FILED, Clerk of the Appellate Division, March 24, 2023, **A-000441-22**, **AMENDED**

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

SHANE FLYTE, JOHN MEENA, FRANK BILOTTA, JORDAN KLEGA-FISCHER, STEVE LAMBIASE and DAVIDE MOREIRA, Individually, and as Members on Behalf of HBI CAPITAL PARTNERS LLC,
Plaintiffs-Respondents,

v.

JONATHAN P. BAKER,
Defendant-Appellant,

&

AMANDA RAE NORCIA-BAKER,
Defendant.

DOCKET NO. A-441-22

Civil Action

ON APPEAL FROM:
Superior Court of New Jersey
Chancery Division, Sussex County
Docket No, SSX-C-2-18

SAT BELOW:
The Hon. Frank J. DeAngelis, P.J.Ch.
(2022-present)
The Hon. Maritza Berdote Byrne, P.J.Ch
(2019-22)
The Hon. Robert J. Brennan, P.J.Ch.
(2018-19)

BRIEF
OF DEFENDANT-APPELLANT JONATHAN P. BAKER

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Revised & Submitted:
March 24, 2023

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Name	Appellate Role	Trial Court Role	Status
Jonathan P. Baker ("Baker")	Appellant	Defendant	Participated Below
Amanda R. Norcia-Baker ("Norcia")	Respondent	Defendant	Participated Below/Dismissed with Prejudice
Shane Flyte	Respondent	Plaintiff	Participated Below
John Meena	Respondent	Plaintiff	Participated Below
Frank Bilotta	Respondent	Plaintiff	Participated Below
Jordan Klega-Fischer	Respondent	Plaintiff	Participated Below
Steven Lambiase	Respondent	Plaintiff	Participated Below
Davide Moreira	Respondent	Plaintiff	Participated Below
HBI Capital Partners LLC	*See Note*[1]		
Hudson Black Inc.	*See Note*[2]		

[1] One of the issues presented to the court below and raised now on appeal concerns the standing of the plaintiffs to assert claims on behalf of HBI Capital Partners LLC ("the Capital Company" or "HCP") and Hudson Black Inc. ("HBI"). The complaint filed in this action indicates that the individuals named as plaintiffs brought suit in their individual capacities and "as members of behalf of" the Capital Company. Following trial, and after entry of judgment against Defendant-Appellant Baker, the court below amended the case caption to include HBI as a plaintiff. This post-trial/post-judgment amendment was the first time HBI was a party to the action below. It is, therefore, unclear what role – if any – these entities have at this stage of the proceedings.

[2] For the sake of clarity, Defendants are referred to herein by their last names, as indicated above. Plaintiffs Flyte, Meena, Bilotta, Klega-Fischer, Lambiase, and Moreira will be referred to by last name and, collectively, as the "Individual Plaintiffs". Together with the Capital Company, they are the "Plaintiffs".

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PRELIMINARY STATEMENT

This appeal follows a long and tortured litigation history comprised not just of the case on appeal, but of a host of related actions brought by the Plaintiffs and HBI[3] against Defendants and their personal, professional, and familial associates. At the heart of all of these actions are a group of intercompany loans between HBI and several entities either owned by or otherwise associated with Baker. On or about October 30, 2018 (nearly a year after the commencement of the underlying action now on appeal), HBI commenced five (5) separate AAA arbitration proceedings against Baker's entities (but not against Baker) to enforce the intercompany loan agreements, and subsequently had arbitration awards confirmed as judgments in the Superior Court in late 2019/early 2020. Additionally, HBI filed its own action in Superior Court alleging fraudulent transfers of the loan proceeds by Baker and his associates. The fraudulent transfer action also included claims for unjust enrichment and conversion. A successful motion for summary judgment filed by three of the defendants in the fraudulent transfer action resulted in dismissal of those defendants with prejudice. Shortly thereafter, HBI filed a stipulation with the court dismissing all claims as to all parties with prejudice.

Some of the claims brought against Baker in this action appear to be duplicative of the claims dismissed with prejudice (specifically, those alleging

[3] HBI (Hudson Black Inc.) was not a party to the action now on appeal prior to the trial court amending the case caption after entry of judgment, as is discussed *infra*. References to "Plaintiffs" refer only those parties specifically named in the Verified Complaint and Amended Verified Complaint.

conversion and unjust enrichment) and are, therefore, precluded under the law if, in fact, HBI remains a plaintiff (which it should not) in this action. This action was the final matter to be adjudicated.

Perhaps owing to the multiple judges assigned to the matter now on appeal (Judge Brennan 2018-2019; Judge Berdote Byrne 2019-2022; and Judge DeAngelis 2022-present), the trial court erred in its application of the law, in differentiating between fact and rhetoric, and in failing to distinguish between parties and non-parties. Judge Berdote Byrne in particular, appeared all too willing to substitute the *ipse dixit* statements of Plaintiffs' counsel not only for the facts on record, but also for the procedural history of the case before her arrival in the Chancery Division. The court also fashioned what it termed equitable remedies that lie in direct conflict with the law. Examples of this can be seen in Judge Berdote Byrne's multiple references in multiple orders to an early order issued by Judge Brennan removing Baker from HBI (the order, in fact, removed Baker as manager of the Capital Company and directed he was to otherwise continue his involvement with the Capital Company and HBI); acceptance of an unproven and unsupported damages calculation set forth for the first time in Plaintiffs' post-trial brief and not ascertainable from the trial transcript or the record, yet incorporated into the final judgment; and failure to distinguish between the Capital Company (referred to as "HCP" in the action below) and non-party Hudson Black Inc. (referred to "HBI" in the action below).

Put into the simplest terms possible, the Plaintiffs lacked standing to bring their claims against Baker and Norcia. Their claims belonged exclusively to

Hudson Black Inc., as evidenced by the judgments Hudson Black Inc. already obtained against the various Baker entities in connection with the intercompany loan agreements. The trial court erred in concluding that HBI and the Plaintiff were synonymous and could be used interchangeably. The Plaintiffs' testimony at trial reveals that they suffered absolutely no personal financial harm from the alleged improper transactions and sustained no "special injuries." Notwithstanding the absence of any personal financial damage stemming from the allegations contained in the complaint, Judge Berdote Byrne awarded damages to the Plaintiffs in the exact same amount as the sum of the judgments obtained by HBI against the Baker entities – further solidifying the fact that the Plaintiffs had sustained no real damages of their own – and conclusively establishing the fact that the trial court failed to distinguish between the corporate entity and the Plaintiffs here.

Judge DeAngelis, upon his assignment to Chancery, inherited Judge Berdote Byrne's post-trial judgment and order. Judge DeAngelis then entered a final judgment and – at the request of Plaintiffs – amended the case caption to include Hudson Black Inc. in an apparent effort to "remedy" the issue of standing.

The entry of judgment in favor of the Plaintiffs and the subsequent amendment of the case caption to include Hudson Black Inc. as a plaintiff was clear error and should be reversed.

PROCEDURAL HISTORY

The action now on appeal commenced with the filing of a Verified Complaint and Order to Show Cause on or about January 19, 2018. (Da629). A hearing on the temporary restraints requested by Plaintiffs was held before the Hon. Robert J. Brennan, P.J.Ch., on January 24, 2018 (3T) and temporary restraints were granted pursuant to the terms stated on the record (*Id.*) and in the court's accompanying order. (Da621). Defendants filed their answer in opposition on February 19, 2018. (Da650). A show cause hearing was held on March 1, 2018 (4T), also before Judge Brennan, and preliminary restraints were entered. (Da626). Both the temporary and preliminary restraints provided for, *inter alia*, maintenance of the *status quo* and the holding in abeyance of a certain stock repurchase transaction affecting Plaintiffs' purported ownership rights in Hudson Black Inc., a non-party to the lawsuit. (*Id*).

At the March 1, 2018 hearing, Judge Brennan expressed displeasure that the *status quo* ordered to be maintained on January 24, 2018 was not, in fact, being maintained. (4T20 at 11; 4T25-26; 4T28 at 7). The court specifically cited changes made by Plaintiff Bilotta to HBI's banking relationships (4T25 at 24) and makes reference to Baker's certification concerning filings made with the State of New Jersey with respect to both the Capital Company and HBI. (4T at 20). Judge Brennan directed each side to submit the names of two individuals for the court's consideration as interim manager of the Capital Company and

indicated that Bilotta was not to remain manager for any longer than was necessary to find a neutral, third-party replacement. (4T28 at 18). Judge Brennan concluded by reiterating instructions to maintain the status quo. (*Supra*).

The Defendants were represented by Bryan Buffalino, Esq. at the January 24, 2018 hearing and by Catherine Pastrikos Kelly, Esq. at the March 1, 2018 hearing. (3T and 4T).

Immediately after the March 1, 2018 show cause hearing, Plaintiffs' counsel began advocating for the termination of Baker's employment with HBI, and suggested as much in a March 2, 2018 email communication to Plaintiffs and non-party Afif Mohammed. Several months of disputes between the parties ensued, Baker's salary was unilaterally cut by roughly half and, facing escalating collection activity from his personal creditors as well as creditors of HBI who were not being paid by Bilotta, Baker filed for personal bankruptcy on July 6, 2018. (*See In re: Jonathan P. Baker*, Bankr. D.N.J. Docket # 18-23591). To supplement the automatic stay provisions provided for by the bankruptcy filing, and by consent of the parties (which included non-bankrupt defendant Norcia), the case was stayed by order dated July 23, 2018 entered by Judge Brennan. (Da764).

Four days after entry of the stay, HBI – through Plaintiff Bilotta – terminated Baker's employment (Da766) in clear violation of Judge Brennan's

January 24 and March 1 orders (*Supra.*) and possibly in violation of the automatic stay provided for under the Bankruptcy Code. (*See* 11 U.S.C. § 362). This termination of employment necessitated withdrawal of Baker's Chapter 13 wage-earner petition with the bankruptcy court and, ultimately, termination of the bankruptcy stay on October 22, 2018 and dismissal of the bankruptcy case in its entirety on December 17, 2018. (*See In re: Jonathan P. Baker*, Bankr. D.N.J. Docket # 18-23591).

In early October 2018, Baker was appointed new counsel by insurer Selective Insurance Co. of America under an employment practices liability/directors and officers policy maintained by HBI covering Baker and others. A case management conference was held between new counsel, Plaintiffs' counsel, and Judge Brennan on October 14, 2018. (*See* order at Da294). Outside of the action now on appeal, HBI commenced arbitration proceedings against Baker's companies on October 30, 2018. (*See* Plaintiffs' *R.* 4:5-1 Certification at Da717). The proceedings ultimately led to the entry of judgments against several of Baker's companies in favor of HBI. (*See* Da40 for listing of judgments; *See also* arbitration awards at Da157-67 and Da225-38).

Several months passed during which parties on both sides grew increasingly eager to move forward, but the trial court was largely unresponsive, presumably due to Judge Brennan's pending retirement from the bench and Judge Berdote Byrne's arrival in Chancery. Several motions were filed by both

sides, the majority of which were ultimately withdrawn or rendered moot due to the passage of time. (*See* ACMS).

On January 11, 2019, Defendants filed a motion to enforce litigants rights seeking a determination that the termination of Baker's employment was a violation of Judge Brennan's "status quo" orders of January 24 and March 1, 2018. At approximately the same point in time, Judge Brennan retired and was replaced by Judge Berdote Byrne. Judge Berdote Byrne denied Defendants motion on April 17, 2019 (Da285) stating, "at no point . . . does the Order specifically require plaintiffs to continue to employ Jonathan Baker pending the outcome of this matter. Nor does the […] Order specifically state 'the status quo is to be maintained.'" (*Id*). This conclusion was a clear error on the part of Judge Berdote Byrne, as the transcripts of the January and March 2018 hearings show. (*See* 3T and 4T, respectively).

Emboldened by Judge Berdote Byrne's misreading of (or, perhaps, failure to read) the transcripts of the hearings before Judge Brennan, Plaintiffs continued their assault on Baker, making multiple references throughout this and the aforementioned companion cases to the fact that Baker had now been removed from HBI by court order, as confirmed by Judge Berdote Byrne.

In July 2019, Plaintiffs amended their complaint (Da672) to remove the count related to restoration of their own employment, thus causing Selective Insurance to decline to pay for continued representation for the Defendants.

With no insurable cause of action in the case, the Selective Insurance-provided counsel was removed and Baker (now unemployed and having exhausted all resources) was forced to proceed *pro se*. Prior to their departure from the case, however, Baker's insurance-appointed counsel did file an Answer to Plaintiffs' Amended Verified Complaint on behalf of Baker. (Da719).

On June 10, 2020, the court entered an order granting partial summary judgment to Plaintiffs (Da310) and shortly thereafter, on June 15,2020, entered an order dismissing Defendant Norcia with prejudice. (Da620).

In July 2020, the matter was scheduled for trial. (Da279). A pre-trial conference was held on September 11, 2020 (5T) and trial took place on September 21 (1T) and 23 (2T), 2020. Baker did not appear at trial and, instead, left Plaintiffs to present their proofs to the trial court. (*Id*). As the record stands, it is unclear whether the proceedings on September 21 and 23, 2020 constituted a "trial" or a "proof hearing." (*See* Judge Berdote Byrne's opening statements in 1T).

Plaintiffs submitted a post-trial brief on October 21, 2020. (Da33).

At approximately the same point in time, the court's docket was updated to indicate that the case had been "closed" and "dismissed by the court with prejudice." (*See* Da154; *See also* Da59 and Da85). Nearly two years elapsed before Plaintiffs filed a motion to re-open the case and request reassignment of the case to a new judge. (Da271). The case was subsequently marked as

"reinstated", but the request to reassign was denied on June 10, 2022. (*Id*).

On June 22, 2022, in response to the reopening of the case (which Baker reasonably believed had in fact been dismissed, for the reasons now stated on appeal and due to the trial court's complete and total silence for nearly two years) and the filing by the Plaintiffs of a proposed form of order and judgment, Baker filed his post-trial submission with the court. (Da59).

On June 23, 2022, Judge Berdote Byrne entered her post trial order (Da6) and opinion. (Da9). Reference is made therein to the judge "misplacing" her trial notes. (*See* Da14 footnote 2). No explanation is offered for why the case was marked as closed and why the court had been completely silent on the matter for nearly two years following trial. (*Id*). It does not appear from Judge Berdote Byrne's Statement of Reasons (*Id.*) – and due to the fact that the court's order was issued less than twenty-four hours after its submission – that any of Baker's post-trial submission was considered by the court.

This appeal follows the denial of Baker's motion to vacate/for reconsideration/for new trial, which was filed with the trial court on July 7, 2022 (Da85) and denied on August 8, 2022. (Da260).

STATEMENT OF FACTS

Entry of final judgment in the matter now on appeal brought to a conclusion roughly fifty-five months of contentious litigation between the parties. In the months and years that elapsed between the filing of the initial

complaint on January 18, 2018 (Da629) and entry of final judgment on August 26, 2022 (Da4), the case now on appeal was before three separate Presiding Judges in the Chancery Division. During that time, Plaintiffs (through their counsel and by directing the actions of Hudson Black Inc.) engaged Mr. Baker, his family, friends, business associates, and affiliated companies in more than a dozen separate actions, (*Infra.*) all premised on the same set of transactions, and in furtherance of a well-planned, well-executed, and well-disguised scheme to destroy the Bakers personally, professionally, and financially. Theories of liability advanced in one case were conspicuously absent from others, as it would have been impossible for the Plaintiffs' conflicting stories to stand up against each other in the same action.

For example, in *Hudson Black Inc. v. 8 Quaker Road LLC et al*, Docket No. SSX-L-144-20, more than thirty motions were decided during the roughly two years the case was pending. (*See* ACMS). Five separate Superior Court judges in Morris and Sussex Counties[4] were involved at different stages of those proceedings, each deciding at least one of the motions filed. After the trial court dismissed the entirety of HBI's complaint – with prejudice – on a motion for summary judgment (*See* ACMS) with respect to three of the defendants, HBI voluntarily dismissed all claims against the eleven remaining defendants, also with prejudice. (Da1077-79). This included some of the same claims asserted

[4] Judges Brennan (t/a on recall), Hansbury (t/a on recall), McGovern, Ramsay, and Weaver.

here against Mr. Baker, namely, those claims alleging conversion (Da1025) and unjust enrichment. (Da1024).

The other matters included five separate AAA arbitrations against five businesses owned by or affiliated with Mr. Baker and decided by two separate AAA arbitrators (Da157-67 and Da225-38); five separate summary cases before three separate judges (*See* MRS-L-2435-19, -2437-19, -2438-19, & 2439-19 (Judge Ramsay); SSX-L-530-20 (Judges Weaver & Brennan)) in Morris and Sussex Counties to convert the AAA awards into judgments; HBI's intervention in a foreclosure matter involving Mr. Baker; intervention in and opposition to confirmation of Mr. Baker's personal bankruptcy as well as that of 8 Quaker Road LLC[5]; and at least four Law Division cases involving HBI and Mr. Baker by virtue of personal guarantees executed by him (*See* SSX-L-326-18, -478-19, -464-19, and -224-18). That is at least sixteen separate actions. Seven Superior Court judges. Two AAA arbitrators. It is no wonder that the record is less than clear.

By now, the Appellate Panel is undoubtedly wondering why these "outside" cases are relevant to the instant matter. The answer to that is simpler than it may appear – these other actions, which were commenced after yet concluded before the matter now on appeal, completely, unquestionably, and

[5] 8 Quaker Road LLC's bankruptcy was ultimately confirmed and HBI's claim settled. *See In Re: 8 Quaker Road LLC*, Bankr. D.N.J. Docket No. 21-14992-JKS.

unequivocally establish that the Plaintiffs here have absolutely no standing because the real party-in-interest is Hudson Black Inc. The trial court even recognized this, albeit after the fact, when it granted Plaintiffs' motion to amend the complaint to "conform to the evidence" by adding Hudson Black Inc. as a plaintiff. (Da260). But Hudson Black Inc. cannot recover in this action, because it has already recovered and because its statements in the other actions directly conflict with the Plaintiffs' statements made in the court below.

Plaintiffs have stated that Mr. Baker stole millions of dollars and never repaid a dime. Hudson Black Inc. stated in the arbitration proceedings (Supra.) and in the litigation against Mr. Baker that it filed separately from this action (Da1012) that money was loaned by Hudson Black Inc. to companies affiliated with Mr. Baker. (Da1013 at ¶2 and ¶7; Da1015 at ¶25; Da1016 at ¶28 and ¶32; Da1017 at ¶36 and ¶39; Da1018 at ¶43 referring to use of "loan proceeds" and ¶44 referring to "defaulting on the loan." Emphasis added). It provided loan registers and testimony (Da1080-109) detailing payments to and from these companies and obtained awards for the outstanding balances due under the five separate loan agreements.

Plaintiffs have stated that the loan agreements were fraudulent. But they cannot be, as Hudson Black Inc. ratified those same agreements by relying on the mandatory arbitration provisions contained in them and by electing to arbitrate – instead of litigate – to determine the amount due.

The matter now on appeal commenced with the filing of a Verified Complaint by Plaintiffs containing five separate counts, namely – Fraud, Breach of Fiduciary Duty, Conversion, Rescission, and Appointment of a Receiver. (Da629-49). By way of an amended complaint, Plaintiffs added counts for Breach of Operating Agreement/Bylaws (Da712), Unjust Enrichment (Da713), and Piercing the Corporate Veil (Da714). The counts alleging Breach of Fiduciary Duty and Breach of Operating Agreement/Bylaws were resolved by summary judgment order entered in favor of the Plaintiffs on June 10, 2020. (Da310). That same order also granted summary judgment with respect to the Rescission count in favor of Plaintiffs and removed Baker as a member of the Capital Company. (*Id*). Following trial, the Unjust Enrichment, Piercing the Corporate Veil, and Receivership counts were dismissed. (Da8 at ¶(2)).

Adding to the confusion created by Plaintiffs' election to litigate/arbitrate in multiple forums simultaneously, from the moment Judge Berdote Byrne first took over the case, she seemed completely unaware of the posture of the case as left by her predecessor, Judge Brennan. In her very first order, April 17, 2019 (Da281), Judge Berdote Byrne refers to a March 28, 2018 order which "provided for the appointment of officers for HBI and HCP." (Da282). That statement finds no support in the record, as neither the March 28, 2018 order (Da626) nor the March 1, 2018 hearing transcript (4T) state any such thing. Continuing on at Da284, Judge Berdote Byrne refers to "a formal meeting of HBI's members."

This is the first moment at which it is obvious that the court has failed to distinguish between the Capital Company (HBI Capital Partners LLC, a plaintiff here) and Hudson Black Inc. (a non-party and a distinct and separate entity) – the Capital Company has members, as a limited liability company; a corporation, on the other hand, has no members. **This error in failing to differentiate between Hudson Black Inc. and the Capital Company is a critical error that permeates the bulk of the trial court's reasoning**.

The court continues, stating, "the March 28 Order [does not] specifically state 'the status quo is to be maintained'" (Da285) and then states "Defendants' motion asserts the March 28 Order obligated plaintiffs to continue to employ and pay Jonathan Baker, but the March 28 Order includes no such language. Defendants' reliance on the equitable principle of a status quo injunction is misplaced." (Da287). All of this lies in direct conflict with Judge Brennan who, in his ruling, ordered, "we will continue as we are and I reiterate my order that the status quo – that means we are not to have any significant out of the ordinary course of business changes to this company. What I want, what I want is the status quo ante as of December 31 to be returned to." (4T34 at 18, emphasis added). And, "Mr. Baker, although fully informed, receiving his remuneration, voting at meetings, being able to participate, would not be in his management role, temporarily." (3T53 at 10, emphasis added).

Over a year later, in its order granting partial summary judgment in favor

of the Plaintiffs, the court once again relied on its mistaken reading of the record and essentially did a "cut and paste" of the language (*Supra.*) concerning the March 28, 2018 order. (*Supra*).

Despite the confusion on the record concerning what was ordered and by which judge, what the Appellate Panel will undoubtedly see from the record now before it is that the Plaintiffs in the action now on appeal failed to establish even the slightest of personal damages from the transactions they allege to be improper. (1T and 2T) In fact, the entirety of the trial transcript focuses on purported losses to Hudson Black Inc., an entity which had never been made a party to this action. (*Supra.*) In their post-trial submission to the trial court judge, (Da33) Plaintiffs reference the judgments obtained by HBI against the various Baker companies (Da40 and Da56-57) and an additional, unproven (1T and 2T) $3,275,962.71 (Da56-57) purportedly owed by another Baker-affiliated company to HBI in calculating their personal damages. Not only is the record devoid of evidence to support the additional $3,275,962.71, but it is also silent as to how the obligations of Baker's companies under judgments entered in favor of Hudson Black Inc. can somehow translate into personal obligations of Baker to the Plaintiffs in this action.

The trial court's judgment following trial fails to set forth the legal basis for converting the monetary judgments against Baker's companies and in favor of HBI into a new judgment against Baker, personally, and in favor of the

Plaintiffs.

LEGAL ARGUMENT

I. AS A THRESHOLD ISSUE, THE PLAINTIFFS LACKED STANDING TO BRING THIS ACTION AND, THEREFORE, THE JUDGMENT OF THE TRIAL COURT CANNOT STAND AS A MATTER OF LAW. (Da260)

The Plaintiffs are barred from recovering as a matter of law, because they lack standing under corporate and LLC law. As an "element of justiciability that cannot be waived or conferred by consent,"[6] standing must be considered by the courts at any stage of litigation – even on appeal – because "standing involves a threshold determination which governs the ability of a party to initiate and maintain an action before the court."[7] Ordinarily, a litigant may not claim standing to assert the rights of a third party.[8]

Standing is an important issue when shareholders (or, as is the case here, members) seek to advance claims for damages to a corporation or LLC, or for personal damages resulting from damages sustained by a corporation or LLC. Corporations and LLCs are entities separate and apart from their shareholders/members.[9] Thus, when parties seek personal damages based on harm to a corporation or LLC in which they are shareholders/members, the court

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6 In re Adoption of Baby T, 160 N.J. 332, 341 (1999).

7 *Triffin v. Somerset Valley Bank*, 343 N.J.Super. 73, 80 (App. Div. 2001).

8 *Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum*, 84 N.J. 137, 144 (1980). *See Delray Holding, LLC v. Sofia Design & Dev. at S. Brunswick, LLC*, 439 N.J.Super. 502, 510 (App. Div. 2015)(corporation); *Strasenburgh v. Straubmuller*, 146 N.J. 527, 549 (1996)(corporation); N.J.S.A. 42:2C-4(a)(LLC).

must consider the standing/real party in interest rules relative to direct and derivate shareholder/member suits.

Due to the intersection of corporations and LLCs being separate legal entities and the rules as to third party standing, law circumscribes direct shareholder suits. "The distinction [between direct and derivative suits] is important because derivative actions are deemed to belong to the subject corporation whereas individual actions do not."[10]

"The law is clear and uniform: shareholders cannot sue for injuries arising from the diminution in value of their shareholdings resulting from wrongs allegedly done to their corporations."[11] "Nor can stockholders assert individual claims for wages or other income lost because of injuries assertedly done to their corporations."[12] Even the execution of guaranties or the providing of collateral to the corporation does not allow the shareholder to bring suit, as the claims for damage to the corporation are held by the corporation alone.[13]

New Jersey statutes also circumscribe the ability of LLC members to sue directly[14]. Going into more detail, the Appellate Court in *Tully* held:

> [R]egard for the corporate personality demands that suits to redress corporate injuries which secondarily harm all shareholders alike are brought only by the corporation. New Jersey follows the American

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10 *Strasenburgh* at 550.

11 *Pepe v. Gen. Motors Acceptance Corp*., 254 N.J. Super. 662, 666 (App. Div. 1992).

12 *Ibid*.

13 *Ibid*.

14 *See* N.J.S.A. 42:2C-67 (LLC member direct action must "plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company").

> rule, which provides shareholders who suffer an injury may not recover for the injury to [their] stock alone, but must seek recovery derivatively [on] behalf of the corporation. Only upon proof of fraud or injustice will the corporate veil be pierced to impose liability on the corporate principals.[15]

The Appellate Court instructed:

> The purpose of a derivative suit is to provide shareholders, or a representative shareholder, with a means to protect the interests of the corporation from the misfeasance and malfeasance of faithless directors and managers. By contrast, a direct action is one in which liability is based upon an injury or violation of a duty owed to a particular shareholder. To determine whether a complaint states a derivative or an individual cause of action, courts examine the nature of the wrongs alleged in the body of the complaint, not the plaintiff's designation or stated intention.[16]

It thus follows:

> A shareholder may maintain a direct action against a corporation or its directors if the shareholder suffers a special injury. A special injury exists where there is a wrong suffered by [the] 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.[17]

Stated another way, "a special injury [is] 'a wrong inflicted upon [the shareholder] alone or a wrong affecting any particular right which [the plaintiff] is asserting, such as . . . pre-emptive rights as a stockholder, rights involving the control of the corporation, or a wrong affecting the stockholders and not the

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15 *Tully v. Mirz*, 457 N.J. Super. 114, 123 - 124 (App. Div. 2018)(internal quotes and citations omitted); *See also Strasenburgh*.

16 *Tully* at 124.

17 *Tully* at 124.

corporation."[18]

Special injuries are those that "unequally affect" the plaintiff shareholders compared to other shareholders.[19] The only shareholder of HBI since 2015 was the Capital Company.[20] Any alleged wrongs against HBI cannot have affected the Capital Company "unequally" from other shareholders <u>because there are no other shareholders</u>.[21]

Likewise, any losses sustained by any of the Individual Plaintiffs, as members of the Capital Company, were also not "unequal." All the members of the Capital Company, Baker included, allegedly lost value in their Capital Company membership interests as an alleged result of the Capital Company losing value in its stock in HBI.

Continuing onward, the *Tully* court observed:

> In the context of a closely-held corporation, courts have discretion to construe a derivative cause of action as a direct claim if doing so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.[22]

Yet, by ignoring the direct/derivative action rules as they have done here, Plaintiffs have engaged in a multiplicity of arbitration proceedings and lawsuits.

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18 *Strasenburgh* at 551.
19 *Id* at 552.
20 Da677 at ¶28; Da682 at ¶63.
21 *Id.*
22 *Tully* at 125.

The sheer amount of litigation, when one single lawsuit could have sufficed to advance all claims, suggests that perhaps the entire controversy doctrine should be once again modified to apply to both parties and claims.

In construing claims in close corporation settings, a claim against a co-owner of the business is a direct claim if it is based on, for example, the "failure [of the other owner] to contribute his fair share (fifty percent) to the debts and liabilities of [the corporation], in breach of an alleged agreement between the [owners] and the covenant of good faith and fair dealing" because the plaintiff is a party to said agreement.[23] In such a situation, because it is the individual plaintiff/owner who is the party to the shareholder/member/owner agreement, the individual – but not the entity – has standing.[24]

Nonetheless, because these plaintiffs do not allege[25] (and cannot have) the presence of a "special injury," they cannot bring direct claims.

A derivative claim, brought on behalf of the corporation by the shareholder would be, for example, a mismanagement claim where the "defendant failed to manage [the corporation] in a commercially reasonable manner."[26] Other examples of derivative claims would be a "conversion claim ... and fraud claim ... alleg[ing] defendant exercised wrongful dominion and

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23 *Tully* at 126.
24 *Ibid*; See also N.J.S.A. 42:2C-67(b)(LLC).
25 Da672-718.
26 *Tully* at 126.

control over the assets of [the corporation] and engaged in a fraudulent kickback scheme."[27] "These claims are derivative in nature because they concern [the corporation's] assets and operations rather than plaintiff as an individual."[28]

Here, we have the Plaintiffs suing Baker for damage to HBI**,** based on the Capital Company owning 100% of HBI and the Individual Plaintiffs being members of the Capital Company.

Plaintiffs' claimed losses relate only to loan agreements executed on behalf of the corporation (HBI), and it is undisputed that HBI was the source of the allegedly diverted funds.[29] Moreover, the Individual Plaintiffs are not even shareholders of HBI. They are members of the Capital Company, which in turn owns 100% of HBI. (Da672).

The Capital Company is subject to the above rules for maintaining a shareholder action. The Individual Plaintiffs are subject to those rules at two different levels (1) whether the Capital Company has the ability to bring a direct action for wrongs allegedly done to HBI, and (2) whether Plaintiffs may bring direct actions for losses the Capital Company allegedly sustained by virtue of

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27 *Ibid*.

28 *Ibid*; *See also* N.J.S.A. 42:2C-68 (member may bring derivative action to "enforce a right of a limited liability company.")(Without getting into the details, the law also imposes, as a prerequisite to maintaining a derivative action, that the shareholder/member must plead and prove that they make a demand to the management of the corporate/LLC, unless demand is futile. *Tully* at 125; N.J.S.A. 14A:3-6.3(demand/corporation); N.J.S.A. 42:2C-68(demand/LLC); *See also* Rule 4:32-3. Plaintiffs failed to do so, which is an independent reason why they cannot maintain this action).

29 1T and 2T.

being shareholder of HBI.

Based on New Jersey law, none of the Plaintiffs in this lawsuit can recover. The claims as alleged belong to HBI – not the Plaintiffs in this lawsuit:

Count I: Alleged Fraud, Self-Dealing, Improper Financial Transactions: Fraud claims are derivative claims if they involve the corporation's assets and operations.[30] Plaintiffs' fraud claims should have been brought on behalf of HBI – not on behalf of the Capital Company, as was improperly done in this lawsuit.[31] HBI was the entity allegedly suffering directly from damages allegedly caused by the alleged wrongs against it, and the alleged fraud involved HBI's assets and operations[32], not those of the Plaintiffs.

None of the Individual Plaintiffs nor the Capital Company have or have even alleged "special injur(ies)." Their alleged damages are indirect and relate to the alleged loss in value of the Capital Company's shares in HBI, which allegedly in turn caused the Individual Plaintiffs' loss of membership value in the Capital Company.

The only parties that would have standing to bring such a claim would be HBI (directly) or the Capital Company (bringing a derivative claim on behalf of HBI).

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30 *Tully* at 126.
31 *Ibid.*
32 1T and 2T.

Yet, none of the Plaintiffs asserted that this action involved derivative claims brought by the Capital Company (or any other party) on behalf of HBI, which is the only party that allegedly suffered the alleged losses. Only HBI and those who sue derivatively on behalf of HBI have standing. The rest of the people and entities named at various times by the Plaintiffs do not. Thus, none of the Plaintiffs have standing and are absolutely barred from bringing and recovering under Count I.

Count II: Alleged Breach of Fiduciary Duties: "Claims of breach of fiduciary duty on the part of directors will also be generally regarded as derivative claims unless the injury to shares is distinct."[33] "For example, claims against directors for the selective dissemination of information to one group of shareholders over another are not derivative in nature because the unfair dealing unequally affects shareholders that were deprived of the information."[34]

This case does not present "distinct" or "unequal" damages to shareholder rights at the HBI corporate level or at the Capital Company level.

The only parties that would have standing to bring such a claim would be HBI (directly) or the Capital Company (bringing a derivative claim on behalf of HBI). Plaintiffs did not assert such claims[35]. Thus, and for the general reasons set forth as to Count I, Plaintiffs have no standing as to Count II.

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33 *Strasenburgh* at 551-552.
34 *Ibid.*
35 Da672-718.

Count III: Alleged Breach of Operating Agreement and Bylaws: None of the Plaintiffs in this action have "special damages" allowing for the assertion of this claim as a direct claim.[36]

It is not clear how the Individual Plaintiffs can enforce the alleged HBI Bylaws when the Capital Company – not the Individual Plaintiffs – is the sole shareholder of HBI, and has been since 2015. Even if the Individual Plaintiffs were to contend that they were shareholders of HBI for a brief period in time before the formation of the Capital Company (which they were not), one cannot enforce a shareholder agreement for alleged breaches occurring when they are no longer shareholders.[37]

As to alleged breaches to the Capital Company Operating Agreement, in their First Amended Verified Complaint and also in their Post-Trial Submission, Plaintiffs fail to explain how the alleged activity involving HBI loan agreements and HBI operations somehow caused a breach of the Capital Company Operating Agreement. Plaintiffs produced no evidence – nor did they even assert – that the alleged losses involved funds of the Capital Company. They also did not allege that any of the various intercompany loan agreements were entered into by or on behalf of the Capital Company. Thus, none of the

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36 1T and 2T.

37 *See Brown v. Brown*, 323 N.J. Super. 30 (App. Div. 1999)(former shareholder had standing to maintain action only because alleged wrongs occurred when she was still a shareholder).

Plaintiffs have standing and are absolutely barred from bringing and recovering under Count III.

Count IV: Conversion: Conversion claims alleging involvement of a corporation's assets and operations are derivative claims.[38] The only parties that would have standing to bring such a claim would be HBI (directly) or the Capital Company (bringing a derivative claim on behalf of HBI). The Plaintiffs did not assert such claims.[39]

Plaintiffs' allegations of conversion relate to HBI property and monies,[40]with the Plaintiffs only suffering alleged losses by way of diminution in value of shares (of HBI, in the case of the Capital Company) and membership interests (in the Capital Company, in the case of the Individual Plaintiffs). Plaintiffs did not have "special injuries." Thus, none of the Plaintiffs have standing and are absolutely barred from bringing and recovering under Count IV.

Count V: Unjust Enrichment[41]: Plaintiffs have no standing and are absolutely barred from asserting this claim as a direct claim. Plaintiffs' allegations of unjust enrichment relate to HBI property and monies, with the Plaintiffs only suffering alleged losses by way of diminution in value of shares

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38 *Tully* at 126.
39 Da672-718.
40 1T and 2T.
41 This count was dismissed by the trial court in its June 23, 2022 order, though the trial court did not specify its reasons for dismissing this specific count.

(in the case of the Capital Company) and membership interests (in the case of the Individual Plaintiffs). Again, the only parties that would have standing to bring such a claim would be HBI or the Capital Company (bringing a derivative claim on behalf of HBI.) Plaintiffs do not have "special injuries." Thus, none of the Plaintiffs have standing and are absolutely barred from bringing and recovering under Count V.

Count VI: Rescission: This claim was not directed toward Defendant Baker. And, while the issue of standing undoubtedly affects this count as well, the trial court's summary judgment order granting rescission should be reversed for reasons discussed *infra*.

Count VII: Piercing the Corporate Veil: This count was also dismissed by the trial court in its June 23, 2022 order. In this claim, Plaintiffs sought to pierce the corporate veil of various entities not even named as parties to this lawsuit.

This claim is undoubtedly a derivative claim for same general reasons set forth above. The only parties that would have standing to bring such a claim would be HBI or the Capital Company (bringing a derivative claim on behalf of HBI.) Plaintiffs did not assert such claims. Thus, Plaintiffs have no standing to assert Count VII.

Punitive Damages: Following trial, the Plaintiffs waiver their punitive damages claim, as reflected in the trial court's final order and judgment. However,

> Punitive damages may be awarded only if compensatory damages have been awarded in the first stage of the trial. An award of nominal damages cannot support an award of punitive damages.[42]

Given that Plaintiffs have no standing to seek compensatory damages as discussed *supra*., N.J.S.A. 2A:15-5.13 effectively bars the Plaintiffs from seeking punitive damages.

II. THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT THE CLAIM THAT THE ORIGINAL PLAINTIFFS SUFFERED ANY DAMAGES WHATSOEVER. (*See* 1T and 2T)

a. **Flyte** did not offer any testimony at trial and was not present.[43] He was never deposed. Flyte submitted nothing to the Court in the form of an Affidavit or otherwise setting forth his alleged damages. The record is completely silent as to his alleged damages. He has failed to establish that he has incurred any damage and, even if the Plaintiffs could prevail under some theory of law in this action – which they cannot – his failure to establish even the slightest hint of damage absolutely bars him from sharing in any award of damages entered in this lawsuit.

b. **Meena** did not offer any testimony at trial and was not present.[44] He was never deposed. Meena submitted nothing to the Court in

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42 N.J.S.A. 2A:15-5.13 (Emphasis added).
43 1T and 2T.
44 1T and 2T.

the form of an Affidavit or otherwise setting forth his alleged damages. The record is completely silent as to his alleged damages. He has failed to establish that he has incurred any damage and, even if the Plaintiffs could prevail under some theory of law in this action – which they cannot – his failure to establish even the slightest hint of damage absolutely bars him from sharing in any award of damages entered in this lawsuit.

c. **Lambiase** did not offer any testimony at trial and was not present.[45] He was never deposed. Lambiase submitted nothing to the Court in the form of an Affidavit or otherwise setting forth his alleged damages. The record is completely silent as to his alleged damages. He has failed to establish that he has incurred any damage and, even if the Plaintiffs could prevail under some theory of law in this action – which they cannot – his failure to establish even the slightest hint of damage absolutely bars him from sharing in any award of damages entered in this lawsuit.

d. **Moreira** did not offer any testimony at trial and was not present.[46] He was never deposed. Moreira submitted nothing to the Court in the form of an Affidavit or otherwise setting forth his alleged

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45 1T and 2T.

46 1T and 2T.

damages. The record is completely silent as to his alleged damages. He has failed to establish that he has incurred any damage and, even if the Plaintiffs could prevail under some theory of law in this action – which they cannot – his failure to establish even the slightest hint of damage absolutely bars him from sharing in any award of damages entered in this lawsuit.

e. **Fischer** offered testimony at trial discussing how Baker's allegedly illegal activities resulted in purported harm to HBI. Fischer's testimony regarding the "personal" impact of the issues raised in this case are confined to Pages 104 – 107 of the trial transcript from September 23, 2020.[47] There, Fischer still fails to substantiate any damage to her, individually, or even to substantiate damage to the Capital Company. The only damage alleged was that purportedly done to HBI.

f. **Bilotta** similarly failed to establish the existence of damages personally sustained by him. Beginning at Page 89 of the September 23, 2020 transcript:[48]

MR. COYLE: I just wanted to ask you, in addition to all the documents and the impact thereof how has this – how have these all [sic] events affected you personally?

MR. BILOTTA: Trying not to say anything that I shouldn't say, ma'am,

47 2T.

48 2T.

Your Honor. Pretty frustrating. It's been trying. It's been, you know, a waste of my time. We've lost a lot of ground that we built up. We lost a lot of equity in the company we used to deal with but to our goodwill and goodwill of our contractors we persevered. So it's – it was a huge setback but again, through the team effort of everyone taking a salary reduction, being able to negotiate with our trusted contractors who offer us some payment discount and to be able to, you know, move forward on newer projects we dug ourselves out of the hole. It's been a long struggle but that's what we do.[49]

MR. COYLE: I feel you're probably underselling your role in this and --

MR. BILOTTA: Again, I don't want to say anything or do anything that will bring my blood pressure up.

MR. COYLE: Let me ask you some questions specifically and see if I can get this. Would it be fair to say that you worked without salary for a rather long portion of time in 2018?

MR. BILOTTA: Myself, yes. I think my weekly check was probably 75 to 85 percent reduction, not the typical 50 percent that the others took. I – I'm a single person so I was able to do that. I sacrificed heavily but, again, I – as I did when I invested in the company with my personal – I personally invested $50,000[50] because I believed in the company and the people that I work with. So, again, I took it upon myself to take a huge salary reduction because I knew the other people couldn't so I had to or the company wasn't going to survive.

MR. COYLE: Right, and over the course of really an insane week from January 8th through the 14th of 2018 it's fair to say that you watched everything you built so hard over the last three years just vanish?

MR. BILOTTA: Well, again, it didn't vanish, it would never vanish

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49 This entire paragraph deals with "loss" to HBI. Furthermore, a plaintiff cannot maintain a direct cause of action against an officer/director/manager/member for lost wages.

50 Bilotta's use of the term "personally invested" is misleading. He established in his testimony that he made a loan of $50,000.00 to HBI, which was repaid in full. This was not an "investment" made by Bilotta in HBI; no more so than a mortgage lender would be able to say it "invested" in a borrower's personal residence. Bilotta did not invest in HBI; he loaned HBI money and he was repaid in full.

unless I gave up the fight and unless my partners and coworkers did the same and that's not what we're about. So, again, Mr. Baker underestimated the resiliency and the resolve of his former partners in digging ourselves out and in righting the ship and in finding out the truth of what actually transpired and that's what we've been presenting over the last two and a half years.

MR. COYLE: Up to the point now that as per our valuation we submitted of Mr. Baker's equity stake in HCP that at the time you took over HBI was worth negative millions of dollars?

MR. BILOTTA: Correct and, again, like I said, we did in one year what he took three years to, you know, put us in that hole. We dug ourselves out because that's what we do.

MR. COYLE: I know the P-58, the QuickBooks audit trail was rather lengthy and we talked about it for a few hours but we really could have talked about this for probably another week of trial straight, is that fair to say?

MR. BILOTTA: Yes, there's enough entries in there to go over ad infinitum which, again, is not something I want to really go through if we don't have to. It's sickening.

MR. COYLE: And while this trial has been focused on the J. Paul Allen aspect of this, the same story has repeated itself five times with respect to all the other companies, correct?

MR. BILOTTA: Correct, and fortunately enough, again, Mr. Baker underestimated the resolve of his partners, his former partners, because he wrote those intercompany loan contracts so that there was a clause for arbitration and I'm pretty sure he never thought we would take him up on it so it's very apropos that those judgments were awarded and we came out on the good side of it, as we should have.

MR. COYLE: And through your perseverance of the last two and a half years you've gotten to prove that many of these documents and arguments and everything that was sworn to up and down in court and used to steal your company false, right?

MR. BILOTTA: Correct.

MR. COYLE: Anything else you want to add?

MR. BILOTTA: No. Again, don't want my blood pressure to go up.

MR. COYLE: Thank you, Mr. Bilotta. I have no further questions for

Mr. Bilotta.
THE COURT: All right, Mr. Bilotta, you are excused.

Bilotta failed to substantiate any damage to him, individually, or even to substantiate damage to the Capital Company. The only damage alleged was that purportedly done to HBI.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER THE IMPACT THAT THE PASSAGE OF TIME HAD ON THE PLAINTIFFS' CALCULATION OF DAMAGES. (Da59 & Da85)

This argument is made at length in Baker's post-trial submission[51] and motion to vacate.[52] For the sake of brevity, the argument is not repeated herein, but the Appellate Division is respectfully directed to the aforementioned sections of the Appendix.

IV. THE TRIAL COURT ERRED IN PERMITTING PLAINTIFFS TO AMEND THEIR COMPLAINT. (Da260)

Plaintiffs argued below that they should be permitted to amend their complaint (or, at the very least, the case caption) to include Hudson Black Inc. as a plaintiff. This argument was first made only after trial and after the court below entered judgment in favor of the plaintiffs. The trial court granted Plaintiffs' request. In so doing, it violated Baker's due process rights.

A. Amending a complaint to add a proper party does not cure an issue of standing.

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51 Da33-58.
52 Da85-238.

Plaintiffs did not dispute the applicability of the *Tully* and *Strasenburgh* decisions in this case. Plaintiffs did not dispute that HBI is a necessary and proper party to this action (notwithstanding their excuses as to why it was never properly joined and their prior opposition to its inclusion.) Rather, they relied on equitable arguments which fall woefully short of overcoming the threshold issue of standing. Equity is intended to supplement – not contradict – the common law. This appears to have been lost on the trial court.

Plaintiffs' reliance on *Deutsche Bank Tr. Co. Ams. v. Angeles*,[53] wherein the Appellate Division affirmed the Chancery Division's denial of a defendant's motion to vacate a judgment for lack of standing, is misguided at best. In that case, the appellant relied on a prior Appellate Court decision – again involving Deutsche Bank[54] wherein the Appellate Court held that "either possession of the note or an assignment of the mortgage that predated the original complaint conferred standing."[55] In that same appeal, however, the Appellate Division, specifically "determined that an amended complaint cannot cure an initial lack of standing."[56] In *Mitchell*, the Appellate Division went on to state that it found the argument for dismissal compelling given that "the defendant actively engaged in the litigation, filing an answer and counterclaims in response to the

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53 *Deutsche Bank Tr. Co. Ams. v. Angeles*, 428 N.J. Super. 315, 320 (App. Div. 2012).

54 *See Deutsche Bank National Trust Co. v. Mitchell*, 422 N.J.Super. 214, 27 A.3d 1229 (App.Div.2011).

55 *Id.* at 216, 225.

56 *Ibid.*

plaintiff's […] complaint."[57] And that the defendant had "also contested the plaintiff's standing to file the […] complaint long before the end of the litigation."[58]

As the record reflects, Baker has actively engaged in this litigation from Day 1. Indeed, the issue of standing was even raised previously.[59] The very same Plaintiffs who now implore the Court to allow them to amend their complaint to add Hudson Black Inc. as a plaintiff argued in their August 22, 2019 opposition to Norcia's motion that "the plaintiffs were not required to join HBI as a plaintiff."[60]

The Plaintiffs in this action are unlike Deutsche Bank in *Angeles*, where standing could be established by "possession of the note or an assignment of the mortgage that predated the original complaint" and the defendant's silence on the issue of standing until long after judgment was entered. Rather, they are in the position of Deutsche Bank in *Mitchell*, where the issue of standing was raised early on with the court and Mitchell actively participated in the case from its commencement. As was the case in *Mitchell*, the issue of standing precludes the Plaintiffs from asserting their claims, and necessitates dismissal.

True to form, Plaintiffs' counsel offered little more than his *ipse dixit*

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57 *Id*. at 220.
58 *Id*. at 220-21.
59 *See supra*.
60 *Id*.

statements, espousing that "of course [the Plaintiffs] have standing. They were directly harmed by Mr. Baker's misconduct." Yet when asked about this very harm at trial, out of six individual plaintiffs, the two who actually appeared and testified were unable to identify any.[61]

The best Plaintiff Bilotta could do was to state that "We've lost a lot of ground that we built up. We lost a lot of equity in the company we used to deal with but to our goodwill and goodwill of our contractors we persevered" and "I think my weekly [pay]check was probably 75 to 85 percent reduction."[62] Asked whether "everything [he] built so hard over the last three years just vanish[ed]," Mr. Bilotta responded with, "Well, again, it didn't vanish, it would never vanish unless I gave up the fight and unless my partners and coworkers did the same and that's not what we're about."[63] Mr. Bilotta offered absolutely nothing to quantify his personal damages, and actually concedes that nothing vanished.[64]

Plaintiff Fischer, when asked about the harm suffered by her personally, replied that "it's had a huge impact on all of us, just in every single aspect."[65] "Jon did lock us out of our offices, including my own office and, you know, I probably had corporate documents in [there]."[66] "He also took the keys to the

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61 1T and 2T.
62 2T89-90.
63 2T91.
64 *Id*.
65 2T104.
66 2T105.

company vans and trucks so he pretty much ended operation of our company like immediately."[67] "Our clients were completely freaked out."[68] "Obviously it's a huge financial impact on our clients if we go even one day without having guys on site or managing our projects properly."[69] "So, on a professional and personal level this had obviously major, major impacts across the board and still to this day."[70] "You know, everybody's salaries were cut. The stress and everything was very crazy. I was pregnant at the time and, you know, there's a lot that goes, you know, into all the – in every emotional part so that was really something, to say the least."[71] Once again, a plaintiff offers no quantifiable damages to support the claims raised in this action. Yet the trial court appears to have washed over the standing arguments because the Plaintiffs were "directly harmed by Mr. Baker's misconduct," at least according to Plaintiffs' counsel.

B. The trial court had already set a deadline to amend to rectify any issues with the names of the parties to the lawsuit, and Plaintiffs affirmatively stated that they did not need to make any amendments.

Following some sort of bizarre interpretation of the law, Plaintiffs moved to amend their complaint – after trial and after entry of judgment – "to account

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67 *Id*.
68 *Id*.
69 *Id*.
70 *Id*.
71 2T106-7.

for the resolution of the ownership of HBI and to conform to the evidence." This is not the purpose of Rule 4:9-2, nor did the Plaintiffs (or the trial court) comply with the requirements prescribed by that Rule. As our Appellate Division has stated, "an amended complaint cannot cure an initial lack of standing."[72] Plaintiffs were given multiple opportunities to add HBI and failed to do so. Norcia raised this issue in her motion filed on or about January 2019. The issue of standing is raised in Baker's Answer. Judge Berdote Byrne entered not one but two case management orders during the course of this litigation setting deadlines to file an Amended Complaint.[73] Plaintiffs have not only continuously maintained that HBI did not need to be a party to this case, they actively opposed its inclusion.

In permitting HBI to be added as a plaintiff, the trial court deprived the Defendants of their ability – and indeed their right – to defend themselves against this new plaintiff, who swoops in after issues had been litigated between improper parties to "claim the reward" of litigation it had no part in.

C. Adding a plaintiff to an action – not merely after filing the initial complaint but, in this case, after a trial and the subsequent entry of judgment against the defendants – denies the defendants due process and the ability to defend themselves.

[72] *Deutsche Bank National Trust Co. v. Mitchell,* 422 N.J.Super. 216, 225, 27 A.3d 1229 (App.Div.2011)

[73] *See* Da292 at ¶6("no amendment(s) to the pleadings adding additional parties after June 30, 2019"); *See* Da289 at ¶11(extending deadline to December 31, 2019); *See also* July 8, 2019 Order(granting leave to file First Amended Verified Complaint).

Our legal system is built upon the concept of due process. Under the law, due process requires adequate notice of the allegation on which the claim is founded and an opportunity to defend.[74] It goes without saying that due process also requires a defendant to know who is making such an allegation. The trial court violated Baker's due process rights by adding HBI as a party to the case after trial and after entry of judgment, without even permitting the filing of an amended answer to the allegations now (supposedly) brought by HBI.

In *R. Wilson Plumbing & Heating, Inc. v. Wadman*,[75] the Appellate Division reversed the trial court's determination that the plaintiff was liable for consumer fraud because plaintiff had no notice of the consumer fraud claim. In that case, plaintiff filed a suit against defendant seeking recovery for an unpaid plumbing invoice.[76] Defendant filed counterclaims based on the quality of plaintiff's services.[77] "[Plaintiff] was not noticed that its conduct could be deemed violative of regulations implementing the Consumer Fraud Act and that it might consequently be held to treble damages and an award of counsel fees" because the consumer fraud claim was not included in defendant's

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74 *New Jersey Div. of Youth & Fam. Servs. v. P.C.*, 439 N.J. Super. 404, 413–14, 109 A.3d 235, 241–42 (App. Div. 2015) ("We are convinced that the procedures employed at the trial level were fundamentally unfair and significantly deprived defendant of her due process rights" because the defendant was held liable for an abuse claim even though that claim was never included in plaintiff's complaint and plaintiff never amended the complaint to include it.).

75 *R. Wilson Plumbing & Heating, Inc. v. Wadman*, 246 N.J. Super. 615, 618-19 (App. Div. 1991).

76 *Wilson* at 618-19.

77 *Id.*

counterclaims.[78] Therefore, the court ruled that the trial court's determination that plaintiff was liable under the consumer fraud act violated plaintiff's due process rights.[79]

In this case, the addition of Hudson Black Inc. as a plaintiff after trial and after entry of judgment clearly violated Baker's due process rights to defend himself against the claims of Hudson Black Inc. But, moreover, the court failed to recognize that on multiple occasions it was suggested that HBI be made a party – and the plaintiffs repeatedly stated that it was not necessary and elected not to join HBI to the action. Thus, this is not simply a case of a defendant not being made aware of the allegations or of the accuser – this is a case where for the entire period between the filing of the action in January 2018 and the entry of judgment in June 2022, Hudson Black Inc. was actively denying that it had any role in the litigation.

> Quoting Plaintiff's counsel at the pre-trial conference, 5T6:
>
> > I do also want to say, Mr. Baker just certified under oath that there's over a dozen – pending matters between the parties. There is one matter involving Mr. Baker at [sic] HBI. Right. And this is [the] fraudulent transfer action, Sussex County. <u>There are no other matters between Mr. Baker and HBI</u>. <u>The plaintiffs here are the owners of HCP and there are no other matters between them and Mr. Baker</u>. The judgment actions are against Mr. Baker's company[ies]. He's not a defendant in those – in those matters. <u>HBI has no claims against Mr. Baker</u>.

78 *Id.*
79 *Id.*

> *See also* Plaintiffs' August 30, 2019 Letter Brief arguing that neither the Capital Company nor HBI are parties to the case. "Even if HCP and HBI had been parties in this action . . ."
>
> *See also* Plaintiff's August 22, 2019 Opposition to Motion to Dismiss: "The Plaintiffs are seeking relief both individually and on behalf of their company, HCP." There is no mention of HBI.

V. THE TRIAL COURT ERRED IN ENTERING A STIPULATION OF DISMISSAL WITHOUT THE CONSENT OF ALL PARTIES. (Da620)

Rule 4:37-1(a) allows a voluntary dismissal by stipulation only when that stipulation is "signed by all parties who have appeared in the action." Here, the court below dismissed Defendant Amanda Rae Norcia-Baker based on the filing by Plaintiffs of a stipulation signed only by Plaintiffs' counsel and Defendant Norcia.[80] Baker was never informed of the basis for the dismissal, apprised of the contents of the settlement reached between the parties, or even aware that the dismissal was forthcoming until it was filed with the trial court.

A similar dismissal was addressed by the Appellate Division in *Burns v. Hoboken Rent Leveling & Stabilization Bd.,* 429 N.J. Super. 435 (App. Div. 2013). There, the Appellate Court found that Bloomfield – the non-party to the stipulation – "was an interested party concerning the claims being dismissed" and ruled that it was error to deny Bloomfield's motion to vacate the dismissal. While the Appellate Division in *Burns* ultimately found the error to be harmless,

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80 Da620.

the circumstances in that case differed in that the dismissal was granted by the trial court following a hearing on a motion for voluntary dismissal, not merely after a filing of a signed stipulation by the plaintiffs, as was done here. And, while it is convenient to assume that the stipulation of dismissal between Norcia and Plaintiffs also terminated Norcia's cross-claims against Baker, that has not been clearly established by the record.

VI. THE TRIAL COURT ERRED BY FAILING TO HEAR ORAL ARGUMENT ON TWO SEPARATE SUMMARY JUDGMENT MOTIONS. (Da310)

On June 10, 2020, the Court granted Plaintiffs' request for partial summary judgment as to Count VI and summary judgment as to Counts II and III of Plaintiffs' Amended Verified Complaint.[81] The Court's Order was issued without hearing oral argument by either side, despite a request for oral argument having been included in the moving papers, and despite very little factual support submitted by the Plaintiffs.[82] Rule 1:6-2(d), which governs oral

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81 Da310.

82 The supporting documentation submitted by Plaintiffs with their two (2) summary judgment motions is largely circumstantial and falls far short of the standard necessary to prevail on a motion for summary judgment. The letter briefs submitted by Plaintiffs' counsel have been included in the appendix for this reason, as they make apparent the fact that the trial court relied primarily on counsel's arguments and characterizations of certain documents, rather than on the contents of the documents themselves. Counsel also attempts to present "testimony" akin to that of an expert in his briefs – *e.g.* he characterizes a signature by William Saks (HBI's former chief operating officer) as a possible forgery based upon his own "hand-writing analysis" which he discusses at length in his brief. These types of arguments by counsel had the desired effect – they caused the trial court to look beyond the facts and to rule based on the picture of Baker painted by Mr. Coyle's false narrative.

argument on motions in the civil division, provides in relevant part, "…no motion shall be listed for oral argument unless a party requests oral argument in the moving papers or in timely-filed answering or reply papers, or unless the court directs. A party requesting oral argument may, however, condition the request on the motion being contested. If the motion involves pretrial discovery or is directly addressed to the calendar, the request shall be considered only if accompanied by a statement of reasons and shall be deemed denied unless the court otherwise advises counsel prior to the return day. As to all other motions, the request shall be granted as of right." (Emphasis added). Thus, the Court erred in not granting oral argument on Plaintiffs' motion.

With regard to Count VI, the Court concluded that, "HCP and Ms. Norcia-Baker have both chosen to relinquish their rights and rescind the contract"[83] and that "because [P]laintiffs' relief is limited to [C]ount VI, rescission of the Repurchase Agreement, and the signatories are in agreement, there are no material facts in dispute."[84]

In reaching its conclusion, the Court reasoned that "'[o]nly the parties to an agreement or the intended third-party beneficiaries of such agreement have

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[83] Da315. *But* note that Plaintiffs relied on a certification (Da336) of since-disqualified counsel, Eric A. Wood, Esq. Mr. Wood was removed from the case due to a potential conflict of interest. (Da298). Because of Mr. Wood's various conflicts, a certification by him waiving Norcia's rights should not have been admitted on summary judgment.

[84] *Id*.

standing to bring an action to declare the validity or enforceability thereof.[85] As such, only HCP and Ms. Norcia-Baker, the signatories, have standing to enforce or waive the benefits pursuant to the Repurchase Agreement."[86]

The Court's decision to grant Plaintiffs' request for rescission of the agreement is flawed for two reasons, both of which would most likely have been addressed at oral argument:

> (1) When the Court granted relief to the Plaintiffs, Norcia was no longer a party-in-interest to the agreement, as she had transferred all of her rights thereto to Baker, pursuant to a divorce settlement[87] which, interestingly enough, had already been filed with the trial court by Norcia herself prior to the grant of the Plaintiffs' summary judgment motions.
>
> (2) While the Plaintiffs (and the Court) have repeatedly referred to the agreement in question as a "Repurchase Agreement," the agreement is actually titled "Stock Sale Agreement with Right to Repurchase." The agreement did not simply give Norcia the right to repurchase her interest in HBI; it was the very agreement by which Norcia's ownership interest in HBI was originally conveyed to HCP. In rendering the agreement null and void *ab initio*, the

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85 *Id.*
86 *Id.*
87 Da598.

> Court appears to have not only nullified Norcia's right to repurchase HBI but has also nullified HCP's acquisition of HBI from Norcia in the first place.

Under principles of contract law, rescission is an equitable remedy and only available in limited circumstances.[88] Ordinarily, contracts may only be rescinded where there is original invalidity, fraud, failure of consideration or a material breach.[89] And even where the grounds for rescission exist, the remedy is discretionary and will not be granted where the claimant has not acted within a reasonable time or where there has been substantial performance.[90] Moreover, to grant rescission, the court must be able to return the parties to their original position.[91]

"[A] court must apply rescission only in circumstances where it is clear that the court can return the parties to the ground upon which they originally stood."[92] Here, the trial court has failed to appreciate the consequences of rescission and, in so doing, has essentially resolved – albeit inadvertently – the

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88 *Hilton Hotels Corp. v. Piper Co.,* 214 N.J. Super. 328, 336, 519 A.2d 368 (Ch.Div. 1986).

89 17A Am. Jur. 2d Contracts § 539, 567. *See Herbtstman v. Eastman Kodak Co.,* 68 N.J. 1, 9, 342 A.2d 181 (1975); *Merchants Indem. Corp. v. Eggleston,* 37 N.J. 114, 130, 179 A.2d 505 (1962); *Giumarra v. Harrington Heights,* 33 N.J. Super. 178, 190, 109 A.2d 695 (App.Div. 1955), *aff'd* 18 N.J. 548, 114 A.2d 720.

90 *Hilton* at 336. *Jones v. Gabrielan,* 52 N.J. Super. 563, 576, 146 A.2d 495 (App.Div. 1958).

91 *Ibid. Driscoll v. Burlington Bridge Co.,* 28 N.J. Super. 1, 4, 99 A.2d 829 (App.Div. 1953).

92 *See Mercedes-Benz USA LLC v. Coast Auto. Group, Ltd*., 2006 U.S. Dist. LEXIS 71953 (D.N.J. 2006)(Emphasis added).

entirety of the disputes in this case. That is, if the Stock Sale Agreement with Right to Repurchase is void *ab initio*, then HCP never owned HBI – ownership of HBI reverts to where it was prior to the sale to HCP. That is, to Norcia. However, since Norcia conveyed her ownership rights in *all* business entities formed after their marriage to Baker[93], it is now Baker who has stepped into her shoes. Presumably, this is not what the trial court intended, as the orders issued subsequent to the order granting partial summary judgment lie in direct conflict with this outcome. These and other substantial issues could have been explored more deeply had oral argument been granted. Had the parties had the opportunity to engage in argument, the trial court may very well have reached a different conclusion.

VII. THE PLAINTIFFS ACTUALLY ADMITTED THAT THE DAMAGES THEY WERE CLAIMING AS THEIR OWN RIGHTFULLY BELONGED TO NON-PARTY HBI. (5T)

In the pre-trial conference, Plaintiffs' counsel discusses at length the issue of "double recovery"[94] and informs the trial court judge that "HBI can recover once." What is seemingly lost on the court (and perhaps even on Plaintiffs' counsel) is that the matter now on appeal was not HBI's matter! It was brought by six individuals, twice removed from HBI, each of whom has a minority ownership interest in the Capital Company, which in turn owns HBI. For

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93 *See Amanda Rae Norcia-Baker v. Jonathan P. Baker*, Superior Court of New Jersey, Chancery Division, Sussex County, Family Part, Docket # FM-19-64-20.

94 5T5 at 15, 5T7, 5T8 at 3-8.

Plaintiffs to state – and for a trial court to agree – that those Plaintiffs are entitled to collect money owed to a separate and distinct entity – which was never made a party prior to judgment being entered – is to defy all semblance of logic. As an example of the lunacy of this logic, and without getting into the merits of their argument, Plaintiffs reference in the First Amended Verified Complaint unpaid payroll taxes owed by HBI. They contend that these taxes remained unpaid because HBI could not collect on its judgments. What would happen if the Plaintiffs – individually – now collected money that was due to HBI? Would they be required to pay HBI's payroll taxes? How would HBI's other creditors be treated? Simply put, there is no basis in fact or in law to support an award of damages to Plaintiffs that mirrors – and is offset by – judgments entered in favor of HBI.

CONCLUSION

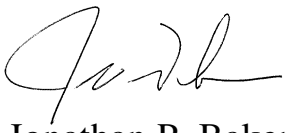
Procedurally, the action now on appeal can perhaps best be summed up by referring to the record as a "nightmare." Between 2018 and 2019, the case languished as Judge Brennan departed for his retirement. Judge Berdote Byrne picked up the case in 2019. Then, after taking nearly two years to reach trial in September 2020, Judge Berdote Byrne "misplaced" the box containing her notes[95] and did not render a final decision until nearly two years later in June 2022. In the interim, the case was marked as "closed" and "dismissed by court

[95] *See* Da14 footnote 2.

with prejudice" according to ACMS.[96] Days after entering her post-trial order and judgment, Judge Berdote Byrne was reassigned and replaced by Judge DeAngelis. Judge DeAngelis was faced with the unenviable task of entering a final judgment and deciding other post-trial issues – all two years after the trial, and having not been a participant in the trial himself. The missing trial notes? It is not clear if they were ever found, as Judge Berdote Byrne's post-trial order seems to mirror in form, language, and fact the post-trial submission of Plaintiffs' counsel.

What the record is clear on, however, is that Plaintiffs (1) lacked standing, (2) did not suffer any personal damages, and (3) failed to join Hudson Black Inc. as a party. In light of the foregoing, I respectfully request that the Appellate Division reverse the post-trial orders issued by the trial court,[97] together with the orders for summary judgment[98] which became final upon entry of the final order.

Respectfully submitted,



Jonathan P. Baker

DATED: March 24, 2023

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96 *See generally* Da271 (Order to correct docket).
97 Da4, Da6, Da239, Da249, and Da260.
98 Da310.

FILED, Clerk of the Appellate Division, May 24, 2023, **A-000441-22**, **AMENDED**

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

SHANE FLYTE, JOHN MEENA, FRANK BILOTTA, JORDAN KLEGA-FISCHER, STEVE LAMBIASE and DAVIDE MOREIRA, Individually, and as Members on behalf of HBI CAPITAL PARTNERS LLC, and HUDSON BLACK INC.,

Plaintiffs-Respondents,

v.

JONATHAN P. BAKER,

Defendant-Appellant,

and

AMANDA RAE NORCIA-BAKER,

Defendant.

DOCKET NO. A-441-22

CIVIL ACTION

On Appeal From: Superior Court of New Jersey, Chancery Division, Sussex County, Docket No.: SSX-C-02-18

SAT BELOW:
Hon. Frank J. DeAngelis, P.J.Ch. (2022-2023)
Hon. Maritza Berdote Byrne, P.J.Ch. (2019-2022)
Hon. Robert J. Brennan, P.J.Ch. (2018-2019)

BRIEF OF PLAINTIFFS-RESPONDENTS

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***On the Brief*:**
John D. Coyle
May 24, 2023

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TABLE OF JUDGMENTS, ORDERS, AND RULINGS

TABLE OF PARTIES[1]

Name	Appellate Role	Trial Court Role	Status
Jonathan P. Baker	Appellant	Defendant	*Did not appear at trial*
Hudson Black Inc.	*Respondent*	*Plaintiff*	*Participated Below*
Shane Flyte, *Individually and on behalf of HBI Capital Partners LLC*	Respondent	Plaintiff	Participated Below
John Meena, *Individually and on behalf of HBI Capital Partners LLC*	Respondent	Plaintiff	Participated Below
Frank Bilotta, *Individually and on behalf of HBI Capital Partners LLC*	Respondent	Plaintiff	Participated Below
Jordan Klega-Fischer, *Individually and on behalf of HBI Capital Partners LLC*	Respondent	Plaintiff	Participated Below
Steven Lambiase, *Individually and on behalf of HBI Capital Partners LLC*	Respondent	Plaintiff	Participated Below
Davide Moreira, *Individually and on behalf of HBI Capital Partners LLC*	Respondent	Plaintiff	Participated Below

[1] Respondents submit the following table of parties who were misidentified or omitted in Appellant's Table. Updated information is in italics.

TABLE OF AUTHORITIES

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STATUTES AND RULES

INDEX TO APPENDIX BY VOLUME

VOLUME I **Pa#**

PRELIMINARY STATEMENT

The Court below found Appellant Jonathan P. Baker liable to the Respondents for fraud, breach of fiduciary duty, breaches of the underlying businesses' operating agreement and bylaws, and conversion. In this appeal, Appellant presents a series of confounding arguments. The supposed shortcomings of Respondents' witnesses and claimed contradictions sound like they would have made for an interesting presentation at trial—had Appellant appeared. Instead, Appellant voluntarily elected not to appear at the trial and tries to pretend the trial never happened to the extent that Appellant's Appendix does not include any of the trial exhibits.

Had Appellant actually appeared at trial, he would have been forced to actually prove his tale of woe about the hardship he befell after he stole over $4,750,000 from Respondents, locked them out of the offices of Respondent Hudson Black Inc. ("HBI") when his fraud was discovered, and attempted to fraudulently transfer HBI to his then wife, Defendant Amanda Rae Norcia-Baker ("Amanda").

Appellant challenges the trial court's grant of summary judgment to Respondents on Counts II, III, and VI of the Amended Complaint and removal of Appellant as a Member of HBI Capital Partners LLC ("HCP"), the parent of HBI. This Order was properly supported by the record below and should be affirmed. Count VI sought rescission of the agreement between HBI and Amanda. Because both parties to the Repurchase Agreement, Amanda and HBI, voided the Agreement,

the Court below properly vacated the agreement. Similarly properly supported was the decision regarding Appellant's breaches of contract and fiduciary duties from Counts II and III. The Court below properly held that Appellant's admitted non-payment of taxes and transfer of these monies to his personal companies via agreements that he concealed from Respondents was a breach of the respective corporate documents and a breach of his fiduciary duties.

The trial Court also properly granted final judgment at trial as to Appellant's liability for fraud and awarded damages. In addition to the fraudulent conduct outlined above, the record properly shows that Appellant also prepared fraudulent corporate resolutions for HBI, falsely certifying that he was the "only officer," the "sole owner," and the "corporate secretary." He was none of those things and used these forged resolutions to obtain loans for his personal companies, who then defaulted on the loans causing HBI hundreds of thousands of dollars in losses.

The true reason Appellant hid from the trial here might be as a result of the undisputed evidence that, after he was removed by the original injunction in 2018 that stopped his theft of the company, he went into HBI's QuickBooks accounting program and made 1,208 changes to incriminating transactions in the 24 hours before he had to produce the QuickBooks file by Court Order. Only after making the 1,208 changes did Appellant print the fraudulent accounting reports and file them with the Court. The Court below properly held that as a result of these doctored

accounting files, "Baker made it appear he had transferred 90% less to his companies than the actual amounts, perpetrating a fraud on the court." The Court below then properly denied Appellant's motion for reconsideration which, like this appeal, was based on cross-examination questions that Appellant never asked.

The Court below then properly granted Respondents' motion to conform the pleadings to the evidence, including the addition of HBI as a named Plaintiff. The initial omission of HBI as a plaintiff was a direct result of some of the very misconduct by Appellant for which he was found liable. When the Complaint was originally filed in January of 2018, Appellant had purportedly transferred HBI to his wife pursuant to Appellant's (now rescinded) fraudulent transfer agreement, and the individual Plaintiffs had been fired from their roles as officers of HBI. They remained members of HCP, HBI's parent company before the fraudulent transfer. Appellant informed the Plaintiffs that they each would be receiving a payment for one-ninth of the value of HBI; a value that he had diminished by $4,750,000 by the fraud described above. As a result, prior to the grant of summary judgment as to Count VI, HBI was 'owned on paper' by Appellant's wife and therefore could not be named as a Plaintiff. As such, the Court properly amended the caption to conform to the evidence presented and added HBI as a named Plaintiff.

Accordingly, the decisions from the Court Below should be affirmed as properly supported by the evidence before the Court.

PROCEDURAL HISTORY

Respondents filed a Verified Complaint and Order to Show Cause seeking temporary and preliminary injunctive relief on January 19, 2018. (Da629). On January 29, 2018 temporary restraints were entered enjoining the disputed transfer of HBI from HCP to Appellant's then wife, Amanda Norcia-Baker. (Da621). The temporary restraints were reaffirmed as preliminary restraints on March 28, 2018. (Da626). As part of that Order, Appellant was removed as an officer from HBI, but to remain as an employee. (Da627). The Order also directed Appellant to provide Respondents with the QuickBooks accounting files for HBI that he removed from the company. (Da628).

On April 17, 2018, Appellant filed a motion to enforce litigants rights seeking to force Respondents to pay him moneys he alleged HBI owed him. One claimed expense was supposed internet expenses set forth in a Verizon bill attached as an exhibit to Appellant's Certification. While that motion was pending, on May 16, 2018, Respondents filed a motion to remove Appellant from his employ with HBI based on a series of newly discovered fraud, including that Appellant had doctored the Verizon invoice he certified to in an attempt to 'seek litigant's rights' and force HBI to pay for the internet charges from his personal companies. The return date of HBI's motion was adjourned from July 6, 2018 at the request of counsel for Appellant. On that adjourned return date, Appellant filed for Chapter 13 Bankruptcy

protection, resulting in an automatic stay of the sanctions hearing.

On July 27, 2018, HBI terminated Appellant's employment after noticing and holding a meeting (which Appellant declined to attend) on the issue of Appellant's forged documents. Appellant's bankruptcy matter ultimately was dismissed by the Hon. John K. Sherwood, U.S.D.J., on December 17, 2018.

With the automatic stay lifted, Appellant filed a motion to enforce litigant's rights seeking to have HBI sanctioned for terminating him. On April 1, 2019, the Court denied Appellant's motion, holding:

> In this case, equity does not support maintenance of the status quo in the form of plaintiffs being forced to continually employ and pay [Appellant]. Plaintiffs have provided evidence of [Appellant]'s misconduct in relation to HBI. Additionally, [Appellant] has admitted to various acts of misconduct in a certification and in sworn testimony. Defendants have not denied plaintiffs' allegations regarding [Appellant]'s actions, but instead claim the March 28, Order requires plaintiffs to continue to pay and employ [Appellant] regardless. To force plaintiffs to employ and pay [Appellant] given the evidence presented against him would not be an equitable order consistent with a status quo injunction. "[E]quity will not consciously become the instrument of injustice."

(Da285). (internal citations omitted).

On June 4, 2019, Respondents filed a motion for Leave to file an Amended Complaint to include financial fraud discovered since the filing of the Complaint to plead Defendant's fraud with specificity. Appellant did not oppose the motion and on July 3, 2019 the Court granted Respondents leave to file an Amended Complaint,

which was filed on July 16, 2019. (Da672).

On July 24, 2019, the Court entered a Case Management Order. (Da288). In relevant part, this CMO scheduled a trial date and deadlines for the parties to submit pre-trial briefs in accordance with R. 4:25-1 and meet and confer to pre-mark exhibits. The Order further provided that:

> Except for good cause shown, no party will be permitted to offer any exhibits not identified or not submitted by said party for examination by opposing counsel in compliance with this Order. Any objections not made in writing at least three (3) business days prior to the scheduled trial date may be considered waived…..
>
> If any witness might be unavailable for trial, their testimony shall be videotaped for trial.

Appellant filed an Answer to the Amended Complaint on September 16, 2019. (Da719). On January 10, 2020, the Court granted Appellant's counsel's motion to be relieved as counsel, and Appellant thereafter appeared *pro se*. (Da298).

On February 11, 2020, Respondents moved for summary judgment against Defendant Amanda Baker seeking the rescission of the fraudulent "transfer agreement" pursuant to Count VI of the Amended Complaint. (Da325). On February 11, 2020 Respondents moved for summary judgment against Appellant pursuant to Counts II and III of the Amended Complaint and seeking the removal of Appellant as a Members of HCP pursuant to N.J.S.A. 42:2C-46.

On May 5, 2020 Defendant Amanda submitted a certification regarding

Summary Judgment as to Count VI. She certified that she previously contacted all counsel in writing to state that she "rescinds and renders void all those certain 'repurchase rights' exercised in that certain April 18, 2015 Hudson Black Inc. Stock Sale Agreement with Right of Repurchase" and stated that she has "NO objection to the agreement being rescinded as I have already rescinded it." (Pa593).

On June 10, 2020, the Court granted Summary Judgment in favor of HBI as to Counts II, III, VI and disassociated Appellant from HCP. (Da310). As to Count VI, the Court held that "HCP and [Amanda] have both chosen to relinquish their rights and rescind the contract. (Da314). Because plaintiff's relief is limited to count VI, rescission of the Repurchase Agreement, and the signatories are in agreement, there are no material facts in dispute." (Da315). With respect to Counts II and III, the Court held:

> The bylaws of HBI gave the power of entering financial transactions to the board of directors, not to [Appellant] alone. Likewise, the Operating Agreement of HCP required [Appellant], as manager, to act in accordance with the will of the members, who have "full, exclusive, and complete" authority to manage HCP. Plaintiffs' Brief at 4. By secretly entering these loan agreements without the knowledge or approval of HBI's board and HCP's executive committee, [Appellant] not only breached the bylaws and operating agreement, but demonstrated numerous instances of self-dealing and bad faith. As previously mentioned, proximate cause is ordinarily reserved for the factfinder. However, given the foregoing facts are undisputed, the court may determine causation at summary judgment. Allowing HBI's federal tax obligations to remain unsatisfied while continuing to

> transfer funds to companies in which he had interests and permitting these companies to default pursuant to the loan terms establish the liability [Appellant] created for HBI and HCP. Accordingly, [Appellant] breached his fiduciary duty in addition to his already established breach of HBI's bylaws and HCP's operating agreement.

(Da318).

On July 2, 2020, the Court issued an Order scheduling trial for September 16, 17, 18, 21, and 22, 2020. (Da279). On September 8, 2020 Appellant filed a motion to stay proceedings which was denied on September 14, 2020. (Da273). On September 11, 2020, the Court held a pretrial conference in which Appellant participated. (1T 4:8-11). During the conference, Appellant stated that he did not object to the admissibility of any of Respondent's exhibits and consented to the Court taking judicial notice of the five arbitration awards entered in favor of HBI and against his various companies. (1T 7:16-8:24). "And [Appellant] stated on the record that he had no opposition to any of the exhibits as be—coming into evidence." (1T 9:6-8).

Appellant made multiple attempts to stay the trial at the eleventh hour, filing an application for permission to file an emergent motion on short notice to the Appellate Division, which was denied on September 15, 2020 (Pa8), and then filing an application for emergent relief in the Supreme Court of New Jersey, which was denied on September 16, 2020. (Pa9).

The trial in this matter commenced on September 21, 2020. (1T). Noting

Appellant's absence, the Court put forth the following colloquy:

> It should be noted for the record that at the pretrial hearing on -- on September 11th, he indicated that he would not participate, even though he can participate and plead the Fifth to any specific question that may incriminate him or have a tendency incriminate him in the criminal proceedings. He still had the opportunity to cross-examine plaintiff's witnesses, put on witnesses of his own, open, and close in these proceedings, and he has voluntarily absented himself from that.

(1T 5:13-22).

The trial concluded on September 23, 2020 and Respondents submitted post-trial briefing on October 21, 2020. Appellant did not submit pre-or post-trial briefing.

On June 23, 2022, the Court entered an Order entering Judgment in favor of Respondents awarding $4,757,133.15 in compensatory damages under Counts I, II, III, IV, and pre-judgment interest, offsetting the award by $39,600 for the value of Appellant's interest in HCP. (Da6) The Court also entered an Opinion on June 23, 2022. (Da9) The Opinion made the following conclusions of law:

- The admissible evidence overwhelmingly demonstrates Appellant engaged in a pattern of willful fraud and deceit, almost from HBI's inception and for a period of two years afterwards, to borrow funds from HBI for his five Baker companies, with no intention of paying these loans back. (Da22).

- Appellant falsified HBI documents to obtain financing for his Appellant companies and drafted a Repurchase Agreement transferring all of plaintiffs' interests in HBI to his wife. (Da22).

- When ordered by the court to produce the books and records of the companies for a third time, Appellant falsified the books and records, perpetrating a fraud on the court. (Da22-23).

- The record is replete with evidence of Appellant's egregious fraud. Appellant gave himself sole access to HBI accounts. He lied to Flyte about being a signatory on the accounts. He regularly reported the accounts contained money that he had transferred to his Baker companies. He lied about the UCC lien being a "mistake" and a "retraction" would issue. He falsified corporate records, claiming he was the "sole member" of HBI and was the "corporate secretary" to obtain funding for his Baker companies, using HBI to secure the funding and to pay back the loans. He failed to disclose the Baker companies' five loan agreements to the Board of Directors or anyone at HBI. (Da23).

- An August 24, 2017 email from Appellant to Respondents is but one example of his systemic fraud. In the email, Appellant stated they were "dangerously close" to the $200,000 cushion and asked Respondents to defer receiving their salary, which plaintiffs did, in reliance upon his representation. Respondents proved, by clear and convincing evidence, the actual account balance on August 24, 2017 was $23.37. (Da15).

- Appellant made this misrepresentation knowingly, to continue to hide his use of HBI's accounts as a personal piggy bank to pay his five Baker companies' bills. (Da23).

- That very same month, HBI paid a total of $251,367.20 to JPA and Swift Capital. Moreover, after his doctoring of the QuickBooks records, Appellant made it appear he had transferred 90% less to his companies than the actual amounts, perpetrating a fraud on the court. But for the UCC lien, Appellant would have continued his fraudulent scheme as evidenced by the meeting at the end of 2017, weeks before his fraud was exposed, where Appellant requested the threshold be raised to withhold even more funds. (Da23-24).

- The court took judicial notice, with Appellant]s consent, of the four orders and judgments entered against the Baker companies at arbitration: $136,759.83 against 8 Quaker Road, $294,653.90 against Arley Farms, $133,819.09 against Konoba, and $915,932.63 against BSG. Plaintiffs proved at trial Appellant transferred $1,481,165.44 for

his transfers from HBI to Konoba, Arley Farms, 8 Quaker Road, and BSG. Plaintiffs further proved they are owed $3,275,967.71 for transfers made by Appellant from HBI to JPA for a total of $4,757,133.15 in compensatory damages. (Da24).

- Here, Appellant profited in the amount of at least $4.7 million dollars stolen during a two-year period. (Da29).

- Appellant did not stop stealing and even withdrew funds on the day the verified complaint was filed, leaving HBI accounts with less than ten dollars total. His total disregard for Respondents would have bankrupted Respondents but for their resilience and resolve. (Da29).

- Finally, Appellant had the opportunity to participate at trial and voluntarily absented himself from the proceedings, although he was made aware, having been denied a stay, he had the ability to assert his fifth amendment privilege against self-incrimination. (Da29).

On July 7, 2022, Appellant filed a motion to vacate the Judgment and Respondents Cross-moved to amend the complaint to conform to the evidence pursuant to Rules 4:9-1 and 4:9-2. (Da85). On August 8, 2022, the Court entered an Order denying Appellant's motion for reconsideration and granting Respondents' motion to amend. (Da260). The Court held:

- Appellant argues he was "unaware that the trial had been converted to a proof hearing. No notice was provided by either the court or by the plaintiffs to Baker of this fact." Def's Supp. Br., at 21. Yet, as the court noted in the June 23, 2022 Opinion, "[t]rial commenced on September 21, 2020. When contacted by the court, Appellant sent an email to plaintiffs' counsel at 10:00a.m. on the morning of trial stating 'on the advice of counsel, I will not be participating in the trial." (Da265).

- Equitable estoppel is an appropriate remedy in the current situation. The court converted the trial into a proof hearing on the same day of the trial and only after Appellant informed the court and Respondents' counsel he would not be participating. Therefore, Appellant's contention that he had no notice and therefore no right to participate in the hearing

strains credulity. (Da266).

STATEMENT OF FACTS

Terms of the Governing Agreements

An Operating Agreement for HCP was entered into as of January 31, 2015 ("HCP Agreement"). (Da470). Pursuant to the HCP Agreement, §3.1.1, the authority to enter into any loan transaction vested in the full membership of HCP, not just Appellant. (Da472; 1T:32:20-35:7). Further, Pursuant to the HCP Agreement, the Members have the "full, exclusive, and complete discretion, power and authority" to "manage, control, administer, and operate the business and affairs of the Company." (Da472, §3.1.1.).

Bylaws of HBI were executed on April 11, 2015 ("Bylaws"). (Da410). Pursuant to the Bylaws, "The management of the affairs, property and interest of the corporation shall be vested in the Board of Directors." (Da412, §4.1). Pursuant to the Bylaws, "No loans shall be made by the corporation to the directors, unless first approved by the holders of two-thirds of the voting shares." (Da413, §4.13).

An Amended and Restated Operating Agreement for HCP was entered into as of July 1, 2015. ("Amended Agreement"). (Da477). HCP is the 100% owner of HBI. (Da477, §1.3.4). Pursuant to the Amended Agreement, "The Company shall be managed by an Executive Committee comprised of three Members, one of whom shall be designated as the Manager of the Company." (Da479, §3.1).

Pursuant to the Amended Agreement, "The Executive Committee shall manage the day-to-day affairs of the Company." (Da479, §3.1.1). The Executive Committee of HBI was Appellant and Respondents Jordan Klega-Fischer and Shane Flyte. (1T:39:12-21). Pursuant to the Bylaws of HBI and the Amended Bylaws of HBI, §3.1.1, approval by the Executive Committee of HBI was required to enter into any loan transaction. (Da412; Da472; 1T:35:22-39:13).

There was a three-person board for HBI consisting of Appellant, Respondent Shane Flyte, and Respondent Jordan Klega-Fischer, who was the corporate Secretary for HBI. (Pa687:61:16-25). According to Appellant, there were no formal meetings for HBI; instead, there were formal meetings of HCP—the parent of HBI—during which the business of HBI was addressed. (Pa688: 62:1-24).

Appellant Unilaterally Transfers Money to 8 Quaker Road LLC

8 Quaker Road, LLC was formed to purchase the property located at 8 Quaker Road, Green Township, New Jersey. (Pa676:17:7-15). At the time it was formed, Defendant Amanda and Appellant were each 50% members of Arley Farms. (Pa678:23:18-22). Appellant prepared a document titled, "Intercompany Loan Agreement" between HBI and 8 Quaker Road, LLC ("8 Quaker Loan"). (Pa686:57:11-22; Da814). Appellant signed the 8 Quaker Loan on February 2, 2016 for HBI and 8 Quaker Road, LLC. (Pa687:60:3-8; Da818). Appellant did not show the 8 Quaker Loan to anyone at HBI prior to its execution. (Pa687:60:19-22). After

executing the 8 Quaker Loan, Appellant did not discuss it at any formal or informal meetings of HBI. (Pa688:64:4-7).

After executing the 8 Quaker Loan, Appellant did discuss it at any meeting of HCP. (Pa688:64:4-7). Appellant did not discuss the 8 Quaker Loan with any of the other members of HCP. (Pa688:64:11-13). Appellant drafted, negotiated, executed, and approved the 8 Quaker Loan without consulting anyone else from HBI or HCP. (Pa686: 65:1-14). At the time of the 8 Quaker Loan, 8 Quaker Road, LLC's sole business was owning Appellants and Amanda's marital residence. (Pa693:82:2-9). Appellant prepared financial statements for HBI and never itemized any amount owed by 8 Quaker Road, LLC pursuant to the 8 Quaker Loan. (Pa692:79:24-80:5). The 8 Quaker Loan required interest to be paid to HBI; Appellant never caused 8 Quaker to make any interest payments. (Pa537:260:11-17). On January 17, 2020, a judgment was entered in favor of HBI and against 8 Quaker for the outstanding amount under the 8 Quaker Loan, $136,759.83. (Da820).

Appellant Unilaterally Transfers Money to Arley Farms LLC

Appellant also drafted and executed an intercompany loan agreement between HBI and Arley Farms, LLC ("Arley Loan") on December 31, 2016. (Da824; Pa695:90:3-20). Appellant negotiated the Arley Loan himself for HBI and for Arley Farms, LLC. (Pa695: 91:3-9). At the time of the Arley Loan, Appellant and his wife Defendant Amanda were the only members of Arley Farms, LLC. (Pa695:93:17-

94:3).

Appellant did not discuss the Arley Loan with anyone at HBI or HCP either before, or after it was executed. (Pa695:91:10-25). Appellant prepared financial statements for HBI never itemized any amount owed by Arley Farms, LLC pursuant to the Arley Loan. (Pa695:92:1-8).

According to the records maintained by Appellant, Respondent HBI transferred $48,295.18 to Arley Farms, LLC prior to the execution of any loan agreement. (Pa703:120:23-121:1). Appellant never discussed these pre-loan agreement payments from HBI to Arley Farms, LLC with amount at HBI or HCP; it was something he determined all on his own. (Pa704:121:2-18). Pursuant to the Arley Loan, interest was due to HBI; Arley Farms never made any interest payments to HBI. (Pa739:261: 7-12). On January 17, 2020, a judgment was entered in favor of HBI and against Arley Farms for the outstanding amount under the Arley Loan, $294,653.90. (Da829).

Appellant Unilaterally Transfers Money to BSG New Jersey LLC

Appellant prepared and executed an intercompany loan agreement between HBI and BSG New Jersey LLC on January 18, 2015 (the "BSG Loan"). (Pa713:157:15-158:2; Da833). Appellant was the sole owner of BSG Madison LLC and its parent company BSG New Jersey, Inc. (Pa714:161:15-17). Appellant testified that he discussed the BSG Loan with his wife Amanda on January 18, 2015;

other than that conversation, he never discussed the BSG Loan with anyone at HBI or HCP. (Pa714:171:17-22). On January 17, 2020, a judgment was entered in favor of HBI and against BSG Loan for the outstanding amount under the BSG Loan, $915,932.63. (Da838).

Appellant Unilaterally Transfers Money to J Paul Allen Inc.

Appellant prepared and executed an intercompany loan agreement between HBI and "J Paul Allen Inc." on September 1, 2016 (the "JPA Loan"). (Pa718:179:10-18; Da842). At the time of the JPA Loan, J Paul Allen Inc. did not exist. (Pa720:187:9-16). Appellant testified that he did not discuss the JPA Loan with anyone at HBI or HCP. (Pa721:190:14-191:4). Pursuant to the terms of the JPA Loan, the maximum amount outstanding could not exceed $500,000. (Da842, §1.1).

By December 15, 2017, Appellant directed additional transfers from HBI to JPA to increase the amount outstanding under the JPA Loan to $692,959. (Pa732:234:1-22). By December 29, 2018, Appellant directed additional transfers from HBI to JPA to increase the amount outstanding under the JPA Loan to $764,941.79. (Pa733:238:6-9; 201:19-25). Appellant did not discuss making these payments to J Paul Allen with anyone at HBI or HCP. (Pa724:202:1-9). The JPA Loan required J Paul Allen Inc. to pay HBI interest on the loan. Appellant never caused JPA to pay any interest to HBI in 2016, or 2017. (Da842; Pa735:247:4-248:25).

Appellant caused transactions from HBI to, or on behalf of J Paul Allen totaling a net of $3,275,962.71. (1T:133-188; *see* Pa037-249). Appellant did not make an interest payment for J Paul Allen Inc. in 2018 because "That would involve me sending a check to HBI, and it will be a cold day in hell before that happens at this rate." (Pa736:252:16-20).

Appellant Transfers HBI's Withholding Taxes to J Paul Allen

Appellant's responsibilities for Respondent HBI included causing all taxes, including payroll taxes to be paid. (Pa723:198:4-25). Appellant caused HBI to be delinquent on its federal payroll tax obligations starting with the second quarter of 2017 (April- June). (Pa723: 99:1-18). In July of 2017, according to Appellant, the amount owed to HBI through the JPA Loan was $41,076.21. (Pa725:207:3-9). In August of 2017, Appellant caused payments to be made from HBI to J Paul Allen increasing the amount owed to $96,013.18. (Pa725:208:13-25).

Appellant also caused HBI's tax delinquency to increase during the third quarter (July-September) of 2017. (Pa726:209:6-9). In September of 2017, Appellant caused payments to be made from HBI to J Paul Allen increasing the amount owed to $209,884.74. (Pa726:209:13-16). In November of 2017, Appellant had caused HBI to be delinquent on its federal payroll tax obligations from the second and third quarters of 2017. (Pa723:199:1-18). To Appellant's knowledge, in November of 2017, HBI was behind in its payroll obligations by approximately

$300,000. (Pa723:200:6-17). Appellant did not bring the tax delinquency to the attention of anyone at HBI or HCP. (Pa725: 208:9-12). During the period he maintained sole control of HBI's bank accounts, Appellant failed to pay over $650,000 in payroll taxes for HBI. (1T:171:6-18);

Appellant Unilaterally Transfers Money to Konoba LLC

Appellant prepared and executed an intercompany loan agreement between HBI and Konoba LLC on January 27, 2016. ("Konoba Loan"). (Pa737:255:2-18; Da848). Appellant is the sole owner of Konoba LLC. (Pa737:255:19-24). Appellant prepared the Konoba Loan and executed it on behalf of HBI and Konoba. (Pa737:256:7-12). Appellant never discussed the Konoba Loan with anyone at HBI or HCP either before or after executing it. (Pa737:256:25-257:7). Appellant never discussed that money was owed to HBI pursuant to the Konoba Loan with anyone at HBI or HCP. (Pa738:259:8-12). The Konoba Loan required Konoba to pay interest to HBI; Konoba never paid interest to HBI. (Pa738:259:22-260:2). On January 17, 2020, a judgment was entered in favor of HBI and against Konoba for the outstanding amount under the Konoba Loan, $133,819.08. (Da854).

Appellant Deceives HBI's Finance Committee

Appellant was the only HBI employee with access to the Sussex Bank accounts for HBI. (2T:19:10-19). HBI had a policy requiring $200,000 to be maintained in its bank accounts at all times as a cushion. (1T:59:18-21; Pa322).

On August 24, 2017, Appellant emailed Respondents to inform them that the combined bank account balance was "dangerously close to the $200,000 mark." As a result, he asked Respondents to defer their weekly paycheck for a week. (Pa322; 1T:58:9). The actual account balance in HBI's three bank accounts on August 24, 2017 was $23.32: $1.00, $18.61; and $3.76 (1T:160:21-25; 162:16-19; 164:9-12; 165:20-166:15; Pa156; Pa158; Pa163).

The ending balance in HBI's accounts in September of 2017 was $10,380.55 (1T:173:17-19; 174:22-24; 176:2-6; Pa168; Pa170; Pa176). The ending balance in HBI's accounts in October of 2017 was $151.13 (1T:180:19-23; 181:21-24;183:1-4; Pa182; Pa186; Pa193). The ending balance in HBI's accounts in November of 2017 was negative -$60,904.49 (1T:173:17-19; 174:22-24; 176:2-6; 2T:17:15-17; Pa202; Pa207; Pa212). The ending balance in HBI's accounts in December of 2017 was $206.54 (1T:24:2-6; 25:25-26:1; Pa222; Pa226; Pa233). The ending balance in HBI's accounts in January of 2018 was negative -$234.88 (2T:29:21-22; 31:6-8; 32:1-3; Pa240; Pa243; Pa246).

Appellant did not disclose the actual account balance to Respondents, or specifically, to the HBI Finance Committee. (1T:167:17-21; 2T:18:7-19). Had he done so, the Finance Committee would have required Appellant to turn over the bank records and explain why the required cushion was no longer in the account. (1T:167:22-168:3; 2T:18:21-19:4). Had the actual balance been disclosed to the

Finance Committee or to the HBI partners, they would have asked for a line-by-line explanation of our situation. (1T:168:4-21; 184:3-8). At that time, Appellant did not disclose to the Finance Committee or the HBI partners that the balance was low because he had caused money to be transferred from HBI to his companies BSG New Jersey, Konoba, Arley Farms, 8 Quaker Road, and J Paul Allen. (1T:167:17-21; 2T:18:7-19).

Appellant Doctors HBI Checks

In October of 2017, Appellant caused checks to be issued from HBI's bank accounts showing the payor as BSG New Jersey. (1T:179:6-180:18; Pa182). In November of 2017, Appellant caused check to be issued by HBI identifying the payor as HBI Paying Agent for Ursa Major. (2T:14:17-15:21).

Appellant Falsifies HBI's QuickBooks Files and Files Fabricated Documents With the Court

HBI uses QuickBooks for its accounting and bookkeeping. (2T:45:19-22). HBI's QuickBooks file was maintained exclusively by Appellant prior to his removal by Court Order on January 25, 2018. (2T:45:23-46:4). The January 25, 2018 Order, as Amended on January 29, 2018, required Appellant to produce HBI's QuickBooks file. (Da621). Respondents filed motions and oral applications for the QuickBooks file because Appellant did not produce it by January 29, 2018 as Ordered. (2T: 47:12-48:6). Counsel for Appellant provided a copy of the QuickBooks file in court in April of 2018. (Pa367).

One of the QuickBooks functions is an "audit trail" that is a pre-loaded report that details every single transaction from day one made to the file. (2T:52:17-53:3). Respondents prepared an audit trail report on the version of HBI's QuickBooks file that was provided by counsel for Appellant pursuant to the Court's January 25, and 29, 2018 Order. (2T: 53:4-8; P-58). The audit trail prepared by Respondents as P-58 was narrowed to show only transactions that were changed between January 28, 2018 and January 29,2018. (2T: 54:9-55:1). Between January 28 and 29, 2018, the audit trail print-out is 291 pages long, reflecting that Appellant made a total of 1,208 changes to HBI's QuickBooks file. (2T:57:17-1). Of the 1,208 changes, 783 transactions were entered for the first time. (2T: 7:19-23).

During this litigation, Appellant filed with the Court loan registers—reports from HBI's QuickBooks file identifying what he determined was owed to HBI by his companies: J Paul Allen, Konoba, Arley Farms, BSG New Jersey, and 8 Quaker Road. (2T:44:7-45:14; Pa307).

From January 28, 2018 through January 29, 2019, Appellant back-dated hundreds of transactions, on paper "decreasing" the amount of money owed by Appellant's companies to HBI by hundreds of thousands of dollars. (9-23 Tr., at 61:13-79:19). These falsified transactions include Appellant entering a transaction on January 29, 2018 that HBI would receive $50,000 two days later, on January 31, 2018 that would reduce the amount owed by his companies by $50,000. (2T:78:3-

14). The imaginary $50,000 was never deposited into HBI's bank accounts. (2T:79:3-6; Pa243).

The audit trail report (Pa381) shows that as of February 17, 2015, Appellant entered a record showing that HCP had a $20,000 equity ownership stake in HBI. (Pa381; 2T:80:9-23). The ownership stake entry was modified slightly on February 27, 2015 by Appellant, reclassifying the transaction. (2T:81:11-23). On January 29, 2018, at 3:24 a.m., Appellant modified the transaction so that it no longer reflected HCP's ownership of HBI, but merely identifying the transaction as a standard banking entry "electronic clearing." (2T:82:12-83:5).

Appellant certified to this Court on May 31, 2018 that he funded HBI with a loan of $125,000. (2T:83:18-84:20; Pa367). However, on February 2, 2015, Appellant recorded a transaction for $125,000 as a payment by Mackenzie Keck to HBI for construction work. (2T: 84:22-85:22). Appellant then modified the transaction a few times in 2015 to change the account the deposit was made into and then identifying the client for the project, Caudile. (2T:85:23-86:22). On January 28, 2018 at 5:59 p.m., Appellant changed these three-year-old transactions to say that it was money "due/to" Appellant for construction income (2T:86:23-87:11). Appellant then modified the 2015 transaction again, at 3:52 a.m. on January 29, 2018 to identify the source of the $125,000 as "Jonathan Baker." (2T:87:12-88:3);

ARGUMENT

POINT I:

STANDARDS OF REVIEW

Appellant challenges the following decisions below: 1) judgment after trial was against the weight of the evidence; 2) denial of post-trial motion for reconsideration; 3) granting summary judgment to Respondents on Count VI for recission; 4) granting summary judgment to Respondents on Counts II and III for breach of contract and breach of fiduciary duty; and 5) granting Respondents' motion to amend to conform to evidence.

A: Award of Damages at Trial/New Trial/Relief from Judgment

To the extent Appellant's post-trial motion is deemed a motion for new trial based on the weight of the evidence, a damages award below should only be set aside if it "shocks the judicial conscience." *Boryszewski v. Burke*, 380 N.J. Super. 361, 392 (App. Div. 2005). A review requires this Court to view all damages evidence in the light most favorable to the prevailing party, with "deference given to the trial court's feel for the case." *Id.*

B: Post-Judgment Motion for Reconsideration

The Appellate Division reviews motions for reconsideration under the abuse of discretion standard. *Fusco v. Board of Educ. Of City of Newark*, 349 N.J. Super. 455, 462 (App. Div. 2002). Motions for reconsideration are granted only under very

narrow circumstances. "Reconsideration should be used only for those cases which fall into that narrow corridor in which either (l) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence." *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch.Div.1990); R. 4:49-2; *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App.Div.1996).

The purpose of a motion for reconsideration is to "bring new or additional information to the Court's attention which it could not have provided on the first application" not to give a dissatisfied litigant "repetitive bites at the apple." *D'Atria*, 242 N.J. Super. at 401-402.

On appeal, the standard of review of the denial of a motion for a new trial requires this Court to give deference to the decision below unless there was a "miscarriage of justice under the law." R. 4:49-1. The "judgment of the initial factfinder . . . whether it be a jury . . . or a judge as in a non-jury case, is entitled to very considerable respect. It should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination, after canvassing the record and weighing the evidence, that the continued viability of the judgment would constitute a manifest denial of justice." *Baxter v. Fairmont Food Co*., 74 N.J. 588, 596 (1977). In other words, "the judge cannot validly intrude unless 'it clearly and convincingly appears that there was a miscarriage of justice under the

law.'" *Id.*

C: Summary Judgment

This Court reviews a decision to grant summary judgment *do novo*. *Rivera v. Valley Hosp., Inc.*, 252 N.J. 1, 17 (2022). Rule 4:46-2(c) provides that summary judgment should be granted when "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. An issue of fact is genuine only if, "considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." *Id*.

"[A] court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" *Brill v. Guardian Life Ins. Co. of Am*., 142 N.J. 520, 529 (1995) (quoting R. 4:46-2(c)). " [W]hen the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court "should not hesitate to grant summary judgment." *Brill,* at 540.

D: Motion To Amend to Conform to Evidence

This Court reviews motions to amend the complaint to conform to the

evidence adduced at trial under R. 4:9-2 for abuse of discretion. *Franklin Med. Assocs. v. Newark Pub. Sch.*, 362 N.J. Super. 494, 506 (App. Div. 2003). R. 4:9-2 "Such amendment of the pleadings and pretrial order as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment." R. 4:9-2. The Rule generally "requires that motions for leave to amend be granted liberally." *Kernan v. One Wash. Park Urban Renewal Assocs*., 154 N.J. 437, 456 (1998). "The determination of a motion to amend a pleading is generally left to the sound discretion of the trial court." *Franklin*, 362 N.J. Super. at 506; *Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment,* 440 N.J. Super. 378, 382 (App. Div. 2015).

"The trial court's broad discretion to permit amendment to conform to the evidence is required to be liberally exercised," but where a "beyond the issues as framed" objection is made, it "must be exercised with due regard to the opportunity of the opposing party to meet the evidence." PRESSLER & VERNIERO, Current N.J. Court Rules, cmt. on R. 4:9-2 (2023) (citations omitted). "The opposing party will ordinarily be deemed to have been on notice sufficient to meet that evidence if the issue has been injected into the case prior to trial even if in a technically deficient manner." *Id.* (citations omitted).

POINT II:

SUMMARY JUDGMENT WAS PROPERLY GRANTED ON COUNT VI.

On June 10, 2020, the Court below granted Respondents' motion for summary judgment as to Count VI of the Amended Complaint. (Da310) The Count sought rescission of the April 15, 2015 agreement between HCP and Amanda Baker (the "Repurchase Agreement"). In response to the motion, Amanda Baker submitted to the Court a Certification stating that she had previously rescinded and rendered void her alleged repurchase rights under the Repurchase Agreement. (Da593). To avoid any uncertainty, she confirmed once again that she was voiding the agreement and did not oppose the summary judgment sought as to Count VI. (Da593).

The Court below properly held that only the parties to an agreement or the intended third-party beneficiaries of such agreement have standing to bring an action to declare the validity or enforceability thereof. *See Reider Cmtys. v. N. Brunswick*, 227 N.J. Super. 214, 221-222 (App. Div. 1988). As such, only HCP and Amanda, the signatories, have standing to enforce or waive the benefits pursuant to the Repurchase Agreement. A court of equity may, through the imposition of flexible remedies, adjust parties' rights and use "a broad range of discretion to fashion the appropriate remedy in order to vindicate a wrong consistent with principles of fairness, justice, and the law." *Granziano v. Grant*, 326 N.J. Super. 328, 342 (App. Div. 1999).

Because the Repurchase Agreement was entered into by HCP and Amanda, when both HCP and Amanda asked the Court to rescind and void the agreement, the undisputed facts supported summary judgment rescinding the Repurchase Agreement as a matter of law. Accordingly, the decision below should be affirmed.

POINT III:

SUMMARY JUDGMENT WAS PROPERLY GRANTED ON COUNTS II AND III.

On June 10, 2020, the Court Below properly granted Respondents' motion for summary judgment as to Counts II and III of the Amended Complaint, entering judgment as to Appellant's liability for breach of contract and breach of fiduciary duty, reserving damages for determination at trial. (Da310).

On appeal, this Court reviews the findings of fact and conclusions of law below *do novo* and reviews, pursuant to Rule 4:46-2(c), whether "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." The Court Below made the following findings of fact that are supported by the record below to show there is no genuine issue of material fact.

- Baker entered into five loan agreements between HBI and each of these companies, never sharing or discussing these loans with HBI's board or HCP's executive committee, and prepared financial statements on behalf of HBI and HCP without listing these loans.

- (Da317; Da892: Material Facts: 20-22; 27-33; 35; 38-41; 48-50; 52-54; 70-73).

- None of these companies paid interest to HBI for the loans or made any payments towards the loans.
  - (Da317; Da892: Material Facts: 36; 46; 51; 69 ("That would involve me sending a check to HBI, and it will be a cold day in hell before that happens as this rate;"), 75).

- Consequently, HBI had obtained judgments after arbitration against 8 Quaker Road for $136,759.83, Arley Farms for $294,653.90, BSG for $915,932.63, and Konoba for $133,819.08.
  - (Da317; Da892: Material Facts: 37; 47; 51; 76).

- The court also found Baker failed to pay federal payroll taxes on behalf of HBI, in the amount of $300,000 by November of 2017.
  - (Da317; Da892: Material Facts: 56-63).

- During the same year, Baker transferred funds from HBI to JPA totaling $692,959.
  - (Da317-318; Da892: Material Facts: 65).

- By December of 2018, the loan amount increased to $764,941.79, above the $500,000 net amount permitted by the JPA loan agreement.
  - (Da318; Da892: Material Facts: 64, 66).

- Baker also argued he was shielded from individual liability because he was acting on behalf of the corporation. However, the bylaws of HBI gave the authority to enter into financial transactions to the board of directors, not to Baker.
  - (Da318; Da892; Da866, 877).

- Likewise, the OA of HCP required Baker, as manager, to act in accordance with the consent of the members, who had "full, exclusive, and complete" authority to manage HCP.
  - (Da884).

The Court below made the following conclusions of law.

- By secretly entering into these loan agreements without the knowledge or approval of HBI's board and HCP's executive committee, Baker not only breached the bylaws and OA, but demonstrated a pattern of self-dealing and bad faith.

This was properly found by applying the correct legal standard. In order to establish a claim for breach of fiduciary duty, plaintiffs must demonstrate: (a) defendant owed them a duty, (b) defendant breached that duty, (c) plaintiffs were injured by defendant's breach, and (d) defendant caused the injury. *Namerow v. PediatriCare Assocs., LLC*, 461 N.J. Super. 133, 146 (Super. Ct., Sept. 28, 2018).

A "fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care." *McKelvey v. Pierce*, 173 N.J. 26, 57 (2002). Pursuant to the New Jersey Revised Uniform Limited Liability Company Act, these fiduciary duties are non-waivable. N.J.S.A. 42:2c-11(c)(2). The 'business judgment rule' shields corporate officers from bad decisions, if they are made in good faith. *Exadaktilos v. Cinnaminson Realty Co*., 167 N.J. Super. 141, 151 (Law Div.1979). Once a party satisfies their initial burden to demonstrate that a decision was the result of self-dealing, the burden shifts to the officer to show that the decision was fair to the corporation. *Maul v. Kirkman*, 270 N.J. Super. 596, 614 (App. Div. 1994).

The court further properly found, by allowing HBI's federal tax obligations to remain unsatisfied while continuing to transfer funds to companies in which he had

financial interests and permitting these companies to default pursuant to the loan terms, plaintiff established liability and Baker breached his fiduciary duty and breached HBI's bylaws and HCP's OA.

The undisputed facts identified above support the Trial Court's conclusions as a matter of law, and summary judgment was properly granted.

POINT IV:

APPELLANT'S MOTION FOR RECONSIDERATION, RELIEF FROM JUDGMENT, OR NEW TRIAL WAS PROPERLY DENIED.

On August 8, 2022, the Court Below properly denied Appellant's post-trial motion that sought reconsideration, a new trial and to vacate the judgment. (Da260).

The Appellate Division reviews motions for reconsideration under the abuse of discretion standard. *Fusco*, 349 N.J. Super. 462. The purpose of a motion for reconsideration is to "bring new or additional information to the Court's attention which it could not have provided on the first application" not to give a dissatisfied litigant "repetitive bites at the apple." *D'Atria*, 242 N.J. Super. at 401-402.

Here, Appellant voluntarily refused to appear at trial. He declined to submit any pre-trial briefings, identify any exhibits, call, or cross-examine any witnesses. As the Court Below made clear to Appellant, he was free to participate in the trial and could assert his Fifth Amendment rights as appropriate. Instead, Appellant waited until after the trial he refused to appear for had concluded to list all the things

that he could have raised if he bothered to appear at the trial. Appellant raises the same list of conceptual cross-examination items on this appeal.

However, nothing presented by Appellant either on the reconsideration motion or here was something overlooked by the Court Below because Appellant never asked these questions or raised those arguments. As such, the motion for reconsideration was properly denied.

Similarly, Appellant fails to meet the standard for a new trial under Rule 4:49-1 because he cannot show that the decision below was a "miscarriage of justice under the law." R. 4:49-1. The Court Below made the following findings of fact that are all supported by the record before the Court:

- Jordan Klega-Fischer is a founding member and corporate secretary of HCP.
    - (1T 25:2).
- She is also the corporate secretary and an employee of HBI, which has been solely owned by HCP since its inception in 2015. HCP was formed to acquire HBI.
    - (1T 25:3-8; 25:15-22; 26:16-19).
- She testified HCP's OA was signed by all of the plaintiffs and defendant. The OA names Baker as manager.
    - (1T 28:6-17).
- According to section 3.1.1. of the OA, only the members can enter into contracts binding the companies. Baker, as manager, could bind the company only on the authority of the members.
    - (1T 33:18- 35:5; 38:22-39:11; 39:25-40:

- She also testified as to the by-laws of HBI, which she signed as corporate secretary.
    - (1T 35:21-36:5).
- Pursuant to section 4.1, the Board of Directors appoints an Executive Committee to make decisions. At the time, the Board of Directors consisted of Baker as president, Flyte as vice president, and her as corporate secretary.
    - (1T 36:13-19; 36:24-37:11).
- She testified she never saw any of the intercompany loan documents entered into by Baker with his five companies before the lawsuit began and was unaware of any loans to these companies until entities doing business with the Baker companies began filing liens against HBI. She testified credibly the loans were never presented to the executive board.
    - (1T 45:4-46:13; 46:16-47:10; 48:17-50:7; 50:9-51:4; 55:1-25; 56:24-57:18).
- Although Baker did not appear at trial or testify, plaintiff's counsel read portions of Baker's deposition into the record, wherein Baker stated he believed he had the sole authority to enter into the loan agreements, without executive board approval, because of the Repurchase Agreement.
    - (1T 42:8-44:5; 48:3-15; 51:24-53:13; 54:9-17).
- She stated Baker sent an email to plaintiffs in August of 2017, advising him he would be issuing paper payroll checks to employees because their liquid funds were "dangerously close" to the $200,000 cushion they had all agreed to maintain. She testified paper checks were issued for payroll "a couple of times."
    - (1T 58:9-59:23).
- Her first notice of the fraud was when Rag + Bone, a client, sent her a UCC lien in January of 2018. She had never heard of the companies mentioned in the lien. When she asked Baker about it, he said it was a "mistake" and they would issue a "retraction letter" to give to the client. She was fired by Baker shortly thereafter.

- (1T 60:1-61:16).

- She was shown a corporate resolution signed by Baker on February 7, 2017 as corporate secretary, stating "I certify I am the only officer in said corporation." Baker was never the corporate secretary of HBI and never the sole officer of HBI. This corporate resolution was drafted to obtain financing for directional drilling equipment, although HBI never used drilling equipment in the performance of its work.

  - (1T 61:22-65:1; 65:16-66:8).

- She testified that she and Flyte went to Sussex Bank the Friday before they were fired, where Flyte learned he was not a signatory on any of HBI's three bank accounts. They asked the bank to freeze HBI's accounts, but they did not have the authority as only Baker was a signatory. They went back to the office and Baker assured them the bank was mistaken and Flyte was a signatory on the accounts. He also stated there was $200,000 total in the three accounts.

  - (2T 100:13-101:15).

- The finance committee believed at the time there should have been $1.2 million in the accounts, plus a $500,000 cushion. They asked Baker to see the bank records and to accompany them back to the bank to clarify the issue of Flyte as a signatory on the accounts. Baker said he would go to the bank after he finished printing out the bank statements. He locked himself in a conference room and then left the building.

  - (2T 101:15-102:24).

- Frank Bilotta testified at the trial. He was the president and manager of both companies after the court removed Baker and at the time of trial, although he has been involved since the companies' inceptions. He loaned HBI its initial funding.

  - (1T 70:19-71:14).

- He also was not aware of any loans made by HBI to the Baker companies prior to this litigation commencing. At the end of 2017, he was on the finance committee with Baker and two others.

  - (1T 72:20-73:3; 77:6-78:10).

- Sussex Bank held all of the corporate accounts. There were three accounts: payroll, operating, and an ACH and wire account where all payments were sent by clients. Only Baker had access to online banking and, unbeknownst to them, he was the sole signatory on all three accounts.
    - (1T 79:2-80:15).
- When he learned of the UCC filing in the first two weeks of January 2018 he asked Baker to explain what had occurred. He and several partners confronted Baker and he also spoke with Baker afterwards. Baker assured him it was all a "misunderstanding," and he would explain it at a meeting Baker called for the following Monday morning.
    - (1T 73:15-74:24).
- On Monday, the locks to the building had been changed. Plaintiffs were all locked out. When the complex's manager gave them access to their building, Baker had cleaned out all paper files and equipment, including his computer, from his office and his mother's office, who served as bookkeeper. Baker refused to give them access to the books and records of the company, even after the court entered the temporary restraining order requiring him to do so.
    - (1T 74:25-76:13).
- On January 15, 2018 they received a five-page email from his wife on behalf of HBI, informing them they had been fired. Prior to that e-mail, he had never heard of the Repurchase Agreement.
    - (1T 81:8-83:5).
- When Oakmont Commercial financing filed an action against HBI, he first learned a valuation report was prepared, valuing Baker's 12% share at $39,600 as of June 10, 2020, the date this court ordered Baker's disassociation.
    - (1T 92:9-94:6).
- Bilotta credibly testified the company did not pay federal taxes for all of 2017, resulting in a penalty and back taxes of $650,000. Baker was responsible for paying the payroll tax and he had no knowledge this

was happening.

  - (1T 94:15-96:5).

- He also testified HBI had no need for directional drilling equipment. He was shown a "certified copy of resolution of board of directors" of HBI certifying Baker was "president and secretary." That resolution was forged by Baker and used by JPA, one of Baker's five companies, to secure a loan and security agreement with Ursa Major directional drilling company.

  - (1T 99:21-102:13).

- He testified HBI never did any business with Infercon, Inc, a company connected to the directional drill. Plaintiffs' counsel took him meticulously through every line item of HBI's accounts at Sussex Bank, where he truthfully and in great detail testified, demonstrating outgoing wires as early as May, 23, 2016 to Infercon, later Arley Farms payroll, Ursa Major, and JPA.

  - (1T 114:3-118:10).

- He also testified as to each line item in JPA's accounts, demonstrating incoming funds from HBI. As these transfers went on, Baker's shell game of wire transfers became more brazen, writing a check for $34,352 to JPA directly from HBI's account and making many wire transfers from HBI's ACH account directly to JPA's payroll account.

  - (1T 118:11-134:10; 136:1-165:14)

- On the date the complaint was filed, Baker withdrew $486,698.98 from HBI's accounts, leaving an ending balance of $39.20. The payroll account had a balance of zero dollars that day.

  - (2T 30:15-31:8).

- On January 25, 2018, Judge Brennan entered an order after plaintiffs were forced to file a motion in aid of litigant's rights to obtain the books and records of HBI. Baker had previously been ordered to produce them twice, at the temporary restraining order hearing and the return of the order to show cause but had violated both orders.

- (2T 46:17-47:17).

- In April of 2018, plaintiffs finally received the QuickBooks file. QuickBooks maintains an audit trail report where it records every transaction, including the time, date, and person who made the entry. He personally ran the audit trail report that shows every keystroke made.

  - (2T 47:18-49:3; 52:2-53:8).

- That report demonstrates, after the order was entered by the court once again requiring Baker to produce books and records, a total of 1,208 "change transaction" entries were made, changing the original transactions. 783 transactions were "added" for the first time and 30 transactions were "deleted."

  - (2T 54:2-:88:3).

As shown above, each of the findings of fact that were relevant to the decision below were properly supported by evidence in the record. Thus, it was not a grave injustice for the Court to deny Appellant's post-trial motion for relief and this Court should affirm the Judgment.

POINT V:

RESPONDENTS' MOTION TO AMEND THE COMPLAINT WAS PROPERLY GRANTED.

Appellant spends the vast majority of his brief arguing why this Court should reverse the decisions below because of his belief that the named plaintiffs prior to June 10, 2020 did not have standing to bring their claims. Missing from his argument is any discussion as to the standard on appeal for reviewing the June 10, 2020 Order below that amended the Complaint, pursuant to Rules 4:9-1 and 4:9-2 to include

Respondent HBI as a named plaintiff. This decision should be affirmed as it was not an abuse of the Trial Court's discretion to conform the pleadings. Further, if the amendment is reversed, the remaining Plaintiffs have standing.

Prior to January 14, 2018, the individual plaintiffs and Appellant were each one-ninth Members of HCP, which in turn was the 100% owner of HBI. (Da410) When Appellant's fraud began to be discovered, he produced the Repurchase Agreement and announced that HBI was no longer owned by HCP but was now owned by Amanda who "repurchased" it for an amount to be determined via a subsequent valuation. Importantly, Appellant did not represent that Amanda would be paying the repurchase price to HCP, he declared that Amanda would be paying their proportionate share of HBI's valuation to each individual plaintiff:

> Within five (5) days, the Transferor [Amanda] shall select an accounting firm to perform the equity valuation, will provide notice to all Members of HBI Capital Partners LLC via certified mail/return receipt requested of that selection, and shall bear all associated costs. **The full amount determined to be payable in connection with the exercise of the repurchase option shall be divided proportionately among the Member(s) of HBI Capital Partners LLC and delivered by the Transferor to each of them**, in certified funds, within ninety (90) days of completion of the valuation.

(Pa317). (emphasis added).

Thus, as Appellant made clear, Respondents in their individual capacity had standing to bring these claims because the diminution of value to HBI was not a

harm that would have been felt solely by the LLC, but by them themselves individually. The doctrine of equitable estoppel precludes Appellant from reversing this position. *Knorr v. Smeal*, 178 N.J. 169, 178 (2003). "Estoppel is an equitable doctrine, founded in the fundamental duty of fair dealing imposed by law." *Casamasino v. City of Jersey City*, 158 N.J. 333, 354 (1999). The doctrine is designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment. *Mattia v. N. Ins. Co. of N.Y.*, 35 N.J. Super. 503, 510 (App. Div. 1955). The doctrine is invoked in "the interests of justice, morality and common fairness." *Palatine I v. Planning Bd.,* 133 N.J. 546, 560 (1993).

Reversing the decision below to amend the complaint and determining that the individual Respondents do not have standing would be a manifest injustice considering the factual circumstances created by Appellant to further his fraud. The Complaint could not have been brought by HBI—because according to Appellant, its president, it now belonged to Amanda, his wife. The Complaint could not have been brought by HCP, because Appellant was the Managing Member of HCP and certainly would not have sued himself for his fraud. Respondents' claims against Appellant have always been for him breaching his fiduciary duties to them. As the Managing Member for HCP, Appellant owed a duty to his fellow Members, a duty he breached by fraudulently transferring $4,750,000 from HBI to himself, then

transferring HBI to his wife, and then attempting to use his fraud to drive the value of HBI below $0 due to uncollectible loans; since it was not yet a cold day in hell, he would not have his companies pay HBI back.

After nearly five years of litigation, the Trial Court had seen it all from Appellant. The forged invoices filed with the Court, refusing to turn over HBI's QuickBooks files, submitting to the Court ledgers showing fraudulent amounts owed by his companies to HBI—after he made 1,208 back-dated entries to the QuickBooks files to create fake exhibits, to invoking 'equity' to attempt to force HBI to rehire and pay him, even though the other HBI officers had to forego salaries to try and save HBI as a result of Appellant's fraud. After all that, the Trial Court properly held that the issue of money being owed to HBI had been in the case from the very first lines of the Complaint and properly exercised its discretion to amend the Complaint to conform to the evidence.

POINT VI:

APPELLANT'S POINT III MUST BE DISMISSED.

Appellant's Point III does not actually contain an argument, but instead directs the Court to look at a brief that he included in his Appendix contrary to the Court Rules. Rule 2:6-1(a)(2) lists "prohibited contents" that an Appellant cannot include in their appendix. This explicitly includes "briefs submitted to the trial court shall not be included in the appendix." There is a limited narrow exception not applicable

here, where the "question of whether an issue was raised in the trial court is germane to the appeal, in which event only the material pertinent to that issue shall be included. R. 2:6-1(a)(2). Because the issue of whether he raised an issue previously is not part of this appeal, Point III should be rejected as not raised in Appellant's brief.

POINT VII:

THE COURT PROPERLY ENTERED A STIPULATION OF DISMISSAL AS TO AMANDA.

Appellant argues that it was error for the Court below to enter a stipulation of dismissal that dismissed Respondent's claims against Ms. Norcia-Baker that he did not have advance notice would be entered. In support of this argument, Appellant cites a case discussing the denial of a motion to vacate such a dismissal, *Burns v. Hoboken Rent Leveling & Stabilization Bd.,* 429 N.J. Super. 435 (App. Div. 2013). While the *Burns* court found the error harmless and affirmed, the more important issue is that *Burns* analyzed the denial of a motion to vacate the dismissal, because Appellant never filed a motion to vacate the issue below. Inasmuch as this issue does not "go to the jurisdiction of the trial court or concern matters of great public interest," this Court should disregard this point. *Monek v. Borough of South River*, 354 N.J. Super. 442, 456, 808 (App. Div. 2002).

POINT VIII:

THE COURT'S DECISION NOT TO HOLD ORAL ARGUMENT DID NOT PREJUDICE APPELLANT.

Appellant argues in Point VI that it was reversible error for the Court below to decline to hear oral argument on Respondents' summary judgment motions. However, he does not articulate any actual prejudice that he suffered without oral argument, nor was there any, so the decision below should be affirmed.

While Rule 1:6-2(d) generally requires oral argument be held on substantive motions, "a request for oral argument respecting a substantive motion may be denied." *Raspantini v. Arocho*, 364 N.J. Super. 528, 531 (App. Div. 2003). Under Rule 1:6-2(d), a trial court may decide a motion on the papers when there are no contested facts requiring an evidentiary hearing for disposition. *See* PRESSLER & VERNIERO, Current N.J. Court Rules, cmt. 5 on Rule 1:6-2(d) (2023); *Guzman v. City of Perth Amboy*, 214 N.J. Super. 167, 176 (App. Div. 1986). The movant must show there was prejudice warranting reversal if the trial court denies a request for oral argument on a motion. *Finderne Heights Condo. Ass'n,* 390 N.J. Super. 154, 165-66 (App. Div. 2007).

Appellant has not identified any error resulting from the denial of oral argument on Respondents' motion regarding Count VI. As discussed above in Point IV, the only two parties to the Repurchase Agreement were HCP and Amanda, and since both agreed to rescission, Appellant failed to identify any argument that he

would have raised orally but did not in his papers.

Similarly, Appellant failed to identify any error resulting from the denial of oral argument on Points II and III. As discussed above in Point III, the Court's decision was based on the uncontested documents and Appellant's own statements under oath that he signed the agreements, concealed them from Respondents, transferred money to companies he owned pursuant to these agreements, and never disclosed the balances from these agreements on any financial report for Respondent. He similarly admitted under oath that he withheld employee tax contributions from HBI's employees and transferred it to his own companies instead of paying it to the state and federal authorities. Inasmuch as the Court based its decision on Appellant's own sworn admissions, there was no need for an evidentiary hearing to address any factual dispute, and thus, it was not an abuse of discretion for the Court Below not to hold argument. *See, Connectone Bank v. Bergen Protective Sys*., 2021 N.J. Super. Unpub. LEXIS 2578, * 27 (App. Div. November 1, 2021).

POINT IX:

REVERSAL IS NOT WARRANTED BECAUSE OF THE HYPOTHETICAL POTENTIAL FOR DOUBLE RECOVERY.

Appellant does not cite any case law or statute for his contention that Respondents cannot be awarded damages here because it would need to be offset by any money that Respondent HBI recovers itself. Appellant makes the false statement

in his brief, "But Hudson Black Inc. cannot recover in this action, because it has already recovered." (Appellant Br. at 12). Assuming Appellant was making a true statement to this Court, there should be some record citation for the more than $4,750,000.00 that HBI recovered from Appellant's other companies. Appellant is correct, conceptually: any amount of the $4,767,826.25 Judgment, including Rule 4:42-11(b) interest, that is recovered from Appellant's other companies can be used to offset against the judgment recovered from him.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Court affirm all of the Orders and the Judgment below.

COYLE & MORRIS LLP
Attorneys for Respondents

By: *s/ John D. Coyle*
John D. Coyle

Dated: May 24, 2023

FILED, Clerk of the Appellate Division, June 07, 2023, **A-000441-22**

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

SHANE FLYTE, JOHN MEENA, FRANK BILOTTA, JORDAN KLEGA-FISCHER, STEVE LAMBIASE and DAVIDE MOREIRA, Individually, and as Members on Behalf of HBI CAPITAL PARTNERS LLC,
Plaintiffs-Respondents,

v.

JONATHAN P. BAKER,
Defendant-Appellant,

&

AMANDA RAE NORCIA-BAKER,
Defendant.

DOCKET NO. A-441-22

Civil Action

ON APPEAL FROM:
Superior Court of New Jersey
Chancery Division, Sussex County
Docket No, SSX-C-2-18

SAT BELOW:
The Hon. Frank J. DeAngelis, P.J.Ch.
(2022-present)
The Hon. Maritza Berdote Byrne, P.J.Ch
(2019-22)
The Hon. Robert J. Brennan, P.J.Ch.
(2018-19)

REPLY BRIEF
OF DEFENDANT-APPELLANT JONATHAN P. BAKER

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PRELIMINARY STATEMENT

Creative storytelling is the cornerstone of Respondents' strategy to lead the Court down a long road paved with baseless allegations, misleading information, altered timelines, unsupported "facts" and, not surprisingly, blatant lies. All as their narrative may require. This battle-tested strategy has been refined over a period of more than 5 years of litigation. It has been honed to perfection by dozens if not hundreds of motions where the truth has been intentionally disguised. It has become a system of masterful deception that relies on combining "half-truths" to create "facts" that are highly convincing, yet 100% false. Time and time again the court has been duped into believing a fictional rendition of the matter at hand. Yet, as skilled as the Respondents have become in their work, all that is really needed is careful and thorough examination - of every sentence they put forth as truth. At first, this is a tedious and time-consuming process. But soon, a pattern emerges, and it becomes easier to spot their deception. Their techniques are repeated and they become more obvious with every discovery. The lies and half-truths are readily exposed and the plain truth is revealed.

The Respondents' brief is a compilation of their "greatest hits" – with paragraphs cut-and-pasted from among hundreds of their motion briefs. I have read them before, so for me, the deception is glaring. But now, they create an opportunity for the court to view their work in an enlightened way, with the guidance I seek to share, and by the examples provided herein.

It is undisputed that HBI made certain loans to various entities owned by Appellant and to a joint venture between HBI, JPA, and Ursa Major Directional Crossings LLC. See generally Pa010/Da225 (re: 8 Quaker Road); Pa017/Da228

(re: Arley Farms); Pa025/Da231 (re: Konoba); Da235 (re: BSG); and Da157 (re: JPA/Ursa Major). It is similarly undisputed that certain funds remain due and owing to HBI from these various loans. But, because the institution of the AAA proceedings against the various borrowing entities by HBI – and HBI's subsequent confirmation of those AAA awards in the Superior Court – are dispositive on the issue of the loans, the court below erred in attempting to fashion a remedy for HBI when a remedy had already been selected and prosecuted to completion.

To the extent that HBI – by virtue of its addition as a plaintiff post-trial seeks to now recover against Appellant individually for those same loan balances, it is prevented from doing so under the doctrines of collateral estoppel, judicial estoppel, res judicata, and/or election of remedies. Although a claim for piercing the corporate veil was raised below (which arguably could have allowed HBI to collect the loan balances from Appellant), it was subsequently abandoned. Furthermore, HBI's claims for conversion and unjust enrichment against Appellant were dismissed with prejudice in a parallel proceeding. (Da1078). And, judicial estoppel precludes HBI from arguing contrary to its position in the AAA arbitrations that those same loan agreements (containing the very clause HBI relied on to compel arbitration) were fraudulent. Put simply, there are no claims asserted in the action below on which HBI is entitled to recover, and the trial court erred in adding HBI as a plaintiff post-judgment so that it could recover on claims that had already been finally adjudicated in other actions.

Just as HBI lacks a basis for recovery in the action below, so too do the Individual Plaintiffs and HBI Capital Partners LLC. Neither the trial testimony nor the pleadings establish that any party (exclusive of possibly HBI, which was

not a party prior to the entry of judgment) suffered any damages as a consequence of the allegations made. Because the elements of fraud under New Jersey's common law include "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; **and (5) resulting damages**" *Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 367 (N.J. 1997). (Emphasis added)., the establishment of actual, resultant damages is an integral part of a determination that a fraud occurred under New Jersey law. Here, those damages simply do not exist vis-à-vis the originally-named plaintiffs.

This Reply addresses the most egregious of Respondents' misstatements, but the court is urged to conduct their own in-depth review of the record, due to the page limitations of this reply. The pervasive nature of Respondents' false statements significantly contributed to the errors made by the trial court in the entry of final judgment and in ruling on the summary judgment motions.

A table of Respondents' most obvious fabrications from their recent brief is attached for the court's reference as an Appendix hereto.

LEGAL ARGUMENT

I. SUMMARY JUDGMENT ON THE ISSUE OF RESCISSION WAS IMPROPERLY GRANTED BECAUSE IT WAS INCOMPLETE AND BECAUSE THE CERTIFICATION RELIED ON BY RESPONDENTS DIRECTLY CONTRADICTED THEIR ARGUMENT. (RESPONDENTS' POINTS II/VIII & APPELLANT'S POINT VI).

Respondents continue to assert that Appellant had no standing to oppose rescission of the "Repurchase Agreement", as it was a contract solely between Amanda and HCP – its original signatories. This assertion is contradicted, however, by the very same certification (Da593) which Respondents reference in their opposition brief and which was filed in connection with the summary judgment motion seeking rescission. At paragraph 5 therein, Amanda states, "Pursuant to the Final Judgment of Divorce . . . I have no rights or obligations to any entities listed and not listed in the Final Judgment of Divorce and Property Settlement Agreement, entered on March 4, 2020." Da594. Amanda goes on to quote the Paragraph 48 of the Baker's PSA (Da614) by stating, "Wife shall relinquish to Husband any ownership interest she may have in any corporate entity formed by either party between January 1, 2010 and July 14, 2019." Da594. Clearly, HBI's formation on January 18, 2015 falls squarely within the prescribed time period, and it is undisputed that HBI was formed by Amanda. Thus, by Amanda's own certification, "any ownership interest she may have" transferred to Appellant when their PSA was signed and divorce finalized on March 4, 2019. *Id.*

Notably, Appellant's opposition to Respondents' motion for summary judgment was due the very same day that the Baker's divorce was finalized. Oral argument was requested (Da433) on the summary judgment motion so that the trial

court could be properly brought up to speed on the implications of the Baker divorce settlement and due to the complexity of the ownership issue which Respondents sought to resolve in a summary fashion. The trial court did not grant oral argument.

Rule 1:6–2 creates "a presumption of the right to oral argument [in] all non-discovery and non-calendar motions in civil cases." *Pressler & Verniero,* Current N.J. Court Rules, comment 5 on R. 1:6–2(d) (2011); See also *Raspantini v. Arocho*, 364 N.J.Super. 528, 531 (App. Div. 2003).

The fact that the trial court failed to even address the implications of the Baker Property Settlement Agreement on Appellant's rights under the "Repurchase Agreement" makes it evident that this issue was lost on the court below, and that Appellant was prejudiced by the inability to reinforce this point at oral argument.

Furthermore, in its ruling, the trial court fails to acknowledge that the "Repurchase Agreement" was more than just an agreement giving Amanda some potential future right. The trial court's order is completely silent as to the implications of rescinding the entirety of the very agreement which effectuated the transfer of HBI from Amanda to the Respondents, despite that being precisely what the court did. As discussed in Appellant's Brief, rescission is not an appropriate remedy when it cannot (or does not) return the parties to the ground upon which they originally stood. Db44. This is but one of many cases in which Respondents' language (here, referring to a stock sale agreement which contained a repurchase option as simply a "Repurchase Agreement") contributed to a misunderstanding of the true nature of the Respondents' claims before the trial court and the fashioning of erroneous relief by that court. It can be reasonably concluded that the court

could have reached a different conclusion had the parties been permitted to argue their respective positions orally.

The court placed no findings on the record to establish that oral argument was not necessary when granting Respondents' motion for summary judgment on the rescission count, despite a clear mandate to do so. See *Raspantini.*

II. SUMMARY JUDGMENT ON THE ISSUE OF BREACH OF DUTIES/AGREEMENTS WAS IMPROPERLY GRANTED BECAUSE RESPONDENTS' ARGUMENT IS NOT SUPPORTED BY THE EVIDENCE PRESENTED AND THE TRIAL COURT INCORRECTLY APPLIED THE GOVERNING AGREEMENTS WITH RESPECT TO HBI AND HCP. (RESPONDENTS' POINTS III/VIII & APPELLANT'S POINT VI).

Because the trial court's grant of summary judgment is reviewed *de novo* on appeal and the entirety of the summary judgment pleadings were attached to Appellant's Brief (from which the Appellate Division can reach its own conclusions), this Reply does not address the trial court's findings point-by-point. However, several key conclusions were reached improperly by the court below with regard to the facts alleged in the pleadings and the conclusions drawn from them, which merit special attention:

A. The Operating Agreement of HCP does not govern the operation of HBI.

None of the actions alleged to have been taken by Appellant were alleged to have been taken on behalf of HCP. The loan agreements entered into and the tax payments alleged to have been missed all relate to HBI, not HCP. HBI is governed by a separate document, namely, its Bylaws. Nonetheless, the court, in the bulk of its pre-trial orders and in its final judgment, does not clearly separate HCP from

HBI and repeatedly lumps the two together. Often times, both Respondents and the trial court use the terms "members" (referring to members of HCP) interchangeably with "directors" (referring to members of HBI's board of directors).

B. The Operating Agreement of HCP does not give the Members direct management authority, despite what Respondents allege and the trial court found.

Respondents' pleadings and the trial court's order on summary judgment both rely on Section 3.1.1 of HCP's Amended & Restated Operating Agreement (which was in effect at the time the relevant loan agreements were signed) when citing the authority of the members and the restrictions imposed upon the Appellant as manager. Respondents allege (and the court concluded) that Appellant was obligated to act "in accordance with the will of the members" and that the Respondents retained "'full, exclusive, and complete discretion, and authority" to 'manage, control, administer, and operate the business and affairs of the company.'" Da315; Da892-93. The problem with this allegation – and with the court's conclusion – is that the Section 3.1.1 cited to is from the *original* operating agreement of HCP, not the Amended & Restated Operating Agreement, which appears separately as Exhibit C to Respondents' motion for summary judgment. Da886. And, while similar in content, the *correct* Section 3.1.1 qualifies precisely how the members may exercise their authority. And that is, "…by replacing any and all members of the Executive Committee, at a meeting called specifically for that purpose, by a two-third majority vote." *Ibid.* Furthermore, the language "in accordance with the will of the members" was removed from the Amended &

Restated Operating Agreement. Thus, the members lacked the direct control that they seem to rely on – and which the trial court accepted them to possess – in granting the relief sought. Oral argument would have been yet another opportunity for this error to be addressed.

C. The Bylaws of HBI do not require that loans first be approved of the shareholders, except in the case of loans made to directors or officers of the corporation. (*See* Da879-80).

D. The loans made by HBI were neither loans to a director nor loans to an officer.

Respondents do not allege that a single loan was made to Appellant, in his individual capacity. Just as the Respondents and the trial court failed to distinguish entity from entity (HCP from HBI), so too do they fail to distinguish entity from its ownership, whether that be a shareholder in a corporation or a member in a limited liability company.

E. Even if the Bylaws did require shareholder approval prior to making any loan – which they did not – Appellant, as the sole Manager of HCP, was the only individual authorized by law to consent on behalf of HBI's sole shareholder, which was HCP.

See N.J.S.A. 42:2C-37(c)1. But, for the reasons discussed in Appellant's initial Brief, even an action for breach of fiduciary duty brought by the individual members of HCP against Appellant, as HCP's manager, must fail for the reasons discussed there, including the requirements for direct vs. derivative proceedings.

The court placed no findings on the record to establish that oral argument was not necessary when granting Respondents' motion for summary judgment on the breach of operating agreement/breach of bylaws/breach of fiduciary duties counts. See *Raspantini.*

III. THE TRIAL COURT APPLIED THE WRONG STANDARD IN DENYING APPELLANTS' MOTION FOR RECONSIDERATION/MOTION TO VACATE. (RESPONDENTS' POINT IV.

The trial court erred in concluding that the "Opinion and Order dated June 23, 2022 were final, as they disposed of all issues with respect to all parties with finality" and that, therefore, "the only standard for reconsideration applicable . . . is Rule 4:49-2." Da263. Judge Berdote Byrne's June 23, 2022 order was not final – the final order was issued by Judge DeAngelis on August 26, 2022 (Da4) – a full eighteen (18) days after he deemed Judge Berdote Byrne's order "final". There can be but one "final order" in a case – and that order must resolve all issues as to all parties. The June 23, 2022 order simply did not do that, as the issue of punitive damages was left wholly unresolved and the June 23, 2022 order actually provided for further discovery. *Id.*

In *Lawson v. Dewar*, 2021 WL 2148885 (App. Div. May 27, 2021), the Appellate Division clarified that only final orders are subject to Rule 4:49-2 and the *Cummings* framework. Motions for reconsideration of interlocutory orders, which constitute the vast majority of orders issued by trial courts (resolving motions for substitute service, motions to amend pleadings, motions relating to discovery, etc.) are instead to be governed by the "far more liberal approach" of Rule 4:42-2, which states that interlocutory orders "shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice." *Lawson* at *2.

Because the trial court failed to apply the proper standard on reconsideration, the Statement of Reasons (Da262) which accompanied the order denying

reconsideration failed to address the issues raised in that motion – including those of collateral estoppel, res judicata, and the entire controversy doctrine.

IV. RESPONDENTS FAILED TO ADDRESS THE ISSUE OF STANDING IN THEIR BRIEF AND THE TRIAL COURT INAPPROPRIATELY PERMITTED THE AMENDMENT OF THE PLEADING POST TRIAL TO ADD PLAINTIFF HBI (RESPONDENTS' POINT V & APPELLANT'S POINTS I AND IV).

Notably, Respondents once again remain silent on the issue of standing. They fail to address in any way the case law cited in Appellant's Brief, despite the fact that that precedent clearly establishes that an initial lack of standing (on the part of HCP and the individual plaintiffs) cannot be cured by the later addition of (Hudson Black Inc.) as a party. They remain silent with regard to their failure to respect the rules governing direct vs. derivative actions. They fail to address the issue of damages to HCP or to themselves individually. In sum, they rely wholly on the trial court's misapplication of Rule 4:9 to grant HBI a position as a plaintiff post-judgment.

But, as discussed in Appellant's Brief, the addition of HBI as a plaintiff after the conclusion of trial and after the entry of judgment finds no support in law and does not cure an initial lack of standing. A reading of the trial court's order and statement of reasons for adding HBI (Da260-70) provides nothing to the contrary – as the trial court did not even attempt to support its ruling. Indeed, despite a 9 page Statement of Reasons discussing focused on Appellant's motion to vacate, the court's discussion of amending the pleadings is confined to a single line at Da260, which reads, "Plaintiff's cross-motion to amend the pleadings to reflect judgment [sic] is **Granted**." *Id.*

V. RESPONDENTS' ACKNOWLEDGMENT OF THE POTENTIAL FOR DOUBLE RECOVERY FURTHER SUPPORTS REVERSAL ON THE BASIS THAT THE RELIEF GRANTED BELOW WAS ALREADY GRANTED BY OTHER COURTS AND THAT THE ISSUES LITIGATED BELOW HAD ALREADY BEEN RESOLVED WITH FINALITY (RESPONDENTS' POINT IX).

Respondents' contention that "reversal is not warranted because of the hypothetical potential for double recovery" (Pb43-44) is perhaps the most flagrant example of the Respondents' disregard for the corporate form. This same disregard was shared by the trial court, with implications that potentially extend far beyond the instant case.

But before arriving at that issue, Respondents' insinuation that Appellant is "making a[n] [un]true statement to this Court" concerning double-recovery is precisely the sort of poisonous accusation that Respondents have relied upon from Day 1 in order to undermine Appellant's credibility. Merriam-Webster's *Dictionary of Law* defines "recovery" as "an amount awarded by . . . a judgment or decree." HBI has in fact recovered from Appellant's companies – it obtained judgments against them and is actively receiving payments from 8 Quaker Road LLC, which is indisputable and evidenced by the Chapter 11 proceedings referenced in Appellant's initial Brief.

Respondents proffer that "Appellant is correct, conceptually: any amount of the $4,767,826.25 Judgment, including Rule 4:42-11(b) interest, that is recovered from Appellant's other companies can be used to offset against the judgment recovered from him." (Pb44). It is evident from this statement that their willingness to argue both sides of the coin seems to know no bounds. Even without prevailing on (or even properly pleading) a veil piercing claim, Respondents would

like this court to disregard the sacrosanct separation between an individual and a corporate/limited liability entity. At the same time, they openly admit that the very same loan agreements which they alleged were fraudulent are, in fact, wholly valid and bona fide loan agreements between HBI and the respective Baker companies.

The doctrine of election of remedies does not allow for such a scenario to exist – least of all not once HBI joined this matter as a plaintiff. Similarly, judicial estoppel prohibits HBI from now asserting a claim that is contrary to what it asserted in the arbitration proceedings. How many times will the Respondents attempt to reframe their claims? The Appellate Division should find that the confirmed AAA arbitration awards were dispositive of all issues as to all parties and HBI should be forced to live with its election to pursue recovery in that forum. What it should not be allowed to do is to make a mockery of the New Jersey Superior Court by making – and prevailing on – irreconcilably different arguments.

CONCLUSION

At the trial court level, judges are afforded broad discretion to make findings of fact, conclusions of law, and (especially in the Chancery Division) to fashion remedies that favor equity in the interest of fairness and justice. What equity does not permit, however, is a result that is contrary to the law. And yet, that is precisely how this case concluded below.

The lengthy delay between the filing of Respondents' verified complaint in January of 2018 and conclusion of the matter in the trial court some four-and-a-half years later undoubtedly contributed to a muddled record below. The handling of the case by three separate presiding judges did not help, nor did the shutdown necessitated by the pandemic. (See Judge Berdote Byrne's statement at Da14

concerning loss of trial notes and closure of the Morris County Courthouse). The record shows Judge DeAngelis relying on earlier orders of Judge Berdote Byrne, as misquoted by Respondents. It shows Judge Byrne relying on the earlier – and similarly misquoted – orders issued by Judge Brennan.

These reassignments and delays provided Respondents with the conditions necessary to build upon their intentional misstatements and to capitalize on confusion. When coupled with the way in which Respondents' counsel littered nearly every filing in the trial court with accusations of criminal wrongdoing[1] on the part of Appellant, it became nearly impossible to distinguish fact from fiction and the trial court substituted its own fact-finding with the *ipse dixit* statements of Respondents' counsel. Similarly, as evidenced by the absence of a statement of reasons in connection with granting Respondents' last-ditch effort to add HBI as a plaintiff, the trial court appears to have "outsourced" its mandate to reach conclusions of law – or to even research it.

No amount of confusion, however, changes the clear fact that the trial court's final judgment was contrary to the law and should, therefore, be reversed:

- The individual plaintiffs failed to overcome their lack of standing, or to even contest the issue as it was set forth in Appellant's initial Brief.
- The individual plaintiffs failed to make the requisite showing of damages required under New Jersey's fraud statutes and failed to establish that Appellant's alleged actions at HBI somehow violated his

[1] N.B. – The criminal allegations against Appellant for wire fraud and money laundering, which were repeatedly raised by Respondents in their pleadings, are scheduled to be dismissed in their entirety. See D.N.J. 19-cr-902.

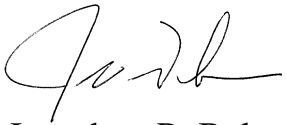
fiduciary duties to them as members of HCP.

- HCP failed to show that it was damaged in any way.
- The individual plaintiffs and HCP all failed to properly plead a derivative cause of action (although doing so would have been futile, as discussed in Appellant's Brief). And, no party established that it had sustained "special injuries."
- The Respondents failed to establish – and the trial court failed to state – how the addition of HBI as a plaintiff post-judgment is in accordance with either the Rules of Court, New Jersey law, or precedent.
- The Respondents failed to establish how the relief afforded HBI by the judgment below is not precluded by HBI's prior recovery in other proceedings or by its own failure to previously participate in this action. In fact, the Respondents at Pb43-44 concede that HBI's prior recovery and the recovery in the action below are one-and-the-same.
- The trial court ignored that HCP and HBI are legally separate and distinct entities.
- The trial court ignored the distinction between Appellant and corporate entities/limited liability entities in which he had/has an ownership interest.
- The trial court failed to appreciate the implications of its grant of rescission of the so-called "Repurchase Agreement" and similarly failed to grant a truly "complete" rescission, in accordance with the law.

- The trial court erred in not hearing oral argument on two dispositive summary judgment motions.
- The trial court applied the wrong standard on Appellant's post-trial motion for reconsideration/motion to vacate.

Naked allegations and accusations can never be the basis upon which a court finds in favor of one party and against another. Rather, a careful analysis of the facts and of the applicable law is critical to the proper exercise of judicial responsibility. Respect for precedent is similarly of great import to any mindful jurist. Whether the erroneous outcome below was the result of confusion, lack of subject matter knowledge, carelessness, or any other reason is largely insignificant at this stage. What is relevant to this appeal is that the trial court's conclusions are not consistent with either the statutory law or case law. Our state statutes concerning the corporate form and the standing of a party to bring an action in court must be respected. Indeed, the cases cited in Appellant's initial Brief underscore this fact. Allowing the judgment below to stand in its current form would undermine the existence of a corporate body as a separate legal person (both from the perspective of the Respondents and the Appellant) and would be to countenance the disregard of decades of legislative and jurisprudential history. I respectfully request that the Appellate Division reverse.

Respectfully submitted,



Jonathan P. Baker