

NOT TO BE PUBLISHED WITHOUT APPROVAL  
FROM THE COMMITTEE ON OPINIONS

CAJOECO, LLC; CAJOECO, LLC  
PROFIT SHARING TRUST; CAJOECO,  
LLC PROFIT SHARING PLAN; JEST  
TEXTILES, INC.; JEST TEXTILES, INC.  
DEFINED BENEFIT PLAN AND  
TRUST; NORMAN MAIS, individually,  
as Trustee, Administrator, and/or  
Beneficiary of Cajoeco, LLC Profit  
Sharing Trust, and as Trustee,  
Administrator, and/or Beneficiary of Jest  
Textiles, Inc. Defined Benefit Plan and  
Trust; CARMEN MAIS, individually and  
as Trustee, Administrator, and/or  
Beneficiary of Cajoeco, LLC Profit  
Sharing Trust;

Plaintiffs,

v.

BENSI ENTERPRISES, LLC; BENSI OF  
OLD TAPPAN, LLC; BENSI OF NORTH  
BRUNSWICK, LLC; BENSI OF OLD  
BRIDGE, LLC; BENSI OF HAMILTON,  
LLC; BENSI OF GARWOOD, LLC;  
RUDY'S OF GARWOOD, LLC; BENSI  
RESTAURANT GROUP, INC.; BENSI  
MANAGEMENT ASSOCIATES, LLC;  
BENSI DEVELOPMENT GROUP, LLC;  
BENSI, INC.; BENSI OF CLIFTON,  
LLC; BENSI OF DENVILLE, LLC;  
BENSI OF ENGLISH VILLAGE, LLC;  
BENSI OF FLEMINGTON, LLC; BENSI  
OF GILLETTE, LLC; BENSI OF  
GLOUCESTER, LLC; BENSI OF  
HAMPTON, LLC; BENSI OF  
HASBROUCK HEIGHTS, LLC; BENSI  
OF HH, LLC; BENSI OF HILLSDALE,  
INC.; BENSI OF MANSFIELD, LLC;  
BENSI OF NORTH ARLINGTON, INC.;  
CENTANNI RISTORANTE, LLC;  
BENSI OF PARAMUS PARK, LLC;  
BENSI OF ROSELAND, LLC; BENSI  
OF ROXBURY, LLC; BENSI OF  
WHIPPANY, LLC; SCALOPINI OF  
WHIPPANY, LLC; BENSI OF  
WHITEHOUSE STATION, LLC; BENSI  
OF WYOMISSING, LLC;

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION – BERGEN COUNTY**

**DOCKET NO. BER-L-3477-16**

Civil Action

**OPINION**

AJO MANAGEMENT, LLC; TPR RESTAURANT PIZZERIA, LLC; JOHN OSSO, individually, as limited liability company member and/or manager, and as shareholder, officer, director, or corporate agent; RIZZIERO OSSO, individually, as limited liability company member and/or manager, and as shareholder, officer, director, or corporate agent; MARIO BERNARDO, individually, as limited liability company member and/or manager, and as shareholder, officer, director, or corporate agent; ARI BEN-YISHAY, individually, as limited liability company member and/or manager, and as shareholder, officer, director, or corporate agent; NANCY OSSO, individually, as limited liability company member and/or manager, and as shareholder, officer, director, or corporate agent; ELSA OSSO, individually, as limited liability company member and/or manager, and as shareholder, officer, director, or corporate agent; BARBARA BEN-YISHAY, individually, as limited liability company member and/or manager, and as shareholder, officer, director, or corporate agent; JORGE RAMIREZ, individually, as limited liability company member and/or manager, and as shareholder, officer, director, or corporate agent; OSCAR BENITEZ, individually, as limited liability company member and/or manager, and as shareholder, officer, director, or corporate agent; ROBERTO DASILVA, individually, as limited liability company member and/or manager, and as shareholder, officer, director, or corporate agent; JAMES KELLY, individually, as limited liability company member and/or manager, and as shareholder, officer, director, or corporate agent; FRANCESCO BERNARDO, individually, as limited liability company member and/or manager, and as shareholder, officer, director, or corporate agent;

JOSE DARIO FERNANDEZ, individually, as limited liability company member and/or manager, and as shareholder, officer, director, or corporate agent; DENISE DIMEGLIO, individually, as limited liability company member and/or manager, and as shareholder, officer, director, or corporate agent; CLEMENTE OSSO, individually, as limited liability company member and/or manager, and as shareholder, officer, director, or corporate agent; ABC ENTITIES 27-100 (fictitiously named business entities); JOHN DOES 12-50 (fictitiously named individuals); JOHN DOES 50-100 (fictitiously named individuals),

Defendants.

**Argued: March 1, 2019**  
**Decided: March 21, 2019**

**THE HONORABLE ROBERT C. WILSON, J.S.C.**

Christos J. Diktas, Esq. appearing on behalf of plaintiffs Cajoeco LLC; Cajoeco LLC Profit Sharing Trust; Cajoeco LLC Profit Sharing Plan; Jest Textiles, Inc.; Jest Textiles, Inc. Defined Benefit Plan and Trust; Norman Mais, and Carmen Mais (from Diktas Gillen, P.C.).

Michele L. Ross, Esq. appearing on behalf of defendants Bensi Enterprises, LLC; Bensi of Old Tappan, LLC; Bensi of Old Bridge, LLC; Bensi of Hamilton, LLC; Bensi of Garwood, LLC; John Osso; Nancy Osso; Jorge Ramirez; Roberto DaSilva; TPR Restaurant Pizzeria, Inc.; Millanni Grill, Inc.; Bensi of Denville, Inc.; Bensi Inc.; Bensi of HH, LLC; Bensi of Whitehouse Station, LLC; Bensi Restaurant Group, Inc.; Bensi of Mansfield, LLC; Centanni Ristorante, Inc.; Bensi of North Arlington, LLC; AJO Management, LLC; Bensi Management Associates, LLC; Bensi of Hasbrouck Heights, Inc.; Bensi of English Village, LLC; Bensi of Hampton, LLC; Bensi of Gloucester, LLC; Bensi Development Group, LLC; Bensi of Wyomissing, LLC; Bensi of Roxbury, LLC; Bensi of Roseland, LLC; Bensi of Clifton, LLC; Bensi of Paramus Park, LLC; Bensi of Flemington, LLC; Bensi of Whippany, LLC; and Bensi of Gillette, LLC (from M. Ross & Associates, LLC).

Robert G. Ricco, Esq. appearing on behalf of defendants Ari Ben-Yishay, Barbara Ben-Yishay, and Bensi of North Brunswick, LLC (from The Law Office of Robert G. Ricco, Esq.).

Nima Ameri, Esq. appearing on behalf of defendant Francesco Bernardo (from Ameri & Associates, LLC).

Joseph B. Fiorenzo, Esq. and Andrew W. Schwartz, Esq. appearing on behalf of defendants Rizziero Osso and Mario Bernardo (from Sills Cummis & Gross, P.C.).

Frederic C. Goetz, Esq. appearing on behalf of defendants Bensi of Hillsdale, Inc. and Clemente Osso (from Frederic C. Goetz, Esq., LLC).

Steve M. Kalebic, Esq. appearing on behalf of defendant Elsa Osso (from the Law Offices of Steve M. Kalebic, P.C.).

### **FACTUAL BACKGROUND**

**THIS MATTER** arises out of business relationship involving plaintiffs Cajoecco, LLC; Cajoecco, LLC Profit Sharing Trust; Cajoecco, LLC Profit Sharing Plan; Jest Textiles, Inc.; Jest Textiles, Inc. Defined Benefit Plan and Trust; Norman Mais; and Carmen Mais (“Plaintiffs”) and the multitude of named defendants, who all invested in a business enterprise that operated Italian restaurants in New Jersey, Pennsylvania, and Virginia.

Plaintiffs allege that John Osso, the majority owner of Bensi Enterprises, LLC (“Bensi Enterprises”), undertook a fraudulent scheme to solicit investments by Plaintiffs in the restaurant enterprise he created. Plaintiff Norman Mais alleges that John Osso directly solicited investments from him and was the “mastermind” behind the restaurant chain who held most, if not all, decision-making power. However, Plaintiffs also named more than fifty additional individual co-investors and entities as defendants in this matter, alleging diverse causes of action against them.

#### **I. The Prototype Restaurant Entities and the Inception of the Bensi Restaurant Business Venture**

The Bensi restaurant business venture (the “Bensi Venture”) was modeled upon a series of existing restaurants owned by John Osso and various partners. Those restaurants were located in Hillsdale, Wayne, North Arlington, Hasbrouck Heights, and Denville, New Jersey (the “Prototype

Restaurants”). The Prototype Restaurants were all managed by a single entity, Bensi Restaurant Group, Inc. (“BRG”).

Sometime in 2002, John Osso told Rizziero “Rick” Osso, his nephew, of his plan to open a chain of owner-operated restaurants based upon the Prototype Restaurants. John Osso would be the exclusive creative force behind Bensi Enterprises. He was the “founding member,” who exclusively designed, developed, and implemented the marketing concept employed to establish individual Bensi restaurants, and exclusively designed, developed, and implemented the capitalization plan for each of the Bensi entities.

The Bensi Venture was to be organized in a manner where the restaurants themselves would be owned individually but managed together as a group by another entity. Specifically, each restaurant was to be owned by a separate limited liability company (“LLC”). Bensi Enterprises was formed in April 2004 as a holding company for the individual LLCs that owned each individual Bensi restaurant. Bensi Enterprises held a fifty-five percent interest in each of the separate LLCs, and the remaining forty-five percent of membership interest was to be owned by that Bensi restaurant’s chef, managers, and employees. BRG was responsible for managing the individual Bensi restaurants in exchange for a management fee of three percent of net sales.

Bensi Enterprises was originally comprised of its Class A members: John Osso, Rick Osso, Mario Bernardo, Jorge Ramirez, and Oscar Benitez. The Class A members held all voting rights. In July 2004, Bensi Enterprises issued a private placement memorandum for the sale of Class B membership units in order to raise \$4,500,000 in capital for the Bensi Venture (the “Private Placement Memorandum”). The U.S. Securities Exchange Commission identified John Osso, Rick Osso, and Mario Bernardo as promoters of this offering.

At the time of the Private Placement Memorandum, John Osso, Rick Osso, Mario Bernardo, Jorge Ramirez, Oscar Benitez, Clemente Osso, and Roberto DaSilva each had an ownership interest in one or more of the Prototype Restaurants. Similarly, these individuals were all members of the board of directors for one or more Prototype Restaurants. At this same time, another entity owned by John Osso and Mario Bernardo were also managed by BRG: TPR Restaurant Pizzeria, Inc. (“TPG”).

Starting in 2004, Bensi Enterprises opened the following new Bensi restaurants: Garwood, Gillette, Roxbury, Roseland, Whippany, Paramus, Clifton, Mansfield, English Village, and Wyomissing (Pennsylvania). Sometime in 2007, John Osso came up with the idea to open even larger restaurants in “lifestyle shopping centers.” Each of these restaurants would be a separate entity owned directly by investors, with John Osso the majority owner and manager of each entity. Bensi Enterprises had no ownership interest in this “second generation” of Bensi restaurants. John Osso opened up the following Bensi restaurants in this manner: Old Bridge, North Brunswick, Flemington, Hamilton, Gloucester, Hampton (Virginia), and Old Tappan.

## **II. The Bensi Restaurant Group Management Team**

As previously stated, the Bensi Venture was managed and operated under BRG. BRG performed all recordkeeping functions for each individual Bensi entity and all records were maintained at the BRG office. Plaintiffs allege that the following individuals were “officers” of BRG, and held various titles corresponding to their duties. However, Plaintiffs base these assertions on various conversations, documents, and records which may not accurately reflect their duties and liabilities. They are listed as follows: John Osso, President; Clemente Osso, Vice President of Finance; Rick Osso, Director of Operations; Oscar Benitez, Corporate Chef; Jorge Ramirez, General Manager; Franco Bernardo, General Manager. Plaintiffs also claim that Ari

Ben-Yishay, an “angel” investor in Bensi Enterprises, held some type of *de facto* managerial role later in the life of the Bensi Venture.<sup>1</sup>

From 2004 to 2013, the Bensi Venture grew to encompass twenty-four restaurants, including the Prototype Restaurants. Each restaurant was associated with a separate entity that had its own set of LLC members or corporate shareholders. Despite the individual ownership of each restaurant by a separate business entity, Plaintiffs allege that the Bensi Venture was managed and operated as a single business enterprise. Plaintiffs state that capital investments and interests were regularly intermingled and transferred between the various individual entities, which they argue went beyond the group management structure which was agreed to at the outset of the venture.

### **III. Plaintiffs’ Investments and Allegations of Investment Fund Diversions**

The Bensi Venture attracted two angel investors to the project: Ari Ben-Yishay and Norman Mais. Both individuals supported the Bensi Venture with loans and investments. Plaintiff Norman Mais was a good friend of John Osso. Prior to 2004, Mr. Mais told John Osso that he would be interested in investing in one of John Osso’s restaurants. In 2004, John Osso provided Mr. Mais with a copy of the Private Placement Memorandum. On or about August 10, 2004, Mr. Mais purchased 1,400 Class B Membership Units of Bensi Enterprises for \$210,000.

Mr. Mais was provided with “Offering Documents,” which included a subscription agreement, the Private Placement Memorandum, and the operating agreement of Bensi Enterprises. Despite warranting that he had read the Offering Documents, Mr. Mais admitted at

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<sup>1</sup> “Angel investors invest in early stage or start-up companies in exchange for an equity ownership interest.” Angel investors usually invest \$25,000 to \$100,000 in a company. Richard Harroch, *20 Things All Entrepreneurs Should Know About Angel Investors*, FORBES, Feb. 5, 2015, available at <https://www.forbes.com/sites/allbusiness/2015/02/05/20-things-all-entrepreneurs-should-know-about-angel-investors/#3d21d3a3c1aa/>.

his deposition that he did not read the Private Placement Memorandum or the Bensi Enterprises' operating agreement. Furthermore, he testified that he did not read the Offering Documents because "[he] trusted John Osso and [he] was committed in [his] own mind to make an investment." In fact, Mr. Mais continued to invest in Bensi Enterprises and individual Bensi restaurants even when distributions ceased, and John Osso instead asked Mr. Mais for additional loans.

At no time did Mr. Mais review any financial records of Bensi Enterprises, or evaluate the risks of the investment in the Bensi Venture because he relied on John Osso's representations. Mr. Mais now alleges that the investments made at his direction were diverted from specific intended LLCs to other purposes, including financial support of other entities in the Bensi Venture and "Ponzi-style" payments to Plaintiffs and other investors.<sup>2</sup>

#### **IV. Allegations of Commingling of Funds, Undercapitalization, Manipulation of Capital Accounts, and the Business Venture's Financial Distress**

The accounting firm Ortega & DiLeonardo provided accounting services for the Bensi Venture from its inception. Frank Ortega, CPA personally performed accounting functions for the venture. The Bensi Venture failed to fund its fifty-five percent membership interest in several of the subsidiary LLCs that owned the individual Bensi restaurants. As a result, millions of dollars in intercompany loans were made by and between the individual entities to address cash flow shortages. However, none of these loans were supported by promissory notes.

Further compounding cash flow problems with certain individual Bensi restaurants was the fact that Bensi Enterprises itself was undercapitalized. Bensi Enterprises had not raised the required capital to sustain its original business plan for the Bensi Venture during the initial offering

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<sup>2</sup> "A Ponzi scheme is an investment fraud that pays existing investors with funds collected from new investors." *Ponzi Scheme*, U.S. Securities & Exchange Commission (last visited Mar. 10, 2019), <https://www.investor.gov/protect-your-investments/fraud/types-fraud/ponzi-scheme>.



in 2004. As a result of the undercapitalization, Bensi Enterprises began soliciting investments from the individual entities. In February 2007, Bensi Enterprises created a new class of membership units, Class AA, and offered its Class B members the opportunity to invest in those units. Plaintiffs' second investment in the Bensi Venture was made in March 2007 in the amount of \$172,500 for Class AA membership units.

While Bensi Enterprises' business records indicated they raised \$8.7 million in capital as of 2009, other documents in the record reflect that the Bensi Venture was struggling financially at this time. Specifically, the business records produced show individual Bensi restaurants carrying millions of dollars in debt. Furthermore, bank accounts affiliated had individual Bensi entities with a negative balance on their ledgers. Mr. Ortega could not corroborate that the bank balance of \$8.7 million was the result of capital realized from the sale of the new Class AA Bensi Enterprise units.

#### **V. Allegations of Preferential Transfers to "Insider" Members of the Bensi Restaurant Group**

In late 2008, Mr. Ben-Yishay became dissatisfied with the performance of his investments in the Bensi Venture. He engaged an outside accountant, Gary Levy, CPA of JH Cohn LLC, to provide an analysis and advice on the Bensi Venture's company structure, controls, and financial performance. After reviewing Bensi Enterprises' books and records, Mr. Levy advised Mr. Ben-Yishay against any further investment in the Bensi Venture. Thereafter, Mr. Ben-Yishay restructured and collateralized the debts owed to him by Bensi Enterprises and John Osso.

In September 2010, Mr. Levy and his firm were engaged by BRG to assist with the Bensi Venture's management in assessing cash flow and individual restaurant performance. Mr. Levy recommended that BRG engage Mr. Michael Jacobs as an operating consultant to help fix the operations of the Bensi Venture. Mr. Jacobs was to provide strategic recommendations to assist

individual restaurants performing poorly. Mr. Jacobs' reports revealed the grim reality of Bensi Venture's financial health. He outlined a "Reorganization Plan" for the Bensi Venture identifying eight Bensi restaurants as "unsustainable locations." A further analysis of short-term cash needs and mid-term cash needs indicated that the Bensi Venture would not have enough cash to satisfy all of its financial commitments.

Mr. Mais claims that he was never made aware that BRG was retaining the services of Mr. Levy or Mr. Jacobs. He also claims that he was not informed of or asked to attend a meeting by BRG on January 11, 2011 to receive the report and recommendations of Mr. Jacobs. He further alleges that the advice provided by Mr. Levy and Mr. Jacobs, to which Mr. Mais was unaware, spurred the "preferential transfers" that Plaintiffs now complain of.

It seems that Plaintiffs' allegations that Mr. Ben-Yishay was a *de facto* manager and insider of the Bensi Venture, and not solely a passive investor, arises from this single instance whereby Mr. Ben-Yishay took it upon himself to hire an outside accountant to evaluate the financial health of the Bensi Venture. However, the fact that Mr. Ben-Yishay was conducting his own due diligence to protect his investments is not actionable. He had a right to inspect books and records as a passive investor, as Mr. Mais could have done.

## **VI. Alleged "Preferential Transfers" to "Insider" Members and Officers of the Bensi Business Venture**

After the reports and recommendations made by Mr. Levy and Mr. Jacobs were conveyed to John Osso and the other members of BRG, Plaintiffs allege that a series of "preferential transfers" were made from Bensi Enterprises to members of BRG or the entities they owned. He claims that these preferential transfers were made to the Bensi Venture "insiders" before John Osso filed for bankruptcy. The details of these transfers are set forth in detail below.

***A. Transfers Involving Ari-Ben Yishay, John Osso, Bensi of North Brunswick, LLC, and Bensi of Hillsdale, Inc.***

Plaintiffs allege that Ari Ben-Yishay held a managerial role in BRG. However, the record supports a finding that Ari Ben-Yishay was solely a passive investor and a creditor to the Bensi Venture. He was not an “insider” to the organization, and in fact, suffered tremendous losses in excess of \$6,000,000 – a number twice as large as the losses claimed by Mr. Mais’ accounting expert. This loss makes him the greatest victim of the failed Bensi Venture.

However, Plaintiffs claim that Ari Ben-Yishay benefitted from “preferential transfers” undertaken before John Osso filed for bankruptcy. Specifically, Plaintiffs claim that from 2007-2010, John Osso, Bensi Enterprises, and/or various individual Bensi entities made promissory notes to Mr. Ben-Yishay promising repayment on hundreds of thousands of dollars that Mr. Ben-Yishay loaned to the Bensi Venture. Mr. Ben-Yishay, John Osso, and/or other Bensi entities entered into other agreements and arrangements to ensure Mr. Ben-Yishay received repayment on his loans and investments in the Bensi Venture.

One of these arrangements was a forbearance agreement entered into by Mr. Ben-Yishay, John Osso, Bensi Enterprises, and Bensi of Hillsdale, Inc. on April 6, 2011 (the “Forbearance Agreement”). Pursuant to the Forbearance Agreement, Mr. Ben-Yishay agreed to forbear from enforcing remedies for default in loan obligations in exchange for an amendment and reinstatement of the indebtedness and pledge of collateral.

John Osso, Bensi Enterprises, and Bensi of Hillsdale, Inc. were unable to meet their obligations to Mr. Ben-Yishay under the Forbearance Agreement. As a remedy, John Osso, Bensi Enterprises, Bensi of Hillsdale, Inc. and Bensi of North Brunswick, LLC entered into an “Equity Conveyance/Transfer Agreement” with Mr. Ben-Yishay. In order to accomplish this, Jorge Ramirez, Elsa Osso, and Nancy Osso exchanged their interests and Class B stock in Bensi of

Hillsdale, Inc. for interests and Class B stock in Bensi of Denville, LLC. In addition to the conveyance of equity in Bensi of Hillsdale, Inc. the Equity Conveyance/Transfer Agreement also provided for two secured promissory notes promising repayment of approximately \$2.9 million by Bensi Enterprises and John Osso to Mr. Ben-Yishay.

***B. Transfers Involving Barbara Ben-Yishay***

Barbara Ben-Yishay is Ari Ben-Yishay's wife. No separate and distinct allegations of any "preferential transfers" have been made against her, yet she is named as a defendant in this action. There is no evidence in the record that Ms. Ben-Yishay was involved in any of the alleged transactions and business dealings involved in this matter. She is merely married to Ari Ben-Yishay, and at most, affiliated with his passive investments.

***C. Transfers Involving Rick Osso***

Rick Osso, the nephew of John Osso, was a minority member of Bensi Enterprises from 2004 to September 2011. This is the only investment that he had in common with Plaintiffs. In addition to being a minority member, Rick Osso also worked for BRG as Director of Operations. In his capacity as Director of Operations, Rick Osso oversaw the day-to-day operations of four of the Bensi restaurants. He was not involved in developing the Bensi concept, in seeking investors, in deciding when to make distributions to members, or with any of the finances of Bensi Enterprises. Those matters were exclusively in the domain of John Osso.

On May 1, 2010, Bensi of Garwood, LLC issued an individual a private placement memorandum soliciting investment funds for 500 units of Class B membership interests. Rick Osso subscribed to the entire offering. In September 2011, Bensi Enterprises transferred to Rick Osso all its membership interests in Bensi or Garwood, LLC, thereby granting sole ownership and

control of the entity to Rick Osso and Jose Dario Fernandez, who held the other outstanding membership shares.

Bensi of Garwood, LLC thereafter registered for the trade name Rudy's Ristorante & Pizzeria, and transferred its assets, including its liquor license, to Rudy's of Garwood, LLC. Rudy's of Garwood, LLC is wholly owned by Rick Osso and uses the trade name Rudy's Ristorante & Pizza. The sale was effectuated through a series of complex transfers of cash, stock shares, promissory notes, and other membership interest in various individual Bensi entities held by Rick Osso.

After the sale was completed, Bensi of Garwood, LLC registered for the trade name Rudy's Ristorante & Pizzeria. Bensi of Garwood, LLC thereafter transferred its assets, including its liquor license, to Rudy's of Garwood, LLC. Rudy's of Garwood, LLC is wholly owned by Rick Osso and operates under the trade name Rudy's Ristorante & Pizzeria.

#### ***D. Transfers Involving Mario Bernardo***

Plaintiffs make no clear or specific allegations of any preferential transfers involving Mario Bernardo. It appears that Mario Bernardo was at all times a passive investor in Bensi Enterprise. Aside from purchasing a minority interest in Bensi Enterprises in 2004, he had no role whatsoever in the management of Bensi Enterprises, or any of the other individual Bensi entities in which Plaintiffs invested. Instead, he worked as the owner/operator of TPR Restaurant and Pizzeria, an Italian restaurant in Tenafly that he opened with John Osso in 1983 ("TPR"). At no time did Plaintiffs have any ownership interest in TPR. TPR was not a part of the Bensi Venture. It was simply a separate restaurant that was also partially owned by John Osso, and managed by BRG.

***E. Transfers Involving Roberto DaSilva***

Roberto DaSilva worked “on and off” in various restaurants owned by John Osso and was another minority investor in Bensi Enterprises. However, Mr. DaSilva would eventually end his business relationship with John Osso and focus his endeavors on a single restaurant. Specifically, sometime in 2011, Mr. DaSilva bought the assets of Bensi of North Arlington, Inc. from John Osso in exchange for his shares in Bensi Enterprises, as well as cash which was paid out over time. Bensi of North Arlington, Inc. was never owned by Bensi Enterprises, and was one of the Prototype Restaurants that existed prior to the formation of Bensi Enterprises.

Plaintiffs never had any interest in Bensi of North Arlington, Inc. Centanni Ristorante, LLC is the entity that purchased the assets of Bensi of North Arlington, Inc., and which was owned and controlled by Roberto DaSilva.

***F. Transfers Involving Bensi of Hasbrouck Heights, Inc.***

In 2014, Bensi of Hasbrouck Heights, Inc. transferred its assets to Bensi HH, LLC – an entity owned by Franco Bernardo, Mario Bernardo, John Osso, and Nancy Osso. Franco Bernardo identified himself as the Managing Member of Bensi of Old Tappan, LLC. It is alleged that the ownership interests in Bensi HH, LLC were distributed in the following manner: forty percent held by Franco Bernardo, ten percent held by Mario Bernardo, forty percent held by Nancy Osso, and ten percent held by John Osso.

***G. Transfers Involving Jorge Ramirez***

Jorge Ramirez has a background in architecture, and first began working with John Osso in the restaurant industry in the 1990s. He would eventually leave architecture to go into the restaurant business with John Osso full-time. While the Private Placement Memorandum refers

to Mr. Ramirez as a “founder,” this term is of no legal significance. In fact, Mr. Ramirez was simply a minority investor in Bensi Enterprises.

In his deposition, John Osso explained that he alone, and none of the other individuals labeled as “founders,” obtained control over Bensi Enterprises and its financial affairs. There is no evidence that Jorge Ramirez had any other role other than the day-to-day management of particular restaurants where he worked. There is no evidence in the record that he had control over Plaintiffs’ investments, or that he made representations to Plaintiffs about those investments.

Plaintiffs’ allegations of a preferential transfer as to Jorge Ramirez related to JJR Foods, LLC, which was formed on December 30, 2015. The LLC’s managing members are John Osso and Jorge Ramirez. Plaintiffs state that JJR Foods, LLC is the entity that manages and realizes profits from the Bensi of Denville, LLC. Bensi of Denville, LLC retains the liquor license of the Bensi of Denville restaurant. However, despite the fact that JJR Foods, LLC currently owns and manages Bensi of Denville, LLC, it appears that JJR Foods, LLC is wholly unrelated to the Bensi Venture. Nothing in the record shows that Bensi Enterprises held an ownership interest in JJR Foods, LLC or that the entity was managed by BRG.

#### ***H. Transfers Involving Carmen Mais and Nancy Osso***

Carmen Mais is Norman Mais’ wife. Nancy Osso is John Osso’s wife. Ms. Osso claims that she was only nominally involved in the Bensi Venture. Specifically, she had no role whatsoever with respect to the particular entities that Plaintiffs invested in.

However, Plaintiffs allege that Carmen Mais and Nancy Osso were the equal owners of Bensi of Old Tappan, LLC. Plaintiffs allege that documents in the record show Nancy Osso transferred Carmen Mais’ equity in Bensi of Old Tappan, LLC without appropriate authorization from Carmen Mais. This transaction reduced Carmen Mais’ share in this entity to twenty percent.

Thereafter, the assets of Bensi of Old Tappan, LLC, including the restaurant's liquor license, were allegedly sold by Nancy Osso without Carmen Mais receiving any consideration for the interest she held in the entity.

### *I. Transfers Involving Franco Bernardo*

Franco Bernardo was the manager of Bensi of Hasbrouck Heights and acquired a ten percent interest Bensi of Hasbrouck Heights, Inc., the entity that owned that restaurant. Franco Bernardo acquired the interest from John Osso sometime in 2008 for approximately \$37,000. After Bensi of Hasbrouck Heights, Inc. became insolvent and the restaurant closed, Franco Bernardo personally negotiated with the landlord of the restaurant's location to try and continue running the business on his own. Franco Bernardo eventually settled the old lease and agreed to a new lease agreement with the landlord. He thereafter purchased the assets of Bensi of Hasbrouck Heights, Inc. which included the equipment and liquor license by virtue of an asset purchase agreement.

Plaintiffs allege that several payments were made to Franco Bernardo regarding this transaction, and those payments can be traced to funds of Plaintiffs intended as their initial investments in the Bensi Venture. As a result of these various transfers, Plaintiffs allege that Franco Bernardo received either a direct or indirect benefit from the conveyances, and that the payments also resulted in a commingling of funds.

However, the record shows that Franco Bernardo never had any business dealings with Plaintiffs. Plaintiffs never directly invested any money whatsoever into Bensi of HH, LLC, which was the entity created by John Osso, Nancy Osso, Mario Bernardo, and Franco Bernardo to hold the assets from the aforementioned asset purchase agreement.



***J. Transfer Involving Clemente Osso***

Clemente Osso was the payroll manager for BRG from August 2006 to August 2012. Incidental to that position, he had check signing authority on some of the BRG accounts. In addition, John Osso did provide some limited investment opportunities to his employees to entice their continued employment with him. Therefore, Clemente Osso was a limited investor in several of the entities managed under BRG.

Aside from his status as the payroll manager and a minority, passive investor in some of the individual Bensi entities, Clemente Osso had no other role in the Bensi Venture. There is no evidence in the record showing, nor do Plaintiffs even allege, any direct contact between Clemente Osso and Plaintiffs other than speaking to him when Plaintiffs expected a distribution.

Clemente Osso is a shareholder of Bensi of Hillsdale, Inc., which is also named as a defendant in this matter. Bensi of Hillsdale, Inc. was never a part of Bensi Enterprises, and there is no evidence that Plaintiffs ever invested in Bensi of Hillsdale or had any ancillary membership interest in it.

Plaintiffs allege that, in his capacity as Controller, Clemente Osso had knowledge of the following: (1) intercompany loans were posted without documentation; (2) intercompany cash transfers were posted without documentation; (3) Ponzi-style distributions were being made; (4) many individual Bensi restaurant entities were undercapitalized; (5) alleged diverted cash dividend payments were made from Norman Mais' equity purchases; and (6) preferential transfers were being made.

***K. Transfers Involving Elsa Osso***

Ms. Elsa Osso is a schoolteacher, who is the sister of defendants John Osso and Clemente Osso. She is not a member or employee of any of the entities that are the subject of this litigation.

At best, the record supports that she is a passive investor in Bensi of Roxbury and Bensi of Hillsdale, Inc. There are no allegations that Plaintiffs knew Ms. Osso, had any dealings with her, or received any representations from her.

## **VII. Defendants' Motion for Summary Judgment**

Defendants Ari Ben-Yishay, Barbara Ben-Yishay, Bensi of North Brunswick, LLC, Franco Bernardo, Rick Osso, Mario Bernardo, Clemente Osso, Bensi of Hillsdale, Inc., Jorge Ramirez, Nancy Osso, Roberto DaSilva, Centanni Ristorante, Inc., and Elsa Osso (collectively, "Defendants") now move for summary judgment. Defendants claim that summary judgment is appropriate at this juncture because Plaintiffs failed to plead a derivative action, and because Plaintiffs have failed to meet their burden of proof with respect to the following claims: (1) fraud, misrepresentation, negligent misrepresentation, and equitable fraud; (2) breach of contract and breach of the covenant of good faith and fair dealing; (3) conversion, corporate waste, and self-dealing; (4) unjust enrichment; (5) negligence; (6) conspiracy and aiding and abetting a conspiracy; (7) tortious interference with contract; (8) indemnification and contribution; (9) breach of fiduciary duty and (10) piercing the corporate veil. Essentially, Defendants argue that nothing on the record demonstrates that Plaintiffs' claims against them have any merit at all. Instead, Defendants contend that Plaintiffs' claims should be directed solely at John Osso, as he was the "mastermind" behind the Bensi Venture who held exclusive power over the venture's decisions. Defendants claim they were only other passive investors who were also harmed by John Osso, but at best divested their interests in the Bensi Venture before Plaintiffs, and therefore suffered lesser losses.

Plaintiffs oppose the motion, arguing that the motion should be denied because: (1) Defendants' motions are procedurally defective, and (2) that there is sufficient evidence in the record to prove the aforementioned claims.

For the reasons below, Defendants' Motions for Summary Judgment are **GRANTED** in their entirety.

### **SUMMARY JUDGMENT STANDARD**

The New Jersey procedural rules state that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. Justice Coleman, writing for the Court, explained that a motion for summary judgment under R. 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on R. 4:37-2(b) or R. 4:40-1, or a judgment notwithstanding the verdict under R. 4:40-2. Id. at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that "there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of R. 4:46-2." Id. at 540.

### **RULE OF LAW AND DECISION**

#### **I. Summary Judgment is Granted to Defendants, as Plaintiffs Failed to Plead a Derivative Action**

Before analyzing the substantive arguments as to why summary judgment must be granted in favor of Defendants, the Court must note that this case must be dismissed on procedural grounds. Plaintiffs lack standing to bring this case, as they have failed to articulate a derivative action lawsuit with the proper parties. The claims alleged by Plaintiffs against Defendants do not belong

to Plaintiffs. Instead, they belong only to the various Bensi entities that directly suffered harm as a result of John Osso's actions.

Pursuant to the New Jersey Revised Uniform Limited Liability Company Act (the "RULLCA"), LLC members are restricted from asserting claims that belong to the LLC. N.J.S.A. 42:2B-1 to 70. Specifically, the RULLCA provides that a member may "maintain a derivative action to enforce a right of a limited liability company," but the members cannot bring such an action directly.

"A corporation is regarded as an entity separate and distinct from its shareholders. It is a principle of corporation law that regard for the corporate personality demands that suits to redress corporate injuries which secondarily harm all shareholders alike are brought only by the corporation." Strassenburgh v. Straubmuller, 146 N.J. 527, 549 (1996). New Jersey follows the "American Rule," which states that a shareholder who suffers damages to their stock, which are identical to the injuries all other shareholders suffer, cannot recover for damages to their shares individually. Id. at 550. Instead, such a shareholder "must seek recovery derivatively in behalf of the corporation." Id. (citing Cowin v. Bresler, 741 F. Supp. 2d 410, 414 (D.C. Cir. 1984).

However, if a particular shareholder suffers a unique harm that is different from the injuries suffered by other shareholders, the "special injury" exception may apply, and a direct suit may be brought by that shareholder. Delray Holding, LLC v. Sofia Design & Dev. at S. Brunswick, LLC, 439 N.J. Super. 502, 540 (App. Div. 2015). "A special injury occurs 'where there is a wrong suffered by [a] plaintiff that was not suffered by all stockholders generally or where the wrong involves a contractual right of the stockholders, such as the right to vote.'" Strassenburgh, 146 N.J. at 550 (quoting In re Tri Star Pictures, Inc., 634 A.2d 319, 330 (Del. 1993).

The RULLCA's provisions regarding standing to bring a cause of action are similar to established principles of corporation law, which restricts a corporation's shareholders from asserting claims of the corporation. Pepe v. Gen. Motors Acceptance Corp., 254 N.J. Super 662, 666 (App. Div. 1992) (“[S]hareholders cannot sue for injuries arising from the diminution in value of their shareholdings resulting from wrongs allegedly done to their corporations. Nor can stockholders assert individual claims for . . . other income lost because of injuries assuredly done to their corporations.”).

In the instant matter, Plaintiffs allege that John Osso transferred and commingled funds among the various Bensi entities and acted without the authority to do so. These claims, if meritorious, belong to the various corporate entities and LLCs and not Plaintiffs, as these entities directly suffered financial harm. Plaintiffs therefore lack standing.

Only the individual Bensi entities have standing to sue to recoup their lost funds. Furthermore, if allegedly misappropriated funds were recovered, they would go to the business entity, and following that perhaps to all shareholders or equity holders. The Plaintiffs would not be solely entitled to such funds. For the foregoing procedural reasons, all of Plaintiffs' claims as to Defendants are dismissed.

## **II. Summary Judgment is Granted as to Plaintiffs' Claims for Fraud, Misrepresentation, Negligent Misrepresentation, and Equitable Fraud**

There are five elements for a fraud claim under New Jersey law: “(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.” Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997) (citing Jewish Ctr. of Sussex County v. Whale, 86 N.J. 619, 624-25 (1981)).

A claim for negligent misrepresentation requires a plaintiff to plead “[a]n incorrect statement, negligently made and justifiably relied on.” Rosenblum, Inc. v. Adler, 93 N.J. 324, 334 (1983). Likewise, a claim for equitable fraud concerns conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other. While similar to legal fraud, equitable fraud does not require plaintiff to establish scienter. Enright v. Lubow, 202 N.J. Super. 58, 72 (App. Div. 1985).

A plaintiff must also plead claims of fraud with particularity. Rule 4:5-8 provides the following:

“[i]n allegations of misrepresentation, fraud, mistake, breach of trust, willful default or undue influence, particulars of the wrong, with dates and times if necessary, shall be stated in so far as practicable. R. 4:5-8. Common-law fraud and claims under the CFA require compliance with Rule 4:5-8(a).

R. 4:5-8.

***A. Defendants Ari Ben-Yishay, Barbara Ben-Yishay, and Bensi of North Brunswick, LLC***

As to Defendants Ari Ben-Yishay, Barbara Ben-Yishay, and Bensi of North Brunswick, LLC, (collectively, the “Ben-Yishay Defendants”) Plaintiffs’ causes of action for fraud and misrepresentation are procedurally deficient. Plaintiffs fail to set forth each and every element of fraud in their complaint, as well as fail to produce any evidence that a fraud or misrepresentation was committed by the Ben-Yishay Defendants. Therefore, Plaintiffs claims for fraud and misrepresentation must fail solely because they were not plead with particularity pursuant to R. 4:5-8.

Plaintiffs’ claims also fail substantively. First, Plaintiffs have been unable to assert any misstatement of fact by the Ben-Yishay Defendants upon which they detrimentally relied. Nothing in Mr. Mais’ deposition supports a finding that he relied on any statements made by the Ben-

Yishay Defendants which induced him to invest in the Bensi Venture. He makes no claim of any kind of sales pitch or any misstatement to him by the Ben-Yishay Defendants.

In fact, Mr. Mais' statements in his deposition show that he made all the decisions for Plaintiffs and did so based solely on his interactions with John Osso, without the benefit of input from anyone else. Mr. Mais even goes so far as to state he did not read the Private Placement Memorandum for Bensi Enterprises, or keep abreast of the financials for the Bensi entities in which he had invested in. There is no evidence in the record that Mr. Mais, at any time, invested funds in the Bensi Venture pursuant to advice or statements made by the Ben-Yishay Defendants.

As Plaintiffs have not shown any misrepresentation by the Ben-Yishay Defendants, there is nothing for Plaintiffs to have detrimentally relied upon, and no other elements of fraud and misrepresentation can be met. Therefore, Plaintiffs' claims for fraud, misrepresentation, negligent misrepresentation, and equitable fraud must be dismissed and summary judgment is granted as to the Ben-Yishay Defendants.

***B. Defendant Rick Osso***

As to defendant Rick Osso, the record is also devoid of any evidence showing a fraud or misrepresentation made by him to Plaintiffs, upon which Plaintiffs reasonably relied. Mr. Mais stated repeatedly in his deposition that he relied solely on John Osso regarding any investments he made in the Bensi Venture. There are no other facts in the record that contradict these statements made by Mr. Mais at his deposition.

Furthermore, Mr. Mais so relied on John Osso that he even continued investing in Bensi entities after distributions stopped, reaffirming that he had faith in John Osso as a friend and believed he would not "steer him wrong" concerning such an investment. Therefore, summary

judgment is granted and Plaintiffs' claims for fraud, misrepresentation, negligent misrepresentation, and equitable fraud are dismissed as to Rick Osso.

***C. Defendant Mario Bernardo***

Simply put, there is no evidence in the record that Mario Bernardo made any representations concerning any of the Plaintiffs' investments. As previously stated, Mr. Mais made clear through statements at his deposition that he relied entirely on John Osso in making his decisions to invest in the Bensi Venture. Plaintiffs cannot satisfy the first element of a fraud or misrepresentation claim, because there was no statement made by Mario Bernardo to Mr. Mais. As a matter of law, these claims cannot lie against Mario Bernardo. Therefore, they must be dismissed as to Mario Bernardo and summary judgment is granted.

***D. Defendant Franco Bernardo***

Plaintiffs fail to specify any facts of substance in their complaint or in their expert's report establishing a claim for fraud or misrepresentation as to Franco Bernardo. As with the other Defendants, Plaintiffs do not plead their claims for fraud and misrepresentation against Franco Bernardo with specificity. Furthermore, there is no evidence in the record of any statements by Franco Bernardo to Mr. Mais intended to induce him to invest in the Bensi Venture. As the first element of *prima facie* fraud, misrepresentation, negligent misrepresentation, or equitable fraud is not met, these claims fail as to Franco Bernardo and summary judgment is granted.

***E. Defendants Jorge Ramirez, Roberto DaSilva, Nancy Osso, and Centanni Ristorante, LLC***

As with the other Defendants, Plaintiffs fail to identify any misrepresentations made by Jorge Ramirez, Roberto DaSilva, Nancy Osso, or any agents of Centanni Ristorante, LLC. All the evidence in the record supports a finding that Mr. Mais relied solely upon the representations made by John Osso, and that he was determined to invest in Bensi Enterprises regardless of the opinions



of the other investors. Therefore, these claims are dismissed and summary judgment is granted as to Jorge Ramirez, Roberto DaSilva, Nancy Osso, and Centanni Ristorante, LLC.

***F. Defendants Clemente Osso and Bensi of Hillsdale, Inc.***

Regarding defendants Clemente Osso and Bensi of Hillsdale, Inc., Plaintiffs fail to set forth a single statement by either party made to Plaintiffs on which they reasonably relied. Any evidence of fraud or misrepresentation is simply absent from the record, even when giving every favorable inference to Plaintiffs. Therefore, Plaintiffs' claims for fraud, misrepresentation, negligent misrepresentation, and equitable fraud must be dismissed as to defendants Clemente Osso and Bensi of Hillsdale, Inc.

**III. Summary Judgment is Granted as to Plaintiffs' Claims for Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing**

The following elements must be met in order for a movant to succeed on a breach of contract claim: (1) the existence of a valid contract; (2) a failure by defendants to perform their obligations under the contract; and (3) resulting damages. Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007). A claim for a breach of the implied covenant of good faith and fair dealing is premised upon the existence of a valid contract. Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997) (“[E]very contract in New Jersey contains an implied covenant of good faith and fair dealing.”).

***A. Defendants Ari Ben-Yishay, Barbara Ben-Yishay, and Bensi of North Brunswick, LLC***

Concerning the Ben Yishay Defendants, there is no evidence in the record showing that they entered into any contract with Mr. Mais, aside from a contract concerning a \$110,000 loan

agreement by the Ben-Yishay Defendants to Mr. Mais. If fact, the record supports a finding that *Mr. Mais* breached this contract in failing to repay the Ben-Yishay Defendants on the loan. As there is no evidence of another contract between the Ben-Yishay Defendants and Mr. Mais in which Plaintiffs set forth allegations that the Ben-Yishay Defendants' breach of a contract, there cannot be a claim for a breach of contract or breach of the covenant of good faith and fair dealing. Therefore, these claims by Plaintiffs must fail as to the Ben-Yishay Defendants, and summary judgment is granted.

***B. Defendant Rick Osso***

As to defendant Rick Osso, there is simply no evidence in the record showing that Plaintiffs ever entered into any contract with him, let alone a contract regarding the Bensi Venture. As there is no contract between Plaintiff and Rick Osso, the first element for a breach of contract claim or a breach of the implied covenant of good faith and fair dealing is not met. Accordingly, Plaintiffs' claims for breach of contract and breach of the implied covenant of good faith and fair dealing are dismissed and summary judgment is granted as to Rick Osso.

***C. Defendant Mario Bernardo***

Like the other Defendants, there is no evidence in the record of any contract entered into between Plaintiffs and Mario Bernardo. Without any contract, there cannot be a breach of contract claim or a breach of the implied covenant of good faith and fair dealing. Therefore, these claims are dismissed as to Mario Bernardo and summary judgment is granted.

***D. Defendants Jorge Ramirez, Roberto DaSilva, Nancy Osso, and Centanni Ristorante, LLC***

Defendants Jorge Ramirez, Roberto DaSilva, Nancy Osso, and Centanni Ristorante, LLC were not parties to any contract with Plaintiffs. There is no evidence set forth by Plaintiffs to prove otherwise. As no such contract existed, these defendants did not have any obligations to perform

as to Plaintiffs. Therefore, claims for breach of contract and breach of the implied warranty of good faith and fair dealing must be dismissed, and summary judgment is granted as to Jorge Ramirez, Roberto DaSilva, Nancy Osso, and Centanni Ristorante, LLC.

#### **IV. Summary Judgment is Granted as to Plaintiffs' Claims for Conversion, Corporate Waste, and Self-Dealing**

Conversion is “an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner’s rights.” Barco Auto Leasing Group v. Holt, 228 N.J. Super. 77, 83 (App. Div. 1988). Conversion is an intentional tort, which requires that the defendant intend “to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff’s rights.” Prosser and Keeton on Torts, § 15 at 92 (5th Ed. 1984).

In the corporate realm, claims for corporate waste and self-dealing are similar to a cause of action for conversion. In New Jersey, corporate waste “entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade.” Seidman v. Clifton Sav. Bank, S.L.A., 250 N.J. 150, 173 (2009).

As discussed above in Section I, claims for corporate waste and self-dealing apply only to the business entity, and not the individual shareholders or members of that entity. Specifically, a claim for corporate waste only concerns whether or not the entity received fair compensation for a transaction. Similarly, self-dealing is a claim for harm to an entity, and not to the individual members of a business entity. As such, the individual members cannot seek recovery for themselves in a corporate waste or self-dealing action, but are required to assert the claim derivatively on behalf of the entity.

***A. Defendants Ari-Ben Yishay, Barbara Ben-Yishay, and Bensi of North Brunswick, LLC***

Mr. Ben-Yishay's status as a passive investor and creditor belie against a finding that he is liable for any allegations of conversion, corporate waste, and self-dealing. He is not responsible for the actions of John Osso, who is the subject matter of the majority of Plaintiffs' expert's report on the accounting and finances of the Bensi entities. Concerning Mr. Ben-Yishay's limited role as a managing member of Bensi of North Brunswick, LLC at the end of the Bensi Venture's life, Mr. Ben-Yishay was forthright and honest with Mr. Mais. Specifically, Mr. Ben-Yishay expressly told Mr. Mais that he was only going to contribute additional funds to keep Bensi of North Brunswick, LLC open in an attempt to save the failing entity. He did not contribute any funds to Bensi of North Brunswick, LLC for any illegitimate purposes.

Furthermore, regarding the funds Mr. Ben-Yishay received in winding down Bensi of North Brunswick, LLC, the record supports that Mr. Ben-Yishay received these funds appropriately, as he was a secured creditor with perfected UCC filings at the time of the equity conveyance. Conversely, it appears that Mr. Mais was an unsecured creditor, and as such, would not be entitled to any distributions until secured creditors, such as Mr. Ben-Yishay, were satisfied in full. When considering the foregoing, it is clear that Plaintiffs' claims for conversion, corporate waste, and self-dealing must be dismissed as to the Ben-Yishay Defendants, and summary judgment is therefore granted.

***B. Defendant Rick Osso***

Regarding Rick Osso, the only transaction he was involved in was this purchase of Bensi Enterprises' interest in Bensi of Garwood, LLC. There can be no claim for corporate waste as to Rick Osso regarding this transaction because such a claim could only be brought on behalf of Bensi Enterprises derivatively. This is because the transaction was between Bensi Enterprises and Rick

Osso, and Bensi Enterprises is the only entity that could have suffered any direct harm from corporate waste in this transaction. Plaintiffs, as members of Bensi Enterprises, would have no direct harm and would instead need to bring such a claim as a derivative action in order for it to be successful.

Even overlooking this procedural defect, summary judgment would still be appropriate as to Plaintiffs' corporate waste claim because there is nothing in the record showing that the consideration Rick Osso paid Bensi Enterprises for Bensi of Garwood, LLC was unreasonable. Without such evidence in the record, there is no material fact in dispute that the consideration was anything but reasonable.

Similarly, Plaintiffs cannot seek recovery for themselves for a claim of self-dealing. Like a claim for corporate waste, Plaintiffs would have had to bring such a claim derivatively on behalf of Bensi Enterprises, because Bensi Enterprises was the only entity that could have suffered a direct harm from self-dealing.

However, even if Plaintiffs could bring such a claim individually, it would still fail on the merits because the record supports a finding that all transactions between Bensi Enterprises and Rick Osso for the sale and purchase of Bensi of Garwood, LLC involved an arms-length negotiation between John Osso and Rick Osso. Therefore, if any cause of action for self-dealing were cognizable, it would be against John Osso only and not Rick Osso.

For the reasons stated above, Plaintiffs' claims for conversion, corporate waste, and self-dealing are dismissed as to Rick Osso and summary judgment is granted.

***C. Defendant Mario Bernardo***

There are simply no facts in the record to support a claim for conversion, corporate waste, or self-dealing involving Mario Bernardo. Accordingly, these claims are dismissed as to Mario Bernardo and summary judgment is granted.

***D. Defendants Clemente Osso and Bensi of Hillsdale, Inc.***

Plaintiffs' claims for conversion, corporate waste, and self-dealing also fail as to defendants Clemente Osso and Bensi of Hillsdale, Inc. Plaintiffs had no fiduciary duty owed to them by Clemente Osso or Bensi of Hillsdale, Inc. Therefore, there can be no nexus between any transfer involving Clemente Osso or Bensi of Hillsdale, Inc. and John Osso. When considering the foregoing, these claims are dismissed as to Clemente Osso and Bensi of Hillsdale, Inc. and summary judgment is granted.

**V. Summary Judgment is Granted as to Plaintiffs' Claims for Unjust Enrichment**

Unjust enrichment is not an independent theory of liability in New Jersey. Goldsmith v. Camden County Surrogate's Office, 408 N.J. Super. 376, 382 (App. Div. 2009). Instead, unjust enrichment is the method of recovery for breach of a quasi-contract properly plead under New Jersey law. Id. A cause of action for unjust enrichment is based on the equitable principle that one should not be permitted to benefit oneself at the expense of another. Id. To succeed on an unjust enrichment cause of action, a plaintiff bears the burden of showing "that the defendant was enriched, . . . received a benefit, and that retention of the benefit without payment therefore would be unjust." Id.

***A. Defendants Ari-Ben Yishay, Barbara Ben-Yishay, and Bensi of North Brunswick, LLC***

It is simply impossible for a claim of unjust enrichment to lie against the Ben-Yishay Defendants. The record shows that Mr. Ben-Yishay lost nearly \$6,000,000 by investing in the Bensi Venture. He was certainly not enriched by his involvement in the venture, let alone enriched unjustly. Therefore, Plaintiffs' claim for unjust enrichment as to the Ben-Yishay Defendants is dismissed, and summary judgment is granted.

***B. Defendant Rick Osso***

As to Rick Osso, Plaintiffs' claim for unjust enrichment is unsuccessful. Nowhere in the record have Plaintiffs identified any "quasi-contractual" obligation of Rick Osso to Plaintiffs. Plaintiffs have also failed to show that Rick Osso received any benefit that would be unjust for him to receive.

Like the other claims involving Rick Osso, Plaintiffs point to his purchase of Bensi of Garwood, LLC from Bensi Enterprises as the source of the unjust enrichment cause of action. However, the record shows that this was an arms-length transaction for which Rick Osso paid fair value for the benefit he received. Plaintiffs have set forth no facts showing that Rick Osso did anything inappropriate that would enrich himself at Plaintiffs' expense. Therefore, Plaintiffs' claim for unjust enrichment as to Rick Osso is dismissed and summary judgment is granted.

***C. Defendant Mario Bernardo***

As to Mario Bernardo, the claim for unjust enrichment fails for several reasons. First, Plaintiffs have failed to identify any "quasi-contractual" obligation of Mario Bernardo to Plaintiffs. Second, Plaintiffs have not identified any benefit received by Mario Bernardo that would be unjust for him to receive. There is no claim that Mario Bernardo did anything that improperly enriched

himself at the expense of Plaintiffs. Therefore, the claim for unjust enrichment is dismissed as to Mario Bernardo and summary judgment is granted.

***D. Defendants Clemente Osso and Bensi of Hillsdale, Inc.***

Plaintiffs' claim for unjust enrichment fails as to Clemente Osso and Bensi of Hillsdale, Inc. for the same reasons as the other defendants in this matter. Namely, Plaintiffs have failed to identify either a "quasi-contractual" obligation of Clemente Osso or Bensi of Hillsdale, Inc. to Plaintiffs, or any enrichment received by these defendants to the detriment of Plaintiffs. As such, these claims are dismissed and summary judgment is granted.

**VI. Summary Judgment is Granted as to Plaintiffs' Negligence Claims**

The following elements must be established in order to successfully plead a cause of action for negligence: "(1) duty of care, (2) breach of that duty, (3) proximate cause, and (4) damages suffered by the plaintiff." Filipowicz v. Diletto, 350 N.J. Super. 552, 558 (App. Div. 2002) (citing Conklin v. Hannoeh Weisman, 145 N.J. 395, 417 (1996)). Determinations as to whether defendants owe a legal duty, as well as the scope of the duty owed, are questions of law for the court to decide.

***A. Defendants Ari Ben-Yishay, Barbara Ben-Yishay, and Bensi of North Brunswick, LLC***

Plaintiffs have failed to set forth a negligence claim as to the Ben-Yishay Defendants. While it is likely that Ari Ben-Yishay had limited duties under the RULLCA, there is no evidence in the record that Mr. Ben-Yishay violated any duties to Plaintiffs, as either a passive investor or as the custodian of Bensi of North Brunswick, LLC. As Plaintiffs fail to set forth demonstrative evidence of a breach of some duty owed to them, their claim for negligence as to the Ben-Yishay Defendants is dismissed and summary judgment is granted.



***B. Defendant Rick Osso***

The facts here demonstrate that the only relationship between Plaintiffs and Rick Osso is that they were both minority members of Bensi Enterprises. Rick Osso had no control over the decisions of Bensi Enterprises, as such decision-making power was vested solely in John Osso. Furthermore, Rick Osso had no ownership interest in any of the other Bensi entities in which Plaintiffs had invested.

As a result, there is no duty of care owed by Rick Osso to Plaintiffs. As Plaintiffs have failed to set forth evidence proving any of the elements of a negligence claim, let alone all the requisite elements, the claim must be dismissed as to Rick Osso and summary judgment is granted.

***C. Defendant Mario Bernardo***

The only relationship between Plaintiffs and Mario Bernardo evidenced by the record is that they were both minority members of Bensi Enterprises. Mario Bernardo had no control over the decisions of Bensi Enterprises, as that power belonged exclusively to John Osso. Furthermore, Mario Bernardo had no ownership interest in any other Bensi entity that Mr. Mais had such an interest in. As Plaintiffs cannot establish that Mario Bernardo owed Plaintiffs a duty of care, or breached such a duty, a claim for negligence as to Mario Bernardo must be dismissed.

***E. Defendants Clemente Osso and Bensi of Hillsdale, Inc.***

Plaintiffs have failed to set forth sufficient evidence for *prima facie* negligence against Clemente Osso and Bensi of Hillsdale, Inc. Nowhere in the record do Plaintiffs show facts or circumstances giving rise to a duty owed to Plaintiffs by Clemente Osso or Bensi of Hillsdale, Inc. Even if such a duty were assumed by the Court, Plaintiffs have also not shown any possible breach of such a duty. Therefore, Plaintiffs' claim for negligence fails as to Clemente Osso and Bensi of Hillsdale, Inc., and summary judgment is granted.

## VII. Summary Judgment is Granted as to Plaintiffs' Claims for Conspiracy and Aiding and Abetting a Conspiracy

The elements for a *prima facie* claim of conspiracy to commit a tort are as follows: (1) a combination of two or more persons; (2) entry into a real agreement or confederation with a common design to perpetuate a tort; (3) for an unlawful purpose or a lawful purpose to be achieved by unlawful means; (4) every member of the conspiracy is equally and vicariously liable; (5) to anyone suffering special damages; (6) proximately caused by a tortious overt act of one or more of the conspirators in furtherance of the conspiracy. Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 83 (1954); Naylor v. Harkins, 27 N.J. Super. 594, 604 (Ch. Div. 1953). A plaintiff must show “that there was one plan and that its essential scope and nature and nature was known to each person who is charged with responsibility for its consequences.” Weil v. Express Container Corp., 360 N.J. Super. 599, 614 (App. Div. 2003).

Regarding a claim for aiding and abetting a conspiracy, the plaintiff must show that the defendant: (1) aided a wrongful act; (2) was generally aware of his role in the tortious activity; and (3) knowingly and substantially assisted the principal violation. Morganroth & Morganroth v. Norris, McLaughlin, & Marcus, P.C., 337 F. Supp. 3d. 406, 415 (3d Cir. 2003).

### *A. Defendants Ari Ben-Yishay, Barbara Ben-Yishay, and Bensi of North Brunswick, LLC*

The record is devoid of any evidence showing that the Ben-Yishay Defendants participated in a conspiracy, or aided and abetted a conspiracy, with John Osso to defraud Plaintiffs. Plaintiffs also do not allege any specific underlying unlawful act upon which the Ben-Yishay Defendants conspired with John Osso or the other Defendants. As such, Plaintiffs' causes of action for conspiracy and aiding and abetting a conspiracy are dismissed and summary judgment is granted as to the Ben-Yishay Defendants.

***B. Defendant Rick Osso***

As to defendant Rick Osso, there is no evidence in the record showing that he was either a party to a conspiracy, or aided and abetted such a conspiracy. As previously stated in this Opinion, there is no evidence in the record that anyone but John Osso controlled all decisions regarding the Bensi Venture. There is no evidence of any agreement between Rick Osso and John Osso, or anyone else, to perpetrate a tort that resulted in harm to Plaintiffs. Likewise, there is nothing in the record to support a claim that Rick Osso was aware of any tortious activity and knowingly participated in a legal violation. Accordingly, Plaintiffs' claims for conspiracy and aiding and abetting a conspiracy are dismissed as to Rick Osso, and summary judgment is granted.

***C. Defendant Mario Bernardo***

The record lacks any evidence that Mario Bernardo either was a party to a conspiracy or aided and abetted a conspiracy. The only evidence in the record shows that John Osso alone controlled all decisions for Bensi Enterprises and all of the other Bensi enterprises in which Plaintiffs invested into. There is no evidence of any agreement between Mario Bernardo and John Osso, or anyone else, to perpetrate a tort that resulted in a harm suffered by Plaintiffs.

There is also nothing in the record to support that Mario Bernardo had any knowledge of tortious activity and knowingly participated in such activity in violation of the law. Therefore, Plaintiffs' claims for conspiracy and aiding and abetting a conspiracy must be dismissed as to Mario Bernardo and summary judgment is granted.

***D. Defendants Clemente Osso and Bensi of Hillsdale, Inc.***

Plaintiffs' claims for conspiracy and aiding and abetting a conspiracy fail because they have not identified any conspiracy "plan" with respect to Clemente Osso and Bensi of Hillsdale, Inc. Plaintiffs allege that Defendants were involved in a scheme with John Osso and the other

Bensi Venture “founders” to defraud the venture’s passive investors. However, there is no evidence of any conversation or correspondence in the record that would support such a notion. Therefore, these claims must be dismissed and summary judgment is granted as to Clemente Osso and Bensi of Hillsdale, Inc.

### **VIII. Summary Judgment is Granted as to Plaintiffs’ Claims for Tortious Interference with Contract**

The requisite elements for tortious interference with contract are as follows: (1) actual interference with a contract; (2) the interference was inflicted intentionally by a defendant who is not a party to the contract; (3) the interference was without justification; and (4) the interference caused damages. Russo v. Nagel, 358 N.J. Super. 254 (App. Div. 2003). The plaintiff bears the burden of proving all four elements in order to succeed on such a claim. Id.

#### ***A. Defendants Ari Ben-Yishay, Barbara Ben-Yishay, and Bensi of North Brunswick, LLC***

As to the Ben-Yishay Defendants, there is no evidence in the record that Mr. Ben-Yishay participated in any action designed to thwart the efforts of Plaintiffs regarding a contract. It is even unclear if Plaintiffs identify a contract in their complaint that the Ben-Yishay Defendants allegedly interfered with. Therefore, this claim is dismissed as to the Ben-Yishay Defendants and summary judgment is granted.

#### ***B. Defendant Rick Osso***

The record is devoid of any evidence that would support a finding of tortious interference as to Rick Osso. There is no evidence that he ever interfered with any contract involving Plaintiffs, or caused any harm to Plaintiffs through interference with a contract. Specifically, Plaintiffs have failed to identify any contract in the Complaint with which Rick Osso allegedly interfered.

Therefore, summary judgment is granted, and Plaintiffs' claim for tortious interference with contract is dismissed as to Rick Osso.

***C. Defendant Mario Bernardo***

There is nothing in the record supporting a claim for tortious interference against Mario Bernardo. Plaintiffs have not identified a contract that Mario Bernardo allegedly interfered with, or that such interference was intentional. Plaintiffs have also not identified any injury allegedly caused by Mario Bernardo's interference with a contract. Therefore, this claim is dismissed as to Mario Bernardo and summary judgment is granted.

***D. Defendants Clemente Osso and Bensi of Hillsdale, Inc.***

Plaintiffs' claims for tortious interference with contract also fail as to Clemente Osso and Bensi of Hillsdale, Inc. As with the other defendants, Plaintiffs fail to identify any contract with which Clemente Osso or Bensi of Hillsdale, Inc. interfered with to their detriment. Therefore, summary judgment is granted and Plaintiffs' claim for tortious interference with contract is dismissed as to Clemente Osso and Bensi of Hillsdale, Inc.

**IX. Summary Judgment is Granted as to Plaintiffs' Claims for Indemnification and Contribution**

Common law indemnity "is a right which ensures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable." Adler's Quality Bakery, Inc. v. Gasteria, Inc., 32 N.J. 55, 80 (1960) (internal citations omitted). Likewise, contribution is a concept involving joint tortfeasors. N.J.S.A. 2A:52A-3. It is not an action by a plaintiff for damages against a defendant. Id. Specifically, a joint tortfeasor is only entitled to contribution from another tortfeasor for excess paid over his pro rata share.

In this instance, Plaintiffs seek to obtain damages from Defendants. They do not assert that they themselves had to pay damages to any party and should be indemnified from paying such damages. Therefore, a cause of action for indemnity must be dismissed.

Similarly, Plaintiffs' cause of action for contribution must also be dismissed because Plaintiffs and Defendants were not actual or potential joint tortfeasors. It is impossible for a plausible claim for contribution to lie against any of the Defendants. Therefore, this cause of action must be dismissed as well.

**X. Summary Judgment is Granted as to Plaintiffs' Claims for Breach of Fiduciary Duty**

A claim for breach of fiduciary duty is a tort claim, similar to a professional negligence claim. In re Estate of Lash, 169 N.J. 20, 27 (2001). A "fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship." McKelvey v. Pierce, 173 N.J. 26, 57 (2002). "The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care." Id. at 57. The Supreme Court of New Jersey further opined that "[t]he essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position. A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship." Id.

***A. Defendants Ari Ben-Yishay, Barbara Ben-Yishay, and Bensi of North Brunswick, LLC***

As stated above, Plaintiffs would have to prove that Mr. Ben-Yishay was an active manager in order for him to owe fiduciary duties to Plaintiffs. However, the record only supports a finding that Mr. Ben-Yishay was a passive investor. As a passive investor, he was entitled to protect his

own interests, which is the only allegation against him in the complaint and in Plaintiffs' expert's report.

Furthermore, Mr. Ben-Yishay even went so far as to inform Mr. Mais that he was not getting repaid on his loans by John Osso and that he had serious concerns regarding the Bensi Venture. As there is nothing in the record supporting a finding that Mr. Ben-Yishay owed a fiduciary duty to Plaintiffs, or that he breached such a duty, Plaintiffs' claim is dismissed and summary judgment is granted.

### ***B. Defendant Rick Osso***

Regarding defendant Rick Osso, there are no material facts in the record to support a claim that he owed any kind of fiduciary duty to Plaintiffs. Bensi Enterprises was the only entity in which Rick Osso and Mr. Mais were common members. It is undisputed that Rick Osso was not a member of any other Bensi entity in which Plaintiffs invested. In addition to holding member status in Bensi Enterprises, Mr. Mais was also a member of the individual Bensi entities owning Bensi restaurants in the following locations: Old Bridge, North Brunswick, Flemington, Hamilton, Gloucester, Hampton, and Old Tappan. Rick Osso was not a member of any of these Bensi Entities. Since there was no common membership in these entities, there was clearly no relationship between Plaintiffs and Rick Osso that would give rise to any fiduciary duty concerning these entities.

Furthermore, while Mr. Mais and Rick Osso were common members in Bensi Enterprises, there is no evidence in the record showing that Rick Osso was in a dominant or superior position to Mr. Mais that would give rise to a fiduciary duty. In Bensi Enterprises, both Mr. Mais and Rick Osso were minority members. It is undisputed that John Osso had absolute control over all decisions regarding Bensi Enterprises. This included: (1) when to issue distributions to members;

(2) the location of new restaurants; (3) soliciting investors; and (4) all matters involving finances of Bensi Enterprises and the restaurants that it owned. John Osso's exclusive and absolute control over decisions was also made clear in both the Private Placement Memorandum and the operating agreement for Bensi Enterprises.

In contrast to John Osso, Rick Osso was a minority member of Bensi Enterprises and had no control over management of the entity. He was not employed by Bensi Enterprises, but by BRG, which was wholly owned by John Osso and provided management services to the individual Bensi restaurants. Rick Osso was the Director of Operations for BRG, and as such, his duties included overseeing the day-to-day field operations for various Bensi restaurants. He had no involvement in the accounting aspects or financial services for either Bensi Enterprises or BRG.

It is undisputed that John Osso was the ultimate decision maker for each of the Bensi entities. Therefore, it is also clear that both Plaintiffs and Rick Osso were not in control of any decisions, as both were minority members in equal positions. Rick Osso was not in a superior position to Plaintiffs, and as such, owed them no fiduciary duty. Even assuming *arguendo* that Rick Osso did owe a fiduciary duty as to Bensi Enterprises, there is no evidence in the record to support a claim that Rick Osso took any action that would constitute a breach of such a duty. As such, summary judgment is granted and Plaintiffs' claim for breach of fiduciary duty as to Rick Osso is dismissed.

### ***C. Defendant Mario Bernardo***

Like Rick Osso, there is no evidence in the record showing that Mario Bernardo was in a superior position to Mr. Mais, and that he therefore owed a fiduciary duty to Plaintiffs. Bensi Enterprises was the only entity in which Mr. Mais and Mario Bernardo were mutual members. Mario Bernardo was not a member of any other Bensi entity in which Plaintiffs invested. As such,



no fiduciary duty could arise from a common membership between Mr. Mais and Mario Bernardo in one of the individual Bensi entities.

Concerning Bensi Enterprises, it is undisputed that John Osso was in charge of all substantive decisions regarding Bensi Enterprises, and all other members were minority members. Since both Mr. Mais and Mario Bernardo were equals as minority members of Bensi Enterprises, there is no way Mario Bernardo could be in a superior position to Mr. Mais which would give rise to any fiduciary duty. Therefore, this claim must be dismissed as to Mario Bernardo and summary judgment is granted

***D. Defendants Jorge Ramirez, Roberto DaSilva, Nancy Osso, and Centanni Ristorante, LLC***

There is no evidence in the record that Jorge Ramirez, Roberto DaSilva, Nancy Osso, or Centanni Ristorante, LLC had any duties to Plaintiffs, or that any such duties were violated. The evidence supports a finding that at all times, the managing member or person in control of Bensi Enterprises was John Osso. Therefore, only John Osso would have owed any duty akin to a fiduciary duty towards Plaintiffs.

Plaintiffs are unable to identify any duty, and thus any breach of any duty owed by Jorge Ramirez, Roberto DaSilva, Nancy Osso, or Centanni Ristorante, LLC. Likewise, they are unable to attribute any wrongful conduct to these defendants. At best, the evidence only shows that these defendants were minority shareholders, who were on equal footing with Plaintiffs and also suffered losses in their investments. Therefore, these claims are dismissed as to Jorge Ramirez, Roberto DaSilva, Nancy Osso, and Centanni Ristorante, LLC and summary judgment is granted.

***E. Defendants Clemente Osso and Bensi of Hillsdale, Inc.***

Neither Clemente Osso nor Bensi of Hillsdale, Inc. owed a fiduciary duty to Plaintiffs. The only common interest both parties had in the Bensi Venture was that they were both minority

members of Bensi Enterprises. Plaintiffs had no other common ownership interests in any other Bensi entity, including Bensi of Hillsdale, Inc., of which Clemente Osso was a shareholder.

In addition, Plaintiffs have not identified any other facts or circumstances that would give rise to Clemente Osso owing them a fiduciary duty. Plaintiffs have also failed to allege any specific harm to which they suffered by virtue of actions by Clemente Osso or Bensi of Hillsdale, Inc. As such, summary judgment is granted in favor of Clemente Osso and Bensi of Hillsdale, Inc. concerning Plaintiffs' claims for breach of fiduciary duty.

#### **XI. Summary Judgment is Granted as to Plaintiffs' Claims to Pierce the Corporate Veil**

It is well settled New Jersey law that "a corporation is a separate entity from its shareholders . . . and that a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise." State Dep't. of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 500 (1983). The protection of limited liability applies equally to members of New Jersey limited liability companies. N.J.S.A. 42:2B-23.<sup>3</sup>

However, under extraordinary circumstances, a court may pierce the corporate veil and attach liability to the members or shareholders of an entity. If a court determines that veil piercing is appropriate under the circumstances, an individual may be liable for actions of the corporate entity. See, Ventron Corp., 94 N.J. at 500 (finding that veil piercing is appropriate where an individual uses a corporation as his or her alter ego and abuses the corporate form to defeat the ends of justice, perpetuate a fraud, accomplish a crime, or otherwise evade the law).

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<sup>3</sup> N.J.S.A. 42:24-23 provides in pertinent part that "the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member, manager, employee or agent of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company . . . by reason of being a member, or acting as a manager, employee or agent of the limited liability company."

A plaintiff must allege the following elements to successfully plead a claim to pierce the corporate veil: (1) there was such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and (2) circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote an injustice. State Capital Title & Abstract Co. v. Pappas Bus. Servs., LLC, 646 F. Supp. 2d 668, 679 (D.N.J. 2009). The following factors are also considered in determining whether piercing the corporate veil is appropriate: (1) gross undercapitalization, (2) failure to observe corporate formalities, (3) nonpayment of dividends, (4) insolvency of debtor corporation, (5) siphoning of funds from debtor corporation by dominant shareholder, (6) nonfunctioning of officers and directors, (7) absence of corporate funds, and (8) whether the corporation is merely a façade for the operations of the dominant shareholder. Interfaith Community Organization v. Honeywell International, 215 F. Supp. 2d 482 (D.N.J. 2002).

A fact finder must conclude that the entity was a “mere instrumentality” of the individual shareholder and that the shareholder “so dominated the corporation that it had no separate existence but was merely a conduit” to perpetrate a fraud or injustice, or otherwise to circumvent the law. Ventron Corp., 94 N.J. at 501; State Capital Title & Abstract Co., 646 F. Supp. 2d at 679.

Plaintiffs have failed to demonstrate that limited liability should be set aside as to the individual Defendants under the circumstances. Specifically, Plaintiffs have failed to set forth any evidence of improper inter-business transfers, or failure to properly invest the funds of the Bensi entities on the part of Defendants. Plaintiffs have only set forth evidence of John Osso’s failures to do so. Regarding Mr. Ben-Yishay, there is no evidence that he violated any of his limited duties under the RULLCA, which would warrant the piercing of the corporate veil. Therefore, this claim must be dismissed as to Defendants and summary judgment is granted.

## **XII. Summary Judgment is Granted as to Plaintiffs' "Preferential Transfers" Claims**

Plaintiffs group the claims against Defendants for "preferential transfers" in the First Count of the Complaint, along with claims for fraud and misrepresentation. However, these claims will be discussed separately in this Opinion. Even upon a cursory inspection of this claim, it is clear that it is fatally flawed and must fail.

Plaintiffs fail to name a statute by which they have attempted to plead preferential transfers or fraudulent transfers. Plaintiffs contend that Defendants are liable for "preferential transfers" they engaged in with John Osso, Bensi Enterprises, and various individual Bensi entities as "insiders" of the Bensi Venture. They were allegedly damaged by such preferential transfers, because they depleted potential funds that could have been available to Plaintiffs when the Bensi Ventures' assets were liquidated in a subsequent bankruptcy proceeding.

Because Plaintiffs fail to name a statute supporting this claim, the Court assumes that Plaintiff seeks to make some kind of claim under New Jersey Uniform Fraudulent Transfer Act (the "NJFTA"). The NJFTA defines two types of improper transfers. The first is where a debtor has an actual intent to "hinder, delay, or defraud" any creditor. This type of fraudulent transfer is regulated under the "actual" fraud provision of the NJFTA. N.J.S.A. 25:2-25. The second type of transfer is made where the debtor does not receive reasonably equivalent value in exchange and the debtor was insolvent at the time of the transfer, or became insolvent as a result thereof. N.J.S.A. 25:2-27.

Any claims for "preferential transfers" in the bankruptcy context would be inappropriate for this Court to adjudicate, as bankruptcy matters in this litigation are exclusively within the purview of the United States Bankruptcy Court for the District of New Jersey. It seems that Plaintiffs are attempting to exercise some type of a "clawback" provision in this proceeding, as

would be done in a bankruptcy action. However, such a provision cannot be exercised by the Superior Court of New Jersey, Law Division.

Plaintiffs point to the Equity Transfer/Conveyance Agreement (the “ETCA”) as the source of the fraudulent or preferential transfers involving the Ben-Yishay Defendants. Regarding the first type of improper transfer under the NJFTA, there is simply no evidence in the record to show that John Osso, or anyone else involved in the ETCA, entered into it with the intent to defraud or cheat any creditors.

Regarding the second type of improper transfer, evidence in the record fails to support a finding that Ari Ben-Yishay received additional value through the execution of the ECTA. Specifically, there is no evidence that Ari Ben-Yishay received a greater amount of funds from John Osso through the ECTA than he lost in forgiving loans made to John Osso and Bensi Enterprises. Ari Ben-Yishay forgave nearly \$2,000,000 of the \$2,950,000 he loaned to John Osso. Additionally, approximately \$1,000,000 owed by John Osso was assigned from Ari Ben-Yishay to Bensi of North Brunswick, LLC but never repaid by John Osso.

Plaintiffs expert provides no evidence to rebut these facts that would support a conclusion that the ETCA was not a fair exchange. This is an essential and critical aspect of a fraudulent transfer that is not proved by Plaintiffs. Accordingly, Plaintiffs’ claim for damages resulting from a fraudulent transfer is dismissed and summary judgment is granted as to the Ben-Yishay Defendants, and all other Defendants.

### **XIII. Summary Judgment is Granted as to Defendant Elsa Osso**

Defendant Elsa Osso is also named as a defendant in this matter. She is discussed in a separate section in this Opinion because it is unclear exactly what claims Plaintiffs allege against her. Plaintiffs only made conclusory allegations as to Elsa Osso in two of their discovery

responses, wherein they allege that she “participated in transfers” with other investors in the Bensi Venture. However, they fail to allege any causes of action with respect to such transfers involving her.

Whatever Plaintiffs’ claims may be as to Elsa Osso, there is nothing in the record supporting any of the aforementioned causes of action in this Opinion with respect to Ms. Osso. The only transaction involving Elsa Osso is that she sold her shares of Bensi of Hillsdale, Inc. to her brother, John Osso. There is no evidence that she had any knowledge regarding these transactions that would support allegations of nefarious conduct towards Plaintiffs.

Similarly, there is nothing in the record to support a finding that Elsa Osso owed a duty towards Plaintiffs not to sell her shares to John Osso. Plaintiffs offer no other evidence that Elsa Osso was involved in the affairs of the Bensi Venture and had any participation in the facts underlying the Plaintiffs’ complaint. Therefore, any claims that Plaintiffs’ have as to Elsa Osso are dismissed and summary judgment is granted.

#### **XIV. Status of John Osso and Other Remaining Defendants in this Matter**

The Court would like to note that this matter is currently stayed as to defendant John Osso, pending the outcome of his Chapter Seven bankruptcy proceeding. As far as the Court is aware, John Osso’s bankruptcy is discharged, but an adversarial proceeding is pending. Therefore, John Osso and several other defendants named in the Complaint remain parties to this litigation, despite the decisions set forth in this Opinion.

#### **CONCLUSION**

Plaintiffs in this action are Mr. Norman Mais, his wife Carmen Mais, and the various entities that they control which are essentially investment and retirement funds holding their capital. Mr. Mais, without doing any due diligence, investigation, or even the most basic reading

of the documents that he would sign, decided to invest in restaurants managed by his friend, John Osso. At first he experienced a return on his investments. But then, like many other business investors in 2008-2010, he began losing money in his investments, due to the economic recession.

Now, Mr. Mais is a disgruntled investor casting a wide net in his litigation, trying to recover funds from anyone or anywhere. In casting such a wide net, Mr. Mais has swept up various individuals and entities who should not be defendants in this matter, as they have not wronged Mr. Mais. The fact that the other investors in Bensi Venture conducted due diligence and had the foresight to pull their investments out of the Bensi Venture earlier than Mr. Mais, thereby minimizing their losses, does not create a cause of action upon which Mr. Mais may recover.

As such, and for the reasons set forth at length in this decision, Defendants' Motion for Summary Judgment is **GRANTED** in its entirety. It is so **ORDERED**.