339 River Road Partners, LLC, Plaintiff, v. 339 River Road Holdings, LLC, Hongkun USA Real Estate Development, LLC, Hongkun Group USA Holdings Corp., Hongkun USA Real Estate Holdings LLC, Fan (Richard) Liu, Weihao (Andy) Zhao, and John Does and ABC Corps. 1 – 10, fictitious parties, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001695-23 CIVIL ACTION SAT BELOW: Superior Court of New Jersey, Chancery Division, Bergen County Docket No. C-137-23 Hon. Edward A. Jerejian, P.J.Ch.

DEFENDANTS-APPELLANTS' BRIEF

COHN LIFLAND PEARLMAN HERRMANN & KNOPF LLP
Jeffrey W. Herrmann, Esq. - 019311976
Alex A. Pisarevsky, Esq. - 0002861999
Park 80 West – Plaza One
250 Pehle Avenue, Suite 401
Saddle Brook, New Jersey 07663
Tel.: (201) 845-9600
Fax: (201) 845-9423
jwh@njlawfirm.com
ap@njlawfirm.com
Attorneys for Defendants-Appellants
Hongkun USA Real Estate Development, LLC, Hongkun Group USA Holdings Corp., and Hongkun USA Real Estate Holdings LLC

Of Counsel:
Jeffrey Herrmann, Esq.
On the Brief
Alex A. Pisarevsky, Esq.
Submitted: May 20, 2024
Amended: May 29, 2024

TABLE OF CONTENTS

Page

TABLE OF ORDERS BEING APPEALED

Page

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Defendants-appellants Hongkun USA Real Estate Development, LLC, Hongkun Group USA Holdings Corp., and Hongkun USA Real Estate Holdings LLC (collectively, the "Hongkun Defendants") respectfully request that this Court reverse the entry of a series of trial court orders that allowed plaintiff-appellee 339 River Road Partners, LLC ("Plaintiff") to buy for $1.00 the same commercial property – 339 River Road, Edgewater, New Jersey (the "Property") – that Plaintiff was willing, little more than one year ago, to buy for $45,000,000. Aside from the blatant inequity of such a result, Plaintiff's position, adopted wholesale by the trial court, is fundamentally flawed as a matter of law.

The Memorandum of Understanding at issue, on which the trial court relied in transferring ownership of the Property, is unenforceable in that it lacks multiple terms essential to an obligation of this magnitude and illusory in that it does not obligate Plaintiff to do anything at all (other than pay $1.00). This has led to a result that is simply absurd and should not be countenanced; a windfall on the one hand and no benefit whatsoever on the other.

Therefore, the Hongkun Defendants respectfully request that the trial court orders requiring the transfer be reversed.

PROCEDURAL HISTORY[1]

On July 18, 2023, Plaintiff filed suit to enforce a Memorandum of Understanding between RRP Group Inc., Hongkun USA Real Estate Holding LLC, and Hongkun Group regarding the transfer of ownership of Appellee 339 Holdings (the "MOU"). (Hongkun Defendants' Appendix 19 - 33) (hereafter, the Hongkun Defendants' Appendix is referred to as "Da"). On September 15, 2023, the trial court entered an Order stating that "the [MOU] between the parties is an enforceable agreement and directing Defendants to specifically perform their obligations under the March 13, 2023 Memorandum of Understanding …." (Da7 - 8). On November 27, 2023, the trial court entered an Order that directed the execution of an Assignment of Interest in Appellee 339 Holdings in the form propounded by Plaintiff (the "Assignment") and awarded Plaintiff counsel fees under the MOU. (Da9 - 11). The November 27, 2023 Order also stated, among other things: "Plaintiff has no obligation to indemnify any guarantors of any debt against the Property or against

---

[1] The volumes of the transcript cited in this brief are as follows:

1T – Transcript of the September 15, 2023 Hearing before the Hon. Edward A. Jerejian, P.J.Ch.

2T – Transcript of the November 17, 2023 Hearing before the Hon. Edward A. Jerejian, P.J.Ch.

The transcript of the January 11, 2024 Hearing before the Hon. Edward A. Jerejian, P.J.Ch., is not cited herein.

any of the Defendants." (Da10). The Assignment was provided to Plaintiff's counsel on December 6, 2023. (Da124).

On January 11, 2024, the trial court denied the Hongkun Defendants' request for a limited stay of the November 27, 2023 Order. (Da12 - 13). On February 5, 2024, the trial court granted Plaintiff's fee application. (Da14 – 18). The Hongkun Defendants filed a timely Notice of Appeal on February 8, 2024. (Da1-5).

STATEMENT OF THE FACTS

A. The Memorandum of Understanding

Appellee 339 Holdings is the record owner of the real property located at 339 River Road in Edgewater, New Jersey (the "Property"). (Da20). On June 2, 2022, Plaintiff entered into a Purchase and Sale Agreement (the "PSA") for the Property in the amount of $45,000,000. (Da21). Plaintiff terminated the PSA on November 29, 2022 due to its assertion that the Property's value had been diminished. (Da21).

On March 13, 2023, the MOU was executed. (Da28 - 33). The MOU recognized that the Property was owned by Appellee 339 Holdings and stated that its purpose "is to set forth the process by which [Plaintiff and its affiliates] shall become the one hundred percent (100%) owner of [Appellee 339 Holdings] with full management control over [Appellee 339 Holdings]." (Da28).

In exchange for obtaining ownership of the entity that owns the Property, for which Plaintiff was previously willing to pay $45,000,000, the only compensation

that Plaintiff is required to pay under the express language of the MOU is the sum of $1.00. Id. (Da28 - 33). The MOU also provides for a "kicker" requiring Plaintiff to pay "$3,000,000 upon the granting of enforceable final zoning approvals equal to: (i) a minimum of 82.50 units per acre for the Property, or (ii) such other lesser minimum units per acre acceptable to [Plaintiff] in its sole discretion …. Id.[2] (Da28 - 29). The MOU does not provide for any payment, aside from $1.00, in the event Plaintiff obtains zoning approval for less than 82.50 units per acre and does not find, in its sole discretion, this less dense amount "acceptable." Id. (Da28 – 33, 56). Indeed, on June 13, 2023, Plaintiff's counsel mailed a check "in the amount of $1.00 in full satisfaction of its obligations for acquisition of 100% of the member interests in 339 River Road Holdings, LLC." (Da38-39).

The MOU also provides that Plaintiff will assume certain corporate debts. (Da29, 32 – 33). The MOU does not expressly mention indemnification of the Hongkun Defendants in connection with the corporate debts or any associated guarantees, such as the Guaranty Agreement executed by Appellant Hongkun USA Real Estate Holdings, LLC ("Hongkun USA") in connection with the promissory note (the "Note") secured by a mortgage on the Property (the "Guaranty"). (Da28 – 33, 87 - 106).

[2] The $3,000,000 payment would go down to $2,000,000 depending on the timing of the zoning approvals. (Da28 - 29).

Critically, however, the MOU does provide: "The transaction described herein shall be evidenced by an assignment of interests and an amendment of the LLC Agreement. Closing shall take place within ten (10) days of the execution and delivery of a purchase and sale agreement, which the parties shall negotiate in good faith promptly upon execution hereof." (Da29) (emphasis added). As the Hongkun Defendants' transactional counsel certified to the trial court, any such final agreement must ultimately deal with a multitude of issues:

> If the mortgage will not be paid off, there needs to be: (a) an assumption of all obligations, (b) a release of the borrower and any guarantor, and (c) indemnification under which the guarantor will be saved from having to pay a deficiency judgment.

(Da108).

The crux of this appeal is that the good faith negotiation the MOU expressly contemplated never took place, making it impossible as a practical matter for the Hongkun Defendants to realize any benefit from the MOU.

B. The Underlying Lawsuit

On July 18, 2023, Plaintiff filed a Verified Complaint and Order to Show Cause seeking to enforce the MOU. (Da19 - 33). The Hongkun Defendants opposed the application arguing, among other things, that the MOU was not a final agreement and unenforceable absent, among other things, an agreement to indemnify Hongkun USA regarding the Guaranty.

At the initial hearing on Plaintiff's application to enforce the MOU, Plaintiff's principal, Bruce Sturman, repeatedly represented to the Court that he was "stepping into" the Owner's obligations and had taken on the burden of paying off the Note:[3]

> MR. STURMAN: I am stepping into those obligations. I am the new shareholder. I am the debtor that has to negotiate with Mr. Shafron [i.e., counsel for the holder of the mortgage], that has to pay Mr. Shafron's client off.
>
> All those obligations are mine. Mine.

1T40-5.

Later on during the same hearing, Mr. Sturman re-iterated the same point:

> MR. STURMAN: And, your Honor, I stepped into the debtor's shoes, pay the debt off, pay – basically I have spent about 600,000 dollars already moving in soft costs on this transactions and I plan to move forward.

1T52-21.

Yet, Mr. Sturman apparently made these representations while he was under the impression that the Note was a non-recourse loan:

> MR. STURMAN: I'm sorry to interject once again, but just from a business perspective, I feel like the Court should understand this.
>
> This is a non-recourse loan, Your Honor. A non-recourse loan. Mr. Herrmann is arguing as though this is a recourse loan, and I respectfully have to stop him from doing so.

[3] Although no testimony was taken, the trial court permitted Mr. Sturman, in effect, to supplement Plaintiff's counsel's argument, over the objection of counsel for the Hongkun Defendants. 1T29-14.

1T39-20.

The Hongkun Defendants' counsel then pointed out the existence of the Guaranty:

> MR. HERRMANN: Thank you. Let me begin with Mr. Sturman's assertion that this was a non-recourse loan.
>
> That is absolutely false. Now, if we were in a courtroom I could hand the document up to the Court. We are on this high tech Zoom thing, so here it is.
>
> This is a guarantee of August 10, 2018 in which Hong Kong [sic] U.S.A. Real Estate Holdings, LLC guarantees the mortgage. And it is still on the hook. That guarantee is still there.

1T42-15.

The Court subsequently recognized the inconsistency of Plaintiff's principal claiming he would pay off the debt, while simultaneously refusing to provide indemnification. Partners' counsel acknowledged that the indemnification issue would have to be dealt with, but claimed this was "tomorrow's question":

> MR. HERRMANN: Let me ask you a simple question if I may.
>
> Let's assume your client doesn't pay off the mortgage loan – right? – and my client, the corporate guarantor, is sued.
>
> Is your client going to bail out my client?
>
> MR. STEIN: Jeff, I don't even understand the assumption. Why on earth would my client step – your client is in a

freaking ditch. He owes 45 million dollar on his debt, that is why everybody was so excited when we were trying to buy the property the first time around and Daibes interfered.

He threw him another life line, and any sophisticated businessman would take that life line. The lifeline, was, I will take you out of the debt. It is no longer your debt, it is no longer your good credit rating and reputation on the line, it is mine.

THE COURT: Mr. Stein, I understand it is not in there, and Marger maybe should have negotiated in there. Mr. Herrmann is saying we were going to do that later.

My point, is, Mr. Sturman stated articulately that he is stepping in the shoes, he is going to be responsible of the debt.

You are saying that is part of the consideration, he is responsible, he steps into the shoes.

So it would be very easy just to put a provision in to appease the situation so we don't have this issue, because there could be a situation if things go array, that ultimately it is only the property that is going to be lost and there is potential exposure.

Now, you may say that is their tough luck, but yet you are saying, no, we are assuming the debt.

MR. STEIN: I am sorry.

THE COURT: Why not say in the purchase and sale agreement let's eliminate that issue.

MR. STEIN: Look, that is a fair concern your Honor is raising, but respectfully, it is irrelevant to the question today. It might be tomorrow's question.

1T49-19 (emphasis added).

The Hongkun Defendants' counsel also pointed out that the MOU's language does not obligate Plaintiff to ever seek residential zoning approval, which is what would trigger the obligation to pay more than $1.00:

> MR. HERRMANN: Second, the MOU has nothing in it about a big box store. It has nothing in it about when they are going to apply for residential. There is no deadline to apply for residential.

1T43-13.

Indeed, Mr. Sturman confirmed that he has no intention of pursuing residential zoning: "I am going for the as-of-right big box store." 1T32-2.

Ultimately, the Court determined that the MOU was enforceable and that the parties should, in good faith, negotiate a sales agreement consistent with the MOU. 1T80-2. The Court specifically recognized that a good faith negotiation would involve the items that the Hongkun Defendants contended were essential to the agreement:

> MR. HERRMANN: Just for clarification, what I think your Honor is saying, but just for clarification is, you recognize the MOU as an agreement. There is an obligation of both parties to negotiate in good faith a sales agreement.
>
> Is that what the Court is saying?
>
> THE COURT: Yes.
>
> MR. HERRMANN: Yes, okay. Good.

THE COURT:	Well, I mean, let's say – I mean, consistent with this – I am not saying all of a sudden we are going to have all new terms –
MR. HERRMANN:	Consistent with the agreement.
THE COURT:	-- consistent with the agreement, I think that is what it calls for. But I don't think you want more than this ultimately until the closing takes place, but some of these other things that are important to your client and that may be important to Mr. Shafron's client, perhaps there is some leverage to get concessions on those and I think you can negotiate that in good faith.

1T80-5.

On October 17, 2023, the Hongkun Defendants' transactional counsel emailed Plaintiff's counsel a draft Assignment and Assumption of Membership Interests and Agreement (the "Assignment"). (Da108, 112 - 119). Consistent with the Hongkun Defendants' prior position, this draft included provisions relating to: (1) indemnification, and (2) Plaintiff's obligation to pursue in good faith the zoning approvals referenced in the MOU. (Da108, 112 - 119).

On October 18, 2023, Plaintiff's counsel informed the Hongkun Defendants' transactional counsel, that, contrary to Plaintiff's prior assurances to the Court and its counsel's acknowledgement that the indemnification issue was a "fair concern," it had no intention of negotiating in good faith the issues the Hongkun Defendants raised: "The bottom line is that our client is not going to renegotiate the MOU. Any

attempt to add an indemnification obligation or cover your clients' personal guarantees is a non-starter." (Da121).

Subsequently, Plaintiff sought to have the trial court require the execution of an Assignment of Interest in the Property with no additional terms. At the hearing on this application, Plaintiff again represented that Mr. Sturman had "assumed" the debt on the Property:

> MR. STEIN: Bruce Sturman is now obligated to pay off the debt and he is doing everything humanly possible with relentless seriousness to make that happen.

2T21-4.

Yet, as counsel for the holder of the mortgage on the Property pointed out, neither Plaintiff nor Mr. Sturman had actually taken on the obligation to do anything:

> MR. SHAFRON: They have not agreed. Mr. Sturman certainly has not agreed to assume this debt. All they've agreed to do is purchase the entity.
>
> They – there is no requirement that they pay this mortgage off, and I have argued this over and over, Your Honor, there is no requirement.
>
> They could easily mess around with this, the application for two years and then decide it is not working, and then walk away.

2T41-16.

Nonetheless, on November 27, 2023, the Court entered an Order that directed the execution of an Assignment of Interest in Appellee 339 Holdings in the form propounded by Plaintiff (the "Assignment") and awarded Plaintiff counsel fees under

the MOU. (Da9 - 11). This Order also stated, among other things: "Plaintiff has no obligation to indemnify any guarantors of any debt against the Property or against any of the Defendants." (Da10). In compliance with the November 27 Order, the Assignment was provided to Plaintiff's counsel on December 6, 2023. (Da124).

On January 14, 2024, the trial court denied the Hongkun Defendants' application for a limited stay. (Da12-13). A motion for a limited stay was filed before the Appellate Division on February 21, 2024, and is currently pending.

LEGAL ARGUMENT

Point I

Standard of Review

Appellate courts apply a *de novo* standard of review in determining the enforceability of contracts. See, e.g., Goffe v. Foulke Management Corp., 238 N.J. 191 (2019). "When no issue of fact exists, and only a question of law remains, this Court affords no special deference to the legal determinations of the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366 (1995)).

There was no discovery taken or testimony given before the trial court, nor did the trial court make any factual findings. Thus, there are no factual determinations entitled to deference.

Point II

The MOU is Unenforceable Because it Lacks Essential Terms (Da7, 9)

"A contract arises from offer and acceptance, and must be sufficiently definite 'that the performance to be rendered by each party can be ascertained with reasonable certainty.'" Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (quoting Friedman v. Tappan Dev. Corp., 22 N.J. 523, 531 (1956)). "An essential characteristic of an enforceable contract is that its obligations be specifically described in order to enable a court or a trier of fact to ascertain what it was the [promisor] undertook to do." Malaker Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bank, 163 N.J. Super. 463, 474 (App. Div. 1978).

"Thus, if parties agree on essential terms and manifest an intention to be bound by those terms, they have created an enforceable contract." Weichert Co. Realtors, 128 N.J. at 435 (citations omitted). "Where the parties do not agree to one or more essential terms, however, courts generally hold that the agreement is unenforceable." Id. (citing Heim v. Shore, 56 N.J.Super. 62, 72-73 (App. Div. 1959)); see also Rauch v. Rauch, DOCKET NO. A-4745-14T4, 2017 N.J. Super. Unpub. LEXIS 2177, at *14 (App.Div. Aug. 30, 2017).

A court also "cannot enforce 'an agreement to agree' that reflects the parties' intention 'to postpone agreement on a term essential to their ultimate contractual objective.'" Zegarski v. Zegarski, DOCKET NO. A-2306-17T2, 2019 N.J. Super.

Unpub. LEXIS 1163, at *7 (App. Div. May 21, 2019) (quoting *Corbin on Contracts*, § 2.9[3](A)(ii) (Timothy Murray ed., rev. ed. 2018)).

"The degree of specificity required in the contract terms is even greater when equitable remedies are requested." Rauch, 2017 N.J. Super. Unpub. LEXIS 2177, at *14 (citing Alnor Const. Co. v. Herchet, 10 N.J. 246, 250 (1952)). "This is so because a 'precise understanding of all the terms' is required before performance can be enforced." Id. (citing Alnor Const. Co., 10 N.J. at 250-51 (1952)). "Essential terms are those that are '[o]f the utmost importance' or are 'basic and necessary' to the parties' agreement." Id. (quoting Black's Law Dictionary 663 (10th ed. 2014)). R

The buyer's obligation to pay an agreed-upon price is "an essential element of all sales." Associates Discount Corp. v. Palmer, 47 N.J. 183, 187 (1966); see also Dknj Real Estate & Appraisal v. Reussi Capital, DOCKET NO. A-2316-19, 2021 N.J. Super. Unpub. LEXIS 235, at *11 (App. Div. Feb. 10, 2021) ("The amount of compensation . . . is an essential term of any contract."); Soom Dat Pokhan v. Peters, DOCKET NO. A-6120-08T1, 2011 N.J. Super. Unpub. LEXIS 671, at *6 (App. Div. Mar. 18, 2011) ("Price is an essential term of a contract, as to which there must be a clear manifestation of mutual assent.").

In Rauch, the Appellate Division affirmed a decision in part by the Hon. Thomas J. LaConte holding that an oral, tape-recorded agreement between parents and their son for the sale of equity in a business was unenforceable because there

were essential terms missing, including the assumption of corporate liabilities and debts, as well as the treatment of preexisting encumbrances. Rauch, 2017 N.J. Super. Unpub. LEXIS 2177, at *16. The Appellate Division agreed, noting that these "were not issues these parties would have overlooked." Id. at *18. As to the corporate liabilities in particular, the Court noted:

> [The son] acknowledged that his parents had "personal guarantees" on the companies, and if the companies failed "it would have meant the end of them." With no discussion of assets and liabilities, the agreement lacked terms "normal to an obligation of this magnitude."

Id. (quoting ." Malaker Corp., 163 N.J.Super. at 475).

Here, as set forth above, the only compensation that Plaintiff is absolutely required to pay under the MOU is the sum of $1.00. The MOU also provides that Plaintiff must pay $3,000,000 upon the granting of final zoning approval for the Property at either: (i) 82.5 units per acre, or (ii) such other lesser minimum units per acre acceptable to Plaintiff in its sole discretion. However, the MOU says nothing about what, if anything, Plaintiff must pay if zoning approval is obtained of less than 82.5 units per acre, and which Plaintiff does not expressly deem "acceptable." (Da Da28 – 33, 56).

The MOU also contains no deadline by which Plaintiff must seek zoning approval of 82.5 units per acre or, for that matter, any other amount. (Da28-33). Plaintiff has sought to take full of advantage of the lack of such essential terms,

asserting that the payment of $1.00 fully satisfies its obligations under the MOU. (Da38-39).

Moreover, while the MOU indicates that Plaintiff will assume certain corporate debts, it says nothing about the essential issues of indemnification of the Hongkun Defendants or their principals in connection with corporate debts (or any associated personal guarantees). (Da28-33, 56). As noted in the certification of transactional counsel for the Hongkun Defendants, obtaining indemnification and creating a timetable for a zoning application and payment terms are essential terms to any contract such as this. (Da56, 108). Following the MOU, attempts were made to negotiate a conveyance agreement with Plaintiff, but such efforts proved futile. (Da57).

Since the MOU lacks essential terms regarding payment and indemnification related to corporate debts, it is unenforceable.

Point III

The MOU is Unenforceable Because It Is Illusory (Da7, 9)

"A contract should not be read to vest a party or his nominee with the power virtually to make his promise illusory. Especially must this be so when a forfeiture will follow." Russell v. Princeton Laboratories, Inc., 50 N.J. 30, 38 (1967). "An illusory promise has been defined as, a 'promise which by its terms makes performance entirely optional with the 'promisor' whatever may happen, or whatever

course of conduct in other respects he may pursue.'" Bryant v. City of Atl. City, 309 N.J. Super. 596, 620 (App. Div. 1998) (quoting *Restatement (Second) of Contracts*, § 2, comment e (1979)).

Our Supreme Court declined to enforce a "requirements" contract for the purchase of wine because "the undertaking of the plaintiff is left to depend for its very existence upon its future election as to whether it will purchase from defendant any bottled wine under its own exclusive brands, or whether it will purchase all or a considerable part thereof from others under other brands." G. Loewus & Co. v. Vischia, 2 N.J. 54, 59 (1949). The Third Circuit Court of Appeals recently relied upon G. Loewus & Co. in holding illusory, and unenforceable under New Jersey law, a contract in which one party promised to "buy salt in such quantities 'as may be desired' or as they 'may want,' …." Mid-American Salt, LLC v. Morris Cty. Coop. Pricing Council, 964 F.3d 218, 228 (3d Cir. 2020).

The only way to avoid rendering Plaintiff's obligations under the MOU illusory is for Plaintiff actually to be obligated, in good faith, to do something. A contracting party has the right to expect the other party to exercise even discretion that is expressly unilateral in good faith. See Nolan v. Control Data Corp., 243 N.J.Super. 420 (App. Div. 1990). In Nolan, "[t]he written contract gave the employer the absolute and unfettered power to alter sales quotas and thereby compensation rates retroactively, currently or prospectively without notice and

presumably without reason." Id. at 421. The Appellate Division in Nolan held that the employer must exercise this discretion in good faith and, in so doing, cited with approval a decision of then Judge Scalia of the D.C. Circuit regarding the appropriate analysis for contracts providing unilateral discretion:

> . . . the reasonably understood effect of an expansive modifier varies from case to case depending upon the nature of the power at issue. Where what is at issue is the retroactive reduction or elimination of a central compensatory element of the contract -- a large part of the quid pro quo that induced one party's assent -- it is simply not likely that the parties had in mind a power quite as absolute as Tymshare suggests. In the present case, agreeing to such a provision would require a degree of folly on the part of these sales representatives we are not inclined to posit where another plausible interpretation of the language is available.

Id. at 434 (quoting Tymshare, Inc. v. Covell, 727 F.2d 1145, 1154 (D.C.Cir.1984)).

Here, the "central compensatory element" of the MOU is the language providing that Plaintiff must pay "$3,000,000 upon the granting of enforceable final zoning approvals equal to: (i) a minimum of 82.50 units per acre for the Property, or (ii) such other lesser minimum units per acre acceptable to [Plaintiff] in its sole discretion …. (Da28-29).[4] The MOU does not provide for any payment, aside from $1.00, in the event Plaintiff obtains zoning approval for less than 82.50 units per acre and does not find, in its sole discretion, this less dense amount "acceptable." (Da28 – 33, 56). Indeed, Plaintiff's counsel has confirmed its view that the payment of $1.00

[4] The $3,000,000 payment would go down to $2,000,000 depending on the timing of the zoning approvals. (Da29).

fully satisfies Plaintiff's "obligations for acquisition of 100% of the member interests in 339 River Road Holdings, LLC." (Da38-39).

As recognized in Nolan, the trial court should not have assumed that the Hongkun Defendants agreed to such an unjust result where another plausible interpretation of the language – that Plaintiff is required at some reasonable, but certain, time to seek residential zoning approval at the density set forth in the MOU – is available.

As it stands, in light of the trial court's decision, Plaintiff is not bound to do anything other than pay $1.00. Therefore, the MOU is illusory.

Point IV

The MOU is Unenforceable Because the Trial Court's Interpretation of the MOU Leads to an Absurd Result (Da7, 9)

"'It is well-settled that [c]ourts enforce contracts based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract.'" Barila v. Board of Educ. of Cliffside Park, 241 N.J. 595, 615-16 (2020) (quoting Matter of County of Atlantic, 230 N.J. 237, 254 (2017)) (internal quotations omitted). "The plain language of the contract is the cornerstone of the interpretive inquiry; 'when the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result.'" Id. at 616 (emphasis added) (quoting Quinn v. Quinn, 225 N.J. 34, 45 (2016)).

Plaintiff no doubt will argue, contrary to its own prior assertions, that the payment of $1.00 does not constitute the substance of its obligations under the MOU because it is also purportedly assuming the Property owner's debt. But, as the major creditor of that debt, the holder of the mortgage on the Property, pointed out before the trial court, neither Plaintiff nor Mr. Sturman had actually taken on the obligation to do anything:

> MR. SHAFRON: They have not agreed. Mr. Sturman certainly has not agreed to assume this debt. All they've agreed to do is purchase the entity.
>
> They – there is no requirement that they pay this mortgage off, and I have argued this over and over, Your Honor, there is no requirement.
>
> They could easily mess around with this, the application for two years and then decide it is not working, and then walk away.

2T41-16.

Rather, Plaintiff simply now owns the Property, and could ultimately choose to abandon it to foreclosure, leaving the guarantor to deal with any deficiency under the Note.

Such a result creates a windfall for Plaintiff, as this would allow it both to obtain the Property – which it was previously willing to buy for $45 million – for $1.00, and to be able to "walk away" if its plans to construct a "big box" store do not come to fruition. On the other hand, this result provides no benefit whatsoever to the

Hongkun Defendants, who have lost the Property for essentially no compensation, and remain – in the case of Hongkun USA – on the hook for the Guaranty.

A result in which the Hongkun Defendants would lose the Property to Plaintiff for no compensation, yet retain exposure to the Loan via the Guaranty, would be absurd, particularly in light of Mr. Sturman's repeated assertions to the trial court, set forth above, that he had agreed to pay the debt.

Point V

Since the MOU is Unenforceable, the Order Granting Counsel Fees Should be Reversed (Da14, 125)

The trial court's decision to award fees against the Hongkun Defendants was based on its view that the Hongkun Defendants had not abided by the requirements of the September 15, 2023 Order. 2T65-8. If this Court reverses the September 15, 2023 Order, then it goes without saying that the fee award also should be overturned.

However, it also is important to emphasize that the Hongkun Defendants did, in fact, comply with the September 15, 2023 Order. That Order simply held that the MOU was enforceable and directed the Hongkun Defendants to perform their obligations under the MOU. (Da7 - 8). On October 17, 2023, the Hongkun Defendants' transactional counsel emailed Plaintiff's counsel a draft Assignment and Assumption of Membership Interests and Agreement (the "Assignment"), in an attempt to "negotiate in good faith" a purchase and sale agreement, as required by the MOU. (Da108, 112 - 119). Consistent with the Hongkun Defendants' prior

position, and in recognition of opposing counsel's acknowledgment, discussed above, that the indemnification issue would have to be dealt with, this draft included provisions relating to: (1) indemnification, and (2) Plaintiff's obligation to pursue in good faith the zoning approvals referenced in the MOU. (Da108, 112 - 119).

On October 18, 2023, Plaintiff's counsel informed the Hongkun Defendants' transactional counsel, that, contrary to Plaintiff's prior assurances to the Court, its counsel's acknowledgement that the indemnification issue was a "fair concern," and the MOU's express language, it had no intention of negotiating in good faith the issues the Hongkun Defendants raised: "The bottom line is that our client is not going to renegotiate the MOU. Any attempt to add an indemnification obligation or cover your clients' personal guarantees is a non-starter." (Da121).

Thus, the trial court's determination that the Hongkun Defendants did not comply with the September 15, 2023 Order was erroneous and should be reversed.

CONCLUSION

For the foregoing reasons, the Hongkun Defendants respectfully request that this Court reverse the September 15 and November 27, 2023 Orders of the trial court enforcing the MOU and requiring the Hongkun Defendants to execute an Assignment of Interest transferring the Property, declaring that "Plaintiff has no obligation to indemnify any guarantors of any debt against the Property or against any of the Defendants," and awarding counsel fees to Plaintiff. Additionally, since the MOU is unenforceable and there was no failure to comply with the September 15, 2023 Order, the Hongkun Defendants also respectfully request that the Court reverse the trial court's February 5, 2024 Order granting Plaintiff's fee application.

COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
Attorneys for Defendants-Appellants
Hongkun USA Real Estate Development, LLC,
Hongkun Group USA Holdings Corp.,
Hongkun USA Real Estate Holdings LLC

BY: /s/ *Jeffrey W. Herrmann*
Jeffrey W. Herrmann
A Member of the Firm

DATED: May 20, 2024

339 River Road Partners, LLC Plaintiff/Appellee, v. Hongkun USA Real Estate Development, LLC, Hongkun Group USA Holdings Corp., Hongkun USA Real Estate Holdings, LLC, Defendants-Appellants and 339 River Road Holdings, LLC, Fan (Richard) Liu, Weihao (Andy) Zhao, Defendants-Appellees	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-001695-23 Civil Action On Appeal from Superior Court of New Jersey Chancery Division Bergen Vicinage Docket No. C-0137-23 Sat Below: Hon. Edward A. Jerejian, P.J.Ch.

PLAINTIFF-APPELLEE'S BRIEF

PASHMAN STEIN WALDER HAYDEN
A Professional Corporation
Court Plaza South – Suite 200
21 Main Street
Hackensack, New Jersey 07601
Phone: (201) 488-8200
mstein@pashmanstein.com
rplawker@pashmanstein.com

Attorneys for Plaintiff,
339 River Road Partners, LLC

Of Counsel:
Michael S. Stein, Esq. (#37351989)

On the brief:
Michael S. Stein, Esq. (#37351989)
Roger Plawker, Esq. (#04951993)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

TABLE OF APPENDIX

PRELIMINARY STATEMENT

Defendants'/Appellants' attempt to rewrite and improve an unambiguous contract was firmly rejected by the court below and should be rejected here. Through a written contract titled "Memorandum of Understanding" (MOU), Plaintiff/Appellee 339 River Road Partners, LLC (RR Partners) purchased a 100% ownership interest in 339 River Road Holdings, LLC (RR Holdings), a company saddled with debt – principally a $30 million mortgage that was in default and has now matured to a $47 million foreclosure judgment. Prior to the execution of the MOU, RR Holdings was a subsidiary or affiliate of Defendants/Appellants Hongkun USA Real Estate Development, LLC, and/or the other Hongkun defendants (collectively, Hongkun or Appellants).

RR Holdings is and remains the fee simple owner of real property located at 339 River Road in Edgewater, New Jersey (the Property). As the new owner of 100% of the membership interests in RR Holdings, RR Partners gained operational control over the Property, but RR Partners does not own the Property.

As consideration for the purchase of a 100% interest in RR Holdings, RR Partners assumed RR Holdings' debts and liabilities totaling $2,569,838.26 plus liability from a foreclosure action amounting to $37,594,492 as of January 1, 2022. The liability from that foreclosure action has since increased to over $47

million, as indicated by the judgment entered on June 20, 2024. (Pa1). Pursuant to the MOU, RR Partners has also expended considerable resources – including around $600,000 to cover soft costs, 1T 52:22-24 – to pursue development rights for the property, with the objective of satisfying RR Holdings' liabilities to the great benefit of Appellants. Due to the magnitude of RR Holdings' liabilities, the parties to the MOU agreed that the assumption of debts by RR Partners was sufficient consideration.

Nevertheless, there was other consideration. Per the plain text of the MOU, there was the nominal $1.00 payment together with the $2 to $3 million "kicker" in the conditional event RR Partners succeeded in obtaining residential zoning (the property is currently zoned for commercial use) within a certain time frame. RR Partners commenced the zoning application process, but even an initial application for retail development was rejected and is now the subject of a separately-pending prerogative writ challenge in Bergen County. 339 River Rd., LLC v. Planning Bd. of the Borough of Edgewater, Docket No. BER-L-2015-24. Axiomatically, to date, RR Partners has not persuaded the town of Edgewater to pursue the residential zoning which would have entitled Appellants to the conditional payments.

RR Partners took the good with the bad by purchasing an entity saddled with as much debt as its assets could secure; Appellants now complain the deal was somehow unfair and wants to recant its agreement.

STATEMENT OF FACTS[1] [2]

339 River Road Partners (RR Partners) purchases a 100% interest in 339 River Road Holdings, LLC (RR Holdings) through a Memorandum of Understanding (MOU).

Defendant 339 River Road Holdings, LLC (RR Holdings) is the record owner of a parcel of land located at 339 River Road in Edgewater, New Jersey (the Property). (Da20, ¶ 11). RR Holdings was a subsidiary or affiliate of Defendant Hongkun USA Real Estate Development, LLC, and/or the other Hongkun defendants (Hongkun or Appellants). Id. (¶ 10). Pursuant to a March 10, 2023, written and signed agreement between the parties titled "Memorandum of Understanding" (the MOU), Plaintiff 339 River Road Partners, LLC (RR Partners) acquired 100% ownership of RR Holdings in exchange for a nominal cash price, conditional cash payments, and the assumption of a $30,000,000 principal loan and

[1] Plaintiff relies on the following references:
Db – Defendant's brief
Pa – Plaintiff's appendix
Da – Defendant's appendix

[2] The volumes of the transcript cited in this brief are as follows, in parallel with Appellants' citations:
1T – Transcript of the September 15, 2023 Hearing before the Hon. Edward A. Jerejian, P.J.Ch.

associated obligations encumbering the Property, presently determined to exceed $47,000,000.[3] Id. (¶ 22).[4]

By its express terms, and as the trial court found, the MOU states the parties' unequivocal intention to be bound, and all essential terms of the agreement are contained therein. It states unequivocally:

> The parties to this MOU further agree that even though they envision that they will enter into more formal documentation, this MOU shall be binding on each of them and is not merely an expression of the parties' interest in pursuing a transaction.
>
> [Da30.]

Under the MOU, the only other documents referenced are ancillary documents to be prepared in the normal course including, but not limited to, an amendment to the RR Holdings Operating Agreement and an assignment of interests, with the closing of a purchase and sale agreement to occur within ten

[3]Appellants appear to suggest that RR Partners' principal, Bruce Sturman, personally assumed the debt because he stated in argument before the Court that he was "stepping into those obligations" as the "new shareholder." Db at 6; 1T 40:5-6. Mr. Sturman is not a party to the MOU and, as noted on the record, he was obviously referring to the entity, not himself, personally. Mr. Herrmann himself explained, correctly, "[a] single-purpose entity is assuming the debt." 1T 38:14-15.

[4] The foreclosure judgment entered on June 20, 2024, awarded an aggregate sum of precisely $47,373,075.98, "together with interest at the rate of 14.5% on the sum of $31,389,798.89, representing the mortgage principal and advances, from February 29, 2024, through the date of this judgment. . . ." (Pa2).

days of the MOU, which "the parties shall negotiate in good faith promptly upon the execution hereof." (Da29).

Appellants, and their affiliate RR Holdings, have sought unilaterally to renounce the MOU. They portray it as nothing more than an agreement to agree and treat it as having no force or effect.

The Parties Entered the MOU Because Their Prior Purchase and Sale Agreement (PSA) was Terminated Due to Outside Interference by a Mortgagee.

Prior to the MOU, RR Holdings mortgaged the Property in connection with the earlier mentioned $30 million loan from East-West Funding, LLC (Mortgagee). (Da20) (¶¶ 12-14). On September 7, 2021, following a series of payments, missed payments, and loan modification agreements, Mortgagee issued to RR Holdings its last notice of default. Id. (¶ 15). Thereafter, RR Holdings sought to sell the Property for an amount sufficient to pay off the Loan. Id. (¶ 17). To that end, on or about June 2, 2022, RR Partners and RR Holdings entered into a Purchase and Sale Agreement (PSA) with a sale price of $45 million. Id. (¶ 18). Unfortunately, Mortgagee's principal, Fred Daibes – who has a well- and publicly-documented relationship with the Borough of Edgewater – willfully interfered with the zoning of the Property causing it to lose a substantial amount of its value and development prospects. (Da21) (¶ 19).

After the municipality threatened to change the zoning, the PSA was terminated on or about November 29, 2022. Id. (¶ 20).

In the interim, Mortgagee had commenced foreclosure proceedings against RR Holdings, Hongkun USA Real Estate Holdings, LLC, and the Property. Consistent with an earlier statement by Mr. Daibes that he intended to "take" the Property, Id. (¶ 21), the Property is presently subject to a writ of execution dated June 25, 2024. (Pa6).

In furtherance of their continuing desire to pursue the objectives of the PSA – debt relief, property development, and prevention of loss of the Property to Mortgagee – RR Partners and Appellants entered into the MOU. (Da21) (¶¶ 22-23); (Da28-33).

RR Partners has fully performed its obligations under the MOU. (Da21) (¶ 27). In reliance on the MOU and with the reasonable expectation that Appellants would perform their obligations thereunder in good faith, RR Partners has incurred, and continues to incur, substantial costs and expenditures of resources in furtherance of developing the Property. Id. (¶ 28).

Appellants Repudiate the MOU

Appellants unilaterally declared—in clear derogation of the MOU—that the MOU is not an enforceable contract and that they do not intend to honor it. RR Partners began this litigation to enforce the MOU and was successful in the

trial court. Appellants repeatedly refused to perform their obligations thereunder despite Court orders. (Da22) (¶ 29). Appellants renounced the MOU so they could enter into a different transaction with Mortgagee's principal, Mr. Daibes. Id. (¶ 30).

Appellants have made it clear that they want to invalidate the MOU so they can trade mortgages with Mr. Daibes. Mr. Daibes is the owner of real property in Edgewater located at 115 River Road. Appellants, or one of their affiliates, are the mortgagees on the 115 River Road property. Id. (¶ 31). Appellants determined that they may have an opportunity to offset the debt from the mortgage on the Property in exchange for cancelling the outstanding lesser debt obligation on the 115 River Road property. Id. (¶ 32). In other words, Appellants sought to offset the debt on the Property by cancelling a mortgage they hold against one of Mr. Daibes' properties. Id. (¶ 33).

In the meantime, as noted, in furtherance of its bargained-for rights under the MOU and in reliance on Appellants' promise to perform thereunder, Plaintiff has incurred, and continues to incur, significant time and expense, including, but not limited to, in relation to engineering studies, site planning, legal compliance, and all ordinary pre-development costs. Id. (¶ 35).

Appellants' bad faith renunciation of the MOU and their refusal to provide the agreed upon closing documentation in breach of the MOU hindered RR

Partners' ability to proceed with developing the Property as planned, including prosecuting a site plan and other municipal applications, and with respect to obtaining financing, which is being actively negotiated but cannot be finalized with the cloud Appellants have created over ownership of the property and the MOU. Id. (¶¶ 36-37).

The MOU Contains a Provision for Attorney's Fees

The MOU contains a fee-shifting provision requiring an award of all costs and counsel fees to the prevailing party in an action seeking its enforcement or protection of a party's rights thereunder stating in relevant part:

> If any party shall retain or engage an attorney or attorneys to collect or enforce or protect such party's interest with respect to this MOU, the prevailing party shall be entitled to receive payment of all costs and expenses of collection, enforcement, or protection, including reasonable attorney's fees, whether or not suit is brought and through all appeals.
>
> [(Da30).]

Despite a counsel fee award by the trial court totaling $34,426.50, as set forth in an Order dated February 5, 2024, Appellants have failed to pay. (Da14).

PROCEDURAL HISTORY

Plaintiff filed an Order to Show Cause on July 21, 2023 seeking a declaration that the MOU was an enforceable agreement and directing the Appellants to cooperate in furnishing the ancillary documents contemplated

thereunder. (Da19-26). The relief sought was granted by Order dated September 15, 2023, which stated:

> It is hereby ORDERED:
>
> 1. That the March 13 [sic], 2023 Memorandum of Understanding between the parties is an enforceable agreement and directing Defendants to specifically perform their obligations under the March 13 [sic], 2023 Memorandum of Understanding.
>
> [(Da7-8).]

In the September 15th argument that resulted in the above-referenced Order, defense counsel sought to argue that enforcement of the MOU merely triggered the beginning of a new negotiation of terms and that there was no timeframe required to get that done. 1T 35:4-13; 37:24-25; 45:10-14. Appellants argued further that there could be no agreement without an indemnification provision, despite no such provision in the MOU. 1T 35:16-20; 46:2-15. The trial court emphatically rejected that suggestion, stating:

> It doesn't say that now we are going to engage in a new round of negotiations leading to a possible understanding.
>
> [1T 84:17-19.]

Despite the trial court's order, Appellants refused to comply with the terms of the MOU. Plaintiff moved for an order compelling an assignment of interest pursuant to the MOU on October 16, 2023. The trial court granted Plaintiff's motion on November 27, 2023, compelling Appellants to execute an

assignment of interest conveying Appellants' interest in RR Holdings to Plaintiff in the form provided by Plaintiff. (Da9-11). Appellants finally executed the assignment of interest on December 6, 2023. Appellants then moved for a stay pending appeal on December 20, 2023, which was denied by the trial court on January 11, 2024. (Da 12-13).

Finally, the trial court entered an order and opinion on February 5, 2024, awarding Plaintiff attorneys' fees pursuant to the express language of the MOU. (Da14). Appellants explicitly informed the trial court that they would not oppose the application for fees, despite its disagreement with the court's prior orders enforcing the MOU and later compelling the assignment of interest. (Da125). Despite choosing not to oppose the fee application, Appellants now seek a reversal of the fee award as well as a reversal of the court's rulings and orders enforcing the MOU.

For the reasons that follow, this Court should affirm the decisions of the trial court and enforce the MOU as written.

LEGAL ARGUMENT

I. STANDARD AND SCOPE OF REVIEW

Appellants seek reversal of the trial court's orders interpreting and enforcing a binding contract; therefore, this Court may review the decisions de novo. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc.,

427 N.J. Super. 45 (App. Div. 2012) (citing Hutnick v. ARI Mut. Ins. Co., 391 N.J. Super. 524, 528 (App. Div. 2007), certif. denied, 192 N.J. 70 (2007)).

The core issue on appeal is the enforceability of the MOU. Appellants seek to set aside the unambiguous contract language for three reasons, each of which is factually and legally incorrect: (1) it allegedly lacks essential terms, (2) its promises are somehow illusory, and (3) it allegedly creates an absurd result. On its face, and as the trial court found, the contract contains all the terms and prerequisites necessary to create a binding contract, including offer, acceptance, and mutual consideration. The consideration exchanged is clear and definite, with no ambiguities. Finally, the result Appellants complain of is what was clearly bargained for when they entered into the agreement and is neither unfair nor absurd.

II. THE MOU IS A COMPLETE AND BINDING AGREEMENT. (Da7-11).

"It has been decided many times and in many cases that the court will not make a different or better contract than the parties themselves have seen fit to enter into." Washington Const. Co. v. Spinella, 8 N.J. 212, 217 (1951) (citations omitted). "A court has no power to rewrite the contract of the parties by substituting a new or different provision from what is clearly expressed in the instrument." Rahway Hosp. v. Horizon Blue Cross Blue Shield of New Jersey, 374 N.J. Super. 101, 111 (App. Div. 2005) (quoting E. Brunswick Sewerage

Auth. v. E. Mill Assocs., 365 N.J. Super. 120, 125 (App. Div. 2004)). Nor may a court "supply terms that have not been agreed upon." Ibid. (quoting Bar on the Pier, Inc. v. Bassinder, 358 N.J. Super. 473, 480 (App. Div.), certif. denied, 177 N.J. 222 (2003)).

A. The MOU is a definite agreement to transfer an interest in a corporate entity in exchange for monetary consideration. (Da7-8).

"A contract arises from offer and acceptance, and must be sufficiently definite 'that the performance to be rendered by each party can be ascertained with reasonable certainty.'" Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (quoting West Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958)). "If the parties agree on essential terms and further manifest an intention to be bound by those terms, they have created an enforceable contract." Graziano v. Grant, 326 N.J. Super. 328, 339-340 (citing Weichert Co. Realtors, 128 N.J. at 435).

By its express terms, the MOU unequivocally states the parties' intention to be bound, and all essential terms of the agreement are contained therein. The MOU states the exchange of consideration in clear and definite terms:

> [RR Partners] shall pay $1.00 for one hundred percent (100%) of the interests in [RR Holdings]. In addition, [Hongkun] shall be entitled to a payment of $3,000,000 upon the granting of enforceable final zoning approvals. . . .
>
> The transaction described herein shall be evidenced by an assignment of interests and an amendment of the

> LLC Agreement. . . . Attached hereto as Schedule A is a list of all litigation to which [Hongkun] is a party, thereby comprising a full disclosure by HK of liabilities to be assumed by [RR Partners] as part of the transaction contemplated hereunder.
>
> [(Da28-29).]

The MOU explicitly states that it is fully integrated and binding:

> This MOU constitutes the entire agreement among the parties hereto with respect to the subject matter hereof and supersedes all prior and contemporaneous agreements, understandings, negotiations and discussions, both written and oral, among such parties with respect to such subject matter.
>
> . . .
>
> The parties to this MOU further agree that even though they envision that they will enter into more formal documentation, this MOU shall be binding on each of them and is not merely an expression of the parties' interest in pursuing a transaction.
>
> [(Da30).]

The MOU is therefore a complete and legally enforceable promise to transfer the interest in RR Holdings to RR Partners in exchange for consideration reflecting RR Holdings' assets and liabilities. The terms are certain, the parties' performance is clear, and the parties made their intention to be bound explicit.

Appellants point to no actual language in the MOU that they contend is ambiguous or otherwise diminishes its express enforceability. Instead, they argue that the consideration under the MOU is inadequate or somehow illusory

and that this Court should intervene to make a better contract for the parties than they made for themselves. Appellants' arguments run against the bedrock principle that courts do not rewrite contracts. Washington Const. Co., 8 N.J. at 217.

B. Indemnification is not an essential term in any contract. (Da 9-11).

Essential terms in a contract may include the price and a sufficient description of what is purchased. See Satellite Entertainment Center, Inc. v. Keaton, 347 N.J. Super. 268, 276 (App. Div. 2002) (enforcing a simple contract to purchase a business for a fixed price). Not all particulars need be included in the contract for it to be enforceable. Ibid. ("It is a settled principle that when the essential parts of a contract are spelled out, a court will not refuse to enforce that contract because some of its less critical terms have not been articulated.").

Appellants now posit that without an indemnification provision for certain guarantees given to Mortgagee, the MOU lacked an essential term. (Da54-57) (¶ 12) ("Marger Cert."); Db at 16. Because indemnification is wholly absent from the MOU, Appellants relied on the general experience of their attorney, Joseph Marger, who drafted the MOU and then later certified that the indemnification sought is typically an "essential" part of such a transaction. Id. (¶11). It is evident and dispositive that if the parties intended for indemnification to be part—in particular an "essential part" of the MOU, they

would have included it. Mr. Marger, who acknowledges that he negotiated and drafted the MOU on Appellants' behalf, and who failed to include this purportedly routine and essential term, sought to correct his omission in the trial court through his own "expert" testimony. Id. (¶¶ 5, 11-13). This unabashed run for cover speaks for itself, and any detriment to defendants from its omission may not be laid at RR Partners' feet.

III. THERE IS ADEQUATE CONSIDERATION FROM RR PARTNERS TO SUPPORT THE MOU. (Da7-8).

Under New Jersey law, consideration is a bargained for exchange of promises or performance that may be an act, a forbearance, or an agreement to create, modify, or destroy a legal relation. Sipko v. Koger, Inc., 214 N.J. 364, 380 (2013); Martindale v. Sandvik, 173 N.J. 76, 87 (2002); Shebar v. Sanyo Business Systems Corp., 111 N.J. 276, 289 (1988). Other basic contract principles applicable here are that "consideration may take the form of either a detriment incurred by the promisee or a benefit received by the promisor." Continental Bank of Pennsylvania v. Barclay Riding Academy, Inc., 93 N.J. 153, 170 (1983). "[T]he value given or received as consideration need not be monetary or substantial." Oscar v. Simeonidis, 352 N.J. Super. 476, 485 (App. Div. 2002). Generally, courts do not weigh the value of the consideration but only assess whether it exists. (see Sipko, 214 N.J. at 381; Martindale, 173 N.J. at 87; Shebar, 111 N.J. at 289) (emphasis added).

Appellants have unilaterally renounced the MOU, seeking to portray it as nothing more than an agreement to agree and treating it as having no force or effect. They further mischaracterize the MOU as a sale of a $45 million property for $1, intentionally ignoring both the true form of the transaction and the assumption of liabilities exceeding $47 million that justify the nominal cash price paid by RR Partners.

As additional consideration, RR Partners promised to undertake all efforts associated with residential zoning applications for the Property and make conditional payments of $2 to $3 million depending on the results of those applications, and the timing of those results. These payments are conditional because RR Partners cannot compel the Borough of Edgewater to approve a zoning change to residential. This conditional payment, as with the other consideration discussed, is a definite and sizeable sum, which facially defeats Appellants' contract-formation argument relating to inadequate consideration.

The trial court properly recognized the adequacy of the consideration under the MOU, and appropriately enforced the MOU through its orders on September 15, 2023, and November 27, 2023. 1T 74:11-17 ("So now to say that all we did was agree to enter into negotiations, I don't think that's what you did. . . . I mean, there is consideration.").

IV. THE OBLIGATIONS UNDER THE MOU ARE NOT ILLUSORY. (Da7-8).

Next, Appellants argue that RR Partners' obligations to attempt to achieve rezoning are illusory; this, too, is meritless. Indeed, the fact that the payment related to zoning was *conditional* demonstrates without question Appellants' knowledge and acceptance of uncertainty regarding the zoning. Uncertainty and illusion are not synonymous. A promise cannot be illusory if it is dependent on something outside the promisor's control. Del Sontro v. Cendant Corp., 223 F. Supp. 2d 563, 578 (D.N.J. 2002) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 2, cmt. e (1979)). Indeed, an "implied obligation to use good faith is enough to avoid the finding of an illusory promise." In re Cendant Corp. Lit., 264 F.3d 286, 300 (3rd Cir. 2001).

Plaintiff is obviously powerless to compel Edgewater to rezone, and the most it could ever do, which it is in fact doing, is apply for zoning in good faith. (Da47-53). The trial court recognized that Plaintiff was able only to pursue zoning rights, and that the final determinations depended on the town of Edgewater. The trial court further noted Plaintiff's good faith efforts and concluded that the promise was not illusory. 1T 74:1-5 ("Now, as a result of this agreement and as a result of that, you now, steps have been taken, applications have been filed, monies have been expended, and I am hearing there is a site plan application pending before the Board right now.").

Appellants complain further that "the MOU says nothing about what, if anything, [RR Partners] must pay if zoning approval is obtained of less than 82.5 units per acre, and which [RR Partners] does not expressly deem acceptable." (Db at 14). No principle of contract law requires a party to pay for anything other than complete fulfillment of a condition. In this instance, there is no payment to Appellant for less profitable zoning. The MOU reflects that negotiation between the parties and strikes a balance that fairly considers RR Holdings' enormous liabilities. Thus, there is no missing essential term or illusory language regarding payment to Appellants.

V. ENFORCEMENT OF THE MOU ACCOMPLISHES THE VERY GOALS THE PARTIES SET OUT TO ACHIEVE AND DOES NOT CREATE AN UNFAIR OR ABSURD RESULT. (Da7-11).

"It has been decided many times and in many cases that the court will not make a different or better contract than the parties themselves have seen fit to enter into." Washington Const. Co. v. Spinella, 8 N.J. 212, 217 (1951) (citations omitted). Contracts are enforced "based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract." JPC Merger Sub LLC v. Tricon Enterprises, Inc., 474 N.J. Super. 145, 160 (quoting In re County of Atlantic, 230 N.J. 237, 254 (2017)). "Contract terms are generally 'given their plain and ordinary meaning.'" Ibid. (quoting M.J. Pacquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 375, 396 (2002)). "Because '[t]he plain language of the

contract is the cornerstone of the interpretive inquiry[,] when the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result.'" Id. at 161 (quoting Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 616 (2020) (alterations in original)). Appellants latch onto this last phrase to argue that their bargain is so unfair to them that it cannot be legally enforced. A term for this exists in law – unconscionability.

Unconscionability requires "two factors: (1) unfairness in the formation of the contract, [procedural unconscionability] and (2) excessively disproportionate terms [, substantive unconscionability]." Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 38-39 (App. Div. 2010) (quoting Sitogum Holdings, Inc. v. Ropes, 352 N.J. Super. 555, 564 (Ch. Div. 2002) (internal quotations omitted) (alterations in original)). Courts in New Jersey may employ a "sliding scale analysis" to assign weight to the two forms of unconscionability and consider "the way in which the contract was formed and, further, whether enforcement of the contract implicates matters of public interest." Id. at 39 (citing Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 301 & n. 10 (2010)).

Appellants' argument that the result of the MOU is "absurd" – i.e., unconscionable – is first undermined by the fact that they contradict themselves in their own brief. They first state that "the MOU indicates that [RR Partners] will

assume certain corporate debts," (Db at 16), then attempt to backpedal by stating "neither [RR Partners] nor Mr. Sturman had actually taken on the obligation to do anything" (Db at 20). The only absurdity present is the notion that RR Partners could simultaneously assume the liabilities of RR Holdings and do nothing at all. The contract language is clear. Under the MOU, RR Partners assumed the liabilities of RR Holdings as an affiliate of Appellants:

> Attached hereto as Schedule A is a list of all litigation to which [Hongkun] is a party, thereby comprising a full disclosure by [Hongkun] of liabilities to be assumed by [RR Partners] as part of the transaction contemplated hereunder.
>
> [(Da29).]

Appellants' position stems apparently from its regret that it did not bargain to have RR Partners indemnify separate guarantees given by them to Mortgagee. Moreover, as the trial court recognized, RR Partners did not "get the property" for $1; rather, it took control of the debt and may have to give the property back to the Mortgagee if it cannot satisfy the debt. 1T 74:25-75:3 ("As I expressed, if this all falls apart, you know, with Mr. Sturman's entity, you know, beyond the hook, you know, just giving up the property, that remains to be seen.").

A. The MOU was not procedurally unconscionable as both parties were sophisticated companies represented by competent counsel. (Da7-11).

"A basic tenet of the law of contracts is that courts should enforce contracts as made by the parties. However, application of that principle assumes that the parties are in positions of relative equality and that their consent is freely given." Vasquez v. Glassboro Service Ass'n, Inc., 83 N.J. 86, 101 (1980) (citing Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 386 (1960)). The Supreme Court's concern is with unequal bargaining power and exertion of unfair influence – these are procedural flaws in the making of a contract that may make it unconscionable. These concerns are not present here.

As the trial court found, Appellants and RR Partners are all sophisticated corporate entities who were represented by competent counsel while negotiating the MOU. 1T 7:17-22, 12:24-13-1 ("[N]ow we are saying all of the people including the gentleman's name who actually negotiated, Mr. Marger, now all of a sudden he doesn't know what he is doing. I guess Mr. Hermann doesn't know what he is doing. Nobody knows what they are doing. . . . I don't want to hear these arguments that we didn't know what we were doing, or this is not what we agreed to."). Despite Mr. Marger's certification appearing to admit his mistake in failing to include indemnification language, he is sophisticated counsel, a partner in the firm Reed Smith. The parties memorialized their

agreement in writing after negotiations regarding both the price and terms of the transfer of interest in RR Holdings. This is a textbook example of voluntary negotiations free from unfair influence. Appellants cannot point to any instance of duress or unfair pressure to support a claim of procedural unconscionability here. This is because the bargain struck in the MOU was fairly and voluntarily reached.

B. The MOU is not substantively unconscionable because the price of the 100% interest in RR Holdings is reflected by its assets as well as its liabilities; thus, Appellants received a fair benefit in their bargain. (Da9-11).

Neither are the terms of the MOU substantively unconscionable. As discussed above, the consideration exchanged was fair. The parties considered both the value of the Property and its liabilities to assess the value of the interest in RR Holdings. The parties even undertook to specify the liabilities RR Partners would be assuming in Schedule A to the MOU. (Da32-33).

Taking Appellants' $45 million figure as a benchmark for the sake of argument, the parties reached a substantively fair agreement. Today, the liability RR Partners assumed relating to the foreclosure litigation against East-West Funding, LLC alone accounts for over $45 million as that litigation has proceeded and the interest on the loan has grown. At the time of the MOU, it was over $37 million. (Da32-33). For Appellants to expect to be paid $45 million

in cash in addition to receiving the benefit of RR Partners' assumption of RR Holdings' liabilities would be to expect a double payment. This would be an example of the absurdity alleged.

Appellants finally complain about the result created by their guaranty agreement with East-West Funding, LLC, RR Holdings' major lender, to argue that they are placed in an unfair position. The result of those contracts is entirely irrelevant to the enforceability of the MOU. Appellants made their bargain in the MOU with full knowledge of the guaranty agreements they entered prior. If Appellants wanted further protections relating to those contracts, they could have sought them during negotiations. RR Partners cannot be held accountable for contracts to which they are not a party and which Appellants themselves freely chose to enter.

VI. THE AWARD OF ATTORNEY'S FEES IS APPROPRIATE PURSUANT TO THE EXPRESS LANGUAGE OF THE MOU. (Da14-15).

Because the MOU is enforceable at law, the trial court appropriately applied its attorneys' fees provision and awarded RR Partners $34,426.50 for professional services rendered and costs incurred in seeking to enforce RR Partners' rights.

This award should remain in force as a result of the MOU's continued enforceability. Pursuant to the plain language of the MOU clause regarding

attorney's fees providing for fees "through all appeals" (Da30), RR Partners is entitled further to fees incurred in connection with this appeal and will submit a fee certification as necessary.

CONCLUSION

For all the foregoing reasons and as set forth in the trial court's opinion, plaintiff respectfully requests that this Court affirm the trial court's orders enforcing the MOU as written and awarding attorneys' fees.

Respectfully submitted,

PASHMAN STEIN WALDER HAYDEN, P.C.
Attorneys for Plaintiff/Appellee 339 River Road Partners, LLC

/s/Michael S. Stein
Michael S. Stein

339 River Road Partners, LLC, Plaintiff, v. 339 River Road Holdings, LLC, Hongkun USA Real Estate Development, LLC, Hongkun Group USA Holdings Corp., Hongkun USA Real Estate Holdings LLC, Fan (Richard) Liu, Weihao (Andy) Zhao, and John Does and ABC Corps. 1 – 10, fictitious parties, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001695-23 CIVIL ACTION SAT BELOW: Superior Court of New Jersey, Chancery Division, Bergen County Docket No. C-137-23 Hon. Edward A. Jerejian, P.J.Ch.

DEFENDANTS-APPELLANTS' REPLY BRIEF

COHN LIFLAND PEARLMAN HERRMANN & KNOPF LLP
Jeffrey W. Herrmann, Esq. - 019311976
Alex A. Pisarevsky, Esq. - 0002861999
Park 80 West – Plaza One
250 Pehle Avenue, Suite 401
Saddle Brook, New Jersey 07663
Tel.: (201) 845-9600
Fax: (201) 845-9423
jwh@njlawfirm.com
ap@njlawfirm.com
Attorneys for Defendants-Appellants
Hongkun USA Real Estate Development, LLC, Hongkun Group USA Holdings Corp., and Hongkun USA Real Estate Holdings LLC

Of Counsel:
Jeffrey Herrmann, Esq.
On the Brief
Alex A. Pisarevsky, Esq.
Submitted: July 12, 2024

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

PRELIMINARY STATEMENT

The Hongkun Defendants[1] submit this reply brief in further support of their request that this Court reverse the September 15 and November 27, 2023 Orders of the trial court requiring the transfer of the Property and awarding counsel fees to Plaintiff.

There is no reasonable dispute that the MOU, as enforced by the trial court, has resulted in a great windfall to Plaintiff, which was never contemplated by the parties. Plaintiff has acquired a commercial property for $1 that it previously was willing to purchase for $45,000,000, yet retained the ability to walk away from the project if it so chooses and owe nothing. On the other hand, the Hongkun Defendants have lost the Property, stand to be paid nothing more than $1, and, in the case of Hongkun USA, remain liable under the debt that the Property secures.

This is a manifest injustice.

PROCEDURAL HISTORY

The Hongkun Defendants will rely upon the Procedural History contained in their opening brief.

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Hongkun Defendants' opening brief.

STATEMENT OF THE FACTS[2]

The Hongkun Defendants will rely upon the Statement of the Facts contained in their opening brief, except to note their disagreement with certain factual assertions made in Plaintiff's opposition papers.

Plaintiff states, after acknowledging that its retail development application for the Property has been rejected: "Axiomatically, to date, RR Partners has not persuaded the town of Edgewater to pursue the residential zoning which would have entitled Appellants to the conditional payments." Pb, 2. Plaintiff also laments that it "is obviously powerless to compel Edgewater to rezone, and the most it could ever do, which it is in fact doing, is apply for zoning in good faith." Pb, 17.

All of this suggests, in a less than subtle fashion, that Plaintiff has attempted to pursue residential zoning for the Property which, if granted, could entitle the Hongkun Defendants to the "kicker" payment under the MOU. This is simply not the case. Plaintiff's Site Plan Approval application before the Edgewater Planning Board, which Plaintiff's opposition papers reference in touting its purported good faith efforts on the zoning issue (Pb, 17), makes clear that it sought approval for

---

[2] The following references are used in this section and throughout the Hongkun Defendants' reply brief:

Db – Hongkun Defendants' opening brief
Da – Hongkun Defendants' appendix
Pb – Plaintiff's opposition brief
Pa – Plaintiff's appendix

"Big box retail of 161,161 square feet with retail (107,939 square feet) and grocery (50,000 square feet)." (Da49). As Plaintiff's principal, Bruce Sturman, made clear before the trial court: "I am going for the as-of-right big box store." 1T32-2.[3]

Moreover, after Plaintiff's "big box" store application was rejected, Plaintiff filed a prerogative writ challenge to this rejection before the Law Division, rather than seeking residential zoning approval. Pb, 2. This course of action expressly contradicts representations made by Mr. Sturman to the Hongkun Defendants' transactional counsel in documents relied upon by Plaintiff before the trial court:

> The Purchaser intends to seek approval for a 220,000 retail use under the B-3 zone, which is an as of right use from the Township. The Purchaser intends to file a site plan application promptly to the Planning Board for this use.
>
> In the event Purchaser receives negative feedback or rejection of this B-3 application from the Township then purchaser will immediately seek appropriate residential zoning for approval from the Township.

(Da61) (emphasis added).

There is nothing in the record to suggest that Plaintiff has ever, let alone "immediately," sought, or ever will seek, residential zoning approval for the Property, which is the only way the Hongkun Defendants could receive more than $1 under the MOU.

---

[3] The volumes of the transcript cited in this brief are as follows:

> 1T – Transcript of the September 15, 2023 Hearing before the Hon. Edward A. Jerejian, P.J.Ch.

LEGAL ARGUMENT

Point I

Plaintiff's Assumption of the Debt of Appellee 339 Holdings is Meaningless

Plaintiff makes much of its assumption of Appellee 339 Holdings' debt. Pb, 2, 3, 12, 13, 16, 19, 20, 22, and 23. Yet, Plaintiff also takes pains to point out that it, as a single-purpose entity, is the only one who has assumed anything. Pb, 4 n. 3.

As explained in detail in the Hongkun Defendants' opening papers, the fact that the debt of 339 Holdings, which owns the Property, has been assumed by Plaintiff, whose only asset is 339 Holdings, creates no benefit for anyone other than Plaintiff and its principal, Mr. Sturman. Plaintiff is able to obtain the Property – which it was previously willing to buy for $45 million – for $1.00, and retains the ability to "walk away" if its plans to construct a "big box" store do not come to fruition, leaving Hongkun USA on the hook for the Guaranty.

This contradicts Mr. Sturman's representations both to the Hongkun Defendants that Plaintiff would "immediately" seek "appropriate residential zoning" if its "big box" application were rejected (Da61) and to the trial court that that he himself was taking on the debt in question: "All those obligations are mine. Mine." 1T40-9.

That Plaintiff may ultimately choose to "walk away" and abandon the Property to foreclosure is no mere speculation, as a final foreclosure judgment has now been entered by the trial court. (Pa1).

Point II

Plaintiff's Conduct Demonstrates the Illusory Nature of its Obligations Under the MOU As Enforced by the Trial Court

Plaintiff asserts that its obligations under the MOU are not illusory because "the fact that the payment related to zoning was *conditional* demonstrates without question Appellants' knowledge and acceptance of uncertainty regarding the zoning." Pb, 17. In other words, according to Plaintiff: "These payments are conditional because RR Partners cannot compel the Borough of Edgewater to approve a zoning change to residential." Pb, 16.

To be sure, "[a] promise is not illusory if the power to terminate is conditioned upon some factor outside the promisor's unfettered discretion, such as the promisee's non-performance, or the happening of some event such as a strike, war, decline in business, etc." Bryant v. City of Atlantic City, 309 N.J.Super. 596, 621 (App. Div. 1998) (internal quotation omitted). But, "if performance of an apparent promise is entirely optional with a promisor, the promise is deemed illusory." Id. at 620.

Here, while the "kicker" payment is conditioned upon the grant of residential zoning approval, it is entirely optional with Plaintiff whether to seek

residential zoning approval in the first instance. Plaintiff's conduct to date in refusing to seek residential zoning approval, despite rejection of its "big box" zoning application, contrary to Mr. Sturman's representation, demonstrates it has no intention of pursuing residential zoning approval.

"In general, our courts should seek to avoid interpreting a contract such that it is deemed illusory." Bryant, 309 N.J.Super. at 621 (citing Russell v. Princeton Lab., Inc., 50 N.J. 30, 38 (1967); Nolan v. Control Data Corp., 243 N.J. Super. 420, 431 (App.Div.1990)). Yet, that is precisely the effect of the trial court's decision, given Plaintiff's blatant refusal to follow through on Mr. Sturman's commitment to "immediately" seek residential zoning approval upon rejection of the "big box" application.

Point III

The MOU As Enforced by the Trial Court Leads to an Absurd Result

Plaintiff devotes a substantial portion of its opposition to the "straw man" argument that the MOU was not drafted in a way that was procedurally or substantively unconscionable. Pb, 18 – 23. As the Hongkun Defendants have already explained, the trial court's decision enforcing the MOU should be reversed not because of the MOU's language or the way it was negotiated, but because the manner in which the trial court enforced it – refusing to require indemnification or impose any obligation to ever seek residential zoning – has led to an absurd result.

It is, of course, true that "[w]here the terms of an agreement are clear, [courts] ordinarily will not make a better contract for the parties than they have voluntarily made for themselves, nor alter their contract for the benefit or detriment of either, particularly in a commercial, arms-length setting." Carroll v. United Airlines, Inc., 325 N.J. Super. 353, 358-59 (App. Div. 1999) (first alteration added). However, in determining the parties' intent, the document "must be read as a whole, without artificial emphasis on one section, with a consequent disregard for others. Literalism must give way to context." Borough of Princeton v. Bd. of Chosen Freeholders of Mercer, 333 N.J. Super. 310, 325 (App. Div. 2000) (citing Schenck v. HJI Assocs., 295 N.J. Super. 445, 452-53 (App.Div.1996), *certif. denied*, 149 N.J. 35 (1997)).

"'A basic principle of contract interpretation is to read the document as a whole in a fair and common sense manner.'" Porreca v. City of Millville, 419 N.J. Super. 212, 233 (App. Div. 2011) (quoting Hardy ex. rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 103 (2009)). "A contract 'should not be interpreted to render one of its terms meaningless.'" Id. (quoting Cumberland County Improvement Auth. v. GSP Recycling Co. Inc., 358 N.J. Super. 484, 497 (App.Div.), *certif. denied*, 177 N.J. 222 (2003)).

"Evidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement." Porreca v. City of Millville, 419

N.J.Super. 212, 232 (App. Div. 2011) (citing Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259, 269 (2006)).

> This is so even when the contract on its face is free from ambiguity. The polestar of construction is the intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded. The admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance. Such evidence is adducible only for the purpose of interpreting the writing--not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said. So far as the evidence tends to show, not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant. The judicial interpretive function is to consider what was written in the context of the circumstances under which it was written, and accord to the language a rational meaning in keeping with the expressed general purpose.

Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259, 269 (2006) (emphasis added) (quoting Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301-02 (1953)).

As noted in the Hongkun Defendants' opening papers, the MOU expressly contemplated that "the parties shall negotiate in good faith" a purchase and sale agreement. (Da29). Indeed, it stands to reason that the purchase and sale of a $45 million property is not done on the back of an envelope. Thus, the MOU was simply an "agreement to agree" to a more comprehensive contract in which the parties would set forth meaningful parameters for the zoning issue and deal with indemnification. (Da108).

But Plaintiff refused to engage in such a negotiation, contrary to its counsel's acknowledgment before the trial court that the issues raised were a "fair concern," making it impossible as a practical matter for the Hongkun Defendants to realize any benefit from the MOU. (Da108); Db, 8, 10.

Moreover, it is clear that the parties expressly contemplated that Plaintiff would pursue residential zoning if the "big box" application was rejected by the Township, as it has been. (Da61).

Point IV

The Hongkun Defendants Preserved Their Right to Object to the Fee Award

Plaintiff suggests that the Hongkun Defendants somehow waived their right to appeal the fee award: "Despite choosing not to oppose the fee application, Appellants now seek a reversal of the fee award as well as a reversal of the court's rulings and orders enforcing the MOU." Pb, 10.

In fact, the Hongkun Defendants specifically informed the trial court that they opposed the fee application inasmuch as it was based upon the underlying orders, and requested a decision from the trial court on the fee application so that this appeal could proceed:

> As Your Honor is aware, the Hongkun Defendants respectfully disagree with the November 27 Order and a prior Order entered on September 15, 2023, and intend to appeal. Apart from their disagreement with the underlying Orders, the Hongkun Defendants will not oppose the fee application and request that Your Honor enter an Order in connection with the application as soon as possible so that the appeal may proceed.

(Da125). Plaintiffs explained in their opening papers that the counsel fee award should be reversed both because the underlying orders of September 15 and November 27, 2023 should be reversed and because the trial court's finding in connection with the November 27, 2023 Order that the Hongkun Defendants did not comply with the September 15, 2023 Order was erroneous. Pb, 21-22.

Thus, the Hongkun Defendants plainly have preserved their right to appeal the counsel fee award.

CONCLUSION

For the foregoing reasons, and those set forth in the opening papers, the Hongkun Defendants respectfully request that this Court reverse the September 15 and November 27, 2023 Orders of the trial court. Additionally, since the MOU is unenforceable and there was no failure to comply with the September 15, 2023 Order, the Hongkun Defendants also respectfully request that the Court reverse the trial court's February 5, 2024 Order granting Plaintiff's fee application.

COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
Attorneys for Defendants-Appellants
Hongkun USA Real Estate Development, LLC, Hongkun Group USA Holdings Corp., Hongkun USA Real Estate Holdings LLC

BY: /s/ *Jeffrey W. Herrmann*
Jeffrey W. Herrmann
A Partner of the Firm

Dated: July 12, 2024