MARTHA MIQUEO, *Plaintiff-Respondent,* v. 300 SYLVAN AVE ASSOCIATES, LLC, PERSISTENCE AND SUCCESS, LLC, and CARMEN GOENAGA, *Defendants-Appellants.*	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APP. DIV. NO.: A-003693-23 On Appeal From: SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION BERGEN COUNTY DOCKET NO.: BER-C-000165-23 Sat Below: Hon. Edward A. Jerejian, P.J. Ch. CIVIL ACTION

REVISED BRIEF AND APPENDIX FOR DEFENDANTS-APPELLANTS 300 SYLVAN AVE ASSOCIATES, LLC, PERSISTENCE AND SUCCESS, LLC AND CARMEN GOENAGA

GREENSPOON MARDER LLP
Kelly M. Purcaro (Atty. ID: 017692009)
Kory Ann Ferro (Atty. ID: 065932013)
One Riverfront Plaza
1037 Raymond Blvd., Suite 900
Newark, New Jersey 07102
Tel.: (732) 456-8734 or 8746
Kelly.Purcaro@gmlaw.com
KoryAnn.Ferro@gmlaw.com
Attorneys for Defendants-Appellants

Of Counsel and On the Brief:
Kory Ann Ferro, Esq.
Kelly M. Purcaro, Esq.

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PRELIMINARY STATEMENT

This appeal seeks to reverse the improper decision by the Chancery Court to compel arbitration where no arbitration agreement exists. Plaintiff-Respondent Martha Miqueo ("Miqueo") chose to file the underlying action in the Chancery Court seeking to compel the sale of a commercial property for $6 million via demand for specific performance of a 2017 unexecuted sale agreement and a purported 2022 addendum to such sale agreement. It cannot be disputed that neither the unexecuted 2017 sale agreement nor the purported 2022 addendum to same contains any agreement to arbitrate whatsoever. Miqueo is the niece of the deceased former co-owner of the company that owns the subject property and the since-terminated manager of that company; however, neither of these facts permit the Chancery Court to invent and enforce an arbitration where no such agreement exists. Thus, arbitration cannot be compelled, and the decision below must be reserved.

The background of this case has been muddied by Miqueo's improper co-mingling of a separate case filed in the Law Division against her and others, arising under different claims and different contracts, and among different parties. Indeed, Miqueo's motion to consolidate this case with the referenced separate Law Division Case was properly denied by the Chancery Court. After consolidation of the two cases was correctly denied, the plaintiffs in the alternate case (which include the deceased co-owner's Estate, not a party to this case) consented to arbitrate only that

case, involving claims related to Miqueo's mismanagement and misappropriation, including civil RICO and conspiracy, then pending in the Law Division against the defendant there Miqueo (the sole Plaintiff here), her husband, and two other companies (the latter three parties not being parties to this case).

In an act of gamesmanship, Miqueo ran back to the Chancery Court for a second bite of the apple reviving her previously denied motion to consolidate under the guise of a motion to compel arbitration. Notwithstanding the prior proper denial of consolidation of the two cases, the same Court astonishingly reversed course and compelled arbitration – which essentially would result in consolidation of the cases.

The decision below must be overturned. Separate parties agreeing to arbitrate separate claims in a separate action against separate parties does not, and cannot, change the fact that no agreement to arbitrate exists in *this case*. This case is solely about Miqueo seeking to compel the sale of the subject property for $6 million from the current owner and Miqueo's asserted "equitable ownership" right to do so under different contracts, which contracts are neither valid, enforceable, nor contain any reference whatsoever to arbitration. The Chancery Court got it right the first time – these cases cannot be consolidated and, where no arbitration agreement exists, arbitration cannot be compelled to effectuate a backdoor to consolidation.

The smoke and mirrors put up by Miqueo should not have, and as a legal matter cannot, change the application of law to the facts in this case. Arbitration

cannot be compelled where, as here, (1) no arbitration agreement exists in the alleged "sale contracts" in dispute; and (2) neither the unrelated operating agreements, nor an abandoned memorandum of understanding, can be used to compel arbitration of Miqueo's claims.

Even if an arbitration agreement existed or could be imputed, which it cannot, Miqueo unequivocally waived any right to arbitrate her claims. Miqueo, with the advice and assistance of counsel, brought the underlying action in the Chancery Court and certified, in her Verified Complaint, that no arbitration was contemplated. Thereafter, Miqueo engaged in substantial litigation over the course of nine months in the Chancery Court, including, request for and receipt of the extraordinary remedy of temporary restraints, motion practice, the filing of an answer to counterclaims devoid of any affirmative defense regarding arbitrability, and substantial discovery which she propounded, benefited from the receipt of responses, and to which she responded. After substantially benefiting from her election to file in the Chancery Court, only two months before trial, Miqueo flipped the script and demanded arbitration. Such demand should have been denied.

For these reasons, as set forth more fully below, the Order Compelling Arbitration must be reversed.

STATEMENT OF MATERIAL FACTS

On July 30, 2012, Defendant-Appellant Persistence & Success, LLC ("P&S") was formed via an Operating Agreement naming Bernardo Goenaga ("Bernardo") and Defendant-Appellant Carmen Goenaga ("Carmen") as the only members. Da115, 121-36. P&S is the sole member of Defendant-Appellant 300 Sylvan Ave Associates, LLC ("300 Sylvan Assoc."),[2] which owns a commercial office building located at 300 Sylvan Avenue, Englewood Cliffs, New Jersey (the "Property"). Da115-16, 138-52. Miqueo was named as the manager of the Companies pursuant to their respective Operating Agreements, she was never a member of either of the Companies and had no ownership interest therein. Da115-16, 121-152, 238-39.

Prior to the formation of P&S and its purchase (through 300 Sylvan Assoc.) of the Property, Miqueo owned the Property with her husband and others, but they lost the Property through foreclosure and related bankruptcy proceedings. Da33-36, 307-08. According to Miqueo, she was "struggling financially" and "could not come up with the money to buy the Property [from the company, Capstone, that had acquired it out of the bankruptcy/foreclosure proceedings] in the immediate future." Da10-11, 36. As such, "[i]nitially, [she and her spouse] requested that Bernardo

[2] To avoid confusion, P&S and 300 Sylvan Ave Assoc. are referred to herein as the "Companies" and with Carmen as "Appellants" rather than Defendants since the Companies, together with Bernardo's Estate, are plaintiffs in the Law Division Case. Moreover, as noted above, Plaintiff-Respondent is referred to as Miqueo rather than Plaintiff since she is a defendant in the Law Division Case.

loan [them] the money needed[.]" Ibid. Miqueo contends that "[i]n furtherance thereof, in May 2012, as part of this understanding, Bernardo advanced to [them] $1 million to use towards the acquisition of the Property and/or confirmation of the [] chapter 11 plan of reorganization." Ibid. To that end, a Memorandum of Understanding ("MOU") was allegedly executed on May 14, 2012. Da311-14.

The MOU related to a proposed loan to Miqueo and her husband for $2,385,250 (including the $1 million Bernardo had already provided May 9, 2012), which was to be bundled with a pre-existing debt of $1,113,750 (which represented another $1 million loan issued in 2006 plus interest), for a total of $3.5 million, with monthly payments due thereon beginning June 1, 2012 and which was to be paid off by June 1, 2014 (*almost eleven years ago*). Ibid. Bernardo was to release the additional $1,385,250 under the MOU "[u]pon such date as [Miqueo and her husband] provide necessary and adequate proof of bank financing in order to acquire the Property" and Bernardo was to obtain a "second mortgage on the Property in the amount of the Bundled Loan." Ibid. However, the MOU was terminated by mutual agreement of the parties shortly after its execution.

As admitted by Miqueo, "given [their] financial situation and the pending bankruptcies, [they] and Bernardo agreed" that Bernardo would purchase the Property outright rather than loan Miqueo the funds to purchase it herself. Da11, 36. As a result of this change of plans, Miqueo never provided proof of financing

for her purchase of the Property from Capstone, never provided Bernardo with a second mortgage on the Property, never made any of the payments contemplated by the abandoned MOU, and did *not* pay off the bundled loan with interest by June 1, 2014. Da36-40. Instead, Bernardo and Carmen formed P&S and purchased the Property themselves[3] installing Martha as *the manager*, not owner,[4] thereof. Da36-40, 115-16, 121-152, 238-39. P&S took out a $3.5 million mortgage on the Property, which Bernardo later paid off. Da12-13, 239. As such, based on Martha and Bernardo's conduct, the MOU was mutually abandoned and terminated.

Over the years since P&S purchased the Property, Miqueo tried, on multiple occasions, to repurchase the Property, but was never successful. Da240. By way of example, in January 2017, Bernardo purportedly agreed to sell P&S (and thereby the Property) to Miqueo for $7,121,590.98 and a Limited Liability Purchase Agreement was drafted (the "2017 Unexecuted Agreement"), but Bernardo "changed his mind" and the 2017 Unexecuted Agreement was never signed and a closing did not occur.

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[3] Martha's claim that Bernardo was holding "legal title" while she was holding "equitable title" is belied by the facts and evidence, disputed by Appellants, and not cognizable under New Jersey law. See, e.g., Courtney v. Hanson, 3 N.J. Super. 47,51 (App. Div. 1949), aff'd, 3 N.J. 571 (1950); N.J.S.A. 25:1-13; McEvoy v. Brooks, 89 N.J. Eq. 37, 39 (Ch. 1918); Prant v. Sterling, 332 N.J. Super. 369, 380 (Ch. Div. 1999), aff'd, 332 N.J. Super. 292 (App. Div. 2000); Morton v. 4 Orchard Land Tr., 180 N.J. 118, 129 (2004).

[4] The initial discussions to abandon the MOU in favor of Bernardo's purchase of the property included Miqueo owning 10% of P&S, but same was rejected by Bernardo as reflected in the Operating Agreement. Da121-36, 319-20.

Da38, 51-56. In or about 2020, Martha obtained an "offer of $5MM from ConnectOne Bank" that Bernardo "did not accept." Da72. In 2020 and 2021, Miqueo contends that that there were additional conversations about her desire to purchase the Property, but again, same never came to fruition. Da187-89. In March 2022, Miqueo obtained a letter of interest from Axos Bank to loan her $4.2 million and Bernardo "told [her] that this offer was not acceptable." Da62-68.

On May 21, 2022, in furtherance of her efforts to repurchase the Property, Miqueo sent a document entitled Addendum to Promissory Note Agreement between Bernardo Goenaga and Martha Miqueo (the "2022 Addendum"), which purports to amend the 2017 Unexecuted Agreement. Da286-288. In her transmittal email, Miqueo stated the 2022 Addendum was "not a legal document" and was being used solely in her attempt to secure financing with the "details" to be worked out only if accepted by the lender. Ibid. On May 23, 2022, the 2022 Addendum, purportedly executed by Bernardo, was emailed back to Miqueo. Da74.[5]

[5] The 2022 Addendum is invalid for many reasons, including, but not limited to, that: (1) Miqueo specifically represented it was not a legal document; (2) it is riddled with false statements and misrepresentations; (3) it is not signed (or otherwise ratified) by Carmen as required by P&S's Operating Agreement; (4) it contains an undated and unwitnessed signature purporting to be that of Bernardo; and (5) if executed by Bernardo, same was completed when he lacked the capacity to do so. Da45, 121-36, 177-79, 240-45.

On June 20, 2022, less than a month after allegedly signing the 2022 Addendum, Bernardo passed away, at which point Carmen became the sole member of P&S. Da40, 116, 136. On June 1, 2023, Miqueo was terminated as manager of the Companies. Da171-72. Based on Carmen's discovery of Miqueo's substantial mismanagement and misappropriation, the Companies and Bernardo's Estate filed a lawsuit in the Law Division against Martha, her spouse, and her businesses related to, amongst other things, Martha's breach of the Companies' Operating Agreements and breaches of her fiduciary duties as well as civil RICO and conspiracy amongst the defendants in the Law Division Case. Da75-103, 117. On the same day, and completely unrelated to the claims against Miqueo in the Law Division, Miqueo filed this case against Appellants in the Chancery Division seeking to enforce the 2022 Addendum to the 2017 Unexecuted Agreement. Da3-23.

STATEMENT OF PROCEDURAL HISTORY[6]

On August 22, 2023, Miqueo filed her Verified Complaint seeking specific performance of a "May 21, 2022 written agreement with her uncle, Bernardo, wherein Bernardo agreed to transfer legal title to the Property in exchange for $6 million" and for declaratory judgment "regarding [Miqueo's] equitable title to the Property and her right to have the legal title transferred to her upon the payment of

[6] 1T shall refer to the June 20, 2024 Transcript of Motion to Compel Arbitration. 2T shall refer to the September 22, 2023 Transcript of Motion on Plaintiff's Order to Show Cause.

$6 million." Da5, 17-20. Miqueo's Complaint contains a Certification of Rule 4:5-1, which includes a representation that "No other action or arbitration proceeding is presently contemplated." Da21. On the same day, Appellants filed a Verified Complaint in the Law Division captioned Persistence & Success, LLC, et al. v. Miqueo-Elian, et al., BER-L-004471-23 (the "Law Division Case") alleging, amongst other counts, Martha's breaches of the Operating Agreements of the Companies and her fiduciary obligations as manager of the Companies as well as civil RICO and conspiracy claims against all defendants in that case. Da75-103.

Also on August 22, 2023, taking full advantage of her choice to file in the Chancery Division rather than arbitration, Miqueo filed an Order to Show Cause seeking temporary restraints to enjoin and restrain Appellants from: (1) selling, transferring, disposing of, or otherwise alienating the Property; (2) mortgaging, encumbering, or permitting liens to be placed on the Property; (3) entering into any lease transactions with regard to the Property; (4) evicting tenants; and/or (5) undertaking or contracting to perform any capital improvements to the Property. Da24-28. On August 28, 2023, Miqueo benefited from her election to file in the Chancery Court when the Chancery Court entered an Order to Show Cause with Temporary Restraints granting Miqueo's requested relief. Da104-08. On August 30, 2023, the Chancery Court set a return date for Miqueo's Order to Show Cause of September 22, 2023. Da109.

On September 8, 2023, Appellants made a Motion to Dissolve or, in the Alternative, Modify the Temporary Restraints, which Miqueo opposed. Da110-12. On September 13, 2023, the Chancery Court conducted a hearing on Appellants Motion and, Miqueo again benefited from her filing in the Chancery Court when it kept the temporary restraints in place pending the September 22, 2023 return date. Da175-76.

On September 8, 2023, Appellants filed a proposed Order to Show Cause seeking to disqualify Shapiro, Croland, Reiser, Apfel & Di Iorio ("Shapiro Croland") from representing Miqueo based on its prior representation of P&S. Da113-14. On September 28, 2023, the Chancery Court entered a Letter Order setting a briefing schedule on Appellants' Order to Show Cause for Disqualification of Shapiro Croland with a return date of October 20, 2023. Da201. On October 5, 2023, Shapiro Croland substituted out of the case. Da218.

On September 22, 2023, the Chancery Court found that Miqueo failed to demonstrate, by clear and convincing evidence, any of the factors under Crowe v. De Gioia, but nonetheless, in another example of Miqueo's benefit from proceeding in Court, the Chancery Division granted Miqueo's Order to Show Cause under the Chancery Court's "equitable powers" to "maintain the *status quo*." 2T67:13-73:1, 2T81:2-87:11. On September 29, 2023, Miqueo submitted a proposed Order Granting Certain Preliminary Injunctive Relief under the Five-Day Rule. Da202-

06. On October 3, 2023, Appellants objected to Miqueo's proposed Order and submitted an alternative proposed Order Granting Certain Preliminary Injunctive Relief under the Five-Day Rule. Da207-17. The Chancery Court entered neither proposed Order.

The Parties appeared before the Chancery Court on October 20, 2023 return date of Appellants' Order to Show Cause after which the Court scheduled a Case Management Conference for November 15, 2023 and set trial dates for August 6-8, 2024. Da219. On October 19, 2023 Appellants' filed their Verified Answer with Affirmative Defenses and Counterclaims. Da220-48.

On November 15, 2023, Miqueo submitted a new proposed Order Granting Certain Preliminary Injunctive Relief (Da252-56) and a Consent Order Appointing Mediator (Da257-58), which were both entered by Court the same day. Da259-64. The preliminary injunctive relief restrained and enjoined Appellants from: (1) selling, transferring, disposing or otherwise alienating the Property; (2) evicting Miqueo's companies from the Property; (3) mortgaging or encumbering the Property absent notice and consent of Miqueo; and (4) undertaking or contracting to perform extraordinary improvements to the Property absent notice and consent of Miqueo. Da259-62. In addition, Appellants were to continue to collect and deposit rent and pay ordinary, necessary and recurring expenses related to the Property; Appellants were required to provide monthly Income Statements to Miqueo; Miqueo was

required to provide monthly contributions towards the Property's operating expenses. Ibid. Such a benefit was reaped by Miqueo as a direct result of her forum shopping to the Chancery Court over arbitration.

On December 6, 2023, the Parties engaged in mediation with the Hon. Harriet Derman, J.S.C. (Ret.), but it was unsuccessful. Da249-51, 263-64.

On January 2, 2024, Miqueo filed her Answer to Counterclaim in which she asserted thirteen Affirmative Defenses, none of which mention arbitration. Da265-74. On January 19, 2024, Miqueo again utilized the Court system to file a Motion seeking to consolidate this matter with the Law Division Case (Da275-77), which, after full briefing and oral argument, was properly denied by the Chancery Court on March 8, 2024. Da299-300.

Once it was clear this case would not be consolidated with the Law Division Case, discovery commenced in earnest in order to comply with the Chancery Court's scheduling, including the then rapidly approaching trial date in August 2024. On March 19, 2024, Appellants served 31 document demands and 39 interrogatories on Miqueo. Da334. On March 27, 2024, Appellants noticed Miqueo's deposition for May 30, 2024. Da335, 338-40. At first, Miqueo actively engaged in the discovery process, further entrenching her election to proceed in the Chancery Court rather than arbitration. To that end, on April 23, 2024, Miqueo provided responses to Appellants' document demands including a production of over 4,070 unorganized

documents. Da335. On May 6, 2024, Appellants served a discovery deficiency notice to Miqueo and Miqueo promised to respond and cure such deficiencies by May 22, 2024. Da335, 342-48.

Then, Miqueo began to obstruct the discovery process. Miqueo's responses to Appellants' interrogatories were due on May 20, 2024, but she failed to produce discovery on either date. Da335. On May 23, 2024, Appellants requested responses to the overdue interrogatories, that the outstanding deficiencies in the document demand responses be cured, and to confirm Miqueo's deposition for May 30, 2024. Da335, 350. On May 24, 2024, Miqueo indicated that, in a self-imposed stay of discovery, she would not respond to the past-due interrogatories, cure her deficiencies, or appear for her scheduled deposition. Da335, 352. On May 29, 2024, Appellants objected to Miqueo's unilateral stay and highlighted that Miqueo's refusal to properly and timely provide discovery was improperly delaying the resolution of this case and interfering with the Court's scheduling. Da335, 354.

Meanwhile, on April 5, 2024, as further evidence of a waiver of any claim of arbitration, Miqueo herself served 30 document demands and three sets of interrogatories – one set per each named Appellant. Da335-36. Appellants timely responded to the document demands on May 10, 2024, including production of more than 350 pages of Bates-stamped and organized documents. Ibid. Appellants' responses to Miqueo's interrogatories were served June 4, 2024. Da335-36, 377.

Once discovery was well underway and after the Parties had already been in litigation for nearly nine months, engaged in no less than six Court appearances (including three motion hearings), no less than 36 filings on docket, and with a trial date scheduled for August 6, 2024 (about two months away) (see, e.g., Da109, 175-76, 201, 219, 259-64, 299-300, 334-54), Miqueo filed her Motion to Compel Arbitration on May 17, 2024.[7] Da304-06. The Chancery Court entertained oral argument on the Motion to Compel Arbitration on June 20, 2024. 1T1-52. On June 25, 2024, the Court entered an Order Compelling Arbitration. Da1. On July 14, 2024, the Court entered an Amended Order Compelling Arbitration clarifying that the Chancery Court retained jurisdiction over the case and that the November 15, 2023 Order Granting Certain Preliminary Injunctive Relief remained in full force

[7] Miqueo's Motion to Compel Arbitration in her Chancery Court case came only days after different parties agreed to arbitrate different claims arising under different contracts in a different case. On April 10, 2024, Miqueo had filed a Motion to Compel Arbitration of the Law Division Case. Da301-03. The Law Division Case, brought by different parties and against different parties, is largely premised upon the Operating Agreements (Da75-103), which contain arbitration provisions related to the Property's management (Da132, 149), and which case was in a completely different procedural posture than this case. For example, no discovery responses were provided, no discovery served by Miqueo and her co-d1efendants, no interim relief granted, no depositions noticed, no trial date set, and arbitration was asserted as an affirmative defense there. On May 28, 2024, a Consent Order in the Law Division Case was entered under which those parties in that case agreed to proceed to arbitration of the Law Division Case only. Da332-33. Arbitration of the Law Division Case is moving forward before the Hon. Karen M. Cassidy, A.J.S.C. (Ret.). Da384-92.

and effect – a benefit Miqueo obtained only because she elected to file in the Chancery Division. Da2. This appeal followed. Da578-82.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

The "standard of review when determining the enforceability of contracts, including arbitration agreements," is *de novo*. Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 207 (2019); Morgan v. Sanford Brown Inst., 225 N.J. 289, 302 (2016); Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 446 (2014). "The enforceability of arbitration provisions is a question of law; therefore, it is one to which we need not give deference to the analysis by the trial court." Goffe, 238 N.J. at 207.

II. THE CHANCERY COURT ERRED IN COMPELLING ARBITRATION BECAUSE THE CONTRACT UPON WHICH PLAINTIFF-RESPONDENT'S CLAIM IS BASED DOES NOT CONTAIN AN ARBITRATION PROVISION (1T38:16-40:19; 1T42:15-46:16; 1T48:7-51:8).

The Chancery Court failed to address or give credence to the uncontroverted fact that the 2022 Addendum upon which Miqueo bases her case, and for which she seeks specific performance, does not have an arbitration agreement thereby precluding the Chancery Court from compelling arbitration of this case.

"The first step in considering [a] challenge to enforcement of an arbitration requirement must be to determine whether a valid agreement exists." Martindale v.

Sandvik, Inc., 173 N.J. 76, 83 (2002). Only if a valid agreement to arbitrate is found to exist, then the Court must determine if the subject dispute falls within the scope of the agreement. Id. at 93. "A legally enforceable agreement requires a meeting of the minds." Atalese, 219 N.J. at 442 (internal quotation marks and citation omitted). "Parties are not required to arbitrate when they have not agreed to do so." Ibid. (internal quotation marks and citation omitted); see also Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001) ("only those issues may be arbitrated which the parties have agreed shall be"). An "arbitrator's authority is circumscribed by whatever provisions and conditions have been mutually agreed upon. Any action taken beyond that authority is impeachable." Grover v. Universal Underwriters Ins. Co., 80 N.J. 221, 229 (1979). "[A] 'court may not rewrite a contract to broaden the scope of arbitration[.]'" Ibid. (quoting Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc., 240 N.J. Super. 370, 374 (App. Div. 1990)) (second alteration in original).

An arbitration provision in one contract cannot be used to compel arbitration of another contract. See Grover, 80 N.J. at 229; see also Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 192 (2013) ("we reject intertwinement as a theory for compelling arbitration"); Bacon v. Bob Ciasulli Auto Grp., Inc., A-0789-14T1 (App. Div. May 7, 2015) (holding that arbitration provision in contract to purchase car did not subsume disputes under the extended service agreement executed ten days later);

Phoenix Motor Co. v. Desert Diamond Players Club, Inc., 144 So. 3d 694, 696 (Fla. 4th DCA 2014) ("Arbitration provisions from one contract cannot be extended to a separate contract between the same parties unless the parties expressly agree to do so.").[8]

Here, Miqueo's Complaint is solely premised on alleged breach of, and a request to compel specific performance under, the 2022 Addendum. Da3-23. Indeed, when seeking a preliminary injunction, which the Chancery Court ultimately granted and which remains in effect today (Da2, 259-62), Miqueo repeatedly represented that her requests were premised upon the enforcement of the 2022 Addendum. See Da42 ("I am seeking an Order of the Court to compel Defendants' specific performance of the [2022 Addendum] by transferring the Property to me."); Da182-83 ("I seek such relief based on my May 21, 2022 written agreement with Bernardo Goenaga [] to transfer legal title to the Property to me in exchange for $6 million[.]"); 2T11:7-10 ("The plaintiff, in accordance with an agreement made in May 2022 that provides for the transfer to be made upon payment of six million dollars.").

[8] Notably, the parties are not even the same. Here, Miqueo seeks to compel the purchase the Property for $6 million from the sole current owner of P&S, Carmen. Da1-23. Whereas, the Operating Agreements and related mismanagement claims under which the Law Division Case is proceeding is brought by Estate of Bernardo and the Companies against Miqueo, her husband, and Miqueo's companies. Da75-103, 121-52.

The 2022 Addendum, upon which Miqueo had based her action, contains no arbitration provision whatsoever. Da45. The 2022 Addendum does not incorporate a prior arbitration provision or reference arbitration in any way. Ibid. In fact, the only other agreement referenced in the 2022 Addendum is "an agreement entered into January 1st 2017 relating to the sale and purchase of" the Property, which is the 2017 Unexecuted Agreement and is similarly devoid of any arbitration provision. Ibid.; see also Da51-56. Miqueo acknowledged that the 2017 Unexecuted Agreement for the sale of the Property "was never signed and the closing did not occur" because "Bernardo had changed his mind." Da38. Thus, admitting that no "agreement [was] entered into January 1st 2017," and thus could not be amended.

In sum, no agreement, let alone a valid agreement, to arbitrate exists. The Chancery Court skipped the crucial first step in the analysis in failing to address the absence of an arbitration provision in the 2022 Addendum or the 2017 Unexecuted Agreement it purports to amend. 1T38-51. Instead, the Chancery Court improperly relied on arbitration provisions in the long since abandoned 2012 MOU and the unrelated Operating Agreements which govern management of the Property – not the proposed sale of same. See Grover, 80 N.J. at 229; Hirsch, 215 N.J. at 192. In direct contravention of the Chancery Court's prior refusal to consolidate this case and the Law Division Case (Da299-300), the Chancery Court inexplicably decided it "think[s] it should be handled together" to avoid "duplicating discovery" and so

there could be "a story told and a decision made" 1T48:8-49:22. Rather than premised on legal precedent, the Chancery Court determined: "So if you start using common sense, like somebody needs to handle this case and decide it." 1T43:9-10. The Chancery Court thus erred by reading an arbitration clause into the 2022 Addendum to the 2017 Unexecuted Agreement that does not exist based on other unrelated agreements not incorporated in any way into the 2022 Addendum at issue in this case. 1T38-51.

In reviewing the 2022 Addendum *de novo*, this Court must reverse the Chancery Court's decision as the 2022 Addendum to the 2017 Unexecuted Agreement lacks an arbitration provision that is necessary to compel the Chancery Division Case to arbitration. See Martindale, 173 N.J. at 83.

III. THE CHANCERY COURT ERRED IN COMPELLING ARBITRATION BECAUSE THE CONTRACTS UPON WHICH THE CHANCERY COURT RELIED WERE SUPPLANTED, INVALID, AND OTHERWISE INAPPLICABLE TO THE DISPUTE AT ISSUE (1T38:16-40:19; 1T42:15-46:16; 1T48:7-51:8).

The Chancery Court erred in "bootstrapping" (1T48:8-49:22) Miqueo's claims under the alleged 2022 Addendum to the 2017 Unexecuted Agreement for the sale of the Property to the arbitration provisions contained in the abandoned 2012 MOU and unrelated Operating Agreements. See Grover, 80 N.J. at 229; Hirsch, 215 N.J. at 192; Bacon, A-0789-14T1; Phoenix Motor Co., 144 So. 3d at 696. Even if the MOU and/or Operating Agreements' arbitration provisions were capable of

compelling arbitration of the 2022 Addendum, which they cannot, the MOU was abandoned and supplanted by the Operating Agreements - which agreements do not apply to the issues in dispute in this case, *i.e.*, whether Miqueo can buy the Property for $6 million, let alone compel the arbitration of the 2022 Addendum upon which Miqueo brought this case.

First of all, Miqueo and Bernardo abandoned the 2012 MOU within days of its execution in favor of P&S's outright purchase of the Property. See Dorchester Manor v. Borough of New Milford, 287 N.J. Super. 163, 170-71 (Law. Div. 1994), aff'd, 287 N.J. Super. 114 (App. Div. 1996) ("a contract will be treated as abandoned where one party acts in a manner inconsistent with the existence of the contract and the other party acquiesces in that behavior"); Cnty. of Morris v. Fauver, 153 N.J. 80, 96 (1998) ("The determination of whether contracting parties intend to abandon their agreement need not be express; it may be inferred from all their acts and circumstances."). Miqueo never provided Bernardo with proof of bank financing because she could not. Miqueo never provided Bernardo with a second mortgage on the Property in the amount of the bundled loan contemplated by the MOU because she could not. Bernardo did not loan Miqueo the amount specified in the MOU because the deal was abandoned. Miqueo did not make monthly payments or complete the payoff within two years as required by the MOU because that deal was canceled. Instead, Bernardo took out his own mortgage on the Property for $3.5

million, which he subsequently paid off in full, and took over lawful ownership of the Property. If the MOU had persisted and had Martha complied with its terms, it would have been paid off over a decade ago and this case would never have come to pass. As admitted in Martha's Complaint, the MOU was the original plan that had to be deserted in favor of P&S's purchase of the Property. As an abandoned contract, the arbitration provision in the MOU is irrelevant.

Even if valid and enforceable, which it is not, the 2012 MOU's arbitration provision states: "Any dispute arising out of or relating to *this Memorandum* shall be resolved by an arbitrator appointed according to the rules of the American Arbitration Association." Da313 (emphasis added). Whether the Property should be sold under the terms of the 2022 Addendum to the 2017 Unexecuted Agreement, a document drafted ten years after the 2012 MOU, does not arise out of or relate to the MOU. The 2022 Addendum does not refer to the 2012 MOU, incorporate the MOU's terms, or integrate the MOU's arbitration provision. Instead, the 2022 Addendum to the 2017 Unexecuted Agreement is for new deal, a different amount, and under completely different terms than contemplated by the abandoned 2012 MOU.

The Operating Agreements, which on their face supplanted and replaced the abandoned 2012 MOU by virtue of their "Entire Agreement" clauses found in paragraphs 10.8 therein, seek to arbitrate only those disputes arising with respect to

the Operating Agreements. Da132-33, 149-50. The Operating Agreements' arbitration clauses do not utilize the "the broader terminology: 'arising out of, concerning or related to' the Agreement." Lederman v. Prudential Life Ins. Co. of Am., 385 N.J. Super. 324, 343 (App. Div. 2006). Instead, the Operating Agreements utilize the identical, more narrow terminology of "with respect to this Operating Agreement." Da132, 149. "Under such narrow arbitration clauses, disputes that do not involve rights traceable to the agreement are beyond the jurisdiction of the arbitrator and therefore are not properly arbitrable." Commc'ns Workers of Am., Loc. 1087 v. Monmouth Cnty. Bd. of Soc. Servs., 96 N.J. 442, 450 (1984). As such, the 2022 Addendum and Miqueo's claim of a right to purchase the Property under same clearly fall outside of the ambit of the Operating Agreements, which relate to the management and operation of the Companies and not the sale of the Property. To be sure, there is no reference whatsoever to the purchase or sale of the Property in the Operating Agreements – which sale is the entirety of the action improperly compelled to arbitration by the Chancery Court here. Da121-52.

Thus, this matter was improperly compelled to arbitration under the guise of the MOU and Operating Agreements. See Atalese, 219 N.J. at 442; Garfinkel, 168 N.J. at 132. Under this Court's *de novo* review, the law clearly dictates that neither the abandoned 2012 MOU nor the Operating Agreements can force the Parties to

arbitrate Miqueo's claims under which arise under the 2022 Addendum to 2017 Unexecuted Agreement for the sale of the Property.

IV. THE TRIAL COURT ERRED IN COMPELLING ARBITRATION BECAUSE PLAINTIFF-RESPONDENT WAIVED THE RIGHT, IF ANY, TO COMPEL ARBITRATION (1T40:20-42:14).

Even assuming that the defective arbitration provisions in extraneous contracts could somehow compel this matter to arbitration, which they cannot, Miqueo waived here right to arbitration through her extensive litigation conduct in, and self-selection of, the Chancery Division. Miqueo: (1) selected the Chancery Division to file her claim (Da3-23); (2) affirmatively certified pursuant to Rule 4:5-1 that "no other action or arbitration proceeding is contemplated," (Da21); (3) sought and obtained temporary restraints against Appellants (Da2, 24-28, 104-08, 259-62); (4) engaged in mediation ordered by the Chancery Court (Da249-51, 263-64); (5) filed and lost a motion to consolidate (Da275-77, 299-300); (6) failed to assert arbitration as an affirmative defense to Appellants' counterclaims (Da272-74); (7) engaged in substantive discovery (Da334-54, 377); and (8) delayed about nine months in making an arbitration request – at which time trial was scheduled to proceed in about two months. Da219, 304-06. These actions by Miqueo clearly constitute a waiver of any right Miqueo may have had to arbitration. The Chancery Court erred in its cursory review of this issue, determining without any explanation or analysis: "I don't see that there has been waiver." 1T41:15-42:14.

Parties can waive the right to arbitration by implication as "[t]he intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or by indifference." Spaeth v. Srinivasan, 403 N.J. Super. 508, 514 (App. Div. 2008) (internal quotation marks and citation omitted). "Waiver is the voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 N.J. 169, 177 (2003). An agreement to arbitrate can "be overcome by clear and convincing evidence that the party asserting it chose to seek relief in a different forum." Cole v. Jersey City Med. Ctr., 215 N.J. 265, 276 (2013) (internal quotation marks and citation omitted).

"In deciding whether a party to an arbitration agreement waived its right to arbitrate, [the courts] concentrate on the party's litigation conduct to determine if it is consistent with its reserved right to arbitrate the dispute." Id. at 280. Among others, the Court in Cole held that the following factors should be evaluated, none of which alone is dispositive:

> (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any.

> [Id. at 280-81; see also Marmo and Sons General Contracting LLC v. Biagi Farms, LLC, 478 N.J. Super. 593 (App. Div. 2024) (reaffirming the Cole factors).]

The Chancery Court improperly failed to analyze any of the Cole factors, but a review of each demonstrates Miqueo's waiver.

First, there was a delay of approximately nine months, during which the Parties engaged in six Court appearances (three motion hearings and three status conferences), 36 filings on the docket, discovery exchange, and had a trial date approaching two months from the return date of Miqueo's Motion to Compel Arbitration – which is substantial and weighs in favor of waiver. See Farese v. McGarry, 237 N.J. Super. 385, 394 (App. Div. 1989) (finding waiver where arbitration was asserted as a defense nine months after complaint was filed); Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 926 (3d Cir. 1992), abrogated on other grounds, White v. Samsung Elecs. Am., Inc., 61 F.4th 334, 338 (3d Cir. 2023) (11-month delay constituted waiver of arbitration); Herrera v. Paramount Freight Sys., Inc., No. A-0424-23, 2024 WL 2683967, at *5 (App. Div. May 24, 2024) (finding sixteen-month delay, seven of which were during a mediator referral period, supported a finding of waiver); Marmo, 478 N.J. Super. at 611 (six-month delay less excusable where plaintiff was represented by counsel and initiated the proceedings in Court "was better equipped to recognize its right to arbitrate and act upon it swiftly."). As in Marmo, Miqueo was represented by counsel and thereby

equipped to recognize her right to arbitrate and act on it swiftly, but she did not. Miqueo elected to file her own case in the Chancery Division and then waited nine months to seek to compel arbitration, which is even longer than the six-month delay Marmo found evidenced waiver.

Second, Miqueo instituted this action with an Order to Show Cause under which she received temporary restraints against Appellants. These restraints have been in place and enjoining Appellants actions since August 28, 2023 and remain in place to date. Such restraints would not have been available to Miqueo in arbitration. As such, Miqueo sought the benefit of Court intervention and, after she received the benefit of same for nine months (and, indeed, continues to receive same), she sought to compel this matter to arbitration. Miqueo's use and manipulation of the Court to obtain restraints weighs heavily in favor of waiver. See Marmo, 478 N.J. Super. at 611 (conduct by the plaintiff that demonstrates the intent to invoke "judicial enforcement processes that are, by comparison, more robust than those in arbitration" evince waiver).

Third, the delay in seeking arbitration was part of Miqueo's litigation strategy tactics. Miqueo used the Chancery Court's equitable powers to obtain significant and extraordinary, immediate restraints against Appellants. She availed herself to the Chancery Court's authority for a mediation referral. Miqueo used the Chancery Court to obtain copious discovery from Appellants. Once Miqueo's deposition date

was quickly approaching and trial about two months away, Miqueo ceased responding to discovery and filed her Motion to Compel Arbitration. Miqueo's delay tactics, including over nine months of availing herself to the benefits of the Chancery Court only to hit pause on essentially the eve of trial, weigh in favor of waiver. See Hopkins v. LVNC Funding, LLC, et al., A-1301-23 at p. 14 (App. Div. February 10, 2025) (Approved for Publication) (defendants' decision to move to compel arbitration after they had already benefited from decisions that benefited them demonstrate litigation strategy).

Fourth, discovery was ongoing and extensive. Both Parties served substantial paper discovery (two sets of document demands and four sets of interrogatories) and produced a combined over 4,400 pages of documents. After which Miqueo ceased cooperating with discovery, electing instead to self-impose a stay of discovery, refusing to cure deficiencies, respond to interrogatories, or produce Miqueo for her noticed deposition. This amount of discovery certainly exhibits Miqueo's waiver of arbitration. See Marmo, 478 N.J. Super. at 612 (Plaintiff's "delay in moving to compel arbitration allowed it to obtain the benefit of early discovery that might not have been as easily obtainable in arbitration."). Months after filing her Complaint, Miqueo propounded copious discovery demands and has had the benefits of responses from Appellants. She has participated in discovery by producing thousands of documents which Appellants promptly reviewed in order to comply

with the Chancery Court's trial scheduling. Even Miqueo's refusal to appear for a noticed deposition weighs in favor of waiver as Miqueo's deposition was noticed months prior to her Motion to Compel Arbitration and, as it drew near, Miqueo moved to change the forum thereby "depriv[ing Defendants] of the ability to carry out [such] deposition[] as a right under the Rules of Court." Id. at p. 23.

Fifth, Miqueo has not raised arbitration in any of her prior filings – to the contrary, she has certified that arbitration was not contemplated. Da21. Miqueo initiated this action by filing a Complaint and Order to Show Cause for immediate restraints rather than asserting her purported right to arbitration. Miqueo further affirmatively certified to this Court that the matter in controversy was not the subject of an arbitration nor was any other "arbitration proceeding [] presently contemplated." Ibid. Rule 4:5-1 recognizes a "continuing obligation" to amend the certification if the underlying facts change. Miqueo made no such amendments. Instead, Miqueo filed an Answer to Counterclaim on January 2, 2024 asserting thirteen affirmative defenses, none of which raised arbitration. Da272-74. As in Marmo, such pleadings and the Rule 4:5-1 certification of counsel "strongly weigh as a factor in favor of waiver." 478 N.J. Super. at 613; see also Hopkins, A-1301-23 at pp. 14-15 (finding waiver where arbitration was not an affirmative defense and R. 4:5-1(b)(2) certification contained representation no arbitration was contemplated, which was never amended); Herrera, 2024 WL 2683967, at *4

(finding waiver citing, in part, to R. 4:5-1 certification despite counsel's argument that the delay was counsel's fault and not that of the client). As the Court noted in Marmo, "judicial resources are wasted when a case is brought by a plaintiff and litigated in the Superior Court when it should have been pursued instead in arbitration." 478 N.J. Super. at 613.

Sixth, the proximity of trial date also weighs heavily against Miqueo. This case was scheduled for trial beginning August 6, 2024, just two months from the return date of Miqueo's Motion to Compel Arbitration. The Chancery Court was emphatic when setting the trial date that it wished to move this matter expeditiously to trial within a year of its filing. See, e.g., 2T87:4-7. Once the Parties were nearing that trial date, with discovery well underway, and with the possibility of summary judgment, Miqueo sought to force the case to hit the restart button to begin anew in a different forum. Miqueo's request to compel arbitration and combine this case with the arbitration of the Law Division Case should have fallen on deaf ears as, in denying Miqueo's Motion to Consolidate, the Chancery Court already determined that the two cases are separate and distinct. Appellants were diligently moving forward towards the August 6, 2024 trial date and were hampered by Miqueo's refusal to comply with discovery demands and tactical maneuver to compel arbitration.

Seventh, Appellants have and will continue to face prejudice should this matter be compelled to arbitration because Appellants already engaged in over nine months of litigation, been subjected to temporary restraints for eighteen months, engaged in mediation and motion practice, made seven Court appearances, and responded to/reviewed copious discovery. Appellants seek to move this matter expeditiously either to trial or to summary judgment. To force this case to arbitration would unduly delay the resolution of this case for an indefinite amount of time. This prejudice weighs in favor of Appellants. See Hopkins, A-1301-23 at pp. 15-16 (finding prejudice as "inherent unfairness – in terms of delay, expense, or damage to a party's legal position" as occurring "when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue" (internal quotation marks and citation omitted)).

This case is squarely analogous to facts and decision in Marmo, where the Court found a waiver of the right to arbitration and the Appellate Court affirmed. 478 N.J. Super. 593. In that case, the plaintiff filed a complaint with the Rule 4:5-1 certification that no arbitration was pending. Id. at 600. The plaintiff filed an answer denying counterclaims and asserting affirmative defenses, none of which included arbitrability. Id. at 601. The case proceeded through "significant discovery," including 100 written demands. Ibid. The plaintiff received discovery from defendant, but withheld its own responses and filed the motion to compel arbitration

before noticed depositions could occur. Id. at 601-02. The case proceeded for six months before the plaintiff filed its motion to compel arbitration. Id. at 602. Under these circumstances, the Court found the plaintiff had waived its right to arbitration. Here, under nearly identical facts, the same result must hold true. Miqueo's conduct evinces a clear relinquishment of any right she may have had to compel arbitration.

In this Court's *de novo* review of the procedural history of this case in light of applicable law, this Court must reverse the Chancery Court's decision based on Miqueo's unequivocal waiver. See Marmo, 478 N.J. Super 593.

CONCLUSION

Based upon the foregoing, Appellants respectfully request that this Court reverse the Chancery Court's decision.

Dated: February 20, 2025

GREENSPOON MARDER LLP
Attorneys for Defendants-Appellants

Kory Ann Ferro
Kory Ann Ferro, Esq.
For the Firm

MARTHA MIQUEO, **Plaintiff-Respondent,** **v.** **300 SYLVAN AVE ASSOCIATES, LLC, PERSISTENCE AND SUCCESS, LLC and CARMEN GOENAGA,** **Defendants-Appellants.**	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **Docket No. A-003693-23** **Civil Action** **On Appeal From: Order from Superior Court of New Jersey Chancery Division, Bergen County Docket No. BER-C-000165-23** **Sat below:** **Hon. Edward A. Jerejian, P.J.Ch.** **Date of submission:** **March 13, 2025**

BRIEF OF PLAINTIFF-RESPONDENT MARTHA MIQUEO

BOCCHI LAW LLC
8 Hillside Avenue, Suite 208
Montclair, NJ 07042
T:(862) 213-0509
abocchi@bocchilaw.com
Attorneys for Plaintiff-Respondent, Marth Miqueo

Of Counsel and On the Brief:
Anthony S. Bocchi, Esq. (Atty ID #005602006)
Jennifer L. Bocchi, Esq. (Atty ID #014002003)

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PRELIMINARY STATEMENT

The motion court properly compelled arbitration in this Chancery action, and its decision should be affirmed. At the heart of this appeal is a decade-long, consistent "rescue" plan that honored an uncle's unwavering intent to save for his niece, Plaintiff Martha Miqueo ("Plaintiff"), certain commercial property that was in risk of foreclosure due to financial troubles Plaintiff and her husband were having in carrying ownership of said property where they conducted their dental practice. Over the course of ten years, the parties entered into a series of agreements to further the rescue plan's purpose so Plaintiff and her husband would not lose the property.

To effectuate the contemplated rescue plan, Plaintiff's uncle, Bernardo Goenaga ("Uncle Bernardo"), and his daughter, Defendant Carmen Goenaga ("Carmen"), formed Defendant Persistence & Success, LLC ("P&S") that would ultimately purchase the property and hold legal title until Plaintiff and her husband could repay the loans and advances Uncle Bernardo made to Plaintiff as part of the deal, at which point, title would transfer to Plaintiff. In the interim, Uncle Bernardo and Carmen entrusted Plaintiff as manager of the property and the companies holding title to it. Plaintiff remained an equitable owner over the ten year course of this rescue plan until she was able to secure financing to pay

back her uncle and repurchase the property.

Unfortunately, Uncle Bernardo passed away before that rescue plan came to completion. Upon his demise, the rescue plan was unexpectedly disrupted by Carmen's post-death opportunism as the now sole member of P&S. Even though at the time of Uncle Bernardo's death Plaintiff had secured funding to repurchase the Property and made attempts to engage Carmen to transfer legal title of the Property from P&S to her in accordance with the rescue plan, Carmen refused to honor her late father's intent. Lawsuits ensued.

Plaintiff filed claims against Defendants in Chancery court pursuant to a 2022 Addendum (the last agreement made in furtherance of the rescue plan) regarding her equitable ownership of the property, and Defendants filed claims against Plaintiff in the Law Division alleging she mismanaged the property. Defendants also counterclaim in the Chancery matter alleging Plaintiff cannot purchase the property because of her mismanagement and seek recission of the 2022 Addendum.

The parties agreed to mediate the Law Division matter, and Plaintiff then filed a Motion to Compel Arbitration in the Chancery matter, which was granted. Defendants now appeal contending that no valid arbitration agreement exists, and even if it did, Plaintiff's ownership claims fall outside the scope of the

arbitration provisions, and Plaintiff waived her right to arbitration. The motion court properly rejected these arguments.

As correctly found below and as more fully argued herein, the parties mutually agreed to a valid and enforceable arbitration agreement within a Memorandum of Understanding ("MOU") executed in 2012 that was the start of Uncle Bernardo's "rescue" plan to save the property for Plaintiff. Within 90 days of the MOU, operating agreements (that also contained arbitration agreements) were executed to carry out the rescue plan. The motion court correctly found that the original arbitration agreement within the MOU was valid, and the parties intended for it to be included in the 2022 Addendum that was executed ten years later in furtherance of the rescue plan. The motion court also rightly found that the language of the arbitration provisions within the agreements are expansive enough to include Plaintiff's equitable ownership claims. Furthermore, the motion court appropriately rejected Defendants' claim that Plaintiff waived her right to arbitrate. As more fully discussed below, the trial court's Cole analysis reached the correct conclusion that the totality of the circumstances weigh in favor of arbitration, not waiver. Therefore, this Court should affirm the motion court's decision to compel arbitration in the Chancery Action and that it be arbitrated with the Law Division matter given the strong similarities between the two cases.

PROCEDURAL HISTORY

On August 22, 2023, Plaintiff Martha Miqueo filed a Verified Complaint (Da3-23) and proposed Order to Show Cause with Temporary Restraints (Da24-28) against 300 Sylvan Ave. Associates, LLC ("300 Sylvan Associates"), Persistence & Success, LLC ("P&S") (collectively, "the Companies"), and Carmen Goenaga (collectively, "Defendants") in the Superior Court of New Jersey, Bergen County, Chancery Division, bearing docket number BER-C-000165-23 ("Chancery Action"). The Chancery Complaint sought specific performance of a written agreement to transfer title from P&S to Plaintiff for the building and property located at 300 Sylvan Avenue, Englewood Cliffs, New Jersey ("the Property") as the remedy for her breach of contract claims asserted against Defendants. (Da3).

On August 22, 2023, P&S, 300 Sylvan Associates, and the Estate of Bernardo Goenaga by and through its Executors Carmen J. Goenaga and Jackeline Goenaga a/k/a Jakeline Goenaga-Torres, filed a Verified Complaint against Martha Miqueo-Elian, Nicolas Elian, Vizstara, LLC, and Vizstara Professional, LLC, in the Superior Court of New Jersey, Bergen County, Law Division, bearing docket number BER-L-004471-23 ("Law Division Action"). (Da75-103). The Law Division Action alleges claims of breach of contract,

breach of covenant of good faith and fair dealing, breach of fiduciary duty, breach of statutory duty of loyalty and care, negligence, gross negligence, fraud, unjust enrichment, conversion, violation of Civil Racketeering Influenced and Corrupt Organizations Act, and civil conspiracy that all arise out of Plaintiff Miqueo's role as Manager of the Property. (Da75-103).

On August 28, 2023, the Chancery court entered an Order to Show Cause with Temporary Restraints, enjoining Defendants from engaging in any acts outside of the ordinary course of operation and business which could affect the ownership or value of the building and property located at the Property. (Da104-108).

On September 8, 2023, Defendants filed an expedited Motion on short notice to dissolve or modify the restraints, as well as an Order to Show Cause to disqualify Plaintiff's counsel. (Da110-12; 1T41:19-23; 1T42:24-25; 1T45:9).

Defendants ultimately withdrew their Motion to disqualify Plaintiff's counsel in the chancery matter, and on October 5, 2023, new counsel substituted in for Plaintiff. (Da218).

On October 19, 2023, Defendants filed their Answer to the Chancery Complaint, with Counterclaims. (Da220-48).

On October 23, 2023, the Chancery court entered an Order for the parties to attend mediation and scheduled trial for August 6, 2024. (Da219).

Thereafter, the parties mediated in December 2023 with the Honorable Harriet Derman, J.S.C. (Ret.), but mediation was unsuccessful. (T45:5-10; Da263-64; 1T45:5-10).

In January 2024, Plaintiff filed her Answer to Defendants' Counterclaims. (Da265-74; 1T45:11-12).

On January 19, 2024, Plaintiff filed a Motion to Consolidate the Chancery Action with the Law Division Action, which was ultimately denied on March 8, 2024. (Da275-77, Da299-300; 1T45:13).

On March 8, 2024, the parties began to engage in discovery in the Chancery Action. (1T12:17-18).

On April 10, 2024, Plaintiff filed a Motion to Compel Arbitration in the Law Division Action (Da301-03) however that application was eventually withdrawn, as the parties agreed to mediate, which was memorialized in Consent Orders dated May 28, 2024, and July 30, 2024. (Da332-33; 1T43:11-13).

On May 17, 2024, Plaintiff filed the Motion to Compel Arbitration in the Chancery Action that is the subject of this appeal. (Da304-06).

On June 25, 2024, the Chancery trial court entered an Order compelling Arbitration. (Da1).

On July 16, 2024, the Chancery trial court entered an Amended Order compelling arbitration. (Da2).

On July 26, 2024, Defendants filed a Notice of Appeal of the trial court's Order entered on June 25, 2024, and Amended Order entered on July 16, 2024.

At the time the June 25, 2024, and July 26, 2024, Orders were entered, dispositive motions had not been in the Chancery Action. (1T40:23-41:2; 1T35:20).

At the time the June 25, 2024, and July 26, 2024, Orders were entered, discovery in the Chancery Action was not nearly complete, including depositions and expert discovery, which still need to be conducted. (1T42:10-11).

In the fall of 2024, the parties engaged in settlement negotiations, but reached a stalemate.

On December 20 and 23, 2024, while this appeal was pending, Defendants filed two separate motions before the Law and Chancery and Divisions, respectively - one seeking to vacate the May 28, 2024, and July 31, 2024, Consent Orders and reinstate the Law Division Action (Pa008), and the other to vacate the

July 16, 2024, Order compelling arbitration and reinstate the Chancery Action. (Pa086).

On December 23, 2024, Plaintiff retained new counsel, and the law firm of Bocchi Law LLC substituted in as counsel for Plaintiff. (Pa108).

On January 17, 2024, the Honorable Kevin P. Kelly, J.S.C. adjourned Defendants' Motions to Vacate and Reinstate, and entered an Order directing the parties to schedule a conference call with Arbitrator, Honorable Karen M. Cassidy, A.J.S.C. (Ret.). (Pa122a).

On January 28, 2025, the parties held a telephone conference with Judge Cassidy, and arbitration was scheduled for May 5, 2025.

On February 13, 2025, Defendants withdrew their Motions to Vacate and Reinstate.

Despite this pending appeal *filed by Defendants almost 8 months ago* on the issue of whether arbitration was properly compelled in the Chancery Action, on February 25, 2025, Defendants filed a Motion to Stay Arbitration in the Chancery Action and proceed with arbitrating only the claims in the Law Division Action. (Pa109). Plaintiff submitted opposition, and the Motion to Stay is returnable March 14, 2025.

On March 6, 2025, a conference was held between Judge Cassidy and counsel.

Judge Cassidy directed that at this time, arbitration is limited solely to the Law Division matter pending the outcome of Defendants' Motion to Stay and this appeal.

STATEMENT OF FACTS

Plaintiff Martha Miqueo and her husband, Nicolas Elian, are dentists. (Da307, ¶2). In 2004, they, together with two other dentists, formed 300 Sylvan Avenue, LLC ("300 LLC") to acquire property located at 300 Sylvan Avenue, Englewood Cliffs, New Jersey ("the Property"). (Da307, ¶3). Martha and Nicolas then formed Vizstara, LLC, a prosthodontic/implant and pediatric dental/ orthodontic practice, and Vizstara Professional LLC, an entity that educates dentists on implantology (collectively "Vizstara"). (Da307, ¶5).

In 2008, Vizstara commenced operations at the Property. (Da307, ¶5). Martha and Nicolas managed the Property from 2004 through 2011. (Da307, ¶4). 300 LLC and Vizstara experienced financial difficulties. (Da8-9, ¶¶40-43). 300 LLC defaulted on the mortgage encumbering the Property, resulting in the appointment of a rent receiver and causing each of 300 Sylvan and Vizstara to file for bankruptcy. (Da9, ¶¶43-46). On December 22, 2010, Vizstara filed for Chapter 11 bankruptcy; and 300 LLC did the same on November 22, 2011. (Da9-10, ¶44, ¶46). While the bankruptcy proceedings were pending, Martha became the sole owner of Vizstara. (Da307, ¶5).

At the suggestion of her father, Martha contacted Bernardo for financial assistance. (Da10-11, ¶51; Da79, ¶22). On May 14, 2012, Bernardo and the Elians

signed the MOU wherein Bernardo agreed to loan monies to the Elians to prevent them from losing ownership of the Property. (Da308). The Elians and Bernardo utilized counsel to prepare the MOU. (Da308, ¶6). Paragraph 1 of the MOU, "Expression of Intent", states in pertinent part:

> This Memorandum is an expression of the interest and intent of the Parties which will form the basis of one of more formal agreements between the Parties which may be necessary, proper or advisable until the [Elians] secure bank financing for the acquisition of ... the Property .... (Emphasis added).

(Da311).

Bernardo agreed to advance $2,386,250 over and above a prior advance of $1,000,000. (Da311-12, ¶1A and B). The new funding would enable the Elians to "acquire ... the Property, obtain approval of the reorganization plan of [Vizstara], [obtain] working capital for [Vizstara], and [pay] legal fees." (Da311-12, ¶1B). Lastly, Paragraph 4 of the MOU states in pertinent part:

> Any dispute arising out of or relating to this [MOU] shall be resolved by an arbitrator appointed according to the arbitration rules of the American Arbitration Association.

(Da313, ¶4).

By correspondence dated May 14, 2012, Bernardo reaffirmed the MOU's goals. (Da316).

On June 1, 2012, Bernardo formed P&S to purchase the Property for Martha's benefit "so that it [would] not [be] lost as part of the bankruptcy and

foreclosure". (Da79, ¶22). On or about June 29, 2012, 300 Sylvan Avenue Associates, LLC ("300 Sylvan Associates"), an entity formed by third-parties, acquired the Property from 300 LLC through a sale approved by the Bankruptcy Court. (Da79, ¶¶20-22). On or about August 29, 2012, 300 Sylvan Associates' members transferred their ownership interests to P&S for $4.95 million. (Da80, ¶26). As a result, P&S is the sole member of 300 Sylvan Associates and holds the title to the Property. (Da77, ¶¶3-4).

P&S's members, Bernardo and his daughter, Carmen, signed the P&S Operating Agreement which appointed Martha as its Manager[1]. (Da123, Art. I, subsection (o)). The Goenagas and the Elians utilized counsel to prepare that agreement. (Da318-20).

The P&S Operating Agreement acknowledges that the Manager is a "party" thereto and entitled to resolve any disputes in arbitration. (Da132-133). Articles 10.1, 10.6 and 10.8 state in pertinent part:

> 10.1 Arbitration. Any dispute arising with respect to this Operating Agreement, or the making or validity thereof, or its interpretation, or any breach thereof, shall be determined and settled by arbitration in Bergen County, New Jersey, pursuant to the rules then pertaining to the American Arbitration Association....

[1] The Manager's rights, powers and obligations are more particularly set forth in Article IV of the P&S Operating Agreement. (Da125-126).

***

> 10.6 Additional Remedies. The rights and remedies of any Member or Manager hereunder shall not be mutually exclusive .
>
> ... [N]othing herein contained is intended to, nor shall it limit or affect, any other rights in equity or any rights at law or by statute or otherwise of any party aggrieved as against the other for breach or threatened breach of any provision hereof, it being the intention of this Section ... to make clear the agreement of the parties hereto that their respective rights and obligations hereunder shall be enforceable in equity as well as at law or otherwise.
>
> ***
>
> 10.8 Entire Agreement. This Operating Agreement constitutes the entire agreement among the parties hereto regarding the operations of the LLC....

(Da132-133).

On August 29, 2012, Martha, as P&S's Manager, signed the Amended and Restated Operating Agreement for 300 Sylvan Associates (the "300 Sylvan Associates Operating Agreement"). (Da137-152). The 300 Sylvan Associates Operating Agreement names Martha as Manager; mirrors the P&S Operating Agreement; and includes an identical arbitration provision. (Da140, Da149; Da123, Da132).

Bernardo agreed that P&S would hold title to the Property as security until Martha could repay his loans. (Da12, ¶¶61-63). Until that occurred, Bernardo

understood and agreed that Martha was the equitable owner of the Property. (Id.). From 2016 through 2022, Martha and Bernardo worked to finalize a loan repayment agreement. (Da13-15, ¶¶68-85). On May 21, 2022, Bernardo and Martha signed an agreement wherein she would pay loans totaling $6 Million and Bernardo would transfer to her title to the Property. (Da44-45). Unfortunately, Bernardo died on June 20, 2022. (Da77, ¶5).

Carmen, the sole remaining member of Defendant P&S and 300 Sylvan Associates and co-executrix of Bernardo's Estate, refused to complete the transaction. (Da16, ¶¶88-90; Da77, ¶6). One year later, on May 23, 2023, Carmen amended both the P&S Operating Agreement and the 300 Sylvan Associates Operating Agreement to delete the arbitration provisions. (Da143, Article 4.6 (viii); Da159, Article 4.6 (viii)).

On August 23, 2023, Martha filed this Chancery Action, seeking, *inter alia*, to compel defendants 300 Sylvan Associates, P&S, and Carmen to specific performance of the May 21, 2022 agreement. (Da3). Later that same day, P&S, 300 Sylvan Associates and Bernardo's Estate filed an action in the Law Division captioned: Persistence & Success, LLC et al. v. Martha Miqueo-Elian et al., BER-L-4471-23 (the "Law Division Action") claiming, among other things, that Martha breached the Operating Agreements and that the Elians failed to satisfy the MOU

loans. (Da86-101, ¶¶63-138). The Law Division Action addresses the same matters involved in the Chancery Action and is the same in all substantial respects as the counterclaim filed in the Chancery Action. (Da3-23; Da75-103). In fact, Defendants in the Chancery Action, who are the Plaintiffs in the Law Division Action, concede that the two cases are related and involve common questions of law and fact. In an August 23, 2023, letter to the trial court, defendants P&S, 300 Sylvan Associates, and Carmen make reference to their Law Division complaint to refute Plaintiff Miqueo's claim that she is the equitable owner of the Property. (Pa001).

On October 19, 2023, the Defendants in this action (P&S, 300 Sylvan Associates and Carmen) filed a Verified Counterclaim, asserting that Martha had breached the Operating Agreements through mismanagement. (Da220-48). A substantial portion of the allegations in that Counterclaim mirror the allegations in Complaint that P&S, 300 Sylvan Associates and Bernardo's Estate filed in the Law Division Action. (Da79-80, ¶¶23-32 and Da238-39, ¶9-17). That Counterclaim also asserts that the May 21, 2022 agreement should be rescinded because Martha, as Manager of P&S and 300 Sylvan Associates, misrepresented that she had been: (a) "properly and appropriately managing the Property"; and (b) "paying down Bernardo's loans with her own funds. (Da243, ¶40; Da244, ¶44; and Da245, ¶50).

On April 10, 2024, Martha, Nicolas and Vizstara, the Defendants in the Law Division Action, filed a motion to compel P&S, 300 Sylvan Associates and the Bernardo's Estate to arbitrate all disputes in accordance with the MOU and the Operating Agreements. (Da301-03). P&S, 300 Sylvan Associates and Bernardo's Estate did not oppose the motion and, instead, signed a consent order agreeing to arbitrate the Law Division Action claims. (Da332-33).

On May 17, 2024, Plaintiff filed a Motion to Compel Arbitration in the Chancery Action. (Da304-06). The trial properly granted Plaintiff's Motion to Compel Arbitration and found that the Chancery Action and Law Division Action should be arbitrated together. (Da1-2; 1T43:2-7; 1T49:5-16; 1T20:4-9; 1T40:4-11; 1T44:12-13; 1T48:17-21; 1T49:5-9; 1T49:20-22).

LEGAL ARGUMENT

POINT I

THE MOTION COURT'S DECISION TO COMPEL ARBITRATION SHOULD BE AFFIRMED BECAUSE IT CORRECTLY FOUND THAT A VALID ARBITRATION AGREEMENT EXISTS WITHIN THE MOU, AND THE PARTIES INTENDED IT TO BE A PART OF THE 2022 ADDENDUM. (1T43:2-7; 1T49:5-16)

A. Standard of Review

The standard of review on appeal of a court's order compelling arbitration is *de novo*. Knight v. Vivant Solar Developer, LLC, 465 N.J. Super. 416, 425 (App. Div. 2020)(citing Goffe v. Foulke Management Corporation, 238 N.J. 191 (2019)). As observed by this Court, "[i]n reviewing such orders,..[the appellate court is] mindful of the strong preference to enforce arbitration agreements, both at the state and federal level." Knight, supra, 465 N.J. Super. at 425 (quoting Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013)). An appellate court will conduct a plenary review of the legal question of whether an arbitration agreement is valid. Perez v. Sky Zone, LLC, 472 N.J. Super. 240, 247 (App. Div. 2022)(citing Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 445-46 (2014) (citing Kieffer v. Best Buy, 205 N.J. 213, 222-23 (2011)); Barr v. Bishop Rosen & Co., Inc., 442 N.J. Super. 599, 605 (App. Div. 2015)(citing Hirsch, supra, 215 N.J. at 186).

"In determining whether a matter should be submitted to arbitration, a court must evaluate (1) whether a valid agreement to arbitrate exists, and (2) whether the dispute falls within the scope of the agreement." Knight, supra, 465 N.J. Super. at 248 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985); Martindale v. Sandvik, Inc., 173 N.J. 76, 92 (2002)). As set forth below, the motion court correctly found that both prongs of this test have been met, and therefore this Chancery matter should be submitted to arbitration with Defendants' Law Division matter.

"New Jersey has a long-standing policy favoring arbitration as a means of dispute resolution." Santana v. Smile Direct Club, LLC, 475 N.J. Super. 279, 285 (App. Div. 2023); see also Martindale, supra, 173 N.J. at 92 (acknowledging "the affirmative policy of this State, both legislative and judicial, favors arbitration as a mechanism for resolving disputes"); (T49:15-16). New Jersey "jurisprudence has recognized arbitration as a favored method of resolving disputes." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 131 (2001). Thus, appellate courts, in reviewing orders compelling or denying arbitration, are "mindful of the strong preference to enforce arbitration agreements…." Hirsch, 215 N.J. at 186.

In keeping those principles in mind, and for the reasons set forth below, the trial court's June 25, 2024, and July 14, 2024, Orders compelling arbitration should be affirmed.

B. A Valid Agreement to Arbitrate Exists Within in the 2012 MOU. (1T43:2-7; 1T49:5-16)

The motion court correctly found that the parties should be compelled to arbitrate pursuant to the enforceable arbitration agreement within the MOU. (1T43:2-7; 1T49:5-16). To be enforceable, "[a]n arbitration agreement must be the result of the parties' mutual assent, according to customary principles of state contract law." Skuse v. Pfizer, Inc., 244 N.J. 30, 48 (2020)(citing Atalese, supra, 219 N.J. at 442). Thus, "there must be a meeting of the minds for an agreement to exist before enforcement is considered." Skuse, supra, 244 N.J. at 48 (citing Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 319 (2019)).

Defendants take the misguided position that the only document relevant to whether arbitration should be compelled is the 2022 Addendum, which, admittedly, does not have any arbitration terms, and therefore, according to Defendants, no arbitration agreement even exists. However, Defendants' narrow framing of the issue is incorrect, as the 2022 Addendum is not a standalone contract tied only to the unexecuted 2017 Agreement. Defendants cannot isolate

the 2022 Addendum from its transactional history. The record supports a finding that the 2022 Addendum was unquestionably a continuation of the MOU's rescue plan (Da310-14; 1T49:5-9) and the Operating Agreements' structure (Da120-36, Da137-52).

As properly found by the lower court, the 2022 Addendum is rooted in the 2012 MOU and the subsequent Operating Agreements of P&S and 300 Sylvan Associates that were executed within 90 days thereafter. (1T49:5-9). The arbitration provision of the MOU states as follows:

> 4. Governing Law. This Memorandum shall be construed and governed in accordance with the laws of the State of New Jersey. Any dispute arising out of or relating to this Memorandum shall be resolved by an arbitrator appointed according to the arbitration rules of the American Arbitration Association.

(Da313).

The motion court correctly concluded that the parties intended for this arbitration provision to be included in the 2022 Addendum. It also properly found that these sophisticated, commercial parties had a meeting of the minds with regard to the arbitration agreement, thereby rendering Atalese, supra, inapplicable. (1T47:19-T48:6). They knew they were entering into agreements that contained arbitration provisions. (1T47:8-11). "Mutual assent requires that

the parties have an understanding of the terms to which they have agreed." Atalese, 219 N.J. at 442.

Defendants' reliance on Atalese is misplaced. In Atalese, the Court examined an arbitration clause in a consumer context. Atalese, supra, 219 N.J. at 435. In that case, plaintiff was an individual consumer who contracted with the defendant for debt-adjustment services. Ibid. The subject contract contained an arbitration provision to resolve any dispute between the parties, however the terms failed to mention that plaintiff waived her right to seek relief in court. Id. The defendant had moved to compel arbitration, which the trial court granted. Id. On appeal, the lower court's decision was affirmed, finding that "the lack of express reference to a waiver of the right to sue in court" did not preclude enforcement of the arbitration clause. Id. The Supreme Court reversed, holding that "the absence of *any* language in the arbitration provision that plaintiff was waiving her statutory right to seek relief in a court of law renders the provision unenforceable." Id. at 436.

The Atalese Court first looked to usual contract principles concerning the requirement of mutual assent and a meeting of the minds. Id. at 442. The Court made an important observation that "…an average member of the public may not know—without some explanatory comment—that arbitration is a substitute

for the right to have one's claim adjudicated in a court of law." Id. The Court emphasized that there is "…no prescribed set of words must be included in an arbitration clause to accomplish a waiver of rights. Whatever words compose an arbitration agreement, they must be clear and unambiguous that a consumer is choosing to arbitrate disputes rather than have them resolved in a court of law. In this way, the agreement will assure reasonable notice to the consumer." Id. at 447. The Court found that the wording of the parties' agreement did not clearly and unambiguously notify plaintiff that she was abandoning her right to pursue her statutory claims in court. Id. As a result, the arbitration agreement was found unenforceable. Id.

The critical distinguishing factor between Atalese and this case is that we are not dealing with the average consumer. As correctly pointed out by the motion court, the agreements made here took place in a commercial setting with commercial parties. (1T47:8-13). Unlike the Atalese plaintiff, the parties in this case were experienced in commercial transactions, and the language of the arbitration provision in the 2012 MOU was sufficiently clear to signal to them that they were waiving their judicial rights. Accordingly, the motion court's rejection of Atalese in this context was correct. (1T47:8-18; 1T13:24-2).

Thus, not only does an arbitration agreement exist within the 2012 MOU, these commercial parties had an understanding of the terms to which they agreed. The parties' intent to engage in this rescue plan and arbitrate any claims arising out of it began with the MOU, and continued with each and every agreement that was made after it. (1T49:5-9). Therefore, the motion court's ruling was correct and should be affirmed.

C. Plaintiff's Equitable Ownership Claims Fall Within the Scope of the Arbitration Provisions within the MOU and the Operating Agreements. (1T43:2-6)

The 2012 MOU and the Operating Agreements contain clear and broad arbitration provisions that encompass this dispute. (1T43:2-6). The language of the MOU's clause ("any dispute arising out of, or relating to," Da313) and the Operating Agreements' clause ("with respect to," Da132, 149) are expansive enough to cover this Chancery dispute, which revolves around the equitable ownership and right to purchase the Property—issues tied to the original intent and subsequent agreements stemming from the MOU, including the Operating Agreements that designate Plaintiff as Manager of the Companies. (1T49:12-14).

Regarding the scope of the subject arbitration provisions, "[c]ourts have generally read the terms 'arising out of' or 'relating to' [in] a contract as indicative of an 'extremely broad' agreement to arbitrate any dispute relating in any way to the contract." Curtis v. Cellco Partnership, 413 N.J. Super. 26, 37-

38 (App. Div 2010)(quoting Griffin v. Burlington Volkswagen, Inc., 411 N.J. Super. 515, 518 (App. Div. 2010)(quoting Angrisani v. Financial Tech. Ventures, L.P., 40 N.J. Super. 138, 149 (App. Div. 2008)). "Such broad clauses have been construed to require arbitration of any dispute between the contracting parties that is connected in any way with their contract." Ibid. The arbitration provisions in the MOU and Operating Agreements both contain extremely broad clauses that can be construed to require arbitration of Plaintiff's ownership claims.

Specifically, the MOU states that "any dispute arising out of or relating to [the MOU] shall be resolved by an arbitrator appointed to the arbitration rules of the American Arbitration Association." (Da313). Thus, the claims concerning: the rescue plan; the payment of Bernardo's loans; Plaintiff's right to obtain legal title to the Property; or the rescission counterclaim, are arbitrable disputes because they arise out of or relate to the MOU's goals. As argued above, the MOU contemplates the execution of the Operating Agreements – "one or more formal agreements between the Parties which may be necessary, proper or advisable" to rescue the Property – thereby bringing disputes concerning breaches of those instruments within the ambit of the MOU arbitration provision. (Da311).

Similarly, these claims are arbitrable under the Operating Agreements. Both Operating Agreements include an arbitration provision, which the motion court

found makes clear how disputes are to be resolved (1T49:10-11). The arbitration provision states as follows:

> Arbitration. Any dispute arising with respect to this Operating Agreement, or the making or validity thereof, or its interpretation, or any breach thereof, shall be determined and settled by arbitration in Bergen County, New Jersey, pursuant to the rules then pertaining to the American Arbitration Association. Any award rendered shall be final and conclusive upon the parties and a judgment thereon may be entered in any court having jurisdiction.

(Da132).

The Operating Agreements require the arbitration of "any dispute arising with respect to [either] Operating Agreement, or the making or validity thereof, or its interpretation, or any breach thereof." (Da132, 149). Given that the Operating Agreements are the necessary, proper and advisable agreements contemplated by the MOU, the claims asserted in the Chancery Action are arbitrable under the identical arbitration provision in each of those instruments. Moreover, Carmen is bound by the arbitration provisions in the Operating Agreements because she is a member of P&S. See Meade v. Cardinale & Jackson Crossing Assoc., LLC, Docket No. A-3358, 2013 WL 362761, at 3-6 (App. Div. Jan. 31, 2013) (affirming trial court's order compelling members of LLC to arbitrate claims), and a representative of Uncle Bernardo's Estate.

Furthermore, Defendants assert counterclaims against Plaintiff seeking recission of the 2022 Addendum upon which Plaintiff relies in support of her equitable ownership claims. The relief Defendants seek on their counterclaims is based on the fraudulent and negligent misrepresentations allegedly made by Plaintiff in her capacity as Manager of the Property. (Da237-245). In essence, Defendants are alleging that Plaintiff cannot purchase the Property because she mismanaged it. Ibid. Thus, these two lawsuits are interrelated. Also, Defendants' focus on management in arguing that Plaintiff's chancery claims fall outside the ambit of the Operating Agreements ignores P&S's role in holding title for Plaintiff's benefit, a dispute well within the clauses' scope under those instruments. (1T49:16).

Accordingly, the arbitration provisions within the MOU and the Operating Agreements unquestionably include this dispute. "Because of the favored status afforded to arbitration, 'an agreement to arbitrate should be read liberally in favor of arbitration.'" Griffin, supra, 411 N.J. Super. at 518 (quoting Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 132 (2001) (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)). Courts apply a "presumption of arbitrability" unless it is clear "that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Curtis, supra, 413 N.J. Super. at 34 (citing Epix Holdings Corp. v. Marsh & McLennan Cos., 410 N.J. Super. 453, 471 (App. Div. 2009), *overruled in part on*

other grounds, (quoting Caldwell v. KFC Corp., 958 F. Supp. 962, 973 (D.N.J. 1997)). Here, the Defendants cannot rebut the presumption of arbitrability. The broad and expansive scope of the three governing provisions requires the parties in this action to resolve their disputes in arbitration. Therefore, the motion court's decision to compel arbitration should be affirmed.

D. The MOU Remains Operative. (1T49:8-9)

Of critical importance, the MOU was never abandoned or terminated. (1T49:8-9). The motion court correctly found that all of the agreements entered into by the parties after the MOU *stem from the MOU* (1T49:5-9), as those subsequent agreements furthered the original, broader intent of the parties with regard to the deal they made, thereby linking the 2022 Addendum to this decade-long rescue plan. The intent of the parties was for Bernardo to rescue the Property from foreclosure and bankruptcy by having P&S acquire and hold title to the Property until Plaintiff and her husband could secure financial assistance to repay the loans and advances made by Bernardo, at which point, legal title would then transfer to Plaintiff, and until that title transfer occurred, Plaintiff was entrusted by Defendants to manage the Companies and the Property in the interim. (Da308, ¶6; Da310-314).

Notably, Defendants' pleading in the Law Division matter admits that they "rescued" the Property from foreclosure and bankruptcy. (Da76). The fact

that the parties to both actions have used the term "rescue" to describe this transaction strongly implies that there was intent to save[2] the Property *for* Plaintiff, not for Defendants. There is no evidence of record that Plaintiff intended to abandon her desire to own the Property. In fact, it is quite the opposite - she became the Manager of the Companies and the Property (and exercised all attributes of ownership by handling leases, vacancies, income and expenses or cash flow (Da32, ¶16)) and sought to purchase the Property back from P&S on multiple occasions.[3] Thus, as evidenced by Plaintiff's conduct and all the agreements that came after the MOU, the terms of which relate to either Plaintiff's management of the Property or her ability to purchase it, the trial court properly found that Plaintiff and her Uncle Bernardo never intended to abandon this original rescue plan in the MOU. (1T49:7-9)

Nor was the MOU ever terminated. Paragraph five of the MOU states there are only two situations in which it would be terminated:

> 5. Term. Unless otherwise extended in writing by the Parties, this Memorandum shall terminate automatically and without any further action by the Parties upon the earlier

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[2] To rescue something is to save it. "Rescue." See *Merriam-Webster.com Thesaurus*, Merriam-Webster, https://www.merriam-webster.com/thesaurus/rescue. Accessed 13 Mar. 2025. If there was no intent to eventually put legal title back in Plaintiff's hands, there would no point in characterizing the deal as a "rescue" of the Property.

[3] Defendants admit that "[o]ver the years since P&S purchased the Property, Miqueo tried, on multiple occasions, to repurchase the Property, but was never successful." (Db6; Da240, ¶19).

> of (i) the execution of the Agreements or (ii) payment in full of the Bundled Loan.

It is undisputed that neither of these events occurred. "The execution of the Agreements" referenced in Paragraph 5 refers to the agreements required for Plaintiff to ensure that Bernardo could "obtain a second mortgage on the Property in the amount of the Bundled Loan…including without limitation one or more promissory notes in the amount of the Bundled Loan secured by the Property." (Da31, Par. D). Defendants admit that neither of these requirements for termination of the MOU have occurred, as they acknowledge that "Miqueo never provided proof of financing for her purchase of the Property from Capstone, never provided Bernardo with a second mortgage on the Property, never made any of the payments contemplated by the abandoned MOU, and did not pay off the bundled loan with interest by June 1, 2014." (Db5-6; Da36-40).[4]

While Defendants contend the parties abandoned the MOU within days of its execution due to "a change of plans" wherein P&S was formed to purchase the Property (Db5-6, Db20), the record does not support a finding of abandonment. To the contrary, the MOU contemplated the execution of the

[4] Defendants have not filed a lawsuit against Plaintiff for not repaying the loans years ago, which demonstrates that the MOU is still in effect.

subsequent Operating Agreements of P&S and 300 Sylvan Associates by its express terms, which state as follows:

> 1. Expression of Intent. This Memorandum is an expression of the interest and intent of the Parties **which will form the basis of one or more formal agreements between the Parties which may be necessary, proper or advisable** until the Debtors secure bank financing for the acquisition of the current mortgage on the Property or the Property and the Debtors and Creditor are fully able to execute and deliver a second mortgage agreement between the Parties relating to such Property.

(Da311).

In accordance with this language, on July 30, 2012, P&S was formed out of necessity by Bernardo and Carmen via an Operating Agreement *for the specific purpose of purchasing 300 LLC, and thereby its interest in the Property, in order to carry out the intent of the parties under the MOU*. (Da79, ¶22). P&S then became the sole member of 300 Sylvan Associates, which owns the commercial office building located on the Property. (Da115-16, 138-52). Pursuant to the Operating Agreements of P&S and 300 Sylvan Associates, Plaintiff was named Manager of the Companies. (Da125, 142). The motion court correctly rejected Defendants' contention that the Operating Agreements are unrelated to the MOU and found that the Operating Agreements were part and parcel of Bernardo's promise to save the property for his niece, Plaintiff. (1T49:5-9).

Indeed, Defendants' pleading admits that Plaintiff's intent was to seek "…assistance from her "uncle" Bernardo to purchase the Property *so that it was not lost as part of the bankruptcy and foreclosure*." (Ibid. (Emphasis added); Db4-5). When Bernardo agreed to help her, the MOU was executed. (Db4-5). The events that transpired after the execution of the MOU, i.e. the execution of the Operating Agreements, the unexecuted 2017 Agreement[5], and the 2022 Addendum, are all entirely consistent with the intent of the MOU. In fact, Defendants' acquiescence in ongoing negotiations between the parties over the years estops them from claiming termination of the MOU. Thus, Defendants' abandonment theory lacks evidence of mutual intent. The parties' decade-long efforts to secure financing (1T9:6-8; Da62-68, Da286-88) show the MOU persisted. (1T49:9).

Paragraph 2 of the MOU further contemplates the execution of subsequent agreements by stating, in pertinent part, as follows:

> 2. Best Efforts and Expenses. The Parties will use their best efforts to take all other actions, and to do, or cause to be done,

[5] The unexecuted 2017 Agreement was a continuation of the parties' discussion of what was contemplated by the MOU, i.e. that Bernado was going to save this property for his niece. (1T25:21-24). The 2017 Agreement was not executed because Bernardo decided he preferred a lump sum payoff rather than wait 25 years for repayment, as was provided in the unsigned 2017 Agreement. (Da38). He also did not want to have any further liability with regard to the Property and, thus, was not interested in acting as a guarantor for any loan Plaintiff obtained. Ibid. It was still intended that Plaintiff take back legal title to the Property, in furtherance of the MOU, as evidenced by the subsequently executed 2022 Addendum. (Da44-45).

> all other things necessary, proper or advisable to carry out their obligations under this Memorandum and to achieve the objectives of this Memorandum.

(Da311).

Thus, the Operating Agreements[6], the unexecuted 2017 Agreement, and the 2022 Addendum were all a continuation of the parties' best efforts to achieve the broader objectives of the MOU, which was that Bernardo would rescue the property until Plaintiff secured financing to repurchase it.

In sum, the Chancery dispute is not an isolated issue, but part of a continuous transaction originating with the 2012 MOU aimed at rescuing the Property from foreclosure and bankruptcy. The Operating Agreements are extensions of this rescue plan, as evidenced by their execution within 90 days of the MOU (Da311; Da121; Da138), as well as the 2022 Addendum and the ongoing debtor-creditor relationship. The intent of Uncle Bernardo was to hold title until Plaintiff could repurchase the Property upon repayment of his loans and advances, a purpose reflected across all agreements. Therefore, the motion court was correct in finding that the MOU was never terminated or abandoned.

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[6] Defendants misinterpret the "Entire Agreement" provision contained in Paragraph 10.8 of the Operating Agreements to mean that they supplant or replace the MOU. (Da133; Db21). Rather, said provision merely states that the parties cannot look to any other contracts or agreements regarding the structure of the LLC that was formed via the operating agreement. It does not eliminate the purpose of the MOU. (1T24:25-T25:3).

POINT II

PLAINTIFF DID NOT WAIVE HER RIGHT TO ARBITRATE HER CLAIMS. (1T41:16-48:7)

In viewing the totality of the circumstances, the motion court correctly concluded that Plaintiff did not waive her right to arbitration. (1T48:7). In assessing whether a party waived the right to arbitrate, a court must engage in a fact-sensitive analysis that focuses on whether the party's litigation conduct is "consistent with its reserved right to arbitrate the dispute." Cole v. Jersey City Medical Center, 215 N.J. 265, 280 (2013).

Importantly, waiver of the right to arbitrate is never presumed. Cole, supra, 215 N.J. Super. at 276. "An agreement to arbitrate a dispute 'can only be overcome by clear and convincing evidence that the party asserting it chose to seek relief in a different forum.'" Ibid. (quoting Spaeth v. Srinivasan, 403 N.J. Super. 508, 514 (App. Div. 2008)). Furthermore, a court should apply the same principles that govern the waiver of a right to arbitrate as waiver of any other right. Id. "For any waiver-of-rights provision to be effective, the party who gives up rights must 'have full knowledge of his legal rights and **intent** to surrender those rights.'" Skuse, supra, 244 N.J. at 48 (quoting Knorr v. Smeal, 178 N.J. 169, 177 (2003). (Emphasis added).

Our Supreme Court in Cole identified certain factors courts should consider when engaging in such an assessment, which include the following:

> (1) the delay in making the arbitration request;
>
> (2) the filing of any motions, particularly dispositive motions, and their outcomes;
>
> (3) whether the delay in seeking arbitration was part of the party's litigation strategy;
>
> (4) the extent of discovery conducted;
>
> (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration;
>
> (6) the proximity of the date on which the party sought arbitration to the date of trial; and
>
> (7) the resulting prejudice suffered by the other party, if any.

Cole, supra, 215 N.J. Super. at 280-81.

As recognized by our courts, "[n]o one factor is dispositive." Id. at 281; see also Marmo and Sons General Contracting, LLC v. Biagi Farms, LLC, 478 N.J. Super. 593, 607 (App. Div. 2024).

The motion court here correctly found that the Cole factors weigh in favor of arbitration.

For factors one, two, and three, the motion court found that given the course of events that occurred during the nine months since the inception of the

litigation, Plaintiff did not delay seeking arbitration, nor was it a part of Plaintiff's litigation strategy. (1T46:5-7). The motion court observed the various applications that were made from the onset: Plaintiff's Verified Complaint and proposed Order to Show Cause with Temporary Restraints were filed on August 22, 2023.[7] (Da3). In September 2023, Defendants filed a Motion to dissolve or modify the restraints, as well as an Order to Show Cause to disqualify Plaintiff's counsel. (Da110-12; 1T41:19-23; 1T42:24-25; 1T45:9). In October 2023, new counsel substituted in for Plaintiff. (Da218). Defendants then filed their Answer with Counterclaims on October 19, 2023. (Da220-48). Thereafter the parties agreed to mediate, which occurred in December 2023, but was unsuccessful. (1T45:5-10; Da263-64; 1T45:5-10). In January 2024, Plaintiff filed her Answer to Defendants' Counterclaims. (Da265-74; 1T45:11-12).

On January 19, 2024, Plaintiff filed a Motion to Consolidate the Chancery Action with Defendants' Law Division Action, which was ultimately denied on March 8, 2024. (Da275-77, Da299-300; 1T45:13). On April 10, 2024, Plaintiff filed a Motion to Compel Arbitration in the Law Division Action (Da301-03), however, that application was eventually withdrawn, as the parties had agreed to mediate, which was memorialized in a Consent Order dated May 28, 2024.

[7] The motion court noted that injunctions are standard pre-arbitration. (1T32:10-12).

(Da332-33; 1T43:11-13). On May 17, 2024, Plaintiff filed the Motion to Compel Arbitration that is the subject of this appeal. (Da304-06). Dispositive motions had not been filed. (1T40:23-41:2; 1T35:20). Accordingly, given the chain of events that occurred prior to Plaintiff's Motion to Compel, factors one, two, and three weigh in favor of arbitration.

For factor four, discovery did not commence until March 8, 2024, when Plaintiff's Motion to Consolidate was denied. (1T12:17-18). The motion court correctly noted that while some discovery had been done, there was still a substantial amount of work to be completed, which included depositions. (1T42:10-11). Factor four weighs in favor of arbitration.

For factor five, as argued by Plaintiff's counsel, Plaintiff's Rule 4:5-1 Certification was that "No other action or arbitration proceeding is ***presently*** contemplated," ((Da21) (Emphasis added); (1T13:14-16)), which was accurate at the time of that filing. Furthermore, the fact that Plaintiff did not assert arbitration as an affirmative defense does not prove her intent to waive her legal right to it. (Da265-74). Thus, factor five weighs in favor of arbitration.

For factor six, trial was scheduled to begin in August 2024, two months after the date on which oral argument was heard on Plaintiff's Motion to Compel. Although Defendants' counsel claimed they would be ready to proceed

to trial in two months, the trial court was rightfully skeptical of that statement given the amount of discovery that still needed to be completed, as well as dispositive motions, and therefore, factor six weighs in favor of arbitration. (1T41:4-6).

Lastly, for factor seven, proceeding with arbitration would not prejudice Defendants. Given the relationship between the parties and the interrelated nature of the claims that all arise out of the same deal made between Plaintiff and Uncle Bernardo, Defendants' claim of prejudice is tenuous and speculative. (1T13:20-23). In fact, compelling arbitration in the Chancery Action with the Law Division Action will serve to benefit all parties. As correctly observed by the motion court, there is an overlap between these two cases because "they have a lot to do with each other" and involve the same parties. (1T49:20-22; 1T40:4011). Another important observation by the motion court was that if these cases are not arbitrated together, the parties will be duplicating discovery. (1T48:24). The duplication of discovery can be time consuming and very costly to litigants. The motion court aptly noted that handling these cases separately will only cause problems in discovery. (1T50:21-22). Therefore, it behooves Defendants to want to arbitrate this Chancery Action with the Law Division Action, and any claim of prejudice is speculative. As such, factor seven weighs in favor of arbitration.

Based on the foregoing, the motion court properly found that Defendants' waiver argument fails the Cole test. Further, the evidence of record does not support a finding that Plaintiff intentionally waived her right to arbitrate.

Defendants' reliance on Marmo is misplaced. In Marmo, the court found that "significant discovery" had been completed and that the party seeking to compel arbitration had used the court system to its advantage before moving to arbitration. Marmo, 478 N.J. Super. 593, 610, 612 (App. Div. 2024). Whereas here, the motion court found that the discovery conducted thus far was limited, and that a substantial amount *remained to be completed*, including depositions. (1T42:10-11). The motion court here also found that given the totality of the circumstances concerning the various filings and negotiations that took place prior to Plaintiff's request to compel arbitration (Plaintiff's Order to Show Cause with Temporary Restraints, which the trial court viewed as commonplace before sending a case to arbitration (1T32:7-12); Defendants' motion to dissolve those restraints and disqualify Plaintiff's counsel; the parties' failed attempts at settlement, the filing of Defendants' counterclaims thereafter, Plaintiff's attempt at consolidation, etc.), there was no evidence that Plaintiff's delay was part of her litigation strategy. (1T46:5-7).

Marmo is also highly distinguishable because it did not involve two separate but highly related cases, as is the situation here. In our case, Plaintiff had initially moved to compel arbitration in the Law Division matter. (Da301). The parties ultimately consented to mediate, and Plaintiff's application was withdrawn. Then, Plaintiff sought to compel arbitration in the Chancery Action given the commonalities between the cases and the parties, that the parties had agreed to mediate the Law Division matter, and that an arbitration agreement existed in the Chancery Action. In fact, the motion court agreed it would "make no sense" to decide these two cases in separate forums. (1T44:12-13). The unique situation that is presented here was not present in Marmo, and that renders Marmo inapposite to this case.

Additionally, Defendants' reliance on Farese v. McGarry, 237 N.J. Super. 385 (App. Div. 1989) is likewise misplaced because in that case, waiver was found where the party asserted arbitration as a defense *just two weeks* before trial. Farese, 237 N.J. Super. at 394. Here, even though the parties were two months away from trial, the motion court was reasonably doubtful that trial would actually commence at that time given the substantial amount of discovery that remains to be completed.

Thus, the motion court was correct in rejecting Defendants' waiver argument.

POINT III

THE MOTION COURT CORRECTLY FOUND THAT BOTH CASES SHOULD BE ARBITRATED TOGETHER. (1T20:4-9; 1T40:4-11; 1T44:12-13; 1T48:17-21; 1T49:5-9; 1T49:20-22)

The motion court's decision to compel arbitration in the Chancery Action alongside the Law Division Action is further supported by the fact that the parties to both lawsuits are essentially the same, and they all played a role in the same rescue plan to save the Property. The parties are far from strangers. In fact, they are family members. For Defendants to argue that the parties are not the same and the claims between the two actions are completely different is disingenuous, at best.

Plaintiff Martha Miqueo (Plaintiff here and Defendant in the Law Division action) is the niece of the late Bernardo Goenaga, and thus the cousin of Carmen Goenaga. (Da77, ¶11). Carmen Goenaga (defendant here), is the daughter of Uncle Bernardo, and the Co-Executor of the Estate of Berardo Goenaga (plaintiff in the Law Division action). (Da77, ¶6; 1T20:16-19). Carmen is the owner of P&S and 300 Sylvan Associates (plaintiff in Law Division action), companies that were originally formed by her and her late father, Bernardo, in

2012. (Da115, 121-36). P&S is the sole member of 300 Sylvan Associates (plaintiff in Law Division action), which is the entity that owns the commercial office building located on the Property. (Da115-16, 138-52). Defendants entrusted Plaintiff Miqueo as manager of the Companies pursuant to the Companies' Operating Agreements (Da125, 142) until she and her husband, Nicolas Elian (Defendant in Law Division action) could obtain financial assistance to pay back Bernardo and ultimately regain legal tile to the Property. Importantly, Plaintiff executed the P&S Operating Agreement in her capacity as Manager. (Da37, ¶38). The motion court correctly noted that Bernardo "didn't just hire her [(Plaintiff)] as a CEO off the street." (1T31:3-4). Defendants agreed. (1T31:5). Also, Carmen's role as the Co-Executor of Bernardo's Estate and owner of the Companies ties her to both cases. Thus, Defendants' claim that the parties and claims between the two actions are separate and distinct was properly rejected by the motion court.

In addition to there being significant overlap between the parties, there is overlap with the claims as well. (1T20:4-9; 1T40:4-11; 1T44:14-18). They involve common questions of law or fact arising out of the same transaction or series of transactions concerning the ownership, operation, and control of Property. The Law Division Complaint addresses the same matters involved in

the Chancery Action and is the same in all substantial respects as the counterclaims Defendants filed in the Chancery Action. (Da75-103; Da220-48).

In the Chancery action, Plaintiff asserts that she is the equitable owner of the Property. (Da3-34). In the Law Division action and in counterclaims asserted in the Chancery action, Carmen alleges that Plaintiff does not have an equitable interest in the Property, mismanaged the Property, and misappropriated funds that belong to P&S. (Da75-103; Da220-48). Simply put, the legal determinations made in the Chancery Action will affect the issues raised in the Law Division Action. (1T51:10-16; 1T20:6-9). For example, if Plaintiff is found to be the equitable owner of the Property since 2012, then Carmen cannot claim that Plaintiff mismanaged the Property or misappropriated P&S assets.

Equally important, both actions will require the use of essentially the same documents, records, and fact witnesses. On the other hand, if these matters are arbitrated together, it will eliminate multiplicity of litigation. (1T48:24). Furthermore, arbitrating them in one forum will eliminate the possibility of inconsistent judgments and enable the arbitrator to determine at one time and place all matters in controversy between the parties. As correctly found by the motion court, it should not be done piecemeal. (1T48:17-21).

Indeed, Defendants concede that the two cases are related and involve common questions of law and fact. In an August 23, 2023, letter to the trial court, Defendants' counsel made reference to their Law Division Complaint to refute Plaintiff's claim that she is the equitable owner of the Property. (Pa001).

Moreover, the lower court's denial of Plaintiff's motion to consolidate does not preclude a finding that these cases should be handled in one forum. Defendants take the position that the trial court's denial of consolidation proves that the Law Division Action is completely separate from the Chancery Action (1T15:12-22), however, the motion judge disagreed and provided the following clarification:

> THE COURT: Not necessarily. I mean, I understand that argument and will give some weight to that, but on the other hand, you know, *we are not in the business of taking Law Division actions*.
>
> A lot of your counterclaims are, you know, very similar. And, you know, the question, is, am I taking everything or are we going to keep those separate?
>
> Now that [the Law Division action] goes to arbitration, so I don't necessarily put blinders on.
>
> So we are supposed to do discovery and have a trial on your counterclaims while you are doing discovery and having arbitration on her mismanagement or whatever it is over there? I mean, *it makes no sense*.

(1T15:23-16:12).

Thus, the motion court was of the correct opinion that simply because consolidation was denied earlier, it did not preclude a finding that these two cases should be arbitrated together in view of all the similarities and connections between them.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court affirm the Orders of the motion court compelling arbitration.

Respectfully submitted,

BOCCHI LAW LLC
Attorneys for Plaintiff-Respondent,
Martha Miqueo

By: *s/ Anthony S. Bocchi*
Anthony S. Bocchi

Dated: March 13, 2025

GreenspoonMarder LLP

Kory Ann Ferro, Senior Counsel
1037 Raymond Blvd., Suite 900
Newark, New Jersey 07102
Phone: 732.494.4800
Fax: 954.333.4222
Direct Phone: 732.456.8746
Direct Fax: 732.957.2314
Email: koryann.ferro@gmlaw.com

March 20, 2025

Via eCourts
Superior Court of New Jersey
Appellate Division
25 Market Street
Trenton, New Jersey 08611

Re: Martha Miqueo v. 300 Sylvan Ave Associates, LLC et al.
App. Div. No. A-003693-23
On Appeal from Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. BER-C-000165-23
Sat Below: Hon. Edward A. Jerejian, P.J. Ch,

Dear Honorable Judges of the Appellate Division:

Pursuant to Rule 2:6-2(b), please accept this letter brief in lieu of a more formal reply brief on behalf of Defendants-Appellants Persistence & Success, LLC, 300 Sylvan Ave Associates, LLC, and Carmen Goenaga (collectively "Appellants") in the above-captioned matter.

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TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellants hereby restate and incorporate by reference the Statements of Material Facts and Procedural History set forth in their Revised Brief. See Db4-15. Appellants also note that they dispute many of the alleged "facts" set forth by Plaintiff-Respondent Martha Miqueo ("Miqueo"). By way of limited example, Appellants vehemently disagree that "Bernardo understood and agreed that Martha

was the equitable owner of the Property," Bernardo agreed to some indefinite duration "rescue plan," or that Appellants ever conceded that this matter and the Law Division Case[1] "involve common questions of law and fact." Pb13-15. These are disputed issues and are most certainly not facts supported by evidence in the record.

LEGAL ARGUMENT

I. THE CHANCERY COURT ERRED IN COMPELLING ARBITRATION BECAUSE THE CONTRACT UPON WHICH PLAINTIFF-RESPONDENT'S CLAIM IS BASED DOES NOT CONTAIN AN ARBITRATION PROVISION (1T38:16-40:19; 1T42:15-46:16; 1T48:7-51:8).

Miqueo admitted that the May 21, 2022 Addendum to Promissory Note Agreement between Bernardo Goenaga and Martha Miqueo (the "2022 Addendum") upon which her case is premised **has no arbitration provision**. See Pb2, 14 (admitting that Miqueo's claims seek to enforce the 2022 Addendum); Pb19 (2022 Addendum "admittedly, does not have any arbitration terms"). As there is no agreement to arbitrate in the 2022 Addendum, the Court cannot rewrite it to compel the Parties to arbitration. See Martindale v. Sandvik, Inc., 173 N.J. 76, 93 (2002); Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 442 (2014); Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001); Grover v. Universal Underwriters Ins. Co., 80 N.J. 221, 229 (1979).

[1] Persistence & Success, LLC, et al. v. Miqueo-Elian, et al., BER-L-004471-2.

In the unequivocal and undisputed absence of an arbitration provision in the contract at issue, Miqueo asks this Court to ignore the actual terms of the 2022 Addendum and instead rely on a purported "transactional history" to manufacture an arbitration clause that does not appear in the four corners of the 2022 Addendum. Pb20. Miqueo claims an arbitration provision was somehow "intended" to be incorporated based on an over ten-year-old, abandoned 2012 Memorandum of Understanding ("MOU"). Pb3, 20. Miqueo's position flies in the face of well-known and universally accepted contract law – parol evidence cannot be utilized to alter the terms of a contract. See Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259, 268 (2006) ("the parol evidence rule prohibits the introduction of evidence that tends to alter an integrated written document"); Ross v. Orr, 3 N.J. 277, 282 (1949) (parol evidence is not admissible to "vary or add to" the terms); Chance v. McCann, 405 N.J. Super. 547, 564 (App. Div. 2009) (extrinsic facts cannot be used to modify or enlarge or curtail the terms). In the absence of ambiguity, "the court must enforce those terms as written." Watson v. City of E. Orange, 175 N.J. 442, 447 (2003); see also Leodori v. CIGNA Corp., 175 N.J. 293, 302 (2003) (the parties are bound by the "four corners of the written instrument," which controls).

The 2022 Addendum is not ambiguous – it does not have an arbitration provision. An agreement to arbitrate cannot be invented using parol evidence,

particularly here when the extrinsic evidence only confirms the lack of an agreement to arbitrate. The alleged intent to arbitrate did not "continue with each and every agreement that was made after" the 2012 MOU as Miqueo contends. Pb23. The exact opposite is true. The 2012 MOU and its arbitration provision were not incorporated by reference in the 2022 Addendum. Da44-45. Even the unexecuted 2017 Limited Liability Company Purchase Agreement ("2017 Unexecuted Agreement"), which the 2022 Addendum purportedly modifies, does not incorporate the 2012 MOU or its arbitration provision by reference. Da51-56. The 2017 Unexecuted Agreement does not even have its own arbitration provision. Ibid. Moreover, the MOU was not mentioned in the communications surrounding the 2022 Addendum and its purported execution. Da70, 72, 74, 286-88. In fact, neither the MOU, nor any purported agreement to arbitrate, was mentioned in Miqueo's initial Complaint (Da3-23), which is likely why she filed same in the Chancery Court. Since 2022, the first time Miqueo even raised the MOU was in 2024, nine months after she filed her Complaint, when she sought to use it to compel arbitration of her own claims, which she herself had affirmative filed in Chancery Court and certified was not subject to arbitration. Da310-14. The MOU is not the bedrock Miqueo now makes it out to be – it was an abandoned, forgotten document that

cannot be used to create an arbitration provision in the 2022 Addendum where one simply does not exist.

Furthermore, as recognized by Miqueo, for an arbitration clause to be enforceable, there must be a meeting of the minds and mutual assent – the parties must have had an understanding as to the terms to which they were agreeing. Pb19-21. Bernardo Goenaga ("Bernardo") could not have understood he was agreeing to an arbitration provision in 2022 based upon a then ten-year-old MOU that was not incorporated into or discussed in conjunction with either the 2017 Unexecuted Agreement or the 2022 Addendum.

In sum, the 2022 Addendum upon which Miqueo bases her claims has no arbitration provision and parol evidence (even if it supported arbitration – which it does not) cannot be used to manufacture one. See Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 192 (2013); Grover, 80 N.J. at 229; Bacon v. Bob Ciasulli Auto Grp., Inc., A-0789-14T1 (App. Div. May 7, 2015) (Da393-98); Phoenix Motor Co. v. Desert Diamond Players Club, Inc., 144 So. 3d 694, 696 (Fla. 4th DCA 2014).

II. THE CHANCERY COURT ERRED IN COMPELLING ARBITRATION BECAUSE THE CONTRACTS UPON WHICH THE CHANCERY COURT RELIED WERE SUPPLANTED, INVALID, AND OTHERWISE INAPPLICABLE TO THE DISPUTE AT ISSUE (1T38:16-40:19; 1T42:15-46:16; 1T48:7-51:8).

Miqueo's position that "the MOU was never abandoned or terminated"

because her "decade-long efforts to secure financing show the MOU persisted" (Pb26) is belied by the facts and her own affirmative filing of her claims before the Chancery Court. Miqueo cherry picks only two terms from the MOU – the "Expression of Intent" and the arbitration provision – while ignoring that all of the substantive terms of the MOU were abandoned. See Cnty. of Morris v. Fauver, 153 N.J. 80, 96 (1998); Dorchester Manor v. Borough of New Milford, 287 N.J. Super. 163, 170-71 (Law. Div. 1994), aff'd, 287 N.J. Super. 114 (App. Div. 1996). Indeed, even Miqueo's "decade-long efforts" evidence the abandonment of the MOU. The MOU mandated proof of bank mortgage financing (which she did not obtain) and a second mortgage (which did not occur) prior to additional disbursements (which were not made consistent with the MOU) and pay off the bundled loan in two years (which she did not do), not ten years of attempted refinancing. Da311-14.

Moreover, if, as Miquo contends, the MOU's "Expression of Intent" was to execute additional agreements, which were the Operating Agreements (Pb24), then, by their own terms, the Operating Agreements supplanted, superseded, and terminated the MOU. Da133, 150 at ¶ 10.8 ("This Operating Agreement constitutes the entire agreement among the parties hereto regarding the operations of the LLC, regardless of anything to the contrary contained in the Certificate of Formation or other instrument, memorandum, or notice purporting to summarize the terms hereof,

whether or not the same shall be recorded or published."). Notably, the Operating Agreements are silent as to Miqueo's claims of "equitable ownership" or any right to purchase the subject property – because such claims are meritless, at best. Instead, the Operating Agreements make clear that Miqueo was appointed as manager only, could be terminated without cause, and had no ownership interest. Da123, 125-26, 130, 136, 140 142-43, 147, 152. Thus, the Operating Agreements make clear that the MOU was discarded and replaced by a new plan.

To be sure, neither the MOU nor the Operating Agreements arbitration provisions can be extended to encompass Miqueo's claim of entitlement to purchase the subject property for $6 million under the 2022 Addendum. The 2012 MOU requires arbitration of "[a]ny dispute arising out of or relating to this Memorandum." Da313. The 2022 Addendum does not arise out of or relate to the MOU – it is a new deal, for a different amount, for different parties (as Miqueo's spouse was a party to the MOU), and under completely different terms than contemplated by the abandoned 2012 MOU.

The Operating Agreements similarly require arbitration of "[a]ny dispute arising with respect to this Operating Agreement," which governs "the operations of the LLC" and not its sale. Da132-33, 149-50 at ¶¶ 10.1, 10.8. Whether Miqueo can enforce the 2022 Addendum to purchase the subject property does not relate to the

operations of the LLC. As detailed above, the Operating Agreements make no mention whatsoever of any right of Miqueo to purchase the subject property nor any "equitable ownership" by Miqueo – because none exist.

Further, contrary to Miqueo's misrepresentations (Pb2, 15), Appellants did not counterclaim in the Chancery Court for any damages related to Miqueo's mismanagement of the property nor did they seek recission based upon her mismanagement. Instead, Appellants' counterclaims seek recission of the 2022 Addendum – to the extent same is valid, which it is not – based upon Miqueo's equitable fraud, fraud, and negligent misrepresentations in making material misrepresentations in order to improperly induce Bernardo to sign[2] the 2022 Addendum. Da243-45.

Thus, the 2022 Addendum and Miqueo's claims arising thereunder cannot be bootstrapped to the arbitration provisions in different agreements involving different parties and providing for arbitration of wholly different disputes.

III. THE TRIAL COURT ERRED IN COMPELLING ARBITRATION BECAUSE PLAINTIFF-RESPONDENT WAIVED THE RIGHT, IF ANY, TO COMPEL ARBITRATION (1T40:20-42:14).

The Chancery Court did not analyze the Cole factors, nevermind reach

[2] As Bernardo's signature is undated and unwitnessed, Appellants contest the authenticity of his purported signature.

Miqueo's proffered conclusion that she did not waive her right to arbitrate. Pb3. However, as this Court's review is *de novo*, a fresh look at this matter reveals that Miqueo unequivocally waived any right she may have had to compel arbitration. See Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 207 (2019); Cole v. Jersey City Med. Ctr., 215 N.J. 265, 276 (2013).

Miqueo claims the first three Cole factors weigh in favor of arbitration because of the "chain of events" while ignoring that she set off that chain of events. Pb36. It was Miqueo who selected the Chancery Division to file her claims (Da3-23), sought and obtained temporary restraints against Appellants (Da2, 24-28, 104-08, 259-62), engaged in mediation ordered by the Chancery Court (Da249-51, 263-64), filed and lost a motion to consolidate[3] (Da275-77, 299-300), and waited nine

[3] Miqueo's arguments (including Point III) that this matter is "highly related" to the Law Division Case and should be arbitrated together must be disregarded. Pb 39-44. Miqueo lost her Motion to Consolidate (Da275-77, 299-300) and failed to move for reconsideration or appeal, and her time to do so has long since expired. In fact, Miqueo's Point III reads as her never filed appeal of the consolidation denial. The Orders compelling arbitration only require arbitration, not consolidated arbitration. Da1-2. Even were these cases consolidated, which they were not, "[p]arties are not required to arbitrate when they have not agreed to do so." Atalese, 219 N.J. at 442 (internal quotation marks and citation omitted). An "arbitrator's authority is circumscribed by whatever provisions and conditions have been mutually agreed upon. Any action taken beyond that authority is impeachable." Grover, 80 N.J. at 229. No matter how Miqueo reframes her case at this late stage (i.e., as a purported "rescue plan"), in the absence of an applicable arbitration provision, consolidation could not compel arbitration of the 2022 Addendum.

months in making an arbitration request. She delayed, filed motions, and strategized to have the benefits of her Chancery Division filing including ongoing restraints and receipt of written discovery responses from Appellants before pulling the rug out on her own case only two (2) months before the scheduled trial date.

With respect to discovery, Miqueo's presentation is disingenuous at best. At the time of Miqueo's arbitration motion, two sets of document demands and four sets of interrogatories had been served by both sides, a combined over 4,400 pages of documents had been produced, Appellants had answered all three sets of Miqueo's interrogatories, and Miqueo's deposition had been noticed for May 30, 2024 (for which Miqueo then refused to appear). Da334-54, 377. Absent Miqueo's self-imposed stay of discovery, discovery would have been completed in June 2024 – there was not "a substantial amount of work to be completed" as Miqueo would have this Court believe. Pb36.

Miqueo claims her Rule 4:5-1 Certification was accurate when filed (Pb36), while ignoring her continuing obligation to amend such Certification. Miqueo also fails to explain how her Certification could have possibly been accurate when filed and inaccurate later, when the document upon which she relies to compel arbitration pre-existed her Complaint by more than eleven years. She also makes the conclusory statement that her failure to assert arbitrability as an affirmative defense is of no

moment in the face of substantial legal precedent to the contrary. See Marmo and Sons General Contracting LLC v. Biagi Farms, LLC, 478 N.J. Super. 593, 613 (App. Div. 2024); Hopkins v. LVNC Funding, LLC, et al., A-1301-23 at p. 14-15 (App. Div. February 10, 2025) (Approved for Publication) (Da405-20). Selection of Chancery Court as her forum for filing, coupled with a certification of non-arbitrability and no affirmative defense related to arbitration, along with actively litigating the case until only two months before trial constitutes undeniable waiver of any right to compel arbitration.

As to the trial date, Miqueo admits that it was scheduled to begin only two months after the date of oral argument, but makes the unsupported and conclusory statement that this close proximity somehow weighs in favor of arbitration. Pb36-37. Miqueo's position is nonsensical and contrary to the law. See Ringel v. BR Lakewood, LLC, No. A-1785-18T2, 2020 WL 3263221, at *2 (N.J. Super. Ct. App. Div. June 17, 2020) (finding trial date having been set for June 2019, where motions to compel arbitration were filed over six months earlier in October and November 2018, weighed in favor of waiver).

Finally, the prejudice faced by Appellants is not speculative. Appellants have and will continue to suffer from the inherent unfairness inflicted by Miqueo's forum shopping "in terms of delay, expense, or damage to" Appellant's legal position

caused by Miqueo forcing Appellants to litigate her claims in the Chancery Division and then in arbitration despite the complete absence of an applicable arbitration provision. See Hopkins, A-1301-23 at pp. 15-16. The costs associated with arbitration alone, not to mention Miqueo's delay tactics (Da384-92; Pa8-123) and ongoing litigation costs for a case that should have concluded last summer in the Chancery Court where Miqueo filed it, are significantly harmful, burdensome, and unjust.

The totality of the circumstances are analogous to Marmo, 478 N.J. Super. 593 and undoubtedly evinces Miqueo's waiver. See Db23-31. In this case, arbitration cannot be compelled.

CONCLUSION

Based upon the foregoing and the arguments set forth in Appellants' opening brief and appendix, Appellants respectfully request that this Court reverse the Chancery Court's decision.

Respectfully Submitted,

GREENSPOON MARDER LLP

Kory Ann Ferro, Senior Counsel