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-003523-23 SAT BELOW: Kathleen A. Sheedy, J.S.C. (Superior Court of New Jersey, Law Division, Monmouth County)

DEFENDANT/APPELLANT SCOTT DIAMOND'S MEMORANDUM OF LAW IN SUPPORT OF HIS APPEAL OF THE TRIAL COURT'S JUNE 30, 2024 JUDGMENT

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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 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 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. First, the Trial Court erred by disregarding the Constitutional rights of nonparty 147 Broad. 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.

Second, the Trial Court erred by re-writing the terms of an agreement between Warren and Scott, so as to create additional benefits for Warren, to Scott's detriment. New Jersey law is clear, however, that a court lacks the authority to re-write the express and unambiguous terms of a contract, merely because it may be functionally desirable to draft it differently. As a matter of law, the Trial Court was precluded from re-writing the parties' agreement. When the Trial Court disregarded this established law and re-wrote the parties' arms-length agreement, it committed reversible error.

Third, the Trial Court erred when it made findings of fact that are wholly unsupported by the record. New Jersey law is clear, that a Trial Court's findings of fact are not afforded *any* deference if they are unsupported by the record. As such, this Court should disregard the erroneous factual findings of the Trial Court below and vacate such portions of the Judgment that lack any basis in the record.

Finally, the Trial Court erred by entering judgment for Warren, in his individual capacity. Although the Court found that Scott's conduct caused damage, it found that such damage was suffered by *147 Broad*, not Warren. At no time during this litigation, or before, was Warren a member of 147 Broad. At most, he was a

creditor of the entity. Thus, absent a showing that Warren, individually, suffered damages, New Jersey law is clear, that judgment cannot be entered in Warren's favor.

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 assert knowingly false claims. 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

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[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

June 2013, Warren, in his individual capacity, entered into a contract with All the Flowers, Inc., to purchase the Property. (Da68 – Da77; 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. (Da78). The certificate of formation for 147 Broad identifies Scott as the company's sole registered agent. (Da78). 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

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"). (Da186 – Da205; 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.

(Da188 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. (Da126 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. (Da157 – Da165). 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. (Da157 – Da165; 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." (Da156 (*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. (Da148 – Da154). 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. (Da148 – Da154). 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.]" (Da155). 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"). (Da137 – Da138). 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." (Da137).

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; Da139 – Da140; 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"). (Da141 – Da143; T6 at 162:12 – 163:23). The Resolution identifies only two members of 147 Broad: Scott Diamond and Melissa Diamond. (Da143). Warren did not sign the Resolution, as he was, and is, not a member of 147 Broad.

(DA141 – Da143). 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 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. (Da166 – Da181). 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. (Da184 at ¶18). 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,

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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.

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

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. (Da137 – Da138). 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"). (Da88 – Da91).

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. (Da88 – Da91; T6 at 45:6 – 46:12). Stated differently, in an arms-length agreement, Warren agreed to transfer a certain 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: (i) he was coerced to enter into the June 3 Agreement; (ii) that the transfer of Warren's loan receivables to Scott were unearned; or (iii) that Scott was not entitled to receive a portion of Warren's loan account. (*See generally* T1 through T10). Rather, the evidence clearly shows that 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. (Da88 – Da91; T6 at 45:6 – 46:12).

Neither the June 3, 2014 Agreement, nor any other agreement between Warren, Scott, and/or 147 Broad established an interest rate for any loans that Warren made to 147 Broad. (Da88 – Da91). Instead, loans that Warren made to 147 Broad did not accrue interest because Warren and 147 Broad did not come to an agreement that specific interest on Warren's loans would be paid. (T5 at 62:25 – 63:2; T9 at 91:19 – 92:12). 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. (Da88 – Da91; 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." (Da90). 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. (Da88 – Da91).

Pursuant to 147 Broad's Operating Agreement, all loans payable to *members* of 147 Broad accrue interest at a rate of 10%. (Da169). As Warren is not a member of 147 Broad, Warren is not a party to 147 Broad's Operating Agreement, and he is not entitled to receive 10% interest on his loans to the company, pursuant to the Operating Agreement. Instead, Warren's agreement concerning his loans to 147 Broad are reflected in the June 3 Agreement. (Da88 – Da91).

H. 147 Broad Borrowed Money from Amboy Bank

In order to purchase the Property, 147 Broad – a distinct, independent entity - borrowed money from Amboy Bank. At the time of closing, 147 Broad submitted three separate proposed leases to Amboy Bank, including a lease agreement between 147 Broad and Scott Diamond, individually. The lease agreement between 147

Broad and Scott, however, was unenforceable and was never intended to be the lease that controlled Scott's tenancy. (T4 at 124:14 – 128:21). Indeed, the lease between 147 Broad and Scott *could not* be enforced, as it contemplated Scott's tenancy commencing in September 2013, before 147 Broad purchased the Property. (Da112 – Da115).

Ultimately, 147 Broad and Scott entered into a separate lease, which established a monthly rent obligation at $2,500 per month. At trial, Warren did not present any testimony – from an expert or lay witness – concerning the reasonableness of Scott's monthly rent obligation, or whether the $2,500 rent obligation was "market rate." Instead, the only testimony presented at trial reflecting the "market rate" for the underlying lease was that the rent was "reasonable," as Scott's $2,500 monthly rent obligation was $500 *more* per month than the previous tenant. (T4 at 159:13 – 160:25).

As the $2,500 monthly rent was different from the rent set forth on the unenforceable lease that was provided to Amboy Bank at closing, 147 Broad provided Amboy bank with *separate* documentation showing the Scott's rent obligation to 147 Broad was $2,500, as opposed to $3,200. (Da116; T10 at 148:2 - 14).

The loan that 147 Broad received from Amboy Bank also provided for a construction reserve in the amount of $250,000. (T4 at 162:24 – 163:13). Little of

the $250,000 construction reserve was used to renovate the second floor of the property. (T7 at 144:2 – 13). Instead, the renovation reserve that was established at the time of closing was primarily used to make renovations to the first floor only. (T6 at 12:7 – 23).

On October 27, 2014, 147 Broad requested that Amboy Bank advance $50,000 from the reserve. (T6 at 9:21 – 10:18). The $50,000 that 147 Broad requested on October 27, 2014 was not used in connection with renovations at the Property. Instead, those funds were used to pay back certain loans that Warren had made to 147 Broad. (T7 at 164:17 – 165:10; T7 at 2376:22 – 238:3; T10 at 127:10 – 131:4).

I. Warren Performed Under the June 3 Agreement and the Memorandum of Understanding by Lending Money to 147 Broad

On or about March 16, 2015, consistent with the Memorandum of Understanding and the June 3 Agreement, Scott wrote an e-mail to Warren, requesting that Warren loan 147 Broad $7,000 to cover a mortgage payment owed by 147 Broad, to Amboy Bank. (Da92). Consistent with the June 3 Agreement, half of the $7,000 loan that Warren provided to 147 Broad was booked to Warren's loan account, and half of the $7,000 loan was booked to Scott's loan account. (T6 at 20:2 – 24:19). After December 2015, Warren did not loan any further money to 147 Broad. (T10 at 113:1 – 5).

In total Warren Diamond loaned approximately $440,000 to 147 Broad. (T6 at 111:13 – 23). In October 2014, 147 Broad re-paid $50,000 in loans to Warren. (T7 at 164:17 – 165:10; T7 at 237:22 – 238:3; T10 at 127:10 – 131:4). At the same time, 147 Broad repaid $12,750 in loans to Scott. (T7 at 166:9 – 167:24). As a result of these repayments of loans, 147 Broad decreased its liabilities. (T7 at 169:10 – 21).

Consistent with the June 3 Agreement, half of the loans that Warren made to 147 Broad were credited to Scott, as repayment for other unrelated loans. In connection with those credits, Scott has received, in total, credits in his loan account in the amount of $239,946.19. (T8 at 150:21 – 25). In 2015, Warren and Scott sat together to review 147 Broad's QuickBooks records, so as to confirm that Warren's loans to 147 Broad were properly split between Warren and Scott, pursuant to the June 3 Agreement. (T4 at 104:2 – 105:3).

J. Amboy Bank Exercised the Assignment of Rents, and Scott Loaned Money to 147 Broad, Leading to an Early Termination of the Assignment of Rents

On or about August 25, 2015, Amboy Bank exercised an assignment of 147 Broad's rents, after Warren failed to adhere to his agreement to cover the shortfall in 147 Broad's expenses. (Da94). At the time that the Bank exercised the assignment of rents, 147 Broad believed that Warren Diamond would advance money to cover any shortfalls in payments to the Bank. (T4 at 142:21 – 143:22; T7 at 102:9 – 103:17; T7 at 244:8 – 10; T1 at 86:15 – 21; T2 at 99:17 – 20; T2 at 201:14 - 18). As such,

147 Broad used rental income to pay expenses relating to the operations and necessary capital improvements, believing that Warren Diamond would cover any such shortfalls. (T4 at 142:21 – 143:22; T7 at 209:6 – 210:5; T7 at 212:15 – 213:11; T10 at 100:22 – 101:25).

During the four month period where Amboy Bank exercised the assignment of rents, Scott loaned the total sum of $18,422.12 to 147 Broad, so that Amboy Bank would rescind the assignment of rents earlier than anticipated. (T10 at 102:14 – 112:25). After December 2015, Amboy Bank did not again exercise an assignment of rents. (T10 at 113:14 – 16).

K. Tri-City Management Diligently Manages the Property

147 Broad is a distinct single purpose entity that owns the Property. (T7 at 129:24 – 25). Accordingly, 147 Broad hires third parties – such as a property management company - to operate the Property. (T7 at 129:24 – 130:2).

Tri-City Management is the third party management company that was hired to manage 147 Broad's property. (T5 at 78:22 – 79:15). Scott owns 99% of the membership interest in Tri-City Management. (T5 at 78:7 – 15). Scott Diamond, individually, does not receive a salary, a W-2, or a 1099 from 147 Broad, in connection with his work as the manager of 147 Broad. (T6 at 59:2 – 17). Moreover, Scott does not receive health insurance from 147 Broad. (T6 at 61:2 – 14). The only

management fee paid to Scott in connection with work performed at the Property is money that Scott receives from Tri-City Management. (T6 at 59:19 – 22).

The management agreement between Tri-City Management and 147 Broad entitles Tri-City Management to payment equal to ten percent of 147 Broad's gross income. (Da117 – Da124; T5 at 81:24 – 82:7; T8 at 55:25 – 56:7). Tri-City Management does not charge 147 Broad development fees or supervisory fees for repairs. (Da117 – Da124; T5 at 81:24 – 82:7).

At trial, Scott provided testimony demonstrating that a management fee equal to ten percent of gross rents is reasonable. (T7 at 130:13 – 18; T7 at 134:13 – 135:24). In this regard, prior to setting a ten percent management fee, Scott reviewed comparable management agreements and conducted additional research to evaluate the reasonableness of a ten percent management fee[3]. (T7 at 136:23 – 138:22; T10 at 13:10 – 13). At trial, Warren did not present any testimony – from an expert or lay witness – to refute the reasonableness of Tri-City Management's fees.

If 147 Broad did not hire Tri-City Management, then it would have had to either hire employees or another property management company, to operate the

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[3] Based upon his research, Scott discovered that third-party property managers often charge: (i) development fees; (ii) hourly fees for court appearances; and (iii) management fees for overseeing repairs, maintenance, and capital improvements. (T10 at 13:10 – 17:15). Tri-City Management does not charge 147 Broad for *any* of those activities. (T10 at 13:10 – 25:4).

property. (T5 at 85:2 – 17; T6 at 102:4 – 103:17; T10 at 11:19 – 23). A third-party property management company would issue bills to 147 Broad for its services. (T10 at 12:4 – 8). If bills issued by a third-party property management company went unpaid, then 147 Broad would suffer repercussions in the form of late fees or termination of services. (T10 at 12:9 – 20).

Due to the obvious relationship between Scott, Tri-City Management, and 147 Broad, however, Tri-City Management continued to provide services to 147 Broad, even when Tri-City Management did not receive payment for services provided to 147 Broad. (T10 at 12:21 – 13:4).

Scott's continued presence on-site at the Property provides 147 Broad with a benefit. Specifically, Scott provides 147 Broad with "day-to-day services" that would normally be performed by an on-site super, including, but not limited to: picking up garbage, refilling coffee stations for tenants, checking printer toner, toilet paper, and lighting, and walking through the property to prospectively identify issues. (T10 at 8:18 – 9:25; T6 at 236:1 – 14). The day-to-day services that Scott provides 147 Broad are not the same services that are provided by professional property management companies. (T10 at 9:5 – 25). Indeed, in contrast to the day-to-day services that Scott provides 147 Broad, a professional property management company will, among other conduct: (i) oversee capital improvements; (ii) hire contractors to perform work at the Property; (iii) collect rent from tenants; and (iv)

negotiate new leases. (T10 at 10:1 – 14). Based upon Scott's presence at the Property, 147 Broad advertises "onsite and available property management" to prospective tenants, as a way to induce new tenants to lease space. (T7 at 89:19 – 90:1).

L. 147 Broad's Operating Agreement Precluded the Issuance of Distributions

Pursuant to 147 Broad's Operating Agreement, 147 Broad is authorized to make distributions *only* after: (i) payment of all necessary operating expenses for the company; and (ii) the company repays its member loans. (Da173).

Between 2017 and 2023, 147 Broad's books and records show that, in some years, the company generated a profit before debt service, but in most years, 147 Broad incurred losses. (T7 at 9:1 – 11:4). During that time, however, no distributions were made from 147 Broad's funds. (T4 at 60:14 – 16; T5 at 104:10 – 15; T7 at 11:2 – 4). For the years where 147 Broad's books and records reflected a pre-debt service profit, Scott, as manager of 147 Broad, used his business judgment to hold back excess funds, as reserves for 147 Broad's future needs. (T7 at 11:2 – 8). This is consistent with 147 Broad's operating agreement, which permits the manager of the company to hold back "reasonable reserves" before paying distributions. (Da173).

Additionally, 147 Broad did not make distributions because the company *did not* repay its outstanding member loans. To this end, loans from Scott – an undisputed member of 147 Broad - are reflected in 147 Broad's bank statements. (T4

at 67:11 – 68:2). Not counting the loan attributed to Scott through the June 3 Agreement, Scott Diamond loaned $602,114.23 of his personal funds to 147 Broad. (T8 at 148:20 – 150:20; Da206 – Da207). Throughout the entirety of 147 Broad's ownership of the Property, the net balance of Scott's loan account was positive, reflecting that Scott's member loans to 147 Broad remained unpaid. (T10 at 161:2 – 165:2).

In light of the fact that 147 Broad's member loans remained unsatisfied, the Operating Agreement forbid distributions, including those distributions to Warren that were authorized by the June 3 Agreement. (Da166 – Da181; Da88 – Da91; T10 at 161:2 – 165:2).

M. 147 Broad Built Out the Second Floor of the Property to Generate Additional Revenue

At the time that 147 Broad purchased the Property, the second floor was undeveloped "raw space" that was not rentable and looked like a "construction zone." (T10 at 137:18 – 138:9). Prior to 2014, when 147 Broad purchased the Property, the second floor had been completely gutted, and was ready to be renovated. (T6 at 138:14 – 22). As a result, at the time that 147 Broad purchased the Property, much of the second floor could not be rented to tenants. (T6 at 19 – 25).

At its inception, 147 Broad did not have sufficient funds to pay for the build out of the second floor. (T7 at 58:5 – 10). Accordingly, 147 Broad had to wait until

Scott had sufficient personal funds that he would loan the company to complete that build out. (*Id.*). Construction on the second floor included: (i) building bathrooms; (ii) building out a kitchen; (iii) installing partitions; (iv) installing doors; (v) updating fire protection systems; and (vi) performing work on the HVAC system. (T5 at 140:6 – 24).

N. Scott's Tenancy at the Property Provides 147 Broad with Additional Benefits

Scott, as tenant, began paying rent to 147 Broad in July 2014. (T5 at 11:15 – 12:23). The majority of rent payments made in connection with Scott's tenancy at the Property were not made in cash. Rather, those rent payments were book entries that reduced 147 Broad's indebtedness to Scott. (T5 at 13:23 – 14:11). 147 Broad made the decision to satisfy Scott's rent obligations through a reduction of the company's indebtedness, based upon the advice of the company's accountant. (T5 at 19:4 – 20:1).

During Scott's tenancy, 147 Broad installed an illuminated sign on the inside of one of the windows of the apartment. (T4 at 151:12 – 152:8). As a result, Scott, as tenant, lost use of one of the windows of the second floor apartment, instead providing 147 Broad with the use and benefit of that window. (T4 at 151:12 – 152:8). Nonetheless, Scott's rental obligation to 147 Broad was not reduced.

The agreement between 147 Broad and Scott, as tenant, provided Scott with two parking spots at the Property. (T4 at 154:24 – 155:6). However, due to high demand for parking at the Property, Scott, as tenant, did not receive a reserved parking spot and Scott did not seek a credit. (T4 at 153:13 – 154:9). Nonetheless, Scott's rental obligation to 147 Broad was not reduced.

For several years, Scott was unable to use the rooftop terrace associated with the apartment. (T6 at 230:13 – 232:6). Notwithstanding the fact that the rooftop terrace was unusable and unsafe, 147 Broad did not decrease the rent associated with Scott's apartment and Scott did not seek a credit, resulting in a benefit to the company. (T6 at 232:1 – 6).

At trial, neither Warren nor Scott presented expert testimony to ascertain whether monthly rent payments of $2,500 for a one-bedroom apartment in Red Bank, New Jersey, constitutes "market rate" or whether the monthly rent for the one-bedroom apartment should have been reduced during the periods of time when construction was taking place at the Property. Instead, the only testimony presented at trial reflecting the "market rate" for the underlying lease was that the rent was "reasonable," as Scott's $2,500 monthly rent obligation was $500 *more* per month than the previous tenant. (T4 at 159:13 – 160:25).

O. 147 Broad Receives a Benefit by Receiving Loans from Scott, as Opposed to Loans from a Third-Party Lender

Pursuant to the Memorandum of Understanding, Warren was supposed to loan money to 147 Broad to cover any shortfalls. (Da137 – Da138). However, Warren did not loan any money to 147 Broad after December 2015. (T10 at 113:1 – 5). Accordingly, when 147 Broad needs money for its operations, or does not otherwise have sufficient cash to maintain the property on a day to day basis, Scott loaned money to the company. (T7 at 15:8 – 17; T7 at 16:4 – 45:5).

The terms of Scott's loans to 147 Broad are governed by 147 Broad's Operating Agreement. (T7 at 15:18 – 21). As manager of 147 Broad, Scott sought to reduce 147 Broad's debts as much as possible. (T7 at 99:21 – 100:24). In this regard, Scott loaned money to 147 Broad, to support operations, at an interest rate of ten percent – as permitted under the Operating Agreement – as opposed to the twenty-five percent interest that 147 Broad would have incurred, had Scott used a credit card to finance the company's operations. (T7 at 100:5 – 24; T8 at 75:10 – 76:2).

The decision to have Scott loan money to 147 Broad, as opposed to seeking financing from a third-party lender, provides a benefit to 147 Broad. To this end, if 147 Broad sought a refinance of its existing mortgage, and obtained additional funds

from that refinance to aid its operations, 147 Broad would incur numerous additional costs, including:

- Tri-City Management would be entitled to receive ten percent of the additional funds (above the existing debt owed to Amboy Bank), pursuant to the management agreement. (T10 at 22:6 – 11).
- In addition to the ten percent fee due to Tri-City Management under the management agreement, that loan would be subject to interest from the lender. (T10 at 22:12 – 14).
- If the loan obtained from a third-party lender was not paid pursuant to a strict scheduled, it would be subject to penalties, or could ultimately result in a foreclosure. (T10 at 22:6 – 22).
- Any loan that 147 Broad obtained from a third-party lender would be subject to closing costs. (T10 at 22:23 – 23:1).

When Scott loans money to 147 Broad, 147 Broad does not incur any fees or late charges, Tri-City Management is not entitled to be paid a management fee in connection with those loans, and 147 Broad is not required to repay those loans on a strict timeline. (T10 at 23:2 – 25:1).

Beginning in 2018, Scott stopped charging interest on loans that he made to 147 Broad. (T7 at 56:15 – 22). To this end, in or about 2018, when reviewing 147 Broad's books and records, Scott believed that the interest accrued on his loan

account "was too high," so he directed that interest stop accruing on his account, until such time that he is able to perform a "full reconciliation" and calculate interest on his loan account correctly. (T8 at 141:4 – 142:5).

Although monthly rent payments for the second floor apartment were consistently used to reduce the balance on Scott's loan accounts, at no time was net balance of Scott's loan account negative. (T10 at 161:2 – 165:2). Instead, Scott's loans to 147 Broad consistently outpaced his rental obligations to the company.

P. Scott's Loans to 147 Broad Were Necessary to Maintain and Continue Company Operations

147 Broad's books and records demonstrate that all loans that Scott provided were necessary to maintain company operations. Indeed, absent Scott's loans to 147 Broad, 147 Broad would not have been able to sustain its operations.

Over the course of approximately ten years, since its inception, 147 Broad received the following inflow of cash to support its operations and to purchase the Property:

- 147 Broad's books and records reflect that it received total rent payments from tenants in the amount of $1,820,512.99. (T10 at 28:18 – 30:4). Subtracted from that income, however, is $275,000 in rent payments attributed to Scott, as tenant, as those rent payments were recorded in 147 Broad's books and records as a reduction of indebtedness to Scott. (T10 at 30:6 – 31:21). Thus,

in connection with rent received, 147 Broad received cash payments in the amount of $1,545,512.99.

- In addition to rent income received, 147 Broad received inflows of cash, as follows:
    - Warren's loan account balance reflects a net inflow of cash to 147 Broad in the amount of $189,269.69. (T10 at 34:3 – 35:4).
    - Consistent with the June 3, 2014 Agreement, Scott has a "split" loan account with 147 Broad, representing half of the loans that Warren made to 147 Broad. (Da88 – Da91). The balance of Scott's "split" loan account is identical to the balance of Warren's loan account, and reflects a net inflow of cash to 147 Broad in the amount of $189,269.69. (T10 at 34:3 – 35:4).
    - 147 Broad's books and records reflect a *second* "split" loan account for Scott, reflecting a net inflow of cash to 147 Broad in the amount of $50,676.51. (T10 at 35:5 – 11). The *second* "split" loan account reflect the remainder of the portion of Warren's loans to 147 Broad that are attributable to Scott, equal to the approximately $50,000 that 147 Broad repaid to Warren in October 2014, as the same sum had *not* been repaid to Scott. (T10 at 35:5 – 21).

- Scott loaned money to 147 Broad, in the net sum of $602,114.23. (T10 at 35:22 – 36:23; T10 at 40:11 – 25; Da206 – Da207).
- 147 Broad received an additional $200,000 loan from Amboy Bank as a "renovation reserve," which was used for construction of the first floor at the Property. (T10 at 36:24 – 38:6)

In total, 147 Broad had the total sum of $2,756,843.09 in available cash (the "Available Cash") to support its operations and to purchase the Property. (T10 at 28:18 – 38:13).

Over the course of approximately ten years, since its inception, 147 Broad incurred the following expenses:

- 147 Broad incurred expenses associated with alarm and security services in the total amount of $13,230.52. (T10 at 43:4 – 18).
- 147 Broad incurred expenses associated with air conditioner replacement in the amount of $29,450. (T10 at 43:18 – 44:7).
- 147 Broad incurred expenses associated with cleaning in the amount of $55,351.88. (T10 at 44:11 – 45:2).
- 147 Broad incurred expenses associated with computer and internet expenses – including Wi-Fi and router costs – in the amount of $27,595.27. (T10 at 45:13 – 46:5).

- 147 Broad incurred expenses associated with construction and development costs in the amount of $423,200.76. (T10 at 46:6 – 47:13).
- 147 Broad incurred expenses associated with fire protection services in the amount of $4,048.80. (T10 at 47:14 – 24).
- 147 Broad incurred expenses associated with furniture and equipment, in the net amount of $30,226.97. (T10 at 48:1 – 17).
- 147 Broad incurred expenses associated with insurance, in the amount of $73,709.69. (T10 at 48:18 – 49:4).
- 147 Broad incurred expenses associated with landscaping in the amount of $52,487.43. (T10 at 49:2 – 17).
- 147 Broad incurred expenses associated with management fees, in the amount of $162,807.87. (T10 at 49:17 – 50:3). Importantly, the management fees *actually* paid by 147 Broad is less than ten percent of the total rental income that 147 Broad received. (T10 at 50:4 – 10).
- 147 Broad incurred expenses associated with office supplies in the amount of $5,347.97. (T10 at 50:20 – 51:11).
- 147 Broad incurred expenses associated with professional fees – including attorneys' fees and accountants' fees, – in the net amount of $143,956.85. (T10 at 51:14 – 53:4).

- 147 Broad incurred expenses associated with real estate taxes in the amount of $371,417.57. (T10 at 55:20 – 56:10).
- 147 Broad incurred expenses associated with snow removal in the amount of $55,763.74. (T10 at 56:19 – 57:7).
- 147 Broad incurred expenses associated with telephone expenses in the amount of $4,161.61. (T10 at 57:7 – 19).
- 147 Broad incurred expenses associated with utilities in the amount of $69,936.82. (T10 at 57:21 – 58:8).
- 147 Broad incurred expenses associated with repair and maintenance in the amount of $97,652.15. (T10 at 58:9 – 60:17).
- 147 Broad paid the sum of $768,582.43, representing interest and principal payments on 147 Broad's outstanding loan from Amboy Bank. (T10 at 60:22 – 71:3).
- In order to close on the purchase of the Property, 147 Broad was required to pay the sum of $285,261.53. (Da79; T10 at 72:10 – 73:2).
- As part of its purchase of the Property, 147 Broad paid an earnest deposit sum of $65,000. (Da81 at line 201; T10 at 73:6 – 74:6).

In total, 147 Broad incurred expenses in the total sum of $2,739,499.86 in expenses relating to its operations and relating to its purchase of the Property. (T10 at 28:18 – 38:13).

Comparing the $2,739,499.86 in expenses, inmprovements, and acquisition costs that 147 Broad incurred, to the Available Cash of $2,756,843.09, it is clear that, without the $602,114.23 that Scott loaned to the company, which was never disputed by Warren, 147 Broad would have been unable to carry on its operations. (T10 at 28:18 – 77:7; Da206 – Da207).

PROCEDURAL HISTORY

A. Warren Commenced This Lawsuit Against Scott Only

On August 24, 2018, Warren commenced this lawsuit against Scott. (Da28-Da38). 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." (Da28). 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. (Da28 – Da38). 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* Da32 – Da36). 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.* Da33).

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." (Da36 at ¶61). Warren claimed that, as a result of Scott's conversion of "funds and other assets of [147 Broad]" that "both the LLC and Warren Diamond have suffered damage." (Da37 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." (Da37 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. (Da5 – Da27). 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." (Da19 – Da20). 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. (Da23).

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**." (Da25 (*emphasis added*)). Among other findings, the Trial Court – without the assistance of any expert testimony or other evidence – superimposed its own opinion, that $3,200 per month rent was "a reasonable figure associated with the property at issue[,]" rejecting Scott's actual lease, which required him to pay $2,500 per month. (Da26).

The Trial Court also found that Scott engaged in "conversion." To support this finding, the trial Court disregarded the June 3 Agreement, finding instead that "Scott was able to convert Warren's $280,000 January 16, 2014 loan into a benefit of $280,000 for himself and a loss of $140,000 for Warren." (Da26). The Trial Court also took umbrage with the fact that Warren's loans to 147 Broad did not accrue interest (pursuant to the June 3 Agreement), while Scott's loans to 147 Broad did accrue interest (pursuant to the Operating Agreement). (*Id.*).

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. (Da5 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. (Da33 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." (Da5 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. (Da5 at ¶4).

At the same time that the Trial Court ordered a nonparty to sell and distribute its assets, the Trial Court established the value of Scott's loan account at 147 Broad to be only $226,769. (Da5 at ¶6). In setting the amount of Scott's loan account, the Trial Court did not engage in any mathematical calculation whatsoever. (Da27). In fact, in setting the value of Scott's loan account, the Trial Court altogether disregarded the $602,114.23 that Scott loaned to 147 Broad, which sum was never disputed by Warren and necessary to sustain 147 Broad's operations. (*Id.*).

Undeniably, the Trial Court's arbitrary calculation of Scott's loan account is not supported by any evidence in the record. To this end, the Trial Court found –

without any evidence in the record to support its conclusion – that "Scott paid approximately $84,000.00 less than he should have for rent." (*Id.*). In reducing the value of Scott's loan account with 147 Broad, the Trial Court again disregarded the June 3 Agreement and the Operating Agreement, finding that "Scott allowed 10% interest to accrue on his loan account while denying the same benefit to his father's loan account." (Da27).

Certainly, the Judgment is replete with errors, requiring its reversal. The Judgment deprives a nonparty of due process of law by forcing 147 Broad to sell and distribute its assets. The Judgment disregards the express terms of the parties' June 3 Agreement, and re-writes that agreement to make a better deal for Warren. The Judgment makes findings of fact that are unsupported by any evidence in the record. The Judgment wholly fails to address the fact that, even accepting the Court's findings as true, that Scott's conduct would have only harmed a nonparty, *147 Broad*, and not Warren. 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)).

With respect to findings of fact, appellate courts apply a deferential standard in reviewing factual findings by a judge. Balducci v. Cige, 240 N.J. 574, 595 (2020); State v. McNeil-Thomas, 238 N.J. 256, 271 (2019). "A reviewing court must accept the factual findings of a trial court that are 'supported by sufficient credible evidence in the record.'" State v. Mohammed, 226 N.J. 71, 88 (2016) (quoting State v. Gamble, 218 N.J. 412, 424 (2014)). "Reviewing appellate courts should 'not disturb the factual findings and legal conclusions of the trial judge' unless convinced that those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)).

LEGAL ARGUMENT

POINT I

THE JUDGMENT SHOULD BE REVERSED BECAUSE THE TRIAL COURT DENIED NONPARTY 147 BROAD ITS DUE PROCESS RIGHTS [Da5 – Da27]

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. (Da5 – Da27). 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. (Da5 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. (Da28 – Da38). 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." (Da19 – Da20). 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.

POINT II

THE TRIAL COURT ERRED WHEN IT RE-WROTE THE JUNE 3 AGREEMENT TO WARREN'S BENEFIT [Da5 – Da27]

New Jersey law is clear that a court lacks the authority to rewrite the express terms of a contract merely because it may be desirable to draft it differently. Brick Tp. Municipal Utilities Authority v. Diversified R. B. & T. Const. Co., Inc., 171 N.J. Super. 397, 402 (App. Div. 1979). In that same light, a court may not alter a contract for the benefit of one party and to the detriment of the other. James v. Federal Ins. Co., 5 N.J. 21, 24 (1950); Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 170 (App. Div. 2007) ("Normally we will enforce a contract freely negotiated at arms' length and will not make a better contract for the parties than that for which they bargained"); Kaur v. Assured Lending Corp., 405 N.J. Super. 468, 477 (App. Div. 2009) (explaining that courts will "'not rewrite contracts in order to provide a better bargain than contained in [the parties] writing.'").

In two distinct regards, the Trial Court committed reversible error when it revised the June 3 Agreement to provide Warren with greater benefits than he was entitled to receive.

First, the Trial Court committed reversible error when it re-wrote the June 3 Agreement and found that "Scott converted one-half of Warren's $280,000 January 16, 2014 investment and allocated it to himself as a loan in the amount of $140,000."

(Da26). Certainly, the Court's finding of unjust enrichment is contrary to the express terms of the June 3 Agreement and the evidence in the record. Indeed, it is undisputed that, in the June 3 Agreement, Warren consented, in an arms-length transaction, to transfer a certain portion of his loan account with 147 Broad to Scott, so as to repay Scott in connection with an unrelated transaction. (Da90; T6 at 45:6 – 46:12). Without any support in the record, the Trial Court disregarded competent evidence, re-wrote the June 3 Agreement, and determined that the parties' agreed-upon transaction somehow constituted unjust enrichment by Scott. The Trial Court's unilateral decision to disregard the June 3 Agreement, with no evidentiary support for its position, should be rejected.

Second, the Trial Court improperly re-wrote the June 3 Agreement to provide Warren with a greater benefit, lamenting that Scott engaged in conversion because "Warren's remaining $140,000 is left in an account which accrues no interest[.]" (Da26). It may offend a notion of fairness that Warren's loans to 147 Broad do not accrue interest, while Scott's loans to 147 Broad accrue ten percent interest. Nonetheless, this was the agreement struck by the parties on June 3, 2014. Indeed, the testimony at trial confirmed that Warren entered into a negotiated agreement – the June 3 Agreement - choosing future interests in 147 Broad over accrued interest on his loan. (Da88- Da91; T6 at 173:23 – 175:6; T10 at 120:14 – 123:4). Conversely, Scott entered into a different negotiated agreement – 147 Broad's Operating

Agreement – which entitled Scott to receive ten percent simple interest on his loans to 147 Broad, and nothing else. (Da166 – Da181). Clearly, Warren made affirmative choices, as reflected in the June 3 Agreement, concerning the repayment of his loans. Without any support in the record, the Trial Court disregarded competent evidence, re-wrote the June 3 Agreement, and determined that the parties' agreed-upon transaction somehow constituted unjust enrichment by Scott, to Warren's detriment.

The Trial Court's decision to re-write the June 3 Agreement is not only unsupported by evidence in the record, but also contradicted by the express terms of the parties' agreement. Consistent with established New Jersey law, the Appellate Division is not required to give the Trial Court's findings *any* deference whatsoever. Accordingly, this Court should reverse the findings of the Trial Court below in their entirety.

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REACHING FINDINGS OF FACT THAT ARE NOT SUPPORTED BY ANY EVIDENCE IN THE RECORD [Da5 – Da27]

New Jersey law is clear, that a judge cannot make a finding of fact, unsupported by the record, based upon their own subjective views or personal experiences. See Cuevas v. Wentworth Grp., 226 N.J. 480, 486 (2016) (rejecting reliance upon a judge's personal experience relating to verdicts when considering a

remittitur motion). Unfortunately, the Trial Court below committed reversible error, when it made conclusions of fact unsupported by any evidence in the record.

A. The Trial Court's Finding That Scott's Rent Was Not "Fair Market Value" Is Not Supported By Any Evidence In The Record

It is undisputed that no party offered expert testimony concerning the "reasonableness" of Scott's $2,500 monthly rent obligation to 147 Broad. In fact, over the course of ten days of trial, the only testimony presented at trial reflecting the "market rate" for the underlying lease was that the rent was "reasonable," as Scott's $2,500 monthly rent obligation was $500 *more* per month than the previous tenant. (T4 at 159:13 – 160:25). Nonetheless, without any evidence to support its finding, the Trial Court found that monthly rent of $3,200 is "a reasonable figure associated with the property at issue" and that "Scott paid approximately $84,000.00 less than he should have for rent." (Da26 – Da27).

Even if this Court were to disregard the fact that no expert testimony was offered during trial concerning the reasonableness of Scott's $2,500 monthly rent obligation, there is *still* no evidence in the record to support the conclusion that $3,200 would have been a "reasonable" rent for Scott to pay 147 Broad. Indeed, the record is devoid of any statistics concerning the rental rates comparable rental properties, or any reports generated concerning the condition of the Property. Stated

differently, the Trial Court's finding that Scott's $2,500 monthly rent obligation was somehow "unreasonable," is unsupported by any evidence in the record.

As there is no basis for the Trial Court's finding, that Scott's $2,500 monthly rent was "unreasonable," this Court is not required to give the Trial Court's findings *any* deference whatsoever. As such, this Court should reverse the findings of the Trial Court below, and enter judgment in Scott's favor.

B. The Trial Court's Finding That Scott's Loan Account with 147 Broad is Only $226,769.69 Is Not Supported By Any Evidence In The Record

Without any evidence in the record to support its finding, the Trial Court established the value of Scott's loan account at 147 Broad to be only $226,769. (Da5 at ¶6). Based upon the records that were reviewed extensively throughout the course of trial, it is clear that Scott loaned $602,114.23 to 147 Broad, and that 147 Broad would not have been able to support its operations without those loans. (T10 at 28:18 – 77:7; Da206 – Da207). For some unknown reason, the Court disregarded those facts in their entirety.

Even if we are to accept the Trial Court's view that Scott's loan account should be reduced, the final calculation should still be based upon concrete facts and evidence. Nonetheless, the Trial Court failed to engage in such an exercise. Indeed, based upon the plain language of the Judgment, it is clear that the Trial Court declined to engage in any mathematical calculation that would result in the reduction

of Scott's loan account. Instead, the Trial Court merely made various unsupported findings – such as "Scott paid approximately $84,000.00 less than he should have for rent" and "Scott allowed 10% interest to accrue on his loan account while denying the same benefit to his father's loan account" – and determined, without any calculation or consideration, that Scott's loan account should be over $600,000 less than what Scott is entitled.

Certainly, there is no basis for the Trial Court's finding, that Scott's loan account with 147 Broad should be reduced by over $600,000, this Court is not required to give the Trial Court's findings *any* deference whatsoever. As such, this Court should reverse the findings of the Trial Court below.

POINT IV

THE TRIAL COURT ERRED BY GRANTING RELIEF BASED UPON WARREN'S INDIVIDUAL CLAIMS [Da5 – Da27]

New Jersey law is clear that, absent proof that Scott caused Warren, individually, to suffer damage, Warren cannot succeed on any of the claims that he asserted, as a matter of law. See Zelnick v. Morristown-Beard School, 445 N.J. Super. 250 (Law Div. 2015) (holding that recovery on breach of contract claim was precluded absent showing that damages sought were result of breach); First Nat'l Bank of Bloomingdale v. N. Jersey Tr. Co., 18 N.J. Misc. 449, 452 (1940) (holding that a claim for conversion requires a showing of damages resulting from the

interference with the right of possession); Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396 (1997) (establishing "damages" as an indispensable element for a claim of breach of the duty of good faith and fair dealing); Namerow v. PediatriCare Associates, LLC, 461 N.J. Super. 133, 146 (Ch. Div. 2018) (holding that a claim for breach of fiduciary duty requires the plaintiff to demonstrate that it suffered damages); EnviroFinance Group, LLC v. Environmental Barrier Co., 440 N.J. Super. 325 (App. Div. 2015) (holding that a claim for unjust enrichment requires a showing that the defendant received a benefit to the detriment of the plaintiff, causing damages).

In his Complaint Warren alleged that "Scott Diamond has converted the funds and other assets of [147 Broad] for his own personal benefit." (Da 36 at ¶61). Notwithstanding this claims, it is undisputed that Scott, in his individual capacity, was not required to repay Warren's loans to 147 Broad, or disburse money to Warren. Instead, those obligations belong to nonparty 147 Broad. Thus, even if Warren had established that he suffered damages relating to unpaid loans, repayment of contributions, or nonpayment of distributions, any such damages would have been caused by 147 Broad (who is not a party to this lawsuit), and not Scott.

Notably, the Trial Court below conceded that Scott did not cause Warren to suffer any damage. Instead, the 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 the LLC [147 Broad] and the future interest of Warren**." (Da25)[4]. Stated differently, the Trial Court found that Scott did not cause Warren to suffer harm, but that Scott caused harm to 147 Broad, an entity in which Warren is indisputably not a member. Thus, accepting the finding that Scott caused 147 Broad to suffer harm, that harm does not flow to Warren, as he is not a member of the entity.

Based upon the Trial Court's own finding of fact, there can be no question that the Trial Court committed reversible error, when it granted judgment in Warren's favor on his claims for conversion and unjust enrichment. Accordingly, the Judgment should be reversed.

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: September 16, 2024

By: _____
Marc J. Gross, Esq.
Jordan B. Kaplan, Esq.

[4] Any alleged harm to the "future interest of Warren" is clearly not a claim that is ripe for judicial determination. See e.g. Garden State Equality v. Dow, 434 N.J. Super. 163 (App. Div. 2013).

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WARREN DIAMOND, individually and derivatively on behalf of 147 BROAD ST., LLC, Plaintiff/Respondent, v. SCOTT DIAMOND, Defendant/Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-003523-23 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

AMENDED BRIEF OF PLAINTIFF/RESPONDENT WARREN DIAMOND

Of Counsel and on the Brief: Matthew K. Blaine, Esq.

Date of Submission: December 3, 2024

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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**" or "**Property**") and the allocates the sale proceeds in accordance with the June 3, 2014 agreement amongst the joint venturers – Plaintiff, Warren Diamond ("**Warren**" or "**Plaintiff**"), Defendant, Scott Diamond ("**Scott**" or "**Defendant**") and Melissa Diamond (who is the remaining disinterested 1% member of 147 Broad St., LLC (the "**LLC**")) – 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 relief is based on Scott's conversion of joint venture funds for the J.V. Property supplied by Warren and Scott's decade-long mismanagement of the J.V. Property that provided an ongoing benefit for himself at the direct expense of Warren. (Da22). These 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 shell companies, Scott Diamond LLC ("**SD LLC**") or Tri City Mgmt., LLC ("**Tri City**")).

Scott's argument that the Judgment somehow violates the due process rights of the owner 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, the LLC was a real party in interest: it was derivatively named in the caption since the complaint was filed 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, 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 Scott's argument is further illustrated by Warren's and Scott's invocation of the trial court's equitable power: Scott 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

The action was commenced when Warren filed the complaint on August 24, 2028. (Da28).

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. (Da28).

Each count's prayer for relief also sought an award of equitable relief. (Da33-37).

On December 26, 2018, 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 Scott's motion to transfer, 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]

[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 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.

During the trial, Warren made a motion for sanctions on account of Scott's spoliation and non-disclosure of relevant and material QuickBooks evidence for the J.V. Property and the LLC.

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 two-page Judgment together with a twenty-one page statement of reasons that set forth extensive factual findings and conclusions of law flowing therefrom. (Da1-23).

On June 30, 2024, Judge Sheedy also entered an 11-page order and statement of reasons that require Defendant to pay Plaintiff sanctions of $9,353.50 in attorney's fees and costs. (Pa6-15).

Respondent's Statement of Facts

1. The Trial Court's Joint Venturer Finding

The Judgment found that Warren is a joint venturer with Scott in relation to the J.V. Property: "While Warren may not be a member of [the LLC], he undeniably purchased the property at issue in junction with Scott as a joint venture." (Da21).

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 2021. (Da21).

b. Warren, in 2013, negotiated a contract of sale for the J.V. Property with Kevin Valerio and Geoff Brothers. (Ibid.).

c. Warren, on June 13, 2013, agreed to the contract terms and, individually, was the contract purchaser. (Ibid.).

d. Warren went on to pay the initial deposit of $20,000 for the J.V. Property on June 12, 2013. (Ibid.).

e. Warren was the guarantor of the J.V. Property's $1,204,000 acquisition and construction loan and mortgage from Amboy Bank. (Da21, citing P-133 at Da107-111).

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. (Da21, citing 2T123:11-21 and P-84 at Da84-85).

g. Warren was also to make up for any shortfall in the rent amount and mortgage payments due to Amboy Bank. (Da21, citing Exhibit D-2 at Da137-138).

h. "Warren was actively engaged, involved, and expected to provide continuing funds in order for the maintenance of the property." (Da21).

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

Substantial evidence adduced at trial amply support Judge Sheedy's joint venture finding.

Warren first discovered the J.V. Property in the mid or late 1990s. (1T41:21 to 42:9). After Raymond Valerio, Warren's friend and the former owner of the J.V. Property, passed away, Mr. Valerio's family approached Warren to buy the Property. (Id. at 47:5 to 49:1). Warren promised them he would close a deal to purchase the Property, and he did. (Id. at 49:2-18 and 551:7-25).

Between March and June of 2013, Warren negotiated and executed the contract of sale as the purchaser for the J.V. Property. (1T53:17 to 54:10, 1T57:25 to 58:21, 1T63:11 to 65:10, 1T65:13 to 68:23, Da68-77, and Pa21-26).

Warren paid the initial deposit of $20,000 and paid $1,800 for an engineering inspection and report. (1T60:13 to 62:11, Pa156, Pa157).

Warren paid the additional deposit of $45,000. (1T81:7 to 84:19, Pa158).

Warren paid numerous additional expenses before the January 17, 2014 closing. (Pa159-171). He worked on closing and construction issues and worked with vendors for the J.V. Property to make sure their proposals were funded and their work was timely performed. (2T33:23 to 36:19, Pa27-30, Pa46-58, Pa158-71). Warren also worked to design and fit-out the J.V. Property's first-floor gallery space. (2T44:3 to 45:6, 2T47:15 to 49:6, Pa39-44).

At the time of closing, there was no written agreement in place between the parties concerning the J.V. Property. (1T89:7 to 90:16).

By the time of the January 17, 2014 closing, Warren had invested at least $**376,273.70** into the J.V. Property, including the $280,000 he wired on January 16, 2014 – one day before the closing. (1T60:18 to 61:20, 1T61:21 to 62:11, 1T71:14-24, 1T59:17 to 60:12, 1T85:3-25, 2T23:11-23, 2T23:24 to 24:11, 2T24:12 to 25:5, 2T25:9-16, 1T61:21 to 62:11, 1T71:14-24,1T59:17 to 60:12, 2T25:15-23, 2T25:24 to 25:7, 2T26:8-19, 1T86:1 to 89:18, 2T26:22 to 27:11, 2T28:18 to 29:4, 2T29:5-18, 2T30:15 to 31:8, 2T31:9 to 32:15, and 4T85:16 to 88:23, 4T89:6-15, and Pa156-173).

Scott did not offer to contribute any of the buyer proceeds needed to close. Therefore, on the day before closing, Warren wired $280,000 to the title company. (2T81:8-23, Pa59-61, Pa172-73).

Between January 30, 2014 and November 2, 2015, Warren invested at least an additional $**202,901.48** into the J.V. Property. (2T177:11 to 178:8, 2T182:3-19, 2T178:15 to 178:22, 2T178:15-22, 2T178:23 to 179:7, Da90, 2T182:3-19, 2T179:19 to 180:1, 2T179:22 to 180:1, 4T18:21 to 20:17, Pa135 regarding Warren's Nacirema distribution, 7T202:6 to 205:13, 2T142:2 to 144:18, 2T151:21, 2T161:1-7, 2T165:13-23, 2T180:23 to and Pa174-186, Pa2 at no. 9).

The evidence adduced at trial therefore shows that Warren invested at least $**577,831.20** into the J.V. Property between June of 2013 and November 2, 2015.

Scott even stipulated that Warren invested at least $440,000 into the J.V. Property (6T111:18 to 112:20) and admitted that Warren, on January 16, 2014, invested the $280,000 that was needed to close the next day. (4T89:6-15).

Scott, on the other hand, invested just a check or two before the January 17, 2014 closing. Scott's investment was "modest, small, nothing huge" – less than $20,000. (4T85:16 to 88:23).

Warren worked to obtain the $1,204,000 acquisition and construction financing from Amboy Bank. (1T69:4 to 73:6).

Warren personally guaranteed the $1,204,000 acquisition and construction loan. (Da107-111).

The closing took place on January 17, 2014.

After the closing, Warren remained involved with the J.V. Property's affairs and operations. Scott sought his help when issues arose. (2T69:18 to 70:1). Scott testified that Warren was to pay the shortfalls if the J.V. Property had vendors to be paid or work had to be done but there were shortfalls in cash flow. According to Scott, this agreement was reached before the closing took place on January 17, 2014. (6T28:23 to 29:21). However, Scott did not "recall a formal agreement drafted

between the two of us and signed. It was just a clear understanding at the time." (6T33:4-16).

Warren invested this money into the J.V. Property based on his understanding that he was going to have 49% of the J.V. Property's profits and distributions. (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). This is why, when the first mortgage payment fell due in February of 2014, Warren expected he would have to fund it because he did not expect the rents to be able to cover the mortgage. Therefore, on February 6, 2014, Warren advised Scott and that he would be paying the first mortgage payment. (2T123:11-21, Da84). Scott also instructed Warren on February 6, 2014 to put money into 147 Broad's account so Scott could manage the funds and, on February 12, 2014, Scott reminded Warren to fund the mortgage payment. (2T124:4 to 125:5, Da86, Pa87).

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, Da90), 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).

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, Da112-115).

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, Pa72-76, Pa77). They worked together to renovate the J.V. Property, deal with general contractor proposals and construction issues, including issues with the Red Bank Construction Department. (2T99:5 to 103:15, Pa68-71). Warren helped to defray other carrying costs in 2014. For instance, in May of 2014, 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 Pa171). In September of 2014, Warren worked with Scott to address insurance issues after Scott allowed the coverage to lapse. (Pa124-134).

Warren and Scott worked together to rent the first-floor gallery of the J.V. Property, find a commercial tenant, and to negotiate a commercial lease that benefited the J.V. Property. (2T88:25 to 90:10, Pa78-116, 2T90:20 to 91:8, 2T92:22 to 94:24, 2T94:18 to 96:16).

Once Red Bank Design Center – the first-floor tenant – began paying its rent in January of 2015, the J.V. Property should have stabilized by the first quarter of

2015, as its rents should have been sufficient to cover its carrying costs. (2T106:10 to 108:1, 2T140:8-15, Pa117-123, Pa187, and Pa2 at no. 4).

Unfortunately, this never happened. Instead, Scott didn't actually pay rent for his occupancy of the J.V. Property's second-floor garden terrace apartment and was taking money out of the J.V. Property to benefit himself instead of paying its expenses.

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 and concluded 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." (Da22).

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." (Da22). In support of this conclusion, Judge Sheedy 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." (Da22).

With respect to Scott's conversion and unjust enrichment of Warren's joint venture investment and assets as a result of Scott's unlawful rent "payment" scheme for occupying its second-floor garden apartment for more than 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. (Da21). "Within [Scott's] capacity as a tenant and in order to reside in the second-floor garden terrace apartment, Scott among other obligations, was to pay a security deposit of $4,800 and a rent of $3,200 per month . . ." (Da21, citing Exhibit P-138 at Da112-115).

The written lease between Scott and the LLC – the only lease ever produced in discovery or admitted into evidence at trial – requires him to pay $3,200 per month in rent, his own utilities, and a $4,800 security deposit. (Da112-115). Despite this, at trial, "Scott testified he never paid a $4,800 security deposit (4T129:4-15), nor did he ever pay any portion of any utility bills including as, water, electric, or cable." (Da21, citing 4T179:19 to 148:5 and 4T156:21 to 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." (Da21, citing 4T135:5-17 and 4T137:24 to 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." (Da21-22). These findings and conclusions are amply supported by the record, including Exhibit P-138, which is the only lease with Scott as a tenant of the J.V. Property that was admitted into evidence. (Da112-115 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).

Scott's own October 27, 2014 stabilization letter to Amboy Bank also confirmed its terms by listing his monthly base rent of $3,200. (8T52:14 to 53:10 and Pa117, Pa118). Scott himself testified that he thought $3,500 was fair market rent. (9T86:17 to 87:5).

He also testified that in 2014, shortly after they closed on the J.V. Property, Scott was seeking to increase the rent paid by its then-holdover-tenant (the broker in the sale, Geoff Brothers) to $3,000 per month. He testified that $3,000 per month would have been fair market value if someone was willing to pay it. (7T85:23 to 86:8 and 88:12-22). Yet, over the last 10 years, Scott has never once increased his rent under his imaginary lease beyond $2,500 per month. (4T149:21 to 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). Photographs of the beautiful second-floor apartment are depicted throughout his listing materials. (Pa149-151; Pa234-235).

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 the LLC required him, as tenant, to pay utilities. (4T145:19-25, Da112 at §8).

Nonetheless, Scott incredulously contended at trial that his written lease is somehow "unenforceable." Scott initially claimed the lease is not enforceable 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 127:23, 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 to 134:21 and 4T135:9).

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." (4T135:5-17 and 4T137:24 to 138:9). Scott also testified that his imaginary lease "would have included utilities because submetering it made no sense." (4T147:9-13). 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. (4T147:19 to 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." (4T148:6-18). 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. I just don't recall. . . . What I do know is what the performance of both sides have been. The conduct of both sides of the agreement over the past nine-and-a-half years is that it's a gross lease." (4T148:25 to 149:16).

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. (4T183:12-19).

Further, Scott caused the J.V. Property to spend a "couple of thousands of dollars" upgrading the sound system in his apartment, repairing the door leading out to his enormous garden terrace, repairing four-by-four posts for the terrace deck, power washing his deck, applying Teak Oil, and conducting other repairs and maintenance to his terrace. (9T78:11 to 89:23, 4T182:16-22, 6T233:22 to 234:21).

Scott also caused 147 Broad 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 Da206-207).

Scott also testified that over the last two years, he caused 147 Broad to make significant improvements to his garden terrace apartment totaling approximately $50,000. These substantial improvements include the installation of new

countertops, splitting a larger sunroom into smaller rooms to create a larger second bedroom, adding recessed lighting, cabinet refinishing, the installation of cabinet doors, painting most of the apartment, replacing his microwave, and more work that he was still having finished for him at the time. (8T82:17-25, 8T83:3-10, 5T128:15 to 129:23, 5T135:2 to 136:7, and 6T231:8-23).

Thus, between July of 2014 and April of 2024, Scott "paid" $292,500 in monthly rent[2] to 147 Broad under his imaginary lease. However, if Scott adhered to the only written lease agreement that was admitted into evidence for his beautiful and enormous second-floor garden terrace apartment (P-138 at Da112-115), 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

[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.

decades-long mismanagement of the property at 147 has provided an ongoing benefit for himself at the direct expense of Warren." (Da22).

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." (Da22).

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 to 65:6, 6T194:2 to 195:14, 9T143:5 to 144:6).

The extensive evidence of Scott's intentional scheme of conversion and unjust enrichment is described in the second full paragraph of page 22 of the Judgment. It

is the basis for Judge Sheedy's finding 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." (Da22, citing 6T11:2-4, 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. (Da22, Da90).

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 to 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. (7T43:5-24, 8T91:25 to 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 to 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.
>
> [Da18, Da90].

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 has been completely miscalculated from its inception. (9T150:13-19 and 151:10-14, 8T140:23 to 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 brazenly 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 the fact that he was systematically siphoning money from his father's loan account and using it to enrich himself.

To better understand the unlawful nature of Scott's scheme to unjustly enrich himself by perpetually converting Warren's joint venture investments and interests, we must highlight Scott's admission that since he moved into the J.V. Property's enormous second-floor garden terrace apartment in July of 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 initial investments and the same "loan interest" account that Scott admits has been completely miscalculated from its start. (9T150:13-19 and 151:10-14, 8T140:23 to 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).

[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).

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 before trial, he did not disclose that he has been using his fabricated and miscalculated "loan interest account" (9T150:13-19 and 151:10-14, 8T140:23 to 142:5) to "pay" his below-market rent via manipulated book 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 to 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 to 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 to 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 to 122:15). In fact, the $1,223,000 of total

liabilities Scott manufactured for his "loan" and "loan" interest accounts are almost as much as the $1,255,000 that 147 Broad paid to buy the Property. (9T74:18 to 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 to 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. (6T11:2-4, 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.

Scott, through these machinations, caused himself to benefit by obtaining $140,000 in "loan" principal and an additional $140,000 in "loan" interest. Scott therefore gave himself a benefit of $280,000 over 10 years while causing Warren to sustain a loss of $140,000. Scott also used his $140,000 of "loan" interest to "pay" his rent, while Warren's remaining $140,000 does not accrue any interest and is

essentially non-performing: it doesn't result in any loan repayments (save the one $50,000 exception in October 2014) or any distributions to Warren.

5. The Trial Court's Findings Are Amply Supported By Scott's Unauthorized and Undisclosed Management Agreement that He Used to Pay His Affiliate Entities $162,807.87 in Unnecessary Management 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. (Da22).

Scott, by himself and with no one else, 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 to 55:21, 10T19:6-24, Da117-124).

Scott owns 99% of both SD LLC and Tri City. (8T107:20 to 108:3). He also owns 99% of the LLC.

Scott concealed his management agreement from Warren. (8T56:8-15, 8T60:13-25). Warren never authorized the J.V. Property enter into a management agreement nor did he have any expectation that any management fees would be paid based on the nature of the J.V. Property, which is one building where Scott lived upstairs and has a commercial tenant downstairs. Scott merely had to cause the J.V.

Property to pay the bills and issue distributions when profits were available. (2T56:20 to 57:12, 58:12-18)

Although Scott entered into 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 also never informed Amboy Bank about it. (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 to 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 to 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 to 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.

This means that 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 the LLC having incurred $143,956.85 in professional fees. (10T5120 to 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, the law firm Pryor Cashman. (8T120:20 to 121:10). Scott also caused 147 Broad to pay $83,760 to his current counsel in this case, Fox Rothschild. (8T118:13 to 119:5).

The $111,216.86 that Scott caused the J.V. Property to pay to Fox Rothschild and Pryor Cashman are misappropriations that benefitted Scott personally: services provided to Scott in defense of this very action and the predecessor action between Scott and Warren concerning the same disputes. (10T52:4 to 53:4).

7. The J.V. Property's Books and Records Are Inherently Unreliable, As Acknowledged By Scott and On Account of His Repeated Failure to Produce Its QuickBooks Records Before Trial

The J.V. Property's books and records that Scott maintained are inherently unreliable because of the multitude of issues Scott himself acknowledged that render its books and records completely inaccurate and because of Scott's sanctioned misconduct due to his knowing failure to timely produce the J.V. Property's Quickbooks until the middle of the trial on January 28, 2024. (Pa3, 10).

In Scott's February 16, 2016 email to his accountants, Scott brazenly directed them 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 to 65:6). Scott's email demonstrates that the anomalies and discrepancies in the Quickbooks records coupled with Scott's willful discovery violations and refusal to produce the records before being ordered to do so *during trial* were the product of Scott's intentional scheme of deliberate manipulation. It shows that Scott's conversion of Warren's loan account and manipulation 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 to 169:10). Although Scott knew of these errors in 2018, he still had not corrected them six years later at trial. (8T140:23 to 142:5). Rather than fix the problem, Scott blamed his accountants. (8T141:4 to 142:3, 8T144:10 to 145:22).

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 to 202:9).

Scott's own loan account analysis that he relies upon in his appellant's brief and appendix (Da206-207) 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 to 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 to 149:8, 9T150:20 to 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 to 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 to 171:3, 10T172:14-21, 10T182:13 to 183:25, 10T201:18 to 202:9, 10T79:23 to 80:13, 10T82:23 to 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 to 56:8, 9T74:18 to 75:19, 9T150:3 to 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 to 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[.]" (Pa3).

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. (11T3:22 to 8:21, 11T26:10 to 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." (Ibid.). "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]." (Ibid.).

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

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. (Da10-11, Da23). 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. (Da23, 10T38:14 to 39:11, 10T40:11 to 41:25, 10T81:25 to 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." (Da23). 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:

> Scott allowed 10% interest to accrue on his loan account while denying the same benefit to his father's loan account. Scott placed his rent payments into that loan account for a period of time thereby earning interest on money he should have been paying and effectively reducing his already unilaterally reduced rent from the only valid signed lease. Scott also credited himself over $50,000 as a result of the one time payment to Warren. That is another example of Scott's mismanagement and overreaching attempt to obtain credit for far more than his contributions. Scott paid approximately $84,000.00 less than he should have for rent. In addition, as a resident of the building Scott paid nothing other than a reduced amount of rent and charged absolutely everything else to 147 Broad, LLC. Scott should have been paying for his residence's phone, internet – wifi and router costs, cleaning, landscaping, snow removal, security, insurance and utilities. As such, the Court finds that Scott is only entitled to receive a total loan value of $226,769.69.

[Da23].

Legal Argument

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).

In addition, 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).

Scott's due process arguments are also wholly without merit. The LLC has been a real party in interest in this case since its inception and has been named in the case's caption since the complaint was filed on August 24, 2018. (Da28). Similarly, 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.

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.

Point I

A Compelled Sale Is an Appropriate Equitable Remedy for Successful Causes of Action for Unjust Enrichment and Conversion that Involve Breach of the Duties to a Coventurer

As joint venturers, parties like Warren and Scott are entitled to seek a partition of their property when their joint enterprise comes to an end, see, e.g., Swartz v. Becker, 246 N.J. Super. 406, 410–11 (App. Div. 1991); Molineaux v. Raynolds, 54 N.J. Eq. 559 (Ch. 1896), irrespective of how title is formally held, see Crowe v. De Gioia, 203 N.J.Super. 22, 34 (App.Div.1985)("The name in which the house was held is essentially irrelevant to an equitable action such as this."), aff'd o.b., 102 N.J. 50 (1986). Among the remedies available — where other modes of relief are not practical — is a forced sale of the property and division of the net proceeds between

the parties. See Swartz, 246 N.J. Super. at 412–13; see also, e.g., Lipin v. Ziff, 53 N.J. Super. 443, 445 Ch. Div. 1959); Mitchell v. Oksienik, 380 N.J. Super. 119, 127–28 (App. Div. 2005).

A joint venture like 147 Broad is simply a single-purpose partnership. Fliegel v. Sheeran, 272 N.J. Super. 519, 524 (App. Div.), certif. denied, 137 N.J. 312 (1994). A partnership is an association of persons who have "join[ed] together their money, goods, labor or skill for the purpose of carrying on a trade, profession, or business, and where there is a community of interest in the profits or losses . . . ." Farris v. Farris Eng'g Corp., 7 N.J. 487, 498 (1951); Fliegel, 272 N.J. Super. at 523–24.

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 for profit where the parties agree to share profits and losses." Wittner v. Metzger, 73 N.J. Super. 438, 444 (App. Div.)(quotations and citations omitted)., certif. denied, 37 N.J. 228 (1962).

"[T]he managing joint adventurer, like the managing copartner, has concomitantly the strictest possible obligation to a coadventurer since the mutual affairs are delegated to his supervision and control without expectation or anticipation by either of routine interference 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.

"A joint venture is predicated on the same legal event as an employment, partnership, contract or other relationship: an agreement of the parties. However, the joint venture relationship may be less formal. It may be implied wholly or in part from the acts and conduct of the parties." Lo Bosco v. Kure Engineering, Ltd., 891 F. Supp. 1020, 1027 (D.N.J. 1995)(citations omitted). "Where there is an agreement, it 'need contain no particular form of expression, nor is formality of execution necessary.'" Id. at 1027 (quoting Wittner, 72 N.J. Super. at 443).

Scott's argument that the trial court somehow impermissibly rewrote the June 3, 2014 agreement therefore misses the mark completely. The relief fashioned by Judge Sheedy is consistent with this agreement, not contrary to it, while acknowledging Scott's extensive and continued decade-long breach of the co-venturer duties he owes to Warren.

Generally speaking, a joint venture has some or all of the following elements, with the caveat that "[a] joint adventurer may entrust actual control of the operation to his coadventurer and it still remains a joint venture." Wittner, 72 N.J. Super. at 446. As set forth in the Statement of Facts above at pages 4-11, each of these elements is present and credibly supported by the record with respect to Warren, Scott and the J.V. Property, with Warren having contributed almost all of the capital

to acquire and carry the J.V. Property and Scott having tended to its control and management: (A) contribution of money, property, effort, knowledge, skill or other assets to a common undertaking; (B) A joint property interest in the subject matter of the venture; (C) A right of mutual control or management of the enterprise; (D) Expectation of profit, or the presence of "adventure," as it is sometimes called; (E) A right to participate in the profits; and (F) Most usually, limitation of the objective to a single undertaking or ad hoc enterprise. Id. at 444 (quoting 2 Williston on Contracts § 318A (3d ed. 1959).

In granting relief to an aggrieved joint venturer in a situation like this, it is "well-established that equity has jurisdiction over issues involving the establishment of a partnership, its dissolution, and for an accounting thereof." Ruta v. Werner, 1 N.J. Super. 455, 459 (Ch. Div. 1948). "As joint venturers, the parties are entitled to seek a partition of their property when their joint enterprise comes to an end, irrespective of how title is formally held." Mitchell, 380 N.J. Super. at 127–28 (internal citations omitted). Thus, Scott's primary argument – that the joint venture property is titled in the name of the LLC – is irrelevant to the relief that the Judgment awarded.

One equitable remedy is a forced sale of the J.V. Property with the division of the proceeds between the parties. Id. at 128 (citing Swartz, 246 N.J. Super. at 412–13). This is because it is "well-established that equity has jurisdiction over issues

involving the establishment of a partnership, its dissolution, and for an accounting thereof. The entire issue should be settled in one proceeding." Ruta, 1 N.J. Super. at 459.

Here, Warren, with ample notice to Scott, invoked the broader equitable jurisdiction of the court. See Mitchell, 380 N.J. Super. at 130–31. Scott acknowledged this in his December 26, 2018 motion to transfer this action to the Chancery Division: "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).

Accordingly, as a matter of judicial economy, all issues between the parties were appropriately resolved in the matter at hand, including disputes over entitlement to property and the division of proceeds. Mitchell at 129-130.

As explained in the case of Ruta v. Werner, a court has equity jurisdiction over disputes like this, where the "various acts of the parties speak eloquently to an arrangement between them whereby there was created a plan of operations with reference to the land in question . . . . That the parties were to share equally in the profits is established without serious contradiction. There was clearly established by the oral agreement a partnership relation and operations conducted in pursuance thereof." 1 N.J. Super. at 459 (citation omitted). Thus, it is "well-established that equity has jurisdiction over issues involving the establishment of a partnership, its

dissolution, and for an accounting thereof. The entire issue should be settled in one proceeding." Id. at 459.

In Ruta, the parties were unmarried and unrelated. They orally agreed to engage as partners in a venture to develop a tract of land, held in the defendant's wife's name, as a dump, for profit. The plaintiff provided the labor while the defendant supplied the capital. The relationship soured and ended with the plaintiff never receiving any remuneration for his services nor any profit from the venture. The court resolved the dispute by issuing an order dissolving the partnership and directing an accounting and allocation of the proceeds. Id. at 457-461.

Similarly, in Mitchell, the court found that both parties had made equal contributions to the purchase and maintenance of real property. 380 N.J. Super. at 129. "Although the parties had not entered into a written agreement with regard to the purchase of the real property, formal written agreements are not necessary for a joint enterprise to exist. The existence of a joint enterprise can be found even in the absence of a written agreement, inferred from the conduct of the parties." Ibid. (citations omitted). "Because the parties' relationship had dissolved, the [Court], in response to a request for relief from either or both parties, justifiably applied its authority to order an equitable remedy, including a division of the assets of the joint enterprise, i.e., the net balance after satisfaction of existing debts and costs." Id. at

129-30; see also, Fortugno, 51 N.J. Super. at 504- (holding that equitable division of assets in a partnership dissolution action is "within the discretion" of the court).

As the appellate panel explained in Fortugno, 51 N.J. Super. at 504-05, the parties' testimony leads "to the inescapable conclusion that all of the corporations formed a single whole within the partnership. They created a single enterprise." Thus, despite the variety of corporate forms that were before the Fortugno panel, the Appellate Division ruled that "[i]t is therefore not unfair to the remaining partners to treat them as truly partners upon dissolution. Only the partners were involved in this litigation; there are no creditors or other third parties. In such cases, we may ignore the corporate entity in order to do that which is just. It offends the sense of fair play to leave [one partner] at the mercy of his partners, even though they may have treated him equitably in the past. We therefore conclude that the assets of the partnership, including those of all the corporations, should be liquidated, and the proceeds distributed in cash." Ibid.

Judge Sheedy similarly concluded that the J.V. Property should be liquidated and the proceeds distributed because, regardless of the property being owned by the LLC, the only interested parties are Warren and Scott and both were involved in the litigation. Warren is the only person who will continue to be harmed if the Judgment is not affirmed. The LLC is dominated by Scott, its 99% member and sole manager, and has been for the last decade. The primary creditor, Amboy Bank, will be paid

from the proceeds. And despite Scott's attempt on appeal to make it seem as though the Judgment will somehow cause Melissa Diamond and her silent 1% interest[4] to suffer some harm, this is a red herring argument. Melissa has no real interest or involvement in the joint venture or the LLC and has never received a single distribution. (10T162:24-25).

Point II

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

The Appellate Division deferentially reviews a trial court's division of a joint venture's assets and will not disturb the court's decision absent an abuse of discretion. See Fortugno, 51 N.J. Super. at 504–06. 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, 380 N.J. Super. 119, 127 (App. Div. 2005).

In his desperate attempt to call Judge Sheedy's factual findings and well settled equitable relief into question, Scott disingenuously argues that the Judgment's finding that Scott's $2,500 rent was below market is somehow not

[4] Melissa Diamond is Warren's daughter and Scott's sister.

supported by any evidence in the record. (Db46-47). Yet, Scott's below market-rent is proven by Scott's own testimony and documentary evidence that Scott has apparently elected to ignore. (Statement of Facts above at pages 11-19).

Scott also incredulously argues that Judge Sheedy's finding and conclusion that his loan account of $226,769.69 is somehow not supported by any evidence in the record. However, this finding and conclusion was based on Scott's own testimony and his own post-trial submission of proposed findings of fact and conclusions of law. (See Statement of Facts above at pages 31-33).

Without question, these findings and conclusions are supported by substantial credible evidence in the record and the well settled application of equitable principles in the context of joint venturers who breach the duties they owe to their co-venturers by engaging in conversion and unjust enrichment of their co-venturer investments and joint venture interests.

A court's decision to fashion appropriate equitable relief based on the particular facts of the case is reviewed for an abuse of discretion where the decision is consistent with applicable legal principles. 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). 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.

"Reviewing appellate courts should 'not disturb factual findings and legal conclusions of the trial judge unless it is convinced that they 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)(quoting Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974).

The Judgment should be affirmed because the remedy fashioned by Judge Sheedy was tailored to the facts of this case and was well within her discretion and consistent with applicable legal principles. The Judgment should also be affirmed because Judge Sheedy's factual findings and legal conclusions following ten days of bench trial are supported by and consistent with the competent, relevant, and reasonably credible evidence adduced at trial.

"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 (alteration in original)(quoting Kingsdorf ex rel. Kingsdorf, 351 N.J. Super. 144, 157 (App. Div. 2002)). 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." Ibid. (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, 411-12 (E. & A. 1938) (quoting Pom. Eq. Jur. § 109 (4th ed. 1918)). "Equities arise and stem from facts which call for relief from the strict legal effects of given situations." Thieme, 227 N.J. 269, 287 (2016)(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)(citations omitted).]

In the analogous situation of courts evaluating the relief of a constructive trust and how to mold the trust to the specific facts of each case, New Jersey courts have held that were there are clear and established facts supporting conversion, unjust enrichment, and misappropriation, a compelled sale through the imposition of a constructive trust or other form of unique equitable relief is an appropriate equitable remedy. 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, 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.

The essential element for the imposition of a constructive trust is unjust enrichment. See Stewart v. Harris Structural Steel Co., Inc., 198 N.J. Super. 255, 265 (App. Div. 1984). In Stewart, the trust was imposed 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 Insurance Company, 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); see also, Trustee of Client's Security Fund v. Yucht, 243 N.J. Super. 97, 131-33 (Ch. Div. 1989).

These cases illustrate the broad powers of the trial court in terms of how it can direct the property under a constructive trust to be handled, including 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. The LLC was, at all times, a real party in interest in this action and Scott knew since at least December 26, 2018 that the crux of this dispute was equitable relief sought by both Warren and Scott in relation to the J.V. Property.

Respectfully,

/s/ Matthew K. Blaine

MATTHEW K. BLAINE

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-003523-23 SAT BELOW: Kathleen A. Sheedy, J.S.C. (Superior Court of New Jersey, Law Division, Monmouth County)

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Date of Submission: January 10, 2025

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PRELIMINARY STATEMENT

Unfortunately, this case represents the circumstance where our Appellate Court should reverse a legally unsustainable and arbitrary decision of the Trial Court below.

As set forth in Scott's opening brief, this appeal focuses primarily upon two issues: (i) the Trial Court denied nonparty 147 Broad its procedural due process rights by ordering the sale of its Real Estate and the distribution of its assets; and (ii) the Trial Court reached multiple, arbitrary conclusions that are wholly unsupported by the record. Rather than oppose Scott's instant appeal by addressing each material error committed by the Trial Court, Warren, ad nauseam, references an order that levied discovery sanctions against Scott, which has no bearing upon the issues in this appeal. With respect to certain arguments advanced in Scott's opening brief, however, Warren ignored them entirely, acknowledging that the Trial Court's decision lacks substantive support. Nonetheless, each of Warren's arguments are without merit and should be disregarded.

Undeniably, the decision of the Trial Court is manifestly incorrect, arbitrary, and contrary to New Jersey law and the United States Constitution. As such, this Court should exercise its appellate review to reverse the Judgment of the Trial Court, ensuring that a miscarriage of justice does not occur in this case.

REPLY STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Scott relies upon and incorporates by reference the statement of facts and procedural history set forth in his opening brief. Additionally, Scott supplements his statement of facts and procedural history as follows:

A. The Requests for Equitable Relief in Warren's Complaint Were Solely in Connection with His Fraudulent Attempt to Claim an Ownership Interest in 147 Broad

Warren's Complaint is devoid of any request for relief from 147 Broad, or a request that 147 Broad's property be sold. Instead, Warren's focus is Scott's prior attempt to transfer this matter to the Chancery Division, when Scott argued that Warren's Complaint primarily sought equitable relief. The equitable relief in Warren's Complaint, however, arises almost entirely from the New Jersey Limited Liability Company Act, N.J.S.A. 42:2C-1 et seq., when Warren fraudulently attempted to assert claims, derivatively, on behalf of 147 Broad, despite not being a member of the entity. Specifically, the Complaint sought the following relief in Counts 1 through 5:

- Immediate access to the books and records of 147 Broad "as required by N.J.S.A. 42:2C-40(a)." (Da32 – Da33).
- An order "**restraining Scott Diamond from encumbering or selling the Property.**" (Da33 and Da35).

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

- An order "removing Scott Diamond as Managing Member of [147 Broad]." (Da33 and Da35).
- An order "appointing Warren Diamond as Managing Member of [147 Broad]." (Da34 and Da35).
- An order "declaring Scott Diamond dissociated from [147 Broad] pursuant to N.J.S.A. 42:2C-46(e)." (Da34 and Da35).
- An order directing "the sale of Scott Diamond's interests in [147 Broad] to Warren Diamond pursuant to N.J.S.A. 42:2C-47(c)." (Da34 and Da35).

Each of those requests for relief were present *only* in Counts 1 through 5 of Warren's Complaint, which the Court dismissed, finding that Warren was never a member of 147 Broad. (Da5). Thus, while Warren now attempts to re-cast the procedural history of this case to be one that is "equitable in nature," or that he always sought a partition of 147 Broad's real estate, Warren's argument is belied by his own pleading. In fact, contrary to the position he now takes – that the Real Estate should be sold – Warren *specifically* sought the entry of an order "**restraining Scott** Diamond from encumbering or **selling the Property**." (Da33 (*emphasis added*)). Critically, Warren never sought *any* relief against 147 Broad, as he did in a prior lawsuit arising out of the same facts, entitled Warren Diamond v. 147 Broad St, LLC, Docket No. MON-L-4068-15.

Simply stated, in order to deprive Scott of his membership interest in 147 Broad, and of the home where Scott has lived for the past decade, Warren flip-flops

on his prior request for relief. Thus, Warren now argues that the Real Estate should be sold. Either way, Warren's arguments lack merit and should be rejected.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ORDERING A NON-PARTY TO SELL AND DISTRIBUTE ITS ASSETS [Da5 – Da27]

Warren's opposition focuses so intently upon whether, in general, New Jersey courts are empowered to order a partition of real estate, that he misses the reversible error that plagues the Judgment: 147 Broad, was *not* a party to this litigation and as an entity that was *not* a party to a purported "joint venture" (Pb at p. 1), 147 Broad cannot be forced to sell and distribute its assets without due process of law.

As set forth in Scott's moving brief, Warren could not maintain claims on behalf of 147 Broad, as he was never a member of the entity[2]. See N.J.S.A. 42:2C-69. Unquestionably, Warren never named 147 Broad as a defendant to this action, as he had done in a prior lawsuit. Clearly, 147 Broad was never a party to this litigation. Thus, by ordering a nonparty, 147 Broad, to sell its Real Estate and distribute its

[2] Importantly, Warren's opposition is silent as to this issue. While Warren repeatedly argues that 147 Broad was identified in the caption of this litigation, he ignores the irrefutable fact that 147 Broad was improperly named as a party in this litigation *solely* because Warren unlawfully attempted to commence a derivative lawsuit on behalf of a company in which he is not a member.

assets, the Court denied 147 Broad its Constitutional right to due process. Certainly, this constitutes reversable error.

In his opposition, Warren ignores these irrefutable facts. Instead, in broad strokes, Warren argues that 147 Broad's Real Estate can be sold because "the parties are entitled to seek a partition of their property when their joint enterprise comes to an end." (*See* Pb at p. 35). Warren's argument fails, both factually and legally.

A. Warren's Argument is Without Factual Support in the Record

Critically, in the *first sentence* of his opposition, Warren concedes that 147 Broad is not a party to the "joint venture" at issue in this case. Instead, Warren admits that the only parties to the "joint venture" are: (i) Warren; (ii) Scott; and (iii) Melissa Diamond, also a non-party. (*See* Pb at p. 1). Thus, by Warren's own admission, 147 Broad is not a party to Warren's "joint venture." Clearly, even according to Warren's new, imaginative "joint venture" theory, 147 Broad was: (a) not part of the "joint venture"; and (b) still denied due process, when the Trial Court ordered 147 Broad to sell its Real Estate.

Warren's argument also fails factually because he overstates the scope of his purported "joint venture." In this regard, the "joint venture" is not a joint ownership of the Real Estate. Indeed, it is undisputed that 147 Broad is the sole owner of the Real Estate. (Da28 at ¶2). Moreover, the Trial Court ***expressly*** rejected the contention that Warren was a member of 147 Broad, obviating the notion that Warren

possesses a present ownership interest in the Real Estate. (Da19 – Da20). Instead, to the extent Warren's "joint venture" has any weight, it could only be construed between Warren and Scott for the purpose of providing funds, irrespective of whether 147 Broad continued to own the Real Estate. For example:

- In the Memorandum of Understanding, the parties agreed that Warren would advance funds to cover 147 Broad's obligations to Amboy Bank, where the income received from rent was insufficient to support company operations. (Da137 – Da138). This obligation was not contingent upon 147 Broad's continued ownership of the Real Estate.

- In the June 3, 2014 Agreement, the parties agreed that 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." (Da88 – Da91). This obligation was not contingent upon 147 Broad's continued ownership of the Real Estate.

- At all times, Warren was not entitled to act on behalf of 147 Broad or take any other action with respect to the maintenance of the Real Estate. To this end, on February 19, 2014, Scott wrote and e-mail to Warren, directing Warren to "discontinue representation that [Warren has] any capacity to act on behalf of or bind 147 Broad Street." (T4 at 38:17 – 39:7). Warren's lack of authority continued throughout the entire relationship, regardless of 147 Broad's continued ownership of the Real Estate.

Even assuming *arguendo,* that a "joint venture" existed, it is undisputed that: (i) 147 Broad was not a party to the joint venture (Pb at p. 1); and (ii) the joint venture did not own the Real Estate. Thus, the Trial Court's decision to compel 147 Broad – a distinct entity that is neither a party to the litigation nor the joint venture – to sell

its Real Estate, is without factual support. Accordingly, the Trial Court's error should be reversed and vacated.

B. Warren's Argument is Without Legal Support

Setting aside the lack of factual support to compel the sale of 147 Broad's Real Estate, the case law Warren cites *also* fails to support the Court's ability to force a sale of property owned by a non-party. Specifically:

- In Swartz v. Becker, 246 N.J. 406 (App. Div. 1991), the partitioned property at issue was owned **by the defendant**. *Id.* 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.") (*emphasis added*).

- In Molineaux v. Raynolds, 54 N.J. Eq. 559 (Ch. 1896), the court acknowledged that the property at issue was owned in the name of the parties to the litigation, writing "the present owners of the property are Charles T. Raynolds, Thomas B. Hidden, **the two defendants**, and Gen. Molineaux, **the complainant**." (*emphasis added*).

- In Crowe v. DeGioia, 203 N.J. Super. 22 (App. Div. 1985), the partitioned property at issue was owned **by the defendant**. *Id.* at 34 ("Nor do we view as meritorious **De Gioia's claim that the purchase of the property in his own name** precludes the conclusion that he promised to convey it to Crowe.") (*emphasis added*).

- In Lipin v. Ziff, 53 N.J. Super. 443 (Ch. Div. 1959), the partitioned property at issue was owned, in part, **by the plaintiff**. *Id.* at 443 ("**Plaintiffs** sued to partition a tract of commercial real estate **in which they owned a 1/12 interest**.") (*emphasis added*).

- In Mitchell v. Oksienik, 380 N.J. Super 119 (App. Div. 2005), the partitioned property at issue was owned **by the defendant**. *Id.* at 123 ("Title to the land was taken **in defendant's name alone**.") (*emphasis added*).

- In Fortugno v. Hudson Manure Company, 51 N.J. Super. 482 (App. Div. 1958), the Court ordered the sale of property owned by a partnership, where all members of the underlying partnership were parties to the litigation, and no individual with a beneficial interest in the property was excluded from the litigation.

Importantly, in one of the cases that Warren cites – Ruta v. Werner, 1 N.J. Super 455 (Ch. Div. 1948) – the property at issue was ***not*** owned by any party to the litigation. Rather, the property was owned by the defendant's *wife*, who was not a party to the lawsuit. Id. at 457. In that light, the Court in Ruta **did not** order the sale of the property. Id. at 460 ("The title to the wife's property is no wise involved in these proceedings, which is limited to an accounting for the increased value of the land.). Instead, the Court ordered *only* a dissolution of the partnership and directed that an accounting be made. Id. at 461.

In this matter, like the case in Ruta, no party to the litigation is an owner of the Real Estate. In fact, the undisputed evidence demonstrates that 147 Broad – an entity that is owned, in part, by Melissa Diamond, who is also not a party to this litigation - is the 100% owner of the Real Estate. (Da28 at ¶2). As the Court in Ruta implicitly acknowledged, it is against the weight of established law to force the sale of real property owned by a nonparty to the litigation. As such, the forced the sale of 147 Broad's Real Estate is a reversible error.

It does not matter that Courts are generally empowered to order a partition of real estate controlled by a joint venture. Indeed, even under Warren's "joint venture"

theory, the "joint venture" did not control the real estate. The question here 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 Real Estate. As 147 Broad and one of its members were excluded from 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.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REACHING FINDINGS OF FACT THAT ARE NOT SUPPORTED BY ANY EVIDENCE IN THE RECORD [Da5 – Da27]

Where the findings of a trial court are "so wholly unsupportable as to result in a denial of justice," those findings are not binding on appeal. See e.g. Greenfield v. Dusseault, 60 N.J. Super. 436, 444 (App. Div. 1960). In this regard, where a "decision [was] made without a rational explanation," it will not be sustained on appeal. See United States v. Scurry, 193 N.J. 492, 504 (2008) (quoting Flagg v. Essex County Prosecutor, 171 N.J. 561 (2002)).

Here, the Judgment is plagued by at least two findings by the Trial Court that are so arbitrary, that they cannot be supported by any rational explanation: (i) the

Trial Court erroneously determined the "fair market value" of Scott's rent without the benefit of appropriate testimony on the issue; and (ii) the Trial Court disregarded competent evidence when establishing the "value" of Scott's loan account.

A. There is No Evidence in the Record from which the Trial Court Could Determine the Fair Market Value of Scott's Rent

Warren ignores the irrefutable fact, that no expert testimony concerning the "reasonableness" of Scott's $2,500 monthly rent obligation was offered at trial. In fact, no testimony was presented at trial to establish what the amount of "reasonable" monthly rent would be, when compared to similar properties in the Red Bank area. Notwithstanding the absence of any evidence on that issue – whether favorable to Scott or otherwise - the Trial Court improperly found that "Scott paid approximately $84,000.00 less than he should have for rent." (Da26 – Da27).

Certainly, the Trial Court's finding, that Scott's $2,500 monthly rent was "unreasonable," is arbitrary, as it is not based upon an expert opinion, testimony, or any credible evidence whatsoever. As such, this Court is not required to give the Trial Court's findings *any* deference. Instead, as the Trial Court's decision is wholly unsupported by any factual evidence in the record below, the finding that Scott's rent is "unreasonable" should be vacated in its entirety.

B. There is No Evidence in the Record to Support the Trial Court's Decision to Disregard Scott's Loans to 147 Broad

Both the Trial Court and Warren ignore a significant volume of evidence demonstrating that, under all circumstances, Scott's loan account at 147 Broad is *significantly* higher than $226,769. For example:

- Warren concedes that 147 Broad's bank records show that Scott loaned no less than $474,053 to 147 Broad, for use in 147 Broad's operations. (T7 at 20:12 – 56:8; Pb at 30). In fact, 147 Broad's bank records demonstrate that 147 Broad would *not* have had sufficient cash to manage its day-to-day operations if Scott did not repeatedly loan money to 147 Broad. (*See e.g.* T7 at 24:13 – 25:16). Nonetheless, the Trial Court entirely disregarded documents reflecting Scott's loan, and arbitrarily excluded those sums from Scott's loan account.

- The Trial Court specifically requested that Scott demonstrate that the money loaned to 147 Broad was necessary to maintain company operations. (T7 at 54:2 – 55:19). As a result, in painstaking detail, Scott presented evidence reflecting the entirety of 147 Broad's income and expenses over the course of a 10-year period[3]. (T10 at 28:18 – 77:7; Da206 – Da207). The unchallenged evidence demonstrates that, but for Scott's loans of over $600,000, 147 Broad would not have been able to support its operations. (*Id.*). Nonetheless, the Trial Court disregarded these facts in their entirety, and arbitrarily excluded these sums from Scott's loan account.

- In the June 3 Agreement, Warren consented, in an arms-length transaction, to transfer a certain portion of his loan account with 147 Broad to Scott. (Da90; T6 at 45:6 – 46:12). Without any support in the record, the Trial Court disregarded the parties' arms-length agreement and found that "Scott

[3] Warren repeatedly argues that 147 Broad's books and records are unreliable. Warren's argument should be disregarded, as the Trial Court did not make *any* findings as to the reliability of 147 Broad's books and records. In fact, the Judgment is wholly devoid of any discussion of the accuracy of those records.

"converted" one-half of Warren's $280,000 January 16, 2014 investment and allocated it to himself as a loan in the amount of $140,000." (Da26).

- Pursuant to 147 Broad's Operating Agreement, all loans payable to *members* of 147 Broad accrue interest at a rate of 10%. (Da169). Notwithstanding that contractual provision, the Trial Court arbitrarily excluded from Scott's loan account *all* interest accrued on loans that Scott made to 147 Broad. In other words, without any explanation or justification, the Trial Court ignored 147 Broad's books and records, and found that Scott's loan account had not accrued a *single penny* of interest over the course of ten years[4].

While disputes are intended to be decided on their merits and upon facts, it is clear that the Trial Court disregarded a significant volume of evidence, so as to arbitrarily arrive at a pre-determined outcome. The only competent evidence before the Court demonstrates that, over a period of ten years, Scott loaned no less than $474,053 to 147 Broad, so that the company could continue its operations. Without explanation, the Trial Court arbitrarily disregarded these facts.

If the Trial Court believed that Scott's loan account should have been reduced for any reason – whether it is the belief that Scott should have paid more in rent or should have reimbursed 147 Broad for utilities – the Trial Court could have

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[4] As set forth in Scott's opening brief, Scott's loans to 147 Broad are subject to a different deal than Warren's loans to 147 Broad. Scott's loans to 147 Broad are governed by 147 Broad's Operating Agreement, which provides for an interest rate of 10%. (Da169). Conversely, Warren's loans to 147 Broad are governed by the June 3 Agreement. The June 3 Agreement provides that, rather than receive interest for loans made to 147 Broad, Warren received other consideration, including: (i) a future contingent interest in 147 Broad; and (ii) 49% of distributions made by 147 Broad. (Da88 – Da91).

calculated the exact amount of any reduction to Scott's loan account. Instead, the Trial Court arbitrarily reduced Scott's loan account, eliminating both interest and principal from Scott's existing loan balance, without explanation or justification.

By all accounts, the Trial Court failed in its obligation to adjudicate this dispute based upon competent evidence in the record. As such, this Court should reverse the findings of the Trial Court below.

POINT III

WARREN FAILED TO OPPOSE SCOTT'S SHOWING THAT THE TRIAL COURT ERRED BY GRATING RELIEF BASED UPON WARREN'S INDIVIDUAL CLAIMS

It remains unrefuted that Scott did not cause Warren, individually, to suffer any damage. As a result, Warren cannot succeed on any of his claims, as a matter of law. (*See* Db at p. 48 – 50). Indeed, even through the most generous reading of Warren's opposition, it is clear that Warren never refuted that he, individually, sustained damages as a result of any act of Scott[5]. By failing to oppose this issue, Warren concedes that the Trial Court erred when it granted judgment in Warren's

[5] Certainly, Warren's decision to not oppose this issue is intentional, and not merely a tactical decision based upon the page limitations set by the Rules of Court. To this end, Warren's opposition brief is replete with discussions surrounding an order of sanctions that is not relevant, in any way, to the issues raised in this appeal. Certainly, if Warren wished to substantively oppose this issue, he could and should have done so.

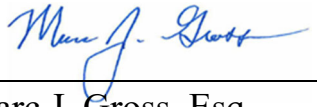
favor on its claims for conversion and unjust enrichment. Accordingly, for the reasons set forth in Scott's moving brief, the Judgment should be reversed.

CONCLUSION

For the reasons set forth herein, along with those advanced in Scott's opening brief, 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: January 10, 2025

By: 

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