SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

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Docket No. A-001523-23

AMBER JONES, *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
v.	:	LAW DIVISION, BERGEN COUNTY
MACKLOCK NATIONAL CREDIT, LLC; EPPS, LLC a/k/a ELECTRONIC PAYMENT PROCESS SYSTEMS, LLC; and JOHN DOES 1 to 10,	:	Trial Court Docket No. BER-L-285-23
	:	Sat Below: HON. PETER G. GEIGER, J.S.C.
	:	DATE: May 15, 2024
Defendant-Respondents.	:	

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Defendant Macklock National Credit, LLC ("Macklock"), now defunct, was a debt adjuster who not only scammed vulnerable New Jersey consumers by charging exorbitant and unlawful fees for debt adjustment services it often failed to perform, Macklock was never licensed to perform debt adjustment services in New Jersey in the first place. The New Jersey Debt Adjustment and Credit Counseling Act ("DACCA"), N.J.S.A. 17:16G-1, *et seq*., makes unlicensed debt adjustment services unlawful in order to protect vulnerable consumers due, in large part, to the industry's susceptibility to consumer fraud.

Defendant EPPS, LLC is a payment processing company who acted as a middleman between Plaintiff Jones and Macklock—managing Jones's escrow account, facilitating payments, doling out illegal fees to Macklock, and collecting illegal service charges. After Jones's filed her Amended Class Action Complaint alleging violations of, *inter alia*, the DACCA, the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1, *et seq.*, the New Jersey Truth in Consumer Contract, Warranty, and Notice Act ("TCCWNA"), N.J.S.A. 56:12-1, and the New Jersey Racketeer Influenced and Corrupt Organizations Act ("NJRICO"), N.J.S.A. 2C:41-1, *et seq.*, EPPS moved to dismiss the Complaint, attacking Jones's claims on the merits. After EPPS's Motion to Dismiss was denied, EPPS then moved to dismiss Jones's claims for

lack of subject matter jurisdiction and to compel arbitration. EPPS's Motion was granted on December 12, 2023 (Pa65).

In granting EPPS's procedurally defective Motion, the trial court erred by 1) effectively weaponizing the doctrine of equitable estoppel in order to compel Jones to arbitrate her claims pursuant to the terms of the illegal contract with Macklock, and 2) by failing to analyze EPPS's waiver of their purported ability to compel arbitration thought their failure to assert arbitration as an affirmative defense in their Answer and by seeking (unsuccessfully) to litigate the merits of Jones's claims. Thus, the trial court's December 12, 2023 Order (Pa65) granting Defendant's Motion to Compel Arbitration should be reversed.

PROCEDURAL HISTORY

Jones initiated the action on January 17, 2023, by filing her Class Action Complaint (Trans ID: LCV2023283327). Jones amended her pleading as of right one day later, filing the Amended Class Action Complaint on January 18, 2023.[1] (Pa1).

On April 20, 2023, EPPS moved to dismiss the Complaint pursuant to *R.* 4:6-2(b) and *R.* 4:6-2(e). (Pa36). Jones opposed the Motion on May 16, 2023

[1] Defendant Macklock National Credit, LLC failed to appear of respond to the Amended Complaint. Jones requested default on October 23, 2023 (Trans ID: LCV20233183875).

(Trans ID: LCV20231560753).

On June 9, 2023, the trial court entered an Order denying EPPS's Motion to Dismiss. (Pa44).

On September 1, 2023, EPPS moved to dismiss the Amended Complaint pursuant to *R.* 4:6-2(a). Jones opposed the Motion on September 28, 2023 (Trans ID: LCV20232973909).

On December 12, 2023, the Court entered an Order granting EPPS's Motion to Dismiss pursuant to *R.* 4:6-2(a).

Jones timely filed her Notice of Appeal on January 24, 2024; Jones filed her Amened Notice of Appeal on January 24, 2024. (Pa71).

STATEMENT OF FACTS

Jones Amended Class Action Complaint alleges that Defendants EPPS and Macklock National Credit, LLC ("Macklock") created and engaged in a scheme to sell fraudulent debt adjustment services to New Jersey consumers. *See* Am. Compl. ¶ 1 (Pa1).

Prior to the filing of the Complaint, Macklock (now defunct) unlawfully sold debt adjustment services to New Jersey consumers, offering to consolidate and negotiate debts in exchange for monthly fees. Am. Compl. ¶¶ 14-16 (Pa3-Pa4). However, Macklock never obtained the necessary licensure, pursuant to the New Jersey Debt Adjustment and Credit Counseling Act ("DACCA"),

N.J.S.A. 17:16G-1, *et seq*., to lawfully perform debt adjustment services in New Jersey. Am. Compl. ¶ 1 (Pa1); *see also* N.J.S.A. 17:16G-2. Additionally, Macklock generated profits by collecting fees from consumers, often without providing any credit assistance or debt settlement and/or consolidation services and/or collecting fees that exceed the amounts permitted by the DACCA. Am. Compl. ¶ 14 (Pa3); *see also* N.J.S.A. 17:16G-6.

EPPS, a Nevada-based payment processing company, is in the business of providing payment processing services for unlicensed debt adjusters, like Macklock, by withdrawing funds from consumers' personal accounts, holding the funds in escrow, then later disbursing the funds to Macklock fraudulently, retaining a fee for the service. Am. Compl. ¶¶ 15, 16 (Pa4); *see also* Client Services Agreement § 4 (Pa28).

Prior to the filing of the Complaint, Jones executed a Client Services Agreement ("CSA") with Macklock (Pa27) and a separate Electronic Funds Transfer Authorization ("EFTA") with EPPS (Pa24). Jones made payments pursuant to the CSA and EFTA until May of 2018, when she had paid approximately $7,585.00 and received no benefits or services from Macklock or EPPS. Am. Compl. ¶ 29 (Pa6). In fact, Jones continued to receive collection letters and court documents from accounts that were covered under the CSA and EFTA. *Id*. Accordingly, the Amended Class Action Complaint alleges

violations of the DACCA, the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1, *et seq.*, the New Jersey Truth in Consumer Contract, Warranty, and Notice Act ("TCCWNA"), N.J.S.A. 56:12-1, New Jersey's statutory prohibition against the unauthorized practice of law codified at N.J.S.A. 2C:21-22, the New Jersey Racketeer Influenced and Corrupt Organizations Act ("NJRICO"), N.J.S.A. 2C:41-1, *et seq.*, and common law.

EPPS first moved to dismiss the Complaint on April 20, 2023 (Pa36). On June 9, 2023, the trial court entered an Order denying EPPS's Motion to Dismiss. (Pa44). After EPPS's attempt to attack the merits of Jones's claims failed, EPPS filed an Answer on June 23, 2023 (Pa46) which asserted twenty-two separate affirmative defenses and "reserve[d] the right to add additional separate defenses as discovery progresse[d]," but failed to assert arbitration or a challenge to jurisdiction as affirmative defenses. *See* Answer p. 12-14 (Pa57-Pa59).

On September 1, 2023, EPPS filed its Motion to Dismiss pursuant to *R.* 4:6-2(a) and compel Jones's to arbitrate her claims. (Pa62). However, EPPS's Motion was procedurally defective as it failed to contain a notice of motion or proof of service. *See R.* 1:6-2(a); *R.* 1:6-3(a); *R.* 1:6-3(c).

On December 12, 2023, the trial court entered an Order granting EPPS's Motion to Dismiss. (Pa65).

LEGAL ARGUMENT

POINT I. THE STANDARD OF REVIEW (Raised Below: T2)

On appeal, the Court applies a plenary standard or review from a trial court's granting of a motion to dismiss. *Rezem Family Assocs., LP v. Borough of Millstone*, 423 N.J. Super. 103, 114 (App. Div. 2011); *Bacon v. N.J. State Dep't of Educ.*, 443 N.J. Super. 24, 33 (App. Div. 2015).

Additionally, the Court "use[s] a *de novo* standard of review when determining the enforceability of an arbitration agreement . . . The validity of an arbitration agreement is a question of law, and appellate courts conduct a plenary review of legal questions." *See Matullo v. Sky Zone Trampoline Park*, 472 N.J. Super. 220, 225-26 (App. Div. 2022) (citing *Goffe v. Foulke Mgmt. Corp.*, 238 N.J. 191, 207 (2019); *Skuse v. Pfizer, Inc.*, 244 N.J. 30, 46 (2020)); *see also Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 186 (2013).

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,[2] 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 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*.

[2] The arbitration provision contained in the CSA relied upon my EPPS states that "[i]n the event of any controversy, claim or dispute between the Parties ("Dispute") arising out of or relating to the Agreement or the breach, termination, enforcement, interpretation, conscionability or validity thereof, including any determination of the scope of applicability of this Agreement to arbitrate . . . shall be resolved in accordance with the procedural laws of the Federal Arbitration Act and any substantive laws of the state of Client's residence at the time the Dispute arises." *See* CSA § 10 (Pa30).

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 herein, EPPS's affirmative litigation conduct is sufficient to manifest waiver of any claimed right to compel arbitration of Jones's claims.

POINT II. THE TRIAL COURT ERRED BY DISMISSING THE COMPLAINT WITH PREJUDICE AS EPPS'S MOTION WAS DEFECTIVE ON ITS FACE (Raised Below: T2)

EPPS's September 1, 2023 Motion to Dismiss (Pa62) was procedurally defective as it failed to contain a notice of motion or proof of service as required by the Court Rules. *See R.* 1:6-2(a); *R.* 1:6-3(a); *R.* 1:6-3(c). Despite the Motion's fatal defects being raised by counsel during oral argument, the trial court failed to address the same. *See* T2 15:12-18. Though *R.* 1:1-2 allows for relaxation of any court rule, "[e]very motion made to a court must 'state the time and place when it is to be presented to the court, the grounds upon which it is made and the nature of the relief sought and shall be accompanied by a proposed form of order.'" *Eastampton Ctr., LLC v. Planning Bd. of Tp. of Eastampton*, 354 N.J. Super. 171, 187 (App. Div. 2002) (quoting *R.* 1:6-2(a)).

"*Rule* 1:1-2 provides that the rules of court shall be construed ***to secure a just determination***. . . ." *Id.* (emphasis added). Here, where enforcement of the CSA—which violates the DACCA and public policy—would constitute enforcement of a contract entered into in violation of a New Jersey licensing statute, relaxation of the Court Rules is inappropriate. *See Accountemps Div. of Robert Half, Inc. v. Birch Tree Grp., Ltd.*, 115 N.J. 614, 626 (1989) ("Our courts have consistently held that public policy precludes enforcement of a contract entered into in violation of [the State's] licensing statute[s]"). 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 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. Any relaxation of the Court Rules serves only to reward EPPS's for their role as co-conspirators in Macklock's fraudulent scheme to defraud New Jersey consumers.

Aside from the trial court's de facto ratification of EPPS's role in unlawful debt adjustment activity, the trial court erred in dismissing the Complaint as the appropriate remedy for a matter referred to arbitration pursuant to the FAA is a stay rather than a dismissal. *See* 9 U.S.C. § 3.

Moreover, "as the dismissal of the complaint was not an adjudication on the merits, the dismissal order should have been without prejudice, not with prejudice." *Egg Harbor Care Ctr. v. Scheraldi*, 455 N.J. Super. 343, 355 (App. Div. 2018); *see also Korvettes, Inc. v. Brous*, 617 F.2d 1021, 1024 (3d Cir. 1980) ("A dismissal for lack of jurisdiction is plainly not a determination of the merits of a claim. Ordinarily, such a dismissal is 'without prejudice.'"); *A.A. v. Gramiccioni*, 442 N.J. Super. 276, 281 n.3 (App. Div. 2015) ("A dismissal based on the court's procedural inability to consider a case is without prejudice."); *Exxon Research & Eng'g Co. v. Indus. Risk Insurers*, 341 N.J. Super. 489, 519 (App. Div. 2001) (finding that a dismissal for lack of jurisdiction should be without prejudice because such a dismissal is not an adjudication on the merits).

Should the Court choose to relax the rules despite EPPS's participation in a fraudulent joint co-venture, the appropriate remedy is a stay of the proceedings pending completion of arbitration. And in the event the dismissal is affirmed, it must be without prejudice as the merits of Jones's claims have not been adjudicated. Thus, the trial court's December 12, 2023 Order must be reversed.

POINT III. THE TRIAL COURT ERRED IN HOLDING THAT EPPS IS ABLE TO COMPEL ARBITRATION THROUGH EQUITABLE ESTOPPEL (Raised Below: T2)

A non-signatory to a contract cannot seek enforcement of the same unless it "clearly appear[s] that the contract was made by the parties with the intention to benefit the third party" and "the parties to the contract intended to confer upon [the third-party] the right to enforce it." *First Nat'l State Bank v. Carlyle House, Inc.*, 102 N.J. Super. 300, 322 (Ch. Div. 1968), *aff'd*, 107 N.J. Super. 389 (App. Div. 1969). "Parties are not required to arbitrate when they have not agreed to do so." *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 442 (2014) (quoting *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989) (internal quotation marks omitted)).

"Estoppel is an equitable doctrine, founded in the fundamental duty of fair dealing imposed by law, that prohibits a party from repudiating a previously taken position when another party has relied on that position to his detriment." *Casamasino v. City of Jersey City*, 158 N.J. 333, 354 (1999) (quoting *State v. Kouvatas*, 292 N.J. Super. 417, 425 (App. Div. 1996) (internal quotation marks omitted)). "Equitable estoppel should be used sparingly to compel arbitration. It is a theory 'designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment.'" *Hirsch, supra,* 215 N.J. at 180 (quoting *Knorr, supra*, 178 N.J. at 178). "Equitable estoppel

is more properly viewed as a shield to prevent injustice ***rather than a sword to compel arbitration***." *Hirsch*, 215 N.J. at 180 (emphasis added).

Despite the trial court previously finding (and EPPS's conceding) that the CSA with Macklock and the EFTA with EPPS were "separate agreement[s],"[3] the trial court dismissed Jones's claims with prejudice, holding that:

> Plaintiff is estopped from avoiding arbitration for her claims against Defendant EPPS. A non-signatory to an arbitration agreement may compel a signatory to arbitrate when issues to be litigated are intertwined with the agreement containing the arbitration. ***It is clear that the merits of Plaintiff's dispute with Defendant EPPS and [sic] bound up/intertwined with Plaintiff's contract with Defendant Madlock.***

Rider to Order Dated December 12, 2023 p. 5 (Pa70) (internal citations omitted) (emphasis added).

Importantly, the New Jersey Supreme Court has held that intertwinement is insufficient to compel arbitration under a theory of equitable estoppel.

> Stated simply, we reject intertwinement as a theory for compelling arbitration when its application is untethered to any written arbitration clause between the parties, evidence of detrimental reliance, or at a minimum an oral agreement to submit to arbitration. As explained earlier, equitable estoppel "is invoked in the interests of justice, morality and common fairness." *Knorr, supra*, 178 N.J. at 178, 952 A.2d 836 (internal quotation marks omitted). Estoppel cannot be applied solely because the parties and claims are

[3] T1 15:21-22.

> intertwined, and, to the extent that *EPIX Holdings* suggests otherwise in its rationale, it extends equitable estoppel beyond its proper scope.

Hirsch, 215 N.J. at 192-93.

The trial court's rationale in granting EPPS's Motion to Dismiss pursuant to *R.* 4:6-2(a) is the same sort of reasoning that *Hirsch* sought to foreclose on in determining that intertwinement is insufficient to weaponize an equitable doctrine to force a plaintiff to arbitrate her claims. Moreover, the trial court's reasoning fails to appreciate that EPPS executed a 'separate agreement' with Jones. Jones's claims do not arise *solely* from the CSA, but also from the EFTA with EPPS. And EPPS chose not to include an arbitration provision in the EFTA—a clear meeting of the minds between Jones and EPPS. EPPS cannot now seek to utilize the illegal CSA as a means to avoid its failure to include an arbitration provision in the EFTA. Thus, the trial court's December 12, 2023 Order granting EPPS's Motion to Dismiss should be reversed.

POINT IV. THE TRIAL COURT ERRED IN DETERMINING THAT EPPS DID NOT WAIVE THEIR PURPORTED ABILITY TO COMPEL ARBITRATION (Raised Below: T2)

Even if EPPS were able to compel arbitration through the doctrine of equitable estoppel, EPPS waived its purported ability to compel arbitration

through affirmative litigation conduct, inconsistent with its ostensible desire to compel arbitration.

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 (Pa30) of the CSA with Macklock, EPPS engaged in affirmative litigation conduct for several months, repeatedly affording itself of judicial resources and seeking relief from the court. EPPS engaged in motion practice and sought to have Jones's claims dismissed on the merits. It was only after EPPS's first Motion to Dismiss was denied (Pa44) that EPPS sought to compel arbitration of Jones's claims. Moreover, EPPS failed to assert arbitration or jurisdiction as affirmative defenses in their Answer to the Amended Complaint—filed less than two months prior to the Motion to Dismiss and compel arbitration—despite asserting twenty-two separate affirmative defenses. Rather, EPPS expressly certified that no arbitration proceedings were contemplated. (Pa61).

In 2013, prior to the prejudice requirement for waiver being effectively removed by *Morgan, supra*, 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 . . . 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).

EPPS filed a dispositive motion attacking the merits of Jones'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*, EPPS failed to assert arbitration as an affirmative defense in its Answer, certified that arbitration was not contemplated presently or in the future, and

gave no indication of an intent to arbitrate until the Motion was filed. Given that *Cole*'s requirement of a showing of prejudice for a finding waiver was abrogated by *Morgan*, EPPS here implicated at least three 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)).

Here, EPPS waived arbitration by engaging in approximately eight 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. The trial court erred by failing to analyze EPPS's conduct manifesting waiver; waiver is not mentioned in the December 12, 2023 Order. The trial court further erred 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 December 12, 2023 Order granting EPPS's Motion to Dismiss and compel arbitration must be reversed.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Amber Jones respectfully requests that the December 12, 2023 Order (Pa65) granting EPPS's Motion to Dismiss pursuant to *R.* 4:6-2(a) be reversed.

Respectfully submitted,

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Dated: May 15, 2024

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001523-23

AMBER JONES, *on behalf of herself and those similarly situated.*	:	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY
Plaintiff-Appellant	:	
v.	:	Trial Court Docket No. BER-L-285-23
MACKLOCK NATIONAL CREDIT, LLC; EPPS, LLC a/k/a ELECTRONIC PAYMENT PROCESS SYSTEMS, LLC; and JOHN DOES 1 to 10	:	Sat Below: HON. PETER G. GEIGER, J.S.C.
Defendants-Respondents.	:	

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT EPPS, LLC a/k/a ELECTRONIC PAYMENT PROCESS SYSTEMS, LLC

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PRELIMINARY STATEMENT

This Appeal seeks to reverse the Trial Court's Order that Defendant-Respondent EPPS, LLC a/k/a Electronic Payment Process Systems, LLC ("EPPS") may enforce the clearly identifiable and comprehensive dispute resolution provision (the "Arbitration Provision") embedded in the Client Services Agreement (the "Contract") between Plaintiff-Appellant, Amber Jones ("Jones") and Co-Defendant Macklock National Credit, LLC ("Macklock"). Specifically, the Trial Court held that despite EPPS' status as a non-signatory to the only Contract at issue, the arbitration provision embedded therein is enforceable pursuant to the doctrine of equitable estoppel. Although Jones currently possesses the right to bring her claims in arbitration, she has instead opted to file this appeal.

In 2017, Jones contacted Macklock seeking debt consolidation services. To comply with banking regulations and ensure Macklock received its monthly fee, Jones selected EPPS – a neutral third-party payment processor – to facilitate the flow of funds. The Contract between Macklock and Jones contained an all-encompassing dispute resolution provision binding all parties to resolve "any controversy, claim or dispute" by arbitration. In that regard, the Trial Court notes: "the broad arbitration provision within the contract . . . binds Plaintiff to resolving her dispute with Defendant EPPS by arbitration" and that "arbitration [is] the only forum for which all parties can proceed in a single action to have this dispute resolved, avoiding piecemeal litigation."

Now, to avoid arbitration, Jones alleges that the trial court (i) improperly

overlooked procedural deficiencies, (ii) incorrectly applied the doctrine of equitable estoppel, and (iii) inaccurately held that EPPS did not waive its right to arbitrate. Despite Jones' arguments to the contrary, the trial court considered all of these issues, reviewed them intently, and deemed them meritless. As set forth more fully herein, it is clear that all of the claims in this action arise from the contract between Jones and Macklock. The individual claims against EPPS cannot be severed from those against Macklock nor can they be adequately redressed absent reliance onthe terms of the Contract, including the requirement for arbitration Therefore, the Trial Court's judgment is sound and should be affirmed.

PROCEDURAL HISTORY

Jones filed the six-count Original Complaint on January 17, 2023. One day later, on January 18, 2023, Jones filed an Amended Complaint that mirrored the Original Complaint, but added non-signatory EPPS as another defendant. (Pa1) The Amended Complaint asserted claims under: New Jersey Debt Adjustment and Credit Counseling Act (Count 1); the New Jersey Consumer Fraud Act (Count II); Unjust Enrichment and Disgorgement (Count III); The Truth-In-Consumer Contract, Warranty and Notice Act (Count IV); the Unauthorized Practice of Law (Count V); and the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") (Count VI). (*Id.*). On April 20, 2023, EPPS filed a Motion to Dismiss Jones' Amended Complaint for failure to state a claim. (Pa36). The trial court denied this Motion. On June 23, 2023, EPPS filed an Answer to Jones' Amended Complaint setting forth affirmative defenses and "reserv[ing] the right to add additional separate defenses . . .." (Pa 46). On September 1, 2023, EPPS filed a

second Motion to Dismiss (hereinafter, "Motion") for lack of subject matter jurisdiction based on the existence of a binding arbitration provision. (Pa62). On September 28, 2023, Jones filed an Opposition to this Motion. On October 24, 2023, the trial court held an oral hearing on the Motion. On December 12, 2023, the trial court entered an Order granting EPPS' Motion to Dismiss and dismissing all claims asserted in Jones' Amended Complaint against EPPS with prejudice. (Pa65).

STATEMENT OF FACTS

Jones' claims stem from her contractual agreement with Macklock, a Delaware limited liability company that settles and contests the debt of its clients in exchange for a monthly fee. (Pa1). In January 2017, Jones sought financial relief from bank accounts which she owed money on. (*Id.*) Jones contacted Macklock seeking debt consolidation services for her indebtedness. (*Id.*) After a brief conversation with a Macklock representative, Jones entered into a Client Services Agreement ("the Contract") with Macklock in which she would "pay a monthly payment over a period of time to have Macklock settle all open collection accounts against [her], as well as for other debt relief services." (Pa5). Jones agreed to pay Macklock $594.18 per month for 24 months in exchange for their services. (*Id.*). EPPS was not a party to the Contract. Jones had no separate contract with EPPS. Jones selected EPPS – from a myriad of possible companies – to act as the neutral payment processor "by which Macklock [got] paid." (*Id.*).

By the time the instant lawsuit was filed, Macklock was defunct. As a result, Jones – in a conclusory fashion and without basis – claimed that EPPS

"conspir[ed]" with Macklock to commit fraudulent business schemes. The extent of Jones' allegations being that "EPPS processes electronic funds on behalf of [] Macklock" and "is in the business of providing payment processing services for [] Debt Adjusters, like Macklock, and . . . retains a fee for the service." (Pa1-Pa19). Despite the allegations, EPPS was never involved in any alleged schemes. Instead, EPPS simply transferred funds pursuant to the terms of the Contract. Notably, Jones cites to no evidence indicating EPPS' involvement in Macklock's "unlawful debt adjustment activities" other than the fact they are referenced in the Contract. (Pa1).

The Contract requires that claims any claims asserted by Jones be determined by arbitration. (Pa30). Because Jones has no separate contract with EPPS, all of her claims against the company arise from the Macklock Contract. As a non-signatory to the Macklock Contract whose is being sued based on provisions of that agreement and who detrimentally relied on the Contract terms, EPPS has standing to enforce the arbitration provision. Therefore, the Trial Court did not err in dismissing Plaintiff's Amended Complaint pursuant to N.J. Ct. R. 4:6–2(a), and "binding Plaintiff to resolv[e] her dispute with [] EPPS by arbitration." (Pa69).

LEGAL ARGUMENT

POINT I. STANDARD OF REVIEW

This Court should apply a "plenary standard of review from a trial court's decisions to grant a motion to dismiss." *Int'l Bhd. of Elec. Workers Loc. 400 v. Borough of Tinton Falls*, 468 N.J. Super. 214, 223 (App. Div. 2021) (quoting

Gonzalez v. State Apportionment Comm'n, 428 N.J. Super. 333, 349 (App. Div. 2012)). The determination of whether subject matter jurisdiction exists, and the validity of the arbitration provision within the Contract, are purely legal questions which shall be reviewed "de novo." *Santiago v. New York & New Jersey Port Auth.*, 429 N.J. Super. 150, 156 (App. Div. 2012). To the contrary, a trial court's decision on procedural requirements is "entitled to respectful review under an abuse of discretion standard[.]" *Thabo v. Z Transportation*, 452 N.J. Super. 359, 368 (App. Div. 2017) (citing *Serenity Contracting Grp., Inc. v. Borough of Fort Lee*, 306 N.J. Super. 151, 157 (App. Div. 1997)).

POINT II. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S ORDER BECAUSE THE TRIAL COURT, IN THE INTEREST OF JUDICIAL EFFICIENCY, DID NOT ABUSE ITS DISCRETION BY RULING ON THE MERITS INSTEAD OF RENDERING A DECISION BASED ON A MINOR PROCEDURAL DEFECT WHICH HAD NO PREJUDICIAL EFFECT ON JONES.

In New Jersey, trial courts have "wide discretion in controlling the courtroom and court proceedings." *D.G. ex rel. J.G. v. N. Plainfield Bd. of Educ.*, 400 N.J. Super. 1, 26 (App. Div. 2008) (citing *Ryslik v. Krass*, 279 N.J. Super. 293, 297 (App. Div. 1995)). Any supposed misconduct by a trial judge must be reviewed within the context of the entire record to determine whether it had a prejudicial impact. *Id.* (citing *Mercer v. Weyerhaeuser Co.*, 324 N.J. Super. 290, 320 (App. Div. 1999)).

To invalidate the trial court's well-reasoned decision, Jones asserts that the Order "must be reversed" because EPPS' Motion "failed to contain a notice of motion or proof of service." In support of her argument that relaxation of court

rules is "inappropriate[,]" Jones cites to *Eastampton Ctr., LLC v. Planning Bd. of Tp. Of Eastampton*, 354 N.J. Super. 171 (App. Div. 2002).

Jones' reliance on *Eastampton* is misplaced. In *Eastampton*, the trial judge denied a motion for reconsideration "because defendant's motion did not provide all of the support required by [a New Jersey statute], [and] the motion was not timely filed." (*Id.* at *186). On appeal however, the appellate judge reversed the trial court's order and found in favor of the relaxation of court rules. Contrary to Jones' argument, the Appellate Division in *Eastampton* decided to grant the defendant an extension of time to "perfect" his non-conforming motion because it would "secure a just determination." (*Id.* at *187) (citing to N.J. Ct. R. 1:1-2). The appellate court notes: "[n]otwithstanding the inadequacy of defendants' motion papers, and without condoning defendants' practice, our concern is that a matter of substantial public interest should be resolved on the merits and not by a procedural default." (*Id.*)

Here, the Trial Court properly decided the Motion on the merits, rather than on the basis of an alleged procedural defect. (*See* Order, Pa69) ("After reviewing the papers submitted to the Court, and oral arguments having taken place, the Court finds that there are no questions of fact that prevent the Court from granting [EPPS'] motion to dismiss.") The absent notice of motion and proof of service neither prejudiced Jones nor the proceedings; Jones was not prevented from timely submitting – or exhaustively drafting – her opposition to EPPS' motion.

Jones' assumption that the trial court "failed to address" the "fatal" procedural defect must be viewed with skepticism. Indeed, Jones did not raise the

procedural argument in her opposition papers, but rather briefly during oral arguments. A true and correct excerpt from the oral argument is set forth below:

> "Thank you, Your Honor. I'll just start out by touching on the fact that the opposition has repeatedly alleged that we preceded that EPPS is Macklock's agent, but that's simply a fiction. We have repeated alleged that EPPS is Macklock's co-conspirator, and the fact that EPPS is Macklock's co-conspirator does not give way to the requisite privity between plaintiff and EPPS for EPPS to be able to enforce alleged contractual provision.
>
> ***And I just want to take a quick step back and, um, just mention that the 9-1 motion papers, the September 1st motion papers, you know, are deficient on proof of service with the motion, and – and the proposed order filed with the motion seeks relief that's inconsistent with the briefing.***
>
> The brief reads like a motion to compel arbitration. The proposed order seeks dismissal with prejudice. The initial briefing papers cite all of the *Martindale v. Sandvik* and *Atalese* standards for arbitration. And then the reply brief goes on to cite all the Printing Mart standards for a motion to dismiss. So, the relief sought is unclear. . . . With respect to waiver – I'll – I'll try to go point-by-point for the sake of our position."

(T2 15:12-18) (Emphasis added). Noticeably, Jones did not describe "how" or "why" the deficiency prejudiced this matter, and instead dedicated the remainder of the oral argument to discussing the merits of the case. (*Id.*) Jones never again mentioned nor sought a ruling on the "fatal defects." (*Id.*) Since Jones failed to demonstrate any prejudice, the Trial Court appropriately ruled on the Motion and opted to overlook a trivial deficiency in furtherance of judicial efficiency.

POINT III. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S ORDER BECAUSE EPPS MAY COMPEL ARBITRATION UNDER THE DOCTRINE OF EQUITABLE ESTOPPEL.

Next, Jones avers that the Trial Court erred in holding (i) that EPPS – a non-signatory to the Contract – can compel Jones to arbitration under to the

doctrine of equitable estoppel and (ii) that the EFT Authorization form was not a "separate agreement" executed by and between herself and EPPS. Jones' arguments lack merit.

First, the Trail Court properly held that EPPS may compel arbitration under the doctrine of equitable estoppel. The law is well settled in New Jersey that arbitration may be compelled by a non-signatory against a signatory to a contract. *See Bruno v. Mark MaGrann Associates, Inc.*, 388 N.J. Super. 539, 546 (App. Div. 2006) ("It is not always necessary that a party be a signatory to an arbitration agreement to be bound by that agreement."); *see e.g.*, *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber and Resin Intermediates S.A.S.*, 269 F.3d 187, 199 (3d Cir. 2001) (a non-signatory may be bound to an arbitration agreement if "under traditional principles of contract . . . [the party is] akin to a signatory of the underlying agreement.") As Jones' appeal notes, New Jersey Supreme Court's decision in *Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 71 A.3d 849 (2013) is instructive. There, the court recognized that a non-signatory may compel arbitration against a signatory under the doctrine of equitable estoppel. (*See id.* at *179) ("It is a theory designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment.") The equitable estoppel path requires, in addition to intertwinement of claims, a showing of detrimental reliance on behalf of the party aiming to compel arbitration. (*Id.*)

EPPS, acting as a non-signatory to the Contract, may enforce the arbitration agreement against Jones – a signatory to the Contract – because of "the

relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract . . . and [the fact that] the claims were intimately founded in and intertwined with the underlying contractual obligations." *KPH Healthcare Servs., Inc. v. Janssen Biotech, Inc.*, No. 20CV05901KMESK, 2021 WL 4739601, at *7 (D.N.J. Oct. 12, 2021); (*see id.*) (recognizing that arbitration agreements can be enforced by non-signatories by way of equitable estoppel). In Jones' Amended Complaint, all of the claims against EPPS are derivative of the claims against Macklock. (Pa1-Pa19). The same facts that form the basis for Jones' claims against Macklock, form the basis of its claims against EPPS. (*See* Order, Pa70) ("[T]he merits of [Jones'] dispute with [] EPPS [are] bound up/intertwined with [Jones'] contract with [] Macklock.") In fact, there would be no claim against EPPS but for the intertwinement of Macklock's obligations as defined in the Contract. *See e.g.*, *Sakyi v. Estee Lauder Companies, Inc.*, 308 F. Supp. 3d 366, 385 (D.D.C. 2018) (finding intertwinement of claims exist when "plaintiff asserts the exact same claims, based on the same operative set of facts, against all [] defendants, [and] discuss[es] the 'Defendants' generally without specifying which claims pertain to which defendant.")

While Jones correctly points out that "intertwinement [by itself] is insufficient to compel arbitration under a theory of equitable estoppel[,]" Jones fails to point out that EPPS nonetheless satisfies New Jersey's heightened estoppel standard.[1] The equitable estoppel path requires, in addition to

[1] In 2013, the New Jersey Supreme Court 'reject[ed] intertwinement as a theory for compelling arbitration when its application is untethered to . . . evidence of detrimental reliance . . .. Estoppel cannot be applied solely because the parties and claims are intertwined." *Hirsch*, 215 N.J. at 174.

intertwinement of claims, "a showing of detrimental reliance on behalf of the party aiming to compel arbitration." *KPH Healthcare*, 2021 WL 4739601 at *7. At all times relevant, EPPS reasonably relied on the fact that service providers like Macklock negotiate agreements with clients like Jones in order to provide services. EPPS did not execute a separate agreement with Jones because of their limited role as a payment processor. As the "credit monitoring, credit repair and account dispute" servicing company, Macklock is the one to seek out, communicate, and enter into agreements with the clients. (Pa1-Pa19) EPPS, a neutral third-party payment processor, simply transfers those client's funds in accordance with the terms of the agreement the client voluntarily enters into. (*Id.*)

Therefore, because Macklock brokers the agreements independently, EPPS reasonably expects that the terms which govern the business relationship between Macklock and its clients – in this case, Jones – would also govern EPPS and those clients. Adhering to the Arbitration Provision for Jones and Macklock, but not for non-signatory EPPS, would constitute a clear detriment to EPPS in its role as a neutral third-party payment processor. *See KPH Healthcare*, 2021 WL 4739601 at *9 (finding a refusal to apply equitable estoppel and compel plaintiff to arbitrate its claims against the signatory to a contract, but not the non-signatory, would constitute a clear detriment to the non-signatory who relied on the signatory to contract); (*see also* Order, Pa69-Pa70) ("It is clear to this Court that the claims in this action cannot be severed from those against Defendant Ma[ck]lock . . .")

Next, Jones' makes the baseless assertion that the Electronic Funds Transfer (EFT) Authorization form attached to the Contract is actually a

"separate" agreement between Jones and EPPS. It is not. A written contract is formed when there is a "meeting of the minds" between parties evidenced by a written offer and an unconditional, written acceptance. *Morton v. 4 Orchard Land Tr.*, 180 N.J. 118, 130, 849 A.2d 164, 170 (2004) (citing *Johnson & Johnson v. Charmley Drug Co.*, 11 N.J. 526, 538, 95 A.2d 391, 396 (1953)). A meeting of the minds can be evidenced by "each side's express agreement to every term of the contract." *State v. Ernst & Young, L.L.P.*, 386 N.J. Super. 600, 612, 902 A.2d 338, 345 (App. Div. 2006).

On January 18, 2017, Jones executed the Contract. Embedded within the Contract was the EFT Authorization which grants third-party payment processors the right to facilitate payment transactions between Macklock and its clients. Despite never communicating with EPPS (or any their representatives), Jones signed the EFT Authorization. The EFT has none of the characteristics of a contract. First is does not contain or recite and agreement between the parties. Second it contains on Jones signature providing authorization not agreement. There is no exchange of consideration and no burden on either party to act. Instead there is a simple authorization to release funds. The only Contract Jones ever signed was the Macklock Contract.

As a separate and independent legal entity acting at arms-length, EPPS was unaware that Jones entered into the Contract, only becoming aware of Jones after she selected them as the neutral payment processor. At all times, EPPS relied on the contractual privity between Macklock and Jones to govern its own services. By way of example, the Contract read:

> **4. Compensation.** … EPPS will hold the Monthly Deposit to be released by Macklock [] upon the 'Completion of the Services,' as described in Paragraph 6 [].
> . . .
> **5. Payments.** Client authorizes EPPS to ACH debit Client's bank account as designated by Client to accumulate the fees associated with this Agreement on a monthly basis at an FDIC-insured institution. Client may stop any ACH debit transaction by providing written or oral notice to EPPS, Macklock National Credit or your banking institution at least three (3) business days prior to the next scheduled debit. Client agrees to review and sign the required debit form providing bank account information to support such payments.
> . . .
> **7. Warranty and Refund Policies.** [A]ny funds deposited by Client with EPPS for Credit Repair Services shall belong to Client and may be withdrawn by Client at any time until such time they have been earned by Macklock . . .."

(Pa28-Pa30). Macklock included EPPS' name in the contract simply to memorialize Jones' payment processor selection and comply with banking regulations. After Jones voluntarily chose EPPS as its third-party custodian, Macklock – again in its sole capacity – provided Jones with the EFT authorization. (*See* Pa31-Pa32) ("Client authorizes Company to use third party vendors in the course of providing services.")

While Jones avers that the trial court "fail[ed] to appreciate" the separate agreement, Jones' seemingly failed to do so as well. Indeed, throughout multiple prior proceedings, Jones has claimed that EPPS was "intimately involved" with and acting "on behalf of" Macklock. (Pa1); (*see e.g.*, Pa5) ("The Contract contained an authorization form from EPPS for the withdrawal of funds.") It was only after EPPS filed its original motion to dismiss – and sought enforcement of the Arbitration Provision of the Contract – did Jones change her tune. As the trial court recognized and correctly noted during oral argument, "[a]n authorization is

not automatically a contract . . ., it's simply an authorization and nothing more." (T2 22:5-22:11)

For these reasons, the Trial Court properly applied the doctrine of equitable estoppel, and its Order should be affirmed.

POINT IV. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S ORDER BECAUSE EPPS DID NOT WAIVE ITS RIGHT TO COMPEL ARBITRATION.

Lastly, Jones argues that EPPS "waived its purported ability to compel arbitration" because EPPS engaged in "affirmative litigation" and "motion practice . . . to have [Jones'] claims dismissed on the merits." In support of her argument, Jones relies on the Supreme Court's decision in *Morgan v. Sundance*, 142 S. Ct. 1708 (2022) and the New Jersey Supreme Court's decision in *Cole v. Jersey City Med. Ctr.*, 215 N.J. 265 (2013). Jones' reliance on both cases is misplaced.

In *Morgan v. Sundance*, the Supreme Court held that the Federal Arbitration Act ("FAA") does not authorize **federal courts** to create "arbitration-preferring procedural rules." 142 S. Ct. at 1713. (Emphasis added). Simply put, federal courts must now treat waiver of an arbitration provision the same way they would treat waiver of other contractual rights; focusing on the actions of the waiving party without requiring a showing of prejudice. *Id.* The Supreme Court makes no mention of waiving arbitration at the state level. In fact, it expressly rejects such precedent:

> "We decide today a single issue, responsive to the predominant analysis in the Courts of Appeals, rather than to all the arguments the parties have raised. **In their briefing, the parties have disagreed about the role state law might play in resolving when a party's**

> **litigation conduct results in the loss of a contractual right to arbitrate**. The parties have also quarreled about whether to understand that inquiry as involving rules of waiver, forfeiture, estoppel, laches, or procedural timeliness. **We do not address those issues**."

Morgan v. Sundance, Inc., 142 S. Ct. 1708, at 1712 (2022) (Emphasis added). *Morgan* therefore does not support Jones' argument and is distinguishable on the law and facts. Similarly, Jones' reliance on *Cole* in support of her argument that EPPS had waived its right to arbitrate is equally misplaced.[2]

In *Cole v. Jersey City*, the New Jersey Supreme Court addressed a party's ability to invoke an arbitration clause where that party moved to compel arbitration "twenty-one months after being joined as a defendant to an action and after actively participating in the litigation . . .." 215 N.J. 265, 268 (2013). The analysis entailed, *inter alia*, the evaluation of:

> (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.* at *281-282). Ultimately, the court in *Cole* held the defendant waived its right to arbitrate because it "engaged in all of the usual litigation procedures for

[2] Even if the trial court compared *Morgan* to this matter, the Order would come out the same. *Morgan* requested that the Court of Appeals for the Eight Circuit inquire into whether the defendant "knowingly relinquish[ed] the right to arbitrate by acting inconsistently with that right[.]" Here, EPPS neither relinquished the right to arbitrate nor acted inconsistently with that right. As iterated at-length herein, EPPS explicitly sought arbitration within three (3) months of receiving the Amended Complaint.

twenty-one months and, only on the eve of trial, invoked its right to arbitrate." (*Id.* at *283).

Here, the defendant's conduct in *Cole* differs greatly from that of EPPS. In that regard, the Trial Court recognized and accepted that EPPS filed its Motion to Dismiss within three months of the Amended Complaint; seventeen (17) months earlier than what was deemed a waiver in *Cole*. Moreover, the defendant in *Cole* waited until three (3) days before the scheduled trial date to invoke the arbitration clause. EPPS on the other hand sought arbitration prior to any substantial discovery.

Since waiver is never presumed, an agreement to arbitrate a dispute "can only be overcome by clear and convincing evidence that the party asserting it chose to seek relief in a different forum." *Spaeth v. Srinivasan,* 403 N.J. Super. 508, 514, 959 A.2d 290 (App.Div.2008). Clearly, EPPS did not affirmatively waive its right to arbitrate; little-to-no delay occurred, little-to-no discovery ensued, and little-to-no prejudice had been suffered by EPPS' so-called three (3) month delay. *Compare Spaeth*, 403 N.J. Super. 508 (holding that defendant did not waive her right to arbitration "before any meaningful exchange of discovery . . . and well in advance of fixing a trial date.") *with Cole*, 215 N.J. 265 (litigating for twenty-one months without invoking arbitration and raising the issue "three days before the [] trial date."), *and Farese v. McGarry*, 237 N.J. Super. 385, 394 (App. Div. 1989) (finding waiver when arbitration was not raised until two weeks before trial). The Trial Court therefore did not err in deciding EPPS' right to arbitrate was at all times relevant, undamaged. Trial Court's order

should be affirmed.

CONCLUSION

For the foregoing reasons, Defendant-Respondent EPPS LLC a/k/a Electronic Payment Process Systems, LLC respectfully requests that the December 12, 2023, Order granting EPPS' Motion to Dismiss pursuant to *R.* 4:6-2(a) be affirmed.

Respectfully submitted,

BOCHETTO & LENTZ, P.C.

Date: June 14, 2024

/s/ Bryan R. Lentz
By: _____
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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

❖ ❖ ❖

Docket No. A-001523-23

AMBER JONES, *on behalf of herself and those similarly situated*,	:	**CIVIL ACTION**
Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY
v.	:	LAW DIVISION, BERGEN COUNTY
MACKLOCK NATIONAL CREDIT, LLC; EPPS, LLC a/k/a ELECTRONIC PAYMENT PROCESS SYSTEMS, LLC; and JOHN DOES 1 to 10,	:	Trial Court Docket No. BER-L-285-23
	:	Sat Below: HON. PETER G. GEIGER, J.S.C.
	:	DATE: May 15, 2024
Defendant-Respondents.	:	

REPLY BRIEF AND APPENDIX ON BEHALF OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

EPPS, LLC's Brief argues that the trial court properly compelled Plaintiff Jones to arbitrate her claims; however, EPPS fails to rebut several of the arguments asserted in Plaintiff's opening Brief.

EPPS fails to address the majority of factors relevant to the Court's analysis of waiver—especially their filing of a failed dispositive Motion, their failure to assert arbitration as an affirmative defense, and their certification in their Answer that no arbitration proceedings were contemplated. EPPS fails to dispute that their Motion was procedurally defective. Moreover, EPPS fails to dispute that, in finding Plaintiff was equitably estopped from opposing arbitration, the trial court made no finding that EPPS detrimentally relied upon the separate agreement Plaintiff had with Defendant Macklock National Credit, LLC ("Macklock"). Notwithstanding the fact that EPPS had executed a separate agreement with Plaintiff that failed to contain an arbitration provision, EPPS argues that the trial court correctly ruled that they are able to compel arbitration through Plaintiff's agreement with Macklock, despite EPPS being a non-signatory to the same.

EPPS's arguments fail because the trial court's December 12, 2023 Order granting EPPS's Motion to Dismiss and Compel Arbitration was based solely on intertwinement of Plaintiff's claims against EPPS and Plaintiff's

claims against Macklock. However, as explained herein, intertwinement of claims (without proving detrimental reliance) is an insufficient basis upon which to compel arbitration through equitable estoppel. Thus, Plaintiff submits her Reply to EPPS's Brief.

REPLY ARGUMENT

POINT I. THE TRIAL COURT'S RELAXATION OF THE COURT RULES WAS IN ERROR AS IT FAILED TO SECURE A JUST DETERMINATION OF EPPS'S MOTION

EPPS Brief does not dispute that the trial court erred in dismissing the Complaint with prejudice—the appropriate remedy for a matter referred to arbitration pursuant to the Federal Arbitration Act is a stay rather than dismissal. *See* 9 U.S.C. § 3. Nor does EPPS dispute that its Motion to Dismiss and Compel Arbitration was procedurally defective as per the Court Rules. Rather, EPPS concedes that the Motion's procedural defects were raised by Plaintiff in the trial court and acknowledges that the trial court did not address the same. *See* EPPS's Br. 7.

EPPS argues that Plaintiff's citation to *Eastampton Ctr., LLC v. Planning Bd. of Tp. of Eastampton*, 354 N.J. Super. 171, 187 (App. Div. 2002),[1] "is misplaced" because "the Appellate Division in *Eastampton* decided

[1] "Though R. 1:1-2 allows for relaxation of any court rule, "[e]very motion made to a court must 'state the time and place when it is to be presented to the

to grant the defendant an extension of time to 'perfect' his non-conforming motion because it would 'secure a just determination.'" EPPS's Br. 6 (quoting *Eastampton*, 354 N.J. Super. at 187). However, EPPS neglects that it did not seek to correct its defective Motion in the trial court. Moreover, in reversing the trial court, the Court in *Eastampton* stated that their "concern is that a matter of substantial public interest[2] should be resolved on the merits." *Eastampton*, 354 N.J. Super. at 187. EPPS does not assert that its position and/or Motion furthers a substantial public policy interest. After all, EPPS attempts to enforce a contract which undisputedly violates the New Jersey Debt Adjustment and Credit Counseling Act ("DACCA"), N.J.S.A. 17:16G-1, *et seq.* "Our courts have consistently held that public policy precludes enforcement of a contract entered into in violation of [the State's] licensing statute[s]," like DACCA. *See Accountemps Div. of Robert Half, Inc. v. Birch Tree Grp., Ltd.*, 115 N.J. 614, 626 (1989). Thus, here and in the trial court, the

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court, the grounds upon which it is made and the nature of the relief sought and shall be accompanied by a proposed form of order.'" *Eastampton Ctr., LLC v. Planning Bd. of Tp. of Eastampton*, 354 N.J. Super. 171, 187 (App. Div. 2002) (quoting R. 1:6-2(a)). "Rule 1:1-2 provides that the rules of court shall be construed to secure a just determination. . . ." *Id.* (emphasis added)." Pl.'s Opening Br. 8-9.

[2] "[A] municipal land use board's adoption of a new Master Plan for the municipality and a developer's attempt to gain long-term protection from zoning changes by obtaining approval of a General Development Plan." *Eastampton*, 354 N.J. Super. at 174.

public policy interest weighs in favor of Plaintiff and EPPS's Motion being denied for its procedural defects. Indeed, EPPS's arguments falsely conflate a decision on the merits with a "just determination." *See* EPPS's Br. 6.

Thus, the trial court's December 12, 2023 Order granting EPPS's Motion to Dismiss and Compel Arbitration must be reversed.

POINT II. THE TRIAL COURT INCORRECTLY APPLIED EQUITABLE ESTOPPEL BECAUSE THE TRIAL COURT'S ORDER IGNORED THE PRIVITY SHOWN BY THE AGREEMENT BETWEEN JONES AND EPPS AND DID NOT FIND THAT EPPS HAD PROVEN DETRIMENTAL RELIANCE

"Estoppel is an equitable doctrine, founded in the fundamental duty of fair dealing imposed by law, that prohibits a party from repudiating a previously taken position when another party has relied on that position to his detriment." *Casamasino v. City of Jersey City*, 158 N.J. 333, 354 (1999) (quoting *State v. Kouvat*as, 292 N.J. Super. 417, 425 (App. Div. 1996) (internal quotation marks omitted)). "Equitable estoppel should be used sparingly to compel arbitration." *Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 179-80 (2013) (quoting *Knorr v. Smeal*, 178 N.J. 169, 178 (2003)).

Here EPPS argues that they "may enforce the arbitration agreement against Jones – a signatory to the Contract – because of 'the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract . . . and [the fact that] the claims were intimately founded in and intertwined with the underlying contractual obligations.'" EPPS's Br. 8-9 (quoting *KPH*

Healthcare Servs. v. Janssen Biotech, Inc., No. 20-cv-05901 (KM) (ESK), 2021 U.S. Dist. LEXIS 196095, at *19 (D.N.J. Oct. 8, 2021)). However, EPPS citation to *KPH Healthcare Servs.* omits the fact that the court was citing examples of standards in *other jurisdictions* and went on to say that the law of New Jersey requires more.

> Many courts have found that equitable estoppel allows a non-signatory to enforce an arbitration agreement against a signatory because of "the close relationship between the entities involved, . . . the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract . . . and [the fact that] the claims were intimately founded in and intertwined with the underlying contract obligations." *DuPont*, 269 F.3d at 199 (quoting *Thomson—CSF, S.A. v. American Arbitration Assoc.*, 64 F.3d 773, 779 (2d Cir. 1995)).
>
> **New Jersey law, however, requires more**. In 2013, the New Jersey Supreme Court "reject[ed] intertwinement as a theory for compelling arbitration **when its application is untethered to any written arbitration clause between the parties, evidence of detrimental reliance, or at a minimum an oral agreement to submit to arbitration**. . . . Estoppel cannot be applied *solely* because the parties and claims are intertwined." *Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 192-93, 71 A.3d 849 (2013) (emphasis added). **What is more, it held that "the doctrine of equitable estoppel does not apply absent proof that a party detrimentally rel[ied] on another party's conduct.**" *Hirsch*, 215 N.J. at 174 (citing *Knorr v. Smeal*, 178 N.J. 169, 178, 836 A.2d 794 (2003)).

KPH Healthcare Servs., 2021 U.S. Dist. LEXIS 196095 at *19-20.

Though EPPS argues that it detrimentally relied upon the contract between Jones and Macklock, EPPS has not met its burden of proof to show detrimental reliance—EPPS's Brief cites only to Plaintiff's Complaint and the trial court's December 12, 2023 Order. *See* EPPS's Br. 10. Perhaps more importantly, the trial court's December 12, 2023 Order did not find that EPPS had shown detrimental reliance. The entire portion of the Order addressing estoppel reads:

> Lastly, this Court finds that Plaintiff is estopped from avoiding arbitration for her claims against Defendant EPPS. A non-signatory to an arbitration agreement may compel a signatory to arbitrate when issues to be litigated are intertwined with the agreement containing the arbitration. *Bruno* 388 N.J. Super. at 548 (*citing Cf. JLM Indus. V. Stolt-Nielsen SA*, 387 F.3d 163, 177-78 (2d Cir. 2004)). It is clear that the merits of Plaintiff's dispute with Defendant EPPS and [sic] bound up/intertwined with Plaintiff's contract with Defendant Macklock.

December 12, 2023 Order 5 (Pa70).

Plaintiff does not dispute that her agreement with EPPS is intertwined with her agreement with Macklock; but as explained above, intertwinement alone is insufficient for an application of equitable estoppel. Moreover, though EPPS argues that the two agreements are essentially one and the same, EPPS's Brief acknowledges that "EPPS was unaware that Jones entered into the Contract [with Macklock], only becoming aware of Jones after she selected

them as the neutral payment processor," i.e., after Jones executed the EFT (Pa24) with EPPS. *See* EPPS's Br. 11. If EPPS was unaware of Jones after her agreement with Macklock, but before the EFT was executed, EPPS cannot argue that the agreement between Jones and Macklock created the relationship between EPPS and Jones. Thus, even if EPPS could prove detrimental reliance (which they cannot), the existence of a separate agreement between Jones and EPPS dictates that detrimental reliance alone is not dispositive of the trial court's application of equitable estoppel.

EPPS next argues that "because Macklock brokers the agreements independently, EPPS reasonably expects that the terms which govern the business relationship between Macklock and its clients . . . would also govern EPPS and those clients." EPPS's Br 10. However, EPPS's arguments ignore the privity between Jones and EPPS shown by the EFT and the terms of the legal relationship created by the EFT—*which EPPS necessarily relied upon*. The terms of the EFT were drafted by EPPS, transmitted to Jones, and then agreed upon—EPPS cannot argue that that there was no meeting of the minds or that they did not expressly agree to the terms of the EFT.

EPPS next argues that the Court must ignore the EFT because "[t]he EFT has none of the characteristics of a contract. First is [sic] does not contain or recite and agreement between the parties . . . . There is no exchange of

consideration and no burden on either party to act." EPPS Br. 11. However, the EFT explicitly states that "[Jones] hereby authorize[s] payments from the Account for the fees and charges provided for *in this application* . . . ." (Pa24). The "Account" is defined by the EFT as "a non-interest bearing special purpose account (the "Account") with a bank . . . selected by ***EPPS, LLC*** . . . for the purpose of accumulating funds to pay for such goods and services as [Jones] so direct[s] ***EPPS, LLC*** to perform." *Id*. The EFT provides a table of fees payable to EPPS for their 'services' managing the Account and refers to EPPS as a "service provider." *Id*. Thus, EPPS cannot argue that the EFT "has none of the characteristics of a contract" or that "[t]here is no exchange of consideration and no burden on either party to act." *See* EPPS's Br. 11. The EFT shows the consent of Jones and EPPS (and their privity in consenting to the terms of the EFT), explicitly describes their duties under the EFT and how each party is to be compensated. Thus, the EFT does bear all the characteristics of a contract: mutual assent, offer, acceptance, and consideration. Therefore, equitable estoppel was incorrectly applied by the trial court and the December 12, 2023 Order granting EPPS's Motion to Dismiss and Compel Arbitration must be reversed.

POINT III. EPPS'S MANIFESTED WAIVER OF ARBITRATION BY MOVING TO DISMISS ON THE MERITS, FAILING TO ASSERT ARBITRATION IN ITS ANSWER, AND BY CERTIFYING THAT ARBITRATION WAS NOT CONTEMPLATED

Ignoring the fact that the trial court failed to address the issue of waiver, EPPS argues in their Brief that they did not waive their purported ability to compel arbitration because the holding in *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022), is ostensibly inapplicable to the case at bar.

> The Supreme Court makes no mention of waiving arbitration at the state level. In fact, it expressly rejects such precedent:
>
> > "We decide today a single issue, responsive to the predominant analysis in the Courts of Appeals, rather than to all the arguments the parties have raised. **In their briefing, the parties have disagreed about the role state law might play in resolving when a party's litigation conduct results in the loss of a contractual right to arbitrate.** The parties have also quarreled about whether to understand that inquiry as involving rules of waiver, forfeiture, estoppel, laches, or procedural timeliness. **We do not address those issues**."

EPPS's Br. 13-14 (quoting *Morgan*, 596 U.S. at 416) (emphasis in original).

The above portion of *Morgan* quoted in EPPS's Brief does not, as EPPS argues, undermine that *Morgan* is binding here or suggest that the holding is inapplicable to analysis of waiver at the state level. The Court in *Morgan* was stating that it would not address the parties' disagreements about the role of

state law; the Court was not stating that the holding and/or analysis had no application to disputes at the state level.

As explained in Jones's opening Brief, the Court in *Morgan* rejected the need to show prejudice in order to establish waiver of arbitration and held that the FAA "does not authorize federal courts to invent special, arbitration-preferring procedural rules" requiring a finding of harm before a party could waive its right to arbitration. *Id.* at 418. Thus, when applying the factors for an analysis of waiver articulated by the New Jersey Supreme Court in *Cole v. Jersey City Med. Ctr.*, 215 N.J. 265 (2013), the Court must remove the requirement of prejudice. The six remaining *Cole* 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. . . .

Cole, 215 N.J. at 280-81.

Further, "[t]he 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. However, EPPS's Brief focuses only on factors three and six, i.e., EPPS argues that their eight-month delay in moving to compel arbitration was

less than the twenty-one-month delay in *Cole* and EPPS's Motion was not filed on the 'eve of trial.' *See* EPPS's Br. 14-15. EPPS's Brief completely fails to address (or mention) that 1) EPPS filed a dispositive motion (Pa36) attacking the merits of Jones's claims (which was denied (Pa44)), 2) EPPS failed to assert arbitration as an affirmative defense in its Answer (Pa46), and 3) EPPS certified in its Answer that arbitration was not contemplated presently or in the future. Notwithstanding the fact that Jones has been prejudiced by having to defend EPPS's prior dispositive Motion while now being forced to assert the same arguments and defenses in arbitration, EPPS's above-described affirmative litigation conduct is sufficient to show waiver. *See Marmo & Sons Gen. Contracting, LLC v. Biagi Farms, LLC*, No. A-3120-22, 2024 N.J. Super. LEXIS 43, at *20-25 (App. Div. May 24, 2024) (where the court found waiver after six months of litigation, citing, *inter alia*, the failure to assert arbitration in the pleadings, despite no trial being scheduled and no dispositive motions being filed). Thus, the trial court's December 12, 2023 Order granting EPPS's Motion to Dismiss and Compel Arbitration must be reversed.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Amber Jones respectfully requests that the December 12, 2023 Order (Pa65) granting EPPS's Motion to Dismiss pursuant to *R.* 4:6-2(a) be reversed.

Respectfully submitted,

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