STEVEN J. KARVELLAS, Plaintiff-Respondents, v. **STEPHEN E. SWEENEY AND LEREGAZZI, L.L.C.,** Defendants-Appellants,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000723-23 SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET # BER-L-2604-20 SAT BELOW: Hon. Nicholas Ostuni, J.S.C. On Appeal from (i) August 30, 2023 Order and Final Judgment; (ii) September 5, 2023 Amended Order and Final Judgment; and (iii) October 18, 2023 Order Denying Motion for Reconsideration

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APPELLANTS' BRIEF IN SUPPORT OF APPEAL

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[1] Highlighting is from original document.

[2] Included pursuant to Rule 1:36-3 and 2:6-1(a)(1).

PRELIMINARY STATEMENT

This appeal presents purely legal questions surrounding the accrual and expiration of a claim for breach of a written, integrated loan contract: (1) Will New Jersey law permit a claim for breach of a written contract whose performance was satisfied in writing as "paid in full" and whose express terms required any modification to be "in writing" based entirely on a later alleged oral agreement to pay some further amount "when able"?; and (2) assuming that a fully integrated and completed loan agreement can be brought as against the statute of limitations, does New Jersey law recognize an oral "pay when able" loan as a cognizable and binding contract? Compounding those legal hurdles, Plaintiff would then still have to prove the existence of such oral "pay-when-able" loan, which he failed to do at trial. Instead, as stated below, the six (6) year statute of limitations has expired because it is undisputed the two written 2008 loans as to which Plaintiff sued were not extended or modified in writing, and there is no evidence except for Plaintiff's self-serving parol testimony to support the existence of a third "pay-when-able" loan.

Plaintiff Steven J. Karvellas ("Plaintiff" or "Karvellas") brought this action against defendants Stephen E. Sweeney ("Sweeney") and LeRegazzi, L.L.C. ("LeRegazzi") (collectively, "Defendants"), claiming Defendants failed to make payments towards an alleged April 2013 "Third Loan." Plaintiff claims

that the alleged "Third Loan" consisted of unpaid principal, interest, and penalties on two (2) previous 2008 loans of $330,000 and $50,000. Plaintiff adduced no evidence of this alleged "Third Loan" apart from his own self-serving testimony of an oral agreement. Notably, the written loan itself precluded any such modification as a matter of law so as to permit continued tolling of any claim under that written agreement.

At trial, not only was Plaintiff required to prove there was an oral "Third Loan," he was also required to prove the alleged "Third Loan" was a "pay-when-able" loan and not a demand loan. However, Plaintiff failed to meet his burden because: (i) the concept of "pay-when-able" loans, supposed to be grounded in a "clear indication" of that mutual intent, has never been recognized by this Court; and (ii) even if the Court were to use this case to recognize them, the undisputed facts demonstrate there was no meeting of the minds much less any indication, "clear" or otherwise that this alleged "Third Loan" was a "pay-when able" loan. Plaintiff did not produce any documents or witnesses to meet his burden that there was a meeting of the minds or any "clear indication" that the alleged "Third Loan" was a "pay-when able" loan. Instead, Plaintiff simply declared an email reflected his own parol recollection of such an arrangement after he had signed a Discharge of Mortgage in 2013, which unequivocally stated the loan was "**Paid in Full**." Plaintiff's remaining theories, including unjust

enrichment, derive from the premise of the validity of a third loan and thus fail as a matter of law. Separately, and at a minimum, the trial court erred in imposing liability on the guarantor, LeRegazzi, in the absence of any writing, and in awarding post-judgment interest at the alleged contract rate.

Lastly, the trial court's decision – and the decision of this court if the decision below is affirmed – will have profound and broad-ranging effects on contract law in this state. If the decision below is affirmed, a contract party will be able to avoid contract obligations by simply arguing there was a later oral modification or new agreement, even in the face of an integration clause. This court's decision has the potential to eviscerate integration clauses and the binding effect of written clauses as to all contracts (e.g., arbitration clauses, venue clauses, etc.), not just loans. This court cannot condone such a sweeping and damaging result.

Consequently, the trial court misapplied the law as to Defendants' statute of limitations defense and incorrectly found that Plaintiff met his burden to prove the alleged third "pay-when-able" loan. As a result, Defendants respectfully request that this Court: (i) reverse the trial court's judgment entered against Defendants; and (ii) dismiss Plaintiff's claims with prejudice, and/or, in the alternative, modify the judgment so as to dismiss Plaintiff's claims as against LeRegazzi and reform its post-judgment interest award.

PROCEDURAL HISTORY[3]

On May 1, 2020, Karvellas filed his Complaint against Defendants alleging two causes of action: breach of contract and unjust enrichment. Da99. On June 8, 2020, Defendants filed their Answer to the Complaint. Da118.

A bench trial was held on June 6, 7 and 15, 2023. On August 30, 2023, the trial court entered its Final Judgment and Opinion in Karvellas' favor. Da1. On September 5, 2023, the trial court entered an Amended Order and Final Judgment, which only amended the date by when Karvellas could record the Final Judgment as a statewide Judgment Lien. Da67. On September 20, 2023, Defendants filed a motion for reconsideration of the trial court's Final Judgment. Da84. On October 18, 2023, the trial court denied Defendants' motion for reconsideration. Da84. On November 8, 2023, Defendants filed their notice of appeal. Da210.

STATEMENT OF FACTS

In or around June 2008, Sweeney approached Karvellas and requested a loan for $330,000. 3T135:5-16. During the drafting of documents for the $330,000 loan from the Steven J. Karvellas Retirement Plan, Karvellas advanced

[3] "Da" shall refer to Defendants' Appendix. "1T" shall refer to Volume 1 of the June 6, 2023 trial transcript. "2T" shall refer to Volume 2 of the June 6, 2023 trial transcript. "3T" shall refer to Volume 1 of the June 7, 2023 trial transcript. "4T" shall refer to Volume 2 of the June 7, 2023 trial transcript. "5T" shall refer to the June 15, 2023 trial transcript. "6T" shall refer to the September 5, 2023 transcript.

to Sweeney a separate personal loan in the amount of $50,000 (the "$50,000 Loan"). 3T136:16-24. The $50,000 loan amount was transferred to Sweeney's bank account on June 25, 2008. Da154. The $50,000 loan was a personal "patch" to get through the period of the drafting of the loan documents for the $330,000 loan. 3T136:25 to 137:8.

The $50,000 Loan: (i) carried no interest; (ii) carried no term; and (iii) was not memorialized through any executed document, contract, agreement or promissory note. 3T136:25 to 140:15-20; 4T250:10-15; 3T6:19 to 7:3. The $50,000 Loan was just an oral loan. 3T8:18-23. There is no written evidence that the $50,000 Loan was a "pay-when-able" loan. 3T8:18-23. There was no discussion that the $50,000 Loan was a "pay-when-able" loan. 3T137:9-18.

On July 7, 2008, Karvellas, through the Steven J. Karvellas Retirement Plan, and Sweeney entered into a $330,000 loan that was memorialized through a promissory note, guarantee, collateral mortgage and other related documents (the "$330,000 Loan"). 3T138:3 to 139:10. Pursuant to the promissory note, Sweeney borrowed the principal sum of $330,000 from the Steven J. Karvellas Retirement Plan. Da108. The $330,000 Loan carried an interest rate of ten percent (10%). Da108. The $330,000 Loan carried a late penalty of five percent (5%). Da108. The promissory note stated the following regarding the maturity date of the $330,000 Loan:

> Interest, on the outstanding and unpaid principal balance of this Note, shall accrue from the date hereof through and including December 15, 2008 ("Accrued Interest"). The entire amount of such accrued and unpaid interest shall be due and payable in full on January 15, 2009. Commencing on January 15, 2009 and continuing on the fifteenth (15th) day of each month thereafter through and including June 15, 2010, subject to extension as provided below, Borrower shall pay monthly installments of accrued and unpaid interest on the outstanding and unpaid principal balance of this Note. Subject to extension as provided herein, on June 15, 2010, the then remaining outstanding and unpaid principal balance of this Note together with all accrued and unpaid interest thereon shall become due and payable in full. Borrower has the option, if it is not in default at any time during the term of this Note, to extend the initial term of this Note until September 15, 2010, upon written notice to the Lender thirty (30) days prior to the end of the initial term. In the event Borrower provides such written notice of extension, Borrower shall continue to pay, on the fifteenth (15th) day of each month thereafter through and including September 15, 2010, all accrued and unpaid interest on the outstanding and unpaid principal balance of this Note, at which time all accrued and unpaid interest on this Note together with the outstanding and unpaid principal balance hereof shall be due and payable in full. [Da108.]

The promissory note was drafted by Plaintiff's attorneys. T260:4-7. Sweeney paid $5,000 towards Plaintiff's fees in preparing the promissory note. Da155. The Promissory Note required that any alterations or modifications be reduced to a writing signed by the parties, specifically stating:

> This Note may not be waived, changed, modified, discharge[d] or terminated orally, but only by an agreement in writing, signed by the party against whom enforcement of any waiver, change, modification, discharge or termination is sought. [Da110.]

There were no mutually executed writing altering the terms of the Promissory Note. 3T93:15-21.

LeRegazzi guaranteed payment of the $330,000 Loan pursuant to a Guarantee that was also executed on or about July 7, 2008. Da113. The LeRegazzi guarantee was duly recorded as a Collateral Mortgage with the Bergen County Clerk's Office on September 24, 2008. Da127.

After the principal was transferred to Sweeney in 2008, Sweeney was not able to make consistent monthly interest payments on the $330,000 Loan due to the economic downturn in 2008-2009. 3T141:10 to 142:13. On or about August 28, 2009, Sweeney sent a letter to Karvellas proposing a modification to the $330,000 Loan and the $50,000 Loan since the installment payments were delinquent. Da158; 3T142:18 to 143:12. Karvellas did not respond to Sweeney regarding the August 28, 2009 letter. 3T143:13-15.

On or about September 18, 2009, Karvellas' counsel sent Sweeney a default notice regarding the $330,000 Loan. Da160; 3T144:3 to 15. On or about September 22, 2009, Sweeney sent Karvellas and Karvellas' counsel a letter with a proposed "cure" regarding the $330,000 Loan and in response to Karvellas' counsel's September 18, 2009 letter. Da168; 3T148:3-23.

On or about October 12, 2010, Sweeney sent a letter to Karvellas as another attempt to modify and/or cure the $330,000 Loan. Da176; 3T151:1-16. As of October 12, 2010, Sweeney had made interest payments of $66,293.84 towards the $330,000 Loan. Da177; 3T23:5-7; 3T151:17 to 152:4.

On or about November 10, 2010, Sweeney sent a letter to Karvellas as another attempt to modify and/or cure the $330,000 Loan. Da180; 3T156:7-18. The November 10, 2010 letter attached two (2) draft promissory notes in an effort to memorialize Sweeney's proposed modifications/extensions to the $330,000 Loan and the $50,000 Loan. Da180; 3T156:16 to 157:23.

By sending modifications and cures, Sweeney was attempting to get the loan back on track and fully paid by the maturity date. Da180; Da188; 3T148:3-23. Karvellas testified that he agreed to any request from Sweeney to forbear. 2T282:8-13; 2T291:4-7; 3T21:4-12. Karvellas never accepted in writing any of Sweeney's proposed extensions or modifications. 2T282:21-24; 2T291:13-15; 3T7:24 to 8:1; 3T20:9-15; 3T28:13 to 29:19; 3T143:13-15; 3T150:6-8.

Sweeney also provided "in-kind" services and materials to Karvellas in 2011-2013, the value of which was to offset a portion of interest related to the $330,000 Loan. Da132; 3T:165: to 166:10; 3T166:21 to 168:18. Such "in-kind" services included graphic arts, website development, promotional materials, and marketing materials for Karvellas' activities associated with his Team USA Camp. Da132; 3T:165: to 166:10; 3T166:21 to 168:18.

In April 2013, Sweeney obtained refinancing of a commercial property to gain sufficient resources to pay the entire principal owed to Karvellas. 3T161:6-9. In anticipation of that closing and the expected proceeds, Sweeney and

Karvellas negotiated a settlement to resolve the outstanding amount owed on the $330,000 Loan. 3T161:14-24; 3T162:6-11. The settlement was negotiated in advance of the April 26, 2013 closing. 3T161:25 to 162:5. Sweeney and Karvellas agreed to a settlement whereby Sweeney would make a payment of $330,000 in full satisfaction of the amounts owed on the $330,000 Loan and Karvellas would sign a discharge of mortgage. 3T162:12 to 163:8. In addition to the $66,293.84 of interest payments made as of October 12, 2010, Sweeney made additional interest payments of approximately $18,000. 3T163:9-21.

On April 26, 2013, through his attorneys, Sweeney made a single lump sum payment of $330,000 to Karvellas. Da149. By accepting the lump sum payment of $330,000 on April 26, 2013, the parties agreed that this remittance fully resolved the outstanding loan balance on the $330,000 Loan, including the paid interest to date and the "in-kind" service and materials provided to Karvellas. 3T175:4-7. Karvellas attended the closing to receive the $330,000 payment and signed the discharge of mortgage. 3T161:14-24; 3T161:25 to 162:5; 3T162:6-11; 3T162:12 to 163:8; 3T175:4-7. Sweeney was not at the closing. 3T172:7-22.

Also on April 26, 2013, Karvellas signed a **Discharge of Mortgage** certifying that the $330,000 Loan had been "**Paid in Full**." Da150; T266:4-8. The Discharge of Mortgage stated that "This Mortgage was made to secure

payment of $330,000.00 and interest." Da150; 2T266:9-12. The LeRegazzi mortgage was therefore discharged. Da150.

After the $330,000 payment on April 26, 2013, the $330,000 Loan was paid in full. As of that date, there were no outstanding amounts, whether principal, interest or penalties. 3T175:4-20. After making the $330,000 payment, Sweeney did not make any separate agreement with Karvellas to pay back any alleged unpaid interest or principal on the $330,000 Loan because there were no unpaid amounts owed. 3T175:4-20. The $330,000 Loan was paid in full and Sweeney did not agree to make any additional payments because there were no outstanding amounts owed. 3T175:4-20.

In this action, Karvellas now claims that at the April 2013 closing, he and Sweeney orally agreed to a new third loan consisting of allegedly unpaid principal, interest and penalties from the $330,000 Loan and the $50,000 Loan, and that Sweeney would pay this new third loan when he was able. Sweeney disputes the existence of this "Third Loan" and maintains that the parties agreed the $330,000 Loan was paid in full as evidenced by the Discharge of Mortgage executed by Karvellas. There is no signed agreement memorializing any alleged "Third Loan" or agreement in April 2013 of any kind. While the $50,000 Loan remained unpaid, there were no interest terms concerning that loan. Sweeney

never agreed in April 2013 to pay back a sum including interest on the $50,000 Loan. 3T175: 4-20.

Plaintiff relies on an August 7, 2013 e-mail, which he falsely claims provides *ex post facto* confirmation of the existence of the alleged oral “Third Loan.” Da196. However, the August 7, 2013 e-mail relied upon by Plaintiff does not include: (i) any reference that the alleged “Third Loan” was a “pay-when-able” loan; (ii) the exact amount that Karvellas claims constituted the “Third Loan”; (iii) any payment terms of the alleged “Third Loan”; and (iv) any terms concerning the interest of the alleged “Third Loan.” Da196; 3T48:22-24; 3T53:9 to 54:11; 3T180:16 to 181:24.

Plaintiff also relied on an October 2019 audio recording, through which Plaintiff secretly recorded a conversation with Sweeney. Da203. However, The audio recording relied upon by Plaintiff does not include: (i) any reference that the alleged “Third Loan” was a “pay-when-able” loan; (ii) any reference to the amount that Karvellas claims constituted the “Third Loan”; (iii) any payment terms of the alleged “Third Loan”; (iv) any terms concerning the interest of the alleged “Third Loan.” Da203; 3T177:25 to 178:14. Sweeney’s statement on the audio recording that he would pay him back was in reference only to the $50,000 Loan. Da0203; 3T177:25 to 178:14.

Until Karvellas' attorneys sent Sweeney a letter on February 20, 2020, Karvellas did not make any demand to Sweeney regarding payment on the alleged "Third Loan." 3T40:16 to 41:11; 3T43:6-13; 3T177:12-24. On May 1, 2020 – seven years after the $330,000 payment and signing of the Discharge of Mortgage – Plaintiff filed a Complaint against Defendants alleging the following causes of action: Count I – Breach of Contract; and Count II – Unjust Enrichment. Da99.

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW

An appellate court's review of rulings of law and issues regarding the applicability, validity or interpretation of laws, statutes, or rules is de novo, including whether a cause of action is barred by a statute of limitations. Kocanowski v. Twp. Of Bridgewater, 237 N.J. 3, 9 (2019); Save Camden Pub. Schs. v. Camden City Bd. of Educ., 454 N.J. Super. 478, 487 (App. Div. 2018). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). Appellate courts also apply a deferential standard in reviewing factual findings by a judge. Balducci v. Cige, 240 N.J. 574, 595 (2020).

POINT II

PLAINTIFF'S CLAIMS ARE TIME-BARRED BECAUSE THE APPLICABLE SIX YEAR STATUTE OF LIMITATIONS ON THE $50,000 AND $330,000 LOAN HAS EXPIRED (Da1-69)

While Defendants refute Plaintiff's claims, including the existence of the alleged "Third Loan," even if Plaintiff's claims were accepted as true, they must be dismissed with prejudice because they are barred by the applicable six (6) year statute of limitations. Plaintiff's claims in this case are grounded in allegations that Defendants allegedly breached two (2) loans that originated in 2008. Further, Plaintiff claims that Defendants' payment of $330,000.00, received on April 26, 2013, allegedly failed to pay off the principal, accrued interest, and late charges for the two (2) loans despite executing a Discharge of Mortgage expressly stating the loan was "**Paid in Full**." These allegations were not communicated by the Plaintiff until February of 2020 – more than seven (7) years later. Plaintiff's attempts to confuse the Court by concocting an alleged "Third Loan" absent any evidentiary support to the contrary are unavailing for multiple reasons.

The most obvious legal failing with this theory is the evidence. Claiming the principal, accrued interest, and late charges as a separate loan and reclassifying it from a demand note to a "pay-when-able" loan, would require some probative evidence to that effect. However, even though Plaintiff alleges

the "Third Loan" was a separate loan, any review of Plaintiff's testimony and evidence makes it clear that this alleged "Third Loan" is merely a continuation of the $330,000 Loan and the $50,000 Loan, which was in no way discussed or memorialized to toll the statute of limitations. Thus, Plaintiff's claims are barred by the six (6) year statute of limitations.

Pursuant to N.J.S.A. 2A:14-1, any claim "for recovery upon a contractual claim or liability . . . shall be commenced within 6 years next after the cause of any such action shall have accrued." "[S]tatutes of limitations have been adopted regarding all causes of action, in order to 'promote repose by giving security and stability to human affairs.'" Caravaggio v. D'Agostini, 166 N.J. 237, 245 (2001)(quoting Wood v. Carpenter, 101 U.S. 135, 139 (1879)). The purpose of statutes of limitations is to:

> penalize dilatoriness and serve as measure of repose. . . When a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action.
>
> [Farrell v. Votator Div. of Chemetron Corp., 62 N.J. 111, 115 (1973).]

The six (6) year statute of limitations begins to run when a claim accrues, which is governed by the "discovery rule." See Grunwald v. Bronkesh, 131 N.J. 483, 494-495 (1993). The "discovery rule" operates to "postpone the accrual of

a cause of action when a plaintiff does not and cannot know the facts that constitute an actionable claim." Id. at 494-498. The "discovery rule" focuses on "an injured party's knowledge concerning the origin and existence of his injuries as related to the conduct of another person. Such knowledge involves two elements, injury and fault." Lynch v. Rubacky, 85 N.J. 65, 70 (1981); Grunwald, 131 N.J. at 492-93. Moreover, "[w]here there is no time stated between debtor and creditor as to when the payment of a money obligation shall be due, it is deemed payable on demand." Denville Amusement Co., 84 N.J. Super. at 169. "A cause of action based upon a money obligation which is payable on demand is deemed to accrue at the time of the loan." Ibid.

Based on the probative facts presented at trial, the $50,000 loan made in June 2008 was a demand loan as there was no time stated between Karvellas and Sweeney as to when the payment was due nor any writings of any kind to the contrary. Accordingly, as to the $50,000 loan, the six (6) year statute of limitations began in June 2008 and ended in June 2014 for any claims concerning that loan.

Based on the language in the promissory note for the $330,000 loan, the latest maturity date on the promissory note was September 15, 2010. Thus, the latest the six (6) year statute of limitations could run on any claim concerning the $330,000 loan was September 15, 2016.

It is undisputed that on April 26, 2013, Sweeney made a payment in the amount of $330,000 and Karvellas executed a written Discharge of Mortgage stating that the loan was "**Paid in Full**." However, Plaintiff alleges (and Defendants dispute) that principal, interest, late charges, and 10% (accruing) interest remained unpaid at that time despite all evidence to the contrary. Thus, according to Plaintiff's allegations, Defendants failed to pay back the $50,000 loan in full by June 2014 and the $330,000 loan in full by September 15, 2010. Prior to accepting the $330,000 payment, Plaintiff could have asserted to the Defendants that a payment deficiency existed, refused to execute the Discharge of Mortgage evidencing the loan was "**Paid in Full**," and brought an action immediately after April 26, 2013, when Defendants allegedly failed to pay any outstanding amounts, but did not do so. But Plaintiff did not file his Complaint against Defendants until May 1, 2020, many years after the six (6) year statute of limitations ran on both loans. Accordingly, by any measure, Plaintiff has failed to comply with the applicable six (6) year statute of limitations on his claims, and his Complaint should be dismissed with prejudice as a result.

Plaintiff misleadingly attempts to evade this clear statute of limitations bar by alleging a "Third Loan" was agreed to on April 26, 2013, comprising of allegedly unpaid principal, interest and late charges, and which would accrue interest on interest. Plaintiff's misleading attempts to allege a "Third Loan" do

not make it an actual separate loan, nor does reclassifying it as a "pay-when-able" loan, given the evidence and testimony presented at trial. In fact, no new money was allegedly loaned by Plaintiff to Defendants in this so-called "Third Loan" because it allegedly only consisted of outstanding principal **already** loaned, as well as interest, late fees, and accruing interest on such principal. It is clear from the trial testimony and evidence therefore that the so-called "Third Loan" is not a separate and distinct loan but rather a continuation of the $50,000 Loan and the $330,000 Loan – and a creative but transparent attempt to avoid the bar of the six-year statute of limitations. And, regardless of how it is viewed in this respect any attempt to vary the written contract and the acknowledgement of payment "in full" would have to rest on parol evidence intended to alter the terms of the written agreement. The parol evidence rule, of course, is not a rule of evidence at all, but one of substantive law, making admission of evidence contrary to a written integrated agreement of no weight. Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259, 268 (2006).

Conveniently, Plaintiff contends that Defendants made a new oral promise to pay the alleged outstanding amounts following Defendants' payment of $330,000 on April 26, 2013. Regardless, the new promise alleged by Plaintiff to pay the outstanding amounts only tolls the statute of limitations period if it is

in writing signed by the party chargeable thereby. Specifically, N.J.S.A. 2A:14-24 states as follows:

> In actions at law grounded on any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, so as to take any case out of the operation of this chapter, or to deprive any person of the benefit thereof, **unless such acknowledgment or promise shall be made or continued by or in some writing to be signed by the party chargeable thereby**. (emphasis added).

"Moreover, the current tendency is in favor of the statute of limitations and against the construction of a statement as an acknowledgment or promise which will avoid its operation." Denville Amusement Co., 84 N.J. Super. at 170. In Denville Amusement Co., the Court required a written acknowledgement or new promise to lift the bar of limitation regarding a decedent's loan to a corporation. Id. at 171-72. Notably, the Court found that letters of transmittal the decedent signed as treasurer of the corporation and sent with financial reports he had prepared as the corporation's accountant were insufficient to limit the statute of limitations bar. Ibid.

In the instant matter, there is no executed writing whatsoever where Sweeney made a new promise of any kind because no such agreement occurred. The alleged August 7, 2013 e-mail (Da196) between Karvellas and Sweeney is insufficient to satisfy the writing requirement of N.J.S.A. 2A:14-24 because it is not "signed by the party chargeable thereby" (i.e., Sweeney). The alleged

spreadsheet attached to the e-mail is simply a spreadsheet but makes no mention of an alleged "Third Loan" or new obligation to pay allegedly unpaid principal, interest and penalties. Even if the Court accepts Plaintiff's claims as true, the so-called "Third Loan" was not a separate and distinct new loan but rather an acknowledgement or renewed promise to pay the outstanding amounts from the $50,000 Loan and the $330,000 Loan. The only way that the statute of limitations on the $50,000 Loan and the $330,000 Loan would be tolled is if Sweeney's promise to pay the alleged outstanding amounts was in an executed writing pursuant to N.J.S.A. 2A:14-24.

Nevertheless, Plaintiff has not produced any such executed writing because there were no outstanding amounts owed and no such writing exists. As a result, Plaintiff attempts to evade the statute of limitations bar by mischaracterizing the alleged "Third Loan" as a so-called "pay-when-able loan," (further discussed *infra*) when it is clear that under any evaluation, the alleged "Third Loan" would be classified as a continuation of the $50,000 Loan and the $330,000 Loan that must comply with the writing requirements of N.J.S.A. 2A:14-24.

Moreover, even if there was a signed writing to toll the statute of limitations when Sweeney allegedly made the acknowledgment or promise in April 2013, that was more than six (6) years prior to the filing of Plaintiff's

Complaint. Consequently, any claim is still barred by the six (6) year statute of limitations. Lastly, to counter any arguments that Defendants were simply trying to "run out the clock," Defendants maintain that the alleged "Third Loan" or any new promise in April 2013 never happened, and that the $330,000 payment was payment in full of the loan and there was no outstanding amount owed to Plaintiff. This is further evidenced by the Discharge of Mortgage executed by Plaintiff.

Thus, since the statute of limitations has expired on any claims regarding the $50,000 Loan and the $330,000 Loan, and the so-called "Third Loan" did not toll the statute of limitations, Plaintiff's Complaint is time-barred and must be dismissed with prejudice.

Alternatively, even if the alleged "Third Loan" was a separate and distinct loan from the $50,000 Loan and the $330,000 Loan, it would still be considered a demand loan as there is no clear indication it was a "pay-when-able" loan (discussed *infra*). As a result, if the alleged "Third Loan" was a demand loan, the statute of limitations began when the loan was made, which was over seven (7) years prior to the filing of the Complaint.

Consequently, regardless of whether the alleged "Third Loan" was a continuation of the $50,000 Loan and the $330,000 Loan, or a new

separate/stand-alone loan, Plaintiff's Complaint is time-barred and should have been dismissed with prejudice.

POINT III

PLAINTIFF'S CLAIMS MUST BE DISMISSED BECAUSE HE HAS NOT PROVEN THE ALLEGED THIRD LOAN WAS A PAY-WHEN-ABLE LOAN (Da1-69)

At the trial court level, Plaintiff conceded that the only way he evades the clear statute of limitations bar is if the alleged "Third Loan" was a pay-when-able loan. Thus, not only was Plaintiff required to prove the existence of a "Third Loan," he was also required to prove the alleged "Third Loan" was specifically a "pay-when-able" loan. However, Plaintiff's position is meritless because: (i) the concept of "pay-when-able loans" is not binding law on this Court; and (ii) even if such loans are legally recognized, the undisputed facts demonstrate there was no meeting of the minds or any "clear indication" that the alleged "Third Loan" was a "pay-when able" loan.

A. The Concept Of "Pay-When-Able Loans" Is Not Binding On This Court (Da1-69)

The concept of a "pay-when-able loan" is unsettled and unfounded in New Jersey. There is no binding Appellate Division case that discusses "pay-when-able loans" or affirms their existence. The only cases presented by Plaintiff for support are an unpublished Appellate Division case, Flynn v. Sevastakis, No. A-3263-04T2, 2006 WL 664180 (App. Div. Mar. 17, 2006)(Da222), and a

Chancery Division case cited by the Flynn court, Guerin v. Cassidy, 38 N.J. Super. 454 (Ch. Div.1955). No other New Jersey case exists that discusses "pay-when-able loans." Meanwhile, there are no published Appellate Division cases confirming the concept of "pay-when-able loans" in New Jersey that are binding on this Court. Specifically, R. 1:36-3 provides that "no unpublished opinion shall constitute precedent or be binding upon any court." It also provides that "no unpublished opinion shall be cited by any court" unless it is an Appellate Division opinion that has "been reported in an authorized administrative law reporter." Ibid. An unreported Appellate Division decision has "neither controlling nor precedential value." Higgins v. Swiecicki, 315 N.J. Super. 488, 491-492 (App. Div. 1998). Therefore, Plaintiff's arguments regarding "pay-when-able loans" is unsupported by competent legal authority and should be rejected by the Court.

B. Even If The Court Accepts The Concept Of "Pay-When-Able Loans," Plaintiff Has Not Proven There Was A "Third Loan" Or That It Was A "Pay-When-Able Loan" (Da1-69)

Since the $50,000 and $330,000 loans were made in 2008, it is undeniable that the statute of limitations on those loans has long expired. It also undeniable that if the parties entered into an alleged "Third Loan" in 2013, the statute of limitations on that loan has also expired if the "Third Loan" is a demand loan. Thus, the only way that Plaintiff can succeed on his claims and escape the statute

of limitations bar is if the alleged "Third Loan" was a "pay-when-able loan," a legal reality that Plaintiff has conceded in this litigation. Consequently, Plaintiff **must** prove the following: (i) the existence of a "Third Loan" entered into in April 2013 where Sweeney agreed to pay back allegedly unpaid amounts on the $50,000 and $330,000 loans; and (ii) a meeting of the minds and a "clear indication" that the alleged "Third Loan" was a "pay-when-able" loan whereby Sweeney would pay Plaintiff back when he was able. However, Plaintiff has failed to prove the existence of a "Third Loan" or that it was a "pay-when-able loan." Thus, Plaintiff's claims are time-barred.

Importantly, the two (2) cases previously cited by Plaintiff regarding so-called "pay-when-able loans" do not support his arguments. In Guerin, the plaintiff attempted to enforce a $3,000 loan that was memorialized by a writing that stated, "to be paid as I can." Guerin, 38 N.J. Super. at 459. The court held it was a "promise to pay a sum certain, when the obligor is financially able to pay." Id. at 460. Without citing any legal support, the court stated that the debt was not due until the defendant was capable of paying, and that the statute of limitations did not commence until at least that time. Ibid. The court ultimately did not enforce the loan because the plaintiff failed to allege the debtor's ability to pay in accordance with the terms of the contract. Id. at 461.

In Flynn, the plaintiffs loaned $15,000 to the defendants. At the time the plaintiffs advanced the loan, they stated to the defendants, "Get it back to us when you can." Flynn, 2006 WL 664180 at *1 (Da222). No other terms were ever mentioned or discussed, nor was it memorialized in a writing. Ibid. Over the ensuing years, the plaintiffs followed up with the defendants about payment of the loan but the defendants told plaintiffs they did not have the money and would pay when they could afford it. Ibid. The plaintiffs filed their complaint, seeking payment of the loan sixteen (16) years after the loan was made. Ibid. After a one-day bench trial, the trial judge found that the loan was not a "pay-when-able" loan and instead was a standard demand loan, and thus the statute of limitations had expired. Id. at *2-3. The trial judge concluded:

> In any event it really appears from this situation that we're talking about a demand loan here. The evidence that this was a pay when you are able loan similar to the one in Guerin, is just not compelling here. **There's very little evidence in that regard. The closest we come to it really is Mrs. Flynn's testimony, that when she handed the check to the defendant she said pay us back when you're able to pay us back.**
>
> **That's not enough to convert it to a pay when you're able loan.** In fact, Mr. Flynn made a demand for payment by everybody's account in 1990. Now the mere fact that the defendant said, I can't pay you back now, I'm not able to, does not convert it to a pay when you are able loan anymore than if there was a promissory note calling for payment within three years and if the plaintiff demanded payment you know, on the third anniversary of the loan and the defendant said, I can't pay you now, and the plaintiff said okay, pay me when you're able, that doesn't covert the note to a pay when you

> are able loan and stop the Statute of Limitations from starting to run.
>
> On a three year note the Statute of Limitations would start to run after three years. Not you know, when the defendant became able to pay simply because the plaintiff said when tried to collect payment, well, pay me when you're able to pay me. That doesn't convert it to a pay when you are able loan.
>
> **While you might not have to be on all fours with Guerin in order for the pay when you are able rule to apply, you have to have some clear indication that this is a pay when you are able loan as opposed to a demand loan. And here, all the evidence is that this was a demand loan**.
>
> Since it was a demand loan, whether we run the Statute of Limitations from the making of the loan in 1988 or the demand for payment in 1990, it's clear that the Statute of Limitations ran a good eight to 10 years ago.
>
> And that being the case there cannot be recovery had on the loan at this point. So, if that's the truth, I would have to enter a judgment dismissing the complaint based on the affirmative defense of the Statute of Limitations.
>
> [Ibid. (emphasis added).]

On appeal, the Appellate Division affirmed the trial court's finding that the plaintiffs' statement of "Get it back to us when you can" was insufficient to convert the loan to a "pay-when-able" loan. Ibid. Importantly, the trial court even found the plaintiff's testimony credible but still found that the plaintiff failed to meet his burden of proving that the loan in question was "pay-when-able." Id. at *3. "As we read the judge's opinion, he simply found, after weighing all of the testimony, that plaintiff had not met his burden of proof. In particular,

the judge concluded that in the absence of 'some clear indication' to the contrary, the loan was presumed to be a demand loan." Id. (citing Denville Amusement Co., 84 N.J. Super. at 169). Thus, the $15,000 loan was an ordinary demand loan subject to the six (6) year statute of limitation. Ibid.

Flynn and Guerin clearly do not support Plaintiff's arguments. First, the loans in those two cases were separate and distinct new loans, not continuations or modifications of existing prior loans. As stated above, since the alleged "Third Loan" is a continuation of the $50,000 and $330,000 loans, it is barred by the six (6) year statute of limitation because it was never modified by a signed writing. Second, unlike in Guerin, there is no signed written contract of a "Third Loan" or any written indication that the terms of the "Third Loan" were "pay-when-able." Third, and most importantly, Plaintiff has presented less proof than the plaintiff in Flynn, who failed to meet his burden of proof. The Flynn court found that the lender stating, "get it back to us when you can" was insufficient to convert the demand loan to a "pay-when-able" loan. Similarly, the only evidence that Plaintiff presented regarding the alleged "pay-when-able" terms of the alleged "Third Loan" is his own self-serving testimony. There was no written evidence that the alleged "Third Loan" was pay-when-able. Unlike in Flynn, Plaintiff has not presented any evidence of written follow-up for the subsequent seven (7) years after the "Third Loan" was allegedly agreed upon.

Notably, the defendant in Flynn acknowledged there was in fact a loan but disputed the alleged "pay-when-able" terms. Conversely, Defendants dispute both the existence of the alleged "Third Loan" – and have documents to further dispute its existence, including the signed Discharge of Mortgage stating the loan was "Paid in Full" – and also dispute the alleged "pay-when-able" term in the non-existent "Third Loan."

Plaintiff's reliance on the August 7, 2013 e-mail and audio recording are insufficient evidence to constitute a "clear indication" that the alleged "Third Loan" was "pay-when-able." The August 7, 2013 e-mail does not reference anything related to a "pay-when-able" term to the alleged "Third Loan." At best, and giving every benefit of the doubt to Plaintiff, that August 7, 2013 e-mail would constitute just an acknowledgment of a "Third Loan," which would make it a demand note subject to a long-expired six (6) year statute of limitation. Moreover, the audio recording does not: (i) identify any specific amount; (ii) reference the alleged "Third Loan" in any way; or (iii) contain any indication that the alleged "Third Loan" was a "pay-when-able" loan.

Thus, even if the Court accepts that "pay-when-able loans" are viable in New Jersey, that Karvellas was credible like the plaintiff in Flynn, and that there was an agreement to pay back allegedly unpaid amounts on April 26, 2013, Plaintiff has still failed to meet his burden that there was a meeting of the minds

or a "clear indication" that the alleged "Third Loan" was a "pay-when-able" loan. See Newfield Fire Co. No. 1 v. Borough of Newfield, 439 N.J. Super. 202, 214 (App. Div. 2015)(A "contract requires a meeting of the minds and mutual assent."); Flynn, at *3 (citing Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App.Div.1997)). There is simply no evidence to support Plaintiff's claims that Sweeney agreed that there was a "Third Loan" or the expressed intent to pay back Plaintiff "when he was able." Plaintiff is in effect requesting that this Court create new case law on "pay-when-able" loans on facts less persuasive than the facts in the unpublished case Flynn, the only Appellate Division case that cites this concept.

Accordingly, while Defendants emphatically dispute the existence of a "Third Loan" of any type, at most the "Third Loan" is a demand loan because there is no evidence to support Plaintiff's claim the "Third Loan" was a "pay-when-able loan." Plaintiff has failed to meet his burden proving that the alleged "Third Loan" was a "pay-when-able" loan, which was the only possible scenario in which his claims would not be dismissed on statute of limitations grounds. As a result, since Plaintiff has failed to meet his burden that the alleged "Third Loan" was a "pay-when-able" loan, at best the "Third Loan" is a demand loan on which the six year statute of limitations has long expired. Thus, the Court should dismiss Plaintiff's Complaint with prejudice.

C. The Court Overlooked The Fact That The Discharge Of Mortgage Signed By Karvellas Stated That It Was "Paid In Full" (Da1-69)

The trial court's Opinion overlooked the fact that the Discharge of Mortgage signed by Karvellas stated that it was "**Paid in Full**" thereby confirming that Sweeney's $330,000 payment in April 2013 was in full and final satisfaction of the $330,000 Loan. The trial court improperly focused on whether the mortgage could be discharged without the $330,000 Loan being satisfied and overlooked Karvellas' own express acknowledgement that the $330,000 Loan was "**Paid in Full**."

LeRegazzi executed a Guarantee and that guarantee was secured by the mortgage. The Discharge of Mortgage, which Karvellas does not contest signing, states, "This Mortgage was made to secure payment of $330,000 and interest," and that "This Mortgage has been **PAID IN FULL** or otherwise **SATISFIED** and **DISCHARGED**."

By signing the Discharge of Mortgage, Karvellas was acknowledging and agreeing that the $330,000 Loan was "paid in full or otherwise satisfied." Although the trial court found that under the promissory note "Karvellas could discharge any collateral without affecting, canceling, or discharging the underlying debt owed by Sweeney," the trial court failed to address that the Discharge of Mortgage did not simply discharge the mortgage tied to the $330,000 promissory note. Instead, the Discharge of Mortgage explicitly stated

that the obligations secured by the Mortgage – i.e., $330,000.00 and interest – had been fully paid and satisfied. The trial court failed to offer any reason why this portion of the Discharge of Mortgage was ignored and not considered. This portion of the Discharge of Mortgage is in direct conflict with Karvellas' testimony that there were outstanding amounts under the $330,000 loan. Karvellas – an experienced businessman and lender – would not have signed such document if there were outstanding amounts. This Discharge of Mortgage clearly contradicts Karvellas' story that there was a Third Loan, an argument that the trial court failed to appreciate.

Moreover, the trial court's reasoning will cause significant practical problems as it would permit lenders to escape a clear discharge of mortgage and acknowledgment of full payment by simply arguing that the parties entered into a separate oral agreement, without any written documentation to support the existence of such oral arrangement. Allowing Plaintiff's claim to proceed in light of the signed Discharge of Mortgage and acknowledgment of full payment would lead to mortgage discharges having no effect whatsoever – a result foreclosed by law, including the parol evidence rule. Affirming the trial court's ruling would allow any party to concoct claims that despite signing a discharge of mortgage stating the loan was paid in full, there remained outstanding

amounts that were unpaid. A higher burden is necessitated to avoid such obvious but crippling practical problems.

Thus, based on Karvellas' admission that the $330,000 loan was paid in full, there can be no separate Third Loan. As a result, the Complaint should be dismissed against Defendants for failure to comply with the statute of limitations.

D. Defendants Are Not Equitably Estopped From Asserting a Statute of Limitations Defense (Da1-69)

The trial court also misapplied the law when it incorrectly held that Defendants were equitably estopped from asserting a statute of limitations defense. Plaintiff failed to offer any evidence that he was lulled into a false sense of security by Sweeney. The New Jersey Supreme Court has held:

> The requirements of equitable estoppel are quite exacting. We have defined equitable estoppel as
>
> > the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed ... as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse....
>
> In contract actions, equitable estoppel has been used to prevent a defendant from asserting the statute of limitations when the defendant engages in conduct that is calculated to mislead the plaintiff into believing that it is unnecessary to seek civil redress. Thus, we have recognized that equitable estoppel may be appropriate where "a defendant has lulled a plaintiff into a false sense of security by representing that a claim will be amicably settled without the necessity for litigation."

[W.V. Pangborne & Co. v. New Jersey Dep't of Transp., 116 N.J. 543, 553–54 (1989)(citations omitted).]

"Likewise, estoppel may arise if a defendant wrongfully conceals or withholds information which it has a duty to provide to the plaintiff, thus causing the plaintiff to miss a filing deadline. However, a plaintiff must act with reasonable diligence once it obtains the information necessary to file its action and cannot invoke equitable tolling if it has the information in sufficient time to comply with the limitations period[.]" Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 171–72 (App. Div. 2007)(citation omitted).

In the instant matter, Plaintiff failed to provide any evidence that Sweeney made affirmative representations to lull Plaintiff into a false sense of security. Instead, the only evidence presented by Plaintiff was Plaintiff's own testimony (that lacked any specificity whatsoever) that Sweeney told him on various occasions over several years that he was unable to pay. During the time period of April 2013 to October 2019, Plaintiff did not provide any evidence that Sweeney represented to him that Plaintiff would be paid soon thereby obviating the need for filing lawsuit. Based on Sweeney's alleged representations that he was unable to pay, Plaintiff still had the ability to file suit and seek recovery of the loan through a judgment collection process. The only meeting that Plaintiff testified to with any specificity was a dinner in 2016. But Plaintiff still had three

(3) years left on the statute of limitations to file suit after that meeting. See Trinity Church, 394 N.J. Super. at 171–72.

Even giving Plaintiff's testimony every benefit of the doubt, there was no indication that Sweeney would repay the alleged Third Loan until the October 2019 audio recording, which was already past the six (6) year statute of limitations on the April 2013 demand loan. Under the trial court's flawed reasoning, the statute of limitations would be tolled on every unpaid debt simply because the debtor stated he was unable to pay. Such limited evidence is insufficient to meet the "exacting" standard of equitable estoppel. W.V. Pangborne, 116 N.J. at 553. Thus, there is no basis to equitably estop Defendants from asserting a statute of limitations defense.

POINT IV

PLAINTIFF FAILED TO PROVE HIS CLAIMS FOR BREACH OF CONTRACT AND UNJUST ENRICHMENT (Da1-69)

If Plaintiff's claims are somehow not time-barred, the Court should still dismiss Plaintiff's claims because he has not proven his claims by a preponderance of the evidence. Plaintiff has not provided any evidence of any kind to support the existence of this alleged "Third Loan." In fact, Plaintiff even executed a Discharge of Mortgage, which unequivocally stated all amounts were "**Paid in Full**." Moreover, despite claiming that he entered into a loan with

Sweeney in April 2013, with yearly interest, Karvellas has been silent and did not make a single written demand or communication to Sweeney, whether through letter, e-mail, or text, requesting payment of the alleged "Third Loan." Now, over ten (10) years later, Plaintiff claims he is owed hundreds of thousands of dollars with no documents to support that claim. Thus, the Court must dismiss Plaintiff's Complaint with prejudice because Plaintiff failed to prove his claims of breach of contract and unjust enrichment.

A. The Court Must Dismiss Count I Of Plaintiff's Complaint Because Defendants Did Not Breach Any Alleged Contract (Da1-69)

In Count I of Plaintiff's Complaint, Plaintiff alleges a cause of action for breach of contract claiming Defendants breached the alleged "Third Loan." "To prevail on a breach of contract claim, a party must prove a valid contract between the parties, the opposing party's failure to perform a defined obligation under the contract, and the breach caused the claimant to sustained damages." EnviroFinance Grp., LLC v. Envtl. Barrier Co., LLC, 440 N.J. Super. 325, 345 (App. Div. 2015). A "contract requires a meeting of the minds and mutual assent." Newfield Fire Co., 439 N.J. Super. at 214. The testimony and evidence establish that the alleged "Third Loan" does not exist.

First, it is undisputed that on April 26, 2013, Sweeney made a single lump-sum payment of $330,000 to Karvellas. It is also undisputed that on April 26, 2013, Karvellas signed a **Discharge of Mortgage** certifying that the $330,000

Loan had been **"Paid in Full."** Thus, Karvellas signed the Discharge of Mortgage, thereby admitting that the $330,000 Loan was "**Paid in Full**." Importantly, Karvellas does not dispute the authenticity of the Discharge of Mortgage. Karvellas' self-serving testimony regarding the "Third Loan" is completely contradicted by the fact he signed the Discharge of Mortgage and was then silent on the matter for seven (7) years. Allowing Plaintiff's claim to proceed in light of the signed Discharge of Mortgage would lead to the absurd result that written mortgage discharges have no binding effect. Affirming the trial court's ruling would allow self-serving testimony regarding alleged oral agreements to displace written mortgage discharges. This would allow any party to concoct outlandish claims that despite signing a discharge of mortgage stating the loan was paid in full, there remained outstanding amounts that were unpaid. This Court cannot permit such absurd result.

Second, it is undisputed there is no document memorializing any alleged "Third Loan" or agreement in April 2013, a fact which Plaintiff admits. This conforms with Defendants' contentions that after the $330,000 payment on April 26, 2013, the $330,000 Loan was paid in full. As of that date, there were no outstanding amounts, whether principal, interest, or penalties. There is no document memorializing any alleged "Third Loan" because there never was a "Third Loan." The alleged August 7, 2013 e-mail is vague and inconclusive,

and does not constitute an agreement of a "Third Loan." That e-mail: (i) does not reference the alleged terms of the "Third Loan", such as the interest; (ii) identifies a different amount than what Karvellas testified as the outstanding amount at the time of the signing of the Discharge of Mortgage; and (iii) does not make any indication of a "pay-when-able" loan.

Third, it is undisputed that until Karvellas' attorneys sent Sweeney a letter on February 20, 2020, Karvellas did not make any written demand to Sweeney regarding payment on the alleged "Third Loan." This fact supports Defendants' contention that there was no "Third Loan." Indeed, Karvellas' failure to seek payment on the alleged "Third Loan" for over seven (7) years fatally undermines his claims that the "Third Loan" even existed.

Fourth, the $330,000 Promissory Note required any alterations or modifications be reduced to a writing signed by the parties. It is undisputed that there were no mutually executed writings altering the terms of the $330,000 Promissory Note, a fact which Karvellas admitted. Thus, if the terms of the $330,000 Promissory Note were modified, i.e., through the alleged "Third Loan," such modification was required to be memorialized through a writing. However, it is undisputed that there is no writing modifying the terms of the $330,000 Promissory Note. Lastly, the long after-the-fact audio recording does not support the existence of a "Third Loan" because the audio recording does

not identify the alleged amount or terms (including the alleged "pay-when-able" term) of the "Third Loan."

Thus, all these facts unequivocally demonstrate that the alleged oral "Third Loan" is a complete fabrication without any supporting evidence. Accordingly, Defendants have not breached the alleged "Third Loan" because there was no agreement to breach. Thus, the Court should dismiss Count I of Plaintiff's Complaint with prejudice.

B. The Court Should Dismiss Count II Of Plaintiff's Complaint Because Defendants Were Not Unjustly Enriched (Da1-69)

In Count II of Plaintiff's Complaint, Plaintiff alleges a cause of action for unjust enrichment against Defendants by claiming Defendants have been unjustly enriched as a result of allegedly failing to pay the alleged "Third Loan." "To establish unjust enrichment, a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust. The unjust enrichment doctrine requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994). The Court must dismiss Count II because Defendants have not been unjustly enriched since there was no "Third Loan."

As articulated above, the alleged "Third Loan" is a complete fabrication with no evidentiary support. First, it is undisputed that Karvellas signed a **Discharge of Mortgage** certifying that the $330,000 Loan had been "**Paid in Full**." Karvellas admits that he signed the Discharge of Mortgage and does not dispute the authenticity of the Discharge of Mortgage. Second, it is undisputed there is no document memorializing any alleged "Third Loan" or agreement in April 2013, a fact which Karvellas admits. The August 7, 2013 e-mail is insufficient to constitute a written acknowledgement of a "Third Loan" for the reasons previously stated. Third, it is undisputed that until Karvellas' attorneys sent Sweeney a letter seven years later on February 20, 2020, Karvellas did not make any written demand to Sweeney of any kind whatsoever regarding payment on the alleged "Third Loan." Karvellas' failure to seek payment on the alleged "Third Loan" for over seven (7) years demonstrates that the alleged "Third Loan" never existed.

All the evidence together leads to the unavoidable resolution that the alleged "Third Loan" was never entered into between Karvellas and Sweeney. Since the alleged "Third Loan" did not occur, Defendants did not retain any benefit at the expense of Plaintiff, and Defendants were thus not unjustly enriched. Thus, the Court must dismiss Count II of Plaintiff's Complaint.

POINT V

LIABILITY WAS IMPROPERLY IMPOSED AGAINST LEREGAZZI BECAUSE LEREGAZZI DID NOT EXECUTE ANY WRITTEN GUARANTEE (Da1-69; Da84-98)

A. Liability Was Improperly Imposed Against LeRegazzi In Violation Of The Statute Of Frauds (Da1-69; Da84-98)

The trial court's Judgment imposed liability against Sweeney and LeRegazzi, jointly and severally. The Court found that Sweeney and Karvellas entered into a new Third Loan and that LeRegazzi would guarantee the new Third Loan. Da21.

However, the trial court improperly imposed liability against LeRegazzi on the basis of the alleged guarantee because the guarantee was not in writing, in clear violation of the statute of frauds. Specifically, N.J.S.A. 25:1-15 states, "A promise to be liable for the obligation of another person, in order to be enforceable, shall be in a writing signed by the person assuming the liability or by that person's agent. The consideration for the promise need not be stated in the writing." It is undisputed that there was no signed writing memorializing LeRegazzi's alleged guarantee.

Under the Statute of Frauds, a promise to answer for the debt of another must be in writing; however, courts have held that if the promise is an original one, rather than a collateral undertaking, it need not be in writing and that the ultimate test is "to whom was credit in fact given." Federal Wine and Liquor

Company v. Jabberwock Country Club, 120 N.J.L. 331, 332, (E. & A. 1938). Here, under the alleged new Third Loan, the credit was given to Sweeney, not LeRegazzi. There was no promise or contract between Karvellas and LeRegazzi. Thus, LeRegazzi's promise was a collateral undertaking that was required to be in writing.

Moreover, the guarantee executed by LeRegazzi for the $330,000 Loan cannot be extended to include the alleged new Third Loan. See Peoples Nat'l Bank v. Fowler, 73 N.J. 88, 101 (1977) ("It has long been settled law that a [guaranty] is chargeable only according to the strict terms of its undertaking and its obligation cannot and should not be extended either by implication or by construction beyond the confines of its contract."). That guarantee was limited to the $330,000 Loan between Sweeney and the Steven J. Karvellas Retirement Plan. Under the Trial Court Opinion, the alleged new Third Loan was a separate and distinct loan from the $50,00 Loan and $330,000 Loan that comprised of amounts from those two (2) loans. Thus, the guarantee signed by LeRegazzi cannot be extended to a new loan. Although the guarantee states that it "shall expire upon the repayment of the Obligations" under the promissory note, Karvellas is not seeking to enforce the $330,000 Loan. He instead filed claims to enforce the alleged new Third Loan. Karvellas cannot on one hand, argue that the new Third Loan replaced the $330,000 Loan and $50,000 Loan, but then on

the other hand, seek to enforce the guarantee on the original $330,000 Loan. Such contradictory positions cannot be adopted by the Court.

Accordingly, LeRegazzi's alleged guarantee of the alleged new "Third Loan" is null and void because it failed to comply with the written requirements of the Statute of Frauds. N.J.S.A. 25:1-15. Thus, if the Judgment is not reversed for the reasons stated above, at a minimum, the Judgment should be amended to dismiss LeRegazzi from this matter with prejudice and no liability should be imposed against it.

B. Defendants Did Not Waive Their Statute of Frauds Defense (Da1-69; Da84-98)

Defendants raised their Statue of Frauds defense in their Answer to Plaintiff's Complaint. Moreover, it has been Defendants' defense throughout this entire matter that the alleged Third Loan never existed and that there are no signed writings (let alone any writings at all) memorializing the alleged Third Loan. Defendants' defense has been consistent throughout this matter and Plaintiff has been aware of Defendants' defense since the beginning. Importantly, in order to impose liability on LeRegazzi, it was Plaintiff's burden to establish there was a written guarantee, which he failed to prove.

At the trial court level, Plaintiff failed to offer any argument as to how their discovery or trial strategy was affected. Plaintiff's entire strategy was proving the existence of the alleged Third Loan. Karvellas testified to the terms

of the alleged Third Loan and the alleged LeRegazzi guarantee of the Third Loan. His testimony would not have changed. It is undisputed that there are no signed writings memorializing the alleged guarantee or even mentioning the guarantee because if there were such writings, Plaintiff would have presented them at trial since they would have undoubtedly supported their claim of a Third Loan. There is no additional discovery or evidence that would have been presented. Thus, Defendants did not waive their statute of frauds defense and Plaintiff has not been prejudiced by Defendants raising this argument in their motion for reconsideration.

C. The "Leading Object" Exception Does Not Bar Defendants' Statute of Frauds Defense (Da1-69; Da84-98)

At the trial court level, Plaintiff incorrectly argued that Defendants' Statute of Fraud defense fails under the "leading object" exception. This exception has been described as follows:

> When the leading object of the promise or agreement is to become guarantor or surety to the promisee for a debt for which a third party is and continues to be primarily liable, the agreement, whether made before or after or at the time with the promise of the principal, is within the statute, and not binding unless evidenced by writing. On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute. (2 Corbin on Contracts s 366, at 273—74 (1950)).
>
> [Howard M. Schoor Assocs., Inc. v. Holmdel Heights Const. Co., 68 N.J. 95, 102 (1975).]

"Whether or not the Statute of Frauds will apply is then to depend upon whether this consideration was Mainly desired for the promisor's benefit or for the benefit of the original debtor." Id. at 105. Plaintiff's reliance on the facts of Schoor is misplaced because the facts of Schoor differ substantially from the facts of the instant matter.

In Schoor, the plaintiffs were two engineering and surveying firms who performed professional services for the defendant construction company on a tract of land upon which it was constructing homes. Id. at 97-99. The individual defendant was an attorney and a stockholder in the defendant construction company. Ibid. After the defendant construction company failed to pay all of the plaintiffs' bills, the individual defendant personally agreed to pay all outstanding bills. Ibid. The Schoor court found that the individual defendant's promise was not within the Statute of Frauds under the "leading object" exception because the individual defendant guaranteed payment so that the plaintiffs would keep working on the development that he had an interest in as a stockholder of the defendant construction company. Id. at 100-101. The individual defendant also induced the plaintiffs to continue their work by leading them to believe he was pledging his personal finances for payment of past and future debt of the defendant construction company. Id. Thus, the promise to pay for the defendant construction company's debts was for the individual

defendant's personal benefit because if the project were successful (which required the plaintiffs' services), the individual defendant would receive a substantial amount of money, including as a stockholder of the defendant construction company and through payment of his own legal bills by the company. Id. at 105-106.

The facts of Schoor are inapposite to the facts of the alleged Third Loan. The leading object of the alleged LeRegazzi guarantee was to guarantee personal loans made by Sweeney. In fact, the guarantee was as to monies already loaned to Sweeney and that remained unpaid. The main purpose of the guarantee was to benefit Sweeney not LeRegazzi. Unlike in Schoor, LeRegazzi was not receiving any financial benefit in guaranteeing the alleged Third Loan. It is clear that the unwritten LeRegazzi guarantee was a collateral undertaking and not an oral promise for its own pecuniary benefit.

Thus, LeRegazzi's alleged guarantee of the alleged new "Third Loan" is null and void because it failed to comply with the written requirements of the Statute of Frauds, N.J.S.A. 25:1-15. As a result, if the Judgment is not reversed for the reasons stated above, at a minimum, the Judgment should be amended to dismiss LeRegazzi from this matter with prejudice and no liability should be imposed against it.

POINT VI

THE COURT IMPROPERLY AWARDED CONTRACT RATE POST-JUDGMENT INTEREST INSTEAD OF THE POST-JUDGMENT INTEREST RATE SPECIFIED IN R. 4:42-11(a) (Da1-69; Da84-98)

The trial court awarded plaintiff "post-judgment interest at the parties' contract rate of 10% simple interest per annum, which interest shall begin to accrue starting August 31, 2023." However, the Court improperly awarded post-judgment interest "at the parties' contract rate of 10% simple interest per annum" instead of the post-judgment interest rate specified in R. 4:42-11(a).

Pursuant to R. 4:42-11, the rate of interest on New Jersey judgments exceeding the $15,000 monetary limit of the Special Civil Part is 2.25% for 2023. The Appellate Division has made it clear that "absent an **extraordinary and equitable** reason," post-judgment interest must be calculated at the post-judgment interest rate specified in R. 4:42-11(a). Marko v. Zurich North America Insurance Company, 386 N.J. Super. 527, 532 (App. Div. 2006) (emphasis added). Consequently, only in very special cases have New Jersey courts permitted the assessment of post-judgment interest at the contract rate of interest rather than the governing rate provided under R. 4:42-11. See R. Jennings Mft. v. Northern Elec., 286 N.J. Super. 413, 418 (App. Div. 1995). Notably in R. Jennings, the Appellate Division recognized "the right of

the trial judge [per] R. 4:42-11(a) to set a post-judgment interest figure at a different rate from that provided in the rule "only if the trial court finds '**particular equitable reasons** for doing so.'" (emphasis added).

The Appellate Division's holdings in R. Jennings Mft. are directly on point and demonstrate the trial court erred in awarding contract-rate post-judgment interest. In R. Jennings Mft., the Court dealt with the identical issue at hand: "Both the appeal and the cross appeal raise the same question: what post-judgment interest rate is to be applied where a rate of interest greater than that set forth in the Court Rules is provided for in the contract between the parties" given the applicability of R. 4:42–11(a) as to pre-judgment and post-judgment interest. R. Jennings Mft., 286 N.J. Super. at 416. The Appellate Division in R. Jennings only dealt with the narrow issue of the interest rate to be applied to the judgment." Id. at 414. In R. Jennings, the judgment debtor "argued that once a judgment is obtained, only the amount of interest specified in R. 4:42–11 applies." Id. The judgment creditors argued that "when contracting parties agree that specific interest is to be paid on detention of a debt, it becomes part of the bargain and is recoverable, with principal, as of right up to the time of payment, even if a judgment is rendered." Id. at 416-417.

The Appellate Division denied the judgment creditor's demand for contract interest post-judgment in reasoning and holding as follows:

In support of this proposition, Jennings cites Estate of Kolker, 212 N.J. Super. 427 (Law Div.1986) and Shadow Lawn Sav. & Loan Ass'n v. Palmarozza, 190 N.J. Super. 314 (App.Div.1983). However, neither of these decisions is helpful to Jennings' position.

The court in Kolker was confronted with the question of which interest rate was applicable to each of the three classes of creditors. The claims, as identified by the trial judge were "(A) those by creditors with judgments; (B) those by creditors whose claims include interest created by contract; (C) all other claims." Id.; 212 N.J. Super. at 438. According to the judge, a judgment creditor would only be entitled to interest in accordance with R. 4:42–11(a), whereas a contract creditor would be entitled to interest in accordance with the terms of the underlying contract. Id. at 438–39. The problem with Jennings' reading of Kolker is that it fails to distinguish between a contract creditor with a judgment and one without a judgment. The former is not a contract creditor at all but a judgment creditor subject to the rule. The reason for this is that a judgment extinguishes the original cause of action and makes available a new cause of action on the judgment, which constitutes a higher form of security. . . . This is the basis for the disparate interest rates applied by the cases to contract claims prior to, and after, judgment. In Shadow Lawn, supra, 190 N.J. Super. at 318, for example, the court held that in a mortgage default case, interest should be calculated as follows:

The total unpaid principal and accrued interest should be determined as of the date the mortgage was declared in default and the full debt accelerated. From that date **until the date of entry of judgment**, interest will run at the contract rate of 9½% per annum on the full unpaid principal and interest due as of the date of the mortgage was declared in default. **After entry of judgment** interest will run **at the legal rate "except as otherwise ordered by the court and except as may be otherwise provided by law." R. 4:42–11(a);** see Hudson City Sav. Bank v. Hampton Gardens, Ltd., 88 N.J. 16, 22 (1981).

Likewise in Mid–Jersey Nat'l Bank v. Fidelity–Mortgage Investors, 518 F.2d 640 (3rd. Cir.1975), **in an action by a bank to recover amounts due under a note, the court applied the contract rate of interest up to the time of judgment and the rate specified in**

> **the Court Rules thereafter. We think this is a rational approach to the issue and adopt it here**. (emphasis added).

Based on the case law identified above, there is no basis to award post-judgment interest at a rate greater than the Court Rules' post-judgment interest rate. Plaintiff failed to provide any argument that there are extraordinary and equitable reasons warranting an award of contract-rate post-judgment interest.

From the evidence presented at trial and the factual findings made by the Court, there are no extraordinary or equitable reasons justifying an award of contract-rate post-judgment interest in a simple breach of loan case. Defendants raised this issue through a post-trial motion for reconsideration, which was denied by the trial court. The trial court based its decision as to post-judgment interest on the grounds that: (i) Sweeney failed to repay the alleged Third Loan; (ii) it may take years for Plaintiff to collect on his judgment and he should therefore obtain contract-rate post-judgment interest during that time period; and (iii) Sweeney lacked credibility. Such factors do not rise to the level of extraordinary and equitable reasons to award post-judgment interest above what R. 4:42–11 provides. Factors (i) and (ii) are found in every breach of loan case, and factor (iii) is found in almost every breach of loan case. The potential that a judgment could go unpaid for years is entirely speculative and applies to all judgments. If these factors are sufficient to constitute extraordinary and

equitable reasons, then contract-rate post-judgment interest would be imposed in all breach of loan cases, thereby negating R. 4:42–11.

Lastly, it is a faulty premise to argue that Sweeney has allegedly had the benefit of the balance from the alleged Third Loan since 2013. The alleged Third Loan consisted of interest on interest and not any principal from the $330,000 Loan. Moreover, according to the Court's factual findings, the alleged Third Loan was a pay-when-able loan, and thus Sweeney's obligation to pay would not trigger until he was financially able to the pay the loan. The Court found that Sweeney was not able to pay the alleged "Third Loan" until October 2019. Da28-29. Accordingly, under the trial court's reasoning, Sweeney did not allegedly breach the Third Loan until October 2019 and thus it cannot be argued that he had the benefit of this loan balance prior to that date. The Court cannot find there are equitable reasons to award post-judgment interest based on Sweeney not paying the alleged "Third Loan" since 2013 when it found he was not able to pay the loan back until October 2019. Under the Court's reasoning, Sweeney was under no obligation prior to October 2019 to pay the alleged "Third Loan" back because he was not able to repay the loan prior to that date. Sweeney was not in breach prior to October 2019. If the Court is penalizing Sweeney for not paying the alleged "Third Loan" since April 2013, then the statute of limitations should run from April 2013, because under that reasoning,

the alleged "Third Loan" was either: (i) a demand loan with a six (6) year statute of limitation period; or (ii) it was a pay-when-able loan and the statute of limitations period began in April 2013 because Sweeney had the ability to pay the loan at the time it was made.

Thus, there are no extraordinary or equitable reasons warranting an award of post-judgment interest at a rate greater than the Court Rules' post-judgment interest rate.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court reverse the trial court's judgment in its entirety.

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STEVEN J. KARVELLAS Plaintiff-Respondent, v. STEPHEN E. SWEENEY and LeREGAZZI, L.L.C., Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000723-23 SUPERIOR COURT OF NEW JERSEY LAW DIVISION DOCKET NO.: BER-L-2604-20 Civil Action SAT BELOW: Hon. Nicholas Ostuni, J.S.C. Trial: June 6, 7, 15, 2023 Defendants' Motion for Reconsideration: September 5, 2023

PLAINTIFF'S MEMORANDUM OF LAW IN OPPPOSITION TO DEFENDANTS' APPEAL FROM THE TRIAL COURT'S ORDER AND FINAL JUDGMENT, AND FROM THE TRIAL COURT'S DENIAL OF DEFENDANTS' MOTION FOR RECONSIDERATION

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FILED, Clerk of the Appellate Division, March 28, 2024, **A-000723-23**, **AMENDED**

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Plaintiff-Respondent Steven J. Karvellas ("Karvellas" or "Plaintiff"), by his counsel, Brown, Moskowitz & Kallen, P.C., respectfully submits this memorandum of law in opposition to the appeal brought by Defendants-Appellants Stephen E. Sweeney ("Sweeney") and LeRegazzi, L.L.C. ("LeRegazzi") (collectively, "Defendants") from (i) the trial court's September 5, 2023 Order and Final Judgment ("Final Judgment"), and (ii) the trial court's denial of Defendants' motion for reconsideration ("October 2023 Order"). For the reasons set forth below, Plaintiff respectfully requests that the trial court's Final Judgment and October 2023 Order be affirmed in their entirety.

PRELIMINARY STATEMENT

Following a nonjury trial conducted by the court on June 6, 7, and 15, 2023, the Hon. Nicholas Ostuni, J.S.C. issued a 63-page Opinion After Trial By the Court on August 30, 2023 ("Opinion"). The trial court made detailed findings of fact and conclusions of law, awarding Final Judgment in favor of Plaintiff in the principal sum of $274,260.64. Plaintiff prevailed on his claim that Defendants breached their express agreement to repay Karvellas the sum of $134,759.74, including interest at the rate of 10% per annum, due and owing under the parties' April 26, 2013 pay-when-able loan. Following the parties' April 2013 loan agreement, Sweeney first indicated in October of 2019 that he would be able to repay the loan by the end of 2019 with his realization of the

proceeds from an unrelated transaction. As a matter of law, the limitations period of the pay-when-able loan did not begin to run until that time, at the earliest. Plaintiff's filing of this action on May 1, 2020 -- just seven months later -- was well within the six-year limitations period.

In the face of the record proofs, including Sweeney's own admissions and the trial court's categorical findings, Defendants now urge, among other things, that no loan agreement was ever made and that New Jersey does not recognize pay-when-able loans. To the contrary, the trial court based its meticulous findings of fact on overwhelming testimonial and documentary evidence -- including Defendants' own admissions confirming the fact of the loan and its terms.

The trial court also rejected Defendants' argument that New Jersey law does not recognize pay-when-able loans on the basis of not only the court's sound legal analysis of relevant case law, but also on the basis of Sweeney's own admission that a prior loan between the parties was pay-when-able. Defendants cannot have it both ways: they cannot admit, on the one hand, that a prior loan between the parties was governed by the term of pay-when-able, then argue the opposite when expedient.

Defendants' arguments on appeal are without merit. The trial court's findings of fact and conclusions of law should be affirmed.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

In addition to the Procedural History set forth by Defendants, Plaintiff includes the following relevant history:

On September 23, 2020, Defendants filed a motion to dismiss the Complaint alleging that Plaintiff's claims were time-barred by the six-year statute of limitations provided by N.J.S.A. 2A:14-1. In opposition, Plaintiff established that, on April 26, 2013, the parties entered into a "pay-when-able" loan, cognizable under New Jersey law, and that the limitations period did not begin to run until late 2019 when Karvellas first became aware that Sweeney would soon be able to pay the loan. On November 13, 2020, the Hon. Robert L. Polifroni, P.J.Ch., denied Defendants' motion without prejudice. Da1.[1]

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[1] Pursuant to R. 2:6-8, and consistent with Appellants' defined abbreviations, abbreviations used herein are as follows:
"Da" refers to the Appendix filed by Defendants.
"Db" refers to Defendants' brief in support of their appeal.
"1T" refers to Volume 1 of the June 6, 2023 trial transcript.
"2T" refers to Volume 2 of the June 6, 2023 trial transcript.
"3T" refers to Volume 1 of the June 7, 2023 trial transcript.
"4T" refers to Volume 2 of the June 7, 2023 trial transcript.
"5T" refers to the June 15, 2023 trial transcript.
"6T" refers to the September 5, 2023 transcript of the hearing on Defendants' post-judgment motion for reconsideration.
"Ex. P[#]" refers to documentary evidence introduced by Plaintiff at trial.
"Ex. D[#]" refers to documentary evidence introduced by Defendants at trial.

On January 22, 2021, the court then denied Defendants' motion for reconsideration of its prior Order. Da71-72. Judge Polifroni rejected Defendants' arguments again, opining that the New Jersey Appellate Division, in Denville Amusement Co. v. Fogelson, 84 N.J. Super. 164, 169 (App. Div. 1964), did not hold that pay-when-able loans are not enforceable. Da81.

On June 22, 2021, Defendants moved for summary judgment on the same bases as their prior dispositive motions. The Hon. John. D. O'Dwyer, P.J.Cv., denied that motion and permitted the matter to proceed to trial. Da83.

After a three-day nonjury trial before the Hon. Nicholas Ostuni, J.S.C., the court entered a Final Order and Judgment in favor Plaintiff. The trial court held, among other things, that (i) pay-when-able loans are enforceable under New Jersey law; (ii) Plaintiff's claims were not barred by N.J.S.A. 2A:14-1; (iii) Sweeney breached the parties' April 26, 2013 pay-when-able loan agreement; and (iv) Plaintiff had not discharged Defendants' prior loan obligation by signing a Discharge of Mortgage which, in fact, served only to discharge the collateral (i.e., the real property encumbered by the mortgage) that secured LeRegazzi's guarantee of that prior loan. Da1-66.

The trial court also found overwhelmingly that Sweeney was not a

credible witness.[2] The trial court awarded Plaintiff the sum of $274,260.64, plus post-judgment interest at the rate of 10% per annum in accordance with the terms of the parties' loan agreement. Da62-63, 68.

On September 20, 2023, Defendants sought reconsideration of the trial court's award of post-judgment interest at the contract rate of 10%, its finding that the discharge of mortgage was not a satisfaction of a prior loan, and its imposition of liability against LeRegazzi. The trial court denied Defendants' motion for reconsideration in its entirety, referencing its comprehensive Opinion. Da84-98. The trial court also opined that LeRegazzi, by failing to raise its purported statute of frauds defense until after trial, waived the defense. Da91-94. On the issue of the rate of post-judgment interest, the trial court emphasized that the equities mandated the imposition of the contract rate of interest. Da96.

[2] See Da10-11, n.4; Da14, n.7 ("this Court finds that Sweeney was not a credible witness"); Da15, n.8 (finding Sweeney's testimony "convenient, and what Sweeney believed would serve him best during [] trial"); Da22-23, n.12 (describing Sweeney's testimony as "nonsensical"); Da24, n. 14; Da24-25, n. 15 (describing Sweeney's testimony as "not believable"); Da27, n. 17 (describing "defendant's demonstrated lack of credibility"); Da33, n. 22 ("the record does not support defendant's claims of honesty," and "[a]gain, this Court finds Sweeney's trial testimony . . . incredible"); Da36 ("this Court finds that Sweeney's story is without any factual basis. . . ."); Da32 (given the number of conflicting statements made by Sweeney, his "credibility [] crumble[d] in this Court's eyes"); Da34 (Sweeney "was prepared to alter his story, or fail to recall facts, whenever he deemed it advantageous"); Da22, n.11 (believing "Karvellas' credible testimony" over Sweeney's testimony).

Defendants' appeal followed. Da237.

COUNTER-STATEMENT OF FACTS

A. The Parties' Relationship And Karvellas' First Loan to Sweeney

As the trial court found, Karvellas and Sweeney enjoyed a close friendship which began in 2004. Da8-9; 1T50-6 to 52-13. In fact, Karvellas considered Sweeney to be one of his closest friends. Da9; 1T50-6 to 52-13.

In 2008, Sweeney told Karvellas that he was in urgent need of cash and, based on their friendship, asked Plaintiff to loan him money. Da9; 1T53-8 to 54-1. Sweeney explained to Karvellas that he had cash flow issues due, in part, to his involvement in certain land use litigation, and that he could not obtain elsewhere the capital he needed to continue his operations. Da9; Da199-202 (Ex. P15); Da203-15 (Ex. P16); 1T54-2 to 20, 93-18 to 94-13. Karvellas agreed to loan Sweeney the principal sum of $330,000, and Sweeney proposed and insisted on paying interest at the rate of ten percent (10%) per annum, based on the interest rate he was then paying to another private lender. Da10; Da162-63 (Ex. P1); Da181-82 (Ex. P8); Da189-93 (Ex. P12); Da203-15 (P16); 1T54-21 to 55-25; 2T293-1 to 4. Sweeney also offered that one of his companies, LeRegazzi, would guarantee repayment of the loan ("Guarantee") and, further, that the Guarantee would be secured by a mortgage ("Mortgage") on an office building owned by the Guarantor (LeRegazzi) located at 1000 Wyckoff Avenue,

Mahwah, New Jersey ("Property"). Da10; Da169-72 (Ex. P5); Da174-80 (Ex. P7); 1T55-25 to 56-2.

The parties documented the terms of the loan ("First Loan") by their execution of a Promissory Note ("Note"), the Guarantee, and the Mortgage. Da11; Da165-68 (Ex. P4); Da169-172 (Ex. P5); Da174-80 (Ex. P7); 1T71-8 to 14, 73-1 to 5. The trial court found that, by the categorical terms of the Note and the Mortgage, the Mortgage secured only LeRegazzi's Guarantee; the Mortgage did not secure Defendants' payment obligation. Da11; 1T78-6 to 11.

The trial court also expressly found that, among other rights, Karvellas reserved the right under the Note to release the Guarantee's collateral (i.e., the Mortgage) without affecting or impairing the Defendants' continuing repayment obligations on the First Loan. Da12-13; Da167 (P4). The Note also provided that, in addition to other relief to which he would be entitled in the event of default, Karvellas would be entitled to recover the costs and legal fees incurred in enforcing his rights under the Note and security agreements. Da13; Da167 (Ex. P4).[3]

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[3] Although the First Loan was initially made from Plaintiff's Retirement Plan (Da10; Da173 (Ex. P6)), upon the advice of his accountant, Karvellas later assigned the First Loan to himself, individually.

B. Karvellas' Second Loan To Sweeney

While the First Loan documents were being prepared, Sweeney explained to his friend, Karvellas, that he was "under extreme pressure" and had an urgent need to pay certain vendors working on the construction of his 30,000 square foot Saddle River "mansion." Da13; 1T57-5 to 18, 58-11 to 17, 65-9 to 13; 3T136-20 to 24, 190-1 to 10. Karvellas immediately responded to his friend's emergency plea by loaning Sweeney, from his personal checking account, the principal sum of $50,000 on or about June 25, 2008 ("Second Loan"). Da13-14; Da164 (Ex. P2); Da181-82 (P8); Da199-202 (P15); Da203-15 (P16); 1T58-2 to 5, 58-21 to 59-1, 63-25 to 65-4, 82-8 to 83:8; 4T243-14 to 21.

The trial court found that Sweeney offered and agreed to repay the Second Loan as soon as he was able, and at the same ten percent 10% per annum interest rate that would govern the First Loan. Da13-14; Da162-63 (Ex. P1); Da181-82 (Ex. P8); Da189-93 (Ex. P12); Da203-15 (Ex. P16); 1T64-7 to 65-4. In email correspondence that Sweeney transmitted to Karvellas on June 25, 2008, the day the Second Loan was made, Sweeney thanked his friend for his willingness to make what he described as a "patch" loan and for being a "lifesaver" for making the Second Loan. Da14; Da162-63 (Ex. P1); 1T64-7 to 65-4; 4T243-14 to 21. The trial court also found that email and documents drafted by Sweeney himself confirmed his agreement that the Second Loan always carried the 10% per

annum interest rate just as Sweeney first proposed and, as noted, the same interest rate that governed the First Loan. Da13-15 ("this Court finds both the first and second loans carried interest rates of ten percent (10%) per annum.").

Sweeney also agreed to pay the Second Loan, the "patch," as soon as he was able to do so. 1T147-21 to 23; 3T8-9 to 17, 9-13 to 18, 126-4 to 5, 136-25 to 137-3, 140-19 to 20, 4T243-3 to 13. The trial court found that "Sweeney traded on his close friendship with Karvellas to obtain the loans which he desperately needed and could not obtain elsewhere." Da15.

C. <u>Sweeney's Default On The First Loan.</u>

Sweeney defaulted on the installment payment obligations due under the First Loan almost immediately. Da15. While he made the first required installment payment of interest only that had become due on January 15, 2009, Sweeney failed to remit the second installment payment when due on February 15, 2009. Da15; Da181-82 (Ex. P8); Da223-29 (Ex. P21). Thereafter, he remitted only four additional, untimely interest payments. Da16; 1T87-8 to 13; 5T13-19 to 22; 5T18-23 to 19-2. Sweeney never cured his continuing default, failing to remit multiple interest-only installment payments when due, and then defaulting on his obligation to make a required balloon payment of all outstanding principal, interest and late penalties by the due date for the balloon payment, i.e., June 15, 2010. Da16; 1T97-1 to 17; Da181-82 (Ex. P8).

After Sweeney defaulted, he and Karvellas had numerous discussions concerning the default and the balance owed to Plaintiff. Da16; 1T87-14 to 88:10. Sweeney repeatedly explained that he continued to have cash flow issues and that he could not borrow from any bank or other party, and he begged Karvellas for his continued forbearance and for the opportunity to cure his default and get back on his financial feet. Da16; Da181-82 (Ex. P8); Da199-202 (P15); Da203-15 (P16). The trial court found that Karvellas, despite his clear contractual enforcement rights, continued to support his friend by agreeing to forebear from enforcing his rights under the First Loan. Da13-14.[4] The trial court found that Karvellas testified candidly that he decided to continue to "give [Sweeney] a break" during his "time of trouble" because he considered Sweeney to be "a brother," even though doing so clearly was not in Karvellas' own business interests. Da18; 1T125-12 to 17, 126-4 to 21.

It is undisputed that Defendants never paid Plaintiff the full amounts due under the First Loan, and never paid anything on the Second Loan. Da18; 1T141-3 to 142-9, 1T184-9 to 25; 5T69-7 to 9.

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[4] Although Sweeney settled the land use litigation that purportedly created or exacerbated his cash flow crunch, receiving $450,000, he did not use those funds to pay-off the First or Second Loans as he had committed to do in a correspondence dated September 22, 2009. Da17; 1T95-9 to 23, 96-22 to 25. The trial court found that Sweeney's promises were "nothing more than hollow promises he never intended to honor." Da18.

D. The Parties Entered Into A New Loan On April 26, 2013.

In April of 2013, Sweeney advised Karvellas that he had finally secured the refinancing necessary to move his business forward, and that the closing of that transaction was scheduled for April 26, 2013. Da18; 1T136-2 to 12. Sweeney informed his friend that, as a result of the refinancing transaction, he would finally be able to pay Karvellas in full all principal and interest due on the First and Second Loans. 1T136-13 to 19, 139-13 to 20, 140-1 to 13.

Several days before the scheduled closing of the refinancing transaction ("Closing"), the parties spoke and confirmed that the total amount owed to Karvellas by Defendants, including the principal sums and interest due on the First and Second Loans, was approximately $495,000. Da19; 1T137-1 to 3, 138-16 to 24, 139-24 to 140-2, 141-25 to 142-3, 144-1 to 6. More specifically, as of April 26, 2013, Sweeney owed Karvellas $419,935.94 on the First Loan, including the $330,000 outstanding principal, plus interest and penalties, and owed $75,000 on the Second Loan, including the $50,000 principal, plus the interest agreed-upon by the parties. Da19; Da216-19 (Ex. P17). The parties agreed that the total due was $494,935.94. Da19; Da216-19 (Ex. P17); 1T137-1 to 3, 138-16 to 24, 139-24 to 140-2, 141-25 to 142-3, 144-1 to 6; 5T32-10 to 18, 39-20 to 40-12, 40-21 to 41-9.

Sweeney directed Karvellas to appear at the April 26, 2013 Closing to pick up a check for the full payment. Da19; 1T140-23 to 24. However, during a private meeting before the Closing, Sweeney informed Karvellas for the first time that he would be able to pay on that day only $330,000, and that he would not be able to then pay the entire outstanding balance of both Loans ($494,935.94) as he had promised only days before. Da19; 1T140-25 to 141-24. Sweeney told Karvellas that he had "other obligations" and "needed the money [that was due to Karvellas] for other things." Da19; 1T142-4 to 12. The trial court found that Karvellas was "blindsided" by Sweeney's "twelfth hour" declaration. Da19, 45.

Sweeney tearfully begged Karvellas to accept the partial payment of $330,000, also explaining to Karvellas that his ability to close the refinancing transaction that day was dependent not only on Karvellas' acceptance of the partial payment that day, but also on Karvellas' agreement to discharge the Mortgage that secured LeRegazzi's Guarantee. Da19-20; 1T143-14 to 24, 144-7 to 17. At trial, Sweeney admitted that he pleaded with Karvellas, stating that if Karvellas were to exercise his rights under the Note, such action would hurt Sweeney, his business, and his family very badly. 4T209-5 to 9.

Again, in deference to the parties' friendship, Karvellas agreed to accept the partial payment of $330,000, and to discharge the Mortgage as part of the

restructuring of Defendants' debt. Da20; 1T144-10 to 24. Contrary to Defendants' arguments, Karvellas never agreed or acknowledged that he had been paid in full, and never agreed to accept the $330,000 partial payment as payment in full of the debts then owed to him on the First and Second Loans. 1T144-10 to 24.

Instead, on that day, Karvellas and Sweeney agreed to restructure the balance of Defendants' debt by entering into a new, negotiated loan agreement. Da20; 1T144-10 to 24, 147-1 to 4; 2T264-7 to 9. The fact of this new loan agreement was later corroborated in writing by Sweeney and his "Director of Accounting," Michael Cyran. Da20; Da223-29 (Ex. P21).[5] Karvellas also contemporaneously reported the fact of the new loan to his general manager, Joy Fowler. Da20; 5T44-5 to 14, 52-23 to 53-11.

Understanding that his "friend was [still] in trouble," Karvellas extended "even more forgiveness" in determining the principal sum of the new loan. Da20; 1T144-10 to 24, 146-10 to 16. Although, after accounting for the $330,00 partial payment, Defendants still owed Plaintiff the sum of approximately $165,000, Karvellas agreed to forgive approximately $30,000 of the outstanding debt. Da20; 1T146-10 to 22. Specifically, at the Closing, Karvellas agreed to

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[5] See Counter-Statement of Facts, Point E, below, setting forth the trial court's findings with respect to Defendants' admissions.

waive the repayment of the approximately $5,000 then due in late penalties under the First Loan, and to waive the $25,000 in interest that had accrued to that date on the Second Loan.[6] Da20; 1T146-10 to 22. Accordingly, as the trial court found, on April 26, 2013, the parties entered into a new, distinct loan in the principal sum of $134,759.74 ("Third Loan").[7] Da20-21; 1T146-23 to 25, 147-18 to 20; 5T53-4 to 11, 67-2 to 5.

Like the First and Second Loans, the parties agreed that 10% interest per annum would accrue on the Third Loan, that LeRegazzi would guarantee repayment of the Third Loan, and that Sweeney (just as the parties had agreed with respect to the Second Loan) would repay the Third Loan as soon as he was able to do so.[8] Da21; 1T147-13 to 17; 5T54-9 to 21. Because the Third Loan

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[6] Karvellas forgave these sums fully aware that he could have exercised all of his rights under the Note and the Guarantee including, without limitation, foreclosing on the Mortgage and insisting upon reimbursement for the attorneys' fees and other costs to be incurred in enforcing his rights. Plaintiff continued to forebear enforcing these rights only in deference only to his relationship with Sweeney. 1T148-13 to 22.

[7] It is also noteworthy that the trial court rejected Sweeney's incredible trial testimony that he was not in New Jersey on the date of the Closing, that one of his attorneys attended the Closing on Sweeney's behalf and, therefore, that Sweeney could not have entered into the Third Loan. Da22, n.11. Defendants offered no corroborating proof at trial. The trial court properly invoked the adverse inference rule on the basis of Defendants' conspicuous failure to call their attorney to testify at trial. Id.

[8] The trial court found that Sweeney's deposition testimony, i.e., that he still owed Karvellas $50,000 pursuant to the Second Loan made in 2008,

was "pay when able," Karvellas' team did not need to track monthly payments because none were due -- the loan was to be paid as soon as defendant was able to do so.[9] 5T54-9 to 21.

E. Sweeney's Confirmation Of The Third Loan.

Before leaving the Closing on April 26, 2013, Karvellas asked Sweeney to send him confirmation in writing of the amount of the Third Loan upon which the parties had just agreed. Da21-22; 1T152-4 to 13. Karvellas also repeated his request for that confirmation from Sweeney after the Closing. Da22; 1T152-14 to 19, 155-12 to 21.

In response to these requests, on August 7, 2013 at 9:48 a.m., Karvellas received an email from Sweeney which stated, "As requested." Da22; Da223-29 (Ex. P21); 1T167-21 to 168-19. Attached to the email was a schedule, reflecting the history of the First and Second Loans, and showing a balance due to Karvellas of $139,773.03 as of <u>April 30, 2013</u> -- <u>four days after the Closing</u>. ("Schedule"). Da22-23; Da223-29 (Ex. P21). The trial court found that the email and Schedule constituted Sweeney's admission of the Third Loan and of

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corroborated Karvellas' testimony that the Second Loan was a pay-when-able loan. Da28, n.18.

[9] The trial court noted that Fowler -- "an independent, unbiased, and credible witness" -- testified at trial that there was no need to continue to track the First and Second Loans because the parties entered into the new, Third Loan on April 26, 2013. Da21; 5T53-24 to 54-2.

the amount due and owing to Karvellas pursuant to the Third Loan as of April 30, 2013, based on Sweeney's own calculations. Da22-23. Again, the Schedule reflects the Defendants' admission of the fact of the Third Loan and its principal amount four days after April 26, 2013 -- the same date on which Defendants nonsensically argue that Plaintiff discharged their debt in the entirety.

As reflected on Defendants' Schedule, after accounting for the $330,000 partial payment made to Karvellas on April 26, 2013, the "Total Due" from Sweeney to Karvellas as of April 30, 2013, including $50,000 due on the "2nd Loan," was $139,773.03 (emphasis added).[10] Da23; Da223-29 (Ex. P21); 1T179-5 to 182-6. More specifically, the Schedule listed monthly interest payments that should have been paid on the First Loan, accounted for five interest payments that defendant made on the First Loan, accounted for the "2nd Loan," and included a section entitled "Payment Amt Due @ 4/30/13" -- all of which reflected Defendants' admission and their own calculation of the

[10] Fowler testified that, although there were slight discrepancies between Sweeney's figures on the Schedule, which were slightly higher than Karvellas' figures, Karvellas gave defendant the benefit of the lower amounts due, as the parties had agreed on April 26, 2013. Da23, n. 13; 1T62-25 to 64-19. The trial court found that the testimony of Karvellas and Fowler was credible, rejecting "the fabricated testimony of Sweeney," and concluding that "the parties agreed [that] the principal sum of the [T]hird [L]oan was $134,759.74." Da25.

outstanding amount due and owing to Plaintiff as of April 30, 2013.[11] Da22-23; Da223-29 (Ex. P21).

Accordingly, as reflected on the Schedule that Sweeney prepared and transmitted to Karvellas more than three months after the Closing, neither the First nor the Second Loan had been satisfied, discharged or waived by Karvellas at the time of the Closing. Da223-29 (Ex. P21). The trial court concluded that "the schedule is clear, that it was transmitted a few months after the closing, and that its intent speaks for itself; it was to outline the express terms of the new

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[11] At trial, Plaintiff also presented evidence of the metadata for both the August 7, 2013 email and the attached Schedule. The metadata confirmed that the email was transmitted by Sweeney himself on that date; the Schedule had been created by Cyran, Sweeney's Director of Accounting, and had been attached to Sweeney's August 7, 2013 email; and the Schedule was last modified by Cyran on August 7, 2013. Da223-29 (Ex. P21); 2T179-3 to 11. No evidence was presented by Defendants to the contrary. After being confronted with the metadata, Defendants stipulated at trial to the authenticity of the Exhibit. 1T16-20 to 19-24, 21-3 to 6, 161-5 to 162-21, 167-9 to 11, 171-24 to 172-2, 172-11 to 13, 172-2 to 5.

The trial court found that "the undisputed metadata evidence clearly establishes that Cyran last modified his schedule on August 7, 2013 – more than three months after the closing, and Sweeney transmitted the schedule to Karvellas that same day." Da21, n. 14 (emphasis in original). The trial court also found that Sweeney's conspicuous failure to call Cyran as a witness to support the preposterous "alternative narrative about the schedule" that Sweeney offered at trial warranted "a negative inference that Cyran would not have supported Sweeney's assertions at trial." Da22, n.15. To be sure, no credible evidence was ever presented to refute the fact that Defendants confirmed their debt months after the Closing at which Sweeney claimed (at trial and now, on appeal) the debt had been extinguished.

third loan." Da25, n.15 (emphasis added). Making its conclusion that the parties entered into a new loan, the trial court further opined:

> While the principal sum of the third loan represents a work-out of unpaid amounts due and owing by Sweeney under [the] first and second loans, the third loan was new, independent loan obligation with new terms. This Court also finds the new terms included an interest rate of ten percent (10%) per annum, and the requirement [that] Sweeney would pay off the loan as soon as he was able to do so. [Da22 (emphasis added)].

F. Sweeney's Continuing Acknowledgement Of His Payment Obligation Under The Third Loan.

After the parties agreed to the Third Loan on the day of the Closing, Karvellas and Sweeney continued to interact as friends and, between April 2013 and October 2019, Sweeney repeatedly begged for Karvellas' patience and forbearance while categorically promising that he would repay Plaintiff in full and as soon as he was able. Da26; 1T185-1 to 186-4, 188-17 to 195-6. Sweeney represented time and again that he was working on new deals that he expected would soon enable him to pay his debt. Da26; 1T185-1 to 186-4. Although Karvellas never pressured his friend for repayment, the parties discussed the Third Loan at various times throughout the time period 2013 to 2019, including at a 2016 dinner in Bergen County.[12] 1T192-2 to 194-1.

[12] Although Sweeney denied these conversations, the trial court again resolved the credibility dispute in favor of Karvellas. Da28.

From these conversations, Karvellas understood from Sweeney that he was not yet able to repay the Third Loan. Da28. Although Sweeney claimed that he could have repaid the debt in 2016, the trial court found that Defendants presented no evidence that "Karvellas knew or had reason to know Sweeney had become able to pay his debt as early as 2016." Da28. In fact, the trial court concluded, "Karvellas was consistently told the exact opposite by Sweeney. . . ." Da28.

By 2019, Sweeney had moved to Las Vegas. 1T195-15 to 17. He and Karvellas met at a Starbucks there in October 2019. Da29; 1T195-7 to 17. Sweeney spoke to Karvellas about his personal life as well as his business. Da30; 1T197-3 to 11; 2T214-14 to 17. During the first hour of the meeting, although Sweeney made no mention of his obligation to repay Karvellas the sum due and owing on the Third Loan, he bragged about impending business deals from which he would realize between $20 and $40 million dollars. Da30; 1T197-17 to 198-2.

Frustrated that Sweeney was touting his financial achievements but failed to mention the substantial debt that Sweeney still owed to him, Karvellas decided to record the parties' conversation. Da30; 1T198-10 to 21. At trial, the audio recording and a transcription of the recording were admitted into evidence. Da30; Ex. P23A (recording); Da230-35 (Ex. P23B, transcription). As reflected

in the recording, Sweeney bragged to Karvellas that he had refinanced his self-described Saddle Brook "palace," realized $7 million in proceeds from that transaction, and reduced his monthly mortgage payment on the residence from $65,000 per month to $43,000 per month (a fact he independently admitted at trial). Da30-31; Da230-35 (Ex. P23B); 4T208-14 to 209-9, 278-19 to 20. Despite having an additional $22,000 per month at his disposal, Sweeney still did not repay Karvellas any part of the Third Loan. Da31; 4T278-9 to 279-4, 309-24 to 310-8.

Sweeney also represented during his meeting with Karvellas that he had a big "payday coming," alluding to a deal in which he was involved that he expected would be lucrative and would enable him, finally, to repay Karvellas. Da31; Da230-35 (Ex. P23B at 3); 2T219-7 to 17. After Sweeney bragged that he had paid all of his other private lenders, Karvellas asked about the Third Loan. Da31; Da230-35 (Ex. P23B at 3); 2T219-7 to 17. Sweeney not only acknowledged the debt, but he immediately committed to repay the debt to Karvellas either "in the next 20 days" from the date of the meeting, or by the end of that year. Da31-32 (Ex. P23B at 3); 2T222-11 to 16.[13] Sweeney promised

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[13] As discussed in Legal Argument Points II and III, below, given Sweeney's admission that he could not pay Plaintiff before late 2019 (at the earliest), the limitations period on the Third pay-when-able Loan did not begin to run, at the earliest, until late 2019. Da53-56; Ex. P23A; Da230-35 (Ex. P23B).

Karvellas not only repayment of the Third Loan, but also a "sweetener" in the form of a trip to Hawaii as a token of his gratitude for Karvellas' extraordinary courtesy and consideration, having stood by him for so many years. Da32; 2T223-4 to 8; Ex. P23A; Da230-35 (Ex. P23B at 4).[14]

G. Defendant's Failure To Pay Any Sum Due On The Third Loan.

After Sweeney made the categorical promises in late 2019 to pay Karvellas the entire sum due on the Third Loan by, at the latest, the end of 2019, he failed to remit any payment or, for that matter, deliver the "sweetener" he had also promised at the Las Vegas meeting. Da34; 2T225-12 to 24. In fact, after the meeting, Sweeney never contacted Karvellas. Da34; 2T225-25 to 226-7. On May 1, 2020, Karvellas commenced this action. Da34.

The trial court found that the entire sum of the Third Loan, as well as the accrued interest at the rate of 10% per year, remained due and owing by Sweeney

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[14] The trial court rejected Sweeney's incredible explanation at trial that his categorical, recorded promise to repay his debt was limited to repayment of the sum of only $50,000, the principal amount of the Second (pay-when-able) Loan. Da34, n. 23. As discussed in Point II and n.19, below, notwithstanding the position he pleaded in the Answer he filed in this case, that he owed Plaintiff nothing, after being confronted at his deposition with his recorded admissions, Sweeny was forced to change his tune and his recitation of the "facts." Further, Sweeney's admission that he owes no less than $50,000 on the Second Loan and, derivatively, that the Second Loan was a pay-when-able loan, cannot be reconciled with Defendants' position on this appeal that pay-when-able loans are not enforceable in New Jersey.

to Karvellas. Da2; Da34-35; Da68; 2T227-11 to 24, 228-1 to 6; 3T55-1 to 9, 57-20 to 23, 67-2 to 5.[15]

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S FINDING THAT PLAINTIFF'S CLAIMS WERE NOT TIME-BARRED SHOULD BE AFFIRMED (Da46-51, 53-56) (Responsive to Defendant's Points II and III.A, B, and D)

Defendants argue that the trial court erred (i) in finding that the parties entered into a Third Loan, (ii) in holding that pay-when-able loans are enforceable in New Jersey, and (iii) in failing to dismiss Plaintiff's claims as time-barred. Defendants argue that Plaintiff failed to present "probative evidence" of a distinct, Third Loan. Db13. Defendants argue only generally, without the support of any legal authority and in irreconcilable conflict with the record facts, that the Third Loan "is merely a continuation of the $330,000 Loan and the $50,000 Loan. . . ." Db13-14.

Defendant's arguments are without merit. The trial court made comprehensive, meticulous, and correct findings that (i) the parties entered into

[15] The trial court also rejected Sweeney's argument that a set-off should be applied in any amount due for any alleged "in-kind services," finding that Sweeney failed to introduce any evidence at trial in support of the alleged set-off or its purported value. Da35-16; Da142-58 (Ex. D4); 3T165-5 to 166-10, 166-21 to 24; 4T315-13 to 19, 316-9 to 317-11 to 14, 320-5 to 8, 321-1 to 3.

a distinct, Third Loan, which was a pay-when-able loan and which constituted a novation of the First and Second Loans; (ii) pay-when-able loans are enforceable in New Jersey and, thus, the statutory limitations period applicable to demand loans did not govern the Third Loan; and (iii) the limitations period with respect to the Third Loan began to accrue in late 2019 -- the earliest point in time that Karvellas knew or had reason to know that Sweeney had the ability to repay that Loan. Da36-64. The trial court's findings should be affirmed.[16]

A. The Trial Court Correctly Found That The Parties Entered Into A New, Pay-When-Able Loan.

Defendants challenge the trial court's detailed factual findings that the parties, on April 26, 2013, entered into a new, pay-when-able loan, i.e., the Third Loan, which was a novation of the First and Second Loans. Defendants, however, have presented no factual support for their argument.

The "scope of appellate review of a trial court's fact-finding function is limited" and "findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411 (1998) (emphasis added) (citing Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)). "Deference is especially appropriate 'when the

[16] In response to Defendant's Point I, the standard of review applicable to each issue on appeal will be addressed within each Point below, as necessary.

evidence is largely testimonial and involves questions of credibility." Id. (citing In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997) (emphasis added). "Because a trial court hears the case, sees and observes the witnesses, [and] hears them testify, it has a better perspective than a reviewing court in evaluating the veracity of witnesses." Id. (internal quotations omitted; alteration in original). An appellate court should not disturb the trial court's factual findings unless they are "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Id. (citing Rova Farms, 65 N.J. at 484).

After carefully assessing the testimony, credibility of the witnesses, and documentary evidence, the trial court concluded that Karvellas and Sweeney entered into an oral agreement, the Third Loan, on April 26, 2013, by which the parties (at Sweeney's behest) agreed to restructure Sweeney's then outstanding balances due on the First and Second Loans. Da20-21, 41-47. The trial court found that the Third Loan was an enforceable contract because all elements of a contract were proved: the parties agreed on all of the material terms of the Third Loan, and there was an offer, an acceptance, and consideration. Da42-47.

1. Meeting of the Minds.

The trial court correctly found that, where the parties "agree on essential terms and manifest an intention to be bound by those terms, they have created

an enforceable contract." Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992); Da42. Further, an oral contract is enforceable "so long as the agreement is sufficiently definite so that the parties' obligations can be 'ascertained with reasonable certainty.'" Da 42 (quoting GMAC Mortgage, LLC v. Willoughby, 230 N.J. 172, 185 (2017) (internal citations and quotations omitted)). "Reasonable certainty of the terms is all that is required." Graziano v. Grant, 326 N.J. Super. 328, 339 (App. Div. 1999) (internal citation omitted).

The trial court found that, on April 26, 2013, in response to Sweeney's plea to Karvellas that he accept only partial payment of the sum due that day and for Plaintiff's continued accommodation, the parties entered into a new loan in the principal amount of $134,759.74, bearing interest at the rate of 10% per year, and which would be repaid on a pay-when-able basis. Da43. The trial court emphasized the significance of Sweeney's own admission of the fact and principal amount of the Third Loan more than three months later. Finding that a meeting of the parties' minds occurred, the trial court concluded:

> Not only is Karvellas' testimony credible and worthy of belief, but the undisputed evidence demonstrates -- more than three months after the closing and the making of the third loan -- Sweeney confirmed the parties' third loan by his August 7, 2013 email to Karvellas. This email contained a schedule drafted by Cyran, [Sweeney's] Director of Accounting, confirming the existence of the third loan and Sweeney's believe that he owed Karvellas $139,773.03 (including the late fees) as of April 30, 2013. . . . His own schedule confirmed, after crediting Sweeney's $330,000 partial

> payment on that date, the remainder of Sweeney's debt to Karvellas had not been satisfied. Sweeney's August 7, 2013 email along with the attached schedule confirms the meeting of the parties' minds concerning the new agreement, i.e., the third loan. Sweeney presented no competent evidence to the contrary, and no plausible explanation has been, or could be, given for the transmittal of the confirming schedule with Sweeney's own words, "[a]s [Karvellas had] requested." See Ex. P21. Sweeney failed to provide any explanations for (i) why his Director of Accounting would calculate amounts due and owing after the closing, or (ii) why Sweeney transmitted the schedule to Karvellas more than three months after the closing.
>
> This Court finds the element of meeting of the minds was proven by Karvellas at trial. [Da43-44 (emphasis added)].

2. Offer, Acceptance, and Consideration.

The trial court also found that, on April 26, 2013, Karvellas, in response to his friend's tearful plea and after Sweeney "begged Karvellas to work-out a solution concerning how to handle the still outstanding balance due and owing to Karvellas," offered to extend a new and distinct loan to Sweeney reflecting a discounted principal sum. Da19-21, Da45. The trial court found that Sweeney gladly accepted the offer, thanking Karvellas profusely. Da46. Significantly, the trial court found that, by his August 7, 2013 email, Sweeney "confirm[ed] the third loan and the principal balance thereof." Da46; see also Da43-44.

With respect to consideration, the trial court correctly found that "[c]onsideration can be a benefit to one party or loss of a benefit to the other

party[,]" and that an exchange of consideration occurs when "something of value [is] bargained for." Da46 (citing Shebar v. Sanyo Bus. Sys. Corpo., 111 N.J. 276, 289 (1988)). Further, "consideration 'may consist of an act, a forbearance, or the creation, modification, or destruction of a legal relationship.'" Da46 (quoting Sipko v. Koger, Inc., 214 N.J. 364, 380 (2013)).

Here, the trial court properly found that at least three of Karvellas' actions constituted consideration with respect to the Third Loan: (i) Karvellas agreed not to exercise his substantial enforcement rights under the Note that governed the First Loan (including his right to foreclose on the Mortgage -- a circumstance that Sweeney acknowledged would be devastating); (ii) Karvellas forgave the penalties still due under the First Loan and forgave all of the accrued interest due under the Second Loan -- forgiveness of approximately $30,000 of the total debt then owed by Defendants as of the date of the Closing; and (iii) Karvellas discharged the Mortgage that secured the Guarantee so that Sweeney could close his refinancing transaction that day. Da47.

The trial court's findings of fact are amply supported by the record and cannot properly be disturbed.[17]

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[17] In conflict with the governing law, Defendants argue on appeal that the parties could not have entered into a new loan agreement because "no new money was allegedly loaned by Plaintiff to Defendants in this so-called 'Third Loan. . . ." Db 17. Defendant also only generally references "the evidence and testimony

B. The Trial Court Correctly Found That The New, Third Loan Was A Novation Of The First and Second Loans.

The trial court also found that the Third Loan was a novation of the First and Second Loans, thereby rejecting Defendant's argument that Plaintiff was barred from pursuing collection of the First and Second Loans by the statute of limitations.

As the trial court held, it is axiomatic that a novation is "the substitution of a new contract or obligation for an old one which is thereby extinguished.'" Da48 (quoting Fusco v. City of Union City, 261 N.J. Super. 332, 336 (App. Div. 1993)). The trial court also properly set forth the elements of a novation: (1) a previously valid contract; (2) an agreement to make a new contract; (3) a valid new contract; and (4) an intent to extinguish the old contract, and noted that "'intent is the primary inquiry.'" Da48 (citing and quoting Wells Reit II-80 Park Plaza, LLC v. Dir., Div. of Taxation, 414 N.J. Super. 453, 467, 566 (App. Div. 2010)).

Since intent is the primary inquiry, the question of whether there has been a novation is one of fact (Wells Reit II, 414 N.J. Super. at 467) and, therefore,

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presented at trial," without a single citation to the record, to any particular finding of the trial court, or to any competent evidence alleged to have been overlooked by the trial court. Db17. Defendants have failed to undermine the trial court's detailed findings concerning the creation and fact of the Third Loan. The trial court's findings are unassailable and fully supported by the record.

the trial court's factual conclusions must be given deference. The trial court found that both parties' actions at the Closing and their communications thereafter "convinced this Court of their intent to extinguish the first and second loans, and to replace those agreements entirely with the third loan." Da49. Therefore, the trial court held that the Third Loan was a novation of the First and Second Loans. Da49. Accordingly, upon the extinguishment of the First and Second Loans, any limitations periods previously applicable to the First and Second Loans no longer governed.

Again, the trial court's finding should be affirmed.

C. The Trial Court Correctly Found That Pay-When-Able Loans Are Enforceable In New Jersey And, Therefore, The Statute of Limitations Did Not Bar Plaintiff's Claim.

The trial court found that the Third Loan was a pay-when-able loan, and concluded that pay-when-able loans are enforceable in New Jersey and, therefore, that Plaintiff's claims are not barred by the statute of limitations. Da36-38. While the appellate court reviews *de novo* the trial court's legal conclusions, Pami Realty, LLC v. Locations XIX Inc., 468 N.J. Super. 546, 556 (App. Div. 2021) (internal citation omitted), there is no basis to disturb the trial court's ruling.

1. Pay-When-Able Loans Are Enforceable In New Jersey.

Defendants argue generally that the "concept" of pay-when-able loans is not binding under New Jersey law. Da21. Other than arguing that no published Appellate Division cases "confirm" the concept of pay-when-able loans, Defendants fail completely to address the published opinion of Denville Amusement Co. v. Fogelson, 84 N.J. Super. 164, 169 (App. Div. 1964), and fail to demonstrate how the trial court's careful analysis of all relevant case law, and its finding that New Jersey has never rejected the concept of pay-when-able loans, was in error.[18]

The trial court concluded that the Appellate Division, in Flynn v. Sevastakis, 2006 WL 664180 (App. Div. Mar. 17, 2006), was faced squarely with the opportunity to reject, as a matter of law, the concept of pay-when-able loans under New Jersey law, but the Appellate Division did not do so. Da38. In arriving at this conclusion, Judge Ostuni analyzed the facts and holding of Flynn, in which the grantor of a loan stated to the grantee, "Get it back to us when you can." Da37 (quoting Flynn 2006 WL 664180 at *1). Flynn sought

[18] Recognizing the absence of binding, definitive published authority concluding that pay-when-able loans are enforceable in New Jersey, the trial court, citing R. 1:36-3, engaged in an analysis of the relevant case law addressing the issue, as did Judges Polifroni and O'Dwyer in ruling on Defendants' prior unsuccessful dispositive motions in this action. Da36-37.

repayment of the loan several different times, but the debtor was, at those times, unable to pay the debt. Finally, the Plaintiff filed a complaint seeking repayment sixteen years after the loan was made. Da37 (citing id. at *4-5).

The issue before the trial and appellate courts was whether the loan in Flynn was a demand loan or a pay-when-able loan. If it had been a demand loan, the statute of limitations would have begun to run when the loan was made. Da37 (citing Flynn at *3, which cited Denville, 84 N.J. Super. at 169). If it were deemed to be a pay-when-able loan, however, the limitations period on repayment would not begin to run until the debtor was able to repay the loan. Da37 (citing Da37 (citing Flynn at *3, which cited Guerin v. Cassidy, 38 N.J. Super. 454, 460 (Ch. Div. 1955)).

In his Opinion in this case, Judge Ostuni analyzed the language of the Flynn opinion and the Appellate Division's recognition that both types of loans, i.e., demand and pay-when-able loans, are enforceable. Da38. He concluded that, while the Appellate Division in Flynn found that the loan at issue was a demand loan, it "did not reject the concept of pay-when-able loans in New Jersey." Da38. Rather, the Appellate Division in Flynn "clarified the parameters on when a pay-when-able loan is specifically created: a writing is not required, but lender's testimony alone is not enough." Da38-39.

Judge Ostuni also analyzed the published Guerin opinion, concluding that the trial court in that case found that the loan at issue was a pay-when-able loan and that the statute of limitations did not run until the debtor was financially able to pay. Da39.

Finally, the trial court analyzed the facts and holding of the published Denville case, concluding that the Appellate Division's holding in Denville "does not definitely rule out pay-when-able loans." Da40. Judge Ostuni found that the Denville Court held only that when there is no time stated concerning the time that payment on a loan is due, the loan presumptively is deemed to be a demand loan. Da39-40. The trial court explained:

> Denville suggests pay-when-able loans are enforceable in this state because the Appellate Division had to first establish the loan in that case was a demand loan to determine the applicable stat[ut]e of limitations rule. Denville, 84 N.J. Super. at 169. The Appellate Division had the opportunity to rule that the loan in question was a demand loan because pay-when-able loans are not recognized in New Jersey. It did not so rule. [Da40 (emphasis added)].

The trial court concluded that "persuasive authority here in New Jersey . . . supports the enforceability of pay-when-able loans, particularly when the loans are made between family members or close friends." Da40 (emphasis added). Having heard and carefully considered the facts presented at trial -- including Karvellas' long and close friendship with Sweeney, his forbearance for many years from enforcing the terms of the Note, his forgiveness of a substantial sum

due on the First and Second Loans, and Defendants' admissions, including the fact that the parties had entered into the Second pay-when-able Loan -- the trial court considered it significant that the loan at issue was between close friends. Nothing would more offend the notions of justice and equity than to permit Defendants to escape their repayment obligations after they exploited the parties' friendship to obtain the use of Karvellas' $380,000 beginning in 2008, and then continued to trade on that relationship to persuade Plaintiff to forebear on the enforcement of his rights until after the purported expiration of a six-year limitations period. The trial court expressly found that "the purpose behind statutes of limitation, cannot be intentionally subverted by Sweeney, and then used by him as a legal shield to prevent Karvellas from collecting what is rightfully due under the terms of the third loan." Da54 (emphasis added).

2. The Statute Of Limitations Did Not Bar Karvellas' Claims.

Given the conclusion that pay-when-able loans are enforceable in New Jersey, the trial court properly found that the six-year statutory limitations period of N.J.S.A. 2A:14-1 did not begin to run on the Third Loan until Plaintiff knew or had reason to know of Sweeney's ability to pay, i.e., October 2019 at the earliest. Da53-56. The trial court correctly concluded that the "limitations period for pay-when-able loans begins once the debtor is found able to repay the loan." Da53; see Guerin, 38 N.J. Super. at 460 (on a pay-when-able loan, "the

debt is not due until the defendant is capable of paying" and the "statute [of limitations] does not commence to run until at least that time"); see also Flynn, 2006 WL at *1 ("the statute of limitations on a 'pay when able' loan does not begin to run until the debtors are capable of paying the loan. . . .") (citing Guerin, supra).

3. The Trial Court Properly Concluded That The Parties Entered Into A Pay-When-Able Loan on April 26, 2013.

Beyond Defendants' baseless attack on the trial court's finding that New Jersey recognizes the enforceability of pay-when-able loans, Defendants declare, in the face of the record, that the facts do not support the conclusion that the parties entered into a pay-when-able loan on April 26, 2013. The record facts, however, fully support the trial court's finding that "Karvellas has proven [that] the parties' [sic] agreed Sweeney would not have to repay the third loan until he was able to do so." Da53.

The testimony established that, on April 26, 2013, as an accommodation to Defendants, the parties entered into the Third Loan, and Sweeney would repay the Third Loan as soon as he was able to do so. 1T147-13 to 17; 3T55-1 to 9, 65-25 to 66-20, 67-2 to 5, 68-13 to 17. The trial court found that the evidence, including Sweeney's August 7, 2013 email and Schedule and the admissions he made during the October 2019 meeting in Las Vegas, proved that the parties entered into the Third Loan and that Sweeney committed to repay the Third

Loan. In fact, as the recording reflects, at the Las Vegas meeting Sweeney committed to repay the Third Loan in full within 20 days of the parties' meeting or, at the very latest, by the end of the calendar year with the anticipated closing of some lucrative deal. Da32-33; Da230-35 (Ex. P23B, transcription); 2T222-11 to 223-8; 4T289-22 to 290-4. The trial court concluded that "Karvellas learned of Sweeney's ability to pay in October 2019, and filed his complaint on May 1, 2020. Consequently, the six-year statute of limitations period set forth in N.J.S.A. 2A:14-1 has not been exceeded." Da53.

The trial court's well-founded conclusions that (i) the parties entered into an enforceable, pay-when-able Third Loan on April 26, 2013, (ii) Karvellas did not learn of Sweeney's ability to repay until October 2019, and (iii) Karvellas was not barred from bringing this action by the expiration of any applicable limitations period, should be affirmed.

D. The Trial Court Correctly Found That Defendants Are Equitably Estopped From Asserting A Statute Of Limitations Defense.

Defendants argue that the trial court "misapplied the law" in holding that Defendants were equitably estopped from asserting a statute of limitations defense. Db31-33. Conflating demand loans and pay-when-able loans, Defendants argue that, "[u]nder the trial court's flawed reasoning, the statute of limitations would be tolled in every unpaid debt simply because the debtor stated

he was unable to pay." Db33. Defendants' argument is incorrect: with respect to a pay-when-able loan, the limitations period is not "tolled," but does not even begin to run until the lender knows or has reason to know that the debtor is able to pay.

Given the trial court's finding that Plaintiff's claim was filed within the applicable limitations period -- well within six years of the parties' October 2019 meeting -- the equitable estoppel discussion in the Opinion is superfluous. However, should the merits of the issue be considered on this appeal, the trial court's conclusion should be affirmed. The trial court's imposition of equitable estoppel is reviewed pursuant to the abuse of discretion standard. Cf. Sears Mortg. Corp. v. Rose, 134 N.J. 326, 354 (1993).

Recognizing the policy underlying statutes of limitations, the trial court found that the natural and probable result of Sweeney's repeated assurances, during the period April 26, 2013 through the parties' October 2019 meeting in Las Vegas, that he would pay Karvellas as soon as he was able was to induce Karvellas' inaction. Da55-56. The trial court also found that, "[e]ven if one were to assume the third loan was immediately payable on demand, defendant would be estopped from asserting the statute of limitations defense because it is now clear that Sweeney deliberately mislead Karvellas about his intentions to repay the debt throughout the parties' communications over the years." Da56

(emphasis in original). The court categorically found that Sweeney "engaged 'in conduct . . . calculated to mislead the plaintiff into believing that it [was] unnecessary to seek civil redress.'" Da56 (quoting W.V. Pangborne & Co. v. N.J. Dep't of Transp., 116 N.J. 543, 553 (1989)).

The trial court did not abuse its discretion and should be affirmed.

POINT II

THE TRIAL COURT'S FINDING THAT THE DISCHARGE OF THE MORTGAGE WAS NOT A SATISFACTION OF THE LOAN SHOULD BE AFFIRMED. (Da57-58) (Responsive to Defendant's Point III.C)

After denying that they owed any money to Karvellas in the Answer they filed on June 8, 2020, Defendants changed their story, asserting at trial that they owed Karvellas no more than $50,000, i.e., the principal sum due on the Second Loan, because the entire First Loan was satisfied by the Discharge of Mortgage.[19] Defendants' argument is without merit. The trial court did not

[19] During Sweeney's deposition in 2021, he was confronted with the electronic recording of the admissions he made at the October 2019 Las Vegas meeting with Karvellas. Given the recorded categorical admissions made by Sweeney, Defendants had no choice but to change their story. As made clear in the Opinion, Judge Ostuni found Sweeney to be incredible and that he essentially made up the "facts" as he deemed expedient, including with respect to whether he owed Karvellas anything. Da28 (noting that "Sweeney's trial testimony was completely contradicted by his deposition testimony when he claimed the only amount still due to Karvellas was the non-interest bearing $50,000 second loan").

abuse its discretion in finding that Karvellas' Discharge of the Mortgage did not constitute a discharge of Defendants' underlying debt.

On the day of the Closing, Sweeney surprised Karvellas by representing to him that his ability to close his refinancing transaction was dependent not only on Karvellas accepting a partial payment at that time, but also on Karvellas' willingness to discharge the Mortgage. Da19-20; 1T143-14 to 24, 144-7 to 17; 2T277-20 to 278-10. Karvellas was not accompanied at the Closing by his attorney because he had no reason to believe that he would need counsel to pick up the check, or that he would be asked to review or sign any documents. 1T140-14 to 24, 150-20 to 151-1. Karvellas was told and expected that he was to attend the Closing only for the purpose of retrieving a check for approximately $495,000. Unbeknownst to Karvellas, however, Sweeney planned for his attorney to meet with Karvellas. 2T275-21 to 22.

Sweeney's attorney, who conspicuously did not testify at trial, presented Karvellas with a document entitled Discharge of Mortgage, which Karvellas signed at his friend's tearful request. 1T151-1 to 5; Da19-20; Da220 (Ex. P19). Karvellas understood that, by signing the document, he was discharging only the Mortgage that secured the Guarantee of the First Loan. 1T151-6 to 16. Karvellas understood that his discharge of the Mortgage was not a discharge of the Note that memorialized the First Loan or a discharge of the debt, nor was it

an acknowledgement that the debt had been paid in full or had been satisfied. 2T279-12 to 23, 280-4 to 7. Karvellas agreed to discharge the Mortgage only to accommodate his friend. 1T151-17 to 19. It was undisputed at trial that at no time did Karvellas sign any document reflecting a "satisfaction" of the Note, nor did he agree to terminate or cancel the debt. 1T151-24 to 152-3. The trial court found that Karvellas' testimony was credible. Da64.

Beyond Plaintiff's testimony, the court based its findings on the language of the instruments themselves in concluding that "the discharge of the mortgage did not effectuate a satisfaction of the first loan." Da57 (emphasis added). Specifically, the trial court found that:

- The Discharge of Mortgage states, "This Mortgage has been PAID IN FULL or otherwise SATISFIED and DISCHARGED. . . . This means that this Mortgage is now cancelled and void[.]" Thus, only the Mortgage -- "and not the note or guarantee" -- was discharged, cancelled, and voided. Da57 (emphasis added); Da220 (Ex. P19).
- The Mortgage states that it was "given as collateral to secure that guarantee made by Mortgagor [LeRegazzi] in favor of the Lender pursuant to the terms and conditions of a certain Guarantee. . . ." Da11; Da57; Da175 (Ex. P7).

- The Mortgage also provides, as the trial court expressly found, that plaintiff would not waive his right to declare defendant to be in default if he delayed in exercising his rights. Da11; Da 177 (Ex. P7, Para. 8); 1T78-12 to 22.
- The Note expressly states that the "obligations of the Guarantor under the Guaranty are secured by a mortgage. . . ." Da57; Da167 (Ex. P4).
- The Note also provides, as the trial court found, that Karvellas could discharge any collateral without canceling or discharging the underlying debt owed to him by Sweeney. Da57-58; Da167 (Ex. P4) (the Lender may "without impairing or in any way affecting the liability of [the Borrower or the Guarantor] to the Lender . . . release . . . collateral held by the Lender as security for any sum owing to the Lender by any party hereto").

On the basis of the documentary evidence, the trial court properly concluded that "the debt stays intact, even when the underlying collateral is released[;]" Karvellas released the collateral for the Guarantee "[w]ithout affecting defendants' underlying debt[;]" and "the parties agreed and understood that nothing short of payment in full of the third loan would satisfy defendant's loan obligations." Da58. See also Highland Lakes Country Club and Commun. Ass'n. v. Franzino, 186 N.J. 99, 114 (2006) ("It has long been the law in New

Jersey that extinguishment of a lien does not affect the validity of the underlying debt that gave rise to the lien.").

Defendants' arguments that the trial court's findings are incorrect are baseless, and are not supported by the law or any record fact, including any fact to contradict the plain language of the instruments themselves. Db16, 29-31. Contrary to Defendants' arguments, the evidence adduced at trial fully supports the trial court's finding. The trial court did not abuse its discretion, and its ruling should be affirmed.[20]

POINT III

THE TRIAL COURT'S FINDING THAT DEFENDANTS BREACHED THE THIRD LOAN SHOULD BE AFFIRMED (Da49-53) (Responsive to Defendant's Point IV.A and B)

Defendants argue that the trial court erred in finding that they breached the Third Loan, basing their arguments on their previous assertion that the parties did not enter into a Third Loan. Db33-38. As established, however, the

[20] Defendants also present a nonsensical argument that, if the trial court is affirmed, its reasoning will create "practical problems" because every lender would be able to escape the ramifications of a discharge of mortgage by arguing that the parties entered into a separate oral agreement. Db30. Of course, the trial court's finding that the Discharge of Mortgage did not effectuate a satisfaction of the underlying debt was independent from its finding that the parties entered into the Third Loan. Defendants' argument is also unsupported by competent evidence or logic. Parties who discharge their loan obligations properly insist on obtaining a "satisfaction" or termination of the underlying debt instrument.

trial court made express and detailed findings that the parties, at the behest of Defendants, entered into the Third Loan. See Point I.A., above.

The trial court then properly concluded that Karvellas proved at trial that Defendants breached their obligations under the Third Loan. Among other things, the trial court found that the October 2019 recording was "very powerful evidence of Sweeney's admission of the debt, his continuing false promises to repay the debt, and promise to provide Karvellas with a 'sweetener' as a token of his appreciation for all Karvellas had done for him. . . ." Da49-51. Citing to Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016), the trial court found that all elements of the breach of contract had been proven by Karvellas by a preponderance of the evidence: (1) the parties entered into an agreement, the Third Loan, (2) Karvellas did what the agreement required him, (3) Sweeney did not do what the agreement required, and (4) Sweeney's breach, or failure to do what the agreement required, caused a loss to Karvellas. Da49.

Defendants have presented no competent evidence to undermine these findings. The trial court did not abuse its discretion in concluding that the Third Loan was breached, and its ruling should be affirmed.[21]

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[21] Defendants also argue on the same basis (i.e., that there was no Third Loan), that Plaintiff did not prove at trial that Defendants were unjustly enriched. Although the trial court analyzed the unjust enrichment doctrine and found that "Karvellas proved this cause of action at trial" (Da51), the trial court

POINT IV

THE TRIAL COURT'S IMPOSITION OF LIABILITY AGAINST DEFENDANTS JOINTLY AND SEVERALLY SHOULD BE AFFIRMED

(Da90-94)

(Responsive to Defendant's Point V)

Defendants argue that the trial court improperly entered Judgment against LeRegazzi because LeRegazzi's Guarantee of the Third Loan was not reduced to writing, citing the statute of frauds, N.J.S.A. 25:1-15, and that they did not waive their statute of frauds defense, as the trial court expressly found. Db39-44. Defendants' argument is irreconcilable with the record and without merit. The trial court's decision should be affirmed.

Defendants chose not to litigate the purported defense at any time pre-trial (i.e., in any of the three (3) motions filed before trial or in any *in limine* motion), or during trial. Defendants also chose not to pursue the argument in their post-trial proposed Findings of Fact and Conclusions of Law. Defendants raised the purported defense for the first time in their post-trial motion for reconsideration.

In its Order Denying Defendants' Post-Judgment Motion for Reconsideration in the entirety (Da84-98), the trial court found that, as a matter of law, Defendants waived the statute of frauds defense. Beyond the waiver,

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acknowledged that, because it found that Sweeney breached the express contract, its findings regarding unjust enrichment "need not apply." Da53. Defendants have improperly requested appellate review of this issue. Db37-38.

LeRegazzi's oral Guarantee is excepted from the statute of frauds pursuant to application of the "leading object" exception.

A. The Trial Court's Finding That Defendants Waived The Statute Of Frauds Defense Should Be Affirmed.

Although it acknowledged that Defendants pled the statute of frauds defense in their filed Answer, the trial court found that, by raising the defense substantively for the first time in its post-judgment motion for reconsideration, Defendants waived the defense. Da91-92 (citing Williams v. Bell Telephone Laboratories, Inc., 132 N.J. 109 (1993)). In Williams, squarely on point, the Supreme Court held that a statute of limitations defense, pled in an answer but "otherwise-unasserted [] through the entire three-and-one-half-year span of the litigation, through preparation for and conduct of a protracted trial, and into a post-verdict submission" had been waived. Id. at 119. As the trial court noted, waiver in these circumstances prevents attorneys from withholding evidence and then moving for reconsideration to get a "second bite of the apple." Da92 (quoting Fusco v. Bd. of Ed. Of City of Newark, 349 N.J. Super. 455, 462-63 (App. Div. 2002)).

The trial court found that "at no point before this motion or after defendants' answer, did defendants raise the defense of the statute of frauds as to LeRegazzi's guarantee of the third loan." Da92-93. Additionally, on

Defendants' reconsideration motion, the trial court concluded that Defendants failed to present any "new or additional information . . . . which [defendants] could not have provided on the first application." Da93 (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401-02 (Ch. Div. 1990)).

The trial court's finding that Defendants waived the statute of frauds defense should be affirmed.

B. Even If The Statute Of Frauds Defense Had Not Been Waived, LeRegazzi's Guarantee Falls Outside Of The Statute Pursuant To The "Leading Object" Exception.

Even if Defendants could overcome their waiver of the statute of frauds affirmative defense, they could never prevail on the merits of the defense because the facts of this case fall squarely within the "leading object" exception.

The "leading object" exception was articulated by the New Jersey Supreme Court in Howard M. Schoor Associates, Inc. v. Holmdel Heights Construction Co., 68 N.J. 95 (1975). "[W]hen the leading object of the promisor is to subserve some interest or purpose of [the promisor's] own, notwithstanding the effect is to pay or discharge the debt of another, [the] promise is not within the statute." Id. at 102 (quoting 2 Corbin on Contracts, § 366 (1950)). The Schoor Court, in adopting the common law exception, explained that "it becomes important, and probably decisive, to determine what interest, purpose or object was sought to be advanced by [the] promise to pay . . . ." Id. (emphasis

added). In defining the "object," the Court opined that, in order to be exempted from the writing requirement of the statute of frauds, the promisor's (or guarantor's, in this case) interest must be "mainly for [the promisor's, in this case LeRegazzi's] own pecuniary or business advantage, rather than in order to benefit the third person [in this case, Sweeney]". Id. at 104-105 (quoting Restatement (First) of Contracts § 184 (1932) (emphasis added). The Court noted that "[t]he identical formulation of the rule appears in the Restatement (First) of Security § 93 (1941)." Id. at 105.

In Schoor, the plaintiffs (engineering and surveying firms) alleged that a non-party individual (Alan Sugarman), who owned approximately one-fifth of the defendant's stock, orally undertook to pay all of plaintiffs' outstanding bills as well as future obligations. Id. at 99. The defendant was developing a tract of land, and plaintiffs' engineering work was necessary for the project to advance. Id. Sugarman's own pecuniary interest in guaranteeing the payment of the plaintiffs' expenses led the Court to enforce Sugarman's oral promise pursuant to the "leading object" exception to the statute of frauds. The Schoor Court explained that Sugarman's "substantial pecuniary and business interest [was] furthered" by his oral promise, making it "abundantly clear" that the "leading object" of the promise was Sugarman's own financial interest. Id.

at 106. Therefore, the Court enforced the oral undertaking, and held that it was excepted from the statute of frauds' writing requirement. Id.[22]

Here, the promisor/guarantor of the Guarantee -- LeRegazzi (acting by its sole owner/member, Sweeney) -- furthered its own pecuniary and business interest by making the oral promise to guarantee the pay-off of the debt obligation pursuant to the Third Loan. As established at trial and as the trial court found, Karvellas had a full panoply of rights at his disposal at the time Sweeney requested the work-out accommodation including, without limitation, foreclosing on the LeRegazzi Mortgage and being reimbursed for all of the attorneys' fees and costs of collection. Da12-13, 17-18, 47. Plainly, the "leading object" of LeRegazzi's oral guarantee of the debt pursuant to the Third Loan was LeRegazzi's own financial and business interests, more specifically, its interest in avoiding foreclosure and the attendant costs and consequences --

[22] Although in 1996 the New Jersey legislature enacted a new statute requiring certain guarantees to be in writing (N.J.S.A. 25:1-15), the "leading object" exception survived. Walder, Sondak, Berkeley & Brogan v. Lipari, 300 N.J. Super. 67, 76-77 (App. Div. 1997) (discussing legislative history and holding that the Legislature did not "intend[] to invalidate Schoor," and that, on the basis of the "leading object" exception, several corporations' oral guarantees to pay a shareholder's legal bills were enforceable); see also Atlantic Plastic & Hand Surgery, P.A. v. Ralling, 474 N.J. Super. 185, 191 (Law Div. 2021) ("In a word, Schoor lives").

consequences that Sweeney himself described would be devastating. 4T209-5 to 9.

Accordingly, even if Defendants had not waived the statute of frauds defense as the trial court correctly found, and had they actually attempted to litigate it in any pre-trial motion or at trial, the purported defense could not have been established due to the applicability of the "leading object" exception.

The trial court should be affirmed and the liability imposed upon Defendants, jointly and severally, should not be disturbed.[23]

POINT V

THE TRIAL COURT'S AWARD OF POST-JUDGMENT INTEREST AT THE CONTRACT RATE OF 10% SHOULD BE AFFIRMED (Da94-97) (Responsive to Defendant's Point VI)

Arguing the absence of any extraordinary and equitable reason, Defendants challenge the trial court's award to Plaintiff of "post-judgment interest at the parties' contract rate of 10% simple interest per annum (i.e.,

[23] Even if Defendants could overcome their waiver of the defense and the inapplicability of the defense pursuant to the "leading object" exception, they still failed to meet their burden to prove the statute of frauds defense at trial, as the trial court found. Defendants pled twenty-two largely boilerplate Affirmative Defenses in their Answer, including the generic argument that Plaintiff's claims were barred by the statute of frauds. After its thorough analysis of the entire record, the trial court held that "defendants have failed to meet their burden to prove any cognizable affirmative defense." Da64.

$36.92 per day), which interest shall begin to accrue starting August 31, 2023." Da68. Review of the trial court's decision is pursuant to an abuse of discretion standard. Baker v. Nat'l State Bank, 353 N.J. Super. 145, 173-74 (App. Div. 2002). The trial court did not abuse its discretion and should be affirmed.

As the trial court noted, R. 4:42-11(a), by its language "Except as otherwise ordered by the court," grants the court discretion to impose an interest rate other than that set forth in the Rule. Da95. The trial court undeniably has the authority to "set a post-judgment interest figure at a different rate from that provided in the rule if he finds particular equitable reasons for doing so." R. Jennings Mfg. Co., Inc. v. Northern Electric Supply Co., Inc., 286 N.J. Super. 413, 416 (App. Div. 1995) (emphasis added). The trial judge must "determine whether it would be equitable to allow interest to run on the judgment at the contract rate to avoid prejudice to the judgment creditor caused by delays in satisfying the judgment." Id. at 418. "When the legal rate is less than the contract rate it may be equitable to allow interest to run on the judgment at the contract rate to avoid prejudice" to the plaintiff. Shadow Lawn Sav. Loan Ass'n v. Palmarozza, 190 N.J. Super. 314, 318 (App. Div. 1983).

In denying the motion for reconsideration on this issue, the trial court noted that both its Opinion and the trial record are "replete with evidence of this Court providing 'equitable' reasons for imposing the ten percent post-judgment

interest rate." Da95. Among those equitable reasons were that (i) Sweeney had the use of Karvellas' funds since 2008, (ii) Sweeney disregarded the interests of Karvellas who refrained from taking action to protect himself on account of their friendship, and (iii) other abundant evidence of Sweeneys' "deceitful actions." Da95. Moreover, the trial court opined that "reducing the rate of interest from 10% to 2.5% [i.e., the R. 4:42-11 rate] would turn this into free money for Mr. Sweeney to have used for what would be upward of 50 years or more." Da96.

The trial court did not abuse its discretion. Its award of post-judgment interest at the rate of 10% per annum was based on ample equitable justification and should be affirmed.

CONCLUSION

For all of the foregoing reasons, Defendants' appeal should be denied in its entirety, and the trial court's Final Judgment and its October 2023 Order should be affirmed in their entirety.

Respectfully submitted,

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Dated: March 28, 2024 (Amended)