SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-002068-23

MICHAEL A. GALLARDO, ESQ.,

Plaintiff-Respondent

-vs-

JOSEPH A. GINARTE, ESQ. and GINARTE GALLARDO GONZALEZ & WINOGRAD, L.L.P. d/b/a GINARTE GONZALEZ WINOGRAD L.L.P., John Does 1-10 and ABC Corporate Entities 1-10, all fictitious entities,

Defendants-Appellants.

Civil Action

On Appeal from:
Superior Court of New Jersey
Law Division: Essex County
Docket No. ESX-L-002267-23

Sat Below:
Hon. L. Grace Spencer, J.S.C.

DEFENDANTS-APPELLANTS' BRIEF IN SUPPORT OF APPEAL

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PRELIMINARY STATEMENT

On October 17, 2023, the Trial Court denied the Defendants-Appellants' Joseph A. Ginarte, Esq. ("Ginarte") and Ginarte Gonzalez Winograd, LLP's (the "Ginarte Firm") (Ginarte and the Ginarte Firm are collectively referred to as "Defendants") motion to compel arbitration, having concluded that the *existence* and application of the parties' Partnership Agreement, which contains the arbitration provision at issue in this appeal, was in question. On January 30, 2024, while captioning the Order as a denial, the Trial Court granted Defendants' motion for reconsideration and found that there existed a partnership agreement with an applicable arbitration provision, but that Defendants' prior counsel "*expressly*" waived it.

The Trial Court's ruling on reconsideration – and as argued by Defendants – applied the balancing criteria in Cole v. Jersey City Medical Center, 215 N.J. 265 (2013), which employs a totality of the circumstances test to ascertain whether a party to an arbitration agreement has waived that remedy. The Trial Court's analysis clearly established that Defendants satisfied the majority if not all Cole criteria to enforce the contractual provision and compel arbitration. However, the Trial Court disregarded its own analysis under Cole and ruled that the circumstances *sub judice* supported an express waiver. Put another way, the Trial Court erroneously expanded the Supreme Court's ruling based on what it

found to be an express waiver, thereby nullifying Cole under such circumstances, regardless of the public policy favoring arbitration.

PROCEDURAL HISTORY

On March 3, 2023, Plaintiff-Respondent Michael A. Gallardo, Esq. filed a Verified Complaint and an application for an Order to Show Cause with Temporary and Preliminary Restraints against Defendants in the Essex County Superior Court, Chancery Division (Docket No. ESX-C-34-23), alleging Defendants took improper actions to prevent clients from transferring their cases from the Ginarte Firm to Plaintiff and his new firm.

On March 8, 2023, the Trial Court held oral argument on Plaintiff's application for temporary and preliminary restraints.[1] On March 9, 2023, the Hon. Lisa M. Adubato, J.S.C. entered an Order to Show Cause without prejudice to the rights and positions of the parties. [Da5-7].[2]

On March 17, 2023, the Ginarte Firm filed a Verified Complaint in a separate matter seeking temporary and preliminary injunctive relief against the law firm of Fredson Statmore Bitterman, LLC ("Fredson Firm") and Michael Gallardo (the Plaintiff in the current matter) in the Essex County Superior Court, Chancery Division (Docket No. ESX-C-37-23), alleging that the Fredson Firm

[1] "1T" refers to the Transcript of Oral Argument on the Order to Show Cause, March 8, 2023.
[2] Pursuant to R. 2:6-8, "Da" refers to the applicable document in the accompanying Appendix.

and Plaintiff employed improper pressure tactics on Ginarte Firm clients to transfer their matters to the Fredson Firm. [Da8].

On March 20, 2023, Plaintiff filed a First Amended Verified Complaint with Exhibits, the operative pleading in this matter, raising new factual allegations to support his claim for retaliation under the New Jersey Law Against Discrimination ("NJLAD"). [Da36].

On March 23, 2023, the parties appeared before Judge Adubato for oral argument on the Ginarte Firm's Order to Show Cause.[3] Thereafter, Judge Adubato entered an Order denying the relief requested by the Ginarte Firm. [Da159].

On March 24, 2023, the Hon. Jodi Lee Alper, P.J.Ch. ordered both parties' actions to be transferred to the Law Division of the Essex County Superior Court. [Da164-65].

On March 29, 2023, the Ginarte Firm voluntarily dismissed its Complaint against Plaintiff and the Fredson firm without prejudice so that the claims could be asserted as a counterclaim and a third-party complaint in the Law Division in the present matter. [Da166]. On May 23, 2023 and in lieu of filing an Answer, Defendants filed a motion to compel arbitration.[4] [Da167].

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[3] "2T" refers to the Transcript of Oral Argument on the Order to Show Cause, March 23, 2023.

[4] Initially, Defendants' motion was brought as a motion to compel arbitration and to dismiss for lack of subject matter jurisdiction under R. 4:6-2(a). Thereafter, Defendants agreed to withdraw, without prejudice, the portion of the motion seeking dismissal to instead seek an order compelling

On October 11, 2023, the Trial Court heard oral argument and denied Defendants' motion to compel arbitration, ruling that the existence of the arbitration clause and whether it was binding on Plaintiff was questionable and nothing was before the Court to establish that Plaintiff had agreed to it. [3T39:23-40:18].[5] On October 17, 2023, the Trial Court entered an Order consistent with its ruling. [Da1-2]. On November 6, 2023, Defendants moved for reconsideration of the Trial Court's October 17, 2023 Order. [Da170].

On December 15, 2023, Defendants filed an Answer with Affirmative Defenses in response to Plaintiff's First Amended Verified Complaint, preserving their position and rights that certain of Plaintiff's claims are subject to the arbitration provision in the parties' Partnership Agreement. [Da173].

On January 26, 2024, the Trial Court heard oral argument and granted Defendants' motion for reconsideration as to the existence and application of the Partnership Agreement and the arbitration provision. [4T50:1-2].[6] The Trial Court then reviewed the arbitration provision and related issues and denied the request to compel certain claims be transferred to arbitration. [4T50:5-6].

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arbitration on Plaintiff's claims arising under the parties' Partnership Agreement and permitting limited discovery on the remaining statutory claims to determine Plaintiff's standing to assert such claims.

[5] "3T" refers to the Transcript of Oral Argument on Defendants' motion to compel arbitration, October 11, 2023.

[6] "4T" refers to the Transcript of Oral Argument on Defendants' motion for reconsideration, January 26, 2024.

On January 30, 2024, the Trial Court entered an Order relating to its ruling on January 26, 2024. [Da3-4].

On March 13, 2024, Defendants appealed the Trial Court's rulings regarding their request to transfer certain claims to arbitration. [Da233-37]. On March 18, 2024, Defendants filed a Notice of Motion to Extend Time to Appeal, which was thereafter amended on March 20, 2024. [Da238].

On April 1, 2024, Plaintiff filed an Opposition to Defendants' Motion to Extend and a Cross-Motion to Dismiss Defendants' Appeal as Untimely. [Da239-40]. On April 25, 2024, the Appellate Division entered Orders granting Defendants' Motion to Extend Time to Appeal and denying Plaintiff's Cross-Motion to Dismiss Defendants' Appeal. [Da241-43].

On May 3, 2024, Plaintiff moved for reconsideration of this Court's April 25, 2024 Orders denying Plaintiff's Cross-Motion and granting Defendants' Motion to Extend Time to Appeal. [Da244-46].

On May 21, 2024, the Court denied Plaintiff's Motion for Reconsideration. [Da247-48].

STATEMENT OF FACTS

The Ginarte Firm is a limited liability partnership existing under the laws of the State of New Jersey with its principal place of business at 400 Market

Street, Newark, New Jersey 07105. [Da37]. Joseph A. Ginarte, Esq. ("Ginarte") is the Senior Partner and Founder of the Firm. [Da203].

The Ginarte Firm Partnership

On or about November 8, 1991, Ginarte and John O'Dwyer, as a Junior Partner, executed a Partnership Agreement ("Partnership Agreement") to engage in the practice of law. [Da203]. Article 7 "Junior Partner's Salary and Equity, Section (4)" of the Partnership Agreement states that "the junior partner shall be entitled to a 5% capital equity interest as determined in accordance with Article 16" of the Agreement. [Da205].

Article 26 of the Partnership Agreement clearly provides that *"[a]ny controversy or claim arising out of this Agreement shall be settled by arbitration (except as otherwise noted in this Agreement) in accordance with the Rules of the American Arbitration Association and judgment upon the award rendered may be entered in any Court having jurisdiction.*" [Da218]. Additionally, Article 28 Subsection B "Non-Waiver" of the Partnership Agreement states: "*No delay on the part of any party in exercising any right hereunder shall operate as a waiver thereof, nor shall any waiver, express or implied, ... constitute or be deemed a waiver of any other right*[.]" [Da219].

On or about July 23, 2003, the Firm hired Plaintiff as an associate attorney. [Da37]. On August 1, 2007, Plaintiff and Ginarte executed an

Addendum to the 1991 Partnership Agreement (hereinafter "2007 Addendum" or "Addendum"), wherein Plaintiff became a "Junior Partner" of the Firm, entitling him a to guaranteed monthly draw and a schedule to vest in the Firm's equity, up to 5%. [Da220]. The 2007 Addendum begins with an explicit citation to the 1991 Partnership Agreement reciting in bold, capital letters: "**THIS ADDENDUM TO THE PARTNERSHIP AGREEMENT** of November 8, 1991[.]" [Da220]. Page 13 of the 2007 Addendum contains witnessed signatures of both Plaintiff and Joseph Ginarte. [Da232].

On November 10, 2018, Plaintiff and Joseph Ginarte executed a Partnership Interest Purchase Agreement and Promissory Note (the "Purchase Agreement"), which subjects the parties to the terms, conditions, and restrictions set forth in the Partnership Agreement in Subsection C of its Recitals. [Da83]. Subsection C of the Purchase Agreement provides, in pertinent part: "Gallardo desires to purchase from Joseph A. Ginarte, 5% of the Seller's interest, pursuant to the terms and conditions set forth herein and in the Limited Liability Partnership Agreement of Ginarte (the '**Partnership Agreement**')." [Da83].

Plaintiff's Termination and Client Solicitation Disputes

Plaintiff was removed as a partner by the Ginarte Firm by way of letter dated February 14, 2023. [Da9]. Following his removal, Plaintiff joined the law firm of Fredson Statmore Bitterman, LLC. [Da9]. On or about February 14,

2023, the Ginarte Firm sent letters to several clients to notify them that Plaintiff was no longer part of the firm, and advised them that they had the right to decide who would be handling their cases from that point forward. [Da12].

Thereafter, Defendants became aware that Plaintiff had surreptitiously contacted approximately twelve Ginarte Firm clients by telephone in an attempt to convince those clients to switch their matters to Plaintiff and the Fredson Firm. [Da12, Da27]. In fact, the clients contacted had previously signed letters expressing their desire to remain with the Ginarte Firm. [Da13-14, Da148].

During the March 8, 2023 Chancery Court hearing, the parties discussed a briefing schedule for a motion to disqualify Defendants' former counsel William D. Wallach, Esq. of McCarter & English, LLP ("Wallach") based on Plaintiff's allegations of a conflict of interest, as well as a motion to compel arbitration to be brought by Defendants. [Da6]. During the March 8 hearing, Mr. Wallach raised the issue of arbitration that he had identified in a letter sent to the Chancery Court the day prior, stating in relevant part, "there's also my point about arbitration, ... but I do not want to waive any right if this matter went forward. [1T12:5-16]. On March 15, 2023, David Mazie of Mazie Slater Katz & Freeman, LLC ("Mazie") substituted in as counsel for Defendants. [Da14].

With respect to the parties' ongoing dispute over the solicitation of Ginarte Firm clients, Mr. Mazie contacted Plaintiff's counsel to propose drafting

a joint letter to be sent on all client files where Plaintiff served as the primary attorney. [Da14]. Having received no response to Mr. Mazie's proposal and acknowledging that Plaintiff was continuing to contact Firm clients during the pendency of Plaintiff's motion for injunctive relief, the Ginarte Firm filed a summary action (ESX-C-37-23) seeking an Order to Show Cause and temporary restraints on March 17, 2023. [Da15].

When attorneys for the parties appeared before Judge Adubato on March 23, 2023, the Chancery Court had before it the Ginarte Firm's application against the Fredson Firm and Plaintiff (ESX-C-37-23) for preliminary injunctive relief premised on client solicitation. [2T7:12-15]. On the day of the proceedings, an exchange occurred between counsel for the parties and Judge Adubato regarding arbitration and the previously referenced motion to compel arbitration. [2T6:12-19]. In response to the Chancery Judge's question, counsel for Plaintiff and counsel for Defendants, David M. Freeman, Esq. of Mazie Slater Katz & Freeman indicated that they were waiving arbitration. [2T6:12-19]. Other than this exchange, there was no other discussion of arbitration and no order of any kind was entered memorializing the exchange or confirming the waiver. See [Da159-63].

Finally, in exchange for an extension to answer Plaintiff's First Amended Verified Complaint, counsel for Defendants agreed to voluntarily dismiss the

Ginarte Firm's action (ESX-C-37-23) and raise the claims asserted therein as part of an answer with counterclaims and third-party complaint. [Da166].

Plaintiff's First Amended Verified Complaint

On March 20, 2023, Plaintiff filed a First Amended Verified Complaint. [Da36]. In his Amended Complaint, Plaintiff added a disability discrimination claim under the NJLAD, but again, omitted any reference to both the 1991 Partnership Agreement and 2007 Addendum, despite being aware of the existence and applicability of the Agreement to his claims. [Da65]. Indeed, the 2007 Addendum incorporated and amended the parties' Partnership Agreement, having specifically referenced and revised Articles 3, 7, 8, 17, 30, 31, and 32 of the 1991 Partnership Agreement. [Da220].

Attempting to evade application of the Partnership Agreement, Plaintiff attached as Exhibit B to his Amended Complaint a copy of a May 21, 2019 "Partners' Certificate" entered into with Esquire Bank to argue that no written partnership agreement existed. [Da90]. The Plaintiff failed, however, to explain the Partners' Certificate's conflicting Paragraph 8, which acknowledges the existence of the Partnership Agreement [containing the applicable Arbitration Clause], and stating in relevant part: "*The execution, delivery and performance of the Loan Documents by the Partnership will not violate any provision of the*

Certificate of Limited Partnership, the Limited Liability Partnership Agreement...." Emphasis supplied. [Da91].

Nothing in the Partners' Certificate supports the Plaintiff's position expressed below that Defendants abandoned the 1991 Partnership Agreement. [Da90-92]. Without dispute, the only arbitration clause at issue in this matter is contained in the Partnership Agreement, of which the Fredson Firm is neither a party to nor a signatory of. [Da219].

Defendants' Motion to Compel Arbitration and Motion for Reconsideration

Questioning the existence of the Partnership Agreement in the first instance, the Trial Court originally denied Defendants' motion to compel arbitration. On Defendants' motion for reconsideration, the Trial Court granted reconsideration of its ruling that originally challenged the existence and applicability of the partnership agreement and the arbitration provision, finding that there in fact exists an enforceable agreement to arbitrate between the parties. [4T45:16-18]. The Trial Court went on to favorably apply the Cole factors to the circumstances here, but ruled that Defendants' express waiver of arbitration during the proceeding before Judge Adubato on March 23, 2023 was dispositive, again denying arbitration. [4T46:17-49:21].

STANDARD OF REVIEW

"[O]rders compelling or denying arbitration are deemed final and appealable as of right as of the date entered." GMAC v. Pittella, 205 N.J. 572, 587 (2011). The enforceability of arbitration agreements is a question of law, to which a reviewing court need not give deference to the trial judge's interpretative analysis. Morgan v. Sandford Brown Inst., 225 N.J. 289, 303 (2016) (citing Atalese v. U.S. Legal Servs. Grp. L.P., 219 N.J. 430, 445-46 (2014)). New Jersey courts review an order granting or denying a motion to compel arbitration de novo. Skuse v. Pfizer, Inc., 244 N.J. 30, 46 (2020) (citing Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 316 (2019)).

Similarly, "[t]he issue of whether a party waived its arbitration right is a legal determination subject to de novo review." Cole, 215 N.J. at 275 (citing Manalapan Realty LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The factual findings underlying the waiver determination are entitled to deference and are subject to review for clear error. See Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483–84, 323 A.2d 495 (1974).

LEGAL ARGUMENT
POINT I

THE TOTALITY OF THE CIRCUMSTANCES IN IN THIS MATTER WEIGHS IN FAVOR OF ORDERING ARBITRATION (DA1-2)

The gravamen of Defendants' argument on appeal rises or falls on the application of Cole v. Jersey City Medical Center, 215 N.J. 265 (2013), to the circumstances here. Indeed, the Trial Court applied the totality of the circumstances criteria under Cole, which clearly supported arbitration. Notwithstanding that application, the Trial Court then rejected application of Cole because – unlike the circumstances in Cole – the waiver here was verbally stated to the Chancery Judge, prior to the matter's transfer to the Law Division. Based on Defendants' reading of Cole, nowhere does the Supreme Court state that public policy favors arbitration only in instances of implied conduct versus instances of an express verbal waiver. In short, the Trial Court erred in ruling that an express waiver of arbitration vitiates the Cole framework where there exists no legal justification or authority which distinguishes a verbal waiver from a waiver based on implicated conduct. Both situations should require a fact-sensitive analysis because public policy favors arbitration. To rule otherwise would contradict Cole and bar arbitration the moment a party voiced waiver, regardless of the underlying circumstances or factors favoring arbitration.

A. A Waiver of Arbitration, Express or Implied, Should be Assessed Under the Cole Factors.

Waiver under New Jersey law "involves the intentional relinquishment of a known right and, thus, it must be shown that the party charged with the waiver knew of his or her legal rights and deliberately intended to relinquish them." Shebar v. Sanyo Bus. Sys. Corp., 111 N.J. 276, 291 (1988). "In other words, for there to be a waiver of arbitration rights, a party must know of the right and affirmatively reveal the intent to waive the right." Spaeth v. Srinivasan, 403 N.J. Super. 508, 514 (App. Div. 2008).

"Determining whether a party waived a right is a fact-sensitive analysis." Cole, 215 N.J. at 277. A party can expressly waive its right to arbitration, Wein v. Morris, 194 N.J. 364, 376 (2008), and it may also waive that right by implication. Knorr v. Smeal, 178 N.J. 169, 177 (2003). "The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or by indifference." Ibid. Above all, "[t]he party waiving a known right must do so clearly, unequivocally, and decisively." Ibid.

Our Supreme Court has recognized that while parties may waive their right to arbitrate in certain circumstances, such waiver is "never presumed." Cole, 215 N.J. at 276. "Any assessment of whether a party to an arbitration agreement has waived that remedy must focus on the totality of the

circumstances," and "no one factor is dispositive." Id. at 280-81. In making this determination, courts "concentrate on the party's litigation conduct to determine if it is consistent with its reserved right to arbitrate the dispute." Ibid. 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.

Ibid.

In Morgan v. Sundance, 596 U.S. 411, 417-419 (2022), the United States Supreme Court addressed a conflict among the circuit courts over the propriety of prejudice as a pre-condition for waiver of arbitration. The Court ruled that inquiry over waiver of the right to arbitrate may not be conditioned on an absolute requirement of prejudice, and any waiver analysis should focus on the conduct of the waiving party. Id. at 419. Similarly, construing Morgan, the Appellate Division has held that consideration of prejudice remains a non-dispositive factor in the waiver analysis. See Marmo & Sons Gen. Cont., LLC,

v. Biagi Farms, LLC, No. A-3120-22 (App. Div. May 24, 2024) (slip op. at 7).

In the decisions following Cole, courts have interpreted waiver of arbitration almost uniformly in the context of implied waiver, where a party's litigation conduct manifests an intention to implicitly waive its right to arbitrate. Yet, the New Jersey Supreme Court never expressed an intention to limit the Cole framework only to interpretation of implicit waivers. Nor has any decision following Cole limited its utility to matters involving implied waiver. In the rulings which Defendants appeal, the Trial Court found that Defendants expressly waived arbitration by way of Mr. Freeman's statements before Judge Adubato during the March 23, 2023 hearing. [4T49:9-12]. The transcript of the March 23 Chancery hearing reads, in pertinent part:

> Judge Adubato: ... I want to confirm on the record—there had been a previous request that there is going to be a motion filed for, the matter to go to arbitration. I believe it's been established that that's been waived and arbitration is no longer an issue. Correct?
> Mr. Freeman: Correct your Honor.
> Mr. Genova: Correct your Honor.

[2T6:12-19].

During oral argument on Defendants' application to compel arbitration, the Trial Court initially stated that an express act of waiver dispenses with the need to analyze the waiver under the seven factors set forth in Cole, with the exception of prejudice. Specifically, the Trial Court stated as follows:

> There's only one factor in Cole that would be relevant, and that's the prejudice. Because all the other factors are irrelevant considering the express [waiver] [sic]. The only factor in Cole that would be relevant to your argument is the prejudice.

[4T40:7-12]. Seemingly contradicting herself, the Trial Judge then stated "[t]here are other factors are to be considered by the Court as well." [4T40:24-41:5].

The Trial Court then applied each of the Cole factors. [4T46:17-48:18]. Despite finding that the facts and circumstances here tilt in favor of compelling arbitration under Cole and noting that "there has not been a lot that has taken place" [4T49:16-17] in this litigation to direct a finding of waiver, the Trial Court nonetheless denied Defendants' request to move the matter to arbitration, citing only to the express, albeit general nature of the waiver made on behalf of Defendants.

In determining whether a party has waived arbitration, there should be no reason or legal basis to treat an express act or statement of waiver differently than an implied waiver based on a party's litigation conduct. Absent a writing or filed order, an express verbal waiver should not carry any more or less legal significance than an implied waiver. As such, the express nature of a waiver does not override the relevance and import to be given to the factors assessing waiver pursuant to Cole. Indeed, the Trial Court's deliberate application of the

Cole framework to the facts of this matter inherently acknowledged that, on balance, the circumstances here do not amount to a finding of waiver.

Defendants contend that a verbal waiver, without more, does not negate or override the magnitude of each factor under Cole, which here, undisputedly weighs against a finding of waiver of Defendants' right to arbitrate.

B. Despite its Ruling to the Contrary, the Trial Court's Analysis Supports a Finding that Defendants Did Not Waive the Right to Pursue Arbitration.

As stated, any assessment of whether a party has waived the right to arbitrate a dispute must focus on the totality of the circumstances, requiring a fact-sensitive analysis. Cole, 215 N.J. at 280. Here, the Trial Court's examination of the facts and circumstances of this matter established that Defendants satisfied the Cole criteria that a waiver did not occur and arbitration could be pursued.

The first Cole factor examining waiver of arbitration looks at the party's "delay" in making the arbitration request. Cole, 215 N.J. at 280-81. Here, this Court can find, as did the Trial Court, that a mere two-month time period between the transfer of Plaintiff's Amended Complaint from the General Equity Part to the Law Division in March 2023 and the filing of Defendants' motion to compel arbitration in May 2023 was not so significant as to weigh in favor of arbitration. Indeed, the Trial Court found that any such delay was "certainly not

significant." [4T47:12-22].

As to the second Cole factor concerning the filing of any motions (particularly dispositive motions) and their outcomes, the Trial Court properly found that no dispositive motions have been filed in this matter. [4T47:23-24]. Here, there exists nothing in the record for the Appellate Division to conclude otherwise. In fact, the only "dispositive" motion in lieu of filing an Answer was Defendants' motion to compel arbitration. As such, this factor also weighs against a finding of waiver.

The third Cole factor considers whether any delay in seeking arbitration was part of the party's litigation strategy. Cole, 215 N.J. at 281. Here, the Trial Court made no findings as to this factor. [4T47:25-48:2]. Regardless, the brief interval between the case's transfer to the Law Division and the timing of Defendants' motion seeking arbitration conferred no benefit on Defendants, and moreover, does not bespeak a litigation strategy of the Defendants in any sense. Contrary, any undue delay is more suggestive of the Plaintiff's litigation strategy where he intentionally omitted reference to the Partnership Agreement and 2007 Addendum to the Partnership Agreement in his pleadings in an effort to avoid their application.

With respect to the fourth Cole factor, the Trial Court correctly determined that the parties have not yet exchanged any discovery in this matter,

[4T48:3-7], except for certain subpoenaed documents that Plaintiff sought and received from Defendants' prior counsel, McCarter & English. Further, the parties have taken no depositions. Moreover, while Plaintiff served the Defendants with discovery demands on May 1, 2023, those responses were not due before Defendants filed the subject motion to compel arbitration on May 23, 2023. Thus, this factor also weighs against waiver and in favor of arbitration.

The fifth Cole factor looks at "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." Cole, 215 N.J. at 281. Here, the Defendants have filed no pleadings inconsistent with the intent to seek arbitration. First, Defendants pleaded arbitration as an affirmative defense to the Plaintiff's Amended Complaint in their Answer filed on December 15, 2023. In addition, while Defendants' former counsel certified that arbitration was not contemplated in the Ginarte Firm's prior action (ESX-C-37-23), see [Da19], the gravamen of that action centered on the solicitation of Ginarte Firm clients by Plaintiff and the Fredson Firm rather than any disputes arising out of the parties' partnership documents.

The General Equity Judge treated the parties' lawsuits (ESX-C-34-23 and ESX-C-37-23) as part and parcel of the same dispute, yet they involved inherently dissimilar claims and different parties. The Ginarte Firm's action

clearly involved separate issues of client solicitation distinct from the common law partnership and statutory discrimination claims raised in the Plaintiff's action. Moreover, Defendants were not at liberty to invoke the arbitration clause in their action against the Fredson Firm, a non-party to the Partnership Agreement. In light of the foregoing, where no one factor is dispositive on waiver, and Defendants properly asserted arbitration in their responsive pleading to this litigation, the fifth Cole factor weighs against a finding of waiver.

As to the sixth Cole factor, the Trial Court noted that no trial date has been scheduled, [4T48:16-17], unlike in Cole, where the defendant moved to compel arbitration just three days before the scheduled trial of a substantially litigated matter. Cole, 215 N.J. at 282.

Lastly, while non-dispositive on its own, the "resulting prejudice" to the party opposing arbitration remains an important consideration. Id. at 281. Presumably because there exists none, Her Honor's initial comment that "prejudice" was the only factor that applied to Defendants' argument, implies a finding that Plaintiff has suffered no resulting prejudice here. [4T48:17-18]. The New Jersey Supreme Court has defined prejudice as "the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—[that] occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate

that same issue." Id. at 282.

Here, the fact that Defendants filed the instant motion to compel arbitration just two months after this case's transfer to the Law Division, as well as the lack of motion practice and discovery prior to its filing, hardly scratch the surface of prejudice. The Appellate Division has noted "simply wasting a party-opponent's time and money... [is] insufficient to constitute prejudice." Spaeth, 403 N.J. Super. at 515. In any event, Plaintiff was on notice of Defendants' intention to pursue arbitration as of early March 2023 and, thus, was afforded the ability to guide his own litigation conduct accordingly.

More importantly, the complete absence of any detriment to the Plaintiff's legal position weighs against a finding of waiver. Specifically, Defendants have acknowledged that the scope of the parties' arbitration agreement is limited to Plaintiff's common law claims relating to the parties' former partnership. On that note, Defendants' right to arbitrate certain claims raised by the Plaintiff should not be foreclosed due to Plaintiff's failure to disclose the arbitration agreement within the partnership documents that he voluntarily signed, followed by his repeated disingenuous efforts to refute their existence and applicability.[7]

[7] "[J]udicial resources are wasted when a case is brought by a plaintiff and litigated in the Superior Court when it should have been pursued instead in arbitration." Marmo & Sons Gen. Cont., LLC, No. A-3120-22, at 25. Here, Plaintiff has never disputed his signature and agreement to the terms of the 2007 Addendum, which expressly incorporates and amends the 1991 Partnership Agreement. Nor does the record suggest that Plaintiff, an attorney, did not appreciate the implications of executing the Addendum.

Clearly, Plaintiff has not been prejudiced where his statutory claims, assuming they survive, will proceed with a jury trial, and where any time and expense Plaintiff incurred opposing arbitration is the result of his own misguided litigation strategy.

In sum, the present circumstances considered under Cole weigh heavily against finding that Defendants irreversibly waived the right to arbitrate; especially so, given the absence of any attempt by Defendants to procure any unfair strategic advantage in defending this litigation and the dearth of any prejudice towards Plaintiff. Further, the Trial Court never rejected the weight of its findings pursuant to the Cole factors, regardless of its ruling on express waiver. In light of the foregoing, the verbal waiver by Defendants' former counsel should not be interpreted as forever disavowing Defendants' arbitration rights, when Defendants have since taken every measure to preserve that right, and no demonstrative prejudice toward the non-moving party has been shown, pursuant to Cole.

POINT II

PUBLIC POLICY AND PRECEDENT STRONGLY SUPPORT THE RIGHT TO TIMELY RETRACT A WAIVER OF ARBITRATION WHERE A PARTY HAS SATISFIED THE COLE FACTORS (DA1-2)

New Jersey "has recognized arbitration as a favored method for resolving disputes." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 131 (2001). In addition, waiver is "never presumed." Cole, 215 N.J. at 276. Where a party waiving arbitration must do so "clearly, unequivocally, and decisively," Knorr, 178 N.J. at 177, here, the parties' colloquy on the record regarding arbitration during the March 23 Chancery hearing is hardly supportive of an unequivocal waiver. The "express waiver" occurred prior to any legal argument on the matter before the Chancery Court and was not formalized in any manner. [2T6:12-19].

Further, election of remedies is not irrevocable unless and until either a court proceeding goes to judgment or an arbitration proceeding consummates in an award. See McKeeby v. Arthur, 7 N.J. 174 (1951). A court has the power to refer the dispute to arbitration at any time prior to judgment. Wasserstein v. Kovatch, 261 N.J. Super. 277, 290 (App. Div. 1993). Here, while the transcript from the March 23, 2023 Chancery hearing references off the record discussions in chambers regarding arbitration, the subsequent Order denying Defendants'

order to show cause does not contain any reference or explicit ruling regarding arbitration, or any waiver thereof. [Da159-63].

While the reason for discussing arbitration during the March 23 Chancery proceedings remains unclear, off the record discussions in chambers and the subsequent colloquy do not formally memorialize a verbal waiver of Defendants' right to arbitrate. Above all, neither party took any action or measure in reliance on or in response to Mr. Freeman's reply to Judge Adubato's question. Where the March 23, 2023 Order did not express a final judgment as to the Defendants' waiver and the parties have not proceeded in reliance on the waiver, the arbitration agreement between Plaintiff and Defendants continues to be valid and enforceable.

To that end, numerous jurisdictions have ruled favorably on a party's right to retract a remedy or right such as waiver before another party has materially changed positions in reliance thereon. See E. Hedinger AG v. Brainwave Sci., LLC, 363 F. Supp. 3d 499, 507 (D. Del. 2019) (concluding that the defendant did not waive the right to arbitrate based on the fact that the case was in the early stages and no discovery had occurred); Hibbard Brown & Co., Inc. v. ABC Family Trust, 772 F. Supp. 894 (D. Md. 1991) (party that waived its right to arbitrate by filing a court action may revoke its waiver unless the opposing party would be prejudiced or the revocation would result in improper manipulation of

the judicial process); Kacha v. Allstate Ins. Co., 45 Cal. Rptr. 3d 92 (Ct. App. 2006) (a waiver may ordinarily be revoked absent a showing of prejudice); Max 327, Inc. v. City of Portland, 838 P.2d 631 (Or. Ct. App. 1992) ([a] waiver can be retracted at any time before the other party has materially changed position in reliance thereon).

In this matter, the Trial Court engaged in a balancing analysis of the Cole factors which clearly weighed in favor of referring certain of the Plaintiff's claims to an arbitral forum, even where an express act of waiver was made on behalf of Defendants. Namely, the Trial Court's analysis found that there was no undue delay by the Defendants in making the request for arbitration, the parties have not engaged in dispositive motion practice or significant discovery, the brief delay was not evidence of a litigation strategy or manipulation of the judicial process, there was no scheduled trial date, and finally, the absence of any discernable prejudice on the Plaintiff. In the absence of any authority to the contrary, the Trial Court's analysis supports that enforcement of an express waiver of arbitration, like an implied waiver, should be considered under the totality of the circumstances.

Under the circumstances here, this Court should follow our Supreme Court precedent in Cole which does not forever bind a party to a verbal or an express waiver made in the initial stages of a matter, where that party's litigation

conduct otherwise satisfies its test in favoring arbitration. Because the circumstances here clearly weigh in favor of compelling arbitration pursuant to Cole, the Plaintiff's claims arising from the parties' Partnership Agreement should proceed to arbitration.

CONCLUSION

For the foregoing reasons, Defendants Joseph A. Ginarte, Esq., Ginarte Gallardo Gonzalez & Winograd L.L.P. d/b/a Ginarte Gonzalez Winograd L.L.P. request that this Court reverse the portion of the Trial Court's January 30, 2024 Order finding an irrevocable, express waiver of the right to proceed to arbitration and direct the arbitrable claims in this matter to proceed to arbitration.

Respectfully submitted,

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By: */s/ Domenick Carmagnola*
DOMENICK CARMAGNOLA

Dated: June 10, 2024

MICHAEL A. GALLARDO, ESQ., Plaintiff-Respondent, v. JOSEPH A. GINARTE, ESQ., GINARTE GALLARDO GONZALEZ & WINOGRAD, L.L.P. d/b/a GINARTE GONZALEZ WINOGRAD, L.L.P., John Does 1-10 and ABC Corporate Entities 1-10, all Fictitious entities, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002068-23 Civil Action On Appeal from: Superior Court of New Jersey Law Division: Essex County Docket No. ESX-L-002267-23 Sat Below: Hon. L. Grace Spencer, J.S.C. *Submission: July 26, 2024* *Resubmitted: July 29, 2024*

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT IN OPPOSITION TO DEFENDANTS-APPELLANTS' APPEAL OF THE TRIAL COURT'S OCTOBER 17, 2023 AND JANUARY 30, 2024 ORDERS

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PRELIMINARY STATEMENT

The essential question on this appeal is whether the Trial Court erred in denying Defendants' motion to rescind their prior on-the record express waiver of an arbitration clause where Defendants offered no justification in law or fact for that recission. This is **not** the typical arbitration-waiver case where one party alleges that the other impliedly waived arbitration by their actions and inactions, *e.g.*, neglecting to timely file an arbitration claim or undertaking litigation in court. Rather, this is a case where Defendants explicitly told a judge on the record that they were waiving arbitration and even went so far as to file a complaint against Plaintiff demanding a jury trial. Thereafter, Defendants retained a new lawyer who now contrives to reverse course and rescind Defendants' original express waiver of arbitration. The Trial Court below properly denied Defendants' motion to rescind their initial waiver of arbitration and here Defendants offer no viable grounds for reversal.

Given the current jurisprudence of arbitration in the workplace setting, granting employers like Defendants the right to reverse a waiver of arbitration based on some unexplained whim is inherently unfair. Suppose employees followed Defendants' pattern of behavior and after knowingly signing a valid arbitration clause, *i.e.* a waiver of jury trial rights (which didn't happen here), such employees announce they are rescinding the arbitration clause and opting

for a jury trial. Would any court ever enforce such a frivolous recission? Yet, here, Defendants are asking for this Court to endorse a reckless, unexplained change of mind by an employer, set on abandoning their original position by willy nilly rescinding a waiver of arbitration. More generally, for the court system to work smoothly, parties must be held to their representations in court. The Trial Judge did not err in holding Defendants to their express waiver of arbitration. The proof that the waiver took place was indisputable and preserved in the transcript of the Chancery proceedings in this case. The audacity of the Defendants, shifting lawyers and then on that basis shifting positions, should never be countenanced in an orderly justice system.

Below, Defendants have already conceded that Plaintiff's CEPA and LAD claims must be tried to a jury. The economic torts and claims alleged by Plaintiff are at issue here. They too should be remanded for a jury trial because of Defendants' express waiver of arbitration and because, as discussed *infra*, the Defendants explicitly in writing abandoned the obsolete, invalid 1991 arbitration clause they rely upon.

PROCEDURAL HISTORY

A. Plaintiff Commences This Action in the Chancery Division

On March 3, 2023, Plaintiff Gallardo filed his initial verified Complaint, Order to Show Cause ("OTSC") for restraints, and Brief in Support of that

injunctive relief in the New Jersey Superior Court, Essex County, Chancery Division, Docket number ESX-C-000034-23. The Complaint alleged, *inter alia*, that Defendants locked Plaintiff out of the Defendant law firm in retaliation for his having engaged in protected activity under the LAD and CEPA.

On March 7, 2023, Defendants, through their then attorneys McCarter & English, wrote to the court alleging that an arbitration clause existed in a 1991 Partnership Agreement. Pa10. That same day, Plaintiff's then co-counsel wrote to the court, disputing any agreement to arbitrate and raised the issue of disqualification of defense counsel. Pa13.

B. <u>The March 8, 2023 Hearing and Briefing Orders</u>

On March 8, 2023, the Chancery Court held an initial hearing with respect to Plaintiff's application for preliminary restraints and during that proceeding Defendants stated their intention to file a motion to compel arbitration. (3/8/23 Transcript, "1T").[1] In arguing against arbitration, Plaintiff's counsel argued, among other things, that as of 2019 the parties to this action had all signed a bank document certifying that the 1991 Partnership Agreement containing the arbitration clause was no longer valid or in force:

<u>MR. MULLIN</u>: There's an awfully important point in Exhibit

[1] There are four court transcripts here. The first one, on 3/8/23, before Chancery is "1T"; "2T" refers to the 3/23/23 Chancery hearing; "3T" is the 10/11/23 Law Division hearing; and "4T" is the 1/26/24 Law Division hearing. Both 1T and 2T were submitted to the Law Division as part of the motion papers.

> B. [*i.e., Ex. B to Da36, Verified Complaint*]
> THE COURT: Well, Exhibit B, you're saying?
> MR. MULLIN: Yes.
> THE COURT: The **partner certificate**? Is that what you're referring to.
> MR. MULLIN: Yes. That's correct. It's dated **May 21, 2019**. Notice Paragraph 4.
> THE COURT: "**Partnership does not have a formal limited liability partnership agreement as in effect on the date hereof."**
> MR. MULLIN: **So, whatever was going on in 2007 [when Plaintiff signed an Addendum to Partnership Agreement with no arbitration clause], we can disregard that. There was no – according to both parties who signed this it didn't have any value or impact or existence even. They didn't -- certainly they didn't make a fraudulent representation to the Esquire Bank. They both signed it in 2019. Whatever was in or not in that 1991 document my client will testify he never saw. Whatever was in it doesn't matter because of that representation to a bank, signed by both parties**.
> [1T30:8-32:4 (emphasis added); with Da90 (Ex. B to Da36)].

The March 8, 2023 Chancery hearing included a discussion of a briefing schedule on the anticipated motion to compel arbitration. 1T115:1-129:13. On March 9, 2023, the court entered an Order on the TRO including a deadline for the threatened motion to compel with a hearing set for March 23, 2023. Da5. The briefing Order was amended. Pa17. The need to file a motion to disqualify the McCarter Firm became moot as new counsel substituted. Pa20, Pa23.

C. Instead of Filing an Arbitration Demand or Motion, Defendants Commence a Separate Lawsuit with a Jury Demand

Days later, on March 17, 2023, instead of complying with the 3/9/23 Order to file a motion to compel arbitration or even to demand arbitration, Defendants

commenced a second lawsuit, in Chancery, via a Complaint *with a Jury Demand* requesting damages against both Plaintiff and his subsequent/current employer. Da8. The Rule 4:5-1(b)(2) Certification with Defendants' Complaint makes NO mention of any contemplated arbitration. Da19.

D. Defendants Expressly Waive Any Right to Arbitrate at the March 23, 2023 Hearing and Both Cases Are Transferred

On March 20, 2023, Plaintiff filed a First Amended Verified Complaint in this case. Da36-158. At the March 23, 2023 hearing for both Chancery cases, all parties appeared before the Honorable Lisa M. Adubato, who confirmed on the record an earlier discussion off the record in which Defendants, through their new counsel, informed the court that they were waiving their right to arbitrate, as follows:

> Judge Adubato:…**I want to confirm on the record—there had been a previous request that there was going to be a motion filed for, the matter to go to arbitration. I believe that it's been established that that's been waived and arbitration is no longer an issue. Correct?**
> Mr. Freeman [for Defendants Ginarte et al]: **That's correct, Your Honor**.
> Mr. Genova [for the Plaintiff Gallardo]: **Correct, your Honor**.
> [2T6:12-19, emphasis added].

That same date, March 23, 2023, the Court entered an Order denying Defendants' OTSC. Da159. On March 24, 2023, the court entered Orders transferring both Chancery lawsuits to the Law Division. Da164-165. On March 29, 2023, Defendants agreed to dismiss their lawsuit and instead file it as a

counterclaim and third-party complaint in this suit. Pa29. They eventually did so a year later.

E. Discovery Commences in the Law Division

On May 1, 2023, Plaintiff served interrogatories and document requests to Defendants, along with Deposition Notices for dates beginning on July 18, 2023. Pa37. Plaintiff also obtained documents via subpoena. Defendants refused to answer discovery, yet served their own discovery demands to Plaintiff.

F. Defendants Breach Their Express Waiver of Arbitration and File a Late Motion to Dismiss and Compel Arbitration

On May 23, 2023, two months after their earlier, explicit, on-the-record waiver of any right to arbitrate, and in breach of the March 9, 2023 Order (Da5) that required such a motion to be filed two months earlier, new counsel (the third) for Defendants filed a Motion to Compel Arbitration and to Dismiss the LAD/CEPA Counts, arguing that Plaintiff was not an "employee" under the statutes or, alternatively, to bifurcate discovery on whether Plaintiff was an "employee." Da167. Days later, Plaintiff's counsel promptly sent new defense counsel R. 1:4-8 letters indicating that Defendants had waived any right to arbitrate. Pa32. Plaintiff filed opposition to the Motion. Pa1.

G. The Court Denies Defendants' Motion to Compel Arbitration

On October 11, 2023, oral argument took place on Defendants' Motion and the trial court denied the Motion in its entirety, refusing to dismiss the

LAD/CEPA counts, or the alternative relief to bifurcate discovery on whether Plaintiff was an "employee" under those statutes, and refusing to compel arbitration. 3T39:16-41:11. On October 17, 2023, the Court entered an Order denying Defendants' Motion to Dismiss in its entirety. (Da1).

H. Defendants' Motion for Reconsideration is Denied

On November 6, 2023, Defendants filed a Motion for Reconsideration of the 10/17/23 Order. They renewed their request to compel arbitration of the non-statutory claims and to bifurcate discovery but abandoned their argument to dismiss the CEPA/LAD counts on the "employee" issue. Da170. Plaintiff opposed the reconsideration motion.

I. Defendants File an Answer, then Counterclaim with Jury Demand

Some two months later after their motion was denied, on December 15, 2023, Defendants belatedly filed their Answer to the First Amended Complaint. Da173. In violation of Court Rules (including R. 4:5-3; R. 4:6-1(b)), Defendants refused to answer parts of the First Amended Complaint, despite the trial court already denying their arbitration motion. (Da173, fn.1; Da194-195; Da200).

After more delay, on March 1, 2024, Defendants filed a Counterclaim/Third-Party Complaint with a Jury Demand that was supposed to be filed a year earlier. See Pa29.

J. Defendants' Motion to Extend Time to Appeal is Granted and Plaintiff's Cross-Motion and Reconsideration Motions Are Denied

On March 13, 2024, Defendants filed a Notice of Appeal (Da233), to this Court, but only as to the 1/30/24 Reconsideration Order. (Da3). On March 18, 2024, Defendants submitted a Motion to Extend Time seeking to belatedly appeal the 10/17/23 Order, and amended it on March 20, 2024. Da238. On April 1, 2024, Plaintiff opposed Defendants' Motion and filed a Cross-Motion to Dismiss Defendants' belated attempt to appeal from the 10/17/23 Order as it violated Rules 2:4-1(a), 2:4-4 and 2:5-1. Da239.

On April 25, 2024, this Court granted Defendants' Motion and denied Plaintiff's Cross-Motion. Da241, Da243. On April 29, 2024, Defendants filed an Amended Notice of Appeal and C.I.S. to include an appeal of the 10/17/23 Order. On May 3, 2024, Plaintiff filed a Motion to Reconsider this Court's April 25, 2024 Orders. Da244. On May 21, 2024, the Court denied Plaintiff's Motion, stating, the "parties are free to argue to the merits panel the appropriate standard of review under these circumstances." Da247. Plaintiff reserves his appeal rights to challenge this Court's jurisdiction over the 10/17/23 Order.

STATEMENT OF FACTS

A. Plaintiff is Hired By Defendants and Later Promoted

On or about July 23, 2003, Plaintiff, Michael Gallardo, accepted a position as an associate with Defendant Ginarte Law (or simply "Firm"), which was then

called Ginarte O'Dwyer & Winograd L.L.P. Defendant Ginarte Law was founded by Ginarte in or around 1982. In general, the Firm represents plaintiffs in personal injury litigation. (Da36), (First Amended Verified Complaint), at ¶¶ 6-7.

Defendant Ginarte Law has been called by various different names. Until Gallardo's sudden termination on February 15, 2023, Ginarte Law was known as Ginarte Gallardo Gonzalez & Winograd. As of February 15, 2023, it is known as Ginarte Gonzalez Winograd L.L.P. Da36, ¶ 8. It has six offices in New Jersey as well as two offices in New York. Id., ¶ 9.

In or around 2007, Plaintiff was named a junior partner in Ginarte Law, a promotion that did not involve Plaintiff receiving or purchasing an equity interest in the firm. Id., ¶ 10. The 2007 agreement that reflected this promotion (Da220) did not have an independent arbitration clause but characterized itself as an addendum to the 1991 agreement that did have such a clause. The 2007 agreement did not attach the 1991 agreement to it and Defendants have produced no evidence that Defendants ever, prior to this litigation, presented Plaintiff with the 1991 Agreement or its arbitration clause, or offered any proof that Plaintiff knew of the clause and agreed to it.

In or around 2013, at the urging of Ginarte and due in part to Plaintiff's success at the Firm in trying and settling cases and attracting clients, Plaintiff was named Managing Partner of Ginarte Law by Ginarte. Da36, ¶ 11.

Around this time, Ginarte took up residence in Florida, and was not present in New Jersey full-time, so he needed Plaintiff to manage the litigations. Also, around this time, Ginarte began to discuss his succession plans with Plaintiff, suggesting that Plaintiff would be chosen to take over the firm's operations upon Ginarte's retirement. Id., ¶ 12.

As Managing Partner, Plaintiff would assign out cases as they came in from the Firm's Claims Department, and due to his success in the practice, Plaintiff would usually personally handle and/or assist other attorneys on the largest and most complex files at the Firm. However, Plaintiff had no authority to manage the operations of the Firm. Id., ¶¶ 13-14.

Plaintiff was one of Ginarte Law's top attorneys, generating the most attorneys' fees out of all New Jersey attorneys on a regular basis. Id., ¶ 15. Starting in 2012, Gallardo was named to Super Lawyers' "Rising Stars" List and Super Lawyers List. In the years that followed, Gallardo received numerous professional accolades for himself and the Firm as well as top verdicts. Id., ¶¶ 16-22.

B. Plaintiff Becomes the Owner of 5% Equity in Ginarte Law

Ginarte informed Plaintiff that there were 2 equity partners in the Ginarte Firm – Ginarte who owned 99.5% and John O'Dwyer who had owned a 0.5% equity interest in Ginarte Law until 2018, at which time O'Dwyer left the Firm to take the bench. Da36, ¶ 23. In 2018, following the departure of now Judge O'Dwyer, Defendant Ginarte approached Plaintiff and asked him if he would be interested in an equity interest in Ginarte Law. Id., ¶ 24. The parties ultimately agreed that Plaintiff would not have to make a capital contribution or cash payment for a 5% equity interest. Plaintiff understood that his 5% interest was in consideration for his continued employment with Ginarte Law and his substantial and continued business development work on behalf of Ginarte Law and revenue to it. Id., ¶ 25.

Moreover, Defendants received the benefit of Ginarte Law retaining its LLP status following the departure of the prior equity partner. Nonetheless, when conveying the 5% equity interest to Gallardo, Ginarte presented Gallardo with a Partnership Interest Purchase Agreement and Promissory Note ("Purchase Agreement"), which both parties signed. Da36, ¶ 26, with Da83, Da87. Neither document contained an arbitration clause, but to the contrary had a forum selection clause. Da87 ("venue for any dispute involving this promissory note

shall be in a court of competent jurisdiction in Essex County, New Jersey."); see also, Da86, ¶ 13.

On or about May 21, 2019, Plaintiff and Defendant Ginarte each signed a document titled Ginarte Gallardo Gonzalez & Winograd, L.L.P. Partners' Certificate ("Partners' Certificate"), which certified certain information to Esquire Bank, National Association in order to get a loan for the Firm. Da36, ¶ 27, with Ex. B thereto (Da90). Specifically, the Partners' Certificate confirms the partnership percentages owned by Plaintiff and Ginarte by stating that Defendant Ginarte owns a 95% interest in Ginarte Law and Plaintiff owns a 5% interest in Ginarte Law. Da36, ¶ 28, with Da090.

The Partners' Certificate further confirms that there is **no** written partnership agreement between the parties by stating that **"[t]he Partnership does not have a formal Limited Liability Partnership Agreement as in effect on the date hereof."** Da36, ¶ 29, with Da90, ¶ 4. Thus, all parties to this litigation agreed that the 1991 Agreement that had the arbitration clause was no longer in effect.

C. Plaintiff Continues to Function as an Employee while Defendant Ginarte Abuses His Exclusive Decision-Making Authority at Ginarte Law

Despite his title of Managing Partner and his 5% equity interest, Plaintiff did not have or exercise decision-making power regarding the affairs of Ginarte

Law. Da36, ¶ 30. For example, Plaintiff did not have the authority to hire or fire employees and had no right to vote on any business decisions. At no point did Ginarte Law conduct partnership meetings or bring any Firm matters to a vote. Id., ¶¶ 31-32. Plaintiff was not shown or given access to Ginarte Law's books and records, was not kept informed on the Firm's financial status, and did not participate in financial decisions. Id., ¶ 33. Plaintiff has no knowledge of the salaries of Ginarte. All decisions regarding partner compensation were made exclusively by Ginarte. Id., ¶ 34. Plaintiff did not exercise any authority to enter any binding contracts on behalf of Ginarte Law without Ginarte's approval. Da36, ¶ 35. Moreover, despite owning 5% of the equity of Ginarte Law as of October 1, 2018 as set forth in the Partnership Interest Purchase Agreement (Da083), Plaintiff never received financial information about firm revenues and profits or any distributions of Ginarte Law's profits. Da36, ¶ 36.

All decision-making power remained with Ginarte, who at all times exercised complete decision-making authority over Ginarte Law. Plaintiff reported to Ginarte on all matters related to the operation of the Firm. Id., ¶ 37; ¶ 150. Defendant Ginarte managed and ran the Firm by himself, but did not litigate cases during the entire time Plaintiff was employed. Defendant Ginarte never attended or conducted trials or mediations, he did not take depositions, nor did he handle any other significant legal work. Id., ¶ 38. Ginarte abused his

decision-making power and engaged in extensive self-dealing in his position as majority owner and *de facto* managing partner of Ginarte Law. By way of example, Ginarte entered into several long-term commercial leases on behalf of Ginarte Law with himself or entities that he controlled as landlord, and set the rent payments at unconscionable rates. Id., ¶¶ 39-43. Ginarte was also paying himself a "management fee" that was not explained or justified that, for example, totaled $2.2 million in 2018. Id., ¶ 44.

In addition, Defendant Ginarte employed his brother, William Ginarte, on a "lifetime" basis, despite little contribution from him, an undefined role, and frequent inappropriate behavior towards female staff at the Firm. Ginarte also employs his brother-in-law, Camilo Azcarati, without any clear contribution to the Firm. Azcarati has also been accused of unlawful, sexually harassing behavior with certain female staff at the Firm. Id., ¶ 45.

D. A Succession Plan is Discussed with Gallardo

In or about July, 2019, Defendant Ginarte contacted Plaintiff and advised Plaintiff that Ginarte had retained the McCarter Law Firm to draft a succession plan document regarding plans for Ginarte Law for such a time as when Ginarte would cease to run the Firm. Ginarte told Plaintiff that he had chosen Plaintiff to be his successor and to run the Firm when he left. Da36, ¶ 46. Discussions about succession and a formal succession plan continued over the next three

years. On or about December 7, 2022, during a lengthy office meeting, Ginarte told Plaintiff that soon the McCarter firm would present Ginarte's succession plan for Plaintiff's review. Id., ¶¶ 47-48.

On or about January 18, 2023, in a telephone call to Plaintiff, Ginarte further discussed Ginarte's succession plan at Ginarte Law. Id., ¶ 49.

During that time period, Plaintiff's success in practicing law continued. The New Jersey litigation department at Ginarte Law had its best year ever in 2022, and exceeded goals in 2020 and 2021, due in large part to Plaintiff's case load and oversight of New Jersey litigations. Id., ¶ 50.

Since the start of the pandemic, most firm attorneys worked remotely, at least for a period of time. Plaintiff also continued to work remotely because his son became ill with a severe respiratory illness, and Plaintiff had to dedicate time to caring for his son. Defendant Ginarte was aware of Plaintiff's son's illness, as was the Firm's CFO, Analia Campbell. In fact, Ms. Campbell inquired regularly about his son's well-being. Id., ¶ 51. In or about December 2022, Plaintiff told Ginarte that he had to continue working remotely from home to allow him to continue caring for his sick child, yet still during this time Plaintiff continued to carry a full case load, handled his files independently, and worked full time. Id., ¶ 52.

E. Plaintiff Engages in Protected Activity During a January 22, 2023 Telephone Call with Ginarte, by Seeking a Reasonable Accommodation and Family Medical Leave and Raising Issues of Unethical Conduct at the Firm In Violation of the RPC's.

On or about Sunday, January 22, 2023, in a telephone call, Plaintiff reported to Ginarte that Plaintiff had achieved remarkable revenue-generating results in the first month of 2023. Gallardo told Ginarte that he, the Plaintiff, had already settled numerous cases in excess of $10 million dollars for calendar year 2023 and had, in the first 7 weeks of the Firm's calendar year, exceeded his 2023 Ginarte-established attorney revenue target for the entire 2023 year. During that call, Ginarte highly praised Plaintiff's job performance and again discussed Plaintiff's succession at Ginarte Law. Da36, ¶ 53. During that call, Plaintiff sought a brief leave to care for his sick child and a reasonable accommodation to protect himself because of his own disability during the Firm's upcoming transition from remote work to in-office work. The modest accommodation/leave the Plaintiff sought was to continue to work from home for a few more weeks.

During that conversation, Plaintiff Gallardo also objected to unethical conduct by the Firm in violation of the New Jersey Supreme Court's Rules of Professional Conduct (hereinafter, "the RPC's"). As detailed below, within days of Plaintiff's objections and requests for accommodation as well as family leave to care for Plaintiff's ailing son, Defendants retaliated against the Plaintiff by

secretly making plans to deny him the previously-planned succession of Plaintiff as manager of the entire Firm, by making plans to terminate him without notice, and by conspiring with a lawyer whose firm was representing the Plaintiff in personal matters, to steal Plaintiff's clients in violation of the RPC's. Da36, ¶ 54.

During the January 22, 2023 call, Defendant Ginarte advised Plaintiff Gallardo that he, Ginarte, expected Plaintiff to immediately stop working remotely and instead come to the Newark Office daily as he did prior to the start of the COVID pandemic. Gallardo reminded Ginarte that he, the Plaintiff, was not only caring for his sick child but additionally that he, the Plaintiff, was immune-compromised due to a severe medical condition. Plaintiff Gallardo reminded Defendant Ginarte that he, Ginarte, had been well aware of Gallardo's disability even before the pandemic. Gallardo reminded Ginarte that he, the Plaintiff, was at an increased risk for developing severe respiratory infections and other serious medical conditions. Gallardo stressed that a COVID infection could be fatal to him. Plaintiff expressed concern that throughout the Firm's Newark and satellite offices, several employees had tested positive in December 2022 and January 2023 coupled with the fact that Newark, New Jersey, the Firm's central locale, was a high-risk area throughout the pandemic. Plaintiff Gallardo reminded Defendant Ginarte of an incident that occurred in 2020

wherein Ginarte had advised Gallardo that a Firm attorney with whom they both had contact had tested negative for COVID when in truth the attorney had tested positive. Gallardo asked for Defendant Ginarte and the Defendant firm to provide a reasonable accommodation, a transition period of continued at-home, remote work for a few weeks, noting that there would be no impact on Plaintiff performing his job responsibilities at the Firm. Da36, ¶ 55.

During the January 22, 2023 telephone call, Gallardo further asked for Ginarte to view the requested weeks of continued at-home remote work as leave to care for his ailing 3-year-old son. Gallardo reminded Ginarte that his 3-year-old child continued under active medical treatment due to a severe respiratory illness coupled with ongoing infections and had upcoming medical appointments. Ginarte resisted the request for a reasonable accommodation and leave and told Gallardo that "everyone has personal issues but the law firm business came first." Gallardo advised Ginarte that, based on his, the Plaintiff's, personal history involving multiple miscarriages and his wife's personal history involving a prior child who experienced severe respiratory issues and eventually passed away, he, the Plaintiff, needed to be present for his family during the coming few weeks. Gallardo said he would still be able to continue handling all of his assigned files and there would be no inconvenience to the law firm or its future success with him continuing to work remotely while transitioning back to

the office. Defendant Ginarte rejected Plaintiff's request for accommodation/leave. Id., ¶ 56.

During that January 22, 2023 call, after hearing Defendant Ginarte's rejection of his accommodation/leave requests, Plaintiff Gallardo replied that while working remotely he had continued to handle all of his assigned cases on a daily basis, including depositions, and court appearances and did not require office attendance. Plaintiff told Defendant Ginarte that since the start of the COVID pandemic, Plaintiff had been going to the Newark office when necessary when no other employees were present. Plaintiff further told Defendant Ginarte that he, Gallardo, had no problem transitioning back to the office full-time but needed a few weeks to make sure proper precautions were being taken as several employees were either not vaccinated or had tested positive multiple times. Id., ¶ 57.

During the January 22, 2023 call, Plaintiff reminded Defendant Ginarte that there had been no client complaints about Plaintiff's accessibility, no issues had been raised by anyone about Plaintiff's job performance and he continued to thrive professionally. Among other things, Plaintiff noted the continued growth and prosperity of the Firm throughout the COVID pandemic while other law firms struggled despite Plaintiff Gallardo working remotely as Litigation Manager. Id., ¶ 58. Ginarte continued to oppose Plaintiff's requests for this

reasonable accommodation/leave, irately stating to Gallardo that he, Ginarte, expected that when he telephoned the Firm's office in the coming days, he expected to hear from employees at the office that Gallardo had in fact been physically present at the office daily. Id., ¶ 59.

During the same telephone call, Defendant Ginarte advised Plaintiff that the Firms' employee, Roger Guarda, who reports directly to Defendant Ginarte, was "making too many mistakes" and seemed unable to keep up with his workload. Ginarte discussed one of the cases being handled by Roger Guarda for Ginarte and Guarda's failure to file a statutorily-required Notice of Claim against a public entity. Defendant Ginarte said Guarda's dereliction exposed the Firm to a legal malpractice claim. Roger Guarda had first brought the issue to the attention of Ginarte and Gallardo in a November 30, 2022 email. Da36, ¶ 60, with Ex. C (November 30, 2022 email from Roger Guarda to Ginarte and Gallardo stating "It appears we may have committed malpractice here.")(Da96).

During the same call, Ginarte directed Gallardo to file a lawsuit in the case that had been mishandled by Mr. Guarda. Plaintiff Gallardo told Ginarte that the Defendant Firm had a conflict of interest under the New Jersey's Rules of Professional Conduct (RPCs) that prevented continued representation of the client since the Firm had committed malpractice by failing to file a Notice of Claim against the public entity that injured the claimant in that case. Plaintiff

Gallardo advised Ginarte that instead of the Firm simply filing a defective lawsuit, the Firm should notify the client of the malpractice. Defendant Ginarte responded that the client did not speak English, only Spanish, so he would never detect the Firm's mistake and the case would eventually "go away" if the Firm was unable to settle the case with other potential defendants. Defendant Ginarte instructed Gallardo to "stay quiet" and not post anything to the file or notify the client and proceed as instructed with filing a lawsuit. Gallardo objected because he did not want to be associated with Ginarte's scheme to deceive the client. Ginarte advised Gallardo that at times "we have to do things that are uncomfortable to protect the law firm" and he ordered Gallardo to do as he, Ginarte, demanded. Da36, ¶ 61.

On the morning of Saturday, January 28, 2023, at approximately 11:08 a.m., Mr. Guarda sent an email to Ginarte and Gallardo regarding the case involving legal malpractice that was the subject of his initial November 30, 2022 email and discussed by Ginarte and Gallardo on January 22, 2023 during their call. Mr. Guarda noted that Plaintiff had posted a message to the case file in the aforesaid malpractice matter in which Guarda had noted the firm "fucked up." He offered to delete the posting from the Firm's "NEOS" system. Da36, ¶ 62, with Da098 (Guarda's 1/28/23 email at 11:08 a.m.).

On the morning of Saturday, January 28, 2023, at approximately 11:10 a.m., Defendant Ginarte responded to Roger Guarda's email sent 2 minutes earlier instructing him to delete the emails posted by Plaintiff Gallardo from the Firm's system. Da36, ¶ 63, with Da100 (Ginarte's 1/28/23 email at 11:10 a.m.). One of the emails that the Plaintiff had posted on the Firm's NEOS system was the November 30, 2022 email by Guarda wherein Guarda admitted the malpractice. Da36, at ¶ 63.

At 3:17 p.m. on January 28, 2023, six days after the telephone conversation of January 22, 2023 and a few hours after the above January 28, 2023 email exchange concerning Plaintiff Gallardo creating an accurate NEOS record of the Firm's malpractice, Defendant Ginarte emailed William Wallach, Esq., a lawyer at McCarter & English, a firm that had been representing the Plaintiff in personal matters while, it turns out, that firm, *i.e.*, the McCarter & English law firm, via the work of William Wallach, Esq., was secretly representing Ginarte in efforts to terminate the Plaintiff in retaliation for having engaged in the aforesaid protected activities. In the email, Defendant Ginarte wrote that he had decided not to go forward with the long-planned Gallardo succession agreement but rather to terminate him. Da36, ¶ 64, with Da102 (1/28/23 email from Ginarte to Wallach at 3:17 p.m. stating, "Bill [Wallach], I've decided not to go forward with Gallardo's [succession]

agreement"). In that email, Ginarte conspired with Wallach – who was functioning as both Ginarte's and Gallardo's lawyer on the issue of a succession agreement – to conceal the decision not to go forward with Gallardo as a successor-manager of the entire Firm. Ginarte wrote, "For obvious reasons, I'm not telling Gallardo anything now." Da36, ¶ 64.

On February 1, 2023, at 4:05 p.m., Wallach emailed Ginarte under the heading, "Severance Considerations," obviously reflecting Ginarte's retaliatory decision not only to appoint someone other than Gallardo as successor, but also to fire him in retaliation for all of the aforesaid protected activity. The email provided attachments that would purportedly assist Ginarte in calculating severance for Plaintiff Gallardo. Id., ¶ 65.

Defendant Ginarte's decision to deny Plaintiff's succession as the Firm's manager and to terminate him was in direct retaliation for Plaintiff having asked for the reasonable accommodation and family medical leave (because of Plaintiff's disability and his son's illness) as well as Plaintiff's opposition to the aforesaid violations of the New Jersey Supreme Court's RPCs. Da36, ¶ 66.

On February 3, 2023, during a weekly Litigation Department Zoom meeting with all the litigation attorneys present, Ginarte, concealing his plans to terminate the Plaintiff on February 15, 2023, praised Plaintiff for his hard work and commitment to Ginarte Law and thanked him in the presence of every

employee on Zoom for Ginarte Law for the success the Firm had that month. Da36, ¶ 67.

On Sunday, February 5, 2023, Ginarte and Wallach, Esq. continued to conspire, secretly planning to mail letters on February 14, 2023 to all of Plaintiff's existing clients advising that Plaintiff was no longer with the Ginarte Law Firm as of February 15, 2023 and soliciting their cases while unethically failing to provide any contact or forwarding information about Plaintiff's continuing law practice. On February 5, 2023, Defendants secretly planned to terminate the Plaintiff on February 15, 2023 by hand-delivering a letter to Plaintiff at his residence thereby cutting him off from his Firm email and files and obstructing his ability and capacity to communicate with his clients in compliance with the Rules of Professional Conduct. Da36, ¶ 68, with Da104 (2/5/23 email from Ginarte to Wallach, Esq.)

On February 9, 2023, in a telephone call, Plaintiff reported to Ginarte that he had settled additional cases and assisted others in settling cases since discussing the topic on January 22, 2023 and further told Ginarte that the Firm was going to have its best year in its history. Ginarte once again highly praised Plaintiff's job performance, thereby lulling Plaintiff into a sense of employment security while Ginarte secretly planned to terminate Plaintiff without notice. Da36, ¶ 69.

F. Plaintiff Objects to Ginarte's Sexual Harassment of a Female Paralegal

On or about February 10, 2023, a young female paralegal at Ginarte Law texted Plaintiff and asked him to call her. Plaintiff subsequently spoke to the paralegal on the phone. The paralegal complained to him that Defendant Ginarte had, in the workplace, while in a third-floor conference room, inappropriately touched her body. She told Plaintiff that she was also going to report the incident to an associate of Ginarte Law, Alphonse Petracco, whom she also worked for at the law firm, since he was currently in the office. Da36, ¶ 70.

On or about February 10, 2023, Plaintiff told Defendant Ginarte that he objected to Ginarte's sexual harassment of the female paralegal. Plaintiff told Ginarte that he should not have engaged in such behavior towards a female staff member. Ginarte did not express any remorse. Rather, he asked Plaintiff if anyone else knew. Plaintiff gave him the name of Mr. Petracco. Id., ¶ 71.

G. Plaintiff Objects to Other Unethical Conduct

On February 9, 2023, Plaintiff was defending one of Ginarte Law's personal injury clients, A.S., during a deposition and learned during the proceedings that the worker's compensation attorney handling her file at Ginarte Law had committed legal malpractice during the handling of the client's worker's compensation claim, and had lied to the client in order to conceal the

malpractice. Da36, ¶ 72. The error was substantial and would deprive A.S. of future reimbursement for certain medical expenses. Plaintiff was candid with the client about the malpractice and he told the client he would get back to her on how to remedy the matter. Id., ¶ 73.

Plaintiff reasonably believed, based on the foregoing information and his knowledge of the RPCs governing New Jersey lawyers, that: (a) Ginarte Law was violating the RPCs prohibiting lawyers from continuing to represent clients when a substantial conflict of interest arose; and (b) others at Ginarte Law were violating the RPCs that prohibit lying to or intentionally misleading a client. Id., ¶ 74.

On or about February 9, 2023, Plaintiff voiced his objections to the unethical course of conduct in the A.S. case to Ginarte. Ginarte said he would "look into the matter" but in the meantime he directed Plaintiff to refrain from recording anything on the case file about the malpractice and to take no action. Id., ¶ 75.

On or about February 10, 2023, Plaintiff spoke to Ginarte and told him the client was waiting to hear back about how to remedy the situation. Ginarte again told Plaintiff to "keep quiet." Id., ¶ 76.

On February 14, 2023, Plaintiff emailed the worker's compensation attorney involved and Ginarte concerning the said issue and internally posted a

note to Ginarte Law's case management software, NEOS, concerning the malpractice in the worker's compensation case. Consistent with the ethics rules, Plaintiff knew that far from "keeping quiet," Ginarte Law should have fully informed A.S. of the malpractice and that Ginarte Law should have explained the conflict of interest to her. Id., ¶ 77. In contrast, Ginarte had a habit of questionable practices with regard to keeping his files up to date and accurate. Da36, ¶ 78, with Da98, Da100 (1/28/23 emails from Guarda and Ginarte regarding deleting messages).

At 8:30 a.m. on February 15, 2023, Plaintiff received a telephone call from the worker's compensation attorney during which he stated he had spoken with Ginarte about the malpractice issue and that Ginarte's instruction was to "simply stay quiet and not discuss this matter further." Da36, ¶ 79.

Plaintiff objected to Ginarte's instruction and reminded the attorney that the client knew about the malpractice and was awaiting a call back about how to remedy the situation. The attorney then told Plaintiff that he would call Ginarte and get back to him. About one-and-a-half hours later, a messenger appeared at Plaintiff's home and dropped off a letter from the Firm, discussed below. Id., ¶ 80.

H. Defendants Abruptly Terminate Plaintiff's Employment and Purport to "Terminate" Plaintiff's Partnership Interest

On February 15, 2023, while working from home, Plaintiff received a

letter dated February 14, 2023 from Ginarte terminating Plaintiff's employment and partner status at Ginarte Law effective February 15, 2023 ("the Termination Letter"). Da36, ¶ 81, with Da106.

The Termination Letter specifically admitted that Plaintiff was "an employee" of the Firm, when it wrote: "Please accept this letter as notice of termination of your status as a partner **and employee** with Ginarte Gallardo Gonzalez & Winograd, LLC…" Da036, at Da106, ¶ 1. The Termination Letter further admitted that Plaintiff was an employee, when it said that his "final paycheck will include your salary through February 15" and payment of three weeks' vacation pay, "less applicable withholdings and deductions." Da106, at second paragraph.

The Termination Letter further states that the termination is "pursuant to Article 16 of the Partnership Agreement dated November 8, 1991[.]" Da36, at ¶ 82, Da106. However, Plaintiff did not work at Ginarte Law in 1991, and has never seen, reviewed, signed or been provided a copy of any so-called partnership agreement or any such agreement dated as indicated. Da36, ¶ 83. Moreover, as noted above, Plaintiff and Ginarte explicitly certified to Ginarte Law's lender, Esquire Bank, N.A., in 2019 that **"[t]he Partnership does not have a formal Limited Liability Partnership Agreement as in effect on the date hereof**." Da36, ¶ 84, Da90 (emphasis added).

The February 15, 2023 Termination Letter (Da106) also requested that Plaintiff sign an enclosed document titled, Separation Agreement and General Release ("Proposed Separation Agreement"). Da36, ¶85, Da109. The Proposed Separation Agreement in the Recital Section expressly referenced that Plaintiff was "**employed**" and that the Firm had "terminated Partner's **employment** and status as a partner in the Firm…" and further provided for a release of claims under numerous laws – **including the LAD and CEPA** – that provide protections and rights for employees and mention "Partner's employment and separation from employment with the Firm… ." Da109, at p. 1 and §2(c)(Da110). That Proposed Separation Agreement also had a proposed confidentiality provision with mandated language under the LAD about confidentiality being unenforceable. Da109, at §6.

That same day, Plaintiff was locked out of the Firm's offices and his computer access and access to clients' contact and files cut off. Da36, ¶ 87, 88.

In addition, since the termination, Ginarte has confiscated all of Plaintiff's personal office belongings. Id., ¶ 89. Ginarte has failed and refused to return these items to Plaintiff. Id., ¶ 90.

Ginarte has also improperly scrubbed any mention of Plaintiff and his success from the Firm's website, in many instances wrongfully attributing the winning outcomes to himself instead, in violation of the New Jersey ethics rules

prohibiting false attorney advertising, RPC 7.1, as detailed in the verified, First Amended Complaint. D36, ¶ 91-97 with Exs. J (Da119), K (Da131), L (Da141), M (Da143), N (Da145). All of the links to Plaintiff's clients' victories improperly imply that Ginarte, and not Gallardo, worked to obtain the legal victory in the case. This is misleading to anyone visiting the site, injurious to Plaintiff, and especially egregious since Ginarte did not litigate cases at all during this time, and was not involved in any way with Plaintiff's cases. Da36, ¶ 98.

Moreover, shortly after Plaintiff's termination, Defendants hastily sent vague and ambiguous letters to Plaintiff's and the Firm's clients, in violation of RPC 1.4. In particular, those letters sent in Spanish (as many of the Firm's clients are Spanish speaking), despite claiming to give the client a choice of counsel, ***instruct*** the client to sign the top line indicating they will remain with the Firm. Da36, ¶ 99. Plaintiff's name is not mentioned as an option on the signature page for the clients to consider at all, nor is contact information given for Plaintiff. Da36, ¶ 100, with Da148. Indeed, several clients have contacted Plaintiff and indicated their desire to keep their files with him, and further advised that the electronic version sent to them only gave a DocuSign option to remain with Ginarte Law. Da36, ¶ 101.

Defendants' service of these letters and their content violate RPC 1.4, which requires a lawyer to keep a client both "reasonably informed about the status of" the client's matter and provide the client with enough information "to permit the client to make informed decisions regarding the representation." In the case of an attorney leaving a firm, RPC 1.4 requires pre-departure notification to affected clients in all circumstances because a law firm's clients and the clients' files are not the "property" of the firm. Da36, ¶ 102.

More egregious, on the evening of Saturday, February 18, 2023, while Plaintiff was home with his wife and son, Ginarte sent an armed guard to Plaintiff's house to hand deliver a packet of these letters, purporting to be a list of clients who had "chosen" to stay with the Firm, and threatening Plaintiff not to contact any of them. Id., ¶ 103, with Da153. Defendant Ginarte took this action to intimidate and threaten Plaintiff, and Plaintiff's wife was alarmed by the presence of an armed guard at their home. Da36, ¶ 104.

Plaintiff also learned that Ginarte sent an internal email to Defendants' employees after Plaintiff's termination instructing them not to provide any information to Plaintiff regarding his clients, including their contact info and case status. Da36, ¶ 105, with Da158.

Defendant Ginarte has also been spreading malicious falsehoods about Plaintiff to at least one attorney at Ginarte Law, stating falsely that Plaintiff is

attempting to "sabotage" Ginarte Law, has acted "unethically" and is trying to "steal" Defendants' clients. Ginarte knew these statements were false, and made them to hurt Plaintiff and future business prospects of Plaintiff. Da36, ¶ 106. Upon information and belief, Ginarte has made similar statements to at least one client of Plaintiff and/or Ginarte Law. Da36, ¶ 107.

Several of Plaintiff's clients have nonetheless contacted him seeking information about his status with the firm, and have stated that based on communications from Ginarte, they "thought something happened" to Plaintiff or that "he was dead." Id., ¶ 108. Several clients have stated to Plaintiff that they felt, based on communications from Defendants, that they had no choice but to remain with Ginarte Law and were advised by Ginarte that keeping their cases with Plaintiff would "delay their case". Id., ¶ 109. Some of these same clients have indicated their desire to keep their cases with Plaintiff. Id., ¶ 110. Additional facts in support of each separate count are set forth in detail in the 218 paragraph First Amended Verified Complaint. Da36.

STANDARD OF REVIEW

The Trial Court's refusal on a motion for reconsideration to rescind the Defendants' prior express waiver of arbitration is reviewed under an abuse of discretion standard. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). As to the earlier October 17, 2023 Order, it is reviewed *de novo* as to

questions of law, Barr v. Bishop Rosen & Co., Inc., 442 N.J. Super. 599, 605 (App. Div. 2015), but factual finding, as admitted by Defendants (Db12), are subject to a clear error standard. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974). See also, Brickstructures, Inc. v. Coaster Dynamix, Inc., 952 F.3d 887, 891 (7th Cir. 2020)(applying a clear error standard and explaining "there is both a factual and a legal dimension to a waiver inquiry…the facts drive the waiver analysis, but the inquiry takes direction from the background legal rules,…we review *de novo* the district court's determinations …[of] legal principles, …but defer to the district court's findings with respect to the facts and the legal consequences of those facts.").

POINT I

THE TRIAL COURT CORRECTLY FOUND AN EXPRESS WAIVER OF THE RIGHT TO ARBITRATE IN BOTH ITS ORDERS (Da1, Da3)

A. Defendants Expressly Waived Arbitration in the Court Below and Have No Legal or Factual Basis For Rescission of That Waiver

Judge Spencer's October 11, 2023 Opinion and October 17, 2023 Order, correctly found that in a prior proceeding in the same matter before Judge Adubato, the Defendants had *expressly* waived any right of arbitration they claimed they had. The Trial Court read into the record Judge Adubato's question about whether the Defendants were waiving their demand for arbitration and the defense counsel answered "Yes." (3T40:20 to 41:5).

The transcript to which Judge Spencer specifically referred is as follows:

> Judge Adubato:…**I want to confirm on the record—there had been a previous request that there is going to be a motion filed for, the matter to go to arbitration. I believe it's been established that that's been waived and arbitration is no longer an issue. Correct**?
> Mr. Freeman [for all Defendants]: **Correct your Honor**.
> Mr. Genova [for the Plaintiff Gallardo]: Correct your Honor.

[3/23/23 Court Hearing, 2T6:12-19, emphasis added]

Thus, on the record, Defendants had, before Judge Adubato, completely and expressly abandoned any claim to arbitration and Judge Spencer's decision was therefore based on a correct and rational basis and was grounded in probative and competent evidence.

In their reconsideration motion below as well as on appeal now, Defendants harp on the Cole v. Jersey City Med. Ctr., 215 N.J. 265 (2023) standards for an *implied* waiver. But the Trial Court's Order as it relates to the waiver issue was properly premised on an *express* waiver, so it was not necessary for Plaintiff to show waiver by pointing to the kind of circumstantial evidence set forth in Cole, supra. Nonetheless, as discussed within, Plaintiff more than meets the Cole factors, even though he did not have to.

It is beyond contest that our courts recognize the binding nature of an express waiver of arbitration:

> An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights…**Parties can expressly waive their rights to arbitration**.

[Spaeth v. Srinivasan, 403 N.J. Super. 508, 514 (App. Div., 2002) (emphasis supplied).] [see also, Wein v. Morris, 194 N.J. 364, 376 (2008)].

Clearly, Defendants' confirmation of the aforesaid express waiver before Judge Adubato, after their failure to comply with the Chancery Court's Order for filing a motion to compel arbitration, fully justified the Trial Court's decision to deny a rescission of the arbitration clause. The mere fact that Defendants changed lawyers months after the express waiver was properly of no moment in the Trial Judge's decision.

Not only was an express waiver made before Judge Adubato on March 23, 2023, but an express waiver was also made by the Defendants on March 17, 2023 when *Defendants* elected to file a Complaint against the Plaintiff in Chancery ***with a jury demand***, their Rule 4:5-1(b)(2) Certification to their Complaint mentioned NO contemplated arbitration filing as they had abandoned it at that point – all acts completely at odds with any claim that the matter belonged in arbitration. Da8, Da18-19.

Judge Spencer's October 17, 2023 Order denying Defendants' motion to compel arbitration and January 30, 2024 Order denying reconsideration were both correctly decided.

B. Even though *Cole* Does Not Apply for an Express Waiver, the Trial Court Applied *Cole* and Correctly Found Waiver

Even though the Trial Court did not have to apply the Cole factors, which apply only when there is a question about an implied waiver, on reconsideration, the Trial Court did so, at Defendants' urging and still found Defendants expressly waived arbitration:

> When the Court considers -- and, you know, I've peppered Mr. Carmagnola with questions with regards to whether or not Cole is even applicable in light of the fact that there is an **express** waiver. And for the record, the Cole case is cited at -- it is Cole v Jersey City Medical Center at 215 N.J. 265, a 2013 case. And even with the 7 factors outlined there, the Court did state that no one factor is dispositive as to whether or not the waiver occurred. But the 7 factors that are outlined under Cole are *** [*court lists factors*]
>
> And Mr. Carmagnola has argued that and although it didn't specifically say it, he has argued that there's no prejudice if the Court were to grant -- if the Court were to grant his motion and order that there was no waiver.
>
> * * *[*court discusses Cole factors*]
>
> **There's no trial date and the resulting prejudice, again I believe that was argued. This Court at this point regardless of what these 7 factors are, the facts are that there was an express waiver of arbitration. It was expressed on the record before the Honorable Lisa Adubato on March 23rd**. In addition to that, subsequent to that and subsequent to -- subsequent to that the parties have come before this Court. This matter was argued before the Court initially as part of the motion that was filed. And this Court had a chance to hear from both counsel at that time as to their positions.
>
> And today, the Court has gone even further to listen to the parties with regards to their positions and also to explore even deeper into the transcript from the proceedings before Judge Adubato. **And this Court finds that with regards to the issue of waiver, this Court finds that the defendants expressly waived arbitration by way of the waiver, by way of the statements made**

> **by Mr. Freeman before Judge Adubato back on March 23rd. There is nothing before this Court to contradict that. And the fact that now the parties are seeking to -- seeking to move this matter to arbitration regardless of the fact that there has not been a lot that has taken place is irrelevant to this Court. There's nothing for this Court to believe that at the time it was expressly waived that that was not the intention. So with regards to that issue, reconsideration is denied.**
> [4T46:10-49:21, emphasis added].

Defendants argue that the Trial Court's earlier statement about prejudice, including the "[t]he only factor in Cole that would be relevant to your [Defendants'] argument is the prejudice," [Db17, citing 4T40:7-12] somehow is contradicted by the Trial Judge applying Cole and still finding waiver. Contrary to Defendants' argument, the Trial Judge did not contradict herself. Judge Spencer went on applying each of the Cole factors, as urged by Defendants, and nonetheless, found that Defendants had expressly waived their right to arbitrate.

Even if the Court were to apply the seven Cole factors to an express waiver –a process that makes no legal sense – those factors weigh in favor of Plaintiff, not Defendants. As to the first factor, although Defendants waited two months before they filed their motion to compel arbitration, the delay is significant here because in so doing, Defendants violated the March 8, 2024 Briefing Order by Judge Adubato (Da5, Pa17), and had they complied with it, the matter would have been decided months earlier in Chancery. A two-month delay when it

comes to compliance with a Court Order is significant and weighs in Plaintiff's favor, not Defendants, under Cole, supra.

For the second factor, Defendants had filed motions: one in the Chancery for a TRO, which was denied, and another one, a dispositive motion to dismiss Plaintiff's statutory claims under the LAD and CEPA after the cases were transferred to the Law Division, arguing that Plaintiff was not an "employee" combining that request for dispositive relief with its motion to compel arbitration, which were also denied in the October 17, 2023 Order. For the third, Defendants' express waiver of arbitration in Chancery, followed by their attempt to reverse that by filing a motion to compel arbitration in the Law Division, were certainly part of their litigation strategy and a change in that litigation strategy, as clearly both were done purposely by counsel in court proceedings.

For the fourth, Plaintiff had served discovery upon Defendants on May 1, 2023, prior to their motion to compel arbitration being filed, and Defendants as part of their motion to dismiss/compel asked for bifurcation of discovery – clearly an attempt by Defendants to get discovery in the court proceedings while at the same time attempting to force Plaintiff into arbitration. As Defendants noted in their Brief (Db20), Plaintiff had also served deposition notices and also had served a subpoena upon and obtained documents from Defendants' prior counsel. Defendants also served discovery upon Plaintiff.

For the fifth factor, as indicated above, even prior to filing any pleading, Defendants indicated to the Chancery Court that they intended to file a motion to compel arbitration. Then, after filing their own lawsuit against Plaintiff in Chancery Division with a Jury Demand, they expressly waived their right to arbitration before Judge Adubato. For the sixth Cole factor, the proximity of the motion to compel to a trial date is not applicable as none had been set.

C. Prejudice is No Longer a Viable Factor

As to the final Cole factor, whether Plaintiff has suffered any prejudice, it is immaterial under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, and it is not a factor to consider when dealing with either an express or implied waiver. In 2022, the United States Supreme Court held that under the FAA even in an implied waiver situation, prejudice, *i.e.* "detrimental reliance," should not be a consideration. Rather, the court's focus should be on the actions of the party who allegedly waived the right to arbitrate – Morgan v Sundance, Inc., 596 U.S. 411, 412, 142 S.Ct. 1708 (2022). As aptly stated by Justice Kagan:

> Outside the arbitration context, a federal court assessing waiver does not generally ask about prejudice. **Waiver, we have said, "is the intentional relinquishment or abandonment of a known right**." United States v. Olano, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (internal quotation marks omitted). **To decide whether a waiver has occurred, the court focuses on the actions of the person who held the right; the court seldom considers the effects of those actions on the opposing party. That analysis applies to the waiver of a contractual right, as of any other. As Judge Colloton noted in dissent below, a contractual waiver**

> **"normally is effective" without proof of "detrimental reliance.**" 992 F.3d at 716; see Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390 (C.A.7 1995) (Posner, C. J., for the Court). So in demanding that kind of proof before finding the waiver of an arbitration right, the Eighth Circuit applies a rule found nowhere else—consider it a bespoke rule of waiver for arbitration.
>
> ***
>
> But the FAA's 'policy of favoring arbitration' does **not authorize federal courts to invent special, arbitration-preferring procedural rules** Moses H. Cone, 460 U.S. at 24, 103 S.Ct. 927. Our frequent use of that phrase connotes something different. "**Th[e] policy, we have explained, "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.**" Granite Rock Co. v. Teamsters, 561 U.S. 287, 302, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) (internal quotation marks omitted). Or in another formulation: The policy is to make "**arbitration agreements as enforceable as other contracts, but not more so**." Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404, n. 12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. **But a court may not devise novel rules to favor arbitration over litigation.** See Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218–221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985).
> [Morgan v. Sundance, 596 U.S. at 417, emphasis added]

Defendants cite to Morgan v. Sundance, supra, in their Brief (Db15), but down-play its significance. Central to Defendants' Cole argument was the assertion that Plaintiff would not suffer "prejudice" by the Defendants' actions if the court enforced arbitration. Therefore, Defendants argued, the Defendants' waiver of arbitration should be abrogated and the Plaintiff's should be ordered to arbitration.

But the Supreme court case of Morgan v. Sundance, supra, completely

defeats Defendants' efforts to use the Cole "prejudice" factor. As indicated above, Morgan v. Sundance, supra, holds that in a case governed by the FAA, **like this one involving interstate commerce**,[2] prejudice should no longer be considered a factor in assessing whether a party has impliedly waived arbitration through its actions and inaction. Prejudice is completely immaterial.

In sum: (1) this is an express waiver case, so the Cole factors do not apply at all here and the Trial Court correctly declined to rescind a waiver of arbitration; (2) even if the Cole factors were relevant – and they are not – the Cole factor of prejudice *vel non*, relied upon centrally by the Defendants is never a determinative factor at all under the Supreme Court's Morgan decision.

Although Defendants also cite to Marmo and Sons General Contracting LLC v. Biagi Farms LLC, 2024 WL 2492213 (NJ App. Div., May 24, 2024), an unquestionably *implied* waiver case, it does not assist them here. Marmo found, applying Cole's totality of the circumstances approach, that Marmo had impliedly waived its right to arbitrate by waiting 8 months to move to compel arbitration. Id., at * 9.

In so ruling, this Court *recognized that given the holding of the United States Supreme Court in Morgan, supra*, the *Cole* prejudice factor can never be

[2] Defendants admitted that the FAA applies to this case in their papers and during argument below. 4T3:11-4:3.

"dispositive" in determining whether or not an implied waiver exists, and that the prejudice element was "not controlling in [Marmo], given the totality of the circumstances that otherwise, on balance, further establish waiver." Marmo, at *1. Again, here, there is no need for this Court to reach the Cole factors at all because here we have an express waiver. The Trial Court below did not abuse is discretion in denying recission of that express waiver.

To the extent that this Court delves into the well of the prejudice element, Defendants wrongly argue that the Trial Court's "initial comment that 'prejudice' was the only factor that applied to Defendants' argument, implies a finding that Plaintiff suffered no resulting prejudice here" (Db 21) – but the Trial Court made no such finding – implied or otherwise. Rather, the Trial Court correctly found that this case involves an express waiver of arbitration so there was no need for Plaintiff to prove any prejudice.

Moreover, even though Plaintiff is not required to show prejudice, it is plentiful here. Defendants' reversing course in the Law Division by attempting to enforce an outdated, unenforceable arbitration clause that Plaintiff never saw and never signed, after Defendants intentionally missed a court Ordered deadline for filing such a motion and then expressly waived the right to compel arbitration before the Chancery Court on the record, undoubtedly has delayed this matter and has wasted both time and substantially increased the fees

incurred by Plaintiff in the process. Defendants wanted the benefit of a public forum in court when they filed their separate lawsuit with a jury demand against Plaintiff in an attempt to tarnish his reputation with baseless claims, then sought to bury Plaintiff's claims against Defendants in the secrecy of arbitration. All of this is highly prejudicial to Plaintiff. However, Plaintiff need not show any prejudice here – this is an express waiver case for which Cole is inapplicable – and under Morgan, supra, prejudice is not even a factor.

POINT II

PUBLIC POLICY DOES NOT FAVOR THE RIGHT TO RESCIND AN EXPRESS WAIVER AND DOES NOT FAVOR ARBITRATION OVER A JURY TRIAL

Defendants illogically argue that a public policy favoring arbitration somehow supports the right of a party to rescind an express waiver of arbitration. (Db24). Defendants' reliance on Garfinkle v. Morristown Obst. & Gynec. Assoc., P. A., 168 N.J. 124 (2001) is of no help to them. There, some two decades ago, the Court refused to enforce an arbitration clause as to both the LAD and common law claims where the arbitration provision did not clearly and unmistakably indicate that the employee was giving up their statutory and constitutional rights to have their claims heard in court before a jury. Id., at 136-137. That holding has no bearing upon the issue of rescinding an express waiver of arbitration.

As to Defendants' so-called federal public policy favoring arbitration, the United States Supreme Court has now clarified that the said policy "is **merely** an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon **the same footing as other contracts**." Morgan, 596 U.S. at 417 (cites omitted). Thus, an arbitration clause is no less susceptible to waiver under state contract law than any other contractual provision.

In 2021, the FAA was amended to expressly exclude gender or sexual discrimination and retaliation claims from arbitration in Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (H.R. 4445); Pa38 (official statements). Thus, federal law now is clear that forced arbitration is "disfavored." New Jersey law also provides that any agreement, such as an arbitration agreement, which hampers a victim's rights under the LAD is **against** the public policy of this State. N.J.S.A. 10:5-12.7.

Defendants further argue that since there is no writing or subsequent Order memorializing the express waiver that they should be able to rescind it. There is no requirement that an express waiver be in writing or be in a Court Order to be binding. But here, there is a writing – a certified Court transcript. Again, the Court below did not abuse its discretion in denying recission of an on-the-record waiver nor did the Court err by any other standard.

POINT III

THE TRIAL COURT CORRECTLY FOUND NO ENFORCEABLE ARBITRATION CLAUSE EXISTED (Da1, Da3)

On January 26, 2024, Judge Spencer responded to Defendants' arguments on reconsideration by deciding not to premise her ruling against arbitration on the non-existence of an operative arbitration clause but instead premised her ruling on the Defendants' express, on-the-record waiver of arbitration before Judge Adubato. 4T45:16-46:19. Thus, with regard to the January 30 Order, Defendants got reconsideration, but still did not prevail on their burden to overturn the October 17, 2023 Order that found no enforceable arbitration provision.

When reviewing a motion to compel arbitration, the court applies a two-prong inquiry: (1) whether there is a valid and enforceable agreement to arbitrate disputes, and (2) whether the dispute falls within the scope of the agreement. Wollen v. Gulf Stream Restoration and Cleaning, LLC, 468 N.J. Super. 483, 497 (App. Div. 2021).

As of 2019 and continuing to the present, there was no written partnership agreement containing an arbitration clause. Da90. In 2019, when Plaintiff was a 5% owner of the Firm, Defendant Ginarte explicitly abandoned the 1991 contract –entered into well before Plaintiff was with the Firm – that had an arbitration clause, albeit, as discussed within, a fatally defective one. In a 2019

certification to the Esquire Bank, Defendant Ginarte certified that the Ginarte Firm "**does not have a formal Limited Liability Partnership Agreement as in effect on the date hereof**." Da36, at Da90. Thus, according to Defendants' own certification to their Bank, at the time of Plaintiff's termination and subsequent litigation, absolutely no arbitration clause was in effect because Defendants had abandoned the 1991 Agreement as of May 2019.

Even without the 2019 signed certification and the explicit waiver discussed above, the alleged 2007 document "Addendum to Partnership Agreement" (Da220) – which was also recognized as void twelve years later in 2019 – does not bind Plaintiff to the arbitration provision in the 1991 Partnership Agreement. The 1991 Partnership Agreement was never given to Plaintiff and he never signed it. The 2007 Addendum admits that the 1991 Agreement was previously amended on other occasions to allow numerous others to join (Da220), yet Defendants did not supply those amendments to the Trial Court, nor to Plaintiff, and there is nothing in the 2007 document to alert Plaintiff that he was agreeing to any of the provisions in the 1991 Agreement, let alone the arbitration provision.

It is fundamental that since "arbitration involves a waiver of the right to pursue a case in a judicial forum, 'courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of

the ramifications of that assent.'" Atalese v U.S. Legal Serv. Grp., LP, 219 N.J. 430, 442-43 (2014), certiorari den. U.S. Legal Serv. Grp., LP. v. Atalese, 576 U.S. 1004 (2015) (citation omitted). Thus, a party cannot assent to something like an arbitration provision in another document unless they were given a copy of it and it is incorporated expressly. For example, in Wollen v. Gulf Stream, 468 N.J. Super. at 498, this Court ruled that an arbitration provision on a website was unenforceable against a consumer where the agreement was embedded under other pages, did not require any express assent, nor reasonable notice of its existence:

> **As we have recognized in the context of whether multiple writings constitute a single contract: "In order for there to be a proper and enforceable incorporation by reference of a separate document ... the party to be bound by the terms must have had 'knowledge of and assented to the incorporated terms**.' " …That knowledge and assent was absent here.
> Wollen, 468 N.J. Super. at 503 (emphasis added, cites omitted).

Consequently, Defendants' argument that there was an agreement to arbitrate is wrong on many fronts. The 1991 Agreement was no longer in existence as early as 2019, and the Trial Court correctly, on reconsideration, still found: "there are some questions as to its existence." 4T45:16-46:19.

Even if there had not been any waiver, and even if there had not been a voiding of the obsolete 1991 Agreement (that Plaintiff had never signed, and never seen and never assented to), the arbitration clause in it was unenforceable

and unconscionable. The 1991 Arbitration provision is remarkedly limited in scope – to the 1991 Agreement itself. It is even more limited than the one struck down in Garfinkle, supra, where the Court refused to enforce an arbitration agreement against a shareholder/employee in an LAD case, since it devoid of any language that plaintiff was giving up his rights to litigate his claims in court. In Garfinkle, the unenforceable provision read:

> Except as otherwise expressly set forth in Paragraphs 14 or 15 hereof, any controversy or claim arising out of, **or relating to**, this Agreement or the breach thereof, shall be settled by arbitration in Morristown, New Jersey, in accordance with the rules then obtaining of the American Arbitration Association, and judgement [sic] upon any reward [sic] rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof.
> [Id., 168 N.J. at 128].

Here, the language is limited to just disputes over the Agreement itself, as the "relating to" language in Garfinkle is missing:

> **Any controversy or claim arising out of this Agreement** shall be settled by arbitration (except as otherwise noted in this Agreement) in accordance with the Rules of the American Arbitration Association and judgment upon the award rendered may be entered in any Court having jurisdiction. [Da218, emphasis added].

Consequently, Plaintiff's claims are all outside of the 1991 Agreement – *i.e.*, those based on his status as an attorney-employee – *i.e.*, under the Tortious Interference claims (Count Seven), the two LAD counts (both inadvertently named Count Eight), CEPA (Count Nine), NJFLA (Count Ten), Conversion (Count Eleven), IIED (Count Twelve), and Defamation (Count Fourteen), as

well as claims over case fees, expressly do not even fall within the scope of the 1991 Agreement. Even the other claims (Counts One to Six and Thirteen) that relate to Plaintiff's status as a minority partner and 5% equity owner, which did not occur until late 2018, are also outside of the arbitration clause which was limited to the 1991 Agreement itself, which, as said, was void as of 2019.

In addition to the claims not falling within the scope of the arbitration language, the 1991 provision which Defendants rely upon is unenforceable since it fails, like in Garfinkle, supra, to advise Plaintiff that he is waiving his statutory and constitutional rights to seek regress in court, including a jury trial and appellate rights. "An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights." Knorr v. Smeal, 178 N.J. 169, 177 (2003). Additionally, the arbitration clause here is woefully deficient since it does not indicate who has to pay for the arbitrator's fees/costs and does not even indicate it is binding.

Courts have struck down similarly deficient or unclear arbitration clauses. Atalese, 219 N.J. at 441 (absence of language about giving up statutory rights made arbitration clause unenforceable); Marchak v. Claridge Commons, Inc., 134 N.J. 275 (1993)(unenforceable it did not clearly state that buyer was electing arbitration as his sole remedy); NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424 (App. Div. 2011)(provisions among various

documents were too plagued with confusing terms, inconsistencies, so arbitration was unenforceable); Barr v. Bishop Rosen & Co., supra (documents during employee's 17 years failed to show he agreed to arbitrate); Ogunyemi v. Garden State Med. Cntr., 478 N.J. Super. 310 (App. Div. 2024)(clause was ambiguous and unenforceable); Delta Funding Corp. v. Harris, 189 N.J. 28, 42 (2006)(requirement that employee pay arbitration costs can have chilling effect); Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 270 (3d Cir. 2003)(unconscionable as parties had to pay their own arbitrator's costs).

Accordingly, Defendants' attempt to overturn the October 17, 2023 Order and January 30, 2024 Order that found that there was no enforceable arbitration provision fails.

CONCLUSION

Plaintiff requests that this Court affirm the Trial Court's two Orders and uphold the denial of Defendants' motions and grant Plaintiff his costs on appeal.

Respectfully submitted,
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Dated: July 29, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-002068-23

MICHAEL A. GALLARDO, ESQ.,

Plaintiff-Respondent

-vs-

JOSEPH A. GINARTE, ESQ. and GINARTE GALLARDO GONZALEZ & WINOGRAD, L.L.P. d/b/a GINARTE GONZALEZ WINOGRAD L.L.P., John Does 1-10 and ABC Corporate Entities 1-10, all fictitious entities,

Defendants-Appellants.

Civil Action

On Appeal from:
Superior Court of New Jersey
Law Division: Essex County
Docket No. ESX-L-002267-23

Sat Below:
Hon. L. Grace Spencer, J.S.C.

DEFENDANTS-APPELLANTS' REPLY BRIEF IN FURTHER SUPPORT OF APPEAL

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Submission Date: August 12, 2024

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PRELIMINARY STATEMENT

The Trial Court's January 26, 2024 Opinion clearly established that Defendants-Appellants satisfied the criteria in Cole v. Jersey City Medical Center, 215 N.J. 265 (2013), which assessed the impact of a party's waiver on the proceedings. Indeed, our Supreme Court's analysis in Cole not limit its application only to an implied arbitration waiver. The record below, in a thorough analysis conducted by the Trial Court, established that the Plaintiff-Respondent did not rely upon the subject waiver, and it did not provide the Appellant any unfair advantage under circumstances infinitely less impactful than precedent that has directed arbitration.

Falling short of calling Plaintiff-Respondent's argument below subterfuge, the Trial Court recognized on reconsideration that he failed to support that the subject arbitration clause did not exist. Confronted with that finding, the opposition desperately manufactures any number of issues to distract from and to avoid being held to the agreement and arbitration provision that he reviewed, considered and agreed to. Applying the Cole criteria, Defendants-Appellants accordingly seek enforcement of a valid arbitration agreement, notwithstanding the waiver upon which Respondent relies.

LEGAL ARGUMENT

POINT I

DEFENDANTS' SATISFACTION OF THE COLE CRITERIA PRESENTS A COMPELLING BASIS TO PERMIT ARBITRATION (DA1-2)

Plaintiff's opposition seeks to muddy the waters and misdirect this Court towards the erroneous conclusion that an express waiver of arbitration at the early stages of a case forever binds the waiving party without consideration of how that waiver has impacted the proceedings or other relevant factors. In other words, under Plaintiff's analysis, a verbal, express waiver can never be changed or reconsidered at any time[1]. Given the presumption against waiver of arbitration and Defendants' satisfaction of the fact-sensitive criteria in Cole, the explicit nature of the waiver by Defendants' former counsel is far from the type of inconsistent conduct that warrants depriving parties from the arbitration forum they bargained for. In sum, Plaintiff's opposing arguments fail to refute the conclusion that Defendants have viable grounds to pursue arbitration of Plaintiff's partnership-related claims, notwithstanding the express waiver made during the incipient stages of this matter.

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[1] Contrast this with scenarios where the Court's requirements are much more stringent when other significant rights are impacted. R. 1:40-4(i)(requiring a settlement reached at mediation to be reduced to writing and signed by each party) and R. 4:37-1(a)(requiring a written stipulation of dismissal signed by all parties who have appeared in the action to dismiss an action where an Answer has been filed).

A. New Jersey Precedent Addressing Waiver of Arbitration Through Implied Conduct Supports Defendants' Position.

In ruling on reconsideration, the Trial Court deliberatively went through a fact-sensitive balancing of the Cole factors, which conclusively demonstrated that Defendants satisfied the criteria considered to compel arbitration of Plaintiff's partnership claims. Plaintiff's numerous attempts to persuade this Court that the valid arbitration agreement here should not be enforced are unpersuasive, and above all, offer no compelling basis to find that an express waiver, as opposed to a waiver implicated from a party's litigation conduct, negates the relevance and import of the Cole criteria.

Initially, Plaintiff's argument that Defendants made an express waiver of arbitration through the March 17, 2023 Chancery action (ESX-C-37-23) is another effort to misdirect the Court into conflating this matter with Defendants' now-dismissed action related to the solicitation of client matters, which were outside the scope of the arbitration agreement. Again, Defendants' complaint and jury demand sought injunctive relief and temporary restraints against a separate party, and alleged claims distinct from the Plaintiff's claims here arising from his partner and shareholder status. Simply put, Defendants' resort to the judicial forum on independent claims against a non-party to the subject arbitration agreement does not manifest an express waiver of arbitration in this

matter. See Lucier v. Williams, et al., 366 N.J. Super 485, 500 (2004) (defendants' submission of a motion for summary judgment did not waive right to arbitration); see also Spaeth v. Srinivasan, 403 N.J. Super. 508,514 (App.Div. 2008) (quoting Hudik-Ross, Inc. v. 1530 Palisade Ave. Corp., 131 N.J. Super. 159, 167 (App. Div. 1974)) (" '[T]he mere institution of legal proceedings ... without ostensible prejudice to the other party' does not constitute a waiver [of an arbitration provision].").

In addition, Plaintiff's claim that this matter "would have been decided months earlier in Chancery" had Defendants not "violated" the March 8, 2023 Order is purely speculative and misstates the record. Defendants did not violate any court order; the schedule outlined in the March 8 Order was modified by way of a Consent Order. [Pa16-18]. In particular, the Consent Order indicated that Defendants' motion to compel would await disposition of Plaintiff's motion to disqualify defense counsel. Plaintiff never moved to disqualify counsel for the Defendants. As such, Plaintiff's claim that Defendants violated the Order is a contrived attempt to present the brief delay in seeking arbitration in Plaintiff's favor when the circumstances – which included a change in counsel - clearly tilt in favor of arbitration.

Further, precedent makes clear that a two month delay in seeking arbitration is far from significant. Cf. Cole, 215 N.J. at 281 (twenty-one month

delay); Spaeth v. Srinivasan, 403 N.J. Super. 508, 516 (App. Div. 2008) (six month delay in asserting arbitration rights did not evidence waiver). Indeed, Plaintiff does not dispute the brevity of the two-month timeframe between the waiver and the Defendants' motion to compel arbitration and concedes that nothing occurred during that timeframe.

As to the second Cole factor, Plaintiff again misrepresents the record with respect to the motions previously filed in this matter. Specifically, while Defendants' motion to compel nominally sought to dismiss the Plaintiff's causes of action arising out of the Partnership Agreement for lack of subject matter jurisdiction under R. 4:6-2(a), the relief sought by Defendants – to compel the partnership claims to arbitration – has remained consistent. Indeed, Defendants have acknowledged that the arbitration provision does not embrace Plaintiff's statutory claims under the NJLAD, CEPA, and NJFLA; which Defendants anticipate will be dismissed because of Plaintiff's partnership status. To that end, Plaintiff conveniently ignores that Defendants withdrew the portion of their motion which initially sought dismissal of the statutory claims to instead request limited discovery on the issue of partnership status, which was clearly reiterated during oral argument on the motion to compel arbitration. [3T5:9-17; 3T6:20-7:1].

Similarly, Defendants' application for injunctive relief and request for a temporary restraining order in the separately filed matter involved inherently dissimilar claims and different parties from Plaintiff's current action. See [Da19]. Defendants could not seek relief under the arbitration provision in that action, because the Fredson Firm (Plaintiff's new firm) is not a party to the Partnership Agreement. Moreover, the outcome of Defendants' Chancery action, which denied the injunctive relief sought, had no discernible impact on the matter underlying this appeal. As such, the Trial Court appropriately determined that aside from Defendants' instant motion to compel, no dispositive motions were filed and decided here, which weighs in favor of arbitration. [4T47:23-24].

As for the consideration of whether any delay was part of Defendants' litigation strategy, Plaintiff concludes without any support that the motion to compel arbitration constitutes a change in Defendants' litigation strategy. In Cole, the defendant actively engaged in the protracted litigation for twenty-one months and took advantage of the judicial forum through discovery and motion practice. Cole, 215 N.J. at 281. Here, in contrast, there is nothing before this Court to even suggest that Defendants utilized the brief delay in moving to compel arbitration in bad faith to frustrate the Plaintiff's rights, or to obtain some benefit that would be otherwise precluded in arbitration.

Considering the fourth Cole factor, Plaintiff's reference to the parties' service of discovery requests is irrelevant where the parties have not actually exchanged any discovery, aside from the documents Plaintiff subpoenaed from Defendants' prior counsel. No discovery relating to the merits of Plaintiff's claims has been exchanged between the parties, and the parties have not taken any depositions in this matter, which weighs in favor of arbitration.

As to the fifth Cole factor of notice, because Plaintiff failed to reference the existence of an arbitration provision in his initial pleadings, Defendants responded by promptly notifying Plaintiff of the intent to seek arbitration on March 7, 2023. [Pa9]. As such, the intent to file for arbitration was not a surprise as Plaintiff acknowledges that Defendants disclosed the intent to arbitrate before even filing a responsive pleading in this matter, and prior to Plaintiff amending his Complaint. In light of the above, along with Plaintiff's continued contrived efforts to refute the existence of the partnership documents since the outset of this matter, Plaintiff has had sufficient notice of Defendants' intent to arbitrate the partnership claims.

Lastly, the Trial Court noted that no trial date was scheduled here, whereas in Cole, the defendant moved to compel arbitration just three days before trial of a substantially litigated matter. [4T48:16-17].

B. Prejudice Remains a Viable, Non-Dispositive Component in Assessing Waiver of Arbitration.

Plaintiff incorrectly contends that the United States Supreme Court's decision in Morgan v. Sundance, 596 U.S. 411 (2022), eviscerates the consideration of prejudice when assessing whether a party has waived the right to pursue arbitration of a dispute. Specifically, Plaintiff argues that, under Morgan, prejudice is "immaterial" and "should no longer be considered a factor in assessing whether a party has impliedly waived arbitration through its actions and inaction." [Pb41]. However, in Marmo & Sons Gen. Contracting, LLC v. Biagi Farms, LLC, 478 N.J. Super. 593 (App. Div. 2024), the court rejected the argument "that the United States Supreme Court's opinion in Morgan v. Sundance, Inc., 596 U.S. 411, 417-19, 142 S.Ct. 1708, 212 L.Ed.2d 753 (2022), eradicates the Cole factor that considers whether the party opposing arbitration was prejudiced by the movant's delay." 478 N.J. Super. at 599. The court stated specifically: "[P]rejudice remains one of the pertinent, but not individually dispositive, Cole factors after Morgan." Id.

Defendants do not contend that prejudice is controlling to the waiver analysis. To the contrary, Morgan merely stands for the proposition that federal courts may not "invent special, arbitration-preferring procedural rules" in favor of arbitration. Morgan, 596 U.S. at 418; see also White v. Samsung Electronics America, Inc., 61 F.4th 334, 339 (3d Cir. 2023). Additionally, Marmo explicitly

found that inclusion of prejudice as a non-dispositive consideration in Cole's multi-factor test does not "unduly tilt the waiver analysis for or against arbitration." Marmo, 478 N.J. Super. at 609.

In any case, determinations relating to prejudice necessarily flow from a fact-sensitive review of the Cole factors under the totality of the circumstances, and here, there is no prejudice to Plaintiff. Defendants filed the instant motion to compel arbitration just two months after this matter's transfer to the Law Division; any delay in seeking to compel arbitration was not a result of bad faith tactics or an attempt by Defendants to gain an unfair advantage. No merits-based motion practice, aside from the motion to compel has taken place, and the parties have not exchanged any discovery or taken any depositions. Moreover, the cited precedent does not support Plaintiff's proposition that delay and incurring increased attorneys' fees is sufficient to constitute prejudice.

As such, Plaintiff is hard pressed to identify any detriment to his legal position or any other measure of prejudice he will suffer by compelling arbitration of his partnership claims.

C. Public Policy Still Favors Arbitration.

Despite Plaintiff's representations to the contrary, Defendants have repeatedly conceded that the scope of this arbitration provision does not embrace the statutory claims Plaintiff hopes to resolve through a jury trial, e.g., claims

based on CEPA, NJLAD, and the NJFLA. As such, the Court need not address Plaintiff's superfluous arguments regarding recent amendments to the NJLAD or the EFAA. Of additional note, this Court has held that Section 12.7 of the NJLAD is preempted when applied to prevent arbitration called for in an agreement governed by the FAA. Antonucci v. Curvature Newco, Inc., 470 N.J. Super. 553 (App. Div. 2022). Thus, NJLAD claims can be subject to arbitration, albeit amid different circumstances than those present. Regardless, Plaintiff's non-statutory claims arise out of the Partnership Agreement, and, therefore, fall directly within the scope of arbitration.

Moreover, in the absence of contrary authority, an express waiver of arbitration, like an implied waiver, should be considered under the totality of the circumstances pursuant to Cole. As illustrated here, a statement of waiver, standing alone, does not waste judicial resources or harm the party opposing waiver. In the aggregate, the Cole factors essentially look to see how a waiver has impacted the proceedings of a case, and there is no legal justification to disregard this consideration by holding an express waiver as more irrevocable than a party desiring to test the waters of litigation through inconsistent conduct.

Where the purpose of arbitration is to streamline proceedings, minimize costs, and conserve judicial and private resources, that purpose is not furthered by holding inconsistent conduct to a separate standard than a party who makes

express waiver at an early stage of a case. In sum, application of the Cole factors equally to implied and express waivers eliminates artificial distinctions and simplifies the waiver analysis.

POINT II

A VALID AGREEMENT TO ARBITRATE EXISTS AND APPLIES TO PLAINTIFF (DA3)

Despite the Trial Court's grant of reconsideration as to the existence and application of the arbitration provision here, Plaintiff still seeks to undermine the existence and application of the parties' arbitration agreement to his partnership claims. In turn, Plaintiff disregards controlling precedent clearly supporting the validity of the subject arbitration provision, and devotes a substantial portion of his opposition brief to frivolous arguments concerning factual and legal matters entirely irrelevant to the issues before the Court.

Plaintiff first contends that there was no written partnership agreement between the parties as of 2019 and continuing to the present. [Pb45]. Referencing the Partners' Certificate executed by the parties on May 21, 2019, [Da90], Plaintiff claims that the 1991 Partnership Agreement and 2007 Addendum – both of which he intentionally failed to disclose in the first instance – was not in effect at the time of Plaintiff's termination. Plaintiff's selective reference, however, fails to acknowledge that the Partnership Interest Purchase Agreement ("Purchase Agreement"), cited in Plaintiff's Complaint, contains

several, explicit references to the valid Partnership Agreement. [Da83].

The Purchase Agreement clearly references the existence and effect of the parties' Partnership Agreement, stating: "*pursuant to the terms and conditions set forth herein and in the Limited Liability Partnership Agreement of Ginarte (the "Partnership Agreement").*" [Da83]. Section 2 ("Representations and Warranties") also references the Partnership Agreement at three consecutive points, acknowledging "the restrictions set forth in the Partnership Agreement[.]" In addition, the Partners' Certificate itself references the "Limited Partnership Agreement" in Section 8. [Da90]. Plaintiff fails to explain the conflict or support the absurd conclusion that Defendants abandoned the 1991 Partnership Agreement. He cannot, because Plaintiff fully acknowledged the existence of the Partnership Agreement and assented to the terms therein by signing the 2007 Addendum.

Equally unavailing, Plaintiff's assertion that "there is nothing in the 2007 Addendum to alert Plaintiff that he was agreeing to any of the provisions in the 1991 Agreement, let alone the arbitration provision," [Pb46], is belied by the Addendum's contents. See [Da220].[2] To that end, New Jersey permits contract

[2] Far from being disguised, the document is titled "Addendum to the 1991 Partnership Agreement" and prominently identifies the Partnership Agreement dated November 8, 1991 as the agreement it is amending, which acknowledges that Article 22 of the original Agreement permits amendments. The Addendum amends upwards of 20 different provisions and adds three new Articles to the 1991 Partnership Agreement.

terms in a separate, unsigned document to be incorporated by reference:

> Generally, all writings which are part of the same transaction are interpreted together. One application of this principle is ... where the parties have expressed their intention to have one document's provision read into a separate document. So long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, non-contemporaneous document, **including a separate agreement to which they are not parties, and including a separate document which is unsigned**.... (Emphasis supplied.)
>
> [Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 533 (App. Div. 2009) (quoting 4 Williston on Contracts §30:25 (4th ed. 1999)).]

Here, the Addendum sufficiently comports with the standard for incorporation by reference, as it describes the Partnership Agreement in express terms such that there is no ambiguity as to what document the Addendum incorporates and amends. Plaintiff also fails to cite any authority in which Defendants were required to supply Plaintiff with every other prior amendment to the Partnership Agreement for purposes of his assent to arbitration.

Further, Plaintiff's argument that he never assented to arbitration because he was never given a copy of the 1991 Partnership Agreement is inapposite to this action, as "no such obligation exists where the provision is not hidden." Young v. Prudential Ins. Co. of Am., 297 N.J. Super. 605, 619 (App. Div. 1997)

("[f]ailure to read a contract does not excuse performance unless fraud or misconduct by the other party prevented one from reading"). Even if Plaintiff certified or testified to the effect – which he has not – there exists nothing in the record to suggest he did not sign the 2007 Addendum or that he was misled into signing it.

As to the contention that the arbitration provision fails for the lack of jury waiver language, an "express waiver of the right to seek relief in a court of law to the degree required by [Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430 (2014)] is unnecessary when parties to a commercial contract are sophisticated and possess comparatively equal bargaining power." Cnty. of Passaic v. Horizon Healthcare Servs., Inc., 474 N.J. Super. 498, 504 (App. Div. 2023). Here, as a seasoned attorney and following his elevation to Managing Partner, Plaintiff is undoubtedly a sophisticated party "presumed to understand ... what was being agreed to[.]" Atalese, 219 N.J. at 442-44.

Backed into a corner, Plaintiff argues that all of his claims are outside the scope of the arbitration provision, rendering it unenforceable. Yet, Defendants have conceded that Plaintiff's statutory claims – which will be dismissed because of his status as a partner - are not subject to the arbitration provision here. See [3T5:9-17; 3T6:20-7:1]. Moreover, the arbitration provision expressly references the Rules of the American Arbitration Association ("AAA"), which

outline responsibility for the fees and costs involved in the process. See [Da218]. Regardless, "an arbitration agreement's silence with respect to [arbitration costs and fees] does not render the agreement unenforceable." Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 82 (2000).

CONCLUSION

For the foregoing reasons, Defendants Joseph A. Ginarte, Esq., Ginarte Gallardo Gonzalez & Winograd L.L.P. d/b/a Ginarte Gonzalez Winograd L.L.P. request that this Court reverse the portion of the Trial Court's January 30, 2024 Order finding an irrevocable, express waiver of the right to arbitrate and direct the arbitrable claims in this matter to proceed to arbitration.

Respectfully submitted,

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Dated: August 12, 2024