ASSOCIATED ASPHALT PARTNERS, LLC AND ASSOCIATED ASPHALT TRANSPORT, LLC, **Plaintiffs,** **V.** **ASPHALT PAVING SYTEMS, INC.,** **Defendant.**	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-001816-23 On Appeal from the Superior Court of New Jersey Law Division, Atlantic County Docket No.: ATL-L-2797-23 Sat Below: Hon. Dean Marcolongo, J.S.C.

BRIEF AND APPENDIX OF APPELLANT ASPHALT PAVING SYSTEMS, INC.

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PRELIMINARY STATEMENT

When parties agree to arbitrate a specific dispute only before a specifically named individual with unique expertise as the "sole arbitrator" of that dispute and make no provision for the appointment of a substitute arbitrator; can a court force the parties to instead arbitrate the dispute before a different individual selected by the court? Both basic contract law and the law of arbitration provide the same answer: No. Because that is exactly what the trial court did here, its decision must be reversed.

Plaintiffs Associated Asphalt Partners, LLC and Associated Asphalt Transport, LLC (collectively, "Associated") and Defendant Asphalt Paving Systems, Inc. ("APS") entered into a written settlement agreement at a mediation appointing Mark Soifer, Esq. to serve as the "sole arbitrator" of disputes concerning the implementation of that settlement. Soifer was not a random selection. He was the mediator who presided over the mediation, conceived the terms of the settlement, and drafted the settlement agreement. He was literally the best-suited person on Earth to interpret and enforce the terms of the settlement agreement in the event of a dispute. Such a dispute later arose.

Unfortunately, during related litigation between the parties, Soifer passed away and the arbitration agreement provides no mechanism for naming a

replacement arbitrator. Associated instituted an action seeking appointment of a substitute arbitrator, which the trial court granted.

Well-established precedent indicates that where the parties have agreed to a specifically named arbitrator and there is no provision in the arbitration agreement for replacing that arbitrator, the agreement to arbitrate only extends to an arbitration before that person. Thus, when that specifically named arbitrator is not available—for whatever reason—the parties must either 1) voluntarily select a mutually agreeable replacement arbitrator or 2) litigate their claims in court. Because the parties specifically named Soifer as the "sole arbitrator" of their disputes and made no provision for his replacement, the trial court's decision granting Associated's application to appoint a replacement arbitrator must be reversed.

Moreover, the appointment of a replacement arbitrator by a court requires an "impenetrable deadlock" or "mechanical breakdown" of the arbitrator selection process. APS attempted in good faith to work with Associated to identify a mutually agreeable replacement arbitrator. Yet, the undisputed evidence before the trial court was that Associated gamed the system by proposing an arbitrator only to—after APS agreed to that selection—reject its own proposed arbitrator and refuse to consider any further proposals from APS. Thus, even if the trial court could appoint a substitute arbitrator here, it still

erred in finding that such inequitable conduct by Associated constituted an "impenetrable deadlock."

Finally, the trial court erred by proceeding while this matter was stayed pursuant to N.J.S.A. 2A:15-67 et seq. As Associated is comprised of Virginia companies, upon the filing of a demand for a statutory security bond by APS, all claims by Associated were automatically stayed. Yet, the trial court refused to recognize the statutory stay and Associated never posted the statutorily mandated security. Rather, both the trial court and Associated ignored the stay and forced APS to litigate the merits of the claim. Our Legislature's policy pronouncement on that issue cannot be so easily sacrificed on the altar of expedient docket management. As the trial court's action violated the statutory stay, it is void *ab initio*.

In short, 1) the trial erred in finding it had the legal authority appoint a substitute arbitrator here, 2) even if the trial court had the legal authority to appoint a substitute arbitrator it erred in finding that Associated established grounds for such appointment here, and 3) the trial court erred by ignoring the statutory stay and proceeding to force APS to litigate the merits to conclusion.

Accordingly, the trial court's decision must be reversed, and the parties left to either mutually agree upon a new arbitrator or pursue their claims in court.

PROCEDURAL HISTORY

Relevant Procedural History of Related Prior Litigation Between the Parties[1]

In 2013, Associated filed suit against APS under Docket ATL-L-3176-13, asserting that APS was responsible for two emulsion tankers Associated had delivered to APS's worksite that were later lost. Pa33, Pa85. The parties resolved the suit at mediation and agreed to arbitrate any disputes related to enforcement of the settlement. Pa85. Thereafter, an arbitrator rendered an award holding APS liable for breaching the settlement agreement and advising a subsequent hearing on damages would be scheduled. Pa86.

APS filed suit to vacate that arbitration award under Docket ATL-L-978-16. Pa85-86. After the trial court refused to vacate the arbitration award, APS appealed; and, on October 19, 2017, the Appellate Division reversed the trial court decision and remanded for further proceedings. Pa84-91 (Opinion in "APS I"). Following a plenary hearing on remand, the trial court again refused to vacate the award and APS again appealed. Pa93. The Appellate Division affirmed in part and reversed in part, and again remanded for further proceedings. Pa92-107 (Opinion in "APS II"). Following additional remand proceedings, the trial court again denied the request to vacate and on APS's

[1] Although subject to judicial notice, see N.J.R.E. 201(a)(4), we have included the Appellate Division's prior decisions in the appendix for ease of reference.

subsequent appeal, the Appellate Division affirmed the trial court decision on November 6, 2020. Pa108-128 (Opinion in "APS III")

Procedural History of This Docket

On October 6, 2023, Associated instituted a summary action by way of verified complaint seeking the appointment of an arbitrator to conduct the damages phase of the arbitration to replace the original arbitrator, Mark Soifer, who is deceased. Pa1-7. On October 20, 2023, the trial court executed the proposed order to show cause. Pa8-12.

On November 1, 2023, APS filed a "Notice of Demand for Security and Automatic Stay of Proceedings Pursuant to N.J.S.A. 2A:15-67" along with a proposed form of order implementing the statutory stay. Pa13-18.[2]

As the trial court never acknowledged the automatic stay, APS filed opposition to the order to show cause and a cross-motion to dismiss Associated's verified complaint on November 10, 2023. Pa19-49. On December 12, 2023, Associated filed reply papers and supporting exhibits. Pa50-51. APS filed a response on December 14, 2023, again invoking the statutory stay. Pa53.

[2] APS's letter-brief to the court and relevant excerpts from other submitted briefs are included in the appendix pursuant to R. 2:6-1(a)(2) because they are relevant to the issue of how and when APS raised its entitlement to a stay under N.J.S.A. 2A:15-67 et seq.

The trial court heard oral argument on the return date of the order to show cause on December 19, 2023. T1. On the same day, the trial court signed an order allowing Associated to deposit funds into the Superior Court Trust Fund in accordance with N.J.S.A. 2A:15-67. Pa57-58. After considering oral argument on the substance of the order to show cause, the trial court reserved decision. T26:2-5.

On February 12, 2024, the trial court entered an order and memorandum of decision granting the application for appointment of a substitute arbitrator. Pa57-69. The trial court subsequently entered an order staying its decision pending appeal pursuant to R. 2:9-5(c). Pa70-11.

APS filed a notice of appeal, case information statement, and transcript request on February 20, 2024. Pa72-80.

STATEMENT OF FACTS

The Underlying Claim and Prior Litigation

Associated initially filed suit against APS alleging that APS was negligent and breached its contract with Associated when two Associated emulsion trailers went missing from an APS jobsite. Pa1, at ¶1, Pa33-43. The parties thereafter participated in a mediation with mediator Mark Soifer, Esq. Pa2, at ¶3. Soifer drafted an agreement signed by the parties which resolved the dispute and appointed Soifer to serve as arbitrator in the event of dispute over

implementation of the settlement agreement. Pa85 ("The agreement designated the person who drafted the agreement on behalf of the parties as the arbitrator of any disputes"), Pa93 (holding parties "agreed to arbitrate a dispute over the terms of the settlement agreement and further agreed the attorney who drafted the agreement would serve as arbitrator"); Pa45 (Settlement Agreement). Specifically, the settlement agreement required APS to deliver two mutually agreeable replacement trailers to Associated, and further provided that:

> If a dispute arises between the parties regarding the performance of the conditions upon which the settlement is based, then the parties agree to binding arbitration of the dispute before Mark Sofier as the sole arbitrator.
>
> Pa45

Following a dispute over who breached the terms of the settlement agreement, the parties participated in an arbitration hearing before Soifer. At the conclusion of that hearing, Soifer asked the parties: "What would be the result if I determined the agreement is too ambiguous to enforce?" Pa93-94. In response, Associated's counsel threatened to sue Soifer for malpractice if he found the settlement agreement to be ambiguous. Pa94. Shortly thereafter, Soifer entered an award finding that the settlement agreement was not ambiguous, that APS breached it, and advising that an additional hearing on damages would be scheduled. Pa86.

Thereafter, APS brought an action to vacate the arbitration award, resulting in multiple trial court and three Appellate Division decisions. Pa84-128. Twice the Appellate Division reversed and remanded trial court decisions refusing to vacate the arbitration award and instead ordered further proceedings. Pa84-107. Ultimately, while the Appellate Division found that Associated's conduct was "wholly inappropriate" and "unsuitable behavior that calls into question the very quality and professionalism of [the arbitration] proceedings," it also found APS did not prove that conduct caused the award to be procured by undue means or that the arbitrator had evident partiality, thus the arbitration award was not vacated. Pa112-113.

The Facts Giving Rise to this Case

During the pendency of the prior appellate litigation, Soifer unfortunately passed away. Pa9. The parties conferred amongst themselves to attempt to select a mutually agreeable replacement arbitrator. Pa4, at ¶16-19. In particular, at one point Associated proposed retired Judge Michael Donio as arbitrator and APS agreed, but Associated immediately reversed course and refused to arbitrate before Judge Donio. Pa4, at ¶16. Specifically, "[Associated] submitted to [APS] counsel two sets of three proposed retired judges to act as substitute arbitrator…They [included]… Retired Judge[].. Donio….[APS] rejected all but Donio, who [Associated] then rejected." See

Pa4, at ¶16. Associated's counsel, R.C. Westmoreland, Esq., confirmed that "[Associated] had worked this case with TJV [Westmoreland's partner, Thomas J. Vesper, Esq.] who was trial counsel and I submitted the names including Judge Donio, but when I spoke with him later TJV rejected that selection." Pa50; T8:3-9; T17:19-22 (The Court: It was—both parties agreed with Judge Donio and then Mr. Vesper, who is member of your firm suggested that would not be a good idea? A: Yeah…).

After Associated refused to arbitrate before its own proposed arbitrator, the parties exchanged the names of a few more retired judges and attorneys to act as a substitute arbitrator but could not agree on anyone. Pa4, at ¶17-19. As the only remaining issues was damages—the values of the replacement trailers—APS proposed the parties consider non-attorney arbitrators with expertise in the paving field. Pa4,-5, at ¶20. However, rather than respond to that proposal, Associated instituted the present litigation. Pa1.

Associated is comprised of two Virginia limited liability companies. Pa1, at ¶1-2, Pa25; Pa28. Shortly after Associated filed its verified complaint in this matter, APS filed a Notice of Demand for Security and Automatic Stay of

Proceedings Pursuant to N.J.S.A. 2A:15-67 et seq.[3] along with a proposed form of order implementing the statutory stay. Pa13-18.

As the trial court never acted on the stay, APS filed opposition to the order to show cause and a cross-motion to dismiss Associated's verified complaint on November 10, 2023. Pa19-49. On December 12, 2023, Associated filed reply papers and supporting exhibits. Pa50-51. APS filed a response on December 14, 2023, again invoking the statutory stay. Pa53.

The trial court heard oral argument on the return date of the order to show cause on December 19, 2023. T1. On the same day, the trial court signed an order allowing Associated to deposit funds into the Superior Court Trust Fund in accordance with N.J.S.A. 2A:15-67. Pa57-58. After considering oral argument on the substance of the order to show cause, the trial court reserved decision. T26:2-5. There is no evidence in the record that Associated ever deposited the required security into the Superior Court Trust Fund. Pa1-148.

The Trial Court Decision

On February 12, 2024, the trial court entered an order and memorandum of decision granting Associated's application to appoint a substitute arbitrator. Pa57-68. In reaching that conclusion, the trial court found that "Mr. Sofier was

[3] As explained in greater detail below, upon the filing of such a demand that statute automatically stays all proceedings by any out-of-state company until it posts the bond or other security mandated therein.

not as important to the agreement to arbitrate as the agreement itself" and that the parties' "dominant intent was clearly to arbitrate any disputes not merely to arbitrate before a particular arbitrator" and Mr. Sofier "was not…central to this agreement." Pa66. Thus, the trial court found it had the power to appoint a substitute arbitrator. Pa67. Likewise, the trial court accepted the Associated argument that the parties "are at an impenetrable deadlock" requiring it to act to appoint the arbitrator. Pa4. However, the trial court then stayed its order pending this appeal. Pa70-71.

ARGUMENT

I. The Trial Court Erred by Compelling Arbitration Before a Substitute Arbitrator Where the Parties Had Only Agreed to Arbitrate Before a Single, Specifically Named Arbitrator. (Raised Below, Pa57-68)

The New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 et seq. and the Federal Arbitration Act, 9 U.S.C § 1 et seq. ("FAA"), [4] vest trial courts with the authority to appoint an arbitrator in certain limited situations. Specifically, Section 5 of the FAA, 9 U.S.C. § 5 provides that if "there shall be a lapse in the naming of an arbitrator or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and

[4] The FAA applies to all agreements to arbitrate, regardless of whether an arbitration issue is being litigated "in federal or state court." Martindale v. Sandvick, 173 N.J. 76, 84 (2002).

appoint an arbitrator." The New Jersey Arbitration Act has a nearly identical provision. N.J.S.A. 2A:23B-11(a).

Arbitration agreements are interpreted by "general contract principles." Martindale, 173 N.J. 85. Thus, such an agreement must be "must be the product of mutual assent, as determined under customary principles of contract law." Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 442 (2014).

Therefore, where "the parties have contractually agreed that only one arbitrator could arbitrate any disputes between them" a court must "decline to appoint substitute arbitrators and compel arbitration" when the original arbitrator is unable to arbitrate the dispute. Moss v. First Premier Bank, 835 F.3d 260, 264 (2d Cir. 2016) (internal alterations omitted) (quoting In re Salomon Inc. Shareholders' Derivative Litigation, 68 F.3d 554 (2d Cir. 1995)). Rather, the arbitration agreement fails at that point, because once the specific arbitrator is unavailable "there is 'no further promise to arbitrate'" before another arbitrator when the contract has no provision for the appointment of substitute arbitrators. Ibid.; see also Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392, 399 (2d Cir. 2018) (noting where sole arbitrator named in agreement is unavailable "those claims should be litigated in district court."); Carideo v. Dell, Inc., 2009 WL 3485933, at *4 (W.D. Wash. 2009) (Pa129-134) (holding "'express statement' designating a specific arbitrator" was "integral to

the arbitration clause" and court could not appoint a substitute arbitrator because it would "eviscerate the core of the parties' agreement" and "constitute a wholesale revision of the arbitration clause.").

In other words, although public policy "favoring arbitration obliges us to resolve any doubts in favor of arbitration, we cannot compel a party to arbitrate a dispute before someone other than the designated arbitrator when that party had agreed to arbitrate disputes only before the arbitrator and the arbitrator" is not available. In re Salmon, Inc., 68 F.3d at 557-558 (internal alterations omitted).

For example, in Moss, supra, the plaintiff agreed that "disputes between her and her payday lender [Premier] would be resolved by arbitration before the National Arbitration Forum ('NAF')." 835 F.3d. at 262. Specifically, the arbitration clause in their contract stated:

> Arbitration of All Disputes: You and we agree that any and all claims, disputes or controversies between you and us, any claim by either of us against the other ... and any claim arising from or relating to your application for this loan, regarding this loan or any other loan you previously or may later obtain from us, this Note, this agreement to arbitrate all disputes, your agreement not to bring, join or participate in class actions, regarding collection of the loan, alleging fraud or misrepresentation ... including disputes regarding the matters subject to arbitration, or otherwise, shall be resolved by binding individual (and not joint) arbitration by and under the Code of Procedure of the National Arbitration Forum ("NAF") in effect at the time the claim is filed....
>
> Id., at 262-263

However, when Moss sought to arbitrate her claims the NAF refused to accept the case. The District Court rejected Premier's attempt to compel arbitration before an alternate arbitrator and Premier appealed. The Second Circuit affirmed, holding:

> The arbitration agreement in this case provides that any disputes shall be resolved 'by binding individual (and not joint) arbitration by and under the Code of Procedure of the National Arbitration Forum ('NAF') in effect at the time the claim is filed.' The agreement does not address how the parties should proceed in the event that NAF is unable to accept the dispute. The question is whether a court may compel arbitration when the designated arbitrator is unavailable.
>
> We addressed that question in In re Salomon Inc. Shareholders' Derivative Litigation, 68 F.3d 554 (2d Cir. 1995). There, a group of shareholders brought a derivative suit against former executives of Salomon Brothers. Id. at 555. The executives had signed arbitration agreements with Salomon Brothers providing that 'any controversy ... arising out of [the employee's] employment ... shall be settled by arbitration at the instance of any such party in accordance with the Constitution and rules then obtaining of the [New York Stock Exchange].' Id. at 558. The executives moved to compel arbitration, and the district court granted the motion, referring the matter to the New York Stock Exchange ('NYSE'). Id. at 555. NYSE declined to arbitrate the dispute, invoking its discretion under its constitution to decline to arbitrate cases referred to it. Id. at 555–56. The executives then returned to the district court and requested that the court appoint a substitute arbitrator pursuant to Section 5. Id. at 557. The court denied the motion. Id.
>
> We affirmed. We held that where 'the parties ha[ve] contractually agreed that *only* [one arbitrator] could arbitrate any disputes between them," a district court must "decline[ ] to appoint substitute

arbitrators and compel arbitration in another forum." Id. at 559. This is because

> [a]lthough the federal policy favoring arbitration obliges us to resolve any doubts in favor of arbitration, we cannot compel a party to arbitrate a dispute before someone other than the [designated arbitrator] when that party had agreed to arbitrate disputes only before the [arbitrator] and the [arbitrator], in turn, exercising its discretion ..., has refused ... to arbitrate the dispute in question.

Id. at 557–58. Once the designated arbitrator refuses to accept arbitration, there is 'no further promise to arbitrate in another forum.' Id. at 557.

Thus, under Salomon, the question in this case is whether the language of the parties' agreement contemplates arbitration before only NAF, or whether it contemplates the appointment of a substitute arbitrator should NAF become unavailable. In Salomon, we concluded that the parties' agreement to arbitrate 'in accordance with the Constitution and rules then obtaining of the NYSE' evinced their intent to 'designat[e] ... an exclusive arbitral forum.' Id. at 558, 561 (alteration omitted).

The same is true here. The arbitration agreement in this case contains numerous indicators that the parties contemplated one thing: arbitration before NAF. The agreement provides that disputes "shall be resolved by binding individual (and not joint) arbitration by ... the National Arbitration Forum." […] Further, the agreement makes no provision for the appointment of a substitute arbitrator should NAF become unavailable. In view of this mandatory language, the pervasive references to NAF in the agreement, and the absence of any indication that the parties would assent to arbitration before a substitute forum if NAF became unavailable, we conclude that, as in Salomon, the parties agreed to arbitrate only before NAF.

835 F.3d at 264–65 (emphasis original, citations to internal appendix omitted)

Similiary, in A-1 Premium Acceptance, Inc. v. Hunter, 557 S.W.3d 923 (Mo. 2018), the Supreme Court of Missouri applied to FAA to determine that in "agreements in which the parties agree to arbitrate before – but ***only*** before – a specified arbitrator … nothing in the FAA authorizes (let alone requires) a court to compel a party to arbitrate beyond the limits of the agreement it made" and a court cannot appoint a substitute arbitrator. Id., at 926 (emphasis original).

In that case, the parties agreed that "and any claim or dispute related to this agreement or the relationship or duties contemplated under this contract, including the validity of this arbitration clause, shall be resolved by binding arbitration by [NAF], under the Code of Procedure then in effect" and contained no provision for a substitute arbitrator. Id., at 924-925. When the NAF was not available to arbitrate the dispute, A-1 sought to compel Hunter to arbitrate before a substitute arbitrator appointed by the court in lieu of litigation. Id., at 926.

As noted above, the Missouri Supreme Court rejected that application, holding "the plain and unambiguous language of the Agreement shows Hunter and A-1 agreed to arbitrate before – but only before – NAF. The Agreement provides Hunter's claims "***shall be*** resolved by binding arbitration ***by the National Arbitration Forum***…The unequivocal, plain and clear terms of this Agreement establish that A-1 and Hunter agreed only to arbitrate before NAF." Id., at 926 (emphasis original). According, because the "plain language of the

Agreement" demonstrated that the "parties arbitration agreement was limited to the specified arbitrator" the Missouri Supreme Court held there was no agreement to arbitrate and therefore no authority to appoint a substitute arbitrator. Id., at 929.

In Local 355 United Serv. Workers Union, Int'l Union of Journeymen & Allied Trades v. Dual-Purpose Corp., 2018 WL 3151686, at *1 (E.D.N.Y. 2018) (Pa135-143)[5], the District Court refused to confirm an arbitration award entered by a substitute arbitrator because there was no agreement to arbitrate before him. In that case, the arbitration agreement provided, in pertinent part:

> All disputes, complaints, controversies, claims and grievances arising between the Employer and the Union ... shall be adjusted in accordance with the following procedure:
>
> …
>
> The parties designate Eugene Coughlin and J.J. Pierson as permanent arbitrators to alternately hear and decide every other grievance, beginning with Arbitrator Coughlin. The decision of the arbitrator shall be final, binding and exclusive upon both parties and shall be fully enforceable in law, or in equity. It is expressly understood and agreed, however, that the arbitrator shall not have the power to amend, modify, or alter, or in any way, add to or subtract from this Agreement or any provision thereof. The cost of arbitration shall be shared equally by the Employer and the Union.
>
> Id., at *2.

[5] The cited decision is the report and recommendation of magistrate judge, however it was subsequently adopted by the district court judge as the final decision of the District Court. See Local 355 United Serv. Workers Union, Int'l Union of Journeymen & Allied Trades v. Dual-Purpose Corp., 2018 WL 1445575 (E.D.N.Y. 2018) (Pa144-148).

When a dispute arose, Local 355 initiated arbitration proceedings before "Aaron Shriftman, Arbitrator/Mediator", but Dual-Purpose did not appear. After Shriftman entered an award for Local 355, Local 355 initiated proceedings to confirm it. The District Court rejected that the request, finding only Coughlin and Pierson could arbitrate disputes between the parties and the District Court could not appoint or approve of a substitute:

> The case here is indistinguishable from the decision in Moss: the arbitration clause at issue only refers to two specific arbitrators, not arbitrations generally; there is no provision for the appointment of a substitute; and there is no indication anywhere in the four corners of the contract or from extrinsic evidence that the parties consented to arbitrate before anyone else. See CBA at 6. Thus, even if Petitioners had argued that Arbitrator Shriftman was a permissible substitute under the clause, it appears that this Court would have to disagree.
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> Id., at *8.

See also Grant v. Magnolia Manor-Greenwood, Inc., 678 S.E.2d 435, 438 (S.C. 2009) ("We see great merit in the Second Circuit's view that Section 5 [of the FAA] does not apply in cases where a specifically designated arbitrator becomes unavailable").

Here, Associated and APS specifically agreed to a single, specific arbitrator:

> If a dispute arises between the parties regarding the performance of the conditions upon which this settlement is based, then the parties

> agree to binding arbitration of the dispute before Mark Soifer as the sole arbitrator.
>
> Pa45, at ¶G.

There is no provision for the appointment of a substitute arbitrator in the contract. Ibid.

Like the previously discussed cases, the arbitration agreement identifies a specific sole arbitrator for the parties' claims and contains no provision for the appointment of a substitute or replacement arbitrator in the event of Soifer's unavailability. Thus, the plain language of the agreement—the polestar of its interpretation—makes clear that the agreement to arbitrate only extended to arbitration before Soifer. Now that he is no longer available, the parties no longer have an agreement to arbitrate their claims. In other words, there was no mutual assent to arbitrate the claims before any arbitrator except for Soifer. While the parties are free to agree to a new arbitrator voluntarily, a court has no authority to impose another arbitrator upon them.

Even if a court were to look beyond the plain language of the arbitration clause, Soifer's identification in the agreement as the "sole arbitrator" is significant, especially given his history with the parties. After the filing of the initial lawsuit in 2013 (Pa33), Soifer mediated the dispute that gave rise to the settlement agreement whereby APS would provide Associated with replacement tankers and Soifer was appointed to serve as arbitrator if there was any dispute

over the implementation of that settlement agreement. Pa45. In fact, it was Mr. Sofier "who drafted the agreement on behalf of the parties." Pa85; see also Pa93 (noting that as part of their settlement agreement the parties "agreed that the attorney who drafted the agreement would serve as the arbitrator" if there was a dispute as to its terms or implementation.)

Accordingly, the parties selected as their "sole arbitrator" the person who had mediated their initial dispute and who himself drafted the settlement agreement at issue. Thus, in assessing liability and damages from any alleged breach of that agreement, Soifer was uniquely suited to both interpret the terms of the agreement—which he wrote himself—and to judge the reasonableness of any claim for damages in light of the parties' prior settlement discussions. Thus, beyond the plain language of the agreement itself, the attendant circumstances further demonstrate that the parties' mutual assent to arbitrate only extended to an arbitration conducted by Soifer.

Therefore, the trial court erred when it found that it could appoint a substitute arbitrator because "Mr. Sofier was not as important to the agreement to arbitrate as the agreement itself" and that the parties' "dominant intent was clearly to arbitrate any disputes not merely to arbitrate before a particular arbitrator" and Mr. Sofier "was not…central to this agreement." Pa66. To the contrary, the plain language and surrounding circumstances demonstrate that the

arbitration agreement here was for arbitration before a specifically identified arbitrator. Once he was no longer available, there was no further, binding agreement to arbitrate claims between the parties. Instead, unless they both agree otherwise, those claims must be pursued in court. Accordingly, the trial court erred in holding it would appoint a substitute arbitrator and that decision must be reversed.

II. The Trial Court Erred in Finding that Plaintiffs' Established a Deadlock Requiring Court Intervention Exists (Raised Below, Pa57-68)

Even if a court has the authority to appoint a substitute arbitrator in this case, the trial court still erred by finding that Associated had established that grounds existed for such an appointment here.

Section 5 of the FAA and the New Jersey statutory equivalent allow the court appointment of an arbitrator only where the parties "have reached an impenetrable deadlock over the appointment of arbitrators to hear their dispute." BP Expl. Libya Ltd. v. ExxonMobil Libya Ltd., 689 F.3d 481, 492 (5th Cir. 2012); see also Int'l Bancshares Corp. v. Ochoa, 311 F. Supp. 3d 876, 878 (S.D. Tex. 2018) (allowing court to appoint arbitrator where "there is some mechanical breakdown in the arbitrator selection process. A mechanical breakdown occurs when the arbitration agreement cannot be enforced at all.");

In re Salomon Inc., 68 F.3d 554 at (holding court may appoint arbitrator if there is a "mechanical breakdown in the arbitrator selection process.")

Here, Associated alleges that appointment of an arbitrator is necessary because Associated rejected its own selected arbitrator after APS agreed to him and then never responded to APS's subsequent proposal for a substitute arbitrator. As Associated alleged in its verified complaint, "[Associated] submitted to [APS] counsel two sets of three proposed retired judges to act as substitute arbitrator…They [included]… Retired Judge[].. Donio….[APS] rejected all but Donio, who [Associated] then rejected. See Pa4, at ¶16. In a subsequent filing with the trial court, Associated's counsel, R.C. Westmoreland, Esq., confirmed that "[Associated] had worked this case with TJV [Westmoreland's partner, Thomas J. Vesper, Esq.] who was trial counsel and I submitted the names including Judge Donio, but when I spoke with him later TJV rejected that selection." Pa50.

In other words, Associated proposed Judge Donio as an arbitrator, APS agreed, and then Associated reversed course and refused to arbitrate with Judge Donio. That is not a mechanical breakdown in the process, it is gamesmanship by Associated, who received exactly what it requested but then rejected its own decision. See e.g. Adam Techs. Int'l S.A. de C.V. v. Sutherland Glob. Servs., Inc., 729 F.3d 443, 451 (5th Cir. 2013) (rejecting plaintiff's demand for

appointment of an arbitrator where its own conduct caused the impasse). It is unclear whether Associated was attempting to game the selection process by baiting APS to identify arbitrators it would accept and then rejecting those arbitrators or it had some other reason for rejecting its own selected arbitrator. However, the fact remains it sabotaged its own proposal.

Likewise, because the issue to be considered at arbitration is the market value of asphalt transport trailers, APS proposed to Associated utilizing a non-attorney arbitrator with expertise in the field. Pa4, at ¶20. However, Associated never responded to that proposal and instead simply filed this litigation. Ibid.

It well-settled that the "the doctrine[] …unclean hands…bar[s] the [plaintiff] from claiming the benefit of one provision of a contract when refusing to abide by the other provisions thereof." Milk Drivers & Dairy Emp., Local 680 v. Cream-O-Land Dairy, 39 N.J. Super. 163, 175 (App. Div. 1956). Here, Associated seeks to enforce the arbitration agreement, yet has participated in the process of selecting an arbitrator with unclean hands by rejecting its proposed own selected arbitrator and then refusing to respond to APS's good faith proposals for substitute arbitrators.

Accordingly, even if a court can appoint a substitute arbitrator here, the trial court still erred in finding that Associated met its heavy burden of proving

an "impenetrable deadlock" or "mechanical breakdown" exists. Therefore, its decision must be reversed.

III. The Trial Court Erred by Proceeding When the Case Was Automatically Stayed Pursuant to N.J.S.A. 2A:15-67 et seq. (Raised Below Pa13, Pa49, Pa53).

N.J.S.A. 2A:15-67 provides:

> Where in any action in the Superior Court any plaintiff or any party asserting a counterclaim, cross-claim or third-party claim is a nonresident, he shall, if, at any time before trial, notice is given to him by an opposing party demanding security for costs, give bond in favor of the opposing party, or, if there is more than one making the demand, in favor of each of them, in the sum of $200, with sufficient surety, conditioned to prosecute the action with effect and to pay costs if the action is dismissed or judgment passes against him. If there is more than one plaintiff or claimant, they may give bond jointly in the sum of $200, all as aforesaid.
>
> If the surety on the bond is an individual and not a corporation, he shall be a resident of this State.
>
> The bond shall be filed in the office of the clerk of the court.

N.J.S.A. 2A:15-67;

"In lieu of a bond for costs, the nonresident party may deposit with the clerk cash…" N.J.S.A. 2A:15-68 (allowing cash deposit into court in lieu of bond). "Upon filing bond or making deposit, the nonresident party shall give notice thereof to the opposing party…." N.J.S.A. 2A:15-70.

Importantly, ***"[w]henever a notice is given demanding from a nonresident party security for costs, all proceedings on his claim shall be***

stayed until the required security is filed or deposit made." N.J.S.A. 2A:15-69 (emphasis supplied). The "***statute is mandatory and selfexecuting. It provides that the plaintiff shall give bond to defendant, and when demanded, all proceedings shall be stayed until such security is filed or deposit made***." Lawrence v. Commercial Cas. Ins. Co., 22 N.J. Misc. 179, 37 A.2d 683, 683 (N.J. Sup. Ct. 1944) (emphasis supplied); see also Marino v. Shiff Realty Co., 164 A. 577, 578 (N.J.Com.Pl. 1933) (holding that upon filing notice of demand "the action [is] stayed in so far as the nonresident plaintiffs are concerned until the security is furnished.")

Here, APS filed its demand for security on November 1, 2023. Pa13. That filing automatically stayed the proceedings as a matter of law until Associated 1) posted security for costs *and* 2) provided notice of that posting to APS. N.J.S.A 2A:15-67 to 70; see also Auto. Banking Corp. v. Birkhead, 22 N.J. Misc. 135, 36 A.2d 608, 609 (N.J. Sup. Ct. 1944) (vacating plaintiff's default judgment because although it had posted security for costs, it did not provide notice to defendant of the same). Recognizing that the trial court may have been unfamiliar with the "mandatory and selfexecuting nature" of N.J.S.A. 2A:15-67 et seq. and that eCourts does not have a corresponding filing category for such

a filing, with its demand APS filed an explanatory letter as well as a proposed form of order for the trial court's execution.[6] Pa15-18.

However, the trial court never entered the stay order nor altered the deadlines set forth in its executed order to show cause. Rather, the trial court and Associated ignored the stay, and plowed forward with the litigation in spite of APS's demand for security. As such, APS was required to respond to the substance of Associated's claims, which it did while specifically reserving its rights to the statutory stay pending the posting of security. Pa19 (APS Cross-Motion to Dismiss); Pa49 (Excerpt from APS Brief) (reiterating the mandatory statutory stay and noting that APS had filed papers because the trial court had not altered the response deadlines, but "to be clear, APS does not waive its right to demand security and a stay").

In fact, Associated acknowledged that it was required to post security to proceed with its claims and on December 12, 2023, submitted a proposed order to the trial court to allow it to post security in the Superior Court Trust Fund. Pa50. On December 14, 2023, APS again reiterated that "no further proceedings

[6] As APS noted in its letter, the demand for security "upon filing automatically stayed all proceedings in this litigation. Nevertheless, as eCourts is not equipped to handle such a filing directly" a confirming form of order was provided for the trial court's convenience. Pa15.

should occur until Associated complies with that mandatory, statutory requirement" of N.J.S.A. 2A:15-67 to post security. Pa53.

Yet, APS never received the benefit of the stay. The trial court ignored its repeated invocations of statutory stay and proceeded to oral argument on the order to show cause on December 19, 2023 as if no stay was, or ever had been, been in place. T1. While the trial court signed an order that day allowing Associated to deposit security with the Superior Court (Pa56), the record is devoid of any proof such deposit was ever made and no notice of deposit was ever provided to APS. See N.J.S.A. 2A:15-70 (requiring notice of deposit to the defendant). As such, the statutory stay remains in place to this day and the trial court's disposition of the merits of the case below violates that stay.

We recognize that N.J.S.A. 2A:15-67 et seq. is an older statute and that it may rarely be invoked. However, it remains the law of our state and our courts must abide by it, even where it is perceived as delaying the disposition of a case. See e.g. Matter of New Jersey Firemen's Ass'n Obligation to Provide Relief Applications Under Open Pub. Records Act, 230 N.J. 258, 274 (2017) ("If the Legislature's intent is clear on the face of the statute, then we must apply the law as written"); Klier v. Sordoni Skanska Const. Co., 337 N.J. Super. 76, 83 (App. Div. 2001) ("Our ultimate goal is not, and should not be, swift disposition of cases at the expense of fairness and justice.").

In the context of bankruptcy, where a stay is in place an "order entered in violation of the stay is void." Clark v. Pomponio, 397 N.J. Super. 630, 640 (App. Div. 2008). Here the automatic stay provisions of N.J.S.A. 2A:15-67 should be interpreted akin to the automatic stay that occurs upon the filing of a bankruptcy petition. To hold otherwise will allow trial courts and parties to simply ignore our Legislature's clear directive and proceed forward without a nonresident party posting the mandatory security and rob the resident defendant of the benefit of the statute. As such, the only just remedy is to void any order entered in violation of the statutory stay. Therefore, the trial court's decision must be reversed.

CONCLUSION

The parties agreed to arbitrate before a specifically identified arbitrator uniquely qualified to adjudicate their dispute—the enforcement of a contract that the arbitrator wrote himself. The agreement to arbitrate only extended to arbitration before that arbitrator and the trial court erred by finding it could force the parties to arbitrate with a substitute arbitrator selected by the court.

Moreover, before seeking a court appointed arbitrator, Associated did not act in good faith. Rather, Associated selected an arbitrator, secured APS's agreement, then rejected its own selected arbitrator and refused to consider any further proposals from APS for a mutually agreeable replacement arbitrator.

Such conduct cannot constitute the "impenetrable deadlock" between the parties necessary to secure judicial intervention (when such intervention is even authorized). Rather, it is Associated manipulating the system by deadlocking with itself rather than APS.

Finally, this matter was stayed as matter of law by N.J.S.A. 2A:15-67 et seq. on November 1, 2023, when APS filed a demand that Associated post a statutory security bond. The trial court ignored the stay and Associated never posted that security. As such, the trial court proceeding to decide the matter on the merits violated the automatic statutory stay.

For all of the foregoing reasons, the trial court's decision must be reversed and the parties left to either mutually agree upon a substitute arbitrator or litigate in their claims in court rather than through arbitration.

HANKIN SANDMAN PALLADINO
WEINTROB & BELL, P.C.

By: /s/ Colin G. Bell
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Attorneys for Appellant
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DATED: May 6, 2024

ASPHALT PAVING SYSTEMS, INC., Appellant, vs. ASSOCIATED ASPHALT PARTNERS, LLC and ASSOCIATED ASPHALT TRANSPORT, LLC Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001816-23

BRIEF & APPENDIX OF RESPONDENTS ASSOCIATED ASPHALT PARTNERS, LLC, and ASSOCIATED ASPHALT TRANSPORT, LLC

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INTRODUCTION

Appellant is attempting to argue that the Trial Court was powerless to appoint a substituted arbitrator and was obliged to order the claim to be remade in new pleadings despite the fact that the original arbitrator had affected a settlement executed by the parties, held a hearing and decided that one party had breached the Agreement and was therefore liable and that a subsequent hearing would be held to assess damages and legal fees. During the several years after that decision, Defendant ultimately unsuccessfully appealed the award three times. Unfortunately, during that time the arbitrator died. The instant application is an obvious attempt to get another bite of the apple by relitigating the matter and re-litigate it over a period of years. Plaintiff believes that Appellant's strategy is obvious -– to wear down its resolve to pursue its claim by extending the case thereby increasing the legal fees and costs expended. This appeal is consistent with its tactics and Plaintiffs' belief.

The idea that after ten years and where a Court-ordered legal process established the liability issue of a claim, to suggest that New Jersey law would require abandoning its ordered process, by ordering the matter to be re-litigated as to all issues is, quite frankly, bizarre and undermines all considerations of fairness, justice and judicial economy.

Moreover, the Trade case fully discussed herein, is directly on point and dispositive of Defendants' claims.

At the heart of Defendants' cases and argument is that the named arbitrator was seminal to the agreement to arbitrate and that this was clearly the intention of the parties, exhibited by their agreement. Ergo, if the arbitrator dies, the parties intentions are defeated by a substituted appointment by the Court. But the Trial Court specifically held that the parties when signing the Settlement Agreement intended to perform it, and if it was somehow breached they would go to binding arbitration of the claim. The Court found that the arbitration of the claim was the paramount intention and not who was to arbitrate it. Even if Defendant had proven that Soifer, as arbitrator, was the significant factor, which it has not, its attempt to reverse Soifer's finding of liability and begin anew falls short under case law holding that a final finding on the issue of liability is conclusive and binds any new arbitrator.

RESPONDENTS' PROCEDURAL HISTORY AND STATEMENT OF FACTS

On March 6, 2014, Plaintiff filed suit against Defendant alleging negligence and breach of contract with respect to the loss of two Seaco trailers. (Ra1)

On June 25, 2014, a mediation was held presided over by Mark Soifer, Esq., which resulted in a Settlement Agreement. (44a) The Agreement included a requirement to submit any disputes over the execution of the Agreement to binding arbitration before Mr. Soifer.

On March 29, 2016, an award was issued by Mr. Soifer finding that the Agreement was violated and scheduling an additional hearing on damages. (Ra12)

On May 6, 2016, Defendant filed a Complaint and Order to Show Cause seeking to enjoin further arbitration proceedings and vacate the award. (Ra20) The trial court issued a bench opinion denying Defendant's application and confirming the award to Plaintiff, which was memorialized by an Order on August 15, 2016. (Ra28)

On August 24, 2016, a Notice of Appeal was filed by Defendant. (Ra30)

On October 19, 2017, the Appellate Division issued a decision holding that the trial court erred in relying on its personal experience with the Arbitrator to resolve the disputed issues of fact and remanded the matter for a plenary hearing. (Ra32)

The plenary hearing was held on June 1, 2018, and on June 26, 2018, the trial court entered an Order and accompanying Memorandum of Decision denying the Defendants application to vacate the award.

On June 29, 2018, Defendant moved for reconsideration of the trial court's decision asserting that the issue of "appearance of impropriety and impartiality" raised in the previous appeal and initial trial court proceedings had not been addressed. The trial court held on August 8, 2018, that while they had erred in holding that the issue of impartiality had not been raised previously, the scope of the appellate remand precluded it from addressing the issue. (Ra40)

Thereafter, another Appellate Division decision held that there was no undue process and remanded to decide the issue of the "appearance of partiality" in the arbitration

On October 18, 2019, the trial court upheld the arbitration award. (Ra51)

After a third appeal on November 16, 2020, the Appellate Division again upheld the arbitration award. (Ra59)

Since then, counsel have exchanged correspondence over nine proposed substitute arbitrators and have been unable to come to an agreement over who can arbitrate the remaining issues of damages and legal fees.

On October 6, 2023, Plaintiff filed a Verified Complaint and Order to Show Cause as to why the Court should not appoint a substitute arbitrator and the Order to Show Cause hearing was set for November 30, 2023. (1a)

On November 1, 2023, Defendant filed a Motion to stay proceedings until money was paid into the Superior Court Trust Fund pursuant to N.J.S.A. 2A: 15-67 (13a) and on December 19, 2023, an Order was entered permitting Plaintiff to deposit $200 into the Superior Court Trust Fund.(56a)

On February 12, 2024 the Court entered an Order and Memorandum of Decision to Appoint Arbitrator. (57a)

The February 12, 2024 Order is the subject of the current appeal.

LEGAL ARGUMENT

A. INTERLOCUTORY REQUIREMENT

The controlling rule, R. 4:2-2 states that an appeal can be heard in order to (a) to prevent irreparable harm and in the interests of justice. See Brundage v. Est of

Carambeo, 195 NJ 575 (2007)

The Trial Court's Order is only to complete a process originally ordered by the Court (mediation), which evolved into an agreement which Defendant breached, triggering a binding arbitration which was completed as to liability only and thereafter appealed three times by Defendant without success, during which time the arbitrator died before damages could be determined, to which the Court ordered a substituted arbitrator to be appointed.

Defendant seeks to emasculate the Trial Court that originated this process by suggesting that it is powerless to guide it to finality, essentially arguing that

(1) because of death of arbitrator to whom both parties agreed that the Court cannot appoint a substitute without their approval, which will not be forthcoming.

(2) the arbitrators' death ended the process which must begin anew with the claim being filed again.

This Order appointing a substitute arbitrator does not create irreparable harm to the Defendant and does not create some grave injustice. Relief is not to be granted in order to be used to correct minor errors and if used only sparingly as caselaw requires, and here should be denied. See State v. Reldon, 100 NJ 187, 205 (1985)

Prior to Plaintiffs' Motion to Appoint Substitute Arbitrator, the parties, for almost two years, engaged in back and forth regarding candidates to replace Mark Soifer (deceased) to arbitrate the final issues to be decided, namely damages, since

liability had already been decided. During this time, Plaintiff submitted eight names and Defendant several more that were not approved by the other party. This conduct by both parties also indicates the continuing intent to arbitrate the remaining issue and when, Defendant was rejected by the Court on its new position, alleges that the matter should be litigated anew. It appeals, interlocutorily, despite that the decision below could not possibly be found to cause him irreparable harm, nor can it be reasonably advocated as against the interests of justice.

B. THE DECISION BELOW

The Trial Court decision established by Federal and State statutes as 9 U.S.C. §5 and NJSA 2A:23B-11(a) its statutory authority to appoint arbitrators to fill a vacancy or if an arbitrator fails or is unable to act and a successor has not been appointed. The Court noted that after the passing of two years and nine rejections, the parties themselves were unable to agree on a substituted arbitrator. It then established an appointment process that allowed each party to submit three names and if a name appeared on both submissions he would be appointed or, if not, the Court would make the choice.

The Court, noting its authority to appoint, proceeded to find that here it was appropriate to do so and in the process serially rejected Defendant's caselaw submissions by clearly distinguishing those cases both factually and legally.

The Court cited Trade & Transport, Inc. v. Natural Petroleum Charterers, Inc.,

931 F2d 191 (2d Cir. 1991) in its decision, which Plaintiffs believe is dispositive on the law and based on the Trial Court's factual findings which will be discussed below.

The Trial Court adopted the caselaw in New Jersey that when an arbitrator named in an arbitration agreement cannot arbitrate the dispute, here merely damages and fees, having already decided liability, by reason of his death, the Court does not void the agreement but instead appoints an substituted arbitrator. McGuire, Comwell & Blakely v. Grider, 77 F.Supp.319 (D.Cdo 1991). The exception is where the arbitrator was as important to the agreement as the agreement itself. McGuire, *infra*

The Court thoroughly examined the Agreement and found that the intent of the parties which was the clear and unmistakable, was to arbitrate. (See Clause G of Exhibit) and that the Agreement is absent any reference of litigating the dispute and further that Mr. Soifer was not intended to be a condition to arbitrate and emphatically not as important to the agreement as the agreement itself. Astra Footwear Indus. V. Harwyn Intl. Inc., 442 F.Supp SDNY 1978). Therefore, a substituted arbitrator should be appointed (McGuire)

The Court rejected Defendant's case law and found that the parties did not present any evidence to indicate Mr. Soifer was the only person who could logically arbitrate this dispute and that Mr. Soifer was not central to the arbitration agreement.

It rejected the holding in Moss v. First Premier Bank, 835 F.3d 260 (2nd Cir 2016) as factually distinguishable and similarly found factual distinguishment of In Re

Salomon Inc. Derivative Litigation, i.e. Guttfreund v. Weiner, 68 F3d 554 (2nd Cir 1995) and Caridco v. Dell Inc. No. C06-1772JLR 2009 Dist, Lexus 104600 (WD Wash Oct 26 2009) A reading of these cases expose the clear fatal differences with this matter, leaving no doubt whatsoever of their lack of precedential value.

Clear guidance is found for appointing a substituted arbitrator for one who has died where the decedent arbitrator had previously decided liability and that on the issue of damages and fees remained to be decided. Trade and Transportation Inc. V. Natl Petroleum Charterers, 911 F2d 191 (2nd cir 1991)

C. CASELAW AND INTERPRETATION

Defendant makes the same arguments that it made below, while adding new caselaw citations.[1] It argues essentially that the arbitrator personally was so critical to the arbitration that because of his demise the liability holding made before his death should be jettisoned and the entire matter should be litigated anew after ten years have passed. The general theory amounts to finding that the arbitrator was more critical to the parties than the arbitration of disputes itself. The Trial Court below rejected this argument, holding specifically that the arbitrator (Soifer) was not as important as the agreement itself, which was a finding of fact based on the parties' intentions, which it

[1] It should be noted that Appellant cites the eight cases cited below and twelve additional cases not cited below, all of which were decided between 1941 and 2018 – well before and thus available to be cited before the Trial Court decision in this matter

found to be clear and unmistakable and that there was no evidence to indicate that the only person who could arbitrate this dispute was Soifer.

The Court also rejected the Defendants' argument that it lacked authority to appoint a substitute arbitrator in this case based on the same caselaw that relied on facts that showed the arbitration itself was the critical component of the agreement, within which the arbitration clause was included.

Here, the Court Ordered mediation which resulted in a settlement agreement that provided that if the settlement agreement was breached it would be sent to binding arbitration on liability and damages, whereas Defendants' relied-upon cases were based on facts where the parties had signed an agreement to arbitrate and had chosen the arbitrator long before any dispute arose.

In Marine Prods. Exp. Corp. v M.T. Globe Galaxy, 977 F2d 66 (2d Cir. 1992), citing Trade & Transport, Inc. v. Natural Petroleum Charterers, Inc., 931 F2d 191 (2d Cir. 1991) cited by the Trial Court, the facts were that the original three-person panel decided liability and before damages were assessed, a panel member died. The Trial Court held that no new panel need be appointed, in accordance with the general rule because the liability had already been decided, saying that:

> In Trade Transport, we concluded that the general rule was not controlling because of the special circumstances of that case. There, the parties had asked the original panel to issue a prompt partial final decision as to liability, and the panel complied. Following the partial final decision, one of the arbitrators died. We affirmed the district court's ruling that that

> event did not revive the question that the panel, pursuant to the parties' agreement, had already finally decided. Upon the rendering of the requested partial decision, the liability question was no longer pending, that decision was final, and the panel was without power to revisit that question. Accordingly, we rejected the appellant's contention that, in accordance with the general rule, an entirely new panel should be chosen and the arbitration of all issues should commence anew. That rule, in light of the parties' agreement, simply was not applicable.

This holding supports the principle that when an arbitrator appointed by the parties rules on liability, it is a partial final decision and the issue will not be revisited following his death, and since Defendant's argument that the matter must be re-litigated is contrary to Trade and should be denied.

The facts in Trade & Transport, Inc. Vs. Natural Petroleum Charterers Incorporated, 931 F2d 191 (2d Cir. 1991) were very similar to those in the instant matter. During the pendency of the arbitration but after a partial final award (liability) had been rendered, a member of a three-member arbitration panel died. The District court ruled that the vacancy had been properly filled and the arbitration had been properly conducted. Defendant appealed, requesting that the entire dispute from the beginning should follow under 9USC §5 for the judicial filling of a vacancy, claiming that the panel acted improperly in deciding liability and a whole new panel had tro be assembled after the one member's death.

Held:

> "Once arbitrators have finally decided the submitted issues, they are, in common-law parlance, "*functus officio"* meaning that their authority over

> those questions is ended. ... Thus, if the parties have asked the arbitrators to make a final partial award as to a particular issue and the arbitrators have done so, the arbitrators have no further authority, absent agreement by the parties, to redetermine that issue.
>
> ... The district court reasoned that "[t]he statutory authority to fill a vacancy must necessarily be construed to refer to a pending arbitration," September 1985 Order at 2, and that the reference in § 5 to "filling a vacancy" would make no sense if the Act were construed to require that whenever one arbitrator died the entire panel must be removed. Since the parties' agreement (a) did not state that the death of one arbitrator after a partial final award would have that effect, and (b) was silent as to the method by which a replacement arbitrator should be designated, it was within the authority conferred by the Act for the court to appoint to the panel NPC's new nominee, Berg, to replace Crocker, its original nominee. We also agree with the district court's conclusion that NPC's naming a successor to Crocker did not give NPC the right to replace the existing neutral arbitrator agreed upon by NPC's original nominee.

Here, our Settlement Agreement was clear that if a breach was found that the parties were bound to binding arbitration under Soifer and after a hearing Soifer found Defendants liable and was about to schedule a hearing on damages when Defendants challenged Soifer's decision based on allegations that he was biased and during the long process to absolve Soifer of bias, Soifer died. That is to say that the finding of liability was not only final, but was affirmed after several appeals. Defendants never attacked the Settlement Agreement that contained the arbitration clause and thus clearly accepted all provisions of it by its execution and its sole objection was to the arbitrator's alleged bias, which the Court found did not exist.

Thus, the finding was final on the issue of liability in accordance with the

Agreement to arbitrate and as *Trade & Transport* says, "functus officio" and cannot be revisited.

Furthermore, Trade held that the District Court's approving a substitute for the de ceased panel member was the correct process under the act to conclude the matter.

Defendant also raises the Court's disregard of a stay which arose by Defendant requiring Plaintiffs to post $200 for costs and Plaintiff not being registered and authorized to do business in New Jersey, each of which were removed by Plaintiff depositing the $200 and producing a Certificate of Authority to do business in New Jersey before the hearing on the motion occurred, thus satisfying the requests and rendering the stay moot.[2]

CONCLUSION

Based upon the above arguments, Defendants' appeal of the Trial Court decision should be denied and Judge Marcolongo's decision should be upheld.

Respectfully,

S/ R C Westmoreland

R C Westmoreland

Dated: June 14, 2024

[2] The hearing was stayed while the moving party paid $200 into Court for costs and produced a certification from the State indicating moving party was authorized to do business in New Jersey.

ASSOCIATED ASPHALT PARTNERS, LLC AND ASSOCIATED ASPHALT TRANSPORT, LLC, **Plaintiffs,** **v.** **ASPHALT PAVING SYTEMS, INC.,** **Defendant.**	**SUPERIOR COURT OF NEW JERSEY** **APPELLATE DIVISION** **Docket No.: A-001816-23** **On Appeal from the Superior Court of New Jersey** **Law Division, Atlantic County** **Docket No.: ATL-L-2797-23** **Sat Below: Hon. Dean Marcolongo, J.S.C.**

APPELLANT ASPHALT PAVING SYSTEMS, INC.'S REPLY BRIEF

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July 2, 2024

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PRELIMINARY STATEMENT

Associated's opposition brief is largely dedicated to arguing against relief APS is not seeking and is premised upon cases that do not apply. APS never contended that the original arbitrator's award on the issue of liability should be "abandoned" or that "the matter be re-litigating as to all issues." To the contrary, APS recognized both before the trial court and the Appellate Division that "the only remaining issue was damages." APS's position is that under the Federal Arbitration Act and its New Jersey law analog, it cannot be compelled to arbitrate the issue of damages before a court-selected replacement arbitrator when the parties agreed to arbitrate their claims only before a specifically named individual with unique expertise as the "sole arbitrator" of their dispute and made no provision for the appointment of a substitute arbitrator. Associated provides no contrary authority on that point, and instead cites cases targeted at a position that APS is not taking.

Moreover, Associated's belated claim that the order at issue is interlocutory and therefore APS must show irreparable harm to prosecute this appeal is also simply wrong. It is beyond question that orders compelling arbitration are appealable as of right under the applicable Rules of Court and that the standard of review is *de novo*.

With respect to the N.J.S.A. 2A:15-67 et seq. automatic stay, Associated again simply notes that the trial court entered an order allowing it to deposit the required security but does not address the fact that the record is devoid of any evidence that such a deposit was ever made.

Finally, Associated completely ignores APS's argument that Associated improperly manufactured the "deadlock" in the parties' attempts to select a mutually agreeable replacement arbitrator by proposing an arbitrator, securing APS's agreement to use that arbitrator, then reversing course by rejecting its own selection and instituting this litigation. As such, Associated essentially concedes there was no basis for court intervention to select a substitute arbitrator.

In short, Associated's submission does nothing to rebut APS's strong claims for reversal of the trial court's order compelling arbitration before a court-selected substitute arbitrator.

ARGUMENT

I. Associated Cites No Case Authorizing a Court to Compel Arbitration before a Court-Selected Substitute for a Specifically Identified Arbitrator in An Arbitration Agreement that Has No Substitution Provision.

Associated's entire appellate position is premised on a strawman argument and supported by inapplicable precedent. APS never contended that the original arbitrator's award on the issue of liability should be "abandoned" or

that "the matter be re-litigating as to all issues." Rb2. To the contrary, APS recognized both before the trial court and the Appellate Division that "the only remaining issue was damages." Pb9; T24:7-12 (APS Counsel: "Liability has been established, Your Honor. That has been litigated…So, the issue that's left is damages.")

Associated's mischaracterization of APS's position is significant because the case law Associated relies upon is focused on that non-existent position. Associated and the trial court relied upon Trade & Transport, Inc. v. Natural Petroleum Charters, Inc., 931 F.2d 191 (2d. Cir. 1991) as the basis for compelling arbitration before a substitute arbitrator. However, the case is both factually distinguishable and largely irrelevant.

In Trade & Transport, the parties to a maritime dispute agreed to an arbitration before a three-arbitrator panel where each party appointed an arbitrator and then those two arbitrators selected the third arbitrator:

> Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner [Trade], one by the Charterer [NPC], and one by the two so chosen. The decision of any two of the three on any point or points shall be final.... The arbitrators may grant any relief which they, or a majority of them, deem just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance.
>
> 931 F.2d at 192.

The parties also agreed that proceedings would be bifurcated, with liability decided first and then the issue of damages. Id., at 193. The panel rendered a liability decision in favor of Trade & Transport ("T&T"), but before further proceedings on damages, Natural Petroleum Charter ("NPC")'s selected arbitrator died. NPC then sought to have an entirely new arbitration panel appointed and "proceed to rearbitrate the entire dispute from the beginning" including the issue of liability. Ibid.

The Second Circuit rejected that application. First, it held that while case law allows for a matter to be rearbitrated *ab initio* when an arbitrator dies or becomes unavailable before the issuance of an award, it does not allow for a matter to be rearbitrated after the issuance of an award. Second, the arbitration involved a panel of arbitrators, not a single arbitrator; and the arbitration agreement gave each party the power to select one arbitrator. Thus, the Second Circuit held that NPC could appoint a replacement arbitrator to join the other two arbitrators for further proceedings on the issue of damages.

Trade & Transport is wholly inapposite to the situation at bar. Contrary to Associated's arguments, and unlike NPC, APS does not seek to vitiate the liability award. Moreover, as set forth at length in APS's initial brief, the arbitration agreement between Associated and APS names only a single, specifically identified arbitrator with unique expertise and makes no provision

for the substitution or replacement. Pb6-7; 19-21. The Trade & Transport agreement has no such provision specifically identifying an arbitrator by name nor is there any evidence that the deceased arbitrator had any unique or specific expertise that rendered him irreplaceable.

Here, APS agreed to arbitrate any dispute involving enforcement of the settlement agreement only "before Mark Sofier as the sole arbitrator" (Pa45), the attorney who had mediated the parties' disputed, conceived of the terms of the settlement, and drafted the agreement itself. Pa85 ("The agreement designated the person who drafted the agreement on behalf of the parties as the arbitrator of any disputes"), Pa93 (holding parties "agreed to arbitrate a dispute over the terms of the settlement agreement and further agreed the attorney who drafted the agreement would serve as arbitrator"); Pa45 (Settlement Agreement).

As detailed in APS's initial brief, there is substantial case law prohibiting courts from compelling arbitration before a court-selected substitute arbitrator when the parties' agreement to arbitrate identifies a specific arbitrator and provides no provision for replacing that arbitrator if he or she is unavailable. See e.g., Moss v. First Premier Bank, 835 F.3d 260, 264 (2d Cir. 2016); In re Salomon Inc. Shareholders' Derivative Litigation, 68 F.3d 554 (2d Cir. 1995)). Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392, 399 (2d Cir. 2018); Carideo v. Dell, Inc., 2009 WL 3485933, at *4 (W.D. Wash. 2009) (Pa129-134);

A-1 Premium Acceptance, Inc. v. Hunter, 557 S.W.3d 923 (Mo. 2018); Grant v. Magnolia Manor-Greenwood, Inc., 678 S.E.2d 435, 438 (S.C. 2009); see also Ass'n of Flight Attendants, AFL-CIO v. Aloha Airlines, Inc., 158 F. Supp. 2d 1200, 1207 (D. Haw. 2001) ("The use of substitute appointments has not often been discussed in the recent case law, and where it is, the use of substitute appointments is disfavored.")

In those cases, as a matter of basic contract law, it was determined that the agreement to arbitrate only extends to arbitration before the specifically named arbitrator. If that arbitration cannot proceed, the parties must either mutually agree on a new arbitrator or pursue their claims in court. That is the situation here and Associated has provided no compelling reason why the result should not be same.

II. APS Has Appealed as of Right and Does not Have to Meet the Requirements for Interlocutory Injunctive Relief.

Associated makes the misguided argument that APS's appeal is interlocutory and therefore "R. 4:2-2 [sic] states that an appeal can heard in order (a) to prevent irreparable harm and in the interests of justice." Rb4-5. The errors in Associated's reasoning are legion.

Presumably, Associated meant to cite R. 2:2-2, which contains many of same words as Associated's sentence, but only governs interlocutory appeals to the Supreme Court from interlocutory orders of the Appellate Division. See R.

2:2-2 ("Appeals may be taken to the Supreme Court by its leave from interlocutory orders: (a) Of the Appellate Division when necessary to prevent irreparable injury…").

In this case, APS has appealed as of right and need not meet any special or heightened burden to obtain relief. Appeals from orders compelling arbitration are appealable as of right. R. 2:2-3(b)(8). Moreover, it is well settled that the Appellate Division reviews such trial court decisions *de novo* and that appellants need not meet any heighted evidentiary burden to prevail. See Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013) ("Orders compelling arbitration are deemed final for purposes of appeal. We review those legal determinations de novo.") (internal citations omitted).

In any event, New Jersey courts have long recognized the inherent irreparable harm in forcing parties to arbitrate when no valid arbitration agreement exists. Thus, R. 2:9-5(c) requires that arbitrations be stayed at the request of a party appealing an order compelling arbitration "unless the court find that exceptional circumstances warrant the arbitration to proceed while the appeal is pending." See also Raritan Plaza I Associates, L.P. v. Cushman & Wakefield of New Jersey, Inc., 273 N.J. Super. 64, 70 (App. Div. 1994) ("we think it is obvious that the harm to a party would be *per se* irreparable if a

court…were to compel a party to submit to an arbitrator's…authority" when it had not agreed to do so). The trial court entered such a stay here.

In short, this matter is properly before the Appellate Division for *de novo* review of the trial court's decision compelling arbitration before a court-selected replacement arbitrator.

III. Associated Has Provided No Evidence it Satisfied the Condition Precedent to Lifting the Automatic Stay.

As APS pointed out in its initial brief, while the trial court entered an order (on December 19, 2023, the same day it held oral argument on Associated's application to compel arbitration) (Pa57-58) allowing Associated to deposit security into the Superior Court Trust Fund, there is no evidence that Associated ever actually deposited the funds. Associated's appellate submission again provides no such evidence. Presumably, if it had posted a statutory bond or cash with the Superior Court, it would have provided the same in its appendix. Yet, it did not do so.

More fundamentally, however, is that upon APS filing the demand for security pursuant to N.J.S.A. 2A:15-67 et seq. on November 1, 2023, all proceedings should have been automatically stayed. See N.J.S.A. 2A:15-69 ("Whenever a notice is given demanding from a nonresident party security for costs, all proceedings on his claim shall be stayed until the required security is filed or deposit made."); Lawrence v. Commercial Cas. Ins. Co., 22 N.J. Misc.

179, 37 A.2d 683, 683 (N.J. Sup. Ct. 1944 (Holding "statute is mandatory and selfexecuting. It provides that the plaintiff shall give bond to defendant, and when demanded, all proceedings shall be stayed until such security is filed or deposit made."); Marino v. Shiff Realty Co., 164 A. 577, 578 (N.J.Com.Pl. 1933) (holding that upon filing notice of demand "the action [is] stayed in so far as the nonresident plaintiffs are concerned until the security is furnished.")

The trial court never recognized that stay, forcing APS to brief the merits and appear for oral argument on the merits before it even entered an order allowing Associated to deposit security into the Superior Court Trust Fund. Even if Associated did subsequently make that deposit (and there is no evidence it did), the trial court still violated APS's right to a mandatory stay of the proceedings up to that point. See Pa49; Pa53 (Continued attempts by APS to assert is right to a stay).

IV. Associated Fails to Address its Unclean Hands in Manufacturing a "Deadlock" by Rejecting its Own Proposed Arbitrator After Securing APS's Agreement.

The second error APS raised on appeal is the trial court finding that Associated had proven a deadlock existed that allowed for judicial intervention under Section 5 of the FAA and its New Jersey statutory equivalent. See e.g. BP Expl. Libya Ltd. v. ExxonMobil Libya Ltd., 689 F.3d 481, 492 (5th Cir. 2012) (allowing court intention when the parties "have reached an impenetrable

deadlock over the appointment of arbitrators to hear their dispute."); Int'l Bancshares Corp. v. Ochoa, 311 F. Supp. 3d 876, 878 (S.D. Tex. 2018) (allowing court to appoint arbitrator where "there is some mechanical breakdown in the arbitrator selection process. A mechanical breakdown occurs when the arbitration agreement cannot be enforced at all."); In re Salomon Inc., 68 F.3d at 544 (holding court may appoint arbitrator if there is a "mechanical breakdown in the arbitrator selection process.")

As APS detailed in its initial submission, Associated had proposed *inter alia* retired Superior Court Judge Michael Donio as an arbitrator, who APS accepted, only for Associated to immediately backtrack, refuse to arbitrate before Judge Donio, and instead ultimately file the action giving rise to this appeal. Pb21-22. APS contends that the trial court erred in finding that such inequitable conduct by Associated could constitute a true deadlock entitling Associated to judicial relief.

In its responsive brief, Associated has failed to even address this argument. Perhaps Associated was unwilling to explain why it refused to take "yes" for answer or perhaps it had no good faith argument as to why its inequitable conduct does not preclude the relief it sought in the trial court. In any event, its silence speaks volumes on the issue and should be viewed as conceding it.

CONCLUSION

The parties specifically named the author of their settlement agreement as the "sole arbitrator" of any dispute concerning the enforcement of that agreement—something he was uniquely qualified to do. The parties made no provision for a replacement or substitute arbitrator. Thus, the agreement to arbitrate extended only to an arbitration before that specifically identified arbitrator. When he was no longer available, there was no further agreement to arbitrate, and the trial court exceeded its authority by compelling APS to arbitrate the dispute before a substitute arbitrator selected by a Superior Court judge.

Nothing raised by Associated in its appellate brief changes that outcome. First, Associated spent most of its brief arguing against relief APS never sought—vitiating the initial arbitration award on liability. APS has never sought such relief. Thus, all the case law cited by Associated on that issue is irrelevant.

Second, this appeal is not interlocutory, and APS does not have to meet a heightened evidentiary burden to obtain relief. APS appealed as of right and the matter is before the Appellate Division for *de novo* review.

Third, Associated still has not provided any proof it has complied with the statutory security requirements necessary to lift the automatic stay imposed by N.J.S.A. 2A:15-67 et seq. Nor does Associated address the fact that APS was

forced to litigate the merits of the issue while the matter should have been stayed.

Finally, Associated completely ignores a major point raised on appeal—that Associated manufactured the alleged "deadlock" by proposing an arbitrator, securing APS's agreement, and then rejecting its own selection and instead filing this litigation. Therefore, Associated essentially concedes that such inequitable conduct precludes the relief it sought in the trial court *even if* the trial court was authorized to appoint a substitute arbitrator.

In short, the trial court erred by finding it had the authority to appoint a substitute arbitrator at all, that Associated had established the necessary deadlock for an appointment if had the authority, and by ignoring APS's right to a statutory stay of proceedings pursuant to N.J.S.A. 2A:15-67 et seq. Alone each of those errors is sufficient to warrant reversal. In combination, they compel it.

Accordingly, for all the foregoing reasons, the trial court's decision must be reversed, and the parties left to either mutually agree upon an acceptable substitute arbitrator or litigate in their claims in court rather than through arbitration.

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