Superior Court of New Jersey
Appellate Division

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Docket No. A-003561-23

TAHISHA ROACH AND EMELIA JACKSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, *Plaintiffs-Appellants*, v. BM MOTORING, LLC AND FEDERAL AUTO BROKERS, INC., BOTH CORPORATIONS T/A BM MOTOR CARS, BORIS FIDELMAN AND MIKHAIL FIDELMAN AND JOHN DOES 1-5, *Defendants-Respondents,*	**CIVIL ACTION** ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MIDDLESEX COUNTY Trial Court Docket No. MID-L-1333-14 Sat Below: HON. ANA C. VISCOMI, J.S.C.

AMENDED BRIEF OF PLAINTIFFS-APPELLANTS

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PROCEDURAL HISTORY

The Plaintiffs filed their Class Action Complaint below on March 6, 2014, asserting claims under the Consumer Fraud Act (CFA) and other statutes on behalf of themselves and a proposed class of other consumers, based on allegations that the Defendants routinely inflated the prices paid for its used cars by adding unlawful dealership fees and overcharging for official registration and title fees. Pa1. On May 2, 2014, the Defendants filed a motion to compel arbitration pursuant to a mandatory arbitration provision in the dealerships' standard Dispute Resolution Agreement (DRA)[1], which was granted but eventually reversed on appeal by the New Jersey Supreme Court on March 9, 2017. *Roach v. BM Motoring, LLC*, 228 N.J. 163 (2017)(holding the Defendants were "barred from compelling arbitration" after they breached the DRA by refusing to pay filing fees for arbitrations initiated by the Plaintiffs prior to filing the action below). *Roach v. BM Motoring, LLC*, 228 N.J. 163, 166-167 (2017).

On remand, the Defendants filed an Answer with Affirmative Defenses on July 13, 2017. Pa28. A series of case management conferences and orders followed, relating to the Defendants' production of class-related discovery and the trial court's efforts to mediate a settlement, including an August 18, 2017

[1] See Pa66 and Pa68 for the DRAs from the Plaintiffs' transactions.

case management order directing the Defendants to provide long-overdue discovery responses by October 17, 2017 (Pa41) and a January 3, 2018 case management order again requiring the Defendants to "respond to interrogatories and notice to produce documents served upon them on April 1, 2014" by January 9, 2018. Pa42. On January 10, 2018, the Defendants served responses to written discovery, including responses to interrogatories requiring the Defendants to identify all defenses and bases of opposition to class certification. Pa52-55. The trial court then held a series of five case conferences between February 16, 2018 to May 21, 2018 to attempt to mediate settlement, without success. See Pa86, 94.

On October 23, 2018, Plaintiffs filed a Motion for Class Certification. Pa58. On November 1, 2018, Defendants filed opposition, asserting for the first time that the absent class members signed DRAs identical to the Plaintiffs' which precluded their participation in the proposed class action. Pa45-47. In their reply, the Plaintiffs submitted a certification appending the Defendants' discovery responses, which failed to list the DRAs with absent class members as a basis of their opposition to class certification. Pa49, 52-55. After hearing oral argument on December 7, 2018, the trial court granted the

Motion for Class Certification on May 31, 2019 with its oral decision placed on the record on the same date. 1T[2], Pa58, 2T.

On June 12, 2019, Defendants filed a Motion to Enforce Class Waivers and Dismiss Class Members (Pa60) seeking reconsideration of the May 31, 2019 Order granting Class Certification, based on a nearly identical certification of Defendant Boris Fidelman. Pa62. While that motion remained pending in the trial court, the Defendants filed a motion with this Court on July 17, 2019, seeking leave for interlocutory appeal of the May 31, 2019 Order Granting Class Certification. Pa70.

On July 26, 2019, the trial court denied the Motion to Enforce Class Waivers (Pa72), after placing an oral decision on the record finding the Defendants had waived their right to invoke the DRA as a defense to class certification. 3T18-1 – 18-22. On July 26, 2019, this Court denied Defendants' Motion for Leave to Appeal the trial court's Order Granting Class Certification, without comment. Pa74.

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[2] Transcript references are as follows: **1T**, December 7, 2018 oral argument on Motion for Class Certification, **2T**, May 31, 2019 decision on Motion for Class Certification; **3T**, July 26, 2019 oral argument and decision on Defendants' Motion to Enforce Class Waivers and Dismiss Class Members, **4T**, January 21, 2022 oral argument and decision on Defendants' Motion for Stay of Proceedings and Plaintiff's Motion to Modify and Direct Class Notice, **5T**: January 20, 2023 oral argument on Defendants' Motion to Enforce Class Waivers and Decertify Class, and **6T**, June 12, 2024 decision on Defendants' Motion to Enforce Class Waivers and Decertify Class

On August 15, 2019, the Defendants filed *another* Motion for Leave to Appeal, this time of the trial court's July 26, 2019 Order denying the Motion to Enforce Class Waivers and Dismiss Class Members. Pa75. On December 10, 2019, this Court issued an Order again denying Defendants' motion for interlocutory appeal, in which the Honorable Jack M. Sabatino, P.J.A.D. wrote:

> Defendants have not demonstrated why it is in the interests of justice to grant interlocutory review over the discrete issues now being presented by appellants in litigation that has already been pending for over five years. Among other things, we note that, regardless of whether the alleged class waivers are enforced as to certain plaintiff class members, the related lawsuits of plaintiffs
>
> Roach and Jackson will remain pending in the Law Division, thereby increasing litigation costs and possibly enabling inconsistent dispositions in the court proceedings and in the arbitrations. In addition, defendants did not seek Supreme Court review of this court's July 25, 2019 order denying leave to appeal the trial court's certification of the plaintiff class, an order that at this point should be left intact. Lastly, we are unpersuaded that defendants' interpretation of the DRA is correct. The motion judge reasonably determined that "[i]t's now time to move this case forward."

Pa77.

After a year of litigation necessitated by the Defendants' failure to produce sufficient information necessary serve the class members with notice of the proceedings as required by R. 4:32-2(b)(2), the Defendants filed a motion to stay all proceedings on December 16, 2021 pending a decision in the

then-pending appeal in *Cerciello v. Salerno Duane, et al*., which the trial court denied on January 21, 2022 after hearing oral argument and placing a decision on the record on the same date. Pa79, T4. On January 25, 2022, the Defendants filed a Motion for Interlocutory Appeal and to Stay Proceedings which was denied by this Court by order filed on March 4, 2022. Pa83.

On January 21, 2022, the trial court entered an order approving an amendment to the previously approved Class Notice (see Pa102-109) and ordering that it be served on all the certified class members by publication and direct mail by February 11, 2022. Pa81. The court-appointed class administration firm successfully served the approved Class Notice (see Pa102-109) on 2,752 of the 2,919 members of the certified class, none of whom subsequently elected to exclude themselves from the class action[3]. Pa99-101.

On August 11, 2022, the Defendants filed yet another Motion to Enforce Class Waivers and Decertify Class, arguing that the recently published decision in *Cerciello v. Salerno Duane*, *Inc.,* 473 N.J. Super. 249 (App. Div. 2022) mandated reconsideration of the trial court's earlier rulings. Pa84. On September 30, 2022, the Plaintiffs filed opposition to the Motion to Enforce Class Waivers and Decertify the Class. Pa86. While the Motion to Enforce

[3] To date, the class members have not been notified of the June 12, 2024 decertification order on appeal.

Class Waivers and Decertify Class was pending, the Plaintiffs filed a Motion for Summary Judgment on September 23, 2022 and the Defendants filed Cross-Motion for Summary Judgment on October 13, 2022. On January 20, 2023, the trial court heard oral argument on both the Defendants' Motion to Enforce Class Waivers and Decertify Class and the Summary Judgment Motion and Cross-Motion. 5T.

On June 12, 2024, the trial court entered an Order granting the Defendants' Motion to Enforce Class Waivers and Decertify Class (Pa111, the order on appeal) after placing an oral decision on the record. 6T. On the same date, June 12, 2024, the Court also entered two separate Orders granting the Plaintiffs' Motion for Summary Judgment as to themselves only (Pa114) and denying the Defendants' Cross-Motion for Summary Judgment. Pa120.

On July 16, 2024, the Plaintiff filed a Notice of Appeal of the June 12, 2024 Order Enforcing Class Waivers and Decertifying Class. Pa122. On July 30, 2024, the Plaintiffs filed a letter with this Court in response to a non-finality notice, clarifying that they are appealing the June 12, 2024 Order Enforcing Class Waivers and Decertifying Class only, and they are *not* appealing the June 12, 2024 Order on their Motion for Summary Judgment. Pa128. The Defendants have not cross-appealed.

STATEMENT OF FACTS

As alleged in the complaint, in 2013, the Plaintiffs each purchased a used car from the Defendants' dealership in Rahway, New Jersey. Pa3, 4, 9. As part of the sales, each Plaintiff signed a one-page document printed on BM Motorcars letterhead, entitled "DISPUTE RESOLUTION AGREEMENT" (the "DRA") which provided, in relevant part,

> The parties to this agreement agree to arbitrate any claim, dispute, or controversy…that may arise out of or relating to the sale or lease identified in this agreement… The parties also agree to (i) waive any right pursue [sic] any claims arising under this agreement including statutory, state or federal claims, as a class action arbitration, or (ii) to have an arbitration under this agreement consolidated with any other arbitration or proceeding. The arbitration shall be conducted in accordance with the rules of the American Arbitration Association… Dealership shall advance both party's filing, service, administration, arbitrator, hearing or other fees…

Pa64, 66, 68.

After purchasing the vehicles, both Plaintiffs initiated arbitration proceedings with the American Arbitration Association (AAA) to assert Consumer Fraud Act (CFA) and other claims against the Defendants arising out of the sales, but the AAA dismissed the arbitrations due to the Defendants' refusal to pay arbitration filing and administration fees. Pa26. See also *Roach v. BM Motoring,* 228 N.J. at 167-171 (stating "the facts of record.") The Plaintiffs then jointly filed the action below, asserting CFA and other claims,

including "both putative class action claims (based on unlawful fees and overcharges that Defendants routinely impose on consumers) and individual claims (based on misconduct that specifically occurred in the two Plaintiffs' transactions)." Pa1. Instead of answering, the Defendants filed a motion to compel arbitration under the DRAs, which was granted, but subsequently reversed by the New Jersey Supreme Court, in an opinion finding that the Defendants' prior refusal to pay arbitration filing fees was a "material breach of the DRA and, as such, bars the [Defendants] from later compelling arbitration." *Roach*, 228 N.J. at 180.

On remand, the Defendants filed an Answer with Affirmative Defenses on July 13, 2017. Pa28. The pleading did not raise DRAs signed by the proposed class members as a defense to class certification, although it did include an affirmative defense to class certification on a different basis. Pa39 (Separate Defense number 17). The parties engaged in class-related discovery, and on January 10, 2018, the Defendants served responses to interrogatories calling for all bases of opposition to class certification, which did not identify proposed class members' DRAs as a defense to class certification. Pa52-55.

After substantial class-related litigation and unsuccessful settlement efforts, the Plaintiffs filed a Motion for Class Certification on October 23, 2018, which the Defendants opposed on November 1, 2018 by asserting, for

the first, that the proposed class members signed DRAs with "class action waivers" identical to the Plaintiffs' which precluded their participation in the proposed class action. Pa45-47.

On May 31, 2019, the trial court entered an Order Granting Class Certification (Pa58), after which the Defendants filed two unsuccessful motions with the trial court, and two unsuccessful motions with this Court, to attempt to relitigate their attempted enforcement of the supposed "class action waivers, as set forth in the foregoing Procedural History.

On August 11, 2022, the Defendants filed yet another motion seeking to invoke the DRA's purported "class action waiver" to defeat class certification, this time arguing that this Court's July 20, 2022 decision in *Cerciello v. Salerno Duane, Inc.* mandated reconsideration of the trial court's earlier rulings. Pa84. On June 12, 2024, the trial court granted the Defendants' motion to enforce the purported "class action waiver" and decertify the Class. based entirely on the court's conclusion, as stated in its oral decision, that this case presents a "duplicate situation of *Cerciello,*" without any reference to or analysis of the language of the DRA that purported waived the class members' rights to participate in a class action *in court*. 6T8-3 – 8-23. The Plaintiffs now appeal from the June 12, 2024 Order decertifying the class.

LEGAL ARGUMENT

I. The trial court's decision to decertify the class was based entirely on the trial court's misassumption that the "class waiver" provision in parties' Dispute Resolution Agreement (see Pa66, 68) is a "duplicate" of the entirely different provision at issue in *Cerciello v. Salerno Duane, Inc.* (decided Below at 6T5-16 – 8-23)

The class decertification order on appeal was based entirely on the trial court's mistaken belief that the parties' Dispute Resolution Agreement (DRA) contained a "class action waiver" that was a "duplicate" of the provision construed and found to be a valid waiver of the right to pursue a class action lawsuit in *Cerciello v. Salerno Duane*, *Inc.,* 473 N.J. Super. 249 (App. Div. 2022)(holding that an express waiver of the right to pursue a class action in court precludes class certification, even if the arbitration provision containing the class action waiver is unenforceable). Although the trial court's decision to decertify the class was ostensibly based on enforcement of a "class waiver" in the parties' DRA, the trial court's oral decision does not include a *single* reference to the DRA and does not identify, quote, or refer to any of the actual text of the DRA or its purported "class action waiver." 6T5-16 – 8-17. Instead, the trial court, after noting that this case and *Cerciello* had similar procedural histories, declared this case to be a "duplicate situation of *Cerciello*" and proceeded to decide the motion based on the class action waiver in Cerciello's "motor vehicle retail order" without addressing whether or not the DRAs in

this case contained similar waivers of the right to pursue a class action in court. 6T8-14 – 8-23.

The court's *entire* decision on class decertification (omitting a recitation of procedural history at 6T7-1 – 8-4) is as follows:

> [A] case by the name of *Cerciello v. Salerno Duane*… involving the same issues that were argued before a judge in Union County [w]ent to the Appellate Division [which] issued a decision… reported at 473 N.J. Super. 249. The same arguments that were presented here were presented there, in the… underlying claim before the judge in Union.
>
> Ultimately, what happened [in *Cerciello*] in a nutshell was the defendant sought to enforce the arbitration provision. And -- but what happened was they went to arbitration, defendant never paid the arbitration fee. Arbitrator threw the case back. And then the plaintiff sought class certification. The defendant at that point in time wanted to rely upon the motor vehicle retail agreement indicating that there was, regardless, a class waiver provision.
>
> The [trial] judge indicated, well, the class waiver provision still controls regardless of what happens with the failure to arbitrate. It goes to the Appellate Division. And in its reported decision, the Appellate Division agreed.
>
> ****
> So this is now…defendant's motion to decertify the class, reconsider the denial of the enforcement of the class waiver provision. Pursuant to rule 4:32-1, and Supreme Court decisions… the Court is free to decertify a class if appropriate at any time...
>
> So the Court here finds that it is appropriate, as this matter is on all [fours] -- this is a duplicate situation of *Cerciello v. Salerno Duane*. And based upon its reading of *Cerciello v. Salerno Duane*, the Court grants the motion for reconsideration and dismisses the class action -- grants that part of it to reconsider or dismiss it. And

> enforces the class waiver provision of those motor vehicle retail orders[4].

6T6-1 – 6-25, 6T8-5 – 8-23.

Despite the similar procedural histories, this case is *not* a "duplicate situation of *Cerciello*." Among other material differences, the two cases arose from sales by two different car dealerships, using different sets of sales forms containing *substantially* different "class waiver" language. The class action waiver in *Cerciello* read, in relevant part, as follows:

> AGREEMENT TO ARBITRATE ALL CLAIMS. READ THE FOLLOWING ARBITRATION PROVISION CAREFULLY, IT LIMITS YOUR RIGHTS, AND WAIVES THE RIGHT TO MAINTAIN A COURT ACTION, OR TO PURSUE A CLASS ACTION *IN COURT AND IN ARBITRATION*.
> . . . .
> …THIS ARBITRATION PROVISION LIMITS YOUR RIGHTS, AND WAIVES THE RIGHT TO MAINTAIN A COURT ACTION OR PURSUE A CLASS ACTION IN COURT OR IN ARBITRATION. PLEASE READ IT CAREFULLY, PRIOR TO SIGNING.

Cerciello, 473 N.J. Super. at 253 (emphases added). The Court held that his language was sufficiently clear and unambiguous to constitute a valid "class action waiver" under New Jersey precedent, *specifically because* it clearly

[4] The reference to enforcement of "the class waiver provision of those motor vehicle retail orders" was an apparent error, as the purported class waivers in this case are in the parties' separate DRA form. Perhaps tellingly, the class action waivers in *Cerciello* were a provision of the "motor vehicle retail order" form used by the dealership in that case.

stated that the waiver applied to class actions in court, as well as class arbitrations:

> In large, bold, capitalized print, directly below the purchase price and a signature line, and again above the document's second signature line, the consumer is informed they cannot pursue a class action in arbitration or in court.

Cerciello, 473 N.J. Super. at 253, 258 (citing *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 447 (2014)). By contrast, the purported "class waiver" in Defendants' DRA form *in this case* states (in small, non-emphasized print buried in the middle of a lengthy paragraph) as follows:

> The parties also agree to (i) waive any right pursue any claims arising under this agreement including statutory, state or federal claims, as a class action arbitration, or (ii) to have an arbitration under this agreement consolidated with any other arbitration or proceeding….

Pa66, 68. Unlike the waiver in *Cerciello*, the DRA does not mention, much less waive, the consumer's right to pursue a class action in court, but instead only specifies waiver of "class action arbitration."

This distinction is critical, because the holding in *Cerciello* that the class action waiver remained enforceable even though the defendants were no longer entitled to compel arbitration *explicitly relied* on the fact that the waiver expressly encompassed class actions "in court," as made clear in the following passage, in which the Court references this fact five times in the span of two paragraphs:

> Plaintiff was informed the [class] waiver applied whether she brought her claims in an arbitration *or before a court*. Therefore, plaintiff was on notice, and agreed, that she could not bring a *class action in court*. Defendants' inability to compel arbitration does not affect plaintiff's waiver of her right to pursue a *class action in court*. Because plaintiff was clearly informed of the waiver that applied both *in court* and arbitration, we are satisfied the class action waiver survives defendants' breach of the agreement and remains applicable to plaintiff's claims.
>
> Therefore, plaintiff could present her claims on an individual basis *in court*, *but she could not act as a class representative* of a class action or participate as a member of a class action.

Cerciello, 473 N.J. Super. 258-59 (emphasis added). In fact, the issue addressed by the *Cerciello* holding, as described by the Court, was "whether defendants' material breach of an arbitration agreement—the failure to pay the administration fees—precludes them from asserting the *waiver of the right to pursue a class action in* the subsequent *Superior Court litigation*." *Cerciello*, 473 N.J. at 252. *Ceriello's* holding therefore applies *only* to cases in which the parties' contract includes an arbitration provision that contains an express "waiver of the right to pursue a class action in… Court litigation." *Id.*

Because the Defendants' DRA unquestionably does *not* contain an express "waiver of the right to pursue a class action in… Court litigation," *Cerciello* is completely inapposite to the issue of class certification in *this* action. The trial court erred by assuming that this case was a "duplicate situation" or "on all fours" with *Cerciello*, and by applying that misassumption

to decertify a class of consumers, nearly five years after the class was certified and provided notice of the pendency of the class action.

II. The trial court's implied finding that the DRA's waiver of "class action arbitration" constituted a valid waiver of the right to pursue a class action *in court* is contrary to New Jersey precedents requiring contractual waiver provisions to be clear and unambiguous, and overlooks unanimous caselaw finding waivers of "class action arbitration" to be inapplicable to class actions in court (decided below at 6T8-5 – 8-23).

The New Jersey Supreme Court recently held that contractual waivers of the right to pursue class actions in court are generally valid, provided that they satisfy the "knowing and voluntary waiver" standard applicable to all contractual waiver provisions under New Jersey law. *Pace v. Hamilton Cove*, 258 N.J. 82, 101-02, 106 (2024)(citing *Atalese*, 219 N.J. at 443). Under that standard, a class action waiver in a consumer contract is valid if it is "'written in a simple, clear, understandable and easily readable way' as required by the CFA, N.J.S.A. 56:12-2, and it clearly and unambiguously put [the consumers] on notice that they could only proceed with a lawsuit against defendants on an individual basis." *Pace*, 258 N.J. at 106 (citing *Atalese*, 219 N.J. at 444, 447). This Court applied the same "clear and unambigious" standard in *Cerciello v. Salerno Duane, Inc.*, when scrutinizing the contractual language to determine the validity of the class action waiver provision, emphasizing the fact that the

provision clearly notified the consumer that she was waiving the right to pursue a class action "in arbitration or in court":

> In large, bold, capitalized print, directly below the purchase price and a signature line, and again above the document's second signature line, the consumer is informed they cannot pursue a class action in arbitration or in court… The class action waiver contained in the arbitration agreement was clear and unambiguous. *See Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 447 (2014).

Cerciello, 473 N.J. Super. at 258. Two paragraphs later, the Court again emphasized that "Plaintiff was informed the waiver applied whether she brought her claims in an arbitration or before a court. Therefore, plaintiff was on notice, and agreed, that she could not bring a class action in court." *Id.*, at 258-59.

Applying these heightened clarity and readability standards to the the BM Motoring DRA, it is beyond question that there is no language in the document that "clearly and unambiguously put [the Plaintiffs] on notice that they could only proceed with a lawsuit against [D]efendants on an individual basis," as there was in the dispute resolution provisions in *Pace* and *Cerciello*. The language that the Defendants claim to be a valid class action waiver,

which appears in very small, non-emphasized type in the middle of a lengthy paragraph,[5] reads as follows:

> The parties also agree to (i) waive any right pursue [sic] any claims arising under this agreement including statutory, state or federal claims, as a class action arbitration, or (ii) to have an arbitration under this agreement consolidated with any other arbitration or proceeding.

Pa66, 68. This sentence does not mention the parties' right to pursue claims as a class action in court, but only purports to "waive any right pursue any claims….as a class action arbitration." The term "class action arbitration" obviously does not "clearly and unambiguously" refer to a class actions in court, as the language in the class action waiver in *Cerciello* did, and therefore the DRA's purported "class waiver" was *not* a valid waiver of the right to pursue a class action in court under the standards set forth in *Pace, Atalese*, and *Cerciello*.

Helpfully, the phrase "class action arbitration" has been construed in at least five decisions issued by this Court, *all* of which found that the language

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[5] In the Supreme Court's opinion in this matter, the Court noted, "Because of the small font size in [the copies of the DRA presented to the Court], none are easy to read… We note that state law "requires that 'a consumer contract . . . be written in a simple, clear, understandable and easily readable way.'" N.J.S.A. 56:12-10 provides certain guidelines to assess whether a consumer contract meets that standard. Among other factors to consider are whether "the main promise" and the "[c]onditions and exceptions" of an agreement are in "at least 10 point type." N.J.S.A. 56:12-10(b)(3)." *Roach*, 228 N.J. at 168 n.1 (citing *Morgan v. Sanford Brown Inst.*, 225 N.J. 289, 310 (2016))

does not express a waiver of class actions in court. See See *NAACP of Camden Cty. E. v. Foulke Mgmt. Corp.,* 421 N.J. Super. 404, 434-35 (App. Div. 2011); *Curiale v. Hyundai Capital Am.*, 2020 N.J. Super. Unpub. LEXIS 765, at *11-12 (App. Div. Apr. 27, 2020); *Haynes v. DCN Auto., L.L.C.*, 2018 N.J. Super. Unpub. LEXIS 732, at *10-11 (App. Div. Apr. 2, 2018); *Snap Parking, LLC v. Morris Auto Enters., LLC*, 2017 N.J. Super. Unpub. LEXIS 750, at *9 (App. Div. Mar. 27, 2017). *Rotondi v. Dibre Auto Grp., L.L.C.,* 2014 N.J. Super. Unpub. LEXIS 1662, at *10-11 (App. Div. July 9, 2014).

For example, in *Curiale v. Hyundai Capital Am.* (decided by the author of *Cierciello*, Judge Currier, as part of a two-judge panel), the Court construed a waiver provision virtually identical to the one contained in the Defendants' DRA form, and found that the waiver of "class action arbitration" unambiguously refers to *class arbitrations only*, and clearly does *not* include class actions in court:

> The absence of any specific waiver of class actions in court is not confusing, and there is no inconsistency between the waiver of the right to pursue court actions and the waiver of the right to "class action arbitration." *The waiver of the right to maintain a "class action arbitration" only applies to the arbitration process*.

Curiale, 2020 N.J. Super. Unpub. LEXIS 765, at *11-12 (emphasis added). Similarly, in *Haynes v. DCN Auto,* the Court found, "The waiver of the right to

maintain a 'class action arbitration' only applies to the arbitration." *Haynes*, 2018 N.J. Super. Unpub. LEXIS 732, at *10-11.

In the other three cases construing provisions waiving the right to "class action arbitration," the Court found the language to be inherently ambiguous and confusing, and therefore unenforceable to restrict the plaintiff's right to pursue a class action in court. For example, in *NAACP of Camden County v. Foulke Management*, the Court noted,

> The potential for confusion is still further compounded by the [language]: "You and we further agree that there shall be *no class action arbitration* pursuant to this agreement." (Emphasis added). By restricting its reference to a class action "arbitration," this… sentence could easily lead a purchaser to believe that she would be free to take part in a class action *lawsuit*, either as a named representative or simply as a class member.

NAACP, 421 N.J. Super. at 434-35. Similarly, in *Snap Parking, LLC v. Morris Auto*, the Court found,

> Since the Agreement does not explicitly state it bars class actions altogether, we conclude the "class action arbitration" waivers were not stated with sufficient clarity to constitute a complete abandonment of court proceedings to pursue a class action.

Snap Parking, 2017 N.J. Super. Unpub. LEXIS 750, at *9-10. See also *Rotondi v. Dibre Auto Grp.,* 2014 N.J. Super. Unpub. LEXIS 1662, at *14 (affirming denial of motion to compel arbitration in part because "the reference in the arbitration clauses to 'class action arbitration' is potentially confusing.")

In short, there is no question that the DRA's small-print provision purporting to waive the right to "class action arbitration" does not constitute a clear and unambiguous waiver of the Plaintiffs' right to pursue a class action in court, and therefore is not a valid waiver of that right under the standards set forth in *Pace, Atalese*, and *Cerciello.* This is fatal to the trial court's decision to decertify the class, which was based entirely on the court's misapprehension that this case, including the "class waiver" language was "a duplicate situation of *Cerciello.*" 6T8-14 – 8-23. In fact, the *Cerciello* decision is limited in application to cases where, unlike here, the parties' arbitration provision contains valid waivers of the right to pursue class actions *in court*.

As noted earlier, the Court in *Cerciello* based its denial of class certification *squarely* on the class waiver's express applicability to "*class actions in court* or in arbitration." *Cerciello,* 473 N.J. Super. at 258. This fact in *Cerciello*, which is entirely absent here, was the lynchpin of the Court's conclusion that the class action waiver remained enforceable, notwithstanding the defendants' loss of the right to compel arbitration due to their breach of their duty to pay fees:

> Defendants' inability to compel arbitration does not affect plaintiff's waiver of her right to pursue a class action in court. ***Because plaintiff was clearly informed of the waiver that applied both in court and arbitration***, we are satisfied the class action waiver survives defendants' breach of the agreement and remains applicable to plaintiff's claims.

> Therefore, plaintiff could present her claims on an individual basis in court, but she could not act as a class representative of a class action.

Cerciello, 473 N.J. Super. at 258-59. Here, unlike in *Cerciello*, there was no "class action waiver [that] survive[d] defendants' breach of the agreement and remain[ed] applicable to plaintiff's claims," and so the trial court erred in decertify the class on that basis.

III. *Cerciello* has no bearing on the trial court's previous ruling that the Defendants waived their right to invoke DRAs signed by absent class members as a defense to class certification, and the Defendants' argument for reconsideration on that basis should not be considered as an alternative basis for affirmance. (not decided below).

Although not addressed in the trial court's decision or order on appeal, the Defendants argued below that this Court's publication of the *Cerciello* opinion, and the Supreme Court's subsequent denial of certification for appeal of that opinion, required reconsideration not just of the trial court's previous refusal to enforce of the purported "class waiver," but also of the court's earlier ruling that the Defendants' waived their right invoke DRAs signed by absent class members in opposition to the initial class certification motion, by failing to raise the defense earlier and through other litigation conduct.

However, there is nothing in the *Cerciello* opinion that suggests any sort of change of law with respect to standards for determining waiver of the right

to compel arbitration through litigation conduct, as set forth in *Cole v. Jersey City Med. Ctr.*, 215 N.J. 265 (2013). The *entire* discussion of the issue in *Cerciello* is as follows:

> We only briefly address plaintiff's argument that defendants did not timely raise the arbitration agreement as an affirmative defense and therefore waived their right to enforce the agreement. As [the trial judge] found, defendants asserted the affirmative defense and moved to dismiss the complaint and to compel arbitration soon after plaintiff filed the class action complaint. Defendants did not delay in raising the defense.

Cerciello, 473 N.J. Super. at 259 (citing *Cole*, 215 N.J. at 277-81).

The Defendants arguments on this point again attempt to substitute the facts of *Cerciello* for the facts of this case to decide whether the Defendants waived their right to invoke arbitration provisions in DRAs with the absent class members to oppose class certification. However, deciding waiver of the right to enforce an arbitration provision requires "a fact-sensitive analyses on a case-by-case basis [and] result of such an approach finds waiver in some situations but not in others." *Cole,* 215 N.J. at 277 (2013).

Here, the Defendants' litigation conduct supporting waiver of the right to compel arbitration is different from, and substantially more compelling than the conduct in *Cerciello*. The Defendants were first put on notice that the Plaintiffs were seeking certification of class when they received service of the complaint below in March of 2014, but did absolutely nothing to alert the court

or the Plaintiffs that it intended to invoke purported DRAs between the Defendants and the absent class members as a defense to class certification, or even that any such DRAs existed until four and a half years later, on November 1, 2018 when they filed their opposition to the Plaintiff's motion for class certification.

Notably, after being served with the complaint, which expressly sought certification of a class and was encaptioned "Class Action Complaint," the Defendants never once mentioned the purported DRAs with absent class members in their initial motion to dismiss and compel arbitration under the DRA, or in any of the subsequent appellate filings. The Defendants' initial motion to dismiss could have, but did not seek dismissal of the Plaintiffs' class action allegations based on purported DRAs between putative class members and the Defendants. See *Myska v. N.J. Mfrs. Ins. Co*., 440 N.J. Super. 458, 472 (App. Div. 2015)(Holding that class certification allegations may be challenged through pre-discovery "motions to dismiss, filed pursuant to Rule 4:6-2(e)").

After the Supreme Court remanded the case in March of 2017, the Defendants continued to engage in conduct contrary to any intent to enforce, or even to disclose the existence of DRAs between the Defendants and the absent putative class members. Unlike the defendants in *Cerciello,* the

Defendants here did *not* plead the DRAs as a defense to class certification. In fact, the Defendants' Answer with Affirmative Defenses filed on July 13, 2017 does not raise or even mention the DRAs or purported class action waivers as a defense to class certification or otherwise. Pa28. Notably, the Defendants' pleading *does* include an affirmative defense specifically contesting class certification on a different basis. Pa39 (defense number 17). Unlike the defendants in *Cerciello,* the Defendants here provided answers to interrogatories that failed to identify the DRAs or purported class action waivers in response to interrogatories that specifically called for identification of all of the Defendants' anticipated defenses and bases of opposition to class certification. Pa52-55. After failing to raise or identify any defenses to class certification based on the DRAs or purported class action waivers, the Defendants participated, without objection, in protracted but ultimately unsuccessful class-wide settlement negotiations, mediated by the then-assigned judge, from January 2018 until May 2018. After the settlement efforts concluded in May of 2018, the Defendants continued to fail to disclose any intention to invoke the DRAs and arbitration provisions with absent class members until November 1, 2018, when they first raised the issue in their opposition to the Plaintiff's motion for class certification.

This litigation conduct was inconsistent with an intent to invoke DRAs to compel the putative class members to individual arbitration, or to defeat class certification. The Defendants' litigation conduct therefore constituted an implied waiver of the right to invoke the purported DRAs with the absent putative class members as a defense to class certification. The decision in *Cerciello* has no bearing on this finding, which was reached by the trial court and endorsed by this Court over five years ago in Judge Sabatino's comments to the denial of the Defendants second motion for interlocutory appeal of the class certification decision. See 3T18-1 – 18-22 and Pa77.

In *Cole,* the Supreme Court held,

> Any assessment of whether a party to an arbitration agreement has waived that remedy must focus on the totality of the circumstances. That assessment is, by necessity, a fact-sensitive analysis. In deciding whether a party to an arbitration agreement waived its right to arbitrate, we concentrate on the party's litigation conduct to determine if it is consistent with its reserved right to arbitrate the dispute. Among other factors, courts should evaluate: (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any. No one factor is dispositive.

Cole at 80-81. Here, the Defendants waited four years before first attempting to invoke the purported DRAs with the putative class members, and in fact

never even mentioned the existence of the purported DRAs until November 1, 2018, when they filed opposition to class certification. As discussed earlier, the Defendants could have, and should have raised this issue in 2014, along with its motion to invoke the DRAs against the Plaintiffs. Having failed to raise this challenge to class certification in its initial R. 4:6-2(e) motion in 2014, and again in its answer and affirmative defenses, the Defendants have acted in a manner entirely inconsistent with an intent to invoke the purported DRAs with the putative class members. *Cole*, at 281 (finding waiver where "Liberty advanced thirty-five affirmative defenses in its answer, but it did not include arbitration as one of them.") Moreover, that inconsistent conduct over the course of years of hard-fought, costly litigation has resulted in prejudice to the Plaintiffs. *Cole* at 282 (Finding prejudice where "Liberty invoked its right to arbitrate their employment dispute [when] Cole was on the verge of a judicial resolution of her complaint. After twenty-one months, Cole was directed to start over in a different forum under different rules."')

CONCLUSION

For the foregoing reasons, the Plaintiffs-Appellants respectfully request that the trial court's order be reversed, and this matter be remanded for further proceedings.

Respectfully submitted,

Dated: January 24, 2025

s/ Henry P. Wolfe
Henry P. Wolfe, Esq.
THE DANN LAW FIRM, PC
Attorneys for Plaintiffs-Appellants

TAHISHA ROACH and EMELIA JACKSON, on behalf of themselves and all others similarly situated, Plaintiffs, v. BM MOTORING, LLC, AND FEDERAL AUTO BROKERS, INC. both corporations t/a BM MOTOR CARS, BORIS FIDELMAN AND MIKHAIL FIDELMAN AND JOHN DOES 1-5, Defendants.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003561-23 TRIAL COURT DOCKET NO.: MID-L-1333-14 SAT BELOW: HON. ANA C. VISCOMI, J.S.C. Civil Action

BRIEF OF APPELLEES BM MOTORING, LLC, FEDERAL AUTO BROKERS, BORIS FIDELMAN AND MIKHAIL FIDELMAN

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PRELIMINARY STATEMENT

In May 2019, the Law Division certified a class. At that time, the court ignored defendants' argument against class certification – that each potential class member had signed a class-waiver. [Plaintiffs' Appendix ("Pa") Volume 1, Page 51a, Pa 1:58a] Later, the court also rejected defendants' motion to enforce those class-waivers. [Pa 1:60a-69a, 2:72a-73a] Both times, defendants unsuccessfully sought leave to appeal. [Pa 2:70a-71a, 2:74a-78a]

But in July 2022, the Appellate Division decided ***Cerciello v. Salerno Duane et al.***, 473 N.J. Super. 249, 252 (App. Div. 2022), *certif. denied*, 252 N.J. 183-84 (2023), and ruled differently. Affirming denial of a class, the Court held that, where each potential class member signed a class-waiver, they could not be part of a class. ***Id.*** The Court expressly rejected the same argument that plaintiffs made here that ***Rule*** 4:32-1 controlled. ***Id.*** at 255.

Armed with this new appellate decision, these defendants moved to decertify the class. [Pa 2:84a-85a] In June 2024, the Law Division finally agreed, decertified the class and vacated all class-related orders. [Pa 2:111a-113a] The court held that ***Cerciello*** was binding and directly on point.

Plaintiffs have appealed. [Pa 2:122a-127a] Because the Law Division correctly accepted, interpreted and applied the holding in ***Cerciello***, and at least

one Appellate Court has upheld the same provision, this Court should affirm the order, decertifying the class.

STATEMENT OF FACTS[1]

This case started with the purchases of two cars. On February 16, 2013, plaintiff Roach bought a 2000 Nissan Exterra from BM Motors. As an integral part of her transaction, she signed a Dispute Resolution Agreement ("DRA") with a class-waiver. ***Roach v. BM Motors Inc.***, 228 N.J. 163, 168-69 (2017). [Pa 1:66a]

On August 17, 2013, plaintiff Jackson bought a 2007 BMW from BM Motors. She too signed an essentially identical DRA that contained a class-waiver. ***Roach***, 228 N.J. at 168. [Pa 1:68a]

Discovery established that each other potential class member had signed an essentially identical DRA with a class-waiver.[2]

---

[1] The Supreme Court summarized the facts and the early procedural history of this case in its opinion deciding the arbitration issue. ***Roach v. BM Motors Inc.***, 228 N.J. at 166-71. These events are only background and do not affect the issues in this appeal.

[2] The DRAs that each plaintiff and each potential class member signed differed only in the information identifying the car (the vehicle year, make, model and Vehicle Identification Number) and whether the car was new or used.

PROCEDURAL HISTORY

A. Early Procedural History.

Initially, both plaintiffs demanded arbitration under BM Motors' DRA. But when it did not pay the administration fee, plaintiffs filed this action in Superior Court, claiming violations of New Jersey's Consumer Fraud Act and Truth-in-Consumer Contract Warranty Notice Act. ***Roach***, 228 N.J. at 167-70.

The defendants moved to dismiss and to proceed in arbitration, invoking the DRA that each plaintiff had signed. ***Id.*** The Law Division denied the motion, and the Appellate Division affirmed. ***Id.*** at 170-71.

The New Jersey Supreme Court granted certification and also affirmed. The Court held that:

(1) the DRA was valid and enforceable;

(2) but by failing to pay the administration fee, defendants had breached a material term of the DRA, and plaintiffs could proceed in Superior Court, not in arbitration. ***Id.*** at 173-74.

On remand, the parties conducted discovery, identified other potential class members and learned that, as part of their purchases, they too had signed DRAs that contained class-waivers.

The class-waiver stated, in bold type:

> THE UNDERSIGNED CUSTOMER AND DEALER AGREE THAT ANY AND ALL CLAIMS, DISPUTES OR ISSUES INVOLVE THE

> CUSTOMER AND DEALER, DEALER'S OFFICERS, AGENTS OR EMPLOYEES, OR DEALERS SURETY BONDING COMPANY SHALL BE RESOLVED IN ACCORDANCE WITH THE FOLLOWING PROVISIONS . . . .
>
> Immediately under that statement, the provision states, in bold type:;
>
> Under that, the provision continues, stating:
>
> AGREEMENT TO ARBITRATE ANY CLAIMS. READ THE FOLLOWING ARBIRATION PROVISION CAREFULLY. IT LIMITS YOUR RIGHTS, INCLUDING THE RIGHT TO MAINTAIN A COUR ACTION.
>
> The parties to this agreement agree to arbitrate any claim, dispute or controversy, including all statutory claims:
>
> The parties also agree to (i) waive any right [to] pursue any claims arising under this agreement including statutory, state or federal claims, as a class action arbitration, or (ii) to have an arbitration under this agreement consolidated with any other arbitration or proceeding.
>
> THIS ARBITRATION PROVISION LIMIT[S] OUR RIGHTS, INCLUDING YOUR RIGHT TO MAINTAIN A COURT ACTION. PLEASE READ IT CAREFULLY PRIOR TO SIGNING.

[Pa 1:66a, 1:68a, 1:63a-64a; Defendants' Appendix ("DA"), page 4a]

B. Relevant Procedural Background: Plaintiffs' Motion for Class Certification and Defendants' Motion to Decertify the Class.

1. Plaintiffs' Motion for Class Certification.

On October 23, 2018, after discovery ended, plaintiffs moved to certify a class relying on the factors listed in ***N.J. Rule*** 4:32-1. [Pa 1:43a-44a, 49a-57a]

On November 1, 2018, defendants opposed the motion and argued that:

(1) each named plaintiff had signed a class-waiver;

(2) each potential class member had signed a class-waiver; and

(3) by signing the class-waiver, plaintiffs and all other potential class members had agreed not to participate in a class action. [Pa 1:45a-49a]

On November 5, 2018, plaintiffs replied and argued that defendants' initial breach of the arbitration agreement waived any defense to class certification based on the purported dispute resolution agreement by failing to raise until now. They also argued that defendants' DRA is generally invalid and unenforceable under New Jersey law.

On May 31, 2019, without addressing defendants' arguments, the Law Division certified a class and held that plaintiffs had satisfied the requirements of ***N.J. Rule*** 4:32-1.

On June 17, 2019, defendants moved for leave to appeal. [Pa 2:70a] On July 2, 2019, plaintiffs opposed the motion. And on July 26, 2019, the Appellate Division denied that motion. [Pa 2:74a]

2. Defendants' Motion to Enforce Class-Waivers.

On June 12, 2019, defendants moved to enforce the class-waivers with plaintiffs and all other potential class members. [Pa 1:60a-69a] They argued that the court should enforce the class-waivers and decertify the class because:

(1) all class members have signed identical Dispute Resolution Agreements, waiving participation in a class action; and

(2) all new class members have signed virtually identical arbitration-class-waiver contracts, they may not participate in a class action.

On July 18, 2019, plaintiffs again countered that the New Jersey Supreme Court had not validated the class-waivers and defendants had waived their right to invoke the DRA's as a defense to class certification.

On July 22, 2019, defendants replied that the ***Roach*** Supreme Court opinion had not addressed the class-waiver and asserted that, under ***AT&T Mobility v. Concepcion***, 563 U.S. 333 (2011), and ***NCAAP v. Foulke Management Corp.***, 421 N.J. Super. 404 (App. Div.), *certif. granted*, 209 N.J. 96 (2011), *appeal dismissed*, 213 N.J. 47 (2013), it was legally valid and enforceable. They stressed that they had properly preserved their rights and had not waived them because none of the new class members were before the Court when plaintiffs and defendants litigated the named plaintiffs' individual rights under their individual arbitration clauses.

On July 26, 2019, the court denied defendants' motion, again with no explanation. [Pa 2:72a-73a]

On August 15, 2019, defendants moved for leave to appeal that order. [Pa 2:75a-76a] On September 3, 2019, plaintiffs opposed the motion. And on September 9, 2019, the Appellate Division denied that motion. [Pa 2:77a-78a]

3. Defendants' Motion to Decertify the Class under *Cerciello*.

On July 20, 2022, the Appellate Division decided ***Cerciello v. Salerno Duane***, *supra*. The Court specifically held that: "[t]he arbitration agreement clearly informed consumer purchasers they were waiving their right to pursue a class action in court and in arbitration. Although defendants cannot compel arbitration because of their failure to pay the requisite fees, their breach of the agreement does not eradicate the other provisions to which plaintiff agreed – namely the waiver of the right to pursue a class action in court." 473 N.J. Super. at 252. The Court also held that defendants' failure to pay the administration fees did not bar them from "asserting the waiver of the right to pursue a class action in the subsequent Superior Court action." ***Id.***

On August 11, 2022, relying on ***Cerciello***, defendants moved to reconsider the court's class certification order, decertify the class and vacate all class-related orders. [Pa 2:84a-85a] They renewed their earlier argument that the class-waiver prevented plaintiffs and all potential class members from participating in a class action. ***Id.*** [Transcript Volume 6 (June 12, 2024)("6T"), pages 5-8]

In opposing it, on September 30, 2022, plaintiffs argued that ***Cerciello*** did not apply and that the court had properly certified the class. [Pa 2:86a-98a]

On October 13, 2022, defendants filed their reply, again rebutting these arguments.

Finally, on June 12, 2024, the court granted defendants' motion, decertified the class and vacated all related orders. [Pa 2:111a-113a] After discussing the original certification and the contentions of the parties on decertification, the court stated:

> Pursuant to ***Rule*** 4:32-1, and Supreme Court decisions, amongst them in ***In re Cadillac*** [***V8-6-4 Class Action***, 93 N.J. 412, 437 (1983)] and ***Little v. Kia*** [***Motors Am., Inc.***, 242 N.J. 557, 590 (2020)], the Court is free to decertify a class if appropriate at any time[, i]ncluding . . . post-verdict, . . . So the Court here finds that it is appropriate, as this matter is on all square completely – this is a duplicate situation of ***Cerciello v. Salerno Duane***.
>
> And based upon its reading of ***Cerciello v. Salerno Duane***, the Court grants the motion for reconsideration[] and dismisses the class action – grants that part of it to reconsider or dismiss it. And enforces the class waiver provision of those motor vehicle retail orders.

[6T, p. 8:9-23]

As a result, plaintiffs have appealed.

LEGAL ARGUMENT

I. THE LAW DIVISION CORRECTLY DECERTIFIED THE CLASS BASED ON *CERCIELLO* BECAUSE, IN SIGNING THE CLASS-WAIVER, PLAINTIFFS HAD KNOWINGLY AND VOLUNTARILY AGREED NOT TO PARTICIPATE IN A CLASS ACTION (6T p. 8; Pa 2:111a-113a)

In decertifying the class, the Law Division recognized and corrected its previous error and agreed that this case presented a "duplicate situation of ***Cerciello***." [6T p. 8] As in ***Cerciello***, "[p]laintiff[s] and the putative class members were clearly informed by [the DRA] that they were waiving their right to pursue a class action or be a member of a class action, whether they asserted claims in an arbitration setting or in court." 473 N.J. Super. at 260. That conclusion is legally correct, and the court did not abuse its discretion in decertifying the class.

A. The Applicable Standards of Review.

This Court's review is two-fold. First, as noted in ***Cerciello***, "interpretation of a contract, including an arbitration clause, is reviewed *de novo*. *See* ***Goffe v. Foulke Mgmt. Corp.***, 238 N.J. 191, 207 [] (2019); ***Kieffer v. Best Buy***, 205 N.J. 213, 222 [] (2011)." 473 N.J. Super. at 257. "'Whether a contractual arbitration provision is enforceable is a question of law, and we need not defer to the interpretative analysis of the trial . . . courts unless we find it persuasive.' ***Skuse v. Pfizer, Inc.***, 244 N.J. 30, 46 [] (2020) (*quoting* ***Kernahan v. Home Warranty***

Adm'r of Fla., Inc., 236 N.J. 301, 316 [] (2019))." ***Id.*** In ***Cerciello***, the Court held that this standard applies equally to the interpretation of a class-waiver. ***Id.***

Second, "review of an order granting or denying class action certification [is] for an abuse of discretion." ***Id.***, *quoting* ***Dugan v. TGI Fridays, Inc.***, 231 N.J. 24, 50 (2017). The same standard applies to decertification. ***Little v. Kia Motors Am., Inc.***, 242 N.J. at 566.

B. The Legal Standard for Class Decertification.

Decertifying a class, in whole or in part, is one of the remedies available under ***N.J. Rule*** 4:32-2. "[A] trial court always will have options at its disposal, such as subdividing the class, if necessary, or, in a worst case scenario, decertifying the class if justice cannot be achieved through a class action." ***Lee v. Carter-Reed Co., L.L.C.***, 203 N.J. 496, 530 (2010). The New Jersey Supreme Court has held that a court may decertify a class at any time, even post-verdict. ***Little v. Kia Motors Am., Inc.***, 242 N.J. at 590; ***In re Cadillac V8-6-4 Class Action***, 93 N.J. at 437.

C. In *Cerciello*, the Union County Law Division Expressly Declined to Accept the Class Certification in this Case (DA5a-33a).

In ***Cerciello***, plaintiff urged the Union County Law Division to certify a class, relying on the court's class certification **in this case**. [DA5a-33a: specifically, DA32a-33a] She argued that the court should ignore the class-waiver and apply the traditional class factors in ***N.J. Rule*** 4:32-1. ***Id.***

Defendants made the same arguments as they did here: (1) each potential class member, including plaintiff, had signed a class-waiver knowingly and voluntarily giving up their right to participate in a class action; and (2) these actions superseded the traditional factors for class certification. [DA5a-33a]

The court agreed, stating: "If, and only, if, the court finds the contractual [class-waiver] language in the MVROs to be legally insufficient is there any reason to address the ***Rule*** 4:32-1 arguments posited by the parties." [DA23a][3] It then examined and upheld the class-waiver, stating that:

(1) class-waivers are contractual rights, guaranteed under the "Contract Clause" of the ***United States Constitution***, Article 1, § 10, cl. 1, and the ***New Jersey Constitution***. Article IV, Section 7, cl. 3. [DA23a-24a];

(2) the New Jersey Supreme Court had already upheld the validity and viability of arbitration/class-waiver agreements, ***Roach v. BM Motors Inc.***, 228 N.J. at 177 [DA24a];

(3) the Supreme Court stressed its "strong preference to enforce arbitration agreements [*citing*] ***Hirsch v. Amper Fin. Servs., LLC***, 215 N.J. 174, 186 (2013)," ***Roach***, 228 N.J. at 173-74, 180 [DA24a]; and

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[3] The Appellate Division agreed that: "it was unnecessary to complete the analysis since ach potential class member, including plaintiff, executed a[n] MVRO with an arbitration agreement containing a class waiver provision." 473 N.J. Super. at 255.

(4) this preference was rooted in the ***Federal Arbitration Act*** ("FAA"), 9 U.S.C.A. 1 to 16. ***Roach***, 228 N.J. at 173-74, 180, *citing* ***Gilmer v. Interstate/Johnson Lane Corp.***, 500 U.S. 20, 24 [] (1992). *See* ***Gras v. Associates First Capital Corp.***, 346 N.J. Super. 41, 45-46 (App. Div. 2001). [DA24a]

As reported with approval in the appellate opinion, the judge:

> reviewed the applicable case law and found "the MVRO satisfies the legal requirements that make it binding on [defendants] and other putative class members as to both the arbitration and no class provisions." He further found the language was clear that the parties could not "pursue any claim . . on behalf of a class or . . . consolidate their claim with those of other persons or entities." In considering the arbitration agreement in the MVRO, the judge found a plain reading "demonstrates it is clearly a waiver of the parties' right to pursue claims in court, either on an individual or a class basis." The judge concluded that "[p]laintiff knowingly and voluntarily agreed to proceed only in . . . her own individual capacity and not as a class representative or member in any forum.' Therefore, plaintiff could not act as the class representative.

473 N.J. Super. at 255.

The court directly addressed the class certification **in this case**. It said: "The court has also carefully considered and rejects Plaintiff's reliance upon the decisions of the Law and Appellate Division in ***Roach***. This court has the utmost respect for the jurists involved in that case, **but Plaintiff has not provided any explanation or reasoning underlying either of the orders cited.** Not only are those orders not binding on this court, but without guidance that brings the record

in this matter directly into the realm of ***Roach*** for some sort of comparison and analysis." (Emphasis added) [DA32a]

D. The Appellate Division Affirmed Class Denial in *Cerciello*.

This Court affirmed the Union County court's "thorough, well-reasoned written decision." 473 N.J. Super. at 252. The Court held that: "[a]lthough defendants cannot compel arbitration because of their failure to pay the requisite fees, their breach of the agreement does not eradicate the other provisions to which plaintiff agreed – namely the waiver of any right to pursue a class action in court." ***Id.*** *See also* ***Id.*** at 255, 260.[4]

The Court continued:

> In a related argument, plaintiff contends that the trial court erred in finding the class action waiver clauses in the putative class members' MVROs prevented them from becoming class members. We disagree. The potential class members all executed a[n] MVRO with the provision noted above in which the consumer was informed they could not pursue any claim, even in court, on behalf of a class or consolidate their claim with any others. For the reasons already stated regarding plaintiff's claims, the putative class members were also foreclosed from joining a class and being part of a class action in court.

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[4] The Court specifically rejected plaintiff's argument "that under ***Roach*** defendants' material breach of the arbitration agreement in failing to pay the required fees rendered the entire agreement unenforceable, including the class action waiver." ***Id.*** at 258. The Court called plaintiffs' reliance on the Supreme Court opinion in ***Roach*** "misplaced" because it "does not reference a class action waiver provision in the arbitration agreement. It was not an issue before the [Supreme Court] and ***Roach*** is not instructive regarding plaintiff's contention." ***Id.***

Id. at 259.

The Court held that plaintiff had waived her right to participate in a class action:

> plaintiff could present her claims on an individual basis, but she could not act as a class representative of a class action or participate as a member of a class action. The court did not err in denying class certification because plaintiff could not serve as a class representative and counsel did not appoint a replacement when they attempted to redefine the classes in the second motion for certification.

Id. at 259.

The Court looked no "further than the plain language of the arbitration agreement" itself and held that: "The class action waiver contained in the arbitration agreement was clear and unambiguous." ***Id.*** at 257. It also held that: "the arbitration agreement clearly informed consumer purchasers that they were waiving their right to pursue a class action in court and in arbitration." ***Id.*** at 260.

As plaintiffs note, recently in ***Pace v. Hamilton Cove***, 258 N.J. 82, 101-02, 106 (2024), the New Jersey Supreme Court upheld contractual waivers, including the waiver in ***Cerciello***, supra. [Plaintiffs' Brief, p. 15] [5] In reversing the Law Division and Appellate Division, the Supreme Court held that: "Class action waivers in consumer contracts are not per se contrary to public policy, but they

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[5] Plaintiffs cited the Appellate Division's contrary holding in ***Pace***, 475 N.J. Super. 568 (App. Div. 2023), in opposing the motion to decertify. Even before the Supreme Court reversed that holding, the Law Division declined to follow it. [6T pp. 7:12-8:2]

may be unenforceable if found to be unconscionable or to violate other tenets of state contract law." ***Id.*** at 88. The Court then upheld the challenged class-waiver, stating that: "because plaintiffs clearly and unambiguously waived their right to maintain a class action and the lease contract is not conscionable as a matter of law . . . ." ***Id.***

The Court cited, with approval, ***Cerciello***'s holding, 473 N.J. Super. at 260, that: "an otherwise valid class action waiver accompanied by an arbitration agreement was not rendered invalid by the court's determination that the arbitration agreement was unenforceable." ***Id.*** at 102.

As a result, this principle applies here.

E. The Appellate Division Has Upheld A "Virtually Identical" Class-Waiver Provision to Defendants'.

Plaintiffs also rely on ***Curiale v. Hyundai Capital Am.***, 2020 N.J. Super. Unpub. 765 (App. Div. 2020), arguing that: "the Court construed a waiver provision **virtually identical** to the one contained in the Defendants' DRA form, and found that the wavier of 'class action arbitration' unambiguously refers to *class arbitrations only*, and does *not* include class actions in court." (Bold emphasis added) [Pltf. Br. at 18]

In fact, the provision stated:

> AGREEMENT TO ARBITRATE ANY CLAIMS. READ THE FOLLOWING ARBIRATION PROVISION CAREFULLY. IT

> LIMITS YOUR RIGHTS, INCLUDING THE RIGHT TO MAINTAIN A COUR ACTION.
>
> The parties also agree to waive any right (i) to pursue any claims arising under this agreement including statutory, state or federal claims, as a class action arbitration, or (ii) to have an arbitration under this agreement consolidated with any other arbitration or proceeding.
>
> THIS ARBITRATION PROVISION LIMIT[S] OUR RIGHTS, INCLUDING YOUR RIGHT TO MAINTAIN A COURT ACTION. PLEASE READ IT CAREFULLY PRIOR TO SIGNING.[6]

In ***Curiale***, the Law Division had denied defendants' motion to compel arbitration, holding that "[t]he parties . . . agree[d] to waive . . . any claims arising under this agreement," but the clause was "ambiguous in the sense that it didn't . . . refer to any class action claim. It only referred to a class action arbitration." ***Id.*** at *8-9.

The Appellate Division reversed and remanded the case for an order dimsssing the complaint and compelling arbitration. ***Id.*** at *14.

Plaintiffs here argue that the Court specifically stated that the class waiver only applied to arbitration. They quote the Court's statement:

> The absence of any specific waiver of class actions in court is not confusing, and there is no inconsistency between the waiver of the right to pursue court actions and the waiver of the right to "class action arbitration." *The waiver of the right to maintain a 'class action arbitration" only applies to the arbitration process*.

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[6] Other than a few word order changes and two typographical errors, the provisions are identical. *Compare* page 5, *supra*, and Pa 1:66a, 1:68a, 1:63a-64a; DA 4a.

Curiale, 2020 N.J. Super Unpub. LEXIS, at *11-12.

However, they failed to quote the very next statement that totally undercuts their argument and requires affirmance here. The Court held:

> There is no ambiguity, that under the clause, **plaintiffs waived their rights to bring any claims that arose under the agreement, including class actions, in court**, and waived their right to pursue a class action arbitration. (Emphasis added)

Curiale, 2020 N.J. Super Unpub. LEXIS, at *11-12.

This statement is consistent with the holdings in ***Cerceillo***, *supra*, and ***Pace***, *supra*, that a class-waiver is a separate, independent provision from the arbitration provision.

Accordingly, this holding supports the Law Division's holding in this case.

F. The Law Division Properly Interpreted and Applied *Cerciello* (6T pp. 5-8)

Cleary, in this case and in ***Cerciello***, plaintiffs have made identical arguments trying to get around the class-waiver. Both cases are similar factually. And in deciding ***Cerciello***, this Court correctly interpreted and applied the applicable law and rejected plaintiff's argument. 473 N.J. Super. at 252, 255, 260.

Here, the Law Division correctly understood, interpreted and applied the holding in ***Cerciello*** to decertify the class. First, the court correctly held that it had the power to decertify a class. ***Little v. Kia Motors Am., Inc.***, 242 N.J. at 590; ***In re Cadillac V8-6-4 Class Action***, 93 N.J. at 437. [6T p. 8]

Second, the court understood, and correctly concluded, that it was bound to follow ***Cerciello***'s holding and that both the class-waiver and the facts fell squarely within that holding. [6T pp. 5-8]

Third, the court correctly concluded that the class-waiver "clearly informed" plaintiffs that they were waiving their right to pursue a class action . . . in an arbitration or in court." *See* ***Curiale***, 2020 N.J. Super Unpub. LEXIS, at *11-12. [6T pp. 5-8]

Fourth, inherently, the court also found that the provision is clear, conspicuous and understandable. ***Id.*** Even a cursory reading proves this point.

As a result, the Law Division correctly rejected plaintiffs' argument that there is no basis for invalidating the class-waiver; it binds the parties, including the potential class members; it is clear, concise and understandable; and it precludes class participation.

G. The Appellate Division and the Supreme Court Have Repeatedly Rejected Plaintiffs' Waiver Argument under *Cole*.

Plaintiffs assert, as an alternate ground for reversal, that defendants have waived their right to invoke the class-waiver based on ***Cole v. Jersey City Medical Center***, 215 N.J. 265 (2013). In decertifying the class, the Law Division overruled its earlier decision, including its decision on waiver. However, despite that fact, plaintiffs have re-raised the issue, and it lacks factual and legal support.

In ***Cerciello v. Salerno Duane, Inc. (Cerciello I)***, 473 N.J. Super. 249 [] (App. Div. 2022), and ***Cerciello v. Salerno Duane, Inc.***, 2024 N.J. Super. Unpub. LEXIS 463, *1 (App. Div. 2024)("***Cerciello II***"), the Appellate Division has tersely rejected these same arguments, stating:

> In ***Cerciello v. Salerno Duane, Inc. (Cerciello I)***, 473 N.J. Super. 249 [] (App. Div. 2022), we declined to **accept substantially the same arguments** being raised by plaintiff Doretta Cerciello in this appeal. Plaintiff argues reconsideration of our prior decision is warranted because our opinion in ***Largoza v. FKM Real Estate Holdings, Inc.***, 474 N.J. Super. 61 [] (App. Div. 2022), mandates that her claims be viewed in a new light. We disagree. Accordingly, we affirm the January 6, 2023 trial court order denying plaintiff's motion for reconsideration of the trial court order denying class certification. (Emphasis added)
>
> The Court explained that:
>
> Plaintiff asserts that the argument warrants revisiting because ***Largoza*** had not yet been decided at the time of the prior appeal. However, plaintiff does not posit any viable argument that ***Largoza*** set forth new law. Instead, ***Largoza*** applied the existing ***Cole*** standard to a forum selection clause. We remain convinced that the **trial court sufficiently analyzed** the ***Cole*** factors **before** entering the August 13, 2020 order denying plaintiff's motion for class certification and the January 6, 2023 order denying plaintiff's motion for reconsideration was not an abuse of discretion. With **no newly established law or substantive arguments to consider**, the interests of justice do not warrant a different conclusion post-***Largoza***.
>
> We reject plaintiff's argument the trial court's August 13, 2020 order should be reversed because it was erroneously based on the assumption that defendants asserted the affirmative defense relating to the class action waiver soon after litigation initially began. It is **undisputed** that defendants filed an answer, **only weeks after plaintiff filed the putative class action complaint,** with an affirmative defense referencing the arbitration clause which

> encompassed the class action waiver. As previously articulated, other actions were thereafter taken by defendants to alert plaintiff to their position that the class action portion of the suit was **barred based upon the waiver in the arbitration clause**. (Emphasis added)

Id. at *9-10.

Factually, this case is no different. Initially, defendants moved to enforce the arbitration agreement. Further, their answer contained a similar affirmative defense.

In addition, on two occasions, defendants tried to unsuccessfully enforce the class-waivers.

In this instance, plaintiff raised this issue before the Law Division, and implicit in the court's opinion, decertifying the class, is the court's rejection of this argument.

CONCLUSION

Because the Law Division correctly accepted, interpreted and applied this Court's holding in ***Cerciello***, this Court should affirm.

Respectfully submitted,

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BY: _____
Michael V. Gilberti

Dated: March 4, 2025

Superior Court of New Jersey
Appellate Division

❖ ❖ ❖

Docket No. A-003561-23

TAHISHA ROACH AND EMELIA JACKSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, *Plaintiffs-Appellants*, v. BM MOTORING, LLC AND FEDERAL AUTO BROKERS, INC., BOTH CORPORATIONS T/A BM MOTOR CARS, BORIS FIDELMAN AND MIKHAIL FIDELMAN AND JOHN DOES 1-5, *Defendants-Respondents,*	**CIVIL ACTION** ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MIDDLESEX COUNTY Trial Court Docket No. MID-L-1333-14 Sat Below: HON. ANA C. VISCOMI, J.S.C.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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Submitted to the Court on March 16, 2025

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REPLY ARGUMENT

I. Defendants' reliance on the abuse of discretion standard is misplaced. (Db10 – 11)

Defendants correctly note in their brief that the trial court's "interpretation of [the DRA] contract… is reviewed *de novo*" its class decertification order is reviewed "for an abuse of discretion." Db10 – 11. However, under the circumstances presented here, reversal on *de novo* review of the trial court's interpretation of the DRA[1] would leave no stated basis for the court's decision to decertify the class and thus require reversal on both issues. See *Parke Bank v. Voorhees Diner Corp.*, 480 N.J. Super. 254, 262 (App. Div. 2024)("A court abuses its discretion 'when a decision is made without a rational explanation… or rested on an impermissible basis.'")(internal citations omitted).

The trial court did not, as Defendants suggest, have unfettered "discretion" to decertify the class, regardless of whether the court was mistaken in its belief that the "class wavier" in the DRA was a "duplicate" of the provision construed in *Cerciello*. The abuse of discretion standard, while deferential, still requires a trial

[1] The trial interpreted the DRA as an effective "duplicate" of the contract at issue in *Cerciello v. Salerno Duane, Inc.* (6T8-14 – 8-23) and thus subject to Cerciello's holding that a "class waiver" provision "that clearly informed [plaintiffs that] the waiver… applied both in court and arbitration… survives defendants' breach of the [arbitration] agreement and remains applicable to plaintiff's claims [in court]." *Id.*, 473 N.J. Super. 249, 258 (App. Div. 2022).

court to explain the bases for its exercise of discretion, and that those bases be rationally founded in fact and consistent with applicable law:

> "Although the… 'abuse of discretion' standard defies precise definition, it arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or *rested on an impermissible basis*.'" *Flagg v. Essex Co. Prosecutor*, 171 N.J. 561, 571 (2002). An abuse of discretion also arises when "the discretionary act was not premised upon consideration of all relevant factors, *was based upon consideration of irrelevant or inappropriate factors*, or amounts to a clear error in judgment."

Masone v. Levine, 382 N.J. Super. 181, 193 (App.Div. 2005)(ruling trial court abused its discretion by denying motion to consolidate cases involving the same automobile accident without providing "rational explanation for… concern" over jury confusion and without "consideration of all relevant factors'" under the consolidation rule); See also *Iliadis v. Wal-Mart Stores, Inc*., 191 N.J. 88, 118 (2006)(ruling trial court abused its discretion by denying class certification based on unspecified manageability concerns because "such considerations must be grounded in 'concrete evidence of actual or likely management problems.'") As noted in Defendants' brief, our Supreme Court contemplates that a trial court's discretion to decertify a class will be exercised "in a worse case scenario." Db11, citing *Lee v.Carter-Reed Co., L.L.C.,* 203 N.J. 496, 530 (2010).

Because the trial court provided no "rational explanation" for exercising its discretion to decertify the class beyond its finding that the DRA's class waiver provision was essentially a "duplicate" of the provision in *Cerciello,* and because

that finding, if erroneous, could not serve as a permissible basis for class decertification, reversal on *de novo* review of the trial court's interpretation of the DRA would necessarily result in an abuse of discretion, requiring reversal of the decertification order. See *Parke Bank*, supra, 480 N.J. Super. at 262..

II. Defendants' brief fails to address the "plain language" of their DRA to determine whether its "class waiver" provision is applicable in court as well as arbitration, as required under the holding in *Cerciello v. Salerno Duane, Inc.* (Db10 – 15).

Defendants' argument for decertification relies entirely on *Cerciello v. Salerno Duane, Inc.*, which held that a car dealership was entitled to enforce a contractual "waiver of… right to pursue a *class action in court*" notwithstanding its "inability to compel arbitration" after it breached the arbitration agreement by failing to pay arbitration fees. *Cerciello v. Salerno Duane, Inc.,* 473 N.J. Super. 249, 258 (App. Div. 2022)(emphasis added). However, the holding in *Cerciello* was explicitly premised on the Court's finding that the sales form at issue *in that case* (Salerno Duane's "MVRO" form) contained a clearly stated contractual waiver of the right to pursue class actions *in court*:

> Defendants' inability to compel arbitration does not affect plaintiff's waiver of her right to pursue a class action in court. *Because plaintiff was clearly informed of the waiver that applied both in court and arbitration*, we are satisfied the class action waiver survives defendants' breach of the agreement and remains applicable to plaintiff's claims.

> Therefore, plaintiff could present her claims on an individual basis in court, but she could not act as a class representative of a class action.

Cerciello, 473 N.J. Super. at 258-59 (emphasis added). This finding required the Court to "look [at] the plain language of" the contract, *Id.*, at 257, and describe what it found, which included a large, bold-type sentence stating that the arbitration provision "WAIVES THE RIGHT… TO PURSUE A CLASS ACTION IN COURT AND IN ARBITRATION" and another stating that it, "WAIVES THE RIGHT TO… PURSUE A CLASS ACTION IN COURT OR IN ARBITRATION." *Cerciello*, 473 N.J. Super. at 253

Defendants make no similar attempt to "look [at] the plain language" of the DRA contract at issue here (nor did the trial court, as discussed in the Plaintiff's initial brief, at Pb10 – 14). That language, which reads, "The parties also agree to… waive any right [to] pursue any claims arising under this agreement… as a class action arbitration," is referenced only one time in Defendants' brief, when its quoted along with other portions of the DRA as part of the procedural history. Db5. The brief makes no attempt to "look" at this plain language and explain exactly how, as Defendants claim, the DRA "clearly informed [Plaintiffs] that they were waiving their right to pursue a class action… whether they asserted claims in an arbitration setting or in court." Db10. Instead, Defendants attempt to conflate the clear and

unambiguous waiver language in the MVRO at issue in *Cerciello* (which expressly and repeatedly "WAIVES THE RIGHT TO… PURSUE A CLASS ACTION IN COURT OR IN ARBITRATION") for the DRA at issue here (which vaguely "waive[s] any right [to] pursue any claims …as a class action arbitration.") *Cerciello*, 473 N.J. Super. at 253 (emphasis in original); Pa66 and Pa68 (copies of the DRAs signed by Plaintiffs). Nor do Defendants make any effort to apply the holding of *Cerciello* to the language of the DRA or the facts of this case, but instead present about five pages discussing *Cerciello*, followed by a single, conclusory sentence, "As a result, this principle applies here" without any explanation for this conclusion. Db16.

Unlike the MVRO in *Cerciello*, the DRA's language waiver of the right to "pursue any claims… as a class action arbitration" cannot be found to be a clear and unambiguous waiver of Plaintiffs' "right to pursue a class action… *whether they asserted claims in an arbitration setting or in court*." *Cerciello*, 473 N.J. Super. at 260 (emphasis added). In the absence of a contractual waiver of the right to pursue a class action *in court*, *Cerciello's* holding that "[a]lthough defendants were foreclosed from compelling arbitration [for failure] to pay the AAA administration fees, they were not precluded from asserting the class action waiver *in the court action*," is inapplicable. *Id.* (emphasis added).

III. The Appellate Division has not "upheld" an "identical class-waiver provision," as Defendants claim in their brief (Db16 – 18)

Plaintiffs' initial brief cited several Appellate Division decisions involving contracts that, like Defendants' DRA, purported to waive the right to pursue "a class action arbitration," and noted that none of the decisions found the language to be a clear waiver of the right to pursue class actions in court. Pb17 – 19. In their brief, Defendants falsely claim that one of these decisions "upheld" a "virtually identical class-waiver provision to Defendants'" Db16, citing *Curiale v. Hyundai Capital Am.,* 2020 N.J. Super. Unpub. 765 (App. Div. 2020).

In fact, *Curiale*, like the four other cases cited by Plaintiff on this point, did not involve a challenge to the validity of a class action waiver, and so the decision did not "uphold" a "class-waiver provision" as Defendants' claim. Rather, the issue in *Curiale* and the other cited cases was whether an *arbitration agreement* was rendered ambiguous and thus invalid under New Jersey precedents by the inclusion of language purporting to waive the parties' rights to pursue "a class action arbitration." For example, in *Curiale,* the Court reviewed an order denying a motion to compel arbitration in which

> the [motion] judge stated, "[t]he parties . . . agree[d] to waive any . . . claims arising under this agreement," but the clause was "ambiguous in the sense that it didn't . . . refer to any class action claim. It only referred to a class action arbitration." The court further reasoned the clause "could lead the reasonable consumer to believe that a class action litigation was not out of the question."

Curiale, 2020 N.J. Super. Unpub. LEXIS 765, at *8-9. The Court reversed, finding that "the motion judge erred in holding the arbitration clause at issue here was ambiguous and unenforceable," *Id.,* at *10, and explaining,

> Contrary to the motion judge's determination, there is no contradiction or confusion caused by the broad waiver of court actions for all claims arising under the agreement and the specific waiver of the right to class action arbitration. The waiver of the right to maintain **a "class action arbitration" only applies to the arbitration process**. **A party's action must be arbitrated individually.**

Id., at *12 (emphasis added). The Court concluded that there "is no ambiguity" because the arbitration provision contained other language indicating "plaintiffs waived their rights to bring any claims that arose under the agreement, including class actions, in court," and therefore the language waiving "class action arbitration" simply meant that the plaintiffs "waived their rights to pursue a class action in arbitration" as well. *Id.*

The other four cases cited in Plaintiffs' initial brief on this point construe waivers of class action arbitration" in a similar context. *Haynes v. DCN Auto., L.L.C.*, 2018 N.J. Super. Unpub. LEXIS 732, at *10-11 (App. Div. 2018)(Rejecting ambiguity challenge to arbitration provision on same basis as *Curiale*, and finding, "The waiver of the right to maintain a 'class action arbitration' only applies to the arbitration."); *NAACP of Camden Cty. E. v. Foulke Mgmt. Corp.,* 421 N.J. Super. 404, 434-35 (App. Div. 2011)(Finding arbitration provision to be ambiguous and invalid, in part because the language

waiving "class action 'arbitration'… could easily lead a purchaser to believe that she would be free to take part in a class action *lawsuit*")(emphasis in original); *Snap Parking, LLC v. Morris Auto Enters., LLC*, 2017 N.J. Super. Unpub. LEXIS 750, at *9 (App. Div. 2017)(rejecting arbitration provision as ambiguous because "the 'class action arbitration' waivers were not stated with sufficient clarity to constitute a complete abandonment of court proceedings to pursue a class action."); *Rotondi v. Dibre Auto Grp., L.L.C.,* 2014 N.J. Super. Unpub. LEXIS 1662, at *10-11 (App. Div. 2014)(affirming denial of motion to compel arbitration in part because "the reference in the arbitration clauses to 'class action arbitration' is potentially confusing.")

Defendants claim that the following passage from *Curiale*, "totally undercuts [Plaintiffs'] argument and requires affirmance":

> There is no ambiguity, that under the clause, plaintiffs waived their rights to bring any claims that arose under the agreement, including class actions, in court and waived their rights to pursue a class action in arbitration.

Db18, citing *Curiale,* at *12. However, it is apparent from other portions of the opinion that the Court's finding that "plaintiffs waived their rights to bring any claims that arose under the agreement, including class actions, in court" refers to the general *agreement to arbitrate* all claims (which the Court refers to as the "broad waiver of court actions") and *not* the "class waiver" provision (which

the Court referred to as the "specific waiver of the right to class action arbitration"):

> The [arbitration] clause states unequivocally that the parties agree "to arbitrate any claim…." The language is clear in stating: "By agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action . . . ."
>
> The clause continues, stating the parties agree to waive their rights to bring claims arising under the agreement "as a class action arbitration," or to have an arbitration under the agreement "consolidated with any other arbitration or proceeding"…
>
> [T]here is no contradiction or confusion caused by the broad waiver of court actions for all claims arising under the agreement and the specific waiver of the right to class action arbitration. The waiver of the right to maintain a "class action arbitration" only applies to the arbitration process. A party's action must be arbitrated individually.

Id., at *11 – 12. Thus, the Court in *Curiale* clearly delineated between the arbitration mandate, which waived the plaintiff's right to pursue *any* claims in court, whether on an individual or class action basis, and the separate class waiver, which only waived the plaintiffs' rights to represent a class in arbitration. This interpretation is consistent with the other holding in the opinion that "[t]he waiver of the right to maintain a "class action arbitration" only applies to the arbitration process." *Id.*

Here, unlike in *Curiale*, the Supreme Court has ruled that Defendants are precluded from enforcing the agreement to resolve all claims, including class

action claims, in arbitration rather than court (the "broad waiver"). And unlike in *Cerciello*, the "specific waiver" narrowly references "class action arbitrations" and does not "clearly inform [Plainiffs] that it applie[s] both in court and arbitration." Thus, Defendants' reliance on *Curiale's* enforceable arbitration agreement is misplaced.

IV. Defendants' brief confirms that they are not seeking review of the trial court's five-year old ruling that Defendants waived the right to enforce arbitration under DRAs with absent class members through their litigation conduct following remand from the Supreme Court. (Db19 - 21)

Defendants mischaracterize Plaintiffs' brief as "assert[ing], as an alternate ground for reversal, that defendants have waived their right to invoke the class-waiver." Db19. The portion of the brief referred to by Defendants (point heading III, Pb21-26) preemptively addressed an argument that Defendants raised below but did not preserve though cross-appeal, claiming that the *Cerciello* opinion required reconsideration not only on the "class waiver" issue, but also of the trial court's earlier ruling that Defendants waived the right to compel arbitration under DRAs with absent class members through their litigation conduct following remand from the Supreme Court in March of 2017. Pb21 – 26. Noting that the Defendants did not cross-appeal on this (or any other) issue, the Plaintiffs' note that the argument was in any event without merit and "should not be considered as an alternative basis for affirmance" because nothing in the *Cerciello* opinion

changed the law regarding waiver of the right to compel arbitration, which requires "a fact-sensitive analyses on a case-by-case basis [which] finds waiver in some situations but not in others." *Cole v. Jersey City Med. Ctr.*, 215 N.J. 265, 277 (2013). *Id.* As discussed in detail in Plaintiffs' initial brief, the facts in favor of waiver in this case were substantially different from, and stronger than, the facts in *Cerciello*. See Pb22-24.[4]

Contrary to Defendants' brief, the Plaintiff's do *not* "assert…that defendants have waived their right to invoke the class-waiver" because it is apparent that there *is no "class waiver" in the DRA*, at least not one that is enforceable outside of the arbitration context (the DRA's waiver expressly applies only to "class action arbitrations") and thus subject to the holding of the *Cerciello* opinion, as discussed earlier. Defendants' briefing on this point confirms that they have not appealed and present no request or argument for reversal of the trial court's earlier ruling that the Defendants' waived the right to invoke DRAs with absent class members.

[4] To summarize, after remand from the Supreme Court in March of 2017, Defendants waited for more than a year-and-a-half before disclosing and attempting to invoke the DRAs with absent class members for the first time, in their November 1, 2018 opposition to Plaintiffs' class certification motion. During this 20-month lapse, Defendants filed an Answer that failed to raise the DRAs as a defense to class certification (while asserting a different defense specific to class certification), failed to disclose the DRAs in their answers to discovery calling for disclosure of all factual and legal bases of their intended opposition to class certification, engaged in protected class-wide settlement conferences, and engaged in class-wide discovery. See Pb22 – 24.

See 3T18-1 – 18-22 (July 26, 2019 decision denying initial motion to reconsider class certification). Their arguments for affirmance are limited to their view that the DRAs waiver of "class action arbitrations" somehow precludes Plaintiffs from pursuing a class action *in court*.

V. Defendants' assertion that the Supreme Court "held that… the DRA was valid and enforceable" is false. (Db4, 12)

Although not directly relevant to the questions on appeal, the Plaintiff takes issue with the repeated falsehood in Defendants' brief that the "New Jersey Supreme Court… held that… the DRA was valid and enforceable" Db4, 12. In fact, there is absolutely nothing in the Supreme Court's opinion that states or suggests that DRA "was valid and enforceable." On the contrary, the Court called into question the validity and enforceability of the DRA in *dicta*, noting, that the DRAs use "small font size [that is not] easy to read" and that state law "requires that 'a consumer contract . . . be written in a simple, clear, understandable and easily readable way'" in "at least 10 point type," but declining to reach the issue. *Roach v. BM Motoring, LLC*, 228 N.J. 163, 168 n.1, (2017)(citing *Morgan v. Sanford Brown Inst.*, 225 N.J 289, 310 (2016) and N.J.S.A. 56:12-10). Moreover, as noted earlier, the Appellate Division has held that arbitration provisions which, like the DRA, purport to waive the right to pursue "class action arbitration" are inherently confusing, and may not be sufficiently clear and understandable under

standards required for contractual waivers of consumers' rights under New Jersey precedent:

> The potential for confusion is… compounded by… the sentence… which recites: "You and we further agree that there shall be *no class action arbitration* pursuant to this agreement." (Emphasis added). By restricting its reference to a class action "arbitration," this… sentence could easily lead a purchaser to believe that she would be free to take part in a class action *lawsuit*, either as a named representative or simply as a class member.

NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., supra, 421 N.J. Super. at 434-35.

CONCLUSION

For the foregoing reasons, and for the reasons stated in their initial brief, Plaintiffs-Appellants respectfully request that the trial court's order be reversed, and this matter be remanded for further proceedings.

Respectfully submitted,

Dated: March 16, 2025

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