SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

SHAUL MOSHE SUGAR

Plaintiff/Appellant

v.

DAVID POLLACK, (Individually); JOSEPH KAHN, (Individually); VISIONRE; MORDECHAI DOMBROFF A/K/A MORDECLAI DOMBROFF, (Individually); NECHAMA DOMBROFF, (Individually); HONOR MEADOWS LLC; SUNTREE INVESTMENT GROUP, LLC And HONOR MEADOWS OWNER LLC

Defendants/Respondents

SUPERIOR COURT OF NEW JERSEY
DOCKET NO.: A-004004-24T4

ON APPEAL FROM:

SUPERIOR COURT OF NEW JERSEY - LAW DIVISION OCEAN COUNTY

DOCKET NO.: OCN-L-1092-25

CIVIL ACTION

Sat Below:
Hon. Robert E. Brenner, J.S.C.

MEMORANDUM OF LAW ON BEHALF OF PLAINTIFF/APPELLANT SHAUL MOSHE SUGAR IN SUPPORT OF APPEAL

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[1] Appellants respectfully submit that an exception to Rule 2:6-1(a)(2) applies concerning the submission of trial court briefs. Indeed, this Court should permit the inclusion of the trial court briefs as the arguments contained therein are germane and review of same is required to adjudicate the instant appeal. The Appellate Division will have an incomplete record without the briefs, certifications and exhibits submitted to the trial court. As such, the briefs, certifications and exhibits annexed thereto that were submitted to the trial court are included in the Appendix.

OPINION BELOW

Plaintiff/Appellant Shaul Moshe Sugar submits this brief in support of his Appeal of the trial court's Order dated July 22, 2025 granting Defendants' Motion Compelling Arbitration. (1a). The opinion of the Superior Court of New Jersey, Law Division, Ocean County is not reported.

PRELIMINARY STATEMENT

This case arises from a fraud perpetrated upon Plaintiff by defendants. At all times relevant to the Complaint and as more specifically set forth in the proposed Amended Complaint, defendants made fraudulent statements in order to induce plaintiff into entering into a contract with them. Based on the fraudulent statements made by defendants, and in reliance upon the fraudulent statements made by the defendants, plaintiff paid defendants $1.5 million dollars and was induced to obligate himself to personally guarantee some ten million dollars, ($10,000,000) in financing for a real estate acquisition and development project located in the state of Indiana.

In July 2024, Appellant and Respondents entered into an Operating Agreement which contains an Arbitration Clause. (4a and 40a-41a). The Arbitration Clause is a broadly worded arbitration agreement which incorporates language already rejected by the Supreme Court of New Jersey. Defendants moved to dismiss the complaint and compel arbitration.

The Trial Court erred where it compelled arbitration of statutory claims in the absence of language in an arbitration provision which clearly and unambiguously compelling arbitration of such claims. Here, Plaintiff has not waived his right to a trial by jury and cannot be compelled to arbitrate statutory claims where the arbitration clause does not compel arbitration of statutory claims. For those reasons, this Court should grant Plaintiff's appeal and reverse the Court's Order compelling arbitration.

PROCEDURAL HISTORY

On or about April 22, 2025, Plaintiff/Appellant filed his Complaint against Defendants/Respondents David Pollak, Joseph Kahn, VisionRe, Mordechai Dombroff and Nemacha Dombroff, Honor Meadows LLC, Suntree Investment Group, LLC and Honor Meadows Owner LLC. (54a). Plaintiff's initial Complaint was a six (6) count complaint alleging:

First Count:	Parties, Jurisdiction and Venue;
Second Count:	General Allegations, including, misrepresentation, unconscionable commercial practices and fraud;
Third Count:	Consumer Fraud;
Fourth Count:	Common Law Fraud;
Fifth Count:	Negligence;

Sixth Count: Exclusive, combined and/or joint claims.

(54a).

On May 15, 2025, defendants Joseph Kahn and VisionRe filed their Answer to the Complaint. (66a). On June 5, 2025, defendants Mordechai Dombroff, Nechama Dombroff, Honor Meadows LLC, Suntree Investment Group, LLC filed their Notice of Motion to Dismiss for Failure to State a Cause of Action and to Compel Arbitration. (74a). On June 12, 2025, Plaintiff cross moved to amend his Complaint. (91a). He also filed opposition to Defendant/Respondent's Motion arguing that arbitration of statutory claims cannot be compelled where the arbitration clause does not clearly and unambiguously obligate arbitration of statutory claims. (93a). On June 18, 2025, Jason J. Rebhun, Esq. entered his appearance on behalf of Defendants, Mordechai Dombroff, Nechama Dombroff, Honor Meadows LLC, Suntree Investment Group, LLC and Honor Meadows Owner, LLC. (109a). On June 19, 2025, Defendants/ Respondents filed opposition to Plaintiff's Cross Motion for leave to Amend and also filed its brief in reply to Plaintiff's opposition to Defendant's motion to dismiss and compel arbitration. (110a). On July 8, 2025 Robert C. Shea, Esq. entered his appearance on behalf of defendant David Pollak. (124a). On July 11, 2025, Plaintiff filed his brief in reply to defendants' opposition to plaintiff's motion for leave to amend. (125a). On July 22, 2025, following oral arguments, the Court entered its Order

dismissing plaintiff's claims against Mordechai Dombroff, Honors Meadows, LLC, Suntree Investments Group, LLC and Honor Meadows Owner, LLC and ordering arbitration as against only those defendants on the basis that those parties and plaintiff are signatories to the arbitration agreement. (1a). The Court's Order also granted Plaintiff's request for leave to file an Amended Complaint. (1a). On July 22, 2025, Plaintiff filed his Amended Complaint. (129a). Plaintiff's Amended Complaint alleges:

First Count:	Common Law Fraud;
Second Count:	Violations of New Jersey Uniform Securities Act, N.J.S.A. 49:3-47 et seq.;
Third Count:	Violations of Indiana Uniform Securities Act, IC 23-19-5 et seq.;
Fourth Count:	Violations of the Securities Act of 1933;
Fifth Count:	Breach of Fiduciary Duty;
Sixth Count:	Breach of Contract;
Seventh Count:	Breach of the Implied Covenant of Good Faith and Fair Dealing;
Eighth Count:	Interference with Prospective Economic Advantage;
Ninth Count:	Conspiracy;
Tenth Count:	Violations of New Jersey RICO Act;
Eleventh Count:	RICO Conspiracy;

Twelfth Count: Consumer Fraud, N.J.S.A. 56:8-1;

(129a).

On September 2, 2025, defendants Joseph Kahn and VisionRe filed their Answer to Plaintiff's Amended Complaint. (159a).

As Appellant's Complaint was dismissed as to Respondents on a motion to dismiss at the preliminary stage of litigation, no discovery has been taken.

STATEMENT OF FACTS

Defendant David Pollak and plaintiff belong to the same community and have intertwined common and associated common acquaintances and friends. (133a). Defendant Pollak, acting on behalf of Defendant/Respondent Mordechai Dombroff and Nemacha Dombroff, approached Appellant with an opportunity "opportunity" for a "great deal." (133a). The deal was the "Honor Meadows" deal. (133a). Defendant/Respondent Honor Meadows, LLC was formed to acquire, develop and operate 7.06 acres of land located generally at 1050 W. Noble Street, Lebanon, Boone County, Indiana (the "Project"). (133a).

Upon information and belief, Honor Meadows, LLC was formed and the powers that it could exercise included: (i) activities involving the business of acquiring, financing, refinancing, developing, rehabilitating, renovating, leasing, maintaining, owning, operating, managing, selling and enhancing the Project, directly or through its ownership of the Subsidiaries or otherwise. (133a). The

Indiana property, otherwise referred to as "The Project" was to/is owned by Honor Meadows Owner LLC, a Delaware limited liability company in which Honor Meadows LLC owns (directly or indirectly) one hundred percent (100%) of. (133a). Honor Meadows LLC is obligated to pay, and presumable has paid, its Managing Member an "Acquisition Fee." The Acquisition Fee is, "equal to $178,500 ("Acquisition Fee") for services in locating the Project as an investment opportunity. (133a). The Acquisition Fee shall be incorporated into the Acquisition Budget for the Company and shall be paid on the Funding Date in a single, lump sum payment." (133a). In addition to the Acquisition Fee aforementioned, Honor Meadows LLC is obligated to pay the "Property Manager" a property management fee in the aggregate amount equal to four percent (4.00%) of the Project's effective gross revenues. (134a). The "Property Manager" is "an Affiliate of the Managing Member and Suntree." (134a). In addition to the Acquisition Fee and the property management fee, both aforementioned, the Managing Member is also to be paid an "Asset Management Fee" calculated at an additional two percent (2.00%) of the Project's effective gross revenues each Fiscal Year." (134a).

Defendant Joseph Kahn, an associate of Defendant Pollack, is the owner/operator of VisionRE. (134a). Defendant Joseph Kahn publicly stated, on his website, the following in regard to management fees: *Property management*

companies typically charge 2-5% of revenue. Sounds reasonable, right? But let's break it down: On a fully stabilized asset, this can maybe work (i'm [sic] *not convinced). On a struggling property—low occupancy, high turnover, or heavy CapEx—it's a different story. How can they provide the extra attention these assets need with such tight margins? The truth? It's often not profitable for management companies to go the extra mile as the fees are not built for this.* (134a). Kahn and VisionRE made that public statement mere months after "Underwriting" the instant deal which has some 6% (4% plus 2%) in management fees. (134a). Defendant VisionRE touts itself as "Realty Advisers" providing "Real Estate Advisory" including, "Due Diligence, Financial Underwriting, Project Management [and] Asset Management." Its website proclaims, "GET THE WHOLE TRUTH OF A DEAL." (134a).

In fact, VisionRE's website states, "Our Mission? Easy Access to Specialized CRE Knowledge From and OBJECTIVE THIRD PARTY YOU CAN TRUST." (135a). The Underwriting Certificate issued by VisionRE was intended to be relied upon by would be investors in this deal, such as plaintiff, and to assist co-conspirators/co-defendants in obtaining funds and guarantees for debt obligation(s) from would be investors such as plaintiff. (135a). VisionRE's website goes on to display, *"There are no hard rules in real estate–the success factor in one deal can be the pitfall for another. Instead, success in real estate is*

about reading between the lines, understanding the different markets, property types, locations, and myriad [sic] *of other details that a project's success depends on. It's know-how we've built from our years of hyper-focused experience,* ***doing just due diligence, due diligence, and more due diligence."*** (135a).

Unbeknownst to Plaintiff/Appellant, Defendant Pollak had an employment and/or business relationship with VisionRE during his interactions with plaintiff. (135a). While trying to pitch this deal to plaintiff, Pollak never disclosed this obvious conflict of interest when using VisionRE's "Underwriting Certificate" as part of the ploy to convince plaintiff how great of a deal/opportunity this was. Pollack, without disclosing his past and/or present relationship with defendant VisionRE related that the deal was so good that VisionRE issued a coveted "Underwriting Certificate" following a thorough investigation and vetting of the deal. (135a). Defendant Pollak made numerous representations and misrepresentations to plaintiff leading Plaintiff to believe that Honors Meadow as a profitable investment opportunity. (135a-136a). Based upon the representations and false statements made by Defendant Pollak, Plaintiff invested one million, five hundred thousand dollars ($1,500,000.00) with additional obligations, including, but not limited to, guaranteeing ten million dollars ($10,000,000) of financing. (137a).

In fact, the defendants contributed zero dollars in investment of the project and the rental amounts portrayed and represented to the plaintiff by the defendants were substantially reduced immediately after plaintiff invested his money and signed onto the deal as Defendants knew the portrayed rental figures were not sustainable by the local market. (137a). In or about July 2024, the parties entered into a written agreement which is now the subject of this litigation. (4a).

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

Orders compelling or denying arbitration are deemed final and appealable as of right. See R. 2:2-3(a); Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013). Appellate Courts exercise plenary review of the trial court's decision regarding the applicability and scope of an arbitration agreement. See Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 446 (2014), cert. denied, 83 U.S.L.W. 3888 (U.S. June 8, 2015). Similarly, the issue of whether parties have agreed to arbitrate is a question of law that is reviewed de novo. See Hirsch, supra, 215 N.J. at 186; see also Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.")

II. THE COURT ERRED IN DISMISSING PLAINTIFF'S COMPLAINT AND COMPELLING ARBITRATION WHERE PLAINTIFF DID NOT AGREE TO ARBITRATE STATUTORY CLAIMS. (Argued Below: T6:1-5; T6:20-25; T7:1-25; T8:24-25; T9:1-25; T10:1-25; T11:1-25; T12:1-25; T13:1-25; T14:1-14; Court's Decision: T46:16-25; T47:1-25; T48:1-25; T49:1-25; T50:1-25; T51:1-25; T52:1-25; T53:1-25 and T54:1-20).

The argument that plaintiff has not waived his right to a trial by jury and that he cannot be compelled to arbitrate statutory claims was raised below. (T6:1-5; T6:20-25; T7:1-25; T8:24-25; T9:1-25; T10:1-25; T11:1-25; T12:1-25; T13:1-25; T14:1-14). To ensure that the record is both accurate and complete, it should be noted that at oral arguments, defendants/respondents argued that plaintiff/appellant omitted reference to the operating agreement and did not attach the agreement to the cross motion or opposition. (T7:10-13). That is not accurate. Defendants' motion to dismiss for failure to state a cause of action and to compel arbitration cited to the Operating Agreement and attached the Agreement as Exhibit 2. (78a; 80a and 4a). In his Opposition, Plaintiff argued that the motion should be converted to a motion for summary judgment because defendant raised issues outside of the pleading, specifically defendants' brief cited to the Operating Agreement. (93a and 96a-97a). Plaintiff also opposed defendant's request to compel arbitration and cited to the Operating Agreement as Exhibit 2. (101a-106a). The cross motion was for leave to file an amended complaint for which the Rules of Court required attaching the proposed Amended Complaint.

The Court's decision dismissing plaintiff's complaint as to signatories to the Agreement and compelling arbitration is found at T46:16-25; T47:1-25; T48:1-25; T49:1-25; T50:1-25; T51:1-25; T52:1-25; T53:1-25 and T54:1-20). The Court's decision compelling arbitration is an issue of law to which no deference is accorded. Manalapan Realty, L.P. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).. The Appellate Court "is not bound by a trial judge's "construction of the legal principles." Lombardo v. Hoag, 269 N.J. Super. 36, 47 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

In the subject case, the Court compelled arbitration stating that there is no prohibition against arbitrating statutory claims:

> With regard to that argument, the first cases I looked at were Garfinkel [v. Morristown Obstetrics & Gynecology Associates, P.A., 168 N.J. 124, 136 (2001)] and Atalese. And while statutory claims were involved, I had referenced the New Jersey law against discrimination claim earlier in Garfinkel. I did not find, as part of the Supreme Court's holding in either of those cases, that across the board, statutory claims are not subject to arbitration. This Court believes they are, but that the arbitration clause, again, without there being any magic language, must clearly communicate to a party signing off on it that they have given up their right to sue and that they are going to arbitrate all of their claims.
>
> ***This Court found no prohibition under New Jersey law against arbitrating statutory claims***, and specifically with regard to a RICO claim, which is part of what the plaintiff is alleging in the proposed amended complaint. In the case of Block v. Plosia, 390 N.J.Super. 543 (App.Div. 2007), the Court explicitly rejected the argument that RICO claims are incompatible with arbitration, finding no indication in the RICO statute that such claims are no amenable to arbitration.

> The Court further held that broadly worded arbitration agreements could encompass statutory claims like RICO, id. [emphasis added].

(T49:25 to T50:1-24).

The issue ***is not whether or not there is a prohibition against arbitrating statutory claims***. The issue is whether or not plaintiff has waived his right to a trial on statutory claims. Like the Appellate Division in Atalese, the trial court's finding of "no prohibition under New Jersey law against arbitrating statutory claims" was rejected by the Supreme Court. In the absence of any language providing that plaintiff has waived his right to a trial on statutory claims renders the arbitration clause unenforceable. Id. at 436. See also, Id. at 448.

In compelling arbitration, the court in the subject case relied upon Garfinkel, but incorrectly found that Garfinkel stood for the proposition that plaintiff was not obligated to arbitrate his claims due to ambiguity and not because of any statutory rights. The trial court here stated:

> THE COURT: Well, Garfinkel, it did involve a New Jersey law against discrimination claim. And as I recall, Garfinkel, the Supreme Court ultimately determined that the arbitration was not enforceable, ***but not because it raised statutory claim, (sic) but rather because of the ambiguity of the language*** contained in the clause in general. [emphasis added].

(T14:8-14).

That is not correct. The arbitration clause in Garfinkel was not enforceable

not because of ambiguity, but because the arbitration clause, like the arbitration clause in the subject case, did not contain language obligating the parties to arbitrate. The Court in Garfinkel expressly stated that only those issues may be arbitrated which the parties have agreed to and also expressly stated that a party's waiver of statutory rights must be clearly and unmistakably established. Garfinkel, supra, 168 N.J. at 131. The Court also stated that courts are not permitted to rewrite a contract to broaden the scope of arbitration. Ibid.

The Court in Garfinkel stated:

> Because of the favored status afforded to arbitration, '[a]n agreement to arbitrate should be read liberally in favor of arbitration.' Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993). ***That favored status, however, is not without limits***. The Court has stressed that '[i]n the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute. Subsumed in this principle is the proposition that ***only those issues may be arbitrated which the parties have agreed shall be***.' In re Arbitration Between Grover Universal Underwriters Ins. Co., 80 N.J. 221, 228 (1979). In respect of specific contractual language, '[a] clause depriving a citizen of access to the courts should clearly state its purpose. The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue.' Marchak, supra, 134 N.J. at 282. ***As we have stressed in other contexts, a party's waiver of statutory rights "must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively." Red Bank Reg'l Educ. Ass'n, [v. Red Bank Reg'l High Sch. Bd. of Educ.,] supra, 78 N.J. [122] at 140 [(1978)]. In the same vein, a "court may not rewrite a contract to broaden the scope of arbitration[.]" Yale Materials Handling Corp. v. White Storage Retrieval Sys., Inc., 240 N.J.Super. 370, 374 (App.Div. 1990).*** [emphasis added].

Garfinkel, supra, 168 N.J. at 132.

The Court in Garfinkel rejected the language of the contract stating "any controversy or claim that arises from the agreement or its breach shall be settled by arbitration" as being sufficient to constitute a waiver of statutory rights, stating:

> ***We reason similarly and conclude that paragraph eighteen of the parties' agreement is insufficient to constitute a waiver of plaintiff's remedies*** under the LAD. The clause states that ***"any controversy or claim" that arises from the agreement or its breach shall be settled by arbitration. That language suggests that the parties intended to arbitrate only those disputes involving a contract term, a condition of employment, or some other element of the contract itself. Moreover, the language does not mention, either expressly or by general reference, statutory claims redressable by the LAD***. As noted, paragraph eighteen excepts from its purview the two paragraphs of the agreement pertaining to post-termination restrictions and severance pay. Those exceptions further suggest that the parties intended disputes over the terms and conditions of the contract, not statutory claims, to be the subject of arbitration. [emphasis added].

Id. at 134.

The court, here, rewrote the contract and broadened the scope of arbitration which it is not permitted to do. A "***court may not rewrite a contract to broaden the scope of arbitration***[.]'' [emphasis added]. Ibid, quoting, Yale Materials Handling Corp. v. White Storage Retrieval Sys., Inc., 240 N.J.Super. 370, 374 (App.Div. 1990). The court mistakenly found an obligation to arbitrate claims which were not clearly, unambiguously and decisively identified as waived. An ***unambiguous writing*** is essential to such a determination" of an intent to waive

statutory rights. [emphasis added]. [emphasis added]. Garfinkel, supra, 168 N.J. at 136.

Here, Plaintiff has not waived his right to a trial by jury and cannot be compelled to arbitrate statutory claims where the arbitration clause does not clearly and unambiguously compel arbitration of statutory claims. "***An arbitration clause, like any contractual clause providing for the waiver of a constitutional or statutory right, must state its purpose clearly and unambiguously***." See Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430, 435 (2014). The defendant in Atalese, also filed a Petition for Writ of Certiorari with the United States Supreme Court on the basis that the Federal Arbitration Act pre-empted any state law rule. The Petition was filed on January 21, 2015. On June 8, 2015, the United States Supreme Court denied defendant U.S. Legal Services Group's Petition.

"A party's waiver of statutory rights 'must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively.'" Red Bank Reg'l Educ. Ass'n v., supra, 78 N.J. at 140. Further, a "***court may not rewrite a contract to broaden the scope of arbitration***[.]'' [emphasis added]. Garfinkel, supra, 168 N.J. at 132.

Moreover, the court, here found mutual assent. "Mutual assent requires that the parties have an understanding of the terms to which they have agreed." Atalese, 219 N.J. at 442. There must be a meeting of the minds. Ibid. "***Only***

those issues may be arbitrated which the parties have agreed shall be."

[emphasis added]. Ibid., quoting In re Arbitration Between Grover & Universal Underwriters Ins. Co., 80 N.J. at 228. If there is a waiver of a right, "an effective waiver must "clear and unequivocal." See West Jersey Title & Guar. Co. v. Industrial Trust Co., 27 N.J. 144 (1958). There, the Supreme Court stated:

> Waiver is the intentional relinquishment of a known right. It is a voluntary act, 'and implies an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded and instead on.' Geo. F. Malcolm, Inc. v. Burlington City Loan and Trust Co., 115 N.J. Eq. 227 (Ch. 1934). ***It is requisite to waiver of a legal right that there be 'a clear, unequivocal, and decisive act of the party showing such a purpose or acts amounting to an estoppel on his part***'; 'A waiver, to be operative, must be supported by an agreement founded on valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition.' Aron v. Rialto Co., 100 N.J. Eq. 513 (Ch. 1927), affirmed 102 N.J. 331 (E. & A. 1928). '***Waiver' presupposes a full knowledge of the right and an intentional surrender***; waiver cannot be predicated on consent given under a mistake of fact. [emphasis added]. [emphasis added].

West Jersey Title, & Guar. Co., supra, 27 N.J. at 152-153.

In Atalese, Plaintiff entered into a service contract whereby the defendant promised to provide debt-adjustment services. Plaintiff filed suit alleging violations of the Consumer Fraud Act and in the Truth-in Consumer, Warranty and Notice Act. Id. at 436. Defendant moved to compel arbitration which the trial court granted. Id. at 437. The trial court found that the arbitration clause sufficient

to put plaintiff on notice that any sort of dispute arising out of [the] agreement was going to be arbitrated. Ibid. The court also found that the arbitration clause met the criteria outlined in Curtis v. Cellco Partnership, 413 N.J.Super. 26 (App.Div. 2010) where the Appellate Division stated that the policy favoring arbitration compelled the result that "an arbitration provision will be enforced so long as it is 'sufficiently clear, unambiguously worded, satisfactorily distinguished from the other [a]greement terms, and . . . provide[s] a consumer with reasonable notice of the requirement to arbitrate'" Atalese, 219 N.J. at 437-438, quoting Curtis, supra, 413 N.J.Super. at 33.

The Appellate Division affirmed "finding that 'the lack of express reference to a waiver of the right to sue in court' did not bar enforcement of the arbitration clause." Id. at 435. The Supreme Court disagreed and reversed, stating: "***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.***" [emphasis added]. Id. at 436. "An arbitration provision – like any comparable contractual provision that provides for the surrendering of a constitutional or statutory right – must be sufficiently clear to a reasonable consumer." Ibid.

In reversing, the Supreme Court considered the Federal Arbitration Act and

cited to a line of cases which stated that "Arbitration's favored status DOES NOT mean that every arbitration clause, however phrased, will be enforceable" and that "the preference for arbitration is not without limits." Id. at 441. Arbitration agreements can be invalidated by applicable contract defenses. Ibid. Courts may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of a contract." Ibid.

The Court then determined that: "because arbitration involves a waiver of the right to pursue a case in a judicial forum, 'courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent.'" Id. at 442-443.

The court stated:

> An agreement to arbitrate, like any other contract, "must be the product of mutual assent, as determined under customary principles of contract law." NAACP of Camden Cnty. E. v. Foulke Mgmt., 421 N.J.Super. 404 (App.Div.), certif. granted, 209 N.J. 96 (2011), and appeal dismissed, 213 N.J. 47 (2013). A legally enforceable agreement requires 'a meeting of the minds.' Morton v. 4 Orchard Land Trust, 180 N.J. 118, 120 (2004). Parties are not required 'to arbitrate when they have not agreed to do so.' Volt Info. Scis. V. Bd. of Trs. Of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488, 499 (1989); see Garfinkel, supra, 168 N.J. at 132 ('[O]nly those issues may be arbitrated which the parties have agreed shall be.' (quoting In re Arbitration Between Grover & Universal Underwriters Ins. Co., 80 N.J. 221, 228 (1979))).
> Mutual assent requires that the parties have an understanding of the terms to which they have agreed. 'An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those

> rights.' Knorr v. Smeal, 178 N.J. 169, 177 (2003) (citing W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 153 (1958). 'By its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in court.' Foulke, supra, 421 N.J. Super. at 425. But 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.

Atalese, supra, 219 N.J. at 442.

The Court further stated that the requirement that ***a contractual provision clearly and unambiguously place an individual on notice that they are waiving a constitutional or statutory right is not specific to arbitration provisions***. [emphasis added]. Id. at 443. "Rather, under New Jersey law, any contractual 'waiver-of-rights provision must reflect that [the party] has agreed clearly and unambiguously' to its terms." Atalese, 219 N.J. at 443, citing Leodori v. CIGNA Corp., 175 N.J. 293, 302 (2003). See also, Dixon v. Rutgers, the State Univ. of N.J., 110 N.J. 432, 460 (1988) (holding that collective bargaining agreement cannot deprive one of statutory rights to evidentiary materials in anti-discrimination case because under N.J. law, the waiver of rights to be effective must be plainly expressed); Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ., 78 N.J. 122, 140 (1970) (explaining, in public-employment labor-relations context, that any waiver of statutory right to file grievances 'must be clearly and unmistakably established."). Atalese, supra, 219 N.J. at 443. The

requirement that a waiver of a statutory right be agreed to clearly and unambiguously has also been applied to the waiver of a right to a statutory hearing to renew a license; waiver of strike related expenses; waiver of right to file a mechanic's lien; and, it has been applied to waiver of statutory rights under the Condominium Act. Id. at443.

The Court further stated:

> Arbitration clauses are not singled out for more burdensome treatment than other waiver-of-rights clauses under state law. Our jurisprudence has stressed that when a contract contains a waiver of rights—whether in an arbitration or other clause—the waiver 'must be clearly and unmistakably established. Garfinkel, supra, 168 N.J. at 132 (citation and internal quotation marks omitted). Thus, a 'clause depriving a citizen of access to the courts should clearly state its purpose.'" Ibid. (quoting Marchak [v. Claridge Commons, Inc.], 134 N.J. [275], 282 [(1993)]. We have repeatedly stated that "[t]he point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." Ibid. (quoting Marchak, supra, 134 N.J. at 282); Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 187 (2013).

Atalese, 219 N.J. at 444.

The arbitration clause in the subject Agreement does not meet the requirement that statutory claims were clearly, unambiguously and unequivocally waived. Here, the arbitration clause at issue in the subject Agreement ***contains no language*** providing that Plaintiff waived his right to a trial by jury on statutory claims. Indeed, paragraph 10.19 suggests that claims not encompassed in the agreement are not subject to arbitration and states in relevant part:

SECTION 10.19 – VENUE.

> The parties agree that any suit, action or proceeding with respect to this Agreement that is not subject to arbitration pursuant to Section 10.18 shall be brought in the state or federal courts sitting in Ocean County in the State of New Jersey. The parties hereto hereby accept the exclusive jurisdiction of those courts for the purpose of any such suit, action or proceeding.

(104a).

Under Atalese, a contractual arbitration clause which fails to incorporate language which clearly and unambiguously informs the plaintiff that they have waived their right to a trial or to sue for a violation of a statutory claim is unenforceable. In Atalese, a unanimous Supreme Court held:

> ***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. An arbitration provision—like any comparable contractual provision that provides for the surrendering of a constitutional or statutory right—must be sufficiently clear to a reasonable consumer. The provision here does not pass that test.*** We therefore vacate the judgment of the Appellate Division and remand to the Special Civil Part for proceedings consistent with this opinion. [emphasis added].

Id. at 436.

The Court concluded:

> In the matter before us, the wording of the service agreement did not clearly and unambiguously signal to plaintiff that she was surrendering her right to pursue her statutory claims in court. That deficiency renders the arbitration agreement unenforceable.

Id. at 448.

Here, Plaintiff did not agree to arbitrate statutory claims. The arbitration clause at issue does not state anywhere that plaintiff is waiving his right to seek relief in court for a violation of any statutory rights. See, Id. at 446. Thus, it cannot be said that the parties agreed to arbitrate statutory claims.

The subject Agreement incorporates language similar to the language of the Agreement in Garfinkel which the Supreme Court has already found to be insufficient to constitute a waiver of statutory rights. The arbitration clause here states: "***ANY DISPUTE AMONG THE MEMBERS UNDER THIS AGREEMENT*** (except as otherwise provided below) shall be resolved and finally determined by arbitration as set forth herein." (103a). Plaintiff/Appellant respectfully requests that the Court remain cognizant that the Supreme Court in Garfinkel stated that the following language was insufficient to constitute a waiver of statutory rights: "any controversy or claim that arises from the agreement or its breach shall be settled by arbitration." Garfinkel, 168 N.J. at 134.

The arbitration clause at issue in the subject case states:

SECTION 10.18 – ARBITRATION OF DISPUTES.

> (a) ***Any dispute among the Members under this Agreement (except as otherwise provided below) shall be resolved and finally determined by arbitration as set forth herein.*** Any arbitration pursuant to this Section 10.18 shall, to the fullest extent permitted by law, be held in Ocean County, New Jersey under the rules of the American Arbitration Association. If the parties do not mutually agree upon an arbitrator within five (5) business days after notice from one party to the other, then any party may apply to the American Arbitration Association

located in Ocean County, New Jersey for the appointment of an arbitrator. In connection with any such application, any party may propose one or more persons to act as the arbitrator; provided, that any such person or persons shall be independent and shall be (x) a licensed attorney with at least ten (10) years' experience in connection with the development and operation of real estate similar to the Project or (y) a retired judge of any court located in Ocean County, New Jersey. After the appointment of the arbitrator, the parties shall have the right to take depositions and to obtain discovery by other means regarding the subject matter of the arbitration as if the matter were pending in the State Court of Ocean County, New Jersey, although the arbitrator may, for good cause shown, limit the nature and extent of such discovery and establish or modify the schedule relating to any discovery requests or applications relating thereto. The arbitrator shall have the power to decide all other procedural issues, including the following: the date, time and place of any hearing; the form, timing and subject matter of any pre-hearing documents to be submitted by the parties; and any evidentiary or procedural issues that may arise at or in connection with any arbitration hearing. The award of the arbitrator shall be conclusive and binding, and any party may seek to have the award confirmed by way of a court order. All fees and expenses of the arbitrators and all other expenses of the arbitration shall be borne initially by the Members pro rata in accordance with their Percentage Interests, but ultimately shall be borne by the non-prevailing party in the arbitration. Nothing contained herein shall be construed as to prevent any party from seeking provisional or equitable relief from a court on the basis that, unless such relief is obtained, any award that the arbitrator may make will be ineffectual, to seek injunctive relief from a court or seek enforcement of an arbitration order from a court.

SECTION 10.19 – VENUE.

The parties agree that any suit, action or proceeding with respect to this Agreement that is not subject to arbitration pursuant to Section 10.18 shall be brought in the state or federal courts sitting in Ocean County in the State of New Jersey. The parties hereto hereby accept the exclusive jurisdiction of those courts for the purpose of any such suit, action or proceeding. The parties hereto hereby irrevocably waive, to the fullest extent permitted by law, any objection that any of them may now or hereafter have to venue of any suit, action or

> proceeding arising out of or relating to this Agreement or any judgment entered by any court in respect thereof brought in Ocean County, New Jersey, and hereby further irrevocably waive any claim that any such suit, action or proceeding brought in Ocean County, New Jersey has been brought in an inconvenient forum.

SECTION 10.20 - WAIVER OF TRIAL BY JURY.

> EACH OF THE PARTIES HERETO AGREES THAT, IN THE EVENT OF ANY SUIT OR LEGAL ACTION BETWEEN OR AMONG THE MEMBERS ARISING IN CONNECTION WITH THIS AGREEMENT, THEY SHALL WAIVE THEIR RIGHT UNDER ANY APPLICABLE LAW TO SEEK A TRIAL BY JURY.

(103a-104a).

Like the clause in Garfinkel, that clause does not clearly and unambiguously waive statutory rights. Like the clause in Garfinkel, that clause is restricted only to claims that arise under the agreement or its breach. Nowhere in that provision is there any language obligating any party to arbitrate statutory claims. The court rewrote the contract and broadened the scope of arbitration which it is not permitted to do. A "***court may not rewrite a contract to broaden the scope of arbitration***[.]'' [emphasis added]. Garfinkel, supra, 168 N.J. at 132, quoting, Yale Materials Handling Corp. v. White Storage Retrieval Sys., Inc., 240 N.J.Super. 370, 374 (App.Div. 1990). The court mistakenly found an obligation to arbitrate claims which were not clearly, unambiguously and decisively identified as waived.

Indeed, the Court in Garfinkel took a narrow view of claims which could be arbitrated and limited arbitration only to claims which the parties agreed to

arbitrate. Garfinkel, 168 N.J. at 132. It further restricted a court's ability to re-write a contract to broaden the scope of arbitration. Ibid. That is exactly what the court in the subject case. By ordering arbitration where the clause does not clearly and unambiguously provide for arbitration of statutory claims, the court inappropriately broadened the scope of arbitration.

Moreover, an ***unambiguous writing*** is essential to such a determination" of an intent to waive statutory rights. [emphasis added]. Garfinkel, supra, 168 N.J. at 136. There can be no mutual assent where the waiver does not clearly, unambiguously or decisively state that statutory rights are waived. Notwithstanding the fact, that the arbitration provision does not clearly and unambiguously state that statutory rights are waived, the Operating Agreement is ambiguous to the extent it recognizes that certain suits, actions or proceedings, which are not identified, may not even be subject to arbitration. Section 10.19, entitled "Venue" states:

> "The parties agree ***that any suit, action or proceeding*** with respect to this Agreement ***THAT IS NOT SUBJECT TO ARBITRATION PURSUANT TO SECTION 10.18 SHALL BE BROUGHT IN THE STATE OR FEDERAL COURTS SITTING IN OCEAN COUNTY IN THE STATE OF NEW JERSEY.***" The Agreement goes on to state that "THE PARTIES HERETY HEREBY ACCEPT THE EXCLUSIVE JURISDICTION OF THOSE COURTS FOR THE PURPOSE OF ANY SUCH SUIT, ACTION OR PROCEEDING." [emphasis added].

(67a).

Further, Defendants waived any objection to venue of any suit where the Agreement states: "The parties hereto hereby irrevocably waive, to the fullest extent permitted by law, any objection that any of them may now or hereafter have to venue of any suit, action or proceeding arising out of or relating to this Agreement or any judgment entered by any court in respect thereof brought in Ocean County, New Jersey, and hereby further irrevocably waive any claim that any such suit, action or proceeding brought in Ocean County, New Jersey has been brought in an inconvenient forum."

Plaintiff did not waive any statutory claims. The Agreement does not include a waiver of statutory claims. Indeed, there can be no clear, effective and unambiguous waiver where the Agreement provides that certain unidentified lawsuits, actions and proceedings may be brought in the ***SHALL not MAY, BUT "SHALL BE BROUGHT IN THE STATE OR FEDERAL COURTS SITTING IN OCEAN COUNTY IN THE STATE OF NEW JERSEY.***" Accordingly, plaintiff is not obligated to arbitrate his claims of Violations of RICO Act, Violations of the New Jersey Uniform Securities Act, Violations of the Indiana Uniform Securities Act, Violations of the Securities Act of 1933 or Violations of New Jersey Consumer Fraud Act.

CONCLUSION

For the above-stated reasons, Plaintiffs respectfully request that the Court's Order granting a new trial be reversed and that the jury's verdict be re-instated.

Respectfully submitted,

/s/ *John J. Novak*
John J. Novak, Esq.
Attorney for Appellant: Shaul Moshe Sugar

Dated: October 17, 2025
cc: All counsel of record
Clients

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

SHAUL MOSHE SUGAR,

Plaintiff/Appellant,

v.

DAVID POLLACK, (Individually); JOSEPH KAHN, (Individually); VISIONRE; MORDECHAI DOMBROFF *A/K/A* MORDECLAI DOMBROFF, (Individually); NECHAMA DOMBROFF, (Individually); HONOR MEADOWS LLC; SUNTREE INVESTMENT GROUP, LLC; and HONOR MEADOWS OWNER LLC,

Defendants/Respondents.

SUPERIOR COURT OF THE STATE OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-004004-24T4

CIVIL ACTION

On Appeal from a Final Order of the Superior Court of New Jersey, Law Division, Ocean County
Docket No.: OCN-L-1092-25

Sat Below:
Hon. Robert E. Brenner, J.S.C.

AMENDED BRIEF FOR DEFENDANTS/RESPONDENTS MORDECLAI DOMBROFF, NECHAMA DOMBROFF, HONOR MEADOWS LLC, SUNTREE INVESTMENT GROUP, LLC AND HONOR MEADOWS OWNER LLC IN OPPOSITION TO APPEAL

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On the Brief:
Jason J. Rebhun, Esq.
Submitted November 14, 2025

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PRELIMINARY STATEMENT

Defendants-Respondents Mordeclai Dombroff, (Individually); Nechama Dombroff, (Individually); Honor Meadows LLC; Suntree Investment Group, LLC; and Honor Meadows Owner LLC submit this Brief in opposition and response (the "Respondents' Brief") to the Appellate Brief entitled, "Memorandum of Law" filed by Plaintiff-Appellant Shaul Moshe Sugar ("Appellant") (the "Appellant's Brief"), seeking review of certain parts of the order of the Hon. Robert E. Brenner, J.S.C., in the Superior Court of the State of New Jersey, Law Division, Ocean County, Docket No.: OCN-L-1092-25, dated and entered on July 22, 2025 (the "Appeal"), whereby the lower court entered an Order: (i) dismissing the Amended Complaint as against Respondents Mordeclai Dombroff, (Individually), Honor Meadows LLC, Suntree Investment Group, LLC, and Honor Meadows Owner LLC (collectively, "Respondents") and compelling arbitration of all claims asserted by Appellant in his Amended Complaint as against them; (ii) staying the underlying action as to the remaining Defendants; (iii) granting Appellant's cross-motion to amend the Complaint; and (iv) dismissing counts 1, 10, 11, and 12 of the Amended Complaint as against Defendant-Respondent Nechama Dombroff (the "Order on Appeal").

This Appeal is patently frivolous, and Appellant's Opening Brief propagates fictitious and otherwise misrepresented factual circumstances and legal conclusions, presenting them with no regard for their demonstrable falsities. As set forth herein,

the lower court properly dismissed the Amended Complaint as against Respondents and compelled arbitration of all claims against them. As such, this Appeal should be dismissed.

At issue on Appeal is the enforceable scope of an arbitration clause (the "Arbitration Clause") in an operating agreement for a limited liability company entered into by sophisticated parties as the byproduct of negotiation and mutual assent (the "Operating Agreement"). In Appellant's own words, "[t]he issue is whether or not plaintiff has waived his right to a trial on statutory claims."

Appellant's Opening Brief is inextricably reliant upon a series of demonstrably false assertions including a meritless presumption that the Operating Agreement was a "consumer contract," an incredibly frivolous argument that Appellant did not waive his right to trial by jury, a baseless contention that arbitration of any dispute was merely discretionary rather than mandatory which is belied by the evidence, the self-serving conclusory allegation that the Arbitration Clause was ambiguous and did not cover statutory claims, and the patently ludicrous assertion that the language contained in the Operating Agreement's Venue Clause was actually located in the Arbitration Clause (which is clearly was not).

As set forth hereinbelow, the lower court correctly dismissed the Amended Complaint as against Respondents and compelled arbitration of the claims against them, the Order on Appeal should not be disturbed, and this Appeal should be

dismissed because: (A) the Operating Agreement was not a "consumer contract" prospectively subject to additional scrutiny of its Arbitration Clause; (B) Appellant indisputably waived any right to trial by jury, and under the standard for non-consumer contracts, the enforceable scope of the Arbitration Clause included Appellant's statutory claims; and (C) even if the Operating Agreement was a "consumer contract" – which it was not – its enforceable scope nonetheless includes Appellant's statutory claims.

Separate and in addition to the foregoing, regardless of the outcome of this Appeal, Respondents note that this Appeal does not raise the issue of the stay imposed in the underlying action or the dismissal of the claims as against Defendant-Respondent Nechama, and as such, the foregoing determinations of the lower court should not be disturbed.

PROCEDURAL HISTORY

On April 22, Plaintiff Shaul Moshe Sugar ("Plaintiff") commenced the underlying action by filing the original complaint, naming David Pollak, Joseph Kahn, VisionRe, Mordeclai Dombroff i/s/h/a Mordechai Dombroff, Nechama Dombroff, Honor Meadows LLC, Suntree Investment Group, LLC, and Honor Meadows Owner LLC as defendants ("Defendants") (the "Complaint"). Pa54.

On May 15, 2025, Defendants Joseph Kahn and VisionRe filed an Answer with Affirmative Defenses. Pa66.

On June 5, 2025, Defendants Mordeclai Dombroff i/s/h/a Mordechai Dombroff, Nechama Dombroff, Honor Meadows LLC, Suntree Investment Group, LLC, and Honor Meadows Owner LLC (the "Moving Defendants") filed a motion to dismiss the Complaint (the "Motion to Dismiss"). Pa74

On June 12, 2025, Plaintiff filed his opposition to the Moving Defendants' Motion to Dismiss and a Cross-Motion to Amend the Complaint (the "Cross-Motion to Amend"). Pa91.

On June 18, 2025, the undersigned, Jason J. Rebhun, Esq., of The Law Offices of Jason J. Rebhun, P.C., entered a formal appearance on behalf of the Moving Defendants. Pa109.

On June 19, 2025, Moving Defendants filed their reply in further support of the Motion to Dismiss and Opposition to Plaintiff's Cross-Motion to Amend. Pa110.

On July 8, 2025, Robert C. Shea, Esq., of R.C. Shea & Associates entered a formal appearance on behalf of Defendant David Pollak. Pa124.

On July 11, 2025, Plaintiff submitted his reply in further support of his Cross-Motion to Amend. Pa125.

The Motion to Dismiss and Cross-Motion to Amend were ultimately scheduled for and returnable, with oral argument, on July 22, 2025, before the honorable Robert E. Brenner, P.J.Cv.P.

On July 22, 2025, the lower court entered an order of the honorable Robert E. Brenner, P.J.Cv.P., whereby: (1) Arbitration was compelled pursuant to Section 10.18 of the subject Operating Agreement as to Saul Moshe Sugar, Mordeclai Dombroff, Honors Meadows LLC, Suntree Investments Group, LLC, and Honor Meadows Owner, and the Complaint, as amended pursuant to the order, was dismissed as against the foregoing Defendants; (2) The underlying action was stayed as against the remaining Defendants, including David Pollak, Joseph Kahn, Vision RE and Nechama Dombroff; (3) Plaintiff's Cross-Motion to Amend was granted and the proposed Amended Complaint was deemed filed as of the date of the order; and (4) As to Defendant Nechama Dombroff, Counts 1,10,11 & 12 of the Amended Complaint were dismissed without prejudice (the "Order on Appeal"). Pa1.

On July 22, 2025, in accordance with and pursuant to the Order on Appeal, the Plaintiff's Amended Complaint was filed. Pa129.

On August 18, 2025, Plaintiff filed a Notice of Appeal of the Order on Appeal.

On September 2, 2025, Defendants Joseph Kahn and VisionRe filed an Answer to Amended Complaint with Affirmative Defenses. Pa159.

COUNTERSTATEMENT OF FACTS

In Mid-2024, Plaintiff-Appellant Shaul Moshe Sugar ("Plaintiff" or "Appellant") and Defendant-Respondent Mordeclai Dombroff, i/s/h/a Mordechai Dombroff a/k/a/ Mordeclai Dombroff ("Mordeclai"), each sophisticated parties, agreed to enter into a joint venture for the development of a real estate project involving the development and operation of 7.06 acres of land located generally at 1050 W. Noble Street, Lebanon, Boone County, Indiana (the "Project"). Pa8, at §B.

In furtherance of the Project, Appellant and Respondent Mordeclai, each sophisticated parties represented by counsel, negotiated and entered into an Operating Agreement effective as of July 15, 2024, for the operation of Respondent Honor Meadows LLC, an Indiana limited liability company formed pursuant to the Articles of Organization filed in the Office of the Indiana Secretary of State on July 15, 2024 for the purpose of completing the Project (the "Operating Agreement"). Pa4-53.

As provided in the Operating Agreement, the members of Honor Meadows LLC would be Appellant and Respondent Suntree Investment Group LLC ("Suntree"), whereby Suntree would be the initial managing member. Pa14, at §1.7(qq). Respondent Mordeclai was the manager of Suntree. Pa44.

As part and parcel of Appellant's membership interest and in exchange for his respective share of payments, returns, distributions, and compensation, Appellant

made an initial capital contribution of one million six hundred thousand ($1,600,000.00) dollars. Pa45. In addition to the sizeable initial capital contribution, Appellant also claims to have personally guaranteed ten million ($10,000,000) dollars of funding for Honor Meadows LLC. Pa132.

As further set forth in the Operating Agreement, the Members, through Honor Meadows LLC, "shall own the Project through Honor Meadows Owner LLC, a Delaware limited liability company in which the Company shall own directly or indirectly one hundred percent (100%) of the membership interests of such entity." Pa4, at §C.

Appellant does not allege any actual wrongdoing with respect to the Honor Meadows property itself—such as defects in title, environmental hazards, construction code violations, or physical mismanagement of the land or development site. Instead, the alleged wrongdoing centers around the investment solicitation process and the representations made to induce Appellant's investment.

The Operating Agreement does not establish any guaranteed return or fixed schedule for distributions. To the contrary, it expressly provides that distributions are contingent upon the availability of "Net Cash Flow," and that the timing and amount of any such distributions are left entirely to the discretion of the Manager. *See* Pa32-33, Operating Agreement §7.1 ("Net Cash Flow, if any, for each Fiscal Year shall be

distributed to the Members at such times and in such amounts as shall be determined by the Manager in its sole discretion").

As is typical in real estate ventures of this nature, returns are inherently speculative and dependent upon a number of variables beyond the parties' control. Appellant's suggestion that he was somehow misled into expecting immediate and substantial profits – without more – is legally insufficient and belied by the governing documents.

Appellant fails to allege any facts specifying *when* such returns were promised or expected, or by whom. More importantly, the notion that substantial profits would materialize *immediately* from a real estate acquisition and development project defies both common sense and commercial reality.

Appellant knowingly invested in a real estate venture – not a fixed-income instrument – and did so with the full understanding, as expressly memorialized in the Operating Agreement, that any distributions would be subject to the Manager's discretion. Pa20, at §3.1(b). To adopt Appellant's logic would not only undermine the contractual framework to which he expressly agreed, but would invite judicial chaos: if the agreement could be rewritten to compel premature distributions, then by the same logic, the Manager could disregard the Operating Agreement altogether and counterclaim for additional capital contributions from Appellant – perhaps even double the amount originally invested – as a condition of preserving his interest in

the Project. Such a result is untenable and would eviscerate the enforceability of operating agreements throughout the commercial investment landscape.

Pursuant to §10.18 of the Operating Agreement, entitled "ARBITRATION OF DISPUTES," "**Any dispute** among the Members under this Agreement (*except as otherwise provided below*) **shall be resolved and finally determined by arbitration** as set forth herein" (the "Arbitration Clause") (emphasis added). Pa40-41. The Arbitration Clause continues, in its entirety,

> **Any arbitration** pursuant to this Section 10.18 **shall**, to the fullest extent permitted by law, be held in Ocean County, New Jersey under the rules of the American Arbitration Association. If the parties do not mutually agree upon an arbitrator within five (5) business days after notice from one party to the other, then any party may apply to the American Arbitration Association located in Ocean County, New Jersey for the appointment of an arbitrator. In connection with any such application, any party may propose one or more persons to act as the arbitrator; provided, that any such person or persons shall be independent and shall be (x) a licensed attorney with at least ten (10) years' experience in connection with the development and operation of real estate similar to the Project or (y) a retired judge of any court located in Ocean County, New Jersey. After the appointment of the arbitrator, the parties shall have the right to take depositions and to obtain discovery by other means regarding the subject matter of the arbitration **as if the matter were pending in the State Court** of Ocean County, New Jersey, although the arbitrator may, for good cause shown, limit the nature and extent of such discovery and establish or modify the schedule relating to any discovery requests or applications relating thereto. The arbitrator shall have the power to decide all other procedural issues, including the following: the date, time and place of any hearing; the form, timing and subject matter of any pre-hearing documents to be submitted by the parties; and any evidentiary or procedural issues that may arise at or in connection with any arbitration hearing. **The award of the arbitrator shall be conclusive and binding**, and any party may seek to have the award confirmed by way

> of a court order. All fees and expenses of the arbitrators and all other expenses of the arbitration shall be borne initially by the Members pro rata in accordance with their Percentage Interests, but ultimately shall be borne by the non-prevailing party in the arbitration. Nothing contained herein shall be construed as to prevent any party from seeking provisional or equitable relief from a court on the basis that, unless such relief is obtained, any award that the arbitrator may make will be ineffectual, to seek injunctive relief from a court or seek enforcement of an arbitration order from a court."

(emphasis added). Pa40-41, at §10.18. The Operating Agreement contains a "VENUE" clause (§10.19), which provides in its entirety,

> "The parties agree that **any suit, action or proceeding with respect to this Agreement <u>that is not subject to arbitration pursuant to Section 10.18</u>** shall be brought in the state or federal courts sitting in Ocean County in the State of New Jersey. The parties hereto hereby accept the exclusive jurisdiction of those courts for the purpose of any **such** suit, action or proceeding. The parties hereto hereby irrevocably waive, to the fullest extent permitted by law, any objection that any of them may now or hereafter have to venue of any suit, action or proceeding arising out of or relating to this Agreement or any judgment entered by any court in respect thereof brought in Ocean County, New Jersey, and hereby further irrevocably waive any claim that any such suit, action or proceeding brought in Ocean County, New Jersey has been brought in an inconvenient forum."

(emphasis added). Pa41, at §10.19.

The Operating Agreement also contains an express, conspicuous "Waiver" clause, entitled, "WAIVER OF TRIAL BY JURY" (§10.20), which provides in its entirety,

> "EACH OF THE PARTIES HERETO AGREES THAT, IN THE EVENT OF ANY SUIT OR LEGAL ACTION BETWEEN OR AMONG THE MEMBERS ARISING IN CONNECTION WITH THIS

AGREEMENT, THEY SHALL WAIVE THEIR RIGHT UNDER ANY APPLICABLE LAW TO SEEK A TRIAL BY JURY."

(emphasis in the original). Pa41, at §10.20.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

A. ARBITRATION – *DE NOVO*

In New Jersey, Orders compelling arbitration are reviewed *de novo* on appeal. *See* Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013); N.J. R. 2:2-3(a). In reviewing such orders, the courts "are mindful of the strong preference to enforce arbitration agreements, both at the state and federal level." Hirsch, 215 N.J. 174, 186 (2013), citing Hojnowski v. Vans Skate Park, 187 N.J. 323 (2006) (noting federal and state preference for enforcing arbitration agreements); Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 131 (2001) (recognizing "arbitration as a favored method of resolving disputes").

Both the Federal Arbitration Act ("FAA"), 9 U.S.C.S. §§1 - 16, and the New Jersey Arbitration Act ("NJAA"), N.J.S.A. 2A:23B-1 to 36, "express a general policy favoring arbitration 'as a means of settling disputes that otherwise would be litigated in a court.'" Cnty. of Passaic v. Horizon Healthcare Servs., Inc., 474 N.J. Super. 498, 501 (App. Div. 2023) (quoting Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 556, 107 A.3d 1281 (2015). Because of the favored status afforded to arbitration, an agreement to arbitrate should be read liberally in favor of arbitration. *See* Garfinkel, 168 N.J. 124, 131 (2001); NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424 (App. Div. 2011).

Where possible, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *See* AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650 (1986). This is because "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum." Arafa v. Health Express Corp., 243 N.J. 147, 170 (2020) (citation and quotation omitted).

As this Court's review of the Order on Appeal is *de novo*, the underlying basis for compelling arbitration in the first place must be revisited. Under the circumstances, the Court "must determine: (1) whether a valid arbitration agreement exists; and (2) whether the dispute falls within the scope of the agreement." Spriggs v. Gardenview OPCO, LLC, No. A-1133-23, 2024 N.J. Super. Unpub. LEXIS 2988, at *12 (App. Div. Dec. 6, 2024) (citing Martindale v. Sandvik, Inc., 173 N.J. 76, 83, 92 (2002).

B. Whether a Valid Arbitration Agreement Exists

To answer the first question under Spriggs and determine whether a valid arbitration exists, we look to the NJAA, N.J.S.A. 2A:23B-1 to 36, and the FAA, 9 U.S.C.S. §§1-16, each of which sets forth the circumstances under which an arbitration agreement is valid. Pursuant to the NJAA, an arbitration agreement "is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." N.J.S.A. 2A:23B-6. Almost identically,

pursuant to the FAA, an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.S. §2.

C. Whether the Dispute Falls Within the Scope of the Agreement

The second question under Spriggs is more fact-intensive and requires further legal analysis, particularly due to the New Jersey Supreme Court's decision in Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430 (2014). Following Atalese, it became necessary determine whether an arbitration agreement at issue was "contained in a consumer contract" (Cnty. of Passaic, 474 N.J. Super. 498, 501 (App. Div. 2023)) or a "commercial contract."

i. The Standard for "Consumer" (and Employment) Contracts

To determine whether an arbitration agreement was "contained in a consumer contract" (Cnty. of Passaic, 474 N.J. Super. 498, 501), "[t]he initial inquiry for any arbitration agreement must be whether the agreement to arbitrate is the product of mutual assent, as determined under customary principles of contract law." Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 137 (2020). The question of mutual assent relies upon a determination as to the parties' bargaining power which is evaluated based on factors such as whether the subject agreement was negotiated or a form contract, and the type of agreement entered into. If, for example, the overarching contract

containing the arbitration clause was considered to be a "consumer" (or employment) contract, under the Atalese standard, the arbitration provision "must 'be sufficiently clear to place *a consumer* on notice that he or she is waiving a constitutional or statutory right'" (emphasis in original). Cnty. of Passaic, 474 N.J. Super. at 501, quoting Atalese, 219 N.J. 430, 443 (2014). This is because, as the Supreme Court in Kernahan v. Home Warranty Adm'r of Fla., Inc., stressed, "[t]he consumer context of the contract mattered." 236 N.J. 301, 307 (2019).

Pursuant to N.J.S.A. 56:12-1, a "'Consumer Contract' means a written agreement in which an individual:

> (a) Leases or licenses real or personal property; (b) Obtains credit; (c) Obtains insurance coverage, except insurance coverage contained in policies subject to the "Life and Health Insurance Policy Language Simplification Act," P.L.1979, c.167 (C.17B:17-17 et seq.); (d) Borrows money; (e) Purchases real or personal property; (f) Contracts for services including professional services; (g) Enters into a service contract, as defined in section 1 of P.L.2013, c.197 (C.56:12-87),
>
> for cash or on credit and the money, property or services are obtained for personal, family or household purposes."

N.J.S.A. 56:12-1. The New Jersey legislature underscored the final sentence of the foregoing, reiterating that a "Consumer contract" only "means a written agreement in which an individual contracts for a service, that is obtained for personal, family, or household purposes." N.J.S.A. 56:12-2a.

Atalese applies "only in the context of employment and consumer contracts" (In re Remicade (Direct Purchaser) Antitrust Litig., 938 F.3d 515, 525 (3d Cir. 2019)

(quoting Kernahan, 236 N.J. 301 (2019)) and does "**not** extend … to commercial contracts" (emphasis added). Victory Entm't, Inc. v. Schibell, No. A-3388-16T2, 2018 N.J. Super. Unpub. LEXIS 1467, at *21 (App. Div. June 21, 2018).

The foregoing conclusion and limitation of the applicability of Atalese has been consistently upheld in the New Jersey Courts. *See* Flanzman, 244 N.J. 119, 137 (2020). (employment contract); Kernahan, 236 N.J. at 307 (consumer contract); Morgan v. Sanford Brown Inst., 225 N.J. 289, 294 (2016) (consumer contract); Atalese, 219 N.J. 430, 443 (consumer contract); Leodori v. Cigna Corp., 175 N.J. 293, 295 (2003) (employment contract); Martindale, 173 N.J. 76, 83, 92 (2002) (employment contract); Garfinkel, 168 N.J. 124, 131 (employment contract) (cf. Cnty of Passaic, 474 N.J. Super. at 503).

Other factors to consider in determining whether a contract was a "consumer" contract include the sophistication of the parties (Id.), whether they were represented by counsel (Id.), and "mutual assent" to the agreement, meaning that it was negotiated and not merely a "form" contract. Id.; *see also* Flanzman, 244 N.J. at 137 (2020); Midland Funding LLC v. Bordeaux, 447 N.J. Super. 330, 335 (App. Div. 2016) ("[a]n agreement to arbitrate, like any other contract, 'must be the product of mutual assent, as determined under customary principles of contract law'") (quoting Atalese, 219 N.J. at 442).

Notwithstanding the limitations on the applicability of Atalese, where applicable, all that is required for an arbitration clause to be enforceable is that "the clause, at least in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute." Atalese, 219 N.J. at 447.

ii. Non-Consumer (or Employment) Contracts

The analysis as to the enforceable scope of an arbitration provision contained in a commercial – rather than consumer or employment – contract is far more straightforward than those falling under the Atalese rule. As provided above, pursuant to the NJAA and FAA, an arbitration agreement is valid, enforceable, and irrevocable unless there exist grounds at law or in equity for the revocation of the overarching contract. *See* N.J.S.A. 2A:23B-6; 9 U.S.C.S. §2.

"When a party enters into a signed, written contract, that party is presumed to understand and assent to its terms, unless fraudulent conduct is suspected." Savage v. Trinity Solar, Inc., No. A-0159-24, 2025 N.J. Super. Unpub. LEXIS 553, at *12 (App. Div. Apr. 8, 2025) (quoting Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 305, 1 A.3d 678 (2010)). Nonetheless, even if there was a claim of fraudulent conduct in connection with the contract's execution, "the claim of fraud in the inducement should be determined by arbitrators." Suratwala v. Gandhi, No. A-0279-19T1, 2020 N.J. Super. Unpub. LEXIS 872, at *12 (App. Div. May 8, 2020) (quoting

Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)).

The FAA, 9 U.S.C.S. §§1 to 16, "was enacted in 'response to [the] hostility of American courts to the enforcement of arbitration agreements.'" Arafa, 243 N.J. 147, 164 (2020) (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001)). Congress, in enacting the FAA, "'intended to place arbitration agreements upon the same footing as other contracts.'" Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 208 (2019) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24, 111 S. Ct. 1647, 114 L.Ed.2d 26 (1991)).

"In accordance with those principles, an agreement to arbitrate generally will be valid under state law unless it violates public policy." Hojnowski, 187 N.J. 323, 342 (2006). As further provided above, both the FAA and NJAA "express a general policy favoring arbitration 'as a means of settling disputes that otherwise would be litigated in a court.'" Cnty. of Passaic, at 501 (quoting Badiali, 220 N.J. 544, 556, 107 A.3d 1281 (2015). Indeed, "our Supreme Court looked 'with disfavor upon the unnecessary bifurcation of disputes between judicial resolution and arbitration.'" Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc., 240 N.J. Super. 370, 375 (App. Div. 1990) (quoting Ohio Cas. Ins. Co. v. Benson, 87 N.J. 191, 199 (1981)).

An arbitration clause inherently encompasses a plaintiff's statutory claims where the statutory claims are based on the same facts as their contract claims. *See* Suratwala, No. A-0279-19T1, 2020 N.J. Super. Unpub. LEXIS 872, at *21 (App. Div. May 8, 2020) ("Plaintiffs' NJRICO claims are based upon the same facts as the claims for distributions that were wrongfully withheld and conversion. The arbitration clauses encompass plaintiffs' NJRICO claims").

"[T]o keep arbitration agreements on 'equal footing' with other contracts, a court 'cannot subject an arbitration agreement to more burdensome requirements than' other contractual provisions." *See* Roach v. BM Motoring, LLC, 228 N.J. 163, 174 (2017) (quoting Atalese, at 441). "Arbitration clauses are not singled out for more burdensome treatment than other waiver-of-rights clauses under state law." Kernahan, 236 N.J. at 332 (quoting Atalese, at 444).

New Jersey law does not require specific "magical language" to accomplish a waiver of rights in an arbitration agreement and New Jersey courts have upheld arbitration clauses that have explained in various simple ways that arbitration is a waiver of the right to bring suit in a judicial forum. *See* Morgan, 225 N.J. 289, 309 (2016). This flexibility in language requirements supports enforceability where the arbitration clause reasonably conveys the parties' agreement to resolve disputes through arbitration rather than litigation.

In fact, even "where parties have clearly expressed by contract an intention that certain of their disputes should be resolved by arbitration but have ambiguously or less clearly identified those issues which need not be so resolved," any such "ambiguities in [the] agreements are to be resolved in favor of arbitration." Yale Materials Handling Corp., 240 N.J. Super. 370, 375 (App. Div. 1990).

II. THE LOWER COURT CORRECTLY DISMISSED APPELLANT'S AMENDED COMPLAINT AND COMPELLED ARBITRATION.

The lower court correctly dismissed the Amended Complaint as against Respondents and compelled arbitration of the claims against them, the Order on Appeal should not be disturbed, and this Appeal should be dismissed because: (A) the Operating Agreement was not a "consumer contract" prospectively subject to additional scrutiny of its Arbitration Clause; (B) the Arbitration Clause is enforceable, its scope includes Appellant's statutory claims, and Appellant indisputably waived any right to trial by jury; and (C) even if the Operating Agreement was a "consumer contract" – which it was not – its enforceable scope nonetheless includes Appellant's statutory claims.

A. The Operating Agreement was not a "consumer contract" or "employment contract" under Atalese

The Operating Agreement was not a "consumer contract" or "employment contract" and was the product of negotiation between its Members, the Atalese

standard does not apply, and the Arbitration Clause meets all requirements for enforcement. Accordingly, this Appeal should be dismissed.

Appellant's Appeal is entirely predicated and reliant upon Appellant's misguided, misleading, and factually and legally untrue arguments that that Appellant was a "consumer," that the Operating Agreement constituted a "consumer transaction," and that Appellant cannot be compelled to arbitrate statutory claims because he purportedly did not agree do so.

Whether deliberately or haphazardly, Appellant completely disregards the fact that Atalese applies "only in the context of employment and consumer contracts" (In re Remicade, 938 F.3d 515, 525 (3d Cir. 2019) (quoting Kernahan, at 301) and does "**not** extend … to commercial contracts" (emphasis added). Victory Entm't, Inc., No. A-3388-16T2, 2018 N.J. Super. Unpub. LEXIS 1467, at *21 (App. Div. June 21, 2018).

"New Jersey courts have emphasized that the [Atalese] rule is inapplicable "when considering individually-negotiated contracts between sophisticated parties – often represented by counsel at the formation stage – possessing relatively similar bargaining power." Hong Zhuang v. Emd Performance Materials Corp., 2024 U.S. App. LEXIS 5261, at *8, n 5 (3d Cir Mar. 5, 2024, No. 23-2715).

From the outset, Appellant would have this Court believe that he is merely a "consumer" and that an LLC's operating agreement is somehow a "consumer

contract." Common sense suggests this is a ridiculous, baseless position to take, and precedential case law agrees. The Operating Agreement does not fall within any one of the seven type of "consumer contracts" set forth under N.J.S.A. 56:12-1 (contracts entered into by the payment of cash or credit in exchange for property or services obtained for personal, family or household purposes, including leases or licenses real or personal property; for credit; insurance coverage; to borrow money; purchases real or personal property; for services including professional services; or to enter into a service contract). In fact, and at law, Appellant was not a consumer, and the Operating Agreement was not a consumer transaction.

A "consumer contract," also known as a "contract of adhesion," is a contract "presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity of the 'adhering' party to negotiate except perhaps on a few particulars." Martindale, 173 N.J. at 89 (quoting Rudbart v. N.J. Dist. Water Supply Com., 127 N.J. 344, 353 (1992)). This is not the case here.

The Operating Agreement was the product of negotiation between the parties. *See* Pa136, at ¶40c (confirming that Appellant negotiated and engaged in repeated "face-to-face meeting(s) as well as in telephone conversations" concerning the scope and nature of the Project and the parties' roles in Respondent Honor Meadows LLC prior to entering into the Operating Agreement). Indeed, prior to finalizing and executing the Operating Agreement, Appellant was presented and reviewed, *inter*

alia, "lofty and seemingly profitable rental figures," (Pa 135, at ¶40a), documents and information concerning "profit trajectory based upon cash flow" (Pa138, at ¶55b1), and the "Underwriting Certificate." Pa139, at ¶55j. "This is a setting where plaintiff is 'presumed to understand . . . what was being agreed to,' including the provision's terms and legal effect." Cohen v. Architecture, No. A-0566-23, 2024 N.J. Super. Unpub. LEXIS 1759, at *18 (App. Div. July 24, 2024) (quoting Kernahan, at 319.

The Operating Agreement was not a consumer contract; it was a thorough, detailed agreement entered into by and between sophisticated parties as the result of extensive negotiation and in which substantial sums of money were invested and guaranteed by non-consumer parties entering into a joint venture as co-members of a limited liability company. Courts routinely distinguish Atalese in this context. Victory Entm't, Inc., at *21 (App. Div. June 21, 2018) ("Atalese does not apply with equal force to sophisticated parties negotiating commercial contracts"). Accordingly, the Operating Agreement was the product of mutual assent and is not a "consumer contract." In other words, "an express waiver of the right to seek relief in a court of law to the degree required by Atalese is unnecessary when parties to a commercial contract are sophisticated and possess comparatively equal bargaining power." Aguirre v. CDL Last Mile Solutions, LLC, 2024 N.J. Super. Unpub. LEXIS 283, at

*23 (Super. Ct. App. Div. Feb. 26, 2024, Nos. A-3346-22, A-3372-22) (quotation omitted).

Despite repeatedly relying upon case law that presumes the existence of a "consumer contract," Appellant never even argues that the Operating Agreement is a "consumer contract." *See generally*, Pb. Similarly, Appellant's attempt to recast himself as a "consumer" is contrived. He initially contributed $1.6 million in exchange for his membership interest, claims to have personally guaranteed $10 million in financing, negotiated business terms, and signed a member-level agreement. Pa45. Appellant's effort to label himself as a "consumer" cannot transform Appellant, a joint-venture investor, into a retail consumer under the Operating Agreement, a commercial – and not "consumer" – contract.

The Operating Agreement does not fall within the parameters of a "consumer contract" as detailed above and obviously is not an employment contract. Indeed, Appellant repeatedly confirms in the Amended Complaint that he was an investor (as opposed to anything resembling an ordinary "consumer" or an "employee"). *See generally*, Pa129-158, Amended Complaint.

The Arbitration Clause here explicitly calls for "binding arbitration," references the "validity" and "transactions contemplated" by the Agreement, and is reinforced by two separate provisions: a jury-trial waiver (§10.20) and a venue

clause (§10.19) designating Indiana as the forum. Pa40-41. Those clear statements far exceed the "minimal clarity" requirement identified in Atalese, at 447-448.

Accordingly, because Appellant is neither a consumer nor does this matter involve a "consumer" or "employment" contract, Atalese does not apply to the question of whether the Arbitration Clause in the Operating Agreement is enforceable.

B. The Arbitration Clause is enforceable, encompasses Appellant's contractual *and* statutory claims, and Appellant indisputably waived any right to trial by jury.

Appellant misleadingly argued in his Opening Brief that the Arbitration Clause is rendered unenforceable pursuant to the holding in Atalese by the (factually untrue) absence of any language providing a waiver of his right to a trial on statutory claims. Pb26. This is plainly false. Pa40-41. Atalese does not apply because the Operating Agreement is not a "consumer contract" and even if Atalese did apply – which it does not – the Arbitration Clause explicitly and unambiguously covers *any* dispute, including Appellant's statutory claims.

i. Presumptive Validity.

As the Operating Agreement is not a "consumer contract," pursuant to the NJAA and FAA, the Arbitration Clause is presumptively valid, enforceable, and irrevocable, unless such grounds exist at law or in equity for the revocation of the overarching contract. *See* N.J.S.A. 2A:23B-6; 9 U.S.C.S. §2.

Appellant, in his Opening Brief, alleges "fraudulent statements" made "to induce plaintiff into entering into a contract with them." Pb1. Generally, with respect to evaluating the validity of a contract, "[w]hen a party enters into a signed, written contract, that party is presumed to understand and assent to its terms, unless fraudulent conduct is suspected." Savage, No. A-0159-24, 2025 N.J. Super. Unpub. LEXIS 553, at *12 (App. Div. Apr. 8, 2025) (quoting Stelluti, 203 N.J. 286, 305, 1 A.3d 678 (2010)). However, in the narrower context of evaluating contractual validity with respect to arbitration provisions, where there *is* a claim of suspected fraudulent conduct, "the claim of fraud in the inducement should be determined by arbitrators." Suratwala, No. A-0279-19T1, 2020 N.J. Super. Unpub. LEXIS 872, at *12 (quoting Prima Paint Corp., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)). Under Prima Paint Corp., allegations of fraudulent inducement to enter a contract containing an arbitration clause are arbitrable unless the clause itself was induced by fraud. While Appellant alleges that he was fraudulently induced to enter the Operating Agreement based on "false statements" by Respondents (Pb1), that contention does not preclude arbitration, and Appellant makes no allegation that the Arbitration Clause itself was the product of fraudulent inducement. *See* Pb.

Notwithstanding the foregoing, even assuming, *arguendo*, that the Operating Agreement was somehow deemed invalid, the Arbitration Clause remains enforceable. *See* Goffe, 238 N.J. 191, 197 (2019). This principle ensures that

disputes about contract validity are resolved through the agreed-upon arbitration process rather than circumventing it.

All of the foregoing, coupled with the presumption that the Arbitration Clause is valid, enforceable, and irrevocable (N.J.S.A. 2A:23B-6; 9 U.S.C.S. §2), the determination of whether such grounds exist at law or in equity for the revocation of the overarching contract be based on fraudulent inducement should be made by the arbitrator.

ii. Enforceable Scope, Generally.

The Arbitration Clause here validly covers, "**Any dispute** among the Members under this Agreement" (emphasis added). Pa40-41, at §10.18. Such language has repeatedly and consistently been held enforceable in New Jersey. *See* Bedrock Steel v. Raritan Urban Renewal, No. A-0410-22, 2023 N.J. Super. Unpub. LEXIS 691, at *15-16 (App. Div. May 8, 2023); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 617 (1985) (enforcing arbitration clause providing that, "All disputes, controversies or differences . . . aris[ing] between [the parties out of their contract] shall be finally settled by arbitration"); Delaney v. Dickey, 244 N.J. 466, 476, 242 A.3d 257 (2020) ("Any disputes arising out of or relating to this engagement agreement..."); Flanzman, 244 N.J. at 126 ("Any and all claims or controversies arising out of or relating to Employee's employment ... shall, in lieu of a jury or other civil trial, be settled by final and binding arbitration"); Skuse

v. Pfizer, Inc., 244 N.J. 30, 38 (2020) ("all disputes, claims, complaints, or controversies that you have now or at any time in the future may have against Pfizer . . . are subject to arbitration pursuant to the terms of this Agreement"); Goffe, 238 N.J. 191, 197 ("you and we agree that either you or we have an absolute right to demand that any dispute be submitted to an arbitrator in accordance with this agreement. If either you or we file a lawsuit. . . or other action in a court, the other party has the absolute right to demand arbitration following the filing of such action"); Cnty. of Passaic, at 501 (enforcing arbitration clause providing that, "the parties shall submit the dispute to binding arbitration").

In consideration of the foregoing, the Operating Agreement's Arbitration Clause validly encompasses "any dispute," meaning all of the claims set forth in Appellant's Amended Complaint, including the statutory claims.

When determining the enforceability of arbitration clauses in consumer contracts, another key consideration is whether the contract was the product of negotiation between the parties or whether one party had to sign the agreement "as-is." In re Remicade, 938 F.3d 515, 525 (quoting Kernahan, *supra*.; *see* Boger v. Ideavillage Prods. Corp., No. A-0888-24, 2025 N.J. Super. Unpub. LEXIS 2160, at *22 (App. Div. Nov. 3, 2025) (finding Atalese does not apply, and the plaintiff was not a mere "consumer" where the agreement in question was the result of "months of negotiations").

Here, like in Boger (Id.) the Operating Agreement was the product of negotiation between the parties. *See* Pa136, at ¶40c (confirming that Appellant negotiated and engaged in repeated "face-to-face meeting(s) as well as in telephone conversations" concerning the scope and nature of the Project and the parties' roles in Respondent Honor Meadows LLC prior to entering into the Operating Agreement).

Indeed, prior to finalizing and executing the Operating Agreement, Appellant was presented and reviewed, *inter alia*, "lofty and seemingly profitable rental figures" (Pa135, at ¶40a), documents and information concerning "profit trajectory based upon cash flow" (Pa 138, at ¶55b1), and the "Underwriting Certificate." Pa1139, at ¶55j. Accordingly, for the foregoing reasons, Atalese does not apply insofar as to require the subject Arbitration Clause to include any additional language or express waiver of the right to litigate claims arising out of the subject agreement in State Court. Moreover, by virtue of the negotiation of the Operating Agreement (and naturally, its clauses, including the Arbitration Clause), under standard contract principles, and the public policy in favor of arbitration, the Arbitration Clause is valid, enforceable, and includes Appellant's contract (and as detailed below, statutory) claims against Respondents.

iii. Enforceable Scope, Statutory Claims.

Appellant misleadingly argues in his Opening Brief that the Operating Agreement does not include "any language obligating any party to arbitrate statutory claims" because the Arbitration Clause (Pa40-41, at §10.18), Venue Clause (Pa41, at §10.19), and Waiver Clause (Id. at §10.20) are purportedly "restricted only to claims that **arise** under the agreement or its breach" (emphasis added) (Pb24). This is blatantly false and deceptive.

In fact, here, the Arbitration Clause (§10.18) broadly, but validly (and explicitly) covers "***any dispute***" between the Members, and not merely controversies that "arise out of" the Operating Agreement, explicitly providing in its very first sentence that, "Any dispute among the Members under this Agreement … shall be resolved and finally determined by arbitration as set forth herein." Pa40-41. Stated differently, the Arbitration Clause covers *both* contractual and non-contractual (i.e., statutory) claims.

In Garfinkel, the Court found that the arbitration clause explicitly which covered any claim that "arises from the agreement or its breach" was "insufficient to constitute a waiver of plaintiff's [statutory] remedies." 333 N.J. Super. 291, 295. Appellant's failure to identify the precise language of the arbitration clause in Garfinkel deprives this Court from a proper analysis. Indeed, the arbitration clause in Garfinkel provided, "*any controversy arising out of, or relating to, this*

Agreement or the breach thereof, shall be settled by arbitration" (emphasis in original). Id.

The foregoing is clearly and materially distinguishable from the Arbitration Clause in the Operating Agreement, which contains no such "arising out of" language.[1] Nonetheless, New Jersey courts have recognized that arbitration provisions covering claims "relating to" a contract are broader than those covering claims merely "arising out of" a contract. *See* Yale Materials Handling Corp., 240 N.J. Super. 370, 375 (App. Div. 1990).

As the Operating Agreement (Pa4-53) properly covers "*Any* dispute" (Pa40, at §10.18) (emphasis added), and not merely those controversies "arising out of" the subject agreement, Garfinkel's holding as to the exclusion of a statutory claim is inapplicable. Accordingly, and by virtue of the clear and express language of the Operating Agreement, Appellant's statutory claims are covered by the Arbitration Clause, and the lower court's decision was proper.

Even assuming, *arguendo*, that the Operating Agreement limited arbitration to those claims which merely "arise out of" the agreement, the lower court would still have properly compelled arbitration. The gravamen of Appellant's claims is that

[1] Appellant misleadingly pointed to misappropriated language from the Venue Clause concerning the scope of waiver of venue, and such waiver nonetheless would require that arbitration was not the proper venue in the first place, as detailed below.

he was misled into investing and has not received "significant returns" on the Project. *See generally*, Pb. Those issues are inseparable from the contract: the distribution waterfall, the management fees, and the Manager's discretion to determine when, whether, and how to make payments to Members are all set forth in the Operating Agreement. Without the Operating Agreement, there is no relationship, no investment, and no alleged wrongdoing.

Phrases such as "arising out of or relating to" have been construed to include tort, statutory, and fraud-in-the-inducement claims. *See* Martindale, at 76; Alpert, Goldberg, Butler, Norton & Weiss v. Quinn, 410 N.J. Super. 510 (App. Div. 2009). Where an arbitration agreement is found to be enforceable and contains "arising out of" language, statutory claims properly fall within the scope of the arbitration agreement. *See* Arafa, 243 N.J. 147, 171-172.

In fact, Appellant's statutory fraud claims and damages theory – that he was deprived of "significant returns" and that fees were misallocated – depends entirely on contractual provisions (§§3.1 and 5.4) governing distributions and fees. Pa20, 29.

The claims therefore *would* "arise out of" and "relate to" the Operating Agreement and would in turn be properly subject to arbitration. *See* Epix Holdings Corp. v. Marsh & McLennan Cos., 410 N.J. Super. 453, 470 (App. Div. 2009) (arbitration compelled where "the factual allegations arise from and depend upon the parties' contractual relationship").

Additionally, an arbitration clause inherently encompasses a plaintiff's statutory claims where the statutory claims are based on the same facts as their contract claims. *See* Suratwala, No. A-0279-19T1, 2020 N.J. Super. Unpub. LEXIS 872, at *21 ("Plaintiffs' NJRICO claims are based upon the same facts as the claims for distributions that were wrongfully withheld and conversion. The arbitration clauses encompass plaintiffs' NJRICO claims"). Consumer fraud and RICO claims have been held subject to arbitration, with courts concluding that a review of the text and history of the Consumer Fraud Act provides no support for the position that such statutory claims are not amenable to arbitration. *See* Gras v. Assocs. First Cap. Corp., 346 N.J. Super. 42, 47 (App. Div. 2001). Indeed, by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum. *See* Arafa, 243 N.J. at 171-172. This principle supports the arbitrability of various statutory claims without requiring explicit waiver language for each specific statute.

Under established New Jersey precedent, where an arbitration clause is broad in scope and covers all claims, disputes, and other matters arising out of or related to the contract, and where there is no doubt that a party asserts a claim arising out of or related to the contract, the dispute is arbitrable. Every statutory count in the amended complaint "arises" from the same operative facts: the investment, the distribution structure, and the management of the LLC, and Appellant's claims

would clearly arise out of or relate to the Operating Agreement and the transactions it governs. The Arbitration Clause in the Operating Agreement is valid, enforceable, and broadly covers all disputes arising out of or relating to the agreement and the transactions it governs. Under New Jersey's strong policy favoring arbitration, Appellant's claims, including statutory claims, fall within the scope of the Arbitration Clause and must be submitted to binding arbitration. This Court should uphold the compelling of arbitration of all claims.

Respondents note that there is a limited, conditional, and theoretical exception set forth in the Arbitration Clause which is inapplicable and nonetheless is not the basis for Appellant's Appeal of the enforceability and scope of the Arbitration Clause. This "exception" does not, in any way, shape, or form, mean that arbitration is discretionary, rather than mandatory for "any dispute." Pa40, at §10.18. Underscoring the foregoing, Arbitration Clause here does not use discretionary language ("may"), which has been held to invalidate an arbitration provision in a consumer contract context. *See* Singer v. Vella, 2024 N.J. Super. Unpub. LEXIS 2774, at *11 (Super. Ct. App. Div. Nov. 6, 2024, No. A-1458-23). In contrast, here, the Arbitration Clause uses "mandatory" and "not permissive" language (Pa40-41, at §10.18, "shall"), which satisfies the Atalese standard. Id.

Instead, it requires an "if all else fails" approach. The Arbitration Clause's "exception" *only* comes into play *if* one of two circumstances exist: (1) a Member

seeks "provisional or equitable relief from a court on the basis that, unless such relief is obtained, any award that the arbitrator may make will be ineffectual;" or (2) a Member seeks "injunctive relief from a court or seek enforcement of an arbitration order from a court." Pa40-41, at §10.18. Neither circumstance exists here.

As to the first prerequisite circumstance, Appellant does not seek "provisional or equitable relief" and Appellant also has not alleged that the arbitrator's award will be "ineffectual." *See generally*, Pb. In fact, Appellant goes one step further in the opposite direction, explicitly stating that "[t]he issue ***is not whether or not there is a prohibition against arbitrating statutory claims***. The issue is whether or not plaintiff has waived his right to a trial on statutory claims." (emphasis in original). Pb12. Stated differently, Appellant does not contend that any award that the arbitrator will make will be ineffectual, as required for the first prerequisite circumstance (Pa40-41, at §10.18); Appellant's issue is that he allegedly did not agree to arbitration of the statutory claims. Pb12. Accordingly, the first prerequisite circumstance does not exist.

For the second prerequisite circumstance to even be possible, there must first be "an arbitration order from a court." Pa41, at §10.18. Obviously, the second prerequisite circumstance does not exist – nor can it – because arbitration has not even begun.

For the foregoing reasons, the Operating Agreement's Arbitration Clause's limited, conditional, and merely theoretical "exception" to compelling arbitration of the Members' disputes is neither discretionary nor applicable, the lower court properly compelled arbitration, and this Appeal should be dismissed.

iv. Waiver of Trial by Jury.

Appellant incredibly argued in his Opening Brief that he "has not waived his right to a trial by jury" because "[a]n arbitration clause… must state its purpose clearly and unambiguously." Pb2. Again, Appellant's contention is as frivolous as it is demonstrably false. Indeed, Appellant absolutely and unequivocally waived his right to a trial by jury because the Operating Agreement dedicates an entire clause to the waiver of trial by jury, unsurprisingly entitled, "WAIVER OF TRIAL BY JURY," conspicuously written in all capital letters. The body of said clause is also conspicuously written in all capital letters, and – predictably – expressly provides for the waiver of any right to seek a trial by jury. Pa41.

To the extent that Appellant is taking the position on Appeal that he did not agree to arbitrate his statutory claims because he did not agree to waive his right to a jury trial, this Appeal must be dismissed.

C. Even Assuming, *arguendo*, that the Operating Agreement was a "consumer contract" – which it was not – the Arbitration Clause is valid, enforceable, and encompasses Appellant's statutory claims.

The Operating Agreement and the relevant clauses therein satisfy all requirements for validity under New Jersey law. Pa4-53. Indeed, even if Appellant was a "consumer" and the Operating Agreement was a "consumer transaction" or "employment contract" under New Jersey law, the lower court's decision was proper based on the applicable legal standards and precedent. The Operating Agreement, Arbitration Clause, and other waiver clauses therein satisfy all requirements for the Arbitration Clause to be valid and enforceable, demonstrate that arbitration was properly compelled, and its enforcement should not be disturbed on Appeal. As such, Appellant's claims were correctly submitted to arbitration, and this Appeal should be denied.

Notwithstanding the foregoing, even if Atalese applies here – which it does not – Appellant's Appeal relies upon a distortion of the rule for the enforcement of arbitration provisions set forth in Atalese, and even if properly read, Appellant nonetheless misapplies Atalese to the facts and circumstances herein. Pb12, 15, 16, 17, 19, 20, 21.

i. New Jersey Law Does Not Require "Magic Language."

In Atalese, the Court set forth a more stringent standard for the enforcement of arbitration clauses whereby a plaintiff "must knowingly and voluntarily waive his

or her right to pursue statutory claims in a judicial forum." Arafa, at 171-172. However, even under Atalese, New Jersey law does not require specific "magical language" in order "to accomplish a waiver of rights in an arbitration agreement." Id.

In Atalese, the Court emphasized in the context of consumer contracts that an arbitration clause does not need "to identify the specific constitutional or statutory right" waived as long as "the clause, at least in some general and sufficiently broad way, . . . explain[s] that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute." Id.

New Jersey's "courts have upheld arbitration clauses that have explained in various simple ways 'that arbitration is a waiver of the right to bring suit in a judicial forum.'" *See* Morgan, 225 N.J. 289, 309 (quoting Atalese, at 444) (citing Martindale, at 83, 92) (upholding arbitration clause which provided that, "all disputes relating to employment … shall be decided by an arbitrator" and that the party "waiv[ed] [her] right to a jury trial"). *See also* Mitsubishi Motors Corp., 473 U.S. 614, 617 (1985) (enforcing arbitration clause providing that, "All disputes, controversies or differences . . . aris[ing] between [the parties out of their contract] shall be finally settled by arbitration"); Delaney, 244 N.J. 466, 476, 242 A.3d 257 (2020) ("Any disputes arising out of or relating to this engagement agreement..."); Flanzman, at 126 ("Any and all claims or controversies arising out of or relating to Employee's

employment ... shall, in lieu of a jury or other civil trial, be settled by final and binding arbitration").

One way of accomplishing a waiver of rights in an arbitration agreement is to clearly differentiate arbitration from a lawsuit in State Court. Atalese, *supra*. The Arbitration Clause does just that, explaining, *inter alia*, that as part and parcel of arbitration, the Members "shall have the right to take depositions and to obtain discovery by other means regarding the subject matter of the arbitration **as if the matter were pending in the State Court** of Ocean County, New Jersey" and that "**The award of the arbitrator shall be conclusive and binding**, and **any party may seek to have the award confirmed by way of a court order**" (emphasis added). (Pa40-41, at §10.18).

As illustrated in, *inter alia*, Martindale, Mitsubishi Motors Corp., Delaney, and Flanzman, even in the consumer service or employment contract contexts which are subject to the more stringent standard under Atalese, under the facts and circumstances herein, the lower court properly compelled arbitration. Here, the Operating Agreement's Arbitration Clause validly covers, "**Any dispute** among the Members under this Agreement" (emphasis added). Pa40-41, at §10.18. The foregoing is analogous to Martindale's language, "all disputes." Martindale, *supra*. The Arbitration Clause also, like in Martindale, states that the dispute(s) "shall be resolved and finally determined by arbitration" and "[t]he award of the arbitrator

shall be conclusive and binding." Pa40-41, at §10.18. Then, identical to Martindale, Appellant here expressly waived the right to a jury trial. *See* Pa41, at §10.20, "WAIVER OF TRIAL BY JURY." Clearly, the language set forth in the Operating Agreement and its relevant clauses fits into the parameters of the "no magical language" requirement of Atalese.

D. This Appeal does not raise the issue of the stay imposed in the underlying action or the dismissal of the claims as against Defendant-Respondent Nechama, which should not be disturbed on Appeal.

Regardless of the outcome of this Appeal, Respondents note that this Appellant does not raise the issue of the stay imposed in the underlying action or the dismissal of the claims as against Defendant-Respondent Nechama in this Appeal. As such, the foregoing determinations of the lower court should not be disturbed.

CONCLUSION

This Appeal is patently frivolous, and the baseless factual circumstances and legal conclusions propagated by Appellant are presented with no regard for their demonstrable falsity. In fact and at law, Appellant was not a consumer and the Operating Agreement was not a consumer transaction. The lower court correctly dismissed the Amended Complaint as against Respondents and compelled arbitration of the claims against them because: (A) the Operating Agreement was not a "consumer contract" prospectively subject to additional scrutiny of its Arbitration Clause; (B) Appellant indisputably waived any right to trial by jury, and under the

standard for non-consumer contracts, the enforceable scope of the Arbitration Clause included Appellant's statutory claims; and (C) even if the Operating Agreement was a "consumer contract" – which it was not – its enforceable scope nonetheless includes Appellant's statutory claims.

The Arbitration Clause, whether or not subject to Atalese, is enforceable and encompasses Appellant's statutory claims, and Appellant (like Respondents) explicitly, expressly, and knowingly waived his right to a trial by jury. Accordingly, for the foregoing reasons, the Order on Appeal should not be disturbed, and this Appeal should be dismissed.

Dated: November 14, 2025

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

SHAUL MOSHE SUGAR Plaintiff/Appellant v. DAVID POLLACK, (Individually); JOSEPH KAHN, (Individually); VISIONRE; MORDECHAI DOMBROFF A/K/A MORDECLAI DOMBROFF, (Individually); NECHAMA DOMBROFF, (Individually); HONOR MEADOWS LLC; SUNTREE INVESTMENT GROUP, LLC And HONOR MEADOWS OWNER LLC Defendants/Respondents	SUPERIOR COURT OF NEW JERSEY DOCKET NO.: A-004004-24T4 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY - LAW DIVISION OCEAN COUNTY DOCKET NO.: OCN-L-1092-25 CIVIL ACTION Sat Below: Hon. Robert E. Brenner, J.S.C.

MEMORANDUM OF LAW ON BEHALF OF PLAINTIFF/APPELLANT SHAUL MOSHE SUGAR IN REPLY TO DEFENDANTS/RESPONDENTS' OPPOSITION

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PRELIMINARY STATEMENT

In Opposition, Respondents have not failed to provide this court with a single meritorious argument in support of their argument compelling arbitration. First, Respondents raised several arguments which were never raised below. For the reasons stated below, those arguments should not be given any consideration.

Importantly, Respondents have, again, failed to address Section 10.19 of the Contract which provides for suits, actions and other proceedings, not subject to arbitration, to be brought in state court in Ocean County, New Jersey. Section 10.19 also includes a waiver to any objection to venue for any suit, action or other proceeding brought in state court. This argument was raised in Plaintiff/Appellant's brief at 105a-106a.

For the reasons stated below, Plaintiff/Appellant respectfully requests that the Order compelling arbitration be reversed.

LEGAL ARGUMENT

I. ARGUMENTS NOT RAISED BELOW SHOULD BE GIVEN NO CONSIDERATION.

It is a well-established principle that our appellate courts will not consider questions not properly presented to the trial court when an opportunity for such presentation was available, unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest. Nieder v. Royal Indemnity Ins. Co., 62 N.J. 229, 234-35 (1973); Krieger v. Jersey City, 27

N.J. 535 (1958); Howard v. Mayor and Bd. of Finance of City of Paterson, 6 N.J. 373 (1951); Morin v. Becker, 6 N.J. 457 (1951); State ex rel. Wm. Eckelmann, Inc., v. Jones, 4 N.J. 207 (1950), rehearing denied, 4 N.J. 374 (1950).

Respondents' brief is replete with numerous issues not raised at the court below as follows:

A. Respondents' Motion to Dismiss at the Trial Court Level Did Not Raise Issues Which are Raised in Respondents' Opposition Brief.

1. Respondents' Merits Brief in Support of Motion to Dismiss.

On June 5, 2025, Respondents filed their Motion to Dismiss for Failure to State a Cause of Action. (76a). The arguments raised by Respondents' brief include: Legal Point Heading I argued: "Plaintiff's Complaint must be dismissed against Moving Defendants pursuant to N.J. R. 4:6-2(e) as it fails to state a claim against Moving Defendants for which relief can be granted." (79a). That legal point heading only raised the argument that Plaintiff did not state a single factual allegation against any of the moving defendants. (80a). Legal Point heading I did not raise the issue of the Arbitration Agreement except to say: ". . . Plaintiff breached the Operating Agreement which provides disputes should be resolved via Arbitration (see section 10.18 of the Operating Agreement Exhibit 2)." (80a). No other arguments were raised regarding the Arbitration Agreement.

Legal point heading II argued: "The Complaint must be dismissed against

Moving Defendants pursuant to R. 4:5-8 as Plaintiff fails to meet the minimum or heightened pleading standards applicable to causes of action sounding [in] fraud pursuant to R. 4:5-8(a)." (81a). Like Legal Point heading I, that legal point heading also did not raise the issue of the Arbitration Agreement, except to say: "Even if the Court were to allow Plaintiff to overcome the arbitration clause and maintain this action against the Moving Defendant despite alleging no alleged wrongdoing on their part, Plaintiff's Complaint fails to sufficiently plead any such claim for fraud (negligently made or otherwise), undermining each Count of Plaintiff's Complaint as against Moving Defendants." (82a).

No other arguments regarding the arbitration provision were raised.

2. Defendants' Reply Brief.

On June 19, 2025, defendants filed their reply brief. Again, the arguments raised on this appeal were not raised in defendants' reply brief. Defendants' reply brief argues: "Separately, Plaintiff's claims, if any even survive, are subject to arbitration pursuant to the parties' Operating Agreement (§ 14.16)." (114a). Legal Point heading IV addresses the Arbitration provision. (121a). That point heading is a 2 paragraph argument. Paragraph 1 argues that "Plaintiff must show both procedural and substantive unconscionability to invalidate the clause." (122a). The second paragraph argues that both federal and New Jersey law strongly favor arbitration. (122a).

The arguments which are now being raised for the first time on this appeal were not argued below.

B. Oral Arguments.

Oral arguments were held on July 22, 2025. At that time, Respondents never argued the issues which they are now arguing on this appeal. At oral arguments, defendants argued with respect to the arbitration agreement that the clause is very broad and arbitration provisions are heavily favored both on a state and federal level. Respondents argued as follows:

> MR. REBHUN: Thank you, Your Honor. So the party's relationship, and really the subject matter of this claim, is governed by the party's operating agreement, which rather unambiguously compels arbitration for any sort of claim that arises pursuant thereto relating to Section 14.16 of the party's operating agreement, which states that any dispute, controversy, or claim arising out of or relating to this agreement or the breached termination of validity thereof, or the transactions contemplated hereby, shall be resolved by binding arbitration. So that is a very broad arbitration claim. Arbitration provisions are heavily favored both on a state and a federal level. The parties freely entered into that agreement, and there's really no claim by the plaintiff who omitted not only reference to the operating agreement itself, but annexing the operating agreement as an exhibit to their cross motion[1] or to the opposition, why the operating agreement should not be covering the party's relationship with the

[1] The Arbitration Clause is not only referenced in defendant's cross motion, it is recited, verbatim, (104a-106a). The Agreement was attached as Exhibit 2 to Defendants' Motion to Dismiss. Had Plaintiff attached the Agreement as an exhibit, it would have been duplicative and unnecessary.

> transaction. In order to escape the implication of the arbitration agreement vis-a-vis the operating agreement, the plaintiff must show both procedural and substantive unconscionability they didn't validate that clause, and the plaintiff simply has not. And the arbitration argument is really a secondary, conditional argument to the outright dismissal position advanced by the moving defendants. In other words, the defendants are basically saying, Your Honor, there is no claim, but even if there was a claim, it belongs in arbitration, not before Your Honor.

(T6:20 – T8:1).

C. Arguments Which Were Not Raised Before the Trial Court.

The following arguments which Respondents have raised for the first time on this appeal include:

Legal Point Heading entitled:

- *"Standard of Review,"*
- *B. "Whether a Valid Agreement Exists." (Db14).*
- *C. "Whether the Dispute Falls Within the Scope of the Agreement." (Db15).*
- *Subparagraph i of argument "C": "The Standard for Consumer(and Employment) Contracts" (Db15).*
- *Subparagraph ii or argument "C": "Non-Consumer (or Employment) Contracts" (Db18).*
- *II. Lower Court Correctly dismissed Plaintiff's Amended Complaint and Compelled Arbitration.*

- *"The Operating Agreement Was Not a 'Consumer Contract' or 'Employment Contract' Under Atalese [v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014)]. (Db21).*

- *Paragraph "i" of Point Heading B entitled: "Presumptive Validity" (Db26).*

- *Conclusion: Under Respondent's Conclusion, Respondent raises conclusions which were never raised by Respondent at the court below and which were never reached by the court below.*

None of the aforementioned arguments were raised at the court below. At no time during oral argument did defendants raise the arguments which they now raise for the first time on appeal. The court never considered or addressed the arguments now being raised by the defendants, did not compel arbitration based on the arguments now being raised by the defendants and there is no order or decision compelling arbitration based on the arguments now being raised by the defendants.

Respondents did not ask the court below to:

1. make a determination as to whether a valid arbitration agreement exists;

2. determine whether the dispute falls within the scope of the agreement;

3. determine the standard for a consumer and employment contract and determine whether the arbitration agreement was contained in a consumer contract or if Supreme Court's decision in Atalese was limited only to consumer contracts;

4. determine if the Arbitration clause is "presumptively valid, enforceable and irrevocable" pursuant to the NJAA and FAA.

Arguments raised by the defendants at the appellate level are not properly before the Court and should not be given any consideration. Appellants respectfully request that the only arguments be considered on this appeal are the arguments raised by the respondents in their merits brief and at oral arguments.

II. CONTRACTUAL LANGUAGE STATING "ANY" CONTROVERSY DOES NOT INCLUDE STATUTORY CLAIMS.

Respondents' arguments that the language stating: "any controversy" includes statutory claims has been soundly rejected by the Supreme Court. Courts may not re-write a contract to broaden the scope of arbitration. Garfinkel v. Morristown Obstetrics & Gynecology Associates, P.A., 168 N.J. 124, 131 (2001). The Court in Garfinkel rejected the language of the contract stating "any controversy or claim that arises from the agreement or its breach shall be settled by arbitration" as being sufficient to constitute a waiver of statutory rights, stating:

> We reason similarly and conclude that paragraph eighteen of the parties' agreement is insufficient to constitute a waiver of plaintiffs remedies under the LAD. ***The clause states that "any controversy or claim" that arises from the agreement or its breach shall be settled by arbitration. That language suggests that the parties intended to arbitrate only those disputes involving a contract term, a condition of employment, or some other element of the contract itself.*** Moreover, the language does not mention, either expressly or by general reference, statutory claims redressable by the LAD. As noted, paragraph eighteen excepts from its purview the two paragraphs of the agreement pertaining to post-termination restrictions and severance pay. Those exceptions further suggest that the parties intended disputes over the terms and conditions of the contract, not statutory

claims, to be the subject of arbitration. [emphasis added].

Id. at 134.

The Court in Garfinkel determined that the clause was restricted only to claims which arise under the agreement or its breach. The clause which was rejected by the Garfinkel court stated: "Any controversy or claim that arises from the agreement or its breach shall be settled by arbitration." Garfinkel, 168 N.J. at 134. The arbitration clause in the subject case states, in pertinent part:

Section 10.18 – Arbitration of Disputes.

> "***Any dispute*** among the Members ***UNDER THIS AGREEMENT*** (except as otherwise provided below) shall be resolved and finally determined by arbitration as set forth herein."

(40a).

Section 10.20 – Waiver of Trial by Jury.

> Each of the Parties hereto agrees that, in the event of any suit or legal action between or among the members ***ARISING IN CONNECTION WITH THIS AGREEMENT***, they shall waive their right under any applicable law to seek a trial by jury.

(41a).

The phrase "any dispute" is no different than the language which the Court in Garfinkel rejected as too broad. The clause relating to disputes to be arbitrated refers to disputes arising "under the agreement." See Id. Moreover, by ordering statutory claims to be arbitrated where the contract does not clearly and

unambiguously provide for the arbitration of statutory claims, the court has impermissibly broadened the scope of arbitration. A "***court may not rewrite a contract to broaden the scope of arbitration***[.]" [emphasis added]. Ibid, quoting, Yale Materials Handling Corp. v. White Storage Retrieval Sys., Inc., 240 N.J.Super. 370, 374 (App.Div. 1990).

III. THERE IS NO MUTUAL ASSENT WHERE THE CONTRACT IS NOT CLEAR AND UNAMBIGUOUS.

There can be no mutual assent or meeting of the minds where there are conflicting provisions in the Agreement. Conflicting arbitration terms are neither clear nor unambiguous. "Only those issues may be arbitrated which the parties have agreed shall be [arbitrated]." Atalese, 219 N.J. at 442, quoting In re Arbitration Between Grover & Universal Underwrites Ins. Co., 80 N.J. 221, 228 (1979).

Arbitration clauses may not be enforced based on traditional legal principles governing the formation of a contract and its interpretation. See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed. 2d 742 (2011). Arbitration clauses are subject to interpretation under general contract principles and a court may invalidate an arbitration clause upon such grounds as exist at law or in equity. Atalese, 219 N.J. at 441. Like any contract, an agreement to arbitrate, like any other contract, "must be the product of mutual assent, as determined under

customary principles of contract law." Id. at 442.

There must be a "meeting of the minds." Ibid. See, e.g., Pinto v. Spectrum Chems. & Lab. Prods., 200 N.J. 580, 600 (2010) (upholding the trial court's ruling that a settlement agreement was unenforceable "because the parties never had a meeting of the minds on the precise terms of the agreement"); Morton v. 4 Orchard Land Trust, 180 N.J. 118, 120 (2004) (declining to enforce a sale agreement where the contract was missing the "essential element" of "a meeting of the minds on the terms of the agreement"). Consequently, the clarity and internal consistency of a contract's arbitration provisions are important factors in determining whether a party reasonably understood those provisions and agreed to be bound by them.

In Atalese, the Court stated:

> Mutual assent requires that the parties have an understanding of the terms to which they have agreed. 'An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights.' By its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in Court.

Atalese, 219 N.J. at 442.

A waiver-of-rights provision must reflect an agreement to clearly and unambiguously to arbitrate the disputed claim. Leodori v. CIGNA Corp., 175 N.J. 293, 302 (2003). A valid waiver results only from an explicit, affirmative agreement that unmistakably reflects mutual assent. See, e.g., Garfinkel, supra,

168 N.J. at 135 (instructing that when asked to enforce arbitration clause, "[t]he Court will not assume that employees intend to waive [their] rights"); Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ., 78 N.J. 122, 140 (1978) (declaring that "[t]o be given effect, any such waiver [of statutory rights] must be clearly and unmistakably established").

Here, there can be no mutual assent or meeting of the minds where the contract has conflicting provisions. The contract does not clearly and unambiguously state that statutory claims must be arbitrated or that appellant has waived his right to a trial on statutory claims. The contract only states that "any dispute" "under this agreement" or "arising in connection with this agreement" must be arbitrated. As previously argued, the Supreme Court has already rejected such language as too broad and is restricted only to claims arising under the agreement or its breach. To permit claims which are not related to the agreement or its breach to be arbitrated is to re-write the contract which the court is not permitted to do.

Conveniently, to this date, defendants have ignored the conflict in its own documents. Plaintiff argued this issue below in his brief. (Pb105a-106a). Defendants did not address the conflict below and still have not addressed the conflict in this appeal, instead, choosing to raise issues never previously argued.

Section 10.19 provides for "suits, actions and proceedings which are not subject to arbitration." Those "suits, actions and proceedings" may be brought in the state or federal courts in Ocean County, in the State of New Jersey.

Section 10.19 entitled "Venue," clearly and unambiguously states:

> SECTION 10.19 – VENUE. ***The parties AGREE that any suit, action or proceeding with respect to this Agreement that is not subject to arbitration pursuant to Section 10.18 SHALL BE BROUGHT IN THE STATE OR FEDERAL COURTS sitting in Ocean County in the State of New Jersey. The parties hereto hereby ACCEPT THE EXCLUSIVE JURISDICTION of those courts for the purpose of any such suit, action or proceeding.*** The parties hereto ***hereby IRREVOCABLY WAIVE, to the fullest extent permitted by law, any objection that any of them may now or hereafter have to venue of any suit, action or proceeding arising out of or relating to this Agreement or any judgment entered by any court in respect thereof brought in Ocean County, New Jersey***, and hereby further irrevocably waive any claim that any such suit, action or proceeding brought in Ocean County, New Jersey has been brought in an inconvenient forum.

(41a).

There is no disputing that Section 10.19 preserved the right to bring a "suit, action or proceeding" in state court for those claims which are not subject to arbitration. The provision does not address what those "suits, actions or proceedings" are which are not subject to arbitration. However, there can be no mutual assent or meeting of the minds to arbitrate statutory claims where the contract itself contains conflicting language. Indeed, it should not escape the Court's attention that Section 10.19 expressly states: "THE PARTIES HERETO

HEREBY ACCEPT THE EXCLUSIVE JURISDICTION OF THOSE COURTS FOR THE PURPOSE OF ANY SUCH SUIT, ACTION OR PROCEEDING." (41a).

Significantly, paragraph 10.19 contains a clear, unambiguous, decisive and IRREVOCABLE WAIVER to any objection to venue for any suit or action brought in Ocean County, New Jersey. (41a). Defendants also waived any claim of *forum inconveniens* in that same paragraph. (41a). Thus, if any party waived anything, it was defendants/respondents who waive any objection to venue for any suit or action brought in Ocean County, NJ. It appears to Plaintiff/Appellant that the Motion to Dismiss, in the first instance, was an objection to venue which the Defendant waived.

Indeed, there is an acknowledgment under Section 10.18 that some disputes may be litigated. Section 10.18 states:

SECTION 10.18 – ARBITRATION OF DISPUTES

(a) Any dispute among the Members under this Agreement (***except as otherwise provided below)*** . . . .

(40a).

Section 10.18 clearly and unambiguously acknowledges that not all disputes will be arbitrated. It does not identify those disputes which are excepted from arbitration.

Where Section 10.19 of the Contract clearly and unambiguously provides that "any suit, action or proceeding" not subject to arbitration may be brought in state court in Ocean County, NJ, Plaintiff/Appellant cannot be said to have waived his right to a trial or to bring a suit, action or proceeding in state court.

There is no mutual assent or meeting of the minds where the contract contains conflicting provisions. Moreover, Plaintiff/Appellant has not waived his right to a trial on statutory claims where the contract clearly and unambiguously states that the parties agree to accept the exclusive jurisdiction of those courts for the purposes of those suits or actions and where the contract clearly and unambiguously states that the parties ***IRREVOCABLY WAIVE*** any objection to venue in Ocean County, New Jersey for those suits and actions.

CONCLUSION

For the above-stated reasons, Plaintiff/Appellant respectfully requests that the trial court's order compelling arbitration be reversed.

Respectfully submitted,

/s/ John J. Novak

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Shaul Moshe Sugar

Dated: November 21, 2025

cc: Jason J. Rebhun, Esq.