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Superior Court of New Jersey

APPELLATE DIVISION

DOCKET NO. A-000466-24T4

CIVIL ACTION

90 HACKENSACK AVENUE, LLC,

Plaintiff,

-v-

APONTE SERVICE STATION, LLC and CARLOS APONTE, individually,

APONTE SERVICE STATION, LLC,

Third-Party Plaintiff-Respondent,

-v-

AERO AMBULANCE, INC., DAVID GATO, individually, SCANDER, LLC, and BASSEM SCANDER, individually,

Third-Party Defendants-Appellants

ON APPEAL FROM
The Final Judgment Entered in
the Superior Court of New Jersey
On September 11, 2024

SAT BELOW:
Hon. Nicholas Ostuni, Sr.

BRIEF OF DEFENDANTS-APPELLANTS

WILLIAM GOLDBERG, ESQ.
Attorney ID# 242481967
Attorney for Defendants-Appellants
45 Essex Street, 3rd Flr.
Hackensack, NJ 07601
(201) 342-4250

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[1] Only Paragraphs 27 and 28 of the Certification of Carlos Aponte dated January 11, 2022, were entered into evidence during the trial. Appellant has attached the first page of the Certification, the respective paragraphs and the signature page.

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PROCEDURAL HISTORY

On April 16, 2021, a Consent Order was entered by the Honorable Robert M. Vinci, permitting Third-Party Plaintiff, Aponte Service Station, LLC, to Amend the Third-Party Complaint to Include Causes of Action Against Additional Third-Party Defendants, Scander, LLC and Bassem Scander, individually (Da1-Da2).

On April 26, 2021, Third-Party Plaintiff filed its Amended Answer, Counterclaims and Third-Party Complaint (Da3 to Da30).

On June 1, 2021, Third-Party Defendants, Scander, LLC and Bassem Scander, individually, were personally served and the Affidavit of Service was filed with the Court on June 1, 2021 (Da31-Da32).

An Answer with Jury Demand to the Third-Party Complaint was filed on June 9, 2021, on behalf of Scander, LLC and Bassem Scander, individually (Da33 to Da40).

Discovery was initially extended by Stipulation of counsel on August 19, 2021, and further extended as a result of several uncontested motions. The final Order Extending Discovery End Date was entered by the Honorable Robert M. Vinci on October 7, 2022 (Da43 to Da44) extending Discovery to December 13, 2022.

On October 11, 2021, a Stipulation of Dismissal With Prejudice as to all claims between Plaintiff and Defendants and between Third-Party Plaintiff and Third-Party Defendant, Aero Ambulance, Inc. and Third-Party Defendant David Gato, individually, only, was filed with the Court (Da41 to Da42).

Third-Party Defendants filed a Motion in Limine on September 25, 2023 in anticipation of the trial proceeding on October 2, 2023. Third-Party Plaintiff filed opposition to the Motion in Limine on September 27, 2023. On the date of trial, the matter was conferenced and adjourned to December 4, 2023.

On October 26, 2023, Third-Party Defendants, Scander, LLC and Bassem Scander filed a Motion for Summary Judgment seeking dismissal of Third-Party Plaintiff's Complaint against Third-Party Defendants, together with a Certification, Undisputed Material Statement of Facts and a proposed form of Order. On November 21, 2023, Plaintiff filed a Cross-Motion for Summary Judgment seeking the entry of a judgment against Third-Party Defendants. The Court scheduled the Motion and Cross-Motion for Summary Judgment for January 5, 2024. On January 5, 2024 after oral argument, before the Honorable Anthony R. Suarez, the Court denied both Motions for Summary Judgment (Da45 to Da48).

On January 29, 2024, the matter was listed for trial for March 25, 2024. The trial date was subsequently adjourned and relisted for June 17, 2024. On the scheduled trial date, June 17, 2024, the matter was conferenced by the Court and adjourned to August 5, 2024.

A jury trial commenced on August 5, 2024 and continued on August 6, 7 and 8, 2024, before the Honorable Nicholas Ostuni, Sr. On August 8, 2024, the jury returned its verdict finding in favor of Third-Party Plaintiff and against Third-Party Defendants, Scander LLC and Bassem Scander, individually, awarding Plaintiff the sum of $225,000 in compensatory damages and $75,000.00 in punitive damages.

On August 20, 2024, Third-Party Defendants filed a Motion for Application for Relief After Judgment (JNOV), together with a supporting Certification of Bassem Scander and Memorandum of Law. Opposition papers were filed on August 27, 2024. The Motion was scheduled for oral argument on August 30, 2024 before the Honorable Nicholas Ostuni, Sr., and was denied (Da49 to Da50) (5T 75 at 9 to 90 at 13).

On September 11, 2024, an Order of Final Judgment was entered by the Honorable Nicholas Ostuni, Sr., (Da51), awarding Third-Party Plaintiff the sum of $332,400.86 which included the jury's award of $225,000 in

compensatory damages, $75,000 in punitive damages and $32,400.84 in prejudgment interest through September 4, 2024.

On October 16, 2024, Third-Party Defendants filed a Notice of Appeal and Case Information Statement. Third-Party Defendants received a deficiency notice from the Court requiring a correction to the caption. On October 24, 2024, Third-Party Defendants filed an Amended Notice of Appeal, Case Information Statement and Proof of Service, correcting the caption (Da52 to Da65).

On October 30, 2024, Respondent filed its Case Information Statement (Da 66 to Da69).

STATEMENT OF FACTS

1. In 2015, Scander, LLC ("Scander LLC") purchased a gas station located at 90 Hackensack Avenue, Hackensack, New Jersey. Bassem Scander, a member of the Scander LLC, ("Scander") operated the business until September 15, 2017 (2T 135 at 14 to 25 & 2T 136 at 1 to 19).

2. Prior to Scander's purchase of the business in 2015, he was provided with a **Fact Sheet** by the broker, Brian Elkin, (hereinafter "Elkin"), which contained the financial information regarding the operation of the gas station. This information was extracted from the gas station's Ruby Point of Sale System, (hereinafter Ruby) (2T 138 at 4 to 7), and contained (a) the total number of gallons of gas sold by the gas station, both on a monthly and yearly basis; (b) the business's operating expenses for the year; and (c) the net profit of the business over the course of the year. (2T 137 at 20 to 25, 2T 138 at 1 to 14).

3. In April, 2017, Scander decided that ownership of the gas station had become too burdensome (2T 136 at 1 to 8). At that point, he retained Elkin, to help him in the sale of his business. (2T 136 at 9 to 12 & 2T 137 at 20 to 25, 2T 138 at 1 to 14)

4. Elkin instructed Scander to provide him with **the same** information that he, Scander, received from the Seller, prior to his purchase of the

business, incorporating all the receipts from the Ruby System for the year 2016 into a Fact Sheet, which Scander then provided to Elkin. (2T 135 at 14 to 25, 2T 136 at 1 to 19 & 2T 137 at 20 to 25, 2T 138 at 1 to 14)

5. Based on the information generated by the Ruby system in the Fact Sheet which showed gasoline sales of 1.2 million gallons in 2016, approximately 100,500 in monthly gasoline sales, (2T 145 at 7), and net income of $151,320 (2T 143 at 8 to 10). The business was listed for sale by Elkin for $285,000 (2T 144 at 2 to 3). The Fact Sheet, also contained a statement that Scander, LLC was a "100% absentee owner." (Da70).

6. In May, 2017, Carlos Aponte ("Aponte"), who like Scander had no prior background in the gas station business, (1T 137 at 16), expressed an interest in purchasing a gas station (1T 137 at 20). Based on the information contained in the Fact Sheet that Scander had provided to Elkin, Aponte sent an email to Elkin stating "Okay. My offer is at 210K. I'm ready to make the purchase as soon as I can match the receipts with the supposed revenues." (Da87) (1T 77 at 13 to 15). Aponte's revised offer in the amount of $245,000 was verbally accepted by Scander, LLC, subject to Aponte's continuing due diligence. (2T 94 at 19 to 21 & 2T 144 at 19 to 25 and 2T 145 at 1 to 3).

7. No written contract or Letter of Intent (2T 145 at 18 to 19) was signed by the parties at the time of Aponte's initial offer (1T 162 at 23) in May, 2017 (2T 145 at 24).

8. When asked what he had to do to finalize the sale, Aponte acknowledged the importance of utilizing the Ruby system to determine the profitability of the gas station, stating "I had to match the receipts, the Ruby receipts, with the supposed revenues on the Excel Sheet (1T 8 at 12 to 14).

9. When asked to explain the Ruby system, Aponte stated as follows:

> A: It's a – it's like a computer system that records everything that's going on at the gas station at the pump itself. So, every time you lift the nozzle, it records it. Like, just lifting it, it will record it, so it records all the sales and stuff like that."
> (1T 78 at 18 to 15).

10. When asked what other documents he reviewed as part of his due diligence, Aponte stated:

> "A: What other documents? That would be his supplies invoices, that Excel sheet, and then I seen a lot of documents from a company who he alleged goes every month to maintain the pumps. That would be Bullseye. I seen documents for a company that does the – the— the yearly tests – test tanks – the tank testing each year."
> (1T 79 at 9 to 15).

11. On May 17, 2017, Aponte, Scander and Elkin met at the gas station (2T 147 at 14 to 21). Elkin testified that at this meeting, he instructed Aponte

to review both the Ruby receipts and delivery slips from P&J Fuel, the gas station's supplier.

12. At this meeting, Aponte noticed a computer and inquired of Scander as to its function (2T 149 at 6 to 8). Scander told him that he had developed a program in order to bill the "house accounts" (2T 149 at 9) and to get a sense of how the gas station was doing on a day-to-day basis, without having to extract the Ruby receipts from the gas pumps – which was far more labor intensive. (2T 6 at 5 to 10 & 2T 149 at 6 to 24).

13. At this meeting, Aponte requested copies of the "Spreadsheets" that were generated by the computer which contained a summary of the Ruby receipts. Scander testified that he advised Plaintiff that the information generated by the software system was used primarily "to track the house accounts" (2T 149 at 16), but was often unreliable and that it had "bugs" in it (2T 149 at 12), (a point he repeated in his email to Plaintiff's attorney on August 25, 2017), prior to the execution of an Asset Purchase Agreement (Da96-Da107). A review of Aponte's testimony does not include any denial by Aponte of Scander's warning to him about the "bugs" in the computer system. (2T 92 at 7 to 17 & 2T 135 at 8 to 13)

14. On June 10, 2017, Scander, Aponte and Elkin met at the gas station. At that time, Scander testified that he provided Aponte with the Ruby Point of

Sale receipts from 2013 to May, 2017 (2T 160 at 16 to 19). Scander also provided Aponte with the **original delivery slips from the gas station's supplier - P&J Fuel** for 2013 to May, 2017 (2T 160 at 18 to 20).

15. On July 1, 2017, Aponte met with Scander at the gas station. Despite his prior receipt of the Ruby records and the P&J invoices (2T 161 at 12 to 125), Aponte requested **printouts** of the P&J invoices from the software for the months of May and June, 2017. (1T 87 at 10 to 24 & 1T 162 at 23 to 25 to 1T 163 at 1 to 9)

16. On July 5, 2017, prior to his receipt of the May and June, 2017 P&J printouts, a Letter of Intent was signed by the parties the purchase price was $245,000, (2T 161 at 16 to 17).

17. On July 29, 2017, Scander provided Aponte with the computer generated P&J invoices for May and June, 2017 (1T 84 at 22 to 23) (Da110-Da139. Aponte testified that he relied exclusively on those invoices, which showed a total of 99,461 gallons of gas purchased for May, 2017, and 103,110 gallons of gas purchased in June, 2017, in deciding to purchase the gas station. (1T 88 at 18 to 21, 1T 87 at 10 to 24 & 1T 162 at 23 to 25 & 1T 163 at 1 to 9).

18. As to the discrepancies between the **actual** P&J invoices and the computer generated invoices (2T 164 at 1 to 3), Scander testified that he

created the computer program for himself (2T 165 at 4) for purposes of convenience (2T 165 at 6 to 8).

19. When asked why the software generated invoices were prone to human error, Scander testified as follows:

> "Because it's – it comes down to people putting numbers – looking at sheets that they get, delivery slips from – that they get from the supplier at the time of the delivery or looking at the printouts from Ruby and putting in numbers on a tablet. So the human factor is – the – the whole application is dependent on people knowing what they're doing." (2T 167 at 8 to 14)

20. Aponte testified that during the three month due diligence period, he reviewed the Ruby receipts and other documents (1T 78 at 10 to 25 and 1T 79 at 6 to 24), but did not offer those documents, i.e., the Ruby receipts, or the results of his investigation into evidence (1T 82 at 9 to 12).

21. On August 13, 2017, at 4:03 PM, 15 days after he received the computer generated printouts for May and June, 2017, Aponte sent the an email to Scander and Elkin requesting an opportunity to visit the gas station to "see the business and its daily operations," and specifically to see the "**receipts from the Ruby system at the end of the day**" (Da241):

> "Bassem and Brian: At this point, I've had access to only the receipts and invoices from the past. I've tried to physically be there and view the day-to-day operations and Bassem repeatedly told me to hold that off until the end. At this point, we are at the end where I am ready to

> sign a contract and make the purchase. However, I was advised not to leave that until after I make the purchase and I agree. I need to see this business and its daily operations and not only in the past. I don't need – I don't even need to stand there for hours. All I need to see are the receipts from the Ruby system at the end of the day and the amount of diesel sold, which is not on the Ruby system." (1T 91 at 2 to 16) (emphasis supplied).

22. On August 14, 2017, at 3:05 PM, Scander sent an email to Aponte **inviting him to come to the gas station for several days to "witness the printing of the Ruby receipts… to compute the overall gallons sold and the profit for the day."** (Da89).

23. Nothing was said by Aponte in his August 13, 2017 email or by Scander in his August 14, 2017 email about Aponte's review of any information generated by the software. (1T 91 at 2 to 16).

24. On August 14, 2017 at 8:17 PM, Aponte responded to Scander's August 13, 2017 email and agreed that he "would need to see the **printouts** at the end of the day to view what was sold." Aponte then requested "3 nights to look at the receipts and the volume of diesel sold and we'll start the cc payment immediately thereafter." (D89).

25. Scander testified that he provided Aponte with the Ruby receipts for June, July and August, 2017, on or around August 15 or 16, 2017 (2T 179 at 18).

26. The parties met at the gas station over the course of three days (August 17, 18 and 19, 2017), where Aponte conducted his due diligence by reviewing the **actual Ruby receipts** on a day to day basis (2T 7 at 14 to 15).

27. On August 20, 2017, Aponte sent an email to Scander (Da91) thanking him for the opportunity "to see the current sales for the past few days" and stating that he had completed his due diligence and that he **now** knew the "current state" of the business; **that it was selling "84,000 gallons of gas a month"** – (not the 99,461 figure for May, 2017 and/or the 103,110 figure for June, 2017), figures which were generated by the software, which he, Aponte, now referred to as "too far off." (2T 11 at 15 to 21).

28. Aponte's August 20, 2017 email (Da91) began as follows:

> "Thank you for allowing me to see the current sales for the past few days as well as the rest of this year. Having been given that chance I now know its current state which doesn't reflect the 2016 summary at all. The gallons sold each month this year has been steady around 84,000 gallons. Last year it was steady around 100K. That's basically off by 15%. I do understand that no business hits the same number year after year. This is why I wanted to view the information prior to agreeing on a purchase price, but Brian told me that Bassem wanted to agree on a price prior to me viewing any information." (1T 100 at 18 to 25 to 1T 101 at 1 to 6).

29. In the balance of his August 20, 2017 email (Da91), Aponte again sought a fair "reduction" in the purchase price based on its current state of

annual sales of 1,000,000 gallons of gas (which is approximately 84,000 gallons per month):

> "I would like to ignore last years 2016 summary since its too far off. Its profitability is nearing 200K with over 1.2 million gallons sold while at its current states its nearing 100k profit with about 1 million gallons sold. I was pressured into making an agreement on the price without this information, which isn't fair. To my knowledge, at this point, we do not have to change anything on the contract at all but I will ask for a fair reduction in the 40k besides that.
>
> On the day of signing I can bring 15K besides the contract price. We can also start the cc payment ASAP. Please let me know ASAP."

30. When asked at trial whether he had concluded that the gas station was selling 84,000 gallons of gas per month, Aponte stated:

> A. Around, yeah.
> Q. Yeah?
> A. I would say yes." (2T 11 at 23).

31. Aponte's August 20, 2017 (Da91) email specifically rejected "last years 2016 summary," which averaged 100,000 gallons of gas per month (2T 184 at 13 to 18).

32. Aponte's August 20, 2017 email included a revised offer of $205,000, (a 16.8% reduction of his prior offer which was contained in the Letter of Intent), based on his observations at the gas station from August 17, to August 19, 2017, that the business produced 84,000 gallons of gas per month, (not 99,461 gallons per month or 103,110 gallons per month) the

number of gallons contained in the computer generated P&J invoices for May and June, 2017.

33. The parties settled on a final purchase price of $225,000.00. (Da91 and Da96-Da107).

34. On August 25, 2017, five days after his receipt of Aponte's email, Scander sent an email to Aponte's attorney, David Branower, alerting him to the unreliability of the software (which generated the May and June, 2017 P&J invoices), stating that it has "bugs" in it, that the "Software is to be used in an as-is condition," and that "Seller assumes no responsibility for any software bugs contained within." (Da92-Da95) (2T 187 at 5 to 25 & 2T 188 at 1 to 7).

35. The Asset Purchase Agreement, signed by Scander on August 28, 2017, contained an agreed upon purchase price of $225,000 (1T 108 at 10 to 11) which, in part, reflected Scander's accommodation to Aponte's finding **that the gas station was producing 84,000 gallons of gas per month (**Da91).

36. The Asset Purchase Agreement was finalized by the parties on September 15, 2017. (Da96-Da107).

37. Aponte experienced problems with the gas station almost immediately. On September 17, 2017, two days after the closing, Aponte notified Scander that "all four pumps are down" (1T 110 at 4).

38. There was no testimony introduced by either party relating to written or oral communications between them until April 16, 2021, 43 months after the closing on September 15, 2017, when Aponte instituted suit against Scander LLC and Scander, individually, alleging, in part, that Scander "fraudulently induced" him to enter into the Asset Purchase Agreement by providing him with the computer generated invoices for May, 2017 and June, 2017.

39. In his lawsuit Aponte did not claim that Scander manipulated or altered the Ruby receipts, or the delivery slips from the Supplier, P&J Fuel. Nor did Aponte claim the Ruby records, or the original P&J delivery slips were falsified or were in any way inaccurate. Nor did Aponte claim that his post-closing business generated less than 84,000 gallons of gas per month (which was the basis for the gas station's "current state").

40. No testimony was produced at trial by Aponte that either monthly or yearly sales of gas were "down" **at any time** after he purchased the business, from the 84,000 figure (or even the 103,110 gallon figure for June, 2017)

41. Rather, Aponte testified at trial that he **relied** on the invoices for May and June 2017, that were generated by the software in purchasing the business (software that he purchased as is). (1T 88 at 18 to 21)

42. At trial, Aponte produced evidence that the actual P&J invoices for May and June, 2017, which he had obtained from P&J during discovery, showed 3,221 gallons of diesel purchased for May, 2017 and 5,007 gallons of diesel purchased for June, 2017 (Da149-Da234).

43. Aponte did not produce evidence contradicting his testimony that the gas station sold 84,000 gallons of gas for the year 2017.

POINT I

NO REASONABLE JURY COULD HAVE CONCLUDED THAT APONTE RELIED ON THE SOFTWARE GENERATED P&J FUEL INVOICES FOR THE MONTHS OF MAY AND JUNE, 2017 IN TENDERING A REVISED OFFER TO SCANDER, LLC ON AUGUST 20, 2017. (1T 49 at 12 to 1T 59 at 10, 3T 176 at 19 to 3T 192 at 6, 3T 194 at 13 to 3T 199 at 7).

In its charge to the jury, the trial court enumerated five elements of proof (all of which had to be satisfied by clear and convincing evidence) for the jury to enter a verdict based on Defendant's fraudulent misrepresentation or inducement (3T 282 at 18 to 25 and 3T 283 at 3 to 25).

In Point I of its Brief, Appellants, Scander, LLC and Bassem Scander, will address only the fourth prong of Plaintiff's burden of proof - that is, whether the jury could reasonably have concluded from the admissible evidence that Carlos Aponte **"relied" on the May and June, 2017, computer generated P&J invoices,** as the basis for his final offer to purchase the gas station.

Notwithstanding the availability of two irrefutable sources of information that he was instructed to review by the Broker, Aponte testified that he relied **solely** on the **computer generated** P&J Fuel Inc. (hereinafter "P&J") invoices **only** for the months of May and June 2017, (which he, Aponte, had **requested** from Scander), in his decision to purchase the gas

station. The P&J invoices were admitted into evidence as Exhibit P-2 (Da110-Da139) during the trial.

The May, 2017 and June, 2017 P&J Fuel invoices which were generated by the computer, indicated sales of 99,461 total gallons sold for May, 2017 and 103,110 total gallons sold for June, 2017.

Appellants would submit that a careful review of the timeline of events, as well as the emails exchanged between the parties between August 14 and August 20, 2017, (Da86 to Da91), compel the conclusion that Aponte not only did **not** rely on the computer generated May, 2017 and June, 2017, P&J invoices in "entering" into the Asset Purchase Agreement, but described the May and June, 2017, computer-generated figures in his August 20, 2017 email to Scander as "too far off."

The timeline of events which preceded Aponte's **revised** offer to purchase the gas station on August 20, 2017, (down from $245,000 to $205,000), after his on-site examination of the gas station's performance, are uncontested.

On July 1, 2017, Aponte requested the computerized P&J records for May and June, 2017 (2T 160 at 23 to 25 to 2T 161 at 1 to 4). On July 29, 2017, at a meeting with Aponte, Scander provided Aponte with copies of the

software-generated P&J invoices **(even though Aponte had previously been given the original P&J delivery slips)** for May and June, 2017.

The computer generated P&J invoices for May and June, 2017, and the computer generated Spreadsheets for 2016, were entered into evidence by Plaintiff as P-2 (Da110 to Da138).

The **spreadsheets (which were summaries of gasoline sales)** showed an average of 100,000 gallons of monthly gasoline sales for 2016.

The P&J Fuel Inc. software generated invoices for May 2017 showed **99,461** total gallons **purchased** from P&J**,** and for June 2017, 103,110 total gallons **purchased** from P&J.

These numbers, which were contained in the Spreadsheets and the P&J invoices, were virtually **identical**.

To support his claim, Aponte subpoenaed the **diesel** records from P& J Fuel for May and June 2017 (Da147-Da148). These records showed actual diesel sales of 3,221 gallons of gas delivered to the gas station by P&J in May, 2017 and 5,007 gallons of diesel fuel delivered to the gas station in June, 2017, were entered into evidence by Plaintiff (Da149-Da234).

What is dispositive of the falsity of Aponte's claim - that he entered into the Asset Purchase Agreement in reliance upon the May and June, 2017 computerized P&J invoices, are his own words as contained in the emails

exchanged between Aponte and Scander on August 13, August 14, 2017 and August 20, 2017 (Da241, Da89 to Da91).

The first of these emails sent by Aponte to Scander and Elkin at 4:03 PM on August 13, 2017, (Da241) stated:

> "Bassem and Brian: At this point, I've had access to only the receipts and invoices from the past. I've tried to physically be there and view the day-to-day operations and Bassem repeatedly told me to hold that off until the end. At this point, we are at the end where I am ready to sign a contract and make the purchase. However, I was advised not to leave that until after I make the purchase and I agree. I need to see this business and its daily operations and not only in the past. I don't need – I don't even need to stand there for hours. All I need to see are the receipts from the Ruby system at the end of the day and the amount of diesel sold, which is not on the Ruby system." (1T 91 at 2 to 16) (emphasis supplied).

The significance of the August 13, 2017 email is two-fold: First, Aponte's "need" to see the business and its daily operations "in person" and "not only in the past." Second, his "request" to see receipt from the Ruby system at the "end of the day" and the "amount of diesel sold."

The second of these emails sent by Scander to Aponte at 3:05 PM, on August 14, 2017 (Da89) confirmed his invitation to Aponte to visit the gas station "**and witness the printing of the Ruby receipts**." The email stated in pertinent part:

> "My last accommodation I'll make to help resolve this issue is to invite you to come for 2 nights at 11:30 pm to

> see how we close the station at night and verify the numbers at the end of the day to witness the printing of the Ruby receipts and entering the data into the tablet to compute the overall gallons sold and the profit for the day. I have a very busy schedule and cannot afford to spend 7 days with you just looking at the receipts. I already had to cancel a business trip to close this week which probably won't happen because of this issue."

The significance of Scander's August 14, 2017 email is threefold: First, Scander states that "you already have **all** the Ruby receipts which proves the sales as well as my purchase orders." (Da89). Second, not a word was said by Scander (or Aponte) about the **computer generated records**. And third, Scander's direct invitation to Aponte to witness the printing of the **Ruby receipts** for a period of two days (Da89).

On the same day, August 14, 2017, and in response to Scander's invitation, Aponte confirmed that "he already has the Ruby receipts for 2017 up to and including May 2017." These receipts confirm the actual sales of the gas station. He also says that he had the delivery slips for this period which would confirm the purchase orders. (Da89-Da90).

Aponte's August 14, 2017 email also highlights the following:

First, his intention of "viewing the **printouts"** which are extracted directly from the Ruby system at the gas pumps for several days "to see what was sold."

Second, Aponte tells Scander that this is my "first business purchase" so I did not "see this **solution** right away" – that is "seeing the **daily sales in the present."**

Third, and **most** significantly, Aponte asks for **three** nights to look at the receipts **and the volume of diesel sold.**

In his August 14, 2017 email, Aponte addressed the question of how he can be assured of the accuracy of the diesel figures (Da90) when he states:

> "My concerns are really with the diesel since the receipts are solid proof. The volume of diesel was stable. It even sells almost 1000 on Saturday and Sunday consistently despite them being the slow days for the other products. The problem is there's no proof unless I'm physically there checking the numbers every night. This is where the problem came in and Dan advised me (2 weeks ago) not to make the purchase until I see it and I'm comfortable. This is why earlier he asked for those 2 weeks because he knows that I've been waiting for that opportunity. Give me 3 nights to look at the receipts and the volume of diesel sold and we'll start the cc payment immediately thereafter." (emphasis supplied)

Aponte's statement in his August 14, 2017 email that "my concerns are really with the diesel since the **receipts** are solid proof" **demonstrated, without question,** that Aponte had reviewed the May and June, 2017, computerized P&J invoices and found questions relating to their reliability. His statement that "the receipts (referring to the Ruby receipts) are "**solid**

proof" is a recognition of Aponte's intention to examine the Ruby receipts at the gas station in order to get "solid proof."

Aponte's statement that "the problem is there's no proof unless I'm physically there **checking the numbers every night** is also a recognition that **only** a review of the Ruby receipts at the gas station itself can resolve the problem with the diesel records.

On the same day, (August 14, 2017), Scander, responded to Aponte's August 14, 2017 e-mail (Da90) stating "OK great. You can stop **by those 3 nights at 11:30 pm and we can go through the process together,"** referring to a review of the actual Ruby POS receipts for each day.

The **definitive** email in this case, sent by Aponte to Scander **after** his three day on-site review of the Ruby receipts at the gas station on August 20, 2017, (Da91) stated, in pertinent part:

> "Thank you for allowing me to see the current sales for the past few days as well as the rest of this year. Having been given that chance I now know its current state which doesn't reflect the 2016 summary at all. The gallons sold each month this year has been steady around 84,000 gallons. Last year it was steady around 100K. That's basically off by 15%. I do understand that no business hits the same number year after year. This is why I wanted to view the information prior to agreeing on a purchase price, but Brian told me that Bassem wanted to agree on a price prior to me viewing any information.
>
> With that being said the business itself is still profitable and I'm still interested. I would like to ignore last years 2016 summary since its too far off. Its profitability is nearing 200K with over 1.2

> million gallons sold while at its current states its nearing 100k profit with about 1 million gallons sold. I was pressured into making an agreement on the price without this information, which isn't fair. To my knowledge, at this point, we do not have to change anything on the contract at all but I will ask for a fair reduction in the 40k besides that." (emphasis supplied)

Aponte's August 20, 2017 email, viewed in conjunction with his August 14, 2017 email, decisively repudiates his testimony at trial (and the jury's finding) that he, Aponte, **relied exclusively** on the May and June, 2017 P&J computerized invoices, when he entered into the Asset Purchase Agreement.

How does this Court know with certainty that Aponte's appearance at the gas station from August 17 to August 19, 2017, and his review of the actual Ruby receipts formed the basis for his finding that the gas station was "steady" at 84,000 gallons a month and not 103,000 and 99,000 gallons (the May and June, 2017 numbers)? Because Aponte says so in his August 20, 2017 (Da91) email.

> "Having been given that chance, I now know its current state which doesn't reflect the 2016 summary at all. The gallons sold each month this year has been steady around 84,000. Last year it was steady around 100K. That's basically off by 15%." (emphasis supplied).

Aponte's findings (there were no emails or correspondence between Aponte and Scander after August 20, 2017) that the gas station's performance was "steady at 84,000 gallons a month," and that the summaries "were too far

off, resulted in his revised offer to purchase the gas station for $205,000. Aponte's revised offer represented a 16.8% reduction from his prior offer of $245,000 which was contained in the Letter of Intent signed on July 5, 2017. Aponte's revised offer resulted in a written agreement between Plaintiff and Defendant signed by Scander on August 28, 2017 – eight days later.

Aponte's August 20, 2017 email to Scander, viewed in conjunction with his previous emails to Scander on August 13, 2017 and August 14, 2017, and the fact that Scander never provided Aponte **with the July and August P&J computer printouts**, contained six essential points:

First, Aponte's statement that "I **now know** its current state," referring to the current state of the business as of August 20, 2017, demonstrates conclusively that he had conducted his on-site due diligence (Da91).

Second, Aponte's statement that, "the gallons sold each month **this year** had been steady around 84,000 gallons, based on SALES for the **past few days** as well as the rest of the year" (Da91) confirms Plaintiff's **reliance** on a source other than the computer generated printouts and the P&J invoices for May and June, 2017, because both the computer printouts, and the P&J invoices for May and June, 2017, generated monthly sales figures in the 100,000 gallon range.

Third, Plaintiff's statement in his August 20, 2017, email that, "last year it was steady at 100,000 gallons," (Da91) was a **reference to the P&J invoices for May and June, 2017**, or the summaries, or the 2016 Fact Sheet, all of which contained monthly gasoline sales in the 100,000 gallon range.

Fourth, Plaintiff in his August 20, 2017, email makes the clear and definitive statement that he will "ignore" last year's 2016 summary, since it is "too far off". Notably, "last year's 2016 summary" of gallons **sold** (Da91) (as contained in the Fact Sheet) was virtually **identical** to the May and June, 2017 P&J computer printouts which Aponte testified he relied exclusively upon.

Fifth, Aponte's "concerns" about diesel fuel which he had raised in his August 14, 2017 email were resolved, when he says, "I now **know** its current state," and "I would like to ignore last year's summary" (which contained the inflated diesel fuel figures).

Sixth, in the same email, (August 20, 2017) (Da91), Plaintiff revised his previous offer, which had been incorporated into the Letter of Intent dated July 5, 2017, seeking a "fair reduction" of the purchase price of $40,000.

It is true that Aponte testified at trial that during his three day on-site visit to the gas station on August 17 to August 19, 2017, he only reviewed the information from the **computer** (rather than the Ruby receipts). However, Aponte's testimony was contradicted by his August 20, 2017 email which

refers **not** to his review of **invoices** (which he received from P&J Fuel), but to his examination of the daily **receipts** from the Ruby system over a period of three days. Notably, it was **only** the Ruby Point of Sale system which produced receipts of the daily transactions at the gas station, not the computer.

In sum, a review of the emails between Scander and Aponte from August 14 and August 20, 2017, (Da89-Da90) make it abundantly clear that during his appearance at the gas station he reviewed the Ruby Point of Sale **printouts**.

But even if the jury believed Aponte's testimony – that he spent three days at the gas station, looking at the **computer** (rather than the Ruby receipts), it does not alter the simple, irrefutable fact that as a **result** of his investigation, he determined that the **gasoline sales were 84,000 gallons per month**, not the 103,110 generated by the computer for June, 2017, or the 99,460 gallons for May, 2017. And it was that fact – the reduction of over 15,000 gallons of gas sold per month, which resulted in his revised offer of $205,000 – a 16.8% reduction from the amount contained in the Letter of Intent.

In short, Aponte's trial testimony – that he relied on the May and June, 2017 computer generated P&J invoices, in purchasing the gas station cannot be reconciled with his **revised** offer to purchase on August 20, 2017, which, in his words, was based on the "**current** state of the gas station." His testimony does

not, and cannot, change the fact that Aponte in his August 20, 2017 email referred to prior figures as "too far off," (an obvious reference to the May and June, 2017 computerized records).

There was no correspondence or any oral communication between Aponte and Scander between August 20 and September 15, 2017 which **modified** the contents of Aponte's August 20, 2017 email and in particular, his reliance upon the 84,000 gallon figure. A Bill of Sale incorporating the provisions of the Asset Purchase Agreement was executed on September 15, 2017.

Notwithstanding the clear references to Aponte's review of the Ruby records in his August 20, 2017 email, and the Asset Purchase Agreement which was signed by Aponte and Scander eight days later on August 28, 2017 (Da96-Da107), Plaintiff testified at trial that the 84,000 gallon monthly sales figure was extracted from the software. (1T 176 at 23 to 25). Although a blatant falsehood, which was contradicted by the emails exchanged by Scander and Aponte which mentioned the word "Ruby" at least five times and the words software or P&J invoices zero, Aponte's testimony actually confirms his reliance **not** on the May, 2017 and June, 2017 P&J invoices, but on the 84,000 monthly sales figure which he obtained during his on-site investigation.

Indeed in his **own words**, his August 20, 2017 email tells this Court that he **relied** on the sale of 84,000 gallons per month and not the May and June, 2017, P&J invoice numbers of 99,461 gallons or 103,110 gallons, or the number of gallons sold or contained in the 2016 Spreadsheets, which Aponte referred to in Plaintiff's Exhibit P-6 (Da73-Da85).

Aponte did introduce a "Spreadsheet" at trial that Scander had provided to him which represented sales of 371,833 gallons of diesel fuel **for 2016**. Although this figure was on its face, outrageous (by simple mathematics it would indicate that the business was generating over 7 million gallons of gas sold for 2016), for purposes of this Appeal, it is sufficient to note that Aponte himself, in his email dated August 20, 2017, stated that the "software was too far off," basically eliminating the figures from the software as a factor in his offer to purchase the business.

Two final points on "diesel sales:" First, although Plaintiff and Plaintiff's counsel, referred to diesel sales endlessly throughout the trial, Plaintiff's testimony and Plaintiff's counsel's opening and closing statements regarding diesel sales and purchases were, without question, nothing more than an absurd smokescreen designed to conceal the four incontrovertible facts: First, Plaintiff purchase the gas station based on his determination that the gas station produced 84,000 total gallons of gas per month. Second, there was

nothing submitted by Plaintiff, during the entirety of the trial, to **show** that by virtue of Defendant's "misrepresentations," gasoline sales were **one gallon less** than 84,000 after the purchase of the gas station.

Third, as to Aponte's testimony, and his attorney's repeated claims that diesel is not tracked on the Ruby system, this assertion is not only nonsensical (a trip to any gas station will demonstrate that diesel is tracked by the Ruby system) but was directly contradicted by the evidence which they submitted to the Court in Exhibit P-8 (Da142-Da146), submitted by Aponte, clearly includes the Ruby system receipts, which not only list diesel fuel but also highlight it prominently on every receipt. This contradiction between their statement and their own evidence further undermines Aponte's credibility and demonstrates a clear attempt to mislead the jury. The presence of highlighted diesel entries on the receipts reveals that diesel was indeed tracked on the Ruby system, making their claim entirely baseless.

POINT II

TWO IRREFUTABLE SOURCES OF INFORMATION PROVIDED BY APPELLANT TO RESPONDENT DURING THE DUE DILIGENCE PERIOD, WHICH INCLUDED THE RUBY RECEIPTS AND THE ORIGINAL P & J DELIVERY SLIPS, TOGETHER WITH APONTE'S THREE DAY ON-SITE EXAMINATION OF THE GAS STATION'S OPERATION, VIEWED IN CONJUNCTION WITH PLAINTIFF'S SILENCE FOR 44 MONTHS AFTER THE CLOSING DATE, COMPEL THE CONCLUSION THAT PLAINTIFF DID NOT JUSTIFIABLY RELY ON THE MAY AND JUNE, 2017, P&J INVOICES IN HIS DECISION TO PURCHASE THE GAS STATION.
(1T 78 at 20 to 25, 1T 167 at 6 to 9, 2T 253 at 18 to 25, 2T 254 at 1 to 12)

It is elemental that "justifiable reliance" on an allegedly fraudulent misrepresentation is necessary to make out a fraud claim, Walid v. Yolanda for Irene Couture, Inc., 425 N.J. Super. 171 (App. Div. 2012). To demonstrate "justifiable reliance," a plaintiff must allege and prove that he or she relied on a misrepresentation to his or her detriment. Such reliance must be justifiable and reasonable. Thus, where a party has a means to discover the "true nature of the transaction by the exercise of ordinary intelligence and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations." Daly v. Kochanowicz, 67 A.D. 3rd 78, 91 (2d Dept. 2009).

In addition to the email exchanges between Plaintiff and Defendant from August 13 to August 20, 2017, (Da 241, Da89 to Da91)which evidenced Scander's invitation to Aponte to examine the Ruby receipts in real time,

Defendant provided a plethora of additional information to Aponte, throughout the due diligence period, which together with Scander's written warning to Aponte's attorney in his August 25, 2017 email (Da92-Da95), that the software (which included the May and June, 2017 P&J invoices) had "bugs in it," and that he, Aponte, was taking the computer "as is," as well as the broker's **instruction** to Aponte to review the Ruby records and the original P&J delivery slips, compel the conclusion that Plaintiff could not have "justifiably" relied on the May and June, 2017 computer generated P&J printouts as the basis for his decision to purchase the gas station.

On June 10, 2017, at a meeting at the gas station, Elkin, the broker in the transaction, instructed Aponte to review the Ruby records and the original P&J delivery slips. (2T 253 at 18 to 25 to 2T 254 at 1 to 12 and 1T 167 at 6 to 9). On June 10, 2017, the Ruby Point of Sale receipts for the years 2013 to May, 2017, were provided to Aponte. On the same day, June 10, 2017, Defendant provided Plaintiff with the original delivery slips for the years 2013 to 2016 from P&J Fuel.

Appellant would submit that Aponte was obligated to review both of the irrefutable sources of information which, would have identified with exactitude, the total number of gallons purchased and sold in the year 2017.

Although under his control at the time of trial, Aponte chose not to offer the Ruby Point of Sale records, or the original P&J records for 2017 (or for any period during his ownership of the business) into evidence for the period of 2017 to the date he filed the Complaint against Scander on April 26, 2021. The reason was obvious: These records would have been **dispositive** of the number of gallons of gas sold by the gas station both before and after the closing.

Although in his possession, Aponte, also did not introduce the **original** (not the computerized) P&J delivery slips or invoices for 2017 into evidence in order to prove the actual number of gallons of gas purchased by the gas station for 2017. Nor did he introduce the records for the entire period **after the closing**, despite the fact that the production of those documents would have proved conclusively whether the gas station's sales were above or below the figures that Plaintiff claimed he relied upon.

On February 17, 2022, Defendants, submitted its Demand for Production of Documents to Respondents and sought the following:

"1. Copies of Ruby Point of Sale Daily Transaction Receipts for the years 2013 through 2020.

2. Copies of Ruby Point of Sale System "end-of-shift reports" Receipts for the years 2013 through 2020.

3. Copies of Ruby Point of Sale System "end of day reports" Receipts for the years 2013 through 2020.

4. Copies of Sales Summary Reports for 2013 through October, 20165 for United S&G, LLC.

5. All Gasoline delivery slips for the years 2013 through 2020.

8. Gas supplier invoices for the years 2017 through 2020 from Gill Energy and any other gas suppliers utilized under your ownership.

9. Copies of all your house account invoices for the years 2017 through 2020, including a list of active house accounts.

14. Copies of any notes which You took during the due diligence period when You were on the premises regarding the sale of fuel, the flow of traffic or any observations you made during the time you spent on the property. "

Plaintiff failed to produce these records. He claimed that it had destroyed these records (2T 56 at 5 to 11).

On September 25, 2023, Defendant filed a Motion in Limine, (in anticipation of the trial proceeding on October 2, 2023) seeking adverse an inference instruction from the Court at the time of trial based on Plaintiff's destruction of the records.

On August 6, 2024, the Motion was denied by the trial judge (2T at page 281 to 284).

In his testimony Aponte was asked by his attorney "what are the Ruby receipts?" Aponte stated:

> "It's a – it's like a computer system that records everything that's going on at the gas station at the pump itself. So, every

> time you lift the nozzle, it records it. Like, just lifting it, it will record it, so it records all the sales and stuff like that." (1T 78 at 20 to 25)

Defendants would submit that because both the original P&J delivery slips and the Ruby Point of Sale receipts were dispositive of the actual number of gallons sold by the gas station on both a monthly and yearly basis and the fact that such evidence was under the control of the Plaintiff, that a reasonable jury could not have concluded that Plaintiff justifiably relied on the May and June, 2017 P&J computer generated invoices.

In conclusion, (a) the totality of information available to Aponte; (b) the instruction by the broker to review the Ruby records and the P&J original delivery slips, (c) the three day, on-site review of the Ruby records, (d) Aponte's email on August 20, 2017 **rejecting** any reliance on past performance by the gas station, and (e) Scander's email on August 25, 2017 warning Aponte's attorney that the software had "bugs" and could not be relied upon, show conclusively that Aponte did not **justifiably** rely on the May and June, 2017 computerized records.

POINT III

NEITHER APONTE, NOR AN EXPERT RETAINED BY APONTE, PROVIDED ANY PROOF OF A CAUSAL CONNECTION BETWEEN DEFENDANT'S ALLEGED CONDUCT AND ANY ASCERTAINABLE LOSS SUSTAINED BY APONTE OR A LOSS OF THE BENEFIT OF THE BARGAIN DURING THE ENTIRETY OF HIS POST-CLOSING BUSINESS OPERATIONS. (NOT RAISED BELOW)

Under New Jersey law, in order for his loss to be compensable, Aponte was required to prove a "causal nexus" between Scander's conduct and an "ascertainable loss" sustained by the business **after** September 15, 2017, the date of closing. Cox v. Sears, 138 N.J. 2 (1994). An ascertainable loss would include "out of pocket" losses for the difference between the price paid an the actual value of the property acquired, Correa v. Magguire, 196 N.J. Super 273, at 284 (1984).

Our Supreme Court has explained that "economic loss" encompasses actions for the recovery of damages for costs of repair…inadequate value, and consequential loss of profits. Contract principles "more readily respond to claims for economic loss" caused by damage to the product itself, Alloway v General Marine Industries, L.P., 149 N.J. 620, at 627 (1997).

In its decision in Thiedemann v. Mercedes-Benz USA, 183 N.J. 234 (2005), the New Jersey Supreme Court redefined the standard by which courts are to evaluate whether a plaintiff has established the essential element of

"ascertainable loss," to require an "**actual loss**," one that is "quantifiable or measurable" not hypothetical or illusory. Id. at 248.

In addition, the Supreme Court in Thiedemann, rejected the plaintiffs' claim of loss of "benefit-of-the bargain" stating:

> "Plaintiffs needed to produce specific proofs to support or infer a quantifiable loss in respect of their benefit-of-the-bargain claim; subjective assertions without more are insufficient to satisfy the requirement of an ascertainable loss that is expressly necessary for access to the CFA remedies." Id at 252.

The record in this case is barren of **any** evidence, which would sustain a claim of loss whether that loss was measured by a reduction in sales volume, or loss of value sustained by the gas station. Indeed, Aponte's testimony was silent on the issue of **any** reduction in sales after the closing, whether measured by either the May and June, 2017 figures of 99,461 and 103,110 gasoline sales), that he testified he relied upon in purchasing the business, or the 84,000 gallon figure that he referred to in his August 20, 2017 email, when he said that he "now knows the current state of the business."

Specifically, Plaintiff failed to produce **any** of the following documentation to prove a "quantifiable loss," from September 15, 2017, the date of closing, to the end of Plaintiff's operation of the business, almost **four years later.**

A. The Ruby Point of Sale Receipts showing a reduction in the amount of gas sold by individual grades (including regular, diesel, super, and plus) at any time **after** the date of closing on September 15, 2017.

B. The P&J gas supplier delivery slips which would have showed the volume of gas purchased by Aponte from the date of closing on September 15, 2017 to the date Plaintiff ceased operations.

C. Tax returns, which would have shown that the net profit of the business was **lower** after Aponte's purchase than Scander LLC's net profits for the years 2016 and 2017 were not introduced into evidence.

D. Expert testimony to document lost profits after the date of closing or any reduction in gallons sold after the closing.

E. Bank statements showing withdrawals or deposits at any time after the closing.

In fact, there is nothing in the entire record to prove **any** quantifiable **loss** based on a reduction of the number of gallons sold by the business after Plaintiff's purchase on September 15, 2017.

It is, therefore, striking that at the end of the trial, neither the jury, nor the court, knew **anything** about Plaintiff's operation of the business after the date of purchase, because Plaintiff failed to produce an iota of evidence about

any aspect of his post-closing operation of his business, or the cause of his financial problems that led to his departure from the premises in 2022.

Despite the absence of any testimony linking the May, 2017 and June 2017, P&J invoices to any losses sustained by Aponte or to the events which led to his eviction in 2022, Aponte's counsel, in his summation, accused Defendant of handing over a "sinking ship" to Aponte This comment was the subject of Defendants' post-judgment motion to set aside the jury verdict pursuant to N.J. C.P. R. 4:40-2 based on the absence of **any** evidence of loss to support such a statement. Defendant's Motion was rejected by the trial judge who stated, in pertinent part:

> "Mr. Scander wanted out of the business, and the only way out of this sinking ship -- to steal the plaintiff's terms -- was to inflate the numbers and deceive a buyer into buying a gas station that wasn't worth what he was asking for even at the $225,000 number." (5T 84 at 14 to 19)

The trial court's astonishing statement that suggests there **was** proof of a sinking ship, and that the gas station presumably could have been worth less than $225,000 was without any basis in fact. Indeed, there was no testimony on loss sustained by Plaintiff during the entirety of Aponte's business operations. No testimony by an expert on the value of the property at any time during Aponte's business operations was introduced into evidence. No testimony on the value of the property at the time of the closing was

introduced into evidence. And yet the Court provided its own opinion that the property may have been worth less than $225,000.

Plaintiff's counsel's misrepresentation to the jury that the Defendant passed along a "sinking ship" to his client, **without a sliver of proof,** of actual damages sustained by Aponte after he took over the business, could reasonably have contributed to a tainted verdict, because Plaintiff's counsel had the final say during closing arguments.

In the recent Supreme Court case of Robev v . SPARC Group, LLC (A-50-22 087981) decided March 25, 2024), Plaintiffs, a group of shoppers, alleged that under the Consumer Fraud Act (CFA), a retail clothing store advertised clothes as being discounted when, in fact, they were not.

The Robev, Supreme Court reversed the Appellate Court finding that the Plaintiffs' claim failed because they could show neither an **out-of-pocket** loss or that the clothing they received was "worth less than they paid."

> "We do not find either type of ascertainable loss applicable here. Plaintiffs cannot assert a 'quantifiable or measurable' loss because they purchased non-defective, conforming goods with no objective, measurable disparity between the product they reasonably thought they were buying and what they ultimately received. Plaintiffs' CA claim therefore fails." (at 3)

The Supreme Court also noted that the "benefit of the bargain principles allow recovery for the difference between the price paid and the value of the

property had the representation been true," quoting Corea v. Magguire, supra. at 284. Notably, Respondent presented no evidence on damages, and in particular, no evidence of the value of the business if Scander's "representations had been true."

While the scope and extent of the damages need not be proven with absolute certainty, in order to recover compensatory damages, a plaintiff **must** prove that he/she "has suffered some loss or injury and **that he has given the jury some basic information from which to estimate the amount of damages**." Nappe v. Anschlewitz, Barr, Ansell Bonello, 97 N.J. 37, 41 (1984).

In Kozlowski v. Kozlowski, 80 N.J. 378 (1979), a woman sued a male cohabitant, seeking recovery of a share in the assets the defendant had accumulated over the years of their cohabitation, as well as value for services rendered in their relationship and future support . In holding in favor of the plaintiff under a breach of contract theory, the New Jersey Supreme Court held that:

> "While the damages flowing from defendant's breach of contract are not ascertainable with exactitude, such is not a bar to relief. Where a wrong has been committed, and it is certain that damages have resulted, mere uncertainty as to the amount will not preclude recovery – courts will fashion a remedy even though the proof on damages in inexact." At 388 – see also In re Estate of Roccamonte, Sr., 174 N.J. 381 (2002) (emphasis supplied)

To be absolutely clear, other than his claim of inflated sales of diesel in May and June, 2017, the **sole** basis for Plaintiff's demand for a return of the purchase price (which was effectively a demand for a rescission of the contract), was not an economic loss sustained by him, but simply, his attorney's statements that Defendant sold Plaintiff a "sinking ship" and that Aponte just "wanted his money back."

The question in every case is whether the factual findings establish entitlement to relief: EnviroFinance Group, LLC v. Environmental Barrier Co., LLC, 440 N.J. Super. 325, 345 (App. Div. 2015). Or as stated in Romero v. Gold Star Distrib., LLC, 468 N.J. Super. 274, 296 (App. Div. 2012), whether there is "substantial evidence in the record to support the trial court's (or in this case, the jury's) factual findings and legal conclusions." Without question, there was no evidence submitted by Aponte to support any finding of loss, or any finding which justified the return to him of the full amount of the purchase price pursuant to his claim for the "benefit of the bargain."

POINT IV

SCANDER'S EMAIL TO APONTE'S ATTORNEY ON AUGUST 25, 2017 WARNING HIM THAT APONTE COULD NOT RELY ON THE SOFTWARE BECAUSE IT HAD BUGS IN IT, PRECLUDED THE JURY FROM REASONABLY CONCLUDING THAT SCANDER HAD ENGAGED IN INTENTIONAL MISREPRESENTATIONS IN ORDER TO INDUCE APONTE TO RELY ON THE SOFTWARE. (3T 259 AT 16 TO 25)

In its charge to the jury, the trial court stated that in order to establish the tort of fraudulent inducement, a plaintiff must prove a misrepresentation of material fact, knowledge or belief by the defendant of its falsity, **intent that the other party rely on it** and detrimental reliance thereon by the other party. Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (citing Jewish Ctr. of Sussex Cnty. v. Whale, 86 N.J. 619, 625 (1981)).

"Fraud, however, is never presumed, but must be established by clear and convincing evidence." Weil v. Express Container Corp., 360 N.J. Super. 599, 613 (App. Div. 2003). The plaintiff's reliance must also be reasonable. Daibo v. Kirsch, 316 N.J. Super, 580, 588 (App. Div. 1998).

Reliance on a misrepresentation is not considered to be reasonable or justifiable if the recipient "knows that it is false or its falsity is obvious to him." Restatement (second) of Torts §541 (Am. Law Inst., 1977) (hereinafter

Restatement): See also: Walid v. Yolanda for Irene Couture, 425 N.J. Super. 171, 182 (App. Div. 2012).

During the entirety of Appellants' relationship with Respondent, there was not **one** instance of Scander inviting, encouraging or recommending that Aponte review the software in deciding whether to purchase the business. On the contrary, Scander told Aponte that "the software was to be used as is, it has bugs and I'm really using it to track house accounts" (2T 189 at 25).

Indeed, it was, in fact, Aponte who on June 10, 2017, inquired of Scander about the computer. It was also **Aponte,** who on July 1, 2017, after he was provided with the actual P&J delivery slips and the Ruby Receipts, **requested** the May and June, 2017 P&J Fuel **computerized** records. On the other hand, it was Scander, who in his August 14, 2017 email to Aponte who urged Aponte to "witness the printing of the **Ruby Records** during his on-site visit to the gas station."

Finally on August 25, 2017, after Scander and Aponte had agreed on a purchase price, in an email to Aponte's lawyer, (Da92), Scander wrote:

> "Please add the following to Section 3.10:
> Seller agrees to include the proprietary US Gas Accounting Computer Software ("Software") part of the Acquired Assets. Software is to be used in an as-is condition. Seller assumes no responsibility for any software bugs contained within." (emphasis supplied)

This email was the definitive warning by Scander to Aponte that he could not rely on the software – (which would include the software generated May and June, 2017 P&J invoices) due to "bugs" in the system.

Based solely on this warning, and in the absence of any prior affirmative act either suggesting or endorsing the use of the software, how, it may be asked, could the jury have concluded that Scander **intended,** by clear and convincing evidence, to defraud Aponte by providing him with the software. The answer to this question is clear: Aponte relied on sources other than software generated information in deciding to purchase the business.

CONCLUSION

A review of the four emails exchanged between Aponte and Scander from August 13, 2017 to August 20, 2017, are definitive proof that Carlos Aponte's revised offer to purchase the gas station on August 20, 2017, was based on the results of his three day on-site investigation of the gas station's productivity that he conducted between August 17-19, 2017.

His conclusions from that investigation were: (a) that he now "knows" the state of the business; (b) that the gas station was **not** producing 100,000 to 103,000 gallons of gas per month (which were the numbers contained in the May and June, 2017 P&J computerized invoices) – but rather 84,000 gallons of gas per month; (c) that the 2016 Summary, and by implication, the May and June, 2017 numbers which were generated by the software, were too "far off;" and (d) that as a result, the business was producing 15% less profit.

As a result of his investigation, Aponte reduced his offer from $245,000 to $205,000. The final purchase price of $225,000 was incorporated into the Asset Purchase Agreement (Da96-Da107)

Although Aponte testified that he relied on the computer generated P&J invoices for the months of May and June, 2017, as the **sole** basis upon which he purchased the business, (and upon which his claim of fraud was predicated), he failed to provide an iota of proof in the form of texts or emails, **after**

August 20, 2017, or testimony that his final **agreement** with Scander was based on **something other** than his three day on-site review of the gas station's operations between August 17 to August 19, 2017, and his **conclusion** as set forth in his August 20, 2017 email that the gas station produced sales of 84,000 gallons per month, a number which he felt warranted a reduction in the sales price.

At trial, Aponte chose **not** to introduce the Ruby records for 2017, or for any of the four years he was in business into evidence. And why this Court may ask have vital records, in the control of Plaintiff, **not** introduced into evidence. The answer is rather obvious: Because the entirety of Aponte's case was based on the May and June, 2017 P&J computerized invoices, and because he knew that if he did introduce those records into evidence, he was **bound** by the content of those records insofar as any claim for damages was concerned. And so Aponte simply chose to avoid entering those records into evidence.

Aponte also chose not to introduce the **original** P&J delivery slips for the year 2017 at trial, which were provided to him by Scander before he purchased the business, or for that matter, for the four year period after he purchased the business. This Court can reasonably conclude that the production of those records would have been **fatal** to his case, or at a

minimum, would not have justified a claim of a loss of the benefit of the bargain, i.e., the return of the full purchase price.

As to why **Defendants** did not introduce the 2017 Ruby records, Scander did attempt to obtain these records in discovery, but was told by Aponte that they had been destroyed. Defendants' Motion in Limine for an instruction by the Court that the jury should draw an adverse inference from Aponte's destruction of the Ruby the records was denied by the Court for reasons set forth by the Court in its oral decision. (2T 282 at 9 to 25, 2T 283 at 1 to 25 to 2T 284 at 1 to 6).

Without question, Plaintiff had an affirmative obligation, **before** he purchased the business to follow the broker's instruction to review both the Ruby Point of Sale receipts and the P&J delivery slips, which were provided to him by Scander in order to determine, with certainty, both the number of gallons purchased and the number of gallons sold by the business in order to determine the profitability of the business for the year 2017. Instead, Aponte testified that he relied only on the computer generated invoices.

As to the operation of the gas station **after** the sale of the business, Aponte provided no testimony at trial (a) that the **actual** number of gallons of gas purchased or sold per month after the closing was one gallon **less** than the May and June, 2017 figures, or even the 84,000 gallon figure that his three-day

on-site visit to the gas station revealed; or (b) that he suffered any damages after he assumed control of the business, as a result of Defendant's conduct; and (c) if so, the amount of his losses. Likewise, his claim that he was deprived of the benefit of the bargain was devoid of any substance because there was no testimony about Plaintiff's direct "quantifiable and measurable " losses, or any anticipated profits, or the difference between the value of the "product" as represented and the value of the product in its defective condition. Robev v . SPARC Group, LLC (A-50-22 087981) decided March 25, 2024).

Finally, on the issues of intent to defraud and reliance, the Court can reasonably conclude that although unrepresented in the sale of his business, Scander, on August 25, 2017, did provide Aponte's attorney with written notice that the **software** which generated the faulty P&J invoices was defective, stating that the "software had bugs in it" and that Aponte was taking the both software and anything generated by the software "as is."

Finally, the record is barren of any attempt by Aponte to communicate with Scander from the date of closing (September 15, 2017) to the date of the filing of the Third Party Complaint on April 26, 2021.

How then, it may be asked, could a jury have "reasonably concluded" that Scander intended to deceive Aponte and that Aponte reasonably relied on

the software, if (a) in addition to providing him with the authentic Ruby records and the original P&J delivery slips, (b) an invitation to Aponte to **review** the operation of the business from August 17-19, 2017,(c) a reduction in the purchase price after Aponte's visit and (d) that he put Aponte on notice as to the infirmities of the computerized records on August 25, 2017, three days prior to his execution of the Asset Purchase Agreement.

For the foregoing reasons and for the additional reasons as set forth in Points I through IV of Appellants' Brief, it is respectfully requested that the Court enter judgment setting aside the verdict of the jury in favor of Plaintiff-Respondent and enter judgment in favor of Defendants, Scander LLC and Bassem Scander, individually, dismissing Plaintiff's Third-Party Complaint.

Respectfully submitted,

Dated: March 13, 2025

William Goldberg
WILLIAM GOLDBERG, ESQ.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

90 HACKENSACK AVENUE, LLC, Plaintiff, vs. APONTE SERVICE STATION, LLC and CARLOS APONTE, individually, Defendants APONTE SERVICE STATION, LLC, Third-Party Plaintiff-Respondent vs. AERO AMBULANCE, INC., DAVID GATO, individually, SCANDER, LLC, and BASSEM SCANDER, individually. Third-Party Defendants-Appellants	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NUMBER A-000466-24 Civil Action ON APPEAL FROM: FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION; BERGEN COUNTY ENTERED ON September 11, 2024 DOCKET NUMBER: BER-L-7638-20 **Sat Below:** Hon. Nicolas Ostuni, Sr., J.S.C.

BRIEF OF RESPONDENT, APONTE SERVICE STATION, LLC SUBMITTED MAY 14, 2025

KRAMINSKY LAW, LLC.
Attorneys for Third-Party Plaintiff/Respondent
1719 Route 10, Suite 302B
Parsippany, New Jersey 07054
(973) 200-3787 / (973) 200-7672 – Facsimile
Alan@Kraminskylaw.com
Justyna@Kraminskylaw.com

On the Brief:
Alan Kraminsky, Esq.
Bar ID# 158282015
Justyna Eisenbardt, Esq.
Bar ID# 403292022

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[1] For ease of reference, Plaintiff will use the same trial transcript designations as Defendants have used in their Brief.

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PRELIMINARY STATEMENT

This case involved the sale of a gas station by Defendants, Scander, LLC ("Defendant Scander LLC") and Bassem Scander ("Defendant Scander") (collectively "Defendants") to Plaintiff, Aponte Service Station, LLC ("Plaintiff"). Prior to entering into the asset purchase agreement, Plaintiff requested a number of documents from Defendants. In particular, Plaintiff requested copies of the invoices from P&J Fuel, Inc. ("P&J Fuel"), Defendants' fuel supplier. By verifying the quantity of diesel fuel purchased from a third-party's records, Plaintiff would then be able to ascertain the quantity of diesel fuel sold and the profitability of the business. Plaintiff ultimately relied upon the P&J Fuel invoices, as well as summaries from a software application created by Defendant Scander, before entering into an asset purchase agreement for the gas station.

After the consummation of the transaction, Plaintiff commenced operating the gas station. It became abundantly clear that the diesel fuel sales were substantially less than the amounts of diesel fuel purportedly purchased from P&J Fuel. Despite Plaintiff's efforts to operate the business over the course of 41 months, the business ultimately failed and Plaintiff lost his entire investment of $225,000.00. Plaintiff commenced suit against Defendants for breach of contract, breach of the covenant of good faith and fair dealing, and fraudulent misrepresentation.

During the course of discovery, Plaintiff obtained true and accurate copies of

the P&J Fuel invoices in response to a subpoena duces tecum served upon P&J Fuel. The actual invoices confirmed that the diesel fuel purchased by Defendants from the supplier amounted to approximately 30,000 less gallons per month than in the purported invoices provided by Defendants to Plaintiff prior to entering into the asset purchase agreement. At trial, Defendant Scander testified nonsensically as to why he produced fraudulent invoices from P&J Fuel and how the invoices were never meant to be relied upon by Plaintiff. His own witness, Brian Elkin ("Elkin"), refuted his testimony. Clearly, the jury ultimately did not find Defendant Scander credible.

On August 7, 2024, after three (3) days of trial, the jury of six returned a unanimous verdict finding by a preponderance of the evidence that Defendant Scander, LLC: (1) breached the contract for the sale of the gas station and (2) breached the implied Covenants of Good Faith and Fair Dealing. The jury also returned a unanimous verdict finding by **clear and convincing evidence** that (1) Defendant Scander, on behalf of Defendant Scander, LLC, made intentionally incorrect statements or omissions to Plaintiff about the P&J Fuel records prior to entering into the asset purchase agreement; (2) Plaintiff relied upon the incorrect statements or omissions made by Defendant Scander; (3) Plaintiff sustained damages as a result of Defendant Scander's intentional misrepresentation or omission on behalf of Defendant Scander, LLC; (4) Defendant Scander, on behalf of Defendant Scander, LLC made a misrepresentation of a material fact or omission about the P&J

Fuel records prior to entering into the asset purchase agreement; (5) Defendant Scander knew that the P&J Fuel records were false when he presented same to Plaintiff; (6) Defendant Scander intended to induce Plaintiff to rely upon the records prior to entering into the asset purchase agreement; (7) Plaintiff relied upon Defendant Scander's misrepresentation of material fact or omission when entering into the asset purchase agreement; and (9) Plaintiff sustained damages as a result of Defendant Scander's fraudulent inducement.

The jury was asked the question as to what amount of money would fairly and reasonably compensate Plaintiff for damages resulting from Defendants' actions, for which they awarded Plaintiff $225,000.00, representing his lost investment, i.e. the purchase price of the business. There is no question that the jury found clear and convincing evidence of Defendant Scander's wrongful conduct. In fact, the next day, on August 8, 2025, the jury awarded Plaintiff an additional $75,000.00 in punitive damages after finding by clear and convincing evidence that Defendants acted in either malicious or wanton disregard of Plaintiff's rights to negotiate the contract with Defendants with accurate information. As such, the jury reasonably inferred that Defendant lied during his testimony that he warned Plaintiff during an in-person meeting with Elkin, which Elkin denied, that the P&J records were computer generated and should not be relied upon. At the end of the day, this case came down to a credibility determination and the jury verdict should not be disturbed.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

Plaintiff intends to rely on the procedural history set forth in Defendants' Brief submitted March 13, 2025.

COUNTER-STATEMENT OF FACTS

Plaintiff's Testimony

1. Defendants' recitation of the testimony and other evidence presented at trial is incomplete and ignores the fact that Defendant Scander's credibility was a significant issue throughout the trial.

2. Plaintiff was seeking to purchase a business operating a gas station and contacted Elkin, a broker in the industry. 1T at 76:4-8.

3. Elkin provided Plaintiff information regarding Defendants' business, which operated a gas station in Hackensack, New Jersey. 1T at 76:6-8; Da96-Da107.

4. Plaintiff was interested in purchasing Defendants' business and presented an offer subject to his due diligence. 1T at 76:21-24; 77:25-78:9; Da86-Da88.

5. Negotiations, as well as due diligence, continued over approximately three months. 1T at 79:24-80:12.

6. As part of due diligence, Plaintiff requested that Defendants provide invoices from Defendants' fuel suppliers. 1T at 83:25-84:24; Da110-Da139.

7. At this time, Plaintiff still had not made a decision to purchase the business as he was still waiting for additional information he requested from Defendants. 1T at 86:8-87:9.

8. In particular, he was waiting for Defendants to produce the invoices from the fuel supplier to confirm the current year's sales, i.e. 2017. 1T at 87:3-9.

9. By email dated July 29, 2017, Defendant Scander sent Plaintiff purporting to be invoices from his fuel supplier, P&J Fuel, and stated, "[p]lease see attached for gas invoices for May-June 2017." 1T at 85:16-23; Da110.

10. Upon receipt and review of said email and the attached invoices purportedly from P&J Fuel, Plaintiff became excited about purchasing a successful business. 1T at 87:10-88:6.

11. Prior to receipt of the email and invoices, Plaintiff was apprehensive of proceeding with the transaction. One of Plaintiff's concerns was that the total daily diesel sales were not reflected in the Ruby System, which tracks the total sales of other fuels. 1T at 90:18-92:5; Da241.

12. However, the P&J Fuel invoices provided by Defendants set forth the purported amount of diesel fuel purchased from the supplier. Hence the amount of diesel fuel sales by Defendants during those months. 1T at 92:6-10.

13. Plaintiff relied upon and was induced to purchase the business based on these purported invoices from the fuel supplier provided by Defendants. 1T at 88:3-21; 92:6-10.

14. Subsequent to the receipt of the aforementioned email and invoices, Plaintiff sought to perform in-store due diligence to see the flow of traffic at the gas station. Defendants responded that in-store due diligence is pointless given that the Ruby receipts and **purchase orders from P&J Fuel** have already been supplied. 1T at 93:18-96:17.

15. Based upon the representations of Defendants, Plaintiff believed at that time that the P&J Fuel diesel fuel invoices produced by Defendants were accurate copies of the actual invoices. 1T at 96:18-23.

16. Defendant Scander is a computer engineer and created a software program application that tracked fuel sales for the business. 1T at 102:11-103:10; 2T at 118:5-16.

17. Defendant Scander acknowledged that it was too burdensome to go through the hundreds or thousands of Ruby system receipts to track sales and that is why he created the application. 2T at 122:5-20.

18. As such, Plaintiff relied upon summaries from Defendant Scander's software application to track the diesel fuel sales, along with the P&J Fuel invoices. 1T at 98:9-11; Da89-Da90.

19. Based on Defendant Scander's software system, Plaintiff was expecting to sell 1,000 gallons of diesel fuel per day. Plaintiff made Defendant aware of his expectations by way of email stating, "it even sells almost 1,000 on Saturday and Sunday consistently, despite them being the slow days for the other products." Most notably, Defendant Scander did not correct or advise Plaintiff that this was an inaccurate figure. 1T at 98:12-19; Da89-Da90.

20. Based upon the information provided by Defendants from their software application, the total fuel sales in 2017 were approximately 84,000 gallons per month rather than the 100,000 gallons per month in 2016. 1T at 100:18-101:6; 157:18-24; 2T:15:11-21.

21. The total monthly fuel sales of 84,000 gallons included the monthly diesel fuel sales of approximately 30,000 gallons based on the P&J Fuel invoices produced by Defendants. Da239.

22. As such, Plaintiff reduced the offer price to purchase the business. 1T at 56:1-57:23

23. The parties ultimately entered into an asset purchase agreement. 1T at 104:23-105:4; Da94-Da107.

24. Notably, the asset purchase agreement stated, in pertinent part that, "[a]ll representations and warranties made by seller shall be accurate in all material respects." 1T at 106:3-6.

25. Plaintiff understood the above to mean that all the information that Defendants provided, was accurate and truthful. Plaintiff executed the asset purchase agreement pursuant to that understanding. 1T at 107:19-22.

26. Ultimately, Plaintiff purchased the business from Defendants for $225,000.00. 1T at 108:2-18.

27. After taking over the operation of the business, Plaintiff quickly found that diesel sales were substantially less than expected based upon the P&J Fuel invoices previously provided by Defendants. 1T at 112:16-114:23; Da141.

28. Plaintiff also noticed that once the Ruby receipt printouts from the gas pumps were logged into the application created by Defendant Scander, the application provided an inflated figure for the diesel fuel sales. 1T at 114:16-116:16; Da141.

29. In fact, on a single day the diesel sales were inflated by 300 gallons. 1T at 114:16-116:16; Da141.

30. In addition to relying upon the P&J Fuel invoices before entering into the asset purchase agreement, Plaintiff also relied upon the inflated diesel sales summaries given to him by Defendant Scander, which were produced by Defendant Scander's software application. 1T at 100:18-102:1.

31. During the course of discovery in this litigation, Plaintiff obtained copies of the true and accurate P&J Fuel invoices for the same time periods for which Defendant Scander provided purported P&J Fuel invoices. Da147-Da148.

32. Upon receipt of same, it became immediately apparent that Defendant Scander manipulated and provided fraudulent P&J Fuel invoices. Da110-Da139; Da147-Da148.

33. Sandeep Chandi, Esq., counsel for P&J Fuel, confirmed that the P&J Fuel invoices produced by Defendant Scander were not authentic. Da235-Da238.

34. At trial the president of P&J Fuel, Jasbir S. Chandi, testified that the records given to Plaintiff by Defendant Scander were not true and accurate copies of records produced by P&J Fuel and provided several examples of the alterations. 2T at 71:14-73:14.

35. Most importantly, the invoices produced by Defendant Scander grossly inflated the diesel fuel purchases for the months of May and June 2017. Da239-Da240.

36. For the months of May and June 2017 alone, Defendant Scander's invoices inflated diesel fuel sales by over 60,000 gallons. Da239-Da240.

37. Given the substantially lower diesel fuel sales than what was represented by Defendant Scander, the business struggled from the start and ultimately failed. 1T at 129:21-130:6.

38. Plaintiff stopped paying rent and the landlord instituted eviction proceedings, which ultimately led to the cessation of business operations.

39. Plaintiff would not have purchased the business if he knew the invoices produced by Defendant Scander were fraudulent. 1T at 128:16-22; 132:3-7.

Defendant Scander's Testimony.

40. Defendant Scandar admitted that some of the numbers that were coming out of his software application did not make sense. 2T at 120:1-9. In fact, Defendant Scandar testified he was aware of the inaccuracies that inflated sales. 2T at 131:8-9; 133:14-19.

41. At trial, acknowledging that the P&J Fuel invoices that he sent to Plaintiff were not authentic, Defendant Scandar attempted to justify same by testifying that the purported invoices were computer-generated in his application and he never represented to Plaintiff that the invoices were from P&J Fuel. 2T at 168:2-13.

42. Notably, when true and accurate copies of the P&J Fuel invoices were requested from Defendants either during due diligence or during discovery, none were produced. 2T:18-22.

43. Defendant Scander also acknowledged that the amount of diesel fuel sales were grossly inflated in the computer-generated P&J Fuel invoices that Defendant Scander produced to Plaintiff. 2T at 219:8-19; 226:9-18.

44. By email dated August 25, 2017 to Plaintiff's counsel, Defendant Scander requested a provision be added to the asset purchase agreement that "[s]oftware is to be used in an as-is condition. Seller assumes no responsibility for any software bugs contained within." Da92.

45. Other than the email above, there is no writing or document advising of bugs in the software application and certainly no writing or document advising Plaintiff that the software and the P&J Fuel invoices produced by Defendant Scander should not be relied upon. 2T at 234:9-235:11.

46. Defendant Scander testified that Elkin was present at a meeting where Defendant Scander warned Plaintiff that the numbers on spreadsheet provided to Plaintiff and the software program were unreliable. 2T at 241:11-19.

47. Defendants later called Elkin who testified there was no discussion about bugs or issues with the software. 2T at 255:25-256:3; 259:1-6.

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

"A jury verdict is entitled to considerable deference and 'should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination, after canvassing the record and weighing the evidence, that the continued viability of the judgment would constitute a manifest denial of justice.'" Hayes v. Delamotte, 231 N.J. 373, 385-86 (2018).

A jury's finding is entitled to "very considerable respect." Baxter v. Fairmont Food Co., 74 N.J. 588, 597 (1977). "The Court may not set aside a verdict merely because in its opinion, the jury upon the evidence might well have found otherwise. This conception of the weight of the evidence governs the trial court as well as the appellate court; and it applies to civil and criminal cases." Hager v. Weber, 7 N.J. 201, 210 (1951) (citations omitted).

The Court in Baxter discussed the degree of deference to the jury:

> The presumption of correctness of a verdict by a jury has behind it the wisdom of centuries of common law merged into our constitutional framework. Of course such verdict is not sacrosanct and can never survive if it amounts, manifestly, to a miscarriage of justice. The resolution of this latter question is reposed in the courts. Respect for our constitutional system requires that this obligation be approached, in all contingencies, with utmost circumspection, lest the courts intrude upon responsibilities which have traditionally, intentionally and constitutionally been vested in a jury of citizens.

Baxter v. Fairmont Food Co., 74 N.J. 588, 598 (1977). If reasonable minds could differ the verdict must stand. Doe v. Arts, 360 N.J. Super 492, 503 (App. Div. 2003).

II. THE JURY UNANIMOUSLY FOUND THAT PLAINTIFF RELIED UPON THE P&J FUEL RECORDS PROVIDED BY DEFENDANT SCANDER. (3T 322:12-20).

Plaintiff introduced an overwhelming amount of evidence that led the jury to conclude that Plaintiff relied on the software generated P&J Fuel invoices[2]. The jury heard testimony from Plaintiff, Jasbir Chandi of P&J Fuel, Defendant Scander, as well as Elkin. The testimony of Plaintiff was supported by all twelve or so exhibits entered into evidence.

Defendants rely heavily on the Ruby system in their argument. DB 20. However, based on Defendant Scander's representations, the total diesel fuel sold in a day was not tracked by the Ruby system. 1T at 98:7-25; Da89-Da90. Plaintiff credibly testified that on July 29, 2017, Defendant Scander provided him with records purporting to be diesel fuel purchase receipts received by Defendants from P&J Fuel from May and June 2017. 1T at 84:22-25; 85:21-23; Da110-Da139. Prior to that, on June 27, 2017, Plaintiff emailed Defendant Scander and advised "I'm

[2] There was also evidence that Defendants made other misrepresentations to Plaintiff during the due diligence period that Plaintiff relied upon. For instance, discussions of diesel fuel sales of 1,000 gallons/day and the fraudulent summaries from the software application.

ready to make the purchase as soon as I can match the receipts with the supposed revenues." 1T at 77:1-19; Da87-88.

On July 29, 2017, Defendant Scander emailed Plaintiff the fraudulent P&J Fuel records. 1T at 84:22-25; 85:21-23; Da110-Da139. Never once in that email does Defendant Scander warn Plaintiff that these were "computer generated" invoices and were wrong or unreliable. Da110-Da139. Defendant Scander unequivocally testified that although he did not warn Plaintiff in the email that the invoices were inaccurate and not to be relied upon, he alleges to have warned Plaintiff during an in-person meeting with Plaintiff and Elkin at the gas station in May 2017. 2T at 215:14-25; 216:1-25; 217:1-10. In an effort to corroborate his position, Defendant Scander called Elkin to testify. 2T at 250. However, although Elkin remembered having a meeting that may have taken place in the winter, he was never present for a conversation where Defendant Scander purportedly warned Plaintiff about bugs or issues with the software application. 2T at 255:5-7. Clearly, calling a witness that failed to corroborate, and if fact refuted, Defendant Scander's nonsensical story was a major mishap for Defendants before the jury. It is also of critical importance to note that in each of Plaintiff's emails, he demonstrated concern over being given all of the information he needed prior to making the purchase. Da87-91; Da241. Defendant Scander testified that Plaintiff was told that the information was wrong

and unreliable, yet that somehow it motivated Plaintiff to make an offer to purchase. 2T at 167:5-168:18. The jury clearly did not accept such a preposterous story.

In fact, to date, nobody, including Defendants, have offered any intelligent explanation as to why P&J Fuel records were put through his software application to begin with. 2T at 230:12-22. On one hand, Defendant testified he did it for convenience even though he knew the system had bugs. 2T at 117:7-118:16. Clearly, convenience was not a believable defense. It makes absolutely no sense why someone would have software that they rely upon for convenience that produces inaccurate information. Defendant Scander would have been forced to order substantial amounts of diesel fuel for the gas station if he in fact relied upon those fraudulent invoices and misinformation in the system, which he clearly did not. Once again, this is not credible.

Moreover, based upon the information and documentation provided by Defendants the total amount of fuel sales in 2016 was in excess of 100,000 gallons per month. 1T at 140:18-141:14. Based upon the information and documents provided by Defendants, it was concluded that the total fuel sales were 84,000 gallons per month in 2017, inclusive of the approximate 32,000 gallons per month of diesel fuel sales. 1T at 155:22-158:1; Da91. Given this reduction in total fuel sales from 2016 to 2017, Plaintiff reduced the amount of his offer to purchase the business. 1T at 155:22-156:10; Da91. However, the 84,000 gallons of fuel sales per month

was later revealed to be grossly inflated. 1T at 158:2-159:3; Da240. The actual diesel fuel sales for May and June were slightly over 4,000 gallons per month. 1T at 113:7-19; Da91; Da141. Defendants inflated the monthly diesel fuel sales by 28,000 gallons, thereby inflating the total fuel sales by 28,000 gallons as well. Accordingly, the total fuel sales were actually 56,000 gallons, not 84,000 gallons.

Further, Defendants argue that the Fact Sheet provided to Plaintiff was reliable, and that the Spreadsheet provided to Plaintiff was not. DB at 5-8; Da70; Da73-Da85. The jury was able to see that the 1.2 million gallon number harped on by Defendants was listed both in the Fact Sheet and in the software generated spreadsheet. Da70; Da73-Da85. As such, it was impossible for a reasonable jury to even follow Defendants' story because their own evidence conflicted with their testimony and arguments. To date, both exhibits still conflict and no logical explanation was given by Defendants to clarify same. Da70; Da73-Da85. Further, Defendants offered absolutely no testimony or backup evidence to support their claim that the information on the Fact Sheet was even accurate. Da70. At trial during cross-examination, Defendant Scander offered no explanation as to why in four (4) years of litigation, he never once took it upon himself to ask his four (4) fuel suppliers for invoices and information that would have supported his defenses in this case. The obvious answer is that they were not requested because they would not further the lies set forth by Defendants. Defendants continue to insist the Court just

believe them and ignore Plaintiff. The jurors would have had to make an extraordinary leap without the benefit of actual written proof to support Defendants' defenses. Clearly, the jurors could have reasonably inferred that the information provided by Defendants to Plaintiff was not reliable at any point. In fact, Plaintiff first heard at trial that there were purportedly two other fuel suppliers. 2T at 201:12-18; 208:6-9. This information, if true, was withheld from Plaintiff both during negotiations and during the litigation.

Last, Defendants again misinterpret Plaintiff's statement in the August 20, 2017 email, an email which Defendants blew up and used as demonstrative evidence before the jury. Da91. The August 14 and August 20 emails were weeks after Defendant Scander already gave Plaintiff the fraudulent 2017 P&J Fuel records. In addition, Defendant Scander, both at trial and now, continues to claim that he warned Plaintiff that the records from P&J Fuel were not real and that Plaintiff was fine proceeding with the transaction knowing that. 2T at 167:20-25; 168:1-18. That is not consistent with Plaintiff's position in the 2017 emails where he was clearly doing everything he could to ascertain accurate information, i.e. "if I remember correctly I only have the receipts for this year up to May. Can you bring the rest of them for June, July, and August"; "[m]y concerns are really with the diesel"; "[g]ive me 3 nights to look at the receipts and the volume of diesel sold"; "I need to see this business in its daily operations and not only in the past". Da87-91; Da241. Moreover,

it would defy logic why anyone would want to move forward with a deal when they are provided critical information, i.e. the amount of diesel being purchased for sale, while being told that information is unreliable.

Accordingly, the jurors clearly found that Plaintiff relied upon the altered P&J Fuel invoices; that Defendants knew they were fake; that Defendant Scander never told Plaintiff they were fake; and that same induced Plaintiff to purchase the business. To say otherwise is to quite literally ignore the testimony and evidence at trial. The jury simply did not find Defendant Scander, his story or explanations, credible. Indeed, they found Defendant Scander to be intentionally deceptive. 3T at 319:23-25; 320:1-24.

III. DEFENDANTS' SOURCES OF INFORMATION DID NOT COMPEL THE CONCLUSION THAT PLAINTIFF DID NOT JUSTIFIABLY RELY ON THE P&J FUEL INVOICES. (3T 322:12-20).

Defendants' argument on this score is simply another version of the same argument above. The evidence in support of Defendants' argument was hotly contested at trial, as was Defendant Scander's credibility. For instance, Defendants claim that Plaintiff was silent as to the within issues for 44 months, yet Defendant Scander testified that it was actually 11 months between the closing and when he first heard from Plaintiff regarding the within issues. DB at 31; 2T at 194:8-12. In addition to the above, this is just another example of Defendants' deceptions. The evidence in support of the jury's verdict was

clearly sufficient and compelled the jury to find that Plaintiff justifiably relied upon the altered and fraudulent P&J Fuel invoices, as well as produced by Defendant Scander. 3T at 319-323.

IV. THERE WAS SUFFICIENT EVIDENCE OF A CAUSAL CONNECTION BETWEEN DEFENDANT SCANDER'S FRAUDULENT CONDUCT AND PLAINTIFF'S ASCERTAINABLE LOSS. (1T at 132:3-7).

A. Standard of Review.

The Court frequently declines to consider issues that were not raised below or not properly presented on appeal when the opportunity for presentation was available, unless the allegations of errors or omissions meet the plain error standard. State v. Robinson, 200 N.J. 1, 20 (2009). Relief under the plain error rule is discretionary and should be sparingly employed." R. 2:10-2; Baker v. Nat'l State Bank, 161 N.J. 220, 226 (1999) (internal citations omitted). The plain error standard requires a determination of: "(1) whether there was error; and (2) whether that error was clearly capable of producing an unjust result, R. 2:10-2; that is, whether there is a reasonable doubt . . . as to whether the error led the jury to a result it otherwise might not have reached." State v. Dunbrack, 245 N.J. 531, 544 (2021) (internal citations omitted). "The high standard used in plain error analysis provides a strong incentive for counsel to interpose a timely objection, enabling the trial court to forestall or correct a potential error." State v. Santamaria, 236 N.J. 390, 404 (2019) (internal citations omitted). "A

defendant who does not raise an issue before a trial court bears the burden of establishing that the trial court's actions constituted plain error because to rerun a trial when the error could easily have been cured on request would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal." State v. Santamaria, 236 N.J. 390, 404-05 (2019) (internal citations omitted).

Here, Defendants claim that there was no evidence submitted by Plaintiff to support any finding of loss, or any finding which justified the return of the full amount of the purchase price pursuant to his claim for the "benefit of the bargain." Db42. This issue was not raised below, as such the plain error standard applies. Defendants, however, failed to meet the standard. Defendants failed to establish that the trial court's actions constituted plain error and whether the pain error was clearly capable of producing an unjust result. Notably, Defendants do not even claim there was a plain error at all. The first time Defendants raised the issue of damages was during their Motion for Judgment Notwithstanding the Verdict. 5T. Now Defendants are attempting to appeal an issue that was never even litigated and at no fault but Defendants' own. As such, no pain error exists and this Court should not consider this argument.

B. There Was Sufficient Evidence of Plaintiff's Damages. (1T at 132:3-7).

Notwithstanding the above, despite Defendants' claims, there was sufficient evidence to prove Plaintiff's damages, which was the amount of the purchase price, i.e. $225,000.00. That is the quantifiable loss. Our Supreme Court has addressed damages in the context of fraud cases and explained, "[t]he rule governing the measurement of damages in fraud actions should be flexible, and the principles applied in a flexible manner." Zeliff v. Sabatino, 15 N.J. 70, 75 (1954) (internal citations omitted). "If the defrauded party is content with the recovery of only the amount that he actually lost, his damages will be measured under that rule." McConkey v. AON Corp., 354 N.J.Super. 25, 52 (2002). Plaintiff could have sought additional damages by way of lost profits, but was content of recovery his investment that he lost.

The trial court gave the jury specific instructions, which all counsel agreed to prior to the jury charges being read to the jury, with respect to damages. 3T at 92:18-25; 93:1. The jury was never instructed to consider only having to award Plaintiff the entirety of the purchase price of the business. 3T at 22:7-11. The jury was asked what amount of damages they felt would fairly and reasonably compensate Plaintiff as a result of Defendants' actions or inactions. 3T at 286:5-25; 287:1-23; 323:7-11. That open-ended question resulted in the jury awarding Plaintiff the return of the entirety of his purchase price. 3T at 323:7-11. The jury was told that Plaintiff

operated the business for forty-four months prior ceasing operations after eviction proceedings. 2T at 38:13-39:9; 3T at 287:1-23. Plaintiff never made a claim for lost profits or damages resulting from Defendants' fraud, other than the fair and reasonable amount of the purchase price he paid to Defendants. The jury was free to infer from the testimony and evidence that Defendant Scander was selling the business after two years because it was not profitable and that he provided false information to Plaintiff to paint a different picture. As such, when the business was not profitable and Plaintiff lost his entire investment based upon Defendant Scander's fraud, the purchase price of the business was an appropriate award of damages.

During trial, Plaintiff offered into evidence two charts, which showed the discrepancy between the fraudulent P&J Fuel records and the actual P&J Fuel records. Da239; Da240; Da141. Based on the discrepancy alone, the real P&J Fuel records showed that diesel fuel sales for the two subject months was almost $700,000.00 less than represented by the fraudulent invoices. Da239; Da240; Da141. However, Plaintiff did not provide the testimony of an expert regarding same, as Plaintiff did not make a claim for same. Accordingly, there was sufficient evidence to prove Plaintiff's damages.

V. THE AUGUST 25, 2017 EMAIL FROM APPELLANT TO RESPONDENT DID NOT PRECLUDE THE JURY FROM REASONABLY CONCLUDING THAT APPELLANT ENGAGED IN INTENTIONAL MISREPRESENTATIONS. (3T at 320:7-15).

Defendants claim to have warned Plaintiff that the software system had bugs in it and therefore, Plaintiff could not have reasonably relied on Defendants' misrepresentations. Db43-44. Again, Defendants' argument on this is simply another version of the same arguments above. The evidence in support of Defendants' argument was contested at trial, as was Defendant Scander's credibility. Defendants offered the August 25, 2025 email as evidence, which in pertinent part states, "[s]oftware is to be used in an as-is condition. Seller assumes no responsibility for any software bugs contained within." Da94. Notably, Defendants and Plaintiff came to an agreement on August 20, 2017, five days **before** Defendant Scander attempted to "warn" Plaintiff that the system Plaintiff relied on to agree to a purchase price had bugs in it. 1T at 180:4-25; 181:1-10. At trial, Plaintiff testified that he interpreted "bugs" to mean the system would crash every now and then and not that the system inflates the numbers of diesel gallons sold. 1T at 179:7-20. Defendants did not warn Plaintiff about the inflated numbers in the system, he did not specifically advise Plaintiff not to rely on the system, or explain to Plaintiff what was meant by the term "bugs." Defendant Scander strategically, at the last minute, after the parties agreed to a purchase price, threw in a vague clause about the system having bugs and a standard as-is provision. Da94. Defendant Scander had multiple

occasions to advise Plaintiff not to rely on the numbers generated by the system as the system inflates the numbers of diesel gallons sold. Although Defendant Scander testified that he warned Plaintiff during an in person meeting with Plaintiff and Elkin, Elkin denied that such a conversation occurred. 2T at 147:14-149:24; 2T at 255:5-24. Not only did Defendant Scander not warn Plaintiff, but Defendant Scander went as far as providing Plaintiff with fraudulent P&J Fuel records generated by the system. 1T at 84:22-25; 85:21-23; Da110-Da139. As such, the jury accurately concluded that Defendant Scander engaged in intentional misrepresentations in order to induce Plaintiff to rely on the software and there was sufficient evidence to support this determination.

Moreover, in addition to the testimony and documentation produced, the jury had the opportunity to assess the behavior and demeanor of Defendant Scander and his wife at the time of trial. During Plaintiff's cross examination, Defendant Scander, on multiple occasions, would improperly interrupt Plaintiff's testimony by making unnecessary comments or stating that Plaintiff was lying. 1T at 162:2-164:19. Additionally, Defendant Scander's wife, who was present in the court room during Plaintiff's testimony, would shake her head and make facial expressions in obvious disagreement with the testimony. 2T at 125:2-126:6. Conversely, Defendant Scander's wife would smile and nod in agreement throughout Defendant Scander's testimony. 2T at 107:10-109:4. Defendant Scander and his wife were cautioned by

the Court on multiple occasions. 1T at 162:2-164:19; 2T at 107:10-109:4; 2T at 125:2-126:6. Defendants behavior and demeanor throughout trial played a crucial role in Defendants' credibility. As such, the jury verdict should not be disturbed.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court affirm the Trial Court's ruling and dismiss Defendants' appeal.

KRAMINSKY LAW, LLC

By: */s/ Alan Kraminsky, Esq.*
ALAN KRAMINSKY, ESQ.

DATED: May 14, 2025

WILLIAM GOLDBERG

Counsellor at Law

Attorney Bar ID: 242481967

45 ESSEX STREET
Third Floor
Hackensack, NJ 07601

Telephone
(201) 342-4250

Facsimile
(201) 342-3961

May 28, 2025

Superior Court, Appellate Division
Att: Patricia A. Shaw – Team 4
Richard J. Hughes Justice Complex
25 Market Street - P.O. Box 006
Trenton, NJ 08625

Re: 90 Hackensack Avenue, LLC, Plaintiff
vs. Aponte Service Station, LLC and
Carlos Aponte, individually, Defendant -
Aponte Service Station, LLC, Third-Party Plaintiff
vs. Aero Ambulance, Inc., David Gato, individually,
Scander, LLC and Bassem Scander, individually,
Third-Party Defendants
Trial Court Docket No. L-7638-20 –
Superior Court, Bergen County – Law Disision
Sat Below: Hon. Nicholas Ostuni, Sr.
Docket No. A000466-24T4

Dear Judges:

Pursuant to R. 2:6-2(b), please consider this Letter Brief as Defendant's Reply to Plaintiff's Brief submitted to this Court on May 14, 2025.

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Argument

The New Jersey Supreme Court in Hager v. Weber, 7. N.J. 201, 209 (N.J. 1951) underwent an exhaustive review of case law on the issue of the importance of upholding a jury's finding of fact. The Court found that the "appellate tribunal cannot invade the constitutional office of the jury, it may not merely weigh the evidence where it is **fairly** susceptible of divergent inferences and substitute its own judgment for that of the jury." Hager v. Weber, supra, at 210.

In Kassick v. Milwaukee Elec. Tool Corp., 120 N.J. 130, 134 (N.J. 1990) the Supreme Court made clear the importance of the role of the jury as fact finder:

> "On this appeal, we are bound by the deference to be accorded to jury verdicts. An appellate court may overturn a jury verdict 'only if [that] verdict is so far contrary to the weight of the evidence as to give rise to the inescapable conclusion of mistake, passion, prejudice, or partiality.' Wytupeck v. City of Camden, 25 N.J. 450, 466, 136 A.2d 887 (1957); Hager v. Weber, 7 N.J. 201, 210, 81 A.2d 155 (1951); see also Baxter v. Fairmont Food Co., 74 N.J. 588, 597-98, 379 A.2d 225 (1977) (concluding a jury verdict should not be set aside unless 'the continued viability of the judgment would constitute a manifest denial of justice'); Kulbacki v. Sobchinsky, 38 N.J. 435, 445-45, 185 A.2d 835 (1962) (trial court cannot displace jury verdict merely because in its view outcome should have been different.)" at 134 (emphasis supplied).

In considering whether to reverse the trial court's denial of defendant's motion for judgment notwithstanding the verdict, the Appellate Division shall apply the proper standard:

> "A motion for involuntary dismissal shall be 'denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor.' R. 4:37-2. The oft-cited test set forth by the Supreme Court in Dolson v. Anastasia, 55 N.J. 2, 5-6, 258 A.2d 706 (1969)."

Appellant, while recognizing the standards of review as cited above, would submit that in this **particular** case, the facts which compel a reversal of the jury verdict are incontrovertible.

Throughout its response to Appellant's Brief, Respondent repeats the contention that Appellant is a "liar" and the jury verdict, which included punitive damages was an expression of the jury's outrage. The "lie" Plaintiff refers to was Scander's delivery of computerized P & J Fuel invoices which Aponte had **requested** on July 29, 2017 – several months after Scander made available to Aponte the **original** P&J delivery slips and the original Ruby Point of Sale receipts whose authenticity and accuracy has never been in question and which contained the same information.

Plaintiff then states that "**he relied on the P&J Fuel invoices**" (meaning the computerized P&J Fuel invoices), as well as **Summaries** from the software before entering into an Asset Purchase Agreement." These invoices showed

99,461 total gallons of gas sold for May, 2017 and 103,110 total gallons sold for June, 2017.

This is essentially the case that Plaintiff presented to the jury: that the records which he obtained from P&J Fuel Inc. during discovery on July 29, 2017, showed that the diesel fuel purchased from P&J Fuel was 30,000 gallons less per month than the invoices provided by Defendants to Plaintiff "prior to entering into the Asset Purchase Agreement."

Respondent, however, in its Brief consistently **fails** to mention the incontrovertible **facts** in this case, which demonstrate conclusively that the computerized records which were provided to Plaintiff on July 29, 2017, (and whose "reliance upon" Respondent says formed the basis of his offer), had **nothing** to do with Plaintiff's final offer of $205,000 to purchase the business which Plaintiff made to Defendant on August 20, 2017, which, after negotiations, resulted in the Agreement to purchase Scander's business on September 15, 2017 for $225,000.

Beginning in mid-August, 2017, several weeks **after** Plaintiff received the computerized records on July 29, 2017, the parties engaged in correspondence over the course of several days (August 14-17, 2017). A review of the correspondence which is set forth at length in Appellant's Brief, makes it crystal clear that (a) Plaintiff was dissatisfied with the information

previously provided to him; and that (b) he wanted an opportunity to review the actual Ruby Point of Sale receipts at the gas station's pumps, before entering into a final Agreement.

This correspondence (between August 14 - 17, 2017) (Da89-Da90), resulted in an **in-person visit** by Aponte at the gas station so that he could review the gas station's Ruby Point of Sale receipts on a daily basis. The result of Respondent's three day inspection of the gas station's receipts between August 17, 2017 and August 19, 2017, was an email sent by Aponte to Scander on August 20, 2017 (Da91). This email is conclusive on the issue of Respondent's reliance on the information he obtained during his three day visit at the gas station in making a revised offer to purchase, which led to the execution of the Asset Purchase Agreement.

On Page 24 of Appellant's Brief, Appellant posed the following question to the Court:

> "How does this Court know with certainty that Aponte's appearance at the gas station from August 17 to August 19, 2017, and his review of the actual *Ruby* receipts formed the basis for his finding that the gas station was "steady" at 84,000 gallons a month and not 103,000 and 99,000 gallons (the May and June, 2017 numbers)? Because Aponte says so in his August 20, 2017 (Da91) email.

As to his **definitive** statement on the issues of exactly what Aponte relied upon in revising his prior offer of $245,000, Aponte stated:

> 'I now know its current state which doesn't reflect the 2016 summary at all. The gallons sold each month this year has been steady around 84,000. Last year it was steady around 100K. That's basically off by 15%.' (emphasis supplied)." (Da91).

When Aponte says "last year it was steady at 100k," **THAT** is the figure that was produced by the P&J computerized invoices – that Aponte insists he relied on in executing the Agreement to purchase the gas station.

To repeat: the **computerized** P&J records which Aponte swears he relied upon were "steady at around 100k."

As to his **revised** offer of $205,000 based on his findings during this three day visit to the gas station reviewing the Ruby Point of Sale receipts, which "**ignored**" the 2016 Summary (Da91), Aponte states, in pertinent part:

> "With that being said the business itself is still profitable and I'm still interested. I would like to ignore last years 2016 summary since its too far off. Its profitability is nearing 200K with over 1.2 million gallons sold while at its current states its nearing 100k profit with about 1 million gallons sold. I was pressured into making an agreement on the price without this information, which isn't fair. To my knowledge, at this point, we do not have to change anything on the contract at all but I will ask for a fair reduction in the 40k besides that." (emphasis supplied)

As to Aponte's concerns about "inflated" diesel fuel figures, which he had raised in his August 14, 2017 email, those concerns were also resolved during his three days at the gas station, after which, he states in his August 20,

2017 email, "I now know its current state and I would like to ignore last year's summaries" which contained the **inflated diesel fuel figures**.

In short, the Ruby receipts that he reviewed at the gas station which, of course, included diesel fuel sales, eliminated any concern Aponte may have over inflated diesel sales. Notably, during the course of the trial, Aponte never claimed, nor could he claim, that the 84,000 gallons the gas station produced per month included inflated diesel fuel sales.

In its Brief, Respondent states that "this case turns solely on credibility," and that the jury "disregarded" Plaintiff's August 14, 2017 and August 20, 2017 emails presumably **relying solely** upon information in those emails dated July 29, 2017.

Appellant would agree. There is no doubt that the jury disregarded (a) the correspondence between the parties from August 14, to August 20, 2017; (b) Plaintiff's three day visit to the gas station; (c) Plaintiff's declaration at the end of the visit that he **now knew** the condition of the business; (d) Plaintiff's conclusion that the gas station **wasn't** producing 99,461 gallons or 103,110 gallons of gas sold, but rather 84,000 gallons per month; and (e) **most** importantly, that based on the actual number of gallons sold on a monthly basis, 84,000, he was reducing his offer to purchase from $245,000 to $205,000.

There is one additional fact, however, that the jury chose to ignore which this Court cannot ignore – and that is that as a result of Aponte's reduced offer of $205,000, the parties, did, in fact, negotiate a final price of $225,000. (2T 184 at 8 to 25, and 2T 185 at 1 to 18) prior to the execution of the Asset Purchase Agreement on September 15, 2017. Notably, Aponte did not say a word about how and why the **final** price of $225,000 was arrived at, at trial.

In fact, Respondent produced no testimony at trial suggesting that any of the information contained in the correspondence from August 14, 2017 to August 20, 2017 was inaccurate or untrue. He provided no explanation to the jury as to why the jury should ignore the August 14-17, 2017 correspondence (Da89-Da90), his August 20, 2017 email (Da92), and his negotiation of a revised purchase price, and why he continued to rely on the computerized P &J records.

Given the above, how, it may be asked, can Respondent credibly argue that in purchasing the business, he relied on documents (from July 29, 2017) when, after his review of the actual day to day sales of the gas station, he reduced his previous offer of $245,00 to $205,000. This offer of $205,000 delivered to Scander on August 20, 2017, based on the monthly sales of 84,000 gallons of gas, was Aponte's definitive statement of his valuation of the business. Any prior attempt by Scander to "mislead" Aponte, was negated by

Aponte's on-site examination of the business and his re-evaluation of the business. Any prior reliance on computerized records, became a distant memory.

The answer to the question as to how Aponte could claim reliance on the computerized records after everything that happened after August 14, 2017, is that there is **no credible answer** to this question. The offer that was made earlier, was based on monthly sales of 99,461 to 103,110 gallons of gas. It is indisputable that Aponte purchased the gas station based on its production of 84,000 gallons a month in sales.

One final note: Although the jury obviously disagreed, Appellant maintained in his testimony that he gave Plaintiff exactly what he asked for – the computerized records. But, in addition, to those records Scander provided Aponte with the Ruby Point of Sale records and the original P&J records which Aponte testified that he had destroyed. And finally, Scander sent an email to Aponte's attorney dated August 25, 2017 (Da92) telling him that he could not rely on the "software" (which produced the P&J computerized records).

If the Court reviews the emails between the parties between August 14, 2017 and August 20, 2017, (Da89 – Da91) it will no doubt conclude that Scander, not only was not averse to Aponte's in-house review of the Ruby

Receipts (directly from the gas pumps) but actually encouraged Aponte to review the Ruby records. This was not the act of a fraudster, but of someone who wanted to get a deal done.

Damages

As to the issue of Damages, and specifically Respondent's attempt to shift the burden of proof at trial to Defendant, by arguing that Defendant "failed to litigate the issue of damages," Appellant would submit that Scander had no obligation to **disprove** what Plaintiff failed to prove – that is damages. As stated and restated in its Brief, it was not sufficient for Plaintiff to simply testify that he lost his entire investment of $225,000, because Scander gave him the computerized records in July, 2017 – which essentially was Aponte's case.

In New Jersey, in order to recover damages, **Plaintiff must** provide credible **evidence** of loss and specific information to aid the jury's estimate of the amount of damages.

Instead, the trial testimony is barren of **any** testimony that the gas station produced one gallon less per month in sales from the 84,000 gallons during the entirety of Plaintiff's operation of the business than it did under Scander's ownership. Not a single document was introduced into evidence to substantiate the existence or extent of his damages – no expert testimony, no

bank records, tax filings, or financial statements. For all the jury knew, the business was a success, or at least modestly successful, for three and half years and then failed for reasons completely unrelated to the volume of gas sold by the gas station.

Did the jury know, for example, whether the Respondent's net income for the first several years of its operation was positive or negative? The answer to this question, as well as **all** questions relating to Aponte's actual operation of the business from 2017 until the filing of the lawsuit is NO.

Instead, the **only** thing the jury knew about Aponte's three and half years as the owner of the business was that Plaintiff was evicted – almost four years after the closing. During that period – September, 2017 until the date of eviction - not a word was spoken by Plaintiff to Defendant accusing him of anything. Plaintiff's silence over a period of more than three years, with regard to any possible claim against Defendants, speaks volumes.

Could the jury reasonably have concluded that providing Plaintiff with the computerized records in July, 2017, which showed sales of gas at 103,110 gallons per month, was the cause of Plaintiff's eviction in 2022 and the loss of his investment – without any additional testimony? The answer clearly is no.

Conclusion

This is a very dangerous case. In an effort to sanctify the untouchability of jury verdicts, this Court is being asked to virtually eliminate the long established requirements that (a) **reliance** in a case involving fraud need not be proved by clear and convincing evidence; and (b) that no proof of loss is required in order to establish damages.

As to the issue of reliance, Plaintiff's only proof in this regard is his statement that he relied on the July 29, 2017 computerized records that he had requested from Defendant in his decision to purchase. Every other fact presented to the jury contradicted this statement. These facts include the following:

(a) Aponte was provided with the original Ruby Point of Sale records which were irrefutable – records which he destroyed;

(b) Aponte was provided with the original records from P&J Fuel which were irrefutable – records which he destroyed;

(c) that the correspondence between Plaintiff and Defendant between August 14 and August 17, 2017 demonstrated that Plaintiff was dissatisfied with the information that he had already received;

(d) this correspondence between Aponte and Scander from August 14 to August 17, 2017, also demonstrated that Plaintiff wanted an opportunity to do

an on-site inspection which would include a day-to-day review of the Ruby Point of Sale records;

(e) Plaintiff did, in fact, conduct an on-site three day investigation of the Ruby Point of Sale receipts;

(f) in his email to Scander on August 20, 2017, he made it very clear that based on his investigation, he "now knew" the condition of the gas station;

(g) Aponte stated very clearly in that email that the **inflated** diesel records were no longer a problem;

(h) based on his on-site investigation, he found at the gas station was producing 84,000 gallons per month **not** the numbers contained in the summaries; and

(i) that based on these findings, Aponte made a revised offer to purchase of $205,000.

Most significantly is the absence of any testimony by Aponte to explain how his $205,000 offer resulted in a $225,000 sales price for the business, which was incorporated into the Asset Purchase Agreement. On what basis were these numbers changed? He does not say. The only conclusion that can be drawn from his silence and from Scander's testimony is that they **negotiated** the final price of $225,000 based on everything which had transpired during the on-site investigation by Plaintiff.

The only possible conclusion to be drawn from these events and in particular the negotiation of a final purchase price, by a reasonable fact-finder was that Aponte **relied** on the information obtained during his three day fact-finding mission at the gas station, and not the computerized records delivered to him on July 29, 2017, in entering into the Asset Purchase Agreement.

Perhaps even more threatening to established precedent is the jury's verdict returning to Plaintiff the full amount of the purchase price, despite the absence of any testimony as to proof of loss. Not only was there no expert testimony, but no testimony at all as to the operation of the business from the date of closing on September 15, 2017 to the date of Plaintiff's eviction – 41 months later.

Should this judgment be upheld, the doctrine of ascertainable loss will no longer be required as an element of proof in the Courts of the State of New Jersey.

For the foregoing reasons and for the reasons set forth in Appellant's Brief, it is respectfully requested that the Court reverse the decision of the trial court enter judgment setting aside the verdict of the jury in favor of Plaintiff-Respondent and enter judgment in favor of Defendants-Appellants, Scander,

LLC and Bassem Scander, individually, dismissing Plaintiff's Third-Party Complaint.

Respectfully submitted,

William Goldberg

Dated: May 28, 2025

William Goldberg, Esq.
Attorney for Defendants-Appellants