
BRICKS FLOWER MARKET,
LLC., Prasad Kuruganti and Veniesa
Kempadoo

Plaintiffs,

v.

BRICK FLOWER MARKET, LLC,
and RALPH PETRELLESE,
NANCY PETRELLESE and
John/Jane Does 1 to 5 and XYZ
entities

Defendants.

SUPERIOR COURT OF NEW
JERSEY APPELLATE
DIVISION
DOCKET NO.: A-003533-23

CIVIL ACTION

ON APPEAL FROM THE
SUPERIOR COURT OF
NEW JERSEY, LAW
DIVISION, MONMOUTH
COUNTY

Sat Below:
Honorable MARA ZAZZALI-
HOGAN, J.S.C.

BRIEF ON BEHALF OF APPELLANT'

DATED FEBRUARY 10, 2025

LAW OFFICES OF SUSHEELA VERMA
On the Brief: Susheela Verma, Esq.
Attorney Id.: 004851992
ATTORNEY FOR APPELLANTS
485 E Route 1 South, Suite 240
Iselin NJ 08830
(732) 596-1140
susheela.verma@susheelaverma.com

TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY	4
STATEMENT OF FACTS	5
COURT’S FINDING OF FACTS AND COMPARISON WITH THE RECORD	15
DRAFTING OF THE DOCUMENTS (2T6 8-15)	21
COURT’S CRUCIAL FACTUAL FINDINGS ARE INCONSISTENT WITH THE EVIDENCE	21
COUNSEL FEE ISSUE	23
LEGAL ARGUMENT	25
I. DISMISSAL OF PLAINTIFF’S FRAUD CLAIM WAS AN ERROR	25
(a) Plaintiffs Proved Both Legal and Equitable Fraud; It Was An Error to Dismiss Their Fraud Claims (5T23 24-25; 5T24 1-5; 5T35 12-13; 5T36 11-13)	25
(b) Plaintiffs were entitled to rescission of the Contract (5T30 1-7)	29
(c) Defendants Committed Legal Fraud and Denying them Relief, Including Punitive Damages was an Error (5T22 17-23; 5T24 6-12)	30
II. POINT TWO	31

(a) Court's Interpretation of Various Contracts was Flawed (7T16 8-9; 5T9 2-10; 5T10 19-25; 5T21 13-18; 5T30 1-3; 5T31 20-25; 5T35 12-18)	31
(b) Court's Decision To Construe Contracts Against The Plaintiffs Was an Error (5T9 18-22; 5T20 5-7)	32
(c) Indemnification Provision Contained In The Bill Of Sale Was Inapplicable and Was Required To Be Must Be Construed Strictly Against the Defendants (5T9 11-17)	35
III. AWARD OF COUNSEL FEE AND COSTS TO DEFENDANTS WAS AN ERROR	
(a) The Americal Rule Prohibited Award of Counsel Fees And Costs (7T14 21-24; 7T15 7-11; 5T35 12-18)	37
IV. POINT FOUR	
(a) Courts Credibility Finding As To Prasad And As To Their Evidence Was an Error (5T26 19-25)	39
(b) Court's Finding That Nancy and Ralph Were Credible Was an Error (5T31 10-19)	41
V. POINT FIVE	
(a) Court's Finding That Plaintiffs Acted In Bad Faith Was An Error (5T32 10-14)	41
(b) Defendants Breached A Duty Of Good Faith and Fair Dealing Owed To the Plaintiffs (5T31 10-19)	42

VI.	POINT SIX	
	Piercing the Corporate Veil (5T33 19-23)	44
VII.	POINT SEVEN	
	Dismissing Plaintiffs Breach of Contract Claim Was an Error (5T22 17-23)	45
VIII.	CONCLUSION	47

TABLE OF JUDGEMENTS, ORDERS AND RULINGS

December 22, 2023 Decision and May 31, 2024 Decision

TABLE OF AUTHORITIES

<u>Authority number</u>	<u>Brief Page</u>
------------------------------------	--------------------------

Case Law:

Accounteks.Net, Inc. v. CKR Law, LLP, 475 N.J. Super. 493, 506 (App. Div. 2023).....	38
Berman v. Gurwicz, 178 N.J. Super. 611, 622 (Ch. Div. 1981)	29
Broadway Maintenance Corp. v. Rutgers, 90 NJ 253, 271, 447 A.2d 906 (1982)	33
Costello v. Porzelt, 116 N.J. Super. 380, 383, 282 A.2d 432 (Ch.Div.1971)	27
Coppa v. Taxation Division Director, 8 N.J. Tax 236, 244 (1986)	45
DSK Enter., Inc. v. United Jersey Bank, 189 NJ Super. 242,251,459 A.2d 1201 (App.Div.), certif. denied, 94 NJ 598, 468 A.2d 232 (1983).....	26
<u>Daibo v. Kirsch</u> , 316 N.J. Super. 580, 588 (App. Div. 1998).....	38
Englert v. The Home Depot, 389 N.J. Super. 44, 51-52 (App. Div. 2006)	36
Foont-Freedenfeld Corp. v. Electro Protective Corp., 126 N.J. Super. 254, 314 A.2d 69 (App.Div.1973), 64 N.J. 197, 314 A.2d 68 (1974).....	30
Gallagher v. New England Mut. Life Ins. Co. of Boston, 33 N.J. Super. 128, 136, 109 A.2d 457 (App.Div.1954) aff'd 19 N.J. 14, 114 A.2d 857 (1955).....	28,29
<u>Globe Motor Co. v. Igdaley</u> , 225 N.J. 469, 482, 139 A.3d 57 (2016)....	46

<u>Goldfarb v. Solimine</u> , 245 N.J. 326, 338–39 (2021).....	46
In re Miller's Estate, 90 <i>N.J.</i> 210, 221, 447 <i>A.2d</i> 549 (1982).....	33
<u>In re Estate of Vayda</u> , 184 N.J. 115, 123 (2005).....	39
Innes v. Marzano-Lesnevich, 224 N.J. 584, 593 (2016)	39
<u>In re Return of Weapons to J.W.D.</u> , 149 N.J. 108, 117, 693 <i>A. 2d</i> 92 (1997).....	40
Gallagher v. New England Mut. Life Ins. Co. of Boston, 33 N.J.Super. 128, 136, 109 <i>A.2d</i> 457 (App.Div.1954) aff'd 19 N.J. 14, 114 <i>A.2d</i> 857 (1955)	27
Jewish Ctr. of Sussex County v. Whale, 86 NJ 619, 624, 432 <i>A.2d</i> 521 (1981)	26
Jewish Ctr. of Sussex Cnty. v. Whale, 165 N.J. Super. 84, 89 (Ch. Div. 1978), aff'd, 172 N.J. Super. 165 (App. Div. 1980), aff'd, 86 N.J. 619 (1981)	28
Karl's Sales & Serv., Inc. v. Gimbel Bros., 249 N.J. Super. 487,492 (App. Div. 1991)	33
Karl's Sales & Serv., Inc. v. Gimbel Bros., 249 N.J. Super. 487,493 (App. Div. 1991)	34
Kieffer v. Best Buy, 205 N.J. 213, 223-24 (2011)	37
Kotkin v. Aronson, 175 NJ 453, 455, 815 <i>A.2d</i> 962 (2003)	34
Liqui-Box v. Estate of Elkman, 238 NJSuper. 588, 599, 570 <i>A.2d</i> 472 (App.Div.1990)	33
Lyon v. Barrett, 89 N.J. 294, 299 (1982)	44
Merchants Indem. Corp. v. Eggleston, 37 N.J. 114, 179 <i>A.2d</i> 505 (1962)	29
Mason v. City of Hoboken, 196 N.J. 51, 70-71, 951 <i>A.2d</i> 1017 (2008)	38

Murphy v. Implicito, 392 N.J. Super. 245, 266 (App. Div. 2007)	47
Nicholson v. Janeway, 16 N.J.Eq. 285, 287 (Cy.1863)	27
Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 52-53 (1984)	31
Occhifinto v. Olivo Const. Co., LLC, 221 N.J. 443, 449 (2015)	39
<u>PSL, L.L.C. v. Terhune</u> , A-3162-07T1, 2009 WL 137309, at 3 (N.J. Super. Ct. App. Div. Jan. 22, 2009)	32
Pacifico v. Pacifico, 190 N.J. 258, 267-68 (2007)	35
Pioneer Nat'l Title Ins. Co. v. Lucas, 155 N.J. Super. 332, 342, 382 A.2d 933, 938 (App.Div.1978), aff'd o. b. 78 N.J. 320, 394 A.2d 360 (1978)	25
Pollack v. Quick Quality Restaurants, Inc., 452 N.J. Super. 174, 188 (App. Div. 2017)	46
Rutgers Cas. Ins. Co. v. LaCroix, 194 N.J. 515, 527 (2008)	30
Rendine v. Pantzer, 141 N.J. 292, 322, 661 A.2d 1202 (1995)	38
Ray v. Beneficial Fin. Co. of N. Jersey, 92 N.J. Super. 519, 538 (Ch. Div. 1966)	45
State, Div. of Youth & Family Servs. v. T.G., 414 N.J. Super. 423, 432-33 (App. Div. 2010)	40
Seidenberg v. Summit Bank, 348 N.J. Super. 243, 259 (App. Div. 2002)	43
Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420-21, 424-25, 690 A.2d 575 (1997)	43
State Dept. of Environmental Protection v. Ventron Corp., 94 N.J. 473, 500 (1983).....	44

Tessmar v. Grosner, 23 <i>N.J.</i> 193, 201, 128 <i>A.2d</i> 467 (1957).....	34
Vosough v. Kierce, 437 <i>N.J. Super.</i> 218, 244-45 (App. Div. 2014)	43
<i>Wakefern Food Corp. v. Liberty Mutual Fire Ins. Co.</i> , 406 <i>N.J. Super.</i> 524, 538–40, 968 <i>A.2d</i> 724 (App.Div.2009).....	34
Wilson v. Amerada Hess Corp., 168 <i>N.J.</i> 236, 253-54 (2001)	44

PRELIMINARY STATEMENT

Plaintiffs Bricks Flower Market, LLC. (“Bricks”), is an entity owned by Prasad Kuruganti (“Prasad”) and Vaniesa Kempadoo. (“Vaniesa”). Defendant Brick Flower Market, LLC. (“Brick”) is an entity owned by Defendants Ralph Petrellese (“Ralph”) and Nancy Petrellese. (“Nancy”) Ralph and Nancy had extensive experience in flower or flower related business. Prasad and Vaniesa are I.T. professionals. In 2017, they decided to purchase a business for Vaniesa. They became aware of Brick and contacted the listing broker Cody Weaver (“Cody”). Ralph provided a Profit and Loss Statement (“P&L”) for nine months for the year 2017. The gross income stated by Ralph in the P&L was \$607,087; total expenses \$376,474, net income \$223,613.00 and the payroll expenses shown were \$59,053.

Plaintiffs relied on the P&L Statement and after meeting Ralph and Nancy decided to purchase the business. The closing occurred on 01/12/2018. The purchase price was \$230,000. Brick financed \$110,000. The parties signed an Asset Purchase Agreement (“APA”), Bill of Sale, Closing Statement, Promissory Note and Security Agreement. The parties were represented by counsels at the closing. The APA contained certain representations, warranties, covenants and promises which were to survive the closing. Sellers represented that they had disclosed all material information to Sellers. The APA did not

contain a provision for attorney's fees. At closing, a Bill of Sale was executed. It provided for the survival of the warranties, covenants and promises contained in the Contract of Sale. It contained a restrictive covenant and indemnification clause.

Brick had a practice of paying six (6) dollars each for certain deliveries. This payment was made outside of the payroll. The P&L did not contain this significant material expense. The actual preexisting Brick's payroll expense was much higher than what was disclosed in the P&L. The combination of undisclosed expenses exceeded \$95,000 per year. After Plaintiffs took over the business, they were perturbed as the operating expenses were much higher than disclosed. Plaintiffs received computer systems used in the business which contained time keeping (punch in and out) software known as TimeTrax. It was used by the Defendants to track employees' time. In October/November of 2018, Prasad reviewed the TimeTrax data for the time period preceding the closing. It revealed a significant gap between the payroll expense Defendants represented to be existing and the actual expense that they incurred.

Plaintiffs also discovered a charge of six (6) dollars expense per delivery paid outside of the payroll. It was another necessary expense which was not disclosed. Unless told by Defendants, Plaintiffs would have no way to know these two expenses. They relied on the P&L and discussions with Ralph and

Nancy. After this discovery, Prasad emailed Ralph and asked him to explain. Ralph did not respond. The litigation ensued. The Defendants filed a counterclaim for the unpaid balance that was financed. The parties had a 4-day bench trial. Several months after submission of the closing statements, the Court rendered an oral decision in December of 2023. Plaintiffs' claims were dismissed with prejudice and judgment in favor of the Defendants was entered. Defendants claimed counsel fees. The Court conducted a hearing and issued an amended judgment awarding Defendants counsel fees and costs.

Prasad was Plaintiffs' witness. His testimony was supported by documentary evidence. It was also corroborated by the Defendants' testimony. The Court, however, ruled that he was not credible and imputed bad faith. The Court decided that the terms of contract needed to be construed against the Plaintiffs. The decision was based upon an assumption that all agreements were drafted by Plaintiffs' counsel. Both parties had counsel, and, except for the APA, the record lacked testimony as to who drafted what. ¹

¹ The transcripts are referenced as follows:

1T March 8, 2023, Trial Transcript

2T March 9, 2023, Trial Transcript

3T March 13, 2023, Trial Transcript

4T March 14, 2023, Trial Transcript

5T December 22, 2023, Oral Decision Transcript

6T May 24, 2024, Counsel Fee Motion Hearing Transcript

7T May 28, 2024, Court's Decision Transcript, Counsel Fees and Amended Judgment

PROCEDURAL HISTORY

Plaintiffs filed a Complaint on or about February 14, 2019. P231a-240a. Defendants filed an Answer, Affirmative Defenses, Counterclaims and Crossclaims on or about March 29, 2019. P241a-262a. Plaintiffs filed an answer to the Counterclaim on or about April 17, 2019. An Amended Answer to the Counterclaim was filed on December 21, 2022. P270a-277a. Defendants filed a Motion for Summary Judgment on or about October 11, 2021. On or about June 14, 2022, the Court partially granted the Motion for Summary Judgment. The Court dismissed Plaintiffs' Count for Unjust Enrichment.

The trial in this matter started on March 8, 2023, and continued on March 9, 13 and 14. The Court rendered an oral decision on December 22, 2023. 5T. The Court dismissed all of Plaintiffs' claims with prejudice. A judgment in favor of the Defendants in the amount of \$109,093.25 was entered. The Defendants were directed to submit an application for attorneys' fees. 5T

On January 22, 2024, the Defendants' filed a Motion for Attorneys' Fees and cost supported by certification and exhibits. P022a-103a. On February 26, 2024, Plaintiffs requested the Defendants to supplement their submission.

Plaintiffs filed an opposing certification to Defendants' Motion for fees and costs on March 7, 2024. P104a-130a.

Oral arguments occurred on May 24, 2024, and May 28, 2024. 6T; 7T. An Amended Order of Judgment was entered on May 31, 2024. P018a-020a. The Court granted judgment in favor of the Defendants in the amount of \$114,512.14. The Court also awarded counsel fees and costs to the Defendants in an amount of \$65,617.12 and ordered the release of ten thousand dollars held in escrow. P018a-020a. On July 15, 2024, Plaintiffs filed a Notice of Appeal and a Case Information Statement P001a-012a. Defendants filed their Case Information Statement on July 23, 2024. P013-017a.

STATEMENT OF FACTS

In 2017, Plaintiffs Prasad and Vaniesa decided to purchase a business. Vaniesa was an IT Professional and was considering a career change. Proximity and profitability were key considerations for them. 1T45: 15-19. In September of 2017, the Plaintiffs approached a business broker known as Cody, signed an NDA and received business listings. 1T46:18-24. Defendants' business was listed for sale with Cody. 1T47:13-16. Plaintiffs met Cody at Brick's premises. Cody represented the Sellers. 1T48:10-23

Defendants provided business records to the Plaintiffs including a P&L prepared by Ralph. The Plaintiffs were provided with POS statements and other documents by email through Cody. 1T51:2-20; 3T172 8-13;1T64 5-25; 1T65: 1-20; 67: 1-15; 68: 1-6.

Prasad interacted with the broker through emails. 1T49:8-14. The parties met prior to the execution of the APA sometime late October 2017. 1T49: 20-25; 1T50:1-3. Prior to the meeting with the Defendants, Plaintiffs had received the P&L statement which they relied upon. They discussed the numbers stated in the P&L with the individual Defendants who convinced them that the business was quite profitable. 1T50: 8-25. The Plaintiffs were never told by the Defendants about the delivery system used by them and the delivery charges incurred outside of the payroll. 1T57: 20-23. Plaintiffs were denied pre-closing presence at the business premises. 1T56:17-25; 1T57: 1-3. Plaintiffs believed the Defendants. 1T57: 4-10.

Defendants represented the gross revenue of Brick to be more than \$600,000 from January to September 2017. 1T82: 13-25. Defendants also represented that the business was profitable and stated a specific number of the profit for nine (9) months. Profitability was an important consideration for Plaintiffs as Vaniesa was employed and was making more than \$90,000 per annum. 1T83: 1-25; 84: 1-9.

The P&L prepared by Ralph was sent to Prasad through Cody. 2T211 10-21; 2T212 7-25. Ralph confirmed the gross revenue to be \$607,480 and net profit of \$223,613. 3T50 6-8; 3T51 11-25; P170a-172a. The payroll expense was represented to be \$59,053.00. 3T52 15-17. The total business expense for the nine months' was represented to be \$376,474.00. 3T53 5-7; P170a-172a.

Ralph pointed to the P&L at trial. 3T47 23-25; 3T48 1-25; 3T49 1-25; 3T50 1-8; P172a. Through Cody, Defendants told Plaintiffs: "Ralph and Nancy's personal salaries and owners' draw are not factored in here. Remainder are any of the discretionary expenses, like family vacations, health insurance, home mortgage payments, et cetra. The bottom line is what will be available to you as cash flow. Brick Flower Market utilizes Ralph's proprietary methods for buying flowers at significantly discounted prices compared to other wholesalers. That is the reason for their excellent margins". 1T68:7-25; 69: 1-20. Emphasis added.

APA was between Brick and Bricks and was executed on December 8, 2017. The purchase price was \$230,000. \$110,000 was financed by Brick. P131a-143a; 2T6 2-24. The financing terms were included in the APA. P132a-133a. Under section 13 (j) of the APA, Brick represented that it had disclosed to buyer all material information. P136a. Section 15 of the Asset Purchase Agreement contained a restrictive covenant. It stated:

“Seller hereby warrants and represents that it has no interest in any other floral business being sold not shall it obtain any such interest directly, through a corporate entity, nor by its principals, within a fifty (50) miles radius from the present site of the subject business for a period of ten (10) years from the date of closing of this transaction, nor shall the members, Nancy and Ralph Petrellese accept employment directly or indirectly with any florist business with the time period and radius specified. The representations and covenants of this paragraph shall survive the closing of the title and shall be part of the Bill of Sale. P136a-137a.”

Sub section a. following the above stated Restrictive Covenant stated:

“With regard to the Seller’s business, NJ Wedding Pro’s, Seller shall be entitled to sell and profit from “floral packages” to clients. Notwithstanding NJ Wedding Pro’s shall not compete with Brick Flower Market in the matter of purchasing raw materials, assembling and designing arrangements, selling tangible flower arrangements and bouquets to an of their wedding planning clients. NJ Wedding Pro’s shall provide Brick Flower Markets with all referrals or sales to fulfill the floral arrangements sold to clients for wedding events. In return Buyer shall offer discounted prices and/or commissions based on wedding referral sales provided to it by NJ Wedding Pro. Buyer shall represent that it shall provide the same quality and meet those standards imposed by the seller in the assemblance and design of floral arrangements requested by NJ Wedding Pros.” P137a. Emphasis added.

Plaintiffs were concerned about competition and sought insertion of a restrictive covenant in the APA. 2T9 10-20. They desired to restrict the Defendants from selling flowers within a certain radius. 2T15 4-14. Section 16 of the APA stated that the warranties, covenants and promise contained therein shall not merge in but shall survive the closing and delivery of the Bill of Sale

and other documents, continuing in full force and effect thereafter unless otherwise excepted in the Agreement. Section 19 stated that the Asset Purchase Agreement was the complete agreement. P137a.

The closing took place on or about January 12, 2018. Parties attended with their attorneys. 2T24 1124. A Bill of Sale was also executed which contained restrictive covenants. P144a-146a. Section 4 contained in the Bill of Sale provided for the survival of the restrictive covenants and promise contained in the contract of sale. Sellers' representations were repeated. P144a.

Defendants never requested a supply of flowers from Plaintiffs. 2T17 20-25; 2T18 14-23. No complaints were ever made. 2T19 3-6. Ralph did not have any sit down with the Plaintiffs about any alleged issues. He assumed that Plaintiffs would not be able to supply the flowers to their NJ Wedding Pro's customers. The Defendants continued to run NJ Wedding Pro business without referring any flower orders to the Plaintiffs. 3T75 8-25; 3T76 1-9. The Defendants never documented or communicated any standard that they expected the Plaintiffs to comply with. 3T178 23-25; 3T179 1-8.

In the middle of 2018, Plaintiffs became aware that Defendants were actively conducting business under NJ Wedding Pro within the fifty (50) miles radius 2T18 5-13; 2T19 22-25; 2T20 1-7. Google map showed the distance

between the Brick Flower Market shop and the NJ Wedding Pros to be 29 miles.
2T20 2-22; 2T21 5-22; P278a.

Nancy and Ralph confirmed the use of TimeTrax. 2T219 16-25; 2T220 1-22; 3T46 9-11. Ralph took care of the payroll. 2T204 11-15. A payroll company processed the payroll based upon the hours reported by Ralph. 3T45 12-14; 3T46 9-11. Plaintiffs were not given any reason to suspect that Defendants kept two sets of records payroll/payments. 1T59:5-25; 1T60:1-9. The system was computerized. 1T60: 13-16. In case of any errors in punching committed by the employees, Nancy fixed it. 2T208 10-25; 2T209 1-15. The TimeTrax system was inherited by Plaintiffs. It contained historical data. 1T90: 6-25; 1T91: 1-7.

After closing, Plaintiffs recognized that employee related expenses were high. In October-November of 2018, Prasad reviewed the preexisting TimeTrax data and noticed a significant gap between the amounts stated on the P&L and the numbers contained in the system. The review revealed that the number of hours worked by Brick's employees in 2017, as documented in TimeTrax system, was much higher than what they were paid through the payroll. 1T92:7-22; 1T94:20-25; 1T95:1-21; 1T96:1-25; 1T91T7: 1-23. The data revealed that twenty-five (25) people were clocking in and out. Many of those who were in TimeTrax were not issued W2. 1T99: 13-23. Defendants had provided a payroll summary/ list of the employees to the Plaintiffs containing only 6-7 names.

Prasad found that 25 people were documented in TimeTrax. 1T100: 10-23. TimeTrax had capacity to compute the hours and wage and generate a report. 1T104:4-6.

Defendants had provided a payroll summary prior to purchasing the business for 9 months. 1T112: 1T7-25; 1T113:2-4. They were also given financial information for the same time frame, which included the payroll cost for the same time period. Plaintiffs relied upon these documents in making their decision. 1T113: 5-25; 1T114: 1-2; 1T115: 7-14. The cost of employees as per the documents given to Plaintiff was shown to be \$33,818 on the books and \$25,235 off the books. The total of the disclosed payroll expense was \$59,053. P172a.

The employees' hours shown in the payroll summary were not the same as in the TimeTrax system. 1T116: 22-25. For the first quarter of 2017 the hours logged through the TimeTrax were a total of 1,999.30. 1T121: 1-5. For the second quarter of 2017, they were 2,672. 1T122: 3-8. This information was preexisting in the TimeTrax system. 1T122: 13-16. The hours for the third quarter were 2,141.15. 1T123: 14-16. For the last quarter of 2017, Defendant's employees logged 2,509.49 hours. 1T124: 11-13. The total hours logged in 2017, as shown in TimeTrax report, were 9,322.44. 1T129:7-8.

The difference was significant. The hours represented for nine months by Defendants were 3,173.25. 1T129: 11-23; P173a-176a. It would amount to approximately 4,875.00 hours for the entire year of 2017. 1T131: 3-12. The difference was a whopping 5,091 hours. 1T135: 6-10. The payroll expense was represented to be half of what it actually was. 1T135: 15-24. The number of employees issued W-2 statements in 2017 was much less than TimeTrax. 1T139: 13-22. As soon as the Plaintiffs discovered the TimeTrax data, Prasad sent an email to Ralph. 1T140: 1-25. 1T141: 12-22. Ralph ignored it. 1T142:3-5.

Plaintiffs discovered that the expense for delivery charges was also misrepresented. 1T141: 23-25; 1T142: 1-2. A routine delivery charge was not disclosed. 2T205 14-24; 1T144: 1T10-19; 1T149: 23-25; 1T150: 1-22. The expense was not paid through the payroll system. 2T206 4-17.

Brick received orders through the website, carry out, phone in, wire out and pick up. 2T217 6-25; 2T218 1-25. Website, phone in, wire-in orders for flowers were subject to delivery charges. 1T157: 1-12. None of the records provided by Defendants contain anything pertaining to the delivery charges. 3T102 4-7. The total deliveries subject to delivery charges of \$6.00 each for the 9 months of 2017 were 5,649. 1T159: 21-25; 1T160-162. 2T205 14-24. It amounted to \$33,894. 1T163: 24-25; 1T164: 1-5. This critical expense was not disclosed. 1T164: 6-13. The Defendants neither maintained any records nor did

they give any to the Plaintiffs. 3T99 9-20; 3T99-101. Plaintiffs relied on the P&L which showed more than \$200,000 in net profit for 9 months' time period. 1T167: 6-25.

Defendants knew that Brick did not make the profit they stated it did. 3T105 2-4. They led the Plaintiffs to believe that it had much lesser expense and was a highly profitable small business. Two significant expenses were not disclosed or were misrepresented. 1T168: 1-14; 1T169:11-23; 1T170: 4-9. In December of 2018, Plaintiffs discovered the falsity of the information and stopped paying. 2T30 14-25; 2T31 1-9. The undisclosed business expense was in the vicinity of \$95,000 per year for the payroll and delivery charges. The deficiency was significant over the 5-year time period. 2T64 9-21. The Plaintiffs had to sustain these undisclosed costs. 2T64 22-25; 2T65 1-4. Both expenses were essential. 2T34 6-16. The Plaintiffs also had to bear counsel fees and cost of litigation. 2T65. Defendants did not receive any flower supply referrals from the NJ Wedding Pro. 2T34 6-22; 2T35 9-20.

Plaintiffs spent \$5,250.00 on searches and attorney fees P169a; 2T41 14-25; 2T42 1-4. Plaintiffs had made eleven (11) payments to Defendants in total amount of \$37,085.39. 2T47 11-22. They paid a security deposit for the lease in an amount of \$4,500.00. 2T48 14-19; P159a. The individual Defendants were

paid \$4,500.00 per month as rent by the Plaintiffs, which increased periodically. P155a-168a.

Nancy mostly worked in a floral business. 2T174 2-6. Ralph and Nancy continued to run the wedding floral business. 2T174 17-24. They expanded it to a second location. 2T175 3-14. The Wedding Pro business was started in 2015. 2T176 2-23. NJ Wedding Pro was supplied flowers by Brick. It constituted a source of revenue for Brick. 2T177 24-25; 2T178 1-4; 2T179 4-13; 2T188 23-25; 2T189 1-5; 2T189 20-23. In January 2018, Nancy and Ralph were the owners of NJ Wedding Pro which was run by her daughter. 2T179 14-25; 2T180 10-25. Nancy testified that her daughter was not on Brick's payroll. 2T181 1-14. She conceded otherwise only after she was confronted with W2. 2T215 2-25; 2T216 1-25; P112a. Starting from January of 2018, NJ Wedding Pro conducted the same business as it was engaged in earlier, but it procured flowers from a third party other than the Defendants. 2T181 15-25; 2T182 1-14. In 2018, it maintained an office in Red Bank, NJ, which was moved later. 2T193 3-9. Nancy understood that the Defendants were not permitted to have a florist business. 2T195 3-8. Nancy never gave any floral referrals to Bricks. 2T197 20-25; 2T198 1; 2T199 21-25; 2T200 1. Nancy's excuse to not to give any referrals to the Plaintiffs for flowers was an alleged call she received from a prospective bride. Nancy claimed that right there and then she lost all respect for Donna (Vaniesa). 2T199

9-12;2T198-199. Nancy's second excuse was that she was not on speaking terms with Vaniesa. 2T201 16-25; 2T202 9-23.

Brick's tax returns were never provided in discovery. 3T44 19-22. No distinction between Brick and individual Defendants was maintained. 3T56 18-20; 3T62 11-14; 3T63 10-16. The Defendants paid for their personal dinners, groceries, water, gas, phone, personal taxes from Brick. 3T59-60; 3T61 19-25.

Defendants claimed they had an in-house delivery person. According to Ralph, on average he worked 22 to 23 hours per week. 4T5 1-12. Ralph claimed that he kept manual records for delivery log and threw them away after 30 days. 4T20 2-25. He did not enter the data in the computer. 4T20 25; 4T21 1.

COURT'S FINDING AND COMPARISON WITH THE RECORD

Court found that Ralph's testimony was more detailed than Prasad. 5T6:19-20. Prasad's testimony however ran into 259 pages while Ralph's testimony covered approximately 218 pages. 1T; 2T; 3T. Prasad went over all the details he was aware of. The Court imputed an obligation upon the Plaintiffs to decline the purchase and a need to engage a financial consultant if they were not given the records. 5T 8:1-5. The Court blamed the Plaintiffs for not filing more than one motion to compel. 5T8:6-14.

As to the indemnification agreement contained in the Bill of Sale, the Court overlooked relevant and material provisions. The Court stated:

“Both parties agreed to indemnification clauses for any liability provided that the other party was not in default, and that clause included reasonable attorney’s fees.” 5T9:14-17.

The Court missed the critical difference between two indemnification provisions. The Court relied on an assumed fact that all the agreements were prepared by Plaintiffs’ counsel. The Court’s finding was as follows:

“The Court ne – also notes that as a threshold matter that these documents were primarily prepared by counsel by Plaintiffs., and with that in mind, the contract is construed against the draft person against the contract.” 5T9:18-22.

The Court failed to give the contractual provisions and contractual framework between the parties’ proper context and interpretation. The Indemnification Clause contained in the Bill of Sale reads as follows:

8. Indemnification of Seller by Buyer. The Buyer indemnifies the Seller against (1) any and all liability under the contracts and obligations assumed under the Contract of Sale provided that the Seller is not in default under any such contracts or obligations as of the date of this Bill of Sale and (2) all actions, suits, proceedings, judgments, costs and expenses (including reasonable attorney’s fees) connected with the matters described in (1) above including any actions, suits or proceedings between Buyer and Seller, and including actions, suits or proceedings to enforce Buyer’s obligations under this paragraph 8.

P145a. Emphasis added.

The Trial Court used the above cited provision to support its decision to award counsel fees. Bill of Sale was a Seller’s document and there was no testimony or evidence supporting the Trial Court’s global finding that the Bill

of Sale was prepared by the Plaintiffs' counsel. The provision contained in the Bill of Sale as to Indemnification of the Buyer by the Seller was different. It read as follows:

Indemnification of Buyer by Seller. The Seller indemnifies the Buyer against (1) all liabilities and obligations of the Seller relating to the Business not expressly assumed by the Buyer; (2) and damage, loss, or deficiency due to any breach of warranty, misrepresentation, or nonfulfillment of any agreement on the part of the Seller contained in the Contract of Sale; and (3) all actions, suits, proceedings, judgments, costs and expenses (including reasonable attorney fees) connected with the matters described in (1) and (2) above, including any actions, suits or proceedings between Buyer and Seller, and including actions, suits and proceedings to enforce Seller's obligations under this paragraph 7. P145a.

Emphasis added.

The indemnification was limited. The Buyer's indemnification covered the warranties, promises, misrepresentations or non-fulfillment of any agreement on the part of the Seller contained in the contract of sale.

The trial Court made a bad faith finding on part of the Plaintiffs notwithstanding the fact that Defendants neither asserted nor argued it. Based upon the record the court could not conclude that the Defendants were not in breach of the APA. Section 15 of the APA contained a clear restrictive covenant. It required the Defendants to refer all flower supplies for their NJ Wedding Pro's business to the Plaintiffs. P136a-137a. Prior to 2018, Defendant entity Brick supplied flowers to NJ Wedding Professionals. 2T179 7-13; 2T187 19-24.

Therefore, that constituted a source of revenue for Brick, which was to continue. She confirmed that after the closing, they referred flower supply requirements to someone else. 2T182 9-14; 2T183 17-25. Nancy knew that the obligation to give the flower supply business to the Plaintiffs. 2T200 25; 2T201 1-2. From Nancy's testimony, it would be reasonable to conclude that the Defendants never intended to refer any business to the Plaintiffs and agreed to sign a contract to induce the Buyer to purchase their business. Instead, the Court declared that the Plaintiffs acted in bad faith when they stopped payment. The Defendants were already in breach of contractual obligation.

Both Ralph and Nancy claimed that in May of 2018 (it must be noted that between May and January 12, 2018, at least 4 months had elapsed, and no referral was given by the Defendants to Plaintiffs) they became aware of an unhappy bride. 2T198; 3T73 13-25; 3T74 1-16. Ralph never tried to contact Plaintiffs. 3T75 8-21. While the trial Court found bad faith on part of Plaintiffs, it imputed no such negative inference to Defendants' complete failure to refer any flower supply business pursuant to section 15 of the APA to the Plaintiffs.

The APA Section 15 a., in relevant part, provided as follows:

“...NJ Wedding Pro's shall provide Brick Flowers Market all referrals or sales to fulfill the floral arrangements sold to clients for wedding events. In return, Buyer shall offer discounted prices and/or commissions based on wedding referral sales provided to it by NJ Wedding Pro. Buyer shall represent that it shall provide the same quality and meet those standards imposed

by the Seller in the assemblance and design of the floral arrangements requested by NJ Wedding Pros.” P137a. Emphasis added.

Ralph and Nancy procured flowers from someone else. They neither knew nor did they ever set any standards for Plaintiffs. Their failure to refer business was a breach of contract day one. Under the indemnification clause of the Bill of Sale this action would have an impact on the interpretation of the contract. The Court’s fact finding was flawed and therefore it reached conclusions not supported by the facts. 5T21 5-18. The Court ignored the clear testimony of the Defendants when they testified that they never mandated any standards and never talked about these alleged issues with the Plaintiffs which formed the core of the Court’s critical decisions in this case. Ralph confirmed that he never gave any list of standards to the Plaintiffs and there were none on the Website. 3T178 17-25; 3T179 1-8. The issues were not discussed. 3T74 1-16. No efforts were made. 3T75 8-21. NJ Wedding Pro itself had negative reviews. 3T180 16-19. When no referral was ever made, the bride incident could not connect to any material wrongdoing by the Plaintiffs. The Court relied upon the Defendants’ testimony as to an upset bride and inserted its own assumptions. 5T21.

As to the issue of credibility, the Court applied different standards to the Plaintiffs and Defendants. The Court stated that Prasad had no document to compare post and pre-sale payroll expenses. 5T26 19-21. The issue, however,

was pre vs. pre payroll expense. This case revolved around the undisclosed pre-sale payroll expense/higher business expense than they were. Common sense dictates the conclusion that if the business expense was higher, the profits represented would have been lower and not as stated by Ralph in the P&L. The plaintiffs' testimony was not in vacuum, it was supported by Defendants' own business records. The Court's narrative and decision contained in lines 19-22, page 26 of December 22, 2023, was based upon the Court's lack of understanding of the issues presented. 5T26 19-25. Converting this mistake into a party's lack of credibility is as unfair as it gets. The court speculated as to the future profits and stated, "The Court noted that it could – the – the profits could have been decreased because 1-800-Flower would decrease volume to a florist if they had a specific percentage of deliveries...". 5T27 22-25.

The Court found the Defendants to be credible. 5T31 10-19. While Prasad's statement that he thought the Plaintiffs were good or nice people led him to lose credibility in the eyes of the trial Court, the same trial Court ignored Nancy's testimony which was designed to hide the fact that her daughter worked at Brick. 2T181 1-14. She did not recant until after she was confronted with the W2 statements issued to her daughter by Brick. Nancy's testimony went as follows:

11 Q Okay. So, is it your testimony that she was

12 not on the payroll at any point in time in Brick
13 Flower?
14 A Not in Brick Flower, no.
2T181 11-14. Also see 2T215 2-9

In similar way as the Court found a couple of responses provided by Prasad, Nancy's testimony was clear and sufficient to support a finding that she told the truth only when she was confronted by a document. Ralph refused to recognize a document containing Brick's payroll summary which was given to the Plaintiffs and also produced in discovery. He recognized the names but refused the document. 3T77 11-25; 3T78 14-21.

DRAFTING OF THE DOCUMENTS

Prasad testified only about APA being drafted by his attorney. He stated that there were negotiations at that time. 2T6 8-15.

COURT'S CRUCIAL FINDINGS WERE INCONSISTENT WITH THE EVIDENCE

Prasad testified that he was given a P&L Statement and a rosy picture as to Brick's profits. 1T81 6-24; 1T167 13-19; 22-25; 1T168 1-12; 1T170 4-9. His testimony as to the P&L remained uncontradicted. Nancy confirmed that P&L was given to Plaintiffs and prepared by Ralph. 2T211 7-22. Ralph admitted preparing the P&L. 3T47 23-25; 3T48 1-17; 3T49 1-16. He confirmed that the net profit represented for 6 months was \$223,000. 3T51 11-25. The payroll expense was represented to be \$33,818.00 and \$25,235.00. There were various

expenses listed on the P&L except that there was no mention for the expense of \$6.00 delivery charge. 3T52 1-25 3T53 1-14. Ralph could not point to any delivery charges disclosed in P&L. Instead, he claimed delivery was included in payroll. 3T70 18-21; 25; 3T71 1-12. The Defendants were asked but did not produce any discovery pertaining to net profits, tax returns, balance sheets etc. 3T103 1-12. P-17 was a payroll summary of Brick Flower for nine (9) months' which was given to Plaintiffs. P173a-P178a. Ralph confirmed that the names were familiar. 3T78 14. This document was titled as "Brick Flower Market Payroll Summary 01/01/2017 -09/30/2017". P173a-P178a. It showed payroll expense for 9 months to be \$36,567.05. P176a. For the entire year it amounted to approximately \$50,000. 2T112-115. The hours Brick's employees documented through TimeTrax were much higher than the hours contained in the payroll summary, which Plaintiffs relied upon. 2T116 16-25. The time punch records were significantly different from the payroll summary. P179a-P194a. The W2 Statements of Brick differed significantly from the punch records. In 2017, Brick issued W-2 Statements to seventeen (17) employees. As per the W-2 Statements, it paid approximately \$47,982.78 in wages in 2017 (P&L given to the Plaintiffs contained wages for 9 months). P195a-P211a. For the three quarters of 2017, the approximate wage cost would have been \$35,987.085. The payroll shown (on the book in the P&L) was \$33,818.00. P172a What

Defendants actively hid from the Plaintiffs were the TimeTrax records. According to this data, the number of hours worked by Brick's employees for the first quarter of 2017 was 1,999.30; second quarter 2,523.50 regular hours and 138.26 overtime hours; for the third quarter the number was 2141.15 hours. The total for regular hours for the three quarters in 2017 as per the TimeTrax was 6,663.95 regular hours and 138.26 over time. P191a-P194a. Ralph testified that he paid \$10.00 per hour. For regular hours, even at this low rate, this expense would amount to \$66,639.50 (6,663.95 hours x \$10.00 = \$66,639.50). For the overtime, at the rate of \$15.00 per hour, it would be an additional \$2,073.90. (138.26 hours x \$15.00 per hour = \$2,073,90).

Brick payroll record shows a higher hourly rate. The employee Paul Barry was paid \$140.00 for 10 hours on 9/29/2017. Jessica Deigert was paid \$100.00 for 10 hours. P173a. Based upon the TimeTrax and Ralph's testimony of paying \$10.00 per hour, Brick had a payroll expense of \$68,713.40 for the 9-month time period. It was much higher than the payroll expense represented in the P&L they had given to the Plaintiffs. This was not an error; it was an active concealment.

COUNSEL FEE ISSUE

The APA does not contain any provision for counsel fees. The Bill of Sale contains indemnification provisions, which has limiting and qualifying language. P145a. The Promissory Note does not contain counsel fee provision.

P148a-P150a. The Security Agreement is a form document. Section 14 has two options. At the end, there is a sentence stating that “I will also pay all expenses you incur in enforcing this Agreement, including reasonable attorney’s fees.” Emphasis added. It is signed by the members of Bricks acted on behalf of the entity only. P152a-p143a. As to the award of counsel fees, the Court’s decision on December 22, 2023, was as follows:

12 For the foregoing reasons, Plaintiffs’
13 complaint is dismissed in its entirety with prejudice.
14 They are entitled to attorney’s fees as set forth in
15 the APA.

5T35 12-15. Emphasis added.

APA did not contain any provision for counsel fees and costs. P131a-P143a.

Defendants filed a motion for attorney’s fees and costs. P022-P067a. Their counsel attached a billing statement to his certification. P034a-P039a. It did not contain any segregation as to what time was spent on defending against the Plaintiffs’ claims and what was spent on pursuing corporate Defendants’ counter claims. On February 7, 2024, Plaintiffs requested a complete copy of the Defendants’ filing. P068a. Defendants made additional submission which contained the same or similar billing statements. P069a-P103a. Plaintiffs filed another letter with the Court on February 26, 2024. P104a. Plaintiffs’ Counsel’s opposition Certification outlined the fact that the Promissory Note did not

contain provision for attorney's fees. The issues with the Defendants' fee application were outlined. P105a-P110a. Plaintiffs' counsel marked entries. P125a-P130a. An oral argument on the issue of counsel fees and costs took place on May 24, 2024. 6T. The Court rendered its decision on May 28, 2024. 7T.

LEGAL ARGUMENT

Point One

DISMISSAL OF PLAINTIFFS' FRAUD CLAIM WAS AN ERROR

"A"

Plaintiffs Proved Both Legal and Equitable Fraud; It Was An Error to Dismiss Their Fraud Claims

(5T23 24-25; 5T24 1-5; 5T35 12-13; 5T36 11-13)

The trial Court opined that when a fraud claim is based on an alleged omission rather than an affirmative representation, the claim cannot lie absent a fiduciary or special relationship between the parties. It was flawed for several reasons. 5T23 24-25; 5T24 1-5. First, it is based upon the Court's conclusion that a false representation was not made. Second, it is based upon the Court's flawed legal conclusion that an omission cannot lead to a successful claim for fraud absent fiduciary relationship. According to the Court, the Plaintiffs should have declined to sign the agreement until information was produced. It was determined to be Plaintiffs' fault. 5T8 1-5.

In Pioneer Nat'l Title Ins. Co. v. Lucas, 155 N.J.Super. 332, 342, 382 A.2d 933, 938 (App.Div.1978), aff'd o. b. 78 N.J. 320, 394 A.2d 360 (1978), the Court

stated, “One who engages in the kind of conduct here involved (intentional nondisclosure) may not urge that his victim should have been more circumspect or astute.”. The trial Court’s decision in our case was contrary to this ruling. The Defendants were bound to provide truthful information. Their failure to abide by their obligation, could not shift the burden to the Plaintiffs to investigate or be held responsible for the wrongdoing of the Defendants.

To prove legal fraud, a plaintiff must demonstrate a “material misrepresentation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment.” *Jewish Ctr. of Sussex County v. Whale*, 86 N.J. 619, 624, 432 A.2d 521 (1981). However, unlike legal fraud which may give rise to money damages, equitable fraud does not require proof that the representation was made with “knowledge of its falsity and an intention to obtain an undue advantage therefrom.” *Id.* at 625, 432 A.2d 521. “Scienter is not at issue.” *Ibid.* Thus, to recover based on equitable fraud the plaintiff must prove his or her reasonable reliance on a material misrepresentation of fact. *Ibid.* See also *DSK Enter., Inc. v. United Jersey Bank*, 189 N.J.Super. 242, 251, 459 A.2d 1201 (App.Div.), *certif. denied*, 94 N.J. 598, 468 A.2d 232 (1983). Moreover, a party claiming equitable fraud must prove the required elements by clear and convincing evidence. *Stochastic Decisions, Inc. v. DiDomenico*, 236 N.J.Super.

388, 395, 565 A.2d 1133 (App.Div.1989), *certif. denied*, 121 N.J. 607, 583 A.2d 309 (1990). Daibo v. Kirsch, 316 N.J. Super. 580, 588 (App. Div. 1998).

The Plaintiff presented more than sufficient documentary evidence to support each element of legal as well as equitable fraud. The Defendants' falsity was well documented in the TimeTrax records and the doctored payroll report. The Plaintiffs made decision to purchase the business relying upon the P&L and payroll report. The truth was in the preexisting TimeTrax records, known to Defendants. The proofs provided to the Court remained uncontroverted and were clear and convincing.

Arguendo, even if an affirmative misrepresentation of material fact was not made, it would not bar the relief sought by the Plaintiffs. The suppression of truth, the withholding of the truth when it should be disclosed, is equivalent to the expression of falsehood. *Costello v. Porzelt*, 116 N.J.Super. 380, 383, 282 A.2d 432 (Ch.Div.1971). The question under those circumstances is whether the failure to volunteer disclosure of certain facts amounts to fraudulent concealment, or, more specifically, whether the defendant is bound in conscience and duty to recognize that the facts so concealed are significant and material and are facts in respect to which he cannot innocently be silent. Where the circumstances warrant the conclusion that he is so bound and has such a duty, equity will provide relief. *Nicholson v. Janeway*, 16 N.J.Eq. 285, 287

(Cy.1863). Jewish Ctr. of Sussex Cnty. v. Whale, 165 N.J. Super. 84, 89 (Ch. Div. 1978), aff'd, 172 N.J. Super. 165 (App. Div. 1980), aff'd, 86 N.J. 619 (1981)

The failure of a plaintiff to investigate cannot relieve the defendant of the consequences of his own undeniably misleading conduct under the circumstances in failing to disclose obviously material information. See Gallagher v. New England Mut. Life Ins. Co. of Boston, 33 N.J. Super. 128, 136, 109 A.2d 457 (App. Div. 1954) aff'd 19 N.J. 14, 114 A.2d 857 (1955), in which it was held that where a relationship of utmost good faith exists, or should exist, one who is a recipient of fraudulent misrepresentations is justified in relying upon them, even though he might have ascertained the falsity of the representations had he made an investigation. Id. at 89-90

The Court relied on the same logic as was argued by the Defendant in Jewish Ctr. Of Sussex County, which was rejected by the Court. In rejecting the argument, the Court stated, “Defendant urges that plaintiff’s reliance on the exceptionally sparse resume provided by him, without seeking details of his prior employment or exploring his offer to provide references, gives rise to an issue of material fact concerning whether a duty to disclose existed and whether the plaintiff was prejudiced by his nondisclosure. However, the failure of plaintiff to investigate cannot relieve defendant of the consequences of his own undeniably misleading conduct under the circumstances in failing to disclose

obviously material information. See *Gallagher v. New England Mut. Life Ins. Co. of Boston*, 33 N.J.Super. 128, 136, 109 A.2d 457 (App.Div.1954) aff'd 19 N.J. 14, 114 A.2d 857 (1955), in which it was held that where a relationship of utmost good faith exists, or should exist, one who is a recipient of fraudulent misrepresentations is justified in relying upon them, even though he might have ascertained the falsity of the representations had he made an investigation." Id. Also see *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 332 N.J. Super. 31, 40-41 (App. Div. 2000)

The Plaintiffs were entitled to rely on the P&L and had no duty to make further inquiry. See *Berman v. Gurwicz*, 178 N.J. Super. 611, 622 (Ch. Div. 1981). The Court rewarded the Defendants by imposing a duty to investigate upon the Plaintiffs instead. This approach was flawed and not supported by the facts and the case law.

"B"

PALINTIFFS WERE ENTITLED TO RESCISSION OF THE CNTRACT

(5T30 1-7)

Contracts in general are subject to rescission when they are obtained by fraud. *Merchants Indem. Corp. v. Eggleston*, 37 N.J. 114, 179 A.2d 505 (1962). That fraud may be either legal or equitable. Legal fraud consists of a material misrepresentation of a presently existing or past fact made with knowledge of

its falsity, with the intention that the other party rely thereon, and he does so rely to his damage. In equitable fraud knowledge of its falsity is not required. Foont-Freedenfeld Corp. v. Electro Protective Corp., 126 N.J.Super. 254, 314 A.2d 69 (App.Div.1973), 64 N.J. 197, 314 A.2d 68 (1974). Internal citations omitted.

The judicial remedy of rescission is rooted in considerations of equity. Where a party has gained an unfair advantage by virtue of fraudulent misrepresentation, and monetary damages alone will not satisfy the injury sustained by the aggrieved party, courts have looked to the equitable remedy of rescission to eliminate the damage. The object of equitable remedies such as ... rescission is to restore the parties to the *status quo ante* and prevent the party who is responsible for the misrepresentation from gaining a benefit. Rutgers Cas. Ins. Co. v. LaCroix, 194 N.J. 515, 527 (2008). Internal citations omitted.

Plaintiffs were induced to purchase a business based upon a fraudulent P&L. They were forced to bear the hidden business expenses due to Defendant's fraudulent conduct. They were entitled to a rescission.

“C”
**DEFENDANTS COMMITTED LEGAL FRAUD AND DENYING THEM
RELIEF, INCLUDING PUNITIVE DAMAGES WAS AN ERROR**
(5T22 17-23; 5T24 6-12)

In the case of legal fraud the plaintiff, in addition to proving damage, must prove scienter, meaning knowledge of the falsity of the representation, with an intent that the other party rely thereon. Such fraudulent conduct constitutes

unfair dealing whether or not actual damages are shown. Even if the person relying on the falsehood were unable to establish actual damages, he should be entitled to vindicate his rights through an award of nominal damages and in appropriate cases to punish the defendant through an award of punitive damages. Nappe v. Anshelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 52–53 (1984)

People should not be able with impunity to trench wilfully upon a right. Moreover, it is especially fitting to allow punitive damage for actions such as legal fraud, since intent rather than mere negligence is the requisite state of mind. Id. at 50. There is more than adequate support in the facts and the law for the Court to find the existence of legal as well as equitable fraud. The conduct of Defendants was so egregious and warranted the finding of legal fraud and award of punitive damages.

POINT TWO

(A)

**COURT’S INTERPRETATION OF VARIOUS CONTRCATS WAS
FLAWED**

**(7T16 8-9; 5T9 2-10; 5T10 19-25; 5T21 13-18; 5T30 1-3; 5T31 20-25; 5T35
12-18)**

The trial Court’s interpretation of the contracts lacked support in the record. It’s finding that all contracts were drafted by the Plaintiffs’ counsel remained unsupported. The trial Court failed to carefully review and analyze the indemnification language contained in the Bill of Sale. P145a. The APA did not contain any provision for counsel fees. P131a-143a. Yet, the Court relied on this

document to award counsel fees and costs. The Bill of Sale contained an indemnification provision which did not support the award of counsel fees and costs. The Promissory Note did not contain provide for counsel fees and costs. P148a-150a. The Security Agreement contained a couple of lines pertaining to the attorney's fees. The individuals were not party to the contracts. The court missed all these points that needed to be weighed in to reach a proper decision.

“B”
COURT’S DECISION TO CONSTRUE CONTRACTS AGAINST THE
PLAINTIFFS WAS AN ERROR
(5T9 18-22; 5T20 5-7)

Construction of a contract is generally a question of law for the court to determine. When interpreting a contract, the task is to discern the intent of the parties. When doing so, Court must consider the relations of the parties, the attendant circumstances, and the objects [the parties] were trying to attain. The interpretation of the contract must be reasonable and in accord with justice and common sense. PSL, L.L.C. v. Terhune, A-3162-07T1, 2009 WL 137309, at 3 (N.J. Super. Ct. App. Div. Jan. 22, 2009). Citations omitted. An agreement must be construed in the context of the circumstances under which it was entered into and it must be accorded a rational meaning in keeping with the express general purpose. Karl's Sales & Serv., Inc. v. Gimbel Bros., 249 N.J. Super. 487, 492 (App. Div. 1991)

Not only the trial Court failed to analyze varying provisions contained in different contracts, It erred by declaring that the contracts were to be construed against the Plaintiffs. 5T9 18-22

The Court did not provide any reliable basis for its conclusion. Prasad's testimony that the APA was drafted by his attorney was taken out of context. He also testified that both parties' counsels were present and that there were negotiations. There is no other testimony as to what the negotiations were and whether anyone asked for any changes and who made the amendments. Further, there was no testimony as to who drafted the Bill of Sale, Promissory Note, Security Agreement and the Lease Agreement.

Also, where an ambiguity appears in a written agreement, while the writing is to be strictly construed against the party preparing it, *See In re Miller's Estate*, 90 N.J. 210, 221, 447 A.2d 549 (1982); *Liqui-Box v. Estate of Elkman*, 238 N.J.Super. 588, 599, 570 A.2d 472 (App.Div.1990), this rule of construction is somewhat tempered by the principle that although "a contractual provision should generally be construed narrowly against its drafter [citation omitted], the construction should be sensible and in conformity with the expressed intent of the parties." *Broadway Maintenance Corp. v. Rutgers*, 90 N.J. 253, 271, 447 A.2d 906 (1982). In this regard, even where the intention is doubtful or obscure, the most fair and reasonable construction, imputing the least hardship on either

of the contracting parties, should be adopted [citation omitted], so that neither will have an unfair or unreasonable advantage over the other. [*Tessmar v. Grosner*, 23 N.J. 193, 201, 128 A.2d 467 (1957)]. Karl's Sales & Serv., Inc. v. Gimbel Bros., 249 N.J. Super. 487, 493 (App. Div. 1991). Emphasis added.

The absence of attorney's fees provision in the APA, existence of the negotiations and lack of testimony as to who drafted the rest of the documents dictated that the court took a step back before it ruled that all contracts were to be construed against the Plaintiffs. *Where the non-drafting party has no opportunity to negotiate the terms of a contract*, ambiguities will be construed against the drafter. See *Kotkin v. Aronson*, 175 N.J. 453, 455, 815 A.2d 962 (2003); *Wakefern Food Corp. v. Liberty Mutual Fire Ins. Co.*, 406 N.J. Super. 524, 538–40, 968 A.2d 724 (App.Div.2009). Emphasis added.

Even though the terms contained in a contract are ambiguous, it is not automatically construed against the drafter. The doctrine may be utilized after a court has examined the terms of the contract, in light of the common usage and custom, and considered the circumstances surrounding its execution. If, at that time, the court is unable to determine the meaning of the term, contra proferentem may be employed as a doctrine of last resort. The rationale behind that method of interpretation is that “[w]here one party chooses the term of a contract, he is likely to provide more carefully for the protection of his own

interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning.” *Ibid.* Importantly, contra proferentem is only available in situations where the parties have unequal bargaining power. Ibid. If both parties are equally “worldly-wise” and sophisticated, contra proferentem is inappropriate. *Pacifico v. Pacifico*, 190 N.J. 258, 267–68 (2007) Emphasis added. Internal citations omitted.

The Court erred as a matter of fact as well as a matter of law in declaring that the contracts will be construed against the Plaintiffs.

“C”

INDEMNIFICATION PROVISION CONTAINED IN THE BILL OF SALE WAS INAPPLICABLE AND WAS REQUIRED TO BE CONSTRUED STRICTLY AGAINST THE DEFENDANTS

(5T9 11-17)

The attorney’s fees provisions contained in the Bill of Sale would not support an award of counsel fees and costs for several reasons. First, there was no evidence that it was drafted by the Plaintiffs. Second, the Court failed to comprehend the language contained in section 8 of the Bill of Sale. Third, the Bill of Sale contained fee provision within the indemnification clauses which must be construed strictly against the indemnitee. The language used in the Bill of Sale for Seller’s indemnification was not open ended. As to indemnification of Seller by Buyer, it stated,

“8. Indemnification of Seller by Buyer. The Buyer indemnifies the Seller against (1) any and all liability under the contracts and obligations assumed under the Contract of Sale provided that the Seller is not in default under any such contracts or obligations as of the date of this Bill of Sale and (2) all actions, suits, proceedings, judgments, costs and expenses (including reasonable attorney’s fees) connected with the matters described in (1) above including any actions, suits or proceedings between Buyer and Seller, and including actions, suits or proceedings to enforce Buyer’s obligations under this paragraph 8.

P145a. Emphasis added.

It used the language “liability under the contracts and obligations assumed under the contract of sale”. It is common knowledge that someone purchasing an active business would be assuming contracts related to the business. An example in this case would be the Plaintiffs assuming obligations under the 1-800 Flowers.com contract that the Defendants had. Bill of Sale which is commonly designed to transfer title to assets. The second part of the above cited provision makes reference to sub section (1) and thus its application as to attorney’s fees was related to what was covered in the first part of this section. The trial court’s use of this provision liberally to grant fees and costs to the Defendants was without basis. Indemnity contracts are interpreted in accordance with the rules governing the construction of contracts generally. When the meaning of the clause is ambiguous, however, the clause should be strictly construed against the indemnitee. Englert v. The Home Depot, 389 N.J. Super. 44, 51–52 (App. Div. 2006) Internal citations omitted. If the meaning of an

indemnity provision is ambiguous, the provision is “strictly construed against the indemnitee. The strict-construction approach is taken for two apparent reasons. One is that a party ordinarily is responsible for its own negligence, and shifting liability to an indemnitor must be accomplished only through express and unequivocal language. Another is that, under the American Rule, absent statutory or judicial authority or express contractual language to the contrary, each party is responsible for its own attorney's fees. Kieffer v. Best Buy, 205 N.J. 213, 223–24 (2011) Internal citations omitted.

The provisions contained in the Bill of Sale required scrutiny and strict interpretation. It was also a document between two entities and not among individuals. The court failed to do so.

POINT THREE

AWARD OF COUNSEL FEE AND COSTS TO DEFENDANTS WAS AN ERROR;

(A)

THE AMERICAN RULE PROHIBITS AWARD OF COUNSEL FEES AND COSTS

(7T14 21-24; 7T15 7-11; 5T35 12-18)

In its December 22, 2023, decision, the trial Court stated, “For the foregoing reasons, Plaintiffs’ complaint is dismissed in its entirety with prejudice. They are entitled to attorney’s fees as set forth in the APA.” Our courts generally adhere to the American Rule, which holds each party responsible for

its own attorney's fees. Rendine v. Pantzer, 141 N.J. 292, 322, 661 A.2d 1202 (1995). Nonetheless, a court may grant a fee award to a prevailing party in litigation to the extent such fee shifting is specifically permitted by law or agreement. Mason v. City of Hoboken, 196 N.J. 51, 70-71, 951 A.2d 1017 (2008). Accounteks.Net, Inc. v. CKR Law, LLP, 475 N.J. Super. 493, 506 (App. Div. 2023) APA and Promissory Note did not provide for attorney's fees. P131a-143a. P148a-150a. The Bill of Sale did not support a sweeping award of counsel fees. P144a-146a. The security agreement was a standard form document and contained a check mark against attorney's fee provision. P151a-154a. Ralph and Nancy were not party to any of the agreements in their individual capacity. Prasad and Vaniesa signed contracts on behalf of Bricks except for guaranteeing the Promissory Note. Against this factual backdrop, the relevant question was whether in the global scheme of various contracts having varying provisions and parties, did the Court have sufficient uncontroverted evidence before it to trump the American Rule and find an exception based upon the contracts in favor of all Plaintiffs? It did not. The fee was awarded against all Plaintiffs.

New Jersey courts “have traditionally adhered to the American Rule as the principle that governs the allocation of attorneys' fees. “The American Rule “ ‘prohibits recovery of counsel fees by the prevailing party against the losing party. Thus, litigants typically bear the cost of their own legal representation.

The purposes behind the American Rule are threefold: (1) unrestricted access to the courts for all persons; (2) ensuring equity by not penalizing persons for exercising their right to litigate a dispute, even if they lose; and (3) administrative convenience. Occhifinto v. Olivo Const. Co., LLC, 221 N.J. 443, 449 (2015). Internal citations omitted.

The Courts are rather reluctant to carve out exceptions to the American Rule. Our Supreme Court has described the policies undergirding the American Rule as “strong.” Our courts have been justifiably circumspect in departing from the [American] rule, doing so only when there is “express authorization by statute, court rule or contract, or when the interests of equity demand it, In re Estate of Vayda, 184 N.J. 115, 123 (2005). Also see Innes v. Marzano-Lesnevich, 224 N.J. 584, 593 (2016) Internal citations omitted. The Court in our case was least interested in considering the relevant facts, factors and the law. P105a-130a; 6T; 7T.

POINT FOUR

“A”

**COURT’S CREDIBILITY FINDING AS TO PRASAD AND AS TO
PLAINTIFFS’ EVIDENCE WAS AN ERROR**

(5T26 19-25)

The Court ruled that the evidence presented by the Plaintiffs was not credible. 5T26 9-25. This determination was rooted in Court’s misunderstanding

of Plaintiffs' position. The Court was looking for pre-sale and post-sale comparison while the issue was pre-sale payroll and delivery charges as represented and pre-sale payroll and delivery charges as they existed. That was the basis for Plaintiffs' claim of misrepresentation in the P&L statement. The documents they presented and relied upon were all pre-sale documents given to them and those which existed but were not given to them. P170a-211a.

The trial Court's credibility findings are normally binding upon the Appellate Court when the evidence is *largely testimonial*. In re Return of Weapons to J.W.D., 149 N.J. 108, 117, 693 A. 2d 92 (1997). Emphasis added. In our case, Prasad's entire testimony was supported by documentary evidence and the documents were created by no other than the Defendants.

The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence *"Trial court findings are ordinarily not disturbed unless 'they are so wholly unsupported as to result in a denial of justice. Reversal is required in those circumstances when the trial court's findings were 'so wide of the mark that a mistake must have been made.'"* State, Div. of Youth & Family Servs. v. T.G., 414 N.J. Super. 423, 432-33 (App. Div. 2010) Emphasis added. Internal citations omitted. In our case, the Court's findings on many critical issues were not supported by the documentary

evidence presented. The credibility as to documentary evidence is one of those. The documents existed but were misunderstood.

“B”

**COURT’S FINDING THAT NANCY AND RALPH WERE CREDIBLE
WAS AN ERROR**

(5T31 10-19)

The Court found both Nancy and Ralph credible. In doing so, Court ignored the fact that Nancy was not truthful about her daughter’s employment with Brick. Ralph tried to deny a critical document which was preexisting and given in discovery. Ralph and Nancy confirmed signing of the APA and being fully aware of the obligation to refer all flower supply to Bricks. They claimed a bride had complained in May. This blatant claim was asserted in light of the fact that they never ever gave any referral to the Plaintiffs for 4-5 months. The Court’s finding of their credibility was inconsistent with their own testimony.

PPOINT FIVE

“A”

**COURT’S FINDING THAT PLAINTIFFS ACTED IN BAD FAITH WAS
AN ERROR**

(5T32 10-14)

The Defendants did not argue bad faith on the part of the Plaintiffs. 5T32 10-14. The court reached this decision based upon its conclusion that Plaintiffs failed to discuss the issues with the Defendants and terminated the contract

unilaterally. It gave no weight to the uncontroverted email sent to Ralph by Prasad seeking explanation. P212a. The Court did not treat the Defendants in the same fashion. The Defendants admitted that they never ever gave referral of flower business to Plaintiffs. They did not even try to comply with their contractual obligation. The Court extended the Defendants every benefit of doubt and went out of its way to find positive in this glaring negative. The Defendants' conduct would have been sufficient to find bad faith and breach of duty of good faith and fair dealing based upon the fact that they conducted business, but no referral was sent to the Plaintiffs.

“B”

DEFENDANTS BREACHED A DUTY OF GOOD FAITH AND FAIR DEALING OWED TO THE PLAINTIFFS

(5T31 10-19)

The Court dismissed Plaintiffs' claim of breach of duty of good faith and fair dealing. Under the APA, the Defendants agreed to refrain from competing with the Plaintiffs and refer all flower requirements used by N.J. Wedding Pro to Bricks. The agreement was signed in January of 2018. P131a-P143a. This litigation commenced in February of 2019. P231a-240a. During this full one year, they never sent any referrals to the Plaintiffs for the supply of flowers.

The guiding principle in the application of the implied covenant of good faith and fair dealing emanates from the fundamental notion that a party to a

contract may not unreasonably frustrate its purpose: [W]here a party alleges frustration of its expectation or fundamental purpose in entering the contract, the question of what interest will be protected by the implied duty answers itself; the plaintiff's interest is internal to the understanding of the parties and good faith requires the defendant not exercise such discretion as it may have under the literal terms of the contract to thwart plaintiff's expectation or purpose. Seidenberg v. Summit Bank, 348 N.J. Super. 243, 259 (App. Div. 2002). Internal citations omitted. The Defendants knowingly and purposefully thwarted the very purpose underlying the restrictive covenant contained in the APA and they did so day one. The Court's ignoring the same was an error.

In addition, bad faith interference with the other party's right to benefit from the "fruits of the contract" may constitute breach of the implied covenant of good faith and fair dealing that is implied in every contract and may result in compensable damages despite the right of the party that acted in bad faith to terminate an at-will contract. *Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, 420–21, 424–25, 690 A.2d 575 (1997). Vosough v. Kierce, 437 N.J. Super. 218, 244–45 (App. Div. 2014) In our case, the contract was not even at will. Defendants never stated any standards they claimed the Plaintiffs were subject to. They themselves did not know what standards they had. What they claimed at trial was nothing more than an excuse to cover their wrongdoing. There were

no facts and no evidence that would have justified Defendants' failure to provide flower referral to the Plaintiffs except that they acted in bad faith and that they never intended to abide by the terms of the contract.

The evidence of bad motive may be established through circumstantial evidence cannot be disputed. It has been recognized that one's state of mind is seldom capable of direct proof and ordinarily must be inferred from the circumstances properly presented and capable of being considered by the court. What a person's intentions were need not be proved from what he said, but they may be inferred from all that he did and said, and from all the surrounding circumstances of the situation under investigation. Wilson v. Amerada Hess Corp., 168 N.J. 236, 253–54 (2001). Internal citations omitted.

Testimony Plaintiffs presented at the trial was sufficient to prove the existence of bad faith on part of the Defendants. Defendants' own testimony proved the required elements and therefore it was an error on part of the Court to dismiss Plaintiff's Complaint as to Defendant's breach of duty of good faith and fair dealing they owed and breached.

POINT SIX
COURT ERRED BY NOT PIERCING THE CORPORATE VEIL
(5T33 19-23)

The general rule is that a corporation is a separate entity distinct from its owners. State Dept. of Environmental Protection v. Ventron Corp., 94 N.J. 473, 500 (1983) Lyon v. Barrett, 89 N.J. 294, 299 (1982). While the main objective

behind a corporate shield is to protect shareholders from liabilities to the extent fraud, injustice or violation of public policy, law or contract will result, courts will disregard the legal separateness of the corporation and impose liability on the individuals associated with it. Coppa v. Taxation Division Director, 8 N.J. Tax 236, 244 (1986). Piercing the corporate veil is designed to remedy fundamental unfairness.

In addition to an injustice and fundamental wrong that occurred at the hands of Defendants against the Plaintiffs, Nancy and Ralph operated the business of Brick in a manner that there was no distinction between them and the company. Their bills were all paid by Brick and no meaningful records were kept creating any distinction. They used the company to satisfy all their objectives and desires including the most outrageous one of committing fraud on an innocent party. They actively used the corporation to accomplish a fraud. It was not a clean and legitimate business operation that they engaged in.

POINT SEVEN
DISMISSING PLAINTIFFS' BREACH OF CONTRACT CLAIM WAS
AN ERROR
(5T22 17-23)

Under the controlling case law, Plaintiffs are permitted to pursue their claim for rescission of contract based upon fraud and in the alternative pursue breach of contract as well. Ray v. Beneficial Fin. Co. of N. Jersey, 92 N.J. Super. 519, 538 (Ch. Div. 1966)

Defendants breached the representations and restrictive covenant contained in the APA. The Plaintiffs provided testimony and documentary evidence as to how the Defendants planned in advance a breach of the contract, they entered into. They agreed to give all flower business to Plaintiffs and then disappeared. The revenue stream from the NJ Wedding Professionals was well defined. The Asset Purchase Agreement and Bill of Sale both contained representations from Sellers which were false and thus the agreements were breached. To prevail on a claim of breach of contract, [o]ur law imposes on a plaintiff the burden to prove four elements: first, that “the parties entered into a contract containing certain terms”; second, that “plaintiffs did what the contract required them to do”; third, that “defendants did not do what the contract required them to do,” defined as a “breach of the contract”; and fourth, that “defendants’ breach, or failure to do what the contract required, caused a loss to the plaintiffs.” Globe Motor Co. v. Igdaley, 225 N.J. 469, 482, 139 A.3d 57 (2016) (alterations omitted) (quoting Model Jury Charges (Civil), 4.10A “The Contract Claim -- Generally” (approved May 1998)).] Goldfarb v. Solimine, 245 N.J. 326, 338–39 (2021) Also see Pollack v. Quick Quality Restaurants, Inc., 452 N.J. Super. 174, 188 (App. Div. 2017) Internal citations omitted.

The breadth of damages available to plaintiff if he succeeds in his breach of contract claim permits a plaintiff to recover for such losses as may fairly be considered to have arisen naturally from the defendant's breach of contract.” That is, compensatory damages are intended to compensate the injured party for loss caused by the breach by putting the injured party in as good a position as it would have been in had the performance been rendered as promised. Compensatory damages are intended to make a litigant whole ... no more, no less”. Murphy v. Implicito, 392 N.J. Super. 245, 266 (App. Div. 2007)

All representations made to the Plaintiffs in APA and Bill of Sale were false. Documentary evidence was testified to by Prasad at trial. It was corroborated by Defendants. Prasad went through the damages caused to the Plaintiffs by Defendants. The Court erred in dismissing Plaintiffs’ count for Breach of Contract. It could be dismissed only if it was concluded that the P&L containing the numbers it did was not given to the Plaintiffs and that the records revealed from TimeTrax were inaccurate. Defendants did not and could not refute the P&L and they did not and could not refute the TimeTrax records. In light of evidence and testimony, there could be no other conclusion but that the representations as to all information given to Plaintiffs were breached.

CONCLUSION

Plaintiffs carried their burden of proof with clear and convincing evidence

for every cause of action asserted even if the lower standard applied. Prasad's testimony was well supported by documentary evidence and corroborated by the testimony of Ralph and Nancy. As to damages, for the fraud, the Plaintiffs asked the court to rescind the contract and make them whole. They paid \$120,000 to the Defendants. They paid for the note for 11 months. They sustained damages in terms of at least \$95,000 each year for the undisclosed cost of payroll and delivery charges that they had to bear. They incurred closing costs in the amount of \$5,250.00. They paid a security deposit to the Defendants for the lease and made payments under the lease which were well defined in the lease agreement. Additionally, they incurred counsel fees and cost of litigation. Defendants got notice from Plaintiffs upon discovery of fraud. They never made any effort to correct the wrong and instead served legal notices. Defendants breached the contract on day one. They signed a contract without intending to perform as they continued NJ Wedding Pro business and never ever gave any business to Plaintiffs. They breached the representations made in contracts day one as they had already made false representations by failing to disclose material facts.

The Courts decision to dismiss all of Plaintiffs claim in light of significant documentary evidence was an error.

Defendants committed fraud as well and breached the contract much before the Plaintiffs stopped making payment under the promissory note. They

should not have been rewarded by the court. The counsel fee award was not supported by the contracts the parties entered into and the conduct of the Defendants.

For the above stated reasons, it is respectfully requested that the trial court's judgment be reversed.

Respectfully submitted.

Law Offices of Susheela Verma

/s/Susheela Verma, Esq.

SUSHEELA VERMA, ESQ.

Counsel for Plaintiffs

**BRICKS FLOWER MARKET, LLC,
PRASAD KURUGANTI, and VENIESA
KEMPADOO,**

Appellants/Plain tiffs,

v.

**BRICK FLOWER MARKET, LLC,
RALPH PETRELLESE, NANCY
PETRELLESE, and John/Jane Does 1 to
5 and XYZ entities,**

Respondents/Defendants.

SUPERIOR COURT OF NEW JERSEY

**APPELLATE DIVISION
DOCKET NO. A-003533-23**

CIVIL ACTION

**ON APPEAL FROM THE SUPERIOR
COURT OF NEW JERSEY, LAW
DIVISION, MONMOUTH COUNTY,
TRIAL DOCKET NO. MON-L-000614-19**

**SAT BELOW:
HONORABLE MARA ZAZZALI-HOGAN,
J.S.C.**

**BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS BRICK FLOWER MARKET,
LLC, RALPH PETRELLESE, AND NANCY PETRELLESE**

MENSCHING & LUCARINI, P.C.

1200 Hooper Avenue

Toms River, NJ 08753

(732) 244-3700

E-MAIL: maryellenj@ogb.us.com or

johnm1@ogb.us.com

John J. Mensching, Esq. on the Brief

NJ Attorney ID # 003091984

Attorneys for Brick Flower Market, LLC, Ralph Petrellese, and Nancy Petrellese

Dated: April 30, 2025

TABLE OF CONTENTS

TABLE OF CITATIONS OF CASES, STATUTES, RULES AND OTHER

AUTHORITIES(ii)

PROCEDURAL HISTORY 1

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 3

LEGAL ARGUMENT 9

POINT I: STANDARDS OF REVIEW 9

POINT II: THE TRIAL COURT’S FINDINGS OF FACT AND CONCLUSIONS OF

LAW WERE SUPPORTED BY THE COMPETENT, CREDIBLE EVIDENCE

ADDUCED DURING TRIAL 11

{a} DAMAGES 11

{b} THE NOTE, GUARANTY, AND RELATED LOAN DOCUMENTS 14

{c} ATTORNEY’S FEES 14

{d} CONTRACT PRINCIPLES 15

{e} RESCISSION 24

{f} FRAUD 25

CONCLUSION 28

|
TABLE OF
CITATIONS OF CASES, STATUTES, RULES
AND OTHER
AUTHORITIES

Cases:

<u>Agathos v. Starlite Motel, 977 F.2nd 1500, appeal after remand,</u> <u>60 F.3d1453 (C.A.3 1992).....</u>	<u>19</u>
<u>Air Master Sales Co. v. Northbridge Park Co-Op, Inc., 748 F. Supp. 1110(D.N.J</u> <u>1990).....</u>	<u>17</u>
<u>Alcoa Edgewater No. 1 Fed. Credit Union v. Carroll, 44 N.J.442 (1965)</u> <u>.....</u>	<u>15</u>
<u>Allstate Ins. Co. v. Northfield Med. Ctr., 228 N.J. 596,619 (2017).....</u>	<u>9</u>
<u>Bak-A-Lum Corp. v. Alcoa Building Products, 69 N.J. 23 (1976).</u>	<u>15</u>
<u>Balsanides v. Protameen Chemicals, 160 N.J. 352 (1999).....</u>	<u>10</u>
<u>Ben Elazar v. Macrietta Cleaners, Inc., 230 N.J.123 (2017).....</u>	<u>10</u>
<u>Biovail Corp. Intern. v. Hoechst Aktiengesellschaft, 49</u> <u>F.Supp.2nd750(D.N.J.1999).....</u>	<u>17</u>
<u>Bonco Petrol, Inc. v. Epstein, 115 N.J. 599 (1989).....</u>	<u>24</u>
<u>Borough of West Caldwell v. Borough of Caldwell, 26 N.J. 9 (1958).....</u>	<u>18</u>
<u>Buscaglia v. Owens-Corning Fiberglass, 68 N.J. Super. 508 (App. Div. 1961).....</u>	<u>19</u>
<u>Caldwell v. Haynes, 136 N.J. 422 (1994).....</u>	<u>11</u>
<u>Carrino v. Novotny, 78 N.J. 355 (1979).....</u>	<u>15</u>
<u>Caruso v. Ravenswood Developers, Inc., 337 N.J. Super. 499 (App. Div. 2001).....</u>	<u>17</u>
<u>Chase v. McGann, 405 N.J. Super. 547 (App. Div. 2009).....</u>	<u>23</u>
<u>Cobo by Hudson Physical Therapy Services v. Market Transition Facility by Material Damage</u> <u>Adjustment Corp., 293 N.J. Super. 374 (App. Div. 1996).....</u>	<u>10</u>
<u>Cohenv. Lawn Dairies Inc., 44 N.J. 450 (1965).....</u>	<u>15</u>
<u>Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259 (2006).....</u>	<u>14</u>

Cooper v. Borough of Wenona, 977 F. Supp. 305 (D.N.J. 1997)..26

Cty. Of Morris v. Fauver , 153 N.J. 80 (1998)..... 18

Donovan v. Bachstadt , 91 N.J. 434 (1982).....12

Dunkin` Donuts of America, Inc. v. Middletown Donut Corp., 100 N.J. 166 (1985).....16

D. W.v. R. W., 212 N.J.132 (2012)..... 10

Emerson Radio Corp. v. Orion Sales, Inc., 80 F. Supp. 2nd 307, rev. 253 F.3d 159 (D.N.J. 2000).....20

Fagliarone v. Twp. of N. Bergen,78 N.J. Super. 154, 188 A.2d 43 (App. Div.), certif. denied, 40 N.J.221 (1963)..... 9

First Atlantic Leasing Corp. v. Tracey, 738 F. Supp. 863 (D.N.J. 1990)..... 20

First Family Mort. Corp. v. Dunham, 108 N.J.277 (1987).....

Fleming Companies, Inc. v. Thriftway Medford Lakes, Inc., 913 F. Supp. 837 (D.N.J. 1995).....16,18

Foont-Freedenfeld v. Electro-Protective Corp., 126 N.J. Super.254 (App. Div. 1973)..... 26

Frank Briscoe Co., Inc. v. Travelers Indem. Co., 65 F. Supp. 2nd 285 (D.N.J. 1999)..... 20

Fravega v. Security S. & L. Ass`n., 192 N.J. Super. 213 (1983).....26

Friedman v. Tappan Development Corp., 22 N.J. 523 (1956)..... 15

Furst v. Einstein Moonjy, Inc., 182 N.J. 1 (2004).....11

George M. Brewster & Son v. Catalytic Const. Co., 17 N.J. 20 (1954)..... 17

Gillman v. Bally Mfg. Corp., 286 N.J. Super. 523 (App. Div.),certif. den. 144 N.J. 174 (1996)... 11

Glenfed Financial v. Penick Corp., 276 N.J. Super. 163 (App. Div. 1994)..... 15,21

Hall v. Resolution Trust Corp., 958 F. 2nd 75 (5th Cir. 1992)..... 21

Herbstman v. Eastman Kodak Co., 131 N.J. Super. 439 (App. Div. 1974)..... 19

Hilton Hotels Corp. v. Piper Co., 214 N.J. Super. 328 (Ch. Div.1986)..... 24,25

Huddell v. Levin, 537 F.2nd 726 (C.A.3 N.J. 1976)..... 12

K. Woodmere Associates, L.P. v. Menk Corp., 316 N.J. Super.6 (App. Div. 1998)..... 21

Kelly v. Berlin, 300 N.J. Super. 256 (App. Div. 1997)..... 12

Krosnowski v. Krosnowski, 22 N.J. 376 (1956)..... 17

Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575 (App. Div. 1955).....16

Leitnerv. Braen, 51 N.J. Super. 31 (App. Div. 1958)..... 17

Lightning Lube, Inc. v. Witco Corp., 4 F 3rd 1153 (3rd Cir. 1993). 26

Lithuanian Commerce Corp., Ltd. v. Sara Lee Hosiery, 23 F. Supp. 2nd 509 (D.N.J. 1998).....12

Magnet Resources, Inc. v. Summit MRI, Inc., 318 N.J. Super. 275 (App. Div. 1998) 23

Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366 (1995) 10

Marchak v. Claridge Commons, Inc., 134 N.J. 275 (1993)..... 16

Matter of Community Medical Center, 623 F.2nd 864 (C.A.3 1980)..... 19

Matter of Paragon Securities Co., 589 F. 2nd 1240 (C.A.3 1978).....24

McConkey v. AON Corp., 354 N.J. Super. 25 (App. Div. 2002)..... 13

McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546 (1993)..... 15

McClellan v. Feit, 376 N.J. Super. 305 (App. Div. 2005).....26

Medivox Productions, Inc. v. Hoffman-LaRoche, Inc., 107 N.J. Super. 47 (L. Div. 1969)..... 23

Michaels v. Brookchester, Inc., 26 N.J. 379 (1958).....19

Middlesex County Sewerage Authority v. Borough of Middlesex,
74 N.J. Super. 591, affirmed, 79 N.J. Super. 24, certif. den. 40 N.J. 501 (L. Div. 1962)..... 16

MTK Food Servs., Inc. v. Sirius AM. Ins Co., 455 N.J. Super. 307 (App. Div. 2018)..... 10

New Jersey Mfrs. V. O'Connell, 300 N.J. Super. I, certif. den. 151 N.J. 75 (App. Div. 1957).... 16

NJDPM v. New Jersey Dept. of Corr., 185 N.J. 137 (2005).....15

Notch View Associates v. Smith, 260 N.J. Super. 190 (L. Div. 1992)..... 25

Novack v. Cities Service Oil Co., 149 N.J. Super. 542, affirmed 159 N.J. Super. 400 (1977).....19

Pacina v. Michelletti, 311 N.J. Super. 557 (App. Div. 1998)..... 15

Petroleo Brasileiro, S.A., Petrobras v. Nalco Chemical Co., 784 F. Supp. 160, affirmed,
977 F. 2nd 569 (D.N.J. 1992)..... 17

Pitts v. Newark Bd. of Educ., 337 N.J. Super. 331 (App. Div. 2001)	12
Pittston Co. Ultramar America Ltd. v. Allianz Ins. Co., 124 F. 3d 508 (C.A. 3 N.J.1997).....	18
PP Inc. v. McGuire, 509 F. Supp. 1079 (D.N.J. 1981).....	14
Presten v. Sailer, 225 N.J. Super. 178 (App. Div. 1988).....	26
Ray v. Beneficial Finance Co. of North Jersey, 92 N.J. Super. 519 (Ch. Div. 1996).....	24
Regan v. Regan, 246 N.J. Super. 473 (Ch. Div. 1990).....	19
Rendine v. Pantzer, 141 N.J. 292 (1995).....	11
<u>Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474 (1974).....</u>	9
Satellite Gateway Com. v. Musi Dining Car Co., 110 N.J. 280 (1988).....	15
S&R Corp. v. Jiffy Lube Int'l, Inc. 968 F. 2 nd 371 (3d Cir.1992).....	22
Schenk v. HJI Associates, 295 N.J. Super. 445, certif. den.149 N.J. 35 (App. Div. 1996).....	16
Sheehy v. Galipeau, 48 N.J. Super. 95 (App. Div. 1957).....	24
Sinopoli v. North River Ins. Co., 244 N.J. Super. 245, certif. den.127 N.J. 325 (App. Div. 1990)..	16
Sons of Thunder, Inc. v. Borden, Inc., 285 N.J. Super. 27, rev. 148 N.J. 396 (App. Div. 1995)	16,20
Stamato v. Aganie, 24 N.J. 309 (1957).....	18
Stanton v. Rich Baker Berman & Co., P.A., 876 F. Supp. 1373 (D.N.J. 1995).....	18
<u>State v. Harris</u> , 181 N.J. 391 (2004)	10
State v. Locurto, 157 N.J. 463 (1999).....	11
State v. Munroe, 210 N.J. 429 (2012).....	11
State v. Nunez-Valdez, 200 N.J. 129 (2009).....	11
<u>State v. Rose</u> , 206 N.J. 141 (2011).....	11
Summer v. Fabregas, 52 N.J. Super. 399 (App. Div. 1958).....	19
<u>T.M.S.v.W.C.P.</u> , 450 N.J. Super. 499 (App. Div. 2017) ...	11
Toll Bros., Inc. v. Twp. of West Windsor, 173 N.J. 502 (2002).....	9

Totaro, Duffy, Cannova and Company, L.L.C. v. Lane, Middleton & Company, L.L.C., 191 N.J. 1 (2007)..... 12

Travelodge Hotels, Inc. v. Honeysuckle Enterprises, 357 F. Supp. 2nd 788 (D.N.J. 2005).....22

United Jersey Bank v. Wolosoff, 196 N.J. Super. 553 (App. Div. 1984)..... 26

U.S. on Behalf of Small Business Admin. v. DelGuercio, 818 F. Supp.725 (D.N.J. 1993)..... 22

Walter v. Holiday Inns, 784 F. Supp. 1159, affirmed 985 F. 2nd 1232 (D.N.J. 1992)..... 25

Watson v. City of Salem, 934 F. Supp. 643 (D.N.J. 1995)..... 20

Weichert Co. Realtors v. Ryan, 128 N.J.427(1992)..... 18

.Zapanta v. Isoldi, 212 N.J. Super. 678 (Ch. Div. 1986).....17

Statutes:

N.J.S.A. 12A:1-20121

N.J.S.A. 12A:1-203 21

N.J.S.A. 12A:3-101 et. seq. 14

N.J.S.A 12A:3-104(a)14

N.J.S.A. 12A:3-604(a) 14

COURT RULES:

Rule 1:7-410

Rule 4:5-8..... 26

Rule4:10-2(d(1))..... 13

Rule 4:42-9 15

PROCEDURAL HISTORY

Respondents agree with the factual recitation of the Procedural History set forth in Appellants' Brief (Pb4, 5).

PRELIMINARY STATEMENT

Defendant Brick Flower Market LLC (“Counterclaimant”) is a limited liability company formed pursuant to the laws of the State of N.J., the Members of which are Defendants Ralph and Nancy Petrellese. Plaintiff Bricks Flower Market LLC (“Bricks”) is a N.J. limited liability company, with (former) commercial business address of 570 Mantoloking Road, Brick, N.J. {the “leased premises”}, which was owned by the Defendant.. Plaintiffs Prasad Kuruganti and Veniesa Kenpadoo (“Guarantors”) are the only Members of Bricks.

In December 2017, Bricks, as “Buyer”, entered into and executed an Asset Purchase Agreement (“APA”) with Counterclaimant, as “Seller”, for the purchase by Bricks of substantially all of the assets of the floral business of the Counterclaimant, with each party being represented by their own respective attorneys at law. Closing of title pursuant to said APA was conducted on January 12, 2018.

At closing, Bricks, as “Borrower”, executed and delivered to Counterclaimant, as “Lender”, a Collateral Promissory Note dated January 12, 2018 (the “Note”); payment and performance thereunder was personally guaranteed by the Guarantors, who are married to each other. Said Note provides, in part, as follows:

- a. Bricks promised to pay to Counterclaimant the principal sum of \$110,000.00, with interest to accrue at the rate of 6.5% per annum, with payments to be made to the Counterclaimant as follows:
 - i) thirty six (36) equal monthly payments in the sum of \$3,371.39, with each such payment due on or before the first day of each month, commencing with the first payment due on February 12, 2018;
 - ii) final payment of all outstanding amounts was due on January 12, 2021;
- b. The Guarantors, individually, guaranteed payment and performance.
- c. Bricks was to contemporaneously grant to Counterclaimant a security interest in all of the fixtures, equipment, accounts receivable, inventory, and property Bricks then-owned or thereafter acquired (the "Collateral").

At closing as aforesaid:

- {i} Bricks, as "Debtor", executed and delivered to Counterclaimant its Security Agreement dated January 12, 2018 (the "Security Agreement"), which includes a contractual provision for the payment of counsel fees and costs by the Plaintiffs;
- {ii} Counterclaimant executed and delivered to Bricks a Bill of Sale, by means of which title to and possession of certain assets were conveyed to Bricks.

Throughout the course of this litigation, Counterclaimant remained the holder and owner of said first lien/security interest in said Collateral.

Bricks, and the Guarantors, defaulted under said Note and Security Agreement. Counterclaimant declared the full amount outstanding to be immediately due and owing by means of letter dated February 21, 2019, before the institution of this litigation. Plaintiffs' default under this loan arrangement was advanced in the context of Defendants' Counterclaim.

Plaintiffs refused to make any payment(s) pursuant to said Note since February

21, 2019 and refused to deliver said Collateral to the Counterclaimant. **During this litigation, the Plaintiffs operated their own floral business out of the leased premises.** In addition, at closing as aforesaid, pursuant to the directive of the N.J. Division of Taxation, in accordance with N.J.S.A. 54:48-1 et. seq., the sum of \$10,000.00 was deducted from the proceeds otherwise due to Counterclaimant as Seller and placed into escrow with the Plaintiffs' transactional attorney, as Escrow Agent, pending the issuance of a "clearance letter". The State issued said clearance letter. Despite same, the Plaintiffs refused to authorize the release to the Counterclaimant of those escrow funds.. Accordingly, this issue was also raised in the Defendants' Counterclaim.

At closing, Plaintiff Bricks, as "Tenant", executed and delivered to Defendants Ralph and Nancy Petrellese, as "Landlord", a Lease Agreement with respect to the leased premises and accepted *possession of same*.

In the context of Plaintiff's Complaint, they advanced 5 causes of action:

- 1} breach of contract;*
- 2} fraud;*
- 3} breach of duty of good faith and fair dealing;*
- 4} unjust enrichment; and*
- 5} piercing the corporate veil.*

During summary judgment motion practice, the trial Court had dismissed Plaintiff's unjust enrichment claim. The trial Court conducted a bench trial, at the conclusion of which all of the remaining Counts in Plaintiff's Complaint were dismissed with prejudice and Judgment was entered in favor of the Defendants on their Counterclaim.

STATEMENT OF FACTS

During the course of trial, the following facts were established and undisputed:

1. Defendant, Brick Flower Market LLC (“Counterclaimant”), is a limited liability company formed and existing pursuant to the laws of New Jersey.(4T107-9 through 22).
2. Plaintiff Bricks Flower Market LLC (“Bricks”) is a limited liability company formed and existing pursuant to the laws of New Jersey.
3. Plaintiffs Prasad Kuruganti and Veniesa Kempadoo (“Guarantors”) were and are the only Members of Bricks. (2T22- 23 through 23-10; Pa148-150).
4. In December 2017, Bricks, as “Buyer”, entered into an Asset Purchase Agreement (“APA”; Pa131-143) with said Counterclaimant, as “Seller”, for the purchase by Bricks of substantially all of the assets of Counterclaimant utilized in the operation of a floral business, with all parties being represented by their own respective attorneys at law. The APA was drafted by Steve Azzoloini, Esq., the attorney for the Plaintiffs . All parties voluntarily entered into same. (1T172- 17 through 20; 2T5-6 through 6-11; 2T97-12 through 99-11; 2T109-23 through 110-23).
5. Closing of title pursuant to said APA was conducted on January 12, 2018 (Pa169; 1T89-5 through 8; 2T24- 2 through 24)
6. At closing , Bricks, as “Borrower”, and the Guarantors, individually, executed and delivered to Counterclaimant, as “Lender”, a Collateral Promissory Note which contains personal Guarantees (Pa148-150) and provides, in part, as follows:
 - a. Bricks promised to pay to Counterclaimant the principal sum of \$110,000.00, with interest to accrue on all outstanding amounts at the rate of 6.5% per annum, with payments to be made to the Counterclaimant as follows:
 - i) thirty six (36) equal monthly payments in the sum of \$3,371.39, with each such payment due and payable on or before the first (1st) day of each month, commencing with the first payment due on February 12, 2018; and
 - ii) final payment of all outstanding amounts then due and owing on 1/12/21;
 - b. As collateral/security for Bricks’ payment and performance thereunder, the Guarantors

individually guaranteed payment and performance.

c. In addition, Bricks was to (and did) contemporaneously therewith grant to Counterclaimant a security interest in all of the fixtures, equipment, accounts receivable, inventory, and all tangible and intangible property Bricks then-owned or thereafter acquired (the “Collateral”).

d. A default under said Note occurs if Bricks fails to make any payment that is due and payable under said Note within thirty (30) days from its due date; fails to keep any other promises or covenants set forth in the Security Agreement , Financing Statements, and other Agreements executed to secure the Lender; or defaults under the terms of the Lease Agreement (Pa155-165) which was, at said closing, entered into and executed by and between Defendants Ralph and Nancy Petrellese, as “Landlord”, of the real property commonly known as 570 Mantoloking Road, Brick, New Jersey, and Bricks, as “Tenant”.

Additional events of default are itemized in said Note.

e. In the event of default, Counterclaimant was authorized to declare the entire unpaid balance of principal to be then immediately due and owing, together with interest at the annual rate of 6.5%, and late charge(s) of 5% of any payment not received within five (5) days after its due date. (2T6-16 through 7-22; 2 T119-2 through 120-4).

7. At closing, Bricks, as “Debtor”, executed and delivered to Counterclaimant, as “Secured Party”, its Security Agreement (“Security Agreement”; Pa151-154) which includes various default provisions and rights and remedies, including an obligation to assemble and turn over to Counterclaimant(s) the Collateral and a contractual stipulation for payment by the Plaintiffs of all expenses incurred by the Counterclaimants in enforcing the loan documents, including reasonable attorneys fees (paragraph 14; 2T149- 22 through 150-1).

8. At closing, Counterclaimant executed and delivered to Bricks a Bill of Sale (Pa144-146).

9. Pursuant to said Bill of Sale and the APA, title to and possession of certain assets were conveyed/delivered to Bricks at closing as aforesaid, on an “as is” basis (Pa144-146; Pa131, pars. 12, 13(f); 2T107-8 through 108-4; 2T113-11 through 114-8). Plaintiffs, thereafter, did not lodge any complaints with respect to the value or utility of those assets. (3T153-12 through 154-10). Bricks, in turn, granted to Counterclaimant a First Lien/security interest in said assets and Collateral, as evidenced by said Security Agreement and “filed” UCC Financing Statement(s) (Pa151-154; Ex. D6).
10. Counterclaimant(s) remains the holder and owner of said loan documents and said first lien/security interest in said Collateral, as well as all other assets acquired subsequent to closing by Bricks. (Pa151-154; D6; 3T144-3 through 15).
11. Said Collateral remains in the possession of each, any, or all of the Plaintiffs. Demand for the assembly and turnover of same was made, but not complied with (Ex. D20; 1T142-6 through 22; 2T80-4 through 10; 2T94-2 through 95-3).
12. Bricks, and the Guarantors, defaulted under said Note, Security Agreement, Guaranty, and Lease Agreement (Pa148-154; Pa155-168).
13. Counterclaimant(s) declared the full amount outstanding to be immediately due and owing pursuant to said Note by means of letter dated February 21, 2019 (Pa222, 223; Ex. D16; 1T142-6 through 22; 2T123-8 through 10).
14. Plaintiffs unilaterally refused to make any payment(s) pursuant to said Note and/or Guaranty and/or Security Agreement since their last payment in December of 2018. (1T140-1 through 19; 1T142-15,16; 1T172-8 through 11; Pa212; 2T30-9 through 13). Prior to that, they made the first 11 minimum monthly payments, with no payments being made thereafter. (2T42-7 through 16; 2T43-1 through 45-11; 3T143-9 through 144-2)
15. Since closing of title, Plaintiffs have failed and refused to deliver said Collateral, or any portion thereof, to Counterclaimant(s).(Ex. D20)
16. At closing as aforesaid, pursuant to the directive of the NJ Division of Taxation, in

accordance with N.J.S.A. 54:48-1 et. seq., the sum of \$10,000.00 was deducted from the proceeds otherwise due to Counterclaimant as Seller and placed into escrow with the plaintiffs' attorney, Steven Azzolini, as Escrow Agent, pending the issuance of a "clearance letter" from NJ (Pa169; Pa220-221; Pa131, par. 9; 2T112-7 through 22).

17. Notwithstanding the issuance of that letter, Plaintiffs have refused to authorize the release to the Counterclaimant of said Escrow Funds . (Pa220-221; 2T112-7 through 113- 10; 3T159-10 through 161-5).

18. At closing, the parties executed a Settlement Statement (Ex. P7), which reflected the credits and debits owed at that time. (2T37-1 through 16).

19. At closing, Bricks, as "Tenant", executed and delivered to Ralph and Nancy Petrellese, as "Landlord", a Lease Agreement with respect to the commercial real property commonly known as 570 Mantoloking Road, Brick, New Jersey (the "Real Property") and a Guarantee of same. (Pa155-168). *The Tenant has been making the Lease payments, because they wanted to continue operating their business (2T7-23 through 8-10; 2T49-17 through 50-23; 2T81-22 through 82-11).*

20. At closing, the Defendants delivered possession of the Real Property to Bricks, subject to the terms of the Lease Agreement, and the Plaintiffs, during the course of this litigation, had continued to exercise their exclusive possessory interest in same (1T89- 5 through 8).

21. Under the APA, the Buyer's sole remedy , in the event any of the Seller's representations proved to be inaccurate, was to terminate the APA and receive a refund of the deposit. (Pa131-143, par. 13(1); 2T114-21 through 115-18).

22. The APA contains an integration provision. (Pa131-143, par. 19).

23. The APA accorded to the Buyer a 30 day due diligence period, subject to an additional 30 day extension, "to satisfy all of Buyer's requirements as to the intended commercial use of the Real Property", with the unfettered right to terminate at Buyer's

sole option. After the APA was signed, Plaintiffs chose not to undertake any due diligence activities. (Pa131-143, par. 23; 2T100-1 through 103-13).

24. Defendant Nancy Petrellese remains the sole owner of the Real Property. (Pa224-225).

25. The Plaintiffs did not present any liability and/or damages expert testimony purporting to support the allegations set forth in their Complaint and/or refuting the allegations set forth in the Counterclaim. (1T, 2T, 3T, 4T).

26. As of May 7, 2023, the total sum of \$109,093.25 was due and owing from the Plaintiffs to the Counterclaimant(s) (not including ongoing legal fees and costs).

27. Plaintiffs, since closing and through trial, had operated their own floral shop/business out of the Real Property and, according to the testifying Plaintiff (without documentary substantiation), their business "...from a revenue standpoint, has been doing very well", with their gross revenue not substantially decreased from Defendants' representation as to their gross revenue (1T89-5 through 8; 2T76-14 through 78-14; 2T79-20 through 24; 2T35-3,4; 2T. 50- 4 through 8; 2T 51- 3 through 24; 2T 62-6 through 8; 2T75-13 through 76-3; 2T 78-6 through 14; 2T 95- 4 through 17; 2T154-1 through 155-20; Pa155-165).

28. The Seller owned another business (NJ Wedding Pros) and was permitted, after closing, to continue same and remained entitled to sell and profit from floral packages to clients, notwithstanding its location within a 50 mile radius of the Real Property. (2T15-15 through 17-16; 2T108- 5 through 109-24; 2T127- 5 through 15; 2T145-13 through 16; 2T174- 2 through 176-10; 2T196-10 through 197-19; 2T228-12 through 17; Pa131-143, par. 15a).

29. After closing, the Defendants did not obtain an interest or accept employment in any other florist business.(2T226- 4 through 227-1; 3T109- 5 through 110-25).

30. Plaintiffs instituted this litigation shortly after their 12/30/18 email raising "issues" as to payroll and delivery charges. (Pa212; 2T36-9 through 16; 2T92-10 through 93-11).

31. As far as NJ Wedding Pros, there was no evidence presented as to post-closing total revenue or revenue allocable to that portion of its business which was subject to the referral

provision. At trial, Plaintiffs did not make a claim for same. (2T76-2 through 5; 2T184-7 through 19).

32. Plaintiffs did not seek damages for “lost wages”. (2T70-5 through 12; 2T72-3 through 12).

33. There was absolutely nothing in the transactional documents which guaranteed any profit whatsoever to the Plaintiffs (who have had other business interests) and they understood that. (2T76-4 through 13; 2T78-15 through 79-17).

34. Prior to trial, Plaintiffs never offered to relinquish possession of the Real Property or the Collateral to the Defendants (2T79-20 through 25; 2T80-1 through 10; 2T94- 2 through 95-2; 3T152-2 through 153-11).

LEGAL ARGUMENT

POINT I

STANDARDS OF REVIEW

The Appellate Court plays a limited role in reviewing the findings on which a trial judge has based a judgment. The standard of review of a trial Court’s fact-finding is one of deference, requiring only that the facts as found are supported by adequate competent evidence in the record. Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474 (1974). The Court will “not disturb the factual findings and legal conclusions of the trial judge unless, they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice”. Ibid;(quoting Fagiarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155, 188 A.2d 43 (App. Div.), certif. den., 40 N.J. 221, 191 A.2d 61 (1963); Allstate Ins. Co. v. Northfield Med. Ctr., 228 N.J. 596, 619 (2017). ‘Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence’. Rova Farms, supra, at 484 (citation omitted); Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502 (2002).

However, unlike a trial judge's fact and credibility findings, the judge's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Crespo v. Crespo, 395 N.J. Super. 190, 194 (App. Div. 2007) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). A trial judge "is in no better position than we are when interpreting a statute or divining the meaning of the law". D.W. v. R.W., 212 N.J. 232, 245 (2012). The Appellate Division reviews issues of law de novo and accords no deference to the trial judge's legal conclusions. MTK Food Servs., Inc. v. Sirius AM. Ins Co., 455 N.J. Super. 307 (App. Div. 2018). Accordingly, when considering questions of law, its review is plenary. Ben Elazar v. Macrietta Cleaners, Inc., 230 N.J. 123 (2017). With respect to mixed questions of law and fact, the reviewing court will give deference to the factual findings of the trial court which are supported by the record, but review, on a de novo basis, the trial court's application of the law to such findings. State v. Harris, 181 N.J. 391 (2004).

Generally, the findings of fact of a trial court sitting without a jury should be affirmed if supported by sufficient credible evidence in the record. However if the Judge misconceived the applicable law, or misapplied it to the factual complex, a reviewing Court must adjudicate the controversy anew. Cobo by Hudson Physical Therapy Services v. Market Transition Facility by Material Damage Adjustment Corp., 293 N.J. Super. 374 (App. Div. 1996).

The appellate court is free to remand for clarification of the trial court findings where necessary for review. Balsamides v. Protameen Chemicals, 160 N.J. 352 (1999); Rule 1:7-4.

Where an issue involves the trial court's exercise of discretion, the appellate court will not interfere unless the trial judge has "...pursue(d) a manifestly unjust course" which has prejudiced the substantial rights of a party. *Gillman v. Bally Mfg. Corp.*, 286 N.J. Super. 523, 528 (App. Div.), certif. den. 144 N.J. 174 (1996); *State v. Munroe*, 210 N.J. 429 (2012). However, there is no deference due to a trial court's discretionary decision based on an erroneous view of the applicable law or to findings based on a misunderstanding of applicable legal principles. *State v. Rose*, 206 N.J. 141 (2011); *T.M.S.v.W.C.P.*, 450 N.J. Super. 499 (App. Div. 2017).

With respect to a trial judge's credibility findings, even if the trial judge's reasons for the credibility determination have not been articulated in detail, that determination is still entitled to deference if it is supported by the record, since credibility findings "... are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." *State v. Locurto*, 157 N.J. 463, 470, 474 (1999); *State v. Nunez-Valdez*, 200 N.J. 129, 141 (2009).

The abuse-of-discretion standard governs review of a trial court's award of attorneys' fees. *Furst v. Einstein Moonjy, Inc.*, 182 N.J. 1 (2004); *Rendine v. Pantzer*, 141 N.J. 292 (1995).

POINT II

THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE SUPPORTED BY THE COMPETENT, CREDIBLE EVIDENCE ADDUCED DURING TRIAL

{a} DAMAGES

Generally, a plaintiff has the burden of proving damages. *Caldwell v.*

Haynes, 136 N.J. 422 (1994). It is the responsibility of the plaintiff to provide for the trier of fact some evidentiary and logical basis for calculating a compensatory award in a rational manner. Huddell v. Levin, 537 F.2d 726 (C.A.3 N.J. 1976). Damage claims that are remote, uncertain or speculative are not recoverable. Lithuanian Commerce Corp., Ltd. v. Sara Lee Hosiery, 23 F. Supp. 2d 509 (D.N.J. 1998).

Generally, a trier of fact should not be allowed to speculate without the aid of expert testimony in any area where lay persons could not be expected to have sufficient knowledge or experience. Kelly v. Berlin, 300 N.J. Super 256 (App. Div. 1997). In Kelly, supra, at 270, the Court concluded that, since plaintiff's damage claim was based on the difference between the amount he actually received in settlement and the amount he claimed he would have received had he known of his true condition, the trial Court properly held that expert testimony was necessary to establish damages.

In the within case, even assuming *arguendo* that Plaintiffs had established a breach of contract and/or fraud (which they did not), Plaintiffs did not present an expert (forensic accounting, appraisal, or otherwise) to attempt to establish the damages allegedly flowing from same. Since closing on January 12, 2018 through trial, the Plaintiffs had operated their own floral business, utilizing the (secured) assets/Collateral conveyed to them by the Defendants, without ever having been paid the full purchase price.

Damages will not be presumed, and a plaintiff must prove actual damages. Pitts v. Newark Bd. of Educ., 337 N.J. Super. 331 (App. Div. 2001). The goal of compensatory damages is to put the injured party in as good a position as if performance had been rendered. Totaro, Duffy, Cannova and Company, L.L.C. v. Lane, Middleton & Company, L.L.C., 191 N.J. 1 (2007). To be compensable, a loss must be a reasonably certain consequence of a breach of contract. Donovan v. Bachstadt, 91 N.J. 434 (1982).

During the course of discovery, Defendants, through counsel, demanded/requested, pursuant to Rule 4:10-2(d) (1), Plaintiffs' expert reports/information; no experts were ever identified and no reports were supplied. The Plaintiff who testified at trial was not identified as an expert and did not supply a report; he was not competent/qualified to articulate his own accounting analysis and/or express any opinions with respect to same; that falls within the purview of a duly-qualified and timely-identified expert.

The measure of damages in a fraud action is based on the following principles:

- a) the party who has been defrauded may choose to recover actual losses;
- b) if the fraudulent representation is tantamount to a warranty, recovery may be awarded for loss of the bargain;;
- c) where the circumstances are too vague with respect to the value of the bargain, a court may award damages for actual losses only;
- d) benefit of the bargain damages may be awarded only if they are proven with sufficient certainty. *McConkey v. AON Corp.*, 354 N.J. Super. 25 (App. Div. 2002).

In the case at bar, the Plaintiffs failed to establish any damages whatsoever. Notably, the Plaintiffs failed and refused to supply to the Defendants during the course of discovery and to the trial Court, during trial, a single document reflecting, for any of the five years (or any portion thereof) they had conducted business, their business-related:

- a) gross income;
- b) net income;
- c) expenses, including, but not limited to, payroll and delivery charges;
- d) assets;
- e) debts and liabilities. (2T62-20 through 23; 2T104-3 through 106-23; 3T155-9 through 156-7; 3T186-3 through 17; 4T130-8 through 20).

Accordingly, it remains unclear as to what profits, if any, had been generated by the Plaintiffs over that time frame. For all the trial Court knew, their profits/net income had exceeded whatever their pre-closing expectations were and/or that which was portrayed to them as being earned by the Defendants while they operated their own busin

{b} THE NOTE, GUARANTY, AND RELATED LOAN DOCUMENTS

Negotiable instruments in New Jersey are governed by Chapter 3 of the Uniform Commercial Code. A "negotiable instrument" is an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

1. is payable to bearer or to order at the time it is issued or first comes into the possession of the holder;
2. is payable on demand at a definite time; and
3. does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money.

The promise or order may contain an undertaking or power to give, maintain, or protect collateral to secure payment. PP Inc. v. McGuire, 509 F. Supp. 1079 (D. N.J.1981); N.J.S.A. 12A: 3-101 et. seq.; 12A: 3-104(a). The Note, Guarantee and related loan documents are integrated and unambiguous. The parol evidence rule prohibits the introduction of evidence that tends to alter an integrated written document. Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259 (2006). Plaintiffs are not permitted to use an oral agreement or oral evidence to discharge a negotiable instrument by cancellation or renunciation. Same is not permitted by the Uniform Commercial Code. See, for example, N.J.S.A. 12 A:3-604(a).

{c} ATTORNEYS FEES

It is well-settled that litigants should bear their own expenses for attorneys fees and

costs, except where specifically authorized by statute, rule, or agreement. Pacina v. Michelletti, 311 N.J. Super. 557 (App. Div. 1998). Our Supreme Court has remained committed to the so-called “American rule”, namely, that the parties bear their own counsel fees. See, for example, NJDPM V. New Jersey Dept. of Corr., 185 N.J. 137 (2005). An award of counsel fees has always been considered a procedural matter for the Courts. Generally, to be allowed, any such award must be authorized by the Rules of Court. McKeown-Brand, v. Trump Castle Hotel and Casino, 132 N.J. 546 (1993). Pursuant to Rule 4:42-9(a), parties their own counsel fees unless the matter comes within one of the eight enumerated fee-shifting exceptions provided by subsections (1) through (8). Subsection 7 provides for possible fee shifting “*As expressly provided by these rules with respect to any action.*”.

New Jersey Courts have consistently recognized the enforceability of commercial contractual agreements for the payment of attorneys fees in a collection action. Glenfed Financial v. Penick Corp., 276 N.J. Super. 163 (App. Div. 1994); Alcoa Edgewater No. 1 Fed. Credit Union v. Carroll, 44 N.J. 442 (1965); Satellite Gateway Com. v. Musi Dining Car Co., 110 N.J. 280 (1988); Cohen v. Lawn Dairies, Inc., 44 N.J. 450 (1965). In the within commercial case, there is a contractual stipulation for the payment of attorneys fees and costs (P5, par. 14 of Security Agreement, expressly incorporated into the Note by reference at DEF-042). In rendering its award, the trial court did not abuse its discretion, thoroughly analyzing both the application for and opposition to same in light of applicable law and Court Rules. Moreover, prejudgment interest may run on contract claims. Same is not a penalty, but payment for the use of the money. Bak-A-Lum Corp. v. Alcoa Building Products, 69 N.J. 23 (1976); Carrino v. Novotny, 78 N.J. 355 (1979).

{d} CONTRACT PRINCIPLES

A contract is a voluntary obligation proceeding from a common intention arising from an offer and acceptance. Friedman v. Tappan Development Corp., 22 N.J. 523 (1956). Parties

are generally free to contract as they desire and, absent mistake, fraud, duress, or illegality, are bound by the unambiguous terms set forth therein. Fleming Companies, Inc. v. Thriftway Medford Lakes, Inc., 913 F. Supp. 837 (D.N.J. 1995).

The duties and rights of parties to a contract are created by and arise from the contract itself, subject to and with reference to existing law. Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575 (App. Div. 1955). Generally, Courts should enforce contracts as made by the parties. Marchak v. Claridge Commons, Inc., 134 N.J. 275 (1993). A party is bound to a contract it made at the time, even if it turned out to be a poor deal. New Jersey Mfrs. v. O'Connell, 300 N.J. Super. 1, cert. denied 151 N.J. 75 (App. Div. 1957). Relief from the terms and provisions of a contract cannot be claimed because it is oppressive, improvident, unprofitable, or produces hardship. Dunkin' Donuts of America, Inc. v. Middletown Donut Corp., 100 N.J. 166 (1985). A Court cannot relieve a party from a "hard bargain" simply because it is alleged to be such. It is not the function of a Court to make a better contract for the parties than they themselves have deemed fit to make. Middlesex County Sewerage Authority v. Borough of Middlesex, 74 N.J. Super. 591, affirmed, 79 N.J. Super. 24, cert. denied 40 N.J. 501 (L. Div. 1962).

It is not the Court's function to make a better Contract for the parties or to supply terms that have not been agreed upon. Schenck v. HJI Associates, 295 N.J. Super. 445, cert. den., 149 N.J. 35 (App. Div. 1996). A Court has no right to rewrite a contract merely because one might conclude that it might well have been functionally desirable to draft it differently. Sons of Thunder, Inc. v. Borden, Inc., 285 N.J. Super. 27, rev. 148 N.J. 396 (App. Div. 1995). A Court may not, even under the guise of good faith and peculiar circumstances, alter the terms of an otherwise unambiguous contract. Sinopoli v. North River Ins. Co., 244 N.J. Super. 245, cert. den., 127 N.J. 325 (App. Div. 1990).

The existence of an obligation on the part of a party to a contract depends not on the so-called real intent of the parties, but on that which has been expressed; the phrase "meeting

of the minds” can properly mean only the agreement as expressed. Leitner v. Braen, 51 N.J. Super. 31 (App. Div. 1958). Courts are generally obligated to enforce contracts based on the intent of the parties, the express terms of the contract, the surrounding circumstances, and the underlying purpose of the contract. Caruso v. Ravenswood Developers, Inc., 337 N.J. Super. 499 (App. Div. 2001). The search for the intent of the parties does not require an inquiry into their subjective intent, but rather centers on the intent embodied by the language that the parties chose to memorialize in their written document. Biovail Corp. Intern. v. Hoechst Aktiengesellschaft, 49 F. Supp. 2d 750 (D.N.J. 1999).

It is the intent as expressed which controls the interpretation of a written contract. Petroleo Brasileiro, S.A., Petrobras v. Nalco Chemical Co., 784 F. Supp. 160, aff. 977 F.2d 569 (D.N.J. 1992). The unexpressed intention of a contracting party is immaterial, except where the equitable remedy of reformation is sought. George M. Brewster & Son v. Catalytic Const. Co., 17 N.J. 20 (1954). Mere speculation as to the probabilities of the intentions of the parties to a contract is not enough to determine the true meaning of that contract. Krosnowski v. Krosnowski, 22 N.J. 376 (1956). It is not the judicial interpretive province to give effect to some supposed unexpressed intention of the parties. Krosnowski, supra. Further, the motivations or mental reservations of/by the parties cannot affect a written contract. Zapanta v. Isoldi, 212 N.J. Super. 678 (Ch. Div. 1986).

A party’s change of mind or heart does not bear upon the validity or existence of a contract. Air Master Sales Co. v. Northbridge Park Co-Op, Inc., 748 F. Supp. 1110 (D.N.J. 1990). Buyer’s remorse is not the standard by which the enforceability of a contract is based. In the within matter, Plaintiffs’ claims constitute nothing more than an attempt to recoup monies they voluntarily invested in what allegedly turned out to be a business venture which failed to meet whatever their pre-closing expectations were. Affixing one’s signature to a contract creates a conclusive presumption that the signer read, understood and assented to its terms (which, in this case, the testifying Plaintiff expressly

acknowledged). There is a presumption that a sophisticated party to a commercial contract has read and knows the terms of their agreement. Cty. of Morris v. Fauver, 153 N.J.80(1998); Fleming Companies, Inc. v. Thriftway Medford Lakes, Inc., 913 F. Supp.837(D.N.J.1995). One who signs a written agreement is conclusively bound by its terms unless fraud, duress, or some other unlawful act on the part of a party is demonstrated. Stanton v. Rich Baker Berman & Co., P.A., 876 F.Supp.1373 (D.N.J.1995). A party may not ignore the provisions of his agreement to suit his own convenience or profit. Stamato v. Aganie, 24 N.J.309(1957).

The APA in this matter contains an integration provision and writing requirement relative to subsequent modification. There were no written modifications to same.

When resolving a contract dispute, and interpreting or construing contractual provisions, the initial determination is whether or not the contract is ambiguous, which requires a court to decide whether the contract is susceptible of more than one meaning. Pittston Co. Ultramar America Ltd. v. Allianz Ins.Co., 124 F.3d 508(C.A.3 N.J.1997).

To establish a breach of contract, a party must prove, by a preponderance of the evidence, that:

- 1) the parties entered into a contract containing certain terms;
- 2) the party asserting a breach did what that contract required them to do;
- 3) the other party did not do what the contract required them to do (a breach of contract);
- 4) the other party's breach caused a loss to the claimant.

To satisfy the certainty requirement(element# 1 above), the claimant must demonstrate that the contractual provisions at issue were sufficiently clear, such that a determination could be made by all parties as to what they were contractually required to do or not do. Weichert Co. Realtors v. Ryan, 128 N.J.427(1992); Borough of West Caldwell v. Borough of Caldwell, 26 N.J.9(1958); Friedman v. Tappan Development Corp., 22 N.J.523(1956); Leitner v. Braen, 51 N.J. Super. 31(App. Div.1958).

As to the Plaintiffs' breach of action claims (Counts One and Three of Complaint), there was no dispute as to the existence of an express written contract (APA and documents executed at closing pursuant to same). The "certainty" of the restrictive covenant and Wedding Pros referral provision (Pa131-143, par.15) is somewhat questionable; the parties' testimony with respect to their understanding of that provision was not entirely consistent. Their course of conduct after closing, however, was consistent: for over a year post-closing: a) the Defendants did not refer any Wedding Pros work to the Plaintiff(s); and b) the Plaintiffs did not make a single inquiry of Defendants as to referrals or object to the lack of referrals, even when they sought "clarification" almost one year post-closing in the context of their December 30, 2018 email (Pa212;3T141-6 through 142-7), only raising this issue, for the first time, during the trial. The conduct of the parties after execution of an agreement may be relevant in determining its meaning, to the extent there may be an ambiguity. *Regan v. Regan*, 246 N.J. Super. 473 (Ch. Div. 1990); *Michaels v. Brookchester, Inc.*, 26 N.J. 379 (1958). A course of performance accepted or acquiesced in without objection by the other party may be evidence of a modification or waiver of a written contract term. *Agathos v. Starlite Motel*, 977 F.2d 1500, appeal after remand, 60 F.3d 143 (C.A.3 1992).

To the extent the referral provision is deemed to be an "illusory promise", same is not enforceable. *Novack v. Cities Service Oil Co.*, 149 N.J. Super. 542, aff. 159 N.J. Super. 400 (1977). To the extent that provision is deemed to be vague or ambiguous or there is fair doubt as to its meaning, it is well-settled that the words and the scope of same must be strictly and most strongly construed against the drafter. *Matter of Community Medical Center*, 623 F.2d 864 (C.A.3 1980); *Herbstman v. Eastman Kodak Co.*, 131 N.J. Super. 439 (App. Div. 1974); *Buscaglia v. Owens-Corning Fiberglass*, 68 N.J. Super. 508 (App. Div. 1961); *Summer v. Fabregas*, 52 N.J. Super. 399 (App. Div. 1958). As acknowledged by the Plaintiff who testified, the APA was drafted by the Plaintiffs' attorney.

Further, the referral provision was subject to an express condition: the Plaintiffs were

required to adhere to the Defendants' business and quality standards, which they did not do.(2T174-2 through 24;2T197-20 through 199-12;3T73-13 through 74-11; 3T106-4 through 107-5; 3T163-1 through 165-24;4T62-9 through 25; 3T114-18 through 123- 6; 3T124-6 through 125-6).The actual day-to-day operator of that business (Plaintiff Venesia/Donna Kempadoo),a newcomer to the floral industry, did not even testify to attempt to refute same (2T85-4 through 25; 2T96-17 through 97-17; 2T156-20 through 25). When a contractual promise is subject to a condition, no liability can arise unless and until the condition is met. *First Atlantic Leasing Corp. v. Tracey*,738 F. Supp.863(D.N.J.1990). Parties are at liberty to contractually agree on one or more conditions precedent upon which their liability will depend. *Watson v. City of Salem*,934 F. Supp.643(D.N.J.1995).

There is no question that the Plaintiffs themselves did not do what those contractual documents require (namely, timely repay the loan which was extended to them). Moreover, the Plaintiffs failed to prove that the Defendants breached those documents. In addition, the Plaintiffs failed to prove that they sustained a loss which was causally related to the alleged breach of the Defendants.

With respect to Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing (which is, in essence, a contract claim; Count Three of Complaint),where parties have expressly addressed an issue in their contract, that expression trumps any contrary claim based upon that implied duty; that duty does not operate to alter the terms of the contract and may not be invoked to preclude a party from exercising its express rights under the contract. *Emerson Radio Corp. v. Orion Sales, Inc.*,80 F. Supp.2d 307,rev.253 F.3d 159(D.N.J.2000); *Frank Briscoe Co., Inc. v. Travelers Indem. Co.*,65 F. Supp. 2d 285(D.N.J.1999); *Sons of Thunder*, supra. In this case, the business assets were expressly sold and accepted in "as is" condition. Parenthetically, it should be noted that the Plaintiffs acknowledged that they never lodged any complaint with the Defendants as to the value or utility of those assets, which they thereafter used in their business operation. Of course, no expert, or other, testimony was presented by them to suggest that the assets did not comport

with the APA and/or representations, if any, made by the Defendants. The phrase “as is” implies that such property is taken with whatever faults it may possess, and the seller is released of any obligation to reimburse the purchaser for losses or damages resulting from the condition of same. *K. Woodmere Associates, L.P. v. Menk Corp.*, 316 N.J. Super. 306 (App. Div. 1998). Conversely, in the within matter, by their express terms and based upon the uncontroverted facts, the Plaintiffs breached the Note, Guaranty, and Security Agreement (Pal48-154). Moreover, the Plaintiffs never established that they were fraudulently induced to sign the loan documents or that any fraud whatsoever occurred in the execution of those, or any other, documents at closing. The loan documents are valid and enforceable.

The Uniform Commercial Code provides that every contract, or duty thereunder, imposes an obligation of good faith in its performance or enforcement. N.J.S.A. 12A:1-203. However, this implied duty of good faith and fair dealing does not operate to “...alter the terms of a written agreement and, accordingly, may not be invoked by a commercial debtor to preclude a creditor from exercising its bargained-for rights under a loan agreement”. A creditor’s duty to act in good faith does not extend to foregoing its contractual right to accelerate upon default or otherwise compromise its contractual rights. *Glenfed Financial v. Penick Corp.*, 276 N.J. Super. 163 (App. Div. 1994); *Hall v. Resolution Trust Corp.*, 958 F.2nd 75 (5th Cir. 1992); N.J.S.A. 12A:1-201(19), 12A:1-203.

The Note, Guaranty, and Security Agreement are documents separate and apart from the APA. Under those documents, the Counterclaimants, as Lender/Obligee, were not obligated to do anything else, inasmuch as they had already fully performed under the loan agreement: all of the loan monies were extended to the Plaintiffs at closing over seven (7) years ago. To the extent these documents are “bilateral contracts”, Counterclaimants have completely satisfied their loan “obligations” to the Plaintiffs and there were and are no remaining executory duties to be performed by them. Accordingly, Defendants were not and cannot be held to be in breach of those documents. On the other hand, the Plaintiffs (Bricks and

Guarantors), by their own admission, have yet to fulfill their contractual duties to the Counterclaimants and defaulted under same. Default was declared (Ex. D16) and has not been cured.

All parties agreed that:

- 1) the Plaintiffs made 11 monthly payments in the minimum amount(s) (2T80-11 through 81-9; 2T134-2 through 15);
- 2) the principal balance which remains due is \$78,628.41 (Pa148-154;; Pa147; 2T136-13 through 25);
- 3) the total amount owed, exclusive of legal fees and costs, is a mathematical calculation based on the terms of the Note; that “updated” calculation was provided in Schedule A (2T134-2 through 135-6).

To be entitled to a Judgment on a Guaranty, a party must demonstrate execution of the Guaranty, the Note obligation and its terms, the lender’s reliance on the Guaranty in extending monies to the borrower, default on the Note, written demand for payment, and a failure to pay. U.S. on Behalf of Small Business Admin. v. DeIGuercio, 818 F. Supp.725(D.N.J.1993). In this matter, the Defendants demonstrated all of the foregoing.

Further, the Lender’s security interest in the Collateral(all of the assets of Bricks) was duly perfected (Ex. D6). The Defendants demanded that the Plaintiffs assemble and turn over to them possession of the Collateral(Ex.D20). The Plaintiffs refused to comply with that demand.

Even if the trial Court had concluded that the provisions of the APA were somehow incorporated into the Note and Guaranty, which they were not (e.g., there is nothing in those documents to suggest that the Borrower’s/Guarantors’ obligation to timely pay is/was contingent upon the Lender referring customers to the Plaintiffs), as the Court noted in Travelodge Hotels, Inc. v. Honeysuckle Enterprises, 357 F. Supp.2d 788 (D.N.J.2005), citing S&R Corp. v. Jiffy Lube Int’l, Inc., 968 F.2d 371(3rd Cir.1992): “*When one party to a contract feels that the other contracting party has breached its agreement, the non-*

breaching party may either stop performance and assume the contract is avoided, or continue its performance and sue for damages. Under no circumstances may the nonbreaching party stop performance and continue to take advantage of the contract's benefits". That is, however, precisely what the Plaintiffs did: they unilaterally, and without legal justification, stopped performance under the Note and Guaranty and sued for damages (and/or rescission) and continued to take advantage of the contract's benefits by retaining the loan monies, retaining all of the business assets (that were transferred, in full, to them by Defendants), and utilizing those assets to further their business interests and generate revenue resulting in (unquantified) profits to them. They wanted to reap (and have reaped) all of the benefits of the bargain without fulfilling their contractual obligations.

Moreover, as the Court noted in Magnet Resources, Inc. v. Summit MRI, Inc., 318 N.J. Super. 275 (App. Div. 1998): "*Material breach*" has been described as follows: *Where a contract calls for a series of acts over a long term, a material breach may arise upon a single occurrence or consistent recurrences which tend to "defeat the purpose of the contract."* [citation omitted] *In applying the test of materiality to such contracts a court should evaluate "the ratio quantitatively which the breach bears to the contract as a whole, and secondly the degree of probability or improbability that such a breach will be repeated."* [citation omitted] [Medivox Productions, Inc. v. Hoffman-La Roche, Inc., 107 N.J. Super. 47 (L. Div. 1969)] (Emphases supplied). Only a material breach will excuse continued performance by the other party. Chase v. McGann, 405 N.J. Super. 547 (App. Div. 2009).

The Defendants did not guarantee the success of the Plaintiffs' business. In addition, as to the Wedding Pros referral provision, even if the Plaintiffs had established a breach of same (which they did not), it was not material and did not go to the essence of the APA:

- a) there was no guarantee of any minimum referrals;
- b) there was no guarantee of a minimum amount of any money that would be generated as a result of those referrals;

c) there was nothing in the APA which required the Defendants to continue that business;
d) Plaintiffs understood, at the time they closed, that there was no promise or guarantee that they would ever receive any referrals or money whatsoever from same. (2T108-5 through 109-23). Note: Plaintiffs' unjust enrichment claim (Count Four of Complaint) was previously dismissed by the trial Court by means of Order filed on 6/14/22.

{e} RESCISSION

The equitable remedy of rescission, which entails the judicial cancellation of an instrument, is available to set aside a contract in limited circumstances. *Hilton Hotels Corp. v. Piper Co.*, 214 N.J. Super. 328 (Ch.Div. 1986). The purpose is to nullify the contract and place the parties in the positions that they occupied prior to entering into the contract. It is governed by equitable principles, including laches, and there must be no adequate legal remedy. *Ray v. Beneficial Finance Co. of North Jersey*, 92 N.J. Super. 519 (Ch. Div. 1966). Granting it is a matter of the trial court's discretion. *Hilton Hotels Corp.*, supra. Rescission is considered to be exceptional in character and, to invoke that remedy, a special ground must be shown. The purpose of that remedy is not to interfere with the parties' freedom to contract or to interfere with legal liability, even in the case of a bad bargain. In seeking rescission of a contract based upon alleged fraud, NJ law requires proof by clear and convincing evidence. *Matter of Paragon Securities Co.*, 589 F.2d 1240 (C.A.3 1978). The alleged misrepresentation must be material. *Sheehy v. Galipeau*, 48 N.J. Super. 95 (App. Div. 1957). A contract breach must be material and concern the essence of the contract. *Cooper v. Borough of Wenonah*, 977 F.Supp. 305 (D.N.J. 1997). Generally, contracts are not to be partially rescinded. *Bonnco Petrol, Inc. v. Epstein*, 115 N.J. 599 (1989).

In the within matter, there is no "special ground" and there was (potentially, if the Plaintiffs had proven their case, which they did not) an adequate legal remedy. Further, there is/was absolutely no way that the trial Court is/was in a position to restore the parties to the

positions they occupied prior to entering into the APA. The Plaintiffs had been operating their own floral business out of the leased premises for over 5 years(2T122-13 through 16). During that time frame, they had sold the inventory assets which were conveyed to them pursuant to the APA and Bill of Sale(2T118-2 through 24).There was no evidence adduced during the trial to suggest that they had “replaced” same with comparable items. Whatever goodwill the Defendants had built up during their (prior) operation of their business over the course of approximately 13 years had been extinguished(2T176-24 through 177-8;3T111-2 through 18). None of the employees of the Counterclaimant worked at the Plaintiffs’ business any longer(2T95-4 through 17). Defendants had been deprived of the use of the leased premises for over 5 years, paying real property taxes and insurance premiums during that time frame(3T158-18 through 159-9). When a return to the status quo ante is a practical impossibility, the remedy of rescission is not available. *Walter v. Holiday Inns*,784 F. Supp.1159,aff.985 F.2d 1232.

Moreover, even where the grounds for rescission exist, same will not be granted where the claimant has not acted within a reasonable period of time or where there has been substantial performance. *Notch View Associates v.Smith*,260 N.J. Super.190(L. Div.1992); *Hilton Hotels*, supra. In the case at bar: a)the Plaintiffs did not act within a reasonable period of time(the “data” upon which Plaintiffs purportedly relied had been sitting in their computer system and available to them since the closing on 1/12/18(3T114-21 through 115-20);their first notice to the Defendants of what appeared to them to be “discrepancies” was on 12/30/18,almost 1 year later(2T89-14 through 91-23; 2T128-4 through 129-3; 2T130-14 through 132-4);and the documents they “relied” upon were printed on 1/15/18(3 days after closing)and 11/16/18(2T141-20 through 143-25);and b)there has been substantial performance by all.

{f}FRAUD

A mere breach of contract alone is not sufficient and does not qualify as the type of

wrongful act constituting fraud. *Presten v. Sailer*, 225 N.J. Super. 178(App. Div.1988). It is well-settled that one who alleges fraud or misrepresentation must do so with specificity and the proofs must be clear and convincing. *Fravega v. Security S.& L. Ass'n.*, 192 N.J. Super. 213 (1983); R.4:5-8(a).

An action for fraud may be legal or equitable in nature. The elements of same are that a defendant made a material misrepresentation of a present or past fact with knowledge of its falsity and with the intention that the other party rely thereon and which resulted in reasonable reliance by the plaintiff. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153(3^d Cir.1993). There is ordinarily no liability for nondisclosure of facts. *Lightning Lube, Inc.*,supra. The distinction between the two causes of action are:

a) to prove legal fraud, the plaintiff must establish, by a preponderance of the evidence, that the defendant made a knowingly false representation of fact, entitling the plaintiff to money damages. *McClellan v. Feit*,376 N.J. Super.305(App. Div.2005);*Lightning Lube, Inc.*,supra; and

b) equitable fraud, for which a victim is only potentially entitled to equitable relief such as rescission or reformation, must be established by clear and convincing evidence. *Foont-Freedensfeld v. Electro-Protective Corp.*,126 N.J. Super.254(App. Div.1973).

Where, as here, the Plaintiffs sought rescission and monetary damages, all of the elements of fraud must be established. *United Jersey Bank v. Wolosoff*,196 N.J. Super.553(App. Div.1984). In the within matter,

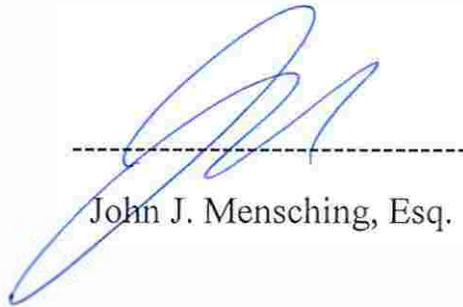
the Plaintiffs failed to establish all of the requisite elements by any evidentiary standard. Their “proofs”, which essentially consisted of one of the Plaintiffs attempting to “compare” certain documents maintained in the computer system which they “inherited” and those prepared by an outside payroll company to other documents and interpret same and/or extrapolate from same were confusing, at best. Defendants did not alter or falsify any documents given to Plaintiffs, lie to them, or withhold significant financial information, and there was no competent, credible evidence of same.(3T1 18-1 through 128-14; 3T145-9

through 147-13). Plaintiffs represented to the Court that “...the only, one and only key issue, as far as the fraud is concerned in this case...” was the absence of information regarding “the \$6.00 delivery charge“(1 T27-24 through 28-2). Plaintiff acknowledged, however, that he was given payroll data prior to signing the APA, both “on the books and off the books“, and line items for same were included in the P&L Statement he received(Ex. P25A; 1T98-17 through 99-5; 3T70-18 through 71-18).

CONCLUSION

For each and all of the foregoing reasons, it is respectfully submitted that the trial court's Amended Final Judgment entered on May 31, 2024 should be affirmed. The trial court thoroughly reviewed the evidence presented and articulated, in detail, the court's findings of fact and conclusions of law, which were supported by the evidence which the court found to be competent and credible.

May 15, 2025



John J. Mensching, Esq.

BRICKS FLOWER MARKET, LLC.,
Prasad Kuruganti and Veniesa
Kempadoo

Plaintiffs,

v.

BRICK FLOWER MARKET, LLC,
and RALPH PETRELLESE, NANCY
PETRELLESE and John/Jane Does 1
to 5 and XYZ entities

Defendants.

SUPERIOR COURT OF NEW
JERSEY APPELLATE
DIVISION
DOCKET NO.: A-003533-23

CIVIL ACTION

ON APPEAL FROM THE
SUPERIOR COURT OF
NEW JERSEY, LAW
DIVISION, MONMOUTH
COUNTY

Sat Below:
Honorable MARA ZAZZALI-
HOGAN, J.S.C.

REPLY BRIEF ON BEHALF OF APPELLANTS*

DATED JULY 03, 2025

LAW OFFICES OF SUSHEELA VERMA
On the Brief: Susheela Verma, Esq. Attorney
Id.: 004851992
ATTORNEY FOR APPELLANTS*
485 E Route 1 South, Suite 240
Iselin NJ 08830
(732) 596-1140
susheela.verma@susheelaverma.com

TABLE OF CONTENTS

RESPONSE OF THE STATEMENT OF FACTS	1
LEGAL ARGUMENT	4
I. POINT ONE	4
There are Exceptions to the General Rule that Lower Court’s Fact Finding and Credibility Determination Should Not be Disturbed	4
II. POINT TWO	6
Damage Expert is Not a General Requirement When Rescission Remedy Has Been Requested	6
III. POINT THREE	
i. Non-Payment by Plaintiffs was Not a Breach Capable of Validating Defendants’ Claims	7
ii. Defendants Committed Fraud	8
iii. Equitable Estoppel	9
iv. Setoff	10
IV. POINT FOUR	
i. Apportionment of Counsel Fee Award in Mixed Cases is Required Evidence Was an Error (5T26 19-25)	11

- ii. Fee Award When Contract Relied Upon is Ambiguous
13

V. POINT FIVE

CONCLUSION

14

TABLE OF AUTHORITIES

**Authority
number**

Brief Page

Case Law:

Conway v. 287 Corporate Ctr. Associates, 187 N.J. 259 (2006).....	14
Empower Our Neighborhoods v. Guadagno, 453 N.J. Super. 565 (2018).....	12
First Am. Title Ins. Co. v. Lawson, 177 N.J. 125.....	7
Great Falls Bank v. Pardo, 263 N.J. Super. 388 (1993).....	8
Grubbs v. Knoll, 376 N.J. Super. 420 (2005).....	11
Hebela v. Healthcare Ins., 370 N.J. Super. 260 (2004).....	12
Kieffer v. Best Buy, 205 N.J. 213 (2011).....	13
Litton Industries, Inc. v. IMO Industries, Inc., 200 N.J. 372 (2009).....	12
Magnet Resources, Inc. v. Summit MRI, Inc., 318 N.J. Super. 275 (1998)...	7,8
New Gold Equities Corp. v. Jaffe Spindler Co., 453 N.J. Super. 358 (2018)	5
New Jersey Div. of Youth and Family Services v. D.M.B ., 375 N.J. Super. 141 (2005).....	6
Nester v. O'Donnell, 208 N.J. Super. 198 (1997).....	11
Nester v. O'Donnell, 301 N.J. Super. 198 (1997).....	13

N.J.Court Rules, R.4:42-9.....	12
N.J.S.A.2A:32-1	9
Notch View Associates v. Smith, 260 N.J. Super. 190 (2003).....	7
Notch View Associates v. Smith, 260 N.J. Super. 190 (2008).....	6
Pioneer Nat'l Title Ins. Co. v. Lucas, 155 N.J. Super. 332 (1978).....	5
Resolution Trust Corp. v. Shoreview Builders, Inc., 252 N.J. Super. 408 (1991)	11
Rendine v. Pantzer, 276 N.J. Super. 398 (1994).....	11
Roach v. BM Motoring, LLC, 228 N.J. 163 (2017).....	7
Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474 (1974).....	5
Rutgers Cas. Ins. Co. v. LaCroix, 194 N.J. 515.....	6
Schlossman's, Inc. v. Niewinski, 12 N.J. Super. 500 (1951).....	9
Securimetrics, Inc. v. Iridian Techs., 2005 U.S. Dist. LEXIS 53857 (D.N.J. 2005).....	8
State v. Haines, 20 N.J. 438 (1956).....	5
State v. Miller, 342 N.J. Super. 474 (2001).....	5
State v. Yohnnson, 204 N.J. 43 (2010).....	5
Walid v. Yolanda for Irene Couture, 425 N.J. Super. 171 (2012).....	9
Winters v. North Hudson Regional Fire and Rescue, 212 N.J. 67 (2012)	10
W.V. Pangborne & Co. v. New Jersey Dep't of Transp., 116 N.J. 543 (1989).....	10

Response to the Statement of Facts

Contrary to the factual assertions made by the Defendants, they were already in breach of the contract. (db2). They had made false representations as to the payroll and delivery expenses before the APA was signed. Defendant Ralph admitted to preparing the profit and loss statement which the Plaintiffs relied upon. As was evident by his testimony and the record, he actively presented false information about the payroll and delivery charges. Therefore, the agreements were already breached and violated by the defendants. Plaintiffs raised the issue of payroll manipulations to Ralph. He did not respond.

Defendants argue that the assets were delivered “as is” and that they were excused as the Plaintiffs did not complain. (db6). The Defendants fail to appreciate that the key issue in this case is Defendants’ misrepresentation as to the payroll and delivery costs and their failure to refer orders for flowers as agreed. Therefore, the factual assertion of “as is” is inapplicable.

There was no default under the lease agreement as argued by the defendants on page 6 of their brief.

Under paragraph 21 of their brief, the Defendants assert that the sole remedy the Plaintiffs had was to demand a refund of the deposit. (db7) This interpretation of the agreement is illogical as there was no deposit remaining as of the date when the

Plaintiffs discovered the fraud perpetrated upon them. The refund of the deposit would apply prior to the closing and not thereafter.

As to the factual assertion/argument of due diligence period of 30 days in paragraph 23, the facts concealed could not have been discovered by the alleged due diligence. (db7) The Defendants had a duty to not to mislead. They had a duty to be truthful. They were not. Therefore, the duty owed was already breached which was known to the defendants all along.

Defendants seem to argue that the Plaintiffs were required to provide a statement of post-closing revenue loss due to Wedding Pros failure to give floral referral. (db8-9). The Defendants' assertion is flawed as there was no referral at all, and no information was provided by Wedding Pros as to how much business they failed to refer. Defendants seek to hold the Plaintiffs responsible for their own breach and failure to do what they were required to do as part of the transaction.

Defendants assert that the APA contained an integration clause without pointing to the exact provision. (db7). Defendants also state that the APA provided for due diligence. (db7). It must be noted that the due diligence section in APA states, “Buyer shall have a period of thirty (30) days from the execution of this Agreement to satisfy all of Buyer’s requirements as to the intended commercial use of the real property (“Due Diligence Period”)” P138a.

As to the argument that Plaintiffs did not have an expert, the numbers were simple and were adequately explained by the Plaintiff during his testimony. Not every claim of damage requires experts. Ralph stated a specific number for the payroll expense. (P172a) The payroll records, which were hidden, had a definite number as well. (P179a-P190a; P191a-194a) There were W-2 statements which contained the amount of wages actually paid. (P195a-P211a) The issue was the difference multiplied by the number of years that Plaintiffs had to endure this extra expense. As to undisclosed delivery charges as well, the number was definite. It was \$6.00. The number of deliveries subject to this charge was identified. It was simple math. A litigant should not be required to be burdened with the expensive experts when the math is simple, and numbers are defined. Prasad was able to identify the numbers and add them up. The judge had no issues with his methods of calculations.

As to Defendants' assertion pertaining to their right to own and operate a wedding floral business, the statement made fails to recognize the issue. (db8) The issue was not their right to own and operate a wedding floral business, it was their breach of the agreement to refer all flower supply requirements to the Plaintiffs. Both Nancy and Ralphs admitted in no uncertain terms that they actively ran the business but never referred any flower supply business to the Plaintiffs. That was a blatant breach of clear terms contained in the parties' agreement.

As to the Defendants' argument that there was no guaranty of the profits, they again miss the point. The business was purchased based upon the profit and loss statement provided. Defendants failed to disclose significant payroll and delivery expenses. The information withheld was material. Defendants knew that the actual gross profit was much lower than what Ralph represented to the Plaintiffs. Therefore, it was not about the guaranty of profits, it was about the higher expense which was not disclosed and had to be endured by the Plaintiffs for years. The Plaintiffs did not claim damages-based upon business going down, they claimed damages for the existing extra expense they incurred at the same level of business as was claimed to be by the Defendants. There was a definite expense which was being incurred and was necessary to run the business at the same level. But for the Defendants' active concealment of highly material facts, Plaintiff would not be paying from their pocket to sustain the business. The choice of saying no to the deal was taken away from them by the Defendant by deception.

LEGAL ARGUMENT

Point One

There are Exceptions to the General Rule that Lower Court's Fact Finding and Credibility Determination Should Not be Disturbed

The trial judge's credibility determination must be ignored when it is clearly and convincingly shown that the findings are so manifestly unsupported by or inconsistent with the competent, relevant, and reasonably credible evidence as to

offend the interests of justice. This principle is reflected in New Jersey case law and court rules, which emphasize that credibility determinations are generally within the purview of the fact-finder, but appellate or reviewing courts may intervene when the trial judge's findings are clearly mistaken or plainly unwarranted State v. Haines, 20 N.J. 438 (1956), Pioneer Nat'l Title Ins. Co. v. Lucas, 155 N.J. Super. 332, (1978) Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474 (1974).

Similarly, appellate courts may disregard a trial judge's credibility findings if they are convinced that the findings are so wide of the mark that a mistake must have been made, such as when the judge overlooks or undervalues crucial evidence or bases conclusions on inherently incredible testimony. Id.

Trial judges' factual findings, including credibility determinations, are generally binding on appeal *if supported by adequate, substantial, and credible evidence*. State v. Miller, 342 N.J. Super. 474 (2001), State v. Yohnnson, 204 N.J. 43 (2010). Emphasis added. A trial judge's credibility determinations must be ignored if they are "manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice" New Gold Equities Corp. v. Jaffe Spindler Co., 453 N.J. Super. 358 (2018).

In our case, the trial judge ignored significant documentary evidence and based her credibility determination on one isolated statement by the Plaintiff Prasad

Kuruganti. This case involved a Profit and Loss Statement admitted to have been prepared by Defendant Ralph. (P170-172a) The Court had ample evidence independent of the witness testimony. It also had the admission of the adverse party which was ignored. The deference to the lower court's credibility determination is not absolute. Credibility determinations must be disregarded when they are "manifestly unsupported by or inconsistent with" credible evidence, as such findings offend the interests of justice. New Jersey Div. of Youth and Family Services v. D.M.B., 375 N.J. Super. 141 (2005)

Point Two

Damage Expert Is Not a General Requirement When Rescission Remedy Has Been Requested

Expert testimony is not a general requirement for rescission. The court's discretion and equitable judgment are the primary tools for determining whether rescission is warranted. However, expert testimony may be relevant in specific cases to establish technical facts or clarify complex issues. For example, in cases involving insurance contracts, expert testimony might help assess the materiality of a misrepresentation or the feasibility of restoring the parties to their original positions. Rutgers Cas. Ins. Co. v. LaCroix, 194 N.J. 515, Notch View Associates v. Smith, 260 N.J. Super. 190 (2008). The discretionary nature of rescission means that courts are not bound by rigid rules but instead adapt the remedy to the circumstances of each case. This flexibility reduces the need for expert testimony in most cases, as

the court relies on its equitable judgment and the evidence presented by the parties. First Am. Title Ins. Co. v. Lawson, 177 N.J. 125, Notch View Associates v. Smith, 260 N.J. Super. 190 (2003).

Point Three

(i)

Non-Payment by Plaintiffs Was Not a Breach Capable of Validating Defendants' Claims

APA was breached by the Defendants as their representations were false. Therefore, the Defendants were in breach of contract from day one. The Plaintiffs discovered the fraud and only then took the step of stopping the payment. They gave an opportunity to the Defendants to explain. Defendants ignored (P212a). Defendants' preexisting breach was material. A material breach occurs when a party's breach involves the essence of the contract, being the type of breach that would warrant the nonbreaching party from further performing their contractual obligations. If there is a material breach, the nonbreaching party is relieved of its obligations under the agreement. See Roach v. BM Motoring, LLC, 228 N.J. 163, 174–75 (N.J. 2017). Whether a breach is material is typically a question of fact for the jury to decide. See Magnet Resources, Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 286 (App. Div. 1998).

Under New Jersey law, a material breach by one party to a bilateral contract excuses the other party from rendering further contractual performance. A material

breach is one that defeats the purpose of the contract. Courts evaluate the materiality of a breach by considering the extent to which the breach affects the contract as a whole and the likelihood of recurrence. Magnet Resources, Inc. v. Summit MRI, Inc., 318 N.J. Super. 275 (1998).

(ii)

Defendants Committed Fraud

Among others, the Plaintiffs asserted affirmative defenses of misrepresentation, fraud, equitable fraud, frustration of purpose, failure of consideration, unclean hands, offset and estoppel. (P270a-277a)

Fraud by one party to a contract can excuse the other party from performance. This principle applies even in cases involving third-party beneficiaries, provided the fraud is material and impacts the contractual obligations. Great Falls Bank v. Pardo, 263 N.J. Super. 388 (1993).

A fraud defense may exist in transactions where consent to entry of the agreement was obtained by fraud. Fraud in the inducement requires a party to demonstrate (1) that a representation was made by the other party with the intent that such representation would be relied on, (2) the other party's knowledge that the representation was false, (3) belief by the party asserting fraudulent inducement that the representation was true, (4) reliance upon the representation, and (5) a resulting injury. Securimetrix, Inc. v. Iridian Techs., 2005 U.S. Dist. LEXIS 53857, at 20

(D.N.J. 2005). The representation must involve a material fact, induced the execution of the contract, and been falsely made. Schlossman's, Inc. v. Niewinski, 12 N.J. Super. 500, 506 (N.J. App. Div. 1951). Introduction of parol evidence is admissible with respect to a fraud in the inducement claim. See Walid v. Yolanda for Irene Couture, 425 N.J. Super. 171, 185 (N.J. App. Div. 2012).

Defendants gave the Plaintiffs a profit and loss statement which was the key foundation for the Plaintiffs' decision to proceed further to purchase the business from the Defendants. Ralph knowingly and intentionally provided false information as to the operating expenses. His conduct falls squarely within the definition of fraud in the inducement.

New Jersey law allows a defrauded party to either rescind the contract entirely and recover the money or property obtained by the fraud or sue on the contract to recover damages. This right arises when there is fraud in the execution or consideration of the contract. N.J.S.A.2A:32-1. This statutory right underscores the principle that fraud undermines the validity of a contract and excuses the defrauded party from performance.

(iii)

Equitable Estoppel

Equitable estoppel is an affirmative defense based on principles of fair play and essential justice and arises when one party lulls another party into a

disadvantageous legal position. If applicable, a party will be barred from asserting something, such as a contractual right, that it otherwise would be entitled to assert. In New Jersey, equitable estoppel is defined as the effect of the voluntary conduct of a party whereby it is precluded both at law and in equity from asserting rights which might have otherwise existed against another party who has in good faith relied upon such conduct, and has been led thereby to change its position for the worse. See W.V. Pangborne & Co. v. New Jersey Dep't of Transp., 116 N.J. 543, 553 (N.J. 1989); Winters v. North Hudson Regional Fire and Rescue, 212 N.J. 67, 86 (N.J. 2012).

Due to their conduct designed to mislead and defraud an innocent party who proceeded to purchase their business based upon false and misleading information, the Defendants are estopped from seeking enforcement of contracts they procured by utilizing improper and prohibited means.

(iv)

Setoff

Plaintiff asserted various claims against the Defendants. They sought return of their investment and the amount of expenses hidden from them which they endured for years. The purchase price they paid far exceeded the amount alleged to be owed. The Plaintiffs were entitled to argue that in the event a judgment is entered against them, the amount of the judgment could be reduced by the amounts owed by

the Defendants to the Plaintiffs or that such judgment amount may account for payments that have been made to the Defendants by the plaintiffs. A setoff involves an affirmative recovery on a claim that may be independent of the transaction upon which the plaintiff is seeking relief and may be awarded for any amount that is owed to the defendant. See Nester v. O'Donnell, 301 N.J. Super. 198, 208 (N.J. App. Div. 1997); Resolution Trust Corp. v. Shoreview Builders, Inc., 252 N.J. Super. 408, 419 (N.J. App. Div. 1991) (distinguishing setoff from recoupment).

Point Four

(i)

Apportionment of Counsel Fee Award in Mixed Cases is Required

A judge is required to apportion counsel fees between the defense against a complaint and the expenditure on pursuing an affirmative counterclaim, provided that such apportionment is feasible and supported by the facts of the case. In New Jersey, courts have consistently emphasized the need to allocate attorney fees to ensure that awards are limited to the claims for which fees are properly recoverable. For instance, in Grubbs v. Knoll, 376 N.J. Super. 420 (2005), the court highlighted that a trial judge must ensure that counsel fee awards do not cover efforts expended on independent claims that are joined with claims for which fees are recoverable. This principle ensures that fee awards are appropriately limited to the claims entitling a party to fees. Id. Similarly, in Rendine v. Pantzer, 276 N.J. Super. 398

(1994), the court disallowed fees for hours spent on claims for which no fee entitlement existed, emphasizing the importance of detailed allocation to avoid improper awards.

Additionally, in Empower Our Neighborhoods v. Guadagno, 453 N.J. Super. 565 (2018), the court affirmed the apportionment of fees based on the level of responsibility of each party and the time invested in the case, underscoring that apportionment is not a precise calculation but must be equitable and reasonable. This approach aligns with the broader principle that courts must analyze the proceedings and relevant facts to arrive at a fair division of costs, as noted in Hebela v. Healthcare Ins. 370 N.J. Super. 260 (2004). Therefore, while scientific precision is not required, judges are expected to use their discretion and legal experience to ensure a fair and reasonable allocation of fees between different claims or defenses.

Additionally, in Litton Industries, Inc. v. IMO Industries, Inc., 200 N.J. 372 (2009), the New Jersey Supreme Court stated that counsel fees must be tethered to successful claims, and hours related to unsuccessful or non-fee-eligible claims should be excluded from the calculation. This principle aligns with the broader requirement that fee applications must provide sufficient detail to enable courts to assess the reasonableness and appropriateness of the fees requested, as outlined in New Jersey Court Rules, N.J. Court Rules, R. 4:42-9.

Therefore, in mixed claim cases, it is the responsibility of the claimant's counsel to ensure that billing records are sufficiently detailed to segregate fees for fee-recoverable claims from those for non-recoverable claims, as courts will not award fees for unrelated or unsuccessful claims. Defendants were not entitled to fees and costs to start with. Even if the fee was to be awarded, it had to be apportioned. The trial court did not engage in any such analysis and was not pleased when the issue was raised, and request was made. The Defendants' bills were challenged and requests for clarification were made. The entire fee and costs as resented by the Defendants for the entire case were awarded.

(ii)

Fee Award When Contract Relied Upon is Ambiguous

When multiple contracts are involved, courts may interpret all related agreements together to ascertain the parties' intent. In Nester v. O'Donnell, 301 N.J. Super. 198, the court noted that all writings forming part of the same transaction should be interpreted together, and ambiguity exists if the terms are susceptible to at least two reasonable interpretations Nester v. O'Donnell, 301 N.J. Super. 198 (1997). Additionally, under New Jersey law, ambiguity in indemnity or fee-shifting provisions is typically construed against the party seeking to enforce them, as seen in Kieffer v. Best Buy, 205 N.J. 213 (2011)

In summary, while contract-based counsel fees can be awarded in New Jersey, the enforceability of such provisions depends on the clarity of the contractual language and the intent of the parties. Ambiguities will be resolved by examining the contracts as a whole and applying principles of fairness and reasonableness.

The court's primary goal is to ascertain the intention of the parties as revealed by the language of the contract, taken as a whole, and in the context of the circumstances under which it was written. This includes examining the situation of the parties, the attendant circumstances, and the purpose of the agreement. Even if the contract appears clear on its face, New Jersey courts permit a broad use of extrinsic evidence to achieve this goal Conway v. 287 Corporate Ctr. Associates, 187 N.J. 259 (2006).

Point Five
Conclusion

Defendants/Respondents in their opposition brief fail to appreciate the core of the Plaintiffs claims. The prominent issue in this case was the active concealment of highly relevant information by the Defendants. The fact that the profit and loss statement was the foundation and beginning point for the Plaintiffs to be attracted to the business was well established. The fact that the Profit and Loss Statement was prepared by Ralph and was given to Plaintiffs was undisputed and admitted. The fact that the TimeTrax system was used by the Defendants to track the employees' time was confirmed by Ralph. The payroll and TimeTrax records were provided the

defendants in discovery. The numbers of hours and resulting expenses for work force was higher and it was established through Ralph's testimony as well. The number as to gross and net revenue was specifically stated by Ralph in the Profit and loss statement. He also included a specific number for payroll expenses. The delivery charge was not disclosed in the profit and loss statement but did exist as admitted by Ralph himself. The Plaintiffs' case was rooted in documents that belonged to the defendants. These documents contained specific and detailed information. Therefore, the trial court's determination on relevant issues based upon alleged lack of credibility was quite a contradiction to what existed independent of the Plaintiff's testimony. As to the reward of fees, the various contracts had different provisions. The court did not conduct any specific hearing on this issue to determine the intent. Further, defendants' claims were determined to be frivolous and therefore, the court needed to require better billing records and apportion fees to the portion allocated to defense against Plaintiffs' claims and the Defendants' affirmative claims. None of this occurred. The required facts are well documented in the record and required no reliance on Plaintiff's credibility, or lack of it.

Respectfully submitted.

/s/Suseela Verma, Esq.

SUSHEELA VERMA, ESQ.