Superior Court of New Jersey

Appellate Division

Docket No. A-003049-23

JOHN LAHOUD,	:	CIVIL ACTION
	:	
	:	ON APPEAL FROM
Plaintiff-Appellant,	:	AN ORDER OF THE
	:	SUPERIOR COURT
	:	OF NEW JERSEY,
vs.	:	LAW DIVISION,
	:	BERGEN COUNTY
	:	
ANTHONY & SYLVAN CORP.,	:	DOCKET NO. BER-L-967-24
T/A ANTHONY SYLVAN POOLS,	:	
	:	Sat Below:
	:	
Defendant-Respondent.	:	HON. NICHOLAS OSTUNI, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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Date Submitted: September 20, 2024

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PRELIMINARY STATEMENT

Plaintiff John Lahoud ("Plaintiff," "Appellant," or "Lahoud") appeals from two orders of the Law Division dated May 30, 2024 (the "Orders"). By way of the Orders, the Law Division: (i) dismissed Plaintiff's Complaint and directed that Plaintiff arbitrate his claims against the defendant Anthony & Sylvan Corp. t/a Anthony Sylvan Pools ("Defendant" or "Respondent"); and (ii) denied Plaintiff's cross motion for judgment on the pleadings as to the Third Count of the Complaint. In that Third Count, Plaintiff sought a declaratory judgment, pursuant to New Jersey's Declaratory Act, that the so-called arbitration provision invoked by Defendant was not enforceable because it was substantively and procedurally unfair.

To the best of Appellant's knowledge all nine state high courts which have examined an arbitration provision comparable to the one before this Court have invalidated it. Appellant is not aware of any state high court ruling the other way. One state supreme court has likened this type of provision at issue to an agreement "between the rabbits and the foxes." Through this appeal, Appellant invites New Jersey to join the majority position rejecting non-mutual arbitration provisions as violative of sound public policy.

Case law holds that agreements to arbitrate disputes generally should be enforced. The overarching question before this Court is what constitutes an

actual "agreement to arbitrate" that promotes the public policy favoring arbitration. Just because Respondent captioned the provision an "agreement to arbitrate" does not mean that the provision is one within the contemplation of the state and federal arbitration acts. Defendant's agreement requires Plaintiff to bring all claims against Defendant, arising from their underlying agreement, in arbitration. The arbitration provision is initially drafted to impose the same obligation on Respondents. However, Respondent then attached language allowing it to opt- out of arbitration for claims seeking money damages against Appellant.

Respondent contended below that the "opt-out" language was limited in scope but that is not really the case. Respondent could not possibly possess any other contractual claim against Appellant than one for money damages. In reality Respondent's opt-out right is all encompassing. The Law Division recognized that this arbitration provision raised troubling public policy concerns. The reason why arbitration agreements generally are enforceable is because they encourage efficient and more timely resolution of civil litigation, encourage consistency of outcome, and further alleviate a burden on already over-taxed state court resources,

Respondent's provision, on the other hand, authorizes duplicative proceedings, and could result in additional costs and burden to the consumer, in

a manner contrary to the very public policy arbitration is supposed to advance. This provision represents a weaponization of this public policy against the consumer. A consumer asserting a claim must file for arbitration. Once that arbitration is filed, the commercial party could then file a lawsuit in the Superior Court, asserting what should have been a counterclaim in arbitration.

The Law Division recognized that this scenario would violate aspects of public policy favoring the enforcement of arbitration provisions, but ultimately limited its comments to one aspect of public policy. Ironically this "arbitration agreement" contravenes the very public policy that favors enforcing genuine arbitration agreements. The Law Division sought to negate the risk of duplicative proceedings by interpreting the language to permit Appellant to dismiss an arbitration and join its claim in the Law Division if Respondent should elect to bring its claims there at a later date. This narrow holding does not actually accomplish what the Law Division hoped, as explained below.

For the reasons detailed in this Brief, this Court should reverse the Orders and remand for further proceedings. New Jersey should adopt the majority position invalidating agreements "between the rabbits and the foxes."

PROCEDURAL HISTORY

Plaintiff filed a complaint against Defendant on February 13, 2024. [Pa29-37].

On April 1, 2024, Defendant filed a motion for dismissal, citing Rule 4:6-2(a) – allowing for dismissal for lack of jurisdiction -- even though it was more likely a motion brought under Rule 4:6-2(e) -- that being a motion for judgment on the pleadings. [Pa39-67]. Defendant argued that Plaintiff's Complaint should be dismissed based on the existence of the so-called arbitration provision in their contract for the installation of an in-ground swimming pool. [Pa39-67].

On April 18, 2024, Plaintiff filed opposition to the Rule 4:6-2 motion and simultaneously cross-moved under Rule 4:6-2(e) for judgment on the pleadings as to the Third Count of the Complaint. [Pa68-72]. By way of the Third Count, Plaintiff sought a Declaratory Judgment under New Jersey's Declaratory Judgment Act ("DJA") that the so-called arbitration provision was not enforceable under New Jersey law. [Pa29-37].

The Law Division conducted oral argument on May 14, 2024. [1T, 5/14/2024]. On May 30, 2024, the Law Division entered the Orders granting the

motion and denying the cross motion. [Pa1-16]. Appellant filed a Notice of Appeal on June 5, 2024. [Pa17-28].[1]

STATEMENT OF FACTS

On or about January 28, 2023, Plaintiff and Defendant entered into a certain written agreement by which Defendant, among other things, agreed to install an in-ground pool at Plaintiff's Mantoloking vacation property. [Pa30]. The Agreement, a preprinted consumer contract offered to Plaintiff on a take-it-or-leave it basis, did not specify a start date for the project. [Pa30]. The Agreement did not specify a completion date for the project. [Pa31].

Under the New Jersey Consumer Fraud Act, *N.J.S.A.* 56:8-1, *et seq*., and the regulations promulgated thereunder by the New Jersey Division of Consumer Affairs, agreement to construct pool for personal resident is deemed to be a contract for home improvement governed by the provisions of the CFA, according to *N.J.A.C.* 13:45A-16.1 [Pa31]. Under the terms of *N.J.A.C.* 13:45A-16.2(a)(12)(iv), it is unlawful for a contractor in a contract for home improvement to fail to specify "[t]he dates or time period on or within which the work is to begin and be completed by the seller." [Pa31].

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[1] Appellant submits that these orders are immediately appealable based on the binding precedent *Wein v. Morris*, 194 *N.J.* 364, 377 (2008). In *Wein*, the Supreme Court held that a court order which directed a party to arbitrate, over the party's objection, should be treated as a final order and immediately appealable, even if the court stays, rather than dismisses, the matter before it.

The failure of Defendant to commit to a start date resulted in Defendant not commencing the project within the time period acceptable to Plaintiff. [Pa31].

As an exchange of email between the parties demonstrates, Plaintiff requested in mid-August 2023 that Defendant begin the project, but Defendant thereafter continually delayed in responding and failed to commence the project in a timely fashion. [Pa31].

After Plaintiff's repeated requests to commence the project, Defendant finally sent an inexperienced excavator, who was not familiar with digging at beach towns like Mantoloking. [Pa31]. On or about September 29, 2023, Defendant's excavator performed approximately two hours of excavation at the Property and thereafter did not return. [Pa31].

Plaintiff had discussions with J.R. Golding, Defendant's General Manager, who acknowledged that the excavator Defendant had sent was inexperienced and not properly familiar with how to dig in beach towns like Mantoloking, and who had not done a proper job. Mr. Golding assured Plaintiff that he would find a new excavator within a few days. [Pa32].

When work had not re-started by October 16, 2023, Plaintiff declared Defendant in material breach of its obligations, and informed Defendant that Plaintiff was terminating the contract. [Pa32].

Although Defendant accepted Plaintiff's termination, Defendant then claimed that its excavator had worked three days on the project, which was inaccurate representation. [Pa32]. Defendant demanded compensation for three days of excavation, when Defendant's excavator had worked just two hours on one day, and sought to collect other expenses. [Pa32].

Despite having materially breached the agreement, Defendant agreed only to refund Plaintiff the sum of $27,890, contending that it was entitled to compensation for permits ($4,493); and three-days of excavation ($15,617). [Pa32-33].

Among other things, Defendant advised Plaintiff that helical pilings needed to be installed before excavation at the Property but Plaintiff later learned that this was not accurate, after having spent $14,000.00 to install the pilings, as directed by Defendant, even though this expenditure was not necessary. [Pa33].

When Plaintiff commenced a lawsuit against Defendant, Defendant sought dismissal based on the arbitration language of their agreement. Plaintiff cross moved for a determination that the provision violated public policy and was not enforceable. [Pa29-67].

The provision at issue stated as follows:

> YOU AND WE AGREE THAT ANY CONTROVERSY, DISPUTE OR CLAIM, INCLUDING BUT NOT LIMITED TO ANY CLAIM

FOR CONSUMER FRAUD OR ANY OTHER STATUTORY CLAIM, (COLLECTIVELY "CLAIM") ARISING OUT OF OR RELATING IN ANY WAY TO THIS AGREEMENT OR ITS BREACH THAT CANNOT BE SETTLED THROUGH DIRECT DISCUSSIONS SHOULD BE SUBMITTED BY THE CLAIMANT TO NONBINDING MEDIATION, ADMINISTERED BY A MEDIATOR MUTUALLY SELECTED AND AGREED TO BY THE PARTIES, OR IF THE PARTIES CANNOT AGREE ON A MEDIATOR, BY A MEDIATOR WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") PURSUANT TO ITS COMMERCIAL MEDIATION RULES. MEDIATION MAY PROCEED REMOTELY AT A&S'S OR CUSTOMER'S ELECTION. IF THE PARTIES ARE UNABLE TO RESOLVE THE CLAIM THROUGH MEDIATION, THE CLAIM SHALL BE SUBMITTED BY CLAIMANT FOR AND RESOLVED BY BINDING ARBITRATION PURSUANT TO THE AAA COMMERCIAL ARBITRATION RULES AND ADMINISTERED BY AN ARBITRATOR MUTUALLY SELECTED AND AGREED TO BY THE PARTIES, OR IF THE PARTIES CANNOT AGREE THEN ONE ASSIGNED BY THE AAA. THE JUDGMENT ON THE AWARD RENDERED BY THE ARBITRATOR MAY BE ENTERED IN ANY COURT HAVING JURISDICTION. YOU AND WE ARE CHOOSING MEDIATION AND ARBITRATION INSTEAD OF LITIGATION TO RESOLVE OUR CLAIMS AND VOLUNTARILY AND KNOWINGLY WAIVE A RIGHT TO A JURY TRIAL. UNLESS OTHERWISE DETERMINED, EACH OF US WILL BEAR OUR OWN COSTS OF THE MEDIATION AND ARBITRATION PURSUANT TO THE THEN CURRENT FEE SCHEDULE LOCATED AT WWW.ADR.ORG. YOU AGREE THAT WE CAN IN OUR DISCRETION JOIN CONTRACTORS, INSURANCE COMPANIES AND ANY OTHER PERSONS OR ENTITIES INTO THE MEDIATION AND/OR ARBITRATION AT ANY TIME, AND CONSENT TO JOINDER AND PARTICIPATION OF SUCH PARTIES. NO ACTIONS BY US IN RESPONSE TO A LEGAL CLAIM SHALL BE DEEMED A WAIVER OF OUR RIGHT TO MEDIATION OR ARBITRATION. NOTWITHSTANDING THE FOREGOING, WE RESERVE THE RIGHT AND MAY AT OUR DISCRETION EXERCISE THE RIGHT TO COMMENCE LEGAL ACTION IN ANY COURT OF COMPETENT JURISDICTION TO COLLECT MONIES YOU

> OWE UNDER THIS AGREEMENT, IN WHICH YOU AGREE TO WAIVE THE RIGHT TO MEDIATION OR ARBITRATION. YOU AND WE, IN PROCEEDING TO MEDIATION AND/OR ARBITRATION, AGREE THAT ALL FACTS ARISING FROM OR RELATED TO THE DISPUTE, INCLUDING RELATED DOCUMENTS USED IN THE MEDIATION AND/OR ARBITRATION, ARE CONFIDENTIAL, AND IF APPLICABLE, ANY ARBITRATION DECISION ISSUED IS ALSO CONFIDENTIAL. SAID DECISION IS FINAL AND BINDING ON THE PARTIES. THE PARTIES FURTHER AGREE THAT THIS DISPUTE RESOLUTION AND ARBITRATION PROVISION DOES NOT, AND IS NOT INTENDED TO, LIMIT, WAIVE AND/OR RELEASE ANY PARTY'S CLAIMS, DAMAGES, AND/OR DEFENSES EACH PARTY MAY HAVE AGAINST THE OTHER, OTHER THAN EACH PARTY WAIVING AND RELEASING THE RIGHT TO PROCEED WITH LITIGATION IN A COURT OF COMPETENT JURISDICTION TO RESOLVE THEIR DISPUTES. **NOTWITHSTANDING THE FOREGOING, WE RESERVE THE RIGHT AND MAY AT OUR DISCRETION EXERCISE THE RIGHT TO COMMENCE LEGAL ACTION IN ANY COURT OF COMPETENT JURISDICTION TO COLLECT MONIES YOU OWE UNDER THIS AGREEMENT, IN WHICH YOU AGREE TO WAIVE THE RIGHT TO MEDIATION OR ARBITRATION.**

[Pa61] (bold-faced added).

ARGUMENT

Introduction

Before this Court is a so-called "arbitration" provision in a consumer contract of adhesion that, in truth, does not require the commercial party/drafter to arbitrate any of its claims at all. Faced with similar provisions, many courts have determined that this type of provision is not "an agreement to arbitrate"

within the meaning of the Federal Arbitration Act and comparable state statutes. These courts have observed that when the purported obligation to arbitrate is unilateral, and is imposed by the drafter on a consumer within a consumer contract of adhesion, there is no mutual or enforceable "agreement" to arbitrate the parties' disputes arising from the agreement.

In fact, Plaintiff's position is the "majority" position, according to the courts.

Putting it simply, in order to gain the protection of the FAA and comparable state law, there must be an actual agreement to submit the ***parties'*** disputes, arising under the agreement, to arbitration. The agreement that Defendant seeks to enforce was not an agreement to submit the ***parties'*** disputes because it entirely excused Defendant from the obligation that Defendant unilaterally imposed on Plaintiff.

Public policy in New Jersey favors the enforcement of arbitration when they promote efficient, prompt resolution of disputes in a cost-effective manner; and because alternative dispute resolution relieves an already overburdened judiciary.

As Judge Pressler observed *in Billig v. Buckingham Towers Condominium Association I, Inc.*, 287 *N.J.Super.* 551, 564, 671 A.2d 623 (App.Div.1996), there is a "strong public policy of this State favoring arbitration as a mechanism

for resolving disputes" because "litigation is expensive and burdensome." As the discussion below establishes, this arbitration clause does not advance those public policy issues and, in fact, is hostile to those policies.

POINT I

THIS ARBITRATION LANGUAGE DOES NOT ADVANCE THE PUBLIC POLICY SUPPORTING THE LAW SUPPORTING THE GENERAL ENFORCEABILITY OF ARBITRATION PROVISIONS AND, IN FACT, CONTRAVENES THAT VERY PUBLIC POLICY, AS THE "MAJORITY" POSITION IN CASE LAW RECOGNIZES

[Raised Below at Pa 67-72; Decided at Pa1-16]

At the outset, it must be highlighted that what Plaintiff advocates is the "majority" position holding that a provision like the one at issue cannot be enforced. *Taylor v. Butler*, 142 *S.W.*3d 277, 286m n. 4 (Tenn.S.Ct. 2004) ("We find the majority view to be more persuasive").

Another state Supreme Court has likened this type of provision -- imposing on the consumer, by way of a contract of adhesion, a "duty" to submit the consumer's claims to arbitration, while the commercial party is entirely exempted from bringing any of its claims to arbitration – as arrangement "between the rabbits and the foxes." *Arnold v. United Cos. Lending Corp.*, 511 *S.E.*2d 854, 861 (W. Va. 1998)[2].

[2] Westlaw reports this case as "overruled," but this is not an accurate characterization. In a later decision -- in which the West Virginia Supreme Court

To the best of Appellant's knowledge, not one state high court that has considered this type of so-called "arbitration clause" has enforced it. At least nine have explicitly held, or opined in *dicta*, that a so-called "arbitration clause" like the one in this case is neither a mutual arbitration agreement nor an agreement that is otherwise enforceable.

In its briefs below, Respondent cited no case law in which a court actually upheld a provision similar to the one at issue. Appellant's own research likewise revealed no cases upholding a provision like this.

New Jersey's single precedent concerning an "uneven" arbitration provision is *Delta Funding Corp. v. Harris*, 189 *N.J.* 28 (2006), involving an agreement between a commercial lender and a consumer.

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held, again, that this type of provision could not be enforced -- the Court observed that language in the Court's Syllabus Five to *Arnold* had been read to suggest that different principles of the state's common law applied to determination of whether an arbitration clause was enforceable.

The West Virginia Supreme Court clarified: "Under the Federal Arbitration Act, a common-law ruling that targets arbitration provisions for disfavored treatment not applied to other contractual terms generally is preempted. [citation omitted]. Accordingly, to the extent that Syllabus Point 5 of Arnold may be read to be a "matter of law," *per se* rule that targets arbitration provisions for disfavored treatment, the FAA compels us to overrule Syllabus Point 5." *Dan Ryan Builders, Inc. v. Nelson*, 230 *W.Va*. 281, 291 (2012). In actuality, the court did not overrule *Arnold;* it overruled cases that had misinterpreted *Arnold.*

In that case, however, the commercial drafter carved out the right to bring an action in court to enforce its foreclosure remedies but otherwise agreed to submit its claims to arbitration. As the New Jersey Supreme Court observed, in upholding the arbitration agreement in that case: "Other courts that have found similar provisions not unconscionable have noted the unique nature of the judicial remedies of foreclosure and similar actions." *Delta Funding*, 189 *N.J.* at 116.

Of course, it makes sense to allow the commercial party access to the courts in order to enforce legal rights that an arbitrator cannot award -- such as a foreclosure remedy. *See Delta Funding*, 189 *N.J.* at 116.

Nonetheless, this case does not concern a provision involving a remedy unavailable to Defendant through arbitration. Defendant purportedly has reserved the right to file an action in court to collect amounts it claims due to it under the contract – money damages, which is a remedy that an arbitrator can award.

Under the reasoning of *Delta Funding*, and the cases it cites, the conscionability and enforceability of an uneven arbitration clause hinges on whether the right the drafter retains involves legal rights that cannot be vindicated before an arbitrator.

A. The Court Decides Whether An Enforceable Arbitration Clause Exists (Pa1-Pa16)

Before advancing to the merits, this Court should address, at the threshold level, whether the court or an arbitrator decides whether an enforceable arbitration provision exists.

Applicable law holds that a court of law, as an initial matter, makes the decision over whether the parties have assented to an enforceable arbitration clause. Section 4 of the FAA mandates a court be satisfied that an arbitration agreement exists before compelling arbitration. 9 *U.S.C.* § 4 provides: "[U]pon being satisfied that the making of the agreement for arbitration ... is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." New Jersey's arbitration act provides for the same: "The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." *N.J.S.A.* 2A:23B-6(b)

In a 2020 decision, the Third Circuit, the federal circuit court governing New Jersey among other states and jurisdictions, held: "We join these circuits in adopting the view that, under section 4 of the FAA, courts retain the primary power to decide questions of whether the parties mutually assented to a contract containing or incorporating a delegation provision." *MZM Constr. Co., Inc. v. New Jersey Building Laborers Statewide Benefit Funds*, 974 F.3d 386, 402 (3d

Cir. 2020) (*citing, In re: Auto. Parts Antitrust Litig.*, 951 *F.*3d 377, 385-86 (6th Cir. 2020); *Berkeley Cty. Sch. Dist. v. Hub Int'l Ltd.*, 944 *F.*3d 225, 234 (4th Cir. 2019); *Lloyd's Syndicate 457 v. FloaTEC, L.L.C.*, 921 F.3d 508, 515 (5th Cir. 2019); *Nebraska Mach. Co. v. Cargotec Sols., LLC*, 762 F.3d 737, 741 & n.2 (8th Cir. 2014)).

The New Jersey Supreme Court has held that "[t]he FAA, however, does not preclude an examination into whether the arbitration agreement at issue is unconscionable under state law." *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 189 *N.J.* 1, 12 (2006). The New Jersey high court continued:

> "[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs., Inc. v. Casarotto*, 517 *U.S.* 681, 687, 116 *S.Ct.* 1652, 1656, 134 *L.Ed.*2d 902, 909 (1996) (emphasis added); *see also Discover Bank v. Superior Court*, 36 *Cal.*4th 148, 30 *Cal.Rptr.*3d 76, 113 *P.*3d 1100, 1112–13 (2005) (stating that "the FAA does not federalize the law of unconscionability or related contract defenses except to the extent that it forbids the use of such defenses to discriminate against arbitration clauses."). Furthermore, "whether the parties have a valid arbitration agreement at all" is a "gateway" question that requires judicial resolution. *Green Tree Fin. Corp. v. Bazzle,* 539 *U.S.* 444, 452, 123 *S.Ct.* 2402, 2407, 156 *L.Ed.*2d 414, 422 (2003) (plurality opinion).
>
> It is clear that under *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 *U.S.* 395, 403–04, 87 *S.Ct.* 1801, 1806, 18 *L.Ed.*2d 1270, 1277 (1967), "a court must decide whether [an] agreement to arbitrate is valid." *Barker v. Golf U.S.A., Inc.*, 154 *F.*3d 788, 791 (8th Cir.1998), *cert. denied*, 525 *U.S.* 1068, 119 *S.Ct.* 796, 142 *L.Ed.*2d 659 (1999).

B. This One-Sided Arbitration Clause Is Not Enforceable (Pa1-Pa16)

Plaintiff's Count III invokes New Jersey's Declaratory Judgment Act. Plaintiff seeks a judicial declaration that the so-called "Arbitration Clause," in this consumer contract between Defendant and the consumer (i) violates the public policy of the State of New Jersey; (ii) is unconscionable on both procedural and substantive grounds; and (iii) cannot be enforced. In fact, when actually examined in its entirety, the provision is not an "arbitration agreement" within the meaning of the Federal Arbitration Act or the New Jersey Arbitration Act because it fails to impose a mutual obligation to arbitrate.

At the outset of this discussion, this Court should note the difference between what Plaintiff will refer to as an "uneven" clause and a "one-sided" clause.

An "uneven" clause is one which reserves to the drafter the right to file a legal action to seek relief unavailable to it through arbitration, such as foreclosure. *See Delta Funding*, 189 *N.J.* at 116. That type of clause is not before this Court.

A "one-sided" arbitration clause is one which, expressly or in actual effect, excuses the commercial drafter entirely from the duty to arbitrate, although imposing such a duty on the consumer. The clause at issue allows Defendant to

opt out of arbitration to pursue amounts allegedly due to it under the agreement. Since this is the only claim that could possibly exist in favor of Defendant against Plaintiff, and because this type of remedy can be granted to it through arbitration, this clause is a "one-sided" arbitration clause.

In 2020, the State of Washington Supreme Court became the latest state high court to adopt the holding that a one-sided arbitration clause is violative of public policy and not enforceable, on both procedural and substantive bases. The court explained:

> Washington recognizes two types of unconscionability for invalidating arbitration agreements, procedural and substantive. *McKee [v. AT&T Corp.,* 164 Wash.2d 372, 396, 191 P.3d 845, 845 (2008)*]*. Procedural unconscionability applies to impropriety during the formation of the contract; substantive unconscionability applies to cases where a term in the contract is alleged to be one-sided or overly harsh. *Nelson v. McGoldrick*, 127 Wash.2d 124, 131, 896 P.2d 1258 (1995). Either is sufficient to void the agreement. *Hill [v. Garda CL Nw., Inc.,* 179 Wash.2d 47, 55, 308 P.3d 635, 635 (2013)].
>
> To determine whether an agreement is procedurally unconscionable, we examine the circumstances surrounding the transaction, including (1) the manner in which the contract was entered, (2) whether Burnett had a reasonable opportunity to understand the terms of the contract, and (3) whether the important terms were hidden in a maze of fine print, to determine whether a party lacked a meaningful choice. *See Nelson*, 127 Wash.2d at 131, 896 P.2d 1258; *Schroeder v. Fageol Motors, Inc.*, 86 Wash.2d 256, 260, 544 P.2d 20 (1975); *Zuver [v. v. Airtouch Commc'ns, Inc.,* 153 Wash.2d 293, 304, 103 P.3d 753. 753 (2004)].

> A contract is "procedurally unconscionable" when a party with unequal bargaining power lacks a meaningful opportunity to bargain, thus making the end result an adhesion contract. *Adler [v. Fred Lind Manor*, 153 Wash.2d 331, 348, 103 P.3d 773, 773 (2004].

Burnett v. Pagliacci Pizza, Inc., 196 *Wash*.2d 38, 54–55, 470 P.3d 486, 494–95 (2020).

Under Point II, below, in the course of discussing the Law Division's ruling concerning substantive unconscionability, Appellant will address the holdings of other cases in line with the Washington Supreme Court in *Burnett.* In the interest of brevity, and to avoid duplication, Appellant incorporates that discussion under this subpoint, as if set forth here. Appellant respectfully requests that this Court consider the briefing under Point II(B) below in further support of this argument that a one-sided arbitration clause is not enforceable.

POINT II

THE LAW DIVISION ERRED IN UPHOLDING THE ONE-SIDED ARBITRATION AGREEMENT; AND IN ITS DISCUSSIONS OF SUBSTANTIVE AND PROCEDURAL UNCONSCIONABILITY

[Raised Below at Pa 67-72; Decided at Pa1-16]

For its part, the Law Division recognized that there were troubling public policy concerns presented by one-sided arbitration agreements. [1T 33:4-40:2]. In fact, the Law Division stated: "Clearly there is [a problem] here." [1T 33:12-13].

Nonetheless, the Law Division focused on only one troubling concern – potential inconsistency of outcomes – while not addressing the threat to efficient, cost effective, and prompt outcomes presented by the clause; or even to the court system's interest in having arbitration agreements enforced to avoid taxing already-overburdened resources of the judiciary. [1T33:4-52:11].

The Law Division's intent seemed to be to alleviate the expressed concerns of the Supreme Court in *Delta Funding*, which the Law Division defined as issue splitting and the risk of inconsistent outcome. At the oral argument at May 14, 2024, the Law Division proposed that the "opt-out" language of the provision should be interpreted to provide that should Appellant file an arbitration, and Respondent thereafter filed a legal proceeding, then Appellant would be permitted to assert his claim as a counterclaim. [1T33:4-52:11]. The arbitration would then be dismissed, negating any risk of issue splitting between the forums. *Id.*

The Law Division questioned Respondent's counsel, who did not precisely admit one way or the other if Respondent generally agreed with that interpretation, but who stated that Respondent would agree to that interpretation for this case. [1T 33:4-40:2].

Appellant's counsel acknowledged that the Law Division's interpretation of the language was not unreasonable but, even if interpreted in this fashion, it

only addressed the concern of "issue splitting" between the two forums. Appellant's counsel argued that the Law Division was not considering other public policy concerns underlying the law's embrace of arbitration agreements, namely promptness of outcome; avoidance of costs and expenses; and relieving the burden to the judiciary. [1T 40:23-52:11].

In support of that position, Appellant's counsel contended that, even accepting the Law Division's interpretation, Respondent still could "toy" with Appellant, or even get a "sneak preview" of the arbitrator before deciding that Respondent did not like the direction of the proceedings. [1T 40:23-52:11].

Under the Law Division's interpretation, proceedings could be well advanced in arbitration after months of discovery – even to the point that the arbitrator had conducted a hearing and was preparing a decision – when Respondent could file a legal action, and pull the plug on the arbitration under the belief that the arbitrator had signaled intentions on the likely outcome. *Id*.

Accordingly, the Law Division's interpretation did not address the injuries to public policy still presented by this arbitration provision, except for issue splitting. For reasons discussed below, Appellant contends this was in error.

A. The Law Division Erred by Ruling On Procedural Unconscionability Without Authorizing Discovery or Conducting a Hearing (Pa1-Pa16)

In connection with the issue of procedural unconscionability, New Jersey courts have held that a consumer contract between a consumer and a commercial entity are "contracts of adhesion" when the commercial party offers a pre-printed standard agreement to the consumer on a "take-it-or-leave it basis." "[T]he essential nature of a contract of adhesion is that it is presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the 'adhering' party to negotiate except perhaps on a few particulars." *Muhammad*, 189 *N.J.* at 15 (*quoting Rudbart v. North Jersey District. Water Supply Com'n*, 127 *N.J.* 344, 353 (1992).

Plaintiff contends that the one-sided arbitration clause is procedurally unconscionable. However, case law further establishes that "a contract of adhesion" is just the beginning point of a more intensive fact-sensitive inquiry into whether grounds exist to negate the agreement on the basis of procedural unconscionability.

Before granting Defendant dispositive relief on Plaintiff's Count III, on procedural unconscionability grounds, the Law Division was obligated to grant limited discovery and then conduct a fact hearing on this issue. It declined to do

so, contending that Appellant's complaint did not allege facts supporting a claim for procedural unconscionability.

As an initial matter, the Law Division's observations were incorrect. Appellant's entire third count alleges facts sufficient to sustain a claim for procedural unconscionability and, further, additional facts before the Court by way of the motion demonstrated that it was a pre-printed consumer commercial services agreement offered to Appellant on a "take-it-or-leave it basis." The Law Division's refusal to permit limited discovery or conduct a hearing, and to rule prematurely without allowing limited discovery, was in error. *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 189 *N.J.* 1, 12 (2006).

B. The Law Division's Ruling Concerning Substantive Unconscionability Was In Error (Pa1-Pa16)

As noted above, the state high courts that have applied their state law principles concerning substantive unconscionability to "one-sided arbitration clauses" have spoken with a universal voice.

The Washington Supreme Court, in *Burnett v. Pagliacci Pizza, Inc.,* stated: "Substantive unconscionability exists when a provision in the contract is one-sided," 196 *Wash.*2d at 57. In that case, the actual effect of the arbitration language "requires Burnett to arbitrate but does not so limit Pagliacci" and thus the provision "remains so one-sided as to be unconscionable." *Id*. at 60.

In adopting this majority position, the Washington Supreme Court adopted the reasoning of the other courts to assess this issue:

> As the California Supreme Court has explained, "Although parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope, ... the doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself." *Armendariz v. Found. Health Psychcare Services., Inc.,* 24 Cal. 4th 83, 118, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000).

Id. at 60.

Other state supreme courts have repeatedly held that one-sided arbitration provisions are unconscionable. The Tennessee Supreme Court noted that the "majority view" of courts nationwide is that a one-sided arbitration clauses -- allowing the corporation's claims to be filed in court while requiring the consumer's claims to go to arbitration -- are unconscionable. *Taylor v. Butler*, 142 *S.W.*3d 277, 286, n.4 (Tenn. 2004). Other state supreme courts have also recognized this as the majority rule. *See Dan Ryan Builders, Inc. v. Nelson*, 737 *S.E.*2d 550, 559 (W. Va. 2012) ("In a majority of jurisdictions, it is well-settled that a contract which requires the weaker party to arbitrate any claims he or she may have, but permits the stronger party to seek redress through the courts, may be found to be substantively unconscionable"); see *Armendariz v. Found. Health Psychcare Services., Inc.,* 24 Cal. 4th 83, 118, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000).

The West Virginia Supreme Court - the first state supreme court to address this issue - struck down a clause requiring the consumers to submit any claims they might have to arbitration, but permitting the lender to sue the couple to collect debts owed. Describing this arrangement as the type of deal reached by a rabbit and fox, the court concluded that the agreement was unconscionable and unenforceable. *See Arnold v. United Cos. Lending Corp.,* 511 S.E.2d 854, 862 (W. Va. 1998). "Such 'unilateral' arbitration clauses lend themselves 'extremely well to the application of the doctrine' of unconscionability because 'the right the clause bestows upon its beneficiary is so wholly one-sided and unfair that the courts should feel no reluctance in finding it unacceptable."' Id. (*quoting, Dan Ryan Builders*, 230 W. Va. at 290.

The New Mexico Supreme Court likewise struck down an arbitration clause because "the lender alone had the exclusive and unlimited alternative to seek any judicial remedies," *Cordova v. World Fin. Corp. of N.M.,* 208 P.3d 901, 904 (N.M. 2009) while the consumers had no right to go to court. *Id*. at 908. The New Mexico Supreme Court reaffirmed that holding in *Rivera v. Am. Gen. Fin. Services, Inc.,* 6 P.3d 803, 819 (N.M. 2011), reversing a lower court that had misread *Cordova* and improperly upheld an arbitration agreement that allowed the lender, but not the borrower, to access the courts.

The Supreme Court of Wisconsin threw out a one-sided arbitration provision in *Wisconsin Auto Title Loans, Inc. v. Jones,* 714 N.W.2d 155, 173 (Wis. 2006). That case involved an arbitration clause allowing Wisconsin Auto Title Loans a choice of forum between arbitration and the circuit court, but restricting the borrower to arbitration. Id. The Wisconsin high court held that the clause was substantively unconscionable because the commercial party had imposed arbitration on the consumer without accepting the arbitration forum itself. Id.

In addition, Mississippi, Montana, and Arkansas have also refused to uphold one-sided arbitration provisions. *Caplin Enters., Inc. v. Arrington*, 145 *So*.3d 608, 617 (Miss. 2014) (en banc) (noting that an arbitration clause "which permitted Zippy Check to pursue judicial remedies while relegating the plaintiffs' claims to arbitration is also clearly oppressive and substantively unconscionable"); *Global Client Solutions, L.L.C. v. Ossello*, 367 *P*.3d 361, 371 (Mont. 2016) (concluding that a clause permitting a service provider to seek judicial relief against a consumer, bound to arbitrate. was unconscionable); *Alltel Corp. v. Rosenow*, 2014 *Ark*. 375, 386 (2014) ("The lack of mutuality to arbitrate in the arbitration agreement renders the agreement invalid and unenforceable."); *Tillman v. Commercial Credit Loans, Inc.,* 362 *N.C.* 93, 107 (2008).

Although cases do exist when an "uneven" arbitration clause has been upheld, Appellant did not find a single case upholding a "one-sided" arbitration clause. As noted, the New Jersey Supreme Court upheld an uneven arbitration clause in *Delta Funding Corp. v. Harris*, 189 *N.J.* 28 (2006); however, the reasoning employed there strongly suggests that this state's high court would follow the majority position, and throw out this one-sided arbitration clause. The reason the Supreme Court upheld the clause in *Delta Funding* was because the commercial party had not sought to bind the consumer to arbitration, while excusing itself totally from arbitration, at its election. The Court's reasoning plainly suggests that the commercial party's "right" to submit all of its claims to court, while binding the consumer to arbitration, would be violative of substantive conscionability:

> The arbitration agreement excludes any foreclosure actions that may be brought against Harris. Thus, foreclosure must proceed in court pursuant to the arbitration agreement. Indeed, that is hardly surprising in that the foreclosure of mortgages is a uniquely judicial process. "The broad statutory framework set forth in *N.J.S.A.* 2A:50–1 to –68, establishes the basis for foreclosure of mortgages." *Highland Lakes Country Club & Cmty. Ass'n v. Franzino,* 186 *N.J.* 99, 106 n. 2, 892 A.2d 646 (2006); see also *R.* 4:64–1 to –8 (establishing rules specific to foreclosure proceedings including *R.* 4:64–5's limitation on joinder of claims in foreclosure). Although Harris is able to raise potential defenses against Wells Fargo, the foreclosing party, in the foreclosure proceeding, as a result of the arbitration agreement she is forced to bring her third-party counterclaims against Delta in arbitration. Harris's defenses to the foreclosure action track her affirmative claims against Delta; thus, she is forced to litigate those substantively similar claims in two

> different forums. That result is burdensome; however, it is not unconscionable.
>
> Other courts that have found similar provisions not unconscionable have noted the unique nature of the judicial remedies of foreclosure and similar actions. *See Walther v. Sovereign Bank*, 386 *Md.* 412, 872 *A.*2d 735, 749 (2005) (stating that "foreclosure proceedings ... do not act solely to protect the interests of the mortgage lender against a defaulting debtor but instead provide protections for both sides."); *see also Conseco Fin. Servicing Corp. v. Wilder,* 47 *S.W.*3d 335, 343 (Ky.Ct.App.2001) (stating that claims involving security interests "have come to be heavily regulated by statute, allowing for streamlined procedures and effective protections for both sides.") (footnote omitted); *Lackey v. Green Tree Fin. Corp.,* 330 *S.C.* 388, 498 *S.E.*2d 898, 905 (S.C.Ct.App.1998) (stating that "[j]judicial remedies for the recovery of property, such as the replevin action, and the foreclosure action, provide specific procedures for protection of collateral and the parties during the pendency of the proceedings. These protections relate to both parties, and are facilitated by the enforcement procedures specified in the law.")

In rejecting what seems to have been a previously unrejected body of case law, the Law Division addressed none of the cases cited to it. Ultimately, the Law Division held that its interpretation of the language, allowing Appellant to file claims in the Law Division should Respondent, alleviated any concern of substantive conscionability.

In so ruling, the Law Division declined to address Appellant's point that, under the interpretation, Respondent could drag Appellant all the way to the point that an arbitrator's decision was imminent, and then "veto" that proceeding when Respondent formed the opinion that the arbitration outcome would be adverse, forcing Appellant to start all over again in the Law Division.

On this issue of substantive unconscionability, the Law Division ruled contrary to the holdings or *dicta* of at least nine state high courts, and set itself on a small island on which it is the only inhabitant. This Court should decline the invitation to join the Law Division in that isolation and, instead, accept Appellant's invitation to join the majority position.

CONCLUSION

For the foregoing reason, this Court should reverse the Orders and remand for further proceedings.

Respectfully submitted,

/s/ Joseph M. Cerra

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Dated: September 20, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

JOHN LAHOUD, Plaintiff/Appellant, vs. ANTHONY & SYLVAN CORP. T/A ANTHONY SYLVAN POOLS, Defendant/Respondent.	Docket No. A-0003049-23 CIVIL ACTION APPEAL FROM FINAL ORDER DATED MAY 30, 2024 Sat Below: Hon. Nicholas Ostuni, Sr., J.S.C. SUPERIOR COURT OF NEW JERSEY LAW DIVISION – BERGEN COUNTY DOCKET NO.: BER-L-0967-24 Civil Action

BRIEF OF DEFENDANT/RESPONDENT ANTHONY & SYLVAN CORP.

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I. INTRODUCTION

This appeal arises out of a contract for the construction of an inground swimming pool by Anthony & Sylvan Corp. ("A&S") at a beach house owned by Plaintiff in Mantoloking. Unsatisfied with the speed with which A&S proceeded, Plaintiff terminated the contract and sued A&S, claiming, among other things, that A&S breached the parties' agreement and violated the New Jersey Consumer Fraud Act ("CFA").

Given the arbitration clause in the parties' agreement, A&S moved to dismiss Plaintiff's Complaint. The trial court granted the motion in accordance with a 12-page opinion and order. On appeal, the issue is a narrow one: namely, whether a single sentence in the parties' dispute resolution provision – permitting A&S to proceed in Court to collect money due and owing – is substantively unconscionable such that the entire dispute resolution provision should be invalidated.

Plaintiff conceded below (and maintains here) that, "but for the last offending sentence," the dispute resolution provision complies with New Jersey law and would be binding on the parties. He nevertheless maintains that,

because courts in several other states allegedly have invalidated so-called "one-sided" provisions as he claims exists here, New Jersey should follow suit and he should be free to litigate this matter in the Superior Court.

Plaintiff's arguments are unsupported by controlling New Jersey law. An arbitration provision is not unconscionable merely because it provides the parties with different remedies. For this reason, Plaintiff's arguments are without merit. Moreover, while Plaintiff attempts to present the matter as one of first impression, this Court need only look to its own precedents to resolve the narrow issue presented and affirm the trial court's decision.

Thus, for these reasons, and those set forth more fully herein, A&S respectfully requests this Court affirm the trial court's order so that the parties may comply with their contractually-agreed-upon dispute resolution agreement.

II. PROCEDURAL HISTORY

On February 13, 2024, Plaintiff filed a three-count Complaint against A&S. (Pa29). On April 1, 2024, A&S filed a motion to dismiss and compel arbitration pursuant to R. 4:6-2(a). (Pa39). On April 18, 2024, Plaintiff filed a

"Cross Motion for Judgment on the Pleadings on Count III of the Complaint." (Pa68).

On May 30, 2024, the Honorable Nicholas Ostuni, J.S.C. issued two orders and a written decision granting A&S's motion to dismiss and compel arbitration (Pa1-14), and denying Plaintiff's cross motion for "judgment on the pleadings." (Pa15-16).

Plaintiff filed this appeal on June 5, 2024. (Pa17-18).

III. STATEMENT OF FACTS

On January 28, 2023, Plaintiff and A&S entered into a Pool Design and Construction Agreement ("Agreement"). (Pa55). The Agreement sets forth the terms for the construction of a swimming pool at 253 Sunset Lane, Mantoloking, New Jersey 08738. (Id.)

A. The ADR Provision in the Agreement.

As relevant here, page seven (7) of the Agreement contains a provision entitled **"DISPUTE RESOLUTION AND ARBITRATION"** that provides as follows:

> **YOU AND WE AGREE THAT ANY CONTROVERSY, DISPUTE OR CLAIM, INCLUDING BUT NOT LIMITED TO ANY CLAIM FOR CONSUMER FRAUD OR ANY OTHER STATUTORY CLAIM, (COLLECTIVELY "CLAIM") ARISING OUT OF OR RELATING IN ANY WAY TO THIS AGREEMENT OR ITS BREACH THAT CANNOT BE SETTLED THROUGH DIRECT DISCUSSIONS SHOULD BE SUBMITTED BY**

> **THE CLAIMANT TO NON-BINDING MEDIATION . . . . IF THE PARTIES ARE UNABLE TO RESOLVE THE CLAIM THROUGH MEDIATION, THE CLAIM SHALL BE SUBMITTED BY CLAIMANT FOR AND RESOLVED BY BINDING ARBITRATION PURSUANT TO THE AAA COMMERCIAL ARBITRATION RULES AND ADMINISTERED BY AN ARBITRATOR MUTUALLY SELECTED AND AGREED TO BY THE PARTIES, OR IF THE PARTIES CANNOT AGREE THEN ONE ASSIGNED BY THE AAA. . . . . YOU AND WE ARE CHOOSING MEDIATION AND ARBITRATION INSTEAD OF LITIGATION TO RESOLVE OUR CLAIMS AND VOLUNTARILY AND KNOWINGLY WAIVE A RIGHT TO A JURY TRIAL. . . . NOTWITHSTANDING THE FOREGOING, WE RESERVE THE RIGHT AND MAY AT OUR DISCRETION EXERCISE THE RIGHT TO COMMENCE LEGAL ACTION IN ANY COURT OF COMPETENT JURISDICTION TO COLLECT MONIES YOU OWE UNDER THIS AGREEMENT, IN WHICH YOU AGREE TO WAIVE THE RIGHT TO MEDIATION OR ARBITRATION.**

(Id. at 61 (emphasis and typeface in original)).

B. The Complaint

Plaintiff alleges three causes of action against A&S arising from the parties' Agreement: (i) Plaintiff alleges A&S "breached the agreement between Defendant and Plaintiff by failing to provide the bargained-for services and expertise and failing to commence, continue, or complete the project in a timely fashion," (Pa33, Compl. ¶¶22-26, Count One); (ii) Plaintiff alleges A&S committed an unconscionable business practice under the CFA because, among other things, A&S delayed starting the project and

did not "send out a new, more experienced excavator" to work on the pool at a time convenient for Plaintiff, (Pa34-35, Compl. ¶¶27-34, Count Two); and (iii) Plaintiff seeks declaratory relief that the alternative dispute resolution in the Agreement is "void as unconscionable and/or void under the public policy and law of the State of New Jersey." (Pa35-36, Complaint ¶35-41, Count Three).

C. The Superior Court Order and Opinion

Upon A&S's motion, the trial court dismissed Plaintiff's Complaint in an order and twelve-page opinion dated May 30, 2024. (Pa1-14). Relevant here, the trial court found the arbitration clause in the parties' Agreement satisfied the requirements set forth in Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 437 (2014) because it clearly and unambiguously advised Plaintiff that he would arbitrate his claims against A&S and informed him that he was waiving his right to seek relief in a judicial forum. (Pa9).

The trial court also concluded that the dispute resolution provision was neither substantively nor

procedurally unconscionable.[1] As to the former, the trial court found that the Supreme Court's decision in Delta Funding Corp. v. Harris, 189 N.J. 28, 48 (2006) was analogous, and, under that precedent, the dispute resolution provision was enforceable. (Da10-11).

It also rejected Plaintiff's claim that the dispute resolution provision was procedurally unconscionable. Specifically, citing Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) the Court observed that "plaintiff has [failed to] allege any facts to support a reasonable inference that the contract or arbitration clause was 'procedurally unconscionable.'" (Pa12). It also noted that "Plaintiff's brief makes no argument regarding the procedural fairness of the contract (i.e. that plaintiff was given the contract on a 'take it or leave it' basis, that he had no opportunity to review the contract or arbitration clause before signing, etc.)." (Id.) Finally,

[1]Plaintiff's brief cites T33:12-13 to suggest that the trial court had troubling concerns about the parties' Agreement and stated "clearly there is [a problem] here." The trial court never said this, nor does the transcript reflect such concerns expressed by the trial court. The lines Plaintiff cites relate to a hypothetical scenario which does not relate to the merits of the arbitration clause.

it found that "Plaintiff's complaint, similarly, makes no allegation that would support a finding of procedural unconscionability." (Id.) It thus rejected Plaintiff's request for limited discovery on a finding that the contract was procedurally unconscionable. (Id.)

Finally, the trial court rejected Plaintiff's public policy argument. In this regard, the trial court acknowledged that the dispute resolution provision permitted A&S "to file a claim in a court of competent jurisdiction" to collect monies. (Pa13). However, the trial court determined that the "one-sided aspect of the clause [was] neither harsh nor unfair," because, if A&S filed a claim to collect monies "plaintiff would be permitted to file any third-party counter claims and defenses in that forum." (Id.) Further, the trial court observed that "Plaintiff is still entitled to bring such claims in a forum our legal system overwhelmingly supports. Thus, the Court does not view the 'one-sided' nature of this clause to be 'harsh or unfair.'" (Pa14).

IV. ARGUMENT

THE TRIAL COURT ORDER SHOULD BE AFFIRMED

A. Standard of Review

This Court reviews a "trial court's order granting or denying a motion to compel arbitration de novo because the validity of an arbitration agreement presents a question of law." Ogunyemi v. Garden State Med. Ctr., 478 N.J. Super. 310, 315 (App. Div. 2024) (citing Skuse v. Pfizer, Inc., 244 N.J. 30, 46 (2020)).

B. The trial court correctly enforced the parties' Agreement (Pa1-14).

Plaintiff's primary argument on appeal focuses on a single sentence of the Agreement's dispute resolution provision. That sentence reads as follow:

> **NOTWITHSTANDING THE FOREGOING, WE RESERVE THE RIGHT AND MAY AT OUR DISCRETION EXERCISE THE RIGHT TO COMMENCE LEGAL ACTION IN ANY COURT OF COMPETENT JURISDICTION TO COLLECT MONIES YOU OWE UNDER THIS AGREEMENT, IN WHICH YOU AGREE TO WAIVE THE RIGHT TO MEDIATION OR ARBITRATION.**

According to Plaintiff, the foregoing language transforms a valid and enforceable arbitration provision into a "one-sided" arbitration clause, which, he claims, other state high courts have "spoken with a universal

voice" and determined to be substantively unconscionable. (Pb22). This argument fails for several reasons.

1. Plaintiff conceded that the arbitration clearly and unambiguously advised him that his claims would be arbitrated (T28:21–25).

At oral argument in the trial court, Plaintiff's counsel conceded that, "but for the last offending sentence" in the penultimate paragraph of the Agreement's alternative dispute resolution provision, "this arbitration clause would be a – a straight up proper, uh, mutual arbitration clause that the parties would be bound to." (T28:21–25).

A&S accepted Plaintiff's concession below and accepts it here because it is substantively correct. That is, the alternative dispute resolution provision here is written in plain language, is conspicuously designated in **BOLD** and **ALL CAPITAL** letters, and specifically advised Plaintiff that he was **"VOLUNTARILY AND KNOWINGLY WAIV[ING] A RIGHT TO A JURY TRIAL."** (Pa61); see Goffe v. Foulke Mgmt. Corp., 454 N.J. Super. 260, 271 (App. Div. 2018) (observing that the arbitration provision, written in "bold and conspicuous print . . . emphasize[s] that . . . plaintiffs . . . agreed to arbitrate all related claims and waived their rights to

trial by jury regardless of the legal basis for the claim"), rev'd on different grounds, 238 N.J. 191, 212 (2019) ("we have no doubt that the arbitration agreements in plaintiffs' contracts -- acknowledged by the Appellate Division to be clear and conspicuous -- are entitled to enforcement").

A&S nevertheless highlights this exchange to focus the Court on the limited issue presented before it on appeal – namely, whether a single sentence of the dispute resolution provision, by itself, is unconscionable and invalidates the entirety of the provision.

As discussed more fully below, the answer to both those questions is "no."

2. The dispute resolution provision complies with New Jersey law (Pa1-14).

Under New Jersey law, a reservation of the right to seek a remedy in a judicial forum by one party does not alone invalidate an arbitration clause. Delta Funding Corp. v. Harris, 189 N.J. 28, 48 (2006). Nor, for that matter, does a "clause giving one party the unilateral right to arbitrate." Kalman Floor Co. v. Joseph L. Muscarelle, Inc., 196 N.J. Super. 16, 23 (App. Div. 1984), aff'd o.b. Kalman Floor Co. v. Jos. L. Muscarelle, Inc., 98 N.J. 266 (1985).

For this reason alone, the trial court order should be affirmed.

Indeed, in Kalman, supra, this Court held – and the Supreme Court thereafter affirmed – that "we see no statutory or current philosophical bar to a contract clause . . . [that] permits unilateral triggering of the arbitration clause." Id. It also observed that there is "**no inherent unfairness** in enforcing a contractual clause which gives [defendant] alone the right to compel AAA arbitration." Id. at 29 (emphasis added).

Thus, the Kalman court ruled, similar to the trial court here, that a "one-sided" arbitration clause is, by itself, neither harsh nor unfair. Cf. Sitogum Holdings, Inc. v. Ropes, 352 N.J. Super. 555, 561 (Ch. Div. 2002) ("the doctrine of unconscionability has a place in our jurisprudence so that grossly unfair or one-sided contracts may be properly 'policed'").

Thereafter, in Delta, the Court ruled that a contractual arbitration provision that required the parties to litigate similar claims in two different forums – a foreclosure action and a private arbitration – was not unconscionable.

In Delta, the court assessed the enforceability of a contractual arbitration provision that exempted "foreclosure actions, eviction actions, all rights of self-help including collection of rents, and other similar actions." Delta Funding Corp. v. Harris, 396 F. Supp. 2d 512, 518 (D.N.J. 2004). Among the host of items raised by the borrower – a seventy-eight-year-old woman with a sixth-grade education and little financial expertise – was the argument that Delta's contract was unconscionable because it "grossly favors the lender." Id.

On a certified question from the Third Circuit, our Supreme Court disagreed. Specifically, the Court ruled that, although Delta's provision might require Harris to litigate "substantively similar claims in two different forums" it was **"not unconscionable,"** Delta, 189 N.J. at 48 (emphasis added).

In reaching this result, the Court was persuaded that any "burden of having to litigate in two forums is alleviated by the fact that attorney's fees and costs are available to Harris under the CFA if she successfully asserts CFA-based defenses in the foreclosure action." Id. at 49.

Here, the same result is all the more reasonable because the claim splitting concerns considered – **but rejected** – in Delta do not exist. Indeed, the Law Division aptly recognized that if A&S decides to file an action to "collect monies," Plaintiff may assert counterclaims in the Superior Court. (See T36:1-38:24).[2]

In an attempt to avoid the consequences of the Law Division's analysis, Plaintiff raises theoretical and unsubstantiated concerns about the impact that such a provision may have on "efficient, cost effective, and prompt" judicial outcomes (Pb19). Not only are Plaintiff's parade of horribles entirely speculative, [3] but glaringly

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[2]Plaintiff argues in his brief that A&S did not "precisely admit one way or the other if Respondent generally agreed" with the trial court's interpretation. (Pb19). Not so. (T38:21-24 ("[S]o I would agree with Your Honor, as to how you're reading it. Um, in a sense that that would eliminate the claims splitting concerns that were raised by the plaintiff.")).

[3]In his brief, Plaintiff argues that A&S could "toy" with Plaintiff, or even get a "sneak preview" of the arbitrator before deciding it wanted to "pull the plug" on the arbitration. (Pb20). But the Agreement does not give A&S the ability to "pull the plug" on an arbitration, only to file an action to "collect monies." This strained and hypothetical example thus makes no sense and does nothing to advance Plaintiff's policy arguments regarding efficiency or judicial burden.

absent from Plaintiff's submission is any explanation of why the Agreement's dispute resolution provision creates any threat necessitating Court intervention to invalidate the provisions of an arms-length private contract. (Pb19).

In any event, enforcing the Agreement here does no violence to the efficient and cost-effective resolution of matters. If Plaintiff intends to assert a claim against A&S, as he did here, it will be arbitrated if not resolved through the mediation process which is a condition precedent that has yet to be fulfilled. If A&S intends to assert a claim against Plaintiff, it will be arbitrated in all but one circumstance.[4] If A&S elects to file an action

[4]Plaintiff argues that an action to collect monies is the "only claim that could possibly exist in favor of Defendant against Plaintiff." (Pb17). While not essential to the Court's analysis, A&S notes that this is not accurate. For example, if Plaintiff entered the work site and damaged A&S's equipment, that claim for property damage would be arbitrated. So too would a claim of commercial disparagement. Moreover, it stands to reason that the only likely claim that a mortgage lender would bring against a borrower is a foreclosure, eviction or similar action for the collection of rents. Cf. Delta Funding Corp. v. Harris, 396 F. Supp. 2d at 518. Yet the Supreme Court in Delta had no trouble enforcing that provision against the borrower (a seventy-eight-year-old woman with a sixth-grade education and little financial expertise) meaning that the same result should apply here.

in Superior Court to collect monies, Plaintiff may then assert his claims as counterclaims in that same action. In all scenarios, there is only one action; and in all but one scenario (e.g., to collect monies), every claim will be arbitrated – thereby relieving the burden to the judiciary and otherwise advancing the policy considerations of efficient and cost-effective outcomes. In sum, Plaintiff's arguments in this regard are unpersuasive.

3. Plaintiff's arguments rely upon inapposite and inapplicable authority.

The out-of-state cases relied on and the reasoning espoused therein have been considered and rejected by New Jersey courts.

For example, the Supreme Court in Delta explicitly considered – and **rejected** – the reasoning in two cases cited by Plaintiff, Wisconsin Auto Title Loans, Inc. v. Jones, 714 N.W.2d 155, 173 (Wis. 2006) (Pb25) and Taylor v. Butler, 142 S.W.3d 277, 284-87 (Tenn. 2004), cert. denied, 543 U.S. 1147, 125 S.Ct. 1304, 161 L.Ed.2d 108 (2005) (Pb11, 23). See Delta, 189 N.J. at 48-49 (citing Taylor and Wisconsin Auto, stating "We acknowledge that contrary determinations have been reached by other courts," and ruling to the contrary).

Plaintiff's further reliance on additional case law from foreign jurisdictions such as New Mexico and Washington is similarly unavailing because their reasoning hinges on Taylor and Wisconsin Auto, each of which have been expressly rejected in New Jersey. See Cordova v. World Fin. Corp. of NM, 208 P.3d 901, 909 (N.M. 2009) (citing both Taylor and Wisconsin Auto); see also Burnett v. Pagliacci Pizza, Inc., 196 Wash. 2d 38, 59, 470 P.3d 486, 497 (2020) (relying on Taylor).

Likewise, the West Virginia Supreme Court's decision in Arnold v. United Companies Lending Corp., 204 W. Va. 229, 237, 511 S.E.2d 854, 862 (1998), overruled in part by Dan Ryan Builders, Inc. v. Nelson, 230 W. Va. 281, 737 S.E.2d 550 (2012), was relied upon by Taylor, which was, again, explicitly considered and rejected by the Supreme Court in Delta. Thus, those cases are also unpersuasive and should not alter the outcome here.

The remaining matters that did not explicitly rely on Taylor or Wisconsin Auto are also distinguishable. In Alltel Corp. v. Rosenow, 2014 Ark. 375, 11 (2014), for instance, the Court invalidated the arbitration provision, not because it was unconscionable, but because Arkansas law

requires mutuality to determine whether "there has even been a valid agreement to arbitrate in the first instance" (e.g., an issue of contract formation which is not raised here). Id. Yet, New Jersey law has no such general requirement for mutuality. See e.g., Fleischer v. James Drug Stores, 1 N.J. 138 (1948) ("It is not necessary, to serve the ends of justice, that the parties shall have identical remedies in case of breach."); see also Martindale v. Sandvik, Inc., 173, N.J. 76, 87 (2002) ("If the consideration requirement is met, there is no additional requirement of gain or benefit to the promisor, loss or detriment to the promisee, equivalence in the values exchanged, or mutuality of obligations.'") (citing Restatement (Second) of Contracts § 79 (1979)).

Similarly, the decisions in Caplin Enterprises, Inc. v. Arrington, 145 So. 3d 608, 611 (Miss. 2014), Tillman v. Com. Credit Loans, Inc., 655 S.E.2d 362, 370 (2008), and Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 121, 6 P.3d 669, 694 (2000) all involved other factors – not present here – which were inextricably tied to the Court's decision on unconscionability. Specifically:

- the arbitration provision in Armendariz, an employer-employee matter, "exclude[ed] damages for prospective future earnings, so-called 'front pay,' a common and often substantial component of contractual damages in a wrongful termination case," 6 P.3d at 694;

- the arbitration provision in Tillman allowed "prohibitively high" arbitration costs to be assessed against the plaintiff and also prohibited joinder of claims and class actions, 655 S.E.2d at 371; and, finally

- some of the arbitration provision(s) in Caplin – which generally dealt with individuals who were "obviously . . . desperate for immediate funds" – limited plaintiffs' damages to an amount so nominal (e.g., $65-$72) that the Court concluded it had the practical effect of "avoiding almost all responsibility." 145 So. 3d at 617.

As noted, the only provision challenged below (and now on appeal) was the so-called "one-sided arbitration clause." (See T28:21-25) (arguing that "but for the last offending sentence . . .this arbitration clause would be a – a straight up ***proper***, uh, mutual arbitration clause that the parties would be bound to.") (emphasis added). Consequently, to the extent that the Court considers these out-of-state decisions, they are distinguishable and

unpersuasive on the facts set forth in Plaintiff's Complaint.

4. The Taylor decision and its progeny do not represent the "majority" position.

To the extent the Court considers the "number" of unbinding and out-of-state decisions persuasive, it is not at all clear that Taylor and its progeny ever represented the "majority" position.

For example, prior to Taylor, the Third Circuit in Harris v. Green Tree Fin. Corp., 183 F.3d 173, 180 (3d Cir. 1999) interpreted Pennsylvania law to conclude that "an arbitration clause need not be supported by equivalent obligations." See id. ("the mere fact that Green Tree retains the option to litigate some issues in court, while the Harrises must arbitrate all claims does not make the arbitration agreement unenforceable").

Courts in many other jurisdictions concur and have applied similar reasoning. Hafer v. Vanderbilt Mortg. & Fin., Inc., 793 F. Supp. 2d 987, 1007 (S.D. Tex. 2011) (Texas law) ("the Court finds that this provision of the RIC's arbitration clause, one-sidedly allowing Vanderbilt to pursue litigation at its option, does not render the arbitration agreement substantively unconscionable");

Conseco Fin. Servicing Corp. v. Wilder, 47 S.W.3d 335, 344 (Ky. Ct. App. 2001) (Kentucky law) ("The Wilders' contention that their arbitration clause is unfairly one-sided rests similarly on a presumption that arbitration will not afford them an adequate opportunity to vindicate their substantive claims. Under both the FAA and Kentucky's UAA, such a presumption is not a proper basis for refusing enforcement of an arbitration clause."); Willis Flooring, Inc. v. Howard S. Lease Const. Co. & Assocs., 656 P.2d 1184, 1186 (Alaska 1983) ("Arbitration is not so clearly more or less fair than litigation that it is unconscionable to give one party the right of forum selection").

In fact, one state supreme court (Missouri) went so far as to say that "the 'mutuality of obligation' requirement" (which is what Plaintiff proposes here) is "a dead letter in contract law." State ex rel. Vincent v. Schneider, 194 S.W.3d 853, 859 (Mo. 2006) (Missouri law). Thus, putting aside that the Supreme Court has already signaled its disagreement with the alleged "majority" position, reliance on out-of-state precedent reveals no obvious tilt in Plaintiff's favor and does not support invalidating the parties' Agreement here.

It is also worth noting that the very same court which Plaintiff cites as evidencing the "majority" position (Tennessee) later walked back those observations in Berent v. CMH Homes, Inc., 466 S.W.3d 740, 753 (Tenn. 2015) (a case Plaintiff does not cite) when it observed that "any attempt to synthesize the cases neatly into a 'majority' and a 'minority' view must necessarily founder," given the states' differing views about unconscionability (a distinction Plaintiff does not grapple with) and the wide variety of arbitration agreements in use. Id.

Thus, for all these reasons, Plaintiff's argument that this Court should invalidate the Agreement here because of an alleged "majority" position is without merit and should be rejected. There is no clear "majority" position, and, even if there was, New Jersey has already decided the issue to the contrary.

5. Additionally, and independently, Plaintiff's position creates a "special rule" for arbitration clauses and is thus preempted by the Federal Arbitration Act.

Finally, in addition to being out of step with New Jersey law, Plaintiff's argument should also be rejected because it would create a "special rule" – applicable only to arbitration provisions – which runs afoul of, and is preempted by, the Federal Arbitration Act, 9 U.S.C.A. §1 et seq. ("FAA").

As noted, New Jersey law has no general requirement for mutuality in contract. Martindale, 173, N.J. at 87 ("If the consideration requirement is met, there is no additional requirement of gain or benefit to the promisor, loss or detriment to the promisee, equivalence in the values exchanged, or mutuality of obligations.'"). Yet under Plaintiff's argument, this Court would invalidate the Agreement's dispute resolution provision simply because it is non-mutual and relates to arbitration. In this circumstance, the general contract defense of unconscionability (while excepted under Section 2 to the FAA) would be applied in a manner which "impermissibly disfavor[s] arbitration," e.g. it would invalidate a "unilateral" provision simply because it relates to

arbitration. Epic Sys. Corp. v. Lewis, 584 U.S. 497, 509 (2018). This, the Court may not do. See U.S. Const. art. VI, cl. 2; see also Antonucci v. Curvature Newco, Inc., 470 N.J. Super. 553, 566 (App. Div. 2022) (finding that Section 12.7 of the NJLAD "singled out" arbitration provisions and was thus preempted by the FAA).

Thus, for all the foregoing reasons, the trial court's decision should be affirmed.

C. The trial court correctly found that Plaintiff failed to plead or show procedural unconscionability (Pa11-14).

In his appellate brief, Plaintiff also argues that the trial court erred because it was "obligated to grant limited discovery and then conduct a fact hearing" on the issue of procedural unconscionability. (Pb21-22). This argument fails for at least three reasons.

First, the term "procedural unconscionability" is not a magic talisman whose invocation automatically necessitates a hearing. Indeed, if that were the case, every party seeking to avoid enforcement of an arbitration clause could simply throw the term in an opposition brief, see Albrecht v. Corr. Med. Servs., 422 N.J. Super. 265, 268 (App. Div. 2011) ("To the extent that CMS presented information about

itself through its brief and its counsel at oral argument on its motion to dismiss, that information is not evidential and will not be considered."), and be guaranteed a hearing which would largely undercut the same efficiencies Plaintiff professes to support. As our courts have long recognized arbitration as a "favored" means of resolving disputes, such a result is inconsistent with existing precedent and should be rejected without further analysis. Angrisani v. Financial Technology Ventures, L.P., 402 N.J. Super. 138, 148 (App. Div. 2008) ("Under New Jersey law, arbitration is also 'favored . . . as a means of resolving disputes,' and for this reason '[a]n agreement to arbitrate should be read liberally in favor of arbitration[.]'" (internal citations omitted)).

Second, and as the trial court correctly concluded (Pa12-13), Plaintiff failed to allege any facts or set forth any evidence (or argument) regarding procedural unconscionability; thus, no hearing was necessary.

When A&S filed its motion to dismiss, it was Plaintiff's burden to show that the Agreement was procedurally unconscionable. See Howard v. Diolosa, 241 N.J. Super. 222, 230 (App. Div. 1990) ("Plaintiff must

demonstrate unconscionability by showing some overreaching or imposition resulting from a bargaining disparity between the parties, or such patent unfairness in the contract that no reasonable person not acting under compulsion or out of necessity would accept its terms.").

Yet, **at the trial level, Plaintiff made "no argument regarding the procedural fairness of the contract (i.e. that plaintiff was given the contract on a 'take it or leave it' basis, that he had no opportunity to review the contract or arbitration clause before signing, etc.)."** (Pa12 (trial court opinion)). Further, and as the trial court correctly reasoned, Plaintiff's Complaint contains no facts regarding procedural unconscionability. (Pa13); accord Pace v. Hamilton Cove, 258 N.J. 82, 107 (2024) (reversing the Appellate Division and observing that the arbitration agreement was enforceable, in part, because plaintiffs' "complaint contains no [] allegations" and the "record must contain some indicia of economic compulsion" to establish procedural unconscionability). Nor did Plaintiff submit a certification in opposition to A&S's motion, in accordance with R. 1:6-6, indicating or suggesting that there were any abnormalities about the

negotiation process, that he was not of sound mind when he signed the Agreement, that he was illiterate or did not understand the Agreement, that he was unsophisticated, or that he was under any coercion (economic or otherwise) which could support a finding of procedural unconscionability. See generally Baldyga v. Oldman, 261 N.J.Super. 259, 265 (App.Div.1993) (The purpose of R. 1:6-6 is in part to "eliminate the presentation of facts which are not of record by unsworn statement of counsel made in briefs and oral arguments.").

In this way, Plaintiff's appellate argument is distinguishable from other matters which may have required evidentiary hearings because he did not take the time present evidence regarding such claims at the trial level. See e.g., Moore v. Woman To Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 43 (App. Div. 2010) (identifying factual disputes about the formation of the contract, not present here, which required an evidentiary hearing); see also Kleine v. Emeritus at Emerson, 445 N.J. Super. 545, 550 (App. Div. 2016) (observing that, in light of the sworn statements submitted in opposition to defendant's motion, not present here, an evidentiary

hearing would have been required). Thus, the trial court correctly denied Plaintiff limited discovery and enforced the parties' Agreement. In re Bloomingdale Convalescent Ctr., 233 N.J. Super. 46, 48 n.1 (App. Div.1989) (noting an issue not briefed is waived); Noye v. Hoffman-La Roche, Inc., 238 N.J. Super. 430, 432 n. 2 (App. Div.) (matter not argued in the brief deemed "abandoned"), certif. denied, 122 N.J. 147 (1990).[5]

Third, to the extent there was an error (which A&S contends there was not), it was one which Plaintiff invited. See New Jersey Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 340 (2010) ("The doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error.")

Here, Plaintiff made the tactical choice to throttle back any arguments on procedural unconscionability. If

[5] While the trial court did not make a finding of waiver, this Court may affirm on grounds other than those set forth in the trial court's opinion. State v. Williams, 444 N.J. Super. 603, 617 (App. Div.2016) ("[A] reviewing court can affirm a decision on different grounds than ... offered by the court being reviewed.").

Plaintiff wanted to pursue a theory of procedural unconscionability, he was obligated to do so in response to A&S's motion. He did not inasmuch as the Complaint alleges no facts and Plaintiff presented no evidence or argument to the trial court on this issue. Therefore, any claimed error on this issue is one which he invited and does not support overturning the trial court's sound decision.

D. Even if the specific provision is unconscionable, it does not apply under the circumstances, should be severed, and the remaining portion should be enforced.[6]

As noted above, the trial court correctly concluded that the arbitration provision in this matter is not substantively unconscionable. However, to the extent the Court has any concerns about the provision, or considers potential departure from Delta's and Kalman's guidance, the offending clause should be severed from the Agreement and the remainder of the dispute resolution provision enforced.

As set forth in Delta, New Jersey law permits courts to sever offending clauses or provisions from an arbitration

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[6]This issue was raised below but not decided because the trial court enforced the parties' Agreement. A&S nevertheless raises the issue here because this Court may affirm on any ground. See Williams, 444 N.J. Super. at 617.

agreement and enforce the remainder of the agreement. See Delta,189 N.J. at 46. (noting that it had "no doubt" that unconscionable provisions "could be severed and that the remainder of the arbitration agreement would be capable of enforcement" because the agreement had a "broad severability clause").

Again, assuming the provision is unenforceable (it is not), the same result applies here for several reasons. First, like the class-arbitration waiver in Delta, the allegedly unconscionable provision at issue here has no application to Plaintiff's claims. Indeed, this is not an instance like Delta where A&S filed an action in Court and then sought to compel arbitration of Plaintiff's counter claims. In fact, that scenario would never occur because the Agreement here would explicitly allow Plaintiff's claims to remain in the Superior Court.

Rather, this is an instance where Plaintiff filed an action in the Superior Court and A&S sought to enforce the terms of the parties' Agreement. Were the Court to grant A&S's motion, Plaintiff would face no additional obstacles to vindicating his rights (e.g., having to litigate in two forums) and could effectively do so in the arbitral forum.

Second, and similar to Delta, the Agreement here contains a broad severability clause. Specifically, Section 13 of the Agreement provides: "If a judge or arbitrator finds any provision of this Agreement invalid or illegal under applicable law or regulation, the remaining provisions will still be valid and remain in effect." (Pa63).

Applying that plain language here, even if the alleged "one-sided" aspect of the provision is unconscionable, the parties agreed that "the remaining provisions will still be valid and remain in effect." Giving due effect to that agreement, the arbitration provision can be enforced by excising the final clause as evidenced below:

> **YOU AND WE AGREE THAT ANY CONTROVERSY, DISPUTE OR CLAIM, INCLUDING BUT NOT LIMITED TO ANY CLAIM FOR CONSUMER FRAUD OR ANY OTHER STATUTORY CLAIM, (COLLECTIVELY "CLAIM") ARISING OUT OF OR RELATING IN ANY WAY TO THIS AGREEMENT OR ITS BREACH THAT CANNOT BE SETTLED THROUGH DIRECT DISCUSSIONS SHOULD BE SUBMITTED BY THE CLAIMANT TO NONBINDING MEDIATION, ADMINISTERED BY A MEDIATOR MUTUALLY SELECTED AND AGREED TO BY THE PARTIES, OR IF THE PARTIES CANNOT AGREE ON A MEDIATOR, BY A MEDIATOR WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") PURSUANT TO ITS COMMERCIAL MEDIATION RULES. MEDIATION MAY PROCEED REMOTELY AT A&S'S OR CUSTOMER'S ELECTION. IF THE PARTIES ARE UNABLE TO RESOLVE THE CLAIM THROUGH**

MEDIATION, THE CLAIM SHALL BE SUBMITTED BY CLAIMANT FOR AND RESOLVED BY BINDING ARBITRATION PURSUANT TO THE AAA COMMERCIAL ARBITRATION RULES AND ADMINISTERED BY AN ARBITRATOR MUTUALLY SELECTED AND AGREED TO BY THE PARTIES, OR IF THE PARTIES CANNOT AGREE THEN ONE ASSIGNED BY THE AAA. THE JUDGMENT ON THE AWARD RENDERED BY THE ARBITRATOR MAY BE ENTERED IN ANY COURT HAVING JURISDICTION. YOU AND WE ARE CHOOSING MEDIATION AND ARBITRATION INSTEAD OF LITIGATION TO RESOLVE OUR CLAIMS AND VOLUNTARILY AND KNOWINGLY WAIVE A RIGHT TO A JURY TRIAL. UNLESS OTHERWISE DETERMINED, EACH OF US WILL BEAR OUR OWN COSTS OF THE MEDIATION AND ARBITRATION PURSUANT TO THE THEN CURRENT FEE SCHEDULE LOCATED AT [AAA website].[7] YOU AGREE THAT WE CAN IN OUR DISCRETION JOIN CONTRACTORS, INSURANCE COMPANIES AND ANY OTHER PERSONS OR ENTITIES INTO THE MEDIATION AND/OR ARBITRATION AT ANY TIME, AND CONSENT TO JOINDER AND PARTICIPATION OF SUCH PARTIES. NO ACTIONS BY US IN RESPONSE TO A LEGAL CLAIM SHALL BE DEEMED A WAIVER OF OUR RIGHT TO MEDIATION OR ARBITRATION. ~~NOTWITHSTANDING THE FOREGOING, WE RESERVE THE RIGHT AND MAY AT OUR DISCRETION EXERCISE THE RIGHT TO COMMENCE LEGAL ACTION IN ANY COURT OF COMPETENT JURISDICTION TO COLLECT MONIES YOU OWE UNDER THIS AGREEMENT, IN WHICH YOU AGREE TO WAIVE THE RIGHT TO MEDIATION OR ARBITRATION.~~

(Pa61).

[7]The website link has been modified to prevent the link from being activated.

See NOTWITHSTANDING, Black's Law Dictionary (11th ed. 2019) (defining "notwithstanding" as "in spite of" or "not opposing").

Finally, severing the provision does not "defeat the primary purpose of the contract" because, again, the provision is not at issue, has no bearing on Plaintiff's claims, and is otherwise "not opposed" to the remainder of the arbitration agreement. Jacob v. Norris, McLaughlin & Marcus, 128 N.J. 10, 33 (1992).

Thus, for all these reasons, A&S respectfully submits that this Court should affirm the trial court's May 30, 2024 Order and compel the parties to abide by the contractually-agreed-upon dispute resolution provision.

E. Even if the dispute resolution cannot be severed, Plaintiff is still required to mediate any disputes prior to any arbitration or litigation.

As before, the trial court correctly concluded that the arbitration provision in this matter is not substantively unconscionable. However, to the extent the Court has any concerns about the provision **and** finds that it is not severable, then Plaintiff should still be required to mediate the matter prior to any litigation.

The Agreement provides, in relevant part, that any claim **"THAT CANNOT BE SETTLED THROUGH DIRECT DISCUSSIONS SHOULD BE**

SUBMITTED BY THE CLAIMANT TO NONBINDING MEDIATION" and that if **"THE PARTIES ARE UNABLE TO RESOLVE THE CLAIM THROUGH MEDIATION, THE CLAIM SHALL BE SUBMITTED BY CLAIMANT FOR AND RESOLVED BY BINDING ARBITRATION."** (Pa61).

Here, Plaintiff has never challenged the portion of the dispute resolution provisions which sets forth the condition precedent that any claim against A&S be mediated before it is arbitrated. Thus, assuming the portion of the provision at issue is unenforceable (it is not), due effect should be given to this separate requirement and Plaintiff should be required to mediate his claims. See Rivera v. Union Cnty. Prosecutor's Off., 250 N.J. 124, 146 (2022) ("Appellate courts can 'exercise ... original jurisdiction as is necessary to the complete determination of any matter on review.'")(citing R. 2:10-5).

V. CONCLUSION

For the foregoing reasons, Defendant/Respondent, Anthony & Sylvan Corp. respectfully requests this Court affirm the trial court's decision so that the parties can abide by the contractually agreed-upon dispute resolution provision.

ARCHER & GREINER, P.C.
Attorneys for
Defendant/Respondent
Anthony & Sylvan Corp.

By: */s/Daniel J. DeFiglio*
Daniel J. DeFiglio

Date: November 1, 2024

Superior Court of New Jersey

Appellate Division

Docket No. A-003049-23

JOHN LAHOUD,	:	CIVIL ACTION
	:	
	:	ON APPEAL FROM
Plaintiff-Appellant,	:	AN ORDER OF THE
	:	SUPERIOR COURT
	:	OF NEW JERSEY,
vs.	:	LAW DIVISION,
	:	BERGEN COUNTY
	:	
ANTHONY & SYLVAN CORP.,	:	DOCKET NO. BER-L-967-24
T/A ANTHONY SYLVAN POOLS,	:	
	:	Sat Below:
	:	
Defendant-Respondent.	:	HON. NICHOLAS OSTUNI, J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Plaintiff John Lahoud, the Appellant, submits this Reply Brief (i) in reply to the opposition brief filed by the Respondent/Defendant Anthony & Sylvan Corp. t/a Anthony Sylvan Pools ("Respondent" or "Defendant") and (ii) in further support of the appeal. For the reasons stated in this Reply Brief, as well as in Plaintiff's initial brief, this Court should vacate the Orders and remand to the Law Division for further proceedings.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Plaintiff relies on his prior Procedural History and Statement of Facts.

ARGUMENT

THE LAW DIVISION'S ORDER SHOULD BE VACATED; AND THE MATTER REMANDED FOR FURTHER PROCEEDINGS (Pa1-Pa16)

A. Standard of Review (Pa1-Pa16)

Defendant acknowledges *de novo* review must be applied to the Order.

B. Defendant's Analysis of Majority Case Law is Flawed (Pa1-Pa16)

Plaintiff advised in his initial brief that every court considering the issue has refused to enforce an "egregious" arbitration provision in consumer contracts of adhesion "that specifically carve[s] out an exception for the corporate drafter of the clause to pursue collection actions in court." *Tillman v. Com. Credit Loans, Inc.*, 655 *S.E.*2d 362, 372 (2008). Now that Defendant has fully briefed its

position, this Court can observe for itself that Plaintiff's observation is entirely accurate.

Defendant perhaps has created the illusion of a lack of uniformity. But this Court should examine the cases Defendant cites carefully. Not one of them concerns the type of "egregious" exception at issue in this case, a carve out which permits the corporate drafter to pursue money remedies in court. Instead Defendant cobbles together sentence fragments from off-point arbitration cases and presents them as if they pertain to exceptions like that one before this Court.

Defendant makes at least three great mistakes throughout its submission. First, it blurs case law applicable to this case -- in which the "egregious" arbitration provision allows the corporate drafter to file in court for a money relief – with decisions allowing a reasonable exception for a secured lender to seek foreclosure-type remedies in court. Defendant improperly employs the latter category of cases to impeach the holdings of the former.

Second, Defendant ignores the vital distinction between consumer contracts of adhesion and commercial agreements. An arbitration carveout found in a commercial agreement negotiated by business entities generally is enforceable -- but those holdings don't apply to this case. Again, Defendant improperly employs the latter category of cases to impeach the holdings of the former.

Third, Defendant has confused the meaning of "mutual assent," an essential element of contract enforcement, with other common law contract principles,

now often disfavored, concerning "mutuality of remedy" or "mutuality of obligation." Defendant collapses these distinct concepts under the general term "mutuality" and then declares "dead" Plaintiff's argument that genuine mutual assent is always at issue when a consumer is handed a contract of adhesion drafted by the corporate party. This error infects Defendant's entire argument pertaining to "mutuality" and renders unreliable its discussion and analysis in every section where some form of that word appears.

What Defendant has ***not*** done is cite a single case involving a consumer contract of adhesion where a provision like this one, allowing the corporate drafter to file in court for a money relief. From Plaintiff's research, it appeared that no such case exists. Defendant's brief now implicitly acknowledges that truth.

1. No New Jersey Precedent Establishes The Legality of This Provision (Pa1-Pa16)

Initially, Defendant seeks to claim that New Jersey precedent governs this outcome [Defendant's Brief, pp.10-15]. Defendant cites two cases as the purported "precedent" requiring that this clause be enforced.

Defendant cites the Supreme Court's decision in *Delta Funding Corp. v. Harris,* 189 *N.J.* 28 (2006). This is an example of the first great mistake. In *Delta Funding*, the Supreme Court permitted a secured lender to file legal action for foreclosure remedies, not available through arbitration, even though the

borrower was required to arbitrate all of his claims. That narrow holding does not govern the much broader clause before this Court.

Second, Defendant cites to *Kalman Floor Co. v. Joseph L. Muscarelle, Inc.*, 196 *N.J. Super*. 16, 23 (App. Div. 1984), *aff'd o.b., Kalman Floor Co. v. Jos. L. Muscarelle, Inc.*, 98 *N.J.* 266 (1985). This is an example of the second great mistake. *Kalman* is off-point because it concerned a one-sided arbitration clause negotiated in a commercial contract between two business entities. The *Kalman* agreement was not one "between the rabbits and the foxes." *Arnold v. United Cos. Lending Corp.*, 511 *S.E.*2d 854, 862 (W. Va. 1998). A commercial agreement,, or an agreement "between a fox and a fox," is not before this Court.

Moreover, a claim for money is the only claim Defendant could possibly have under the agreement. Defendant suggests otherwise but the single example it cites – a claim for property damage arising from Plaintiff's entering the worksite and damaging Defendant's equipment – is an independent tort claim. Tort claims for property damages are not "arising out of or relating in any way to this agreement or its breach." Such a claim would be resolved under tort law.

Defendant asserts further that a secured lender could never possess other claims against the borrower except for foreclosure remedies. That is clearly incorrect. In fact, the principal remedy sought by a secured lender is payment in full of the underlying promissory note. The lender's claim under the Promissory Note can always be pursued outside of a foreclosure proceeding in New Jersey.

The Promissory Note and the Mortgage are distinct agreements -- the mortgage merely being security for payment of the Promissory Note.

2. <u>Defendant's Effort to Distinguish The Majority Case Law is Flawed</u> (Pa1-Pa16)

(a)*Delta Funding* Didn't "Reject" *Taylor* or *Wisc. Auto;* The Court Distinguished Them (Pa1-Pa16)

Defendant next argues that cases cited by Plaintiff were "rejected" by the Supreme Court in *Delta Funding.* In *Delta Funding*, the Supreme Court considered a uniformity of case law holding that one-way arbitration clauses were suspect. Among that authority, the cases then divided on the narrow question on the permissibility of carve-outs for foreclosure remedies. The Supreme Court sided with allowing this carve-out since foreclosure remedies were procedural remedies unavailable in mediation. *Delta Funding,* 189 *N.J.* at 48-49. Defendant therefore simply misreads *Delta Funding* to create a "rejection" of *Taylor* and *Wisconsin Auto Title Loans* when the Court merely distinguished them. If Defendant's reading were accurate, then the Supreme Court would have ruled more broadly and approved one-sided arbitration clauses in general.

Believing to have felled *Taylor* and *Wisconsin Auto Title Loans,* Defendant then dismisses any authority citing these decisions as "rejected" in New Jersey. Defendant thereby avoids a massive body of case law casting doubt on its

position before this Court, and it does so without analysis of any of the legal reasoning behind these cases.

(b) **Defendant Errs In Its Discussion on "Mutuality" (Pa1-Pa16)**

Defendant further contends that the Alabama Supreme Court's decision in *Alltel Corp. v. Rosenow*, 2014 *Ark.* 375 (2014) differs from New Jersey law. The *Alltel* court assessed the arbitration agreement as a separate undertaking by and between the parties for which genuine mutual assent was required. Defendant briefs that Alabama law differs from New Jersey law on "mutuality," but Defendant is incorrect. In *Kernahan v. Home Warranty Administrator of Florida, Inc.,* 236 *N.J.* 301, 319 (2019), the New Jersey Supreme Court wrote:

> In this state, when called on to enforce an arbitration agreement, a court's initial inquiry must be -- just as it is for any other contract -- whether the agreement to arbitrate all, or any portion, of a dispute is "the product of mutual assent, as determined under customary principles of contract law." *Atalese [v. U.S. Legal Servs. Grp., L.P.,* 219 *N.J.* 430], 442 [(2014)] (internal quotation marks and citation omitted).

In its hurry to distinguish *Alltel* from New Jersey law, Defendant confuses the "mutual assent" -- a bedrock, unyielding principle of contract formation and enforceability -- with the common law concepts of principles of "mutuality of obligation" or "mutuality of remedy," both which have come under fire in more modern contract law. [*See Defendant's Brief, pp. 16-17, citing Fleischer v. James Drug Stores*, 1 *N.J.* 138 (1948) (addressing mutuality of obligation) and

Martindale v. Sandvik, Inc., 173 *N.J.* 76, 87 (2002) (addressing mutuality of remedy)]. This third great mistake infects every discussion Defendant advances over "mutuality." Defendant simply collapses these distinct concepts under the general term of "mutuality." Defendant then blurs these distinct concepts even further by claiming that Plaintiff cannot attack the contract on the basis of mutuality. In truth Plaintiff has argued throughout that genuine mutual assent is lacking because the so-called arbitration provision is imposed by way of a pre-printed consumer contract of adhesion offered on a take-or-leave-it basis. *See Muhammad v. County Bank of Rehoboth Beach, Delaware,* 189 N.J. 1, 16-17 (2004). *See also Appellant's Brief, pp. 15, 21-22; Pra12 (Plaintiff's Brief Below)*][1].

(c) Defendant Ignores Meaningful Cases Due to Different "Facts" (Pa1-Pa16)

Having given itself a pass on discussing the legal analysis of all authority with different facts, Defendant simply ignores the legal reasoning applied by *Caplin Enterprises, Inc. v. Arrington*, 145 *So*.3d 608 (Miss. 2014), *Tillman v. Com. Credit Loans, Inc.*, 655 *S.E*.2d 362, 370 (2008), and *Armendariz v. Found. Health Psychcare Servs., Inc.,* 24 Cal. 4th 83, 121, 6 *P*.3d 669, 694 (2000). Case

[1] Plaintiff's brief below is submitted as a supplemental appendix, consistent with the exception to *R.* 2:6-1(a)(2), as germane to this appeal. It is submitted to rebut directly Defendant's claim that Plaintiff did not argue procedural unconscionability below.

law is always distinguishable on facts but that is no legal justification to ignore legal lessons unless the party discusses why the factual distinction matters.

For example, in *Tillman,* the North Carolina Supreme Court instructed that substantive unconscionability "refers to harsh, one-sided, and oppressive contract terms." Although Defendant makes much about the factual distinction between the provision struck down in *Tillman* and the provision before this Court, that distinction works in Plaintiff's favor. In fact, the North Carolina Supreme Court struck down the one-sided arbitration clause and did so even though ***"[t]his arbitration clause is not as egregious as some that specifically carve out an exception for the corporate drafter of the clause to pursue collection actions in court."*** *Tillman*, 655 S.E.2d at 372 (emphasis added).

C. The Court's Effort To Avoid "Issue Splitting" Created Issues (Pa1-Pa16)

Respondent writes that the Law Division did not observe that "clearly there is [a problem] here." But the transcript shows the Law Division identified that problem as issue splitting – even though there were other problems before the court left unaddressed. The Law Division observed "that [Defendant"], has the unilateral right to seek legal action to collect money [owed]" while Plaintiff did not. [1T 33:12-19].

At oral argument, Respondent responded that this problem is "hypothetical," as it does again in its brief. But the Law Division dismissed this

non-answer, repeating that the issue is "in this case." [1T35:23]. To address the problem, the Law Division devised a remedy even worse for Plaintiff. The Law Division interpreted the text to require Plaintiff to file an arbitration as his only way to bring claims. But to avoid "issue splitting," the Law Division then read into the text obligating Plaintiff to bring those claims by way of a counterclaim in any legal action subsequently filed by Defendant. "Simply put, although the arbitration clause is 'one-sided,' if defendant chose to file a collection action in a court of competent jurisdiction, then the entire controversy would be litigated in that court." [Pa11].

Plaintiff protested that this would allow Defendant to terminate the arbitration process should Defendant determine it was going to lose the arbitration. At oral argument, the Law Division said that this issue was not before it, even though the Law Division's ruling created the issue.

D. The Law Division Erred By Rewriting The Clause (Pa1-Pa16)

1. Plaintiff Didn't Concede That The Arbitration Clause "Cleary Advised That His Claims Would Be Arbitrated" (Pa1-Pa16)

Plaintiff did not make the concession attributed to him in Defendant's appellate brief. What Plaintiff "admitted" is that the arbitration clause would have satisfied the notice provisions fixed by *Atalese v. U.S. Legal Services Group,* 219 *N.J.* 430 (2014), *cert. den.* 576 U.S. 1004 (2015)) but for the inclusion of the last sentence. The last sentence is, in the words of case law, an

"egregious" provision "that specifically carve[s] out an exception for the corporate drafter of the clause to pursue collection actions in court." *Tillman*, 655 S.E.2d at 372 (emphasis added). Accordingly, the whole provision needed to be severed. To get around this issue splitting, the Law Division interpreted it to require Plaintiff to abandon a previously-initiated arbitration should Defendant thereafter file a legal action for money damages. No such language "requiring" Plaintiff to abandon a previously-filed arbitration appears in the text.

Additionally, the Law Division created an alarming problem of inefficiency and procedural fairness. The Law Division avoided these issues by claiming they were not before him, even though his rule created these issues. The Law Division didn't address how unfair it would be to require Plaintiff to abandon a previously-filed arbitration. It further declined to address the mischief that Defendant could cause by filing a legal action on the eve of a ruling by the arbitrator. Defendant has no response to this problem created by the Law Division's ruling, trying to sidestep it by declaring it a "parade of horrible" that makes "no sense." The concern makes sense and is a genuine concern. The Law Division took an unfair and uneven provision, and then made it even worse for Plaintiff by imposing a "requirement" nowhere stated in the actual text.

2. Case Law Cited by Defendant Is Inapposite (Pa1-Pa16)

Close scrutiny of the authority cited by Defendant does not help Defendant. Rather Defendant has collected those cases addressing whether a secured lender may carve out an arbitration exception for foreclosure-type remedies. Without acknowledging that critical distinction, Defendant excerpts language from the cases apart from its proper context. Defendant then blurs the vital distinction between case law that allows for a limited carve-out for foreclose-type remedies and cases addressing "egregious" exceptions "that specifically carves out an exception for the corporate drafter of the clause to pursue collection actions in court." *Tillma*n, 655 *S.E.*2d at 372.

For example, in *Harris v. Green Tree Fin. Corp.*, 183 *F.*3d 173, 180 (3d Cir. 1999), the Third Circuit, simply permitted a secured lender "to use judicial or non-judicial relief to enforce a mortgage, deed of trust, or other security agreement relating to the real property secured in a transaction underlying this arbitration agreement, or to enforce the monetary obligation secured by the real property, or to foreclose on the real property." *Harris*, 183 *F.*3d at 177-178.

The court in *Hafer v. Vanderbilt Mortgage & Fin., Inc.*, 793 *F. Supp.*2d 987, 1007 (S.D. Tex. 2011) likewise permitted a secured lender to use judicial means "to enforce a security agreement relating to the Manufactured Home secured in a transaction underlying this arbitration agreement, to enforce the monetary obligation secured by the Manufactured Home or to foreclose on the manufactured home." *Hafer,* 793 *F.Supp.*2d at 1005. These cases are consistent

with *Delta Funding* and in no way pertinent to the "egregious" clause in this case.

More off point is Defendant's citation to *Conseco Fin. Servicing Corp. v. Wilder*, 47 *S.W.*3d 335 (Ky. Ct. App. 2001). In that case, the Wilder plaintiffs attacked a completely even arbitration clause simply because it was inserted into a boiler-plate consumer contract. They requested the court to presume that arbitration was more favorable to commercial parties than consumers, which the court refused to do.

Completely off-point is Defendant's reliance on *Willis Flooring, Inc. v. Howard S. Lease Const. Co. & Assocs.*, 656 *P.*2d 1184, 1186 (Alaska 1983). That case concerned terms of a negotiated arbitration agreement between two commercial business entities, not a consumer contract.

Defendant pins hopes on the Tennessee Supreme Court's decision in *Berent v. CMH Homes, Inc.*, 466 *S.W.*3d 740, 753 (Tenn. 2015). Defendant presents *Berent* as the court's walk-back from its prior decision in *Taylor v. Butler,* 142 *S.W.*3d 277, 284–87 (Tenn.2004), *cert. denied,* 543 *U.S.* 1147 (2005). That is not the case at all.

Berent was another case dealing with a lender carve-out for foreclosure remedies. In *Berent*, the commercial drafter contended that the holding in *Taylor* was no longer the "majority" position and argued for it to be overruled. When the court chided the secured lender's efforts to blur issues -- writing that "any

attempt to synthesize the cases neatly into a 'majority' and a 'minority' view must necessarily founder" -- it was addressing the lender's advocacy which – like here – involved blurring cases allowing carve-outs for foreclosure-type remedies with other provisions. In fact, the *Berent* court held that:" [A]fter reviewing the law in other jurisdictions, we decline to overrule or modify the ruling in *Taylor.* Applying *Taylor* to the contract in this case, we conclude that the sellers' retention of a judicial forum for limited purposes does not render the arbitration agreement unconscionable." *Berent,* 466 *S.W.*3d at 742.

Thus, a jurisdiction can hold that egregious carveouts, like one allowing the corporate party the single right to sue for money in court, are not legal; however, a carveout allowing the corporate party access to court to seek foreclosure remedies is legal.

E. Applying Unconscionability Principles Does Not Violate The FAA (Pa1-Pa16)

Defendant also asserts that applying state law unconscionability principles to arbitration clauses violates the FAA's requirement that no special rule of law may be applied by state courts to an arbitration agreement. This position has already been explicitly rejected by the Supreme Court of New Jersey. *Kernahan v. Home Warranty Administrator of Florida, Inc.,* 236 *N.J.* 301, 330 (2019).

F. Plaintiff Set Forth The Basis For Procedural Unconscionability (Pa1-Pa16)

One of the most remarkable aspects of the decision below was its contention that Plaintiff had not set forth the basis for a finding of procedural unconscionability. Defendant asks this Court to affirm this clearly infirm ruling. Plaintiff explicitly argued:

> In connection with the issue of procedural unconscionability, New Jersey courts have held that a consumer contract between a consumer and a commercial entity are "contracts of adhesion" if the commercial party presents a pre-printed standard agreement to the consumer on a "take-it-or-leave it basis." "[T]he essential nature of a contract of adhesion is that it is presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the 'adhering' party to negotiate except perhaps on a few particulars." Muhammad, 189 *N.J.* at 15 (*quoting Rudbart v. North Jersey Dist. Water Supply Com'n*, 127 N.J. 344, 353 (1992).
>
> Plaintiff contends that the one-sided arbitration clause is procedurally unconscionable.

[Pra12]. Plaintiff then asked for limited discovery pertaining to this issue. [Pra13]. Ignoring that explicit argument, the Law Division leapt to the error that: "Plaintiff made 'no argument regarding the procedural fairness of the contract (i.e. that plaintiff was given the contract on a 'take it or leave it' basis, that he had no opportunity to review the contract or arbitration clause before signing, etc.).'" Defendant asks this Court to affirm that error.

Even if the Law Division believed the Complaint was not clear enough, the Law Division still erred by dismissing the Complaint without leave to file an amended complaint.

G. <u>The Only Remedy Is To Sever The Provision in Full</u> (Pa1-Pa16)

Defendant further requests that the offending sentence of the arbitration provision be severed and the rest of the provision left intact. That cannot be done. The legal doctrine of severability permits a provision an agreement to be severed, and the rest of the agreement to be performed, if the agreement remains viable after the severance of the provision. However, the law does not permit a sentence from a provision to be deleted, and then allows that provision, as now re-written, to be enforced for the benefit of one party. *Washington Const. Co. v. Spinella*, *8 N.J.* 212, 217 (1951) (*citing, Herbert L. Farkas Co. v. N.Y. Fire Ins. Co.*, 5 *N.J.* 604, (1950). The arbitration provision, as written, is not enforceable. It must be severed in full. This Court is not in the business of re-writing contractual provisions for the benefit of one party, and to the detriment of another. Defendant also asks for the mediation text to be enforced. For the reasons expressed above, the arbitration clause must be stricken in full, including the mediation text.

CONCLUSION

This Court should vacate the Orders and remand for further proceedings, including discovery on procedural unconscionability and entry of an order holding the provision is substantively unconscionable.

Respectfully submitted,

/s/ Joseph M. Cerra

Dated: November 27, 2024 Joseph M. Cerra