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CHICAGO TITLE INSURANCE CO., as subrogee of GOLDEN UNION	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION
	:	
Plaintiff,	:	
	:	
v.	:	ESSEX COUNTY
	:	DOCKET NO.: ESX-L-3785-15
	:	
UNION AVENUE HOLDING, LLC,	:	
JUDAH BLOCH, ARIEL GANTZ	:	
AND STUART BIENENSTOCK	:	
	:	
Defendants.	:	

Dated: July 14, 2016

By: Stephanie A. Mitterhoff, J.S.C.

Brian S. Tretter, Esq.

Fidelity National Law Group

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Ronald L. Davison, Esq.

Starr, Gern, Davison & Rubin

Attorney for Defendants, Union Avenue Holding LLC, Judah Bloch, and Ariel Gantz

Stuart Bienenstock

Pro se

STATEMENT OF FACTS

This matter was tried before me as a bench trial on March 8, 2016. In addition to the trial testimony, the parties stipulated that Trial Exhibits 1 through 39 were in evidence, and the deposition transcripts of Stuart Bienenstock, Daniel Turetsky, Stuart Friedman and Ronald Herbst were also in evidence. In addition, there was a stipulation that Plaintiff, Chicago Title, had paid \$1.3 million dollars to West 58th St., LLC to resolve a title claim against its policy insuring Golden Union, LLC after a title dispute arose. The claim arose as a result of allegations by West 58th St., LLC that executed discharges of its \$1.1 million mortgage and an assignment of leases and rents, presented at the closing of a property purchased by Golden Union, were forged. After Chicago Title paid the claim, as subrogee to West 58th St. it brought the instant lawsuit against the seller, Union Avenue Holdings, LLC, and UAH's members Stuart Bienenstock, Judah Bloch and Ariel Gantz,

The first witness to testify in Plaintiff's case was Steven Fortunato. Fortunato testified that he formed Golden Union, LLC, for the purpose of purchasing the property located at 380 Union Avenue in Irvington (1T:23-13 to 17).¹ The agreed upon purchase price for the property was \$1.4 million. (1T:24-11 to 13). Fortunato identified Exhibit 18 as the title binder provided by Ardent Title Group, which provided a list of items that needed to be cleared in order to convey clear title (1T:26-6 to 23). Fortunato did not intend to purchase the property subject to any of the liens listed in the title binder. Rather, his understanding was that the liens would "absolutely" have to be discharged at or before the closing. (1T:27-1 to 7). One of the liens was

¹ 1T refers to the Transcript of Trial dated March 8, 2016.
2T refers to the October 27, 2014 deposition transcript of Ronald Herbst.
3T refers to the November 13, 2014 deposition of transcript of Stephen Friedman.
4T refers to the July 30, 2014 deposition transcript of Stuart Bienenstock.
5T refers to the January 12, 2015 deposition transcript of Daniel Turetsky.

a \$1.1 million dollar mortgage from West 58th St, LLC. Fortunato testified that he attempted, but failed, to obtain a pay-off of the West 58th St. mortgage prior to closing (1T:27-10 to 18). Instead, he was given repeated assurances from the seller's attorney, Stephen Friedman, that Friedman would be handling the discharge and pay-off for West 58th St. (1T:27-21 to 24). Fortunato identified Exhibit P5 as emails from Mr. Friedman as the seller's attorney that he was assuming responsibility for the payoffs and discharges. Fortunato then forwarded these confirmations to Ardent for their approval (1T:28-9 to 22).

Fortunato had conversations with Bienenstock in which Bienenstock was pressuring Golden Union to close. Fortunato indicated that no closing would be scheduled until everything was discharged. In response, a conference call was initiated between Friedman, Fortunato and Bienenstock, in which Fortunato was advised that the mortgages were going to be discharged pursuant to some other business dealings between the parties. Fortunato agreed to schedule the closing on receipt of a copy of the proposed discharges (1T:30-1 to 11). The title company approved the form of the discharges prior to the closing (1T:30-15 to 22).

Fortunato and his business partner Michael Toarmina attended the closing on behalf of Golden Union (1T:31-14 to 18). Stuart Bienenstock and Judah Bloch attended the closing on behalf of Union Avenue (1T:31-19 to 22). Fortunato identified Exhibit 10 as the HUD settlement statement from the closing, which reflected that none of the proceeds of the sale were used to satisfy the West 58th St. mortgage (1T:32-2 to 11). Fortunato testified that Bienenstock brought an executed discharge of the West 58th St. mortgage to the closing (1T:32-12 to 15). The provision of the executed discharge led Fortunato to believe the West 58th St. mortgage was in fact satisfied (1T:32-19 to 22), and that he had thus obtained clear title to the property (1T:34-1 to 4). None of the seller's representatives told Fortunato at the closing that the discharge of

the mortgage was contingent on some future post-closing event (1T:32-23 to 33-15). Fortunato testified that if he had known the West 58th St. mortgage was not satisfied prior to the closing, he would not have gone through with the transaction (1T:33-18 to 21).

On cross-examination, Fortunato indicated that he had been a practicing attorney since 1996, initially in the field of real estate, but since 2001 he has worked exclusively in the field of real estate development (1T:34-14 to 35-7). His partner Michael Taormina is also an attorney admitted to the bar of New Jersey (1T:35-8). Fortunato confirmed that Exhibit 2 was the August 15, 2011 mortgage held by West 58th St., and that he was aware that the mortgage was a lien on the property (1T:37-11 to 20). Turning to Exhibit 18, the title commitment, Fortunato confirmed that Chicago Title Insurance Company was the entity that would actually issue the title policy. (1T:37-21 to 38-7). Exhibit 19 was an endorsement modifying the original commitment reflecting an assignment of the West 58th St. mortgage to TSR (1T:38-8 to 18; 1T:39-12 to 14). As the closing went on it became unclear whether the assignment had been properly indexed and recorded, so some confusion arose as to the proper method to discharge the mortgage (1T:39-15 to 19). The discharge itself, which was marked as Exhibit 7, was produced by Bienenstock at the closing, and was provided to Mr. Friedman (1T:41-3 to 8). Fortunato confirmed that the signatory for West 58th St. LLC was, according to the document, Ronald S. Herbst, Authorized Signatory (1T:41-22 to 42-1). Fortunato did not, prior to the closing, investigate whether Herbst was in fact an Authorized Signatory for West 58th St. LLC (1T:43-21 to 44-3). Fortunato confirmed that the acknowledgment section stated, "I certify that Eliezer Swerdlow personally came before me and stated to my satisfaction that this person was the maker of the attached instrument." (1T:44-4 to 15). Fortunato did not recall whether he noticed that discrepancy at the closing (1T:44-21 to 45-1). Fortunato confirmed that Taormina signed the HUD as the

settlement agent and that his responsibilities included clearing title on behalf of the title company (1T:46-6 to 19). It was Bienenstock that signed the deed, the seller's residency certification, the affidavit of consideration, and the affidavit of title on behalf of Union Avenue Holding (1T:47-6 to 23).

Approximately six months after the closing, Golden Union received a certified letter from Ronald Herbst, Esq. alleging the discharge was forged (T55-6 to 12). At Herbst's deposition, he testified that although he generally was an authorized signatory for Mr. Turetsky on behalf of West 58th St. LLC (2T:8-5 to 22), he denied having signed anything on behalf of West 58th St. LLC in connection with the subject closing (2T:9-3 to 18). Herbst denied that the signature on the discharge was his and he claimed that the notarization by Ms. Zion, his associate, was likewise a forgery (2T:36-17 to 9). In that regard, Herbst testified that Ms. Zion denied that the signature was hers. In addition, Herbst testified that he knew that the notary stamp was not Ms. Zion's stamp because her stamp did not bear an expiration date; rather she would hand write in the date, whereas the notary stamp on the mortgage discharge bore an expiration date (2T:38-7 to 21). In addition, Herbst stated that the address listed on the discharge for his law firm was incorrect, the firm having moved from that address in October 2010 (2T:40-14 to 41-23).

Stephen Friedman, Esq., the seller's attorney, testified at his deposition that he had been involved in negotiating and preparing the contract of sale, and that both Bienenstock and Bloch were involved in the negotiation of the contract as well (3T:24-4 to 25-3). Friedman, who attended the closing, testified that the allegedly forged discharges of the West 58th St. and TSR mortgages were delivered to him at the closing, either by Bienenstock or Bloch. Friedman stated that the discharge, which was signed, was presented at the closing table. He did not believe he reviewed the discharges after they were delivered (3T:31-7 to 18). Friedman believed the

signatures on the discharge were original signatures; otherwise the title company would not have closed. (3T:11 to 18). Friedman stated that he had prepared the form of the discharge at the request of Bloch and Bienenstock, and after preparing it he forwarded the form discharge via email to both Bloch and Bienenstock with the understanding that they would obtain the signatures required for an effective discharge (3T:32-19 to 33-20).

Friedman identified Golden 10, two emails, one of which he sent to Stephen Fortunato stating, "No payoff amount necessary. They are being discharged pursuant to a separate agreement." (3T:34-25 to 36-9). Friedman identified Golden 46, as a September 11, 2012 email he sent to Stephen Fortunato, which included Exception 7 stating, "Seller will be delivering at or prior to closing release/satisfaction of mortgage from TSR Group." (3T:48-24 to 49-6). Similarly, Golden 48 was identified as a September 14, 2012 email that Friedman sent to Mr. Fortunato stating, "I will get the corporate documents and mortgage termination shortly." (3T:52-9 to 15).

Friedman testified that he recalled conversations about the closing proceeds being used to purchase an investment in an Israeli company buying bonds. (3T:66-7 to 14). His conversations about the use of the proceeds was with both Mr. Bienenstock and Mr. Bloch. (3T:66-15 to 18). Friedman confirmed that the closing proceeds of \$637,822.27 were insufficient to satisfy the West 58th St. and TSR mortgages. (3T:69-5 to 14).

According to Answers to Interrogatories certified by Daniel Turetsky on behalf of West 58th St. LLC, on August 15, 2011, West 58th St. LLC made a wire transfer in the amount of \$1.1 million dollars issued to SJB Capital, LLC for the benefit of Union Avenue, along with the execution of relevant loan documents. (Response to Interrogatory 8). To date, it is undisputed that no payments have been made on the loan. After SJB/UAH defaulted on the mortgage,

various proposals to restructure the loan were proposed. The first proposal was that Union Avenue would pay \$200,000.00 to West 58th St. in exchange for assignment of its mortgage and Union Avenue's pledge of two or three new mortgages encumbering additional properties in New Jersey. This arrangement did not reach fruition due to UAH's failure to pay the \$200,000.00. Next, UAH proposed to tender a partial payment in the amount of \$400,000.00 in exchange for the return of the assignment and the execution of two new mortgages encumbering properties in New Jersey. Again, this proposal did not reach fruition due to UAH's failure to tender the \$400,000.00. Finally, most relevant to this case, in mid-September 2012 Turetsky and Bienenstock discussed the possibility of West 58th St. agreeing to discharge its mortgage encumbering the Union Avenue property in exchange for Bienenstock's agreement to fund for Turetsky the acquisition of a United States limited liability company that had bid to purchase publicly traded bonds on the Tel Aviv Stock Exchange for a company with which Mr. Turetsky was affiliated. According to Turetsky, Bienenstock did not disclose that he had already orchestrated a sale of the property without notifying West 58th St., without procuring a discharge from West 58th St., and without satisfying its mortgage. When further discussions about the proposed debt restructure failed in December 2012, West 58th St. advised Union Avenue that the loan could not be restructured and that West 58th St. would proceed with its remedies. (Response #27 in West 58th St.'s Answers to Interrogatories). It is undisputed that at no time before December 2012 did West 58th St. seek a foreclosure on the mortgage based on the long-term default of Union Avenue, nor did the company pursue a judgment against Union Avenue or any of its principals for the alleged wrongful sale of the property and alleged fraudulent discharge of its mortgage. Nor did West 58th St. seek judgment on the personal guarantees of Messrs. Bienenstock, Bloch or Gantz. Instead, the only remedy sought by West 58th St. based on the

alleged wrongdoing of UAH and its members was to seek a declaratory judgment that the discharge of its mortgage was invalid and that its mortgage was still a first lien on the property. In addition, for the first time, West 58th St. sought a judgment of foreclosure based on UAH's default.

The court had an opportunity to review the deposition of Daniel Turetsky. Mr. Turetsky currently resides in Israel. Sovereign Assets is an Israeli publicly traded company with subsidiaries in the United States (T:13-14 to 17). The purpose of Sovereign Assets is to invest in real estate in the United States and build a portfolio of investment properties primarily in United States real estate (T:20-8 to 16). Turetsky is the sole owner of West 58th St. LLC (T:19-1 to 6).

Plaintiff next called Ariel Gantz. Mr. Gantz confirmed that he executed a personal guarantee for the payment of the West 58th St. mortgage, which was marked as Exhibit 3 (1T:58-5 to 25). Gantz never made any payments on the mortgage, either before or after the sale of the property (1T:59-1 to 19). Gantz testified that he did not believe the West 58th St. mortgage would remain a lien on the property after the closing; rather, part of the overall transaction was that the outstanding mortgage was being taken care of by an arrangement whereby money was going to be sent to Israel after the sale of the property to purchase bonds (1T:60-11 to 23). Gantz never informed anyone at Golden Union that the West 58th St. mortgage was going to be discharged pursuant to the Israeli bond purchase. (1T:61-22 to 62-1).

On cross-examination, Gantz denied any background in real estate transactions or finance. He was brought in to perform the construction and renovation at the subject property (1T:62-8 to 15). He was never a member of Union Avenue Holding or SJB Capital (1T:62-16 to 24). He admitted, however, that he had loaned money to either Union Avenue or SJB in advance of the closing to assist in "cleaning up" the company so that he could become an equity

partner (1T:70-69-10 to 70-4). Gantz did not consult an attorney before signing the guarantee. Gantz testified that he signed the guarantee on the mortgage because Bienenstock said it needed to be done to move forward, and he knew the building was worth more than the note, so he really never thought it would see the light of day (1T:63-3 to 13). Judah Bloch, the third signatory, is Gantz's brother-in-law.

Gantz did not communicate with Mr. Friedman nor did he attend the closing. His understanding was that all of the legal aspects of the transaction were being handled by Bienenstock (1T:64-22 to 65-9). He denied any knowledge of the allegedly forged discharge, and was unaware that such a document would be produced at closing. His involvement in the sale was to conduct the walk through with Golden Union representatives to record the current status of the building (1T:66-11 to 23).

The sole witness for the defense was Judah Bloch. Mr. Bloch has a degree in economics from the University of Maryland. He does not hold any licenses or certifications in the fields of real estate or real estate finance (1T:75-16 to 24). Prior to 2009, the year of this sale, Bloch had not been involved in any real estate related businesses. Bloch testified that he and Stuart Bienenstock grew up in the same neighborhood (1T:76-18 to 22). In April 2008, Bienenstock joined Bloch as a member of SJB Capital (1T:77-3 to 10). The pair subsequently formed Union Avenue Holding LLC to purchase the property at 380 Union Avenue and two other properties in Irvington (1T:77-14 to 23). Bloch confirmed that in 2011 Union Avenue borrowed \$1.1 million dollars from West 58th St. LLC; Union Avenue never took a mortgage loan from TSR Group (1T:80-4 to 22).

The purpose of the loan according to Mr. Bloch was to buy out partners in an entity, Rockaway Capital, which owned an interest in Union Avenue Holding (1T:80-9 to 16). After

partially buying out the partners, however, there was insufficient money to make needed renovations, even after bringing in additional capital for that purpose. Therefore, the renovations were never completed (1T:82-2 to 23). Bloch testified that his main role with respect to the property was managing the operational finances including payroll and collecting rents (1T:84-9 to 21). Bloch stated that Bienenstock's role was "similar," although Bienenstock took more of an active role in structuring deals. (1T:84-22 to 85-7), and he had more extensive education in real estate transactions (1T:85-8 to 19).

In or about June of 2012, Union Avenue made the decision to sell the 380 Union Avenue property (1T:85-20 to 25). To that end, the company retained a broker who marketed the property (1T:85-4 to 9). Union Avenue retained Stephen Friedman to represent them in the sale. Bloch believed that it was Stuart Bienenstock that initially contacted Friedman regarding the retention; however, Bloch and Bienenstock jointly agreed to retain Friedman (1T:87-6 to 18). At the time of Friedman's retention, Bloch was aware that Friedman had in the past represented West 58th St. in some capacity (1T:18-19 to 24).

Prior to the closing, only Bienenstock interacted with Friedman. Bloch, however, attended the closing along with Bienenstock. Bloch denied telling any representative of Golden Union that any and all liens on the Union Avenue property were going to be satisfied at the closing (1T:88-20 to 25). He did not recall seeing the allegedly forged discharge at the closing, stating that "there were a series of documents that went around Stephen Friedman. Some I signed, some I don't even know specifically what went." (1T:89-7 to 15). When asked whether he had any understanding prior to the closing as to what would happen to any of [the] liens that attached to the property, Bloch responded "You know, to me there was --- the building and many issues, liens, all sorts of things which I really understood to be technicalities, so I didn't really

get into this versus that.” Notwithstanding that disavowal of the knowledge of any of the liens, Bloch admitted that there was one particular lien he personally worked on clearing prior to the closing (1T:90-5 to 12). Bloch denied having a conversation with Bienenstock about how all of these liens were going to be satisfied (1T:90-18 to 21). He also denied knowledge of the alleged forgery of the discharge or having been involved in the actual forgery itself (1T:53-9 to 22).

Bloch’s understanding was that the proceeds of the sale were going to be used to purchase bonds in Israel representing a first debt position for a multi-million dollar company that owned assets in Tennessee and Connecticut, and that the funds were going to be used to purchase the bonds to assist Turetsky and TSR in taking control of this company. Bloch’s understanding was that based on this contribution, Bienenstock and Bloch would become partners in the Israeli company (1T:90-14 to 91-10). Bloch was aware that Turetsky was the principal of West 58th St. LLC. Bloch understood the nature of the transaction to be an asset replacement whereby UAH would sell the building and buy the bonds. (1T:93-19 to 92-4). Bloch’s knowledge was based on “conversations taking place in Israel in which we were told by TSR, and that we’re basically doing what we would call like an asset replacement.” (1T:91-21 to 92-1). Bloch stated he was aware of these conversations through Stuart Bienenstock (1T:92-5 to 7). Bloch personally wired the \$600,000.00 proceeds of the closing to Israel (1T:92-10 to 22). In addition, Bloch sent an additional \$400,000.00 to Israel to effect the purchase of the bonds.

On cross-examination, Bloch admitted that Turetsky had emailed Bloch to ask him to weigh in on “the arrangements I’m trying to put together.” (1T:95-3 to 20). When asked whether he knew the whether the West 58th St. mortgage was going to be discharged prior to closing, Bloch responded evasively by stating “I did not know specifically what would be satisfied as far as I knew the mortgage holder was TSR.” (1T:96-25 to 97-6). Bloch

acknowledged, however, Exhibit 21, an email from Stephen Friedman sent to both Bloch and Bienenstock dated September 11, 2012, nine days prior to the September 20, 2012 closing (1T:97-7 to 11). The email listed the two mortgages, the first listed being the West 58th St. mortgage for \$1.1 million. The email further stated: “these need to be released, satisfied by West 58th Street or if there wasn’t an assignment recorded by finding recording information and having these re-assessed --- released by TSR Group.” (1T:97-15 to 24). Bloch also admitted that the wire transfer of the money to Israel did not take place for a couple of weeks after the closing because the receiving account was not established at the time of the closing (1T:98-17 to 99-13). Bloch indicated that he did not know whether TSR or West 58th St. was requesting the money; but it was definitely Danny Turetsky that was requesting the money (1T:99-18 to 24).

Bloch admitted that he knew that the principals of Golden Union believed that upon closing it would own the property free of any liens (1T:100-1 to 11). He denied, however, knowing that the West 58th St. mortgage would not be satisfied at or before the closing (1T:101-21 to 24). Notwithstanding, Bloch admitted that the repayment, if any, to West 58th St. should be effected at the closing with the proceeds of the funds to purchase the bonds. Those proceeds, however, were not paid directly to West 58th St. or even UAH. Rather, they were wired into SJB’s business account. (1T:102-8 to 22). Bloch was aware that other than the \$600,000.00 net proceeds of the closing, no other money exchanged hands at the closing (1T:103-4 to 8). Bloch also admitted that he alone had managed SJB’s business accounts since 2010, prior to the 2011 execution of the West 58th St. mortgage (1T:103-9 to 23).

Bienenstock did not testify at trial. At deposition, he testified that there was a partnership agreement between either UAH or SJB and a partnership comprised of Abraham Poznanski, Edwin Cohen and Daniel Turetsky, whereby the Poznanski partnership committed to a five

million dollar investment in UAH/SJB. After the Poznanski group defaulted on the commitment, the parties participated in a Jewish arbitration the result of which was that UAH/SJB ended up losing a property at 404 to 410 Union Avenue to one of UAH/SJB's other investors, Rockaway Capital. In addition, by virtue of the judgment of the rabbi, UAH/SJB was required to pay Rockaway an additional million dollars. In order to satisfy the judgment, UAH/SJB decided to borrow \$1.1 million from Daniel Turetsky in exchange for a mortgage on the 380 Union Avenue property (4T:31-2 to 32 to 18). The closing to the \$1.1 million dollar loan was attended by Bienenstock, Bloch, Herbst and Zion. (4T:46-20 to 26). Bienenstock and Bloch were not represented by an attorney; their attorney did not agree to the changes made by Herbst, and their attorney was concerned because there were so many exceptions to title. (4T:47-7 to 17). Notwithstanding, Bloch and Bienenstock made the determination to go forward without representation because they were under the gun and desperate for the money (4T:47-8 to 13).

Bienenstock testified that at the closing of the subject transaction between Golden Union and UAH, after paying all the expenses and liens, the net proceeds of the sale were approximately \$600,000.00. The money was to be forwarded to purchase bonds in Israel from a company called Sovereign Assets. Bienenstock's understanding was that the payment of the money would result in a partnership between Bloch and Bienenstock as members of SJB and Daniel Turetsky and TSR (4T:48-5 to 24). Consistent with Bloch's testimony, Bienenstock confirmed that it was Bloch who actually wired the closing proceeds to Israel, to an entity called IBI (4T:74- 1 to 17). Bienenstock testified that upon receipt of the funds, Turetsky was to forgive the \$1.1 million dollar mortgage held by West 58th St. (4T:75-3 to 16). Bienenstock testified that Bloch was involved in all aspects of negotiating the Golden Union deal, including

attending the closing (4T:152-11 to 19). Gantz, on the other hand, was a very passive member (4T:152-20 to 24).

Bienenstock denied having seen the allegedly forged discharges of the mortgage and assignment of rents, D6 and D7, until after the closing (4T:162-16 to 22). He admitted, however, that the handwriting on the discharge of rents “looks very similar to my handwriting.” (4T:166-23 to 25). He denied delivering the discharge to the closing, contrary to two witnesses, Friedman, who testified the discharge was delivered by either Bienenstock or Bloch, and Fortunato, who testified that Bienenstock delivered the discharge at the closing (4T:13 to 15).

Based on the foregoing evidence, Plaintiff, Chicago Title, seeks a judgment against Defendants UAH, Stuart Bienenstock, Judah Bloch, and Ariel Gantz based on common law fraud, negligent misrepresentation, fraudulent inducement, and fraudulent misrepresentation. In addition, Plaintiff seeks punitive damages.

DISCUSSION

I. Defendants Bloch and Gantz’s Motion to Dismiss pursuant to R. 4:40-1

At trial, Defendants Bloch and Gantz moved for a directed verdict pursuant to R. 4:40-1. The court reserved decision on Defendant’s motion because it had been provided with five depositions and a binder of trial exhibits that the court had not yet had the opportunity to review. Having now considered all the evidence, it is clear that at the close of Plaintiff’s case Chicago Title had established a prima facie case of fraud and therefore the motion will be denied.

The standard for determining a motion to dismiss at the close of the plaintiff’s case is the same as that stated in R. 4:37-2(b), governing determination of a motion for an involuntary dismissal, namely, whether on the basis of the proofs presented and all legitimate inferences

therefrom and upon the applicable law, the plaintiff has shown no prima facie case. Pitts v. Newark Bd. of Educ., 337 N.J. Super. 333, 340 (App. Div. 2001). Defendants' argument in favor of dismissal is unavailing for the reasons set forth more fully below.

II. Plaintiff's Fraud claims

To establish a claim for common law fraud, Plaintiff must show “(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.” Banco Popular N.A. v. Gandi 184 N.J. 161, 172 (2005), quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997). Fraud may also be committed by intentional concealment of a material fact that the concealing party has a duty to disclose. In the context of a business transaction, such as in the context of a sale of commercial property, the elements of fraudulent concealment are “the deliberate concealment or nondisclosure by the seller of a material fact or defect not readily observable to the purchaser, with the buyer relying upon the seller to his detriment.” State Dep't of Environmental Protection v. Ventron Corp., 94 N.J. 473, 503 (1983).

Fraud is never presumed. Each of the elements of fraud must be proven by clear and convincing evidence. Stoecker v. Ecevarria, 408 N.J. Super. 597, 618 (App. Div. 597, 618 (App. Div.), certif. denied, 200 N.J. 549 (2009).

The clear and convincing evidence standard of proof is a higher standard of proof than the preponderance of the evidence, but a lower standard than proof beyond a reasonable doubt. Liberty Mut. Ins. Co. v. Land 186 N.J. 163, 169-170 (2006). The clear and convincing standard “should produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.” In re Purrazzella, 134 N.J. 228, 240 (1993).

The elements of a cause of action for fraudulent inducement and fraudulent misrepresentation are essentially the same as those for common law fraud. In order to establish such claims, five elements must be shown: (1) a material misrepresentation; (2) made with knowledge of its falsity; and (3) with the intention that the other party rely thereon; (4) resulting in reliance by that party; (5) to his detriment.” Metex Mfg. Corp. v. Manson, No. 05-2948, 2008 WL 877870, at *4 (D.N.J. March 28, 2008). The “deliberate suppression or omission of a material fact that should be disclosed, is equivalent to a material misrepresentation.” Strawn v. Caruso, 140 N.J. 43 (1995). A defendant will not be excused from fraudulent conduct “merely because the plaintiff might have or should have discovered the fraud by its own diligence or investigation.” Jewish Center of Sussex County v. Whale, 86 N.J. 619, 625-26 (1981).

In this case, as to the first three elements of fraud, unquestionably there was a material misrepresentation by both Bloch and Bienenstock, made with knowledge of its falsity, with the intent that Golden Union and its principals would rely on it. The misrepresentation consisted of the failure of Bloch and Bienenstock to disclose to Messrs. Fortunato and Taormina what both defendants, clearly and convincingly, knew: that the West 58th St./TSR mortgages were not going to be discharged at or before the closing. The court concludes, for reasons set forth more fully below, that there is insufficient evidence to find that Ariel Gantz participated in the fraud and will dismiss the claims against Mr. Gantz. The court finds the following as facts.

This twisted tale began with a Jewish arbitration resulting in a rabbi entering judgment against Bienenstock and Bloch and their companies, UAH and SJB. The judgment required UAH/SJB to relinquish the property at 404 to 410 Union Avenue to one of UAH/SJB’s other investors, Rockaway Capital. In addition, by virtue of the judgment of the rabbi, UAH/SJB was required to pay Rockaway an additional million dollars. In order to satisfy the judgment,

UAH/SJB decided to borrow \$1.1 million from Daniel Turetsky via his company, West 58th St. LLC, in exchange for a mortgage on the subject property, 380 Union Avenue (4T:31-2 to 32 to 18). The closing to the \$1.1 million dollar loan was attended by Bienenstock, Bloch, Herbst and Zion. (4T:46-20 to 26).

On August 15, 2011, West 58th St. LLC made a wire transfer in the amount of \$1.1 million dollars issued to SJB Capital, LLC for the benefit of Union Avenue, along with the execution of relevant loan documents. After SJB/UAH defaulted on the mortgage, various proposals to restructure the loan were proposed. Most relevant to this case, in mid-September 2012 Turetsky and Bienenstock discussed the possibility of West 58th St. agreeing to discharge its mortgage encumbering the Union Avenue property in exchange for Bienenstock's agreement to fund for Turetsky the acquisition of a United States LLC that had bid to purchase publicly traded bonds on the Tel Aviv Stock Exchange for a company with which Mr. Turetsky was affiliated. According to Turetsky, as these discussions were ongoing, Bienenstock did not disclose to Turetsky that he had already orchestrated a sale of the property.

Bloch and Bienenstock were consistent in their understanding of the details of the proposed debt restructure. Bloch testified that the proceeds of the sale were going to be used to purchase bonds in Israel representing a first debt position for a multi-million dollar company that owned assets in Tennessee and Connecticut, and that the funds were going to be used to purchase the bonds to assist Turetsky and TSR in taking control of this company. Bloch's understanding was that based on this contribution, Bienenstock and Bloch would become partners in the Israeli company (1T:90-14 to 91-10). Bloch was aware that Turetsky was the principal of West 58th St. LLC. Bloch understood the nature of the transaction to be an asset replacement whereby UAH would sell the building and buy the bonds. (1T:93-19 to 92-4). Bloch's knowledge was based

on “conversations taking place in Israel in which we were told by TSR, and that we’re basically doing what we would call like an asset replacement.” (1T:91-21 to 92-1). Bloch stated he was aware of these conversations through Stuart Bienenstock (1T:92-5 to 7), but admitted that Turetsky had emailed Bloch to ask him to weigh in on “the arrangements I’m trying to put together.” (1T:95-3 to 20). Bloch personally received the proceeds of the closing into SJB’s business account, an account of which Bloch had exclusive control, and personally wired the \$600,000.00 proceeds of the closing to Israel (1T:92-10 to 22). Bloch knew at the time of the closing that the wire transfer of the money to Israel would not take place immediately because the receiving account was not established at the time of the closing. Ultimately the transfer did not occur for two weeks after the closing (1T:98-17 to 99-13). Bloch, Bienenstock and Gantz all knew the critical fact that gives rise to the fraud in this case: that the discharge could not occur until the closing proceeds were wired to Turetsky or his representatives in Israel. Gantz was not familiar with the details of the transaction and may not have understood that the buyer had demanded the discharge of the mortgages at or before the closing. Both Bienenstock and Bloch, however, were well aware that Golden Union had that expectation.

In that regard, Bienenstock and Bloch participated in the negotiation and (failed) execution of the proposed debt restructure. With respect to Bienenstock, the court finds, clearly and convincingly, that he brought the forged discharge to the closing. Friedman testified that either Bloch or Bienenstock delivered the discharges to the closing, and Fortunato testified that it was Bienenstock that delivered them. The court finds that is highly likely that Bienenstock forged the document himself, based on his own admission that some of the handwriting on the discharge looked remarkably similar to his own. Moreover, Bienenstock’s credibility is completely undermined by his denial that he brought the discharges to the closing, which the

court finds to be false, and his denial of any knowledge where the discharges came from, which the court finds to be ludicrous. The fact that Bienenstock delivered the forged discharges to the closing, knowing the buyer would not close without a discharge of the West 58th St. mortgage at or prior to closing, knowing that the seller would rely on the discharges in agreeing to close, clearly and convincingly satisfies the first three elements of Plaintiff's fraud claims against Bienenstock.

With respect to Bloch, his self-serving testimony at trial concerning his relative lack of expertise and his attempts to shift all blame to his partner Bienenstock, the court finds not at all credible. In that regard, Bloch is a far more educated individual who has a degree in economics, and he testified in great detail and clearly was aware of all the mechanics of the transaction. In addition, Bloch had sole control of the business account of SJB. It was Bloch who took control of the closing proceeds, had them deposited into the SJB business account, and thereafter wired them to Israel in the apparently thwarted expectation of both he and Bienenstock becoming partners in Turtesky's company.

Bloch admitted that he knew the buyer believed the closing would result in his obtaining clear title to the property, which Bloch knew was untrue. Bloch's disavowal of any knowledge that the mortgages were to be discharged at or prior to closing is equally unavailing. Both Bienenstock and Bloch received emails from their attorney, Stephen Friedman, in advance of the closing indicating the necessity of obtaining a discharge of the West 58th St./TSR mortgages. To that end, Friedman had prepared the form of the discharge at the request of both Bloch and Bienenstock. After preparing it, he forwarded the form discharge via email to both Bloch and Bienenstock with the understanding that they would obtain the signatures required for an effective discharge at the time of closing. The court further finds that Bienenstock and Bloch,

desperate to consummate this deal with Daniel Turetsky, each knew that they would be unable to do so without securing the \$637,000.00 net proceeds from the closing. Thus, Bloch as well as Bienenstock clearly knew and understood that the buyer expected the mortgages needed to be discharged at or before the closing and would not close unless they were discharged. The court finds that Bienenstock and Bloch made a decision to induce the buyer into believing the mortgages were discharged in order to take possession of the closing proceeds and consummate their deal with Turetsky. Bloch's understanding of this is further supported by his evasiveness when asked at trial whether he knew the West 58th St. mortgage was going to be discharged prior to closing, to which he responded "I did not know specifically what would be satisfied as far as I knew the mortgage holder was TSR." (1T:96-25 to 97-6). Clearly, he understood something was to be discharged at the closing, and the court finds he actually knew exactly what was to be discharged based on his and his partner Bienenstock's review of the discharges. The discharges were prepared by Friedman at the request of Bloch and Bienenstock, emailed to both Bloch and Bienenstock, and regardless of who forged the document, the court finds both Bloch and Bienenstock knew that to induce the buyer to close, the discharges had to be executed and presented to the buyer at or before closing. Thus, the first three elements of a cause of action are satisfied as to Bloch and Bienenstock.

With respect to Defendant Ariel Gantz, the court reaches a different conclusion. Gantz testified that he did not believe the West 58th St. mortgage would remain a lien on the property after the closing. He evinced some understanding that as part of the overall transaction the outstanding mortgage was being taken care of by an arrangement whereby money was going to be sent to Israel after the sale of the property to purchase bonds (1T:60-11 to 23). It is true that Gantz never informed anyone at Golden Union that the West 58th St. Mortgage was going to be

discharged pursuant to the Israeli bond purchase. (1T:61-22 to 62-1). Unlike Bloch, however, Gantz appeared to have little personal knowledge of the details of the proposed transaction between Bienenstock/Bloch/SJB and Turetsky/TSR. Gantz was not a member of SJB, and he was not a party to the transaction to fund Turetsky's purchase of bonds. Gantz had no background in real estate transactions or finance. He was brought in primarily to perform the construction and renovation at the subject property (1T:62-8 to 15). Gantz never communicated with Mr. Friedman, nor did he attend the closing. His involvement in the sale was to conduct the walk through with Golden Union representatives to record the current status of the building (1T:66-11 to 23). Accordingly, the court finds there is insufficient evidence to find that Gantz participated in the fraud, and the claims against him are therefore dismissed.

III. Was Golden Union's reliance reasonable?

The fifth element of fraud, damages, clearly is satisfied. Defendant Bloch urges the court to find, however, that the fourth element of fraud, reasonable reliance, is not satisfied, defeating Plaintiff's fraud claims. In that regard, in order to sustain a fraud claim a plaintiff must prove by clear and convincing evidence that the plaintiff's reliance on the misrepresented material fact was reasonable. Banco Popular, supra, 184 N.J. at 172. Defendants argue that Plaintiff conducted its own investigation into the facts upon which the fraud claim is based and therefore, Defendant cannot be held liable because there is no reliance as a matter of law. Walid v. Yolanda for Irene Couture, 425 N.J. Super. 171, 180 (App. Div. 2012). Specifically, Defendants allege that Golden Union's subrogee, Chicago Title, had its own settlement agent, Michael Taormina, an attorney and principal of Golden Union, handle the closing, review the documents provided and certify to Chicago Title that all of the insurance commitment requirements were satisfied. Therefore,

Defendants contend that Taormina having failed to discern a discrepancy in the signatures on the discharge defeats any finding of reasonable reliance.

In 48 Horsehill, LLC v. Kenro Corp., 2006 WL 349739 (App. Div. 2006), plaintiffs brought an action against a vendor alleging fraud and negligent misrepresentation in regards to chemical contamination on the property. The plaintiff alleged the defendant's failure to disclose that chemical contamination on the property had not been remediated constituted fraud and negligent misrepresentation, and that the seller's misrepresentation was material to the purchase of the property because had plaintiff known this fact, plaintiff would not have purchased the property. Defendants in 48 Horsehill argued that because plaintiff commissioned its own inspection of the property, the essential element of reliance was missing. The Appellate Division held that "it is of no consequence that plaintiff conducted its own due diligence because defendants failed to provide all information critical to the evaluation – a fact upon which plaintiff may have justifiably relied."

Similarly in this case, the court rejects that Plaintiffs did not reasonably rely on Defendants' misrepresentation. In that regard, a defendant will not be excused from fraudulent conduct "merely because the plaintiff might have or should have discovered the fraud by its own diligence or investigation," Jewish Center of Sussex, *supra*, 86 N.J. at 625-26. Moreover, the court finds that Golden Union acted reasonably diligently in demanding the form of discharge, obtaining the form of the discharge, obtaining approval from the title company for the proposed discharges, and receiving an executed discharge at closing. That Plaintiff did not discern that it was being defrauded by Defendants with a forged discharge, the court concludes, does not defeat Golden Unions claims for fraud.

In that regard, Fortunato tried, but failed, to obtain a pay-off of the 58th St. mortgage prior to closing (1T:27-10 to 18). Instead, he was given repeated assurances from the seller's attorney, Stephen Friedman, Esq., that he would be handling the discharge and pay-off for West 58th (1T:27-21 to 24). Friedman emailed Fortunato to assure him that the payoffs and discharges would be effected at or prior to closing. In one of his emails to Fortunato, stated, "No payoff amount necessary. They are being discharged pursuant to a separate agreement." (3T:34-25 to 36-9). On September 11, 2012, Friedman sent an email to Stephen Fortunato stating, "seller will be delivering at or prior to closing release/satisfaction of mortgage from TSR Group." (3T:48-24 to 49-6). On September 14, 2012, Friedman emailed Fortunato stating, "I will get the corporate documents and mortgage termination shortly." (3T:52-9 to 15).

At the closing, Bienenstock delivered an executed discharge of the West 58th St. mortgage (1T:32-12 to 15). The provision of the executed discharge led Fortunato to believe the West 58th St. mortgage was in fact satisfied (1T:32-19 to 22), and that he had thus obtained clear title to the property (1T:34-1 to 4). None of the seller's representatives told Fortunato at the closing that the discharge of the mortgage was contingent on some future post-closing event (1T:32-23 to 33-15), a fact that Bienenstock and Bloch clearly and convincingly both knew. Bienenstock signed the deed, the seller's residency certification, the affidavit of consideration, and the affidavit of title on behalf of Union Avenue Holding (1T:47-6 to 23).

Although there was a discrepancy between the signature line that was signed by Ronald S. Herbst, Authorized Signatory (1T:41-22 to 42-1), and the affidavit of the notary stating, that it was Eliezer Swerdlow that appeared before her and prepared the instrument, that discrepancy alone does not defeat the fraud claims. Rather, in light of assurances, both explicit and implicit, by Bloch, Bienenstock and their attorney Stephen Friedman that the mortgage was discharged at

closing, the court finds that Plaintiff's reliance on these assurances was reasonable under the circumstances. Based on all the circumstances, the court finds that Golden Union did not know that the discharge was false, nor was the falseness of the discharge obvious.

Relatedly, Defendants argue that Plaintiff has failed to establish that the conduct of Union Avenue Holding was the proximate cause of loss. Proximate cause consists of "any cause which in the natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without which the result would not have occurred." Townsend v. Pierre, 221 N.J. 36, 51-52 (2015). Defendants argue that Plaintiff's own negligence in failing to confirm that the signature on the Discharge Form was that of Mr. Herbst was an "efficient intervening cause." As an initial matter, the court rejects that in the context of a routine real estate closing the buyer has an obligation to independently investigate and verify the authenticity of every signature on every document presented by the seller or to launch an independent investigation to verify whether the person who purports to be an authorized signatory is so in fact, particularly where the subject of the discharges had been the matter of extensive discussions and reassurances by the seller in advance of the closing. Moreover, as stated in 48 Horsehill, LLC v. Kenro Corp., 2006 WL 349739 (2006), "it is of no consequence that plaintiff conducted its own due diligence because defendants failed to provide all information critical to the evaluation-a fact upon which plaintiff may have justifiably relied." Defendants attempt to shift the blame onto Plaintiff's attorney. However, the facts clearly demonstrate that Defendants refused to submit payoff figures from West 58th St. and prevented Golden Union from obtaining them directly. Therefore, the Plaintiff has established by clear and convincing evidence both reasonable reliance and proximate cause.

Finally, Defendants argue that Plaintiff has failed to prove fraud by Union Avenue Holding. Fraud cannot be committed by an entity, by definition; fraud can only be committed by an individual who has the capacity to consciously engage in an act of deception. The case cited by Defendants NCP Litig. Trust v. KPMG LLP, 187 N.J. 353 (2006), does not further that proposition. The court was unable to locate anything that would support the claim that a fraud claim cannot lie against an LLC as well as its members, and the court notes that in other contexts such as the Consumer Fraud Act, it is plain that a corporate entity or LLC clearly can be sued for fraud. Accordingly, the court rejects that UAH cannot be held liable for the fraud perpetrated on Golden Union.

For the foregoing reasons, the court finds that Plaintiff has satisfied all of the requisite elements of all asserted fraud claims against UAH, Bienenstock and Bloch including common law fraud, fraudulent inducement, and fraudulent misrepresentation.

IV. Plaintiff's Claims for Negligent Inducement

In the second count of the cross-claim directed against Union Ave Holding only, Plaintiff alleges Defendants are liable for negligent inducement. To sustain a claim for negligent misrepresentation, the plaintiff must demonstrate, “(1) defendant negligently made a false communications of material fact, (2) plaintiff justifiably relied upon the misrepresentation; and (3) the reliance resulted in an ascertainable loss of injury.” The Supreme Court of New Jersey held in H. Rosenblum, Inc. v. Adler, 93 N.J. 324, 334 (1983), “a false statement negligently made, and on which justifiable reliance is placed, may be the basis for the recovery of damages for injury sustained as a consequence of such reliance.” In examining a negligent misrepresentation claim, the court acknowledged that negligent misrepresentation involves “a

weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.” Id.

Defendants further argue that Plaintiff failed to prove that there was negligence on part of the seller, Union Avenue Holding. To sustain a cause of action for negligence, “a plaintiff must establish (1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages.” Townsend v. Pierre, 221 N.J. 36, 51-51 (2015), quoting, Polozo v. County of Essex, 195 N.J. 569, 584 (2008), in turn quoting, Weinberg v. Dinger, 106 N.J. 469, 484 (1987). The burden of establishing those elements is by “some competent proof.” Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014), citing, Buckelew v. Grossbard, 87 N.J. 512, 525 (1981).

Defendants argue, “in a complex commercial real estate transaction such as involved in this case, expert testimony was required to provide the standard of care.” Defendants cite to Froom v. Perel, 377 N.J. Super. 298 (2005) which held that “jurors could not be expected to know, based on their own common knowledge and experience, whether sophisticated investors would be willing to invest in the acquisition and development of the property and allow the Company to retain a 50% interest while making no monetary contribution to the project.” Id. at 318.

At the outset, the court finds that unlike the circumstances in Froom, the underlying transaction was not a complex real estate transaction but a simple sale. Notwithstanding, the court need not address whether expert testimony was needed to support Plaintiffs’ claims of negligence because the court finds, as set forth above, that the actions of Bienenstock and Bloch on behalf of UAH were unquestionably intentional. Accordingly, the claims for negligent misrepresentation, as well as those for negligent breach of covenant, are dismissed.

V. Plaintiff's Claim for Breach of Covenant

In Count III, Plaintiff alleges that in the deed to Golden Union, UAH warranted that it had done no act to encumber the Property but the mortgage remained a lien on the premises. Thus, Plaintiff asserts that Defendants are liable for breach of covenant because Defendants allowed a lien (i.e. the mortgage) to remain on the property. Defendants argue that Golden Union and its subrogee were clearly aware of the existence of the West 58th Street mortgage and that it needed to be discharged. Defendants claim that neither Plaintiff, nor its subrogee, were misled by anything stated in the deed.

In Mayte v. Nemecz, 131 N.J.L. 173 (1944), defendants conveyed to the plaintiff a deed that contained a covenant that the premises were not encumbered. Thereafter, plaintiffs found that there were unpaid taxes and water charges due the municipality. The Supreme Court of New Jersey held that “plaintiffs established by the proofs a clear breach of the covenant in the deed since the premises were encumbered when the deed was given, and the plaintiffs were entitled to judgment.” Similarly, in this case, UAH warranted that it had done no act to encumber the Property, but there was an outstanding mortgage on the premises. Under New Jersey Law, if a bargain and sale deed contains a warranty as to the grantor’s acts, and the subject property is encumbered as a result of actions taken by the grantor, then the grantor is liable to the grantee when the deed is given. Id. Additionally, a covenant of good faith and fair dealing is implied in every contract in New Jersey. Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997). A party breaches this implied covenant “if the breaching party exercises its discretionary authority arbitrarily, unreasonably, or capriciously, with the objective of preventing the other party from receiving its reasonably expected fruits under the contract.” Wilson v. Amerada Hess Corp., 168 N.J. 236, 251 (2001).

In this case, the court finds that there is ample credible evidence to support Plaintiff's claims based on the breach of the covenant in the warranty as Defendants conveyed title knowing the West 58th St. mortgage remained as an encumbrance on the property. Contrary to Defendants' arguments, the issue is not whether Plaintiffs were misled, but whether the statements in the warranty were true, which clearly they were not. As a result, Plaintiff was deprived of the expected fruits of the contract; namely, clear title to the property. Defendants claim that Plaintiff knew of the existence of the mortgage and the assignment to TSR does not relinquish Defendants from their duties arising from the covenant in the deed.

VI. Punitive Damages

In Count IV, Plaintiff seeks punitive damages because Defendants knew that the mortgage would not be discharged prior to or at the closing. Pursuant to N.J.S.A. 2A:15-5.12, punitive damages may be awarded where a plaintiff is damaged by defendant's acts or omissions and those acts or omission were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might have been harmed by those acts or omissions. Plaintiff argues that Defendants never disclosed the fact that the mortgage would not be discharged prior to or at the closing. They went so far as to bring a forged Discharge Form to the closing to conceal that the mortgage was not discharged. Plaintiff states throughout the litigation and the trial, Defendants attempted to blame Golden Union, its principals, and UAH's lawyer for Defendants' own fraudulent conduct.

In Gennari, supra, 148 N.J. 582, plaintiffs, purchasers of homes in a real estate development, brought action against the real estate brokerage firm that marketed the development. Defendants induced the purchasers to rely on their representations that the contractor was experienced, finished construction on schedule, and was a craftsman. Id. at 609.

The Supreme Court of New Jersey held that the “sole purpose for Defendants’ misrepresentations to plaintiffs was to get them into the development, take their money, and make a profit, without regard to the consequence that plaintiffs would have to live in homes built by inexperienced and careless subcontractors.” Id.

Although the court has concluded that Defendants Bloch and Bienenstock intentionally defrauded Golden Union and its principals, the court does not find that Defendants’ fraudulent acts give rise to a claim for punitive damages. In that regard, unlike Gennari, it is clear from the evidence that Bloch and Bienenstock believed that the mortgage would be discharged post-closing after the settlement proceeds were wired to an entity in Israel. Thus, the court finds that their actions were not motivated by actual malice or accompanied by a wanton and willful disregard of potential harm to Golden Union. Rather, they believed, incorrectly, that this was a stop-gap measure to facilitate the consummation of their deal with Turetsky and that there would be no long-term harm to Golden Union. For reasons that the court will not speculate upon, Turetsky did not honor his promise to discharge the mortgage, which the court finds Bienenstock and Bloch most likely did not anticipate. Accordingly, the court will not award punitive damages.

CONCLUSION

For the foregoing reasons, the court will enter judgment against Defendants Union Avenue Holdings, LLC, Stuart Bienenstock, and Judah Bloch in the amount of \$1.3 million dollars plus pre-judgment interest. The claims against Ariel Gantz are dismissed with prejudice. Counsel for Plaintiff shall forward a form of judgment in accordance with this decision.