Superior Court of New Jersey

Appellate Division

Docket No. A-001981-24T2

MILAGROS CINTRON, *Plaintiff-Respondent,* vs. BRINK'S INCORPORATED, CHRIS GHIRTSOS, LISA JOHNSON, and LISA DUFFY, *Defendants-Appellants.*	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY DOCKET NO. ESX-007421-24 Sat Below: HON. JEFFREY B. BEACHAM, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS

On the Brief:
THOMAS J. RATTAY, ESQ.
Attorney ID# 018231996
JOCELYN A. MERCED, ESQ.
Attorney ID# 023772009
ERIN N. DONEGAN, ESQ.
Attorney ID# 304712019

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
Attorneys for Defendants-Appellants
10 Madison Avenue, Suite 400
Morristown, New Jersey 07960
(973) 656-1600
thomas.rattay@ogletreedeakins.com
jocelyn.merced@ogletreedeakins.com
erin.donegan@ogletreedeakins.com

Date Submitted: May 1, 2025

CP COUNSEL PRESS (800) 4-APPEAL • (380906)

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PRELIMINARY STATEMENT

This is an employment discrimination case that belongs in arbitration because of the parties' agreement to resolve their claims in this alternative forum. Plaintiff retains all rights and remedies in the arbitration forum and the Trial Court's reasoning for denying Defendant Brink's Incorporated's ("Defendant" or "Brink's") attempt to proceed to arbitration is legally and factually incorrect and should be reversed.

On December 20, 2024, the Trial Court entered an order granting Brink's unopposed Motion to Dismiss Plaintiff Milagros Cintron's ("Plaintiff") Complaint and Compel Arbitration ("Motion to Dismiss"). Plaintiff thereafter filed a Motion for Reconsideration claiming that the Court's order dismissing her case should be overturned because she "inadvertently failed" to oppose Defendant's Motion to Dismiss.

A different trial judge, citing a calendaring error that was not raised by either party and was previously unknown to them, granted Plaintiff's Motion for Reconsideration and reversed the prior decision, thereby vacating Defendant's Motion to Dismiss. In doing so, the Trial Court also ruled that Plaintiff (1) did not receive adequate consideration for entering the arbitration agreement, (2) did not understand what she was signing, and (3) did not understand that she

could "opt out" of the arbitration agreement. As a result, the Trial Court refused to enforce the arbitration agreement.

The Trial Court's decision is wrong and should be reversed for multiple reasons. First, the Trial Court's ruling ignores well-settled state and federal precedent which favors enforcement of arbitration agreements and is not supported by the record evidence. A valid arbitration agreement exists and Plaintiff does not dispute that she signed it in the course of her employment with Brink's. The discrimination claims alleged in Plaintiff's Complaint fall squarely within the scope of the arbitration agreement.

The Trial Court's refusal to enforce the Arbitration Agreement ignores well-settled case law holding that continued employment is sufficient consideration for an agreement to arbitrate. Moreover, New Jersey Courts have repeatedly declined to invalidate a contract based on one party's mere allegation that they could not recall signing the contract or that the other party to the contract should have explained it to them even though they never asked to have it explained to them. Additionally, the Trial Court's finding that Plaintiff did not know she could opt out of the Arbitration Agreement is not supported by the record. Indeed, Defendant has no legal obligation to provide any additional guidance on how to utilize the opt out provision when it is clear on its face and Plaintiff never asked about for it at the time.

Moreover, these arbitrability issues should not have even been presented to the Trial Court as Plaintiff expressly agreed in the Arbitration Agreement to present any such questions to an arbitrator for decision. New Jersey courts have enforced contract provisions allowing arbitrators to make preliminary threshold determinations regarding enforceability of arbitration agreements.

Finally, there was no calendaring error and Defendant's motion was not returnable on an improper date. Plaintiff simply did not oppose Brink's motion. The second Trial Judge misapplied *Rule* 4:6-2 and this did not provide a valid basis to overturn the prior Trial Judge's ruling.

For all the foregoing reasons and those discussed more fully below, this Court should reverse the Trial Court's order, grant Defendant's Motion to Dismiss, and compel Plaintiff to file her claims in arbitration.

PROCEDURAL HISTORY

A. Plaintiff Violates the Agreement and Files Suit in State Court

Despite having agreed to arbitrate all employment claims, Plaintiff filed a Complaint (the "Complaint") in the Superior Court of New Jersey, Law Division, Essex County, on October 24, 2024. (*See* Da13-18). In her Complaint, Plaintiff asserts claims for hostile work environment harassment due to race and gender and retaliation against Brink's in violation of the New Jersey Law Against Discrimination ("NJLAD") and a claim for aider and abettor liability in violation of the NJLAD against the individually named defendants. (*See* Da13-18).

Counsel for Defendants reminded Plaintiff, through her attorneys, of her agreement to arbitrate all claims arising from her employment, including the NJLAD claims asserted in Plaintiff's Complaint. (Da37-38). Plaintiff refused to withdraw the Complaint and file this claim in arbitration. (*Id.*).

B. Defendant Brink's Motion to Dismiss

On December 2, 2024, Brink's filed a Motion to Dismiss Plaintiff's Complaint and Compel Arbitration. (Da33-34). Plaintiff did not oppose the motion. (Da114-115). The Court granted Brink's motion on December 20, 2024, dismissed Plaintiff's Complaint without prejudice and ordered her to pursue her

legal claims against all defendants in accordance with the terms of the 2022 Mutual Arbitration Agreement. (*Id.*)

C. Plaintiff's Motion for Reconsideration

Rather than comply with the Court's order, Plaintiff filed a Motion for Reconsideration on December 23, 2024. (Da10). Defendants Brink's, Lisa Duffy, and Lisa Johnson (collectively, "Defendants") opposed Plaintiff's motion. (Da1-2). The sole basis for the Motion for Reconsideration was that they inadvertently forgot to file opposition to the Motion to Dismiss and Compel Arbitration. (Da11).

Oral argument was heard on February 14, 2025. 1T[1]. Prior to hearing the parties' respective arguments, the Trial Judge expressed his belief that "all *Rule* 4:6 motions have to have a 28-day return date." 1T4:6-7. The Trial Court further stated that, because Defendant Brink's motion was filed on December 2, the initial return date was incorrect. 1T4:8-11. The Trial Court then advised that Judge Russo improperly decided the motion because "it wasn't his motion." 1T4:16-20.

After the parties presented their respective positions, 1T4:4:25-11:13, the Trial Judge issued his decision on the record, 1T11:14-16:1. The Trial Judge

[1] "1T" refers to the oral argument transcript, dated February 14, 2025, on Plaintiff's Motion for Reconsideration.

reiterated that Plaintiff's Motion for Reconsideration was granted because Defendant's initial motion had been calendared on the improper return date. 1T11:14-17.

With respect to the motion to compel arbitration, The Trial Court cited several cases regarding the sufficiency of "consideration for an employee's submission to various demands of an employer." 1T14:17-15:14 (citing *Quigley v. KPMG*, 330 N.J. Super. 252 (App. Div. 1984); *Kamensky v. Home Depot U.S., Inc.*, No. A-0930-14 (App. Div. Sept. 29, 2015); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126 (7th Cir. 1997); *Hogan v. Bergen Brunswig Corporation*, 153 N.J. Super. 27 (App. Div. 1977)). The Trial Court ultimately held that "there was not consideration for this agreement because the plaintiff had been working there for so long and she was not told that she would be fired if she did not sign the agreement." 1T15:15-19.

The Trial Court also found that "plaintiff did not know what she was signing when she signed the agreement," and while "she was given the option to opt out, . . . she really did not know that she had the option to opt out because it was not explained to her." 1T15:20-24.

For these reasons, the Trial Court reversed its prior order and denied Defendant Brink's Motion to Dismiss and Compel Arbitration.

STATEMENT OF FACTS

A. Plaintiff Agreed To A Valid, Binding Arbitration Agreement

Brink's is a security and operations company. (Da101). It is a provider of cash and valuables management, digital retail solutions, and ATM managed services. (*See id*.).

During the hiring process, Brink's provides its employees with an arbitration agreement. (*See id*.). Employees may also receive updated versions of an arbitration agreement during the course of their employment. (*See id*.). Employees receive the opportunity to review any arbitration agreement presented to them, like all documents shared with employees, before signing it. (*See id*.).

Plaintiff began working for Brinks in June 1997. (*See id*.). Plaintiff is currently a Balance Processor at Brink's Maywood, New Jersey branch office. (*See id*.). Plaintiff received a document titled "Mutual Arbitration Agreement," which she electronically signed on March 9, 2021 ("the 2019 Agreement"). (*See id.*; Da103-107).

In March 2022, Brink's updated the Mutual Arbitration Agreement ("the 2022 Mutual Arbitration Agreement"). (Da101). Plaintiff received a copy of the 2022 Mutual Arbitration Agreement and electronically signed it on May 26, 2022. (*See id.*; Da108-112).

Both arbitration agreements included an "opt-out" provision. (*See* Da101). Pursuant to the 2022 Mutual Arbitration Agreement, if the employee wanted to timely opt-out, they had to follow the instructions under the section labeled, "**OPTION TO OPT OUT OF AGREEMENT – NON-CALIFORNIA EMPLOYEES**." (*See id.*; Da113). The provision states, "You have the right to opt out of this Agreement within 30 days from the date you sign this Agreement." (Da112). Brink's provided an Opt-Out form upon request. (*See* Da101). The 2022 Mutual Arbitration Agreement expressly provided that "Your employment status will not be affected if you decide to opt out of this Agreement." (Da112). The provision identifies the address to which employees should send the Opt-Out form. (*Id.*). Plaintiff did not Opt-Out of the Mutual Arbitration Agreement. (*See* Da102).

The 2022 Mutual Arbitration Agreement provides:

> Both you and Brink's agree that you and Brink's must submit all legally cognizable claims between you and Brink's to binding arbitration, except as provided below. Claims against Brink's subject to this Agreement include claims against Brink's parents, subsidiaries, affiliates, divisions, brands, alleged agents, and alleged joint or co-employers, and their respective directors, officers, employees, and agents, whether current, former, or future.[] **You and Brink's voluntarily waive all rights to trial in court before a judge or jury on all claims covered by this agreement.**

> [*See* (Da108) (emphasis in original) (footnote omitted).]

As to the claims subject to arbitration, the 2022 Mutual Arbitration Agreement states, "Claims covered by this Agreement include, but are not limited to, claims involving harassment, discrimination, or retaliation of all types. . . ." (*See* Da109).

Additionally, pursuant to the Arbitration Procedure clause in the 2022 Mutual Arbitration Agreement, Plaintiff agreed that ". . . to the maximum extent permitted by law, the arbitrator, and not any court, shall have the exclusive authority to resolve any dispute relating to the formation, enforceability, applicability, or interpretation of this Agreement." (*See* Da110).

Lastly, in executing the 2022 Mutual Arbitration Agreement, Plaintiff acknowledged that she was:

> ". . . knowingly and voluntarily waiving the right to file a lawsuit in court relating to [her] employment with Brink's and related entities and persons, as well as the right to resolve disputes in a proceeding before a judge or jury. . . ."
>
> BY SIGNING THIS AGREEMENT, YOU WAIVE YOUR RIGHT TO A JURY TRIAL AND INSTEAD AGREE THAT ANY CLAIMS COVERED BY THIS AGREEMENT WILL BE DECIDED IN THE ARBITRATION FORUM.
>
> [(*See* Da112) (emphasis in original).]

STANDARD OF REVIEW

The Appellate Division undertakes a *de novo* review of Trial Court decisions regarding the enforceability of an arbitration agreement. *Goffe v. Foulke Mgmt. Corp.*, 238 N.J. 191, 209 (2019). "The enforceability of arbitration provisions is a question of law; therefore, it is one to which we need not give deference to the analysis by the trial court . . . ." *Id.*; *see also Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 186 (2013) (citing *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995)) ("A trial court's interpretation of the law and legal consequences that flow from established facts are not entitled to any special deference.").

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S DECISION VIOLATES WELL-SETTLED PRECEDENT FAVORING ENFORCEMENT OF ARBITRATION AGREEMENTS (Raised Below Da89-94)[2]

The Trial Court's decision failed to resolve the arbitrability issue against the backdrop of the strong federal and New Jersey public policy in favor of arbitration, which requires this Court to read the Arbitration provision "***liberally***

[2] Defendant acknowledges that Rule 2:6-1(a)(2) typically prohibits inclusion of briefs that had been submitted to the Trial Court in the appendix. However, the brief is being submitted in accordance with the exception of Rule 2:6-1(a)(2), to demonstrate that the issues presented by Defendant to the Appellate Division were raised to the Trial Court. These issues were not addressed by the Trial Court in its decision.

***in favor of arbitration*.**" *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.*, 168 N.J. 124, 132 (2001) (emphasis added); *see also Martindale v. Sandvik, Inc.*, 173 N.J. 76, 84-85, 91-92 (2002); *Marchak v. Claridge Commons Inc.*, 134 N.J. 275, 281 (1993); *Barcon Assocs., Inc. v. Tri-Cty. Asphalt Corp.*, 86 N.J. 179, 186 (1981).

The Trial Court's decision is also preempted by the Federal Arbitration Act ("FAA"). Congress enacted the FAA to reverse judicial hostility to arbitration agreements and "to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-22 (1985). A state contract law, even one of general applicability, is preempted by the FAA where it is applied to arbitration agreements in a manner different from other contracts or in a manner that disfavors arbitration. *AT&T Mobility v. Concepcion*, 563 U.S. 333, 341-42 (2011); *see also Morales v. Sun Contractors, Inc.*, 541 F.3d 218, 223-24 (3d Cir. 2008) (holding application of a heightened "knowing consent" standard to arbitration agreements is inconsistent with FAA). Because the Trial Court declined to enforce the 2022 Mutual Arbitration Agreement for reasons that have no basis in the law, the decision is preempted by the FAA.

A. Federal and New Jersey Law Favor Enforcement of Arbitration Agreements (Da89-91)

Federal policy strongly favors arbitration as an efficient and effective means for resolving disputes between parties. Congress enacted the FAA to reverse then-existing judicial hostility to arbitration agreements and "to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 24 (1991); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20, n.6 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510, n.4 (1974). To that end, the FAA mandates that where a party to an arbitration agreement fails, neglects, or otherwise refuses to submit a matter to arbitration, the other party may seek to compel arbitration. *See* 9 U.S.C. § 4. The substantive protection of the FAA applies irrespective of whether arbitrability is raised in federal or state court. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Moreover, due to the strong public policy in favor of arbitration, the United States Supreme Court has emphasized that questions of arbitrability "must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Thus, "any doubts concerning the scope of arbitrable issues **should be resolved in favor of arbitration.**" *Id.* at 24-25 (emphasis added).

New Jersey has an equally strong public policy favoring arbitration as a tool for resolving disputes. *See, e.g., Ogunyemi v. Garden State Med. Ctr.*, 478 N.J. Super. 310, 315 (App. Div. 2024); *Gayles by Gayles v. Sky Zone Trampoline Park*, 468 N.J. Super. 17, 23 (App. Div. 2021); *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 84-85, 91-92 (2002); *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.*, 168 N.J. 124, 131 (2001). The New Jersey Legislature has expressed its endorsement of arbitration agreements in the New Jersey Arbitration Act, *N.J.S.A.* 2A:23B-1, *et seq.*, which, like the FAA, provides that an agreement to arbitrate is "valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." *N.J.S.A.* 2A:23B-6(a); *see also Morgan Stanley & Co., Inc. v. Druz*, 2013 WL 68712, at *4 (App. Div. Jan. 8, 2013)[1] (noting the presumption of arbitrability under the New Jersey Arbitration Act). "Because of the favored status afforded to **arbitration, an agreement to arbitrate should be read liberally in favor of arbitration**." *Garfinkel*, 168 N.J. at 132 (emphasis added) (quotes and citation omitted). Critically, an agreement to arbitrate disputes is enforceable to the same extent as all other contracts under state law–courts cannot "subject an arbitration agreement to more burdensome requirements than those governing

[1] All unpublished cases have been provided in Defendant's Appendix. The undersigned is unaware of any unpublished opinions contrary to those cited herein.

the formation of other contracts." *Leodori v. CIGNA Corp.,* 175 N.J. 293, 302 (2003); *Martindale,* 173 N.J. at 83-86. Indeed, under both the FAA and NJAA, "arbitration is fundamentally a matter of contract," and should be regulated according to general contract principles. *Ogunyemi*, 478 N.J. Super. at 315 (App. Div. 2024) (quoting *Antonucci v. Curvature Newco, Inc.*, 470 N.J. Super. 553, 561 (2022)).

The New Jersey Supreme Court has comprehensively addressed the enforceability of agreements to arbitrate employment-related disputes in a trilogy of decisions. *See Leodori,* 175 N.J. at 302; *Martindale*, 173 N.J. at 86-87; *Garfinkel*, 168 N.J. at 131-32. In particular, there is no public policy against enforcing a mandatory agreement to arbitrate certain employment claims. *Antonucci*, 470 N.J. Super. 553, 566; *Martindale*, 173 N.J. at 92-93. Indeed, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral[,] rather than a judicial, forum." *Antonucci*, 470 N.J. Super. at 566 (quoting *Martindale,* 173 N.J. at 93) (alterations in original).

In considering a motion to compel arbitration, a court must engage in a two-step analysis: First, it must determine whether a valid agreement to arbitrate exists; second, it must decide whether the specific dispute falls within the scope of the agreement. *Martindale*, 173 N.J. at 94. Here, there is a clear, valid written

agreement whereby the parties agreed that arbitration is the exclusive means of resolving disputes arising out of Plaintiff's employment. Accordingly, Defendant's Motion to Dismiss and to Compel Arbitration should be granted.

B. The Parties Have a Valid and Enforceable Agreement to Arbitrate (Da91-94)

Courts apply basic state contract principles to determine whether an agreement to arbitrate exists. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Leodori*, 175 N.J. at 302; *Martindale,* 173 N.J. at 86-88; *Caruso v. Ravenswood Developers*, 337 N.J. Super. 499, 504 (App. Div. 2001). "An agreement to arbitrate . . . 'must be the product of mutual assent,'" and "requires 'a meeting of the minds.'" *Antonucci*, 470 N.J. Super. at 561 (quoting *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 442 (2014). Additionally, the arbitration agreement must be supported by consideration. *Martindale*, 173 N.J. at 87-88.

New Jersey law requires that, for an arbitration agreement to be enforceable in the employment context, it must clearly and unambiguously establish that an employee intended to waive the right to have their claim tried in a judicial forum. *Ogunyemi*, 478 N.J. Super. at 316; *see Atalese*, 219 N.J. at 442; *Antonucci*, 470 N.J. Super. at 561. To accomplish a waiver of rights, "[n]o magical language is required." *Morgan v. Sanford Brown Inst.*, 225 N.J. 289, 309, (2016). However, "[e]mployees should at least know that they have

'agree[d] to arbitrate all statutory claims arising out of the employment relationship or its termination.'" *Atalese*, 219 N.J. at 447 (quoting *Garfinkel*, 168 N.J. at 135) (alteration in original).

Here, Plaintiff clearly and unambiguously agreed to submit all claims which fall within the 2022 Mutual Arbitration Agreement's scope, to final and binding arbitration, and Plaintiff expressly waived her right to try any covered claims in court before a judge or jury. Indeed, the 2022 Mutual Arbitration Agreement conspicuously provides:

> Both you and Brink's agree that you and Brink's must submit all legally cognizable claims between you and Brink's to binding arbitration, except as provided below. Claims against Brink's subject to this agreement include claims against Brink's parents, subsidiaries, affiliates, divisions, brands, alleged agents, and alleged joint or co-employers, and their respective directors, officers, employees, and agents, whether current, former, or future.[ ] **You and Brink's voluntarily waive all rights to a trial in court before a judge or jury on all claims covered by this agreement.**
>
> [(*See* Da108) (emphasis in original)(footnote omitted).]

"[C]laims covered by this Agreement include, but are not limited to, claims involving harassment, discrimination, or retaliation of all types. . . ." (*See* Da109).

Further, in capital lettering, right above the signature line, the 2022 Mutual Arbitration Agreement informs Plaintiff that: "BY SIGNING THIS

AGREEMENT YOU WAIVE YOUR RIGHT TO A JURY TRIAL AND INSTEAD AGREE THAT ANY CLAIMS COVERED BY THIS AGREEMENT WILL BE DECIDED IN THE ARBITRATION FORUM." *Id.* (emphasis in original).

Plaintiff's DocuSign signature is more than sufficient evidence of Plaintiff's assent to the terms of the Agreement. *See Powell v. Prime Comms Teail, LLC*, 2023 WL 2375918 (N.J. Super. 2023) (upholding trial court's determination that Plaintiff assented to electronic arbitration provision by clicking boxes, irrespective of the appearance of an electronic signature). Indeed, electronic signatures carry the same binding legal effect as a written signature. *N.J.S.A.* § 12A:12-7. Plaintiff signed the 2022 Mutual Arbitration Agreement, which unmistakably indicates her assent to its terms. *Leodori*, 175 N.J. at 306-07. Moreover, as a result of the capitalized text, conspicuously placed just above the signature line, there can be no doubt that Plaintiff had full knowledge that by executing the 2022 Mutual Arbitration Agreement and continuing her employment with Brink's, Plaintiff was forfeiting her right to pursue any claims arising under the 2022 Mutual Arbitration Agreement in a court of law. Accordingly, Plaintiff knowingly accepted the terms of the 2022 Mutual Arbitration Agreement, including the arbitration provision.

POINT II

THE PARTIES HAVE A VALID AND ENFORCEABLE AGREEMENT TO ARBITRATE (Raised Below Da91-94)

The Trial Court denied Defendant's Motion to Dismiss for three reasons: (1) Plaintiff received insufficient consideration because Plaintiff had already been employed by Defendant at the time she signed the 2022 Mutual Arbitration Agreement; (2) Plaintiff did not know what she was signing when she acknowledged the 2022 Mutual Arbitration Agreement; and (3) while Plaintiff was given the option to opt out of the 2022 Mutual Arbitration Agreement, she did not know she had the option because it was not explained to her. 1T15:15-24.

It is well-settled that Plaintiff's continued employment was sufficient consideration for her agreement to arbitrate. Moreover, New Jersey courts have repeatedly declined to invalidate a contract based on one party's allegation that they did not recall signing an agreement or did not know what they were signing. Finally, it is illogical to suggest that Plaintiff did not know she had the opportunity to opt out of the Agreement, as the disclosure informing her that she could opt out immediately precedes her signature; nor does Brink's have an obligation to explain any terms of the Agreement to Plaintiff, especially when she did not ask at the time.

A. Plaintiff Received Adequate Consideration for Signing the Agreement (Da93-94; 1T15:15-19)

The Trial Court held that, because Plaintiff was already employed at the time she was asked to sign the 2022 Mutual Arbitration Agreement, this somehow precludes her continued employment from being deemed as adequate consideration for entering the agreement. 1T15:15-19. However, this holding has no basis in the law, and the Trial Court failed to cite any cases which support its holding.

Under New Jersey law, it is well established that continued employment, without more, constitutes adequate consideration to support an agreement to arbitrate. *See*, *e.g.*, *Martindale*, 173 N.J. at 88 ("[I]n New Jersey, continued employment has been found to constitute sufficient consideration to support certain employment related agreements," including agreements to arbitrate); *Powell v. Prime Comms Retail, LLC*, Dkt. No. A-3053-21, 2023 WL 2375918, at *4 (N.J. Super. Ct., App. Div., Mar. 7, 2023) ("The law is clear that continued employment after giving that assent, which was afforded here to the plaintiff, constitutes adequate consideration for an agreement to arbitrate, an agreement which she entered into."); *Forsyth v. First Trenton Indem. Co.,* 2010 WL 2195996, at *8 (N.J. Super. Ct. App. Div. May 28, 2010) (compelling arbitration, finding plaintiff-employee's continued employment to constitute adequate consideration for agreement to arbitrate); *Bourgeois v. Nordstrom,*

Inc., 2012 WL 42917, *3-4 (D.N.J. Jan. 9, 2012) (finding continued employment constitutes adequate consideration for an agreement to arbitrate under New Jersey law); *Quigley v. KPMG Peat Marwick, LLP*, 330 N.J. Super. 252, 265-66 (App. Div. 2000) (finding continued employment can constitute adequate consideration for an employee's submission to demands of employer, including arbitration); *D.M. v. Same Day Delivery Serv., Inc.*, 2018 WL 4011660, *4 (N.J. Super. Ct. App. Div. Aug. 23, 2018) ("An offer of employment or continued employment is adequate consideration for an arbitration agreement.").

Defendant's mutual promise to submit to binding arbitration any covered claims they may have against Plaintiff also independently satisfies the consideration requirement. *See Blair v. Scott Specialty Gases*, 283 F.3d 595, 603 (3d Cir. 2002) (observing that "[w]hen both parties have agreed to be bound by arbitration, adequate consideration exists, and the arbitration agreement should be enforced"); *Horowitz v. AT&T Inc.*, 2019 WL 7731, *9 (D.N.J. Jan 1, 2019) (granting motion to compel arbitration and holding that "consideration was also present in the Arbitration Agreement, since the agreement mutually obliges both parties to arbitrate all employment disputes and Plaintiffs have continued their employment with Defendants").

Here, Plaintiff received adequate consideration for the 2022 Mutual Arbitration Agreement rendering it enforceable under applicable law.

B. Plaintiff's Alleged Failure to Recall and/or Misunderstanding of the 2022 Mutual Arbitration Agreement was Not a Valid Basis to Deny Defendant's Motion to Dismiss (1T15:20-24)

The Trial Court denied Defendant's Motion to Dismiss based on Plaintiff's self-serving assertion that she did not understand the terms of the 2022 Mutual Arbitration Agreement. However, the Trial Court's reliance on this allegation is improper for two reasons. First, it is well settled that a party to a contract is assumed to have read and understood its terms before signing. Second, Plaintiff's claim that the 2022 Mutual Arbitration Agreement is confusing is belied by the clear, unambiguous and specific language advising Plaintiff that she is waiving her rights to pursue the claims at issue in court before a jury.

1. Whether Plaintiff Understood the Agreement is Irrelevant to Whether it Should Be Enforced.

This Court has held that "[a] party who enters into a contract in writing, without any fraud or imposition being practiced upon him, is conclusively presumed to understand and assent to its terms and legal effect." *Roman v. Bergen Logistics, LLC*, 456 N.J. Super. 157, 174 (App. Div. 2018) (quoting *Rudbart v. N. Jersey Dist. Water Supply Comm'n*, 127 N.J. 344, 353 (1992)). "An employee who signs but claims to not understand an arbitration agreement will not be relieved from an arbitration agreement on those grounds alone." *Id.* at 174-75 (citing *Booker v. Robert Half Int'l, Inc.*, 315 F.Supp.2d 94, 101

(D.D.C. 2004) ("Failing to read or understand an arbitration agreement, or an employer's failure to explain it, simply will not constitute 'special circumstances' warranting relieving an employee from compliance with the terms of an arbitration agreement that she signed.")). Notably, a case that has been cited by Plaintiff herself, reaffirms this point. *See Skuse v. Pfizer, Inc.*, 244 N.J. 30, 54 (2020) (a plaintiff's "failure to review [her employer]'s communications would not invalidate the" arbitration agreement; "[a]s a general rule, 'one who does not choose to read a contract before signing it cannot later relieve himself of its burdens.' The onus was on plaintiff to obtain a copy of the contract . . . to ascertain what rights it waived by beginning the arbitration process." (alteration in original) (quoting *Riverside Chiropractic Grp. v. Mercury Ins. Co.*, 404 N.J. Super. 228, 238 (App. Div. 2008))). Accordingly, Plaintiff's alleged ignorance of what arbitration is or the fact that it precludes her from bringing suit against Defendant in court does not relieve Plaintiff of her agreement to arbitrate her NJLAD claims, and neither does her purported ignorance that she signed the Agreement. *See Roman*, 456 N.J. Super. at 174-75.

Moreover, Plaintiff's allegation that she does not recall reviewing the Agreement is irrelevant in the face of the evidence presented by Defendant that she actually did so. Indeed, in *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119, 126

n.2 (2020), the Court held that an arbitration agreement was enforceable even where "[plaintiff] did not recall ever seeing the form called 'Arbitration Agreement' before this litigation" and allegedly had "no memory of being asked to sign this specific form called 'Arbitration Agreement.'" Similarly, in *Gomez v. Rent-A-Center, Inc.*, 2018 WL 3377172, at **3-4 (D.N.J. July 10, 2018), the District Court compelled arbitration under circumstances materially identical to those presented here, holding that "a party's failure to recall [electronically signing an arbitration agreement] is insufficient to raise an issue as to the occurrence of that event." As such, New Jersey precedent is clear that Plaintiff's failure to recall electronically signing the Agreement does not render it unenforceable.

As such, the Trial Court's order should be reversed.

2. Plaintiff's Alleged Misunderstanding of the Terms of the 2022 Mutual Arbitration Agreement is Baseless

a. The 2022 Mutual Arbitration Agreement is Clear and Unambiguous

In support of Plaintiff's Motion for Reconsideration, Plaintiff claimed that she did not understand the 2022 Mutual Arbitration Agreement because it is ambiguous. Plaintiff first cited *Kernahan v. Home Warranty Adm'r of Fla., Inc.*, 236 N.J. 301 (2019), which evaluated the arbitration provision embedded within the alternative dispute resolution provision of a consumer, not an employment,

contract. The Court summarized its bases for holding the provision unenforceable as follows: "(1) the inconspicuous location of the agreement to arbitrate under a section labeled 'MEDIATION'; (2) its small-font text and confusing ordering of sentences; and (3) the invocation of the Commercial Mediation Rules." *Kernahan*, 236 N.J. at 325. Plaintiff also cited *Skuse*, 244 N.J. 30. Notably, *Skuse* evaluated the enforceability of an arbitration agreement that was entered into by an employee's continued employment, regardless of whether they acknowledged the agreement. *Skuse*, 244 N.J. at 50-51. Plaintiff claimed that *Skuse* somehow requires employers to provide additional documentation further explaining the arbitration agreement they are being asked to sign. This is a mischaracterization of the Court's holding. While the Court referred to the supplemental documents to support its holding that the plaintiff knew that continued employment bound her to the arbitration agreement, the Court's focus was ultimately on the substance of the agreement. *Skuse* does not **require** employers to provide employees with anything additional to explain their arbitration agreements.

Here, there is no doubt that the language of the 2022 Mutual Arbitration Agreement clearly and unambiguously informed Plaintiff that she was waiving her right to pursue her NJLAD claims in Court. Moreover, the 2022 Mutual Arbitration Agreement does not jump between topics as Plaintiff suggests. The

agreement headings clearly delineate the subject of its contents, which include important information that must be included in arbitration agreements. Additionally, while Plaintiff attempted to color the 2022 Mutual Arbitration Agreement as being akin to the agreement in *Kernahan* because it contains a mediation provision within the agreement, this is simply mistaken. Although there is a section within the 2022 Mutual Arbitration Agreement entitled, "Mediation – Optional," it is a separate section that precedes the sections of the agreement which detail the mandatory arbitration procedure.

b. The 2022 Mutual Arbitration Agreement is Sufficiently Specific

Plaintiff advanced another futile argument that the 2022 Mutual Arbitration Agreement is not sufficiently specific in that it does not explicitly identify which statutory discrimination and retaliation claims are being waived. Of note, **Plaintiff cited no legal authority** in support of the proposition that such specificity is required. That is because no such authority exists and New Jersey courts have expressly held otherwise. *See e.g. Atalese*, 219 N.J. at 447 ("a waiver-of-rights provision need not 'list every imaginable statute by name to effectuate a knowing and voluntary waiver of rights.'"); *Garfinkel*, 168 N.J. at 135.

Plaintiff attempted to rely upon three inapposite cases: *Garfinkel*; *Quigley v. KPMG Peat Marwick, LLP*, 330 N.J. Super. 252 (App. Div. 2000); and

Grasser v. United Healthcare, 343 N.J. Super. 241 (App. Div. 2001). As set forth below, none of these cases support her minimum specificity argument.

To be sure, the Agreement identifies a host of claims that are covered by its terms:

> [C]laims covered by this Agreement include, but are not limited to, claims involving **harassment, discrimination, or retaliation of all types**; claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, the Americans with Disabilities Act, and the Age Discrimination In Employment Act; claims for worker's compensation retaliation; . . . and the alleged violation of any other **federal, state, or local statute**, regulation, or common law.

(Da109) (emphasis added). On its face, the 2022 Mutual Arbitration Agreement clearly goes beyond the bare bones language of the arbitration provision in *Garfinkel*, specifically contemplating and including (1) claims "involving harassment, discrimination, or retaliation of all types" and (2) claims for "alleged violation of any other federal, state, or local statute, regulation, or common law." Cf. (Da109); *Garfinkel*, 168 N.J. at 127-28. The 2022 Mutual Arbitration Agreement also names specific federal statutes and is plainly distinguishable as more specific than the arbitration provision in *Garfinkel* which more broadly defines covered claims as "any controversy or claim arising out of, or relating to, this Agreement or the breach thereof." *Garfinkel*, 168 N.J. at 128.

Plaintiff's citations to *Quigley* and *Grasser* similarly failed to support her statutory specificity argument. Even the language Plaintiff herself cited highlighted that those arbitration agreements lacked expansive language or verbiage that referred to other anti-discrimination laws. Here, that is clearly not the case. Not only does the 2022 Mutual Arbitration Agreement cover "claims involving harassment, discrimination, or retaliation of all types," but also "claims under Title VII of the Civil Rights Act of 1964" and the "alleged violation of any other federal, state, or local statute, regulation, or common law." Clearly, the inclusion of the federal anti-discrimination statute and claims subject to state or local statutes implies that comparable state law claims such as the NJLAD are also covered claims subject to arbitration.

Moreover, agreements that contain significantly less specific claims language than the 2022 Mutual Arbitration Agreement have routinely been found by New Jersey courts to waive statutory employment claims. *See e.g. Russo*, 2021 WL 4204948 at **1, 5. In *Russo*, the court found that the following arbitration provision was sufficiently specific to waive the plaintiff's right to a jury trial under New Jersey statutory employment claims, including the NJLAD:

> The parties agree that all disputes, controversies, or claims, or any proceeding seeking to investigate such disputes, controversies or claims between them arising out of or relating to this Agreement, any other agreement relating hereto or otherwise arising out of or relating to the employment relationship of Employee

> with Employer or the termination of same, including, but not limited to, claims of discrimination, harassment and retaliation, shall be submitted to, and determined by, binding arbitration.

Id. In *Russo*, the plaintiff, there too, argued that the arbitration provision was deficient in that it lacked any express waiver of statutory rights. *Id.* at *2. Despite not specifically identifying the NJLAD, and not containing the word "statutory," the *Russo* court nevertheless held that the arbitration provision "contains a definitive and valid waiver of the right to a jury trial for statutory claims of 'discrimination' and 'retaliation' . . .." *See id.* at *5.

C. Plaintiff's Issues with the Opt-Out Form are Baseless (1T15:20-24)

The Trial Court denied Defendant's Motion to Dismiss based on Plaintiff's representation that she did not know about the opt-out form, and Brink's never informed her of it. As discussed, *supra*, Plaintiff cannot be excused from complying with the terms of the 2022 Mutual Arbitration Agreement because she failed to read or understand it. Moreover, Plaintiff's allegation that the opt-out form was "only available if an employee read the 'fine print' of the agreement" is simply incorrect. The provision informing employees of their ability to opt out of the Agreement is located in the second to last paragraph before their signature, on the same page. (*See* Da112). The title of the provision – like all other headings in the Agreement – is bold and underlined, stating "**OPTION TO OPT OUT OF AGREEMENT**." *Id.* (emphasis in

original). Moreover, this provision is not hidden or disguised. Indeed, the body of the provision is in the same exact font as the rest of the Agreement. Plaintiff should not be rewarded for failing to read a document before agreeing to its terms.

Nor does Brink's have any obligation to explain the terms of the 2022 Mutual Arbitration Agreement to Plaintiff. Indeed, the New Jersey District Court has held that an arbitration agreement is not procedurally unconscionable simply because the employer did not discuss and explain the terms of the agreement with the plaintiff. *See Toma v. Ernst & Young, LLP*, 2005 WL 8145778 at **3-4 (D.N.J. Apr. 25, 2005) (holding that plaintiff failed to provide, and the Court did not discover, any legal authority for concluding that the Dispute Resolution Program ("DRP") was procedurally unconscionable based upon the employer's failure to discuss or explain the terms of the DRP). Similar to *Toma*, the Trial Court presented no authority for the claim that Brink's was obligated to discuss and explain the terms of the 2022 Mutual Arbitration Agreement, specifically the opt out form, to Plaintiff. Thus, the Trial Court's order should be reversed.

POINT III

THE ARBITRABILITY OF PLAINTIFF'S CLAIMS SHOULD HAVE BEEN DECIDED BY AN ARBITRATOR (Raised Below Da95-96)

Finally, the Trial Court should have never even decided these motions, as the 2022 Mutual Arbitration Agreement requires that an arbitrator determine whether Plaintiff's claims should be submitted to arbitration. (Da110). Parties are free to agree to arbitrate threshold questions, such as whether they have agreed to arbitrate, whether the agreement is enforceable, or whether their agreement covers a particular dispute. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69-70 (2010); *Aguirre v. Conduent Patient Access Sols., LLC*, 2022 WL 893636, at *5 (App. Div. Mar. 28, 2022) (reserving for arbitration whether plaintiff's LAD claims were within the scope of what can be arbitrated, when specifically delegated to the arbitrator by agreement). Here, Plaintiff specifically delegated to the arbitrator the right to resolve the issue of arbitrability. (Da110; Da112). The Arbitration Procedure clause specifically provides that "[t]o the maximum extent permitted by law, the arbitrator, and not any court, shall have the exclusive authority to resolve any dispute relating to the formation, enforceability, applicability, or interpretation of this Agreement" along with "disputes concerning formation or enforceability of this Agreement." (*See* Da110).

Accordingly, the Court should reverse the Trial Court's order and direct the Trial Court to dismiss Plaintiff's Complaint and order Plaintiff to binding arbitration to allow an arbitrator the determination as to arbitrability.

POINT IV

THE TRIAL COURT ERRED IN HOLDING THAT DEFENDANT'S MOTION TO DISMISS SHOULD HAVE BEEN RETURNABLE IN ACCORDANCE WITH RULE 4:46-1 (Not Raised Below[3])

Pursuant to Rule 4:6-2,

> the following defenses, unless otherwise provided by R. 4:6-3, may at the option of the pleader be made by motion, with briefs: (a) lack of jurisdiction over the subject matter, (b) lack of jurisdiction over the person, (c) insufficiency of process, (d) insufficiency of service of process, (e) failure to state a claim upon which relief can be granted, (f) failure to join a party without whom the action cannot proceed, as provided by R. 4:28-1.

The Rule further provides,

> A motion to dismiss **based on defense (e)**, and any opposition thereto, shall be filed and served in accordance with the time frames set forth in R. 4:46-1. If, on a motion to dismiss **based on defense (e)**, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable notice of the court's intention to treat the motion as one for summary judgment and a reasonable opportunity to present all material pertinent to such a motion.

[3] This issue could not be raised below because the parties were not made aware of the Trial Court's intentions until oral argument.

[(emphasis added).]

As such, the Trial Court's reliance on this provision was improper for three reasons: (1) Defendant Brink's moved to dismiss based on Rule 4:6-2(a) (lack of subject matter jurisdiction); (2) parties are permitted to present extraneous evidence when moving to dismiss and compel arbitration without converting the motion into one for summary judgment; and (3) even if the Trial Court interpreted Defendant's motion as one for summary judgment, the parties were not given reasonable notice of the court's intention to do so.

A. Motions to Dismiss and Compel Arbitration are Brought Because the Trial Court Lacks Subject Matter Jurisdiction. (Not Raised Below)

"A court lacks subject matter jurisdiction over a case if it is brought in an ineligible forum." *Hoffman v. Supplements Togo Mgmt., LLC*, 419 N.J. Super. 596, 606 (App. Div. 2011). "[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.*

Because Plaintiff entered into an enforceable arbitration agreement, Defendant Brink's moved to dismiss Plaintiff's improperly filed lawsuit and compel her to file her claims in arbitration. As such, Defendant's motion was based on the Trial Court's lack of subject matter jurisdiction and is therefore governed by Rule 4:6-2(a).

The Trial Court held that Defendant's motion was decided prematurely because it was not calendared as a motion for summary judgment. The Trial Court incorrectly stated that all motions brought under Rule 4:6-2 are to be returnable in accordance with the schedule provided for motions for summary judgment. 1T4:6-7. However, this ignores the plain language of the Rule, which clearly states that ***only*** motions brought pursuant to Rule 4:6-2(e), motions to dismiss for failure to state a claim, should be treated as motions for summary judgment.

Thus, Defendant's motion was properly calendared, and Plaintiff failed to oppose it. As such, the motion was properly granted[4].

B. Parties are Permitted to Present Documents and Information Outside the Pleadings when Moving to Dismiss and Compel Arbitration. (Not Raised Below)

When presented with a motion to compel arbitration, the court may consider the arbitration agreement because it is a "document[] integral to the complaint." *Segenbush v. House Values Real Estate Sch.*, 2021 N.J. Super. Unpub. LEXIS 173, at *13 (App. Div. Feb. 2, 2021)[5]; *see also Hoffman*, 419

[4] To the extent the Trial Court claims that the matter was initially decided by the incorrect judge, Defendant Brink's should not be prejudiced by a miscommunication amongst the Vicinage. Defendants have no doubt that Judge Russo was qualified to preside over the Motion to Dismiss.

[5] The unpublished decisions referenced in this brief are included in Defendant's Appendix. The undersigned is unaware of any unpublished opinions contrary to those identified above.

N.J. Super. at 611 n.7 (striking a forum selection clause, noting "[t]he trial court appropriately considered, with respect to the motion to dismiss for lack of subject matter jurisdiction under Rule 4:6-2(a), matters outside the pleadings, without converting that specific application to a summary judgment motion"); *Myska v. New Jersey Mfrs. Ins. Co.*, 2014 N.J. Super. Unpub. LEXIS 650, at **10-11 (Law Div. Mar. 21, 2014) (observing that "courts have made clear that documents extraneous to the pleadings may be considered in support of a motion to dismiss without converting the motion to one for summary judgment where the document is integral to the complaint, its authenticity is not disputed, and the plaintiff undisputedly had notice of the document").

Here, the 2022 Mutual Arbitration Agreement is integral to the Complaint because the terms of the Agreement clearly and unambiguously advise the parties that they have waived the right to have their employment-based claims (statutory or otherwise) heard in court. (*See* Da108-112). As such, Defendant's motion should not have been treated as one for summary judgment.

C. The Parties Were Not Given Reasonable Notice that this Motion Would Be Heard as a Motion for Summary Judgment. (Not Raised Below)

Rule 4:6-2 provides, "all parties shall be given reasonable notice of the court's intention to treat the motion as one for summary judgment and a reasonable opportunity to present all material pertinent to such a motion."

Simply stated, no such notice was ever given. Thus, this motion should not have been treated as a motion for summary judgment.

Because Defendant's Motion to Dismiss pursuant to Rule 4:6-2(a) was properly calendared, there was no reason for the **Trial Court** to reconsider the motion.

CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court reverse the Trial Court's order granting Plaintiff's Motion for Reconsideration and Denying Defendant's Motion to Dismiss and Compel Arbitration.

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
Attorneys for Defendants Brink's Incorporated, Lisa Duffy, and Lisa Johnson

Dated: May 1, 2025

By: *s/ Jocelyn A. Merced*
Jocelyn A. Merced
Erin N. Donegan
Thomas J. Rattay

MILAGROS CINTRON, Plaintiff, v. BRINK'S INCORPORATED, CHRIS GHIRTSOS, LISA JOHNSON, and LISA DUFFY, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001981-24 Law Div. Docket No. ESX-L-7421-24 Sat Below: Hon. Jeffrey B. Beacham, J.S.C. Civil Action

PLAINTIFF'S AMENDED BRIEF IN OPPOSITION TO DEFENDANTS' APPEAL

CASTRONOVO & McKINNEY, LLC
71 Maple Avenue
Morristown, NJ 07960
(973) 920-7888
Attorneys for Plaintiff-Respondent
Milagros Cintron

Of Counsel and On the Brief:
Thomas A. McKinney (ID # 022202003) (tom@cmlaw.com)

On the Brief:
Anaïs V. Paccione (ID # 247502017) (anais@cmlaw.com)

Amended Brief and Appendix Submitted: June 5, 2025

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PRELIMINARY STATEMENT

The Trial Court correctly granted Plaintiff's motion for reconsideration and vacated the prior Order granting Defendants' motion to dismiss and compel arbitration. This Court must affirm the Trial Court's Order because the Arbitration Agreement is invalid and unenforceable. Moreover, Plaintiff's sex and racial harassment claims must remain in Court, not arbitration, pursuant to the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFAA").

Reconsideration is in the sound discretion of the Court. The Trial Court properly exercised that discretion to arrive at a result that was in the clear interests of justice. As set forth in Plaintiff's motion for reconsideration, Plaintiff's initial failure to oppose Defendants' motion to dismiss and compel arbitration was a mere clerical error. In the motion for reconsideration, Plaintiff asserted that her important statutory rights could not be curtailed, forcing her to arbitrate her claims, simply due to a clerical error. Judge Beacham agreed and raised the fact that the underlying motion to dismiss was calendared incorrectly on the docket. Moreover, the Trial Court properly rejected enforcement of the Arbitration Agreement on a substantive basis, essentially finding that there was no mutual assent to support the Agreement. The Court held that Plaintiff did not receive adequate consideration for entering into the Arbitration Agreement,

did not understand the Arbitration Agreement, and was not apprised of the possibility that she could opt out of the Agreement. Defendants' attempt at a second bite at the apple in this appeal is insufficient to disturb Judge Beacham's decision.

Accordingly, Plaintiff respectfully requests that this Court affirm the Trial Court's Order granting Plaintiff's motion for reconsideration and denying Defendants' motion to dismiss and compel arbitration. To the extent this Court is inclined to reverse the Trial Court's decision, the EFAA mandates that Plaintiff's case be heard in the Superior Court, not arbitration, because it centers on her Law Against Discrimination ("LAD") sexual harassment claim.

PROCEDURAL HISTORY

In this hostile work environment case, Plaintiff asserts claims against Defendants, Brink's Incorporated ("Defendant Brink's"), Chris Ghirtsos ("Defendant Ghirtsos"), Lisa Duffy ("Defendant Duffy"), and Lisa Johnson ("Defendant Johnson") (collectively, "Defendants"). Plaintiff commenced this action by filing a Complaint on October 24, 2024 in the Superior Court, Essex County, against Defendants, alleging hostile work environment claims on the basis of race and gender and aiding and abetting claims against the individual Defendants. Pa1. On December 2, 2024, Defendants moved to dismiss the Complaint and compel arbitration based on a Mutual Arbitration Agreement ("Arbitration Agreement" or the "Agreement") between Plaintiff and

Defendants. Da33-34, Da101, 103-107, 108-112. Plaintiff inadvertently did not oppose the motion, resulting in the motion being granted on December 20, 2024. Da10, 114-115.

Because the motion to dismiss was granted as unopposed simply due to a clerical error, Plaintiff filed a motion for reconsideration on December 23, 2024. Da10. In the motion, Plaintiff advised the Court of the inadvertent failure to oppose Defendants' motion to dismiss. Plaintiff set forth her substantive legal arguments in opposition to the enforcement of the Arbitration Agreement.

At oral argument on Plaintiff's motion, the Trial Judge indicated that Rule 4:6 motions are to have a 28-day return date. 1T4:6-7.[1] Thus, as a preliminary matter, the initial return date of Defendants' motion was incorrect. 1T4:8-11. The Trial Judge then heard each party's argument and issued an oral decision. 1T11:14-16:1. First, the Trial Judge granted Plaintiff's motion due to the fact the initial return date was incorrect. 1T11:14-17. Next, the Trial Judge reversed the decision granting Defendants' motion. The Trial Judge correctly held that "there was not consideration for this agreement because the Plaintiff had been working there for so long and she was not told that she would be fired if she did not sign the agreement." 1T15:15-19. The Trial Judge stated that, "[F]urthermore . . . Plaintiff did not know what she was signing when she signed

[1] 1T refers to the February 14, 2025 oral argument transcript.

the agreement," nor did she "know that she had the option to opt out because it was not explained to her." 1T15:20-24. Thus, the Trial Judge denied Defendants' motion to dismiss and compel arbitration. Defendants' appeal followed.

STATEMENT OF FACTS

The following facts are drawn from the motion record submitted to the court below including Plaintiff's Complaint and Certification. Pa1-9.

Plaintiff began her employment with Defendants in June 1997, initially as a Currency Processor. Pa1. In May 2022, Plaintiff transferred from the Newark branch to Defendant Brink's Maywood location, reporting to supervisor Defendant Ghirtsos. *Id.* at ¶¶3-4. During the time that Plaintiff reported to Defendant Ghirtsos, several Brink's employees, including her direct supervisor Defendant Ghirtsos, participated in a group chat text message chain in which they frequently used racist and sexist language. *Id.* at ¶¶5-8. For example, they sent text messages referring to African American and female coworkers as "nigger," "cunt," "monkey," and "bitch." *Id.* at ¶¶8-10. Even more offensively, the employees–including Plaintiff's supervisor–referred to Plaintiff specifically as a "cunt," "bitch," and "dumb bitch." *Id.* at ¶10.

A participant in the group text chat reported the text messages to Defendant Brink's management. Brink's Human Resources–including Defendant Duffy and Defendant Johnson, who were aware of the text messages

–did not do anything in response to the report. *Id.* at ¶12. None of the individuals who participated in the chat were ever disciplined. *Id*. One of the individuals in the chat was Plaintiff's current Route Supervisor, James Reilly. *Id.* at ¶6. At one point, a representative from Defendant's corporate Human Resources department in Texas visited the Maywood branch, but nobody approached Plaintiff or met with her about the offensive text messages. *Id.* at ¶24. Plaintiff was forced to continue working alongside coworkers who used racist and sexist language, despite Human Resources' awareness of the text messages. *Id.* at ¶26. Defendant Brink's swept the harmful text messages under the rug, acting like they never happened. *Id.* at ¶27. Plaintiff, who is still an employee of Brink's, was and is forced to work alongside and subordinate to individuals who called her a "cunt," "bitch," and "dumb bitch" with no repercussions from Brink's. She continues to feel extremely uncomfortable in the workplace. *Id.* at ¶28.

Plaintiff occasionally receives assignments for trainings and other tasks in Brink's Human Resources software Workday. Pa9, at ¶23. When she is assigned a task, she receives an email telling her that the task is mandatory, not optional. *Id.* at ¶¶24-25. No one at Defendant Brink's mentioned arbitration to Plaintiff, nor did anyone advise she would be required to sign an Arbitration Agreement. *Id.* at ¶14. No one explained the Arbitration Agreement to Plaintiff.

Id. at ¶15. No one advised her she could negotiate her contract or that she should consult an attorney before signing any of the onboarding documents. *Id.* at ¶¶21-22. No one at Brink's explained that Plaintiff could opt out of the Arbitration Agreement, and she has never seen the Mutual Arbitration Agreement Opt-Out Form prior to this litigation. *Id.* at ¶17. While an employee can *request* an Opt-Out Form, it was not provided along with the Arbitration Agreement. *Id.* Plaintiff was unaware that the Arbitration Agreement could prevent her from filing a lawsuit for violations of the LAD in court. *Id.* at ¶¶18-20.

Defendants filed their Motion to Dismiss the Complaint and Compel Arbitration on December 2, 2024. *See* Da81. Inadvertently, Plaintiff failed to timely file an Opposition to the motion. As a result, the Court granted Defendants' motion as unopposed on December 20, 2024. Da114. Accordingly, Plaintiff moved for reconsideration and for denial of Defendants' motion to dismiss and compel arbitration. Da10, Da116. The Trial Court granted Plaintiff's motion on February 14, 2025. Da1.

STANDARD OF REVIEW

"Orders compelling arbitration are deemed final for purposes of appeal." *Hirsch v. Amper Financial Services, LLC*, 215 N.J. 174, 186 (2013) (citing *R.* 2:2-3(a); *GMAC v. Pittella*, 205 N.J. 572, 587 (2011)). Appellate courts review those legal determinations *de novo*. *Id.* (citing *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995) ("A motion judge's

interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference")).

In evaluating the enforceability of an arbitration clause, "[a] court must first apply 'state contract-law principles ... [to determine] whether a valid agreement to arbitrate exists.'" *Id*. at 187 (emphasis added) (quoting *Hojnowski v. Vans Skate Park*, 187 N.J. 323, 342 (2006)). "This preliminary question, commonly referred to as arbitrability, underscores the fundamental principle that a party must agree to submit to arbitration." *Id*. (citing *Garfinkel v. Morristown Obstetrics*, 168 N.J. 124, 132 (2001) ("The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue"); *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 771 (3d Cir. 2013) (explaining that "a judicial mandate to arbitrate must be predicated upon the parties' consent")).

"Notably, the arbitrability analysis is expressly included in the Arbitration Act." *Hirsch*, 215 N.J. at 187-88 (citing N.J.S.A. 2A:23B–6(b) ("The court shall decide whether an agreement to arbitrate exists....")). Thus, "a state cannot subject an arbitration agreement to more burdensome requirements than those governing the formation of other contracts." *Id*. at 188 (citing *Hojnowski*, 187 N.J. at 342 (quoting *Leodori v. CIGNA Corp.*, 175 N.J. 293, 302, *cert. denied*, 540 U.S. 938, 124 S. Ct. 74, 157 L.Ed.2d 250 (2003)). 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." *Id*. (citing *Marchak v. Claridge Commons, Inc.*, 134 N.J. 275, 282 (1993)). "After finding the existence of an arbitration clause, a court then must evaluate whether the particular claims at issue fall within the clause's scope. A court must look to the language of the arbitration clause to establish its boundaries." *Id*. (citing *Garfinkel*, 168 N.J. at 132). Here, as will be set forth below, the Trial Court properly granted Plaintiff's motion for reconsideration, thereby vacating the prior Order granting Defendants' motion to dismiss and compel arbitration. With the above legal standard in mind, the Trial Court correctly found that there was no mutual assent to the Arbitration Agreement because Plaintiff did not know what she was signing, there was no consideration, and Plaintiff was unaware of Defendants' opt-out provision. The Trial Court's decision must therefore be affirmed.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY GRANTED PLAINTIFF'S MOTION FOR RECONSIDERATION, THEREBY VACATING THE ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND COMPEL ARBITRATION.

In granting Plaintiff's motion for reconsideration and reversing the prior Order granting Defendants' motion to dismiss and compel arbitration as

unopposed, the Trial Court properly exercised its discretion. The Trial Court reconsidered the fact that not only was the Order granting Defendants' motion based on a clerical error, the motion had also been placed on the incorrect motion cycle. Accordingly, the Trial Court considered the interests of justice and properly allowed Plaintiff to oppose the motion.

Upon considering the merits of Plaintiff's opposition to Defendants' motion, the Trial Court correctly concluded that the Arbitration Agreement was invalid and unenforceable. Defendants' appeal focuses solely on the purported validity of the Arbitration Agreement, while ignoring the fact that the Court properly granted reconsideration in the interest of justice, finding that the Arbitration Agreement was unenforceable against Plaintiff.

A. Reconsideration is in the Sound Discretion of the Court.

The Trial Court properly considered and rejected Defendants' arguments in opposition to Plaintiff's motion for reconsideration. As such, the Trial Court's February 14, 2025 decision must be affirmed.

A motion for reconsideration **always within the sound discretion of the Court**, to be exercised in the interest of justice. *See D'Atria v. D'Atria*, 242 N.J. Super. 392, 4401-02 (Ch. Div. 1990). "Reconsideration under *Rule* 4:49-2 is a matter within the sound discretion of the court and is to be exercised 'for good cause shown and **in the service of the ultimate goal of substantial**

justice.'" *See Casino Reinvestment Dev. Auth. v. Teller*, 384 N.J. Super. 408, 413 (App. Div. 2006) (emphasis added) (citing *Johnson v. Cyklop Strapping Corp.*, 220 N.J. Super. 250, 264 (App.Div.1987), *certif. denied*, 110 N.J. 196 (1988)). Moreover, reconsideration of a final order requires a showing that the challenged order was the result of a palpably incorrect or irrational analysis or **the judge's failure to consider or appreciate competent or probative evidence**. *See R.* 4:49-2 (emphasis added). Through no fault of the Court, the Trial Court was unable to consider competent, probative evidence set forth in Plaintiff's opposition until Plaintiff filed the motion for reconsideration. Plaintiff demonstrated good cause for the Trial Court to reconsider its December 20, 2024, Order. It was not a situation in which Plaintiff was merely dissatisfied with the Court's decision, nor did Plaintiff reargue a motion. Plaintiff never had the opportunity to oppose Defendants' motion, and her case was dismissed based on a procedural misstep. The Trial Court properly acknowledged Plaintiff's situation as the appropriate time to exercise its discretion in the interest of justice.

The Court had previously based its decision solely on Defendants' motion papers, without the knowledge that Plaintiff inadvertently failed to file a timely opposition. As a result, the Court was not able to consider all pertinent facts regarding the issue of arbitration and the problems with the substance of

Defendants' Arbitration Agreement. Instead, the Court was faced only with a one-sided argument in support of enforcement of the Agreement, without Plaintiff's chance to be heard. Clearly, the Trial Court recognized this upon review of Plaintiff's motion for reconsideration. In the interest of justice, Plaintiff's opposition to Defendants' motion was thereafter fully considered by the Trial Court.

B. The Trial Court Exercised Its Inherent Power to Set the Return Date of Defendants' Motion to Dismiss and Properly Treated Defendants' Motion as a Motion for Summary Judgment.

Defendants take issue with the Trial Court's determination that Defendants' motion to dismiss should have been placed on the motion cycle in accordance with *R.* 4:46-1. Defendants now claim that the underlying motion to dismiss and compel arbitration was based on their defense that the Court lacked subject matter jurisdiction over Plaintiff's Complaint, as set forth in *R.* 4:6-2(a)—not based on *R.* 4:6-2(e), failure to state a claim upon which relief can be granted. *See* Defendants' Brief at 31-33. Defendants assert that therefore, the motion should not have been returnable in accordance with the summary judgment schedule. Defendants' assertion ignores the fact that the Trial Court has significant discretion to determine the scheduling and mode of disposition of motions pursuant to *R.* 1:6-2. As set forth in *R.* 1:6-2(b), "[w]hen a civil action has been specially assigned to an individual judge for case management

and disposition of all pretrial and trial proceedings . . . the judge, on receipt of motion papers, shall determine the mode and scheduling of the disposition of the motion." *Id.* As such, the Rule grants judges the authority to manage the timing and manner in which motions are decided. Regardless, the Trial Court ultimately based its decision on **both** the return date issue and the merits of Plaintiff's motion for reconsideration. Accordingly, the Court's decision that the motion to dismiss should have been heard according to the 28-day return date schedule should be affirmed together with its decision on the merits of Plaintiff's opposition contained within the motion for reconsideration.

Next, Defendants rely entirely on unpublished case law to support their position that the Court may consider documents and information outside the pleadings when moving to dismiss and compel arbitration. *See* Defendants' Brief at 33. In their one-sentence argument, Defendants outrageously claim that the Arbitration Agreement is "a document integral to the complaint." In reality, Plaintiff's Complaint is silent as to the issue of arbitration. How, when it is not mentioned or discussed even once throughout the Complaint, can the Arbitration Agreement be considered integral to the Complaint?

A motion to dismiss "should be based on the pleadings, with the court accepting as true the facts alleged in the complaint." *Nat'l Realty Couns., Inc. v. Ellen Tracy, Inc.*, 313 N.J. Super. 519, 522 (App. Div. 1998). When matters

outside of the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment and disposed of as provided by *R.* 4:46. *Id.* (citing *R.* 4:6-2). In reviewing a motion under *R.* 4:6-2(e), the court may consider "allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 183, 876 A.2d 253, 267 (2005).

Defendants' motion centered on the at-issue Arbitration Agreement. However, Plaintiff's Complaint does not discuss arbitration and Defendants' Arbitration Agreement has nothing to do with Plaintiff's hostile work environment claims. Plaintiff argued this in her motion for reconsideration and opposition to Defendants' motion to dismiss. This should have placed Defendants on reasonable notice that the Trial Court would consider the motion as a motion for summary judgment. Accordingly, the Trial Court properly converted the motion to a motion for summary judgment, as Defendants' motion focused on documents and information outside of the pleadings.

POINT II

THE COURT RECOGNIZED THE UNENFORCEABILITY OF DEFENDANTS' ARBITRATION AGREEMENT AND PROPERLY VACATED THE ORDER GRANTING DEFENDANTS' PRIOR MOTION TO DISMISS.

As is plain from the Trial Court's decision, Defendants' Arbitration Agreement is unenforceable against Plaintiff. *See* 1T:11-16. While Defendants base much of their argument in support of enforcing the Arbitration Agreement on the FAA and public policy in favor of arbitration, this ignores the fact that the FAA permits states to regulate arbitration agreements under standard contract law.[2] *See Martindale v. Sandvik, Inc.,* 173 N.J. 76, 85 (2002). As such, basic contract formation principles govern here. *See Kernahan v. Home Warranty Admin. of Florida, Inc.*, 236 N.J. 301, 307 (2019); *Garfinkel*, 168 N.J. at 132. Under those basic contract principles, the at-issue Arbitration Agreement is unenforceable because Plaintiff did not knowingly and voluntarily waive her statutory rights to file suit. The Trial Court properly applied those principles and reached this conclusion.

A. The Arbitration Agreement Fails Because There Was No Meeting of the Minds, therefore the Agreement Lacks Mutual Assent.

There is no record evidence that Plaintiff clearly and unambiguously agreed to arbitrate her claims. Under New Jersey contract law, a person must "knowingly and voluntarily" waive his or her statutory rights. *Martindale*, 173 N.J. at 96. It is well-settled that a legally enforceable contract requires "a meeting of the minds." *Morton v. 4 Orchard Land Trust*, 180 N.J. 118, 120

[2] As will be set forth in Point III, *infra*, the EFAA also trumps the FAA's policy favoring arbitration.

(2004). The Third Circuit has held that "[b]efore a party to a lawsuit can be ordered to arbitrate and thus be deprived of a day in court, there should be an express, unequivocal agreement to that effect." *James v. Glob. TelLink Corp.*, 852 F.3d 262, 268 (3d Cir. 2017) (citing *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980)). *Martindale* held that an employee must knowingly and voluntarily waive her statutory right to redress discrimination claims in court and through a trial by jury. *Martindale*, 173 N.J. at 96. Courts apply this knowing and voluntary standard to employee waivers of statutory claims. *See Keelan v. Bell Communications Research*, 289 N.J. Super. 531 (App. Div. 1996).

Here, Plaintiff did not have informed consent before purportedly waiving her statutory rights after almost thirty years of working for Brink's. Defendants do not and cannot dispute Plaintiff's certification in which she certified that no one informed her she was signing an arbitration agreement, no one explained the Agreement to her, and no one advised her she could have time to review the Agreement, including with an attorney, prior to signing. No one informed Plaintiff she could negotiate anything in the Agreement. Defendants presented the Agreement to Plaintiff in a take-it-or-leave-it manner—out of nowhere—to Plaintiff, a Brink's employee of **nearly thirty years**. *See* Pa7-9. Therefore, there can be no mutual assent to the terms of the Arbitration Agreement.

Defendants have set forth no argument excusing their failure to so much as discuss the Arbitration Agreement with Plaintiff. Waiver of the time-honored right to sue in court in front of a judge and jury is not to be taken lightly—especially when an employee of nearly thirty years was never subject to an arbitration agreement before. The LAD is to be construed broadly and an agreement to arbitrate "must be the product of mutual assent, as determined under customary principles of contract law." *Atalese v. U.S. Legal Servs. Grp.*, 219 N.J. 430, 442 (2014). "[A]n effective waiver requires a party to have full knowledge of [her] legal rights and intent to surrender those rights." *Id.*, *citing Knorr v. Smeal,* 178 N.J. 169, 177 (2003). In giving up that time-honored right to sue, it is essential that the parties know there is a distinction between resolving a dispute in arbitration and in a judicial forum." *Atalese,* 219 N.J. at 445. Plaintiff's Certification makes clear that there was no true waiver of her right to file suit.

Finally, Defendants rely almost entirely on unpublished case law to support their assertion that Plaintiff's continued employment was sufficient consideration to support enforcement of the Arbitration Agreement. In analyzing whether the Arbitration Agreement was supported by adequate consideration, the first inquiry is whether the plaintiff agreed to the Agreement

in the first instance. Because Plaintiff did not assent to the Arbitration Agreement, continued employment is insufficient consideration.

B. The Arbitration Agreement is Unenforceable Because It Fails to Unambiguously Explain What Rights Plaintiff Relinquished Under the LAD.

Defendants' assertion that their Arbitration Agreement itself is "clear and unambiguous" is self-serving and belied by a plain reading of the Agreement. While Plaintiff does not assert that any certain "magic words" are necessary in an arbitration agreement, Defendants' Arbitration Agreement is deficient in several respects, which, taken as a whole, render the Agreement unenforceable. Importantly, the at-issue Arbitration Agreement's failure to explain the difference between arbitration and litigation is especially confusing to a layperson, as the Agreement discusses various types of relief in court, not arbitration. Simply put, a layperson cannot understand the differences of the various non-mandatory and mandatory forums discussed in the Agreement. Thus, Plaintiff could not have possibly understood that she was waiving her right to seek relief in court for her statutory LAD claims and that her claims would be forced to be adjudicated in an arbitration forum.

Because the Arbitration Agreement at issue does not clearly and unambiguously lay out that the employee is surrendering their right to pursue a judicial remedy of her statutory LAD claims, the Agreement must be deemed

unenforceable. *See id.* at 444, 447-448. The Arbitration Agreement fails to unambiguously provide that it applies to statutory employment claims. Instead, the Arbitration Agreement jumps between "direct access process" "mediation" and "arbitration." *See* Da103-104, 108-109. The Arbitration Agreement then states there are several categories of claims that are exempt from the Agreement, including "claims for which this Agreement would be invalid as a matter of federal law or state law that is not preempted by federal law." *Id.* These conflicting statements render the Agreement too confusing for a layperson to understand what rights they may be relinquishing.

Pursuant to well-settled precedent, the Arbitration Agreement's ambiguities must be construed against the drafter. *Garfinkel*, 168 N.J. at 131-135. The New Jersey Appellate Division has unequivocally held that the omission of a waiver of statutory discrimination or retaliation claims can be fatal to an arbitration agreement. *See Quigley v. KPMG Peat Marwick*, LLP, 330 N.J. Super. 252, 271, 257 (App. Div. 2000); *Grasser v. United Healthcare*, 343 N.J. Super. 241, 250 (App. Div. 2001) (the arbitration agreement did not apply to the plaintiff's LAD claim because "it does not mention arbitration of LAD claims or arbitration under comparable federal anti-discrimination laws.") (emphasis added). Because the at-issue Arbitration Agreement is plainly devoid of a clear and unambiguous waiver of Plaintiff's LAD claims, it is unenforceable.

C. Plaintiff Was Unaware of the Purported Opt-Out Provision.

Defendants' attempt to substantiate the effectiveness of its "opt-out" provision falls flat. It is simply unreasonable to believe that an employee would understand the significance of an opt-out provision, when the meaning of the Arbitration Agreement itself is ambiguous and unintelligible to a layperson reader. Further, there is no evidence that any employee has successfully opted out of Brink's Arbitration Agreement.

Much like Plaintiff was not fully apprised of the rights that were to be relinquished by way of the Arbitration Agreement, she was not apprised of the effect or importance of the opt-out provision. The record shows that the opt-out option was only offered on demand, was not a part of the Arbitration Agreement, nor was it provided to employees together with the Agreement. Defendants' employees are not trained attorneys. Plaintiff noted that assignments in Workday were presented as mandatory, and employees would be disciplined by their managers if they failed to complete them. Thus, the mere existence of an Opt-Out Form, which was only available upon request, does not excuse the other coercive factors weighing against the enforcement of Defendants' Arbitration Agreement.

POINT III

EVEN IF THE APPELLATE DIVISION REVERSED THE TRIAL COURT, ALL OF PLAINTIFF'S CLAIMS MUST BE HEARD IN COURT PURSUANT TO THE EFAA.

Even if this Court is inclined to reverse the Trial Court's decision, the EFAA mandates that Plaintiff's case be heard in the Superior Court, not arbitration. Plaintiff's case centers on her sex and racial harassment claims. Accordingly, her entire case is subject to the EFAA.

Congress enacted the EFAA to "restore access to justice for millions of victims of sexual assault or harassment who are currently locked out of the court system and are forced to settle their disputes against companies in a private system of arbitration that often favors the company over the individual." *See* H.R. Rep. No. 117-234 at 4 (2022). In enacting the EFAA, Congress recognized that mandatory arbitration clauses often enable employers to "choose the arbitrator who decides the case, as well as the rules of procedure and evidence that apply, and the distribution of costs of the arbitration," "protect the company by keeping the records of an arbitration secret," permit employers to "retaliate against a victim—rather than confront the harasser . . . without fear of their actions becoming public through the courts," and "prevent[ ] victims from sharing their stories." *Id.* This tactic "allows for the growth of office cultures that ignore harassment and retaliate against those who report it, prevent future

victims from being warned about dangerous companies and individuals, and create incentives for the corporate protection of rapists and other serial harassers." *Id.* Several of those concerns have already occurred, with Plaintiff as a long-time, current employee. The EFAA was enacted to level the playing field for victims such as Plaintiff.

The EFAA states, in pertinent part:

> [A]t the election of the person alleging conduct constituting a sexual harassment dispute . . . . no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to **a case** which is filed under Federal, Tribal, or State law and **relates to** the sexual assault dispute or the sexual harassment dispute.

See 9 U.S.C. § 402(a) (emphasis added).

As is clear from the text message chain at the center of this case, Plaintiff experienced sexual and racial harassment. Plaintiff's sexual harassment claims directly relate to her racial harassment claims. Thus, pursuant to the EFAA, all of Plaintiff's claims must be heard together in court.

A. The EFAA is Controlling and Requires that Plaintiff's Claims Be Heard in Court, Not Arbitration.

The EFAA, as the first major amendment in the history of the FAA, trumps the FAA's general policy of resolving disputes regarding the scope of arbitrable issues in favor of arbitration. *See Olivieri v. Stifel, Nicolaus & Co., Inc.*, 112 F.4th 74, 84 (2d Cir. 2024). "The EFAA is codified directly into the FAA and limits the scope of this broad mandate to enforce arbitration agreements." *Id.*

Because Plaintiff's claims accrued after the date of the enactment of the EFAA, the EFAA governs. *See* 9 U.S.C. § 401 ("This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act."); *see generally* Pa1-6 (setting forth Plaintiff's allegations of harassment occurring throughout late 2022). Thus, while Defendants claim that the parties agreed that the FAA governs the at-issue Arbitration Agreement, the EFAA still applies to limit the FAA's general mandate to enforce arbitration agreements. New Jersey courts now recognize that when the EFAA is implicated, an "otherwise valid arbitration agreement [is] unenforceable."[3] *See Michael v. Bravo Brio Restaurants LLC*, No. CV 23-3691, 2024 WL 2923591, at *6 (D.N.J. June 10, 2024) (denying the defendant's motion to stay and compel arbitration); *see* Pa10.

Congress used the word "**case**" in the text of the EFAA. As the Southern District of New York stated in *Diaz-Roa v. Hermes L., P.C.*, "if the EFAA is properly invoked and applies, the pre-arbitration agreement is invalid and unenforceable with respect to the **entire case**." *See* 757 F. Supp. 3d 498, 532 (S.D.N.Y. 2024) (emphasis added). The Southern District explained that the word "case" is "'familiar to the law' and 'captures the legal proceeding as an

[3] As set forth in Point I and the underlying motion practice, Plaintiff disputes the validity of the Arbitration Agreement.

undivided whole.'" *See id.* (citing *Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535, 559 (S.D.N.Y. 2023)). Congress uses the narrower term "claim," when it so intends, as it did elsewhere in the EFAA, when it clarified the EFAA's effective date. *Id.*; *Keene Corp. v. United States*, 508 U.S. 200, 210, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993). In the EFAA, Congress used the word "case" and not "claim" in describing the effect of the EFAA to matters to which it is applicable. *Id.* Congress's amendment of the FAA "directly with text broadly blocking enforcement of an arbitration clause with respect to an entire 'case' 'relating to' a sexual harassment dispute reflects its rejection—in this context—of the FAA norm of allowing individual claims in a lawsuit to be parceled out to arbitrators or courts depending on each claim's arbitrability." *See Johnson*, 657 F. Supp. 3d at 561 (holding that where a claim in a case alleges conduct constituting a sexual harassment dispute, the predispute arbitration agreement is unenforceable with respect to the entire case relating to that dispute).

Moreover, the court in *Diaz-Roa* recognized that

> a requirement that the litigant split their claims, trying some in arbitration and others in court, 'would be inconsistent with Congress's stated purpose in enacting the EFAA: to empower claims by sexual harassment and/or assault victims that had been inhibited by proliferating arbitration clauses in employment agreements.'

Id. (internal quotes omitted).

Not only is it mandated by the EFAA that all claims be heard together in

Court, it is already well-established that the entire controversy doctrine requires all claims against all parties to be resolved in a single Superior Court proceeding. *See R.* 4:30A, Comment 1 (entire controversy doctrine's "purposes are to encourage comprehensive and conclusive litigation determinations, avoid fragmentation of litigation, and promote fairness and judicial efficiency" such that "all aspects of the controversy between those who are parties to the litigation be included in a single action"). Courts traditionally favor one forum and efficiency. Given the amount of overlapping witnesses and documentary evidence in this case, efficiency mandates that all claims be heard in Court. For purposes of efficiency and consistent outcomes, Plaintiff's claims against all Defendants cannot be resolved in dual tracks of arbitration and Superior Court.

B. The Court, Not an Arbitrator, Must Decide Issues of Arbitrability.

The plain text of the EFAA requires that an arbitrator decide issues of arbitrability. Pursuant to Section 402(b),

> The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies **shall be determined by a court**, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and **irrespective of whether the agreement purports to delegate such determinations to an arbitrator**.

See 9 U.S.C. § 402(b) (emphasis added).

Accordingly, this Court must decide the issue of whether all of Plaintiff's claims must be heard in the Superior Court or in arbitration.

Aside from the EFAA, the law is clear that an arbitrator shall not decide whether the parties have submitted the dispute to arbitration in the first place. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) ("The question whether the parties have submitted a particular dispute to arbitration, i.e., the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'"). "Issues of substantive arbitrability are generally decided by the court." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc.*, 427 N.J. Super. 45, 59 (App. Div. 2012). In short, the question of "whether the parties have a valid arbitration agreement at all" is an issue for judicial determination. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003).

The parties have not submitted this matter to arbitration for the reasons set forth above. The parties have not "unmistakably provided otherwise" to allow an arbitrator to decide arbitrability instead of the court. The language upon which Defendants rely in support of their argument on arbitrability is not sufficient to pass muster. The word "arbitrability" is nowhere in the Arbitration Agreement. Buried in the second to last page of the Arbitration Agreement, the Agreement states that "the arbitrator, and not any court, shall have the exclusive

authority to resolve any dispute relating to the formation, enforceability, applicability, or interpretation of this Agreement, including without limitation any claim that is void or voidable." *See* Da105. This is ambiguous, as it is unclear to a layperson such as Plaintiff that an arbitrator would decide what a "void" or "voidable" claim is. Moreover, unlike a judge, an arbitrator has an inherent financial interest to enforce the Arbitration Agreement. In other words, if an arbitrator invalidates the Agreement, then he or she is forfeiting tens of thousands of dollars in fees. This imbalance in bargaining power is unconscionable. To the extent Defendants' appeal is not denied outright, the Court must therefore decide the question of arbitrability.

CONCLUSION

For the reasons above, the Order granting Plaintiff's motion for reconsideration must be affirmed in its entirety.

Respectfully submitted,

Castronovo & McKinney, LLC
Attorneys for Plaintiff

Dated: June 5, 2025

By:_____
Thomas A. McKinney

Superior Court of New Jersey

Appellate Division

Docket No. A-001981-24T2

MILAGROS CINTRON, *Plaintiff-Respondent,* vs. BRINK'S INCORPORATED, CHRIS GHIRTSOS, LISA JOHNSON, and LISA DUFFY, *Defendants-Appellants.*	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY DOCKET NO. ESX-007421-24 Sat Below: HON. JEFFREY B. BEACHAM, J.S.C.

REPLY BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS

On the Brief:
THOMAS J. RATTAY, ESQ.
Attorney ID# 018231996
JOCELYN A. MERCED, ESQ.
Attorney ID# 023772009
ERIN N. DONEGAN, ESQ.
Attorney ID# 304712019

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
Attorneys for Defendants-Appellants
10 Madison Avenue, Suite 400
Morristown, New Jersey 07960
(973) 656-1600
thomas.rattay@ogletreedeakins.com
jocelyn.merced@ogletreedeakins.com
erin.donegan@ogletreedeakins.com

Date Submitted: June 16, 2025

CP COUNSEL PRESS (800) 4-APPEAL • (382387)

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PROCEDURAL HISTORY

Defendant hereby incorporates by reference and relies upon the Procedural History set forth in its Opening Brief.

STATEMENT OF FACTS

Defendant hereby incorporates by reference and relies upon the Statement of Facts contained in its Opening Brief.

POINT I

THE TRIAL COURT ERRED IN GRANTING RECONSIDERATION (Da1-Da2; 1T4:1-24)

Plaintiff submits that her case was sent to arbitration initially based on a "procedural misstep" (Pb10)[1] because she "never had the opportunity to oppose Defendants' motion" and the Trial Court was "unable to consider competent, probative evidence set forth in Plaintiff's opposition until Plaintiff filed the motion for reconsideration." (*Id.*). But this was because of a clerical error by Plaintiff's law office. These circumstances do not demonstrate the very limited scope required to prevail on a motion for reconsideration.

"Motions for reconsideration are granted only under very narrow circumstances." *Fusco v. Bd. of Educ.*, 349 N.J. Super. 455, 462 (App. Div. 2002). These motions must be denied when filed "merely because of [the litigant's]

[1] "Pb" hereby refers to Plaintiff's brief submitted in response to Defendants' Appeal.

dissatisfaction with a decision of the Court." *Allman v. Allman*, 2009 WL 874499, at *3 (App. Div. Apr. 3, 2009) (citing *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990); *see also Palombi v. Palombi*, 414 N.J. Super. 274, 278 (App. Div. 2010). The Trial Court should not have granted reconsideration when Plaintiff failed to oppose Brink's motion to dismiss and compel arbitration in the first instance.

First, contrary to the opposition, the Trial Court also did not have discretion to determine the motion schedule under Rule 1:6-2. (Pb11). That Rule applies only to cases "specially assigned to an individual judge for case management." No such assignment occurred here below.

Second, the Court erred in applying Rule 4:46-1's Motion Schedule. Defendant moved to dismiss this lawsuit for lack of subject matter jurisdiction pursuant to Rule 4:6-2(a) on account of the mutual arbitration agreement. The Trial Court held that Defendants' motion was decided prematurely because "**all** Rule 4:6 motions have to have a 28-day return date." 1T4:6-7.[2] (emphasis added). That interpretation of the Civil Practice Committee's 2020 amendment was plain error. Rule 4:6 is clear that the briefing schedule in R. 4:46-1 *does not* apply to motions to dismiss for lack of subject matter jurisdiction pursuant to Rule 4:6-2(a), only to motions under Rule 4:6-2(e), for failure to state a claim. Compounding this error, the Court permitted no further argument, stating "we d[idn't] really have to talk

[2] "1T" refers to the oral argument transcript, dated February 14, 2025, on Plaintiff's Motion for Reconsideration.

about the basis for reconsideration." 1T4:8-11. Defendants' initial motion was properly calendared; Plaintiff failed to oppose it.

Third, the Trial Court erred by converting Defendants' motion to a summary judgment motion. Rule 4:6-2(a) permits the trial courts to consider matters outside of the pleadings without converting the motion to a summary judgment motion. *See Hoffman v. Supplements Togo Mgmt., LLC,* 419 N.J. Super. 596, 611 n.7 (App. Div. 2011). The Arbitration Agreement was integral to the Complaint and did not require the trial court to covert the motion. *See* Da 108.

Lastly, the Trial Court's reconsideration decision contravenes federal and New Jersey public policy requiring that Arbitration provisions be construed "**liberally *in favor of arbitration*.**" *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.*, 168 N.J. 124, 132 (2001) (emphasis added). The Trial Court's ruling should be overturned as violative of public policy favoring arbitration. *See AT&T Mobility v. Concepcion*, 563 U.S. 333, 341-42 (2011); *see also Morales v. Sun Contractors, Inc.*, 541 F.3d 218, 223-24 (3d Cir. 2008) (holding application of a heightened "knowing consent" standard to arbitration agreements is inconsistent with FAA).

POINT II

PLAINTIFF UNDERSTOOD THE RIGHTS THAT SHE WAIVED (Da92-Da94, 1T:11-16)

Plaintiff's arguments are meritless that the 2022 Arbitration Agreement did not explain the difference between arbitration and litigation and because she did not know of the Opt-Out Provision. (Pb14-19). Neither argument reflects lack of mutual assent.

A. The Agreement is Clear, Unambiguous, and Explains Arbitration (Da92-94)

The 2022 Arbitration Agreement sufficiently explains the difference between arbitration and litigation. (Pb17). In bold print on its first page, the Agreement states, "**You and Brink's voluntarily waive all rights to trial in court before a judge or jury on all claims covered by this Agreement**." Da 108 (emphasis in original). The Agreement also contains an entire section dedicated to "Arbitration Procedure." Da 110-111. Finally, in capital letters, just above Plaintiff's signature, the Agreement expressly states, "BY SIGNING THIS AGREEMENT, YOU WAIVE YOUR RIGHT TO A JURY TRIAL AND INSTEAD AGREE THAT ANY CLAIMS COVERED BY THIS AGREEMENT WILL BE DECIDED IN INDIVIDUAL ARBITRATION." Da 112. Plaintiff's opposition is baseless.

B. The Agreement is Sufficiently Specific (1T15:20-24)

Plaintiff submits that the 2022 Arbitration Agreement lacks requisite specificity because it does not identify the NJLAD. However, this is not required. *See e.g. Atalese v. U.S. Legal Servs. Grp., L.P.*, 242 N.J. Super. 392, 401 (Ch. Div. 1990) ("a waiver-of-rights provision need not 'list every imaginable statute by name to effectuate a knowing and voluntary waiver of rights.'"); *see also Garfinkel*, 168 N.J. at 135. And as Defendant's opening brief explained, agreements that contain significantly less specific claims language than the 2022 Arbitration Agreement have routinely been found by New Jersey courts to waive statutory employment claims. *See, e.g., Russo v. Chugai Pharma USA,* Inc., A-1410-20, 2021 WL 4204948 at **1, 5 (N.J. Super. Ct. App. Div. Sept. 16, 2021). Despite not specifically identifying the NJLAD, and not containing the word "statutory," the *Russo* court nevertheless held that the arbitration provision "contains a definitive and valid waiver of the right to a jury trial for statutory claims of 'discrimination' and 'retaliation' . . .." *See id.* at *5. The Agreement here was sufficiently specific and the decision below should be reversed.

POINT III

PLAINTIFF CANNOT PROVE THAT THE AGREEMENT WAS UNCONSCIONABLE (1T15:20-25)

Plaintiff argues that the 2022 Arbitration Agreement is procedurally unconscionable because: (1) Brink's did not provide Plaintiff with guidance relating to the Agreement (they didn't tell her she could negotiate or consult with

an attorney); (2) no one informed her that she was signing an arbitration agreement; and (3) Plaintiff had to request the Opt-Out Form. (Pb19). These arguments are without merit.

First, Plaintiff presents no authority for the claim that Brink's was obligated to discuss and explain the terms of the Agreement to Plaintiff. *See Toma v. Ernst & Young, LLP*, 2005 WL 8145778 at **3-4 (D.N.J. Apr. 25, 2005) (company need not explain the terms of the DRP). She accordingly fails to overcome the presumption that she understood and assented to what she signed.

Second, she argues that the Opt-Out Form was not provided with the Agreement. This is meaningless. She cites no case law explaining how the boldface title "**OPTION TO OPT OUT OF AGREEMENT**," along with its accompanying instructions, was not sufficient. (Da. 112).

POINT IV

PLAINTIFF'S EFAA ARGUMENTS ARE NOT PRESERVED (Not Raised Below[3])

Plaintiff's argument in opposition to Defendants' appeal that the federal Ending Forced Arbitration Act ("EFAA") mandates that all of her claims be heard in Court is an unpreserved argument not made to the trial court below. This Court "will decline to consider questions or issues not properly presented to the trial

[3] This issue could not be raised below because Plaintiff did not make this argument to the trial court below.

court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" *Hallion v. Liberty Mut. Ins. Co.*, 337 N.J. Super. 360, 367 (App. Div. 2001) (citing *Brown v. Township of Old Bridge,* 319 *N.J. Super.* 476, 501 (App. Div.), *certif. denied,* 162 N.J. 131, (1999) (citations omitted). However, "even if the matter satisfies that test, an appellate court should not consider the issue if the record before the court is not complete as to the newly-presented issue." *Id.* The record here is incomplete since the Court below was not presented with Plaintiff's EFAA arguments. This Court should not consider Plaintiff's EFAA arguments in this particular matter for the first time on appeal.

POINT V

THE EFAA IS NOT APPLICABLE (Not Raised Below[4])

Plaintiff's appeal asserts in conclusory fashion that the EFAA applies because "the case centers on her sex and racial harassment claims." (Brief in Opposition at 20). However, even if the Court considers this argument, she is mistaken because Plaintiff's hostile work environment claim is premised upon race and gender. The EFAA's jurisdictional provision provides that a predispute arbitration agreement is unenforceable "with respect to a ***case*** which is filed under

[4] This issue could not be raised below because Plaintiff did not make this argument to the trial court below.

Federal, Tribal, or State law ***and relates to*** . . . the sexual harassment dispute." 9 U.S.C. § 402(a) (emphasis added). The EFAA does not apply to the claim here.

The EFAA amended the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*., to exempt from arbitration disputes involving sexual assault and sexual harassment claims under applicable law. The statute defines "sexual assault dispute" as "a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in [18 U.S.C. § 2246] or similar applicable Tribal or State law, including when the victim lacks capacity to consent." 9 U.S.C. § 401(3). This definition contemplates conduct of a sexual nature.

"Sexual harassment dispute" is defined differently. It "means a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." *Id*. § 401(4). This statutory text represents a deliberate decision by Congress to exempt not all sex *discrimination* claims from the FAA, but those narrower claims of sexual assault or sexual harassment.

The legislative history makes this clear. The intent of the EFAA is "not to be the catalyst for destroying predispute arbitration agreements in all employment matters." 168 Cong. Rec. S619, S625 (daily ed. Feb. 10, 2022) (statement of Sen. Joni Ernst) (emphasis added). Congress did not "intend to take unrelated claims out of" an arbitration contracts but instead intended to prevent "sexual assault and sexual harassment claims from being forced into arbitration." *Id.* at S625 (statement of Sen. Lindsey Graham). Senator Gillibrand stated that, "[t]he bill

plainly reads . . . that only disputes that relate to sexual assault or harassment conduct can escape the forced arbitration clauses. 'That relate to' is in the text." *Id*. at S627 (statement of Sen. Kirsten Gillibrand).[5] The EFAA was not intended to preclude from arbitration gender and race discrimination claims here. Indeed, sexual harassment is only one form of the broader category of sex discrimination that violates Title VII and the NJLAD. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-67 (1986); *Lehmann v. Toys 'R' Us, Inc.*, 626 A.2d 445, 452 (1993) (citing *Meritor Sav. Bank*, 477 U.S. 57); *Cornelius v. CVS Pharmacy Inc.*, No. 23-cv-01858, 2023 WL 6876925, at *4 (D.N.J. Oct. 18, 2023) (finding Plaintiff alleged gender discrimination claims and facts to support discrimination based on sex, but not sexual harassment, and therefore could not rely on the EFAA to avoid arbitration).

Furthermore, Plaintiff does not even address the law's requirement that analysis be taken *to whether the claims "relate to" a sexual harassment dispute*.

[5]The law's main sponsors had proposed legislation in 2017 explicitly including sex discrimination, but it did not advance. Their proposed Ending Forced Arbitration of Sexual Harassment Act of 2017 would have made predispute arbitration agreements invalid and unenforceable if they "require[d] arbitration of a sex discrimination dispute." S. 2203, 115th Cong. § 2 (2017); H.R. 4570, 115th Cong. § 2 (2017). This never-enacted legislation defined "sex discrimination dispute" using the standards of Title VII. *Id*. The legislation was reintroduced using the same definitions in the following Congress, but it too failed. H.R. 1443, 116th Cong. § 2 (2019).

On this point, three New Jersey Courts have addressed whether the EFAA bars the arbitration of only sexual harassment-related claims (as its title suggests) or the entire lawsuit, as Plaintiff argues, including claims wholly unrelated to sexual harassment.[6] *See Rivera-Santana v. CJF Shipping, LLC*, Docket No. ESX-L-5834-24T4 (Essex Cnty. Sup. Ct. Dec. 17, 2024), *appeal filed*, A-001568-24 (holding "[t]here is a valid, enforceable, unambiguous arbitration agreement that requires the remaining causes of actions to arise out of a set of different facts than the sexual harassment claims to be arbitrated"); *McDermott v. Guaranteed Rate, Inc.* Docket No. MRS-L-360-24 (Morris Cnty. Sup. Ct. Sept. 23, 2024), *appeal filed*, A-000921-24T2 (analyzing the relationship between the FAA and the EFAA and holding "it is clear that the EFAA does not intend to exclude from arbitration claims that are unrelated to a claim of sexual harassment and are otherwise arbitrable");[7] *Paton v. Davis, Saperstein & Salomon, P.C.*, No. BER-L-4319-24 (Bergen Cnty. Sup. Ct., Oct. 8, 2024) (holding that claims relating to sexual harassment had to be litigated, while other claims, including a failure-to-accommodate pregnancy claim were requred to be arbitrated). Moreover, other courts that have addressed this issue have reached the same conclusion. *See, e.g., Mera v. SA Hosp. Grp., LLC*, 675 F. Supp. 3d 442, 448 (S.D.N.Y. 2023).

Plaintiff's implicit argument that Section 402(a) does not require any

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[7] Both cases have appeals pending without oral argument dates set.

analysis of relation between the claims that comprise a *case* and sexual harassment for purposes of the agreement's enforceability results in a very awkward manner of describing a *case* as "relating to" a particular legal theory. Normal parlance would instead describe a *case* as containing and/or setting forth a *claim* for sexual harassment as opposed to *relating to* sexual harassment. Thus, Defendants submit that "case" and "relates to" instead modify the predispute agreement, such that these *conjunctive* terms must both be satisfied in the context of agreement's enforceability (as opposed to one another). Otherwise, they become superfluous in that *any* sexual harassment claim renders the agreement unenforceable, which is at odds with the conjunctive language utilized in Section 402(a). A federal court recently agreed with this interpretation, while also noting that Plaintiff's interpretation invites mischief:

> The EFAA states that no arbitration agreement shall be enforceable "with respect to a case which is filed under Federal, Tribal, or State law and relates to the [] sexual harassment dispute." 9 U.S.C. § 402(a) (emphasis added). Some courts have assigned significance to the use of the word "case" and suggest the use of that term means all claims are precluded from arbitration in any case that includes even one claim that relates to a sexual harassment dispute. *See, e.g., Johnson v. Everyrealm, Inc.*, 657 F.Supp.3d 535, 558-561 (S.D.N.Y. 2023); *but see id.* at 562 n.23 (noting that court did not have the opportunity "to consider the circumstances under which claim(s) far afield might be found to have been improperly joined with a claim within the EFAA"). But that reading of the term "case" could lead to strategic pleading by plaintiffs to avoid arbitration of claims that have nothing to do with sexual harassment or related conduct. Indeed, at least one court has implicitly rejected that reading of "case." *See Mera v. SA Hosp. Grp.*, LLC, 675 F. Supp. 3d 442, 447-48 (S.D.N.Y. 2023). There, the court compelled to arbitration state-law and FLSA claims about wage and hour law

> violations, but declined to compel to arbitration of hostile work environment claims that arose from sexual orientation discrimination. *Mera*, 675 F. Supp. 3d at 443. The court reasoned the wage and hour claims did "not relate in any way to the sexual harassment dispute." *Mera*, 675 F. Supp. 3d at 448. ***This is plain language interpretation of "relate to." It also effectuates the statute's purpose of discouraging the concealment of behavior involving sexual harassment and misconduct, not necessarily prohibiting non-public resolution of all legal violations by employers***.

Lee v. Taskus, No. SA-23-CV-01456-OLG, 2024 U.S. Dist. LEXIS 116623, *8-9 (W.D. Tex. July 2, 2024); *see also Turner v. Tesla, Inc.*, 686 F. Supp. 3d 917, 926 (N.D. Cal. 2023) (analyzing each individual claim for relatedness to sexual harassment under the EFAA). *Mera*, *Lee, and Turner* strike the proper balance here in the interpretation of Section 402(a). They are also in accord with the FAA's long-standing policy requiring bifurcation "when a complaint contains both arbitrable and nonarbitrable claims," which is eviscerated by Plaintiff's interpretation. *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011); *see also* 9 U.S.C. § 3 (*requiring* bifurcation of arbitrable and non-arbitrable claims).

Lastly, Plaintiff's reliance on the Entire Controversary Doctrine to somehow suggest that it should govern the scope of relatedness under 9 U.S.C. § 402(a) is further misdirection. Indeed, there is no logical relationship whatsoever between the federal EFAA and New Jersey's Entire Controversary Doctrine, the latter of which is simply a *claim joinder* requirement. See R. 4:30A. While R. 4:30A does not articulate the broad scope of joinder required under this doctrine, the New Jersey Supreme Court has observed that the "claims must 'arise from related facts

or the same transaction or series of transactions' ***but need not share common legal theories***." *Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C.*, 237 N.J. 91, 119 (2019) (emphasis added). Plaintiff's proposed application of the Entire Controversary Doctrine, when taken to its logical conclusion, would effectively result in *all employment-related claims* being deemed non-arbitral under the EFAA. Such a heavy-handed application of this equitable doctrine is inconsistent with the congressional intent of Section 402(a) and at odds with bifurcation traditionally applied under the Federal Arbitration Act ("FAA"). *See KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011) ("[W]hen a complaint contains both arbitrable and nonarbitrable claims, the [FAA] requires courts to 'compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.").

Plaintiff's cited cases do not compel a different result. She cites the *Johnson v. Everyreal, Inc.*, 657 F. Supp. 3d 535, 559 (S.D.N.Y. 2023) and *Diaz-Roa v. Hermes L., P.C.*, 757 F. Supp. 3d 498, 532 (S.D.N.Y. 2024), decisions out of the Southern District Court of New York in support of her argument that the EFAA requires the entire case to be heard in court. *Diaz-Roa* is directly at odds with other S.D.N.Y decsions, however, and *Johnson* noted it "[did] not have occasion here to consider the circumstances under which claim(s) far afield might be found to have been improperly joined with a claim within the EFAA so as to enable them

to elude a binding arbitration agreement." *Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535, 562, fn. 23 (S.D.N.Y. 2023). Other cases following *Johnson*, including, again, other S.D.N.Y. decisions than *Diaz-Roa*, have nonetheless engaged in an analysis of a claim's "relation to" a sexual harassment dispute. *See Newton v. LVMH Moet Hennessy Louis Vuitton Inc.*, No. 23-CV-10753, 2024 U.S. Dist. LEXIS 151749, *22-23 (S.D.N.Y. Aug. 23, 2024) (examining factual relatedness pursuant to Section 402(a) based on subject matter); *Baldwin v. TMPL Lexington LLC*, 2024 U.S. Dist. LEXIS 148291, *1-2 (S.D.N.Y. Aug. 19, 2024) (examining relatedness of wage-related claims to sexual harassment under Section 402(a)); *see also Turner v. Tesla, Inc.,* 686 F. Supp. 3d 917, 924-25 (N.D. Cal. 2023) (examining each of the plaintiff's claims to determine whether they were either "inherently intertwined" with or "substantially related to" her sexual harassment claim); *Ding Ding v. Structure Therapeutics, Inc.*, 2024 U.S. Dist LEXIS 196549 (N.D. Cal., Oct. 29, 2024) (holding that the plaintiff's "non-sexual-harassment claims are based upon the same underlying facts as her sexual harassment claim" for purposes of establishing relatedness under Section 402(a)). These courts would not have engaged in the analysis of determining whether other claims related to the underlying sexual harassment claim if Section 402(a) required the entire case to be arbitrated simply because a sexual harassment claim was alleged.

Plaintiff's appeal wrongly asserts that the EFAA applies. Her position implies that 9 U.S.C. § 402(a) requires no analysis of the relationship between the claims that comprise a *case* and sexual harassment for purposes of the agreement's enforceability, effectively meaning that *any* sexual harassment claim renders an arbitration agreement unenforceable. That is not the result envisioned by the EFAA drafters, and Plaintiff's race and gender based discrimination claims are not subject to it here. Defendants, therefore, respectfully urge this Court to reverse the judgment below in line with the FAA's intent of facilitating arbitration, and compel Plaintiff's complaint to arbitration.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Defendants' Moving Brief, Defendants respectfully request the Court reverse the Trial Court's order granting Plaintiff's Motion for Reconsideration and Denying Defendants' motion to Dismiss and Compel Arbitration.

Dated: June 16, 2025

/s/ Jocelyn A. Merced
Jocelyn A. Merced