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**HARBORVIEW PLAZA ASSOCIATES LLC**

**Plaintiff- Appellant,**

**vs.**

**BLUERISE GROUP LLC AND UNIVERSAL  
TITLE AGENCY**

**Defendants- Respondents.**

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1976-24  
CIVIL ACTION**

**ON APPEAL FROM**

**LAW DIVISION: OCEAN COUNTY**

**DOCKET NO. OCN-L-2409-22**

**SAT BELOW: HON. VALTER H. MUST,  
J.S.C.**

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**BRIEF OF PLAINTIFF-APPELLANT IN SUPPORT OF APPEAL**

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On the Brief

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**PRELIMINARY STATEMENT**

Plaintiff/Appellant has clearly demonstrated, by a minimal of the required preponderance of evidence, that the trial court should have rule in their favor on both Counts I and II of the Complaint if the Contract was properly interpreted, the evidence was properly considered, and certain statement admitted into evidence.

The language of the Contract and the actions of the parties shows that the first \$250,000.00 deposit in the subject commercial real estate transaction was non-refundable at the conclusion of the due diligence period. Even if the contract is deemed ambiguous on this issue and the language is not construed against the Defendant, the extrinsic evidence imparts that the first deposit was nonrefundable. The trial court committed harmful error that caused an unjust result in their interpretation of ¶13 of the subject contract. (Pa 27).

The Plaintiff also proved by a preponderance of the evidence that the Defendant breached the contract and the implied covenant of good faith and fair dealing by self-sabotaging their own HAP application as they clearly changed their mind about purchasing the Property; likely due to financing. They delayed their application, prevented Plaintiff from speaking directly to HUD, were slow to provide additional documentation and advised HUD that

they were not interested in proceeding to the point that the HUD representative advised that they thought the application was withdrawn and then noted in his denial letter that Defendant did not want the Property. This is not a he said/he said between the Plaintiff and the Defendant. HUD corroborates Plaintiff's position, on multiple occasions, demonstrating by the preponderance of the evidence (more than 50%) that Plaintiff should have prevailed on Count II. As such, based upon the liquidated damage clause of the Contract, Plaintiff is entitled to the full deposit of \$500,000.00 in damages. The trial court committed harmful error that caused an unjust result in their limiting of public official statements that qualify as a hearsay exception under N.J.R.E. 803(c)(8)(a). The trial court also failed to consider certain statements that were admitted into evidence which is reflected by inconsistent statements in the court's opinion as to the evidence. There is also an attorney's fees provision entitling Plaintiff to legal fees and costs. This trial court's ruling should be reversed with the matter remanded.

### **PROCEDURAL HISTORY**

The Plaintiff/Appellant, Harborview Plaza Associates, LLC, filed a Complaint against the Defendant/Respondent, Bluerise Group LLC, seeking a judgment against the Defendant for a non-refundable

deposit in the amount of \$250,000.00 plus interest, legal fees and costs and for a judgment for the deposit amount of \$500,000.00 in liquidated damages, plus interest, legal fees and costs based on a written contract between the Parties. (Pa1).

The Defendant filed an Answer essentially denying the allegations of the Complaint, a Counterclaim demanding the return of both of the two \$250,000.00 deposits from the escrow agent and seeking an award of legal fees. (Pa6) The Plaintiff filed an Answer to the Counterclaim denying its allegations (Pa15). The lower court conducted a bench trial. At the conclusion of the trial, the lower court Judge verbally put his preliminary thoughts on the record and gave the Parties the opportunity to submit written summations (1T142:21-148:12).

After the submission of the written summations, the lower court then amended his primary thoughts and entered a judgment in favor of the Defendant (Pa17). At that time the Plaintiff verbally requested a stay of the judgment, and the lower court verbally denied the request without prejudice and advised the Plaintiff to file a written request for a stay so the Defendant would have an opportunity to respond. Since the lower court's decision allowed the release of the escrowed deposits it obviously was not without

prejudice to the Plaintiff. The Plaintiff filed a Notice of Appeal (Pa19) and filed a written request for a stay. The lower court ultimately denied the request for the stay (Pa23) and acknowledged that the deposits had been released and even stated in the opinion that the Defendant would probably spend the deposit money. The Appellant then filed a motion for a stay with the Appellate Division, and it was denied.

### **Statement of Facts**

In February 2022, the Parties, Harborview Plaza Associates LLC (Plaintiff/Appellant) and Bluerise Group, LLC (Defendant/Respondent) entered into a written contract (Pa23) for the purpose of Bluerise purchasing a 72-unit apartment complex (two buildings) from Harborview located in Tuckerton, New Jersey. Said Contract expressly provided for a non-refundable deposit and contained a liquidated damage clause.

At trial, Benjamin Weinstein, the owner and sole member of Bluerise Group, was the only person who testified on behalf of the Defendant and testified that Bluerise is a shell company that has no properties and has no assets other than the deposits. (1T8:18-23). Dore Beinhaker, who is the managing member of Plaintiff, testified on behalf of Harborview.

The Contract (Pa23) between the Parties was prepared by Counsel for Bluerise, (Scott Fireison, Esq.) who is apparently a self-purported expert dealing with HUD and HAP contracts. (1T88:18-24). Mr. Fireison did not testify at trial. Weinstein testified that he had worked with Fireison “plenty of times” and Fireison was an expert (1T11:5-10). The terms of the Contract were based on a letter of intent (Pa55) which also identified the deposit as non-refundable. The purchase price was \$7,200,000.00. Neither the Letter of Intent nor the Contract provided for a mortgage or financing contingency - it was an all-cash deal. But Weinstein testified that he was never going to purchase it in cash, and he was going to get financing (1T133:1-3).

Fifty of the seventy-two one-bedroom apartments were and are subject to a Housing Assistance Program (HAP). The original HAP contract and its most recent renewal were provided to Bluerise as part of the due diligence period. As set forth in the HAP contract, the HAP program is subject to expire in May of 2026. The Contract (Pa24) gave Bluerise the right to apply for renewal of the HAP contract. The HAP program provides rental assistance to qualifying tenants who reside in the specific fifty apartments. The subject property is NOT subject to any federal loans. Bluerise, in accordance with both a letter of intent and the Contract, initially

tendered a non-refundable \$250,000.00 deposit that was to be held in Escrow in an interest-bearing account (we later learned it was not put into an interest-bearing account) by Bluerise's title company. (Pa24) The title company is located at the same address as Bluerise (2T6:12-18).

The Contract provided for a 60-day due diligence period (it was extended for an additional 30 days at the request of Bluerise with the consent of Harborview). The Contract provided that at the conclusion of the due diligence period the initial \$250,000.00 deposit, in accordance with the original letter of intent, the express terms of the Contract, and the course of conduct between the Parties, would become non-refundable and an additional \$250,000.00 was required to be tendered by Bluerise. (Pa24).

Paragraph 13 and 14 of the Contract sets forth conditions under which the initial non-refundable \$250,000.00 deposit would no longer be non-refundable.

Paragraph #13 expressly reads:

#13 Damage or Destruction. A) Material Loss. If, prior to Closing, any portion of the Project is damaged or destroyed to a "material" (as hereinafter defined) extent or in the event the project becomes the subject of any notice of condemnation, Seller shall notify Purchaser in writing within seven (7) days and Purchaser may, at its option, terminate this Agreement by delivery of written notice of such termination to Seller within fourteen (14) days after written receipt of

such notice. If damage or destruction occurs within fourteen (14) days prior to closing, the closing shall be extended to a date fourteen (14) days after such occurrence and Purchaser may, at its option, terminate this Agreement by delivery of written notice of such termination to seller during such extension period and, notwithstanding the terms of this Agreement to the contrary, the Deposit shall be returned to the Purchaser. Upon receipt of such notice of termination each party shall be relieved of further obligations here under. If purchasers elect not to terminate, each party shall have the exclusive right to settle the loss and to receive all proceeds of the insurance covering the Improvements or Personal Property so damages or destroyed, or to receive the benefits of the condemnation settlement, and receive at Closing a credit equal to the amount of any deductibles provided under applicable insurance policies. The purpose of this Paragraph 13a). "material" shall mean damage or destructions of the Project for which the aggregate estimated cost of repair, restoration and rehabilitation (including all indirect and incidental costs and expenses) is in excess of One Hundred Thousand and no/100 dollars (\$100,000.00). (emphasis added)

b) Other Damage or Destruction. If, prior to closing, any portion of the Project is damages or destroyed but such damage or destruction is not "material." Purchaser may not terminate this Agreement on account thereof, but upon Closing, Purchaser shall have the exclusive right to settle the loss and to receive all he proceeds from the applicable insurance policies covering the Improvements or Personal Property so damages or destroyed and receive at Closing a credit equal to the amount of any deductibles provided under applicable insurance policies. (Pa37)

(Paragraph 14 addresses the issue if the seller defaults so it is not applicable to this case.)

Paragraph 4 b) of the Contract states:

HUD Approval. Purchaser shall promptly (Emphasis added) apply to HUD for consent to assume the HAP Contract, and may apply for approval of renewal, modification, conversion and/or extension of the HAP Contract (HUD Approval..... vi) Purchaser agrees to promptly deliver to HUD all documents...” (Pa27)

Weinstein testified that he was aware that he was required to act promptly in seeking renewal of the HAP contract, (1T102:9-13). But, in fact, the Defendant failed to act promptly and did not act in good faith. They did not even file with HUD until four months after signing the Contract, after they were repeatedly pressed by Plaintiff. In fact, a representative of HUD (Eugene Walton) advised Harborview (Beinhaker) that Bluerise had withdrawn their application.

Furthermore, Pa58, which is in evidence, is an email from HUD to Bluerise indicating that they had dropped their interest in buying Harborview and that they wanted HUD to issue a denial. (Pa58). This document was not objected to by Defendant when Plaintiff offered it into evidence.

In addition, as referred to above, another email dated August 17, 2022 (Pa62) from HUD to the Plaintiff (Beinhaker) advised the Plaintiff that Bluerise pulled out weeks ago. Upon receipt of this email, Plaintiff requested permission from Bluerise to contact HUD, but they refused permission (Pa62). In fact, the

Plaintiff made several additional requests from Bluerise, and they continued to refuse permission.

At the conclusion of the due diligence period, Bluerise in fact tendered the second deposit and Harborview confirmed the first deposit was now Non-refundable. (Pa63) Defendant did not dispute that the initial deposit was now non-refundable.

Counsel for Bluerise, being an expert and knowing that the HAP contract was not assignable, drafted a Contract that provided that closing was contingent upon Bluerise obtaining approval from HUD. (Pa29). Bluerise was always aware that they would have to obtain HUD approval in order to benefit from the HAP contract (Pa63). In fact, Weinstein testified “that it is always part of the contract to purchase property subject to a HAP contract is going through the HUD-approval process (1T90:11-22). HUD denied the assignment based on Bluerise’s counsel’s independent self-created opinions and Bluerise asking to be denied. Pa64 is a September 21, 2022, letter to Bluerise from HUD acknowledging that they had not filed an application until June 15, 2022, and stating that Bluerise had “expressed concerns about owning this property in light of the growing uncertainty of the macroeconomic environment in terms of higher inflation, interest rates, along

with difficulties filling vacant units with good standing tenant”. These are all issues that are only a concern to and were created by Bluerise. There are rarely, if ever, vacant HAP units and since this was an all-cash deal interest rates are irrelevant. It should be noted that the principal of Bluerise, Mr. Weinstein, testified that he is the owner/manager of at least three other properties subject to HAP contracts and HUD approval (1T101:12-16). The Plaintiff requested permission to file an appeal of the HUD letter of September 21, 2022, and the Defendant refused.

It appears that the lower court acted arbitrarily and took the illogical position that based upon the incorrect reasoning that the HAP contract is assignable (which is not without express consent of HUD which obviously could be withheld) falls within the terms of paragraph 13. (Pa27) This is in direct contradiction to the plain language of the Contract. It should be noted that the property can be sold without the HAP contract and the units rented at market rents. In fact, if a tenant did not qualify, they would be required to pay the market rent. Moreover, if not renewed there is no HAP contract after May 2026. Most importantly, there also was not even a scintilla of evidence at trial that this caused damage in the amount of \$100,000.00 as required to apply by

paragraph 13 of the Contract. This is a prima facia fact that the Defendant failed to establish, or even attempt to establish, in order to apply paragraph 13. (Pa27)

It should also be noted that the Contract specifically provides that:  
Attorney fees. ... the non-defaulting party shall be entitled to reasonable attorney's' fees as may be allowed by the Court. .... (Pa38).

Weinstein never testified that the initial \$250,000.00 deposit was refundable, or the HAP contract was covered under paragraph 13. If it was covered under paragraph 13, why did it have to be mentioned numerous other times throughout out the Contract? In fact, Weinstein testified “the termination of the Contract and request of the deposit to be returned based on the fact that we did not get the HUD approval as required.” (1T99:4-20)

We respectfully remind the Court that if a judge makes a discretionary decision but acts under a misconception of the applicable law or misapplies it, the exercise of legal discretion lacks a foundation and it becomes an arbitrary act, not subject to the usual deference. Summit Plaza Assocs. v. Kolta, 462 N.J. Super. 401, 409 (App. Div. 2020); Alves v. Rosenberg, 400 N.J. Super. 553, 563 (App. Div. 2008).

In such a case, the reviewing court must instead adjudicate the controversy in the light of the applicable law in order that a manifest denial of justice be avoided. State v. Lyons, 417 N.J. Super. 251, 258 (App. Div. 2010); State v. Steele, 92 N.J. Super. 498, 507 (App. Div. 1966); Kavanaugh v. Quigley, 63 N.J. Super. 153, 158 (App. Div. 1960).

### **LEGAL ARGUMENT**

#### **I. THE TRIAL COURT COMMITTED HARMFUL ERROR IN FAILING TO AWARD THE PLAINTIFF THE \$250,000.00 NON-REFUNDABLE DEPOSIT (Pa25, Pa 37, Pa 55 ; 2T4:7-12, 2T6:21-25, 2T13:2-10, 1T75:18-25, 1T122:5-10, 1T110:10-11:22, 1T11:5-10)**

##### **A. Standard of Review**

An interpretation of a contract is reviewed de novo. Serico v. Rothberg, 234 N.J. 168, 178 (2018), Kieffer v. Best Buy, 205 N.J. 213, 222 (2011). The trial court's decision as to the initial \$250,000.00 deposit and whether it was non-refundable along with its interpretation of Paragraph 13 of the Contract constitutes harmful error. The harmful error rule is used when a specified error was brought to the trial judge's attention. State v. G.E.P., 243 N.J. 362, 389 (2020); State v. Mohammed, 226 N.J. 71, 86

(2016). The question for the Appellate Division is "whether in all the circumstances there [is] a reasonable doubt as to whether the error denied a fair trial and a fair decision on the merits." State v. G.E.P., 243 N.J. 362, 389 (2020) (alteration in original), (quoting State v. Mohammed, 226 N.J. 71, 86-87, (2016)). "In such cases, the reviewing court asks whether the error is 'clearly capable of producing an unjust result.'" State v. Mohammed, 226 N.J. 71, 87 (2016) (quoting R. 2:10-2). A contract as negotiated by the parties should be enforced as written. Vasquez v. Glassboro Serc. Association, 83 N.J. 86, 101 (1980). It is a function of the Court to enforce unambiguous terms of a contract. *Id.* (holding that Courts should enforce contracts as made by the parties); Schenck v. HJI Associates, 295 N.J. Super. 445, 450-451 (App. Div. 1996) (holding that it is the function of the Courts to enforce the unambiguous terms of a contract and not make a better contract for either party); O'Brien (Newark) Congregation, Inc. v. Automatic Sprinkler Corp. of America, 361 N.J. Super. 264, 272 (App. Div. 2003). It is well-settled that when the terms of a contract are clear, "it is the function of a Court to enforce it as written and not to make a better contract for either of the parties." Kampf v. Franklin Life Ins. Co., 33 N.J. 36 (1960). Absent ambiguity, the intention of the parties is to be ascertained by the language of the contract Dontzin v. Myer, 301 N.J. Super. 501, 507 (App.Div.1997).

B. The Initial \$250,000.00 was Non-refundable at the Conclusion of the Inspection Period Based Upon the Plain Language of the Contract

In the matter before the Court, there is nothing ambiguous about “nonrefundable.” The Parties entered into a contract. The initial \$250,000.00 deposit became non-refundable based on the language of the Contract and the conclusion of the inspection period. The Contract contained a provision that “Upon the last day of the Inspection Period..... the initial \$250,000.00 shall be non-refundable. (Pa 25). The Contract provided that the Inspection period is 30 days from February 23, 2022. (Pa 25). On March 25, 2022, the parties signed a First Amendment to the Property and Sale Agreement extending the Inspection Period to 5:00 pm on April 29, 2022. (Pa 55). At that time, the initial \$250,000.00 deposit became non-refundable regardless of whether the Contract was breached or not.

The Contract unambiguously states the “initial Two Hundred Fifty Thousand and no/100 Dollars shall be non-refundable except as provided in Section 13 or Section 14.” (Pa 25). Section 14 deals with Plaintiff breaching the contract and is not relevant. (Pa 37) Section 13 deals with a risk of loss clause and the physical condition of the building having to suffer a cost of repairs in the aggregate of \$100,000.00. (Pa 37) The lower court clearly found the initial \$250,000.00 was non-refundable. (2T4:7-12).

The trial court stated that the “only fact at issue in this case is that did the plaintiff prove by a preponderance of the evidence, credible evidence, that Bluerise Group breached the agreement by not making a timely application” (2T6:21-25).” But then the trial court went on to rule that Paragraph #13 of the Contract caused it to be refundable. This finding is not based on anything Bluerise testified to or the plain language of the subject clause. This ruling is harmful error.

Before we address the illogical application of paragraph 13, as cited above, it should be acknowledged that there was no finding by the trial court or assertion by Bluerise of any damage or destruction of the Project for which the aggregate estimated cost of repair, restoration and rehabilitation (including all indirect and incidental costs and expenses) is in excess of One Hundred Thousand and no/100 dollars (\$100,000.00) as required by the language in ¶ 13 of the Contract. No evidence whatsoever was presented that the \$100,000.00 threshold was reached. Furthermore, there was no finding by the trial court or assertion by Bluerise that it elected to terminate pursuant to paragraph 13.

But most importantly the HAP contract was never intended to be subject to paragraph 13. To the contrary, the HAP contract is specifically addressed in

numerous clauses drafted by Bluerise's HUD expert throughout the Contract. The trial court erred in its reasoning that if something cannot be assigned without government approval it is still assignable. The trial court incorrectly established a right to Bluerise that it clearly did not and does not have and then tried to pigeonhole it into paragraph 13 after the fact and several years later.

The trial court found that "failure to get a HAP approval is such damage that it would give them the right to terminate." (2T13:2-10) The trial court incorrectly found that the HAP agreement is assignable. The apparent basis of that opinion is because if Bluerise received HUD approval, Harborview agreed to assign it and since they did not get approval Harborview did not assign it. Therefore, it falls under the paragraph 13 which states: "purchaser shall assume only such contracts as seller may be allowed to assign." (Pa 37). How does that make sense? There is no question that Harborview was not allowed to assign the HAP contract, which is why Bluerise had to file an application. Assignable contracts are for such things as laundry service, landscaping, extermination, snow removal, leases, cable service and things of similar nature. So not only did the Defendant not present any evidence that the \$100,000.00 threshold was reached, but it is also harmful error for the lower court to determine that this clause had anything to do with the HAP contract.

C. Even if the Contract is Considered Ambiguous the Initial Deposit is Still Considered Non-refundable

Even if the Contract language is considered ambiguous, when contract language is ambiguous, the court should examine extrinsic evidence. Integrated Health Resources LLC v. Rossi Psychological Group, P.A. 537 F. Supp. 2d 672 (D.N.J. 2008); Driscoll Const. Co., Inc. v State Dep't of Transportation, 371 N.J. Super. (App. Div. 2004). Evidence of the circumstances surrounding the contract is always admissible in aid of the interpretation of an integrated agreement. Porreca v. City of Millville, 419 N.J. Super. 212 (App. Div. 2011). In ascertaining the intention of contracting parties, the court must consider the surrounding circumstances. Pingaro v. Rossi, 322 N.J. Super. 494 (App. Div. 1999); Graziano v. Grant, 326 N.J. Super 328 (App Div. 1999) Review of extrinsic evidence demonstrates without question that the initial \$250,000.00 was considered non-refundable at the conclusion of the due diligence period regardless of Paragraph 13. Both parties testified that the Contract was drafted based on the language in the letter of Intent (1T75:18-25 and 1T122:5-10). The Letter of Intent stated that the earnest money (\$250,000.00) shall be non-refundable at the end of the due diligence period. (Pa55). Moreover, at the conclusion of the due diligence period, Plaintiff noted to Defendant that the initial \$250,000.00 was now non-refundable and requested the second

deposit. There was no pushback or dispute from Defendant. Rather, Defendant merely sent the second deposit. (1T110:10-11:22). The conduct supports the fact that the initial deposit was non-refundable at the conclusion of due diligence and that all of the parties thought the same. Defendant was aware of this and was kept in the loop by his counsel the entire time. (1T11:5-10) Any way you look at it, whether it's the language of the contract or the extrinsic evidence, there is no question that the first \$250,000.00 deposit became non-refundable at the end of the due diligence period regardless of whether the Contract was breached by the Defendant.

ii. **THE TRIAL COURT ERRED IN NOT FINDING THAT THE DEFENDANT HAD BREACHED THE CONTRACT BY NOT PROMPTLY FILING FOR HUD APPROVAL AND NOT ACTING IN GOOD FAITH(Pa24, Pa27, Pa29, Pa37, Pa58, Pa61, Pa 62, Pa64, Pa65 1T126:16-22; 2T16:7-20; 1T102:6-8; 1T108:6-12; 1T113:20-25; 1T116:16-117:5; 1T134:14-22; 1T101:7-22; 1T:129- 10-130:7; 1T96:18-24 ; 2T6:21-25 ; 2T6:6-10 ; 1T:119-21-T120:5; 1T108:9-11)**

A. Standard of Review

Defendant breached the Contract as well as its obligation of good faith and fair dealing by not filing it's HUD application promptly and by seeking denial of its own application. Thus, in addition to Count I seeking the release of the non-refundable \$250,000.00 deposit, we submit that \$500,000.00 was to be the amount of liquidated damages for a breach of contract claim. We respectfully submit that the Appellate

Court's review of the rulings of law and issues regarding the applicability, validity or interpretation of laws, statutes, or rules is de novo. Serico v. Rothberg, 234 N.J. 168, 178 (2018). The trial court committed harmful error in contract interpretation, applying evidence in the record, and ruling on evidentiary issues.

**B. The Trial Court Failed to Consider Evidence and Incorrectly Interpreted the Subject Contract Resulting in Harmful Error and an Unjust Result. Plaintiff is Entitled to \$500,000.00 in Liquidated Damages**

The Property Purchase and Sale Agreement dated February 23, 2022, (Pa 37) expressly says, “Seller and Purchaser agree that the payment of the Deposit to seller under this Paragraph 14.a) shall be liquidated damages and not as a penalty....”

Since there is a liquidated damages clause it is not relevant that the damages incurred by the Seller are more than \$500,000.00. Plaintiff is entitled to the \$500,000.00 liquidated damages amount. The totality of the evidence, including the evidence wrongfully excluded and that the court did not realize was included in the record, demonstrates that Defendant breached the contract and the covenant of good faith and fair dealing.

The trial court’s decision as to not allow certain statements from public officials into evidence constitutes a clear harmless error in judgment. State v. Medina, 242 N.J. 397, 412 (2020) (quoting State v. Scott, 229 N.J. 469, 479 (2017)).

Moreover, in ruling as to whether Defendant breached the subject contract, the trial court also erred by not realizing that certain statements and documents were not objected to by defense counsel and in evidence. The ultimate oral decision given by the trial court was in direct contrast to the court's evidentiary rulings and also demonstrates if the wrongfully excluded evidence was admitted into evidence that the ruling would have been in favor of Plaintiff. The evidentiary rulings and the fact that the trial court did not realize certain statements were in evidence, without objection, constitute harmful error. Correctly including the omitted and forgotten statements makes it apparent that Plaintiff met its burden at trial.

C. The Trial Court Failed to Consider Evidence and Allow Certain Statements into Evidence in Adjudicating the Claim of Breach of the Covenant of Good Faith and Fair Dealing

Every contract in New Jersey contains an implied covenant of good faith and fair dealing. Fields v. Thompson Printing Co., Inc., 363 F.3d 259 (N.J. Cir 2004); Emerson Radio Corp. v. Orion Sales, Inc., 253 F.3d 159 (N.J. Cir. 2001); Blackhorse Lane Assoc., L.P. v. Dpw Chemical Corp., 228 F.3d 275 (N.J. Cir 2000); Kalogeras v. 239 Broad Ave., L.L.C., 202 N.J. 349 (2010). Neither party shall do anything to prevent the other party from receiving the fruits of the contract. Wade v. Kessler Institute, 172, N.J. 327 (2002).

In the context of a claim for breach of implied covenant of good faith and fair dealing, inquiry looks to the reasonable expectations of the contracting parties. Emerson Radio Corp. v. Orion Sales, Inc., 253 F.3d 159 (N.J. Cir. 2001). Under New Jersey law, a defendant may be liable for a breach of the covenant of good faith and fair dealing even if the defendant does not violate an express term of the contract. DiCarlo v. St. Mary Hosp., 530 F. 3d 255 (N.J. Cir. 2008).

In this matter, Plaintiff must prove the breach of contract/covenant of good faith and fair dealing by a preponderance of the evidence; slightly more than 50%. A review of all the evidence improperly excluded as well as (Pa 58) which the trial court did not realize was of record, imparts that Plaintiff easily met its burden. Defendant had issues with financing and since the Contract was not contingent upon financing, Defendant had to find a way to no longer be obligated under the Contract. As a result, he did everything in his power to seek a denial from the government. He slow played his application to the point that the government no longer thought he was interested. (Pa 58). He requested that the government deny his application and his attorney even stated that he understands why the government does not want to issue a denial. (Pa 58) Defendant must have ultimately changed the government's mind and received the denial that they requested. (Pa 58). He requested more time to evaluate his own circumstances. (Pa 58). He even noted to the government that

his usual investors will likely not participate in this transaction. (Pa 58). The government even states “So you are again interested,” which shows that the Defendant had indicated that he was no longer interested. (Pa 58) This email alone pushes Plaintiff past the 50% preponderance of the evidence threshold as to Count II but was completely ignored by the court as the court was clearly not aware that (Pa 58) was in evidence. Pa58 was not objected to and was entered into evidence by Plaintiff. (1T126:16-22).

Defendant breached the covenant of good faith and fair dealing by self-sabotaging his own application. As such, this email should be considered in its entirety by the court with a plain language/common sense reading of what it says. P-18(Pa64) which is also in evidence without limitation, is the “denial” letter from HUD. This document states that the Defendant had concerns in purchasing the property due to the uncertainty in the economy. Again, this is in evidence and reveals that they wanted out of the transaction because of the economy and financing (interest rates) even though this was contractually not contingent upon any financing. Plaintiff established a breach of contract/good faith by a preponderance of evidence. The trial court’s ruling, which forgot some of the evidence in record, was harmful error.

It should be noted that a hearsay exception applies to statements of government officials. Therefore, the communications from the HUD officials should have been admitted into evidence as a hearsay exception and without limitation; not just (Pa 58) and (Pa 64). The trial court erred on this issue. R. 2:10-2 provides that "[a]ny error or omission shall be disregarded by the appellate court unless it is of such nature as to have been clearly capable of producing an unjust result. See Pressler & Verniero, Current N.J. Court Rules, cmt. 2.1 on R. 2:10-2 (2022). All errors, including both plain error and harmful error, are tested by the standard set forth in R. 2:10-2, that is, as set forth above, whether the error is "clearly capable of producing an unjust result." N.J.R.E 803(c)(8)(a) states as follows:

(A) a statement contained in a writing made by a public official of an act done by the official or an act, condition, or event observed by the official if it was within the scope of the official's duty either to perform the act reported or to observe the act, condition, or event reported and to make the written statement;

The trial court even noted in it's decision that:

Now, I would agree, and I understand the difficulty that plaintiff had in trying to prove that the defendant was somehow did not act in good faith. That somehow, the market changed or some of his — some of his investors bowed out and they're simply using this as an excuse to get their money back. That they really didn't act in good faith. I can't find that. That's speculative. There wasn't evidence of that. I don't know that the best attorney of any kind, at any time could prove that fact.

Because that would require, you know, you to get HUD, this Eugene Walton into court to testify as to that. You're not getting them into a state court here. And I understand that.- (2T16:7-20)

Of course, it is difficult, if not impossible, to have a HUD official come to testify. This is why we have N.J.R.E. 803(c)(8)(a). It is because their statements are reliable, and it is almost impossible to have them come testify in state court.

These statements include Pa61 and Pa65 which do prove the fact that Defendant did not act in good faith. Pa61 is a statement from HUD Official Eugen Walton on August 17, 2022, stating that Defendant pulled out of its application weeks ago. Pa 65 is a statement from the same official on September 12, 2022, advising that the buyer (Defendant) promised updated documents weeks ago that still have not been provided.

The lower court, not allowing these statements into evidence, which clearly qualify as a hearsay exception, is harmful error that impacted the result of the trial and causing an unjust result.

Further, the Contract was not contingent on any financing. (Pa 24) (1T102:6-8) To Defendant, however, this was all about financing. Defendant even conceded that he extended the due diligence because of financing and never intended to

purchase the Property without financing. (1T108:6-12) He admits he had concerns about the market. (1T113:20-25) His investors decided not to participate in the transaction. (1T116:16-117:5). Defendant maintains that he had investors and could have received financing if needed, however he testified that he never provided any financial information to HUD other than his own. Yet he was denied over financing issues? This position is not credible because if he really wanted the property still as he states, then he would have provided more information to HUD pertaining to his financiers/lender. (1T134:14-22) It is obvious based on his actions and the email chain (Pa58) with HUD, that once his usual investors backed out, he no longer wanted the Property and did everything he could to manufacture a denial.

Why would the Defendant not have been approved? He operates three other HUD properties without issue. All of which were acquired by way of a HAP assignment just like we have here. (1T101:7-22). The failure on behalf of the Purchaser either to appeal the decision of HUD or allow the Seller to do so is a breach to diligently pursue approval. (1T:129- 10-130:7) If he wanted to move forward, why not allow an appeal at no cost or effort to him? Why was he no longer interested?

Perhaps most telling is Pa 64 wherein HUD tells us in a letter addressed to

“Weinstein” “you expressed concerns about owning this property in light of the growing uncertainty of the macroeconomics environment in terms of higher inflation, interest rate, along with difficulties filling vacant units with good standing tenants”.

It should be noted that there are no vacant HAP units – the government pays most of their rents and there is a waiting list. This was an all-cash deal with no government or other financing (Pa 24) therefore interest rates and the filing of vacant units were not an issue to HUD and not relevant whatsoever to the application.

These statements incorrectly excluded from evidence (Pa 58 and Pa 65), combined with the statements in Pa 58 and Pa 64 establish the inescapable conclusion that the Plaintiff met its burden of proof by more than 50% but the lower court committed harmful error by excluding and failing to factor in these documents which demonstrate Defendant’s breach of contract by failing to act in good faith in self-sabotaging their own HUD application.

A review of the included and wrongly excluded HUD official’s statements also shows that Defendant breached the contract by failing to promptly make application. Defendant did not want HUD approval once his usual investors backed out. The Purchaser having not acted promptly nor diligently was in default and had

no right to terminate.

The Contract (Pa24), states: “b) HUD Approval. Purchaser shall promptly apply to HUD for consent to assume the HAP contract.... \_” (emphasis added) The Purchaser did not promptly apply. The Contract was entered into February 23, 2022, and the Purchaser did **not** apply for four (4) months (June 22, 2022, Pa 64) (and interestingly would not consent to the purchaser looking into the status of the application). Furthermore, at page 4 Paragraph b) vi) of the Property Purchase and Sale Agreement “Purchaser agrees to promptly deliver to HUD all documents ....” (emphasis added). (Pa 27) The Purchaser did **not** promptly deliver to HUD the documents. (Pa 65) The Property Purchase and Sale Agreement (Pa 29) reads “... Purchaser agrees to take all reasonable actions to diligently complete all required processing on as timely a basis as possible” .... (emphasis added). Moreover, the reading of Pa 58 referred to above and Pa 61, an email from Eugene Walton to Dore Beinhaker dated August 17, 2022, that read “Hi Dore Your Buyer pulled out weeks ago...” indicates that the Purchaser was not acting diligently and was in default of the contract. Defendant failed to promptly apply, nor did he take reasonable actions to complete all required of him. In fact, Defendant did the opposite in violation of his obligation of good faith and fair dealing.

It should also be noted that Weinstein testified that he was very confident that his application would be approved by HUD. Obviously, that is the reason he agreed to a non-refundable deposit. He told the trial court that he had been granted approval three times before. (1T96:18-24). As we stated above, the trial court stated that the “only fact at issue in this case is that did the plaintiff prove by a preponderance of the evidence, credible evidence, that Bluerise breached the agreement by not making a timely application” (2T6:21-25). The Court stated the only evidence as to a non-timely application comes from hearsay testimony from this HUD employee” (2T6:6-10). But the trial court ignores Pa58 and Pa61 in evidence wherein HUD states Bluerise did not file its application until June 15, 2022.

This alone proves Plaintiff’s case by a preponderance of evidence. Moreover, Defendant failed to diligently act. They did not even file with HUD until four months after signing the Contract. They failed to act in good faith. In fact, HUD advised Harborview that Bluerise had withdrawn their application.

In addition, the email dated August 17, 2022 (Pa61) from HUD to the Plaintiff advised the Plaintiff that Bluerise pulled out weeks ago. Upon receipt of this email the Plaintiff requested permission from Bluerise to contact HUD, but they refused permission (Pa62). While Weinstein stated he never pulled out, it was his attorney

that filed and controlled the application on his behalf. The Defendant for some reason failed to call his attorney as a witness at trial. We respectfully submit that all the emails from HUD should have been admitted for limited purposes as per N.J.R.E 803(c)(8)(a). These documents should all be in evidence without restriction just as Pa58 and Pa64 were admitted without limitation.

If the Purchaser was diligently and in good faith attempting to obtain a prompt assignment of the HAP contract, then:

1. Why did they not permit the Seller to ascertain the status with HUD and mostly ignore his inquiries?
2. Why did HUD think they withdrew?
3. Why did they express to the government concerns about owning this property in light of the growing uncertainty of the macroeconomics environment in terms of higher inflation and interest rate, along with difficulties filling vacant units with good standing tenants?
4. Why did Fireison send an email (Pa 58) Dated September 14, 2022, from Scott Fireison (attorney for the purchaser to Eugene Walton (a public official from HUD) stating

“I understand why you do not want to write us a denial. But I did want to resend this Scott”? and, (the Court questioned Mr. Weinstein twice about this and Mr. Weinstein stumbled over an answer. (1T:119-21-T120:5).

5. Why did they not appeal?
6. Why did they not allow the Seller to appeal?
7. Why if Pa 64, the letter of September 2022 states “if you have any questions contact Eugene Walton” did they fail to even do that and in fact immediately attempted to terminate the contract?
8. Why didn't the person who perhaps could best testify as to the promptness and diligence of the Purchaser (Scott Fireison) not testify?
9. Why did we not hear an explanation from the Purchaser as to what HUD criteria they did not meet?
10. Why did the Purchaser not even inquire of HUD as to what criteria they did not meet?
11. Why would HUD, on its own initiative, deny approval to an assignment of a HAP contract to a party that was already a party to three other HAP Contracts?

(1T:101-17) where Mr. Weinstein acknowledges he is not aware of any issues HUD has with him as an owner or manager of his other HAP properties) (1T96:20 wherein Mr. Weinstein's testifies he has never had a denial before).

The answer to all these questions, and others, is that the Defendant changed their mind because they could not get the financing (that the deal was not contingent upon) and wanted to get a denial. (1T108:9-11)

So, they did not act promptly or diligently in violation of the Contract and the covenant of good faith and fair dealing. This is further supported by Mr. Fireison's email of July 19, 2022, apparently resent on September 14, 2022 (Pa 58) to Eugene Walton which read "...the investors by whom his housing projects are commonly funded have recently concluded they will not participate in this transaction." Why are they telling HUD this, unless they wanted a denial?

Everything, when viewed in totality, clearly results in the finding that the reason for a failure to obtain approval for an assignment of the HAP Contract was a direct result of the actions or inactions of the Purchaser in breach or default of the Property Purchase and Sale Agreement. This is especially so upon review of the statements made by the public officials at HUD that were either incorrectly excluded

by the court or mistakenly omitted. Both of which constitute harmful error causing an unjust result. Plaintiff satisfies that Defendant breached the covenant of good faith and fair dealing by a preponderance of evidence when the statements of public officials are properly considered. It is clear that Defendant did not promptly or diligently file its application with HUD.

**III. THE TRIAL COURT ERRED IN NOT AWARDING THE PLAINTIFF LEGAL FEES AND COSTS (Pa38)**

The Contract specifically provides in paragraph 15 on page 15 states, “Attorney fees. ... the non-defaulting party shall be entitled to reasonable attorney’s’ fees as may be allowed by the Court. ....” (Pa 38).

At no time was Harborview in default, therefore they are clearly entitled to reasonable attorney’s fees as may be allowed by the Court as a result of Defendant’s breach of contract as discussed above.

**CONCLUSION**

We respectfully submit that based on the above referred to facts, argument and in the interest of fairness and justice, the Judgment should be reversed, and that a judgment be entered against the Defendant and in favor of the Plaintiff in the amount of \$500,000.00. Furthermore, the Plaintiff should be awarded a legal fee, and the matter should be remanded to determine a reasonable amount.

Respectfully submitted,  
Dore R. Beinhaker /s/  
Dore R. Beinhaker

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HARBORVIEW PLAZA : SUPERIOR COURT OF NEW  
ASSOCIATES, LLC, JERSEY  
: APPELLATE DIVISION  
Plaintiff-Appellant, : DOCKET No. A-001976-24T1  
:  
v. : Civil Action  
:  
BLUERISE GROUP LLC AND : On Appeal from:  
UNIVERSAL TITLE AGENCY, Superior Court of New Jersey  
: Law Division: Ocean County  
Defendants-Respondents. : Docket OCN-L-2409-22  
:  
Sat Below.: Hon. Valter H. Must,  
J.S.C.

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**DEFENDANT’S/RESPONDENT’S/CROSS-APPELLANT’S, BLUERISE  
GROUP, LLC, BRIEF**

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## I. PRELIMINARY STATEMENT

After the Trial Court correctly entered Judgment in favor of Bluerise Group LLC (“Bluerise”) and against Appellant, Harborview Plaza Associates, LLC (“Harborview”), the Trial Court denied Respondent/Cross-Appellant’s, Bluerise’s, application for fees and costs, which had been made pursuant to the Agreement between the Parties. This Cross-Appeal arises out of that denial. For the reasons set forth below, it is respectfully submitted that the Trial Court’s Judgment in favor of Bluerise should be affirmed and that the Trial Court’s denial of Bluerise’s application for fees and costs in light of the granting of Judgment in its favor should be reversed and remanded for further proceedings.

Bluerise is a New Jersey based company that is owned by Benjamin Weinstein (“Mr. Weinstein”). Harborview owns an apartment complex in Tuckerton, New Jersey. Dore Beinhaker (“Mr. Beinhaker”), is one of the members of Harborview and was the person with whom Mr. Weinstein dealt in connection with the subject transaction. In February 2022, Mr. Weinstein learned of the opportunity to purchase Harborview Plaza Apartments and retained counsel to draft and negotiate the terms of a purchase and sale agreement with Mr. Beinhaker – an attorney who has been practicing since 1978. The property, Harborview Plaza Apartments, is subject to a HAP Contract with HUD. As such, it was a necessary condition precedent for HUD to approve the assignment of the HAP Contract from Harborview to Bluerise.

After the Parties executed the Agreement (defined below), Mr. Weinstein escrowed the first deposit in the amount of \$250,000.00. The Parties later executed an Amendment to the Contract to extend the Inspection Period to April 29, 2022. At the conclusion of the Inspection Period, Mr. Weinstein escrowed a second deposit in the amount of \$250,000.00. In September 2022, HUD concluded that Mr. Weinstein was not the “right fit” and issued a rejection letter of the Application to Assign the HAP Contract from Seller to Bluerise. Without HUD’s approval, there was no way for the Parties to move forward with the purchase and sale of Harborview Plaza Apartments. Bluerise sent a written Notice of Termination and demanded the return of its \$500,000.00 Deposit.

A Trial was necessary to determine whether a \$500,000.00 Deposit should be returned to Bluerise, or whether Harborview, was entitled to retain the Deposit. Following the Parties’ presentation of testimony and evidentiary support, the Court delivered its preliminary findings. (*See* 1T: 142-152). At that time, the Court indicated that it was inclined to enter an Order directing the return of \$250,000.00 to Bluerise and to allow the retention of \$250,000.00 by Harborview. However, the Parties were provided with the opportunity to simultaneously submit written closings. To that end, the issues now raised by Harborview in its Appeal, were already reviewed and considered by the Trial Judge.

Indeed, after the Trial Court reviewed the Parties Post Trial submissions, it properly entered an Order of Final Judgment, dated March 7, 2025, in favor of Bluerise and against Harborview, and adjudged that Bluerise was entitled to the return of its total Deposit in the amount of \$500,000.00. The Trial Court, nevertheless, further declined to award attorneys' fees and costs to Bluerise, notwithstanding that Section 15 of the Agreement provides that the "non-defaulting party *shall* be entitled to reasonable attorneys' fees . . . in addition to any court costs[.]" (emphasis supplied).

Now, on appeal, Appellant's brief through rhetoric and whataboutism, asks the Appellate Division to speculate on *why* HUD denied Bluerise's application for the assignment of the HAP Contract. Appellant posits its rhetorical questions notwithstanding that it was not able to prove any of its assumptions at Trial. The salient fact is that HUD denied Bluerise's application for the assignment of the HAP Contract. As a result, pursuant to the terms of the Agreement, a material loss was suffered. The Trial Court, therefore, correctly decided to grant Judgment in favor of Bluerise on the First Count of Bluerise's Counterclaim. The Trial Court, however, erred when it entered Judgment in favor of Harborview and against Bluerise on the Second Count of Bluerise's Counterclaim, denying Bluerise's request for an award of attorneys' fees and costs, pursuant to Section 15 of the Agreement.

## II. PROCEDURAL HISTORY<sup>1</sup>

This matter was initiated by way of a two count Complaint against Bluerise. (Pa001). The First Count demanded the return of the \$250,000.00 First Deposit (defined below) and the Second Count demanded the return of the \$250,000.00 Additional Deposit (defined below) as liquidated damages. (Pa003-004). Bluerise filed an Answer and Counterclaim seeking the return of the \$500,000.00 Deposit (defined below) and a second count seeking an award of fees and costs, pursuant to the terms of the Parties' Agreement. (Pa006). Discovery proceeded in the ordinary course.

A one-day bench Trial took place on December 5, 2024, before the Honorable Valter H. Must, J.S.C. (*See generally* 1T). Following the Parties' presentation of testimony and evidence, the Court delivered its preliminary findings. (1T: 142-152). The Parties were then provided with an opportunity to submit written summations to "point[] out maybe something [the Trial Judge] missed or where [the Trial Judge] got it wrong." (1T: 142:1-5). Written summations were simultaneously filed on January 24, 2025.

On March 4, 2025, the Court read its Opinion and Decision into the record. (*See generally* 2T). On March 7, 2025, the Court entered an Order of Final Judgment

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<sup>1</sup> A Transcript of the Trial, dated December 5, 2024, is designated **1T**. A Transcript of the Oral Statement of Reasons, dated March 4, 2025, is designated **2T**.

in favor of Bluerise and against Harborview, and adjudged that Bluerise was entitled to the return of its full Deposit in the amount of \$500,000.00 (the “March 7, 2025 Order”). (Pa017). The March 7, 2025 Order further entered Judgment in favor of Harborview and against Bluerise on the Second Count of Bluerise’s Counterclaim, thereby declining to award fees and costs to Bluerise. (*Id.*) On March 10, 2025, Harborview filed a Notice of Appeal. (Pa020).

On March 11, 2025, pursuant to the March 7, 2025 Order, Universal Title Agency (“Universal Title”) released the sum of \$500,000.00 from its escrow to Bluerise. On March 28, 2025, the Trial Court entered an Order denying Harborview’s Motion to Stay the Judgment pending appeal. (Pa023).

On April 11, 2025, Harborview filed a Motion to Stay in the Appellate Division. On April 25, 2025, the Appellate Division denied Harborview’s application for a Stay.

### **III. STATEMENT OF FACTS**

Harborview is the owner of an apartment complex, Harbor View Plaza Apartments, located in Tuckerton, New Jersey (the “Subject Property”). (1T: 12:6-11). The Subject Property is subject to a Section 8 Housing Assistance Payments Contract (the “HAP Contract”) with the United States Department of Housing and Urban Development. (1T: 13:8-9).

On February 23, 2022, Harborview and Bluerise, entered into a Property Purchase Agreement for the sale and purchase of the Subject Property for \$7,200,000.00 (the “Agreement”). (Pa024). The relevant provisions of the Agreement are set forth as follows:

Section 3: Deposit. Upon execution of this Agreement by all parties hereto, Purchaser shall deposit Two Hundred Fifty Thousand and no/100 Dollars (\$250,000.00), as good faith deposit, in an interested bearing escrow account with Universal Abstract and Title Agency (“Escrow Agent”) which, together with said interest (the “Deposit”), shall either be applied by Purchaser toward to payment of the Purchase Price, returned to the Purchaser or paid to Seller as provided in this Agreement. Upon the last day of the Inspection Period (as hereinafter defined) an additional deposit of Two Hundred Fifty Thousand and no/100 Dollars (\$250,000.00) shall be delivered to Escrow Agent by Purchaser, with additional deposit shall be combined with and considered together with and a part of the Deposit for all purposes hereunder and the initial Two Hundred Fifty Thousand and no/100 Dollars (\$250,000.00) shall be non refundable, except as provided in Section 13. Or Section 14. of this Agreement[.]

...

Section 4(b)(ix). Closing is expressly conditioned on HUD Approvals. If HUD Approvals are not obtained prior to the Closing Date (as hereinafter defined) either party that is not then in default under this Agreement may terminate this Agreement.

...

Section 6: Conditions Precedent to Closing. The Closing and the obligations of Purchaser under this Agreement are subject to the satisfaction of all the conditions set forth in

this Section 6. Both Seller and Purchaser agree to take all reasonable action to diligently complete all required processing on as timely a basis as possible. Both parties agree to use best efforts to meet the following schedule of conditions precedent, provided, however, that Seller and Purchaser agree to reasonable case-by-case extensions to this schedule in the event of delay caused by third parties, including without limitation, Purchaser's lenders or HUD. If this schedule of conditions precedent is not met, the Purchaser may (i) terminate this Agreement by giving written notice of such termination to the Seller, and thereafter, the Deposit shall be returned to the Purchaser, this Agreement shall terminate and the parties shall be relieved of all further obligations to each other; (ii) waive such condition(s) precedent and proceed to Closing; and/or (iii) exercise such other rights as are available under this Agreement, including without limitation those described in Section 14 hereof.

...

Section 13(a): "Material Loss. If, prior to Closing, any portion of the Project is damaged or destroyed to a "material" (as hereinafter defined) extent or in the event the Project becomes to subject of a notice of condemnation, Seller shall notify Purchaser in writing within (7) days and Purchaser may, at its option, terminate this Agreement by delivery of written notice to Seller within fourteen (14) days after written receipt of such notice."

(*Id.*) (emphasis supplied).

Upon execution of the Agreement, Bluerise paid the initial deposit in the amount of \$250,000.00 to the Escrow Agent. (1T: 91:5). On March 25, 2022, the Parties executed a First Amendment to Property Purchase and Agreement (the "First Amendment"). (Pa056). The First Amendment extended the Inspection Period to

5:00 p.m. on April 29, 2022. (*Id.*) After the expiration of the Inspection Period, Bluerise escrowed a second deposit in the amount of \$250,000.00 with the Escrow Agent. (1T: 23:9-24:1; 1T: 92:21-25).

After the expiration of the due diligence period, Bluerise continued to prepare its application for HUD approval of the Assignment of the HAP Contract. As Mr. Weinstein testified, the “process of putting an application together is pretty extensive. My understanding is that involves close to 30 different documents that need to be compiled, some of which are done by third parties[.]” (1T: 93:12-23).

On May 12, 2022, Mr. Beinhaker was provided with an update from Bluerise’s counsel, via email: HUD “has an extended list of “extra items” and some PCNA extras that is need – and so we are putting a “bigger package” together now.” (Da003). In June 2022, Bluerise submitted that “bigger package” to HUD for an Assignment of the HAP Contract. (1T: 94:21-23). Shortly thereafter, in June 2022, Benjamin Weinstein and his attorney, Scott Fireison, had a conference call with HUD representatives. (1T: 95:1-16). During that call, HUD pressed Mr. Weinstein to confirm that he “was the right purchaser for this property. They felt that the property needed somebody that had the financial wherewithal to be able to purchase it. And they wanted to confirm that I was the right fit for it.” (1T: 95:17-24). During that call, HUD also requested that Bluerise “send updated financials.” (1T: 97:2-6).

On or about July 19 2022, Bluerise submitted the additional requested materials to HUD for HUD's consideration. (Da014; 1T: 97:2-6).

On September 21, 2022, HUD sent Bluerise a letter rejecting Bluerise's Application to assign the HAP contract from Harborview to Bluerise. (Pa064). On September 23, 2022, Bluerise sent a letter to Seller terminating the Agreement and demanding the return of its \$500,000.00 Deposit. (Da002). The basis for Bluerise's termination of the Agreement was because "it was impossible to close on this property without HUD approval." (1T: 99:4-14). As Mr. Weinstein further explained: "You cannot purchase a property with a HAP contract without getting HUD approval. And that's across the board with any properties that have a HAP contract component to it." (1T: 99:18-20).

#### **IV. LEGAL ARGUMENT**

##### **A. Standard of Review**

The standard of review of judgments or orders entered after bench trials is well settled. The findings of the trial judge are binding on appeal if they are supported by "adequate, substantial and credible evidence." *Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am.*, 65 N.J. 474, 484 (1974). "[A]ppellate courts should 'not disturb the factual findings and legal conclusions of the trial judge' unless convinced that those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to

offend the interests of justice.” *Allstate Ins. Co. v. Northfield Med. Ctr., P.C.*, 228 N.J. 596, 619 (2017) quoting *Rova Farms Resort*, 65 N.J. at 484. “Deference to a trial court’s fact-findings is especially appropriate when the evidence is largely testimonial and involves questions of credibility.” *In re J.W.D.*, 149 N.J. 108, 117 (1997) (citations omitted). “That is so because an appellate court’s review of a cold record is no substitute for the trial court’s opportunity to hear and see the witnesses who testified on the stand.” *Balducci v. Cige*, 240 N.J. 574, 595 (2020) (citations omitted).

“Questions of law receive de novo review.” *Allstate Ins. Co.*, 228 N.J. at 619 citing *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995).

Under *R. 2:10-2*, “[a]ny error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result[.]” To that end, the degree of harm necessary before an error is reversible is that it must be “clearly capable of producing an unjust result.” *Id.*

**B. Judgment Should be Affirmed in Favor of Bluerise and Against Harborview on Count One of Bluerise’s Counterclaim Because the Trial Court Correctly Determined that Bluerise Was Entitled to the Return of its \$500,000.00 Deposit pursuant to Section 13 of the Agreement. (2T: 10:20 - 17:16)**

“The interpretation and construction of a contract is a matter of law for the trial court, subject to de novo review on appeal.” *Cumberland Farms, Inc. v. New*

*Jersey Dept. of Environmental Protection*, 447 N.J. Super. 423, 438 (App. Div. 2016) *citing Fastenberg v. Prudential Ins. Co. of Am.*, 309 N.J. Super. 415, 420, (App. Div. 1998).

By way of its Appeal, Harborview asks this Court to ignore the language in Section 3 of the Agreement, providing for an exception to the non-refundability of the initial deposit in the amount of \$250,000.00. The Agreement is clear and unambiguous. Section 3 of the Agreement provides, in pertinent part: “[the] additional deposit shall thereafter be combined with and considered together with and a part of the Deposit for all purposes hereunder and the initial Two Hundred Fifty Thousand and no/100 Dollars (\$250,000.00) shall be nonrefundable, *except as provided in Section 13 or Section 14 of this Agreement.*”<sup>2</sup> (Pa025).

Section 13(a) of the Agreement provides in pertinent part:

“Material Loss. If, prior to Closing, any portion of the Project is damaged or destroyed to a “material” (as hereinafter defined) extent or in the event the Project becomes to subject of a notice of condemnation, Seller shall notify Purchaser in writing within (7) days and Purchaser may, at its option, terminate this Agreement by delivery of written notice to Seller within fourteen (14) days after written receipt of such notice.”

(Pa037).

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<sup>2</sup> Bluerise concedes that Section 14 of the Sale Agreement is inapplicable here.

It is true that typically in a real estate contract, a material loss provision refers to the damage or destruction of physical property *e.g.*, a building. If the Parties here intended to say that, they could have. They could have said, “any portion of the ‘Buildings’,” which is defined in the Agreement as “a total of 72 apartment units in one building.” (Pa024; §1(a)). Or, they could have said, “any portion of the Real Property,” which is also defined in the Agreement. *Id.* They did not. Here, when discussing what is included in a “Material Loss,” the Parties chose to refer to the “Project.” Section 1 of the Agreement provides: “the term ‘Project’ as used herein means the aggregate of the Real Property,<sup>3</sup> Personal Property,<sup>4</sup> and the Intangible Property.” (Pa024-025).

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<sup>3</sup> Real Property is defined as: The real property more particularly described in Exhibit A attached hereto (the “Land”), together with all rights, easements, and interests appurtenant thereto including but not limited to, Seller’s interest in any streets or other public ways adjacent to said Land and any water or mineral rights owned by or leased to Seller (“Additional Interests”), and including all improvements located on the Land (“Improvements”), including but not limited to a total of 72 apartment units in one building (the “Buildings”), all other structures, parking areas, systems, and utilities associated with, and utilized by, Seller in the ownership and operation of the Buildings (the Land, Additional Interests, Buildings, and Improvements collectively referred to as the “Real Property[.]”). (Pa024; §1(a)).

<sup>4</sup> Personal Property is defined as: All furniture, furnishings, fixtures, equipment, tools, supplies and other tangible personal property presently affixed to and/or located at or on the Real Property, and which is used in connection with the management, operation or repair of the Real Property, or replacements of those items as permitted under this Agreement and Project Reserves (as hereinafter defined) (collectively “Personal Property[.]”). (Pa024; §1(a)).

Section 1(c) of the Agreement defines Intangible Property as: “The following intangibles (‘Intangible Property’): (1) any and all Leases (as hereinafter defined) and all commitments, contracts, options or other agreements with respect to the maintenance, repair or operation of the Real Property or Personal Property (collectively, ‘Contracts’), in effect on the Closing Date (as hereinafter defined[.])” (Pa024-025).

Putting the pieces together, pursuant to Section 13, when HUD denied Bluerise’s application for Assignment of the HAP Contract, a “Material Loss” was suffered – a contract with respect to operation of the Real Property was deemed unassignable. In other words, as defined by Section 13 the Agreement, HUD’s denial had the same effect as if the Buildings burned down. The basis for Bluerise’s termination of the Agreement was because “it was impossible to close on this property without HUD approval.” (1T: 99:4-14). Mr. Weinstein further explained: “You cannot purchase a property with a HAP contract without getting HUD approval. And that’s across the board with any properties that have a HAP contract component to it.” (1T: 99:18-20). Harborview never challenged either notion.

On September 21, 2022, HUD sent a letter to Bluerise denying Bluerise’s application for assignment of the HAP Contract from Harborview Plaza Associates to Bluerise. (Pa064). Harborview was immediately provided with a copy of that rejection letter along with Bluerise’s notice of termination of the Agreement.

(Da002). Once HUD rejected the application to assign the HAP Contract, by the terms of the Agreement, “Intangible Property,” which is part of the “Project,” was destroyed. The Trial Court correctly concluded that the HAP Contract is an agreement with respect to the operation of the real property and that “it is clear . . . that the assignment of the HAP agreement was an essential ingredient in this whole process.” (2T: 15:16-22). Here, there can be no question that the Trial Court properly gave the term “Project” the meaning that the Parties agreed to when they entered into the Agreement. (*See also* 1T: 143:14-16 (“Everything that is this agreement is within the four corners of this document which was P-2”)). The Court’s “task is to enforce the contract according to its terms, giving those terms ‘their plain and ordinary meaning.’” *GMAC Mortg., LLC v. Willoughby*, 230 N.J. 172, 186 (2017) (citations omitted). The Trial Court correctly found that “defendants [sic] did what they needed to under the contract. They made their application. They put up the money. It’s good faith to show that they’re not just winging it. . . He got turned down by HUD and that - -he had a right to terminate the agreement. In the way the Court now reads the contract, it allows him to retrieve both deposits. Even the non-refundable *because it became refundable because the HAP agreement was disapproved.*” (2T: 16:24-17:12). As a matter of law, the Trial Court correctly interpreted the Agreement. The Trial Court’s ruling should be affirmed.

Indeed, the Trial Court’s conclusion that the full \$500,000.00 deposit was to be returned, pursuant to Sections 3 and 13 of the Agreement, is supported by the other provisions of the Agreement. For example, Section 4(b)(ix) provides, “Closing is expressly conditioned on HUD Approvals.” (Pa027). And the relevant portion of Section 6 provides, “If this schedule of conditions precedent is not met, the Purchaser may (i) terminate this Agreement by giving written notice of such termination to the Seller, and thereafter, the Deposit shall be returned to the Purchaser[.]” (Pa0029). *See Graziano v. Grant*, 326 N.J. Super. 328, 342 (App. Div. 1999) (recognizing that courts do not “make better contracts for the parties, or supply terms that have not been agreed to”); *Willoughby*, 230 N.J. at 186 (citations omitted) (“Our task is to enforce the contract according to its terms, giving those terms ‘their plain and ordinary meaning.’”). The Trial Court correctly concluded that the agreed upon terms of the Agreement required the return of the \$500,000.00 Deposit to Bluerise.

On Appeal, Harborview asserts that the HAP Contract was “never intended to be subject to paragraph 13,” because the HAP Contract is addressed in other clauses within the Agreement. (Pb15). Harborview’s argument is, of course, inconsistent

with the plain words of the Agreement.<sup>5</sup> Had Harborview intended to exclude issues with the assignment of the HAP Contract from Section 13 it could have insisted on using the words “Building” or “Real Property” instead of “Project.” Or, it could have used the word “Project” but insisted on the inclusion of an exception for issues specifically addressed elsewhere in the Agreement. Or, it could have presented credible testimony regarding any discussion it had, prior to signing the Agreement, where it took the position that “Project” in Section 13 should not include the HAP Contract, notwithstanding the plain words of the Agreement. Harborview did none of the above. As a matter of law, the Trial Court correctly interpreted the unambiguous terms of the Agreement. The Trial Court’s Judgment in favor of Bluerise and against Harborview on Count I of Bluerise’s Counterclaim should be affirmed.

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<sup>5</sup> Similarly, Harborview’s suggestion that because Bluerise transmitted the Additional Deposit at the conclusion of the due diligence period is somehow demonstrative of Bluerise’s acknowledgment that the first deposit became completely non-refundable under any circumstances, is non-sensical and requires the Court to ignore the language of Sections 3, 4, 6, and 13 of the Agreement.

**C. Judgment Should be Affirmed in Favor of Bluerise and Against Harborview on Count One of Bluerise’s Counterclaim Because the Trial Court Properly Weighed the Evidence and the Witnesses’ Testimony and Determined that Bluerise Did Not Breach the Covenant of Good Faith and Fair Dealing (2T: 6:22 – 10:14)**

Appellate Courts “give deference to the trial court that heard the witnesses, sifted the competing evidence, and made reasoned conclusions.” *Rova Farms Resort*, 65 N.J. at 483-84. The findings of the trial judge are binding on appeal if they are supported by “adequate, substantial and credible evidence.” *Id.* “[A]ppellate courts should ‘not disturb the factual findings and legal conclusions of the trial judge’ unless convinced that those findings and conclusions were ‘so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.’” *Allstate Ins. Co.*, 228 N.J. at 619 *quoting Rova Farms Resort*, 65 N.J. at 484. “Deference to a trial court’s fact-findings is especially appropriate when the evidence is largely testimonial and involves questions of credibility.” *In re J.W.D.*, 149 N.J. at 117 (citations omitted).

Harborview posits that: *if* the Trial Court had admitted a hearsay statement – “Your Buyer pulled out weeks ago” - into evidence; and *if* the Trial Court accepted that statement as a fact; and *if* the Trial Court had interpreted other extrinsic evidence as Harborview does; *then* the Trial Court would have concluded that Bluerise acted in bad faith and, therefore, entered judgment in favor of Harborview and against

Bluerise. Not only is Harborview’s strung-together argument speculative at best, but all of the “ifs” were addressed, and properly dismissed, by the Trial Court.<sup>6</sup> The general rule as to the admission or exclusion of evidence is that “[c]onsiderable latitude is afforded a trial court in determining whether to admit evidence, and that determination will be reversed only if it constitutes an abuse of discretion.” *State v. Feaster*, 156 N.J. 1, 82 (1988) *cert. den.* 532 U.S. 932 (2001); see also *State v. Nantambu*, 221 N.J. 390, 402 (2015).

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<sup>6</sup> “The only evidence as to a non-timely application comes from hearsay testimony from this HUD employee. And I made a ruling at the time of the trial that you cannot use the emails from this HUD employee to prove that fact. . . . I ruled at that time that I could not use that email to support a conclusion that they in fact pulled out weeks ago. But I allowed it to the extent that Dore was aware of this to explain what he did thereafter. Thereafter, he contacted the other side. What’s going on? You know. . . . Mr. Weinstein, it should be noted, in his testimony, denied that directly. He said no. I — I never — we never pulled out. I don’t know why this Mr. Watson would say something like that. But even, tell you, even if I were to accept that as true, that somehow they had done something to lead this Mr. Watson to believe that they were no longer interested in the project, it would appear to the Court that the plaintiff’s actions were supported — supportive of the defendant reviving the application process by allowing them to give additional documents. They were talking about penning a letter to the — to HUD to show that we want this to go through. . . . So even if way back when, let’s say when they found out that they had abandoned it, they could have pulled the plug on the agreement at that time, but they didn’t. So in a sense, if that was a violation of the agreement at that time, they waived their rights to — to press their rights at that time. They helped them along in the process. And whatever that happened, eventually, the HAP assignment was denied. And at that point, once they got the denial, the defendant said we are terminating the agreement.” (2T: 7:7 - 8:18).

The Trial Court correctly excluded the hearsay statement contained within Plaintiff's Exhibit, P-11. (Pa061). P-11 is an email communication between Eugene Walton, a HUD employee, and Mr. Beinhaker – Harborview's agent. The Court sustained an objection after concluding that a *N.J.R.E.* 803(c)(8) exception did not apply to the statement "Your Buyer pulled out weeks ago." Judge Must explained: "Here's the problem I have with that. Comes up all the time. It's called included hearsay. Let's say this was a police report and the police writes down a narrative of what he was told by the other people there. There would be [an] automatic objection. You've got to bring in those witnesses because you can't cross-examine them. So I'm gonna [sic] sustain the objection as to the truth of the matter." (1T: 31:21-5).

The Trial Court's evidentiary ruling was correct and should not be disturbed. The email at issue here was an informal, benign communication, not an official record or investigative report. *See Villanueva v. Zimmer*, 431 N.J. Super. 301, 317–18 (App. Div. 2013) (holding that *N.J.R.E.* 803(c)(8) does not extend to evaluative or investigatory conclusions outside the scope of an official's duty and stressing the requirement of trustworthiness); *State v. Wilson*, 227 N.J. 534, 547–48 (2017) (rejecting admission of a map prepared under government contract where the proponent could not show it was made by a public official acting within the scope of an official duty, emphasizing that the exception is narrowly construed); accord *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167-68 (1988) (*F.R.E.* 803(8)(c)

requires factual findings or conclusions in public investigative reports be trustworthy and final to be an admissible exception to hearsay). The statement at issue – “Your buyer pulled out weeks ago” – is inherently untrustworthy because there is no way to identify the source of the information, let alone confirm any other details. *See N.J.R.E.* 803(c)(8).

Even if this Court concludes that the statement contained in P-11 should have been admitted into evidence, at best the decision to exclude it was *harmless* error. As the Trial Court noted, the evidence and testimony presented at Trial belies the statement: “Your buyer pulled out weeks ago.” Mr. Beinhaker testified that he confronted Mr. Weinstein, Mr. Weinstein’s attorney, and the broker, and that Mr. Beinhaker was told “I don’t know who told [Eugene] that as it is completely untrue.” (Da0012). Moreover, the evidence admitted at Trial demonstrates that Bluerise continued with the process after Mr. Walton send the email marked as P-11. Indeed, Mr. Weinstein testified that Bluerise provided additional Financial Information to HUD in July 2022. (Da014; 1T: 97:2-6). In late August 2022, Mr. Beinhaker and Mr. Fireison discussed penning a letter to HUD. (Pa062). And, Bluerise provided additional information to Mr. Walton on September 14, 2022. (Pa058 & Pa065). Two months after Buyer had been reported to have backed out, on September 21, 2022, HUD issued a letter rejecting the application to assign the HAP Contract. (Pa064). After receiving the rejection letter from HUD, Bluerise, only then, sent a

Notice of Termination. (Da003). As such, even if it is determined that the Trial Court should have admitted the statements contained in P-11 (Pa061) or even P-18 (Pa064), those statements were belied by the testimony presented at Trial.<sup>7</sup> As such, the Trial Court correctly concluded that the weight of the evidence was against Harborview’s position. Finally, the Trial Court did address Harborview’s interpretation of the statement “Your Buyer pulled out weeks ago,” and correctly reached a determination in favor of Bluerise and against Harborview. *See supra* footnote 5. (2T: 7:7 - 8:18). (*See also* 2T: 10:2-14).

After hearing to the Parties’ testimony, and reviewing the exhibits admitted into evidence, correctly concluded that “there wasn’t evidence[.]” (2T: 16:12-16). It cannot be stated that the Trial Court’s findings and conclusions were “so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.” *See Rova Farms Resort*, 65 N.J. at 484. As such, the Trial Court’s exclusion of the statements proffered by Harborview was, at best, harmless error. The Trial Court’s decision to

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<sup>7</sup> “But even, tell you, even if I were to accept that 4 as true, that somehow they had done something to lead this Mr. Watson to believe that they were no longer interested in the project, it would appear to the Court that the plaintiff’s actions were supported — supportive of the defendant reviving the application process by allowing them to give additional documents. They were talking about penning a letter to the — to HUD to show that we want this to go through.” (2T8:4-12).

enter Judgment in favor of Bluerise and against Harborview, and to dismiss Harborview’s Complaint against Bluerise, should be affirmed.

**D. The Court Erred When it Declined to Award Attorneys’ Fees and Costs to Bluerise (2T: 21:22 – 22:9)**

The Trial Court erred when it declined to award attorneys’ fees and costs to Bluerise. Section 15 of the Agreement provides in pertinent part:

**Attorneys’ Fees.** In the event that any party hereto brings an action or proceeding for a declaration of the rights of the parties under this Agreement . . . the non defaulting party shall be entitled to reasonable attorneys’ fees as may be allowed by the Court at the time of settlement, at trial or any appeal or petition to review therefrom, in addition to court costs incurred and in addition to any other damages or relief awarded.

(Pa038).

Consistent with Section 15 of the Agreement, as the non-defaulting party, Bluerise “shall” be entitled to its reasonable attorneys’ fees as costs. The plain language of Section 15 mandates an award of attorneys’ fees and costs. *See Harvey v. Essex Cy. Freeholder Bd.*, 30 N.J. 381, 391 (1959) (“[T]he general rule of construction is that “may” means permissive and “shall” means mandatory.”).

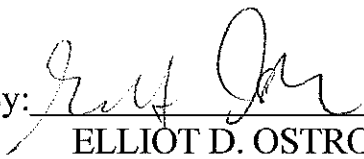
In declining to award fees and costs, the Trial Court departed from the plain language in Section 15 of the Agreement. Indeed, the Court mistakenly determined that: “Within the discretion of the Court, I could have allowed attorney’s fees. I don’t think it’s mandatory under the law.” (2T: 22:1-4). The language of Section

15 is non-discretionary and dictates that the non defaulting party *shall* be entitled to its reasonable attorneys' fees and costs. The Trial Court erred when it failed to enforce Section 15 of the Agreement and award Bluerise its reasonable attorneys' fees and costs. As such, the Trial Court's decision on the issue of an award of attorneys' fees and costs should be reversed and remanded for further proceedings.

**V. CONCLUSION**

For the reasons set forth above, it is respectfully submitted that the Trial Court's Judgment in favor of Bluerise and against Harborview on Count I of Bluerise's Counterclaim should be affirmed. It is further respectfully submitted that the Trial Court's ruling on Count II of Bluerise's Counterclaim should be reversed and the matter should be remanded to the Trial Court for a determination of an award of reasonable attorneys' fees and costs to Bluerise.

**EPSTEIN OSTROVE, LLC**

By:   
\_\_\_\_\_  
ELLIOT D. OSTROVE  
A Member of the Firm

Dated: September 30, 2025

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**HARBORVIEW PLAZA ASSOCIATES LLC**

**Plaintiff- Appellant,**

vs.

**BLUERISE GROUP LLC AND UNIVERSAL  
TITLE AGENCY**

**Defendants- Respondents.**

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1976-24  
CIVIL ACTION**

**ON APPEAL FROM**

**LAW DIVISION: OCEAN COUNTY**

**DOCKET NO. OCN-L-2409-22**

**SAT BELOW: HON. VALTER H. MUST,  
J.S.C.**

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**REPLY BRIEF OF PLAINTIFF-APPELLANT IN SUPPORT OF APPEAL**

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**PRELIMINARY STATEMENT**

For some reason the Defendant advises the Court on page 1 line 16 of their Reply Brief that Dore Beinhaker (the managing member of the Plaintiff) has been practicing law since 1978. During those 47 years he has never seen a judgment that is so manifestly unsupported by or inconsistent with competent, relevant and reasonably credible evidence that it not only offends the interests of justice but the denial by the Trial Judge of a stay of the judgment pending the appeal further denied the Plaintiff of basic due process rights and was unjust.

We respectfully submit that this matter involves basically two questions.

1. The first is, was the first \$250,000.00 deposit refundable?
2. The second is why did the Federal government deny the Defendant's application to assume the Section 8 HAP contract?

When you examine the specific and undisputed facts and apply basic logic, fairness and justice it leads you to only two correct answers.

First and foremost, is that the initial \$250,000.00 deposit was not refundable, and the second is that the Defendant solely and intentionally caused the denial of the assignment of the Section 8 HAP contract by the Federal government.

**LEGAL ARGUMENT**

**I. THE FIRST \$250,000.00 DEPOSIT WAS NOT REFUNDABLE(Pa 5, Pa 10, Pa 24, Pa 27, Pa 37, Pa 48, Pa 53, Pa 55, Pa 63)**

We respectfully submit that regarding the first \$250,000.00 being nonrefundable, the undisputed, relevant, adequate, substantial, consistent, credible and supported facts are as follows:

1. The letter of intent prepared by the Buyer expressly refers to the deposit being nonrefundable. (Pa55 See Paragraph #3)

2. The Contract between the Parties, drawn in accordance with the Letter of Intent, both of which were prepared by the Buyer, expressively state that the deposit is nonrefundable. (Pa24 See paragraph #3)

3. An email, (P5), sent after the “extended” period of due diligence (which was requested by the Defendant) from Dore Beinhaker (Seller) to Scott Fireson (Buyer) confirms that the deposit was non-refundable. (Pa63)

4. At the conclusion of the due diligence period, the Defendant in fact tendered the second deposit (See Page 2 line 4 and page 8 line 2 of Defendant’s Reply Brief) and Harborview (the Plaintiff) confirmed the first deposit was now non-refundable.

The Defendant argued for the first time at trial, in order to rebut the obvious conclusion that the first \$250,000.00 was nonrefundable by making the absurd statement that the failure to satisfy the express written contractual contingency to

close title by not obtaining an assignment of the Section 8 HAP contract is the same as the building being destroyed by fire. (Page 13 line 11 of Defendant's Reply Brief). We respectfully submit that that finding and that conclusion are so manifestly unsupported by and inconsistent with the competent, relevant and reasonably credible evidence that it offends the interests of justice. Ironically, a fire is an example of just the type of event paragraph #13 (See below) of the Contract between the Parties was meant to address. There is no evidence whatsoever of record that the \$100,000.00 threshold was reached. (Pa37)

The Defendant argues the property is prohibited from being transferred without an assignment of the Section 8 HAP contract. That is not true and is unsupported by any evidence. In fact, HAP contracts have an express term limit and the purchase contract between the Parties had a provision to permit the Defendant to apply for an extension of the Section 8 HAP contract. (Pa27) (See page 4 of Contract). The obtaining of an assignment became a condition precedent (requested by the Defendant) as part of the Contract (not as a legal requirement of title). The HAP contract is not a recordable document and is not a lien on the property. In fact, since the Trial in this case, the Superior Court of New Jersey in the matter of Citizens Bank v Harborview, Docket Number SWF-012002-24F, has ordered transfer of title to the subject property and the Section 8 HAP contract has not been assigned.

Also, we respectfully remind the Court of the following facts.

1. The Section 8 HAP contract only applies to at most 50 of the 72 units.
2. A fire in the building would not void the Section 8 HAP contract. As is typical of all commercial insurance policies, any rent that is lost because of a fire would be insured and paid to the insured (title owner) under the insurance policy covering the property.
3. Paragraphs #13 and #14 of the Contract sets forth conditions under which the initial non-refundable \$250,000.00 deposit would no longer be non-refundable. Paragraph #13 expressly reads:

**#13 Damage or Destruction.** A) Material Loss. If, prior to Closing, any portion of the Project is damaged or destroyed to a “material” (as hereinafter defined) extent or in the event the project becomes the subject of any notice of condemnation, Seller shall notify Purchaser in writing within seven (7) days and Purchaser may, at its option, terminate this Agreement by delivery of written notice of such termination to Seller within fourteen (14) days after written receipt of such notice. If damage or destruction occurs within fourteen (14) days prior to closing, the closing shall be extended to a date fourteen (14) days after such occurrence and Purchaser may, at its option, terminate this Agreement by delivery of written notice of such termination to seller during such extension period and, notwithstanding the terms of this Agreement to the contrary, the Deposit shall be returned to the Purchaser. Upon receipt of such notice of termination each party shall be relieved of further obligations here under. If purchasers elect not to terminate, each party shall have the exclusive right to settle the loss and to receive all proceeds of the insurance covering the Improvements or Personal Property so damaged or destroyed, or to receive the benefits of the condemnation settlement, and receive at Closing a credit equal to the amount of any deductibles

provided under applicable insurance policies. The purpose of this Paragraph 13a “material” shall mean damage or destructions of the Project for which the aggregate estimated cost of repair, restoration and rehabilitation (including all indirect and incidental costs and expenses) is in excess of One Hundred Thousand and no/100 dollars (\$100,000.00). (emphasis added)

b) Other Damage or Destruction. If, prior to closing, any portion of the Project is damaged or destroyed but such damage or destruction is not “material.” Purchaser may not terminate this Agreement on account thereof, but upon Closing, Purchaser shall have the exclusive right to settle the loss and to receive all the proceeds from the applicable insurance policies covering the Improvements or Personal Property so damaged or destroyed and receive at Closing a credit equal to the amount of any deductibles provided under applicable insurance policies. (Pa37)

Interestingly, (and for obvious reasons) the Defendant neglects to set forth either the words of Paragraph #13 that we have underlined or any part of #13b in its Reply Brief. (See Page 8 of Defendant’s Reply Brief)

4. The Buyer (Defendant) failed to provide any of the required notices referred to in paragraph #13.

5. The Defendant expressly pled in their Counterclaim (Pa10)

“The agreement, and Bluerise’s obligation to purchase the Property, were wholly contingent on Bluerise obtaining approval from the department of Housing and Urban Development (HUD) to assume the existing rent assistance contract (HAP)”.

Nowhere and at no time did the Defendant allege any issues or allegations regarding paragraph #13 of the contract.

If a failure to obtain an assignment to the Section 8 HAP contract was to make the deposit refundable under paragraph #13, why doesn't the Contract, that was prepared by Defendant's counsel, specifically refer to the Section 8 HAP contract in paragraph #13? Why did the Defendant not respond to the email from Dore Beinhaker to Scott Fireson confirming the deposit is non-refundable with a contradictory reply? The logical and fair answers are that the Section 8 HAP contract had nothing to do with paragraph #13.

Furthermore, where is it suggested, yet alone proven, that "the cost of repair, restoration and rehabilitation (including all indirect and incidental costs and expenses) is in excess of One Hundred Thousand and no/100 dollars (\$100,000.00)."? (emphasis added)

In fact, the use of the words "repair, restoration and rehabilitation" that the Defendant used in preparing the Contract demonstrate the logic of not applying the Section 8 HAP contract to paragraph #13. There was nothing to repair, restore or rehabilitate regarding the Section 8 HAP contract and of course the cost of repair, restoration and rehabilitation (including all indirect and incidental costs and expenses) was not in excess of One Hundred Thousand and no/100 dollars (\$100,000.00).

Ironically, if the failure of the contingency to close title to obtain an assignment of the Section 8 HAP contract is the same as the building being destroyed by fire, it is the Defendant who started the fire. Therefore, they should be estopped from raising said issue. Furthermore, if the Defendant really believed that the denial of the assignment of the Section 8 HAP contract fell under paragraph #13 then why did they not assert or plead that provision when they requested the return of the non-refundable deposit or file their counterclaim?

The Plaintiff is not asking the Court to ignore the language in Section #3 of the Contract as stated by the Defendant in its Reply Brief on page 11 but rather is asking the Court to enforce Section #3, which clearly states that the \$250,000.00 was nonrefundable.

To follow the Trial Court's or now the Defendant's argument that failure to assume the Section 8 HAP contract falls under paragraph #13 might be analogous to saying that if the Contract was subject to the assumption of an existing mortgage on the property and the bank (mortgage holder) refused to agree to the assumption of the mortgage then paragraph #13 would apply. Paragraph #13 clearly acts as a risk of loss clause under a typical real estate contract. Note there is no other risk of lost clause in the Contract. That is why it states:

“If purchasers elect not to terminate, each party shall have the exclusive right to settle the loss and to receive all proceeds of the insurance covering the Improvements or Personal Property so damaged or

destroyed, or to receive the benefits of the condemnation settlement, and receive at Closing a credit equal to the amount of any deductibles provided under applicable insurance policies” and cost of repair, restoration and rehabilitation (including all indirect and incidental costs and state “the purpose of this Paragraph 13a ‘material” shall mean damage or destructions of the Project for which the aggregate estimated expenses) is in excess of One Hundred Thousand and no/100 dollars (\$100,000.00)” (emphasis added) (Pa37)

The findings and legal conclusions of the Trial Judge were so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence that they offend the interests of justice.

The Defendant is further attempting to have the Court apply Paragraph #13 by including the assignment of the Section 8 HAP Contract in the definition of the term “Project” as an intangible asset that the Parties were buying and selling. But in direct contradiction to the Contract, not only is the Section 8 HAP Contract not referred to in the paragraphs of the Contract where the intangible assets are referred to (Pa24) but are not referred to in the Bill of Sale prepared by Defendant (Pa48) that was attached to the Contract. In fact, the Section 8 HAP Contract is dealt separately by an assignment pursuant to a separate Exhibit G that also was prepared by the Defendant and attached to the Contract (Pa53).

We respectfully submit that there are no facts (let alone, relevant, adequate, substantial, consistent, or credible ones) in evidence or otherwise, or logical argument that support the conclusion that the first \$250,000.00 was refundable. In

fact, all the facts, (which are undisputed, relevant, adequate, substantial, consistent, credible and supported) as well as logic and elements of basic fairness, require a finding that the first \$250,000.00 was non-refundable.

II. **THE FEDERAL GOVERNMENT'S DENIAL OF THE DEFENDANTS LATE FILED APPLICATION TO ASSUME THE SECTION 8 HAP CONTRACT WAS CAUSED DIRECTLY AND INTENTIONALLY BY THE ACTIONS OR INACTIONS OF THE DEFENDANT (Da 4, Pa8, Pa 27, Pa 58, Pa 59, Pa 61, Pa 62, Pa 64, 1T102:9-13)**

The Contract between the Parties was signed in February 2022. The application to achieve an assignment of the Section 8 HAP contract was not started until June 2022. (hardly “promptly”) The Defendant submits on page 8 of its Reply Brief that “after the expiration of the due diligence period” (which was on April 29, 2022) they “continued” to prepare their application. But all communications from HUD impart that the application was not made until mid-June 2022. We surmise that by “after”, the Defendant meant “months”. (hardly “promptly”) The Defendant tells us (See Page 8 line 7 of their Reply Brief) that their alleged application involved 30 different documents and the involvement of third parties, yet they fail to show us even transmittal emails let alone any part of the application or the documents. Nor do they tell us who the third parties were or call any third parties to testify.

Regarding why the Federal government denied the Defendant’s untimely application to assume the Section 8 HAP contract, we respectfully remind the Court

of the following undisputed, relevant, adequate, substantial, consistent, credible and supported facts:

1. The letter from the Federal government to the Defendant expressly stated: “you” (meaning the Defendant) “expressed concerns about owning the property....” (Da4).

The denial was based on the Defendant’s positions not HUD’s. Why would they express any concerns to HUD?

2. The email dated September 12, 2022, from the Federal government expressly stated “If the potential buyer is still interested in this transaction, the Buyer promised me updated documents reflecting the economic outlook and other things” (Pa65).

The Defendant gave no explanation for this email which is dated seven months after the Contract.

3. Even though the Contract was not contingent upon financing, the Defendant sent an email to the Federal government on July 19, 2022, (five months after the Contract was signed) advising them that the Defendant’s investors will not participate in the transaction (Pa59).

Why did they tell HUD this?

4. On August 17, 2022, (six months after the Contract was signed) the Federal government emailed the Plaintiff stating, “**your Buyer pulled out weeks ago**” (Pa61)

Again, no explanation by the Defendant.

5. The email dated September 14, 2022, (seven months after the Contract was signed) from the Defendant to the Federal government expressly stated “I understand why you do not want to write us a denial.... (Pa58)

Why was this sent?

6. The email dated September 16, 2022, (P58) (seven months after the Contract was signed) from the Federal government to Defendant expressly stated, “So you are again interested in Buying Harborview Plaza?”

No explanation was given by Defendant. Nor did they produce a response to HUD’s question.

7. The Defendant refused to allow the Plaintiff to communicate with the Federal government during the application process. Why?

8. Paragraph 4b of the Contract which is dated February 2022 states:

HUD Approval. Purchaser shall promptly (Emphasis added) apply to HUD for consent to assume the HAP Contract, and may apply for approval of renewal, modification, conversion and/or extension of the HAP Contract (HUD Approval..... vi) Purchaser agrees to promptly deliver to HUD all documents...” (Emphasis added) (Pa27)

9. Weinstein (Buyer/Defendant) testified that he was aware that he was required to act promptly in seeking renewal of the HAP contract, (1T102:9-13).

10. The Defendant did not even file with HUD until four months after signing the Contract. Why?

11. Emails dated September 14 and 16, 2022 (P8 in evidence) (Pa58) between HUD and the Defendant (Bluerise) indicate that they had dropped their interest in buying Harborview and that they wanted HUD to issue a denial.

12. As stated above, an email dated August 17, 2022 (Pa61) from HUD to the Plaintiff advised the Plaintiff that the Defendant had withdrawn their application. Upon receipt of this email, Plaintiff requested permission from the Defendant (Bluerise) to contact HUD, but they refused permission (Pa62). Why? In fact, the Plaintiff made several additional requests to the Defendant (Bluerise), and they continued to refuse permission.

Why?

13. P18 in evidence (Pa64) is a September 21, 2022, letter to Bluerise from HUD acknowledging that they had not filed an application until June 15, 2022, and stating that the Defendant had

“Expressed concerns about owning this property in light of the growing uncertainty of the macroeconomic environment in terms of higher inflation, interest rates, along with difficulties filling vacant units with good standing tenant”.

If the Defendant wanted the assignment to happen, why did THEY express any concerns to HUD at all? It should be noted since the Contract was not contingent upon financing there is no relevancy to the issue of “interest rates”. Since the Section 8 HAP Units were never vacant and a waiting list always existed there is also no relevancy of a non-issue of the “difficulties filing vacant units”.

14. The Defendant, who already was an accepted party to other HAP contracts, refused to appeal the decision of the Federal government. Why?

15. The Defendant, who already was an accepted party to other HAP contracts, refused to allow the Plaintiff to appeal the decision of the Federal government.

Why?

16. The letter from HUD to the Defendant is dated only five days after the September 16, 2022, email from the Federal government to the Defendant that expressly stated, “So you are again interested in Buying Harborview Plaza?”

We respectfully submit that the Defendant apparently was not “again” interested in buying Harborview Plaza and were only interested in being denied. Plaintiff clearly met its burden of proof on this issue at trial which is by a preponderance of evidence.

The Defendant argues (See page 2 line 7 of their Reply Brief) that “without HUD’s approval there is no way to move forward”. While we are not sure how this

is relevant to the application of paragraph #13, it is factually not true. They could have purchased the membership interest in the LLC (the Plaintiff), or they could have converted the HAP units to market or individual Section 8 units (which when the HAP contract's term ends would have to be done anyway). They could have appealed.

While all the evidence demonstrates that the Defendant's intentional actions and/or inactions were the reason for the denial, there are no facts, in evidence or otherwise, that support the conclusion that the Defendant's express actions were not the reason for the denial. We respectfully remind the Court that the Defendant failed to call Scott Fireson, a person who was intimately involved in the application process, to testify at trial.

We respectfully suggest that all the facts require a finding that the denial of the HAP assignment was intentionally caused by the Defendant and the Defendant breached Paragraph 4b of the Contract by failing to promptly apply to HUD for consent to assume the HAP Contract, and promptly delivering to HUD all documents..." (Pa27)

In fact, according to HUD the Defendant withdrew their application. We surmise that the Defendant may suggest that our arguments are based on rhetorical questions. Our response is – with the rhetorical question- what are their answers?

Regarding the awarding of legal fees, the Plaintiff was not the defaulting party. The default occurred when the Defendant specifically failed to promptly seek an assignment of the Section 8 HAP contract and intentionally acted to receive a denial.

Ironically, since the Defendant was in default it did not have the right to terminate the Contract under Paragraph 4(b)(ix) of the Contract that the Defendant cites in its Reply Brief on page 6. (Pa 27)

### **III. DEFENDANT IS NOT ENTITLED TO LEGAL FEES**

Plaintiff strongly believes that this Court will overturn the trial court's decision but either way there is no basis to award legal fees. The relevant contract provides for attorney's fees for an action arising out of this agreement. (Pa 38) Defendant has not alleged that Plaintiff has breached the agreement, they are merely seeking a release of a deposit held by a third party. There is no basis to award Defendant legal fees.

### **STANDARD OF REVIEW**

We respectfully agree with the Defendant, when they submit in their Reply Brief, that the standard of review of a judgment after a bench trial is well settled and that the finding of the trial judge is binding on appeal **IF** they are supported by "adequate, substantial and credible evidence". Furthermore, we agree that appellate courts should not disturb the factual findings and legal conclusions of the trial judge

**UNLESS** convinced that those findings and conclusions were so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence to offend the interests of justice.

In applying that standard we respectfully submit that the following conclusion must be reached.

**CONCLUSION**

For the reasons set forth above and those put forth in our original Brief as supported by our Brief's appendix, it is respectfully submitted that findings and conclusions were so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence to offend the interests of justice that the Trial Court's Judgment be reversed in favor of the Plaintiff and the Defendant's Counterclaim be dismissed and the matter be remanded to address the awarding of legal fees to the Plaintiff.

Beinhaker & Beinhaker, LLC

By *Dore R. Beinhaker*

Dore R. Beinhaker

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HARBORVIEW PLAZA ASSOCIATES, LLC	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
Plaintiff-Appellant,	:	DOCKET No. A-001976-24T1
	:	
v.	:	Civil Action
	:	
BLUERISE GROUP LLC AND UNIVERSAL TITLE AGENCY,	:	On Appeal from:
	:	Superior Court of New Jersey
Defendants-Respondents.	:	Law Division: Ocean County
	:	Docket OCN-L-2409-22
	:	
	:	Sat Below.: Hon. Valter Must, J.S.C.

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**DEFENDANT’S/RESPONDENT’S/CROSS-APPELLANT’S, BLUERISE  
GROUP, LLC, REPLY BRIEF**

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Notice of Trial, dated October 1, 2024	Dra001
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Bluerise's Letter to Court requesting an adjournment of Trial to allow for the opportunity to file a Motion for Summary Judgment, dated October 11, 2024	Dra004
Docket Entry Denying Bluerise's Request for an Adjournment, dated October 15, 2024	Dra005

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## I. PRELIMINARY STATEMENT

Having failed to convince the Trial Court to interpret the Parties' Agreement and to view the evidence exactly as Appellant, Harborview Plaza Associates, LLC ("Harborview"), interpreted and viewed it, Harborview now tries to convince the Appellate Court, through rhetoric and supposition, that the Trial Court somehow got it wrong when it Ordered the return of a \$500,000.00 Deposit to Bluerise Group LLC ("Bluerise"). It didn't. As a matter of law, the Trial Court correctly interpreted the Agreement and its judgment should be affirmed. Further, the Trial Court did not abuse its discretion when it determined, after hearing the witnesses' testimony and weighing the evidence, that Bluerise did not violate the covenant of good faith and fair dealing. For the reasons set forth below, as well as for the reasons set forth in Bluerise's initial brief, it is respectfully submitted that the Trial Court's Judgment in favor of Bluerise should be affirmed and that the Trial Court's denial of Bluerise's application for fees and costs, in light of the granting of Judgment in Bluerise's favor, should be reversed and remanded for further proceedings.

## II. PROCEDURAL HISTORY

This matter was initiated by way of a two count Complaint against Bluerise. (Pa001). The First Count demanded the return of the \$250,000.00 First Deposit<sup>1</sup> and

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<sup>1</sup> Terms defined in Defendant's/Respondent's/Cross-Appellant's, Bluerise Group, LLC, Brief are incorporated herein by reference.

the Second Count demanded the return of the \$250,000.00 Additional Deposit as liquidated damages. (Pa003-004). Bluerise filed an Answer, Affirmative Defenses, and Counterclaim seeking the return of the \$500,000.00 Deposit and a second count seeking an award of fees and costs, pursuant to the terms of the Parties' Agreement. (Pa006). Discovery proceeded in the ordinary course.

On October 1, 2024, a Notice of Trial was issued for a December 2, 2024 Trial Date. (Dra001). On October 10, 2024, Epstein Ostrove LLC filed a Substitution of Counsel on behalf of Bluerise. (Dra002). On October 11, 2024, counsel on behalf of Bluerise requested an adjournment of the Trial Date so that Defendant would have an opportunity to file a Motion for Summary Judgment by or before November 22, 2024. (Dra004). On October 15, 2024, the request for an adjournment was denied. (Dra005).

A one-day bench Trial took place on December 5, 2024, before the Honorable Valter H. Must, J.S.C. (*See generally* 1T).

On March 4, 2025, the Court read its Opinion and Decision into the record. (*See generally* 2T). On March 7, 2025, the Court entered an Order of Final Judgment in favor of Bluerise and against Harborview, and adjudged that Bluerise was entitled to the return of its full Deposit in the amount of \$500,000.00 (the "March 7, 2025 Order"). (Pa017). The March 7, 2025 Order further entered Judgment in favor of Harborview and against Bluerise on the Second Count of Bluerise's Counterclaim,

thereby declining to award fees and costs to Bluerise. (*Id.*) On March 10, 2025, Harborview filed a Notice of Appeal. (Pa020).

On March 11, 2025, pursuant to the March 7, 2025 Order, Universal Title Agency (“Universal Title”) released the sum of \$500,000.00 from its escrow to Bluerise.

### III. STATEMENT OF FACTS

Bluerise incorporates the Statement of Facts submitted in its memorandum of law in support of its cross-appeal, as if more fully set forth herein.

### IV. LEGAL ARGUMENT

#### A. **Judgment Should be Affirmed in Favor of Bluerise and Against Harborview on Count One of Bluerise’s Counterclaim Because the Trial Court Correctly Determined that Bluerise Was Entitled to the Return of the Entirety of its \$500,000.00 Deposit as a Matter of Law (2T: 10:20 - 17:16).**

Harborview’s incessant insistence that ‘nonrefundable means nonrefundable’ does not change the plain language of the Agreement carving out two exceptions to the non-refundability of the Deposit. Section 3, Deposit, of the Agreement provides, in pertinent part:

“[the] additional deposit shall thereafter be combined with and considered together with and a part of the Deposit for all purposes hereunder and the initial Two Hundred Fifty Thousand and no/100 Dollars (\$250,000.00) shall be nonrefundable, *except as provided in Section 13 or Section 14 of this Agreement.*”

(Pa025).

“So, it’s non-refundable, except.” (2T: 11:14). If Harborview intended for the Initial Deposit to be non-refundable under any circumstance, whatsoever, Harborview could have drafted that. It did not. *See GMAC Mortg., LLC v. Willoughby*, 230 N.J. 172, 186 (2017) (“The terms of the contract must be given their plain and ordinary meaning.”)

Section 13(a) of the Agreement provides in pertinent part:

“Material Loss. If, prior to Closing, any portion of the Project is damaged or destroyed to a “material” (as hereinafter defined) extent or in the event the Project becomes to subject of a notice of condemnation, Seller shall notify Purchaser in writing within (7) days and Purchaser may, at its option, terminate this Agreement by delivery of written notice to Seller within fourteen (14) days after written receipt of such notice.”

(Pa037).

When discussing the consequences of a Material Loss, the Agreement provides that the remedy described is for any “Material Loss” suffered by “any portion of the Project.” “Project” includes Real Property, Personal Property, and Intangible Property. Intangible Property includes the necessary contracts. As submitted via documentary evidence and testimony at Trial, once HUD denied Bluerise’s application for an Assignment of the HAP Contract – a necessary condition precedent to Closing – “Intangible Property” was destroyed. *See Graziano v. Grant*, 326 N.J. Super. 328, 342 (App. Div. 1999) (recognizing that courts do not

“make better contracts for the parties, or supply terms that have not been agreed to”); *Willoughby*, 230 N.J. at 186 (citations omitted) (“Our task is to enforce the contract according to its terms, giving those terms ‘their plain and ordinary meaning.’”).

Had Harborview intended to exclude the assignment of the HAP Contract from Section 13 it could have insisted on using the words “Building” or “Real Property” instead of using the word “Project.” Or, it could have presented credible testimony regarding any discussion it had, prior to signing the Agreement, where it took the position that “Project” in Section 13 should exclude the HAP Contract, notwithstanding the plain words of the Agreement. Harborview did none of those things. As a matter of law, the Trial Court correctly interpreted the unambiguous terms of the Agreement.

The Trial Court correctly found that “defendants [sic] did what they needed to under the contract. They made their application. They put up the money. It’s good faith to show that they’re not just winging it. . . He got turned down by HUD and that - -he had a right to terminate the agreement. In the way the Court now reads the contract, it allows him to retrieve both deposits. Even the non-refundable *because it became refundable because the HAP agreement was disapproved.*” (2T: 16:24-17:12). *Willoughby*, 230 at 186 (The Court’s “task is to enforce the contract according to its terms, giving those terms ‘their plain and ordinary meaning.’”)

(citations omitted). As a matter of law, the Trial Court correctly interpreted the Agreement.

Harborview's assertions in its Reply Brief in Further Support of Appeal are easily dismissed. First, Harborview points to a letter of intent as 'evidence' that the "Buyer expressly refers to the deposit being nonrefundable." (Prb2). Notwithstanding the fact that Harborview is seeking to use extrinsic evidence when the terms of the Agreement are unambiguous, the introduction of the letter of intent is misleading. The letter of intent that Harborview relies on is a document executed by a *different* potential buyer, GM Equities. (Pa55). It has no bearing, whatsoever, on the Agreement between Harborview and *Bluerise*. Second, Harborview's suggestion that because Mr. Firieson didn't raise the two contractual exceptions to the non-refundability of the Initial Deposit in an April 2022 email, is nothing more than a red herring. (Pbr2). At that time, Bluerise was in the process of preparing its application to HUD for the HAP Assignment and had no way of knowing that HUD would ultimately deny its application for the HAP Assignment for another six months. (Da003). Finally, Harborview's assertion that somehow the transfer of title could have been effectuated without the HAP Assignment is negated by the express condition precedent of the Contract. (Pa035). Indeed, Section 4(b)(ix) provides in relevant part, "Closing is expressly conditioned on HUD Approvals." (*Id.*).

The Trial Court got it right as a matter of law. Its Judgment in favor of Bluerise and against Harborview on Count I of Bluerise's Counterclaim should be affirmed.

**B. Judgment Should be Affirmed in Favor of Bluerise and Against Harborview on Count One of Bluerise's Counterclaim Because the Trial Court Did Not Abuse its Discretion when it Properly Determined that Bluerise Did Not Breach the Covenant of Good Faith and Fair Dealing (2T: 6:22 – 10:14).**

The Trial Court properly found that Harborview failed to demonstrate, by a preponderance of the evidence, that Bluerise's actions somehow caused HUD to deny Bluerise's application for assignment of the HAP Contract. (2T: 6:22 – 10:14). Notwithstanding Harborview's game of twenty questions, the inescapable conclusion is that the Trial Court did not abuse its discretion when it declined to find that Bluerise acted in bad faith.

After hearing the Parties' testimony, and reviewing the exhibits admitted into evidence, the Trial Court rejected Plaintiff's assertion that Bluerise somehow caused HUD to deny Bluerise's application for an Assignment of the HAP Contract. In its Decision, the Court stated:

I understand the difficulty that plaintiff had in trying to prove that the defendant was [sic] somehow did not act in good faith. That somehow, the market changed or some of his -- some of his investors bowed out and they're simply using this as an excuse to get their money back. That they really didn't act in good faith. **I can't find that. That's speculative. There wasn't evidence of that.** (2T:16:8-16) (emphasis supplied).

\* \* \* \*

[T]he Court is — doesn't feel that it can make a reasonable inference that that happened. It's merely a suspicion.

(2T:16:21-23).

The Trial Court's findings and conclusions are not “so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.” *See Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am.*, 65 N.J. 474, 484 (1974). The Trial Judge listened to the witnesses' testimony, assessed the witnesses' credibility, and thoughtfully considered evidentiary issues before issuing his final decision. Indeed, “[d]eference to a trial court's fact-findings is especially appropriate when the evidence is largely testimonial and involves questions of credibility.” *In re J.W.D.*, 149 N.J. 108, 117 (1997) (citations omitted). “That is so because an appellate court's review of a cold record is no substitute for the trial court's opportunity to hear and see the witnesses who testified on the stand.” *Balducci v. Cige*, 240 N.J. 574, 595 (2020) (citations omitted).

Again, all of the insinuations that Harborview raises in its Reply were

addressed, considered, and rejected,<sup>2</sup> by the Trial Court. (*See generally* Pbr10-13). *See Rova Farms Resort*, 65 N.J. at 483-84 (Appellate Courts “give deference to the trial court that heard the witnesses, sifted the competing evidence, and made reasoned conclusions.”). The Trial Court’s determination should not be disturbed.

**C. The Court Erred When it Declined to Award Attorneys’ Fees and Costs to Bluerise (2T: 21:22 – 22:9).**

Harborview incorrectly suggests that the “relevant contract provides for attorney’s fees for an action arising out of this agreement” and that because “Defendant has not alleged that Plaintiff has breached the agreement,” “there is no basis to award Bluerise its attorneys’ fees.” (Prb15). Harborview’s assertion is belied by the unambiguous language of Section 15 of the Agreement. Section 15 of the Agreement provides in pertinent part:

**Attorneys’ Fees.** In the event that any party hereto brings an action or proceeding for a declaration of the rights of the parties under this Agreement . . . the non defaulting party shall be entitled to reasonable attorneys’ fees as may be allowed by the Court at the time of settlement, at trial or any appeal or petition to review therefrom, in addition to court costs incurred and in addition to any other damages or relief awarded.

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<sup>2</sup> “But one thing this Court is finding, it is not convinced by a preponderance of the evidence that the defendant defaulted.” (2T: 10:2-4) “So it comes down to this. Is the HAP agreement – it’s clearly assignable because they agreed to assign it. Is it an agreement with respect to the operation of the real property? The Court finds that it is.” (2T: 15:16-20); “So I find that defendants did what they needed to under the contract. They made their application. They put up the money. It’s good faith to show that they’re just not winging it.” (2T: 16:24 – 17:2).

(Pa038).


The Trial Court, as a matter of law, concluded that Bluerise was entitled to the return of its \$500,000.00 Deposit pursuant to the Agreement. As such, pursuant to the Agreement, Harborview was required to return the \$500,000.00 Deposit when Bluerise terminated the Agreement, but refused to do so. As a result, Harborview was in default of its obligations under the Agreement. Bluerise was forced to file a Counterclaim for Declaratory Judgment for the return of the \$500,000.00 Deposit, and, as the non defaulting is now entitled to an award of its attorneys' fees. The plain language of Section 15 mandates an award of attorneys' fees and costs. *See Harvey v. Essex Cy. Freeholder Bd.*, 30 N.J. 381, 391 (1959) (“[T]he general rule of construction is that “may” means permissive and “shall” means mandatory.”).

The Trial Court erroneously determined that “Within the discretion of the Court, I could have allowed attorney’s fees. I don’t think it’s mandatory under the law.” (2T: 22:1-4). That conclusion is contrary to the language of Section 15 which is non-discretionary and dictates that the non defaulting party *shall* be entitled to its reasonable fees and costs. Accordingly, the Trial Court’s ruling on Count II of Bluerise’s Counterclaim should be reversed and the matter remanded with instructions to award Bluerise its reasonable fees and costs consistent with Section 15 of the Agreement.

V. CONCLUSION

For the reasons set forth above, and for those set forth in Bluerise's moving papers, it is respectfully submitted that the Trial Court's Judgment in favor of Bluerise and against Harborview on Count I of Bluerise's Counterclaim should be affirmed. It is further respectfully submitted that the Trial Court's ruling on Count II of Bluerise's Counterclaim should be reversed and the matter should be remanded to the Trial Court for a determination of an award of reasonable attorneys' fees and costs to Bluerise.

EPSTEIN OSTROVE, LLC

By:   
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ELLIOT D. OSTROVE  
A Member of the Firm

Dated: December 12, 2025