SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

MICHAEL T. MACK,	: DOCKET NO.: A-003319-23-T2
Plaintiff/Appellant	: CIVIL ACTION
v.	: ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW
WELLS FARGO BANK, N.A.,	: DIVISION - CIVIL PART BURLINGTON COUNTY
Defendant/Respondent	: DOCKET NO.: L-002113-23
	: SAT BELOW: HONORABLE RICHARD L. HERTZBERG
	: J.S.C.

BRIEF ON BEHALF OF PLAINTIFF/APPELLANT, MICHAEL T. MACK

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Preliminary Statement

The Bank's motion contended (1) Plaintiff signed Bank's application to open an account and by doing so entered into a binding arbitration agreement since the application stated customer's use of the deposit account confirms customer's receipt of and agreement to be bound by the bank's applicable account agreement which included the arbitration clause, (2) Plaintiff's claims fell within its scope, and (3) there was no dispute Plaintiff signed the application.

In opposition, Plaintiff denied (1) signing the application, (2) receiving a copy of the deposit agreement or application, and (3) being advised where these documents could be found. Rather, bank employee questioned him at the local bank branch, inserted information into and asked him to sign an ipad, did not advise him he was signing an application or entering into a deposit agreement, and did not offer or give him the opportunity to read what he was signing. Plaintiff did not sign, see or enter into any agreement which included an arbitration clause.

While its undisputed Plaintiff signed the iPad, it is equally undisputed Mack (1) did not know nor did the Bank's representative advise or explain to him what he was signing and (2) did not see nor was he presented with any contract with an arbitration clause. Nothing the Bank representative did or said complied, triggered or generated inquiry notice by the Plaintiff.

In spite of these facts, the trial court held since Plaintiff knew he was opening a bank account, which common sense and experience teach is governed by contract, he was obligated to investigate the terms of the relationship into which he was entering, made no effort to do so, and could not avoid the consequences of his inattention. The court placed the complete burden and responsibility on the Plaintiff to ascertain what was on the iPad, relieving the Bank of any duty or responsibility of advising the customer of the nature of the transaction.

No case, common or statutory law was cited by the court or the Bank to support such a conclusion.

Plaintiff contends it was the Bank's duty to clearly and conspicuously inform him he was signing a contract with an arbitration clause, allow him to read it and provide copies of the documents and the location where they could be found. Absent that, there was no enforceable contract or arbitration clause.

Procedural History

Plaintiff, Michael T. Mack (Mack) filed his complaint against Defendant Wells Fargo Bank, NA (Bank) on 11/6/23 seeking a judgment for $18,900.00 plus interest representing the amount the Bank permitted to be withdrawn from his bank account without his authorization. (Pa 10).

The Bank, on 1/26/24, filed a motion to compel arbitration and stay the proceedings seeking counsel fees and costs (Pa 20). Plaintiff filed opposition with oral argument occurring on 4/12/24 (1T), at which time the judge requested additional submissions. (1T 31-22 to 32-2), which Plaintiff and Defendant filed on 5/1/24 and 5/16/24 respectively.

No additional oral argument was held and the court rendered a written opinion and order on 6/20/24 (Pa 6 to 9) requiring Plaintiff to submit his claims to arbitration in (30) days, and dismissing the complaint without prejudice to be reinstated if an arbitration award was entered. The judge denied the Bank's request for counsel fees in his opinion (Pa 9). The Bank to filed no cross appeal from that or any part of the decision.

Statement of Facts

Plaintiff opened a checking and savings account in Bank in 2013 and 2015, respectively. He is a sole proprietor t/a Mike Mack's Golf Shop, located at 170 Burrs Road, Westampton, N.J. 08060. The accounts were used as his personal and business accounts. (Pa 134, Par. 1).

In May 2022, someone hacked into the Bank's computer and transferred the entire balance of $101,000.00 from Plaintiff's savings into his checking account, from which $160,000.00 was withdrawn in $20,000.00 increments through the

Bank's bill pay feature, a feature Mack never requested nor activated. (Pa 134) - MC-2. Mack had no knowledge of this until he received notice from Bank one of his checks was dishonored. (Pa 134, Par. 3). He immediately contacted Bank because his checking account had a balance sufficient to cover the dishonored check. (Pa 135, Par. 4).

Bank's local branch told him to contact the fraud department. He advised it he had not authorized these transactions, and asked why if he only had a balance of $150,000.00 in his checking account, $160,000.00 could have been withdrawn from it. The Bank advised that it was covered by the overdraft protection from his savings account even though the savings account, because of the fraudulent transfer, had no balance. (Pa 135, Par. 5).

On the Bank's instructions, in order to avoid future fraudulent withdrawals, Mack on 5/18/22, at his local branch, opened new business/personal checking and savings accounts with account numbers that differed from the hacked accounts. (Pa 135, Par. 6). He was under the impression that the bank's local branch knew what happened, was aware of his situation and would guide him through the process to make sure his accounts were not hacked again. (Pa 153, Par. 3).

He trusted the bank to take act in a manner to prevent future hacking of his accounts. (Pa 154, Par. 5). Mack was taken into the manager's office, asked

some questions and advised to sign the manager's electronic ipad where indicated, to open the accounts. The manager told Mack to type his new user name and password into the computer. At no time did the manager show Mack any paper or electronic documents. He was not advised he was signing any type of document, application or contract on the ipad. No copies of any documents were given to him when this meeting ended. The manager did not advise him that any documents would be emailed or otherwise sent to him and none were. Mack was not advised to log into the bank's website to review at any documents or contracts when he signed the ipad. He thought he was just acknowledging that he opened an account, answered the manager's questions, verified this information, user name and password and was giving a handwriting sample. The whole process did not take very long and was done rather informally. Mack thought this was because he was an existing customer. (Pa 135, Par 6).

On 6/1/22, Bank credited to Mack's new savings account, the $150,000.00, that had been fraudulently withdrawn in May 2022 from his old savings and checking accounts. (Pa 136, Par. 7).

The Bank did not provide an explanation of what occurred, why it occurred or when or why the money was credited back to his account. (Pa 136, Par. 8).

On 8/7/23, someone again hacked into the Bank's computer, transferred

$45,000.00 from Mack's new savings account into his new checking account and requested a wire transfer. Mack never before wired funds from any account he had with the Bank, the procedure to do so was unknown to him, and he did not initiate the transfer from his savings to his checking account. (Pa 136, Par. 9).

Mack received a phone call on 8/7/23 which caller id indicated was from the Bank. The caller stated that he was calling because Mack's accounts had again been hacked and they had to be closed. The caller advised that a code number would be sent to Mack's cell phone and Mack needed to give him that number to close the accounts. Code numbers were sent to Mack by text which he provided to the caller. Bank did not advise why it was sending or the purpose of the transmission of the code number, that a wire transfer request had been made, why it wanted the code number entered or that it was part of any security procedure. (Pa 136, Par. 10).

Bank then wired from Mack's checking account $18,900.00 to someone unknown to Mack, charging a $25.00 wire transfer fee. A notation on Mack's bank statement reads: 8/7/23 WT FED# 08134 Metropolitan COMME/FTR/BNF = Kevin Iamas SRF # OW00003499082556 TRN# 230807175817 RFB# OW00003499082556. Mack is unaware of the notation's meaning or to whom the funds were transferred. (Pa 136 - 137, Par. 11).

Upon discovering these unauthorized transfers, Mack immediately notified the Bank, which advised it would attempt to rescind the (Pa 137, Par. 12).

On 8/8/23, Mack contacted a technology company to scan his computer for viruses or malware to determine if his computer had been hacked. The scans revealed it had not. (Pa 137, Par. 13).

On 8/9/23, Bank sent Mack a letter, stated it had investigated an unauthorized online transfer from his savings to his checking account and reversed the unauthorized transfer from the savings account. The Bank however did not deposit $45,000.00 of its own funds into Mack's savings account, rather it transferred the funds from his checking account. The Bank's letter went on to state "that the online fraud claim regarding transaction totaling $18,900.00 was not related to an online fraud event and cannot be resolved by our team. We've forwarded your claim to the correct department." (Pa 137, Par. 14).

On 8/14/23, Mack received a letter from the Wells Fargo Claims Assistance Center/Check Fraud Claims Department stating from its investigation: "we have determined that the transaction was performed by you or someone using your username and password. Under our online wire terms and conditions, Online Access Agreement and Deposit Account Agreement, you are responsible for online wires that originate using your username and password". (Pa 137, Par.15).

However, Mack had not entered into any wire terms and conditions agreement, any Online Access Agreement or Deposit Account Agreement with Bank or any agreement which stated he was responsible for online wire transfers that originate using his username or password. Nor would he have done so, since the bank had previously been hacked and Mack's user name and password were used to commit the first fraudulent transfer previously described. (Pa 138, Par. 16). Mack reported this theft to law enforcement. (Pa 138, Par. 17).

Bank never advised Mack of any security procedures in effect, the use thereof, how they operate, or what was expected of him in relation to such procedures. (Pa 138, Par. 18).

Mack again contacted the Bank about this matter and the Bank responded by letter dated 8/25/23 that it would respond within 10 business days. (Pa 138, Par. 19).

On 8/29/23, Mack received a letter from Bank's Business Resolution Team stating it was unable to assist him but that the Claims Assistance Center should be contacted. (Pa 138, Par. 20).

Mack did so and on 9/6/23, received a letter from William Chase of the Small Business Resolution Team that the claim was denied because "the fraud and claims investigation shows a one-time passcode was sent to the phone number on

file and redeemed. Under our Online Access Agreement and Deposit Account Agreement, the customer is responsible for online wires that originate using their username and password whether or not actually authorized by them". (Pa 138, Par. 21).

No one other than the Bank and Mack were aware of Mack's user name and password and Mack did not provide the user name and password to anyone other than the Bank. (Pa 138-139, Par. 22).

Mack consulted an attorney after the denial of his claim, but had no documents concerning the opening of his new accounts since none were provided. (Pa 139, Par. 23). Mack went to his local branch and asked if they had any documents concerning the opening of the accounts. (Pa 139, Par. 24). The only document Mack was given was a document entitled Business Account Application dated 5/18/22. (Pa 139, Par. 25); (Pa 142-150).

The black redactions on the document were made by the bank at that time, before it was given to Mack. He does not know and wasn't advised why the redactions were made. (Pa 138-139, Par. 26).

The name of the person under "Banker's Name" was blacked out as well as other identifying information on page one. (Pa 139, Par. 27). This was the first time Mack had ever seen this document. (Pa 139, Par. 28). Other personal

information was redacted in white by Mack when submitted to the Trial Court so Bank's redactions could be differentiated. (Pa 139, Par. 29).

The version of this document attached to the Bank's motion, (Pa 29) was different since the redactions in that version made by the bank changed from the one's it made in the copy provided to Mack by the Bank at the local branch. (Pa 139, Par. 30).

These were the only facts before the trial judge concerning the opening of Plaintiff's accounts. The Bank presented no certifications or affidavits from its employees at the local branch where Plaintiff opened his accounts.

In support of its motion the Bank submitted a certification dated 1/26/24 of its 10 year employee, Kanza Fizazi, stating she had personal knowledge of Wells Fargo's general business practice with respect to account opening and maintenance of deposit and checking accounts. (Pa 26, Par. 3).

Attached were three exhibits which she stated were true and correct business records created and maintained by Wells Fargo in the course of regularly conducted business activity and as part of regular practice of Wells Fargo to create and maintain such records which were made at the time of the act, transaction, occurrence or event or within a reasonable time thereafter (Pa 26-27, Par. 4): Exhibit "A" - Account Application for checking account at issue; (Pa 29-37),

Exhibit "B" - a copy of the Wells Fargo Deposit Agreement effective 7/25/23; (Pa 39-78) and Exhibit "C" - a copy of the 7/31/23, checking account statement of the Plaintiff (Pa 80-87) (Pa 27, Par. 6-8).

When pointed out by Plaintiff's counsel that the effective date of Exhibit "B", the deposit agreement, post dated the opening of Plaintiff's bank account 5/18/22, Fizazi submitted a supplemental certification attaching a copy of the Bank's Deposit Agreement effective 5/9/22. (Pa 88-89, Par. 3); (Pa 91-131).

Legal Argument

I. Appellate Standard of Review of Motion to Compel Arbitration.

A decision granting or denying a motion to compel arbitration is reviewed de novo because the validity of an arbitration agreement presents a question of law, Skuse v. Pfizer, Inc., 244 NJ 30, 46 (2020). As a result, the reviewing court need not give deference to the legal analysis by the trial court. Goffe v. Foulke Mgt. Corp., 238 NJ 191, 207 (2019).

Goffe set the standards applicable to a motion to compel arbitration. Goffe cited the Third Circuit handling of the issue in Guidotti v. Legal Helpers, 716 F3d. 764, 780 (3d Cir. 2013) Id. at 214. See also Kirleis v. Dickie, et al., 560 F3d. 156, 161-162 (3d Cir. 2009) - Once an opposing party comes forward with evidence he or she did not enter into an arbitration agreement, the movant must submit

evidence showing the agreement was made. If that is done, the weight to be given the evidence would be for the jury or fact finder.

These three cases hold that if there is a challenge to the validity of the arbitration agreement with factual disputes as to the existence of mutual assent, the court applies a summary judgment standard, holding a preliminary hearing as to disputed facts Goffe at 215, Guidotti at 214. Because arbitration provisions are often embedded in contracts of adhesion, courts take particular care in assuring the knowing assent of both parties to arbitrate and a clear mutual understanding of the ramifications of that assent NAACP Camden v. Foulke Mg., 421 NJ Super 404, 425 (App. Div. 2011); Atalese v. US Legal, 219 NJ 430, 442-443 (2014).

The party seeking to enforce an arbitration agreement has the burden to prove by a preponderence of the evidence the non-moving party assented to it. Midland Funding v. Bordeaux, 447 NJ Super 330, 337 (App. Div. 2016); Merrill Lynch v. Cantone, 427 NJ Super 45, 59 (App. Div. 2012); Paul v. Timco, 356 NJ Super 180, 185 (App. Div. 2002). The threshold issue for the court, is to determine whether there is an agreement to arbitrate Martindale v. Sandvik, 173 NJ 76, 86 (2002). When deciding whether the parties agreed to arbitration, courts apply ordinary state law principles governing contract formation. Kernahan v. Home Warranty Adm., 236 NJ 301, 317-318 (2019). Courts examine the terms,

surrounding circumstances and purpose of the contract, Hirsh v. Amper Fin., 215 NJ 174, 187 (2013). If there is an agreement, the court must decide its scope. Martindale supra 173 NJ at 92.

In the quest for the common intentions of the parties to a contract the court must consider the relations of the parties, the attendant circumstances and the objects they were trying to attain Kernahan 236 NJ at 320. An agreement must be sufficiently definite in its terms that the performance to be rendered by each party can be ascertained with reasonable certainty. Id. at 325.

II. Plaintiff did not Sign the Bank's Application, Deposit Agreement or Agree to Arbitrate Disputes with Bank. (Raised below in Brief-Trial Judge's Opinion Pa 7-8)

A. Plaintiff did not Agree to Arbitration with the Bank.

The only document purporting to have Plaintiff's signature produced by the Bank is the account application, (Pa 29), which mentions arbitration on Page 7:

> "Each person who signs the "Certified/Agreed to" section of this application certifies that: "The Customer's use of any Wells Fargo Bank, NA ("Bank") deposit account, ... will confirm the Customer's receipt of, and agreement to be bound by, the Bank's applicable ... account agreement that includes the Arbitration Agreement under which any dispute between the Customer and the Bank relating to the Customer's use of any Bank deposit account, will be decided in an arbitration proceeding before a neutral arbitrator as described in the Arbitration Agreement and not by a jury or court trial". (Pa 35).

The Bank's application and this language has been the subject of much

litigation in this and other jurisdictions because of Wells Fargo's lax procedures.

Heller v. Wells Fargo Bank, 2016 W.L. 818734 (App. Div. 2016), (Vol. II, Pa 157) (unreported) addressed the same language. The court reversed an order permitting arbitration stating whether the language satisfied Atalese could not be determined because the arbitration agreement to which the application refers was not attached to the application nor was it presented to the trial court. The case was thus remanded for further proceedings and if there were irreconcilable factual disputes an evidentiary hearing was to be conducted. Id. at *4. (Vol. II, Pa 159).

In McMillan v. Wells Fargo Bank, 2009 W.L. 1686431 (ND Calif. 2009) (Vol. II, Pa 161) (unreported) the court noted the account application recited applicant has received a copy of the applicable account agreement but oddly does not actually say what account agreement is applicable and omits any acceptance of any terms of that document. Id. *4. (Vol. II, Pa 163).

Noting that fact issues were presented as to whether certain forms were ever agreed to or even received, the court ordered discovery. Id. *5. (Vol. II, Pa 164).

In Mitchell v. Wells Fargo Bank, 280 F. Supp 3d 1261 (CD Utah 2017) a class action case, (including NJ residents) the same account application, and language were at issue Id. at 1277-1278.

Plaintiffs in Mitchell stated they did not receive the Account Agreement or

sign any Account Application. Id. at 1278.

There were so many questions of fact whether the Plaintiffs actually entered into any agreements, agreed to arbitration, the meaning of the arbitration clause or whether Wells Fargo's procedures were reasonable, the court ordered a summary trial to resolve the factual issues. Id. at 1298.

There is no need for a plenary hearing in this case since the Bank did not refute or submit evidence to rebut Mack's certification. The absence of such testimony serves not only to support Plaintiff's position but leaves no room to find any factual disputes.

While there is a presumption in favor of arbitration, that presumption applies only when interpreting the scope of an arbitration clause, not whether a valid agreement exists in the first instance. Sapp v. Indus Action, 75 F. 4th 205, 212 (3d. Cir. 2023); Flintkote Co. v. Aviva, PLC, 269 F.3d 215, 220 n.3 (3d. Cir. 2014).

Presumably, the Trial Judge, without any evidence to the contrary, accepted Plaintiff's version of the facts because he decided the question as a matter of law, accepting the Bank's argument. At oral argument, the Bank's attorney stated the Bank did not have to provide an affidavit or certification to refute Plaintiff's facts since the facts refuting Plaintiff's account of the transaction in opening the

accounts were found on the face of the account application itself. (1T 19-5 to 19-11).

However, even if one argues that an acknowledgment of receipt in a document creates a rebuttable presumption thereof, that presumption may be overcome by evidence that the documents were not received, see Johnson v. Hegarty, 93 NJ Super 14, 20 (App. Div. 1966) - in reference to the mail box rule; Cwiklinski v. Burton, 217 NJ Super 506, 511 (App. Div. 1987) - to establish a presumption of mailing the person placing the mail in the mailbox must submit an affidavit to that fact; Needham v. NJ Ins. Und., 230 NJ Super 358, 369 (App. Div. 1989) - Proof of mailing may be sufficient proof of notice of cancellation of an insurance policy but its not conclusive on the issue of mailing and the insured can present evidence it was not received to refute the hypothesis of mailing.

Here the Bank did not produce direct evidence by affidavit or certification that the Plaintiff signed the account application or that copies of the application and deposit agreement were supplied to the Plaintiff at the local branch or otherwise. Nor did the Bank present evidence that any established or standard procedure was followed.

Bank's attorney argued that to accept Plaintiff's position would "up end the consumer financial industry, affecting all types of consumer bank, credit card and

loan agreements, which are done electronically (1T 22-23 to 22-17).

To avoid this, he added, it must be presumed as a matter of law conclusively that, "common sense and experience dictate that a consumer's use of a bank account is governed by an agreement between the consumer and the bank" (1T 23-2 to 23-4).

The court at oral argument seemed to adopt this view: "The courts view of the law is an individual signing a document that has something to do with a bank account at a financial institution is reasonably charged with understanding what he is signing (1T 27-5 to 27-17).

The judge's opinion reiterated that understanding: "Plaintiff knew he was opening a bank account. Common sense and experience teach accounts are governed by contract. Plaintiff was obligated to investigate the terms of the relationship he was entering. He made no effort to understand the ramification of what he was signing. In fact, he acknowledged receipt, though he appears to claim he never actually received anything ... Simply stated, Plaintiff cannot avoid the consequences of his inattention". (Pa 7 to 8).

The common sense and experience of a judge or attorney is not the same as an average reasonable prudent person or consumer. The judge said he was familiar with banking law since he did bank work before he assumed the bench. (1T 29-

11).

Neither the judge nor the Bank cited any authority for this conclusion. Plaintiff has been unable to locate any case that holds that when a customer opens an account at a bank, he understands through common sense and experience he or she is entering into a contract in the absence of notice from the Bank. In its reply brief the Bank attempted to do so:

> "Plaintiff misses the point. First, it is disingenuous for Plaintiff to suggest that he was unaware that his relationship with Wells Fargo would be governed by an account agreement, and to turn a blind eye to that agreement's terms (i.e., the DAA's terms). Even if he failed to request or read the DAA, "experience and common sense" dictate the understanding that "bank accounts are governed by contracts between the bank and its customer." Clay v. Jie-Davis, No. 16-45, 2016 US Dist. LEXIS 182536, at *29 (Dec. 9, 2016), report and recommendation adopted, 2016 US Dist. LEXIS 182436, at *1 (D. Guam Dec. 31, 2016);

The danger in extracting a quote from case law without setting forth the facts and issues under consideration, and thus taking it out of context, is that while it sounds appealing, the above quote does not address the issue in this case.

In Clay v. Jie-Davis supra, (Vol. II, Pa 174) (unreported) the federal magistrate was considering in a motion to dismiss, among other things, one count in Plaintiff's complaint for intentional interference with contractual relations requiring a valid contract between the Plaintiff and a third party. While noting the complaint did not specifically allege there was a contract between the Plaintiff and

the third party, it observed:

> The Complaint's allegations do not specifically allege there was a contract between the Plaintiff and a third party. However, based on past experience and common sense, see Iqbal, 550 US at 679 ("Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."), bank accounts are governed by contracts between the bank and the customer. Here, the Complaint asserts that Tony Mark had three accounts with the Bank of Hawaii... and that the Plaintiff was named the co-owner of the Bank of Hawaii checking account and sole beneficiary of the three accounts. Thus, by implication, the factual allegations sufficiently plead the existence of a contract between the Plaintiff and the Bank of Hawaii. (Vol. II, Pa 189-190).

This is a far cry from the principle for which Wells Fargo cites this case, and offers no support for the Bank's and Judge's conclusion.

The statement in the application, "The Customer's use of any Wells Fargo Bank N.A. (Bank) deposit account ... will confirm the customer's receipt of and agreement to be bound by the Bank's applicable ... account agreement that includes an arbitration agreement ... (Pa 35, 148) is not proof of an agreement where Bank did not (1) provide Plaintiff with a copy of the application or agreement before he left the Bank, (2) give him an opportunity to read or review the application or agreement when he was there or (3) advise him of the nature of the transaction or where the deposit agreement could be found. Without that disclosure, how was Plaintiff to know use of the account bound him to an

agreement he had not seen, did not know was available or where to find it. Even if he had the application, it did not advise him how to find or where the deposit agreement was located.

If use of the account triggered the contract, Plaintiff would have been immediately bound since when he opened the new accounts, funds from the hacked accounts were transferred thereto. Use is not defined in the bank's application, the deposit agreement glossary (Pa 130), or the sections on opening accounts (Pa 94-95) and Depository Funds (Pa 95-97). Use is not defined under the Uniform Commercial Code, N.J.S.A. 12A:4-104.

Bank inconsistently argued in its supplemental brief , Page 6, that by signing the iPad, Plaintiff agreed to arbitrate because he signed the account application, Wells Fargo had no duty to expressly tell Mack what he was signing, and it was Plaintiff's responsibility to understand what he was signing. If signing of the iPad was the moment of contracting, then the UCC's good faith requirement attached.

Every contract within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement N.J.S.A. 12A:1-304. Unless displaced by the particular provisions of the UCC the principles of law and equity including the law merchant and the law relative to capacity to contract, principal

agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy and other validating or invalidating cause supplement its provision N.J.S.A. 12A:1-103b.

Plaintiff asserts then that Wells Fargo had a good faith duty to provide Plaintiff with a copy of the application and the deposit agreement or advise him where they could be located before transferring his funds into the new accounts or at the very least upon transfer of the funds.

Plaintiff's account statement dated 7/31/23 (Pa 80), contrary to the Bank's insistence, does not advise the depositor the account agreement is available online.

First, Plaintiff can find no disclosure on the account statement providing that use of the account is an agreement to the arbitration clause and other terms of a deposit agreement or the location of the deposit agreement.

The only reference to account agreement terms appears on pages 2 and 4 of the statement, (Pa 81, 83):

Page 2 - "New Jersey account terms and conditions apply, (Pa 81);

Page 4 - (Pa 83) Monthly service fee summary - For a complete list of fees and detailed account information see the disclosures applicable to your account or talk to a Banker. Go to wellsfargo.com/feefaq for a link to these documents, and answers to common monthly service fee questions". That link takes you to a one

page document entitled "Checking and Savings Monthly Fee Questions" with no reference to the account agreement or arbitration clause. (Pa 155-156).

This is certainly not a clear, unambiguous reference to an arbitration or any agreement. Nor does it explain where to find it.

No where in the nine page application (Pa 29-37) does it state that the Plaintiff acknowledges he was given a paper copy or provided the location of the application or any account agreement, that he was given the opportunity to review these, that he was given a copy of or the opportunity to review the arbitration agreement (which is not included in the application but in the account agreement which he did not see and was not referred to specifically).

B. Notice of the Arbitration Clause.

An arbitration provision is not enforceable unless the consumer has reasonable notice of its existence Santana v. Smiledirectclub, 475 NJ Super 279, 285 (App. Div. 2023).

In the context of electronic agreements, reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms is essential if electronic bargaining is to have integrity and credibility, Wollen v. Gulf Stream, 468 NJ Super 483, 499 (App. Div. 2021).

A party may not claim lack of notice of the terms of an arbitration provision

for failure to read it unless some fraud or imposition is practiced upon him, Santana v. Smiledirectclub, 475 NJ Super 279, 286 (App. Div. 2023). However, this assumes knowledge of what is being signed.

What is "imposition"? Dictionaries define imposition as: Laying on of something as a burden or obligation; something imposed as a burden or duty; an unusual or extraordinary burdensome requirement or task; an excessive or uncalled for requirement or burden. Collins American English Dictionary, Randam House & Harper Collins Publishers; Merriam-Webster Unabridged Dictionary.

Fraud in the execution (raised below oral argument 1T 12-24 to 13-24) may be present when a party executes an agreement with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms by reason of excusable ignorance. Although, excusable ignorance does not require an affirmative intent to defraud it typically involves some sort of misconduct or imposition that cuts off the signer's opportunity to read. Peter Kero v. Terminal Const., 6 NJ 361, 368 (1951); Connors v. Fawn Mis. Corp., 30 F.3d 483, 490 (3d. Cir. 1994), MZM Constr., v. NJ Bldg. Lab, 974 F.3d 386, 404 (3d. Cir. 2020). This is particularly true where a relation of natural trust and confidence, though not strictly a fiduciary relation exists between the parties. Kero, supra at 370.

Mack was present at the local branch on instructions of the bank in order to

prevent future hacking of his account shortly after the first hacking incident. The opening of the new accounts had to be done quickly, not only to prevent future hacking but so Mack could continue to process his personal matters and business transactions. He was also under the impression the Bank knew why he was there given the circumstances as presented at that time. He didn't know what documents to ask for. He was not familiar with the Bank's procedure in opening accounts.

Expecting Plaintiff to know that by signing the iPad he was entering into a thirty seven (37) page deposit agreement with an arbitration clause without the Bank's representative advising him that was the affect of his signing the iPad is such an unusual or extraordinary burdensome requirement or task as to result in an imposition in the execution of the documents. Atalese, 219 NJ at 446 (clause on Page 9 of 23 Page contract; Noble v. Samsung, 682 Fed. App. 113, 117-118 (3d Cir. 2017) (clause on Page 97 of 143 Page document).

The Plaintiff did not choose to arbitrate with an explicit affirmative and unmistakable intention that he was expressly giving up his right to bring a court action in favor of arbitration. Leodori Servs. Grp. v. CIGNA, 175 NJ 293, 303 (2003). The execution on the iPad did not present a clear expression of an explicit and voluntary agreement to forego the court system. Atalese v. US Legal, 219 NJ 430, 447 (2014).

For a party to be bound by a contract for failure to read its terms, he must know or it must be readily apparent that he or she is executing a contract and must affirmatively choose not to read it. This is not what happened.

The Bank relied upon 3 unpublished opinions from two 2 U.S. District Courts to support its contention that a customer is bound by documents he never saw or received once the customer signed an iPad..

In Blocker v. Wells Fargo Bank, 2011 W.L. 1230026 (D. Ore. 2011) (Vol. II, Pa 206) Plaintiff asserted he should not be bound by the Consumer Account Agreement because he never received, read or signed the document. The district Court Judge found Plaintiff did sign an application on 09/18/2007 on an iPad stating he received a copy of the applicable account agreement and privacy brochure and agreed to be bound by them. Therefore, he was bound by the agreement. Id. *1. This conclusion was based on facts found by the Magistrate Judge which differ from our case. Blocker argued that the document he signed did not disclose the agreement containing the terms and condition of his contract with Wells Fargo and that Wells Fargo effectively represented to him that his signature would have the sole effect of securing the personal identification number associated with the account. Blocker v. Wells Fargo Bank, 2010 W.L. 6403721 (D. Ore. 2010). (Vol. II, PA 194).

Unlike our case, Blocker did not contend he never saw the Wells Fargo application or that he didn't sign it. The magistrate judge found the application clearly stated its an application for a bank account and his signature appeared immediately above a short paragraph containing a statement that the signatory received a copy of the applicable account agreement and primary brochure and agreed to be bound by them. Blocker offered no evidence that Wells Fargo made any misrepresentations in reliance on which Blocker elected to enter into the agreement, and the court declined to construe the agreement as unenforceable on the theory Blocker's consent was fraudulently obtained, Id. at *8.

These facts readily distinguish Blocker. Plaintiff did not sign the Wells Fargo application. Blocker didn't contest the fact that he signed the application and knew that he was signing an application. Blocker didn't deny he received a copy of the application, just the account agreement. Blocker was not a case in which Wells Fargo filed a motion to compel arbitration as that was not at issue in the case.

In Bayron-Paz v. Wells Fargo Bank, 2023 W.L. 4399041 (SDNY 2023) (Vol. II, Pa 209) Plaintiff financed purchase of an automobile at a car dealership. The Installment Contract (containing an arbitration agreement) was assigned to Wells Fargo. On the day he bought the vehicle, Plaintiff contended he met the

finance manager who had him sign a blank iPad and stated a copy of the documents would be emailed later for him to read. The finance manager did not tell Plaintiff he was signing a contract and Plaintiff did not consent to attaching his signature to the contract.

In opposition, the finance manager certified the contract was contained on the iPad screen when Plaintiff signed it and he didn't stop, present or dissuade the Plaintiff from reading it. Plaintiff left with the vehicle which was defective and sued. Wells Fargo moved to compel arbitration. The Judge found Plaintiff bought an expensive new car, knew he had to sign a contract in connection with the purchase particularly because he needed to finance part of the purchase price and wanted the benefits of the warranty. Plaintiff expected the financing terms to be set forth in a written contract. He asked before he signed where the documents were and was told they would be emailed to him. He then signed the iPad screen.

The Judge concluded Plaintiff's actions on the sale date revealed he chose to sign the contract without reading it. He knew the transaction would be governed by a written agreement but chose to sign the iPad without requesting that its contents be displayed to him or demanding a hard copy before signing the iPad. Plaintiff understood that his signature was necessary on the iPad for the sale to occur and did not insist on reading it. He was bound by the contract.

Again these facts are distinguishable. The Bank did not submit any opposition to the facts as alleged by Mack and Mack did not know nor was he advised that he was signing a contract or that it was necessary to open an account.

In Lojewski v. Group Solar, 2023 W.L. 5301423 (SDNY 2023) (Vol. II, Pa 214) Plaintiff financed installation of solar panels in her home, knew that she had to sign a contract and signed a blank iPad although she didn't know the terms of the agreement which included an arbitration provision. The court stated Plaintiff had constructive notice of the arbitration clause since she knew she was financing the purchase of the solar panels and had to sign a contract before installation. Given the transactional context of the parties dealings, a reasonable person in her position would presume that this third step in the process clearly contemplated some sort of continuing relationship between the parties that would require some terms and conditions. A reasonable person would understand that her signature on the iPad constituted assent to these terms and conditions even if she didn't read them.

The economic setting and factual circumstances of Lojewski differ from the transaction between Mack and Bank. There are no facts to support an inference that Mack knew or contemplated he was entering into a contract when he signed the iPad and Lojewski and Bayron - Pay concerned ordinary commercial purchase

transactions.

C. Inquiry Notice.

Even in cases in which a consumer contracts online, there must be some method by which the consumer has reasonable notice of and access to the arbitration agreement for purposes of review, before checking a box or otherwise affirmatively indicating agreement to the terms of the arbitration clause and the balance of the contract. Santana v. Smile Direct Club, L.L.C., 475 NJ Super 279 (App. Div. 2023).

In Santana, the court noted in the context of computer click wrap agreements, where there is no evidence that the offeree had actual notice of the terms and conditions of the agreement, the offeree could still be bound by the agreement if a reasonable prudent user would be on inquiry notice of the terms. Id. at 288 citing Meyer v. Uber Techs, 868 F3d. 66, 74-75 (2nd Cir. 2017).

What circumstances puts a consumer on inquiry notice? In determining reasonable inquiry notice, a court must consider the conspicuousness and placement of the means to access the arbitration clause, other notice given to consumers and a website's general design. Id. at 291-292. The writing on the computer screen must still give notice to the consumer or reasonably prudent internet user of the agreements terms or conditions by providing wording or a

hyperlink requiring the consumer or user to affirmatively assert, read or acknowledge the terms and conditions. Id. at 287-288.

While receipt of a physical document containing contract terms or notice thereof in the world of paper transactions can be a sufficient circumstance to put a consumer on inquiry notice of the terms, Santana supra, 475 NJ Super at 289 citing Specht v. Netscape, 306 F3d. 17, 31 (2d Cir. 2002), Mack's case is neither an all paper transaction or internet transaction. It is more of a hybrid situation where Bank was present with the consumer using a computer taking an application to open a bank account.

The question to be answered is whether a reasonably prudent person or consumer under the facts as exist in the record should have known that he or she was entering into a contract with an arbitration clause by applying to open a bank account without being advised what it was that was being signed, without being offered the opportunity to review what was on the computer screen and without being provided a copy or given access to the documents before the computer screen was signed. Plaintiff did not have knowledge of the nature and usages of the banking business.

The Bank argued below that (1) Plaintiff did not allege that he ever asked what he was signing or that facts were misrepresented. Rather he instead relied on

his own subjective and mistaken understanding of what he was executing, therefore failure to read the documents he signed does not excuse him from adherence to the terms, (2) Plaintiff did not claim that he requested and was denied a copy of what he was signing instead relying on his subjective and unfounded belief that he was just acknowledging that he opened an account and was giving a sample of his handwriting, (3) by signing the application, Plaintiff acknowledged that by using the account he confirmed receipt of an agreement to be bound by the Bank's applicable ... account agreement that includes the Arbitration Agreement, (4) "Even if Mack did not immediately receive the Deposit Account Agreement, he knew or should have known how to obtain it" citing to the Fizazi certification of 1/26/24 (Pa 26) and Plaintiff's account statement of 7/31/23 at Page 5 (Pa 84). Page five refers to a deposit account agreement, but does not state where to find it. It merely mentions an amendment effective on 7/25/23. If Plaintiff had to wait for notice until he received a statement, then according to the application, he would already be bound because he used the account. Notice after the fact is not reasonable notice.

Just like judges are not like pigs hunting for truffles buried in a party's brief, U.S. v. Dunkel, 927 F2d. 955, 956 (7th Cir. 1991), a Bank customer should not have to resemble a dog negotiating an obstacle course before he can receive the

"treat", in this case, the arbitration agreement. Mack would have had a better chance of locating the account agreement and arbitration clause by using an oracular inquiry by extispicy.

The Bank incorrectly contended Plaintiff agreed to the terms of the Deposit Account Agreement twice over, once by signing the application and again by using the account. No where in the application does it state by signing the application the customer agrees to the Deposit Account Agreement. It merely states that the customer's use of the account confirms the customer's receipt of, and agreement to be bound by the account agreement. (Pa 35).

D. Conspicuousness.

Even if the customer was fortunate enough to find the deposit agreement, the arbitration clause appears on pages 35-36 (Pa 73-74) and the only mention that it exists is on page three in the table of contents in an indistinguishable font. (Pa 41).

New Jersey law requires reasonable notice as a predicate to enforceability of any provision in a contract, including arbitration clauses, Hoffman v. Supplements Togo Mgt., L.L.C., 419 NJ Super 596, 609 (App. Div. 2011); Noble supra 682 F'App at 116 - Contractual terms, including a arbitration clauses, will only be binding when they are reasonably conspicuous rather than proffered unfairly or

with a design to conceal or de-emphasize its provisions citing Caspi v. Microsoft, 323 NJ Super 118, 125-126 (App. Div. 1999).

Hoffman cited Specht v. Netscape, 306 F.3d 17 (2nd Cir. 2002) which found an arbitration clause unenforceable because Plaintiffs had not been provided with reasonable notice of its existence and therefore lacked knowing assent. The arbitration provision was not reasonably conspicuous since it was to far down the webpage. The court stated "there is no reason to assume viewers will scroll down to subsequent screens simply because screens are there. Id. at 31. See Hoffman supra at 609-610. Here the bank's arbitration agreement was not highlighted in any manner and buried at the back of the agreement where the ordinary consumer would not look.

AT&T Mobility v. Concepcion, 563 US 333 (2011) noted States remain free to take steps addressing the concerns that attend contracts of adhesion for example requiring class action waivers to be highlighted as long as they don't conflict with the FAA. Id. at 347 n.6. A contract of adhesion is a contract presented on a take it or leave it basis, commonly on a standardized form, without the opportunity of the adhering party to negotiate, except perhaps on a few particulars Martindale v. Sandvik, 173 NJ 76, 89 (2002).

In NAACP v. Foulke Mgt., 421 NJ Super 404 (App. Div. 2011) the court,

citing the above Concepcion footnote, acknowledged an arbitration clause could be found unenforceable for reasons other than public policy or unconsionability, under laws governing formation and interpretation of agreements. Id at 427. See Rockel v. Cherry Hill Dodge, 368 NJ Super 577, 585-586 (App. Div. 2004) arbitration clause unenforceable due to placement, size and language. Kernahan v. Home Warranty, 236 NJ 301 (2019) - there is a lack of mutual assent if the language is debatable, confusing, contradictory, or misleading. Id. at 308. Notation in the Bank's table of contents here was not conspicuous.

See Leodori v. CIGNA Corp., 175 NJ 293 (2003) an acknowledgment form need not recite the arbitration clause verbatim so long as the form refers specifically to arbitration in a manner indicating an employee's assent and the policy is described more fully in an accompanying handbook or in another document known to the employee. Id. at 307. (emphasis added). That is also lacking here.

Nothing in the application acknowledges Mack received the deposit agreement with the arbitration clause. Id. at 305 - stating that because the employee did not sign a receipt and agreement form, he did not assent to the arbitration.

The Bank asserts the application constitutes part of the account agreement

because Plaintiff allegedly signed the application but not the account agreement. The Account Agreement, Page 2 (Pa 91) states in non-highlighted print that "when you sign an account application or use your account you ... consent to the terms of the agreement. (Pa 92). The application does not have such language stating only that use of the account confirms customer's receipt of and agreement to the bound by the account agreement. (Pa 35). The conflict is apparent. There is no binding arbitration clause or other contract between the parties.

III. The Application Limited the Arbitration Clause to any Dispute between the Customer and Bank Relating to the Customer's Use of the Account. The Unauthorized Use of the Account by a Third Party Hacker or the Bank itself is not within the Scope of the Issues Subject to Arbitration. (Raised below in Brief - Not Decided by Trial Judge)

The examination of the scope of any arbitration provision, must be on a case by case basis, Curtis v. Cellco Ptnr., 413 NJ Super 26, 35 (App. Div. 2010).

The scope of arbitration is governed by the intention of the parties and courts are not permitted to rewrite a contract to broaden it, Caruso v. Ravenwood, 337 NJ Super 499, 504 (App. Div. 2001); Martindale v. Sandvik, 173 NJ 76, 92 (2002).

In determining the scope, one must first look to the specific language of the clause and determine if its broad enough to cover the factual allegations in the complaint, rather than the causes of actions asserted; in a broad clause, if these

factual allegations touch matters covered by the agreement those claims must be arbitrated. Epix Holdings v. Marsh McLennan, 410 NJ Super 453, 474 (App. Div. 2009). Most of these cases deal with clauses that have broad language: "all disputes that arise under or arise out of or relate to the agreement" at Id. 472. That is not the case here.

Wells Fargo cited the arbitration language of the Account Agreement arguing it was all encompassing because (1) it covered disputes between Wells Fargo and you, (2) a dispute was defined as any unresolved disagreement between Wells Fargo and you, and (3) Wells Fargo and you agree to submit to binding arbitration all claims, disputes and controversies between Wells Fargo and you whether in tort, contract or otherwise arising out of or relating to your account. (Pa 74). The Bank did not cite and ignored the arbitration language in the account application.

The application and deposit agreement conflict and are ambiguous. While the application states arbitration applies to any dispute between the customers and the Bank in relation to the customer's use (emphasis added) of any Bank deposit account, (Pa 35) the deposit agreement states that arbitration "applied to all the claims, disputes and controversies between or among Wells Fargo and you ... whether in tort or in contract or otherwise arising out of or relating in any way to

your accounts ... (Pa 74).

Since the dispute in this case arises from the hacking of Plaintiff's account by another and not through consumer's use of the account, a consumer reading the application separately or in conjunction with the deposit agreement may easily interpret this language as limiting arbitration to his or her use of the account and not under the circumstances presented by this case, the hacking of the account by another. This would be a reasonable interpretation by one in Plaintiff's position.

The ambiguity should be construed in favor of the consumer. Arbitration agreements are interpreted under the objective "average consumer standard ie., is it clear and understandable to the average consumer, Atalese v. US Legal, 219 NJ 430, 446 (2014); Morgan v. Standford Brown, 225 NJ 289, 308 (2016); Kernahan v. Home Warranty, 236 NJ 301, 321 (2019); Skuse v. Pfizer, Inc., 244 NJ 30, 49 (2020).

This language calls for application of the doctrine of contra proferentem. When a contract term is ambiguous, the rule requires the court to adopt the meaning that is most favorable to the non drafting party, after a court has examined the terms in light of common usage and customs, considered the circumstances and is unable to determine the meaning. The doctrine is available where the parties have unequal bargaining power and are not equally worldly wise

and sophisticated Pacifico v. Pacifico, 190 NJ 258, 267-268 (2007).

Plaintiff, previously having his accounts hacked and the money replaced by the Bank, due to no fault of his own with no explanation by the Bank as to what or why it happened, could reasonably believe the arbitration provision only applied to his use of the accounts.

The questions of whether there was an agreement to arbitrate or whether the dispute is within the scope of the arbitration clause took on added importance since buried in the arbitration clause on page 36 of the account agreement, (Pa 126) is a small print clause which reads:

> Arbitration is beneficial because it provides a legally binding decision in a more streamlined, cost-effective manner than a typical court case. But, the benefit of arbitration is diminished if either Wells Fargo or you refuse to submit to arbitration following a lawful demand. Thus, the party that does not agree to submit to arbitration after a lawful demand by the other party must pay all of the other party's costs and expenses for compelling arbitration.

Plaintiff claimed this attorney's fee clause was unconscionable. It is found in both arbitration provisions in consumer or business accounts (Pa 125-126). Plaintiff used this account as both his personal and business account. (Pa 134, MC1).

This clause was not part of the application which is the only document allegedly signed by the Plaintiff and no information was given to the Plaintiff

where to find the account agreement.

The fact the Bank buried this request for counsel fees in a document not shown to the Plaintiff gives the Bank an incentive to play fast and loose with how this information is disclosed to the customers. This provision establishes a systematic effort to disadvantage the Bank's customers into foregoing a challenge to the arbitration clause. Does the bank truly believe that a customer such as the Plaintiff will demand arbitration that the Bank will refuse? The right provided to the customer is illusory. Further there is no reciprocal right to counsel fees if the party is successful in opposing a motion to compel arbitration. See Delta Funding v. Harris, 189 NJ 28, 42-43 (2006) addressing unconscionability of cost shifting provisions in arbitration agreements in contracts of adhesion. Atalese v. US Legal, 219 NJ 430, 448 n.3 (2014) - provisions shifting total costs of arbitration to losing party disfavored. See Kleine v. Emeritus at Emerson, 445 NJ Super 545, 551 (App. Div. 2016) suggesting a lack of reciprocity in a contract of adhesion may be unconscionable.

The judge's opinion found this attorney's fee provision unenforceable (Pa 9). Plaintiff did not appeal that part of the judge's decision (Pa 1) and the Defendant has not filed a cross-appeal. Plaintiff's dispute with Bank is not within the scope of the arbitration clause.

IV. The Bank's Deposit Account Agreement was not Properly Incorporated by Reference Into the Application. (Raised below in Brief - Not Decided by Trial Judge)

Alpert, Goldberg v. Quinn, 410 N.J. Super 510 (App. Div. 2009) held in order for a document to be properly incorporated by reference, a contract must make clear reference to the document and describe it in such terms that its identity may be ascertained beyond doubt ... In order to uphold the validity of terms incorporated by reference, it must be clear that the parties to the agreement had knowledge of and assented to the incorporated document. Id. 533.

Even assuming Plaintiff saw and signed the application, (Pa 35) its terms do not satisfy the Alpert standard for incorporating the account agreement by reference as it merely states the use of the account confirms customer's agreement to "the Bank's applicable fee and information schedule and account agreement that includes the arbitration agreement ...

This language does not describe the applicable account agreement to which it refers and does not advise where this applicable agreement may be found.

While the document states the use of the account will confirm the customer's receipt of and agreement to be bound by the applicable agreement, that does not save the day since just what the applicable agreement is and where it may be found is not described in any manner and Plaintiff was not provided with a

copy.

How can use of an account confirm receipt of a document not provided in any manner. Nor does the language require the customer to affirmatively request a copy of the agreement. There is no proof of knowledge or assent. Even in Alpert, where the attorney's retainer agreement stated the incorporated document would be provided on request, 410 N.J. Super at 520, 535 such an invitation was deemed insufficient to pass muster.

The heightened scrutiny of incorporated documents is designed to assure there is an actual meeting of the minds and to discourage sharp practices. See Atlantic Fabrication v. ISM/Mester, 2021 W.L. 5264364 (App. Div. 2021)*6 (unreported) (Pa 166) citing 64 Baylor Law Review 651, 661 (2012).

Even if it could be found that the Plaintiff actually signed the application, there is no agreement to arbitrate as the deposit agreement was not properly incorporated by reference.

V. Neither the Application nor Deposit Agreement Presented by the Bank were Properly Authenticated. (Raised below in Brief - Not Decided by Trial Judge)

There is a question of the authentication of the documents attached to the Bank employee's certification which is silent on how the Bank created, acquired, maintained and preserved, if at all, the electronically created and electronically

stored document making that testimony insufficient to establish that the proffered document is what it purports to be. Without this, it can not be authenticated. The authentication of electronically stored records and information generally requires consideration of the ways in which such data can be manipulated or corrupted US v. Browne, 834 F.3d 403, 412 (3rd Cir. 2016).

The Bank employee's certification does not state that the document was presented to the Plaintiff in the same format as shown and was preserved without alteration or change. She has no idea and did not certify how the document came into existence, just that it was found in a computer.

Authenticity can be established by direct proof such as testimony by the author admitting authenticity or circumstantial evidence demonstrating the statement or document divulged intimate knowledge of information which one would expect the author or participant to have. State v. Hannah, 448 NJ Super 78, 90 (App. Div. 2016). We have neither of those circumstances in this case. Producing such proof does not impose any excessive burden on the Bank. The only thing known is the Bank employee printed the document from a computer.

The application is offered as a business record. While records of regularly conducted activity can constitute an exception to the hearsay rule, NJ Evid R. 803 (c)(6), the rule states the exception doesn't apply if the source of information or

the method, purpose or circumstances of preparation indicate that it is not trustworthy. Plaintiff presented a prima facie case satisfying that exception. The source of the information and the method and circumstances of the preparation of the writing must justify allowing it into evidence. State v. Matulewicz, 101 NJ 27, 29 (1985). The Bank presented none. A judge should examine the proffered records and hear the manner of their preparation explained before determining whether they merit the general acceptance of trustworthiness accorded to such records or whether instead he entertains serious doubt as to their dependability. Id. at 29-30. A business record is not self-authenticating under NJ Evid. R. 902. The application and deposit agreement were improperly considered by the court.

VI. A Fiduciary Relationship Existed between the Bank and the Plaintiff under the Circumstances Surrounding the Opening of Plaintiff's Replacement Accounts. (Raised below in Brief - Trial Judge's Opinion Pa 8-9)

The Trial Court asked the parties to address whether under the facts and circumstances of this case, the Bank was in a fiduciary or special relationship with the Plaintiff such that it had a duty to advise the Plaintiff of the nature of what he was signing and the terms thereof, including inclusion of the arbitration clause, (1T 31-5 to 32-8).

The issue whether a Defendant owes a legal duty or its scope is generally a question of law for the court to decide. Carvalho v. Toll Bros. & Developers, 143

NJ 565, 572 (1996); Kelly v. Gwinnell, 96 NJ 538, 552 (1984). The determination of the existence of a "duty to exercise reasonable care to avoid a risk of harm to another ... is one of fairness and public policy that implicates many factors". Carvalho, supra, 143 NJ at 572. In a case in which the legal relationship is clearly defined, common law classifications can be useful in determining the existence and scope of the duty of care owed. Id.

While there is no presumed fiduciary relationship between a Bank and its customers, one can be implied in law depending on the specific factual situation surrounding the transaction and the relationship of the parties United Jersey Bank v. Kensey, 306 NJ Super 540, 552 (App. Div. 1997). Given the fact that Plaintiff was in the position he was in, having his account frozen and being advised to open a new account, with no explanation as to how his account was hacked, (Pa 153-154, MSC 3-5) all based on the conduct of the Bank, Plaintiff was justified in believing the Bank would act in his best interest, reposing a trust and confidence in the Bank. Because of the circumstances of this case, the nature of the dealings and the position of the parties towards each other, that trust and confidence was necessarily implied. Id at 551. The Bank had a duty to disclose to the Plaintiff that he was signing an application, where to find a deposit agreement and the presence of an arbitration clause.

This duty also arises in transactions which in their essential nature are "intrinsically fiduciary and necessarily call for perfect good faith and full disclosure without regard to any particular intention of the parties. A duty of a fiduciary to disclose is required when the individual knows a fact which may justifiably induce another to act or refrain from acting in a business transaction if the individual is under a duty to disclose. The fiduciary must disclose facts basic to the transaction if he knows that the other is about to enter into it under ignorance or mistake and that the other, because of the relationship between them or customs of the trade or other objective circumstances would reasonably expect a disclosure of these facts. Id at 554.

Under the circumstances of this case, the Bank knew or had reason to know that Plaintiff was placing his trust and confidence in the Bank to inform and counsel him on protecting his money, Id. 559, as it never explained what happened.

City Check Cashing v. Manf. Hanover, 166 NJ 49 (2001) stated that in general, in a banking context, banks have a duty to disclose where some special relationship has been established such as fiduciary, confidential, contractual or legal or where there was fraud or misrepresentation in the part of the Bank. This special relationship can arise by agreement, undertaking and contact. Id at 59-60.

These are three distinct concepts. An agreement or undertaking will give rise to a duty with respect to the subject agreed upon or undertaken. Whether a contact creates a duty is determined by its nature and surrounding circumstances. Id. at 62.

While United Jersey and City Check dealt with the tort of breach of a fiduciary duty, in the contract context, the duty of disclosure should be no different. The fiduciary owes the beneficiary of his concern the duty of good faith, loyalty, due care and disclosure. Delaney v. Dickey, 244 NJ 456, 485 (2020). The count should have determined under the circumstances a fiduciary duty existed and it was breached.

Conclusion

The court should reverse the decision below and find Plaintiff did not enter into an arbitration or any agreement with the Bank.

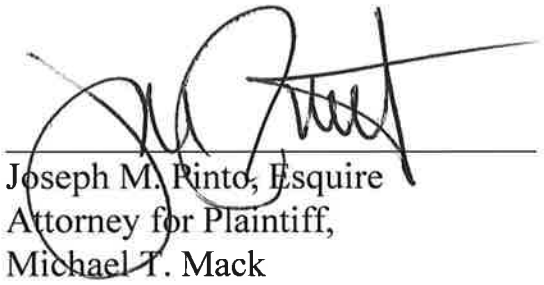
The matter should be remanded for a jury trial on the mertis. Since the Bank made a strategic choice not to dispute or refute Plaintiffs facts and felt no need to present contrary evidence, the matter should not be remanded to give the Bank a second chance to do so. This would be unfair to the Plaintiff, unnecessarily costly, delay this case and may result in another appeal.

The Bank is a sophisticated litigator. It made its choice to solidify the disadvantages imposed on consumers in the manner it conducts business. The

Bank should not be rewarded with a second bite of the apple to rework how it will litigate this case, to the continuing disadvantage of the consumer.

The court has the authority to direct on remand that a different judge consider the matter in order to preserve the appearance of a fair and unprejudiced hearing P.T. v. M.S., 325 NJ Super 193, 220 (App. Div. 1999). In this case the judges strong commitment to his opinion and his banking background call for a remand to a different judge.

Respectfully submitted,



Dated: August 28, 2024

Joseph M. Pinto, Esquire
Attorney for Plaintiff,
Michael T. Mack

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

MICHAEL T. MACK, Plaintiff/Appellant, v. WELLS FARGO BANK, N.A., Defendant/Appellee,	DOCKET NO. A-003319-23-T2 ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION - CIVIL PART, BURLINGTON COUNTY, DOCKET NO. BUR-L-002113-23 SAT BELOW: HONORABLE RICHARD L. HERTZBERG, J.S.C.

BRIEF ON BEHALF OF DEFENDANT/APPELLEE, WELLS FARGO BANK, N.A.

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I. PRELIMINARY STATEMENT

This appeal presents a single overarching issue: did the trial court err when it compelled the Plaintiff/Appellant, Michael T. Mack ("Mack"), to submit his claims against Defendant/Appellee, Wells Fargo Bank, N.A. ("Wells Fargo"), to arbitration pursuant to the terms of the governing Deposit Account Agreement (the "DAA")? Wells Fargo respectfully submits that the answer is "no." This Court should affirm.

II. PROCEDURAL HISTORY

On November 6, 2023, Mack filed his Complaint and asserted three counts against Wells Fargo, for alleged violations of the Uniform Commercial Code ("UCC") and common-law negligence. Each count concerned an allegedly unauthorized wire transfer from Mack's Wells Fargo bank account. (See generally PA010-019.)

On January 26, 2024, Wells Fargo filed its Motion to Compel Arbitration and Stay Proceedings (the "Motion"). (PA020.) On February 7, 2024, Mack responded to the Motion. (SA001-009.) On February 12, 2024, Wells Fargo filed its Reply.

On April 12, 2024, the trial court held oral argument and then invited supplemental briefing by the parties. On May 1, 2024, Mack filed his supplemental brief. (See SA010-032.) On May 16, 2024, Wells Fargo submitted its supplemental brief.

On June 20, 2024, the trial court issued its Order compelling arbitration and its Statement of Reasons. (PA006-009.) The court

held that Mack bound himself to arbitrate by electronically signing an account application and thereby acknowledging receipt of and agreeing to be bound by the DAA. (PA007–008.) The court rejected Mack's argument that Wells Fargo was obligated to ensure that Mack understood what he was signing. (Id.) The trial court reasoned that "[c]ommon sense and experience teach that bank accounts are governed by contract," found that Mack "made no effort to understand the ramifications of what he was signing," and faulted Mack for failing "to investigate the terms of the relationship he was entering." (PA007–008.) The court also specifically rejected Mack's argument that Wells Fargo owed Mack a fiduciary duty to educate him about the document he signed. (PA008–009.)

Alternatively, the trial court held that Mack bound himself to arbitrate by using his Wells Fargo bank account. (PA008.) The court cited the DAA passage stating that use of a Wells Fargo bank account constitutes "consent to the terms of this Agreement." (Id.) The court stated that Mack "cannot avoid the consequences of his inattention." (Id.)

On June 27, 2024, Mack appealed. (PA001.) On appeal, Mack now argues that: (1) he did not agree to arbitrate; (2) Wells Fargo owed him a fiduciary duty to explain the effect of his electronic signature; and (3) neither the account application nor the DAA were properly authenticated. (See generally Appellant Br.)

III. STATEMENT OF FACTS

Mack alleged that he opened Wells Fargo bank accounts in 2013 and 2015. (PA010.) In 2022, after noticing allegedly unauthorized transfers, Mack closed the affected accounts and opened new Wells Fargo bank accounts. (See PA010–011.) Mack alleged that he visited a Wells Fargo branch, where he was taken into the manager's office, was asked some questions, entered his new user name and password into a computer, and signed an iPad. (Id.) Later, in response to Wells Fargo's Motion, Mack asserted that no one explained what he was signing, and he received no documents. (PA135–136.)

On May 18, 2022, Mack electronically signed a Wells Fargo account application. (PA029–037.) Among other things, the account application states:

> Each person who signs the "Certified/Agreed To" section of this Application certifies that:
>
> A. The Customer's use of any Wells Fargo Bank, N.A. ("Bank") deposit account, product or service will confirm the Customer's receipt of, and agreement to be bound by, the Bank's applicable fee and information schedule and account agreement that includes the Arbitration Agreement [i.e., the DAA] under which any dispute between the Customer and the Bank relating to the Customer's use of any Bank deposit account, product or service will be decided in an arbitration proceeding before a neutral arbitrator as described in the Arbitration Agreement and not by a jury or court trial.

(PA035.) Mack's signature appears in the "Certified/Agreed To" section of the account application. (Id.)

The DAA appears in the record. (PA091–130.) On its first full page of text, the DAA states: "When you sign an account application or use your account, including any account service, you . . . consent to the terms of this Agreement." (PA092.) Wells Fargo produced account statements evidencing Mack's use of his account. (See PA080–087.) Those statements provided that "New Jersey account terms and conditions apply" (PA081), expressly referred to the DAA (PA084), and directed the reader to the Wells Fargo website to download "the disclosures applicable to your account" (PA085.)

In the DAA's Table of Contents, the phrase "Resolving Disputes Through Arbitration" appears in bold print. (PA093.) That phrase also appears in a larger font on page 36, where the DAA sets forth the terms of the parties' agreement to arbitrate:

> . . . Wells Fargo and you agree, at Wells Fargo's or your request, to submit to binding arbitration all claims, disputes, and controversies between or among Wells Fargo and you . . ., whether in tort, contract or otherwise arising out of relating in any way to your account(s) and/or service(s), and their negotiation, execution, administration, modification, substitution, formation, inducement, enforcement, default, or termination (each a "dispute"). **DISPUTES SUBMITTED TO ARBITRATION ARE NOT RESOLVED IN COURT BY A JUDGE OR JURY. TO THE EXTENT ALLOWED BY APPLICABLE LAW, WELLS FARGO AND YOU EACH IRREVOCABLY AND VOLUNTARILY WAIVE THE RIGHT EACH MAY HAVE TO A TRIAL BY JURY FOR ANY DISPUTE ARBITRATED UNDER THIS AGREEMENT.**

(PA126.) The DAA arbitration provision is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1, et seq. (the "FAA"). (Id.)

In support of its Motion, Wells Fargo introduced several exhibits, including Mack's account application, the DAA, and account statements. Wells Fargo authenticated each exhibit through the Declarations of Wells Fargo employee Kanza Fizazi. (PA026–029, PA088–90.) Ms. Fizazi stated under penalty of perjury that she had "personal knowledge of Wells Fargo's general business practices with respect to account-opening and maintenance of deposit and checking accounts," and that Wells Fargo's exhibits were "all true and correct business records created and maintained by Wells Fargo, or its affiliates, in the course of regularly conducted business activity, and as part of the regular practice of Wells Fargo to create and maintain such records, and also were made at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter." (PA026–27, PA088–89.) Ms. Fizazi also stated that each exhibit was a true and correct copy of what it purported to be. (PA027, PA089.)

IV. LEGAL ARGUMENT

Mack's arguments on appeal fall into three broad categories: (1) that he did not agree to arbitrate; (2) that Wells Fargo owed him a fiduciary duty to explain the effect of his electronic signature; and (3) that the account application and DAA were not properly authenticated. (See generally Appellant Br.) All of Mack's arguments are meritless. The trial court correctly compelled arbitration, and this Court should affirm.

A. Appellate Standard of Review

Whether a valid and enforceable arbitration agreement exists is a question of law subject to de novo review. See Antonucci v. Curvature Newco, Inc., 470 N.J. Super. 553, 560 (App. Div. 2022). It "involves the application of established facts to the legal question of what constitutes assent to a contract." Id. Similarly, whether claims fall within the scope of an arbitration agreement is subject to de novo review. See id. However, this Court may defer to trial court's "interpretative analysis" if this Court "find[s] it persuasive." Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 316 (2019).

As to Mack's evidentiary challenge, this Court should review Wells Fargo's authentication of exhibits under the deferential "abuse of discretion" standard. See Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383–84. This Court should "uphold the . . . findings undergirding the trial court's decision if they are supported by adequate, substantial and credible evidence on the record." Id. (citation omitted).

B. The trial court correctly held that Mack must arbitrate his claims. (PA007–008.)

1. The trial court correctly held that Mack must arbitrate his claims because he signed the account application and thereby agreed to the DAA's terms, including the arbitration provision.

Both the FAA and New Jersey law favor arbitration and require courts to enforce contractual arbitration provisions according to

their terms. See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011); Frumer v. Nat'l Home Ins. Co., 420 N.J. Super. 7, 13 (App. Div. 2011) ("New Jersey law comports with its federal counterpart in striving to enforce arbitration agreements." (citations and quotation marks omitted)). Thus, the FAA, case law, and public policy all favor arbitration here.

Mack's primary argument, both in the trial court and on appeal, is that he should not be bound by his signature--and by virtue of that signature, his agreement to arbitrate under the DAA--because he signed an iPad without first questioning what he was signing or the effect of his signature. Mack asserts that, at the time, he did not understand that he "was signing any type of document, application or contract on the ipad." (PA135.) However, the trial court correctly found that Mack never asked what he was signing, and Mack presented no evidence that Wells Fargo misrepresented any fact to him. (PA007-008.) Instead, Mack relied on his own subjective and mistaken belief that, by signing his name, he merely acknowledged opening an account and provided a handwriting sample. (See PA008, PA135-136.)

Mack's failure to read or otherwise ask about what he was signing, or the effect of his signature, does not excuse him from the "consequences of his inattention." (PA008.) Whether an agreement to arbitrate exists depends on ordinary contractual principles. See, e.g., Kernahan, 236 N.J. at 307. And it is

black-letter law that a party cannot rely on his own ignorance to avoid or invalidate contractual terms. As the Supreme Court of the United States explained:

> It will not do for a man to enter into a contract, and, when, called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law.

Upton v. Tribilcock, 91 U.S. 45, 50 (1875). Indeed, "to hold otherwise would contravene the well settled principle that a failure to read a contract will not excuse a party who signs it, nor will the party's ignorance of [his] obligation." ADP, LLC v. Lynch, No. 16-1111, 2016 U.S. Dist. LEXIS 85636, at *15 (D.N.J. June 30, 2016) (citation and quotation marks omitted), aff'd 678 F. App'x 77 (3d Cir. 2017). Thus, Mack's failure to read what he was signing, failure to ask for copies of the paperwork he signed, and alleged ignorance of the terms of the paperwork he signed are immaterial. See Padró v. Citibank, N.A., No. 14-2986, 2015 U.S. Dist. LEXIS 51442, at *5 (E.D.N.Y. Apr. 20, 2015) ("[I]t is not relevant, for purposes of [a motion to compel arbitration], whether Plaintiff recalls signing documents acknowledging the Employment Arbitration Policy, or whether she subjectively understood at the time the contents thereof.").

The trial court's Order aligns with several decisions of other courts enforcing a plaintiff's electronic signature despite the

plaintiff's later allegation that he did not know what he was signing or did not receive a copy of the terms he agreed to by signing. For example, in Blocker v. Wells Fargo Bank, the plaintiff argued that he was not bound by a Wells Fargo account agreement both because "he signed a 'computer generated signature pad' rather than a written document," and "because he never received, read, or signed the document." No. 08-1196, 2011 U.S. Dist. LEXIS 36387, at *2-3 (D. Or. Mar. 30, 2011). The district court rejected the plaintiff's argument. The court found that the plaintiff signed an account application and, by signing, stated that he received a copy of the agreement and agreed to be bound by it. See id. at *3. Because the plaintiff offered no evidence of fraud or misrepresentation, he "remain[ed] bound by the Agreement regardless of whether he read it." Id.

Similarly, in Bayron-Paz v. Wells Fargo Bank, N.A., the court held that the plaintiff "entered into the Contract and is bound by its arbitration clauses." No. 22-6122, 2023 U.S. Dist. LEXIS 116807, at *7 (S.D.N.Y. July 7, 2023). The court aptly explained:

> [T]he plaintiff bought an expensive new car from [the dealership,] B&Z. He knew that he needed to sign a contract in connection with that purchase, particularly because he needed to finance part of the purchase price and wanted the benefits of warranty. He expected the financing terms to be set forth in the written contract. On the day of the purchase, before he drove away with the car, he was asked to sign an iPad as he sat at the salesman's desk. He had not yet been given any contract of sale or financing agreement, and therefore asked, before he entered his signature on the iPad, where the

> documents were. The salesman told him not to worry and that the documents would be emailed to him afterwards. He then signed the iPad in two locations. He did not see any document on the iPad screen but nonetheless signed twice. His electronic signature appears in two places on the Contract.
>
> Accepting each of the plaintiff's representations . . . as true, his actions and inaction on the day of purchase constitute admissions sufficient to show that he chose to sign the contract for sale of the automobile without reading it. The plaintiff has not identified a material fact in dispute that requires a trial to determine whether he signed the Contract. He knew that the transaction would be governed by a written agreement with the dealership for the purchase of the car and the financing of the purchase, but chose to sign the iPad twice without requesting that its contents be displayed to him or otherwise demanding a hard copy of the Contract before he gave the dealership his signature on the iPad.

Id. at *9–10.

Finally, in Lojewski v. Group Solar United States, LLC, the plaintiff decided to finance a home improvement project. See No. 22-10816, 2023 U.S. Dist. LEXIS 147246, at *4 (S.D.N.Y. Aug. 17, 2023). The defendant's representative came to the plaintiff's home and presented "an electronic tablet screen" for a signature. Id. The tablet "only showed a rectangular area to digitally sign" and "contained no visible reference to a link or other place" where the plaintiff might obtain the terms she would agree to by signing, including an arbitration agreement. Id. at *5; see also id. at *9 (detailing arbitration agreement). Based on those facts, the Lojewski court considered whether mutual assent was lacking and concluded it was not. See id. at *20–33. The court held that any

reasonable person in the plaintiff's position would have understood that the parties contemplated a continuing relationship requiring "some terms and conditions." Id. at *23. The district court further held that a "reasonable person would understand that her signature on the iPad constitutes assent to those terms and conditions, even if she did not read the terms." Id. at *23-24 (citations and quotation marks omitted).

The Lojewski court further explained that the plaintiff was obligated to ask about the terms to which she agreed if she wanted to know what they were. See id. at *24 ("That no one purportedly explained or showed the contents of the terms and conditions to Ms. Garcia does not preclude a finding that she had reasonable notice of the existence of those terms and conditions--and, therefore, the duty to inquire about those terms if she wished."). The plaintiff's duty to read and understand the documents that she signed was not "diminished merely because [she] was provided with only a signature page." Id. at *24-25 (citation and quotation marks omitted). That conclusion was reinforced by the plaintiff's signature "in the presence of [defendant's] representative":

> Unlike parties to one-way, online transactions, the [plaintiffs] had the opportunity to directly engage with a representative of the other contracting party to ask about the Agreement--yet, by their own account, did not do so. Although the FAC states that the [plaintiffs] were not affirmatively "given an opportunity to review the documents or permitted to scroll through the documents on the iPad," there is no indication that they requested or attempted to review the terms, let alone

> that such requests were denied. Their actions and inaction on the day of purchase constitute admissions sufficient to show that [they] chose to sign the contract . . . without reading it.

Id. at *25 (citations and quotation marks omitted).

The same result is warranted here for the same reasons. As the trial court held, "[a] party is charged with understanding what they are signing." (PA007.) Cf. Santana v. SmileDirectClub, LLC, 475 N.J. Super. 279, 286 (App. Div. 2019) ("[A] party may not claim lack of notice of the terms of an arbitration provision for failure to read it."). Like the plaintiff in Blocker, Mack electronically signed an account application through which he acknowledged receiving and agreed to the DAA's terms, including the arbitration agreement. Like the plaintiffs in Bayron-Paz and Lojewski, Mack signed in the presence of the defendant's representative but failed to ask what he was signing or about the effect of his signature. Finally, like those other plaintiffs, Mack introduced no evidence that Wells Fargo misrepresented any aspect of the transaction to him.

Mack tries to distinguish Blocker, Bayron-Paz, and Lojewski by arguing that he, unlike the plaintiffs in those cases, had no reason to know or suspect that his relationship with Wells Fargo would be governed by contract (or, as expressed in Lojewski, by "some terms and conditions," 2023 U.S. Dist. LEXIS 147246, at *23).

(See Appellant Br., 18.) He is wrong. Mack "knew he was opening a bank account" (PA007), and "experience and common sense" dictate that "bank accounts are governed by contracts between the bank and its customer." Clay v. Jie-Davis, No. 16-45, 2016 U.S. Dist. LEXIS 182536, at *29 (Dec. 9, 2016), report & rec. adopted, 2016 U.S. Dist. LEXIS 182436, at *1 (D. Guam Dec. 31, 2016);[1] see also United States v. Markert, 732 F.3d 920, 927 (8th Cir. 2013) ("This contention defies common sense and the realities of commercial banking. When a bank makes a loan and deposits the proceeds in a customer's checking account, the customer acquires use and control of the funds, subject to the terms and conditions of the account relationship."); Geiger v. Crestar Bank, 778 A.2d 1085, 1090 (D.C. App. 2001) ("The relationship between a bank and a depositor is a contractual relationship that is governed by the written agreement between the parties."). Mack knew or should have known that his relationship with Wells Fargo was governed by contract. (See PA007.) See also, e.g., Clay, 2016 U.S. Dist. LEXIS 182536, at *29. But he, like the Bayron-Paz and Lojewski plaintiffs, failed to ask what he was signing or the effect of his signature.[2]

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[1] Mack argues that this quotation from Clay is taken out of context because the Clay court decided a motion to dismiss, not a motion to compel arbitration. However, Mack fails to explain how that is a distinction with a difference.

[2] Mack also argues that he was not on inquiry notice of the terms he agreed to by signing. Because Mack's inquiry notice argument fails under the arguments above, Wells Fargo does not separately address it.

Based on the facts of record, Mack was willfully ignorant of the effect of his signature. That willful ignorance does not permit him to disavow his agreement to arbitrate. Thus, this Court should affirm.

2. Mack waived argument on "imposition" or a lack of "good faith." In any event, neither argument is supported by the evidence.

Mack argues that placing him in a position to ask what he was signing or for copies of the governing terms was an "imposition" that allows Mack to disregard his agreement to arbitrate. (See Appellant Br., 22–24.) However, Mack failed to raise this argument to the trial court. (See SA001–032.) Thus, Mack waived his argument on imposition, and this Court should not consider it. See, e.g., State v. Stein, 225 N.J. 582, 585 (2016) (holding that issue not raised to trial court was waived); Dickinson v. Plainfield, 116 N.J.L. 336, 338 (1936) ("A question not presented and argued in a court below will be held to be waived and abandoned and will not be considered in an appellate tribunal.").

In any event, Mack has not cited (and Wells Fargo is not aware of) any case holding that the circumstances here constitute an "imposition." Mack argues that there was an "imposition" because "[h]e didn't know what documents to ask for" and "was not familiar with the Bank's procedure in opening accounts." (Appellant Br., 24.) However, Mack cites no evidence of a legal imposition, i.e., "fraud or misconduct by [Wells Fargo] that prevented [him] from

reading" the documents at issue. Young v. Prudential Ins. Co. of Am., Inc., 297 N.J. Super. 605, 619 (App.Div. 1997). He cites no evidence of "'significant time pressure'" or "reliance on an erroneous 'assurance' that the parties' oral understanding had been or would be accurately memorialized in an instrument." MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386, 404 (3d Cir. 2020) (decided under New Jersey law). Because no such evidence exists, Mack's argument fails.[3]

Mack also argues that, pursuant to the Uniform Commercial Code (the "UCC"), Wells Fargo "had a good faith duty to provide Plaintiff with a copy of the application and deposit agreement or advise him where they could be located . . . ." (Appellant Br., 20-21.) However, once again, he failed to raise this argument in the trial court. (See SA001-032.) Thus, once again, Mack waived his argument, and this Court should not consider it. See, e.g., Stein, 225 N.J. at 585; Dickinson, 116 N.J.L. at 338. And again, Mack has not cited (and Wells Fargo is not aware of) any case imposing a UCC-based requirement on banks to preemptively answer questions that the bank's customer fails to ask. Imposing such a

[3] Mack now argues that "[t]he opening of new accounts had to be done quickly . . . ." (Appellant Br., 23.) However, he cites no evidence in support, and his bald argument has no evidentiary value. See State v. Carrillo, 469 N.J. Super. 318, 333 (App. Div. 2021); see also, e.g., Wallace v. Del. River Ferry Co., 127 N.J.L. 513, 516 (1941) (demonstrating that statements of supposed facts in briefs may "be persuasive" only if "they [a]re supported by the proofs").

requirement here would relieve Mack of any obligation he had to make basic inquiries, which would be inconsistent with the foregoing case law.

3. The remaining cases cited by Mack are inapposite.

Next, Mack attempts to sidestep the consequences of his inattention and inaction by citing Heller v. Wells Fargo Bank, but that case does not support Mack's position. Heller involved the same account application language at issue here, through which the plaintiff acknowledged receipt of and agreed to be bound by the DAA arbitration provision. See No. A-4728-14T4, 2016 N.J. Super. Unpub. LEXIS 464, at *3 (App. Div. Mar. 3, 2016). However, following appeal, the case was remanded for further proceedings because the parties failed to place the agreement into the record. See id. at *10-11. Here, the DAA was presented to and received by the trial court. (PA0091-131.) Thus, Heller is inapposite.

Mack also cites McMillan v. Wells Fargo Bank, No. 08-5739, 2009 U.S. Dist. LEXIS 57111 (N.D. Cal. June 12, 2009), and Mitchell v. Wells Fargo Bank, 280 F. Supp. 3d 1261 (D. Utah 2017). However, he fails to explain how or why those cases support his position on appeal. (See generally Appellant Br., 14-15.)[4] Mack's undeveloped

[4] Mitchell is particularly inapposite. The Mitchell court never resolved Wells Fargo's motion to compel arbitration. Instead, the court reserved ruling to permit a summary trial on issues that do not exist here, such as (among other things) whether the bank waived its right to arbitrate the claims at issue through earlier Congressional testimony. See 280 F. Supp. 3d at 1294-97. Wells

argument should be disregarded. See Gormley v. Wood-El, 218 N.J. 72, 95 n.8 (2014); Chase Bank USA, N.A. v. Staffenberg, 419 N.J. Super. 386, 413 n.17 (App. Div. 2011).

In sum, the trial court correctly concluded that, as a consequence of signing the iPad without asking about what he was signing or the effect of his signature, Mack is bound to arbitrate. This Court should affirm.

C. The trial court correctly held that Wells Fargo owed Mack no fiduciary duty to educate him about the consequence of his electronic signature. (PA008-009.)

To sidestep the foregoing points, Mack argued in the trial court that he and Wells Fargo enjoyed a fiduciary relationship, through which the bank was required to affirmatively disclose what he was signing and the consequences of his signature. The trial court correctly rejected that argument because: first, it was Mack's obligation to ask for information, and there was no evidence that Mack ever asked any questions about his iPad signature; and second, because Wells Fargo did not owe Mack any fiduciary duty. (See PA007-009.)[5]

Fargo withdrew its motion, and the court dismissed most of the plaintiffs' claims and requested briefing on jurisdiction over the remaining state-law claims. See generally Mitchell v. Wells Fargo Bank, N.A., 355 F. Supp. 3d 1136 (D. Utah 2018).

[5] Mack's obligation and failure to ask questions about his iPad signature are addressed in Section IV.B, supra. To avoid repetition, this Section only addresses the lack of fiduciary duty.

Below, the trial court correctly held that the traditional relationship between a bank and its customer is "simply that of creditor and debtor." (PA008 (quoting Pagano v. United Jersey Bank, 143 N.J. 220, 233 (1996)).) The Court also correctly recognized that a fiduciary relationship might arise where: "(1) there is a fiduciary relationship such as principal and agent or attorney and client; (2) one or each of the parting, in entering into the transaction, expressly reposes a trust and confidence in the other or where, because of the circumstances of the case[,] such a trust and confidence is necessarily implied; or (3) there exist contracts or transaction which in their essential nature, are intrinsically fiduciary, and necessarily call for perfect good faith and full disclosure, without regard to any particular intention of the parties." (Id. (quoting United Jersey Bank v. Kensey, 306 N.J. Super. 540, 551 (App. Div. 1997)) (quotation marks, brackets, and ellipses omitted).) Finally, the trial court correctly held under the facts in this case, that no fiduciary relationship or duty existed. (PA008–009.) The court explained:

> [T]here is no evidence of a fiduciary relationship, other than [Mack]'s subjective impressions which caused him to believe that the bank was acting in his "best interest." No representations of any sort are attributed to the bank. There is no evidence of expression by either party reflecting anything other than the typical debtor/creditor relationship, nor do the circumstances necessarily imply a heightened duty. No fiduciary duty existed, and the general rules articulated above apply. [Mack] is bound by the terms of the account agreement and the arbitration clause it contains.

(Id.) The trial court also correctly held that "[a] plenary hearing [wa]s unnecessary" because, "[t]aking [Mack]'s submissions as true proves nothing other than the bank took no actions to create a heightened duty." (PA009 n.1.)

On appeal, Mack concedes that "there is no presumed fiduciary relationship between a Bank and its customers . . . ." (Appellant Br., 44.) Cf. Kensey, 306 N.J. Super. at 552 (holding that "there is no presumed fiduciary relationship between a bank and its customer"). Mack argues, however, that one was necessarily implied here based on "the circumstances of this case, the nature of the dealings and the position of the parties towards each other[.]" (Appellant Br., 44.) Once again, he is wrong. The facts and circumstances of this case do not "necessarily imply" the existence of a fiduciary relationship. In cases involving alleged omissions, a fiduciary relationship is "necessarily implied" only where "the advantage taken of the plaintiff's ignorance is so shocking to the ethical sense of the community, and is so extreme and unfair, as to amount to a form of swindling . . . ." Kensey, 306 N.J. Super. at 554 (citation and quotation marks omitted). In Kensey, this Court held that such a case must involve "egregious breaches of the [defendant bank's] duty of good faith and fair dealing," where a fiduciary duty existed because the defendant "acted no better than common swindlers." Id. at 557. As examples, the Court cited

(among other cases) Barnett Bank of West Florida v. Hooper, 498 So.2d 923 (Fla. 1986), and Capital Bank v. MVB, Inc., 644 So.2d 515 (Fla. 1994), where each defendant bank "actively encouraged the plaintiff to rely upon its advice and concealed its self-interest in promoting the transactions involved." Id. at 557; see also id. at 555-57.[6]

The facts held to be critical in Kensey do not exist here. Wells Fargo did not open Mack's account or have Mack sign an account application out of self-interest. Mack never alleged that Wells Fargo "encouraged [him] to repose special trust or confidence in its advice" or "represent[ed itself] as experts in a field and invited reliance of another party on such expertise." Stevenson v. Mazda Motor of Am., Inc., No. 14-5250, 2015 U.S. Dist. LEXIS 70945, at *26 (D.N.J. June 2, 2015) (citations and quotation marks omitted).

Mack argues that a fiduciary relationship existed because he "was justified in believing the Bank would act in his best interest[.]" (Appellant Br., 44.) However, Mack's subjective

[6] In Barnett Bank, the defendant bank encouraged the plaintiff to place $90,000 with a bank client as a tax shelter, while failing to disclose either (1) that its client was check kiting, or (2) its account was overdrawn. The bank then used the plaintiff's deposit to "zero out" the fraudster's account for the bank's benefit. In Capital Bank, the bank's loan officer actively misrepresented facts to encourage the plaintiff to purchase equipment from a bank customer. Once the plaintiff's purchase monies were deposited, the bank used them to offset its customer's debts to the bank. See Kensey, 306 N.J. Super. at 555-56.

beliefs do not give rise to a fiduciary relationship (and Mack cites no authority suggesting otherwise). (See PA008-009.) See also, e.g., Argabright v. Rheem Mfg. Co., 201 F. Supp. 3d 578, 603 (D.N.J. 2016) ("The mere fact that Plaintiff trusted and relied on Defendant is insufficient to show a special relationship requiring a duty to disclose." (citation and quotation marks omitted)). Indeed, if a plaintiff's subjective beliefs were sufficient, then every non-fiduciary relationship could be converted to a fiduciary one based solely on the plaintiff's say-so. That would not be fair or equitable, and it is not the law.

Finally, the act of opening a replacement bank account is not "intrinsically fiduciary." Mack suggests otherwise (see Appellant Br., 45), but he has not cited any supporting fact of record or case law (from this jurisdiction or others). He cannot. When parties deal at arms' length, without misrepresentations or affirmative steps to conceal key facts, their transaction is not "intrinsically fiduciary" in nature. See Fisher Dev. Co. v. Boise Cascase Corp., 37 F.3d 104, 111 (3d Cir. 1994) (holding that the relationship between landlord and tenant was not "intrinsically fiduciary" because the parties negotiated at arms' length, the landlord did not misrepresent any facts, and the landlord did not conceal the condition of the property).

Of course, accepting Mack's contrary position, and imposing a fiduciary relationship under the circumstances of this case,

would effectively create a fiduciary relationship between every bank and depositor. The mere act of opening a bank account, even under the circumstances of this case, does not suggest or support the imposition of such a relationship. Accordingly, this Court should adhere to the principle that "there is no presumed fiduciary relationship between a bank and its customer," Kensey, 306 N.J. Super. at 552, and affirm the trial court's conclusion that no fiduciary duty existed here.

D. The trial court correctly held, in the alternative, that Mack must arbitrate because he agreed to the terms of the Wells Fargo Deposit Account Agreement by using his bank account. (PA008.)

On its first full page of text, the DAA states: "When you sign an account application or use your account, including any account service, you . . . consent to the terms of this Agreement." (PA092.) One of the terms, of course, requires arbitration of all "claims, disputes, and controversies between or among Wells Fargo and [Mack]. . ., whether in tort, contract or otherwise arising out of relating in any way to [his] account(s) and/or service(s)." (PA126.) Mack does not dispute that he used his Wells Fargo account, and he cannot. His account statements evidence his use of the bank account at issue. (See PA080-087.) Thus, Mack is bound to arbitrate his claims because he used his Wells Fargo bank account and thereby agreed to the terms of the DAA. (See PA092.) See also, e.g., Ellin v. Credit One Bank, No. 15-2694, 2015 U.S. Dist. LEXIS

153533, at *6-9 (D.N.J. Nov. 12, 2015) (enforcing arbitration agreement where first few sentences of cardholder agreement stated that use of card constituted acceptance of cardholder terms and conditions, which included agreement to arbitrate).

Mack raises several arguments against application of the DAA's plain language. Each of those scattershot arguments lacks merit. First, Mack argues that "use" is not defined in the account application, DAA, or the UCC. (See Appellant Br., 20.) However, that argument is a red herring. The definition of "use" does not matter. Mack does not and cannot contest that he used his account. Wells Fargo produced evidence demonstrating that Mack used it and thereby consent to the terms of the DAA, including the arbitration provision. (PA029-037, PA089.) Furthermore, Mack seems to concede that his use of the account constituted acceptance of the DAA's terms. (See Appellant Br., 32 (recognizing that the account application states that Mack's "use of the account confirms [his] receipt of, and agreement to be bound by the account agreement").)

Mack next argues that Wells Fargo cannot enforce parties' agreement to arbitrate because, in his view, the arbitration provision is not conspicuous. (See Appellant Br., 32-25.) However, Mack relies on a series of cases involving website and click-wrap agreements. See id. In the process, Mack ignores that in Heller--a case that he heavily relied on in the trial court and now relies on again on appeal--this Court held both that "[w]hether

an arbitration agreement was formed is determined under general contract principles," and that courts cannot "subject an arbitration agreement to more burdensome requirements than those governing the formation of other contracts." 2016 N.J. Super. Unpub. LEXIS 464, at *9.

Moreover, Mack's position is specious. Mack relies on Rockel v. Cherry Hill Dodge, where this Court declined to enforce an arbitration provision that appeared only in small print, on the reverse side of the retail installment contract at issue. See 368 N.J. Super. 577, 585-86 (App. Div. 2004). The Court held that "the arbitration provisions in the retail installment contract are difficult to locate and, once found, onerous to read in light of the small size of the print." Id. at 586. Those issues do not exist here. In the DAA Table of Contents, the words "**Resolving Disputes Through Arbitration**" appear in bold-face type and instruct readers where exactly they can find that provision (i.e., on pages 36-37). (PA093.) Then, on page 36, the words "Business Accounts Only: Resolving Disputes Through Arbitration" appear in a much larger typeface, with specific arbitration terms called out in the left-hand margin, in bold typeface. (PA126.) Mack has not cited any case holding that this type of placement or typeface are problematic. Thus, his argument (which was not well-developed and, for the reasons stated above, should not be considered) fails. Mack remains bound by the DAA and must arbitrate his claims.

Mack next argues that Wells Fargo did not properly incorporate the DAA into the account application. (See Appellant Br., 40–41.) This argument is a red herring. Because Mack agreed to arbitrate by using his account, it does not matter whether the account application properly incorporated the DAA.

In any event, Mack is wrong; the account application properly incorporated the DAA by reference because both elements of the Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn test are met here: (1) "the document to be incorporated" is "described in such terms that its identity may be ascertained beyond doubt"; and (2) "the party to be bound by the terms" (i.e., Mack) had "knowledge of and assented to the terms." 410 N.J. Super. 510, 533 (App. Div. 2009).

In Alpert, a law firm attempted in its engagement letter to incorporate by reference its "standard billing practices and firm policies." The firm claimed that those terms appeared in a separate "Master Agreement." The court held that there was no incorporation by reference because the law firm's general reference to "standard billing practices and firm policies" was not sufficiently specific. Those are not the facts here. The account application expressly referred to the "account agreement that includes the Arbitration Agreement under which any dispute between the Customer and the Bank relating to the Customer's use of any deposit account, product or service will be decided in Arbitration[.]" (PA035.)

That description refers to only one document: the DAA. Moreover, Mack acknowledged "receipt of, and agreement to be bound by," the DAA's terms by signing the account application (id.), and otherwise was under an obligation to inquire about the DAA and its terms, see Section IV.B, supra. Thus, the DAA was properly incorporated into the account application.

Finally, Mack expressly argues that he cannot be bound by the DAA because he never received it. (See Appellant Br., 40–41.) However, as discussed above, Mack knew or should have known that his relationship with Wells Fargo would be governed by contractual terms and conditions, and he should not be rewarded for remaining willfully ignorant. See Section IV.B, supra. Mack should have asked Wells Fargo for a copy of the governing terms. See id. Moreover, his account statements stated that "New Jersey account terms and conditions apply" (PA081), expressly referred to the DAA (PA084), and directed him to the Wells Fargo website, where he could download "the disclosures applicable to [his] account" (PA085). Mack disputes that his account statements told him where he might download the DAA. However, he acknowledges that his account statement expressly states that "New Jersey account terms and conditions apply" (Appellant Br., 21), and he fails to acknowledge that the account statements expressly referred to the DAA, which put him on inquiry notice. Thus, Mack's failure in inquire about

those terms and conditions amounts to inattention and inaction, which doom his position.

Accordingly, this Court should affirm the trial court's Order compelling arbitration on the alternative basis that Mack's use of his Wells Fargo bank account constituted acceptance of the DAA's terms, including the agreement to arbitrate.

E. Mack's claims are within the scope of the parties' arbitration agreement. (Not expressly decided below.)

Mack argues that language in the account application and in the DAA "conflict and are ambiguous." Id. at 36. Mack's argument fails for five reasons.

First, there is no conflict between the documents. The account application refers to the DAA and characterizes the scope of the DAA arbitration provision as governing "any dispute between [Mack] and [Wells Fargo] relating to," among other things, Mack's "use of any Bank deposit account . . . ." (PA035.) The DAA arbitration provision applies to "all claims, disputes and controversies between or among Wells Fargo and [Mack]," regardless of the nature of claim, "arising out of or relating in any way to" Mack's Wells Fargo bank accounts (and other matters not at issue here). (PA126.) Because the account application referred to the DAA, it provided adequate notice of the existence of the controlling document. See Tantillo v. Citifinancial Retail Servs., No. 12-511, 2013 U.S. Dist. LEXIS 21832, at *24 (D.N.J. Feb. 19, 2013) (holding that

plaintiff "signed an application for a line of credit and thereby acknowledged the existence of another document that contained an applicable arbitration provision," and thus "had adequate notice of the existence" of the controlling document). Thus, those documents do not conflict. They are harmonious.

Second, if there were a conflict--and to be clear, there is not--that conflict would be controlled by the terms of the DAA. Mack agreed to the terms of the DAA, including its arbitration provision, both by signing the account application and by later using his account. (See PA035, PA089.) The DAA expressly supplanted "all prior agreements" regarding Mack's bank account, "including any verbal or written statements or representations." (PA092.)

Third, the DAA arbitration provision is not at all ambiguous. It applies to, among other things, "all claims, disputes and controversies between or among Wells Fargo and [Mack]," regardless of the nature of claim, "arising out of or relating in any way to" Mack's Wells Fargo bank accounts. (PA126.) Other courts have held that similar arbitration provisions are unambiguous. See Berryman v. Newalta Envtl. Servs., No. 18-793, 2018 U.S. Dist. LEXIS 186789, at *5, *14 (W.D. Pa. Nov. 1, 2018) (holding as a matter of law that arbitration provision applying to "all disputes, claims or controversies" between the parties that were "arising out of or relating in any way" to their relationship was "unambiguous"); see also, e.g., Vollmering v. Assaggio Honolulu, LLC, No. 22-2, 2022

U.S. Dist. LEXIS 184938, at *9, *32 (S.D. Tex. Sept. 19, 2022) (holding that arbitration provision governing "[a]ll disputes" between employer and employees was, "while broad, not ambiguous"); D-J Eng'g Inc. v. UBS Fin. Servs., No. 11-1316, 2012 U.S. Dist. LEXIS 6678, at *7 (D. Kan. Jan. 20, 2012) (holding that arbitration provision governing "any controversy" or "all controversies" between the parties was "plain and unambiguous").

Fourth, because the DAA arbitration provision is unambiguous, it does not require application of the doctrine of contra proferentem. See Oxford Realty Grp. Cedar v. Travelers Excess & Surplus Lines Co., 229 N.J. 196, 212 (2017) ("Because we do not find the terms of the Policy ambiguous, we need not address Oxford's contentions about contra proferentem . . . ."). Further, applying the doctrine here would violate the FAA's mandate that "any doubts concerning the scope of the arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

Fifth, Mack's claims plainly fall within the scope of the DAA's unambiguous arbitration provision. That provision requires Wells Fargo and Mack to arbitrate "all claims, disputes and controversies between or among Wells Fargo and [Mack]," regardless of the nature of claim, "arising out of or relating in any way to your accounts and/or service" (and other matters not at issue here). (PA126.) As a matter of law, the provision is broad. See

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 398 (1967) (referring to a clause requiring arbitration of claims "arising out of or relating to" an agreement as "a broad arbitration clause"). Further, the provision plainly applies to Mack's claims, which rest on the allegation that an unnamed non-party transferred funds out of Mack's Wells Fargo bank account without Mack's authorization. Other courts have held that bank customer claims concerning unauthorized transactions fall within the scope of similarly broad arbitration provisions, despite the fact that those transactions allegedly were initiated by someone other than the bank's customer. See, e.g., A-1 Am. Fence, Inc. v. Wells Fargo Bank, N.A., 2021 U.S. Dist. LEXIS 254241, at *29-31 (E.D. Tex. July 14, 2021) (holding that plaintiff's "argument that Wells Fargo was negligent in handling the misdirected wire payment . . . implicates [plaintiff's] use of Wells Fargo's banking services"); Novak v. JPMorgan Chase Bank, NA, No. 06-14862, 2008 U.S. Dist. LEXIS 122096, at *23-24 (E.D. Mich. Jan. 4, 2008) (holding that bank's arbitration provision governed plaintiffs' claims for unauthorized transactions because those claims "cannot be maintained without reference to the account . . . and Plaintiff's relationship with Defendant").

For all of these reasons, the trial court correctly compelled arbitration of Mack's claims. This Court should affirm. See New Jersey Div. of Child Prot. & Permanency v. K.M., 444 N.J. Super.

325, 333–34 (App. Div. 2016) ("It is a long settled principle of appellate jurisprudence that an appeal is taken from a trial court's ruling rather than reasons for the ruling. We may affirm the final judgment of the trial court on grounds other than those upon which the trial court relied." (citations and quotation marks omitted)).

F. Wells Fargo properly authenticated its evidence. (Not expressly decided below.)

Lastly, Mack asserts that Wells Fargo did not properly authenticate either the account application or DAA. (See Appellant Br., 41–43.) That assertion, like the others discussed above, falls flat. Mack argues that Wells Fargo did not properly authenticate those documents because Wells Fargo's supporting certification "is silent on how the Bank created, acquired, maintained and preserved, if at all, the electronically created and electronically stored document[s]" at issue. (Appellant Br., 41.) In support, Mack relies on United States v. Browne, 834 F.3d 403, 412 (3rd Cir. 2016). But the issue in Browne was the authentication of social media records. See 834 F.3d at 412–13. Authentication of social media records "presents some special challenges because of the great ease with which a social media account may be falsified or a legitimate account may be accessed by an imposter." Id. at 412. Those same challenges do not exist with respect to the plain-vanilla business records that Wells Fargo offered here.

In fact, Wells Fargo properly authenticated those records. In support of its Wells Fargo's Motion, Wells Fargo employee Kanza Fizazi declared that she had "personal knowledge of Wells Fargo's general business practices with respect to account-opening and maintenance of deposit and checking accounts," and that she is responsible for "preparing declarations in connection with litigation involving Wells Fargo . . . ." (PA026, PA088.) Ms. Fizazi also declared that Wells Fargo's exhibits were business records maintained by the bank or its affiliates in the course of regularly conducted business activity, "and as part of the regular practice of Wells Fargo to create and maintain such records," which "were made at the time of the act, transaction occurrence or event, or within a reasonable time thereafter." (PA026-27, PA088-89.) Furthermore, she declared that each exhibit, including the account application and DAA, was a true and correct copy of what it purported to be. (PA027, PA089.) For such routine business records, nothing more is required. See United States v. Kassimu, 188 F. App'x 264, 265 (5th Cir. 2006) ("A business record can be authenticated by testimony of either the 'custodian' of the record or an 'other qualified witness.' An 'other qualified witness' is defined as 'one who can explain the record keeping system of the organization and vouch that the requirements of Rule 803(6) [e.g., regarding when the record was made, and whether it was kept in the course of regularly conducted business activities] are met.'");

see also State v. Rinker, 446 N.J. Super. 347, 362 (App. Div. 2016) (stating that New Jersey courts "frequently consider . . . federal precedent construing analogous Federal Rules of Evidence").[7]

Mack also argues that "a business record is not self-authenticating under NJ Evid. R. 902." (Appellant Br., 43.) That is yet another red herring. Wells Fargo did not offer self-authenticating records. Rather, Wells Fargo offered business records properly authenticated by an "other qualified witness," as permitted under Kassimu.

In any event, with respect to the account application, Mack undermined his own argument by submitting another copy of the same document. (See PA142-150.) Mack's copy, aside from redactions, is the same as the copy offered in support of Wells Fargo's Motion. (Compare PA029-037, with PA142-150.) Indeed, Mack's copy, like the copy offered in support of Wells Fargo's Motion, establishes that Mack: (1) "confirmed receipt of" and agreed "to be bound by" the DAA by using his Wells Fargo account; and (2) agreed to arbitrate all disputes with Wells Fargo relating to his use of that bank account pursuant to the terms of the DAA. (Compare PA035, with PA148.)

[7] As noted above, Mack relies on Browne. In turn, Browne relies in part on Lorraine v. Markel American Insurance Co., 241 F.R.D. 534, 543 (D. Md. 2007), which relies in part on the portions of the Kassimu decision cited here in the text.

V. CONCLUSION

For all of the foregoing reasons, this Court should affirm the trial court's June 20, 2024 Order compelling arbitration.

Dated: October 23, 2024

Respectfully submitted,

s/ Justin Kerner

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LETTER REPLY BRIEF ON BEHALF OF PLAINTIFF/APPELLANT, MICHAEL T. MACK

Honorable Judges of the Superior Court of New Jersey
Appellant Division
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625-006

Re: Michael T. Mack (Plaintiff/Appellant) v.
Wells Fargo Bank, N.A. (Defendant/Respondent)
Appellate Docket No.: A-003319-23-T2
Civil Action: On Appeal from a Final Judgment
of the Superior Court of New Jersey,
Law Division, Burlington County.
Docket No.: BUR-L-002113-23

Sat Below: Hon. Richard L. Hertzberg, J.S.C.

To the Honorable Judges of the Appellate Division:

Pursuant to R. 2:6-2(b), and R. 2:6-4(a), this letter reply brief is submitted on behalf of the Plaintiff/Appellant Michael T. Mack.

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LEGAL ARGUMENT

I. Wells Fargo's contention that it is Common Knowledge that a Consumer Opening an Account knows he is signing a Contract with the Bank is not supported by the record or the law.

The question which Wells Fargo has never addressed in this matter, whether Mack signed the account application or should have known he was signing the account application, results from its assumption that Mack signed the application, electronically on May 18, 2022, when he signed the iPad. (Db3).

In all the cases in which a consumer has been held to the terms of a contract because he knowingly signed a document whether by hand or electronically, without reading it, the consumer knew or should have known that was the affect of the signature.

In this case both Wells Fargo and the Trial Court conclusively presumed that because the relationship between the consumer and bank is one of debtor and creditor usually governed by contract, the consumer must know by common knowledge that anything he signs when he opens the account is or could be a contract or other document, binding him to a deposit agreement with an arbitration clause without being advised by the Bank that is what he is signing. The burden completely falls upon the consumer to make inquiry as to what he is signing because of that common knowledge. (Db3). In other words, caveat emptor.

Wells Fargo and the trial judge's position simply stated, is that it does not matter whether Mack knew what he was signing or that the Bank failed to advise him of such, because common knowledge dictates he should have known he was signing a contract when he signed the iPad. If he didn't know, his failure to ask what he was signing results in a fait accompli.

No case, holding, statute or other evidence was cited by Wells Fargo or the trial court to support this conclusion.

Signing an iPad without more just because a consumer opens a bank account without receiving any documents at the time of the signing or thereafter (which is what the record in this matter supports) does not result in the mutual assent necessary for the formation of an arbitration or other agreement.

Wells Fargo ignores all the facts leading up to the opening of the new account and transfer of the funds from the old account to it, as if irrelevant, and treats this as just an ordinary run of the mill account opening.

Mack overcame any presumption of receipt of documents by submission of his affidavit explaining he did not receive them. This was not a blanket denial, but rather a step by step recounting of the facts of the case.

While a presumption of receipt, might arise by signing an acknowledgment of receipt, (if in fact one was signed) the introduction of evidence to rebut the

presumption destroys it leaving only that evidence and its inferences to be judged against the competing evidence and its inferences to determine the ultimate evidence at issue. The burden of persuasion as to the proof or disposal of the presumed fact does not shift to the party against whom the presumption is directed unless otherwise required by law. See NJRE 301(b) and (d); Cappuccio v. Prime Capital Funding, 649 F.3d 180, 189 (3d. Cir. 2011) holding the evidence needed to overcome the presumption is minimal given that the presumption's only effect is to require the party contesting it to produce enough evidence substantiating the presumed fact's absence, to withstand a motion for summary judgment. A single non-conclusory affidavit or witness testimony based on personal knowledge and directed at the material issue is sufficient. Id; Hendall v. Hoffman & LaRoche, 209 NJ 173, 197 (2012) - If evidence is produced raising a debatable question among reasonable people, the presumption is overcome.

In Cappuccio, supra, the court stated if a consumer signs a written acknowledgment of receipt the signature does no more than create a rebuttable presumption thereof. Id at 189.

However, Wells Fargo produced no affidavits based on personal knowledge supporting its contention that Mack signed or knew he signed the account application or received a copy of the account application or deposit agreement.

See G.E. Capital v. Marilao, 352 NJ Super 274, 278 (App. Div. 2002), the court upheld a ruling that the presumption of accuracy of a sheriff's certification in a foreclosure matter, that he had posted a notice of sale, had been rebutted by the contrary certification of two residents of the building where the sheriff certified he had posted the notice.

As to a business record, its admissibility depends on its trustworthiness, not the fact that it is found in the Bank's computers. Carmona v. Resorts Int'l., 189 NJ 354, 380 (2007) - business records maintained in a computer system are not treated differently from hard copies merely because they are electronically stored ... there is no reason to believe that a computerized business record is not trustworthy unless the opposing party comes forward with some evidence to question its reliability. Id.

Here, Mack by his certification produced such evidence. Enough questions were raised as to reliability and trustworthiness in the application's preparation that the actual Bank employee who attended to Mack that day, should have submitted a certification on that issue. No explanation was given for its absence. Manata v. Perera, 436 NJ Super 330, 346-347 (App. Div. 2014) - a court retains the power to bar a business record if the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy, citing

NJRE 803(c)(6).

The certification of the Bank's employee Kanya Fizazi, stating she has personal knowledge of Wells Fargo's general business practices with respect to account opening or maintenance of deposit and checking accounts (Pa 26, Par. 3) does not state what these general business practices were or that they were followed in this instance. The preparation of the application was not within her personal knowledge. She admits that some of the information she sets forth in her certification was provided by persons working under her direction and supervision (Pa 27, Par. 4).

Why wasn't any affidavit submitted to the court by the Bank employee who serviced Mack when he opened the replacement account?

The Bank did not state that person was unavailable. When one looks at the history of lax practices of Wells Fargo in opening accounts set forth in the numerous cases cited in Plaintiff's initial brief (Pb 13-15)and the way Mack was treated by Wells Fargo in servicing his original account and the replacement account, it can be readily inferred that any such affidavit would have only been adverse to Wells Fargo's position.

Wells Fargo believes it does not have to advise its customers of the nature of what they are signing because Bank customers must fend for themselves.

There is a difference between stating that the relationship between a Bank and customer is one of debtor-creditor governed by contract and the proposition that it is common knowledge that when a customer opens an account he knows he is signing a contract with an arbitration agreement.

Courts may not blind themselves to the common understanding of our society FTC v. Verity Intern., 124 F. Supp 2d. 193, 200 (SDNY 2000).

Common understanding is derived from day to day living experiences and depends on the sophistication of the consumer. Do ordinary and untrained members of the public have a common understanding that they are entering into a contract when depositing money with a Bank and that when, after a brief interview, they are asked to sign an iPad without being told what is on it, they should know they are electronically signing an application and a 37 page deposit agreement with an arbitration clause when not given a copy of the documents, the opportunity to read them or advised otherwise? The Court erred in so holding, especially in the absence of any supporting evidence.

II. The Scope of the Arbitration Clause as described in the Application is not superceded by the Deposit Agreement.

The Bank in its brief takes a curious position in regard to the issue concerning the scope of the arbitration agreement raised by the Plaintiff. (See Pb

35).

In an attempt to avoid the inconsistency and ambiguity raised between the scope of the arbitration agreement set forth in the application and the DAA, the Bank states, (with no explanation), while there is no conflict, even if there was, "that conflict would be controlled by the terms of the DAA" because "the DAA expressly supplemented all prior agreements regarding Mack's bank account, including any verbal or written statement or representations" citing PA 092.

PA 092 is an informational page (page 2 of the DAA) before the table of contents and body of the DAA setting forth general information. The page starts out as follows:

> Thank you for doing business with us
>
> This Deposit Account Agreement applies to new and existing consumer and business accounts and together with the following documents, is your contract with Wells Fargo and constitutes the "Agreement" that governs your account with Wells Fargo.
>
> - The Consumer Account Fee and Information Schedule "Consumer Schedule") or the Business Account Fee and information Schedule ("Business Schedule"),
> - Our interest rate sheet for interest-bearing accounts,
> - Our privacy notice, and
> - Any additional disclosures, amendments, or addenda we provide to you.

Presumably this last sentence would include the application which the Bank claims Mack executed.

Yet the next sentence is apparently being relied upon by the Bank to vitiate the contents of the application according to the Bank's brief and its reference to Pa 092:

> This Agreement is applicable to new and existing accounts and replaces all prior agreements regarding your account, including any verbal or written statements or representations. When you sign an account application or use your account ... you ... consent to the terms of this agreement.

What does this mean? Is the application an agreement, disclosure, a notice? What would an ordinary consumer understand this to mean?

The Bank has continuously relied upon the application through out its brief as the document signed by Mack which binds him to the DAA because the application states he received a copy of the DAA: "Mack's failure to read or otherwise ask about what he was signing or the affect of his signature, does not excuse him from the consequences of his inattention (Db 7 - quoting the judges opinion at Pa 8).

The Bank's argument that the DAA supersedes the Bank's representations in the application and certification included therein, which the Bank claims Plaintiff signed, is not supported by these documents or this above language and does not absolve the conflict.

III. It is in the Public Interest to Consider the Issue of whether the Bank has a Good Faith Duty under the UCC to provide copies of Documents to its Customers when signed.

Wells Fargo suggests the Court should not consider the issue of whether Wells Fargo had a good faith duty under the UCC to provide Plaintiff with a copy of the application and deposit agreement or advise where they could be located since it was not raised below. (Db15).

If the issue is of special significance to the litigant, to the public or to the achievement of substantial justice and the record is sufficiently complete to permit its adjudication the appellate court can consider it. Boro of Keyport v. Maropakis, 332 NJ Super 210, 216 (App. Div. 2000).

Here, the facts were all presented to the Trial Court and will not change if the Court considers this issue on appeal. See State v. Roman-Rasado, 462 NJ Super 183, 202-203 (App. Div. 2020) - when facts are the same, raising a new legal theory that invokes the same concerns as the other theories raised would not bar the Court from considering the new legal theory.

Even the UCC recognizes that a person has notice of a fact if the person (1) has knowledge of it, (2) has received a notice or notification of it or (3) from all the facts and circumstances known to the person at the time in question, has reason to know it exists. N.J.S.A. 12A:1-202a. A person notifies or gives a notice or

notification to another person by taking steps as may be reasonably required to inform the other person in ordinary course, whether or not the other person actually comes to know of it. N.J.S.A. 12A:1-202d.

Besides this issue is of importance not only in this case but to the banking public in general.

The Court should consider this issue.

Conclusion

Finally, the Plaintiff submits he has adequately addressed the other points raised in Wells Fargo's brief in opposition in his initial brief and asks the Court to reverse the Trial Court as requested in his original brief.

Date: November 4, 2024

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