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Superior Court of New Jersey
APPELLATE DIVISION
DOCKET NO. A-2381-23T1

CRIMINAL ACTION

STATE OF NEW JERSEY, :	On Appeal from an Order Granting a New Trial by the Superior Court of New Jersey, Law Division, Hudson County.
Plaintiff-Appellant, :	
v. :	Sat Below:
NIRAV PATEL, :	Hon. Mitzy R. Galis-Menendez, J.S.C.
Defendant-Respondent. :	

BRIEF AND APPENDIX VOLUME I (Sa001 to Sa125)
ON BEHALF OF THE STATE OF NEW JERSEY

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May 16, 2024

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6T – trial transcript, April 19, 2023;
7T – trial transcript, April 20, 2023;
8T – motion transcript, October 12, 2023;
9T – motion transcript, December 14, 2023.

PRELIMINARY STATEMENT

Defendant was convicted of second-degree theft by deception following a seven-day jury trial. The evidence showed that defendant accepted $750,000 from six investors in exchange for 30% ownership in a franchise of World of Beer (WOB), a restaurant, in Hoboken, when defendant in fact only owned 5% of that franchise. Defendant also did not have the authority to sell shares without the consent of his business partner, which he did not have. Defendant then used the investors' money to pay off personal debts.

Barely a week following his conviction at trial, defendant filed a motion for a new trial based on newly discovered evidence. In support of the motion, defendant alleged that he had discovered franchise agreements, signed by him, showing that a business owned by his sister was the sole franchisee for the Hoboken location. Defendant testified that he discovered these franchise agreements—which were contained in his own emails—in just about an hour. Ignoring the fact that he could have conducted the same search at any time during the four years between the indictment and trial, the trial judge found that the documents could not have been discovered with reasonable diligence.

The trial court also ignored a plethora of evidence—on the face of the documents, in testimony from the other signatory to them, and through defendant's own contradictory actions—that the franchise agreements were

obviously fraudulent. While the trial judge addressed and dismissed the other signatory's testimony that WOB could not locate any copy of these documents, the judge failed to consider the credible evidence adduced at trial that the agreements were more than likely forged.

Finally, the documents would not have changed the outcome of trial, as they did not show that defendant owned more than 5% of the franchise that he sold, much less that he had the right to sell those shares. And one of the documents—which again did not address ownership of the Hoboken franchise—was cumulative of evidence presented at trial. Because the so-called newly discovered evidence on which defendant based his motion did not satisfy any of the prongs for a new trial, the trial court's order granting a new trial should be reversed and defendant's conviction reinstated.

STATEMENT OF PROCEDURAL HISTORY

On May 8, 2019, a State Grand Jury returned Indictment No. 19-05-00046-S, charging defendant Nirav Patel with one count of second-degree theft by deception, in violation of N.J.S.A. 2C:20-4. (Sa1-3). On April 20, 2023, following a seven-day trial, a jury sitting before the Honorable Mitzy R. Galis-Menendez, J.S.C., found defendant guilty of theft by deception of property valued over $75,000. (7T110-14 to 19; Sa4).

Sentencing was scheduled for June 16, 2023. (7T112-14 to 113-1). However, on April 28, 2023, defendant filed a motion for a new trial and a judgment of acquittal. (Sa5-12). That motion alleged, in relevant part, that defendant was in possession of newly discovered evidence. (Sa11).[1] On July 7, 2023, defendant filed a brief in support of the motion, to which he attached several documents—purported franchise agreements for a World of Beer franchise for the same location in Hoboken signed over a year apart and a principal owner's guaranty allegedly showing that defendant had a 30% interest in the franchise—as well as an affidavit from defendant's sister, Lina

[1] In his motion, defendant alleged that this evidence was also exculpatory and had been in the possession of the State. (Sa11). Defendant, however, does not present any support for this allegation and the trial court did not find the State in violation of Brady v. Maryland, 373 U.S. 83 (1963), for failing to turn over this purported newly discovered evidence.

Patel,[2] claiming to have found the documents after searching boxes in the family's garage. (Sa126-71).

On October 12, 2023, and December 14, 2023, a hearing was held on the motion. (8T-9T). On February 16, 2024, Judge Galis-Menendez granted the motion for a new trial based on newly discovered evidence but denied a judgment of acquittal. (Sa13-33). The State filed a motion for leave to appeal, which this Court granted on April 8, 2024. (Sa34-37).

[2] To avoid any confusion, the State refers to defendant's sisters by their first names.

STATEMENT OF FACTS

A. Trial Facts

On April 24, 2012, defendant, Will Mingo, and Jerrid Douglas entered into an area development agreement (ADA) with World of Beer Franchising, Inc. (WOB). (Sa37-69). That agreement gave them rights to open twelve WOB franchises—retail alcohol establishments focusing on beer—in New Jersey and Pennsylvania over a five-year period. (Sa66). On November 23, 2012, the agreement was amended to add a fourth partner, Kenny Lee, and was later expanded to include locations in New York. (1T88-3 to 14; Sa68-69). The partnership operated under the name "Tapmasters." (1T88-25 to 89-1).

Initially the four partners were to share in the profits equally, but over time, given various dynamics, different ownership structures were arranged for different franchise locations. (1T89-11 to 90-6). Each franchise location had its own franchise agreement giving the partnership the right to open a Tapmasters at the specified location; there was also a separate operating agreement setting forth the terms of ownership, including the percentage of ownership for each partner. (1T91-21 to 92-6). Tapmasters was also required to provide a principal owner's guaranty to WOB contemporaneously with the signing of each franchise agreement, which also set forth the ownership percentage. (Sa47 at ¶ 6.3).

In February 2014, Tapmasters was looking for a location to open a franchise in Hoboken and settled on 100 Sinatra Drive,[3] where defendant had operated a Melting Pot restaurant that failed and he had lost his lease. (1T93-15 to 94-23). Because defendant had an untenable relationship with the landlord and his credit was weak at the time, the Hoboken operating agreement gave Mingo 95% ownership and defendant 5%.[4] (1T94-7 to 15; 1T97-10 to 20; 1T105-13 to 107-8; Sa107). That operating agreement was signed on May 2, 2014. (1T109-10; Sa70-119).

Like all the WOB operating agreements, the Hoboken agreement provided that any potential investors had to complete a subscription agreement, which also had to be vetted by the voting members; the potential investors could then be admitted to the company, but only with the written approval of the managing partner and 51% of the voting interest. (1T111-19 to 120-19; Sa88). Mingo was the managing partner and held the majority of the voting interest. (1T113-2 to 22). Any contributions would then be used for the benefit of the company, Tapmasters Hoboken, LLC. (1T116-14 to 117-8;

[3] 100 Sinatra Drive is sometimes referred to as 111 River Street, but they are the same location.

[4] Both Jerrid Douglas and Kenny Lee gradually decreased their involvement in the business prior to the Hoboken franchise agreement. (1T91-9 to 18; 1T170-14 to 171-9).

Sa79 at ¶ 3.06). Defendant and Mingo signed a guaranty on March 25, 2015, and as the principals of Tapmasters Hoboken, they also signed an addendum to the WOB Hoboken franchise agreement, both of which indicated that Mingo owned 95% of Tapmasters Hoboken and defendant owned 5%. (Sa120-22).

Between March and May of 2014, nearly a year before defendant and Mingo finalized the WOB Hoboken franchise agreement, defendant began seeking additional investors in the project, with Mingo's knowledge. (1T5-8 to 14; 4T205-10 to 23). Ultimately, Steve Antaro, with whom defendant had another business, assembled six investors, including himself, under the name "HOBWOB" to invest $750,000 in WOB Hoboken, to purchase a 30% stake in the WOB Hoboken franchise. (3T37-1 to 38-18).

Between March 18 and May 16, 2014, these investors provided the funds to defendant either by wire transfers to an account held by Bhagu, Inc. ("Bhagu"), or checks made payable to Bhagu. (4T206-12 to 208-7; 4T220-17 to 23; 4T227-16 to 19; 4T231-19 to 232-3; 4T244-11 to 18; 4T249-9 to 250-6; 4T252-1 to 253-4; 4T254-19 to 255-8). Bhagu is a company owned by defendant's sister Sonal Patel, but which defendant was running for her and for which he had signing rights. (6T8-14 to 11-16).

Almost immediately after those funds were deposited into Bhagu's account—an account that had a negative balance prior to those deposits—

defendant used the funds to pay a number of personal expenses that were not related to Tapmasters Hoboken, including the mortgage on an apartment, car payments, and outstanding debts for the failed Melting Pot. (4T236-15 to 248-25; 4T238-1 to 8; 4T242-24 to 243-2; 4T250-16 to 251-25; 4T253-9 to 254-21; 4T). Little, if any, of the funds were used for expenses related to the WOB Hoboken franchise. (4T258-6 to 16).

On June 27, 2014, after defendant had received and spent the investors' money, he sent a proposed operating agreement for HOBWOB to Mingo and Tassos Efstratiades, their attorney, stating that they should add the investors and "not delay the funding." (Sa125). Mingo responded that they needed to identify their shares and contributions, and defendant agreed; defendant did not mention that he had already received the contribution. (Sa123). It was not until August 2014, when Mingo happened to see Antaro at a restaurant and Antaro asked about the status of the subscription documentation memorializing the group's investment, that Mingo learned that the group had come to an investment agreement and had given defendant the funds. (1T144-8 to 145-8). Mingo was stunned because he had not approved any investment, as he was required to do under the terms of the operating agreement, nor had he even been told that the investment had been made. (1T145-21 to 147-17). On August 11, 2014, Mingo notified defendant that, pursuant to the terms of the

contract and as a result of his misuse or misappropriation of $750,000 belonging to the company, he was removing defendant from Tapmasters Hoboken, LLC, for cause. (1T152-2 to 16).

At trial, defendant testified in his own defense. Like Mingo, he testified that the ownership agreement under the ADA was originally a 40/30/30 split between Mingo, himself, and Douglas, with Mingo having the larger share and serving as managing partner. (6T88-16 to 90-25). Later the ADA was amended to cover New York and add Lee as an additional partner, with each partner having a 25% interest. (6T92-8 to 16). But defendant testified, without relying on any documents, that he and Mingo were 50/50 partners in the WOB Hoboken franchise because Douglas had gradually withdrawn from the company. (6T116-2 to 119-9). Defendant contended that he did not recall signing the Hoboken operating agreement showing that he only had a 5% interest in WOB Hoboken and the only reason he may have done so was to secure a small business loan. (6T10-2 to 8; 6T173-13 to 18).

Based on the evidence that defendant took $750,000 from six individuals in exchange for 30% of a business that he did not own, then spent the money on unrelated personal expenses, defendant was convicted of one count of second-degree theft by deception of property valued in excess of $75,000. Eight days later, defendant filed a motion for a new trial based on newly

discovered evidence.

B. Evidence from the Motion Hearing

Just over two months after filing his motion for a new trial, defendant filed a brief in support of that motion, to which he appended the supposedly new evidence: (1) two purported WOB franchise agreements between WOB and Bhagu for the Hoboken location, one signed January 22, 2014, and the other May 7, 2015; (2) a principal owner's guaranty for "Tapmasters II" showing that defendant had a 30% interest in that entity; (3) a certification from defendant's sister Lina claiming to have found the documents after "days" of searching boxes in the family's garage; and (4) bank statements that were introduced by the State at trial. (Sa126-296). Defendant contended that this evidence showed that he was the sole franchisee of the Hoboken WOB franchise and thus had the authority to sell the shares to the HOBWOB investment group.

On October 12, 2023, the trial court held a hearing on the motion. At the hearing, Lina testified, contrary to her certification, that she only found approximately eleven random pages that said "Bhagu" and "World of Beer" on them. (8T13-13 to 19; 8T24-23 to 25). She showed those pages to defendant, who then searched his own email accounts, first using the search terms "Bhagu" and "World of Beer," without success. (8T13-20 to 25). After this,

defendant searched for "Bhagu., Inc., franchise agreement" and found "a whole bunch of emails," one of which had the two agreements (set forth above as Item #1) attached to it. (8T14-1 to 4). Lina testified that it took "close to an hour" to locate the documents in defendant's email. (8T33-2). She did not explain where the guaranty for Tapmasters II (Item #2) was found.

Defendant also testified at the motion hearing that he searched his emails for the documents after his sister found several pages in boxes. (8T40-24 to 41-6). Unlike Lina, however, he testified that the only documents attached to the email dated May 7, 2015—sent to him from his own email account—were the 2014 franchise agreement and an addendum, both dated January 22, 2014. (8T77-1 to 79-1). He was unable to explain where the 2015 franchise agreement was found. (8T78-4 to 80-20). Defendant also testified that the principal owner's guaranty appended to the certification, which was for "Tapmasters II," not Tapmasters Hoboken, showed the breakdown of ownership of the entire territory covered by the ADA. (8T47-14 to 20).[5] While defendant testified that the guaranty was also attached to an email from Mingo, located in defendant's own email account, defendant did not say when or how he located it. (8T47-21 to 48-15; Sa297-300).

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[5] "Tapmasters II" was the investment group that had the area development rights for New Jersey, New York, and Pennsylvania. (9T42-21 to 45-24).

Finally, defendant introduced letters of approval for the Hoboken site, which were attached to an email from Ryan McCarthy of WOB. (Sa301-04). Defendant testified that those approvals needed to be in place before a franchise agreement would be approved. (67T57-19 to 58-15). The email was dated October 21, 2014, and was sent to defendant, Mingo, and Douglas. One of those documents confirmed the continued enforceability of the ADA between those three and WOB. (8T59-17 to 22; Sa303).

On December 14, 2023, Benjamin Novello, the Chief Development Officer of WOB, testified. Novello, whose signature appears on both Bhagu-WOB franchise agreements, testified that the first time he saw a Bhagu-WOB franchise agreement was during the summer of 2023, when defendant's cousin Neil Patel, who had a franchise in Syracuse, New York, asked for WOB's help. (9T13-13 to 14-5; 9T7-5 to 11). Neither Novello nor his colleague McCarthy recalled any Bhagu franchise agreement, nor were they able to locate one in their electronic or paper records or with their lawyers, although the company kept copies of every franchise agreement it ever executed. (9T14-6 to 23). Novello also did not recall signing either Bhagu franchise agreement. (9T15-20 to 16-4; 9T18-3 to 14).

Novello also testified that the agreements overlapped with the franchise agreement for Tapmasters Hoboken, which was signed on May 7, 2015, and

was in WOB's files. (9T9-18 to 20; 9T15-4 to 12; 9T20-20 to 22; Sa305-63). Both agreements purported to grant an exclusive 10-year franchise for the same location. (9T9-18 to 13-12; 9T15-11 to 16; 9T17-12 to 18-2). Moreover, because of the ADA, WOB would not have approved a franchise for anyone other than Tapmasters. (9T22-19 to 21).

Novello also testified that, under the ADA, defendant had 30% of the area development rights, but that each time a new unit was opened, a separate operating agreement had to be executed setting forth the ownership interest for that unit. (9T40-7 to 16; 9T47-10 to 14). Based on documents submitted by Tapmasters to WOB and signed by both defendant and Mingo, defendant only had a 5% ownership share in WOB Hoboken. (9T41-19 to 42-7). He testified that the principal owner's guaranty for Tapmasters II that was submitted along with Lina's certification related only to the ADA concerning the exclusive right to open franchises throughout New Jersey, New York, and Pennsylvania, and not the Hoboken franchise agreement that detailed percentages of ownership in the single Hoboken location. (9T42-21 to 45-24).

On February 16, 2024, the trial court issued a written opinion finding that "the newly discovered documents submitted were not discoverable by reasonable diligence at the time of trial" because "the evidence was discovered among presumably thousands of documents" and "[d]efendant searched his

email for around an hour before any emails with the documents popped up.'" (Sa24). The court further rejected Novello's opinion that the Bhagu franchise agreements were fraudulent because, although WOB could not locate those two agreements in its files, it was able to locate the Tapmasters II guaranty in its files. (Sa25). The trial court found that the documents were material because the Bhagu franchise agreements gave the defendant the authority to sell shares and "thus [he] could not have deceived investors," and the Tapmasters II guaranty does not portray defendant as a 5% owner in the franchise. (Sa25-26). The court therefore granted defendant's motion for a new trial based on newly discovered evidence.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

The court below improperly vacated the jury's verdict. New-trial motions based on newly discovered evidence are "not favored and should be granted with caution by a trial court." State v. Conway, 193 N.J. Super. 133, 171 (App. Div. 1984) (citation omitted). On appeal from an order granting or denying a new trial based on newly discovered evidence, "the reviewing court must engage in a thorough, fact-sensitive analysis to determine whether the newly discovered evidence would probably make a difference to the jury." State v. Ways, 180 N.J. 171, 191 (2004).

A judge can only subvert a jury's verdict and grant a new trial based on newly discovered evidence where "the evidence is, indeed, newly discovered." State v. Szemple, 247 N.J. 82, 99 (2021). A defendant must show the "new" evidence is: "(1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted." Ibid. A defendant is not entitled to a new trial unless all three prongs are satisfied.

Ways, 180 N.J. at 187.

Prongs one and three of the new-trial test are "inextricably intertwined." State v. Nash, 212 N.J. 518, 549 (2013). "Material evidence is any evidence that would 'have some bearing on the claims being advanced.'" Ways, 180 N.J. at 188 (quoting State v. Henries, 306 N.J. Super. 512, 513 (App. Div. 1991)). "Newly discovered evidence must be reviewed with a certain degree of circumspection to ensure that it is not the product of fabrication, and, if credible and material, is of sufficient weight that it would probably alter the outcome of the verdict in a new trial." Id. at 187-88.

Here, defendant cannot satisfy any of the prongs of the new-trial test, let alone all three. The evidence in question could have been discovered at any time before or during trial with the exercise of reasonable diligence. But even if defendant had found the evidence before trial, it was not material because it either did not shed light on defendant's authority to sell shares in Tapmasters Hoboken or was cumulative of evidence presented at trial. Moreover, the trial court ignored evidence that strongly suggested that some of the "new" evidence was fabricated. Therefore, this Court must vacate the order granting defendant a new trial and reinstate the jury's verdict.

A. The Newly Discovered Documents Found in Defendant's Own Email Account By Defendant Himself After a One-Hour Search Were Plainly Discoverable By Reasonable Diligence if Defendant had Searched in the Four Years Before Trial.

The court below erroneously found that "the newly discovered documents submitted were not discoverable by reasonable diligence at the time of trial." (Sa24). The basis for that conclusion was that (1) "the evidence was discovered among presumably thousands of documents" and (2) "Defendant searched his email for **around an hour** before any emails with the documents popped up.'" (Sa24, emphasis added). But the trial court failed to explain why defendant could not have found the documents sooner without exercising reasonable diligence.

The reasonable-diligence prong is intended to "encourage defendants and attorneys to act with reasonable dispatch in searching for evidence before the start of the trial." Ways, 180 N.J. at 192. But defendant did not do so. Instead, he waited until after he was convicted before searching through the boxes of business records in his family home and his own emails for evidence to support his claim that he had the right to sell shares in WOB Hoboken. Once he began that endeavor, his sister located pages of the documents in a matter of days, and he found at least one full agreement in his own email in about an hour.

Here, if defendant had conducted the same search at any point during the

four years between his indictment and the start of trial, he would have easily located the same evidence long before trial—documents whose existence he should have known about, since he purportedly signed them. The trial court's finding that documents located after an hour-long email search could not have been located by reasonable diligence at any point in the four years before trial clearly misses the mark—it ignores the fact that defendant made no attempt whatsoever to locate these documents before trial, when he could easily have done so. Because defendant failed to act with reasonable diligence in locating the allegedly new evidence before or during trial, the trial court's order granting a new trial should be reversed by this Court.

B. The Newly Discovered Documents Would Not Have Changed the Jury's Verdict.

The documents also would not have likely changed the outcome of trial for three reasons. First, contrary to the trial court's decision, there was ample evidence that the judge failed to recognize that several of the documents were most likely fabricated. Second, none of the documents shed any light on defendant's right to sell 30% of the shares of WOB Hoboken. And third, the only document that addressed defendant's ownership interest in any WOB entity would have amounted to cumulative evidence. Thus, the trial court erred in finding the "new" evidence material and granting a new trial.

1. The trial court disregarded overwhelming evidence that the "newly discovered evidence" was fabricated.

In determining that the newly discovered evidence was material, the trial court failed to heed the Supreme Court's instruction to review the evidence "with a certain degree of circumspection to ensure that it is not the product of fabrication." Ways, 180 N.J. at 187-88. Although Judge Galis-Menendez addressed Novello's testimony that WOB had no record of the two franchise agreements with Bhagu and that Novello himself had no memory of signing them, she failed to acknowledge Novello's testimony that WOB would not have entered into those agreements because they conflicted with WOB's agreements with Tapmasters. Nor did she properly consider Novello's opinion that his signatures appeared to be identical to those on another franchise agreement between WOB and Tapmasters Albany that were executed on the same day as the purported 2014 Bhagu agreement, or any of the other evidence supporting Novello's opinion. (See 9T15-1 to 18-14; Sa364-423).[6] Because the evidence when considered in its totality strongly suggests that the purportedly new evidence was fraudulent, the trial court should not have granted a new trial.

When the Tapmasters Albany franchise agreement and the alleged "new"

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[6] The Tapmasters Albany Franchise Agreement was appended to the State's Brief in Opposition to Defendant's Motion for a New Trial, and was thus before the trial court for consideration. (Sa364-423).

2014 Bhagu franchise agreement for Hoboken are compared side-by-side, it is readily apparent that the "newly discovered" 2014 agreement appears to be a doctored version of the Albany agreement. The handwritten dates on the first and last pages of the agreements are identical. (Sa130; Sa189; Sa364; Sa423) . Both documents also have an identical stray pen mark to the left of the signatures on page 55, which is the addendum to the franchise agreement. (Sa189; Sa423). The handwritten words "managing partner" and the date under Mingo's and defendant's signatures are identical on each corresponding signature page. (Sa184-87; Sa187; Sa418-21; Sa423). And, as Novello testified, his signatures on each corresponding signature page are not just similar, but identical. (9T16-2 to 4; Sa184-87; Sa187; Sa418-21; Sa423).

Similarly, Novello's identical signatures appear on the corresponding pages of the 2015 Bhagu agreement. (Sa288-91). The words "Managing Partner" under defendant's signature on each of those pages is also identical to the handwriting under Mingo's signature on the corresponding pages of the 2014 Albany agreement, but the date is written much more lightly, apparently with a different pen. And the date on page one—May 7, 2015—appears to be the same as the date on the first page of the Tapmasters Hoboken franchise agreement that was signed the same day.[7] (Sa233; Sa305).

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[7] The 2015 Bhagu agreement does not have the addendum page containing the

Moreover, although the 2015 Tapmasters franchise agreement contains various amendments to the standard language, changing its length and resulting in the first signatures appearing on page 51 of the agreement, the first signatures in the 2015 Bhagu agreement still appear on page 50. (Sa288; Sa359). Under the ADA, WOB provides franchisees with a standard form of the agreement "we are then using," and thus all agreements executed at the same time should be identical. (Sa47 ¶ 6.3). The fact that two agreements purportedly signed the same day are not identical further supports Novello's testimony that the one WOB has no record of (Bhagu) is fraudulent.

Novello also testified that WOB would not have entered into either franchise agreement with Bhagu because they would have been in violation of both the ADA giving Tapmasters exclusive development rights in New Jersey and the May 7, 2015 Tapmasters Hoboken franchise agreement, signed the same day as the purported 2015 Bhagu agreement. (9T12-17 to 13-12; 9T22-12 to 21). And even if defendant had the authority under the ADA to enter into a franchise agreement without his co-investors in Tapmasters, he was not an owner of Bhagu. Rather, Bhagu was owned by his sister Sonal, and defendant merely had the authority to sign on her behalf. (6T8-14 to 11-16).

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stray pen mark.

Because Sonal was not a party to the ADA, Bhagu could not become a WOB franchisee in Hoboken.

Even defendant's own evidence at the motion hearing undermined the validity of the Bhagu franchise agreements. Defendant introduced an email from WOB dated October 21, 2014—long after the first purported Bhagu agreement was signed—with attachments, including letters of approval and documents confirming the continued enforceability of the ADA between Mingo, defendant, and Douglas and WOB. (67T57-19 to 58-15; 8T59-17 to 22; Sa301-04). If WOB already had a franchise agreement in place for the Hoboken location, it would not have been continuing to discuss the franchise with Tapmasters.

Defendant's actions after January 22, 2014, further support a finding that the 2014 Bhagu franchise agreement is fraudulent. Throughout the spring and summer of 2014, defendant continued to negotiate with WOB on behalf of Tapmasters to establish a WOB location at the site of his failed Melting Pot in Hoboken. (6T107-21 to 115-25; 6T 117-11 to 118-1; 6T126-10 to 130-5). And Bhagu transferred the liquor license and leasehold for the Melting Pot location to WOB in 2014. (6T13-6 to 16-7; 9T55-12 to 13; Sa424-29). But if Bhagu had a franchise agreement for the Hoboken location, it would have needed the lease and liquor license to operate.

While a trial court's factual finding are generally entitled to deference, factual findings that are "clearly mistaken are accorded no deference." State v. L.H., 239 N.J. 22, 47 (2019) (citing State v. S.S., 229 N.J. 360, 381 (2017)). "Simply put, '[d]eference ends when a trial court's factual findings are not supported by sufficient credible evidence in the record.'" Ibid. (quoting S.S. 229 N.J. at 381). Here, in light of the documentary evidence, as well as the testimonial support at trial and the motion hearing—none of which Judge Galis-Menendez seemed to have considered—the judge's rejection of Novello's testimony that the Bhagu agreements were fraudulent was not supported by the trial record. Her failure to view the evidence with a proper degree of suspicion, especially when the "new" documents came from defendant himself, compels reversal. See State v. Buonadonna, 122 N.J. 22, 50-51 (1970) (noting that newly discovered evidence is highly suspect when it comes from someone close to the defense).

2. The documents do not show that defendant had the authority to sell shares of WOB Hoboken.

The trial court also found that the Bhagu franchise agreements gave the defendant the authority to sell shares and "thus [he] could not have deceived investors." (Sa25). But based on Novello's testimony and defendant's own testimony at the motion hearing, the franchise agreements do not address ownership percentages. (8T82-9 to 83-13; 9T12-7 to 11). Rather, that

information is set forth in the operating agreement and in a separate personal owner's guaranty that is appended to each franchise agreement; however, no such guaranty was included with the Bhagu franchise agreements. (8T82-9 to 83-13). So even if Bhagu was the sole franchisee—a fact Novello's testimony, the ADA, the Tapmasters Hoboken franchise agreement, and defendant's own conduct disprove—the franchise agreements would not establish defendant's authority to sell shares.

The newly discovered Tapmasters II guaranty is also not relevant or material to Bhagu's or defendant's ownership interest in WOB Hoboken. As defendant himself testified at the motion hearing, the Tapmasters II guaranty showed the ownership breakdown of ownership of the entire territory, not the Hoboken location. (8T47-14 to 20). Indeed, defendant, Mingo, and Novello all testified that the ownership of the individual franchises was spelled out in the operating agreements for each location. (1T91-19 to 24; 8T82-9 to 83-13; 9T40-7 to 16; 9T47-10 to 14). Thus, the relevant guaranty was the one executed as part of the Tapmasters Hoboken franchise agreement, which was admitted at trial. (See Sa120-22). That agreement, which defendant signed, sets forth the ownership percentages of WOB Hoboken as 95% for Mingo and 5% for defendant, which was consistent with the Tapmasters Hoboken operating agreement. (3T163-2 to 18; 7T172-2 to 17; Sa107).

Because the Tapmasters II guaranty simply provides the presumptive regional division of shares as determined by an ADA executed in April 2012, it was not material and would not have changed the outcome of trial. Since the newly discovered documents do not shed any light on whether defendant owned 30% of WOB Hoboken or had the rights to sell those shares, they do not have any "bearing on the claims being advanced." See Ways, 180 N.J. at 188). The trial court's conclusion to the contrary was erroneous and this Court should reverse its ruling.

3. The trial court erred in finding the Tapmasters II guaranty was material because it is cumulative evidence.

Finally, the trial court erred in finding that the Tapmasters II guaranty presented with Lina's certification was alone sufficient to grant a new trial, because it does not portray defendant as a 5% owner in the franchise. (Sa26). That document is not only immaterial, but it is merely cumulative of evidence presented at trial. The Tapmasters II guaranty was signed more than a year before the first purported Bhagu franchise agreement and does not relate to the Hoboken franchise specifically, or even the purported Bhagu franchise, but is for the entire region covered by the ADA. (9T43-2 to 46-13).

Moreover, the guaranty shows only that defendant has a 30% stake in the Tapmasters II partnership, Mingo a 40% share and Douglas a 30% share. (Sa295). This information, if not the document itself, was before the jury at

trial in the form of a May 7, 2014 text message from Mingo to defendant discussing the split of the area development rights, but not individual units. (2T64-18 to 66-9; Sa430). In that text message, Mingo stated that the split for New Jersey was "40/30/30." (2T66-8 to 8; Sa430). As such, the Tapmasters II guaranty is merely cumulative and not a basis for granting a new trial. Szemple, 247 N.J. at 99.

* * *

In sum, defendant discovered the allegedly new evidence after searching his own emails for a mere hour, something he could have done at any point during the four years before trial. And the testimony and documentary evidence at the hearing on the motion for a new trial strongly established that the allegedly new evidence was fabricated. In any event, that evidence would not have altered the outcome of trial because it was merely cumulative of evidence presented at trial and did not shed light on the ultimate issue of whether defendant had the authority to sell shares in WOB Hoboken. For all these reasons, the trial court erred in granting the motion for a new trial and this Court should vacate that order and reinstate defendant's well-proved conviction.

FILED, Clerk of the Appellate Division, July 09, 2024, **A-002381-23**

STATE OF NEW JERSEY, Plaintiff, v. NIRAV PATEL, Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APP. DIV. DOCKET NO.: A-000337-23 INDICTMENT NO. 19-05-00046-S CRIMINAL ACTION **ON STATE'S LEAVE FOR APPEAL FROM GRANTING OF NEW TRIAL**

Sat below:
Hon. Mitzy Galis-Menendez, P.J.Cr.

BRIEF IN SUPPORT OF DEFENDANT NIRAV PATEL (Sa14-33)

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PRELIMINARY STATEMENT

On February 16, 2024, the trial court granted Nirav Patel's motion for a new trial based upon live testimony, newly discovered documents, and extensive briefing that verified that Mr. Patel had full authority to raise capital for the Hoboken World of Beer project at issue here. That reality was based upon the Tapmasters II Principal Owner's Guaranty Agreement showing his thirty percent (30%) stake and the consistent assent and understanding from his partners that he was raising money for the project. It was also due to the fact that his family's company, which he ran, was the sole franchisee of World of Beer at the Hoboken location during the period he raised the capital based on two (2) franchise agreements executed at that time. In its decision, the trial court gave significant weight to the fact that these agreements, which were proven to have been generated and in effect around the time of execution and thus not fabricated as alleged by the State, would likely convince a jury that Mr. Patel had that authority.

The State's contention that Mr. Patel lacked authority to raise money for the project is plainly belied by the testimony and documentary evidence presented to the trial court. The trial court had the opportunity to observe the live testimony of the witnesses presented at both trial and the two (2) hearings conducted following the filing of the defense's post-verdict motions, as well as

review the documents entered into evidence through those witnesses and question the witnesses herself. At one point, Mr. Patel verified the dates of the newly discovered documents as having been generated contemporaneously with the period of their execution by opening the emails to which they were attached in open court. (8T 43:1 to 54:25). That alone warrants this Court affirming the ruling below granting Mr. Patel a new trial, as the State's position hinges entirely upon its unfounded assertion in its brief that these documents were "obviously fraudulent" and "more than likely forged." (Sb3). Yet, the State conceded that those documents were attached to emails contemporaneous with their execution, (8T 53:25 to 54:13), and not generated after Mr. Patel's verdict, as it appears to also assert throughout its brief despite that notion being antithetical to the State's concession.

This case involved complicated relationships and financial transactions in addition to a myriad of documents and testimony from over a dozen witnesses. It is clear that the jury did not dedicate sufficient time to consider that complexity, returning a verdict in just over an hour. The trial court, having presided over the case, recognized the complexity and performed a comprehensive analysis in granting the defense's motion.

The State, on the other hand, purposefully oversimplified the case for the jury in a manner that prevented it from fully understanding what occurred in the

development of the project. Had it not been for Mr. Patel's family's desperate search for a needle in a haystack following a verdict that "shocked" and "dumbfounded" them, an innocent person would now be incarcerated. Based upon what the trial court considered and found to be legitimate, the jury's verdict would necessarily be different. Accordingly, the trial court's conclusion, based upon a complete understanding of what occurred, should not be disturbed.

PROCEDURAL HISTORY

On May 9, 2019, Mr. Patel was charged in Municipal Court Complaint No. S-2019-000514-0905 with one count of second degree theft by deception, contrary to the provisions of N.J.S.A. 2C:20-4, for conduct occurring on or about March 18, 2014 in the City of Hoboken. On May 17, 2019, Mr. Patel was charged in Indictment No. 19-05-00046-S with one count of second degree theft by deception, contrary to the provisions of N.J.S.A. 2C:20-4, for conduct occurring on or about March 18, 2014 in the City of Hoboken. (Sa1-3). The allegations involved a claim of the misappropriation of seven hundred and fifty thousand dollars ($750,000.00) from a group of investors between March and May of 2014.

From the outset, Mr. Patel has denied the allegation that any deception or theft took place as he attempted to develop the Hoboken World of Beer project

in a restaurant space leased by his family's business, which also maintained a liquor license for that space.

The matter proceeded to trial on March 28, 2023 and concluded on April 20, 2023.[1] The trial was put on hold for the week of April 10, 2023 due to a juror, a Deputy Attorney General, support staff, and defense counsel contracting COVID-19.

On April 20, 2023, following a mere hour and ten minutes of deliberation, even denying the opportunity for a lunch break and perhaps cognizant that at least one (1) juror had upcoming vacation plans, the jury returned a guilty verdict on the single count under which Mr. Patel was charged. (Sa4).

On April 28, 2023, defense counsel timely filed a Motion for a New Trial and a Motion for a Judgment of Acquittal. (Sa5-13). The trial court then heard testimony on October 12, 2023, (8T), and December 14, 2023, (9T). On February 16, 2024, the trial court granted Mr. Patel's Motion for a New Trial.

[1] 1T refers to the trial transcript from April 4, 2023.
2T refers to the trial transcript from April 5, 2023.
3T refers to the morning trial transcript from April 6, 2023.
4T refers to the afternoon trial transcript from April 6, 2023.
5T refers to the trial transcript from April 18, 2023.
6T refers to the trial transcript from April 19, 2023.
7T refers to the trial transcript from April 20, 2023.
8T refers to the hearing transcript from October 12, 2023.
9T refers to the hearing transcript from December 14, 2023.

(Sa14-33). The State then filed a Motion for Leave to Appeal, (Sa34-35), which was granted on April 8, 2024, (Sa36-37).

STATEMENT OF FACTS

In this case, the State alleged at trial that Mr. Patel misappropriated seven hundred and fifty thousand dollars ($750,000.00) from a group of investors between March of 2014 and May of 2014. (Sa1-3). Those funds were intended to be used to develop a World of Beer restaurant franchise at 100 Sinatra Drive in Hoboken, New Jersey.

In 2007, his family's business, Bhagu, Inc., purchased the restaurant property leasehold at 100 Sinatra Drive in Hoboken. In fact, Bhagu, Inc. was created in order to purchase and develop the Melting Pot franchise, as well as the leasehold at 100 Sinatra Drive in addition to the liquor license to operate at that location. Mr. Patel, his older sister, Sonal Patel, and his father, Bhagvati Patel, served as signatories. (6T 8:14 to 9:13).

Bhagu, Inc. purchased the leasehold and liquor license for five hundred and fifty thousand dollars ($550,000.00), and there was a two hundred and fifty thousand dollar ($250,000.00) letter of credit for a security deposit, one hundred and fifty thousand dollars ($150,000.00) of which would be returned after two (2) years. (6T 10:21 to 10:25). The leasehold was particularly valuable because it was a seventeen (17) year total leasehold, (6T 101:7), and both the leasehold

and liquor license were particularly valuable given the restaurant's location. Further, when Mr. Patel renegotiated the lease in furtherance of developing the World of Beer project, he secured a full twenty (20) year timeframe and two hundred thousand dollars ($200,000.00) in tenant improvement funds, or "T.I." dollars, and a personal guarantee on the lease. (Da11; 6T 104:1 to 105:22).

Securing the leasehold on the property was likely the most important step in the process of making World of Beer a potential success because of its location. 100 Sinatra Drive is quite possibly the most coveted location in New Jersey for a restaurant as it is steps from Hoboken Terminal directly on the Hudson River with sweeping views of the Manhattan skyline and adjacent to Pier A Park. It is also connected to a parking garage and is one (1) to (2) blocks away from two (2) other parking garages. It is a block from Hoboken's only hotel. Hoboken is a commuter hub, has thousands of people congregate for its nightlife, and is known for its young, wealthy residents.

That initial Hoboken World of Beer investment also secured the liquor license. The ability to sell alcohol is crucial not only to an establishment whose entire premise is entirely contingent upon selling alcohol, but to any restaurant along the Hoboken waterfront. In fact, all seven (7) restaurants similarly situated and currently on that stretch of Hoboken waterfront have liquor licenses; 100 Sinatra Drive is currently a cocktail bar.

The liquor license was indispensable not only due to the location, but the landlord would not agree to lease the premises if Tapmasters, LLC did not agree to secure it from Bhagu, Inc.: "Tenant hereby represents that Tenant has entered into an agreement with Prior Tenant… to purchase a Plenary Retail Consumption License for the sale of alcoholic beverages." (Da48) (emphasis added). World of Beer Hoboken would not have a location but for Bhagu, Inc. agreeing to transfer the liquor license. That agreement was entered into between Bhagu, Inc. and Tapmasters Hoboken, LLC on November 25, 2014. (Da83-88). The liquor license that Bhagu, Inc. owned was the key.

Sonal moved to Syracuse, New York in 2008 leaving Mr. Patel with full autonomy to run the business, including the authority to sign checks, as Mr. Patel had been trained in and was well-versed in the business and was personally acquainted with city officials, vendors, and banks. (6T 10:23 to 11:16). During that time the business had no issues with the landlord filing any lawsuits or seeking eviction. (6T 12:5 to 13:5). Bhagu, Inc., agreed to sign the leasehold and liquor license over to Tapmasters Hoboken, LLC on November 26, 2014 for five hundred thousand dollars ($500,000.00). (Da83-88; 6T 13:6 to 16:11). That agreement was ultimately handled in bankruptcy court after the project fell apart.

A couple of years prior, in 2012, with knowledge that he had become successful in the restaurant industry in Hoboken and Jersey City, Will Mingo approached Mr. Patel with a business proposition. (6T 85:19 to 86:4). Mr. Patel had opened other businesses, including a Tilted Kilt on the West Side of Hoboken, a Tilted Kilt in Jersey City, and a Doggy Daycare/Club Barks in Jersey City. (6T 85:1 to 85:8). Will Mingo convinced Mr. Patel to become involved in the establishment of World of Beer franchises in New York, New Jersey, Pennsylvania, and Connecticut, as evidenced by the series of Franchise Agreements that they entered into together along with additional investors. (6T 88:9 to 89:4).[2]

In 2013, when the World of Beer corporate office was creating pressure to open at least four (4) locations per year, it was agreed by corporate, Mr. Patel, Will Mingo, and their partners, that 100 Sinatra Drive would be the perfect location, and, conveniently, the extended leasehold on that property and a liquor

[2] In its motion, the defense also raised the issue that Mr. Patel's business partner, Will Mingo, offered perjured testimony that warranted the "disturbance" of the final judgment, citing Shammas v. Shammas, 9 N.J. 321 (1952). This argument was based upon, among other things, a series of text messages and emails between the two wherein it was clear that Mr. Mingo knew that Mr. Patel was soliciting investments for the project and, in fact, encouraged it. The trial court did not definitively rule that Mr. Mingo did not testify falsely, but rather ruled that the defense had the means to refute the testimony at trial and thus it was not a basis for a new trial. (Sa27-28). Mr. Mingo's propensity for falsehoods is only relevant to the issue before this Court in that he claimed that Mr. Patel lacked the authority that the newly-discovered evidence demonstrates Mr. Patel to have.

license was controlled by Bhagu, Inc., in which Mr. Patel was in an excellent position to effectuate that transfer as the head of the company. (6T 97:19 to 99:8). As a result, Bhagu, Inc. was made the sole franchisee of World of Beer as of January 22, 2014, giving Mr. Patel full authority to develop the franchise. (Sa130-189). On April 9, 2014, Bhagu, Inc. paid the initial franchise fee to World of Beer Franchising, Inc. in the amount of thirty thousand dollars ($30,000.00). (Sa211). That agreement was renewed on May 7, 2015. (Sa234-292).

At the time, Mr. Patel and his partners had opened World of Beer locations in New Brunswick, New Jersey; Syracuse, New York; Albany, New York; and in Chelsea in Manhattan. In each of these prior agreements, Mr. Patel had either an equal ownership interest or an interest slightly reduced due to the number of partners. In no instance was Mr. Patel a five percent (5%) partner. In New Jersey, he acknowledged that his interest had to be less than the managing partner, Will Mingo, due to conflicts created by Mr. Patel owning other bars, so it was always his understanding that the split would be 40/30/30 in New Brunswick and Hoboken split between Will Mingo, Mr. Patel, and Jerrid Douglas respectively. That arrangement was memorialized in a Principal Owner's Guaranty. (Sa294-296). The document specifically acknowledges that Tapmasters II, LLC was formed under the laws of New Jersey. (Sa294-296).

The original Tapmasters II, LLC had been formed on February 8, 2013 with only Mr. Patel and Willie Mingo as "Members" of the company. (Da89-99). By October 11, 2013, Jerrid Douglas was included as a 30% partner, with Willie Mingo at 40% and Mr. Patel 30%. (Da100-110).

Initially, Jerrid Douglas had been tasked with raising the substantial amount of money to fund the "build out" on the different locations, but in early 2014 with him failing to do so and pressure from the corporate office mounting, Mr. Patel, in documented communications, e.g. text messages, phone messages, and other communications with his partners, indicated that he would seek investments on behalf of the project because Jerrid Douglas had failed to do so. Will Mingo confirmed that Jerrid Douglas had his role diminished due to his inability fulfill his promises with respect to soliciting and collecting investments on all of the projects he was involved with. (1T 170:14 to 171:13). Naturally, any shares that Jerrid Douglas held prior to being pushed out, were split between Mr. Patel and Will Mingo, which further shows how involved Mr. Patel was financially having gained an additional fifteen percent (15%) interest, all on top of his intimate involvement in working to make these projects successful.

Mr. Patel estimated that $1.5 million would be necessary for the build out of the Hoboken location, inclusive of the key money and assets necessary for the leasehold and liquor license maintained by Bhagu, Inc. When he explained

that to Will Mingo in detail and discussed his efforts to raise money, Will Mingo engaged in that discussion rather than asking Mr. Patel why he was raising money for a project in which he had what the State has maintained was a nominal financial interest. (Da111). The valuation of the project was $2.5 million, so everyone involved had an expectation of success. (Da112).

Mr. Patel was able to raise seven hundred and fifty thousand dollars ($750,000.00) for the Hoboken World of Beer franchise, five hundred thousand dollars ($500,000.00) of which came from one investor, Jude Konzelman. The remaining shares came from Steve Anatro, William Grant, Jeff Menkes, Rupesh Patel, and Walter Anatro.

The State has claimed that Mr. Patel lacked the authority to raise that money, despite the fact that Bhagu, Inc. was the sole franchisee of World of Beer at the Hoboken location. Attached to a Supplemental Report dated October 25, 2017 authored by Investigator James Scott, indicating that Santander Bank had provided additional documents showing wire transfers in and out of the Bhagu, Inc. account, is plain evidence that Bhagu, Inc. paid World of Beer Franchising, Inc. thirty thousand dollars ($30,000.00). (Sa211). Any competent investigator would have explored why an entity that the prosecution would claim had no rights with respect to the Hoboken World of Beer project was paying

World of Beer Franchising, Inc. a substantial sum. However, the State went further than simply not investigating that transaction.

Shockingly, Investigator Scott testified to that exact transaction in a protracted line of questioning attempting to demonstrate that none of the wire transfers into and out of the Bhagu, Inc. account were related to the Hoboken World of Beer project:

> Q. And was that to the Sunshine Property Enterprise with a memo stating 110 Vincent?
>
> A. Yes.
>
> Q. Was 110 Vincent related to the World of Beer Hoboken?
>
> A. No, it was not.
>
> Q. On April 8th, 2014, was there a transaction with a note Melting Pot royalty in the amount of approximately $2,300?
>
> A. Correct. 2,393.06. The check is made out to The Melting Pot royalty, April 8th.
>
> Q. Thank you. On April 9th, 2014, was there an outgoing wire in the amount of $30,000?
>
> A. Yes.
>
> Q. On April 10th, 2014, was there a transaction for UPS Capital in the amount of $16,000.28?
>
> A. Yes. $16,028.29 to UPS Capital.
>
> Q. And was that related to the World of Beer Hoboken?
>
> A. No, it was not.

(4T 240:1 to 240:20). The State went through every transaction relating to that account and Investigator Scott was asked whether each related to World of Beer Hoboken... except the thirty thousand dollar ($30,000.00) transaction on April 9, 2014, the "beneficiary" of which was "WORLD OF BEEN (sic) FRANCHISING INC" with the World of Beer Franchising Inc. address correctly listed as 10910 Sheldon Road in Tampa, Florida. (Sa211).

This convenient omission demonstrates that the State actively, and seemingly purposefully, ignored evidence of Mr. Patel's authority with respect to the Hoboken World of Beer project of in pursuit of a conviction. The investigator then stated the following:

> Q. After your review of the records were any of those monies transferred for the purpose of World of Beer Hoboken?
>
> A. No.

(4T 58:13 to 58:16). Not only did the State go over this specific transaction in Investigator Scott's testimony, but the State had gone so far as to redact portions of it. There is little to no possibility that the State was unaware that Bhagu, Inc. paid World of Beer Franchising, Inc. thirty thousand dollars ($30,000.00) as a franchise fee on April 9, 2014.

The State's sole "evidence" is a May 2, 2014 Operating Agreement that purports to represent Will Mingo having a ninety-five (95%) interest and Mr. Patel having a five percent (5%) interest in Hoboken Tapmasters. (Sa113). The

defense has called into question the authenticity of that document.[3] Not only would that split not make any sense for Mr. Patel to agree to and is inconsistent with every other arrangement they had entered into across multiple projects in four (4) states, Will Mingo expressly acknowledged that he and Mr. Patel owned all of the New York locations except Syracuse 50/50 and "[s]till 40/30/30 NJ-PA." (Da113).

Regardless, by that time, the vast majority of all of the money had already been raised and negotiated by Mr. Patel, who had the authority to do so for Bhagu, Inc., the actual franchisee of World of Beer from January of 2014 onward. For example:

> The evidence that shows that Mr. Patel obtained $500,000 from Jude Konzelmann is in evidence. Those two separate wires of March 18th, 2014, and March 17th, 2014, appear in the Bhagu bank account statements. They appear in evidence presented by Mr. Konzelmann, an email from his bank confirming the wire, and Jude Konzelmann testified that he made those payments.

(7T 64:13 to 64:20). The indictment charges that this alleged theft took place between March 18, 2014 and May 15, 2014. (Sa2-3). This agreement, which is the linchpin of the State's case, is purported to have been executed on May 2, 2014.

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[3] There is evidence in the record that a 95/5 split would have been a convenient way for Will Mingo to secure a loan from the Small Business Administration (SBA).

The State also presented evidence that Steve Anatro ran into Will Mingo by chance and Will Mingo claimed to have no knowledge of the money that Mr. Patel had raised. However, months of email and text conversations demonstrate that to be false. In particular, on February 28, 2014 Mr. Patel, specifically referencing "the group in Hoboken," had told Will Mingo that he would be raising funds on his own if he did not have "answers by March 7th" because he had grown frustrated with Jerrid Douglas's inability to draw significant investments. (Da111).

Mr. Patel had texted Will Mingo on March 9, 2014 asking him: "Can u please have a thorough convo with jerrid and see where we are with funding? <u>I'm officially raising money for Hoboken</u> and I don't want to go to outside if I don't have to especially that I know it's a gold mind (sic)." (Da114) (emphasis added). Two days later, on March 11, 2014, Mr. Patel texted Will Mingo about fundraising: "Find out from Marjorie and Daren and your neighbor by the week for sure. <u>I will have 1,000,000 raised I need 500k.</u> Everyone will be in on a 2.5 mil evaluation." (Da112) (emphasis added).

On June 17, 2014, Sai Restaurants, LLC (hereafter "SAI"), run by Mr. Patel's close family friend, Curtis Patel, agreed to invest one hundred and fifty thousand dollars ($150,000.00) <u>prior</u> to August of 2014, which was acknowledged by Will Mingo, Jerrid Douglas, and Nirav Patel. (Da115).

Ultimately, SAI capital provided three hundred thousand dollars ($300,000.00) in funding. Curtis indicated in his statement that he handed both checks he provided to Mr. Patel personally in the presence of Will Mingo and Jerrid Douglas. (Da116-138).

The SAI investment is one that Mr. Patel had been developing months prior and discussed with Will Mingo by text on March 6, 2014: "Please tell Kelley to spend some time today and get me sales reports. The last time I asked for something he sent me garbage and it was embarrassing to show Curtis. Adams chart is so much better from Syracuse. I need this for te (sic) capital raise in Hoboken. Jerrid pinged me this morning saying he doesn't know anything yet. Please make sure this is priority to Kelley as he should have this done anyhow." (Da139) (emphasis added).

The emails introduced into evidence further demonstrated that Mr. Patel was operating appropriately with respect to his business relationship with Will Mingo and that Will Mingo was fully aware of the fact that Mr. Patel was raising money for the Hoboken World of Beer project. The record demonstrated to the trial court that it was abundantly clear not only was Mr. Patel at the forefront of attempting to make this project to be a success, despite the evident failings of his partner, but that at no point was there any nefarious intent.

The Hoboken World of Beer or "HOBWOB" investors also continued with the investment at 100 Sinatra Drive long after Will Mingo falsely claimed that he discovered that Mr. Patel was raising funds outside of the operating agreement for Tapmasters. Prior to the project ultimately failing in 2017, no investor claimed that Mr. Patel had committed theft, which, in an actively attended, high stakes financial arrangement, was over three (3) years since the State alleges the theft took place.

Following his conviction, Mr. Patel's family began a frantic search through a mountain of documents relating to the many businesses that the family had been involved in. The genesis of that search was the fact that his family was blindsided by the guilty verdict. Knowing the history, they fully expected that Mr. Patel would be found not guilty and were "shocked," (8T 12:22), and "dumbfounded" by the result. (8T 30:11). It was only then, sifting through an incredible volume of documents that his family, specifically his sister, Lina Patel, was able to uncover the newly discovered documents at issue. Once Mr. Patel reviewed them, they began to realize their exculpatory significance and performed a search through past emails to see if they would come up there. Not only were they able to recover these documents as email attachments, but the emails were contemporaneous to their execution.

The trial court had the benefit of considering all of this information in addition to live testimony accompanying the newly discovered documents in this case in coming to its conclusion.

STANDARD

The trial court's ruling on a Motion for a New Trial "shall not be reversed unless it clearly and convincingly appears that there was a manifest denial of justice under the law." State v. Sims, 65 N.J. 359, 373-374 (1974).

> [I]n reviewing a trial court's action on a motion for a new trial following a jury verdict, the appellate court must give deference to the views of the trial judge in certain areas. Although his determination as to worth of certain evidence, plausibility or consistency of individual testimony, and other tangible considerations apparent from the face of the record do not deserve any special deference, his views of credibility of witnesses, their demeanor, and his general "feel of the case" must be weighed heavily. Where these factors are primary in the grant of a new trial, it should be most rare that leave to appeal be granted to the State.

Id. at 373. In this case, the trial granted the defense's motion based upon newly discovered evidence. There are three (3) prongs to be met under the standard for a new trial based upon newly discovered evidence. The evidence must be "(1) material, and not 'merely' cumulative, impeaching, or contradictory; (2) that the evidence was discovered after completion of the trial and was "not discoverable by reasonable diligence beforehand"; and (3) that the evidence "would probably change the jury's verdict if a new trial were granted." State v. Ways, 180 N.J. 171, 187 (2004) (quoting State v. Carter, 85 N.J. 300, 314, 426

(1981)). The trial court granted the defense's motion pursuant to Rule 3:20-1 after presiding over the matter for an extended period, including both pre- and post-trial motions, as it was "required in the interest of justice" because "it clearly and convincingly appear[ed] that there was a manifest denial of justice under the law." R. 3:20-1.

In order for an appellate court to recognize an argument pursuant to Rule 3:20-1 based upon the grounds that a jury verdict was against the weight of the evidence, the issue must be raised before the trial court. See State v. Saunders, 302 N.J. Super. 509 (App. Div. 1997); State v. Baker, 303 N.J. Super. 411 (App. Div. 1997); State v. Froland, 378 N.J. Super. 20 (App. Div. 2005); State v. Yough, 208 N.J. 385 (2011); State v. Armour, 446 N.J. Super. 295 (App. Div. 2016), certif. den., 228 N.J. 239 (2016). Said motion must be filed "within 10 days after the verdict or finding of guilty." R. 3:20-2. "The jury verdict will be upheld where there is sufficient evidence to support the conviction on that charge." State v. Terrell, 452 N.J. Super. 226, 269 (App. Div. 2016) (citing State v. Brooks, 366 N.J. Super. 447, 454 (App. Div. 2004)). In this case, the motion was timely filed.

Trial courts are afforded a great deal of discretion in the consideration of new trial motion, as Appellate Courts are averse to overruling such decisions. "The trial court's ruling on [] a motion [for a new trial] shall not be reversed

unless it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1. Further, "a motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000); see also State v. Henries, 306 N.J. Super. 512, 529 (App. Div. 1997); State v. Conway, 193 N.J. Super. 133, 172 (App. Div.), certif. denied, 97 N.J. 650 (1984); State v. Artis, 36 N.J. 538, 541 (1962). "In reviewing a trial judge's decision, [an Appellate Court] give[s] deference to his feel for the case because he had the opportunity to observe and hear the witnesses as they testified." State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002) (citing Carrino v. Novotny, 78 N.J. 355, 360 (1979)).

ARGUMENT

THE TRIAL COURT'S DECISION SHOULD BE AFFIRMED BECAUSE THE STATE HAS FAILED TO CLEARLY AND CONVINCINGLY DEMONSTRATE THAT THE TRIAL'S GRANTING OF A NEW TRIAL WAS A MANIFEST DENIAL OF JUSTICE UNDER THE LAW (Sa14-33)

The three documents at issue in this case demonstrate that the State's theory of the case, that (1) Mr. Patel lacked authority to collect investments for the World of Beer Project, and (2) that Mr. Patel lacked the necessary number of shares himself in the World of Beer project in order sell them, is not only flawed, but fundamentally incorrect. The trial court carefully considered these

documents as well as extensive testimony in coming to its conclusion that a new trial is appropriate in this matter. Those documents are:

1. World Of Beer Franchising, Inc. Franchise Agreement dated January 22, 2014 naming Bhagu, Inc. as Franchisee (Sa130-189).

2. World Of Beer Franchising, Inc. Franchise Agreement dated May 7, 2015 naming Bhagu, Inc. as Franchisee (Sa234-292).

3. Tapmasters II Principal Owner's Guaranty providing 40% interest to Will Mingo, 30% interest to Nirav Patel, and 30% interest to Jerrid Douglas (Sa294-296).

As discussed above, the test for whether a new trial should be granted based on newly discovered evidence, first set forth in State v. Carter (Carter III), requires that a defendant to demonstrate that the evidence:

> (1) was discovered after the trial and was not discoverable by reasonable diligence at the time of trial;
>
> (2) is material to the issue and not merely cumulative, impeaching or contradictory; and
>
> (3) would probably change the jury's verdict (if a new trial were granted).

State v. Behn, 375 N.J. Super. 409 (App. Div.), certif. denied, 183 N.J. 591 (2005) (citing State v. Carter, 91 N.J. 86, 121 (1982) (Carter IV); State v. Bey, 161 N.J. 233, 287 (1999), cert. denied, 530 U.S. 1245 (2000)); See also Russo, 333 N.J. Super. at 136-137; Henries, 306 N.J. Super. at 529.

In this case, the trial court considered the Certification of Lina Patel, (Sa126-128), live testimony from Lina Patel, (8T), and live testimony from Mr. Patel, (8T). (Sa19-20). The evidence was discovered by his family immediately following Mr. Patel's conviction as they were frantically searching through thousands upon thousands of documents stored in their garage relating to the many businesses they are involved in. (Sa127). Mr. Patel's family ended up going page by page amidst a sea of disorganized documents in order to uncover these particular documents:

> [S]o after the verdict we were -- the family was shocked. We didn't realize that this happened, um, so my parents started cleaning up the apartment – I mean the house. We had files in our family room. We had files in the dining room. We had files in the library. And my mom wanted us to start clearing out the house with the files. So I started in the dining room and my dad started in the family room putting stuff together and filing it back. Picked up a few boxes. We brought it towards the garage and we walked into the garage and we found boxes of files that I didn't know of, you know, Nirav didn't know of. So we're like we opened it and were just paperwork. Again, they weren't labeled with businesses, um, so we started -- I started looking through it. Dad started looking through it and decided to bring a box at a time inside the house. Um, one of the documents I saw -- I found on one side it had Tilted Kilt. On the other side it had -- it said modification and it had World of Beer and had Bhagu and it wasn't like a whole document stapled together. It was just pieces. Fumbled through it again and it was again a document that stated World of Beer and Bhagu. So that's when I called him over, Nirav, and said, What's this about. And he, and he looked at it and he's like, he had to think about it. Like what is this about? So then we went to the computer and looked to see -- you know, pulled up World of Beer, Bhagu. Nothing came up. Then he thought about the term. I guess he used Bhagu, Inc. franchise agreement and he put that up in

> the search and a whole bunch of emails came up and we opened it and that's when I -- we saw the document.

(8T 12:21 to 14:4). Ms. Patel then affirmatively acknowledged that, consistent with her Certification, that they were able to find two (2) franchise agreements naming my family company, Bhagu, Incorporated, as the sole franchisee of the World of Beer project in Hoboken, as well as a Tapmasters agreement showing that Mr. Patel has a thirty percent (30%) interest in the project.

Ms. Patel further testified that her family began its desperate search through these thousands of documents as they were "dumbfounded" by the verdict:

> Right after we got the verdict. We -- my mom – we were all dumbfounded. We were like we didn't believe this was happening. You know, we were devastated. And then my mom's like, okay, start cleaning up my parents -- we didn't have a dining room. We didn't have a family room. We didn't have a library so we started packing up files, um, and in packing up the files we went to the garage and that's when we saw more files. We have a two-car garage but there's no cars in there. It's filled with stuff.

(8T 30:10 to 30:19).

The Patel family had an interest in seventeen (17) restaurants, with Mr. Patel spearheading their operation. Prior to him moving back home, his apartment in Hoboken was filled with banker's boxes of files. When he moved back home, those boxes inundated his parents' house even though he had made an effort to dispose of duplicative and extraneous files. That was the scene from

which his sister was able to discover the documents at issue in this case. Based upon the massive volume of documents traded in discovery in this case and entered into evidence, and with Mr. Patel being involved in many businesses, (8T 33:11 to 33:13), one can imagine how voluminous the files were. Even when she discovered the documents and Mr. Patel began to realize their significance to the case, they were only able to find the corresponding emails attaching the documents after an extensive search that took "[c]lose to an hour I would say," (8T 33:2), and that was only after scouring the house and garage for documents. The State's bald assertion that reasonable diligence was not exercised does not appropriately acknowledge the circumstances of their discovery. The Patel family was involved in many businesses over the course of an extended period of time resulting in endless boxes of thousands of documents. They were overrun by them. Mr. Patel believed that the substantial evidence presented at trial plainly demonstrated that he lacked any intent to deceive and was astonished by the jury's lack of consideration of the evidence in the extremely limited time they deliberated. It was only after the verdict that desperation truly set in and spurred the frantic search that resulted in the discovery of these documents.

There is no question that these documents are material to the State's allegation of deception and would probably change the jury's verdict. The

State's theory in this case is that Mr. Patel lacked authority to solicit investments for this project because he had only a five percent (5%) stake. The Bhagu, Inc. franchise agreements show that the company he was running for his family had an arrangement with World of Beer to run a franchise out of the Hoboken location that Bhagu, Inc. controlled. The Tapmasters II Principal Owner's Guaranty demonstrates that Mr. Patel had a thirty percent (30%) interest in the project through Tapmasters. These documents are plainly material to the issue of whether Mr. Patel deceived investors with respect to his authority to solicit investments, which is the singular count of the indictment on which he was convicted. The documents demonstrate his authority to do so.

Throughout its summation, the State repeatedly asserted that its case hinged on two admittedly simple notions:

> You can't sell something you don't own. If you don't own something you can't sell it. It works either way and that's the basis of the State's case. And I know that sounds so simple and probably impossibly simple after all of the evidence and all of the testimony you heard from both sides, but that's the basis for the State's case. If you don't own something you can't sell it, and Mr. Patel didn't own the shares of the World of Beer Hoboken that he promised to the investors and didn't -- he couldn't sell them.

(7T: 58:22 to 59:6). The problem for the State here is that Mr. Patel was the franchisee and did own those shares. As of January 22, 2014, Bhagu, Inc. was the direct franchisee of World of Beer, meaning that he could not have deceived

investors as to his authority, negating the primary element of the crime that the State alleged.

Based on its own summation, the State would have to concede that the jury's verdict would have been different because these newly discovered documents undermine both theories advanced by the State comprehensively:

> There's only two situations in which he could have made that sale and I'm just going to go through those briefly. The first one is if Mr. Patel owned 30 percent of World of Beer Hoboken just as if I had something in my pocket and I want to sell it to you. If he owned 30 percent of those shares he could have taken them and he could have given them to the investors, but he didn't own 30 percent of World of Beer Hoboken. It's our argument that he owned 5 percent at that time of World of Beer Hoboken and so he couldn't take something he owned and sell it to the investors.

(7T 59:7 to 59:17) (emphasis added). It is indisputably clear that Mr. Patel, through Bhagu, Inc. was the sole franchisee of World of Beer at the time he accepted the key money investments. He also had another basis; he owned thirty percent (30%) of Tapmasters. Thus, Mr. Patel had two bases upon which to act as he did. That State's only other basis was described as follows:

> The second situation where this would work is if Mr. Patel had the authority from World of Beer Hoboken to sell those shares to the investors. So in that situation Mr. Patel kind of is the middleman, right, he's in the middle. World of Beer is going to sell shares to the investors. The investors are going to give money and the World of Beer Hoboken is going to give shares back. But Mr. Patel just simple didn't have the authority to do that so that doesn't work either.

(7T 59:18 to 60:1) (emphasis added).

It is indisputably clear that Mr. Patel, through Bhagu, Inc. was the sole franchisee of World of Beer at the time he accepted the key money investments. Bhagu's payment of the initial franchise fee on April 9, 2014 confirms that Bhagu, Inc., with Mr. Patel as the managing partner, was the sole franchisee of World of Beer Hoboken. Perhaps the State said it best in its summation when discussing the Bhagu, Inc. bank account: "And, most importantly, Mr. Patel controlled the Bhagu account. He's a signatory on that account. That gives him rights." (7T 64:4 to 64:6).

Moreover, the State's contention that these documents were "obviously fraudulent" and "more than likely forged," (Sb3), is essentially an acknowledgment that the documents are material and exculpatory. That allegation relies solely upon Ben Novello, an individual who has been involved in litigation with Mr. Patel in the past, claiming that he did not possess these documents. The State ignores the fact that at the time these documents were generated, as confirmed by being attached to contemporaneous emails, Mr. Patel would not have any incentive to fraudulently generate them. The trial court correctly noted that "[t]he documents discovered were signed and dated four years before the Indictment and seven years before the trial." (Sa24).

Ms. Patel testified credibly that she knew that "they're authentic documents... 'cause I found them on email." (8T 34:24 to 35:3). The trial court

keyed in on that issue: "This court watched Defendant retrieve the documents from his email which are dated at or around the time of the creation of the agreements and the parties stipulated to this fact." (Sa25).

The Court further discounted the State's claim that these documents are fraudulent based on Mr. Novello not possessing them: "Mr. Novello admits that the Tapmasters II Principal Owner's Guaranty was discovered in World of Beer's records, yet this document was never provided to counsel or to the jury. It is most likely true World of Beer cannot find the franchise agreements in its records, but that does not necessarily mean the documents are illegitimate." (Sa25).

The Court also recognized that this newly discovered evidence is "material and likely to change the evidence at trial because the documents further perpetrate the theory that Defendant had the authority to sell shares... [and] it would likely change the jury's verdict simply because the evidence presented paints a picture the Defendant was not a mere 5% owner." (Sa27). The State's conviction hinges entirely on its proposition that Mr. Patel was a five percent (5%) owner without the authority to solicit investments for the project. These documents would change the jury's verdict because they demonstrate that he had had full authority to solicit investments for the project.

In some cases, courts are reluctant to provide defendants with new trials against the backdrop of "substantial evidence of guilt." Armour, 446 N.J. Super. at 295. In that case, the court relied upon detailed, unmistakable identifications, the lack of an alibi, and statements from the defendant relaying information he could not have known if he were not the perpetrator. In this case, no such clarity of guilt exists.

In Armour, the court found that the Carter test was not satisfied because "[t]he latent fingerprint at issue was not the sole evidence linking the robber to the crime. Nor was it a crucial piece of evidence." Armour, 446 N.J. Super. at 315. Here, the question is whether the evidence in question supports the notion that Mr. Patel purposefully deceived the investors. There is no additional evidence like possession of a bloody knife or a DNA match that the State could rely upon to support a conviction. For the State, a conviction in this case must necessarily be firmly based upon evidence of deceit. It is the "sole evidence" required to satisfy the second element of N.J.S.A. 2C:20-4. Here, the newly discovered documents do not demonstrate deceit and cannot support a conviction. In fact, they lead to the opposite conclusion and warrant a new trial.

CONCLUSION

Based on the foregoing, this Court should affirm the decision of the trial court granting Mr. Patel a new trial. Giving due deference to the trial court's

feel for the case, having decided pretrial motions, presided over the trial, heard post-verdict motions and testimony, it cannot be said that the State has clearly and convincingly established that there was a manifest denial of justice under the law. The sound discretion of the trial judge in this case should not be interfered with as no clear abuse or miscarriage of justice has been demonstrated by the State.

Respectfully submitted,

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LETTER IN LIEU OF REPLY BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

The Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: STATE OF NEW JERSEY (Plaintiff-Appellant) v.
NIRAV PATEL (Defendant-Respondent)
Docket No. A-2381-23T1

Criminal Action: On Appeal from an Order Granting a New Trial by the Superior Court of New Jersey, Law Division, Hudson County.

Sat Below: Hon. Mitzy R. Galis-Menendez, J.S.C.

Honorable Judges:

Please accept this letter brief in lieu of a formal brief under Rule 2:6-2(b) and Rule 2:6-5 on behalf of the State of New Jersey.

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STATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

The State relies on the procedural history and facts as detailed in its brief previously filed in this Court.[2]

LEGAL ARGUMENT

POINT I

DEFENDANT WAS NOT ENTITLED TO A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

A. Defendant's Over-Confidence in the Strength of His Case Does Not Excuse His Lack of Diligence in Searching for the Documents He Now Claims Were Newly Discovered.

Defendant was indicted in May 2019. Almost four years later, after a trial that took place over the course of more than two weeks, he was convicted on the sole count in the indictment. Just eight days later, defendant filed a motion for a new trial alleging that he was in possession of newly discovered

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[1] The following citation form is adopted:
- Sb – State's principal brief;
- Sa – appendix to State's principal brief;
- Db – defendant's brief;
- Da – appendix to defendant's brief.

[2] Defendant includes in his appendix several documents that do not appear to have been made part of the record before the trial court—specifically the Tapmasters II operating agreements at Da89 and Da100, Kirit Patel's statement at Da116, and the communication at Da139—all of which appear only to be mentioned in the statement of facts in his appellate brief. Although the documents in question bear exhibit stickers, the State has not been able to locate any reference in the transcripts to those documents or their assigned document numbers being admitted into evidence.

evidence that had been in boxes in his house and his own emails the entire time. (Sa5-12). In his appellate brief, defendant's only explanation for failing to discover the evidence in question prior to or during trial is that he believed he had a strong case and saw no reason to search through the numerous disorganized boxes in his possession in which the documents were eventually located.

But that is not the proper standard for the grant of a new trial based on newly discovered evidence. To the contrary, a new trial should only be granted where "the evidence is, indeed, newly discovered." State v. Szemple, 247 N.J. 82, 99 (2021). A defendant must show the "new" evidence is: "(1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted." Ibid. A defendant is not entitled to a new trial unless all three prongs are satisfied. State v. Ways, 180 N.J. 171, 187 (2004) .

Defendant has not even attempted to meet the second prong of this test—demonstrating that the documents were undiscoverable by reasonable diligence before trial—but merely argues that he did not think he needed any additional evidence because his believed his case was so strong. But as he concedes, his

family located the documents "immediately following" his conviction in documents stored in the family garage as soon as they felt motivated to look for them. (Db22). The fact that the documents were disorganized and the task was difficult does not alter the fact that both the initial paper documents and the electronic documents that were subsequently found by searching defendant's own emails for "around an hour" were, indeed, readily discoverable before trial with reasonable diligence. (See Sa24). The fact that defendant was able to file a motion for a new trial based on the discovery of the documents just eight days after his conviction is ample proof that he could have located them at any point during the four years between the indictment and trial had he only bothered to try. The bottom line is it did not take that much time or effort to find these documents.

Rather than address whether the evidence in question was discoverable by reasonable diligence, defendant dedicates a considerable amount of his brief to discussing the alleged strength of his defense at trial. Indeed, his brief reads like a brief in support of a motion for a new trial based on the weight of the evidence, including citing to the standard of review for such a claim. (See Db19). Although defendant sought a new trial based on the weight of the evidence, the trial court denied that part of his motion and defendant did not appeal that ruling. Thus, the only issue before this Court is the issue raised in

the State's Motion for Leave to Appeal—whether the trial court erred in granting a new trial based on newly discovered evidence—which this Court granted. Simply, his weight-of-the-evidence claim is not properly before this Court. See Mondelli v. State Farm Mut. Ins. Co., 102 N.J. 167, 170 (1986) (finding that where defendants did not file a cross-appeal, the court's review was "confined to the sole issue raised on plaintiff's appeal").

Because defendant does not provide any valid explanation for why he could not have located the newly presented documents with reasonable diligence, but only explained why he did not try to do so, the trial court erred in granting him a new trial.

B. Defendant Has Also Not Met the Remaining Prongs of the Newly-Discovered Evidence Test.

The State will rely on its principal brief as to why defendant has failed to meet the remaining two prongs of the newly discovered evidence test. The State notes only that its argument that the allegedly newly discovered documents appear to be fraudulent is not an acknowledgement that the documents are material or exculpatory, as defendant asserts. (See Db27). To the contrary, as discussed in the State's principal brief, even if the documents are genuine, they do not establish defendant's right to sell shares in World of Beer Hoboken. (See Sb23-26).

CONCLUSION

For these reasons, and those in the State's principal brief, the State asks this Court to vacate the trial court's order granting defendant a new trial and reinstate the conviction.

Respectfully submitted,

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