SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

❖ ❖ ❖

Docket No. A-3399-24

DEVON BYRD,	:	**CIVIL ACTION**
	:	
Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL
	:	JUDGMENT OF THE SUPERIOR
v.	:	COURT OF NEW JERSEY
	:	LAW DIVISION, ESSEX COUNTY
MHC RECEIVABLES, LLC;	:	
FNBM, LLC;	:	Trial Court Docket No.
SHERMAN ORIGINATOR III LLC;	:	ESX-L-7532-24
SHERMAN ORIGINATOR LLC;	:	
and JOHN DOES 1 to 10,	:	Sat Below:
	:	HON. JOSHUA D. SANDERS, J.S.C.
Defendant-Respondents.	:	
	:	DATE: November 13, 2025
	:	

BRIEF ON BEHALF OF PLAINTIFF-APPELLANTS

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PRELIMINARY STATEMENT

This appeal challenges the trial court's unprecedented decision compelling arbitration based on a revised agreement issued months after Plaintiff ceased all account activity. The court concluded that Plaintiff "assented" to the revised terms, including a new delegation provision, by merely carrying a pre-existing balance—recasting the passive status of indebtedness as "actual use" of a credit card under Nevada law. That ruling has no basis in Nevada precedent or statutory text, and it converts financial incapacity into manufactured consent.

The Revised Credit One Agreement cannot bind Plaintiff. By Defendants' own account, Plaintiff's last charge occurred in April 2018 and his last payment in September 2018. The revised terms were not issued until December 2018, when the account was dormant. Without post-notice charges, payments, or any affirmative conduct, there is no contractual act that could tether assent to the new arbitration provision. Nevada law requires "actual use"; no court has ever equated an existing balance with "use." The trial court's novel expansion is contrary to both the statute's plain meaning and persuasive authority rejecting "assent-by-balance."

Nor does the unilateral-amendment clause in the Original Agreement cure the defect. That provision required a consumer who wished to avoid a

change to "notify" the bank and "close" the account. But for a consumer already carrying a balance, that option is illusory—conditioning non-assent on an immediate payoff transforms debt into a lever of coercion. Assent inferred from such a non-choice is not contract formation; it is compulsion.

Because Plaintiff never manifested assent to the Revised Agreement, the trial court erred in compelling arbitration. Ordinary contract principles require reversal.

STATEMENT OF FACTS

According to Defendants, Byrd opened a credit card account with Credit One Bank, N.A. on October 30, 2017 which contained a cardholder agreement ("Original Agreement"). (Wiese Aff ¶ 4; Pa30). Defendants further note that Byrd made his last purchase on April 9, 2018 (Wiese Aff ¶ 7; Pa31) and his last payment on September 14, 2018 (Wiese Aff ¶ 8; Pa31). Thereafter, in December 2018, Credit One issued a revised cardholder agreement ("Revised Card Agreement") that, among other changes, amended the arbitration provision and added a delegation clause assigning issues of arbitrability to the arbitrator. (Wiese Aff ¶ 9; Pa31).

On October 30, 2020, non-party LVNV Funding LLC filed a collection lawsuit (Pa1) against Byrd in the Special Civil Part of the Passaic County Law Division, docket number PAS-DC-8477-20 ("Collection Lawsuit"), seeking to

collect the amount of $661.59, plus costs, alleged due from a defaulted and charged off Credit One Bank, N.A. account. LVNV asserts that Credit One sold, assigned, or otherwise transferred the alleged account to MHC, who then sold, assigned, or otherwise transferred the account to FNBM, then to Sherman III LLC, then to Sherman, then finally to LVNV. *See* Collection Complaint ¶ 4 (Pa1). Default judgment was entered in the Collection Lawsuit on April 14, 2023 (Pa3), and the judgment was marked satisfied on July 7, 2023 (Pa4).

Plaintiff's Complaint (Pa6-Pa24) alleges that Defendants unlawfully purchased and enforced void consumer debts without first obtaining the license required under the New Jersey Consumer Finance Licensing Act, N.J.S.A. 17:11C-1 to -49. Plaintiff's claims against Defendants arise from Defendants' engagement in a fraudulent joint co-venture with LVNV to enforce a void debt against Plaintiff. *See Allen v. V & A Bros., Inc.*, 208 N.J. 114, 125-27 (2011). Defendants subsequently moved to compel arbitration on January 31, 2025. (Pa25-Pa26). After briefing, the trial court entered an order compelling arbitration on May 16, 2025. (Pa79-Pa82). By granting Defendant-Respondents' Motion to Compel Arbitration, the trial court erred by finding that the Revised Card Agreement is enforceable.

PROCEDURAL HISTORY

On October 29, 2024, Plaintiff initiated this action by filing the Complaint (Pa6-Pa24).

Defendants moved to compel arbitration on January 31, 2025. (Pa25-Pa26).

On May 9, 2025, oral argument was held.

On May 16, 2025, the trial court entered an Order compelling arbitration. (Pa79-Pa82).

On June 30, 2025, Byrd timely filed his Notice of Appeal of the May 16, 2025 Order. (Pa83-Pa90).

LEGAL ARGUMENT

POINT I. THE STANDARD OF REVIEW (Raised Below: T1[1]; Pa81)

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.") (citing *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)).

[1] T1 refers to the transcript of the oral argument held on May 9, 2025.

To compel arbitration of a dispute, a court must determine that a valid arbitration agreement exists between the parties and that the dispute falls within the scope of the agreement. *See Hirsch*, 215 N.J. at 179; *see also Martindale v. Sandvik, Inc.*, 173 N.J. 76, 83-84 (2002). 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 provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." "[T]herefore, an arbitration clause may be invalidated upon such grounds as exist at law or in equity for the revocation of any contract." *Martindale*, 173 N.J. at 85 (citing 9 U.S.C. § 2 (internal quotation marks omitted)).

Thus, the Court must look to ordinary contract principles to determine whether a party is bound by the terms of an alleged arbitration agreement. *See 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.").

POINT II. THE TRIAL COURT ERRED BY EQUATING MERE INDEBTEDNESS WITH CONTRACTUAL ASSENT: CARRYING A BALANCE IS NOT "USE," AND CONSUMERS CANNOT CLEAR DEBT ON A WHIM (Raised Below: T1; Pa81)

Pursuant to the choice-of-law provision in the Original Agreement, the trial court applied Nevada law to determine whether Byrd assented to the Revised Card Agreement.[2] (Pa81). Nevada law provides that a cardholder "shall be deemed to have accepted the written terms and conditions provided by the issuer upon subsequent actual use of the credit card." Nev. Rev. Stat. § 97A.140. In compelling arbitration, the trial court applied this rule not to any new transactions but to Byrd's pre-existing indebtedness. (Pa81). Although Byrd stopped making charges and payments before the amendment issued, the court reasoned that he was "continu[ing] to avail [himself] of the credit offered insofar as there was a running balance to the consumer credit account," and that "while enjoying the benefits of the credit provided by [Credit One Bank] by continuing to maintain a balance, the plaintiff engaged in actual use of the credit line extended." (Pa81). On that basis, the court held that the mere existence of a balance constituted "actual use" and thus assent to the amended arbitration clause. (Pa81).

[2] Plaintiff acknowledges that there is a choice of law provision contained in the Original Agreement that selects the laws of the State of Nevada. However, Plaintiff's ultimate position is that Original Card Agreement will be deemed void in its entirety for Defendants' violations of the NJCFLA.

Initially, no Nevada court has ever expanded "actual use" to mean the passive status of carrying a prior balance. The trial court's decision to equate indebtedness with "use" is thus without precedent and finds no support in the statutory text. It is a novel rule of its own making, untethered to Nevada law, and it improperly transforms a condition of debt into a manifestation of assent.

Courts confronting this precise issue have rejected it. In *Shea v. Household Bank (SB)*, the California Court of Appeal—applying Nevada law—squarely held that "failure to immediately pay off the balance and cancel the card" did not amount to ratification of an amendment adding arbitration, even though the cardholder carried a balance. *Shea v. Household Bank (SB), Nat'l Ass'n*, 105 Cal. App. 4th 85, 88 (Ct. App.), *review denied*, 2003 Cal. LEXIS 2126 (Cal. 2003). The court emphasized that Nevada's statute requires "actual use," which denotes "some kind of affirmative act; mere inaction would not seem to suffice." *Id*. at 89 (relying on statute's "plain language" and "commonsense meaning"). It further reasoned that treating an existing balance as assent rests "on the unwarranted premise that a credit card holder is always in a financial position to be able to immediately pay off the entire balance when confronted with an unacceptable change of terms," when "[i]n fact, it is much more likely the reverse is true." *Id*. at 90.

The California court did not cite statistics, but its observation is confirmed by empirical reality: A majority of Americans report living paycheck to paycheck, with reputable recurring surveys placing the share commonly around 60%.[3] When most households depend on the next paycheck to meet ordinary expenses, the notion that they can *immediately* zero a revolving balance to preserve non-assent is illusory. Separate national polling underscores the fragility: 78% of workers would face financial difficulty if a paycheck were delayed by a week—i.e., they lack cushion for short-run shocks, let alone lump-sum payoff of revolving balances.[4] Bank-level spending data likewise show a large minority of households devote ~all income to necessities (~26% at a 95% threshold), leaving no slack for abrupt debt liquidation.[5] These balances are also not trivial, average per-borrower balances

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[3] Newsweek, *2025 Sees Rise in Americans Living Paycheck to Paycheck*, Newsweek (Sept. 14, 2025), REDACTED newsweek.com/2025-rise-americans-living-paycheck-2128753 (67% of U.S. workers say they live paycheck to paycheck); Clara Haverstic & Catey Hill, *Paycheck-to-Paycheck Statistics*, MarketWatch (May 14, 2025), REDACTED .marketwatch.com/financial-guides/banking/paycheck-to-paycheck-statistics/ (57% of Americans live paycheck to paycheck in 2025); *Paycheck-to-Paycheck Living Reaches Four-Year High*, Yahoo Finance (July 15, 2025), REDACTED finance.yahoo.com/news/paycheck-paycheck-living-reaches-four-101500945.html (69% of Americans say they live paycheck to paycheck).

[4] *Survey Reveals Ongoing Financial Strain as Majority of Americans Depend on Timely Paychecks*, PRNewswire, (Sept. 17, 2025), REDACTED prnewswire.com/news-releases/survey-reveals-ongoing-financial-strain-as-majority-of-americans-depend-on-timely-paychecks-302558209.html (reporting 78% would face financial difficulty if a paycheck were delayed one week; 77% in 2024).

[5] Bank of America Institute, *Paycheck to Paycheck: Lower-Income Households* (Oct. 22, 2024), REDACTED institute.bankofamerica.com/content/dam/economic-insights/paycheck-to-

hover around $6.3k–$6.5k, and industry data show the number of consumers carrying balances remains high.[6]

These facts connect directly to assent. Conditioning "non-assent" on instant payoff manufactures agreement out of economic impossibility. Once indebted, the consumer cannot "opt out" without funds they do not have; the issuer can append new terms (like arbitration) and then point to the borrower's *inability* to pay as "use" and thus "consent." Debt thus becomes the lever by which consent is manufactured and freedom of contract erased. Such a rule strips assent of meaning. A consumer's financial incapacity cannot serve as a proxy for voluntary agreement. To hold otherwise reduces contract law to a mechanism of coercion, where indebtedness alone ensures compliance with whatever terms the stronger party dictates.

POINT III. THE REVISED CREDIT ONE AGREEMENT IS UNENFORCEABLE BECAUSE IT ISSUED AFTER ALL ACCOUNT ACTIVITY CEASED (Raised Below: T1; Pa81)

"An arbitration agreement must be the result of the parties' mutual assent, according to customary principles of state contract law." *Skuse v. Pfizer, Inc.*, 244 N.J. 30, 48 (2020) (citing *Atalese v. U.S. Legal Servs. Grp.,*

paycheck-lower-income-households.pdf (finding ~26% of households spend ≥95% of income on necessities; ~30% at ≥90%).

[6] TransUnion, *Credit Industry Insights Report (Q2 2025)* (Aug. 14, 2025), REDACTED newsroom.transunion.com/q2-2025-ciir/ (avg. debt per borrower ≈ $6,473; many consumers carrying balances)

L.P., 219 N.J. 430, 442 (2014)). "Thus, 'there must be a meeting of the minds for an agreement to exist before enforcement is considered.'" *Id*. (quoting *Kernahan v. Home Warranty Adm'r of Fla., Inc.*, 236 N.J. 301, 319 (2019)). "In the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute." *Grover v. Universal Underwriters Ins. Co.*, 80 N.J. 221, 229 (1979).

Here, Defendants assert that the original agreement between Plaintiff and Credit One Bank was sent to Plaintiff on or about November 1, 2017, after Plaintiff applied for a credit card. (Weiss Aff. ¶¶ 4-5; Pa30). The Weiss Aff. acknowledges that Plaintiff's assent to the Arbitration Agreement contained in the original Credit One Agreement was allegedly manifested "[b]y using the Account." (Wiese Aff ¶ 7; Pa31). Defendants further note that Byrd made his last purchase on April 9, 2018 (Wiese Aff ¶ 7; Pa31) and his last payment on September 14, 2018 (Wiese Aff ¶ 8; Pa31). The Revised Card Agreement was sent several months after Plaintiff's last payment(s)/purchase(s) on the Account. (*See* Wiese Aff. ¶¶7-9; Pa31). Thus, Plaintiff never assented to or agreed to the modifications in the Revised Card Agreement because he did not "actual[ly] use" the Account pursuant to Nev. Rev. Stat. § 97A.140.

The distinction between the original Credit One Agreement and the Revised Card Agreement is material in that the Arbitration Agreement in the

Original Agreement states that "disputes about the validity, enforceability, coverage or scope of this Arbitration Agreement or any part thereof are **not subject to arbitration and are for a court to decide**." (Original Agreement, at p. 6; Pa41) (emphasis added). In pertinent part, the Revised Card Agreement defines "Covered Claims" as follows: "Also, controversies or disputes about the validity, enforceability, coverage, meaning, or scope of this agreement to arbitrate or any part thereof are subject to arbitration and are for the arbitrator to decide." (Revised Card Agreement, at p. 8; Pa56).

The original Credit One Agreement does not delegate the threshold question of arbitrability to the arbitrator (but rather expressly states that it is an issue for the Court to decide), while the Revised Card Agreement contains a delegation clause. Thus, here, the trial court erred by compelling arbitration under a delegation clause that was never validly assented to, thereby abdicating its own responsibility to decide arbitrability in the first instance.

POINT IV. THE ORIGINAL UNILATERAL-AMENDMENT CLAUSE DOES NOT SALVAGE ASSENT; IT CREATES A HOBSON'S CHOICE THAT CANNOT MANUFACTURE CONSENT. (Raised Below: T1; Pa81)

Defendants will say the Original Agreement's change-in-terms clause "solves" assent: the bank may add terms on notice, and silence (i.e., not rejecting/closing) binds the cardholder. But that theory is the *same* mistake the order made—equating the *status* of a running balance with *actual* assent.

Pursuant to the Original agreement, the terms of the agreement can be unilaterally "changed." (Original Agreement, at p.2; Pa37). However, if a consumer "do[es] not wish to be subject to the change, [they] must notify Credit One Bank . . . prior to the effective date of the change, and close [their] Account."

The Order's core premise was that Byrd "continued to avail [himself] of the credit offered insofar as there was a running balance," and therefore "by continuing to maintain a balance, the plaintiff engaged in actual use of the credit line extended," which the court treated as acceptance of the revised terms (Pa81). That is precisely how Defendants would have the unilateral-amendment clause operate: any cardholder who, after notice, does not reject/close (while still owing on the account) is deemed to have "accepted"—even if there is no post-notice transaction and no affirmative act. In both formulations, indebtedness is rebranded as use, and inertia is rebranded as assent. The label differs (statute vs. contract clause), but the mechanism is identical.

That mechanism does not create genuine consent; it creates a Hobson's choice.[7] The supposed "options" are (1) silent acceptance—i.e., do nothing

[7] Hobson's Choice, Merriam-Webster Dictionary, REDACTED .merriam-webster.com/dictionary/Hobson%27s%20choice (last visited Sept. 22, 2025) ("an

while continuing to carry a past-incurred balance—or (2) immediately close the account to avoid the change and pay the balance. For most cardholders carrying an outstanding balance, that is no real alternative at all. It is the same non-choice the Order endorsed: treat the impossibility (or impracticality) of instant payoff as if it were a voluntary "yes." As *Shea* explained applying Nevada law, "actual use" denotes an affirmative act; mere inaction would not seem to suffice," and the contrary view rests on "the unwarranted premise that a credit card holder is always in a financial position to be able to immediately pay off the entire balance," when "it is much more likely the reverse is true. *Shea*, 105 Cal. App. 4th at 89-90.

Critically, nothing in the Original Agreement's change-in-terms language converts carrying a prior balance into post-notice assent; at most, it prescribes a notice/closure pathway to *avoid* changes. Treating the failure to take that pathway as a new "yes" is simply the Order's reasoning in contractual clothing. It is still assent-by-balance. And as the Defendant-Respondents themselves show, Byrd stopped making charges and payments before the amendment issued (*see* Pa31), so there is no post-notice conduct to

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apparently free choice when there is no real alternative"); *see also* James Dawson, Comment, *Contract After Concepcion: Some Lessons from the State Courts*, 124 Yale L.J. 233, 242–43 (2014) (contending that post-*Concepcion* consumer arbitration/class-waiver terms offered on a take-it-or-leave-it basis present consumers with only nominal "choice"—accept the clause or forgo essential goods/services—and thus amount to a Hobson's choice rather than genuine assent).

which assent could be tethered. Repackaging that absence of conduct as agreement via a unilateral-amendment clause would replicate—not cure—the very error the Order committed.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellants respectfully request that the trial Court's Order (Pa81) granting Defendant-Respondents' Motions to Compel Arbitration be reversed.

Respectfully submitted,

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Appellate Division

Docket No. A-3399-24

DEVON BYRD, *Plaintiff-Appellant,* vs. MHC RECEIVABLES, LLC; FNBM, LLC; SHERMAN ORIGINATOR III LLC; SHERMAN ORIGINATOR LLC; and JOHN DOES 1 to 10, *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY Trial Court Docket No. ESX-L-7532-24 Sat Below: HON. JOSHUA D. SANDERS, J.S.C.

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Defendants MHC Receivables LLC ("MHC") and FNBM LLC ("FNBM") along with Defendants Sherman Originator LLC ("Sherman Originator") and Sherman Originator III LLC ("Sherman Originator III," and together with Sherman Originator, MHC, and FNBM, "Defendants") jointly submit this Brief in opposition to the Brief on Behalf of Plaintiff-Appellant.

I. PRELIMINARY STATEMENT

Devon Byrd alleges that out-of-state Defendants violated New Jersey consumer finance law by receiving transfers of his charged-off credit card account and receivables from non-party Credit One Bank to Defendants. Those accounts and receivables were ultimately transferred to and collected by non-party LVNV Funding LLC ("LVNV"), a licensed consumer lender in the State of New Jersey. The trial court correctly held that Mr. Byrd's claims are subject to the arbitration agreement contained in his credit card agreement. On appeal, Mr. Byrd contends that he cannot be held to that arbitration agreement because he did not agree to the revised credit card agreement (the "Revised Card Agreement") that contained it. He is wrong.

First, the court below correctly held that Mr. Byrd agreed to the Revised Card Agreement through "actual use" of his credit card under Nevada law, which governs the agreement. Mr. Byrd kept his line of credit active and maintained a balance on his account, despite having the opportunity to close his account

without paying his balance. By continuing to utilize the credit extended, Mr. Byrd "actual[ly] use[d]" his card and consented to its terms of use.

Second, even if Mr. Byrd were correct as to the lack of "actual use," he is wrong that such use is required under Nevada law to bind a cardholder to a card agreement. Nevada law provides that an issuer may unilaterally change any term without prior written notice, so long as the change does not increase costs. Nev. Rev. Stat. Ann. § 97A.140(4). Further, Mr. Byrd does not dispute that he agreed to the original card agreement (the "Original Card Agreement"), which provided that Credit One Bank could unilaterally "change any term of this Agreement . . . at any time upon such notice to you as is required by law." Pa37.

Third, Mr. Byrd's argument that it is unjust to force cardholders to pay off their balances to reject modified terms is irrelevant. The card agreements here did not require him to pay anything at all to close his account and reject an amendment. Pa39, 55. Mr. Byrd's argument also ignores the provision in the Revised Card Agreement that allowed him to opt out of the arbitration agreement without closing his account at all. Pa57.

The Revised Card Agreement is enforceable against Mr. Byrd and requires arbitration of his claims. But even if accepted, Mr. Byrd's challenge to the trial court's holding would not change the outcome of this case. That is because the Original Card Agreement also required arbitration of "any controversy or

dispute between you and us" and provided bold, prominent notice of that fact.

Mr. Byrd apparently thinks he will have an easier time under the Original Card Agreement because, unlike the Revised Card Agreement, it did not delegate questions of arbitrability to the arbitrator. See Pb11. But that is beside the point because neither of the challenges that Mr. Byrd made under the Original Card Agreement have any merit. His argument that the arbitration agreement is void because the entire contract is allegedly void runs counter to established principles of severability of arbitration clauses and has been rejected by the Supreme Court. In any event, the Original Card Agreement delegated to the arbitrator "disputes about the application, enforceability or interpretation of the Card Agreement as a whole," which this plainly would be. And Mr. Byrd's suggestion that a contract's intermediate assignee cannot invoke arbitration when sued on that contract ignores the relevant agreement's plain language that it "shall survive . . . termination of the Account or the relationship between you and us, including . . . any transfer or sale of your Account" and that it binds both "successors" and "predecessors." Pa41–42. If all else fails, Mr. Byrd would still be equitably estopped under Nevada law from evading arbitration by strategically not naming LVNV, the entity that actually holds his account.

The trial court did not err in enforcing the arbitration provision of Mr. Byrd's card agreement and should be affirmed.

II. COUNTERSTATEMENT OF THE FACTS

A. Mr. Byrd Opened And Used A Credit Account Pursuant To The Credit One Cardholder Agreements.

On or around November 1, 2017, Mr. Byrd opened an account with Credit One Bank, a national bank, which issued him a credit card bearing an account number with the last four digits "0540" (the "Account"). See Pa30, ¶¶ 4–5. Credit One Bank mailed the credit card and a copy of the Original Card Agreement to Mr. Byrd. Ibid. Mr. Byrd activated the card on November 7, 2017. Pa31, ¶ 7. After doing so, Mr. Byrd made charges on the card, presumably receiving the value of the goods and services that he purchased. Ibid. He made his last purchase using the Account on April 9, 2018, and his last payment on September 14, 2018. Pa31, ¶¶ 7–8.

In December 2018, Credit One Bank modified its standard terms, and consistent with typical industry practice sent a copy of the Revised Card Agreement to Mr. Byrd at his billing address. Pa31, ¶ 9. The revision to Mr. Byrd's card agreement was accomplished pursuant to and in accordance with the terms of the Original Card Agreement. Specifically, that Agreement provided that Credit One Bank could "change any term of this Agreement . . . at any time upon such notice to you as is required by law." Pa37. Had Mr. Byrd not wished to be bound by the Revised Card Agreement, he could have simply contacted Credit One Bank and closed his account. See ibid. [Original Card

Agreement] ("We can change any term of this Agreement. . . . If you do not wish to be subject to the change, you must [contact us] prior to the effective date of the change, and close your Account."). Both the Original Card Agreement and the Revised Card Agreement provided that Mr. Byrd could close his account at any time without paying off his balance first. See Pa39, Pa55. He did not do so. Pa31, ¶ 10.

Mr. Byrd also had another option. Had he wished to maintain his account without being bound to the arbitration agreement contained in the Revised Card Agreement, he could have simply opted out of it. The Revised Card Agreement provided, "You can reject this agreement to arbitrate but only if we receive from you a written notice of rejection within 45 days after it was first provided to you. To reject this agreement to arbitrate you must send the notice of rejection to . . . Credit One Bank." Pa57. It is undisputed that Mr. Byrd did not avail himself of this option. Rather, he continued to maintain an open line of credit. Pa31, ¶ 10.

B. The Cardholder Agreements Each Contained Enforceable Arbitration Provisions.

Both the Original Card Agreement and the Revised Card Agreement are governed by Nevada law, Pa40, Pa55, and both provided that all disputes between the issuer and the cardholder would be resolved by arbitration.

i. The Original Arbitration Agreement

The Original Card Agreement contained an arbitration agreement (the "Original Arbitration Agreement"), which provided that "any controversy or dispute between you and us . . . [could] be submitted [by either party] to mandatory, binding arbitration." Pa41. It further defined "us" as "Credit One Bank, N.A., its successors or assigns," Pa37, and provided that the arbitration agreement would survive any assignment of the Account and would apply to non-signatory co-defendants:

> Similarly, Claims subject to arbitration include not only Claims that relate directly to us, a parent company, affiliated company, and any predecessors and successors (and the employees, officers and directors of all of these entities), but also Claims for which we may be directly or indirectly liable, even if we are not properly named at the time the Claim is made, and Claims brought against any other person or entity named as a defendant or respondent in a Claim brought by you against us.
>
> * * *
>
> ***Severability, Survival***: This Arbitration Agreement shall survive . . . (iii) any transfer or assignment of your Account, or any amounts owed on your Account, to any other person.

Pa41 (emphasis in original).

The Original Arbitration agreement further delegated "disputes about the application, enforceability or interpretation of the [Original] Card Agreement as a whole" to the arbitrator, while "disputes about the validity, enforceability, coverage or scope of [the Original Arbitration Agreement] or any part thereof" were delegated to the court. Ibid. It also provided that "[a]ny questions about

what Claims are subject to arbitration shall be resolved by interpreting this Arbitration Agreement in the broadest way the law will allow it to be enforced." Ibid.

ii. The Revised Arbitration Agreement

The Revised Card Agreement likewise contained an arbitration agreement (the "Revised Arbitration Agreement"), which provided as follows:

> This agreement to arbitrate provides that you or we can require controversies or disputes between us to be resolved by BINDING ARBITRATION. You have the right to REJECT this agreement to arbitrate by using the procedure explained below.
>
> If you do not reject this agreement to arbitrate, you GIVE UP YOUR RIGHT TO GO TO COURT and controversies or disputes between us will be resolved by a NEUTRAL ARBITRATOR INSTEAD OF A JUDGE OR JURY, using rules that are simpler and more limited than in a court. Arbitrator decisions are subject to VERY LIMITED REVIEW BY A COURT. Arbitration will proceed INDIVIDUALLY—CLASS ACTIONS AND SIMILAR PROCEDURES WILL NOT BE AVAILABLE TO YOU.

Pa55 (emphasis in original). It also contained a delegation clause (the "Delegation Clause"), which delegated questions of arbitrability to the arbitrator by providing that if there are "disputes about the validity, enforceability, coverage, meaning, or scope" of the Arbitration Agreement, those disputes "are subject to arbitration and are for the arbitrator to decide." Pa56. That clause further directed that any questions "about what Claims are subject to arbitration shall be resolved by interpreting this agreement to arbitrate in the broadest way the law will allow it." Ibid.

Like under the Original Arbitration Agreement, the Revised Arbitration Agreement's protections were expressly extended to Credit One Bank's successors and any co-defendants named in the same lawsuit:

> For purposes of this agreement to arbitrate . . . "we" or "us" includes Credit One Bank, N.A., all of its parents, subsidiaries, affiliates, successors, predecessors, employees, and related persons or entities. . . .
>
> * * *
>
> **Other Parties Subject to this Agreement to Arbitrate:** In addition to you and us, the rights and duties described in this agreement to arbitrate apply to: any third party co-defendant of a claim subject to this arbitration provision. . . .

Pa55, 57. The Arbitration Agreement also provided that it would survive any assignment of the Account:

> **Survival, Severability, and Amendment of Terms:**
> *Survival*. This agreement to arbitrate shall survive changes in the Agreement and termination of the Account or the relationship between you and us, including the bankruptcy of any party and any transfer or sale of your Account, or amounts owed on your Account, to another person or entity. Ibid.

Mr. Byrd does not dispute having received either the Original Card Agreement or the Revised Card Agreement. See Db passim. Nor does Mr. Byrd deny having relied on those agreements and the credit provided by Credit One Bank to make purchases and maintain an account balance.

C. Mr. Byrd's Delinquent Account Was Assigned To Defendants (Other Than FNBM).

By late 2018, Mr. Byrd had failed to pay amounts owed on the Account

as they became due, and his account fell into delinquency. On January 14, 2019, Credit One Bank "charged-off" his Account. Pa32, ¶ 11.

By January 31, 2019, Credit One Bank transferred the Account, along with other charged-off accounts, to MHC. Pa65. Pursuant to that transfer, Credit One Bank sold, and MHC acquired, all rights, title, and interest of Credit One Bank in Mr. Byrd's Account, including "all claims or rights arising out of or relating to" the Account. Ibid. MHC then transferred the Account to Sherman Originator III. Pa77. The receivables associated with Mr. Byrd's Account had already been transferred from Credit One Bank to MHC, Pa68, then from MHC to FNBM, Pa71, and finally from FNBM to Sherman Originator III, Pa74, by the time Sherman Originator III received the Account from MHC. Sherman Originator III then transferred all of its rights (both the Account and the receivables associated with it) to Sherman Originator, which in turn sold the same to LVNV. Da113. With each transfer of the Account, all of the rights under the Card Agreement, including the right to enforce its arbitration clause, were likewise transferred to each assignee. Pa32–33, ¶¶ 12–17.

For convenience, the full chain of title for the Account and associated receivables is summarized below:

- As of 1/31/2019: **Credit One Bank** had transferred to **MHC** the Account and "all claims or rights arising out of or relating to" the Account. Pa65.
- As of 1/31/2019: **Credit One Bank** had transferred to **MHC** the receivables associated with the Account and "all claims or rights arising out of or relating to" the receivables. Pa68.
- As of 2/14/2019: **MHC** had transferred to **FNBM** the receivables associated with the Account and "all claims or rights arising out of or relating to" the receivables. Pa71.
- On 2/14/2019: **FNBM** transferred to **Sherman Originator III** the receivables associated with the Account and "all claims or rights arising out of or relating to" the receivables. Pa74.
- On 2/14/2019: **MHC** transferred to **Sherman Originator III** the Account and "all claims or rights arising out of or relating to" the Account. Pa77.
- On 2/14/2019: **Sherman Originator III** transferred to **Sherman Originator** both the Account and the associated receivables. Da113.
- On or around 2/14/2019: **Sherman Originator** transferred both the Account and the associated receivables to **LVNV**. Da113.

Defendants are out-of-state financing entities organized in Delaware and based in South Carolina. None of the above transactions took place in New Jersey. Da109 ¶ 20. Indeed, Defendants have never interacted with Mr. Byrd.[1]

[1] In his brief, Mr. Byrd asserts a "fraudulent joint co-venture with LVNV to enforce a void debt against Plaintiff." Pb3. There are no facts in the record supporting this assertion. In support of this prejudicial argument, Mr. Byrd cites Allen v. V & A Bros., Inc., 208 N.J. 114, 125–27, which concerned questions of individual liability for "Home Improvement Practices" violations under the New Jersey Consumer Fraud Act and the quantum of damages. Id. at 133–34. These questions are entirely irrelevant to the issues on appeal.

The only entities that interacted with Mr. Byrd are non-parties Credit One Bank and LVNV, and LVNV—the final assignee of the Account and its associated receivables—*is* a licensed consumer lender and sales finance company in New Jersey.

III. COUNTERSTATEMENT OF PROCEDURAL HISTORY

A. LVNV Filed A Collection Action In The Special Civil Part

On October 30, 2020, LVNV filed a debt collection action against Mr. Byrd in the Passaic County Special Civil Part to collect the charged-off debt, styled as LVNV Funding LLC v. Devon Byrd, Case No. PAS-DC-8477-20 (the "Collection Action"). Pa1. Mr. Byrd failed to respond, resulting in a default judgment in favor of LVNV entered on February 25, 2022. See Da104. On April 14, 2023, the court ordered Mr. Byrd's bank to turn over $896.21 to satisfy the judgment in full. Pa3. On July 7, 2023, LVNV issued a Warrant for Satisfaction of Judgment. Pa4.

B. Mr. Byrd Filed This Action To Collaterally Attack The Judgment Against Him.

Almost four years after LVNV filed the Collection Action and over two years after a default judgment was entered against him, Mr. Byrd filed the instant Complaint in the Essex County Law Division against Defendants (which do not include LVNV). Pa6. In his Complaint, Mr. Byrd alleged that LVNV's Collection Action was unlawful and that his debt was void on the theory that

Defendants were subject to the licensing requirements of the New Jersey Consumer Finance Licensing Act, N.J.S.A 17:11C-1 et. seq., (the "NJCFLA"), notwithstanding that Defendants are out-of-state financing entities that never attempted to collect Mr. Byrd's debt. See Pa6–24. Mr. Byrd sought a declaratory judgment and permanent injunction against Defendants and brought claims for violations of the NJCFLA and the New Jersey Consumer Fraud Act (the "NJCFA"), as well as common law fraud and fraudulent inducement. Pa22–24.

On January 31, 2025, Defendants submitted a Joint Motion to Compel Arbitration. The motion was fully briefed by May 1, 2025, and on May 9, 2025, the court heard oral argument. On May 16, 2025, the court granted the Motion to Compel Arbitration and dismissed the Complaint "in its entirety," holding that Mr. Byrd was bound by the terms of the Revised Arbitration Agreement. Pa79–82.[2] The court reasoned that "by continuing to take advantage of the credit offered, [Mr. Byrd] did actually use the card." Pa81. Regarding the enforceability of the Delegation Clause, the court applied Nevada law and concluded that the Revised Card Agreement "assigns questions of arbitrability to the arbitrator." Pa82. This appeal followed.

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[2] The Order Granting the Motion to Compel Arbitration is included in Plaintiff's Appendix incorrectly labelled as the "Order Denying Motion to Compel Arbitration." Compare Paiii with Pa79–82.

IV. LEGAL ARGUMENT

A. Standard of Review

Appellate courts review an order granting a motion to compel arbitration de novo and the "enforceability of arbitration provisions is a question of law." See Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 207 (2019). A trial court's finding that a plaintiff agreed to arbitrate is also reviewed de novo. Antonucci v. Curvature Newco, Inc., 470 N.J. Super. 553, 561 (App. Div. 2022).

"New Jersey has a long-standing policy favoring arbitration as a means of dispute resolution." Santana v. SmileDirectClub, LLC, 475 N.J. Super. 279, 285 (App. Div. 2023) Thus, "[i]t is firmly established" in New Jersey "that because of the favored status afforded to arbitration, an agreement to arbitrate should be read liberally in favor of arbitration." Griffin v. Burlington Volkswagen, Inc., 411 N.J. Super. 515, 518 (App. Div. 2010) (cleaned up). The same is true under Nevada law, which governs the contracts at issue in this case. See State ex rel. Masto v. Second Judicial Dist. Court of State, 125 Nev. 37, 44 (2009) ("As a matter of public policy, Nevada courts encourage arbitration and liberally construe arbitration clauses in favor of granting arbitration.").

Further, under the Federal Arbitration Act ("FAA"), arbitration agreements in contracts "evidencing a transaction involving [interstate] commerce . . . shall be valid, irrevocable, and enforceable, save upon such

grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme Court has repeatedly recognized that the FAA embodies a "national policy favoring arbitration," Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006), AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 346 (2011), and therefore, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). See also Arafa v. Health Express Corp., 243 N.J. 147, 164 (2020) ("The FAA has a liberal federal policy of favoring arbitration . . . ."). New Jersey courts routinely apply the FAA to require arbitration. See Arafa, 243 N.J. at 164 ("As 'the supreme law of the land regarding arbitration,' '[t]he FAA preempts any state rule discriminating on its face against arbitration.'" (quoting Goffe, 238 N.J. at 207 and Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246, 251 (2017))).

"[A]rbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63, 67 (2019); see also Arafa, 243 N.J. at 164 (same). "In determining whether a matter should be submitted to arbitration, a court must evaluate (1) whether a valid agreement to arbitrate exists, and (2) whether the dispute falls within the scope of the agreement." Perez v. Sky Zone LLC, 472

N.J. Super. 240, 248 (App. Div. 2022). "The FAA and the [New Jersey Arbitration Act], however, allow the second question—the scope of what is subject to arbitration—to be delegated to the arbitrator." Ibid. Thus, where an arbitration agreement contains such a delegation clause, and it is severable from the arbitration agreement, the court's inquiry is limited to determining whether a "valid agreement to delegate questions of arbitrability between the parties exists," and whether "the parties' intent to delegate arbitrability questions [was] 'clear and unmistakable.'" Zirpoli v. Midland Funding, LLC, 48 F.4th 136, 43 (3d Cir. 2022) (quoting Henry Schein, 586 U.S. at 69); see also Buckeye Check Cashing, 546 U.S. at 445–46.

B. The Court Below Correctly Held That The Revised Card Agreement Governs This Dispute And Requires Arbitration Of Mr. Byrd's Claims.

As Mr. Byrd's brief recognizes, the question of which version of the card agreement governs this action is significant because the trial court relied on the Revised Card Agreement's Delegation Clause in holding that Mr. Byrd's challenges to arbitrability are for the arbitrator to decide. See Pa82 [Order Granting the Motion to Compel Arbitration] ("[T]he contract assigns questions of arbitrability to the arbitrator. Under Nevada law, this court must follow suit.") (citing Airbnb, Inc. v. Rice, 518 P.3d 88, 92 (Nev. 2022)). The trial court did not err in its holding that the Revised Card Agreement governs this action, nor

in its holding that the Delegation Clause therein submits Mr. Byrd's challenges to arbitrability to the arbitrator.

i. The Trial Court Correctly Held That Mr. Byrd Accepted the Revised Card Agreement by Maintaining His Account.

The trial court correctly applied the card agreement that was actually operative at the time Mr. Byrd filed his claim—the Revised Card Agreement. Mr. Byrd does not dispute that if the Revised Card Agreement applies, he is obligated to arbitrate these claims. His only argument is that he is not bound by the Revised Card Agreement. See Pb1. He is wrong.

Mr. Byrd does not dispute that the enforceability and application of both the Revised Card Agreement and the Original Card Agreement are governed by Nevada law. As the trial court recognized, under Nevada law, "[a] cardholder shall be deemed to have accepted the written terms and conditions provided by the issuer upon subsequent actual use of the credit card." Nev. Rev. Stat. Ann. § 97A.140(2).[3] Mr. Byrd became bound by the Revised Card Agreement under

[3] The Supreme Court of Nevada has "long held that statutes should be given their plain meaning," and that "statutory interpretation should avoid absurd or unreasonable results." Alsenz v. Clark Cnty. Sch. Dist., 864 P.2d 285, 286 (Nev. 1993) (per curiam). That standard applies to this provision: "in determining the law of a sister state," New Jersey courts "look at the opinions of the state's highest court and, if it has not addressed the question, [proceed] to predict how, in the light of developing law both within and without the state to date, it would decide." Fantis Foods, Inc. v. N. River Ins. Co., 332 N.J. Super. 250, 260–61 (App. Div. 2000).

Nevada law through his "actual use" of his credit card after receiving the revised agreement. Pa81–82.

Mr. Byrd argues that he never "used" his card after receiving the Revised Card Agreement because he did not incur new charges. But he does not dispute that he maintained the Account and the benefit of the revolving credit line that was extended to him and utilized. Mr. Byrd argues that the trial court erred by "equat[ing] indebtedness with 'use.'" See Pb7. But Mr. Byrd did more than just fail to pay off his debt to Credit One Bank. Instead, after receiving that agreement, which afforded him the opportunity to close his Account without the need to immediately pay off his outstanding debt, Mr. Byrd decided to keep his Account open, maintaining his line of credit (including the right to make additional purchases), and took no steps to reject the Revised Card Agreement or the arbitration agreement contained therein.

Shea v. Household Bank (SB), Nat'l Ass'n, 129 Cal. Rptr. 2d 387, 390 (Ct. App. 2003), review denied, 2003 Cal. LEXIS 2126 (Cal. 2003)—which is the focus of Mr. Byrd's argument—is inapposite. See Pb7. There, the defendant bank argued that a revised agreement was enforceable because the relevant agreement required full account payoff for an account to be closed or for a consumer to avoid assenting to an amendment. Shea, 129 Cal. Rptr. 2d at 390. Notably, in *Shea*, the cardholder had actually contacted the defendant bank and

attempted to reject the modified card agreement at issue. Ibid. The court accordingly refused to enforce the agreement on California public policy grounds, reasoning that a revised card agreement that expressly conditions rejection of the revised terms on full payment deprives consumers of any choice at all. Id. at 392.

Had Mr. Byrd done here what the plaintiff in Shea did, he would not be bound by the Revised Card Agreement. But Mr. Byrd made no effort to reject the Revised Card Agreement, notwithstanding that the card agreement here provided him with multiple modalities to either close his Account or reject the arbitration term. Pa37 [Original Card Agreement] ("We can change any term of this Agreement . . . . If you do not wish to be subject to the change, you must notify Credit One Bank . . . and close your Account."); Pa57 [Revised Card Agreement] ("You can reject this agreement to arbitrate but only if we receive from you a written notice of rejection within 45 days after it was first provided to you.").

Notably, the Shea court itself explicitly distinguished the facts of that case with a scenario, like here, where "the amendment gave the plaintiff the option to close his account if he did not agree to [it]." Shea, 129 Cal. Rptr. 2d at 392 (citing Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862 (2002)). In that vein, while Mr. Byrd's brief equates account closure with "immediate payoff," Pb2,

the record clearly demonstrates that Credit One Bank permits consumers to close accounts before paying outstanding balances, see Pa55 [Revised Card Agreement] ("You may close your Account at any time. You will remain responsible for any amount you owe us under this Agreement."); Pa39 [Original Card Agreement] ("This Account may be terminated by you at any time by giving notice in writing to Credit One Bank. If your Account is closed by you or us, the Annual Membership Fee will continue to be charged until you pay your outstanding balance in full."). Account closure instead operates to terminate the line of credit, not to require an immediate payment of a consumer's balance. See Pa39 [Original Card Agreement] ("In the event of voluntary or involuntary Account termination, all credit privileges under the Account and Credit One Bank membership will be terminated immediately."). The trial court correctly held that by maintaining his account open, Mr. Byrd consented to be bound by the Revised Card Agreement.

ii. The Revised Card Agreement Would Have Been Enforceable by Operation of Nevada Law Regardless of Whether Mr. Byrd "Actual[ly] Used" it.

The focus on whether Mr. Byrd "actually used" his card after the date of his last purchase or payment is a double canard. Not only does it not matter because arbitration would have been required under the Original Card Agreement, infra Section IV.C, it also does not matter because "actual use" is

not required for amendments in a consumer credit agreement to be enforceable under Nevada law.

Section 97A.140(4) of the Nevada Revised Statutes Annotated provides that "[a]n issuer may unilaterally change any term or condition for the use of a credit card without prior written notice to the cardholder unless the change will adversely affect or increase the costs to the cardholder for the use of the credit card. If the change will increase such costs, the issuer shall provide to the cardholder . . . notice . . . [and] [a]n opportunity to avoid the change. . . ." Nev. Rev. Stat. Ann. § 97A.140(4).[4]

Nothing in Section 97A.140(2) states or otherwise implies that actual use is the only mechanism by which a consumer can be bound by a credit card agreement—or that parties to a credit card agreement cannot agree to other methods of acceptance. Instead, courts routinely permit unilateral amendments to credit card agreements under Section 97A.140(4). See Stuart v. Household Retail Servs., 2000 U.S. Dist. LEXIS 22509, at *11 (C.D. Cal. Dec. 14, 2000) [Da86] ("[U]nder the terms of the 1999 arbitration agreement, the clause is a term 'for the use of a credit card' within the scope of the broad language of Nevada Revised Statute § 97A.140(4). Accordingly, the 1999 arbitration clause

[4] There is no dispute that the modifications at issue here did not increase the costs to Mr. Byrd. See Pa48 [Revised Card Agreement] ("No changes are being made to the rates and fees on your Account.").

could be unilaterally implemented by the defendants . . . ."); Mandel v. Household Bank (Nevada), Nat'l Ass'n, 105 Cal. App. 4th 75, 79–80 (2003) [Da100–01] (enforcing an arbitration agreement added unilaterally to a cardholder agreement under Nev. Rev. Stat. Ann. § 97A.140(4)), review granted, depublished, 132 Cal. Rptr. 2d 525 (2003), review dismissed pursuant to settlement, 112 P.3d 1 (2005)); Fremeau v. Credit One Bank, N.A., 2020 U.S. Dist. LEXIS 7792, at *11–13 (E.D. Va. Jan. 10, 2020) [Da13–14] (in discussing the same Card Agreement at issue in this case, noting that "it is clear that Credit One had the power to unilaterally change the terms of the credit card agreement per the contract and Nevada statute") (citing Nev. Rev. Stat. Ann. § 97A.140(4)). The Revised Card Agreement is therefore fully enforceable against Mr. Byrd, and he is bound to mandatory arbitration under its express terms.

In an attempt to avoid that provision, Mr. Byrd again falls back on the out-of-state authority Shea v. Household Bank. But Shea is just as inapposite to the application of Section 97A.140(4) of the Nevada Revised Statutes Annotated as it is to Section 97A.140(2). Indeed, the Shea court explicitly "acknowledge[d that] Nevada law provides for unilateral modification of credit card contracts by the issuer" and rejected the application of Nevada's unilateral modification provision only because it would "fly in the face of California public policy" to enforce a revised card agreement that expressly conditioned rejection of the

revised terms on full payment. Shea, 129 Cal. Rptr. 2d at 392.

This case simply does not implicate the same policy considerations that governed in Shea. Without paying anything towards his balance, Mr. Byrd could have rejected the Arbitration Agreement in the Revised Card Agreement by (a) refusing the revised terms writ large and closing his Account or (b) opting out of the Arbitration Agreement, with or without closing his Account. See Pa37, 39 [Original Card Agreement]; Pa55, 57 [Revised Card Agreement]. Indeed, the reasoning of Shea supports the proposition that unilateral amendments to card agreements with a meaningful opt-out provision are permissible, even assuming the existence in New Jersey or Nevada of an equivalent to the California public policy that led the Shea court to reject the modified card agreement at issue in that case. In rejecting that revised card agreement for being effectively coerced, the Shea court explicitly distinguished a case upholding "a unilateral amendment adding an arbitration provision [where] the amendment gave the plaintiff the option to close his account if he did not agree to [it]." Shea, 129 Cal. Rptr. 2d at 392 (citing Szetela, 97 Cal. App. 4th 1094). Shea and Szetela therefore support rather than refute the validity of the card agreement amendment at issue here.

iii. Under the Original Card Agreement, Mr. Byrd Agreed That it Could be Amended by Credit One Bank.

Mr. Byrd is also bound by the Revised Card Agreement under ordinary principles of contract law. The Original Card Agreement provides clearly that

"[w]e can change any term of this Agreement . . . or add new terms to this Agreement, at any time upon such notice to you as is required by law," and that "[i]f you do not wish to be subject to the change, you must notify Credit One Bank." Pa37. That is an enforceable contract term under Nevada law. See Lyft, Inc. v. Abenante, 574 P.3d 433, at *13 (Nev. App. Aug. 20, 2025) [Da29] (holding that unilateral amendment clauses in arbitration agreements are valid and enforceable, provided that the "party with the right to unilaterally modify an arbitration agreement must do so in good faith and not in a way that defeats the opposing party's 'reasonable expectation that the parties are mutually bound to arbitration'") (quoting Paxson v. Live Nation Ent., Inc., 778 F. Supp. 3d 1113, 1130 (D. Nev. 2025)). So too under New Jersey law. See Mayer v. United Air Lines, Inc., 2010 N.J. Super. Unpub. LEXIS 2748, at *11 (App. Div. Nov. 15, 2010) (per curiam) [Da33–34] (upholding unilateral change to consumer contract given express change-in-terms clause, as "unilateral modification of a contract is permissible, provided that the party imposing the change expressly reserved the right to do so") (citing Sautter v. Supreme Conclave, 76 N.J.L. 763, 767 (1908)).

Mr. Byrd agreed to the arbitration agreement contained in the Original Card Agreement when he used his Account after receiving his card. Pa30–31 [Wiese Aff. ¶¶ 5–7]; Pa 44 [Ex. B] (billing statement reflecting purchases made

on the Account in March and April 2018); see also Pa37 [Original Card Agreement] ("By requesting and receiving, signing or using your Card, you agree [to the terms of the Original Card Agreement].") And Mr. Byrd does not contest that he received notice of the change in terms in the Revised Card Agreement. Nor does he contest that, following that notice, he did not notify Credit One Bank that he wished to reject the revised terms and close his Account, or alternatively accept the revised terms but opt out of the Arbitration Agreement. Mr. Byrd is therefore bound by the Revised Card Agreement, including the Arbitration Agreement contained therein. See Gonzales v. Credit One Bank, N.A., 2020 U.S. Dist. LEXIS 46236, at *11 (E.D. Cal. Mar. 17, 2020) [Da21] (plaintiff bound by arbitration agreement in revised Credit One Bank cardholder agreement, in part, where she "received the original cardholder agreements"; she "assented to the terms of the original cardholder agreements by activating the credit cards"; she "was provided a notice of changes to the original cardholder agreements and did not reject those changes despite being given an opportunity to do so"; "the operative cardholder agreement further provided her with an opportunity to reject the arbitration agreement but she did not do so"; and "the operative cardholder agreement contained an arbitration agreement").

Because the Revised Card Agreement is enforceable for the reasons stated

above, and because the Revised Card Agreement delegates all challenges to arbitrability to the arbitrator, this Court should affirm the Order Compelling Arbitration.[5]

C. The Defenses Mr. Byrd Raised Below To Enforcement Of The Original Card Agreement's Arbitration Provision Are Meritless.

To the extent that this Court determines that the Revised Card Agreement is not the operative agreement in this action, it should nonetheless affirm the Order of the trial court below for two reasons. First, the Original Card Agreement contains an enforceable agreement to arbitrate that covers this dispute.[6] Second, although the Original Arbitration Agreement delegates certain arbitrability questions to the Court rather than to the arbitrator, the only two

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[5] Critically, the only argument that Mr. Byrd raises in his appeal is that the Revised Card Agreement is unenforceable. See generally Pb. He concedes that the Revised Card Agreement delegates the question of arbitrability to the arbitrator, and he does not challenge that portion of the decision of the court below. See Pb11 ("The original Credit One Agreement does not delegate the threshold question of arbitrability to the arbitrator (but rather expressly states that it is an issue for the Court to decide), while the Revised Card Agreement contains a delegation clause.").

[6] If Mr. Byrd is not bound by the Revised Card Agreement, there is no dispute that the Original Card Agreement would apply instead. Mr. Byrd concedes below that he had assented to the Original Arbitration Agreement in the Original Card Agreement. Byrd v. MHC Receivables, LLC et al., No. ESX-L-7532-24 (N.J. Super. Ct. Law Div. Apr. 17, 2025) (Plaintiff's Brief in Opposition to Defendants' Motion to Compel Arbitration) ("Opp.") 5; Byrd v. MHC Receivables, LLC et al., No. ESX-L-7532-24 (N.J. Super. Ct. Law Div. May 9, 2025) (Motion to Compel Hearing Transcript) ("T") 39.

challenges[7] Mr. Byrd has raised to arbitrability in this action cannot defeat his agreement to arbitrate as a matter of law.

i. Mr. Byrd's Challenge to the Original Card Agreement as a Whole is Delegated to the Arbitrator under the Original Arbitration Agreement.

Mr. Byrd's first challenge to arbitrability below was that Defendants' alleged failure to be licensed under the NJCFLA when assigned Mr. Byrd's Account rendered the applicable card agreement void and thus its arbitration provision invalid. But this is a question delegated to the arbitrator under the Original Arbitration Agreement, just as it is under the Revised Arbitration Agreement. The full delegation clause in the Original Arbitration Agreement states that "disputes about the validity, enforceability, coverage or scope of this Arbitration Agreement or any part thereof are not subject to arbitration and are for a court to decide. But disputes about the application, enforceability or interpretation of the Card Agreement as a whole are subject to arbitration and are for the arbitrator to decide." Pa41 (emphasis added). Mr. Byrd's "ultimate position" is that the "Original Card Agreement will be deemed void in its

[7] Mr. Byrd is limited to the arbitrability challenges that he raised below, as all other potential challenges have been waived. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (noting the "well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available").

entirety" under the NJCFLA. Pb6 n.2. Indeed, Mr. Byrd conceded below that his challenge to the Original Arbitration Agreement under the NJCFLA is based on his challenge to the validity of the Original Card Agreement as a whole. See Opp. 10–13; T19–20, 33. Thus, Mr. Byrd's argument that the NJCFLA voids the Original Card Agreement, including the Original Arbitration Agreement contained therein, is for the arbitrator to decide under the express terms of the arbitration agreement.

This would be the case even if the Original Card Agreement itself were not as clear as it is. As the Supreme Court explained in Buckeye Check Cashing, 546 U.S. at 449, "regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." This Court reached the same conclusion in a case similar to this one, Midland Credit Management v. Nongrum, brought by Mr. Byrd's counsel. In Nongrum, like here, the plaintiff resisted arbitration claiming that his card agreement was void under the NJCFLA. See Midland Credit Mgmt. v. Nongrum, 2023 N.J. Super. Unpub. LEXIS 1792, at *7 (App. Div. Oct. 18, 2023) (per curiam) [Da37]. Rejecting the plaintiff's argument, this Court enforced the arbitration agreement in the applicable Credit One Bank card agreement, applying the delegation clause dictating that "disputes about the application, enforceability or

interpretation of the Card Agreement as a whole are subject to arbitration and are for the arbitrator to decide." See ibid. (emphasis added). The language at issue in Nongrum was the exact same language as in the Original Card Agreement here.

ii. Mr. Byrd's Challenge to Defendants' "Standing" to Enforce Arbitration, Even if Delegated to the Court under the Original Arbitration Agreement, is Both Meritless and Estopped.

Mr. Byrd's second and final challenge to arbitrability below was that Defendants do not have standing to enforce the Original Arbitration Agreement because they have assigned their rights under the applicable card agreement to non-party LVNV. Opp. 9. But even if this Court determines that the Original Card Agreement applies, and that Mr. Byrd's standing challenge has not been delegated to the arbitrator, it should nonetheless uphold the Order of the trial court below because Mr. Byrd's standing argument fails as a matter of both law and equity.

1. Mr. Byrd is incorrect that assignment eliminates arbitration rights as a matter of law.

Mr. Byrd is incorrect as a matter of law that Defendants' subsequent assignment of Mr. Byrd's Account to LVNV deprives them of the right to compel arbitration. Assignment does not destroy arbitration rights when an assignor is sued based on the assigned agreement. See, e.g., Emerzian v. N. Bros. Ford Inc., 2024 Mich. App. LEXIS 2254, at *19–21 (Ct. App. Mar. 21,

2024) [Da8] (compelling arbitration of claim against assignor-defendant where, "[b]y pursuing a claim against defendant . . . based on the [relevant contract], plaintiff implicitly recognized that defendant retained some postassignment relationship to the [contract]," noting "[t]here is no authority presented or located for the proposition that an assignment would allow a claim against the assignor, but would [simultaneously] prevent the assignor's recourse to any defenses, under the assigned agreement"); Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 208 (1991) ("[S]tructural provisions relating to remedies and dispute resolution [such as] an arbitration provision" can be enforced, even after a contract has been terminated, in a dispute "aris[ing] under the contract."); Skymark Props. Corp. v. Katebian, 2022 U.S. Dist. LEXIS 59390, at *46–48 (E.D. Mich. Mar. 14, 2022) [Da69–70] (under Litton, assignor defendant "retained the ability to rely on the [arbitration agreement] as to claims that are based in part on facts that arose before [the] assignment") (cleaned up); see also Vainqueur Corp. v. Lamborn & Co., 305 F. Supp. 1007, 1008 (S.D.N.Y. 1969) ("When there is a specific written agreement to arbitrate any dispute that may arise out of an agreement, . . . the other party is entitled to an order compelling arbitration even if [it] has irrevocably assigned its rights. . . .").

Further, even if assignment could eliminate the right to arbitrate where the assignor is sued based on the assigned agreement, the express terms of the

Original Arbitration Agreement here dictate that it is enforceable even after assignment. The Original Card Agreement makes clear that the Original Arbitration Agreement survives any "termination or changes in the Card Agreement, the Account and the relationship between you and us concerning the account . . . [and] any transfer or assignment of your Account." Pa42. Moreover, the Original Card Agreement expressly states that "Credit One Bank, its successors or assigns" may compel to arbitration any claims against "Credit One Bank, its successors or assigns," see Pa41, Pa37, and further extends an arbitration right to "predecessors," "successors," and "any other person or entity named as a defendant or respondent in a Claim brought by you against us," Pa40–41. Because "[a]ssignments establish a relationship between the parties in which the assignor is the predecessor-in-interest, and the assignee is the successor-in-interest," this provision explicitly permits the Defendants that were assigned Mr. Byrd's Account and the associated arbitration rights (all Defendants other than FNBM) to enforce arbitration as the successors of Credit One Bank and the predecessors of LVNV. See Am. Nat'l Tr. Co. v. Ky. Fried Chicken, 308 Ill. App. 3d 106, 117 (1999). And while FNBM was never assigned Mr. Byrd's Account or the associated arbitration rights (only the associated receivables), it is also entitled to enforce the Original Arbitration Agreement as a co-defendant to claims against MHC, Sherman Originator, and

Sherman Originator III. See Pa41 [Original Card Agreement] ("Similarly, Claims subject to arbitration include . . . Claims brought against any other person or entity named as a defendant or respondent in a Claim brought by you against us.").

Indeed, in Russell v. Midland Credit Management, Inc., the Northern District of Illinois considered identical language in a credit card agreement and held that defendant Midland Credit Management had standing as a valid assignee of Credit One Bank to compel arbitration. 2021 U.S. Dist. LEXIS 61744, at *35 (N.D. Ill. Mar. 30, 2021) [Da48].

> Pursuant to the preamble of the Card Agreement, the words "we," "us," "our," and "Credit One Bank," "refer to Credit One Bank, N.A., its successors or assigns. This means that the Card Agreement applies to Midland Funding, as an assignee of Credit One. The Card Agreement does not limit the definition or application of these terms. The arbitration provision also states that claims subject to arbitration include claims "that relate directly to us, a parent company, affiliated company, and any predecessors and successors (and the employees, officers and directors of all of these entities), but also Claims for which we may be directly or indirectly liable, even if we are not properly named at the time the Claim is made.

Ibid. (emphasis added). So too here. Even if the Revised Card Agreement does not govern this dispute (which it does), Defendants have the right to compel arbitration under the Original Card Agreement and the Original Arbitration Agreement.

2. Even if assignment eliminated Defendants' arbitration rights under the Original Card Agreement, Mr. Byrd is equitably estopped from resisting arbitration.

Even if the Court determines that Defendants, as intermediate assignees, extinguished their arbitration rights directly under the Original Arbitration Agreement by way of their subsequent assignment of those rights to LVNV, Mr. Byrd is nonetheless estopped from resisting arbitration under Nevada law. Mr. Byrd has strategically omitted LVNV—the entity whose judgment against him he wishes to collaterally attack by way of this action—from his complaint in this action as an attempted end-run around the binding arbitration provisions to which he agreed. But under Nevada law,[8] a party is equitably estopped from resisting arbitration if his claims either "arise out of and relate directly to the [operative agreement]" or "involve allegations of substantially interdependent and concerted misconduct by both the nonsignatory seeking to compel arbitration and one or more of the [agreement's] signatories." RUAG Ammotec GmbH v. Archon Firearms, Inc., 538 P.3d 428, 435 (Nev. 2023) (en banc) (cleaned up). Both scenarios apply here.

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[8] Mr. Byrd does not dispute that Nevada law applies. See Pb6 n.2; see also Zografos v. Wehbe, 2017 N.J. Super. Unpub. LEXIS 2319, at *8–15 (App. Div. Sep. 18, 2017) (per curiam) [Da91–93] (holding (a) that because the plaintiff signed an arbitration agreement with a choice-of-law provision selecting Delaware law, the agreement was governed by Delaware law; and (b) that Delaware equitable estoppel law operated to require arbitration of the plaintiff's claims against a non-signatory).

With respect to the first scenario, Mr. Byrd is equitably estopped from resisting the Arbitration Agreement's applicability because each of his claims "relate directly" to the Revised Card Agreement and its assignment. See Pa6–25 [Compl.] ¶¶ 28–30, 37–39, 46, 49–51, 55–58, 67, 71, 76, 91, 100. That is sufficient to permit all Defendants to compel arbitration. See Hard Rock Hotel, Inc. v. Eighth Jud. Dist. Ct. of State, ex rel. County of Clark, 390 P.3d 166, at *3 (Nev. 2017) [Da24] ("When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate.") (cleaned up).

With respect to the second scenario, Mr. Byrd is also equitably estopped from resisting arbitration because he alleges interdependent misconduct by each Defendant and LVNV, the Account's ultimate assignee. See Pb3 ("Plaintiff's claims against Defendants arise from Defendants' engagement in a fraudulent joint co-venture with LVNV to enforce a void debt against Plaintiff."); Opp. 2 (same). Equitable estoppel therefore serves as an independent, alternative basis for affirming the Order Granting the Motion to Compel Arbitration.[9]

[9] New Jersey principles of equitable estoppel, while they do not apply here, would compel the same outcome. Courts in New Jersey frequently compel arbitration where a plaintiff takes "deliberate action with regard to placing the . . . Agreement squarely at issue in the claims it has asserted against" a non-

V. CONCLUSION

For all the foregoing reasons, Defendants respectfully request that the Court affirm the Order Granting the Motion to Compel Arbitration.

signatory, to the non-signatory's detriment. Sicily by Car S.p.A. v. Hertz Glob. Holdings, Inc., 2015 U.S. Dist. LEXIS 65751, at *13 (D.N.J. May 20, 2015) [Da53]; see also Salerno Med. Assocs., LLP v. Riverside Med. Mgmt., LLC, 542 F. Supp. 3d 268, 280 (D.N.J. 2021) ("[A] party cannot, with one hand, rely on a contract as the basis for its claims, and with another, repudiate that contract's arbitration clause."). And Mr. Byrd attempts to do just that. New Jersey law is clear: under the circumstances, "Plaintiff[ ] cannot now avoid arbitration simply by omitting [a party] from its complaint." Bruno v. Mark MaGrann Assocs., Inc., 388 N.J. Super. 539, 548. (App. Div. 2006).

Respectfully submitted,

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Dated: December 15, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

❖ ❖ ❖

Docket No. A-3399-24

DEVON BYRD,	:	**CIVIL ACTION**
	:	
Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL
	:	JUDGMENT OF THE SUPERIOR
v.	:	COURT OF NEW JERSEY
	:	LAW DIVISION, ESSEX COUNTY
MHC RECEIVABLES, LLC;	:	
FNBM, LLC;	:	Trial Court Docket No.
SHERMAN ORIGINATOR III LLC;	:	ESX-L-7532-24
SHERMAN ORIGINATOR LLC;	:	
and JOHN DOES 1 to 10,	:	Sat Below:
	:	HON. JOSHUA D. SANDERS, J.S.C.
Defendant-Respondents.	:	
	:	DATE: February 16, 2026
	:	

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PRELIMINARY STATEMENT

The trial court never reached the merits of Plaintiff's statutory claims. Instead, it concluded that the Revised Card Agreement applied and, on that basis, deferred to its delegation clause—effectively relinquishing judicial authority at the threshold. That was error for two independent reasons. First, the Revised Agreement does not govern this dispute. Mr. Byrd never manifested assent to its terms, and the trial court erred in equating mere indebtedness with contractual acceptance. Second, even assuming the Revised Agreement applies, the court still should not have compelled arbitration. Plaintiff's claim under the New Jersey Consumer Finance Licensing Act renders the contract void ab initio—treated as though it never legally *existed*. Courts, not arbitrators, must determine whether a valid contract *exists* at all. The order compelling arbitration should be reversed.

LEGAL ARGUMENT

POINT I. THE REVISED CARD AGREEMENT IS UNENFORCEABLE BECAUSE MR. BYRD NEVER MANIFESTED ASSENT TO ITS TERMS

A. The Unilateral-Amendment Clause in the Original Agreement Cannot Manufacture Consent to the Revised Agreement.

Respondents contend that the Original Card Agreement's change-in-terms clause independently binds Mr. Byrd to the Revised Card Agreement. (Db22–24). That clause provides that Credit One Bank may "change any term

of this Agreement . . . at any time upon such notice to you as is required by law," and that a consumer who does not wish to be bound "must notify Credit One Bank . . . prior to the effective date of the change, and close [the] Account." (Pa37). Respondents treat this provision as a self-executing mechanism of assent: send notice, receive silence, and the consumer is automatically bound. But this theory cannot withstand scrutiny under Nevada's statutory scheme, the contractual language of the agreements themselves, or fundamental principles of contract formation.

Shea squarely addressed this argument and rejected it. The court analyzed the interplay between Nev. Rev. Stat. Ann. § 97A.140(2), which requires "subsequent actual use" to deem a cardholder to have accepted terms, and § 97A.140(4), which permits issuers to unilaterally modify credit card agreements. *Shea v. Household Bank (SB), Nat'l Ass'n*, 105 Cal. App. 4th 85 (Ct. App. 2003). The court reasoned that because both provisions are "contained in the same section and therefore are part of the statutory scheme regulating credit card issuers," it is "not likely the legislature would have required actual use by a consumer to accept the original terms of a credit card agreement but settled for something less definite or overt to signify acceptance of an amendment to that agreement." *Id.* at 89.

The court continued: "[I]t is not reasonable to presume the Nevada

Legislature intended to allow all modifications to be applied to all previous extensions of credit, no matter what the consumer does to demonstrate lack of agreement." *Id.* at 90. This reasoning applies with full force here. Mr. Byrd stopped making charges in April 2018 and stopped making payments in September 2018. (Pa31, ¶¶ 7–8). The Revised Card Agreement was not issued until December 2018, when the Account was dormant. (Pa31, ¶ 9). There is no post-notice conduct—no charges, no payments, no affirmative act of any kind—that could constitute the "actual use" required under Nevada's statutory scheme. The unilateral-amendment clause does not and cannot fill that void.

B. The Revised Card Agreement's Own Terms Confirm That Mr. Byrd Never Accepted It.

Respondents' theory is further undermined by the Revised Card Agreement itself, which defines the precise mechanism of acceptance. That agreement states, in plain terms: "You accept this Agreement when you use the Account." (Pa51). It further provides: "You may still reject this Agreement if you have not yet used the Card or paid a fee after receiving a billing statement." (*Ibid.*). This language tracks the statutory requirement of "actual use" under Nev. Rev. Stat. Ann. § 97A.140(2) and establishes that even under the agreement's own framework, acceptance requires an affirmative act of account usage—not mere indebtedness.

Mr. Byrd engaged in no such use. He made no purchases, no cash

advances, and no payments after the Revised Card Agreement was issued. By its express terms, a consumer who has not "used the Account" after receiving the agreement has not accepted it. Respondents cannot claim the Revised Agreement binds Mr. Byrd while simultaneously ignoring that agreement's own definition of what acceptance requires.

C. Neither of Respondents' Purported "Avenues of Rejection" Provided a Meaningful Opportunity to Avoid the Revised Arbitration Agreement

Respondents assert that Mr. Byrd had two avenues to reject the arbitration agreement in the Revised Card Agreement: "(a) refusing the revised terms writ large and closing his Account or (b) opting out of the Arbitration Agreement, with or without closing his Account." (Db22). Neither withstands analysis.

1. Respondents' First Proposed Avenue of Rejection—Account Closure—Is Illusory

As to the first, Respondents attempt to distinguish *Shea* by arguing that "[t]here, the defendant bank argued that a revised agreement was enforceable because the relevant agreement required full account payoff for an account to be closed or for a consumer to avoid assenting to an amendment." (Db17). Respondents claim this case is different because Credit One's agreements permit account closure without full payoff. (Db18–19). But this purported distinction collapses upon inspection.

Closing a Credit One account while carrying a balance does not terminate the consumer's obligations under the agreement—it merely eliminates the ability to make new charges. Both the Original and Revised Card Agreements make this explicit. The Original Agreement provides: "This Account may be terminated by you at any time by giving notice in writing to Credit One Bank. If your Account is closed by you or us, the Annual Membership Fee will continue to be charged until you pay your outstanding balance in full." (Pa39). The Revised Agreement is even more direct: "You may close your Account at any time. You will remain responsible for any amount you owe us under this Agreement." (Pa55).

This is not a genuine escape from the revised terms. A consumer who "closes" the account remains contractually bound to the bank under the very agreement being contested, continues to be charged recurring fees (including the annual membership fee billed monthly), and remains subject to whatever terms the bank has imposed—including any unilateral amendments. The bank retains the right to change rates, fees, and other terms, and the agreements expressly state that such **changes can apply to "outstanding balance[s]."** (*See* Pa37 (emphasis added)). Account closure, in short, is not an exit from the contractual relationship; it is merely the forfeiture of the consumer's right to use the credit line while all other obligations persist.

Shea's reasoning anticipated this precise scenario. As the court observed, when a consumer is "placed between Scylla and Charybdis, the practical result is the consumer has no choice at all and is forced to 'agree' to the modification." *Shea*, 105 Cal. App. 4th at 90. The Hobson's choice here is functionally identical: Mr. Byrd's "options" were to do nothing and be deemed to have accepted, or to "close" his account and remain bound to the same agreement under its surviving terms. That is no choice at all.

Moreover, even account closure would not have freed Mr. Byrd from the arbitration provision. The Revised Card Agreement's arbitration clause expressly provides: "This agreement to arbitrate shall survive changes in the Agreement and termination of the Account or the relationship between you and us, including the bankruptcy of any party and any transfer or sale of your Account." (Pa57). The Original Arbitration Agreement contains a materially identical survival clause. (Pa42). Thus, even a consumer who affirmatively closed the account and paid the balance in full would still be bound to arbitrate.

Shea addressed a nearly identical survival provision and found it deeply problematic. The majority observed: "Even if plaintiff had done what defendant suggests, he still would have been subject to the arbitration provision; there was no way for him to opt out." *Shea*, 105 Cal. App. 4th at 90.

The court noted that "a good case could be made the term was unconscionable." *Ibid.* Critically, even the *Shea* dissent—which argued the cardholder should be bound to arbitration—acknowledged that the survival-after-termination provision "may be unconscionable." *Id.* at 92 (Fybel, J., concurring and dissenting). When both the majority and the dissent agree that an arbitration clause purporting to survive termination raises unconscionability concerns, Respondents' claim that account closure provided a meaningful avenue of rejection rings hollow.

2. Respondents' Second Proposed Avenue of Rejection—The Arbitration Opt-Out—Is Circular and Presupposes the Very Assent in Dispute.

Respondents' second argument fares no better. They point to the Revised Card Agreement's opt-out provision, which permitted a cardholder to reject the arbitration clause within 45 days of first receiving the agreement. (Db5; Pa57). This argument is fatally circular: it assumes Mr. Byrd was bound by the Revised Card Agreement in order to prove that he was bound by the Revised Card Agreement.

The opt-out provision exists solely within the four corners of the Revised Card Agreement. It was a new feature, added for the first time in that agreement—as the cover letter accompanying the revision itself acknowledges: "The Arbitration section has been amended to provide the ability to reject the

agreement to arbitrate." (Pa48). The Original Card Agreement contained no such opt-out mechanism. The opt-out provision therefore derives its force entirely from the Revised Agreement's own terms. But if Mr. Byrd never assented to the Revised Agreement—and, as demonstrated above, he did not—then the opt-out provision has no contractual force over him. A consumer cannot be expected to exercise a right of rejection contained in a contract he never entered.

Put simply: the Revised Agreement states it is accepted "when you use the Account." (Pa51). "Actual use" under Nevada law requires an affirmative act, not mere inaction. *Shea*, 105 Cal. App. 4th at 89. Mr. Byrd engaged in no post-notice use. He therefore never accepted the Revised Agreement, including its opt-out provision. Respondents are pointing to an escape hatch in a building Mr. Byrd never entered. One cannot "opt out" of something one never opted into.

The logical structure of Respondents' argument reveals its deficiency. Their position requires this Court to accept the following chain of reasoning: (1) the Revised Agreement's opt-out provision was available to Mr. Byrd; (2) he failed to exercise it; (3) therefore he is bound by the Revised Agreement. But step (1) presupposes what Respondents must prove—that the Revised Agreement applies to Mr. Byrd in the first place. This is textbook petitio

principii. The failure to exercise a contractual right cannot establish the contractual relationship that gives rise to the right.

D. Respondents' Theory Would Produce Absurd and Unjust Results.

This Court should also consider the practical consequences of adopting Respondents' position. Under their theory, a credit card issuer could wait until a cardholder accumulates a balance, then unilaterally impose any terms it desires—mandatory arbitration, class action waivers, limitations on damages, attorney fee-shifting, choice of forum in Antarctica, governing law of North Korea[1]—and the consumer would be bound simply by virtue of remaining indebted.

As demonstrated in Appellant's Opening Brief, the financial reality confronting American consumers underscores this concern. (*See* Pb8–9). Respondents' rejoinder—"just opt out" or "just close the account"—does not solve the problem, because in practice those options are not meaningful. Empirical research consistently shows consumers rarely read (much less act on) fine-print dispute-resolution provisions. A Brookings survey found that large majorities of users do not reliably read terms of service before

[1] Plaintiff is using an extreme example for illustrative purposes. The hyperbole underscores the absence of any limiting principle in Respondents' theory if indebtedness alone suffices as "acceptance."

consenting (with a substantial share reporting they "never" read them).[2]

Most importantly for Respondents' "opt-out" fallback, evidence indicates opt-outs are *vanishingly* rare in operation. The Consumer Financial Protection Bureau's arbitration study found that although many credit-card arbitration agreements contained opt-out provisions, "very few consumers (0.3%) believed they had been given an opportunity to opt out of mandatory arbitration, and none of them had done so."[3]

If this Court adopts Respondents' position, it would effectively provide a roadmap for predatory contract amendments. In a marketplace where issuers know that consumers rarely read revised terms and almost never exercise opt-out rights, unilateral amendments sent to indebted or dormant accounts will operate, in practice, as binding modifications without meaningful assent. Issuers would have every incentive to time revisions for moments when

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[2] See Darrell M. West, *Brookings Survey Finds Three-Quarters of Online Users Rarely Read Business Terms of Service*, Brookings Institution (May 21, 2019), brookings.edu/articles/brookings-survey-finds-three-quarters-of-online-users-rarely-read-business-terms-of-service/ (showing that when asked how often they read terms of service, 32% of respondents reported "never," 39% "sometimes," 20% "most of the time," and 9% did not know or did not answer).

[3] *See* Roseanna Sommers, What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation, 19 PLOS ONE e0296179 (2024), pmc.ncbi.nlm.nih.gov/articles/PMC10889883/ (citing Consumer Fin. Prot. Bureau, *Arbitration Study: Report to Congress* (Mar. 2015), available: consumerfinance.gov/data-research/research-reports/arbitration-study-report-to-congress-2015/).

cardholders are most financially constrained, confident that silence coupled with indebtedness will be deemed acceptance. Such a regime is incompatible with the Legislature's consumer-protective mandate. As the New Jersey Supreme Court has recognized, New Jersey has enacted "one of the strongest consumer protection laws in the nation." *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 15 (1994). Construing the law to permit consent to be manufactured from economic constraint would undermine, not advance, that legislative objective.

POINT II. EVEN IF THE REVISED CARD AGREEMENT APPLIES, THE TRIAL COURT ERRED IN DEFERRING TO THE DELEGATION CLAUSE BECAUSE MR. BYRD CHALLENGES THE EXISTENCE—NOT THE VALIDITY—OF THE CONTRACT.

The trial court compelled arbitration based on the Revised Card Agreement's delegation clause, reasoning that the agreement "assigns questions of arbitrability to the arbitrator." (Pa82). Respondents frame Mr. Byrd's arguments as an attack on the "validity" of the Card Agreement, which they contend "runs counter to established principles of severability." (Db3). But Mr. Byrd's NJCFLA argument is not that an existing contract is unconscionable or otherwise defective. He argues that the contract is statutorily void under the New Jersey Consumer Finance Licensing Act ("NJCFLA"), N.J.S.A. 17:11C-1 to -49, and therefore *void ab initio*—treated as though it never existed.

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

Respondents do not dispute the core facts of the licensure violation: Defendants were not licensed under the NJCFLA when they purported to acquire Mr. Byrd's account. The legal consequence of this failure is not left to judicial discretion or arbitrator interpretation; it is statutory command. N.J.S.A. 17:11C-33(b) mandates that a contract in violation of the licensing act "shall be void." The statute does not say "voidable." It does not say "unenforceable at the option of the borrower." It uses the mandatory and definitive term: "void."

This distinction is dispositive under New Jersey Supreme Court precedent. 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.

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."** 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.

Respondents attempt to sidestep this fatal defect by arguing that Mr. Byrd is merely challenging the "validity" of the contract. But this is a challenge to the contract's *existence*. If the underlying transaction is void *ab initio*, there is no contract to be assigned to Defendants, and certainly no contract that can compel Mr. Byrd to a private forum.

B. Respondents Miscast Plaintiff's Argument as a "Validity" Attack; Plaintiff Challenges Contract Existence, and Courts Must Decide That Threshold Question.

Respondents try to funnel Plaintiff's NJCFLA argument into *Buckeye* by labeling it a challenge to the "Card Agreement as a whole." (Db26-27). That framing is incorrect because it starts from the wrong premise.

Buckeye involved a challenge that sought to invalidate an agreement

based on alleged defects inherent in the contract itself. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (plaintiffs alleged usurious interest rates). Here, by contrast, Plaintiff's claim is that New Jersey law itself withdraws legal effect from the transaction because of the assignee's unlicensed *conduct*. The voidness consequence is triggered by Defendants' statutory noncompliance—conduct external to the four corners of the agreement—not by any allegedly unlawful clause embedded within it.

Severability doctrines presume there is a legally operative contract from which an arbitration clause may be severed and enforced while other disputes are sent to arbitration. But when a statute declares that, because of the counterparty's conduct, the contract is void from inception and legally ineffective, the threshold question is not whether a particular term is invalid; it is whether there is any enforceable contractual instrument at all that can supply arbitral authority.

Courts—not arbitrators—possess the inherent authority to determine whether a contract ever legally existed. 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." *Coinbase, Inc. v. Suski*, 602 U.S.142, 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)).

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 v. Gruma Corp.*, 135 F.4th 55, 79 (3d Cir. 2025).

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/existence of the very document that purportedly gives them the authority to decide anything at all.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellants respectfully request that the trial Court’s Order (Pa81) granting Defendant-Respondents’ Motions to Compel Arbitration be reversed.

Respectfully submitted,

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