NJ PROPERTYLINK, LLC, DAVID VARCADIPANE, LISA BARTLOW, Plaintiffs, vs. ADT CORPORATION, INTEL VIDEO SURVEILLANCE CORP., R&J HOME SERVICES, LLC, AND JOHN/JANE DOES I-X, ABC CORPORATIONS/ENTITIES I-X, XYZ PARTNERSHIPS I-X, and 123 TRUSTS, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: DOCKET NO.: A-003586-23T4 On Appeal From: Superior Court of New Jersey Law Division – Sussex County Docket No. SSX-L-451-23 Sat Below: The Honorable Vijayant Pawar, J.S.C.

BRIEF OF PLAINTIFFS/APPELLANTS, NJ PROPERTYLINK, LLC, DAVID VARCADIPANE, LISA BARTLOW

Kevin D. Kelly, Esq. – 022601979
KELLY & WARD, LLC
27 Ike Williams Road
Newton, NJ 07860
Tel. (973)579-6250
E-Mail – kkelly@kellyandward.com

On the Brief:

Kevin D. Kelly, Esq.

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PRELIMINARY STATEMENT

At issue in these proceedings is the validity and enforceability of waiver and arbitration provisions of Defendsnt ADT Corporation's ("ADT") 8 page, standardized, pre-printed "Small Business Contract" ("Contract") dated June 30, 2022 in a consumer transaction to provide security services to Plaintiff, NJ Propertylink, LLC ("Propertylink").

This document was presented to Propertylink's owner, Plaintiff David Varcadipane ("Varcadipane") on an iPad by ADT's salesperson, who was unauthorized to negotiate any terms, on a take-it-or-leave-it basis.

Varcadipane signed the cover page of the Contract on behalf of Propertylink and was not shown the remaining pages. Varcadipane did not individually sign the Contract and Plaintiff, Lisa Bartlow ("Bartlow") did not sign the Contract. ADT did not sign the Contract.

Thereafter, ADT arranged for installation of the security equipment by its subcontractor, Defendant Intel Video Surveillance Corp. ("Intel") which, in turn, arranged for installation by Defendant, R & J Home Services, LLC ("R&J"). Plaintiffs were not advised by ADT and were unaware of the involvement of subcontractors until many months later when ADT sought to hold them responsible for the Plaintiffs' claims.

Malfunctioning equipment and installation related leaks/damage were immediately reported to ADT by Plaintiffs. For approximately 5 months, ADT responded to these problems and attempted to fix them, without success.

Plaintiffs instituted suit in October 2023, including claims for damages and consumer fraud. ADT has asserted its contractual waiver and arbitration defenses. Plaintiffs challenged the validity and enforceability of provisions of the Contract by Motion that was denied by the trial court, without oral argument requested by all responding parties, without any evidential hearing, and without any findings to support its conclusion that "this court finds the arbitration agreement states the terms clearly and unambiguously." The Court held that Plaintiffs "have not identified how this arbitration agreement is not enforceable." This appeal follows.

The New Jersey Supreme Court has addressed the requirements for waivers and contractual arbitration provisions at least eight (8) times since 2014. By far the most important requirement in this determination are the contractual principles of mutual assent and meeting of the minds and clear evidence in support thereof. These decisions also require a strict approach/focus on the unequal relationship between the contracting parties and/or the adhesional nature of the contract.

The insertion of an arbitration clause in a contract is "an acknowledgment" that the parties may be future adversaries. Its use by ADT in its Small Business

Contract shows that this was an ADT business strategy and that ADT selected the forum in which any future disputes would be decided to gain an edge over its customers. In doing so, ADT places its interests above its customers'. Here, the customer obviously was not anticipating how, where, and by what rules, future disputes would be decided. The customer's only interest was the price and amount of security equipment in the transaction.

The insertion of waiver and exculpatory clauses in a contract is an acknowledgement that the parties already are adversaries and that one party is already seeking an advantage. This conduct violates public policy and is "particularly disfavored" in contracts for "professional services defined as 'involving specialized knowledge, labor or skill'." *Lucier v. Williams*, 366 *N.J.Super.* 485, 496 (App. Div. 2004).

PROCEDURAL HISTORY

By Contract dated June 30, 2022, Propertylink entered an agreement with ADT to provide for security equipment installation and monitoring at the residence of Varcadipane and Bartlow.[1] (Pa14)

ADT was notified immediately with respect to its malfunctioning equipment and installation and tried to fix/repair these problems from July 2022 through February 2023, without success. (Pa3 Complaint, paras. 3-6)

Plaintiffs obtained counsel and instituted this litigation on October 24, 2023. (Pa1)

Defendant Intel filed an Answer and Crossclaim on December 18, 2023. (Pa141). Defendant R&J was served on August 29, 2024 and has not filed an Answer (nor did it participate at the trial level). Defendant ADT has not filed an Answer but did participate at the trial level.

On December 20, 2023, ADT filed a motion to compel arbitration. The motion was resolved by Consent Order dated January 4, 2024 providing for the completion of arbitration proceedings by May 4, 2024. (Pa162)

[1] Varcadipane and Bartlow are not parties to the Contract

After expiration of the May 4 deadline to complete arbitration contained in the January 4, 2024 Order, ADT filed a motion for an additional stay of this litigation that was opposed by Plaintiffs. Both parties requested oral argument. By Order dated May 24, 2024 the Court denied ADT's request for additional AAA arbitration proceedings without oral argument.

On May 10, 2024, Plaintiffs moved to vacate the January 4, 2024 Court Order, stay the AAA arbitration, and invalidate portions of the Contract between ADT and Propertylink. (Pa164). The parties again requested oral argument and were denied. Plaintiffs' relief was also denied. (Pa253). This appeal followed.

STATEMENT OF FACTS

There were 2 witnesses to the execution of ADT's Small Business Contract with Propertylink dated June 30, 2022: ADT representative Sang Kim ("Kim") and Varcadipane.

Varcadipane's account of this event is contained in his Certification submitted with this Motion (Pa168) and is supported by the Certification of Co-Counsel, F. William LaVigne, Esq. (Pa171) ADT has not provided any facts with respect to execution of the Contract.

Kim presented the Contract on his company iPad to Varcadipane at the residence in Ogdensburg, NJ that he shares with Bartlow. Varcadipane signed the cover page of the form Contract on behalf of Propertylink and was unable to read the remaining 7 pages. The only issues discussed between Kim and Varcadipane were prices and cameras. (Pa169, para.7) There was no mention of arbitration, waivers, or any other contract provisions. Kim was not permitted to negotiate even if the subjects had been questioned. Varcadipane did not sign the Contract personally. Bartlow did not sign it at all. ADT did not sign the Contract. (Pa169, para. 7)

Installation began immediately thereafter. ADT did not tell Plaintiffs that subcontractors were being used. Camera malfunctions and installation

leaks/damages were reported to ADT representatives who attempted to fix the problems for many months before submitting the matter to its insurance carrier and adjusters in January 2023. (Pa33, 46)

The ADT Contract is attached in its entirety. (Pa14) The Contract specifically provides that:

> "Any dispute regarding the applicability, enforcement or interpretation of Paragraph E or this Paragraph F shall be resolved by a court having proper jurisdiction."

Plaintiffs object to the following specific provisions of Paragraphs E and F (double spaced and in much larger font here):

1. "IF EITHER PARTY ELECTS TO ARBITRATE A DISPUTE, ADT AND CUSTOMER WAIVE THE RIGHT TO A JURY TRIAL AND TO OTHERWISE LITIGATE THE DISPUTE IN COURT. BY AGREEING TO ARBITRATE, THE PARTIES MAY ALSO WAIVE OTHER RIGHTS THAT WOULD OTHERWISE BE AVAILABLE IN COURT. FURTHER, IF EITHER PARTY ELECTS TO ARBITRATE A DISPUTE, CUSTOMER WAIVES ITS RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR TO PARTICIPATE AS A MEMBER OF ANY CLASS ACTION RELATING TO THE DISPUTE. This means that all Disputes

selected for arbitration will be arbitrated on an individual basis, between ADT and Customer only, without exception." (Pa21, para. F).

2. "Because Customer's transaction(s) with ADT involve interstate commerce, this Arbitration Agreement and any Dispute arbitrated hereunder shall be governed by the Federal Arbitration Act ("FAA")." (Pa21, pg. 7, para. F).

3. "ADT SHALL IN NO EVENT BE LIABLE TO CUSTOMER FOR INDIRECT, INCIDENTAL, COLLATERAL, SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGES OR LOSSES SUCH AS BUT NOT LIMITED TO LOSS OF REVENUESLOSS OF ANTICIPATED SAVINGS OR LOST PROFITS, WHETHER OR NOT FORESEEABLE, AND WHETHER ARISING IN CONTRACT (INCLUDING WARRANTY), TORT (INCLUDING ACTIVE, PASSIVE OR IMPUTED NEGELIGENCE), STRICT LIABILITY OR OTHERWISE." (Pa20, pg. 6, para. E 3).

4. "THE PROVISIONS OF THIS PARAGRAPH E ALL APPLY NO MATTER HOW THE LOSS, DAMAGE OR INJURY OR OTHER CONSEQUENCE OCCURS, EVEN IF DUE TO ADT'S PERFORMANCE OR NONPERFORMANCE OF ITS OBLIGATIONS UNDER THIS CONTRACT OR FROM NEGLIGENCE (ACTIVE OR OTHERWISE), STRICT LIABILITY, VIOLATION OF ANY APPLICABLE CONSUMER

PROTECTION LAW OR ANY OTHER ALLEGED FAULT ON THE PART OF ADT, ITS AGENTS OR EMPLOYEES."

(Pa20, pg. 6, para. E 4).

5. "CUSTOMER SHALL INDEMNIFY AND HOLD ADT HARMLESS FROM ANY AND ALL SUCH CLAIMS AND LAWSUITS, INCLUDING THE PAYMENT OF ALL DAMAGES, EXPENSES, COSTS AND ATTORNEY'S FEES." (Pa20, pg. 6, para. E 4).

6. "NO SUIT OR ACTION SHALL BE BROUGHT AGAINST ADT OR ITS AGENTS, EMPLOYEES, SUBSIDIARIES, AFFILIATES OR PARENTS (BOTH DIRECT AND INDIRECT) MORE THAN ONE (1) YEAR AFTER THE INCIDENT THAT RESULTED IN THE LOSS, INJURY OR DAMAGE OCCURRED, OR THE SHORTEST DURATION PERMITTED UNDER APPLICABLE LAW IF SUCH PERIOD IS GREATER THAN ONE (1) YEAR." (Pa20, pg. 6, para. E 5).

7. "THE ARBITRATOR'S DECSION WILL BE FINAL AND BINDING." (Pa21, pg. 7, para. F).

Other provisions of the Contract demonstrate ADT's clear intent to tilt the playing field against its Customers and in its favor. Examples include:

1. "This Contract is not assignable by Customer except upon written consent of ADT being first obtained. ADT shall have the right to assign this Contract or to subcontract any of its obligations under this Contract without notice to Customer. If any of the provisions of this Contract shall be determined to be invalid or unenforceable, the remaining provisions shall remain in full force and effect." (Pa21, pg. 7, para. J).

2. "Customer consents to ADT recording telephone conversations between representatives of Customer and ADT. ADT may collect, use, disclose and transfer Customer's personal information, and that of third parties provided by Customer." (Pa21, pg. 7, para. L).

STANDARD OF REVIEW

The validity of an arbitration agreement is a question of law. *Goffe v. Foulke Mgmt.*, 238 *N.J.* 191 (2019); *First Options of Chi., Inc. v. Kaplan*, 514 *U.S.* 938 (1995); *Atalese v. U. S. Legal Servs. Grp., LP*, 219 *N.J.* 430 (2014). "Our Courts review de novo the enforceability of arbitration . . . owes no deference to the trial court's analysis of such provisions." *Arafa v. Health Express Corporation*, 243 *N.J.* 147, 169 (2020). Arbitration agreements are afforded the same contract defenses of fraud, duress and unconscionability as other contracts. *Delta Funding Corp. v. Harris*, 189 *N.J.* 28 (2006).

"With respect to a contractual dispute, the initial task [for a motion court] is to determine the parties' intent." *Globe Motor Co. v. Igdalev*, 225 *N.J.* 469 (2019). As a general principle whether the parties have agreed at all to submit their dispute to arbitration "is typically an issue for judicial determination." *Morgan v. Sanford Brown Institute*, 225 *N.J.* 289 (2016), quoting *Granite Rock Co. v. Int'l Bhd. Of Teamsters*, 561 *U.S.* 287 (2010)(additional citations omitted). An arbitration agreement in a consumer contract requires a "mutuality of assent to form an agreement to arbitrate." *Kernahan v. Home Warranty Administrator of Florida Inc.*, 23 *N.J.* 301 (2019).

Here, the Motion Court performed a perfunctory and limited review, simply concluding that "this Court finds the arbitration agreement states the terms clearly and unambiguously." (Pa257)

Doubts or ambiguities as to the scope of exculpatory language must be resolved against the drafter of the agreement and in favor of affording legal relief. *Gershon v. Regency Driving Center*, 368 *N.J.Super.* 237, 248 (App. Div. 2004), citing *Chemical Bank of New Jersey v. Bailey*, 296 *N.J.Super.* 515 (App. Div.), cert. den. 150 *N.J.* 28 (1997).

The arbitration agreement will be enforced only if:

1. it does not adversely affect the public interest,
2. the exculpated party is not under a legal duty to perform,
3. it does not involve a public utility or common carrier,
4. the contract does not grow out of unequal bargaining power or is otherwise unconscionable

In judging whether a consumer contract meets this standard, courts must take into consideration the guidelines set forth in the Plain Language Review Act N.J.S.A. 56:12-1 to 56:12-13, specifically N.J.S.A. 56:12-10. If a party challenges the validity of an arbitration provision, the court must consider the challenge before ordering compliance. *Rent-A-Center W Inc. v. Jackson*, 561 *U.S.* 63, 71 (2010)

LEGAL ARGUMENT

POINT ONE: THE FACTS IN THIS CASE DEMONSTRATE THAT THE WAIVER AND ARBITRATION PROVISIONS OF ADT'S SMALL BUSINESS CONTRACT ARE NOT ENFORCEABLE AGAINST THE PLAINTIFFS (Pa256)

An arbitration agreement must satisfy the elements necessary for the formation of a contract under state law. A legally enforceable agreement requires mutual assent and a "meeting of the minds," *Atalese v. U. S. Legal Servs. Grp.*, LP, 219 *N.J.* 430, 442 (2014), citing *First Options of Chi, Inc. v. Kaplan*, 514 *U.S.* 938 (1995) and *Morton v. 4 Orchard Land Trust*, 180 *N.J.* 118 (2004). "Mutual assent requires that the parties have an understanding of the terms to which they have agreed." *Atalese*, supra. 219 *N.J.* at 442.

"The initial inquiry must be whether the agreement to arbitrate all, or any portion, of a dispute is the product of mutual assent, as determined under customary principles of contract law." *Flanzman v. Jenny Craig, Inc.*, 244 *N.J.* 119 (2020), quoting *Kernahan v. Home Warranty Adm'r of FLA*, 236 *N.J.* 301, 319 (2019) and *Atalese*, supra. 219 *N.J.* at 442.

An arbitration agreement is valid only if the parties intended to arbitrate because the parties are not required to arbitrate when they have not intended to do so. *Kernahan*, supra. 236 *N.J.* at 321:

> "A court's obligation in construing a contract is to determine the intent of the parties. In the quest for the common intention of the parties to a contract the court must consider the relations of the parties, the attendant circumstances, and the objects they were trying to attain." Id at 321, citing *Kieffer v. Best Buy*, 205 *N.J.* 213 (2011) and *Tessmar v. Grosner*, 23 *N.J.* 193 (1957)

When determining the enforceability of an arbitration agreement, courts will consider whether there was mutual assent, as impacted by the motive of unconscionability, the parties' sophistication and the one-sided nature of the negotiations. *Muhammad v. Cnty. of Rehoboth Beach*,189 *N.J.* 1, 15 (2006). Invalid contract provisions are severable. *Goffe v. Foulke Management Corp.*, 238 *N.J.* 191 (2019).

The New Jersey Supreme Court has long recognized and required a strict analysis of consumer contracts.

In *Atalese*, the Court had 2 important concerns with respect to consumer contracts. First, the Court noted that a consumer "is not necessarily versed in the meaning of law-imbued terminology about procedures tucked in form contracts." *Atalese*, supra. 219 *N.J.* at 442. Here for example, ADT argues that Plaintiffs understood and agreed to the provisions of the Federal Arbitration Act, 9 U.S.C. Sec. 1-16, and the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to 36). Second, the Court found that these contracts violate the Consumer Fraud Act, N.J.S.A. 56:8-1 to 227, which requires that consumer contracts be "written in a simple, clear, understandable, and easily readable way." 219 *N.J.* at 444, quoting N.J.S.A.

56:12-2. "We have repeatedly stated that the point is to assure that the parties know that in selecting arbitration as the exclusive remedy and are waiving their time-honored right to sue." Ibid.

Here, the Motion Court concluded simply that the

> "contract states in all capital letters that the parties would be waiving their rights otherwise available to them if they went to court. Plaintiffs have not identified how the contract is unenforceable." (Pa256)

In *Morgan v. Sanford Brown Institute*, 225 *N.J.* 289, 304 (2016), the Court held that in judging whether a consumer contract meets the standard that it be written "in a simple, clear, understandable, and easily readable way" courts "must take into consideration the guidelines set forth in N.J.S.A. 56:12-2 and N.J.S.A. 56:12-10."

In *Vitale v. Schering-Plough Corp.*, 231 *N.J.* 234 (2017) the Court held that a consumer contract was one of adhesion where, as here, "it is presented on a take-it-or-leave-it basis, commonly in a standardized printed form without opportunity for the adhering party to negotiate." Id. at 246, quoting *Rudbart v. N. Jersey Dist. Water Supply Comm'n*, 203 *N.J.* 586 (2010). "Such contracts are subject to close judicial scrutiny." Id. at 247, quoting *Stelluti v. Casebenn Enters. LLC*, 203 *N.J.* 286 (2010).

In *Kernahan v. Home Warranty Administrator of Florida Inc.*, 236 *N.J.* 301, 322 (2019), the Court held that "a consumer cannot be required to arbitrate when it cannot fairly be ascertained from the contract's language that she knowingly

assented to the provision's terms or knew that arbitration was the exclusive forum for dispute resolution." Here, there is not even an allegation that Bartlow or Varcadipane signed ADT's Contract. Plaintiffs have nothing in their possession to show that ADT ever signed this document. (Pa169)

In *Hirsch v. Amper Financial Services, LLC*, 215 *N.J.* 174, 196 (2013), the Court emphasized the right to a jury trial and held that "in the absence of a consensual understanding neither party is entitled to force the other to arbitrate their dispute" Id. at 194, and that "absent express contractual language signaling an agreement to arbitrate, a court has little to interpret in favor of compelling arbitration." quoting *Garfinkel v. Morristown Obstetrics & Gynecology Assoc., P.A.*, 168 *N.J.* 124 (2001). With respect to waiver provisions "an exculpatory clause can only bind the individuals who signed it." *Gershon v. Regency Driving Center*, 368 *N.J.Super.* 237, 247 (App. Div. 2004). Any doubts or ambiguities as to the scope of the exculpatory language must be resolved against the drafter of the agreement and in favor of affording legal relief. Ibid.

In *Kernahan*, the Court also held that New Jersey's Plain Language Act requires that "consumer contracts with conditions and exceptions to the main promise of the agreement shall be given equal prominence with the main promise and shall be in at least 10 point type." N.J.S.A. 56:12-10(b)(3). Id. at 326.

In *Delaney v. Dickey*, 244 N.J. 466, 497 (2020), Justice Albin noted that the insertion of an arbitration provision indicates that a party "has given thought to the prospect that a client may be a future adversary and has selected the forum in which potential disputes will be resolved." Justice Albin analyzes at length the differences between arbitration and the court system, including discovery, finality, damages and, in particular, costs. Id. at 494. Further, not all arbitration provisions are alike. The Court emphasized that "the basic advantages and disadvantages" of each element of arbitration proceedings be discussed. Id. at 496. Here, cost is a major factor. Individuals who suffered significant damages to their property are now being required to pay an arbitrator $320.00 per hour and $2,200.00 per day in order to pursue their claims which they were never told in advance. Nor were they advised in advance that AAA would be selected to arbitrate, nor did they receive its 38 pages of rules.

POINT TWO: THESE ARBITRATION AND WAIVER PROVISIONS DO NOT SATISFY FAA AND NJAA REQUIREMENTS (Pa253)
(not addressed in ruling)

Both the Federal Arbitration Act, 9 U.S.C. §§ 1 – 16 ("FAA") and the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to 36 ("NJAA") express a general policy favoring arbitration as a means of settling disputes that otherwise would be litigated in a court. *Badiali v. N.J. Mfrs. Ins. Corp.*, 220 *N.J.* 554, 556 (2015). They express federal and state policies favoring arbitration. *Atalese*, supra. 219 *N.J.* 430, 441; *Hojnowski v. Vans State Park*, 187 *N.J.* 323, 341 (2006). The FAA contains no express pre-emptive provision and does not reflect a federal intent to occupy the entire field of arbitration. *Arafa v. Health Express Corporation*, 243 *N.J.* 152 (2020).

"The main thrust of the FAA, as well as the NJAA, is to ensure that states place arbitration agreements on an equal footing with other contracts." *Delaney*, supra. 244 *N.J.* at 466, 494, quoting *AT&T Mobility LLC v. Concepcion*, 563 *U.S.* 333, 339 (2011).

> "The FAA declares that a written arbitration provision encompassed by the FAA shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or inequity for the revocation of any contract. 9 U.S.C. §2. The save upon phrase at the end of 9 U.S.C. §2 opens the door for application of ordinary state law principles that govern the formation of contracts. *First Options of Chi., Inc. v. Kaplan*, 514 *U.S.* 938, 944 (1995). So, when determining the enforceability of an arbitration

> agreement, like any other contract, our courts will consider whether there was mutual assent, as impacted by notions of unconscionability that vary from case to case based upon the parties' sophistication and the one-sided nature of the negotiations. *Muhammad*, supra. 189 *N.J.* at 15, citing *Sitogum Holdings Inc. v. Ropes*, 352 *N.J.Super.* 555, 564 (Ch. Div. 2002)."
> *County of Passaic v. Horizon Healthcare Services Inc.*, 474 *N.J.Super*. 496, 501 (App. Div. 2023).

A court must first apply state contract law principles to determine whether a valid agreement to arbitrate exists. *Hirsch*, supra. 215 *N.J.* at 187. This arbitrability analysis is set forth in N.J.S.A. 2A:23B-6(b) and fact-finding requirements at N.J.S.A. 2A:23B-7(c):

> "When deciding whether the parties agreed to arbitrate a certain matter courts generally should apply ordinary state law principles that govern the formation of contracts." *Atalese*, supra. 219 *N.J.* at 142, citing *Hojnowski*, supra. 187 *N.J.* at 342

The inquiry is "whether the agreement to arbitrate all, or any portion of a dispute is the product of mutual assent as determined under customary principles of contract law." *Delaney*, supra. 244 *N.J.* at 495, citing *Flanzman v. Jenny Craig, Inc.*, 244 *N.J.* 119, 137 (2020) and *Kernahan*, supra. 236 *N.J.* at 319.

Accordingly, these arbitration and waiver provisions do not meet FAA or NJAAA requirements.

POINT THREE: THE MOTION JUDGE FAILED TO COMPLY WITH R. 1:6-2 (not raised below)

R. 1:6-2(d) provides for oral argument upon request by a party in its moving papers, in timely-filed answering papers, or reply papers. "The right to oral argument is generally applicable to all non-discovery and non-calendar motions in civil cases . . . a request for oral argument by a party is required to be granted as of right." Pressler & Verniero, *Current N.J. Court Rules*, Comment R. 1:6-2(d), Sec. 5 (Gann 2024), citing *Filippone v. Lee*, 304 *N.J.Super.* 301, 306 (App. Div. 1997) (Additional citations omitted)

In this case, the Plaintiffs unconditionally requested oral argument in their Notice of Motion filed on May 10, 2024. (Pa165) ADT requested oral argument (Pa239). Intel requested oral argument.

On May 10, 2024 (Pa209) and June 5, 2024 (Pa248), the Court Clerk issued Notices that mistakenly stated that oral argument had not been requested. By letter to the Motion Court, Plaintiffs' Co-Counsel again requested oral argument and appended the filed Notice of Motion with said request. (Pa251)

Arguably, the contested nature and complex issues in this dispositive Motion could have warranted an evidentiary hearing. Pressler, cmt. R. 1:6-2(d) at 64. Certainly this Motion justified oral argument and would have produced a record with findings of fact and conclusions of law explaining the disposition pursuant to R. 1:6-2(f) and N.J.S.A. 2A:23B-7.

CONCLUSION

The Appellate Division holding in *County of Passaic v. Horizon Healthcare Services Inc.*, 474 *N.J.Super*. 498, 508 (App. Div. 2023) that an express waiver of a right to seek relief in a court of law to the degree required by *Atalese* is unnecessary when parties to a commercial contract are sophisticated and possess comparatively equal bargaining power illustrates both the benefits and the detriments of arbitration agreements – and explains the differences between them.

As noted in this opinion, "the focus, in *Atalese* and other Supreme Court decisions, is on the unequal relationship between the contracting parties or the adhesional nature of the contract." Id. at 503. *County of Passaic* involved a dispute between County government and its 17-year contractual relationship with the manager of its health benefits plan. Both parties were knowledgeable and experienced with the subject matter, were represented by legal counsel at every stage of the negotiated agreement, and had been involved in an established business relationship. The playing field was level. Their agreement was enforceable.

This case is the other side of that coin. Here, a nationwide corporation agreed to provide its services to a consumer that paid for them. That was not enough. Rather, the nationwide corporation – with full legal support – sought to gain a substantial advantage by adding pages of clauses, waivers and releases

without even telling its customer. ADT created an adversarial relationship from the beginning and now asks this Court to be its enforcer.

Based upon all of the facts and legal authority set forth herein, Plaintiffs' requested relief should be granted, the arbitration requirement in ADT's Contract held to be unenforceable, and waiver and exculpatory provisions in Paragraphs E and F that Plaintiffs challenge be invalidated and severed.

Respectfully submitted,

/s/ Kevin D. Kelly

Kevin D. Kelly, Esq.

Dated: September 30, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003586-23T4

NJ PROPERTYLINK, LLC; DAVID VARCADIPANE; and LISA BARTLOW,

Plaintiffs-Appellants,

v.

ADT CORPORATION; INTEL VIDEO SURVEILLANCE CORP.; R&J HOME SERVICES, LLC; JOHN/JANE DOES 1-X; ABC CORPORATION/ENTITIES 1-X; XYZ PARTNERSHIPS 1-X; and 123 TRUSTS,

Defendants-Respondents.

CIVIL ACTION

ON APPEAL FROM:

SUPERIOR COURT, LAW DIV.

SUSSEX COUNTY

DOCKET NO. SSX-L-451-23

Honorable Vijayant Pawar, J.S.C.

BRIEF FOR DEFENDANT-RESPONDENT ADT LLC, D/B/A ADT SECURITY SERVICES

SHOOK, HARDY & BACON L.L.P.
Frantz J. Duncan (NJ Bar No. 210002016)
Two Commerce Square
2001 Market Street, Suite 3000
Philadelphia, PA 19103-7044
Telephone: (215) 278-2555
Facsimile: (215) 278-2594
fduncan@shb.com

On the Brief:

Frantz J. Duncan, Esq.

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PRELIMINARY STATEMENT

Each of the issues Plaintiff raises in this appeal is moot. Plaintiffs have unequivocally agreed, more than once, to arbitrate the underlying dispute with ADT; they have forfeited any ability to now renege on that agreement. In the Contract between ADT and Plaintiff NJ PropertyLink (which forms the basis for Plaintiffs' lawsuit), the parties agreed to arbitrate all disputes arising under the Contract. Then, Plaintiffs consented to Superior Court's January 4, 2024 order compelling arbitration of this matter ("Consent Order or January Order"). Further, even if Plaintiffs could have withdrawn their consent by challenging the Consent Order (through appeal or otherwise), they were required to do so within 45 days of that order. But ***Plaintiffs chose not to do so***.

Instead, Plaintiffs waited until May 2024—five months after the Superior Court had entered the ***consent*** order compelling arbitration, and after ADT had already initiated arbitration with the American Arbitration Association ("AAA")—to file a Motion to Vacate the Consent Order. Because the Superior Court denied Plaintiffs' Motion to Vacate (the "June Order"), reiterating that the dispute was arbitrable, Plaintiffs filed this appeal. This appeal, which is a last-ditch effort to renege on their agreements to arbitrate, is not only improper, but fails for three reasons.

First, the June Order Plaintiffs are appealing is not a final order. Plaintiffs have not timely (*i.e.,* within 45 days) appealed an order "compelling arbitration." Instead, Plaintiffs are appealing—without leave—an order denying a motion to vacate filed over five months after entry of the order compelling arbitration. Plaintiffs' ploy is an attempt to undo the consequences of their agreement to the Consent Order and failure to appeal it. Plaintiffs cannot dupe this Court into believing the June Order denying their motion to vacate is a final judgment under Rule 2:2-3(b). Their appeal is improper and should be dismissed.

Second, even if this Court were to consider the substantive merits of this appeal, black letter New Jersey law requires the rejection of Plaintiffs' arguments. Plaintiffs are ultimately trying to bring an untimely appeal of ***the Consent Order they agreed to***, which requires the parties to arbitrate this dispute. By consenting to the Consent Order, Plaintiffs waived the right to appeal it. Indeed, Plaintiffs provide no valid reasons why the Consent Order was improper.

Third, even if Plaintiffs had not expressly consented to the order they now appeal, the Court should uphold the Superior Court's decision that the underlying dispute is arbitrable pursuant to the terms of the parties' Contract.

Finally, this Court should instruct that the Superior Court action be stayed pending arbitration pursuant to New Jersey and United States Supreme Court precedent.

PROCEDURAL HISTORY

Plaintiffs initiated this lawsuit in October 24, 2023 against ADT, Intel Video Surveillance Corp. ("Intel"), and R&J Home Services, LLC ("R&J"). [Pa1-Pa12] On December 20, 2023, ADT Filed a Motion to Compel Arbitration and Stay Proceedings pursuant to the arbitration provision within its Small Business Contract (the "Contract") with NJ Propertylink. [Pa174–80].

On January 4, 2024, ADT and Plaintiffs filed a Consent Order with the Court, whereby Plaintiffs agreed that they were bound by the Contract to arbitrate this dispute and that they would arbitrate their dispute accordingly. [Pa162–63].

The Superior Court entered the Consent Order on January 4, 2024, staying the matter for 120 days until May 4, 2024 and directing the parties to arbitration ("January Consent Order"). [Pa162–63]. Plaintiffs never appealed the January Consent Order. After the Superior Court entered the January Consent Order, Plaintiffs refused to initiate arbitration. Accordingly, ADT initiated arbitration with the AAA on or about April 8, 2024.

Over five months later, on May 10, 2024, Plaintiffs filed a motion to vacate the January Consent Order. [Pa164–65]. The Superior Court denied Plaintiffs' motion ("June Order"). [Pa253–57]. Plaintiffs now bring this purported "appeal as of right" from the Superior Court's June Order denying Plaintiffs' motion to vacate. [Pa262].

STATEMENT OF FACTS

On June 30, 2022, Plaintiffs contracted with ADT for the installation of security monitoring devices. [Pa3; Pa15–21]. The Contract contained an arbitration provision requiring all disputes arising from the services provided by ADT be heard in arbitration. [Pa21]. Mr. Varcadipane, on behalf of the Plaintiffs, signed the Contract and thus agreed to be bound by its terms. [Pa15].

In October of 2023, Plaintiffs sued ADT. [Pa1-12]. The grounds of their lawsuit are not relevant to this appeal. What is relevant, however, is that when ADT moved to compel arbitration (per the Contract Mr. Varcadipane signed), ***Plaintiffs agreed to arbitrate according to the Contract's terms***. [Pa220]. Recognizing this obligation, Plaintiffs signed the January Consent Order, which was entered by the Superior Court. [Pa164–65].

After agreeing to arbitrate under the January Consent Order, however, Plaintiffs balked. They refused to initiate arbitration. Ultimately, ADT initiated arbitration, but Plaintiffs refused to participate—despite their agreement under the January Consent Order. They then moved to vacate the January Consent Order. [Pa164–65]. When the Superior Court properly denied their motion to vacate, Plaintiffs filed the present appeal. [Pa262]. That is, Plaintiffs are appealing the June Order denying their motion to vacate—they are not appealing the January Consent Order compelling arbitration. [Pa262].

LEGAL ARGUMENT

I. Plaintiffs' appeal is an improper interlocutory appeal and should be dismissed. (June Order [Pa253–54]).

A. Standard of Review

Under Rule 2:2-3(b), a party may only appeal a ***final judgment***. If an order is not final, or among those categories of orders expressly designated as final for purposes of appeal, a party must seek leave to appeal from this Court. R. 2:5-6(a). Unless it is an extraordinary case, it is inappropriate for a court to grant leave to appeal *sua sponte*. *Frantzen v. Howard*, 132 N.J. Super. 226, 227–28 (App. Div. 1975). If a party fails to seek leave to appeal a non-final order, the appeal must be dismissed. *See Parker v. City of Trenton*, 382 N.J. Super. 454 (App. Div. 2006) (dismissing appeal of non-final judgment as interlocutory); *Triffin v. Zurich Am. Ins. Co.*, No. A-0297-16T4, 2018 WL 636703, at *2 (N.J. Super. Ct. App. Div. Jan. 31, 2018) (unpublished) ("Because plaintiff neither sought nor obtained leave to appeal the order from which he appeals, we must dismiss the appeal as interlocutory.").

B. Plaintiffs have no right to appeal the June Order. (June Order [Pa253–57]).

Plaintiffs are unable to appeal the June Order as of right. They cite Rule 2:2-3(b)(8) as grounds for their appeal, but ***Rule 2:2-3(b)(8) does not apply to the order they are appealing.***

Rule 2:2-3(b)(8) maintains that an order "compelling or denying arbitration" is a final, appealable order. But the June Order that Plaintiffs now appeal is not an

order "compelling or denying arbitration." The June Order simply denied Plaintiff's motion to vacate the prior order—and the denial of a motion to vacate is *not* a final order ripe for appeal. *See Sanderhoff v. Miller*, No. A-1314-08T1, 2009 WL 4724274, at *1 (N.J. Super. Ct. App. Div. Dec. 8, 2009) (unpublished) (dismissing appeal because an order denying a motion to vacate "is not a final judgment, and [the party] has not sought leave to appeal such interlocutory order").

If Plaintiffs wanted to appeal an order compelling arbitration in this case, they could have appealed the January Consent Order granting ADT's motion compelling arbitration within the time window provided under the Rules. But their opportunity to appeal the January Consent Order passed long ago. *See* R. 2:4-1(a) (setting a 45-day deadline for appeals).

In short, Plaintiffs failed to timely appeal the January Consent Order, waited *six months* to file a baseless motion to vacate the January Consent Order, and engaged in further delay tactics by filing a frivolous appeal. They have no right to appeal at this juncture. And as argued below, ADT does not believe that *any* reasonable grounds exist for appealing the January Consent Order—*a consent order to which they explicitly agreed*.

Whether Plaintiffs are trying to appeal the June Order or the January 4 Consent Order, the outcome is the same: Their time to appeal the January Consent Order is over, and the June Order is not a final judgment with a right of appeal. This

Court should therefore dismiss this appeal and instruct the Superior Court to stay this matter pending the conclusion of arbitration, as both state and federal law require. *See* 9 U.S.C. § 3; N.J.S.A. 2A:23B-7(g).

C. Plaintiffs cannot appeal the Consent Order under New Jersey law. (June Order [Pa253–57]).

To the extent Plaintiffs are asking this Court to review the Consent Order, Plaintiffs have missed their opportunity to do so. *See* R. 2:4-1(a) (setting a 45-day deadline for appeals). And even if they did not miss their deadline, an order consented to by the parties—e.g., the January Consent Order—is not appealable. *See, e.g., Winberry v. Salisbury*, 5 N.J. 240, 267 (1950) ("This order was consented to by the attorneys for each party and it is therefore not appealable."); *Jacobs v. Mark Lindsay & Son Plumbing & Heating, Inc*., 458 N.J. Super. 194, 205 (App. Div. 2019) ("It is a long-established principle of appellate jurisprudence in our State that an order consented to by the attorneys for each party is ordinarily not appealable"); *New Jersey Sch. Const. Corp. v. Lopez*, 412 N.J. Super. 298, 308 (App. Div. 2010) ("[A]n order . . . consented to by the attorneys for each party . . . is . . . not appealable." (internal quotations omitted)).[1]

[1] Moreover, judicial estoppel bars Plaintiffs from contesting the enforceability of the arbitration provision. Once a party convinces the court to accept a position—as the Plaintiffs did in the January Consent Order—that party cannot then assume the opposite position. *See Brown v. Allied Plumbing & Heating Co*., 129 N.J.L. 442, 446 (Sup. Ct. 1943). Plaintiffs are playing "fast and loose" with the judicial system. *Wallhauser v. Rummel*, 25 N.J. Super. 358, 387 (Ch. Div. 1953).

II. The Superior Court did not abuse its discretion in denying Plaintiffs' motion to vacate (June Order [Pa253–54]).

A. Standard of Review

Plaintiffs frame their appeal as if this Court's task is to assess the validity of the Contract's arbitration provision. They cite a *de novo* standard of review, as if they were appealing an order compelling arbitration. But that is not the procedural posture here. Plaintiffs are not appealing an order substantively ruling on the Contract's validity or compelling arbitration; they are appealing an order denying their motion to vacate the January Consent Order.

This Court is *not* tasked with reviewing the Contract's enforceability *de novo*. Rather, the Superior Court's denial of Plaintiffs' motion to vacate should be reviewed "under an abuse of discretion standard." *257-261 20th Ave. Realty, LLC v. Roberto*, 477 N.J. Super. 339, 366 (App. Div. 2023) ("We review a motion under Rule 4:50-1 to vacate . . . under an abuse of discretion standard."). "An abuse of discretion occurs when a decision was made without a rational explanation, inexplicitly departed from established policies, or rested on an impermissible basis." *Id.* (internal quotations omitted). Reversal is only merited when the exercise of discretion was "manifestly unjust." *Id.*

B. The Superior Court rightly exercised its authority when denying Plaintiffs' motion to vacate. (June Order [Pa253–54]).

The Superior Court rightly applied Rule 4:50-1 to Plaintiffs' motion to vacate. It pointed out that Plaintiffs' motion "only provides the conclusions that they are

entitled to relief . . . not why they are entitled to relief." [Pa. 255]. In addition to Plaintiffs' lack of argument, the Superior Court also found:

> Plaintiffs signed a Consent Order after not filing an opposition to defendant ADT's motion to compel arbitration. Now, plaintiffs seek relief from this consent order and do not provide a cognizable reason for relief aside from conclusory statements.

[Pa. 256]. The Superior Court also explained that, despite Plaintiffs' insistence that the Contract's arbitration agreement violated New Jersey law, "Plaintiffs have not identified how this arbitration contract is unenforceable." [Pa. 256].

Plaintiffs have failed to show (or even argue) that the Superior Court abused its discretion when refusing to vacate the January Consent Order. Nowhere in Plaintiffs' brief do they argue that the Trial Court abused its discretion under Rule 4:50-1, nor do they even mention the applicable legal standard. As such, Plaintiffs failed to provide any grounds for reversal.

C. To the extent this Court chooses to assess the enforceability of the Contract, the Contract's arbitration clause is enforceable under New Jersey law. (June Order [Pa253–57]; January Consent Order [Pa162–63]).

As discussed above, this Court is not tasked with a *de novo* review of the Contract's arbitration provisions; it is rather tasked with reviewing whether the Superior Court abused its discretion when it denied Plaintiffs' motion to vacate. Nevertheless, even under a *de novo* standard of review, Plaintiffs have failed to show that the Contract's arbitration provisions are unenforceable.

1. The Contract's arbitration provisions are enforceable under New Jersey law.

When assessing whether a valid arbitration agreement exists, a court must apply "state contract-law principles," which include the policy favoring arbitration. *See Skuse v. Pfizer, Inc.*, 244 N.J. 30, 46–48 (2020). In Point One of their brief, Plaintiffs claim that the arbitration agreement in the Contract is not enforceable. However, they neglect to articulate the substantive basis for this argument.

Rather than present this Court with an argument supporting reversal, "Point One" of Plaintiffs' brief simply recites quotes and holdings from New Jersey cases, without any attempt to show that the cited cases have any application here. That is just as well, because none of the cases Plaintiffs cite are relevant to their appeal.

For example, the *Atalese* case Plaintiffs cite supports ADT's position. *See Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430 (2014). There, the New Jersey Supreme Court affirmed that arbitration provisions are enforceable under New Jersey law. *Id.* at 442. The holding in *Atalese* was that, despite the general enforceability of arbitration provisions, they will not be enforced if language within fails to inform the parties that they are "waiving [their] right to seek relief in court." *Id.* at 446. Plaintiffs do not accuse ADT's arbitration provision of violating this standard. Nor could they, as ADT's arbitration provision states, in capitalized, bold letters across the page:

> **IF EITHER PARTY ELECTS TO ARBITRATE A DISPUTE, ADT AND CUSTOMER WAIVE THE RIGHT TO A JURY TRIAL AND TO OTHERWISE LITIGATE THE DISPUTE IN COURT. BY AGREEING TO ARBITRATE, THE PARIES MAY ALSO WAIVE OTHER RIGHTS THAT WOULD OTHERWISE BE AVAIALBLE IN COURT.**

[Pa21]. Because the Contract contains the very same language that the *Atalese* contract lacked, *Atalese* has no bearing on Plaintiffs' appeal.

Plaintiffs also cite *Vitale*, a case about the enforceability of contractual liability waivers. *Vitale v. Schering-Plough Corp.*, 231 N.J. 234 (2017). While ADT's Contract contains certain liability waivers, their enforceability was never an issue before the Superior Court. Moreover, *Vitale* simply stands for the proposition that certain attempts to waive liability for personal injury are invalid under Sections 39 and 40 of the Worker's Compensation Act. *Id.* at 240–41. This case involves neither personal injuries nor the Worker's Compensation Act.

The other cases cited by Plaintiffs are similarly inapplicable. In *Kernahan*, the arbitration provision was hidden in a section of the contract labeled "MEDIATION"—an unacceptably confusing circumstance. *Kernahan v. Home Warranty Adm'r of Fla., Inc.*, 236 N.J. 301, 308 (2019). Unlike the *Kernahan* contract, ADT's Contract had a clearly-marked arbitration provision which explained the nature of the arbitration proceedings to which the parties agreed in advance. In *Hirsch*, which Plaintiffs also cite, there was no contractual language

signaling an agreement to arbitrate—because such language is clearly present here. *Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 179 (2013).[2] And *Delaney* is also inapplicable; it simply held that an arbitration provision existing between an attorney and his client is unenforceable against the client, if the attorney failed to explain the arbitration provision. *Delaney v. Dickey*, 244 N.J. 466 (2020).

Below, the Superior Court explained that "Plaintiffs have not identified how this arbitration contract is unenforceable." [Pa256] The same can be said here. Mr. Varcadipane represented that he read, understood, and agreed to the terms in the Contract. The Contract includes a conspicuous arbitration provision.[3] Moreover, the arbitration provision's validity has been *further* ratified by Plaintiffs' agreement to

[2] To the extent Plaintiffs are arguing that some of the Plaintiffs are not bound by the arbitration agreement, this argument fails. Again, Plaintiffs never made this argument prior to the entry of the January Consent Order. And in the January Consent Order, ***all plaintiffs*** agreed to arbitrate per the Contract's terms. Any attempt to claim that Mr. Varcadipane or Ms. Bartlow are not bound by the Contract is self-defeating, as their claims against ADT are grounded in the Contract. [Pa5–10]

[3] Plaintiffs attempt to introduce factual claims and materials that were never raised before the Superior Court prior to the entry of the January Consent Order compelling arbitration under the Contract. For example, none of the materials from the following appendix pages were before the Superior Court at the time of the Consent Order: [Pa166–73; 2 Pa 181–258]. And Plaintiffs' factual assertions about the interaction between ADT and Plaintiffs (*see* Pa1) were never before the Superior Court, nor was any such evidence to support these assertions ever presented to the Superior Court (nor was there any need for such evidence as ***Plaintiffs agreed to the January Consent Order***). To the extent Plaintiffs are (improperly) seeking review of the January Consent Order, such factual claims and irrelevant materials should be struck from the appellate record. *See* R. 2:5-4(a); *see also Townsend v. Pierre*, 221 N.J. 36, 45 n. 8 (2015) (discussing that on appeal only records presented to the trial court are to be considered).

the January Consent Order. At bottom, Plaintiffs have provided no argument supporting their position that ADT's arbitration provision is unenforceable.[4]

2. The Contract's arbitration provisions are valid under the FAA and NJAA.

Plaintiffs claim that the arbitration and waiver provisions "do not satisfy FAA and NJAA requirements." *See* Appellant's Br. at 18. Frankly, ADT cannot make sense of what Plaintiffs are arguing here.

As Plaintiffs themselves state, the FAA and NJAA hold arbitration agreements enforceable to the extent they are enforceable under state contract law. Plaintiffs entire "Point Two" is devoid of any argument about "FAA and NJAA requirements." Plaintiffs simply cite cases and statutes (all of which affirm that arbitration agreements are enforceable as contracts) and conclude with an unsupported assertion that "these arbitration and waiver provisions do not meet FAA

[4] Plaintiffs make a series of false claims in their brief that ADT now corrects. **First**, Plaintiffs say that "cost is a major factor" in their resistance to private arbitration. *See* Appellant's Br. at 17. But the Contract is clear that ADT is responsible for paying arbitration filing fees. When Plaintiffs raised their concerns about costs, ADT and co-defendant Intel offered to pay Plaintiffs' portion of the arbitrator's fees. So it is false that Plaintiffs are "being required to pay an arbitrator $320.00 per hour and $2,200.00 per day." *See id*. **Second**, Plaintiffs claim that they were not "advised in advance that AAA would be selected to arbitrate." *See id.* This is also false. Under the Contract, Plaintiffs had the right to select from between AAA or JAMS. ADT asked Plaintiffs to select which forum they preferred, and Plaintiffs refused to choose. Only after they refused to choose did ADT initiate proceedings with AAA. [*See, e.g.*, Pa231–33] And **third**, Plaintiffs say they did not receive AAA's "38 pages of rules." *See id.* But AAA's rules are posted publicly on its website; at any point after signing the Contract—including in the months following ADT's motion to compel and the subsequent January Consent Order—Plaintiffs could have reviewed the AAA and JAMS rules to determine which arbitration forum they preferred. They cannot blame their failure to do so on ADT.

and NJAAA [sic] requirements." *See* Appellant's Br. at 19. What those requirements are, or why the Contract's arbitration provisions do not meet them, we are not told. Plaintiffs have failed to articulate any grounds for relief under Point Two, and this Court should accordingly deny Plaintiffs any relief on these grounds.

III. Plaintiffs have not identified any reversible error under Rule 1:6-2 (not raised below).

Plaintiffs claim that the Trial Court failed to schedule oral argument for their Motion to Vacate. While it is true that the Trial Court did not schedule oral argument for Plaintiffs' motion, this in itself is not reversible error. As explained in *Raspantini v. Arocho*, 364 N.J. Super. 528, 532 (App. Div. 2003), failure to set oral argument, without more, is not grounds for reversal.

Under *Raspantini*, a failure to set oral argument is reversible error if the motion judge "failed . . . to set forth his findings of fact and conclusions of law on the record." *Id.* Here, however, Judge Pawar clearly articulated the grounds for denying Plaintiffs' motion. [Pa255–57]. Moreover, Plaintiffs have not established that they were prejudiced by lack of oral argument. *See Spina Asphalt Paving Excavating Contractors, Inc. v. Borough of Fairview*, 304 N.J. Super. 425, 427 n.1 (App. Div. 1997) (refusing to remand for failure to set oral argument); *Finderne Heights Condo. Ass'n, Inc. v. Rabinowitz*, 390 N.J. Super. 154, 165 (App. Div. 2007) (affirming trial court decision, despite trial court's refusal to hold oral argument or justify its refusal to do so, because "we find no prejudice under the circumstances");

ConnectOne Bank v. Bergen Protective Sys., Inc., No. A-0468-20, 2021 WL 5045440, at *9 (N.J. Super. Ct. App. Div. Nov. 1, 2021) (unpublished) ("The movant must show there was prejudice warranting reversal if the trial court denies a request for oral argument on a motion."). Because Plaintiffs have not identified any reversible error or prejudice, the Trial Court's denial of Plaintiffs' Motion to Vacate should be affirmed.

IV. Under the FAA and NJAA, this Court should order the Trial Court to stay litigation pending the AAA arbitration.

As explained above, Plaintiffs are bound by a valid arbitration provision in the Contract. Indeed, the Trial Court has already held (at least twice) that the dispute at issue is arbitrable under the Contract and entered the January Consent Order to which Plaintiffs consented. As such, the case ***must*** be stayed pending arbitration.

Under the Federal Arbitration Act, if a party is compelled by a court to arbitrate, that court *must* stay the civil case until the arbitration is complete. *See* 9 U.S.C. § 3 (requiring "the court . . . upon application of one of the parties" to "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement); *see also, e.g., Smith v. Spizzirri*, 601 U.S. 472, 476 (2024) (explaining that, by stating that a court compelling arbitration "shall" stay the arbitration, "the FAA created a ***mandatory*** obligation that left no place for the exercise of discretion"); *Alfano v. BDO Seidman, LLP*, 393 N.J. Super. 560, 577

(App. Div. 2007) ("Under section 3 of the FAA, the court must stay an arbitrable action pending its arbitration.").

While the FAA certainly applies to this dispute given the interstate commerce at issue, the same rule applies under the New Jersey Arbitration Act. *See* N.J.S.A. § 2A:23B-7(g) ("If the court orders arbitration, the court on just terms ***shall*** stay any judicial proceeding that involves a claim subject to arbitration."); *see also Cervalin v. Universal Glob., Inc.*, No. A-0974-20, 2021 WL 2793593, at *6 (N.J. Super. Ct. App. Div. July 6, 2021) (unpublished) (remanding "for entry of a new order and direct that the new order compel arbitration and stay the civil action pending those proceedings"); *Jefferson v. Midland Credit Mgmt., Inc.*, No. A-0535-21, 2022 WL 2351711, at *5 (N.J. Super. Ct. App. Div. June 30, 2022) (unpublished) ("Based on the language of the FAA and N.J.S.A. 2A23B-7, the matter should have been stayed pending the arbitration."). These statutes and their supporting case law are clear: the proper disposition of this case requires that as soon as the Trial Court finds that the matter is arbitrable per the parties' agreement, the Trial Court ***must*** (not may) stay the matter pending arbitration per the terms of the Contract.

This Court should instruct the Trial Court accordingly. *See Antonucci v. Curvature Newco, Inc.*, 470 N.J. Super. 553 (App. Div. 2022) (explaining that the proper judicial recourse when compelling arbitration under the FAA is to stay the litigation until arbitration is completed).

CONCLUSION

Plaintiffs are trying escape an arbitration that they have agreed to on multiple occasions: First, in their Contract with ADT, and second by consenting to the January Consent Order compelling the parties to arbitrate the underlying dispute in this lawsuit. But even if they hadn't done so, or changed their minds at some point along the way, Plaintiffs failed to appeal the January Consent Order within 45-days of entry of that order. Instead, Plaintiffs waited five months to file a Motion to Vacate the January Consent Order, an obvious attempt to lay the groundwork to circumvent the rules governing appeals.

This Court should not fall for Plaintiffs' shenanigans. First, the June Order is not a final order compelling arbitration that could be subject to an interlocutory appeal. Second, even if it was an order compelling arbitration, Plaintiffs cannot appeal their own consent to arbitrate. Third, even if they could, the Superior Court properly held that the Contract's arbitration clause was valid and enforceable and this lawsuit is arbitrable. Therefore, this Court should deny Plaintiffs' appeal and instruct the Superior Court to stay this matter until the arbitration is complete.

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

Dated: November 27, 2024

By: /

Frantz J. Duncan, Esq. (NJ Bar #210002016)
Two Commerce Square
2001 Market Street, Suite 3000
Philadelphia, PA 19103

(215) 278-2555
fduncan@shb.com

Attorneys for Defendant ADT LLC, d/b/a ADT Security Services

MEGAN@BJS.COMNJ PROPERTYLINK, LLC, DAVID VARCADIPANE, LISA BARTLOW, Plaintiffs-Appellants, v. ADT CORPORATION, INTEL VIDEO SURVEILLANCE CORP., R&J HOME SERVICES, LLC, AND JOHN/JANE DOES I-X, ABC CORPORATIONS/ENTITIES I-X, XYZ PARTNERSHPIS I-X, AND 123 TRUSTS, Defendants-Respondents.	: SUPERIOR COURT OF NEW JERSEY : APPELLATE DIVISION : Docket No: A-003586-23T4 : CIVIL ACTION : ON APPEAL FROM : SUPERIOR COURT, LAW DIVISION : SUSSEX COUNTY : Honorable Vijayant Pawar, J.S.C. Sat below :

BRIEF AND APPENDIXES FOR DEFENDANT-RESPONDENT INTEL VIDEO SURVEILLANCE CORP.

GOLDBERG SEGALLA LLP
301 Carnegie Center Drive, Suite 200
Princeton, New Jersey 08540-6587
T: 609.986.1326 F: 609.986.1301
jmcconnell@goldbergsegalla.com
Attorney for Defendant-Respondent Intel Video Surveillance Corp.

On the Brief:

John M. McConnell, Esq. (No. 028152006)

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PRELIMINARY STATEMENT

On June 30, 2022, Appellants entered a Small Business Contract (the "Contract") with ADT Security Services ("ADT") to provide security equipment and installation services at 13 Main Street, Ogdensburg, New Jersey 07439 (the "13 Mian Street Property"). In so doing, Appellants acknowledged and agreed to certain general terms, such as services to be provided and costs associated therewith, as well as "Important Terms and Conditions" that incorporated information related to "LIMITATIONS ON LIABILITY" and "ARBITRATION" (collectively referred to as "the Clauses").

Through a series of agreements involving ADT, Intel Video Surveillance Corp. ("Intel"), and R&J's Home Services, LLC ("R&J"), installation of security cameras was completed. Thereafter, Appellants alleged that the security cameras were incorrectly installed causing damage to the property, various economic losses, and injuries.

As such, Appellants initiated this case in Superior Court by filing a Complaint and Jury Demand against ADT, Intel, and R&J. Afterwards, ADT and Appellants filed a Consent Order with the Court, by which Appellants acknowledged their binding agreement to arbitrate. After that point, however, Appellants refused to participate in arbitration. Later, Appellants moved to vacate the January 4, 2024

Court Order and invalidate the agreement to arbitrate. The Court denied the motion and Appellants appealed.

As described in more detail below, Appellants and ADT voluntarily entered the binding Contract that included valid, legal, and enforceable waiver and arbitration provisions, among others. Additionally, the Federal Arbitration Act ("FAA") and New Jersey Arbitration Act ("NJAA") favor arbitration, and the arbitration clause in this case meets any related requirements. Finally, the motion judge was not required to hear oral argument before deciding on the written filings. Therefore, based upon all of the facts and legal authority set forth herein, Respondent Intel requests that the Court deny Appellants' requested relief and determine that Appellants are obligated to arbitrate based on the enforceable Contract and limitations on liability and arbitration clauses.

PROCEDURAL HISTORY

On October 24, 2023, Appellants initiated this case in Superior Court by filing a Complaint and Jury Demand against ADT, Intel, and R&J (Dr1). On December 18, 2023, Intel filed its Answer, as well as Cross-Claims (Dr14).

On December 20, 2023, ADT filed a motion to stay proceedings and compel arbitration pursuant to their Contract with Appellants that included valid, legal, and enforceable waiver and arbitration provisions, among others.

On January 4, 2024, ADT and Appellants filed a Consent Order with the Court, by which Appellants acknowledged their binding agreement to arbitrate with ADT ("Plaintiffs have a binding agreement to submit all claims between themselves and ADT, pursuant to the operative agreement contained in Plaintiff's Small Business Contract.") (Dr35).

That same day, the Court granted ADT's motion to compel arbitration, directed the parties to arbitrate, and Ordered that the matter be "stayed until May 4, 2024 pending the outcome of arbitration as agreed by the parties" (Dr35). The Court also clarified that "[i]f the parties need or require additional time beyond May 4, 2024 for arbitration to be completed, a Consent Order may be submitted setting forth a specific date by which arbitration is to be completed" (Dr36).

On February 16, 2024, Appellants submitted correspondence to ADT concerning details of the pending arbitration (Dr37). Appellants stated, "[w]hile we have no objection to arbitrating this matter, we do have an objection to arbitrating this matter in the fashion as called for in the contract" (Dr37). Appellants clarified that "a review of both arbitration organizations referred to in the contract are highly unacceptable on an overall scale and not recommended to be utilized as there is a tremendous deal of dissatisfaction from all parties involved with them" (Dr37). As such, Appellants proposed conducting "local arbitration" through Sussex County (Dr38).

On March 27, 2024, ADT submitted a Demand for Arbitration to the American Arbitration Association ("AAA") (Dr39-41). On April 19, 2024, Appellants submitted correspondence directly to AAA that outlined their opposition to arbitration and forecasted that they would apply to the Court to vacate the existing Order referring this matter to Arbitration (Dr42-43).

On May 8, 2024, ADT filed a motion to stay proceedings until such time that the pending Arbitration is completed, and ADT moved for sanctions against Appellants. ADT alleged that Appellants, in violation of both the Contract and the Consent Order to which they willingly agreed, refused to initiate and participate in Arbitration proceedings. ADT continued in that Appellants' willful failure to comply with the Court's Order merited sanctions under Rule 1:10-3 and/or pursuant to the Court's inherent authority.

On May 10, 2024, Appellants moved to vacate the Court's Order and invalidate the arbitration and waiver provisions of the Contract. Appellants also requested that the Court restore this matter to the active trial calendar, as well as oral argument.

On May 24, 2024, the Court denied ADT's motion and did not sanction Appellants (Dr44-45). The Court clarified that there was no automatic stay, and the Court Order was clear that the parties may extend the stay if a date was provided (Dr44-45).

On May 30, 2024, ADT filed a motion in opposition to Appellants' motion to vacate the Court's Order. ADT highlighted that Appellants failed to provide valid grounds in support of vacation, they waived their right to oppose arbitration, and the Court lacked authority to entertain Appellants' motion because the case was stayed. Additionally, on May 31, 2024, ADT requested that the Court approve oral argument. On June 3, 2024, Intel opposed Appellants' motion to vacate the Court's Order.

On June 20, 2024, the Court denied Appellants' motion to vacate (Dr48). The Court highlighted that Appellants were not entitled to relief under R. 4:50-1 because they failed to cite any reasons as to why they were entitled not to comply with the Court's Order (Dr48-49). Moreover, Appellants signed the consent order and knew that they were agreeing to submit to arbitration (Dr49). Additionally, the Court validated the arbitration agreement in so far as its terms were clear and unambiguous and Appellants failed to indicate how the same was unenforceable (Dr48-49).

On July 1, 2024, this case was selected for mandatory, non-binding arbitration scheduled for September 20, 2024 (Dr53). On July 3, 2024, ADT submitted a motion for the Court to reconsider the May 24, 2024 Order denying a further stay and sanctions. On July 11, 2024, Intel filed a cross-motion seeking the same relief as requested in ADT's motion to reconsider. On July 18, 2024, Appellants filed a

Notice of Appeal (Dr57-60). Thereafter, Appellants filed an Amended Notice of Appeal on July 29, 2024 (Dr61-66).

On August 16, 2024, the Court denied ADT's motion for reconsideration, as well as Intel's cross-motion (Dr67). On September 12, 2024, ADT requested an adjournment of the Court-Ordered Arbitration, which the Court granted and rescheduled for October 18, 2024 (Dr69).

On October 11, 2024, Intel requested that the Court adjourn Arbitration in light of the pending appeal (Dr69). The Court denied Intel's request that same day (Dr70). Also on October 11, 2024, Appellants requested that the Court enter default against R&J (Dr73). Appellants filed a Motion to Enter Default against ADT, too.

On October 15, 2024, the Court entered default against R&J (Dr78). The next day, on October 16, 2024, ADT requested that the Court remove the case from mandatory, non-binding arbitration. ADT also requested that the Court adjourn Arbitration until after the Court rendered a decision on its motion. On October 17, 2024, the Court rescheduled Arbitration for November 15, 2024.

On November 8, 2024, the Court denied the motion to remove the case from Arbitration, Motion for default, and Motion to stay the case (Dr78-84). Additionally, the Court dismissed ADT from this matter without prejudice (Dr85).

On November 15, 2024, Arbitration proceeded, with the Arbitrator ultimately determining that there was "inadequate information at this time to render an

arbitration decision. Litigation is pending at both the trial level and in the Appellate Division, the results of which will affect the issues of the case" (Dr86).

STATEMENT OF FACTS

Appellant David Varcadipane ("Varcadipane") is the sole member/manager of NJ Propertylink, LLC ("Propertylink") (Dr88). Propertylink is a Limited Liability Company in the State of New Jersey (Dr1). Varcadipane is engaged to Appellant Lisa Bartlow ("Bartlow") (Dr88).

For clarity, in Appellants' Complaint, the term "Plaintiffs" was used indiscriminately to refer to NJ Propertylink, David Varcadipane, and Lisa Bartlow. However, Appellants note in their Brief that Varcadipane signed the Contract on behalf of Propertylink, not in his individual capacity. Similarly, Bartlow did not sign the Contract. Yet, while there is only one signatory on the Contract, all said parties are beneficiaries of the Contract. As well, they all claim to be in privity with ADT and are attempting to hold ADT liable under the Contract.

For these reasons, all three parties are bound by its terms and conditions, including the waiver and arbitration clauses, and they are collectively referred to as "Appellants" herein. See e.g., Jansen v. Salomon Smith Barney, Inc., 776 A.2d 816, 820 (App.Div.2001) ("Non-signatories of a contract . . . may . . . be subject to

arbitration if the nonparty is an agent of a party or a third party beneficiary to the contract.").

Varcadipane owns the 13 Main Street Property, where he resides with Bartlow (Dr1, 88). As a self-employed contractor, Varcadipane conducts some degree of business from his shop located at the 13 Main Street property (Dr88).

Appellants wanted to obtain security equipment, installation, and monitoring for the 13 Main Street property, which they used as a "residence and business" (Dr1, 3, 88). Varcadipane contacted two security companies, one was ADT and the other was a local company. Varcadipane received a proposal from both security companies.

After considering the proposals, Appellants ("We") selected ADT due to its "established reputation" and executed the contract for security equipment, installation, and monitoring for the 13 Main Street property (Dr3). Appellants' "only interest was the price and amount of security equipment in the transaction".

The Contract listed Propertylink as the business customer and Varcadipane as the responsible party (Dr91). Varcadipane executed the Contract by signing the same on June 30, 2022 (Dr91). In so doing, Varcadipane acknowledged and agreed that he had read, understood, and agreed to each and every term of the Contract (Dr135). For example, the Contract outlined general terms such as services to be provided and costs associated therewith (See Dr91-94). It also detailed "Important Terms and

Conditions," which incorporated information related to "LIMITATIONS ON LIABILITY" and "ARBITRATION" (Dr96-97). ADT sent Varcadipane a copy of the Contract via e-mail a few days after he executed the same (Dr89).

Subsequently, ADT retained Intel to install the cameras pursuant to an agreement between the two (Dr89). Thereafter, Intel retained R&J to complete the installation of the security cameras at the 13 Main Street property. Appellants alleged that the security cameras were incorrectly installed causing damage to the 13 Main Street property, economic losses, and various injuries (Dr89).

ARGUMENT

I. APPELLANTS AND ADT VOLUNTARILY ENTERED INTO A BINDING CONTRACT THAT INCLUDED VALID, LEGAL, AND ENFORCEABLE WAIVER AND ARBITRATION PROVISIONS, AMONG OTHERS.

Here, the Superior Court properly denied Appellant's motion to vacate the Superior Court's January 4, 2024 Order and invalidate the arbitration and waiver provisions of the Contract as the parties entered into a contract with an enforceable arbitration provision. "As a general and long-standing matter, contracting parties are afforded the liberty to bind themselves as they see fit." Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 302 (2010), citing Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 356 (1931) ("The general rule is that competent persons shall

have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.").

Every "consumer contract" in New Jersey must "be written in a simple, clear, understandable and easily readable way." N.J.S.A. 56:12-2. "When a party enters into a signed, written contract, that party is presumed to understand and assent to its terms, unless fraudulent conduct is suspected." Id. at 305, citing Rudbart v. N. Jersey Dist. Water Supply Com, 127 N.J. 344, 353 (1992). "Arbitration clauses . . . will pass muster when phrased in plain language that is understandable to the reasonable consumer." Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430, 444 (2014).

"An agreement to arbitrate, like any other contract, must be the product of mutual assent, as determined under customary principles of contract law." Id. at 435 (internal citation omitted). "Mutual assent requires that the parties have an understanding of the terms to which they have agreed." Id. Since an average member of the public may not know that arbitration is a substitute for the right to have one's claim adjudicated in a court of law, an arbitration agreement must make clear to parties that electing arbitration as the exclusive remedy waives their right to sue. See id. (internal citations omitted).

A contract can contain a waiver of rights, whether in an arbitration or other clause, as long as it is done "clearly" and "unmistakably." Id. at 444, citing Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 132 (2001). A

"clause depriving a citizen of access to the courts should clearly state its purpose." Id. citing Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993). "The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." Marchak, supra at 282.

In Atalese, the Court held that the arbitration provision at issue featured none of the language that the Courts have deemed satisfactory in upholding such provisions. For example, "clear and unambiguous language that the plaintiff is waiving her right to sue or go to court to secure relief." Atalese, supra at 446. The clause in "some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute." Id. at 447.

The Atalese arbitration clause is readily distinguishable from the one at bar. "Nowhere" in the Atalese clause was "there any explanation that plaintiff [was] waiving her right to seek relief in court for a breach of her statutory rights." Id. at 446. Furthermore, "[t]he provision [did] not explain what arbitration [was], nor [did] it indicate how arbitration [was] different from a proceeding in a court of law. Nor [was] it written in plain language that would be clear and understandable to the average consumer that [plaintiff was] waiving statutory rights." Id.

Here, among its first few sentences, the Clause clarified that arbitration is a "dispute resolution process that does not involve a judge or jury. Instead, Disputes

are decided by a neutral third-party arbitrator in a process that is less formal than court" (Dr97).

Then later, in plain, bold, capitalized language, the Clause outlined that

> **IF EITHER PARTY ELECTS TO ARBITRATE A DISPUTE, ADT AND CUSTOMER WAIVE THE RIGHT TO A JURY TRIAL AND TO OTHERWISE LITIGATE THE DISPUTE IN COURT. BY AGREEING TO ARBITRATE, THE PARTIES MAY ALSO WAIVE OTHER RIGHTS THAT WOULD OTHERWISE BE AVAILABLE IN COURT. FURTHER, IF EITHER PARTY ELECTS TO ARBITRATE A DISPUTE, CUSTOMER WAIVES ITS RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR TO PARTICIPATE AS A MEMBER OF ANY CLASS ACTION RELATING TO THE DISPUTE.**

(Dr168).

In reaching its conclusion, the Atalese Court contrasted three cases featuring acceptable arbitration provisions, which are analogous here. For example, in Martindale v. Sandvik, the plaintiff "agreed to waive [her] right to a jury trial" and that "all disputes relating to [her] employment . . . shall be decided by an arbitrator." 173 N.J. 76, 81-82, 96 (2002).

In Griffin v. Burlington Volkswagen, Inc., the arbitration clause expressed that "[b]y 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 or administrative proceeding, to settle their disputes." 411 N.J. Super. 515, 518 (App.Div.2010).

Finally, in Curtis v. Cellco P'ship, the relevant clauses were "sufficiently clear, unambiguously worded, satisfactorily distinguished from the other [a]greement terms, and drawn in suitably broad language to provide a consumer with reasonable notice of the requirement to arbitrate." 413 N.J. Super. 26, 33 (App.Div.2010).

The Clauses featured in Martindale, Griffin, and Curtis, that the Court deemed acceptable, are similar to the Clause in this case in that it simply and unambiguously informed Appellants that they were giving up their right to sue. Moreover, it sufficiently notified Appellants that arbitration would result in waiver of the right to a jury trial and to otherwise litigate the dispute in court; a neutral third-party arbitrator, not a judge or jury, would resolve any disputes in a setting less formal than court; and arbitrating could lead to waiver of other rights available in court. In sum, the Clause made Appellants sufficiently aware that there is "a distinction between resolving a dispute in arbitration and in a judicial forum" (Atalese, supra at 445) and the former would be employed to resolve disputes in this case.

Also, the Agreement clearly explained the arbitration process. First, there was a Pre-Arbitration Notice Requirement. That is, ADT and Appellants agreed that before initiating arbitration, they were required to first provide to the other a written "Notice of Dispute" (Dr97). The justification underlying the Notice requirement

was, in part, to allow ADT and Appellants to "make attempts to resolve the Dispute . . ." (Dr97).

If a resolution could not be reached, however, the Agreement explained how to initiate arbitration. For example, if either party elected to arbitrate a "Dispute," it "shall be resolved by arbitration pursuant to this Arbitration Agreement and the then current code of proceedings of the national arbitration organization to which the Dispute is referred. A party may refer a Dispute to either the American Arbitration Association ('AAA') or the Judicial Arbitration and Mediation Services ('JAMS')" (Dr97).

In addition to clearly informing Appellants about the differences between court and arbitration and the expected process, ADT agreed to pay for the costs associated therewith (See Dr97) ("Upon Customer's request, ADT will reimburse Customer for all filing and administrative fees required for initiating the arbitration.").

Appellants appeared to ignore this provision entirely. They proclaimed that "cost is a major factor" in this case and proceeded to argue how it was unfair that not only had they suffered significant property damages but now they were "required to pay an arbitrator $320.00 per hour and $2,200.00 per day in order pursue their claims . . ." (Dr126). However, Appellants never submitted a request to ADT related to reimbursement for such costs or much less inquired as to what would be covered.

Relatedly, Appellants made several accusations about information they were not provided. For example, Appellants claimed they were never told about costs associated with arbitration. Moreover, they were not informed that AAA would be selected to arbitrate, nor did they receive its rules.

Appellants' assertions are inaccurate and refutable. The Arbitration clause clearly outlined how to initiate arbitration and through whom it would be completed. The Clause stated that "[a] party may refer a Dispute to either the American Arbitration Association ('AAA') or the Judicial Arbitration and Mediation Services ('JAMS')" (Dr168). In terms of deciding between AAA and JAMS, Appellants were afforded the ultimate choice. That is, if ADT elected arbitration and chose AAA or JAMS, Appellants were permitted to object and automatically have the other organization administer the proceedings, simply by notifying ADT (Dr97).

By contrast, ADT did not retain this privilege of choice, thereby providing Appellants with the ultimate and final say on the matter. Additionally, despite AAA and JAMS being two of the most recognizable arbitration entities, ADT provided website and contact information for both, so as to effectuate Appellants making an informed decision in the event they were unfamiliar with either organization (Dr97) ("To obtain a copy of the procedures . . . , Customer may contact the organizations at the following: (1) AAA, 335 Madison Avenue, New York, NY 10017,

www.adr.org and (2) JAMS, 1920 Main Street, Suite 300, Los Angeles, CA 92614, www.jamsadr.com.").

In fact, navigating to AAA's website using the information ADT provided reveals a user-friendly interface for the American Arbitration Association. Conspicuously listed at the top is a "Rules, Forms & Fees" tab. There, any member of the public can quickly and easily reference AAA's various rules, forms, and fees. Appellants, through simple due diligence, could have done the same, but argued to the contrary.

As a final point related to costs and impacts on Appellants, the Clause not only provided that ADT would reimburse Appellants for all filing and administrative fees required for initiating the arbitration, but "arbitration [would] be conducted by a single, neutral arbitrator at a location within the federal judicial district in which [Appellants'] protected premises are located" (Dr97). This provision ensured that in the event of arbitration, Appellants would be able to conveniently attend the arbitration "at home" as opposed to some far-off foreign jurisdiction.

Separately, Appellants expended a great deal of effort illustrating several cases that purportedly supported their arguments. However, each respective case is readily distinguishable from the one at bar.

For example, the Court should give no weight to Appellants' application of Vitale v. Schering-Plough Corp. for the following reasons. First, the arbitration

provision at issue in that case was contained in an employment agreement, not a consumer contract, as Appellants erroneously argued. See 231 N.J. 234 (2017). It being an employment agreement was a critical fact that the court focused on when analyzing whether the provision should be enforced.

Additionally, Appellants analogized Vitale to this case, calling the contract one of "adhesion" (Dr124). As an initial matter, even assuming arguendo that the Contract here was one of adhesion, Vitale was clear that does not make it "per se unenforceable . . . ." Id. at 246. Instead, courts have discretion to decline such contracts if they deem them "unconscionable." Id. In so doing, there are "four factors that focus on procedural and substantive aspects of the contract to determine whether the contract is so oppressive, or inconsistent with the vindication of public policy, that it would be unconscionable to permit its enforcement." Id., citing Rodriguez v. Raymours Furniture Co., 225 N.J. 343, 367 (2016) (internal quotations and citations omitted). Here, Appellants do not claim that the Contract is unconscionable.

Similarly, the Court should give no weight to Appellants' treatment of Kernahan v. Home Warranty Administrator of Florida, Inc. Appellants highlighted that "a consumer cannot be required to arbitrate when it cannot fairly be ascertained from the contract's language that she knowingly assented to the provision's terms or knew that arbitration was the exclusive forum for dispute resolution." 236 N.J. 301, 322 (2019). However, Kernahan featured a "confusing and misleading" provision

that "unpredictably" shifted between the terms of "arbitration" and "mediation." Id. at 320-321. As such, the Court fairly concluded that the contract "fail[ed] to signal to consumers that it contain[ed] an arbitration provision affecting their rights . . . ." Id. at 322.

No comparable circumstances are featured in the case at bar. There are no confusing or misleading terms within the Clause. Moreover, the Clause does not exhibit the erroneous conflation of "mediation" and "arbitration" such that Appellants could have been reasonably confused.

Appellants also leveraged Kernahan to argue that "there is not even an allegation that Bartlow or Varcadipane signed ADT's contract," thus we have no way of determining what Appellants may have known (Dr125). The Agreement is clear that the customer business was Propertylink, located at the 13 Main Street property. Also, Varcadipane was listed as the party responsible, and it is undisputed that he was the sole member/manager of Propertylink. Just below that information, the Agreement clearly says, "[b]efore signing this Contract, I have read, understand and agree to each and every term of this Contract" (Dr91). In the very next section, it lists "Customer's Approval: Original Signature Required," beneath which is Varcadipane's signature, dated June 30, 2022, which was the date he initiated the Contract with ADT.

In addition, the Court should give no weight to Appellants utilization of Delaney v. Dickey to illustrate a requirement that "the basic advantages and disadvantages of each element of arbitration proceedings be discussed." Dr127, citing 244 N.J. 466, 496 (2020) (internal quotations omitted). No such requirement applies here and Appellants' reliance on Delaney to the contrary is misleading and erroneously attempts to heighten ADT's burden.

Delaney involved a situation unique from the one in this case because the relevant arbitration provision was contained in a retainer agreement for legal services. See id. Ultimately, the Court held that the professional and fiduciary obligation imposed on a lawyer requires that the lawyer discuss with the client the basic advantages and disadvantages of a provision in a retainer agreement that mandates the arbitration of a future fee dispute or malpractice claim against the attorney. Id. at 496. In the absence of such an explanation in Delaney, the Court found the arbitration provision to be invalid. See id.

Importantly, this additional Delaney requirement to explain the advantages and disadvantages of an arbitration provision, either in writing or orally, applied to a retainer agreement. The Court clarified that the arbitration provision would have otherwise been enforceable if it was contained in a typical contract between a commercial vendor and a customer. Id. at 494. "In clear and unambiguous language,

the arbitration provision explain[ed] that Delaney [chose] to arbitrate disputes rather than have them resolved in a court of law." Id. (internal quotations omitted).

Finally, the Court should consider the circumstances surrounding the bargaining between Appellants and ADT. As a starting point, Appellant Varcadipane was the sole member/manager of Propertylink and in need of security-related services. As such, he was sophisticated enough to realize that ADT was not his only option as he obtained an additional quote from a local security company.

Also, when faced with deciding between ADT and the local company, there was no apparent rush or constrained timeline forcing Appellants to decide. During that time, Appellants could have obtained additional quotes, acquired more information, sought the advice of an attorney, or undertaken any number of other activities to ensure they were making the right decision based on their needs. Instead, satisfied with just the two quotes, they selected ADT. Appellants' admitted interest was "only . . . the price and amount of security equipment in the transaction".

Appellants should be foreclosed from breaking their agreement with ADT. Their lack of due diligence and/or affirmative disregard of certain aspects of the Contract should not be advanced by granting their requested relief to the detriment of ADT. Appellants were sophisticated enough to understand the Contract's clear and unambiguous Clauses and had every opportunity to carefully examine them to

their liking or identify a suitable alternative. However, Appellants selected ADT and bound themselves to the Contract.

Additionally, Appellants knew of their obligation to arbitrate disputes associated with the Agreement and consistently acknowledged the same (See Dr35; ; see also Dr37) ("we have no objection to arbitrating this matter . . . ."). Specifically, Appellants admitted they "ha[d] a binding agreement to submit all claims between themselves and ADT, pursuant to the operative arbitration agreement contained in Plaintiff's Small Business Contract" (Dr35). Nevertheless, Appellants failed to meaningfully participate in arbitration and stalled efforts related to the same because they wanted to arbitrate through "the Sussex County Arbitration system." Allowing Appellants to prevail on appeal would amount to an endorsement of their clear violation of the Agreement and Consent Order. For these reasons, the binding contract that included valid, legal, and enforceable waiver and arbitration provisions must be enforced.

II. THE FAA AND NJAA FAVOR ARBITRATION AND THE ARBITRATION CLAUSE IN THIS CASE MEETS ANY AND ALL RELATED REQUIREMENTS.

Congress, through Section 2 of the Federal Arbitration Act ("FAA"), has declared "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Flanzman v. Jenny

Craig, Inc., 244 N.J. 119, 132 (2020), citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

More specifically, Section 2 of the FAA states that a

> written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

"[C]ourts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms." Flanzman, supra at 132, citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

As the Supreme Court held in Kindred Nursing Ctrs. Ltd. P'ship v. Clark, "[t]he FAA thus preempts any state rule discriminating on its face against arbitration—for example, a law prohibiting outright the arbitration of a particular type of claim." 580 U.S. 246, 251 (2017), citing AT&T, supra at 341 (internal quotations and brackets omitted). Similarly, the "Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that . . . have the defining features of arbitration agreements." Id., citing AT&T, supra at 342.

In a similar way, the New Jersey Arbitration Act ("NJAA") is the "affirmative policy of th[e] State, both legislative and judicial, favor[ing] arbitration as a mechanism of resolving disputes." Flanzman, supra at 133. "The NJAA is nearly identical to the FAA and enunciates the same policies favoring arbitration." Id., citing Arafa v. Health Express Corp., 243 N.J. 147, 167, 233 A.3d 495, 2020 N.J. LEXIS 807 (2020)(internal quotations omitted).

The NJAA was enacted to "advance arbitration as a desirable alternative to litigation and to clarify arbitration procedures in light of the developments of the law in this area." Assemb. Judiciary Comm. Statement to S. 514 1 (Dec. 9, 2002). It provides that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." Id. at 133-134, citing N.J.S.A. 2A:23B-6(a).

Strong policy principles encourage the use of arbitration as a mechanism for resolving disputes. Arbitration is viewed as a desirable alternative to litigation because it is more efficient and flexible and usually less complicated and expensive. For these reasons, courts are required to place arbitration agreements on an equal footing with other contracts and enforce their terms. States are no longer permitted to discriminate against arbitration by, for example, prohibiting outright the arbitration of a particular type of claim. As such, the FAA and NJAA work to

advance arbitration as a desirable option to resolve disputes in light of its many advantages.

The arbitration clause in this case is valid, irrevocable, and enforceable. In accordance with the FAA and NJAA's mandates, it must therefore be upheld. To allow Appellants to withdraw from their agreement would vitiate everything the FAA and NJAA stand for, as well as the valuable purpose and strong public policy in favor of arbitration generally. Additionally, permitting Appellants to not abide by the Contract would send a disastrous message to others about the enforceability of arbitration provisions. Therefore, Appellants should be foreclosed from breaking their agreement to arbitrate with ADT.

III. THE MOTION JUDGE WAS NOT REQUIRED TO HEAR ORAL ARGUMENT BEFORE DECIDING ON THE WRITTEN FILINGS.

As per R. 1:6-2(d), "no motion shall be listed for oral argument unless a party requests oral argument in the moving papers or in timely-filed answering or reply papers, or unless the court directs." If the motion involves pretrial discovery or is directly addressed to the calendar, "the request shall be considered only if accompanied by a statement of reasons and shall be deemed denied unless the court otherwise advises counsel prior to the return day." Id. Regarding all other motions, "the request shall be granted as of right." Id.

In Diaz v. Bobadilla, the plaintiffs filed a motion to vacate dismissal and restore the case to the trial calendar. 2019 N.J. Super. Unpub. LEXIS 799, *7 (App.Div.2019). The Diaz Court reasoned that the plaintiffs' motion "could be seen as a motion addressed to the calendar." Id. (internal quotations omitted).

Here, among other things, Appellants endeavored to file a motion to vacate the Order entered January 4, 2024 and restore the case to the trial calendar. Therefore, in light of Diaz, it can be said that this aspect of Appellants' motion is "directly addressed to the calendar."

Therefore, while Appellants requested oral argument in their Notice of Motion (see Dr54), they failed to otherwise comply with R. 1:6-2(d) by not including "a statement of reasons." Additionally, even if Appellants had filed such a statement, the motion judge did not have to grant their request. In fact, it would have been presumptively denied under R. 1:6-2(d) in the absence of "the court otherwise advis[ing] counsel prior to the return date." Therefore, since Appellants' motion was "directly addressed to the calendar," the motion judge was not required to hear oral argument. Even still, Appellants failed to comply with R. 1:6-2(d).

Assuming arguendo that Appellants' motion was not "directly addressed to the calendar," the motion judge was still not required to hear oral argument before deciding on the written filings. While R. 1:6-2(d) provides that a request for oral argument as to all other motions "shall be granted as of right," "a trial court may

decide a motion on the papers when there are no contested facts that would otherwise require an evidentiary hearing." Delgado v. Yourman-Helbig, 2022 N.J. Super. Unpub. LEXIS 1266, *14 (App.Div.2022), citing Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 1:6-2(d)(2022).

In Delgado, the Court determined that the motion judge improperly denied oral argument since, inter alia, the matter under review involved contested facts. Id. at 15. The Court concluded that the "absence of certified and admissible evidence require[d the Court] to vacate the motion judge's . . . order and remand the matter so that respondents [could] submit affidavits or certifications [supporting] their factual representations, thereby providing the motion court with a proper basis to make sufficient factual findings." Id.

This case is distinguishable from Delgado for several reasons. First, the case here features a straightforward contractual dispute: Appellants entered into an agreement with ADT for the installation of cameras at their property. Through a series of agreements, the work was completed. However, Appellants alleged that the cameras were incorrectly installed causing damage to the Property, as well as various economic losses and injuries. This is not a complex matter of litigation requiring voluminous sources of evidence or particularly niche expertise.

Plus, whereas in Delgado there was an "absence of certified and admissible evidence," here, Appellants included the Certification of F. William LaVigne, Esq.,

the Certification of David Varcadipane, the Contract, and several other pieces of documentary evidence. Accordingly, the motion court had a proper basis to make sufficient factual findings in rendering its decision. Therefore, Appellants' conclusory argument that an evidentiary hearing could have been "warranted" should be given no weight.

CONCLUSION

Based upon all of the facts and legal authority set forth herein, Respondent Intel requests that the Court deny Appellants' requested relief and determine that Appellants are obligated to arbitrate based on the enforceable Contract and arbitration clause.

Respectfully submitted,

/s/John M. McConnell
John M. McConnell, Esq.

Dated: November 27, 2024

NJ PROPERTYLINK, LLC, DAVID VARCADIPANE, LISA BARTLOW, Plaintiffs, vs. ADT CORPORATION, INTEL VIDEO SURVEILLANCE CORP., R&J HOME SERVICES, LLC, AND JOHN/JANE DOES I-X, ABC CORPORATIONS/ENTITIES I-X, XYZ PARTNERSHIPS I-X, and 123 TRUSTS, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: DOCKET NO.: A-003586-23T4 On Appeal From: Superior Court of New Jersey Law Division – Sussex County Docket No. SSX-L-451-23 Sat Below: The Honorable Vijayant Pawar, J.S.C.

REPLY BRIEF OF PLAINTIFFS/APPELLANTS, NJ PROPERTYLINK, LLC, DAVID VARCADIPANE, LISA BARTLOW

Kevin D. Kelly, Esq. – 022601979
KELLY & WARD, LLC
27 Ike Williams Road
Newton, NJ 07860
Tel. (973)579-6250
E-Mail – kkelly@kellyandward.com

On the Brief:

Kevin D. Kelly, Esq.

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PRELIMINARY STATEMENT

While enforcement of an arbitration agreement may not depend on "magic words," a meeting of the minds is essential. Our case law demands that consumer arbitration agreements be stated in plain, clear and understandable language. Our public policy focuses on the unequal relationship between the contracting parties and the adhesional nature of the contract.

The insertion of an arbitration agreement in a consumer contract is an adversarial decision intended to provide significant advantages in future litigation (e.g. choice of forum, rules of engagement). Here it is being used as both a shield and a sword to delay/avoid remedies to the Plaintiffs for faulty equipment installation by ADT that has continuously caused damage to their residence and business property since the fall of 2022.[1]

Defendants cannot defend the trial court's reasoning because it is manifestly incorrect about New Jersey contract law. It also failed to engage in fact finding and state its conclusions (R. 1:6-2(f) and R. 1:7-4).[2] The trial court dealt with all of the arbitration issues in approximately one single page. (Pa256)[3] It references only *Atalese* and one appellate decision in 2006. (Id.) It concludes, without explanation, that Plaintiffs did not "identify" how this arbitration is "unenforceable." (Pa257). It fails to even mention the Certifications of Plaintiff, David Varcadipane (Pa168) and F. William LaVigne, Esq. (Pa171) that contain the only facts submitted by any party in this appeal.

[1] ADT subcontracted with Co-Defendant Intel Video Surveillance Corp. ("Intel") and again with Co-Defendant R & J Home Services, LLC ("R&J") without Plaintiffs' knowledge or consent.
[2] The trial court also denied the requests for oral argument submitted by each party to address the issues directly.
[3] Also included in Intel's Appendix (Dr112)

There were only 2 witnesses to the execution of ADT's Small Business Contract ("Contract") with Plaintiff, NJ Propertylink, LLC ("Propertylink") dated June 30, 2022 (Pa15; Dr163): ADT representative Sang Kim ("Kim") and Propertylink representative and Plaintiff, David Varcadipane ("Varcadipane"). Kim presented the first page of the Contract on his ADT iPad to Varcadipane at the residence in Ogdensburg, NJ that he shares with Plaintiff Lisa Bartlow ("Bartlow"). Varcadipane signed the cover page of the form contract on behalf of Propertylink and was unable to read the remaining 7 pages. The only issues discussed between Kim and Varcadipane were prices and cameras. (Pa169) There was no mention of arbitration, waivers, or any other contract provisions. Kim was not permitted or qualified to negotiate even if the subjects had been questioned.

Varcadipane did not sign the Contract individually. Bartlow did not sign it at all. ADT did not sign the Contract. (Pa169)[4]

Installation began immediately thereafter. ADT did not tell Plaintiffs that subcontractors were involved. Camera malfunctions, installation leaks and damages were reported to and responded to by ADT representatives who attempted to fix these problems for many months before submitting the matter to its insurance carrier. (Pa22-45) ADT's carrier's agent blamed the subcontractor (Pa50), whose agents blamed ADT.

These facts "identify" exactly how and why this arbitration agreement is "unenforceable". In contrast, ADT and Intel present nothing to articulate the substantive bases for their boilerplate agreements. Conspicuously absent in this record, and the motion below, is

[4] Neither Defendant addresses the lack of signature by anyone on behalf of ADT

any Certification or facts from any of their representatives or witnesses with respect to the formation and execution of this Contract.

Even more conspicuous is ADT's refusal to file an Answer or identify its defenses to Plaintiffs' Complaint filed on October 24, 2023. (Pa1) ADT did not respond to the Court's Dismissal Notice dated August 16, 2024 pursuant to R. 1:13-7. (Pra272) Nor did ADT respond to motions to enter default against it filed by Plaintiffs in the trial court on October 15, 2024 and the appellate division on December 5, 2024. ADT also chose not to participate in the Court ordered arbitration pursuant to R. 4:21A-1, thus preventing the arbitration from proceeding. (Dr86)

Application of settled New Jersey law to the record before this Court requires that the trial court be reversed, the binding arbitration requirement in ADT's Contract held to be unenforceable, and the waiver and exculpatory provisions in Paragraphs E and F of the Contract invalidated and severed.

STANDARD OF REVIEW

Defendant ADT disputes Plaintiffs' contention that the validity of an arbitration agreement is a question of law subject to de novo review. (Pb11)

Instead, ADT mistakenly asserts that Plaintiffs appeal from an interlocutory motion to vacate that "should be reviewed under an abuse of discretion standard." (Db8) ADT is uncertain "whether Plaintiffs are trying to appeal the June [20, 2024] Order or the January [4, 2024] Court Order." (Db6) Plaintiffs' Notice of Appeal answers ADT's doubts. (Pa263) All issues proposed in this Notice reference the validity and enforceability of the binding arbitration and waiver

provisions in the Contract. None of the proposed issues in this Notice reference the January 4, 2024 Order (that expired by its own terms four months later on May 4, 2024. (Dr35).[5]

Plaintiffs' motion filed on May 10, 2024 (decided by the Court Order on June 20, 2024) contained 5 separate requests for relief. (Pa165) One request was for vacation of the January 4, 2024 Order; however, on May 8, 2024 ADT filed a notice of motion to further stay the litigation pending AAA arbitration. This relief was denied by Order of the trial court dated May 24, 2024 wherein the court ruled that the parties could have decided to extend the January 4, 2024 Order but did not do so. (Dr44)[6] Thus, the January 4, 2024 Order providing for binding arbitration outside the court system was moot by the time of the June 20, 2024 Order that is the subject of this appeal. Defendant's request to vacate the January 4, 2024 Order was also moot and is not an issue in this appeal.

At issue in this appeal is the validity and enforceability of waiver and binding arbitration provisions of ADT's standard pre-printed Small Business Contract. (Pa1) Although, again, while "magic words" (e.g. compel, deny, stay or dismissed) are not used in the June 20, 2024 Order, the substance and result of this decision necessarily decides the validity of this agreement. The clear purpose of R. 2:2-3(b)(8) and cases decided under this rule broadly apply it to orders to compel or deny arbitration. *GMAC v. Pittella*, 205 *N.J.* 572 (2011); *Wein v. Morris*, 194 *N.J.* 362 (2008).

> Inasmuch as this rule denominates orders compelling or denying arbitration as final and inasmuch as R. 2:9-1(a) reserves for the trial court jurisdiction only over other claims and parties, it would appear that as with all final judgments, the Appellate Division should have jurisdiction over all issues

[5] Paradoxically, ADT argues that ADT "could have appealed" the January 4, 2024 Order (Db6) and that this Order "is not appealable" (Db7)

[6] ADT filed a motion for reconsideration of the May 24, 2024 decision that was likewise denied by the trial court by Order dated August 16, 2024. (Pra270) ADT did not further appeal.

> relating to the claims and parties subject to the arbitration ruling
> and consequently should review all interlocutory orders.
> Pressler & Verniero, *Current N. J. Court Rules*, comment R. 2:2-3 at 451
> (Gann 2024)(emphasis added)

Review of a trial court's order granting or denying a motion to compel arbitration is de novo because the validity of an arbitration agreement presents a question of law. *Santana v. Smile Direct Club, LLC.*, 475 *N.J.Super.* 279 (App. Div. 2023), citing *Skuse v. Pfizer, Inc.*, 244 *N.J.* 30 (2020). "We owe no special deference to the trial court's interpretation of an arbitration provision which we review 'with fresh eyes." *Ogunyemi v. Garden State Medical Center*, No. A-1703-22, 2024 WL 1243552 (N.J. Super. Ct., App. Div. March 25, 2024, citing *Morgan v. Sanford Brown Inst.*, 225 *N.J.* 289 (2016).

ARGUMENT

I. The waiver and arbitration provisions of ADT's Small Business Contract are not enforceable.

A. Defendant ADT is in default in this litigation and has waived the right to participate in these proceedings.

ADT's Contract with Propertylink is dated June 30, 2022. (Pa15; Dr91) Installation of ADT's equipment began in July 2022. (Pa3) Plaintiffs' complaints about faulty installation began in September 2022 (Pa33) and resulted in ADT's unsuccessful remediation attempts throughout the remainder of 2022 and into 2023. (Pa22, Pa33) In January 2023, ADT's insurance carrier became actively involved in response and to investigate Plaintiffs' claims. (Pa47) The parties communicated with respect to these claims until October 24, 2023 when Plaintiffs instituted this action.(Pa1).

Defendant Intel filed its Answer, Affirmative Defenses and Cross-Claims on December 27, 2022. (Pa141) ADT filed its motion to compel arbitration on December 20, 2023 (Pa163)

and its demand for arbitration with AAA on March 27, 2024. (Dr39) ADT has been permitted to participate throughout this litigation notwithstanding Plaintiffs' objection that it failed to file an Answer and identify its defenses as required by the Rules of Court (below).

On August 16, 2024, Plaintiffs received a Dismissal Notice from the Superior Court pursuant to R. 1:13-7 advising that ADT and R&J were subject to being dismissed as parties. (Pra272) After speaking with ADT counsel, Plaintiffs filed a motion to enter default against ADT pursuant to R. 4:43-2 on October 15, 2024 as required by the Dismissal Notice. (Pra272) On November 8, 2024, the trial court denied Plaintiffs' motion with a handwritten decision: "Denied w/o prejudice pending resolution of the interlocutory appeal." (Dr82) On December 5, 2024, Plaintiffs' subsequent motion to enter default against ADT and suppress its brief was denied by the Appellate Division on December 20, 2024. ADT submitted no opposition to either motion to enter default against it. Default was entered against R&J.

Notwithstanding Plaintiffs' compliance with R. 1:13-7, ADT was dismissed as a party by administrative Order dated November 8, 2024. (Dr85). By Court Order dated November 15, 2024 the administrative Order was vacated and ADT reinstated as a party. (Pra273).[7]

ADT has failed to comply with pleading requirements of the Rules of Court. Included in this list of violations is R. 1:13-7(a) and (b)(2) (failure to file an Answer); R. 4:5-1 (Case Information Statement, Certification); R. 4:5-3 (failure to plead defenses); R. 4:5-4 (statement of facts); R. 4:6-1 (time requirements); and R. 4:6-2 (defense requirements). ADT has been on notice and involved in responding to Plaintiffs' claims since September 2022. (Pa168) Its only defense to date has been the arbitration and waiver provisions in its unsigned Contract.

[7] Intel's Brief references the dismissal but omits the reinstatement, giving a false impression that the dismissal was based on merit and that ADT was not reinstated as a party defendant. (Db6)

In addition to its default, ADT has waived its rights to proceed in both arbitration and litigation forums as a result of its conduct since the beginning of Plaintiffs' claims in 2022. Waiver is a fact-sensitive inquiry. In *Cole v. Jersey City Medical Center*, our Supreme Court cited timeliness, defendant's participation in the proceedings and prejudice as factors to be determined in the waiver analysis. 215 *N.J.* 265 (2013), citing the Third Circuit decision in *Hoxworth v. Blinder, Robinson & Co.*, 980 *F.2d* 912 (3d Cir. 1992). An additional consideration required by *Cole* is whether the delay is part of the party's litigation strategy. Absent efforts to assert a defense, the plaintiffs have not been fairly apprised of ADT's defenses to this action. *White v. Karlson*, 354 *N.J.Super.* 284 (App. Div. 2002).

Here, ADT has pursued both arbitration and litigation. In actuality, it is not arbitration, per se, that ADT seeks. ADT has only doggedly pursued expensive, third-party arbitration through AAA with its intended finality, waivers and preclusion of court remedies. ADT refused to participate in and derailed arbitration pursuant to R. 4:21A-1. (Dr86) It has had it both since the beginning of this litigation. It continues to thumb its nose at the Court Rules with no consequences whatsoever. It has prejudiced the Plaintiffs, defined in this context as "inherent unfairness – in terms of delay, expense or damage to a party's legal position." *Cole* at 282. ADT has inflicted delay, unnecessary expenses and diverted the focus of this litigation from the continuing losses sustained by Plaintiffs to its unconscionable Contract.

B. **Under both the Federal Arbitration Act [9 U.S.C. secs. 1-307] and the New Jersey Arbitration Act [2A:23B-1 to 36] Arbitration is Fundamentally a Matter of Contract**.

Defendants ADT (ADT Defendant Brief to be referred to as "ADb")(ADb15) and Intel (Intel Defendant Brief to be referred to as "IDb")(IDb21) argue again that the Federal Arbitration Act ("FAA") and New Jersey Arbitration Act ("NJAA") require enforcement of the arbitration and waiver provisions at issue in this appeal. Nothing in this record supports an argument that ADT's Contract is on "unequal footing" with any other contracts. *Skuse v.* Pfizer, 244 *N.J.* 30 (2020). This argument is without merit and has been denied in various motions in the trial court.

The same arguments were made to the trial court throughout the Spring, Summer and Fall of 2024 and lost on each occasion without any appeals. These occasions include the following motions by Defendants:

1. On **May 8, 2024,** ADT filed a Motion to Stay Case. These issues appear in its Memorandum of Law in support of the motion. On **May 24, 2024** this motion was denied. (Dr44) because the January 4, 2024 Consent Order had expired.

2. On **July 3, 2024**, ADT filed a Motion to Reconsider the above **May 24, 2024** Order. These issues appear in its Memorandum of Law in support of the motion. On **August 16, 2024** this motion was denied. (Pra270)

3. On **July 11, 2024**, Intel filed a Motion to Stay Case. These issues appear in its Memorandum of Law in support of the motion. On **August 16, 2024** this motion was denied. (Dr67)

4. On **October 16, 2024**, ADT filed a Motion to Remove from (court) Arbitration. These issues appear in its Memorandum of Law in support of the motion. On **November 8, 2024** this motion was denied. (Dr81)

5. On **October 31, 2024**, ADT filed a Cross-Motion to Stay Case. These issues appear in its Memorandum of Law in support of the motion. On **November 8, 2024** this motion was denied. (Dr84)

All of these motions and briefs included the same contentions regarding FAA and NJAA requirements and all were denied. Neither ADT nor Intel sought to appeal these decisions and are out of time in which to do so.[8]

The FAA and the NJAA represent a legislative choice to "keep arbitration agreements on an equal footing with other contracts." *Ogunyemi v. Garden State Medical Center*, No. A-1703-22, 2024 WL 1243552 (N.J. Super. Ct., App. Div. March 25, 2024), citing *Roach v. BMW Motoring LLC*, 228 *N.J.* 163 (2017), quoting *Atalese v. U.S. Legal Servs. Grp., LLC*, 219 *N.J.* 430 (2014). Under both statutes, arbitration is fundamentally a matter of contract and should be regulated according to contract principles. *Antonucci v. Curvature Newco, Inc.*, 470 *N.J.Super.* 553 (2020), citing *Rent-A-Center, W. Inc. v. Jackson*, 561 *U.S.* 63 (2010).

An agreement to arbitrate must be the product of mutual assent and requires a meeting of the minds. *Ogunyemi*, No. A-1703-22, 2024 WL 1243552 (N.J.Super., App. Div. March 25, 2024), quoting *Atalese*.[9]

[8] Both Defendants assert that the Plaintiffs knew, understood and agreed to FAA and NJAA requirements in the (***claimed???***) arbitration agreement

[9] Plaintiffs respectfully refer the Court to their Brief on the issues and facts with respect to contract formation

C. The January 4, 2024 Consent Order Has No Bearing On This Appeal.

Defendants devote substantial efforts and major portions of their legal arguments in an attempt to revive a Consent Order executed by counsel found by the court to have expired and not appealed. (Dr44) This Order provided a 4 month stay of this litigation "pending the outcome of arbitration." Judge McGovern added the requirement of an additional (new) court order if the matter was not completed within 4 months:

> "By the Court: If the parties need or require additional time beyond May 4, 2024 for Arbitration to be completed, a Consent Order may be submitted setting forth a specific date by which arbitration to be completed." (Pa163)

Thus the Court Order expired on May 4, 2024. (Pa163) Counsel were unable to agree upon terms for the required new Consent Order.

Acknowledging the expired Consent Order, ADT filed a motion to stay case, compel arbitration and sanction Plaintiffs for allegedly violating the expired Consent Order. ADT's Memorandum of Law in support of this motion contended that the expired Consent Order bound Plaintiffs to the contested arbitration provisions. By its Order dated May 24, 2024 the trial court held that the January 4, 2024 Consent Order had expired and that a new order with a specific date was required to extend its terms. (Dr44) Defendants did not appeal this decision.

As set forth in the previous point, ADT requested reconsideration of the May 24, 2024 Order and was denied. It subsequently sought more re-consideration under different headings, all of which were denied. (See Orders listed on page vi herein)

All issues with respect to the January 4, 2024 Consent Order have been decided many times and long ago adversely to the arguments that Defendants now seek to resurrect out of time to create an agreement that does not exist.

D. ADT's Small Business Contract Bears Only One Signature.

It is undisputed that Plaintiff signed ADT's Contract on behalf of Propertylink, not individually. Bartlow did not sign it. This record does not include any evidence that ADT signed the Contract. (Pa14; Dr91)

Defendants strain to construct arguments, speculate, and even flat out create "facts" to convince this Court to enforce a Contract that neither even signed. For example, Intel claims that Varcadipane and Bartlow are personally bound by the Contract because their claims are "grounded in the contract," (Db12) thereby ignoring that unconscionable portions of the Contract are severable. (Pa14) Intel emphasizes that Plaintiffs' "attempt to introduce factual claims and materials that were never raised . . . prior to the **January 2024 Consent Order**." (Db12) This is absolutely true, completely irrelevant, and entirely misleading. This is an appeal of the Court Order dated **May 24, 2024** and all of the facts in this record were presented to the trial court in Plaintiffs' motion that was denied. (Pa164) Intel does not present any facts.

ADT admits that "the customer business was Propertylink." (Db18) It then argues that Varcadipane was personally responsible but "was the sole member/manager of Propertylink." (Db18) This speaks for itself.

As the sole member/manager of this limited liability company ("LLC"), Varcadipane is protected from personal liability. N.J.S.A. 42:2C-30.

New Jersey law does not permit one spouse to waive the other's right to trial and bind them to arbitration absent agency or consent.[10] *Moore v. Woman to Woman Obstetrics & Gynecology LLC*, 416 *N.J.Super.* 30 (App. Div. 2010). Bartlow's claims are direct and not derivative of Propertylink or Varcadipane.

[10] Varcadipane and Bartlow are engaged, not married

New Jersey law provides that "an agent may only bind his [or her] principal for such acts that are within his [or her] actual or apparent authority." *N.J. Laws. Fund for Client Prot. V. Stewart Title Guar. Co.*, 203 *N.J.* 208 (2010). The scope of the agent's implied authority is limited to only what he or she may reasonably draw from the principal's words and conduct and the facts then known to the agent. *Kisselbach v. Cnty. Of Camden*, 271 *N.J.Super.* 558 (App. Div. 1994). Absent guardianship or another like relationship there is no legal basis to permit one person to bind another to arbitration. *Gayles v. Sky Zone Trampoline Park*, 468 *N.J.Super.* 17 (App. Div. 2021).

New Jersey law further provides that "the determining factors as to the rights of third-party beneficiaries is the intention of the parties who actually made the contract." *Broadway Maint. Corp. v. Rutgers, State Univ.*, 90 *N.J.* 253 (1982).

The Defendants have failed to produce any facts in this record to support any of their laundry list of arguments to bind Varcadipane and Bartlow to a Contract, let alone these binding arbitration and waiver provisions.

E. The Validity and Enforceability of this Contract Should Be Decided Upon This Record

This Court "may exercise such original jurisdiction as is necessary to the complete determination of any matter on review." *Price v. Himeji, LLC*, 214 *N.J.* 263 (2013), citing R. 2:10-5. Original jurisdiction is particularly appropriate here to avoid further unnecessary litigation. Since September of 2022, Defendants have known about Plaintiffs' claims of deterioration and damages from leaks and mold, among other problems that persist. Their insurance companies have "investigated" these claims since January of 2023 for the apparent sole purpose of finger pointing. (Pa46)

Defendants have had every opportunity during 2023 and in all of the motions that they filed throughout 2024 to provide their record of events to the courts. In all of that time they have not produced even one Certification from a fact witness – including ADT's employee who was the only other witness to the transaction. (Pa168) Any remand at this stage of the proceedings would set the clock back to at least October 2023, when the Complaint was filed, and reward the Defendants, particularly ADT, for its strategy of ignoring the merits of this case for this entire time.

Defendants' primary defenses are their interpretation of the January 4, 2024 Consent Order and their parsing of the contested portions of the Contract, and their agency/third-party beneficiary theories. Defendants' presentation of these defenses has been entirely limited to their legal briefs and Certifications by their attorneys.[11] These defenses are primarily questions of law that are well-suited for resolution now without remand. *Luchejko v. City of Hoboken*, 207 *N.J.* 191 (2011); *Still v. Ohio Cas. Ins. Co.*, 189 *N.J.Super.* 231 (App. Div. 1983).

CONCLUSION

The long-standing policy of New Jersey is to protect the right to access its courts. As provided in Article I, paragraph 9 of the New Jersey Constitution, "[t]he right of trial by jury shall remain inviolate."

"Although rights may be waived, courts 'indulge every reasonable presumption against waiver of fundamental constitutional rights.' (internal citation and quotation omitted). To be valid, waivers must be knowing, intelligent, and voluntary." *Mazdabrook Commons Homeowners' Ass'n. v. Khan*, 210 *N.J.* 482, 505 (2012).

[11] ADT did not file an Answer or assert any defenses

In its *Atalese* decision the Supreme Court intended to "assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." *Atalese*, 219 *N.J.* at 444, quoting *Garfinkel v. Morristown Obstetrics & Gynecology Assoc., P.A.*, 168 *N.J.* 124, 132 (2001). While emphasizing that "no prescribed set of words must be included in an arbitration clause to accomplish a waiver of rights" the Court held that to be enforceable "the clause, at least in some general and sufficiently broad way, must explain that the plaintiff is giving up her [or his] right to bring her [or his] claims in court or have a jury resolve the dispute." *Atalese* at 447.

Based upon all of the facts and legal authority set forth in Plaintiffs' Brief and this Reply Brief their requested relief should be granted, the arbitration requirement in ADT's Contract held to be unenforceable, and the waiver and exculpatory provisions in Paragraphs E and F of the Contract invalidated and severed.

Respectfully submitted,

/s/ Kevin D. Kelly

Kevin D. Kelly, Esq.

Dated: January 13, 2025