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Supreme Court of New Jersey

DOCKET NO. 090380

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Appellant,	:	On Appeal from an Interlocutory Order of the Superior Court of New Jersey, Appellate Division.
v.	:	
NIRAV PATEL,	:	Sat Below: Hon. Jessica R. Mayer, P.J.A.D. Lisa A. Puglisi, J.A.D.
Defendant-Respondent.	:	

SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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August 6, 2025

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GLOSSARY OF TERMS

World of Beer Franchising, Inc. (WOB) – Florida-based corporation licensing franchises for beer-themed WOB restaurants

Tapmasters, LLC – partnership of defendant and Will Mingo formed to open WOB franchises in Pennsylvania and New Jersey

Tapmasters II, LLC (Tapmasters) – successor partnership to Tapmasters LLC, with additional partners Jerrid Douglas and, briefly, Kenny Lee, to open WOB franchises in Pennsylvania, New Jersey, and New York

Tapmasters Hoboken, LLC (Tapmasters Hoboken) – partnership between defendant and Mingo formed to open a WOB franchise in Hoboken, NJ

WOB Hoboken – planned, but never opened, Hoboken WOB franchise

HOBWOB – investor group formed to invest in WOB Hoboken

Bhagu, Inc. (Bhagu) – business owned by defendant's sister Sonal Patel and operated by defendant

Area Development Agreement (ADA) – contract between WOB and Tapmasters granting Tapmasters exclusive rights to open WOB franchises in Pennsylvania, New Jersey, and New York

Franchise agreement – agreement giving Tapmasters the right to open a franchise. There is a franchise agreement for each franchise location.

Operating agreement – agreement setting forth the terms of ownership for the franchise, including ownership percentage for each partner. There is an operating agreement for each franchise location.

Principal owner's guaranty – guaranty provided by Tapmasters to WOB setting forth ownership percentage. There is a principal owner's guaranty for each franchise location and for Tapmasters, LLC.

HOBWOB subscription agreement – agreement setting forth the terms of HOBWOB's investment in Tapmasters Hoboken

PRELIMINARY STATEMENT

This Court has long recognized and embraced a high standard for granting motions for a new trial based on newly discovered evidence—and has therefore required any defendants seeking a new trial on the basis of newly discovered evidence to show both (1) that they could not have previously discovered the evidence with reasonable diligence, and (2) that the newly discovered evidence is actually sufficiently material and probative such that it more likely than not would have changed the jury's verdict. The Appellate Division broke with that commonsense tradition, allowing defendant a new trial even though defendant had signed, emailed to himself, and possessed all the key documents in his email account for years, and even though the allegedly new evidence was not credible or probative as to defendant's asserted innocence. This Court should reverse the decision below and reinstate defendant's conviction.

Defendant took $750,000 from investors who believed they were buying a 30% stake in Tapmasters Hoboken—the franchisee for a World of Beer (WOB) franchise located in Hoboken. In fact, defendant owned only 5% of Tapmasters Hoboken. And although defendant told the investors they were buying shares in Tapmasters Hoboken, he instructed them to make payments to Bhagu, Inc., claiming it was a holding company for Tapmasters Hoboken when in reality it was an unrelated company owned by his sister. Defendant then spent the

$750,000 the investors paid into the Bhagu account on personal expenses and unrelated debts; he never delivered (or even attempted to deliver) any shares in Tapmasters Hoboken to them, nor did he even sign the subscription agreement finalizing the deal. Neither did his business partner, Will Mingo, without whose consent defendant lacked authority to sell shares in the first place—and whom defendant had not even told of these investors at all.

Barely a week after a jury convicted him of theft by deception, defendant moved for a new trial, alleging he had discovered new evidence that would have changed the verdict at his trial. That evidence consisted chiefly of (1) franchise agreements signed by defendant purportedly showing that Bhagu was indeed the franchisee of WOB Hoboken and that he had the right to sell 30% ownership in that franchise in exchange for the $750,000 that he had received, (2) as well as a separate guaranty that reflected a 30% share in exclusive rights to develop WOB franchises in the region generally, but had nothing to do with a specific share in any franchise location, much less the franchise location the HOBWOB investors thought they were buying into. At a hearing, meanwhile, defendant claimed that he failed to locate these franchise agreements in the four years between his indictment and trial, yet testified that he found them roughly a week after his conviction after searching his own email account for about an hour. In contrast, the alleged counterparty to the agreements did not recall ever signing

them, did not believe he had signed them, and noted that his signature looked highly suspicious—skepticism that a side-by-side comparison of relevant documents bears out. Despite all this, the courts below ruled that defendant was entitled to a new trial, finding that the evidence qualified as newly discovered and deferring any assessment of its credibility to a jury at the new trial.

That was error for multiple reasons. First, as rulings from this Court and numerous other courts have made clear, defendant's failure to locate agreements that he himself signed, emailed to himself, and possessed for four years between indictment and trial—and then located after an hour of searching roughly a week after trial—does not reflect reasonable diligence. Second, the evidence was not credible and it could not have changed the jury's verdict. To start, a plethora of signs showed that at least several key documents were likely inauthentic, and the lower courts' conclusion that such credibility questions should be weighed by a jury at a new trial flip both the new-trial standard and the post-conviction court's gatekeeping function on its head. In any event, these documents would not in fact have changed the outcome of the trial, because they did not show that defendant had the right to sell these shares, believed he had the right to sell these shares, or in any event actually intended to sell any shares to the victims at all—yet undisputedly took and spent the victims' $750,000 while delivering nothing in return. For any or all of these reasons, this Court should reverse.

QUESTIONS PRESENTED

1. Whether documents that defendant had signed, emailed to himself, and possessed in his email account throughout the four years between his indictment and conviction could have been found before trial with reasonable diligence.

2. Whether defendant's documents are sufficiently credible and probative to demonstrate that the jury would have been more likely than not to acquit him had the documents been presented at trial.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. The Underlying Conviction.

In 2012, defendant Nirav Patel, along with associates Will Mingo and Jerrid Douglas, entered into an area development agreement (ADA)[2] with World of Beer Franchising, Inc. (WOB), giving Patel, Mingo, and Douglas exclusive rights to open twelve WOB franchises—retail establishments focusing on beer—in New Jersey, Pennsylvania, and later New York over a five-year period. (1T88-3 to 89-8; Sa38-69). The partnership operated under the name "Tapmasters, LLC," and later as "Tapmasters II, LLC" (Tapmasters). (1T88-25 to 89-1). The partners were initially to share in the profits equally, but over time, they agreed to different ownership structures for different franchise locations. (1T89-11 to 90-6). Each location was subject to its own franchise agreement, which gave Tapmasters the right to open a WOB franchise at that location, as well as a separate operating agreement, which set forth the terms of ownership, including the percentage of ownership for each partner. (1T91-21 to 92-6). Tapmasters was also required to provide a principal owner's guaranty

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[1] The statements of procedural history and facts are closely related and are presented together for the Court's convenience.

[2] Because many of the entities and documents in this matter have similar names, the State has provided a glossary of terms, located after the table of citations at the beginning of this brief.

to WOB contemporaneously with the signing of each franchise agreement, which also set forth the ownership percentages. (Sa47 ¶ 6.3).

In February 2014, Tapmasters decided to open a WOB franchise in Hoboken at a location where defendant had previously operated a Melting Pot restaurant that had failed. (1T93-15 to 94-23). The operating agreement for that WOB location—establishing Tapmasters Hoboken, LLC (Tapmasters Hoboken)—was signed on May 2, 2014. (Sa70-101). That agreement stated that Mingo had 95% ownership and defendant had 5%. (1T94-7 to 15; 1T97-10 to 20; 1T105-13 to 107-8; 1T109-10; Sa107). As the principals of Tapmasters Hoboken, on March 25, 2015, defendant and Mingo signed a principal owner's guaranty, (Sa113-14), and a principal owner's statement also indicating that Mingo owned 95% of Tapmasters Hoboken and defendant owned 5%, (Sa120-22).

Like all WOB operating agreements, the Tapmasters Hoboken operating agreement for WOB Hoboken provided that any potential investors had to complete a subscription agreement, which had to be vetted by the voting members of Tapmasters Hoboken. Potential investors could then be admitted to the company, but only with the written approval of the managing partner and 51% of the voting interest. (1T111-19 to 120-19; Sa77 ¶ 3.02). Because Mingo was the managing partner of Tapmasters Hoboken and held 95% of the voting

interest, he would need to approve any investors. (1T113-2 to 22). Any contributions would then be used for the benefit of Tapmasters Hoboken. (1T116-14 to 117-8; Sa79 ¶ 3.06).

Between March and May 2014, around the time that defendant and Mingo signed the original Tapmasters Hoboken operating agreement, defendant sought additional investors for the project. (1T5-8 to 14; 4T205-10 to 23). Mingo knew defendant was engaged in this recruitment, but had not approved any specific investors, as would be required by the operating agreement. (1T128-20 to 130-12). Steve Antaro, with whom defendant had another business, assembled six investors under the name "HOBWOB" to invest $750,000 in Tapmasters Hoboken in exchange for what defendant represented would be a 30% stake in the WOB Hoboken franchise. (3T37-1 to 38-18; 3T102-12 to 105-5). For every $25,000 invested, the investors were to receive one percent of the WOB Hoboken franchise. (3T104-22 to 24). Antaro, as a representative of HOBWOB, signed a subscription agreement memorializing the investment in Tapmasters Hoboken. (Sa123-55). Neither Mingo nor anyone else signed the subscription agreement on behalf of Tapmasters Hoboken to accept the investment. (Sa134).

Between March 18 and May 16, 2014, the six HOBWOB investors provided the promised funds to defendant either by wire transfers to a bank

account held by Bhagu, Inc., or checks made payable to Bhagu, which had been the operating entity for the Melting Pot—defendant's failed restaurant. (3T107-11 to 14). Bhagu itself was owned by one of defendant's sisters, but defendant operated it and had signing rights for it. (6T8-14 to 11-16). These deposits and payments, totaling $750,000, occurred both before and after execution of the Tapmasters Hoboken operating agreement on May 2, 2014, which showed that defendant owned only 5% of the Tapmasters Hoboken franchise. (Sa77-101). None of the investors made payments to any Tapmasters or WOB entity.

Before the first HOBWOB investor payment, the Bhagu bank account had a negative balance of over $10,000. (4T220-17 to 221-1). Almost immediately after each deposit of funds from the HOBWOB investors into Bhagu's account, defendant used those funds for personal expenses, including paying the mortgage on a hotel condominium, payments on his Porsche, writing checks to himself, paying credit-card bills, and covering outstanding debts for the now-defunct Melting Pot. (4T220-8 to 229-25; 4T236-15 to 248-25; 4T250-16 to 251-25; 4T253-9 to 254-21; 4T258-6 to 16). Defendant did not make any payments related to WOB Hoboken. (4T258-6 to 16). Just two weeks after defendant received the final HOBWOB investor payment, the Bhagu account returned to a negative balance. (4T255-19 to 257-10).

On June 27, 2014, after the investors' money had been exhausted, defendant emailed the HOBWOB operating agreement to Mingo and their attorney, Tassos Efstratiades, stating that they should add the investors and "not delay the funding." (Sa158). Mingo responded that they needed to identify their shares and contributions and get a completed subscription agreement, and defendant agreed. (Sa156). Defendant did not mention that he had already received the money. (Ibid.)

In August 2014, Mingo learned what had happened. He ran into Antaro at a restaurant, and Antaro asked about the status of the subscription agreement memorializing the group's investment—thus revealing to Mingo that the group already believed they had come to an investment agreement with defendant and that they had already given defendant their money. (1T144-8 to 145-8). Mingo explained that he was stunned because defendant had never told him about that agreement or the transfer of funds. (1T145-21 to 147-17). On August 11, 2014, Mingo's attorney confronted defendant about the misappropriation. (1T152-2 to 11; 2T32-8 to 14). Ultimately, Mingo notified defendant that, in light of the misappropriation of $750,000, he was removing defendant from Tapmasters Hoboken for cause. (1T150-21 to 152-16).

On May 8, 2019, a State Grand Jury returned Indictment No. 19-05-00046-S, charging defendant with one count of second-degree theft by deception, in violation of N.J.S.A. 2C:20-4. (Sa1-3).

A seven-day jury trial took place in April 2023. At trial, defendant testified in his own defense. Like Mingo, he testified that the ownership structure for the partnership under the ADA was originally a 40/30/30 split between Mingo, himself, and Douglas, with Mingo having the largest share and serving as managing partner. (6T88-16 to 90-25). But defendant also testified, without relying on any documents, that he and Mingo were 50/50 partners in the WOB Hoboken franchise because Douglas had gradually withdrawn. (6T116-2 to 119-9). Defendant testified that he did not recall signing the Tapmasters Hoboken operating agreement for WOB Hoboken that showed that he had only a 5% interest in WOB Hoboken, and claimed that the only reason he may have done so was to secure a small business loan. (7T110-14 to 19; Sa4).

After being presented with this evidence at trial—showing that defendant had taken $750,000 from investors in exchange for a 30% share he did not possess and had immediately diverted these investor funds to cover his unrelated personal expenses—a jury convicted defendant of theft by deception of property valued in excess of $75,000 on April 20, 2023. (6T110-9 to 24).

B. Defendant's Motion For A New Trial.

Eight days after his conviction, defendant filed a motion for a new trial and for a judgment of acquittal, asserting that he was in possession of newly discovered evidence. (Sa5-12). Over two months later, defendant submitted a brief in support of that motion, to which he appended the following evidence: (1) two alleged WOB franchise agreements between WOB and Bhagu for the Hoboken location, one dated January 22, 2014, (Sa163-222), and the other dated May 7, 2015, (Sa267-325) (the Bhagu franchise agreements); (2) a principal owner's guaranty for "Tapmasters II" indicating that defendant had a 30% interest in that entity, (Sa327-29); and (3) bank statements that had already been introduced by the State at trial, (Sa224-65).[3] Accompanying the evidence was a certification from defendant's sister, Lina Patel,[4] claiming both to have found the Bhagu franchise agreements after searching boxes in the family's garage and to have further recovered the Tapmasters II guaranty. (Sa159-61). Defendant contended that this evidence showed that he was the sole franchisee of the WOB

[3] There was little discussion at the motion hearing about the relevance of the bank records. In any event, these bank records had already been admitted at trial and testified to at length. (4T218-21 to 261-3).

[4] To avoid confusion, the State refers to defendant's sisters by their first names. No disrespect is intended.

Hoboken franchise and therefore had the authority to sell 30% of the franchise shares to the six-member HOBWOB investment group.

At an October 12, 2023 hearing on the new-trial motion, Lina testified—contrary to her certification—that she found only approximately eleven pages that said "Bhagu" and "World of Beer" on them. (8T13-13 to 19; 8T24-23 to 25). Unlike in her certification, she testified that she showed those pages to defendant, which led him to search his own email account, where he found "a whole bunch of emails," including the Bhagu franchise agreements. (8T13-20 to 8T14-4). Lina, who took part in the email search, testified it took "close to an hour" to locate the documents in defendant's email account. (8T33-2). She did not explain where the ostensible guaranty for Tapmasters II was found.

Defendant also testified at the motion hearing that he searched his emails for the documents after Lina found several pages in boxes. (8T40-24 to 41-6). Unlike Lina, however, he testified that the only documents attached to the email he had found through that search—an email dated May 7, 2015, and sent from his own email account to himself—were the 2014 Bhagu franchise agreement and an addendum, both dated January 22, 2014. (8T77-1 to 79-1). Defendant was unable to explain where the 2015 Bhagu franchise agreement was found. (8T78-4 to 80-20). He also failed to explain how he had located the Tapmasters II guaranty submitted with his motion. (8T47-21 to 48-15; Sa330-33).

On December 14, 2023, Benjamin Novello, Chief Development Officer of WOB, testified at the new-trial hearing. Novello, whose signature appears on both of the alleged Bhagu franchise agreements (purportedly signed January 22, 2014, and May 7, 2015), testified that the first time he saw either agreement was in summer 2023—that is, after defendant was convicted at trial. (9T7-5 to 11; 9T13-13 to 14-5). Neither Novello nor a colleague with whom he had consulted recalled any franchise agreement with Bhagu, nor were they able to locate one in their electronic or paper records or with their lawyers, even though it was WOB's practice to keep copies of every franchise agreement it ever executed. (9T14-6 to 23). Novello not only testified that he could not recall signing these agreements, (9T15-20 to 16-4; 9T18-3 to 14), but he also testified that his signature on the January 22, 2014 Bhagu agreement looked identical—not just similar—to his signature on an agreement between WOB and Tapmasters for an Albany WOB franchise signed on the same date. (9T15-1 to 18-14).

Novello also offered other reasons for skepticism. Novello noted that the time period in these agreements overlapped with the franchise agreement for Tapmasters Hoboken, which was signed on May 7, 2015, and <u>was</u> in WOB's files. (9T9-18 to 20; 9T15-4 to 12; 9T20-20 to 22; Sa338-96). Novello added that both agreements purported to grant an exclusive 10-year franchise for the same location to different entities and thus were in conflict—but without either

document acknowledging a conflict or noting which superseded. (9T9-18 to 13-12; 9T15-11 to 16; 9T17-12 to 18-2). Moreover, Novello added, because of the ADA between WOB and Tapmasters, WOB would not have approved a WOB franchise in Hoboken for anyone other than Tapmasters. (9T22-19 to 21).

Novello further explained that, under the ADA, defendant had 30% of the area development rights, but each time a new franchise was opened, a separate operating agreement had to be executed setting forth the ownership interest for that specific franchise unit. (9T40-7 to 16; 9T47-10 to 14). He testified that the principal owner's guaranty for Tapmasters II that accompanied Lina's certification related only to the ADA that gave the partnership exclusive rights to open franchises throughout New Jersey, New York, and Pennsylvania, and not the Hoboken franchise, which was governed by a separate agreement that detailed percentages of ownership in the WOB Hoboken location specifically. (9T42-21 to 47-8). According to other documents submitted by Tapmasters to WOB and signed by both defendant and Mingo, defendant in fact only had a 5% ownership share in Tapmasters Hoboken. (9T41-19 to 42-7).

C. The Decisions Below.

On February 16, 2024, the trial court issued a written opinion granting defendant's motion for a new trial. First, the court found that the evidence qualified as "new"—ruling that the documents "were not discoverable by

reasonable diligence at the time of trial" because they were "discovered among presumably thousands of documents" and because "[d]efendant searched his email for around an hour before any emails with the documents popped up." (Sa24). Second, the court found that the evidence was material and would probably change the verdict at trial because the franchise agreements, reflecting that Bhagu was the sole franchisee of WOB Hoboken, gave defendant authority to sell the shares and "thus [he] could not have deceived investors." (Sa25). The court also reasoned that the Tapmasters II guaranty was "alone sufficient" because it does not portray defendant as a 5% owner in the franchise. (Sa26). And finally, the court rejected Novello's testimony that the Bhagu franchise agreements were fraudulent because, although WOB could not locate those two agreements in its files, it was able to locate the Tapmasters II guaranty in its files. (Sa25). The trial court thus vacated the jury's verdict.

The Appellate Division granted the State's motion for leave to appeal, (Sa34-37), but ultimately affirmed in an unpublished opinion, (Sa464-81). First, the panel found that the trial court did not abuse its discretion in holding that defendant could not have located the documents with reasonable diligence given the "presumably thousands of documents" among which they were discovered. (Sa475). Second, the panel found that the new evidence was material and likely would have changed the jury's verdict. Despite acknowledging the "issues of

authenticity" with the franchise agreements, the panel agreed that a future jury alone should determine at the second trial whether the evidence was fabricated. (Sa478-79). The panel also reasoned that the two Bhagu franchise agreements were material to showing that defendant, through Bhagu, was the sole franchisee of WOB Hoboken when he accepted investments from HOBWOB. (Sa478). And the panel reasoned that the Tapmasters II guaranty, standing alone, was sufficient because it identified defendant as a 30% owner, and the Hoboken Tapmasters operating agreement reflecting defendant's ownership percentage as only 5% was not signed until May 2, 2014, after defendant had begun accepting HOBWOB's investments. (Sa479-80).

On May 13, 2025, the Court granted the State's motion for leave to appeal. (Sa483). This supplemental brief follows.

LEGAL ARGUMENT

To obtain a new trial based on newly discovered evidence, a defendant must show that the newly discovered evidence is: "(1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted." State v. Szemple, 247 N.J. 82, 99 (2021); see also State v. Haines, 20 N.J. 438, 443 (1956) ("Motions for new trials, disruptive as they are of the judicial process, are not favored and are properly entertained with caution by the trial courts."). The first and third prongs of this test "are inextricably intertwined." State v. Nash, 212 N.J. 518, 549 (2013). Thus, to be entitled to a new trial, a defendant must establish that the materials offered both could not have been previously obtained with reasonable diligence and are sufficiently additive and probative to make it more likely than not the jury would ultimately have acquitted him had the materials been presented at trial. Defendant failed to make either showing: the "new" materials were all in his own possession throughout the four years between indictment and trial (and indeed were signed and emailed by him), and they were not credible or persuasive enough to establish a sufficient likelihood of a different outcome. On any of these bases, reversal is warranted.

POINT I

THE MATERIALS WERE DISCOVERABLE WITH REASONABLE DILIGENCE.

There is no basis for deeming the documents offered by defendant—agreements he had signed and had long possessed—not reasonably obtainable. Under New Jersey law, just as a "defendant is not entitled to benefit from a strategic decision to withhold evidence," neither can he obtain a new trial by failing or declining "to act with reasonable dispatch in searching for evidence before the start of the trial." State v. Ways, 180 N.J. 171, 192 (2004). Thus, where no "external obstacle" impedes a defendant's access to evidence before or during trial, defendants usually cannot present such evidence post-conviction as a basis for a new trial. Szemple, 247 N.J. at 100; cf. Nash, 212 N.J. at 552 (considering whether defense counsel's pretrial efforts to obtain evidence "were probably thwarted" by a third party). So evidence does not qualify as "newly discovered" for these purposes when it involves, e.g., "testimony of a witness whose 'identity was well known to the defense at trial,'" Szemple, 247 N.J. at 100 (quoting Ways, 180 N.J. at 196)), or "scientific reports" that "existed at the time of trial," ibid. (quoting State v. Fortin, 464 N.J. Super. 193 (App. Div.), certif. denied, 246 N.J. 50 (2021)). Put simply, evidence cannot qualify as newly discovered where a defendant reasonably could have identified and obtained it on his own.

That should have foreclosed defendant's claim to a new trial. After all, the documents defendant put forward were allegedly found just one week after his conviction, and were comprised in relevant part of franchise agreements that (in defendant's own telling) were sitting in his family's garage and available in his own email account well before he was either indicted or convicted at trial. (8T40-24 to 41-6). Defendant had four years between indictment and conviction to locate these materials—at least some of which, by his own admission, were recovered after only about an hour of searching his email account. (8T77-1 to 79-1). Neither court below explained why defendant's failure to obtain these materials in his family's garage and his own personal email account qualified as "reasonable dispatch in searching for evidence before the start of the trial," Ways, 180 N.J. at 192, let alone identify a single "external obstacle" that had impeded his access to them, Szemple, 247 N.J. at 100. Nor did they explain why a search of one's own email that takes only an hour is unreasonable.

Voluminous precedent is in accord. See United States v. Cimera, 459 F.3d 452, 460 n.10 (3d Cir. 2006) (collecting, and agreeing with, cases holding that evidence in defendant's possession is not "newly discovered"); United States v. Garcia-Alvarez, 541 F.3d 8, 18 (1st Cir. 2008) (evidence of defendant's location derived from "complex and time-consuming" analysis of call records was not newly discovered because the defense possessed the records pretrial); United

States v. Rodriguez-Marrero, 390 F.3d 1, 29 (1st Cir. 2004) (information in police report was not newly discovered where defendant had report); United States v. Castillo, 171 F.3d 1163, 1167 (8th Cir. 1999) (evidence was not newly discovered where defendant had audiotape); United States v. Jaramillo, 42 F.3d 920, 925 (5th Cir. 1995) (explaining "[d]ue diligence requires that a defendant exert some effort to discover the evidence" in his possession); Gutierrez v. State, 602 S.W.3d 17, 21-22 (Tex. App. 2020) (testimony of defendant's friends and family known to defendant at time of trial was not newly discovered); People v. Wong, 784 N.Y.S.2d 158, 160 (N.Y. App. Div. 2004) (information contained in report "in defendant's possession" at time of trial was not newly discovered); State v. Perez, 457 N.W.2d 448, 457 (Neb. 1990) (tape recording that defendant listened to after trial was not newly discovered because it was in defendant's possession).[5] As this broad consensus confirms, evidence will seldom if ever be

[5] That is so even in cases where defendant "fail[ed] to realize" the "relevance" of the evidence in his possession. Cimera, 459 F.3d at 460 n.10; see also, e.g., Rodriguez-Marrero, 390 F.3d at 29 (same); Stone v. State, 304 So.3d 601, 605 (Miss. 2020) (evidence that defendant's hand had been in a cast at the time of offense was not "newly discovered" merely because defendant allegedly "could not have known its significance until the State's witnesses testified"). And it is so even where the material in defendant's position would require "complex and time-consuming" analysis. Garcia-Alvarez, 541 F.3d at 18; see also State v. Reed, 971 S.W.2d 344, 349 (Mo. Ct. App. 1998) (receipt book from defendant's business was not "newly discovered" because defendant "was always aware of [its] existence" and his "inability to locate" it during trial did not "convert the receipt book into newly discovered evidence").

"newly discovered" if it is possessed by, or easily accessible to, the defendant prior to trial.

The rationale below—that pages of the agreements were found in the garage "among presumably thousands of documents" after searching "for several days," (Sa18; Sa475), and that defendant then searched his email "for around an hour" before the documents "popped up," (Sa24)—did not justify departing from this wall of precedent. As noted, "[d]ue diligence requires that a defendant exert some effort to discover the evidence," see Jaramillo, 42 F.3d at 925—which means that the defendant must "act with reasonable dispatch in searching for evidence before the start of the trial," Ways, 180 N.J. at 192. Here, a simple search of company names and other relevant terms in defendant's email account would logically have yielded the files in question. And the papers that were located in defendant's own boxes in his parents' garage likewise could have been found with reasonable diligence in the four years before trial. The mere fact that locating the available evidence may have been "complex and time-consuming" is not itself sufficient to justify a new trial. Garcia-Alvarez, 541 F.3d at 18. Were it otherwise, in this digital age, where large volumes of documents are generated and numerous emails are sent each day, a defendant could establish that he was unable to discover by "due diligence" documents he

had in his possession all along merely by showing that he generally retained a large volume of documents and emails. That is not the law.

To be sure, there may be rare factual scenarios where evidence that is in a defendant's possession still qualifies as newly discovered—in circumstances of the sort that qualify as a true "external obstacle" to knowing of or accessing the evidence, rather than the standard inconvenience inherent in looking through one's email account or files. See Szemple, 247 N.J. at 100. For example, in Commonwealth v. Boyle, 625 A.2d 616 (Pa. 1993), a state high court concluded that a defendant convicted of failing to file sales tax returns had met the bar for newly discovered evidence when he moved for a new trial based on a one-page document prepared by a tax auditor indicating that he had received an extension of time to file his returns. Id. at 621-22. Though the document had technically been in the defendant's possession before trial, there was no reason for him to know of the document's existence or that it was in his possession, because he was not aware the tax auditor had made a written note of the extension, nor that the prosecution had placed that note in one of several boxes of materials it had previously seized from the defendant and then returned to him before trial. Id. at 622. So while reasonable diligence may not "require a defendant to examine boxes of his own documents on the outside chance that the Commonwealth may have placed or secreted relevant evidence among the documents," ibid., no such

exception could apply here. After all, the relevant agreements were ostensibly in defendant's email account because defendant had emailed them to himself (and to himself alone)—they were not created by someone else, unbeknownst to him, and then secretly placed within his email account. See supra at 12. So unlike in Boyle, defendant here had every reason to know to look for them within his email account.

Even if that alone were not enough (though it should be), there is also the fact that defendant undisputedly signed the relevant documents, and thus cannot deny his own personal knowledge of them in the years between indictment and trial. Much as courts recognize that materials in a defendant's possession will seldom if ever qualify as "newly discovered," they likewise consistently hold that defendants cannot claim that materials they either created or had personal knowledge of so qualify. See, e.g., State v. Uranga, 950 N.W.2d 239, 244 (Iowa 2020) (holding letter that defendant had received, and so was aware of, before trial was not "newly discovered"); Muse v. State, 748 S.E.2d 136, 141 (Ga. Ct. App. 2013) (holding website post that defendant responded to was not "newly discovered" because defendant "was the party who actually responded to the Craig's List post and, accordingly, was necessarily aware of its content"); Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987) (holding evidence that defendant company had paid plaintiff pension benefits could not be "newly

discovered" to warrant modification of damages award since the company itself had approved the payments). Here, even assuming that a hypothetical defendant could claim newly discovered evidence if he found helpful materials that he had never before seen after searching his garage the week after trial, defendant here cannot have acted with reasonable diligence in failing to locate documents that he not only possessed in his email account—but that he also had himself known of, signed, and emailed to himself.[6]

Nor has defendant identified any other "external obstacle" that prevented him from conducting this search earlier. Indeed, the only explanation defendant offered for the four-year delay in searching his own email account was his belief that he did not need additional evidence because he had a strong trial defense. (See Db24). But courts do not throw out jury verdicts simply to afford a defendant the "opportunity to rectify a faulty trial strategy." Garcia-Alvarez, 541 F.3d at 18; see Ways, 180 N.J. at 192. And for good reason: adopting such

[6] For similar reasons, the rationale that defendant began searching his emails only after his sister discovered several pages of one of the agreements in hard-copy records, see supra at 15, is a red herring. With or without those pages to jog his memory, defendant should have known of the existence of agreements that he signed and emailed to himself. See, e.g., People v. Garcia, 236 N.E.3d 488, 501 (Ill. App. Ct. 2023) (holding records related to defendant's own award of Social Security benefits were not "newly discovered" because the information contained within them was not "unknown" despite defendant's "alleged inability to locate the box where they were stored").

a rule would starkly encourage gamesmanship, incentivizing defendants to test a preferred theory at trial while holding evidence in reserve to later seek a second bite at the apple. See Ways, 180 N.J. at 192. This Court should instead reaffirm the principles reflected in longstanding precedent from across jurisdictions and make clear that where, as here, a defendant has possession of the relevant documents, years to locate them, and indeed himself signed and emailed them to himself, they were previously discoverable with reasonable diligence.

POINT II

IN ANY EVENT, THE DOCUMENTS WOULD NOT HAVE LIKELY CHANGED THE JURY'S VERDICT.

As noted, the first and third prongs of the new-trial inquiry are "inextricably intertwined," and thus together test whether the new evidence is additive and persuasive enough that it would likely change the jury's verdict. Nash, 212 N.J. at 549-50 ("The power … to alter the verdict is the central issue, not the label to be placed on that evidence." (citation omitted)). The analysis below failed on this intertwined prong for two independent reasons. First, the courts failed to assess the credibility of the evidence, even though its credibility was highly doubtful. Second, even assuming the evidence was credible, it was not material enough to have likely changed the outcome.

A. The Evidence Was Not Credible.

As an initial matter, the reasoning below that a jury at a second trial should be the one to assess credibility of defendant's proffered new evidence conflicts with this Court's admonition that trial judges serve an important gatekeeping function as to the veracity of post-trial evidence. This Court requires a judge to review the credibility of newly discovered evidence "with a certain degree of circumspection to ensure that it is not the product of fabrication," Ways, 180 N.J. at 187-88, especially where "sketchy" evidence comes from the defendant or those close to him, State v. Buonadonna, 122 N.J. 22, 50-51 (1991). The

proper practice is for the judge, as both "gatekeeper" and "factfinder" in this posture, to address both admissibility and truthfulness. Cf. State v. Tormasi, 443 N.J. Super. 146, 157 (App. Div. 2015) (addressing role of PCR court). Otherwise, courts would regularly have to grant new trials despite severe doubts as to the reliability of the new evidence—necessarily rewarding the introduction of sketchy evidence and incentivizing it. See Ways, 180 N.J. at 187-88.

The courts below abdicated that obligation here. Crucially, the Appellate Division acknowledged that there are "issues of authenticity regarding the newly discovered franchise agreements." (Sa478). But instead of confronting those issues and adjudicating them, the panel reasoned simply that "'the jury should be given the opportunity to determine the evidence' that was presented during the hearing." (Sa479). That rule cannot be right, or else a court's gatekeeping role (and its analysis of these intertwined factors of the new-trial test) would be rendered meaningless, and defendants who offered questionable evidence would be rewarded for doing so with exactly the relief they seek—the new trial itself. Put otherwise, a key input to assessing whether to grant a new trial cannot simply be deferred to that new trial without rendering the test hopelessly circular.

This case is a perfect example of the dangers of such a rule, given the highly questionable credibility of the Bhagu franchise agreements. Even leaving aside Novello's explicit inability to recall either of these agreements that he had

purportedly signed, supra at 12, comparing the Bhagu agreements side-by-side with other agreements in WOB's records reveals that they are identical to two other agreements—including Novello's signature—except for defendant's own signature and the name of the franchisee. Compare (Sa163-222 to Sa397-456), with (Sa237-325 to Sa328-96). Indeed, the January 2014 agreement even has the same stray pen mark on page 55 that a franchise agreement for a WOB franchise in Albany has. (Sa222; Sa456). And Novello testified that WOB would not have entered into a franchise agreement for WOB Hoboken with Bhagu because it would have violated the ADA and the franchise agreement that WOB had with Tapmasters for that same location. (9T12-17 to 13-12; 9T22-12 to 21); supra at 13-14. Moreover, neither defendant nor his sister Sonal, who owned Bhagu, stated during their trial testimony that Bhagu, not Tapmasters, was the franchisee for WOB Hoboken—a glaring omission if the agreements are actually authentic. On the contrary, defendant claimed at trial that he had the right to sell the shares because he owned 30% (or at one point 50%) of Tapmasters Hoboken. (6T88-16 to 90-25; 6T116-2 to 119-9).

Defendant's own evidence at the motion hearing further undermined the authenticity of the Bhagu documents. Defendant introduced an email from WOB dated October 21, 2014—long after the first purported Bhagu agreement was signed—with attachments, including letters of approval and other

documents confirming the continued enforceability of the ADA that Mingo, defendant, and Douglas had entered into with WOB. (67T57-19 to 58-15; 8T59-17 to 22; Sa334-37). Yet if WOB already had a franchise agreement with Bhagu in place for the Hoboken location (as defendant's proffered documents suggest), it would not have been continuing to discuss the ADA between WOB and the Tapmasters partners.

Defendant's actions after January 22, 2014, further support a finding that the 2014 Bhagu franchise agreement is not credible. Throughout both the spring and summer of 2014, defendant continued to negotiate with WOB on behalf of Tapmasters to establish a WOB location in Hoboken at the site of his failed Melting Pot restaurant. (6T107-21 to 115-25; 6T 117-11 to 118-1; 6T126-10 to 130-5). And in November 2014, Bhagu transferred the liquor license and leasehold for the Melting Pot location to Tapmasters Hoboken. (6T13-6 to 16-7; 9T55-12 to 13; Sa457-62). But if Bhagu had a franchise agreement for WOB Hoboken, it would have needed the lease and liquor license to operate, and so it would not have transferred those items to Tapmasters Hoboken. Furthermore, the HOBWOB subscription agreement among the six investors itself indicates that HOBWOB was investing in Tapmasters Hoboken—not Bhagu, an entity that is not mentioned anywhere in that subscription agreement. (Sa123-55).

The primary response by the two courts below was to note that defendant emailed the Bhagu franchise agreements to himself "four years before the indictment and seven years before the trial"—when defendant purportedly "had little to no reason to fabricate them." (Sa478). But a proper gatekeeping inquiry would have quickly revealed a key flaw in this reasoning: defendant sent the only email he could identify containing the "new" documents to himself in May 2015, (7T44-15 to 46-20)—nearly nine months after Mingo notified defendant that he knew defendant had pocketed $750,000 from investors, thus putting defendant amply on notice that he might face legal scrutiny in the future, see (1T154-2 to 16). Indeed, on the State's theory of the case (and the jury's finding of guilt after trial), defendant would have had a strong incentive to fabricate the franchise agreements at least by March 18, 2014, when the first HOBWOB investor made a payment for his investment to Bhagu (instead of Tapmasters) at defendant's direction, since defendant would have by then completed a knowing criminal act. See (4T220-15 to 23). Finally, although the first Bhagu franchise agreement was purportedly dated January 2, 2014, it only appeared as an attachment to an email sent on May 7, 2015. In other words, no independent evidence linked it to January 2014, and the long delay between the alleged date of the agreement and the date defendant emailed it to himself is another reason

for skepticism that the "newly-discovered" Bhagu franchise agreement was in fact authentic and could justify invalidating a jury verdict.

B. The Evidence Was Not Sufficiently Probative.

Even assuming that the evidence in defendant's possession was credible, the documents were not probative enough to make an acquittal likely. Judges reviewing new-trial motions must conduct a "thorough, fact-sensitive analysis to determine whether the newly discovered evidence would probably make a difference to the jury." Ways, 180 N.J. at 192. Yet for two separate reasons, neither the Bhagu franchise agreements nor the Tapmasters II guaranty would likely have changed the jury's conclusion that defendant purposefully obtained the HOBWOB investment by "creating or reinforcing the false impression" that the money "would be used as an investment for" WOB Hoboken. (Sa2).

1. Initially, the proffered evidence would not likely establish that defendant had authority to sell a 30% share in the WOB Hoboken location. The trial court found that the Bhagu franchise agreements gave defendant the authority to sell a 30% share in the Hoboken location and "thus [he] could not have deceived investors." (Sa25); see (Sa480-81). But the Bhagu franchise agreements do not in fact set forth ownership percentages; only the Tapmasters Hoboken operating agreement and principal owner's guaranty do, and neither was included with the Bhagu documents. (9T42-21 to 45-24). Moreover, the

HOBWOB subscription agreement provides that the investors' payments were in exchange for a "membership interest" in Tapmasters Hoboken, (Sa123)—an entity in which trial evidence established defendant held only a 5% share (Sa70-101; Sa113-22). And Antaro and a HOBWOB investor who testified at trial confirmed that their understanding was that Tapmasters Hoboken—not Bhagu—was the entity they were investing in. (3T28-12 to 29-6; 3T137-21 to 139-17).

The courts also erred in concluding that the Tapmasters II guaranty was sufficient on its own to make acquittal more likely than not. (Sa480); see also (Sa26). The reasoning stemmed from the fact that the undated Tapmasters II guaranty reflected a 30% interest in Tapmasters II—that is, the guaranty gave defendant a 30% share of any value or property in that partnership itself, such as its exclusive rights to develop WOB locations in New Jersey, New York, and Pennsylvania under the ADA. See (Sa26; Sa480); see also (Sa68) (Tapmasters paid $225,000 in exchange for these exclusive development rights). In the panel's view, that supported defendant's claim that he also owned a 30% ownership share in Tapmasters Hoboken, because the Tapmasters Hoboken operating agreement—which made clear that defendant's share of the Hoboken location was only 5%—was not signed until May 2, 2014, after the HOBWOB investors had begun to make payments. (Sa480); see also (Sa26).

But crucially, the Tapmasters II guaranty establishes nothing about the Hoboken location that the HOBWOB investors believed they were investing in—or, for that matter, about any other franchise location. Instead, as Mingo testified at trial, each location had its own franchise agreement, as well as a separate operating agreement that set forth the terms of ownership, including the percentage of ownership for each partner, (1T91-21 to 92-6), and at least one of these franchise operating agreements predated defendant's transactions with the HOBWOB investors, see (2T61-1 to 22) (discussing Albany WOB franchise agreement, in which defendant owned 10%). So even though the Tapmasters Hoboken operating agreement was not signed until May 2, 2014, (Sa70-101), after defendant had begun to receive payments from the HOBWOB investors, the Tapmasters II guaranty would not have made it reasonable for defendant to believe he could sell the HOBWOB investors a 30% share in Tapmasters Hoboken (or any other location). And, of course, the HOBWOB investors' testimony and subscription agreement makes clear that they understood that they were indeed investing in Tapmasters Hoboken specifically—not the Tapmasters II ADA. (3T28-12 to 29-6; 3T137-21 to 139-17; Sa123).

In short, even if the Bhagu franchise agreements were credible, neither those agreements nor the Tapmasters II guaranty would have been likely to alter the jury's verdict, because neither establishes that defendant had authority to

sell a 30% share in Tapmasters Hoboken—which is exactly what the HOBWOB investors mistakenly thought they were buying with their $750,000.

2. Finally, leaving each of these errors aside, one fundamental point remains: even assuming (contrary to the trial evidence and the various credibility issues with his post-verdict submission) that defendant sincerely believed he owned a 30% share of Tapmasters Hoboken (or indeed even did actually own a 30% share), that would not provide any basis for expecting a different result. After all, this panoply of legal and factual issues risks obscuring that, sweeping all of them aside, the trial evidence still would have established that defendant deliberately deceived the HOBWOB investors and never intended to give them their promised 30% stake, whether he owned that stake or not. Although defendant told the investors that they were buying shares in WOB Hoboken, as each payment came in to the Bhagu account, he spent the money on personal expenses, including payments for his Porsche, mortgage payments, and debts on his failed restaurant. (4T220-8 to 229-25; 4T236-15 to 248-25; 4T250-16 to 251-25; 4T253-9 to 254-21; 4T258-6 to 16). And the investors' deposits to, and defendant's withdrawals from, the Bhagu account occurred both before and after defendant signed the Tapmasters Hoboken operating agreement and guaranty showing that he only owned 5% of Tapmasters Hoboken, Compare (3T107-11 to 14), with (Sa77-101; Sa113-114)—independently undermining

any notion that the payments to Bhagu gave investors a collective 30% stake in WOB Hoboken, or that defendant had any intent to deliver on his promise to give them such a stake. Nor did defendant ever inform Mingo that he had secured investors and received funds from them, much less receive Mingo's approval to do so (as required). So even if defendant believed he had the right to sell a 30% share when he began accepting the investors' $750,000—a questionable proposition at best— defendant knew long before he accepted the last payment that he had no such right to retain those funds, much less continue spending them on personal uses in secret.

And defendant never did deliver on his initial promise to give the HOBWOB investors the collective stake they thought they were getting. While Antaro, as a representative of HOBWOB, signed a subscription agreement attempting to memorialize the group's investment in Tapmasters Hoboken, (Sa123-55; 3T139-5 to 17), neither Mingo nor anyone else signed that subscription agreement on behalf of Tapmasters Hoboken granting the HOBWOB investors their promised stake in the business, (Sa134; 2T161-4 to 162-1). Defendant has never claimed otherwise, nor could he. In other words, even if defendant could somehow establish (1) that he could not have located the documents with reasonable diligence, (2) that the documents were wholly authentic, and (3) that he indeed owned a 30% stake in Tapmasters Hoboken,

even still he would have no answer to why he took $750,000 from the investor-victims, spent it on himself, and gave them nothing in return. That alone is dispositive, because it means he has not and cannot establish that the evidence would have more likely than not yielded a different outcome.

In sum, even giving defendant's proffered evidence the benefit of every doubt—contrary to the more demanding new-trial standard—it could not have "strongly advanced [defendant]'s general denial of guilt." Nash, 212 N.J. at 551. Defendant was not entitled to a new trial, and the Appellate Division erred in allowing him one and deferring these questions to that new trial.

CONCLUSION

This Court should reverse the trial court's order granting defendant a new trial, reinstate defendant's conviction, and remand for sentencing.

Respectfully submitted,

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