No. 1032251
(Court of Appeals No. 84748-1)

SUPREME COURT OF THE STATE OF WASHINGTON

12TH AND JOHN INVESTORS, LLC,

Appellant,

v.

BROADMARK REALTY CAPITAL INC.,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

To obtain discretionary review, a petitioner must establish that the case qualifies under RAP 13.4(b)—a standard Petitioner fails to even cite, much less argue. Petitioner also ignores RAP 13.4(c)(7)'s clear directive that a petition must include "[a] direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument." Far from being "direct" or "concise," Petitioner here presents *eight* issues for review, never once explaining how any (much less each) of these eight issues warrants review under one of RAP 13.4(b)'s four tests. Petitioner not only fails to address RAP 13.4's standards, it cannot meet them.

Discretionary review is unwarranted. The Court of Appeals' unanimous unpublished decision, signed by Judges Birk, Dwyer, and Feldman, does not conflict with any published decision, does not involve constitutional questions,

and does not involve any issues of substantial public interest under RAP 13.4(b)(1)–(4).

Instead, Petitioner rests its case entirely on the nonsensical premise that a secured lender loaning money to a cash-bled, failing condominium project is not entitled to be repaid and maintain priority over unsecured investors with only an equity interest in the project. Petitioner's equitable lien claims fail as a matter of law because no reasonable trier of fact could find clear and unequivocal intent to create a lien. The tort claims likewise fail. Without any contractual expectancy to be paid *out of loan proceeds*, there could be no tortious interference, unjust enrichment, or conversion. The trial court properly granted summary judgment, the Court of Appeals properly affirmed, and there is nothing in the petition for review to suggest this Court's intervention is warranted.

II. RESTATEMENT OF ISSUES RAISED BY PETITIONER

1. Did the Court of Appeals err in affirming the dismissal of Plaintiff 12th and John Investors, LLC's ("12J")

claim to an equitable lien on proceeds of the refinance loans to Capitol Hill Subway, LLC ("Subway"), where 12J cannot show unequivocal intent to create a lien and where the proceeds have been distributed?

2. Did the Court of Appeals err in affirming the trial court's dismissal of 12J's remaining claims on summary judgment, where 12J has no lien, 12J consented to the loans, and 12J had no proof of damages?

III. RESTATEMENT OF FACTS

A. Overview

This case arises out of a multifamily residential development. 12J invested $3.2 million in Subway, the LLC that constructed and marketed the development, in exchange for *preferred equity* in Subway itself—not for any secured interest. 12J's only security was a personal guarantee from Subway's principal, Robert Hardy. As expected for such a high risk unsecured investment, 12J hoped to receive, only 2.5 years after its initial investment, a rich return of almost double its money.

That never happened. As with many real estate developments, Subway suffered cost overruns, delays, and ran in the red. Subway's lender threatened foreclosure. To save the project, another real estate lender—the predecessor in interest to Defendant Broadmark Realty Capital, Inc. ("BRC")—twice came to the rescue and refinanced Subway's construction loan, allowing Subway to avoid foreclosure and fund a conversion of the property to condominiums.

12J consented to both refinances through its former manager—a fact 12J does not dispute. But under new management, 12J has brought suit against BRC, insisting it was wronged because its consent was not appropriately documented—never mind that Subway undisputedly had 12J's actual prior consent, and never mind that without BRC's refinance loans, 12J would be exactly where it is now, having lost its risky bet on a real estate investment. Why sue BRC? Because the only ones who actually had obligations to 12J had no money: Subway was judgment proof, and Hardy was

bankrupt. Thus, 12J here attempts to extract from Subway's construction *lender* BRC the return *Subway* promised 12J in a contract to which BRC never was a party.

But, as explained further below, 12J never had a lien in the proceeds of any refinance. Regardless, those proceeds have long been disbursed, the development is built, the condominium units were sold with 12J's knowledge and written consent, and the lender has been (at least partially) repaid.

B. BRC's Predecessor Loans Money to Subway

This case concerns two construction loans provided by a real estate lender, PBRELF I, LLC ("PBRELF"),[1] to Subway allowing it to complete a residential complex on Capitol Hill in Seattle. CP 195, 203–04. The first loan paid off the original secured lender, who threatened to foreclose on the uncompleted project. CP 728 (41:23–44:3). The second loan bought out the

[1] BRC is the successor of PBRELF. CP 724 (8:1–9).

remaining junior debt and provided additional funds necessary to complete the project as a condominium. CP 747–49.

Both loans were actually approved by 12J through its then-manager, Joseph Schocken. CP 1709, 1711–13. Unfortunately for Subway and its two members, 12J and Hardy (the developer of the property), the project suffered delays, cost overruns, and a cooling market. CP 195, 204, 1356–57. As a result, Subway did not make any profit to pay back 12J's investment with the anticipated hefty return. CP 1356–57. Rather than accept that their risky investment had failed, 12J investors John Zebala and David Hartman began filing lawsuits. They first sued Hardy on behalf of 12J, then Schocken personally, and then—after replacing Schocken as manager of 12J—brought this suit against Subway and BRC, a publicly traded real estate lender created in November 2019. CP 1, 39–42, 244, 724.

C. The Project Requires Capital

Hardy formed Subway in 2016 to hold the property he wished to develop. CP 195, 963. To fund construction, Subway obtained two secured loans: a $10.9 million construction loan from Trez Capital (the "Trez loan"), secured by a first-position deed of trust, and a second (or "mezzanine") loan of $1.5 million provided by Zebala's entity, Sherwood Capital, secured by a second-position deed of trust (the "Sherwood loan"). CP 197, 713. At the time, Hardy believed that these loans were sufficient to fund construction. CP 197–200.

D. Subway Seeks Investors

Hardy wanted to monetize his ownership interest in the project immediately, and marketed equity in Subway. CP 195.

Hardy contracted with Tranceka Capital,[2] a broker-dealer, to solicit potential investors in Subway. CP 196.

Tranceka's offering materials cautioned potential investors *four times* that "the $3.2 million investment will not be used to finance the project and is strictly a payment for 50% of the economics in the project"—e.g., an equity interest in Subway. CP 195–201. Because their investment would not be used to fund construction or purchase the property, investors were warned that they "would be dependent on [Hardy's] personal guarantee for a return early in the life of the project." CP 197.

Tranceka also disclosed its relationship with PBRELF and its management company, Pyatt Broadmark Management, LLC ("PBM") to potential investors. CP 196. Potential investors were also informed that Hardy had a long-term

[2] Tranceka was formerly Broadmark Capital, LLC—an entity that is separate from BRC, CP 141, and will be called "Tranceka" to avoid confusion with BRC.

relationship with PBM, having repaid 10 loans from PBRELF and having nine loans totaling $15 million outstanding. CP 196.

E. 12J Is Formed to Invest in Subway and Its Investment Is Defined by Two Agreements

12J was created to serve as the vehicle for the Subway investment. CP 208. 12J's LLC agreement provided that 12J Management LLC—an entity to which Schocken was the sole member—would manage 12J. CP 210.

Schocken, on behalf of 12J, negotiated the terms of 12J's investment in Subway with Hardy. CP 1672. The terms were memorialized in two February 2016 agreements: a preferred investment agreement ("Agreement"), and an amendment to Subway's operating agreement ("Amendment"), through which 12J was admitted as a "Preferred Member" of Subway, issued "Preferred Member Units," and which Amendment was incorporated into the Agreement. CP 897–961, 963–77.

Subway agreed that 12J would have its investment repaid in full, along with a 30 percent return, compounded annually, on the redemption date of August 31, 2018. CP 939–40. Subway also agreed that 12J would receive its full redemption payment before Hardy made anything. CP 197. 12J's anticipated return reflected the "very high degree of risk" for that investment (as 12J investors were cautioned). CP 646 (§ 3.1). Hardy personally guaranteed Subway's obligation to 12J to pay the return. CP 953–59.

F. The Trez Loan Is Refinanced

By late 2017, the project ran into delays and Hardy approached Trez to increase its loan by $1 million. CP 734 (131:1–15), 1140. Schocken's agents (Daniel Hirsty, Bryan Graf, and Adam Fountain) asked attorney Phil Roberts whether signatures from 12J investors were needed to approve the refinance. CP 1140, 1712 (¶ 3). Roberts advised that "the manager of [12J (e.g. Schocken)] has the authority to consent to the increase in the [Trez] loan without needing the consent of

the individual members (investors) of [12J]." CP 1136. Ultimately, 12J executed a consent for the increase. CP 1142.

G. PBRELF Provides Rescue Financing

1. PBRELF refinances with 12J's consent after Trez refuses to loan Subway more funds to complete the project.

Trez's additional increase was insufficient. By spring 2018, "the project fell behind schedule, was running over budget, and Trez said they were going to stop funding the loan." CP 728 (41:25–42:2). This would be a "disaster . . . had somebody not stepped in to replace Trez . . . [t]he result would have been essentially an abandoned project." CP 728 (42:3–25). To pay off the Trez loan and provide additional capital to cover cost overruns, Hardy requested a refinance from PBRELF to save the project. CP 729 (46:24–47:1), 1681 (¶ 5).

Schocken consented to the April 2018 refinance on behalf of 12J. CP 729 (46:24–47:1), 1711 (¶¶ 4–5) ("[As] the Manager of 12J, I consented to the first PBRELF refinance on behalf of 12J."). 12J's consent was reflected in

contemporaneous written communications as Schocken specifically "authorized Hirsty and Graf to structure, approve, and complete the refinance on behalf of 12J." CP 1711 (¶¶ 4–5), 1708–09 (¶¶ 3–6), 1680 (¶¶ 4–6). Graf wrote to Zebala (who provided the Sherwood Loan) "proposing that [PBRELF] refinance[] Trez in 1st position to provide the remaining costs to finish" the project. CP 1691, 239 (53:1–20). Graf forwarded this email to Schocken, who said it was "nicely done . . . [w]e should also write [12J's] investors." CP 1690. Schocken viewed this email as documenting 12J's consent to the April 2018 refinance, and understood Graf's email to be on behalf of 12J. CP 1712 (¶ 6).

2. The April 2018 refinance pays off the Trez loan and pays down the Sherwood loan.

The majority of the proceeds of the $14.3 million April 2018 refinance paid off the Trez loan ($9.7 million) and paid down the Sherwood loan ($900,000). CP 406. After fees and

interest, Subway had approximately $2.8 million remaining in a construction reserve to complete the project. CP 406.

H. 12J Consents to a Second PBRELF Refinance to Fund a Condominium Conversion

In June 2018, Hardy was assessing the economics of converting the project to condominiums to make up for the delays and cost overruns in light of a deteriorating apartment market. CP 1153, 1571. By July 2018, 12J determined that a second refinance was necessary for a condo conversion. CP 1571 (126:1–11), 1712 (¶ 7). To Schocken, a conversion "made more economic sense" and "presented the best opportunity for investors to recover their funds and make a profit on the investment." CP 730 (59:2–9). Again, 12J, through Schocken, consented to the refinance. CP 729 (48:3–19), 1713 (¶ 8).

12J's consent was documented in contemporaneous written communications. CP 1713 (¶ 7–8). Graf asked Schocken and Fountain to approve a second refinance as it was

"in the best interest for the [12J] investors" because it would pay off the Sherwood loan and finance the condominium conversion. CP 746. Fountain, after conferring with Schocken as 12J's manager, approved the approximately $17.5 million July 2018 refinance. CP 746, 1556–57, 1682–83 (¶¶ 12–14), 1712 (¶¶ 7–8).

12J's investors were informed that 12J and Hardy "feel that the highest and best use of the project is as 'for sale condos' versus 'for rent apartments,'" and were apprised of the July 2018 refinance. CP 747–48. At the time, 12J anticipated a condominium would increase the value of the project by $6 million, an amount sufficient to pay 12J. CP 749.

I. Hardy Is Replaced by a 12J Appointee, Who Approves Further Extensions of the PBRELF Loan

Throughout the summer of 2018, 12J lost faith in Hardy's ability to complete the project on time and profitably. CP 1150–51. While Subway was obligated to redeem 12J's membership interests on August 31, 2018, given that the project

was incomplete, it (unsurprisingly) defaulted. CP 243 (121:7–122:6), 727 (34:1–9), 940.

By the end of 2018, it was clear Hardy needed to be replaced. CP 1280–81, 204 (¶ 7). 12J considered pursuing Hardy on his guarantee, but decided against it in part because it did not want to risk a bankruptcy filing delaying the project further. CP 204 (¶ 7), 1649–50 (36:2–39:17). Instead, after receiving an opinion letter explaining its options, 12J declared Subway to be in default. CP 1282–84. 12J at that point could take possession of the property and complete the project if it wished. CP 1282.

Rather than further delay the project through litigation with Hardy, 12J made a business decision to focus on completing and selling the property. CP 204 (¶ 7), 1280, 1285. At 12J's insistence, in early 2019, Subway's members (Hardy and 12J) executed a document authorizing Paul Birney, who had over 35 years of real estate experience, to oversee condo unit sales and execute any loan documents. CP 762, 857–58,

1135. 12J reserved the sole right to revoke Birney's authority. CP 1135.

In the ensuing months, Birney, as Subway's representative, signed off on condo sales. CP 755 (71:13–20), 756–57 (76:23–77:13), 837. Birney also executed multiple extensions of the PBRELF loan on Subway's behalf. CP 824–29, 1135. Each extension ratified the loan terms, stipulating that all other terms of the loan documents remained "in full force and effect, and unchanged." CP 824–29.

J. 12J's Efforts to Recover Through Litigation Fail; the Condos Are Sold with 12J's Approval

In fall of 2019, Hartman and Zebala filed a derivative lawsuit on behalf of 12J against Hardy to enforce his personal guarantee, obtaining an uncollectable default judgment against him for the redemption price. CP 205 (¶ 9), 1650 (39:18–40:11). In early 2020, Hartman and Zebala removed Schocken as manager of 12J and replaced him with their own entity. CP 39.

They then sued Schocken for breach of fiduciary duty and related claims for "directing" the refinances. CP 773–87. Schocken successfully compelled arbitration, and neither Hartman nor Zebala pursued the case further. CP 735 (179:13–180:10).

As 12J never revoked Birney's written authorization to sell units, every sale by Birney was expressly authorized by 12J. CP 756–57 (76:23–77:13), 1135. Even after Zebala took over 12J, 12J's current attorney informed Fidelity, the property's title insurer, that he did "not object to . . . Fidelity moving forward and closing on these [condo] transactions." CP 754 (51:11–25), 756 (74:16–76:10). The sales did not generate sufficient revenue to pay off the PBRELF loan in its entirety, so 12J did not get a return on its investment. CP 770 (162:16–164:2), 1041.

K. Procedural History

12J sued BRC and Subway, seeking a declaratory judgment regarding its claimed "lien rights" and claiming BRC

tortiously interfered with 12J's relationship with Subway, somehow converted the funds it loaned Subway, and was unjustly enriched when it was (partially) paid back on its loan. CP 1–10. Subway never entered an appearance and a default was entered against it. CP 26–27.

BRC and 12J moved for summary judgment, which the trial court granted in BRC's favor. CP 160, 873–93, 1779. The trial court further observed there was:

> [undisputed] evidence that . . . the project was going to go under when Trez . . . was not going to extend this loan. There was a strong need for a refinancing in April and then again in July. There is evidence that I don't think is disputed at all that 12J was in support of the condo conversion in July that necessitated that refinance.

RP 231. The Court of Appeals unanimously affirmed.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Contracts Do Not Show Unequivocal Intent to Create a Lien

1. Equitable liens require unequivocal intent to create a lien, which is not present here.

Parties must "unequivocally" intend to create a lien before an equitable lien will be applied. *Huber v. Coast Inv.*

Co., Inc., 30 Wn. App. 804, 808–09, 638 P.2d 609 (1981) ("The intent may be derived from the express language of the agreement or by necessary implication, but it must appear unequivocally.").

12J contends that it had an equitable lien in the proceeds of any refinances that occurred without formal documentation memorializing 12J's actual consent. Pet. 25. 12J claims that "[t]he Agreement and the Amendment both provided that if Subway's loan was refinanced or modified without 12J's express prior written consent, 12J would be paid in full out of the loan proceeds." Pet. 10. Without explanation or analysis, 12J claims that these provisions are, for some reason, "[w]holly apart" from the default remedies set forth in the two contracts. *Id*.

This is incorrect. Neither the Agreement nor Amendment provide that 12J must be repaid from loan proceeds to which it did not appropriately document its actual consent. Instead, these documents provide, at most, that any

requirement to formally document consent is entirely excused if 12J was redeemed as a result of the transaction. Second, even if 12J were correct (it is not), this would not create a lien as a matter of law.

12J points to two provisions it claims give rise to an equitable lien: Section 7.1 of the Agreement and Section 7(b)(iv) of the Amendment. Even assuming these provisions applied, they do *not* state that the remedy for failure to obtain formal documentation of consent is that 12J can foreclose on the proceeds of any loan, jumping ahead of secured lenders whose construction loans undoubtedly come with a host of conditions and must be used to fund specified construction—certainly not to redeem an unsecured equity investor. Indeed, the contracts do not even specify what the "proceeds" are. Are they the excess after all secured loans and unsecured claims? Are they the profit returning from a sale of the property? To what would a lien attach? These unanswered questions are proof that "unequivocal" intent does not exist.

12J's reading runs counter to the default and remedies provisions in the Amendment. Under the Amendment, any failure to perform any obligation or make a payment when due constitutes a default by Subway. CP 967. Remedies available to 12J under Amendment Section 6(e) include its option to trigger a sale of the property. CP 970. But if such a sale were triggered, the Amendment explicitly requires all secured lenders to be paid before 12J—a result inconsistent with 12J's purported "lien." CP 971 (§ 6(e)(iii)).

The default and remedies provisions make no exception for refinances lacking formal documentation of actual consent. Such an exception would be required to show unequivocal intent to create a lien. If, in the event of a sale (a remedy for any default) 12J will be paid last under the Amendment, how can it be that, in the case of a default resulting from a refinance without formal documentation of consent, 12J was somehow entitled to be paid *first* as it claims?

The same result holds if the property were sold or operated as a completed apartment complex or condominium without 12J enforcing a default remedy. Under Amendment Section 3(a)(ii), 12J may be paid from "cash generated by the operations or sale of the Property" but any secured lender must be paid first. CP 965 (excluding cash used to pay amounts due under "a Senior Loan," defined to mean "any third party indebtedness secured by a mortgage or deed of trust," CP 975, from amounts distributed to 12J). If the agreements require Subway to pay secured creditors (like PBRELF) first when either selling or operating the property, even if there had been a default, how could those agreements show an unequivocal intent to create an equitable lien in 12J's favor, particularly one (as 12J contends), which is *superior* to the interests of secured creditors like PBRELF? 12J's reasoning fails.

In sum, nothing in the Agreement or Amendment indicates an "unequivocal" intent to create a lien, and Agreement Section 7.1 and Amendment Section 7(b)(iv) must

also be harmonized with Amendment Sections 3(a)(ii) and 6(e)(ii), which clearly contemplate that 12J will be paid after secured lenders.

2. The Court of Appeals applied the proper standard.

12J claims that the Court of Appeals "violated the existing body of equitable lien law" teaching that an equitable lien will not be found unless the intent to create a lien is clear and unequivocal. Pet. 22–24. But in affirming the trial court's conclusion that there is no equitable lien, the Court of Appeals held that 12J failed to establish that the parties "unequivocally intended to subject the specific loan proceeds in question to an equitable lien in [12J's] benefit." Op. 45. This holding is consistent with the precedent that 12J claims the Court of Appeals disregarded.

Despite the Court of Appeals' holding, 12J untenably contends that instead of applying the clear and unequivocal

standard,[3] the Court of Appeals employed a "newly minted" test. In truth, the Court of Appeals reasoned that 12J's "proposed interpretation" that the documents create a lien is "far from clear and unequivocal," because 12J's reading is "plainly *not* a commercially reasonable interpretation," unlike BRC's interpretation, which *is* commercially reasonable. Op. 53–54. In sum, 12J is bickering over pure semantics, not substance.

Of course, if 12J's interpretation is not even commercially reasonable, it stands to reason it is not clear and unequivocal, as the law requires before finding an equitable lien. Likewise, if BRC's interpretation *is* commercially reasonable, then 12J's opposing interpretation cannot be "clear" or "unequivocal" as required. 12J never explains how the Court of Appeals' use of the phrase "commercially reasonable" is at

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[3] The Court of Appeals peppered its opinion with the clear and unequivocal standard, Op. 10, 41, 43, 44, 47, 49, 53, contrary to 12J's contention that it ignored this standard, Pet. 22–24.

odds with the "unequivocal" standard entrenched in precedent. If anything, "commercially reasonable" is a lens that is *more favorable to 12J* than the unequivocal standard. Regardless, because the Court of Appeals applied the correct standard, its decision does not conflict with this Court's precedent or its own, and there is no basis for discretionary review under RAP 13.4.

12J never explains how the hodgepodge list of what it describes as "inferences" the Court should have made, *see* Pet. 19–22, would be material for purposes of summary judgment when, as a matter of law, there was no clear and unequivocal intent to create an equitable lien. And 12J's claim that the Court of Appeals somehow violated RAP 6.1 (Pet. 27, 31)—which is in any event wrong—does not create a basis for discretionary review under RAP 13.4, nor does 12J attempt to argue for review under any of RAP 13.4's other tests.

B. The Court of Appeals Did Not Overlook a Business Expectancy

12J next claims that the Court of Appeals "rejected" viable business expectancies, arguing that BRC never challenged the first two elements of the tortious interference claims. Pet. 24–26. This is false. Because BRC's motion pointed to 12J's lack of evidence supporting its claims, CP 160, the burden shifted to 12J to support each element of its claims and show that issues of genuine material fact remained for trial, *Zonnebloem v. Blue Bay Holdings, LLC*, 200 Wn. App. 178, 183, 401 P.3d 468 (2017) (noting that moving party can meet its "burden by showing that there is an absence of evidence to support" its opponent's case). Regardless, the expectancies identified by 12J do not support a claim.

Because there is no equitable lien, that non-existent "expectancy" cannot give rise to a tortious interference claim. And 12J never argued below that its contractual interest in being paid on the redemption date gave rise to a tortious

interference claim. App. Br. 55–67. The brief mention of the right to be paid on the redemption date in an issue statement, App. Br. 3, fails to constitute an argument supported by citation and analysis, and the Court of Appeals concluded that it would not consider any such unsupported arguments under RAP 10.3(a)(6). Op. 55. 12J does not even attempt to show that this conclusion is inconsistent with precedent, and there is thus no basis for discretionary review under RAP 13.4(b).

Moreover, the unrebutted evidence was that Subway paid its secured lenders first, and there was no profit remaining to pay back 12J's investment. CP 1356–57. This failure to make a profit was caused by market conditions and Hardy's mismanagement; 12J presented no evidence or argument that such was caused by any actions of BRC, and its claims therefore fail.

C. Summary Judgment Was Properly Granted on the Unjust Enrichment Claim

12J faults the Court of Appeals for purportedly applying what 12J characterizes as an "ad hoc" unjust enrichment standard inconsistent with *Davenport v. Wash. Educ. Ass'n*, 147 Wn. App. 704, 197 P.3d 686 (2008), and *Seekamp v. Small*, 39 Wn.2d 578, 237 P.2d 489 (1951). According to 12J, a theory of unjust enrichment based on the "branch" of "money had and received" does not require that 12J lose something it was entitled to and that BRC have been unjustly enriched as a result. *See* Pet. 26–29.

But *Davenport* makes clear that unjust enrichment sounds in restitution and "requires only that the transferee have received *the property of another* under circumstances that result in the transferee's 'unjust enrichment.'" 147 Wn. App. at 726 (emphasis added). In the same vein, *Seekamp* explains that the gist of an action for money had and received exists where "the defendant has received money which in equity and good

conscience should have been paid to the plaintiff." 39 Wn.2d at 584; *see also Earley v. Rooney*, 49 Wn.2d 222, 227, 299 P.2d 209 (1956) ("An action for money had and received may be maintained against one who has money in his hands which he is not entitled to retain as against the plaintiff[.]"). Thus, both *Davenport* and *Seekamp* require that the plaintiff have suffered some loss of an entitlement.

Here, 12J points only to BRC's having been paid its own money back according to the terms of Subway's secured loan. Pet. 28. Because that money was not 12J's property, there was no unjust enrichment. As 12J fails to show any conflict between the Court of Appeals decision and binding precedent, there is no basis for discretionary review under RAP 13.4.

D. 12J's Tort Claims Fail

12J's contention that the tort claims (tortious interference, unjust enrichment, and conversion) are somehow distinct from its equitable lien claim is baseless. As explained above in Parts IV.B and C, the tortious interference and unjust

enrichment claims fail. And 12J conceded at oral argument that if there is no equitable lien, the conversion claim falls:

> **Judge Birk**: Is the same true of your conversion claim? If we don't agree that there's a security interest created by the language you refer to, do you still have a conversion claim?
>
> **Counsel**: No, your honor. The conversion claim drops out.

Wash. Ct. App. oral argument, No. 84748-1-I (Jan. 17, 2024), at 22:15–22:30, available at https://tvw.org/video/division-1-court-of-appeals-2024011375/?eventID=2024011375. 12J fails to explain how the Court of Appeals' accepting this concession could create a basis for discretionary review by this Court. And, of course, it cannot.

Regardless, BRC does not dispute that 12J had a contractual right against Subway to be receive the redemption price on the redemption date of August 31, 2018. But the senior loan extended to Subway to build the properties was secured by the property, and secured lenders receiving the payment they were entitled to ahead of 12J—even assuming

they were aware that 12J had an unsecured contractual right to be paid—simply is not tortious. Accepting 12J's argument would mean that secured lenders could face liability for being repaid before unsecured lenders, a construction that turns the law on its head. 12J fails to explain how rejecting this proposition violates established precedent, and review under RAP 13.4 should be denied.

E. Review Is Not Warranted Where Multiple Alternative Bases for Affirmance Exist

As explained above, 12J fails to argue for discretionary review under RAP 13.4. Regardless, review should be denied because alternative bases exist to affirm, as BRC explained on appeal. The fact that 12J through Schocken *actually consented* to the refinances (which were necessary to keep the project afloat and attempt to avoid a certain loss) is a complete defense to 12J's claims. Resp. Br. 11–13, 25–31.

And 12J cannot show damages resulting from BRC's loans because it cannot show that, but for these loans, 12J

would have been paid. Indeed, the opposite is true: the refinances provided a glimmer of hope that a failing project that the prior lender was threatening to foreclose on might succeed. Resp. Br. 54, 63–64. Without that loan, 12J's complete loss was assured, and 12J never attempted to prove otherwise on summary judgment. *See id.* Review is unjustified in these circumstances.

V. CONCLUSION

This Court should deny review.

* * *

This document contains 4,993 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 6th day of September, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2024, I caused to be filed and served a copy of the foregoing Respondent's Answer to Petition for Review upon the following via the Washington State Appellate Court's Portal and via electronic email service (courtesy copy):

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