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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' PROPOSED FURTHER MERITS BRIEF

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PRELIMINARY STATEMENT

Plaintiff-Petitioner Gerald Fazio, Jr. filed this lawsuit after he refused to comply with a retail store's common-sense health and safety protocols that were in place during the summer of 2021, while the nation remained in the midst of the COVID-19 pandemic and New Jersey had declared a public health emergency. According to Fazio, the requirement that he wear a mask to enter the store violated New Jersey's Law Against Discrimination. Both the Appellate Division and the Superior Court correctly concluded that Fazio's claims are for an arbitrator to decide under the arbitration provision in the Customer Service Agreement governing his relationship with Respondents (collectively, "Altice").

As the case comes to this Court, the terms of the arbitration provision are valid and enforceable under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, and New Jersey law, and Fazio's claims fall within the scope of that provision. The sole question before this Court is whether the uncontroverted evidence that Altice presented to the trial court, including evidence of its routine business practice at the time of Fazio's transactions of emailing a full electronic copy of the

Customer Service Agreement to its customers, was sufficient to demonstrate that Fazio assented to that agreement, including its arbitration provision.

The answer is "yes," and accordingly the decision below should be affirmed. New Jersey Rule of Evidence 406(a) all but resolves the certified question: it expressly authorizes the admission of a "habit or routine practice" – "whether corroborated or not" – to "prove that on a specific occasion a person or organization acted in conformity with the habit or routine practice." N.J.R.E. 406(a) (emphasis added).

Moreover, New Jersey's Rule 406(a) is modeled after Federal Rule of Evidence 406, and overwhelming authority applying the federal rule establishes that a defendant may introduce evidence of its routine or customary business practices, such as its general contract formation process, to prove that a specific plaintiff accepted the terms of the contract under that process, without additional proofs that that business practice was followed on the specific occasion in question. This Court has previously explained that it views federal precedent concerning the Federal Rules of Evidence as relevant in

interpreting analogous provisions of the New Jersey Rules of Evidence.

Because Altice provided probative evidence of Fazio's agreement to arbitrate and Fazio did not rebut that evidence, the Appellate Division correctly affirmed 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 brief before the Appellate Division, see Defs.' App. Div. Br. at 3-9, and add the following for further context relevant to the certified question.

Plaintiff-Petitioner Gerald Fazio, Jr. initiated his mobile phone service at an Altice retail store on November 20, 2019. JA22.[1] In the trial court, Altice submitted the affidavit of a "Senior Director of Management, Retail Stores" who has personal knowledge of and is "familiar" with "Altice's and Optimum Mobile's business practices." JA44 ¶ 1. As a matter of those routine business practices, Fazio

[1] "JA__" refers to the Joint Appendix in the Appellate Division. "Pa__" refers to the appendix accompanying the Petition for Certification.

"would have received a copy of the Customer Service Agreement by email" as part of his November 20, 2019 transaction. JA45 ¶ 7. The Customer Service Agreement is the contract governing the relationship between Altice and Optimum Mobile customers like Fazio, and it contains an arbitration provision. JA23-43.

Five days later, Fazio purchased a cell phone at an Altice retail store for use with his new mobile service. Altice produced an authenticated receipt from Fazio's November 25, 2019 retail transaction, which stated that "[a] copy of all documents and agreements—including Terms & Conditions, Autopay, handset insurance, etc." would have been "sent electronically to the email address you provided during account creation." JA45-46 ¶¶ 8, 11, JA48. In addition, Altice produced a Retail Installment Contract from the November 25, 2019 transaction that was **signed** by Fazio. JA17-20. The Retail Installment Contract expressly incorporates the terms, conditions and provisions of the Customer Service Agreement, including expressly notifying the customer of and incorporating the arbitration provision in the Customer Service Agreement. JA18 ¶¶ 1, 2.

Fazio did not challenge below the admissibility of Altice's evidence of its routine business practices at the time of Fazio's transactions or the validity of his signature on the Retail Installment Contract, nor did he deny receiving the email containing an electronic copy of the Customer Service Agreement in 2019. Rather, Fazio asserted only that when he searched his email inbox after bringing this litigation (over two years later), he could not locate the Customer Service Agreement. JA15-16.

The trial court concluded that Fazio agreed to arbitrate and that his agreement was valid and enforceable. As relevant here, the court noted that "Defendant certifies that it is their standard business practice to email customer service agreements to customers after initially signing up for the services." Pa22. The court further repeatedly underscored that these types of transactions "take place by the thousands every day, via email." Pa24; see also id. ("Again, the Court will emphasize, that on a regular basis, daily, thousands of times per day, retail agreements are emailed to parties."); id. ("thousands of these transactions happen daily").

The Appellate Division affirmed. The court discussed the affidavit accompanying Altice's motion and concluded that the "record shows" that "defendants emailed a 'Customer Service Agreement' to [Fazio]." Pa04, 10. The court also determined that Fazio's argument that he did not agree to the contract because he could not find it in his emails years after the fact "has no merit." Pa10.

Fazio petitioned for certification, and this Court granted the petition limited to "the challenge 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."

ARGUMENT

POINT I

Evidence of an Organization's Routine and Customary Practice Regarding Contract Formation is Probative Evidence that a Particular Individual Agreed to Arbitrate.

Whether a binding arbitration agreement is formed is governed by "ordinary state-law principles that govern the formation of contracts." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). As the U.S. Supreme Court has underscored, the FAA requires that those principles be generally applicable, rather than "singling

out" arbitration agreements "for disfavored treatment." Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246, 252 (2017); accord, e.g., Skuse v. Pfizer, Inc., 244 N.J. 30, 47 (2020).

Generally applicable principles found in New Jersey's evidentiary rules and an overwhelming body of case law interpreting the analogous provision of the Federal Rules of Evidence support affirmance of the decision below. A defendant may produce evidence of its routine or customary business practices, including its standard process regarding contract formation, to prove that a specific plaintiff accepted the terms of the contract under that process.

A. New Jersey Rule 406(a) Expressly Allows for the Admission of Routine Business Practice Evidence without Case-Specific Corroboration.

New Jersey Rule of Evidence 406(a) provides: "Evidence, whether corroborated or not, of habit or routine practice is admissible to prove that on a specific occasion a person or organization acted in conformity with the habit or routine practice." N.J.R.E. 406(a) (emphases added). New Jersey Rule 406(a) was adopted in 1993 as part of a broader "revision of our evidence rules"; those revisions "adopted the numbering used in the Federal Rules of Evidence and

followed those rules in many instances." State v. Harris, 209 N.J. 431, 442 (2012).

Rule 406(a) was no exception to this general trend among the 1993 revisions. The commentary specifically notes that "Paragraph (a) of Rule 406 follows Fed.R.Evid. 406." N.J.R.E. 406, 1991 Supreme Court Committee Comment. This Court has similarly recognized that "New Jersey Rule of Evidence 406 is derived from Federal Rule of Evidence 406." Sharpe v. Bestop, Inc., 158 N.J. 329, 331 (1999). The respective texts of the New Jersey and Federal Rules are functionally identical.[2]

Moreover, in 1967, New Jersey made a significant change to Rule 406 (then Rule 49). Previously, the introduction of evidence of a habit

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[2] Federal Rule of Evidence 406 currently provides: "Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness." Prior to 2011, that rule provided: "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." Fed. R. Evid. 406 (1975). The 2011 "changes are intended to be stylistic only." Fed. R. Evid. 406 Advisory Committee Notes 2011 Amendments.

or custom was often conditioned on the introduction of evidence that the habit or custom was followed in the particular instance. The Rule change—adding the phrase "whether corroborated or not"—expressly authorized the admission of evidence of a habit or custom **without** evidence that the habit or custom was followed in the particular instance. Biunno, Current N.J. Rules of Evidence, Comment 1 on N.J.R.E. 406(a) (Gann).

This Court has not had occasion to address application of Rule 406(a) to evidence of routine business practices surrounding contract formation. As discussed next, however, federal courts applying the equivalent federal rule have consistently held that defendants can use such evidence to prove the existence of a contract. This Court has previously recognized that when the Federal Rules of Evidence are similar to the New Jersey rules, "reference to federal decisions" applying the analogous federal rule "is pertinent." Brown v. Brown, 86 N.J. 565, 581-82 (1981) (following federal cases applying Federal Rule of Evidence 407 in construing the predecessor to what is now New Jersey Rule of Evidence 407). As the Appellate Division has remarked, New Jersey courts "frequently consider as instructive

federal precedent construing analogous Federal Rules of Evidence." State v. Rinker, 446 N.J. Super. 347, 362 (App. Div. 2016).

B. Federal Courts Have Held that, under Federal Rule of Evidence 406, Evidence of a Routine Contract Formation Process Demonstrates the Existence of a Contract.

Federal courts have frequently held that, under FRE 406, "[d]efendants may use" evidence of routine business practice "to meet their initial burden on their motions" to compel arbitration. Hancock v. AT&T, 701 F.3d 1248, 1262 (10th Cir. 2012). It "is pertinent" for this Court to consider those federal decisions. Brown, 86 N.J. at 581-82. And those decisions conclude that evidence of routine and customary business practice is not only admissible and proper—as FRE 406 establishes—but also "is particularly persuasive in the business context because of the profit-driven need for regularity." 2 Weinstein's Federal Evidence § 406.03[1] (1997); accord Hancock, 701 F.3d at 1262 (quoting same).[3]

In Hancock, for example, the AT&T defendants presented evidence "of the standard practice for customer acceptance of U-verse

[3] Accord, e.g., 1 Kenneth S. Broun, McCormick on Evidence § 195 (6th ed. 2006); 2 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:48 (3d ed. Supp. 2008).

[Internet/TV/telephone] terms of service" in order to show "what happened when the individual Plaintiffs acquired U-verse." Id. at 1264. As to one of the four plaintiffs, the defendants were unable to locate any records specific to that plaintiff "'because the complaint disclosed nothing more than [his] name and state of residence.'" Id. at 1266. That was no obstacle to proving contract formation, the Tenth Circuit held, because "[d]efendants were entitled to rely on the declarations describing the standard practice to show that [the plaintiff] accepted the terms of service." Id.

The Third Circuit has taken a similar approach in reversing a district court's denial of arbitration. In Schwartz v. Comcast Corp., the district court had held that Comcast was required to show that the plaintiff himself had received a copy of the customer contract containing an arbitration provision. 256 F. App'x 515, 517, 519 (3d Cir. 2007) (SA_1).[4] That was error, the court of appeals held: "Comcast's evidence of its policy to provide the Subscriber Agreement to new customers was relevant to show that [the customer] did in fact

[4] "SA_" refers to the Supplemental Appendix submitted with this brief, containing the unreported decisions cited in this brief pursuant to R. 1:36-3.

receive a copy," because "under state and federal rules, evidence of the policy does constitute proof of actual notice to" the customer. Id. at 518-19 (emphasis added). It was enough that "Comcast presented evidence that it provided the Subscriber Agreement to all new customers, including [plaintiff]." Id. at 519 (emphasis added). Altice did the same here; the affiant explained that, as a matter of "Altice's and Optimum Mobile's business practices," Fazio "would have received a copy of the Customer Service Agreement by email" in connection with his November 20, 2019 transaction. JA44-45 ¶¶ 1, 7.

The Third and Tenth Circuit's decisions are merely the tip of the iceberg. In another case involving an Altice subsidiary, the company submitted a declaration establishing that, "as a matter of routine business practice at the time of Plaintiff's order" for internet service, the company "would send a new customer" emails linking to the terms on the company's website. Lopez v. Cequel Communications, LLC, 2021 WL 5112982, at *2 (E.D. Cal. Nov. 3, 2021) (SA_5). The same declaration further established the company's process for obtaining the customer's assent to the terms on a mobile device at the time their service was installed. Id. at *3. The court overruled the plaintiff's

objection to this evidence because the "evidence is admissible under Federal Rule of Evidence 406," and the court further noted that the plaintiff "fail[ed] to rebut Defendant's evidence that routine business practices were followed." Id. at *3 & n.4. The same is true here.

In another case, the court similarly compelled arbitration based on the defendant's declarations establishing a "standard business practice" of providing new customers with terms and conditions. Cuadras v. MetroPCS Wireless, Inc., 2011 WL 11077125, at *5-6 (C.D. Cal. Aug. 8, 2011) (SA_10). That evidence proved that "plaintiff agreed to the arbitration agreement" over plaintiff's objection that the defendant "has not produced any signed agreement or testimony of anyone who can establish that she was actually provided" with the terms. Id.

In still another case, a district court compelled arbitration as to two plaintiffs for whom the defendants did not have evidence of signed terms and conditions. Frazier v. Western Union Co., 377 F. Supp. 3d 1248, 1259-61 (D. Colo. Mar. 27, 2019). The court explained that evidence of the defendants' standard practices requiring customers placing money order transactions to agree to contract terms "met their

initial burden" of proving that the plaintiffs agreed to a contract: "Personal knowledge of what happened when the individual plaintiffs completed their transactions is not required to admit Rule 406 routine practice evidence." Id. at 1259, 1261.

Finally, a court enforced the defendant's online agreement based on FRE 406 evidence of the defendant's "'standard practice followed' when customers make purchases through the Groupon website" and "that Plaintiff could not have completed her purchase without clicking on the button accepting Groupon's Terms of Use." Davis v. USA Nutra Labs, 303 F. Supp. 3d 1183, 1192-93 (D.N.M. 2018). As the court explained, that is enough to show, "as a matter of law," that the plaintiff herself assented to the terms containing the arbitration provision. Id.[5]

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[5] Time and time again, federal courts have relied on evidence of routine business practices in compelling arbitration. See, e.g., Hiotakis v. Celebrity Cruises Inc., 2011 WL 2148978, at *4-5 (S.D. Fla. May 31, 2011) (SA_20) (compelling arbitration based on affidavit establishing defendant's "custom and regulations" to require all employees to sign the contracts at issue despite the "absence of signed" agreements); JPMorgan Chase Bank, N.A. v. Lott, 2007 WL 30271, at *3-4 (S.D. Miss. Jan. 3, 2007) (SA_28) (contract was proved by affidavit reciting car dealer's practice of requiring "every customer purchasing a vehicle" to sign agreement); Edwards v. Blockbuster, Inc., 400 F. Supp. 2d 1305, 1308 (E.D. Okla. 2005) ("while Defendant

In short, this Court should interpret New Jersey Rule of Evidence 406 in harmony with the overwhelming body of federal case law, and hold that evidence of routine business practices surrounding contract formation can prove that a specific plaintiff agreed to a contract.

C. This Court's Decision in SSI Medical Services is not to the Contrary.

As noted above, this Court has not had occasion to address the application of New Jersey Rule of Evidence 406 to evidence of routine business practices surrounding contract formation. In SSI, the Court, discussing paper mailings of Medicaid claim forms, and without addressing Rule 406, "acknowledge[d]" older cases holding "that mailing based in part on evidence of business custom or practice also

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has not submitted the application actually signed by Plaintiff, such a submission is not required" because the evidence showed that "Plaintiff would have been unable to obtain a movie rental without signing the appropriate application which contained the clause in question"); Blashka v. Greenway Capital Corp., 1995 WL 608284, at *2, *5 (S.D.N.Y. Oct. 17, 1995) (SA_34) (testimony that "regular business practice [is] not to permit trading in a customer's account unless and until the account application and agreement," including its arbitration provision, "have been approved" suffices to prove that the customer "either signed such an agreement or authorized someone else to sign on his behalf").

requires proof that the custom or practice was actually followed on the specific occasion." SSI Med. Servs., Inc. v. State Dep't of Human Servs., 146 N.J. 614, 624 (1996) (citing Cwiklinski v. Burton, 217 N.J. Super. 506, 511 (App. Div. 1987); Weathers v. Hartford Ins. Grp., 77 N.J. 228, 235 (1978)). The Court noted, however, that "where the business organization is large, the nature of the business operations is complex, and the items mailed on a daily basis are voluminous, it may not be possible for individuals engaged in mailing activities to recall actual mailing of a document or whether the custom or practice of mailing was followed on a given day." 146 N.J. at 624. The Court thus concluded that SSI's submission of affidavits that "recited SSI's office procedure for filing claim forms" and demonstrated the routine nature of the mailing process sufficed to "creat[e] a presumption of mailing and receipt." Id. at 623-24.

The decision below is therefore entirely consistent with the holding in SSI. Altice's uncontested evidence of its routine business practice to email new customers a copy of the Customer Service Agreement created a presumption that the agreement was sent to Fazio when he initiated his mobile service on November 20, 2019. As

the Superior Court recognized, these types of automated transactions "take place by the thousands every day, via email." Pa24. And the routine nature of the practice was further confirmed by a receipt from Fazio's purchase of a mobile device five days later, which stated that the "Terms & Conditions" would have been "sent electronically to the email address you provided during account creation," as well as by Fazio signing a Retail Installment Contract that expressly referred to the Customer Service Agreement. JA18, 48.[6]

Moreover, for several reasons, any suggestion in SSI that case-specific proof is required above and beyond evidence of routine business practices to demonstrate that a specific document was sent should not be extended to the circumstances of this case.

First, and most significantly, Rule 406(a) is squarely on point and controls here. It expressly allows for admission of routine business practice, "whether or not corroborated," to prove that the practice was followed on a specific occasion. N.J.R.E. 406(a). As

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[6] Fazio protested below that the receipt used the phrase "Terms & Conditions" rather than "Customer Service Agreement." Pl.'s App. Div. Br. 3-4. But that is a distinction without a difference; indeed, Fazio has not argued that "Terms & Conditions" refers to a different set of contract terms.

detailed above, an overwhelming body of federal courts applying the analogous FRE 406 do not require plaintiff-specific evidence in addition to evidence of routine business practice to demonstrate the existence of a contract.

Second, the Court in SSI was careful to limit its endorsement of prior case law requiring evidence about the mailing of a specific document to circumstances "when the issue of mailing arises in a context where it would be expected that those charged with the duty of mailing would be capable of testifying that the documents at issue were actually mailed or that the custom or practice was actually followed." SSI, 146 N.J. at 624. Those circumstances are not present for "large" businesses with "complex" operations that send "voluminous" numbers of documents every day (id.)—which aptly describes Altice here.

Third, and relatedly, SSI, as well as the cases it cites, involved the physical mailing of documents. As the SSI Court recognized nearly three decades ago, then-"new technologies" like "e-mail" may present different considerations and be subject to "different proofs." 146 N.J. at 624 n.1. The computerized processes for businesses (like Altice) to

automatically email documents to their customers do not present the same concerns about potential deviations from office custom that appeared to be animating the discussion in SSI and its predecessors—such as hard-copy documents getting left in a folder, misplaced in a mail room, or never picked up and delivered to the post office.

Fourth, and finally, if this Court concludes that SSI controls here and is not distinguishable, it should reverse course and overrule that decision. As a leading treatise notes, requiring case-specific corroboration would "defeat[] the purpose of N.J.R.E. 406." Biunno, Current N.J. Rules of Evidence, Comment 1 on N.J.R.E. 406(a) (Gann). The Biunno treatise goes on to say that SSI "appears to have ignored the change" in New Jersey's evidentiary rules removing any corroboration requirement. Id.; see also pages 8-9, supra. Indeed, when SSI was decided nearly 30 years ago, the opinion did not mention Rule 406 at all. The Court should follow the text of the rule and federal precedent and eliminate the need for case-specific corroboration.

CONCLUSION

Altice's evidence of customary and routine business practice surrounding contract formation sufficed to meet its burden of demonstrating that the practice was followed as to Fazio. The Court should affirm the Appellate Division's decision.

Respectfully submitted,

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