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MEGAN MCDERMOTT,

Appellant/Cross-Respondent,

v.

GUARANTEED RATE, INC., and
JOSEPH MOSCHELLA, and JON
LAMPKIN

Respondents/Cross-Appellants.

SUPERIOR COURT OF NEW
JERSEY APPELLATE DIVISION
Docket No. A-000921-24T2

SUPERIOR COURT OF NEW
JERSEY LAW DIVISION – MORRIS
COUNTY
Docket No.: MRS-L-360-24

Sat Below: Hon. Noah Franzblau, J.S.C.

Appellant/Cross-Respondent's Brief

**PLAINTIFF-APPELLANT/CROSS-RESPONDENT'S BRIEF IN SUPPORT
OF HER APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY FOR
MORRIS COUNTY LAW DIVISION'S (HON. NOAH FRANZBLAU, J.S.C.)
SEPTEMBER 23, 2024 ORDER COMPELLING ARBITRATION IN PART
AND NOVEMBER 8, 2024 ORDER DENYING RECONSIDERATION**

Submitted March 19, 2025

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ISSUES ON APPEAL

1. Whether the Ending Forced Arbitration Act, which prohibits enforcement of predispute arbitration agreements "with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual harassment dispute," bars arbitration of Equal Pay Act claims challenging the same discriminatory compensation practices that form part of a broader pattern of gender-based harassment and discrimination.

2. Whether claims "relate to" sexual harassment under the EFAA when they challenge the same discriminatory conduct through different legal frameworks, even if they require proof of different elements.

3. Whether arbitration of contract and statutory claims should proceed where arbitral findings about witness credibility and workplace events could constrain the presentation of evidence in a pending sexual harassment case that Congress expressly removed from arbitration's reach.

4. Whether an arbitration agreement containing multiple unconscionable provisions—specifically, a one-sided fee-shifting provision that the employer has used to secure massive fee awards, a forum selection clause requiring distant arbitration, and an arbitration provision covering claims which cannot be forced into arbitration as a matter of law—should be declared unenforceable rather than

reformed through severance, particularly where the employer maintained these provisions despite prior judicial warning.

PROCEDURAL HISTORY

On February 24, 2024, Plaintiff/Appellant McDermott (“Plaintiff”) filed her initial complaint in New Jersey Superior Court. (1a-14a). The operative Fourth Amended Complaint, filed May 13, 2024, asserts fourteen causes of action: sexual harassment and gender discrimination under the New Jersey Law Against Discrimination (Counts I-III); violations of the New Jersey Equal Pay Act (Count IV); wage payment claims (Counts V-VI); breach of contract claims (Counts VII-X); and claims arising from post-employment conduct (Counts XI-XIV). (75a-95a).

On June 21, 2024, Defendants moved to dismiss Count II (sexual harassment) as time-barred and to compel arbitration of all claims pursuant to an arbitration provision in McDermott's 2012 compensation agreement. (96a-97a). After full briefing and oral argument¹, the trial court issued its decision on September 23, 2024. (219a-220a).

The court denied the motion to dismiss Count II, finding Plaintiff had properly alleged a continuing violation through November 2022. (227a-231a). Analyzing the interaction between the Federal Arbitration Act and the Ending Forced Arbitration Act, the court adopted a bifurcated approach. (234a-242a). It retained jurisdiction over Counts I-III (sexual harassment, gender discrimination, and constructive

¹ 1T, Transcript of Hearing (Vol. 01), dated September 13, 2024

discharge) as sufficiently "related to" sexual harassment under the EFAA. (231a, 241a-242a). However, it compelled arbitration of Counts IV-XIV, including Plaintiff's Equal Pay Act claim, after severing the agreement's unconscionable fee-shifting and forum selection provisions. (242a)

This appeal followed. (255a-259a). Plaintiff challenges the order compelling arbitration of Counts IV-XIV. (255a). Defendants have cross-appealed the denial of arbitration as to Count I and have sought to appeal the denial of Defendants' motion to dismiss Count II of the Amended Complaint asserting that Defendants engaged in unlawful sexual harassment as being "intertwined with the trial court's arbitration rulings[.]" (260a-264a).

STATEMENT OF FACTS

Given that this matter was resolved on a motion to dismiss asserting that Plaintiff had failed to state a claim upon which relief had been granted pursuant to R: 4:6-2(e), Plaintiff is granted “every reasonable inference of fact” from the complaint. *Printing Mart-Morristown v. Sharp Electronics Corps.*, 116 N.J. 739 (1989); *Major v. Maguire*, 224 N.J. 1, 26 (2016). Accordingly, the facts set forth herein are taken from the operative Fourth Amended Complaint.

Plaintiff Megan McDermott began working as a mortgage loan officer for Superior Mortgage in March 2005. (76a at ¶ 10). In February 2012, when Guaranteed Rate acquired Superior Mortgage, she became an employee of Guaranteed Rate. (77a at ¶ 13). Throughout her tenure, McDermott demonstrated exceptional performance, achieving membership in the company's President's Club for 2018, 2019, and 2022, and advancing to the more prestigious Chairman's Circle tier in 2020 and 2021. (77a-78a at ¶¶ 14, 19-20).

The first precursor of the sexual harassment Plaintiff would suffer came before Guaranteed Rate acquired Superior Mortgage, when, in 2006, Plaintiffs’ then-manager Joseph Moschella told her that she was a lawsuit waiting to happen. (77a at ¶ 12). After the acquisition, a new manager, Defendant Jon Lamkin, was placed between Plaintiff and Moschella (who, like Plaintiff, remained with Guaranteed Rate after the acquisition). (77a at ¶ 13, 80a at ¶ 39). In December 2015, Plaintiff met

Lamkin for the first time at a corporate function. (80a at ¶ 39). At this event, Lamkin responded to learning of her status as a single mother with an egregiously offensive sexual comment. (80a at ¶¶ 41-42). McDermott immediately reported this conduct to Regional Manager Joseph Moschella, who, rather than address the harassment, pressured her not to file a formal complaint. (80a-81a at ¶¶ 44-46).

This marked the beginning of a systematic pattern of a sexual harassment hostile work environment. Throughout McDermott's employment, Lamkin regularly directed gender-based slurs and hostile comments at her and other female employees. (81a at ¶¶ 48-49). The pervasiveness of this conduct led both Plaintiff and other women to file complaints with Human Resources about Lamkin and ultimately drove two female employees to resign. (*Id.* at ¶¶ 52-53). This pattern of harassment persisted unabated through McDermott's final day of employment in November 2022. (*Id.* at ¶ 54).

The gender-based animus manifested in compensation practices as well. In January 2022, after receiving competing employment offers, McDermott requested a retention bonus. (78a at ¶¶ 21-23). Lamkin and Moschella falsely represented that Guaranteed Rate did not provide retention bonuses to any loan officers. *Id.* McDermott later discovered that male loan officers of comparable qualifications had indeed received substantial retention bonuses. (78a at ¶ 26). Similarly, despite achieving Chairman's Circle status—a designation reserved for high-performing

loan officers—McDermott was denied the standard increase in commission rates routinely provided to others who reached this tier. (79a-80a at ¶¶ 31-36).

PRELIMINARY STATEMENT

In 2022, Congress banned enforcing predispute arbitration agreements for cases related to sexual harassment claims. Concluding that corporations were using the arbitration process to impose an inferior forum for these claims, the Ending Forced Arbitration Act ensures individual can bring these claims in court.

However, claims rarely travel alone. The default rule in the United States is that all claims and disputes between parties should be resolved in a single proceeding. Workplace sexual harassment claims are a paradigmatic example of the wisdom of that rule, because such claims are rarely the sole controversy between an employee and employer. Whether the sexual harassment is accompanied by intersectional discrimination, pay discrimination, breaches of contract or tortious interference, it is often the case that sexual harassment of an employee will be accompanied with other types of wrongdoing, or will be actionable under multiple legal theories.

The rule against claims splitting was relaxed under the Federal Arbitration Act, but, importantly, the EFAA makes clear that the FAA does not extend to any case related to a sexual harassment dispute. Given this background, since the EFAA was enacted, there has been substantial litigation as to whether the EFAA bars arbitration of **all** claims a plaintiff asserts in a single case, or just the sexual harassment claims.

Overwhelmingly, courts have found that the plain language of the EFAA—which applies to cases, not claims—demonstrates that absent misjoinder, the EFAA will bar enforcement of an arbitration provision as to all the claims a sexual harassment victim asserts in his or her lawsuit against the harasser. Plaintiff urges the Court adopt this majority view as the simple plain-language construction of the EFAA.

The minority view—of which the trial court’s decision is an example—holds that there must be some factual/relational nexus between the non-sexual harassment claims and the harassment claims in order to extend the EFAA to the non-sexual-harassment claims. However, even under this minority view, the trial court erred, requiring the relationship in question be one in which the non-sexual harassment claim is inextricably intertwined with the sexual harassment claim. This inextricably intertwined standard has no basis in either the statutory text or case law.

Here, Plaintiff’s claims of gender pay discrimination, breach of contract, and post-employment misappropriation of her identity, are all factually related to her sexual harassment claim, and are accordingly barred from arbitration under the EFAA, even under the minority view requiring a factual nexus. Accordingly, the Court should reverse and remand the decision of the trial court.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

The existence of a valid and enforceable arbitration agreement posts a question of law, and accordingly, the standard of review of an order denying or compelling arbitration is *de novo*. *Barr v. Bishop Rosen & Co., Inc.*, 442 N.J. Super. 599, 605 (2015). Questions of statutory construction are reviewed *de novo*. *State v. Gomes*, 253 N.J. 6, 16 (2023).

In construing a federal statute, the Court’s “overriding goal is to determine Congress’s intent,” and this analysis “begins with the language of the statute, affording the statute’s words their ordinary and accustomed meaning.” *State v. Amer*, 254 N.J. 405, 421-422 (2023). “If a plain-language reading of the statute leads to a clear and unambiguous result, then [the] interpretive process is over.” *Id.* at 422. If, on the other hand, an ambiguity remains in the statutory language, courts then turn to “extrinsic evidence, including legislative history, committee reports, and contemporaneous construction.” *DiProspero v. Penn*, 183 N.J. 477, 492-93 (2005). However, the U.S. Supreme Court has made clear that it is improper to use legislative history to “muddy the meaning of clear statutory language.” *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 436 (2019).

“We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut*

Nat. Bank v. Germain, 503 U.S. 249, 253-254 (1992). “When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.”

Id.

Moreover, while the interpretation of federal law by federal courts other than the U.S. Supreme Court is not binding on New Jersey courts, under the principles of judicial comity and to avoid “forum shopping,” New Jersey courts afford the decisions of federal courts due respect, “especially when they are in agreement.” *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 79-80 (1990); *Young v. Prudential Ins. Co. of Am.*, 297 N.J. Super. 605, 622 (App. Div. 1997).

II. THE TRIAL COURT ERRED IN APPLY THE EFAA’S ARBITRATION BAR ONLY TO PLAINTIFF’S SEXUAL HARASSMENT AND GENDER DISCRIMINATION CLAIMS ASSERTED UNDER NJLAD (219a-220a, 234a-242a).

A. The EFAA Exempts All Claims Properly Joined in a Single Case to a Sexual Harassment Claim from the FAA

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act reflects Congress's determination that sexual harassment claims warrant public resolution in court rather than private arbitration. Through carefully chosen statutory language, Congress crafted a broad prohibition:

Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a **case** which

is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

9 U.S.C.A § 402(a) (emphasis added).

The instant case contains claims for sexual harassment, gender discrimination (including constructive termination), gender-discriminatory pay practices, breaches of contract, misappropriation of identity, and failure to timely pay post-termination wages.

The Trial Court found that the EFAA should be applied on a claim-by-claim basis, with the sexual harassment and gender discrimination claims barred from arbitration by the EFAA, and the remaining claims subject to arbitration because, the Court found, those claims are not “inextricably intertwined” with Plaintiff’s sexual harassment claim. (242a, 254a). The Trial Court based this determination on finding (a) that the EFAA’s purported bar on applying arbitration agreements to entire cases related to sexual harassment disputes was in tension with the FAA’s provisions providing that arbitrable claims should be bifurcated from non-arbitrable claims, *see* 234a-235a, and (b) “legislative history” consisting of statements from two minority-party Senators discussing supposed limitations on the reach of the EFAA which are not present anywhere in the plain and ordinary text. *See* 238a.

This was plain error, because it contradicted the plain meaning of the statutory language, which applies the EFAA not to sexual harassment-related claims but to sexual harassment-related cases. Because the EFAA applies to cases, all claims

appropriately brought together in a single civil action are subject to the EFAA's arbitration bar, subject only to bifurcation for misjoinder. This is the proper construction of the EFAA that 15 different federal courts have endorsed, a near uniform result that is entitled to significant deference due to considerations of judicial comity and based on the persuasiveness of their reasoning. *See Dewey*, 121 N.J. at 79-80; *Young*, 297 N.J. Super. at 622.

a) The EFAA's language extending its application to entire cases, not claims, is clear and unambiguous.

[T]he EFAA makes a pre-dispute arbitration agreement invalid and unenforceable 'with respect to a **case** which is filed under Federal, Tribal, or State law and relates to . . . the sexual harassment dispute.' 9 U.S.C. § 402(a). "If a plain-language reading of the statute leads to a clear and unambiguous result, then [the] interpretive process is over." *Amer*, 254 N.J. at 422 . "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat. Bank*, 503 U.S. at 253-254. "Where Congress does not furnish a definition of its own, we generally seek to afford a statutory term 'its ordinary or natural meaning.' *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 594 U.S. 382, 388 (2021); *see also Dewberry Grp., Inc. v. Dewberry Eng'rs Inc.*, No. 23-900, 2025 U.S. LEXIS 867, at *8 (Feb. 26, 2025) (noting that ordinary legal terms such as 'defendant' bear their usual legal meaning unless specially defined).

Here, the term “case” as used in the EFAA is not ambiguous—it has a clear and ordinary legal meaning. In *Johnson v. Everyrealm*, 657 F. Supp. 3d 535 (S.D.N.Y. 2023), Judge Engelmayer of the Southern District of New York outlined that meaning as follows:

T]he EFAA makes a pre-dispute arbitration agreement invalid and unenforceable ‘with respect to a case which is filed under Federal, Tribal, or State law and relates to . . . the sexual harassment dispute.’ 9 U.S.C. § 402(a). This text is clear, unambiguous, and decisive as to the issue here. It keys the scope of the invalidation of the arbitration clause to the entire ‘case’ relating to the sexual harassment dispute. It thus does not limit the invalidation to the claim or claims in which that dispute plays a part.

The term ‘case’ is familiar in the law. Dictionaries define a ‘case’ as ‘a suit or action in law or equity,’ Case, Merriam Webster, <https://www.merriam-webster.com/dictionary/case> (last visited Feb. 20, 2023), or ‘a civil or criminal proceeding, action, suit, or controversy at law or in equity,’ Black's Law Dictionary (11th ed. 2019); *see United States v. Santos*, 553 U.S. 507, 511, 128 S. Ct. 2020, 170 L. Ed. 2d 912 (2008) (using dictionaries in statutory construction). ‘[C]ase’ thus captures the legal proceeding as an undivided whole. It does not differentiate among causes of action within it. The term ‘case’ stands in contrast to the terms ‘claim’ and ‘cause of action.’ A ‘claim’ is ‘a right to something,’ Claim, Merriam Webster, <https://www.merriam-webster.com/dictionary/claim> (last visited Jan. 28, 2023), or ‘the assertion of an existing right; any right to payment or to an equitable remedy,’ Black's Law Dictionary (11th ed. 2019). A ‘cause of action’ is ‘the grounds (such as violation of a right) that entitle a plaintiff to bring a suit,’ Cause of Action, Merriam Webster, <https://www.merriam-webster.com/dictionary/cause%20of%20action> (last visited Feb 20, 2023), ‘a group of operative facts giving rise to one or more bases for suing,’ or ‘a factual situation that entitles one person to obtain a remedy in court from another person,’ Black's Law

Dictionary (11th ed. 2019).

Case law is, unsurprisingly, in accord. It underscores that a ‘case’ or ‘action’ refers to an overall legal proceeding filed in a court, whereas a ‘claim’ or a ‘cause of action’ refers to a specific assertable or asserted right within such a proceeding. *See Brownback v. King*, 141 S. Ct. 740, 751, 209 L. Ed. 2d 33 (2021) (Sotomayor, J., concurring) (‘An “action” refers to the whole of the lawsuit. Individual demands for relief within a lawsuit, by contrast, are “claims.”’) (internal citations omitted)); *Higazy v. Templeton*, 505 F.3d 161, 171-72 (2d Cir. 2007) (using ‘case’ as a general term for an action in court); *Serv. Emps. Int’l Union Nat’l Indus. Pension Fund v. Hebrew Homes Health Network Inc.*, No. 17 Civ. 01215 (TNM), 2019 U.S. Dist. LEXIS 156156, 2019 WL 4346325, at *10 (D.D.C. Sept. 12, 2019) (contrasting ‘action,’ which is ‘the claims on which a given action is based,’ and ‘claim,’ which is ‘the means by which a person can obtain a privilege, possession, or enjoyment of a right or thing; cause of action’); *La. Crisis Assistance Ctr. v. Marzano- Lesnevich*, 878 F. Supp. 2d 662, 667 (RD. La. 2012) (distinguishing ‘cause of action’ and ‘claim’ from ‘lawsuit’ or ‘case’).

With the ordinary meaning of "case" in mind, the text of § 402(a) makes clear that its invalidation of an arbitration agreement extends to the entirety of the case relating to the sexual harassment dispute, not merely the discrete claims in that case that themselves either allege such harassment or relate to a sexual harassment dispute (for example, a claim of unlawful retaliation for a report of sexual harassment).

Id. at 558-560.

The textual analysis of *Johnson* demonstrates that the EFAA extends not simply to claims, but rather to entire cases. Here, Plaintiff’s case asserted fourteen counts, and there is no suggestion that those counts were improperly joined or could or should not be properly asserted as a single case under either New Jersey or federal

civil procedure. Accordingly, the EFAA—by its plain language—applies to all of the claims in Plaintiff’s case.

b) The EFAA’s larger textual context demonstrates that Congress meant to bar arbitration of entire cases, not simply claims.

As noted, where the plain language of a statute is unambiguous, judicial interpretation should cease. *Connecticut Nat. Bank*, 503 U.S. at 253-254. Nevertheless, additional canons of statutory construction provide further support Congress intended the EFAA to extend to entire cases, not simply the sexual harassment claims set forth in multi-claim actions.

Here, the EFAA uses the term “case” to identify what the EFAA excludes from arbitration, *see* 9 U.S.C.A § 402(a) while using the term “claim” in a separate section to identify when the EFAA will become effective:

This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act.

See Pub. L. No. 117-90, § 3, 136 Stat. 26, 28 (2022); 9 U.S.C. § 401, Note.

“Congress, in enacting the EFAA, thus can be presumed to have been sensitive to the distinct meanings of the terms ‘case’ and ‘claim.’” *Johnson*, 657 F. Supp. 3d at 560. “When Congress includes particular language in one section of a statute but omits it in another, th[e] Court presumes that Congress intended a difference in

meaning.” *Id.* (quoting *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777, 200 L. Ed. 2d 15 (2018)).

- c) Legislative history supports the conclusion that the EFAA applies to entire cases which include sexual harassment claims, not simply the sexual harassment claims within those larger cases.

Though legislative history should not be used when the text is clear, *see Connecticut Nat. Bank*, 503 U.S. at 253-254, here, the legislative history of the EFAA further demonstrates that it was Congress’ intent not to force sexual harassment victims to divide their claims between court and arbitration. Several senators, including a lead sponsor of the Act, expressly addressed this issue during debates, stating that keeping cases whole “is exactly what we intended the bill to do.” 168 Cong. Rec. S627 (daily ed. Feb. 10, 2022) (statement of Sen. Kirsten Gillibrand). Senator Gillibrand explained that the bill included the “relates to” to keep cases covered by EFAA together throughout litigation. “When a sexual assault or sexual harassment survivor files a court case in order to seek accountability, her single case may include multiple claims.” *Id.* “[I]t is essential that all the claims related to the sexual assault or harassment can be adjudicated at one time” to ensure that a victim need not “relive that experience in multiple jurisdictions.” *Id.* “To ensure that a victim is able to realize the rights and protections intended to be restored to her by this legislation, all of the related claims will proceed together.” *Id.*

Senator Durbin, Chair of the Judiciary Committee, echoed that intent: “So to clarify, for cases which involve conduct that is related to a sexual harassment dispute or sexual assault dispute, survivors should be allowed to proceed with their full case in court regardless of which claims are ultimately proven. I am glad that is what this bill provides.” 168 Cong. Rec. S626 (daily ed. Feb. 10, 2022) (statement of Sen. Richard Durbin).

That the EFAA extends to entire cases, not individual claims is further supported by the history of a parallel and more limited version of this bill which Congress **did not** enact, and which was explicitly limited only to “sexual harassment claims,” not entire cases.

EFAA was introduced in the Senate as Senate Bill 2342 on July 14, 2021, and the House of Representatives as House Bill 4445 on July 16, 2021, and was enacted by the House on February 7, 2022, and by the Senate on February 10, 2022. (266a-267a).

The competing bill “Resolving Sexual Assault and Harassment Disputes Act of 2021,” (“RSAHD”) S.3143, 117th Cong. (2021) was introduced on November 2, 2021, was sponsored by Senators Joni Ernst, John Cornyn, Cindy Hyde-Smith, and Cynthia Lummis, and was never enacted. (268a-269a).

The RSAHD, though similar in some respects to the EFAA, laid out a **far** different framework than the EFAA with respect to how claims joined to a sexual

harassment claim would be treated as to arbitrability.

Unlike the EFAA's Section 403, the RSAHD's arbitration bar read as follows:

SEC. 402. Limit on validity and enforceability.

(a) In general.—Notwithstanding any other provision of this title, a predispute arbitration agreement shall have no force or effect with respect to a sexual assault claim.

(b) Other claims.—All claims other than those subject to subsection (a) shall be subject to the provisions of this title, provided that, for sexual harassment claims, section 403 is satisfied.

(273a-274a).

The RSAHD, in other words, would have explicitly made clear that only sexual harassment claims would be barred from arbitration, but that all other claims asserted in a cause of action would be subject to the FAA—including the FAA's provisions permitting the bifurcation of arbitrable and non-arbitrable claims. The RSAHD's language is as clear as the EFAA's on this point—and would have allowed for the result that the Trial Court found here. Because the RSAHD was specifically rejected by Congress in favor of more expansive language, this further demonstrates Congress' intent that the EFAA bar all claims asserted together in a single case from forced arbitration, not simply the asserted sexual harassment claims.

Here, the Trial Court found differently. In its Statement of Reasons, the Trial Court focused on concerns Senator Ernst and Senator Graham expressed during the floor debate on the Senate prior to enactment that the EFAA's expansive language

could but **should not** be used to destroy predispute arbitration agreements in all employment matters. (239a). The Trial Court also noted Senator Gillibrand’s response that the concerns of Ernst and Graham were misplaced because only disputes that “relate” to sexual harassment “can escape the forced arbitration clauses.” *Id.*

But the concerns of Senators Ernst and Graham about a hypothetical consequence in which the EFAA is used to bar arbitration in cases where there is no sexual harassment claim, or Senator Gillibrand’s response that, by definition, any case covered by the EFAA would have to **relate** to a sexual harassment dispute (by including such a claim as one of the pleaded causes of action) provides no sound basis for concluding Congress meant anything other than what it said—that once a case includes a sexual harassment claim within it, that, by definition, is a case that relates to sexual harassment, and all the claims asserted in that case are subject to the bar against forced arbitration. For this reason as well, the Court should reverse the decision of the trial court and remand.

d) Principles of judicial comity support finding that the EFAA extends to entire cases, as has been found by fifteen different federal courts to date.

While the interpretation of federal law by federal courts other than the U.S. Supreme Court is not binding on New Jersey courts, under the principles of judicial comity and to avoid “forum shopping,” New Jersey courts afford the decisions of

federal courts due respect, “especially when they are in agreement.” *Dewey*, 121 N.J. at 79-80; *Young*, 297 N.J. Super. at 622.

Here, there has been a widespread and growing consensus among the federal courts that the EFAA applies to entire cases, not simply the sexual harassment claims within them. More than a dozen federal courts from New York, Connecticut, Pennsylvania, Maryland, and Texas have all addressed this question in the last two years and found that EFAA bars enforcement of the arbitration agreement as to the **entire case**, not simply claims asserting sexual harassment or which are inextricably intertwined with a claim asserting sexual harassment. *See Bruce v. Adams*, No. 3:24-cv-00875, 2025 U.S. Dist. LEXIS 33532, at *34-38 (M.D. Tenn. Feb. 25, 2025); *Puris v. TikTok Inc.*, No. 24cv944 (DLC), 2025 U.S. Dist. LEXIS 16998, at *15-16 (S.D.N.Y. Jan. 30, 2025); *Diaz-Roa v. Hermes Law, P.C.*, No. 24-cv-2105 (LJL), 2024 U.S. Dist. LEXIS 212472, at *35-39 (S.D.N.Y. Nov. 21, 2024); *Ding Ding v. Structure Therapeutics, Inc.*, No. 24-cv-01368-JSC, 2024 U.S. Dist. LEXIS 196549, at *36-37 (N.D. Cal. Oct. 29, 2024); *Clay v. Fgo Logistics, Inc.*, No. 3:23-cv-01575-MPS, 2024 U.S. Dist. LEXIS 175470, at *10-11 (D. Conn. Sep. 27, 2024); *Bray v. Rhythm Mgmt. Grp., LLC*, Civil Action No. TDC-23-3142, 2024 U.S. Dist. LEXIS 173020, at *18-25 (D. Md. Sep. 24, 2024); *Williams v. Mastronardi Produce, Ltd.*, No. 23-13302, 2024 U.S. Dist. LEXIS 150550, at *17-18 (E.D. Mich. Aug. 22, 2024); *Scoggins v. Menard, Inc.*, No. 2:24-cv-00377, 2024 U.S. Dist. LEXIS

147638, at *20-21 (S.D. Ohio Aug. 19, 2024); *Baldwin v. TMPL Lexington LLC*, 2024 U.S. Dist. LEXIS 148291, at *1-2 (S.D.N.Y. Aug. 19, 2024); *Michael v. Bravo Brio Rests. LLC*, Civil Action No. 23-3691 (RK) (DEA), 2024 U.S. Dist. LEXIS 102504, at *18 (D.N.J. June 10, 2024); *Doe v. Saber Healthcare Grp.*, No. 3:23cv1608, 2024 U.S. Dist. LEXIS 94955, at *3-4, *20 (M.D. Pa. May 29, 2024); *Molchanoff v. SOLV Energy, LLC*, No. 23cv653-LL-DEB, 2024 U.S. Dist. LEXIS 36400, at *4-5 (S.D. Cal. Mar. 1, 2024); *Mitura v. Finco Servs., Inc.*, 712 F. Supp. 3d 442, 451 (S.D.N.Y. 2024); *Turner v. Tesla, Inc.*, 686 F. Supp. 3d 917, 924-26 (N.D. Cal. 2023); *Delo v. Paul Taylor Dance Found., Inc.*, 685 F. Supp. 3d 173, 180-81 (S.D.N.Y. 2023); *Watson v. Blaze Media LLC*, No. 3:23-CV-0279-B, 2023 U.S. Dist. LEXIS 135694, at *3-4 (N.D. Tex. Aug. 3, 2023); *Johnson*, 657 F. Supp. 3d at 558-61.

These cases have consistently held that the EFAA extends to entire cases, even the causes of action which do not assert sexual harassment or sexual harassment-derived causes of action, based on the plain meaning of the statutory text, the purpose of the EFAA, as well as the unmanageability of conducting a detailed “related-to” analysis for every claim in a civil action prior to discovery and the unfolding of the litigation.

For instance, in *Diaz-Roa v. Hermes Law, P.C.*, No. 24-cv-2105 (LJL), 2024 U.S. Dist. LEXIS 212472 (S.D.N.Y. Nov. 21, 2024), the plaintiff had two core

disputes with the defendant, her former employer. First, the plaintiff had been promised stock options which she attempted to purchase once vested. *Id.* at *2-5. Upon attempting to complete this purchase, the defendant terminated her. *Id.* Second, the plaintiff alleged that during her employment, she had been sexually harassed and instructed to flirt with potential clients and use her appearance to attract business. *Id.* She asserted claims for sexual harassment under the NYCHRL and NYSHRL, and claims for breach of contract, deprivation of earned compensation, tortious interference, and conversion under New York and Delaware law. *Id.*

As here, the defendant in *Diaz-Roa* argued that notwithstanding the EFAA, the plaintiff's non-sexual harassment compensation-based claims should be subject to arbitration under the FAA. *Id.* at *24-25. The court rejected that argument as being inconsistent with the plain language of the EFAA, *id.* at *37-38. The court also noted that requiring a litigant split their claims and try some in court and some in arbitration "would be inconsistent with Congress's stated purpose in enacting the EFAA: to empower claims by sexual harassment and/or assault victims that had been inhibited by proliferating arbitration clauses in employment agreements." *Id.* at *38.

Moreover, the *Diaz-Roa* court addressed the core problem with the approach taken by the Trial Court in this case: the impossibility and complexity of carving up a civil action between sexual harassment and non-sexual-harassment cases, especially at an early stage of the litigation:

[Bifurcating non-sexual-harassment claims from sexual harassment claims] would require courts to carve up every case to which the EFAA applies by reaching judgment—with respect to each claim—on whether the claim relates to the sexual harassment or sexual assault dispute. But that approach not only is antithetical to the language of the EFAA and its protective intent, but it would also have the court address early in a case and in a definitive manner a question that often is not easily answered on the pleadings. It is not self-evident for example, that evidence that the plaintiff was the victim of persistent sexual assault or harassment would be irrelevant to the claim that such person had also been deprived of her rights to a minimum wage and overtime pay.

Id. at *38, fn. 9.

This same reasoning was adopted by Judge Aleta Trauger of the Middle District of Tennessee in the recent decision of *Bruce v. Adams*, No. 3:24-cv-00875, 2025 U.S. Dist. LEXIS 33532 (M.D. Tenn. Feb. 25, 2025). There, the court held that plaintiff's claims for **disability** discrimination in violation of the Americans with Disability Act were barred from arbitration under the EFAA because the plaintiff had also asserted a plausible sexual harassment cause of action in the same action, and the court found that the EFAA's statutory language and legislative structure extended the arbitration bar to all claims asserted in a single cause of action, not simply the sexual harassment claims. *Id.* at *4-*12, *32-38. *Bruce* likewise recognized that the claim-carving of the type the trial court engaged in in this case would “impose an unmanageable standard.” *Id.* at *37-38.

In another recently decided case, *Puris v. TikTok Inc.*, No. 24cv944 (DLC), 2025 U.S. Dist. LEXIS 16998 (S.D.N.Y. Jan. 30, 2025), the plaintiff alleged that TikTok had discriminated against her on the basis of gender, disability, and age in violation of the New York State Human Rights Law and New York City Human Rights Law, interfered with her rights protected by the New York City Human Rights Law, discriminated against her on the basis of age in violation of the Age Discrimination in Employment Act, interfered with her rights under the Family and Medical Leave Act, and discriminated against her on the basis of gender and created a hostile work environment in violation of Title VII of the Civil Rights Act of 1964. *Id.* at *16-17. Despite this wide variety of claims and legal theories, the court in *Puris* held that all of the plaintiff's claims were barred from forced arbitration under the EFAA. *Id.* at *15-16.

In *Baldwin v. TMPL Lexington LLC*, 2024 U.S. Dist. LEXIS 148291, at *1-2 (S.D.N.Y. Aug. 19, 2024), the court found that the EFAA extended both to the sexual harassment claims as well as claims for failure to pay minimum wage, overtime, and a failure to furnish wage statements. While *Baldwin* held in the first instance that there was simply no ambiguity that the EFAA worked to bar the entire filed case from forced arbitration, the court also noted that claims for unpaid minimum wage and overtime “clearly relate, factually and temporally, to her sexual harassment claims [because] they all arise from Baldwin’s employment at TPML between

January 2022 and September 2023 and relate to her own experience there.” *Id.* at *23-24. *Baldwin* contrasted these claims from claims for antitrust or securities law violations (i.e., non-employment claims) which might not be covered by the EFAA because they might constitute “improperly joined claims.” *Id.* at *24.

In *Delo v. Paul Taylor Dance Found., Inc.*, 685 F. Supp. 3d 173 (S.D.N.Y. 2023), a former employee of the dance foundation asserted claims for retaliation under FLSA, NYLL, and New York Human Rights Laws, as well as gender and familial status discrimination. The court explicitly adopted the reasoning of *Johnson v. Everyrealm*, finding that the EFAA's text was "clear, unambiguous, and decisive" in its application to entire cases, not just sexual harassment claims. *Id.* at 180. Because the plaintiff plausibly pled sexual harassment violations, the court ruled that "the EFAA applies to block arbitration of all her claims.” *Id.* at 185.

In *Mitura v. Finco Servs., Inc.*, 712 F. Supp. 3d 442 (S.D.N.Y. 2024), the plaintiff brought a multi-count action asserting claims under the Family and Medical Leave Act, Section 1981, Equal Pay Act, New York State Paid Employee Leave, and New York State and City Human Rights Laws. The court followed *Johnson v. Everyrealm*'s holding that "when a claim in a case alleges 'conduct constituting a sexual harassment dispute' as defined by the EFAA, at the election of the party making such an allegation, any predispute arbitration agreement is unenforceable with respect to all causes of action relating to that dispute." *Id.* at 451.

Other federal decisions are consistent with these. In *Watson v. Blaze Media LLC*, No. 3:23-CV-0279-B, 2023 U.S. Dist. LEXIS 135694, at *3-4 (N.D. Tex. Aug. 3, 2023), the plaintiff brought claims for religious discrimination, gender discrimination, and retaliation for complaining about sexual harassment. In *Clay v. FGO Logistics, Inc.*, No. 3:23-cv-01575-MPS, 2024 U.S. Dist. LEXIS 175470, at *22 (D. Conn. Sep. 27, 2024), the plaintiff asserted claims for hostile work environment, wrongful termination based on race and color, and intentional infliction of emotional distress alongside sexual harassment claims. In *Williams v. Mastronardi Produce, Ltd.*, No. 23-13302, the plaintiff's complaint included racial discrimination claims under 42 U.S.C. § 1981 and the Elliott-Larsen Civil Rights Act, as well as retaliation claims in addition to sexual harassment allegations. In *Scoggins v. Menard, Inc.*, No. 2:24-cv-00377, 2024 U.S. Dist. LEXIS 147638 (S.D. Ohio Aug. 19, 2024), the plaintiff brought claims for state and federal retaliation, sex discrimination and harassment, and disability discrimination under both the Americans with Disabilities Act and state law. In each of these cases, the courts found that EFAA applied to all the claims asserted in the action.

A majority of these cases were decided after the Trial Court's decision in this matter. Accordingly, this Court has the benefit of a consensus of federal case law holding that the EFAA should be applied according to its plain language as a contrary Congressional command that amends and overrides the FAA, not as a companion

statute which is in tension with and must be harmonized with the FAA. For this reason as well, the Court should reverse the decision of the trial court and find that the EFAA bars all of Plaintiffs' claims from arbitration.

B. The EFAA's Express Displacement of the FAA Precludes Importing FAA Claim-Splitting Rules

The trial court erred in assuming that the Federal Arbitration Act's allowance of claim-splitting survives the EFAA's express displacement of the FAA's application to sexual harassment "cases." The trial court described this as a "conflict between the EFAA and FAA" (235a), and described its role as requiring it to "harmonize the FAA and EFAA in order to give effect to both." (237a). The trial court cited *Epic Systems Corp. v. Lewis*, 584 U.S. 497, 511 (2018), for this need to harmonize the FAA with its later amendment in the EFAA.

This is error, because once Congress enacted a contrary congressional demand inconsistent with the mandates of the FAA **by amending the FAA and taking an entire ambit of cases out of its scope**, there was no further requirement that courts look at the EFAA and FAA as too unrelated statutes in tension with each other and in need of harmonization. *Lewis* concerning reconciling the NLRA and the FAA, to independent statutes which had been enacted separately and without any suggestion that one was repealing or modifying the other. In that circumstance, the Supreme Court declined to find that the NLRA contained a "poison pill" which would preclude applying the FAA to employment cases. *Id.* at 516-517.

But that is not the case here. Indeed, in *Lewis*, the Supreme Court pointed out that if Congress had wanted to override the FAA by enacting another statute, it would expect that “Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute.” *Id.* at 510. That is exactly what happened here, and, accordingly, there is no need to harmonize the EFAA with the FAA—rather, the EFAA was enacted to “suspend [the FAA’s] normal operations” with respect to cases related to sexual harassment disputes. *See id.*

The EFAA begins with the clear command that “notwithstanding any other provision of this title”—meaning the FAA—predispute arbitration agreements shall not be enforceable with respect to cases relating to sexual harassment. 9 U.S.C. § 402(a). This explicit displacement of the FAA’s operation means courts cannot import the FAA’s claim-splitting principles into the EFAA’s framework. *See Clay*, No. 3:23-cv-01575-MPS, 2024 U.S. Dist. LEXIS 175470, at *32-33; *Johnson*, 657 F. Supp. 3d at 560.

The Supreme Court has emphasized that when Congress includes such “notwithstanding” language, it signals an intent to override all contrary provisions. *See Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (use of “notwithstanding” clauses “clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other section”). Here, Congress did not merely create an exception to the FAA—it

expressly displaced the FAA's operation entirely with respect to cases relating to sexual harassment.

This complete displacement makes the trial court's reliance on *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011), and other FAA claim-splitting precedents misplaced. Those cases interpret how the FAA operates when it applies—and how the FAA modifies the baseline rule against claims-splitting. But the EFAA's “notwithstanding” clause means the FAA simply does not apply to cases relating to sexual harassment. The proper question is therefore not how the FAA would handle related claims and bifurcation, but what Congress meant by protecting entire “cases” from arbitration in the EFAA itself.

This reading aligns with the Supreme Court's recent guidance that courts must first determine whether the FAA applies before considering its requirements. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537 (2019) (court must first determine whether FAA applies before enforcing arbitration). Where, as here, Congress has expressly displaced the FAA's application through a “notwithstanding” clause, i.e., an explicit partial repeal, courts cannot selectively import FAA principles into the analysis because of a default canon of statutory construction that applies to reconciling two separate statutes, not an earlier statute with its amendment.

The displacement/amendment of the FAA means courts must interpret the EFAA's scope based on its text and purpose alone, without reference to FAA-based

preferences for claim-splitting. Indeed, this is obvious. The FAA's purpose, as the trial court pointed out, was to encourage and increase private arbitration. The EFAA's purpose was the very opposite. There is no harmony to be had between the EFAA and the FAA—rather, there is simply line-drawing. And that line-drawing is not done on a case-by-case basis by judges in every federal and state court in the nation, but by Congress, when it enacted the statute. Again, the ordinary text controls: Congress elected to protect “cases” relating to sexual harassment from arbitration, and for those cases, the FAA and its purposes simply do not apply. For this reason as well, the trial court erred, and this Court should reverse and remand.

C. Claims Challenging the Same Conduct Through Different Legal Theories "Relate To" Sexual Harassment Under the EFAA

As set forth above, the plain language of the EFAA holds that all claims asserted in a single cause of action are barred from forced arbitration. However, even if Plaintiff were required to show that all of her claims are “related” to her sexual harassment claim, *see, e.g., Diaz-Roa*, No. 24-cv-2105 (LJL), 2024 U.S. Dist. LEXIS 212472, at *38, fn. 9, Plaintiff can readily do so with her non-sexual harassment claims.

First, however, it is important to reiterate that the trial court's requirement that in order to relate to a sexual harassment the dispute, the claims must be inextricably intertwined with the alleged sexual harassment, *see* 254a, has no basis in the text of the EFAA, or any case law interpreting the EFAA. Rather, case law confirms that the

qualification that the case must be “related” to a sexual harassment dispute is a broad one.

“[The] ordinary meaning of [related] is a broad one – ‘to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,’ and the words thus express a broad pre-emptive purpose.” *Morales v. TWA*, 504 U.S. 374, 383 (1992). The phrase 'relating to' is deemed synonymous to 'in connection with,' 'associated with,' 'with respect to,' and 'with reference to.'" *Kamagate v. Ashcroft*, 385 F.3d 144, 154 (2d Cir. 2004) (citation omitted); *accord Prus v. Holder*, 660 F.3d 144, 148 (2d Cir. 2011).

"Congress's use of the phrase 'relating to' in federal legislation generally signals its expansive intent." *Mizrahi v. Gonzales*, 492 F.3d 156, 159 (2d Cir. 2007) (citing *Morales*, 504 U.S. at 383); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990)); *see also Bristol-Myers Squibb Co. v. Superior Ct. of Cal., S. F. Cnty.*, 582 U.S. 255, 262 (2017) (holding that the requirement that a suit arise out of or *relate to* the defendant's contacts with the forum for specific jurisdiction to lie means that "there must be an affiliation between the forum and the underlying controversy" (citation omitted)); *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 362 (2021) (holding that the rule that specific jurisdiction attaches to suits "relat[ing] to the defendant's contacts with the forum" does not require a "strict causal relationship between the defendant's in-state

activity and the litigation" (citation omitted)); *see also United States v. Portanova*, 961 F.3d 252, 260 (3d Cir. 2020) (noting broad use of “relating to” language by Congress); *Drakes v. Zimski*, 240 F.3d 246, 249 (3d Cir. 2001) (same).

In the **arbitration** context, contracts which extend to claims which “relate to” a subject matter such as employment are interpreted broadly as “connected by reason of an established or discoverable relation.” *See, e.g., Coregis Ins. Co. v. American Health Foundation, Inc.*, 241 F.3d 123, 128-29 (2d Cir. 2001); *United States v. Liestman*, 97 F.4th 1054, 1061 (7th Cir. 2024).

It would be ironic if courts which routinely hold that any and all claims with any tenuous connection to an employment contract “relate” to that contract such that a broad relating-to arbitration scope would subsume such claims, but that in the mirror image context, a case or a claim is only “related” to a sexual harassment dispute if, as the Trial Court held, those claims are “inextricably linked” with a sexual harassment cause of action.. (241a-243a).

Rather than require a close, inextricable nexus between a claim and a sexual harassment claim, the claims instead must simply be associated or connected with the sexual harassment claim. One clear connection where the claims would relate to each other would be when the claim challenges the **same** conduct through a different legal framework. *See, e.g., Turner v. Tesla, Inc.*, 686 F. Supp. 3d 917, 924-925 (N.D. Cal. 2023) (FLSA and injury claims relate to sexual harassment dispute because they

arise out of the same underlying facts); *Newton v. LVMH Moet Hennessy Louis Vuitton Inc.*, No. 23-CV-10753 (LAP), 2024 U.S. Dist. LEXIS 151749, at *22-23 (S.D.N.Y. Aug. 23, 2024) (noting that a claim relates to a sexual harassment claim based on the factual subject matter, not the legal theories asserted).

Given the above, the trial court committed clear error when he found that Plaintiff's Equal Pay, wage, contract, and tort claims did not relate to her sexual harassment claim. The trial court found, without specific analysis, that Plaintiff's Equal Pay claim did not "relate" to her sexual harassment claim. (242a). In denying Plaintiff's motion for reconsideration, the trial court made clear the incorrect standard being applied:

As discussed at length in this court's September 23, 2024, opinion, a plaintiff's claims that are not **inextricably intertwined** with claims of sexual assault and/or sexual harassment may be bifurcated and arbitrated. *See KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011) (recognizing that the "act [FAA] has been interpreted to required that if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation"). Here, the court does not conclude that the factual underpinnings of Counts IV through XIV, including, but not limited to, claims of disparate pay, breach of contract, misappropriation of name and mark under New Jersey's Unfair Competition Law, and failure to pay wages at termination, are **inextricably intertwined** with claims of sexual harassment based upon a hostile work environment, which is defined as "conduct that occurred because of her sex and that a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive working environment.

(254a (emphasis added)).

This standard is clearly incorrect and inconsistent with the plain ordinary meaning of the term “related.” With respect to Plaintiff’s claim that Defendant violated the NJEPA, Plaintiff alleges that Defendant paid Plaintiff less than similarly situated men. (77a-80a at ¶¶ 19-36). Moreover, though Plaintiff need not prove that Defendant intentionally engaged in gender pay discrimination in order to recover under the NJEPA, Plaintiff alleges that Defendant’s violation of the NJEPA **was intentional**, and makes that averment part of her pleadings of that claim. (87a at ¶ 102). And Plaintiff alleges that this pay discrimination—and the lies her supervisors told her in connection with this pay discrimination—was **part** of the pattern of gender discrimination and sexual harassment she suffered. (78a at ¶¶ 23-25, 79a at ¶ 33, 85a at ¶¶ 83-85, 86a at ¶¶ 90-92).

Similarly, though Plaintiff seeks to recover for breach of contract, Plaintiff certainly alleges that the **reason** Defendants breached their contract with her and paid her less than she was due was part and parcel of the gender discrimination she faced. (83a at ¶¶ 67-70). Finally, with respect to Defendants’ post-termination misappropriation of identity, that misappropriation was conducted by the same management team that had engaged in gender discrimination for years—and was one more instance of disrespect, demeaning behavior which failed to treat Plaintiff as a respected and successful colleague. (84a at ¶¶ 73-78).

These claims clearly “relate to” Plaintiff’s sexual harassment within the EFAA’s meaning. Plaintiff’s Equal Pay Act claim challenges Defendants’ gender-based compensation practices—specifically, their selective provision of retention bonuses to male employees while denying them to women. While the NJEPA creates strict liability for such disparities without requiring proof of discriminatory intent, see N.J.S.A. 10:5-12(t), the challenged conduct forms part of the same pattern of gender-based discrimination that manifested in sexual harassment. The same decision-makers (Lamkin and Moschella) who allegedly created a hostile work environment also implemented these discriminatory compensation practices.

That the NJEPA provides an additional mechanism for challenging such conduct—one that does not require proving discriminatory intent—makes the claims complementary rather than unrelated. Congress designed the EFAA to prevent sexual harassment from being “shielded from public scrutiny” through forced arbitration. H.R. Rep. No. 117-234, at 3 (2022). This purpose would be undermined if employers could compel arbitration of claims challenging the same discriminatory conduct merely because they proceed under strict liability frameworks.

D. Forcing Arbitration of Plaintiff’s Non-Sexual Harassment Claims Challenging the Same Conduct as her Discrimination and Harassment Claims Would Undermine EFAA’s Core Purpose

Congress enacted the EFAA to ensure that sexual harassment receives a full and public hearing in court rather than being “buried in forced arbitration.” Yet the

trial court's bifurcation order threatens to accomplish indirectly what Congress expressly prohibited directly: the fragmentation and potential constraint of sexual harassment claims through private arbitration.

This threat stems not from broad notions of claim splitting, but from the concrete risk that arbitration of related claims will produce binding determinations about crucial factual issues while multiplying the proceedings and permitting an employer to *win back* in secret arbitration what it might *lose* in court. While arbitration of Plaintiff's contract and compensation claims need not address discriminatory intent, it necessarily requires the arbitrator to evaluate the credibility of key witnesses—particularly Lamkin and Moschella—regarding specific workplace events. These pure credibility determinations about what occurred, as distinct from why it occurred, may carry preclusive effect in subsequent litigation. See *Olivieri v. Y.M.F. Carpet, Inc.*, 186 N.J. 511, 521 (2006) (findings "actually determined" in prior proceeding may bind subsequent litigation between same parties); " *Zirger v. Gen. Accident Ins. Co.*, 144 N.J. 327, 337, 676 A.2d 1065, 1071 (1996).

Consider how bifurcation would operate here. Plaintiff's contract claims challenging the denial of Chairman's Circle benefits require determining whether Lamkin and Moschella testified truthfully about compensation policies and their implementation. If the arbitrator finds their testimony credible on these points, that

factual determination—though made without reference to discriminatory intent—could constrain how Plaintiff presents her harassment case. The arbitrator's findings about what these key witnesses said and did would follow them into court, potentially fragmenting the holistic evaluation that sexual harassment claims require.

This provides further reason for reversing the decision of the trial court and remanding this case such that all of Plaintiff's claims can be heard in court.

E. Basic Principles of Claim-Splitting and Judicial Economy Support Reading EFAA to Bar Bifurcation Here

When Congress legislates against established common law principles, courts presume it intended to incorporate those principles absent clear indication otherwise. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991). The EFAA's protection of "cases" that "relate to" sexual harassment must therefore be understood not against the FAA's special rule regarding claims splitting, but rather against the backdrop of fundamental common law principles disfavoring claim-splitting.

The common law has long recognized that claims arising from the same conduct should be litigated together. This principle finds expression in both claim preclusion doctrine and rules governing supplemental jurisdiction. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966) (claims form one case when they "derive from a common nucleus of operative fact"). Congress presumably understood these established principles when choosing to protect entire "cases" from arbitration.

Here, compelling arbitration would require precisely the kind of artificial claim-splitting that courts have long disfavored. Plaintiff's Equal Pay Act claim challenges the same discriminatory compensation practices that form part of her harassment case. The claims share not just factual overlap but a common core of evidence about how Lamkin and Moschella treated female employees. Forcing bifurcation would require duplicative proceedings examining the same conduct through slightly different legal lenses.

This inefficient splitting of related claims becomes particularly problematic given the EFAA's core purpose. Congress sought to ensure sexual harassment receives full and public examination in court rather than being "buried in forced arbitration." H.R. Rep. No. 117-234, at 3 (2022). Yet bifurcation would require Plaintiff to litigate key aspects of the discriminatory conduct—specifically, gender-based compensation practices—in the very private forum Congress deemed inappropriate for examining such behavior. Moreover, though in this particular case, Defendants seek to bifurcate, clearly, a bifurcated proceeding in which discovery will necessarily be duplicated and in which rulings might contradict each other will result in significant additional expense and complexity—the very disadvantages arbitration is supposed to avoid.

III. THE TRIAL COURT ERRED IN SEVERING UNCONSCIONABLE PROVISIONS RATHER THAN INVALIDATING THE ARBITRATION AGREEMENT (219a-220a, 243a-247a).

A. The Agreement's Multiple Unconscionable Terms Demonstrate a Systematic Effort to Impose an Inferior Forum

Even absent application of the EFAA, the arbitration here is improper because Defendant's arbitration agreement is unconscionable, and the lower court erred in finding that the agreement could be saved by severing the unconscionable provisions. While the trial court correctly found that the agreement was unconscionable, it erred in rewriting the agreement to remove the most egregious sections rather than refusing to enforce it.

While courts generally favor arbitration, this preference cannot salvage an agreement that systematically seeks to deter employees from vindicating their rights. The arbitration agreement here contains multiple unconscionable provisions that, viewed collectively, reveal a deliberate strategy to create an inferior forum: a unilateral fee-shifting provision that threatens financial ruin, coupled with a forum selection clause requiring arbitration in a distant jurisdiction.

The fee-shifting provision's potency as a deterrent is not theoretical. In *Mott v. Guaranteed Rate*, the company wielded an identical provision to secure an arbitral award of \$262,869.74 in attorneys' fees against a former employee—effectively nullifying her recovery on meritorious statutory claims. (204a). While that fee award was later vacated, *id.*, the attempted enforcement demonstrates how Guaranteed Rate employs these provisions to intimidate employees contemplating legal action.

The company's aggressive interpretation of the fee-shifting provision is particularly troubling. In *Mott*, Guaranteed Rate argued—and the arbitrator agreed—the provision authorized fee recovery not just for contract claims, but for "any claim that fell within the [agreement's] broad arbitration provision." (213a-14a). This expansive reading transforms a standard contract term into a weapon against statutory claims—precisely the kind of overreaching that renders arbitration provisions unconscionable. See *Delta Funding Corp. v. Harris*, 189 N.J. 28, 43 (2006) (provisions deterring vindication of statutory rights are unconscionable).

The forum selection clause compounds this deterrent effect. While modern technology may facilitate remote proceedings, the requirement to arbitrate in Chicago imposes real burdens on employees seeking to present their cases effectively. These burdens fall particularly heavily on employees like Plaintiff, who must balance litigation with ongoing family and work responsibilities in New Jersey. The provision's practical effect is to discourage pursuit of legitimate claims—an effect magnified by its combination with the fee-shifting threat.

And indeed, there is a third unconscionable provision as well—the provision that Plaintiff must arbitrate sexual harassment disputes, in contravention of the clear statutory requirement of the EFAA barring such a provision. After the EFAA was enacted, Defendants made no effort to amend the agreement or inform Plaintiff that due to the EFAA, sexual harassment claims were no longer required to be

arbitrated. The failure to do so—and the likelihood that many victims of sexual harassment might not know about the EFAA, or what it entailed, makes agreements that that require such arbitrations even after the EFAA's effective date substantively unconscionable.

This systematic deterrence distinguishes the present case from those where courts have severed isolated unconscionable terms. *See Roman v. Bergen Logistics, LLC*, 456 N.J. Super. 157, 171 (App. Div. 2018) (allowing severance where "agreement [was] otherwise valid"). Here, the unconscionable provisions operate in tandem to create precisely what the law forbids: an arbitration regime designed to discourage the assertion of legal rights.

B. Severance Inappropriately Rewards Strategic Overreach in Contract Drafting

This case exemplifies why severance is inappropriate. In 2019, a federal court specifically warned Guaranteed Rate that its arbitration agreement contained unconscionable terms and urged the company to "revise its arbitration agreement in the interest of fairness and to avoid future litigation." *Pereyra v. Guaranteed Rate, Inc.*, No. 18-cv-06669-EMC, 2019 U.S. Dist. LEXIS 108940, at *32 n.1 (N.D. Cal. June 28, 2019). The court cautioned that failure to reform the agreement might demonstrate "bad faith and an overarching intent to impose arbitration as an inferior forum." *Id.* Yet Guaranteed Rate maintained these provisions, continuing to present employees with agreements it knew courts had found problematic.

This calculated retention of unconscionable terms distinguishes the present case from *Delta Funding Corp. v. Harris*, where the New Jersey Supreme Court permitted severance of a single unconscionable provision. 189 N.J. 28 (2006). *Delta Funding* involved no evidence that the drafter had persisted in using terms after judicial warning. Here, by contrast, Guaranteed Rate's decision to maintain provisions it knew courts had condemned reveals a deliberate strategy: include unconscionable terms to deter claims, knowing courts might merely sever them while preserving the arbitration requirement.

The New Jersey Appellate Division has recognized that severance becomes inappropriate when it would "endors[e] [a defendant's] failure to address" judicial determinations of unconscionability. *Guc v. Raymours Furniture Co.*, No. A-3452-20, 2022 N.J. Super. Unpub. LEXIS 395, at *12 (App. Div. Mar. 11, 2022). (285a). While *Guc* is unpublished, its reasoning illuminates why severance here would undermine rather than advance New Jersey's public policy favoring arbitration. That policy assumes good-faith agreements to arbitrate, not systematic attempts to impose inferior forums through provisions known to be unconscionable.

The practical effect of severance in this context is to eliminate any meaningful incentive for employers to draft fair arbitration agreements. If courts merely excise unconscionable provisions while maintaining the arbitration requirement, employers face no real consequence for overreach. They obtain the benefit of arbitration even

when unconscionable terms successfully deter some employees from pursuing claims. This outcome conflicts with fundamental principles of contract law, which should not reward parties who deliberately include unconscionable terms in their agreements.

C. The Unconscionable Terms Form an Integral Part of the Agreement's Arbitration Scheme

The unconscionable provisions in this agreement cannot be severed because they form an integral part of its arbitration scheme. While courts may excise discrete unenforceable terms that are ancillary to an arbitration agreement's core purpose, severance becomes inappropriate when the unconscionable provisions are fundamental to how the arbitration mechanism was designed to function.

The structural role of these provisions becomes clear upon examination. The fee-shifting provision does not merely address cost allocation—it fundamentally alters the risk calculus for pursuing claims in arbitration. By threatening to impose massive fee awards, as demonstrated in the Mott arbitration, this provision creates an arbitration regime where employees must risk financial ruin to pursue their rights. Similarly, the forum selection clause does not simply designate venue—it imposes practical barriers that reshape how claims can be presented and proved.

These provisions work in concert to create an arbitration framework materially different from what New Jersey law contemplates. Our courts have long recognized that arbitration agreements must provide "a forum to vindicate [statutory]

rights." *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 93 (2002). Yet the agreement here constructs a forum designed to deter such vindication through interlocking unconscionable terms. Removing these provisions would not merely adjust peripheral aspects of the arbitration scheme—it would fundamentally alter the dispute resolution mechanism the parties purportedly agreed to.

This integration of unconscionable terms distinguishes the present case from situations where courts have permitted severance. In *Roman v. Bergen Logistics*, the Appellate Division allowed severance of a provision barring punitive damages because the agreement remained "otherwise valid and enforceable." 456 N.J. Super. at 171. Here, by contrast, the unconscionable provisions are not isolated terms but essential components of how the arbitration mechanism was structured to operate.

The New Jersey Supreme Court's severance analysis in *Delta Funding Corp. v. Harris* supports this conclusion. 189 N.J. 28 (2006). While *Delta Funding* permitted severance of certain provisions, it emphasized examining whether unconscionable terms are "essential to the overall agreement." *Id.* at 46. Here, the fee-shifting and forum selection provisions fundamentally shape the agreement's allocation of rights and risks. Their excision would not preserve the parties' basic agreement to arbitrate but rather create an entirely different arbitration framework than the one Guaranteed Rate deliberately constructed.

Finally, because the provision requires (but also provides Plaintiff with the advantage) of Plaintiff asserting all of her claims in a single forum, albeit an arbitral forum, the Court cannot sever Plaintiff's sexual harassment claims from the scope of the arbitration provision without **rewriting** that provision—by changing it from a provision that concentrates all of Plaintiff's claims in a single forum, to one in which Plaintiff will require to bring her claims in both court and arbitration if she asserts both sexual harassment claims and non-sexual harassment claims. Plaintiff did not agree to having to use two forums and litigate in two separate proceedings, and changing the arbitration agreement to address its unconscionable overbreadth as to sexual harassment claims will require fundamentally rewriting the core of what was purportedly agreed to—that plaintiffs' claims would be heard jointly and efficiently in a single proceeding.

Severance in this context would require the court to substantially rewrite rather than merely reform the agreement. Such extensive judicial revision exceeds the proper scope of severance, particularly where, as here, the unconscionable terms reflect a deliberate strategy to impose an inferior forum. The appropriate remedy is to declare the arbitration agreement unenforceable in its entirety.

IV. CONCLUSION

For the foregoing reasons, the Court should reverse the decisions of the Trial Court and remand this case for further proceedings.

Respectfully submitted,

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Superior Court of New Jersey

Appellate Division

Docket No. A-000921-24T2

MEGAN MCDERMOTT,	:	CIVIL ACTION
	:	
<i>Plaintiff-Appellant/Cross-</i>	:	ON APPEAL FROM A
<i>Respondent,</i>	:	JUDGMENT OF THE
	:	SUPERIOR COURT
	:	OF NEW JERSEY,
vs.	:	LAW DIVISION,
	:	MORRIS COUNTY
	:	
GUARANTEED RATE, INC., and	:	
JOSEPH MOSCHELLA and JON	:	Docket No.: MRS-L-360-24
LAMPKIN	:	
	:	Sat Below:
	:	
<i>Defendants-Respondents/Cross-</i>	:	HON. NOAH FRANZBLAU, J.S.C.
<i>Appellants.</i>	:	

BRIEF ON BEHALF OF DEFENDANTS- RESPONDENTS/CROSS-APPELLANTS

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PRELIMINARY STATEMENT

Respondents/Cross-Appellants Guaranteed Rate, Inc. (“GRI”), Joseph Moschella and Jon Lamkin (collectively, “Defendants”), hereby submit this memorandum of law in opposition to Appellant/Cross-Respondent Megan McDermott’s (“Plaintiff’s”) appeal and in support of Defendants’ cross-appeal.

In a case of first impression in New Jersey, the Trial Court correctly concluded that the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (“EFAA”) does not bar an entire action from arbitration but, rather, only those claims “inextricably intertwined” with a sexual harassment cause of action. This well-reasoned decision struck the proper balance between the longstanding bifurcation requirement under the Federal Arbitration Act (“FAA”) and the EFAA’s express prohibition of “forced” arbitration of sexual harassment claims. In doing so, the Trial Court properly concluded that Plaintiff’s wage, contract, and intellectual property claims have no bearing on her sexual harassment claim. Indeed, several of these counts relate to conduct that allegedly occurred after her employment with GRI ended and thus could not possibly relate to her sexual harassment claim. As such, the Trial Court’s detailed statutory interpretation should be affirmed and adopted by this Court.

Second, the Trial Court correctly found that Plaintiff’s claims were properly subject to the parties’ arbitration agreement. Plaintiff executed a “Sales

Compensation Plan” with GRI wherein the parties waived any right to have their employment-based claims heard in a court of law in an arbitration provision (the “Arbitration Agreement”). As a result, Plaintiff knowingly and voluntarily agreed in writing to arbitrate the employment-based claims asserted in her Fourth Amended Complaint (“Complaint”) as a condition of her employment with GRI. The Trial Court correctly determined the Arbitration Agreement was enforceable in a well-reasoned decision.

Plaintiff’s challenges to the Arbitration Agreement’s enforceability must also fail. Plaintiff contends that the Trial Court erred by severing two provisions deemed “unconscionable” – a forum selection clause contained in the Arbitration Agreement and a fee-shifting provision in Plaintiff’s Sales Compensation Plan. While these provisions should not be deemed facially unconscionable, the Trial Court’s severance of them was in full accord with precedent of the New Jersey Supreme Court. The Trial Court’s determination that the Arbitration Agreement is enforceable should not be disturbed.

On cross-appeal, Defendants contend the Trial Court erred in finding Plaintiff’s gender discrimination claim was “inextricably intertwined” with her sexual harassment claim and thus was not arbitrable under the EFAA. The Complaint makes clear that the gender discrimination claim in Count I is premised on alleged disparate treatment relating to GRI’s bonus and

commission-based policies and practices on a company-wide basis. Thus, resolution of the gender discrimination claim will focus on GRI's company-wide practices against the backdrop of the parties' Sale Compensation Plan, not any allegedly unwelcomed conduct directed at Plaintiff that purportedly created a hostile work environment. As such, this aspect of the Trial Court's determination is ripe for reversal.

Moreover, the Trial Court erroneously declined to dismiss Plaintiff's sexual harassment claim (Count II) as untimely under its two-year statute of limitations. As established in the Complaint, Count II focuses on alleged conduct occurring outside of the statute of limitations. The Trial Court's application of the continuing violation rule ("CVR") to render this conduct timely is erroneous because it misconstrues these allegations as indiscrete acts incapable of triggering the statutory limitations clock. The Trial Court also erred by alternatively holding that Plaintiff's timely remaining allegations support a claim for sexual harassment in the absence of the untimely conduct. These generic allegations fall far short of satisfying the pleading requirements imposed under R. 4:6-2(e) and merely recite the prima facie elements of a harassment claim. Accordingly, the Trial Court erred in not dismissing Count II, which, importantly, resulted in an *unnecessary invocation of the EFAA in relation to the parties' Arbitration Agreement*.

QUESTIONS PRESENTED

- 1) Whether the Trial Court correctly held that Counts IV through XIV of the Complaint were arbitrable pursuant to the EFAA.
- 2) Whether the Trial Court correctly held that the terms of the parties' Arbitration Agreement were enforceable as a matter of law.
- 3) Whether the Trial Court erred in determining that the cause of action for gender discrimination under the Law Against Discrimination ("LAD") asserted in Count I of the Complaint was not arbitrable pursuant to the EFAA.
- 4) Whether the Trial Court erred in denying Defendants' motion for dismissal of the cause of action for sexual harassment under the LAD asserted in Count II of the Complaint on the grounds that it was untimely under the LAD's two-year statute of limitations and thus failed to state a cognizable claim.

ANSWERS TO QUESTIONS PRESENTED

- 1) Yes, the Trial Court correctly: (i) concluded that the EFAA did not intend to exclude non-sexual harassment related claims from arbitration (240a) and (ii) interpreted Section 402(a) of the EFAA to require bifurcation of Counts IV through XIV on the grounds that they do not "relate to" sexual harassment or sexual assault to preclude their arbitrability. (234a-241a.)
- 2) Yes, the Trial Court correctly held that the parties' Arbitration Agreement was enforceable as a matter of law. (243a-250a.)

3) Yes, the Trial Court erred in determining that the gender discrimination claim (Count I) is “inextricably intertwined” with Plaintiff’s sexual harassment claim so that it is deemed related under Section 402(a) for purposes of being precluded from arbitration under the EFAA. (241a-242a.)

4) Yes, the Trial Court erred in holding that Plaintiff pleaded a timely sexual harassment claim (Count II) based on the CVR, thereby triggering the application of the EFAA, and that Plaintiff’s remaining allegations sufficiently supported an actionable claim of sexual harassment. (230a-231a.)

PROCEDURAL HISTORY/STATEMENT OF FACTS¹

A. Employment Background

In or about March 2005, Plaintiff was hired as a mortgage loan officer at Superior Mortgage by Defendant Joseph Moschella. (76a, ¶ 10.) Plaintiff contends that in **2006**, Moschella made a sexually charged comment to her based on her appearance that she construed as fostering “the possibility she would be sexually harassed in the workplace.” (77a, ¶ 12.)

GRI secures and underwrites mortgages for real estate purchasers and sells the mortgages that it underwrites. (*Id.* at ¶ 16.) In or about February 2012, GRI

¹ Due to the pre-discovery posture of this matter, Defendants have combined their Statement of Fact and Procedural History sections herein. In addition, Defendants object to Plaintiff’s Statement of Facts, which is replete with disputed allegations – as opposed to “facts” – gleaned from her Complaint.

acquired Superior Mortgage at which time Plaintiff and Moschella became employees of GRI. (Id.) Moschella is a Senior Vice President and Regional Manager for GRI. (76a, ¶ 13.)

In 2015, Plaintiff met her former supervisor, Lamkin, for the first time at a corporate event. (80a, ¶ 39.) Lamkin is Senior Vice President and Area Manager for GRI. (76a, ¶ 6.) Plaintiff alleges that during this meeting, Lamkin made the following comment to her in reference to her becoming a single mother in college: “You should have known better than to let some guy’s d**k come inside you.” (80a, ¶ 42.) Plaintiff also alleges that she “found this statement from her supervisor (whom she was meeting in person for the first time) disgusting, repulsive, and demeaning and told Defendant Lamkin his comment was outrageous, offensive, and unwelcome.” (Id. at ¶ 43.) Plaintiff further alleges that Lamkin continued to be “abusive to [her], regularly screaming at her and using gender-based and demeaning slurs to refer to [her].” (81a, ¶ 48.) Plaintiff contends that she “also had to suffer Defendant Lamkin treating other women in Plaintiff’s workplace in the same offensive and demeaning manner.” (Id. at ¶ 49.) In or about 2019, Plaintiff allegedly complained to GRI’s Human Resources Department about Lamkin’s alleged sexual harassment. (Id. at ¶ 51.) Plaintiff further contends that “Lamkin’s persistent and pervasive abuse continued through the end of Plaintiff’s tenure with [GRI].” (Id. at ¶ 54.)

In November 2022, Plaintiff resigned from GRI. (77a, ¶ 14.)

B. Arbitration Agreement

On January 25, 2012, Plaintiff executed a Sales Compensation Plan with GRI that *incorporated* the Arbitration Agreement. (D4a.) The Arbitration Agreement provides:

Any and all claims (legal or equitable), demands, disputes, or controversies between Employee (for the purpose of this Agreement the term Employee shall include Employee as well as former Employee of the Company) and the Company must be resolved by arbitration in accordance with the rules of the American Arbitration Association then in existence.

(Id.) The Sales Compensation Plan also includes a unilateral fee-shifting provision allowing fees to be provided to GRI to the extent it prevails in claims brought under its terms. (Id.)

C. The Original and Four Amended Complaints

On February 21, 2024, Plaintiff filed her initial Complaint, alleging the following five counts: Count I: Gender Discrimination under the LAD; Count II: Hostile Work Environment under the LAD; Count III: Disparate Pay under the New Jersey Equal Pay Act (“NJEPA”); Count IV: Failure to Pay Wages under the New Jersey Wage Payment and Collection Law (“NJWPCL”); and Count V: Breach of Contract. (1a-14a.)

On March 6, 2024, Plaintiff filed an Amended Complaint adding the following causes of action: Count III: Constructive Discharge under the LAD; Count VII: Commercial Misappropriation of Likeness; Count VIII: Unfair Competition; Count VIII: Tortious Interference with Contractual Relationships; and Count IX: New Jersey Unfair Competition Law. (15a-32a.)

By electronic mail dated March 12, 2024, defense counsel advised Plaintiff's counsel that Plaintiff entered into an agreement with GRI to arbitrate the claims filed in this action. (98a.) Defense counsel provided Plaintiff's counsel with a copy of the Arbitration Agreement executed by the parties. (98a-99a.) Defense counsel further inquired whether Plaintiff was "amenable to voluntarily dismissing the complaint while arbitration is pending." (99a.)

By electronic mail dated March 22, 2024, Plaintiff's counsel advised that Plaintiff will not consent to arbitration of her claims in this action and intended to challenge the parties' Arbitration Agreement on the grounds of the EFAA and unconscionability. (Id.) That same day, Plaintiff filed her Second Amended Complaint adding the additional claims: Count VI: Failure to Pay Commissions under the NJWPCL; Count VIII: Breach of Implied Contract; Count IX: Breach of the Covenant of Good Faith and Fair Dealing (commissions); Count X: Breach of the Covenant of Good Faith and Fair Dealing (bonuses); and Count XIV: Misappropriation of Name and Mark. (33a-53a.)

On May 13, 2024, Plaintiff filed her Third and Fourth Amended Complaints each revising several paragraphs relating to alleged sexual harassment she contends occurred *nine years earlier in 2015*. (54a-74a; 75a-95a, respectively.)

D. The Trial Court's Order/Decision

On June 21, 2024, Defendants filed a motion to dismiss the Complaint and compel arbitration pursuant to the parties' Arbitration Agreement. Defendants contended that Plaintiff's sexual harassment claim as pleaded in Count II of the Complaint was untimely under the LAD's two-year statute of limitations because the untimely harassment allegations alleged in the Complaint constituted discrete acts and, thus, did not invoke the CVR, and because any conduct which was timely pleaded was not sufficient to establish a claim for sexual harassment. Defendants further contended that the remaining causes of action were, therefore, subject to arbitration under the Arbitration Agreement, and that the EFAA did not apply because no sexual harassment claim remained.

On September 13, 2024, the Hon. Noah Franzblau heard oral argument on Defendants' motion for dismissal/arbitration. On September 23, 2024, the Trial Court ruled that the sexual harassment claim pleaded in Count II of the Complaint was timely pursuant to the CVR. (227a.-231a.) As such, the Trial Court ruled that Count I (gender discrimination), Count II (the sexual

harassment claim) and Count III (constructive discharge) were precluded from arbitration under EFAA as being “inextricably intertwined” with Plaintiff’s sexual harassment dispute. (242a.) The Trial Court, however, held that Counts IV through XIV were not precluded from arbitration under the EFAA and, thus, ordered that these causes of action be submitted to arbitration pursuant to the Arbitration Agreement. (242a-250a.)

On October 14, 2024, Plaintiff filed a motion for reconsideration of the Trial Court’s September 23, 2024 decision. (251a-252a.) In addition, Plaintiff sought to “amend” the Trial Court’s order to allow for additional time to submit Counts IV through XIV to arbitration (notwithstanding the fact that the deadline for submission of those claims would pass prior to the Trial Court’s resolution of the motion).

On November 8, 2024, the Trial Court denied Plaintiff’s motion for reconsideration of the September 23, 2024 decision for the same reasons expressed in its underlying decision. (254a.) The Trial Court, however, amended the September 23, 2024 order “to require that Plaintiff submit her claims to arbitration within 45 days of the September 23, 2024 order, as may be extended by the filing of this motion for reconsideration.” (253a.)²

² Notably, Plaintiff did not submit any of her claims to arbitration in accordance with the Trial Court’s November 8, 2024 order nor was a stay sought pursuant to R. 2:9-5(c).

On December 2, 2024, Plaintiff filed her Notice of Appeal “as to [the Trial Court’s] holding that Counts IV through XIV of Plaintiff’s Complaint are arbitrable under the FAA, and EFAA.” (255a.) On December 17, 2024, Defendants filed their Notice of Cross-Appeal challenging the Trial Court’s denial of the motion to (i) dismiss Count II (sexual harassment) as untimely and (ii) compel arbitration of Count I (gender discrimination) pursuant to the parties’ Arbitration Agreement. (260a.)

STANDARD OF REVIEW

This Court construes arbitration provisions of a contract under a de novo standard of review in which no deference is owed. Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 445-46 (2014). Likewise, this Court applies a de novo standard of review when “construing the meaning of a statute.” Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). Lastly, determining the applicable statute of limitations is an issue of law that is also subject to plenary review. Town of Kearny v. Brandt, 214 N.J. 76, 91, 67 A.3d 601 (2013).

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY HELD THAT COUNTS IV THROUGH XIV OF THE FOURTH AMENDED COMPLAINT ARE SUBJECT TO ARBITRATION UNDER THE FAA/EFAA (234a).

The Trial Court’s well-reasoned decision rejecting Plaintiff’s entire “case” theory under the EFAA and requiring bifurcation of sexual harassment and non-sexual harassment claims should not be disturbed, as it strikes the proper balance between the text and legislative histories of the FAA and the EFAA. Effective March 3, 2022, the EFAA amended the FAA to provide that “no predispute arbitration agreement . . . shall be valid or enforceable with respect to a case which is filed under Federal [] or State law ***and*** relates to . . . the sexual harassment dispute.” 9 U.S.C. § 402(a) (emphasis added).

To date, the Trial Court is the only court in New Jersey to address whether the EFAA bars the arbitration of sexual harassment-related claims only (as its title suggests) or an entire lawsuit (as Plaintiff suggests), including claims wholly unrelated to sexual harassment. Indeed, courts addressing this issue have reached different conclusions. Compare Mera v. SA Hosp. Grp., LLC, 675 F. Supp. 3d 442, 448 (S.D.N.Y. 2023) (holding that wage-based claims unrelated to sexual harassment are bifurcated for arbitration) with Johnson v. Everyrealm, Inc., 657 F. Supp. 3d 535, 558 (S.D.N.Y. 2023) (holding the entire “case” is

precluded from arbitration merely on account of containing a sexual harassment claim).

The difference in courts' interpretations stems from the EFAA's jurisdictional provision, which provides that an arbitration agreement is unenforceable "with respect to a *case* which is filed under Federal, Tribal, or State law and relates to . . . the sexual harassment dispute." 9 U.S.C. § 402(a) (emphasis added).³ When viewed against the backdrop of both its intent and a common sense reading of its text, it is clear that the EFAA was intended to end forced arbitration of sexual harassment and sexual assault claims *only*. For the reasons set forth below, the Trial Court's well-reasoned decision should be affirmed.

A. The Trial Court Correctly Interpreted Section 402(a) Of The EFAA To Be Limited To Claims That "Relate To" Sexual Harassment (242a).

In Point II of her brief, Plaintiff argues that pursuant to the EFAA, *all* claims asserted in a case which also asserts a sexual harassment claim must be

³ While the caselaw is conflicting, the EFAA-related issues in this action have not been the subject of appellate review. In 1985, the United States Supreme Court resolved a conflict in which numerous federal circuits refused to bifurcate arbitrable and nonarbitrable claims that were "sufficiently intertwined factually and legally." Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 216-17 (1985). Undoubtedly, this issue "will very likely be a matter for the United States Supreme Court to decide" once again. Williams v. Mastronardi Produce, Ltd., No. 23-13302, 2024 U.S. Dist. LEXIS 150550, *17 (E.D. Mich. Aug. 22, 2024).

arbitrated. Thus, Plaintiff takes the position that the Trial Court erred in ruling that Counts VI through XIV can be arbitrated because they are not “inextricably intertwined” with Plaintiff’s sexual harassment claim. However, the Trial’s Court’s decision that *only* claims *related* to the sexual harassment dispute are immune from arbitration under a valid and enforceable arbitration agreement is firmly rooted in the language of the EFAA, its legislative history, and importantly, common sense.

1. The Trial Court Applied a “Plain Meaning” Interpretation of the EFAA (242a).

The Trial Court correctly construed the terms of the EFAA to conclude that it applied only to sexual harassment and sexual assault-related claims. Section 402(a) of the EFAA states:

Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, . . . no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable ***with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.***

9 U.S.C. § 402(a) (emphasis added.) Plaintiff relies on the statute’s use of the term “case” to argue that if a case alleges a claim related to sexual harassment, ***all*** claims in the case—including those that do ***not*** relate to sexual harassment—are not subject to arbitration because they are contained within the same “case.”

(Pb13-Pb20.) Thus, if a “case” contains a viable claim for sexual harassment, Plaintiff is allowed to invalidate a predispute arbitration agreement as to all other claims within the case. (Id.) Plaintiff’s interpretation, however, reads the requirement that the “case” “relates to . . . the sexual harassment dispute” out of the statute, rendering the “relates to” language superfluous. See United States v. Williams, 917 F.3d 195, 202 (3d Cir. 2019) (observing that “[a] cardinal rule of statutory interpretation is that courts should avoid interpreting a statute in ways that would render certain language superfluous”). Such interpretation is at odds with the conjunctive language utilized in Section 402(a).

Instead, the Trial Court implemented a plain language reading of the EFAA’s “related to” language to conclude that only claims related to alleged sexual harassment were immune from a predispute arbitration agreement.⁴ The Trial Court’s plain meaning construction is consistent with the result in Mera,

⁴ Specifically, the terms “case” and “relates to” are intended to modify “predispute agreement,” which is the object of Section 402(a). As such, these conjunctive terms must both be satisfied in the context of the predispute agreement’s enforceability. That is, an arbitration agreement is only invalidated to the extent: (i) a “case” involving a predispute agreement is filed *and* (ii) the predispute agreement “relates to the sexual assault or the sexual harassment dispute.” Under Plaintiff’s interpretation, however, the reference to a “case” being filed becomes wholly superfluous in that any sexual harassment claim would render an arbitration agreement unenforceable, e.g., “*at the election of the person alleging conduct constituting a sexual harassment dispute . . . no predispute arbitration agreement . . . shall be valid or enforceable with respect to . . . the sexual harassment dispute.*” Such interpretation is at odds with the conjunctive language utilized in Section 402(a).

675 F. Supp. 3d at 447 (interpreting Section 402(a) as rendering an arbitration agreement unenforceable “only with respect to the claims in the case that relate to the sexual harassment dispute. To hold otherwise would permit a plaintiff to elude a binding arbitration agreement with respect to wholly unrelated claims affecting a broad group of individuals having nothing to do with the particular sexual harassment affecting the plaintiff alone.”).

Indeed, several courts have similarly adopted the Trial Court’s plain meaning interpretation of the EFAA to conclude that only claims that “relate to” sexual harassment are precluded from arbitration. See, e.g., Lee v. Taskus, No. SA-23-CV-01456-OLG, 2024 U.S. Dist. LEXIS 116623, *8-9 (W.D. Tex. July 2, 2024) (adopting the statutory interpretation in Mera as a “plain language interpretation of ‘relate to’” that “effectuates the statute’s purpose of discouraging the concealment of behavior involving sexual harassment and misconduct, not necessarily prohibiting non-public resolution of all legal violations by employers.”); Dixon v. Dollar Tree Stores, Inc., No. 22-CV-131S, 2023 U.S. Dist. LEXIS 37974, *16-17 (W.D.N.Y. Mar. 7, 2023) (approving of bifurcation under the EFAA because it “only applies prospectively to sexual assault and sexual harassment claims arising on and after the Act’s effective date”); Guzman v. BFS Grp. of Cal., LLC, 2024 Cal. Super. LEXIS 30912, *11 (Sup. Ct. April 16, 2024) (approving of bifurcation because “the EFAA does not

apply to claims that are wholly unrelated to sexual harassment”); Williams v. Apro, LLC, 2023 Cal. Super. LEXIS 108098, *6 (Sup. Ct. July 18, 2023) (“[n]othing in the statute suggests a plaintiff may merge allegations subject to [EFAA] with others that are not, and thereby avoid arbitration of the non-[EFAA] claims”); Bustos v. Stations Serv., 2023 Cal. Super. LEXIS 41466, *3 Sup. Ct. June 23, 2023) (requiring bifurcation of wage and hour claims under the EFAA). In Lee, the court aptly observed:

The EFAA states that no arbitration agreement shall be enforceable “with respect to a case which is filed under Federal, Tribal, or State law and relates to the [] sexual harassment dispute.” 9 U.S.C. § 402(a) (emphasis added). Some courts have assigned significance to the use of the word “case” and suggest the use of that term means all claims are precluded from arbitration in any case that includes even one claim that relates to a sexual harassment dispute. See, e.g., Johnson v. Everyrealm, Inc., 657 F.Supp.3d 535, 558-61 (S.D.N.Y. 2023); *but see id.* at 562 n.23 (noting that court did not have the opportunity “to consider the circumstances under which claim(s) far afield might be found to have been improperly joined with a claim within the EFAA”). . . . Indeed, at least one court has implicitly rejected that reading of “case.” See Mera v. SA Hosp. Grp., LLC, 675 F. Supp. 3d 442, 447-48 (S.D.N.Y. 2023). There, the court compelled to arbitration state-law and FLSA claims about wage and hour law violations, but declined to compel to arbitration of hostile work environment claims that arose from sexual orientation discrimination. Mera, 675 F. Supp. 3d at 443. The court reasoned the wage and hour claims did “not relate in any way to the sexual harassment dispute.” Mera, 675 F. Supp. 3d at 448. This is plain language interpretation of “relate to.” It also effectuates the statute’s purpose of

discouraging the concealment of behavior involving sexual harassment and misconduct, not necessarily prohibiting non-public resolution of all legal violations by employers.

Lee, 2024 U.S. Dist. LEXIS 116623 at *8-9.

Plaintiff also engages in a textual construction of what “relating to” means in the context of Section 402(a):

“[The] ordinary meaning of [related] is a broad one – ‘to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,’ and the words thus express a broad pre-emptive purpose.” The phrase “relating to” is deemed synonymous to “in connection with,” “associated with,” “with respect to,” and “with reference to.”

(Pb32 (citations ommitted).) Plaintiff’s above contention as to relatedness, however is at odds with the Section 402(a)’s language. It is well-settled that the *threshold* requirement for invoking the EFAA is an expressly pleaded sexual harassment claim, as opposed to sexual harassment allegations that merely support another cause of action (e.g., constructive discharge or retaliation). See, e.g., Mitchell v. Raymond James & Assocs., Inc., No. 8:23-CV-2341-VMC-TGW, 2024 WL 4263151, *2 (M.D. Fla. Sept. 23, 2024) (holding that “[b]ecause [the plaintiff’s] allegations do not plausibly constitute sexual harassment under federal law, her retaliation claim fails to trigger EFAA”); Rossman v. Applied Materials, Inc., No. 1:24-CV-00203-RP, 2024 WL 5065640 (W.D. Tex. Oct. 8,

2024) (holding that the EFAA did not apply because the plaintiff asserted “no allegation of sexual assault or sexual harassment” in his complaint). Under Plaintiff’s interpretation, therefore, the “relates to” requirement under Section 402(a) must be applicable to an *expressly* pleaded sexual harassment claim since she contends under Point II of her brief that *all* claims become non-arbitrable once the EFAA is triggered, which renders that language awkward and inoperative. G.S. v. Dept. of Hum. Svcs., Div. of Youth and Family Svcs., 157 N.J. 161, 172 (1999) (observing that courts “should strive for an interpretation that gives effect to all of the statutory provisions and does not render any language inoperative, superfluous, void or insignificant”).

Nevertheless, both Plaintiff and case law she relies on construe the “relates to” clause in the context of *non*-sexual harassment claims – as did the Trial Court. Indeed, the Trial Court’s interpretation of Section 402(a) reference to “relates to” not only avoids making that clause superfluous, but is also aligned with the specific intent of the EFAA – ending forced arbitration of *sexual harassment* claims.⁵

⁵ While Plaintiff cites to cases she contends support a contrary interpretation of Section 402(a), many of these courts deemed it necessary to nonetheless engage in a relatedness analysis, thus signaling significant doubt or even rejection of the “case” interpretation advanced by Plaintiff. See, e.g., Turner v. Tesla, Inc., 686 F. Supp. 3d 917, 924-25 (N.D. Cal. 2023) (examining each of the plaintiff’s claims to determine whether they were either “inherently intertwined” with or

2. The Trial Court's Interpretation of the EFAA Reconciles the Intent of the FAA and EFAA (235a).

Plaintiff argues that the Trial Court erroneously imported the FAA's mandate to bifurcate claims that are not arbitrable to the EFAA. (Pb28.) The Trial Court, however, properly relied on the FAA and EFAA's legislative history to reconcile the intent of the statutes and conclude that the EFAA only excluded sexual harassment claims from a predispute arbitration agreement. The Trial Court engaged in a reasoned analysis that "harmonize[d] the FAA and EFAA in order 'to give effect to both.'" (237a.) In doing so, the Trial Court acknowledged both the Congressional intent behind the FAA in preserving an avenue to resolve disputes outside of court "as quickly and easility as possible" (238a.) and the

"substantially related to" her sexual harassment claim) (Pb33); Newton v. LVMH Moet Hennessy Louis Vuitton Inc., No. 23-CV-10753, 2024 U.S. Dist. LEXIS 151749, *22-23 (S.D.N.Y. Aug. 23, 2024) (examining factual relatedness pursuant to Section 402(a) based on subject matter) (Pb34); Baldwin v. TMPL Lexington LLC, 2024 U.S. Dist. LEXIS 148291, *1-2 (S.D.N.Y. Aug. 19, 2024) (examining relatedness of wage-related claims to sexual harassment under Section 402(a)) (Pb25); Ding Ding v. Structure Therapeutics, Inc., 2024 U.S. Dist LEXIS 196549 (N.D. Cal., Oct. 29, 2024) (holding that the plaintiff's "non-sexual-harassment claims are based upon the same underlying facts as her sexual harassment claim" for purposes of establishing relatedness under Section 402(a)) (Pb21); Martinez v. San-I-Pak Pac., Inc., 2024 Cal. Super. LEXIS 12986, *16 (Sup. Ct. March 5, 2024) (holding that "[t]he EFAA was intended to apply to the entire case *as long as it has some nexus* to the sexual harassment dispute). These courts would not have engaged in the analysis of determining whether other claims related to the underlying sexual harassment claim if Section 402(a) required the entire action to be arbitrated simply because a sexual harassment claim was alleged.

EFAA’s policy to prevent sexual harassment claims from being forced into arbitration, rather than “*to be a catalyst for destroying predispute arbitration agreements in all employment matters.*” (239a (quoting 168 Cong. Rec. S625 (statement of Sen. Joni Ernst) (emphasis added).) On balance, the Trial Court correctly concluded that harmonization of the FAA with the EFAA required that only claims related to a sexual harassment dispute be immune from a predispute arbitration agreement. (240a.)

Plaintiff argues that so-called “claim splitting” (i.e., bifurcation) is contrary to the EFAA and will produce calamitous results for plaintiffs. (Pb28-Pb31.) This is simply untrue; bifurcation has been a longstanding requirement under 9 U.S.C. § 3 of the FAA. While “the FAA does make plain that arbitration shall not reach ‘a sexual harassment dispute or sexual assault dispute,’ . . . nothing in the FAA would impede . . . claims – which do not involve sexual harassment – from proceeding to arbitration.” Potts v. Excalibur Assocs., Inc., No. 8:22-cv-02565-PX, 2023 U.S. Dist. LEXIS 78110, *8 (D. Md. May 3, 2023).

As the Trial Court correctly observed, the “FAA mandates bifurcation of arbitrable claims from non-arbitrable claims in order to effectuate the legislative intent of enforcing arbitration agreements.” (239a.); see, e.g., KPMG LLP v. Cocchi, 565 U.S. 18, 22 (2011) (observing that “when a complaint contains both arbitrable and nonarbitrable claims, the [FAA] requires courts to ‘compel

arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums”); see also Hudson Tea Bldgs. Condo. Ass’n v. Block 268, LLC, No. A-3789-11T3, 2013 N.J. Super. Unpub. LEXIS 978, *19 (App. Div. Apr. 29, 2013) (observing that “[t]he United States Supreme Court has expressly rejected the so-called ‘doctrine of intertwining,’ pursuant to which some courts claimed they had discretion to deny arbitration of arbitrable claims ‘[w]hen arbitrable and nonarbitrable claims arise out of the same transaction, and are sufficiently intertwined factually and legally’”) (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 216-17 (1985)). Nor is there anything in either the text or the legislative history of the EFAA that unambiguously establishes that Congress intended for a “complete displacement” of this important principle. (Pb30.)

3. The Trial Court’s Interpretation of the EFAA Comports With Common Sense and Promotes Fairness (241a).

The Trial Court used common sense to reject the proposition that the EFAA excluded all claims brought with a sexual harassment claim—including those that are not “relat[ed] to the sexual harassment dispute”—from a predispute arbitration agreement. The canons of statutory construction do not require a court to forego the use of common sense in construing ambiguous statutory language. See, e.g., Roschen v. Ward, 279 U.S. 337, 339 (1929)

(observing “there is no canon against using common sense in construing laws as saying what they obviously mean”); State in Interest of K.O., 217 N.J. 83, 94 (2014) (holding that “[s]tatutory language is . . . to be given a common-sense construction”); State v. Hobokin, 768 S.W.2d 76, 77 (Mo. 1989) (observing that “[t]he rule of strict construction does not require that the court ignore either common sense or evident statutory purpose”); see also John Paul Stevens, The Shakespeare Canon of Statutory Construction, 140 U. PA. L. Rev. 1373, 1383 (1992) (“The fifth canon of statutory interpretation requires judges to use a little common sense.”).

Here, Plaintiff’s “case”-based proposed construction is hyperliteral and defies common sense. See, e.g., RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 640 (2012) (rejecting a party’s proposed statutory construction on the same grounds). The Trial Court reasoned that if the EFAA was interpreted to exclude all claims brought with a sexual harassment claim in a single case, it would allow plaintiffs to game the system and sidestep their preexisting contractual obligations to arbitrate disputes:

In the context of the foregoing, this court cannot help but think about a scenario in which an employee agrees to arbitrate all employment disputes. Thereafter, that employee files a fourteen-count complaint, which contains one count alleging sexual harassment. If the court were to refuse to bifurcate the thirteen unrelated claims, and the court subsequently was to dismiss the sexual harassment claim before trial, the court arguably

would have to retain jurisdiction over 13 counts that should have been arbitrated. This extreme example reflects an absurd outcome that this court believes should be avoided.

(241a.)

Plaintiff's proposed construction also creates the potential for either permitting individuals in multiple party cases to be unfairly benefited or restricted by one party's sexual harassment claim despite having absolutely no connection that particular claim or even litigant. It is not at all unusual for employment claims to consist of either multiple plaintiffs or defendants. Under the "case" theory urged by Plaintiff, one party asserting a sexual harassment claim would permit other plaintiffs bound by such claim to unfairly avoid their contractual obligation to arbitrate. Indeed, the Mera Court contemplated this very scenario:

The Court holds that, under the EFAA, an arbitration agreement executed by an individual alleging conduct constituting a sexual harassment dispute is unenforceable only to the extent that the case filed by such individual "relates to" the sexual harassment dispute, see 9 U.S.C. § 402(a); in other words, only with respect to the claims in the case that relate to the sexual harassment dispute. ***To hold otherwise would permit a plaintiff to elude a binding arbitration agreement with respect to wholly unrelated claims affecting a broad group of individuals having nothing to do with the particular sexual harassment affecting the plaintiff alone.***

Mera, 675 F. Supp. 3d at 448. Conversely, multiple defendants with no bearing whatsoever to the sexual harassment claims would likewise be unfairly denied the benefit of their prior bargain to arbitrate. Permitting bifurcation to continue under the EFAA avoids these thorny scenarios.

Lastly, the interpretation advanced by Plaintiff poses the danger of providing an individual a means by which to *intentionally* invalidate an arbitration agreement through fabricated sexual harassment allegations. In Lee, the district court keenly recognized that Plaintiff’s “reading of the term ‘case’ could lead to *strategic pleading* by plaintiffs to avoid arbitration of claims that have nothing to do with sexual harassment or related conduct.” Lee, 2024 U.S. Dist. LEXIS 116623 at *8-9 (emphasis added). No guardrails exist that are capable of preventing this sort of “strategic pleading” from becoming the norm. In the event the fabricated sexual harassment claim is dismissed following discovery, arbitration proceedings are simply no longer practical. See, e.g., Dean Witter Reynolds, 470 U.S. at 221 (observing that “encouragement of efficient and speedy dispute resolution” are goals of arbitration). Even the courts relied upon by Plaintiff have deemed it necessary to acknowledge this conundrum. See, e.g., Johnson v. Everyrealm, Inc., 657 F. Supp. 3d 535, 562, fn. 23 (S.D.N.Y. 2023) (holding that the court “does not have occasion here to consider the circumstances under which claim(s) far afield might be found to have been

improperly joined with a claim within the EFAA so as to enable them to elude a binding arbitration agreement”); Ruiz v. Butts Foods, L.P., No. W2023-01053-COA-R3-CV, 2025 Tenn. App. LEXIS 125, *42 fn.9 (Ct. App. Apr. 14, 2025) (same). The Trial Court properly considered the above policy-based concerns in rejecting Plaintiff’s expansive interpretation of Section 402(a). (241a.)

B. The Trial Court Correctly Determined That Counts IV Through XIV Of The Fourth Amended Complaint Do Not “Relate To” Sexual Harassment Under The EFAA (242a).

Plaintiff does not offer any rational basis for disturbing the Trial Court’s determination that Counts IV through XIV of the Complaint consist of claims untethered to sexual harassment under the EFAA.

1. The Trial Court Properly Applied the “Inextricably Intertwined” Test For Relatedness (242a).

Plaintiff’s challenge of the Trial Court’s “inextricably intertwined” test for relatedness under the EFAA misses its mark. (241a-243a.) Plaintiff asserts:

It would be ironic if courts which routinely hold that any and all claims with any *tenuous connection* to an employment contract “relate” to that contract such that a broad relating-to arbitration scope would subsume such claims, but that in the *mirror image context*, a case or a claim is only “related” to a sexual harassment dispute if, as the Trial Court held, those claims are inextricably linked” with a sexual harassment cause of action. (241a-243a.)

(Pb33 (emphasis added).)

As a preliminary matter, Defendants are unaware of *any* New Jersey court ever applying a “tenuous connection” test when determining the enforceability of an arbitration agreement in an employment context. To the contrary, New Jersey courts have made it patently clear that employees must have been made aware that they are waiving a statutory claim and/or jury trial in order to have a valid arbitration agreement. See, e.g., Quigley v. KPMG Peat Marwick, LLP, 330 N.J. Super. 252, 272 (App. Div. 2000) (holding that an arbitration agreement’s reference to “[a]ny claim or controversy . . . in any way *related to* the terms and conditions” of the plaintiff’s employment failed to create an unenforceable agreement) (emphasis added). Moreover, the term “relates to” in Plaintiff’s illustration above is not actually tenuous in either example. That is, claims that *relate to* employment as defined in an arbitration provision must be intertwined with employment to be deemed within the scope of arbitration, while claims that *relate to* a “sexual harassment dispute” under Section 402a likewise must be intertwined with sexual harassment to be non-arbitrable. Thus, Plaintiff’s example above further undermines her flawed interpretation of Section 402(a).

2. Counts IV Through XIV Do Not Share Prima Facie Elements With a Sexual Harassment Claim (242a).

The Trial Court’s use of an “inextricably intertwined” test for determining relatedness under the EFAA should be affirmed. (241a.) Under this standard, the relationship inquiry must focus on the nature of the claims asserted, not shared

factual circumstances.⁶

At oral argument the Trial Court recognized that Plaintiff's theory of relatedness was premised on nothing more than her claims relating to her prior employment:

They're related insofar as they're all derived from *her employment experience*. But a wage claim is not the same as an employment claim is not the same as a breach of contract claim, the breach of implied covenant of good faith and fair dealing. Those are – they're much different.

(T49-9 (emphasis added).) In response, opposing counsel acknowledged that not all claims for lost overtime wages and breach of the duty of good faith and fair dealing necessarily “relate to” a sexual harassment claim. (T49-15.) Opposing counsel, however, further added: “But it's the same facts, and the facts can't be determined in two different ways.” (T50-5.) This circular reasoning underscores the defect in Plaintiff's relatedness argument, which is exemplified in Point II, Subheading D: “Forcing Arbitration of Plaintiff's Non-Sexual Harassment Claims Challenging the Same Conduct as her Discrimination and Harassment Claims Would Undermine EFAA's Core Purpose.” (Pb36 (emphasis added).) The causes of action pleaded in Counts IV through XIV of the Complaint have no

⁶For example, , “use of the word ‘harassment’ alone, without supporting legal or factual allegations [in the complaint], does not bring [a] case within the ambit of 9 U.S.C. § 402.” Pepe v. N.Y. Life Ins. Co., No. 22-4005, 2023 U.S. Dist. LEXIS 20992, *10, n.19 (E.D. La. Feb. 7, 2023).

evidentiary bearing whatsoever on Plaintiff's sexual harassment narrative. If such claims were pleaded in the absence of a sexual harassment claim, not an iota of evidence relating to either pervasive/severe conduct or a hostile/abusive work environment would be admissible to a factfinder.

When properly viewed through the lens of the claims' prima facie elements, there can be no question that the causes of action pleaded in Counts IV through XIV of the Complaint are not related to Plaintiff's sexual harassment cause of action. Contrary to Plaintiff's contention, her breach of contract claims (Count VII and VIII) and her claims for breach of the Duty of Good Faith and Fair Dealing (Counts IX and X) are all contract-based claims. See, e.g., Goldfarb v. Solimine, 245 N.J. 326, 329 (2021) (breach of contract claim requires proof of the following: (i) an enforceable contract; (ii) the plaintiff performed under the contract; (iii) the defendant failed to satisfy the terms of the contract; and (iv) said breach caused a loss to the plaintiff); Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 203 (App. Div. 2003) (observing that in "every contract there is an implied covenant that neither party shall commit any act which shall destroy or injure the rights of the other party to enjoy the fruits of the contract"). Not only are the claims' prima facie elements vastly different from that of a sexual harassment claim, there are no facts *probative* to these claims that relate in any way to severe, pervasive, hostile and/or abusive conduct. See Godfrey v.

Princeton Theological Seminary, 196 N.J. 178, 181 (2008) (observing that a hostile work environment claim requires conduct that was sufficiently severe or pervasive to create a hostile or abusive workplace). Plaintiff's contention to the contrary is the same rehashed argument against bifurcation that was made prior to the EFAA and is simply misdirection.

Similarly, neither Plaintiff's intellectual property (Counts XI and XIV) nor her unfair trade-based claims (Counts XII and XIII) based on misappropriation and/or tortious interference allow for a factfinder's consideration of any alleged conduct related to a hostile and/or abusive workplace. *In fact, these causes of action do not even relate to conduct that occurred during her employment, much less harassing conduct.* These are commercial-based torts that have no bearing whatsoever on statutory sexual harassment claims. See McFarland v. Miller, 14 F.3d 912, 919 n.11 (3d Cir. 1994) (holding that "to sustain an action claiming misappropriation of the image of another, a *commercial purpose* must be present") (emphasis added). Moreover, the measurement of compensatory damages associated with such claims bears no relation to those available for a sexual harassment claim under the LAD. As such, the Trial Court's conclusion that Counts XI through XIV "do not relate" to sexual harassment should be left intact.

As the Trial Court recognized, Plaintiff's wage-based claims under the New Jersey Wage Payment and Collection Law ("NJWPCL") (Counts V and VI) and the New Jersey Equal Pay Act (NJEPA) (Count IV) also are "much different" in character from her sexual harassment claim. (D49a.); see also Mera, 675 F. Supp. 3d at 448 ("Since Plaintiff's wage and hour claims under the FLSA and the NYLL do not relate in any way to the sexual harassment dispute, they must be arbitrated, as the Arbitration Agreement requires."). Plaintiff's wage-based claims are determined through an analysis of *compensation metrics* and *payroll practices*, while sexual harassment focuses on workplace *conduct*. These causes of action are by no means related. See Bustos, 2023 Cal. Super. LEXIS 41466 at *3 (holding that the wage and hour claims "do not relate to" the plaintiff's claim for sexual harassment, "and the EFAA thus does not compel arbitration of those claims"). As such, a factfinder considering these wage-based claims will not weigh evidence relating to severe and/or pervasive conduct in the workplace.

While Plaintiff unsuccessfully contended that her NJEPA claim "relates to" her sexual harassment claim in both the underlying motion to dismiss and Plaintiff's motion for reconsideration of same, Plaintiff continues to offer no rational basis for disturbing the Trial Court's decision. Rather, Plaintiff misconstrues critical distinctions between a LAD sexual harassment claim and a NJEPA claim. That is, Plaintiff's contention that these claims are somehow

“related” for purposes of the EFAA is premised on a misunderstanding of the different evidentiary frameworks that govern them. The factual predicates for a sexual harassment claim under the LAD and a NJEPA claim are not sufficiently related, or for that matter, even similar for purposes of the EFAA.

The NJEPA (which applies to *a member of any protected class*) primarily requires only a differential in compensation, as opposed to any overt animus based on Plaintiff’s gender. See N.J.S.A. 10:5-12(t) (“It shall be an unlawful employment practice . . . [f]or an employer to **pay** any of its employees who is *a member of a protected class* at a rate of compensation, including benefits, which is *less than* the rate paid by the employer to *employees who are not members of the protected class for substantially similar work*, when viewed as a composite of skill, effort and responsibility.” (emphasis added)). Indeed, even a pay disparity among genders may be lawful if certain other factors are present, such as where “[pay] differential is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production” (among others). Id. As such, the fact-finder in a NJEPA claim does not consider animus-based factors relating to workplace conduct. See New Jersey Model Civil Jury Charge 2.24A (stating, in relevant part, that “you must keep in mind that the plaintiff does not have to prove that defendant meant to discriminate

against plaintiff because [he/she] is [insert protected class]. In other words, the plaintiff does not have to prove intent to discriminate...”). For these reasons, Plaintiff’s attempt to conflate her sexual harassment claim with her NJEPA claim for purposes of relatedness under the EFAA was properly rejected by the Trial Court.

* * *

For all of the foregoing reasons, the Trial Court’s reliance on an “inextricably intertwined” standard was in accordance with the EFAA’s statutory language and, thus, should be affirmed. See, e.g., Guzman, 2024 Cal. Super. LEXIS 30912 at *11 (holding that under the EFAA “the fourth cause of action is *inextricably intertwined* with the sexual harassment claims since those claims must be adjudicated before it can be determined that [the defendant] failed to prevent the harassment”) (emphasis added). As such, the Trial Court’s determination that Counts IV through XIV of the Complaint do not “relate to” Plaintiff’s sexual harassment claim under the EFAA should not be disturbed.

POINT II

THE TRIAL COURT CORRECTLY DETERMINED THAT THE PARTIES’ ARBITRATION AGREEMENT IS ENFORCEABLE AS A MATTER OF LAW (248a-249a).

The Trial Court’s determination that the Arbitration Agreement was neither unconscionable nor otherwise unenforceable should not be disturbed. Specifically, the Trial Court properly determined that neither the forum selection

clause nor the fee-shifting provision rendered the Arbitration Agreement unenforceable. Moreover, the arguments advanced by Plaintiff address issues reserved for the arbitrator under controlling law.

A. The Forum Selection And Fee-Shifting Provisions Are Not Facially Unconscionable (247a).

Plaintiff's argument that the forum selection clause contained in the Arbitration Agreement and the fee-shifting provision contained in the Sales Compensation Plan render the Arbitration Agreement substantively or procedurally unconscionable should be swiftly rejected. (Pb39-Pb46.)

Plaintiff first argues that the provision requiring that arbitration take place in Chicago where GRI is located is unconscionable because it will require her to leave her family and travel to Chicago for the arbitration proceeding. (D4a.) Plaintiff's argument, however, is completely misplaced. The Arbitration Agreement's forum selection clause, which requires that the arbitration take place in Chicago where GRI is located, does not render the agreement unenforceable. (Id.) Unlike in 2012 when the arbitration agreement was executed, today it is commonplace for arbitrations to be conducted virtually. Thus, an arbitration proceeding conducted virtually in Chicago does not impose any hardship whatsoever on Plaintiff, especially where it is within the arbitrator's discretion "to determine the time and place of the hearing" consistent with the

due process protocols established by the American Arbitration Association (“AAA”).

Moreover, Plaintiff’s procedural objection is premature in that the arbitrator will determine whether New Jersey law requires the arbitration take place in a locale other than what the parties agreed to in their Arbitration Agreement. See AAA Employment Rule 12(b) (noting that an agreement’s requirement as to a specific location is subject to “a determination by the arbitrator that applicable law requires a different locale”) (amended May 1, 2025). Even in the absence of this provision in the Arbitration Agreement, the issue of where the arbitration proceedings take place must nevertheless be resolved by an arbitrator. Per the AAA Employment Rules, the arbitrator may override any preference set forth in an agreement that does not comport with the AAA’s due process considerations. (Id.) The parties are located in different states and, thus, the arbitrator is required to determine the location and mode of the proceedings in accordance with due process regardless of this provision and/or any other party preference. This is routinely done in arbitrations and there is nothing unique about these circumstances. As such, this provision is not *facially* unconscionable.

Next Plaintiff argues that the unilateral fee shifting provision in the Sales Compensation Plan is unconscionable because it is a “deterrent” to litigation in

that Plaintiff may be faced with paying a large attorney fee award if she is unsuccessful at arbitration. (Pb40.) The fee-shifting provision is neither intended nor capable of negating any of the substantive remedies provided under the LAD. See N.J.S.A. 10:5-27.1. That is, there is no scenario where the fee provision can supplant the LAD's fee-shifting scheme, which provides potential fee-shifting to both parties. The requirement of providing a party with any substantive remedies afforded under the controlling statute is firmly embodied within the AAA Employment Due Process Protocol, which provides that "Arbitrators should be empowered to grant *whatever relief would be available in court under the law.*" (Emphasis added.) This requirement is further reinforced in the AAA Employment Rule relating to an arbitration award, which allows the arbitrator to award any remedy in accordance with applicable law. See AAA Employment Rule 46(a); see also Delta Funding Corp. v. Harris, 189 N.J. 28, 50 (2006) (reserving on an unconcionable determination "[b]ecause it is unclear how the arbitrator will ultimately interpret the broad cost allocation provisions of the arbitration agreement").

As such, the fee provision at issue here has no impact whatsoever on the LAD's fee-shifting requirements applicable to both employees and employers. Plaintiff's attorneys' fee entitlement under N.J.S.A. 10:5-27.1 is in no way impeded by the Sales Compensation Plan's fee-shifting provision. Likewise,

Plaintiff remains potentially liable to GRI for its fees pursuant to N.J.S.A. 10:5-27.1 should GRI prevail in demonstrating Plaintiff's claims were brought in bad faith.

Plaintiff's reliance on Mott v. Guaranteed Rate, Inc., Case No. 01-20-0004-9434 to demonstrate that the fee-shifting provision is unconscionable is misplaced for several reasons and actually serves to undercut her argument. (Pb40-Pb41.) Whether the operative fee provision was unconscionable was never at issue in Mott. The issue in Mott was instead a dispute over the breadth of the fee provision. The arbitrator in Mott interpreted the fee provision to permit granting GRI fees for its breach of fiduciary duty and Illinois Eavesdropping Act claims that were related to claims against Mott for her breach of the Sales Compensation Plan, whereas the Circuit Court of Cook County in Illinois interpreted the provision to apply much more narrowly. Further, the arbitrator in those proceedings correctly observed that the fee provision does not contain any language that would preclude an employee from receiving fees under a statutory fee-shifting claim. (192a.) In fact, Mott was awarded statutory attorneys' fees for prevailing on both her claims under the Illinois Right to Publicity Act and the Illinois Wage Payment and Collection Act, notwithstanding the Sales Compensation Plan's fee provision. (Id.) The Arbitration Agreement here does not prohibit an arbitrator from awarding

Plaintiff attorneys' fees for her LAD claims should she prevail, in the same way the arbitrator applying the same attorneys' fee provision in Mott was not precluded from awarding Mott any attorneys' fees on her claims where she prevailed.

As Defendants explained to the Trial Court, the Circuit Court of Cook County in Illinois vacated the fee award that the Mott arbitrator awarded to GRI for succeeding on its claims for breach of fiduciary duty and under the Illinois Eavesdropping Act (204a.) In vacating the attorney's fees, the Court held that *the fee provision expressly required that any subject claim relate directly to the "terms herein" of the Sales Compensation Plan, not the Arbitration Agreement:*

The fee shifting provision and the arbitration clause are not coextensive. That is apparent on the face of the agreement.

. . . .

Here the arbitrator's ruling ignored the plain meaning of the contractual language. Ignored the difference between the scope of the arbitration provision and the fee shifting provision. Writes the more restrictive language of the fee shifting provision right out of the agreement and assumes the parties' intent was different than the intent that's expressed plainly by the unambiguous language of the contract and construed the fee shifting provision broadly rather than narrowly.

(214a-215a; 30:22-24, 33:19-34:5.) Thus, the Circuit Court held that the fee provision was limited only to claims alleging or defendaing against a breach of the terms of the Sales Compensation Plan, not that the free provision itself was unconscionable. This result refutes Plaintiff's construction of the challenged fee provision within the Sales Compensation Plan.

Accordingly, the Trial Court's determination that the parties' Arbitration Agreement is not unenfoceable as a matter of law should be affirmed.

B. The Trial Court Did Not Abuse Its Discretion In Severing The Forum Selection And Fee-Shifting Provisions (247a).

Next, Plaintiff argues that by severing the forum selection and attorney fee-shifting provisions and enforcing the remainder of the Arbitration Agreement, the Trial Court has in effect re-written the parties' agreement, and endorsed some startegic overreach by GRI reagarding arbitration agreements. (Pb42.) Plaintiff's arguments related to severance, however, ignore well-settled New Jersey law and should be rejected.

As the Trial Court observed, numerous courts in New Jersey have "recognize[d] that doubts as to the scope of the arbitration are to be resolved in favor of arbitration." (243a-244a.) In response to Plaintiff's contention that the Arbitration Agreement's forum selection provision and the Sales Compensation Plan's fee-shifting provision are unconscionable, the Trial Court correctly determined that it is well-settled that these provisions are severable under New

Jersey law. (245a-248a.) In doing so, the Trial Court further referenced the severability provision within the parties' Sales Compensation Plan. (246a; D66a.)

Plaintiff offers no rational basis for disturbing this aspect of the Trial Court's decision, which is plainly based on both the parties' Sales Compensation Plan and New Jersey Supreme Court precedent. See, e.g., Delta Funding, 189 N.J. at 43-45 (recognizing the availability of severing unconscionable terms in an arbitration agreement). In response, Plaintiff speciously contends that the Trial Court's decision to sever the two challenged provisions constituted "rewriting the agreement to remove the most egregious sections rather than refusing to enforce it." (Pb40.) As noted above, Plaintiff's reliance on the wholly unrelated Mott arbitration is misplaced. Unlike in the Mott arbitration, the fee-shifting provision here was severed before the parties's arbitration proceedings thereby rendering it irrelevant. Most importantly, Plaintiff cites no controlling case law whatsoever demonstrating how the Trial Court's reliance on Delta Funding constituted reversible error.

To the contrary, it is well-settled that New Jersey law permits severability in arbitration agreements. See Delta Funding, 189 N.J. at 43-45 (approving of the severing of an unconscionable fee-shifting provision); Arafa v. Health Express Corp., 243 N.J. 147, fn. 2 (2020) (rejecting the proposition that an

unenforceable provision within an arbitration agreement cannot be severed thereby rendering the agreement enforceable); Jaworski v. Ernst & Young U.S., LLP, 441 N.J. Super. 464, fn. 8 (App. Div. 2015) (observing that “even if the fee-sharing provision was unconscionable . . . the [agreement] contains a clause providing for broad severability in the event any portion of its terms is found unenforceable”). In fact, even in the absence of a severability provision a court may nevertheless sever an unconscionable provision within an arbitration agreement. See, e.g., Roman v. Bergen Logistics, LLC, 456 N.J. Super. 157, 170-71 (App. Div. 2018) (determining that an unenforceable provision in an arbitration contract should be severed notwithstanding the absence of a severability clause).

Plaintiff’s further contention that the Trial Court’s decision to sever the forum clause and fee provision was somehow unconscionable because they constituted a “strategic overreach in contract draft” and “form[ed] an integral part of the Agreement’s arbitration scheme” also must be rejected. (Pb42-Pb46.) Plaintiff relies on a decision involving GRI out of the Northern District of California, entitled Pereyra v. Guaranteed Rate, Inc., No. 18-cv-06669-EMC, 2019 U.S. Dist. LEXIS 108940, *32, fn. 1 (N.D. Cal. June 28, 2019), in which Plaintiff contends “[t]he court cautioned that failure to reform the agreement *might* demonstrate ‘bad faith and an overarching intent to impose arbitration as

an inferior forum.” (Pb42 (emphasis added).) Plaintiff further intimates that because GRI was aware of this decision it was under some sort of duty to revise each and every similar arbitration agreement it ever entered into with every employee in every jurisdiction. (Pb43a.) Plaintiff, of course, is unable to cite to any case law in support of this preposterous contention.

Moreover, Plaintiff’s reliance on arbitration being an “inferior forum” – which is the tail wagging Plaintiff’s entire appeal – is not supported by case law. See, e.g., Delta Funding, 189 N.J. at 49 (observing that because the plaintiff’s “claims are, at their core, a form of generalized attack on arbitration as a method of dispute resolution . . . they are not persuasive”); Shearson/American Express v. McMahon, 482 U.S. 220, 231-232 (1987) (observing that “[w]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution”). To the contrary, it is well-settled that New Jersey courts *favor* arbitration, as do the federal courts.⁷ See, e.g., Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 133-34 (2020); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). In fact, this Court has observed a “strong public policy in our state favoring arbitration as a

⁷ Indeed, the Trial Court also cited cases supporting this proposition, which likely accounts for the Trial Court disregarding the identical argument below. (243a-244a.)

means of dispute resolution and requiring a liberal construction of contracts in favor of arbitration.” Alamo Rent-A-Car, Inc. v. Galarza, 306 N.J. Super. 384, 389 (App. Div. 1997).

Plaintiff relies solely on an unpublished decision to assert that “severability here would undermine rather than advance New Jersey’s public policy favoring arbitration.” (Pb43.) Plaintiff further contends *without any evidentiary basis whatsoever* that such “unconscionable terms successfully deter some employees from pursuing claims.” (Pb44.) That is, that there is purportedly some sort of grand conspiracy to utilize unconscionable terms in arbitration agreements in the hopes that potential claimants are somehow scared away.⁸ Plaintiff, however, wholly ignores the two-sided nature of *agreements* and that judicial tools such as severability permit contracting parties to bilaterally enforce the remainder of their agreement. Case in point, the severability provision here is contained in the parties’ Sales Compensation Plan that sets forth Plaintiff’s compensation structure. The severability of unenforceable terms in an agreement permits both contracting parties to continue to enjoy the fruits of their respective bargains. Clearly, it would not be Plaintiff’s preference to invalidate *that agreement* in the event one of its terms is deemed unenforceable.

⁸ Plaintiff contends she does not understand the arbitration provision, much less, was somehow deterred by it. (101a.) Nor did Plaintiff pay any attention to it when executing the Sales Compensation Plan. (Id.)

Here, the Trial Court also utilized severance to preserve the parties' contractual intent: "The clear language of the Agreement and interpretive case law support severance of an unenforceable provision such that the remainder of the Agreement, *including arbitration*, is enforced." (246a.)

In sum, the Trial Court's exercise of discretion to sever the forum and fee provisions was in accordance with controlling precedent and, thus, should not be disturbed.

C. The EFAA Does Not Require That Parties Amend An Otherwise Enforceable Arbitration Agreement (Pb41).

Plaintiff contends that GRI was obligated to "amend the Agreement or inform Plaintiff that due to the EFAA, sexual harassment claims were no longer required to be arbitrated." (Pb41-Pb42.) No such duty or obligation exists. As an initial matter, Plaintiff did not raise this baseless argument before the Trial Court and, therefore, should not be permitted to do so on appeal. See, e.g., Airwork Serv. Div. v. Director, Division of Taxation, 4 N.J. Tax 532, 533 (App. Div. 1982) (observing that "we need give no consideration here to plaintiff's contention, raised for the first time on this appeal"). Moreover, Plaintiff's contention that GRI was legally obligated to contact *every* employee with whom it had ever entered into an arbitration agreement to either provide notice of a change in the law or amend their agreements is simply nonsensical. The Trial Court did not err in rejecting this argument as a matter of law. See, e.g., N.J.

Mfrs. v. O’Connell, 300 N.J. Super. 1, 7 (App. Div. 1997) (observing the a “general principle[] of contract law . . . is that a contract, valid at its inception, is not invalidated or eviscerated by a subsequent change in decisional or statutory law”).

* * *

Accordingly, Plaintiff has not demonstrated (i) that the Trial Court erred in finding the parties’ Arbitration Agreement is enforceable and/or (ii) that invoking the severability provision constitutes reversible error.

POINT III

THE TRIAL COURT ERRED IN DETERMINING THAT PLAINTIFF’S LAD GENDER DISCRIMINATION CLAIM SUFFICIENTLY “RELATES TO” SEXUAL HARASSMENT TO BE NON-ARBITRABLE UNDER THE EFAA (241a).

Notwithstanding the Trial Court’s well-reasoned analysis of the text and legislative history of Section 402(a) of the EFAA, Defendants respectfully submit that the Trial Court erred in concluding that Count I of the Complaint alleging gender discrimination “relates to” sexual harassment under Section 402(a). While the Trial Court correctly applied the “relates to” clause of Section 402(a) to Plaintiff’s *other* non-sexual harassment claims, Defendants contend that it cast too large a net under the EFAA with regard to her gender discrimination claim. For this reason, this aspect of the Trial Court’s decision should be modified by this Court.

First and foremost, the fact that Congress specifically refers to *sexual harassment* disputes instead of generic *discrimination* in the title of the EFAA should not be understated. “[D]iscrimination refers to bias in the exercise of official actions on behalf of the employer, and harassment refers to bias that is expressed or communicated through interpersonal relations in the workplace.” Pollock v. Tri-Modal Distribution Servs., Inc., 281 Cal. Rptr. 3d 498, 505 (2021). New Jersey courts have also noted the difference between these two distinct causes of action:

In Erickson, the New Jersey Supreme Court considered a claim of employment discrimination based on disparate treatment that allegedly resulted in a tangible economic loss to the plaintiff, *i.e.*, an “adverse employment decision.” Such a claim differs markedly from one such as that presented here by plaintiff DeCapua of harassment that creates “working environments so heavily polluted with discrimination” as to destroy workers’ “emotional and psychological stability.” ***Logically, therefore, the prima facie elements of these two separate strains of “the cancer of discrimination” may differ as well.*** Adverse employment decision claims inherently require a comparison between how the plaintiff and “someone else” of a different race, gender, religion, or national origin is treated. Another, occupying a different status, must get the job or the promotion in order for plaintiff to establish a prima facie case. Hostile work environment claims do not require this comparison, since as previously noted, they may depend on an analysis of individual relationships.

DeCapua v. Bell Atl.-N.J., Inc., 313 N.J. Super. 110, 119-20 (Law Div. 1998) (citations omitted). These differences are also reflected in the distinct charges provided to a jury for each of these causes of action. Compare N.J. Civil Model Jury Charge 2.25 (harassment) with N.J. Civil Model Jury Charge 2.21 (disparate treatment discrimination). Further, a harassment claim is factually distinct from a disparate treatment discrimination claim in that there is an affirmative defense available to such conduct where no such defense exists for a discrimination claim. Id. In sum, both the evidentiary framework and nature of proofs at issue differ greatly between these two causes of action.

As set forth above, if Congress intended to cast a larger net it easily could have done so through a myriad of ways, such as merely referring to “gender” or generic discrimination instead of *expressly* referencing “the sexual assault dispute or the sexual harassment dispute” in the conclusion of Section 402(a). See, e.g., Jinadasa v. Brigham Young Univ.-Haw., No. 14-00441 SOM/BMK, 2016 U.S. Dist. LEXIS 8019, *34 (D. Haw. Jan. 25, 2016) (the “[Hawaii] legislature specifically referred to sexual harassment and sexual assault as distinguishable from sex discrimination in general”). Because Congress did not do so, the logical inference is that the EFAA deliberately repeated references to “sexual harassment” in the EFAA’s title and statutory language to emphasize the fact that the statute applies to claims related specifically to sexual

harassment. See Loper Bright Enters. v. Raimondo, 603 U.S. 369, 393 (2024) (observing that statutory text “means what it says”); Dahda v. United States, 138 S. Ct. 1491, 1498 (2018) (observing that a “statute means what it says”). There can be no dispute that the only conduct in Section 402(a)’s crosshairs are specific claims of sexual harassment and sexual assault, as opposed to more generic conduct impacting terms and conditions of employment. See Marks v. Lockheed Martin Corp., No. 3:12-CV-0042-G, 2012 U.S. Dist. LEXIS 133277, *17 (N.D. Tex. Sep. 18, 2012) (referring to an allegation based on the “terms and conditions of employment” as a “generic complaint of discrimination”).

Instead of the interpretation of “relates to” advanced by Plaintiff that is capable of swallowing the rule, the Trial Court set forth the proper test by requiring non-sexual harassment claims be “inextricably intertwined” to sexual harassment or assault. (241a.) That said, the test for being inextricably intertwined must demand more than some mere categorical association or common nexus (i.e., working conditions) to be meaningful in this context. See, e.g., Oliver v. Amazon.Com Servs., LLC, No. SAG-22-1400, 2022 U.S. Dist. LEXIS 147859, *6 (D. Md. Aug. 16, 2022) (observing that “in its most general sense, *every* employment discrimination claim deals in some way with ‘working conditions,’ and that generic phrase cannot be read as expansively as Plaintiff

suggests without nullifying the purpose of administrative exhaustion”) (emphasis added).

At a minimum, this test must center on *facts*, as opposed to categorical designations. See, e.g., Dixon, 2023 U.S. Dist. LEXIS 37974 at *16-17 (holding that the “[EFAA] does not preclude arbitration of claims under other sexual and age discrimination claims, such as [the plaintiff’s] allegations of disparate treatment because of her age and gender, that do not allege sexual assault or harassment”). The court in Dixon recognized that discriminatory treatment based on gender – although equally reprehensible – is markedly different in character than a sexual harassment claim. That is, *disparate* treatment may not be factually related to *abusive* treatment, even when both share a relationship to gender. See, e.g., Singh v. Meetup LLC, Case No. 23-CV-9502, 2024 WL 4635482, *3 (S.D.N.Y. Oct. 31, 2024) (observing that “behavior Singh allegedly experienced at Meetup LLC, while undoubtedly gender discrimination, did not qualify as sexual harassment under state statute [and, therefore] [h]er claims thus do not fall under the EFAA’s exception to the FAA, and thus are subject to mandatory arbitration”).

In order to *relate to* a sexual harassment claim under the EFAA, a non-sexual harassment claim should factually should share the same factual nexus from an evidentiary standpoint. By way of example, Defendants concede that

Count III for constructive discharge “relates to” sexual harassment for purposes of the EFAA because that claim hinges on Plaintiff demonstrating conduct constituting sexual harassment to prevail. That is, Plaintiff must demonstrate that the alleged abusive treatment towards her was “not merely ‘severe or pervasive’ conduct, but conduct that is so intolerable that a reasonable person would be forced to resign rather than continue to endure it.” Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 28 (2002). As such, a harassment claim is typically subsumed within a constructive discharge claim from an evidentiary standpoint. See Pa. State Police v. Suders, 542 U.S. 129, 154 (2004) (observing that “a constructive discharge is more akin to ‘an aggravated case of . . . sexual harassment or hostile work environment’”). Because the proofs submitted to the jury in support of each of these claims are to some degree overlapping, they are *inextricably intertwined* for purposes of the EFAA.

Likewise, a retaliation claim based on sexually harassing conduct may meet this test if the sexual harassment constitutes a *factual predicate* for that cause of action. See, e.g., Guzman, 2024 Cal. Super. LEXIS 30912 at *11-12 (recognizing that a retaliation claim premised on harassing conduct is subject to the EFAA). Stated differently, where a retaliation claim is based on the alleged harassment (like in Guzman), “the retaliation would not have occurred but for

the sexual harassment.” Id. Thus, conduct constituting *but for* causality would meet the test for being inextricably intertwined under the EFAA. Id.

Here, Count I of the Complaint does not satisfy the above standards from a factual standpoint to be subject to EFAA. The Complaint makes clear that Count I is grounded on disparate treatment relating to the terms of Plaintiff’s compensation under the Sales Compensation Plan. (55a-59a; ¶¶ 19-36, “Gender-based Pay Discrimination”.) Specifically, Plaintiff contends she was denied a “retention bonus” on account of her gender. (Id. at ¶ 30.) Plaintiff contends that this was the result of a “policy and practice” of GRI concerning the “Chairman’s Circle” designation, which she contends entitled her to an increased “commission formula.” (Id. at ¶¶ 31-32.) Plaintiff asserts that the policy and practice was applied to males and females differently, as opposed to her individually. (Id. at ¶ 26.) Under Count I, Plaintiff specifically asserts “Defendants violating [sic] Plaintiff’s rights under the NJLAD by failing to pay Plaintiff the same compensation as Plaintiff’s male counterparts received, including with respect to the Chairman’s Circle commission rate enhancement, and with respect to retention bonuses.” (Id. at ¶ 83.)

As demonstrated through Plaintiff’s own allegations, the resolution of her disparate treatment claim in Count I will focus solely on GRI’s policy and practice concerning retention bonuses and commission formulas on a *company-*

wide basis. As such, this will require analysis of both the Sales Compensation Plan and any commission-based incentive practices, such as the “Chairman’s Circle.” This claim will presumably focus largely on comparator-based data for purposes of differential treatment based on gender on a systemic basis. None of the above proofs bears any relationship, much less is inextricably intertwined, with Plaintiff’s allegations that she was subjected to sexually-charged comments and other abusive treatment she contends that she *personally* endured by Defendants.

Nowhere in its decision did the Trial Court consider fact-based differences discussed above between Counts I and II. Defendants respectfully submit that this omission and the determination that Count I “relates to” Count II under the EFAA, constitutes reversible error.

POINT IV

THE TRIAL COURT ERRED IN CONCLUDING THAT PLAINTIFF’S SEXUAL HARASSMENT CLAIM WAS NOT BARRED BY THE LAD’S TWO-YEAR STATUTE OF LIMITATIONS, IMPROPERLY TRIGGERING THE EFAA (230a).

Defendants respectfully submit the Trial Court erred in holding Plaintiff’s sexual harassment-related allegations that occurred between 2015 and 2019 (*and which culminated in Plaintiff allegedly complaining to Human Resources of harassment*) constituted indiscrete acts deemed timely by application of the

CVR under the LAD’s two-year statute of limitations. (230a.) The Trial Court further erred by alternatively construing the conclusory and amorphous allegations in paragraphs 48, 49, 54, 90, 92 and 93 to support a viable sexual harassment claim in Count II of the Complaint. (239a.)

In the absence of these errors, the EFAA would not have applied to this action at all because Plaintiff’s untimely claim for sexual harassment by her former supervisor clearly arose and/or accrued under New Jersey law *prior the EFAA’s effective date of March 3, 2022*. See Yost v. Everyrealm, Inc., 657 F. Supp. 3d 563, 577 (S.D.N.Y. 2023) (observing that to qualify as a “sexual harassment dispute” under EFAA, the claim must be capable of surviving a motion to dismiss on other grounds). Accordingly, the Trial Court erred by not holding that the alleged harassment was untimely under the LAD’s two-year statute of limitations and therefore outside the ambits of the EFAA. See, e.g., Rotkiske v. Klemm, 140 S. Ct. 355, 364 (2019) (observing that a claim accrues “when the statute of limitations commences to run”).

A. The Trial Court Erred By Concluding That The Conduct Alleged To Have Occurred Between 2015 Through 2019 Is Rendered Timely By The CVR (230a).

Plaintiff’s sexual harassment claim, which was originally filed on February 21, 2024, is time-barred because she relies on *discrete, independent forms* of sexual harassment that purportedly occurred between 2015 to 2019, at

which time the LAD’s two-year statute-of-limitations clock began ticking. See Roa v. Roa, 200 N.J. 555, 556-70 (2010) (distinguishing between discrete and non-discrete actions for purposes of triggering the LAD’s two-year statute-of-limitations under the CVR). Contrary to the Trial Court’s ruling, the CVR does not permit these allegations to potentially be timely in perpetuity.

In Roa, the New Jersey Supreme Court distinguished between “discrete discriminatory acts” and non-discrete acts for the purpose of establishing the availability of the CVR – a narrow “equitable exception to the statute of limitations.” Id. at 566. Applying United States Supreme Court precedent, Roa held that individually actionable allegations (i.e., discrete acts) cannot be aggregated for purposes of the CVR but, rather, are ***independently actionable*** for purposes of the statute-of-limitations. Id. at 567 (emphasis added). The Court explained:

Defendants counter that the continuing violation theory cannot be applied to sweep in an otherwise time-barred discrete act. We agree. As we have said, the continuing violation theory was developed to allow for the aggregation of acts, each of which, in itself, might not have alerted the employee of the existence of a claim, but which together show a pattern of discrimination. In those circumstances, the last act is said to sweep in otherwise untimely prior non-discrete acts.

What the doctrine does not permit is the aggregation of discrete discriminatory acts for the purpose of reviving an untimely act of discrimination that the victim knew or should have known was actionable.

Each such “discrete discriminatory act starts a new clock for filing charges alleging that act.

Id. at 569-70 (emphasis added) (citations omitted).

“[I]n direct contrast to discrete acts, a single [non-discrete act] may not be actionable on its own.” National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002). Rather, it is the cumulative effect of a series of non-discrete acts from which a hostile work environment claim arises, providing the rationale for application of the CVR. Id. As such, the CVR is an equitable doctrine in that its application is limited to situations where a particular act in isolation is *reasonably* incapable of providing notice of an actionable harassment claim as a matter of law. Roa, 200 N.J. at 569-70. Importantly, however, the CVR is not intended to restart “a new clock” for each and every act of harassment sustained by an employee. See Morgan, 536 U.S. at 113 (holding that “[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act” and that any related claim “must be filed within the [statutorily prescribed] time period after the discrete discriminatory act occurred”). Thus, the distinction between discrete and indiscrete acts are critical to the application of the CVR. See, e.g., Dyer v. N.J. Tpk. Auth., No. A-4313-17T3, 2020 N.J. Super. Unpub. LEXIS 1491, *29-30 (App. Div. July 24, 2020) (affirming the trial court’s decision “that plaintiff alleged discrete acts occurring earlier than March 5, 2012 and that her claims arising from such conduct are time-barred”); Castro v. Cty.

of Bergen, No. A-1903-14T1, 2016 N.J. Super. Unpub. LEXIS 616, *19 (App. Div. Mar. 22, 2016) (same).

The Third Circuit applied this CVR standard to harassment allegations with similar emphasis on the discrete/indiscrete nature of the allegations. See O'Connor v. City of Newark, 440 F.3d 125, 127 (3d Cir. 2006) (observing that discrete acts “must be raised within the applicable limitations period or they will not support a lawsuit” such that discrete acts “are not actionable if time barred, even when they are related to acts alleged in timely filed charges”); see also Nicolas v. Trenton Bd. of Educ., No. A-4039-21, 2024 N.J. Super. Unpub. LEXIS 75, *20 (App. Div. Jan. 17, 2024) (observing that “‘individually actionable allegations cannot be aggregated’ for purposes of the continuing violation doctrine and must be asserted within their individual limitations periods”) (quoting O'Connor, 440 F.3d at 127). The Third Circuit further observed that “there is not a single vote on the [Morgan] Court for the proposition that *individually actionable discrete acts* may support suit outside the limitations period if they are aggregated and labeled as a hostile environment claim.” Id. at 129 fn.6. In sum, a discrete violation of the LAD is independently actionable and, thus, triggers its own statutory clock for purposes of the statute of limitations.

Here, the Complaint establishes that the earliest alleged statement supporting Plaintiff's hostile work environment claim was made in December 2015 – *nearly nine years* prior to Plaintiff filing this action. Plaintiff contends that her supervisor made the following sexually vulgar comment to her upon their first meeting in 2015: "You should have known better than to let some guy's d**k come inside you." (80a, ¶ 42.) The Trial Court erred by concluding that the untimely conduct alleged by Plaintiff was neither independently actionable nor *reasonably* capable of putting her on notice of a sexual harassment claim. (230a.) Specifically, the Trial Court held that the Plaintiff pleaded a continuing violation "because much of the conduct in the Complaint might not have been readily identifiable as harassment at the time it occurred." (*Id.*) The Trial Court, however, did not explain how the meaning and/or context of the allegedly vulgar comment above was somehow illuminated by the passage of time. This alleged comment is the gravamen of Plaintiff's sexual harassment claim. Indeed, Plaintiff amended her Complaint solely to insert this language to emphasize the vulgarity of this alleged conduct as constituting actionable harassment, which is intimated in both paragraphs 42 and 90 of the Complaint to constitute *actionable harassment*.

Plaintiff further contends that "during her tenure, Lamkin was regularly abusive to [her], regularly screaming at her and using gender-based and

demeaning slurs to refer to [her],” and that she complained about it to Human Resources *in 2019*. (81a, ¶¶ 48 and 51.) Thus, the Complaint confirms that the preceding allegations are intended to set forth various forms of discrete harassment occurring from 2015 to 2019, when Plaintiff allegedly “*complained* to GRI’s Human Resources Department regarding Defendant Lamkin’s “abusive behavior.” (*Id.*, at ¶ 51.) As such, the Complaint squarely refutes the Trial Court’s conclusion that the alleged conduct “might not have been readily identifiable as harassment at the time it occurred.” Instead, the Complaint confirms that these allegations are intended to set forth various forms of discrete harassment occurring from 2015 to 2019, when Plaintiff allegedly “complained to GRI’s Human Resources Department regarding Defendant Lamkin’s [allegedly] abusive behavior.” (*Id.*)

Moreover, there are no further assertions setting forth specific allegations and/or their dates to support a timely hostile work environment claim in the Complaint (*i.e.*, all of Plaintiff’s *specific* allegations fall outside the LAD’s two-year statute of limitations period). Instead, Plaintiff merely adds that “Lamkin’s persistent and pervasive abuse continued through the end of Plaintiff’s tenure with Defendant Guaranteed Rate” as an apparent catch-all effort to resurrect her untimely allegations. (*Id.* at ¶ 54.) This sort of innocuous and conclusory

assertion falls far short of establishing a continuing violation of a hostile work environment.

Importantly, the Complaint itself makes clear that the allegations in paragraphs 39 through 47 consist of *discrete, independently actionable* acts of sexual harassment under the Morgan/Roa framework. There is no ambiguity to the severity and/or hostility of this alleged conduct nor is any intended. As noted, Plaintiff specifically amended her Complaint to reference the alleged 2015 statement by Lamkin and describes it as an “outrageously offensive sexual comment.” (86a, ¶ 90.) It is also no coincidence that Plaintiff further describes this alleged harassing conduct by reciting the prima facie elements of a hostile work environment claim utilizing the following descriptors: “sexually explicit,” “offensive terms,” “outrageous, offensive and unwelcome,” and “abusive.”

The New Jersey Supreme Court has repeatedly observed that even a single utterance is capable of constituting a discrete act of harassment. See, e.g., Taylor v. Metzger, 152 N.J. 490, 501 (1998) (observing that “a single utterance” is capable of creating a hostile work environment); Cutler v. Dorn, 196 N.J. 419, 440 (2008) (same); see also Lehmann v. Toys-R-Us, 132 N.J. 587, 606-07 (1993) (observing that “it is certainly possible” that a single incident can be sufficiently severe so that it makes the work environment hostile to a reasonable woman); Leonard v. Metro. Life Ins. Co., 318 N.J. Super. 337, 345 (App. Div.

1999) (observing that “[e]ven a single derogatory remark may be sufficiently severe to produce a hostile work environment”). Moreover, it is well-settled that the severity of a harassing remark allegedly made by an alleged supervisor is “exacerbated” for purposes of constituting harassment. See, e.g., Rios v. Meda Pharm., Inc., 247 N.J. 1, 11 (2021) (holding that “the severity of a remark can be ‘exacerbated’ when it is uttered by a supervisor); Leonard, 318 N.J. Super. at 345 (noting that “the severity of the remarks was underscored by the fact that they were uttered by plaintiff’s supervisor, who has a unique role ‘in shaping the work environment’ and preventing and rectifying invidious harassment in the workplace”).

In sum, the Trial Court committed reversible error when applying the CVR to the above alleged conduct thereby permitting it to constitute a timely sexual harassment claim. See, e.g., Bolinger v. Bell Atl., 330 N.J. Super. 300, 307-09 (App. Div. 2000) (rejecting a claim that discriminatory treatment constituted a continuing violation over a seven-year period because this “did not arise as the result of continuously inflicted, albeit discrete and individual injuries that, taken together, comprised a single tortious act”). Indeed, Plaintiff’s own Complaint demonstrates that she “knew or should have known [this alleged conduct by her supervisor] was actionable,” which is the sine qua non of the CVR. Roa, 200 N.J. at 569; see also Brennan v. State, No. A-3119-07T3, 2009 N.J. Super.

Unpub. LEXIS 1920, *17 (App. Div. July 24, 2009) (holding that “to the extent that plaintiff believed [a reduction of his job duties] was a discriminatory act within the larger hostile work environment at DHS, he was obligated to commence his suit within two years of the events” by the CVR). Plaintiff cannot contend that her untimely allegations of sexual harassment did not constitute discrete harassment due to insufficient notice because she admittedly complained of this alleged harassment as early as 2019, a relevant fact which is not referred to in the Trial Court’s decision. See, e.g., Nicolas, 2024 N.J. Super. Unpub. LEXIS 75 at *20 (rejecting the CVR because the “[p]laintiff knew these allegedly discriminatory acts could be actionable, as demonstrated by his filing the 2011 Law Division complaint and multiple EEOC complaints regarding similar if not identical claims”); Porcaro v. Twp. of Rochelle Park, No. A-1802-19, 2021 N.J. Super. Unpub. LEXIS 2813, *22 (App. Div. Nov. 16, 2021) (observing that “[a] key factor in determining whether acts of discrimination were discrete or connected is ‘permanence,’ meaning ‘whether the nature of the violations should trigger *an employee’s awareness of the need to assert her rights* and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate’”) (emphasis added).

Accordingly, Plaintiff should not be permitted to rely on the alleged conduct of 2015 to 2019 to support her sexual harassment claim in Count II of the Complaint.

B. The Trial Court Erred in Applying the EFAA to Plaintiff's Time-Barred Sexual Harassment Claims (233a).

The statutory note to the EFAA establishes that “[t]his Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act,” which was March 2022. Pub. L. 117-90 § 3. “This statutory note is ‘congressionally enacted text’ and provides the legal evidence of the law.” Castillo v. Altice USA, Inc., No. 1:23-cv-05040 (JLR), 2023 U.S. Dist. LEXIS 224924, *16-17 (S.D.N.Y. Dec. 14, 2023). As such, a sexual harassment claim that either arises or accrues prior to March 2022 is not within the EFAA’s reach. Further, sexual harassment claims under the LAD are subject to a two-year statute of limitations. Montells v. Haynes, 133 N.J. 282, 287 (1993).

As discussed above, Plaintiff’s sexual harassment allegations are based on discrete, independent instances of sexual harassment that purportedly occurred between 2015 to 2019. As a result, the Trial Court erred in applying CVR to Plaintiff’s sexual harassment claims, making them time-barred under the LAD. Because they cannot invoke CVR, the alleged instances of sexual harassment predate the enactment of the EFAA, making it inapplicable to Plaintiff’s sexual

harassment claims. Thus, Plaintiff's sexual harassment claims are subject to the parties' arbitration agreement and cannot separately be litigated in court.

C. The Trial Court Further Erred By Alternatively Ruling That The Conclusory Conduct Alleged In Paragraphs 48, 49, 54, 90, 92 And 93 Supports A Viable Sexual Harassment Claim (229a).

The Trial Court further erred in alternatively holding that *even in the absence of the untimely allegations above*, Plaintiff nevertheless pleaded an actionable claim of sexual harassment. (229a.) Specifically, the Trial Court relies on paragraphs 48, 49, 54, 90, 92 and 93 of the Complaint to support its holding. (81a and 86a.) Defendants respectfully submit that in the absence of the untimely allegations above, Plaintiff's remaining harassment-related allegations fall short of supporting an actionable claim for sexual harassment. As such, this aspect of the Trial Court's decision should be reversed.

"[T]he essential facts supporting [the] plaintiff's cause of action must be presented in order for the claim to survive; conclusory allegations are insufficient in that regard." AC Ocean Walk, LLC v. Am. Guarantee & Liab. Ins. Co., 256 N.J. 294, 311 (2024). The Trial Court erred in finding that this standard was met here. The paragraphs upon which the Trial court relied simply do not allege the "essential facts" necessary to plead a viable cause of action for sexual harassment. For example, paragraph 48 does not establish any timeline for the *subsequent* conduct that is alleged therein. The section of the Complaint

– subtitled “Sexual and Gender-Based Hostile Work Environment” – is arranged in chronological order. (80a-82a.) Based on its positioning in the Complaint and the alleged conduct preceding it, the conduct alleged in paragraph 48 occurred *prior to* the Human Resources complaint allegedly made by Plaintiff in 2019, which is alleged in paragraph 51. More importantly, this conclusory allegation fails to provide Defendants with sufficient notice of the subject matter, frequency or precise nature of the alleged conduct to even *surmise* whether a continuing violation is alleged. See Bolinger, 330 N.J. Super. at 307 (observing that subject matter, frequency and nature of violations must be analyzed to determine whether a continuing violation occurred). Indeed, the continuing violation standard is not met through simply pleading certain conduct “regularly” occurred. Id. (holding that harassment must be “more than the occurrence of isolated or sporadic acts of intentional discrimination” but, instead “a continuing pattern of discrimination” to constitute a continuing violation); see also Dyer, 2020 N.J. Super. Unpub. LEXIS 1491 at *30 (observing that after determining that discrete acts were time-barred “any allegations of conduct occurring within the statute of limitations did not reveal a pattern of tortious conduct sufficient to warrant application of the continuing violation doctrine”).

Plaintiff’s generic references to conduct such as “gender-based and demeaning slurs” is also insufficient to support actionable sexual harassment.

“[P]leadings reciting mere conclusions without facts . . . do not justify a lawsuit.” Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1998). Defendants have no factual basis whatsoever to evaluate the specific nature of these allegations. That is, “a hostile work environment discrimination claim cannot be established by . . . comments which are ‘merely offensive.’” Mandel v. UBS/Painewebber, Inc., 373 N.J. Super. 55, 73 (App. Div. 2004); see also Neuwirth v. State, 476 N.J. Super. 377, 393 (App. Div. 2023) (observing that “[r]epeated, conclusory allegations . . . are mere recitations of the applicable legal standard, not factual assertions” for pleading purposes). Indeed, none of the paragraphs referenced by the Trial Court permit Defendants to determine whether the alleged harassment was “sufficiently severe or pervasive to alter the conditions of employment and to create a hostile or intimidating work environment.” Lehmann, 132 N.J. at 611. Paragraph 49 merely repeats the same generic allegations as to *other women*, none of which are identified in the Complaint.

Paragraph 54 of the Complaint also merely states that the alleged generic “abuse continued through the end of Plaintiff’s tenure with [GRI].” Given its chronological position in the Complaint, this conclusory description is intended to cover *the entire tenure of Plaintiff that was within the LAD’s two-year statute of limitations*. At this point in the Complaint’s chronology, however, Plaintiff

still has not identified a *specific* instance of harassing conduct that is timely, much less rising to the level of actionable harassment.

Lastly, paragraphs 90, 92 and 93 are merely recitals of the prima facie standard for a hostile work environment under Lehmann. In fact, paragraph 92 merely asserts that the individual Defendants aided and abetted a “gender-based hostile work environment” without any factual basis whatsoever. The allegations in these paragraphs are far more amorphous than “self-serving conclusory statements based largely on unsubstantiated inferences and feelings” that this Court has rejected. Dyer, 2020 N.J. Super. Unpub. LEXIS 1491 at *33. As such, the Trial Court’s reliance on paragraphs 48, 49, 54, 90, 92 and 93 of the Complaint to support its holding that Plaintiff pleaded an actionable sexual harassment claim should be reversed. If the sexual harassment claim is reversed, then the EFAA does not apply to any of Plaintiff’s claims.

* * *

In conclusion, the Trial Court’s decision that the untimely allegations of sexual harassment are deemed timely by the CVR and alternatively that the conclusory allegations in paragraphs 48, 49, 54, 90, 92 and 93 support a viable sexual harassment claim in Count II of the Complaint should be reversed.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court deny Plaintiff's appeal in its entirety and grant the relief sought in their cross-appeal on the grounds stated above.

Dated: May 9, 2025

By: s/ Robert M. Pettigrew
Carmen J. DiMaria
Robert M. Pettigrew

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Appellant/Cross-Respondent,

v.

GUARANTEED RATE, INC., and
JOSEPH MOSCHELLA, and JON
LAMPKIN

Respondents/Cross-Appellants.

SUPERIOR COURT OF NEW
JERSEY APPELLATE DIVISION
Docket No. A-000921-24T2

SUPERIOR COURT OF NEW
JERSEY LAW DIVISION – MORRIS
COUNTY
Docket No.: MRS-L-360-24

Sat Below: Hon. Noah Franzblau, J.S.C.

Appellant/Cross-Respondent's
Opposition and Reply Brief

**PLAINTIFF-APPELLANT/CROSS-RESPONDENT'S
REPLY/OPPOSITION BRIEF IN SUPPORT OF HER APPEAL AND IN
OPPOSITION TO CROSS-APPEAL FROM THE SUPERIOR COURT OF
NEW JERSEY FOR MORRIS COUNTY LAW DIVISION'S (HON. NOAH
FRANZBLAU, J.S.C.) SEPTEMBER 23, 2024 ORDER COMPELLING
ARBITRATION IN PART AND NOVEMBER 8, 2024 ORDER DENYING
RECONSIDERATION**

Submitted June 30, 2025

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff incorporates by reference the Statement of Facts and Procedural History set forth in her opening brief.

PRELIMINARY STATEMENT

This case presents a straightforward question of statutory interpretation: When Congress enacted the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFAA"), did it intend to exempt entire "cases" containing sexual harassment claims from forced arbitration, or did it intend courts to parse individual claims within those cases? The answer lies in Congress's deliberate choice of language. The EFAA invalidates arbitration agreements "with respect to a case" that "relates to" a sexual harassment dispute—not with respect to "claims" or "causes of action."

The trial court's decision to compel arbitration of Counts IV through XIV represents a fundamental misreading of the EFAA that has been rejected by an overwhelming consensus of federal courts. Seventeen federal district courts have held that the EFAA's plain language exempts entire cases from arbitration when they include sexual harassment claims. Only three outliers support Defendants' position. This is not a close question.

Defendants' brief reveals the practical absurdity of their interpretation. Under their view, a supervisor who sexually harasses an employee on Monday and denies

her a promotion on Tuesday creates two separate legal tracks—one public, one private—for what any reasonable person recognizes as unified discriminatory conduct. This fragments justice, forces victims to prosecute related claims in different forums, and allows employers to shield most discrimination from public accountability while only the most egregious sexual comments see daylight. Congress enacted the EFAA precisely to prevent such gamesmanship.

Defendants' cross-appeal fares no better. They seek review of an interlocutory order denying their motion to dismiss Count II—a prototypical non-appealable decision over which this Court lacks jurisdiction. Even if the Court could reach the merits, the trial court correctly found that McDermott's sexual harassment claim is timely under the continuing violation doctrine. Allegations that harassment continued through November 2022 for a complaint filed less than two years later are more than sufficient to survive a motion to dismiss, regardless of when the pattern began. And their argument that the Trial court erred in finding claims of gender discrimination based on disparate treatment sufficiently intertwined with Plaintiff's sexual harassment claim to warrant application of the EFAA even under the Trial court's erroneous claim-by-claim relatedness analysis should be rejected regardless of whether the Court finds the Trial court erred in construing the EFAA.

The EFAA represents Congress's recognition that forced arbitration was systematically failing victims of workplace sexual misconduct. Its broad language—

protecting entire "cases," not individual "claims"—reflects a deliberate policy choice to ensure comprehensive public accountability. For the reasons set forth in Plaintiff's opening brief, and below, this Court should honor that choice by reversing the trial court's order compelling arbitration and dismissing Defendants' improper interlocutory appeal of the trial court's denial of Defendants' motion to dismiss.

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN COMPELLING ARBITRATION OF PLAINTIFF'S COUNTS IV TO XIV

A. Defendant's Argument that the EFAA applies on a Claim-by-Claim Basis Should Be Rejected as inconsistent with the Statutory Text.

Defendant argues that the Trial court's claim-by-claim relatedness test comports with the requirements of the EFAA by arguing that it is: (a) consistent with the plain language of the statute; (b) it harmonizes the EFAA with the FAA; (c) it is consistent with common sense and fairness; and (d) it prevents strategic pleading.

With respect to Defendant's argument regarding plain language, Plaintiff set forth in her opening brief why the plain language of the EFAA requires application of the EFAA's arbitration bar to entire cases, not claims. (Pb13-16). With respect to the Trial court's attempt to harmonize the EFAA with the FAA rather than determine which statute applies, Plaintiff fully explained in her opening brief why the EFAA supplanted the FAA such that attempts to harmonize the FAA with the EFAA betrays Congress' intent to **erase** the FAA, its presumptions, and any policy considerations

favoring either arbitration or respect for pre-dispute arbitration contracts for the cases to which the EFAA applies. (Pb28-31).

Accordingly, beyond the issues Plaintiff has already addressed, Defendant raises two additional reasons for why it contends the Trial court's construction of the EFAA are correct: common sense and fairness considerations, and the ways in which the Trial court's construction avoids a strategic/improper pleading concern. Neither of these policy-based reasons demonstrate that the Trial court correctly construed the EFAA by applying its arbitration bar on a claim-by-claim instead of case-by-case basis.

Defendants' "common sense" argument rests on hypotheticals designed to make the EFAA's broad application seem absurd. They posit scenarios where multiple plaintiffs with unrelated claims might benefit from one plaintiff's sexual harassment claim, or where an employee files a "fourteen-count complaint" with thirteen unrelated claims alongside one harassment claim. (Db23-24). But these parade of horrors ignores both existing procedural safeguards and the actual common-sense problem their interpretation creates.

Courts already possess ample tools to address misjoinder, frivolous claims, and litigation gamesmanship. Fed. R. Civ. P. 11 and N.J. Rule of Court 1:4-8 sanctions punish bad-faith pleading. Fed. R. Civ. P. 20 and N.J. Rule of Court 4:27,

4:28, 4:29 and 4:30 governs proper joinder of claims and parties. Fed. R. Civ. P. 42(b) and N.J. Rule of Court 4:30 and 4:38 permits severance when appropriate.

As *Johnson v. Everyrealm*, 657 F. Supp. 3d 535 (S.D.N.Y. 2023), recognized, courts retain authority to address "circumstances under which claims far afield might be found to have been improperly joined." 657 F. Supp. 3d at 562 n.23. The existence of potential abuse does not justify rewriting clear statutory language—if it did, no statutory exception would ever survive.

The real common-sense problem lies in Defendants' interpretation. Under their view, a supervisor who sexually harasses an employee on Monday and denies her a promotion on Tuesday creates two separate legal tracks—one public, one private—for what any reasonable person recognizes as unified discriminatory conduct. This fragments justice, multiplies proceedings, and forces harassment victims to simultaneously prosecute related claims in different forums. Congress enacted the EFAA precisely to avoid such artificial splitting of workplace sexual misconduct cases.

As for strategic pleading concerns, Defendants' focus on hypothetical manipulation by plaintiffs conveniently ignores the very real manipulation their interpretation enables. Employers could systematically shield discrimination from public view by characterizing each discriminatory act under a different legal theory, sending most to private arbitration while only the most egregious sexual comments

remain public. This allows employers to minimize reputational damage, avoid comprehensive discovery, and prevent the public accountability that Congress deemed essential for addressing workplace sexual harassment. If we're concerned about strategic behavior, Defendants' interpretation creates far more opportunities for gamesmanship than the EFAA's straightforward case-based approach.

B. The Clear Federal Judicial Consensus Defeats Defendants' Position

Defendant cites to *Mera*, two additional federal cases, and three California trial court decisions which followed the minority position of the current doctrinal divide to argue that “several courts have adopted the Trial court’s” interpretation of the EFAA.

First, New Jersey courts grant deference to federal courts’ interpretation of federal law, not the trial court decisions of other states. With respect to California in particular, California law and the California Rules of Court provide that only published appellate decisions may be cited or relied on. Cal. Rule of Court 8.1115(a). Given same, Defendant’s three California cases should be afforded **no weight** in this Court’s assessment of how courts have constructed the EFAA. Rather, to the extent that this Court would look to how California courts and California law is interpreting the EFAA, the California Court of Appeal for the 2nd District, in the published decision *Liu v. Miniso Depot CA, Inc.*, 105 Cal. App. 5th 791, 794 (2024), applied

Johnson and held that when a plaintiff alleges conduct constituting a sexual harassment dispute then the plaintiff can opt their entire case out of arbitration.

Without those unpublished trial court cases from California, Defendant is left with three federal cases, *Mera, Lee v. Taskus*, No. SA-23-CV-01456-OLG, 2024 U.S. Dist. LEXIS 116623 (W.D. Tex. July 2, 2024), and *Dixon v. Dollar Tree Stores, Inc.*, No. 22-CV-131S, 2023 U.S. Dist. LEXIS 37974 (W.D.N.Y. Mar. 7, 2023), to Plaintiff's **seventeen** rejecting the Trial court's approach below. (Pb21-22).¹ Defendant is simply wrong that "several courts have . . . adopted the Trial court's . . . interpretation of the EFAA." **Few courts have adopted the Trial court's interpretation, and the clear and overwhelming majority of courts have rejected it.**

Indeed, after Plaintiff's brief was filed, the Tennessee Appeals Court addressed this issue again and determined that "it agreed with the clear majority view on this issue" and that where a colorable sexual harassment claim is asserted, the arbitration agreement is unenforceable as to the entire case. *See Ruiz v. Butts Foods, L.P.*, No. W2023-01053-COA-R3-CV, 2025 Tenn. App. LEXIS 125, at *40 (Ct. App. Apr. 14, 2025).

¹ Defendant claims that these three decisions are "several," but in fact, the most common adjective to describe a trio is not "several" but "few." If one held a birthday party with only three guests, it would be misleading to say there were "several people there."

Defendant does not explain why or how these the consensus position of the federal court decisions—all in essential agreement—should be rejected, or why *Mera*—which concerned class allegations, or why *Lee* and *Dixon* are more persuasive than *See Bruce v. Adams*, No. 3:24-cv-00875, 2025 U.S. Dist. LEXIS 33532, at *34-38 (M.D. Tenn. Feb. 25, 2025); *Puris v. TikTok Inc.*, No. 24cv944 (DLC), 2025 U.S. Dist. LEXIS 16998, at *15-16 (S.D.N.Y. Jan. 30, 2025); *Diaz-Roa v. Hermes Law, P.C.*, No. 24-cv-2105 (LJL), 2024 U.S. Dist. LEXIS 212472, at *35-39 (S.D.N.Y. Nov. 21, 2024); *Ding Ding v. Structure Therapeutics, Inc.*, No. 24-cv-01368-JSC, 2024 U.S. Dist. LEXIS 196549, at *36-37 (N.D. Cal. Oct. 29, 2024); *Clay v. Fgo Logistics, Inc.*, No. 3:23-cv-01575-MPS, 2024 U.S. Dist. LEXIS 175470, at *10-11 (D. Conn. Sep. 27, 2024); *Bray v. Rhythm Mgmt. Grp., LLC*, Civil Action No. TDC-23-3142, 2024 U.S. Dist. LEXIS 173020, at *18-25 (D. Md. Sep. 24, 2024); *Williams v. Mastronardi Produce, Ltd.*, No. 23-13302, 2024 U.S. Dist. LEXIS 150550, at *17-18 (E.D. Mich. Aug. 22, 2024); *Scoggins v. Menard, Inc.*, No. 2:24-cv-00377, 2024 U.S. Dist. LEXIS 147638, at *20-21 (S.D. Ohio Aug. 19, 2024); *Baldwin v. TMPL Lexington LLC*, 2024 U.S. Dist. LEXIS 148291, at *1-2 (S.D.N.Y. Aug. 19, 2024); *Michael v. Bravo Brio Rests. LLC*, Civil Action No. 23-3691 (RK) (DEA), 2024 U.S. Dist. LEXIS 102504, at *18 (D.N.J. June 10, 2024); *Doe v. Saber Healthcare Grp.*, No. 3:23cv1608, 2024 U.S. Dist. LEXIS 94955, at *3-4, *20 (M.D. Pa. May 29, 2024); *Molchanoff v. SOLV Energy, LLC*, No. 23cv653-

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Defendants’ only response to these cases is to simply argue that some of these cases also looked at relatedness of claims. But clearly, where a defendant is arguing that the EFAA should only cover related claims on a claim-by-claim basis, many courts will apply that test in the alternative to see if following *Johnson*’s rule would result in a different outcome than rejecting it. Plaintiff has asked this Court to engage in that same analysis in the alternative, but that request no more militates against the soundness and simplicity of *Johnson*’s analysis than any other analysis in the alternative.

This Court should reject the decision below for the same reason it should reject *Mera*, *Lee*, and *Dixon*—it elevates its own view of “common sense” and “fairness” over the clear textual command of the EFAA and the policy choice—wise or not—embodied by the Congress in the EFAA. The Court should reject the decision below as departing from the strict textual construction consistently applied by *Johnson* and its progeny.

C. Defendant’s Misguided Analysis of the Statutory Text Departs from *Johnson* and Does Not Support Defendant’s construction.

Defendant characterizes Plaintiff’s textual statutory construction analysis as being an invention of Plaintiff, but Plaintiff followed *Johnson*’s analysis—Plaintiff did not engage in an independent textual analysis divorced from the well-reasoned precedent cited in Plaintiff’s brief. But Defendant’s criticism of that textual analysis—*Johnson*’s, not Plaintiff’s—fails to persuade.

Defendant suggests that to read “a case related to the . . . sexual harassment dispute” to encompass all claims within a case that contains a sexual harassment claim would be to “read” the “related to” requirement out of the statute, and thereby create a disfavored surplusage. (Db15). But not a single federal court who followed *Johnson*’s logic and textual analysis concluded that following *Johnson*’s holding would result in making the “related to” language surplusage.

Moreover, Defendant’s footnote 4 at page 15 of its brief is nonsensical. Defendant attempts to argue that in order for the EFAA to apply, the “predispute agreement” must “relate to a sexual harassment dispute,” and—it is unclear. Plaintiff has reviewed the syntax of the sentence, and Defendant’s contention is simply wrong as a matter of grammar.

The provision provides:

...no predispute arbitration agreement ... shall be valid or enforceable

└──────── main clause ─────────┘

with respect to a **case**

[**which** is filed under Federal, State or Tribal law
and relates **to** the sexual assault dispute or the sexual harassment dispute].

_____ relative clause modifying “case” _____

The preposition phrase “with respect to a case” is the object of “valid or enforceable.” In other words, the object of the main clause is “case.” The relative clause “which . . . and . . .” begins with the relative pronoun **which** with two conjoined predicates (“is filed” and “relates”), both sharing the same subject, the antecedent **case**.

The clause cannot modify “predispute agreement” because (a) a private arbitration agreement is not something that is filed, a case is; (b) under the rule of last antecedent, relative clause beginning with *which* is presumed to modify the nearest reasonable noun—here, *case*—unless context unmistakably says otherwise; and (c) Because “is filed” and “relates” share the same grammatical subject, Defendant’s view would require an arbitration agreement both to be “filed” and to “relate” to the dispute—an implausible result. Read naturally, both verbs describe the *case*.

Defendant’s linguistic acrobatics aside, Defendant simply fails to engage with the textual analysis in *Johnson*—that the term “case” was deliberate, has a definitive meaning, and therefore eschews a claim-by-claim relatedness analysis. *Johnson*’s

analysis was correct, as demonstrated by the number of federal courts across the nation which have followed and agreed with it, and Defendant's inaccurate grammar arguments to the contrary are wholly insufficient to discredit that analysis.

D. The Trial Court's Test Would Create Unworkable Procedural Chaos

Neither the trial court nor Defendant provides any practical guidance for how courts should apply their "inextricably intertwined" standard at the pleading stage. Must courts conduct mini-trials on relatedness before any discovery? How can judges determine whether pay discrimination is sufficiently "intertwined" with harassment without knowing who made decisions, when they occurred, or what motivated them? These questions show that the test is unworkable in practice, and why courts have rejected it.

As *Bruce v. Adams* recognized, requiring courts to parse degrees of relatedness between claims at the motion to dismiss stage would "impose an unmanageable standard." 2025 U.S. Dist. LEXIS 33532, at *37-38. The test transforms a straightforward gateway question—does this case include a sexual harassment claim?—into complex factual inquiries impossible to resolve without discovery.

Worse, the Trial court's approach guarantees inconsistent results. One judge might find pay discrimination "inextricably intertwined" with harassment by the same supervisor, while another finds them severable. Such uncertainty serves no

one—not courts seeking efficient case management, not employers seeking predictability, and certainly not harassment victims seeking vindication of their rights. Congress avoided this chaos by using clear language: entire "cases" relating to sexual harassment avoid forced arbitration.

E. Defendants' "Legal Elements" Test Defies both Logic and the Statutory Text

Defendants both defend the trial court's attempt to use an "inextricably intertwined" test while arguing that the trial court did not go far enough. Defendants would modify the test to hold that claims are only "inextricably intertwined" if proving the non-harassment claim requires proving sexual harassment as a predicate element.

Under this cramped view, constructive discharge qualifies because it requires proof of intolerable conditions, but gender discrimination in pay and other terms and conditions of employment does not because it can theoretically be proven without referencing harassment. This legal-elements test finds no support in the EFAA's text and would eviscerate its protection.

First, nothing in the phrase "relates to" suggests Congress intended such a narrow, technical meaning. If Congress meant to limit the EFAA to claims requiring proof of sexual harassment as a legal element, it knew how to say so—just as it did in countless statutes that explicitly reference "elements" or "prerequisites." Instead, Congress chose "relates to," a phrase the Supreme Court consistently interprets

broadly to encompass any claim with "a connection with or reference to" the subject matter. *Morales v. TWA*, 504 U.S. 374, 383 (1992). A supervisor's discriminatory denial of bonuses plainly "relates to" his sexual harassment of the same employee, even if proving the former doesn't technically require proving the latter.

Moreover, Defendant's test falls apart even in the midst of their brief. They claim that retaliation claims for reporting a sexual harassment complaint would be covered by their "legal elements" test but apparently take the position that a plaintiff alleging retaliation for reporting a sexual harassment complaint must **prove** that the conduct complained of actually constituted sexual harassment. That is decidedly not the test—retaliation claims are cognizable even if the underlying conduct in fact does not rise to the level of unlawful sexual harassment. Accordingly, under Defendant's legal elements test, the retaliation claim in fact would go to arbitration because a retaliation plaintiff does not need to prove that sexual harassment occurred in order to survive dismissal or receive a verdict.

Likewise, Defendant apparently argues that if a Plaintiff who is being subjected to both sexual harassment and unequal pay claims such that she quits alleging constructive discharge, the constructive discharge claim (factually based on both the harassment and discriminatory pay) and sexual harassment claim both remain in court, while the predicate unequal pay claim has to go to arbitration because a plaintiff can prove that claim without referencing the harassment.

Moreover, even if it is a single manager who is solely responsible for sexually harasses women also pays them less, steals their commissions, and denies them promotions, Defendant's test would have each form of discrimination parsed into different forums based on technical pleading requirements. This fragments the very workplace accountability Congress sought to ensure. No rational legislator would create a system where sexual harassment receives public scrutiny while pendent discrimination factually and temporally linked to the harassment and perpetrated by the same actors remains hidden in arbitration simply because lawyers can (and must) articulate different legal theories.

F. Defendants' "Strategic Pleading" Concerns Prove Too Much

Defendants warn about plaintiffs adding frivolous harassment claims to avoid arbitration, citing the trial court's "extreme example" of thirteen unrelated claims escaping arbitration due to one harassment claim. (Db23-24). This argument fails for multiple reasons.

First, courts already possess tools to address misjoinder and frivolous claims. Sanctions, dismissals, and severance for misjoinder all exist. As *Johnson* noted, courts can address "circumstances under which claims far afield might be found to have been improperly joined." 657 F. Supp. 3d at 562 n.23. Here, there is no allegation of improper actions, and Defendant has argued and lost that Plaintiff's sexual harassment claim is either time-barred, legally insufficient, or both. Nor has

either party implicated uninvolved third-parties who would either benefit or be hurt by application of the EFAA to Plaintiff's claims. Accordingly, like in *Johnson*, this is not the case which calls for examination of the outer limits of joinder, misjoinder, and relatedness under the EFAA.

Second, Defendants' concern proves too much. Under their logic, Congress should never create exceptions to arbitration because someone might exploit them. Yet Congress regularly creates such exceptions, trusting courts to police abuse.

Third, the real manipulation occurs under Defendants' interpretation, where employers can carve off legitimate discrimination cases which also implicate non-discriminatory causes of action across multiple forums, forcing victims to prosecute parallel proceedings all related to the same wrongful conduct in different forum.

G. The Trial Court's Misplaced "Harmonization" Misunderstands the EFAA's Purpose

Defendants defend the trial court's attempt to "harmonize" the EFAA with the FAA's preference for bifurcation. But there is nothing to harmonize when Congress says, "notwithstanding any other provision of this title." The EFAA explicitly overrides conflicting FAA provisions—it does not work alongside them.

More importantly, the claim-splitting provisions of the FAA exist because the FAA respects contracts, and will respect the contract decision to claim-split over the judicial preference against claim-splitting. But the EFAA provides that for **these** types of disputes, the **contract** does not matter and should not be enforced.

The trial court treated the EFAA as a minor adjustment to the FAA that must work together with the FAA rather than what it is: a Congressional override born from recognition that forced arbitration was sheltering harassers from accountability and **explicitly** provided that its scope was not simply to sexual harassment claims but to entire cases which relate to sexual harassment disputes. Attempting to preserve the FAA's claim-splitting principles under the theory that the FAA means courts owe a residual deference to an unenforceable arbitration contract defeats the very purpose of the EFAA's enactment.

H. Defendant fails to meaningfully respond to Plaintiff's arguments regarding the plain meaning of the EFAA and Congress' rejection of the RSAHD.

Defendant also fails to meaningfully respond to Plaintiff's arguments related to the construction of the EFAA. Defendant provides no reasoned explanation for why the EFAA's language would extend its prohibition to **cases** and not **claims** if it intended its arbitration bar to proceed on a claim-by-claim basis. Defendants emphasize Senators Ernst and Graham's concerns about the EFAA's breadth. But the fears of these senators about hypothetical consequences cannot override what Congress actually enacted. When statutory text is clear, legislative history cannot be used to 'muddy' clear statutory language. *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 436 (2019). Defendant provides no explanation for Congress' rejection

of the RSAHD which explicitly provided for non-sexual-harassment claims to remain subject to arbitration.

I. The Court Should Find that the Trial Court Erred in Finding Plaintiffs' Counts IV to XIV Are Not Covered by the EFAA

For the reasons set forth above, and in Plaintiff's opening brief, the Court should find that the Trial Court erred in finding that Plaintiffs' Counts IV to XIV are not covered by the EFAA. Defendant's response fails to provide justification for ignoring the clear and overwhelming federal consensus that when a Plaintiff files a case which includes a colorable sexual harassment claim, the EFAA acts to bar arbitration of the entire case. *See supra*.

II. THIS COURT LACKS JURISDICTION TO REVIEW THE DENIAL OF DEFENDANTS' MOTION TO DISMISS COUNT II

Defendants' cross-appeal seeks review of an interlocutory order denying their motion to dismiss Count II—a prototypical non-appealable decision that this Court lacks jurisdiction to consider. While Defendants attempt to bootstrap this interlocutory order onto their cross-appeal by claiming it is "intertwined with the trial court's arbitration rulings," (260a), such creative labeling cannot manufacture appellate jurisdiction where none exists. This Court should dismiss the cross-appeal as to Count II without reaching its merits.

A. The Denial of a Motion to Dismiss Is Not an Appealable Final Order

The law could not be clearer: denials of motions to dismiss are interlocutory orders not subject to immediate appeal. N.J. Rule of Court 2:2-3(a) limits appeals as of right to "final judgments of courts and final determinations of actions by administrative agencies." A denial of a motion to dismiss is interlocutory and, hence, not appealable as of right. *See United Cannery Maint., etc. v. United Packinghouse Workers*, 16 N.J. 264, 265 (1954); *Rendon v. Kassimis*, 140 N.J. Super. 395, 398, 356 A.2d 416, 417 (Super. Ct. App. Div. 1976).

Defendants identify no exception to this bedrock principle. They did not seek leave to appeal under N.J. Rule of Court 2:5-6.² They point to no provision in N.J. Rule of Court 2:2-4's catalog of appealable interlocutory orders that would permit immediate review of a limitations-based dismissal denial. Indeed, none exists. "Interlocutory appellate review runs counter to a judicial policy that favors an "uninterrupted proceeding at the trial level with a single and complete review," and even where properly requested, "is granted sparingly." *State v. Reldan*, 100 N.J. 187, 205 (1985).

Because Defendant did not seek leave to appeal the denial of their motion to dismiss, this Court is without jurisdiction to hear that cross-appeal.

² Under N.J. Rule 2:5-6, if Defendants wished to appeal the interlocutory orders regarding Defendants' motion to dismiss, they were required to serve a motion to the trial court within 20 days of the denial of Plaintiff's motion for reconsideration. Defendants did not and have not filed any such motion.

B. Plaintiff should not be required in the first instance to address a jurisdictional defect that Defendant has not itself addressed in its Brief.

Plaintiff can only speculate as to what, if any, argument Defendant might muster as to why an interlocutory cross-appeal of a denial of a motion to dismiss should be permitted based on some relation between that order and the Court's Order granting in part and denying in part Defendant's motion to compel arbitration. Nevertheless, as a rule, the filing of an interlocutory appeal permitted by right under R. 2:2-4 does not permit Defendant to cross-appeal any order whatsoever. *Trecartin v. Mahony-Troast Constr. Co.*, 21 N.J. 1, 7 (1956).

C. Plaintiff would be prejudiced if Defendant's interlocutory appeal is heard.

Plaintiff has already been prejudiced by Defendant's attempt to have this Court consider an interlocutory appeal of the denial of its motion to dismiss without Defendant having moved for same or demonstrated why departing from the principle against interlocutory appeals is warranted in the instant case.

Rule 2:4-4(b) explicitly requires appeals from interlocutory orders to be brought "on motion." Defendant has filed no such motion. Instead, Defendant attempts to bootstrap this non-appealable order onto its arbitration cross-appeal without explanation, hoping this Court will overlook the complete absence of:

- Any motion for leave to appeal under R. 2:5-6

- Any showing of good cause for the delay
- Any analysis of potential prejudice to Plaintiff
- Any explanation for why this issue was not raised earlier

All other issues in this case have been briefed. Engaging in substantial appellate motion practice now, to address arguments that Defendant was required to raise months ago at the time it filed its cross-appeal will result in additional delay, complexity, and attorneys' fees.

On the other hand, Defendants will suffer no prejudice from being in the same position of any defendant who has been denied an early motion to dismiss on the pleadings: the opportunity to seek dismissal or judgment again before the Trial court on a different or more complete record, or seek a verdict in its favor at trial.

III. THE TRIAL COURT PROPERLY FOUND COUNT II TIMELY UNDER THE CONTINUING VIOLATION DOCTRINE

Even if this Court reaches the merits of Defendants' challenge to Count II—which it should not—the trial court correctly determined that McDermott adequately pleaded a timely sexual harassment claim. Defendants' cross-appeal fundamentally mischaracterizes the continuing violation doctrine by arguing that McDermott's knowledge of offensive conduct in 2019 somehow bars her from invoking the doctrine. This is precisely backwards. As *Shepherd v. Hunterdon Developmental Center*, 174 N.J. 1, 22 (2002), makes crystal clear: "a victim's knowledge of a claim

is insufficient to start the limitations clock so long as the defendant continues the series of non-discrete acts on which the claim as a whole is based."

A. The Continuing Violation Doctrine Applies Even When a Victim Knows Conduct Is Actionable

The trial court correctly recognized that McDermott alleges a continual, cumulative pattern of tortious conduct extending from 2015 through the end of her employment in November 2022. (230a-231a). The trial court further recognized that even if Plaintiff had understood Lamkin's behavior to be "extremely distasteful" and evidence of a "hostile work environment," that knowledge was "not sufficient to start the statute of limitations clock because Plaintiff alleges that she and other women continued to be subjected to the same harassing behavior throughout the duration of her tenure and up and until the cessation of her employment in November 2022." (231a).

The Trial court's conclusion was unquestionably a correct application of *Shepherd* and the continuing violations doctrine. Under that doctrine, knowledge of harassment does not start the limitations clock. Defendants' entire statute of limitations argument rests on a fundamental misunderstanding of New Jersey law. They argue that because McDermott complained to HR in 2019, she "knew or should have known" she had an actionable claim, and therefore the limitations period began to run. This argument was explicitly rejected in *Shepherd*. 174 N.J. at 22.

The continuing violation doctrine "was developed to allow for the aggregation of acts, each of which, in itself, might not have alerted the employee of the existence of a claim, but which together show a pattern of discrimination." *Roa v. Roa*, 200 N.J. 555, 569 (2010). But even when an employee is alerted—even when she complains to HR—the limitations clock does not begin if the harassment continues. As *Shepherd* explained, the doctrine recognizes that hostile work environment claims "by '[t]heir very nature involve[] repeated conduct' of varying types and ... '[s]uch claims are based on the cumulative effect of individual acts.'" 174 N.J. at 18 (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002)).

B. McDermott's Allegations Establish Ongoing Harassment Through November 2022

The Complaint explicitly alleges that "Lamkin's persistent and pervasive abuse continued through the end of Plaintiff's tenure with Defendant Guaranteed Rate." (81a ¶54). This is not a "conclusory" allegation as Defendants claim—it is a factual assertion that harassment continued through November 2022, well within the limitations period.

McDermott's Declaration provides additional detail about this ongoing pattern of harassment and hostile work environment and when it occurred:

- Lamkin spoke to her "in an aggressive and disrespectful manner" up until her final day of employment (103a ¶32)

- She received reports through her final day that Lamkin regularly subjected other female employees to similar treatment (103a ¶33)
- The hostility manifested both overtly and covertly, undermining her success in ways he did not do with male colleagues (103a ¶34)
- This pattern forced her to limit interactions with her own supervisor, making her employment "exceedingly difficult, unwelcoming, and hostile" (104a ¶37)

C. The 2019 HR Complaint Does Not Convert Ongoing Harassment Into Time-Barred Discrete Acts

1. Reporting Harassment Does Not Transform Its Legal Character

Defendants argue that McDermott's 2019 HR complaint proves she knew the conduct was actionable and therefore cannot invoke the continuing violation doctrine. This argument finds no support in law or logic. If accepted, it would create the perverse incentive for employees to remain silent about harassment to preserve their legal claims—exactly the opposite of what employment law seeks to encourage.

In *Alexander v. Seton Hall University*, 204 N.J. 219, 229 (2010), the New Jersey Supreme Court clarified that even when some discriminatory acts occur outside the limitations period, they remain part of a continuing violation if the overall unlawful practice continues into the limitations period. The Court emphasized evaluating the pattern as a whole, not parsing individual incidents.

2. The Complaint Alleges Harassment Despite the HR Report

Critically, the Complaint alleges that despite McDermott's 2019 complaint to HR, "Lamkin's persistent and pervasive abuse continued." (81a ¶54). An employer's failure to remedy reported harassment extends the hostile environment. The limitations period does not begin to run while the harassment continues, regardless of whether the employee has reported it.

D. Defendants Mischaracterize the Nature of Hostile Work Environment Claims

1. The December 2015 Comment Was the Beginning, Not the Entirety

Defendants fixate on the December 2015 comment as if it were McDermott's entire claim. But Paragraph 48 alleges that "during her tenure, Lamkin was regularly abusive to McDermott, regularly screaming at her and using gender-based and demeaning slurs." (81a ¶48). This describes an evolving pattern, not isolated incidents.

The continuing violation doctrine recognizes that hostile work environment claims are "different in kind from discrete acts" because their "very nature involves repeated conduct." *Morgan*, 536 U.S. at 115. A single offensive comment in 2015, while crude, might not create a hostile environment. But when that comment becomes part of years of "screaming," "gender-based and demeaning slurs," and "persistent and pervasive abuse," the pattern emerges.

2. This Case Exemplifies Why the Continuing Violation Doctrine Exists

In *Youngclaus v. Residential Home Funding Corp.*, No. A-1404-22, 2024 N.J. Super. Unpub. LEXIS 347 (App. Div. Mar. 5, 2024), the Appellate Division reversed a trial court's dismissal of a hostile work environment claim under R. 4:6-2(e) where the plaintiff alleged a pattern of demeaning and abusive language coupled with unequal treatment based on gender. The court found such allegations more than sufficient to plead a continuing violation.

Here, McDermott alleges far more than *Youngclaus*—not just a pattern of demeaning language but a seven-year campaign of gender-based hostility that persisted despite complaints to HR and continued through her last day of employment.

E. At Minimum, Recent Conduct States an Independent Timely Claim

Even if this Court were to find—which it should not—that pre-February 2022 conduct is time-barred, the Complaint adequately alleges timely harassment. Paragraph 54's allegation that abuse "continued through the end of Plaintiff's tenure" in November 2022 encompasses nearly nine months within the limitations period.

On a motion to dismiss, the question is not whether McDermott has proven her claim but whether she has alleged one. *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 746 (1989). The allegation that pervasive

harassment and a severe and pervasive change in the terms and conditions of her employment continued through November 2022 is sufficient at the pleading stage. Indeed, the disrespectful lies related to Plaintiff's compensation and pay discrimination occurred during this time frame. Plaintiff's allegations are more than sufficient at the pleading stage, even when Lamkin's inappropriate statement is ignored.

F. The Denial of Dismissal Should Be Affirmed

The trial court correctly applied the continuing violation doctrine to McDermott's hostile work environment claim. She alleges ongoing harassment continuing through November 2022, well within the limitations period. Defendants' attempt to parse individual incidents and argue that McDermott's knowledge bars her claim misunderstands both the law and the nature of hostile work environment claims.

To the extent that this Court does not find Defendant's cross-appeal of this interlocutory order improper, this Court should affirm the trial court's determination that Count II is timely.

G. Defendant did not appeal the application of the EFAA to Count II

Notably, Defendant did not appeal the application of the EFAA to Count II—it only appealed the denial of the motion to dismiss itself. Whether this Court dismisses Defendant's cross-appeal on this issue, or hears and denies that claim on

the merit, Defendant is not entitled to an order from this Court ruling that the EFAA does not apply to Count II.

IV. THE COURT DID NOT ERR IN FINDING THAT PLAINTIFF'S GENDER DISCRIMINATION CLAIM IS RELATED TO HER SEXUAL HARASSMENT CLAIM AND BARRED FROM ARBITRATION BY THE EFAA

A. Plaintiff's Disparate Treatment Claim (Count I) is Factually Intertwined with her Hostile Work Environment Claim (Count III) because they share an intertwined factual core.

Defendants argue on cross-appeal that the trial court erred in finding Count I "inextricably intertwined" with McDermott's sexual harassment claim. While McDermott maintains that the trial court applied an improperly narrow standard—an argument addressed in our opening brief and reply *supra*—if this Court were to adopt the trial court's standard, it should nevertheless find that the trial court correctly held that Count I meets that test. The gender discrimination and sexual harassment claims here are not merely tangentially related; they are interwoven manifestations of the same discriminatory conduct by the same actors.

More importantly, Defendant misrepresents Plaintiffs' gender discrimination claim by arguing that it grounded solely on company-wide gender discrimination, (Db51), not the application of both discriminatory company-wide policies and discriminatory managerial discretion to Plaintiff by her discriminatory and sexually harassing managers Lamkin and Moschella. Moreover, a company that directs

and/or permits gender discrimination in pay and other terms and conditions of employment will contribute to the *totality* of a hostile work environment.

Indeed, that is exactly what the trial court found, holding that "the underlying facts supporting the allegation of gender discrimination are inextricably intertwined with the allegations of sexual harassment in Count II." (241a). "It is reasonable to extrapolate that Defendants' disparate treatment of Plaintiff and other women in the workplace contributed to the hostile work environment based upon sex/gender." *Id.*

Indeed, Plaintiff's hostile work environment claim includes and subsumes her pay discrimination allegations (86a ¶¶91-93), and her gender discrimination allegations address not only pay discrimination but also discrimination in "praise, advancement, referral sources, and sales of mortgage contracts," and avers that Lamkin and Moschella—the individuals who perpetrated her harassment—aided and abetted all aspects of the disparate treatment. (85a ¶¶84-85). Accordingly, Defendant's attempt to argue that Plaintiff's gender discrimination claim is solely "grounded on disparate treatment relating to the terms of Plaintiff's compensation under the Sales Compensation Plan" (Db51) is inconsistent with Plaintiff's pleadings and theory of the case.

Plaintiff disputes that carving claims out from arbitration on a relatedness standard is what the EFAA permits, but if it is, it is unquestionably the case that the trial court correctly identified that relatedness of a claim is based on the actual

factual overlap between the claims, not Defendant's convoluted test related to *prima facie* elements and the minimal facts necessary to avoid dismissal. Accordingly, though Plaintiff maintains that the Trial court made the right decision for the wrong decision, the Trial court was correct that Plaintiff's gender discrimination disparate treatment claim is factually inextricably intertwined with her hostile work environment claim.

CONCLUSION

For the reasons set forth in Plaintiff's opening brief, and for the additional reasons set forth above, the Court should grant Plaintiff's appeal, and deny Defendant's cross-appeal.

Respectfully submitted,

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Dated: June 30, 2025

MEGAN MCDERMOTT,

*Plaintiff-Appellant/Cross-
Respondent,*

vs.

GUARANTEED RATE, INC.,
and JOSEPH MOSCHELLA
and JON LAMPKIN,

*Defendants-Respondents/Cross-
Appellants.*

CIVIL ACTION

ON APPEAL FROM A
JUDGMENT OF THE
SUPERIOR COURT
OF NEW JERSEY,
LAW DIVISION,
MORRIS COUNTY

Docket No.: MRS-L-360-24

Sat Below:

HON. NOAH FRANZBLAU, J.S.C.

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PRELIMINARY STATEMENT

Respondents/Cross-Appellants Guaranteed Rate, Inc. (“GRI”), Joseph Moschella and Jon Lamkin (collectively, “Defendants”), hereby submit this reply to Appellant/Cross-Respondent Megan McDermott’s (“Plaintiff’s”) opposition to Defendants’ cross-appeal.

The Trial Court erred in two important aspects. *First*, the Trial Court erroneously found that Plaintiff’s gender discrimination claim (Count I) was somehow “inextricably intertwined” with her sexual harassment claim (Count II) and, therefore, barred from arbitration under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (“EFAA”).

As demonstrated in Rivera-Santana v. CJF Shipping, LLC, Dkt. No. ESX-L-5834-24 (Law Div. Dec. 17, 2024), a recent Law Division decision, a claim of disparate treatment discrimination is not factually related, much less inextricably intertwined, with sexual harassment as required to invoke the protections of the EFAA. The nucleus of Plaintiff’s gender discrimination claim is disparate treatment resulting in tangible economic loss, such as GRI’s application of the parties’ Sale Compensation Plan as it relates to bonuses and commission. This type of discrimination claim is not akin to a claim of sexual harassment. Moreover, Plaintiff contends the Sale Compensation Plan is being discriminatorily applied on a *company-wide* basis. Plaintiff’s contention that this

alleged conduct somehow “will contribute to the totality of a hostile work environment” is legally baseless. Because the Trial Court’s decision to bar arbitration of Count I improperly conflates disparate treatment in compensation and other business-related activities with sexually harassing conduct for purposes of the EFAA, it is ripe for reversal.

Second, the Trial Court incorrectly applied the continuing violation rule (“CVR”) to Plaintiff’s sexual harassment claim to find it timely under its two-year statute of limitations, thus unnecessarily triggering the application of the EFAA. Plaintiff’s Complaint makes clear that her sexual harassment claim is rooted firmly in several allegations occurring outside of the applicable two-year statute of limitations. The Trial Court erred in classifying such untimely allegations as non-discrete acts of conduct, incapable of triggering the statutory limitations clock. Relatedly, Plaintiff makes no effort to establish how, in the absence of the untimely sexual harassment allegations, any of her remaining factually threadbare allegations could even ostensibly support a viable claim for sexual harassment. Against this backdrop, the Trial Court erroneously denied Defendants’ motion to dismiss Count II of the Complaint. Given that Plaintiff’s sexual harassment claim should be dismissed, the application of the EFAA to the parties’ Arbitration Agreement is improper and moots this appeal.

Lastly, Plaintiff’s challenge that this Court lacks jurisdiction with regard

to Count II of the Complaint is baseless. Defendants were not required to move for leave to appeal an interlocutory ruling to seek review of the Trial Court's decision regarding arbitrability. Indeed, this Court expressly acknowledged its *discretion* to consider an otherwise interlocutory ruling when addressing appeals related to arbitrability under similar circumstances. As such, Plaintiff's lack of compelling substantive grounds to support the Trial Court's misapplication of the CVR to Count II cannot be remedied on improper jurisdictional grounds.

PROCEDURAL HISTORY

Defendants rely on the Procedural History included in their original brief.

STATEMENT OF FACTS

Defendants rely on the Statement of Facts included in their original brief.

ARGUMENT

POINT I

PLAINTIFF'S GENDER DISCRIMINATION CLAIM DOES NOT SUFFICIENTLY "RELATE TO" SEXUAL HARASSMENT TO BE NON-ARBITRABLE UNDER THE EFAA (Pbr40-42).

Although following the proper standard under the "relates to" prong of the EFAA, the Trial Court nonetheless erred in applying that standard to find that Plaintiff's gender discrimination claim (Count I) is somehow inextricably intertwined with her sexual harassment claim (Count II). (241a.) Without supporting legal authority, Plaintiff erroneously contends that "gender

discrimination in pay and other terms of conditions of employment will contribute to the *totality* of a hostile work environment.” (Prb4-41.) If this theory were valid, practically all sex discrimination claims in and of themselves would be barred from arbitration under the EFAA – a result that neither the EFAA nor controlling case law requires. See Cornelius v. CVS Pharma., Inc., 2023 WL 6876925, *3-4 (D.N.J. Oct. 18, 2023) (finding that the “[p]laintiff’s argument that the alleged discrimination amounts to sexual harassment and thus is not subject to the arbitration agreement are unsupported and unpersuasive. Therefore, her claims are not subject to the EFAA and are not excused from arbitration”).

Here, Plaintiff confuses disparate treatment discrimination claims with hostile work environment claims, both of which are markedly distinct claims in New Jersey. See, e.g., DeCapua v. Bell Atl.-N.J., Inc., 313 N.J. Super. 110, 119-20 (Law Div. 1998) (observing that disparate treatment discrimination resulting in a tangible economic loss “differs markedly from [harassment]”). Indeed, the continuing violation theory Plaintiff relies on to support her harassment claims cannot extend to claims of tangible conduct resulting in economic loss (i.e., discrete conduct), such as those alleged in Plaintiff’s gender discrimination claims. See National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002) (observing that “[e]ach discrete discriminatory act starts a new clock for

filing charges alleging that act”). Plaintiff’s allegation that GRI “favor[s] male comparators over her in terms of praise, advancement, referral sources, and sales of mortgage contracts” all relate to *tangible economic loss* and, thus, are limited to Count I. (Prb41; 85a, ¶ 84.) There is no entwinement whatsoever between this alleged disparate treatment discrimination and the alleged sexually-harassing conduct Plaintiff relies on under Count II for purposes of the EFAA. See Dixon v. Dollar Tree Stores, Inc., No. 22-CV-131S, 2023 U.S. Dist. LEXIS 37974, *16-17 (W.D.N.Y. Mar. 7, 2023) (observing that “[EFAA] also does not preclude arbitration of claims under other sex and age discrimination claims, such as Dixon’s allegations of disparate treatment because of her age and gender, that do not allege sexual assault or harassment”); accord Miles v. Greystar Mgmt Svcs, LP, 2025 WL 2021337, *3 (D. Nev. July 17, 2025) holding that “wage-hour claims are unrelated to . . . sexual harassment and retaliation claims rendering these claims subject to arbitration” under EFAA).

The New Jersey Superior Court’s recent opinion in Rivera-Santana correctly applied the EFAA in an action alleging both disparate treatment discrimination (based on pregnancy) and sexual harassment under the LAD. See Rivera-Santana v. CJF Shipping, LLC, Docket No. ESX-L-5834-24 (Law Div. Dec. 17, 2024). In Rivera-Santana, the plaintiff asserted four causes of action under the LAD: (Count 1) pregnancy discrimination; (Count 2) retaliation;

(Count 3) failure to accommodate discrimination; and (Count 4) sexual harassment. (Dra23-Dra31.) On a motion to dismiss the complaint and compel arbitration, the court denied the motion as to the sexual harassment claim under the EFAA. (Dra1-Dra2.) However, the court compelled the remaining *disparate treatment* claims to arbitration. (Id.) The court observed: “There is a valid, enforceable, unambiguous arbitration agreement that requires the remaining causes of actions *[that] arise out of a set of different facts than the sexual harassment claims* to be arbitrated.” (Dra10.) Like the claims in Rivera-Santana, Plaintiff’s disparate treatment claim *arises of of a different set of facts* from her sexual harassment claim, and were not sufficiently intertwined to satisfy the “relates to” standard under the EFAA. As such, this aspect of the decision should be reversed and the disparate treatment claim should be compelled to arbitration.

POINT II

PLAINTIFF’S SEXUAL HARASSMENT CLAIM IS BARRED BY THE LAD’S TWO-YEAR STATUTE OF LIMITATIONS, THUS MOOTING THIS APPEAL (230a).

The Trial Court erred in holding that Plaintiff’s sexual harassment-related allegations occurring between 2015 and 2019 (*and which culminated in Plaintiff allegedly complaining to Human Resources of harassment in 2019*) constituted non-discrete acts deemed timely under the LAD’s two-year statute of limitations by application of the CVR. (230a.) The Trial Court further erred by alternatively

finding Plaintiff's conclusory harassment-related allegations supported a viable sexual harassment claim under Count II. (239a.) These errors resulted in application of the EFAA to the parties' Arbitration Agreement where no timely sexual harassment claim has been pled. See Yost v. Everyrealm, Inc., 657 F. Supp. 3d 563, 577 (S.D.N.Y. 2023) (observing that "sexual harassment dispute" under EFAA must be capable of surviving a motion to dismiss). Application of the EFAA was improper and must be reversed.

A. This Court May Exercise Appellate Review Over Defendants' Cross-Appeal Challenging the Denial of Defendants' Motion to Dismiss Count II of the Complaint.

As an initial matter, this Court does not lack jurisdiction to review Defendants' cross-appeal of the Trial Court's denial of Defendants' motion to dismiss Plaintiff's sexual harassment claim. (Prb30-33.) This aspect of Defendants' cross-appeal is indeed within the purview of R. 2:2-3(b)(8) relating to review of orders compelling or denying arbitration. This Court also possesses the discretion to review interlocutory rulings in appeals relating to arbitrability determinations as a matter of law. See, e.g., Epstein v. Wilentz, Goldman & Spitzer, P.A., No. A-1157-14T1, 2016 N.J. Super. Unpub. LEXIS 121, n. 1 (App. Div. Jan. 22, 2016) (referring to the Court's discretion as to the scope of appellate review for arbitrability determinations).

Rule 2:2-3(b)(8) creates an exception for interlocutory orders compelling

and/or denying arbitration thereby making them appealable as of right. The Trial Court's determination as to the viability of Count II was a critical aspect of its order denying arbitration because it directly triggered the application of the EFAA to the parties' Arbitration Agreement. R. 2:2-3(b)(8). Indeed, the Trial Court would have compelled the *entire* Complaint to arbitration pursuant to the parties' Arbitration Agreement *but for* the EFAA. Against this backdrop, Plaintiff's contention that she must "speculate" as to what the connection is between Count II and the Trial Court's partial denial of the motion to compel arbitration is nonsensical. (Prb32.)

Even setting R. 2:2-3(b)(8) aside, the Court otherwise has discretion to review interlocutory rulings in appeals challenging arbitrability decisions. Epstein, 2016 N.J. Super. Unpub. LEXIS 121, n.1 (observing under similar circumstances that other aspects of an interlocutory appeal are reviewable "in the *exercise of our sole discretion*") (emphasis added). The Trial Court's decision to dismiss Count II was a threshold issue as to the arbitrability of the remaining claims not compelled to arbitration. As such, Plaintiff's contention that this Court somehow lacks jurisdiction to exercise discretion under these circumstances lacks merit.

For these reasons, Defendants' cross-appeal of the Trial Court's application of the CVR to Count II is both reviewable under R. 2:2-3(b)(8) and

warranted under the Court’s general discretion.

B. The Trial Court Incorrectly Applied the EFAA to Count II of the Complaint (233a).

The Trial Court’s application of the CVR to Count II was not in accord with controlling law. Plaintiff conflates the important distinction between discrete and non-discrete acts by arguing that mere “knowledge of a [sexual harassment] claim” does not trigger the statute of limitations. (Prb33-34.)¹ But this straw argument is pure misdirection. Plaintiff’s sexual harassment claim *as pleaded* is time-barred. Plaintiff specifically amended her Complaint to reference the alleged 2015 statement by Lamkin and describes it as an “outrageously offensive sexual comment.” (86a, ¶ 90.) Plaintiff further describes this alleged harassing conduct by reciting the *prima facie* elements of a hostile work environment claim utilizing the following descriptors: “sexually explicit,” “offensive terms,” “outrageous, offensive and unwelcome,” and “abusive.” As such, it is premised on discrete, independent incidents of sexual harassment that allegedly occurred between 2015 to 2019, triggering the two-year statute-of-limitations. See Roa v. Roa, 200 N.J. 555, 556-70 (2010) (distinguishing between discrete and non-discrete actions for purposes of

¹ The United States Supreme Court distinguished “hostile work environment claims” (a “series” of non-discrete acts) from *discrete* acts that constitute independently actionable harassment. See Morgan, 536 U.S. at 115.

triggering the LAD’s two-year statute-of-limitations under the CVR). Plaintiff’s position is improper because it permits independently actionable claims to be timely in perpetuity.

In Roa, the New Jersey Supreme Court distinguished between “discrete discriminatory acts” and non-discrete acts for the purpose of establishing the availability of the CVR – a narrow “equitable exception to the statute of limitations.” Id. at 566. Applying Supreme Court precedent, Roa held that individually actionable allegations (*i.e.*, discrete acts) cannot be aggregated for purposes of the CVR but, rather, are *independently actionable* for purposes of the statute-of-limitations. Id. at 567 (emphasis added). Similarly, the United States Supreme Court observed: “[I]n direct contrast to discrete acts, a single [non-discrete] act of harassment may not be actionable on its own.” Morgan, 536 U.S. at 115. The Court held that it is the cumulative effect of a series of non-discrete acts from which a hostile work environment claim arises. Id. Contrary to Plaintiff’s argument, the CVR cannot restart “a new clock” for every act constituting harassment. See Morgan, 536 U.S. at 113 (holding that “[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act” and that any related claim “must be filed within the [statutorily prescribed] time period after the discrete discriminatory act occurred”). The Trial Court’s ruling failed to acknowledge this critical distinction between discrete and non-discrete

acts in its application of the CVR. See, e.g., Dyer v. N.J. Tpk. Auth., No. A-4313-17T3, 2020 N.J. Super. Unpub. LEXIS 1491, *29-30 (App. Div. July 24, 2020) (affirming the trial court’s decision “that plaintiff alleged discrete acts occurring earlier than March 5, 2012 and that her claims arising from such conduct are time-barred”); Castro v. Cty. of Bergen, No. A-1903-14T1, 2016 N.J. Super. Unpub. LEXIS 616, *19 (App. Div. Mar. 22, 2016) (same).

The crux of Count II allegedly occurred in December 2015 – *almost a decade prior to the filing this action*. In fact, Plaintiff amended her Complaint specifically to highlight a vulgar comment she alleges was made to her by her purported supervisor. See Nuness v. Simon & Schuster, Inc., 325 F. Supp. 3d 535, 548 (D.N.J. 2018) (holding that a single racial slur made “in the course of directing a sexually-charged remark” constituted actionable harassment under the LAD). Without explanation, however, the Trial Court concluded that Plaintiff somehow pleaded a continuing violation “because much of the conduct in the Complaint might not have been readily identifiable as harassment at the time it occurred.” (230a.) Plaintiff’s only attempt to plead further *specific* conduct consisted of contending that “Lamkin was regularly abusive to [her], regularly screaming at her and using gender-based and demeaning slurs to refer to [her],” which she purportedly reported to Human Resources in 2019, more than two years before this case was filed. (81a, ¶¶ 48 and 51.) As such, this

alleged conduct also is well beyond the two-year statute of limitations. Contrary to the Trial Court's decision, this conduct was indeed "readily identifiable as harassment at the time it occurred." (230a.)

Furthermore, Plaintiff distorts the CVR standard as it relates to the issue of relevance of a plaintiff's knowledge of an actionable claim of harassment. (Prb34-35.) Plaintiff asserts that her knowledge of purportedly being harassed beginning in 2015, which allegedly culminated in a Human Resources complaint in 2019, is irrelevant to whether Count II is timely under the CVR. In this regard, Plaintiff erroneously contends:

Defendants' entire statute of limitations argument rests on a fundamental misunderstanding of New Jersey law. They argue that because McDermott complained to HR in 2019, she "knew or should have known" she had an actionable claim, and therefore the limitations period began to run. This argument was explicitly rejected in *Shepherd*.

(Id.) To the contrary, the issue of the significance of Plaintiff's knowledge was neither rejected, nor even addressed in Shepherd. Here, Plaintiff misleadingly only addresses the element of an employee's knowledge of harassment based on a series of *non-discrete acts* in the context of a continuing violation. That issue, however, is entirely separate and distinct from whether particular conduct constitutes a *discrete act* for purposes of initiating the statute of limitations. It is the latter issue that Defendants rely on here. Indeed, *nowhere in Plaintiff's*

brief is this critical distinction even addressed.

It is well-settled that a plaintiff is not required to determine at what precise point a series of conduct constitutes an actionable claim of harassment provided the conduct continues. See Shepherd v. Hunterdon Dev. Ctr., 174 N.J. 1, 22 (2002) (quoting Morgan, 536 U.S. at 117). Shepherd's reference to “a victim’s knowledge of a claim [being] insufficient to start the limitations clock so long as the defendant continues the series of non-discrete acts” was in the context of the Morgan Court distinguishing “hostile work environment claims” (a “series” of non-discrete acts) from independently actionable *discrete* acts. See Morgan, 536 U.S. at 115 (observing that “[h]ostile environment claims are different in kind from discrete acts”). In stark contrast, neither the United States Supreme Court nor the New Jersey Supreme Court permits a continuing violation to be premised on an untimely *discrete* act. See Roa, 200 N.J. at 569 (agreeing “that the continuing violation theory cannot be applied to sweep in an otherwise time-barred discrete act”); Morgan, 536 U.S. at 114 (holding that the plaintiff “can only file a charge to cover discrete acts that ‘occurred’ within the appropriate time period”).

And contrary to Plaintiff’s contention, a plaintiff’s *knowledge* is a critical element the Court can use to distinguish between discrete and non-discrete acts of harassment. The CVR is an equitable doctrine that reflects the challenge of

identifying an “unlawful employment practice’ [that] cannot be said to occur on any particular day.” Id. at 115. Conversely, a plaintiff’s knowledge is probative to determining the existence of a discrete act. Acknowledging the significance of such knowledge, the Roa Court observed:

What the [CVR] doctrine does not permit is the aggregation of discrete discriminatory acts for the purpose of reviving an untimely act of discrimination *that the victim knew or should have known was actionable*. Each such “discrete discriminatory act” starts a new clock for filing charges alleging that act.

Roa, 200 N.J. at 569-70 (emphasis added); see also Brennan v. State, No. A-3119-07T3, 2009 N.J. Super. Unpub. LEXIS 1920, *17 (App. Div. July 24, 2009) (relying on the plaintiff’s knowledge to identify a discrete act for purposes of the statute of limitations); Nicolas v. Trenton Bd. of Educ., No. A-4039-21, 2024 N.J. Super. Unpub. LEXIS 75, *20 (App. Div. Jan. 17, 2024) (same); Porcaro v. Twp. of Rochelle Park, No. A-1802-19, 2021 N.J. Super. Unpub. LEXIS 2813, *22 (App. Div. Nov. 16, 2021) (same).

In sum, Plaintiff alleges both discrete acts of conduct and knowledge of the same occurring *outside* of the statute of limitations period, which cannot be revived by the CVR. (80a, ¶ 42; 81a, ¶¶ 48 and 51.) As set forth in point C, infra, Plaintiff’s remaining conclusory allegations within the statute of limitations period are legally insufficient to support a hostile work environment and, thus,

the Trial Court erred by not dismissing Count II.

C. Plaintiff's Remaining Conclusory Allegations Do Not Support A Viable Sexual Harassment Claim (229a).

Plaintiff fails to establish how her remaining conclusory and non-specific references to sexual harassment post-2019 support either a hostile work environment claim and/or the application of the CVR. (Pb35-36.) The Trial Court erred in alternatively determining that these amorphous allegations alone sufficed as a cognizable claim of sexual harassment. (229a.) Clearly, paragraphs 33 through 37 of the Complaint – without any reference to time and consisting merely of “aggressive and disrespectful” communications – fall far short of constituting actionable harassment. (Prb37-38.) That is because these conclusory allegations were ostensibly intended to be anchored by the untimely allegations of discrete conduct, as opposed to independently supporting a hostile work environment claim. As such, this aspect of the Trial Court's decision should be reversed and remanded accordingly.

CONCLUSION

As set forth above, Defendants respectfully reiterate their request that the Court grant the relief sought in their cross-appeal on the grounds stated above.

Dated: August 4, 2025

By: s/Robert M. Pettigrew
Carmen J. DiMaria
Robert M. Pettigrew