FILED, Clerk of the Supreme Court, 31 Mar 2025, **089744**

SUPREME COURT OF NEW JERSEY

Docket No. 089744

GERALD FAZIO JR. Petitioner, v. ALTICE USA, CABLEVISION, OPTIMUM, and OPTIMUM MOBILE, Respondents.	ON CERTIFICATION FROM SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No. A-2102-22 Civil Action SAT BELOW: Hon. Thomas W. Sumners Jr., J.A.D. Hon. Morris G. Smith, J.A.D.

RESPONDENTS' RESPONSE TO AMICUS CURIAE BRIEFS

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PRELIMINARY STATEMENT

The question certified by this Court is limited to "the sufficiency of establishing mutual assent through a business's practice of sending a service agreement to the plaintiff without proving that practice was followed as to the plaintiff." *See* Order Granting Petition. The Court specifically rejected the other question presented by the petitioner (Gerald Fazio, Jr.): whether "a broadly drafted arbitration clause … include(s) within its scope claims brought pursuant to the NJ Law Against Discrimination." *Id.*; Petition For Certification 6.

The amicus curiae briefs submitted by the National Employment Lawyers' Association of New Jersey ("NELA") and the New Jersey Association for Justice ("NJAJ") in support of Fazio have little bearing on the certified question. Neither brief so much as mentions New Jersey Rule of Evidence 406(a) or its federal counterpart. Nor do those briefs meaningfully address the Customer Service Agreement – which contains an arbitration provision – instead implying that the Retail Installment Contract is the only agreement before the Court.

In any event, the Court should reject amici's arguments for the reasons detailed below. Contrary to both NELA's and NJAJ's

arguments, the Customer Service Agreement easily comports with this Court's decision in Atalese v. U.S. Legal Services Group, 219 N.J. 430 (2015), because it sufficiently explains the import of arbitration. NJAJ's suggestion that Fazio's signature or other plaintiff-specific evidence of assent was required to form a contract flies in the face of this Court's precedents and the Federal Arbitration Act. And the Customer Service Agreement unambiguously requires arbitration of statutory claims, including Fazio's claims under New Jersey's Law Against Discrimination.

Accordingly, NELA and NJAJ offer no persuasive basis to disturb the Appellate Division's affirmance of the trial court's order holding Fazio to his obligation to arbitrate. This Court should affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendants-Respondents (collectively, "Altice") adopt the Statement of Facts and Procedural History in their further merits brief in this Court and their brief before the Appellate Division, see Defs.' App. Div. Br. at 3-9.

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ARGUMENT

A. The Customer Service Agreement Satisfies Atalese.

Both NELA and NJAJ argue that the arbitration clause does not satisfy this Court's decision in Atalese. See NELA Br. 19-26; NJAJ Br. 11-12.[1] But their argument rests on an inappropriate sleight-of-hand.

Specifically, NELA and NJAJ argue that the Retail Installment Contract does not satisfy Atalese. But amici ignore the fact that the Retail Installment Contract – which was signed by Fazio – cross-references the arbitration agreement in the Customer Service Agreement. For all of the reasons detailed in Altice's further merits brief, the agreement between Altice and Fazio includes the arbitration provision in the Customer Service Agreement.

The Customer Service Agreement easily satisfies the standard announced by this Court in Atalese and subsequent cases, which require that an arbitration provision, "in some fashion, explain that it was intended to be a waiver of the right to sue in court." Kernahan

[1] This Court's February 26, 2025 "Sua Sponte Order" authorizing the parties to respond to the amici motions and briefs refers (*inter alia*) to NJAJ's motion and brief but does not mention NELA's motion and brief. We take this opportunity to respond to both briefs in the event that the Court grants either or both motions.

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v. Home Warranty Admin. of Fla., Inc., 236 N.J. 301, 320 (2019) (citing Atalese, 219 N.J. at 436). In the second paragraph, the Customer Service Agreement informs the customer in bold and all-capital letters that "**THESE TERMS OF SERVICE CONTAIN A BINDING ARBITRATION PROVISION THAT AFFECTS YOUR RIGHTS, INCLUDING THE WAIVER OF JURY TRIALS AND CLASS ACTIONS**." JA23. The arbitration provision itself explains that "[r]esolving Your dispute with Altice through arbitration means You will have a fair hearing before a neutral arbitrator instead of in court before a judge or jury." JA38 (emphasis added). And it reiterates, again in bold and capital letters, that "**YOU AGREE THAT BY ENTERING INTO THIS SERVICE AGREEMENT, YOU AND ALTICE EACH WAIVE THE RIGHT TO A TRIAL BY JURY**." JA38-39.[2]

[2] Altice respectfully submits that the rule in Atalese is preempted by the Federal Arbitration Act, as interpreted by the U.S. Supreme Court's decision in Kindred Nursing Centers Limited Partnership v. Clark, 581 U.S. 246 (2017). This Court has previously declined to decide whether the FAA as interpreted in Kindred preempts Atalese. See Kernahan, 236 N.J. at 308, 324. There is also no need to reach that question in this case. The plain language of the Customer Service Agreement satisfies Atalese's requirements (preempted or not).

This Court has recognized that similar language – providing that claims would be resolved by arbitration, "not 'by court or jury,'" and that arbitrators, "'rather than judges or juries,'" would resolve the parties' disputes – "complied with our mandate in Atalese." Skuse v. Pfizer, Inc., 244 N.J. 30, 51-52 (2020). This Court has likewise held that language providing that "'final and binding arbitration' will take the place of 'a jury or other civil trial'" "meets the standard of Atalese." Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 137-38 (2020). The result should be no different here.

B. New Jersey Law Permits Assent by Conduct.

NJAJ argues that mutual assent can never be proven by evidence of routine business practices, because, in its view, plaintiff-specific evidence of assent (such as a signature) is always required. NJAJ Br. 4-13. That is incorrect.

To begin, as Altice detailed in its further merits brief (at 10-15), courts repeatedly have held that evidence of routine business practices surrounding contract formation can prove that a specific plaintiff agreed to a specific contract.

In addition, this Court has declared that "New Jersey contract law recognizes that in certain circumstances, conduct can constitute contractual assent." Skuse, 244 N.J. at 50. Thus, the Court in Skuse held that the plaintiff accepted the agreement containing an arbitration provision by her "continued employment" after receiving an email containing the contract terms, which provided that continued employment constituted acceptance of those terms. Id. at 51.

That result followed from the settled principle that "[i]f parties agree on essential terms and manifest an intention to be bound by those terms, they have created an enforceable contract." Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992); see also id. ("An offeree may manifest assent to the terms of an offer through words, creating an express contract, or by conduct, creating a contract implied-in-fact.") (emphasis added); Restatement (Second) of Contracts § 19(1) (1981). "Accordingly, where an offeree gives no indication that he or she objects to any of the offer's essential terms, and passively accepts the benefits of an offeror's performance, the offeree has impliedly

manifested his or her unconditional assent to the terms of the offer." Weichert, 128 N.J. at 436-37.

NJAJ relies (Br. 6-7) on Leodori v. Cigna Corp., 175 N.J. 293 (2003), but that reliance is misplaced. In Leodori, the employer's "own documents contemplated [the employee's] signature as a concrete manifestation of his assent." Id. at 306. Thus, continued employment could not substitute for that signature in the absence of any alternative means of assent "reflected in the text of the agreement." Id. at 300 (quotation marks omitted).

Here, by contrast, "the text of the agreement" expressly calls for assent by performance. Id. The Customer Service Agreement provides that "Subscriber's use of the Altice Mobile Service" and "paying for the Altice Mobile Service or Device" constitutes assent to the agreement. JA23-24. As the Appellate Division held, Fazio paid for and received his mobile service, thereby manifesting his assent to the Customer Service Agreement. Pa11.

In short, as in Skuse, the Appellate Division's conclusion in this case that there was assent was based on the general principle of New

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Jersey law that assent may be manifested by performance after receiving notice of contractual terms.

Finally, and consistent with that widely recognized common-law rule, under the FAA, arbitration agreements need only be written and accepted, not signed, in order to be enforceable – as every federal court of appeals to consider the issue has held. See, e.g., Seawright v. Amer. Gen. Fin. Servs., 507 F.3d 967, 978 (6th Cir. 2007) ("[A]rbitration agreements under the FAA need to be written, but not necessarily signed."); Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1368 (11th Cir. 2005) ("[W]hile the FAA requires that the arbitration agreement be in writing, it does not require that it be signed by the parties."); Tinder v. Pinkerton Sec., 305 F.3d 728, 736 (7th Cir. 2002) ("Although § 3 of the FAA requires arbitration agreements to be written, it does not require them to be signed."); Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987).

C. Fazio Agreed to Arbitrate his Statutory LAD Claims.

NELA argues that Fazio's agreement to arbitrate his statutory claims under New Jersey's Law Against Discrimination was not sufficiently clear and unmistakable. NELA Br. 7-19. That argument

again rests on the incorrect premise that the Retail Installment Contract is the only operative agreement, ignoring the Customer Service Agreement and its accompanying arbitration provision. See id. at 2-3, 20, 25.

The Customer Service Agreement requires arbitration of "Claims arising out of or relating to any aspect of the relationship between us, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory." JA38 (emphasis added). This Court has repeatedly held that similar language requires arbitration of a plaintiff's statutory claims. In Skuse, for example, the plaintiff agreed to arbitrate any "'claim under any federal, state, or local statute, constitution, regulation, rule, ordinance, or common law'" arising out of or relating to her employment or its termination. 244 N.J. at 38. Based on that language, this Court held that "Skuse's LAD [Law Against Discrimination] claim was indisputably included in the Agreement's broad language describing the employment-related claims subject to arbitration." Id. at 52.

Similarly, this Court has held that an agreement "to arbitrate any claim 'arising out of or in any way relating to the Agreement or

the transportation services provided hereunder'" sufficed to cover "plaintiffs' statutory wage claims." Arafa v. Health Exp. Corp., 243 N.J. 147, 172 (2020). As the Court reaffirmed, "an arbitration provision need not 'refer specifically to the [statute] or list every imaginable statute by name.'" Id. at 170 (quoting Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 135-36 (2001)).

As in Skuse and Arafa, the arbitration provision in the Customer Service Agreement encompasses Fazio's statutory claims under New Jersey's Law Against Discrimination.

CONCLUSION

The Court should affirm the Appellate Division's decision.

Respectfully submitted,

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Dated: March 28, 2025

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FILED, Clerk of the Supreme Court, 31 Mar 2025, **089744**

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