LIAM LI, a Minor, by his parents and guardians ad litem, Jie He and Qian Li, Plaintiff, v. FAMILY ADVENTURES NORTH JERSEY, LLC, D/B/A URBAN AIR TRAMPOLINE & ADVENTURE PARK SOUTH HACKENSACK, Defendants.	**Superior Court of New Jersey, Appellate Division** **Docket No. A-001480-24** On Appeal From The Superior Court of New Jersey, Law Division, Bergen Vicinage Trial Court Docket No: Docket No. BER-L-005337-24 Sat Below (Trial Court): Hon. Anthony R. Suarez, J.S.C.

PLAINTIFF LIAM LI'S BRIEF IN SUPPORT OF HIS APPEAL

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PRELIMINARY STATEMENT

Five-year-old Minor Plaintiff Liam Li suffered severe fractures of his left ulna and radius while using a trampoline attraction at Defendant's facility. Prior to the Minor Plaintiff using the facility, Defendant had required the Minor Plaintiff's father to electronically sign a "Waiver, Release and Indemnification Agreement" that appeared in a miniscule font. The agreement's title and preliminary paragraph contained no mention of arbitration. However, buried within its provisions, many of which appear in bold, underlined, and capitalized letters, was an arbitration paragraph with no emphasis on its text. The arbitration provision contained no explanation of what arbitration is, made no mention of waiving the right to sue in court, and failed to explain that arbitration entails the waiver of the right to present one's claims in a judicial forum before a judge or jury. A subsequent paragraph, entitled "jury trial waiver", applies only to "Adult Participants" and makes no mention of applying to child participants such as the Minor Plaintiff. Nowhere does the agreement advise that participants are waiving the right to present their claims in the court system before a judge. Notwithstanding the foregoing, the trial court granted Defendant's motion to compel the arbitration of Minor Plaintiff's common law and statutory claims.

This Court should reverse the trial court's order compelling arbitration because Defendant's arbitration clause lacked clear and unambiguous language

advising that arbitration requires the waiver of one's right to sue in the court system and to pursue the Minor Plaintiff's claims before a judge or jury. There was thus no meeting of the minds and the arbitration provision was unenforceable under the basic principles of contract law that apply to all contracts.

The arbitration provision was also unenforceable because it failed to reference the waiver of the right to present statutory claims (such as the Minor's claims under the Consumer Fraud Act, Truth-In-Consumer Contract, Warranty and Notice Act, and Products Liability Act) to a judge or jury. Moreover, the arbitration provision contained several misleading and unenforceable terms, such as stating that an inapplicable set of "commercial" rules would govern the arbitration and purporting to limit the substantive relief that would be available in arbitration. The arbitration provision was also presented in a hard-to-read format and was inherently ambiguous and confusing in the context of the agreement as a whole.

Both individually and cumulatively, the above deficiencies in Defendant's arbitration provision demonstrate that there was no meeting of the minds and therefore no enforceable agreement to arbitrate Minor Plaintiff's claims. The trial court's order compelling arbitration should therefore be reversed.

PROCEDURAL HISTORY

On September 16, 2024, Minor Plaintiff Liam Li, by his parents and guardians ad litem, Jie He and Qian Li, filed a complaint in the Superior Court against Defendant Family Adventures North Jersey LLC d/b/a Urban Air Trampoline & Adventure Park South Hackensack arising from injuries that Liam sustained at Defendant's trampoline park on June 23, 2024. Pa14, Pa16 (¶ 6). On January 6, 2025, the trial court granted Defendant's motion to stay the Minor Plaintiff's lawsuit and to compel arbitration. Pa1-9.[1] This appeal now follows.

FACTUAL HISTORY

A. Minor Plaintiff Liam Li Is Injured At Defendant's Facility

On June 23, 2024, five-year-old Minor Plaintiff Liam Li suffered severe fractures to his left ulna and radius while he was a business invitee at the trampoline park owned, operated, and/or controlled by Defendant Family Adventures North Jersey, LLC, d/b/a Urban Air Trampoline & Adventure Park South Hackensack ("Urban Air"). See Pa15 (¶¶ 3-4), Pa16 (¶¶ 6-9).

On its website, Defendant Urban Air represented that it would provide a "safe place where your whole family can jump, soar, race, climb, and play." See Pa23 (¶ 36). Contrary to Defendant's representation, Defendant failed to enforce

[1] The transcript of the January 3, 2025 oral argument before the trial court is referenced herein as "T".

its own safety rules and policies at its South Hackensack facility. See Pa29 (¶ 45). Specifically, Defendant failed to enforce a dedicated "Children's Zone" where children under the age of six, such as Minor Plaintiff, would be able to jump separate from the areas where older, larger children and adults were jumping. See Pa26 (¶ 41(f)); Pa29-30 (¶ 45(e), (f), (j)). Defendant also failed to properly train or supervise its staff members, referred to as "Court Monitors", to enforce Defendant's own safety rules, including separating children under six years of age to the dedicated Children's Zone and limiting trampoline use to one jumper per trampoline at a time. Pa30-31 (¶ 50). Contrary to Defendant's own representations to the public about the safety of its facility, Defendant actually prohibits its employees from providing warnings, coaching, or instruction to patrons. Pa29 (¶ 45(b)). Furthermore, the trampoline attraction that Minor Plaintiff was using at the time he was injured was inherently defective and dangerous in its design, manufacture, and configuration. See Pa42-4, (¶¶ 84-92).

As a result of Defendant's dangerous acts and omissions, Liam was seriously injured while using Defendant's facility, suffering severe fractures of his left ulna and radius. Pa16 (¶ 9).

B. Defendant's "Urban Air Agreement"

Prior to entering Defendant's facility on June 23, 2024, Defendant had required the Minor Plaintiff's father, Qian Li, to electronically sign a "Waiver,

Release And Indemnification Agreement" (referred to herein as "the Urban Air Agreement" or "the Agreement"). See Pa59-60. Because the miniscule font used by Defendant in the Urban Air Agreement renders it difficult, if not impossible, to read, Minor Plaintiff's Appendix also includes a version of the Agreement that has been enlarged by Plaintiff's counsel to increase its legibility. See Pa163-5. All citations herein to the Agreement will include both the actual and enlarged versions of the document.[2]

Nothing in the title or at the top of the Urban Air Agreement indicates that it contains an arbitration clause. See Pa59; Pa163. The line under the title of the Agreement states, in general, that "by signing, you are giving up legal rights" without providing any description of the nature of the rights being waived. Id.

In its preliminary paragraph, the Agreement defines the key terms "Adult Participant" and "Child Participant", noting that "[c]ollectively and severally, Adult Participant and Child Participant, their heirs, successors, and assigns are hereinafter referred to as the Participant." Pa59, Pa163.

[2] During oral argument before the trial court, without citing any evidence in the record, defense counsel represented that the Agreement was presented to consumers on a computer screen and that it was possible to "zoom in". T8:5-9:7. These unsupported representations were improper and should not have been considered by the Court, as they were not derived from any evidence in the motion record. See R. 1:6-6. The only version of the Agreement put into the record by Defendant was the Agreement that appears at Pa59, in a miniscule font.

The Agreement then sets forth paragraphs entitled (1) "Nature of the Activities"; (2) "Types Of Risks"; (3) "Assumption of Risks"; and (4) "Alcohol". Pa59; Pa163.

i. Paragraph 5 – The "Release And Indemnity" Provision

Paragraph 5 of the Agreement, entitled "Release And Indemnity", provides that "to the fullest extent permitted by law, Adult Participant on behalf of himself, child participant, and their heirs, executors, and representatives releasees, **agrees not to sue**, and shall indemnify and defend" Defendant "from and against all liability, losses, damages, claims, demands, actions suits, causes of action, costs, fees, and expenses" arising from "bodily injury" resulting from, inter alia, "Participant's use of the premises". Pa59; Pa164 (emphasis added). Paragraph 5 specifies that the Participant must indemnify Defendant for all "costs, fees and expenses", "including reasonable attorney's fees and court or other costs" arising from bodily injury suffered by a Participant. Id. Paragraph 5 further provides that Participants cannot sue Defendant "even if any claim is caused in whole or in part by the negligence, gross negligence, strict liability, or willful misconduct" of Defendant. Id. In other words, Paragraph 5 of the Agreement purports to prohibit patrons asserting any bodily injury claims against Defendant, regardless of Defendant's level of culpability. Id.

As set forth in Minor Plaintiff's complaint, Paragraph 5 of the Agreement is riddled with illegalities and is unenforceable as to minors. See Pa16-22 (¶¶10-20); Pa38-39 (¶¶73-4). Nearly two decades ago, the New Jersey Supreme Court held that a purported agreement to waive a personal injury claim on behalf of a minor is unenforceable. See Pa16 (¶ 10) (citing Hojnowski v. Vans Skate Park, 187 N.J. 323, 336-338 (2006)). Over two decades ago, this Court prohibited the imposition of fee-shifting agreements upon participants in recreational activities. See Pa18 (¶ 14) (citing Dare v. Free Fall Adventures, Inc., 349 N.J. Super. 205, 223 (App. Div.), certif. denied, 174 N.J. 43 (2002)). Defendant's inclusion of these and other illegal provisions in the Agreement violates the Truth-In-Consumer Contract, Warranty And Notice Act. See Pa38-39.

The trial court, in its written decision regarding this matter, mistakenly held that Paragraph 5, the "Release and Indemnity" paragraph, set forth an "agreement to arbitrate". See Pa8-9. However, Paragraph 5 makes no reference to arbitration. Pa59; Pa164. The actual arbitration clause, containing the first mention of arbitration in the entire Agreement, appears later at Paragraph 6(A). Pa59; Pa164. The trial court quoted language from Paragraph 5, which was not the arbitration clause, in support of its finding regarding Plaintiffs' purported agreement to arbitrate: "By its terms, Plaintiffs' agreement to arbitrate applies broadly to 'all liabilities, losses, damages, claims, demands, actions, suits,

causes of action, costs, fees, and expenses' arising out of personal injuries on the Premises." Pa8-9 (quoting language from Paragraph 5, the release and indemnity provision, not the arbitration provision). Thus, the trial court mistakenly conflated Paragraph 5 with the subsequent arbitration clause appearing later in Paragraph 6(A). Id.

A review of the text of Paragraph 5, which is printed in underlined, emboldened, and capitalized letters in the Agreement, demonstrates that it contains no reference to, and has nothing to do with, arbitration:

> 5. **RELEASE AND INDEMNITY. TO THE FULLEST EXTENT PERMITTED BY LAW, ADULT PARTICIPANT ON BEHALF OF HIMSELF, CHILD PARTICIPANT, AND THEIR HEIRS, EXECUTORS, AND REPRESENTATIVES RELEASES, AGREES NOT TO SUE, AND SHALL INDEMNIFY AND DEFEND URBAN AIR,** [and the other Protected Parties…] **FROM AND AGAINST ALL LIABILITIES, LOSSES, DAMAGES, CLAIMS, DEMANDS, ACTIONS, SUITS, CAUSES OF ACTION, COSTS, FEES, AND EXPENSES (INCLUDING REASONABLE ATTORNEY'S FEES AND COURT OR OTHER COSTS) (COLLECTIVELY, CLAIMS) RELATING TO, RESULTING FROM, OR ARISING OUT OF OR ALLEGED TO HAVE ARISEN OUT OF (IN WHOLE OR IN PART) ANY PROPERTY DAMAGE OR BODILY INJURY (INCLUDING DEATH) TO PARTICIPANT RESULTING IN ANY WAY FROM (A) PARTICIPANT'S USE OF THE PREMISES, (B) PARTICIPANT'S ACTIVE OR PASSIVE PARTICIPATION IN THE ACTIVITIES, (C) LOSS OR THEFT OF PERSONAL PROPERTY, (D) FROM THE CONSUMPTION OF ALCOHOL AT THE PREMISES BY PARTICIPANT OR ANY OTHER INVITEE OF URBAN AIR, OR (E) PARTICIPANT'S BREACH OF THIS AGREEMENT.**

> **THIS RELEASE AND INDEMNITY SHALL APPLY EVEN IF ANY CLAIM IS CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE, GROSS NEGLIGENCE, STRICT LIABILITY, OR WILLFUL MISCONDUCT OF THE PROTECTED PARTIES OR PARTICIPANT.**
>
> **THE INDEMNITY SHALL ALSO INCLUDE ADULT PARTICIPANT'S OBLIGATION TO INDEMNIFY THE PROTECTED PARTIES FROM (A) ANY SUM OR SETTLEMENT PAID TO OR ON BEHALF OF THE CHILD PARTICIPANT RESULTING FROM A CLAIM IN ANY WAY INVOLVING THE FOREGOING SUBSECTIONS AND (B) ALL CLAIMS RESULTING FROM OR RELATING TO ANY INSUFFICIENCY OF PARTICIPANT'S LEGAL CAPACITY OR AUTHORITY TO EXECUTE THIS AGREEMENT FOR OR ON BEHALF OF THE CHILD PARTICIPANT.**

[Pa59; Pa164 (emphasis in original).]

Thus, Paragraph 5 has nothing to do with arbitration. Id. If anything, Paragraph 5 appears inconsistent with the concept of arbitration since it purports (albeit unenforceably) to waive participants' rights to assert any injury claims against Defendant. Id. In other words, if Paragraph 5 were enforced, there would be no claims to arbitrate, rendering any arbitration clause illusory and meaningless. Id.

ii. Paragraph 6– The "Dispute Resolution" Provision

Despite the fact that Paragraph 5 of the Agreement purportedly bars the filing of any injury claims against Defendant, Paragraph 6 deals with "Dispute Resolution" and includes two subsections entitled (A) "Arbitration" and (B) "Waiver of Jury Trial". Pa59; Pa164. While the entirety of Paragraph 5 was

printed in bold, underlined, capital letters, the text within the sub-section entitled "Arbitration" is given no emphasis at all. Pa59; Pa164.

The entire text of Paragraph 6, "Dispute Resolution", is as follows;

6. **DISPUTE RESOLUTION.**

A. ARBITRATION. Any dispute or claim arising out of or relating to this Agreement, breach thereof, the Premises, Activities, property damage (real or personal), personal injury (including death), or the scope, arbitrability, or validity of this arbitration agreement (Dispute) shall be brought by the parties in their individual capacity and not as a plaintiff or class member in any purported class or representative capacity, and settled by binding arbitration before a single arbitrator administered by the American Arbitration Association (AAA) per its Commercial Industry Arbitration Rules in effect at the time the demand for arbitration is filed. Judgment on the arbitration award may be entered in any federal or state court having jurisdiction thereof. The arbitrator shall have no authority to award punitive or exemplary damages. If the Dispute cannot be heard by the AAA for any reason, the Dispute shall be heard by an arbitrator mutually selected by the parties. If the parties cannot agree on an arbitrator, then either party may petition an appropriate court to appoint an arbitrator. Arbitration and the enforcement of any award rendered in the arbitration proceedings shall be subject to and governed by 9 U.S.C. § 1 et seq.

B. WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY LAW, ADULT PARTICIPANT AND URBAN AIR KNOWINGLY, WILLINGLY, AND VOLUNTARILY, WITH FULL AWARENESS OF THE LEGAL CONSEQUENCES, AFTER CONSULTING WITH COUNSEL (OR AFTER HAVING WAIVED THE OPPORTUNITY TO CONSULT WITH COUNSEL) AGREE TO WAIVE THEIR RIGHT TO A JURY TRIAL OF ANY DISPUTE AND TO RESOLVE ANY AND ALL DISPUTES THROUGH ARBITRATION. The right to a trial by jury is a right parties would or might otherwise have had under the

> Constitutions of the United States of America and the state in which the Premises is located.
>
> [Pa59; Pa164.]

The Urban Air Agreement's arbitration provision as set forth in Paragraph 6(A) contains no description of: what arbitration is; that it differs from a proceeding in court; that there is no judge; that there is no jury; that there is only a limited right to "appeal" an arbitrator's decision; or that an agreement to arbitrate means foregoing the right to sue and to have one's claims resolved in a judicial forum as opposed to a private, arbitral setting . See Pa59; Pa164. The word "sue" appears nowhere in Paragraph 6(A) or (B) and there is no explanation that arbitration means waiving the right to sue in court. Id. The only references to "court" in Paragraph 6 are to applications to enter judgment on an arbitration award or to appoint an arbitrator. Id. There is no explanation in the arbitration provision, or anywhere else in the Agreement, that arbitration means waiving one's right to have one's claim heard in the court system. Id.

The arbitration provision also makes no mention of applying to statutory claims, such as claims under the Consumer Fraud Act, Truth-In-Consumer Contract, Warranty and Notice Act, or Products Liability Act. Id.

The subsequent provision regarding "Jury Trial Waiver" set forth in Paragraph 6(B) applies **only** to "**Adult Participant**" and makes no mention of applying to the "Child Participant" (i.e., Minor Plaintiff). See Pa59; Pa164. At

the beginning of the Agreement, the terms "Adult Participant" and "Child Participant" were separately defined, with the term "Participant" defined as a collective term used to include both the "Adult Participant" and "Child Participant". Pa59; Pa163. The "Jury Trial Waiver" provision significantly does not use the collective term "Participant" and makes no reference to applying to the "Child Participant"; it refers only to the "Adult Participant". Pa59; Pa164. Thus, there is nothing in the Agreement indicating that a "Child Participant" such as Minor Plaintiff is waiving his right to a jury trial or that arbitration would entail the waiver of a child's right to a jury trial. Id.

iii. Defendant's Arbitration Provision Misleadingly States That The AAA "Commercial Industry Arbitration Rules" Will Apply

The arbitration provision in Defendant's Agreement provides that the arbitration will be "administered by the American Arbitration Association (AAA) per its Commercial Industry Arbitration Rules [….]" Pa59; Pa164. However, when Defendant presented the Agreement to Minor Plaintiff's father, Defendant knew or should have known that the Commercial Industry Arbitration Rules do not apply to arbitrations involving personal injury claims at Defendant's facility. See Pa107-108. On August 4, 2022, nearly two years before the June 23, 2024 incident that forms the basis of this matter, AAA sent correspondence to Urban Air Trampoline Adventure Park, through its attorneys, regarding another lawsuit in which a minor was asserting claims against an

Urban Air facility. Pa107. In this letter, AAA advised Urban Air that the "**Consumer** Arbitration Rules" (Consumer Rules) applied to the minor's claim. Pa107. In the letter, AAA noted that "this business [Urban Air] has previously indicated that it willing to have all consumer-related disputes heard in accordance with the Consumer Rules and Protocol[.]" Pa108. Despite being on notice that the Commercial Rules do not apply to "consumer" claims arising from the use of its facilities, Defendant nevertheless continues to misleadingly state in its arbitration provision that the Commercial Rules will apply. See Pa59; Pa164.

The Commercial Rules are significantly more financially burdensome to claimants than the Consumer Rules. Compare Pa89-90 (R-54) to Pa142. The Commercial Rules are meant to apply to disputes arising from "business transactions". Pa67. Under the Commercial Rules, the parties are required to equally split the expenses of the arbitration. Pa89-90 (R-54). In contrast, under the Consumer Rules, which apply to claims between consumers and businesses, the consumer/claimant is only responsible for a $200 filing fee, while the business is responsible for a larger $1,700 filing fee and bears the complete cost of compensating the arbitrator. Pa142.

The AAA's August 4, 2022 letter also advises that AAA protocol requires Urban Air's arbitration provision to be reviewed by AAA for "material

compliance with the due process standards of [AAA's] Consumer Due Process Protocol ("Protocol") and the Consumer Rules." Pa108. The AAA found that Urban Air's arbitration deviated from the Consumer Rules and/or Due Process protocol by including a provision stating: "The arbitrator shall have no authority to award punitive or exemplary damages." Pa108. Despite being advised that this provision is inconsistent with AAA's own Due Process protocol and Rules, Defendant continued to include the exact same prohibited language in the subject Agreement. See Pa59; Pa164.

As Minor Plaintiff has alleged in his complaint, it appears that Defendant has knowingly continued to include such improper provisions in its arbitration clause for the purpose of misleading, intimidating, and dissuading injured claimants from pursuing their claims against Defendant by falsely suggesting that the cost of doing so will be prohibitive or the substantive remedies available will be limited, when Defendant knows this is not the case. See Pa39 (¶ 74).

During oral argument before the trial court, defense counsel attempted to excuse Defendant's inclusion of these improper provisions in its arbitration clause by asserting, without citing any evidence in the record, that the language in the Agreement was set by the national Urban Air franchisor and that the local franchisee did not have "an option" to change the wording of the agreement. See T9:9-21. Minor Plaintiff's counsel responded by arguing that a party may not

include improper or illegal provisions in a contract merely because the contract was drafted by a national corporate office. See T11:20-13:9.

iv. The Remainder Of The Agreement

Paragraph 7 of the Agreement grants Defendant licenses to use the images of participants in promotional materials. Pa59; Pa164. Paragraph 8 confirms the Adult Participant's authority to sign on behalf of a Child Participant, including "the arbitration clause". Id.

Paragraph 9 of the Agreement contains various "acknowledgements" lumped together in an undifferentiated paragraph. Pa59; Pa165. One sentence sets forth a severability clause providing that "if any portion [of the Agreement] is held invalid, it is agreed that the balance shall, notwithstanding, continue in full force and legal effect." Id. No specific reference is made to the provisions in the Agreement are unenforceable under longstanding New Jersey law. Id.

Significantly, there is a venue provision in Paragraph 9 providing that "Venue for **any action** brought hereunder or **due to Participant's use of the Premises or participation in the Activities** shall lie in the County in which the Premises is located. The substantive laws of the state in which the Premises is located shall apply." Pa59; Pa165 (emphasis added). In apparent conflict with the inclusion of a purported arbitration provision, this provision can be read as

providing that court actions may be brought against Defendant arising from a participant's use of the premises. Id.

Paragraph 10 consists of miscellaneous "representations by Participant". Pa59; Pa165.

Above the signature line, a final paragraph that is not numbered and appears in even smaller print than the rest of the Agreement, provides as follows:

> I, the Parent/Guardian, on behalf of myself and that of the minor(s) identified above, as applicable, have read the above Assumption of Risk, Waiver of Liability, and Indemnification Agreement and fully understand and agree to its terms. I understand that I am giving up substantial rights, including my right to sue, by executing this Agreement. I further acknowledge that I am agreeing to indemnify Urban Air, as provided above, for all claims the referenced minor may have against Urban Air. Lastly, I acknowledge that I am signing this Agreement freely and voluntarily, and intend my signature to constitute a complete and unconditional release of Urban Air for all liability due to (1) ordinary negligence of Urban Air and those parties named herein and (2) to the inherent risks of the activity, to the greatest extent permitted by the laws of the state in which Urban Air is located. By signing below, the Parent or Court-Appointed Legal Guardian agrees that they are also subject to all the terms of this document, as set forth above.
>
> [Pa59; Pa165.]

This final paragraph contains no reference to arbitration at all. Pa59; Pa165. Rather, this paragraph references giving up "my right to sue" in the context of the "Assumption of Risk, Waiver of liability, and Indemnification Agreement" releasing Defendant "for all liability" due to its negligence or the inherent risks of the activity conducted at Defendant's facility. Id. In other

words, this final paragraph references giving up the right to assert any bodily injury claims at all against Defendant as expressed in the blanket waiver of all liability claim previously set forth in Paragraph 5 of the Agreement, which is unenforceable as to minors. See Pa59; Pa164.

Significantly, the word "sue" appears only in Paragraph 5 (regarding the waiver of all liability claims) and in this final paragraph; the word "sue" is not mentioned in the actual arbitration provision (Paragraph 6) and the Agreement never states that arbitration means giving up to the right to sue in court. Pa59; Pa163-5. In summary, the final paragraph does not mention arbitration, nor does it explain that arbitration entails waiving the right to sue or to bring Minor Plaintiff's claims before a judge and/or jury in a court of law. Pa59; Pa165.

Minor Plaintiff's father, Qian Li, electronically signed the Urban Air Agreement on behalf of Minor Plaintiff Liam Mi on June 23, 2024. Pa59; Pa165.

C. Minor Plaintiff's Law Division Complaint

On September 16, 2024, Minor Plaintiff filed a complaint in the Law Division of the Superior Court against Defendant arising from the injuries Minor Plaintiff suffered at Defendant's facility, asserting claims sounding in:

> (1) negligence, gross negligence, recklessness, willful and wanton conduct, and intentional conduct (Pa23-33);
>
> (2) failure to warn regarding a dangerous product (the trampoline attraction on which Minor Plaintiff was injured) (Pa33-35);

(3) equitable fraud arising from the illegal provisions in the Urban Air Agreement (Pa36-38);

(4) violation of the New Jersey Truth-In-Consumer Contract Warranty And Notice Act (TCCWNA) arising from the illegal provisions in the Urban Air Agreement (Pa38-39);

(5) strict products liability regarding the subject trampoline attraction (Pa39-41);

(6) Products Liability Act (PLA) claims for defective design and manufacture of the subject trampoline attraction (Pa41-45);

(7) PLA claims for failure to warn regarding the subject trampoline attraction (Pa45-47); and

(8) Consumer Fraud Act (CFA) violations arising from Defendant's false representations that their facility was safe for the Minor Plaintiff (Pa47-48).

On November 18, 2024, in lieu of filing an answer, Defendant filed a motion to stay Minor Plaintiff's Superior Court lawsuit and to compel arbitration based on the Urban Air Agreement's arbitration provision. Pa10. Minor Plaintiff opposed Defendant's motion, arguing that the arbitration provision was invalid and unenforceable. See T4:16-7:8.

D. The Trial Court's Order Compelling Arbitration

The trial court heard oral argument regarding Defendant's motion to compel arbitration on January 3, 2025. See T. On January 6, 2025, the trial court issued an order and written statement of reasons granting Defendant's motion, staying Minor Plaintiff's complaint, and compelling arbitration. Pa1-9.

As noted above, in the trial court's written decision, the trial court mistakenly concluded that an "agreement to arbitrate" was set forth in Paragraph 5, the "Release and Indemnity" provision, which in fact does not mention arbitration. See Pa8-9. The trial court set forth the complete text of both Paragraphs 5 and 6 and then incorrectly quoted language from Paragraph 5 in concluding that "Plaintiffs' agreement to arbitrate applies broadly to 'all liabilities, losses, damages, claims, demands, actions, suits, causes of action, costs, fees, and expenses' arising out of personal injures on the Premises." Pa8-9. The language quoted by the trial court, which appears in Paragraph 5, has nothing to do with arbitration and does not appear in the actual arbitration provision found at Paragraph 6(A). See Pa59; Pa164.

The trial court concluded that "the arbitration clause explicitly informed Plaintiffs that by agreeing to arbitration, they were waiving their right to a judicial adjudication of their disputes. This clause appropriately informs Plaintiffs of the consequences of the agreement to arbitrate." Pa9. The trial court further held that "the arbitration clause cited above is clear and unambiguous [….]" Pa9. However, the text of the actual arbitration provision found in Paragraph 6(A) contains no reference whatsoever to waiving the "right to a judicial adjudication of disputes", a term that appears nowhere in the arbitration clause or the agreement itself. See Pa59; Pa163-5. The arbitration provision in

Paragraph 6(A) says nothing about what arbitration is, that it involves the waiver of having a judge preside over the case, that it involves a waiver of the right to a jury, or that it is subject to only limited appellate review. Id. The following sub-section, Paragraph 6(B), "Waiver of Jury Trial", applies only to the "Adult Participant", not the Minor Plaintiff. Id. In any event, Paragraph 6(B) deals only with the waiver of a jury trial and does not say anything about waiving the ability to have a judge preside over the case in court or the other attendant features of arbitration, including limited appellate review. Id.

Minor Plaintiff now appeals the trial court's January 6, 2025 order staying this matter and compelling arbitration. Pa154. For the reasons set forth below, Minor Plaintiff respectfully submits that the trial court's January 6, 2025 order should be reversed because the arbitration agreement was unenforceable.

STANDARD OF REVIEW

"The existence of a valid and enforceable arbitration agreement poses a question of law, and as such, [this Court's] standard of review […] is de novo." Barr v. Bishop Rosen & Co., 442 N.J. Super. 599, 605 (App. Div. 2015), certif. denied, 224 N.J. 244 (2016). No deference is owed to the interpretative analysis of the trial court. See Morgan v. Sanford Brown Inst., 225 N.J. 289, 303 (2016).

LEGAL ARGUMENT

POINT I

THE ARBITRATION PROVISION IS UNENFORCEABLE (Pa1-Pa9).

A. An Enforceable Arbitration Agreement, Like Any Contract, Requires A Meeting Of The Minds, Meaning The Arbitration Provision Must Clearly And Unambiguously Explain To A Layperson What Arbitration Is And That It Entails The Waiver Of The Right To Sue And To Pursue Claims In Court Before A Judge Or Jury (Pa1-Pa9)

The New Jersey Arbitration Act (NJAA) provides that an arbitration agreement may be invalidated "upon a ground that exists at law or in equity for the revocation of a contract." N.J.S.A. 2A:23B-6(a). Courts must determine whether a valid arbitration agreement exists before compelling arbitration. N.J.S.A. 2A:23B-6(b), (d). The Federal Arbitration Act (FAA) similarly provides that an arbitration agreement may be deemed unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract[.]" 9 U.S.C.A. § 2. "[T]he existence of a valid arbitration agreement is a gateway question requiring judicial resolution." Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 36 (App. Div. 2010) (internal citation and quotation marks omitted).

"Arbitration's favored status does not mean that every arbitration clause, however phrased, will be enforceable." Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 441 (2014), cert. den., 576 U.S. 1004 (2015). Arbitration

provisions must be "examined on a case-by-case basis" and "may be enforced if they contain the appropriate attributes or disregarded if they do not." Rockel v. Cherry Hill Dodge, 368 N.J. Super. 577, 580 (App. Div.), certif. denied, 181 N.J. 545 (2004).

"When deciding whether the parties agreed to arbitrate a certain matter […] courts generally […] should apply ordinary state-law principles that govern the formation of contracts." Atalese, 219 N.J. at 441 (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995)).

"An agreement to arbitrate, like any other contract, must be the product of mutual assent, as determined under customary principles of contract law." Atalese, 219 N.J. at 442 (internal citation and quotation marks omitted). "A legally enforceable agreement requires a meeting of the minds." Ibid. "Mutual assent requires that the parties have an understanding of the terms to which they have agreed." Ibid. "An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights." Ibid.

"By its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated **in court**." Atalese, 219 N.J. at 442 (internal citation and quotation marks omitted) (emphasis added). "But an average member of the public may not know—without some explanatory comment—that arbitration is a substitute for the right to have one's

claim adjudicated in a court of law." Ibid. "Moreover, because arbitration involves a waiver of the right to pursue a case **in a judicial forum**, courts taken particular care in assuring the knowing assent of both parties to arbitrate and a clear mutual understanding of the ramifications of that assent." Id. at 442-443 (internal citations and quotation marks omitted) (emphasis added).

"Arbitration clauses are not singled out for more burdensome treatment than other waiver-of-rights clauses under state law." Atalese, 219 N.J. at 444. "Our jurisprudence has stressed that when a contract contains a waiver of rights—whether in an arbitration or other clause—the waiver must be clearly and unmistakably established. Id. (internal citation and quotation marks omitted). "Thus, a clause depriving a citizen of **access to the courts** should clearly state its purpose." Ibid. (emphasis added). "[T]he point is to assure that the parties know that in electing arbitration as the exclusive remedy, **they are waiving their time-honored right to sue**." Ibid. (emphasis added).

"The waiver-of-rights language […] must be clear and unambiguous—that is, the parties must know that there is a distinction between resolving a dispute in arbitration and in a judicial forum." Atalese, 219 N.J. at 445.

> Consumers can choose to pursue arbitration and waive their right to **sue in court**, but should know that they are making that choice. An arbitration clause, like any contractual clause providing for the waiver of a constitutional or statutory right, must state its purpose **clearly and unambiguously**. In choosing arbitration, consumers

> must have a basic understanding that they are giving up their right to seek relief **in a judicial forum.**
>
> [Atalese, 219 N.J. at 435 (emphasis added).]

Citing New Jersey's Plain Language Act, the New Jersey Supreme Court emphasized that "every 'consumer contract' in New Jersey must 'be written in a simple, clear, understandable and easily readable way.'" Atalese, 219 N.J. at 444 (quoting N.J.S.A. 56:12-2). "Arbitration clauses—and other contractual clauses—will pass muster when phrased in plain language that is understandable to the reasonable consumer." Id. at 444.

"Whatever words compose an arbitration agreement, they must be clear and unambiguous that a consumer is choosing to arbitrate disputes rather than have them resolved **in a court of law.**" Atalese, 219 N.J. at 447 (emphasis added). The arbitration clause, "at least in some general and sufficiently broad way, **must** explain that the plaintiff is giving up her right to bring her claims **in court** or have a jury resolve the dispute." Id. (emphasis added).

For example, in Atalese, the Court approved of language used in an arbitration provision from a different case that provided as follows:

> **Instead of suing in court**, we each agree to settle disputes (except certain small claims) only by arbitration. The rules in arbitration are different. **There's no judge or jury**, and review is limited, but an arbitrator can award the same damages and relief, and must honor the same limitations stated in the agreement as a court would.

> [Atalese, 219 N.J. at 445 (quoting Curtis v. Cellco P'ship, 413 N.J. Super. 31 (App. Div.), certif. denied, 203 N.J. 94 (2010) (emphasis added).]

The arbitration provision in Curtis was valid because it included "a clear and explicit waiver of the right to **judicial adjudication**." Curtis, 413 N.J. Super. at 37 (emphasis added).

Unlike the arbitration provision in Curtis, the arbitration agreement in Atalese was found to be invalid because "the absence of any language in the arbitration provision that plaintiff was waiving her statutory right to seek relief **in a court of law** renders the provision unenforceable." Atalese, 219 N.J. at 436 (emphasis added).

Like the instant matter, the plaintiff's claims in Atalese included allegations that the defendant violated the Consumer Fraud Act (CFA) and the Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA). Atalese, 219 N.J. at 436. See also Pa38-39; Pa47-48. Both the CFA and the TCCWNA "explicitly provide remedies in a court of law." Atalese, 219 N.J. at 446 (citing N.J.S.A. 56:8-19 and N.J.S.A. 56:12-17). Moreover, the CFA confers the right to a jury trial, which is also guaranteed by the New Jersey Constitution. See Morgan, 225 N.J. at 308 (citing N.J. Const., art. I, ¶ 9). "The right to a civil jury trial is one of the oldest and most fundamental of rights." Allstate N.J. Ins. Co. v. Lajara, 222 N.J. 129, 134 (2015). Any arbitration agreement, to be

enforceable, would have to clearly and unambiguously explain that arbitration meant the waiver of one's rights to sue and to have one's claims decided in court or judicial forum: that is, by a judge or jury. Atalese, 219 N.J. at 445.

The arbitration provision in Atalese did not state that the plaintiff would be waiving her right to sue in a court of law. Atalese, 219 N.J. at 430. "Nowhere in the arbitration clause is there any explanation that plaintiff is waiving her right to seek relief **in court** for a breach of her statutory rights." Id. at 446 (emphasis added). "The provision does not explain what arbitration is, nor does it indicate how arbitration is different from a proceeding in a court of law." Id. "Nor is it written in plain language that would be clear and understandable to the average consumer that she is waiving statutory rights." Id.

Thus, the arbitration provision in Atalese lacked the necessary "clear and unambiguous language that the plaintiff is waiving her right to sue or go to court to secure relief." Atalese, 219 N.J. at 446. Because the contract in Atalese "did not clearly and unambiguously signal to plaintiff that she was surrendering her right to pursue her statutory claims **in court**[,]" the arbitration agreement was "unenforceable." Atalese, 219 N.J. at 448 (emphasis added).

The New Jersey Supreme Court has recognized that a jury trial is not the only type of trial available in court and that an arbitration agreement must "explain that the parties had waived the rights to purse their claims **before a**

judge or jury in court." Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 137 (2020) (emphasis added). In Flanzman, the Court found an arbitration agreement to be valid where it explained that arbitration would take the place of "a jury **or other** civil trial." Id. at 138 (emphasis added). Thus, while language communicating that arbitration entails the waiver of a jury trial is necessary for there to be an enforceable arbitration clause, jury trial waiver language alone is not sufficient: the clause must communicate that arbitration entails the waiver of any right to judicial resolution in court, such as a bench trial.

"[A]n arbitration agreement must inform a consumer in some manner that she is waiving her right to seek relief **in the judicial system**." Morgan, 225 N.J. at 294 (emphasis added). In Morgan, the New Jersey Supreme Court held that an arbitration provision was invalid because it "nowhere mention[ed]" that the signatories were "surrendering their right to resolve their legal claims in a judicial forum." Morgan, 225 N.J. at 294. Thus, the Court found that the arbitration provision in Morgan "suffers from the same flaw found in the arbitration provision in Atalese—it does not explain in some broad or general way that arbitration is a substitute for the right to seek relief in our court system." Id. at 307-308. Specifically, the arbitration provision "failed to explain in some sufficiently broad way or otherwise that arbitration was a substitute for

having disputes and legal claims resolved before a **judge** or jury." Morgan, 225 N.J. at 311-312 (emphasis added).

Similarly, in Barr, 442 N.J. Super. at 602, this Court held that an arbitration agreement was unenforceable because the provisions at issue failed to "clearly evince an effective waiver of plaintiff's right to seek relief […] in a **judicial forum**[.]" (Emphasis added). The arbitration provision must clearly "convey that parties are giving up their right to bring their claims **in court** or have a jury resolve their dispute." Barr, 442 N.J. Super. at 606 (emphasis added). "An arbitration agreement that fails to 'clearly and unambiguously signal' to parties that they are surrendering their right to pursue **a judicial remedy** renders such an agreement unenforceable." Id. (quoting Atalese, 219 N.J. at 444). This Court found that the arbitration provisions in Barr "fail[ed] to 'explain what arbitration is,' nor [did] they 'indicate how arbitration is different from a proceeding in a court of law.'" Id. at 607-608 (quoting Atalese, 219 N.J. at 446). Thus, the arbitration provisions in Barr were unenforceable. Id. at 608.

Even if it contains some reference to the rights being waived as a result of arbitration and the nature of arbitration procedures, an arbitration clause may be rendered invalid if it is ambiguous. See Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 127 (2001). "An ambiguity in a contract exists if the terms of the contract are susceptible to at least two

reasonable alternative interpretations." Schor v. FMS Fin. Corp., 357 N.J. Super. 185, 191 (App. Div. 2002) (internal citation and quotation marks omitted). "In interpreting a contract, it is not the real intent but the intent expressed or apparent in the writing that controls." Garfinkel, 168 N.J. at 135 (internal citation and quotation marks omitted). "An unambiguous writing is essential" to determining whether a signatory actually intended to waive the rights at issue. Id. at 136. In Garfinkel, because the arbitration provisions failed to unambiguously convey that the plaintiff was waiving his statutory right to pursue his Law Against Discrimination (LAD) claims in court, the New Jersey Supreme Court found the arbitration provision unenforceable. Id. at 136.

Likewise, this Court has held that "despite the general rule that arbitration clauses are to be liberally construed, courts have not hesitated to apply the common-law rule that a court should construe ambiguous language against the interest of the party that drafted it." Quigley v. KPMG Peat Marwick, LLP, 330 N.J. Super. 252, 271 (App. Div. 2000), certif. denied, 165 N.J. 527 (2000). This Court held that "the language of the arbitration clause" in Quigley "was too ambiguous and inadequate to constitute a waiver of [the plaintiff's] statutory remedies." Quigley, 330 N.J. Super. at 256-257.

B. Defendant's Arbitration Provision Is Unenforceable Because There Was No Meeting Of The Minds As Required Under *Atalese* (Pa1-Pa9)

Here, there was no meeting of the minds because the Urban Air Agreement failed to clearly and unambiguously explain what arbitration is or that by agreeing to arbitration, a signatory would be waiving the Minor Plaintiff's right to sue or present his or her claims in court before a judge or jury.

Nothing in the title or at the top of the Urban Air Agreement indicates that it contains an arbitration clause. See Pa59; Pa163. Paragraph 5 of the Agreement provides that the Adult Participant, on behalf of the Child Participant, "releases, agrees not to sue, and shall indemnify and defend" Defendant from all claims arising from "bodily injury" due to use of the premises. Pa59; Pa164. Defendant's attempt to waive all personal injury claims is unlawful and unenforceable as to the Minor Plaintiff. See Hojnowski v. Vans Skate Park, 187 N.J. 323, 336-338 (2006). Despite the fact that Paragraph 5 of the Agreement purportedly bars the filing of any personal injury claims against Defendant, Paragraph 6, entitled "Dispute Resolution" and provides as follows:

> 6. **DISPUTE RESOLUTION.**
>
> **A. ARBITRATION.** Any dispute or claim arising out of or relating to this Agreement, breach thereof, the Premises, Activities, property damage (real or personal), personal injury (including death), or the scope, arbitrability, or validity of this arbitration agreement (Dispute) shall be brought by the parties in their individual capacity and not as a plaintiff or class member in any purported class or representative capacity, and

settled by binding arbitration before a single arbitrator administered by the American Arbitration Association (AAA) per its Commercial Industry Arbitration Rules in effect at the time the demand for arbitration is filed. Judgment on the arbitration award may be entered in any federal or state court having jurisdiction thereof. The arbitrator shall have no authority to award punitive or exemplary damages. If the Dispute cannot be heard by the AAA for any reason, the Dispute shall be heard by an arbitrator mutually selected by the parties. If the parties cannot agree on an arbitrator, then either party may petition an appropriate court to appoint an arbitrator. Arbitration and the enforcement of any award rendered in the arbitration proceedings shall be subject to and governed by 9 U.S.C. § 1 et seq.

B. WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY LAW, ADULT PARTICIPANT AND URBAN AIR KNOWINGLY, WILLINGLY, AND VOLUNTARILY, WITH FULL AWARENESS OF THE LEGAL CONSEQUENCES, AFTER CONSULTING WITH COUNSEL (OR AFTER HAVING WAIVED THE OPPORTUNITY TO CONSULT WITH COUNSEL) AGREE TO WAIVE THEIR RIGHT TO A JURY TRIAL OF ANY DISPUTE AND TO RESOLVE ANY AND ALL DISPUTES THROUGH ARBITRATION. The right to a trial by jury is a right parties would or might otherwise have had under the Constitutions of the United States of America and the state in which the Premises is located.

[Pa59; Pa164.]

The Urban Air Agreement's arbitration provision as set forth in Paragraph 6(A) contains no description of: what arbitration is; that it differs from a proceeding in court; that there is no judge; that there is no jury; that there is only a limited right to "appeal" an arbitrator's decision; or that an agreement to arbitrate means foregoing the right to sue and to have one's claims resolved in

the court system or a judicial forum as opposed to a private, arbitral setting . See Pa59; Pa164. The word "sue" appears nowhere in Paragraph 6, the arbitration provision, and there is no explanation that arbitration means waiving the right to sue in court. Id. The only references to "court" in Paragraph 6 are to applications to court to enter judgment on an arbitration award or to appoint an arbitrator. Id. There is no explanation in the arbitration provision, or anywhere else in the Agreement, that arbitration means waiving one's right to have one's claim heard in the court system or before a judge in a bench trial. Id.

Accordingly, Defendant's arbitration provision is fatally deficient and fails to establish the meeting of the minds required by Atalese and New Jersey's basic contract law. The arbitration provision fails to mention that, by agreeing to arbitrate, signatories are "waiving their time honored-right to sue". See Atalese, 219 N.J. at 444. There is likewise no explanation that arbitration means the waiver of the right to "seek relief in a judicial forum" or "court of law" Id. at 436, 445, 447. There is no explanation that arbitration means the "waiver of the right to judicial adjudication." Curtis, 413 N.J. Super. at 37. Likewise, there is no language in Paragraph 6(A) expressing that arbitration means "waiving the rights to pursue [one's] claims **before a judge or jury in court**" in a "jury **or other civil trial**." Flanzman, 244 N.J. at 137-138 (emphasis added).

The subsequent provision regarding "Jury Trial Waiver" set forth in Paragraph 6(B) does not cure the fatal deficiency of the arbitration provision. First, the jury trial waiver applies **only** to "**Adult Participant**" and makes no mention of applying to the "Child Participant" (i.e., Minor Plaintiff). See Pa59; Pa164. At the beginning of the Agreement, the terms "Adult Participant" and "Child Participant" were separately defined, with the term "Participant" defined as a collective term used to include both the "Adult Participant" and "Child Participant". Pa59; Pa163. The "Jury Trial Waiver" provision does not use the collective term "Participant" and makes no reference to applying to the "Child Participant"; it refers only to the "Adult Participant". Pa59; Pa164. Thus, there is nothing in the Arbitration Agreement indicating that a "Child Participant" such as Minor Plaintiff is waiving his right to a jury trial or that arbitration would entail the waiver of a child's right to a jury trial. Id. At best, the "Jury Trial Waiver" provision is ambiguous as to whether it applies to the Child Participant/Minor Plaintiff, and arbitration may not be enforced based on an ambiguous agreement. See Atalese, 219 N.J. at 445 (holding that the waiver of rights language in an arbitration agreement "must be clear and unambiguous").

Even if the "Jury Trial Waiver" provision were to be read as applying to the Child Participant (which it does not), that would still not cure the arbitration provision's failure to explain that arbitration means the waiver not only of a jury

trial, but of any right to "seek relief in a judicial forum" or "court of law", Atalese, 219 N.J. at 436, 445, 447, which includes "waiving the rights to pursue their claims **before a judge or jury in court**" in a "jury **or other civil trial**." Flanzman, 244 N.J. at 137-138 (emphasis added). Nothing in the agreement states that, by agreeing to arbitration, a Child Participant is waiving the right to a bench trial before a Judge of the Superior Court. Furthermore, nothing advises as to what arbitration is or that an arbitrator's ruling is subject to only limited appellate review. Thus, even if the "Jury Trial Waiver" provision were found to be applicable to the Child Participant, despite its failure to so state, the arbitration provision would remain fatally deficient and unenforceable for utterly failing to convey that arbitration entails the waiver of any right to present one's case in the court system or to a judge.

It is anticipated that Defendant may attempt to rely upon the final, non-numbered paragraph that appears, in an even smaller font than the rest of the Agreement, above the signature line by arguing that this paragraph remedies the deficiencies of the Agreement's arbitration provision in Paragraph 6. However, this final paragraph contains no reference to arbitration at all. Pa59; Pa165. This paragraph does not satisfy Atalese's requirement of explaining that "arbitration is a substitute for the right to have one's claim adjudicated in a court of law" in a manner that is "clear[] and unambiguous[.]" See Atalese, 219 N.J. at 442-443.

While the final paragraph references giving up "my right to sue", it does so not in reference to arbitration, but rather in the context of the "Assumption of Risk, Waiver of liability, and Indemnification Agreement" releasing Defendant "for all liability" due to its negligence or the inherent risks of the activity conducted at Defendant's facility. Id. In other words, this final paragraph references giving up the right to assert any bodily injury claims at all against Defendant as expressed in the blanket waiver of all injury claims set forth in Paragraph 5 of the Agreement. See Pa59 and Pa164. This waiver of bodily injury claims is illegal and unenforceable as to children such as the Minor Plaintiff. See Hojnowski, 187 N.J. at 336-338.

In any event, the final paragraph of the Agreement contains no reference to arbitration at all and does not explain that the agreement to **arbitrate** a claim means giving up the rights to sue or to appear before a judge and/or a jury in the judicial system. See Pa59; Pa165. At best, this final paragraph renders the agreement ambiguous, which is insufficient to satisfy the requirement of Atalese to "clearly and unambiguously" explain that arbitration equates with a waiver of the right to present ones claims before a judge or jury in a court of law. Atalese, 219 N.J. at 442-443. Thus, the general reference to completely waiving the "right to sue" in the final paragraph of the Agreement, which reference is not in any way connected to arbitration, does not substitute for the necessary,

unambiguous explanation that agreeing to arbitrate a claim entails waiving the right to sue or to pursue one's claims in court before a judge or jury.

The arbitration provision in Flanzman, a case relied upon by the trial court, is sharply distinguishable from the invalid arbitration provision in the instant matter. In Flanzman, the arbitration agreement provided that the parties agreed to a "final and binding arbitration" that would take the place of "a jury **or other civil trial**." Flanzman, 244 N.J. at 124 (emphasis added). In contrast, here, the Urban Air Agreement's arbitration provision contains no mention of the parties waiving their right to a "civil trial" or any type of court proceeding or judicial review. See Pa59, Pa164, ¶ 6. The only time the Agreement mentions waiving a "jury trial", that waiver is limited to the "Adult Participant"; no mention is made of the Child Participant's right to a jury being waived. Id. Furthermore, there is no mention of any of the participants waiving rights to court proceedings, a bench trial, or judicial/appellate review. Id.

The Agreement's inclusion of a venue provision in Paragraph 9 increases the ambiguity of the purported arbitration agreement. The sentence in question provides that "[v]enue for any action brought hereunder or due to Participant's use of the Premises or participation in the Activities shall lie in the County in which the Premises is located." Pa59; Pa165. The setting of a venue for an "action" arising from the use of the premises would only be relevant for the

filing of a court action, which would be inconsistent with the purported arbitration agreement. This ambiguity further demonstrates that the Agreement fails to set forth an enforceable arbitration agreement under Atalese.

The trial court's references in its decision to arbitration clauses being "severable" are beside the point. Pa6-7. It is well-settled that "unless a plaintiff's challenge to an agreement is specifically directed toward the arbitration clause, any dispute regarding the agreement [as a whole] must be presented to the arbitrator." Pa7. Here, however, Minor Plaintiff is specifically challenging the validity and enforceability of the arbitration provision in the Urban Air Agreement; therefore, the validity of the arbitration provision was required to be addressed by the trial court in the first instance. See Pa6-7.

Both the United States and New Jersey Supreme Courts have distinguished between challenges to the general validity of a contract as a whole, which are to be determined by an arbitrator, and specific challenges to the validity of an arbitration clause, which are to be determined by the court prior to deciding whether to send a matter to arbitration. "**[U]nless the challenge is to the arbitration clause itself**, the issue of the contract's validity is considered by the arbitrator in the first instance." Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 210 (2019) (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-446 (2006)) (emphasis added). Unlike the Minor Plaintiff herein, the

plaintiff in Goffe had "not attacked the language or clarity of the arbitration agreement" and had "not raised a specific claim attacking the formation of the arbitration agreement[.]" Goffe, 238 N.J. at 212. Here, Minor Plaintiff has asserted that the arbitration clause in the Urban Air Agreement is invalid and unenforceable due to its failure to contain the clear, unambiguous waiver language required by Atalese. The doctrine of "severability" has no application to that issue. If, as Minor Plaintiff contends, the arbitration clause is unenforceable, the trial court was required to deny Defendant's motion to compel arbitration.

The case of AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) cited by the trial court has no bearing on the specific issue raised by this appeal. The Court in AT&T held that a California court ruling prohibiting the arbitration of class action claims was preempted by the FAA. Id. at 341. The Court's holding had nothing to do with, and did not alter, the fact that arbitration agreements may be invalidated based on "such grounds as exist at law or in equity for the revocation of any contract[.]" See 9 U.S.C.A. § 2. This Court has held that, "in the aftermath of AT&T Mobility, state courts remain free to decline to enforce an arbitration provision by invoking traditional legal doctrines governing the formation of a contract and its interpretation." NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 428 (App. Div. 2011),

certif. granted, 209 N.J. 96 (2011), appeal dismissed, 213 N.J. 47 (2013). Here, as set forth above, Defendant's arbitration provision is invalid under the traditional legal doctrines governing contract formation because it failed to clearly and unambiguously describe the nature of arbitration and that arbitration entails the waiver of the Minor Plaintiff's rights to present his claims in the judicial system to a judge or jury. The trial court's order compelling arbitration should therefore be reversed.

C. Defendant's Arbitration Provision Is Particularly Invalid As To Minor Plaintiff's Statutory Claims (Pa1-Pa9)

While Defendant's arbitration provision is completely invalid as to all of Minor Plaintiffs' claims, it is particularly deficient with respect to Minor Plaintiffs' statutory claims. The waiver of statutory rights in any context, including arbitration, requires a heightened level of specificity not met by the Urban Air Agreement. As noted above, many of the Minor Plaintiff's claims against Defendant assert statutory rights under statutes such as the CFA, TCCWNA, and the Products Liability Act. The CFA and TCCWNA explicitly confer a right to proceed in court. See Atalese, 219 N.J. at 446 (citing N.J.S.A. 56:8-19 and N.J.S.A. 56:12-17). The CFA confers the right to a jury trial, which is also guaranteed by the New Jersey Constitution. See Morgan, 225 N.J. at 308 (citing N.J. Const. art. I, ¶ 9).

"An agreement to waive statutory remedies must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively." Alamo Rent A Car, Inc. v. Galarza, 306 N.J. Super. 384, 391 (App Div. 1997). (internal citation and quotation marks omitted). "To pass muster […] a waiver-of-rights provisions should **at least** provide that the employee agrees to arbitrate **all statutory claims** arising out of the employment relationship or its termination." Garfinkel, 168 N.J. at 135 (emphasis added). This Court has held as follows:

> Arbitration of statutory claims is enforceable when the contract provisions (1) contain language reflecting a general understanding of the type of claims included in the waiver; or (2) provide that, by signing, the consumer agrees to arbitrate "all **statutory** claims arising out of the relationship," or any claim or dispute based on a **federal or state statute**.
>
> [Curtis, 413 N.J. Super. at 35-36 (emphasis added).]

See also Quigley, 330 N.J. Super. at 273 (holding that an arbitration clause was unenforceable as it contained no reference to the "plaintiff's statutory rights."). And see Rockel, 368 N.J. Super. at 580 (invalidating an arbitration agreement in part due to "the absence of a definitive waiver of plaintiffs' statutory claims").

Here, the arbitration provision of the Urban Air Agreement fails to make even a general reference to statutory claims. See Pa59, Pa164, ¶ 6. Thus, the Agreement fails to set forth a valid, enforceable waiver of the Minor Plaintiff's right to pursue his statutory claims in court.

The arbitration provision in the Flanzman case relied upon by the trial court is once again distinguishable from the invalid arbitration provision in the instant matter. In Flanzman, the arbitration provision contained a specific reference to applying to claims "whether arising under **statute** or common law". Flanzman, 244 N.J. at 126 (emphasis added). In contrast, the arbitration provision in the instant matter fails to make even a general reference to statutory claims. See Pa59, Pa164, ¶ 6.

In Garfinkel, the New Jersey Supreme Court held that the plaintiff's statutory claims were not subject to arbitration because the arbitration agreement failed to unambiguously indicate that the plaintiff was waiving the right to pursue statutory claims in court. Garfinkel, 168 N.J. at 136. The Court further held that the plaintiff's common law claims, which otherwise would have been subject to arbitration, should also be resolved in the Law Division to avoid "the unnecessary bifurcation of disputes between judicial resolution and arbitration." Id. at 137 (internal citation and quotation marks omitted).

The dilemma presented in Garfinkel is not posed here because the Urban Air Agreement's arbitration clause is so fundamentally deficient that it does not validly apply to any of the Minor Plaintiffs claims, whether they arise under statutory or common law. That said, assuming arguendo the Court were to disagree, the arbitration clause is patently insufficient to apply to statutory

claims and, therefore, as in Garfinkel, all of Minor Plaintiff's claims should be resolved in the Law Division to avoid the unnecessary bifurcation of claims between litigation and arbitration.

D. Defendant's Misleading Inclusion Of The Commercial Arbitration Rules And Other Unlawful Provisions Further Establishes That The Arbitration Clause Is Unenforceable (Pa1-Pa9)

While Defendant's arbitration provision is unenforceable due to its failure to contain the clear and unambiguous waiver of rights language necessary to establish a meeting of the minds under Atalese, Defendant's inclusion of misleading and unlawful provisions in the arbitration provision further establishes its unenforceability. As set forth below, the purpose behind Defendant's use of these improper provisions was clearly to intimidate and mislead injured patrons from pursuing claims against Defendant.

i. The Arbitration Provision's Misleading Reference To AAA's "Commercial Industry Arbitration Rules" And Unlawful Prohibition Of The Award Of Punitive Damages (Pa1-Pa9)

The arbitration provision in Defendant's Agreement provides that the arbitration will be "administered by the American Arbitration Association (AAA) per its Commercial Industry Arbitration Rules [….]" Pa59; Pa164. However, on August 4, 2022, nearly two years before the June 23, 2024 incident that forms the basis of this matter, AAA sent correspondence to Urban Air Trampoline Adventure Park, through its attorneys in another matter, advising

Urban Air that the "Consumer Arbitration Rules" ('Consumer Rules') applied to the arbitration of a minor's claim. Pa107. In that letter, AAA noted that "this business [Urban Air] has previously indicated that it willing to have all consumer-related disputes heard in accordance with the Consumer Rules and Protocol[.]" Pa108. Despite being on notice that the Commercial Rules do not apply to "consumer" claims arising from the use of its facilities, Defendant Urban Air nevertheless continues to improperly state in its arbitration provision that the Commercial Rules apply.

The Commercial Rules are significantly more financially burdensome to claimants than the Consumer Rules. Compare Pa89-90 (R-54) to Pa142. The Commercial Rules are meant to apply to disputes arising from "business transactions". Pa67. Under the Commercial Rules, the parties are required to equally split the expenses of the arbitration, which would impose a substantial financial burden on claimants such as Minor Plaintiff. See Pa89 (R-54). In contrast, under the Consumer Rules, which apply to claims between consumers and businesses, the consumer/claimant is only responsible for a $200 filing fee, while the business is responsible for a larger $1,700 filing fee and bears the complete cost of compensating the arbitrator. Pa142.

The reason that Defendant has improperly continued to state that the Commercial Rules apply in its arbitration provision, despite being on notice that

AAA will apply the Consumer Rules, is obvious: Defendant wants to deceive consumers into believing that if they pursue claims against Defendant and those claims end up in arbitration, the consumers will bear the risk of having to shoulder half the costs of the arbitration, whatever they end up being. "The Supreme Court has recognized that 'the prospects of having to shoulder all the costs of arbitration could chill ... [plaintiffs] from pursuing their statutory claims through mandatory arbitration.'" Jaworski v. Ernst & Young U.S. LLP, 441 N.J. Super. 464, 482 (App. Div. 2015) (quoting Delta Funding Corp. v. Harris, 189 N.J. 28, 42 (2006)). The same chilling effect would apply here under the Commercial Rules, as many consumers would likely forego pursuing their claims altogether rather than risk being responsible for some unknown amount of arbitration costs. Thus, Defendant misleadingly included an inapplicable provision in its arbitration clause to deceive consumers into foregoing claims.

The AAA's August 4, 2022 letter to Urban Air also advises that Defendant's arbitration provision deviated from the AAA's Consumer Rules and/or Due Process protocol by including a provision stating: "The arbitrator shall have no authority to award punitive or exemplary damages." Pa108. It is well-settled that arbitration provisions may not preclude the award of punitive damages when such damages are specifically authorized by a statute such as the CFA, since "[b]y agreeing to arbitrate a statutory claim, a party does not forgo

the substantive rights afforded by the statute[.]" Atalese, 219 N.J. 430, 448 FN3 (2014). Despite being advised that the language barring the award of punitive damages is inconsistent with AAA's own Due Process protocol and Rules, Defendant continued to include the exact same prohibited language in the subject Agreement. See Pa59; Pa164.

It appears that Defendant has knowingly continued to include such improper provisions in its arbitration clause for the purpose of misleading and intimidating injured claimants from pursuing their claims against Defendant by falsely suggesting that the cost of doing so will be prohibitive or the substantive remedies available will be limited, when Defendant knows this is not the case. The use of such misleading, improper, and unlawful provisions in the arbitration clause is inconsistent with the requirement that arbitration clauses must contain clear and unambiguous descriptions of the signatories' rights so that there can be a meeting of the minds. See Atalese, 219 N.J. at 442.

During oral argument before the trial court, defense counsel attempted to excuse Defendant's inclusion of improper provisions in its arbitration clause by asserting, without citing any evidence in the record, that the language in the Agreement was set by the national Urban Air franchisor and that the local franchisee did not have "an option" to change the wording of the agreement. See T9:9-21. Defendant's argument, besides being factually unsupported, is patently

without merit. A party may not include improper or illegal provisions in a contract merely because the contract was drafted by a national corporate office.

The TCCWNA specifically bans the inclusion in a consumer contract of "any provision that violates any clearly established legal right of a consumer [….]" N.J.S.A. 56:12-15. A consumer may petition a court to terminate or void any contract that violates this requirement. N.J.S.A. 56:12-17. Plaintiffs seek such relief in the Fourth Count of the Complaint. See Pa38-Pa39. Moreover, if a consumer contract's provisions may not be enforceable in every jurisdiction, the contract must specify which provisions are void in New Jersey. N.J.S.A. 56:12-16. Thus, it is not sufficient for a contract to contain a vague, broad "severance" provision, like that found buried in Article 9 of the Urban Air Agreement, which states "if any portion [of the Agreement] is held invalid, it is agreed that the balance shall, notwithstanding, continue in full force and legal effect." Pa59; Pa165. Under the TCCWNA, such a provision is required to specify which provisions of the agreement are invalid under New Jersey law, which Defendant patently failed to do. Defendant's use of unlawful and deceptive terms in the arbitration provision further demonstrates that it is unenforceable under the general contract principles set forth in Atalese.

ii. Defendant's Inclusion Of An Unlawful Waiver Of A Minor's Bodily Injury Claims Renders The Inclusion Of An Arbitration Clause Inherently Misleading And Ambiguous (Pa1-Pa9)

Despite the fact that waivers of personal injury claims on behalf of minors have been unlawful and unenforceable in New Jersey for nearly two decades, see Hojnowski, 187 N.J. at 336-338, Defendant continues to include precisely such an illegal waiver of all bodily injury claims on behalf of a minor in Paragraph 5 of the Urban Air Agreement. See Pa59; Pa164. Defendant's inclusion of this illegal waiver in Paragraph 5 of the Agreement renders the arbitration provision in Paragraph 6 inherently illusory, misleading, and ambiguous. Since Paragraph 5 creates the impression that a minor will not be able to assert any bodily injury claims, why would the signatory pay attention to Paragraph 6, which purports to require the arbitration of the very personal injury claims that have already supposedly been waived in Paragraph 5? In other words, if Paragraph 5's waiver were to be enforced, there would be no injury claims to be resolved, by arbitration or otherwise, so the arbitration provision would appear to be immaterial.

A layperson presented with the Agreement would be unlikely to be familiar with the Hojnowski decision and would therefore be likely to be deceived into thinking that no bodily injury claims could be asserted against Defendant, whether in arbitration or otherwise. A layperson would therefore be

deceived into believing that the arbitration provision that follows the waiver of all bodily injury claims is immaterial and meaningless; since all personal injury claims have supposedly been waived, what does it matter if one enters into an arbitration agreement regarding non-existent claims? Accordingly, Defendant's inclusion of an illegal, unenforceable waiver of a minor's bodily injury claims renders the arbitration provision that follows it inherently illusory, misleading, and ambiguous. The ambiguity created by Defendant's misleading inclusion of an illegal waiver provision in its Agreement represents another reason why Defendant's arbitration provision is unenforceable under Atalese.

E. The Confusing And Hard-To-Read Presentation Of The Agreement Further Demonstrates Its Unenforceability (Pa1-Pa9)

This Court has held that "[t]he size of the print and the location of the arbitration provision in a contract has great relevance to any determination to compel arbitration, particularly when, like here, the provision is contained in a contract of adhesion." Rockel, 368 N.J. Super. at 585. "[T]he essential nature of a contract of adhesion is that it is presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the adhering party to negotiate except perhaps on a few particulars." Moore, 416 N.J. Super. at 38 (internal citation and quotation marks omitted). In Rockel, the arbitration provision was "difficult to locate and, once found, onerous to read in light of the small print." Rockel, 368 N.J. Super. at 586. Moreover, there was no prominent

language on the first page of the document "which warns that the right to pursue a lawsuit in court or the waiver of statutory claims or the right to trial by jury will be affected or eliminated by provisions contained elsewhere in the document." Id.

Citing New Jersey's Plain Language Act, the New Jersey Supreme Court emphasized that "every 'consumer contract' in New Jersey must 'be written in a simple, clear, understandable and easily readable way.'" Atalese, 219 N.J. at 444 (quoting N.J.S.A. 56:12-2). "Arbitration clauses—and other contractual clauses—will pass muster when phrased in plain language that is understandable to the reasonable consumer." Id. at 444.

Here, for the reasons set forth above, Defendant's Agreement fails to comply with the requirements for clarity and plain language necessary to establish a valid arbitration agreement. As in Rockel, the Agreement is a contract of adhesion and there was no prominent language in its title or at the top warning that it contained an arbitration agreement. Pa59. Unlike other provisions, which appeared in capital letters, underlined, and in bold, the text of the arbitration provision set forth in Paragraph 6(A) is not emphasized at all. Pa59. As demonstrated by the version of the Agreement put in the motion record by Defendant, the Agreement was presented in an illegibly small font that prohibits, or at the very least discourages, its being read, particularly by a

layperson. Pa59. Defense counsel's unsupported assertion during oral argument that the consumer could have zoomed in on the agreement to enlarge it should be disregarded as it is not derived from any competent evidence in the motion record. R. 1:6-6. Likewise, there is no evidence regarding whether patrons were made aware of the ability to enlarge the document. In any event, the only version of the Agreement put into the motion record by Defendant is the illegibly microscopic version that appears at Pa59. Accordingly, in addition to failing to contain the unambiguous language necessary for a meeting of the minds as required by Atalese, the arbitration agreement is also unenforceable due to its failure to be set forth in a clear, legible, readily understandable format.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's January 6, 2025 order staying this matter and compelling arbitration. The litigation and trial of Minor Plaintiff's claims should proceed before the Law Division.

Thank you for the Court's consideration herein.

Respectfully submitted,

Dated: 4/14/2025 /s David K. Chazen, Esq.

Superior Court of New Jersey

Appellate Division

Docket No. A-001480-24

LIAM LI, a Minor, by his parents and guardians ad litem, Jie He and Qian Li, *Plaintiff-Appellant*, vs. FAMILY ADVENTURES NORTH JERSEY, LLC, d/b/a Urban Air Trampoline & Adventure Park South Hackensack, *Defendant-Respondent.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY Docket No. BER-L-005337-24 Sat Below: HON. ANTHONY R. SUAREZ, J.S.C.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT

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PRELIMINARY STATEMENT

This matter arises out of a claim for injuries allegedly sustained by Plaintiff/Appellant Liam Li ("Minor Plaintiff") on June 23, 2024, at approximately 10:06 am, while participating in trampoline activities at the Urban Air Trampoline & Adventure Park ("the Park") located in South Hackensack, New Jersey. At that time, the Minor Plaintiff was using the "Apex" trampoline attraction in the park. The Apex consists of many smaller trampoline beds across the floor, with larger trampoline beds creating angled walls for customers to bounce off of. The Minor Plaintiff was allegedly injured when another child jumped onto the same trampoline bed as him, causing Plaintiff to "double bounce" and land awkwardly. The Minor Plaintiff allegedly suffered fractures to the radius and/or ulna in his left forearm.

The Park is owned by Defendant/Respondent, Family Adventures North Jersey, LLC d/b/a Urban Air Trampoline and Adventure Park. The Minor Plaintiff's claims were brought by his parents and guardians, Jie He and Qian Li (collectively "Appellants"). As a precondition of Minor Plaintiff's entry to the Park, Appellants agreed to arbitrate all disputes arising out of their presence at the Park. Appellants consented to the Waiver, Release, and Indemnification Agreement ("the Agreement") which required all claims to be brought in binding arbitration.

On January 3, 2025, the Honorable Anthony R. Suarez, J.S.C., sitting in the New Jersey Superior Court, Bergen County, Law Division, Civil Part, heard oral argument on, and subsequently granted Respondent's Motion for an Order staying the case as to all parties pursuant to N.J.S.A. 2A:23B-7 and compelling arbitration. Appellant claims that the lower Court erred when it found that the Agreement was enforceable.

Despite Appellants' protests, the Court did not err by granting Respondent's motion and compelling this matter to binding arbitration.

PROCEDURAL HISTORY

Appellants filed their Complaint on September 16, 2024. Pa14. On November 18, 2024, Respondent filed their Motion for an Order staying the case as to all parties pursuant to N.J.S.A. 2A:23B-7 and compelling arbitration. Pa10. On December 12, 2024, Appellants filed their opposition to Respondents' motion. Pa61. After hearing oral argument on January 3, 2025, Judge Suarez issued a written opinion granting Respondent's motion to Stay and Compel Arbitration. Pa1. Appellants appealed Judge Suarez's decision on January 23, 2025. Pa154.

STATEMENT OF THE FACTS

Respondent, Family Adventures North Jersey, LLC, owns and operates Urban Air Trampoline & Adventure Park ("the Park") located in South

Hackensack, New Jersey. Pa15. On January 23, 2024, Appellants were present at the Park. Pa14. Before entering the Park, Appellants were presented with a Waiver, Release, and Indemnification Agreement ("the Agreement"). Pa59. The Agreement provides in pertinent part as follows:

5. Release and Indemnity. **TO THE FULLEST EXTENT PERMITTED BY LAW, ADULT PARTICIPANT, ON BEHALF OF HIMSELF, CHILD PARTICIPANT AND THEIR HEIRS, EXECUTORS, AND REPRESENTATIVES RELEASES, AGREES NOT TO SUE, AND SHALL INDEMNIFY AND DEFEND….**

COLLECTIVELY "PROTECTED PARTIES" FROM AND AGAINST ALL LIABILITIES, LOSSES, DAMAGES, CLAIMS, DEMANDS, ACTIONS, SUITS, CAUSES OF ACTION, COSTS, FEES, AND EXPENSES (INCLUDING REASONABLE ATTORNEY'S FEES AND COURT OR OTHER COSTS) (COLLECTIVELY CLAIMS) RELATING TO, RESULTING FROM, OR ARISING OUT OF OR ALLEGED TO HAVE RISEN OUT OF (IN WHOLE OR IN PART) ANY PROPERTY DAMAGE OR BODILY INJURY (INCLUDING DEATH) TO PARTICIPANT RESULTING IN ANY WAY FROM (A) PARTICIPANT'S USE OF THE PREMISES, (B) PARTICIPANT'S ACTIVE OR PASSIVE PARTICIPATION IN THE ACTIVITIES, (C) LOSS OR THEFT OF PERSONAL PROPERTY, (D) FROM THE CONSUMPTION OF ALCOHOL AT THE PREMISES BY PARTICIPANT OR ANY OTHER INVITEE OF URBAN AIR, OR (E) PARTICIPANT'S BREACH OF THIS AGREEMENT. THIS RELEASE AND INDEMNITY SHALL APPLY EVEN IF ANY CLAIM IS CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE, GROSS NEGLIGENCE, STRICT LIABILITY, OR WILLFUL MISCONDUCT OF THE PROTECTED PARTIES OR PARTICIPANT. THE INDEMNITY SHALL ALSO INCLUDE ADULT PARTICIPANT'S OBLIGATION TO INDEMNIFY THE PROTECTED PARTIES FROM (A) ANY SUM OR SETTLEMENT PAID TO OR ON BEHALF OF THE CHILD PARTICIPANT RESULTING FROM A CLAIM IN ANY WAY INVOLVING THE FOREGOING SUBSECTIONS AND (B) ALL CLAIMS RESULTING FROM OR RELATING TO ANY INSUFFICIENCY OF PARTICIPANT'S LEGAL CAPACITY OR

AUTHORITY TO EXECUTE THIS AGREEMENT FOR OR ON BEHALF OF THE CHILD PARTICIPANT."

6. Dispute Resolution

A. ARBITRATION. Any dispute or claim arising out of or relating to this Agreement, breach thereof, the Premises, Activities, property damage (real or personal), personal injury (including death), or the scope, arbitrability, or validity of this arbitration agreement (Dispute) shall be brought by the parties in their individual capacity and not as a plaintiff or class member in any purported class or representative capacity, and settled by binding arbitration before a single arbitrator administered by the American Arbitration Association (AAA) per its Commercial Industry Arbitration Rules in effect at the time the demand for arbitration is filed. Judgement on the arbitration award may be entered in any federal or state court having jurisdiction thereof. The arbitrator shall have no authority to award punitive or exemplary damages. If the Dispute cannot be heard by the AAA for any reason, the Dispute shall be heard by an arbitrator mutually selected by the parties. If the parties cannot agree upon an arbitrator, then either party may petition an appropriate court to appoint an arbitrator. Arbitration and the enforcement of any award rendered in the arbitration proceedings shall be subject to and governed by 9 U.S.C. §1 et seq.

B. WAIVER OF JURY TRIAL. **TO THE FULLEST EXTENT PERMITTED BY LAW, ADULT PARTICIPANT AND URBAN AIR KNOWINGLY, WILLINGLY, AND VOLUNTARILY, WITH FULL AWARENESS OF THE LEGAL CONSEQUENCES, AFTER CONSULTING WITH COUNSEL (OR AFTER HAVING WAIVED THE OPPORTUNITY TO CONSULT WITH COUNSEL) AGREE TO WAIVE THEIR RIGHT TO A JURY TRIAL OF ANY DISPUTE AND TO RESOLVE ANY AND ALL DISPUTES THROUGH ARBITRATION.** The right to a trial by jury is a right parties would or might otherwise have had under the Constitution of the United States of America and the state in which the Premises is located.
[Pa59].

Appellant, Qian Li, executed the Agreement on behalf of both themself and the Minor Plaintiff. Pa60. The Minor Plaintiff was allegedly injured at

approximately 10:45 am, while using the "Open Court" trampoline attraction. Pa16.

On November 18, 2024, Respondents filed a Motion for an Order staying the case as to all parties pursuant to N.J.S.A. 2A:23B-7 and compelling arbitration. Pa10. On January 3, 2025, oral argument on the Motion was heard by the Honorable Anthony R. Suarez, J.S.C., sitting in the New Jersey Superior Court, Bergen County, Law Division, Civil Part. Pa1. Judge Suarez issued a written opinion granting the Motion on January 6, 2025. Pa1. Appellants appealed Judge Suarez's decision on January 23, 2025. Pa154.

LEGAL ARGUMENT

I. THE TRIAL COURT'S FACTUAL FINDINGS UNDERLYING THE WAIVER DETERMINATION ARE ENTITLED TO DEFERENCE

An appellate court's review of rulings of law and issues regarding the applicability, validity (including constitutionality) or interpretation of laws, statutes, or rules is de novo. See In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020) (agency's interpretation of a statute); State v. G.E.P., 243 N.J. 362, 382 (2020) (retroactivity of statute); State v. Hemenway, 239 N.J. 111, 125 (2019) (constitutionality of a statute); State v. Hyland, 238 N.J. 135, 143 (2019) (appealability of a sentence); Kocanowski v. Twp. of Bridgewater, 237 N.J. 3, 9 (2019) (statutory interpretation); Green v. Monmouth Univ., 237 N.J. 516, 529 (2019) (applicability of charitable immunity); State v. Fuqua, 234 N.J. 583, 591

(2018) (statutory interpretation); State v. Dickerson, 232 N.J. 2, 17 (2018) (interpretation of court rules).

We agree that the Appellate courts "review de novo the trial court's judgment dismissing the complaint and compelling arbitration." Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 131 (2020). See Skuse v. Pfizer, Inc., 244 N.J. 30, 46 (2020). A reviewing court however must accept the factual findings of a trial court that are "supported by sufficient credible evidence in the record." State v. Mohammed, 226 N.J. 71, 88 (2016) (quoting State v. Gamble, 218 N.J. 412, 424 (2014)). "Reviewing appellate courts should 'not disturb the factual findings and legal conclusions of the trial judge' unless convinced that those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). In this case, a review of the Court's decision fails to show any findings or conclusions that were manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interest of Justice.

The trial court found that the Agreement "explicitly informed [Appellants] that by agreeing to arbitration, they were waiving their right to a judicial

adjudication of their disputes" and "appropriately informs [Appellants] of the consequences of the agreement to arbitrate." Pa9. The trial court went on to find that the terms of the Agreement are "clear and unambiguous and if [Appellant] was not able to understand the same, it also refers to the [Appellants'] right to consult with counsel in this regard." Pa9.

II. THE LANGUAGE OF THE AGREEMENT PROPERLY INFORMED APPELLANTS ABOUT THE RAMIFICATIONS OF ENTERING INTO THE AGREEMENT.

Under the Federal Arbitration Act, 9 U.S.C. § 1 to 16 (hereinafter "FAA") arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 344 (2011) (quoting Volt Info. Scis., Inc. v. Bd. Of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989) (alteration in original). Likewise, the New Jersey Arbitration Act (hereinafter "NJAA"), codified at N.J.S.A. 2A:23B-1 to - 32, provides that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." N.J.S.A. 2A:23B-6(a).

Both "[t]he Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1–16, and the nearly identical New Jersey Arbitration Act, N.J.S.A. 2A:23B–1 to –32, enunciate federal and state policies favoring arbitration." Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 440 (2014); see also Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 133 (2020); Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 556 (2015). The Court recognized that "[t]he FAA requires courts to 'place arbitration agreements on an equal footing with other contracts and enforce them according to their terms.'" Atalese, 218 N.J. at 441 (quoting Concepcion, 563 U.S. at 339). The Supreme Court of New Jersey, has interpreted the scope of arbitration clauses broadly to vindicate "the strong public policy favoring the settlement of dispute through arbitration." Hojnowski v. Vans Skate Park, 187 N.J. 323, 343 901 A.2d 381 (2006).

Appellants argue that the Agreement is invalid because it does not adequately inform the consumer of their rights and remedies that are to be waived. Appellants argue that the Agreement does not adequately describe how arbitration differs from litigation in the Superior Court, thereby failing to meet the requirements of Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430 (2014). However, as noted above, the trial court found that the Agreement "explicitly informed [Appellants] that by agreeing to arbitration, they were waiving their

right to a judicial adjudication of their disputes" and "appropriately informs [Appellants] of the consequences of the agreement to arbitrate." Pa9.

Section 6 of the Agreement is titled "Dispute Resolution", with two subsections titled "6(A) ARBITRATION" and "6(B) WAIVER OF JURY TRIAL", and provides the exact information that the courts want these agreements to contain. Pa59. Section 6(A) explains that all disputes, controversies and claims shall be submitted to binding arbitration, and that the arbitration shall be under the jurisdiction of the AAA and subject to their rules. Pa59. Section 6(B) informs the reader of their right to a jury trial, the opportunity to consult with counsel before agreeing, and reiterates that any and all disputes will be resolved by arbitration. Pa59.

Appellants argue that Atalese requires language beyond just waiver of "jury trial", but also waiver "of any right to "seek relief in a judicial forum" or "court of law", which includes "waiving the rights to pursue their claims before a judge or jury in court" in a "jury or other civil trial." However, Atalese addressed the standard by which these agreements are to be analyzed, holding that "[t]he FAA requires courts to 'place arbitration agreements on equal footing with other contracts and enforce them according to their terms.'" Atalese, *supra*, 218 N.J. at 441 (quoting AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 339 (2011)). Accordingly, in articulating New Jersey law on mutual assent, the

New Jersey Supreme Court emphasized that it was imposing "no greater burden on an arbitration agreement than on any other agreement waiving constitutional or statutory rights." Atalese, *supra*, 219 N.J. at 447. "Thus, if parties agree on essential terms and manifest an intention to be bound by those terms, they have created an enforceable contract." Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992). The Atalese Court highlighted that "[n]o particular form of words is necessary to accomplish a clear and unambiguous waiver of rights." Atalese, *supra*, 219 N.J. at 444. It went on to note that the only essential terminology required in an arbitration provision is that the arbitration provision, "at least in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute." Atalese, *supra* 219 N.J. at 447.

"Our courts have upheld arbitration clauses phrased in various ways when those clauses have explained that arbitration is a waiver of the right to bring suit in a judicial forum." Atalese, *supra*, 219 N.J. at 444. For example, Atalese refers to Martindale v. Sandvik, Inc., 173 N.J. 76, 81-82 (2002), where the court upheld an arbitration clause because it explained that the plaintiff agreed "to waive [her] right to a jury trial" and that "all disputes relating to [her] employment . . . shall be decided by an arbitrator." Atalese, *supra*, 219 N.J. at 444-45; Martindale, *supra* 173 N.J. at 81-82 (2002) (stating that "arbitration agreement not only was

clear and unambiguous, it was also sufficiently broad to encompass reasonably plaintiff's statutory causes of action"). The Atalese Court identified another valid arbitration clause in Griffin v. Burlington Volkswagen, Inc., 411 N.J. Super. 515 (App. Div. 2010). In Griffin, *supra*, the Appellate Division upheld an arbitration clause, which expressed that "[b]y agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes." 411 N.J. Super. at 518.

III. THE ARBITRATION PROVISION APPLIES TO ALL PARTICIPANTS, INCLUDING CHILD PARTICIPANTS.

Appellant argues that there is nothing in Section 6 of the Agreement indicating that a "Child Participant" such as Minor Plaintiff is waiving their right to a jury trial or that arbitration would entail the waiver of a Child Participant's right to a jury trial. **Appellants' Brief page 32.** However, the language of the Agreement, taken as whole, clearly reflects the intent of the parties that all participants waive their right to a jury trial and submit to arbitration.

Section 8 of the Agreement, "AUTHORITY", states that "[i]f Adult Participant signs this Agreement on behalf of his/her spouse, child, family member, friend, minor child, or other person, Adult Participant warrants and represents to Urban Air that he/she has the legal authority and such person's

actual and implied authority to execute this Agreement on their behalf, including, but not limited to, the arbitration clause, release, indemnity agreement, and license." Pa59 (emphasis added). The terms of the Agreement clearly exhibit the drafter's intent for the terms to apply to both Adult Participants and Minor Participants.

Further, there is language on the signature page of the Agreement that states "I, the Parent/Guardian, on behalf of myself and that of the minor(s) identified above, as applicable, have read the above Assumption of Risk, Waiver of Liability, and Indemnification Agreement and fully understand and agree to its terms. I understand that I am giving up substantial rights, including my right to sue, by executing this Agreement. I further acknowledge that I am agreeing to indemnify Urban Air, as provided above, for all claims the referenced minor may have against Urban Air." Pa60 (emphasis added). Once again, the terms of the Agreement make it abundantly clear that the Agreement covers claims that the Minor Participant may bring. That same paragraph concludes by stating that, "by signing below, the Parent or Court-Appointed Legal Guardian agrees that they are also subject to all the terms of this document, as set forth above." Pa60 (emphasis added). The phrasing of this sentence highlights that the Minor Participant is the primary focus of the Agreement, with the parent or guardian as secondary considerations.

IV. THE REFERENCE TO THE AAA COMMERCIAL INDUSTRY ARBITRATION RULES DID NOT PREVENT A MEETING OF THE MINDS.

Appellants argue that the reference to the American Arbitration Association ("AAA")'s Commercial Rules, instead of the Consumer Rules, prevents there being mutual assent. However, the Supreme Court in Flanzman addressed this issue and held that the identification of an arbitral forum is not an essential term without which arbitration is unenforceable. Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 139 (2020). Although the Court noted that designating an arbitral forum, as well as "an alternative method of choosing an organization should the parties' primary choice be unavailable," may be beneficial and avoid disputes, the lack of such designation does not invalidate an agreement to arbitrate. Flanzman, *supra* at 140. Appellants rely on correspondence from AAA in a completely separate matter that does not have the arbitration agreement in that case attached. Appellants use this correspondence to claim that AAA was never available to the parties as the agreement in another case was not approved by AAA and that Consumer rules need to be applied instead of Commercial rules as noted in the Agreement. However, the same letter the Appellant uses to support its claim states that "[t]he AAA's review is administrative, it is not an opinion on whether the arbitration agreement, the contract, or any part of the contract is legally enforceable, nor is it a determination regarding the

arbitrability of the dispute." Pa108. Furthermore, the Agreement itself notes that in the event that parties are unable to use AAA, the dispute will be heard by another party. Pa59. Although Flanzman articulates that the designation of a forum is not an essential term to an arbitration provision, AAA is a forum available to parties. Additionally, the Agreement accounts for an alternative method of choosing an arbitrator. Therefore, there was a meeting of the minds regarding arbitration as all essential terms were agreed upon.

Appellants also claim that the incorporation by reference to the Commercial Industry Rules was intended to intimidate the Plaintiff with potential costs of arbitration. **Appellants' Brief page 42**. First, there is no evidence in the record or case law to support this allegation of intimidation. In fact, the Supreme Court has held an agreement that failed to explain fees required under AAA rules did not invalidate the arbitration clause and arbitration was compelled. Martindale v. Sandvik, Inc., 173 N.J. 76, 97 (2002). Appellants were not forced to enter into the Agreement and were free to not participate in the activities of the Park. More importantly, Appellants have already engaged in litigating a complex case which has its own substantial fees and cost. The argument that Respondent attempted to intimidate Appellants with the potential costs of arbitration is without merit as Appellants have shown that they will not shy from engaging in costly litigation.

Second, Appellants argue that they could not have assented to the Commercial Industry Rules. However, this argument is a red herring as New Jersey law does not require that arbitration rules must be provided or explained. In fact, courts have repeatedly upheld arbitration provisions that do not do so. See Martindale v. Sandvik, Inc., 173 N.J. 76 (2002); Curtis v. Cellco Partnership, 413 N.J. Super. 26, 31 (App. Div. 2010); Griffin v. Burlington Volkswagen, Inc., 411 N.J. Super. 515, 518 (App. Div. 2010); Morgan v. Sanford Brown Institute, 225 N.J. 289, 312 (2016). Further, the Supreme Court's decision in Flanzman enforced an arbitration agreement that did not even include a reference to what rules would apply to the arbitration. Thus, if the arbitration provision need not include reference to the particular rules that will apply, there can be no requirement that a copy of such rules be provided or such rules be explained in order for the provision to be enforceable. As such, Appellants' argument is without merit as it has been squarely decided opposite to the position Appellants take herein.

V. THE AGREEMENT IS NOT ILLUSORY OR CONTRADICTORY.

Appellants argue that because the title and last paragraph of the Agreement do not mention arbitration, the arbitration provision of the Agreement is not binding. As noted in Atalese, a "consumer contract" in New Jersey must "be written in a simple, clear, understandable and easily readable

way. Arbitration clauses—and other contractual clauses— will pass muster when phrased in plain language that is understandable to the reasonable consumer." Atalese, 219 N.J. at 444. The final paragraph reiterates that Appellants fully understood and agreed to all of the terms of the Agreement and once again acknowledges that Appellants were waiving their right to sue. Pa60. Further Section 8 of the Agreement, "AUTHORITY", notes that the signatory of the Agreement had the Minor Plaintiff's "actual and implied authority to execute this Agreement on their behalf, including, but not limited to, the arbitration clause, release, indemnity agreement, and license." Pa59 (emphasis added). This language in conjunction with clearly labeled "Dispute Resolution" section is quite clear about the arbitration and waiver of rights. Pa59.

Appellants also argue that inclusion of a waiver of bodily injury claims on behalf of a minor renders the subsequent arbitration provision illusory, ambiguous, and misleading. **Appellants' Brief pg. 47.** Appellants claim that a layperson presented with the Agreement would be deceived into thinking that no bodily injury claims could be brought in any forum, even arbitration, because the liability waiver precedes the arbitration provision in the Agreement and therefore discouraged from pursuing their claims at all. However, the argument fails because as noted in the arbitration provision, the provision encompasses all claims relating to the Agreement and not just personal injury claims, so there

would be claims to arbitrate. Pa59. Additionally, as noted above, Appellants have already engaged in litigating a complex case with substantial fees and costs. Clearly the language of the Agreement did not discourage Appellants from bringing their claims against Respondent, nor were Appellants deceived into believing that the Agreement prevented them from bringing any claims.

Appellants also argue that the language regarding venue is confusing as it mentions bringing an "action." However, the language merely accounts for the event the matter does goes to litigation as is the case with this matter. This does not cause confusion but is a provision made to address the exact situation in this case.

As a matter of substantive federal law, which applies in State Courts, arbitration clauses are severable from the remainder of a contract. See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46 (2006); see also Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 195 (2019) (holding that "Supreme Court holdings treat an arbitration agreement as severable and enforceable, notwithstanding a plaintiff's general claims about the invalidity of the contract as a whole."). This means that unless a plaintiff's challenge to an agreement is specifically directed towards the arbitration clause, any dispute regarding the agreement must be presented to the arbitrator. See e.g., Buckeye, 546 U.S. at

445-46. A challenge to the enforceability of the agreement as a whole cannot be a basis to avoid arbitration. See Goffe, 238 N.J. at 213.

VI. THE AGREEMENT DOES NOT VIOLATE THE PLAIN LANGUAGE ACT.

Appellants argue that the presentation of the Agreement makes it unenforceable. Appellants' reliance upon Rockel v. Cherry Hill Dodge, 368 N.J. Super. 577 (App. Div. 2004), which was decided before Atalese, is misplaced. Rockel involved a car sale with two separate contracts containing arbitration clauses. In that case, one arbitration clause was only fifty-five words long and contained no clear reference to a waiver of the right to maintain a court action, while the second clause was "far more expansive," even extending the right to compel arbitration to non-parties. Id. at 582. In the present matter, there is only one agreement at issue, which, as previously noted, the trial court found "explicitly informed [Appellants] that by agreeing to arbitration, they were waiving their right to a judicial adjudication of their disputes" and "appropriately informs [Appellants] of the consequences of the agreement to arbitrate." Pa9.

Further, Appellants argue that this matter is similar to Rockel because the version of the Agreement put in the motion record is in an "illegibly small font". **Appellants' Brief, page 49**. As noted during oral argument in the trial court, the version of the Agreement put in the motion record does not accurately reflect

what Appellants viewed when they executed the Agreement, as the Agreement was presented to Appellants on a digital screen with the ability to zoom in on the text. Appellants further argue that this matter should be treated the same as Rockel because there is no language in capital or bold lettering "which warns that the right to pursue a lawsuit in court or the waiver of statutory claims or the right to a trial by jury will be affected or eliminated by provisions contained elsewhere in the document." Rockel, *supra*, at 586. While Appellants correctly point out that Section 6(A) of the Agreement, which contains the arbitration provision, is written in standard text, without bold or underline. However Appellants fail to note that the next Section of the Agreement, 6(B), contains the following pertinent language:

> **TO THE FULLEST EXTENT PERMITTED BY LAW, ADULT PARTICIPANT AND URBAN AIR KNOWINGLY, WILLINGLY, AND VOLUNTARILY, WITH FULL AWARENESS OF THE LEGAL CONSEQUENCES, AFTER CONSULTING WITH COUNSEL (OR AFTER HAVING WAIVED THE OPPORTUNITY TO CONSULT WITH COUNSEL) AGREE TO WAIVE THEIR RIGHT TO A JURY TRIAL OF ANY DISPUTE AND TO RESOLVE ANY AND ALL DISPUTES THROUGH ARBITRATION.** Pa59.

This language appears in the Agreement in all capital letters, bolded and underlined.

VII. APPELLANTS' STATUTORY CLAIMS DO NOT PREVENT THIS MATTER FROM BEING COMPELLED TO ARBITRATION.

Appellants' statutory claims are meritless and are included solely for the purpose of keeping this matter out of arbitration. Appellants asserted claims under the New Jersey Products Liability Act (PLA), N.J.S.A. 2A:58C-1 thru 7, stemming from the alleged "defective design and manufacture of the subject trampoline attraction." Pa41-45. Appellants further assert claims under the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 (CFA), stemming from Respondent's alleged "false representations that their facility was safe for the Minor Plaintiff." Pa47-48. This is a classic case of over-pleading a simple claim for premises liability. This matter is not the type that the CFA was meant to govern; Appellants did not purchase a product from Respondent, they merely used the premises. Appellants assertion that Respondent made "false representations that their facility was safe for the Minor Plaintiff" is baseless. Respondent went out of its way to put all participants, including Appellants, on notice of the "inherent risks in and injuries that may occur from participating in the Activities." Pa59.

Appellants assert claims under the New Jersey Truth-In-Consumer Contract Warranty And Notice Act, N.J.S.A. 56:12-14, et seq. (TCCWNA).

Pa38-39. The TCCWNA prohibits sellers from entering into a written consumer contract providing a consumer warranty or displaying a notice or sign that includes "any provision that violates any clearly established legal right of a consumer or responsibility of a seller… as established by a State or Federal law." N.J.S.A. 56:12-15. In order to demonstrate a violation of TCCWNA, a plaintiff must establish that: (1) the defendant was a "seller, lessor, creditor, lender or bailee or assignee of any of the aforesaid"; (2) the defendant offered or entered into a "written consumer contract or [gave] or display[ed] any written consumer warranty, notice or sign"; (3) at the time that the written consumer contract is signed or the written consumer warranty, notice or sign is displayed, that writing contains a provision that "violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee" as established by State or Federal law; and (4) that the plaintiff is an "aggrieved consumer." N.J.S.A. 56:12-15, -17. TCCWNA creates civil liability to "aggrieved" consumers for actual damages or statutory damages of $100 per violation and also provides for attorney's fees and costs. N.J.S.A. 56:12-17.

The term "aggrieved consumer" denotes a consumer who has suffered some form of harm as a result of the defendant's conduct, thus, an "aggrieved consumer" is a consumer who has been harmed by a violation of N.J.S.A. § 56:12-15 of the TCCWNA. Spade v. Select Comfort Corp., 232 N.J. 504, 523

(2018). A consumer who has been exposed to a contract, warranty, or notice that violates TCCWNA, but did not otherwise incur any monetary damage or suffer other adverse consequence as result is not an "aggrieved consumer." *Ibid*. Simply alleging exposure to a consumer contract, warranty, or notice that may not be in compliance with TCCWNA is not enough to maintain a cause of action. *Ibid*. In the present matter, any alleged violation of the TCCWNA by Respondent was insufficient for Appellants to qualify as an "aggrieved consumer". This matter being stayed and ordered to arbitration has not harmed Appellants. As noted above, both "[t]he Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1–16, and the nearly identical New Jersey Arbitration Act, N.J.S.A. 2A:23B–1 to –32, enunciate federal and state policies favoring arbitration." Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 440 (2014); see also Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 133 (2020); Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 556 (2015). The Supreme Court of New Jersey, has interpreted the scope of arbitration clauses broadly to vindicate "the strong public policy favoring the settlement of dispute through arbitration." Hojnowski v. Vans Skate Park, 187 N.J. 323, 343 901 A.2d 381 (2006). Therefore, Appellants' statutory claims under the TCCWNA are without merit, and should not support a reversal of the trial court's order granting Respondent's motion to stay and compel this matter to arbitration.

CONCLUSION

Therefore, for the foregoing reasons, Respondents would argue that Appellants' appeal has no merit, and the trial court's order in this matter should be affirmed.

Respectfully submitted,

REILLY, McDEVITT & HENRICH, P.C.

By: */s/ Michael J. Jubanyik*
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Attorneys for Defendant Family Adventures North Jersey, LLC

Dated: May 29, 2025

LIAM LI, a Minor, by his parents and guardians ad litem, Jie He and Qian Li, Plaintiff, v. FAMILY ADVENTURES NORTH JERSEY, LLC, D/B/A URBAN AIR TRAMPOLINE & ADVENTURE PARK SOUTH HACKENSACK, Defendants.	**Superior Court of New Jersey, Appellate Division** **Docket No. A-001480-24** On Appeal From The Superior Court of New Jersey, Law Division, Bergen Vicinage Trial Court Docket No: Docket No. BER-L-005337-24 Sat Below (Trial Court): Hon. Anthony R. Suarez, J.S.C.

PLAINTIFF LIAM LI'S REPLY BRIEF IN FURTHER SUPPORT OF HIS APPEAL

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POINT I

THE ARBITRATION PROVISION IS UNENFORCEABLE (Pa1-Pa9).

A. Defendant's Arbitration Provision Is Unenforceable Because There Was No Meeting Of The Minds As Required Under *Atalese* (Pa1-Pa9)

At the outset, Defendant misconstrues the appellate standard of review that governs this Court's determination of whether the arbitration provision of the Urban Air Agreement is enforceable. Defendant erroneously argues that this Court "must accept" what Defendant mischaracterizes as "factual" findings of the trial court that the Urban Air Agreement "appropriately informs [Plaintiff] of the consequences of the agreement to arbitrate" and that the agreement was "clear and unambiguous[.]" See Db6-7. However, these were legal, not factual, findings and are therefore not entitled to deference on appeal. This Court applies a de novo standard of review when reviewing the enforceability of arbitration agreements. Checchio v. Evermore Fitness, LLC, 471 N.J. Super. 1, 6 (App. Div.), certif. denied, 252 N.J. 85 (2022). "Whether a contractual arbitration provision is enforceable is a question of law, and [this Court] need not defer to the interpretive analysis of the trial … courts unless [it] find[s] it persuasive."

[1] Minor Plaintiff incorporates by reference the Procedural and Factual History sections in his initial brief. To the extent any sub-headings of Minor Plaintiff's Legal Argument are not specifically addressed in this reply brief, Minor Plaintiff relies upon the arguments set forth in his initial brief.

Id. (internal citation and quotation marks omitted). Thus, this Court owes no deference to the trial court's conclusions regarding the enforceability of the arbitration provision herein.

Ultimately, whether the trial court's findings are characterized as factual or legal in nature, the trial court erred as a matter of law in holding that the arbitration provision in question is enforceable. The Urban Air Agreement never explains that arbitration entails waiving the right to sue or to any judicial adjudication of disputes in a court of law, including a bench trial or proceeding before a judge. Furthermore, the Agreement never indicates that the Minor Plaintiff (as opposed to the adult signatory) is waiving his right to a jury trial, never advises that statutory claims will be subject to arbitration, never describes what arbitration is, and fails to establish a clear and unambiguous meeting of the minds to arbitrate Minor Plaintiff's statutory and common law claims. Accordingly, the trial court's order compelling arbitration should be reversed.

While "[n]o particular form of words is necessary to accomplish a clear and unambiguous waiver of rights[,]" to be enforceable, an arbitration agreement must express that "the right to bring suit in a judicial forum" is being waived in "a simple, clear, understandable and easily readable way." Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 444 (2014), cert. den., 576 U.S. 1004 (2015). An arbitration agreement must "explain that the parties had waived the

rights to purse their claims **before a judge or jury in court**." Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 137 (2020) (emphasis added). No language in the Urban Air Agreement informs the reader that any participant, adult or child, is purportedly waiving the right to seek any relief in a judicial forum, including a bench trial before a judge.

Furthermore, Defendant fails to cite to any language in the Urban Air Agreement advising that a "Child Participant" such as the Minor Plaintiff is waiving the right to have a jury determine his common law and statutory claims. That is because no such language exists in the agreement. The "Jury Trial Waiver" set forth In Paragraph 6(B) applies only to the "Adult Participant" and makes no mention of applying to the "Child Participant", terms which are specifically defined at the beginning of the agreement. See Pa59, Pa163-Pa164.

Defendant's strained argument that its "intent" was for the jury trial waiver provision to apply to Child Participants is without merit. See Db11-12. The plain text of the jury trial waiver provision refers only to the Adult Participant and makes no reference to waiving a Child Participant's right to a jury trial. Pa164. "[A] court should not rewrite a contract or grant a better deal than that for which the parties expressly bargained." Quinn v. Quinn, 225 N.J. 34, 45 (2016). Defendant, which drafted this contract of adhesion, could have explicitly applied the jury trial waiver to Child Participants had it chosen to do

so, but Defendant did not. The fact that the Adult Participant represented that he had the authority to sign the Urban Air Agreement on behalf of the Child Participant does not change the actual text of the agreement or the fact that the jury trial waiver provision does not apply to the Child Participant. The fact that other provisions of the Urban Air Agreement do explicitly indicate that they apply to minors only highlights that the jury trial waiver provision, as drafted by Defendant, does not apply to Child Participants such as Minor Plaintiff. The arbitration provision is therefore unenforceable, particularly as to minors.

A recent unpublished opinion involving Defendant Urban Air demonstrates that Defendant knows how to draft an enforceable arbitration agreement, but, for some reason, failed to do so here. See Coppi v. Family Adventures North Jersey, LLC d/b/a Urban Air Trampoline And Adventure Park, et al., A-3083-23, 2025 WL 1189908 (App. Div. April 24, 2025), Pa166. The arbitration agreement that this Court found enforceable in the Coppi case demonstrates the stark inadequacy and unenforceability of the Urban Air Agreement at issue in the present matter.

The plaintiffs in Coppi went to the same Urban Air facility as the Minor Plaintiff herein: Defendant's South Hackensack facility. See Pa16 (¶ 6) (Plaintiff's complaint) and Pa167 (Coppi). However, the plaintiffs in Coppi went to the facility on February 22, 2022, while the Minor Plaintiff herein went to the

facility over two years later, on June 23, 2024. Id. It is evident that Defendant was using a different arbitration agreement in 2022 than it was using in 2024. Compare the Urban Air Agreement signed by Minor Plaintiff's father (Pa59, Pa163-Pa165) with the agreement used in the Coppi case (Pa167, Pa171-Pa173).

Preliminarily, the arbitration agreement Defendant used in the Coppi case referenced "Arbitration" in its title: "Customer Release, Assumption of Risk, Waiver of Liability, **Arbitration** and Indemnification Agreement." Pa167 (emphasis added). In contrast, the Urban Air Agreement signed by Minor Plaintiff's father made no mention of arbitration in the title: it was entitled "Waiver, Release And Indemnification Agreement." Pa59.

Like the Urban Air Agreement signed by Minor Plaintiff's father, the agreement in Coppi separately defined the terms Adult Participant and Child Participant and stated that the term "Participant" would be used to refer to the Adult and Child Participants collectively. Compare the Urban Air Agreement in the instant matter (Pa59, Pa163) with the agreement in the Coppi case (Pa171).

Critically, unlike the arbitration clause in the agreement signed by the Minor Plaintiff's father herein, the arbitration clause used by Defendant in the Coppi case expressly applies to all Participants, explains what arbitration is, states that all parties "are **waiving their right to seek legal remedies in court** including the right to a trial by jury", and specifically provides that it applies to

statutory as well as common law claims. See Pa172-Pa173 (emphasis added). The arbitration provision used by Defendant in the Coppi case reads as follows, in full:

> Dispute Resolution/Waiver Of Jury Trial. If a dispute arises under this Agreement or from Participant's use of the Premises or participation in the Activities, the Participant shall engage in good faith efforts to mediate a settlement prior to filing a demand for arbitration. Should the dispute not be resolved by mediation, Urban Air and the Participant agree that all disputes, controversies, or claims arising out of the Participant's use of the Premises or participation in the Activities shall be submitted to binding arbitration before and in accordance with the Commercial Rules of the American Arbitration Association then in effect. **It is acknowledged, understood and agreed that any such arbitration will be final and binding and that by agreeing to arbitration, the parties are waiving their respective rights to seek remedies in court, including the right to a jury trial. The parties waive, to the fullest extent permitted by law, any right they may have to a trial by jury in any legal proceeding directly or indirectly arising out of or relating to this Agreement, whether based in contract, tort, statute (including any federal or state statute, law, ordinance or regulation), or any other legal theory. It is expressly acknowledged, understood and agreed that: arbitration is final and binding; the parties are waiving their right to seek legal remedies in court including the right to a trial by jury; pre-arbitration discovery generally is more limited than and different from that available in court proceedings; the arbitrator's award is not required to include factual findings or legal reasoning; and any party's right to appeal or vacate, or seek modification of, the arbitration award, is strictly limited by law.** It is understood, acknowledged and agreed that in any such arbitration, each party will be solely responsible for payment of his/her/its own counsel fees, with the costs of arbitration borne equally by the parties. Any such arbitration will be conducted in the State of New Jersey and the law of the State of New Jersey shall apply.

[Coppi, Pa172-Pa173 (emphasis added).]

This Court held that the arbitration provision in the Coppi case was "clear and unambiguous", as it contained a detailed explanation of the rights that the Plaintiff was waiving, including the right to seek any relief in court, and detailed the differences between arbitration and civil litigation. Pa183.

The unenforceability of the arbitration provision in the Urban Air Agreement signed by Minor Plaintiff's father is apparent when it is juxtaposed with the clear, enforceable language used in the Coppi agreement. For this Court's ease of reference, the deficient "Dispute Resolution" provision in the Urban Air Agreement in the instant matter provides as follows:

6. **DISPUTE RESOLUTION.**

> **A. ARBITRATION.** Any dispute or claim arising out of or relating to this Agreement, breach thereof, the Premises, Activities, property damage (real or personal), personal injury (including death), or the scope, arbitrability, or validity of this arbitration agreement (Dispute) shall be brought by the parties in their individual capacity and not as a plaintiff or class member in any purported class or representative capacity, and settled by binding arbitration before a single arbitrator administered by the American Arbitration Association (AAA) per its Commercial Industry Arbitration Rules in effect at the time the demand for arbitration is filed. Judgment on the arbitration award may be entered in any federal or state court having jurisdiction thereof. The arbitrator shall have no authority to award punitive or exemplary damages. If the Dispute cannot be heard by the AAA for any reason, the Dispute shall be heard by an arbitrator mutually selected by the parties. If the parties cannot agree on an arbitrator, then either party may petition an appropriate court to appoint an arbitrator. Arbitration and the enforcement of any

award rendered in the arbitration proceedings shall be subject to and governed by 9 U.S.C. § 1 et seq.

B. WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY LAW, ADULT PARTICIPANT AND URBAN AIR KNOWINGLY, WILLINGLY, AND VOLUNTARILY, WITH FULL AWARENESS OF THE LEGAL CONSEQUENCES, AFTER CONSULTING WITH COUNSEL (OR AFTER HAVING WAIVED THE OPPORTUNITY TO CONSULT WITH COUNSEL) AGREE TO WAIVE THEIR RIGHT TO A JURY TRIAL OF ANY DISPUTE AND TO RESOLVE ANY AND ALL DISPUTES THROUGH ARBITRATION. The right to a trial by jury is a right parties would or might otherwise have had under the Constitutions of the United States of America and the state in which the Premises is located.

[Pa59; Pa164 (emphasis in original).]

Unlike the enforceable arbitration provision Defendant used in Coppi, the Urban Air Agreement used by Defendant in the instant matter contains:

- No language explaining that the parties are purportedly waiving their rights to seek remedies in Court;
- No language explaining that the Minor Plaintiff (as opposed to an Adult Participant) was purportedly waiving his right to a jury trial;
- No language stating that the purported arbitration agreement would apply to statutory claims; and
- No description of what arbitration is or how it differs from court proceedings.

[Compare the agreement Defendant used here (Pa59, Pa163-Pa165) with the enforceable arbitration agreement Defendant used in Coppi (Pa172-Pa173).]

The Agreement used by Defendant in the instant matter failed to meet the minimum requirements for an enforceable arbitration agreement set forth by the New Jersey Supreme Court in Atalese, 219 N.J. at 435-436, 447, Flanzman, 244 N.J. at 137, and Morgan v. Sanford Brown Inst., 225 N.J. 289, 294 (2016). As this Court persuasively observed in a recent unpublished opinion, an arbitration agreement is unenforceable if it "does not mention that arbitration was in lieu of a '**jury or other civil trial**' or provide any other indication that the parties waived their right to litigate **in a courthouse**." Little v. American Income Life Ins. Co., A-3741-23, et al., 2025 WL 1550016 (App. Div. May 30, 2025) (emphasis added), Pa218. "While Atalese does not require "magic words," […] the absence of any explicit indication that the parties agreed to waive their rights renders their Arbitration Agreement invalid." Id., Pa218-Pa219.

Here, the Urban Air Agreement failed to clearly and unambiguously explain what arbitration is, that it entails the waiver of any right to have the dispute determined in Court, including by a Judge, and that, as to the Minor Plaintiff, it required the waiver of the right to a jury trial. The Agreement also made no reference to applying to statutory claims. Accordingly, the trial court's

erroneous order enforcing the Agreement's legally deficient arbitration clause should be reversed.

The case of Griffin v. Burlington Volkswagen, Inc., 411 N.J. Super. 515 (App. Div. 2010) cited by Defendant only highlights the deficiency of the Urban Air Agreement herein. In Griffin, the arbitration clause explained that the parties were waiving the right to maintain "a court action" and specifically noted that the arbitration agreement applied to "all statutory claims". Id. at 518. In contrast, the Urban Air Agreement makes no reference to waiving the right to file a "court action" and no reference to statutory claims. See Pa59, Pa164.

The case of Martindale v. Sandvik, Inc., 173 N.J. 76 (2002) cited by Defendant is likewise distinguishable. Unlike the instant matter and Atalese, which involve consumer interactions, Martindale was an employment case. See Martindale, 173 N.J. at 81. The Court in Atalese emphasized the need for consumer arbitration agreements to be "clearly and unambiguously worded" so that "consumers must have a basic understanding that they are giving up their right to seek relief in a judicial forum." Id. at 435. Moreover, the arbitration agreement in Martindale unambiguously advised that the parties were waiving their right to a jury trial. Martindale, 173 N.J. at 81. In contrast, here, the Urban Air Agreement does not state that child participants such as the Minor Plaintiff are waiving their right to a jury trial at all. See Pa59, Pa164.

B. Defendant's Arbitration Provision Is Particularly Invalid As To Minor Plaintiff's Statutory Claims (Pa1-Pa9)

Defendant appears to concede that the Urban Air Agreement is unenforceable as to Minor Plaintiff's statutory claims under the Products Liability Act (PLA), Consumer Fraud Act (CFA), and the Truth-In-Consumer Contract, Warranty and Notice Act (TCCWNA). See Db20-Db22. To validly apply to statutory claims, an arbitration provision must, "at least", include a general reference that it applies to "all statutory claims", even if no specific statutes are listed. See Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 135 (2001). The Urban Air Agreement fails to make even a general reference to statutory claims and thus fails to set forth an enforceable waiver of Minor Plaintiff's right to pursue those claims in Court. See Pa164 (¶ 6).

Defendant does not deny that its arbitration agreement is unenforceable as to Minor Plaintiff's statutory claims. Instead, Defendant now argues, for the first time, that Minor Plaintiff's statutory claims are substantively without merit. See Db20-Db22. Defendant's argument is erroneous in several respects.

First, Defendant's challenges to the substantive merits of Minor Plaintiff's statutory claims have no relevance to the issue on appeal. The sole question on appeal is whether the parties entered into an enforceable agreement to arbitrate Minor Plaintiff's claims, regardless of whether Minor Plaintiff ultimately

prevails on those claims. The trial court did not address the substantive merits of Minor Plaintiff's underlying claims because that issue was never before it. See Pa1-Pa9. Rather, N.J.S.A. 2A:23B-7(d) makes clear that the decision of whether to send a claim to arbitration is separate and distinct from whether the underlying claims have merit. Defendant's challenges to the ultimate merits of Minor Plaintiff's statutory claims are therefore irrelevant to this appeal.

Second, Defendant's arguments regarding the substantive merits of Minor Plaintiff's statutory claims were not raised below. See Pa10-11 (Defendant's notice of motion seeking only to stay the case and compel arbitration); T, generally (the oral argument transcript); and Pa1-9 (the trial court's statement of reasons). It is improper for Defendant to inject arguments regarding the substantive merits of Minor Plaintiff's statutory claims into this matter for the first time on appeal. See, e.g. Chubb Group on Behalf of Conrad v. Trenton Bd. of Educ., 304 N.J. Super. 10, 19-20 (App. Div. 1997), certif. denied, 152 N.J. 188 (1997) (declining to address a respondent's argument that was raised for the first time on appeal).

In any event, Minor Plaintiff's statutory claims are properly pled. In addition to asserting common law negligence and premises liability claims against Defendant in its capacity as the operator of the Urban Air facility, see Pa23-Pa33, Minor Plaintiff has also alleged that Defendant is liable under the

Products Liability Act (PLA) in its capacity as the "manufacturer, seller, distributor, marketer, and/or supplier" of the trampoline attraction on which Minor Plaintiff was injured. See Pa41-Pa46 (¶¶ 82-104). Minor Plaintiff has alleged that the trampoline attraction in question was dangerously and defectively designed in various ways, which claims clearly fall under the PLA. See Pa42-43 (¶¶ 84-85). Contrary to Defendant's argument, to state a claim under the PLA, the claimant need not have purchased the product, but only need allege that the injury-causing product was defective due to its design, manufacture, or failure to warn. See N.J.S.A. 2A:58C-1(b)(1) and N.J.S.A. 2A:58C-2. For example, in Ridenour v. Bat Em Out, 309 N.J. Super. 634, 638, 642 (App. Div. 1998), this Court held that products liability principles applied to the manufacturer and owner of a change machine that injured a user, even though the change machine itself was not sold to that user. Thus, Minor Plaintiff has properly asserted PLA claims against Defendant.

Similarly, Minor Plaintiff has properly pled a claim against Defendant under the Consumer Fraud Act, N.J.S.A. 56:8-1, et seq., based upon the allegation that Defendant falsely represented and advertised that steps were taken to ensure the safety of its facility when such was not the case. See Pa23, (¶ 36) and Pa47-Pa48 (¶¶ 106-112).

Minor Plaintiff's TCCWNA claim is likewise validly pled. The TCCWNA allows an "aggrieved consumer" to recover a statutory penalty, attorney's fees, and court costs if a defendant offers a consumer a contract that "includes any provision that violates any clear established legal right of a consumer or responsibility of a seller [….]" N.J.S.A. 56:12-15 and -17. To be an "aggrieved consumer" under the TCCWNA, the plaintiff must have suffered some type of harm, but that harm does not have to have been an injury that is independently compensable by monetary damages. Spade v. Select Comfort Corp., 232 N.J. 504, 523 (2018). As set forth in Minor Plaintiff's complaint, the Urban Air Agreement is riddled with illegal provisions that Defendant knew or should have known were unenforceable, such as a purported waiver of the personal injury claims of minors, which is unlawful under Hojnowski v. Vans Skate Park, 187 N.J. 323, 336-338 (2006) and a fee-shifting/indemnification provision that is unlawful under Dare v. Free Fall Adventures, Inc., 349 N.J. Super. 205, 223 (App. Div.), certif. denied, 174 N.J. 43 (2002). See Pa16-22 (¶¶10-20); Pa38-39 (¶¶73-4). Defendant's inclusion of these illegal provisions in the Urban Air Agreement clearly violated the TCCWNA.

As to the "aggrieved consumer" element of a TCCWNA, to the extent that issue is properly addressed at the pre-discovery stage, Minor Plaintiff has adequately pled that he was aggrieved by Defendant's unlawful contract. Minor

Plaintiff herein is distinguishable from the plaintiff in Spade, who was found not to be an "aggrieved consumer" under the TCCWNA because, although he signed a contract containing illegal provisions, he received the products he ordered and suffered no harm. Spade, 232 N.J. at 524. In contrast, here, the Minor Plaintiff was seriously injured at Defendant's facility and was exposed to Defendant's deceptive and illegal agreement in an attempt by Defendant to prevent the filing of this lawsuit. Defendant should not be rewarded or absolved of liability merely because its deceptive use of unlawful contract provisions ultimately failed to stop the filing of Minor Plaintiff's complaint.

All that said, this appeal does not present the appropriate forum for addressing the substantive merits of Minor Plaintiff's statutory claims. It is undisputed that the Urban Air Agreement failed to contain the language needed to validly require the arbitration of Minor Plaintiff's statutory claims.

CONCLUSION

For the foregoing reasons, as well as those set forth in Minor Plaintiff's initial brief, this Court should reverse the trial court's January 6, 2025 order compelling arbitration. All of Minor Plaintiff's claims should proceed before the Law Division. Thank you for the Court's consideration herein.

Respectfully submitted,

Dated: 6/12/2025 /s David K. Chazen, Esq.