EXTECH BUILDING MATERIALS, INC., Plaintiff/Respondent, v. E & N CONSTRUCTION, INC., SHAWN RONEY and JOAQUIM G. FERREIRA, Defendants/Petitioner,	SUPREME COURT OF NEW JERSEY DOCKET NO.: 089720 Civil Action On petition for certification from the Superior Court of New Jersey, Appellate Division (No.: No. A-0191-23 T1) Sat Below: Hon. Francis J. Vernoia, J.A.D. and Hon. Kay Walcott-Henderson, J.S.C. (t/a) Law Division: Hon. Robert C. Wilson, J.S.C.

DEFENDANT/PETITIONER JOAQUIM G. FERREIRA'S PETITION FOR CERTIFICATION AND APPENDIX

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Defendant/Petitioner Joaquim G. Ferreira ("Ferreira") respectfully submits this petition seeking certification and review of the July 5, 2024 decision of the Appellate Division to reverse the trial court's November 4, 2022 entry of summary judgment dismissing the claims asserted against Ferreira by Plaintiff Extech Building Materials, Inc. ("Extech").

SHORT STATEMENT OF THE MATTER

This case concerns the facial validity of a personal guaranty. Below, the Appellate Division issued a decision that requires intervention regardless of whether it is right or wrong.

The Appellate Division upended years of uniform authority, declaring that there was no controlling rule of law as to the formal requirements for an effective guaranty. If that is correct, then this case presents an alarming open issue that should be settled by this Court. Personal guaranties are an important, commonplace business tool. Contracting parties and litigants should not be left to guess; New Jersey law should provide a clear, dependable rule.

On the other hand, however, the Appellate Division issued a decision in conflict with all prior decisions of equal or higher courts on the issue (including another unpublished decision of the Appellate Division on the same exact issue just months prior). This creates legal uncertainty and calls for the supervision of this Court. It also imposes an unfair and unjust result for Ferreira in particular.

Either way, this case presents an urgent need for certification and review – whether to settle an open question or to correct an erroneous result and serve the interest of justice.

FACTUAL AND PROCEDURAL BACKGROUND

For the purposes of this petition only, Ferreira accepts the facts as alleged by Extech or established as undisputed on summary judgment.

This matter arises out of a business relationship between Extech and the primary defendant, E&N Construction, Inc. ("E&N"). Extech is a supplier of building materials, and E&N is a construction company. Extech allegedly sold materials to E&N for several years. Pa423.[1] These sales were made pursuant to a written "Credit Application," which created the contractual supplier-customer relationship between Extech and E&N. Pa046; Pa009; Pa012; Pa423.

The Credit Application was executed in 2012 by Ferreira and Roney. Pa046. At the relevant times, Ferreira was the President of E&N. Pa061; Pa087-88; Pa272. Defendant Shawn Roney was the Manager of E&N. *Id.* Extech itself expressly concedes that Roney and Ferreira executed the Credit application "on behalf of E&N" (Pb3)[2] and that in executing the Credit Application "they clearly acted as representatives of E&N." Pb10.

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[1] Citations to "Pa__" refer to the Appendix submitted to the Appellate Division below by Plaintiff, Extech.

[2] Citations to "Pb__" and "Preply__" refer to the Extech's merits brief and reply.

At first, Extech sued only E&N, commencing this action on March 11, 2021. Pa344. Extech alleged that E&N owed a balance of $1,016,627.65. Pa423. Extech filed an Amended Complaint on June 1, 2022, alleging that Roney and Ferreira had personally guaranteed the obligation of E&N. Pa422-27. Before exchanging discovery, Extech moved and Ferreira cross-moved for summary judgment. Pa006-7; Pa053. On November 4, 2022, the trial court denied Plaintiff's motion and granted Ferreira's motion, dismissing the guaranty claims against him. Pa001-3. The trial court also dismissed the guaranty claims against Roney for the same reasons. Pa004-5.

The case proceeded as to the remaining parties, and default judgment was entered against E&N on August 10, 2023. On July 5, 2024, the Appellate Division reversed the grant of summary judgment in favor of Ferreira. PCa5-22.

QUESTIONS PRESENTED

1. Did the Appellate Division err in concluding that there is no "brightline requirement" concerning the formal requirements to manifest an effective personal guaranty under New Jersey law?

2. Is there a reliable rule of law to guide contracting parties in drafting predictably effective guaranties so as to reduce transaction costs and prevent surprise liabilities – or is the legal sufficiency of every purported guaranty shrouded in uncertainty pending the completion of discovery and litigation?

3. Is there a rule of law that litigants can rely on in evaluating a potential guaranty claim so as to avoid unnecessary litigation where such claim would lack merit – or must parties endure the burden and cost of litigation to determine the formal sufficiency of every guaranty, no matter how deficient?

4. Did the Appellate Division err in issuing a decision in conflict with all prior case law concerning the interpretation of guaranties and the formal requirements to manifest an effective guaranty under New Jersey law?

5. Did the Appellate Division err in concluding that additional discovery was necessary to determine whether a guaranty was formed where a corporate officer undisputedly signed a contract only once on behalf of a corporation and did not sign a separate guaranty or any other instrument?

6. Did the Appellate Division err in concluding that a contract did not clearly define the capacity in which it was executed by the signor where a corporate officer undisputedly signed the document only once on behalf of a corporation and did not sign any other instrument?

7. Did the Appellate Division err in concluding that there was no basis to determine whether a corporate officer executed a contract on behalf of a corporation or in his personal capacity where the officer undisputedly signed the document only once on behalf of corporation?

STATEMENT OF THE ERRORS COMPLAINED OF

The Appellate Division's decision in this matter (which it erroneously and dismissively described as a "collection case") reflects several reversible errors.

First, the Appellate Division failed to acknowledge the clear and uniform guidance of all prior authority with respect to the nature, formation, and construction of guaranties. Instead, it concluded that no such rules existed. Its decision "cuts against the grain of a long line of jurisprudence" to reach a rogue, outlier result in conflict with New Jersey law.

Second, the Appellate Division employed the incorrect analytical framework. It overlooked the principle, well settled for centuries, that guaranties are strictly construed and interpreted against their proponent. Instead, the Appellate Division conducted a backwards, deferential analysis that transformed fatal legal deficiencies into excuses for further fact discovery.

Third, the Appellate Division introduced the brand new issue of ambiguity and avoided the issues raised by the parties. The Appellate Division found that the Credit Application was ambiguous because it did "not clearly define the capacity in which Ferreira and Roney executed the document." PCa19. This conclusion is inexplicable and inexcusable in light of the fact that the parties do not even dispute that Ferreira signed the document on behalf of E&N.

These errors cry out for certification and review by this Court.

REASONS WHY CERTIFICATION SHOULD BE ALLOWED AND COMMENTS WITH RESPECT TO THE APPELLATE DIVISION OPINION

I. CERTIFICATION SHOULD BE GRANTED BECAUSE THIS APPEAL PRESENTS A QUESTION OF GENERAL PUBLIC IMPORTANCE THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

This case concerns the question of whether New Jersey law requires that a personal guaranty contain a second signature, separate from the signature on the underlying written contract, in order to be effective and enforceable. According to the Appellate Division, this is an open question.

Further, this open question is one of general public importance because the decision below does not only affect "the parties to this particular dispute." *See Mahony v. Danis*, 95 N.J. 50, 52 (1983) (Handler, J., concurring). Rather, the decision affects the "rights of innocent persons, or an unwary public…" *Id.*

As described *infra*, Ferreira contends and argued below that New Jersey law clearly and uniformly requires that a personal guaranty be accompanied by a separate and distinct signature in order to create a separate and distinct obligation enforceable against the guarantor. The Appellate Division disagreed, however, concluding that "[t]here is no such brightline requirement." PCa20-21. Thus, even if the Appellate Division is correct that there is no such rule, that determination only confirms that certification is required to settle this issue, which is undoubtedly of great and broad public importance.

Personal guaranties are a common contractual device used in a variety of commercial contexts. Such guaranties are often included in franchise agreements, commercial and residential leases, credit applications (such as the one at issue in this case), small business loans, or consumer credit/financing agreements (such as, for example, auto loans). Further, in the absence of a clear principle, personal guaranties are prone to uncertainty and dispute. For these exact reasons, our Legislature specifically included personal guaranties in New Jersey's Statute of Frauds. *See* N.J.S.A. § 25:1-15.

In the absence of any existing rule of law (according to the Appellate Division), guidance from the Supreme Court is just as important to the public as are the statutory formal requirements for an effective will or real estate closing. *See, e.g.*, N.J.S.A. §§ 25:1-11 and 3B:3-2. Further, providing clear and uniform guidance on this issue that can be relied upon by all contracting parties in New Jersey serves the very same critical policy interests that are reflected in Rule 1:1-2(a) (*i.e.*, securing "just determination[s], simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay").

Beyond the parties to this particular case, guidance from the Supreme Court is necessary for any contracting parties attempting to draft an enforceable personal guaranty. New Jersey law should provide a reliable rule so that the

enforceability of such provisions – *i.e.*, whether guaranty is or is not sufficiently memorialized and executed – is easily predictable.

Similarly, settling of this issue has great significance for future litigants attempting to evaluate whether guaranty claims or defenses thereto are likely to succeed. Such questions should not always require discovery and a thorny and expensive ambiguity analysis by the factfinder. A clear rule will provide certainly and allow those parties to avoid or resolve unnecessary litigation. Continued uncertainty, in contrast, will only embolden baseless litigation and increase costs without yielding any corresponding benefit.

This is a question of enormous general public importance. Certification should accordingly be granted. If the Appellate Division is correct that it has not yet been answered, then it should be settled by the Supreme Court adopting the commonsense "brightline requirement" that is already the law in many other jurisdictions. *See, e.g.*, *Capitol Grp., Inc. v. Collier*, 365 S.W.3d 644, 648 (Mo. Ct. App. 2012); *Livonia Bldg. Materials Co. v. Harrison Const. Co.*, 742 N.W.2d 140, 146 (Mich. Ct. App. 2007); *Express Recovery Servs., Inc. v. Rice*, 125 P.3d 108, 109 (Utah Ct. App. 2005); *Sunbelt Sec. Servs., Inc. v. Delahoussaye*, 572 So. 2d 598, 606 (La. Ct. App. 1990); *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63, 67 (N.Y. 1961)).

II. CERTIFICATION SHOULD BE GRANTED BECAUSE THE DECISION BELOW IS IN CONFLICT WITH EVERY OTHER DECISION OF THE SAME OR A HIGHER COURT – CALLING FOR THE SUPREME COURT'S SUPERVISION.

The Appellate Division's decision is characterized by an avoidance of the controlling New Jersey authority. Moreover, the Appellate Division dismissively portrayed the trial court's decision as supported only by unpublished case law. In reality, the trial court did not break any new ground. Until this point, New Jersey courts had been unanimous in addressing this issue. In fact, the rule that individuals must sign in different capacities when executing both as a representative of the corporate maker of a contract and as a personal guarantor was stated unambiguously by the Supreme Court in *Ligran, Inc. v. Medlawtel, Inc.*, 86 N.J. 583, 589 (1981).

Because the Appellate Division's decision is at odds with the entire body of New Jersey authority produced until that point, it is in conflict with equal and higher courts. This calls for the supervision of the Supreme Court.

A. The Appellate Division erred by failing to construe the purported guaranty strictly and by employing a deferential analysis instead.

New Jersey law imposes a series of requirements for personal guaranties, and a plaintiff seeking to enforce a purported guaranty must clear a high hurdle. Failure to clear the hurdle should result in the failure of the guaranty claim. Here, however, the Appellate Division inverted the analysis. The formal

shortcomings of Extech's purported guaranty should have precluded its enforcement as a matter of law. Instead, those very deficiencies were used as an excuse to resurrect the claim and outsource the analytical task to the factfinder.

The Appellate Division was initially correct that, in a general sense, guaranties are interpreted according to general contract principles. *Ctr. 48 Ltd. P'ship v. May Dep't Stores Co.*, 355 N.J. Super. 390, 405 (App. Div. 2002). That is just the beginning, however, and the Appellate Division failed to recognize the complete analytical framework for interpreting guaranties.

Beyond general contract principles, "guaranties are strictly construed and interpreted most strongly against the entity which has prepared the form." *Id.* (citing *Nat'l Westminster Bank NJ v. Lomker*, 277 N.J. Super. 491, 499 (App. Div. 1994)). Thus, guaranties are considered under the maxim of "*strictissimi juris* (according to strict law)" and "a guarantor cannot be held liable beyond the strict terms of the guaranty." *Nat'l Westminster Bank*, 277 N.J. Super. at 498 (citing *Max v. Schlenger*, 109 N.J.L. 298, 301 (E. & A. 1932); *Housatonic Bank and Trust Co. v. Fleming*, 234 N.J. Super. 79, 82 (App. Div. 1989)).

This keystone principle is entirely absent from the Appellate Division's analysis. However, it has been the rule since at least 1874, and seems to have been long established even at that time. *See Paulison v. Halsey*, 37 N.J.L. 205,

210 (Sup. Ct. 1874) (quoting *Miller v. Stewart*, 22 U.S. (9 Wheat.) 680, 703 (1824)); *see also Guttenberg v. Vassel*, 74 N.J.L. 553, 556 (E. & A. 1907).

However, the Appellate Division failed to employ this long established analytical framework. Instead of the required strict construction, the Appellate Division employed a strikingly deferential analysis and held absolutely nothing "against the entity which has prepared the form." Every formal peculiarity and gap in the Credit Application – which should have doomed Extech's attempt to enforce such a shoddy guaranty – was instead used to resurrect the claim.

Such a loose and deferential analysis is completely at odds with more than two hundred years of legal authority. By giving Extech the benefit of every doubt instead of construing the guaranty strictly against Extech as the proponent of the form, the Appellate Division rendered a decision in conflict with all other New Jersey authority. The intervention of this Court is required.

B. The Appellate Division erred in determining that genuine issues of fact remained because Ferreira's single signature could not create a binding personal guaranty as a matter of law.

Extech defined its claims against Ferreira quite clearly. There is exactly one document at issue, which contains the entire universe of Extech's claims. That document is explicitly alleged to create both the underlying contract between Extech and E&N, as well as a personal guaranty from Ferreira. There is no oral statement or any other document alleged to evidence the purported

guaranty. As a result, the validity of Extech's guaranty claim can be determined as a matter of law on the face of the document itself.

New Jersey law has defined both the legal nature of what a guaranty is and the formal requirements necessary to create one. However, in concluding that discovery was necessary, the Appellate Division conspicuously avoided engaging with the established law. The result was a decision in stark conflict with every other decision of equal or higher courts (including a decision by a different panel of the Appellate Division issued just months prior).

A guaranty is, by definition, a secondary obligation – it requires an underlying primary obligation in order to exist. "A guaranty is a separate and independent contract. The guarantor is not a party to the contract between the principal obligor and the guarantee…." *Great Falls Bank v. Pardo*, 263 N.J. Super. 388, 398 n.5 (Ch. Div. 1993), *aff'd*, 273 N.J. Super. 542 (App. Div. 1994). "'Under a guaranty contract, the guarantor, in a separate contract with the obligee, promises to answer for the primary obligor's debt on the default of the primary obligor.'" *Feigenbaum v. Guaracini*, 402 N.J. Super. 7, 18 (App. Div. 2008) (quoting *Cruz-Mendez v. ISU/Ins. Servs.*, 156 N.J. 556, 568 (1999)).

This Court has already explained how to establish this tripartite contractual relationship. "Generally, a guarantor is a different person from the maker or, if the same person, signs in different capacities when signing as maker

and guarantor (*e.g.*, an individual may sign as an officer of a corporate maker and also sign individually as a guarantor of the corporate obligation)." *Ligran*, 86 N.J. at 589. Here, though, there is no separate contract from the Credit Application – which was undisputedly signed by Ferreira and Roney on behalf of E&N. There is likewise no execution of any agreement by Ferreira separate from his one signature on behalf of E&N.

Below, the Appellate Division cited *Ligran* only once, in passing, before proceeding to disregard it entirely. *See* PCa16. In turning away from *Ligran*, the Appellate Division dismissively remarked that the requirement of a second signature is "primarily supported by citations to unpublished cases." PCa20. In reality, it is squarely supported by longstanding, published case law. The settled principles governing the strict interpretation of guaranties are set forth in cases such as *Ctr. 48 Ltd. P'ship*, *Nat'l Westminster Bank*, *Housatonic Bank*, *Max*, *Paulison*, and *Guttenberg*. The separate and distinct nature of a guaranty is explained in *Feigenbaum*, *Cruz-Mendez*, and *Ligran*. *Ligran* clearly explains the need for a second agreement or, at a minimum, a second signature.

Extech failed to cite a single case in which a contract like the Credit Application here – a single document with only one signature – was held to create an enforceable personal guaranty against the corporate representative who executed it on behalf of the company. The Appellate Division also cited no such

case. After several rounds of briefing in the Law Division and the Appellate Division, it appears that such a case does not exist.

Remarkably, the Appellate Division decided this same exact issue the opposite way just 129 days earlier. *See Inglesino, Webster, Wyciskala & Taylor, LLC v. Sapphire Assisted Living, LLC*, No. A-2288-22, 2024 N.J. Super. Unpub. LEXIS 293, at *4-5 (App. Div. Feb. 27, 2024)[3] (dismissal of guaranty claim warranted where agreement was "signed by Sapphire's corporate officers" and provided that the officers "would be personally liable" but "did not contain separate signature lines binding them as individuals."). Although this unpublished case, decided after briefing was completed below, is not binding authority, it illustrates that the decision below is at odds with New Jersey law.

The Appellate Division overlooked that a guaranty is a separate contract and failed to require a separate signature. This is in conflict with all other New Jersey authority and requires the intervention of this Court.

C. There was no basis for the Appellate Division's conclusions that the Credit Application was ambiguous or that it failed to define the capacity in which it was executed by Ferreira – an issue that was expressly conceded by Extech.

The Appellate Division read the Credit Application so as to infer various internal contradictions, none of which change the fact that it was signed only on

[3] Annexed hereto at PCa42. Petitioner is not aware of any contrary unpublished opinions – except the outlier decision of the Appellate Decision in this case.

behalf of E&N. Nevertheless, the Appellate Division concluded that the Credit Application did not clearly define the capacity in which Ferreira executed it (PCa19), that there was no support in the summary judgment record to make that determination (*id.*), and that additional discovery was necessary in to determine whether an effective personal guaranty was formed. PCa19-20.

Any ambiguity, however, is only imagined. In fact, this issue was not even raised by the parties. Quite the contrary: Extech itself asserted no fewer than eight (8) times that the Credit Application was unambiguous. *See* Pb7, Pb8, Pb18 (twice), Pb23, Preply1, Preply11 (twice).

Moreover, it is impossible – logically and legally – that Ferreira signed the Credit Application in any capacity other than on behalf of E&N. Otherwise, there would have been no underlying contract between Extech and E&N to guarantee in the first place. To be clear, this point is not even in dispute – Extech agrees that Roney and Ferreria both "signed ***on behalf of E&N***." Pb3 (emphasis added). Extech added that Roney and Ferreira "***clearly acted as representatives of E&N***." Pb10 (emphasis added).

Further, there is no dispute that Ferreira signed the document only once and never executed a separate guaranty agreement. No amount of discovery, evidence, or factfinding can change that. Typically, incomplete discovery is no reason to deny summary judgment absent a showing "that further discovery will

supply the missing elements of the cause of action." *Badiali v. N.J. Mfrs. Ins. Grp.*, 220 N.J. 544, 555 (2015). Such a showing cannot possibly be made here.

In its finding of ambiguity, the Appellate Division put the proverbial cart before the horse. There is no occasion to search the meaning of the agreement because there is no agreement at all. In interpreting contracts, "there must be a validly formed agreement to enforce." *Kernahan v. Home Warranty Adm'r of Fla., Inc.*, 236 N.J. 301, 307 (2019). To echo the rhetorical question posed by the Appellate Division in *Home Buyers Warranty v. Roblyn Dev. Corp.*, No. A-0500-05T5, 2006 N.J. Super. Unpub. LEXIS 3000, at *14 (App. Div. Aug. 4, 2006),[4] if Ferreira and Roney signed in their personal capacities – then who signed on behalf of E&N? Extech cannot answer this key question, and the Appellate Division declined to address it. The fact that this rhetorical question was posed in an unpublished opinion does not change the fact that it is fatal to Extech's claim. The failure to address this obvious concern is revealing.

Neither Extech nor the Appellate Division are able to articulate any scenario in which Ferreira signed the Credit Agreement in his personal capacity to create a binding guaranty. The conclusion that the agreement is ambiguous and discovery is needed, is in direct conflict with New Jersey law.

[4] Annexed hereto at PCa45. Petitioner is not aware of any contrary unpublished opinions – except the outlier decision of the Appellate Decision in this case.

III. THE INTEREST OF JUSTICE REQUIRES CERTIFICATION BECAUSE THE DECISION BELOW IS PALPABLY WRONG AND UNFAIR TO FERREIRA, AND A UNIFORM RULE OF LAW IS NECESSARY.

Beyond settling an open issue of great public importance and correcting the outlier Appellate Division decision, certification of this matter is also required by the interest of justice.

Certification is warranted in the interest of justice where the result reached by the lower court is "palpably wrong, unfair, or unjust." *See e.g., Bandel v. Friedrich*, 122 N.J. 235, 237 (1991) (quoting *Mahony*, 95 N.J. at 52 (Handler, J., concurring) (denying certification because "there has been no showing of an egregious miscarriage of justice.")). That is the case here.

To begin, the decision below is in fact "palpably wrong" for the reasons set forth above. However, the decision also has the unfair and unjust effect of needlessly subjecting Ferreira to the cost and burden of litigating a seven-figure claim that, on its face, is without merit. The opinion below unquestionably "cuts against the grain of a long line of jurisprudence in New Jersey" (*D.N. v. K.M.*, 216 N.J. 587, 589 (2014) (Albin, J., dissenting)), to toss Ferreira back into a litigation from which he had been rightfully spared.

The interest of justice requires that litigants not be forced to litigate cases where dismissal is required as a matter of law. This is the same exact reasoning behind the Court's exhortations in *Brill v. Guardian Life Ins. Co. of Am.*: "The

thrust of today's decision is to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." 142 N.J. 520, 541 (1995).

It is not for trial or appellate courts to find "ambiguity" where there is none or to imagine any potential ground for keeping litigation alive. *Id.* Nor can the interests of justice tolerate a court resuscitating claims that were rightfully dismissed. Yet, that is exactly what transpired below. The Appellate Division injected the issue of ambiguity for the first time to revive a properly dismissed claim. This is unjust and unfair to Ferreira, who was entitled to be free from the costs of discovery and litigation (and, of course, potential liability).

The interests of justice also require that New Jersey law provide the benefit of a clear and reliable rule to guide persons and entities conducting business in this state. As described above, contracting parties are left without guidance as to what is required of a personal guaranty and litigants are left to guess as to what claims or defenses might be likely to succeed.

Thus, the decision below creates an egregious miscarriage of justice in this specific case. At the same time, it undermines the "long line of jurisprudence in New Jersey" that had previously provided reliable guidance and certainty to contracting parties and litigants alike. The interests of justice require that certification be granted.

CONCLUSION

For the foregoing reasons, Ferreira respectfully requests that the Court grant certification, settle any open questions of public importance, correct the outlier decision of the Appellate Division, and safeguard the interest of justice.

Whether the Appellate Division is right or wrong, certification should be granted in this case. If the Appellate Division is correct that there is no rule governing this issue, then this appeal presents an open question of great and general public importance that should be settled by the Supreme Court.

On the other hand, if the Appellate Division is incorrect – and there is in fact a uniform rule of law reflected by every other case on record – then the decision below calls for an exercise of the Supreme Court's supervision.

Last, the interest of justice requires certification to be granted in this case. The Appellate Division cut against the grain of a long line of jurisprudence, found ambiguity where there was none, and reached a decision that was palpably wrong, unfair, and unjust.

For these reasons, Ferreira respectfully requests that the Supreme Court grant this application for certification and review.

Respectfully submitted,

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Dated: August 5, 2024

CERTIFICATION PURSUANT TO RULE 2:12-7(a)

I hereby certify that this Petition represents a substantial question and is filed in good faith and not for purposes of delay. This Petition is submitted timely pursuant to Rules 2:12-7(b) and 1:3-1.

By: _____
Zachary D. Wellbrock, Esq.
Counsel for Petitioner

Dated: August 5, 2024