SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-001301-23

RANDY HOPKINS, *on behalf of himself and those similarly situated*,	:	**CIVIL ACTION**
Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, HUDSON COUNTY
v.	:	
LVNV FUNDING LLC; MHC RECEIVABLES, LLC; FNBM, LLC; SHERMAN ORIGINATOR III, LLC; SHERMAN ORIGINATOR LLC; and JOHN DOES 1 to 10,	:	Trial Court Docket No. HUD-L-1732-22
	:	Sat Below: HON. ANTHONEY V. D'ELIA, J.S.C.
Defendant-Respondents.	:	DATE: May 9, 2024

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

TABLE OF JUDGMENTS, ORDERS AND RULINGS v

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 3

STATEMENT OF FACTS 5

LEGAL ARGUMENT 7

POINT I. THE STANDARD OF REVIEW (Raised Below: T1) 7

POINT II. THE TRIAL COURT ERRED IN DETERMINING THAT DEFENDANTS DID NOT WAIVE THEIR PURPORTED ABILITY TO COMPEL ARBITRATION (Raised Below: T1) 10

POINT III. THE TRIAL COURT ERRED BY ALLOWING DEFENDANTS TO ENFORCE A PROVISION OF A CONTRACT DECLARED VOID BY THE LEGISLATURE (Raised Below: T1) 17

POINT IV. THE TRIAL COURT ERRED BY GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION WITHOUT ALLOWING DISCOVERY ON THE ISSUE OF ARBITRABILITY (Raised Below: T1) 31

CONCLUSION 32

TABLE OF AUTHORITIES

Cases

Accountemps Div. of Robert Half, Inc. v. Birch Tree Grp., Ltd.,
115 N.J. 614 (1989) 30

Arafa v. Health Express Corp.,
243 N.J. 147 (N.J. 2020) 10

Arroyo v. Stoneleigh Recovery Assocs., LLC,
2019 U.S. Dist. LEXIS 138287 (D.N.J. Aug. 14, 2019) 27

Barr v. Bishop Rosen & Co., Inc.,
442 N.J. Super. 599 (App. Div. 2015) 7

Browne v. Nat'l Collegiate Student Loan Tr.,
No. 21-11871 (KM) (JSA), 2021 U.S. Dist. LEXIS 244537
(D.N.J. Dec. 22, 2021) 23

Cole v. Jersey City Med. Ctr.,
215 N.J. 265 (2013) 11, 12

Family Fin. Corp. v. Gaffney,
11 N.J. 565 (1953) 19

Family Fin. Corp. v. Gough,
10 N.J. Super. 13 (App. Div. 1950) 18, 19

Frumer v. Nat'l Home Ins. Co.,
420 N.J. Super. 7 (App. Div. 2011) 8

Goffe v. Foulke Mgmt. Corp.,
238 N.J. 191 (2019) 10, 31

Hirsch v. Amper Fin. Servs., LLC,
215 N.J. 174 (2013) 8

In re Resolution of State Com. of Investigation,
108 N.J. 35 (1987) 24

Insight Global, LLC v. Collabera, Inc.,
446 N.J. Super. 525 (Ch. Div. 2015) 30

Jubelt v. United Mortg. Bankers, Ltd.,
Civil Action No. 13-7150 (ES) (MAH), 2015 U.S. Dist. LEXIS 84595
(D.N.J. June 30, 2015) 23

Knorr v. Smeal,
178 N.J. 169 (2003) 9

Langer v. Morris Plan Corp.,
110 N.J.L. 186 (1933) 19

Latteri v. Mayer,
2018 U.S. Dist. LEXIS 85926 (D.N.J. May 22, 2018) 28

Lemelledo v. Benefit Mgmt. Corp.,
150 N.J. 255 (1997) 19, 21, 26

Lopez v. Law Offices of Faloni & Associates, LLC,
2016 U.S. Dist. LEXIS 124730 (D.N.J. Sept. 14, 2016) 28

Martindale v. Sandvik, Inc.,
173 N.J. 76 (2002) 8

McKeeby v. Arthur,
7 N.J. 174 (1951) 15

McQueen v. Fein, Such, Kahn & Shepard, P.C.,
ESX-L-1439-22, 2023 N.J. Super. Unpub. LEXIS 640
(Law Div. April 26, 2023) 26, 27

Morgan v. Sundance, Inc.,
142 S. Ct. 1708 (2022) 9, 13

New Century Fin. v. Trewin,
2018 N.J. Super. Unpub. LEXIS 1688 (Ch. Div. May 24, 2018) 23

North v. Portfolio Recovery Assocs., LLC,
No. 2:20-cv-20190-BRM- JSA, 2021 U.S. Dist. LEXIS 184974
(D.N.J. Sep. 24, 2021) 28

Peralta v. Ragan,
2022 U.S. Dist. LEXIS 234300 (D.N.J. Dec. 30, 2022) 29

R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.,
168 N.J. 255 (2001) 24

Tompkins v. Selip & Stylianou, LLP,
2019 U.S. Dist. LEXIS 21937 (D.N.J. Feb. 11, 2019) 29

Valentine v. Mullooly, Jeffrey, Rooney & Flynn LLP,
2022 U.S. Dist. LEXIS 118399 (D.N.J. July 6, 2022) 29

Veras v. LVNV Funding, LLC,
No. 13-1745 (RBK/JS), 2014 U.S. Dist. LEXIS 34176
(D.N.J. Mar. 17, 2014) 23, 24, 29

White v. Samsung Elecs. Am., Inc.,
61 F.4th 334 (3d Cir. 2023) 13

Woo-Padva v. Midland Funding LLC,
2022 N.J. Super. Unpub. LEXIS 96 (Law Div. Jan. 21, 2022) 23

Statutes

9 U.S.C. § 2 8

N.J.S.A. 17:11C-18 22

N.J.S.A. 17:11C-2 .... 6, 22

N.J.S.A. 17:11C-3 .... 6, 22

N.J.S.A. 17:11C-3(a) 1

N.J.S.A. 17:11C-33(b) 1, 6, 17

N.J.S.A. 17:11C-7(c) 22

N.J.S.A. 17:11C-7(e) 22

N.J.S.A. 52:9M-15(a) 24

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Order Granting Motion to Compel Arbitration
filed November 22, 2023 ....Pa187

PRELIMINARY STATEMENT

"No person shall engage in business as a consumer lender or sales finance company without first obtaining a license or licenses under this act." N.J.S.A. 17:11C-3(a).

> A consumer lender who violates or participates in the violation of any provision of section 3 . . . of this act, *shall be guilty of a crime of the fourth degree*. A contract of a loan not invalid for any other reason, in the making or collection of which any act shall have been done which constitutes a crime of the fourth degree under this section, *shall be void and the lender shall have no right to collect or receive any principal, interest or charges . . . .*"

N.J.S.A. 17:11C-33(b) (emphasis added).

It is undisputed that Defendants; MHC Receivables, LLC ("MHC"), FNBM, LLC ("FNBM"), Sherman Originator III, LLC ("Sherman III"), and Sherman Originator LLC ("Sherman," collectively "Assignor Defendants") were not licensed pursuant to the New Jersey Consumer Finance Licensing Act ("NJCFLA") when they attempted to take assignment of the Credit One Bank, N.A. account allegedly belonging to Plaintiff Hopkins. Thus, the contract governing the account was void the moment it was acquired by unlicensed MHC (being the first in the chain of assignment), as per N.J.S.A. 17:11C-33(b). It is also undisputed that Defendant LVNV Funding LLC ("LVNV") purchased or otherwise acquired Hopkins's alleged debt from the unlicensed Assignor Defendants—after the contract governing the account was rendered

void. Upon assignment of the void account, LVNV initiated a collection lawsuit against Hopkins in the Special Civil Part of the Passaic County Law Division. In so doing, LVNV fraudulently misrepresented the status of the void debt and misrepresented that they had the right to enforce the void debt, in violation of, *inter alia,* the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. 1692, *et seq.*, the New Jersey Consumer Fraud, N.J.S.A. 56:8-1, *et seq.*, and common law.

Accordingly, Hopkins asserted counterclaims and initiated a separate putative class action in the Law Division of Hudson County. The actions were later consolidated. The parties proceeded to engage in litigation, including a dispositive motion filed by Defendants (which was denied), for nearly a year and a half before Defendants moved to compel arbitration. Despite the fact that Defendants had, *inter alia*, failed to assert arbitration as an affirmative defense, certified that arbitration was not contemplated, and filed and lost a motion for dismissal attacking the merits of Hopkins's claims, the trial court determined that Defendants had not waived their purported ability to compel arbitration. Moreover, the trial court failed to acknowledge or analyze the issue of voidness under the NJCFLA as it related to the contract ostensibly governing Hopkins's account and refused to allow any discovery into the threshold issue of arbitrability. Thus, the trial court's November 11, 2022

Order (Pa187) granting the Defendants' Motion to Compel Arbitration should be reversed.

PROCEDURAL HISTORY

On January 26, 2022, LVNV filed a collection Complaint (Pa1) against Hopkins in the Special Civil Part of the Passaic County Law Division, docket number PAS-DC-655-22 ("Collection Lawsuit"), seeking to collect the amount of $746.71, plus costs, alleged due from a defaulted and charged off Credit One Bank, N.A. account. The collection Complaint asserts that Credit One sold, assigned, or otherwise transferred Hopkins's alleged account to MHC, who then sold, assigned, or otherwise transferred the account to FNBM, then to Sherman III LLC, then to Sherman, then finally to LVNV. *See* Collection Complaint ¶ 4 (Pa1).

On March 7, 2022, Hopkins responded to the Collection Complaint by filing his Answer and Class Action Counterclaim (Pa3), alleging violations of the FDCPA, CFA, and common law, based on LVNV's unlicensed enforcement of a void debt.

On March 28, 2022, LVNV filed their Answer to the Counterclaim (Pa25), denying any wrongdoing, failing to assert arbitration as an affirmative defense, *and* certifying pursuant to *R.* 4:5-1 that "[t]he matter in controversy is not the subject of any . . . pending arbitration proceeding; *and no other action*

or arbitration proceeding is contemplated." Answer to the Countercl. p. 23 (Pa47).

On May 25, 2022, Hopkins initiated the lead case underlying this appeal by filing his Class Action Complaint (Pa48) against LVNV, MHC, FNBM, Sherman, and Sherman III, alleging violations of the FDCPA, the CFA, and common law. The same day, May 25, 2022, Plaintiff moved to transfer the Collection Lawsuit from the Special Civil Part of the Passaic County Law Division to the Hudson County Law Division and consolidate it with the putative class action. (Pa68).

On June 16, 2022, Defendants opposed Plaintiff's Motion to Transfer and Consolidate and cross moved to dismiss pursuant to *R*. 4:6- 2(e). (Pa72) On September 23, 2022, the Court entered an Order (Pa75) granting Plaintiff's Motion to Transfer and Consolidate, as well as dismissing *only* Hopkins's unjust enrichment claim.

On July 14, 2023, Defendants filed their Answer (Pa78) to the Class Action Complaint, again denying any wrongdoing, failing to assert arbitration as an affirmative defense, *and* erroneously certifying pursuant to *R.* 4:5-1 that "*[t]he matter in controversy is not the subject of any other action pending in any Court* or a pending arbitration proceeding; *and no other action or arbitration proceeding is contemplated*." *See* Answer p. 23 (Pa100).

After serving discovery requests on November 11, 2022, serving a *R.* 1:6-2(c) good faith letter on June 8, 2023, and receiving no responses from Defendants for approximately one year, Hopkins filed his Motion to Compel Discovery Responses (Pa101) and his Motion to Extend Discovery (Pa110) on September 20, 2023. *See* Certification of Mark Jensen ¶¶ 4-8 (Pa103-Pa104). Both Motions were withdrawn by the Court on September 22, 2023. (Pa114-Pa115).

On September 22, 2023—nearly a year and a half after the Class Action Complaint was filed—Defendants filed their Motion to Compel Arbitration. (Pa116).

On November 22, 2023, the trial court entered an Order granting Defendants' Motion to Compel Arbitration. (Pa187).

On January 2, 2024, Hopkins timely filed his Notice of Appeal. (Pa188).

STATEMENT OF FACTS

Sometime prior to the initiation of this action—and without being licensed under the NJCFLA—MHC allegedly purchased a pool of defaulted consumer debts for a fraction of their face value, including Hopkins's purported Credit One Bank, N.A. account. *See* Class Action Compl. ¶ 21 (Pa51); Collection Compl. ¶ 4 (Pa1). Hopkins's alleged account was then assigned from MHC to FNBM, Sherman III, and Sherman, respectively, before

being assigned, transferred, or sold to LVNV. *Id.* However, none of the Assignor Defendants were licensed under the NJCFLA and, by purchasing or otherwise taking assignment of Hopkins's alleged account, the Assignor Defendants engaged in the "consumer loan business" as defined at N.J.S.A. 17:11C-2. As a result of the Assignor Defendants' violations of the NJCFLA's licensure requirements at subsection 3 of the NJCFLA,[1] the contract governing Hopkins's alleged account was made void as of the date MHC purchased and/or took assignment of the same, pursuant to N.J.S.A. 17:11C-33(b).[2]

After Hopkins's void account was transferred to LVNV, LVNV commenced the Collection Lawsuit on January 26, 2022. (Pa1). As explained above, Hopkins responded by filing his Class Action Counterclaim (Pa3), the Class Action Complaint (Pa48), and then moving to consolidate the two actions. (Pa68, Pa75). Defendants then opposed Hopkins's Motion while filing a dispositive Cross Motion (Pa72), attempting to defeat Hopkins's claim on the merits. After Defendants' Cross Motion to Dismiss was denied and Defendants had expressly certified that no arbitration proceedings were contemplated in

[1] N.J.S.A. 17:11C-3.

[2] "A consumer lender who violates or participates in the violation of any provision of section 3 . . . of this act, shall be guilty of a crime of the fourth degree. *A contract of a loan not invalid for any other reason . . . shall be void and the lender shall have no right to collect or receive any principal, interest or charges. . . .*" N.J.S.A. 17:11C-33(b) (emphasis added).

both the Answer to the Counterclaim (Pa25) and the Answer to the Class Action Complaint (Pa78), Defendants moved to compel arbitration. (Pa116). In granting Defendants' Motion to Compel Arbitration, the trial court erred by 1) finding that Defendants had not waived their purported ability to compel arbitration through repeated affirmative litigation conduct, 2) finding that Defendants were able to enforce a provision of a void contract, and 3) holding that Defendants were able to compel arbitration despite no discovery into the terms of the assignment of the account as it relates to arbitrability, Defendants' abject and unjustifiable refusal to participate in discovery (including any discovery related to the Collection Lawsuit initiated by LVNV), and the Court's withdrawal of Hopkins's Motion to Compel Discovery Responses (Pa114).

LEGAL ARGUMENT

POINT I. THE STANDARD OF REVIEW (Raised Below: T1)

This Court's standard of review of the trial court's Order compelling arbitration is *de novo*. *See Barr v. Bishop Rosen & Co., Inc.*, 442 N.J. Super. 599, 605 (App. Div. 2015) ("The existence of a valid and enforceable arbitration agreement poses a question of law, and as such, our standard of review of an order denying a motion to compel arbitration is de novo."); *see*

also Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013); *Frumer v. Nat'l Home Ins. Co.*, 420 N.J. Super. 7, 13 (App. Div. 2011).

To compel arbitration of a dispute, a court must determine that a valid arbitration agreement exists between the parties and that the dispute falls within the scope of the agreement. *See Hirsch*, 215 N.J. at 179; *see also Martindale v. Sandvik, Inc.*, 173 N.J. 76, 83-84 (2002). Further, the Court must look to ordinary contract principles to determine whether a party is bound by the terms of an alleged arbitration agreement. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.").

Although the Federal Arbitration Act ("FAA"), which controls here,[3] encourages practices that enable disputes to be solved through arbitration, it is not a mandate that requires arbitration each and every time an arbitration clause may be part of a contract. 9 U.S.C. § 2 contains specific exceptions to the enforceability of arbitration clauses and states that arbitration is improper where "such grounds exist at law or in equity for the revocation of any

[3] The agreement between Hopkins and Credit One Bank states that it "shall be governed by, and enforceable under, the Federal Arbitration Act. . . ." *See* Credit One Bank Card Agreement p. 6 (Pa141).

contract." Like other contractual rights, the right to compel arbitration may be relinquished through waiver. Simply, "[w]aiver is a voluntary and intentional relinquishment of a known right." *Knorr v. Smeal*, 178 N.J. 169, 177 (2003). Waiver need not be stated expressly but may be implied, "provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference." *Id.*

In analyzing waiver of arbitration, the United States Supreme Court has determined that courts must treat arbitration agreements like any other contract and may not create novel rules or employ practices "fostering arbitration." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1710 (2022). When a party knows of its ostensible right to compel arbitration and acts inconsistently with it, that party waives its right to compel arbitration. *Id.* at 1709-10. As explained here, Defendants affirmative litigation conduct over the course of approximately eighteen months is sufficient to manifest waiver of any claimed right to compel arbitration of Hopkins's claims.

Lastly, if the pleadings and supporting documents are unclear regarding the agreement to arbitrate at issue, or if the non-moving party has responded to a motion to compel arbitration with facts to contest the arbitration agreement, the parties should be entitled to discovery on the issue of arbitrability before the motion to compel is granted. *See Goffe v. Foulke Mgmt. Corp.*, 238 N.J.

191, 214 (2019). Here, where the agreement at issue was made void by statutory mechanism and where Defendants have failed to show that their purported ability to compel arbitration was not limited by the terms of the assignment from the contracting party, the Motion to Compel Arbitration should not have been granted without discovery into the issue of arbitrability.

POINT II. THE TRIAL COURT ERRED IN DETERMINING THAT DEFENDANTS DID NOT WAIVE THEIR PURPORTED ABILITY TO COMPEL ARBITRATION (Raised Below: T1)

There is no mandate that requires arbitration each and every time an arbitration clause may be part of a contract. *See Arafa v. Health Express Corp.*, 243 N.J. 147, 164-65 (N.J. 2020). Despite the incredibly broad language contained in the arbitration provision (Pa141-Pa142) of the agreement purportedly governing Hopkins's account, Defendants engaged in affirmative litigation conduct for a year and a half, repeatedly affording themselves of judicial resources and seeking relief from the court. LVNV sued Mr. Hopkins in court. Defendants engaged in motion practice and sought to have Hopkins's claims dismissed on the merits. It was only after Defendants' Motion to Dismiss was denied (apart from the claim for unjust enrichment being dismissed without prejudice) that Defendants sought to compel arbitration of Hopkins's claims. Moreover, Defendants failed to assert arbitration as an affirmative defense in their responsive pleadings. Rather, Defendants

repeatedly and expressly certified that no arbitration proceedings were contemplated. (Pa47, Pa100).

In 2013, prior to the prejudice requirement for waiver being effectively removed by *Morgan*, the New Jersey Supreme Court analyzed waiver of arbitration in *Cole v. Jersey City Med. Ctr.*, 215 N.J. 265 (2013). In *Cole*, the court reasoned:

> Any assessment of whether a party to an arbitration agreement has waived that remedy must focus on the totality of the circumstances. That assessment is, by necessity, a fact-sensitive analysis. In deciding whether a party to an arbitration agreement waived its right to arbitrate, we concentrate on the party's litigation conduct to determine if it is consistent with its reserved right to arbitrate the dispute. ***Among other factors, courts should evaluate: (1) the delay in making the arbitration request***; ***(2) the filing of any motions, particularly dispositive motions, and their outcomes***; ***(3) whether the delay in seeking arbitration was part of the party's litigation strategy***; (4) the extent of discovery conducted; (5) ***whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration***; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any. No one factor is dispositive. A court will consider an agreement to arbitrate waived, however, if arbitration is simply asserted in the answer and no other measures are taken to preserve the affirmative defense.
>
> Applying those factors to this case, we conclude that [Defendant] engaged in litigation conduct that was inconsistent with its right to arbitrate . . . [Defendant]

> was a party to the lawsuit for twenty-one months before seeking to invoke the arbitration provision. ***A twenty-one-month delay is substantial, particularly in light of the fact that [Defendant] otherwise failed to provide notice of its intent to seek arbitration*** . . . Although the failure to list arbitration as an affirmative defense is not dispositive of the issue, *see, e.g., Spaeth, supra*, 403 N.J. Super. at 512, 516-17, 959 A.2d 290, it does inform the waiver analysis.

Cole, 215 N.J. at 280-81 (emphasis added).

Cole found waiver after twenty-one months of litigation; here, Defendants litigated for seventeen months—not including the Collection Lawsuit filed four months earlier. Defendants also filed a dispositive motion attacking the merits of Hopkins's claims. "The filing of a dispositive motion is a significant factor demonstrating a submission to the authority of a court to resolve the dispute." *Id.* at 282. As in *Cole*, the dispositive motion here "was partially granted and partially denied. . . .Notably, [Defendant] does not take the position that it would surrender that partial substantive dismissal if the matter proceeded to arbitration." *Id.* As in *Cole*, Defendants failed to assert arbitration as an affirmative defense in their pleadings, certified that arbitration was not contemplated presently or in the future, and gave no indication of an intent to arbitrate until the Motion to Compel was filed. Given that *Cole*'s requirement of a showing of prejudice for a finding waiver was abrogated by *Morgan*, Defendants here implicated at least four out of the remaining six

factors for waiver discussed in *Cole*.

In *Morgan, supra*, the United States Supreme Court determined that a court should not engage in efforts "fostering arbitration" and that any actions taken by a party which are inconsistent with that party's purported desire to compel arbitration can show waiver of any alleged contractual right to compel arbitration. The Court rejected the addition of a need to show prejudice to establish waiver of an arbitration provision and held that the FAA "did not authorize federal courts to create an arbitration-specific procedural rule requiring a finding of harm before a party could waive its right to arbitration. . . ." *Id.* at 1709. In other words, "the [FAA]" does not authorize the courts to invent arbitration-preferential rules.[] Thus, the [Supreme] Court directed the Courts of Appeals to 'hold a party to its arbitration contract just as the court would to any other kind, but not devise novel rules to favor arbitration over litigation.'" *White v. Samsung Elecs. Am., Inc.*, 61 F.4th 334 (3d Cir. 2023) (quoting *Morgan* at 1713)).

With respect to factor four discussed in *Cole*, *to wit*, "the extent of discovery conducted," Defendants refused to participate in discovery or even attempt to fulfill their defaulted obligations. *See* Certification of Mark Jensen ¶¶ 4-8 (Pa103-Pa104). Ten months after Hopkins's served discovery requests (Pa106) and three months after serving a *R.* 1:6-2(c) good faith letter (Pa109),

Hopkins was forced to move to compel discovery responses (Pa101) and to extend discovery (Pa110). However, both Motions were withdrawn by the Court on September 22, 2023. (Pa114-Pa115). Defendants were effectively rewarded for their dilatory strategy—which implicates factor three discussed in *Cole*, *i.e.*, the extent to which delay was part of a litigation strategy.

In granting Defendants' Motion to Compel Arbitration, the trial court cited *Cole* multiple times—primarily emphasizing the "prolonged litigation" analyzed in *Cole*. *See* T1 10:11-12:14. Moreover, the trial court based at least a portion of its totality-of-circumstance analysis by "presum[ing] there was [a demand for arbitration] inserted into the answer." T1 10:24-25. Which Defendants' counsel then erroneously confirmed. *See* T1 10:25-11:5. After Hopkins's counsel corrected the record and informed the trial court that, in fact, Defendants had not asserted arbitration as an affirmative defense and had instead certified that arbitration was not contemplated, the trial court stated "Okay. All right. Then I stand corrected on the factual record. But because of the lack of the total lack of real substantive litigation ***since the 4:6-2 motion*** was decided, I still stand by my opinion, for the record." T1 13:3-7 (emphasis added). Notwithstanding the trial court's error with respect to assertion of arbitration in Defendants' pleadings, the trial court all but disregarded Defendants' Cross Motion to Dismiss as 'substantive litigation' and measured

only the actions taken by Defendants *during the year after the Cross Motion to Dismiss was denied*. Moreover, the trial court repeatedly emphasized the 'prolonged litigation' in *Cole* (being twenty-one months) while failing to acknowledge that the instant litigation had gone on for at least seventeen months. The trial court also ignored the fact that LVNV had initiated the Collection Lawsuit four months prior to the Class Action Complaint being filed, effectively bringing the total to twenty-one months.

With respect to the filing of the Collection Complaint by LVNV, the New Jersey Supreme Court has held that a clear and expressed showing of a party's abandoning of a purported right to compel arbitration may be manifested by bringing claims in court instead of arbitration.

> It is generally considered that the bringing of an action at law is a revocation of an agreement to arbitrate, and although our former Supreme Court, in *Knaus v. Jenkins*, *supra*, held that a suit at law by one of the parties was not a revocation, ***we are of the opinion that the bringing of action by both parties on the subject matter of the agreement manifests a mutual change of mind and does accomplish a revocation***. When all parties to an agreement to arbitrate elect to prosecute their respective claims by actions at law, and institute and carry forward the course thus elected, the logical, indeed the necessary, result of that course is an abandonment of arbitration and a revocation of the agreement to pursue that form of adjudication.

McKeeby v. Arthur, 7 N.J. 174, 182 (1951) (emphasis added).

Therefore, considering the foregoing in light of *Morgan*, the cases that have found that a consumer waived any right to a jury trial by agreeing to a multipage agreement that included an arbitration agreement is now the same standard in determining if a business waives the arbitration agreement by voluntarily choosing to file a court action when there is an arbitration alternative available to it. In the same way the Courts have found that a consumer's passive consent to an agreement waives a jury trial, *a fortiori* a creditor's active choice to file a court action rather than an arbitration claim shows waiver by that creditor.

Here, completely aside from the filing of the Collection Complaint by LVNV, Defendants have waived arbitration by engaging in at least seventeen months of litigation, by filing an unsuccessful dispositive motion, by failing to assert arbitration as an affirmative defense and certifying that no arbitration proceedings were contemplated, and by delaying the progression of the litigation and failing to serve responses to discovery requests as part of their litigation strategy. The trial court erred by 1) emphasizing only the 'prolonged litigation' in *Cole* without acknowledging that the instant litigation had gone on nearly the same amount of time, 2) by basing its reasoning on the erroneous premise that Defendants' had asserted arbitration as a defense in their pleadings, 3) by effectively rewarding Defendants for their improper refusal to

provide any responses to Hopkins's discovery requests—withdrawing Hopkins's discovery motions without offering any avenue of recourse or relief, and 4) by failing to acknowledge *Morgan* as controlling law and Defendants' affirmative litigation conduct as inconsistent with the desire to compel arbitration. Thus, the trial court's November 22, 2023 Order granting Defendants' Motion to Compel Arbitration must be reversed.

POINT III. THE TRIAL COURT ERRED BY ALLOWING DEFENDANTS TO ENFORCE A PROVISION OF A CONTRACT DECLARED VOID BY THE LEGISLATURE (Raised Below: T1)

As explained herein, at all times relevant to this action, the Assignor Defendants lacked the licensure required to even possess Hopkins's alleged account, let alone enforce the void contract governing the same. Indeed, the Assignor Defendants have never disputed that they were unlicensed under the NJCFLA. Rather, in replying to Hopkins's Opposition to their Motion to Compel Arbitration, Defendants attempted to obfuscate the purpose of the NJCFLA and undermine the Act's legislative intent and application. In granting Defendants' Motion to Compel Arbitration, the trial court erred by failing to acknowledge or analyze the issue of voidness of the contract governing Hopkins's account under the NJCFLA. *See* N.J.S.A. 17:11C-33(b). Instead, the trial court focused only on waiver. However, given the standard of review here, the pertinent issues, and Defendants' anticipated argument that

the NJCFLA does not afford a private right of action to aggrieved consumers, discussion of the development of jurisprudence regarding the private right of action is necessitated in light of the statutory history of the NJCFLA discussed, *infra*.

The present-day iteration of the NJCFLA originated as the New Jersey Small Loan Law ("NJSLL"), enacted in 1914. The NJSLL was meant to curtail predatory loan practices widely unregulated at the time.

> The small loan business has long been the subject of study, legislation and judicial determination. *See Gallert, Hilborn and May, Small Loan Legislation* (Russell Sage Foundation, 1932); *Hubachek, Annotations on Small Loan Laws* (Russell Sage Foundation, 1938); *Law and Contemporary Problems* (Winter, 1941). New Jersey was one of the five large industrial states which early adopted general acts designed to regulate and control the business of making small loans. Thus *P.L.* 1914, *c.* 49 provided for the licensing of small loan companies and granted power to the Commissioner of Banking and Insurance to reject an application for license because of lack of character or fitness of the applicant. In 1916, the Russell Sage Foundation submitted its first draft of a Uniform Small Loan Law which adopted the regulatory philosophy of the New Jersey act and some of its provisions.

Family Fin. Corp. v. Gough, 10 N.J. Super. 13, 19 (App. Div. 1950).

The NJSLL—like the NJCFLA— allowed for enforcement by the Commissioner and was intended to protect consumers from usurious, predatory, and unlawful loan practices by regulating and limiting what entities

could enter the consumer loan marketplace.[4] Determinative criteria for licensure was within the purview of the Commissioner, "dependent upon their relation to the objectives of the Small Loan Act in light of its history and purpose, it is difficult to see how better the Commissioner can execute the legislative policy than by looking to the needs of the community. . . ." *Family Fin. Corp. v. Gaffney*, 11 N.J. 565, 572 (1953). In addition to enforcement and gatekeeping remedies afforded to the Commissioner, the NJSLL also allowed private actions for damages by individual consumers. *See, e.g., Langer v. Morris Plan Corp.*, 110 N.J.L. 186, 187 (1933).

The NJSLL was superseded by the New Jersey Consumer Loan Act ("NJCLA") in 1962. The NJCLA's espoused goal was to "prohibit[] deceptive lending practices generally, N.J.S.A. 17:10-13 (replaced by N.J.S.A. 17:11C-20)." *Lemelledo v. Benefit Mgmt. Corp.*, 150 N.J. 255, 271 (1997). "If a violation of the CLA [was] proven, the typical remedy, obtainable by the Department of Banking and Insurance or ***by individual consumers, is voiding of the contract***," though the NJCLA also provided for awards of damages to aggrieved consumers. *Lemelledo*, 150 N.J. at 272 (emphasis added).

[4] "[T]he Small Loan Law was intended to and does afford to the Commissioner power to limit the number of licenses in a community." *Gough*, 10 N.J. Super. at 21.

Between 1962 and 1983, the NJCLA was amended seven times—many of the amendments added mortgage-based provisions, such as the Secondary Mortgage Loan Act of 1970. "On January 8, 1997, the Governor signed the New Jersey Licensed Lenders Act, which combines the [NJ]CLA with two mortgage-related statutes.[5] L. 1996, c. 157 (codified at N.J.S.A. 17:11C-1 to -49)." *Lemelledo*, 150 N.J. at 262 n.1. When the NJCLA was combined with the New Jersey Residential Mortgage Lending Act ("NJRMLA"), N.J.S.A. 17:11C-51 to -89, under the umbrella of the Licensed Lenders Act ("NJLLA"), the consumer-lending based provisions formerly known as the NJCLA became the "Consumer Finance Licensing Act."

Like the NJCLA before it (and the NJCFLA now), the NJLLA (comprised of both consumer loan statutes and mortgage related statutes) enumerated the Commissioner's enforcement mechanisms at subsection 18 and stated in subsection 33(b) that "[a] consumer lender who violates or participates in the violation of any provision of sections 3 . . . shall be guilty of a crime of the fourth degree. A contract of loan not invalid for any other reason, in the making or collection of which any act shall have been done which constitutes a crime of the fourth degree under this section, shall be void

[5] The New Jersey Residential Mortgage Lending Act ("NJRMLA"), N.J.S.A. 17:11C-51 to -89.

and the lender shall have no right to collect or receive any principal, interest or charges . . . ." New Jersey Licensed Lenders Act, 1997 N.J. A.N. 2513. Additionally, "[t]he [NJ]CLA, as incorporated in the Licensed Lenders Act, allow[ed] for treble damages by aggrieved consumers, N.J.S.A. 17:11C-33b, and summary revocation of a lender's license, N.J.S.A. 17:11C-48a." *Lemelledo*, 150 N.J. at 272.

In 2010, the NJLLA, N.J.S.A. 17:C-1 to -49, was divided, separating the New Jersey Residential Mortgage Lending Act ("NJRMLA"), N.J.S.A. 17:11C-51 to -89, from the NJCFLA—the NJRMLA and NJCFLA were now their own respective standalone statutes. Importantly, all iterations of the consumer lending based provisions—whether the NJCFLA, the NJSLL, NJCLA, or NJLLA—were enacted remedially to protect New Jersey consumers by, inter alia, curtailing predatory and usurious lending practices, limiting what property could be held as collateral, conducting ongoing criminal background checks on applicants and licensees, and ensuring that only qualified, regulated, licensed entities would enter the marketplace as consumer lenders in New Jersey. Indeed, in addition to regular criminal background checks for every officer, director, partner, and/or owner with a controlling interest in the applicant/licensee, the Commissioner must "find[] that the financial responsibility, experience, character, and general fitness of

the applicant for a new license or for a renewal of a license demonstrate that the business will be operated honestly, fairly, and efficiently within the purposes of [the NJCFLA]" N.J.S.A. 17:11C-7(c); *see also* N.J.S.A. 17:11C-7(e).

Like the NJSLL and NJCLA, the newly titled NJCFLA (under the umbrella of the NJLLA) allowed for a private right of action by individual consumers in addition to the enforcement remedies of the Commissioner. Indeed, codified statutory mechanism of enforcement by which an individual consumer voided an unlawful loan contract and/or pursued treble damages was N.J.S.A. 17:11C-33(b)—the same provision of the same statute which Plaintiff asserts has voided her unlawful contract in the instant action under the same NJCFLA.

In 2010, when the NJRLMA and NJCFLA were separated, subsection 18 (of the then NJLLA) remained combined with the consumer lending provisions, as it had been for several decades. And reasonably so—the provisions of subsection 18 relate only to the Commissioner's authority relative to licensure to act as a "consumer lender" or "sales finance company" and do not address mortgages or real property. See N.J.S.A. 17:11C-2; N.J.S.A. 17:11C-3; N.J.S.A. 17:11C-18. Post 2010, the first case to address the NJCFLA was in the District Court of New Jersey: *Veras v. LVNV Funding,*

LLC, No. 13-1745 (RBK/JS), 2014 U.S. Dist. LEXIS 34176 (D.N.J. Mar. 17, 2014) (Pa259). All case law post 2014 in the Superior Court and/or the District Court which analyzes the private right of action under the NJCFLA can be traced back to *Veras*. The first cases in the Superior Court to address the private right of action under the NJCFLA were *New Century Fin. v. Trewin*, 2018 N.J. Super. Unpub. LEXIS 1688 (Ch. Div. May 24, 2018) (Pa233) and *Woo-Padva v. Midland Funding LLC*, 2022 N.J. Super. Unpub. LEXIS 96 (Law Div. Jan. 21, 2022) (Pa267). *Woo-Padva* cites to *Browne v. Nat'l Collegiate Student Loan Tr.*, No. 21-11871 (KM) (JSA), 2021 U.S. Dist. LEXIS 244537, at *8 (D.N.J. Dec. 22, 2021) (Pa201)—who in turn cites to *Jubelt v. United Mortg. Bankers, Ltd.*, Civil Action No. 13-7150 (ES) (MAH), 2015 U.S. Dist. LEXIS 84595, at *14 (D.N.J. June 30, 2015) (Pa205), with *Jubelt* citing *Veras*.

In addressing the private right of action under the NJCFLA, the District Court in *Veras* reasoned that in order to determine whether the NJCFLA implies a private right of action, "the Court must consider . . . *whether there is any evidence that the Legislature intended to create a private cause of action under the statute and whether implication of a private cause of action in this case would be consistent with the underlying purposes of the legislative scheme.*" *Id.* (emphasis added) (quoting *In re Resolution of State Com. of*

Investigation, 108 N.J. 35, 41 (1987) (internal quotation marks omitted)). Indeed, "the primary goal in determining whether a statute implies a right of action has almost invariably been a search for the underlying legislative intent." *Veras*, No. 13-1745 (RBK/JS), 2014 U.S. Dist. LEXIS 34176, at *24 (quoting *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 168 N.J. 255, 272-73 (2001) (internal quotation marks omitted)).

With respect to the legislative intent of the NJCFLA, the NJCFLA's intended mechanisms of enforcement, and the history of the same, the Court must certainly consider the NJCFLA's statutory predecessors, discussed *supra*, for context. Despite the above, the court in *Veras* completely failed to analyze the statutory history or the legislative intent of the NJCFLA. Instead, *Veras*'s determination that no implied private right of action existed in the NJCFLA was based entirely on the existence of the Commissioner's enforcement abilities under subsection 18. But N.J.S.A. 17:11C-18 had always existed in conjunction with private enforcement remedies, i.e., N.J.S.A. 17:11C-33(b).

Moreover, *In re Resolution of State Com. of Investigation*, *supra*—cited by *Veras*—addressed and analyzed a statute that explicitly disallowed a private right of action, i.e., N.J.S.A. 52:9M-15(a). *See In re Resolution of State Com. of Investigation*, 108 N.J. at 36-37. *In re Resolution* did not analyze an implied private right of action because there was no need to—improper disclosures of

information related to investigations into crime by the State Commissioner of Investigation ("SCI") were and are explicitly within the purview of the SCI, as per the black letter language of the statute. *In re Resolution* supports *Veras*'s reasoning that, generally, when there are extensive state enforcement mechanisms included in a statute, that statute rarely also includes a private right of action. But *Veras* failed to acknowledge that the NJCFLA's statutory predecessors all contained enforcement mechanisms by the Commissioner and an implied private right of action—including the most recent NJLLA, which contained the same codifications comprising the current NJCFLA under a subsection with the same title. There was virtually no basis to reason that the separation of the NJRLMA from the rest of the current NJCFLA suddenly also removed the implied private right of action from the NJCFLA. In context, *Veras*'s citation to *In re Resolution* in ostensible support of the notion that the NJCFLA does not provide for a provide right of action does not make practical sense given that the enforcement mechanisms in subsection 18 have always coexisted with the implied private right of action in the NJSLL, NJLLA, and NJCLA.

The sudden reading of the private right of action out of the NJCFLA by *Veras* was simply not rooted in an examination of the NJCFLA's legislative and statutory history and intent—as *Veras* acknowledged was the linchpin in

determining whether an implied private right of action existed. Rather, *Veras* acknowledged the existence of subsection 18 and determined that that, in and of itself, was sufficient to show that no implied private right of action existed in the statute, without further analysis. Since *Veras* was decided in 2014, every case that has determined that no private right of action exists under the NJCFLA can, directly or indirectly, be traced back to *Veras*. Seemingly contradicting the holding in *Veras*, *Lemelledo* discussed an analyzed the NJLLA's provisions for "voiding of the contract" by "individual consumers" just a few years prior. *See Lemelledo*, 150 N.J. at 272.

Further, though this area of law is still developing and there are no published decisions addressing the issue of voidness of a contract for violations of the NJCFLA, the NJCFLA's licensure provisions and their application to debt buyers/collectors as "consumer lender[s]," as defined by N.J.S.A. 17:11C-2, has been analyzed several times in recent years—both in the Superior Court of New Jersey and in our sister federal court for the United States District Court for the District of New Jersey. On April 26, 2023, the Honorable Keith E. Lynott, J.S.C. issued an Order and Statement of Reasons in a case venued in the Law Division of Essex County Superior Court, *McQueen v. Fein, Such, Kahn & Shepard, P.C.*, ESX-L-1439-22, 2023 N.J. Super. Unpub. LEXIS 640 (Law Div. April 26, 2023) (Pa228), which analyzed the

NJCFLA's licensure requirements in great depth. In denying the defendant's motion to dismiss Judge Lynott opined:

> [The NJCFLA] captures within the definitions of "consumer lender" and "consumer loan business" a wide range of other participants in consumer lending. As a result of the second sentence of the definition, the statutory coverage extends not only to those making or extending loans, but those that solicit such loans, those that assist in the procurement or negotiation of the same and those that purchase or acquire "notes." The purpose of the second sentence of the definition is pellucid – to expand the scope of the statute and its licensure and other requirements well beyond the entities that actually provide the credit ab initio.
>
> It is in this context that one must examine the explicit text that the statutory scheme encompasses those in the business of "buying, discounting or endorsing notes." Because the statutory definition includes (i) those that initiate consumer loans by issuing credit cards and credit card agreements; and (ii) via the second sentence, intended to broaden the coverage, those engaged in purchasing "notes," there is no reason to suppose that the Legislature intended by use of that term to limit the same to negotiable promissory notes. . . . Put differently, as the statute and licensing requirement apply to original credit card issuers, there is ample reason to suppose that the Legislature intended to include purchasers of credit card accounts within the scope of a provision – the second sentence – that brings within its reach the purchasers of consumer loans.

McQueen, ESX-L-1439-22, 2023 N.J. Super. Unpub. LEXIS 640, at *13-14.

In *Arroyo v. Stoneleigh Recovery Assocs., LLC*, 2019 U.S. Dist. LEXIS 138287, at *11-13 (D.N.J. Aug. 14, 2019) (Pa194), the District Court held that

an assignee of an allegedly defaulted Capital One credit card debt had to be licensed under the NJCFLA, that unlicensed entities were precluded from demanding or collecting interest on a charged off account, and that said violations support affirmative claims for violations of the FDCPA.

In *Latteri v. Mayer*, 2018 U.S. Dist. LEXIS 85926, at *6 (D.N.J. May 22, 2018) (Pa218), the District Court denied defendant debt collector's motion to dismiss the Complaint wherein plaintiff alleged FDCPA violations based on defendant's attempts to collect an alleged debt while unlicensed as a consumer lender under the FDCPA.

In *Lopez v. Law Offices of Faloni & Associates, LLC*, 2016 U.S. Dist. LEXIS 124730, at *13 (D.N.J. Sept. 14, 2016) (Pa222), the District Court held that a debt buyer had to be licensed under the NJCFLA and opined, "a debt collector's representation in a collection complaint that it had the right to collect a debt when, in fact, it lacked the license required to initially purchase the debt, would violate, at minimum, FDCPA section e(10)."

In *North v. Portfolio Recovery Assocs., LLC*, No. 2:20-cv-20190-BRM-JSA, 2021 U.S. Dist. LEXIS 184974 (D.N.J. Sep. 24, 2021) (Pa236), the District Court denied a debt buyer's motion for judgment on the pleadings to dismiss CFA claims against an assignee for failure to be licensed under the NJCFLA and collecting on the void debt.

In *Peralta v. Ragan*, 2022 U.S. Dist. LEXIS 234300, at *5-8 (D.N.J. Dec. 30, 2022) (Pa243), the District Court denied defendants' motion to dismiss and held that defendant debt buyer's failure to be licensed under the NJCFLA supported plaintiff's claims for violations of the FDCPA.

In *Tompkins v. Selip & Stylianou, LLP*, 2019 U.S. Dist. LEXIS 21937, at *7-11 (D.N.J. Feb. 11, 2019) (Pa248), the District Court held that defendant debt buyer's attempts to collect an alleged debt while unlicensed under the NJCFLA supported claims under the FDCPA. *See also Id*. at *2 (collecting cases within the District of New Jersey holding that "a debt collector's failure to obtain a license pursuant to the [NJCFLA] can constitute a violation of the FDCPA").

In *Valentine v. Mullooly, Jeffrey, Rooney & Flynn LLP*, 2022 U.S. Dist. LEXIS 118399, at *13 (D.N.J. July 6, 2022) (Pa253), the District Court denied defendants' motion to dismiss plaintiff's FDCPA claims and held that "[c]ourts in this District have invoked that part of the NJCFLA—the part reading: "directly or indirectly engag[es] . . . in the business of buying, discounting or endorsing notes"—when classifying debt collection practices as falling within the 'consumer loan business.'"

In *Veras*, *supra*, 2014 U.S. Dist. LEXIS 34176, at *18 (Pa259), the District Court denied defendant's debt buyer's motion to dismiss and stated

that "it would strain logic to conclude that if a debt collector is prohibited from engaging in debt collection activity in a state, he avoids the risk of liability under the FDCPA so long as he conceals this fact and does not make any representation that he actually has debt collection authority."

As shown by the litany of cases above, courts in this state have generally reasoned (completely aside from the private right of action) that the NJCFLA's licensure requirements apply to debt buyers as consumer lenders under the statute.

Lastly, enforcement of Hopkins's alleged debt would constitute enforcement of a contract entered into in violation of New Jersey's licensing statute. *See Accountemps Div. of Robert Half, Inc. v. Birch Tree Grp., Ltd.*, 115 N.J. 614, 626 (1989) (holding "[o]ur courts have consistently held that public policy precludes enforcement of a contract entered into in violation of [the State's] licensing statute[s]"). Similarly, in *Insight Global, LLC v. Collabera, Inc.*, 446 N.J. Super. 525, 531-32 (Ch. Div. 2015), the Chancery Division examined the limit on the ability of an unlicensed entity to seek relief from a court. *Insight Global* held that an unlicensed party has no right to bring claims before the court and public policy prohibits enforcement of a contract entered into in violation of a licensing statute. *Insight Global, LLC*, 446 N.J. Super. at 531-32. Courts in New Jersey and many other states have

consistently refused to aid or ratify unlicensed and unlawful collection activities. Thus, the trial court's November 11, 2022 Order granting Defendants' Motion to Compel Arbitration should be reversed.

POINT IV. THE TRIAL COURT ERRED BY GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION WITHOUT ALLOWING DISCOVERY ON THE ISSUE OF ARBITRABILITY (Raised Below: T1)

With their Motion to Compel Arbitration, Defendants provided evidence of the assignments of Hopkins's alleged account (Pa164-Pa186) but failed to provide any terms included in the pertinent forward flow purchase agreements related to arbitrability. In opposing Defendants' Motion to Compel Arbitration, Hopkins (through counsel) argued that discovery should be permitted on the issue of arbitrability, because there is no evidence on record regarding the terms of the assignment(s) of Hopkins's account and Defendants had refused to fulfill any of their defaulted discovery obligations; *to wit*, it is entirely plausible that terms in the forward flow purchase agreement(s) limited Defendants ability to compel arbitration as assignees. *See* T1 6:20-7:8.

Given the undeveloped trial court record and Defendants' failure to participate in discovery, Hopkins should have been entitled to discovery on the issue of arbitrability before the Motion to Compel was granted. *See Goffe, supra,* 238 N.J. at 214. The trial court did not acknowledge or analyze Hopkins's arguments regarding the threshold issue of arbitrability. Instead, the

trial court effectively rewarded Defendants for approximately a year of non-responsiveness with respect to their discovery obligations, despite Hopkins's good faith efforts to facilitate discovery and subsequent Motion to Compel, which was withdrawn by the Court.

Thus, the trial court's November 11, 2022 Order should be reversed to allow discovery into the issue of arbitrability and the terms of the assignment(s) of Hopkins's alleged account.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Randy Hopkins respectfully requests that the November 11, 2022 Order (Pa187) granting Defendants' Motion to Compel Arbitration should be reversed.

Respectfully submitted,

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Docket No. A-001301-23

RANDY HOPKINS, on behalf of himself and those similarly situated,	:	CIVIL ACTION
Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY
vs.	:	
LVNV FUNDING LLC; MHC RECEIVABLES, LLC; FNBM, LLC; SHERMAN ORIGINATOR III, LLC; SHERMAN ORIGINATOR LLC; and JOHN DOES 1 to 10,	:	DOCKET NO. HUD-L-1732-22
	:	Sat Below:
	:	HON. ANTHONY V. D'ELIA, J.S.C.
Defendants-Respondents.	:	

BRIEF AND APPENDIX ON BEHALF OF DEFENDANTS-RESPONDENTS LVNV FUNDING LLC, MHC RECEIVABLES, LLC, FNBM, LLC, SHERMAN ORIGINATOR III, LLC AND SHERMAN ORIGINATOR LLC

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TABLE OF CONTENTS

TABLE OF CONTENTS i

APPEDIX TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 2

I. THE COLLECTION ACTION 2

II. THE PRESENT ACTION AND APPEAL 3

STATEMENT OF FACTS 5

I. THE DEBT 5

II. THE AGREEMENT TO ARBITRATE 6

III. TRANSFER AND ASSIGNMENT OF THE ACCOUNT 9

LEGAL ARGUMENT 10

I. THIS COURT LACKS JURISDICTION OVER AN APPEAL FROM THE LOWER COURT'S INTERLOCUTORY ORDER COMPELLING ARBITRATION 10

II. EVEN IF THIS COURT EXERCISES JURISDICTION, THE LOWER COURT CORRECTLY DETERMINED THAT THE MATTER MUST BE REFERRED TO ARBITRATION 12

A. There is an Insurmountable Preference for Arbitration 13

B. The United States Supreme Court and New Jersey Courts Mandate that an Arbitrator Determine the Arbitration Agreement's Enforceability 14

C. The Arbitration Agreement is Enforceable under Both Federal and New Jersey Law 19

D. Appellant's Claims are Encompassed by the Cardholder Agreement and Respondents are Entitled to Enforce it 22

E. Respondents' Motion was Timely and Defendants did not Waive their Right to Arbitrate 26

CONCLUSION 30

APPENDIX TABLE OF CONTENTS

Page

Unpublished Decision in *Bellows v. Midland Credit Mgmt.,* 2011 U.S. Dist. LEXIS 48237, 2011 WL 1691323 (S.D. Cal. 2011) ... Da1

Unpublished Decision in *Brown v. 5101 N. Park Drive Operations, LLC*, 2014 N.J. Super. Unpub. LEXIS 920, 2014 WL 1613648 (N.J. Super. Ct. App. Div. 2014) ... Da6

Unpublished Decision in *Clarke v. Alltran Fin., LP,* 2018 U.S. Dist. LEXIS 29011, 2018 WL 1036951 (E.D.N.Y. Feb. 22, 2018) ... Da10

Unpublished Decision in *Dicent v. Kaplan Univ.,* 2019 U.S. App. LEXIS 872, 2019 WL 158083 (3d Cir. Jan. 10, 2019) ... Da18

Unpublished Decision in *Everbank v. Tierney,* 2020 N.J. Super. Unpub. LEXIS 1414, 2020 WL 3980393 (N.J. Super. Ct. App. Div. July 15, 2020) ... Da22

Unpublished Decision in *Fuller v. Frontline Asset Strategies, LLC,* 2018 U.S. Dist. LEXIS 61015, 2018 WL 1744674 (N.D. Ill. Apr. 11, 2018) ... Da26

Unpublished Decision in *Funderburke v. Midland Funding, L.L.C.*, 2013 U.S. Dist. LEXIS 13438, 2013 WL 394198 (D. Kan. Feb. 1, 2013) ... Da30

Unpublished Decision in *Holland v. LVNV Funding, LLC,* No. 2016 U.S. Dist. LEXIS 146112, 2016 WL 6156187 (W.D. Ky. Oct. 21, 2016) ... Da38

Unpublished Decision in *Jade Apparel, Inc. v. United Assurance, Inc.,* 2016 N.J. Super. Unpub. LEXIS 2250, 2016 WL 5939470 (N.J. Super. Ct. App. Div. 2016) ... Da49

Unpublished Decision in *James v. Portfolio Recovery Assocs., LLC,* 2015 U.S. Dist. LEXIS 20786, 2015 WL 720195 (N.D. Cal. 2015) .. Da55

Unpublished Decision in *Kuehn v. Citibank, N.A.,* 2012 U.S. Dist. LEXIS 173346, 2012 WL 6057941 (S.D.N.Y. Dec. 6, 2012) ... Da61

Unpublished Decision in *Lyon v. Kull Auto Sales, Inc.,* 2017 N.J. Super. Unpub. LEXIS 133, 2017 WL 344438 (N.J. Super. Ct. App. Div. 2017) Da65

Unpublished Decision in *Maisano v. LVNV Funding, LLC,* 2019 N.J. Super. Unpub. LEXIS 2421 (App. Div. Nov. 27, 2019) Da71

Unpublished Decision in *Mark v. Portfolio Recovery Assocs., LLC,* 2015 U.S. Dist. LEXIS 54498, 2015 WL 1910527 (N.D. Ill. Apr. 27, 2015) Da75

Unpublished Decision in *Noonan v. Comcast Corp.,* 2017 U.S. Dist. LEXIS 175549, 2017 WL 4799795 (D.N.J. Oct. 24, 2017) Da79

Unpublished Decision in *Ramos v. Hertz Corp*., 2018 U.S. Dist. LEXIS 165803, 2018 WL 4635972 (D. Col. Sept. 26 2018) Da87

Unpublished Decision in *Schall v. Adecco U.S.A., Inc.*, 2011 U.S. Dist. LEXIS 8884 (E.D. Pa. Jan. 28, 2011) Da93

Unpublished Decision in *Smith v. Resurgent Capital Servs., LP*, 2020 U.S. Dist. LEXIS 153607 (D. Md. Aug. 24, 2020) Da96

Unpublished Decision in *Valentine v. LVNV Funding LLC,* 2020 U.S. Dist. Lexis 185521, 2020 WL 5646975 (N.D. Ill. Oct. 7, 2020) Da103

Unpublished Decision in *Williams-Hopkins v. LVNV Funding, LLC,* 2019 N.J. Super. Unpub. LEXIS 957, 2019 WL 1873155 (N.J. App. Div. Apr. 26, 2019) Da108

Unpublished Decision in *Zenon v. Dover Downs, Inc.*, 2022 U.S. Dist. LEXIS 112798, 2022 WL 2304118 (D. Del. June 27, 2022) Da110

Unpublished Decision in *Zephyr Fluid Sols., LLC v. Scholle IPN Packaging, Inc.*, 2023 U.S. Dist. LEXIS 20890 (D. Del. Feb. 7, 2023) Da113

TABLE OF AUTHORITIES

Cases

14 Penn Plaza, LLC v. Pye, 129 S. Ct. 1456 (2009) 13

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)......................... 14

Amalgamated Transit Union, Local 880 v. N.J. Transit Bus Operations, Inc., 975 A.2d 403 (2009).. 15

American Casualty Co. v. L-J, Inc., 35 F.3d 133 (3d Cir. 1994) 12

AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740 (2011).....................13, 21

Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 99 A.3d 306 (2014) 13, 20

Banque v. Amoco Oil Co., 573 F. Supp. 1464 (S.D.N.Y. 1983)...................... 23

Bellows v. Midland Credit Mgmt., 2011 U.S. Dist. LEXIS 48237, 2011 WL 1691323 (S.D. Cal. 2011).. 23-24

Borsack v. Chalk & Vermilion Fine Arts, Ltd., 974 F. Supp. 293 (S.D.N.Y. 1977).. 23

Brown v. 5101 N. Park Drive Operations, LLC, 2014 N.J. Super. Unpub. LEXIS 920, 2014 WL 1613648 (N.J. Super. Ct. App. Div. 2014).. 21

Clarke v. Alltran Fin., LP, 2018 U.S. Dist. LEXIS 29011, 2018 WL 1036951 (E.D.N.Y. Feb. 22, 2018)... 15

Cole v. Jersey City Med. Ctr., 215 N.J. 265 (2013) 27, 29

Comrey v. Discover, 806 F. Supp. 2d 778 (M.D. Pa. 2011)........................... 23

Com-Tech Assoc. v. Computer Assoc. Int'l, Inc., 938 F.2d 1574, 1576-78 (2d Cir. 1991).. 27

Correia v. Deutsche Bank Nat'l Trust Co., 452 B.R. 319, 324 (B.A.P. 1st Cir. 2011)... 25

Dicent v. Kaplan Univ., No. 18-2982, 2019 WL 158083 (3d Cir. Jan. 10, 2019)... 20

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) 13, 21

Everbank v. Tierney, 2020 N.J. Super. Unpub. LEXIS 1414, 2020 WL 3980393 (N.J. Super. Ct. App. Div. July 15, 2020) 25

F.C. Schaffer & Assocs. v. Demech Contrs., 101 F.3d 40 (5th Cir. 1998) 12

Flexi-Van Leasing, Inc. v. Through Transport Mut. Ins. Assn., 108 Fed. Appx. 35 (3d Cir. 2004) 22

Fuller v. Frontline Asset Strategies, LLC, 2018 U.S. Dist. LEXIS 61015, 2018 WL 1744674 (N.D. Ill. Apr. 11, 2018) 24

Funderburke v. Midland Funding, L.L.C., No. 12-2221-JAR-DJW, 2013 U.S. Dist. LEXIS 13438, 2013 WL 394198 (D. Kan. Feb. 1, 2013)............. 24

Gavlik Constr. Co. v. H.F. Campbell Co., 526 F.2d 777 (3d Cir. 1975)........... 26

Gay v. CreditInform, 511 F.3d 369 (3d Cir. 2007) 14, 21

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 13

Great Western Mortgage Corp. v. Peacock, 110 F.3d 222 (2d Cir. 1993) ..10, 14

Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000).. 21

Harrison v. Nissan Motor Corp. in U.S.A., 111 F.3d 343 (3d Cir. 1997)... 10

Henry Schein, Inc. v. Archis & White Sales, Inc., 139 S. Ct. 524, 202 L. Ed. 2d 480 (January 8, 2019) 14, 15, 18

Holland v. LVNV Funding, LLC, 2016 WL 6156187 (W.D. Ky. Oct. 21, 2016) 23

Homa v. Am. Express Co., 494 Fed. Appx. 191 (3d Cir. 2012) 21

Hoxworth v. Blinder, Robinson & Co., 980 F.2d 223 (3d Cir. 1992)............... 27

Jade Apparel, Inc. v. United Assurance, Inc., 2016 N.J. Super. Unpub. LEXIS 2250, 2016 WL 5939470 (N.J. Super. Ct. App. Div. 2016) 22

James v. Portfolio Recovery Assocs., LLC, 2015 U.S. Dist. LEXIS 20786, 2015 WL 720195 (N.D. Cal. 2015)... 24

John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132 (3d Cir. 1998)..11, 12

Kai Peng v. Uber Techs., Inc., 237 F. Supp. 3d 36 (E.D.N.Y. 2017)............... 16

Kuehn v. Citibank, N.A., 2012 U.S. Dist. LEXIS 173346, 2012 WL 6057941 (S.D.N.Y. Dec. 6, 2012) 16

Livonia Prop. Holdings, LLC v. 12840012976 Farmington Rd. Holdings, LLC, 717 F. Supp. 2d 724 (D. Mich. 2010) 25

Lyon v. Kull Auto Sales, Inc., 2017 N.J. Super. Unpub. LEXIS 133, 2017 WL 344438 (N.J. Super. Ct. App. Div. 2017) 22

Maisano v. LVNV Funding, LLC, 2019 N.J. Super. Unpub. LEXIS 2421 (N.J. App. Div. Nov. 27, 2019) 16, 17, 22

Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993) 14

Mark v. Portfolio Recovery Assocs., LLC, 2015 U.S. Dist. LEXIS 54498, 2015 WL 1910527 (N.D. Ill. Apr. 27, 2015) 23

Martindale v. Sandvik, 173 N.J. 76 (2002) 19

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 14

Morgan v. Sanford Brown Inst., 225 N.J. 289, 137 A.3d 1168 (2016) 15, 27, 28, 30

Noonan v. Comcast Corp., 2017 U.S. Dist. LEXIS 175549, 2017 WL 4799795 (D.N.J. Oct. 24, 2017) 20

Novack v. Cities Serv. Oil Co., 149 N.J. Super. 542, 374 A.2d 89 (Law Div. 1977) 17, 20

Ortiz v. Dodge, 126 F.3d 545 (3d Cir. 1997) 11

Peltz ex rel. Peltz v. Sears, Roebuck & Co., 367 F. Supp. 2d 711 (E.D. Pa. 2005) 27

Pisgah Contrs. v. Rosen (In re Pisgah Contrs.), 117 F.3d 133 (4th Cir. 1997) 11

Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110 (3rd Cir. 1993) 22

Puleo v. Chase Bank USA, N.A., 605 F.3d 172 (3d Cir. 2010) 13

Rajamin v. Deutsch Bank Nat'l Trust Co., 757 F.3d 79 (2d Cir. 2014) 25, 26

Ramos v. Hertz Corp., 2018 U.S. Dist. LEXIS 165803, 2018 WL 4635972 (D. Col. Sept. 26 2018).. 24

Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 70, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010) 15

Restoration Pres. Masonry Inc. v. Grove Eur. Ltd., 325 F.3d 54 (1st Cir. 2003) 27

S+L+H S.p.A. v. Miller-St. Nazianz, Inc., 988 F.2d 1518, 1993 U.S. App. LEXIS 5536 (7th Cir. 1993) 11

Schall v. Adecco U.S.A., Inc., 2011 U.S. Dist. LEXIS 8884 (E.D. Pa. Jan. 28, 2011) 26

Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987)...................... 13

Smith v. Resurgent Capital Servs., LP, 2020 U.S. Dist. LEXIS 153607 (D. Md. Aug. 24, 2020) 24

Standard Motor Freight, Inc. v. Local Union No.560, 228 A.2d 329 (1967)... 15

Stolt-Nielsen S.A. v. Animal Seeds Int'l. Corp., 130 S. Ct. 1758 (2010) 13

Sweiger v. Calvary Portfolio Services, LLC, 2012 WL 1940678 (W.D. Pa. 2012).. 23

Vaden v. Discover Bank, 556 U.S. 49 (2009).. 13

Valentine v. LVNV Funding LLC, 2020 U.S. Dist. Lexis 185521, 2020 WL 5646975 (N.D. Ill. Oct. 7, 2020) 24

Variblend Dual Dispensing Sys., LLC v. Seldel GmbH & Co., KG, 970 F. Supp. 2d 157 (S.D.N.Y. 2013) 23

Volt Info. Scis. v. Bd. of Trustees, 489 U.S. 468 (1989) 13

White v. Samsung Elecs. Am., Inc., 61 F. 4th 334 (3d Cir. 2023) 27, 28, 29

Williams-Hopkins v. LVNV Funding, LLC, 2019 N.J. Super. Unpub. LEXIS 957, 2019 WL 1873155 (N.J. App. Div. Apr. 26, 2019)...16, 17, 18, 22

Zenon v. Dover Downs, Inc., No. 21-1194, 2022 U.S. Dist. LEXIS 112798, 2022 WL 2304118 (D. Del. June 27, 2022) 26

Zephyr Fluid Sols., LLC v. Scholle IPN Packaging, Inc., 2023 U.S. Dist. LEXIS 20890 (D. Del. Feb. 7, 2023)... 30

Statutes

15 U.S.C. § 1692 2
9 U.S.C. § 1 .... 8, 10
9 U.S.C. § 2 19
9 U.S.C.S. § 16 .... 1, 10
N.J.S.A. 17:11C–1 2
N.J.S.A. 2A:16-53 2
N.J.S.A. 2A:23B-6 19
N.J.S.A. 56:8-1 2

PRELIMINARY STATEMENT

Appellant seeks to reverse the Lower Court's correct and proper grant of Respondent's motion to compel arbitration pursuant to a valid, binding, and applicable arbitration agreement between the parties.

Initially, the Appeal is improper because the Federal Arbitration Act ("FAA"), governing the subject Arbitration Agreement (defined herein), specifically disallows appeals from interlocutory orders, such as the Lower Court's Order, referring actions to arbitration. *See* 9 U.S.C.S. § 16(b)(2). Thus, as a matter of law this honorable Court lacks jurisdiction and cannot hear the appeal.

Regardless of the jurisdictional bar, the subject Arbitration Agreement is valid, and Appellant cannot overcome the strong presumption in favor of arbitration.

Finally, the Court correctly determined that Respondents did not waive their right to enforce the Arbitration Agreement by merely engaging in early-stage litigation activities.

For these reasons, as more fully set forth below, this honorable Court must affirm the Lower Court's referral of the action to arbitration under the binding and applicable arbitration agreement between the parties.

PROCEDURAL HISTORY

I. THE COLLECTION ACTION

On January 26, 2022, LVNV initiated a Collection Action in the Superior Court of New Jersey Law Division, Special Civil Part, Passaic County ("Collection Court") by filing a Summons and Complaint ("Collection Complaint") captioned, *LVNV Funding LLC v. Randy Hopkins*, under Docket Number PAS-DC-000655-22. (Pa3-Pa24).

In the Collection Complaint, LVNV alleged its ownership of the Debt (defined *infra*) and sought to collect on the Debt. (Pa1-Pa2).

On March 7, 2022, Appellant filed an Answer with Counterclaims against LVNV in the Collection Action. (Pa3-Pa24). Appellant alleges Counterclaims solely against LVNV for violations of the New Jersey Consumer Finance Licensing Act (*N.J.S.A.* 17:11C–1, *et seq.*) (under the guise of the Uniform Declaratory Judgments Law, *N.J.S.A.* 2A:16-53) (Count I), the New Jersey Consumer Fraud Act (*N.J.S.A.* 56:8-1, *et seq.*) (Count II), Unjust Enrichment (Count III), and violation of the Fair Debt Collection Practices Act (15 U.S.C. §§ 1692d, 1692e, and 1692f) (the "FDCPA"), in connection with the acquisition and collection of a credit card debt she incurred with Credit One. (Pa12-Pa22).

On March 28, 2022, LVNV filed a response to Counterclaims. (Pa25-Pa47).

II. <u>THE PRESENT ACTION AND APPEAL</u>

On May 25, 2022, Appellant filed the Summons and Complaint ("Complaint") against Respondents. (Pa48-Pa67). The Complaint alleges, against all Respondents, identical causes of action to the Counterclaims listed in the Collection Action, which were raised solely against LVNV: violations of the NJCFLA, the NJCFA, Unjust Enrichment, and violation of the FDCPA, in connection with the acquisition and collection of a credit card debt she incurred with Credit One. *Id.*

On May 25, 2022, Appellant moved to consolidate the Action with the Collection Action. (Pa120). In opposition, on June 16, 2022, Respondents cross-moved to dismiss the Complaint. *Id.* On August 18, 2022, Appellant opposed Respondent's cross-motion and replied in further support of its motion to consolidate. *Id.* On September 6, 2022, Respondents replied in further support of their cross-motion to dismiss. *Id.*

By Order dated September 23, 2022, the Lower Court granted Respondents' cross-motion to the extent that it dismissed Appellant's unjust enrichment claim only and denied the remaining portions of Respondents'

Cross-Motion. (Pa121). In addition, by Order dated September 23, 2022, the Court granted Appellant's motion to consolidate. *Id.*

On September 20, 2023, Appellant filed both a Motion to Compel Discovery and a Motion to Extend the Discovery deadlines, but which were thereafter withdrawn on September 22, 2023. (Pa114-Pa115).

On September 22, 2023, Respondents filed a motion to compel arbitration under the terms of a valid, binding, and operative arbitration agreement. (Pa116-Pa118). On October 26, 2023, Appellant filed his opposition to Respondents' motion. On November 13, 2023, Respondents filed their reply in further support of their motion to compel arbitration.

On November 17, 2023, counsel for Appellant and counsel for Respondents virtually appeared for oral argument on Respondents' motion to compel arbitration. *See* Transcript, *generally*. At oral argument, the Lower Court held that the timeliness of when a party asserts to the right to arbitration is relevant. *See* Transcript, 11:19-20. In noting this principle, the Lower Court further noted that "in our case, there's been nothing don except paper discovery served, no answers provided, no depositions, nothing like that." *Id.*, 12: 6-8. Thus, the Lower Court granted Respondents' motion to compel arbitration because in "considering the totality of the circumstances . . . there has not been

the type of prolonged litigation which equity would compel this Court to deny a motion like this." *Id.*, 12:9-12.

Appellant thereafter filed his Notice of Appeal. (Pa188-Pa192). Appellant obtained an extension of time to perfect the appeal, and thereafter timely perfected on May 10, 2024. Likewise, Respondents obtained an extension of time to submit the Respondents' Brief, and they now timely submit their Brief pursuant to the Order of this Court.

STATEMENT OF FACTS

I. THE DEBT

On or about December 5, 2018, Credit One Bank, N.A. ("Credit One") issued Appellant an open-end credit card bearing account number ending in 6103 (the "Account"). (Pa1-Pa2).

At the same time, and in connection with the Account, Appellant entered into a Card Agreement (the "Agreement"), containing an explicit arbitration agreement (the "Arbitration Agreement" and together with the Agreement, the "Cardholder Agreement"), setting forth the terms of, and the parties rights in connection with, the Account. (Pa136-Pa146).

On or about December 5, 2018, the Cardholder Agreement, containing the Arbitration Agreement, was mailed by Credit One to Appellant with the credit card for the Account. (Pa132). Appellant received the Cardholder Agreement

by mail, accepted same, and proceeded to use the Account. (Pa 133, Pa 136-Pa146, Pa 148-Pa161 & Pa167).

Appellant made periodic payments on the balance incurred on the Account until June 17, 2019. (Pa 167). Thereafter, Appellant made no further payments on the Account. *Id.* The Account was charged off on December 18, 2019. *Id.*; (Pa133).

Notably, the Cardholder Agreement remained unchanged during the pendency of the Account as well as after the Account was charged off and all rights and interests in the Account were transferred to and among the Respondents, as is detailed below. (Pa164-Pa171).

II. <u>THE AGREEMENT TO ARBITRATE</u>

Within the Cardholder Agreement, the Arbitration Agreement, *inter alia*, (1) applies to claims against Credit One and its successors or assignees regarding collections disputes and any other matters relating to the Account, (2) expressly waives class action claims; and (3) designates the American Arbitration Association ("AAA") as the arbitration administrators for any covered disputes. (Pa136-Pa146).

In particular, the Arbitration Agreement defines "we" or "us" as Credit One and "all of its parents, subsidiaries, affiliates, successors, predecessors, employees, and related persons or entities, and al third parties who are regarded

as agents or representatives of us in connection with the subject matter of the claim or dispute at issue." (Pa136-Pa146 & Pa168). In addition, the Arbitration Agreement states:

> Claims subject to arbitration include, but are not limited to, any controversies or disputes arising from or relating in any way to your Account . . .
>
> * * *
>
> Also, controversies or disputes about the validity, enforceability, coverage, meaning, or scope of this agreement to arbitrate or any part thereof are subject to arbitration and are for the arbitrator to decide. Any questions about what Claims are subject to arbitration shall be resolved by interpreting this agreement to arbitrate in the broadest way the law will allow it to be enforced.

(Pa136-Pa146 & Pa168). The Arbitration Agreement further states:

> Class actions and other similar procedures in which individuals seek to represent similarly situated individuals or seek relief on behalf of the general public, and consolidation or joinder of Claims (except for claimants on the same account), are NOT available under this agreement to arbitrate. Claims in arbitration will proceed on an INDIVIDUAL basis only.
>
> UNLESS YOU REJECT THIS AGREEMENT TO ARBITRATE, YOU AND WE WAIVE HTE RIGHT TO ASSERT OR PARTICIPATE IN A CLASS ACTION OR ANY REPRESENTATIVE OR CONSOLIDATED PROCEEDING IN COURT OR IN ARBITRATION.
>
> The arbitrator shall have no authority to entertain any Claim as a class action or private attorney general action or on any other similar representative basis, nor shall the arbitrator have any authority to consolidate or join Claims brought by

> separate claimants (except for claimants on the same account). This also means that the arbitrator shall have no authority to make any award for the benefit of, or against, any person other than the individual who is the named party.

(Pa136-Pa146 & Pa168-Pa169). The Arbitration Agreement also provides:

> **PLEASE READ CAREFULLY – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS**
>
> This agreement to arbitrate provides that you or we can require controversies or disputes between us to be resolved by BINDING ARBITRATION. You have the right to REJECT this agreement to arbitrate by using the procedure explained below.
>
> If you do not reject this agreement to arbitrate, you GIVE UP YOUR RIGHT TO GO TO COURT and controversies or disputes between us will be resolved by a NEUTRAL ARBITRATOR INSTEAD OF A JUDGE OR JURY, using rules that are simpler and more limited than in a court. Arbitrator decisions are subject to a VERY LIMITED REVIEW BY A COURT. Arbitration will proceed INDVIDUALLY – CLASS ACTIONS AND SIMILAR PROCEDURES WILL NOT BE AVAILABLE TO YOU.

(Pa136-Pa146 & Pa169). Further, Appellant also agreed that the Arbitration Agreement is subject to the Federal Arbitration Act, 9 U.S.C. § 1 (“FAA”). (Pa136-Pa146 & Pa170). In addition, the Arbitration Agreement provides that “[t]he arbitration shall be administered by the American Arbitration Association (‘AAA’) before a single arbitrator under the AAA’s Consumer Arbitration Rules,

or by a mutually agreeable administrator, before a single arbitrator, as modified by this arbitration provision." *Id.*

The Arbitration Agreement was never updated, changed, or altered. (Pa134).

III. TRANSFER AND ASSIGNMENT OF THE ACCOUNT

On December 31, 2019, after the Account had been charged off, Credit One sold, assigned, and conveyed the rights to various consumer credit accounts, including the Account, to MHC Receivables, LLC ("MHC"). (Pa134, Pa170 & Pa175-Pa186).

Thereafter, on January 15, 2020, the Account was further sold, assigned, and conveyed, first from MHC to FNBM, then from FNBM to Sherman III, then from Sherman III to Sherman, and finally from Sherman to LVNV. (Pa170-Pa171 & Pa175-Pa186).[1]

On January 16, 2020, Credit One provided notice to Appellant of the sale to LVNV. (Pa134 & Pa163). Thus, all rights, title, and interest to Appellant's

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[1] Thus, each of the Respondents is an assignee of the Account and can enforce all rights and remedies set forth in the Cardholder Agreement, which remained the same throughout the pendency of the Account and thereafter, including during the transfers to and among Defendants. (Pa148-Pa161, Pa171 & Pa175-Pa186).

Account, including any associated receivables, and the right to enforce the Arbitration Agreement were therefore assigned to LVNV. (Pa 134 & Pa171).

Appellant never rejected or opted out of the terms of the Arbitration Agreement. (Pa171).

LEGAL ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER AN APPEAL FROM THE LOWER COURT'S INTERLOCUTORY ORDER COMPELLING ARBITRATION

The Federal Arbitration Act – which Appellant admits in its moving papers "controls here"[2] – specifically provides that "an appeal may not be taken from an interlocutory order . . . directing arbitration to proceed under Section 4 of this title." *See* 9 U.S.C.S. § 16(b)(2) (emphasis added). The Third Circuit has specifically recognized that "if one party seeks an order compelling arbitration and it is granted, the parties must then arbitrate their dispute to an arbitrators' decision, and cannot seek recourse to the courts before that time." *Harrison v. Nissan Motor Corp. in U.S.A.*, 111 F.3d 343, 350 (3d Cir. 1997) (citing *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (2d Cir. 1993) (emphasis

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[2] In addition, the Arbitration Agreement specifically states "This agreement to arbitrate is made pursuant to a transaction involving interstate commerce, and shall be governed by, and enforceable under, the Federal Arbitration Act (the "FAA"), 9 U.S.C.§1 et seq."

added)("Once a dispute is determined to be validly arbitrable, all other issues are to be decided at arbitration.")).[3]

That is because "[t]he general approach to appellate jurisdiction as set forth in the FAA is constrained; the Act typically precludes appellate review of orders allowing arbitration 'until after the arbitration process has gone forward.'" *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 135 (3d Cir. 1998); *see also S+L+H S.p.A. v. Miller-St. Nazianz, Inc.*, 988 F.2d 1518, 1993 U.S. App. LEXIS 5536 (7th Cir. 1993) (holding the lower court's decision granting arbitration was not appealable).

The question of whether an order compelling arbitration is appealable under the FAA turns on whether the relevant order is a final decision on the merits, or an interlocutory order. "A final decision, as that term is commonly understood for purposes of appellate jurisdiction, refers to an order that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Olick*, 151 F.3d at 135 (quoting *Ortiz v. Dodge*, 126 F.3d 545, 547 (3d Cir. 1997)). "Within the context of orders relating to arbitration, the decisive issue is 'whether arbitrability was the sole issue presented in the action or

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[3] *See also Pisgah Contrs. v. Rosen (In re Pisgah Contrs.),* 117 F.3d 133, 9 4th Cir. & D.C. Bankr. Ct. Rep. 379, 1997 U.S. App. LEXIS 15184 (4th Cir. 1997) (holding Court of Appeals lacked jurisdiction to hear appeal from district court order directing arbitration to proceed).

whether the issue of arbitrability originated as part of an action raising from other claims for relief.'" *Olick*, 151 F.3d at 135 (quoting *American Casualty Co. v. L-J, Inc.*, 35 F.3d 133, 136 (3d Cir. 1994)); *see also F.C. Schaffer & Assocs. v. Demech Contrs.*, 101 F.3d 40, 41 (5th Cir. 1998).

Here, the issue of arbitration is interlocutory. The putative class action brought by Appellant clearly does not pertain solely to issues of arbitrability, but rather is rooted in claims under the NJCFA and NJFCLA. (Pa48-Pa67). (Pa141).

Thus, the Lower Court's order granting Appellant's motion to arbitrate is not appealable as a matter of law and this Court must decline to exercise jurisdiction and dismiss the Appeal.

II. EVEN IF THIS COURT EXERCISES JURISDICTION, THE LOWER COURT CORRECTLY DETERMINED THAT THE MATTER MUST BE REFERRED TO ARBITRATION

The Lower Court correctly held the instant Action must be referred to arbitration because: (a) there is an insurmountable preference for arbitration; (b) the United States Supreme Court and New Jersey Courts mandate that an arbitrator determine the Arbitration Agreement's enforceability; and (c) there is a valid, binding, and enforceable arbitration agreement between the parties.

A. There is an Insurmountable Preference for Arbitration

The United States Supreme Court has repeatedly held that the "principal purpose of the FAA is to ensur[e] that private Arbitration Agreements are enforced according to their terms." *See, e.g., AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (citing *Volt Info. Scis. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989)); *Stolt-Nielsen S.A. v. Animal Seeds Int'l. Corp.,* 130 S. Ct. 1758 (2010); *Atalese v. U.S. Legal Servs. Grp., L.P.,* 219 N.J. 430, 440, 99 A.3d 306, 312 (2014).

The FAA was enacted by Congress to "reverse the longstanding judicial hostility to Arbitration Agreements." *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 24 (1991); *Vaden v. Discover Bank,* 556 U.S. 49 (2009); *Shearson/Am. Express, Inc. v. McMahon,* 482 U.S. 220, 225-26 (1987); *Puleo v. Chase Bank USA, N.A.,* 605 F.3d 172, 177-78 (3d Cir. 2010). As the Supreme Court stated:

> [T]he recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration. Parties trad[e] the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration.

14 Penn Plaza, LLC v. Pye, 129 S. Ct. 1456, 1471 (2009) (citations omitted); *accord AT&T Mobility*, 131 S. Ct. at 1748-49; *see also Epic Sys. Corp. v. Lewis*,

138 S. Ct. 1612, 1621 (2018) (reiterating the benefits of arbitrating favor a presumption that arbitration should apply because of "the promise of quicker, more informal, and often cheaper resolutions for everyone involved"). The Supreme Court's preference for arbitration extends to consumer disputes as well. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) .

Under the FAA, a court must compel arbitration if it finds: (1) that a valid arbitration agreement exists between the parties, and (2) the dispute falls within the scope of the agreement. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626-28 (1985); *Gay v. CreditInform*, 511 F.3d 369, 386 (3d Cir. 2007) (*citing Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 228 (3d Cir. 1997)). Because of the favored status afforded to arbitration, "[a]n agreement to arbitrate should be read liberally in favor of arbitration." *Marchak v. Claridge Commons, Inc.,* 134 N.J. 275, 282 (1993).

B. The United States Supreme Court and New Jersey Courts Mandate that an Arbitrator Determine the Arbitration Agreement's Enforceability

The United States Supreme Court definitively stated "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Henry Schein, Inc. v. Archis & White Sales, Inc.,* 139 S. Ct. 524, 528, 202 L. Ed. 2d 480 (January 8, 2019). In *Henry Schein*, the Court reversed the lower court's improper review

of an arbitration agreement and reemphasized the Court's longstanding precedent: when parties agree to arbitration, an arbitrator (not the court) decides the merits of a dispute and "gateway" questions of arbitrability, "such as whether the parties have agreed to arbitrate and whether their agreement covers a particular controversy. *Id.* at *3 (citations omitted) (emphasis added); *see also Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70, 130 S. Ct. 2772, 2778, 177 L. Ed. 2d 403 (2010) (when an agreement contains a delegation clause, challenges to its enforceability must be referred to the arbitrator); *Morgan v. Sanford Brown Inst.,* 225 N.J. 289, 303, 137 A.3d 1168, 1177 (2016) ("a delegation clause in an arbitration agreement can provide that an arbitrator, rather than a judge, will decide such 'threshold issues' as whether the parties agreed to arbitrate a legal claim brought by a plaintiff."); *Amalgamated Transit Union, Local 880 v. N.J. Transit Bus Operations, Inc.,* 975 A.2d 403, 409-410 (2009) (holding courts ought not intrude on the merits of an issue the parties have agreed would be determined through arbitration, and should only determine whether the issue is facially subject to arbitration); *Standard Motor Freight, Inc. v. Local Union No.560,* 228 A.2d 329 (1967); *Clarke v. Alltran Fin., LP,* 2018 U.S. Dist. LEXIS 29011, 2018 WL 1036951 (E.D.N.Y. Feb. 22, 2018) (holding an arbitration

provision subjects arbitration to any "[c]laims regarding the application, enforceability or interpretation" to the arbitrator) (Da10-Da17).[4]

Motions to compel arbitration on identical claims and circumstances were granted by the court and upheld on appeal in both *Williams-Hopkins v. LVNV Funding, LLC,* 2019 N.J. Super. Unpub. LEXIS 957, 2019 WL 1873155 (N.J. App. Div. Apr. 26, 2019) and *Maisano v. LVNV Funding, LLC,* 2019 N.J. Super. Unpub. LEXIS 2421 (N.J. App. Div. Nov. 27, 2019). *Id.*; *see also Williams-Hopkins v. LVNV Funding, LLC,* 2019 N.J. Super. Unpub. LEXIS 957, 2019 WL 1873155 (N.J. App. Div. Apr. 26, 2019) (Da108-Da109) (holding because the arbitration agreement required the dispute to be submitted to arbitration, pursuant to U.S. Supreme Court authority, it had to be adjudicated in

[4] Specifically, the court held, "[h]ere, the arbitration provision subjects to arbitration any "[c]laims regarding the application, enforceability, or interpretation of this Agreement and this arbitration provision." (Montgomery Decl. Ex. 1 at 9.) Courts in this Circuit have consistently concluded that similar language constitutes a "clear and unmistakable" delegation. *See, e.g., Kai Peng v. Uber Techs., Inc.,* 237 F. Supp. 3d 36, 53 (E.D.N.Y. 2017) ("The delegation clause's language that an arbitrator will decide disputes 'arising out of or relating to interpretation or application of this Arbitration Provision, including [its] enforceability, revocability or validity,' clearly and unmistakably delegates the gateway issues to the arbitrator." (alteration in original) (collecting cases)); *Kuehn v. Citibank, N.A.,* 2012 U.S. Dist. LEXIS 173346, 2012 WL 6057941, at *4 (S.D.N.Y. Dec. 6, 2012) (Da61-Da64) ("The arbitration agreement between the parties in this case provides that '[c]laims relating ... to application, enforceability or interpretation of my Account, including this arbitration provision' are subject to arbitration. This provision plainly delegates resolution of questions about the arbitration agreement's enforceability to an arbitrator."). Thus, the arbitration provision here clearly and unmistakably delegates issues concerning the class action waiver's enforceability to the arbitrator."

arbitration); *Maisano v. LVNV Funding, LLC,* 2019 N.J. Super. Unpub. LEXIS 2421 (N.J. App. Div. Nov. 27, 2019) (Da71-Da74) (holding because the arbitration agreement required the dispute to be submitted to arbitration, it must be adjudicated in arbitration). -

No different than *Maisano* and *William-Hopkins*, here, the Cardholder Agreement mandates that the matter be referred to arbitration, including for determination of "gateway" issues like whether the Arbitration Agreement is enforceable — Claims subject to arbitration include the application, enforceability, or interpretation of the Cardholder Agreement and the Arbitration Agreement. (Pa141-Pa143). This necessarily includes the NJCFA, NJCFLA, and declaratory relief claims raised here.

Thus, Appellant's attempts to argue that the Cardholder Agreement is unenforceable are misplaced because such attempts may only be made before an arbitrator. In any event, Plaintiff cannot dispute that he entered into the Agreement, nor that he used and benefitted from it. (Pa132-Pa133). *See Novack v. Cities Serv. Oil Co*., 149 N.J. Super. 542, 548, 374 A.2d 89 (Law Div. 1977) (use of a credit card constitutes acceptance of the offer of credit in accordance with its terms), *aff'd*, 159 N.J. Super. 400, 388 A.2d 264 (App. Div.), *cert. denied*, 78 N.J. 396, 396 A.2d 583 (1978).

Again, the United States Supreme Court has specifically held "a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019). Any issues including whether the agreement is void pertaining to the validity of the assignment of the Agreement must be submitted to arbitration. *See Williams-Hopkins v. LVNV Funding, LLC*, 2019 N.J. Super. Unpub. LEXIS 957 (App. Div. Apr. 26, 2019) (holding that plaintiff's arguments that the agreement is void must be referred to the arbitrator).

The facts of *Williams-Hopkins* are directly on-point. In *Williams-Hopkins*, the plaintiff – represented by the same counsel as here – challenged whether the action should be compelled to arbitration and, like the plaintiff here, argued that defendant cannot enforce the arbitration agreement because it lacked licensure at the time of assignment, but the court held that these issues must be submitted to arbitration:

> Here, plaintiff's claim relates to the Bank's assignment of the Agreement to defendant. This issue, as well as other issues raised by plaintiff, must be submitted to arbitration in accordance with the terms of the Agreement. During oral argument before the panel, defendant conceded the arbitrator should determine whether the Bank assigned to defendant all rights under the Agreement, including the right to compel arbitration.

2019 N.J. Super. Unpub. LEXIS at *4-5.

No different here, any challenge to Respondents' ability to enforce the Agreement as a result of the licensure status must be determined by the Arbitrator, consistent with *Henry Schein, Inc.* and *Williams-Hopkins.*

C. The Arbitration Agreement is Enforceable under Both Federal and New Jersey Law

Regardless of Appellant's misguided challenge to Respondents' ability to enforce the Cardholder Agreement and its Arbitration Agreement, the Cardholder Agreement is enforceable under both federal and New Jersey law. New Jersey courts enforce contracts where there is "a bargained for exchange of promises or performance that may consist of an act, a forbearance, or the creation, modification, or destruction of a legal relation." *Martindale v. Sandvik*, 173 N.J. 76, 88 (2002). Under both federal and New Jersey law, a written agreement to arbitrate is presumed valid and enforceable. *See* 9 U.S.C. § 2 ("A written provision in . . . a contract . . . to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable. . ."); *N.J.S.A.* 2A:23B-6 (a) ("An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract."). Thus, the Agreement is presumptively valid under New Jersey and federal law.

Even setting aside the presumption of validity and the mandatory referral to arbitration, there is no legitimate dispute regarding the Cardholder Agreement's enforceability. Appellant entered into the Cardholder Agreement by using and benefitting from the credit card, making payments on the Account, and incurring the Debt that is the subject of the Complaint without objection or opt-out. (Pa129-Pa134 & Pa164-Pa171); *Novack v. Cities Serv. Oil Co.,* 149 N.J. Super. 542, 548 (Law Div. 1977) (holding the use of a credit card constitutes acceptance of the offer of credit in accordance with its terms), *aff'd,* 159 N.J. Super. 400 (App. Div. 1978), *cert. denied*, 78 N.J. 396 (1978); *Dicent v. Kaplan Univ.,* No. 18-2982, 2019 WL 158083, at *2 (3d Cir. Jan. 10, 2019) (enforcing arbitration agreement that was e-signed, noting that plaintiff's failure to review it prior to signing did not excuse his from arbitration) (Da18-Da21).

Also, the Arbitration Agreement conforms with New Jersey law by "clearly and unambiguously agree[ing] to a waiver of the right to sue"[5] by indicating in capital letters:

> **PLEASE READ CAREFULLY – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS**
>
> This agreement to arbitrate provides that you or we can require controversies or disputes between us to be resolved by

[5] *See Atalese,* 219 N.J. at 443; *Noonan v. Comcast Corp.,* 2017 U.S. Dist. LEXIS 175549, 2017 WL 4799795 (D.N.J. Oct. 24, 2017) (Da79-Da86).

> BINDING ARBITRATION. You have the right to REJECT this agreement to arbitrate by using the procedure explained below.
>
> If you do not reject this agreement to arbitrate, you GIVE UP YOUR RIGHT TO GO TO COURT and controversies or disputes between us will be resolved by a NEUTRAL ARBITRATOR INSTEAD OF A JUDGE OR JURY, using rules that are simpler and more limited than in a court. Arbitrator decisions are subject to a VERY LIMITED REVIEW BY A COURT. Arbitration will proceed INDVIDUALLY – CLASS ACTIONS AND SIMILAR PROCEDURES WILL NOT BE AVAILABLE TO YOU.

(Pa141).

It is also well-settled that under federal law, class action waiver is enforceable. *See AT&T Mobility,* 131 S. Ct. 1740; *Epic Sys. Corp.*, 138 S. Ct. 1612; *Homa v. Am. Express Co.,* 494 Fed. Appx. 191, 195-7 (3d Cir. 2012); *Gay v. CreditInform,* 511 F.3d 369, 387 (3d Cir. 2007). Thus, there can be no dispute to the Arbitration Agreement's enforceability under either FAA or New Jersey law.

Once a defendant establishes the validity of the arbitration agreement, the burden shifts to plaintiff to rebut the presumption of arbitration. *See Green Tree Fin. Corp.-Alabama v. Randolph,* 531 U.S. 79, 92, 121 S. Ct. 513, 522, 148 L. Ed. 2d 373 (2000) (opposing party has the burden of rebutting the presumption of arbitration); *Brown v. 5101 N. Park Drive Operations, LLC*, 2014 N.J. Super.

Unpub. LEXIS 920, 2014 WL 1613648 (N.J. Super. Ct. App. Div. 2014) (same) (Da6-Da9).

D. Appellant's Claims are Encompassed by the Cardholder Agreement and Respondents are Entitled to Enforce it

The Cardholder Agreement, which was sent to Plaintiff, plainly applies to Credit One and its successors or assignees. (Pa136-Pa146). The Resurgent Affidavit demonstrates proof of the assignment of Plaintiff's Account and that LVNV is an assignee of Credit One. (Pa170-Pa171).

New Jersey Courts have consistently held assignees and non-signatories like LVNV are entitled to enforce an arbitration agreement. *See Williams-Hopkins,* 2019 N.J. Super. Unpub. LEXIS 957, at *4 (enforcing arbitration provision in favor of current owner of the debt, LVNV, pursuant to U.S. Supreme Court authority); *Maisano,* 2019 N.J. Super. Unpub. LEXIS 2421, at *10 (same); *Lyon v. Kull Auto Sales, Inc.,* 2017 N.J. Super. Unpub. LEXIS 133, 2017 WL 344438 (N.J. Super. Ct. App. Div. 2017) (Da65-Da70) (arbitration agreement enforced by contract assignee); *Jade Apparel, Inc. v. United Assurance, Inc.,* 2016 N.J. Super. Unpub. LEXIS 2250, 2016 WL 5939470, at *3 (N.J. Super. Ct. App. Div. 2016) (Da49-Da54) (arbitration compelled by non-signatory because of agency relationship with signatories and inclusion in language of agreement);

Flexi-Van Leasing, Inc. v. Through Transport Mut. Ins. Assn., 108 Fed. Appx. 35, 40 (3d Cir. 2004) (holding "traditional principles of contract and agency law," including third-party beneficiary principles, applied to arbitration agreements); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 7 F.3d 1110, 1122 (3rd Cir. 1993); *Holland v. LVNV Funding, LLC,* No. 5:16-CV-00069, 2016 WL 6156187, at *1 (W.D. Ky. Oct. 21, 2016) (Da38-Da48) (holding LVNV Funding possessed the right to compel arbitration of an assigned Credit One credit card agreement); *Comrey v. Discover,* 806 F. Supp. 2d 778 (M.D. Pa. 2011); *Sweiger v. Calvary Portfolio Services, LLC*, 2012 WL 1940678 (W.D. Pa. 2012) (plain language of arbitration agreement "demonstrates that Defendant Calvary Portfolio Services, LLC, is the valid, existing assignee of the contract by which Sweiger agreed to binding arbitration"); *Borsack v. Chalk & Vermilion Fine Arts, Ltd.,* 974 F. Supp. 293 (S.D.N.Y. 1977) ("Our Court of Appeals has rejected the proposition that only signatories to an Arbitration Agreement can be bound by its terms."); *Variblend Dual Dispensing Sys., LLC v. Seldel GmbH & Co., KG,* 970 F. Supp. 2d 157 (S.D.N.Y. 2013) ("the rights of an assignee are subject to . . . all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom. This principle applies to arbitration provisions, which would be of no value if a party could escape the effect of such a clause by assigning a claim subject to arbitration between the

original parties to a third party"); *Banque v. Amoco Oil Co.,* 573 F. Supp. 1464 (S.D.N.Y. 1983); *Mark v. Portfolio Recovery Assocs., LLC,* 2015 U.S. Dist. LEXIS 54498, 2015 WL 1910527 (N.D. Ill. Apr. 27, 2015) (Da75-Da78) (arbitration clause enforced in case filed by consumer against debt collector who purchased account from original creditor); *Bellows v. Midland Credit Mgmt.,* 2011 U.S. Dist. LEXIS 48237, 2011 WL 1691323 (S.D. Cal. 2011) (Da1-Da6); *James v. Portfolio Recovery Assocs., LLC,* 2015 U.S. Dist. LEXIS 20786, 2015 WL 720195 (N.D. Cal. 2015) (Da55-Da60) (arbitration clause enforced in case filed by consumer against debt collector who purchased account from original creditor); *Ramos v. Hertz Corp*., 2018 U.S. Dist. LEXIS 165803, at *6, 2018 WL 4635972 (D. Col. Sept. 26 2018) (Da87-Da92) (holding assignee stands in shoes for purposes of arbitration); *Funderburke v. Midland Funding, L.L.C*., No. 12-2221-JAR-DJW, 2013 U.S. Dist. LEXIS 13438, 2013 WL 394198, at *5 (D. Kan. Feb. 1, 2013) (Da30-Da37) (holding non-signatory to an arbitration agreement containing an assignment clause could enforce the arbitration agreement because the non-signatory was an assignee, and thus "it steps into the shoes of" the assignor who signed the arbitration agreement").

Under similar circumstances and based on affidavits almost identical to those before this Court, the Northern District of Illinois held that LVNV established chain of title and was able to enforce the arbitration agreement. *See*

Valentine v. LVNV Funding LLC, 2020 U.S. Dist. Lexis 185521, 2020 WL 5646975 (N.D. Ill. Oct. 7, 2020) (Da103-Da107) (citing *Fuller v. Frontline Asset Strategies, LLC,* 2018 U.S. Dist. LEXIS 61015, 2018 WL 1744674, at *3 (N.D. Ill. Apr. 11, 2018) (Da27-Da29)) *see also Smith v. Resurgent Capital Servs., LP*, 2020 U.S. Dist. LEXIS 153607, at fn. 4 (D. Md. Aug. 24, 2020) (Da98) (based on virtually identical affidavits to those here, even though Defendants are not parties to the underlying card agreement, they may nevertheless invoke its arbitration provisions).

Finally, Appellant lacks standing to challenge the validity of the assignment between two separate parties, or any actions taken by Credit One. *See Everbank v. Tierney,* 2020 N.J. Super. Unpub. LEXIS 1414, *9-10, 2020 WL 3980393 (N.J. Super. Ct. App. Div. July 15, 2020) (a litigant who is not a party to the agreement, nor a third-party beneficiary, lacks standing to challenge the agreement) (Da25) (citing *Rajamin v. Deutsch Bank Nat'l Trust Co.*, 757 F.3d 79, 88-90 (2d Cir. 2014) (holding that mortgagors lacked standing to complain that the assignment of their mortgages to the defendant violated the terms of a pooling agreement in which the mortgagors' original lender was a party); *Correia v. Deutsche Bank Nat'l Trust Co.*, 452 B.R. 319, 324 (B.A.P. 1st Cir. 2011) (stating that debtors lacked standing to object that an assignment of their mortgage violated a pooling and servicing agreement because they were neither

parties to, nor third-party beneficiaries of, the agreement); *Livonia Prop. Holdings, LLC v. 12840012976 Farmington Rd. Holdings, LLC*, 717 F. Supp. 2d 724, 736-737 (D. Mich. 2010) (stating "a litigant who is not a party to an assignment lacks standing to challenge that assignment'), *aff'd*, 399 F. App'x 97 (6th Cir. 2010)"). Any transfer is voidable not void and only the beneficiaries, of which Plaintiff is not one, can call into question the issues of an assignment. *See Rajamin,* 757 F.3d at 90.

Thus, as Appellant was neither a party to nor third-party beneficiary of the assignment, he lacks standing to challenge the validity of the assignments. Any argument as to the validity of the assignment to LVNV would be between Credit One and LVNV. *See id.* at 90. As a result, Plaintiff lacks standing to contest any transfer from Credit One on the grounds that the transfer is in contravention of the terms of the trust or the alleged trustees lack of authority. *Id.*

As a result, Respondents are covered by the Arbitration Agreement and, as such, the Lower Court correctly referred the matter to arbitration.

E. Respondents' Motion was Timely and Defendants did not Waive their Right to Arbitrate

"[M]erely answering on the merits, asserting a counterclaim (or cross-claim) or participating in discovery, without more, will not necessarily constitute a waiver." *Gavlik Constr. Co. v. H.F. Campbell Co.*, 526 F.2d 777 (3d Cir. 1975); *see, e.g., Schall v. Adecco U.S.A., Inc.*, 2011 U.S. Dist. LEXIS 8884, at *6 (E.D.

Pa. Jan. 28, 2011) (Da93-Da95) ("[a]n answer alone is not a waiver of arbitration rights" and, further, providing discovery responses and objections to interrogatories does not amount to prejudice finding waiver); *Zenon v. Dover Downs, Inc.*, No. 21-1194, 2022 U.S. Dist. LEXIS 112798, 2022 WL 2304118, at *2 (D. Del. June 27, 2022) (Da110-Da112) (no waiver when defendant filed an answer that did not mention arbitration); *Peltz ex rel. Peltz v. Sears, Roebuck & Co.*, 367 F. Supp. 2d 711, 722 (E.D. Pa. 2005) (granting motion to compel arbitration despite seven-month delay during which moving party filed two motions to dismiss, answered interrogatories, and conducted a deposition.").

The Third Circuit has stated that "[w]aiver will normally be found only where the demand for arbitration came long after the suit commenced and when both parties had engaged in extensive discovery." *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 223 (3d Cir. 1992); *see also Restoration Pres. Masonry Inc. v. Grove Eur. Ltd.,* 325 F.3d 54 (1st Cir. 2003) (waiver where, over four-year period, parties were involved in numerous depositions and pretrial conferences and trial was less than two months away); *Com-Tech Assoc. v. Computer Assoc. Int'l, Inc.*, 938 F.2d 1574, 1576-78 (2d Cir. 1991) (waiver where defendant actively participated in discovery and filed dispositive motions over course of eighteen months and trial was only three months away).

Plaintiff relies on *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022), *White v. Samsung Elecs. Am., Inc.*, 61 F. 4th 334 (3d Cir. 2023), and *Cole v. Jersey City Med. Ctr.*, 215 N.J. 265 (2013), none of which support waiver of arbitration based on the facts at hand.

In *Morgan*, the Supreme Court rejected the prejudice-focused inquiry as to whether Federal Courts could condition a waiver of the right to arbitrate on a showing of prejudice. 142 S. Ct. at 1712-1713. The Court reasoned, "the FAA's policy favoring arbitration does not authorize federal courts to invent special, arbitration-preferring procedural rules . . . But a court may not devise novel rules to favor arbitration over litigation." *Id.* at 1713. Thus, the Supreme Court only held that a showing of prejudice is not required and is not a condition of finding that a party waived its right to arbitration. Notably, the Supreme Court did not hold that defendants waived their right to arbitrate and, instead, held that a court cannot make up a new procedural rule to favor arbitration, *i.e.*, that a showing of prejudice is required.

In *White,* a post-*Morgan* case, the Third Circuit held that the defendant, in fact, did waive its right to arbitrate. 61 F.4th at 340. But in *White,* the Third Circuit held that defendants' actions over a period of *multiple* years expressed an intent to litigate. Specifically, defendant sought and agreed to multiple stays in discovery, engaged in affirmative discovery, engaged in various motions

seeking both dismissal and reconsideration of the order denying dismissal, engaged in additional non-merits motion practice, acquiesced and assented to pre-trial orders, filed a motion for certification of an interlocutory appeal, participated in numerous court conferences. *Id.* at 340-341. Due to these numerous affirmative acts over an extended period, the Third Circuit held that defendant's actions demonstrate a waiver of its right to arbitrate.

In *Cole,* like *White,* the Court held that defendant waived its right to compel arbitration because the motion to compel arbitration was filed a mere three days before the scheduled trial date – "[b]y then, as evidenced by the preparation and submission of proposed witness and exhibit lists, interrogatory and discovery readings, and *motions in limine,* the parties' conduct reflected a commitment to try the case. Invoking an arbitration clause on the eve of trial has a detrimental impact on the litigation process." *Id.* at 281-282. In addition, the Court held that the parties engaged in motion practice, defendant filed a motion for summary judgment, and engaged in extensive discovery. *Id.* at 282-283.

This case is not like *White* or *Cole.* Rather, the Action is still in its infancy. The Action is not on the eve of trial; instead, while Respondents filed a pre-Answer Motion to Dismiss the Complaint, which was granted in part, thereafter, Respondents only filed an Answer to the Complaint.

As the Lower Court rightly noted, the parties have not engaged in any substantive discovery, as Appellant served initial discovery demands and Respondents has not produced documents in response. No depositions have taken place or have been scheduled. No scheduling orders have been issued and, while Appellant sought an extension of time on Discovery, no trial date has been scheduled. Therefore, unlike the facts of *White* and *Cole,* Respondents' actions do not evince an intent to knowingly relinquish the right to arbitrate by acting inconsistently with that right to compel arbitration. *See Morgan*,142 S. Ct. 1708; *see also Zephyr Fluid Sols., LLC v. Scholle IPN Packaging, Inc.*, 2023 U.S. Dist. LEXIS 20890, at *6-7 (D. Del. Feb. 7, 2023 (holding arbitration not waived simply by filing a motion to dismiss) (Da113-Da116).

Thus, when the Lower Court granted Respondents' motion to compel arbitration, the Action was (and is) still in the preliminary stages, and the Lower Court therefore correctly held that Respondents did not waive their right to compel arbitration.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this honorable Court affirm the Lower Court's grant of Respondents' motion to compel arbitration pursuant to the valid, binding, and enforceable agreement.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-001301-23

RANDY HOPKINS, *on behalf of himself and those similarly situated*,	:	**CIVIL ACTION**
Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, HUDSON COUNTY
v.	:	
LVNV FUNDING LLC; MHC RECEIVABLES, LLC; FNBM, LLC; SHERMAN ORIGINATOR III, LLC; SHERMAN ORIGINATOR LLC; and JOHN DOES 1 to 10,	:	Trial Court Docket No. HUD-L-1732-22 Sat Below: HON. ANTHONEY V. D'ELIA, J.S.C. DATE: August 23, 2024
Defendant-Respondents.	:	

REPLY BRIEF AND APPENDIX
ON BEHALF OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
APPENDIX TABLE OF CONTENTS v
TABLE OF JUDGMENTS, ORDERS AND RULINGS vi
PRELIMINARY STATEMENT 1
REPLY ARGUMENT 2
POINT I. FOR THE PURPOSES OF APPEAL, AN ORDER COMPELLING ARBITRATION OF ALL CLAIMS IS A FINAL ORDER 2
POINT II. PLAINTIFF HAS CHALLENGED THE VALIDITY OF THE DELEGATION CLAUSE AND ARBITRATION PROVISION BY CHALLENGING THE VALIDITY OF THE CONTRACT 4
POINT III. DEFENDANTS WAIVED ARBITRATION THROUGH PROLONGED AFFIRMATIVE LITIGATION CONDUCT INCONSISTENT WITH A DESIRE TO ARBITRATE PLAINTIFF'S CLAIMS 8
POINT IV. DEFENDANTS WAIVED ANY OPPOSING ARGUMENTS AS TO THE ISSUES OF VOIDNESS UNDER THE NJCFLA AND DISCOVERY INTO ARBITRABILITY BY FAILING TO RESPOND TO POINTS III AND IV OF PLAINTIFF'S OPENING BRIEF 13
CONCLUSION 14

TABLE OF AUTHORITIES

Cases

500 Columbia Tpk. Assocs. v. Haselmann,
275 N.J. Super. 166 (App. Div. 1994) 13

Coinbase, Inc. v. Suski,
144 S. Ct. 1186 (2024) 5

Cole v. Jersey City Med. Ctr.,
215 N.J. 265 (2013) 10, 11, 12

Com-Tech Assoc. v. Computer Assoc. Int'l, Inc.,
938 F.2d 1574 (2d Cir. 1991) 9

Correia v. Deutsche Bank Nat'l Tr. Co.,
452 B.R. 319 (B.A.P. 1st Cir. 2011) 7

Dig. Equip. Corp. v. Desktop Direct,
511 U.S. 863 (1994) 3

Everbank v. Tierney,
No. A-2435-18T2, 2020 N.J. Super. Unpub. LEXIS 1414
(App. Div. July 15, 2020) 6

GMAC v. Pittella,
205 N.J. 572 (2011) 3

Green Tree Fin. Corp.-Alabama v. Randolph,
531 U.S. 79 (2000) 3

Hirsch v. Amper Fin. Servs., LLC,
215 N.J. 174 (2013) 3

Hoxworth v. Blinder, Robinson & Co.,
980 F.2d 223 (3d Cir. 1992) 8

In re Almeida,
417 B.R. 140 (Bankr. D. Mass. 2009) 7

In re Estate of McManus,
417 N.Y.S.2d 55 (1979) 7

In re Mirant Corp.,
613 F.3d 584 (5th Cir. 2010) 10

In re Pharmacy Benefit Managers Antitrust Litig.,
700 F.3d 109 (3d Cir. 2012) 3

John Hancock Mut. Life Ins. Co. v. Olick,
151 F.3d 132 (3d Cir. 1998) 2, 3

Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington Rd. Holdings, L.L.C., 717 F. Supp. 2d 724 (E.D. Mich. 2010) 7

Lloyd v. Hovensa,
369 F.3d 263 (3d Cir. 2004) 3

Morgan v. Sundance, Inc.,
596 U.S. 411 (2022) 10, 12

Rajamin v. Deutsche Bank Nat'l Tr. Co.,
757 F.3d 79 (2d Cir. 2014) 7

Rent-A-Center, W., Inc. v. Jackson,
561 U.S. 63 (2010) 5

S. Jersey Catholic Sch. Teachers Org. v. Saint Teresa of the Infant Jesus Church Elem. Sch.,
150 N.J. 575 (1997) 13

Sacks v. DJA Auto.,
No. 12-284, 2013 WL 210248 (E.D. Pa. Jan. 18, 2013) 9

State v. Lefante,
14 N.J. 584 (1954) 13

White v. Samsung Elecs. Am., Inc.,
61 F.4th 334 (3d Cir. 2023) 10, 12

Statutes

9 U.S.C. § 16(b)(2) 2

9 U.S.C. § 4 2

N.J.S.A. 17:11C-3 5

FILED, Clerk of the Appellate Division, August 23, 2024, **A-001301-23**

N.J.S.A. 17:11C-33(b) 5, 13

APPENDIX TABLE OF CONTENTS

(Appendix immediately follows Reply Brief's CONCLUSION page)

Everbank v. Tierney,
No. A-2435-18T2, 2020 N.J. Super. Unpub. LEXIS 1414
(App. Div. July 15, 2020) Pra1

Sacks v. DJA Auto.,
No. 12-284, 2013 WL 210248 (E.D. Pa. Jan. 18, 2013) Pra5

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Order Granting Motion to Compel Arbitration
filed November 22, 2023 ....Pa187

PRELIMINARY STATEMENT

Defendants' Brief argues four primary points: 1) this Court does not have jurisdiction to hear this Appeal; 2) Plaintiff did not specifically and directly challenge the arbitration provision and delegation clause at issue; 3) Plaintiff does not have standing to challenge the assignment of his alleged account; and 4) Defendants did not waive arbitration. However, Defendants' arguments as to standing and jurisdiction are misplaced.

Similarly, Defendants' arguments as to arbitrability fail to analyze recent case law from the United States Supreme Court which determines that challenges to the validity of a contract as a whole (as was done here) includes a challenge to the arbitration provision and delegation clause contained therein. A court must decide such challenge, not the arbitrator.

Lastly, Defendants' arguments as to waiver fail to analyze the majority of relevant factors informing the analysis. Defendants focus only on the lack of a trial date, but largely ignore their default of their discovery obligations in the trial court, their unsuccessful dispositive motion obtaining a partial dismissal on the merits, and the more than a year and a half of litigation in the trial court. When considering the totality of circumstances, Defendants repeated affirmative litigation conduct was inconsistent with their purported desire to

arbitration Plaintiff's claims and illustrated their intent to submit to the jurisdiction of the trial court. Thus, Defendants waived arbitration.

REPLY ARGUMENT

POINT I. FOR THE PURPOSES OF APPEAL, AN ORDER COMPELLING ARBITRATION OF ALL CLAIMS IS A FINAL ORDER

Defendants first argue that the Court lacks jurisdiction to adjudicate this Appeal because the FAA does not allow for appeals of order compelling arbitration pursuant to 9 U.S.C. § 4. *See* Defs.' Br. 10 (citing 9 U.S.C. § 16(b)(2)). Defendants argue:

> The question of whether an order compelling arbitration is appealable under the FAA turns on whether the relevant order is a final decision on the merits, or an interlocutory order. "A final decision, as that term is commonly understood for purposes of appellate jurisdiction, refers to an order that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" "Within the context of orders relating to arbitration, the decisive issue is 'whether arbitrability was the sole issue presented in the action or whether the issue of arbitrability originated as part of an action raising from other claims for relief.'"
>
> Here, the issue of arbitration is interlocutory. The putative class action brought by Appellant clearly does not pertain solely to issues of arbitrability, but rather is rooted in claims under the NJCFA and NJFCLA.

Defs.' Br. 11-12. (quoting *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 135 (3d Cir. 1998)) (internal citation omitted). Defendants' argument, however, misinterprets applicable law. When *Oleck* referred to arbitrability

being the 'sole issue presented,' i.e., not "embedded in some broader context raising issues or claims for relief outside the arbitration context," the Third Circuit was referring to "issues or claims for relief outside the arbitration context." *Olick*, 151 F.3d at 135. *To wit*, *Oleck* was explaining that an appeal from an order compelling arbitration encompassing all claims for relief "falls under section 16(a)(3) as an appeal from a final order because the litigation before the district has effectively ended on the merits." *Olick*, 151 F.3d at 136.

The approach to deem orders compelling arbitration final orders for the purposes of appeal has been repeatedly affirmed by the New Jersey Supreme Court, the Third Circuit Court of Appeals, and the United States Supreme Court. *See, e.g., Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 186 (2013); *GMAC v. Pittella*, 205 N.J. 572, 575 (2011); *In re Pharmacy Benefit Managers Antitrust Litig.*, 700 F.3d 109, 115 (3d Cir. 2012); *Lloyd v. Hovensa*, 369 F.3d 263, 268 (3d Cir. 2004); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 89 (2000); *Dig. Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 867 (1994). See also, Court Rule 2:2-3(b)(8).

As the trial court's Order compelling arbitration was a final order for the purposes of appeal, Defendants' jurisdictional arguments fail.

POINT II. PLAINTIFF HAS CHALLENGED THE VALIDITY OF THE DELEGATION CLAUSE AND ARBITRATION PROVISION BY CHALLENGING THE VALIDITY OF THE CONTRACT

Defendants next argue that the trial court properly compelled arbitration because the parties delegated the issue of arbitrability to an arbitrator. Defs.' Br. 14-16. Defendant further argues that "Appellant's attempts to argue that the Cardholder Agreement is unenforceable are misplaced because such attempts may only be made before an arbitrator." Defs.' Br. 17. However, the United States Supreme Court has recently addressed the severability principle in the context of delegation clauses and held that when a challenge applies equally to an entire contract, inclusive of the delegation clause and arbitration provision, the court, not the arbitrator, must address said challenge.

> The severability principle establishes that a party seeking to avoid arbitration must directly challenge the arbitration or delegation clause, not just the contract as a whole. But this rule does not require that a party challenge *only* the arbitration or delegation provision. Rather, where a challenge applies "equally" to the whole contract and to an arbitration or delegation provision, a court must address that challenge. Again, basic principles of contract and consent require that result. Arbitration and delegation agreements are simply contracts, and, normally, if a party says that a contract is invalid, the court must address that argument before deciding the merits of the contract dispute. So too here. "If a party challenges the validity . . . of the precise agreement to arbitrate at issue, the federal court *must* consider the challenge before ordering compliance with that [arbitration] agreement."

Coinbase, Inc. v. Suski, 144 S. Ct. 1186, 1194 (2024) (emphasis in original) (quoting *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010)) (emphasis added) (internal citations omitted).

Analogous to *Rent-A-Center* and *Coinbase*, Plaintiff here has challenged the validity of the Credit One Bank, N.A. account agreement as a whole, inclusive of the delegation clause, for Defendants' violations of the New Jersey Consumer Finance Licensing Act ("NJCFLA"). *See* N.J.S.A. 17:11C-3; N.J.S.A. 17:11C-33(b). Plaintiff is not required to challenge *only* the delegation clause—all provisions of the agreement are void for Defendants' violations of the NJCFLA. *See* N.J.S.A. 17:11C-33(b). *Coinbase*'s broad holding as to severability and delegation clauses is applicable here—when a litigant provides a basis for a challenge to a contract as a whole, as was done here, the Court must address the challenge. A litigant is not required to directly challenge *only* the arbitration and delegation provisions. *Coinbase, Inc.*, 144 S. Ct. at 1194.

Defendants next argue that because assignees of contracts can generally enforce arbitration clauses contained in said contracts, Plaintiff "lacks standing to challenge the validity of the assignment between two separate parties, or any actions taken by Credit One. (a litigant who is not a party to the agreement, nor a third-party beneficiary, lacks standing to challenge the

agreement)" Defs.' Br. 22-24 (citing *Everbank v. Tierney*, No. A-2435-18T2, 2020 N.J. Super. Unpub. LEXIS 1414, at *8-9 (App. Div. July 15, 2020)). Defendants' argument is somewhat perplexing, however, because Defendants' collection Complaint (Pa1) and their Motion to Compel Arbitration (Pa119-Pa120, ¶¶ 3-5) rest on Plaintiff being a party to the Credit One credit card agreement. To the extent Defendants argue that Plaintiff "lacks standing to challenge the validity of the assignments [to Defendants]" because "Appellant was neither a party to nor third-party beneficiary of the assignment," that argument also fails for misinterpretation of the law. *See* Defs.' Br. 26. Indeed, by Defendants' rationale, no contracting party could ever challenge an assignment of their contract they are a party to. Such cannot be true.

The cases cited by Defendants—primarily unpublished opinions outside of this jurisdiction—do not support Defendants' argument that a debtor cannot challenge the assignment of their account. The cases cited by Defendants reasoned that a debtor who is not party to an assignment cannot assert claims for breach of the governing agreement or invalidate the assignment due to an alleged breach; the cases did not say that a debtor cannot assert defenses that render an assignment void. *See Everbank*, No. A-2435-18T2, 2020 N.J. Super. Unpub. LEXIS 1414, at *9 ("[Debtor] lacks standing to assert a claim that [assignor] acted in breach of the agreement.); *Rajamin v. Deutsche Bank Nat'l*

Tr. Co., 757 F.3d 79, 88 (2d Cir. 2014) (quoting *In re Estate of McManus*, 417 N.Y.S.2d 55, 56 (1979)) ([U]nder New York law, only the intended beneficiary of a private trust may enforce the terms of the trust . . . . Where the challengers to a trustee's actions are not beneficiaries, and hence lack standing, the court 'need not decide whether the conduct of the trustee comported with the terms of the trust.'); *Correia v. Deutsche Bank Nat'l Tr. Co.*, 452 B.R. 319, 324 (B.A.P. 1st Cir. 2011) (quoting *In re Almeida*, 417 B.R. 140, 149 n.4 (Bankr. D. Mass. 2009)) (Where the "Debtors asked the bankruptcy court to declare the mortgage assignment invalid based upon non-compliance with the provisions of the [Pooling and Services Agreement]—a contract to which they were not a party" and the court held that a debtor "was not a third party beneficiary of the PSA, and, ironically, he would appear to lack standing to object to any breaches of the terms of the PSA."); *Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington Rd. Holdings, L.L.C.*, 717 F. Supp. 2d 724, 735-36 (E.D. Mich. 2010) ([A] debtor may assert certain defenses that render an assignment absolutely invalid (such as nonassignability of the right assigned) . . . . [a] debtor . . . cannot raise alleged acts of fraud, or question the motive or purpose underlying an assignment."). Thus, Defendants arguments do not withstand scrutiny.

Plaintiff has standing to assert affirmative claims or defenses that render an assignment absolutely invalid,' 'such as nonassignability of the right assigned' due to Defendants' violations of the NJCFLA. Plaintiff has provided a basis for the Credit One agreement as a whole, inclusive of the delegation clause and arbitration provision, to be void. Thus, Defendants' arguments as to standing and arbitrability fail.

POINT III. DEFENDANTS WAIVED ARBITRATION THROUGH PROLONGED AFFIRMATIVE LITIGATION CONDUCT INCONSISTENT WITH A DESIRE TO ARBITRATE PLAINTIFF'S CLAIMS

As explained in Plaintiff's opening Brief, Defendants waived any purported ability to compel arbitration by engaging in a year and a half of litigation, by filing a partially successful dispositive motion, by failing to assert arbitration as an affirmative defense and certifying that no arbitration proceedings were contemplated, and by delaying the progression of the litigation and failing to serve responses to discovery requests as part of their litigation strategy.

In their Brief Defendants argue that waiver should only be found when the parties "engaged in extensive discovery," and "where defendant[s] actively participated in discovery and filed dispositive motions over course of eighteen months." Defs.' Br. 27 (quoting *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 223 (3d Cir. 1992); *Com-Tech Assoc. v. Computer Assoc. Int'l, Inc.*, 938

F.2d 1574, 1576-78 (2d Cir. 1991)). Defendants' arguments miss the mark.

First, Defendants fail to address the facts that the parties here litigated for 17 months, Defendants filed a dispositive motion that was partially granted, and Defendants refused to participate in discovery as part of a larger dilatory strategy (forcing Plaintiff to file a motion to compel discovery).

Moreover, if the arbitrator should be the sole arbiter of this case as Defendants claim, Defendants should not have invoked the trial court's jurisdiction by seeking and obtaining a ruling on the merits. They cannot ask the court to rule on Plaintiff's claims, win a significant victory by obtaining a dismissal of Plaintiff's unjust enrichment claim, then only after being faced with other claims and a motion to compel discovery, change course and ask the court this case should have been in arbitration in the first place.

In other words, Defendants "seeks to have both its proverbial cake and to eat it too: it only wants arbitration if it does not win on [on the merits]." *Sacks v. DJA Auto.*, No. 12-284, 2013 WL 210248, at *6 (E.D. Pa. Jan. 18, 2013). But they "cannot retain its right to elect arbitration as an insurance policy to be exercised in the event that it does not obtain a favorable decision on [the merits]." *Id.* In a similar scenario, the Fifth Circuit found waiver where the defendant sought dismissal of the complaint with prejudice and *alternatively* moved to compel arbitration. *See In re Mirant Corp.*, 613 F.3d

584 (5th Cir. 2010). In denying arbitration, the Court of Appeals observed that the defendant was "attempt[ing] to game the system by seeking a decision on the merits while keeping the arbitration option as a backup plan in case the effort fails." *Id.* at 590. That is exactly what Defendants continue to do here. Such gamesmanship should not be rewarded.

Defendants next attempt to distinguish the case at bar from the supporting cases cited in Plaintiff's Brief: *Cole v. Jersey City Med. Ctr.*, 215 N.J. 265 (2013); *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022); and *White v. Samsung Elecs. Am., Inc.*, 61 F.4th 334 (3d Cir. 2023). Defendants argue:

> This case is not like *White* or *Cole*. Rather, the Action is still in its infancy. The Action is not on the eve of trial; instead, while Respondents filed a pre-Answer Motion to Dismiss the Complaint, which was granted in part, thereafter, Respondents only filed an Answer to the Complaint.
>
> As the Lower Court rightly noted, the parties have not engaged in any substantive discovery, as Appellant served initial discovery demands and Respondents has not produced documents in response. No depositions have taken place or have been scheduled. No scheduling orders have been issued and, while Appellant sought an extension of time on Discovery, no trial date has been scheduled.

Defs.' Br. 29-30.

Defendants' arguments focus on only two of the seven *Cole* factors[1] cited in Plaintiff's opening Brief—the proximity of their Motion to trial and the extent of discovery conducted. Plaintiff concedes that a trial date had not been set at the time Defendants moved to compel arbitration, *but* "*[n]o one factor is dispositive*." *Cole*, 215 N.J. at 281. With respect to 'the extent of discovery conducted,' Defendants' dilatory strategy and refusal to participate in discovery, while in default of their obligations should not be rewarded. As discussed in *Cole*, "whether the delay in seeking arbitration was part of the party's litigation strategy" informs the waiver analysis. *Id.* Here, Defendants filed a dispositive Motion on the merits—"a significant factor demonstrating a submission to the authority of a court to resolve the dispute." *Cole*, 215 N.J. at 282. Then, *a year after their Motion to Dismiss was denied* (with the except of the unjust enrichment claim), Defendants moved to compel arbitration. As explained above, Defendants litigated for 17 months in the trial court—significantly longer than the 8 months in *Morgan* and comparable to the

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[1] "(1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any." *Cole*, 215 N.J. at 280-81.

twenty-one months in *Cole*. As in *White*, Defendants were aware that Plaintiff's claims were purportedly subject to arbitration and, "[t]hus, from the outset of the litigation, [Defendants] w[ere] on notice that plaintiff's claims could be arbitrable . . . ." *White*, 61 F.4th at 340.

Further, Defendants' Brief does not address their failure to assert arbitration as a defense in their Answer or their certification that no future arbitration proceedings were contemplated, which also "informs the waiver analysis." *Cole*, 215 N.J. at 281. Even accepting Defendants' position for the sake of argument, Defendants have conceded *at least* 4 of the 7 *Cole* factors. And, as explained in Plaintiff's opening Brief (and not disputed by Defendants), "in *Morgan* the Supreme Court 'expressly rejected' the prejudice-based waiver analysis." *White*, 61 F.4th at 338 (3d Cir. 2023) (quoting *Morgan*, 596 U.S. at 415-16). Thus, a finding of prejudice is no longer *a requirement* for a finding of waiver.

Here, Defendants' arguments in response attempt to ignore most of the litigation in the trial court, and questionably assert that after a year and a half of litigation, "the Action was (and is) still in the preliminary stages." Defs.' Br. 30. However, Defendants do not acknowledge that the arguable lack of progress in the trial court was because of Defendants' ongoing failure to fulfill their obligations. When considering the totality of circumstances, the *Cole*

factors, and the abrogation of the 'prejudice-based waiver analysis' by *Morgan*, it is clear that the trial court erred by finding that Defendants had not waived arbitration.

POINT IV. DEFENDANTS WAIVED ANY OPPOSING ARGUMENTS AS TO THE ISSUES OF VOIDNESS UNDER THE NJCFLA AND DISCOVERY INTO ARBITRABILITY BY FAILING TO RESPOND TO POINTS III AND IV OF PLAINTIFF'S OPENING BRIEF

Point III of Plaintiff's opening Brief asserts that Defendants cannot enforce the arbitration provision of the Credit One agreement because the Legislature declared contracts acquired in violation of the NJCFLA's licensure provisions to be void. *See* N.J.S.A. 17:11C-33(b). Point IV of Plaintiff's opening Brief argues that the trial court erred by granting Defendants' Motion to Compel Arbitration without allowing discovery into the issue of arbitrability. Because defendants failed to brief these arguments, they are waived. *See S. Jersey Catholic Sch. Teachers Org. v. Saint Teresa of the Infant Jesus Church Elem. Sch.*, 150 N.J. 575, 581 (1997); *see also 500 Columbia Tpk. Assocs. v. Haselmann*, 275 N.J. Super. 166, 172 (App. Div. 1994) (dismissing cross-appeal in part due to lack of supporting arguments in brief); *State v. Lefante*, 14 N.J. 584, 589-90 (1954) ("[A] respondent who is merely seeking to maintain his judgment may brief and argue on the appeal any points that will sustain his judgment and if he does not brief and argue such points he will be taken to have waived them.").

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Randy Hopkins respectfully requests that the November 11, 2022 Order (Pa187) granting Defendants' Motion to Compel Arbitration should be reversed.

Respectfully submitted,

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September 9, 2024

Superior Court of New Jersey - Appellate Division
Supplemental Letter Brief
Appellate Division Docket Number: A-001301-23

RANDY HOPKINS, on behalf of himself and those similarly situated,
Plaintiff-Appellant,
vs.
LVNV FUNDING LLC; MHC RECEIVABLES, LLC; FNBM, LLC; SHERMAN ORIGINATOR III, LLC; SHERMAN ORIGINATOR LLC; and JOHN DOES 1 to 10,
Defendants-Respondents.

Case Type:	Civil
County:	Hudson
Trial Court Docket No.:	HUD-L-1732-22
Trial Court Judge:	Anthony V. D'Elia, J.S.C

Re: **Letter Brief on behalf of: Respondents LVNV Funding LLC, MHC Receivables, LLC, FNBM, LLC, Sherman Originator II, LLC, and Sherman Originator LLC**

PRELIMINARY STATEMENT

Respondents, LVNV FUNDING LLC, MHC RECEIVABLES, LLC, FNBM, LLC, SHERMAN ORIGINATOR II, LLC, and SHERMAN ORIGINATOR LLC (collectively, "Respondents"), hereby submit this Supplemental Letter Brief as directed by the Superior Court

of New Jersey, Appellate Division, in light of its holding in *Marmo & Sons Gen. Contr., LLC v. Biagi Farms, LLC*, 478 N.J. Super. 593 (App. Div. 2024).

As is set forth in greater detail herein, this Court's holding in *Marmo* provides additional weight in favor of affirming the Lower Court's Order holding that based on the totality of the circumstances, Respondents did not waive their right to compel arbitration pursuant to a valid, binding arbitration agreement. The factors set forth in *Cole v. Jersey City Medical Center*, 215 N.J. 265, 281 (2013) and re-affirmed by *Marmo* continue to weigh in favor Respondents' request to compel arbitration and they show that Appellant cannot overcome the strong public policy preference for arbitration.

SUPPLEMENTAL LEGAL ARGUMENT

I. *MARMO* SUPPORTS NEW JERSEY'S STRONG PUBLIC POLICY PREFERENCE IN FAVOR OF ARBITRATION

There is no dispute that the Parties entered an Agreement that is subject to the Federal Arbitration Act, 9 U.S.C. § 1 ("FAA"). (Pa136-Pa146 & Pa170). Thus, any calculus begins with the strong presumption in favor of arbitration created by the FAA. *Marmo & Sons Gen. Contr., LLC v. Biagi Farms, LLC*, 478 N.J. Super. 593, 602 (App. Div. 2024). The United States Supreme Court has repeatedly held that the "principal purpose of the FAA is to ensur[e] that private Arbitration Agreements are enforced according to their terms." *See, e.g., AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (citing *Volt Info. Scis. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989)); ; *Atalese v. U.S. Legal Servs. Grp., L.P.,* 219 N.J. 430, 440, 99 A.3d 306, 312 (2014).

II. *MARMO* SUPPORTS THE LOWER COURT'S CONCLUSION THAT RESPONDENTS DID NOT WAIVE THEIR CONTRACTUAL RIGHT TO ARBITRATION

"No one factor is dispositive" in a court's determination as to whether a party has waived its contractual right to arbitration. *Marmo*, 478 N.J. Super at 602-03 (quoting *Cole v. Jersey City Medical Center*, 215 N.J. 265, 281 (2013)). Indeed, as recognized by the *Marmo* court, the totality of seven factors should be considered:

> (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any.

Id. And the lower court's "factual findings underlying the waiver determination are entitled to deference and are subject to review for clear error." *Cole*, 215 N.J. at 275 (citing *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 N.J. 474, 483-84 (1974)). Thus, not only must Appellant overcome the strong preference for arbitration, but Appellant must also overcome deference to the factual findings of the Lower Court the led to the trial court's holding that Respondents did not waive their contractual right to arbitrate. *See* Transcript, 12:6-8 ("in our case, there's been nothing done except paper discovery served, no answers provided, no depositions, nothing like that."); *see also* Transcript, 12:9-12 ("considering the totality of the circumstances . . . there has not been the type of prolonged litigation which equity would compel this Court to deny a motion like this").

In *Marmo*, this Court determined that waiver occurred primarily because no different than the parties in *Cole* and *White v. Samsung Elecs. Am., Inc.,* 61 F.4th 334 (3d Cir. 2023), the party seeking to compel arbitration weaponized the litigation process and extracted the benefit from the

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formality of discovery to the prejudice of the non-moving party. *Marmo*, 478 N.J. Super. at 602. And once the plaintiff in that case had received the substantial benefit of discovery that would not have been afforded to it in arbitration, turn to arbitration to obtain a desired result. *Id*. This is evidenced in that, despite having already engaged in arbitration with respect to the lien, at the time of service of its counterclaim and third-party complaint, plaintiff served defendant with 100 written discovery demands. *Id.* And not only were those demands served, but defendant provided substantial responses, including "over 800 pages of documents and several gigabytes of e-discovery that required the use of an outside vendor to complete." *Id.*

Even more brazenly, despite receiving voluminous responsive documentation, plaintiff in turn failed to provide any responses to the demands served by Biagi, yet still attempted to schedule defendant's depositions. *Id.*, at 602. Indeed, plaintiff's conduct evidences that formal discovery is ripe for "abuses, intrusion, delays, and costs." MATTHEW H. ADLER, ARBITRATION: CASES, PROBLEMS AND PRACTICE 259 (2018). And thus, by the time plaintiff sought to compel arbitration, plaintiff had derived the substantial benefits of formal discovery in litigation, that it would not have been afforded in arbitration, while also avoiding its own discovery obligations. This was the central issue that tipped the totality of the circumstances in favor of waiver.

As compared to *Marmo,* the totality of the circumstances here does not rise to the level of waiver. The factual findings of the Lower Court, that can only be overturned by clear error, demonstrate that Respondents have not abused, delayed, or burdened the discovery process and, have not benefitted from the formality of litigation. *See* Transcript, 12:6-8. Respondents neither served discovery demands, nor provided any responses. *Id.* And no depositions were scheduled or even contemplated at the time of making the motion to compel. *Id.* Thus, unlike *Marmo* Appellant

and Respondents have engaged in no discovery and have not shown their cards or used the litigation process to otherwise prejudice one party or the other for when this matter is referred to arbitration. *Marmo*, 478 Super. at 611-12; *see also* Transcript, 12:6-8 ("in our case, there's been nothing done except paper discovery served, no answers provided, no depositions, nothing like that.").

Respondents anticipate that Appellant may argue that, by Respondents' filing of their cross-motion to dismiss and the dismissal of Appellant's unjust enrichment claim, that Respondents have benefitted from the litigation to the detriment of Appellant. (Pa76). But first, that cross-motion was made only in response to Appellant's procedural motion seeking to consolidate this action with the prior collection action, and the commencement of a collection action does not constitute waiver. (Pa120); *Gunton Corp. v. Diorio*, 2023 N.J. Super. Unpub. LEXIS 1881 (App Div. Oct. 23, 2023) (holding that the creditor did not waive its right to arbitration by commencing a collection action and then seeking to compel arbitration upon the filing of the debtor's counterclaims). And second, a motion to dismiss is a technical motion, and one that does not reach the merits or proof of Appellant's claims asserted in his Complaint. Rather, *Rule* 4:6-2(e) simply "tests 'the legal sufficiency of the facts alleged on the face of the complaint.'" *Guzman v. M. Teixeira International, Inc.*, 476 N.J. Super. 64, 69 (App. Div. 2023) (quoting *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 746 (1989)). Indeed, the fact that a *Rule* 4:6-2(e) motion does not reach the proof or merits of a claim is evidenced by the fact that "[i]n deciding whether to grant dismissal, the complaint's allegations are accepted as true…" *Mac Property Group LLC & The Cake Boutique LLC v. Selective Fire and Cas. Ins. Co.*, 473 N.J. Super 1, 16 (App. Div. 2022) (citing *Watson v. New Jersey Dep't of Treasury*, 453 N.J. Super. 42,

47 (App. Div. 2017)). And, in fact, "[d]ismissals under *Rule* 4:6-2(e) are ordinarily without prejudice," such that Appellant, should he wish to do so, may be able to revive the unjust enrichment claim in arbitration. *Id.*, at 17 (citing *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 772 (1989)). Regardless, at best this is only one factor under the seven-factor *Cole* totality test and does not tip the scales in favor of waiver.

Under the *Cole* seven-factor test, there is no question that the totality of the circumstances supports the Lower Court decision. The seven factors are (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party.

In their totality, these factors favor a holding that Respondents did not waive their right to arbitrate this dispute. The cross-motion filed by Respondents did not reach the merits of Appellant's claims, but rather only reached whether they were sufficiently pleaded. (Pa121). There is no evidence in the record suggesting that the timing of Respondents' motion to compel arbitration was part of a nefarious litigation strategy, as is revealed by the fact that Respondents sought to compel arbitration prior to engaging in and benefitting from the opportunity to conduct litigation discovery. Respondent made it motion to compel at the infancy of the case and not after multiple years. *See.* Transcript, p. 12:13-14 ("due to the lack of litigation, I am going to grant the defendant's motion").

Most importantly to the *Marmo* analysis, ***no discovery has been conducted***. *See* Transcript, 12:2-8 ("the central part of the argument regarding how much has been done to contest the facts raised by the plaintiff [. . .] there's been nothing done except paper discovery served, no answers provided, no depositions, nothing like that"). . Without the parties having conducted any discovery, providing any documentation, or taking any depositions, this action remains in its infancy. *See also White*, 61 F. 4th at 340 (holding engaging in affirmative discovery over multiple years weighed heavily in favor of waiver); *Cole*, 215 N.J. at 281-282 (holding defendant had waived right to arbitrate by invoking arbitration on the eve of trial after getting the benefit of the litigation process). When Respondents sought to compel arbitration, trial was not imminent or scheduled. Respondents have not benefited from the litigation process and Appellant cannot demonstrate any prejudice arising from the referral of the action to arbitration.

In short, unlike in *Marmo*, Respondents did not weaponize litigation or formal discovery to the prejudice of Appellant such that there was no clear error in holding that Respondents did not waive their contractual right to arbitrate. And under the strong public policy in favor of arbitration, the Lower Court Order should be affirmed.

Respectfully submitted,
/s/ Austin Patrick O'Brien
Austin Patrick O'Brien, Esq.
NJ ID No. 418342023

Dated: September 9, 2024

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September 9, 2024

Via eCourts

Honorable Jack M. Sabatino, P.J.A.D.
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 977
Trenton, New Jersey 08625

Re: *Randy Hopkins v. LVNV Funding LLC, et al.*
Case No.: A-1301-23

Dear Judge Sabatino:

This firm represents Plaintiff-Appellant Randy Hopkins. As per the Court's directive, please accept this Letter Brief addressing the Court's recently published opinion in *Marmo & Sons Gen. Contracting, LLC v. Biagi Farms, LLC*, 478 N.J. Super. 593 (App. Div. 2024). As explained below, *Marmo* supports Hopkins's position that the trial court erred in declining to find that Defendants waived arbitration here.

Like the case at bar, *Marmo* addresses and analyzes the multifactor test for waiver of arbitration articulated by the New Jersey Supreme Court in *Cole v. Jersey City Medical Center*, 215 N.J. 265 (2013), post the United States Supreme Court's decision in *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022). In *Marmo*, the Court rejected the defendant's argument that *Morgan* "forbids any consideration of prejudice," and instead "construe[d] *Morgan* to disallow consideration of prejudice *only* . . . ." *Marmo*, 478 N.J. Super. at 607

(emphasis added). *To wit*, *Marmo* reasoned "*Cole* illustrates that, under New Jersey law, prejudice can serve as one of many waiver factors[1] within the totality of circumstances . . . Cole displaced our own previous appellate decisions that had *required* a party asserting an opponent's waiver of an arbitration right to demonstrate it had suffered prejudice." *Id.* at 609 (emphasis added). Because *Cole* includes "prejudice within its multifactor test as a non-dispositive and non-essential consideration," *Cole* is not necessarily at odds with *Morgan*'s holding that prejudice cannot be an essential requirement for a finding of waiver. *Ibid*. Indeed, in analyzing waiver in any context, "the court seldom considers the effects of those actions on the opposing party." *Morgan*, 596 U.S. at 417. Rather, waiver "focuses predominantly on the intent of the waiving party." *Marmo*, 478 N.J. Super. at 607 (citing *Shebar v. Sanyo Bus. Sys. Corp.*, 111 N.J. 276, 291 (1988)).

Considering the above, *Marmo* analyzes the seven *Cole* factors in light of *Morgan*. With respect to delay, *Marmo* reasoned that a six-month delay was "not inordinate," and "substantially less than the twenty-one-month delay that the Court decried in *Cole*." *Id.* at 611. "Six months is approximately the same

[1] In addition to prejudice, the relevant factors to a waiver analysis are delay, motion practice, litigation strategy, extent of discovery conducted, the pleadings, and proximity to a trial date. *See Marmo*, 478 N.J. Super. at 610-13 (citing *Cole*, 215 N.J. at 280-81).

delay [the Court] excused in *Spaeth*, 403 N.J. Super. at 516, 959 A.2d 290." *Ibid.* However, *Marmo* specifically noted that unlike the pro se litigant in *Spaeth*, "Marmo was represented here by counsel, who was better equipped to recognize its right to arbitration and act upon it swiftly." *Ibid.* Applying *Marmo*'s reasoning to the case at bar, LVNV Funding LLC ("LVNV"), through counsel, filed their Collection Complaint (Pa1) against Hopkins twenty-one months before Defendants moved to compel arbitration in the consolidated action. Defendants, collectively represented by counsel, litigated Hopkins's class claims for seventeen months before they moved to compel arbitration—after they failed to obtain full dismissal of Hopkin's claims on the merits. Thus, Defendants' delay here is comparable to the delay in *Cole*, and weighs in favor of the Court finding waiver.

The next factor analyzed by *Marmo* is motion practice. In *Marmo*, "[n]o motion practice, dispositive or otherwise, occurred before Marmo moved to compel arbitration." *Marmo*, 478 N.J. Super. at 611. Whereas here, Defendants opposed Hopkins's Motion to Consolidate (Pa68; Pa75) the Collection Lawsuit and the Class Action by filing a dispositive Cross Motion (Pa72), attempting to defeat Hopkins's claims on the merits. After the Cross Motion to Dismiss was only denied in part (with only the claim of unjust enrichment being dismissed), Defendants litigated for another year before moving to compel arbitration—

which was noted by the trial court.[2] "Though no one factor is dispositive," "[t]he filing of a dispositive motion is a significant factor demonstrating a submission to the authority of a court to resolve the dispute." *Cole*, 215 N.J. at 281, 282. As in *Cole*, the dispositive motion here "was partially granted and partially denied . . . . Notably, [Defendants] do[] not take the position that [they] would surrender that partial substantive dismissal if the matter proceeded to arbitration." *Id*. Thus, under *Cole* and *Marmo*, the factor of motion practice also weighs in favor of waiver here.

Marmo then analyzes the third and fourth factors together, reasoning that litigation strategy and the extent of discovery conducted are related. *See Marmo*, 478 N.J. Super. at 612. *Marmo* reasoned that factors three and four weighed in favor of waiver because plaintiff Marmo "obtained substantial discovery" while defaulting on its own obligations. *Ibid.* Like Defendants here, Marmo only moved to compel arbitration when it seemed like they might be compelled to produce discovery after several months of improperly refusing to do so. *Ibid.* Here, Hopkins served discovery requests on November 11, 2023, and, after receiving no responses for a year due to Defendants' dilatory tactics, filed his Motion to Compel Discovery Responses (Pa101) on September 20, 2023. *See* Certification of Mark Jensen ¶¶ 4-8 (Pa103-Pa104). Defendants filed

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[2] *See* T1 13:3-7.

their Motion to Compel Arbitration on September 22, 2023 (Pa116). Though *Marmo* is distinguishable in that Defendants here did not obtain discovery from Hopkins, the reasoning is applicable in that Defendants' unreasonable delay, their default of their discovery obligations, and their filing of the Motion to Compel Arbitration after Hopkins moved to compel discovery responses all go to factor four—the degree to which the delay was part of Defendants' litigation strategy. While factor three (extent of discovery) does not weigh in favor of waiver here, factor four (litigation strategy) certainly does—Defendants were effectively rewarded for their dilatory strategy.

Marmo's facts and reasoning as to the fifth *Cole* factor is on all fours with the case at bar. *Marmo* reasoned that "[t]he fifth *Cole* factor, 'whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration,' also weighs against Marmo." *Marmo*, 478 N.J. Super. at 613 (quoting *Cole*, 215 N.J. at 281).

> Here, Marmo initiated the action by filing its complaint rather than asserting its right to arbitration . . . Marmo attested in its *Rule* 4:5-1(b)(2) certification that no arbitration was pending and that . . . none was contemplated. The *Rule* recognizes a party's 'continuing obligation' to amend the certification if the underlying facts change. Marmo made no such amendment, instead responding to Biagi's counterclaims with an answer alleging eight affirmative defenses, none of which concerned arbitration. ***These***

> ***pleadings strongly weigh as a factor in favor of waiver.***

Marmo, 478 N.J. Super. at 613 (emphasis added). Here, like *Marmo*, Defendants failed to assert arbitration as an affirmative defense in the Answer (Pa25) to the Counterclaim in the Collection Lawsuit and in their Answer (Pa78) to the Class Action Complaint, despite asserting several other affirmative defenses. And in both pleadings, the *R*. 4:5-1 Certification stated that "[t]he matter in controversy is not the subject of any other action pending in any Court or a pending arbitration proceeding; and no other action or arbitration proceeding is contemplated." Here, like *Marmo*, "[the] pleadings strongly weigh as a factor in favor of waiver." *Ibid*.

Factor six (proximity to a trial date) weighs against a finding of waiver here because, like *Marmo*, "no trial date in the Law Division had been set." *Marmo*, 478 N.J. Super. at 614. However, unlike *Marmo*, the case at bar is designated as complex commercial case where a trial date is not (usually) automatically calendared.

Lastly, factor seven (prejudice) weighs in favor of a finding of waiver here. *Marmo*, citing *Cole*, "explain[s] that '[i]f we define prejudice as 'the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—[then prejudice] occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue.'" *Marmo*, 478 N.J.

Super. at 608 (quoting *Cole*, 215 N.J. at 282). That is exactly what Defendants' conduct accomplished here—*to wit*, (after initiating the Collection Lawsuit) Defendants forced Hopkins to litigate for twenty-one months while attacking the merits of Hopkins's claims through, *inter alia*, Defendants' dispositive Motion. If the matter was referred to arbitration, Defendants would seek to defeat Hopkins's claims on the merits again, likely utilizing the same arguments that were unsuccessful in their dispositive Motion in the trial court; however, Defendants would not seek to relitigate the dismissed claim for unjust enrichment. *To wit*, Defendants "seeks to have both its proverbial cake and to eat it too: [they] only want[] arbitration if [they] do[] not win on [on the merits]." *Sacks v. DJA Auto.*, No. 12-284, 2013 WL 210248, at *6 (E.D. Pa. Jan. 18, 2013). However, Defendants "cannot retain [their] right to elect arbitration as an insurance policy to be exercised in the event that [they do] not obtain a favorable decision on [the merits]." *Id*. As five of the seven *Cole* factors analyzed in *Marmo* weigh heavily in favor of waiver here, the Court here should find Defendants waived arbitration.

Respectfully Submitted,

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