Superior Court of New Jersey

Appellate Division

Docket No. A-001985-24

HILIL NICKERSON, *Plaintiff-Respondent,* vs. BRINK'S INCORPORATED, *Defendant-Appellant,* and CHRIS GHIRTSOS, *Defendant,* and LISA JOHNSON and LISA DUFFY, *Defendants-Appellants.*	:	CIVIL ACTION ON APPEAL FROM THE ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY DOCKET NO: ESX-L-007307-24 Sat Below: HON. ROBERT H. GARDNER, J.S.C.

BRIEF FOR DEFENDANTS-APPELLANTS

On the Brief:
JOCELYN A. MERCED, ESQ.
ID # 023772009
ERIN N. DONEGAN, ESQ.
ID # 304712019
MICHAEL J. NACCHIO, ESQ.
ID # 010132011

OGLETREE DEAKINS
Attorneys for Defendants-Appellants
Ten Madison Avenue, Suite 400
Morristown, New Jersey 07960
(973) 656-1600
jocelyn.merced@ogletree.com
erin.donegan@ogletree.com
michael.nacchio@ogletree.com

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CP COUNSEL PRESS (800) 4-APPEAL • (380907)

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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 January 31, 2025, the Trial Court entered an order denying Brink's Motion to Dismiss Plaintiff Hilil Nickerson's ("Plaintiff") Complaint and Compel Arbitration ("Motion to Dismiss"). In doing so, the Trial Court ruled that (1) the arbitration agreement did not adequately specify the claims covered by the agreement; (2) arbitration was not explained to Plaintiff; and (3) Plaintiff did not understand what he was signing. 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 he signed it in the course of his 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 wherein the New Jersey Courts have repeatedly declined to invalidate a contract based on one party's mere allegation that they did not understand 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.

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.

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 his 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 21, 2024. (*See* Da14-20). In his Complaint, Plaintiff asserts claims for hostile work environment harassment due to race 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 Id.*).

Counsel for Defendants reminded Plaintiff, through his attorneys, of his agreement to arbitrate all claims arising from his employment, including the NJLAD claims asserted in Plaintiff's Complaint. (Da12). Plaintiff refused to withdraw the Complaint and file this claim in arbitration. (Da13).

B. Defendant Brink's Motion to Dismiss

On December 2, 2024, Brink's filed a Motion to Dismiss Plaintiff's Complaint and Compel Arbitration. (Da10-11).

Oral argument was heard on January 31, 2025. 1T[1].

[1] "1T" refers to the oral argument transcript, dated January 31, 2025, on Brink's Motion to Dismiss and Compel Arbitration.

After the parties presented their respective positions, 1T5:7-8:5, the Trial Judge issued his decision on the record, 1T8:6-9:9. After citing the provision of the arbitration agreement that states, in bold, that Plaintiff and Brink's "voluntarily waive all right to trial . . . before a judge or jury [for] all claims covered by this agreement," the Trial Court held that the arbitration agreement was unenforceable because it "doesn't indicate what, in fact, claims are covered by this particular agreement." 1T8:13-17.

The Trial Court further held that there was a "substantial issue of operative fact" whether the arbitration agreement "was explained or not" and a question as to "what the plaintiff knew and when they knew it and . . . what they were waiving." 1T8:18-21; 1T8:22-9:3. The Trial Court also determined that there were "issues with regard to adhesion." 1T9:2-3.[2]

For these reasons, the Trial Court 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. (Da69). It is a provider of cash and valuables management, digital retail solutions, and ATM managed services. (*See id*.).

[2] It is of note that neither party raised this issue.

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 March 2022. (*See id*.). Plaintiff is a former Trainer at Brink's Maywood, New Jersey branch office. (*See id*.). Plaintiff received a document titled "Mutual Arbitration Agreement," which he electronically signed on February 26, 2022 ("the 2021 Agreement"). (*See id.*; Da71-76).

In September 2022, Brink's updated the Mutual Arbitration Agreement ("the 2022 Mutual Arbitration Agreement"). (Da69). Plaintiff received a copy of the 2022 Mutual Arbitration Agreement and electronically signed it on February 9, 2023. (*See id.*; Da78-82).

Both arbitration agreements included an "opt-out" provision. (*See* Da69). 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**." (*See id.*; Da82). The provision states, "You have the right to opt out of this Agreement within 30 days from the

date you sign this Agreement." (Da82). Brink's provided an Opt-Out form upon request. (*See* Da69). The 2022 Mutual Arbitration Agreement expressly provided that "[y]our employment status will not be affected if you decide to opt out of this Agreement." (Da82). The provision identifies the address to which employees should send the Opt-Out form. (*Id.*). Plaintiff did not Opt-Out of the 2022 Mutual Arbitration Agreement. (*See* Da70).

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 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* (Da78) (emphasis in original) (footnote omitted).]

As to the claims subject to arbitration, the 2022 Mutual Arbitration Agreement states:

> [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.
>
> [*See* (Da79) (emphasis added).]

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, including without limitation any claim that it is void or voidable." (*See* Da81).

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

> ". . . knowingly and voluntarily waiving the right to file a lawsuit in court relating to [his] 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 INDIVIDUAL ARBITRATION.
>
> [(*See* Da82) (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 Da172-177)[3]

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***

[3] 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 briefs are 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*, 173 N.J. at 84-85, 91-92; *Garfinkel*, 168 N.J. at 131. 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)[4] (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 the formation of other contracts." *Leodori v. CIGNA Corp.,* 175 N.J. 293, 302 (2003);

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

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 his 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 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* (Da78) (emphasis in original) (footnote omitted).]

The 2022 Mutual Arbitration Agreement further provides:

> [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.

[*See* (Da79) (emphasis added).]

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 INDIVIDUAL ARBITRATION." (Da82) (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 his 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 his employment with Brink's, Plaintiff was forfeiting his 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 Da177-178; Da186-194)

The Trial Court denied Defendant's Motion to Dismiss for three reasons: (1) the 2022 Mutual Arbitration Agreement allegedly did not specify the types of claims it covered; (2) arbitration was not explained to Plaintiff; and (3) Plaintiff did not know what he was signing when he acknowledged the 2022 Mutual Arbitration Agreement. 1T8:13-9:3.

It is without question that the 2022 Mutual Arbitration Agreement applies to NJLAD claims. Moreover, Brink's does not have an obligation to explain any terms of the 2022 Mutual Arbitration Agreement to Plaintiff, especially when he did not ask at the time. Finally, 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.

A. The 2022 Mutual Arbitration Agreement Requires Arbitration of NJLAD Claims (Raised Below 1T5:7-6:12; 1T7:23-8:3)

The Trial Court held that the 2022 Mutual Arbitration Agreement "doesn't indicate what, in fact, claims are covered." 1T8:13-17. Of note, the Trial Court cited no legal authority in support of its finding 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.

In his opposition below, Plaintiff attempted to rely upon three inapposite cases to demonstrate that the 2022 Mutual Arbitration Agreement is not sufficiently specific because it does not explicitly state that it covers his NJLAD claims: *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 his 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.
>
> [*See* (Da79) (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. (Da79); *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 his specificity argument. Even the language Plaintiff himself 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." (Da79) (emphasis added). 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 a plaintiff's right to a jury trial on 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.

Under the relevant law, the 2022 Mutual Arbitration Agreement sufficiently identifies Plaintiff's NJLAD claims as covered claims. Plaintiff's claims should be dismissed.

B. Brink's Is Not Obligated to Explain its Arbitration Agreements to its Employees (Raised Below Da186-194)

In opposition to Defendant's Motion to Dismiss, Plaintiff argued that *Atalese* requires "clear and unambiguous" language which explains arbitration and how it is different from a proceeding in a court of law. However, *Atalese* created no such requirement. *See Atalese*, 219 N.J. at 446-47. In *Atalese*, the Court held that the lack of an explanation regarding arbitration was merely included in a list of the possible avenues to supplement the specificity that the arbitration provision in *Atalese* lacked. *Id.* at 446. In fact, in initially analyzing provisions explaining the distinction between arbitration and court proceedings, the Court in *Atalese* stated, "*Martindale*, [*Griffin v. Burlington Volkswagen, Inc.*, 411 N.J. Super. 515, 518 (App. Div. 2010)], and [*Curtis v. Cellco P'ship*, 413 N.J. Super. 26, 33–37, (App. Div.), *certif. denied*, 203 N.J. 94 (2010)] show that, without difficulty and in different ways, the point can be made that by choosing arbitration one gives up the 'time-honored right to sue,'" clearly indicating that there is no minimal requirement to explain the distinction between arbitration and court. *Id.* at 445.

Notwithstanding that there is no such requirement under *Atalese*, the Arbitration Agreement does, in fact, describe arbitration proceedings, at length. In bold print on the first page of the Arbitration Agreement, it 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." (Da78) (emphasis in original). The Arbitration Agreement also contains an entire section dedicated to "Arbitration Procedure." (Da81). Finally, in capital letters, just above Plaintiff's signature, the Arbitration 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." (Da82). Plaintiff's argument is factually and legally baseless and should have been rejected in its entirety.

Plaintiff also cited *Skuse v. Pfizer, Inc.*, 244 N.J. 30 (2020). 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 *Skuse* 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. As such, the Trial Court's decision should be reversed.

C. 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 (Raised Below Da189-190; Da192-194)

The Trial Court denied Defendant's Motion to Dismiss based on Plaintiff's self-serving assertion that he 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 and unambiguous language advising Plaintiff that he is waiving his 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 himself, reaffirms this point. *See Skuse*, 244 N.J. at 54 (a plaintiff's "failure to review [his 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 him from bringing suit against Defendant in court does not relieve Plaintiff of his agreement to arbitrate his NJLAD claims, and neither does his purported ignorance that he signed the Agreement. *See Roman*, 456 N.J. Super. at 174-75.

Moreover, Plaintiff's allegation that he does not recall reviewing the Agreement is irrelevant in the face of the evidence presented by Defendant that he 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, as it is Clear and Unambiguous

In support of Plaintiff's opposition to Plaintiff's Motion to Compel Arbitration, Plaintiff claimed that he 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.

Here, there is no doubt that the language of the 2022 Mutual Arbitration Agreement clearly and unambiguously informed Plaintiff that he was waiving his right to pursue his 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.

D. No "Adhesion Issue" Warranted Denial of the Motion to Compel Arbitration

The Arbitration Agreement here is not a contract of adhesion, as the Trial Court wrongly determined. A contract of adhesion is a "contract where one party … must accept or reject the contract." *Rudbart*, 127 N.J. at 353. The

Court's *sua sponte* determination that there were "issues with regard to adhesion," an argument that neither party raised, was plain error. 1T9:2-3. There was no risk here that Plaintiff would have lost or been denied employment if he did not sign the arbitration agreement. He was clearly informed under the section labeled, "**OPTION TO OPT OUT OF AGREEMENT**" that "[his] employment status will not be affected if you decide to opt out of this Agreement." (Da82).

Even still, the Trial Court made the determination that there were "issues with regard to adhesion" without developing the record, requiring reversal. 1T9:2-3. Even assuming *arguendo* that the 2022 Mutual Arbitration Agreement was a contract of adhesion, "the determination that a contract is one of adhesion … 'is the beginning, not the end, of the inquiry …'" *Rudbart*, 127 N.J. at 354 (1992). As the Supreme Court explained,

> in determining whether to enforce the terms of a contract of adhesion, courts have looked not only to the take-it-or-leave-it nature or the standardized form of the document but also to the subject matter of the contract, the parties' relative bargaining positions, the degree of economic compulsion motivating the "adhering" party, and the public interests affected by the contract.
>
> [*Id.* 356.]

The Trial Court here conducted no such inquiry. The Trial Court was required to consider the *Rudbart* factors, yet failed to do so. *See Rodriguez v.*

Raymours Furniture Co., Inc., 22 N.J. 343, 366 (2016) ("the unconscionability determination requires evaluation of both procedure and substance. Procedural unconscionability 'can include a variety of inadequacies, such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process.'"); *see Wilson v. US Med-Equip, LLC*, No. A-0379-24, 2025 WL 1009411, at *5 (App. Div. Apr. 4, 2025) (Reversing because "based on the scant record, the court was not in a position to conduct the type of fact-sensitive analysis required to determine unconscionability.") Here, the record is devoid of any such analysis by the Trial Court. Reversal is required.

POINT III

THE ARBITRABILITY OF PLAINTIFF'S CLAIMS SHOULD HAVE BEEN DECIDED BY AN ARBITRATOR (Raised Below Da178-179)

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. (Da81). 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.

CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court reverse the Trial Court's order 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 23, 2025

By: *s/ Jocelyn A. Merced*
Jocelyn A. Merced
Erin N. Donegan
Michael Nacchio

HILIL NICKERSON, Plaintiff, v. BRINK'S INCORPORATED, CHRIS GHIRTSOS, LISA DUFFY, and LISA JOHNSON, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001985-24 Law Div. Docket No. ESX-L-7307-24 Sat Below: Hon. Robert H. Gardner, J.S.C. Civil Action

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' APPEAL

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

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)

Brief and Appendix Submitted: June 23, 2025

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PRELIMINARY STATEMENT

The Trial Court correctly denied Defendants' motion to dismiss and compel arbitration and there is no reason to disturb the Court's decision. Defendants provided Plaintiff with an invalid and unenforceable Arbitration Agreement in a take-it-or-leave-it manner, by slipping it to him within a plethora of other new-hire documents. Brink's simply expected employees to breeze through the Arbitration Agreement and waive their time-honored right to have their case heard in court in front of a judge and jury. **Plaintiff did not know what arbitration was**. No one at Brink's explained it to him or went over the Arbitration Agreement with him prior to requiring him to sign it on Workday. Plaintiff believed it was a mandatory requirement in order to keep his job. Thus, the Trial Court rightly found that there was no mutual assent between the parties and the Agreement is unenforceable. This Court must affirm the Trial Court's well-reasoned decision and Plaintiff's case must proceed in court, not arbitration.

Accordingly, Plaintiff respectfully requests that this Court affirm the Trial Court's January 31, 2025 Order denying Defendants' motion to dismiss and compel arbitration.

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 21, 2024 in the Superior Court, Essex County, against Defendants, alleging hostile work environment claims on the basis of race. 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. Da10-11. Plaintiff opposed the motion.

At oral argument on Defendants' motion, the Trial Judge indicated that Defendants' Arbitration Agreement failed to specify that it covered statutory claims. 1T8:15-17.[1] The Judge held that there was a "substantial issue of operative fact" with regard to whether the waiver of claims was explained to Plaintiff. 1T8:18-21. The Trial Judge further stated he was denying Defendants' motion because there was an issue of fact as to what Plaintiff knew was to be waived upon execution of the Agreement. 1T8:22-9:5. The Trial Judge then

[1] 1T refers to the January 31, 2025 oral argument transcript.

properly denied Defendants' motion to dismiss and compel arbitration. Da1. Defendants' appeal followed.

STATEMENT OF FACTS

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

Plaintiff, an African American man, began his employment with Defendants in March 2022. Pa1. Plaintiff was initially a Messenger reporting to supervisor Defendant Ghirtsos in Defendants' Maywood branch. *Id.* at ¶¶7, 9. Plaintiff later took on the role of Firearms Instructor and Branch Trainer. *Id.* at ¶8. During the time that Plaintiff reported to Defendant Ghirtsos, several Brink's employees, including Defendant Ghirtsos himself, participated in a group chat text message chain in which they frequently used racist language. *Id.* at ¶11. The employees – including Defendant Ghirtsos – referred to Plaintiff as "Niggerson." *Id.* at ¶12. The employees also sent text messages referring to African American people and coworkers as "nigger," "cunt," "monkey," and "bitch." *Id.* at ¶13. When Plaintiff learned of these racist messages, he immediately reported them to Defendant Duffy in Defendant Brink's Human Resources Department. *Id.* at ¶¶14-15. Plaintiff reported that he was uncomfortable working with the people who exchanged and laughed at others' racist comments. *Id.* at ¶16. However, Brink's Human Resources Department, including Defendant Duffy and Defendant Johnson, did nothing in response to

Plaintiff's complaint. *Id.* at ¶17. None of the individuals who participated in the chat were disciplined. *Id.* at ¶18. Plaintiff was forced to continue working alongside coworkers who used racist language, despite Human Resources' awareness of the text messages. *Id.* at ¶19. Plaintiff was also uncomfortable at work because many of Defendants' employees in the group chat carry guns as part of their job duties. Plaintiff felt unsafe around them. *Id.* at ¶¶20-21.

When Plaintiff was hired in March 2022, he was told to sign a number of documents electronically through the software Workday. Pa7. Someone from Brink's told Plaintiff that he needed to sign the documents to begin his work. *Id.* at ¶4. Plaintiff did not review the Arbitration Agreement when he began working at Brink's. *Id.* at ¶5. No one at Brink's mentioned arbitration to Plaintiff, nor did anyone advise he would be required to sign an Arbitration Agreement. Pa8. No one explained the Arbitration Agreement to Plaintiff. *Id.* at ¶7. No one at Brink's explained that Plaintiff could opt out of the Arbitration Agreement, and he has never seen the Mutual Arbitration Agreement Opt-Out Form prior to this litigation. *Id.* at ¶¶12. Plaintiff was simply unaware that the Arbitration Agreement could prevent him from filing a lawsuit for violations of the LAD in court. *Id.* at ¶¶13-14.

Defendants filed their Motion to Dismiss the Complaint and Compel Arbitration on December 2, 2024. *See* Da10-11. Plaintiff opposed the motion.

Da90-91. The Trial Court denied Defendants' motion on January 31, 2025. 1T. Defendants filed an appeal based on the Court's denial of their motion.

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.'" *Hirsch*, 215 N.J. 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....")). 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, the Trial Court properly denied Defendants' motion to dismiss and compel arbitration after considering the contractual terms, surrounding circumstances, and purpose of the contract. With the above legal standards as the central focus, the Trial Court correctly found that there was no mutual assent to the Arbitration Agreement because Plaintiff did not know what he was signing, and he was not aware of the claims he waived. Defendants attempt to assert that the Trial Judge either disregarded or ignored applicable state and federal precedent. However, the Trial Judge stated on the record that he

reviewed the parties' motion papers, which addressed at length the parties' respective positions. *See* 1T5:4-5. Thus, the Trial Judge was well aware of the governing precedent before making his decision. He properly applied the law to determine that issues of fact remained as to whether or not Plaintiff knew what rights and claims he was waiving. The Trial Court's decision must therefore be affirmed.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT RECOGNIZED THE UNENFORCEABILITY OF THE ARBITRATION AGREEMENT AND PROPERLY DENIED DEFENDANTS' MOTION TO DISMISS AND COMPEL ARBITRATION.

The Trial Court applied sound contract principals in denying Defendants' motion to dismiss and compel arbitration. The record demonstrates that the Arbitration Agreement lacked any mutual assent from Plaintiff, who was unaware of what he was signing and the fact that he was being stripped of his rights to file a LAD lawsuit in court. Upon considering the merits of Plaintiff's opposition to Defendants' motion, the Trial Court correctly concluded that the Arbitration Agreement was invalid and unenforceable.

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

As the United States Supreme Court held in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), state law principles governing contract

formation apply to arbitration agreements. *See also Kernahan v. Home Warranty Admin. of Florida, Inc*, 236 N.J. 301, 307 (2019). 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 (2004). Under New Jersey contract law, a person must "knowingly and voluntarily" waive his or her statutory rights. *See Martindale v. Sandvik, Inc.*, 173 N.J. 76, 96 (2002). In reviewing arbitration agreements, "basic contract formation and interpretation principles still govern, for there must be a validly formed agreement to enforce." *Kernahan*, 236 N.J. at 307 (citing *Volt Info. Scis., Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1909)); *Garfinkel*, 168 N.J. at 132). 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).

To determine whether a matter should be submitted to arbitration, a court must evaluate (1) whether a valid agreement to arbitrate exists; and (2) whether the dispute falls within the scope of the agreement. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Martindale*, 173 N.J. at 92. The inquiry here fails at step one: there was no valid agreement to arbitrate because Plaintiff did not knowingly and voluntarily waive his rights to

file suit. As noted above, *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, the Trial Court correctly found that Plaintiff did not expressly and unequivocally agree to arbitrate his claims. There is no record evidence that Plaintiff knowingly and voluntarily waived his statutory rights to file suit. Defendants rely only upon their contention that Plaintiff electronically "signed" the Agreement on Workday. Yet, there is no record evidence that Plaintiff received, reviewed, read, or understood the Arbitration Agreement. These are issues of fact that remain open.

Moreover, no one at Brink's informed Plaintiff he could negotiate anything in the documents. Pa8. No one encouraged Plaintiff to consult with an attorney before signing the Arbitration Agreement. Plaintiff was not aware of his statutory rights under the LAD. He only began to fully understand the extent of his statutory rights when he consulted with an attorney. Plaintiff therefore could not have understood that the Arbitration Agreement was meant to waive his right to file a lawsuit in court under LAD for harassment. Without knowing what his rights were under LAD, and that he was giving up his right to

file a lawsuit in court, Plaintiff did not have "full knowledge of his legal rights and intent to surrender those rights." *See Atalese v. U.S. Legal Servs. Grp.*, 219 N.J. 430, 442 (2014) (citing *Knorr v. Smeal,* 178 N.J. 169, 177 (2003)). The Trial Court properly applied well-settled contract principles and reached the conclusion that there is an issue of fact as to whether Plaintiff knew what he was signing.

Waiver of the time-honored right to sue in court in front of a judge and jury is not to be taken lightly. 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*, 219 N.J. at 442. 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. That was not present here.

Plaintiff's Certification makes clear that there was no true waiver of his right to file suit. Pa7-9. Plaintiff did not have informed consent before allegedly waiving his statutory rights to file suit under the LAD. Defendants do not and cannot dispute Plaintiff's certification in which he certified that no one informed him he was signing an Arbitration Agreement, no one explained the Agreement to him, and no one advised him he could have time to review the Agreement (including with an attorney) prior to signing. Pa7-8. Plaintiff was not made

aware that he could negotiate anything in the Arbitration Agreement. *Id.* Instead, Defendants presented the Agreement to Plaintiff in a take-it-or-leave-it manner, which Plaintiff asserted in his initial opposition to Defendants' motion. The Trial Court correctly agreed and acknowledged this in noting that there were open issues as to whether the Arbitration Agreement was a contract of adhesion. *See* 1T9:2-3. Moreover, there is absolutely no record evidence that Plaintiff was made aware that he could opt out of the Agreement and whether opting out would affect his employment. *See* Point D., *infra*. Therefore, there was no mutual assent to the terms of the Arbitration Agreement. The Trial Court correctly recognized the lack of mutual assent in its January 31, 2025 decision.

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

To be enforceable, a waiver-of-rights clause must specify that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination. *Garfinkel*, 168 N.J. at 131 (2001). Any ambiguity in the agreement must be construed against the employer as the drafter. *Id.* at 133. Here, the Agreement was unclear and ambiguous as to LAD claims, therefore Plaintiff was unaware of the rights he relinquished in allegedly electronically executing the agreement.

New Jersey courts have repeatedly emphasized that "[t]he point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." *Garfinkel,* 168 N.J. at 132 (2001) (quoting *Marchak,* 134 N.J. at 282; *see also Hirsch,* 215 N.J. at 187). The *Atalese* court unequivocally stated "the waiver-of-rights language … must be clear and unambiguous—that is, the parties must know that there is a distinction between resolving a dispute in arbitration and in a judicial forum." *Atalese,* 219 N.J. at 445. *Atalese* further held that an arbitration agreement that fails to "clearly and unambiguously signal" to parties that they are surrendering their right to pursue a judicial remedy renders such an agreement unenforceable. *See id.* at 444, 447-448.

The *Garfinkel* court recognized that "a party's waiver of statutory rights must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively[.]" *Id.* at 132 (emphasis added). Importantly, the arbitration clause in *Garfinkel* did not specify "statutory claims redressable by the LAD." *Id.* at 134. This failure to refer to the employee's waiver of statutory claims was fatal to the arbitration agreement. *Id.* at 135. "To pass muster, however, a waiver-of-rights provision should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination." *Id.* The *Garfinkel* court

stated that the arbitration agreement "should also reflect the employee's general understanding of the type of claims included in the waiver. . .". *Id.* The court concluded that the arbitration clause did not sufficiently reflect the plaintiff's waiver of his statutory rights. *Id.* at 136. Here, Defendants' Arbitration Agreement fails to mention the LAD, rendering it unclear what rights Plaintiff allegedly relinquished.

Defendants' assertion that the 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 many respects, which, taken as a whole, render the Agreement unenforceable. The 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 <u>in court</u>, not arbitration. Most laypersons without a legal background cannot understand the differences of the various non-mandatory and mandatory forums discussed in the Agreement. Thus, Plaintiff could not have possibly understood that he was waiving his right to seek relief in court for his statutory LAD claims and that his claims would be forced to be adjudicated in an arbitration forum.

The New Jersey Appellate Division has also found 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 (App. Div. 2000); *see also 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."). In *Quigley*, the plaintiff signed an agreement that provided:

> "Any claim or controversy between the parties arising out of or relating to this Agreement or the breach thereof, or in any way related to the terms and conditions of the employment of [plaintiff] by [defendant], shall be settled by arbitration under the laws of the state in which [plaintiff]'s office is located."
>
> *Id.* at 257.

Moreover, the *Quigley* court indicated that "[t]o be given effect, any waiver of a statutory right must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively." *Id.* at 272 (emphasis added).

Similarly, in *Grasser v. United Healthcare*, the arbitration agreement did not bar the plaintiff from pursuing his LAD claims in court before a jury. *See* 343 N.J. Super. 241 (App. Div. 2001). The plaintiff in *Grasser* signed an agreement that provided:

> "I understand that arbitration is the final, exclusive and required forum for the resolution of all employment related disputes which are based on a legal claim. I agree to submit all employment related disputes based on a legal claim to arbitration under [defendant]'s policy."

Id. at 244. This 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." *Id.* at 250 (emphasis added).

The agreements in *Quigley* and *Grasser* are similar to Defendants' Agreement in that the LAD is never mentioned. Instead, there are merely vague references to the "laws of the state in which [plaintiff]'s office is located" in *Quigley*, "employment related disputes based on a legal claim" in *Grasser*, and claims of violations of "state," "federal," or "local" laws in Defendants' Agreement. The Arbitration Agreement here fails to unambiguously provide that it applies to LAD claims. Because the at-issue Arbitration Agreement does not clearly and unambiguously lay out that the employee is surrendering their right to pursue a judicial remedy of his statutory LAD claims, the Agreement must be deemed unenforceable. *See Atalese*, 219 N.J. at 444, 447-448.

Further confusing the layperson employee, the Arbitration Agreement jumps between "direct access process" "mediation" and "arbitration." *See* Da78-79. 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 unintelligible 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. Because the at-issue Arbitration Agreement is plainly devoid of a clear and unambiguous waiver of Plaintiff's LAD claims, it is unenforceable, as the Trial Court correctly held.

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

Defendants' attempt to substantiate the effectiveness of its "opt-out" provision likewise fails. 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 unexplained to a layperson reader.

Further, there is no evidence that any employee has successfully opted out of Brink's Arbitration Agreement. This is just another example of the many other issues of fact which remain, and which the Trial Court cited in denying Defendants' motion. Much like Plaintiff was not fully apprised of the rights that were to be relinquished by way of the Arbitration Agreement, he 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 stated in his Certification that the Workday forms were presented as mandatory. Pa7. 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.

Accordingly, the Trial Court correctly denied Defendants' motion to dismiss and compel arbitration.

POINT II

THE COURT, NOT AN ARBITRATOR, MUST DECIDE ISSUES OF ARBITRABILITY.

The Court must decide the issue of whether Plaintiff's claims must be heard in the Superior Court or in arbitration. 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* Da81. 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. Furthermore, unlike a judge, an arbitrator has an inherent financial interest in enforcing 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 decide the question of arbitrability.

POINT III

DEFENDANTS' MOTION SHOULD BE CONSIDERED A MOTION FOR SUMMARY JUDGMENT, AS DEFENDANTS RELY ON DOCUMENTS AND CONTENTIONS OUTSIDE OF THE PLEADINGS WHILE ISSUES OF FACT REMAIN.

In the event this Court is inclined to reverse the Trial Court's decision, Defendants' motion should be considered a motion for summary judgment, where open issues of fact exist.

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 centers on the at-issue Arbitration Agreement; however, Plaintiff's Complaint does not discuss arbitration or the Arbitration Agreement. As a result, if this Court does not deny Defendants' motion outright,

the motion should be converted to a motion for summary judgment pursuant to *R.* 4:6-2, because Defendants rely on documents outside of the pleadings. As a summary judgment motion, several factual disputes arise as to Plaintiff's understanding of the Arbitration Agreement and whether he knowingly and willingly consented to it. Accordingly, the Court must first resolve the issues of fact regarding the formation of the Arbitration Agreement and whether Plaintiff agreed to arbitrate his claims. *See Knight v. Vivint Solar Dev.*, LLC, 465 N.J. Super. 416, 427 (App. Div. 2020) (remanding the matter for the trial court to decide threshold discovery issues with respect to the arbitration agreement); *see also Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 776 (3d Cir. 2013) (if the complaint is unclear about any agreement to arbitrate, or if the plaintiff opposes a motion to compel arbitration "with additional facts sufficient to place the agreement to arbitrate in issue," the parties should be entitled to discovery on arbitrability before any further briefing on the issue); *Lepore v. SelectQuote Insurance Services, Inc.*, No. 2:22-cv-01753 (3d Cir. December 7, 2023).[2] In a scenario where arbitrability is not apparent on the face of a complaint, a "motion to compel arbitration must be denied pending further development of the factual record," because an inquiry into factual issues is "necessary to properly evaluate whether there was a

[2] A true and correct copy of this unpublished opinion is included in Plaintiff's Appendix at Pa10.

meeting of the minds on the agreement to arbitrate." *Guidotti*, 716 F.3d at 774. Afterwards, the court may hear a renewed motion to compel arbitration under a summary judgment standard of review. *Id*. at 776.

This is how the instant matter should proceed should the Court reverse the Trial Court's January 31, 2025 Order. Plaintiff's Complaint is silent on arbitration, and the Arbitration Agreement was entered into the record for the first time in Defendants' motion. Because the Arbitration Agreement is not a document forming the basis of Plaintiff's claims, the Court cannot consider it in deciding Defendants' motion without first having the parties engage in limited discovery on the issue of arbitrability. *See Guidotti*, 716 F.3d at 776. The parties should be permitted to conduct discovery on the open factual issues concerning, *inter alia*, whether anyone explained the Arbitration Agreement to him and whether he was encouraged to consult with an attorney prior to executing it. Plaintiff should be allowed the opportunity to provide testimony on whether he understood the Arbitration Agreement and the circumstances of how it was presented to him before he signed it.

CONCLUSION

For these reasons, the Order denying Defendants' motion to dismiss and compel arbitration must be affirmed in its entirety.

Respectfully submitted,

Castronovo & McKinney, LLC
Attorneys for Plaintiff

Dated: June 23, 2025

By:_____
Thomas A. McKinney

Superior Court of New Jersey

Appellate Division

Docket No. A-001985-24

HILIL NICKERSON, *Plaintiff-Respondent,* vs. BRINK'S INCORPORATED, *Defendant-Appellant,* and CHRIS GHIRTSOS, *Defendant,* and LISA JOHNSON and LISA DUFFY, *Defendants-Appellants.*	:	CIVIL ACTION ON APPEAL FROM THE ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY DOCKET NO: ESX-L-007307-24 Sat Below: HON. ROBERT H. GARDNER, J.S.C.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

On the Brief:
JOCELYN A. MERCED, ESQ.
ID # 023772009
ERIN N. DONEGAN, ESQ.
ID # 304712019
MICHAEL J. NACCHIO, ESQ.
ID # 010132011

OGLETREE DEAKINS
Attorneys for Defendants-Appellants
Ten Madison Avenue, Suite 400
Morristown, New Jersey 07960
(973) 656-1600
jocelyn.merced@ogletree.com
erin.donegan@ogletree.com
michael.nacchio@ogletree.com

Date Submitted: July 7, 2025

CP COUNSEL PRESS (800) 4-APPEAL • (383194)

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PROCEDURAL HISTORY

Defendants hereby incorporate by reference and rely upon the Procedural History set forth in their Opening Brief.

STATEMENT OF FACTS

Defendants hereby incorporate by reference and rely upon the Statement of Facts contained in their Opening Brief.

POINT I

PLAINTIFF UNDERSTOOD THE RIGHTS THAT HE WAIVED (Raised Below Da1-2; Da177-178; Da186-194)

Plaintiff claims that the Trial Court properly denied Defendants' motion to dismiss for three reasons: (1) there was no mutual assent; (2) the 2022 Mutual Arbitration Agreement does not explain the rights Plaintiff relinquished; and (3) Plaintiff was unaware of the opt out provision. (Pb7-17)[1]. None of these reasons have merit.

A. The Agreement is Clear and Unambiguous (Da91-94)

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 v. Garden State Med. Ctr.*, 478 N.J. Super. 310, 316 (App. Div. 2024); *see Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430,

[1] "Pb" refers to Plaintiff's Opposition Brief.

442 (2014); *Antonucci v. Curvature Newco, Inc.*, 470 N.J. Super. 553, 561 (2022). Admittedly, "[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 v. Morristown Obstetrics & Gynecology Assocs.*, 168 N.J. 124, 135 (2001)) (alteration in original).

Here, Plaintiff claims that "there is no record evidence that Plaintiff received, reviewed, read, or understood the Arbitration Agreement." (Pb9). Yet that is exactly what his signature signifies: "You warrant and agree that you have **read and understand** this Agreement and **have had the opportunity to consult with an attorney** of your choosing regarding the effect of this Agreement to the extent you deem necessary." (Da82) (emphasis added). If Plaintiff did not read or understand the agreement or have the opportunity to consult an attorney, he simply should not have signed the agreement.

Moreover, Plaintiff completely ignores the well-settled case law that holds that a party who signs a contract is presumed to have read and understand it, and, as such, failing to review a contract does not absolve the signor of their obligations under it. *See Roman v. Bergen Logistics, LLC*, 456 N.J. Super. 157, 174-75 (App. Div. 2018); *Skuse v. Pfizer, Inc.*, 244 N.J. 30, 54 (2020) (quoting *Riverside Chiropractic Grp. v. Mercury Ins. Co.*, 404 N.J. Super. 228, 238 (App.

Div. 2008)). Nor does he address the fact that Brink's does not have an obligation to explain the 2022 Mutual Arbitration Agreement. *Toma v. Ernst & Young, LLP*, 2005 WL 8145778 at **3-4 (D.N.J. Apr. 25, 2005); *Atalese*, 219 N.J. at 445-47.

The fact remains, the 2022 Mutual Arbitration Agreement could not be clearer. It explicitly states, in no legalese, "**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* (Da78) (emphasis in original). Moreover, 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 INDIVIDUAL ARBITRATION." (Da82) (emphasis in original).

There is no reasonable basis to believe that Plaintiff did not understand the impact of signing the 2022 Mutual Arbitration Agreement.

B. The 2022 Mutual Arbitration Agreement Expressly Applies to NJLAD Claims (Raised Below 1T5:7-6:12; 1T7:23-8:3)

Plaintiff argues that the 2022 Mutual Arbitration Agreement lacks requisite specificity because it does not identify the NJLAD. (Pb11-16). However, this is not required. *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.'"); *see also Garfinkel*, 168 N.J. at 135. And as Defendants' opening brief explained, the cases cited by Plaintiff do not support his argument.

Plaintiff's piecemeal citation to the 2022 Mutual Arbitration Agreement is disturbingly misleading. (Pb15). Plaintiff claims the 2022 Mutual Arbitration Agreement contains "vague references to . . . claims of violations of 'state,' federal,' or 'local' laws in Defendants' Agreement." (*Id.*) This completely ignores the **first three** types of claims mentioned in the relevant provision:

> [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.
>
> [*See* (Da79) (emphasis added).]

Plaintiff's attempt to color the final catch-all provision as the only one encompassing his claims is completely improper.

As also noted in Defendants' opening brief, 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 v. Chugai Pharma USA,* Inc., A-1410-20,

2021 WL 4204948 at **1, 5 (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.

Plaintiff also argues that the 2022 Mutual Arbitration Agreement is misleading because it addresses potential mediation of issues prior to arbitration. (Pb13, 15-16). However, 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.

The 2022 Mutual Arbitration Agreement here was sufficiently specific and the decision below should be reversed.

C. Plaintiff Was Aware of the Opt-Out Form (Raised Below Da170)

Plaintiff claims that an employee cannot understand the significance of the Opt-Out Form, yet fails to provide its language. The provision plainly states, under the boldface title "**OPTION TO OPT OUT OF AGREEMENT**," "You have the right to opt out of this Agreement within 30 days from the date you sign this Agreement." (Da82).

Plaintiff cites no case law explaining how the accompanying instructions were insufficient. Rather, Plaintiff states that no evidence has been produced relating to other employees who have successfully opted out of the 2022 Mutual Arbitration Agreement. It is entirely unclear what purpose such information would serve; the fact is, Plaintiff could have opted out of the 2022 Mutual Arbitration Agreement based on its plain, clear language.

POINT II

PLAINTIFF DELEGATED THE QUESTION OF ARBITRABILITY TO THE ARBITRATOR (Da1-2)

As Plaintiff himself argues, "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**.'" (Pb17); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (emphasis added). Here, the parties expressly agreed to submit all questions of arbitrability to the arbitrator.

The 2022 Mutual Arbitration Agreement specifically provides that "to the maximum extent permitted by law, the arbitrator, and not any court, shall have exclusive authority to resolve any dispute relating to the formation, **enforceability**, **applicability**, or interpretation of this Agreement, including without limitation any claim that it is void or voidable." (*See* Da110) (emphasis added). Plaintiff ignores the first part of the clause and instead focuses on the

last clarifying statement – that the clause applies to claims that are void or voidable. (Pb18). However, read as a whole, the clause is not misleading and clearly (and plainly) indicates that Plaintiff agreed to submit all questions of arbitrability to an arbitrator. While the term "arbitrability" is admittedly not mentioned, Black's Law Dictionary defines "arbitrability" as "[t]he status, under applicable law, of a dispute's being or not being resolvable by arbitrators, esp. on grounds of the subject matter." The "applicability" or "enforceability" of the 2022 Mutual Arbitration Agreement is therefore synonymous with whether the Agreement is arbitrable.

As discussed at length in Defendant's opening brief, the trial court's order should be reversed, Plaintiff's Complaint should be dismissed, and the question of arbitrability, although there is not one, should be presented to an arbitrator.

POINT III

THE SUMMARY JUDGMENT STANDARD DOES NOT APPLY (Da1-2)

Plaintiff argues that Defendant's Motion to Compel arbitration should have been evaluated under the summary judgment standard because Defendant submitted a Certification from Nick Johnson, Manager HR – Compliance, in support of this motion which attaches copies of the two arbitration agreements, including the operative Arbitration Agreement, electronically signed by Plaintiff. Plaintiff's argument must be rejected.

Under a motion to compel arbitration, the arbitration agreement may be considered by the court because it is a "document[] integral to the complaint." *Segenbush v. House Values Real Estate Sch.*, No. A-3094-19T4, 2021 N.J. Super. Unpub. LEXIS 173, at *13 (App. Div. Feb. 2, 2021); *see also Myska v. New Jersey Mfrs. Ins. Co.*, No. BER-L-5136-13, 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 this Court. (*See* Da78-82). Moreover, Plaintiff cannot introduce a self-serving certification to challenge the authenticity of the 2022 Mutual Arbitration Agreement or claim that he did not have notice of the Agreement. *Gomez v. Rent-A-Center, Inc.*, Civil Action No. 2:18-cv-1528 (KM-SCM), 2018 WL 3377172, at **3-4 (D.N.J. July 10, 2018).

However, even if the Trial Court applied the summary judgment standard to Defendant's motion, the outcome remains the same – arbitration would have

been compelled. When it is not apparent based on the face of a complaint that a party's claims are subject to an enforceable arbitration clause, the Court should utilize the summary judgment standard. *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 776 (3d Cir. 2013). Under the summary judgment standard, a court must compel arbitration if the movant shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. R. 4:46-2(c). Accordingly, the Court must first determine whether there is a genuine issue of material fact as to whether a valid arbitration agreement exists. *Morando v. NetWrix Corp.*, 2012 WL 1440229, at *2 (D.N.J. Apr. 24, 2012). In making this determination, the Court must grant Plaintiff the benefit of all reasonable doubts and inferences that may arise. *Id.* Then, the Court must determine whether Plaintiff's claim falls within the scope of the Arbitration Agreement. *Id.* In examining whether certain claims fall within the ambit of an arbitration agreement, a court must focus on the factual allegations in the complaint rather than the legal causes of action asserted. *Id.* If the court decides that the arbitration agreement is valid and the claims at issue fall within the scope of the arbitration clause, the court must then refer the dispute to arbitration without considering the merits of the case. *Id.*

Based on the foregoing, the Trial Court should have compelled arbitration and dismissed the Complaint without conducting any discovery because there is no genuine dispute over any material facts—and no reasonable jury could find otherwise—that the 2022 Mutual Arbitration Agreement is valid and enforceable and Plaintiff's NJLAD claims clearly fall within the scope of the agreement to arbitrate.

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: July 7, 2025

Respectfully submitted,

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

By: *s/ Jocelyn A. Merced*
Jocelyn A. Merced
Erin N. Donegan
Michael Nacchio