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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION**

Docket No. A-003323-24

VELOCITY INVESTMENTS, LLC,	:	<b>CIVIL ACTION</b>
assignee of Cross River Bank,	:	
	:	
Plaintiff-Respondent,	:	ON APPEAL FROM THE FINAL
	:	JUDGMENT OF THE SUPERIOR
v.	:	COURT OF NEW JERSEY
	:	LAW DIVISION: ESSEX COUNTY
GREGORY FRANCIS,	:	
	:	
Defendant-Appellant.	:	Trial Court Docket No.
	:	ESX-L-7501-24
And	:	
	:	Sat Below:
GREGORY FRANCIS,	:	HON. ROBERT H. GARDNER,
	:	J.S.C.
Counterclaimant-Appellant	:	
	:	December 23, 2025
vs.	:	
	:	
VELOCITY INVESTMENTS, and	:	
JOHN DOES 1 to 10,	:	
	:	
Defendant on the Counterclaim-	:	
Respondent,	:	
	:	
and	:	
	:	
Gregory Francis,	:	
	:	
Third-Party Plaintiff-Appellant,	:	
	:	
vs.	:	
	:	
UPGRADE, INC., and JOHN DOES	:	
1 TO 10,	:	
	:	
Third-Party Defendant-Respondent.	:	
	:	

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**BRIEF ON BEHALF OF DEFENDANT-APPELLANT GREGORY  
FRANCIS**

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## PRELIMINARY STATEMENT

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This appeal challenges an Order compelling arbitration that fundamentally misapprehends the limits of private contract power in the face of statutory prohibition. The core issue before this Court is whether a private "delegation clause" can survive within a contract that the New Jersey Legislature has expressly declared "void" and legally non-existent.

The underlying dispute arises from a purported "Upgrade Card Personal Credit Line Agreement" (the "Credit Line Agreement") allegedly entered into between Appellant Gregory Francis ("Francis") and Upgrade / Cross River Bank. This transaction is statutorily void *ab initio* under the New Jersey Consumer Finance Licensing Act ("NJCFLA"), N.J.S.A. 17:11C-33(b), because Third-Party Defendant Upgrade, Inc. ("Upgrade") engaged in the consumer loan business without the mandatory license required by the State. Recognizing the danger posed by unregulated lending, the Legislature enacted a strict remedy: any contract made in violation of the licensing statute "shall be void," and the lender "shall have no right to collect or receive any principal, interest or charges." *Id.*

Despite this clear legislative mandate, Plaintiff Velocity Investments, LLC ("Velocity")—a debt buyer purporting to stand in Upgrade's shoes as an assignee of the Credit Line Agreement—filed a collection lawsuit in the

Superior Court. When Francis asserted his statutory rights and countersued, Velocity reversed course, attempting to retreat to arbitration based on a clause contained within the very contract the Legislature has deemed a legal nullity.

The Trial Court initially got it right. In its February 28, 2025 Order, the Court denied arbitration, correctly finding that "the agreement to arbitrate is void as Upgrade was not a licensed lender." However, on reconsideration, the Trial Court committed reversible error. It vacated its own ruling and compelled arbitration, effectively holding that an arbitrator—not the Court—must decide whether the Credit Line Agreement is void. This ruling constitutes an improper abdication of the judiciary's constitutional duty to interpret the law. Under *Sun Life Assurance Co. of Canada v. Wells Fargo Bank, N.A.*, 238 N.J. 157 (2019), and *Coinbase, Inc. v. Suski*, 602 U.S. 143 (2024), a court cannot enforce a "delegation clause" buried inside a contract that never legally existed. A legal nullity cannot delegate power.

Furthermore, the Order ignores Velocity's litigation conduct and evidentiary failures. Velocity affirmatively chose to invoke the judicial process by filing a collection lawsuit based on the Credit Line Agreement, thereby waiving any right to arbitrate under *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022). Moreover, Velocity failed to produce the critical assignment documents necessary to prove it even owns the right to enforce the arbitration

clause, a fatal evidentiary gap under *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764 (3d Cir. 2013).

To permit this Order to stand would allow unlicensed lenders to immunize themselves from our state laws by embedding procedural hurdles in illegal contracts, stripping our courts of their essential gatekeeping function. This Court should reverse the Order below, restore the Trial Court's initial finding that the Credit Line Agreement is void, and remand for further proceedings in the Law Division.

## **PROCEDURAL HISTORY**

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On August 7, 2024, Velocity commenced a collection action against Francis in the Superior Court of New Jersey, Law Division, Special Civil Part, Essex County, seeking to collect approximately \$5,605.64. (Da1). On September 16, 2024, Francis filed an Answer, Counterclaim, and Third-Party Complaint against Velocity and Upgrade (collectively, "Respondents"). Francis alleged violations of the New Jersey Consumer Fraud Act ("CFA"), the Fair Debt Collection Practices Act ("FDCPA"), and common law, asserting that the respondents were attempting to collect on a debt that was void *ab initio* due to unlicensed activity under the NJCFLA. (Da4). On October 25, 2024, the Trial Court granted Francis's motion to transfer the matter from the Special Civil Part to the Law Division. (Da29).

On January 6, 2025, Velocity and Upgrade jointly moved to compel arbitration and stay the proceedings. (Da31). On February 28, 2025, the Trial Court denied the Motion to Compel Arbitration. (Da53). The Court's Order explicitly found that "the agreement to arbitrate is void as Upgrade was not a licensed lender and Velocity stands in the place of Upgrade." (Da54).

After filing an appeal, on March 13, 2025, Velocity filed a Motion to Stay Pending Appeal with the Appellate Division regarding the February 28, 2025 Order denying arbitration. (Da55). Despite the pending appeal, on March 20, 2025, Velocity and Upgrade filed a Motion for Reconsideration with the Trial Court mirroring the arguments taken in their initial motion. (Da58). The Appellate Division granted a limited remand on April 24, 2025 to address the reconsideration motion. (Da85).

On May 9, 2025, the Trial Court granted the Motion for Reconsideration. (Da88). The court reversed its prior ruling and ordered that "[t]he issues in this matter be submitted to arbitration... in accordance with the contractual provisions in the loan agreement." (Da89). Francis filed the instant appeal on June 23, 2025, challenging the May 9, 2025 Order. (Da90).

## **STATEMENT OF FACTS**

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On or around March 17, 2022, Francis allegedly initiated a request for a Upgrade personal line of credit with Upgrade which uses Cross River Bank.

See, Jan. 6, 2025 Certification of Michael Young (“First Young Cert.”), ¶6 (Da35) and the Upgrade Card Personal Credit Line Agreement (Da66).

Upgrade was involved from the beginning. Indeed, Upgrade “operates a national online consumer loan marketplace platform, via its website(s) and mobile application(s), including the website located at [www.upgrade.com](http://www.upgrade.com) (together, the "Site"), through which [a consumer] may request and apply for consumer installment loans or other financial products. Upgrade will also administer and service this Agreement on behalf of [Cross River Bank].” (Da66). See also, “Limited Power of Attorney for Executing Your Promissory Notes” (Da68).

Further, the Agreement incorporates “the Upgrade Terms of Use and your Consent to Conduct Business Electronically” as the entire agreement. (¶ 26.1, Da73).

This credit line was serviced by Upgrade from the beginning (¶ 9, Da69) and/or acquired by Third-Party Defendant Upgrade See, Mar. 20, 2025 Certification of Michael Young (“Second Young Cert.”), ¶¶6, 13 (Da62-Da63).

However, Upgrade was not licensed as a "consumer lender" or "sales finance company" under the New Jersey Consumer Finance Licensing Act ("NJCFLA"), N.J.S.A. 17:11C-3. See Countercl. ¶33 (Da14). Because Upgrade engaged in the consumer loan business without the mandatory licensure, the

underlying loan contract is statutorily void. *See* Countercl. ¶¶35-36 (Da14). Specifically, N.J.S.A. 17:11C-33(b) mandates that any contract of a loan made or collected upon in violation of the Act “shall be void and the lender shall have no right to collect or receive any principal, interest or charges.”

Despite the void status of the debt, Upgrade purportedly assigned the account to Plaintiff/Respondent Velocity Investments, LLC for the purpose of collection. *See* Compl. ¶2 (Da1). Velocity then began dunning Francis for the void debt, misrepresenting the status of the account and the creditor’s right to collect. *See* Countercl. ¶50 (Da16).

## **LEGAL ARGUMENT**

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### **POINT I. STANDARD OF REVIEW**

This Court’s standard of review of the Trial Court’s Order compelling arbitration is *de novo*. *See Barr v. Bishop Rosen & Co., Inc.*, 442 N.J. Super. 599, 605 (App. Div. 2015) (“The existence of a valid and enforceable arbitration agreement poses a question of law, and as such, our standard of review of an order denying a motion to compel arbitration is *de novo*”); *see also Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 186 (2013); *Frumer v. Nat’l Home Ins. Co.*, 420 N.J. Super. 7, 13 (App. Div. 2011).

When deciding a motion to compel arbitration, the Court must look to ordinary contract principles to determine whether a party is bound by the terms

of an alleged arbitration agreement. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (“When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”); *see also Martindale v. Sandvik, Inc.*, 173 N.J. 76, 85 (2002). It is axiomatic that “[t]he first step in determining the enforceability of an arbitration agreement is to determine whether a valid agreement exists.” *Martindale*, 173 N.J. at 81.

Even when an agreement contains a delegation clause, a court must make the initial finding that a valid arbitration agreement exists between the parties. *See Coinbase, Inc. v. Suski*, 602 U.S. 143, 151 (2024); *Adler v. Gruma Corp.*, 135 F.4th 55, 66 (3d Cir. 2025) (“notwithstanding the presence of a delegation clause, a court still may not send a dispute to arbitration without first determining that there is an agreement to arbitrate that is enforceable under applicable law”) (citing *New Prime Inc. v. Oliveira*, 586 U.S. 105, 111 (2019); *see also Hirsch*, 215 N.J. at 179; *Cottrell v. Holtzberg*, 468 N.J. Super. 59, 70-71 (App. Div. 2021). If a plaintiff is “not bound to the arbitration provision, they [are] necessarily not bound to its delegation clause.” *Adler*, 135 F.4th at 79.

Although the Federal Arbitration Act (“FAA”) encourages practices that enable disputes to be solved through arbitration, it is not a mandate that requires arbitration each and every time an arbitration clause may be part of a contract. *See Arafa v. Health Express Corp.*, 243 N.J. 147, 164-65 (N.J. 2020). 9 U.S.C. § 2 contains specific exceptions to the enforceability (or lack thereof) of arbitration clauses and states that arbitration is improper where “such grounds exist at law or in equity for the revocation of any contract.” It is axiomatic that any contract which, in its formation or performance, violates a statute, will not be enforced by the Court. *See Naseef v. Cord, Inc.*, 90 N.J. Super. 135, 142 (App. Div. 1966) (citing *Samuel D. Wasserman, Inc. v. Klahre*, 24 N.J. Super. 143, 148 (App. Div. 1952); *Lehigh Valley R. Co. v. United Lead Co.*, 102 N.J.L. 545 (Sup. Ct. 1926)). Further, “[o]ur courts have consistently held that public policy precludes enforcement of a contract entered into in violation of [the State's] licensing statute[s].” *Accountemps Div. of Robert Half, Inc. v. Birch Tree Grp., Ltd.*, 115 N.J. 614, 626 (1989); *see also Insight Global, LLC v. Collabera, Inc.*, 446 N.J. Super. 525, 531-32 (Ch. Div. 2015).

**POINT II. THE TRIAL COURT ERRED BY ENFORCING A "DELEGATION CLAUSE" WITHIN A CONTRACT THAT THE LEGISLATURE HAS DECLARED STATUTORILY VOID *AB INITIO*, THEREBY ENFORCING CONTRACTS THAT ARE PROHIBITED BY LAW. (RAISED BELOW: T1<sup>1</sup>)**

**A. The NJCFLA Expressly Declares Contracts by Unlicensed Lenders "Void," Creating a Statutory Bar to Enforcement.**

The Trial Court's order compelling arbitration rests on the legally erroneous premise that a contract declared "void" by the Legislature can still possess sufficient life to bind parties to its procedural terms. This contradicts the New Jersey Supreme Court's definitive holding in *Sun Life Assurance Co. of Canada v. Wells Fargo Bank, N.A.*, 238 N.J. 157 (2019), which establishes that contracts violating public policy mandates are *void ab initio*—treated as if they never existed.

In *Sun Life*, the Supreme Court analyzed whether "stranger-originated life insurance" (STOLI) policies were enforceable despite violating New Jersey's public policy against wagering on human life. *See generally id.* To determine the legal status of such contracts, the Court looked to New Jersey's anti-gambling statutes, specifically citing N.J.S.A. 2A:40-3, which declares that any agreement associated with gaming "shall be utterly void and of no effect". *See id.* at 173.

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<sup>1</sup> T1 refers to the transcript of the oral argument held before the Trial Court on May 9, 2025.

Here, the Legislature employed the exact same mandatory language in the NJCFLA as it did in the anti-gambling statute cited in *Sun Life*. N.J.S.A. 17:11C-33(b) commands that contracts in violation of the statute "**shall be void.**" It does not say "voidable." It does not say "unenforceable at the option of the borrower." It says "void." Just as the gaming contracts in N.J.S.A. 2A:40-3 are "utterly void and of no effect", the loan agreement here is a legal nullity.

Because the contract is void *ab initio* under *Sun Life*, "it is as though the [contract] never came into existence". *Sun Life*, 238 N.J. at 187. Consequently, **there is no contract** in which an arbitration clause or delegation provision can reside. To compel arbitration would require this Court to breathe life into a contract that the Legislature has declared dead on arrival, a result strictly prohibited by New Jersey Supreme Court precedent.

**B. The "Separability" Doctrine of *Rent-A-Center* Applies to "Voidable" Contracts, Not Those That Are Statutorily Void *Ab Initio*.**

The court erroneously relied on *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), and *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63 (2019), to argue that the "delegation clause" within the Credit Line Agreement must be enforced regardless of the contract's validity. (*See* T1, 19:17-20). This reliance ignores a critical distinction in contract law that the

United States Supreme Court and New Jersey courts have recognized: the difference between a contract that is merely *voidable* and one that is *void ab initio*.

In *Rent-A-Center*, the Supreme Court applied the "severability" rule to enforce a delegation clause where the plaintiff challenged the underlying contract as unconscionable. *Id.* at 66. Unconscionability is a defense that renders a contract *voidable*—meaning the contract is valid and binding until it is annulled by a court. Because a valid contract legally existed, the Court held that the specific agreement to arbitrate (the delegation clause) could be severed and enforced. *Id.* at 70-71.

Similarly, *Henry Schein* holds that when a valid contract delegates the question of arbitrability to an arbitrator, a court may not override that contract, even if the argument for arbitration appears "wholly groundless." 586 U.S. at 68. However, the holding in *Henry Schein* is explicitly premised on the existence of a valid agreement; the case did not involve a challenge to the *existence* or *legality* of the contract itself. The Court stated: "Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." *Id.* at 67. It logically follows that if the underlying contract is *void ab initio*—a legal nullity—there are no "terms" for a court to enforce. *Henry Schein* does not command courts to enforce provisions within a

contract that the Legislature has prohibited from existing.

Most recently, in *Coinbase, Inc. v. Suski*, the Supreme Court reaffirmed that "[a]rbitration is strictly a matter of consent" and that "before referring a dispute to an arbitrator... the court determines whether a valid arbitration agreement exists." 602 U.S. at 148-149 (first quoting *Lamps Plus, Inc. v. Varela*, 587 U. S. 176 (2019), then quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U. S. 63, 69 (2019)). The Court emphasized that where a challenge applies "equally" to the whole contract and the arbitration provision—such as a claim that the entire agreement is invalid—the court must decide that threshold issue. *Id.* at 151.

Here, Francis does not argue that the Credit Line Agreement is merely unconscionable or induced by fraud. Rather, Francis argues that under N.J.S.A. 17:11C-33(b), the entire transaction is statutorily **void**. As established above, in subsection A, a contract that is void *ab initio* is a legal nullity that is treated as if it “never came into existence.” *Sun Life*, 238 N.J. at 187 (2019).

Because the underlying loan agreement "never existed" in the eyes of the law, there is no "container" in which a valid delegation clause can reside. A legal nullity cannot delegate authority. If a plaintiff is “not bound to the arbitration provision, they [are] necessarily not bound to its delegation clause.” *Adler*, 135 F.4th at 79. Unlike the *voidable* contract in *Rent-A-Center*, or the

valid contract in *Henry Schein*, a void contract provides no legal basis for an arbitrator to act. To hold otherwise would allow parties to use a clause inside an illegal, non-existent contract to bypass the very courts charged with enforcing the Legislature's prohibition. There is no meaningful legal distinction between compelling arbitration based on a contract that is statutorily void *ab initio* and compelling arbitration against a party who never signed the agreement. In both instances, the legal instrument purporting to create the obligation is non-existent, and enforcing it would violate the foundational principle that "arbitration is strictly a matter of consent." See *Coinbase*, 602 U.S. at 143. Therefore, neither "separability" nor *Henry Schein* can save the delegation clause here; the purported contract does not legally exist and thus cannot be used to compel arbitration.

**C. The Trial Court Improperly Abdicated Its Constitutional Duty to Decide the Threshold Issue of Statutory Legality.**

The Trial Court's decision to compel arbitration rests on the erroneous conclusion that a "delegation clause" strips the judiciary of its power to determine whether a contract violates a strict liability statute. This ruling impermissibly transfers a core judicial function—statutory interpretation—to a private adjudicator. The question of whether the NJCFLA renders the underlying transaction void is not a dispute about contract terms or performance; it is a pure question of law regarding legislative prohibition.

Resolving this question requires a determination of public policy and legislative intent, functions that are uniquely the province of the courts. As Chief Justice Marshall famously declared: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). When a party asserts that a contract is statutorily void *ab initio*, they are asking the tribunal to define the boundaries of legal conduct in New Jersey. That definition must come from a judge, not an arbitrator whose authority is derived solely from the disputed instrument itself. It is logically incoherent to ask an arbitrator to determine if the contract that created their position is a legal nullity. If the contract is void *ab initio* due to statutory prohibition, then the source of the arbitrator's power never legally existed. An arbitrator cannot lift themselves up by their own bootstraps to decide the legality of the very document that purportedly gives them the authority to decide anything at all.

Respondents' argument would create a dangerous precedent: it would allow bad actors to immunize themselves from state laws simply by adding a procedural layer to their illegal contracts. This would be akin to a loan shark using a "delegation clause" in a criminally usurious note to force a borrower to argue the loan's illegality before a private adjudicator rather than a judge. In such a scenario, the clause functions as a shield against public accountability,

allowing the "void" transaction to survive long enough to dictate the terms of its own review. The Legislature enacted N.J.S.A. 17:11C-33(b) to extinguish such transactions immediately, not to subject them to private dispute resolution.

The Trial Court correctly recognized its duty in its initial February 28 Order, finding "the agreement to arbitrate is void as Upgrade was not a licensed lender". (Da54). By later reversing itself and sending this threshold legal question to an arbitrator, the Trial Court abdicated its constitutional role. The determination of whether the contract is void *ab initio* under New Jersey law is a gateway issue of legality that the Court must decide.

**POINT III. VELOCITY WAIVED ANY PURPORTED RIGHT TO ARBITRATE BY AFFIRMATIVELY INVOKING THE JUDICIAL PROCESS TO FILE A COLLECTION LAWSUIT. (RAISED BELOW: DA45-DA52)<sup>2</sup>**

Although practices that enable disputes to be solved through arbitration are often encouraged, there is no mandate that requires arbitration each and every time an arbitration clause may be part of a contract. *See Arafa*, 243 N.J.

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<sup>2</sup> Plaintiff preserved this issue in the trial court by expressly briefing it. Although trial-court briefs generally are not reproduced in an appellate appendix, Plaintiff includes the limited excerpt at Da45-Da52 because "the question of whether an issue was raised in the trial court is germane to the appeal," and *Rule* 2:6-1(a)(2) permits inclusion of "only the material pertinent to that issue." *See* R. 2:6-1(a)(2).

at 164-65. Even assuming *arguendo* that there is a valid arbitration agreement between the parties, Velocity chose to seek a court judgment rather than an arbitration award, thus acting inconsistently with its purported desire to compel arbitration with respect to claims related to Francis's alleged debt.

In *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1709-10 (2022), the United States Supreme Court determined that a court should not engage in efforts “fostering arbitration” and that actions taken by a party which are inconsistent with that party's purported desire to compel arbitration illustrate waiver of any alleged contractual right to compel arbitration. *See also White v. Samsung Elecs. Am., Inc.*, 61 F.4th 334, 340 (3d Cir. 2023). The Court rejected the addition of a need to show prejudice to establish waiver of an arbitration provision and held that the Federal Arbitration Act (which controls here) “did not authorize federal courts to create an arbitration-specific procedural rule requiring a finding of harm before a party could waive its right to arbitration. . .” *Id.* at 1709. Therefore, the cases that have found that a consumer waived any right to a jury trial by agreeing to a multipage agreement that included an arbitration agreement is now the same standard in determining if a business waives the arbitration agreement by voluntarily choosing to file a court action when there is an arbitration alternative available to it. In the same way the Courts have found that a consumer's passive consent to an agreement waives a

jury trial, *a fortiori* a creditor's active choice to file a court action rather than an arbitration claim shows waiver by that creditor.

In other words, “the [Federal Arbitration Act]” does not authorize the courts to invent arbitration-preferential rules.[] Thus, the [Supreme] Court directed the Courts of Appeal to ‘hold a party to its arbitration contract just as the court would to any other kind, but not devise novel rules to favor arbitration over litigation.’” *White v. Samsung Elecs. Am., Inc.*, 61.4th 334 (3d Cir. 2023) (quoting *Morgan* at 1713)).

Simply, “[w]aiver is a voluntary and intentional relinquishment of a known right.” *Knorr v. Smeal*, 178 N.J. 169, 177 (2003). Waiver need not be stated expressly but may be implied, “provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference.” *Id.*

In 2013, prior to the prejudice requirement for waiver being effectively removed by *Morgan*, the New Jersey Supreme Court analyzed waiver of arbitration in *Cole v. Jersey City Med. Ctr.*, 215 N.J. 265 (2013). In *Cole*, the court reasoned:

Any assessment of whether a party to an arbitration agreement has waived that remedy must focus on the totality of the circumstances. That assessment is, by necessity, a fact-sensitive analysis. In deciding whether a party to an arbitration agreement waived its right to arbitrate, we concentrate on the party's litigation conduct to determine if it is consistent with its reserved right to arbitrate the

dispute. *Among other factors, courts should evaluate: (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any. No one factor is dispositive. A court will consider an agreement to arbitrate waived, however, if arbitration is simply asserted in the answer and no other measures are taken to preserve the affirmative defense.*

*Cole*, 215 N.J. at 280-81 (emphasis added).

Here, Velocity made the conscious and voluntary choice to seek relief from the Superior Court of New Jersey and not from an arbitrator by seeking to collect monies from Francis.

Velocity waived the right to compel arbitration by seeking affirmative relief against Francis. A clear and expressed showing of a party's abandoning any right it may have had to compel arbitration is by bringing that claim in court instead. As the New Jersey Supreme Court explained:

It is generally considered that the bringing of an action at law is a revocation of an agreement to arbitrate, and although our former Supreme Court, in *Knaus v. Jenkins*, supra, held that a suit at law by one of the parties was not a revocation, we are of the opinion that the bringing of action by both parties on the subject matter of the agreement manifests a mutual change of mind and does accomplish a revocation. When all parties to an agreement to arbitrate elect to prosecute their respective claims by actions at law, and institute and carry forward the course thus elected, the logical, indeed the necessary, result of that course is an abandonment of arbitration and

a revocation of the agreement to pursue that form of adjudication. *McKeeby v. Arthur*, 7 N.J. 174, 182 (1951); *see also Cain v. Midland Funding*, 156 A.3d 807 (Md. 2017) (“Because Midland’s [previous] collection action is related to Cain's claims, Midland waived its right to arbitrate the current claims when it chose to litigate the collection action. In addition, Cain does not have to demonstrate that he suffered prejudice to establish that Midland waived the arbitration provision.”).

Moreover, the plain language of the Credit Line Agreement supports a finding of waiver. Section 16 ("Remedies") permits the lender to take "any remedy allowed by law" upon default, (Da70) while Section 18 ("Arbitration Agreement") provides that the lender "may, at its sole election," require arbitration (Da71). By filing a Superior Court complaint, Velocity affirmatively elected the litigation remedy under Section 16.

Notably, while Section 18(f) expressly exempts a *borrower's* small claims action from triggering arbitration (Da72), the Agreement contains no corresponding "safe harbor" provision allowing the *lender* to file a collection lawsuit without waiving its right to arbitrate. The absence of such a clause is dispositive. Furthermore, the general "no waiver" provision in Section 26.4 applies only to a "failure or delay" in exercising rights (Da74); it does not shield a party from the consequences of affirmatively invoking the judicial

process. Having chosen the path of litigation to the prejudice of Francis, Velocity cannot retreat to arbitration merely because it dislikes the counterclaim it invited.

Finally, Velocity's complaint contained a *R. 4:5-1* certification. (*See* Da1). Which requires "a certification as to whether the matter in controversy is the subject ... a pending arbitration proceeding, or whether any other action or arbitration proceeding is contemplated[.]" *R. 4:5-1*. Recently, in *Marmo & Sons Gen. Contracting, LLC v. Biagi Farms, LLC*, 478 N.J. Super. 593 (App. Div. 2024), the Appellate Division analyzed the *Cole* factors in light of the United States Supreme Court's decision in *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022). *Marmo* reiterated that prejudice is not an indispensable requirement for a finding of waiver *and* placed particular emphasis on correct *R. 4:5-1* certifications. *See Marmo*, 478 N.J. Super. at 605, 609.

*Marmo* through its counsel certified [in its *Rule 4:5-1(b)(2)* statement] that "no other action or arbitration proceeding is contemplated." The court observed, "[i]t is difficult to read that [certification] as other than a voluntary and intentional relinquishment of a known right. What else does that mean than 'we do not plan to go through arbitration?'"

\*\*\*

[J]udicial resources are wasted when a case is brought by a plaintiff and litigated in the Superior Court when it should have been pursued instead in arbitration. Consequently, we emphasize the importance of accurate *Rule 4:5-1(b)(2)* certifications at the outset of a case, and counsel's due diligence in promptly advising the court and

opposing counsel, on a continuing basis, as to whether arbitration might be sought.

*Id.* at 606, 613 (only last alteration added). Thus, the court in *Marmo* established that *R.* 4:5-1 certifications (swearing that no arbitration is contemplated) weigh heavily in favor of waiver because the certification provides an expressed and intentional relinquishment of a known right. *See Knorr v. Smeal*, 178 N.J. 169, 177 (2003).

**POINT IV. THE MOTION RECORD WAS INADEQUATE TO ESTABLISH RESPONDENTS' STANDING TO COMPEL ARBITRATION, AS THEY FAILED TO PROVE VALID ASSIGNMENT OF THE RIGHT TO ARBITRATE ABSENT LIMITED DISCOVERY. (RAISED BELOW: DA41-DA44)<sup>3</sup>**

The Third Circuit has held that if based on the face of the complaint, and documents relied upon in the complaint it is apparent that the parties' claims are subject to an enforceable arbitration agreement, the motion to compel arbitration should be considered under a Fed. R. Civ. P. 12(b)(6) (or the analogous *R.* 4:6-2(e)) motion to dismiss standard. *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 776 (3d Cir. 2013); *accord Goffe v. Foulke Mgmt. Corp.*, 238 N.J. 191, 214 (2019). On the other hand, if the

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<sup>3</sup> Plaintiff preserved this issue in the trial court by expressly briefing it. Although trial-court briefs generally are not reproduced in an appellate appendix, Plaintiff includes the limited excerpt at Da41–Da44 because “the question of whether an issue was raised in the trial court is germane to the appeal,” and *Rule* 2:6-1(a)(2) permits inclusion of “only the material pertinent to that issue.” *See* *R.* 2:6-1(a)(2).

complaint and its supporting documents are unclear regarding the agreement to arbitrate, or if the plaintiff has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate in issue, then "the parties should be entitled to discovery under Fed. R. Civ. P. 56 (or the analogous R. 4:46) on the question of arbitrability before a court entertains further briefing on the question. *Guidotti*, 716 F.3d at 776; accord *Goffe*, 238 N.J. at 214.

Under this standard, the party seeking to compel arbitration bears the initial burden of showing that "there is no genuine dispute as to any material fact" regarding the existence of a valid agreement to arbitrate. *Id.* at 773. If the materials before the court are unclear, or if the opposing party places the existence of the agreement in issue, the court must deny the motion and allow discovery. *Id.* at 774. Respondents failed to meet this burden because they did not produce competent evidence that either Velocity or Upgrade possesses the requisite standing to enforce the arbitration clause.

Arbitration is a matter of contract that requires mutual assent. *Knight v. Vivint Solar Developer, LLC*, 465 N.J. Super. 416, 425 (App. Div. 2020). The original Credit Line Agreement was entered into between Francis and Upgrade / Cross River Bank. Neither Upgrade nor Velocity is the original lender. Although Section 22 of the Agreement permits assignment, and Section 18

purports to cover "assigns," these provisions do not prove that an assignment *actually occurred*. To invoke the arbitration clause, both Respondents must prove a valid chain of assignment tracing the specific account from Cross River Bank to Upgrade, and ultimately to Velocity.

Respondents attempted to prove this critical chain of title solely through a certification that baldly asserted rights as "assignees," without attaching the actual assignment agreements, bills of sale, or forward flow agreements that purportedly transferred the account. (*See e.g.*, Da37). Without these controlling documents, it is impossible for the Court to determine *what* rights were actually transferred. In the debt buying industry, assignment agreements frequently transfer only the right to collect receivables (the money owed) while retaining or extinguishing other contractual rights, such as the right to compel arbitration. Or, the assignment contracts may contain specific carve-outs or limitations that would preclude arbitration of these specific claims.

By failing to produce the assignment contracts, Respondents left the Trial Court to guess at the nature and scope of the rights transferred from Cross River Bank. A general provision in the original loan agreement allowing for assignment is insufficient to prove that Velocity *is* in fact the assignee. Without proof of the specific assignment terms, there is no evidence of "mutual assent" between Francis and either Respondent to arbitrate disputes.

*See Knight*, 465 N.J. Super. at 428 (holding that the court must resolve issues of fact pertaining to formation before sending a matter to arbitration).

Because Francis explicitly challenged the standing of both Respondents and the validity of the purported assignments, the existence of an agreement to arbitrate with these specific parties was a material fact in dispute. Under *Guidotti*, the Trial Court was required to deny the motion and order limited discovery to resolve this threshold issue. *Guidotti*, 716 F.3d at 776. By instead granting the motion on a deficient record, the Trial Court erroneously relieved Respondents of their burden of proof and compelled arbitration based on contract rights they have not proven they possess.

## **CONCLUSION**

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The Trial Court erred by enforcing a delegation clause within a statutorily void contract, ignoring Respondents' affirmative waiver of arbitration, and granting relief without competent proof of standing. Accordingly, Francis respectfully requests that this Court reverse the order below, reinstate the initial ruling denying arbitration, and remand for further proceedings in the Law Division.

/s/ Yongmoon Kim  
Yongmoon Kim  
KIM LAW FIRM LLC

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**Superior Court of New Jersey**  
**Appellate Division**

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Docket No. A-003323-24

VELOCITY INVESTMENTS, LLC,	:	CIVIL ACTION
assignee of Cross River Bank,	:	
	:	
<i>Plaintiff-Respondent,</i>	:	ON APPEAL FROM A
	:	FINAL JUDGMENT OF
vs.	:	THE SUPERIOR COURT
	:	OF NEW JERSEY,
GREGORY FRANCIS,	:	LAW DIVISION,
	:	ESSEX COUNTY
<i>Defendant-Appellant,</i>	:	
	:	
and	:	Docket No. ESX-L-7501-24
	:	
GREGORY FRANCIS,	:	Sat Below:
	:	
<i>Counterclaimant-Appellant,</i>	:	HON. ROBERT H. GARDNER,
	:	J.S.C.
<i>(For Continuation of Caption</i>	:	
<i>See Next Page)</i>	:	

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**BRIEF FOR THIRD-PARTY DEFENDANT-RESPONDENT  
UPGRADE, INC.**

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Date Submitted: January 21, 2026

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vs. :  
: :  
VELOCITY INVESTMENTS, and :  
JOHN DOES 1 to 10, :  
: :  
    *Defendant on the Counterclaim-* :  
        *Respondent,* :  
: :  
and :  
: :  
GREGORY FRANCIS, :  
: :  
    *Third-Party Plaintiff-Appellant,* :  
: :  
vs. :  
: :  
UPGRADE, INC., and JOHN DOES :  
1 TO 10, :  
: :  
    *Third-Party Defendant-Respondent.* :  
:

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**PRELIMINARY STATEMENT**

Respondent, Third-Party Defendant Upgrade, Inc. (“Upgrade”), through its respective counsel, respectfully submits this brief in opposition to Appellant Counterclaimant and Third-Party Plaintiff Gregory Francis appeal from the Honorable Robert H. Gardner, J.S.C. Order of the New Jersey Superior Court: dated May 9, 2025, granting Respondent’s motion for reconsideration to compel arbitration.

Appellant’s arguments are wholly unavailing and include arguments that were not previously raised, and arguments based upon incorrect facts and statutory analysis. This appeal turns on a straightforward proposition: Appellant agreed to arbitrate, delegated threshold arbitrability issues to the arbitrator, and cannot evade that agreement by repackaging merits and licensing arguments as gateway disputes for a court to resolve. The trial court correctly reconsidered its initial ruling and compelled arbitration because the parties’ agreement is valid and enforceable, its arbitration clause sweeps broadly, and its delegation provision assigns disputes about enforceability and scope to the arbitrator.

The Complaint arises from a Credit Line Agreement Appellant executed on March 17, 2022, under which he obtained and used a personal credit line and promised to repay through installment payments. (Da1, Da46-49) That Agreement includes an arbitration provision defining “Claims” to encompass

any dispute “relating to or arising out of” the Agreement or the relationships flowing from it, expressly including challenges to “the validity or enforceability of this Arbitration Provision, any part thereof, or the entire Agreement,” and it is to be given the broadest enforceable interpretation. (Da56-58) The Agreement also provides that the arbitration provisions are governed by the Federal Arbitration Act. (*Id.*) Appellant acknowledged and agreed to the Arbitration Agreement, used the account, and did not exercise any opt-out right. (*Id.*)

Appellant’s brief offers newly minted theories and misreads authorities to avoid the parties’ bargain, but none justifies judicial resolution of issues the parties unmistakably delegated. He levels a global attack under the NJCFLA to claim the contract is “void,” yet he does not specifically challenge the delegation clause. Under settled severability and delegation principles incorporated by the agreement and recognized by New Jersey courts, the arbitrator must decide any dispute about the enforceability of the Agreement, the arbitration clause, and chain-of-title or assignment issues. The arbitration clause expressly extends to disputes involving Upgrade, and “any assigns,” and encompasses the validity or enforceability of the arbitration provision and the entire Agreement, regardless of whether claims arise in contract, tort, statute, equity, or otherwise. (Da65-58)

Nor did Respondents waive arbitration. Filing a collection action to recover an undisputed debt does not forfeit the contractual right to arbitrate once

a live dispute materializes and counterclaims are asserted; Velocity promptly pivoted to arbitration rather than litigating on the merits. (Da1-31) That litigation posture is consistent with preserving arbitration and avoids the inefficiency and risk of inconsistent outcomes that would follow from splintering arbitrable controversies.

Appellant's remaining efforts to manufacture threshold obstacles, whether by recasting licensing contentions as standing defects or invoking case law that does not govern a single-contract or single-delegation dispute, likewise fail. The FAA-governed arbitration provision is valid, the delegation clause is enforceable, Respondents did not waive arbitration, and Appellant's contract-wide challenges and licensing theories must be presented to the arbitrator.

Therefore, the trial court properly granted the Respondents' motion for reconsideration to compel arbitration because the Appellant was bound by a valid and enforceable arbitration agreement.

### **PROCEDURAL HISTORY**

Respondent adopts the procedural history set forth in the Appellant's moving appeal brief.

### **COUNTERSTATEMENT OF FACTS**

The Complaint centers around a Credit Line Agreement that Appellant executed on March 17, 2022. (Da46-49) Appellant initiated a request for a

personal credit line from Cross River Bank (“CRB”) on or around March 17, 2022, and executed the Credit Line Agreement the same day. (*Id.*). As a result of entering the Credit Account, Appellant was allowed to make charges totaling \$4,987.85 in exchange for a promise to repay with interest in the form of thirty-six regular payments beginning 51 days after the first draw on his credit line. (*Id.*)

The Credit Account contains an arbitration provision (the “Arbitration Agreement”) through which Appellant waived his right to file this lawsuit. (Da56-58) The Arbitration Agreement states that Appellant agreed that:

- “Claim” shall include “any claim including past, present, or future claim, dispute, or controversy involving you (or persons claiming through or connected with you), on the one hand, and CRB or Upgrade and/or any assigns of CRB or Upgrade (or persons claiming through or connected with CRB or Upgrade and/or any assigns of CRB or Upgrade, on the other hand, relating to or arising out of this Agreement and/or the activities or relationships that involve, lead to, or result from this Agreement.” (Da56)
- “including ... the validity or enforceability of this Arbitration Provision, any part thereof, or the entire Agreement. Claims are subject to arbitration regardless of whether they arise from

contract; tort (intentional or otherwise); a constitution, statute, common law, or principles or equity; or otherwise.” (*Id.*)

- “Claims including matters arising as initial claims, counter-claims, cross-claims, third-party claims, or otherwise.” The scope of this Arbitration Provision is to be given the broadest possible interpretation that is enforceable. (*Id.*)

The Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.*, governs the Credit Account. (Da57) The Credit Account states: “the arbitration provisions of this Note will be governed exclusively by the Federal Arbitration Act (Title 9 of the U.S. Code). (*Id.*)

Appellant acknowledged and agreed to the Arbitration Agreement and did not exercise any opt-out right under the Arbitration Agreement. (Da48)

Based on Appellant’s default, Respondent Velocity filed a complaint against Appellant in the Superior Court of New Jersey, Law Division, Special Civil Part, Essex County. (Da1) Velocity seeks to collect Appellant’s debt in the amount of \$5,605,64. (*Id.*) On September 16, 2024, Appellant filed an answer, affirmative defenses, and third-party counterclaim against Respondents. (Da4) Appellant seeks declaratory relief injunctive relief, and contends that the enforcement of the debt was unauthorized and unlawful because Respondents did not hold licenses allegedly necessary to collect a debt

under the New Jersey Consumer Finance Licensing Act, N.J.S.A. 17:11C-3, and that any assignment and/or rights under the Credit Line Agreement are void under N.J.S.A. 17:11C-33(b). (*Id.*) Appellant alleges causes of action under the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, unjust enrichment, and the Fair Debt Collection Practices Act, 16 U.S.C. § 1692, *et. seq.*

On October 4, 2024, Appellant moved to transfer this matter from the Special Civil Part to the Law Division. (Da29.) This Court granted the motion to transfer on October 25, 2024. (*Id.*)

On March 23, 2023, Respondents filed a joint motion to compel arbitration. (Da31) On February 28, 2025, the Honorable Robert H. Gardner, J.S.C. denied the Respondents' joint motion to compel arbitration. (Da38) Respondents moved for a stay pending appeal, which was granted on April 11, 2025. (Da68) Respondents then moved for reconsideration in a motion dated March 20, 2025. (Da43) Respondents also moved before this Court for a limited remand allowing the trial court to decide its motion for reconsideration, which was granted by Order on April 24, 2025. (Da70) In an order dated May 9, 2025, the Honorable Robert H. Gardner, J.S.C. granted Respondents' motion for reconsideration. (Da73). Appellant filed his notice of appeal on June 23, 2025 (Da75)

## ARGUMENT

### POINT I. STANDARD OF REVIEW

#### A. Standard of Review for Motions to Compel Arbitration

Rule 2:2–3(a) permits appeals as of right from all orders compelling or denying arbitration. The existence of a valid and enforceable arbitration agreement poses question of law, and as such, the standard of review of an order denying a motion to compel arbitration is de novo. *GMAC v. Pittella*, 205 N.J. 572, 587 (2011); *Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 186 (2013). “In reviewing such orders, [the Appellate Division] is mindful of the strong preference to enforce arbitration agreements, both at the state and federal level.” *Hirsch*, 215 N.J. at 186.

Additionally, when reviewing a motion for reconsideration, this Court applies an abuse of discretion standard. *Fusco v. Bd. of Educ. of City of Newark*, 349 N.J. Super 455, 462 (App. Div.), *certif. den.*, 174 N J 544 (2002); *Cummings v. Bahr*, 295 N.J. Super. 374, 389 (App. Div. 1996). “Reconsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice.” *Cummings*, 295 N J Super at 384. “Reconsideration is a matter to be exercised in the trial court's sound discretion.” *Capital Fin. Co. of Del. Valley, Inc. v. Asterbadi*, 398 N.J. Super. 299, 310 (App. Div.) (citing *Johnson v. Cyklop Strapping Corp.*, 220 N.J. Super. 250, 257 (App. Div. 1987), *certif. denied*, 110 N.J. 196 (1988)). Reconsideration is warranted when “either (1) the Court has

expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance or probative, competent evidence.” *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1986). “If a litigant wishes to bring new or additional information to the Court's attention which it could not have provided on the first application, the Court should, in the interest of justice (and in the exercise of sound discretion), consider the evidence.” *Id.*

Here, the Arbitration Agreement specifically incorporates the FAA and, thereby, invokes the body of federal case law interpreting arbitration agreements under the FAA. (Da50-64) That body of law clarifies that, as the United States Supreme Court has held repeatedly, “courts must rigorously enforce arbitration agreements according to their terms.” *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (holding courts must enforce arbitration agreements even where the cost of arbitrating individual claims would exceed recovery) (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

Stated another way, the “emphatic federal policy in favor of arbitral dispute resolution” embodied by the FAA “requires courts to enforce the bargain of the parties to arbitrate.” *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011) (internal citation omitted); *see also Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 532-33 (2012) (holding the FAA “requires courts to enforce the

bargain of the parties to arbitrate”); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (holding the FAA’s “liberal federal policy favoring arbitration agreements” requires courts to enforce arbitration agreements even where federal statutes create a private right of action).

New Jersey has long favored arbitration as a method of resolving disputes. *Hirsch*, 215 N.J. at 174. As early as 1923, with its enactment of the New Jersey Alternative Procedure for Dispute Resolution Act, the New Jersey legislature recognized the validity of agreements to arbitrate. *See* N.J.S.A. 2A:24-1 (“a written agreement to submit ... any existing controversy to arbitration ... shall be valid, enforceable and irrevocable ....”). Since then, New Jersey courts have consistently acknowledged the public policy favoring arbitration and have upheld arbitration provisions. *See Martindale v. Sandvik*, 173 N.J. 76, 83, 96-97 (2002) (reaffirming strong public policy enforcing arbitration provisions, even one contained in standard form employment application; citing a string of cases upholding arbitration agreements); *Marchak v. Claridge Commons, Inc.*, 134 N.J. 275, 281 (1993) (“arbitrators function with the support, encouragement, and enforcement power of the State”); *Singer v. Commodities Corp.*, 292 N.J. Super. 391, 401 (App. Div. 1996) (“our courts have long favored the settlement of disputes by

arbitration;” citing cases) (quoting *Stigliano v. Saint Rose High Sch.*, 198 N.J. Super. 520, 529 (App. Div. 1984)).

Indeed, recognizing the strong public policy in favor of arbitration in New Jersey, the *Marchak* court stated that New Jersey courts must liberally construe agreements to arbitrate all manner of claims. *Id.* at 281 (“an agreement to arbitrate should be read liberally in favor of arbitration”) (citations omitted); *see also Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (“any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”); *AT&T Techs. Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986) (the “presumption [in favor of arbitrability] is particularly applicable where the [arbitration] clause is ... broad”).

Accordingly, “courts operate under a presumption of arbitrability” such that “an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Curtis v. Clco Pship*, 413 N.J. Super. 26, 34 (App. Div.), *certif. denied* 203 N.J. 94 (2010).

Because the Arbitration Agreement invokes the FAA, and the evidentiary record confirms that the Appellant agreed to its terms, and there is no disagreement that the arbitration agreement covers the dispute at issue, this

Court must affirm the trial court's decision to compel arbitration and grant reconsideration.

## **POINT II. THE DELEGATION CLAUSE IS ENFORCEABLE**

### **A. Arbitrability Was Properly Referred to The Arbitrator**

Appellant presents numerous unresponsive reasons why the Arbitration Agreement is unenforceable. Appellant's principal position is that the NJCFLA renders the entire credit transaction "void," thereby precluding enforcement of any term, including the delegation clause. (AB 11-15) But the Appellant acknowledges the presence of an arbitration provision and frames its attack as one directed at the entire contract rather than specifically at the arbitration agreement or the delegation clause. (*Id.*) Under severability principles, where a party challenges the contract as a whole on a ground not specific to the arbitration agreement, the delegation clause must be enforced and the arbitrator decides validity issues. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019); *Amalgamated Transit Union, Local 880 v. N.J. Transit Bus Operations, Inc.*, 200 N.J. 105 (2009) (holding "[a] court's duty is to refrain from adjudicating the merits of a dispute that properly belongs to an arbitrator"); *Spring Oaks Cap. SPV, LLC v. Banton*, No. A-3315-22, 2024 WL 1564441, at \*2 (N.J. Super. Ct. App. Div. Apr. 11, 2024), *cert. denied*, 259 N.J. 371 (2024)

(citing *Henry Schein* and holding that “a court may not decide an arbitrability question that the parties have delegated to an arbitrator.”).

The Appellant’s citations to inapposite cases only strengthen the trial court’s decision to refer this case to arbitration. *First*, the Appellant makes a devious argument that the decision in *Sunlife Assurance Co. of Canada v. Wells Fargo Bank, N.A.*, 238 N.J. 157 (2019) stands for the proposition that the contract is void, which makes the Arbitration Agreement void *ab initio* so that it never came into existence. (AB 9-10) This argument is entirely meritless as it applies to this case. In *Sun Life*, the New Jersey Supreme Court analyzed STOLI policies through New Jersey’s anti-gambling framework and emphasized that such contracts are void *ab initio* and treated as if they never existed. *Sun Life Assurance of Canada*, 238 N.J. at 157. Importantly, *Sun Life*’s holding addressed the global voidness of the insurance policy and its proceeds without severability of ancillary provisions, whereas this case turns on whether any arbitration or delegation clause can be severed from, or survive within, an alleged statutorily void consumer credit agreement. Moreover, arbitration was not the focus in *Sun Life*; by contrast, the central question here is whether a court may enforce an arbitration delegation clause embedded in a contract alleged to be void under the NJCFLA, a threshold issue that *Sun Life*’s did not address.

*Second*, the trial court did not erroneously rely on the *Rent-A-Center* and *Henry Schein* decisions. The opposite is true. In *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), the United States Supreme Court held as valid a provision in a contract that delegated to the arbitrator the question of arbitrability under circumstances in which the plaintiff challenged only the validity of the contract as a whole, rather than mounting a challenge to the validity of the delegation provision specifically. *Id.* at 72. In doing so, the Supreme Court reaffirmed an earlier holding in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) to the same effect and added that a party opposing a motion to compel arbitration on an arbitrability issue must specifically challenge the delegation clause itself rather than assert a general challenge to the validity of the contract as a whole. *Ibid.* The Supreme Court explained that section two of the FAA “states that a ‘written provision’ ‘to settle by arbitration a controversy’ is ‘valid, irrevocable, and enforceable’ without mention of the validity of the contract in which it is contained.” *Id.* at 70. Thus, it follows that the arbitration agreement may be valid even if the underlying contract is not. *Ibid.*

As a result, because the plaintiff, in that case, challenged only the validity of the contract as a whole, the delegation of authority to the arbitrator to resolve disputes relating to the enforceability of the agreement was valid. *Id.* at 72-73.

The New Jersey Supreme Court has acknowledged the legitimacy and applicability of the *Rent-A-Center* holding to delegation provisions in New Jersey arbitration agreements. *Goffe v. Foulke Mgmt. Corp.*, 238 N.J. 191, 210–11 (2019).

For at least the last decade, New Jersey law generally required courts to refer arbitrability issues to an arbitrator when the parties agreed to do so. *Amalgamated Transit Union, Local 880*, 200 N.J. at 118. Additionally, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, changed the legal landscape in early 2019 by holding that when the contract delegates the question of arbitrability to an arbitrator, a court may not override the contract, even if the court thinks that the argument that the arbitration agreement applies to the dispute is “totally groundless.” *Henry Schein, Inc.*, 139 S. Ct. 524, 528-29. The holding in *Henry Schein, Inc.* is now the law of every state, including New Jersey. Appellant is challenging the agreement as a whole by arguing that it is unenforceable for violations of the NJCFLA. The Arbitration Agreement delegates that issue solely to an arbitrator.

The Arbitration Agreement clearly and expressly states that “Claim” includes “the validity or enforceability of this Arbitration Provision, any part thereof, or the entire Agreement. Claims are subject to arbitration regardless of whether they arise from contract, tort (intentional or otherwise), a constitution,

statute, common law, or principles of equity, or otherwise.” (Da56-58). Therefore, the threshold issue of arbitrability is for the arbitrator to determine. *See, e.g., Raia v. CohnReznick LLP*, 2020 WL 3408732, at \*3 (App. Div. June 22, 2020) (affirming Judge Robert C. Wilson's grant of the motion to compel arbitration and denial of the motion for reconsideration, both of which relied upon *Henry Schein, Inc.*); *Jackson-Billie v. Virtua Mem'l Hosp. Burlington County, Inc.*, No. A-0418, 2020 WL 1983054, at \*3 (App. Div. Apr. 27, 2020) (affirming grant of motion to compel arbitration in reliance upon *Henry Schein, Inc.*); *Maisano v. LVNV Funding, LLC*, No. A-1775-18T2, 2019 WL 6341035, at \*2 (N.J. Super. Ct. App. Div. Nov. 27, 2019).

*Third*, Appellant makes a baseless argument that the decision in *Coinbase, Inc. v. Suski*, 144 S.Ct. 1186 (2024) stands for the proposition that a court must make a preliminary determination of a contract's validity. (*Id.* at pp. 8-9) This argument is entirely meritless and a complete misrepresentation of the holding in *Suski*. In *Suski*, the Supreme Court considered a dispute involving two contracts, one of which the plaintiff claimed superseded the other. *Suski*, 144 S. Ct. at 1190. *Suski* did not change or modify any of the well-settled legal principles governing arbitration agreements as are applicable here, including: (1) “arbitration is a matter of contract”; (2) arbitration agreements in contracts, standing alone, are “valid, irrevocable, and enforceable”; and (3) while

arbitration is a matter of consent, that consent is manifested through a binding arbitration agreement. *Suski*, 144 S. Ct. at 1192. Appellant's reliance on *Suski* is misplaced. That case involved a question of which contract controls for arbitration purposes when a court is faced with two contracts with competing delegation clauses—one sending the arbitrability of disputes to the arbitrator and the other sending it to the courts. *Id.* at 1192-1194. That question is not before this Court since the unambiguous terms of the Arbitration Agreement in the Credit Account mandate that the Parties' dispute be arbitrated. (Da56-58.)

The Appellant provides no authority to suggest that the reasoning in *Suski* would be extended here. Unlike in *Suski*, the parties in this case did not sign multiple contracts containing multiple forum selection clauses. Instead, Appellant's agreement delineated questions of enforceability to an arbitrator. (*See id.*)

Moreover, the Appellant's arguments have been flatly rejected by this Court in comparable cases. Indeed, legal counsel for Appellant in this action, the Kim Law Firm, is the very same legal counsel that represented the appellants in both the *Maisano* and *Banton* cases before this Court, which upheld the decisions to compel arbitration. *Banton*, No. A-3315-22, 2024 WL 1564441, at \*2; *Maisano*, 2019 WL 6341035, at \*4 (same); *see also CohnReznick LLP*, 2020 WL 3408732, at \*3; *Jackson-Billie*, 2020 WL 1983054, at \*3 (same). Where

specified disputes are properly delegated, the disputes are within the exclusive determination of the arbitrator. *Id.*

### **POINT III. VELOCITY DID NOT WAIVE ARBITRATION**

#### **A. Filing Suit Did Not Forfeit the Right to Arbitrate**

Appellant asserts that Velocity waived the right to arbitration when it filed the collection lawsuit. In doing so, Appellant ignores the relevant case law while attempting to misconstrue inapplicable case law.

Appellant relies heavily upon a 2022 United States Supreme Court decision – *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022). In *Morgan*, the Supreme Court held that the waiver analysis focuses "on the actions of the person who held the right." *Id.* at 1713. "The court seldom considers the effects of those actions on the opposing party." *Id.* As such, the *Morgan* Court held that when evaluating whether a party has waived a right, it is improper to require a showing of prejudice on the non-moving party. That being said, waiver is to be determined by the "circumstances and context of each case." *Gray Holdco, Inc. v. Cassidy*, 654 F.3d 444, 452 (3d Cir. 2011).

The Third Circuit Court of Appeals recently considered the waiver standard in light of the *Morgan* holding. See *White v. Samsung Electronics America, Inc.*, 61 F. 4<sup>th</sup> 334 (3d. Circ. 2023). As stated by the *White* Court,

Applying the general rule for waiver as *Morgan* directs, waiver occurs where a party has "intentional[ly]

relinquish[ed] or abandon[ed] . . . a known right." In analyzing whether a waiver has occurred, a court focuses on the actions of the party who held the right and is informed by the circumstances and context of each case.

*Id.* at 338.

The *White* Court found that Samsung should have known it could have arbitrated the claims from the beginning, but instead pursued dismissal on the merits. Only when it appeared that further litigation would be necessary did Samsung seek to compel arbitration. The underlying case was filed originally in 2017. As further stated by the *White* Court,

Samsung's pursuance of dismissal of the action and failure to notify plaintiffs or the Court of its right to arbitrate, prior to May 2020, demonstrated a decision to pursue the benefits of litigating its arbitrable claims and is inconsistent with an intent to arbitrate. Contrary to Samsung's contention, a motion to compel arbitration—or at the very least notice of an intent to seek arbitration—would not have been "futile."

*Id.* at 334. Thus, the *White* Court found that Samsung had acted inconsistently with the intent to arbitrate.

In this matter, Velocity filed a complaint to collect the debt in the Special Civil Part. (Da1) Appellant exercised his right to file an answer, counterclaim, and third-party claim, which was then transferred to the Law Division. (Da4-29) Because Appellant disputed aspects of the allegations in the complaint, Velocity took no further action in the lawsuit and instead invoked its

right to arbitration. Nothing about Velocity's actions before that constitutes an intentional relinquishment or abandonment of its right to arbitration, and Appellant's claims to the contrary are without merit. *See Banton*, No. A-3315-22, 2024 WL 1564441, at \*3 ("Banton's interpretation of waiver suggests that a lending entity would be barred from arbitration by filing a complaint. This is an absurd conclusion, because a complaint could result in default or payment of the debt, neither of which would necessitate the invocation of an arbitration clause. It is only when a dispute arises, as demonstrated by Banton's actions in this matter, that a lender must decide whether to invoke arbitration or waive arbitration and litigate the matter.")

Further, in support of Appellant's position, he relies upon a 2017 Maryland decision (*Cain v. Midland Funding*, 452 Md. 141, 158 (2017)). In *Cain*, the defendant sought to compel arbitration years after it obtained a judgment on the account. Thus, the case cited by Appellant is an extreme case in which it is clear that a waiver took place.

Moreover, if the Court were to allow the other parties to arbitrate the claims and leave Velocity to litigate, there is a possibility of conflicting decisions. The allegations made by Appellant and the defenses to the same are "interconnected and intertwined that any other decision would promote the chaos and inefficiency of piecemeal litigation....the interest of justice" weighs

in favor of having all parties arbitrate all claims. *See PNY Technologies, Inc. v. Samsung Electronics Co.*, 2011 WL 900154 (D.N.J. March 14, 2011).

Additionally, the Credit Line Agreement's remedies clause does not convert a litigation filing into a forfeiture of the contractual right to arbitrate, and nothing in the agreement requires a lender-only “safe harbor” to preserve arbitration. *Delta Funding Corp. v. Harris*, 189 N.J. 28, 48 (2006) (determining that where lender reserves judicial foreclosure remedy but only arbitration is available for mortgagee's claims, possibility that mortgagee may be “forced to litigate those substantively similar claims in two different forums” is “burdensome; however, it is not unconscionable”)

Also, Appellant raises, for the first time on appeal, a new argument that a state court Rule 4:5-1 certification filed by Velocity somehow serves as a waiver to compel arbitration. As an initial matter, Appellant’s argument should not be considered because Appellants failed to make any such argument to the trial court. *Zaman v. Felton*, 219 N.J. 199, 226-27 (2014); *State v. Robinson*, 200 N.J. 1, 20 (2009).

In any event, Appellants' argument is meritless. Rule 4:5-1 is a New Jersey State Court rule that requires a particular statement—certifying that a matter in controversy is not subject to another court action or arbitration proceeding—to accompany a party's first pleading (a “complaint” or an “answer”). *See* R. 4:5-

1. Appellant argues that Velocity's certification when it filed the lawsuit seeking to collect Appellant's debt somehow waived the right to arbitrate claims. In addition to being facially meritless, Appellant's argument has been rejected by this Court. *See Ocean Fireproofing, LLC v. 23rd St. Urb. Renewal JOF AAI III, LLC*, No. A-0388-23, 2024 WL 2683968, at \*7 (N.J. Super. Ct. App. Div. May 24, 2024)(finding no waiver of arbitration rights despite counsel filing a Rule 4:5-1 certification that no arbitrations were contemplated).

Furthermore, the facts of this case are wholly dissimilar to *Marmo & Sons Gen. Contr., LLC v. Biagi Farms, LLC*, 478 N.J. Super. 593, (App. Div. May 24, 2024). Unlike the litigant in *Marmo*, Respondents did not avail themselves to the court for an extended period of time before only raising arbitration rights after receiving the benefits of litigation before the court (i.e., partial dismissal of claims and extensive discovery). *Marmo*, 478 N.J. Super at 610-11 (waiver occurred after the plaintiff, the entity that filed the lawsuit in the first place, engaged in extensive discovery, during which over 800 pages of documents and several gigabytes of E-discovery were provided to them). The plaintiff then refused to reciprocate and did not provide discovery responses, instead moving to compel arbitration.)

The trial court's decision finding that Respondents did not waive the right to arbitration should be affirmed.

#### **POINT IV. LIMITED DISCOVERY IS NOT NECESSARY**

##### **A. The Record Supports Respondents' Ability to Enforce Arbitration**

The Appellant's argument that the Respondent lacks standing to compel arbitration is entirely conclusory. The Credit Line Agreements permit assignment and include assignments within the arbitration clause. (Da 5-49) The challenge to the chain of title concerns the scope and effect of assignments embedded in the parties' contractual relationship, which falls within the arbitrability gateway issues that the parties delegated. Even if this Court were to consider Appellant's contention that the assignments were void, Appellant is the one who lacks standing to assert that claim under the NJCFLA.

*First*, the Arbitration Agreement clearly and expressly states that "Claim shall include any past, present, or future claim, dispute or controversy involving you ... Upgrade and/or any assign of CRB or Upgrade ... relating to or arising out of this Agreement and/or the activities or relationships that involve, lead to, or result from this Agreement ... including ... the validity or enforceability of this Arbitration Provision, any part thereof, or the entire Agreement. Claims are subject to arbitration regardless of whether they arise from contract, tort (intentional or otherwise), a constitution, statute, common law, or principles of equity, or otherwise." (Da56)

Therefore, the threshold issue of arbitrability is to be determined by the arbitrator, not by this or any other court. *See, e.g., Banton*, 2024 WL 1564441, at \*2; *CohnReznick LLP*, 2020 WL 3408732, at \*3; *Jackson-Billie v. Virtua Mem'l Hosp. Burlington County, Inc.*, 2020 WL 1983054, at \*3 (App. Div. Apr. 27, 2020) (affirming grant of motion to compel arbitration in reliance upon *Henry Schein, Inc.*); *Maisano*, 2019 WL 6341035, at \*4 (same). As such, whether Upgrade and/or its assignee Velocity had the proper licenses under the NJCFLA is not an issue for this Court to decide, but rather an issue only for the arbitrator.

*Second*, even if this Court were to consider Appellant's arguments under the NJCFLA, Appellant lacks standing even to bring such an action. *See Francavilla v. Absolute Res. VI.*, 478 N.J. Super. 171, 182 (App. Div. 2024); *Jefferson Cap. Sys., LLC v. Glover*, No. A-3545-22, 2024 WL 3039784, at \*4 (N.J. Super. Ct. App. Div. June 18, 2024), *cert. denied*, 260 N.J. 289 (2025) (affirming *Francavilla's* holding that there is no private right of action under the NJCFLA); *Portfolio Recovery Assocs., LLC v. Chartonavich*, No. A-1088-23, 2024 WL 4533275, at \*3 (N.J. Super. Ct. App. Div. Oct. 21, 2024) (same); *Diana v. LVNV Funding LLC*, No. A-1000-23, 2024 WL 4296874, at \*3 (N.J. Super. Ct. App. Div. Sept. 26, 2024) (per curiam) ("We found the plaintiff in *Francavilla* lacked standing under the CFLA to proceed with a class action since

there was no legislatively-crafted private right of action. We see no reason to depart from our conclusion in *Francavilla* in this case. Plaintiff relies solely on non-binding authority to argue that there is an implied private right of action under the CFLA. We are unconvinced by plaintiff's suggestion that we should contravene the plain statutory language of the CFLA.”).

**CONCLUSION**

For the reasons above, the Respondent respectfully requests that the Court: **(i)** affirm the Order granting Respondents' motion for reconsideration to compel arbitration; and **(ii)** grant any other relief deemed just and proper.

Dated: New York, New York  
January 21 2026

Respectfully submitted,

**TROUTMAN PEPPER LOCKE LLP**

By: *s/ Joseph M. DeFazio*

Joseph M. DeFazio

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**REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT  
GREGORY FRANCIS**

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## **PRELIMINARY STATEMENT**

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This appeal presents a threshold question of contract existence and arbitral authority. Defendant-Appellant Gregory Francis (“Francis”) challenges the order compelling arbitration entered in favor of Plaintiff-Respondent Velocity Investments, LLC (“Velocity”) and Third-Party Defendant-Respondent Upgrade, Inc. (“Upgrade”) (collectively, “Respondents”).

Respondents’ position rests on a mischaracterization of the dispute. Francis does not challenge the validity of a particular provision within an existing agreement. He challenges the entire contract. He contends that Respondents’ unlicensed lending conduct triggered the New Jersey Consumer Finance Licensing Act (“NJCFLA”), N.J.S.A. 17:11C-1 to -49, which provides that contracts made in violation of the statute “shall be void” and unenforceable. A contract declared void ab initio is treated as though it never came into legal existence and cannot supply a delegation clause or arbitral jurisdiction.

Even if a contract capable of delegation existed, Respondents independently forfeited any right to arbitrate by electing to litigate, certifying that no arbitration was contemplated, and failing to establish a competent chain of assignment conferring standing to compel arbitration. Respondents’ brief does not confront those threshold defects. Instead, it attempts to reframe a

formation and existence dispute as a mere validity challenge, and to shift issues of contract existence and contractual entitlement to an arbitrator.

Because the NJCFLA voidness challenge places the very existence of any agreement in dispute; because courts—not arbitrators—must determine whether a valid arbitration agreement exists and who may enforce it; and because Respondents waived arbitration and failed to establish standing in any event, the order compelling arbitration cannot stand. The Court should reverse, reinstate the original order denying arbitration, and remand for further proceedings.

## LEGAL ARGUMENT

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**POINT I. BECAUSE THE NJCFLA RENDERS UNLICENSED LOAN CONTRACTS VOID AB INITIO, APPELLANTS' CHALLENGE GOES TO CONTRACTUAL EXISTENCE AND FORMATION—NOT VALIDITY—AND THEREFORE CANNOT BE DELEGATED TO AN ARBITRATOR.**

Respondents' principal argument, that Appellants' challenge must be sent to the arbitrator under *Rent-A-Center* and *Henry Schein*, (Rb<sup>1</sup>11–16), rests on a foundational mischaracterization of the claim. They never grapple with the threshold issue: Appellant's argument is not a validity challenge to an existing contract, but an existence and formation challenge grounded in a statute that declares the agreement void ab initio and therefore treated as

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<sup>1</sup> “Rb” refers to Respondent's Joint Brief.

though it never existed. Because a delegation clause cannot be severed from a contract that never legally came into being, the severability framework on which Respondents rely is inapplicable.

The severability cases relied on by Respondents all presuppose the existence of a contract from which an arbitration or delegation clause can be severed. (*See* Db<sup>2</sup>10-13). The critical distinction that Respondents ignore is the difference between a challenge to *provisions within the four corners of a contract* and a challenge based on *extracurricular conduct* that renders the entire contract void by operation of law.

Here, Francis does not challenge a provision within the Credit Line Agreement. For example, he does not argue that any term is unconscionable, that the arbitration clause lacks mutuality, or that the delegation provision is procedurally defective. Rather, Francis argues that Respondents' *conduct*—engaging in the consumer loan business without the mandatory license required by N.J.S.A. 17:11C-3—triggered a statutory consequence that the Legislature has declared shall render the contract void. N.J.S.A. 17:11C-33(b). The challenge is not to the contract's provisions but to the legality of the *conduct* that produced it.

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<sup>2</sup> “Db” refers to Defendant-Appellant’s Opening Brief.

Because the NJCFLA targets the lender's conduct, the challenge necessarily places the existence of the contract in dispute. This is not a challenge that can be "severed" from the arbitration clause because it does not originate from within the contract at all. It originates from the Legislature's determination that certain conduct is prohibited and that contracts produced by that conduct are *legal nullities*.

Respondents' effort to dismiss *Sun Life Assurance Co. of Canada v. Wells Fargo Bank, N.A.*, 238 N.J. 157 (2019), because it "did not address" arbitration (Rb12) is a non sequitur. *Sun Life* establishes the *general principle* of New Jersey law that when the Legislature declares a contract "void," that contract is treated as if it "never came into existence." *Id.* at 187. The absence of an arbitration issue in *Sun Life* does not limit the reach of its holding on void contracts—it simply means the question of what happens to an arbitration clause inside a void contract was not presented. That question is presented here, and the answer follows inescapably from *Sun Life's* reasoning: if the contract never came into existence, there is no contract in which an arbitration or delegation clause can reside.

Because the NJCFLA's void-contract command is triggered by the lender's unlicensed criminal conduct—not by any deficiency in the contract's provisions—the severability framework of *Rent-A-Center* and *Henry Schein* is

inapplicable. Those cases provide the rules for severing and enforcing provisions *within* an existing contract. They do not, and cannot, supply the rules for enforcing provisions within a contract when the Legislature has declared the contract does not exist.

**POINT II. THE COURT—NOT AN ARBITRATOR—MUST DETERMINE WHETHER A VALID ARBITRATION AGREEMENT EXISTS.**

Respondents misunderstand *Coinbase, Inc. v. Suski*, 602 U.S. 143 (2024). (Rb15.) *Coinbase* reaffirms a foundational principle of arbitration law: “before referring a dispute to an arbitrator . . . the court determines whether a valid arbitration agreement exists.” *Coinbase*, 602 U.S. at 149. It follows then, a court should decide whether the contract exists.

Respondents attempt to confine *Coinbase* to its facts—a dispute involving competing delegation clauses in separate contracts. (Rb15–16.) But the Supreme Court’s statement was not a fact-bound observation; it was a general restatement of the judiciary’s threshold obligation. The principle is embedded throughout arbitration jurisprudence. New Jersey’s Arbitration Act provides that “[t]he court shall decide whether an agreement to arbitrate exists.” N.J.S.A. § 2A:23B-6(b) (emphasis added). The Appellate Division has held that “[c]ontract formation issues relating to an arbitration agreement containing a delegation clause are properly resolved by the trial court, not an arbitrator.” *Murray v. Manorcare-West Deptford of Paulsboro NJ, LLC*, No.

A-5640-16T1, 2018 N.J. Super. Unpub. LEXIS 1269, at \*11–12 (App. Div. May 31, 2018) (Dra1)<sup>3</sup>. And the New Jersey Supreme Court has confirmed that "[t]he first step in considering plaintiff's challenge to enforcement of an arbitration requirement must be to determine whether a valid agreement exists." *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 83 (2002). Consistent with those authorities, the Third Circuit has rejected any suggestion that delegation clauses create a categorical bar to judicial review of arbitrability. Indeed, *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229 (3d Cir. 2020), clarified that *Henry Schein* “did not change the rule that courts must first decide whether an arbitration agreement exists at all.” *Id.* at 237 n.7.

That rule reflects a basic premise: arbitration derives its legitimacy from consent. A putative delegation clause embedded in a contract whose existence or legality is disputed cannot supply its own jurisdiction. To hold otherwise would permit private parties to manufacture arbitral authority without judicial confirmation that any agreement exists under governing law.

**POINT III. FRANCAVILLA DOES NOT DEPRIVE THE COURT OF AUTHORITY TO DETERMINE WHETHER THE CONTRACT IS VOID, AND ANY PRIVATE-RIGHT-OF-ACTION ARGUMENT GOES ONLY TO THE MERITS OF A SINGLE COUNT**

Respondents argue that Francis lacks “standing” to invoke N.J.S.A.

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<sup>3</sup> “Dra” refers to Defendant-Appellant’s Reply Appendix.

17:11C-33(b) based on *Francavilla v. Absolute Resolutions VI, LLC*, 478 N.J. Super. 171 (App. Div. 2024), asserting that the NJCFLA contains no private right of action. (Rb23–24.) That contention conflates two analytically distinct questions: whether a complaint states a cause of action under the statute, and whether a court may determine if a contract is void and therefore incapable of delegating arbitral authority.

At the outset, this argument is now directed only to the merits of one count in the complaint. Even assuming Respondents’ characterization of *Francavilla* was correct, it would *at most* support a motion to dismiss the NJCFLA count. It does not affect the threshold question presented here—whether the contract is void by operation of statute and therefore incapable of conferring arbitral jurisdiction. That issue precedes and is independent of the viability of any single cause of action.

Nor does *Francavilla* hold what Respondents claim. The Appellate Division did not conduct any analysis of whether the NJCFLA creates an implied private right of action, nor did it apply the three-factor test adopted in *In re Resolution of State Comm’n of Investigation*, 108 N.J. 35 (1987) to determine an implied private right of action. The case turned on the entire controversy doctrine and affirmed dismissal on that ground. *See Francavilla*, 478 N.J. Super. at 180. The lone sentence noting that the NJCFLA lacks a

private right of action appears only in passing, without analysis, and was unnecessary to the disposition. Such a statement is properly classified as dicta<sup>4</sup> and does not constitute a controlling holding. *Marconi v. United Airlines*, 460 N.J. Super. 330, 339 (App. Div. 2019) (“where dictum is ‘not necessary to the decision then being made[,]’” it “‘does not invoke the principle of stare decisis.’”).

More fundamentally, even if *Francavilla* were read to foreclose a private damages action under the NJCFLA, that would not resolve the question before this Court. A private right of action addresses whether a plaintiff may recover damages under a statute. It does not determine whether a court may recognize and apply a statutory command that a contract “shall be void” and unenforceable. Those are distinct inquiries. The broader issue here is who decides whether the contract exists and can confer arbitral authority. The answer is the court, regardless of whether any particular statutory count ultimately survives on the merits. A private right of action answers one question: may this plaintiff *sue for damages*? It does not answer the analytically prior question: may a court *enforce this contract*? “Our courts have consistently held that public policy precludes enforcement of a contract

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<sup>4</sup> “Dictum (Obiter Dictum or Dicta)” is defined as “[a] judge’s comments in an opinion that are inessential to its ruling.” *Dictum (Obiter Dictum or Dicta)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (2012).

entered into in violation of [the State’s] licensing statute[s].” *Accountemps Div. of Robert Half, Inc. v. Birch Tree Grp., Ltd.*, 115 N.J. 614, 626 (1989). That principle operates as a limitation on enforcement and judicial power to enforce—not as a freestanding damages remedy—and it applies regardless of whether the underlying licensing statute creates a private right of action.

Francis does not rely on the NJCFLA solely as an affirmative damages claim. He invokes N.J.S.A. 17:11C-33(b) as a rule of decision governing the contract’s legal existence. The statute provides that a contract made in violation of the Act “shall be void” N.J.S.A. 17:11C-33(b). That command operates by force of law. Courts routinely apply statutory voidness provisions and other enforceability limits—such as statutes of limitations, licensing prohibitions, and illegality doctrines—without requiring a freestanding private cause of action. The absence of a damages remedy does not convert a void contract into a valid one, nor does it deprive courts of authority to determine whether an agreement exists.

Accordingly, Respondents’ reliance on *Francavilla* is misplaced. At most, it presents a merits-based argument directed to one count of the complaint. It does not bear on the antecedent judicial obligation to determine whether a valid arbitration agreement exists or whether the contract—if statutorily void—can delegate arbitral authority at all.

**POINT IV. VELOCITY WAIVED ANY PURPORTED RIGHT TO ARBITRATE BY AFFIRMATIVELY INVOKING THE JUDICIAL PROCESS.**

**A. Respondents' Reliance on Banton Is Misplaced Because the Agreement's Own Terms Define Velocity's Collection Lawsuit as an Arbitrable "Claim."**

Respondents' reliance on *Spring Oaks Capital SPV, LLC v. Banton*, No. A-3315-22, 2024 WL 1564441 (N.J. Super. Ct. App. Div. Apr. 11, 2024), is misplaced. *Banton* reasoned that a lending entity filing a complaint would not trigger waiver because "a complaint could result in default or payment of the debt, neither of which would necessitate the invocation of an arbitration clause" and that "[i]t is only when a dispute arises . . . that a lender must decide whether to invoke arbitration or waive arbitration and litigate the matter." *Id.* at \*3 (Ra28)<sup>5</sup>.

That reasoning is irreconcilable with the parties' own Agreement. The Credit Line Agreement does not condition arbitrability on the borrower first "contesting" the complaint. It defines "Claim" to include "any past, present, or future claim, dispute, or controversy . . . relating to or arising out of this Agreement . . . including . . . the validity or enforceability of this Arbitration Provision . . . or the entire Agreement." (Da71.) It further provides that

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<sup>5</sup> "Ra" refers to Respondents' Appendix. Appellant uses "Ra" to prevent confusion since both Defendant-Appellant and Respondents used "Da" to paginate their respective appendices.

"Claims include matters arising as initial claims, counter-claims, cross-claims, third-party claims, or otherwise." (Da71.) Under the parties' own contract, a collection lawsuit is, at minimum, an "initial claim" that "relat[es] to or aris[es] out of" the Agreement and therefore fits squarely within the contractual definition of "Claim."

The Agreement also provides that "either you or CRB or its service provider Upgrade (or any subsequent assigns of the foregoing), may, at its sole election, require that the sole and exclusive forum and remedy for resolution of a Claim be final and binding arbitration." (Da71.) Velocity—as an alleged assignee—had the contractual right and obligation to elect arbitration for its collection claim. Instead, it elected litigation. Having made that election, Velocity cannot reverse course merely because the borrower's counterclaim proved inconvenient.

Moreover, as Francis argued in his opening brief, while Section 18(f) expressly exempts a borrower's small claims action from triggering arbitration (Da72), the Agreement contains *no* corresponding safe harbor permitting the lender to file a collection lawsuit without waiving its right to arbitrate. That absence is dispositive because it reflects deliberate contractual design. The parties expressly contemplated circumstances in which one side could invoke the courts without forfeiting arbitration and chose to provide that protection

only to the borrower. Under settled principles of contract interpretation, where a contract specifically enumerates one exception but omits another closely related one, courts presume the omission was intentional. The Agreement's silence as to lender-filed collection actions therefore confirms that no such preservation right was intended, and that a lender electing to sue necessarily elects litigation over arbitration.

Nothing in *Banton* suggests that a party may disregard the plain language of its own arbitration agreement and invoke the courts to prosecute a claim that the agreement itself defines as arbitrable. Nor does *Banton*, an unpublished decision binding only on the parties therein, purport to create a categorical rule insulating lenders from waiver where the contract's text provides otherwise.

**B. The Rule 4:5-1 Certification Argument Was Raised Below and Demonstrates Waiver.**

Respondents assert that Francis raises the *Rule* 4:5-1 certification argument "for the first time on appeal." (Rb20.) This assertion is incorrect, and a review of the record makes that clear. The Point III heading in Francis's opening brief explicitly states "(Raised Below: Da45–Da52)," which corresponds to the trial court briefing where this very argument was presented *almost verbatim*. (See Da49–50). No more is required to preserve the issue for appellate review.

On the merits, the *Rule* 4:5-1 certification remains powerful evidence of waiver. (See Db20-21 (analyzing *Marmo & Sons Gen. Contracting, LLC v. Biagi Farms, LLC*, 478 N.J. Super. 593 (App. Div. 2024))). See also, *Hopkins v. LVNV Funding LLC*, 481 N.J. Super. 49, 65 (App. Div. 2025), quoting *Marmo* and emphasizing that *Rule* 4:5-1(b)(2) imposes a "'continuing obligation' to amend the certification if the underlying facts change."

Respondents rely on *Ocean Fireproofing, LLC v. 23rd St. Urb. Renewal JOF AAI III, LLC*, No. A-0388-23, 2024 WL 2683968 (App. Div. May 24, 2024), but *Marmo* and *Hopkins*—published decisions—squarely address the waiver significance of a *Rule* 4:5-1 certification. To the extent Respondents attempt to distinguish *Marmo* based on the degree of litigation activity, that was not the linchpin of the decision. The court emphasized the certification itself as evidence of voluntary relinquishment: “It is difficult to read that [certification] as other than a voluntary and intentional relinquishment of a known right.” *Marmo*, 478 N.J. Super. at 606. That reasoning applies here. For the reasons already set forth in the opening brief, the *Rule* 4:5-1 certification independently supports a finding of waiver.

**C. Respondents Are Not Entitled to Compel Arbitration in the "Interest of Justice."**

Respondents contend that even if Velocity waived arbitration, this Court should compel arbitration of all claims to avoid “conflicting decisions” and

promote the “interest of justice.” (Rb19–20.) That request is, in substance, an appeal to equitable estoppel. It fails under controlling New Jersey law.

Equitable estoppel is applied “sparingly” and functions as a shield to prevent injustice—not a sword to compel arbitration where no contractual right exists or has been forfeited. *Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 179-80 (2013). Nor may arbitration be compelled merely because claims or parties are intertwined; the New Jersey Supreme Court has expressly rejected the “intertwinement” theory Respondents propose as a basis to force arbitration. *Id.* at 192-93.

Respondents identify no detrimental reliance and no conduct by Francis that induced them to forgo arbitration. Velocity chose litigation and cannot now invoke equity to obtain a second forum. Efficiency concerns do not create arbitral jurisdiction, and the “interest of justice” does not permit compelling arbitration where the right to do so has been waived or cannot otherwise be established.

**POINT V. THE MOTION RECORD WAS INADEQUATE TO ESTABLISH RESPONDENTS' STANDING TO COMPEL ARBITRATION, AND THE DELEGATION CLAUSE DOES NOT CURE THIS DEFICIENCY.**

Respondents contend that any dispute over assignment must be decided by the arbitrator under the delegation clause. (Rb22–23.) That argument is circular. The antecedent question is whether Respondents established that they

are parties to a valid arbitration agreement with Francis at all. That threshold issue—existence and contractual entitlement—must be decided by the Court.

To invoke the arbitration clause, Respondents must prove a valid chain of assignment tracing the specific account—and the specific *right to compel arbitration*—from Cross River Bank to Upgrade and ultimately to Velocity. Just as a court must determine whether a valid agreement exists before enforcing it (*see Coinbase*, 602 U.S. at 149; *Martindale*, 173 N.J. at 83), a court must determine whether the party seeking to invoke the arbitration clause actually possesses the contractual right to do so. A delegation clause cannot bootstrap standing. For the reasons set forth in the opening brief, the motion record did not meet that threshold.

## **CONCLUSION**

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For the reasons herein and the Opening Brief, Francis respectfully requests that this Court reverse the order under review, reinstate the original order denying arbitration, and remand for further proceedings in the Law Division.

*/s/ Yongmoon Kim*  
Yongmoon Kim  
KIM LAW FIRM LLC