FILED, Clerk of the Appellate Division, April 29, 2024, **A-001458-23**

DAVID J. SINGER, individually, and derivatively on behalf of VELLA SINGER AND ASSOCIATES, PC.,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001458-23
Plaintiffs,	On Appeal From:
vs.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MERCER COUNTY DOCKET NO.: MER-L-1983-23
MAUREEN E. VELLA, individually, and THE LAW OFFICES OF MAUREEN E. VELLA, LLC.	Sat Below: Hon. Brian McLaughlin, J.S.C.
Defendants.	

BRIEF AND APPENDIX ON BEHALF OF DEFENDANTS/APPELLANTS MAUREEN E. VELLA, individually, and THE LAW OFFICES OF MAUREEN E. VELLA, LLC.

SIMON LAW GROUP, LLC
40 West High Street
Somerville, NJ 08876
(800) 709-1131
Attorneys for Defendants

Of Counsel and on the Brief:
Kenneth S. Thyne, Esquire
kthyne@simonattorneys.com
#025951990
Dated: April 29, 2024

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INTRODUCTORY STATEMENT

A basic rule of contract construction is that Courts are to read contracts so as to give meaning to their provisions. In other words, Courts are not supposed to reach results which render a contract provision meaningless.

Here the Trial Court construed an arbitration provision drafted by the Plaintiff which stated that the parties *may* institute arbitration as being permissive and not mandatory. Such an interpretation renders the arbitration clause meaningless. If both parties must agree to go to arbitration, there is no need for an arbitration clause. Furthermore, the subsequent provision in the arbitration clause regarding the choice of an arbitrator is also entirely inconsistent with the reading given by the Trial Court and is likewise rendered pointless by the Trial Court's construction. A later provision in the same contract giving the arbitrator the power to specifically enforce the agreement is also rendered superfluous by this construction.

The other basis of the Trial Court's disregard of the party's agreement to arbitrate was the Trial Court's erroneous application of the protections given to consumers and employees regarding waiver of their right to sue in Court to the contractual provision between the sophisticated parties to this agreement. The Plaintiff is an experienced litigator and scrivener of the provision in question.

He did not need to be informed in writing that by agreeing to alternative dispute resolution he was waiving his right to go to Court.

The Plaintiff is a seasoned attorney, and his justification for avoiding arbitration is that he was not informed in writing that he was going to be waiving his right to litigate to the court. This rationale is difficult to accept when Plaintiff himself drafted the arbitration provision and as a member of the bar certainly can be presumed to have known of his rights to litigate in our Courts.

The Defendant always understood that any dispute arising out of her law practice with the Plaintiff would be resolved in arbitration in accordance with the Shareholder's Agreement. It is an injustice that she should be forced to litigate this matter in open Court. She looks to this Court to reverse the Trial Court's erroneous denial of her Motion to Dismiss and remand to the Trial Court for an entry of an Order to compel arbitration.

PROCEDURAL HISTORY

Plaintiff instituted this matter by Verified Complaint on April 6, 2023 (Pa001). The parties agreed to settle the matter and it was dismissed on April 24, 2023 (Pa.17). Thereafter, the settlement was unable to be consummated and an Order was entered to transfer the matter to another venue on October 19, 2023

(Pa018). Defendant, in lieu of filing an answer, filed a Motion to Dismiss based upon the arbitration provision in the party shareholder's agreement (Pa019). The motion was supported by the Certification of Maureen Vella (Pa21) which had appended to it, the parties' shareholders agreement (Pa024) and several of the demands Defendant made regarding arbitration (Pa042-47).

Plaintiff filed a four-page certification in opposition to the motion (Pa48-58). Nowhere in this certification does Plaintiff claim he entered into the agreement as a consumer or that he did not understand that the dispute resolution provision was a waiver of his right to sue in Court. After hearing oral argument on January 11, 2024, the Court denied Defendant's motion (Pa059-60). Defendants filed a Notice of Appeal on January 17, 2024 (Pa061-64). Defendants have requested oral argument (Pa066).

FACTS

Maureen Vella is a member of the New Jersey Bar and has been practicing law since 1984. Ms. Vella is also a Municipal Court Judge in the Township of Franklin. (Pa021) Ms. Vella was also one of two shareholders in Vella, Singer and Associates, P.C. Plaintiff Singer was the other shareholder Id. Plaintiff, Singer was admitted to the bar in 2006 and his current firm's website advertises

that his practice focuses on environmental litigation and general civil litigation. Ms. Vella had always expected any disputes with Plaintiff Singer to be resolved through mediation, and failing that, arbitration (Pa022). Plaintiff has always asserted that any dispute between Plaintiff and herself belonged in arbitration and not in Superior Court (Pa023).

The October 18, 2019, Law Firm Shareholders agreement was largely drafted by Plaintiff (Pa021). Paragraph 23 of the Shareholders Agreement, provides:

> "**Dispute Resolution**. In the event of a dispute among the Shareholders, the Shareholder (sic) agree to conduct good faith negotiations in order to settle the dispute. If the dispute cannot be settled within 30 days, the Shareholders agree to submit the dispute to mediation before a mutually-agreed upon mediator. **If mediation proves unsuccessful within 45 days of submission of the dispute, the Shareholder may submit the dispute to binding arbitration before a mutually-agreed upon Arbitrator. If the parties cannot agree to a mediator/arbitrator the dispute may be submitted to JAMS using the procedures outlined by JAMS."** (emphasis added) (Pa031)

This commitment to the resolving disputes in arbitration is reiterated ten paragraphs later in Paragraph 33:

> "**Enforcement.** The Shareholders understand that it is impossible to measure, in dollars the damage[s] to be sustained by the Law Firm and each other in the event of a breach of the provisions of this Agreement. **Accordingly, the Shareholders hereby submit to Dispute Resolution as defined in Paragraph 23 of this**

> **Agreement with the understanding that the Arbitrator shall specifically enforce the provisions of such paragraphs** as it determines warrant specific performance thereof, without limiting the rights of the aggrieved part(ies) to seek, in addition thereto, compensatory and/or punitive damages, by reason of such breach(es) (Pa037) (emphasis added).

After an unsuccessful mediation, Plaintiff Singer filed a complaint rather than submitting the dispute to binding arbitration. Defendant immediately asserted this matter belonged in arbitration, (Pa022). Prior to Defendant filing a response to the Complaint, Plaintiff dismissed the lawsuit without prejudice (Pa012).

Thereafter, the parties attempted to settle the matter. Defendant informed Plaintiff that if the matter was not settled Defendant would arbitrate; Defendant repeatedly informed the Court and Plaintiff that arbitration is where the parties' disputes should be resolved (Pa043).

When settlement negotiations proved unfruitful Plaintiff revived his lawsuit (Pa018). Plaintiff did so despite being put on notice of Defendants/Appellants demand that the dispute be submitted to binding arbitration before a mutually agreed upon Arbitrator in accordance with Paragraph 23 of the Shareholders Agreement (Pa031).

The Trial Court denied Defendant/Appellant's Motion to Compel arbitration and refused to enforce Paragraph 23 of the Shareholder's Agreement leading to this appeal. The Trial Court set forth two rationales for its decision.

First, the Trial Court held that *Atalese v. U.S. Legal Servs. Grp.,* 219 N.J. 430, 435 (2014), which dealt with arbitration provisions in consumer contracts, required that this contact between lawyers contain a provision stating that the lawyers understood that by agreeing to the dispute resolution provision of the contract they would be waiving their right to have their disputes adjudicated in Court.

The second rationale the Trial Court held that the use of the verb 'may', rendered Paragraph 23 permissive and required that both parties agreed to go to arbitration for the clause to be effective.

The Court's decision was erroneous, and its rationale is unsustainable. First, Atalese does not require a written waiver in a contract provision written by an experienced litigator against whom it is being enforced. Second, the Trial Court's construction of the Plaintiff's dispute resolution clause renders two clauses of the Shareholder's Agreement meaningless- therefore a violation of both general and specific rules of contract construction. Defendant/Appellant looks to this Court to correct this error and remand this matter for an entry of an

Order compelling the arbitration the parties agreed to in their Shareholder's Agreement.

ARGUMENT

I. ATALESE'S REQUIREMENT THAT A CONSUMER BE INFORMED OF HIS WAIVER OF HIS RIGHT TO SUE IN COURT IS INAPPLICABLE TO A LITIGATOR WHO HAS DRAFTED A LAW FIRM'S SHAREHOLDERS AGREEMENT (APPEALING THE ORDER DATED JANUARY 11, 2024 FOUND AT Pa059)

The Trial Court held the provision drafted by Plaintiff failed to comply with New Jersey's rule of consumer contractual interpretation requiring waivers of constitutional or statutory rights to be stated "clearly and unambiguously." *Atalese v. U.S. Legal Servs. Grp.,* 219 N.J. 430, 435 (2014). Underlying New Jersey's rule is the notion that agreements to arbitrate, "like any other contract, must be the product of mutual assent," Id. at 442 (internal quotation marks and citation omitted), and because "an average member of the public may not know—without some explanatory comment—that arbitration is a substitute for the right to have one's claim adjudicated in a court of law," Id. at 442, arbitration clauses will not be construed to encompass constitutional or statutory rights

absent some "concrete manifestation" of the intention to do so, *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.,* 168 N.J. 124, (2001);

The *Atalese* Court made clear that its requirement that the arbitration clause contained a clear statement that a party was waiving their right to go to Court was directed at unsophisticated consumers. As Justice Albin noted: "An average member of the public may not know-without some explanatory comment-that arbitration is a substitute for the right to have one's claim adjudicated in a court of law." *Atalese* at 432.

> "The requirement that a contractual provision be sufficiently clear to place a consumer on notice that he or she is waiving a constitutional or statutory right is not specific to arbitration provisions." Id. at 443. The Court relied upon a statute that require that "every consumer contract" in New Jersey "must be written in a simple, understandable, and easily readable way." Id. citing N.J.S.A. 56:12-2 (emphasis added).

Thus, *Atalese* holding can be summarized as requiring an explicit notification in the contract that indicates that a consumer or employee has been informed that they are waiving their right to sue in Court. Application of that principle to the sophisticated parties to the shareholders' agreement in this context makes absolutely no sense.

First, the Plaintiff is a member of the bar for nearly twenty (20) years and is by self-description a litigator. He is not a consumer or an average member of

the public. He did not indicate in his opposition to the Trial Court that he did not know that an arbitration provision would divest him of his right to sue in Court. How could he make such an assertion with a straight face?

While our Supreme Court has not definitively resolved the scope of the rule requiring statement of waiver in *Atalese*, it has been applied thus far only in the context of employment and consumer contracts. See *Kernahan v. Home Warranty Adm'r of Fla., Inc.,* 236 N.J. 301, (2019) (consumer); *Atalese*, supra (N.J. 2014) (consumer); *Martindale v. Sandvik, Inc.,* 173 N.J. 76, (2002) (employment); *Garfinkel*, supra (employment); see also *Moon v. Breathless, Inc.*, 868 F.3d 204, 214–15 (3d. Cir. 2017) (employment).

Moreover, in its most recent discussion of the rule, our Supreme Court emphasized that "the consumer context of the contract [in Atalese] mattered," *Kernahan*, 236 NJ at 319-320, and that the "twin concerns" animating its application of the rule there were that (1) "a consumer is not necessarily versed in the meaning of law-imbued terminology about procedures tucked into form contracts" (as opposed to "individually negotiated" ones), and that (2) "plain language explanations of consequences had been required in contract cases in numerous other settings where a person would not be presumed to understand that what was being agreed to constituted a waiver of a constitutional or statutory

right," Id. Neither concern applies to the shareholder's agreement before the Court. The parties are not consumers but experienced members of the bar, and in Plaintiff's case the scrivener of the provision; they understood what they were agreeing to and what they were waiving; no form contract is involved.

The U.S. Court of Appeals for the Third Circuit has recently concluded that the weight of authority suggests New Jersey would not extend *Atalese* to commercial contracts which "resulted 'from a lengthy negotiation process' and where no party was an 'average member[ ] of the public.' " *In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515, 525 (3d Cir. 2019) (citing *Victory Entm't, Inc. v. Schibell*, 2018 WL 3059696 at (App. Div. June 21, 2018)). Its survey of New Jersey Supreme Court and Appellate Division precedent, led it to the conclusion that New Jersey "has applied [*Atalese*] thus far only in the context of employment and consumer contracts." Id.

In addition to *Kernahan*'s strong intimation and Remicade's conclusion that the rule applies only where the parties have unequal bargaining power and levels of sophistication—as in the employment and consumer contexts—this Court has held on several occasions that the rule "d[oes] not extend ... to commercial contracts," i.e., contracts that resulted "from a lengthy negotiation process" and where no party was an "average member[ ] of the public." *Victory*

Entm't, Inc. v. Schibell, No. A-3388-16T2, 2018 WL 3059696, at (N.J. Super. Ct. App. Div. June 21, 2018) (Pa067) (citation omitted); see also *Dailey v. Borough of Highlands*, for instance, where the Appellate Division concluded that Atalese was inapplicable to a contract between a business and a municipality, because "Atalese was primarily driven by the fact that it was examining a consumer contract" and, generally speaking, "the sophistication of the parties may bear on whether they knowingly and voluntarily agreed to a contract's terms." N.o. A-3475-18T2, 2020 WL 6297469, *Discovery House v. Advanced Data Sys. RCM, Inc.,* No. CV1921602KMJBC, 2020 WL 6938353, at (D.N.J. Nov. 25, 2020)(Pa081); *Columbus Circle N.J., LLC v. Island Constr. Co.,* No. A-1907-15T1, 2017 WL 958489, at (N.J. Super. Ct. App. Div. Mar. 13, 2017) (Pa090) (rejecting application of Atalese to the contract at issue, which was not "a consumer contract of adhesion where [one party] ... possessed superior bargaining power and was the more sophisticated party" (alteration in original) (citation omitted)); *Gastelu v. Martin,* No. A-0049-14T2, 2014 WL 10044913, (N.J. Super. Ct. App. Div. July 9, 2015) (Pa096) ("Parties to a commercial contract can express their intention to arbitrate their disputes rather than litigate them in court, without employing any special language .... In the present case ... we are dealing with commercial business transaction [sic] and,

therefore, the standard is not as stringent [as the one put forward in Atalese].”). see also Van Duren v. Rzasa-Ormes, 394 N.J. Super. 254, 257 (App. Div. 2007) (enforcing an arbitration agreement “between two sophisticated business parties, each represented by counsel”), aff'd o.b., 195 N.J. 230 (2008).

Additionally, the waiver of statutory claims are not implicated in this dispute. Cf. Atalese (waiver of right to pursue claims under the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20 and the Truth-in-Lending Contract, Warranty and Notice Act, N.J.S.A. 56:12-14 to -18, in court); Garfinkel, 168 N.J. at 135 (waiver of right to pursue claims under Law Against Discrimination, N.J.S.A. 10:5-1 to -42, in court); Atalese is inapplicable to this dispute.

In summary, the Court erred in denying Defendant’s Motion to Compel Arbitration because Plaintiff (the scrivener) did not include a provision informing himself that he was waiving his right to go to Court when he wrote the Dispute Resolution provision of the party’s agreement.

II. THE TRIALS COURT’S CONSTRUCTION OF PARAGRAPH 23 OF THE SHAREHOLDER’S AGREEMENT AS PERMISSIVE RENDERS THE PROVISION MEANINGLESS AND VIOLATES THE RULES OF CONTRACTUAL CONSTRUCTION (APPEALING THE ORDER DATED JANUARY 11, 2024 FOUND AT Pa059)

Arbitration is a favored means of dispute resolution." *Hojnowski v. Vans Skate Park,* 187 N.J. 323, 342 (2006); *Martindale v. Sandvik, Inc.,* 173 N.J. 76, 84, (2002); *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.,* 168 N.J. 124, 131, (2001); *Marchak v. Claridge Commons, Inc.,* 134 N.J. 275, 281, (1993); *Barcon Assocs. v. Tri–County Asphalt Corp.,* 86 N.J. 179, 186, (1981). As such, under the Uniform Arbitration Act, N.J.S.A. 2A:23B–1 to –32, an arbitration agreement is considered to be "valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." N.J.S.A. 2A:23B–6; see also N.J.S.A. 2A:23A–2 (stating agreement to settle dispute by means of alternative resolution provided by New Jersey Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A–1 to –30, is valid, enforceable, and irrevocable except on legal or equitable grounds to revoke contract). Plaintiff is an attorney and drafted the arbitration provision in question.

"An arbitration agreement is a contract and is subject, in general, to the legal rules governing the construction of contracts." *McKeeby v. Arthur,* 7 N.J. 174, 181, (1951) (citation omitted). Because of the favored status afforded to arbitration, '[a]n agreement to arbitrate should be read liberally in favor of arbitration.'" *Griffin v. Burlington Volkswagen, Inc.,* 411 N.J. Super. 515, 518

(App. Div. 2010) (quoting *Garfinkel v. Morristown Obstetrics & Gynecology Assoc.,* 168 N.J. 124, 132 (2001)). Accordingly, courts apply a 'presumption of arbitrability' unless it is clear "that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Curtis v. Cellco P'ship,* 413 N.J. Super. 26, 34 (App. Div. 2010) (quoting *Epix Holdings Corp. v. Marsh & McLennan Cos.,* 410 N.J. Super. 453, 471 (App. Div. 2009), overruled in part on other grounds, *Hirsch v. Amer. Fin. Servs., LLC,* 215 N.J. 174, 193 (2013)). *Victory Ent., Inc. v. Schibell,* No. A-3388-16T2, 2018 WL 3059696, at (N.J. Super. Ct. App. Div. June 21, 2018).

In construing contractual provisions such as the Dispute Resolution provision of the Shareholder's Agreement the Court's inquiry is governed by "familiar rules of contract interpretation." Serico v. Rothberg, 234 N.J. 168, 178 (2018). "It is well-settled that '[c]ourts enforce contracts "based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract."'" Matter of County of Atlantic, 230 N.J. 237 (2017) (alteration in original) (quoting *Manahawkin Convalescent v. O'Neill,* 217 N.J. 99, 118, (2014)).

"In a word, the judicial interpretive function is to consider what was written in the context of the circumstances under which it was written and accord

to the language a rational meaning in keeping with the express general purpose." *Barila v. Bd. of Educ. of Cliffside Park,* 241 N.J. 595, 615–16, (2020), citing *Owens v. Press Publishing Co*, 20 N.J. 537, 543 (1956).

Importantly, "[a] contract 'should not be interpreted to render one of its terms meaningless.' " *Porreca v. City of Millville*, 419 N.J. Super. 212, 233 (App. Div. 2011) (quoting *Cumberland Cty. Improvement Auth. v. GSP Recycling Co.*, 358 N.J. Super. 484, 497, (App. Div. 2003)). *C.L. v. Div. of Med. Assistance & Health Servs.,* 473 N.J. Super. 591, 599, (App. Div. 2022)

If possible, effect should be given to all parts of the contract and an interpretation or construction which gives reasonable meaning to all of its provisions is preferred to one that leaves a portion of the writing useless or inexplicable. *Bullowa v. Thermoid Co.*, 114 N.J.L. 205, 209–210 (E. & A. 1935); *Goldberg v. Commercial Union Ins. Co. of N.Y.,* 78 N.J.Super. 183, 190 (App.Div.1963); *Cooper v. Kensil,* 31 N.J.Super. 87, 91, (Ch.Div.1954) aff'd 33 N.J.Super. 410 (App.Div.1954).

The Trial Court's construction of the contract fails to give Paragraph 23 a rational meaning and renders the provision meaningless, useless and inexplicable. By holding that the term "may" rendered the provision completely permissive the Court essentially held that the provision is

meaningless. Although the provision is entitled "Dispute Resolution", the parties could only go to arbitration to have their disputes resolved pursuant to its terms only if they both subsequently agreed. Then why have the provision? They don't need the provision to arbitrate if they both must subsequently agree to do so.

This construction clearly ignores the probable intent of the parties, the rational meaning of its provision and the provision's purpose. Why would two sophisticated lawyers include a provision in a contract entitled "Dispute Resolution" that provides for mediation and then failing meditation, arbitration if both parties would have to agree to subsequently agree to the arbitration provision that they just put into their contract? Such an interpretation renders the provision useless.

Furthermore, why would the parties include a procedure regarding selection of the arbitrator if they could not agree upon an arbitrator if they were both required to agree to arbitration and then both required to agree to the method of selecting an arbitrator? Such an interpretation flies in the face of reason and renders the sentence inexplicable. The use of "may" regarding the selection of an arbitrator cannot be reconciled with the Trial Court's construction.

On top of that, Merriam Webster defines "may" as "1(b). to have permission to" or "be free to" or "4. shall, must." Thus, under the Dispute Resolution provision, the parties either had permission to, or were required to submit this dispute to arbitration.

In accordance with the Arbitration Act, if a party has permission to commence arbitration that becomes the exclusive remedy for the party's suit. N.J.S.A 2A:23B-1 to -32. It would again be nonsensical to state that a party has permission to commence arbitration but that the other party could file suit in Superior Court despite such an arbitration. How would that make any sense whatsoever?

Finally, what sensible interpretation can be given to Paragraph 33's announcement that "the Shareholders hereby the Shareholders hereby submit to Dispute Resolution as defined in Paragraph 23 of this Agreement with the understanding that the Arbitrator shall specifically enforce the provisions of such paragraphs as it determines warrant specific performance thereof, without limiting the rights of the aggrieved part(ies) to seek, in addition thereto, compensatory and/or punitive damages, by reason of such breach(es)" (Pa037) if the Trial Court's construction is credited? The Trial Court's construction renders both Paragraph 23 and 33 superfluous and nonsensical.

Given the law favoriting arbitration, Garfinkle, supra, it is inconceivable that these two sophisticated parties would include in their contract a provision regarding alternative dispute resolution which was wholly permissive and could not be enforced by either party and was therefore meaningless and then subsequently give the Arbitrator the power to specifically enforce the agreement. The construction that they would then include a second provision giving further force to the earlier meaningless provision is farcical when considered with the "presumption of arbitrability" Curtis, supra.

Arbitration is particularly appropriate when contracted for by attorneys who practice together. Our Courts' longstanding endorsement of arbitration as a favored remedy, "reflects its value as a procedure for resolving disputes out of court that in the process combines the advantages of privacy and efficiency. **Its virtues have special application to conflicts arising out of agreements between lawyers in practice together. Such conflicts are best resolved quickly and efficiently, and the parties' best interests are likely to be served by a dispute-resolution process that limits notoriety about the underlying issues**." *Heher v. Smith, Stratton, Wise, Heher & Brennan*, 143 N.J. 448, 459, (1996), (emphasis added)

By erroneously requiring the shareholder's Dispute Resolution provision to comply with the notice requirements of consumer contracts and by interpreting the dispute resolution provision to be entirely permissive and requiring the consent of both parties the Trial Court rendered the provision meaningless and its decision is contrary to public policy and the expectation of the parties. In so ruling the Trial Court deprived Defendant of her prudent choice to enter into a dispute resolution provision that limits the notoriety of the underlying issues as Defendant expected and as counseled by Court in Heher, supra. This Court should correct that injustice.

CONCLUSION

For the foregoing reasons the Trial Court's Order denying Plaintiff's motion should be reversed and the matter should be remanded to Trial Court to enter the proposed form of Order which accompanied Defendant's motion (Pa023a).

SIMON LAW GROUP, LLC

Attorney for Defendant

By: /s/ Kenneth S. Thyne

Dated: April 29, 2024

Kenneth S. Thyne

FILED, Clerk of the Appellate Division, May 31, 2024, **A-001458-23**

DAVID SINGER, individually, and derivatively on behalf of VELLA SINGER AND ASSOCIATES, PC, Plaintiffs / Respondents, vs. MAUREEN E. VELLA, individually, and THE LAW OFFICES OF MAUREEN E. VELLA, LLC, Defendants / Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET No.: A-001458-23 On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MERCER COUNTY DOCKET NO.: MER-L-001983-23 Sat Below: Hon. Brian McLaughlin, J.S.C.

OPPOSITION BRIEF AND APPENDIX ON BEHALF OF PLAINTIFFS / RESPONDENTS DAVID SINGER, individually, and derivatively on behalf of VELLA SINGER AND ASSOCIATES, PC

LAW OFFICES OF BRIAN M. CIGE
Attorney ID: 015671984
7 East High Street
Somerville, New Jersey 08876
Phone: 908-685-3775
Attorney for Plaintiffs / Respondents

On the Brief:
Brian M. Cige, Esquire
Cigelaw@gmail.com

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PRELIMINARY STATEMENT

Appellant Maureen Vella and Respondent David Singer were partners in the Respondent Vella Singer and Associates, PC and entered into a Shareholder's Agreement dated October 18, 2019 (the "Agreement") (Appellants' Pa024). This Agreement includes a dispute resolution provision which first mandated that Mediation take place – which it did but was unsuccessful – and then referenced that the dispute "*may*" be submitted to Arbitration (Appellants' Pa031). The parties disagreed on whether submission to arbitration was required. Appellant Vella took the untenable position that it was mandatory – despite the permissive language in the Agreement. Both were experienced attorneys and could have required Arbitration by including the word "shall".

PROCEDURAL HISTORY

Because the language is permissive, Plaintiffs / Respondents were not barred from filing a Complaint, and did so on 6 April 2023. (Appellants' Pa001). The presiding Civil Judge in Somerset County, Robert A. Ballard, Jr., P.J.Cv., tried to settle the case but ultimately did not. It was then transferred to Mercer County (Appellants' Pa018) to be handled by Brian McLaughlin, J.S.C. who heard and denied a Motion to Dismiss Complaint in Lieu of Filing an filed by Appellants in an effort to avoid litigation in the Superior Court (Appellants' Pa019).

Then, instead of engaging in the litigation process, Appellants chose to file this Appeal (Appellants' Pa061) with the foreseeable consequence of further delaying same. Appellants requested a transcript of Judge McLaughlin's decision, a Certification of Transcript Completion and Delivery was filed confirming it was uploaded and has been or will be included in Appellants' Appendix per R.2:6-1(a)(1)(G). As a result, litigation of the underlying matter regarding the financial obligations of the parties and requirements to pay debts of Respondent Vella Singer and Associates PC and the personally liable individual parties involved continue to be on hold until this issue is resolved by the Appellate Division.

STATEMENT OF FACTS

Respondents rely on the Certification by Respondent David Singer dated November 28, 2023 (Appellants' Pa048), which was provided to the Trial Court in support of Respondents' Opposition to the Motion to Compel Arbitration, and incorporate same by reference herein. The facts there set forth correct the numerous misstatements which Appellants continue to aver. For example, Respondent David Singer was not the "scrivener" of the Shareholders' Agreement (Appellants Pa025). Rather and in fact, it was Appellant Maureen E. Vella, an attorney of more than forty (40) years and the Managing Partner who was responsible for drafting it.

LEGAL ARGUMENT

Appellants filed a Motion to Dismiss pursuant to Rule 4:6-2(e), consistent with N.J.S.A. 2A:23B-7 Application to compel or stay arbitration: (2) if the refusing party opposes the summary action, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate, rather than an Answer, seeking to compel Arbitration pursuant to the Shareholders Agreement dated 18 October 2019 (Appellants' PA025), which they opposed.

I. STANDARD OF REVIEW

This Appellate Court may conduct a *de novo* review of questions of law when reviewing a trial court decision and interpreting a contract, including an arbitration agreement. *Serico v. Rothberg*, 234 N.J. 168, 178 (2018) (noting *de novo* appellate review of contracts); *Kieffer v. Best Buy*, 205 N.J. 213, 222 (2011) (noting same); *Goffe v. Foulke Mgmt. Corp*., 238 N.J. 191, 207 (2019) (noting *de novo* appellate review of arbitration agreements). This is rightly done for a "review de novo the trial court's judgment dismissing the complaint and compelling arbitration." See *Flanzman v. Jenny Craig, Inc*., 244 N.J. 119, 131 (2020).

As will be clear upon completion of the Court's plenary review, Judge McLaughlin's basis for the denial of Appellants' Motion concluding the parties' Agreement was clearly unenforceable given the facts and the applicable law.

II. INSUFFICIENT FACTS TO COMPEL ARBITRATION

Appellants' arguments begin with the assertion that they have not waived their right to arbitration. To support this contention, they cite basic law which is all premised on binding arbitration provisions included in contracts or agreements. But that is not the case here, as set forth in the Certification of David Singer dated November 28, 2023 (Appellants' Pa048). The language here is permissive with the option of proceeding with arbitration, which Respondents do not want to do under the circumstances. Moreover, this precedent makes clear that parties can only be required to arbitrate if they know they are making that choice as this language does not indicate that there is no option but to proceed by arbitration. See Atalese v. U.S. Legal Servs. Grp., LP, 219 N.J. 430 (N.J. 2014). See also County of Passaic v. Horizon Healthcare Services, Inc., 474 N.J. Super. 498 (App. Div. 2023), citing Atalese favorably.

The Trial Court below correctly identified the narrow issue regarding whether Arbitration is mandatory as argued by Appellants or permissive as argued by Respondents. Judge McLaughlin noted in his decision that while arbitration is generally favored in the law, to be required the language must be unambiguous that a "consumer" is choosing to arbitrate its disputes rather than having them resolved in a court of law (See transcript of the Trial Court Decision, Page 10, Lines 16-19). Holding that where there is an ambiguity in this regard, whether arbitration was agreed to as required or not, Appellants surrender the right to avoid pursuit of claims in court, language regarding arbitration being unenforceable (See Atalese, supra, and the Trial Court Decision, Page 10, Lines 21-25). The Court correctly concluded that here, where one party wants arbitration and another doesn't, and the language is ambiguous regarding whether this is a requirement, it is permissive and not mandatory (See transcript of the Trial Court Decision, Page 12, Lines 5 - 11).

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CONCLUSION

While Appellants are understandably not happy with the Trial Court's decision, they have failed to provide evidence or successfully argue that Judge McLaughlin's determination is against the weight of the evidence or otherwise requires reversal after a *de novo review*. Consequently, looking at the four corners of the Agreement document, the pending Appeal should be dismissed and the parties allowed to proceed with litigation in the Superior Court.

Respectfully submitted,

LAW OFFICES OF BRIAN M. CIGE
Attorney for Respondents

Brian M. Cige .
BRIAN M. CIGE, ESQ.

Dated: 31 May 2024

FILED, Clerk of the Appellate Division, June 14, 2024, **A-001458-23**

40 WEST HIGH STREET, SOMERVILLE, NEW JERSEY 08876
(800) 709-1131 FAX (800) 709-1141

BRITT J. SIMON * + ◇
STEPHEN ZULLO
JOEL A. FRIEDMAN
JOHN A. KELLEHER
KENNETH S. THYNE
ERIK FRINS
JOHN E. MALCHOW

Of Counsel:
ANGELA M. ROPER

Paralegal:
HELEN DONIS
New York Bar *
Commonwealth of Pennsylvania ◇
District of Columbia Bar +

June 14, 2024

VIA ECOURT APPELLATE
Clerk, Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625-0970

RE: Singer v. Vella
Trial Court Docket No.: MER-L-1983-23
Appellate Docket No.: A-001458-23

Dear Honorable Judges of the Appellate Division:

Please accept this letter brief in lieu of a more formal brief as a reply to the opposition brief filed by the Plaintiff-Respondent.

FILED, Clerk of the Appellate Division, June 14, 2024, **A-001458-23**

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(800) 709-1131 FAX (800) 709-1141

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I. RESPONDENT-PLAINTIFF RECOGNIZES THAT ATALESE DOES NOT REQUIRE A WRITTEN STATEMENT OF WAIVER TO LITIGATORS SUCH AS PLAINTIFF AND HIS PROFFERED INTERPRETATION OF THE TWO PROVISIONS OF THE SHAREHOLDER'S AGREEMENT REGARDING ARBITRATION DO NOT MAKE ANY SENSE AND RENDERS THE PROVISIONS OF THE SHAREHOLDER'S AGREEMENT MEANINGLESS 1

CONCLUSION 4

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(800) 709-1131 FAX (800) 709-1141

FACTS

The Respondent-Plaintiff set forth in his brief (Pb at 2) that Appellant-Defendant was "responsible for drafting the Shareholders Agreement" but does not cite where in the appendix this allegation has factual support; the allegation is contradicted by Ms. Vella's certification (Ra21).

LEGAL ARGUMENT

I. Respondent-plaintiff recognizes that Atalese does not require a written statement of waiver to litigators such as plaintiff and his proffered interpretation of the two provisions of the shareholder's agreement regarding arbitration do not make any sense and renders the provisions of the shareholder's agreement meaningless

At the outset of Appellant-Defendant's initial brief, Appellant set forth "A basic rule of contract construction is that Courts are to read contracts so as to give meaning to their provisions. In other words, Courts are not supposed to reach results which render a contract provision meaningless." (Db at 1)

Plaintiff-Respondent's brief does not attempt to provide any meaningful interpretation of the two provisions found at paragraph 23 and 33 of the Shareholder's Agreement concerning arbitration. Pages 15 through 18 of Appellant's brief, challenged Respondent's to give a rational meaning to paragraph

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(800) 709-1131 FAX (800) 709-1141

23 and its terms. That challenge is completely ignored in Respondent's brief. Respondents refused to explain to this Court why there is a provision in an agreement between sophisticated parties which is meaningless and would require the parties to subsequently agree to the provision to give it any effect whatsoever.

Respondent fails to indicate why the provision would be drafted and titled "Dispute Resolution" if the provision required subsequent agreement by the parties to be enforceable. Respondent does not indicate why the parties would include a procedure regarding the selection of an arbitrator if they were both subsequently required to agree to the method of the selection of an arbitrator due to the use of the word "may".

The Respondent gives no explanation whatsoever as to why the Shareholder's Agreement would include in paragraph 33's "the Shareholders hereby submit to Dispute Resolution as defined in Paragraph 23" with the understanding that the arbitrator can order specific performance in addition to damages when the parties would have to again agree to arbitration and the selection of an arbitrator when a dispute arose.

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Nor do the Respondents dispute the definitions of "may" set forth in Appellant's brief (Db17) as meaning "to have permission to" or "shall, must". Rather, Defendants rely upon the Trial Court's erroneous interpretation of the parties' contract without trying to defend the Trial Court's reliance on Atalese, supra, as though this was a dispute between unsophisticated consumers in interpreting this provision.

Respondents themselves cite County of Passaic v. Horizon Healthcare Services, Inc., 474 N.J. Super. 498 (App. Div. 2023) which held the Atalese v. U.S. Legal Servs. Grp., LP, 219 N.J. 430 (N.J. 2014) consumer protection provisions do not apply to this dispute between lawyers.

This Court held last year that "although our Supreme Court has not expressly declared it, and although we too have not said as much in any published opinion, we are satisfied, as the court of appeals recognized in Remicade, citation omitted – and as we now so hold – that an express waiver of the right to seek relief in a court of law to the degree required by Atalese is unnecessary when parties to a commercial contract are sophisticated and possess comparatively equal bargaining power." County of Passaic, supra, 474 N.J. Super. at 504. The Plaintiff is a

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sophisticated litigator and he does not contend that he had unequal bargaining power.

As the only sensible interpretations of the Dispute Resolution provisions of the party's contract indicate that either party "has permission to" or "shall" initiate arbitration the erroneous Order of the Trial Court must be reversed.

CONCLUSION

For the foregoing reasons, the Trial Court's Order should be reversed, and this matter should be remanded for entry of the order found at Pa023a at Appellant's Appendix.

Respectfully submitted,

/s/ Kenneth S. Thyne

Kenneth S. Thyne, Esq.

KST/hd

Dated: June 14, 2024