Superior Court of New Jersey

Appellate Division

Docket No. A-001051-23T4

WINE OF JAPAN IMPORT, INC. and SANWA TRADING CO., INC.,	:	CIVIL ACTION
Plaintiffs-Appellants,	:	ON APPEAL FROM A FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY
vs.	:	
SAPPORO U.S.A., INC., MASASHI MINAMI, ANDREW MURPHY and TAKESHI MIYAHARA,	:	DOCKET NO.: MRS-L-002143-22
	:	Sat Below:
	:	HON. STEPHAN C. HANSBURY, J.S.C.
Defendants-Respondents.	:	

BRIEF AND APPENDIX ON BEHALF OF PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Plaintiffs-Appellants Wine of Japan Import, Inc. ("WOJ") and Sanwa Trading Co., Inc. ("Sanwa") (collectively, "Appellants")—two family-owned New Jersey businesses importing and distributing malt beverage product to and from New Jersey—appeal from an order submitting to arbitration their claims against Defendants Sapporo U.S.A., Inc. ("Sapporo USA"), Masashi Minami ("Minami"), Andrew Murphy, and Takeshi Miyahara (collectively, "Defendants") for violating New Jersey's Malt Beverage Practices Act (N.J.S.A. § 33:1-93.12 et seq.), New York's Alcoholic Beverage Control Law ("ABC") § 55-c, breaching the parties' Wholesaler Agreement (defined below), and other common law claims.

This case arises from Sapporo USA's bad faith attempt to terminate Appellants' distribution rights to Sapporo products, despite the parties' 45-year relationship. Although a productive relationship, Appellants have had to withstand and reluctantly accept Sapporo USA's discriminatory and abusive policies, demands, and tactics through the years: (1) despite broad territorial rights to distribute Sapporo products, Appellants are largely restricted to sell to only Asian-owned businesses, (2) Sapporo USA encourages its distributors to violate antitrust laws, (3) Sapporo USA long restricted Appellants from utilizing sub-distributors, even though other Sapporo distributors were permitted to do

so, and (4) representatives of Sapporo USA were caught rummaging through Appellants' offices copying confidential material. In October 2022, to Appellants' great surprise, Sapporo USA attempted to terminate the parties' Wholesaler Agreement utilizing tactics the trial court deemed to be neither "fair" nor "reasonable."

On September 29, 2023, the trial court granted Appellants' request for a preliminary injunction prohibiting Sapporo USA from terminating the Agreement while litigation ensued. This appeal centers on Defendants' Motion to Compel Arbitration and Dismiss the Complaint, Or, in the Alternative, to Dismiss Counts Three and Six Through Nine of the Complaint Pursuant to Rule 4:6-2(e) ("Motion to Compel"), which the trial court granted in an October 23, 2023, Order (the "Order"), based on an arbitration clause within the parties' Wholesaler Agreement. The trial court's decision was erroneous for three reasons.

1. **Choice of Law** The trial court improperly applied New York law in its substantive review of the Wholesaler Agreement. The application of New York law violates the express requirements of the MBPA, and is also inapplicable pursuant to the Restatement (Second) of Conflicts of Law § 187 since New York has no "substantial relationship" to the parties or issues in Appellants' Verified Complaint, and New York law would violate New Jersey

public policy. Finally, the application of New York law violates clear precedent arising under the NJFAP, which the trial court was required but failed to consider under the MBPA.

2. **Arbitration Clause** The arbitration clause contained in the Wholesaler Agreement does not contain any express waiver language and is unenforceable under Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014), and its application to commercial contracts under County of Passaic v. Horizon Healthcare Servs., Inc., 474 N.J. Super. 498 (App. Div. 2023). Moreover, the trial court's additional reliance on the Federal Arbitration Act ("FAA") is misguided because the FAA is inapplicable when there is no valid arbitration clause to enforce. Finally, any application of the FAA to enforce arbitration violates the Twenty-First Amendment of the U.S. Constitution. Finally, the court again failed to consider precedent arising under the NJFPA supporting Appellants position that the arbitration clause is unenforceable.

3. Arbitrability The trial court wrongly determined that there was a valid arbitration clause that should be enforced pursuant to the FAA, but also stated that determinations of arbitrability are reserved for arbitrators if there is reference to the American Arbitration Association. The trial court's holding ignored New Jersey's "clear and unmistakable" standard for arbitrability clauses.

PROCEDURAL HISTORY

On December 14, 2022, Appellants filed an Order to Show Cause seeking a preliminary injunction ("Motion for a Preliminary Injunction") against Sapporo U.S.A. from, among other things, terminating the parties' Wholesaler Agreement. (Pa18-22). On December 15, 2022, the Court granted Appellants' Order to Show Cause. (Pa18-22). On January 19, 2023, Defendants filed their opposition to the Order to Show Cause, and also filed the Motion to Compel. On January 23, 2023, Appellants filed their Reply Brief in support of the Motion for a Preliminary Injunction. On February 7, 2023, Appellants filed their opposition to Defendants' Motion to Compel, and Defendants filed their reply in support of the Motion to Compel on February 13, 2023. After several adjournments of oral arguments by the Court, oral arguments on the two motions were scheduled for September 29, 2023.[1]

On September 29, 2023, the Hon. Stephen C. Hansbury, J.S.C. heard oral arguments and, on the record, granted Appellant's Motion for a Preliminary Injunction in full. (T3:2-5; 78:10-13). That same day, Judge Hansbury entered

[1] On September 25, 2023, Defendants submitted an untimely and procedurally improper letter to the Court without its permission, in an effort to supplement their previous submissions to the Court. Appellants submitted a responsive letter the next day requesting that the Court disregard Defendants' procedurally improper letter. The Court acknowledged that Defendants' untimely submissions were "filed late and without permission." (T47:24-48:1).

an Order prohibiting Sapporo USA for the length of litigation from, among other things, (1) not "complying" with all terms of the Wholesaler Agreement, (2) from refusing to Appellants the right to "purchase and resell" Sapporo products in the assigned territories, and (3) from "disparaging, defaming, and/or slandering" Appellants or their representatives (Pa148-149). Judge Hansbury did not, however, decide Defendants' Motion to Compel during oral arguments and reserved judgment, so that he could review and consider County of Passaic and its impact on the arbitration clause in the Wholesaler Agreement.

On October 23, 2023, the Court issued and filed the Decision granting Defendants' Motion to Compel. (Pa1-7). On December 7, 2023, Appellants filed a Notice of Appeal with the Superior Court – Appellate Division.

STATEMENT OF FACTS

I. Appellants Are Long-Time, Loyal Distributors Of Sapporo Products Whose Relationship Is Memorialized in The Wholesaler Agreement.

WOJ has been a family-owned company since its founding in 1973, specializing in the wholesale distribution of ultra-premium Japanese sake, spirits, and beer in the United States. Sanwa was established in 1984 as WOJ's importer of alcohol and commercial foodstuffs. (Pa30). WOJ has maintained a 45-year relationship with Sapporo, and played an integral role in introducing and growing the Sapporo brand in the United States since 1977. (Pa30).

Appellants also have a long-standing history in New Jersey. Appellants' principal place of business is located in Pompton Plains, New Jersey, Sanwa is incorporated in New Jersey, the first step of Appellants' role as Sapporo's distributor is to purchase and import ***into New Jersey*** all of the Sapporo products in Appellants' portfolio. Appellants then distribute those goods from New Jersey throughout Appellants' Sapporo distribution territories. Critically, all of the events in Appellants' Verified Complaint occurred in New Jersey. (Pa30-44).

On or about March 18, 2005, WOJ, Sanwa, and Sapporo USA entered into the Wholesaler Agreement (the "Wholesaler Agreement" or "Agreement") during a meeting in New Jersey, which is the most recent documentation of their contractual relationship, and which purported to appoint Appellants as wholesalers of Sapporo products in the New York tri-state area and the entire state of New Jersey. (Pa30; Pa62-74). In section 1(d)(i) of the Agreement, Appellants agreed to "use best efforts to promote the sale and distribution of Sapporo's Products to all possible accounts in its market area…" (Pa64). There is no definition of "best efforts" in the Agreement. The Agreement also restricts any party from terminating the Agreement on only sixty (60) days' notice unless the party giving notice "reasonably believes" that termination will be "mutually beneficial to both parties." (Pa66).

The Agreement includes an arbitration clause stating that it shall be "governed by, and construed in accordance with, the laws of the State of New York" and that any "controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in New York, New York pursuant to the rules and regulations of the American Arbitration Association." (Pa69).

II. The MBPA Contains Strong Protections For Wholesalers, Including Safeguards Against Unreasonable Or Bad Faith Brewers

The sale of malt alcoholic beverages in New Jersey "vitally affects" its economy and public welfare and, as a result, the MBPA was established, in part, to "protect beer wholesalers from ***unreasonable demands and requirements by brewers…***" N.J.S.A. § 33:1-93.13(c) (emphasis added). To ensure protection to wholesalers, the MBPA requires all wholesaler agreements for the sale of malt beverages in New Jersey to "conform to State law and the terms of [the MBPA]" N.J.S.A. § 33:1-93.15(a). The MBPA goes on to state that:

> The provisions of this act ***may not be waived or modified by written or oral agreement, estoppel or otherwise****, and* ***any provision of a contract or ancillary agreement that directly or indirectly requires or amounts to a waiver of any provision of this act,*** or that would relieve any person of any obligation or liability under this act, ***or that imposes unreasonable standards of performance on a wholesaler, shall be a violation of this act and shall be null, void and of no effect****.*

N.J.S.A. § 33:1-93.15(a) (emphasis added).

The MBPA prohibits brewers from "terminat[ing]…a contract…with a wholesaler…except where the brewer establishes that it has acted for good cause and in good faith." (Pa33); N.J.S.A. 33:1-93.15(c)(1). "Good Cause" is defined as "failure to substantially comply with reasonable terms contained in a contract or agreement." (Pa33); N.J.S.A. § 33:1-93.14. The MBPA also prohibits brewers from terminating or refusing to renew a contract with a wholesaler "because the wholesaler refuses to accept an unreasonable amendment to the contract, agreement or relationship." (Pa33); N.J.S.A. § 33:1-93.15(c)(2). At its core, the MBPA requires brewers to act "in a manner consistent with the covenant of good faith and fair dealing implicit in State Contract law." (Pa33); N.J.S.A. § 33:1-93.15(c)(11).

Should a conflict arise under the MBPA, the Act requires such conflicts and controversies be brought in State Court, stating that "[w]hether the terms of a contract, agreement or relationship conform with the provisions of this section ***shall be*** determined by a court of this State…" N.J.S.A. § 33:1-93.15(e) (emphasis added). Accordingly, any conflict or controversy concerning the terms of a wholesaler agreement or the relationship between a brewer and wholesaler must be brought in New Jersey courts.

III. The MBPA Instructs Courts To Follow Precedents From The New Jersey Franchise Practices Act When There Are Conflicts Arising From The MBPA And Its Provisions.

Unlike New York's statutory regime, the MBPA is fundamentally distinct and unique because it reflect the Legislature's intent for courts to consider and rely upon precedents arising under the New Jersey Franchise Practices Act ("NJFPA") for any conflicts or controversies involving the MBPA and its provisions. Specifically, the MBPA expressly states that when there is a "case or controversy among wholesalers and brewers…**proper consideration should be given to relevant precedents provided under the 'Franchise Practices Act'** P.L. 1971, c. 346 (C. 56:10-1, *et seq*.)." N.J.S.A. § 33:1-93.15(e). (emphasis added).

The importance the Legislature placed on NJFPA precedent is evident in N.J.S.A. § 33:1-93.19, which states that if sections three (N.J.S.A. § 33:1-93.14) ("Definitions"), four (N.J.S.A. § 33:1-93.15) ("Contract Between Brewer and Wholesaler…Applicability…Prohibited and Conforming Contract Terms; Violations") and seven (N.J.S.A. § 33:1-93.18) ("Action against Brewer for Violation; Remedies; Third-Party Action Limited") are held "invalid" then the NJFPA "shall be fully applicable to the extent it would otherwise apply as if this act had not been enacted."

IV. Sapporo Has Long Engaged In The Type Of Abusive Tactics The MBPA Was Designed To Protect Against.

Even though the Agreement appointed Appellants as non-exclusive wholesalers of Sapporo products in the New York tri-state area and the entire

state of New Jersey, Sapporo USA has long enforced a discriminatory policy on Appellants that restricted Appellants' market to "Asian accounts," which has essentially meant Asian-owned restaurants.[2] Though other distributors could sell freely to any local retailers in their territory, and the Agreement called on Appellants "to promote the sale and distribution of Sapporo's Products to all possible accounts in its market area," Sapporo USA had always limited Appellants to only Asian accounts, which were disproportionately impacted by COVID-19. (Pa37, Pa40-41). Sapporo USA also prohibited Appellants from using "sub-jobbers," which are sub-distributors, while permitting other Sapporo wholesalers to do so. (Pa37-38).

[2] COVID-19 had a devastating effect on restaurants across the globe, particularly on Asian restaurants in New York City, which were devastated by the pandemic. By March 2020, consumer spending in Manhattan's Chinatown neighborhood and Flushing—two areas with a significant number of Asian restaurants—had dropped by 96%. (Pa40-41). For WOJ, seven of its retailer-customers in New Jersey closed because of the pandemic. Of those seven, five purchased Sapporo products from WOJ. In New York, WOJ had 129 retailer-customers that closed due to the pandemic, constituting almost 23% of its retail-customers in New York. Of those 129, nearly all of them purchased Sapporo products from WOJ. (Pa41). Sapporo USA was fully aware that a significant portion of the retailers Appellants serviced permanently closed because of the pandemic, and that those closures had a disproportionate impact on Appellants' sales volumes, particularly since Sapporo USA permits Appellants to only sell Sapporo products to Asian restaurants and markets. (Pa41). Any purported decline in Appellants' sales figures of Sapporo products is thus a result of natural market conditions and not Appellants' alleged failure to use "best efforts."

Additionally, on January 12, 2009, WOJ and Sapporo USA entered into a Nondisclosure Agreement (the "NDA") after WOJ found a representative of Sapporo USA rummaging through files in its offices in New Jersey and copying confidential financial documents without permission or right. The NDA prohibits Sapporo USA from distributing Confidential Information to third parties without WOJ's written consent. (Pa94-96).

V. Defendants Violate The MBPA And Anticipatorily Breached The Agreement By Falsely Accusing Appellants Of Violating The "Best Efforts" Provision Of The Agreement In Bad Faith And Threatening Termination Without Good Cause.

These abusive tactics by Sapporo USA continued into 2022 and extended to personal and cultural insults against Appellants. On September 29, 2022, Defendants met at Appellants' offices in New Jersey (the "September Meeting") for the purported purpose of introducing Appellants to Sapporo USA's new Vice President of Sales, Defendant Andrew Murphy ("Murphy"). (Pa34). The September Meeting was actually an ambush and pretext based on a false premise, setting the stage to execute Sapporo USA's preconceived plan to terminate the Agreement with Appellants. During that meeting, Murphy insulted Appellants and their Japanese customs, used profane and insulting language, and falsely accused Appellants of generating poor sales numbers for 2022, using misleading data. (Pa34-36). Among other things, Murphy told Appellants' officers, including Masahiro Takeda ("Takeda"), the Vice President

of Appellants and the son of Appellants' founder, that "you don't know anything about [alcohol sales] data," that Mr. Takeda "wouldn't understand [Sapporo's] data," and that he had come to Appellant's offices to "tell you how to do your job." (Pa34-36).

While disputing Defendants' accusations, Appellants asked Defendants what solutions they proposed to increase sales figures. In response, Defendants suggested that Appellants emulate their competitors' practice of incentivizing and increasing sales by bundling Sapporo products with free and discounted food products, such as rice and soy sauce. (Pa36-37). Appellants immediately rejected this illegal request because incentivizing sales in this manner would violate of the Federal Alcohol Administration Act ("FAAA"), as well as several state laws, which would put Appellants' alcoholic beverage licenses at risk. (Pa37). In fact, in support of Defendants' Motion to Compel, then-Sapporo USA president Minami openly admitted that Sapporo USA engages in unlawful conduct, stating that under its policies "distributors must compete and make arrangements with each other to determine which accounts each distributor will service" and that "[i]t is up to WOJ/Sanwa to engage retailers and work out sales arrangements with its fellow distributors." (Pa100). Such an allocation of customers by competing non-exclusive distributors would be a *per se* violation of the antitrust laws and demonstrates Sapporo USA's open disregard for the

law when making demands of its distributors. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972) ("classic examples of *per se* violation of [Section 1 of the Sherman Act] is an agreement between competitors at the same level of the market structure to allocate territories.").

On October 4, 2022, Appellants each received letters purportedly from Sapporo USA entitled Notice of Deficiency and Pending Termination (each letter lacked Sapporo's letterhead), which were replete with false allegations, erroneous data, and speculative conclusions (the "October 4 Notices" or the "Notices"). (Pa38; Pa75-79). The Notices accused Appellants of violating the "best efforts" provision of the Agreement by pointing to Appellants' alleged decline in sales in 2022 relative to its, and its competitors', pre-pandemic performance in 2019 (Pa38-39; Pa76; Pa78). Sapporo USA claimed that Appellants' drop in sales was based on Sapporo USA's unsupported "belie[f]" that Appellants utilized "driver sales personnel" and reduced the number of these personnel from 2019. This is false. (Pa77; Pa79). As stated in the Verified Complaint, WOJ employs a team of ten (10) to twelve (12) delivery drivers and helpers. (Pa40). WOJ maintains a sales team separate and apart from their drivers, who conduct no sales whatsoever. Only the sales team sells product; the drivers do not. Defendants were advised of this during the September 29 Meeting, but nonetheless, included this false accusation in the Letters. (Pa40).

The Notices conclude by requiring Appellants to "restore sales volume in [Appellants'] territory to ***ninety-six*** percent of calendar year 2019 sales levels" by October 24, 2022, or else Sapporo USA would terminate the Agreement on January 31, 2023. (Pa77; Pa79). This requirement is not only unreasonable but an entirely new requirement not included in the Agreement.

The trial court accurately described the Notices and Defendants' tactics as unfair and unreasonable. Specifically, Judge Hansbury stated:

> I've been given nothing to suggest that there was a problem and – and the relationship has gone on be – between the parties for 45 years, as I understand it. And I've been given nothing to suggest there was any problem until September, I guess it was '22, as I recall. And they gave – were given four months to submit a plan.
>
> That's pretty precipitous with a 45-year relationship. I just don't think that that's really treating the – the plaintiff in a fair and reasonable way to say, you know, we've been doing great for 45 years. Now you have four months to figure this out and get it done.

(T76:8-22). This statement not only confirmed Appellants were entitled to injunctive relief, but implicitly agreed that Sapporo USA's actions were not in good faith and were unreasonable.

ARGUMENT

POINT I

STANDARD OF REVIEW

Orders compelling or denying arbitration are treated as final orders for purposes of appeal. R. 2:2-3(3); GMAC v. Pittella, 205 N.J. 572, 575 (2011).

This Court's review of a motion to compel arbitration is *de novo*, and the Court need not defer to the trial court's analysis. Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 316 (2019). Similarly, on appeal, the Court's review of the trial court's application of a statute is *de novo*. State v. Goodwin, 224 N.J. 102, 110 (2016).

POINT II

THE COURT MUST APPLY NEW JERSEY LAW TO ITS ANALYSIS OF THE WHOLESALER AGREEMENT AND WHETHER ITS ARBITRATION CLAUSE IS VALID (Pa5).

The trial court erred in applying New York law to the "substantive merits" of Appellants' complaint because Respondents' actions violate New Jersey public policy and the MBPA. Rather, New Jersey law should apply, pursuant to the MBPA and the Restatement (Second) of Conflicts of Law § 187 (1969) (the "Restatement").

A. The MBPA Mandates That New Jersey Law Must Govern The Wholesaler Agreement (Pa5).

Any choice of law analysis is "preempted" where the Legislature determines that New Jersey public policy requires the application of New Jersey law to a particular type of claim "regardless of the interest of another state." Fiarfax Fin. Holdings Ltd. v. S.A.C. Capital Mgmt., L.L.C, 450 N.J. Super. 1, 43 (App. Div. 2017) (citation omitted); see also Restatement (Second) of Conflict of Laws § 6(1). The paramount expression of New Jersey public policy

is the Legislature's enactment, which can be "discerned by background circumstances revealing the evil sought to be remedied." Turner v. Aldens, Inc., 179 N.J. Super. 596, 602 (App. Div. 1981) (citing Oxford Consumer dis. Co. of No. Phila. V. Stefanelli, 102 N.J. Super. 549 (App. Div. 1986)).

The MBPA states that the "terms and provisions" of a contract between brewer and wholesaler under the MBPA must "***comply with and conform to State law and the terms of this act.***" N.J.S.A. § 33:1-93.15(a).[3] (emphasis added). Any provision that "directly or indirectly requires or amounts to a waiver of any provision of this act…shall be a violation of this act and shall be ***null, void and no effect***." Id. In short, the MBPA requires strict compliance with ***both*** New Jersey law and the terms of the MBPA to "protect beer wholesalers from unreasonable demands and requirements by brewers…" and any provision that contradicts State law or the MBPA is "null, void and no effect." N.J.S.A. § 33:1-93.13(c).

The MBPA's forceful language requiring strict compliance with both New Jersey State law and the MBPA underscores its intent to protect New Jersey wholesalers from unreasonable acts by brewers. This includes the unreasonable Notice of Termination—which the trial court deemed unreasonable—the

[3] The MBPA confirms that it "shall apply to all contracts, agreements and relationships among any brewers and wholesalers…" N.J.S.A. § 33:1-93.15(b).

discriminatory policies imposed by Sapporo USA on Appellants for decades, and the other abusive tactics detailed above. Regardless of the Agreement's choice-of-law provision, the Legislature has directed that all wholesaler agreements comply (and be governed by) with the laws of this State—not just the terms of the MBPA. The application of New York law would necessarily amount to a "waiver" of this provision of the MBPA. Thus, the Agreement's choice of law provision prescribing New York law must be deemed null and void, particularly since the Agreement was renewed each year after the MBPA was enacted. The trial court erred in ignoring the clear mandate by the Legislature, and this Court should instead apply New Jersey law to the Agreement and this matter without the need to engage in a choice of law analysis.

B. Appellants Satisfy The Restatement's Factors To Disregard The Wholesaler Agreement's Choice-of-Law Provision (Pa5).

Should the Court perform a choice of law analysis, the Restatement, which the Supreme Court adopted in Instructional Sys., Inc. v. Computer Curriculum Corp., 130 N.J. 324 (1992), would apply. The Restatement provides that, where there is a conflict of laws, the law of the state chosen by the parties will apply unless either:

> (1) The chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

> (2) Application of the law of the chosen state would be contrary to a fundamental policy of a state, which has a materially greater interest than the chosen state in the determination of the particular issues and which…would be the state of the applicable law in the absence of an effective choice of law by the parties.

In this case, both prongs of the Restatement are relevant because New York has an insufficient relationship to both the parties to this dispute and the facts that give rise to Appellants' claims in this action. Further application of New York law would run afoul of New Jersey's fundamental policy and express interest in regulating the malt beverage industry, including the contractual relationships between brewers and wholesalers operating within this State.

(i) New York Has No Substantial Relationship To The Parties Or The Transactions At Issue In The Verified Complaint (Pa5).

Under the Restatement, a choice-of-law provision will be disregarded when there is no "substantial relationship" between the law chosen and the parties or the transactions at issue. The Restatement instructs courts to look at "where performance" by one of the parties took place, where a party maintains "[its] principal place of business," or the state that is "the place of contracting." Restatement, cmt. F. New Jersey is the location for each of these factors.[4]

[4] The trial court did not analyze whether New York had any "substantial relationship" to the parties or transactions set forth in the Verified Complaint. (Pa1).

In a factually similar matter in Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128 (7th Cir. 1990), the Seventh Circuit Court of Appeals agreed with the district court's conclusion that Indiana public policy precluded the application of a New York choice-of-law provision. In that case, plaintiff corporation was an Indiana franchisee, and the franchisor was a New York corporation with its principal place of business in New Jersey. The franchisee argued that the franchisor had violated Indiana law by terminating the relationship without good cause and unilaterally changing other terms. Despite a New York choice-of-law provision in the franchise agreement, the Indiana district court held that Indiana had articulated strong public policy in its franchise laws, which prohibited parties from contracting out the protections of Indiana franchise law. Moreover, Indiana had a materially greater interest in litigation because New York's only connection was that the defendant was incorporated in New York. See Wright-Moore, 908 F.2d at 133. See also McCabe v. Great Pac. Century Corp., 222 N.J. Super. 397, 400 (App. Div. 1988) (overturning trial court's application of Indiana law set forth in the parties' agreement because the contract was "fully performed" in New Jersey and a "complex set of New Jersey regulations…had to be followed in performing the contract").

In this case, there is no substantial relationship between New York and the parties or the transactions alleged in the Verified Complaint. Appellants

both have their principal places of business in Pompton Plains, New Jersey—and hence, their employees are employed in New Jersey, Sanwa is incorporated in New Jersey, the September Meeting occurred in New Jersey and the Agreement was executed by Appellants in New Jersey. (Pa28-30; Pa34). Notably, all interactions between Sapporo and Appellants under the Agreement are all performed in New Jersey: the first step of Appellants' role as Sapporo's distributor is to purchase and import ***into New Jersey*** all of the Sapporo products in Appellants' portfolio. Appellants then distribute those goods from New Jersey throughout Appellants' Sapporo distribution territories. (Pa24). Critically, none of the events described in the Verified Complaint occurred in New York, none of the parties are located in New York, and no transactions between Appellants and Sapporo USA occur in New York.

The only relationships Defendants could identify to the trial court to justify the application of New York law to the Agreement was that (1) WOJ and Sapporo are incorporated in New York, (2) WOJ holds a New York and federal wholesaler license with permits in New York, (3) Sapporo USA was headquartered in New York when the Agreement was executed, and (4) much of Appellant's sales occur in New York. (T79:16-80:3)

These tenuous connections fall woefully short of constituting a "substantial relationship." First, the location of incorporation is not sufficient

to maintain a sufficient relationship. See Wright-Moore, 908 F.2d at 133; see also Curtis 1000, Inc. v. Suess, 24 F.3d 941, 948 (7th Cir. 1994) (place of incorporation alone is insufficient to sustain choice of that state's law). Second, WOJ's wholesale licenses in New York are not relevant to the Agreement or any of the events set forth in the Verified Complaint. See Diversant, LLC v. Carino, 2018 WL 1610957 (D.N.J. Apr. 2, 2018) ("New Jersey Courts focus on the ***dispute-related contacts or relationships***" to determine choice-of-law disputes) (emphasis added). Indeed, Appellants distribute non-Sapporo products and must maintain those licenses notwithstanding its relationship with Sapporo. Third, Sapporo's reliance on the location of its former headquarters is simply not relevant to the analysis or fails to explain why New York would have an interest in a company that is no longer headquartered there. See Rowen Petroleum Properties, LLC v. Hollywood Tanning Syst., Inc., 899 F. Supp. 2d 303, 307 (D.N.J. 2012) (stating that Ohio no longer had a "substantial relationship" to the matter or parties because only a predecessor-in-interest was an Ohio LLC); Bailey v. Wyeth, Inc., 422 N.J. Super. 343, n. 5 (Law Div. 2008) (denying choice-of-law motion as untimely but stating that the location of a party's current headquarters is more relevant than the party's former headquarter location).

Finally, the location of sales in New York is not relevant in determining a substantial relationship and New Jersey courts have specifically stated that the focus is on where the parties and events are "situated" – not the location of a party's sales.[5] Instructional Sys., 130 N.J. at 345 (the purpose behind "franchise-act legislation is that dealers geographically 'situated' in a forum state are to be the 'desired beneficiaries of the legislation in order to make their bargaining position more equal to manufacturers.'") (citing Bimel-Walroth Co. v. Raytheon Co., 796 F.2d 840, 843 (6th Cir. 1986). The disregard for sales locations was best illustrated by our Supreme Court:

> To use a mundane example, assume that an automobile manufacturer gave a franchise to a dealer in Montvale, New Jersey to serve northern Bergen County, New Jersey as well as Rockland County, New York. Would we assume that the New Jersey Legislature would be indifferent to the dealer's plight if, after having made a substantial investment in the fixed plant and having created a market for the manufacturer's vehicle in Rockland County, the manufacturer, without good cause, took over the Rockland County market for itself?

Instructional Sys., 130 N.J. at 345.

Like Instructional Sys., New Jersey courts will not abandon New Jersey companies or forfeit New Jersey's interest in protecting its companies simply because some sales occur in a State other than New Jersey. Though Appellants

[5] New Jersey applies its own choice-of-law rules since it is the forum for the lawsuit. See Rowe v. Hoffman-La Roche, Inc., 189 N.J. 615, 621 (2007).

have sales in New York, those sales do not create a substantial relationship with New York sufficient to vitiate New Jersey's interest and public policy. Instructional Sys., 130 at 345 ("Few franchises are intrastate") (citing Winer Motors, Inc. v. Jaguar Rover Triumph, Inc., 208 N.J. Super. 666, 671-72 (App. Div. 1986)). For these reasons, the Agreement's New York choice of law provision should be disregarded since New York has no "substantial relationship" to these parties or this dispute, and New Jersey law should govern.

(ii) Application of New York Law Would Violate New Jersey Public Policy And The Express Provisions Of The MBPA (Pa5).

Under exception (b) of the Restatement, it is clear that (A) the application of New York law would run afoul of a fundamental policy of New Jersey; (B) that New Jersey has a materially greater interest than New York in the determination of the particular question at issue, and (C) under the general choice-of-law considerations of § 188 of the Restatement (Second) of Conflict of Laws, New Jersey law would apply.

(A) **Applying New York Law to Deny Appellants The Protections of New Jersey Law Would Run Afoul of New Jersey's Fundamental Public Policy (Pa5-6).**

As discussed above, New Jersey law should govern this controversy and the Agreement because it has a strong and express public policy interest in regulating the malt beverage industry. See N.J.S.A. § 33:1-93.13(a) (the sale of

malt alcoholic beverages in New Jersey is an industry that "vitally effects the general economy and revenues of the Sate, as well as the public interest and public welfare.") This directive is emphasized by the "null, void and no effect" provision of the MBPA for any contract that violates the MBPA. N.J.S.A. § 33:1-93.15(a).

Consistent with the precedential NJFPA, when a wholesaler is located in New Jersey, it should benefit from the protections of the MBPA and New Jersey law ***regardless*** of the choice-of-law provision in any wholesaler agreement. See Red Roof Franchising, LLC v. Patel, 877 F.Supp. 2d 124, 130 (D.N.J. 2012) (citing Instructional Sys., 130 N.J. at 345); see also Dunkin' Donuts Franchised Restaurants LLC v. Strategic Venture Group, Inc., 2010 WL 4687838, at *3 (D.N.J. Nov. 10, 2010) (noting that parties agreed that because the franchisee were located in New Jersey, they benefited from the protections of the NJFPA, even though the parties contracted for Massachusetts law to govern disputes concerning or arising out of the Franchise Agreement).[6]

The Supreme Court has expressly stated that "parties to a franchise agreement cannot void the franchise law of the state in which the franchisee is

[6] As noted above, the MBPA expressly states that courts should give "proper consideration" to any "relevant precedents provided under the [NJFPA]" when there is a controversy between brewers and wholesalers. N.J.S.A. § 33:1-93.15(e).

located by providing in their agreement that the laws of another state will govern." Instructional Sys., 130 N.J. at 344 (citation omitted). The same applies to other important regulatory statutes in this state. See Prescription Counter v. AmeriscourceBergen Corp., 2007 WL 3511301 (D.N.J. Nov. 14, 2007) ("The importance of the consumer protection policy manifested by the [New Jersey Consumer Protection Act] has led the courts to apply New Jersey law, even though other choice of law rules pointed elsewhere."); Turner v. Aldens, Inc., 179 N.J. Super. 596 (App. Div. 1981) (choice-of-law provision in retail sales contract was unenforceable as against public policy since the Legislature intended to offer state consumers the protection of New Jersey's Retail Installment Sales Act).

In Red Roof, plaintiff was a Red Roof Inn hotel franchisee in New Jersey and brought claims against the Red Roof Inn franchisor for violation of the NJFPA, as well as common law claims, regarding the franchisor's termination of the franchise agreement, which contained a Texas choice-of-law provision. See 877 F.Supp.2d at 126-127. The Court found that because of New Jersey's "strong policy in favor of protecting its franchisees" the NJFPA "applies to claims relating to the franchise agreement notwithstanding the Texas choice-of-law provision. Thus, plaintiff's claim for breach…relate to the franchise agreement which would implicate the NJFPA and ***application of New Jersey***

law." Id. at 131 (citation omitted) (emphasis added); see also King v. GNC Franchising, Inc., 2007 WL 1521253, at *2, n. 1 (D.N.J. May 23, 2007) (though the franchise agreement contained a Pennsylvania choice-of-law provision, the court found "New Jersey choice of law jurisprudence clearly holds that ***the law of the state in which the franchisee has its principal place of business*** should apply, despite a contractual choice of law provision") (emphasis added).

In Winer Motors, another case invoking the NJFPA, the Appellate Division found that the trial judge erred in applying New Jersey law to a franchise agreement dispute for a franchisee located in Connecticut. Though the agreement had a New Jersey choice-of-law provision, the court stated that the insertion of a choice-of-law provision by a franchisor should not "with a stroke of a pen remove the beneficial effect of the franchisee state's remedial legislation." Winer Motors, 208 N.J. Super. at 671-72. In addressing the Restatement, the court acknowledged there was "little difference between the law of New Jersey and Connecticut on this subject…[though] the application of Connecticut law might permit the imposition of attorneys[‘] fees, if warranted." Id. at 673. But nonetheless, the Winer Motors court affirmed Connecticut law.

In the instant case, there are significant, material differences between New York and New Jersey law, which evidences New Jersey's far greater interest in resolving issues pertaining to parties in the malt beverage industry, and the

imposition of New York law would undermine fundamental policies that New Jersey champions. For instance, New York permits material modifications to a wholesaler agreement if there is good cause, whereas the MBPA provides stronger protections for wholesalers and does not permit such modifications without the wholesaler's consent. Compare ABC Law § 55-c(4)(b) with N.J.S.A. § 33:1-93.15(c)(2). In this case, Sapporo USA's unilateral imposition of a 96% sales restoration requirement, which constituted a material modification of the Agreement, was never accepted by Appellants and therefore violates New Jersey Law. Under New York law, however, Appellants may conceivably have to comply with such an onerous requirement if Sapporo USA purports to have inserted this new term for good cause and in good faith—an issue Appellants fervently dispute. Moreover, the ABC Law only prohibits mandatory arbitration clauses; brewers and wholesalers are still free to resolve their claims by any means including arbitration, if they chose to do so. By contrast, N.J.S.A. § 33:1-93.15(e) requires any dispute regarding the terms of the wholesaler agreement and their compliance with the MBPA be "determined by a court of this State."

Additionally, like Winer Motors, the MBPA entitles prevailing parties who bring claims under the MBPA to reasonable attorney's fees, whereas the

ABC Law does not. Se N.J.S.A. § 33:1-93.18(a).[7] Critically, ABC Law clearly does not afford wholesalers the same protections that the MBPA provides and, in fact, ***does not even apply to sales within New Jersey.*** See S.K.I. Beer Corp. v. Baltika Brewery, 443 F. Supp.2d 313, 321 (E.D.N.Y. 2006) (stating that the "overarching purpose of the [ABC Law] is not to regulate out-of-state transactions").

While there is no dispute that New York law would not provide Appellants the aforementioned protections, Defendants claimed (without support) that the MBPA's fee-shifting statute is not a "fundamental" policy. Courts do, however, consider fee-shifting statutes, which are implemented by our Legislature, to be important policy "to ensure 'that plaintiffs with bona fide claims are able to find lawyers to represent them [,] ... to attract competent counsel in cases involving statutory rights, ... and to ensure justice for all citizens.'" Warren Distrib. Co. v. InBev USA, LLC, 2011 WL 770005, at * 7 (D.N.J. Feb. 28, 2011) (awarding reasonable attorney's fees under the fee-shifting provision of the NJFPA) (citing

[7] While the Verified Complaint sets forth a valid cause of action for breach of the good faith and fair dealing under either State's law, New York places a greater burden on pleading the claim than New Jersey and, therefore, application of New York law would violate fundamental New Jersey principles surrounding that common law claim. See Jurista v. Amerinox Processing, Inc., 492 B.R. 707, 756 (D.N.J. 2013).

New Jerseyans for Death Penalty Moratorium v. N.J. Dep't of Corrections, 185 N.J. 137 (2005)).

Lastly, the trial court stated in the Decision that there is "no contravened matter of public policy between the treatment of arbitration clauses in New York and New Jersey." (Pa6). This is incorrect. New York does not have a comparable requirement of express waiver under Atalese or its applicability to commercial contracts pursuant to County of Passaic. The trial court failed to recognize or address this Court's ruling in County of Passaic in the Decision. Rather, it relied on the unreported case of Tox Design Group LLC v. RA Pain Services, No. A-4092-18T1, 2019 WL 7183687 (N.J. Super. Ct. App. Div. December 26, 2019), to claim that Atalese is inapplicable to commercial contracts. Not only is Tox Design not precedential or binding, but it now directly at odds with County of Passaic which is a published Appellate Division decision.

Just as the NJFPA protects franchisees in this state, as described above, the intent of the MBPA is to "further the public policy of this State and protect beer wholesalers from unreasonable demands and requirements by brewers." N.J.S.A. § 33:1-93.13(c); see also Business Incentives Co. v. Sony Corp. of Am., 397 F. Supp. 63, 67 (S.D.N.Y. 1975) (declining to apply a contractual provision that New York law because, pursuant to the Restatement, **"New Jersey has a**

strong public policy – enunciated both by its courts and its legislature – **in favor of protecting the relatively powerless consumer or small businessman from more powerful commercial giants**") (emphasis added); Winer Motors, Inc, 208 N.J. Super. at 666, n.3 (App. Div. 1986) (recognizing the "unequal bargaining power between franchiser and franchisee" as a reason to disregard the contractually agreed-upon choice-of-law provision in a franchise agreement).

Here, the enforcement of the New York choice-of-law provision in the Agreement would potentially enable Defendants to avoid the MBPA by the stroke of a pen. See Instructional Sys., Inc., 130 N.J. at 345 (declining to apply contractual choice-of-law because otherwise "any large franchisor by insertion of a choice of law provision requiring the application of the franchisor's home state's law, could with a stroke of a pen remove the beneficial effect of the franchisee's state's remedial legislation"). Indeed, Defendants admitted and argued before the trial court that the choice-of-law provision entitles them to circumvent the MBPA's protections for New Jersey malt beverage distributors, which protect distributors to a greater degree than New York's ABC Law. (T80:21-81:1).

To permit brewers to avoid the MBPA through the mere insertion of a choice-of-law provision would eviscerate the protections New Jersey hoped to

provide with the passage of the MBPA. Moreover, New Jersey's liquor laws and alcohol distribution system would be rendered meaningless because those laws could be avoided (or bargained away) by simply placing a choice-of-law provision in the contract, thereby restricting New Jersey's ability to enforce those provisions.[8] The U.S. Supreme Court has expressly noted that in circumstances like this, where the "choice-of-forum and choice-of-law clauses operate[ ] in tandem as a prospective waiver of a party's right to pursue statutory remedies…we would have little hesitation condemning the agreement as against public policy." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 673, n. 19 (1985).

It should also be recognized that when the Agreement was executed, Appellants and Sapporo USA were not contracting as equals. Like franchise relationships, the MBPA was intended to address concerns relating to "unequal bargaining power that exists…and the unavailability of prompt judicial relief" to the wholesaler. B & S Ltd., Inc. v. Elephant & Castle Intern., Inc., 388 N.J. Super. 160, 169 (Ch. Div. 2006). In this case, Sapporo USA, which singly

[8] Moreover, the choice-of-law provision should be deemed void since it directly contradicts or waives the entire MBPA, or at the very least, violates the MBPA's requirement that the Agreement "conform to State law," there by voiding that provision. See e.g. Gamble v. Connolly, 399 N.J. Super. 130, 144 (Law Div. 2007) ("Here the contract in question transgresses a statute, N.J.S.A. § 46:8-10, and is, therefore, disruptive of public policy, at odds with the public interest and deleterious to the common good.")

drafted the Wholesaler Agreement, would have terminated its relationship with Appellants if Appellants did not agree to the terms—a risk, as outlined in the certifications of Masahiro Takeda ("Takeda") in support of Appellants' Motion for a Preliminary Injunction, which would have irreparably harmed Appellants. (Pa120-122; Pa131). Appellants are multi-generational family-run businesses that have loyally supported the Sapporo brand for over 45 years. As a long-standing wholesaler of Sapporo products, Appellants are closely associated with the Sapporo brand, and the sudden loss of that brand if Appellants refused the proposed choice-of-law provision or arbitration clause "inevitably creates irreparable damages to the good will of the distributor." Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904 (2d Cir. 1990). Indeed, as also set forth in the Reply Certification of Takeda, throughout the parties' long relationship, Appellants have had to capitulate to Sapporo USA's demand and requirements, including but not limited to Sapporo USA's racist policies of restricting Appellants' sales to the Asian market. For these reasons, application of New York law would violate fundamental policy principles of New Jersey.

(B) New Jersey Has A Materially Greater Interest Than New York In This Matter And New Jersey Would Govern The Dispute Absent The Choice-Of-Law Provision (Pa5).

As a threshold matter, Courts have not imposed a high burden to establish the Restatement's exception to the choice-of-law provision based on the relative

interests of the state whose law is identified as the contractual governing law, and the state that has the greater interest in applying its own law.

New Jersey focuses on the dispute at issue and analyzes the "contacts or relationships with the relevant states to determine which state has a materially greater interest" to that specific dispute. Diversant, LLC, 2018 WL 1610957, *3 (citation omitted). As discussed above, Appellants are located in New Jersey, this matter does not affect any wholesalers located in New York, all the events set forth in the Verified Complaint occurred in New Jersey. See Newcomb v. Daniels, Saltz, Mongeluzzi & Barrett, Ltd., 847 F. Supp. 1244, 1250 (D.N.J. 1994). Moreover, Sanwa is a New Jersey corporation, Appellants' principal places of business are located in New Jersey, the Wholesaler Agreement was executed in New Jersey, Appellants perform their obligations—particularly the importation of Sapporo products and sales to New Jersey retailers—in New Jersey, and Appellants' injuries would be solely felt in this state. See e.g. Networld Commc'ns Corp. v. Croatia Airlines, D.D., 2014 WL 4662223 (D.N.J. Sept. 18, 2014) (declining to enforce a choice-of-law provision because, in part, New Jersey had a greater interest in the dispute since plaintiff was a New Jersey corporation, the contract was executed in New Jersey, the plaintiff performed its obligations in New Jersey and the injuries were felt in New Jersey).

Conversely, as discussed above, Sapporo USA is headquartered in California, and none of the Individual Defendants are located in New York. While Appellants make sales in New York, that is of little import. Like franchisees under the NJFPA, Wholesalers "geographically 'situated' in a forum state are to be the 'desired beneficiaries of [that state's] legislation in order to make their bargaining position more equal to manufacturers'…[T]o strip away the spokes of a 'hub-type' franchise would counter the purpose of such legislation." Instructional Sys., 130 N.J. at 345 (citations omitted). Moreover, New Jersey has a greater interest in the claims here, as the central issue in this litigation is the unlawful attempt to terminate the Wholesaler Agreement and the distribution rights conferred on Appellants who are headquartered and operate out of New Jersey—issues that the MBPA directly addresses.

Lastly, the facts and circumstances of this case satisfy the final requirement of Restatement § 187(b) for the Court to disregard the Wholesaler Agreement's choice-of-law provision and apply New Jersey law: under § 188 of the Restatement, absent the choice-of-law provision in the Wholesaler Agreement, "New Jersey law would govern the instant dispute."[9] Networld

[9] § 188 of the Restatement states, among other things, that contacts to be taken into account to determine the law applicable to an issue include: (1) place of contracting; (2) place of negotiation of the contract; (3) place of performance; (4) location of the subject matter of the contract; and (5) domicile, residence, nationality, place of incorporation and place of the business of the parties. See

Commc'ns, Corp., 2014 WL 4662223, at *3. As set forth above, New Jersey has the most significant relationship to the Wholesaler Agreement and the parties compared to New York. Therefore, since the operative facts giving rise to Appellants' claims are centered on New Jersey, New Jersey would be the most appropriate law to apply in the absence of any choice-of-law provision.

POINT III

THE AGREEMENT'S ARBITRATION CLAUSE IS UNENFORCEABLE UNDER NEW JERSEY LAW (Pa5-7)

A. The Wholesaler Agreement's Arbitration Clause Is Invalid Because It Does Not Expressly Waive Appellants' Rights To Access Courts When Appellants Are In A Much Weaker Bargaining Position To Sapporo USA (Pa5-7).

The arbitration provision in the Wholesaler Agreement violates New Jersey law and is therefore unenforceable. While the trial court and Defendants contended that the Federal Arbitration Act ("FAA") provides for enforcement of arbitration agreements in contracts, that preference is "not without limits." Garfinkel v. Morristwon Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001). A court must first apply "state contract-law principles…[to determine] whether a valid agreement to arbitrate exists." Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006). This preliminary question underscores

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Restatement (Second) of the Conflicts of Laws § 188(2) (1971). These contracts are to be evaluated according to their "relative importance with respect to the particular issue." Id.

the fundamental principle that a party must agree to submit to arbitration. See Garfinkel, 168 N.J. at 132.

Under New Jersey law, the first step is to ask "whether the agreement to arbitrate all, or any portion, of a dispute is the product of mutual assent." Kernahan v Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 319 (2019). In this context, the Court cannot favor arbitration in determining whether a contract has been legally formed. See Jaludi v. Citigroup, 933 F.3d 246, 255 (3d Cir. 2019) ("In applying state law at step one, we do not invoke the presumption of arbitrability."). The Supreme Court found that "under New Jersey law any contractual waiver-of-rights provision must reflect that the partie[s] ha[ve] agreed clearly and unambiguously to its terms." Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014). Thus, an arbitration clause "in some general and sufficiently broad way, must explain that the [party] is giving up [their] right to bring [their] clams in court." Id. at 447. The clause must convey that "arbitration is a waiver of the right to bring suit in a judicial forum." Id. at 444.

The ruling in Atalese has historically not been limited to consumer contract contexts, and the Supreme Court has never narrowed its applicability to exclude commercial contracts. See Est. of Noyes v. Morano, 2019 WL 149521, at *4, n. 3 (App. Div. Jan 8, 2019) ("we are not convinced that the Court in Atalese limited its holding only to consumer transactions," acknowledging that

"our courts have also applied its holding to other contracts and statutory causes of action"); Estate of Watson v. Piddington, 2020 WL 2710168 (App. Div. May 26, 2020) (in a dispute between members of an LLC, the Appellate Division upheld the trial court's determination that the arbitration provision was unenforceable since "nowhere in the agreements was there a statement that the right to sue was being waived").

The Appellate Division has recently clarified the applicability of Atalese in County of Passaic v. Horizon Healthcare Servs., Inc., 474 N.J. Super. 498 (App. Div. 2023) ("Passaic"), by ruling that the "express waiver of the right to seek relief in a court of law to the degree required by Atalese is unnecessary when parties to a commercial contract are sophisticated ***and possess comparatively equal bargaining power."*** Id. at 504. (emphasis added).

Moreover, the need for a clear explanation in the arbitration agreement is particularly important when a litigant may be waiving statutory rights. The Supreme Court emphasized that a "waiver of statutory rights 'must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively.'" Garfinkel, 168 N.J. at 132 (citing Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. Of Educ., 78 N.J. 122, 140 (1978)); see also Quigley v. KPMG Peat Marwick, LLP, 330 N.J. Super. 252, 273 (App. Div.), certif. denied, 165 N.J. 527 (2000) (noting that it

is a "well-settled principle that '[a] cause depriving a citizen of access to the courts should clearly state its purpose.'") (citation omitted); Itzhakov v. Segal, 2019 WL 4050104 (App. Div. Aug. 28, 2019) (invalidating an arbitration clause because the "Court must be convinced that [the party] intended to waive his statutory rights" through "[a]n unambiguous writing").

The arbitration provision in the Wholesaler Agreement states in relevant part as follows:

> This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York. Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in New York, New York pursuant to the rules and regulations of the American Arbitration Association.

(Pa69).

The express waiver requirement of Atalese applies here since there is a clear imbalance of power between Sapporo USA (brewer) and Appellants (wholesalers), that is not only factually supported by the evidence, but presumed in the MBPA itself. See N.J.S.A. § 33:1-93.13(b) (the purpose of the MBPA was in part to "protect beer wholesalers from unreasonable demands and requirements by brewers"); Winer Motors, 208 N.J. Super. at 666, n.3 (recognizing the "unequal bargaining power between franchiser and franchisee"). As previously discussed, Sapporo USA and Appellants do not have equal bargaining power. Appellants are a family-run business that have

loyally supported the Sapporo brand for over 45 years, and the sudden loss of Sapporo products—a brand Appellants are closely associated with—if Appellants attempted to negotiate, question or accept the proposed arbitration clause would cause them "irreparable damage." There is no basis to question the imbalance between Sapporo USA and Appellants, particularly in light of Sapporo USA's decades-long discriminatory policy of limiting Appellants to Asian markets, Sapporo USA's admitted antitrust policies for wholesalers, Sapporo USA's history of rummaging through Appellants' offices to copy confidential materials, and Sapporo USA's limitation on Appellants—though not other Sapporo wholesalers—from utilizing sub-jobbers. The need to have express waiver language is particularly necessary here because the Agreement's arbitration clause waives statutory rights to State Court and New Jersey law set forth in the MBPA for the very purpose of protecting wholesalers from such predatory behavior.

Clearly, the Wholesaler Agreement's arbitration clause falls woefully short of the "express waiver" language required under Atalese and Passaic and provides no explanation or language describing that the parties are waiving their rights, as well as provisions of the MBPA, to seek redress in State Court. This arbitration clause is therefore unenforceable as a matter of law.

B. There Is No Mutual Assent To Arbitrate MBPA Claims Since The MBPA Was Not Enacted When The Wholesaler Agreement Was Executed (Pa5-7).

There can be no "mutual asset" to arbitrate Appellants' MBPA claims under the Agreement because the MBPA did not exist when the parties executed the Agreement. See Quigley, supra, 330 N.J. Super. at 267-270 (finding that a plaintiff did not knowingly and voluntarily waive his right to a trial by jury on his statutory remedies because the statute providing plaintiff with a jury trial for his claims did not exist at the time he signed the contract at issue). In this case, the Wholesaler Agreement was executed in March 2005. (Pa72). The MBPA did not become law until December 15, 2005, and did not go into effect until approximately March 15, 2006. Appellants did not, and could not, have agreed to arbitrate statutory claims—nor waive the provisions of the MBPA requiring certain disputes to be resolved by a court—when those statutory rights and claims did not exist at the time the Wholesaler Agreement was signed. See Atalese, supra, 219 N.J. at 442-45 (any waiver of a right "must be a product of mutual assent" and "a meeting of the minds"). To determine otherwise, would permit brewers to force wholesalers to waive away rights that do not yet exist, and preemptively nullify any rights the Legislature intends to protect wholesalers with in the future.

The intent of the Legislature was for wholesalers to bring an action invoking the MBPA and addressing issues governed by the MBPA in Superior Court. See N.J.S.A. § 33:1-93.18(a); N.J.S.A. § 33:1-93.15 ("Whether the terms of a contract, agreement or relationship conform with the provisions of this section shall be determined by a court of this State…"). The Appellate Division recently stated in a matter relating to whether arbitration clauses in last will and testaments are valid that "we note that arbitration clauses that eliminate the courts' expected role in resolving will disputes are inconsistent with the detailed statutory scheme vesting the superior courts with the authority to adjudicate such issues." In the Matter of the Estate of Samuel P. Hekemian, 2023 WL 176098, at *12 (App. Div. Jan. 13, 2023). Likewise, the MBPA is a complex statutory scheme that expressly contemplates and articulates the Legislature's desire that the courts—not private arbitral bodies—enforce public policy in an area that "vitally affects the general economy and revenues of the State, as well as the public interest and public welfare." Sending this important litigation to the dark cavern of arbitration—potentially in another state and without the protection of the MBPA, as Defendants desire—is counter to the policy and intent of this State, and should make it even more essential that an arbitration clause be explicit in giving up the right to a determination in Superior Court, as the Legislature intended.

C. The Federal Arbitration Act Violates The Twenty-First Amendment Which Confers On States Unfettered Control Over The Sale And Structure Of Beverage Alcohol Distribution (Pa5-7).

Should the Court determine that the arbitration clause in the Agreement is enforceable under the FAA, the MBPA's provisions mandating adjudication of the parties' disputes by courts supersedes the FAA pursuant to the Twenty-First Amendment. Section 2 of the Twenty-First Amendment to the Constitution provides that the "transportation or importation into any State, Territory or possession of the United States or delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. U.S. Const. art. XXI, § 2. The U.S. Supreme Court states that the Twenty-First Amendment gives a state "virtually complete control over the importation and sale of liquor and the structure of the liquor distribution system." North Dakota v. United States 495 U.S. 423, 431 (1990) (citation omitted); see also Sea Girt Restaurant and Tavern Owners Ass'n, Inc. v. Borough of Sea Girt, New Jersey, 625 F. Supp. 1482, 1485 (D.N.J. 1986) ("The New Jersey courts have held consistently that this power to regulate the sale of alcoholic beverages is virtually limitless"). Whether the FAA preempts the exercise by New Jersey of a core power granted pursuant to the Twenty-First Amendment is a matter of first impression for New Jersey.

In deciding whether a state statute enacted pursuant to the Twenty-First Amendment should prevail, a two-step analysis should be applied. See 324 Liquor Corp. v. Duffy, 479 U.S. 335, 341 (1987). First, the threshold question is whether the statute does, in fact, conflict with federal law. Second, if the conflict does exist, the relevant inquiry is whether the state regulation is "so closely related" to the powers reserved by the Twenty-First Amendment that the regulation will prevail, regardless of any conflict with federal policies. Id. at 347.

As for the first question, the MBPA states that whether the terms of the MBPA conform with its provision "***shall*** be determined by a court of this State in the context of a specific case or controversy among wholesalers and brewers…" N.J.S.A. § 33:1-93.15(e) (emphasis added). Here, Appellants are challenging Defendants' improper Notices to terminate the Agreement. Appellants are also challenging the choice-of-law provision and arbitration agreement because they fail to "conform to State law," as required under the MBPA. While the MBPA mandates that these issues be "determined by a court of this State," the FAA purports to preempt any statute restricting arbitration. See Brayman Constr. Corp. v. Home Ins. Co., 319 F.3d 622, 627 (3d Cir. 2003) ("The FAA prevents state law from undermining parties' contracts to arbitrate"). Thus, there is a clear conflict between the FAA and the MBPA, whose power to

regulate the malt beverage industry is promulgated by the Twenty-First Amendment.

Regarding the second question, the Supreme Court has held that, when the State establishes regulations to "ensur[e] orderly market conditions, and raising revenue," then the "State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate." North Dakota, 495 U.S. at 432. The Supreme Court emphasized that state alcohol policies "are supported by a strong presumption of validity and should not bet set aside lightly." Id. at 433. In this case, the MBPA's purpose, as set forth in the statute, is to

> Foster responsible industry practices involving the moderate and responsible use of these beverages, ***to provide a framework for the malt alcohol beverage industry that recognizes and encourages the beneficial aspects of competition, to provide trade stability***, to maintain the three-tier distribution system, to protect the interests of the consumer regarding product quality and freshness and to achieve all facets of the legislatively declared public policy of this State
>
> …
>
> It is therefore fitting and proper to ***regulate the business relationship between brewers and wholesalers of malt alcoholic beverages and set forth their respective responsibilities to further the public policy of this State and protect beer wholesalers from unreasonable demands and requirements by brewers***, while devoting sufficient efforts and resources to the distribution and sale of malt alcoholic beverages.

N.J.S.A. § 33:1-93.13(b)-(c) (emphasis added). The legislative history of the MBPA supports this policy, as the New Jersey Senate Committee Statement for

the MBPA legislation states that the MBPA was intended to "establish[ ] a framework for damages and injunctive relief…and provides for actions that violate the committee substitute's provisions to be brought in the Superior Court of New Jersey." New Jersey Senate Committee Statement, A.B. 3619, 9/26/2005 (Pa144).[10]

Pursuant to the powers granted by the Twenty-First Amendment, the MBPA expressly included language mandating that disputes relating to the terms of a wholesaler agreement be resolved in Superior Court. This provision was designed to ensure stable brewer-wholesaler relationships, and that our Courts and judicial system—rather than unfamiliar, foreign, or unversed

[10] The court in John G. Ryan, Inc. v. Molson USA, LLC, 2005 WL 2977767 (E.D.N.Y. Nov. 7, 2005) addressed a similar issue of interplay between the FAA and Twenty-First Amendment in the context of New York's ABC Law and found that the ABC Law was not closely related to the powers given under the Twenty-First Amendment. As discussed above, however, the ABC Law only prohibited mandatory arbitration clauses; the parties were still free to resolve their claims by any means including arbitration, if they chose to do so. Thus, that statute's prohibition on such mandatory arbitration clauses was not viewed as a "necessary component" of the ABC Law's regulatory regime since its effects on the statute's regulation of alcohol were "indirect." By contrast, in this case, N.J.S.A. § 33:1-93.15(e) requires any dispute regarding the terms of the wholesaler agreement and their compliance with the MBPA be "determined by a court of this State." This mandatory language that disputes be resolved in New Jersey courts underscores that this is not a mere "indirect" provision but an integral and important aspect of maintaining "orderly market conditions." See Soc'y for Animal Rts., Inc. v. Mahwah Twp., 138 N.J. Super. 322 (Law Div. 1975), aff'd sub nom. 148 N.J. Super. 249 (App. Div. 1977) ("statutory use of the word 'shall' denotes the imperative and mandatory while 'may denotes only the permissive and directory").

arbiters—can confirm to the public that the MBPA and New Jersey public policy is followed. This provision would ensure "orderly market conditions" surrounding brewer and wholesaler relations, and is a power closely related to those envisioned by the Twenty-First Amendment. For these reasons, the MBPA supersedes the FAA and the arbitration clause should be deemed unenforceable.

POINT IV

THE TRIAL COURT'S FINDINGS ON ARBITRABILITY WERE INCORRECT (Pa7)

Though the trial court wrongly determined whether a valid arbitration clause existed, it nonetheless held that the Agreement's Arbitration Clause's reference to the American Arbitration Association ("AAA") rules means the question of arbitrability is for an arbitrator. This is incorrect. The law "presumes that a court, not an arbitrator, decides any issue concerning arbitrability." Morgan v. Sanford Brown Inst., 225 N.J. 289, 303 (2016); see Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 756 (3d Cir. 2016) ("It is presumed that courts must decide questions of arbitrability…"). This is because these threshold determinations are "'a necessary prerequisite' in fulfilling the court's gatekeeping function." MZM Constr. Co., Inc. v. New Jersey Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386, 398 (3d Cir. 2020) (citation omitted).

The burden of overcoming this presumption is "onerous." Chesapeake, 809 F.3 at 756. The presumption can only be overcome when there is "'clea[r] and unmistakabl[e]' evidence" that the parties "agreed to arbitrate arbitrability." First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (quoting AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986)). "Silence or ambiguous contractual language is insufficient to rebut the presumption." Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 331 (3d Cir. 2014) (quotation omitted).

Even under the FAA, "[judges] retain the primary power to decide questions of whether the parties mutually assented to a contract containing or incorporating a delegation provision." Cottrell v. Holtzberg, 468 N.J. Super. 59, 70 (App. Div. 2021). Rather, a "judicial forum is generally appropriate" to determine arbitrability and only once "a court makes a threshold decision that a valid agreement to arbitrate exists, it then considers the next issue, whether there is 'clear and unmistakable' evidence that the parties intended to delegate arbitrability questions to the arbitrator." Id. at 71 (citing Henry Schein, Inc. v. Archer and White Sales, Inc., 139 S. Ct. 524, 530 (2019)).

The trial court's statement that reference to the AAA rules indicates mutual assent that arbitrators determine arbitrability is not "clear and unmistakable" and does not satisfy the "onerous" presumption. Here, as noted

above, there is no valid arbitration agreement in the Agreement, nor is there a delegation clause, or determination on arbitrability, anywhere in the Agreement. Without "clear and unmistakable" evidence, a judicial forum is the only proper venue to make that determination. Accordingly, New Jersey has never "specifically addressed the issue" in a published decision and has often times ruled that mere reference to the AAA is not sufficient to satisfy the "clear and unmistakable" requirement. Schmidt v. Laub, 2020 WL 2130931 (App. Div. May 5, 2020); see also e.g. Ames v. Premier Surgical Ctr., L.L.C, 2016 WL 3525246, at *3 (App. Div. June 29, 2016) (though defendants argued that arbitrability is assigned "to an arbitrator via reference to the AAA rules, such delegation is not 'clearly and unmistakably established' by the language in the agreement…[t]o the extent defendants assert a valid delegation clause exists, we conclude any such delegation clause fails to comport" with New Jersey law.). Accordingly, to the extent that the issue of arbitrability is relevant, any such question should be determined by the court.

POINT V

SAPPORO USA'S WITHDRAWAL OF THE OCTOBER 4 NOTICES DOES NOT MOOT THIS APPEAL (Not Raised Below)

Sapporo USA's withdrawal of the Notices does not moot this appeal because Appellants are still entitled to affirmative relief. Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res., 532 U.S. 598,

608-609 (2001). As noted above, Sapporo USA has been enjoined from refusing to comply with the terms of the Agreement, or interfering with Appellants' ability to buy and resell Sapporo products during the course of this litigation. (Pa148). Sapporo USA's withdrawal of the Notices merely complies with the Order granting Appellants Motion for a Preliminary Injunction, and is not a voluntary cessation of its violations and breaches. See Hartnett v. Pennsylvania State Educ. Ass'n, 963 F.3d 301, 306 (3d Cir. 2020) (courts must be "skeptical of a claim of mootness when a defendant yields in the fact of a court order and assures us that the case is moot because the injury will not recur, yet maintains that its conduct was lawful all along").

In any event, Appellants are still entitled to a Declaratory Judgment that they were not in breach of the Agreement and that Sapporo USA had no basis to terminate the Agreement, to ensure that this false accusation is not a recurring tactic by Sapporo USA, and to establish that Appellants are entitled to monetary relief under the MBPA. See Navigators Specialty Ins. Co. v. Scarinci & Hollenbeck, LLC, CIV.09-4317 (WHW), 2010 WL 1931239, at *5 (D.N.J. May 12, 2010) (in a declaratory judgment action, the court stated that though there was "no controversy" with respect to the plaintiff's "current obligation to defend its insureds in the underlying Litigation, there most certainly is a controversy

with respect to amounts already incurred by [the plaintiffs] in defending the Underlying Action.") (quotation omitted) (emphasis in original).

The remaining causes of action against Defendants, namely breach of the MBPA, New York's ABC Law, breach of contract, unjust enrichment and breach of fiduciary duty, all entitle Appellants to damages, and attorney's fees and costs, regardless of Defendants' belated withdrawal of the Notices. These all remain "viable claims" for damages against Defendants. National Iranian Oil Co. v. Mapco Int'l, Inc., 983 F.2d 485, 490 (3d Cir. 1992) (internal citation omitted); Surrick v. Killion, 449 F.3d 520, 526 (3d Cir. 2006) ("[t]he burden of demonstrating mootness is a heavy one.") (internal citation omitted).

CONCLUSION

For the reasons set forth herein, Appellants respectfully request this Court reverse the trial court's Order.

Respectfully submitted,

MORITT HOCK & HAMROFF LLP

By *__/s/ James P. Chou*_____
James P. Chou
Marshall O. Dworkin

SUPERIOR COURT OF NEW JERSEY

Appellate Division

Docket No. A-001051-23T4

WINE OF JAPAN IMPORT, INC. and Sanwa Trading Co., Inc.,

Plaintiffs-Appellants,

v.

Sapporo U.S.A., Inc., Masashi Minami, Andrew Murphy and Takesha Miyahara,

Defendants-Respondents.

On Appeal from a Final Order of the Superior Court of New Jersey, Law Division, Morris County

Sat Below: Honorable Stephan C. Hansbury, J.S.C.

RESPONDENTS' BRIEF

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PRELIMINARY STATEMENT

Appellants Wine of Japan Import, Inc. and Sanwa Trading Co., Inc. ("Appellants") filed this action seeking to enjoin the potential termination of their Wholesaler Agreement with defendant Sapporo U.S.A. Inc. ("Sapporo USA"). In so doing, they seek to enforce the Wholesaler Agreement selectively and to avoid two of its key provisions – the arbitration and choice-of-law clauses. The Wholesaler Agreement specifically requires that Plaintiffs arbitrate any dispute relating to or arising from the Wholesaler Agreement and states that New York law applies. The trial court correctly enforced those provisions and dismissed the case with prejudice. This Court should affirm.

First, there is no dispute that Plaintiffs' claims all relate to or arise from the Wholesaler Agreement, which contains an arbitration clause. The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, generally requires enforcement of arbitration provisions in contracts involving interstate commerce and preempts any contrary provision of state law. The FAA applies as the Wholesaler Agreement grants Appellants the right to distribute Sapporo beer in two states, New York and New Jersey. Unable to contend that the FAA does not apply, Appellants contend that the FAA is invalid under the Twenty-First Amendment – a baseless argument that has previously been rejected.

Second, arbitration is also appropriate under state law regardless of whether New York or New Jersey law applies. The parties agreed in the Wholesaler Agreement that New York law governs their relationship. That choice-of-law should be enforced because New York bears a reasonable relationship to the parties and their transactions. Indeed, although the Court would not know it from reading Appellants' brief ("Pb") *90%* of Appellants' Sapporo sales are in New York. WOJ and Sapporo USA are also incorporated in New York, Sapporo USA was headquartered in New York when the Wholesaler Agreement was negotiated and signed, Sapporo maintains a New York State Liquor Authority license, and WOJ maintains federal and New York wholesaler licenses and a New York location as required by 27 U.S.C. § 203 and New York Alcoholic Beverage Control Law (the "ABC Law") § 53. Thus, New York has the most substantial relationship to the parties and the greatest interest in having its law applied. New York law, like the FAA, enforces arbitration clauses.

Third, even if New Jersey law applies, arbitration is still required. The arbitration provision of the Wholesaler Agreement was the result of an arm's length transaction between sophisticated commercial parties. Although Appellants argue that certain New Jersey case law requires that an arbitration agreement expressly waive the right to litigate in court, there is no such requirement for an

arbitration clause between sophisticated commercial parties. Thus, under New Jersey law, arbitration also is required.

Fourth, as the trial court correctly held, Appellants cannot selectively enforce only the clauses of the Wholesaler Agreement on which they base their claims while seeking to invalidate the clauses they now disavow – namely, the arbitration and choice-of-law clauses.

Fifth, the trial court correctly determined that the issue of arbitrability should be determined by the arbitration panel. The law is clear that, because the parties incorporated the American Arbitration Association ("AAA") Rules in the Wholesaler Agreement's arbitration clause, the arbitration panel must decide the threshold issue of arbitrability. This ruling too should be affirmed.

Sixth and finally, this appeal has been rendered moot. After the trial court issued its rulings, and in a good faith effort to end the parties' dispute and halt their legal spend, Sapporo retracted the termination notices giving rise to this lawsuit. Thus, Appellants no longer face the loss of their Sapporo distribution rights or any cognizable damages. If the trial court's rulings are not affirmed – which they should be – this appeal should be dismissed as moot.

PROCEDURAL HISTORY

Appellants filed their Complaint and an Order to Show Cause seeking a preliminary injunction (the "Preliminary Injunction Motion") on December 14, 2022. (Pa18-60.)[1] The trial court signed the Order to Show Cause on December 15, 2022. (*Id.*) On January 19, 2023, Appellees filed an opposition to the Preliminary Injunction Motion and also filed a Motion to Compel Arbitration and to Dismiss the Complaint (the "Arbitration Motion"). Appellants filed their reply papers in support of their Preliminary Injunction Motion on January 23, 2023. On February 7, 2023, Appellants filed their opposition to the Arbitration Motion. Appellees filed a reply in support of the Arbitration Motion on February 12, 2023.[2]

The trial court held oral argument for both motions on September 29, 2023. The trial court granted Appellants' Preliminary Injunction Motion from the bench and reserved judgment on the Arbitration Motion. (T3:2-5; 78:10-13.) On October 23, 2023, the trial court issued a decision and order granting Appellees' Arbitration Motion and dismissing the Complaint with prejudice. (Pa1-7.) Appellants filed a Notice of Appeal with this Court on December 7, 2023. (Pa8-17.)

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[1] References to Appellants' Appendix are labeled as "Pa". References to Respondents' Appendix submitted herewith are labeled as "Da".

[2] On September 25, 2023, Appellees submitted a letter to the trial court advising of a relevant post-submission opinion pertaining to the Preliminary Injunction Motion, *Autobar Systems of New Jersey v. Berg Liquor Sys., LLC, et al.*, 23-cv-3790 (MAS) (JBD), 2023 WL 5311499 (D.N.J. Aug. 16, 2023). (Da93-Da96.)

STATEMENT OF FACTS

A. Sapporo USA's Reliance on Distributors to Sell Sapporo Beer

Sapporo is a brand of beer. (Pa24 ¶ 3.) Sapporo Holding is a Japanese company that brews Sapporo beer. (Pa30 ¶ 26.) In 1984, Sapporo Holding founded Sapporo USA to help preserve Sapporo's high standard of quality throughout the United States. (*Id.*) Sapporo USA relies on distributors to sell Sapporo products nationally, including in New York and New Jersey. (Pa32-Pa33 ¶¶ 32, 40.)

New Jersey and New York have each enacted beer distribution statutes, known respectively as the New Jersey Malt Beverage Practices Act, N.J.S.A. § 33:1-93.12 *et seq*. (the "MBPA") and the New York ABC Law. Although omitted from Appellants' recitation of the policies embodied by the MBPA and the ABC Law, those statutes recognize the need for beer distributors (also known as wholesalers) to invest in their businesses and to perform their basic responsibilities.

For example, the New Jersey Legislature included the following detailed findings and declarations in the MBPA:

> It is therefore fitting and proper to regulate the business relationship between brewers and wholesalers of malt alcoholic beverages and set forth their respective responsibilities to further the public policy of this State and protect beer wholesalers from unreasonable demands and requirements by brewers, *while devoting sufficient efforts and resources to the distribution and sale of malt alcoholic beverages*.

N.J. Rev. Stat. § 33:1-93.13(2)(c) (emphasis added).

> Every brewer shall contract and agree in writing with a wholesaler for all supply, distribution and sale of the products of the brewer in this State, and each contract shall provide and specify the rights and duties of the brewer and the wholesaler with regard to such supply, distribution and sale. The terms and provisions of such contracts shall be reasonable, *reflect the parties' mutuality of purpose and community of interest in the responsible sale and marketing of their products*, and shall comply with and conform to State law and the terms of this act.

N.J. Rev. Stat. § 33:1-93.15(4)(a) (emphasis added).

Similarly, the New York Legislature enacted the ABC Law with the purpose of "supporting economic growth, job development, and the state's alcoholic beverage production industries and its tourism and recreation industry[.]" N.Y. Alco. Bev. Cont. Law § 2. The New York Legislature also found that the "regulation of business relations between brewers and beer wholesalers is necessary and appropriate to the general economy and tax base of this state and in the public interest." N.Y. Alco. Bev. Cont. Law § 55-c.

Thus, both states' legislatures envisioned that brewers and wholesalers must each sustain a productive business relationship that boosts each state's economy.

B. Appellants Agreed to Use Their Best Efforts to Sell Sapporo Beer and to Arbitrate Any Disputes Under The Wholesaler Agreement

Sapporo USA works with thirteen distributors that sell Sapporo beer in the New York City metropolitan area (known as "Metro-New York") and the state of New Jersey. (Da11-Da13 ¶¶ 7, 11.) These distribution agreements are non-

exclusive. (Da13-Da14 ¶¶ 11, 16.) Thus, distributors compete with each other on service, brand selection, and other commercial factors.[3] (*Id.*)

The relationship between Sapporo USA and Appellants is governed by a Wholesaler Agreement. (Pa61-74.) The Wholesaler Agreement defines Appellants' "non-exclusive" territory as Metro-New York and the entire state of New Jersey (the "Territory"). (Pa63 § 1(c), Pa74.) Sapporo USA also works with other distributors that sell Sapporo beer in the Territory. (Pa31 ¶ 28, Pa35-Pa36 ¶ 49.)

In recognition of the Appellants' importance to the success of the Sapporo brand in their Territory, Section 1(a) of the Wholesaler Agreement states:

> Sapporo and Wholesaler recognize and agree that it is essential to their mutual objectives under this Agreement that Wholesaler maintain financial and competitive capabilities to achieve efficient and effective distribution of Sapporo's products in Wholesaler's Territory (as defined hereinafter) and to assure continued protection of the high quality and integrity of Sapporo products.

[3] Appellants falsely accuse Sapporo USA of violating antitrust laws (notwithstanding that Appellants asserted no antitrust claim) based on Mr. Minami's statement that "Distributors are independent businesses protected by state licensing and franchise laws. Accordingly, it is up to the distributors to *compete* on service, brand selection, and other commercial factors and to determine through their own arrangements with each other and their customers which accounts each distributor will service." (Da13 ¶ 11) (emphasis added). Appellants ignore Mr. Minami's clear statement that distributors are required to "compete" with each other and, instead, seek to twist his statement into an admitted antitrust violation. It is no such thing. Appellants' only purported support for their position is an irrelevant U.S. Supreme Court case involving the distribution of sales territories among members of a cooperative association of supermarkets. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 602 (1972). Appellants' claims of illegality are false and, in any event, irrelevant to whether the Wholesaler Agreement's arbitration should be enforced.

(Pa63 § 1(a).) In furtherance of that goal, Appellants agreed as "Wholesaler" to use their "best efforts" to promote the sale and distribution of Sapporo Products in Appellants' Territory. Specifically, Wholesaler agreed:

> To use its best efforts to promote the sale and distribution of Sapporo's Products in all possible accounts in its market area. Wholesaler shall furnish and maintain at its own expense the sale and distribution organization suitable and sufficient for the proper effective performance of its obligations herein. Wholesaler shall conduct such sales, promotional and advertising activities reasonably necessary to fulfill its obligations[.]

(*Id.* § 1(d)(i).)

Appellants and Sapporo USA both have substantial ties to New York. Most notably, approximately 90% of Appellants' Sapporo sales by volume are in New York and only 10% are in New Jersey. (Da12 ¶ 10.) In addition, WOJ and Sapporo USA are both New York corporations. (Pa28-Pa29 ¶¶ 16, 18.) Sapporo USA was headquartered at 11 East 44th Street, Suite 708 in New York City when the Wholesaler Agreement was signed. (Pa63.) WOJ also has a federal wholesaler permit and a New York wholesaler license at a New York office and warehouse. (Da63-66.) In recognition of these facts, the Wholesaler Agreement states in Section 11, "This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York." (Pa69.)

Finally, and most relevant to this appeal, the parties also agreed to arbitrate any disputes between them. Specifically, Section 11 of the Wholesaler Agreement

states, "Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in New York, New York pursuant to the rules and regulations of the American Arbitration Association." (*Id.*) In addition, Sapporo USA and Appellants further agreed that they each "hereby irrevocably consent to jurisdiction of the State of New York over their person and waive any defense based on improper venue, inconvenient venue arbitration shall be deemed a breach of this Agreement." (*Id.*)

C. Sapporo USA Meets with Appellants to Discuss How to Improve Their Poor Performance

Appellants' sales performance was by far the worst of any Sapporo distributor in the Territory since well before the COVID-19 pandemic began in 2020. (Da15-Da17 ¶¶ 19-25.) In addition, although most Sapporo distributors had recovered their 2019 sales levels by 2021 and exceeded them by 2022, Appellants' sales volume was down over 20% from 2019 to 2022. (*Id.* ¶¶ 23-24.)

On September 29, 2022, Sapporo USA senior executives traveled to Appellants' offices to meet. (Pa34-38 ¶¶ 44-57; Da19-23 ¶¶26-46; Da2-Da8 ¶¶ 6-26.) During the meeting, Sapporo USA's representatives explained that they were concerned that Appellants' sales performance was substantially worse than other distributors' sales performance in the Territory. (Pa35-Pa36 ¶¶ 49-51; Da19-Da21 ¶¶ 26, 33-34; Da2 ¶¶ 4-5; Da4 ¶ 13.) Sapporo USA representatives shared sales data demonstrating this disparity. (Pa35-Pa36 ¶ 49; Da20-Da21 ¶ 34; Da4 ¶ 13.)

In response, Appellants were defensive. (Pa35-Pa38 ¶¶ 49-56.) They claimed that they were performing worse than their competitors, at least in part, because their competitors engaged in "unlawful" or "illegal bundling" of beer with free or heavily discounted food items, whereas Appellants did not. (Pa36-37 ¶¶ 53-54, Pa42 ¶ 74.) Contrary to Appellants' assertion, Sapporo USA never suggested or told Appellants to do anything illegal, but rather suggested engaging in various legal promotional activities that may increase sales. (Da21-Da23 ¶¶ 38-39, 42-43; Da6-Da7 ¶¶ 21, 25.)

Appellants also blamed their decreased sales on the COVID-19 pandemic, claimed that Sapporo USA prohibited Appellants from selling to certain accounts, and asserted that Sapporo USA provided insufficient promotional support. (Da24-Da29 ¶¶ 51-52, 55, 65, 67-71.) Sapporo USA representatives disagreed and explained that COVID-19 had impacted the other local distributor who sold to so-called "Asian" accounts, and yet that distributor had exceeded its pre-pandemic sales levels. (Da16-Da21 ¶¶ 22-25, 34, 37; Da4-Da5 ¶¶ 13-18.)

Appellants also stated that they only had three salespeople to cover the entire Territory, which is both geographically expansive and densely populated. (Da6 ¶ 22.) Not only is such a small salesforce inadequate, but Sapporo USA understood that the salespeople were delivering products to customers – diverting valuable time and resources from sales and marketing. (Da2 ¶ 5, Da6 ¶ 23; Da13 ¶ 12; Da21 ¶ 37.)

Appellants also claim that Sapporo USA executive Andrew Murphy "insulted Appellants and their Japanese customs, used profane and insulting language, and falsely accused Appellants of generating poor sales numbers for 2022, using misleading data." (Pb at 11.) Sapporo USA – a company whose heritage and many of its executives are Japanese – strongly disputed those allegations. (Da19-Da23 ¶¶ 26-46; Da2-Da9 ¶¶ 6-30.) Indeed, if Mr. Murphy engaged in such behavior, his colleagues – two of whom are Japanese and one of whom is of Japanese descent – would have intervened. (Da19-Da20 ¶¶ 30-31.)

At the end of the meeting, Sapporo USA's attendees requested that Appellants present solutions to increase Appellants' sales. (Pa36-Pa37 ¶ 53; Da23 ¶¶ 44-46; Da7-Da8 ¶¶ 25-26.) However, the meeting ended without a resolution or an agreed-upon path forward. (Pa38 ¶ 57; Da ¶¶ 45-46; Da7-Da8 ¶ 26.)

D. Sapporo USA Sends Appellants Breach Notices and Provides an Opportunity to Cure

By letters dated October 4, 2022, Sapporo USA advised Appellants that they had violated the Wholesaler Agreement by failing to use their best efforts to promote the sale and distribution of Sapporo products in their Territory and summarized Appellants' sales deficiencies (the "Notices"). (Pa38-Pa39 ¶ 59; Pa41-Pa42 ¶¶ 71-72; Pa76-Pa79.) The Notices further explained that Appellants' use of salespeople to deliver products was negatively impacting Appellants' sales performance as it was "not adequate to add new accounts and maintain effective

sales relationships with the large number of accounts in the Metro-New York area . . . ." (Pa77; *see* Pa79.)

Sapporo USA requested that Appellants provide a written plan of corrective action to cure the deficiencies by October 24, 2022, and, as evidence that Appellants were exercising their best efforts to sell Sapporo beer, to restore their sales volumes to 96% of their calendar year 2019 sales level within approximately 120 days or risk termination. (Pa41-Pa42 ¶¶ 72, 75; Pa76-Pa79.) The Notices also stated that Sapporo USA was willing to discuss the sale of Appellants' distribution rights to another distributor if Appellants preferred. (Pa42 ¶ 75; Pa77; Pa79.)

E. Appellants Provide No Corrective Plan and Instead Offer to Sell Their Distribution Rights

Appellants responded to the Notices by letters dated October 11, 2022. (Pa42 ¶ 76; Pa82-Pa86.) Instead of providing a plan to improve their performance, Appellants claimed insult and denied any breach of the Wholesaler Agreement. (Pa42-Pa43 ¶ 77; Pa82-Pa86.) Yet Appellants nonetheless invited Sapporo USA to make an offer for Appellants' Sapporo distribution rights "using an appropriate industry multiple of no less than 5x." (Pa85.)

F. Sapporo USA Accepts Plaintiffs' Offer to Sell Their Distribution Rights and Plaintiffs Respond by Filing Suit

Because Appellants stated that were willing to sell their distribution rights to another distributor, Sapporo USA approached other distributors to determine if they

were interested in buying those rights. (Pa43 ¶ 78; Pa85; Da38-Da51.) By letter dated November 30, 2022, Sapporo USA's counsel advised Appellants' counsel that two distributors were willing to purchase Appellants' distribution rights. (Da38.)

Appellants responded by filing this lawsuit on December 14, 2022. Appellants falsely claimed (among other things) that, despite the clear invitation to Sapporo USA to obtain an offer from another distributor to buy Appellants' Sapporo distribution rights at a specific industry-standard multiple, Sapporo USA had improperly shared Plaintiffs' sales information with other distributors to obtain offers. (Pa43-Pa44 ¶¶ 79-84; Pa82-86; Da27 ¶ 59.) Appellants also asserted that the offer was "insultingly low" and made no counteroffer. (Pa43 ¶ 78.)

G. The Trial Court Rules, Sapporo USA Withdraws the Notices, and Appellants Appeal

On September 29, 2023, the trial court granted Appellants' Motion for a Preliminary Injunction. On October 23, 2023, the trial court granted Sapporo USA's Arbitration Motion and directed the parties to "submit this dispute to binding arbitration before the American Arbitration Association in New York, New York pursuant to Section 11 of the Wholesaler Agreement between [Appellants] and Sapporo USA." (Pa2.)

Appellants did not initiate arbitration. Accordingly, on November 3, 2023, Sapporo USA's counsel called Appellants' counsel to discuss whether and when Appellants would commence arbitration and to revisit Sapporo USA's buy-out offer.

(Da77.) Appellants' counsel advised Appellees' counsel that Appellants would not make a counteroffer to Sapporo USA's buy-out offer and that Appellants wanted to renegotiate the Wholesaler Agreement. (*Id.*)

On November 14, 2023, Sapporo USA's counsel sent a letter to Appellants' counsel expressing Sapporo USA's disappointment over Appellants' refusal to entertain Sapporo USA's buy-out offer after having invited that offer in their October 11, 2022 letters. (*Id.*) However, in a good faith attempt by Sapporo USA to end this litigation for the benefit of all parties, Sapporo USA's counsel withdrew the Notices because "it is in all parties' interest to end their dispute and continue operating under the Wholesaler Agreement." (*Id.*) Notwithstanding that Sapporo USA had withdrawn the Notices on December 7, 2023, and continues to supply Appellants with beer under the Wholesaler Agreement, Appellants filed a Notice of Appeal with this Court.

ARGUMENT

I. PUBLIC POLICY STRONGLY FAVORS ENFORCING ARBITRATION AGREEMENTS

This Court reviews orders compelling arbitration *de novo*. *Goffe v. Foulke Mgmt. Corp*., 238 N.J. 191, 207 (2019). In conducting this review, this Court has been "mindful of the strong preference to enforce arbitration agreements, both at the state and federal level." *Pandya v. Sky Zone Lakewood*, No. A-5064-18T4, 2020 WL 2036645, at *2 (N.J. Super. Ct. App. Div. Apr. 28, 2020) (Da144-Da147)

(citation omitted). Indeed, "the affirmative policy of this State, both legislative and judicial, favors arbitration as a mechanism of resolving disputes." *Williams v. Ysabel*, No. A-1391-22, 2023 WL 5768422, at *3 (N.J. Super. Ct. App. Div. Sept. 7, 2023) (Da152-Da156) (citation omitted). That policy should be enforced here.

II. THE FAA REQUIRES ENFORCEMENT OF THE WHOLESALER AGREEMENT'S ARBITRATION CLAUSE

The trial court properly granted the Arbitration Motion and ordered the parties to submit this dispute to binding arbitration before the AAA in New York, New York pursuant to Section 11 of the Wholesaler Agreement. (Pa1-Pa2.) As discussed in greater detail below – and largely glossed over by Appellants – the FAA governs because the Wholesaler Agreement is a contract involving interstate commerce that contains an arbitration provision and no exception to the FAA applies. Indeed, Appellants concede (as they must) that they engage in interstate commerce as the Wholesaler Agreement "appointed Appellants as non-exclusive wholesalers of Sapporo products in the New York tri-state area and the entire state of New Jersey". (Pb 9-10; Pa74.) Even if FAA does not apply – which it does – the trial court correctly held that Appellants were still required to submit their claims to arbitration under both New York and New Jersey state law. (Pa5-7; *see also* N.J.S.A. § 2A:23B-6(b), 7(b); CPLR 7503(a).)

A. The FAA Requires Enforcement of Arbitration Clauses Involving Interstate Commerce and Preempts Conflicting State Law

The FAA generally requires enforcement of written arbitration provisions in contracts that – like the Wholesaler Agreement – involve interstate commerce. Specifically, when a contract involving interstate commerce contains a valid arbitration clause, it "shall be" enforced under section 2 of the FAA, which states:

> A written provision in any . . . *contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract* or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable*.

9 U.S.C.A. § 2 (emphasis added). The FAA further provides in Section 4 that the court "shall" direct the parties to arbitration:

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration . . . the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

See 9 U.S.C.A. § 4.

The FAA's general requirement that arbitration clauses in contracts involving interstate commerce be enforced has repeatedly been upheld by the United States Supreme Court and by state courts, including in New Jersey and New York. *See, e.g.*, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) ("Because the statute provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause, [] it is perfectly clear that the FAA encompasses a wider

range of transactions than those actually in commerce – that is, within the flow of interstate commerce.") (internal quotation marks and citations omitted); *Antonucci v. Curvature Newco, Inc.*, 470 N.J. Super. 553, 564 (App. Div. 2022) ("[T]he FAA protects arbitration agreements involving interstate commerce"); *Reid v. Goldman, Sachs & Co.*, 586 N.Y.S.2d 459, 460 (Sup. Ct. N.Y. Co. 1992) (holding that the FAA applies to any written agreement to arbitrate where interstate commerce is involved), *aff'd*, 590 N.Y.S.2d 497 (1st Dep't 1992), *aff'd sub nom. Fletcher v. Kidder, Peabody & Co.*, 601 N.Y.S.2d 686 (1993).

Applying the FAA is particularly appropriate here given the parties and their contractual relationship. The Wholesaler Agreement covers two states, the parties are incorporated in different states, and Appellants hold multiple federal permits to engage in interstate commerce.[4] (Pa28-Pa29 ¶¶ 16-17; Da63-Da66.)

In arguing that the Wholesaler Agreement's arbitration clause is unenforceable under New Jersey law, Appellants ignore that the FAA preempts any state laws that "stand as an obstacle to the accomplishment of the FAA's objectives." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011) ("Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations.").

[4] WOJ and Sapporo USA are incorporated in New York while Sanwa is incorporated in New Jersey. (Pa28-Pa29 ¶¶ 16-18.) Sapporo USA and WOJ hold New York State Liquor Authority licenses and New Jersey Division of Alcoholic Beverage Control licenses to sell alcoholic beverages within each jurisdiction. (Da63-Da66.)

See also Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."); *John G. Ryan, Inc. v. Molson USA, LLC*, No. 05-cv-3984 (NGG)(JMA), 2005 WL 2977767, at *1 (E.D.N.Y. Nov. 7, 2005) (Pa204-Pa220) (holding that the FAA preempts the ABC Law's anti-arbitration prohibition); *Matter of GAF Corp. v. Werner*, 495 N.Y.S.2d 312, 317-18 (1985) (approving order to compel arbitration under 9 U.S.C. § 4 and holding that state courts are required to issue orders to arbitrate where section's conditions are met); *Fletcher*, 601 N.Y.S.2d at 689 ("A further basic principle that is essential to our analysis is the corollary tenet that, in situations where the FAA is applicable, it preempts State law on the subject of the enforceability of arbitration clauses."); *Antonucci*, 470 N.J. Super. at 564 ("[A] state law that conflicts with the FAA or frustrates its purpose violates the Supremacy Clause of the United States Constitution.") (citing U.S. Const. art. VI, cl. 2); *Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc.*, 240 N.J. Super. 370, 376 (N.J. Super. Ct. App. Div. 1990) ("The Federal Arbitration Act constitutes a congressional declaration of a liberal federal policy favoring arbitration agreements and preempts state arbitration law for contracts involving interstate commerce.").

Appellants also disregard that federal, New Jersey, and New York public policy all strongly favor arbitration. *See, e.g.*, *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."); *Hojnowski v. Vans Skate Park*, 187 N.J. 323, 342 (2006) ("[The New Jersey] Legislature codified its endorsement of arbitration agreements in the Arbitration Act, N.J.S.A. 2A:24-1 to -11, which . . . 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'".) (quoting N.J.S.A. 2A:24-1); *Wilson v. PBM, LLC*, 140 N.Y.S.3d 276, 282 (2d Dep't 2021) ("Arbitration is a matter of contract, and arbitration clauses, which are subject to ordinary principles of contract interpretation, must be enforced according to their terms.") (citation omitted).

Indeed, the FAA, the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to 32 ("NJAA"), and the New York Arbitration Act, C.P.L.R. § 7501 *et seq.* ("NYAA"), each support enforcing written arbitration provisions. *See, e.g.*, *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 84-85 (2002) (explaining that arbitration is a favored mechanism for resolving disputes as a matter of federal and New Jersey state policy); *Stark v. Mold Spitz DeSantis & Stark, P.C.*, 845 N.Y.S.2d 217, 221 (2007) (recognizing New York's "long and strong public policy favoring arbitration") (internal quotations and citation omitted).

As discussed in greater detail below, no exception to the FAA applies. Thus, this case must be submitted to arbitration.

B. The FAA Does Not Violate the Twenty-First Amendment

Seeking to circumvent the FAA, Appellants argue that "the MBPA's provision mandating adjudication of the parties' disputes by courts supersedes the FAA pursuant to the Twenty-First Amendment." (Pb at 42-46.) This specious argument has already been rejected.

Section 2 of the Twenty-First Amendment states, "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The United States Supreme Court has explained that Section 2 of the Twenty-First Amendment "allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests, but it does not license the States to adopt protectionist measures with no demonstrable connection to those interests." *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2474 (2019).

In *Ryan,* a beer distributor claimed that the anti-arbitration provision in the ABC Law trumped the FAA's enforcement of arbitration clauses. Specifically, ABC Law § 55-c(7)(c) states, "No brewer or beer wholesaler may impose binding arbitration of any issue as a term or condition of an agreement." *Ryan*,

2005 WL 2977767, at *4 (Pa204-Pa220). The court found that this anti-arbitration clause does not fall within the "core" of the Twenty-First Amendment because it is "a purely procedural matter." *Id.* at *10.[5]

The same is true of the MBPA's anti-arbitration provision. Contrary to Appellants' assertion (Pb at 45, n.10), N.J.S.A. § 33:1-93.15(e) is substantively the same as ABC Law § 55-c(7)(c). The former law states that the "terms of a contract, agreement or relationship conform with the provisions of this section shall be determined by a court of this State in the context of a specific case or controversy among wholesalers and brewers. . . ." The latter law states, "No brewer or beer wholesaler may impose binding arbitration of any issue as a term or condition of an agreement." Thus, the MBPA purports to require parties to bring their claims in court while the ABC Law purports to bar arbitration – they are mirror images of one another. Both plainly "govern[] a procedural matter affecting only the forum in which a dispute will be considered." *Ryan*, 2005 WL 2977767, at *11 (Pa204-

[5] The other cases that Appellants cited are distinguishable or undermine their position. In *North Dakota v. United States*, the Supreme Court found that state liquor labeling and reporting regulations "[fell] within the core of the State's power under the Twenty-first Amendment," and thus were not preempted by a federal statute governing alcohol on military bases. 495 U.S. 423, 432 (1990). In *324 Liquor Corp. v. Duffy*, the Supreme Court held that New York's statutes on liquor pricing could not prevail over the Sherman Act, notwithstanding the Twenty-First Amendment. 479 U.S. 335, 341-43 (1987). Both cases involved core substantive issues addressed by the Twenty-First Amendment, not procedural matters.

Pa220). Accordingly, the Twenty-First Amendment does not apply let alone nullify the FAA and the Wholesaler Agreement's arbitration clause must be enforced.

III. THE TRIAL COURT CORRECTLY ENFORCED THE WHOLESALER AGREEMENT'S CHOICE-OF-LAW PROVISION

In arguing that the Wholesaler Agreement's arbitration clause should not be enforced under the FAA, Appellants claim that state law applies to determine if a "valid" arbitration agreement exists and seek to apply New Jersey law to determine validity. (Pb at 35.) However, Section 11 of the Wholesaler Agreement states that New York law governs the agreement. (Pa69) ("This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York."). Indeed, Appellants brought a claim *under New York's ABC Law*. (Pa50-51.) The trial court correctly applied New York law because "no fundamental policy of New Jersey is contravened by applying New York law to the substantive claims." (Pa5.) That ruling should be affirmed.

A. The MBPA Does Not Override the Parties' Choice-of-Law

Appellants contend the MBPA preempts the parties' selection of New York law. (Pb at 15-17.) However, as the trial court correctly observed, "It is well settled that the law of the state chosen by the parties will be honored so long as that choice does not contravene a fundamental policy of New Jersey." (Pa5) (quoting *Winer Motors, Inc. v. Jaguar Rover Triumph, Inc.*, 208 N.J. Super. 666, 671 (App. Div. 1986)). *See also S.K.I. Beer Corp. v. Baltika Brewery*, 443 F. Supp. 2d 313,

324 (E.D.N.Y. 2006) ("Public policy concerns abrogate a contracted-for forum selection clause only in exceptional circumstances.") (citation omitted). Here, no "exceptional circumstances" warrant abrogating the parties' choice-of-law.

To begin, Appellants cite no case invalidating a choice-of-law provision in a wholesaler agreement. (Pb 15-17.) Moreover, the principal case on which Appellants rely, *Fairfax Financial Holdings Ltd. v. S.A.C. Capital Mgmt., L.L.C.*, 450 N.J. Super. 1 (App. Div. 2017), undermines their position. After noting that New Jersey and federal law recognize that a plaintiff may maintain a private civil RICO cause of action whereas New York law does not, the court agreed that the trial court *correctly applied New York law* in dismissing the RICO claim. *Id.* at 33, 57. The court recognized that a choice-of-law analysis "is preempted when our Legislature has determined that New Jersey public policy requires the application of our substantive law whenever our courts have jurisdiction over the kind of claim at issue, regardless of the interest of another state," but concluded "that our Legislature has not made such a declaration for cases like this, either (a) expressly, or (b) by implication." *Id.* at 43-44. The court further explained:

> If a statute declares that a substantive rule applies in a situation that would otherwise pose a choice-of-law question, New Jersey courts would follow that directive even when the law of other jurisdictions dictated a contrary result. [] That understanding conforms with the Second Restatement's instruction that, subject to constitutional restrictions, a court will follow a statutory directive of its own state on [choice-of-law]. . . . The absence of such a declaration in an enactment implies the Legislature intended application only to conduct or results

> that occur within the State, and that it did not have an interest in facilitating or preventing developments occurring elsewhere.

Id. at 44-45 (internal quotations and citations omitted).

Here, the New Jersey Legislature has not required the application of MBPA to *out-of-state* conduct. The MBPA states:

> Every brewer shall contract and agree in writing with a wholesaler for all supply, distribution and sale of the products of the brewer *in this State*, and each contract shall provide and specify the rights and duties of the brewer and the wholesaler with regard to such supply, distribution, and sale. The terms and provisions of such contracts shall be reasonable, reflect the parties' mutuality of purpose and community of interest in the responsible sale and marketing of their products, and shall comply with and conform to *State law* and the terms of this act.

N.J. Stat. Ann. §§ 33.1-93.15(a) (emphasis added).

The ABC Law contains similar provisions. It defines a "brewer" as "any person or entity engaged primarily in business as a brewer, manufacturer of alcoholic beverages, importer, marketer, broker or agent of any of the foregoing who sells or offers to sell beer to a beer wholesaler *in this state* or any successor to a brewer." N.Y. Alco. Bev. Cont. Law § 55-c(2)(b) (emphasis added). The ABC Law states, "It is hereby declared as the policy of the state that it is necessary to regulate and control the manufacture, sale and distribution *within the state* of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law[.]" N.Y. Alco. Bev. Cont. Law § 2.

As demonstrated by the "in this state" and "within the state" language in both the MBPA and the ABC Law, the purpose of these statutes "is not to regulate out-of-state transactions, since [they] clearly aim[]to regulate those transactions 'within the state.'" *S.K.I.*, 443 F. Supp. 2d at 321. Neither statute states that it preempts a choice-of-law provision, as doing so would have raised serious constitutional issues. *See Amtec Int'l of NY Corp. v. Polish Folklore Import Co., Inc.*, No. 20-cv-3, 2022 WL 992565, at *6 (E.D.N.Y. March 31, 2022) (Da85-Da92) (recognizing that such an argument would "raise[] constitutional concerns" because it "would mean that any transaction in the world with a licensed New York wholesaler is covered by the New York beer distribution statute. The constitutional concerns apply equally to the New Jersey distributor statute."). "Because such an extensive reach would likely constitute 'an impermissible intrusion into the affairs of other states,'" this Court should reject Appellants' contention that the MBPA preempts the parties' choice of New York law. *Fairfax*, 450 N.J. Super. at 44 (quoting *O'Connor v. Busch Gardens*, 255 N.J. Super. 545, 549-50 (App. Div. 1992)).

B. The Restatement § 187(2) Exceptions Neither Apply Nor Warrant Overriding the Parties' Contractual Choice-of-Law

Appellants next argue that the Restatement (Second) of Conflicts of Law (the "Restatement") invalidates the parties' choice of New York law. (Pb at 17-35.) Under Restatement § 187(2), a contractual choice-of-law will be honored unless:

> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence of an effective [choice-of-law] by the parties.

As discussed below, neither exception applies because New York has a substantial relationship to the parties and their transactions – indeed, 90% of Appellants' Sapporo sales are in New York. Accordingly, New York also has the materially greater interest in this dispute and, in any event, applying New York law would not violate a fundamental policy of New Jersey and New York would be the most appropriate law to apply absent any choice-of-law provision.

i. New York Has a Substantial Relationship with the Parties and Their Transactions

The first prong of the Restatement test requires a substantial relationship between the chosen state and the parties or the relevant transactions and a reasonable basis for selecting that state's law to avoid invalidation of the parties' selection of New York law. *See* Restatement § 187(2)(a). This prong is easily satisfied here.

Although Appellants try to hide it, it is undisputed that 90% of Appellants' Sapporo sales are in New York. (Da12 ¶ 10.) In addition, WOJ and Sapporo USA are both New York corporations. (Pa28-Pa29 ¶¶ 16, 18.) When the Wholesaler Agreement was negotiated, Sapporo USA was headquartered in

New York. (Pa63.) WOJ also holds a New York wholesaler license and federal wholesaler and importer permits in Long Island City, New York. (Pa28-Pa29 ¶¶ 16-17; Da63-Da66.)

Appellants' attempts to minimize these New York contacts each fail. *First*, as to place of performance, the Restatement states that a substantial relationship "will be the case, for example, when this state is that where performance by one of the parties is to take place." Restatement § 187, cmt. f. That requirement is plainly met as 90% of Appellants' Sapporo sales are in New York.

In addition, the primary case on which Appellants rely, *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 130 N.J. 324, 342 (1992), is easily distinguished.[6] That case was brought by a computerized educational-learning system distributor under the New Jersey Franchise Practices Act. It was not an action brought by a malt beverage distributor under the MBPA or ABC Law. The court also held that the "exception set forth in part (a) of the Restatement approach *does not* apply because [defendant] is headquartered in California, and hence California law has a 'substantial relationship to the parties.'" *Id.* at 342 (emphasis added). Finally, as discussed in greater detail below, Appellants'

[6] Appellants' citation to *Winer Motors* is also misplaced because the franchisee in that case was not incorporated in – nor were most of its sales in – the same state whose law applied per the contract. *See Winer Motors*, 208 N.J. Super. at 671, 677.

hyperbolic claim that this Court would "abandon" Plaintiffs and "New Jersey's interest in protecting its companies" (Pb at 22) ignores that the ABC Law also protects these interests.

Second, Appellants' argument that a party's place of incorporation does not constitute a substantial relationship with that state again contorts the case law. Appellants cite *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128, 133 (7th Cir. 1990), in which the Seventh Circuit found that the *only* New York connection was defendant's incorporation in New York. Here, there are multiple New York connections – most notably that 90% of Appellants' Sapporo sales are in New York.

Third, Appellants contend that Sapporo being headquartered in New York at the time the Wholesaler Agreement was negotiated and signed is not "relevant to the analysis" and "fails to explain why New York would have an interest in a company that is no longer headquartered there." (Pb at 21.) This contention ignores that a "substantial relationship" exists "when [the chosen] state is the place of contracting". Restatement § 187, cmt. f. Here, Sapporo USA was headquartered in New York when it contracted with Appellants. (Pa63.)[7]

[7] Other cases cited by Appellants are inapposite. In *Rowen Petroleum Properties, LLC v. Hollywood Tanning Systems, Inc.*, 899 F. Supp. 2d 303, 307 (D.N.J. 2012), both parties agreed that the Ohio choice-of-law provision in a lease should not apply because "Ohio has no connection with the present litigation." In *Bailey v. Wyeth, Inc.*, 422 N.J. Super. 343, 347 n.5 (Law Div. 2008), the court did not perform a choice-of-law analysis.

Fourth, Appellants contend that WOJ's wholesaler licenses in New York are irrelevant because "Appellants distribute non-Sapporo products and must maintain those licenses notwithstanding its relationship with Sapporo." (Pb at 21.) However, if WOJ did not maintain its wholesaler licenses and separate business premises in New York, WOJ would have been unable to execute the Wholesaler Agreement or distribute 90% of its Sapporo products in New York. Moreover, the case Appellants cite to support this contention, *Diversant, LLC v. Carino*, No. 18-3155, 2018 WL 1610957 (D.N.J. Apr. 2, 2018) (Pa155-Pa159), did not address whether state wholesaler licenses constitute a "substantial relationship" with that state.

In short, there is more than a sufficient relationship between the parties, their dealings, and New York to meet the first Restatement factor. That 90% of Appellants' Sapporo sales are in New York is alone sufficient. That Sapporo USA and WOJ are both incorporated in New York, Sapporo was headquartered in New York at the time of contracting, and WOJ has New York wholesaler licenses and a New York location only add to the substantial relationship with New York.

ii. New York Has a Materially Greater Interest in This Dispute and Applying New York Law Would Not Violate New Jersey Public Policy

For Appellants to argue successfully that the New York choice-of-law provision in the Wholesaler Agreement should not be honored based on the second prong of the Restatement test, Appellants must demonstrate that: (i) New Jersey has

a materially greater interest in this dispute than New York, (ii) application of New York law will violate a fundamental policy of New Jersey, *and* (iii) under the rule of § 188, New Jersey would be the state of the applicable law in the absence of an effective choice-of-law by the parties. *See* Restatement § 187(2)(b). Appellants fail to satisfy any of these requirements.

a. New Jersey does not have a materially greater interest than New York in determining the issues in this dispute

In arguing that New Jersey has the materially greater interest in this dispute than New York, Appellants again minimize the parties' contacts and relationships with New York. For example, Appellants contend that "[w]hile Appellants make sales in New York, that is of little import." (Pb at 34.) However, they do not explain *why* these sales are "of little import" especially when 90% are in New York.

The principal case cited by Appellants again undermines their position. In *Diversant,* the agreement at issue contained a New Jersey choice-of-law provision. The defendant argued that provision should not be enforced because it "was part of a contract of adhesion and because California has a materially greater interest in this dispute, pursuant to New Jersey's approach to conflict of laws, California law governs." *Diversant*, 2018 WL 1610957, at *1 (Pa155-Pa159). The court analyzed whether the second of the Restatement § 187(2) prongs exceptions applied, held it did *not*, and *enforced* the choice-of-law clause. *Id.* at *4.

As in *Diversant*, one state (New Jersey) has a relationship to this dispute and a material interest in enforcing its public policies. However, another state (New York) has a more substantial relationship to this dispute and a material interest in enforcing its public policies. Given that 90% of the beer sales at issue are in New York, Appellants have not established here that New Jersey possesses a "materially greater" interest than New York.[8] For that reason alone, the second Restatement exception does not apply.

b. Applying New York law does not violate a fundamental policy of New Jersey

The trial court also correctly held that "no fundamental policy of New Jersey is contravened by applying New York law to the substantive claims". (Pa5.) In arguing that the trial court erred, Appellants exaggerate any differences between the MBPA and the ABC Law.

[8] Appellants' cited cases do not involve the alcoholic beverage industry and are distinguishable. In *Networld Communications Corp. v. Croatia Airlines, D.D.*, No. 13-4770 (SDW), 2014 WL 4662223, at *3 (D.N.J. Sept. 18, 2014) (Pa254-58), an agreement contained a Croatia choice-of-law provision, but the contract was executed in New Jersey (here, the Wholesaler Agreement was executed by Appellants in New Jersey and by Sapporo USA in New York) and the plaintiff performed its obligations in New Jersey (here, 90% of Appellants sales are in New York). In *Newcomb v. Daniels, Saltz, Mongeluzzi & Barrett, Ltd.*, 847 F. Supp. 1244 (D.N.J. April 4, 1994), a personal injury client challenged the validity of a contingent attorney fees agreement with no choice-of-law provision.

Both statutes allow a beer supplier to terminate a distributor for good cause. N.Y. Alco. Bev. Cont. Law § 55-c(4); N.J. Rev. Stat. § 33:1-93:15(c). If the supplier terminates without good cause, the supplier must pay the distributor the fair market value of its lost distribution rights. N.Y. Alco. Bev. Cont. Law § 55-c(7)(b); N.J. Rev. Stat. § 33:1-93:15(d). Appellants' contention that Sapporo USA imposed a "material modification" to the Wholesaler Agreement by asking Appellants to propose a plan to achieve 96% of their pre-pandemic sales is disingenuous. (Pb at 27.) Sapporo USA sought to enforce the Wholesaler Agreement's "best efforts" clause and to seek from Appellants pursuant to the MBPA and the ABC Law a plan to cure their deficient performance. There was no "modification."[9]

Appellants contend that applying the ABC Law would undermine a fundamental policy of New Jersey because they interpret the MBPA as not permitting arbitration whereas the ABC law permits it. (Pb at 27.) However, as discussed in Section II.A above, *both* the MBPA and the ABC Law preclude arbitration. As the court held in *Ryan*, these provisions are preempted by the FAA and are unenforceable because the Wholesaler Agreement involves interstate commerce. *Ryan*, 2005 WL 2977767, at *6 ("New York's interests underlying

[9] The Wholesaler Agreement also states, "No amendment of this Agreement shall be binding upon the parties unless made in writing and signed by the parties hereto." (Pa71 § 17(b).)

Section 55-c and the national policy underlying the FAA are clearly in conflict.") (Pa204-Pa220). Thus, any differences – and there substantively are none – between the two statutes' anti-arbitration clauses are irrelevant.

Appellants nonetheless contend that the "trial court failed to recognize or address this Court's ruling" in *County of Passaic v. Horizon Healthcare Services, Inc.*, 474 N.J. Super. 498 (App. Div. Feb. 8, 2023). (Pb at 29.) However, as explained in greater detail in Section IV.A below, *County of Passaic* supports affirming the trial court's holding because Appellants and Sapporo USA are sophisticated commercial parties who clearly understood that they were agreeing to arbitrate their claims.

Appellants do not – because they cannot – dispute that they are sophisticated. They have distributed beer for approximately 50 years. (Pa24 ¶ 2.) They admit that their executives "have extensive familiarity with federal and state alcohol beverage control laws, particularly the state laws of the states that are relevant to WOJ/Sanwa's business." (Pa119 ¶ 3.) Appellants' Vice President, Masahiro Takeda, who cosigned Appellants' October 11, 2022 response to Sapporo's Notices (Pa82-Pa86), is a member of the bar of New York and Florida. (Pa119 ¶ 3.)

Instead, Appellants claim they were "not contracting as equals." (Pb at 31.) But the law does not require "equality"; it requires sophistication enough to

understand that each party was agreeing to arbitrate. Nor have Plaintiffs established that Sapporo USA could simply force Appellants to accept the arbitration agreement.

In *B & S Ltd., Inc. v. Elephant & Castle International, Inc.*, 388 N.J. Super. 160, 169 (Ch. Div. 2006) – the case on which Appellants primarily rely[10] – the court held that, to set aside an arbitration clause as substantively unconscionable, it "must determine that the exchange of obligations was so one-sided it shocks the conscience" and that "no aspects of procedural unconscionability [were] present." *Id.* at 177. The court further explained:

> While [plaintiff's] counsel makes assertions that [defendant] is a large international corporation with bargaining power superior to [plaintiff], [plaintiff] has presented no competent proofs as to the disparate size between [plaintiff] and [defendant]. No proofs were presented to the court as to the sophistication of the parties or the respective financial positions of the parties. Nor have any proofs been submitted to the court that [plaintiff] is an unsophisticated entity or is of limited financial means. Further, no evidence has been submitted to the court that unfair bargaining tactics were used. Mere assertions of counsel are not sufficient for the court [to] find the existence of procedural unconscionability. The proofs that have been submitted to court show that both parties were represented by counsel during the negotiation and execution of the Franchise Agreement.

Id. at 176-77. This Court should likewise find that no aspects of unconscionability are present, let alone those that "shock[] the conscience." *Id.* at 177. Appellants

[10] Appellants also cite *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 903 (2d Cir. 1990), which does not involve enforcement of a choice-of-law provision or arbitration clause.

have submitted no competent proof supporting their conclusory assertions that they had no ability to negotiate the Wholesaler Agreement before it was signed.

Appellants further contend that the MBPA entitles prevailing parties to reasonable attorneys' fees, whereas the ABC Law does not. (Pb at 27-28.) But a provision that shifts attorneys' fees from one party to another does not implicate the fundamental policies underlying a statute particularly where, as here, either party could prevail and have attorneys' fees awarded to it. Indeed, should Appellants be found to have breached the Wholesaler Agreement, they would be required to indemnify Sapporo USA under Section 10(b), including for "reasonable attorney's fees," due to any "act, error or omission of Wholesaler . . . ." (Pa68.)[11]

Because there are no material policy differences between New York and New Jersey laws regulating the malt beverage industry, applying the ABC Law would not "directly or indirectly require[] or amount[] to a waiver of any provision of [the MBPA], or [] relieve any person of any obligation or liability under [the MBPA]". N.J.S.A. § 33:1-93.15(a). Likewise, applying New York law would not contravene New Jersey public policy because the ABC Law provides substantively

[11] The cases on which Appellants rely are (per usual) inapposite. *See Warren Distrib. Co. v. InBev USA, LLC*, 2011 WL 770005, at *7 (D.N.J. Feb. 28, 2011) (Pa288-Pa309) (no choice-of-law analysis); *Winer Motors*, 208 N.J. Super. at 678 (no analysis on "fundamental policy" of fee-shifting provisions in New Jersey because both New Jersey and Connecticut statutes at issue permitted fee shifting).

the same protections to distributors as the MBPA. *See Citibank, N.A. v. Errico*, 597 A.2d 1091, 1095 (N.J. Super. Ct. App. Div. 1991) ("there is no impediment to applying a contractual choice of substantive law provision as long as the public policy of the forum state is not violated"); *Bulut v. JPMorgan Chase Bank*, N.A., No. 22-04276, 2023 WL 869402, at *6 (D.N.J. Jan. 27, 2023) (Da104-Da110) (finding that Delaware law governs agreement under New Jersey choice-of-law rules because "there is no reason to believe that applying Delaware law is contrary to a fundamental policy of New Jersey") (internal quotations and citations omitted).[12]

[12] The cases Appellants cite are distinguishable. *See, e.g.*, *Business Incentives Co. v. Sony Corp. of Am.*, 397 F. Supp. 63, 67-68 (S.D.N.Y. 1975) (contract "contemplated performance exclusively in New Jersey" and the parties' relationships did not qualify for protection under the NJFPA); *Instructional Sys., Inc.*, 130 N.J. at 345 (involving computerized educational-learning systems reseller and 90% of plaintiff's sales were not in the state whose law the contract applied); *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (affirming arbitration provision and stating in dicta that it would condemn an agreement as against public policy *in the event* "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations"); *Gamble v. Connolly*, 399 N.J. Super. 130, 144 (Law Div. 2007) (recognizing that "[r]esidential tenants are viewed as a special class of individuals for whom the legislature has articulated a need for special protection; offending contractual provisions are in direct violation of this protective scheme"). Defendants also misquote the transcript from the oral argument before the trial court in stating that "Defendants admitted and argued before the trial court that the choice-of-law provision entitles them to circumvent the MBPA's protections for New Jersey malt beverage distributors, which protect distributors to a greater degree than New York's ABC Law." (Pb at 30.) The quotation they cite, T80:21-81:1, states: "MR. KRATENSTEIN: So for all of those reasons, we contend that New York not New Jersey law should apply. Or if Your Honor doesn't agree with

c. New York Law would still govern absent a choice-of-law provision

Appellants argue that the final requirement of the second Restatement exception applies – *i.e.*, what law would govern under § 188 absent the choice-of-law provision in the Wholesaler Agreement – because "New Jersey has the most significant relationship to the Wholesaler Agreement and the parties compared to New York" and "since the operative facts giving rise to Appellants' claims are centered on New Jersey, New Jersey would be the most appropriate law to apply in the absence of any choice-of-law provision." (Pb at 34-35.)

It is undisputed that the contacts to consider in determining the state whose law would apply in the absence of a choice-of-law provision under Restatement § 188 include: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. *See* Restatement § 188(2); Pb at 34, n.9. Given that 90% of Appellants' Sapporo sales occur in New York and Appellants' maintain licensed premises in New York, it is clear that New York has the most significant relationship and contacts with the parties and their transactions. Thus, New York would be the most appropriate law to apply absent any choice-of-law provision.

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that, New York law should at least apply the ABCL to the 90 percent of beer distributed in New York and the MBPA apply to the 10 percent in New Jersey."

IV. THE TRIAL COURT CORRECTLY DETERMINED THAT THE WHOLESALER AGREEMENT'S ARBITRATION CLAUSE IS ENFORCEABLE UNDER NEW JERSEY LAW

The trial court correctly held that, even if New Jersey law applies, the Wholesaler Agreement's arbitration clause should still be enforced. (Pa7.) In seeking to invalidate the arbitration clause, Appellants again misstate and misapply New Jersey law. The trial court correctly rejected these arguments.

A. The Parties are Sophisticated Business Entities

Appellants seek to invalidate the Wholesaler Agreement's arbitration clause by arguing that, without an express waiver of the right to bring suit in a judicial forum, the arbitration clause violates New Jersey public policy as set forth in *Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430 (2014), and its progeny. (Pb at 3, 36-39.) However, these cases generally involve contracts of adhesion signed by unsophisticated parties, which is not the case here.

In *Atalese*, a consumer plaintiff signed a 23-page service contract under which she paid over $5,000 to have the defendant settle personal debts with her creditors. *Id.* at 436. She then sued under the Consumer Fraud Act and the Truth-in-Consumer Contract, Warranty and Notice Act for alleged misrepresentations by the defendant about its work. *Id.* The defendant sought to compel arbitration. *Id.* at 437.

The New Jersey Supreme Court invalidated the arbitration clause because the clause was not clear enough to be enforceable against a consumer. Specifically, the

Court found that "[a]n agreement to arbitrate, like any other contract, 'must be the product of mutual assent . . . [and] [m]utual assent requires that the parties have an understanding of the terms to which they have agreed." *Id.* at 442. The Court then held that an arbitration clause in a consumer contract "in some general and sufficiently broad way, must explain that the plaintiff is giving up [his] right to bring [his] claims in court or have a jury resolve the dispute." *Id.* at 447. The Court elaborated that no specific magic words are required:

> We emphasize that no prescribed set of words must be included in an arbitration clause to accomplish a waiver of rights. Whatever words compose an arbitration agreement, they must be clear and unambiguous that ***a consumer is choosing to arbitrate disputes*** rather than have them resolved in a court of law.[ ] In this way, the agreement will assure ***reasonable notice to the consumer***. To be clear, under our state contract law, we impose no greater burden on an arbitration agreement than on any other agreement waiving constitutional or statutory rights.

Id. at 447 (emphasis added).

Appellants argue that "*Atalese* has historically not been limited to consumer contract contexts". (Pb at 36.) However, the New Jersey Supreme Court has extended *Atalese* mainly to arbitration clauses in employment contracts. *See Flanzman v. Jenny Craig, Inc*., 244 N.J. 119, 137 (2020).[13]

[13] The cases cited by Appellants involve either consumer or employment contracts or are otherwise distinguishable. *Est. of Noyes v. Morano*, No. A-1665-17T3, 2019 WL 149521, at *4 (N.J. Super. Ct. App. Div. Jan. 8, 2019) (Pa185-Pa190) (consumer contract); *Kenahan v. Home Warranty Adm'r of Fla. Inc.*, 236 N.J. 301, 307 (2019) (same); *Quigley v. KPMG Peat Marwick, LLP*, 330 N.J. Super. 252, 273

By contrast, New Jersey courts have repeatedly declined to extend *Atalese* to commercial contracts. For example, in *Tox Design Group, LLC v. RA Pain Services, PA*, this Court held that "[t]he *Atalese* standard has not been extended beyond consumer and employment contracts. It does not apply to commercial arbitration agreements between commercial entities." No. A-4092-18T1, 2019 WL 7183687, at *6 (N.J. Super. Ct. App. Div. Dec. 26, 2019) (Pa281-Pa287) (citation omitted).[14]

(App. Div. 2000), *certif. denied*, 165 N.J. 527 (2000) (employment agreement); *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 168 N.J. 124, 131-32 (2001) (same); *Itzhakov v. Segal*, No. A-2619-17T4, 2019 WL 4050104, at *3-8 (N.J. Super. Ct. App. Div. Aug. 28, 2019) (Pa195-Pa203) (ordering discovery to "illuminate[] the meaning of [an] arbitration provision"); *Estate of Watson v. Piddington*, 2020 WL 2710168, at *1 n.2 (N.J. Super. Ct. App. Div. May 26, 2020) (Pa191-Pa194) (one attorney drafted an LLC agreement for both LLC members).

[14] *See also Grandvue Manor, LLC v. Cornerstone Contracting Corp.*, 471 N.J. Super. 135, 146 (App. Div. 2022) (declining to extend *Atalese* to a commercial contract because the parties "were sophisticated parties who elected arbitration clearly and unambiguously and that their statutory claims were arbitrable"); *Reinv. Fund, Inc. v. Rauh*, No. A-3184-21, 2022 WL 17587863, at *2 (N.J. Super. Ct. App. Div. Dec. 13, 2022) (Da148-Da151) (compelling arbitration "despite the lack of any specific mention of the parties' statutory rights" due to "an arms-length agreement formulated by sophisticated parties that memorialized a commercial undertaking"); *Gastelu v. Martin*, No. L-4067-14, 2014 WL 10044913, at * 6 & n.4 (N.J. Super. Ct. App. Div. July 9, 2015) (Da114-Da121) (holding that the waiver of rights "standard is not as stringent" for parties to a commercial contract); *Schmidt v. Laub as Trustee for Carol L. Glatstian Living Trust*, No. A-0620-19T1, 2020 WL 2130931, at *4 (N.J. Super. Ct. App. Div. May 5, 2020) (Pa275-Pa280) (enforcing arbitration provision between "sophisticated businesspeople"); *In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515, 525 (3d Cir. 2019) (finding application of *Atalese* "only in the context of employment and consumer contracts" and that the "rule 'd[oes] not extend . . . to commercial contracts'") (citation omitted).

Here, the trial court correctly held that *Tox* "points out the limiting language of *Atalese*" and that "[c]ommercial entities such as the parties here should not need to be told if they agree to arbitrate, they can't litigate also." (Pa7.)

Appellants then curiously rely on *County of Passaic*, which reaffirmed that *Atalese* is generally inapplicable to commercial contracts. 474 N.J. Super. at 503 ("[O]ur Supreme Court has adopted the stricter approach found in *Atalese* 'only in the context of employment and consumer contracts.' This observation is certainly correct.") (quoting *Remicade*, 938 F.3d at 525). Importantly, this Court confirmed that *Atalese* and *Flanzman* were "about the nonexistence of a waiver of the important right to seek relief in a court of law in contracts involving *consumers and employees*, who are not necessarily versed in the meaning of law-imbued terminology about procedures tucked into form contracts." *Id.* at 503 (internal citations and quotation marks omitted). However, this concern "vanishes" in the commercial context:

> This concern for those not versed in the law or not necessarily aware of the fact that an agreement to arbitrate may preclude the right to sue in a court . . . vanishes when considering individually-negotiated contracts between sophisticated parties – often represented by counsel at the formation stage – possessing relatively similar bargaining power. Although our Supreme Court has not expressly declared it, and although we too have not said as much in any published opinion, we are satisfied . . . and as we now so hold – that an express waiver of the right to seek relief in a court of law to the degree required by *Atalese* is unnecessary when parties to a commercial contract are sophisticated and possess comparatively equal bargaining power.

Id. at 503-04 (citations omitted).

Appellants argue that *County of Passaic* nonetheless requires application of *Atalese* here because Appellants are purportedly in a "weaker bargaining position to Sapporo" and "there is a clear imbalance of power between Sapporo USA (brewer) and Appellants (wholesalers)." (Pb 35, 38.) However, the "bargaining power" at issue in *County of Passaic* and *Atalese* concerns the parties' sophistication and whether they understood what they were agreeing to in their contract. *Atalese* does not apply simply because one party *may* have more bargaining power than another party (which is disputed here, particularly as Appellants clearly do not simply accede to Sapporo USA's wishes). To find otherwise would allow a party to sign an unambiguous contract, but then at its option avoid enforcement certain terms while enforcing others by claiming that the other party had more bargaining power.

The real issue is whether the parties had notice of and understood the terms to which they agreed. As the court explained in *County of Passaic*:

> The parties here were represented by counsel at all relevant stages of their negotiations and during the formation of the relevant contract documents over the course of their seventeen-year relationship and ***understood the difference between the right to seek relief in a court of law and being relegated to arbitration under AAA's commercial rules***. We thus agree with the trial judge that the arbitration provision was enforceable notwithstanding its lack of an express waiver of the County's right to seek relief in a court of law.

474 N.J. Super. at 503-04 (emphasis added).

Appellants were on notice that their claims required arbitration. The Wholesaler Agreement's arbitration clause clearly and unequivocally requires

that "[a]ny controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in New York, New York pursuant to the rules and regulations of the American Arbitration Association." (Pa69 § 11.)

Appellants are also sophisticated business entities. They have been operating their business since 1973. (Pa24 ¶ 2.) Their executives "have extensive familiarity with federal and state alcohol beverage control laws, particularly the state laws of the states that are relevant to WOJ/Sanwa's business." (Pa119, ¶ 3.) They cannot seriously claim that they did not understand that, by agreeing to arbitrate, they were foregoing the right to sue in state or federal court.

In sum, the Wholesaler Agreement is an "arms-length agreement formulated by sophisticated parties that memorialized a commercial undertaking." *Reinv. Fund, Inc*, 2022 WL 17587863, at *2 (Da148-Da151). Appellants did not need to be told that, by agreeing to arbitrate, they were giving up their right to go to court. Accordingly, the trial court's referral to arbitration should be affirmed.

B. Appellants Agreed to Arbitrate Any Controversy Arising Out of the Wholesaler Agreement Including any Statutory Claims

Appellants next argue that "[t]here can be no 'mutual assent' to arbitrate Appellants' MBPA claims under the [Wholesale] Agreement because the MBPA did not exist when the parties executed the Agreement." (Pb at 40.) This argument fails for several reasons.

First, the MBPA was introduced to the New Jersey legislature through two different bills prior to the enactment of the Wholesaler Agreement. Specifically, New Jersey Senate Bill S2170 was introduced on December 13, 2004, and New Jersey Assembly Bill A3619 was introduced on January 10, 2005.[15] Appellants were presumably aware of these bills given their "extensive familiarity with federal and state alcohol beverage control laws". (Pa119 ¶ 3.)

Second, even if Appellants did not know that the MBPA had been introduced in the Legislature, the MBPA expressly renewed the Wholesaler Agreement and the arbitration provision. The MBPA states that agreements "existing prior to the effective date of this act that are continuing in nature, have an indefinite term or have no specific duration shall be deemed for purposes of this act to have been renewed 60 days after the effective date of this act." N.J. Stat. Ann. § 33:1-93.15(b). Thus, the Wholesaler Agreement and its arbitration provision renewed 60 days after the MBPA's effective date, which means that the renewed arbitration clause applies to all of Appellants' claims, including the statutory claims. *See 1567 South Realty, LLC v. Strategic Contract Brands, Inc.*, No. A-0935-19T2, 2020 WL 3864974, at *3 (N.J. Sup. Ct. App. Div. 2020) (Da79-Da84) (finding that arbitration provision need

[15] Bill S2170, 211th Legislature (2004), available at https://pub.njleg.state.nj.us/Bills/2004/S2500/2170_I1.PDF; A3619, 211th Legislature (2005), available at https://pub.njleg.state.nj.us/Bills/2004/A3500/3619_I1.PDF. (Da67-Da76.).)

not state that plaintiffs waived their statutory right to sue in court because the plaintiffs were not an "average member of the public" and "are sophisticated").

Third and finally, as discussed above in Sections II and III, the FAA trumps the MBPA. The Wholesaler Agreement covers New York and New Jersey, Appellants are incorporated in those two states and maintained licenses premises in both states while Sapporo USA is incorporated in New York, Appellants brought a claim under the ABC Law, and 90% of Appellants' Sapporo sales are in New York. Ultimately, it is New York that has both the most substantial relationship to the parties' dealings and the greatest interest in having its law applied to this dispute.

V. APPELLANTS CANNOT SELECTIVELY ENFORCE THE WHOLESALER AGREEMENT

In addition to the reasons stated above, the trial court also held that Appellants "should not be permitted to void the arbitration clause where they stand on the validity of the contract for all other claims in the complaint." (Pa7) (citing *Housekeeper v. Lourie*, 39 A.D.2d 280, 282-83 (1st Dep't 1972) ("[W]here a party has confirmed or stands upon the validity of a contract containing an arbitration clause, he may not resist arbitration of a claim of fraud embraced by the clause.")). Appellants do not address this holding in their brief.

VI. THE TRIAL COURT CORRECTLY HELD THAT ARBITRABILITY SHOULD BE DECIDED BY THE ARBITRATION PANEL

Finally, the trial court correctly determined that "[b]ecause the arbitration

agreement here is so broad and states merely that any claim arising from the Agreement is arbitrable under the AAA rules, ultimately, '[w]here parties agree that the AAA rules will govern, questions concerning the scope and validity of the arbitration agreement, including issues of arbitrability, are reserved for the arbitrators.'" (Pa7) (citing *Flintlock Constr. Servs., LLC. V. Weiss*, 991 N.Y.S.2d 408, 410 (1st Dep't 2014)). Appellants argue that the question of arbitrability should be decided by the court. (Pb at 46-48.) They are again incorrect.

"When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue." *Tox*, 2019 WL 7183687, at *4 (citation omitted) (Pa281-Pa287). Likewise, the validity of a contract with an arbitration clause must be decided by the arbitrator, not the court. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) ("[A] challenge to the validity of [a] contract as a whole . . . must go to the arbitrator.").

The Wholesaler Agreement contains the parties' clear and unmistakable agreement to delegate arbitrability to the arbitration panel through incorporation of the AAA's Rules. (Pa69 § 11.) Rule 7(a) of the AAA's Commercial Arbitration 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."[16]

New Jersey and New York courts have repeatedly held that incorporation of the AAA Rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate the issue of arbitrability. *Tox*, 2019 WL 7183687, at *4 (Pa281-Pa287) ("[v]irtually every circuit to have considered the issue has determined that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability") (internal quotations and citations omitted).[17] Thus, as the trial court held, the Wholesaler Agreement's incorporation of the AAA Rules requires that any "gateway" questions regarding arbitrability be decided by the arbitrators.[18]

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[16] *See* AAA, Commercial Arbitration Rules and Mediation Procedures, Rule 7(a), *available at* https://www.adr.org/sites/default/files/Commercial-Rules_Web.pdf.

[17] *See also Neal v. Asta Funding, Inc.*, No. 13-6981, 2016 WL 3566960, at *14 (D.N.J. June 30, 2016) (Da122-Da143) ("By agreeing to arbitrate in accordance with AAA rules, the parties . . . clearly and unmistakably agreed to arbitrate the issue of arbitrability."); *Goffe*, 238 N.J. at 211 ("[W]hen the parties' contract delegates the question of the arbitrability of a particular dispute to an arbitrator, a court may not override the contract"); *Schmidt*, 2020 WL 2130931, at *5 (Pa275-280) ("[T]he incorporation of the AAA rules into the arbitration provision clearly and unambiguously expressed the parties' intent to empower the arbitrator to determine arbitrability."); *Fritschler v. Draper Mgmt., LLC*, 164 N.Y.S.3d 609, 611 (1st Dep't 2022) (same).

[18] The cases Appellants cite are again distinguishable. *See Morgan v. Sanford Brown Inst.*, 225 N.J. 289, 306 (2016) (defendants "did not raise [the] issue of the delegation clause" and both parties expected the motion court to decide arbitrability); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 946 (1995) ("[M]erely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate

VII. IN ANY EVENT, THIS APPEAL IS MOOT

Finally, Sapporo USA's withdrawal of the Notices after the trial court's ruling moots this appeal. "[I]n New Jersey, moot or academic appeals are generally dismissed." *Fredco Landscaping, LLC v. Twp. of Cedar Grove*, No. A-3082-09T3, 2010 WL 4137429, at *2 (N.J. Super. Ct. App. Div. Oct. 22, 2010) (Da111-Da113). A moot appeal may be decided in "matter[s] of public importance," such as where the case involves public health and welfare issues. *Betancourt v. Trinitas Hosp.*, 415 N.J. Super. 301, 311-12 (App. Div. 2010) (citing cases). By contrast, this case involves a private contract dispute between two sophisticated parties.

Appellants contend that the case is not moot because they are entitled to "a Declaratory Judgment that [Appellants] were not in breach of the Agreement and that Sapporo USA had no basis to terminate the agreement." (Pb at 49.) They purportedly seek "to ensure that" Sapporo USA's threatened termination of the

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that issue[.]"); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 645, 647 (1986) (involving an arbitration clause not incorporating AAA rules); *SBRMCOA, LLC v. Bayside Resort, Inc.*, 707 F.3d 267, 274 (3d Cir. 2013) (no dispute over who decides arbitrability); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 754 (3d Cir. 2016) (addressing "class arbitrability"); *MZM Constr. Co., Inc. v. New Jersey Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 392 (3d Cir. 2020) (issue was whether the court could "decide whether fraud in the execution vitiated the formation or existence of" a contract and arbitration provision"); *Cottrell v. Holtzberg*, 468 N.J. Super. 59, 70 (App. Div. 2021) (declining to refer arbitrability question to the arbitrator when arbitration agreement was signed upon 2017 admission to nursing home, but no agreement was signed upon 2018 admission that gave rise to the claim).

Wholesaler Agreement "is not a recurring tactic by Sapporo USA, and to establish that Appellants are entitled to monetary relief under the MBPA" and "damages, and attorney's fees and costs" from Appellants' other causes of action. (*Id.* at 49-50.)

Appellants' claim that Sapporo will seek to terminate them again is unsupported. A case is moot when "there is no reasonable likelihood that a declaratory judgment would affect the parties' future conduct." *Hartnett v. Pennsylvania State Educ. Ass'n*, 963 F.3d 301, 306-08 (3d Cir. 2020). Before 2022, Sapporo USA had not threatened to terminate Appellants' distribution rights. Sapporo USA also requested a plan to cure Appellants' deficiencies. (Pa76-Pa79.) Appellants declined, and instead sued. Yet Sapporo continued to supply Appellants with beer. Sapporo USA also advised Appellants "that it is in all parties' interest to end their dispute" and that Sapporo USA would "continue to operate under the Wholesaler Agreement." (Da77.)

As to Appellants' damages claim, they do not articulate either in their brief or their Complaint any damages that they have suffered from Sapporo USA's threatened termination of the Wholesaler Agreement.[19] That is not surprising as

[19] By contrast, in *National Iranian Oil Co. v. Mapco International, Inc.*, 983 F.2d 485, 489 (3d Cir. 1992), cited by Appellants (Pb at 50), the mootness issue arose out of the defendant's inability to pay a judgment. In another case cited by Appellants, *Surrick v. Killion*, 449 F.3d 520, 526 (3d Cir. 2006), the mootness issue arose out of appellants' alleged failure to comply with the district court's order.

Appellants continue to sell Sapporo beer and no longer face the loss of their Sapporo distribution rights. Thus, any potential damages have been averted.

Plaintiffs claim that they may nonetheless be entitled to "attorney's fees and costs" of this action. (Pb at 50.) Yet, ironically, Appellants unnecessarily continue to run up their own and Appellees' legal expenses by pursuing this appeal after the Notices were withdrawn. In any event, as Appellants recognize, they may be entitled to fee shifting only if New Jersey law applies *and* if they prevail on their MBPA claim. (*Id.* at 27-28.) As discussed above, New Jersey law does not apply.

For this reason, Appellants' cite to *Navigators Specialty Ins. Co. v. Sarancini & Hollenbeck, LLC*, No. 09-4317 (WHW), 2010 WL 1931239 (D.N.J. May 12, 2010), is inapposite. It arose from a dispute over an insurance policy "which would allow Plaintiff to recover the disputed costs from Defendants." *Id.* Here, Appellants do not identify any authority allowing them to recover attorneys' fees and costs aside from the inapplicable MBPA. Thus, if the trial court's ruling below is not affirmed – which it should be – then this appeal should be dismissed as moot.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's order directing the parties to arbitrate this matter and dismissing this case.

Dated: March 20, 2024 Respectfully submitted,

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Superior Court of New Jersey

Appellate Division

Docket No. A-001051-23T4

WINE OF JAPAN IMPORT, INC. and SANWA TRADING CO., INC.,	:	CIVIL ACTION
Plaintiffs-Appellants,	:	ON APPEAL FROM A FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY
vs.	:	
SAPPORO U.S.A., INC., MASASHI MINAMI, ANDREW MURPHY and TAKESHI MIYAHARA,	:	DOCKET NO.: MRS-L-002143-22
	:	Sat Below:
	:	HON. STEPHAN C. HANSBURY, J.S.C.
Defendants-Respondents.	:	

REPLY BRIEF AND APPENDIX ON BEHALF OF PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

In opposing this Appeal, Sapporo cannot dispute that the gravamen of this action centers on its threat to terminate the Wholesaler Agreement and cut off the supply of Sapporo products into New Jersey where Appellants (collectively, "WOJ") operate their business, store their inventory, and place Sapporo products into the stream of commerce. Sapporo's insistence that the MBPA and State law are inapplicable because of the locale of WOJ's sales is flawed because, as New Jersey's three-tier alcohol distribution system mandates, Sapporo cannot have direct connection, relationship, or involvement with any wholesale transactions to on-and-off premise retailers. Thus, as confirmed by applicable case law, the final destination of WOJ's sales is immaterial to this Court's choice-of-law analysis, and the MBPA and New Jersey law must apply since WOJ's and Sapporo's mutual obligations and transactions (as well as all events in the Complaint) occur ***solely*** in this State.

Accordingly, the Agreement's arbitration clause is invalid as a matter of New Jersey law under *County of Passaic v. Horizon Healthcare Servs., Inc.*, 474 N.J. Super. 498 (App. Div. 2023) ("*Passaic*"). Sapporo, however, misconstrues *Passaic* by conflating sophistication with bargaining power, and plainly ignores that WOJ has never had never had equal bargaining power and never engaged in arms-length negotiations with Sapporo, and thus should enjoy heightened

protections to ensure mutual assent to arbitration. And while the FAA is inapplicable since the Agreement's arbitration clause is invalid, the MBPA would nonetheless supersede the FAA under the Twenty-First Amendment, as the right to bring brewer-wholesaler disputes in this State's courts is imperative to the MBPA's goal of maintaining "orderly market conditions." Accordingly, with no valid arbitration agreement, the issue of arbitrability is moot, and in any event, mere reference to AAA rules is not "clear and unmistakable" proof that the parties delegated the question to an arbitrator. Lastly, Sapporo's withdrawal of the Notices cannot moot this case, as it merely comported with the trial court's injunction, and Sapporo remains steadfast in maintaining that its conduct was lawful when it clearly was not.

ARGUMENT

For purposes of its arguments in reply, WOJ incorporates by reference the Procedural History and Statement of Facts Set forth at Pb4-14.

I. SAPPORO'S JUSTIFICATION FOR APPLYING NEW YORK LAW IS MISPLACED (Pa5). Sapporo tries to circumvent New Jersey law and the MBPA by contending, *ad nauseum*, that the bulk of WOJ's sales of Sapporo products occurs in New York. But that contention is wholly misplaced because, under New Jersey's three-tier distribution framework, Sapporo has no direct relationship to—or involvement with—WOJ's retail customers, and plays no

role in such distribution other than to supply product to WOJ ***in New Jersey***. Unsurprisingly, applicable precedent holds that the final destination where a wholesaler's sales of product physically ends up has no bearing on whether the MBPA applies to a dispute between a wholesaler and brewer. To be sure, all of Sapporo's dealings with WOJ have been in New Jersey, including its bad faith conduct at the heart of the Complaint which the MBPA was designed to safeguard wholesalers against.

a. The Locale Of WOJ's Sales Is Irrelevant To Choice-of-Law (Pa5). WOJ's sales in New York are immaterial because the choice-of-law analysis here must center on where WOJ and Sapporo have performed—and continue to perform—their obligations ***to each other*** under the Wholesaler Agreement. The recent decision, *Amtec Int'l of NY Corp. v. Polish Folklore Import Co., Inc. ("Amtec II")*, is instructive.[1] *See* 2023 WL 2734642 (E.D.N.Y. March 31, 2023). There, the court determined that a wholesaler could not enforce either New York's ABC Law or the MBPA in a dispute over its agreement with a brewer because the "sale and delivery of the product at issue" between the wholesaler and brewer "took place outside of New York and New Jersey [in Poland]." *Id.* at *3. In so ruling, the *Amtec II* court found that the "final

[1] Sapporo's reliance on *Amtec Int'l of NY Corp. v. Polish Folklore Import Co., Inc.*, 2022 WL 992565 (E.D.N.Y. March 31, 2022) ("Amtec I") is misplaced and, in any event, undermined by the subsequent *Amtec II* ruling in that same matter.

destination" of the product was "***of no consequence***" because the transaction between the brewer and wholesaler "was wholly extraterritorial to both New York and New Jersey"—i.e. Poland—and the dormant Commerce Clause "preclude[s] a state from regulating wholly extraterritorial commerce, even where the commerce may have effects within the state." *Id*. at *3.[2]

As in *Amtec II,* Sapporo's myopic focus on the final destination of WOJ's sales is misguided. First, it is indisputable that Sapporo supplies ***100%*** of its product to WOJ's headquarters in New Jersey where WOJ stores its Sapporo inventory and distributes Sapporo products to retailers. Second, ***all*** of the material facts central to the parties' dispute occurred in New Jersey. Pa30-44. Lastly, the State's three-tier distribution system limits Sapporo's direct dealings to only wholesalers. Simply put, WOJ's sales to retailers in New York are merely incidental. Thus, in light of *Amtec II,* New Jersey law and the MBPA must govern the Wholesaler Agreement.[3]

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[2] *See also S.K.I. Beer Corp. v. Baltika Brewery*, 443 F.Supp.2d 313 (E.D.N.Y. 2006) (ABC Law did not apply to wholesaler agreement because "physical delivery" to the wholesaler was in St. Petersburg, Russia, and "neither sale nor delivery" of product to wholesaler occurred in New York).

[3] Focusing on the locale of the parties' relationships, rather than the destination of goods, is also consistent with the New Jersey Franchise Practices Act ("NJFPA"), whose precedents the Court must consider under the MBPA. *See* N.J.S.A. § 33:1-93.15(e); *see also Instructional Sys., Inc. v. Computer Curriculum Corp.*, 130 N.J. 324 (1992) (the NJFPA protects franchisees "geographically 'situated' in a forum state since they are the 'desired beneficiaries'").

b. The Agreement's Choice-of-Law Clause Is Null and Void (Pa5). As discussed in WOJ's opening brief, after passage of the MBPA, the Agreement's New York choice-of-law provision, by operation of the MBPA's own terms, was necessarily rendered null and void upon the Agreement's post-MBPA renewal because the provision would otherwise run afoul of the MBPA's mandate that New Jersey law must apply to brewer-wholesaler relationships in the State. NJSA 33:1-93.15(a). There is no authority—and Sapporo cannot cite any—holding that the MBPA cannot render the renewed Agreement's New York choice-of-law provision a nullity.[4]

Instead, quoting from the language defining the scope of the MBPA's reach, Sapporo wrongly suggests that WOJ is seeking to apply the MBPA's provisions to WOJ's sales of Sapporo products to New York retailers. Pa23-25. That suggestion is not only incorrect, it disregards both New Jersey's three-tier distribution paradigm and the crux of this case: Sapporo's bad faith and ill-conceived plan to discontinue the supply of Sapporo products to WOJ ***in New Jersey***. Thus, Sapporo's recurring focus on the final destination of WOJ's sale of Sapporo goods is a red herring. Indeed, the MBPA itself governs only the

[4] The Agreement has a one-year term which automatically renews. The MBPA, which applies to contracts that renew after the statute's effective date, clearly states that its provisions cannot be waived or modified, and any contractual provision that directly or indirectly requires such a waiver is null and void. NJSA 33:1-93.15(a).

relationship between brewers and wholesalers, ***not*** wholesalers and retailers. *See generally*, NJSA Title 33:1-93.11-20.

Additionally, Sapporo's drawn-out explanation of *Fairfax Fin. Holdings Ltd. v. S.A.C. Capital Mgmt., L.L.C*, only serves to support WOJ's contention that New York law cannot apply to the brewer-wholesaler relationship in New Jersey. 450 N.J. Super. 1 (App. Div. 2017). While *Fairfax* ultimately applied New York law to dismiss a Civil RICO action—a very different context than here—its choice-of-law analysis and discussion are favorable to WOJ. Indeed, ***all*** of the language from *Fairfax* that Sapporo quotes concerning New Jersey public policy and the application of statutory directives to conduct within the State, weighs decidedly in favor of applying the MBPA and State law to Sapporo's actions, which transpired in New Jersey. To conclude otherwise and apply New York law to purely New Jersey-based conduct would raise the very type of Constitutional quagmire and violation of the Dormant Commerce Clause that Sapporo wrongly contends would result from the application of New Jersey law. *See County of Warren v. State*, 409 N.J. Super. 495, 506 (App. Div. 2009) (courts are "obligated to construe a challenged statute to avoid constitutional defects…") (citation omitted).

c. The Restatement Also Favors Applying New Jersey Law (Pa5). Even if the Court determines that the MBPA did not automatically void the

Agreement's choice-of-law clause, the Restatement favors New Jersey law. Sapporo cannot establish otherwise.

First, Sapporo's contention that the location of WOJ's sales establishes a substantial relationship to New York, as discussed above, is inapplicable and irrelevant. Second, the other alleged connections with New York can hardly establish a substantial relationship. WOJ's and Sapporo's respective incorporation in New York cannot sustain New York law. *See Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128 (7th Cir. 1990). Sapporo's previous headquarters in New York when the Agreement was signed is irrelevant, particularly since Sapporo relocated to California several years ago. *See Rowen Petroleum Properties, LLC v. Hollywood Tanning Syst., Inc.*, 889 F. Supp. 2d 303, 307 (D.N.J. 2012).[5] Nor can WOJ's New York licenses and permits establish a substantial connection, as they are incidental to sales, which as discussed above, are irrelevant to the choice-of-law analysis. Simply put, these tenuous connections, independently or in the aggregate, do not constitute a "substantial relationship" or have any relevance to this matter.

[5] Sapporo claims that New York contacts exist beyond WOJ's and Sapporo's places of incorporation. But it has failed to show that any such remaining contacts either relate to this matter or are substantial. Sapporo also distinguishes *Rowen* by asserting that the choice-of-law provision there did not apply as the court found "Ohio has no connection with the present litigation." Here, however, New York has no meaningful connection to the "supply and delivery" of Sapporo products to WOJ in New Jersey.

Third**,** as for the relative interests between New York and New Jersey, again Sapporo improperly relies on WOJ's sales to retailers in New York, which ignores that ***WOJ is a New Jersey wholesaler that stores its inventory in New Jersey and distributes Sapporo products into the stream of commerce from its facilities in New Jersey.*** Because the MBPA embodies a strong public policy to protect this State's wholesalers, New Jersey has a far greater interest in this dispute than New York, whose ABC Law cannot address Sapporo's conduct extraterritorially. *See supra* I(b). Accordingly, New Jersey law and the MBPA, in particular, must apply here.

New Jersey regularly disregards contractual choice-of-law provisions to enforce State law and critical statutory regimes. *See Red Roof Franchising, LLC v. Patel*, 877 F.Supp.2d 124, 130 (D.N.J. 2012) (applying the NJFPA despite a Texas choice-of-law provision in the franchise agreement).[6] In *Winer Motors, Inc. v. Jaguar Rover Triumph, Inc.*, 208 N.J. Super. 666, 672 (App. Div. 1986), the Appellate Division condemned the possibility that franchisors would utilize choice-of-law provisions to remove "with a stroke of a pen" the "beneficial effect of the franchisee's state's remedial legislation."[7]

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[6] Sapporo repeatedly attempts to distinguish cases involving the NJFPA as "not relevant." That brazenly ignores the MBPA requirement to consider NJFPA precedent when interpreting and enforcing the MBPA. N.J.S.A. § 33:1-93.15(e).

[7] In fact, the *Winer* court vitiated a franchise agreement's choice-of-law provision and utilized the law of the franchisee's home state despite "little difference between

Insofar as a comparison with New York's ABC Law is warranted, the MBPA is still better suited to promote New Jersey's public policy protecting its wholesalers:

- Sapporo's 96% pre-COVID performance target: The MBPA does not permit modification to wholesaler agreements without wholesaler consent, whereas the ABC Law simply permits brewers to modify wholesaler agreements with good cause and without wholesaler consent. *See* N.J.S.A. § 33:1-93.15(c)(2); ABC Law § 55-c(4)(b).[8]

- Forum selection: Employing the term, "shall," the MBPA mandates all disputes relating to wholesaler agreements be determined "by a court of this State," whereas the ABC Law only prohibits mandatory arbitration clauses, allowing parties to privately contract for arbitration. N.J.S.A. § 33:1-93.15(e). Contrary to Sapporo's insistence, ABC Law and the MBPA are ***not*** mirror images of each other.

- Fee shifting: The MBPA provides for a fee-shifting provision, which New Jersey has regularly found to be an important policy decision by the Legislature. *See Warren Distrib. Co. v. InBev USA, LLC*, 2011 WL 770005, at *7 (D.N.J. Feb. 28, 2011).[9] New York has no such provision.

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the law[s]." 208 N.J. Super. at 672. Sapporo tries to distinguish *Winer* by claiming the franchisee was not incorporated in New Jersey and most of its sales were outside of New Jersey. Db27. But neither fact was relevant to the court's choice-of-law analysis. The Court in this matter should likewise ignore incorporation and location of sales and focus instead on protecting the interests of its wholesalers, such as WOJ.

[8] Without support, Sapporo dismisses this argument as "disingenuous" but cannot identify any provision in the Agreement that permits Sapporo to set a sales threshold for WOJ. Sapporo's reliance on *Bulut v. JPMorgan Chase Bank, N.A.*, 2023 WL 869402 (D.N.J. Jan. 27, 2023) and *Citibank, N.A. v. Errico*, 597 A.2d 1091 (App. Div. 1991) is inapposite since neither case addressed an industry's statutory scheme.

[9] Sapporo proffers no support for its contention that fee-shifting provisions are not fundamental policies. Further, Sapporo's attempts to distinguish *Warren Distrb.* and *Winer* because the courts there discussed fee-shifting clauses outside the context of

In short, only the MBPA can realize New Jersey's public policy and interest in protecting its wholesalers—a policy that the MBPA itself explicitly embodies.[10]

II. THE ARBITRATION CLAUSE HERE IS LEGALLY INVALID (Pa5-7). *County of Passaic v. Horizon Healthcare Servs., Inc.*, 474 N.J. Super. 498 (App. Div. 2023) ("Passaic") states that the express jury waiver under *Atalese v. U.S. Legal Services Group, L.P.*, is not required when parties to a commercial contract "are [1] sophisticated ***and*** [2] possess comparatively equal bargaining power." 219 N.J. 430 (2014). Nonetheless, Sapporo proffers a tortured reading of *Passaic* that limits the inquiry to the parties' sophistication by effectively conflating bargaining power with the parties' sophistication. Pa41-42.[11] Neither *Passaic's* plain language nor this State's public policy

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its Restatement analysis is meaningless. Additionally, Sapporo's reference to the Agreement's indemnification provision is plainly misplaced since that provision only appears to indemnify WOJ against third-party trademark infringement claims, not Sapporo's violation of the MBPA. Db35.

[10] Sapporo wrongly contends that New York law would apply absent a choice-of-law provision, again placing misguided emphasis on WOJ's sales to retailers. But for all of the reasons discussed above, the balance of the relevant factors weigh heavily in favor of the application of New Jersey law: location of contracting, where the contract is performed and parties' domicile, etc.

[11] None of Sapporo's cases are relevant because they fail to address commercial parties with demonstrably unequal bargaining power. *See Grandvue Manor, LLC v. Cornerstone Contracting Corp.*, 471 N.J. Super. 135 (App. Div. 2022) (a construction contract with contractor for services); *Reinvestment Fund, Inc. v. Rauh*, 2022 WL 17587863 (App. Div. Dec. 13, 2022) (finding "no evidence here of unequal

supports this strained reading.

Critically, *Passaic*'s focus on bargaining power is wholly consistent with this State's history of protecting vulnerable actors, such as wholesalers and franchisees. Because brewers enjoy disproportionate bargaining power, New Jersey presumes wholesaler agreements, like franchise agreements, are not arms-length, negotiated agreements, where wholesalers have an opportunity to negotiate, question, or dictate any aspect of the agreement. *See Kubis & Perszyk Assoc., Inc. v. Sun Microsystems, Inc.*, 146 N.J. 176, 192-5 (1996) ("franchise agreement in many cases is not a matter of mutual consent but actually a contract of adhesion—either take it or leave it.").[12] In these circumstances, the concern that parties—even "sophisticated" parties—mutually assent to relinquish their statutory right to our courts does not "vanish," since these agreements are not "individually-negotiated contracts" amongst parties of "relatively similar bargaining power." *Passaic*, 474 N.J. Super. at 503-04 (citations omitted).

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bargaining power"); *Gastelu v. Martin*, 2014 WL 10044913 (App. Div. July 9, 2015) (noting no evidence of unequal bargaining power); *Schmidt*, 2020 WL 2130931 (same); *In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515, 525 (3d Cir. 2019) (no unequal bargaining power).

[12] Sapporo's discriminatory policy requiring WOJ to only market to "Asian accounts" is indicative of this unequal bargaining power. Pa122; Pa137-141. Sapporo's flippant remark that WOJ "clearly do[es] not simply accede to Sapporo USA's wishes" is particularly insulting in light of the decades of discriminatory policies, that Sapporo has imposed on WOJ. Pb42.

Thus, to protect these businesses, *Passaic* requires more to ensure mutual assent and full understanding about waiving one's rights to the courthouse, particularly when such rights are guaranteed by statute. *See Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 168 N.J. 124, 132 (2001) ("waiver of statutory rights must be clearly and unmistakably established") (citations omitted).[13] Accordingly, without the express waiver language of *Atalese*, there can be no presumption that a franchisee or wholesaler understood the consequences and effects of an arbitration provision.

While the parties in *Passaic* were both sophisticated actors and enjoyed equal bargaining power, the *Passaic* court recognized that this is not always the case. As a result, it purposefully carved out an exception where commercial contracts involving parties with disproportionately less bargaining power, such as wholesalers and franchisees, require *Atalese's* express language to ensure mutual assent. Here, because the Agreement's arbitration clause failed to include such express waiver language the clause unenforceable.[14]

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[13] WOJ could not have waived its right to access a court, since the MBPA did not exist when the Agreement was executed. Nonetheless, Sapporo insists that WOJ should have known of the MBPA when the Legislature introduced it as a mere bill (Pb44). Sapporo fails to support its suggestion that WOJ should have been clairvoyant, and its additional argument that the Agreement's automatic renewal after the MBPA was enacted necessarily reflects WOJ's knowledge, assent or agreement to waive the right to a court is as impractical as it is meritless.

[14] The trial court's and Sapporo's reliance on *Housekeeper v. Lourie*, 39 A.D.2d 280 (1st Dep't 1972) to charge WOJ of selective enforcement is misguided. WOJ simply

III. THE FAA VIOLATES THE TWENTY-FIRST AMENDMENT (Pa5-7). Even if the Court determines that the arbitration clause is enforceable, the MBPA's provisions mandating that disputes be adjudicated in a court of law supersedes the FAA under the Twenty-First Amendment. Notably, this is a matter of first impression in New Jersey. Sapporo's principal case, *John G. Ryan, Inc. v. Molson USA, LLC*, 2005 WL 2977767, at *1 (E.D.N.Y. Nov. 7, 2005), is an unpublished decision of no precedential value that addresses a materially different statute than the MBPA. In *Ryan*, the ABC Law's anti-arbitration provision bars wholesaler agreements from ***requiring*** arbitration agreements but leaves room for parties to privately contract for an arbitral forum, whereas the MBPA expressly mandates that claims ***shall*** be brought in New Jersey courts. While Sapporo characterizes the two statute's anti-arbitration clauses as "mirror images" of each other, they plainly are not. Moreover, the MBPA's mandate advances an important policy objective of ensuring "orderly market conditions." N.J.S.A. § 33:1-93.13(b).

IV. A COURT MUST DETERMINE ARBITRABILITY HERE (Pa7). The arbitrability issue is a red herring because judges "retain the primary power

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seeks to enforce the MBPA, not selectively enforce the Agreement. Moreover, *Housekeeper* dealt with New York's "permeation doctrine," prohibiting a party from enforcing an arbitration agreement while simultaneously claiming that it was induced by fraud. That is not an issue here.

to decide questions of whether the parties mutually assented to a contract containing or incorporating a delegation provision." *Cottrell v. Hotlzberg*, 468 N.J. Super. 59, 70 (App. Div. 2021). [15] Critically, a "judicial forum is generally appropriate" to determine arbitrability and only once "a court makes a threshold decision that a valid agreement to arbitrate exists, it then considers the next issue, whether there is 'clear and unmistakable' evidence that the parties intended to delegate arbitrability to an arbitrator." *Id*. at 71 (citing *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 530 (2019)). In this case, no valid arbitration agreement exists, so a determination on arbitrability is unnecessary.[16]

V. THIS APPEAL IS NOT MOOT (Not Raised Below). Sapporo fails to satisfy its heavy burden to establish that this appeal is moot. *See Hartnett v. Pennsylvania State Educ. Ass'n*, 963 F.3d 301, 307 (3d Cir. 2020). Courts must

[15] Sapporo's cases (many unpublished) are irrelevant, as they pre-date *Cottrell*. *See Neal v. Asta Funding, Inc.*, 2016 WL 3566960 (D.N.J. June 30, 2016); *Tox Design Group, LLC v. RA Pain Services, PA*, 2019 WL 7183687 (App. Div. Dec. 26, 2019); *Goffe v. Foulke Mgmt. Corp.*, 238 N.J. 191 (2019); *Schmidt v. Laub as Trustee for Carol L. Glatstian Living Trust*, 2020 WL 2130931 (App. Div. May 5, 2020).

[16] Nevertheless, overcoming New Jersey's presumption that courts decide arbitrability issues is onerous and only achievable with "clear and unmistakable evidence." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (citation omitted). Mere reference to AAA rules in a contract is not a "clear and unmistakabl[e]" delegation of the arbitrability question and simply referencing AAA rules "fails to comport" with New Jersey law. *Ames v. Premier Surgical Ctr., L.L.C.*, 2016 WL 3525246, at *3 (App. Div. June 29, 2016).

be particularly "skeptical" of a party's mootness claim when that party only "yields in the face of a court order" yet "maintains that its conduct was lawful all along." *Id*. at 306. Here, Sapporo withdrew the Notices only after the trial court enjoined it from terminating the Agreement. Yet, it still propagates the fiction that the Notices were merely a request for a plan to cure WOJ's "deficiencies." Pa49. The trial court already rejected this fiction,[17] observing that Sapporo's actions were not "fair and reasonable." T76:8-22.[18] At no point does Sapporo provide any argument as to why it cannot or will not repeat this misconduct. In fact, it is apparent from litigations against Sapporo in other jurisdictions that improper termination of wholesalers is part of a greater consolidation process.[19] Thus, this action is not moot.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below in its entirety.

Dated: April 17, 2024

/s/ *James P. Chou*
James P. Chou

[17] Sapporo also continues to perpetuate the fiction that WOJ's sales performance was "substantially worse than other distributors," WOJ is not restricted to selling to Asian-owned entities, and WOJ diverted salespersons to deliver products. Db9-10.

[18] The trial court also noted that Sapporo's demands were "precipitous" to "say, you know, we've been doing great for 45 years. Now you have four months to figure this out and get it done." T76:8-22.

[19] *See, e.g., Louis Glunz Beer, Inc. v. Sapporo U.S.A., Inc.*, Case No. 1:23-cv-1482, pending in the Chancery Division of the Circuit Court of Cook County, Illinois.

WINE OF JAPAN IMPORT, INC. and SANWA TRADING CO., INC., Plaintiffs-Appellants, v. SAPPORO U.S.A., INC., MASASHI MINAMI, ANDREW MURPHY and TAKESHI MIYAHARA, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001051-23T4 CIVIL ACTION ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY DOCKET NO.: MRS-L-2143-22 SAT BELOW: HON. STEPHAN C. HANSBURY, J.S.C.

BRIEF AND APPENDIX OF PROPOSED AMICUS CURIAE BEER WHOLESALERS' ASSOCIATION OF NEW JERSEY

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STATEMENT OF INTEREST

The Beer Wholesalers' Association of New Jersey ("BWANJ") is a non-profit trade association founded in 1933. Its primary purpose is to represent and advocate for its members, independently owned and operated wholesalers of malt beverages. Critical to all licensed New Jersey beer wholesalers is the three-tier system established by New Jersey's Legislature and in place since the adoption of the Twenty-First Amendment. While some form of a three-tier system has been enacted by nearly every State to regulate beer importation and distribution since the end of Prohibition, each State developed and implemented its own "system" through State-specific regulations tailored to its unique needs.

As expressly understood by the New Jersey Legislature when it developed its current scheme, all beer wholesalers, regardless of size or brand, confront the same issue when negotiating with brewers and/or suppliers: the unequal bargaining power of the brewers with whom the wholesalers contract and procure malt beverages. As it stands, the trial court's decision in the underlying action, which dismissed the claims of Plaintiffs-Appellants, Wine of Japan Import, Inc. and Sanwa Trading Co., Inc. (collectively, "Plaintiffs" or "Appellants"), and compelled them to arbitrate their disputes with Defendants-Respondents, Sapporo U.S.A., Inc., Masashmi Minami, Andrew Murphy, and Takeshi Miyahara (collectively, "Defendants" or "Respondents"), undermines

the protections intended for New Jersey's beer wholesalers. Accordingly, the BWANJ agrees with the Plaintiffs that the trial court's decision should be reversed and respectfully requests leave to serve as Amicus Curiae to advocate on behalf of a position that aligns with the objectives of the Malt Alcoholic Beverages Practices Act, N.J.S.A. § 33:1-93.12, et seq. ("MBPA") and long-standing New Jersey policy.

The outcome of this case will have a significant and direct impact on BWANJ's members and other licensed New Jersey beer wholesalers. The trial court's ruling, if affirmed, will directly impair the protections afforded to wholesalers under the MBPA, and will encourage brewers to engage only with wholesalers who also conduct business in less protective States, such as New York. Taken to its logical conclusion, the trial court's decision will effectively authorize brewers to avoid New Jersey's statutory requirements and to forgo New Jersey Courts as the proper forum to litigate disputes arising under the MBPA, even when the underlying conduct occurred in this State. If the trial court's decision is left intact, the very purpose of the MBPA will be thwarted.

Accordingly, the BWANJ joins in the Plaintiffs' arguments and urges the Court to reverse the trial court's decision dismissing Plaintiffs' Complaint and compelling them to arbitrate in contravention of the express language of the MBPA. The Plaintiffs, like BWANJ's other members, often face unreasonable

and/or non-negotiable demands from the manufacturers and brewers with whom they contract. The MBPA, which expressly requires parties to a wholesaler agreement to settle disputes arising under the MBPA before a Court of this State, mandates a reversal of the trial court's decision.

In sum, the BWANJ seeks to be heard so that this Court's decision will be consistent with the plain language of the MBPA, will uphold the intent of that statute, and will preserve the protections afforded to wholesalers that were intended to level the playing field. BWANJ respectfully submits this brief in further support of its request to appear as an amicus curiae and to appear at oral argument. If BWANJ's motion is granted, please accept this brief as BWANJ's brief on the merits.

PROCEDURAL HISTORY AND STATEMENT OF MATERIAL FACTS[1]

Proposed amicus curiae, BWANJ, adopts the Plaintiffs' Procedural History and Statement of Facts. (Pb4-14).[2]

[1] Given BWANJ's limited role, the Statement of Facts and Procedural History have been combined for this Court's convenience.

[2] Hereinafter, "Pb" refers to Plaintiffs' moving brief; "Pa" refers to Plaintiffs' appendix; and "Aa" refers to proposed Amicus Curiae BWANJ's appendix. Additionally, unless otherwise indicated, any defined terms herein shall have the meaning ascribed to them in Plaintiffs' moving brief.

LEGAL ARGUMENT

POINT ONE

THE MBPA WAS DESIGNED AND IMPLEMENTED TO PROTECT NEW JERSEY BEER WHOLESALERS AND TO PREVENT INEQUITY IN BARGAINING POWER BETWEEN WHOLESALERS AND BREWERS

A. Following The Passage Of The Twenty-First Amendment, New Jersey Adopts The Three-Tier System

New Jersey's MBPA was designed and enacted to, among other things, preserve the three-tier distribution system governing the sale and distribution of malt alcoholic beverages in this State. See N.J.S.A. 33:1-93.13(b). The "three-tier system," in which brewers sell to wholesalers, wholesalers sell to retailers, and retailers sell to consumers, was conceived to combat many of the evils and wrongdoing that unfolded in the pre-Prohibition and Prohibition eras. Indeed, the problems that surrounded alcohol consumption "prompted States to enact a variety of regulations, including licensing requirements, age restrictions, and Sunday-closing laws." Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2446, 2463 (2019).

Initially, the United States's alcoholic beverage system followed the English "tied-house" system, under which "an alcohol producer, usually a brewer, would set up saloonkeepers, providing them with premises and equipment, and the saloonkeepers, in exchange, agreed to sell only that

producer's products and to meet set sales requirements." Id. at 2463 n.7. This resulted in the "proliferation of saloons, and myriad social problems were attributed to this development." Id. at 2463.

States attempted to "ban the production and sale of alcohol within their borders, but those bans were ineffective because out-of-state liquor was immune from any state regulation as long as it remained in its original package." Id. at 2465 (internal quotations omitted). To combat this, in 1913, Congress passed the Webb-Kenyon Act, which expanded States' regulatory authority over the importation of alcohol. Id. at 2466. Because these regulatory actions were ineffective, in 1919, the Eighteenth Amendment was ratified, prohibiting the manufacture, sale, or transportation of alcohol. U.S. Const. Amend. XVIII. But this only led to more problems and the proliferation of organized crime during the Prohibition era.

Reversing course, the Twenty-First Amendment was ratified and essentially repealed the Eighteenth Amendment. The Twenty-First Amendment empowered each State to determine "whether to permit sales of alcohol within its borders and, if so, on what terms and in what way." Lebamoff Enters. Inc. v. Whitmer, 956 F.3d 863, 868 (6th Cir. 2020), cert. denied, 141 S. Ct. 1049 (2021). Many states, including New Jersey, passed some form of a three-tier licensing structure for alcohol sale and distribution. See Grand Union Co. v.

Sills, 43 N.J. 390, 397-98 (1964) ("New Jersey's Control Act expressly outlawed the tied house system."); Arnold's Wines, Inc. v. Boyle, 571 F.3d 185, 187 (2d Cir. 2009); B-21 Wines, Inc. v. Bauer, 36 F.4th 214, 218 (4th Cir. 2022) ("The basic framework of the three-tier system has been in place for the better part of a century.").

Under New Jersey's "three-tier alcoholic beverage distribution system," suppliers/brewers sell alcohol to wholesalers, then wholesalers sell to retailers, who then sell to consumers. N.J.S.A. 33:1-3.1(b)(8); see also R&R Mktg., L.L.C. v. Jim Bean Brands Co., 383 N.J. Super. 323, 326-27 (App. Div. 2006). The system is heavily regulated. It requires wholesalers to obtain licenses from the State and is intended to, among other things, prevent vertical integration and the tied-house problem. See, e.g., N.J.S.A. 33:1-43 (preventing a licensee in one tier from holding a license in another tier or possessing a financial interest in a business licensed in another tier). In short, "[t]he distribution and sale of malt alcoholic beverages in this State vitally affects the general economy and revenues of the State, as well as the public interest and public welfare[,]" and the State has a direct interest in its regulation of this system. See N.J.S.A. 33:1-93.13(a).

B. The 2005 MBPA Enactments Regarding Wholesaler Agreements

Aligned with these fundamental goals, but recognizing the inherent uneven bargaining power in the brewer-wholesaler contractual relationship despite the tiered structure, in 2005, the New Jersey Legislature enacted the MBPA, N.J.S.A. 33:93.12 to 93.20. These provisions identified the need for statutory protections to wholesalers and require "reasonable" terms in any wholesaler agreement. Indeed, a primary purpose of the MBPA is to prevent the type of misconduct Defendants engaged in and to protect wholesalers, such as Plaintiffs.

In the Statement to Assembly Committee Substitute for Assembly, No. 3619, the Legislature stated that the MBPA was established to govern "written agreements between brewers and wholesalers." (Pa144-47.) The Legislature makes clear that the MBPA dictates the framework for a brewer-wholesaler contractual relationship. "The terms of the agreement must be reasonable and any provision that imposes an unreasonable standard of performance on a wholesaler is a violation of the substitute's provisions and as such would be null and void." (Pa145.) Additionally, the MBPA was devised to "establish[] a framework for damages and injunctive relief in the event of reasonable and unreasonable terminations and provide[] for actions that violate the committee substitute's provisions to be brought in the Superior Court of New Jersey." Id.

Looking to the statute itself, and when viewed in the historical context leading to the implementation of the three-tiered system, it cannot be reasonably disputed that the Legislature expressly and implicitly intended to provide broad protections to wholesalers in their dealings with brewers. The Legislature went so far as to state:

> It is therefore fitting and proper to regulate the business relationship between brewers and wholesalers of malt alcoholic beverages and set forth their respective responsibilities to **further the public policy of this State and protect beer wholesalers from unreasonable demands and requirements by brewers**, while devoting sufficient efforts and resources to the distribution and sale of malt alcoholic beverages.
>
> [N.J.S.A. 33:1-93.13(c) (emphasis added).]

With respect to the interplay of brewers and wholesalers, the Legislature clearly intended that any dispute arising under the MBPA be adjudicated by a New Jersey State Court, pursuant to the New Jersey State law and the terms of the MBPA. See N.J.S.A. 33:1-93.15(a). In fact, the MBPA expressly precludes brewers and wholesalers from waiving or modifying, by contract or otherwise, "any provision" of the MBPA. Ibid. For example, the District of New Jersey has expressly invalidated a portion of a contract between a wholesaler and brewer because it was in conflict with the MBPA. See Warren Distrib. Co. v. InBev USA L.L.C., No. 07-1053, 2010 U.S. Dist. LEXIS 55542, at *17-18

(D.N.J. June 7, 2010) (finding that a clause that conflicted with the MBPA was null and void).

Leaving no doubt, if there is any question of whether a wholesaler agreement "conform[s] with the provisions" of the MBPA, the statute confirms that such issue "shall be determined by a court of this State in the context of a specific case or controversy among wholesalers and brewers only, and not by generally applicable rule, regulation or otherwise." N.J.S.A. 33:1-93.15(e). Moreover, the MBPA creates a cause of action for any brewer or wholesaler to sue "a brewer for violation of [the] act . . . in connection with a termination pursuant to [section 33:1-93.15(d)(1)]," and provides that "[t]he wholesaler or brewer who sues alleging a violation of [the Act] shall, if successful, also be entitled to the costs of the action, including, but not limited to, reasonable attorney's fees." Ibid.

Finally, the Legislature made clear that the Franchise Practices Act, N.J.S.A. 56:10-1, et seq., serves as a supplement to the MBPA and should be given consideration in any determination under the MBPA. See N.J.S.A. 33:1-93.15(e) ("[P]roper consideration should be given to relevant precedents provided under the 'Franchise Practices Act,' . . . and the fact that a term of a contract, agreement or relationship may be a term of the kind described in section 9 of this act shall not be considered in making such determination.").

Notably, the Franchise Practices Act largely echoes and emboldens the strong protections available for the party in a position of lesser-bargaining power. The Franchise Practices Act provides "that a franchise may not be terminated, cancelled, or non-renewed 'without good cause.'"[3] Instructional Sys. v. Computer Curriculum Corp., 130 N.J. 324, 374 (1992) (quoting N.J.S.A. 56:10-5). In fact, the Franchise Practices Act prescribes that if a franchisee is fulfilling its contractual obligations, a franchisor cannot even make good faith structure changes if those changes include termination of the franchisee's franchise. Instructional Sys., 130 N.J. at 374. The Legislature's decision to incorporate the Franchise Practices Act as a gap-filler for the MBPA and to call for New Jersey Courts to consider the Franchise Practices Act in any analysis of the MBPA only highlights the broad protective intent of the MBPA.

[3] "The Act narrowly defines 'good cause' as 'failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise.'" Instructional Sys., 130 N.J. at 374 (quoting N.J.S.A. 56:10-5).

POINT TWO

CONSIDERING THE MBPA'S INTENT, A CHOICE OF LAW ANALYSIS NECESSITATES THE APPLICATION OF NEW JERSEY LAW TO THIS DISPUTE

BWANJ joins in Plaintiffs' arguments that the trial court erred in applying New York law to this matter and that this Court should reverse the trial court's order compelling arbitration. If New York law is applied and the court's order is left intact, the protections afforded to wholesalers under the MBPA, and New Jersey's public policies seeking to neutralize uneven bargaining power in any contractual relationship, will be jeopardized. If permitted to stand, the decision below will signal to all brewers that it can avoid this State's mandates simply because a wholesaler with whom it contracts also engages in business in another State and/or agreed to disregard New Jersey's laws. This will not only undermine the distinct regulations governing the system established by our State, it will encourage brewers to only engage in business with wholesalers who also distribute to jurisdictions with less favorable protections to wholesalers, such as New York.

Stated differently, the trial court's decision will embolden brewers to engage in the conduct that occurred here, and will harm family-owned and operated New Jersey beer wholesalers. For this reason, the BWANJ submits

that this Court should reverse the trial court's order and remand with instructions that any analysis of the Wholesaler Agreement apply New Jersey law.

A. The MBPA's Statutory Scheme Requires Any Agreement Between A Brewer And A New Jersey Wholesaler To Comply With New Jersey State Law And The MBPA

A choice-of-law analysis "is preempted when [the] Legislature has determined that New Jersey public policy requires the application of [New Jersey's] substantive law whenever [State] court have jurisdiction over the kind of claim at issue, regardless of the interest of another state." Fairfax Fin. Holdings Ltd. v. S.A.C. Capital Mgmt., LLC, 450 N.J. Super. 1, 43 (App. Div. 2017) (citing P.V. ex rel. T.V. v. Camp Jaycee, 197 N.J. 132, 140 (2008)). Generally, a court must discern whether there is an express and/or implied directive from the Legislature precluding or preempting a choice-of-law analysis. The preeminent expression of New Jersey public policy is the Legislature's enactments. State Farm Mut. Auto. Ins. Co. v. Estate of Simmons, 84 N.J. 28, 39 (1980). If a statute declares that a substantive rule applies in a situation that would otherwise pose a choice-of-law question, "New Jersey courts would follow that directive even when the law of other jurisdictions dictated a contrary result." Ibid.

The MBPA expressly states that the terms and provisions of a brewer-wholesaler contract must "comply with and conform to State law and the terms

of this act." N.J.S.A. 33:1-93.15(a), (b). Further, any determination whether the terms of a contract, agreement, or relationship conform with the MBPA "shall be determined by a court of this State in the contest of a specific case or controversy among wholesalers and brewers only[.]" N.J.S.A. 33:1-93.15(e) (emphasis added). On its face, the MBPA confirms that in a circumstance where the MBPA is implicated in a dispute, New Jersey courts are the appropriate forum for disposition. This will ensure that the disparity in bargaining power between wholesalers and brewers is checked and protected by a state tribunal and the MBPA's provisions remain in full effect.

Given the clear language chosen by the Legislature, any analysis of a wholesaler agreement must be determined using the laws of this State, by a court of competent jurisdiction in this State. It follows that application of New York law would essentially render the MBPA's provisions useless in any wholesaler agreement that contains a choice-of-law provision, in direct conflict with the Legislature's intent.

B. Even If The MBPA Did Not Mandate Application Of New Jersey Law, Application of New York Law Violates New Jersey Public Policy

As adopted in Instructional Systems Incorporated v. Computer Curriculum Corporation, in a choice-of-law analysis, the Restatement (Second) of Conflicts of Laws § 187 applies. 130 N.J. 324, 341-42 (1992). Specifically, where a conflict of law exists, the state contracted for will apply unless:

> (1) The chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (2) Application of the law of the chosen state would be contrary to a fundamental policy of a state, which has a materially greater interest than the chosen state in the determination of the particular issues and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties.
>
> [Ibid.]

As to the first exception to the conflict-of-law analysis, proposed amicus accepts the Plaintiffs' factual allegations and joins in Plaintiffs' legal argument set forth in Point II.B.i. (Pb18-19.)

As to the second exception, as is the case here and in all wholesaler agreements, a fundamental public policy of New Jersey is implicated, and application of New York law would contravene that policy. The MBPA explicitly states its strong public policy interest in regulating the malt beverage industry:

> It is therefore fitting and proper to regulate the business relationship between brewers and wholesalers of malt alcoholic beverages and set forth their respective responsibilities to **further the public policy of this State and protect beer wholesalers from unreasonable demands and requirements by brewers**, while devoting sufficient efforts and resources to the distribution and sale of malt alcoholic beverages.

[N.J.S.A. 33:1-93.13(c) (emphasis added).]

To preserve this intent, the MBPA provides that any contract provision that violates its terms is null and void. N.J.S.A. 33:1-93.15(a).

While the Federal Arbitration Act ("FAA") provides for the enforcement of arbitration agreements and New Jersey has a public policy in favor of upholding said agreements, that preference is "not without limits." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001). As is the case here, New Jersey has at least an equally vital and important public policy regarding the sale of malt alcoholic beverages.

Specifically, New Jersey's Legislature recognized that any brewer-wholesaler relationship has an inherent bargaining power imbalance, and to ensure a harmonious three-tier system of brewers, distributors, and retailers of malt alcoholic beverages. As detailed at length above, before Prohibition, the existence of "tied houses" allowed for retailers to be dominated by large out-of-state manufacturers. To avoid the issues latent during the pre-Prohibition and Prohibition eras, New Jersey established this regulatory scheme and separated each segment of the industry. The system is intended to maintain the independence of each tier and prevent interference and overreach by large national brewers into the locally owned and licensed wholesalers and retailers. The MBPA represents a critical tool in wholesaler's ability to remain

independent and outside the undue influence of much larger and often more sophisticated multi-national brewers and suppliers, such as Defendants.

Consistent with this goal, the MBPA established that there exists a baseline reasonableness required in any brewer-wholesaler relationship:

> The provisions of this act may not be waived or modified by written or oral agreement, estoppel or otherwise, and any provision of a contract or ancillary agreement that directly or indirectly requires or amounts to a waiver of any provision of this act, or that would relieve any person of any obligation or liability under this act, or that imposes unreasonable standards of performance on a wholesaler, shall be a violation of this act and shall be null, void and of no effect.
>
> [N.J.S.A. 33:1-93.15(a).]

Indeed, a fundamental purpose of the MBPA was to "protect beer wholesalers from unreasonable demands and requirements by brewers." N.J.S.A. 33:1-93.13(c). This was in response to the tied-house system that existed prior to the Twenty-First Amendment and establishment of New Jersey's three-tier system.

Thus, applying New York law despite the Legislature's clear intent that New Jersey law and, specifically, the MBPA apply, will undermine and effectively moot the statute. While New York's Alcoholic Beverage Control Law ("ABC Law") and the MBPA contain similar provisions, the two differ in several key respects. First, the ABC Law permits modifications to a wholesaler-brewer agreement so long as good cause exists. ABC Law, 55-c(4)(b). New

Jersey, recognizing the need for stronger protections for wholesalers, specifically provides that a brewer may not terminate, cancel, or refuse to renew a wholesaler agreement because the wholesaler refuses to accept an unreasonable amendment to a wholesaler agreement. See N.J.S.A. 33:1-93.15(c)(2). Further, the MBPA requires that any dispute regarding the terms of a wholesaler agreement be determined by a court of this State, while the ABC Law only prohibits mandatory arbitration clauses. Cf. N.J.S.A. 33:1-93.15(e) with ABC Law, § 55-c(7)(c). And, notably here, New York does not have a comparable express waiver requirement under Atalese or County of Passaic, which—as further discussed below—would render the arbitration clause in this matter null and void.[4] Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014); County of Passaic v. Horizon Healthcare Servs., Inc., 474 N.J. Super. 498 (App. Div. 2023). Finally, to deter brewers from engaging in unreasonable conduct against their wholesalers, New Jersey, which traditionally follows the American Rule, permits fee-shifting unlike New York. Cf N.J.S.A. 33:1-93.18(a) with ABC Law, 55-c.

[4] See also Aguirre v. CDL Last Mile Sols., LLC, 2024 N.J. Super. Unpub. LEXIS 283, *16 (App. Div. Feb. 26, 2024) (holding that application of New York law with respect to arbitration would be "contrary to a fundamental" New Jersey policy, namely, the "right to access [New Jersey's] courts").

These differences underscore the efforts of the Legislature to equalize the balance of power between brewers and wholesalers, and the deleterious effect on those efforts (and the resulting dangers to wholesalers statewide) if the trial court's decision is affirmed. The MBPA is meant to protect wholesalers from the very harm Plaintiffs allege Defendants caused here. At bottom, the application of New York law will violate New Jersey's public policy favoring the protection of wholesalers against more powerful brewers.

POINT THREE

THE MBPA'S ENFORCEMENT PROVISION ESTABLISHES THAT NEW JERSEY COURTS ARE THE CORRECT FORUM FOR ACTIONS ARISING UNDER THE MBPA

Applying New Jersey law, the arbitration provision of the Wholesaler Agreement is void and unenforceable.

As is the case for any agreement, the Supreme Court of New Jersey has determined that "any contractual waiver-of-rights provision must reflect" that the parties "clearly and unambiguously" agreed to its terms. Atalese v. U.S. Legal Services, Group, L.P., 219 N.J. 430 (2014). Where a party is waiving their right to pursue claims in a court, such waiver must be clearly and conspicuously stated and assented to by the contracting party. Id. at 447. More recently, as determined by the Appellate Division in County of Passaic, these same principles apply even to sophisticated parties entering a commercial contract if the parties do not possess comparatively equal bargaining power. See County of Passaic v. Horizon Healthcare Servs., Inc., 474 N.J. Super. 498 (App. Div. 2023).

Specifically, in County of Passaic, the Appellate Division determined that the County entered into an arm's length agreement with Horizon concerning the County's self-funded health benefit plan. Id. at 496-97. However, the Appellate Division made clear that Atalese and its progeny "focus on the unequal

relationship between the contracting parties or the adhesional nature of the contract when holding an arbitration agreement could not be enforced without an express waiver of the right to seek relief in a court of law." Id. at 503.

As established, the MBPA was designed to maintain and facilitate the three-tier system in place between brewers, wholesalers, and retailers of malt alcoholic beverages. To this end, the New Jersey Legislature carved out additional protections for wholesalers in wholesaler agreements with brewers because of the innate unequal bargaining power between a wholesaler and a brewer. See N.J.S.A. 33:1-93.13(c) (stating the MBPA was to "further the public policy of this State and protect beer wholesalers from unreasonable demands and requirements by brewers, while devoting sufficient efforts and resources to the distribution and sale of malt alcoholic beverages" (emphasis added)). Apparent by the plain language of the statute, wholesalers are not on the same footing as brewers.

Accepting the Plaintiffs' allegations, the Plaintiffs were tasked with unreasonable, and facially discriminatory, demands by the Defendants. (See Pb38-39.) Plaintiffs cannot realistically acquiesce to these demands, nor should they be beholden to such discriminatory requirements and obligations from their brewers. If proven, the Plaintiffs' allegations demonstrate precisely why this Court clarified and limited the applicability of Atalese, and why the MBPA

mandated protections to wholesalers. And because the MBPA was not even law when the underlying Wholesaler Agreement was entered, the parties could not have contracted around the mandates of that statute—like they could have under New York law— even if they had mutually agreed to waive the right to litigate any dispute in court.[5]

Given the parties' unequal bargaining power alleged here, and the unequal bargaining power inherent in any brewer-wholesaler business relationship, absent an express waiver, the arbitration clause in the Wholesaler Agreement is unenforceable.

[5] BWANJ also notes that the MBPA applies retroactively to all agreements between brewers and wholesalers existing prior to the effective date of the Act. See N.J.S.A. 33:1-93.15(b).

CONCLUSION

For these reasons and those set forth more fully by the Plaintiffs, this Court should reverse the trial court's Order and remand this matter to the Superior Court of New Jersey, Law Division, for disposition.

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By: */s/ Kyle Vellutato*

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