brief: Timothy C. Moriarty, Esq.

Date of Submission: April 28, 2025

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PRELIMINARY STATEMENT

The June 30, 2024 order of judgment ("**Judgment**") that compels the sale of the joint venture property located at 147 Broad Street in Red Bank, New Jersey (the "**J.V. Property**") and that allocates the sale proceeds in accordance with the June 3, 2014 agreement amongst the joint venturers – Plaintiff, Warren Diamond ("**Warren**"), Defendant, Scott Diamond ("**Scott**") and Melissa Diamond (who is the remaining disinterested 1% member of 147 Broad St., LLC ("**Intervenor**")) – must be affirmed because its factual findings and the legal conclusions flowing therefrom are well supported by the substantial credible evidence adduced at trial.

This equitable relief was the natural consequence of Scott's "decade-long continuous and unexplainable misappropriation" of funds Warren supplied for the J.V. Property, and Scott's mismanagement of the J.V. Property that provided an ongoing benefit for himself at the direct expense of Warren. (Ia23). The Trial Court's conclusions are supported by the extensive evidence adduced at trial proving how Scott engaged in a decade-long campaign of deceit, manipulation, and fraud whereby he willfully manipulated the J.V. Property's financial records, concealed crucial data, and unjustly enriched himself, personally, while harming Warren's joint venture interest by continuously funneling joint venture funds to himself (or to his other shell companies, Scott Diamond LLC ("**SD LLC**") or Tri City Mgmt., LLC ("**Tri City**")).

Intervenor's argument that the Judgment somehow violates its due process rights as owner of the J.V. Property – the LLC in which Scott is the 99% member and sole manager – is a red herring that should be rejected by this panel. First, through its sole managing member (i.e., Scott), Intervenor knew of this action from its inception and has had its rights represented by Scott, who is the only member authorized to represent the LLC's interests. Second, Intervenor has always been a real party in interest, ever since it was derivatively named in the caption on August 24, 2018. The compelled sale of the J.V. Property and the disposition of the sale proceeds are also consistent with the equitable relief that may be fashioned by trial judges of the Superior Court pursuant to well-established New Jersey law, particularly in situations like this that involve the violation of joint venture duties and successful causes of action asserted by one venturer against another for unjust enrichment and conversion.

The fallacy of Intervenor's argument is further illustrated by Warren's and Scott's invocation of the trial court's equitable power: Scott (Intervenor's sole managing member and 99% owner) acknowledged the equitable nature of the dispute as far back as December 26, 2018, when his counsel certified that "the relief sought by the parties is almost wholly equitable in nature" and the "focal point of this dispute is, by far, equitable in nature . . . ." (Pa20).

The Judgment should therefore be affirmed in its entirety.

RESPONDENT'S PROCEDURAL HISTORY

Warren commenced this action upon filing the complaint on August 24, 2018. (Ia29, 39).

Scott is and has been Intervenor's sole managing member for over a decade, and has been a party to this suit since its inception. (Ia8-9, 23); (6T58:18-59:5; 5T85:6–11; 7T145:5–12). Intervenor has been a real party in interest in this action since its inception. The complaint's caption named Intervenor as a real party in interest, where Warren sought individual relief and derivative relief concerning Intervenor. (Ia29-39).

Each count's prayer for relief also sought an award of equitable relief. (Ia33-38). On December 26, 2018, Intervenor's sole managing member (i.e., Scott) acknowledged the equitable nature of the dispute and the equitable relief sought by Warren (and Scott) when Scott moved to transfer this action from the Law Division to the Chancery Division. (Pa16-17). In support of that motion, his counsel certified that "the relief sought by the parties is almost wholly equitable in nature" and the "focal point of this dispute is, by far, equitable in nature . . . ." (Pa20).

The matter was tried by way of a ten-day bench trial before Judge Sheedy on January 16, 17, 18, 22, 23, 24, 25, 31, and on March 18 and 19, 2024.[1]

During trial, Warren sought sanctions on account of Scott's spoliation and non-disclosure of relevant and material QuickBooks evidence for the J.V. Property and Intervenor. On April 3, 2024, Judge Sheedy granted Warren's motion for sanctions in part and awarded attorney's fees and costs incurred by Warren from Scott's January 28, 2024 production of QuickBooks records to the March 18, 2024 resumption of the trial. (Pa3-4).

On June 30, 2024, Judge Sheedy entered the Judgment together with the statement of reasons that set forth extensive factual findings and conclusions of law flowing therefrom. (Ia6-28). The same day, Judge Sheedy also entered an order and statement of reasons that require Scott to pay Warren sanctions of $9,353.50 in attorney's fees and costs. (Pa5-15).

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[1] "1T" references the trial transcript dated January 16, 2024.
"2T" references the trial transcript dated January 17, 2024.
"3T" references the trial transcript dated January 18, 2024.
"4T" references the trial transcript dated January 22, 2024.
"5T" references the trial transcript dated January 23, 2024.
"6T" references the trial transcript dated January 24, 2024.
"7T" references the trial transcript dated January 25, 2024.
"8T" references the trial transcript dated January 31, 2024.
"9T" references the trial transcript dated March 18, 2024.
"10T" references the trial transcript dated March 19, 2024.
"11T" references the trial transcript before the Hon. Owen C. McCarthy, P.J.Cv., dated January 31, 2024.

RESPONDENT'S STATEMENT OF FACTS

1. Intervenor's Sole Manager Is and Always Has Been A Party to the Suit, as Has Intervenor

Scott is and has been Intervenor's sole managing member for over a decade, and had been a party to this suit since its inception. (Ia8-9, 23); (6T: 59:22–25; 85:6–8; 7T: 145:5–12). Intervenor cannot credibly dispute its awareness of the suit given that Intervenor paid over one hundred thousand dollars' worth of Scott's legal fees in this action, (8T120:20 to 121:10, 8T118:13 to 119:5, and 10T52:4 to 53:4), which is a decision that only Intervenor's managing member could have approved. (Ia114).

The LLC has been a real party in interest in this action since its inception. The complaint's caption named the LLC as a real party in interest, where Warren sought individual relief and derivative relief concerning the LLC. (Ia29–39).

2. The Trial Court's Joint Venturer Finding Is Amply Supported By the Record

The Judgment found that Warren is a joint venturer with Scott in relation to the J.V. Property: "Warren . . . undeniably purchased the property at issue in junction with Scott as a joint venture." (Ia23).

In support of the joint venture finding, Judge Sheedy made the following findings of fact that are supported by substantial credible evidence:

a. Warren first discovered the property in the mid to late 1990s and first inquired as to the possibility of buying it in approximately 2010. (Ia26, 1T41:21-42:9, 1T47:5-49:1).

b. Warren, in 2013, negotiated a contract of sale for the J.V. Property with Kevin Valerio and Geoff Brothers. (Ia26, 1T49:2-18 and 1T55:7-23).

c. Warren, on June 13, 2013, agreed to the contract terms and, individually, was the contract purchaser. (Ia26, 1T53:17-54:17, 1T57:25-58:21, 1T63:11-65:10, 1T65:13-68:23, Ia69-78, and Pa21-26).

d. Warren went on to pay the initial deposit of $20,000 for the J.V. Property on June 12, 2013. (Ia26, 1T60:13 to 62:11, Pa156, Pa157).

e. Warren was the guarantor of the J.V. Property's $1,204,000 acquisition and construction loan and mortgage from Amboy Bank. (Ia26).

f. Warren continued to be involved and invest his own money in the J.V. Property, such as when the first mortgage payment was delinquent in February of 2014 and Warren advised that he would be covering that mortgage payment. (Ia26, 2T123:11-21, 2T53:2-6, 2T123:11-21,2T124:4 to 125:5, Pa87).

g. Warren was also to make up for any shortfall in the rent amount and mortgage payments due to Amboy Bank. (Ia26 citing Exhibit D-2 at Pa 255-256).

h. "Warren was actively engaged, involved, and expected to provide continuing funds in order for the maintenance of the property." (Ia26, 2T69:18 to 70:1, 6T28:23 to 29:21).

i. Scott acknowledged that the June 3, 2014 agreement between the parties required the LLC to recognize a loan account for Warren and confirmed Warren is entitled to 49% of the distributions (5T45:11-17, 5T119:3-15, Pa242), though he attempted to claim at trial that Warren is not entitled to any money back or return on investment. (5T118:7-25, 5T108:8-12, 5T119:3-15).

j. Warren understood that Scott was going to move into the J.V. Property's second-floor apartment, manage the building, pay $3,200 per month in rent, pay the expenses, and make distributions of profit at the end of each month. Warren expected he would begin receiving distributions in 2015 or 2016, once the J.V. Property started turning a profit. Warren never envisioned going 10 years without receiving a distribution. (2T55:10 to 56:18, 2T98:5-24, Pa250-253).

k. Warren and Scott worked together to address issues concerning the construction and buildout of the J.V. Property and to ensure that its mortgage payments were made. (2T134:2 to 137:2, Pa72-77). They worked together to renovate the J.V. Property, and deal with general

contractor proposals and construction issues. (2T99:5 to 103:15, Pa68-71). Warren helped to defray other carrying costs, such as, in May 2014, when Scott asked Warren to invest $1,173.10 to prevent the Property's insurance from lapsing, which Warren did (2T108:18 to 109:7), and did again in September 2014. (Pa124-134).

3. The Trial Court's Findings of Harm to Warren's Joint Venture Investment and Interest Due to Scott's Conversion and Unjust Enrichment Are Amply Supported By the Record

Judge Sheedy found that Scott "engaged in a decade-long continuous and unexplainable misappropriation of funds which served his own benefit [at] the expense of Warren and his investment-backed expectations associated with 147 Broad." (Ia27).

Scott's unjust enrichment and conversion were conducted "by way of manipulation of [the] books and loan accounts [of the J.V. Property], [which] converted funds provided by Warren and . . . utilized them in a manner which directly impedes the possibility of financial gain by Warren." (Ia27). Judge Sheedy further found that Scott "utilized these manipulation methods in conjunction with unnecessary utilization of affiliate companies SD LLC and Tri City to essentially reside in the second-floor apartment at a reduced rate while simultaneously rendering 147 Broad devoid of any opportunity to allow Warren a return on his investment to which he is entitled." (Ia27).

Regarding Scott's conversion of Warren's joint venture investment and assets for over ten years, Judge Sheedy found that the parties agreed Scott would move into the second-floor garden terrace apartment and ultimately serve as its property manager. (Ia26, citing Exhibit P-138 at Pa250-253).

The written lease between Scott and Intervenor – the only lease admitted in evidence – requires him to pay $3,200 per month in rent, his own utilities, and a $4,800 security deposit. (Pa250-253). Yet, at trial, "Scott testified he never paid a $4,800 security deposit, nor did he ever pay any portion of any utility bills including as, water, electric, or cable." (Ia26, citing 4T179:19-148:5 and 4T156:21-157:5). "Additionally, Scott testified that since July of 2014, he had been paying rent of $2,500 per month but that figure was not being paid pursuant to any signed agreement." (Ia26, citing 4T135:5-17 and 4T137:24-138:9).

Although Scott somehow contended that his written and signed lease was not enforceable, Judge Sheedy concluded "it is in fact the only signed lease admitted into evidence before the Court, and the Court finds this to be a reasonable figure associated with the property at issue. The Court finds no such enforceable agreement exists with regard to this figure of $2,500 to be paid each month." (Ia26-27). These findings and conclusions are amply supported by the record, including Exhibit P-138. (Pa250-253 at §§4, 8, 30, and 33).

Warren understood that Scott was obligated to pay $3,200 in monthly rent in accordance with his written lease, as well as utilities. (2T98:5-24). And Scott's own October 27, 2014 stabilization letter to Amboy Bank aligned with the lease, listing his monthly base rent of $3,200. (8T52:14-53:10 and Pa117, Pa118).

Scott also testified that in 2014, shortly after they closed on the J.V. Property, he was seeking to increase the rent paid by its then-holdover-tenant (the broker in the sale, Geoff Brothers) to $3,000 per month, which Scott himself said would have been fair market value. (7T85:23 to 86:8 and 88:12-22). Yet, over the last 10 years, Scott has never increased his rent under his imaginary lease beyond $2,500 per month. (4T149:21-151:19).

Even Scott's own November 2015 listing materials through which he was trying to sell the J.V. Property to potential third-party buyers admit that Scott's lease was a "gross lease **at below market-value rent with seller**." (Pa153 (emphasis added)).

Scott's same listing materials describe his second-floor garden terrace apartment as "a beautiful apartment with 2 bedrooms, 2 baths, living, dining, library room and enormous rooftop terrace." (Pa148).

Scott acknowledged that the J.V. Property's only other tenant in 2015, Red Bank Design Center, was required to pay utilities and that his written and signed

lease with Intervenor required him, as tenant, to pay utilities. (4T145:14-25, Pa250 at §8).

Nonetheless, Scott incredulously contended at trial that his written lease is somehow "unenforceable" because the LLC did not perform. Yet, he had no recollection of ever telling Amboy Bank, or anyone else, his position that the lease was not enforceable. (4T124:19 to 127:21, 8T45:7-20, 8T52:14 to 53:12). Scott also admitted that Amboy Bank sent him a tenant letter dated August 25, 2015 that invoked the bank's assignment of leases and rents in relation to the J.V. Property due to the default he caused on the $1,204,000 mortgage. However, Scott never told Amboy Bank that he did not have a signed enforceable lease agreement. (Pa94 and 4T131:18-134:21).

Scott testified he has been paying rent of $2,500 per month since July of 2014 but it "just wasn't pursuant to a signed agreement." (4T134:14-17 and 4T137:24 to 138:9). Scott also testified that his imaginary lease "would have included utilities because submetering it made no sense." (4T146:9-11). However, Scott himself chose not to submeter the second floor. (10T182:10-12). Scott testified that he, as tenant, has never paid any share of any electric bill, gas bill, water/sewer bill, or cable bill. (4T147:8-148:5 and 4T156:21 to 157:5).

Scott dubiously described his imaginary lease as a "gross lease" that "includes pro rata share of taxes, insurance, and even utilities" that "are provided

by the landlord, in exchange for [a] . . . single gross payment." (4T147:18-24). Scott also testified that he didn't recall authoring any other written lease besides the lease admitted into evidence and just had **"an agreement with myself. It was an agreement with 147 Broad Street, LLC.** If there was a drafter, 147 Broad Street, LLC and Scott Diamond, as tenant, I guess would have drafted it together." (4T148:14-22) (emphasis added). Scott recalled the imaginary lease he negotiated with himself had a term of 25 years but he was not sure that was accurate. (4T21:5-9 and 4T38:14-16).

Scott also confirmed that a substantial portion of the landscaping costs for his apartment have been paid by the J.V. Property. (4T182:18-20). Scott also caused Intervenor to purchase, for his personal use in his apartment, a TV for himself for $1,563.27 and a mattress for himself for $930. Although Scott testified that he later reversed these transactions and booked them against either his "loan" or "loan" interest accounts, a review of his very same manipulated "loan" account that Scott introduced into evidence confirms there is no reference whatsoever to a deduction of $1,563.27, $930, or for a TV or a mattress. (Pa199-220, 5T148:15-21, 5T151:24 to 152:17, 5T152:25 to 153:6, and 5T149:23 to 150:16, and Pa258-259). Scott also testified that over the last two years, he caused Intervenor to make significant improvements to his garden terrace apartment totaling approximately $50,000. (8T82:17-25, 5T128:15–129:23, 5T135:2–136:7, and 6T231:8-23).

Thus, between July of 2014 and April of 2024, Scott "paid" $292,500 in monthly rent[2] to Intervenor under his imaginary lease. However, if Scott adhered to the only written lease agreement that was admitted into evidence for his second-floor garden terrace apartment (P-138 at Pa250-253), then even without any rent escalations, his monthly base rent of $3,200 over the same time period should have been almost $100,000 more ($374,400.00).

Scott's own records show that the J.V. Property paid $69,936.82 in utilities charges and $21,000 in cable bills, including other of Scott Diamond's personal charges and expenses, between 2014 and the close of 2023. (10T58:1-8 and 10T180:3-17).

Based on this substantial and reliable evidence in the record, Judge Sheedy therefore concluded, "[T]he actions carried out by Scott amount to that of Conversion of funds supplied by Warren as a joint venturer of 147 Broad. Scott's decades-long mismanagement of the property at 147 has provided an ongoing benefit for himself at the direct expense of Warren." (Ia23).

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[2] As described below, Scott didn't actually pay rent in money – rather, he converted Warren's investments for his benefit and took book account deductions against an imaginary loan interest account to make it seem like he was paying rent.

4. The Trial Court's Findings Are Amply Supported By Scott's Practice of Not Actually Paying Rent

As further support for the conclusion that Scott converted Warren's joint venture interest and investments to unjustly enrich himself to Warren's detriment as part of his "decade-long continuous and inexplainable misappropriation of funds," Judge Sheedy found that Scott, in order to "pay" his monthly below-market rent of $2,500 pursuant to his imaginary lease, utilized "interest accrued upon the loans taken from Warren and other miscellaneous company loans to fund expenses that ultimately end up benefiting himself, including the payment of rent." (Ia23).

This finding is based on the evidence adduced at trial that Scott used the June 3, 2014 agreement to convert one-half of Warren's investment in the J.V. Property – both before and after June 3, 2014 – all while violating the same June 3, 2014 agreement by refusing to repay Warren's loans, refusing to issue any distributions, eliminating Warren's loan account in lieu of the account manipulated by Scott called "Scott Diamond FBO," and compounding Warren's joint venture losses by charging 10% interest each year on Warren's one-half converted "loan". (5T62:23–65:6, 6T194:2–195:14, 9T143:5–144:6).

Scott's conversion and unjust enrichment lie at the heart of the Judgment. Judge Sheedy found that, "[t]hrough this process Scott was able to convert Warren's $280,000 January 16, 2024 loan into a benefit of $280,000 for himself and a loss of $140,000 for Warren. Additionally, Warren's remaining $140,000 is

left in an account which accrues no interest and which Warren has received only one payment in the amount of $50,000 since January 16, 2014." (Ia23, citing 6T11:2-5, 9T10:19-24).

In mid-2014, Scott obtained almost all of his initial "loans" by taking one-half of Warren's loans through the June 3, 2014 agreement. (Ia23, Pa242).

Yet, when Warren invested in the J.V. Property before June 3, 2014, Scott never disclosed that he intended to take one-half of Warren's investments. (6T44:15-45:25). Nor did Scott disclose to Warren that he was going to charge 10% interest on the loans he was taking from Warren while Warren's loans would not accrue any interest. (8T91:25-93:12).

The June 3, 2014 agreement also does not specifically provide, and Scott admits he never disclosed to Warren, that Scott was going to convert one-half of every loan that Warren made after June 3, 2014 for Scott himself, in perpetuity, and thereafter compound Warren's losses by taking 10% interest on the converted amount for each of the coming years. (9T143:5–144:6).

With respect to the J.V. Property, the agreement provides:

> Warren acknowledges approximately $200,000 in loans from Scott to Warren in June and July of 2013. Scott acknowledges Warren has invested $380,000 into 147 Broad Street LLC. They both have invested time, knowledge and expertise. In consideration thereof, the parties agrees that when Scott no longer lives at 147 Broad St, Red Bank, NJ, Red Bank, NJ Scott will transfer to Warren 49% of the membership interest in 147 Broad

> Street LLC. The books and records of 147 Broad Street LLC will be maintained to indicate loans from Warren are credited % to Warrens loan account and % to Scott's loan account. Warren acknowledges and reaffirms that he is the guarantor of a loan taken with Amboy bank in connection with the January 2014 closing of 147 Broad Street, Red Bank, NJ by 147 Broad Street LLC. In any event whenever distributions are made they shall be made 1% to Melissa Diamond, 49% to Warren and 50% to Scott.

(Ia23). Although Warren's joint venture investments funded Scott's "loan" account and, by extension, his undisclosed 10% "loan interest" account, while Scott was reviewing his own interest account during cross-examination, he claimed he was unable to ascertain the amount of loans he took from Warren. (10T201:18 to 202:9). Scott also admitted that his "loan interest" account was completely miscalculated *ab initio*. (9T150:13-19 and 151:10-14, 8T140:23–142:5).

A February 16, 2016 email from Scott to his accountants (Pa225, 9T74:12) illuminates the depths of Scott's scheme. In this email, Scott directed his accountants to "redo" journal entries in the J.V. Property's QuickBooks to ensure that his personal "loan" account never fell below Warren's loan account, which Scott unilaterally relabeled as the "Scott Diamond FBO Account".[3] By instructing his accountants to manipulate the journal entries (Pa225), Scott sought to disguise

[3] The "Scott Diamond FBO" loan account is Warren's loan account with the J.V. Property but Scott unilaterally relabeled it to "Scott Diamond FBO" (5T64:10 to 65:6) even though Scott acknowledged that the June 3, 2014 agreement required him and the J.V. Property to recognize a loan account for Warren and confirmed that Warren is entitled to 49% of its distributions. (5T45:11-17, 5T119:3-15).

the fact that he was systematically siphoning money from his father's loan account and using it to enrich himself.

Further evidence of Scott's scheme is found in Scott's admission that after moving into the J.V. Property's enormous second-floor garden terrace apartment in July 2014, he has paid just $10,000 in actual money (at most) for rent. (8T31:13-15). This is because Scott "paid" rent through book account deductions from his "loan interest" account in the J.V. Property – the same "loan" account that was funded by Warren's investments and the same account that Scott admits was miscalculated from its start. (9T150:13-19 and 151:10-14, 8T140:23–142:5).

Scott never told Amboy Bank of his method of "paying" his rent through book account deductions from his "loan interest" account (8T50:6-25, 8T82:8-22) as opposed to paying actual money. (5T30:12-25, 5T39:8-10, 5T40:17-20).

Thus, not only did Scott fail to disclose to Warren, Amboy Bank or anyone else that (a) he is not paying $3,200 in rent per his only written lease agreement that we have ever seen and (b) that he has used 147 Broad to pay his own tenant utilities for ten years (8T49:15-21), but he also did not disclose (until trial) that he has been using his fabricated and miscalculated "loan interest account" (9T150:13-19 and 151:10-14, 8T140:23–142:5) to "pay" his below-market rent via manipulated account deductions.

At trial, Scott testified he had not significantly paid down any of the principal of his member "loan" account in the preceding 10 years. (10T89:25-91:10). Although Scott insists that the 10% interest rate on his "loans" is reasonable, Scott never tried to get a third-party loan, never filled out a loan application, and never received any paperwork from a bank stating what the percentage rate of interest for such a loan would be. (10T20:14-22:4).

Even Scott acknowledged that the J.V. Property "was being buried" with imaginary liabilities associated with his manipulated "loan" account and manipulated "loan interest" account. (8T143:14–146:18).

In 2017, the 10% interest of $82,000 that Scott added to his "loans" in that calendar year alone exceeded – by 2X – the interest that was paid by the J.V. Property to Amboy Bank in the same year for its $1,204,000 acquisition mortgage and construction loan. (5T121:19-122:15). In fact, the $1,223,000 of total liabilities Scott manufactured for his "loan" and "loan" interest accounts nearly equal the $1,255,000 that 147 Broad paid to buy the Property. (9T74:18–776:20).

Despite this, Scott ensured that he continued to receive 10% interest on his "loans" that he converted from Warren (10T24:11-14) so he could continue to accrue 10% interest each year to make it seem like he is "paying" his imaginary below market rent. (10T89:9-91:10).

Scott explained how this mechanism enabled him to maintain his inflated and fabricated "loans", "earn" 10% interest on them each year, and "pay" rent without ever paying any actual money. This practice is the primary reason why Scott has prevented the J.V. Property from paying any distributions since its inception and has not returned any loans to Warren except for the $50,000 that was paid in October of 2014. (6T11:2-5, 9T10:19-24). But for Scott, the J.V. Property could have made distributions and loan repayments to people besides Scott on many occasions since 2014. Although Warren's loans to the J.V. Property are the oldest loans on its books, Scott unilaterally chooses not to pay them.

Scott ensured he would (a) receive $0.50 of every dollar ever invested by Warren (both before and after June 3, 2014 but without disclosing this was a perpetual conversion, (2) plus another $0.10 of interest on the same dollar each year thereafter (10% simple "loan" interest). The detrimental impact of Scott's scheme is proven by evaluating long-term consequences of Scott's conversion of one-half ($140,000) of the $280,000 that Warren invested on January 16, 2014 (10T82:1-7):

a. Scott took $0.50 of each dollar, or one-half of Warren's $280,000 investment ($140,000), and allocated it to Scott himself as a "loan".

b. Scott took $0.10 of each dollar, or 10% annual interest on the same $140,000 "loan" ($14,000 per year). After 10 years, the interest on the $140,000 that Scott took from Warren totaled $140,000.

c. Scott used the same $140,000 of interest to "pay" 56 months of Scott's own personal below-market rent through his book account deduction and without paying any actual money to 147 Broad.

Scott therefore caused Warren to lose $140,000. In the process, Scott gained $140,000 in "loans" plus $14,000 in 10% loan "interest" each year, which equates to $140,000 in interest over 10 years. This means that between January 16, 2014 and January 16, 2024, the $140,000 "loan" that Scott took from Warren earned Scott another $140,000 in interest.

5. The Trial Court's Findings Are Amply Supported By Scott's Undisclosed Management Agreement that He Used to Pay His Affiliate Entities $162,807.87 in "Fees"

The evidence adduced at trial concerning Scott's unauthorized, undisclosed, and unnecessary management agreement between the LLC and his affiliate companies, SD LLC and Tri City, is the factual basis for the Judgment's finding that Scott unnecessarily utilized his two affiliate companies to reside in the second-floor apartment at a reduced rate while rendering the J.V. Property devoid of any opportunity to allow Warren a return on his investment. (Ia23).

Scott, alone, entered into a management agreement between the J.V. Property and his affiliate company, SD LLC, which became effective on October 29, 2014. (8T54:7–55:21, 10T19:6-24). Scott owns 99% of both SD LLC and Tri City. (8T107:20–108:3). Scott concealed his management agreement from Warren. (8T56:8-15, 8T60:13-25). Although Scott entered this management

agreement with himself just two days after he prepared and sent his October 27, 2014 rent stabilization letter for 147 Broad to Amboy Bank, he never disclosed the agreement to Amboy. (Pa117-118, 8T58:2 to 59:25).

Scott's management agreement provides that SD LLC is entitled to 10% of the J.V. Property's gross revenue. (8T55:25–56:6). Scott used his management agreement to collect 10% of the J.V. Property's tenants' security deposits and pay them to SD LLC or Tri City. (8T109:8-25). The management agreement that Scott made with himself further provides that SD LLC or Tri City is entitled to 10% of any proceeds of a refinance or a sale of the J.V. Property in excess of the existing mortgage debt. (10T19:6-24, 9T169:18–170:3). The total management fees billed by Tri City or SD LLC under Scott's management agreement from October 29, 2014 through the time of trial was $162,807.87. (8T114:1–115:1).

Scott collects a 10% management fee on his own book account "rent" payments that don't involve Scott's payment of actual money. (7T113:8-20). Scott injured Warren's joint venture interests by not paying any actual money in rent the J.V. Property yet nonetheless causing the J.V. Property to pay $0.10 of management fees in actual money to one of his affiliate entities even though the rent that Scott "pays" is based only on Scott's creative and self-serving accounting.

Thus, although Scott can easily manipulate the books of the J.V. Property to show $250,000 in "payments" of fake rent from Scott, he will simultaneously have

caused his affiliate entities to earn 10% of that $250,000 – or $25,000 – in bogus management fees that Scott paid to his affiliates.

6. The Trial Court's Findings Are Amply Supported By Scott's Payment of $111, 216.86 to His Lawyers from the Joint Venture

Scott testified to Intervenor having incurred $143,956.85 in professional fees. (10T5120-52:2). However, of this nearly $144,000, Scott caused the J.V. Property to pay $27,511.86 to his prior counsel in this case, Pryor Cashman. (8T120:20–121:10). Scott also caused Intervenor to pay $83,760 to his current counsel in this case, Fox Rothschild. (8T118:13–119:5); (10T52:4–53:4).

7. The J.V. Property's Books and Records Are Inherently Unreliable, As Acknowledged By Scott

The J.V. Property's books and records that Scott maintained are inherently unreliable because of the multitude of inaccuracies (as acknowledged by Scott), and in light of Scott's sanctioned misconduct in knowingly failing to produce the J.V. Property's QuickBooks until the middle of the trial. (Pa3, 10).

In a February 16, 2016 email, Scott directed his accountants to "redo" the J.V. Property's journal entries in QuickBooks to ensure that his personal "loan" account never fell below the "Scott Diamond FBO Account", which is Warren's loan account for the joint venture that Scott unilaterally relabeled "Scott Diamond FBO Account". (Pa225, 5T64:10-65:6). The email shows the anomalies and discrepancies in the QuickBooks records coupled with Scott's willful discovery

violations (*e.g.*, his refusal to produce the records before being ordered to do so *during trial*) were the product of deliberate manipulation by Scott – that Scott's conversion of Warren's loan account and distortion of the books and records were intended outcomes of a concerted scheme.

Scott also confirmed multiple times at trial that his entire QuickBooks "loan" interest account transactions and "loan" interest report were completely wrong. (9T150:13-19 and 151:10-14, 10T168:1–169:10). Although Scott knew of these errors in 2018, he still had not corrected them six years later at trial. (8T140:23–142:5). Rather than fix the problem, Scott blamed his accountants. (8T141:4–142:3, 8T144:10–45:22).

While Scott was reviewing his own "loan" interest account during cross-examination, he was completely unable to ascertain the amount of loans he took from Warren. (10T201:18–202:9).

Scott's own loan account analysis that he relies upon in his appellant's brief and appendix (Pa258-259) is similarly unreliable. The foundation for Scott's "loan" account testimony from March 19, 2024 was his alt 1 and alt 2 analyses, which were marked as Exhibit D-30 but were *not* admitted into evidence. (10T31:22-35:5). Scott also testified on March 18, 2024 that his loan account analyses had *not* been adopted. Rather, the analyses just showed the results of calculations that Scott did. They did *not* show the calculations themselves nor did

they reflect any of the backup that was needed to test and evaluate the inaccuracy of Scott's self-serving analysis. Scott also failed to bring any of the backup with him to trial. (9T148:3–149:8, 9T150:20–151:14).

In fact, Scott admitted he did not have any backup documents for any of the QuickBooks transactions and reports he reviewed while on the stand on March 19, 2024. He again acknowledged that all of his interest account transactions were completely incorrect. (10T168:1-169:10).

Scott further acknowledged he did not review nor present any invoices or backup documentation to support any of the transactions he reviewed and discussed that day, including the report he reviewed that was admitted into evidence as Exhibit D-33. (10T170:25–171:3, 10T172:14-21, 10T182:13–183:25, 10T201:18–202:9, 10T79:23–80:13, 10T82:23–84:7). Scott acknowledged he had not produced the backup for each of the transactions listed in the reports he was reviewing while on the stand. Scott also acknowledged that a lot of the backup isn't even in QuickBooks. (9T141:1-24).

In relation to the $602,114.23 in loans that Scott, on March 19, 2024, testified to having made to 147 Broad, Scott failed to prove that they were reasonable, necessary, or otherwise required, and was unable to provide any backup or other reasonable explanation to show what the loans were used to do, how the loans were paid or why they were needed. (10T41:1-10, 7T48:1–50:7,

9T74:18–75:19, 9T150:3–151:14, 10T41:6-17). A few days earlier, Scott only referenced and admitted into evidence bank statements evidencing transfers that could show he made $474,053 of what he incredulously, on his own say-so, labeled as "reasonable" and "required" loans. (7T48:1-56:8).

Although requested numerous times in discovery, Scott failed to produce the J.V. Property's QuickBooks records until the middle of trial on January 28, 2024. (Pa10). In granting in part Warren's sanctions application, Judge Sheedy acknowledged Scott's "repeated violative conduct in failing to produce necessary Discovery[.]" (Pa9). On January 31, 2024, when counsel appeared before the Honorable Owen C. McCarthy, P.J.Cv., Scott was unable to provide any explanation, whatsoever, as to why he failed to produce the QuickBooks records until two weeks into the trial despite the fact that the records were requested by Warren multiple times in discovery. (11T5:22–8:21, 11T26:10–34:10).

Thereafter, Judge Sheedy "partially granted [Warren]'s Motion for Sanctions as a result of [Scott]'s failure to turn over QuickBooks Records which [he] held in his possession." (Id.). "It was [Scott]'s repeated failure to produce these Records which made up the subject of the Motion for Sanctions, and it was that repeated failure that triggered the Court to grant-in-part in favor of [Warren]." (Id.).

"The Court was forced to adjourn the trial, in the midst of litigation, due to [Scott]'s repeated failure to produce these Records." (Id.).

8. The Trial Court's Finding of Scott's $226,269.69 In Loans Is Based on Scott's Own Testimony and Post-Trial Submission

On January 31, 2024, Scott testified that he received, in total, credits to his loan account in the amount of $239,946.19. (8T150:21-25). He reached this figure by adding $189,269.68 from the loan account his analysis titled "Scott Split Loan" to the $50,676.51 loan account entitled "Scott Split Loan Diff." (8T150:21-25). The same facts are also set forth in Scott's post-trial submission, in proposed finding of fact no. 75.

Based upon the loans that Warren provided 147 Broad, and consistent with the June 3 Agreement, Scott has received, in total, credits in his loan account in the amount of $239,946.19. (T8 at 150:21-25). The sum of $239,946.19 is calculated by adding $189,269.68 from the loan account entitled "Scott Split Loan" to the $50,676.51 from the loan account entitled "Scott Split Loan Diff." (T8 at 150:21–25). (Pa233).

In the Judgment, Judge Sheedy referenced and then partially adopted Scott's proposed finding of fact no. 75. (Pa11-12, Ia24). Judge Sheedy also incorporated by reference but did not explicitly state that she was adopting Scott's proposed finding of fact no. 74, which stated: "At the same time, 147 Broad repaid $12,750 in loans to Scott." (Pa233, citing 7T166:9 to 167:24).

From the $239,946.19 figure that Scott himself provided at trial and in his post-trial submission, Judge Sheedy subtracted from that the $12,500 that Scott received from the J.V. Property at the same time that Warren received his sole $50,000 loan reduction payment in October of 2014. By subtracting $12,500 from Scott's own $239,946.19 figure, Judge Sheedy calculated $226,769.69 as Scott's total loans to the J.V Property. (Ia24, 10T38:14-39:11, 10T40:11-41:25, 10T81:25-82:13). If anything, Judge Sheedy gave Scott an unwarranted benefit of $250 by utilizing a figure of $12,500 to deduct from $239,946.19 instead of the actual figure of $12,750.

Judge Sheedy rejected the balance of Scott's attempt to improperly inflate his loan account to over $600,000: "While Scott asserts a much higher loan account balance, the Court does not find that to be true." (Ia24). In so doing, Judge Sheedy reiterated Scott's extensive pattern of conversion and unjust enrichment since the joint venture acquired the J.V. Property in January of 2014. (Ia28).

LEGAL ARGUMENT

Intervenor's Brief is a naked (and futile) attempt to fill the gaping holes in Scott's appeal. The Judgment must be affirmed because its findings of fact and conclusions of law are amply supported by the extensive credible evidence adduced at trial, primarily from Scott's own testimony.

Appellate courts in New Jersey deferentially review a court's division of a joint venture's assets and will not disturb the court's decision absent an abuse of discretion. See Fortugno v. Hudson Manure Co., 51 N.J. Super. 482, 504–06 (App. Div. 1958) (holding that equitable division of assets in a joint venture is "within the discretion" of the court). Indeed, a trial court's decision to fashion an appropriate equitable remedy to fit the particular circumstances of a case should be upheld absent an abuse of discretion. Marioni v. Roxy Garments Delivery Co., 417 N.J. Super. 269, 275 (App. Div. 2010).

Intervenor's due process arguments are wholly without merit. Intervenor's sole managing member (i.e., Scott) – the only person authorized to make decisions on Intervenor's behalf – has been a party to this suit since its inception. Indeed, since at least December 26, 2018, Scott has been fully aware of the equitable relief sought by Plaintiff in relation to the J.V. Property (Pa16-20), which equitable relief was ultimately fashioned and tailored by Judge Sheedy in entering the Judgment that orders the sale of the J.V. Property and the distribution of its assets. Even more, Intervenor itself has been a real party in interest since August 24, 2018, when it was named derivative as a plaintiff in the Complaint.

Intervenor's reliance on the RULLCA is also misplaced. First, the plain language of the statute makes clear that N.J.S.A. 42:2C-43 only applies "on application" by a judgment creditor of a member, and here, no such application

was made. Second, nothing in the Judgment permits a judgment creditor to interfere with the management of Intervenor, or foreclose Scott's transferrable interest in such. Third, Intervenor overlooks that RULLCA is silent on the equitable remedies available to coventurers, as present here.

The equitable remedy fashioned by Judge Sheedy is supported by longstanding New Jersey law concerning joint ventures, conversion, unjust enrichment, and constructive trusts. The same equitable remedy is supported by the court's credible and appropriate factual findings concerning Scott's decade-long breach of the joint venture duties he owes to Warren and his continuous pattern and practice of converting Warren's joint venture investment and interests to benefit and unjustly enrich Scott himself at Warren's expense.

Intervenor's appeal is nothing more than a last-ditch effort to distract the Panel and cause Warren to litigate two appeals. The Judgment should be affirmed.

Point I

The Compelled Sale Does Not Implicate Intervenor's Due Process Rights Because Intervenor's Controlling Interest Holder Is And Always Has Been A Party to the Suit

Intervenor's due process concerns in an action brought derivatively on its own behalf and against its sole managing member are wholly without merit. According to Intervenor, the Trial Court violated Intervenor's due process rights by compelling the sale of the J.V. Property (owned by Intervenor, whose sole

managing member is Scott) without Intervenor as a party to the action. Intervenor's argument falls flat for several reasons. First, under New Jersey law, Intervenor had adequate notice of the action from the second Scott – its sole managing member, and 99% owner – had notice of same. Second, Intervenor has itself been a party to this action from the start, as Warren brought the action derivatively on Intervenor's behalf. Accordingly, Intervenor's due process claims ring hallow, and should be rejected.

A. Intervenor's Managing Member Adequately Represented Intervenor's Interests

Under New Jersey law, due process requires notice to the interested parties of the pendency of an action so as to provide such parties an opportunity to present their objections. See U.S. Const. amend. XIV; N.J. Const. art. I, ¶ 1; Rosa v. Araujo, 260 N.J. Super. 458, 463, (App. Div. 1992) (quotation marks omitted) ("[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

As a non-human entity, a limited liability company – like Intervenor here – is adequately provided notice of a proceeding when its managing member becomes aware of the proceeding. See, e.g., United States v. Driscoll, No. 18-11762 (RK) (RLS), 2025 WL 30092, at *4 (D.N.J. Jan. 6, 2025) (a limited liability company

does not need to be joined in an action where the members who have "decision-making power over the LLC's activities" are joined and can "adequately representing the LLC's interests"); Foster Owners Co. v. Farrell, No. 14-5120 (FSH), 2015 WL 778758, at *6 (D.N.J. Feb. 24, 2015) (finding limited liability company was not an indispensable party under Fed. R. Civ. P. 19(b) where managing member was party to action).[4] Such notice is sufficient because, *inter alia*, in a manager-managed limited liability company, "any matter relating to the activities of the company is decided exclusively by the managers". Foster Owners Co., 2015 WL 778758, at *6 (citing N.J.S.A. 42:2C–37) (quotation marks omitted).

Here, Scott is and has been Intervenor's sole managing member for over a decade, and has been a party to this suit since its inception. (Ia9, 23; 6T58:18-59:5; 5T85:6–11; 7T145:5–12). As the sole manager and 99% owner of Intervenor, Scott has "decision-making power over the LLC's activities" and can "adequately represent[] the LLC's interests in this case." Driscoll, 2025 WL 30092, at *4.

Scott – the managing member and purported 99% interest holder in Intervenor was the named Defendant; Warren effectuated proper service of process

[4] Notably, the fact that members named in an action may have (unlike Scott here) interests "distinct" from the limited liability company itself does not prevent the members from adequately representing the company's interests. Foster Owners Co., 2015 WL 778758, at *7. Moreover, while *Foster Owners Co.* involved a federal rule, New Jersey courts have recognized that R. 4:26-1 is substantially similar to F.R.C.P. 19(b). See David Rago Auctions, Inc. v. Hutchison, No. A-1425-21, 2023 WL 6140270, at *9 (N.J. Super. Ct. App. Div. Sept. 20, 2023), cert. denied, 256 N.J. 209 (2024).

on Scott; Scott filed a responsive pleading; Scott actively participated in the litigation; Scott testified at trial; Scott was represented by competent counsel throughout the 7-years of litigation – all of which undeniably establishes by operation of law, that Intervenor's interests were adequately represented. Driscoll, 2025 WL 30092, at *4.

Even a cursory review of the Complaint makes clear that Intervenor owns the J.V. Property and that the J.V. Property lies at the heart of the dispute (Ia29-Ia39).

With that information alone, Intervenor would have known (and Scott, as its manager and 99% owner, did know) that Warren sought an adjudication regarding rights or interests in the J.V. Property. Intervenor cannot credibly dispute the inalienable conclusion that it had sufficient, and complete knowledge of the litigation, the claims, and otherwise. In essence, Scott was "147 Broad" or Intervenor – the managing member of Intervenor and holder of 99% of Intervenor's membership interest – and Scott actively defended the claims from start to finish. Scott even caused Intervenor to pay over one hundred thousand dollars' worth of Scott's legal fees in this action, (8T:120:20–121:10, 8T:118:13–119:5, and 10T52:4–53:4), which is a decision that only Intervenor's manager could approve. (Ia114); 7T113:2-11; Foster Owners Co., 2015 WL 778758, at *6.

Scott's consistently articulated position throughout this litigation from its inception through trial was: he held 99% membership interest in Intervenor, he was its sole managing member, he controlled, operated, and was the only person authorized to make decisions – including retaining counsel, defending a claim, and otherwise – for Intervenor. No amount of wordsmithing can alter the fact that "Scott" and "Intervenor" were essentially "the same".

As such, service of the Complaint on Scott was more than enough to make Intervenor aware, in 2018, of a challenge to its interests in the J.V. Property, which gave Intervenor ample time to seek to join the action and "protect" the interests already being represented by its manager and 99% owner, Scott. Instead, Intervenor, through its manager and 99% owner, Scott, elected to wait over six years – after the parties had incurred millions of dollars in legal fees, after the parties had prepared for and completed a ten-day bench trial, and after the Trial Court entered judgment in favor of Warren – before seeking to intervene. Courts do not interpret the long-held protections against due process violations so broadly as to insulate parties from their own dilatory tactics, and neither should this Panel.

B. In Any Event, Intervenor Is Already a Party to This Action.

Intervenor itself was a real party in interest from the moment Warren brought this suit on its behalf. (Ia29). Warren is and was justified in bringing a suit on Intervenor's behalf because he is a member of Intervenor, based on, the

undisputed fact, which was confirmed by Scott during the trial on numerous occasions, that Warren maintained an interest entitling him to 49% of any distributions and profits in Intervenor. (2T113:211–14:22); (8T37:2-16). Accordingly, Intervenor's arguments to the contrary are meritless.

Warren is a member of Intervenor and properly asserted a derivative claim. See N.J.S.A. 42:2C-68; N.J.S.A. 42:2C-69. Under New Jersey law, RULLCA "does not require [the members'] agreement to be bound by an operating agreement be in writing or that it be executed by them." Premier Physician Network, LLC v. Maro, 468 N.J. Super. 182, 195 (App. Div. 2021) (citing N.J.S.A. 42:2C-2). In fact, the operating agreement may be oral. Id.; N.J.S.A. 42:2C-2 (including "oral" agreement in definition of operating agreement).

Here, the record is replete with testimony and other evidence demonstrating the operating agreement between Scott and Warren concerning Intervenor was a combination of oral, implied by conduct, and written. **First**, as to the oral component of the agreement, Warren and Scott both testified that, before entering into the June 2014 Agreement, the parties had agreed that Warren would have a 49% interest in the profits of Intervenor. (2T113:21-114:22); (8T37:2-16).

Second, the parties' agreement was further implied by their conduct – namely, through the March 15, 2016 capital call made on Warren by Scott's counsel. In New Jersey, a capital call is a demand from the LLC upon a member to

collect funds for the LLC when the need arose. See Care One, LLC v. Straus, No. A-1215-20, 2022 WL 17072371, at *9 n.3 (N.J. Super. Ct. App. Div. Nov. 18, 2022). Here, it cannot be reasonably disputed that Warren made contributions to Intervenor to become a member upon its formation in accordance with an agreement to become initial members, in accordance with an agreement between Warren and the company after its formation, and in accordance with the operating agreement or an agreement between Warren and the company.

Alternatively, Warren became a member of Intervenor pursuant to "Section 10.C of the company's amended and restated operating agreement . . . , which provides that for immediate family members like Warren and Scott, '[n]otwithstanding any other provisions of this agreement, a Member's interest may be transferred in whole or in part to the estate of a Member or by sale, gift, or bequest to a Member's spouse, parent, child, grandchild, brother or sister, niece or nephew over the age of 21 . . . .'" (Ia12). Warren properly asserted a derivative claim.

In any event, Warren duly served Intervenor's managing member and 99% owner, Scott, on September 17, 2018. (Pa261-262). Moreover, since at least December 26, 2018, Intervenor and Scott have been fully aware of the equitable relief sought by Warren in relation to J.V. Property, which equitable relief was

granted by Judge Sheedy in entering the Judgment that orders the sale of J.V. Property and the distribution of its assets. (Ia8-28).

Even if Intervenor was not named as a defendant, the undisputed fact is Intervenor was a real party in interest and its due process rights were not violated. See Bussell v. DeWalt Prods. Corp., 259 N.J. Super. 499, 510–11 (App. Div. 1992) (finding that "[e]ven if an individual is not named as a party of record, he may be liable for the judgment if he participated in the suit or had an opportunity to be heard."); Kosson Architectural Aluminum & Glass, Inc. v. T2 Structural Steel, Inc., 2006 WL 350164, at *3 (N.J. Super. Ct. App. Div. Feb. 17, 2006); Allbright v. Standard Roofing Co., 10 N.J. Misc. 646, 647 (1932), aff'd sub nom. Albright v. Standard Roofing Co., 111 N.J.L. 238 (1933) ("the court below was entitled to assume" that the "Company and [respondent] were identical", where nothing was "offered in the court below to dispute the claim that . . . [the] Company was merely the trade-name of [respondent] and that the latter is the real party in interest.").

This equitable remedy is supported by longstanding New Jersey law concerning joint ventures, conversion, unjust enrichment, and constructive trusts. The same equitable remedy is supported by the Trial Court's credible and appropriate factual findings concerning Scott's decade-long breach of the joint venture duties he owes to Warren and his continuous pattern and practice of

converting Warren's joint venture investment and interests to benefit and unjustly enrich Scott himself at Warren's expense.

C. Scott's Due Process Argument Is Made in Bad Faith

Where, as here, an appellant like Intervenor (a/k/a Scott) is found liable of bad faith, fraud or unconscionable acts in the transaction, which forms the basis of the lawsuit, the Court is justified in refusing to listen to the application even in situations – unlike this case – in which an intervenor has well-founded due process arguments. Goodwin Motor Corp. v. Mercedes Benz of N. Am, Inc., 172 N.J, Super. 263, 272 (App. Div. 1980).

Intervenor is Scott's alter ego. See Beuff Enters. Fla., Inc. v. Villa Pizza, LLC, No. 07-2159 PGS, 2008 WL 2565008, at *12 (D.N.J. June 25, 2008). As the Trial Court observed:

> Scott, by way of manipulation of the books and loan accounts, has converted funds provided by Warren and has utilized them in a manner which directly impedes the possibility of financial gain by Warren. Scott appears to have utilized these manipulation methods in conjunction with unnecessary utilization of affiliate companies SD LLC and Tri City to essentially reside in the second-floor apartment at a reduced rate while simultaneously rendering 147 Broad devoid of any opportunity to allow Warren a return on his investment to which he is entitled.

(See Ia27).

Intervenor – Scott – cannot proffer any legitimate argument in support of a claim that Intervenor's interests were not adequately represented nor can Scott

articulate any valid reason for not seeking to intervene at any time prior to the Court issuing its decision, which the Court issued following 7 years of litigation, and a ten-day bench trial.

It was only upon the Court rendering its decision – a decision Scott believed was unfavorable – that Scott as managing member and decision maker for Intervenor "had an epiphany" that Intervenor's interests were not adequately represented in the preceding 7-years of litigation, and following the 10-day bench trial. Respectfully, it is difficult to comprehend what – other than the Court's decision which Scott appealed and found unfavorable – occurred "alerting" Scott, as sole person vested with decision making authority for Intervenor, that Intervenor's interests were not adequately represented.

If Scott, the managing member and sole decision maker for Intervenor, legitimately believed there was a need for Intervenor to join in the case – a case in which Intervener has been identified in the caption as a derivative party in interest since its inception – then Intervenor would have sought to intervene long, long ago. Indeed, the bad faith nature of Intervenor's appeal is proven by the fact that Scott chose to cause Intervenor to intervene after years of discovery, an extensive bench trial, and the entry of the Court's June 30, 2024 Judgment.

To the extent Intervenor asserts it lost "an opportunity to be heard at trial", Intervenor is wrong. (Ia155). First, Intervenor was provided an opportunity to be

heard at trial through its sole manager and 99% owner, Scott, who was duly served with process and a party to this action from its inception. (Ia6) Second, not only was Intervenor fully represented by its managing member at trial, but also any purported denial of opportunity was effected by its own manager, not Warren or the Trial Court. At some point between service of process in 2018 and entry of Judgment in June 2024, Scott elected not to cause Intervenor to become a party to the action. Scott does not get to cry foul now, having failed to take action for years.

Point II

Issues II through IV in Intervenor's Brief Are Not Properly Before This Panel Because They Were Not Raised at the Trial Court

It is procedurally improper for this Court to consider Points II through IV in Intervenor's brief because appellant did not raise any of these issues to the trial court. State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). The court should dismiss these claims. As discussed above, Scott, as the 99% member and sole manager of the LLC, had the opportunity to raise these issues to the trial court and failed to do so. The LLC, which Scott manages, does not get a second bite at the apple now to raise new issues.

It is a "well-settled principle that [] 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." State v. Robinson, 200 N.J. 20 (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 234); State v. Jones, 232 N.J. 308, 321 (2018); Zaman v. Felton, 219 N.J. 199, 226 (2014); J.K. v. N.J. State Parole Bd., 247 N.J. 120, 138 n.6 (2021). It is procedurally improper for this court to consider Intervenor's arguments not properly presented to the trial court, which do not challenge the court's jurisdiction or involve a matter of the public interest. State v. Robinson, 200 N.J. 20 (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 234. Further, these questions must be reviewed under an abuse of discretion standard. Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011) (quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 App. Div. 2007)) ("[w]hen examining a trial court's exercise of discretionary authority, we reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances.").

Point III

Intervenor's Invocation of N.J.S.A. 42:2C-43 Has No Bearing on the Trial Court's Broad Equitable Powers to Adjudicate the Rights of Co-Venturers

Intervenor contends, without citation to a single case, that cherry-picked provisions of RULLCA displaced the Trial Court's broad equitable power. According to Intervenor, Warren became a judgment creditor of a member of

Intervenor (*i.e.*, Scott) once the court granted judgment to Warren on Counts six and seven of Warren's complaint (Ia24-28), arguing the sole remedy of a judgment creditor of a limited liability company is 42:2C-43, which permits the charging of the transferable interest of the LLC member to satisfy the judgment. See Ib24. Intervenor is wrong.

N.J.S.A. 42:2C-43 of New Jersey's RULLCA provides:

> On application by a judgment creditor of a member, a court may charge the transferable interest of the member with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the limited liability company interest. An action by a court pursuant to this section does not deprive any member of the benefit of any exemption laws applicable to his transferable interest. A court order charging the transferable interest of a member pursuant to this section shall be the sole remedy of a judgment creditor, who shall have no right under 42:2C-1 et seq. or any other State law to interfere with the management or force dissolution of a limited liability company or to seek an order of the court requiring a foreclosure sale of the transferable interest. Nothing in this section shall be construed to affect in any way the rights of a judgment creditor of a member under federal bankruptcy or reorganization laws.

Id.

Here, the statute's plain language demonstrates its inapplicability to this case. First, as the statute's first sentence makes clear, N.J.S.A. 42:2C-43 only applies when there is an "application by a judgment creditor of member[.]" See Zavodnick v. Leven, 340 N.J. Super. 94, 97 (App. Div. 2001) (assessing scope of

charging lien where party filed motion to charge member's interest). In this case, no party, let alone Warren, made any such application. Thus, even assuming *arguendo* that Warren was a judgment creditor of a member within the meaning of the statute, the statute cannot apply because that perquisite was never met.

Second, as Intervenor acknowledges, N.J.S.A. 42:2C-43 was enacted to prevent a *judgment creditor* from (i) interfering with the management of a limited liability company or (ii) "requiring a foreclosure sale of the transferable interest." Ib24; Cf. Parke Bank v. 2820 Mt. Ephraim Ave., LLC, No. A-0943-18T2, 2019 WL 1977092, at *3 (N.J. Super. Ct. App. Div. May 3, 2019) (finding 42:2C-43 inapplicable where trial court's order against sole manager of a limited liability company did not permit creditor to interfere with management of company). But nothing in the Judgment or the record grants Warren rights to manage Intervenor. Nor does any part of the Judgment require a foreclosure sale of Scott or Melissa's transferable interest. (Ia19-Ia28).

Instead, the Judgment aligns with long-standing New Jersey law finding that the RULLCA neither prevents an LLC member from facing liability for tortious conduct, nor prevents a court from providing equitable relief to party aggrieved by a member's tortious conduct. See N.J.S.A. 42:2C-30(a)(2); see also 49 N.J. Prac., Business Law Deskbook § 3:17 (2024-2025 ed.) ("RULLCA does not provide

protection if the liability or obligation arises from a member's assumption of liability or if the member committed or ratified a tortious act as a member").

Third, Intervenor overlooks that the Court entered relief for Warren not as a judgment creditor of a member of Intervenor, but as a party wronged by a fellow coventurer. (Ia24-28). A joint venture is "[a] special combination of two or more persons where in some specific venture a profit is jointly sought without any actual partnership or corporate designation, and a joint adventure is an undertaking usually in a single instance to engage in a transaction of profit where the parties agree to share profits and losses." Wittner v. Metzger, 72 N.J. Super. 438, 444 (App. Div. 1962) (quotations and citations omitted), cert. denied, 37 N.J. 228 (1962).

The relation of joint venturers, "like that of copartners, is fiduciary, one of trust and confidence, calling for the utmost good faith, permitting of no secret advantages or benefits." Silverstein v. Last, 156 N.J. Super. 145, 152 (App. Div. 1978) The joint venture relationship is a "corollary" of the rule that "the managing joint adventurer, like the managing copartner, has concomitantly the strictest possible obligation to a coventurer since the mutual affairs are delegated to his supervision and control without expectation or anticipation by either of routine inference or monitoring on the part of the nonmanaging venturer." Silverstein v.

Last, 156 N.J. Super. 145, 152 (App. Div. 1978) (citations omitted); see also, Wittner, 72 N.J. Super at 444.

Here, the Trial Court found Warren and Scott were joint venturers with respect to the J.V. Property because, among other things, they shared in Intervenor's profits and losses. (2T51:2-17, 2T53:2-6, 2T54:21 to 55:5, 2T77:12 to 79:14, 2T113:21 to 114:22, 2T117:19 to 119:6, 9T143:5 to 144:6). Scott conceded, and therefore, its undisputed that Warren is entitled to 49% of Intervenor's profits; Warren, having personally guaranteed the $1,204,000 acquisition and construction mortgage from Amboy Bank, agreed to share in the losses; Warren, as confirmed by Scott, agreed to cover any shortfalls in cash flow regarding vendors engaged by Intervenor; and Warren covered substantial costs for Intervenor from 2013 through 2015 (Ia26).Accordingly, the rights of a judgment creditor against a member of an LLC were not the only rights at issue before the Court. RULLCA is silent as to rights of coventurers, and Intervenor's attempt to sidestep the joint venture at the heart of this case is inapposite.

Point IV

The Equitable Remedy of a Forced Sale Was Properly Fashioned Within the Sound Discretion of the Trial Court Based Upon the Findings Made at Trial

In fashioning equitable relief, judges have "broad discretionary power to adapt equitable remedies to the particular circumstances of a given case." Marioni, 417 N.J. Super. at 275; see also Tarta Luna Properties, LLC v. Harvest Restaurant

Groups LLC, 466 N.J. Super. 137, 153 (App. Div. 2021). "Reviewing appellate courts should 'not disturb the factual findings and legal conclusions of the trial judge' unless convinced that those findings and conclusions [are] 'so manifestly unsupported or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Griepenberg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (citing Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)).

Where, as here, Judge Sheedy's findings concerning the parties' relationship and conduct are well-supported by substantial credible evidence, they are binding on appeal, and the Court's conclusions flowing from those findings, including that the property was purchased and operated as a joint venture, are likewise controlling. Mitchell v. Oksienik, 380 N.J. Super. 119, 127 (App. Div. 2005).

Intervenor disingenuously claims that Warren, in Counts Six and Seven of the Complaint, did not request equitable relief, while in the next sentence quoting Warren's request that the court award "[a]ll other relief that the Court deems equitable and just." (Ia37-38). A forced sale of the J.V. Property, with the division of the proceeds between the parties, is an equitable remedy at the Trial Court's disposal. Mitchell, 380 N.J. Super. at 128 (citing Swartz v. Becker, 246 N.J. Super. 406, 412–13 (App. Div. 1991)).

The Judgment should be affirmed because the remedy fashioned by Judge Sheedy comports with the Court's factual and credibility determinations; the Court properly tailored its decision and relief utilizing those determinations; and the equitably remedy is consistent with established precedent failing squarely within the Court's vested discretion. Judge Sheedy's factual findings and legal conclusions following a ten-day bench trial are overwhelmingly supported by and consistent with the competent, relevant, and reasonably credible evidence adduced at trial; therefore, Warren respectfully submits that there exists no basis to grant Intervenor's appeal.

Point V

Trial Courts Have Authority to Order a Partition and the Decision of Judge Sheedy Must be Affirmed.

"A court [of equity] must exercise its inherent equitable jurisdiction and decide the case based upon equitable considerations." Thieme v. Aucoin-Thieme, 227 N.J. 269, 287 (2016) (alteration in original) (quotation marks omitted) (quoting Kingsdorf v. Kingsdorf, 351 N.J. Super. 144, 157 (App. Div. 2002)) (abrogated on other grounds). Because "equity 'will not suffer a wrong without a remedy[,]'" Crane v. Bielski, 15 N.J. 342, 349 (1954), "a court's equitable jurisdiction provides as much flexibility as is warranted by the circumstances[.]" Matejek v. Watson, 449 N.J. Super. 179, 183 (App. Div. 2017).

"Equitable remedies are distinguished for their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety in application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties." Id. (quotation omitted).

Further, a "court can and should mold the relief to fit the circumstances[.]" Cooper v. Nutley Sun Printing Co., 36 N.J.189, 199 (1961). "[T]he court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties." Sears, Roebuck & Co. v. Camp, 124 N.J. Eq. 403, 412 (1938) (quoting Pom. Eq. Jur. § 109 (4th ed. 1918)). "[E]quities arise and stem from facts which call for relief from the strict legal effects of given situations." Thieme, 227 N.J. at 287 (quoting Carr v. Carr, 120 N.J. 336, 351 (1990)). Notably,

> The jurisdiction of a court of equity does not depend upon the mere accident whether the court has, in some previous case or at some distant period of time, granted relief under similar circumstances . . . . And the mere fact that no precedent exists is no sound reason for denying relief when the situation demands and no other principle forbids. Every just order or rule known to courts of equity was born of some emergency, to meet some new conditions, and was, therefore, in its time, without a precedent. New remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief.

Briscoe v. O'Connor, 115 N.J. Eq. 360, 364-65 (Ch. 1934) (internal citations omitted). As established above, a compelled sale is an appropriate equitable remedy for successful causes of action for unjust enrichment and conversion. Scott mismanaged the J.V. Property for decades to provide an ongoing benefit for himself at the direct expense of Warren. The sale of partition was the equitable solution to ensure that all parties received relief.

In the analogous situation of courts evaluating the validity and legality of the imposition of a constructive trust, New Jersey courts have upheld a compelled sale through the imposition of a constructive trust or other form of unique equitable relief is an appropriate equitable remedy when the trial Court's determinations were supported by the factual evidence supporting claims of conversion, unjust enrichment, and misappropriation. New Jersey courts have long used constructive trusts not only to remedy the wrongful acquisition or retention of property but also to direct the management and disposition of such property to ensure equitable outcomes. See Thompson v. City of Atlantic City, 386 N.J. Super. 359, 376-377 (App. Div. 2006) (collecting cases), aff'd as modified on other grounds, 190 N.J. 359 (2007).

"A constructive trust is a relationship with respect to property subjecting the person holding the title to the property, to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that

he would be unjustly enriched if he were permitted to retain the property." Restatement (Second) of Trusts § 1, Comment e. (1959) (Pa234-35); Stretch v. Watson, 5 N.J. 268, 278–279 (1950); Hill v. Warner, Berman & Spitz, P.A. 197 N.J. Super. 152, 168 (App. Div. 1984).

A constructive trust is an equitable remedy and not a cause of action in and of itself. See Flanigan v. Munson, 175 N.J. 597 (2003). Courts in New Jersey have traditionally applied a two-part test when determining whether a constructive trust is an appropriate remedy. D'Ippolito v. Castoro, 51 N.J. 584 (1968). There must be a showing of (1) a wrongful act, which (2) resulted in an unjust enrichment. Id.; See Stewart v. Harris Structural Steel Co., 198 N.J. Super. 255, 265 (App. Div. 1984) (imposing trust not only upon monies paid as consideration in a subsequently voided sale of corporate stock, but also on the interest generated on the sale proceeds during litigation).

It is fundamental that a constructive trust should "be impressed in any case where to fail to do so will result in an unjust enrichment." D'Ippolito, 51 N.J. at 588; Hirsch v. Travelers Ins. Co., 134 N.J. Super. 466, 470 (App. Div. 1975). "'[A] constructive trust may arise . . . even though the acquisition of the property was not wrongful. It arises where the retention of the property would result in the unjust enrichment of the person retaining it.'" Stewart, 198 N.J. Super. at 266 (quoting D'Ippolito, 51 N.J. at 589).

These cases illustrate the broad powers vested with the trial court with respect to the imposition of a constructive trust and the implication of same, which includes the sale of the property if such an action is necessary to achieve an equitable result, such as satisfying the claims of those like Warren who have been unjustly deprived of their property or interests. The court can impose specific directions on how the proceeds of the sale are to be distributed to ensure that no party is unjustly enriched at the expense of another. Thus, selling the J.V. Property to fulfill the purpose of the joint venture is not only permissible but has also been found to be (and affirmed) as a necessary action directed by the court to ensure equity amongst the parties involved.

CONCLUSION

For the foregoing reasons, the Judgment should be affirmed because it is based on sound findings of fact amply supported by the trial record and the well-established conclusions of law that flow therefrom.

Respectfully,

/s/ Timothy C. Moriarty

TIMOTHY C. MORIARTY

WARREN DIAMOND, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF 147 BROAD ST., LLC, Plaintiff/Respondent, v. SCOTT DIAMOND, Defendants/Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-000581-24 **On Appeal From:** SUPERIOR COURT OF NEW JERSEY LAW DIVISION DOCKET NO. MON-L-3090-18 Sat Below: Hon. Kathleen A. Sheedy, J.S.C.

REPLY BRIEF ON BEHALF OF INTERVENOR/APPELLANT 147 BROAD ST., LLC IN SUPPORT OF ITS APPEAL OF THE TRIAL COURT'S JUNE 30, 2024 JUDGMENT

GREENBAUM, ROWE, SMITH & DAVIS LLP
331 Newman Springs Road
River Centre Building 1, Suite 122
Red Bank, New Jersey 07701
(732) 476-2660
Attorneys for Intervenor/Appellant,
147 Broad St., LLC

Of Counsel and On the Brief:

Darren C. Barreiro, Esq. (047911998) – dbarreiro@greenbaumlaw.com

Joseph A. Natale, Esq. (275622018) – jnatale@greenbaumlaw.com

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PRELIMINARY STATEMENT

It is hardly controversial that due process protections should intervene to overturn a court-ordered sale of property owned by an entity that was never named as a party, served with process, afforded the right to present evidence, or given an opportunity to defend against any proposed claims or consequences. But Plaintiff/Respondent Warren Diamond ("Warren") would prefer that this Court eviscerate those Constitutional protections and sanction the Trial Court's Judgment so depriving Intervenor/Appellant 147 Broad St., LLC ("147 Broad") of its property.

This Court should decline that invitation. As part of his proverbial effort to throw everything at the wall in hopes that something sticks, Warren first contends that no due process violation occurred because Defendant/Respondent Scott Diamond ("Scott") was adequately representing 147 Broad's interests, overlooking that Scott is undisputedly not the only member of that entity. Out of the other side of his mouth, Warren next contends that no due process violation occurred because Warren was representing 147 Broad's interests by virtue of his derivative claims. This is despite that the Trial Court dismissed those claims on the ground that Warren was never a member of 147 Broad. Grasping at straws, Warren then claims that Scott and 147 Broad are one in the same, even though he never pursued any such alter ego theory at trial and improperly raised this unsupported argument for the first time on appeal. None of Warren's arguments, however inconsistent they may be,

do anything to cure the reversible error resulting from the Trial Court's due process violation.

Nor can Warren overcome the fact that the Trial Court's Judgment awarded relief that New Jersey law prohibits. While Warren asks this Court to ignore the newly-raised arguments that 147 Broad made in this respect, he fails to appreciate that his failure to name 147 Broad as a party precluded it from raising them previously. And while Warren emphasizes the discretion that courts have to fashion equitable remedies, an abuse of that discretion occurs when the remedies are, as was the case here, inconsistent with controlling legal principles.

To cure such legal error, this Court should reverse the Trial Court and vacate the portions of its Judgment that seek to compel the sale of 147 Broad's Property.

REPLY STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

147 Broad relies upon and incorporates by reference the statement of facts and procedural history set forth in its opening brief dated February 25, 2025.[2]

[1] The Reply Statement of Facts and Statement of Procedural History have been combined in the interest of judicial economy.

[2] All capitalized terms not defined herein shall have the same meaning as set forth in 147 Broad's opening brief.

LEGAL ARGUMENT

POINT I

WARREN'S MISGUIDED ARGUMENTS FAIL TO OVERCOME THE CLEAR REVERSIBLE ERROR THAT THE TRIAL COURT COMMITTED BY ORDERING THE PARTITION AND FORCED SALE OF A NON-PARTY'S PROPERTY WITHOUT ANY DUE PROCESS OF LAW (Raised Below; Ia151—Ia152)

In his responding brief, Warren presents nothing more than a hodgepodge of reasons why he believes that it was acceptable for the Trial Court to order a non-party, 147 Broad, to partition and sell its Property without any due process of law. Those reasons are as unsupported as they are self-serving.

The "critical components" of due process "are adequate notice, opportunity for a fair hearing[,] and availability of appropriate review." Schneider v. E. Orange, 196 N.J. Super. 587, 595 (App. Div. 1984). "The right to a hearing includes not only the right to present evidence[,] but also a reasonable opportunity to know what claims must be defended against and what consequences are proposed." In re Heller, 73 N.J. 292, 311 (1977). Typically, without being made a party by service of process, "one is not bound by a judgment[.]" Hansberry v. Lee, 311 U.S. 32, 40 (1940).

As set forth below, none of the reasons advanced by Warren can overcome the fact that 147 Broad – which was never made a party to the action, afforded the right to present evidence, or given a reasonable opportunity to defend against any

proposed claims or consequences before the Trial Court entered the Judgment compelling the sale of 147 Broad's Property – was denied its Constitutional right to due process. Certainly, this constitutes reversible error.

A. The Prescence in an Action of One Member of an LLC Is Not an Adequate Substitute for Due Process Upon that LLC

First, Warren contends that no due process was required for the Trial Court to compel the sale of 147 Broad's Property simply because one of its members, Scott, was a party to the underlying litigation. In support of this fallacy, Warren relies on nothing more than two unpublished federal court decisions: United States v. Driscoll, No. 18-11762, 2025 WL 30092 (D.N.J. Jan. 6, 2025) and Foster Owners Co. v. Farrell, No. 14-5120, 2015 WL 778758 (D.N.J. Feb. 24, 2015). Pb30-Pb33. The argument fails for multiple reasons.

As an initial matter, federal district court decisions, whether published or not, are not binding on New Jersey courts. See In re Contest of Nov. 8, 2011, 210 N.J. 29, 45 (2012) (holding, with respect to a published federal district court decision, that "the federal decision simply is not binding on our courts"). Pursuant to Rule 1:36-3, the federal decision becomes all the more non-binding when, like Driscoll and Foster Owners, it is unpublished. See R. 1:36-3.

In addition to being non-binding, Driscoll and Foster Owners are readily distinguishable. In both cases, the courts found that the parties' jointly-owned LLCs were not necessary or indispensable parties under Fed. R. Civ. P. 19 because all of

the LLC's members were already joined in the action, eliminating any risk that the LLC's interests were not being adequately represented in the case. See Driscoll, 2025 WL 30092 at *4, 9 (holding that, because the parties were "the only two members of the LLC" and were both already "joined in this action," they were "adequately representing the LLC's interests"); Foster Owners, 2015 WL 778758, at *6 (holding that, "[b]ecause all members of [a] small limited liability company [were] before the Court," the LLC was not an indispensable party).

Unlike in those cases, not all members of 147 Broad were parties to this litigation. Indeed, one of the undisputed members of 147 Broad, Melissa Diamond, is not and never was made a party to the case. Thus, Warren's reliance on Driscoll and Foster Owners – however non-binding they may be – is also misplaced.

What is more, multiple reported federal decisions have reached an opposite conclusion and held that an LLC is a necessary party to a dispute among its members. See, e.g., Trident-Allied Assocs., LLC v. Cypress Creek Assocs., LLC, 317 F. Supp. 2d 752, 754-56 (E.D. Mich. 2004); Weber v. King, 110 F. Supp. 2d 124, 128 (E.D.N.Y. 2000); Trademark Retail, Inc. v. Apple Glen Ivs., LP, 196 F.R.D. 535, 540 (N.D. Ind. 2000). By any measure, therefore, Warren failed to establish that the presence of one of 147 Broad's members in this action was sufficient to safeguard the entity's procedural due process rights.

B. 147 Broad's Due Process Rights Were Not Adequately Protected by Virtue of the Derivative Claims that Warren, as a Non-Member of the Entity, Attempted to Assert on its Behalf

Warren next argues that 147 Broad's due process rights were not violated because Warren was adequately protecting them by attempting to assert derivative claims on its behalf. This argument is untenable.

As set forth in 147 Broad's opening brief, Warren could not maintain claims on behalf of 147 Broad as he was never a member of the entity. See N.J.S.A. 42:2C-69 (stating that a derivative action "may be maintained only by a person that is a member" throughout the action). As set forth in the Judgment, "Warren was not a member of [147 Broad] and as such, ha[d] no standing to be granted" any relief predicted on his purported membership status. Ia21.

Seemingly unwilling to accept this conclusion, Warren argues in his responding brief that he is in fact a member of 147 Broad. See Pb33—Pb35. That argument is not only erroneous – it is improper. If Warren wished to challenge the Trial Court's finding that he was not a member of 147 Broad as part of this appeal, Warren should have filed a cross-appeal. He did not. Therefore, this Court should decline Warren's invitation to revisit the Trial Court's conclusion. See Bogey's Trucking & Paving, Inc. v. Indian Harbor Ins. Co., 395 N.J. Super. 59, 69 n.3 (App. Div. 2007) (observing that it is only "an alternative argument for affirmance that can be raised without cross-appeal").

Put simply, Warren is not, and never was, a member of 147 Broad. This belies any contention by Warren that his baseless derivative claims were somehow adequate to protect 147 Broad's due process rights.

C. Scott's Party Status Alone Was Not Sufficient to Protect 147 Broad's Interests and Warren Should Be Estopped from Claiming Otherwise

Similarly unpersuasive is Warren's argument that 147 Broad's interests were protected simply by virtue of Scott having been named a party to the action. In fact, Warren, who throughout the litigation pursued derivative claims on the basis that he purportedly represented 147 Broad's interests, should be judicially estopped from even making this baseless assertion.

"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 Props. Ass'n v. Borough of Cresskill, 308 N.J. Super. 326, 335 (App. Div. 1998). The doctrine "is meant to protect the integrity of the judicial system" and "designed to prevent litigants from 'playing fast and loose with the courts.'" Id. at 335.

For six years, Warren took the position that he – not Scott or anyone else – was representing 147 Broad's interests throughout this lawsuit. See, e.g., Tully v. Mirz, 457 N.J. Super. 114, 124 (App. Div. 2018) (citation omitted) ("The purpose of a derivative suit is to provide shareholders, or a representative shareholder, with 'a means to protect the interests of the corporation[.]'"). In fact, Warren asserted

that, as a purported member of 147 Broad, he was entitled to bring a derivative lawsuit to protect 147 Broad's interests.

Now, Warren has flip-flopped. Instead of arguing that he represents the interests of 147 Broad, Warren now contends that Scott, who was aware of the litigation, should have caused 147 Broad to intervene prior to the Court issuing its Judgment. Clearly, Warren's new position is contradicted by the prior position he advanced during this litigation. Indeed, had 147 Broad sought to intervene prior to the entry of the Judgment, Warren's argument, that he was protecting 147 Broad's interests, would have precluded 147 Broad's intervention. Based upon the present circumstances, the Court should reject Warren's attempts to play "fast and loose" with the Court and estop Warren from arguing that Scott was adequately representing 147 Broad's interests such that its due process rights were not violated.

Warren should also be precluded from arguing, for the first time on appeal, that 147 Broad was Scott's alter ego such that his status as a party should have operated to satisfy 147 Broad's due process rights. Under New Jersey law, courts will pierce the corporate veil and treat the corporation as an alter ego of its owners where the corporation fails to adhere to corporate formalities, and acts as a mere conduit to perpetuate fraud. See Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388 (App. Div. 1989). Our Appellate Division has held that, even where a single individual dominates all aspects of the business, courts will not breach the

corporate veil where the corporation: (1) does not comingle funds; (2) maintains separate books and records; (3) files its own tax returns; and (4) maintains its own bank accounts. See Verni ex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160 (App. Div. 2006). The party seeking to pierce the veil bears the burden of proof. Tung v. Briant Park Homes, Inc., 287 N.J. Super. 232, 240 (App. Div. 1996).

At no point during the trial did Warren ever allege that 147 Broad failed to adhere to corporate formalities, or that it was an alter ego of Scott. In fact, there is no denying that Warren's position was that 147 Broad was a distinct entity from Scott, and that Warren was pursuing remedies on a derivative basis, on behalf of 147 Broad. Certainly, Warren's position was grounded upon the undisputed fact that 147 Broad is a distinct entity. This is consistent with New Jersey law. See N.J.S.A. 42:2C-4(a) ("A limited liability company is an entity distinct from its members.").

Nonetheless, Warren now argues, contrary to his earlier position, that 147 Broad is an "alter ego" of Scott. Raising such an issue for the first time on appeal, when Warren had an opportunity to earlier, is plainly improper. See N. Haledon Fire Co. No. 1 v. Borough of N. Haledon, 425 N.J. Super. 615, 631 (App. Div. 2012).

Regardless, Warren's dredged up theory that 147 Broad is nothing more than Scott's alter ego and therefore adequately represented by Scott not only flies in the face of the evidence and Warren's prior assertions, it also overlooks that one of the undisputed members of 147 Broad, Melissa Diamond, was never a party to this

proceeding. It is far-fetched to claim that an entity is the mere alter ego of one person when that entity is partially owned by someone else.

D. Non-Party 147 Broad Was Never a "Real Party In Interest" Because It Never Effectively Participated in the Lawsuit

Similarly baseless is Warren's contention that 147 Broad was a "real party in interest" all along. The cases that Warren cites in support of this proposition, Pb36, involved situations where an entity effectively participated in the litigation but due to a misnomer, was never technically named. See Bussell v. DeWalt Prods. Corp., 259 N.J. Super. 499, 510-11 (App. Div. 1992) (finding that a defendant's successor company, although not named, was a real party in interest where it was actually defending the suit through its insurance carrier); Kosson Architectural Aluminum & Glass, Inc. v. T2 Structural Steel, Inc., No. A-5814-04T1, 2006 WL 350164, at *3 (App. Div. Feb. 17, 2006) (finding that an entity was a real party in interest where it participated in the legal proceeding but, due to a misspelling of its corporate name, was technically misidentified in the caption); Allbright v. Standard Roofing Co., 10 N.J. Misc. 646, 647 (1932) (holding that an individual was the real party in interest where the "company" named as the defendant was not a formally organized legal entity but instead nothing more than a trade name used by the individual).

There were no such misnomers or technical errors here. At bottom, this case involves a question of whether 147 Broad – an independent legal entity that was not a party to this litigation – was afforded its due process rights before being deprived

of its Property. As 147 Broad and one of its members were excluded from this litigation prior to the entry of the Judgment, there can be no question that 147 Broad was denied its due process rights. Accordingly, the Court should find that the Trial Court committed a reversible error when it deprived 147 Broad of its Constitutional rights and vacate the Judgment.

POINT II

THIS COURT HAS GROUNDS TO CONSIDER THE SUPPLEMENTAL ARGUMENTS RAISED IN 147 BROAD'S OPENING BRIEF BECAUSE, AS A NON-PARTY, IT HAD NO OPPORTUNITY TO RAISE THOSE ARUGMENTS BELOW (Not Raised Below)

Warren contends that there are no grounds for this Court to consider the arguments that 147 Broad raised in Points II through IV of its opening brief because they were technically not raised below. Not so.

As Warren admits, appellate courts only decline to consider issues not presented below "when an opportunity for such a presentation is available[.]" State v. Robinson, 200 N.J. 1, 20 (2009) (citation omitted). As 147 Broad indicated in Footnote 3 of its opening brief, it did not have an opportunity to raise the subject issues before the entry of the Judgment because 147 Broad, in violation of its due process rights, was never made a party or served with process before then.

In any event, appellate courts always review legal issues de novo. See Smith v. Millville Rescue Squad, 225 N.J. 373, 387 (2016). Because Point II (whether

N.J.S.A. 42:2C-43 prohibited the compelled sale of 147 Broad's Property as an award of relief to Warren), Point III (whether joint venturers whose venture is coming to an end may legally seek a partition of property that they do not own) and Point IV (whether the Trial Court was legally authorized to award damages based on a new theory) each raise questions of law, this Court may address them de novo.

POINT III

DESPITE THE BROAD LATITUDE THAT COURTS MAY HAVE WHEN FASHIONING EQUITABLE REMEDIES, THE TRIAL COURT ABUSED ITS DISCRETION BY FASHIONING A REMEDY THAT IS INCONSISTENT WITH NEW JERSEY LAW (Not Raised Below)

Warren would prefer that this Court overlook the well-grounded legal attacks on the Judgment that 147 Broad included in Points II through IV of its opening brief based on nothing more than the principle that courts have broad discretion when fashioning equitable remedies. See Pb46 – Pb47. That discretion, however, is not unbridled and does not permit a court to award relief that New Jersey law prohibits.

Although trial courts have broad discretion "in fashioning an appropriate equitable remedy to fit the particular circumstances," an appellate court may set aside the determination of the trial court for "an abuse of discretion." Marioni v. Roxy Garments Delivery Co., Inc., 417 N.J. Super. 269, 275 (App. Div. 2010). "A court abuses its discretion 'when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible

basis.'" Tarta Luna Props., LLC v. Harvest Rests. Grp. LLC, 466 N.J. Super. 137, 154 (App. Div. 2021). Implicit in the exercise of equitable discretion "is conscientious judgment directed by law and reason and looking to a just result.'" In re Estate of Hope, 390 N.J. Super. 533, 541 (App. Div.), certif. denied, 191 N.J. 316 (2007). Indeed, the "judge is required to apply accepted legal and equitable principles; no deference is afforded in this regard." Marioni, 417 N.J. Super. at 275.

Here, the Trial Court abused its discretion by fashioning a remedy for Counts Six and Seven of Warren's Complaint that is inconsistent with the established legal principles espoused: (1) in N.J.S.A. 42:2C-43 of the RULLCA, which expressly prohibit those with a judgment against an LLC member from securing any remedy other than a court order charging the transferrable interest of the member; and (2) in the New Jersey case law that only authorizes joint venturers whose venture is coming to an end to seek a partition of their own property.

As set forth in 147 Broad's opening brief, N.J.S.A. 42:2C-43 makes clear that "[a] court order charging the transferrable interest of a member . . . shall be the sole remedy of a judgment creditor" of an LLC member, and the creditor "shall have no right under [the RULLCA] or any other State law to . . . force dissolution of a limited liability company[.]" Paragraph 11(A) of the Operating Agreement states that 147 Broad "shall be dissolved" upon "the sale of the Property and all or substantially all of the assets of the Company and the collection and distribution on the proceeds of

such sale." Ia118. In the Judgment, the Trial Court improperly authorized Warren to collect on his judgment against Scott by way of the proceeds from the compelled sale of 147 Broad's principal asset, the Property, which sale would trigger the dissolution of 147 Broad under Paragraph 11(A) of its Operating Agreement. This is a result that N.J.S.A. 42:2C-43 expressly prohibits.

While Warren engages in a hyper-literal reading of N.J.S.A. 42:2C-43 and argues that it only applies if there is a formal "application" made by the creditor, this reading is nonsensical and overlooks the statute's overall scheme of limiting the ability of a creditor to collect on their judgment against an LLC member vis-à-vis the LLC. See Haines v. Taft, 237 N.J. 271, 283 (2019) ("[S]tatutes are to be read sensibly rather than literally and the controlling legislative intent is to be presumed as consonant to reason and good discretion."). Indeed, while there are no published cases in New Jersey interpreting N.J.S.A. 42:2C-43, the statute's markedly similar predecessor, N.J.S.A. 42:2B-45, was interpreted as broadly "govern[ing] the rights of a judgment creditor vis-à-vis a debtor who is a member of a limited liability company." Leonard v. Leonard, 428 N.J. Super. 272, 274 (Ch. Div. 2012). The Trial Court improperly attempted to expand those rights when it entered the Judgment.

In addition, nowhere in Warren's academic discussion of general equitable jurisdiction, joint venturers, and constructive trusts, Pb43—Pb50, did he address the fact that New Jersey case law has only entitled joint venturers to seek a partition

their own property – not to a partition, without any due process of law, of property owned by a distinct non-party entity. See, e.g., Connell v. Diehl, 397 N.J. Super. 477, 500 (App. Div. 2008) (providing that joint venturers "are entitled to seek a partition . . . of their property when their joint enterprise comes to an end"); see also Mitchell v. Oksienik, 380 N.J. Super. 119, 127 (App. Div. 2005) (involving the partition of property owned by at least one of the parties); Swartz v. Becker, 246 N.J. Super. 406, 410-11 (App. Div. 1991) (same); Crowe v. DeGioia, 203 N.J. Super. 22, 34 (App. Div. 1985) (same); Lipin v. Ziff, 53 N.J. Super. 443, 445 (Ch. Div. 1959) (same). This being so, the Trial Court's determination in the Judgment to order the partition of 147 Broad's Property based on a finding that Warren and Scott were joint venturers, was unsupported by law and therefore an abuse of discretion.

CONCLUSION

For the reasons set forth herein, this Cout should reverse the Trial Court below and vacate Paragraphs 3 and 4 of the Judgment.

Respectfully submitted,

GREENBAUM, ROWE, SMITH & DAVIS LLP
Attorneys for Intervenor/Appellant,
147 Broad St., LLC

By: _____*/s/ Darren C. Barreiro*_____
DARREN C. BARREIRO

Dated: May 20, 2025

WARREN DIAMOND, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF 147 BROAD ST., LLC, *Plaintiff/ Appellee,* v. SCOTT DIAMOND, *Defendant/ Appellant.*	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-00581-24 SAT BELOW: Kathleen A. Sheedy, J.S.C. (Superior Court of New Jersey, Law Division, Monmouth County)

DEFENDANT/RESPONDENT SCOTT DIAMOND'S MEMORANDUM OF LAW IN RESPONSE TO APPEAL FILED BY INTERVENOR 147 BROAD ST., LLC

FOX ROTHSCHILD LLP
49 Market Street
Morristown, New Jersey 07960
973-992-4800 (phone)
973-992-9215 (fax)
Attorneys for Defendant/Respondent Scott Diamond
e-mail: mgross@foxrothschild.com
e-mail: jbkaplan@foxrothschild.com

Of Counsel:
Marc J. Gross, Esq. (Attorney ID: 02009-1991)

On the Brief:
Jordan B. Kaplan, Esq. (Attorney ID: 06080-2013)

Dated: June 18, 2025

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PRELIMINARY STATEMENT

Warren Diamond ("Warren") commenced this suit against his son, Scott Diamond ("Scott"), both in Warren's individual capacity and, purportedly, derivatively on behalf of nonparty/intervenor 147 Broad St., LLC ("147 Broad"). 147 Broad is an independent limited liability company that owns the real property located at 147 Broad Street, Red Bank, New Jersey (the "Property"). Scott lives at the Property and is the sole manager of 147 Broad.

The fatal flaw in Warren's strategy, however, was that he *was never* a member of 147 Broad. As such, Warren never had standing to bring his suit derivatively, and 147 Broad was never made a party to this lawsuit. Notwithstanding this clear defect, the Trial Court, after ten days of trial, entered a judgment against 147 Broad. Specifically, the Trial Court ordered a nonparty, 147 Broad, to sell its Property, to distribute the proceeds of the sales, and effectively terminate all of its business operations, in an attempt to end any future disputes between Warren and Scott relating to the Property.

For multiple reasons, the Trial Court's Judgment should be reversed. At issue in this appeal – instituted by intervenor 147 Broad – is that the Trial Court erred by disregarding 147 Broad's Constitutional rights. Unquestionably, 147 Broad was not served with a summons, was never a party to this litigation, was never represented by counsel, and did not, at any time, participate in this years-long litigation.

Notwithstanding 147 Broad's wholesale absence from this case, the Trial Court denied 147 Broad its procedural due process rights by ordering the sale of 147 Broad's Property and the distribution of its assets.

As set forth below, this Court should certainly reverse the Judgment entered by the Trial Court. But, equally important, it should send a message to Warren, a serial litigant, that he cannot knowingly assert false claims. Indeed, the New Jersey Courts should not be Warren's personal instrument to perpetuate a fraud or to otherwise harass his son. Accordingly, for the reasons set forth herein, this Court should reverse the decision of the Trial Court below, and dismiss all of Warren's claims, with prejudice.

STATEMENT OF FACTS

A. Warren Locates the Property

In early 2013, Warren engaged in conversations with a real estate broker, so as to inquire as to a potential sale of certain property located at 147 Broad Street, Red Bank, New Jersey (the "Property"). (T1[1] at 53:17 – 54:5). Ultimately, in or about

[1] T1 refers to the transcript of proceedings on January 16, 2024
T2 refers to the transcript of proceedings on January 17, 2024
T3 refers to the transcript of proceedings on January 18, 2024
T4 refers to the transcript of proceedings on January 22, 2024
T5 refers to the transcript of proceedings on January 23, 2024
T6 refers to the transcript of proceedings on January 24, 2024
T7 refers to the transcript of proceedings on January 25, 2024
T8 refers to the transcript of proceedings on January 31, 2024
T9 refers to the transcript of proceedings on March 18, 2024

June 2013, Warren, in his individual capacity, entered into a contract with All the Flowers, Inc., to purchase the Property. (Ia69 – Ia78; T1 at 55:12 – 56:3; T4 at 91:7 – 16).

B. Warren Assigns His Interest in the Contract of Sale to 147 Broad and 147 Broad Purchases the Property

147 Broad was formed as a New Jersey entity in September 2013. (Ia79). The certificate of formation for 147 Broad identifies Scott as the company's sole registered agent. (*Id.*). In or about January 2014, Warren assigned his interests in the contract of sale to 147 Broad. (T2 at 68:12 – 25; T2 at 201:10 – 13). No document or law compelled Warren to transfer the contract of sale to 147 Broad. (T4 at 96:5 – 11).

As a result of the assignment of the contract of sale, 147 Broad – an independent entity in which Warren is not a member - purchased the property from All the Flowers, Inc. (T6 at 136:9 – 14).

C. Warren Has Repeatedly Affirmed Under Oath That He is Not a Member of 147 Broad

Although Warren commenced this litigation based upon the unsupported allegation that he is a member of 147 Broad, the overwhelming evidence demonstrates that Warren is not a member of 147 Broad, and that he never was a member of 147 Broad. Thus, consistent with New Jersey law, Warren lacked the

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T10 refers to the transcript of proceedings on March 19, 2024

capacity to bring suit on behalf of 147 Broad, and 147 Broad was never properly a party to this litigation.

i. Warren Filed an Affidavit in Florida Confirming that he Does Not Own a Membership Interest in 147 Broad

On or about February 3, 2020 – during the pendency of this litigation, where Warren claimed he owns 49% of 147 Broad – Warren filed a sworn affidavit with the United States District Court for the Southern District of Florida, in an unrelated lawsuit, entitled *Warren Diamond et al. v. Scott Diamond*, United States District Court, Southern District of Florida, West Palm Beach Division, Case No. 9:16-cv-81923-DLB (the "Florida Affidavit"). (Ia125 – Ia144; T6 at 175:15 – 176:14). Unequivocally, Warren confirmed in the Florida Affidavit that:

> The property, **147 Broad Street, in which Scott Diamond owns a 99% interest in,** has an approximate value of $2,500,000.00 with a mortgage on the property of $1,000,000.00.

(Ia127 at ¶11). After being presented with the Florida Affidavit at trial, Warren provided inconsistent testimony concerning the membership interests in 147 Broad. Specifically, Warren testified that *he* owns the remaining 1% of 147 Broad, and that Melissa Diamond ("Melissa") – Warren's daughter and Scott's sister – does not own any interest in 147 Broad whatsoever. (T4 at 15:3 – 16:16). This is contradicted *directly* by the allegations in Warren's Complaint, where, in 2018, Warren alleged that *Melissa* owns the remaining 1% in 147 Broad. (Ia30 at ¶6).

Certainly, Warren's trial testimony as to membership interests in 147 Broad was untruthful, and it is inconsistent with his sworn statement in the Florida Affidavit and his own Complaint.

ii. Warren Provided Sworn Testimony Confirming that he Does Not Own a Membership Interest in 147 Broad

On November 7, 2017, Warren, as a judgment debtor in a separate action, provided sworn deposition testimony concerning assets that he owned. In response to an information subpoena, Warren was asked to identify all property with a value equal to or greater than $10,000, in which he has a direct, indirect, or fractional interest. (Ia100 - Ia108). Warren responded to that information subpoena, under oath, and omitted any mention of 147 Broad, as property in which he has a direct, indirect, or fractional interest. (Ia100 - Ia108; T3 at 55:8 – 15). During that deposition, Warren was questioned as to why he *did not* list an ownership interest in 147 Broad as an asset that would be subject to execution. In response, Warren swore, under oath, that he does not own "an LLC interest" in 147 Broad. Instead, Warren admitted that his "interest" in 147 Broad is limited to "50 percent of the sales price and that [he is] owed monies on a mortgage." (T10 at 234:2 – 235:16).

Later in his sworn deposition, and consistent with his sworn statement in the Florida Affidavit, Warren *again* testified that he does not possess an ownership interest in 147 Broad, swearing:

> Q: What did you mean by interest in the building?

[…]

A: That is exactly what I said. I have an interest in the building. **It doesn't say I own the property. I have an interest**. When you own a mortgage on a property, you have an interest in the building. I think that is very clear.

[…]

Q: Well, Mr. Drucker, if you turn to page 2 of that very document says "As a property owner, you need to request us to issue." He took it from your communication that you were representing yourself as a property owner, correct?

[…]

A: It doesn't say as a property owner. It says as you have a property interest.

Q: No, he says to you "As a property owner," that is in quotes, "if there is a conflict, you need to request us to issue a stop work order."

A: Where does it say that?

Q: The top of the second page of the document. First words.

A: Well, I didn't request for them to issue a stop work order, because I did not **– I'm not the property owner.**"

(T10 at 237:1 – 238:17 (*emphasis added*)). Clearly, Warren's unequivocal sworn testimony confirms that, as of November 2017 – well before the commencement of the instant lawsuit - Warren *was not* a member of 147 Broad. As such, when Warren commenced this lawsuit several months after he provided the above testimony, there

can be no question that Warren was barred from asserting claims derivatively, on behalf of 147 Broad.

D. Warren Repeatedly Confirmed that he Does Not Own a Membership Interest in 147 Broad

As of July 8, 2015, Warren knew that he was not a member of 147 Broad, as Warren asked that Scott "put [him] **back on the LLC** so [Warren] can get the appropriate K-1." (Ia99 (*emphasis added*)). Shortly thereafter, on or about October 31, 2015, Warren's accountants confirmed *again* that Warren was not a member of 147 Broad. Specifically, Warren's accountants drafted a document entitled "Warren Diamond Statement of Financial Condition October 31, 2015," that included a comprehensive schedule of closely held entities in which Warren held an ownership interest. (Ia91 – Ia97). Warren testified that, if he owned any interest in 147 Broad, his personal financial statements would reflect such interests. (T3 at 23:21 – 25). Notwithstanding that testimony, the "Warren Diamond Statement of Financial Condition October 31, 2015" does not reflect any ownership interest in 147 Broad. (Ia91 – Ia97). Warren's accountant, Steve Stolzenberg, again confirmed that Warren is not a member of 147 Broad, writing that "as it relates to 147 Broad, (Warren) is not an owner [of 147 Broad.]" (Ia98). As such, when Warren commenced this lawsuit three years after publishing his Statement of Financial Condition, it is clear that Warren was barred from asserting claims derivatively, on behalf of 147 Broad.

E. Warren Lacks any Membership Interest in 147 Broad

i. The Memorandum of Understanding Demonstrates that Warren is Not a Member of 147 Broad

On December 18, 2013, prior to 147 Broad purchasing the Property, Scott drafted a Memorandum of Understanding, which memorialized the parties' agreement as to the operations of 147 Broad and the identities of 147 Broad's members (the "Memorandum of Understanding"). (Ia84 – Ia85). Although he received the Memorandum of Understanding, Warren did not respond or otherwise reject its contents. In the Memorandum of Understanding, Scott specifically memorialized the parties' agreement, stating that Warren "will assign the contract [to 147 Broad] and [147 Broad] is 99 percent owned by [Scott] and one percent by Melissa." (Ia84).

The fact that Warren was not a member of 147 Broad – as reflected in the Memorandum of Understanding - was not only Scott's understanding of the parties' agreement, but it was also Scott's *requirement* for entering into the agreement. (T6 at 166:24 – 167:15; Ia86 – Ia87; T6 at 178:9 – 179:11). Stated differently, Scott would not have participated in any way in this real estate venture if Warren was going to be a partner of his in any entity acquiring the Property. (*Id.*). Indeed, as Scott was going to be a tenant at 147 Broad, Scott insisted upon avoiding circumstances where Warren would have the authority to act on behalf of the owner of the property where Scott lived. (T6 at 167:16 – 168:5; T6 at 169:12 – 170:2).

Thus, while Warren and Scott agreed to loan money to support 147 Broad's operations, it is clear that 147 Broad remained a separate and distinct entity that, standing alone, owned the Property.

On December 23, 2013 – after Scott confirmed the substance of the parties' agreement in the Memorandum of Understanding – Warren attempted to renegotiate the terms of the agreement, so as to grant himself an interest in 147 Broad. (T4 at 77:23 – 80:12). When Warren attempted to renegotiate the terms of the agreement, Scott withdrew from the deal, because he did not want Warren to be a member of an entity that served as the landlord for the property where Scott intended to live. (T4 at 79:10 – 80:12; 80:13 – 82:20).

ii. The Limited Liability Company Resolution and Consent of 147 Broad Demonstrates that Warren is Not a Member of 147 Broad

One document prepared in connection with 147 Broad's purchase of the Property was Limited Liability Company Resolution for 147 Broad (the "Resolution"). (Ia88 – Ia90; T6 at 162:12 – 163:23). The Resolution identifies only two members of 147 Broad: Scott Diamond and Melissa Diamond. (Ia90). Warren did not sign the Resolution, as he was, and is, not a member of 147 Broad. (Ia88 – Ia90). Warren neither objected to the Resolution at the time of closing, nor did he write to Scott to state that the Resolution was incorrect. (T6 at 164:11 – 20).

As such, when Warren commenced this lawsuit years *after* the Resolution was drafted and executed, it is clear that Warren was barred from asserting claims derivatively, on behalf of 147 Broad.

iii. 147 Broad's Operating Agreement Demonstrates that Warren is Not a Member of 147 Broad

In addition to the Resolution, 147 Broad's Amended and Restated Operating Agreement (the "Operating Agreement") identifies only two members of 147 Broad: Scott, who owns a 99% interest in 147 Broad, and Melissa, who owns a 1% interest in 147 Broad. (Ia109 – Ia124). Warren did not sign 147 Broad's operating agreement, as he was, and is not a member of 147 Broad. (T3 at 93:11 – 94:10).

As such, when Warren commenced this lawsuit years the Operating Agreement was drafted and executed, it is clear that Warren was barred from asserting claims derivatively, on behalf of 147 Broad.

iv. E-mail Exchanges Between Warren and Scott Demonstrate that Warren is Not a Member of 147 Broad

E-mail exchanges between Scott and Warren demonstrate that Warren is not a member of 147 Broad, and that Warren lacks the authority to act on behalf of 147 Broad. To this end, on February 19, 2014, Scott wrote an e-mail to Warren, directing Warren to "discontinue representation that [Warren has] any capacity to act on behalf of or bind 147 Broad Street." (T6 at 217:3 – 219:2). Two hours later, Warren responded to Scott: "You were not even going to be an owner of the building until I

decided to transfer my interest in the contract to you two days before closing[.]" (T6 at 219:3 – 220: 15).

F. Warren Previously Sought to Steal Scott's Interests in 147 Broad

Prior to the instant lawsuit, Warren sought to enforce an alleged agreement between Warren, Scott, 147 Broad, and other entities (the "Alleged Agreement"). (T3 at 148:20 – 161:13). The Alleged Agreement included a provision, where Scott purportedly "irrevocably consented" to transfer interest in 147 Broad to Warren. (T4 at 48:19 – 49:4). For reasons that Warren did not explain, the Alleged Agreement was declared to be "invalid."[2] (T3 at 151:13-17).

Importantly, Warren neither attempted to introduce the Alleged Agreement at trial, nor did he offer testimony concerning the purported concessions that are set forth in the Alleged Agreement. (*See generally,* T1, T2, and T3). In this regard, Warren sought to avoid revealing to the Trial Court his prior attempts to unlawfully seize Scott's interests in 147 Broad. Nonetheless, the fact is abundantly clear, that Warren is not, and was never, a member of 147 Broad.

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[2] In reality, the Alleged Agreement was deemed invalid because it was a forgery. The facts surrounding Warren's forgery and the false notarization that Warren obtained from his long time attorney, Ellen Dorfman, are reflected in the published decision in the matter of Matter of Tobak, 199 A.D.3d 99 (1st Dep't 2021), of which the Court should take judicial notice.

G. Warren and Scott Negotiated and Executed the June 3, 2014 Agreement

At the time that 147 Broad purchased the Property, Scott did not have a significant amount of money that he was able to loan to 147 Broad. (T6 at 40:18 – 41:8; T6 at 105:4 – 106:11). As a result of Scott's initial lack of funds, the parties agreed – and memorialized in the Memorandum of Understanding – that Warren would advance funds to cover 147 Broad's obligations to its lender, Amboy Bank, if the income that 147 Broad received from rent was insufficient to support both company operations and its debt obligation to its lender. (Ia84 – Ia85). In other words, if all of 147 Broad's ordinary income was used to support the company's day-to-day operations, Warren would loan money to 147 Broad, to satisfy the mortgage payments owed to Amboy Bank and avoid foreclosure. (T6 at 28:9 – 29:16; T6 at 139:8 - 17).

On June 3, 2014, approximately five months after 147 Broad purchased the Property, Scott and Warren entered into an agreement, which was intended to resolve numerous disputes between them, including issues relating to 147 Broad (the "June 3 Agreement"). (Ia80 – Ia83). In the June 3 Agreement, Scott and Warren agreed that, in light of various loans that Scott had provided to Watten in connection with other unrelated ventures, any loan that Warren made to 147 Broad would be credited half to Warren's loan account, and half to Scott's loan account. (Ia80 – Ia83; T6 at 45:6 – 46:12). Rather than receive interest for loans made to 147 Broad, Warren

received other consideration. Specifically, as set forth in the June 3, 2014 Agreement, in exchange for providing loans to 147 Broad, Warren was to receive: (i) the repayment of half of the principal amount that Warren loaned 147 Broad; (ii) a future contingent interest in 147 Broad, which will not vest until Scott moves out of the Property; (iii) 49% of all distributions made by 147 Broad. (Ia80 – Ia83; T6 at 173:23 – 175:6; T10 at 120:14 – 123:4). Specifically, the June 3 Agreement confirmed that, "in consideration" for Warren loaning money to 147 Broad, "the parties agrees [*sic*] that when Scott no longer lives at 147 Broad St., Red Bank, NJ, Scott will transfer to Warren 49% of the membership interest in 147 Broad Street, LLC." (Ia82). Thus, the June 3 Agreement makes clear that Warren's loans to 147 Broad were made *in consideration* for a future contingent interest and other benefits, as opposed to interest presently accruing on loan principal. (Ia80 – Ia83).

PROCEDURAL HISTORY

A. Warren Commenced This Lawsuit Against Scott Only

On August 24, 2018, Warren commenced this lawsuit against Scott. (Ia29 – Ia39). Even though the facts clearly demonstrate that Warren was never a member of 147 Broad, the plaintiff in Warren's Complaint was identified as "WARREN DIAMOND, individually and derivatively on behalf of 147 Broad St., LLC." (Ia29). The *sole* named defendant in Warren's Complaint is "SCOTT DIAMOND." (*Id.*).

Over the course of six years, Warren *never* named 147 Broad as a defendant to this litigation, and he never sought to amend his Complaint to name additional parties. As such, 147 Broad's *sole* participation in this lawsuit was based upon Warren's purported ability to assert claims derivatively, as a member of 147 Broad, on 147 Broad's behalf. (Ia29 – Ia39). Indeed, as 147 Broad was never named as a defendant in this lawsuit, it was not served with a summons, did not file any pleadings, and was not represented by counsel, as would be required by R. 1:21-1(c).

Counts One through Five of Warren's Complaint were based upon claims arising under the New Jersey Revised Uniform Limited Liability Company Act, N.J.S.A. 42:2C-1 et seq. (the "RULLCA"). (*See* Ia33 – Ia37). Among other relief requested under those Counts, Warren sought the entry of an order "restraining Scott Diamond from encumbering or selling the Property." (*See e.g.* Ia34).

In Count Six of his Complaint, Warren asserted a claim for conversion against Scott, alleging that "Scott Diamond has converted the funds and other assets of [147 Broad] for his own personal benefit." (Ia38 at ¶61). In Count Seven of his Complaint, Warren asserted a claim against Scott for unjust enrichment, alleging that Scott "has conferred benefits upon himself that are not deserved and has otherwise benefited himself at the expense of the LLC and Warren Diamond." (Ia38 at ¶64).

B. The Trial Court Enters Judgment Requiring A Nonparty, 147 Broad, to Sell the Property and Distribute its Assets

On June 30, 2024, after ten days of trial, the Trial Court entered the Judgment, accompanied by a 21-page written decision. (Ia6 – Ia28). In the written decision, the Trial Court held that "the Court finds that Warren was not a member of [147 Broad] and as such, has no standing to be granted the relief sought under these Counts." (Ia21). Instead, the sole members of 147 Broad are: (i) Scott, who owns a 99% interest in 147 Broad; and (ii) nonparty Melissa Diamond, who owns a 1% interest in 147 Broad. As a result, the Trial Court dismissed Counts One through Five of Warren's Complaint, with prejudice. (Ia24).

With respect to Counts Six and Seven – alleging conversion and unjust enrichment - the Trial Court reached a different result. Specifically, the Trial Court found that "Scott has been unjustly enriched as he has conferred a benefit upon himself that are not deserved and has otherwise unjustly benefited himself **at the expense of [147 Broad] and the future interest of Warren**." (Ia26 (*emphasis added*)).

Despite finding that Warren could not assert claims on 147 Broad's behalf, and that harm was purported inflicted upon "the LLC and the future interest of Warren," the Trial Court ordered that *nonparty 147 Broad* sell its Property and distribute its assets. (Ia6 at ¶3 - 4). Unquestionably, this was a remedy that was neither requested by Scott nor Warren. In fact, Warren had sought the *opposite* relief, to enjoin and

forbid any sale of the Property. (Ia34 at ¶B). Thus, in disregard of 147 Broad's basic Constitutional rights, the Court required the "sale of the property located at 147 Broad Street, Red Bank, N.J." (Ia6 at ¶3). The Trial Court further ordered that nonparty 147 Broad distribute the proceeds of the sale – as opposed to reinvesting those funds into another real estate venture - such that 147 Broad will be forced to cease operations altogether following the sale of the Property. (Ia6 at ¶4).

Certainly, the Judgment is replete with errors, requiring its reversal. Among other critical errors, the Judgment deprives a nonparty of due process of law by forcing 147 Broad to sell and distribute its assets. Accordingly, this Court should reverse the Judgment, and enter an Order dismissing all of Warren's claims against Scott, with prejudice.

STANDARD OF REVIEW

An appellate court's review of rulings of law is *de novo.* Kocanowski v. Twp. of Bridgewater, 237 N.J. 3, 9 (2019); Green v. Monmouth Univ., 237 N.J. 516, 529 (2019); State v. Fuqua, 234 N.J. 583, 591 (2018); State v. Dickerson, 232 N.J. 2, 17 (2018) (interpretation of court rules). At the same time, a court's interpretation of a contract is reviewed *de novo.* Serico v. Rothberg, 234 N.J. 168, 178 (2018); Kieffer v. Best Buy, 205 N.J. 213, 222 (2011). These matters are reviewed *de novo* because "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." 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)).

LEGAL ARGUMENT

THE JUDGMENT SHOULD BE REVERSED BECAUSE THE TRIAL COURT DENIED INTERVENOR 147 BROAD ITS DUE PROCESS RIGHTS [Ia6 – Ia28]

The Fourteenth Amendment of the United States Constitution and the New Jersey Constitution protect entities from deprivations of life, liberty, and property, without due process of law. See U.S. Const. Amend. 14; N.J. Const. art. 1, ¶ 1. "In examining a procedural due process claim, [New Jersey courts] first assess whether a liberty or property interest has been interfered with by the State, and second, whether the procedures attendant upon that deprivation are constitutionally sufficient." Doe v. Poritz, 142 N.J. 1 (1995).

Procedural due process requires that persons or entities whose rights may be affected are entitled to be heard independently, and in order that they may enjoy that right, they must first be notified; correlatively, this right to have an opportunity to be heard must be extended at a meaningful time and in a meaningful manner. Boddie v. Connecticut, 401 U.S. 371, 377 (1971); Armstrong v. Manzo, 380 U.S. 545 (1965); Doe v. Poritz, 142 N.J. 1, 106 (1995)("The minimum requirements of due process, therefore, are notice and the opportunity to be heard."). The administration of procedural due process rights requires notice and an opportunity to be heard, or to

defend or respond, in an orderly proceeding, adapted to the nature of the case in accordance with established rules. See Doe v. Poritz, 142 N.J. 1, 106 (1995) (citing Kahn v. U.S., 753 F.2d 1208, 1218 (3d Cir. 1985).

Evaluating the tests applicable to the deprivation of due process rights to the facts present here, there can be no question that the Trial Court erred when it forced nonparty 147 Broad to sell its Property and distribute its assets, without due process of law. First, it is beyond dispute that the Judgment, entered by the Trial Court below, interferes with 147 Broad's right to possess its Property. (Ia6 – Ia28). Indeed, on its face, the Judgment compels the immediate sale of 147 Broad's Property to an unaffiliated third party and directs 147 Broad to distribute its assets, such that it cannot continue its business operations in any capacity. (Ia6 at ¶3 and 4). Thus, there can be no question that, by entering the Judgment, the Trial Court below interfered with nonparty 147 Broad's property interests and, by extension, Scott's interests as a member of 147 Broad.

Second, it is clear that nonparty 147 Broad was not afforded any "constitutionally sufficient" procedures before the Trial Court below ordered that its Property be sold and its assets distributed. To that end, 147 Broad was never provided with independent notice of these proceedings or any opportunity to be heard at trial. In other words, the question of "constitutional sufficiency" of the proceedings – as it pertains to 147 Broad – can be answered quickly, as 147 Broad was not a party to

any proceedings whatsoever. Thus, based upon long established precedent, nonparty 147 Broad was denied the basic due process rights afforded to it by the United States Constitution and the New Jersey Constitution.

Any attempt by Warren to argue that 147 Broad *did* participate in this litigation, or that it received Constitutional due process, is wholly without merit. Initially, it is undisputed that 147 Broad was never named as a defendant in this action, and was never served with process. Instead, Warren may argue that 147 Broad participated in this litigation through Warren's attempt to assert *derivative* claims on behalf of the entity. (Ia29 – Ia39). New Jersey law requires that Warren's argument be rejected. To this end, N.J.S.A. 42:2C-69 conclusively states that a derivative action "may be maintained only by a person that is a member at the time the action is commenced and remains a member while the action continues." In order words, an individual that is not a member of the limited liability company cannot commence or sustain derivative litigation on behalf of the Complaint. As set forth in the Judgment, "Warren was not a member of [147 Broad] and as such, as no standing to be granted the relief sought under these Counts." (Ia21). Thus, because Warren is not, and was never, a member of 147 Broad, N.J.S.A. 42:2C-69 bars Warren from commencing litigation on behalf of 147 Broad. In other words, despite Warren's best efforts, 147 Broad was neither a plaintiff nor a defendant to this lawsuit. As 147

Broad never participated in this lawsuit, it is beyond dispute that it was denied its procedural due process rights, before the Court entered the Judgment.

Warren may also attempt to argue that nonparty 147 Broad's Property could be sold because Warren and Scott were parties to a joint venture that concerned the Property. Once again, Warren's argument fails, as it ignores the clear deprivation of 147 Broad's independent Constitutional rights. Indeed, 147 Broad alone is the undisputed 100% owner of the Property. Moreover, one of the undisputed members of 147 Broad – Melissa Diamond – was never a party to this litigation. Thus, even if the Court were to consider Warren's arguments concerning a "joint venture" between Warren and Scott, that argument still fails based upon Warren's failure to provide *both* 147 Broad *and* Melissa Diamond with notice and an opportunity to be heard, prior to the entry of the Judgment.

It does not matter that Courts are generally empowered to order a partition of real estate controlled by a joint venture. Rather, the question is whether 147 Broad – an independent entity that was not a party to this litigation – was afforded its due process rights before being deprived of its Property. As 147 Broad, and fewer than all of its members, were excluded from participation in this litigation prior to the entry of Judgment, there can be no question that 147 Broad was denied its due process rights. Accordingly, the Court should find that the Trial Court committed a

reversible error when it deprived 147 Broad of its Constitutional rights, and vacate the Judgment in its entirety.

CONCLUSION

For the reasons set forth herein, this Court should reverse the Trial Court below, vacate the Judgment, and enter judgment in Scott's favor on all counts, dismissing Warren's Complaint with prejudice.

Respectfully submitted,
FOX ROTHSCHILD LLP

Dated: June 18, 2025 By: 

Marc J. Gross, Esq.
Jordan B. Kaplan, Esq.