Superior Court of New Jersey

APPELLATE DIVISION

KIM KONDAK, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

EQUINOX HOLDINGS, INC.,

Defendant-Respondent,

and

JOHN DOES 1-25,

Defendants.

DOCKET NO. A-000079-24

CIVIL ACTION:

On Appeal From the Superior Court of New Jersey, Law Division, Union County Docket No. UNN-L-000971-24

SAT BELOW:

Hon. John G. Hudak, J.S.C.

DATE SUBMITTED:

October 18, 2024

BRIEF FOR PLAINTIFF-APPELLANT

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PROCEDURAL HISTORY and STATEMENT OF FACTS[1]

On May 14, 2024, Plaintiff/Appellant, Kim Kondak ("Plaintiff" or "Kondak") filed a Class Action Complaint alleging that Defendant/Respondent, Equinox Holdings, Inc.'s ("Defendant" or "Equinox") form New Jersey health club "Membership Agreement" (offered to any, and all, of the New Jersey public) violated New Jersey's Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq.* ("CFA"); Health Club Services Act ("HCSA"), N.J.S.A. 56:8-42 *et seq.;* Retail Installment Sales Act ("RISA"), N.J.S.A. 17:16C-1 *et seq*., and, the Truth-in-Consumer Contract Warranty and Notice Act ("TCCWNA), N.J.S.A. 56:12- 14 *et seq*. (Ja13-Ja43) As more fully set forth in the Complaint, Plaintiff alleged:

- Defendants have violated the CFA through the use of cancellation policies and billing practices which have the primary effect of discouraging and impeding their customers from cancelling what are otherwise perpetual and automatically self-renewing monthly contracts. Specifically, it is decisively unclear when the consumer needs to cancel the Membership Agreement in order to avoid having to pay additional monies beyond the "Initial Period". Alternatively, and although 30 days' notice is allegedly required for the consumer to cancel the Membership Agreement to avoid having to pay additional monies beyond the "Initial Period", it is further decisively unclear when the 30 days' notice begins if a consumer cancels the Membership Agreement more than 30 days before the Initial Period ends,

[1] For judicial economy purposes as the procedural history in the case merely consists of an initial Class Action Complaint, and motion to compel arbitration

or exactly 30 days before the Initial Period ends. (Ja14);

- Defendants have violated the HCSA by failing to provide Plaintiff's total payment obligation. HCSA, 56:6-42(b). Specifically, the sales tax allegedly due by the consumer during the "Initial Period" and/or the fee (including the alleged sales tax) for a "Select Monthly" membership is not included in the "Total Annual Payment" for the Membership Agreement, which is part of Plaintiff's total payment obligation. (Ja14-Ja15); *and*,

- Defendants have also violated the HCSA by using minimum term Membership Agreements, usually for twelve months that automatically renew each month at the end of the initial term in perpetuity until and unless the customer cancels the contract and by imposing unreasonable and unduly onerous requirements for customers to cancel their health club contracts. HCSA, 56:6-42(i). (Ja15)

Critically, and in addition to class certification, a declaratory judgment, actual damages, statutory damages, treble damages, attorney fees and costs, and pre/post judgment interest, Plaintiff's Complaint seeks injunctive relief[2] (i.e. "public injunctive relief" (infra **Section I[C]**) enjoining Equinox from engaging in future violations of the HCSA, CFA, TCCWNA, and RISA. (Ja27-Ja28) See *DiCarlo v MoneyLion, Inc.*, 988 F.3d. 1148, 1152 (9th Cir. 2021) In other words,

[2] "c. For injunctive relief, enjoining Defendants from engaging in future violations of the HCSA, CFA, TCCWNA, and RISA;" (Ja27)

Plaintiff sought to prevent Equinox from future use of its form New Jersey health club Membership Agreement thereby immediately preventing other New Jersey consumers from being exposed to the type of HCSA, CFA, TCCWNA, and RISA violations alleged by Plaintiff against Equinox in the Complaint.(Ja13-Ja43)

Equinox's response to the Complaint (Ja13-Ja43) was a motion to compel arbitration and to stay proceedings pending the completion of arbitration. Critically, the arbitration provisions in Equinox's Membership Agreement state the following, in relevant part (Ja36):

7. ARBITRATION AGREEMENT AND CLASS ACTION WAIVER

7.1 Informal Dispute Resolution: Our goal is to do our best to ensure that every experience you have with Equinox exceeds your expectations. If that doesn't happen, we hope you will give us the opportunity to try to address any problem or concern. To do so, please contact us by visiting equinox.com/contactus. When contacting us, we ask that you include your name, address, phone number and email address, a description of your problem or concern and any specific relief you seek.

7.2 Arbitration: You agree to submit any and all Disputes (as defined in Section 7.4) to binding arbitration pursuant to the Federal Arbitration Act (Title 9 of the United States Code), which will govern the interpretation and enforcement of this arbitration agreement ("**Arbitration Agreement**"). Arbitration will be before either (1) JAMS (formerly known as Judicial Arbitration and Mediation Services), jamsadr.com, or (2) the American Arbitration Association ("**AAA**"), adr.org. If you initiate arbitration, you may choose between these two arbitration forums; if Equinox initiates arbitration, it will have the choice as between these two arbitration forums.

YOU AND EQUINOX AGREE THAT, EXCEPT AS PROVIDED IN SECTION 7.4, ANY AND ALL DISPUTES WHICH ARISE AFTER

YOU ENTER INTO THIS AGREEMENT WILL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION RATHER THAN IN COURT BY A JUDGE OR JURY, IN ACCORDANCE WITH THIS ARBITRATION AGREEMENT.

In addition, Equinox's Membership Agreement further states (Ja37):

7.3 Definition of "Dispute": Subject to the following exclusions, "Dispute" means any dispute, claim, or controversy between you and Equinox regarding any aspect of your relationship with Equinox, whether based in contract, statute, regulation, ordinance, tort (including without limitation fraud, misrepresentation, fraudulent inducement, negligence, gross negligence or reckless behavior), or any other legal, statutory or equitable theory, and includes without limitation the validity, enforceability or scope of the Agreement (except for the scope, enforceability and interpretation of the Arbitration Agreement and Class Action Waiver). However, "Dispute" will not include (1) personal injury claims or claims for lost, stolen, or damaged property; (2) claims that all or part of the Class Action Waiver is invalid, unenforceable, unconscionable, void or voidable; and (3) any claim for public injunctive relief, i.e., injunctive relief that has the primary purpose and effect of prohibiting alleged unlawful acts that threaten future injury to the general public. Such claims may be determined only by a court of competent jurisdiction and not by an arbitrator.

7.5 Arbitration Procedures and Location: Either you or Equinox may initiate arbitration proceedings. Arbitration will be conducted before a single arbitrator. If you or Equinox initiate arbitration, you and we have a choice of doing so before JAMS or the AAA:

(1) For arbitration before JAMS, the JAMS Comprehensive Arbitration Rules & Procedures and the JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases will apply. The JAMS rules are available at jamsadr.comor by calling 1-800-352-5267.

(2) Which particular rules apply in AAA arbitration will depend on how much money is at issue. For less than $75,000, the AAA's Supplementary Procedures for Consumer-Related Disputes/Consumer Arbitration Rules will apply; for Disputes involving $75,000 or more, the AAA's Commercial Arbitration Rules will apply. The AAA rules are available at adr.org or by calling 1-800-778-7879.

> If required for the enforceability of the Arbitration Agreement under the Federal Arbitration Act, Equinox will pay all arbitrator's costs and expenses. If not, those costs will be paid as specified in the above-referenced rules. You and Equinox both agree to bring the arbitration in either the county in which your Home Club is located or in New York City, New York. As set forth in Section 8.5 below, the arbitrator will apply New Jersey law.

Thus, and pursuant to Paragraph 7.4 (Ja37) of Equinox's Membership Agreement, a claim of "public injunctive relief" is specifically excluded from arbitration under Paragraphs 7.1-7.2 (Ja36) of Equinox's Membership Agreement; and is defined by Equinox at Paragraph 7.4 (Ja37) "…as injunctive relief that has the primary purpose and effect of prohibiting alleged unlawful acts that threaten ***future*** injury to the general public." (emphasis added)

On July 29, 2024, the trial court granted Defendant's motion to stay proceedings and compel plaintiff to arbitrate all claims set forth in her Class Action Complaint. (Ja5-Ja12a) The trial court stated the following, in relevant part, as to both the issues of arbitrability (i.e. whether a New Jersey judge, or arbitrator, should interpret the scope of the arbitration provision in Equinox's Membership Agreement), and also whether Plaintiff pleaded the type of "public injunctive relief" specifically excluded from Equinox's arbitration provision:

> "…Under paragraph 7.4, the parties include a delegation clause that states that disputes over the scope of the agreement should be decided by an arbitrator. Further, the parties also agreed as part of the membership agreement that arbitration will be before either the AAA or JAMS, both of which have rules that

explicitly state that issues of an arbitration provision's scope and interpretation must be decided by an arbitrator. This means that the issue of whether plaintiff's claims are for public injunctive relief must be decided by an arbitrator rather than by this Court…" (Ja10); *and*

"Even if the issue of whether plaintiff has a claim for public injunctive relief is decided by this Court, this case would be stayed in favor of arbitration. Injunctive relief is considered 'private' when it offers relief to an individual plaintiff or a group of individuals similarly situated to the plaintiff. See, e.g., *Hodges v. Comcast Cable Communs.*, LLC, 12 F.4th 1108, 1115 (9th Cir. 2021). Injunctive relief is 'public' when it is relief that benefits the general public and benefits an individual plaintiff only incidentally or as a member of a class. *DiCarlo v. MoneyLion, Inc.*, 988 F.3d 1148, 1152 (9th Cir. 2021); *Jack v. Ring, LLC*, 91 Cal. App. 5th 1186, 1202 (2023). (Ja10)

Plaintiff is seeking to remedy alleged violations of consumer law that she is claiming on behalf of herself and others similarly situated as part of a class action. The relief she is seeking relates to her own membership in a fitness club. Plaintiff is seeking money damages in addition to the injunctive relief. It cannot be said that any relief she is seeking would only incidentally benefit herself. The relief plaintiff is seeking is for herself and members of the Equinox Fitness Club…

…The statutes under which plaintiff is seeking relief—New Jersey's HCSA, the CFA, the RISA, and the TCCWNA—do not authorize plaintiff to act as a private attorney general and assert a "public injunctive relief" claim on behalf of the general public. Under other New Jersey statutes, certain individuals are authorized to bring lawsuits on behalf of the state. See, e.g., N.J.S.A. 49:5-12(a); N.J.S.A. 17:10B-5(b). Plaintiff here is not

> bringing claims on behalf of the state or the general public.
>
> Thus, as an additional reason to stay the proceedings, this Court finds that none of plaintiff's claims are for public injunctive relief. Plaintiff makes a claim for injunctive relief, but the claims at issue were not brought on behalf of the public. Plaintiff's claims were brought to benefit plaintiff and members of the class action who are similarly situated to plaintiff. There is a valid and binding agreement that provides reasonable notice to plaintiff that she gave up her rights to pursue her claims before a judge or jury. The arbitration provision also provides a delegation clause that provides that issues relating to the scope of the arbitration provision—including whether a claim is subject to the arbitration provision—are to be decided at arbitration..." (Ja10-Ja11)

As will be further shown, not only are Plaintiff's HCSA, CFA, TCCWNA, and RISA claims against Equinox justiciable by a New Jersey judge (as opposed to an arbitrator, infra **Section I[B]**) but, of equal importance, Plaintiff's claims seeking, among other things, injunctive relief (i.e. for Equinox to cease using its New Jersey form health club Membership Agreement), is the type of "public injunctive relief" that Equinox specifically excluded from arbitration in its Membership Agreement. Infra **Section I[C]**; (Ja27, Ja36-Ja37)

For these reasons, the trial court's July 24, 2024 Order should be reversed, and Plaintiff's case should be reinstated to the New Jersey trial court for the parties to commence discovery. (Ja5-Ja12)

LEGAL ARGUMENT

I. THE TRIAL COURT'S JULY 29, 2024 DECISION COMPELLING ARBITRATION AND STAYING PLAINTIFF'S CASE SHOULD BE REVERSED (Ja5-Ja12)

A. Standards For Evaluating Motions To Compel Arbitration

"It is the FAA's 'principal purpose' to 'ensur[e] that private arbitration agreements are enforced according to their terms' (citations omitted)" See *Goffe v Foulke Mgmt., Corp.*, 238 N.J. 191, 208 (2019) "Pursuant to the FAA, courts must 'place arbitration agreements' on equal footing with all other contracts (citations omitted). Thus, a state may not 'subject an arbitration agreement to more burdensome requirements than those governing the formation of other contracts' (citation omitted)" See *Skuse v Pfizer, Inc.*, 244 N.J. 30, 47 (2020); *Atalese v U.S. Legal Services Group, L.P.* 219 N.J. 430, 441 (2014) A state may regulate agreements, including those that relate to arbitration, by applying its contract law principles that are relevant in a given case. See *Leodori v Cigna Corp.*, 175 N.J. 293, 302 (2003); *Atalese*, 219 N.J. at 441-442. "Arbitration agreements are interpreted under the objective, "average consumer" standard. *Atalese v. U.S. Legal Servs. Grp., L.P.,* 219 N.J. 430, 446, 99 A.3d 306 (2014); see also *Morgan v. Sanford Brown Inst.*, 225 N.J. 289, 308, 137 A.3d 1168

(2016)" See *Trout v Ford*, 2019 N.J. Super. Unpub. LEXIS 2440, *12 (App. Div. December 3, 2019)

Given that arbitration is a contractual matter, before a court compels arbitration pursuant to the FAA, it must determine that: (1) a valid agreement to arbitrate exists, and (2) the particular dispute falls within the scope of the agreement. See *Saunders v Collabella, Inc.*, 2021 U.S. Dist. LEXIS 143237, *4 (D.N.J. 2021) (Ja93-Ja97) State courts have similarly found that on a motion to compel arbitration, a court must first apply state contract-law principles to determine whether a valid agreement to arbitrate exists, and then evaluate whether the particular claims at issue fall within the arbitration clause's scope. See *Hirsch v Amper Financial Services, LLC*, 215 N.J. 174, 187 (2013)

In determining whether a valid arbitration agreement exists, a court must first decide whether to use the motion to dismiss or the summary judgment standard of review. See *Schultz v Midland Credit Mgmt.*, 2019 U.S. Dist. LEXIS 79889 (D.N.J. 2019) (Ja103-Ja114) New Jersey courts have clarified the standards to be applied to motions to compel arbitration, identifying the circumstances under which district courts should apply the standard for a motion to dismiss, and those under which they should apply the summary judgment standard. See *Goffe*, 238 N.J. at 203 citing *Guidotti v Legal Helpers Debt Resol., LLC*, 716 F.3d 764, 767 (3rd Cir. 2013) The *Guidotti* Court stated that where the

affirmative defense of arbitrability of claims is apparent on the face of a complaint (or documents relied upon in the complaint), the FAA would favor resolving a motion to compel arbitration under a motion to dismiss standard without the inherent delay of discovery. Id. at 774 However, a motion to dismiss standard would be inappropriate when the motion to compel arbitration does not have as its predicate a complaint with the requisite clarity to establish on its face that the parties agreed to arbitrate. Id. at 774. Under that scenario – the arbitrability not being apparent on the face of the complaint – "the motion to compel arbitration must be denied pending further development of the factual record" Id. at 774 Regarding the further development of the factual record, the *Guidotti* Court explained that "a 'restricted inquiry into factual issues' will be necessary to properly evaluate whether there was a meeting of the minds on the agreement to arbitrate, (citation omitted), and the non-movant 'must be given the opportunity to conduct limited discovery on the narrow issue concerning the validity' of the arbitration agreement (citation omitted)". Id. at 774 The *Guidotti* Court went on to state: "After limited discovery, the court may entertain a renewed motion to compel arbitration, this time judging the motion under a summary judgment standard" Id. at 776

This Court has stressed the need for clarity in arbitration clauses. See *Rotondi v Dibre Auto Group, L.L.C.*, 2014 N.J. Super. Unpub. LEXIS 1662, *11-

12 (App. Div. July 9, 2014) (cert denied 220 N.J. 31 [2014]) citing *Foulke*, 421 N.J. Super at 425. (Ja88-Ja92) "'[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.' (quoting *Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ.*, 78 N.J. 122, 140, 393 A.2d 267 (1978))(Ja91); *Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C.*, 416 N.J. Super. 30, 37, 3 A.3d 535 (App. Div. 2010) ('Courts decline to enforce an arbitration agreement that is not sufficiently clear as to the rights the party is waiving.')". Id. at *11.

Here, while Equinox may be able to establish the first prong for a motion to compel arbitration (i.e. that a valid arbitration agreement exists), the trial court's July 29, 2024 decision (Ja5-Ja12) should be reversed because Equinox cannot establish the second prong (i.e. that Plaintiff's injunctive relief [amongst others] damages for her CFA, HCSA, RISA, and TCCWNA claims)(Ja27-Ja28) fall within the scope of the arbitration provision in Equinox's Membership Agreement. See *Saunders*, 2021 U.S. Dist. LEXIS 143237, *4 (Ja94); infra **Section I(C)** Moreover, and as to the issue of arbitrability, a New Jersey judge should decide whether the arbitration agreement applies as opposed to an arbitrator. Infra **Section I(B)**

B. The Trial Court's July 29, 2024 Decision Should Be Reversed Because Whether Plaintiff's CFA, HCSA, RISA, and TCCWNA Allegations In The Complaint Are Covered By the Arbitration Provision in Equinox's "Membership Agreement" Should Be Determined By A New Jersey Judge And Not An Arbitrator (Ja8-Ja10, Ja12)

The trial court determined that an arbitrator, as opposed to the trial court itself, should determine the "issue of arbitrability" (i.e. whether Plaintiff's allegations are covered by the arbitration provision in Equinox's form health club Membership Agreement.(Ja12); infra **Section I(C)**. To that end, and although Equinox's arbitration agreement incorporates the rules of the AAA (and JAMS)(Ja37), the trial court should not have decided that an arbitrator should determine whether Plaintiff's claims fall within the scope of Equinox's arbitration agreement.

In support, the trial court relies on *Goffe v. Foulke Management Corp.*, 238 N.J. 191, 211 (2019) (Ja10) However, neither *Goffe* nor the fact that Equinox's definition of "Dispute" (Ja37) nullifies arbitration in Plaintiff's case supports this premise. In *Goffe*, 238 N.J. at 195, the New Jersey Supreme Court stated: "In order to be decided by a court, an arbitrability challenge -- a challenge as to whether a particular matter is subject to arbitration or can be decided by a court must be directed at the delegation clause itself (which itself constitutes an

arbitration agreement subject to enforcement); a general challenge to the validity of the agreement as a whole will not suffice to permit arbitration to be avoided. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 72, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)." This is exactly what Plaintiff has done in the case, *sub judice*, as the word "Disputes" (which is part of the delegation clause in Paragraph 7.2 of Equinox's Membership Agreement) (Ja36) is specifically, not generally, included in the Equinox Membership Agreement arbitration provision and, yet, Plaintiff's damages (set forth in the Complaint) seeking injunctive relief (Ja27) is specifically excluded from the definition of "Disputes" at Paragraph 7.4 of Equinox's Membership Agreement. (Ja37) Accordingly, the trial court should determine whether the arbitration provision applies to the relief sought in Plaintiff's Complaint based on Equinox's violations of the HCSA, CFA, TCCWNA and RISA, and not an arbitrator.

During the July 19, 2024 oral argument on this point, the trial court was concerned with Plaintiff's argument concerning the confusing nature of the sections (7.2, 7.4 and 7.5) in Defendant's arbitration provision (in the subject New Jersey, form, health club Membership Agreement) concerning "Disputes". (T30-24-25; T31-1-3) Accordingly, and unlike cases that will be relied on by Equinox, the issues of "Dispute", "public injunctive relief" and/or arbitrability are intertwined throughout multiple sections (7.2, 7.4, and 7.5), and over the

course of multiple pages, of Equinox's arbitration provision as opposed to clearly set forth in just one section.(Ja36-Ja37) This conflicts with the clarity for arbitration provisions required by this Court in *Rotondi*, 2014 N.J. Super. Unpub. LEXIS 1662, *10-12 citing *NAACP of Camden County East* 421 N.J. Super. at 429 (Ja90-Ja91) For example, Equinox's confusing arbitration provision (set forth in multiple paragraphs, and multiple pages) can be juxtaposed with that set forth by this Court in one paragraph in *Trainor v Chrysler*, 2021 N.J. Unpub. LEXIS 2202, * 5-6 (App. Div. September 20, 2021)(Ja119):

> "Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Provision, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Provision shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose the American Arbitration Association, 1633 Broadway, 10th Floor, New York, New York 10019 (adr.org), or any other organization to conduct the arbitration subject to our approval. You may get a

> copy of the rules of an arbitration organization by contacting the organization or visiting its website."

As to the issue of arbitrability, it is anticipated that Equinox will argue (and cite to *Blueprint Cap. Advisors, LLC v N.J. Div. of Inv.,* 2023 U.S. App. LEXIS 34032, *4, 7 (3d Cir. December 22, 2023) (Ja62-Ja66) that Plaintiff misinterpreted *Goffe*, 238 N.J. at 211 or misinterpreted the "delegation clause" in the arbitration provision in Equinox's Membership Agreement. Unlike the subject arbitration provision[3] in *Blueprint Cap. Advisors, LLC*, 2023 U.S. App. LEXIS 34032, *4, 7 (Ja64-Ja66), Equinox's arbitration provision is far from clear.

First, in Equinox's arbitration provision you have Paragraph 7.2 (Ja36) of the arbitration provision which states: "**Arbitration:** You agree to submit any and all ***Disputes*** (as defined in Section 7.4) to binding arbitration pursuant to the Federal Arbitration Act (Title 9 of the United States Code), which will govern the interpretation and enforcement of this arbitration agreement ("**Arbitration Agreement**"). Arbitration will be before either (1) JAMS (formerly known as Judicial Arbitration and Mediation Services),

[3] "Any controversy or claim arising out of or relating to this Agreement or the breach thereof, that cannot be settled between the Parties, shall be settled by arbitration in accordance with AAA and pursuant to the AAA Rules; *provided*, that each Party shall retain his or its right to commence an action to obtain specific performance or other equitable relief from any court of competent jurisdiction."

jamsadr.com, or (2) the American Arbitration Association ("**AAA**"), adr.org..." (emphasis added) Unlike the purported corresponding paragraph in *Blueprint,* 2023 U.S. App. LEXIS 34032, *4, 7 (Ja64-Ja66) Defendant's Paragraph 7.2 (Ja36) does not mention the "AAA Rules (or those of JAMS). *Second*, Paragraph 7.2 (Ja36) from Equinox's arbitration provision references (and only applies to) "Disputes" which is defined in an entirely different part of the arbitration provision at Paragraph 7.4. (Ja37) As argued below, "Disputes" does not apply (per Equinox's own definition) to Plaintiff's claims involving "public injunctive relief". Infra **Section I(C)** *Third*, any reference to the AAA or JAMS rules is only found in a separate paragraph (7.5)(Ja37), on an entirely separate page, from Paragraph 7.2. (Ja36) Accordingly, this is all not the same type of clear delegation[4] provision (and corresponding individuals paragraph concerning arbitrability) as set forth in *Blueprint,* 2023 U.S. App. LEXIS 34032, *4, 7. (Ja64-Ja66)

Accordingly, a New Jersey Judge, and not an arbitrator, should determine whether the injunctive relief set forth in Plaintiff's Complaint alleging CFA,

[4] Such as the clear (unlike Equinox's here) provision at issue in *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63,66 (2010), which will be relied on by Equinox: "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable."

HCSA, TCCWNA, and RISA violations against Equinox is covered by Equinox's form, New Jersey, health club Membership Agreement

C. The Trial Court's July 29, 2024 Decision Should Be Reversed Because The Injunctive Relief Set Forth in Plaintiff's Class Action Complaint Alleging Equinox's CFA, HCSA, RISA, and TCCWNA Violations Is The Type of "Public Injunctive Relief Specifically Excluded By the Arbitration Provision in Equinox's "Membership Agreement" (Ja10-Ja12)

Public injunctive relief has been defined as "relief that by and large benefits the general public .... and that benefits the plaintiff, if at all, only incidentally and/or as a member of the general public." See *DiCarlo*, 988 F.3d. at 1152 citing *McGill v. Citibank, N.A.,* 2 Cal. 5th 945 (Cal. 2017); see also *Kilgore v Keybank, N.A.*, 718 F. 3d. 1052, 1060 (9th Cir. 2013) cited by *Beture v Samsung Elecs. Am. Inc.*, 2018 U.S. LEXIS 121801, *28-29 (D. New Jersey July 18, 2018) (Ja51-Ja61) "A claim for public injunctive relief therefore does not seek "'to resolve a private dispute but to remedy a public wrong.'" *Kilgore*, 718 F. 3d at 1060 citing *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67, 76 (Cal. 1999)

Equinox drafted the arbitration provision in its Membership Agreement. (Ja36-Ja37) Equinox specifically excluded claims against it seeking "public injunctive relief" from being covered under the arbitration provision. (Ja37) Put

differently, Equinox already determined that claims (such as Plaintiff's CFA, HCSA, RISA and TCCWNA claims) seeking "public injunctive relief" can be heard in this Court, and are not required to be heard in arbitration. Id. ;supra **Section I(B)**

Equinox defined "public injunctive relief" as follows at paragraph 7.4 (Ja37) of the arbitration provision "…as injunctive relief that has the primary purpose and effect of prohibiting alleged unlawful acts that threaten ***future*** injury to the general public." (emphasis added). Accordingly, Plaintiff's damages in her Class Action Complaint against Equinox seeking "injunctive relief" (Ja26) is the type of "public injunctive relief" excluded under Equinox's Membership Agreement. *DiCarlo*, 988 F.3d. at 1152; *McGill,* 2 Cal. 5th 945; *Kilgore*, 718 F. 3d. at 1060; *Beture*, 2018 U.S. LEXIS 121801, *28-29 (Ja59); *Broughton*, 988 P.2d at 76 This is because Plaintiff is seeking to enjoin Equinox from using the same form health club contract (which violates New Jersey's CFA, HCSA, RISA and TCCWNA) to enroll future New Jersey customers that seek to join an Equinox health club. This fits squarely within the definition of "public injunctive relief" (Ja37) set forth in Equinox's Membership Agreement; and therefore, Plaintiff's claims are specifically excluded from arbitration.

In its July 29, 2024 decision (and July 19, 2024 oral argument) on this point, the trial court was concerned with the basis for Plaintiff to act as a private

attorney general[5] regarding her injunctive relief claim seeking "public injunctive relief". (Ja11; T14-23-25; T15-1-4; T16-1-2,10-13; T17-1-6,13-24; T26-9-12, 19-22; T27-12-16, 19-25; T28-1-3, 7-8, 13-19; T31-7-13) To that end, the Consumer Fraud Act ("CFA"), NJSA 56:8-19 states the following:

> "Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefor[e] in any court of competent jurisdiction. In any action under this section the court shall, ***in addition to any other appropriate legal or equitable relief***, award threefold the damages sustained by any person in interest. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit." (emphasis added)

In addition, under the CFA, a private litigant (such as Plaintiff here) can bring an action (thereby acting as a private attorney general) seeking injunctive relief (in addition to monetary damages) so long as her claims include that she suffered an ascertainable loss of money or property. See *Weinberg v Sprint Corp.*, 173 N.J. 233, 250 (2002) Conversely, the Attorney General of New Jersey can bring

[5] The words "private attorney general" are not even stated in Paragraphs 7.2, 7.4 or 7.5 of Equinox's arbitration provision but separately concerning a class action waiver in Paragraph 7.3. (Ja36-Ja37)

an action solely for injunctive relief and, therefore, does not have the ascertainable loss requirement. Id.

As further set forth in *Weinberg,* 173 N.J. at 253

> "Read sensibly, the statute allows a private cause of action to proceed for all available remedies, ***including an injunction***, whenever a consumer can plead a claim of ascertainable loss that can survive a motion for summary judgment. The legislative intent to permit a private cause of action under the Act would be frustrated if a private litigant, who succeeds in bringing such a claim to a jury, must gamble on whether he or she will prevail ultimately on proof of the loss in order to obtain attorneys' fees, when he or she otherwise proves unlawful conduct." (emphasis added).

Therefore with respect to injunctive relief, the only difference between a private attorney general and the Attorney General of New Jersey is that the Attorney General of New Jersey does need to allege an ascertainable loss. The CFA provides that *both* a private attorney general and the Attorney General of New Jersey can seek "injunctive relief". Further, the CFA does not differentiate between the type of injunctive relief either a private attorney general and the Attorney General of New Jersey may seek. If the legislature intended to exclude "public injunctive relief" from private attorney's general it would have done so.

As previously stated, public injunctive relief has been defined as: "…relief that 'by and large' benefits the general public…and that benefits the plaintiff, 'if at all,' only 'incidental[ly]' and/or as 'a member of the general public'" see

McGill v Citibank, N.A., 393 P. 3d at 89 cited by *DiCarlo*, 988 F.3d at 1152; see also *Beture*, 2018 U.S. LEXIS 121801, *28-29 (Ja59) Both *McGill* and *DiCarlo* courts gave corresponding examples of public injunctive relief:

- "'[E]ven if a CLRA plaintiff stands to benefit from an injunction against a deceptive business practice, it appears likely that the benefit would be incidental to the general public benefit of enjoining such a practice.'...Likewise, the court explained in *Cruz*, an injunction under the UCL or the false advertising law against deceptive advertising practices 'is clearly for the benefit of … the general public'; 'it is designed to prevent further harm to the public at large rather than to redress or prevent injury to a plaintiff."…To summarize, public injunctive relief under the UCL, the CLRA, and the false advertising law is relief that has 'the primary purpose and effect of' prohibiting unlawful acts that threaten future injury to the general public. Relief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff—or to a group of individuals similarly situated to the plaintiff—does not constitute public injunctive relief." See *McGill*, 393 P.3d at 89; and,

- "Consider the relief sought here. Among other things, DiCarlo seeks to enjoin MoneyLion from '[f]alsely advertising to the general public within the State of California that the [credit-builder] Loan contains 'no hidden fees.'"…But what good will that do her in the future? She already knows that these claims are (allegedly) untrue. That's why she sued. DiCarlo seeks the injunction to aid those who do not already know what she has learned…That is public injunctive relief." See *DiCarlo*, 988 F.3d at 1152

Here, Equinox specifically excluded "public injunctive relief" from its definition of a "Dispute" (Section 7.4)(Ja37) in the New Jersey health club contract provided to Plaintiff and the putative class. Thus, "public injunctive relief" is not a claim covered by Defendant's arbitration provision and, pursuant to Defendant's arbitration provision, would be litigated before this Court. See

Sections 7.2, 7.4 and 7.5 (Ja36-Ja37); supra Plaintiff specifically pleaded the following relief sought in its Class Action Complaint alleging violations of the CFA, HCSA, TCCWNA and RISA: "For injunctive relief, enjoining Defendants from engaging in future violations of the HCSA, CFA, TCCWNA, and RISA". (Ja27)

Although the specific California claims in *McGill* and *DiCarlo* provide for "public injunctive relief" whereas the CFA, HCSA, RISA, and TCCWNA do not specifically use that term, the "injunctive relief" sought by Plaintiff in the case *sub judice* (and the relief provided by the CFA, NJSA 56:8-19 and TCCWNA, NJSA 56:12-17 supra) mimics the definition of "public injunctive relief", and corresponding examples, from *McGill* and *DiCarlo*. See *Weinberg,* 173 N.J. at 253 Plaintiff and the putative class have already been provided with Equinox's form New Jersey health club contract that (Plaintiff alleges in her Class Action Complaint) violates New Jersey law. (Ja13-Ja43) Accordingly, and similar to that stated by the *DiCarlo* court, what would enjoining Equinox from using its form New Jersey health club contract do for Plaintiff (or the putative class) as she already knows that Equinox violated the CFA, HCSA, RISA, and TCCWNA? Alternatively, enjoining Equinox from using the form New Jersey health club contract (provided to Plaintiff and the putative class) would be

"public injunctive relief" because it directly affects the general public of future New Jersey consumers who will sign Equinox's form health club contract.

The cases it is anticipated Equinox will rely on concerning this issue are inapposite. For example, in *Cunningham v Lyft, Inc.*, 2020 U.S. Dist. LEXIS 48037, *5-7 (D. Mass. March 20, 2020)(Ja71-Ja73), the plaintiff alleged violations of Massachusetts wage law as opposed to the type of consumer protection statute at issue in the case, *sub judice*. In addition, and given that the subject claims in *Cunningham* (Ja71-Ja73) only involved the wages of workers at a ride-share company (as opposed to form health club contracts available, and advertised to, the New Jersey general public in Plaintiff's case), the relief in *Cunningham* (Ja71-Ja73) was only private injunctive relief. As for *Bodie v Cricket Wireless, LLC*, 350 So. 3d 480, 481 (Ct. of Appeal, Fla., Second Dist. November 16, 2022), also relied on by Equinox, the subject arbitration provision as opposed the one in Equinox's arbitration provision did not even use the term "public injunctive relief". In other words, Equinox included the phrase "public injunctive relief" in its New Jersey form health club contract because it is relief permitted by the New Jersey statutes Equinox seeks to transfer to arbitration from this Court. (Ja37)

It is anticipated that Equinox will further rely on several cases, which are inapposite to Plaintiff's claims in the case *sub judice*, or actually support

Plaintiff's claims. See *Hodges v. Comcast Cable Communs., LLC*, 12 F.4th 1108 (9th Cir. 2021) *Netzel v. Am. Express Co.*, 2023 U.S. Dist. LEXIS 135427 (D. Ariz. August 3, 2023)(Ja82-Ja87); *Torrecillas v Fitness Internat., LLC*, 52 Cal. App. 485 (2nd District Court of Appeal 2020); *Capriole v Uber Techs. Inc.*, 7 F. 4th 854 (9th Cir. 2021); *Blueprint Cap. Advisors, LLC,* 2023 U.S. App. LEXIS 34032, *4, 7 (Ja64,Ja66); *Rent-A-Center, W., Inc.* 561 U.S. at 66

In *Hodges*, 12 F.4th at 1115, the 9th Circuit wrote: "It follows that public injunctive relief within the meaning of *McGill* is limited to forward-looking injunctions that seek to prevent future violations of law for the benefit of the general public as a whole, as opposed to a particular class of persons, and that do so without the need to consider the individual claims of any non-party. The paradigmatic example would be the sort of injunctive relief sought in *McGill* itself, where the plaintiff sought an injunction against the use of false advertising to promote a credit protection plan…Such an injunction attempts to stop future violations of law that are aimed at the general public, and imposing or administering such an injunction does not require effectively fashioning individualized relief for non-parties." (internal citations omitted) This is exactly the type of injunctive relief Plaintiff seeks here—to wit, for Equinox to cease (in the future) providing New Jersey consumers with a form health club contract that fails to provide the "total payment obligation" in violation of HCSA, 56:8-

42(b), obligates future New Jersey consumers to automatically and perpetually renew their contracts, imposing unreasonable and unduly onerous requirements to cancel their health club memberships, and fails to provide the required items pursuant to RISA, 17:16C-27 or RISA, 17:16C-50. (Ja14-Ja15)

Netzel, 2023 U.S. Dist. LEXIS 135427, *10 (Ja84-Ja85) (wherein the court determined the alleged damages were private injunctive relief) is unrelated to Plaintiff's case as it merely involves employees at a private company[6] alleging "specific injuries and injuries to a 'group of individuals similarly situated" involving civil rights violations at the private company. This is vastly different from Defendant's form health club contract offered and/or advertised to the New Jersey public at large in Plaintiff's consumer case.

Accordingly, Plaintiff's injunctive relief sought in the Complaint alleging Equinox's CFA, HCSA, TCCWNA and RISA violations is specifically excluded from the arbitration provision in Equinox's form, New Jersey, health club "Membership Agreement"

[6] This is also why *Capriole*, 7 F.4th at 871-72 and *Torrecillas*, 52 Cal. App. 485 are not germane to Plaintiff's case. *Capriole* involved rideshare drivers at a private company and their wage law claims. Similarly, *Torrecillas* is also not germane as it involves employment contracts for, at best, that plaintiff's and potentially some of the other employees at the private fitness company.

CONCLUSION

For these reasons, the trial court's July 24, 2024 Order (Ja5-Ja12) should be reversed, and Plaintiff's case should be reinstated to the New Jersey trial court for the parties to commence discovery.

Dated: October 18, 2024

Respectfully submitted,

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FILED, Clerk of the Appellate Division, November 13, 2024, **A-000079-24**, **AMENDED**

Superior Court of New Jersey

APPELLATE DIVISION

DOCKET NO. A-000079-24

KIM KONDAK, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

—against—

EQUINOX HOLDINGS, INC.,

Defendant-Respondent,

—and—

JOHN DOES 1-25,

Defendants.

CIVIL ACTION

ON APPEAL FROM
THE SUPERIOR COURT
OF NEW JERSEY,
LAW DIVISION,
UNION COUNTY
DOCKET NO. UNN-L-000971-24

SAT BELOW:
HON. JOHN G. HUDAK, J.S.C.

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PRELIMINARY STATEMENT

There is no dispute that plaintiff voluntarily signed a valid and enforceable arbitration agreement by which she agreed that "any and all disputes" regarding "any aspect" of her health club membership with Equinox, including any disputes regarding the "validity, enforceability, or scope" of her membership agreement, would be resolved exclusively on a single-claimant basis in binding arbitration. Her claims in this lawsuit—which involve statutory claims challenging certain terms and conditions of her membership agreement—fall plainly within the scope of the parties' arbitration agreement.

Nevertheless, plaintiff—seeking to sidestep her obligations so she can proceed with a class action in court—asserts that her claims are not subject to arbitration under the parties' arbitration agreement because she is requesting "public injunctive relief." Her claim seeking "injunctive relief" in connection with her private health club membership, however, does not constitute a claim for "public injunctive relief" under the plain definition contained in the parties' arbitration agreement and well-established case law. Rather, it constitutes a claim for "private injunctive relief," as it is ***primarily*** intended to benefit only herself and a discrete class of current and former members of two Equinox health clubs in New Jersey (versus a "public injunctive relief" claim, which is ***primarily*** intended to benefit the general public at

large). Indeed, plaintiff is not even authorized to seek "public injunctive relief" under any of the statutes on which she bases her claims.

Finally, even if there could be a dispute as to whether plaintiff's injunction claim qualifies as a claim for "public injunctive relief," that would constitute an issue of arbitrability that must be decided by an arbitrator under the express terms of the parties' arbitration agreement.

For these reasons (and those below), the lower court's order compelling plaintiff to arbitrate her claims on an individual basis and staying plaintiff's lawsuit pending the completion of arbitration should be affirmed in its entirety.

PROCEDURAL HISTORY

On March 14, 2024, plaintiff filed a putative class action lawsuit against Equinox in Superior Court, Union County, alleging that certain terms and conditions of her Equinox health club membership agreement do not comply with New Jersey's Health Club Services Act ("HCSA"), Consumer Fraud Act ("CFA"), Retail Installment Sales Act ("RISA"), and Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA").[1] Ja13-29.

On May 14, 2024, Equinox filed a motion for an order (i) compelling plaintiff to arbitrate all the claims set forth in her complaint on an individual basis in accordance with the terms of the parties' arbitration agreement and (ii) staying plaintiff's lawsuit pending the completion of arbitration.

On July 19, 2024, the parties appeared for oral argument on Equinox's motion before the Honorable John G. Hudak. Ja45.

On July 26, 2024, the parties submitted supplemental letter briefs to Judge Hudak on two issues that were discussed during the oral argument.

On July 29, 2024, Judge Hudak issued an order granting Equinox's motion in its entirety, with an accompanying statement of reasons. Ja5-12.

This appeal ensued. Ja1-4.

[1] Plaintiff's membership agreement, which contains the parties' arbitration agreement, was attached as "Exhibit A" to plaintiff's complaint. Ja30-43.

STATEMENT OF FACTS

A. The Parties

Equinox owns and operates two private health clubs in New Jersey—a club in Summit, New Jersey (the "Equinox Summit Club") and a club in Paramus, New Jersey (the "Equinox Paramus Club"). Ja30-43.

Plaintiff became a member of the Equinox Summit Club in September 2023. Ja30.

B. The Parties' Arbitration Agreement

When plaintiff joined the Equinox Summit Club as a member, she agreed to arbitrate any disputes regarding her Equinox membership, including any disputes relating to the terms and conditions of her membership agreement, on a single-claimant basis. Ja36-37. In particular, plaintiff agreed as follows:

> 7.2 **Arbitration**: You agree to submit any and all Disputes (as defined in Section 7.4) to binding arbitration pursuant to the Federal Arbitration Act (Title 9 of the United States Code), which will govern the interpretation and enforcement of this arbitration agreement ("**Arbitration Agreement**"). Arbitration will be before either (1) JAMS (formerly known as Judicial Arbitration and Mediation Services), jamsadr.com, or (2) the American Arbitration Association ("**AAA**"), adr.org. If you initiate arbitration, you may choose between these two arbitration forums; if Equinox initiates arbitration, it will have the choice as between these two arbitration forums.

> **YOU AND EQUINOX AGREE THAT, EXCEPT AS PROVIDED IN SECTION 7.4, ANY AND ALL DISPUTES WHICH ARISE AFTER YOU ENTER INTO THIS AGREEMENT WILL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION RATHER THAN IN COURT BY A JUDGE OR JURY, IN ACCORDANCE WITH THIS ARBITRATION AGREEMENT.**
>
> 7.3 **Class Action Waiver**: You agree that the arbitration of any Dispute will be conducted on an individual, not a class-wide, basis, and that no arbitration proceeding may be consolidated with any other arbitration or other legal proceeding involving Equinox or any other person. You further agree that you, and anyone asserting a claim through you, will not be a class representative, class member, or otherwise participate in a class, representative, or consolidated proceeding against Equinox, and that the arbitrator of any Dispute between you and Equinox may not consolidate more than one person's claims, and may not otherwise preside over any form of a class or representative proceeding or claim (such as a class action, representative action, consolidated action or private attorney general action). If the foregoing class action waiver ("Class Action Waiver") or any portion thereof is found to be invalid, illegal, unenforceable, unconscionable, void or voidable, then the Arbitration Agreement will be unenforceable and the Dispute will be decided by a court of competent jurisdiction. Any claim that all or part of the Class Action Waiver is invalid, illegal, unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator.

Ja36-37.

Moreover, the parties' arbitration agreement broadly defines "Disputes" as follows (the "Dispute Clause"):

> 7.4 **Definition of** "**Dispute**": Subject to the following exclusions, "**Dispute**" means any dispute, claim, or controversy between you and Equinox regarding any aspect of your relationship with Equinox, whether based in contract, **statute**, regulation, ordinance, tort (including without limitation fraud, misrepresentation, fraudulent inducement, negligence, gross negligence or reckless behavior), or any other legal, statutory or equitable theory, and includes without limitation the **validity, enforceability or scope of the [membership agreement]** (except for the scope, enforceability and

> interpretation of the Arbitration Agreement and Class Action Waiver). However, "Dispute" will not include (1) personal injury claims or claims for lost, stolen, or damaged property; (2) claims that all or part of the Class Action Waiver is invalid, unenforceable, unconscionable, void or voidable; and (3) any claim for public injunctive relief, i.e., injunctive relief that has the primary purpose and effect of prohibiting alleged unlawful acts that threaten future injury to the general public. Such claims may be determined only by a court of competent jurisdiction and not by an arbitrator.

Ja37 (*emphasis added*).

Finally, the delegation clause in the arbitration agreement specifically incorporates the parties' agreement to arbitrate in accordance with the rules of the American Arbitration Association ("AAA") or JAMS (the "Delegation Clause"):

> 7.5 **Arbitration Procedures and Location**: Either you or Equinox may initiate arbitration proceedings. Arbitration will be conducted before a single arbitrator. If you or Equinox initiate arbitration, you and we have a choice of doing so before JAMS or the AAA:
>
> (1) For arbitration before JAMS, the JAMS Comprehensive Arbitration Rules & Procedures and the JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases will apply. The JAMS rules are available at jamsadr.com or by calling 1-800-352-5267.
>
> (2) Which particular rules apply in AAA arbitration will depend on how much money is at issue. For less than $75,000, the AAA's Supplementary Procedures for Consumer-Related Disputes/ Consumer Arbitration Rules will apply; for Disputes involving $75,000 or more, the AAA's Commercial Arbitration Rules will apply. The AAA rules are available at adr.org or by calling 1-800-778-7879.
>
> If required for the enforceability of the Arbitration Agreement under the Federal Arbitration Act, Equinox will pay all arbitrator's costs and expenses. If not, those costs will be paid as specified in the above-referenced rules. You and Equinox both agree to bring the arbitration in either the county in which your Home Club is located or in New York City, New York. As set forth in Section 8.5 below, the arbitrator will apply New Jersey law.

Ja37.

C. Plaintiff's Claims in the Lawsuit

Plaintiff's lawsuit claims relate solely to certain terms and conditions of her Equinox membership agreement. By way of example, plaintiff alleges that her membership agreement:

- does not comply with the HCSA because it fails to accurately set forth her "total payment obligation;"
- does not comply with the CFA because its cancellation provisions are deceptive; and,
- does not comply with the RISA because it does not contain a specific statutory notice.

Ja13-29.

As one of her ten claims for relief in her complaint, plaintiff seeks "injunctive relief" on behalf of herself and a discrete class of current and former members at the Equinox Summit Club and the Equinox Paramus Club who also signed the same membership agreement between 2018 and the present. Ja16-17, 27.

ARGUMENT

I.

THE LAW STRONGLY FAVORS ARBITRATION

Arbitration is strongly favored on the federal and state level. Indeed, Section 2 of the Federal Arbitration Act ("FAA") states that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract." *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 84, 800 A.2d 872, 876 (2002), *quoting* 9 U.S.C. § 2. For decades, the courts have interpreted Section 2 of the FAA as representing "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119, 132, 236 A.3d 990, 997-98 (2020), *quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941 (1983).

New Jersey jurisprudence has also long recognized arbitration "as a favored method for resolving disputes." *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 168 N.J. 124, 131, 773 A.2d 665, 670 (2001), *citing Barcon Associates, Inc. v. Tri-County Asphalt Corp.*, 86 N.J. 179, 186, 430 A.2d 214, 217 (1981) (noting the long-standing practice of arbitration in New Jersey and the authority in favor of that practice); *Hojnowski v. Vans Skate Park*, 187 N.J. 323, 342, 901 A.2d 381, 392 (2006) (*internal quotations omitted*) (the state legislature

"codified its endorsement of arbitration agreements in the Arbitration Act…which, like its federal counterpart, provides that agreements to arbitrate shall be valid save for such grounds as exist at law or in equity for the revocation of a contract"); *Perez v. Sky Zone LLC*, 472 N.J. Super. 240, 247, 276 A.3d 190, 194 (App. Div. 2022) ("[t]he FAA and the nearly identical New Jersey Arbitration Act…enunciate federal and state policies favoring arbitration") (*citation omitted*).

As this Court has repeatedly acknowledged, both the FAA and New Jersey's strong public policy favoring arbitration extend to consumer disputes, including disputes arising under state consumer protection statutes. *See e.g. Szinmonowitz v. Travelscape*, *LLC*, 2024 N.J. Super. Unpub. LEXIS 1045 (App. Div. June 5, 2024) (affirming order compelling arbitration of plaintiff's claims arising under the CFA stemming from the purchase of airline tickets); *Trainor v. Chrysler Capital*, 2021 N.J. Super. Unpub. LEXIS 2202 (App. Div. September 20, 2021) (affirming order compelling arbitration of plaintiff's claims arising under the CFA and the TCCWNA stemming from the purchase of an automobile); *Maisano v. LVNV Funding, LLC*, 2019 N.J. Super. Unpub. LEXIS 2421 (App. Div. November 27, 2019) (affirming order compelling plaintiff to arbitrate his claims under the CFA and the Consumer Financing Licensing Act on a single-claimant basis).

II.

JUDGE HUDAK PROPERLY GRANTED EQUINOX'S MOTION TO COMPEL ARBITRATION

A. Plaintiff's Claims are Arbitrable Under the Parties' Agreement

In evaluating a motion to compel arbitration, the sole determinations for the court are "(1) whether a valid agreement to arbitrate exists and (2) whether the particular dispute falls within the scope of that agreement."[2] *446 Bellevue LLC v. Global Life Enters., LLC*, 2018 N.J. Super. Unpub. LEXIS 1690, * 7 (App. Div. July 16, 2018), *quoting Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529, 532 (3d Cir. 2005); *see also Perez v. Sky Zone LLC*, 276 A.3d at 194, 472 N.J. Super. at 247 ("[t]he validity of an arbitration agreement is a question of law") (*citations omitted*).

Here, plaintiff concedes—as she did before Judge Hudak—that the parties' arbitration agreement is valid and enforceable. *See Pltf's Brief, p. 11*; Ja11 ("[p]laintiff does not dispute that there is a valid and enforceable agreement to arbitrate").[3] Moreover, her claims under the HCSA, the CFA, the RISA, and the

---

[2] Where, as here, the arbitration agreement refers issues of arbitrability to the arbitrator, the arbitrator assumes the determination of whether a particular dispute falls within the scope of the agreement. *See Argument, Section III below*.

[3] Judge Hudak correctly concluded that the arbitration agreement clearly and conspicuously advised plaintiff that she was waiving her right to assert claims against Equinox in a judicial forum, pointing out in particular the capitalized and bold language set forth in Section 7.2 of the agreement. Ja36; s*ee also Perez v. Sky Zone LLC*, 276 A.3d at 195, 472 N.J. Super. at 248-49 (enforcing arbitration agreement which stated that plaintiff was "agreeing to arbitrate any dispute arising out of his use of the trampoline park and was waiving [his] right…to maintain lawsuit").

TCCWNA indisputably concern the "***validity, enforceability or scope of the [membership agreement]***" and, thus, plainly fall within the Dispute Clause of the arbitration agreement (a fact also not contested by plaintiff). Ja37 (*emphasis added*); *see also Victory Entm't, Inc. v. Schibell*, 2018 N.J. Super. Unpub. LEXIS 1467, * 23 (App. Div. June 21, 2018) (affirming order compelling arbitration, finding that "[t]he underlying dispute falls squarely within the scope of the arbitration provision").

Nevertheless, plaintiff asserts that she should be permitted to proceed with a class action in court because she is seeking "public injunctive relief" under the terms of the parties' arbitration agreement. As set forth below, her injunction claim does not constitute a claim for "public injunctive relief" as a matter of law.

B. <u>Plaintiff is Not Asserting a Claim for "Public Injunctive Relief"</u>

Plaintiff's injunction claim does not constitute a claim for "public injunctive relief" under the parties' arbitration agreement and applicable case law. This is because her basic claim for "injunctive relief" is not intended to ***<u>primarily</u>*** benefit the general public at large (to the contrary, it is primarily intended to benefit only herself and a discrete class of former and current private health club members of Equinox). In fact, she has no express authority to even assert such a claim under the HCSA, the CFA, the RISA, or the TCCWNA.

i. The Primary Purpose of Plaintiff's Injunction Claim Is To Benefit Herself and Other Current and Former Equinox Members

As set forth in the arbitration agreement, "public injunctive relief" is relief "that has the ***primary*** purpose and effect of prohibiting alleged unlawful acts that threaten future injury to the ***general public***." Ja37 (*emphasis added*); *see also Flanzman v. Jenny Craig, Inc.*, 244 N.J. at 132, 236 A.3d at 998 ("[i]n accordance with the FAA, courts must place arbitration agreements on an equal footing with other contracts…and enforce them according to their terms") (*citations omitted*).

This is entirely consistent with the definition of "public injunctive relief" under case law in New Jersey and elsewhere. As the New Jersey federal district court has held, "public injunctive relief" is "relief that ***by and large*** benefits the ***general public*** and that benefits the plaintiff, if at all, only incidentally." *Beture v. Samsung Elecs. Am., Inc.*, 2018 U.S. Dist. LEXIS 121801, * 28 (D.N.J. July 18, 2018), *quoting McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 955 (Cal. 2017).[4]

This is contrasted by the courts with "***private injunctive relief***," which is "relief that primarily resolves a [dispute between private parties] and rectifies individual wrongs, and that benefits the public, if at all, only incidentally." *Beture v. Samsung Elecs. Am., Inc.*, 2018 U.S. Dist. LEXIS 121801, at * 28, *quoting McGill*

[4] This consistency is not a coincidence. The issue of "public injunctive relief" in the context of arbitration originally arose in the California state and federal courts, *see McGill, supra*. Equinox, which operates numerous health clubs in California, specifically incorporated provisions relating to "public injunctive relief" into its arbitration agreement in response to these legal developments (as presumably many other businesses operating in California did).

v. Citibank, N.A., 2 Cal. 5th at 955. In this respect, "private injunctive relief" offers relief to ***a particular class of persons***, such as current or former health club members, as opposed to the general public at large. *See e.g. Hodges v. Comcast Cable Communs., LLC*, 12 F.4th 1108, 1115 (9th Cir. 2021) ("when the injunctive relief being sought is for the benefit of a discrete class of persons, or would require consideration of the private rights and obligations of individual non-parties, it has been held to be private injunctive relief").

As such, in *Beture*, the New Jersey federal district court held that the purchasers of "defective" Samsung smartphones were seeking "private injunctive relief" rather than "public injunctive relief" because they were "principally focused on rectifying individual wrongs" on behalf of plaintiffs themselves and a discrete class of similarly situated persons (i.e., the relief would primarily benefit the discrete class members who purchased defective phones and suffered actual harm by requiring Samsung to "correct, replace or otherwise rectify" the phones, and, at best, would incidentally benefit potential future purchasers of Samsung smartphones who had not suffered any harm). *See Beture v. Samsung Elecs. Am., Inc.*, 2018 U.S. Dist. LEXIS 121801, at * 28. Other courts outside New Jersey have likewise drawn the same distinctions:

- *Grigorian v. Citibank, N.A.*, 2024 U.S. Dist. LEXIS 71375, * 10 (C.D. Cal. April 17, 2024) (putative class action filed on behalf of credit card applicants and customers of Armenian descent did not seek "public injunctive relief" because the relief stood to primarily benefit

"presumed Armenian applicants and credit card holders" and would only "incidentally benefit the public" in the form of potentially curbing discrimination against future potential Armenian applicants and customers who have not been harmed);

- *Netzel v. Am. Express Co.*, 2023 U.S. Dist. LEXIS 135427, * 10 (D. Ariz. August 3, 2023) (former employees of American Express who asserted employment discrimination claims were not seeking "public injunctive relief" in order to "prohibit[] unlawful acts that threaten the general public with future injury" but were rather seeking "to redress their specific injuries and injuries to a group of individuals similarly situated to [them]");

- *Hodges v. Comcast Cable Communs., LLC*, 12 F.4th at 1121 (putative class action filed on behalf of consumer cable customers did not seek "public injunctive relief" because the relief sought was primarily intended to benefit Comcast "cable subscribers," as "[t]here [was] simply no sense in which this relief could be said to *primarily* benefit the general public as a more diffuse whole") (*emphasis in original*);

- *Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 871-72 (9th Cir. 2021) ("the district court correctly concluded that plaintiffs' requested relief is not one for 'public injunctive relief'…the relief sought by plaintiffs—to 'enjoin Uber from misclassifying its drivers as independent contractors, thus entitling them to the protections of Massachusetts wage laws, including paid sick leave'—is overwhelmingly directed at plaintiffs and other rideshare drivers…[t]he public health implications of paid sick leave, which would not even begin to accrue for months, only benefit the general public incidentally");

- *Torrecillas v. Fitness Internat., LLC*, 52 Cal.App.5th 485, 499 (Cal. 2020) (prayer for injunctive relief was "private in nature" because the "beneficiary of an injunction would be [plaintiff] and possibly [defendant's] current employees, not the public at large"); and,

- *Kilgore v. KeyBank, N.A.*, 718 F.3d 1052, 1061 (9th Cir. 2013) (students who sought to enjoin a bank and loan servicer from reporting loan defaults to credit agencies and from enforcing notes against former students were seeking "private" rather "public" injunctive relief,

> reasoning that the "requested prohibitions against reporting defaults on the Note and seeking enforcement of the Note plainly would benefit only the approximately 120 putative class members").

Here, plaintiff is not seeking injunctive relief that has the ***primary*** purpose and effect of protecting the general public at large. Indeed, her own complaint only seeks "injunctive relief" on behalf of herself and a discrete class of current and former private health club members who signed Equinox's New Jersey membership agreement between 2018 and the present in connection with their memberships at the Equinox Summit Club or the Equinox Paramus Club, i.e., the persons who were allegedly harmed by any purported violation of the subject statutes. Ja16-17. To be sure, she does even make even a single allegation in her complaint involving the general public. Ja13-29.

Further, the assertion that a change to Equinox's membership agreement may ***incidentally*** benefit some future potential membership applicant—who has no standing to even be a member of the putative class—is not sufficient to transform her private injunctive relief claim into a claim for "public injunctive relief."[5] *See Hodges v. Comcast Cable Communs., LLC*, 12 F.4th at 1121; *Grigorian v. Citibank, N.A.*, 2024 U.S. Dist. LEXIS 71375, at * 10; *see also* Ja10 ("[p]laintiff is seeking to remedy alleged violations of consumer law that she is claiming on behalf of herself

[5] Moreover, potential health club members of two private health clubs located in one part of the state hardly constitute the "general public" in any event.

and others similarly situated as part of a class action…[t]he relief she is seeking relates to her own membership in a fitness club…[p]laintiff is seeking money damages in addition to the injunctive relief…[i]t cannot be said that any relief she is seeking would only incidentally benefit herself…[t]he relief plaintiff is seeking is for herself and members of the Equinox Fitness Club").

ii. The Statutes Under Which Plaintiff Asserts Claims Do Not Authorize Claims of "Public Injunctive Relief"

Indeed, the statutes under which plaintiff is asserting her claims do not even expressly authorize her to assert a claim for "public injunctive relief"—a fact that courts across the country have repeatedly cited in rejecting assertions by plaintiffs that they were seeking "public injunctive relief." *See e.g. Cunningham v. Lyft, Inc.*, 2020 U.S. Dist. LEXIS 48037, * 5 (D. Mass. March 20, 2020) ("[u]nlike the consumer protection statutes at issue in *McGill*, the Massachusetts Wage Act includes no provisions for public injunctive relief"); *Bodie v. Cricket Wireless, LLC*, 350 So.3d 480, 481 (Fla. 2d DCA 2022) (rejecting assertion that arbitration agreement's prohibition on representative actions on behalf of the public violated public policy, stating in pertinent part that "[plaintiff] identifies no provision of FDUTPA giving him the right to seek public injunctive relief") (*quotations omitted*).

Here, the HCSA, the CFA, the RISA, and the TCCWNA likewise contain no provisions authorizing plaintiff to assert a "public injunctive relief" claim on behalf of the general public. Ja11 ("[t]he statutes under which plaintiff is seeking relief…do

not authorize plaintiff to act as a private attorney general and assert a 'public injunctive relief' claim on behalf of the general public"). This is contrasted with other New Jersey statutes where the legislature expressly authorized certain individuals to seek injunctive relief "in the name and on behalf of the state." *See e.g.* N.J.S.A. 49:5-12(a) (authorizing the Chief of the Bureau of Securities to bring injunction action "in the name and on behalf of the State"); N.J.S.A. 17:10B-5(b) (authorizing the Commissioner of Banking to bring injunction action "in the name and on behalf of the State").[6]

Plaintiff's reliance on the New Jersey Supreme Court's decision in *Weinberg* is misplaced. For one thing, the *Weinberg* court did not expressly or implicitly state that a private litigant can assert a claim of "public injunctive relief" under the CFA (or any other consumer statute). *See Weinberg v. Sprint Corp*., 173 N.J. 233, 801 A.2d 281 (2002). To the contrary, the court simply stated that the CFA "allows for a ***private*** cause of action to proceed for all ***available*** remedies, including an ***injunction***…" (i.e., not "public injunctive relief"). *Id.*, 173 N.J. at 253, 801 A.2d at 293 (*emphasis added*). Indeed, the court made clear that the CFA does ***not*** provide a private litigant with the same powers as the Attorney General (as the Attorney

[6] Plaintiff's assertion that she is authorized to assert a "public injunctive relief" claim under the CFA because the CFA does not expressly preclude her from doing so is meritless and unsupported by any law.

General is not required to demonstrate "ascertainable loss" to maintain a claim).[7] *Id.*

Plaintiff's reliance on the 9th Circuit's decision in *DiCarlo* is also misplaced. As an initial and dispositive matter, the statutes at issue in *DiCarlo*—e.g., California's Unfair Competition Law, False Advertising Law, and Consumers Legal Remedies Act—all ***expressly authorize*** claims of "public injunctive relief" to be asserted by private litigants, whereas the HCSA, the CFA, the RISA, and the TCCWNA do not. *See e.g. DiCarlo v. MoneyLion, Inc.*, 988 F.3d 1148, 1153 (9th Cir. 2021) ("[t]he UCL, FAL, and CLRA all authorize public injunctive relief"). Thus, the primary purpose of the plaintiff's "public injunctive relief" claim in *DiCarlo* was to enjoin the defendant from "***falsely advertising*** to the ***general public*** within the State of California" under statutes that ***expressly*** authorized her to seek such "public injunctive relief."[8] *Id.*, 988 F.3d at 1152 (*emphasis added*).

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[7] Even if a private litigant and the Attorney General had the same powers under the CFA, plaintiff mistakenly assumes that any injunction claim asserted by the Attorney General under the CFA qualifies as a claim for "public injunctive relief," which it does not. The Attorney General too can obtain injunctive relief primarily intended to benefit just a discrete class of individuals who have been harmed.

[8] Not only did these cases involve statutes expressly authorizing claims for "public injunctive relief," but they also involved false advertising claims, which, by their very nature, typically involve advertising disseminated to the general public at large. *See c.f. DiCarlo, supra*; *McGill v. Citibank, N.A.*, 2 Cal. 5th at 956-57 ("[b]y definition, the public injunctive relief available under the UCL, the CLRA, and the false advertising law…is primarily for the benefit of the general public"); *Stevenson v. Sirius XM Radio Inc.*, 2023 U.S. Dist. LEXIS 201781, * 16-18 (N.D. Cal. November 9, 2023) (claims under the UCL, the FAL, and the CLRA that sought to "protect the general public by putting an end to SiriusXM's unlawful advertising scheme" constituted claims for "public injunctive relief"). A private membership agreement is, of course, not akin to a claim of false advertising to the general public and, again, there are no statutes authorizing any such "public injunctive relief" on plaintiff's claims.

For these reasons too, plaintiff is not seeking "public injunctive relief." *See Cunningham v. Lyft, Inc.*, 2020 U.S. Dist. LEXIS 48037; *Bodie v. Cricket Wireless, LLC*, 350 So.3d 480.[9]

III.

ANY ISSUES OF ARBITRABILITY ARE RESERVED FOR THE ARBITRATOR

To the extent there could be any dispute about whether plaintiff's claim constitutes "public injunctive relief," the parties' arbitration agreement requires that an arbitrator decide that dispute.

As the courts have repeatedly held, the parties' incorporation of the AAA and JAMS rules in their arbitration agreement constitutes clear and unmistakable evidence of their intent to delegate issues of arbitrability to the arbitrator. *See e.g. Blueprint Cap. Advisors, LLC v. N.J. Div. of Inv.*, 2023 U.S. App. LEXIS 34032, * 7 (3d Cir. December 22, 2023) ("the Transaction Agreement clearly and unmistakably specifies that the AAA's [rules] apply, making Rule 7(a) readily accessible…[w]e therefore hold that the arbitration clause clearly and unmistakably delegates the

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[9] "Injunctive relief" constitutes just one of the ten claims for relief pleaded in plaintiff's complaint. Ja27-28. As such, even if plaintiff were found to be asserting a claim for "public injunctive relief" (which she is not), her other claims remain arbitrable, and this action would need to be stayed as to her purported claim for "public injunctive relief" pending the parties' arbitration of her remaining claims. *See e.g. Gov't Emps. Ins. Co. v. Mian*, 2024 U.S. Dist. LEXIS 83670, * 12 (D.N.J. May 8, 2024) ("[w]here, as here, the arbitrable claims predominate the non-arbitrable claims, courts tend to grant a stay of the non-arbitrable claims") (*citation omitted*).

threshold arbitrability question, and an arbitrator must determine whether BCA's claims against Walsh are arbitrable"); *Goffe v. Foulke Management Corp.*, 238 N.J. 191, 211, 208 A.3d 859, 872 (2019) ("[o]ur court has acknowledged the legitimacy and applicability of…delegation provisions in New Jersey arbitration agreements") (*citation omitted*); *Schmidt v. Laub*, 2020 N.J. Super. Unpub. LEXIS 827, * 11 (App. Div. May 5, 2020) ("[w]e conclude that the incorporation of the AAA rules into the arbitration provision clearly and unambiguously expressed the parties' intent to empower the arbitrator to determine arbitrability").

Here, the Delegation Clause in the parties' arbitration agreement specifically provides that the AAA or the JAMS rules "will apply" to the arbitration of any "Disputes," as that term is defined in the arbitration agreement's Dispute Clause.[10] This means that only an arbitrator can decide disputes over whether plaintiff's injunction claim qualifies as a claim for "public injunctive relief" under the Dispute Clause. *See Blueprint Cap. Advisors, LLC v. N.J. Div. of Inv.*, 2023 U.S. App. LEXIS

[10] The AAA Commercial Arbitration Rules supplement the AAA Consumer Arbitration Rules, which are also referenced in the parties' arbitration agreement. Rule 7(a) of the AAA commercial rules states that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement ***or to the arbitrability of any claim or counterclaim***." Similarly, Rule 11(b) of the JAMS rules states that "[j]urisdictional ***and arbitrability disputes***, including disputes over the formation, existence, validity, interpretation or ***scope*** of the agreement under which Arbitration is sought…shall be submitted to and ruled on by the Arbitrator…[t]he Arbitrator has the authority to determine jurisdiction ***and arbitrability issues*** as a preliminary matter."

34032, at * 7; *Goffe v. Foulke Management Corp.*, 238 N.J. at 211, 208 A.3d at 872; *Schmidt v. Laub*, 2020 N.J. Super. Unpub. LEXIS 827, at * 11.[11]

As such, Judge Hudak correctly found that an arbitrator should decide any issues of arbitrability. Ja10.

Dated: November 13, 2024

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[11] As she did in the court below, plaintiff conflates the separate and distinct purposes of the Dispute Clause and the Delegation Clause in arguing that the court should decide issues of arbitrability. A delegation clause is a specific clause in an arbitration agreement by which parties agree to delegate gateway issues, such as arbitrability issues, to an arbitrator (here, it is the Delegation Clause that states in pertinent part that the AAA or the JAMS rules "will apply"). Ja37. A dispute clause, on the other hand, defines which claims are arbitrable or not under the agreement (here, it is the Dispute Clause that expressly defines which "Disputes" are covered by the parties' arbitration agreement). Ja37. Because the Delegation Clause delegates gateway issues of arbitrability to an arbitrator, it is up to the arbitrator to decide potential disputes as to whether a claim, such as plaintiff's purported claim for "public injunctive relief," fall under the Dispute Clause.

Superior Court of New Jersey

APPELLATE DIVISION

KIM KONDAK, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

EQUINOX HOLDINGS, INC.,

Defendant-Respondent,

and

JOHN DOES 1-25,

Defendants.

DOCKET NO. A-000079-24

CIVIL ACTION:

On Appeal From the Superior Court of New Jersey, Law Division, Union County Docket No. UNN-L-000971-24

SAT BELOW:

Hon. John G. Hudak, J.S.C.

DATE SUBMITTED:

November 19, 2024

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

On May 14, 2024, Plaintiff/Appellant, Kim Kondak ("Plaintiff" or "Kondak") filed a Class Action Complaint alleging that Defendant/Respondent, Equinox Holdings, Inc.'s ("Defendant" or "Equinox") form New Jersey health club "Membership Agreement" (offered to any, and all, of the New Jersey public) violated New Jersey's Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq*. ("CFA"); Health Club Services Act ("HCSA"), N.J.S.A. 56:8-42 *et seq.;* Retail Installment Sales Act ("RISA"), N.J.S.A. 17:16C-1 *et seq*., and, the Truth-in-Consumer Contract Warranty and Notice Act ("TCCWNA), N.J.S.A. 56:12- 14 *et seq*. (Ja13-Ja43)

Critically, and in addition to class certification, a declaratory judgment, actual damages, statutory damages, treble damages, attorney fees and costs, and pre/post judgment interest, Plaintiff's Complaint seeks "…***injunctive relief***, enjoining Defendants from engaging in future violations of the HCSA, CFA, TCCWNA, and RISA;" (Ja27) (i.e. "public injunctive relief" enjoining Equinox from engaging in future violations of the HCSA, CFA, TCCWNA, and RISA. (Ja27-Ja28). Infra **Section I(A)** Given that Equinox already provided Plaintiff with its Membership Agreement that violated the HCSA, CFA, TCCWNA, and RISA, the injunctive relief sought by Plaintiff in the Complaint would not benefit her because she already received the Membership Agreement.

Conversely, the injunctive relief sought by Plaintiff (i.e. that Equinox cease using the Membership Agreement) would immediately prevent other New Jersey consumers from being exposed to the type of HCSA, CFA, TCCWNA, and RISA violations alleged by Plaintiff against Equinox in the Complaint. (Ja13-Ja43)

In its appellate brief ("Equinox Brief"), Equinox reads words into Plaintiff's Complaint, and makes conclusory assumptions about its own Membership Agreement (concerning the subject "**ARBITRATION AGREEMENT AND CLASS ACTION WAIVER"**)(Ja36), which do not exist as well as argues legal theories concerning "public injunctive relief" as applied to a health club contract such as Equinox's Membership Agreement that defy logic. Infra **Section I(A)** For example, throughout its appellate brief, Equinox strategically (or negligently) uses the phrases "discrete class of current and former members", "discrete class of persons", "discrete class of similarly situated persons" "discrete class members" and/or "discrete class of individuals" despite the undisputed fact that Plaintiff never pleads the words "discrete class" in her Class Action Complaint. See Equinox Brief, pp. 1,7,11,13,15,18 It then cleverly attempts to put the square peg in the round whole by attempting to apply these incorrect ("discrete class") statements to precedent such *Hodges v. Comcast Cable Communs., LLC*, 12 F.4th 1108, 1115 (9th Cir. 2021)(which does not involve health club contracts). Id.

Similarly, Equinox insinuates that the "public injunctive relief" language in its "Membership Agreement" (which Plaintiff argues applies to the injunctive relief she seeks for Equinox's CFA, HCSA, RISA and TCCWNA violations) is really only applicable to plaintiffs who brings claims against its California health clubs despite the fact that the Membership Agreement says nothing of the sort in its New Jersey (or any other State or territory) health club contracts. Id at p. 12 This is all in addition to Equinox's (and with all due respect the Trial Court's) misinterpretation as to the applicability of Plaintiff's "injunctive relief" damages in her Complaint applicable to future New Jersey consumers who could receive Equinox's Membership Agreement.

The trial court's July 29, 2024 decision (Ja5-Ja12) should be reversed because Equinox cannot establish that Plaintiff's injunctive relief damages for her CFA, HCSA, RISA, and TCCWNA claims(Ja27-Ja28) fall within the scope of the arbitration provision in Equinox's Membership Agreement. See *Saunders*, 2021 U.S. Dist. LEXIS 143237, *4 (Ja94) Moreover, and as to the issue of arbitrability, a New Jersey judge should decide whether the arbitration agreement applies as opposed to an arbitrator.

LEGAL ARGUMENT

I. THE TRIAL COURT'S JULY 29, 2024 DECISION COMPELLING ARBITRATION AND STAYING PLAINTIFF'S CASE SHOULD BE REVERSED (Ja5-Ja12)

A. The Trial Court's July 29, 2024 Decision Should Be Reversed Because The Injunctive Relief Set Forth in Plaintiff's Class Action Complaint Alleging Equinox's CFA, HCSA, RISA, and TCCWNA Violations Is The Type of "Public Injunctive Relief Specifically Excluded By the Arbitration Provision in Equinox's "Membership Agreement" (Ja10-Ja12)

Public injunctive relief has been defined as "relief that by and large benefits the general public .... and that benefits the plaintiff, if at all, only incidentally and/or as a member of the general public." See *DiCarlo*, 988 F.3d. at 1152 citing *McGill v. Citibank, N.A.,* 2 Cal. 5th 945 (Cal. 2017); see also *Kilgore v Keybank, N.A.*, 718 F. 3d. 1052, 1060 (9th Cir. 2013) cited by *Beture v Samsung Elecs. Am. Inc.*, 2018 U.S. LEXIS 121801, *28-29 (D. New Jersey July 18, 2018) (Ja51-Ja61) "A claim for public injunctive relief therefore does not seek "'to resolve a private dispute but to remedy a public wrong.'" *Kilgore*, 718 F. 3d at 1060 citing *Broughton v. Cigna Healthplans of Cal*., 988 P.2d 67, 76 (Cal. 1999)

In its Membership Agreement, Equinox specifically excluded claims against it seeking "public injunctive relief" from being covered under the arbitration provision. (Ja36-JA37) Despite that insinuated in Equinox's Brief,

nowhere in its Membership Agreement does Equinox state that the "public injunctive relief" language was only available to plaintiffs in lawsuits involving its California health club contracts or merely in response to California state law and/or court precedent. See Equinox Brief, p. 12, FN4 Put differently, Equinox already determined that claims (such as Plaintiff's New Jersey CFA, HCSA, RISA and TCCWNA claims) seeking "public injunctive relief" are applicable in its New Jersey health club contracts (such as that provided by Equinox to Plaintiff) and can be heard in this Court, as opposed to arbitration. Id.

Equinox defined "public injunctive relief" in its Membership Agreement as follows at paragraph 7.4 (Ja37) of the arbitration provision "…as injunctive relief that has the primary purpose and effect of prohibiting alleged unlawful acts that threaten ***future*** injury to the general public." (emphasis added). Accordingly, Plaintiff's damages in her Class Action Complaint against Equinox seeking "injunctive relief" (Ja26) is the type of "public injunctive relief" excluded by Equinox through its own Membership Agreement. *DiCarlo*, 988 F.3d. at 1152; *McGill,* 2 Cal. 5th 945; *Kilgore*, 718 F. 3d. at 1060; *Beture*, 2018 U.S. LEXIS 121801, *28-29 (Ja59); *Broughton*, 988 P.2d at 76 This is because Plaintiff is seeking to enjoin Equinox from using the same form New Jersey health club contract (which violates New Jersey's CFA, HCSA, RISA and TCCWNA) to enroll future New Jersey customers that seek to join an

Equinox health club. This fits squarely within the definition of "public injunctive relief" (Ja37) set forth in Equinox's Membership Agreement; and therefore, Plaintiff's claims are specifically excluded from arbitration. That Equinox may have inserted the words "public injunctive relief" into its health club contracts in response to California law/precedent is of no moment as this type of exclusion (i.e. "public injunctive relief is only applicable to its California contracts) is not stated in Plaintiff's New Jersey health club contract. See Equinox Brief, p. 12, FN4

In its July 29, 2024 decision (and July 19, 2024 oral argument) the trial court was concerned with the basis for Plaintiff to act as a private attorney general[1] regarding her injunctive relief claim seeking "public injunctive relief". (Ja11; T14-23-25; T15-1-4; T16-1-2,10-13; T17-1-6,13-24; T26-9-12, 19-22; T27-12-16, 19-25; T28-1-3, 7-8, 13-19; T31-7-13) To that end, the Consumer Fraud Act ("CFA"), NJSA 56:8-19 states the following:

> "Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefor[e] in any court of competent jurisdiction. In any action under this section the court shall, ***in addition to any other***

[1] The words "private attorney general" are not even stated in Paragraphs 7.2, 7.4 or 7.5 of Equinox's arbitration provision but separately concerning a class action waiver in Paragraph 7.3. (Ja36-Ja37)

> ***appropriate legal or equitable relief***, award threefold the damages sustained by any person in interest. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit." (emphasis added)

In addition, under the CFA, a private litigant (such as Plaintiff here) can bring an action (thereby acting as a private attorney general) seeking injunctive relief (in addition to monetary damages) so long as her claims include that she suffered an ascertainable loss of money or property. See *Weinberg v Sprint Corp.*, 173 N.J. 233, 250 (2002) Conversely, the Attorney General of New Jersey can bring an action solely for injunctive relief and, therefore, does not have the ascertainable loss requirement. Id.

As further set forth in *Weinberg,* 173 N.J. at 253

> "Read sensibly, the statute allows a private cause of action to proceed for all available remedies, ***including an injunction***, whenever a consumer can plead a claim of ascertainable loss that can survive a motion for summary judgment. The legislative intent to permit a private cause of action under the Act would be frustrated if a private litigant, who succeeds in bringing such a claim to a jury, must gamble on whether he or she will prevail ultimately on proof of the loss in order to obtain attorneys' fees, when he or she otherwise proves unlawful conduct." (emphasis added).

Therefore with respect to injunctive relief, and contrary to that argued by Equinox in its appellate brief, the only difference between a private attorney general (such as Plaintiff's counsel) and the Attorney General of New Jersey is

that the Attorney General of New Jersey does need to allege an ascertainable loss. See Equinox Brief, pp. 17-18 The CFA provides that *both* a private attorney general and the Attorney General of New Jersey can seek "injunctive relief". Further, the CFA does not differentiate between the type of injunctive relief either a private attorney general and the Attorney General of New Jersey may seek. If the legislature intended to exclude "public injunctive relief" from private attorney's general it would have done so. Accordingly, this counters Equinox's argument that Plaintiff "…has no express authority to even assert such a claim under…the CFA…". See Defendant's Brief, p. 11.

Here, Equinox specifically excluded "public injunctive relief" from its definition of a "Dispute" (Section 7.4)(Ja37) in the New Jersey health club contract provided to Plaintiff and the putative class. Thus, "public injunctive relief" is not a claim covered by Defendant's arbitration provision and, pursuant to Defendant's arbitration provision, would be litigated before this Court. See Sections 7.2, 7.4 and 7.5 (Ja36-Ja37); infra **Section I(B)** Plaintiff specifically pleaded the following relief sought in its Class Action Complaint alleging violations of the CFA, HCSA, TCCWNA and RISA: "For injunctive relief, enjoining Defendants from engaging in future violations of the HCSA, CFA, TCCWNA, and RISA". (Ja27)

Equinox's attempts to apply various cases (many of which Plaintiff previously distinguished and/or addressed in its underlying brief) only reaffirms Plaintiff's argument. See Equinox Brief, pp. 13-15 For example, Equinox relies on *Beture*, 2018 U.S. Dist. LEXIS 121801, at * 28 for the following: "…the relief would primarily benefit the discrete[2] class members who purchased defective phones and suffered actual harm by requiring Samsung to 'correct, replace or otherwise rectify' the phones, and, at best, would incidentally benefit potential future purchasers of Samsung smartphones who had not suffered any harm)…" Id. Here, and unlike *Betre*, where the alleged injunctive relief could "replace" or "rectify" the phones purchased by those plaintiffs (i.e. to their direct and immediate benefit), changing Equinox's form, New Jersey, Membership Agreement does nothing for Plaintiff or the putative class as they have already received Equinox's health club contract, which violates various New Jersey consumer statutes. Thus, stopping Equinox from using the Membership Agreement does not change the fact that when it was first provided to Plaintiff it failed to contain her total payment obligation, or obligated her to renew the contract pursuant to HCSA, 56:8-42(b) and (i). (Ja14,Ja22-Ja23) On the other hand, if Equinox is forced to change its Membership Agreement, the total

[2] Which as previously stated was not pleaded in Plaintiff's Complaint but made up by Equinox. Supra.

payment obligation would be present, and the obligating renewal language would be absent, from the Membership Agreement provided to future New Jersey consumers.

Equinox also relies on *Grigorian v. Citibank, N.A.*, 2024 U.S. Dist. LEXIS 71375, * 10 (C.D. Cal. April 17, 2024) which is inapplicable to the case, *sub judice*, for a couple of reasons. First, the subject arbitration and/or class action waiver provisions do not mention "public injunctive relief" (unlike Equinox's Membership Agreement"; and, second, unlike *Gregorian* which involved a specific ethnic group's (i.e. Armenians') credit card applications, Plaintiff's Complaint does not contain such limitations but involves the entire New Jersey public who could be provided with Equinox's violating Membership Agreement.

Accordingly, Plaintiff's injunctive relief sought in the Complaint alleging Equinox's CFA, HCSA, TCCWNA and RISA violations is specifically excluded from the arbitration provision in Equinox's form, New Jersey, health club "Membership Agreement"

B. The Trial Court's July 29, 2024 Decision Should Be Reversed Because Whether Plaintiff's CFA, HCSA, RISA, and TCCWNA Allegations In The Complaint Are Covered By the Arbitration Provision in Equinox's "Membership Agreement" Should Be Determined By A New Jersey Judge And Not An Arbitrator (Ja8-Ja10, Ja12)

The trial court determined that an arbitrator, as opposed to the trial court itself, should determine the "issue of arbitrability" (i.e. whether Plaintiff's allegations are covered by the arbitration provision in Equinox's form health club Membership Agreement.(Ja12); infra **Section I(C)**. To that end, and as argued by Equinox in its appellate brief (Equinox Brief, p.19), its arbitration agreement incorporates the rules of the AAA (and JAMS)(Ja37) and, accordingly, the trial court should not have decided that an arbitrator should determine whether Plaintiff's claims fall within the scope of Equinox's arbitration agreement.

In support, and as echoed by Equinox in its appellate brief (Equinox Brief, p. 20), the trial court relies on *Goffe v. Foulke Management Corp.*, 238 N.J. 191, 211 (2019) (Ja10) However, neither *Goffe* nor the fact that Equinox's definition of "Dispute" (Ja37) nullifies arbitration in Plaintiff's case supports this premise. In *Goffe*, 238 N.J. at 195, the New Jersey Supreme Court stated: "In order to be decided by a court, an arbitrability challenge -- a challenge as to whether a particular matter is subject to arbitration or can be decided by a court must be

directed at the delegation clause itself (which itself constitutes an arbitration agreement subject to enforcement); a general challenge to the validity of the agreement as a whole will not suffice to permit arbitration to be avoided…" This is exactly what Plaintiff has done in the case, *sub judice*, as the word "Disputes" (which is part of the delegation clause in Paragraph 7.2 of Equinox's Membership Agreement) (Ja36) is specifically, not generally, included in the Equinox Membership Agreement arbitration provision and, yet, Plaintiff's damages (set forth in the Complaint) seeking injunctive relief (Ja27) is specifically excluded from the definition of "Disputes" at Paragraph 7.4 of Equinox's Membership Agreement. (Ja37) Accordingly, the trial court should determine whether the arbitration provision applies to the relief sought in Plaintiff's Complaint and not an arbitrator.

As anticipated, and as for its "Delegation Clause" argument, "Equinox relies on *Blueprint Cap. Advisors, LLC v N.J. Div. of Inv.,* 2023 U.S. App. LEXIS 34032, *4, 7 (3d Cir. December 22, 2023) (Ja62-Ja66)(Equinox Brief, pp. 20-21). Unlike the subject arbitration provision[3] in *Blueprint Cap. Advisors,*

[3] "Any controversy or claim arising out of or relating to this Agreement or the breach thereof, that cannot be settled between the Parties, shall be settled by arbitration in accordance with AAA and pursuant to the AAA Rules; *provided*, that each Party shall retain his or its right to commence an action to obtain specific performance or other equitable relief from any court of competent jurisdiction."

LLC, 2023 U.S. App. LEXIS 34032, *4, 7 (Ja64-Ja66), Equinox's arbitration provision is far from clear. On this point, and as previously set forth in Plaintiff's opening brief, *first*, in Equinox's arbitration provision you have Paragraph 7.2 (Ja36) of the arbitration provision which states: "**Arbitration:** You agree to submit any and all ***Disputes*** (as defined in Section 7.4) to binding arbitration pursuant to the Federal Arbitration Act (Title 9 of the United States Code), which will govern the interpretation and enforcement of this arbitration agreement ("**Arbitration Agreement**"). Arbitration will be before either (1) JAMS (formerly known as Judicial Arbitration and Mediation Services), jamsadr.com, or (2) the American Arbitration Association ("**AAA**"), adr.org..." (emphasis added) Unlike the purported corresponding paragraph in *Blueprint,* 2023 U.S. App. LEXIS 34032, *4, 7 (Ja64-Ja66) Defendant's Paragraph 7.2 (Ja36) does not mention the "AAA Rules (or those of JAMS).

Second, Paragraph 7.2 (Ja36) from Equinox's arbitration provision references (and only applies to) "Disputes" which is defined in an entirely different part of the arbitration provision at Paragraph 7.4. (Ja37) "Disputes" does not apply (per Equinox's own definition) to Plaintiff's claims involving "public injunctive relief".

Third, any reference to the AAA or JAMS rules is only found in an entirely separate paragraph (7.5)(Ja37), on an entirely separate page, from Paragraph 7.2.

(Ja36) Accordingly, this is all not the same type of clear delegation[4] provision(i.e. "Delegation Clause")(and corresponding individuals paragraph concerning arbitrability) as set forth in *Blueprint,* 2023 U.S. App. LEXIS 34032, *4, 7. (Ja64-Ja66)

Accordingly, a New Jersey Judge, and not an arbitrator, should determine whether the injunctive relief set forth in Plaintiff's Complaint against Equinox is covered by Equinox's form, New Jersey, health club Membership Agreement

[4] Such as the clear (unlike Equinox's here) provision at issue in *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63,66 (2010), which will be relied on by Equinox: "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable."

CONCLUSION

For these reasons, the trial court's July 24, 2024 Order (Ja5-Ja12) should be reversed, and Plaintiff's case should be reinstated to the New Jersey trial court for the parties to commence discovery.

Dated: November 20, 2024

Respectfully submitted,

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