

PETER FALOTICO,

Appellant,

v.

MV REALTY PBC, LLC; MV REALTY OF NEW JERSEY, LLC; MV BROKERAGE OF NEW JERSEY, LLC, MV REALTY NJ, LLC; AMANDA J. ZACHMAN; DAVID MANCHESTER; ANTHONY MITCHELL A/K/A TONY MITCHELL; DAVID REINER; PASHMAN, STEIN, WALDER, HAYDEN, P.C.; DORIS CHEUNG, ESQ., ABC COMPANIES 1 through 100 (being the fictitious names of corporations, LLC's, partnerships, or other business entities whose identities are not yet know), and JOHN DOES 1 through 100 (being the fictitious names of persons whose identities are not yet known),

Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-1663-24T2

ON APPEAL FROM:
SUPERIOR COUR OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO. UNN-L-2841-24

Sat Below:
Hon. Mark P. Ciarrocca, P.J.Cv.

Civil Action

Submitted: July 7, 2025

BRIEF IN SUPPORT OF APPEAL

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Preliminary Statement

The case concerns a new scheme of consumer fraud, i.e., “Lien Enforcement” fraud. Its objective is to extort from Consumers at closing payment of liquidated damages secured by a lien recorded against the Consumer’s home upon execution of an “Exclusive Real Estate Listing” agreement.

Critically important, from the moment of its recording, the lien for unadjudicated and unaccrued liquidated damages is fully enforceable against liable and non-liaible Consumers alike. MV Realty need not demonstrate the Consumer’s liability as a pre-condition to enforcing it at closing. As long as it remains of record, the Consumer’s liability for payment is certain. Thus, the lien’s immediate recording shifts onto the Consumer the burden of accessing the Superior Court, demonstrating the Consumer’s non-liability, and obtaining an Injunctive Order directing the County Clerk to remove the lien from the Land Records.

The Superior Court is the sole forum in which an Injunctive Order to the Clerk can issue. Accordingly, to make this new fraud profitable, MV Realty ensures that no Court Order can issue by blocking the Consumer’s access to the Superior Court and competent counsel. MV Realty accomplishes this through its enforcement of arbitration provisions that require, inter alia, arbitration of “any and all disputes, claims, or controversies whatsoever”.

The mandatory arbitration provisions deprive the Superior Court of subject matter jurisdiction, forcing the Homeowner to present all claims and defenses to an Arbitrator who has no authority to issue an order directing the County Clerk to remove the illegal lien. Further, as drafted by the Merchant, these arbitration provisions make the futile arbitration so expensive, time-consuming, and unfavorable to the Homeowner, that no rational attorney would accept the Consumer's case without a significant retainer, and no rational Homeowner would be willing to pursue it.

Given only a Hobson's Choice, innocent Homeowners with no factual or legal liability are inevitably forced to accept the bitter pill of capitulation and pay liquidated damages to MV Realty as a condition of closing. MV Realty thus unconscionably reaps a windfall at the expense of innocent Consumers, and fully immunizes itself from accountability for its CFA violations.

MV Realty's gift begins with an offer of "Free Money". In exchange for a quickly issued check, typically between \$500 and \$1,500, MV Realty says all they require is the Homeowner's promise to use MV Realty as their Exclusive Real Estate Listing agent in the future, if and when the Homeowner ever decides to sell. MV Realty claims the money is "not a loan", it will "never have to be paid back", and there is "no obligation to sell."

To get the “Free Money” Homeowners must sign a lien, which MV Realty fraudulently calls a “Memorandum of Agreement”. Regardless of its name, lenders and buyers require it to be discharged or satisfied at closing. That lien secures payment of liquidated damages to MV Realty in the amount of 10 times the amount of the “Free Money” paid over (a 1,000% return).

Thus, by immediately recording a lien for unadjudicated liquidated damages at the time of contracting and blocking the Consumer’s access to the Superior Court, MV Realty transforms its lien into an extra-judicial, self-executing, final judgment of liability, rendering moot all of the Consumer’s defenses to enforcement, including those under the CFA, and further eliminating all risk to MV Realty of being hauled into Court.

Lien Enforcement is MV Realty’s primary profit center. Between 2018 and 2023, MV Realty harvested \$18,434,805.12 in liquidated damages from consumers-which stood at approximately 41% of its total revenue. The pace at which it harvested liquidated damages increased over time from 12% of its revenue in 2020 to 57% of total revenue by 2023.

Here, after fraudulently inducing Falotico to execute the contract and lien with \$943.00 in “Free Money”, MV Realty went silent and abandoned the contract. It refused to answer Falotico’s calls or list his property for sale in clear breach of the Exclusive Listing agreement. Foreseeably, Falotico then

listed with another real estate agent. MV Realty then sprang into action, refusing to allow Falotico to close unless he paid liquidated damages at closing. After weighing the expense, risk and delay of cancelling his pending contract of sale and entanglement in years of expensive and futile legal proceedings, Falotico capitulated and paid MV Realty at closing.

Falotico then brought this action under the CFA. MV Realty moved to dismiss the complaint and compel arbitration. Falotico moved for partial summary judgment under the CFA. Falotico now appeals the Motion Court's January 31, 2025 Order granting MV Realty's motion to enforce the arbitration clause and denying Falotico's motion for partial summary judgment.

Questions Presented

As this appeal concerns a new type of consumer fraud, the questions presented are of first impression: Under what circumstances is a Merchant's arbitration clause in a consumer contract prohibited under the CFA, and what constitutes an "ascertainable loss" and "damages"?

Falotico urges this Court to hold that where a Merchant records a lien for liquidated damages against a Consumer's home at the initiation of a contractual relationship, a mandatory arbitration clause wrongfully deprives Consumers of access to the Superior Court's exclusive remedy, i.e., an Order

directing the County Clerk to discharge the lien. It prolongs the life of the encumbrance, and effectively gives the Merchant the power to prevent any sale of the Consumer's property. Accordingly, because the non-liable Consumer's primary relief cannot be obtained in arbitration, the arbitration clause violates the CFA and is unenforceable.

Here, preservation of the Merchant's lien through denial of access to the Superior Court through enforcement of its arbitration clause is the lynchpin of MV Realty's lien enforcement fraud, and must be deemed a prohibited practice under the CFA. Accordingly, Falotico further urges this Court to hold a Merchant's efforts to preserve a lien in the Land Records through in-court enforcement of an arbitration clause is itself a separate, prohibited act giving rise to a separate and independent violation of the CFA, with the Consumer's ascertainable loss and damages measured by the value of the legal fees incurred in opposing the Merchant's in-court effort. As such, the Consumer's legal fees must be trebled as are all other damages arising from an unlawful act or practice under the CFA.

Procedural History

MV Realty of New Jersey, LLC v. Falotico, ATL-C-60-21

On October 15, 2021 MV Realty filed a complaint for breach of contract against Falotico in the Chancery Division, ATL-C-60-21, 113a, and issued a Lis Pendens for recording in the Atlantic County Clerk's office. 129a.

Falotico neither answered nor appeared. 230a. One month later, Falotico closed the sale of his home and paid liquidated damages. 270-272a. On January 12, 2022, MV Realty of New Jersey, LLC filed a stipulation of dismissal. 232a. No settlement agreement or release was executed.

Falotico v. MV Realty of New Jersey et al., UNN-L-2841-23

On August 29, 2023 Plaintiff Falotico initiated this Consumer Fraud action, and on September 19, 2024 Falotico filed and served a First Amended Complaint. 145a. On October 14, 2024, MV Realty filed a Motion to Dismiss the Complaint With Prejudice and to Compel Arbitration. 190a. On October 15, 2024 Falotico notified MV Realty that their filing of a Motion to Compel Arbitration was an unlawful act in violation of the CFA. 208a.

Falotico filed opposition to MV Realty's motion to compel arbitration, and on October 18, 2024 separately filed a motion for partial summary judgment as to Count II (Consumer Fraud), 273a, which was opposed by MV Realty. 282a.

The Motion Court on January 31, 2025 entered a single Order and Decision granting MV Realty's motion to compel arbitration and denying Falotico's motion for partial summary judgment. 1a., 2a. This appeal follows.

Statement of Facts

Peter Falotico was the owner of 121 Brettwood Drive, Egg Harbor Township. 184a-187a. Falotico was referred to MV Realty's agent Denise Rosetti through a friend who had previously entered into an Exclusive Listing Agreement (a/k/a/ "Homeowners Benefit Agreement" or "HBA"). 184a-187a. Rosetti called Falotico dozens of times, at one point almost hourly, harassing him to sign the HBA. 184a-187a. Rosetti told Falotico that it wasn't a scam and it was "free money". 184a-187a.

On January 15, 2021, after much harassment, Falotico signed the HBA, 9a, and received \$943.00 a short time thereafter. 184a-187a. MV Realty then recorded a lien signed by Falotico (deceptively titled "Memorandum of MVR Homeowner Benefit Agreement") with the Atlantic County Clerk's office. 19a. Section 7 of the HBA contains the following arbitration clause:

In particular, **any and all disputes, claims, or controversies whatsoever** between you and MV Realty ... shall be referred to and resolved exclusively by binding arbitration (the "Arbitration"). However, in the event of any dispute, claim or controversy between the Parties, **the Company shall retain the right to file judicial action to enable the recording of a notice of pending action or lis pendens.** The Company's filing of such judicial action shall not constitute a waiver of the Parties' right under this Agreement to arbitrate all disputes, claims, or controversies (without exception), which right to arbitrate **shall be enforced at all times.** [14a (emphasis added).]

In or about August and September 2021, Falotico called MV Realty five or six times to instruct MV Realty to list his home for sale. 184a-187a. Falotico left voice mails each time. 184a-187a. Nobody returned Falotico's calls. 184a-187a. This went on for several weeks. 184a-187a. Accordingly, in late September or early October 2021 Falotico listed his home for sale with another realtor, Century 21 Alliance, who produced a buyer within about two weeks of listing the property. 184a-187a.

Within days of listing with Century 21, Falotico began receiving phone calls from Rosetti and MV Realty's attorney, Doris Cheung, Esq. 184a-187a. Rosetti was furious, and told him that he signed a contract, and it was for 40 years. 184a-187a. Falotico said that he was never told it was a 40-year contract, and had he known that he never would have signed. 184a-187a.

Rosetti also told Falotico that since MV Realty paid him, he has to honor the contract and that MV Realty will start a lawsuit against him if he didn't. 184a-187a. Falotico told Rosetti that he had called MV Realty many times and nobody got back to him, so he got tired of it and moved on with Century 21. 184a-187a.

Attorney Cheung called Falotico and threatened him saying that MV Realty will definitely pursue a lawsuit against him and put a lien on his property. 184a-187a. Cheung never mentioned arbitration. 184a-187a. Falotico

tico explained, among other things, that he had called MV Realty numerous times to list the property and no one ever returned his calls. 184a-187a.

On October 15, 2021 MV Realty filed a complaint against Falotico in the Superior Court, Chancery Division, ATL-C-60-21 alleging Falotico's breach of the Exclusive Listing Agreement. 113a. MV Realty then issued a Lis Pendens for recording in the Atlantic County Clerk's office. 129a.

Referring to Section 7 of the HBA, 14a, paragraph 16 of the Complaint deprived the Superior Court of jurisdiction to hear Falotico's claims and defenses to enforcement of the Lis Pendens and lien. Paragraph 16 states:

16. Pursuant to Section 7 of the Agreement, MV and Defendant agreed that any and all disputes, claims, or controversies between Defendant and MV arising under the Agreement shall be referred to and resolved exclusively by binding arbitration. Notwithstanding the foregoing and in an abundance of caution, the instant action is being filed to preserve and protect MV's rights and interests in the Property, including the filing of a *lis pendens* contemporaneously with the filing of the instant complaint, with all other claims held by MV against Defendant being brought in arbitration. [115a.]

Falotico was served on October 26, 2021. 231a. Falotico did not answer the complaint. 230a. MV Realty admits that it never initiated arbitration proceedings against Falotico. 22a, 278a, 298a, 304a.

Notably, MV Realty filed identical complaints against 33 other New Jersey Homeowners in the Chancery Division. 22a, 278a. Each com-

plaint alleges breach of contract, and each contains an identical allegation 16. 22a, 278a. MV Realty also recorded identical Lis Pendens against these 33 New Jersey Homeowners. 22a, 278a. MV Realty has admitted that it never initiated arbitration proceedings against any of these Homeowners. 298a, 304a.

On November 23, 2021, unable to afford a lawyer, unwilling to cancel the contract of sale, and unwilling to upend his plans to relocate, Falotico closed and paid liquidated damages to MV Realty PBC, LLC (MV Realty of New Jersey, LLC's parent company) in the amount of \$6,620.00. 184a-187a, 270a, 272a.

On January 12, 2022, MV Realty of New Jersey, LLC filed a stipulation of dismissal. 232a. No settlement agreement or release was presented to or executed by Falotico. Thus, Falotico received \$943.00 in "Free money" in January 2021 and following MV Realty's refusal to provide real estate services, was forced to pay MV Realty \$6,620.00 at closing. 184a-187a, 270a, 272a. Falotico walked away from the sale with zero dollars.

On September 19, 2024 Falotico filed and served a First Amended Complaint in this action, 145a, alleging that Defendants deceptively and unlawfully recorded a lien and Lis Pendens with the County Clerk, and further,

that MV Realty's enforcement of the Dispute Resolution scheme and arbitration provisions were separate and independent violations of the CFA. 162a.

On October 14, 2024, the MV Realty filed a Motion to Dismiss the Complaint With Prejudice and to Compel Arbitration, 190a, demanding enforcement of the arbitration provisions it had previously incorporated into its Chancery Complaint three years earlier. 113a, 115a. It bears repeating: MV Realty admits that to date, it has never initiated arbitration against Falotico or any other homeowner.

On October 15, 2024 Falotico notified MV Realty that its filing of a motion to compel arbitration was a violation of the CFA. 208a. Falotico opposed the motion to compel arbitration.

October 18, 2024 Falotico separately filed a motion for partial summary judgment as to Count II of his amended complaint. 273a. Falotico argued that the motion to compel arbitration must be denied as the arbitration clause is central to a new scheme of Consumer Fraud and is further made deliberately procedurally and substantively unconscionable to create a safe harbor for MV Realty in which it can evade accountability and judicial scrutiny.

Falotico further argued that because the arbitration clause is central to MV Realty's new scheme of fraud and violated the CFA, MV Realty's in-court efforts to enforce that that arbitration clause was an "aggravating fac-

tor” so to speak, that elevates a simple motion to compel arbitration into a separate and independent violation of the CFA. Falotico identified two such in-court efforts:

- (1) MV Realty’s October 15, 2021 filing of a Chancery Division complaint against Falotico in MV Realty of New Jersey, LLC v. Falotico, ATL-C-61-21, which deprived the Court of subject matter jurisdiction, and subsequent recording of a Lis Pendens encumbering Falotico’s title; and,
- (2) MV Realty’s October 14, 2024 filing of a Motion to Dismiss Falotico’s Complaint and to Compel Arbitration in this present action, Falotico v. MV Realty PBC, et al., UNN-L-2841-23. [273a.]

Falotico further argued that because the mandatory arbitration clause violated the CFA and was unenforceable as part of a new scheme of fraud, Falotico’s legal fees expended to oppose that motion and preserve and/or restore his right of access to the Superior Court are both an ascertainable loss and direct damages subject to trebling under the CFA.

The motion judge disposed of both the motion to compel arbitration and Plaintiffs’ motion for partial summary judgment in a single order and decision dated January 31, 2025, 1a, from which Falotico now appeals.

LEGAL ARGUMENT

POINT I

THE MOTION COURT ERRED IN ENFORCING THE ARBITRATION CLAUSE WITHOUT FIRST DETERMINING WHETHER IT VIOLATED THE CFA (1a, Opinion page 5).

MV Realty presently has more than 1,200 liens recorded against New Jersey homes, and it continues to demand payment of liquidated damages at closings. Pursuant to the plain language of the contract, not a single homeowner has the right to appear before the Superior Court for an order discharging the illegal lien. All must pursue an expensive, time-consuming and futile arbitration, with their property encumbered pendente lite.

As demonstrated by Judge McGovern in the Patterson case, a plain reading of the terms within the four corners of the contract is all that is needed to recognize the true nature of this fraud, and the central role that arbitration plays in it. 83a, 90a, 92a. Judge McGovern found the contract so egregiously unconscionable and predatory on its face, it could not survive a motion for summary judgment, entered prior to discovery.

Here, the Motion Court erred in several respects. First, the Motion Court erred by declining to consider the contract in its entirety, the purpose of the contract and the surrounding circumstances. In doing so, the Motion Court effectively nullified Falotico's First Amended Complaint and the substantial

evidence presented. Second, the Court applied the wrong legal standard, i.e., a presumption in favor of arbitrability. See, Point II, infra. Finally, the Motion Court sua sponte re-wrote the arbitration clause and crafted an exception to it that simply cannot be reconciled with its plain language. See, Point III, infra.

A. The Motion Court Erred In Declining To Consider The Contract In Its Entirety

Proper application of the CFA requires a case-specific analysis of a defendant's conduct and the harm to the consumer. D'Agostino v. Maldonado, 216 N.J. 168 (2013).

Because MV Realty's lien is recorded at the time of contracting, MV Realty cannot improve its financial position by devoting the time and resources needed to actually list and sell a Consumer's house. Once the lien is recorded, any added effort will produce no additional return or profit for MV Realty. At the same time, the value of MV Realty's lien is not diminished if MV Realty willfully refuses to perform in breach of its contract. In either case, the amount of the Consumer's liability is fixed at the time of contracting.

For MV Realty, litigation in the Superior Court brings with it only downside risk, as it would allow the Consumer to assert claims and defenses against enforcement before a Judge with the power and authority to order the County Clerk to discharge the lien. Thus, MV Realty's profit is guaranteed, provided MV Realty can block the Consumer's access to the Superior Court.

As a consequence, depriving the Superior Court of jurisdiction by mandating arbitration is essential to the grift, and is in MV Realty's financial self-interest.

Pursuant to N.J.S.A. 2A:23B-69(b), "The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." N.J.S.A. 2A:23B-6(a) provides that an "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."

"In evaluating the existence of an agreement to arbitrate, a court consider[s] the contractual terms, the surrounding circumstances, and the purpose of the contract." Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993) (citation omitted). Thus, the law requires Courts to look beyond the narrow language of the arbitration clause and examine the full context of the transaction.

Respectfully, if the arbitration provisions violate the CFA, they are unenforceable. Here, the Motion Court declined to consider the contractual terms, the surrounding circumstances, and the purpose of the contract. That was error. Indeed, when Judge McGovern reviewed the contract in its entirety,

His Honor aptly detected “The smell of rotting fish emanat[ing] from the entire transaction” 59a. The arbitration provisions smell no better.

At the outset, MV Realty presented to Falotico for signing a lien for liquidated damages deceptively titled “Memorandum of Agreement”. Indeed, the deception continues. MV Realty argued “there is no lien for liquidated damages that is filed at the time of contract. The memorandum is just a public notice that the parties have entered into this agreement”. T1 (37:23 to 38:4). Yet, there is no dispute that title companies, buyers and lenders require that it be cleared from title at closing. These facts, without more, demonstrate that the deceptively captioned MOA has the capacity to mislead Consumers into believing it is not a lien.

Having concealed the true nature of the MOA from the Consumer, MV Realty records it at the time of contracting. This too is an unconscionable practice. Respectfully, this Court should adopt the sound reasoning of Judge Farfante, who writes:

12. Moreover, Defendants' immediate recording of the HBA Memorandum in the public records is unconscionable in both procedural and substantive aspects. Defendants represented to homeowners through both online and telemarketing pitches that the Memorandum is merely a notice to the public of the homeowner's obligations to MV Realty under the HBA. However, it is undisputed that title companies and lenders require that the recorded Memoranda be subordinated, satisfied, or terminated in order for an impacted home-

owner to close on any financial transaction involving their home - often times a consumers most valuable asset. (Ex. 31, Deposition of Richard Barbara at pp. 69:3-70:25, 73:4--73:21 : Dkt. No. 280 at 237:8-24.) MV Realty's recordation in the public records materially impacts homeowners by complicating, delaying, or altogether precluding consumers from accessing their home equity or closing transactions. (*Id.* at pp. 69:3-70:25: Dkt. 280 at 237:8-24.)

13. The issue is not whether the various recording offices categorize the Memoranda as a "Lien" or a "Memorandum" on the public record, it is the undisputed fact that the recorded Memoranda precludes homeowners from accessing their home equity or closing transactions absent MV Realty's consent. Homeowners are held over the proverbial "barrel," meaning MV Realty's Memoranda must be satisfied or otherwise terminated prior to closing any transaction involving the property. Based upon the practical realities surrounding typical real estate transactions, consumers are essentially stripped of the right to challenge the one-sided terms, and Defendants force recovery of the Early Termination Fee as a result. [48a.]

Because MV Realty records the lien at the time of contracting, MV Realty need not demonstrate the Consumer's liability as a pre-condition to enforce it at closing. As long as it remains of record, the lien is equally enforceable against all Consumers, regardless of whether they liable for liquidated damages. Accordingly, to preserve its liens, MV Realty relies upon the arbitration clause to block the Consumer's access to the Superior Court's remedies.

Again, it is undisputed that MV Realty never uses the arbitration clause to resolve disputes. Without offering any excuse or justification, MV

Realty has admitted that it has never initiated arbitration proceedings. 298a. This Court's own docket stands as evidence of MV Realty's fraud. 233a. MV Realty has relied upon the so-called "mandatory arbitration clause" to file 34 complaints and record 34 identical Lis Pendens, to further encumber Homeowner's property and pressure them to capitulation, all the while blocking their access to the Superior Court. The so-called "mandatory arbitration" clause, which says it "shall be enforced at all times," has not resulted in a single arbitration.

Respectfully, how much more is needed to demonstrate that the arbitration clause itself is central to the grift? New Jersey's "consumer fraud statute is aimed at promoting truth and fair dealing in the marketplace." Feinberg v. Red Bank Volvo, Inc., 331 N.J.Super. 506, 512 (App. Div. 2000). It is intended to protect consumers "by eliminating sharp practices and dealings". Lemelledo v. Beneficial Management Corp. of America, 150 N.J. 255, 263 (1997) quoting, Channel Cos. v. Britton, 167 N.J.Super. 417, 418 (App. Div. 1979). It is "one of the strongest consumer protection laws in the nation." Cox v. Sears Roebuck & Co., 138 N.J. 2 (1994). It reads:

The act, use or employment by any person of any commercial practice that is unconscionable or abusive, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale

or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.... [N.J.S.A. 56:8-2.]

“‘[U]nconscionability’ under the consumer fraud act is ‘an amorphous concept obviously designed to establish a broad business ethic.’ [citation omitted]. The standard of conduct that the term ‘unconscionable’ implies is a lack of good faith, honesty in fact and observation of fair dealing.” Cox, supra, quoting, Kugler v. Romain, 58 N.J. 522 (1971); Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 655 A.2d 417, 429 (N.J. 1995)(citing Meshinsky v. Nichols Yacht Sales, Inc., 541 A.2d 1063, 1066 (N.J. 1988)). As the Supreme Court has recognized:

Because the fertility of the human mind to invent new schemes of fraud is so great, the CFA does not attempt to enumerate every prohibited practice, for to do so would severely retard[] its broad remedial power to root out fraud in its myriad, nefarious manifestations. Lemelledo, supra, 150 N.J. at 265 (quoting Kugler v. Romain, 58 N.J. 522, 543 n.4 (1971)). Thus, to counteract newly devised stratagems undermining the integrity of the marketplace, [t]he history of the [CFA] [has been] one of constant expansion of consumer protection. Gennari v. Weichert Co. Realtors, 148 N.J. 582, 604 (1997). [Gonzalez v. Wilshire Credit Corp., 207 N.J. 557 (2011).]

As remedial legislation, the CFA must be liberally construed in favor of the injured party to accomplish its dual objectives of deterrence and

protection. Lettenmaier v. Lube Connection, Inc., 162 N.J. 134, 139 (1999).
Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 69 (1985).

“Lien Enforcemnt Fraud” is clearly a new scheme of Consumer Fraud. The Legislature has charged the Courts with a duty to root out and address new schemes of consumer fraud. Before ordering Arbitration, it was incumbent upon the Motion Court to adopt a presumption of non-arbitrability (see, Point II, infra.), carefully examine the complete contract and record, and then make a determination as to whether enforcement of the arbitration clause was, within the specific context of this transaction, a prohibited practice under the CFA. The Motion Judge improperly declined to do so.

POINT II

THE DISPUTE OVER THE ARBITRATION CLAUSE’S ILLEGALITY UNDER THE CFA IS BEYOND THE REACH OF ARBITRATION. (1a, Opinion page 2)

The parties disagree over whether the arbitration clause violates the CFA and is unenforceable. That dispute is beyond the reach of arbitration. It must be fully and finally determined by the Court, not the arbitrator.

A. The Mandatory Arbitration Provision Is Presumptively Unenforceable

MV Realty’s arbitration clause, like all arbitration agreements, affects a litigant’s fundamental right to access to the court system and its procedural safeguards. But here, under this new scheme of fraud, deprivation of

access preserves a Merchant's lien on the Land Records for unadjudicated liquidated damages. That is the very object and purpose of the so-called "mandatory arbitration" clause.

A party resisting arbitration cannot be deprived of the fundamental right of access absent a legal and enforceable agreement to arbitrate. Litton Financial Printing Div. v. National Labor Rel. Bd., 501 U.S. 190, 199-201 (1991); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

Accordingly, where a party resists arbitration by challenging the validity of the arbitration agreement, the law requires a careful and searching review of the evidence, followed by a judicial determination of the dispute. PMC, Inc. v. Atomergic Chemetals Corp., 844 F.Supp. 177, 181 (S.D.N.Y. 1994)(stating, "before a party can be required to submit to arbitration, it is entitled to a judicial determination of the threshold question of whether it entered into an agreement which obliges it to consent to arbitration."). Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006)(holding that challenges to the validity of the arbitration clause itself must be decided by the courts). Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S.Ct. 588, 592 (2002)(stating, "a gateway dispute about whether the parties are bound by a

given arbitration clause raises a ‘question of arbitrability’ for a court to decide.”).

In reviewing the parties’ evidence Courts must protect the resisting party from a wrongful deprivation of its right of access to the judicial system. Thus, the familiar principle resolving doubts concerning the scope of arbitrable issues in favor of arbitration does not apply to disputes concerning the formation of a contract containing an arbitration clause. Spear Leeds & Kellogg v. Central Life Assurance Company, 85 F.3d 21, 25 (2d Cir. 1996).

In fact, where the parties dispute the existence of an arbitration agreement, that presumption is reversed, and replaced with a presumption of non-enforceability.

In First Options, the Supreme Court expressed concern that, if the general presumption in favor of arbitration were applied to the question of arbitrability, it “might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.” 514 U.S. at 945, 115 S.Ct. 1920. The Supreme Court sought to alleviate this concern by “revers[ing] the presumption” to favor judicial determinations of arbitrability questions. Id.; see also Dean Witter Reynolds v. Byrd, 470 U.S. 213, 219-20, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) (noting that the Arbitration Act’s basic purpose is to “ensure judicial enforcement of privately made agreements to arbitrate”). [John Hancock Life Ins. Co. v. Wilson, 254 F.3d 48, 55 (2d Cir. 2001).]

The Motion Court improperly applied a presumption in favor of arbitration, when application of a presumption of non-arbitrability was required. A plain reading of the terms within the four corners of the contract is all that is needed to recognize the arbitration clause deprives the Consumer of a needed remedy to the financial gain of MV Realty. Additionally, Falotico presented overwhelming, uncontested evidence that the so-called “mandatory arbitration” clause is central to MV Realty’s fraud. Because the legality of the arbitration clause under the CFA is contested, the Motion Court erred by enforcing it without first resolving the dispute as to its legality.

B. There Was No Mutual Assent To Arbitration

While there is a strong public policy favoring arbitration, an agreement to arbitrate must be the product of mutual assent. 9 U.S.C. §1-16; N.J.S.A. §2A:23B-1-32. Meeting of the minds is required to create a legally enforceable agreement. Consistent with mutual assent, parties are not required to arbitrate when they have not agreed to do so. Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430, 442 (2014).

Under New Jersey law, any contractual "waiver-of-rights provision must reflect that [the party] has agreed clearly and unambiguously" to its terms. Leodori v. CIGNA Corp., 175 N.J. 293, 302, cert. denied, 540 U.S. 938 (2003). See, e.g., Dixon v. Rutgers, the State Univ. of N.J., 110 N.J. 432, 460-

61 (1988)(holding that collective bargaining agreement cannot deprive one of statutory rights to evidentiary materials in anti-discrimination case because "[u]nder New Jersey law[,] for a waiver of rights to be effective it must be plainly expressed"); Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ., 78 N.J. 122, 140 (1978)(explaining, in public-employment labor-relations context, that any waiver of statutory right to file grievances "must be clearly and unmistakably established"); W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144. 152-53 (1958)("It is requisite to waiver of a legal right that there be a clear, unequivocal, and decisive act of the party Waiver presupposes a full knowledge of the right and an intentional surrender")(citations and internal quotation marks omitted); Atalese, 219 N.J. at 443.

In this case, the so-called "arbitration" provisions are not "the product of mutual assent, as determined under customary principles of contract law." Atalese, 219 N.J. at 442 quoting NAACP of Camden Cnty. v. Foulke Mgmt. Corp., 421 N.J.Super. 404, 424 (App. Div.), certif. granted, 209 N.J.96 (2011) and appeal dismissed, 213 NJ. 47 (2013). Because mandatory arbitration requires a waiver of the Consumer's right to seek relief in the Superior Court, "courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent." Atalese, quoting Foulke Mgmt. Corp., *supra*, 421 N.J.Super. at 425.

Here, the lien itself is deceptively named “Memorandum of Agreement” rather than “Lien” to hide its true nature from the Consumer. Respectfully, can a Consumer reasonably be expected to fully understand the implications of the arbitration clause when the lien itself is misrepresented at the outset of the transaction to be a “Memorandum of Agreement”?

But there is more. The arbitration clause allows MV Realty to litigate in the Superior Court to obtain a Lis Pendens but deprives the Consumer of their right to challenge that same Lis Pendens in the Superior Court. These provisions effectively give MV Realty the power to prevent the sale of the Consumer’s property and hold it hostage unless and until the lien is paid.

Respectfully, can a Consumer reasonably be expected to fully understand MV Realty will have the right to prevent the sale of the Consumer’s home? Or that the Consumer has a statutory right to challenge the validity of the lien and Lis Pendens, but can do so only in the Superior Court, as that remedy is not available in arbitration? Clearly, no Consumer would knowingly agree to such shockingly one-sided terms.

C. An Arbitrator Cannot Find The Arbitration Agreement Illegal

Assuming arguendo that Falotico demonstrated to the Arbitrator that the arbitration clause violates the CFA, the Arbitrator’s determination will

be null and void as a matter of law. But most notably, MV Realty's lien will have been preserved during the entire futile arbitration proceeding.

Because an Arbitrator derives his power solely from the arbitration agreement and cannot decide any dispute without a valid arbitration agreement, an Arbitrator cannot hold the arbitration agreement to be illegal and unenforceable. International Ladies' Garment Workers' Union, AFL-CIO v. Ashland Industries, Inc., 488 F.2d 641 (5th Cir. 1974)(stating, "The arbitrator who derives his power solely from the contract cannot hold that charter to be legally ineffective."), citing, United Steel Workers of America v. Enterprise Wheel & Car Corp., supra, 363 U.S. at 597.

The Motion Court, applying the wrong legal standard, erroneously referred to the Arbitrator the question of whether the arbitration clause violated the CFA. The Motion Court erroneously held:

The following language in the agreement delegates questions of arbitrability to the arbitrator: the arbitrator will: . . . resolve all disputes and issues between the parties, including issues of arbitrability (whether it is proper for the dispute to be heard by an arbitrator) and the validity of this arbitration provision.

As a consequence of its narrow focus on the language of the arbitration clause, the Motion Court gave weight to the very mechanism that makes MV Realty's scheme profitable. MV Realty's entire gift relies upon Courts declining to examine the transactional context.

As stated, there are currently more than 1,200 New Jersey Homeowners who accepted the “Free Money” and are unaware that the “MOA” is actually a lien. I most respectfully caution this Court, if the law permits this arbitration clause to be read in isolation, without reference to the entire transaction, then this new “Lien Enforcement Fraud” will spread like a cancer in the marketplace. This new fraud can be easily modified to apply to any number of consumer contracts for the provision of future goods or services, i.e., window replacement contracts, auto repairs, theatre and sporting event tickets, health care, landscaping, pizza delivery, and indeed, even future legal services.

As evidenced by the speed and ease with which MV Realty fleeced Falotico and 1,200 other New Jersey Homeowners, and the enormous legal effort expended to date challenging the arbitration clause in pursuit of recovering the \$6,620.00 in “liquidated damages” wrongfully taken from Falotico at closing, Court-ordered referral to a futile and protracted arbitration is the very mechanism that makes “Lien Enforcement” fraud profitable. Respectfully, this Court cannot permit this gift to continue.

POINT III

THE ARBITRATION CLAUSE VIOLATES THE CFA AS IT PRESERVES A LIEN WHILE DEPRIVING CONSUMERS OF THEIR REMEDY (1a, Opinion page 3)

MV Realty relies upon its mandatory arbitration provisions to evade legal challenges to its lien in the Superior Court in two ways: First, the mandatory arbitration clause immediately deprives the Superior Court of subject matter jurisdiction. Second, their shockingly one-sided provisions dissuade and discourage even the most aggressive Consumer and attorneys from pursuing arbitration by ensuring that the financial and non-financial costs of pursuing the futile arbitration far exceed the relatively small cost of capitulation at closing. Working in tandem, these arbitration provisions preserve MV Realty's illegal lien against the Consumer's home on the Land Records.

A. Exclusive Jurisdiction of The Superior Court

Initially, the Motion Court disregarded the plain language of the arbitration clause in concluding that it does not block a Consumer's access to the Superior Court.

The arbitration clause is clear: It applies to "any and all disputes, claims, or controversies whatsoever" and further states that it "shall be enforced at all times." 14a. Yet, during argument, the Motion Court sua sponte determined that the arbitration clause is no impediment to Consumers who

wish to obtain an Injunctive Order from the Superior Court directing the County Clerk to discharge MV Realty's lien. See, (T1 24:14-25, 35:7-9), finding fault with Falotico's failure to file an Order to Show Cause pursuant to R. 4:67 to have the lien removed in the original Chancery action. Disregarding its plain language and incorrectly concluding that the arbitration clause does not block the Consumer's access to the Superior Court and its remedy, the Motion Court held, "In the present matter, the Court finds that the parties entered into a valid arbitration agreement." 7a, Opinion page 5. The Motion Court clearly erred.

Arbitrators, whose jurisdiction is created by contract, lack the power to order County Clerks to remove or discharge illegal liens. Arbitrators are not officers of the Court and cannot issue enforceable injunctions to County Clerks.

The Judges of the Superior Court have exclusive jurisdiction over the validity, enforcement, and discharge of liens making arbitration an inadequate forum for resolving such disputes. See, New Jersey Construction Lien Law (N.J.S.A. 2A:44A-1 et seq.) expressly requiring court action for the discharge of a lien.

Similarly, the filing of a Lis Pendens is authorized and governed by statute. N.J.S.A. 2A:15-7. The Legislature has conferred exclusive juris-

diction over the review of Lis Pendens to Judges of the Superior Court. See, N.J.S.A. 2A:15-7(b), stating, “Any party claiming an interest in the real estate affected by the notice of lis pendens may, at any time thereafter, file with the court, in accordance with the Rules Governing the Courts of the State of New Jersey, except as otherwise provided herein, a motion for a determination as to whether there is a probability that final judgment will be entered in favor of the plaintiff sufficient to justify the filing or continuation of the notice of lis pendens.” See also, N.J.S.A. 2A:15-10, stating, “If plaintiff in an action as to which a notice of lis pendens has been filed as herein required fails to prosecute the same diligently, the court wherein the action is pending may, for such cause or for other good cause shown, by order direct the county clerk or register of deeds and mortgages, as the case may be, to discharge the lis pendens of record.”

The arbitration clause is clear: It applies to “any and all disputes, claims, or controversies whatsoever” and further states that it “shall be enforced at all times.” 14a. The Motion Court erred in rewriting the arbitration clause to allow a Consumer to file and order to show cause in the Superior Court to challenge the lien and lis pendens.

B. Motion Court's Legal Error

The Motion Court declined to examine or consider the contract in its entirety, declined to consider Judge McGovern's and Judge Farfante's opinions finding the terms of the contract and lien unconscionable, declined to consider Falotico's evidence, and improperly suggested that the contract's mandatory arbitration clause does not block the consumer's access to the Superior Court and its injunctive relief. The Motion Court's January 31, 2025 decision is grounded solely upon the language of mandatory arbitration clause, and the exception the Motion Court erroneously read into it. That was far too narrow a focus.

The Supreme Court has held that contract provisions that violate the CFA or are contrary to public policy are unenforceable. The CFA is remedial legislation designed to be liberally construed in favor of the consumer. See Furst v. Einstein Moomjy, Inc., 182 N.J. 1 (2004).

A fundamental principle of contract interpretation is that a contract must be considered in its entirety. See Cumberland Cty. Imp. Auth. v. GSP Recycling Co., 358 N.J. Super. 484, 497 (App. Div.) (citation omitted) (noting a contract "must be read as a whole, in "accord with justice and common sense"), certif. denied, 177 N.J. 222 (2003).

Shockingly, the Motion Court effectively gave the Court's endorsement to what the plain language of the contract obviously shows, when read in its entirety, to be the lynchpin of MV Realty's gift. To the continuing profit of MV Realty, the Motion Court enforced the arbitration clause in a vacuum and declared it had no subject matter jurisdiction, holding as follows:

In the present matter, the Court finds that the parties entered into a valid arbitration agreement. The opening line of paragraph 7 of the provisions section of the HBA, i.e., the arbitration section, reads” **“BY SIGNING THIS AGREEMENT, YOU AGREE TO WAIVE YOUR STATUTORY RIGHT TO SEEK RELIEF IN A COURT OF LAW AND YOUR RIGHT TO A TRIAL BY JURY.”** This bold-face, capital letter notice is the sort of clear and unambiguous language that is contemplated by Atlese. Further, the section explains what arbitration is, explains what claims will be arbitrated and identifies AAA as the forum, explains the effect of an arbitrator's determination, and otherwise previews how an arbitration might proceed. (MV's Ex. A at 6.) This information provided Plaintiff with the requisite knowledge of his rights that was required before he could waive them.

The Motion Court clearly erred in several respects. Initially, the court erred in holding that the arbitration clause “provided Plaintiff with the requisite knowledge of his rights that was required before he could waive them.” This was error. As argued in Point II, B., the Motion Court gave no weight to the fact that a lien recorded at the inception of the transaction, was

deceptively captioned “Memorandum of Agreement” to hide its true nature from Falotico.

But further, Atalese’s “clear language” requirement is necessary, but in this case not sufficient, to find the arbitration language legal and enforceable. The CFA imposes requirements on arbitration clauses in consumer agreements that go beyond mere clarity of language. Indeed, Judge McGovern in the Patterson case correctly recognized that language clarity and satisfaction of the CFA are not the same:

However, language clarity is irrelevant to whether the HBA's terms are unconscionable in this case. Likewise, whether or not the plaintiff was misled or deceived is irrelevant under N.J.S.A 56:8-2. The court finds and determines that the aforesaid acts and practices of MV Realty of [New Jersey], LLC, are so patently, clearly, and facially unconscionable, deceptive, unreasonable, and predatory that they are per se violations of the New Jersey Consumer Fraud Act under N.J.S.A. 56:8-2 as they apply to the sale of real estate. [101a-102a]

But most damaging was the Motion Court’s refusal to consider the arbitration clause within the context of this new scheme of “Lien Enforcement” fraud. At a minimum, the Motion Court was required to first consider the context and implications of arbitration and carefully review Falotico’s evidence to determine whether the arbitration clause violated the CFA.

By its adoption of broad language in the CFA, the Legislature has charged the Courts with the duty to root out new schemes of consumer fraud as they are discovered. Gonzalez v. Wilshire Credit Corp., 207 N.J. 557 (2011). “[U]nconscionability’ under the consumer fraud act is ‘an amorphous concept obviously designed to establish a broad business ethic.’ [citation omitted]. The standard of conduct that the term ‘unconscionable’ implies is a lack of good faith, honesty in fact and observation of fair dealing.” Cox v. Sears Roebuck & Co., 138 N.J. 2 (1994), quoting, Kugler v. Romain, 58 N.J. 522 (1971).

Here, the plain language of the contract and Falotico’s undisputed evidence demonstrates that MV Realty’s mandatory arbitration clause is a central part of this new scheme of consumer fraud. The contract gives MV Realty the right to file a lien and lis pendens. MV Realty did so. The contract also gives MV Realty the power to deprive the Superior Court of subject matter jurisdiction, thus depriving the Consumer of necessary statutory remedies. MV Realty did so and thus enforced a lien for unadjudicated liquidated damages. This is unconscionable and predatory per se. There are no questions of fact.

But further, as Judge McGovern’s well-reasoned opinion in the Patterson case demonstrates, the contract and lien and entire transaction are permeated with one-sided, grossly unfair provisions, and have virtually no

chance of being enforced by the Superior Court. On October 1, 2024 Judge McGovern in the Patterson case held from the bench as follows:

I mean, you know, look, when I first remember reading the papers that were filed in this case last spring, 2023, I remember remarking to myself and my law clerk at the time, this is unique. This is different. I've never seen a real estate model for selling or listing real estate like this before and in my prior life as a practicing New Jersey attorney handling well over 1,000 real estate closings, hundreds of refinancings and the like I never saw or encountered anything like this, but, you know, the -- the human mind is creative. The human mind is occasionally imaginative. [82a (54:17- 55:3).]

MV Realty of New Jersey, LLC is the signatory to this agreement, which candidly struck me as **not only unique, not only creative, not only imaginative, but also blatantly offensive to the conscience of the court** to such an extent that I find it overwhelmingly shocking and a clear and blatant and unconscionable practice in violation of the New Jersey Consumer Fraud Act to lock up and entangle a property for a period of 40 years. That duration is so clear to my eyes and to my mind a blatant violation of any interpretation of – of commercial reasonableness no matter how you try to describe it or define it.

What would be commercially reasonable? I don't know. But I can tell you what its not, like Justice Stewart, I know commercial unreasonableness when I see it in terms of his famous quote regarding pornography. So, I know when I see a purported agreement that binds a property owner for 40 years and purports to extract an exit fee of over \$10,000 or three percent of the current market value as MV Realty of New Jersey, LLC may, in its discretion, decide whichever is greater that is patently and blatantly offensive and it's clear as -- as day, as the sun rises in the east, and sets in the west,

an unreasonable and unconscionable practice in violation of the New Jersey New Jersey Consumer Fraud Act.

* * *

But for today I'm convinced beyond any question and beyond any shadow of a doubt that the practice engaged in by this particular defendant, MV Realty of New Jersey, LLC to entangle, handcuff, lockup, capture whatever verb you wish to use, a residential property and residential property owner for a period of 40 years with the draconian exit fee provisions that are clear and unrefuted and as to which no discovery is, in my view, needed. They are grossly, patently unfair, unconscionable in violation of the Consumer Fraud Act. [87a (64:24-66:20).]

In Patterson Judge McGovern held that this contract could not survive a motion for summary judgment, and granted Ms. Pattersons motion without discovery and indeed, even prior to MV Realty filing an answer.

It strains credulity to believe that the arbitration clause stands alone as a beacon of fairness and good faith in a contract so replete with unreasonable and unconscionable terms that it, as described by Judge McGovern, smells like rotting fish.

The arbitration clause is central to the grift. It preserves the illegal lien on the Land Records, preventing the sale or transfer of the Consumer's property and pressuring the Consumer's capitulation. The arbitration clause violates the CFA, and the Motion Court erred in enforcing it.

POINT IV

THE ARBITRATION CLAUSE VIOLATES THE CFA AS IT IMPOSES UNCONSCIONABLE NON-FINANCIAL AND FINANCIAL COSTS ON THE CONSUMER (1a, Opinion page 3)

The overwhelming evidence demonstrates that MV Realty’s so-called “arbitration clause” does not resolve disputes, but rather, it transforms a lien for unadjudicated liquidated damages into an extra-judicial, self-executing, final judgment of liability. Deflection of consumer disputes into a futile, expensive, and time-consuming arbitration allows MV Realty’s illegal lien to remain of record, and prevents Consumers from selling their home, pressuring them to capitulate. That is exactly what happened to Falotico.

The Motion Court erred in failing to assess whether the mandatory arbitration provisions were unconscionable. These provisions virtually guarantee that the financial and non-financial cost to the Homeowner would far exceed the cost of capitulation. Falotico respectfully urges this Court to hold that these provisions are unconscionable and unenforceable.

A. NON-FINANCIAL COSTS OF ARBITRATION

One of the more ruthless and insidious aspects of the gift is that it empowers MV Realty to hold the Consumer’s entire life hostage. MV Realty leverages its contractual power against the Consumer’s desire to sell and relocate to pressure the Consumer into capitulation.

For Consumers like Falotico, the sale of a home is far more than a property transaction. It is the reordering of a person's life, often involving children and other family members, new schools, new employment, and other uniquely personal and important concerns. Some move for health reasons, others retire and seek to relocate to be closer to their children or grandchildren. All of these factors converge on the Homeowner to create a foreseeable and particularly acute vulnerability to MV Realty's fraud.

MV Realty has the power to prevent the Consumer from making those life changes by preventing any sale of the property. In that way, MV Realty's scheme creates very real non-financial costs and pressure on the Homeowner. But under this "Lien Enforcement" scheme, MV Realty can wait as long as 40 years for the consumer to capitulate.

To pursue the futile arbitration mandated under the contract, a Consumer must put his life on hold. "According to the AAA, the average consumer arbitration requires 6.9 months to complete."¹ Achey v. Cellco Partshp., 475 N.J. Super. 446 (App. Div. 2023). According to the contract, arbitration appeals are to be commenced within 30 days of the award, with the arbitration appeal concluded within 160 days thereafter. Thus, assuming a Consumer is

¹ As discussed below, although clearly a consumer transaction, MV Realty has mandated the application of the AAA's more expensive "Commercial Rules".

irrational enough to fund a futile arbitration, the Consumer who wishes to pursue “Commercial Arbitration” can expect more than a year to pass before getting into the Superior Court, where MV Realty could contest the validity of the arbitration award. Quite simply, the pursuit of arbitration will require the Consumer to cancel any existing contract of sale and postpone any future sale of the property until the dispute with MV Realty is resolved.

B. FINANCIAL COSTS OF ARBITRATION

Falotico received \$942.00 in “Free Money” from MV Realty. After recording a lien on his property, MV Realty then refused to answer Falotico’s voice mails or list his property for sale. With the assistance of Century 21, he executed a contract of sale with a Buyer, and had made arrangements to move to a new residence when served with MV Realty’s complaint and unchallengeable Lis Pendens. MV Realty demanded payment of \$9,420 to allow Falotico’s closing to proceed. He capitulated at closing without ever being found liable for liquidated damages.

For Homeowners such as Falotico, postponing or canceling a closing to pursue arbitration invites potential liability to the buyer. Further, a contract to purchase a new home may have been executed with a deposit paid.

MV Realty has drafted the arbitration provisions to deliberately amplify the financial risk and delay to the Consumer to discourage pursuit of

Arbitration. In this regard, MV Realty has abandoned all pretense.² The mandatory arbitration provisions are permeated with patently illegal, unconscionable and predatory terms and provisions.

Thus, when considered in context of MV Realty's goal of lien preservation, it is clear these terms serve no legitimate purpose, but rather, are included by MV Realty to discourage Consumers and attorneys from pursuing arbitration, thus leaving Consumers with no choice but to capitulate and pay liquidated damages without adjudication.

Three conclusions necessarily follow: First, as a matter of law the arbitration clause is unenforceable under Cellco Partshp., supra, 475 N.J. Super. 446 (holding that the "cumulative effect" of the various unconscionable terms within the arbitration agreement rendered it unenforceable in its entirety.) Second, because the mandatory arbitration clause deprives the Consumer of access to the Superior Court and its remedies, the arbitration clause itself violates the CFA and is unenforceable. Third, MV Realty's in-court enforcement of the mandatory arbitration clause is an "aggravating factor" making that in-court enforcement effort a separate and independent violation of the CFA, with the ascertainable loss and damages measured by the value of the le-

² MV Realty made no serious attempt to defend these terms, arguing only that the arbitrator can strike them if illegal or unconscionable. 294a. But see,

gal fees incurred to defend the Consumer's right of access to the Superior Court and its remedies. See, Point V, infra.

"A contract is unenforceable if its terms are manifestly unfair or oppressive and are dictated by a dominant party." Howard v. Diolosa, 241 N.J. Super. 222, 230 (App. Div.)(citing Kuzmiac v. Brookchester, 33 N.J. Super. 575 (App. Div. 1955)), certif. denied, 122 N.J. 414 (1990). A contract is unconscionable if there is "some over-reaching or imposition resulting from a bargaining disparity between the parties, or such patent unfairness in the terms of the contract that no reasonable [person] not acting under compulsion or out of necessity would accept them." Rotwein v. Gen. Accident Grp., 103 N.J. Super. 406, 418 (Law Div. 1968).

To determine unconscionability, the Court should consider both procedural unconscionability and substantive unconscionability. Procedural unconscionability focuses upon the defects in the process by which the contract was formed, and "can include a variety of inadequacies, such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process." Muhammad v. Cnty. Bank of Rehoboth Beach, 189 N.J. 1,

14a stating, "In the event of a conflict between this arbitration provision and the AAA Rules, this arbitration provision shall prevail."

15 (2006) (quoting Sitogum Holdings, Inc. v. Ropes, 352 N.J. Super. 555, 564-66 (Ch. Div. 2002)).

Substantive unconscionability "suggests the exchange of obligations so one-sided as to shock the court's conscience." Sitogum Holdings, supra, 352 N.J. at 565. It is demonstrated by the presence of harsh, unfair, and one-sided terms. Muhammad v. County Bank, supra, 189 N.J. at 14. "Grossly unfair contractual obligations resulting from the use of such expertise or control by the one possessing it, which result in assumption by the other contracting party of a burden which is at odds with the common understanding of the ordinary and untrained member of the public, are considered unconscionable and therefore unenforceable". Ellsworth Dobbs, Inc., supra, 50 NJ at 554 (invalidating provision in real estate brokerage contract that obligated the seller to pay commission even if the buyer was financially unable or unwilling to complete the transaction). Such contractual provisions are unenforceable "[w]henver there is substantial inequality of bargaining power, position or advantage between the broker and the other party involved." Id. at 555.

A. Deprivation Of Impartial Arbitrator

As Judge McGovern on August 22, 2023 already found in Patter-son, the HBA's instructions to the Arbitrator are unconscionably one-sided and unenforceable as they effectively call for the arbitrator to be biased:

The language of the arbitration agreement presents concerns which, if arbitration proceeded, may well result in the arbitrator concluding that all provisions of the HBA are automatically enforceable, regardless of any defenses or lack of proofs. This, of course, is patently unfair and cannot be tolerated or condoned by the Court. Notably, the language above does not communicate that the arbitrator “will have the authority to enforce every provision of this Agreement”, but rather the arbitrator “will enforce every provision of this Agreement,” seemingly making the role and function of the arbitrator a mere rubber stamp in favor of Defendants. [41a-42a.]

This provision on its face deprives the Homeowner of a neutral arbitrator making the Homeowner’s resort to Arbitration futile.

B. Selection Of More Expensive Commercial Rules

The HBA is obviously a consumer contract. Yet MV Realty requires application of the AAA’s more expensive “Commercial Rules”. (a, para. 1. MV Realty makes no effort to justify its selection of the more expensive “Commercial Rules”. Yet tellingly, after increasing the financial cost to do so, MV Realty argues that Consumers are free to initiate arbitration should they choose to do so.

Under the AAA’s “Consumer Rules”, the maximum cost to the Homeowner who initiates proceedings is \$225.00. 194a-195a. Where a Business initiates arbitration under the “Consumer Rules”, the cost to the Consumer is ZERO dollars. Furthermore, the “Consumer Rules” expressly reserve to

the Consumer the option to reject arbitration and seek relief in the Special Civil Part, where a case can be initiated for less than \$200. 194a.

But under the “Commercial Rules”, “The Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or addition claim is filed.” For disputes of less than \$75,000.00, the Initial Filing Fee is \$925.00. Furthermore, “The Final Fee will be incurred for all cases that proceed to their first hearing and is payable in advance at the time the first hearing is scheduled.” For disputes of less than \$75,000.00, the Final Fee is \$800.00. 210a. Thus, if a Homeowner sought to initiate arbitration proceedings under the Commercial Rules, that Homeowner would incur a cost of \$1,725.00 in administrative fees alone.

Ordinary consumers cannot be expected to know that the AAA has separate “Commercial Rules” and “Consumer Rules”, no less have any understanding of the differences between them. Equally clear, no consumer would knowingly agree to the cost prohibitive “Commercial Rules” when the more affordable “Consumer Rules” are available.

MV Realty has never initiated arbitration, so the cost of doing so is meaningless to MV Realty. But not for the Consumer. MV Realty’s selection of the more expensive Commercial Rules is a deliberate impediment to the Homeowner, as it needlessly inflates the cost of arbitration.

C. Prohibition On Treble Damages Under CFA

The HBA states that the arbitrator's award will "Award compensatory damages" but

shall not include or allow for punitive or exemplary damages ... [and] that the arbitrator cannot award punitive damages under any circumstances whatsoever. [14a.]

This is clearly a direct attack on the foundational principles of the CFA, i.e., to deter and punish wrongdoers. An award of treble damages under the CFA has both a compensatory component (the amount of the ascertainable loss) and a punitive aspect (double the ascertainable loss). See Neveroski v. Blair, 141 N.J.Super. 365, 381-82 (App. Div. 1976), 49 Prospect Street v. Sheva Gardens, 227 N.J.Super. 449, 481-82 (App. Div. 1988)(noting that two-thirds of total damages awarded under CFA "represents a punitive recovery").

The limitation of damages clause in the HBA prohibiting the award of treble damages is illegal. The Appellate Division in Achey v. Cellco Partshp., 475 N.J. Super. 446 (App. Div. 2023) affirmed the lower court's decision to strike an arbitration agreement's limitation on damages clause, "finding that it immunized defendant's from paying treble damages in contravention of the CFA." However, the Appellate Division reversed the lower court's decision to sever it from the agreement, holding instead that the "cumulative effect" of the various unconscionable terms within the arbitration agreement

rendered the arbitration agreement unenforceable in its entirety. Respectfully, the Court should apply the same reasoning here and reach the same result.

D. Threat Of “Loser Pays”

In Cox v. Sears, supra, 13 N.J. at 24, the Supreme Court said “The fundamental remedial purpose of the Act dictates that plaintiffs should be able to pursue consumer-fraud action without experiencing financial hardship.”

Here, not only has MV Realty selected the more expensive “Commercial Rules”, it further threatens the Homeowner with ruinous financial costs and penalties with its “loser pays” provision. In an obvious effort to intimidate Homeowners, Paragraph 7 first calls attention to the significant costs and expenses associated with “Commercial Arbitration”:

The potential costs of arbitration can involve the payment of a filing fee, ongoing administrative costs, the cost of an arbitrator at a daily or hourly rate, and the cost of your own lawyers and experts. [14a.]

Paragraph 7 v., then goes on to state that if the Homeowner loses, not only will the Homeowner have spent money on his own case, but the Homeowner shall also be liable to MV Realty for MV Realty’s costs and expenses of arbitration. It states that the arbitrator will:

award to the prevailing party reimbursement of all attorney’s fees and arbitration costs incurred by that party in the Arbitration, which means that the losing party must pay the attorney’s fees and costs that the other party incurred in connection with the Arbitration. [14a.]

The HBA's "loser pays" provision is irreconcilable with the "fundamental remedial purpose" of the CFA which "dictates that plaintiffs should be able to pursue consumer-fraud action without experiencing financial hardship." Cox, 13 N.J. at 24.

Furthermore, the Legislature has declared "loser pays" to be prohibited in virtually all consumer contracts that are subject to arbitration, even those in which the CFA is not asserted or does not apply. See, N.J.S.A. 2A:23B-35: Payment of fees, costs, which states:

- a. A consumer arbitration shall not require a consumer who is a party to the arbitration to pay the fees and costs incurred by an opposing party if the consumer does not prevail in the arbitration, including, but not limited to, the fees and costs of the arbitrator, arbitration organization, attorney, or witnesses.

Clearly, MV Realty's selection of the "Commercial Rules", its "Limitation on damages" and the "loser pays" provisions, are unconscionable and unenforceable in a consumer contract. But again, these clauses were never meant to be reviewed by a Judge of the Superior Court, which is deprived of jurisdiction by the same arbitration clause. Their purpose was to discourage victimized Homeowners, with a contract of sale pending and a closing date fast approaching, from initiating arbitration, and to compel their capitulation.

The one-sided, patently illegal and unconscionable arbitration provisions deliberately inflate the Consumer's costs, instruct the arbitrator to be biased in favor of MV Realty, threaten the Consumer with financial ruin in the event the consumer does not "win", and deprive the consumer of Treble Damages under the CFA.

Their inclusion in the HBA is no accident. MV Realty included these provision to ensure the cost and risk to the Homeowner for asserting his/her rights in arbitration far exceed the cost of the bitter pill of capitulation.

E. "Loser Pays" Discourages The Plaintiffs' Bar

Respectfully, it is common for practitioners today to charge \$600, \$700, or even \$1,000 per hour. Accordingly, without the prospect of having the Merchant pay attorneys fees under the CFA, most people are unable to pay the legal fees required to retain an attorney and litigate the matter to a conclusion. Notably, in the present case, Falotico received \$942 in "Free Money", and MV Realty demanded \$9,420 to allow him to close.

The Supreme Court in Skeer v. EMK Motors, Inc., 187 N.J.Super. 465 (App. Div. 1982) recognized that N.J.S.A. 56:8-19's fee shifting mechanism is designed to minimize or eliminate the financial cost to a private plaintiff who would otherwise "have to pay attorney's fees and incur potentially considerable expense for a small recovery". Id. at 476. But importantly, its

further purpose is to encourage members of the bar to become “private attorneys general.” Gonzalez v. Wilshire Credit Corp., *supra*, 207 N.J. 557, 585 (2011).

Fee Shifting under the CFA was intended by the Legislature to attract competent counsel to take these very winnable, but otherwise uneconomical cases. Jacobs v. Lindsey & Son, Plumbing, 485 N.J.Super. 194, 21 (App. Div. 2019)(Legislature adopted fee shifting to CFA to induce competent counsel and to advance public interest through private enforcement of statutory rights.).

In a consumer fraud action, the Legislature has recognized that the right of access to the courts is meaningless unless the injured party has the resources to launch a suit. Fee-shifting provides an incentive to competent counsel to undertake high-risk cases and to represent victims of fraud who suffer relatively minor losses. *See* Coleman v. Fiore Bros., 113 N.J. 594, 597 (1989) (explaining that fee-shifting is the Legislature's attempt to provide equal access to the courts by encouraging private enforcement of law); [Furst v. Einstein Moomjy, Inc., *supra*, 182 N.J. at 21.]

To incentivize the Plaintiffs’ Bar and attract competent counsel, under the CFA a plaintiff need not “win” before a jury to be entitled to an award of legal fees. All that is required is a demonstration of an unlawful practice under the Act and enough evidence of an “ascertainable loss” to reach a jury. Even if the jury ultimately decides there was no ascertainable loss, the

plaintiff will be entitled to a fee award. See, Sema v. Automall 46, Inc., 384 N.J.Super. 145, 151-52 (App. Div. 2006); Wienberg v. Sprint Corp., 173 N.J.233, 253 (2002).

Our Supreme Court has been clear, “Although defendants have no obligation to provide counsel to plaintiff, **they cannot take action that impedes ordinary citizens access to representation to vindicate their rights.**” Muhammad v. County Bank, supra, 189 N.J. 1 (2006)(invalidating class action waiver that would leave consumers will no available recourse).

MV Realty’s arbitration clause hits the trifecta of access blockage: Not only does it require the Consumer to arbitrate before a biased arbitrator in a forum that cannot provide the needed relief, and not only does the “loser pays” provision threaten financial ruin if the Consumer does not succeed, it further prevents the Consumer from retaining counsel because it eliminates the very fee shifting mechanism of N.J.S.A. 56:8-19 intended to attract competent counsel. The “loser pays” provision on its face, and in combination with the other provisions, clearly “impedes ordinary citizens access to representation to vindicate their rights.” Ibid.

But again, for MV Realty to profit from this gift, it simply does not matter whether the “loser pays” provision is legal. These provisions, like the rest of the HBA, were never intended to pass judicial muster in the Superi-

or Court, which is deprived of jurisdiction. Lien preservation is the goal. Thus, these provisions are designed to discourage and prevent the Consumer from seeking arbitration, and more importantly, to disincentivize the Plaintiffs' Bar from accepting these victimized clients and their cases without a substantial retainer.

The Supreme Court, in an analogous situation, refused to permit such a result. In Muhammad v. County Bank, *supra*, 189 N.J. 1, the Supreme Court was presented with a class action arbitration waiver in a consumer contract. The Supreme Court emphasized the important public policy of ensuring that Consumers are able to attract competent counsel, so that merchants cannot evade accountability for their misconduct. *Id.* The Court stated that "In addition to their impact on individual litigants, class-action waivers can functionally exculpate wrongful conduct by reducing the possibility of attracting competent counsel to advance the cause of action." The Court found that a class-action waiver in an arbitration clause was unconscionable because it effectively deprived the consumer of a meaningful opportunity to seek redress for small claims, which would have been economically infeasible to pursue individually. The court held that such provisions resulted in economic harm to consumers that amounted to an unconscionable commercial practice under the CFA.

The object and purpose of the HBA, as written, is to convince the Homeowner that capitulation is the only way out. Until Ms. Patterson and Mr. Falotico filed their actions, MV Realty's scheme had succeeded 100% of the time.

POINT V

IN-COURT ENFORCEMENT OF THE ARBITRATION PROVISIONS IS A PROHIBITED ACT UNDER THE CFA (1a, Opin- ion page 3)

A. In-Court Enforcement Is A Violation Of The CFA

When taken together, the arbitration provisions are unenforceable under Achey v. Cellco Partshp., supra, 475 N.J. Super. 446 (App. Div. 2023). The entire arbitration scheme is permeated with unconscionable and one-sided terms and conditions that render it unenforceable. But this case concerns far more than a typical effort by a Merchant to enforce an arbitration clause. Here, in-court enforcement of the arbitration provision is itself an unconscionable act that must be deemed a prohibited practice under the CFA.

MV Realty starts this transaction by recording a lien for unaccrued and unadjudicated liquidated damages. It is equally enforceable against all consumers, irrespective of their of factual or legal liability. The arbitration provisions preserve the lien by blocking the Consumer's access to Court and its exclusive remedy.

Thus, for the innocent Consumer to clear title, the Consumer must first retain litigation counsel, a feat which MV Realty has made virtually impossible for many consumers by the “Loser Pays”, ban on treble damages, and the other one-sided provisions discussed above.

Once retained, the Consumer’s attorney must first oppose and overcome enforcement of the arbitration clause so that the Consumer can have the opportunity to obtain the needed Order discharging the lien. If the arbitration clause is enforced, the lien remains an encumbrance on the property while the Consumer is forced into expensive and biased arbitration in a forum without any remedy.

Thus, MV Realty has placed an additional hurdle in front of the Consumer. That additional burden requires the Consumer to expend money on legal fees that would not be required if MV Realty made no effort to block the Consumer’s access to the needed remedy. Indeed, the cost and expense of retaining counsel to oppose enforcement of the arbitration clause is enough to compel Consumers’ capitulation. Thus, the arbitration provisions, and the cost of the litigation it invites, are central to the grift.

The arbitration provisions create a “safe harbor” in which MV Realty can evade accountability for its violations of the CFA by blocking the

Consumer's access to the Superior Court and competent counsel. "Safe harbors" are not permitted under the CFA.

In Bosland v. Warnock Dodge, Inc., 197 N.J. 543 (2009), the Court was presented with a seller of automobiles who allegedly overcharged purchasers a small amount of money, \$20 to \$40, for an undisclosed service fee. The Defendants argued that in light of the small amount of the overcharge, the Court should adopt an interpretation of the CFA that would require consumers to demand a refund from the offending merchant prior to initiating an action, permitting the offending merchant to issue the refund without the necessity of litigation. The Supreme Court refused to adopt the rule:

There are sound reasons why a pre-suit demand requirement is not implicit in the CFA. This dispute in particular illustrates how reading such a requirement into the CFA would potentially permit practices, that the statute is designed to deter, instead to continue unabated and unpunished. Plainly, if we require plaintiffs, as a precondition to filing a complaint under the CFA, to first demand a refund, **we will create a safe harbor for an offending merchant. A merchant could rely on the pre-suit refund demand requirement, boldly imposing inflated charges at no risk, and planning to refund the overcharges only when asked.** Such an analysis of the CFA would limit relief by making it available only to those consumers who are alert enough to ask for a refund, while allowing the offending merchant to reap a windfall. We see in the broad remedial purposes of the CFA a strong contrary expression of public policy. We discern in the CFA a clear expression of the Legislature's intent to empower consumers who seek to secure relief for themselves and for others who may not be aware that they

have been victimized. Because reading a pre-suit demand for refund requirement into the CFA would thwart those salutary purposes, we will not endorse it. [Warnock Dodge, Inc., supra, 197 N.J. at 561.]

Here, rather than arguing that the Court should require consumers to demand a refund prior to initiating an action, MV Realty argues that the Court must require Consumers to arbitrate in a forum that cannot provide relief prior to initiating an action in the Superior Court. All the while, MV Realty's lien (and lis pendens) remain in full force. MV Realty then relies upon the grossly unconscionable arbitration provisions to ensure arbitration is not a viable option, boldly demanding payment of liquidated damages at closing with no risk of being hauled into Court. MV Realty's arbitration provisions go even further by discouraging the Plaintiffs' bar from accepting these obviously aggrieved consumers and their cases.

While MV Realty feigns that the disputes should be resolved in arbitration, it has never initiated any arbitration proceedings. Instead, it has drafted the arbitration provision to be so grossly unfair, time consuming, and expensive that Consumers are left with no reasonable alternative but to capitulate.

MV Realty has done with its arbitration clause what the Supreme Court refused to do by fiat. MV Realty has shielded itself from accountability and deprived Consumers of their remedy, while continuing to extract payment

of liquidated damages from innocent consumers on a contract and lien already found to violate the CFA.

Falotico respectfully urges this Court to hold that MV Realty's in-court enforcement efforts of these arbitration provisions give rise to a separate and independent violation of the CFA.

B. Falotico's Attorneys Fees Are "Damages" Subject To Trebling Under N.J.S.A. 56:8-19

As this is a new type of consumer fraud, examination of the existing remedies, including the composition of "ascertainable loss" and the causally related damages that flow from this new scheme is required. Falotico respectfully urges this Court to hold that because MV Realty's in-court enforcement of the arbitration clause is itself a separate, unconscionable practice under the CFA, it gives rise to its own ascertainable loss and damages, measured by the legal fees incurred in restoring and/or preserving the consumer's access to the Superior Court.

Case law recognizes that attorneys fees can be deemed an ascertainable loss arising from a prohibited practice under the CFA. However, there are no reported cases that hold they are subject to trebling. Similarly, there are no reported cases where a Merchant blocks a consumer's access to the Superior Court and competent counsel to preserve an illegal lien for unadjudicated liquidated damages.

This Court has previously held that where the CFA is successfully asserted as a defense to a merchants' complaint seeking to collect a debt, the consumer's legal fees satisfy the "ascertainable loss" requirement. BMJ Insulation v. Evans, 287 N.J.Super. 513 (App. Div. 1996)(holding that as to attorneys' fees "the CFA makes no distinction between a person who raises the act's provisions in an affirmative claim and one who pleads it as a defense").

The Appellate Division stated:

Clearly, the reasonable counsel fee associated with raising a meritorious claim under the act is an obligation owed by the claimant. As such, it is as ascertainable a loss as any other out of pocket expense resulting from a violation of the act's terms, specially treated only in the respect that it is not subject to the trebling for which other losses qualify. [BMJ Insulation v. Evans, 287 N.J.Super. 513 (App. Div. 1996).]

But the case before this Court is different in a very important respect, and justice demands an extension of the rule. Here, deprivation of access to preserve a lien is the Merchants' goal, and is the subject of Count II of Falotico's complaint. That condition was not present in BMJ Insulation.

There, the Merchant's recovery of damages was contingent upon the Merchant obtaining a favorable adjudication in court. Thus, the Merchant had a financial incentive to bring the suit to Court and prove the Consumer's liability. The Merchant did not impede the Consumer's right to assert all claims and defenses and obtain relief, nor did the Merchant hold the Consum-

er's property hostage. The Consumer had access to all needed relief and remedies. Accordingly, while the Consumer's attorneys' fees satisfied the "ascertainable loss" requirement, they were not found to be subject to trebling.

But here, blocking access is the target and goal. MV Realty has a financial incentive to **prevent the dispute** from ever being adjudicated and has drafted its arbitration provisions to deprive the Consumers of access to Court and its remedy. This is an offence to the administration of justice. Compare, N.J.S.A. 2A:15-59.1 (b)(1), Frivolous causes of Action (prohibiting complaints that are "commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury."), and R. 1:4-8 (a)(1), Frivolous Litigation (signature on pleading certifies "the paper is not being presented for any improper purposes, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"), with, R. 1:1-2. Construction and Relaxation, "These rules shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

The reasonable counsel fee associated with raising a meritorious defense to enforcement of the arbitration provisions is undoubtedly an obligation owed by the claimant. Under the unique facts of this case, Falotico respectfully urges this Court to hold that the Consumer's legal fees expended

challenging MV Realty's in-court efforts are "direct damages" and subject to trebling under N.J.S.A. 56:8-19.

There is ample flexibility in the CFA to extend the rule in BMJ Insulation v. Evans. N.J.S.A. 56:8-19 provides that the mandatory award of "threefold the damages sustained" is "in addition to" any other appropriate or legal or equitable remedy." Section 19 states.

Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefor in any court of competent jurisdiction. In any action under this section the court shall, **in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest.** In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

The Supreme Court has noted that the phrase "in addition to" gives Courts substantial discretion to "fashion individualized relief appropriate to the specific case...." D'Agostino v. Maldonado, 216 N.J. 168 (2013).

As evidenced by the speed and ease with which MV Realty fleeced Falotico and 1,200 other Homeowners, and the enormous legal effort expended toward opposing enforcement of the arbitration provisions in the pursuit of recovering the \$6,620.00 wrongfully extorted from Falotico at closing, Court-

ordered referral to a futile, expensive and protracted arbitration is the very mechanism that makes “Lien Enforcement” fraud profitable. Again, this new fraud can be easily modified to apply to any number of consumer contracts for the provision of future goods or services, i.e., window replacement contracts, auto repairs, theatre and sporting event tickets, health care, landscaping, pizza delivery, and indeed, even future legal services. A strong penalty should be imposed upon Merchants who seek to perpetrate this new type of consumer fraud, with that penalty being used and applied to encourage the Plaintiffs’ bar to accept these cases and defend the Consumers’ right of access.

Plaintiff respectfully urges this Court to hold that MV Realty’s in-court efforts to enforce its arbitration clause is a separate and independent act taken in violation of the CFA, and therefore the Consumer’s legal fees expended challenging those efforts are “direct damages” and subject to trebling under N.J.S.A. 56:8-19.

CONCLUSION

For the foregoing reasons, Peter Falotico respectfully requests that the Motion Court’s Order of January 31, 2025 granting MV Realty’s motion to compel arbitration and denying Falotico’s motion for partial summary judgment be reversed.

Dated: June 4, 2025

Respectfully submitted,
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<p>PETER FALOTICO,</p> <p style="text-align: center;">Plaintiff/Appellant,</p> <p>v.</p> <p>MV REALTY PBC, LLC; MV REALTY OF NEW JERSEY, LLC; MV BROKERAGE OF NEW JERSEY, LLC, MV REALTY NJ, LLC; AMANDA J. ZACHMAN; DAVID MANCHESTER; ANTHONY MITCHELL A/K/A TONY MITCHELL; DAVID REINER; PASHMAN, STEIN, WALDER, HAYDEN, P.C.; DORIS CHEUNG, ESQ., ABC COMPANIES 1 through 100 (being the fictitious names of corporations, LLC's, partnerships, or other business entities whose identities are not yet know), and JOHN DOES 1 through 100 (being the fictitious names</p>	<p>SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION</p> <p>A-001663-24 TEAM 01</p> <p>ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY CIVIL DIVISION, UNION COUNTY, DOCKET NO. UNN-L-002841-23</p>
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of persons whose identities are not yet known),	
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Defendants/Respondents.	
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TABLE OF AUTHORITIES

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I. PRELIMINARY STATEMENT

Stripped of unfounded conclusions and hyperbole, the issues on appeal are quite simple. Plaintiff Peter Falotico (“Plaintiff”) asks this Court to apply incorrect law, overturn the trial court’s opinion, and make findings that are neither ripe for consideration on appeal nor correct.

The only issue that is properly before this Court is whether the trial court was correct to enforce a contractual arbitration provision and dismiss Plaintiff’s complaint in favor of arbitration. The trial court correctly determined that there was a valid and enforceable contract between the parties – the contract is called a “Homeowner Benefit Agreement” (“HBA”) – which included an express arbitration provision, that Plaintiff had assented to arbitration in the HBA, and that Plaintiff’s claims fell within the scope of the arbitration provision. Accordingly, the trial court dismissed Plaintiff’s claims and compelled arbitration. In doing so, the trial court rejected Plaintiff’s efforts to argue the merits of his consumer fraud claims as a basis to avoid arbitration, as the arbitration provision required such claims to be heard by an arbitrator in the first instance. Based on the record before it, the trial court’s decision was correct and should be affirmed.

Following the trial court’s decision, and Plaintiff’s numerous attempts to file an appellate brief in compliance with this Court’s rules, another trial court in New Jersey entered an Order that enjoined MV Realty of New Jersey from enforcing any

HBAs in New Jersey, required MV Realty of New Jersey to record terminations of any recorded Memoranda on New Jersey properties subject to an HBA, and required MV Realty of New Jersey to notify each HBA customer in New Jersey that the HBA and Memorandum are unenforceable and that they are no longer bound by the terms of the HBA. *See Platkin, et al. v. MV Realty PBC, LLC, et al.*, Superior Court of New Jersey, Chancery Division, Essex County, Docket No. ESX-C-000080-23, Order Dated August 18, 2025, Trans. ID: CHC2025263578 (the “*Platkin Order*”). The *Platkin Order* is not a final order, so it is not yet subject to appeal as of right, and there is a pending motion for reconsideration with respect to the *Platkin Order*. Nonetheless, MV Realty of New Jersey has complied with the terms of the *Platkin Order*, including by recording terminations of all the HBAs in New Jersey and providing notice to all NJ HBA customers that the HBA had been terminated and was not enforceable.

Although the HBA that is the subject of this appeal is currently terminated and unenforceable, the *Platkin Order* is not yet final and could be amended or overturned after reconsideration and/or subsequent appeal(s). Indeed, the final disposition of the *Platkin* case may resolve Plaintiff’s claims and/or render them moot. Regardless, the fact that the HBA is no longer enforceable does not change the fact that the trial court’s decision was correct based on the record before it. At the time that the trial court dismissed Plaintiff’s Complaint and compelled

arbitration, there was a valid and enforceable HBA that required arbitration, including any claims of consumer fraud and challenges to the arbitration provision itself. The subsequent entry of the *Platkin* Order in another proceeding does not render the trial court's decision incorrect, as the trial court lacked jurisdiction at that time to decide Plaintiff's claims or otherwise declare the HBA (or the arbitration provision) to be unenforceable. Unless and until the HBA and/or the arbitration provision were found to be unenforceable – whether by an arbitrator or a court with jurisdiction – the trial court was bound to compel arbitration when faced with a contract where the Plaintiff had indisputably assented to arbitration. Based on the record before the trial court, which is the record on appeal, the trial court's decision should be affirmed.

II. PROCEDURAL HISTORY

Plaintiff filed his initial complaint against Defendants on August 29, 2023, and subsequently filed the operative Amended complaint on September 17, 2024. On October 14, 2024, Defendants filed their Motion to Dismiss and Compel Arbitration. On October 18, 2024, Plaintiff filed his Motion for Partial Summary Judgment. On November 12, 2024, Plaintiff filed his Brief in Opposition to Defendants' Motion to Dismiss and Compel Arbitration. On November 12, 2024, Defendants filed their Opposition to Plaintiff's Motion for Partial Summary Judgment dated October 18, 2024. On November 16, 2024, Plaintiff filed a Reply in

Support of his Motion for Partial Summary Judgment. (*Id.*) On November 18, 2024, Defendants filed their Reply in Support of the Motion to Dismiss and Compel Arbitration. The trial court held oral argument on the motions on January 10, 2025. On January 31, 2025, the trial court issued the order on appeal and accompanying letter opinion. (Plaintiff's Appendix ("P"), at P1a and 2a.) Plaintiff filed the instant appeal on February 7, 2025.

III. STATEMENT OF FACTS

The order on appeal was issued by the Trial Court on January 31, 2025 (the "Order"). (P1a.) The Order was accompanied by a Letter Opinion (the "Opinion"). (P2a.) The Order granted Defendants' Motion to Dismiss and Compel Arbitration and denied Plaintiff's Motion for Partial Summary Judgment, without prejudice, pending the outcome of arbitration. (P1a.) The Opinion summarizes Plaintiff's allegations in the matter:

Plaintiff filed his Complaint on August 29, 2023. After voluntarily dismissing and reinstating this suit, Plaintiff filed the First Amended Complaint on September 17, 2024. Plaintiff alleges that MV defrauded distressed homeowners through a program and contract called the Homeowner Benefit Agreement ("HBA"). Plaintiff alleges that MV would offer a payment equal to 0.03% of the property's value as a promotion for using MV as an exclusive broker, but that MV would obtain the right to assert a forty-year lien for roughly one hundred times the value of the promotion, and that this right was contained within the HBA. Plaintiff further alleges MV would not perform its duties as a broker and that MV's real business was in extracting early termination fees, liquidated damages, and enforcing lopsided, mandatory arbitration against the homeowners. Plaintiffs continue, alleging that Defendants Pashman Stein Walder Hayden P.C. and Doris Cheung, Esq.

(collectively, “Pashman”) participated in this scheme, beyond simply serving as MV’s counsel, including by drafting the HBA and enforcing it in litigation.

Plaintiff alleges that he signed the HBA on January 15, 2021, obtaining a \$943.00 payment. Plaintiff further alleges that MV refused to sell his home, so Plaintiff found another broker who sold the home quickly, but then MV, through Pashman, filed suit based on Plaintiff’s violation of the exclusive listing right of MV’s. Plaintiff alleges that the suit was filed by Pashman on October 15, 2021, seeking to recover \$9,430.00 through a security lien, as provided for in the HBA as liquidated damages.

(P3a.)

MV Realty PBC, LLC was founded in 2014 and initially operated as a traditional real estate brokerage firm. (Certification of Antony Mitchell in Support of Defendants’ Response in Opposition to Plaintiff’s Motion for Partial Summary Judgment, P289a-P293a, at P290a ¶ 4.) In October 2018, MV PBC began focusing its efforts on marketing a unique product to residential homeowners – a business process which was the subject of two United States Patents issued by the United States Patent and Trademark Office. (*Id.*) In or around October 2018, MV PBC implemented the “Homeowner Benefit Program” (the “HBP”). (*Id.*) As part of the HBP, the MV PBC subsidiaries, including MV Realty of New Jersey, LLC, enter into HBAs with residential homeowners. (*Id.*) The HBA is not a listing agreement but is a contract pursuant to which the MV PBC subsidiaries pay an upfront cash payment to homeowners in exchange for the exclusive right to list a homeowner’s

home if the homeowner ever decides to sell their home. (*Id.*) The term of the HBA is forty (40) years subject to certain early termination events. (*Id.*)

In accordance with an HBA, a selling homeowner lists their home with the applicable MV PBC subsidiary, or its assignee, which then lists and sells the home for a standard 6% commission, typically 3% paid to the listing agent and 3% paid to the buyer's agent. (*Id.* at P290a-P291, ¶ 5.) In the event the home does not sell within six (6) months, the homeowner has an opportunity to sell the property on their own for a period of sixty (60) days, subject to certain requirements, failing which the HBA rights remain with the MV PBC subsidiary. (*Id.* at P291a, ¶ 6.)

In the event a homeowner breaches the HBA, the MV PBC subsidiaries may be contractually entitled to a termination fee or liquidated damages typically equal to three percent (3%) (the same amount to which the MV PBC subsidiary would have earned as a commission as a result of the sale of the home) of the greater of (a) the fair market value of the home at the time the HBA is entered, or (b) the fair market value at the time of breach or early termination. There are other early termination events provided for under the HBAs. (*Id.*)

Additionally, each of the MV PBC subsidiaries reserves the right to record a memorandum ("Memorandum"), which is executed separately by the homeowner. (*Id.* ¶ 7.) The memoranda were filed in accordance with applicable laws of the State of New Jersey and are intended to provide public notice of the HBA. (*Id.*) The

memoranda assist the MV PBC subsidiaries, like MV Realty of New Jersey, LLC, by providing a fair and reasonable way of enforcing limited contractual rights in the event the homeowner attempts to sell their home without using the MV PBC subsidiary as their agent (as agreed to in the HBA). (*Id.*) In addition, the Memoranda serve as a deterrent to any listing agent seeking to coerce any homeowner to breach the HBA. (*Id.*) In the HBA, MV reserves the right to record Memoranda in the public records in the county in which the real estate is located. (*Id.*) Neither the HBA nor the Memorandum creates any current lien against a homeowner's property at the time the HBA is executed or the Memorandum is recorded. (*Id.*)

The key facts at issue in this appeal are relatively limited. Specifically, on January 15, 2021, Plaintiff was presented with the HBA by a Notary Public for the State of New Jersey, at which time Plaintiff signed and initialed the HBA before the notary. (P3a; P9a-P20a.) The *very first* page of the HBA, "Definitions," paragraphs 1 and 3 provide a clear indication that arbitration language appears in the HBA:

1. "**AAA Rules**" means the commercial rules of the American Arbitration Association that govern Arbitration.

...

3. "**Arbitration**" means binding arbitration.

(P9a (emphasis in *original*)).) Beginning at the very top of page 6 and extending all the way into the middle of page 7 of the HBA, the arbitration provision provides:

7. Arbitration. BY SIGNING THIS AGREEMENT, YOU AGREE TO WAIVE YOUR STATUTORY RIGHT TO SEEK RELIEF IN A COURT OF LAW AND YOUR RIGHT TO A TRIAL BY JURY.

In particular, any and all disputes, claims, or controversies whatsoever between you and MV Realty, whether based on contract, tort, or any other legal right or claim, including an alleged violation of consumer or privacy laws, shall be referred to and resolved exclusively by binding arbitration (the “Arbitration”). However, in the event of any dispute, claim or controversy between the Parties, the Company shall retain the right to file a judicial action to enable the recording of a notice of pending action or lis pendens. The Company’s filing of such judicial action shall not constitute a waiver of the Parties’ right under this Agreement to arbitrate all disputes, claims, or controversies (without exception), which right to arbitrate shall be enforced at all times. **This means that an independent neutral arbitrator, and not a court of law or a jury, will make a decision about the dispute after receiving evidence and hearing arguments. The decision of the arbitrator is final, can be enforced by a court, and can only be appealed on very narrow grounds.** The potential costs of arbitration can involve the payment of a filing fee, ongoing administrative costs, the cost of an arbitrator at a daily or hourly rate, and the cost of your own lawyers and experts.

If a dispute is referred to arbitration, then the Arbitration will be governed by the commercial rules under the American Arbitration Association (the “**AAA Rules**”). In the event of a conflict between this arbitration provision and the AAA Rules, this arbitration provision shall prevail. You can find a copy of the AAA Rules at <https://adr.org/commercial>. **MV Realty** will also provide you with a copy of the AAA Rules upon request.

After the Arbitration commences, you and **MV Realty** will appoint a single arbitrator, who will make a decision about the dispute based on New Jersey law. If you and **MV Realty** cannot agree on the selection of an arbitrator within twenty (20) days after the Arbitration commences, then the American Arbitration Association will appoint an independent neutral arbitrator.

The Arbitration will take place in New Jersey, and the arbitrator will:

- i. resolve all disputes and issues between the Parties, including issues of arbitrability (whether it is proper for the dispute to be heard by an arbitrator) and the validity of this arbitration provision;
- ii. enforce every provision of this Agreement and any other agreement between you and **MV Realty**, including this arbitration provision;
- iii. temporarily and permanently enjoin (prohibit) a breach of this Agreement or any other agreement between the you and **MV Realty**;
- iv. award compensatory damages in the event damages are suffered by the victim of a breach of this Agreement or any other agreement between you and **MV Realty**; and
- v. award to the prevailing party reimbursement of all attorney's fees and arbitration costs incurred by that party in the Arbitration, **which means that the losing party must pay the attorney's fees and costs that the other party incurred in connection with the Arbitration.**

The arbitrator's award shall be in writing, with findings of fact and conclusions of law, shall not include or allow for punitive or exemplary damages, and shall provide a breaching party no more than twenty (20) days to comply with every provision of this Agreement and every other agreement between the **Parties**. **This means that the arbitrator cannot award punitive damages under any circumstances whatsoever.**

If the arbitrator issues an award or partial award that is inconsistent with this arbitration provision, the award shall be null and void and each party shall have thirty (30) days to appeal before a panel of three neutral arbitrators (the "**Appellate Panel**") to be promptly appointed by the American Arbitration Association. The Appellate Panel shall issue a final award that follows and enforces this arbitration provision within one hundred and sixty (160) days of the appointment by the American Arbitration Association of the full Appellate Panel. The Appellate

Panel shall provide the Parties an equal and fair opportunity to present their case. This arbitration provision shall survive the termination, voidance or annulment of this Agreement or any other provision of this Agreement.

Despite any language to the contrary in this Agreement, the **Parties** hereby agree:

- i. that the arbitration award may be appealed pursuant to the AAA's Optional Appellate Arbitration Rules ("Appellate Rules");
- ii. that the arbitration award rendered by the arbitrator shall, at a minimum, be a reasoned award; and
- iii. that the arbitration award shall not be considered final until after the time for filing the notice of appeal pursuant to the Appellate Rules has expired.

Appeals must be initiated within thirty (30) days of receipt of an arbitration award, as defined by Rule A-3 of the Appellate Rules, by filing a Notice of Appeal with any AAA office. Following the appeal process, the decision rendered by the appeal tribunal may be entered in any court having jurisdiction thereof.

(P14a-P15a (emphasis in original).) The HBA provides a *separate* provision, paragraph 8 on page 7, which relates to class action relief but also mentions arbitration multiple times in bold, all-capital letters. (P16a.)

In sum, Plaintiff does not, and cannot, deny that at the time of signing the HBA, he had every opportunity to read the HBA, which contained multiple references to arbitration and, on page 6, provided with utmost clarity: "7. Arbitration.

BY SIGNING THIS AGREEMENT, YOU AGREE TO WAIVE YOUR STATUTORY RIGHT TO SEEK RELIEF IN A COURT OF LAW AND

YOUR RIGHT TO A TRIAL BY JURY.” (P14a (emphasis in original).)

Arbitration is referenced and/or fully described in three of the nine substantive pages of the HBA. (P9a-20a.) Plaintiff’s knowing, voluntary assent to arbitrate was objectively clear.

IV. LEGAL ARGUMENT

On the record below, the trial court properly decided Defendants’ Motion, brought pursuant to Rule 4:6-2(a), finding that Plaintiff agreed to arbitrate, and properly denied Plaintiff’s motion for partial summary judgment, without prejudice pending the outcome of arbitration, for lack of jurisdiction.

A. Standard of Review

The trial court’s Order is reviewed de novo because the validity of an arbitration agreement presents a question of law. *Skuse v. Pfizer, Inc.*, 244 N.J. 30, 46 (2020).

B. The Trial Court Correctly Enforced the Valid, Enforceable, Bargained-For Arbitration Provision. (P1a-P8a.)

On the record before it, the trial court properly decided Defendants’ Motion to Dismiss and Compel Arbitration pursuant to Rule 4:6-2(a) because there is an enforceable arbitration agreement between MV and Plaintiff that deprived the trial court of subject matter jurisdiction. (P1a-P8a.) Under New Jersey law, an arbitration agreement is valid, enforceable, and irrevocable if it expresses the parties’ intent to submit an existing or future controversy to arbitration. N.J.S.A. 2A:23B-6(a). New

Jersey law strongly favors arbitration and requires courts to compel arbitration where there is a mutually assented to arbitration clause. *Caruso v. Ravenswood Developers, Inc.*, 767 A. 2d 979, 982 (N.J. Super. Ct. App. Div. 2001) (noting that the State has strong public policy favoring arbitration and requiring a liberal construction of contracts in favor of arbitration); *Littman v. Morgan Stanley Dean Witter*, 766 A. 2d 794, 802 (N.J. Super. Ct. App. Div. 2001) (“Our State’s policy in favor of arbitration is well settled”); *Martindale v. Sandvik, Inc.*, 800 A. 2d 872, 881 (N.J. 2002) (“[T]he affirmative policy of this State, both legislative and judicial, favors arbitration as a mechanism of resolving disputes.”).

It is well-established in New Jersey that courts should enforce contracts as made by the parties. *Stelluti v. Casapenn Enters., LLC*, 1 A.3d 678, 690 (N.J. 2010) (“When a party enters into a signed, written contract, that party is presumed to understand and assent to its terms, unless fraudulent conduct is suspected.”). Honoring an agreement to submit a matter to arbitration is consistent with the premise that parties may generally bargain freely. *E.g., Singer v. Commodities Corp.*, 678 A. 2d 1165, 1170 (N.J. Super. Ct. App. Div. 1996) (“[T]he duty to arbitrate, and the scope of arbitration, are dependent solely upon the parties’ agreement.”). New Jersey courts routinely dismiss complaints based upon the failure to comply with a valid and enforceable arbitration agreement. *E.g., Hojnowski v. Vans Skate Park*, 901 A. 2d 381, 391-94 (N.J. 2006); *Littman*, 766 A. 2d 794. Basic contract principles

apply when a court interprets an arbitration clause because “a submission to arbitration is essentially a contract, and the parties are bound to the extent of that contract,” therefore, courts must generally enforce contracts based on the intent of the parties, express terms of the contract, circumstances of the contract, and underlying purpose of the contract. *Loc. 462, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Charles Schaefer & Sons, Inc.*, 539 A. 2d 295, 298 (N.J. Super. Ct. App. Div. 1988); *see also Kampf v. Franklin Life Ins. Co.*, 161 A. 2d 717, 720 (N.J. 1960).

Arbitration clauses in consumer contracts are enforceable so long as the waiver of right to a jury trial is clear and unmistakably established. *Atalese v. U.S. Legal Servs. Grp., L.P.*, 99 A. 3d 306, 314 (N.J. 2014). “An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights.” *Knorr v. Smeal*, 836 A. 2d 794, 799 (N.J. 2003). The New Jersey Supreme Court has held that “[a]rbitration clauses—and other contractual clauses—will pass muster when phrased in plain language that is understandable to the reasonable consumer.” *Atalese*, 99 A. 3d at 314. “No particular form of words is necessary to accomplish a clear and unambiguous waiver of rights.” *Id.*; *see also Jaworski v. Ernst & Young U.S. LLP*, 119 A. 3d 939, 950 (N.J. Super. Ct. App. Div. 2015) (upholding, in light of *Atalese*, an arbitration clause which said the parties would not “be able to sue in

court”). Ultimately, a litany of precedent in New Jersey provides that parties can give up the right to sue in court in a multitude of ways.

Plaintiff signed the HBA and initialed it in multiple places. The HBA provided expressly, in bold, all-capital letters, that **“BY SIGNING THIS AGREEMENT, [PLAINTIFF] AGREE[S] TO WAIVE [HIS] STATUTORY RIGHT TO SEEK RELIEF IN A COURT OF LAW AND [HIS] RIGHT TO A TRIAL BY JURY.”** (P14a (emphasis in original).) Plaintiff specifically assented and agreed to arbitrate “any and all disputes, claims, or controversies whatsoever between [him] and MV Realty, whether based on contract, tort, or any other legal right or claim, including an alleged violation of consumer or privacy laws, shall be referred to and resolved exclusively by binding arbitration.” (*Id.*) The Arbitration clause is detailed with key disclosures in bold throughout the section. Plaintiff was specifically notified, again in bold font, that the arbitration clause **“means that an independent neutral arbitrator, and not a court of law or a jury, will make a decision about the dispute after receiving evidence and hearing arguments. The decision of the arbitrator is final, can be enforced by a court, and can only be appealed on very narrow grounds.”** (*Id.* (emphasis in original).) The arbitration provision in the HBA goes above and beyond what is required to notify a party of arbitration and to describe the process of arbitration and potential appeals.

Moreover, section 7 of the HBA also notified Plaintiff in clear terms that:

[T]he arbitrator will:

- i. resolve all disputes and issues between the Parties, including issues of arbitrability (whether it is proper for the dispute to be heard by an arbitrator) and the validity of this arbitration provision;
- ii. enforce every provision of this Agreement and any other agreement between you and **MV Realty**, including this arbitration provision

(*Id.* (emphasis in original).) Thus, as a threshold issue, substantive arbitrability issues must be decided by the arbitrator. *Goffe v. Foulke Mgt. Corp.*, 208 A. 3d 859, 875 (N.J. 2019) (holding that, even where plaintiff claimed the sales contract is invalid in its formation or effectively rescinded, the arbitration agreement that is part of the overall invalid sales agreement is severable and enforceable). Once the Court determines there was a contract containing an arbitration provision between the parties (even if Plaintiff challenges the contract for fraud), any threshold arbitrability determination must be made by the arbitrator if so delegated in the contract. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019) (“[A] court may not decide an arbitrability question that the parties have delegated to an arbitrator.”); *see also Amalgamated Transit Union, Local 880 v. N.J. Transit Bus Operations, Inc.*, 975 A. 2d 403, 412 (N.J. 2009) (“A court’s duty is to refrain from adjudicating the merits of a dispute that properly belongs to an arbitrator”).

The language of the arbitration clause in the HBA is both clear and unambiguous and amply meets the standards set forth in *Atalese*. The distinction between resolving the dispute in arbitration and in a judicial forum is set forth in specific detail. The arbitration clause is plain on its face and understandable to the average consumer that he or she is waiving statutory rights. By signing the HBA, Plaintiff expressly represented that he understood and assented to the terms, including the arbitration provision. Plaintiff did not dispute receiving a copy of the HBA, including its arbitration provision, at the time of signing same before a notary public, and Plaintiff does not dispute signing the HBA before a notary public. Again, arbitration is referenced in three of the nine total pages of the HBA, including two references on the very first page. Because the arbitration clause in the HBA is sufficient to put Plaintiff on notice that he is waiving the right to a court of law or jury, Plaintiff's Complaint was properly dismissed in favor of arbitration.

Before the trial court, Plaintiff made no attempt to argue relevant considerations such as those pertaining to Plaintiff's assent or formation of contract issues. Knowing his assent to the HBA and its arbitration provision were concretely established, Plaintiff instead repeated irrelevant, red-herring arguments that have little merit. Mandatory arbitration is common in consumer agreements with businesses. Arbitration is not, as Plaintiff suggests, an illegitimate, deficient forum for adjudication of legal disputes. Arbitration serves critical, important, and valid

purposes. As the New Jersey Supreme Court observed more than forty years ago, “[a]rbitration is a substitution, by consent of the parties, of another tribunal” for the one provided by law, with the “goal of providing final, speedy and inexpensive settlement of disputes.” *Barcon Assocs., Inc. v. Tri-County Asphalt Corp.*, 430 A.2d 214, 217-18 (N.J. 1981) (citations omitted).

Claims brought by litigants alleging CFA violations are frequently subject to arbitration and/or motions to compel arbitration. Indeed, not once, to the undersigned’s knowledge, has a party’s attempt to or actual enforcement of an arbitration provision in a contract been held to be a standalone CFA violation, let alone one that precluded arbitration in the first instance. As provided in *Gras v. Associates First Capital Corp.*, 786 A.2d 886 (N.J. Super. Ct. App. Div. 2001), *certif. denied*, 794 A.2d 184 (N.J. 2002):

Our Supreme Court has stated that the three main purposes of the CFA are:

to compensate the victim for his or her actual loss; to punish the wrongdoer through the award of treble damages, *Roberts v. Cowgill*, 316 N.J. Super. 33, 45, 719 A.2d 668 (App. Div. 1998); and, by way of the counsel fee provision, to attract competent counsel to counteract the community scourge of fraud by providing an incentive for an attorney to take a case involving a

minor loss to the individual. *Silva v. Autos of Amboy, Inc.*, 267 N.J. Super. 546, 555, 632 A.2d 291 (App. Div. 1993). [*Lettenmaier v. Lube Connection, Inc.*, 162 N.J. 134, 139, 741 A.2d 591 (1999).]

All three of these objectives can be vindicated in the arbitration forum and a successful plaintiff can achieve all statutory remedies in the same forum.

In addressing the issues before us, two significant public policies must be harmonized. Plaintiffs identify the first and correctly assert that the policy behind the CFA is to “root out consumer fraud.” *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255, 264, 696 A.2d 546 (1997). However, that policy must be balanced by a competing and compelling public policy favoring arbitration as a means of dispute resolution and requiring liberal construction of contracts in favor of arbitration. *Alamo Rent A Car, Inc. v. Galarza*, 306 N.J. Super. 384, 389, 703 A.2d 961 (App. Div. 1997) (citing *Marchak v. Claridge Commons, Inc.*, 134 N.J. 275, 281, 633 A.2d 531 (1993)).

On balance, even if we consider the policies in equipoise, we must consider that here the parties have agreed to permit the issues to be resolved in the arbitration forum. We recognize that the parties were in distinctly different bargaining positions. We are less certain of the economic compulsion that caused plaintiffs to recast each loan with a new loan over a short period of time. Nevertheless, even assuming that these factors ultimately favor plaintiffs’ position, the absence of a legislative mandate or overriding public policy in favor of class actions leads us to conclude that the arbitration provision in question here is enforceable.

Id. at 892-93; *id.* at 894 (“Although plaintiff contended that defendant never alerted him to the arbitration provision, no such obligation exists where the provision is not hidden.”); *id.* at 894 (“Failing to read a contract does not excuse performance unless fraud or misconduct by the other party prevented one from reading.” (quoting *Berman v. Gurwicz*, 429 A.2d 1084, 1087 (1981))); *see also* *Rockel v. Cherry Hill*

Dodge, 847 A.2d 621, 623 (N.J. Super. Ct. App. Div. 2004), *certif. denied*, 181 N.J. 545 (2004) (finding arbitration provision not sufficiently clear to be enforced but confirming that CFA claims are arbitrable, holding that “[a] consumer’s claim that a contract was the product of unconscionable practices in violation of the CFA does not necessarily prohibit the enforcement of an arbitration clause contained in the contract under attack” (emphasis added)); *Forde v. Terrelongue*, No. A-3528-04T2, 2006 WL 3782935, at *4 (N.J. Super. Ct. App. Div. Feb. 10, 2006) (affirming trial court order that CFA claims were subject to arbitration pursuant to arbitration provision); *Muhammad v. Cnty. Bank of Rehoboth Beach, Delaware*, 189 N.J. 1, 14, 912 A.2d 88, 96 (2006) (“[*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)], and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440[] (2006), hold that because arbitration agreements are, as a matter of federal arbitration law, severable from the remainder of a contract, a challenge to a contract as a whole is for an arbitrator to decide.”).

There is no merit in Plaintiff’s argument that an arbitrator cannot decide whether his claims are subject to arbitration in the first place or the argument that the arbitrator cannot determine the arbitration provision is unenforceable or, as Plaintiff calls it, “illegal.” Because Defendants established that a valid arbitration agreement exists (acceptance, consideration, meeting of the minds, and sufficiently definite terms, *Weichert Co. Realtors v. Ryan*, 608 A.2d 280, 284 (N.J. 1992)), the

next question is whether Plaintiff's claims are arbitrable. Whether the trial court or the arbitrator is the one to determine whether Plaintiff's claims are arbitrable "turns on whether the parties have delegated to the arbitrator the power to decide the issue of arbitrability."

Here, the arbitration provision which Plaintiff assented to *expressly provides* that the "arbitrator will: i. resolve all disputes and issues between the Parties, including issues of arbitrability (whether it is proper for the dispute to be heard by an arbitrator) and the validity of this arbitration provision" (P14a (emphasis added)). *E.g.*, *Banquez v. Deutsche Bank Nat. Tr. Co.*, No. A-3705-13T2, 2014 WL 7735837, at *4 (N.J. Super. Ct. App. Div. Feb. 3, 2015) ("While courts commonly are tasked with making the initial determination of whether a particular dispute is arbitrable, parties can delegate that power to an arbitrator." (citing first *AT & T Techs., Inc. v. Comms. Workers of Am.*, 475 U.S. 643, 649 (1986); and then *Commerce Bank, N.A. v. DiMaria Constr. Co.*, 692 A.2d 54, 57 (N.J. Super. Ct. App. Div. 1997))); *Westerkamp v. Samsung Elecs. Am., Inc.*, No. 21CV15639JXNJRA, 2023 WL 4172967, at *9 (D.N.J. June 26, 2023) (citing *Beture v. Samsung Elecs. Am., Inc.*, No. CV 17-5757 (SRC), 2018 WL 4621586, at *10 (D.N.J. July 18, 2018)). "Because the parties clearly and unmistakably delegated' to the arbitrator the question of whether Plaintiff's claims fall within the scope of the arbitration

agreement, the Court will reserve this determination for the arbitrator.” *Westerkamp*, 2023 WL 4172967, at *9 (quoting *Beture*, 2018 WL 4621586, at *10).

“Having found that a valid arbitration agreement exists and that it is for the arbitrator to determine whether Plaintiff’s claims fall within the scope of the arbitration agreement, this Court finds it appropriate to grant Plaintiff’s motion to compel arbitration.” *Id.* (citing *Vasadi v. Samsung Elecs. Am., Inc.*, No. CV 21-10238-WJM-AME, 2021 WL 5578736, at *7, 10-11 (D.N.J. Nov. 29, 2021) (applying New Jersey law)). Accordingly, Plaintiff’s argument that “[g]ranted MV Realty’s motion to enforce the mandatory arbitration clause would require the Court to effectively grant MV Realty summary judgment on Count Two of Falotico’s complaint” is patently wrong. (Opposition at p. 7.)

Plaintiff’s argument that the arbitration provision is unenforceable in its entirety because of allegedly unconscionable provisions therein is misguided. Plaintiff cites *Achey v. Cellco P’ship*, 293 A.3d 551, 553 (N.J. Super. Ct. App. Div. 2023) for the holding that this arbitration provision is unenforceable in its entirety because of unconscionable provisions therein. In *Achey*, the New Jersey Appellate Division reviewed an appeal in a class action suit after Verizon’s motion to compel arbitration was granted based on the Verizon Customer Agreement. *Id.* The arbitration provision was part of an adhesion contract, but the arbitration provision therein is clearly distinguishable—the provision was so permeated by

unconscionable provisions that the entire arbitration agreement was unconscionable and, therefore, unenforceable. *Id.* at 554-58. Such is not the case here. For example, the HBA's arbitration provision does *not* impose an inferior forum on customers, a narrow window to notify MV of dispute or otherwise waive claims, preclude injunctive relief (to the contrary, it provides for the arbitrator to enjoin a breach of the HBA by any party), preclude introduction of evidence obtained by a party from the other, or compel mass arbitration (*i.e.*, a bellwether provision). These types of provisions and effects, which are *not* present in the HBA's arbitration provision, led the court in *Achey* to conclude that the arbitration provision in that case was unenforceable for being entirely unconscionable. There is simply no comparison to the HBA's arbitration provision.

Plaintiff's argument that Defendants' "enforcement" of the arbitration provision is "itself an unconscionable practice" does not help him avoid arbitration of his claims. Putting aside the absurdity of such a contention, the arbitration provision in the HBA clearly covers claims against Defendants for consumer fraud, among other things, but such is a determination to be made by the arbitrator. If Plaintiff truly believes enforcement of the arbitration provision is an unconscionable practice under the CFA, he can argue that before the arbitrator.

Ultimately, Plaintiff assented to arbitration of his claims. Therefore, the trial court properly dismissed his claims against MV in favor of arbitration.

C. The Trial Court Correctly Denied Plaintiff’s Motion for Partial Summary Judgment for Lack of Jurisdiction. (P1a-P8a.)

Plaintiff’s main goal on appeal is to have the Court of Appeals adjudicate his summary judgment motion. Specifically, Plaintiff urges this Court to decide issues that the trial court properly abstained from. Because the trial court found that there was a binding, enforceable agreement to arbitrate, the court properly held that it lacked subject matter jurisdiction to decide Plaintiff’s Motion for Partial Summary Judgment. (P8a.) Specifically, it is “well established that a court cannot hear a case as to which it lacks subject matter jurisdiction even though all parties thereto desire an adjudication on the merits.” *Peper v. Princeton University Bd. of Trustees.*, A.2d 465, 470 (N.J. 1978). “A court lacks subject matter jurisdiction over a case if it is brought in an ineligible forum.” *Hoffman v. Supplements Togo Management, LLC*, 18 A.3d 210, 216 (N.J. Super. Ct. 2011) (citing *Peper*, 389 A.2d at 470). “In particular, a plaintiff cannot file suit in a court if he or she has entered into an enforceable agreement to bring such claims in another forum” *Id.* (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-94 (1991)). Accordingly, the trial court properly held that because it “already determined that all of Plaintiff’s claims against MV must be submitted to arbitration,” the court lacked jurisdiction. (P8a.) accordingly, the trial court lacked jurisdiction to grant or deny Plaintiff’s Motion for Partial Summary Judgment and denied the motion without prejudice pending the outcome of arbitration. (*Id.*)

Plaintiff's appeal asks this Court to step into the role of the trial court and grant him summary judgment on issues that were not decided below. Accordingly, Plaintiff's appeal should be denied.

V. **CONCLUSION**

For the aforementioned reasons, jointly and independently, Defendants respectfully request that this Court deny Plaintiff's appeal.

Respectfully submitted,

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PETER FALOTICO,

Appellant,

v.

MV REALTY PBC, LLC; MV REALTY OF NEW JERSEY, LLC; MV BROKERAGE OF NEW JERSEY, LLC, MV REALTY NJ, LLC; AMANDA J. ZACHMAN; DAVID MANCHESTER; ANTHONY MITCHELL A/K/A TONY MITCHELL; DAVID REINER; PASHMAN, STEIN, WALDER, HAYDEN, P.C.; DORIS CHEUNG, ESQ., ABC COMPANIES 1 through 100 (being the fictitious names of corporations, LLC's, partnerships, or other business entities whose identities are not yet know), and JOHN DOES 1 through 100 (being the fictitious names of persons whose identities are not yet known),

Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-1663-24T1

ON APPEAL FROM:
SUPERIOR COUR OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO. UNN-L-2841-24

Sat Below:
Hon. Mark P. Ciarrocca, P.J.Cv.

Civil Action

Submitted: October 23, 2025

REPLY BRIEF IN FURTHER SUPPORT OF APPEAL

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Preliminary Statement

MV Realty's Homeowner Benefit Agreement is not an ordinary service contract; it is a device by which MV Realty surreptitiously secures a lien for unearned and unadjudicated liquidated damages that encumbers a Consumer's title for 40-years.

Similarly, MV Realty's arbitration clause is not an alternative dispute mechanism. Rather, MV Realty enforces the arbitration clause within the HBA to deny consumers access to the only tribunal with the power to discharge the illegal liens. The arbitration clause shields that encumbrance and MV Realty's illegal contract from judicial review and allows the lien to persist for the earlier of 40-years, or until such time as the Consumer capitulates and pays "liquidated damages".

In their opposition brief, Respondents do not contest their lien and arbitration clause together work exactly as Appellant describes. Yet, Respondents offer no explanation of how such an arrangement can be reconciled with the remedial purpose of the Consumer Fraud Act, which exists to prevent precisely this kind of abusive, self-perpetuating restraint on consumer property rights.

Respondents' brief fails to address the central issues presented by this appeal, i.e., the interplay between the lien and the arbitration clause. Respondents merely assert that a valid arbitration clause exists and that arbitration is generally favored. Appellant's core arguments are unopposed.

LEGAL ARGUMENT

POINT I

RESPONDENTS FAIL TO JOIN ISSUE ON THE QUESTIONS PRESENTED.

The Appellant's brief framed two narrow questions. First, whether an arbitration clause that bars the consumer from the only forum capable of clearing an unlawful lien violates the Consumer Fraud Act.

Second, does a Merchant's in-court enforcement of that arbitration clause itself arise to a violation of the CFA, thus elevating the Consumers attorneys fees expended toward defeating that enforcement, to be both an ascertainable loss and subject to trebling under the Act.

Respondents' brief does not confront either question. It merely asserts that a valid arbitration clause exists and that arbitration is generally favored. At the same time, Respondent's cite the recent Chancery Division decision, Platkin v. MV Realty PBC, LLC, ESX-C-80-23, granting summary judgment to the Attorney General. There, Judge Adubato found that MV Realty's Homeowner Benefit Agreements are "unconscionable, unreasonable, and sharply one-sided," that the recorded memoranda are "liens as a matter of law," and that the arbitration clause is itself unconscionable because "it allows MV Realty to litigate in the Superior Court to obtain the lis pendens, but deprives the consumer of their right to challenge that same lis pendens in the Superior Court." The Chancery Division's statewide injunction against recording or enforcing liens under HBA demonstrates that MV's Realty's arbitration clause is not merely disfavored but unlawful as a matter of public policy.

Here on appeal, MV Realty simply declines to address the interplay between the lien and the arbitration clause. Respondents have failed to

answer the core questions on appeal. Their omission is fatal. See R. 2:11-3(e)(1)(E).

POINT II

ENFORCEMENT OF THE ARBITRATION CLAUSE IS ITSELF AN UNLAWFUL PRACTICE

Respondents argue that the arbitration clause is “clear and enforceable” under Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014). But Atalese concerned a neutral clause in an otherwise lawful contract. Here, the arbitration clause is itself the instrument of the fraud. It is not collateral to the unlawful conduct—it is what enables it.

By diverting the consumer away from Superior Court while preserving MV Realty’s own right to litigate there to protect its lien, the clause ensures that the encumbrance remains in place indefinitely. It therefore functions as a continuation of the unlawful practice condemned in Cox v. Sears Roebuck & Co., 138 N.J. 2 (1994): an arrangement that allows the merchant to retain the fruits of its deception while denying the consumer an effective remedy.

The Consumer Fraud Act does not yield to the Federal Arbitration Act when the arbitration clause itself violates the CFA. Delta Funding Corp. v. Harris, 189 N.J. 28 (2006), makes clear that a clause requiring a consumer to forfeit statutory protections or limiting access to court remedies is unconscionable and void. The clause at issue here is far more extreme. It extinguishes judicial access altogether in a setting where only the courts can clear title. That deprivation of remedy is a substantive illegality, not a matter of contract interpretation.

Enforcement of such a clause would contravene the very CFA principles that Judge Adubato, Judge McGovern, and Judge Farfante have each independently invoked to prohibit this same conduct.

POINT III

RESPONDENTS' REMAINING ARGUMENTS ARE GENERIC AND INAPPLICABLE

The remainder of Respondents' brief consists of boilerplate FAA citations and quotations from Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019), concerning delegation clauses. Those authorities do not address the issues on appeal. The issue here is not "who decides" arbitrability but whether the clause itself is lawful. Courts, not arbitrators, determine the validity of the clause under Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006). The Motion Court therefore erred in compelling arbitration before addressing the clause's substantive illegality under the CFA.

CONCLUSION

Respondents' failure to address the two core questions presented speaks volumes. Their brief never disputes that their arbitration clause, coupled with a recorded lien for liquidated damages, denies all consumers (liable and non-liable alike) judicial access to clear title and thereby perpetuates an unlawful encumbrance. They offer no argument against Appellant Falotico's contention that a merchant's in-court efforts to enforce an arbitration clause to preserve an illegal lien is itself a separate and independent violation of the CFA.

The Attorney General's statewide injunction confirms that this practice is unconscionable and void. The order compelling arbitration should be reversed, summary judgment should be granted, and the matter remanded to the Law Division for further proceedings.

Dated: October 23, 2025

Respectfully submitted,
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/s/Daniel P. Silberstein

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