Superior Court of New Jersey

APPELLATE DIVISION

ROMA PIZZERIA, on behalf of itself and all others similarly situated, Plaintiff(s), v. HARBORTOUCH f/k/a UNITED BANK CARD, Defendant(s).	**Docket No. A-003222-23** ***Civil Action*** **ON APPEAL FROM:** **LAW DIV., HUNTERDON COUNTY** **Docket No. HNT-L-637-12** **SAT BELOW:** **Hon. Edward M. Coleman, P.J. Ch. (ret.)**

BRIEF OF PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

In response to a complaint filed by Plaintiff Dr. Marc J. Gannon in New Jersey federal court, *Gannon et al. v. Shift4 et al.* (Docket No. 3:23-cv-04313), Defendant Harbortouch f/k/a United Bank Card moved to reopen this lawsuit ("*Roma Pizzeria*"), an unrelated matter they had settled with a class of plaintiffs that included Dr. Gannon in 2015. Harbortouch insisted that the claims filed by Dr. Gannon in federal court in 2023—arising from facts that occurred long after *Roma Pizzeria* was dismissed—were extinguished by the 2015 settlement in *Roma Pizzeria*. Judge Coleman agreed.

Final judgment was entered in *Roma Pizzeria* Feb. 20, 2015, and the complaint therein, originally filed in 2012, was dismissed with prejudice. The *Gannon* complaint asserts different claims arising from separate misconduct that occurred well after the dismissal of *Roma Pizzeria*. The *Gannon* complaint filed in federal court does not involve the fees at issue in *Roma Pizzeria*. The *Gannon* complaint, asserting claims based on transactions that occurred *post* 2015, does not—in fact, it could not—involve the transactions that were at issue in *Roma Pizzeria*.

Moreover, there is nothing in the 2015 *Roma Pizzeria* settlement (hereinafter, the "2015 Settlement") to indicate that the *Roma Pizzeria* class agreed to relinquish *future* claims that had yet to accrue for *future* misconduct

that had yet to even occur. Most importantly, the 2015 Settlement does not contain any "covenant not to sue"—a covenant whereby "a party having a right of action agrees not to assert that right in litigation" (BLACK'S LAW DICTIONARY, 299 (7th ed. 2000))—for claims accruing *after* Feb. 20, 2015. In the absence of a "covenant not to sue", Harbortouch cannot accuse Dr. Gannon, or any other member of the *Roma Pizzeria* class, of having breached the 2015 Settlement. Without a breach of the 2015 settlement, there was no cause to reopen *Roma Pizzeria*—other than for the limited purpose of declining jurisdiction over the 2023 *Gannon v. Shift4* matter in federal court.

Defendants' strategy is clear: rewrite the 2015 Settlement to absolve themselves, into perpetuity, of any *future* claims arising from *future* allegations of misconduct that bear any likeness at all to the claims asserted in *Roma Pizzeria*. Even Judge Coleman acknowledged in his Statement of Reasons that "the fees at issues in the Gannon case are not the exact same fees at issue in Roma" (Pa0108). Members of the *Roma Pizzeria* class who would otherwise be members of the *Gannon* class are severely prejudiced by the trial court's decision to indulge Defendant Harbortouch's artful litigation maneuver.

The *Gannon* class members have the right to assert their present claims in their chosen forum. The Defendants cannot retroactively rewrite the 2015 Settlement into something the *Roma Pizzeria* class never agreed to: a perpetual

claim preclusion license. The trial court did not have jurisdiction over *Gannon v. Shift4* simply because a decade ago, a class of plaintiffs asserted similar claims arising from separate facts in a separate forum.

If there was any cause at all to reopen *Roma Pizzeria*, it was only for the purpose of ruling that the 2015 Settlement does not amount to a release of any claims accruing after Feb. 20, 2015—and therefore does not bar Dr. Gannon's action in federal court on behalf of all others similarly situated. Defendant Harbortouch's motion to reopen *Roma Pizzeria* should have been denied and Judge Coleman's order of May 8, 2024 should otherwise be reversed.

PROCEDURAL HISTORY

Plaintiff-appellant Dr. Marc Gannon filed a complaint (Pa000114) on behalf of himself and all others similarly situated in U.S. District Court, D.N.J., Docket No. 3:23-cv-04313, against United Bank Card Services, Inc. (presently d/b/a "Harbortouch"), Harbortouch Financial, LLC, and Shift4 Payments, LLC ("Shift4"). In response, Harbortouch f/k/a United Bank Card filed a motion to suspend the matter in federal court (see Pa000112) and then filed a motion in New Jersey Superior Court to reopen previous litigation that settled in 2015, viz., *Roma Pizzeria v. Harbortouch f/k/a United Bank Card*, Docket No. HNT-L-637-12 (Pa000011). Respondent also filed a motion to enforce (Pa000013), arguing that that Dr. Gannon's federal complaint is precluded by the terms of the settlement agreement he agreed to as a member of the *Roma Pizzeria* class nearly a decade ago (see Pa000039).

Plaintiff filed an opposition (Pa000015) to Harbortouch's motion and asked that the court reopen HNT-L-637-12 only for the limited purpose of declining jurisdiction and for entry of an order remanding back to federal court. A hearing before the Hon. Edward M. Coleman, J.S.C. (ret., on recall) was held Nov.17, 2023 (transcript references herein denoted as "H"). The court granted the Defendant's motion to reopen *Roma Pizzeria*, and enforced

the 2015 Settlement, holding that Dr. Gannon's claims were thereby precluded (Pa000079-80). The federal court then dismissed Dr. Gannon's complaint.

STATEMENT OF FACTS

1. Plaintiff Dr. Marc J. Gannon ("Dr. Gannon") is an optometrist, with his offices located at 1540 E Commercial Blvd. #102, Fort Lauderdale, Florida. Dr. Gannon is engaged in the practice of optometry, and he entered into an agreement with Shift4 Payments, LLC ("Shift4") on or about December 23, 2010, so that he could offer payment by credit card to his patients. The contractual documents drafted by Shift4, establishing an Agreement to provide Dr. Gannon with their credit card processing services, consist of the Shift4 Merchant Application, and Shift4's Merchant Processing Terms and Conditions (Pa000117).

2. Defendant Harbortouch f/k/a United Bank Card is a New Jersey corporation, with a principal business address of 53 Frontage Road, Perryville Corporate Park, Bldg. III, Hampton, NJ 08827, and a registered service of process address at The Corporation Trust Company, 820 Bear Tavern Road, West Trenton, NJ 08628. The Main Business Address, as set forth on its New Jersey Entity Status Report from the Division of Revenue, is 2202 North Irving Street, Allentown, PA 18109. Harbortouch was named as a defendant in the

action brought by Dr. Marc Gannon under Docket No. 3:23-cv-04313, *sub nom.* United Bank Card, Inc. (Pa000117-118).

3. Harbortouch f/k/a United Bank Card was named as a defendant in this earlier action filed by Roma Pizzeria in New Jersey Superior Court, Hunterdon County in 2012, on behalf of itself and all others similarly situated. The claims brought against Harbortouch in 2012 were settled in an executed settlement and release dated Sept. 22, 2014 (Pa000039) and final judgment was entered Feb. 20, 2015 (Pa000071).

4. Shift4 Payments, LLC is a Delaware limited liability company, with a principal business address of 2202 North Irving Street Allentown, PA 18109 and a registered service of process address at The Corporation Trust Company, 820 Bear Tavern Road, West Trenton, NJ 08628. Harbortouch Financial, LLC is a Pennsylvania limited liability company with its principal business address at 2202 North Irving Street Allentown, PA 18109. Shift4 Payments and Harbortouch Financial are corporate affiliates of Defendant Harbortouch f/k/a United Bank Card. All three entities were separately named as defendants in the action brought by Dr. Gannon in federal court, Docket No. 3:23-cv-04313 (see Pa0000117-118).

5. Defendant Harbortouch, f/k/a United Bank Card, Shift4 Payments and Harbortouch Financial are merged business entities, hereinafter referred to

collectively simply as "Defendants". Combined, the Defendants are a major player in the credit card processing industry and earned $1.994 billion in revenue as reported in their 2022 annual report, in large part through fees charged to their Merchant Customers for credit card processing services. (Pa000118).

6. Defendants use various pricing programs to bill its Merchant Customers, including an "Interchange PLUS" pricing program, where the term "interchange" is a term of art in the credit card processing industry, referring to the "interchange rates" published by the major credit card brands such as VISA, MasterCard, American Express and Discover, and widely available on their websites. The "interchange rate" is a percentage to be applied to the nominal value of a transaction in which a credit card is used to consummate an exchange of goods or services. (Pa000119).

7. The "PLUS" element (also referred to as the "discount" or "discount fee") of Defendants' "Interchange PLUS" pricing formula is supposed to reflect a second, typically smaller markup for the credit card processing company itself (like Shift4 Payments). The "discount" or "discount fee" represents the profit margin Defendants purportedly receive for the services they provide as the Merchant Customer's credit card processing company. Moreover, when Defendants bill for what are supposed to be the charges agreed upon by their Merchant Customers, Defendants typically also include various additional,

miscellaneous "pass through" charges consisting of administrative expenses imposed by the credit card issuers and paid by Defendants on behalf of their Merchant Customers, for which Defendants claim the right to be reimbursed. In fact, however, as explained below, each of these three categories of charges – the "interchange rate", the "discount fee", and the "pass through" expenses Defendants supposedly paid on behalf of their Merchant Customers – have been systematically, surreptitiously and artificially inflated by Defendants to their benefit. (Pa000119-120).

8. Because of the limited number of credit card processing companies in the United States, there is an enormous inequality of bargaining power between credit card processing companies like Defendants and their Merchant Customers. Defendants have exploited this inequality of bargaining power, along with confusing and arcane pricing practices, to modify the terms of their credit card processing agreements without consent, violating the legal and contractual rights of Merchant Customers who have chosen "Interchange Plus" pricing and resulting in excessive fees being surreptitiously collected from them. (Pa000120).

9. Defendants' Merchant Application form and Merchant Processing Terms and Conditions document are the two documents specified by Defendants as together representing their agreement with their Merchant Customers. The

various pricing programs Shift4 Payments offers Merchant Customers like Dr. Gannon, including the charges they levy for the services provided, are described in these documents. (Pa000121).

10. Many of Shift4 Payment's Merchant Customers opt for the "Interchange PLUS" pricing model, because that option appears to tie the price for Shift4's services to the published and widely available "interchange rates" established by the credit card issuers, and to the "discount fees" quoted in their Merchant Customer Application forms with Shift4. (Pa000120).

11. In fact, however, for approximately the last ten years, Shift4 Payments has effectively ignored the rates agreed to in the Merchant Customer Application forms, and instead has billed its Merchant Customers at steadily increasing rates far above the "interchange rates" charged by the credit card issuers. Shift4 has likewise ignored the "discount fees" agreed to in their contracts with their Merchant Customers, and instead has increased those "discount fees" to the point that they now exceed the mark-ups of the major credit card issuers themselves. (Pa000121).

12. The result has been excessive charges to their Merchant Customers by Defendants that amount to hundreds, if not thousands of dollars in unwarranted charges to their Merchant Customers on an individual basis, and the collection of millions, if not hundreds of millions in excessive charges by

Defendants from those same Merchant Customers on a cumulative, class-wide basis. (Pa000121).

13. Importantly, the Merchant Processing Terms and Conditions document drafted by Defendant Shift4 specifically states:

> "Merchant agrees to pay [First National Bank of Omaha] the fees as set forth in the Merchant Application and all other sums owed to FNBO ("FEES") for SALES and SERVICES as set forth in this AGREEMENT as amended from time to time…."

(Pa000121).

14. This language necessarily permits Shift4 Payments to implement pricing changes from time to time, as long as they provide appropriate notice to their Merchant Customers, since the "interchange rates" published by the credit card issuers themselves change from time to time. (Pa000121).

15. As a result, the Merchant Processing Terms and Conditions document also includes the following language:

> "The FEES may be amended by FNBO on thirty (30) days written notice to MERCHANT unless provided otherwise herein."

(Pa000121).

16. The published "interchange rates" referred to in Defendant's Merchant Application are the upper limit that Shift4 can charge to Merchant Customers who opt for the "Interchange PLUS" pricing. Otherwise, the Merchant Application Form, which is the only portion of the Agreement

between Shift4 and its Merchant Customers including a specific agreement to the payment of specific consideration for Shift4's services, would be rendered effectively meaningless. (Pa000122).

17. Nevertheless, throughout the proposed Class Period, Defendants have unilaterally and arbitrarily increased the "Interchange PLUS" pricing model by arbitrarily increasing the rate far above the "interchange rates" published by the major credit card issuers, while at the same time arbitrarily increasing the "discount fees" they charge their Merchant Customers, through the use of surreptitious "bill stuffers." (Pa000122).

18. For example, on or about February 1, 2020, Shift4 Payments used a bill stuffer that purported to "simplify" its billing practices, but which instead increased the interchange rate for Merchant Customers who opted for "Interchange PLUS" pricing. This bill stuffer read as follows, in part:

> "In 30 days from your receipt of this notice, we will modify the Merchant Processing Agreement to make the changes below. Section 3.5 and 8.2(H) (pg.7 and 11) of the Merchant Processing Agreement allows us to make this modification (The page and section numbers may be different for prior versions of the Agreement.) Visa, MasterCard, Discover, and American Express ("Card Brands") typically evaluate interchange rates, dues, and assessments twice per year and make changes in April and October. As you have probably seen, Visa and the other Card Brands have announced that they will implement the most significant changes to the interchange structure in over a decade starting in April. In an effort to simplify this overhaul and the growing number of Card Brand interchange rates, we will be bundling various categories of

> existing and new interchange rates. You will be charged for sales in accordance with these simplified categories effective April 1, 2020.
>
> This message and a schedule of the simplified categories can be found by logging into the Lighthouse online portal and clicking on the Notices section under the Location Overview tab. These modified rates and categories will be reflected in your merchant statement for transactions processed beginning in April. You agree to this modification of the Agreement by continuing to use our services after 30 days."

Pa000122-Pa000123).

19. What Shift4's February 2020 notice to its Merchant Customers failed to mention was that instead of merely simplifying its billing, the new "bundling" categories described therein increased the "interchange rate" substantially above the "interchange rates" published by the credit card issuers, with the excess fee being billed to the Merchant Customer. For example, instead of a VISA credit card transaction resulting in a processing fee that would incorporate VISA's published interchange rate, that transaction now resulted in a credit card processing fee that incorporated Defendant Shift 4's wholly arbitrary, and typically substantially higher, "bundled" rate. This subtle change in billing rates concealed from the putative Class of Shift4 Merchant Customers who used Defendant's credit card processing services between April 2020 and the present, an increase over and above the rates provided for in their agreements with Shift4 amounting to hundreds, and sometimes thousands, of dollars. On a cumulative basis, Shift4's arbitrary "bundled rate" has resulted in their

collection of millions of dollars of excessive fees from the Class of Merchant Customers the Plaintiffs seek to represent in this action. (Pa000123).

20. Significantly, a direct comparison of the interchange rates quoted by Defendant Shift4 in residual reports provided to their Independent Sales Organizations ("ISOs"), and the interchange rates published by the major credit card issuers, confirms that the "bundled" rates Shift4 began charging in April 2020 were substantially higher than the published rates they were supposed to be applying pursuant to their Agreements with Merchant Customers who opted for "Interchange PLUS" pricing. (Pa000123-124).

21. In addition to inflating the "interchange rates," as described above, throughout the Class Period, Shift4 also engaged in the practice of slowly, steadily, and arbitrarily inflating the "PLUS" element of their "Interchange PLUS" pricing formula. Initially, the "discount fee" that the "PLUS" element refers to was 0.3% in the initial Agreements with Shift4 in 2010. The "discount fees" were later elevated to 1.3% or higher, an excessive fee collected from the Merchant Customers included in this "Discount Fee" Subclass, who were charged at least 1% more than the actual "discount fee" they had agreed to. (Pa000124).

22. Finally, in addition to artificially inflating the "Interchange" and "PLUS" elements of the Agreements, in July 2020 Shift4 also began to include

various miscellaneous charges to certain Merchant Customers (the "Miscellaneous" Subclass), designating these miscellaneous charges in their Merchant Statements as "non-qualified", or "other", even though these charges should never have been applied at all. Although Defendants do not disclose the specific nature or purpose of these fees in billing statements to their Merchant Customers, upon information and belief there is no basis for these "Miscellaneous" charges in the Agreements between Shift4 and the Merchant Customers who are the members of the putative "Miscellaneous" Subclass. These "miscellaneous" charges also represent nothing more or less than excessive, unauthorized charges the members of this Subclass are entitled to recover. (Pa000124).

23. For example, in the Merchant Application of Dr. Marc J. Gannon, attached hereto as Exhibit B, Dr. Gannon opted for Defendant's "Interchange PLUS" pricing, which entitled him to receive Shift4's credit card processing services at the interchange rates published by VISA, MasterCard, Discover, and American Express, plus a Discount Rate of 0.30%; all together, a cost assessment of $0.11 cents per transaction. (Pa000124-125).

24. Nevertheless, the fees collected from Dr. Gannon by Defendants for the month of March 2023, were based upon interchange rates and discount fees that exceeded those Dr. Gannon agreed to pay Shift4 by $387.15; see Complaint,

Exh. F attached thereto, comparing the interchange rates reported by Shift4 to its ISOs (sub-column "Residual Report Cost To ISO" highlighted in purple), with the interchange rates applied by Shift4 to Plaintiff Dr. Gannon (sub-column "Merchant Statement Cost To Merchant" highlighted in purple) and the interchange rate published by VISA in March, 2023 at Exh. G, attached thereto. (Pa000125).

25. Upon information and belief, most or all of Defendants' approximately 200,000 Merchant Customers who opted for "Interchange PLUS" pricing have experienced similar losses on a monthly basis, as a result of the violations of the terms of their agreements with Defendants, and/or as a result of the wrongful, and deceptive conduct described herein, and have experienced cumulative losses, in the form of excessive charges collected by Defendants, in the hundreds of millions of dollars. (Pa000126).

26. Plaintiff Dr. Gannon brought this action on his own behalf and additionally, pursuant to Rule 23(b)(2) and (3) of the Federal Rules of Civil Procedure, on behalf of a subclass (the "Subclass") of Shift4 customers in New Jersey, who were charged and paid fees to Shift4 in excess of those agreed to in their Merchant Agreements with Shift4, by virtue of the wrongdoing described herein. The proposed subclass would exclude any Merchant Customers whose Merchant Agreements contain a clause in which they agreed not to participate

in any class action, and to submit their claims herein only to arbitration on an individualized basis. (Pa000126-129).

LEGAL ARGUMENT

A. (Pa000093) THE *ROMA PIZZERIA* SETTLEMENT DOES NOT PRECLUDE THE CLAIMS ASSERTED BY DR. GANNON IN FEDERAL COURT BECAUSE THE EXPRESS TERMS OF THE SETTLEMENT DID NOT REACH FUTURE CLAIMS ARISING FROM MISCONDUCT OCCURRING AFTER FEB. 20, 2015.

A settlement agreement is a contract and should be construed as such. See Halderman v. Pennhurst State Sch. & Hosp., 901 F.2d 311, 318 (3d Cir. 1990). "The agreement memorializes the bargained for positions of the parties and should be strictly construed to preserve those bargained for positions." Id. at 319. "Although settlement of litigation ranks high in our public policy, [this] does not mean that courts will rewrite or unduly expand settlement agreements in order to deem settled or waived things not legitimately encompassed." Isetts v. Borough of Roseland, 364 N.J. Super. 247, 254 (App. Div. 2003).

To discern the parties' intentions, a court should initially look to the four corners of the settlement agreement itself. Marwood v. Elizabeth Forward Sch. Dist., 93 F. App'x 333, 336 (3d Cir. 2004). "Generally, the terms of an agreement are to be given their plain and ordinary meaning." M.J. Paquet, Inc.

v. N.J. DOT, 171 N.J. 378, 396 (2002). Note that "a clear provision cannot be overcome by a doubtful one." Halderman, 901 F.2d at 319. And finally, "the policy in favor of settlement suggests only that the court should view the release with an assumption that the parties intended to terminate the *then existing* lawsuit." Id. at 335 (italics added).

A straightforward application of the above principles to the 2015 Settlement yields only one possible outcome: That settlement could not have resolved future claims arising from misconduct occurring *after* the entry of final judgment in *Roma Pizzeria* on Feb. 20, 2015. The misconduct alleged in the *Gannon* complaint occurred well after that date. Nothing in the 2015 Settlement suggests that either party intended for the Settlement to extinguish claims for *future* misconduct that might accrue long after entry of final judgment.

In fact, the plain language of the 2015 Settlement makes clear the parties intended to resolve only those claims that had accrued to the *Roma Pizzeria* plaintiffs as of the date of entry of final judgment. See, e.g., Pa0044-45, 2015 Settlement, at ¶2.1 ("The purpose of this Settlement is to forever settle and compromise *any and all claims, disputes, and controversies that were or could have been raised against Harbortouch in the Settled Action*…") (emphasis added); see also Pa0059-60, at ¶5.2 ("It is the desire of the Settling Parties to fully, finally, and forever settle, compromise, and discharge all of the Class

Representative's and the Class Members' Released Claims *which were or which could have been asserted in this action*…") (same).

1. (Pa000093) The claims of the proposed *Gannon* class members could not have been asserted in *Roma Pizzeria* and were therefore not extinguished by the 2015 Settlement.

The *Roma Pizzeria* class members did not settle any claims accruing in the future, i.e., *post* Feb. 20, 2015. In their presentation below, Defendants used a clever ellipsis relevant to the definition of "Released Claims" at ¶1.29 (Pa0042) to make it appear that the 2015 Settlement goes so far as to encompass future claims "that relate to" the *Roma Pizzeria* matter. (See H14:20-H15:6). Defendant's surgical manipulation of the language of ¶1.29 is wholly at odds with the Settlement's purpose statement at ¶2.1, clearly limiting the 2015 Settlement to claims "that were or could have been raised against Harbortouch in the Settled Action. . . " (Pa0044-0045).

Claims that had yet to accrue until nearly a decade after *Roma Pizzeria* settled are clearly not claims that "were or could have been raised" in the *Roma Pizzeria* litigation, seeing as the complaint was dismissed with prejudice on Feb. 20, 2015. Harbortouch's invitation to rewrite its 2015 Settlement is an attempt to twist the *Roma Pizzeria* settlement into a perpetual license to abuse its customers, all the while enjoying immunity from state consumer protection law.

But by its own terms, that was not the purpose of the 2015 Settlement. The *Roma Pizzeria* settlement resolved class claims for misconduct by Harbortouch that occurred prior to the entry of final judgment by this Court on Feb. 20, 2015, not for misconduct occurring after that date. It is as simple as that.

Harbortouch could have insisted on language absolving itself of any fraud claims that might accrue to members of the *Roma Pizzeria* class in the future, *post* Feb. 20, 2015. Compare Wells Fargo Bank, N.A. v. Schultz, 2013 N.J. Super. Unpub. LEXIS 406, *5 (releasing any claim that "has been, or could have been or in the future might be asserted by any Releasing Party in the Lawsuit . . . , or in any other action or proceeding in this Court, or any other court") to ¶1.29 (Pa0042) (releasing claims "that were, have been or could have been, now, in the past or in the future, asserted or alleged in" *Roma Pizzeria*). Had the *Roma Pizzeria* class counsel agreed to such language, the Settlement Agreement likely would have been void as against public policy because it would amount to a surreptitious exculpatory clause, in essence what Defendants are seeking to accomplish now. "[I]t has been held contrary to the public interest to sanction the contracting-away of a statutorily imposed duty." Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 303 (2010); see also Schwartz v. Dall. Cowboys Football Club, Ltd., 157 F. Supp. 2d 561, 578 (E.D. Pa. 2001) (rejecting antitrust

settlement on fairness grounds where the proposed release "was too broad because it bars later claims based on future conduct") (internal citations omitted).

"The scope of a release is determined by the intention of the parties as expressed in the terms of the particular instrument, considered in the light of all the facts and circumstances."

Bilotti v. Accurate Forming Corp., 39 N.J. 184, 203 (1963). "A general release, not restricted by its terms to particular claims or demands, ordinarily covers all claims and demands due at the time of its execution and within the contemplation of the parties." Id., at 204; see also F.P.P.E. Consulting Eng'rs, Inc. v. Morda, 2009 N.J. Super. Unpub. LEXIS 419, at *12 (App. Div. Feb. 25, 2009) (reversing judgment and remanding back to trial court for a plenary hearing to determine whether the parties intended to release future malpractice claims).

Defendants agreed to limit the 2015 Settlement to all claims "that were, have been or could have been, now, in the past, or in the future, asserted or alleged in" *Roma Pizzeria*, and to claims "that relate to" *Roma Pizzeria* (see Pa0042, at ¶1.29). Note that the adverbial "now, in the past, or in the future" clause only modifies claims "that were, have been or could have been . . . asserted or alleged" by the *Roma Pizzeria* class members in that lawsuit at that

time. The furthest ¶1.29 can therefore reach are to related claims that had accrued by the date of final judgment, which had yet to be "asserted or alleged" by the *Roma Pizzeria* class members as of that date, but which could have been "asserted or alleged" sometime "in the future" absent the entry of final judgment and dismissal of the complaint.

Nothing in the 2015 Settlement clearly indicates that the *Roma Pizzeria* class members agreed to exculpate Harbortouch or its corporate successor for future claims arising from future misconduct. Cf. Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 304-05 (2010) ("[T]o be enforceable an exculpatory agreement must reflect the unequivocal expression of the party giving up his or her legal rights that this decision was made voluntarily, intelligently and with the full knowledge of its legal consequences.") (internal quotation marks omitted). ¶1.29 does not encompass claims that had yet to accrue after entry of final judgment on Feb. 20, 2015. None of the claims accruing on Feb. 21, 2015 or any time thereafter could have been alleged by any member of the Roma Pizzeria class because by that point, their complaint had been dismissed with prejudice. This is further made clear by ¶5.2, "Waiver of Unknown Released Claims", which states that "each Class Member, upon the Effective Date [of final judgment, Feb. 20, 2015], shall be deemed to have, and by operation of the Final Settlement Order and Judgment shall have, fully, finally, and forever

settled and released any and all Released Claims, . . . which then exist, or heretofore have existed upon any theory of law . . . ." (Pa0059).

"[A] settlement acts as a release only in respect of those claims that the parties actually released, or intended to release." Goncalvez ex rel. Goncalvez, 188 N.J. Super. 620, 629 (App. Div. 1983). Strikingly absent from ¶5.2 is any mention of "claims that do not yet exist", or "claims that might exist in the future", or simply "future claims." See, e.g., Witasick v. Minn. Mut. Life Ins. Co., 803 F.3d 184, 192 (3d Cir. 2015) (plaintiff's complaint was barred by an earlier settlement expressly releasing defendant insurance company from "any future claims, either known or unknown") (italics added); Monaco v. Mitsubishi Motors Credit of Am., Inc., 34 F. App'x 43, 45 (3d Cir. 2002) (dismissing complaint where an earlier class settlement had previously released defendants from "any other claims of any kind, known, or unknown, that class members had, have or may in the future have arising out of the class members' vehicle leases") (italics added).

When read in conjunction with ¶1.29, the waiver provision at ¶5.2—together with the purpose statement at ¶2.1—reinforces the conclusion that the 2015 Settlement Agreement extinguished only the claims that had accrued to the *Roma Pizzeria* class members on or before Feb. 20, 2015, not later claims that may arise after that date, i.e., Feb. 21, 2015 onward. And to be sure, ¶5.2 was

"separately bargained for and a key element of the Settlement of which this release is a part." (Pa0059).

Finally, Harbortouch's proposed reinterpretation of its 2015 Settlement suffers from another defect: New Jersey law disfavors contracts that run into perpetuity, and Harbortouch's proposed reinterpretation of its 2015 Settlement as somehow barring future claims arising from future misconduct would have the effect of creating a perpetual release. "Absent an almost overwhelming showing that the parties to a contract intended such a one-sided, unreasonable construction, courts will not construe a contract as providing some perpetual right or option which one side can exercise against the other at any time in the future." Home Props. of N.Y., L.P. v. Ocino, Inc., 341 N.J. Super. 604, 613 (App. Div. 2001); see also In re Estate of Miller, 90 N.J. 210, 218 (1982). Harbortouch's failure to point to any sunset clause in the 2015 Settlement is yet further indicia that the parties to that agreement never intended to extinguish claims that had yet to accrue upon the entry of final judgment.

2. (Pa000097) The claims asserted by the members of the proposed Gannon class do not relate to the claims brought by the *Roma Pizzeria* class members.

Nor do the claims of the proposed *Gannon* class "relate to" the claims brought by the *Roma Pizzeria* class members. The defendants themselves admitted in their briefing below—and Judge Coleman agreed—that the *Gannon*

class members are complaining about fees different from those at issue in *Roma Pizzeria*, see Def. Harbortouch's Br., p. 9 ("the Merchants complain about different fees in *Gannon* than the ones disputed in [*Roma Pizzeria*]"). In addition, the transactions involved in *Gannon* took place long after entry of final judgment in *Roma Pizzeria*. To that extent, Defendants' arguments fall short of the basic principles of claim preclusion under New Jersey law: "1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the *same transaction or occurrence* as the claim in the earlier one." Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 412 (1991) (italics added; internal citations omitted).[1]

To be sure, the misconduct alleged against Shift4 on behalf of the *Gannon* class is in many ways analogous to the misconduct alleged in *Roma Pizzeria*. But the "relating to" language in the 2015 Settlement does not permit a time warp that somehow extinguishes the claims by *Gannon* class members for misconduct arising long after Feb. 20, 2015 simply because the *Gannon* complaint suggests that Defendants have again engaged in wrongdoing similar to that at issue in *Roma Pizzeria*. Cf. Dando v. Bimbo Food Bakeries

[1] Any concerns the Defendants may have about overlap between the two classes could easily be resolved by a class certification order expressly omitting claims for misconduct that occurred on or before Feb. 20, 2015.

Distribution, LLC, 2015 U.S. Dist. LEXIS 132038, at *7 (D.N.J. Sep. 29, 2015) ("The key inquiry is whether the factual predicate for future claims is *identical* to the factual predicate underlying the settlement agreement.") (italics added). Defendant's reliance on the vague "relating to" formulation in ¶1.29 of the Settlement Agreement to overturn the more specific ¶¶ 2.1 and 5.9, both of which clearly restrict the release to claims existing at the time final judgment was entered, attempts to re-write the Settlement Agreement to give Defendants a perpetual license to abuse their customers—and the more specific language should prevail over the general, non-specific wording in ¶1.29. Cf. Halderman, 901 F.2d at 319.

The claims of the proposed *Gannon* class members could not have been asserted or alleged by any of the members of the *Roma Pizzeria* class on Feb. 20, 2015, because those claims do not relate to misconduct that occurred before Feb. 20, 2015; they relate to misconduct occurring *after* that date. The claims being asserted by the *Gannon* plaintiffs did not accrue until Shift4 engaged in misconduct long after 2015; in fact, Dr. Gannon's complaint in federal court proposed several examples of wrongful fees and surcharges occurring in 2020. (Pa0023-25, at ¶¶ 29-33). Those claims were brought in the U.S. District Court for the District of New Jersey on the basis of diversity jurisdiction. They were not brought in New Jersey Superior Court, and the trial court never had

jurisdiction over them because the claims alleged by the *Gannon* class fall well outside the scope of the 2015 Settlement in *Roma Pizzeria*.

B. (Pa000098) HARBORTOUCH CANNOT RELY ON THE 2015 SETTLEMENT TO PRECLUDE THE CLAIMS FILED IN GANNON BECAUSE THE 2015 SETTLEMENT DID NOT CONTAIN ANY "COVENANT NOT TO SUE."

"A release is a provision that intends a present abandonment of a known right or claim. By contrast, a covenant not to sue also applies to future claims and constitutes an agreement to exercise forbearance from asserting any claim which either exists or which may accrue [in the future]." Medtronic AVE Inc. v. Advanced Cardiovascular Sys., 247 F.3d 44, 55 n.4 (3d Cir. 2001) (citing McMahan & Co. v. Bass, 673 N.Y.S.2d 19, 21 (App. Div. 1998)).

The absence of any "covenant not to sue" in the 2015 Settlement estops the defendants from relying on that settlement to extinguish "future claims" arising *after* the settlement—like the claims that Dr. Gannnon seeks to assert in federal court. The defendants played a substantial role in drafting that 2015 Settlement. If they had sought to absolve themselves of liability for the kind of future claims at issue here, i.e., claims that had yet to accrue until *after* Feb. 20, 2015, they had the opportunity to do so, but they did not. Instead, the 2015 Settlement is written in terms of releasing *existing* claims against the defendants, whether direct or related, *sans* any covenant not to sue. Cf. Sullivan v. DB Invs.,

Inc., 2008 U.S. Dist. LEXIS 81146, at *74 (D.N.J. May 22, 2008) (concluding that a release of "related claims" "only applies to the class period and to claims arising out of or relating to the underlying [litigation]" and dismissing objection by class member that the proposed settlement would extinguish future causes of action).

Expanding the 2015 Settlement's release language to encompass future claims arising from future misconduct would be tantamount to manufacturing a "covenant not to sue" out of whole cloth, thereby drafting a settlement better than the one the Defendants bargained for. Cf. Joao v. Cenuco, Inc., 376 F. Supp. 2d 380, 384 (S.D.N.Y. 2005) (licensor did not release patent infringement claims where the contract was silent as to covenant not to sue or release licensor's patent claims).

In the absence of any "covenant not to sue", none of the *Roma Pizzeria* class members have breached their obligations under the 2015 Settlement Agreement. The complaint Dr. Gannon filed in federal court does not seek to duplicate the relief sought by the *Roma Pizzeria* class; the *Gannon* class is not the *Roma Pizzeria* class redux, notwithstanding Harbortouch's suggestions to the contrary. In the absence of any breach of the 2015 Settlement, there was never cause for reopening *Roma Pizzeria* to estop the proposed *Gannon* class

from asserting claims that accrued long after *Roma Pizzeria* was dismissed with prejudice.

Harbortouch's theory that the trial court had exclusive jurisdiction to enforce the 2015 Settlement assumes that the settlement had been breached, which it had not. Because the parties to the 2015 Settlement did not breach their agreement, the trial court did not assert jurisdiction over the *Gannon v. Shift4* matter; the *Gannon* plaintiffs chose to assert their separate claims in a separate forum, *viz.*, federal court. Defendants' true aim is to expand the 2015 Settlement *post hoc* so as to encompass future claims arising from future misconduct. Reopening *Roma Pizzeria* in order to rewrite the 2015 Settlement is not a legitimate basis upon which to confer jurisdiction over the *Gannon* claims upon the trial court.

The claims of the proposed *Gannon* class members could not have been asserted or alleged by any of the members of the *Roma Pizzeria* class on Feb. 20, 2015. The *Gannon* claims do not relate to misconduct that occurred before Feb. 20, 2015, they relate to misconduct occurring *after* that date. The claims being asserted by the *Gannon* class plaintiffs did not accrue until Harbortouch's corporate affiliate, Shift4 Payments, engaged in misconduct long after 2015. Dr. Gannon chose to bring those claims in federal court, not New Jersey Superior Court. Defendants' motions to reopen and enforce the 2015 Settlement was a

ploy to defeat the fundamental principle a plaintiff is entitled to the forum of its choosing. See, e.g., Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970) (noting the heavy burden to transfer from plaintiff's chosen venue under 28 U.S.C. §1404(a)).

Reopening Roma Pizzeria to rewrite the 2015 Settlement to extinguish future claims for future misconduct was prejudicial to Dr. Gannon and the potential class members, and the court below ultimately wrote a better contract than the one for which the Defendants bargained. Cf. Isetts, 364 N.J. Super. at 254. The only cause for reopening *Roma Pizzeria* was for the trial court to decline jurisdiction over *Gannon*, a conclusion that required the trial court to properly interpret the scope of ¶1.29. (Pa0067, at ¶¶ 8.18-19, and Pa0073, Final Order of the Hon. Edward Coleman, P.J. Ch., at ¶16). The only plausible conclusion of that provision is that the 2015 Settlement *did not* release Defendants from future claims for future misconduct occurring after Feb. 20, 2015. The trial court should have declined jurisdiction over the claims asserted in the pending *Gannon* litigation, and should have recommended that the stay imposed in Dr. Gannon's federal action in U.S. District Court for the District of New Jersey, 3:23-cv-04313, be lifted.

CONCLUSION

On the basis of the foregoing, Plaintiffs respectfully submit that the court's order of May 8, 2024, reopening *Roma Pizzeria v. Harbortouch f/k/a United Bank Card, Inc.*, should be reversed, and an order declining jurisdiction should be entered.

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By: ___/s/G. Martin Meyers_____
G. Martin Meyers, Esq.

Dated: Sept. 23, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003222-23

ROMA PIZZERIA, on behalf of itself and all others similarly situated,

Plaintiffs-Appellants,

v.

HARBORTOUCH f/k/a UNITED BANK CARD,

Defendant-Respondent.

CIVIL ACTION

COURT BELOW:
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
HUNTERDON COUNTY
DOCKET NO. HNT-L-637-12

SAT BELOW:
Hon. Edward M. Coleman, P.J. Ch. (ret.)

BRIEF OF DEFENDANT-RESPONDENT HARBORTOUCH f/k/a UNITED BANK CARD

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Defendant-Respondent Harbortouch f/k/a United Bank Card opposes Plaintiff-Appellant Dr. Marc J. Gannon's appeal from the Superior Court of New Jersey, Law Division, Hunterdon County's May 8, 2024 order granting Harbortouch's motion to reopen this case to enforce a 2015 National Class Action Settlement Agreement and Release ("Settlement Agreement"). For the reasons below, this Court should affirm.

I. PRELIMINARY STATEMENT

This appeal is Plaintiff Marc J. Gannon's third attempt to renege on a 2015 class action Settlement Agreement with Defendant Harbortouch that resolved this matter almost a decade ago. He first breached it by filing a related federal action in which he asserted the very claims he brought (and resolved) here. *See Gannon, et al. v. United Bank Card, Inc., et al.*, in the District Court for the District of New Jersey. No. 3:23-cv-04313-ZNQ-DEA (D.N.J., filed Aug. 11, 2023). Next, when *Gannon* was stayed because the Superior Court of Hunterdon County has exclusive jurisdiction over the Settlement Agreement, Plaintiff opposed Harbortouch's motions to reopen this case and enforce the Settlement Agreement. Then, after Judge Edward M. Coleman, P.J. Ch., granted Harbortouch's motions and held that Plaintiff released his claims against Harbortouch in the settlement, Plaintiff appealed.

Plaintiff's appeal is fatally defective. His largely recycled brief does not say how the trial court abused its discretion in reopening this case or erred in enforcing the Settlement Agreement against him—indeed, he does not even identify the relevant appellate standards of review. And Plaintiff's copy-and-paste arguments again fail to rebut the simple fact that he released his *Gannon* claims in the Settlement Agreement. Disappointment is not the standard for reversal. This Court should affirm.

II. PROCEDURAL HISTORY

In 2015, Plaintiff, a settlement class member in this action, released the very claims he asserts here against Harbortouch – specifically, that Harbortouch violates the law by amending its agreements to modify the fees it charges for processing credit and debit card transactions. Pa000084. Yet, on August 11, 2023, Plaintiff filed the *Gannon* action in the District of New Jersey alleging those same claims. Pa000017. So Harbortouch moved in October 2023 in the Superior Court of Hunterdon County—the court with exclusive jurisdiction over *Roma*'s class settlement—to reopen this case and enforce the parties' Settlement Agreement to bar the *Gannon* action. *See* Pa000011–Pa000014. Meanwhile, the parties jointly moved to stay *Gannon*. Order Granting Mot. to Stay, *Gannon*, No. 3:23-cv-04313, Dkt. 14.

On May 8, 2024, after briefing and argument, Judge Coleman (who presided over and approved the *Roma* settlement) granted Harbortouch's motions and held that Plaintiff had released his *Gannon* claims in the *Roma* settlement. Pa000079–Pa000111. The parties notified the *Gannon* court of the trial court's decision. *See Gannon*, No. 3:23-cv-04313, Dkt. 15. On June 19, 2024, Plaintiff appealed. Pa000001. *Gannon* remains stayed.

III. COUNTERSTATEMENT OF FACTS

United Bank Card, Inc. and Harbortouch Payments, LLC, now known as Shift4 Payments, LLC (collectively, "Harbortouch"), is a leading independent provider of software and payment processing solutions in the United States. Da68. Harbortouch serves merchants of all sizes in a host of industries, providing hardware and software to these merchants to facilitate secure and convenient electronic payments. Da68. For example, merchants can buy or lease payment terminals and software from Harbortouch to process customers' credit card payments at the point of sale. Da68. These payment processing services were at issue in this case in 2015 and are at issue in *Gannon*.

In 2012, Roma Pizzeria sued Harbortouch on behalf of a putative class of Harbortouch's merchant customers. Da1. Roma alleged Harbortouch charged the class members unauthorized fees in violation of their merchant agreements, including "basis point" charges, annual fees, "interchange fees," and "gateway

fees." Da2, Da4–Da6. Roma asserted class claims for violation of the New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-2, breach of contract, breach of the implied duty of good faith and fair dealing, and unjust enrichment. Da9–Da12.

Harbortouch argued that the fees were proper based on valid amendments to the merchant agreements. Ultimately, after two years of litigation and three full-day mediation sessions with sophisticated counsel on both sides, the parties settled *Roma* on a class basis. Pa000071–Pa000076. On September 22, 2014, the parties executed the Settlement Agreement, which was mutually drafted, the result of arms-length negotiations, and fully integrated. Pa000039–Pa000079; Settlement Agreement, §§ 8.8, 8.11 (Pa000067–Pa000068).

The Settlement Agreement has three key provisions. Section 1.29 defines the *Roma* settlement class members' "Released Claims":

> **1.29 Released Claims.** "Released Claims" means and includes all claims, allegations, causes of action, liabilities, damages, demands, rights, equitable relief, legal relief, or administrative relief, of any basis or source, whether known or unknown, that were, have been or could have been, now, in the past, or in the future, asserted or alleged in, or that relate to, the Settled Action by Class Members, including, but not limited to, any and all allegations and claims asserted by Class Members in the Complaint filed in the Settled Action, as well as any claims by Class Members relating to: (a) whether Harbortouch's . . . charges for (1) Annual Fees, (2) UBC Gateway Fees, (3) IMS Reporting Fees, (4) IRS Processing Validation Fees, (5) PCI Annual Fees, or (6) any other dues, assessments, discounts, fees, or charges of any kind are unauthorized by any agreement or violate or are subject to claims for damages, refund, or other relief under the laws or common law of any state or territory in which Class Members or Harbortouch

> reside or of the United States; or (b) whether Harbortouch . . . has the right to amend or modify any agreements, dues, assessments, discounts, fees, or charges of any kind.

Settlement Agreement, § 1.29 (Pa000044). Section 2.1 states the class and Harbortouch's purpose in executing the Settlement Agreement:

> **2.1 Purpose of the Settlement.** The purpose of this Settlement is to forever settle and compromise any and all claims, disputes, and controversies that were or could have been raised against Harbortouch in the Settled Action by Class Members relating to the (a) Annual Fee, (b) UBC Gateway Fee, (c) IMS Reporting Fee, (d) IRS Processing Validation Fee, (e) PC1 Annual Fee or (f) any other fee or charge of any kind that Harbortouch . . . assessed to the Class Representative or any Class Member, or relating to whether Harbortouch . . . has the right to amend or modify any agreement or fee or charge of any kind.

Settlement Agreement, § 2.1 (Pa000046–Pa000047). And Section 5.2 states that the settlement class members intended to release their unknown claims:

> **5.2 Waiver of Unknown Released Claims.** It is the desire of the Settling Parties to fully, finally, and forever settle, compromise, and discharge all of the Class Representative's and the Class Members' Released Claims which were or which could have been asserted in this action, whether known or unknown, against all Released Persons. As a consequence, the Class Representative and each Class Member may hereafter discover facts in addition to or different from those which he or she now knows or believes to be true with respect to the subject matter of the Released Claims, but the Class Representative and each Class Member, upon the Effective Date, shall be deemed to have, and by operation of the Final Settlement Order and Judgment shall have, fully, finally, and forever settled and released any and all Released Claims, known or unknown . . . . The Class Representative acknowledges, and each Class Member shall be deemed by operation of the Final Approval Order and Judgment to have acknowledged, that the foregoing waiver was

> separately bargained for and a key element of the Settlement of which this release is a part.

Settlement Agreement, § 5.2 (Pa000061).

In exchange for the *Roma* settlement class members' release of their claims, Harbortouch agreed to provide up to $7.2 million to the Settlement Class in cash and product credits and to pay class counsel $940,000. Settlement Agreement, §§ 3.1, 3.2, 3.3, 3.7, 3.8 (Pa000048–Pa000051, Pa000054–Pa000056); Da30.

On February 20, 2015, the Hunterdon County court approved the settlement and entered final judgment. Pa000071–Pa000076. According to the Settlement Agreement, the court retained "exclusive jurisdiction over the Parties and Class Members for all matters relating to this action and the settlement, including the . . . enforcement of the Agreement." Pa000075; Settlement Agreement, §§ 8.17, 8.18 (Pa000069). The settlement class ultimately included 38,337 class members, including Plaintiff, Pa000085, and Harbortouch remitted approximately $353,827.97 in cash and product credits to the class members, and an additional $940,000 in attorneys' fees, for a total settlement value of approximately $1.3 million. *See* Pa000085; Da17.

Eight years later, Plaintiff filed *Gannon* in the District of New Jersey. Pa000017–Pa000038. On behalf of a class of merchants, he complains about the very things he complained about (and resolved) in *Roma*: Harbortouch's

right to amend his Merchant Application and modify the fees it charges. The chart below helps illustrate the fact that the two complaints are virtually identical at their core:

The *Roma* Complaint:	The *Gannon* Complaint
Para. 12 – "On each credit and debit card transaction accepted at the POS, Class members are charged a fee by Defendant for processing the transaction. This fee includes what is known as an 'interchange' fee plus additional costs and fees added by the Defendant. Da4.	Para. 18 – "Shift4 uses various pricing programs to bill its Merchant Customers, including an 'Interchange PLUS' pricing program, where the term 'interchange' is a term of art in the credit processing industry, referring to the 'interchange rates' published by the major credit card brands such as VISA." Pa000022.
Para. 17 – "Per the Merchant Application, the parties agreed that Plaintiff would pay the interchange fee, plus 25 basis points, plus 10 cents on each transaction." Da5.	Para. 22 – "Many of Shift4's Merchant Customer opt for the 'Interchange PLUS' pricing model, because that option appears to tie the price for Shift4's services to the published and widely available 'interchange rates' established by the credit card issuers, and to the 'discount fees' quoted in their Merchant Customer Application forms with Shift4." Pa000023.
Para. 18 – "Instead of applying the agreed upon terms included in the Merchant Application, Defendant routinely charged Plaintiff as high as 98 basis points on some transactions." Da5.	Para. 23 – "In fact, however, for approximately the last ten years, Defendant Shift4 has effectively *ignored* the rates agreed to in the Merchant Customer Application forms, and instead has billed its Merchant Customers at steadily increasing rates far *above* the 'interchange rates' charged by the credit card issuers." Pa000024.

Because Plaintiff's Complaint was based on the same conduct he challenged (and released) in *Roma*, Harbortouch moved in the Superior Court for Hunterdon County to reopen the case and to enforce the Settlement Agreement. *See* Pa000011–Pa000014. Harbortouch argued that Plaintiff's *Gannon* claims are "Released Claims" under Section 1.29 of the Settlement Agreement because they relate to *Roma* and concern Harbortouch's right to charge fees and amend its merchant agreements. Pa000090–Pa000091, Pa000099–Pa000105.

On May 8, 2024, the Hunterdon County court granted Harbortouch's motion to reopen the case and enforced the Settlement Agreement against Plaintiff. Pa000079–Pa000111. The court held Plaintiff's *Gannon* claims are "Released Claims" that he relinquished in the *Roma* settlement. Pa000105–Pa000111. Citing the "significant similarities" between the *Roma* and *Gannon* class complaints, including their allegations about Harbortouch's fee structure in its merchant agreements, the court concluded the classes "made the same allegations," challenged "the same fees," and raised "the same theories of relief" in both cases. Pa000108–Pa000110. The court rejected Plaintiff's argument that he could not have "raise[d] these claims prior to the Settlement Agreement [in *Roma*]," holding the *Roma* class "clearly *did* raise the same issues back in

2012." Pa000110. The court held the *Gannon* claims are not "future claims," but "the same claims regarding the interchange fees addressed in the *Roma* case, and are thus covered by the Settlement Agreement." Pa000110.

On June 19, 2024, Plaintiff appealed. Pa000001–Pa000002.

IV. ARGUMENT

The Superior Court for Hunterdon County did not abuse its discretion in reopening this case or err in enforcing the Settlement Agreement against Plaintiff. This Court should therefore affirm the trial court's order.

A. STANDARDS OF REVIEW

"[A]n appeal is taken from a trial court's ruling rather than reasons for the ruling." *N.J. Div. of Child Prot. & Permanency v. K.M.*, 444 N.J. Super. 325, 333 (App. Div. 2016) (internal quotation marks omitted). This Court thus can "affirm the final judgment of the trial court on grounds other than those upon which the trial court relied." *Id.* at 334 (internal quotation marks omitted).

1. Motion to reopen case

A decision to reopen or reinstate a case is reviewed for an abuse of discretion. *Tomney v. Ebeling*, 105 N.J. Super. 66, 70 (App. Div. 1969); *Odukoya v. Sobanjo*, No. A-3323-19, 2021 WL 1904565, at *1 (N.J. Super. Ct. App. Div. May 12, 2021) (reviewing order on motion to reopen case); *Baskett v. Kwokleung Cheung*, 422 N.J. Super. 377, 382 (App. Div. 2011) (reviewing order on motion to reinstate case under R. 1:13-7). Unless a trial court's

decision "rested on an impermissible basis, considered irrelevant or inappropriate factors, failed to consider controlling legal principles[,] or made findings inconsistent with or unsupported by competent evidence," the court has not abused its discretion. *Elrom v. Elrom*, 439 N.J. Super. 424, 434 (App. Div. 2015) (internal quotation marks and citations omitted).

2. Motion to enforce Settlement Agreement

Settlement agreements are contracts reviewed *de novo* based on questions of law. *See Quinn v. Quinn*, 225 N.J. 34, 45 (2016). An order granting a motion to enforce a settlement agreement is thus reviewed under that standard. *See Thakkar v. Greystone Park Psychiatric Hosp.*, No. A-3529-14T2, 2016 WL 3909553, at *3 (N.J. Super. Ct. App. Div. July 20, 2016).

New Jersey public policy strongly favors the settlement of litigation because it promotes the parties' own bargained-for "certitude" and finality. *Brundage v. Estate of Carambio*, 195 N.J. 575, 600–01 (2008); *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 421 N.J. Super. 445, 451–52 (App. Div. 2011), *aff'd*, 215 N.J. 242 (2013). A court therefore "strain[s] to give effect to the terms of a settlement wherever possible." *Brundage*, 195 N.J. at 601; *Josefowicz v. Porter*, 32 N.J. Super. 585, 590 (App. Div. 1954) ("[E]very part will be interpreted with reference to the whole and, if possible, be so interpreted as to give effect to its general purpose."). It may not disturb the parties'

negotiated peace by "rewrit[ing] or revis[ing] an agreement" or enforcing "a contract better than or different from the agreement [the parties] struck between themselves." *Quinn*, 225 N.J. at 45. "[W]hen the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result." *Id.*

B. THE COURT SHOULD DISMISS PLAINTIFF'S APPEAL BECAUSE HE DOES NOT EXPLAIN HOW THE TRIAL COURT ABUSED ITS DISCRETION IN REOPENING *ROMA* OR ERRED IN ENFORCING THE SETTLEMENT AGREEMENT (NOT RAISED BELOW).

The Court should dismiss Plaintiff's appeal because he did virtually nothing to show how the trial court abused its discretion. Rather, Plaintiff argues once again that the *Gannon* claims are "future claims" that he could not have asserted in *Roma*. Pb16–Pb23. In other words, he disagrees with the trial court's conclusion that they are not "future claims." *See* Pa000108–Pa000110. But he never identifies any abuse of discretion in the trial court's reopening decision or any legal flaw in its contractual analysis.[1]

[1] Plaintiff does not even identify the relevant standards of review because he largely copied and pasted his trial court brief. *Compare* Pb16–Pb29 *with* Pa000092–Pa000098. That is not a proper appeal. *See Sackman v. N.J. Mfrs. Ins. Co.*, 445 N.J. Super. 278, 298 (App. Div. 2016) (concluding a brief showed "lack of effort," including because it did not cite the relevant standard of review); *Conboy v. U.S. Small Bus. Admin.*, 992 F.3d 153, 157–58 (3d Cir. 2021) (admonishing counsel for "fil[ing] a copy-and-paste appeal without bothering to

Plaintiff's mere declaration that the court's order should be reversed does not frame the issues for the Court or advance his appeal. *See* Pb3 (stating without support that the trial court had no jurisdiction over the *Gannon* claims and its order should be reversed), 23–24 (similar), 28–29 (similar); *Conboy*, 992 F.3d at 157 ("Unsurprisingly, the lack of appellate argument reflects the correctness of the [lower court's] judgment."). And that failure to "provide any reasons why the decision should be modified or overturned" is fatal to his appeal. *Pandolfo v. D & C Chevy/Honda*, No. A-4037-12T3, 2014 WL 7236788, at *1 (N.J. Super. Ct. App. Div. Dec. 22, 2014) ("[W]e are constrained to dismiss this appeal."); *Special Police Org. of N.J. v. City of Newark*, No. A-4168-19, 2022 WL 2912038, at *8 (N.J. Super. Ct. App. Div. July 25, 2022), *cert. denied,* 253 N.J. 600 (2023) ("Our standards of review, and our role as an appellate court, does not require that we forage through the record to determine whether the court committed errors plaintiffs fail to expressly identify or provide legal argument."); *Drinker Biddle & Reath LLP v. N.J. Dep't of Law & Pub. Safety*, 421 N.J. Super. 489, 496 n.5 (App. Div. 2011) (explaining issues not briefed on appeal are abandoned). Because Plaintiff failed to identify what the lower court did wrong or why, the Court should dismiss this appeal.

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explain what the [lower court] did wrong," which "is not proper appellate advocacy").

C. THE COURT SHOULD AFFIRM BECAUSE THE TRIAL COURT NEITHER ABUSED ITS DISCRETION IN REOPENING *ROMA* NOR ERRED IN ENFORCING THE SETTLEMENT AGREEMENT (PA000105–PA000111).

If it does not dismiss this appeal, this Court should affirm the trial court's order because Judge Coleman neither abused his discretion in reopening this case nor committed a legal error in holding Plaintiff's *Gannon* claims are "Released Claims" under the *Roma* Settlement Agreement.

1. The trial court did not abuse its discretion in reopening *Roma* because Harbortouch demonstrated good cause (Pa000105–Pa000106).

Plaintiff does not argue that the trial court abused its discretion in reopening this case to enforce the Settlement Agreement. *See generally* Pb (mentioning neither "discretion" nor "good cause"). He merely says that the trial court lacked jurisdiction over *Gannon* and should not have considered Harbortouch's arguments because the *Gannon* claims "fall well outside the scope of the 2015 Settlement in *Roma Pizzeria*" and are simply "similar claims arising from separate facts in a separate forum." Pb3, Pb25–Pb26. Plaintiff has not meaningfully challenged the trial court's decision to reopen, so this Court can affirm it. *See Shapiro & Croland v. Bairan*, No. A-3704-05T5, 2007 WL 1574407 at *1 (N.J. Super. App. Div. June 1, 2007) ("deem[ing] waived" an issue subsumed within a notice of appeal but omitted from briefing).

Affirmance is also appropriate because Harbortouch demonstrated good cause to reopen this case. *See* Pa000105–Pa000106. For starters, the Settlement Agreement expressly states that the lower court had exclusive jurisdiction to address whether Plaintiff released his *Gannon* claims. Settlement Agreement, §§ 8.17, 8.18 (Pa000069); Pa000075. The balance of harms also favored reopening because Plaintiff breached the Settlement Agreement when he filed *Gannon* and alleged claims he had released. Pa000106. Relitigating the *Roma* class issues would have unfairly burdened Harbortouch, which paid for peace almost ten years ago. The trial court's decision therefore did not "rest[ ] on an impermissible basis," involve "irrelevant or inappropriate factors," or miss "controlling legal principles." *Elrom*, 439 N.J. Super. at 434. The court properly exercised its discretion to reopen *Roma*.

2. The trial court did not err in enforcing the unambiguous Settlement Agreement (Pa000106–Pa000111) because Plaintiff's claims are "Released Claims."

This Court should also affirm the enforcement of the Settlement Agreement against Plaintiff. The Parties agree the Settlement Agreement is unambiguous, that Plaintiff is a *Roma* "Settlement Class" Member, and that Harbortouch (now Shift4) is a "Released Person." *See generally* Pb; Settlement Agreement, §§ 1.37, 1.17 (Pa000042, Pa000046). The Parties disagree only

about whether Plaintiff's *Gannon* class claims are "Released Claims" under Section 1.29. The trial court correctly held that they are.

Plaintiff chiefly argues on appeal—as he did below—that the *Roma* Settlement Class Members did not release "future claims." Pb16–23. The trial court rightfully rejected Plaintiff's argument because the Gannon claims are related to the claims in Roma, making them "Released Claims." Pa000044. But this Court can affirm the trial court's decision for any reason in the record. N.J. Div. of Child Prot. & Permanency, 444 N.J. Super. at 334. The Court has six reasons to affirm.

a. The Gannon claims "relate to" Harbortouch's amendments to its merchant agreements (Pa000100–Pa000101).

First, Plaintiff released all claims that "relate to" Harbortouch's "right to amend or modify" its merchant agreements with the *Roma* class members. Both Sections 1.29 and 2.1 of the Settlement Agreement reflect that Plaintiff released claims about amendments:

> **1.29 Released Claims.** "Released Claims" means and includes ***all claims***, . . . whether known or unknown, that were, have been or could have been, now, in the past, or in the future, asserted or alleged in, or that relate to, the Settled Action by Class Members, ***including*** . . . ***any claims by Class Members relating to: . . . whether Harbortouch . . . has the right to amend or modify any agreements***, dues, assessments, discounts, fees, or charges of any kind.

Settlement Agreement, § 1.29 (emphases added) (Pa000044).

> **2.1 Purpose of the Settlement.** The purpose of this Settlement is to forever settle and compromise ***any and all claims***, disputes, and controversies that were or could have been raised against Harbortouch in the Settled Action by Class Members . . . ***relating to whether Harbortouch . . . has the right to amend or modify any agreement*** or fee or charge of any kind.

Settlement Agreement, § 2.1 (emphases added) (Pa00046–Pa00047).

Plaintiff has never disputed this point. *See* Pa000101; Pb16–Pb19 (lacking the words "modify," "modification," and "amend"). The trial court even observed that Plaintiff never "provided . . . compelling reasons for why" Harbortouch's changes to its fees and agreements were "'future claims' and new fees . . . outside the scope of the Settlement Agreement." Pa000106. Plaintiff's failure to explain how the *Gannon* claims fall outside Harbortouch's right to amend is a waiver of any contrary argument. *See Gormley v. Wood-El*, 218 N.J. 72, 95 n.8 (2014) (declining to address an issue "in light of [the appellant's failure to argue or brief the issue, or develop the type of record that would assist the Court in resolving" it).

Had Plaintiff challenged this point, he would still lose. The unambiguous phrases "relate to" in Section 1.29 and "relating to" in Section 2.1 are broad; they cover all claims that "have some connection to" or "stand in relation to" *Roma*. *Relate*, Black's Law Dictionary; *see also O'Brien v. Two W. Hanover Co.*, 350 N.J. Super. 441, 448–49 (App. Div. 2002) (defining "relates to" as having "a connection with or reference to" (internal quotation marks omitted)).

Plaintiff never contends with the "broad common-sense meaning" of "relate to," *Mackey v. Lanier Coll. Agency & Serv., Inc.*, 486 U.S. 825, 841–42 (1988) (Kennedy, J., dissenting); instead, he attempts to reframe Harbortouch's argument as a claim preclusion argument. Pb24. But Harbortouch has not asserted and need not prove claim preclusion because the plain language of the Settlement Agreement is enough. Plaintiff released all claims with "a connection with or reference to" Harbortouch's right to amend its agreements. *O'Brien*, 350 N.J. Super. at 448–49 (internal quotation marks omitted).

No matter when the *Gannon* claims accrued or Plaintiff learned about allegedly improper amendments to its merchant agreements, his claims based on amendments are barred because he and the *Roma* settlement class members released "any and all" claims relating to Harbortouch's ability to amend or modify its agreements and fees. Settlement Agreement, §§ 2.1, 1.29 (Pa000044, Pa00046–Pa00047).[2] The trial court held as much. Matching *Roma* and *Gannon* allegations side-by-side, Judge Coleman noted that both putative classes "made the same allegations, based on the same theories of relief." Pa000110.

[2] If Plaintiff wanted to restrict Harbortouch's ability to amend or modify its fees, he could certainly have sought to negotiate a settlement that did that. He didn't. In fact, he did the exact opposite, releasing all claims relating to Harbortouch's "right to amend or modify any agreement or fee or charge of any kind." Settlement Agreement, § 2.1 (Pa00046–Pa00047).

Plaintiff's "new" claims in *Gannon* about Harbortouch's fees, the "bundling" of rates, and its amendments to Plaintiff's merchant agreements *for over fifteen years* align squarely with the *Roma* claims—claims Harbortouch already paid $1 million to resolve. *See* Pa000110 ("It is not clear to this Court how the bundling of rates is a future issue that was not addressed by the Settlement Agreement.").

Judge Coleman keenly recognized the practicality of the broad *Roma* release: "[i]ncreasing rates over time is not an uncommon practice as inflation rises." Pa000110. It makes sense that Harbortouch would need the *Roma* settlement class to release all claims about Harbortouch amending its merchant agreements. Indeed, although it could have, the heavily-negotiated and fully integrated Settlement Agreement required no business change on Harbortouch's part and provided no injunctive relief for the class. *See* Settlement Agreement, § 8.8, 8.11 (Pa000067–Pa000068). Instead, the settlement class members—a limited, defined group of businesses—released all claims about Harbortouch's amendments, and Harbortouch continued its business practices. That is a typical class action settlement.

The Court can affirm the trial court's decision on this independent basis.

b. The Gannon claims "relate to" Harbortouch's fees (Pa000100, Pa000103).

Second, in the same way Plaintiff's class claims in *Gannon* concern Harbortouch's right to amend its agreements, they concern Harbortouch's right to charge fees as it sees fit. Both Sections 1.29 and 2.1 of the Settlement Agreement show that Plaintiff and the *Roma* class released fee-related claims—another independent basis for affirmance.

> **1.29 Released Claims.** "Released Claims" means and includes ***all claims*** . . . that ***were, have been or could have been***, now, in the past, or in the future, asserted or alleged in, or that relate to, the Settled Action by Class Members, including . . . any claims by Class Members relating to: (a) whether ***Harbortouch's . . . charges for [five specified fees] or (6) any other dues, assessments, discounts, fees, or charges of any kind are unauthorized by any agreement or violate or are subject to claims for damages, refund, or other relief under the laws or common law of any state*** . . . .

Settlement Agreement, § 1.29 (emphases added) (Pa000044).

> **2.1 Purpose of the Settlement.** The purpose of this Settlement is to forever settle and compromise any and ***all claims***, disputes, and controversies that ***were or could have been raised*** against Harbortouch in the Settled Action by Class Members ***relating to [five specified fees] or (f) any other fee or charge of any kind that Harbortouch . . . assessed*** to the Class Representative or any Class Member . . . .

Settlement Agreement, § 2.1 (emphases added) (Pa000046–Pa000047).

In the Settlement Agreement, Plaintiff released all claims relating to "any . . . fee or charge of any kind that Harbortouch . . . assessed" or to Harbortouch's right to charge "assessments, discounts, fees, or charges of any

kind." Settlement Agreement, §§ 2.1, 1.29 (Pa000046–Pa000047, Pa000044). Yet he has brought those same claims again in *Gannon*, complaining about Harbortouch's increasing of its fees and "ignoring" the original rates listed in merchant applications. Pa000018–Pa000019, Pa000024–Pa000027. These are "Released Claims."

Plaintiff responds that the *Gannon* putative class members "are complaining about fees different from those at issue in *Roma*" and transactions that happened after *Roma* was settled. Pb23–Pb24. He misses the mark. Where the Settlement Agreement expressly and broadly covers all claims against Harbortouch involving "any" "dues, assessments, discounts, fees, or charges of any kind," it does not matter what specific fees were at issue in *Roma* versus *Gannon*. Settlement Agreement, §§ 1.29, 2.1 (Pa000044, Pa000046–Pa000047). All fee-related claims were released.

This Court can independently affirm the trial court's decision that Plaintiff's claims are "Released Claims" because they concern Harbortouch's fees.

c. The Gannon claims "relate to" *Roma* (Pa000090–Pa000091).

Third, Section 1.29 contains a catchall provision in which Plaintiff released "all claims" that "relate to" *Roma*:

> **1.29 Released Claims.** "Released Claims" means and includes ***all claims***, . . . whether known or unknown, that ***were, have been or could have been***, now, in the past, or in the future, asserted or alleged in, ***or that relate to, the Settled Action*** by Class Members . . . .

Settlement Agreement, § 1.29 (emphases added) (Pa000044).

This broad language means "Released Claims" covers the *Gannon* claims, which Plaintiff concedes involved "analogous" conduct to that at issue in *Roma*. Pb23–Pb25. Indeed, it is undisputed that *Roma* involved Harbortouch's fees and merchant transactions, like *Gannon* does. *See id.*; Pa000108–Pa000110 (confirming similarities in complaints). Plaintiff cannot credibly argue that the *Gannon* claims do not "relate to" *Roma*.

Plaintiff's sole response to this argument—and the rest of Harbortouch's arguments below—is that Section 1.29 released only

> related claims that had accrued by the date of final judgment, which had yet to be "asserted or alleged" by the *Roma Pizzeria* class members as of that date, but which could have been "asserted or alleged" sometime "in the future" absent the entry of final judgment and dismissal of the complaint.

Pb20–Pb21. But that is not what Section 1.29 says. It does not cover only claims that "had accrued" by final judgment in *Roma*. It includes no accrual cutoff date. Instead, "Released Claims" includes all claims, "known or unknown, that were, have been or could have been, now, in the past, or *in the*

future" asserted in *Roma*. Settlement Agreement, § 1.29 (emphasis added) (Pa000044).

As the trial court held, the *Gannon* claims about Harbortouch's fees and amendments are "striking[ly]" similar to the *Roma* claims. Pa000108. Not only do Plaintiff's *Gannon* claims "relate to" the same issues in *Roma*, but they center on fees and amendments—"exactly" the issues *Gannon* raises—and therefore "could have" been brought in *Roma*. Indeed, if Plaintiff wanted to negotiate the cessation of a business practice (i.e., the way in which Harbortouch amends and modifies its fee structure), he could have done that. He didn't. Instead, he released those claims, and Judge Coleman's decision to enforce the Settlement Agreement, should be affirmed on this basis.

d. The Gannon claims are "future" claims (Pa000102–Pa000105).

Fourth, the plain language of "Released Claims" includes "future" claims.

> **1.29 Released Claims.** "Released Claims" means and includes ***all claims***, . . . ***whether known or unknown, that were, have been or could have been, now, in the past, or in the future, asserted or alleged in***, or that relate to, the Settled Action by Class Members . . . .

Settlement Agreement, § 1.29 (emphases added) (Pa000044).

Plaintiff offers three arguments for why the *Roma* Settlement Class Members did not release "future claims." One, he says the Settlement Agreement does not include that term. Pb22–Pb23. But Section 1.29 covers

settlement class members' claims that "could have been" "asserted or alleged in" *Roma* "in the future." Settlement Agreement, § 1.29 (Pa000044). In other words, Plaintiff and the remaining Settlement Class Members released claims they could otherwise have brought in the future related to *Roma* and Harbortouch's fees and amendments.

Two, Plaintiff relies on nonbinding District of New Jersey language to argue the "relating to" language in Section 1.29 does not cover future claims unless "the factual predicate for future claims is *identical* to the factual predicate underlying the settlement agreement." Pb25 (quoting *Dando v. Bimbo Food Bakeries Distr., LLC*, No. 14-2956 (NLH/JS), 2015 WL 5770014, at *3 (D.N.J. Sept. 30, 2015), and adding emphasis). Plaintiff misunderstands that the Third Circuit has interpreted this principle to mean that "identical" means "similar," not "the same." *Freeman v. MML Bay State Life Ins. Co.*, 445 F. App'x 577, 578–80 (3d Cir. 2011) (holding claim was barred by previous class release and the factual predicates were "identical" where the claims arose out of the same insurance policy; it did not matter that the new claim challenged different practices with respect to the policies); *Monaco v. Mitsubishi Motors Credit of Am., Inc.*, 34 F. App'x 43, 45 (3d Cir. 2002) (holding claim was barred by previous class release arising from the same early termination charge provisions

in a lease agreement; it did not matter that the new claim was brought under a different statute).[3]

Here, as Judge Coleman recognized, the two cases share the same fee and amendment basis. Pa000108. In short, their claims are "related."

And three, Plaintiff argues "Released Claims" covers claims the *Roma* class members could have brought "in the future" only if they came into existence between the execution of the Settlement Agreement and final judgment. *See* Pb19–Pb21. Neither the text of Section 1.29 nor the reality of the class settlement supports that artificial limitation. With its business goals in mind, Harbortouch paid over $1 million in exchange for lasting peace from the *Roma* settlement class members and the right to continue to amend its agreements and charge fees as it deems appropriate. It would not have paid that amount merely to resolve the claims the *Roma* class members had already brought only to face the same claims a decade later. Plaintiff's post-hoc

[3] Plaintiff also cites, but misreads, another non-binding opinion, *Sullivan v. DB Invs., Inc.*, No. 04-2819 (SRC), 2008 WL 8747721 (D.N.J. May 22, 2008). There, the court did not conclude the proposed settlement would not or could not extinguish future claims. *Contra* Pb26–Pb27. It held that the release at issue applied only to claims within the class period which arose out of the class litigation, but it confirmed that a class settlement can release "[c]laims arising from the same facts but not asserted" in the action and claims "arising out of or relating to" the action. 2008 WL 8747721, at *25. The "Released Claims" here fall into those two categories.

interpretation of "in the future" significantly diminishes the release's value to Harbortouch and it is not what the parties agreed to in *Roma*.

The Court can affirm the trial court's decision on this basis because Plaintiff released all claims related to *Roma*—including Settlement Members' claims that arose "in the future."

e. The Gannon claims are "unknown" claims (Pa000104–Pa000105).

Fifth, this Court can affirm the decision below because Plaintiff released unknown claims, including those he asserts in *Gannon*. Section 5.2 of the Settlement Agreement reflects an intent to release unknown claims based on later-discovered facts but which could have been asserted in *Roma*.

> **5.2 Waiver of Unknown Released Claims.** It is the desire of the Settling Parties to fully, finally, and forever settle, compromise, and discharge all of the Class Representative's and the Class Members' ***Released Claims which were or which could have been asserted in this action, whether known or unknown***, against all Released Persons. As a consequence, the Class Representative and each Class Member ***may hereafter discover facts in addition to or different from those which he or she now knows or believes to be true with respect to the subject matter of the Released Claims***, but the Class Representative and each Class Member, upon the Effective Date, shall be deemed to have, and by operation of the Final Settlement Order and Judgment ***shall have, fully, finally, and forever settled and released any and all Released Claims, known or unknown*** . . . . The Class Representative acknowledges, and each Class Member shall be deemed by operation of the Final Approval Order and Judgment to have acknowledged, that the foregoing waiver was separately bargained for and a key element of the Settlement of which this release is a part.

Settlement Agreement, § 5.2 (emphases added) (Pa000061).

The *Gannon* claims fit neatly into Section 5.2; they are premised on Harbortouch's fees and its right to amend its agreements with the settlement class members. Plaintiff argues that the *Roma* class released only claims that existed before or at final judgment. Pb21–Pb22. But accepting Plaintiff's narrow interpretation of the timing of Released Claims would require the Court to again ignore the meaning of "Released Claims," which is nested within Section 5.2. For the reasons explained above, "Released Claims" in Section 5.2 encompasses not just claims at final judgment but "all claims" "related to" *Roma*, including those that could be brought "in the future" or were otherwise "unknown" but related.

f. The Settlement Agreement's release of claims is effective without a covenant not to sue (Pa00098).

Finally, the Court can affirm the trial court's decision notwithstanding Plaintiff's "covenant not to sue" argument. Plaintiff asserts that the Settlement Agreement released no future claims because the agreement lacks a covenant not to sue. Pb26–Pb27. But Plaintiff elevates form over substance in seeking to limit the scope of the *Roma* claim release through a separate covenant not to sue. *See Breen v. Peck*, 28 N.J. 351, 358 (1958) ("The distinction between releases and covenants not to sue has properly been described as an artificial one which looks to form rather than substance and which tends to trap the unwary.").

The Settlement Agreement does not contain a covenant not to sue because the parties did not need one. The plain language of the Settlement Agreement includes a release of claims about amendments, claims about fees, "*Roma*-related" claims, and claims that settlement class members could bring "in the future." Settlement Agreement, § 1.29 (Pa000044). A covenant not to sue would be superfluous, a finding contrary to contract construction principles. *Cf. Josefowicz*, 32 N.J. Super. at 590 (requiring a court to give "every part" of a contract meaning to accomplish the contract's purpose). The more reasonable—and correct—interpretation of the unambiguous language in Sections 1.29, 2.1, and 5.2 is that the settlement class released all claims accruing in the future that "relate to" *Roma*, amendments, or fees. This Court can reject Plaintiff's covenant not to sue argument and affirm the trial court's decision that he released his *Gannon* claims.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's May 8, 2024 Order.

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Dated: October 23, 2024

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Superior Court of New Jersey

APPELLATE DIVISION

ROMA PIZZERIA, on behalf of itself and all others similarly situated, Plaintiff(s), v. HARBORTOUCH f/k/a UNITED BANK CARD, Defendant(s).	**Docket No. A-003222-23** ***Civil Action*** **ON APPEAL FROM:** **LAW DIV., HUNTERDON COUNTY** **Docket No. HNT-L-637-12** **SAT BELOW:** **Hon. Edward M. Coleman, P.J. Ch. (ret.)**

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PRELIMINARY STATEMENT

Defendants propose that Plaintiff's omission of the well-known "abuse of discretion" standard from their brief renders the trial court's decision unassailable. It does not. Nothing in the 2015 *Roma Pizzeria* settlement (hereinafter, the "2015 Settlement") indicates that the *Roma Pizzeria* class agreed to relinquish *future* claims that had yet to accrue for misconduct that had yet to even occur.

Judge Coleman's finding that the *Roma Pizzeria* settlement was breached because one class member (Dr. Gannon) chose to assert his claims for conduct that had not even occurred when the settlement was executed amounts to abuse of discretion. The absence of a "covenant not to sue" is fatal to Defendants' theory. Without an actual breach of the 2015 settlement, there was no cause to reopen *Roma Pizzeria*—other than for the limited purpose of declining jurisdiction over the 2023 lawsuit filed by Dr. Gannon in federal court on behalf of all others similarly situated, *Gannon v. Shift4*.

Harbortouch's motion to reopen *Roma Pizzeria* should have been denied and Judge Coleman's order of May 8, 2024 should otherwise be reversed.

LEGAL ARGUMENT

A. The Court Below Abused Its Discretion.

Contrary to defendants' suggestion that only the end result and not the reasoning of the court's decision below need be reviewed by this Court (Db9), review of a decision on reopening a case under the abuse-of-discretion standard embraces both the reasoning and the result. Handleman v. Cox, 74 N.J. Super. 316, 329-330 (App. Div. 1962). This is particularly true where, as here, "[t]he issue in dispute seriously affected the substantial rights of the plaintiff and he should have been given the opportunity to supplement his proofs". Id., 74 N.J. Super. at 333.

While the misconduct alleged on behalf of the *Gannon* class is in many ways *analogous* to that alleged in *Roma Pizzeria,* the "relating to" language in the 2015 Settlement does not extinguish sight-unseen the claims by *Gannon* class members for misconduct arising long after Feb. 20, 2015 simply because the *Gannon* complaint suggests that Defendants have engaged in wrongdoing *similar* to that at issue in *Roma Pizzeria*. Cf. Dando v. Bimbo Food Bakeries Distribution, LLC, 2015 U.S. Dist. LEXIS 132038, at *7 (D.N.J. Sep. 29, 2015) ("The key inquiry is whether the factual predicate for future claims is *identical* to the factual predicate underlying the settlement agreement", italics added). Defendant's reliance on the vague "relating to" formula in ¶1.29 of the

Settlement Agreement to overturn the more specific ¶¶ 2.1 and 5.9, both of which clearly limit the release to claims existing at the time final judgment was entered, attempts to re-write the Settlement Agreement to give Defendants a perpetual license to abuse their customers. The more specific language should prevail over the general, non-specific wording in ¶1.29. Cf. Halderman, 901 F.2d at 319.

The claims of the proposed *Gannon* class members could not have been asserted or alleged by any of the members of the *Roma Pizzeria* class on Feb. 20, 2015, because those claims do not relate to misconduct that occurred before Feb. 20, 2015; they relate to misconduct occurring *after* that date. The claims being asserted by the *Gannon* plaintiffs did not accrue until Shift4 engaged in misconduct long after 2015; in fact, Dr. Gannon's complaint in federal court proposed several examples of wrongful fees and surcharges occurring in 2020. (Pa0023-25, at ¶¶ 29-33).

Moreover, where a party arbitrarily restructures its service fees subsequent to a baseline period, it is an abuse of discretion to decide that the revised fee structure is substantially the same as before and thus entitled to the same treatment by the court. Cobo by Hudson Physical Therapy Servs. v. Market Transition Facility, 293 N.J. Super. 374, 388 (App. Div. 1996).

Shift4's February, 2020 "bill stuffer" notice to its Merchant Customers (Pa000122-Pa000123) concealed that, instead of merely simplifying its billing, the new "bundling" categories described therein increased the "interchange rate" substantially above the "interchange rates" published by the credit card issuers, with the excess fee being billed to the Merchant Customer. For example, instead of a VISA processing fee that would incorporate VISA's published interchange rate, that transaction now resulted in a credit card processing fee that incorporated Defendant Shift 4's wholly arbitrary, and typically substantially higher, "bundled" rate. (Pa000123). On a cumulative basis, Shift4's arbitrary "bundled rate" has resulted in their collection of millions of dollars of excessive fees from the Class of Merchant Customers the Plaintiffs seek to represent in this action. (Pa000123-Pa000124).

B. New Jersey Courts Disfavor Permitting Class Action Settlements To Bar Claims That Were Not Actually Litigated Between The Parties.

The Defendants themselves admitted in their briefing below, and Judge Coleman agreed, that the fees at issue in *Gannon* are different from those in *Roma Pizzeria*, Pa00090 ("the Merchants complain about different fees in *Gannon* than the ones disputed in [*Roma Pizzeria*]"). In addition, the transactions involved in *Gannon* took place long after entry of final judgment in *Roma Pizzeria*. To that extent, Defendants' arguments fall afoul of the basic principle of claim preclusion under New Jersey law, that "the parties in the

later action must be identical to or in privity with those in the prior action[, and] the claim in the later action must grow out of the *same transaction or occurrence* as the claim in the earlier one." Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 412 (1991) (emphasis supplied, internal citations omitted).

"[A] class action settlement should not bar all claims that could have been litigated between the parties but only those claims that were actually litigated." Garvey v. Tp. of Wall, 303 N.J. Super. 93, 103 (App. Div. 1997), *quoting* Hilliard v. Shell W. E & P, Inc., 885 F. Supp. 169, 173 (W.D.Mich.1995). This so, in part, because "[t]he notice provided to a class member typically describes only the claims actually asserted in the class action. Consequently, the class member does not receive notice that other unasserted claims may be barred by a final judgment." Garvey, 303 N.J. Super. at 102.

The claims of the proposed *Gannon* class members could not have been asserted or alleged by any of the members of the *Roma Pizzeria* class on Feb. 20, 2015, because those claims relate only to misconduct occurring *after* that date. The claims asserted by the *Gannon* plaintiffs did not accrue until Shift4 engaged in misconduct long after 2015; in fact, Dr. Gannon's complaint in federal court outlined several examples of wrongful fees and surcharges occurring in 2020. (Pa0023-25, at ¶¶ 29-33). Those claims were brought in the

U.S. District Court for the District of New Jersey on diversity grounds, not New Jersey Superior Court, and the Law Division never had jurisdiction over them because the claims alleged by the *Gannon* class fall well outside the scope of the 2015 Settlement in *Roma Pizzeria*.

While the misconduct alleged against Shift4 on behalf of the *Gannon* class is in many ways analogous to the misconduct alleged in *Roma Pizzeria,* the "relating to" language in the 2015 Settlement does not extinguish the claims by *Gannon* class members for misconduct arising long after Feb. 20, 2015 simply because the *Gannon* complaint suggests that Defendants have again engaged in fraudulent practices. Cf. Dando v. Bimbo Food Bakeries Distribution, LLC, 2015 U.S. Dist. LEXIS 132038, at *7 (D.N.J. Sep. 29, 2015) ("The key inquiry is whether the factual predicate for future claims is *identical* to the factual predicate underlying the settlement agreement.") (italics added). Defendant's reliance on the general (and vague) "relating to" formula in ¶1.29 of the Settlement Agreement to negate the more specific language of ¶¶ 2.1 and 5.9, which clearly limit the release to claims in existence when final judgment was entered, effectively re-wrote the Settlement Agreement to give Defendants a perpetual license to abuse their customers. The more specific language should prevail over the general, non-specific wording in ¶1.29. Cf. Halderman, 901 F.2d at 319.

C. (Pa000093) The Express Terms Of The Settlement Did Not Reach Future Claims Arising From Misconduct Occurring After Feb. 20, 2015.

The plain language of the 2015 Settlement makes clear the parties' intent to resolve only claims that had accrued as of the date of entry of final judgment. See, e.g., Pa0044-45, 2015 Settlement, at ¶2.1 ("The purpose of this Settlement is to forever settle and compromise *any and all claims, disputes, and controversies that were or could have been raised against Harbortouch in the Settled Action*…") (emphasis added); Pa0059-60, at ¶5.2 ("settle, compromise, and discharge all of the Class Representative's and the Class Members' Released Claims *which were or which could have been asserted in this action*…").

D. (Pa000093) The claims of the proposed *Gannon* class members could not have been asserted in *Roma Pizzeria* and were therefore not extinguished by the 2015 Settlement.

Claims that had yet to accrue until nearly a decade after *Roma Pizzeria* settled are clearly not claims that "were or could have been raised" in the *Roma Pizzeria* litigation, seeing as the complaint was dismissed with prejudice on Feb. 20, 2015. By its own terms, the *Roma Pizzeria* settlement resolved class claims for misconduct by Harbortouch that occurred *prior to* the entry of final judgment on Feb. 20, 2015, *not* for misconduct occurring after that date. Harbortouch could have insisted, but did not, on language absolving itself of any fraud claims that might accrue to members of the *Roma Pizzeria* class *after* Feb. 20, 2015.

Contrast Wells Fargo Bank, N.A. v. Schultz, 2013 N.J. Super. Unpub. LEXIS 406, *5 (Ch. Div. 2013) (releasing any claim that "has been, or could have been or in the future might be asserted by any Releasing Party in the Lawsuit . . . , or in any other action or proceeding in this Court, or any other court").

"A general release, not restricted by its terms to particular claims or demands, ordinarily covers all claims and demands *due at the time of its execution* and within the contemplation of the parties." Id., at 204 (emphasis supplied); see also F.P.P.E. Consulting Eng'rs, Inc. v. Morda, 2009 N.J. Super. Unpub. LEXIS 419, at *12 (App. Div. Feb. 25, 2009) (reversing judgment and remanding for plenary hearing to determine whether the parties intended to release future malpractice claims).

Defendants agreed to limit the 2015 Settlement to all claims "that were, have been or could have been . . . asserted or alleged in" *Roma Pizzeria*—whether those claims could have been asserted "now, in the past, or in the future"—and any related claims (see Pa0042, at ¶1.29). The adverbial phrase "now, in the past, or in the future" modifies claims "that were, have been or could have been . . . asserted or alleged" by the *Roma Pizzeria* class members in that lawsuit at that time. The furthest ¶1.29 can therefore reach is to *related* claims that had accrued by the date of final judgment, which had yet to be "asserted or alleged" by the *Roma Pizzeria* class members as of that date, but

which could have been "asserted or alleged" sometime "in the future" absent the entry of final judgment and dismissal with prejudice.

Nothing in the 2015 Settlement clearly indicates that the *Roma Pizzeria* class members agreed to exculpate Harbortouch or its corporate successor for future claims arising from future misconduct. Cf. Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 304-05 (2010) ("[T]o be enforceable an exculpatory agreement must reflect the unequivocal expression of the party giving up his or her legal rights that this decision was made voluntarily, intelligently and with the full knowledge of its legal consequences.") (internal quotation marks omitted). ¶1.29 does not encompass claims that had yet to accrue after entry of final judgment on Feb. 20, 2015. No claim accruing on Feb. 21, 2015, or any time thereafter, could have been alleged on behalf of the Roma Pizzeria class because by that point, the complaint had been dismissed with prejudice. This is further made clear by ¶5.2, "Waiver of Unknown Released Claims", which states that "each Class Member, upon the Effective Date [of final judgment, Feb. 20, 2015], shall be deemed to have, and by operation of the Final Settlement Order and Judgment shall have, fully, finally, and forever settled and released any and all Released Claims, . . . *which then exist, or heretofore have existed* upon any theory of law . . . ." (Pa0059) (italics added).

"[A] settlement acts as a release only in respect of those claims that the parties actually released, or intended to release." Goncalvez ex rel. Goncalvez, 188 N.J. Super. 620, 629 (App. Div. 1983). Strikingly absent from ¶5.2 is any mention of "claims that do not yet exist", or "claims that might exist in the future", or simply "future claims." See, e.g., Witasick v. Minn. Mut. Life Ins. Co., 803 F.3d 184, 192 (3d Cir. 2015) (plaintiff's complaint was barred by an earlier settlement expressly releasing defendant insurance company from "any future claims, either known or unknown") (italics added); Monaco v. Mitsubishi Motors Credit of Am., Inc., 34 F. App'x 43, 45 (3d Cir. 2002) (dismissing complaint where an earlier class settlement had previously released defendants from "any other claims of any kind, known, or unknown, that class members had, have or may in the future have arising out of the class members' vehicle leases") (italics added).

When read in conjunction with ¶1.29, the waiver provision at ¶5.2— together with the purpose statement at ¶2.1— compels the conclusion that the 2015 Settlement Agreement extinguished only the claims that had accrued to the *Roma Pizzeria* class members on or before Feb. 20, 2015; not claims arising on or after that date. And to be sure, ¶5.2 was "separately bargained for and a key element of the Settlement of which this release is a part." (Pa0059).

Finally, Harbortouch's reinterpretation of the 2015 Settlement suffers from another defect: New Jersey law disfavors contracts that run into perpetuity, and Harbortouch's proposed reinterpretation of its 2015 Settlement as somehow barring future claims arising from future misconduct amounts to a perpetual release. "Absent an almost overwhelming showing that the parties to a contract intended such a one-sided, unreasonable construction, courts will not construe a contract as providing some perpetual right or option which one side can exercise against the other at any time in the future." Home Props. of N.Y., L.P. v. Ocino, Inc., 341 N.J. Super. 604, 613 (App. Div. 2001); see also In re Estate of Miller, 90 N.J. 210, 218 (1982). The notable absence of any sunset clause in the 2015 Settlement is yet further indicium that the parties never intended to extinguish claims that had yet to accrue.

E. (Pa000098) Harbortouch Cannot Rely On The 2015 Settlement To Preclude The Claims Filed In Gannon Because The 2015 Settlement Did Not Contain Any "Covenant Not To Sue."

"A release is a provision that intends a present abandonment of a known right or claim. By contrast, a covenant not to sue also applies to future claims and constitutes an agreement to exercise forbearance from asserting any claim which either exists or which may accrue [in the future]." Medtronic AVE Inc. v. Advanced Cardiovascular Sys., 247 F.3d 44, 55 n.4 (3d Cir. 2001) (citing McMahan & Co. v. Bass, 673 N.Y.S.2d 19, 21 (App. Div. 1998)).

Judge Coleman ignored the effect of the absence of a "covenant not to sue" in the 2015 Settlement estopping "future claims" arising *after* the entry of final judgment. The defendants played a substantial role in drafting the 2015 Settlement. If they had sought to absolve themselves of liability for the future claims at issue here—claims that had yet to accrue until *after* Feb. 20, 2015—they had an opportunity to do so, but they did not avail themselves of it.

Instead, the 2015 Settlement is written in terms of releasing *existing* claims against the defendants, whether direct or related, *sans* any covenant not to sue. Cf. Sullivan v. DB Invs., Inc., 2008 U.S. Dist. LEXIS 81146, at *74 (D.N.J. May 22, 2008) (concluding that a release of "related claims" "only applies to the class period and to claims arising out of or relating to the underlying [litigation]" and dismissing objection by class member that the proposed settlement would extinguish future causes of action).

Expanding the 2015 Settlement's release language to encompass claims arising from not-yet-existent misconduct permitted Defendants to manufacture a "covenant not to sue" ex nihilo. The trial court thereby drafted a settlement agreement better than the one the Defendants bargained for. Cf. Joao v. Cenuco, Inc., 376 F. Supp. 2d 380, 384 (S.D.N.Y. 2005) (licensor did not release patent infringement claims where the contract was silent as to covenant not to sue or release licensor's patent claims).

None of the *Roma Pizzeria* class members have breached their obligations under the 2015 Settlement Agreement, because they none of them ever agreed to a perpetual "covenant not to sue." Harbortouch's theory that the trial court had exclusive jurisdiction to enforce the 2015 Settlement assumes that the settlement had been breached, but it had not. Reopening *Roma Pizzeria* to rewrite the 2015 Settlement so as to bar "future claims arising from future misconduct" is not a legitimate basis upon which to confer jurisdiction over the *Gannon* claims upon the trial court.

The claims asserted by the *Gannon* class plaintiffs did not accrue until Harbortouch's corporate affiliate, Shift4 Payments, engaged in misconduct long after 2015. Dr. Gannon chose to bring those claims in federal court, not New Jersey Superior Court. Defendants' motions to reopen and enforce the 2015 Settlement were a ploy to defeat the fundamental principle that a plaintiff is entitled to the forum of its choosing. See, e.g., Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970) (noting the heavy burden to transfer from plaintiff's chosen venue under 28 U.S.C. §1404(a)).

Reopening Roma Pizzeria to rewrite the 2015 Settlement to extinguish "future claims arising from future misconduct" was prejudicial to Dr. Gannon and the potential class members, and the court below ultimately wrote a better contract than the one for which the Defendants bargained. Cf. Isetts v. Borough

of Roseland, 364 N.J. Super. 247, 254 (App. Div. 2003). The trial court improperly ignored the effect of ¶1.29 limiting grounds for reopening Roma Pizzeria to declining jurisdiction over *Gannon*. (Pa0067, at ¶¶ 8.18-19, and Pa0073, Final Order of the Hon. Edward Coleman, P.J. Ch., at ¶16). The only plausible conclusion to drawn from ¶1.29 is that the 2015 Settlement *did not* release Defendants from any claims arising from misconduct occurring *after* Feb. 20, 2015. The trial court should have declined jurisdiction over the claims asserted in the pending *Gannon* litigation, and should have recommended that the stay imposed in Dr. Gannon's lawsuit in federal court, 3:23-cv-04313, be lifted. To hold otherwise was an abuse of discretion.

CONCLUSION

On the basis of the foregoing, Plaintiffs again respectfully submit that the trial court's order of May 8, 2024, reopening *Roma Pizzeria v. Harbortouch f/k/a United Bank Card, Inc.*, should be reversed, and an order declining jurisdiction should be entered.

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