JIA WANG and XIAODONG JIANG,

Plaintiffs-Respondents,

vs.

COA 99 HUDSON, LLC, CHINA OVERSEAS AMERICA, INC. and THE MARKETING DIRECTORS, INC.,

Defendants-Appellants.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Docket No. A-003594-23

CIVIL ACTION

On Appeal from:
SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY

Docket No. Below: HUD-L-2296-23

Sat Below:
THE HON. KALIMAH H. AHMAD, J.S.C.

BRIEF OF DEFENDANTS-APPELLANTS IN SUPPORT OF THE APPEAL

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PRELIMINARY STATEMENT

The Agreement and Arbitration Clause at issue are not the form consumer contracts the Atalese Court addressed. The Plaintiffs-Respondents Jia Wang and Xiaodong Jiang ("Plaintiffs") are experienced investors in high-risk pre-construction condominium units. They are not the "consumers" the Atalese Court intended to protect. Individuals with bargaining power and legal representation are definitionally sophisticated, and wholly unlike the average consumer in Atalese. Even if there is a presumption under Atalese that a consumer contract must contain "clear and unmistakable" language that references a loss of "access to Courts" or a "jury trial," it does not and cannot apply here.

The present appeal before this Court arises from a trial court's Order invalidating an Arbitration clause contained within the Subscription and Purchase Agreement (herein the "SPA" or "Agreement") for the purchase of a luxury condominium. The decision fails to assess the Agreement's validity within the context of the Federal Arbitration Act ("FAA") and explicitly applies to the Agreement - a fact no party has denied. By overlooking the FAA, the trial court improperly relied upon Atalese and rejected a factual record that demonstrates the tenets of mutual assent—sophistication and equal bargaining power—even in this commercial context.

The record before the trial court, and now on appeal, is devoid of any competent evidence asserting that Plaintiffs did not know what "binding arbitration" was or that they had waived a right to relief in Court. In fact, the record demonstrates the opposite. Plaintiffs have never disputed their education level, sophistication as buyers, retention of competent counsel to review and negotiate the Agreement, ability to negotiate the purchase of the Unit, explicit execution of the Agreement, initialing of the conspicuous broad-form Arbitration clause, incorporation of the AAA rules and explanation of Arbitration in the Purchase Offering Statement, or the failure to cancel after the statutory-afforded extended periods for "attorney study" and diligent review. And even when a demand for Arbitration was filed by the Defendants-Appellants, Plaintiffs did not object. Rather, Plaintiffs hired new Counsel in the appropriate arbitral forum who submitted both an Answer and Counterclaim in the American Arbitration Association.

This is not the consumer setting in Atalese. Plaintiffs were not forced to accept the term of Arbitration without any negotiating power through a contract of adhesion. The trial Court's decision was incorrect. New Jersey law only requires that an arbitration provision explain generally that a signatory is giving up their right to bring claims in court; no "magic or talismanic" words are required. As experienced investors of real estate, Plaintiffs cannot plausibly

contend that they did not understand what "arbitration" meant, especially when Plaintiffs still have failed to argue that fact in an otherwise empty record.

Plaintiffs unmistakably agreed to arbitration. The Atalese presumption does not apply. This Court should reverse the trial court's denial of Defendant's motion to enforce the Arbitration clause and require the Plaintiffs to participate in Arbitration.

PROCEDURAL HISTORY

A. The Arbitration filed with the American Arbitration Association ("AAA")

On March 7, 2023, COA 99 Hudson, LLC, ("COA 99") filed a Rider, and Demand for arbitration with AAA against Jia Wang and Xiaodong Jiang ("Plaintiffs") for declaratory judgment and breach of contract due to Plaintiffs' failure to close title to a condominium, Unit 1601, located at 99 Hudson Street in Jersey City, New Jersey, pursuant to the parties' executed Subscription and Purchase Agreement ("SPA") ("the Arbitration"). (DA77-84). COA 99's Demand for arbitration included two counts, one for declaratory judgment and one for breach of contract, both of which sought relief pursuant to the liquidated damages clause in the SPA that entitled COA 99 to retain Plaintiffs' 10 percent deposit held in escrow. (Id.).

AAA confirmed receipt of COA 99's filing on March 14, 2023, and advised the parties that Plaintiffs' answer, counterclaim or objection was due on or before March 28, 2023. (DA196). The letter, addressed directly to Plaintiffs, advised that they should "review the Rules" and the enclosed Arbitration Information Sheet. (Id.).

On March 27, 2023, attorney, Alexander Schachtel, Esq., ("Attorney Schachtel") appeared on behalf of the Plaintiffs and filed an Answer and separate Counterclaims. (DA202-211). Count One of the Counterclaims alleged

breach of contract, breach of implied duty of good faith, negligent/fraudulent misrepresentations/omissions, and sought dismissal of the arbitration, refund of Plaintiffs deposit, as well as an Order awarding costs of suit and arbitration and attorneys fee. (DA209-210.). Count One also alleged that COA 99 "materially breached the parties' contract by failing to disclose the nature and extent of various substantial defects with the construction," including allegedly "fail[ing] to disclose water damage to Unit 1601 in a timely manner and by submitting an inconsistent incident report and estimate of repairs," and "defects with the windows and the truthfulness of the representations as to the dimensions of the units." (Id.). Plaintiffs also averred that "the building is presently the subject of multiple multi-plaintiff and/or class action lawsuits which could have a significant adverse financial impact on the Respondents by way of future assessments or special assessments distributed among the unit owners." (Id.). Notably, Plaintiffs conceded their knowledge of multiple lawsuits in Hudson County Superior Court related to the building, but never explained their failure to file first to seek relief in a different forum. (Id.)

Subsequently, on April 4, 2023, an administrative conference call was conducted by AAA with all the parties in attendance. (D157). Plaintiffs did not object to Arbitration or the forum, and in fact Attorney Schachtel indicated a willingness to engage in settlement discussions. (DA157). On or about April

7, 2023, a substitution of attorney was filed by Keith N. Biebelberg, Esq. ("Attorney Biebelberg") (DA213-14). Attorney Biebelberg requested that the matter be removed from arbitration. (Id.).

In a letter dated June 12, 2023, AAA confirmed that it

> has made an administrative determination that Claimant [COA99] has met the filing requirements by filing a demand for arbitration providing for administration by the AAA under its Rules. Accordingly, in the absence of an agreement by the parties or a court order staying this matter, the AAA will proceed with the administration of the arbitration."
>
> (DA216.)

Thereafter, on July 18, 2023, counsel for COA 99 and Attorney Biebelberg participated in a preliminary hearing before the AAA-appointed arbitrator and agreed upon a schedule for arbitration. (DA1582). During this conference, the parties agreed upon an evidentiary hearing date of June 17-21, 2024. (DA1582-1583).

On December 7, 2023, counsel for the parties appeared telephonically before the AAA arbitrator to provide updates on the trial court and appellate filings and schedules. (DA1585-1586). At that time, the arbitrator agreed to hold the matter in abeyance until a decision was issued in the trial court on the parties' competing motions for stays related to an appeal filed by Plaintiffs. (Id.).

On February 22, 2024, a status conference call was conducted by the Arbitrator with all parties present. (DA1557-1561). During the telephonic conference, the parties agreed to stay discovery until an Appellate Division decision was entered as to the validity of the agreement to arbitrate in this matter, or the unit at issue was contracted to sell. (Id.). Following the February 22, 2024 conference, Counsel for both parties provided their written consent to adjourn the AAA Arbitration hearing. (DA1562-1575). Currently, the AAA matter remains in abeyance.

B. The New Jersey Superior Court Matter (HUD-L-2296-23)

On June 27, 2023, Plaintiffs filed a Complaint against all named Defenants-Appellants, and simultaneously filed an application by way of Order to Show Cause ("OTSC") seeking "temporary" restraints pursuant to Rule 4:52-1 and injunctive relief pursuant to Rule 4:52-2. (DA01-154). Count One of the Complaint sought "Declaratory Judgment That the Arbitration Be Dismissed," as well as rescission of the SPA, "[c]ompensatory damages, including the loss of any deposit and any costs incurred in relation to the transaction, and the loss in value of their unit as a result of the diminished size thereof, trebled under the provisions of the [Consumer Fraud Act ("CFA")]," as well as attorneys' fees, costs of suit, and interest. (DA6-7). Count Two alleged violations of the CFA and requested the same relief as Count One. (DA7-8). Count Three alleged

violations of the New Jersey Planned Real Estate Development Full Disclosure Act ("PREDFDA") and requested rescission of the SPA, refund of Plaintiffs deposit, compensatory damages, attorneys fees and costs of suit. (DA8-9). Count Four alleged breach of contract, breach of implied duty of good faith and negligent/fraudulent misrepresentation/omission as to COA 99 and requested the same relief as Count Three. (DA9).

In response to the OTSC entered by the Court, Defendants submitted opposition briefing. (DA155-158). On August 25, 2023, the Honorable Kimberly Espinales-Maloney, J.S.C. heard oral argument on Plaintiffs' Order to Show Cause application. (1T).[1] During oral argument, Counsel for Plaintiffs conveyed the following about Plaintiffs' status as sophisticated parties and whether they had prior representation:

> MR. BIEBELBERG: Also I just want to note briefly. Counsel said that my clients are not unsophisticated. Your Honor, my clients names are Jai, J-a-i, Wang, W-a-n-g, and Xiaodong, X-i-a-o-d-o-n-g, Jiang. And I can represent to you that English is not their first language.
>
> THE COURT: But they were represented by counsel though, weren't they?
>
> MR. BIEBELBERG: Well, they had a real estate lawyer. And, quite honestly, Your Honor, I don't think

[1] 1T = Transcript of August 25, 2023.
2T = Transcript of October 20, 2023.
3T = Transcript of April 26, 2024.

> that the polestar is whether a real estate lawyer took note of the infirmity of the arbitration clause. Real estate lawyers do not necessarily keep track of Supreme Court Rulings and Litigation matters. So it is part of the mosaic, but I would submit a very minor part.
>
> [1T 15:15 to 16:4.]

On September 26, 2023, Judge Espinales-Maloney entered an Order denying the OTSC and striking through the relief as described in Plaintiffs' proposed form of Order filed on June 27, 2023. (DA217-222). The accompanying Statement of Reasons explained that Plaintiffs could not meet the four-prong test established in Crowe v. De Gioia, 90 N.J. 126, 132-33 (1982) – particularly, the first prong, irreparable harm. (DA220-222). The Statement of Reasons concluded: "Plaintiff's request for injunctive relief – to either dismiss or stay the arbitration – is denied in its entirety and this Order to Show Cause is hereby dissolved. The parties are to proceed with the AAA Arbitration as provided for in the SPA." (DA222).

Plaintiffs submitted a Motion for Reconsideration on September 28, 2023, requesting the trial court reconsider the decision to deny the OTSC and stay the arbitration. (DA223-224).

On October 20, 2023, Judge Espinales-Maloney heard oral argument on Plaintiffs' Motion for Reconsideration. [2T]. In arguing for reconsideration of

the court's decision on Plaintiffs' OTSC application, counsel for Plaintiffs declined to reach the Atalese arguments. (2T:20-23 to 21:5).

Judge Espinales-Maloney entered an Order denying Plaintiffs' Motion for Reconsideration on October 24, 2023. (DA256-260). In the accompanying Memorandum, the Judge explained that Plaintiffs failed to set forth a justifiable reason to reconsider the September 26 Order based on new facts or law that had been overlooked. (Id.). In responding to Plaintiffs' mischaracterizations of her prior Order as deciding validity under Atalese, the judge also explained her prior decision:

> In the September 26 Order, th[e] Court did not decide this issue because Plaintiffs did not properly raise the issue in a R. 4:2-1 motion to show cause. As Plaintiffs are seeking a permanent injunction on the arbitration clause, and injunctive relief applications do not permit the entry of a permanent injunction, a decision on this issue would be inappropriate.
>
> [DA260.]

On November 2, 2023, Plaintiffs filed a Notice of Appeal seeking review of the Court's September 26, 2023 Order denying Plaintiffs' Order to Show Cause application to dismiss the Arbitration and the October 24, 2023 Order denying Plaintiffs' motion for reconsideration. (DA1058). In conjunction with the same, on November 8, 2023, Plaintiffs filed a Motion to Stay the Arbitration pending appeal. (DA1066). On November 22, 2023, Defendants cross-moved

to Stay the Trial Court Docket pending resolution of Plaintiffs' appeal. (DA1115). The trial court issued an Order granting the stay on January 4, 2024. (DA1069).

Also, on January 11, 2024, the Appellate Division dismissed Plaintiffs' Appeal. (DA1078). The Appellate Division's Order dismissing Plaintiffs' appeal, stated as follows:

> The trial court's September 26, 2023 order denying plaintiffs' application for preliminary injunctive relief, and October 24, 2023 order denying plaintiffs' motion for reconsideration of the September 26, 2023 order, do not compel arbitration within the meaning of R. 2:2-3 (b)(8) because the trial court did not make a substantive decision on the enforceability of the arbitration clause at issue. Those orders, therefore, are interlocutory and may not be appealed as of right. The parties have represented to this court that presently pending in the trial court are plaintiffs' motion for a stay of arbitration and defendants' motion to dismiss or to compel arbitration. We are confident that those motions will result in a determination by the trial court of whether the arbitration clause at issue is enforceable and orders either compelling or denying arbitration, which can be appealed pursuant to R. 2:2-3(b)(8).
>
> [Id.]

Thereafter Defendants filed a Motion seeking Summary Disposition on the enforceability of the Arbitration Agreement and to stay all claims pending completion of the AAA proceeding, or, in the Alternative to dismiss Plaintiffs' Complaint pursuant to Rules 4:6-2(a) and 4:6-2(e) on February 6, 2024.

(DA265). Upon receipt of the parties' briefing, the Honorable Kalimah H. Ahmad heard oral argument on April 26, 2024. (3T).

On or about June 12, 2024, the Court efiled an Order denying Defendants' Motion to Dismiss in its entirety. (DA1540-1550). While the Order on eCourts is effectively dated April 26, 2024, the date of the oral argument, the parties were not in receipt of the actual Order and more importantly, the Court's decision as to whether the relief was granted or denied, until it was served on the parties through eCourts on June 12, 2024. (Id.).

This appeal now follows.

STATEMENT OF FACTS

A month and a half after purchasing two condominiums which are less than a mile away, Plaintiffs signed another contract, the SPA, for a residential condominium unit in a 79-story building in Jersey City, New Jersey, known as "99 Hudson." (DA159-183). Plaintiffs retained and were represented by Counsel to review and advise them on the contract documents, specifically the SPA, and the Public Offering Statement issued to the consumer public for the sale of all 99 Hudson Units. (DA363-364). Plaintiffs still have not closed on their unit because, inter alia, they assert that their unit is substantially smaller than advertised based upon measurements of 42 other units in the building. (DA202-211).

On or about December 23, 2017, Plaintiffs Jia Wang and Xiaodong Jiang signed the SPA for the purchase of condominium unit 1601 located at 99 Hudson Street in Jersey City, New Jersey ("the Unit"). (DA176-177). Pursuant to the terms of the SPA, Plaintiffs paid a deposit by check in the sum of $86,700.00 to COA 99's escrow agent on or about December 23, 2017. (DA161). Plaintiffs also executed an Election Form to receive a digital copy of the Public Offering Statement. (DA181-183).

A simple glance at the first page of the SPA reveals that Plaintiffs are immediately advised of their rights under New Jersey law to one seven-day

period for review and cancellation of a broker-prepared contract, pursuant to PREDFDA, N.J.S.A. 45:22A-21 to -42. (DA159). The cover page informs the buyers, in capitalized and bold font, that:

> **YOU HAVE THE RIGHT TO CANCEL THIS CONTRACT OR AGREEMENT BY SENDING OR FILED, DELIVERING WRITTEN NOTICE OF CANCELLATION TO THE DEVELOPER (SELLER) BY MIDNIGHT OF THE SEVENTH CALENDAR DAY FOLLOWING THE DAY ON WHICH IT IS EXECUTED. SUCH CANCELLATION IS WITHOUT PENALTY AND ALL MONIES PAID BY YOU SHALL BE PROMPTLY REFUNDED IN THEIR ENTIRETY.**
>
> [DA159.]

This exact language appeared again, capitalized and underlined, right before the SPA's signature block. (DA176). This was signed by Plaintiff Jia Wang and dated December 23, 2017. (DA176-177).

Plaintiffs were also advised, in Section 20 of the SPA, that the contract was subject to a three-day period of attorney review for both parties, which ran from receipt of a fully executed SPA together with its exhibits (one of which was the Purchase Offering Statement). (DA174-175). Under Section 20, titled "ATTORNEY REVIEW," the SPA included prominent notice language required by law:

> (a) **Study by Attorney.** Buyer and/or Seller may choose to have an attorney study this Contract (Agreement). *If an attorney is consulted, the attorney*

must complete his or her review of this Contract (Agreement) within three (3) business days (as calculated below). This Contract will be legally binding at the end of this three (3) day period unless an attorney for Buyer or Seller reviews and disapproves of the Contract (Agreement).

(b) **Counting the Time.** The parties count the three days from the date of delivery of the signed Contract (Agreement) to Buyer and to Seller. You do not count Saturdays, Sundays or legal holidays. Buyer and Seller may agree in writing to extend the three (3) day period for attorney review.

(c) **Notice of Disapproval.** If an attorney for Buyer or Seller reviews and disapproves of this Contract (Agreement), the attorney must notify the Broker(s) and Buyer and Seller within the three (3) day period, otherwise this Contract (Agreement) will be legally binding as written. The attorney must send a notice of disapproval to the Broker(s) and Buyer and Seller by certified mail, by facsimile, or by delivering it personally. The facsimile or certified letter will be effective upon delivery to the Broker's and Seller's respective offices and to Buyer at his or her address on page 1 of this Contract (Agreement). The attorney may also, but need not, inform the Broker(s) and the parties of any suggested revisions in the Contract (Agreement) that would make it satisfactory.

(d) **Other Rights of Cancellation.** The provisions of subparagraphs (a), (b) and (c) above are required by law due to the fact that this Agreement is being completed by a real estate broker. These provisions do not modify or lessen any other rights of cancellation given in this Agreement. Buyer should familiarize himself or herself with the other rights of cancellation as they are broader than those discussed above.

[Id. (emphasis added).]

The SPA provided that the contract "will be legally binding" after the review period, unless an attorney reviews and disproves of it. (Id.). Plaintiffs retained counsel, Gregory Wang, Esq., the managing partner of Wang Mugno & Park LLP ("Attorney Wang"), to review and advise them on the fully executed contract documents, including the Public Offering Statement. (DA362) There was no dispute raised below that Plaintiffs and their counsel received the documents and completed review of same during the three-day attorney review period.

The Subscription and Purchase Agreement ("SPA") at issue here, included Section 13, titled "ARBITRATION" in bold font and capital letters (the "Arbitration Provision"), which states the following:

> **ARBITRATION**: Buyer, on behalf of Buyer and all permanent residents of the Unit, including minor children, hereby agree that any and all disputes with Seller, Seller's parent company or their subsidiaries or affiliates arising out of the Unit, this Agreement, the Unit warranty, any other agreements, communications or dealings involving Buyer, or the construction or condition of the Unit including, but not limited to, disputes concerning breach of contract, express and implied warranties, personal injuries and/or illness, mold-related claims, representations and/or omissions by Seller, on-site and off-site conditions and all other torts and statutory causes of action ("Claims") shall be resolved by binding arbitration during the warranty period in accordance with the rules and procedures of Construction Arbitration Services, Inc. or its successor or an equivalent organization selected by Seller. If CAS

> is unable to arbitrate a particular claim, then that claim shall be resolved by binding arbitration pursuant to the Construction Rules of Arbitration of the American Arbitration Association or its successor or an equivalent organization selected by Seller. In addition, Buyer agrees that Buyer may not initiate any arbitration proceeding for any Claim(s) unless and until Buyer has first given Seller specific written notice of each claim (at 1500 Broadway, Suite 2301, New York, New York, 10036, Attn: Warranty Dispute Resolution) and given Seller a reasonable opportunity after such notice to cure any default, including the repair of the Unit, in accordance with the Unit warranty. The provisions of this section shall be governed by the provisions of the Federal Arbitration Act, 9 U.S.C. § §1, et seq. and shall survive settlement.
>
> [DA169.]

At the conclusion of this section is a separate line item requesting "Buyer's initials." Both Plaintiffs individually initialed the SPA directly next to the Arbitration Provision and executed the SPA on December 23, 2017. (Id.).

On January 3, 2018, Xin Xu, Chairman of Defendant-Appellant China Overseas America, Inc. signed the SPA on behalf of the Seller, thereby accepting Plaintiffs' offer on Unit 1601. (DA177). On January 5, 2018, a representative for COA 99 sent by e-mail the counter-signed SPA to Plaintiff Jia Wang and included a Dropbox link to the POS. (DA361).

On January 11, 2018, Attorney Wang, who had been retained by Plaintiffs emailed Counsel for Defendants stating: "This email confirms that attorney review for unit 1601 of 99 Hudson is hereby concluded." (DA363). No issues or

objections were raised during the attorney-review period to the Arbitration Provision or any other SPA provision. (Id.)

A Certificate of Occupancy ("CO") for the Unit was issued to Plaintiffs' Counsel via e-mail on October 8, 2020. (DA366). Plaintiffs did not request access to the unit and were never physically present in the unit for the purposes of inspection or obtaining measurements of the dimensions inside the unit in anticipation of closing. (DA393).

On November 15, 2021, Counsel for COA 99 issued a letter to Plaintiffs' Counsel, Mr. Wang, reminding him that a CO was issued for the Unit and requested confirmation of Plaintiffs' intent to close. (DA369-370). Counsel for COA 99's letter further stated: "If we do not receive notice of your client's intent to proceed to closing by December 15, 2021, Seller will utilize the arbitration provision within the Subscription and Purchase Agreement in order to collect liquidated damages." (Id.).

On December 9, 2021, Plaintiff Jia Wang contacted Counsel for COA 99 by e-mail informing him that "Greg Wang, Esq. (Wang Mugno & Park) has terminated the client-attorney relationship with [Plaintiffs]" and requested that Counsel contact her directly going forward regarding "[Plainitffs'] intention to proceed with the closing of Unit 1601 within 99 Hudson." (DA372). Counsel

for COA 99 revised the November 15, 2021 letter to Attorney Wang and sent it via email to Plaintiff Jia Wang that same day. (DA374-375).

On December 12, 2021, Plaintiff Jia Wang responded, notifying Counsel for COA 99, of "[her] intent to proceed with closing." (DA377). On January 6, 2022, Counsel for COA 99 responded by e-mail to Plaintiff Jia Wang, inquiring as to whether Plaintiffs were still unrepresented by counsel and as to Plaintiffs "timing and when [they] plan to schedule a closing." (DA379). On January 7, 2022, Plaintiff Jia Wang responded by re-affirming her intent to close on the unit, indicating her difficulty with finding replacement counsel, and inquiring about the "deadline" to close. (DA381). Counsel for COA 99 answered by e-mail the same day, responding that the deadline was "as soon as possible as this unit has been able to close for some time." (DA383).

On January 18, 2022, Counsel for COA 99 sent a follow-up e-mail to Plaintiff Jia Wang, requesting to "close this unit by the end of the month." (DA385). Plaintiff Jia Wang responded the same day that "the end of the month may not be promising" and expressed continued difficulty with finding replacement counsel. (DA387).

Thereafter, Litigation Counsel for COA 99 transmitted by e-mail a letter dated March 22, 2022, informing Plaintiffs that their delay in closing on the Unit was unreasonable and set a firm closing date for April 28, 2022. (DA389-391).

The letter concluded by informing Plaintiffs that continued failure to close could result in COA 99 filing for arbitration against them. (Id.). Plaintiff Jia Wang responded to Counsel the same day via e-mail by: "reiterating [her] intention to proceed with closing"; "DISAGREE[ING] with the action closing date of April 28, 2022, set by seller"; requesting "the last settlement date" "under the terms of Section 11 SETTLEMENT of [her] SPA"; and informing Counsel that the March 22 letter incorrectly referred to the Default Clause as Section 7. (DA393). Plaintiff Jia Wang e-mailed again on April 10, 2022, again requesting "the last day to settle the purchase of the Unit under the terms of Section 11 SETTLEMENT of [her] SPA[.]" (DA402).

Prior to that, on April 5, 2022, Litigation Counsel for COA 99 sent a letter via e-mail to Plaintiff Jia Wang correcting the Default Clause and again requesting that Plaintiffs close on the Unit. (DA398-400). The letter noted Plaintiff Jia Wang's repeated, broad expressions of intent to close, yet refusal to cooperate in setting a closing date. (Id.). Counsel's letter also specified that "[t]here is a continuing obligation since the issuance of the CO to close pursuant to the express terms of the SPA, and [Plaintiffs'] repeated, unjustified refusal to do so constitutes an instance of default." (Id.). Accordingly, the letter "re-affirm[ed] the action closing date for the Unit as April 28, 2022" and re-informed Plaintiffs that "**[f]ailure to close title will result in the filing of a**

complaint for arbitration without further correspondence or discussion."

(Id.) (emphasis added).

On April 10, 2022, Plaintiff Jia Wang responded by e-mail to counsel for COA 99's letter:

> I am happy to see that you have corrected the error of referencing a wrong section number of DEFAULT. Please CONFIRM that you are referencing my SPA.
>
> I would like to reiterate my intention to proceed with closing. I am strictly following the SPA to settle. I DISAGREE with the action closing date, April 28, 2022, set by Seller. This date is not defined by my SPA. I further DISAGREE with all other statements in your letter that are not defined by my SPA.
>
> I have attempted twice to CLARIFY the last day to settle according to SECTION 11 SETTLEMENT of my SPA. You have NOT provided any clarification to this question. This is my third attempt to request clarification. This is NOT an assertion.
>
> Is the last day to settle defined by my SPA? This is a Yes or No question.
>
> (A) Yes,
>
> (B) No.
>
> Your accusation of my delay or default is INVALID without defining the last day to settle by my SPA.
>
> [DA402.]

On June 1, 2022, Litigation Counsel for COA 99 responded by e-mail, firmly reminding Plaintiff Jia Wang that Counsel had "responded to this [date of settlement] issue, multiple times, via letter. There is no final date, you have had a continuing obligation to follow through on the contract you executed. If you do not furnish us with a workable closing, we will be filing for arbitration." (DA404.).

On July 10, 2022, Plaintiff Jia Wang responded: "Thanks for clarifying that there is no final date of settlement defined by my SPA. As previously discussed, I intend to process [sic] with closing. Could you please define what you meant by 'a workable closing'? I cannot find the definition of 'workable' in my SPA." (DA406). The same day, Litigation Counsel for COA 99 responded by e-mail, informing Plaintiff Jia Wang that Plaintiffs "are in direct violation of [their] obligation to close" and that they "have seven days to propose a closing date." (DA408).

On November 26, 2022, Plaintiff Jia Wang reached out again by e-mail, reaffirming Plaintiffs' "intent to proceed with closing" and inquiring "[w]hat . . . the status of [her] SPA [is] at this moment?" (DA408). The same day, Counsel for COA 99 responded indicating that "[i]f a closing date is not provided immediately we will be proceeding with legal action. (DA410). No date was ever provided.

Plaintiffs' failure to close title constitutes a default under the express terms of the SPA. Specifically, Section 8 provides:

> DEFAULT: If Buyer defaults in performing any of its obligations under this Agreement, and such default continues for 7 days after notice, Seller shall have the right, as its sole remedy, to terminate this Agreement and retain as liquidated damages an amount equal to such sums paid on account of the purchase price not to exceed 10% of the base purchase price and this Agreement shall be null and voId. Buyer and Seller agree that such damages are not a penalty, but represent the parties' best estimate of the actual damages which Seller will sustain upon a default by Buyer, which damages are substantial but not capable of precise determination. No delay or forbearance by Seller in exercising any right or remedy hereunder shall be deemed a waiver thereof. If Seller defaults under this Agreement for reasons beyond its control prior to the Outside Settlement Date (as defined in section 11 below) and such default continues for 7 days after written notice, Seller's sole liability shall be the return of all sums paid on account of the purchase price to Buyer including all costs paid for title searches and survey, plus all mortgage-related fees and expenses actually paid by Buyer and this Agreement shall be null and void.
>
> [DA165.]

LEGAL ARGUMENT

STANDARD OF REVIEW

Orders denying arbitration are deemed final for purposes of appeal. R. 2:2-3(a). It is well established that the standard of review for legal determinations as to the enforceability of an arbitration agreement is de novo. Hirsch v. Amper Financial Services, LLC, 215 N.J. 174, 186 (2013); see Kernahan v. Home Warranty Adm'r of Florida, Inc., 236 N.J. 301, 316 (2019); see also Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 207, (2019). The validity of an arbitration agreement poses a question of law, and appellate courts conduct a plenary review of legal questions. Hirsch, 215 N.J. at 186. As a general rule, questions of law addressed to the trial court are not entitled to deference and an appellate panel's review of legal issues is de novo. Manalapan Realty v Twp. Committee, 140 NJ 366, 378 (1995); see Morgan v. Sanford Brown Institute, 225 N.J. 289, 303 ("[w]e owe no deference to the interpretative analysis of either the trial court or Appellate Division, except as we may be persuaded by the reasoning of those courts.").

Our Court has emphasized that when "reviewing such orders, we are mindful of the strong preference to enforce arbitration agreements, both at the state and federal level." Hirsch, 215 N.J. at 186. See Hojnowski v. Vans Skate Park, 187 N.J. 323, 341-42 (2006) (noting federal and state preference for

enforcing arbitration agreements); Garfinkle v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 131 (2001) (recognizing "arbitration as a favored method for resolving disputes.").

POINT I

THE ARBITRATION CLAUSE CONTAINED WITHIN THE SUBSCRIPTION AND PURCHASE AGREEMENT IS VALID AND ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT. (DA1540-1550)

It is undisputed that the Federal Arbitration Act ("FAA") applies to the parties' contract, the SPA, and as such the arbitration agreement contained therein is enforceable. The agreement to arbitrate cannot be invalidated by State laws or rules, that discriminate on their face, against arbitration. This, and the standard in Atalese, is expressly preempted by the FAA.

Congress enacted the FAA, 9 U.S.C. § 1, et seq., in 1925 "to abrogate the then-existing common law rule disfavoring arbitration agreements 'and to place arbitration agreements upon the same footing as other contracts.'" Martindale v. Sandvik, Inc., 173 N.J. 76, 83-84 (2002) (quoting Gilmer v. Interstate Johnson Lane Corp., 500 U.S. 20, 24 (1991)). The FAA broadly defines a contract as evidencing a transaction involving commerce. 9 U.S.C.A. § 2. Section 9 provides, in pertinent part, that "a written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy

thereafter arising out of such contract or transaction . . . **shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract**." 9 U.S.C.A. § 2 (emphasis added).

Section 13 of the SPA, which Plaintiffs-Respondents, COA 99, and China Overseas expressly agreed to, provides that the contract is "governed by the provisions of the (FAA), 9 U.S.C. §§1, et seq. and shall survive settlement." Even if the SPA was not expressly governed by this clear language establishing the FAA authority, the SPA undisputedly "evidenc[es] a transaction involving commerce." At the time the SPA was executed, COA 99 maintained its office in New York. The development of the condominium building, 99 Hudson, in New Jersey involved construction and acquisition of materials and labor. Furthermore, certain provisions within the SPA define the mortgage financing contingency for the Plaintiffs' deal that could extend to various institutions. (DA155-156) Moreover, the original Complaint in this action notes that Defendants China Overseas America and The Marketing Directors, Inc. ("TMD") have their offices in New York. The Citizens Bank v. Alfabco, 539 U.S. 532, 56 (2003) (quoting Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273 (1995)); see also Crawford v. West Jersey Health Systems, 847 F. Supp. 1232, 1240 (D.N.J. 1994). The commercial aspect of the transaction is both apparent and verified.

Because the FAA maintains that Arbitration Provisions are fundamentally contracts, courts are required to review their enforceability in accordance with the applicable state law of contract formation and place the parties' agreement "on an equal footing with other contracts," and enforce it according to the contract's terms. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

A. The FAA Preempts State Laws that Impermissibly Burden or Discriminate Against Arbitration Agreements.

The language of 9 U.S.C.A. § 2 has been continuously defined as an "equal treatment" principle or rule. See Kindred Nursing Centers L. P. v. Clark, 581 U.S. 246, 251, (2017) (quoting Concepcion, 563 U. S., at 339). The clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability'" while at the same time offering no refuge for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Epic Sys. Corp. v. Lewis, 584 U.S. 497, 507-508 (2018) (citations omitted). Section 2's mandate undeniably protects a right to enforce arbitration agreements. Viking River Cruises, Inc. v. Moriana, 596 U.S. 639, 650-651 (2022). And as the Supreme Court articulated, "[t]hat right would not be a right to arbitrate in any meaningful sense if generally applicable principles of state law could be used to transform traditiona[l] individualized . . . arbitration into the litigation it was meant to displace through the imposition of procedures at

odds with arbitration's informal nature." Viking River Cruises, Inc., 596 U.S. at 651 (citations and quotations omitted).

The Supreme Court in Kindred Nursing provided new context to the pro-arbitration policy furthered by the FAA. Upon the deaths of two residents who were residing at Kindred nursing home their estates brought suit for wrongful death caused by the administration's substandard care. Kindred Nursing, 581 U.S. at 249. However, prior to the residents' deaths, their two respective family members who each held a power attorney signed an arbitration agreement with Kindred on behalf of their relative upon admission to the nursing home. Id. As a result, and upon the filing of the Complaints, Kindred moved to dismiss the cases claiming the signed arbitration agreements prohibited the estates from bringing their disputes in a Court of law. Id.

Upon review of the two powers of attorney the Supreme Court of Kentucky determined that the arbitration agreements contained therein were invalid Id. at 250. The Court held that a power of attorney could not entitle a representative of an agent to enter into an arbitration agreement "without specifically saying so." Id.

> "[A]n agent could deprive her principal of an "adjudication by judge or jury" only if the power of attorney "expressly so provide[d]." And that clear-statement rule—so said the court—complied with the FAA's demands. True enough that the Act precludes "singl[ing] out arbitration agreements." . . . the court

> asserted, because its rule would apply not just to those agreements, but also to some other contracts implicating "fundamental constitutional rights.". In the future, for example, the court would bar the holder of a "non-specific" power of attorney from entering into a contract "bind[ing] the principal to personal servitude."
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> [Kindred Nursing, 581 U.S. at 250-251.]

While the Court affirmed this "clear statement" rule, it was not unanimous. Justice Abramson who authored the dissent emphasized that the rule "ran afoul of the FAA." Id.

Upon evaluation of the Kentucky Supreme Court's decision, Justice Kagan confirmed the "clear statement" rule "fails to put arbitration agreements on an equal plane with other contracts." Id. at 252. In fact, Justice Kagan concluded that this Court "did exactly what Concepcion barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." Id. Similarly, in Morales v. Sun Contractors, Inc., 541 F.3d 218, 223 (3d Cir. 2008), the Third Circuit held that under the FAA, arbitration agreements may ***not*** be subjected to "a heightened standard of 'knowing consent' … because of the valuable rights relinquished under the provision." The FAA forbids "applying a heightened 'knowing and voluntary' standard" requiring "more than an understanding that a binding agreement is being entered and without fraud or duress." Id. at 223-24 (quoting Seus v. John Nuveen & Co., Inc., 146 F.3d 175, 183-84 (3d Cir.

1998), overruled on other grounds by Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000)); see Zoller v. GCA Advisors, LLC, 993 F.3d 1198 (9th Cir. 2021) (reversing district court's denial of defendants' motion to compel arbitration of plaintiff employee's statutory employment discrimination and civil rights claims based on a lack of knowing agreement and finding the clause's clear and mandatory language to be sufficient without any explanation that arbitration is distinct from court). Indeed, multiple Federal appellate courts describe the fact that arbitration precludes a jury trial as being "***obvious***." See, e.g., Tracinda Corp. v. DaimlerChrysler AG, 502 F.3d 212, 223 (3d Cir. 2007) (emphasis added); Sydnor v. Conseco Fin. Servs. Corp., 252 F.3d 302, 207 (4th Cir. 2001); Cooper v. MRM Investment Co., 367 F.3d 493, 506 (6th Cir. 2004).

Prior to Kindred Nursing, the Supreme Court in Concepcion, 563 U.S. 333 ruled in plain language that "[a]ny general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA." Id. at 341. Nothing in the FAA's savings clause "suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." Id. at 343. In this regard, Concepcion, long before Kindred Nursing, condemned state law rules that "have a disproportionate impact on arbitration agreements." Id. at 342. States, whether through Courts or legislative action may not determine that a contract is fair

enough to enforce all its basic terms, "but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing' directly contrary to the Act's language and Congress' intent." Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995).

Analogous to Concepion and Kindred Nursing, applying Atalese's express waiver requirement here would place the parties' arbitration clause on unequal footing. This is directly contrary to the FAA. Atalese notably stated that:

> No particular form of words is necessary to accomplish a clear and unambiguous waiver of rights. It is worth remembering, however, that every "consumer contract" in New Jersey must "be written in a simple, clear, understandable and easily readable way." N.J.S.A. 56:12-2. Arbitration clauses -- and other contractual clauses -- will pass muster when phrased in plain language that is understandable to the reasonable consumer.
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> . . . [N]o prescribed set of words must be included in an arbitration clause to accomplish a waiver of rights. Whatever words compose an arbitration agreement, they must be clear and unambiguous that a consumer is choosing to arbitrate disputes rather than have them resolved in a court of law. In this way, the agreement will assure reasonable notice to the consumer.
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> [Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430, 444, 447 (2014).]

The Atalese rule is, much like Kindred Nursing, a "clear statement rule" which discriminates on its face against arbitration agreements even if parties have

mutually assented to the agreement. The FAA prevents Atalese from invalidating a clear and unambiguous clause as not properly "formed" based on a faulty presumption that a Plaintiff represents the "average consumer" who should be presumed to lack even the most basic knowledge that arbitration is an alternative forum to court. That presumption does not meet the FAA's standard of treating as valid, irrevocable, and enforceable a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction", unless it is subject to grounds "for the revocation of any contract."

The Atalese clear statement rule is a defining trait that subjects arbitration agreements to an uncommon barrier that ultimately ends the mutual assent inquiry before it can even begin. Here, the trial Court while applying Atalese did not assess, or ascribe the necessary weight to several factors unique to this commercial contract; specifically: the sophistication of the parties, the incorporation of the AAA Rules and inclusion of the POS in the SPA; the parties' bargaining power; that the parties understood and consulted with Counsel regarding the agreement's terms; and that the plain meaning of the term "binding arbitration" can be gleaned from the entire contract or else the "common ordinary meaning" that would be ascribed by N.J.S.A. 56:12-10(a)(5). Each of these forgoing factors should be considered to determine mutual assent

rooted in ordinary contract principles derived from more than a half century of judicial opinions and various restatements of contract law. Yet, Atalese does what Concepion barred: "adopt a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." Kindred Nursing, 581 U.S. at 252; citing Concepion, 563 U.S. at 341-42.

Per the FAA, the trial court should have applied equal principles to the SPA, as it would to any contract, to help determine the meaning the parties gave to the words, or even the meaning that a reasonable person would have given to the language used. To presume that the parties did not intend to arbitrate their disputes in an arbitral forum, without a jury, because of the need for or absence of "magic words" is flatly inconsistent with the FAA. The FAA does not require "a talismanic approach" or certain language that "plaintiffs are waiving their statutory right to seek relief in court." (DA1857)

POINT II

EVEN IF THE FEDERAL ARBITRATION ACT DOES NOT APPLY, THE DECISION IN ATALESE IS NOT A BRIGHT LINE RULE AND IS NOT APPLICABLE TO THIS COMMERCIAL CONTRACT AS THERE WAS MUTUAL ASSENT. (DA1540-1550)

The Court's decision in Atalese is not a rigid or absolute standard. Instead, it is a balancing test employed when construing the waiver of rights

language in Arbitration clauses for consumer contracts. Even if Atalese was a bright line rule, the bedrock principles undergirding the decision make plain that it does not apply to commercial contracts, like the one at issue, because there was clear mutual assent by Plaintiffs.

Prior to 2014, Patricia Atalese entered into a contract with U.S. Legal Services Group, L.P. (USLSG), for debt-adjustment services. Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430, 435 (2014). The contract that Ms. Atalese executed contained an "arbitration provision for the resolution of any dispute between the parties," but it "did not mention that Ms. Atalese was waiving her right to go to Court and seek relief." Id. The Arbitration clause was contained on page nine (9) of a twenty-three (23) page contract executed by Ms. Atalese and USLSG. Id. at 446. On page nine (9), the clause provides that: "either party may submit any dispute to binding arbitration, that [t]he parties shall agree on a single arbitrator to resolve the dispute, and that the arbitrator's decision shall be final and may be entered into judgment in any court of competent jurisdiction." Id. (quotations omitted). Under the terms of the contract, USLSG was to provide Ms. Atalese with "debt adjustment services." Id. However, Ms. Atalese alleged that these services which were promised, were never performed. Id. Also, it was alleged that USLSG misrepresented that various attorneys were working on her case, and the company also knowingly

omitted that it was not a licensed debt adjuster in this State. Atalese, 219 N.J. at 446.

The facts of Atalese are consequential. Ms. Atalese was an individual, consuming a service. She purchased "debt adjustment services." The contract required USLSG to "review plaintiff's financial circumstances, provide consultations, evaluate potential legal defenses to plaintiff's debts and claims under the Fair Debt Collection Practices Act, and then negotiate and attempt to enter into settlements with creditors in an effort to modify and restructure plaintiff's debt obligations." Atalese v. United States Legal Servs. Group, L.P., A-0654-12T3, 2013 LEXIS 391, *1 (App. Div. Feb. 22, 2013). Notably, the record is devoid of any facts that indicate Ms. Atalese was familiar with debt adjustment services as she was contracting with USLSG to assist "in dealing with her credit problems." Id. These facts demonstrate that Atalese was concerned with a very specific type of consumer agreement: one in which "[a] consumer is ***not necessarily*** versed in the meaning of ***law-imbued terminology*** about procedures ***tucked*** into form contracts." Kernahan v. Home Warranty Adm'r of Florida, Inc., 236 N.J. 301, 319 (emphasis added).

Five years after Atalese, the Court in Kernahan reiterated that in Atalese, "[t]he consumer context of the contract mattered." Id. at 320. Atalese explicitly held that "an average member of the public may not know – without some

explanatory comment – that arbitration is a substitute for the right to have one's claim adjudicated in a court of law." Atalese, 219 N.J. at 442. The holding in Atalese "repeatedly notes that it is addressing a form consumer contract, not a contract individually negotiated in any way; accordingly, basic statutory consumer contract requirements about plain language implicitly provided the backdrop to the contract under review." Kernahan, 236 N.J. at 319. And because a consumer should have full knowledge of her legal rights, any agreement to arbitrate is still governed under the principle of "mutual assent." Atalese, 219 N.J. at 447. "An agreement to arbitrate, like any other contract, must be the product of mutual assent, as determined under customary principles of contract law." Id. at 442.

Therefore, Atalese has been incorrectly branded as a per se rule that applies to all contracts. As confirmed by the Court five years post Atalese, its standard is prescribed specifically to only certain adhesive consumer and employment contracts. For all other commercial contracts subject to the FAA, ordinary contract principles must govern, with no particular form of words being necessary to accomplish a clear and unambiguous waiver of rights. Id. at 444.

It is apparent that both "Atalese and Kernahan recognize there are no talismanic statements required when evaluating the enforceability of an arbitration clause. **Rather, both cases are tethered to basic contract**

principles about the lack of mutuality of assent." Bartz v. Weyerhaeuser Co., 2020 N.J. Super. Unpub. LEXIS 1640, *12 (App. Div. Aug. 26, 2020) (emphasis added). Mutual assent may be manifested through a party's written or spoken words, silence, conduct, or failure to act, so long as the party "intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents." Restatement (Second) of Contracts § 19(1)-(2).

The record here demonstrates that over the course of seven (7) years Plaintiffs' words and conduct manifests mutual assent to be bound to the SPA, and the Arbitration Provision as contained therein. Manifestation of intent to be bound may take a number of forms, including by word, act or conduct which evinces the intention of the parties to the contract. The actions of Plaintiffs undeniably manifest mutual assent.

A. Plaintiffs' Intent to Purchase and Signature Manifest Mutual Assent

The first of Plaintiffs' acts, which they have never disputed, is the submission of an offer to purchase Unit 1601. Upon simultaneous presentation of their offer, Plaintiffs signed a one-page agreement electing to electronically receive the document which was provided in English. On December 23, 2017, Plaintiffs signed the SPA, with each providing their respective signatures on pages seventeen and eighteen, and initialed on pages ten, thirteen, and

seventeen, as well as two out of the three exhibits which were attached to the SPA. Plaintiffs also wrote their initials at the end of Section 13, the Arbitration Provision, acknowledging their acceptance of the provision.

Not only did Plaintiffs physically sign and initial the SPA, Plaintiffs also tendered actual payment for the Unit. A check signed by Jia Wang for ten percent (10%) of the purchase price was deposited to COA 99's escrow agent on or about December 23, 2017. Plaintiffs had also retained Counsel to represent them as the buyers in the transaction, and for the forthcoming attorney review process.

B. Plaintiffs Had Ample Time to Examine the Agreement with the Counsel of their Choosing During the Statutorily-Required Attorney Review Provided for in the SPA

In fact, Plaintiffs were afforded the legally-required "three-day attorney review" period for broker-negotiated real estate agreements. Plaintiffs effectively had at least seventeen (17) days from when they signed the SPA on December 23, 2017, to the end of 3-day attorney review period on January 11, 2018. Upon execution of the offer, Plaintiffs hired an attorney Gregory Wang, Esq., to assist in finalizing the transaction and to represent their interests.

Under the law, it is presumed that Plaintiffs' attorney is familiar with arbitration being a different type of forum and should counsel Plaintiffs on those terms if unclear. See Delaney v. Dickey, 244 N.J. 466, 500 (2020) (recognizing

that attorneys possess superior knowledge of what a binding arbitration agreement means, as their "training and experience make them keenly aware of the fine distinctions between an arbitral and judicial forum") (emphasis added); Cnty. of Passaic v. Horizon Healthcare Servs., Inc., 474 N.J. Super. 498, 503-04 (App. Div. 2023); see also N.J. R.P.C 1.4(c) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"); McCullough v. Sullivan, 102 N.J.L. 381, 384 (E&A 1926) (recognizing standard for practicing lawyer is to possess "reasonable knowledge and skill ordinarily possessed by other members of his profession").

In Levison v. Weintraub, 215 N.J. Super. 273 (App. Div. 1987), the Appellate Division explained that the clause's "purpose is to protect parties against being bound by broker-prepared contracts without the opportunity to obtain adequate protection of their separate interests." Id. at 277 (emphasis added). The Court went on to hold that, considering the terms of this clause, "the contract does not provide that it becomes enforceable" once the seller approves and executes it. Id. at 276. "Instead, it was agreed that the contract would become binding at the end of three days 'unless' disapproved within that time. This means that if attorney disapproval is registered within three days there can be no contract, regardless of prior approvals." Id. at 276-77. Based on the clear

terms of the provision, the Levison Court held that the seller was within its rights to disapprove the contract before the end of the 3-day period. Id. at 277. Levison discussed the case of Trenta v. Gay, 191 N.J. Super. 617 (Ch. Div. 1983), where the seller also timely canceled the contract. Id. at 277-78. In that case, "the rebuffed purchasers argued that the purpose of the attorney review clause was to permit consultation on technical terms and details and not to create an interval to accommodate a rethinking of the entire transaction or for the receipt of a better offer." Levinson, 215 N.J. Super. at 277 (citing Trenta, 191 N.J. Super. at 621-622) (emphasis added). The Levinson Court approved the following "treatment":

> Attorneys offer advice on a limitless range of matters. Clients rely on them not only for legal advice but also for emotional support, financial guidance and common sense. They do not often come to their attorneys with their deals all made, save only the limited contributions of the scrivener. For those reasons, there is nothing surprising about a contract provision that effectively creates a timeout period for discussion and advice from a trusted counsellor. That advice can be on details or on price and, to be effective, has to be uncontrolled.
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> [Id.]

Plaintiffs had a fair opportunity to review the terms of the SPA, including any legal-imbued terminology, and protect their interests by consulting with an attorney of their own choosing before the SPA became binding. Therefore, the agreement at issue is distinct from the contracts of adhesion discussed in

Atalese. See Martindale v. Sandvik, Inc., 173 N.J. 76, 83-84 (2002) (declining to find that plaintiff was forced to sign without an opportunity for attorney review or discussion, and rejecting the notion the arbitration agreement was "oppressive or unconscionable). See also Rose v. Shore Customs Homes Corp., 2024 N.J. Super. Unpub. LEXIS 2091 (App. Div. Sept. 3, 2024) (finding that home renovation agreement was not a contract of adhesion, where plaintiff had the express right to retain counsel to review the contract terms and a right to cancel the contract within three days).

C. Plaintiffs' Duty to Read the Incorporated Public Offering Statement Is Further Evidence of Their Intent to Be Bound to Arbitrate

In New Jersey, condominium sponsors, such as COA 99, are subject to rigorous statutorily required documents for the development of a condominium building and to establish condominium associations. The rules and regulations governing the process are enforced by the State Department of Consumer Affairs ("DCA") and grants the DCA wide ranging authority to protect condominium purchasers. See e.g. N.J.S.A. 45:22A-37 (provision of PREDFDA granting the DCA the authority to order the recission of condominium unit purchase agreements that violate PREDFDA). To that effect, Sponsors must file certain statutorily-required documents with the DCA for review and approval, including a master deed, Public Offering Statement ("POS"), and Purchase Agreements for units. See N.J.S.A. 45:22A-26(a) (prohibiting developers from offering or

disposing of any real property or interest therein without registration with the DCA and provision of a POS to the purchaser); N.J.S.A. 46:8B-9 (provision of the Condominium Act listing all required contents for any registered condominium master deed); N.J.A.C. 5:26-6.2, -6.3, and -6.6 (requiring a condominium sponsor's POS and unit purchase agreements to be uniform). Plaintiffs voluntarily signed an Election Form, expressing their agreement and preference to accept the POS digitally. When they affixed their signatures on the SPA, Plaintiffs manifested an agreement to the incorporation of the POS as part of the entire agreement relating to a subscription and purchase of Unit 1601 in the 99 Hudson development. The POS was provided to Plaintiffs before the contract became binding, and they had a duty under the law to review that document. Indeed, through express language in the SPA, Plaintiffs had reasonable notice that they should carefully review of the POS (along with all other contract documents) before the expiration of the applicable noticed cancellation periods. Thus, under ordinary contract law, the POS should be considered as part of the SPA. Reviewing the POS as part of the Court's consideration of the total contract aids in resolving any claimed ambiguity with respect to the SPA's arbitration provision.

By law, the POS must contain critical "guidance" information spelled out in twenty-three (23) subsections. See N.J.A.C. 5:26-4.2. The Foreword page

notably contains a notice effectively explaining that arbitration involves a waiver of a jury trial. While that provision relates to the separate agreement for the condominium association, the POS is nevertheless an Exhibit to the SPA and incorporated by reference, and therefore, the Court can still consider that this notice provided Plaintiffs, which they had a duty under the law to read, informed them of a definition of arbitration as distinct from a judicial forum. Indeed, our Supreme Court has found agreement valid where instructional materials to explain the arbitration policy and procedures were provided after the agreement signed by an employee. See, e.g., Skuse v. Pfizer, Inc., 244 N.J. 30, 48 (2020) (upholding unrepresented employee's signed agreement that did not contain explicit waiver language and instead merely acknowledged that a "training" module would be emailed later and that the contract would be binding after continued employment).

Finally, the incorporation of the AAA Construction Rules provides clarity as to the arbitration procedures that would replace, and are distinct from, a judicial forum. The AAA Construction Rules incorporated by reference in the Arbitration Provision were "described in such terms that [their] identity may be ascertained beyond doubt." Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 533 (App. Div. 2009). By analogy to the question of arbitrability, which the U.S. Supreme Court holds to a heightened standard

under the FAA, federal courts have resoundingly found as it relates to sophisticated parties, that the incorporation of the AAA's Rules rises to the level of "clear and unmistakable evidence" that the parties agreed to submit arbitrability issues to the arbitrator. See Roach v. BM Motoring, Inc., 228 N.J. 163, 172 (2017) (enforcing incorporated AAA rules as binding); Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 763 (3d Cir. 2016); Preston v. Ferrer, 552 U.S. 346, 362–63 (2008). There is no rational basis for the Court to impose a reverse presumption and assume that Plaintiffs did not review and understand the terms of the arbitration provision and its incorporated AAA Construction Rules.

D. The Agreement is Clear, Unambiguous and Conspicuous

Consistent with the FAA, the parties' agreement to arbitrate must be enforced because it clearly and unambiguously indicates the intention of the parties to submit the disputes at issue to arbitration. The provision sets forth an unambiguous agreement to resolve disputes by binding arbitration through the AAA, not in court. The provision plainly reflects that the obligation is mandatory by use of the word "shall", making it mandatory, and the word "binding" as confirming the decision will be final. Notably, this language is even more precise than the standard clause for pre-dispute agreement under the AAA Construction and Commercial Rule, which do not include the word "binding".

The parties' agreement also applies to "any and all" claims and disputes between Plaintiffs and with Seller and its parent and affiliates, with the scope broadly defined as "arising from the Unit warranty, any other agreements, communications or dealings involving Buyer, or the construction or condition of the Unit." The clause also states that its scope includes, but is not limited to, "disputes concerning breach of contract, express and implied warranties, personal injuries and/or illness, mold-related claims, representations and/or omissions by Seller, on-site and off-site conditions and all other torts and statutory causes of action ("Claims")."

Explicit mention of the right to a jury trial was not necessary for a valid agreement to submit a statutory cause of action to arbitration. See Young v. Prudential Ins. Co. of Am., Inc., 297 N.J. Super. 605, 614-19, (App. Div.), certif. denied, 149 N.J. 408 (1997) (finding an agreement to arbitrate waived the right to jury trial even though the right was not specifically mentioned); see also Littman v. Morgan Stanley Dean Witter, 337 N.J. Super. 134, 146-48, (App. Div. 2001) (following Young because "the right to jury trial, even under an anti-discrimination statute, does not alone control the issue of enforceability of an agreement to arbitrate").

The Arbitration Provision was also conspicuous. It had its own section in the SPA with a clear heading "Arbitration" and was double-spaced and in large

font. There was also a line for Plaintiffs to place their initials immediately following it, which they did. The initial lines evidence that Plaintiffs were aware of the provision governing resolution of all disputes. See Fairfield Leasing Corp. v. Techni-Graphics, Inc., 256 N.J. Super. 538, 540 (Law Div. 1992). There is nothing about the clause that de-emphasized or buried the relevant terms. There is also nothing unclear or ambiguous about the language contained in the document.

E. Plaintiffs Never Asserted They Did Not Understand the Arbitration Clause

The facts of this case cannot be reconciled with Atalese where the record is devoid of any declaration from Plaintiffs averring that they did not understand the arbitration clause. At no point in the record have Plaintiffs ever asserted that they did not know what arbitration was. And Plaintiffs never objected to Arbitration before April 2024, after nearly six (6) years had passed since the SPA was signed. No certifications or declarations have ever been submitted, with any pleading or in response to a Motion.

Plaintiffs never asserted that they did not read the Arbitration Provision. In fact, Plaintiffs never claimed that they didn't understand what it meant at the time of execution. Plaintiffs retained Counsel and never claimed Counsel failed to explain that provision. In fact, every other piece of evidence, the language of the document, the references to the FAA, the timing within which Plaintiffs

possessed the SPA and POS, the incorporation of the POS, and the presence of Counsel both at time of execution, speaks to the contrary.

The entire record is bereft of any sworn assertion to the contrary. That is because the actions, conduct and words of Plaintiffs demonstrate that Plaintiffs assented to the Arbitration Provision in the SPA.

POINT III

THE PARTIES HERE ARE SOPHISTICATED AS THEY WERE REPRESENTED BY COUNSEL AND POSSESSED EQUAL BARGAINING POWER (DA1540-1550)

Appellants' contention that Atalese is not a bright line rule is further substantiated by recent jurisprudence carving out an exception for sophisticated parties. In Cnty. of Passaic v. Horizon Healthcare Servs., Inc., 474 N.J. Super. 498 (2023) this Court reaffirmed that Atalese does not apply to sophisticated contracting parties who maintain sufficient or equal bargaining power – which precisely describes the Plaintiffs. The factual record demonstrates that Plaintiffs were not only represented by Counsel, but experienced investors who retained negotiating when issuing an offer a high-risk pre-construction condominium unit. This is not the Atalese paradigm.

In 2002, the County of Passaic ("the County") contracted with Horizon Healthcare Services, Inc. ("Horizon") to administer the County's self-funded health benefit plan sponsored by the County. Id. at 501. This "relationship"

lasted until 2021 when the County filed an action claiming that Horizon had failed to implement the modified reimbursement rates thus breaching the current contract. Id. Horizon subsequently moved to compel arbitration based on the 2009 written agreement that stated "[i]n the event of any dispute between the parties to this Agreement arising under its terms, the parties shall submit the dispute to binding arbitration under the commercial rules of the American Arbitration Association." Id. at 501. The County claimed that this was unenforceable as the agreement did not contain the waiver of rights language required by Atalese. Id.

The Appellate Panel in County of Passaic first clarified that Atalese, and its progeny, "focus on the unequal relationship between the contracting parties." Id. at 503. "Throughout the Atalese opinion, the Court mentioned that the arbitration provision was contained in a **consumer contract**, and, in its holding, the Court emphasized that an arbitration provision must "be sufficiently clear to place a consumer on notice that he or she is waiving a constitutional or statutory right." Id at 502-503. "All these decisions reveal the Court's concern about the nonexistence of a waiver of the important right to seek relief in a court of law in contracts involving consumers and employees, who are not "necessarily versed in the meaning of law-imbued terminology about procedures tucked into form contracts."" Id. at 503 (citing Atalese, 219 N.J. at 442). Yet, this concern

"vanishes" when contracts are negotiated between sophisticated parties – "often represented by counsel at the formation stage - possessing relatively similar bargaining power." Id. at 503-504. In County of Passaic, because the parties were "represented by counsel at all relevant stages of their negotiations" the panel determined that the express waiver in Atalese was not triggered because the parties to the contract "are sophisticated" and "possess comparatively equal bargaining power. Id. at 504.

Here, both parties involved and named in this case were sophisticated parties involved in a transaction who each had the opportunity to bargain over the terms of the SPA. Each voluntarily and willingly accepted the terms of the agreement they entered – and did so while represented and guided by Counsel. Plaintiffs both possess Ph.Ds, corporate jobs, and had very recent experience purchasing two other new development condominiums in Jersey City. They are, therefore, not "average consumers" or persons that do not have the ability to comprehend or ascertain the meaning of the term "arbitration." See Stamato v. Morgan Stanley Smith Barney, 2020 N.J. Super. Unpub. LEXIS 322 (App. Div. Feb. 13, 2020) (granting motion to compel arbitration based on the finding that the plaintiff – a former VP former VP executive who "is in financial transactions business that deals with due diligence involving different types of types of commercial agreements" was a sophisticated party within the meaning of

Atalese); see also Gilmer, 500 U.S. at 33 (holding plaintiff, an educated businessman, remained subject to ordinary contract principles, and absent fraud or mental incompetence he was bound by the uniform securities registration application he signed); Sarbak v. Citigroup Global Markets, Inc., 354 F. Supp. 2d 531, 536-37 (D.N.J. 2004) (finding plaintiff, who possessed an academic background in mathematics and computer programming, more than capable of understanding the content of the arbitration provisions).

Prior to the ruling in County of Passaic, the Appellate Division had previously held that a party to a real estate transaction can be sophisticated, even if not represented by Counsel. Grandvue Manor, LLC v. Cornerstone Contracting Corp., 471 N.J. Super. 135, 146 (App. Div. 2022). Plaintiffs who were two homeowners sought to build a "luxury home" and formed a limited liability corporation, "Grandvue" as a vehicle to build the home. Id. at 139. Grandvue then contracted with the Defendant to build a ten-million-dollar residence in New York. Id. at 140. The contract entered into between the parties contained an Arbitration Provision. Id. The trial court below found that "the litigants were sophisticated parties that freely entered into a contract to build a house for over $10 million." Id. at 142. The Appellate Division ultimately agreed with the trial court's finding that these were sophisticated parties who possessed relatively equal bargaining power. Id. at 145.

A year later, in County of Passaic, the Appellate Division similarly found that because the parties were "represented by counsel at all relevant stages of their negotiations" the express waiver in Atalese was not triggered as the parties to the contract "are sophisticated" and "possess comparatively equal bargaining power. County of Passaic, 474 N.J. Super. at 503.

Even if Plaintiffs are consumers, they do not fit within the consumer model that Atalese intends to shield. A month and a half before Plaintiffs purchased Unit 1601 in 99 Hudson, Plaintiffs purchased two luxury (2) condominium units in the same municipality – Jersey City. These two luxury condominiums were located in Gulls Cove, a condominium complex with an address of 201 Marin Boulevard. This building is only .5 miles away from 99 Hudson Street. Unit 6080 at Gulls Cove, which includes a parking space, was purchased on November 10, 2017, by Plaintiffs for $695,000.00. The second condominium, Unit 6150, was also purchased by Plaintiffs on November 10, 2017, for $455,000.000. Exactly forty-three (43) days after the two (2) Gulls Cove purchases, Plaintiffs signed the SPA for the purchase of Unit 1601.

These two Plaintiffs possessed the means to purchase all three luxury condominium units in forty-three (43) days, situated half a mile apart, and which are all subject to mortgage payments from certain financial institutions. This is

not the average consumer with unequal bargaining power entering the marketplace on a take-it-or-leave-it basis.

POINT IV

THE FILING OF A COMPLAINT AND COUNTERCLAIMS IN THE AMERICAN ARBITRATION ASSOCIATION FORUM CONSTITUTED A WAIVER AND FORECLOSED PLAINTIFFS-RESPONDENTS FROM INITIATING A CLAIM IN THE SUPERIOR COURT. (DA1540-1550)

Under an assessment of the totality of circumstances, Plaintiffs are foreclosed from commencing a lawsuit in the New Jersey Superior as their actions constitute a waiver, or alternatively demonstrate knowing consent to be bound to the Arbitration forum.

[P]arties may waive their right to have a court determine the issue by their conduct or by their agreement to proceed in arbitration. Wein v. Morris, 194 N.J. 364, 381 (2008) (citing N.J. Mfrs. Ins. Co. v. Franklin, 160 N.J. Super. 292, 300, (App. Div. 1978)).

> The court should **consider the totality of circumstances** to evaluate whether a party has waived the right to object to arbitration after the matter has been ordered to arbitration and arbitration is held. Some of the factors to be considered in determining the waiver issue are whether the party sought to enjoin arbitration or sought interlocutory review, whether the party challenged the jurisdiction of the arbitrator in the arbitration proceeding, and whether the party included

> a claim or cross-claim in the arbitration proceeding that was fully adjudicated.
>
> [Wein, 194 N.J. at 383-384 (emphasis added).]

Yet, "[a] court will consider an agreement to arbitrate waived, however, if arbitration is simply asserted in the answer and no other measures are taken to preserve the affirmative defense." Cole v. Jersey City Medical Center, 215 N.J. 265, 281 (2013). "The relevant question . . . is not only whether the objecting party intentionally relinquished his objection to the arbitration, but whether he so conducted himself that he should be held to have made a binding election." Highgate Development Corp. v. Kirsh, 223 N.J. Super. 328, 333-34 (App. Div. 1998); see also Wein, 194 N.J. 364.

A comprehensive review of the totality of the communications demonstrates there is no basis for any presumption that Plaintiffs did not intend to be bound to the SPA, and the arbitration agreement. Plaintiffs communicated not only with their counsel, but continuously with COA 99's Counsel. Nothing in the record demonstrates that Plaintiffs were of limited intelligence, sophistication, or could not understand the English language. Notably, in correspondence from COA 99's counsel sent to them more than a year before the AAA case was commenced, Plaintiffs were informed that if they failed to agree to close title, **the Seller will seek to declare them in default and enforce the right to retain the deposit by way of filing a complaint in arbitration**.

Plaintiffs' response is telling. They never objected to the asserted right of the Sellers in those letters to file for arbitration or expressed any comment or question regarding the meaning of the Arbitration Provision in Section 13. Yet, Plaintiffs did, for example, speak out when they felt an incorrect statement was made as to a different section of the SPA.

The most meaningful evidence signifying Plaintiffs' intent can be gleaned from the filing of an Answer and distinct Counterclaims in the Arbitration on March 28, 2023. This was done despite the plain language of the AAA Rules that would bind Plaintiffs to the jurisdiction of the arbitrator and prevent them from withdrawing those Counterclaims unilaterally. Both the March 14 AAA letter and the AAA Rules provided that any "answer, counterclaim or objection to Claimant's requested locale should be filed within 14 days." Although the March 14, 2023 letter indicated deadlines could be extended on consent, Plaintiffs proceeded to retain counsel and file both an Answer and Counterclaims on the date of the deadline. Plaintiffs' Counterclaims were accepted for filing, and their counsel participated at the April 4th Administrative Conference with the AAA.

Plaintiffs irrefutably knew or were on notice of such facts that would have led a prudent person – let alone the educated persons who hired an attorney to review the contract – to evaluate whether the filing of the Counterclaims in the

AAA proceeding would manifest evidence of asset to the arbitration provision in the SPA.

The totality of the circumstances warrants a finding of waiver and consent to Arbitration. Not only did Plaintiffs agree to, or consent to arbitration, they intended to remain in that forum without hesitation. This is evidenced by the filing of counterclaims which demonstrates Plaintiffs' intent to pursue their own claims against Defendants without any objection. The plain language of the Arbitration Provision, and reasonable notice provided to Plaintiffs of the duty to read and approve all contract documents and incorporated documents prior to the expiration of the attorney review period are equally significant. Plaintiffs' prior real estate experience, knowing and voluntary assent to the binding arbitration agreement in the POS, and their knowing and voluntary election to arbitrate the same core disputes with the AAA in March 2023 warrant a finding that the Plaintiffs objectively manifested an intent to resolve all disputes at issue in this Action and the AAA case exclusively by binding arbitration. As such, this Court should find that Plaintiffs waived their right to initiate a lawsuit in any other forum, but Arbitration.

CONCLUSION

The Court should reverse the trial court's April 26, 2024 Order, find the Arbitration clause contained within the SPA both valid and enforceable and compel Plaintiffs-Respondents to Arbitration upon a dismissal of the Complaint in the Superior Court.

Respectfully Submitted,

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SUPERIOR COURT OF
NEW JERSEY APPELLATE DIVISION

Docket No. A-003594-23

JIA WANG and XIAODONG JIANG,

Plaintiffs - Respondents,

v.

COA 99 HUDSON, LLC, CHINA OVERSEAS AMERICA, INC. and THE MARKETING DIRECTORS, INC.

Defendants - Appellants.

On Appeal From:
SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
LAW DIVISION
Civil Action

DOCKET NO. Below HUD-L-2296-23
Sat Below:
Honorable Kalimah H. Ahmad, J.S.C.

PLAINTIFFS – RESPONDENTS' BRIEF

Keith N. Biebelberg
Of Counsel

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PRELIMINARY STATEMENT

Plaintiff-Respondents are husband and wife consumers who signed a form contract to purchase a residential condominium unit as their home. Their Complaint alleges that Defendants-Appellants falsely advertised the size of the condominium unit, in violation of the New Jersey Consumer Fraud Act and other law.

Plaintiffs submit this Brief in opposition to the defendants' appeal from the Order of the Superior Court, Hudson County denying their pre-answer motion for summary judgment to dismiss plaintiffs' Complaint seeking, inter alia, (a) a declaratory judgment that the arbitration clause in their form contract is invalid under Atalese v. U.S. Legal Service Group L.P, 219 N.J. 430 (2014), cert. den., 576 U.S. 1004 (2015), and its progeny, and (b) an injunction enjoining the AAA arbitration commenced by defendant COA 99 Hudson, LLC ("COA 99 Hudson") to declare plaintiffs in default of that contract, and to retain the contract deposit, for plaintiffs' decision not to close title on the unit due to its size being significantly smaller than advertised.

The court below held that the arbitration clause is invalid under Atalese because it merely provides for "binding arbitration during the warranty period" and does not contain language that plaintiffs are waiving their statutory right to seek relief in a court of law. It also denied defendants' motion to dismiss the

Counts of the Complaint for the alleged failure to sufficiently plead the causes of action. Defendants have not appealed from that denial. Their Appellants' Brief is limited to the Motion Judge's ruling that the arbitration clause is invalid under Atalese. *See also* Appellants' Civil Case Information Statement ("Appellants are appealing the entirety of the trial Court's decision as it relates to the arbitration clause at issue.").

Each one of defendants' arguments on this appeal is contrary to well-established caselaw. Defendants' principal argument is that the Atalese standard is preempted by or inconsistent with the Federal Arbitration Act ("FAA"). That argument has been repeatedly rejected by the New Jersey Supreme Court and this Court.

Defendants also argue that Atalese does not apply to plaintiffs' contract to purchase a condominium unit because, they claim, the contract is a commercial contract rather than a consumer contract. Defendants did not make this unsupportable argument below. In the lower court, defendants did not dispute that plaintiffs are consumers or that the contract is a consumer contract. The CFA defines a "consumer contract" as "a written agreement in which an individual… purchases real or personal property," N.J.S.A. 56: 12 – 1 (e), and Appellants' Brief acknowledges that the form contract contained in

COA 99 Hudson's Public Offering Statement ("POS") is governed by the State Department of Consumer Affairs (Br. at 40 - 41).

Defendants then erroneously argue that, even if the Atalese standard applies, it does not apply to these plaintiffs because they are allegedly "sophisticated" parties who were represented by counsel on their contract. There are no New Jersey cases, and defendants do not cite to any, holding that Atalese does not apply to "sophisticated" consumers or consumers represented by counsel. Indeed, this Court has rejected this argument and held that a consumer's "sophistication" and representation by counsel do not alter the Atalese standard.

Finally, as the Motion Judge correctly held, plaintiffs did not waive their Atalese objection to the arbitration clause (or their constitutional right to a trial in the court system) by their prior counsel's filing of an Answer and Counterclaims in the embryonic state of the AAA arbitration, followed by their new counsel's objections to the clause 10 days later.

PROCEDURAL HISTORY

Plaintiffs entered into a contract to purchase Condominium Unit 1601 in a 79-story condominium building in Jersey City, New Jersey, known as "99 Hudson." (Da159). Defendant COA 99 Hudson is the Sponsor/Developer of the condominium. (Da1). The contract to purchase is known as a Subscription

and Purchase Agreement ("SPA") and was a form contract prepared by COA 99 Hudson's condominium counsel, Connell Foley, its counsel in this case. The Complaint at ¶20 alleges the SPA to be a "form contract." (Da4). Plaintiffs did not close title on the purchase of their unit because, inter alia, they assert that their unit is substantially smaller than advertised based upon measurements of 42 other units in the building by a civil engineer. To date, COA 99 Hudson has not allowed plaintiffs access to Unit 1601 to measure it.

In addition to COA 99 Hudson, the defendants are its sole member (China Overseas America, Inc.) and the New Jersey marketing agent for the development (The Marketing Directors, Inc.). COA 99 Hudson offered the 99 Hudson units for sale to the consumer public pursuant to the POS prepared by Connell Foley. The POS contains the form SPA required to be signed by all purchasers. COA 99 Hudson refused to deviate from it. The sale of condominium units to the consumer public is regulated by the New Jersey Department of Consumer Affairs and subject to the New Jersey Consumer Fraud Act ("CFA") and the New Jersey Planned Real Estate Development Full Disclosure Act ("PREDFDA"), both important pieces of consumer protection legislation. The defendants are sued herein under these statutes for the false advertising of the square footage of the units.

On March 7, 2023, COA 99 Hudson filed an AAA arbitration demand claiming that plaintiffs had breached their contract by failing to close, and that it was entitled to keep plaintiffs' escrowed down payment. (Da12). Plaintiffs retained an attorney to represent them, and he filed an Answer and Counterclaims with the AAA on March 28, 2023 as demanded by the AAA. (Da422, 127 – 136). The Answer asserted at paragraph 23 that "the meaning and significance of the arbitration provision was not explained to Respondents by counsel, nor were they advised that they had a right to reject or negotiate against the arbitration agreement." (Da129). The Motion Judge correctly interpreted this as a challenge to the arbitration. (Da1550).

On April 7, 2023, only ten days later, plaintiffs retained their present counsel. On April 7, 2023, April 25, 2023 and May 24, 2023, plaintiffs' present counsel asserted in writing to the AAA and COA 99 Hudson's counsel that the arbitration clause was invalid under Atalese and that the AAA did not have jurisdiction. (Da137, 141, 145). On June 12, 2023, the AAA notified the parties that it would proceed with the arbitration until such time as the Superior Court orders otherwise. (Da150). On June 27, 2023, Plaintiffs filed their Superior Court Complaint herein asserting, inter alia, that the disputed arbitration clause (Section 13 of the SPA) is unenforceable under Atalese and that the AAA arbitration should be enjoined.

In addition to seeking a declaratory judgment that the arbitration clause is invalid and dismissing the AAA arbitration, plaintiffs' Complaint herein asserts Counts for violations of the CFA and PREDFDA, breach of contract, breach of the implied covenant of good faith and fair dealing, negligent and fraudulent misrepresentation and omission, and for a declaratory judgment rescinding their condominium purchase agreement.

Plaintiffs make the same allegations as made in four other actions pending in the Superior Court, Hudson County Vicinage by a total of 52 units in the building. Plaintiffs assert a systemic and building-wide consumer fraud by the defendants' false advertising of the size and square footage of the condominium units in the building, including Unit 1610 which plaintiffs contracted to purchase. The other four actions are consolidated for discovery under Docket No. HUD-L-232-21 before the Hon. Anthony V. D'Elia. (Da1275 – 1370). Eighteen months before COA 99 Hudson's commencement of the AAA proceeding against plaintiffs herein, Judge D'Elia had denied COA 99 Hudson's motion to compel arbitration of these claims based upon the plaintiffs' consumers' claims that the arbitration clause did not meet the Atalese standard. (Da90 – 125).

The defendants herein are the same defendants in the four consolidated actions. In the first of those cases, on their motions to dismiss the actions and

compel arbitration, defendants herein relied upon the same arbitration clause in the SPA that COA 99 Hudson presently relies upon in this case.

Judge D'Elia denied defendants' motion to dismiss and to enforce the arbitration clause in the first of those cases. Judge D'Elia ruled from the bench as follows:

> It is not the type of clear, unambiguous evidence that one needs to conclude the plaintiffs gave up their right to a jury trial when you simply say in a subscription agreement you have to arbitrate, which this one does, and, by the way, look at all of these attached exhibits which are now part of your contract. One of them -- not the only one -- is a 633-page document written in, let's face it, legalese, well-done, excellent document, and buried in that document at page iv is the type of language to satisfy, that satisfies the requirements of Atalese. That's not the type of clear and unambiguous evidence that I can rely upon at this stage of the proceedings without discovery to conclude that the plaintiffs clearly and unambiguously knew what they were, what they were getting involved in.
>
> *See* (Da119 - 120).

On June 27, 2023, plaintiffs herein also filed an Order to Show Cause application to dismiss or stay the AAA arbitration. On August 25, 2023, oral argument on the motion was heard. On September 26, 2023, Judge Espinales-Maloney denied plaintiffs' motion, without deciding the issue of whether the arbitration clause is invalid under Atalese. She reiterated her denial in an October 24, 2023 Order on plaintiffs' motion for reconsideration.

Plaintiffs filed a notice of appeal from Judge Espinales-Maloney's Orders on the grounds that they effectively compelled arbitration. In moving to dismiss the appeal, defendants took the position that neither Order by Judge Espinales-Maloney had determined whether the arbitration clause is invalid under Atalese. On January 11, 2024, this Court granted defendants' motion to dismiss the appeal, holding that in those Orders "the trial court did not make a substantive decision on the enforceability of the arbitration clause at issue" and that the appellate panel was "confident" that "defendants' motion to dismiss or to compel arbitration… will result in a determination by the trial court of whether the arbitration clause at issue is enforceable and orders either compelling or denying arbitration, which can be appealed pursuant to R. 2:2-3(b)(8)." (Da1078 - 1079)

On February 5, 2024, defendants replaced their "motion to dismiss or to compel arbitration" with their motion for summary judgment, taking the position that Atalese does not apply to this consumer transaction.

The Lower Court's Opinion

The Honorable Kalimah H. Ahmad denied defendants' motion for summary judgment, (Da1540), holding that the SPA's arbitration clause was not valid under Atalese because "the agreement is deficient as it fails to include language that plaintiffs are waiving their statutory right to seek relief

in court." (Da1550). Her Honor rejected defendants' contention that Atalese did not apply because plaintiffs were "sophisticated parties" who were represented by counsel. Judge Ahmad held that Atalese applies to consumer contracts ("[t]here is no exception recognized by law for "sophisticated parties" in consumer contracts") (Da1550) and distinguished the principal case upon which defendants relied, County of Passaic v. Horizon Healthcare Services, Inc., 474 N.J. Super 498 (App. Div. 2023) on the grounds that it involved a commercial contract and "[t]his matter does not involve a commercial contract." (Da1548). Finally, Her Honor rejected defendants' contention that plaintiffs had waived their right to object to the arbitration by filing an Answer and Counterclaims in the arbitration and thereafter repeatedly objecting to the arbitration. (Da1550).

STATEMENT OF FACTS

This is a classic consumer fraud case. Defendants falsely advertised the size of the condominium units sold to consumers at a high-rise residential building in Jersey City.

Plaintiffs were born in Shanghai, China. English is not their native language. (Da1219, 1221). They signed the SPA on December 23, 2017 before retaining counsel and before ever being given access to, or a copy of, the POS. On January 5, 2018, COA 99 Hudson emailed to Plaintiffs the fully executed

SPA along with a link for electronic access to the POS. (Da361). Notably, COA 99 Hudson and its counsel herein, Connell Foley, told all prospective purchasers that COA 99 Hudson would not allow any changes to be made to its form contract and that, under paragraph 9 of the SPA (Da165), COA 99 Hudson would not allow any third-parties to accompany the purchaser on any walk-through inspection prior to closing.

Plaintiffs' SPA is identical to the ones signed by the buyers of the other 52 units in the four pending actions. Section 13 of the SPA (Da169) sets forth the purported arbitration clause. It provides as follows:

> **ARBITRATION:** Buyer, on behalf of Buyer and all permanent residents of the Unit, including minor children, hereby agree [sic] that any and all disputes with Seller, Seller's parent company or their subsidiaries or affiliates arising out of the Unit, this Agreement, the Unit warranty, any other agreements, communications or dealings involving Buyer, or the construction or condition of the Unit including, but not limited to, disputes concerning breach of contract, express and implied warranties, personal injuries and/or illness, mold-related claims, representations and/or omissions by Seller, on-site and off-site conditions and all other torts and statutory causes of action ("Claims") **shall be resolved by binding arbitration during the warranty period** in accordance with the rules and procedures of Construction Arbitration Services, Inc. or its successor or an equivalent organization selected by Seller. If CAS is unable to arbitrate a particular claim, then that claim shall be resolved by binding arbitration pursuant to the Construction Rules of Arbitration of the American Arbitration Association or its successor or

> an equivalent organization selected by Seller. In addition, **Buyer agrees that Buyer may not initiate any arbitration proceeding for any Claim(s) unless and until Buyer has first given Seller specific written notice of each claim (at 1500 Broadway, Suite 2301, New York, New York, 10036, Attn: Warranty Dispute Resolution) and given Seller a reasonable opportunity after such notice to cure any default, including the repair of the Unit, in accordance with the Unit warranty**. The provisions of this section shall be governed by the provisions of the Federal Arbitration Act, 9 U.S.C. 1, et seq. and shall survive settlement. (emphasis added).

The arbitration clause here is virtually identical to the clause in Atalese, (quoted at page 14 herein), which the Supreme Court of New Jersey held was unenforceable. Both merely provide for "binding arbitration" of all disputes, and both lack any language that the consumer is waiving his or her constitutional right to seek relief in court.

Further, the clause, drafted by COA 99 Hudson and its counsel (Connelly Foley), provides for "binding arbitration during the warranty period." Aside from the fact that the warranty period has not commenced and, therefore, any obligation to arbitrate has not commenced, there is no warranty period for plaintiffs' claims or even COA 99 Hudson's claim that it is entitled to keep plaintiffs' deposit. To a reasonable consumer, the clause means that arbitration is limited to matters covered by a warranty (and only after a closing, since a warranty can arise only after a closing), especially since the arbitration clause immediately follows the warranty clause in Section 12 and the Buyer cannot

even initiate any arbitration proceeding unless and until the Buyer has given notice to the "Warranty Dispute Resolution" department and the Seller has an opportunity to cure the problem "in accordance with the Unit warranty." Since a closing has not occurred, the parties hereto are not in a "warranty" setting, and the clause does not apply to plaintiffs' or COA 99 Hudson's claims.

Defendants and their New Jersey condominium counsel (Connell Foley) drafted the SPA three years after Atalese was decided. They knew that the purported arbitration clause in the SPA was required to have language that the purchaser was giving up his or her right to seek relief in court, but they chose not to include that language in the SPA clause. All they needed to do was what the New Jersey Supreme Court declared in Atalese must be done - - simple as that.

Engaging in purchase and sale transactions with immigrant buyers whose first language is not English, this developer and its real estate law firm could have made the arbitration clause (a) clear and specific, and (b) in compliance with Atalese. Instead, they chose not to. Whatever their reasons, the clause they wrote is unenforceable.

LEGAL ARGUMENT

POINT I
DEFENDANTS DID NOT MEET THE HIGH STANDARD FOR A MOTION FOR SUMMARY JUDGMENT. ACCORDINGLY, THE LOWER COURT'S ORDER DENYING DEFENDANTS' PRE-ANSWER MOTION FOR SUMMARY JUDGMENT SHOULD BE AFFIRMED

Defendants moved for summary judgment on the First Count of plaintiffs' Complaint seeking a declaratory judgment on the enforceability of the arbitration clause contained in plaintiffs' SPA. Defendants' motion for summary judgment sought a declaration that the clause is enforceable. It is axiomatic that a motion for summary judgment must be denied where there are genuine issues of material fact and movants do not show that they are entitled to that judgment as a matter of law. Rule 4:46 – 2(c).

Here, there is no dispute that the SPA arbitration clause does not contain the waiver language required by Atalese and its progeny. Defendants do not even claim that it does. Defendants' arguments that Atalese is not applicable are wrong as a matter of law; and, in any event, would raise factual issues defeating their motion for summary judgment.

POINT II
THE ARBITRATION CLAUSE DOES NOT MEET THE *ATALESE* STANDARD

In Atalese, the plaintiff filed an action asserting, *inter alia*, a violation of the Consumer Fraud Act. The parties had a 23-page service contract, similar in volume to the 19-21 pages of the Subscription and Purchase Agreements in the case at bar. The arbitration clause was located on page 9, paragraph 16 of the contract between Ms. Atalese and the defendant - - similar in appearance to the fact that the arbitration clause in the case at bar is located in the middle of the SPA. It provided:

> **Arbitration**: In the event of any claim or dispute between Client and the USLSG related to this Agreement or related to any performance of any services related to this Agreement, the claim or dispute shall be submitted to binding arbitration upon the request of either party upon the service of that request on the other party. The parties shall agree on a single arbitrator to resolve the dispute. The matter may be arbitrated either by the Judicial Arbitration Mediation Service or American Arbitration Association, as mutually agreed upon by the parties or selected by the party filing the claim. The arbitration shall be conducted in either the county in which Client resides, or the closest metropolitan county. Any decision of the arbitrator shall be final and may be entered into any judgment in any court of competent jurisdiction. The conduct of the arbitration shall be subject to the then current rules of the arbitration service. The costs of arbitration, excluding legal fees, will be split equally or be born by the losing party, as determined by the arbitrator. The parties shall bear their own legal fees. (emphasis added).

The Supreme Court of New Jersey held that "the absence of any language in the arbitration provision that plaintiff was waiving her statutory right to seek relief in a court of law renders the provision unenforceable." 219 N.J. at 436. The Court clearly stated that providing for "binding arbitration" is not enough, and that there must also be language in the arbitration clause itself that a plaintiff was waiving his or her right to seek relief in court because: "An arbitration provision - like any comparable contractual provision that provides for the surrendering of a constitutional or statutory right – must be sufficiently clear to a reasonable consumer. The provision here does not pass that test." Id. The Court explained that: "a clause depriving a citizen of access to the courts should clearly state its purpose. We have repeatedly stated that [t]he point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." Id at 444.

The Supreme Court observed that the arbitration clause providing only for "binding arbitration" was not enforceable because it does not convey to the average member of the public that he or she is giving up "the right to have one's claim adjudicated in a court of law." Id. at 442. It emphasized that:

> nowhere in the arbitration clause is there any explanation that plaintiff is waiving her right to seek relief in court for a breach of her statutory rights… The provision does not explain what arbitration is, nor does it indicate how arbitration is different from

> proceeding in a court of law. Nor is it written in plain language that would be clear and understandable to the average consumer that she is waiving statutory rights.

Id. at 446**.** The Court went on to say that while "no prescribed set of words must be included" for an arbitration clause to be valid, it must have some words which "explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute". Id. at 447.

In citing a long line of New Jersey cases, the Atalese Court noted:

> We have repeatedly stated that "[t]he point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." Ibid. (quoting Marchak, supra, 134 N.J. at 282, 633 A.2d 531); Hirsch, supra, 215 N.J. at 187, 71 A.3d 849 (same).
>
> No particular form of words is necessary to accomplish a clear and unambiguous waiver of rights. It is worth remembering, however, that every consumer contract in New Jersey must be written in a simple, clear, understandable and easily readable way. N.J.S.A.56:12-2. ...
>
> Our courts have upheld arbitration clauses phrased in various ways when those clauses have explained that arbitration is a waiver of the right to bring suit in a judicial forum.

Id. at 443.

The Atalese Court concluded by explaining that "... the wording of the Service Agreement did not clearly and unambiguously signal to plaintiff that

she was surrendering her right to pursue her statutory claims in court. That deficiency renders the Arbitration Agreement unenforceable." Id. at 448.

The entire basis for the Atalese ruling is that the consumer's waiver of his or her right to pursue a case in court must be knowing, intentional and the product of a clear and unmistakable arbitration clause that informs the consumer of that waiver and to which the consumer assents. Id. at 442 – 443. As the Supreme Court stated:

> An agreement to arbitrate, like any other contract, must be the product of mutual assent… Mutual assent requires that the parties have an understanding of the terms to which they have agreed. An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights.

Id. at 442. Thus, the Court held, there must be waiver language in the arbitration clause of the contract signed by the consumer.

Here, the arbitration clause does not contain the waiver language required by Atalese. It does not even provide that arbitration is the exclusive remedy.

The New Jersey Supreme Court reaffirmed the importance of Atalese in its 2019 decision in Kernahan v. Home Warranty Administrator of Florida, Inc., 236 N.J. 301 (2019). There, it declared unenforceable an arbitration clause in a consumer contract which first referred to mediation and then to "mandatory arbitration" as the exclusive means to resolve all disputes ("Any

and all disputes, claims and causes of action… shall be resolved exclusively by the American Arbitration Association in the State of New Jersey under its Commercial Mediation Rules.") The Kernahan Court found the clause to be confusing, not written in plain language (as required by the Plain Language Act) and not notifying the consumer that she was waiving her right to proceed in court.

The Court described its Atalese decision as follows:

> In Atalese, this Court relied on mutuality of assent as its animating principle when we considered the enforceability of an agreement to arbitrate in a consumer contract for debt-adjustment services. 219 N.J. at 442, 99 A.3d 306. We were guided essentially by twin concerns. First, the Court was mindful that a consumer is not necessarily versed in the meaning of law-imbued terminology about procedures tucked into form contracts. Ibid. The decision repeatedly notes that it is addressing a form consumer contract, not a contract individually negotiated in any way; accordingly, basic statutory consumer contract requirements about plain language implicitly provided the backdrop to the contract under review. Id at 444, 99 A.3d 306. And, second, the Court was mindful that plain language explanations of consequences had been required in contract cases in numerous other settings where a person would not be presumed to understand that what was being agreed to constituted a waiver of constitutional or statutory right. Id. at 442-44, 99 A.3d 306.
>
> At bottom, the judgment in Atalese, which declined to enforce the arbitration provision at issue, is rooted in the notion that mutual assent had not been achieved because the provision did not, in some fashion,

> explain that it was intended to be a waiver of the right to sue in court. Id. at 436, 99 A.3d 306. Because the provision could not be deemed a knowing waiver of the right to sue in court, a meeting of the minds did not occur. Id. at 435, 447, 99 A.3d 306. The consumer context of the contract mattered. Id. at 444, 99 A.3d 306 (referencing N.J.S.A. 56:12-2).

236 N.J. at 319 – 320.

In Skuse v. Pfizer, Inc., 244 N.J. 30 (2020), the Supreme Court again reaffirmed the importance and continued vitality of its Atalese decision. In Skuse, the Atalese doctrine was applied to an employment contract. The employment contract contained an arbitration clause which provided that all claims, including breach of contract, tort claims and statutory employment claims, "will be resolved by arbitration and NOT by a court or jury. THE PARTIES HEREBY FOREVER WAIVE AND GIVE UP THE RIGHT TO HAVE A JUDGE OR JURY DECIDE ANY COVERED CLAIMS." 244 N.J. at 38. The Court held that this language satisfied the Atalese standard. 244 N.J. at 51 – 52.

Finally, in Flanzman v. Jenny Craig, Inc., 244 N.J. 119 (2020), the New Jersey Supreme Court again held that the language required by Atalese must explain "that a party who goes to arbitration waives the right to sue in court and makes clear that arbitration and civil litigation are distinct proceedings." 244 N.J. at 137. It held that an arbitration clause in an employment contract

stating there shall be "final and binding arbitration" "in lieu of a jury or other civil trial" was sufficient because it distinguishes between arbitration and civil litigation and explains that arbitration is in place of litigation. 244 N.J. at 137-138.

Applying Atalese and Flanzman, the Appellate Division in Drosos v. GMM Global Money Managers Ltd., 2023 WL 7545067 (App. Div. 2023) (Da 1374), recently dealt with the sufficiency of an arbitration clause in a limited liability company Operating Agreement for the operation of a chain of food stores. It held in November 2023 that the arbitration clause satisfied the Atalese standard by stating that disputes shall be resolved by arbitration "rather than the parties going into litigation in the Judicial Court system." (Da1377).

Here, the arbitration clause refers only to "binding arbitration", has no language that it is precluding litigation, and does not distinguish between arbitration and litigation. It does not enlighten the consumers that they are supposedly waiving their statutory and constitutional right to have a dispute heard in the Superior Court. It is wholly deficient under Atalese, Skuse and Flanzman.

To comply with the dictates of Atalese, New Jersey practitioners (like those in Skuse, Flanzman and Drosos) have since drafted their arbitration

clauses so as to clearly provide therein for arbitration and that the party is waiving his or her right to proceed in court, e.g., Kleine v. Emeritus at Emerson, 445 N.J. Super. 545 (App. Div. 2016) (providing for "binding arbitration" and that "any claimant… hereby waives any and all rights to bring any such claim or controversy in any manner not expressly set forth in this paragraph, including, but not limited to, the right to a jury trial"). Simple enough. Yet, defendants and their counsel chose not to do so. Therefore, their arbitration clause is unenforceable.

Nor is it acceptable for defendants to suggest that language buried in page iv of the 663 page POS is the missing waiver language. The New Jersey Supreme Court has repeatedly held that the waiver language must be in the arbitration clause itself. Indeed, the fact that defendants point to language on page iv of the 663 page POS means that they could have included it in the arbitration clause, but chose not to . (See Point E, pp 35-42 herein). It is no wonder that Judge D'Elia took note of the insufficiency of what they did, as quoted at p. 7 herein.

POINT III
DEFENDANTS ERRONEOUSLY ARGUE THAT *ATALESE* DOES NOT APPLY

A. *Atalese* Is Not Preempted By, or Inconsistent with, the FAA

Despite existing caselaw to the contrary, defendants argue that Atalese is preempted by, or inconsistent with, the FAA. This argument has been repeatedly rejected by the New Jersey Supreme Court and this Court. Flanzman, *supra*; Skuse, *supra*; Kernahan, *supra*; Drosos, *supra*; Aguirre v. CDL Last Mile Solutions, LLC, 2024 WL 762467 (App. Div. 2024) (Pa 1), cert. den 257 N.J. 589 (2024). Atalese itself rejected the FAA argument.

The New Jersey Supreme Court has explained that Atalese is not inconsistent with the FAA because it does not treat arbitration contracts differently from all other contracts. The same state contract law principles on basic contract formation and interpretation are applied to determine whether there has been "mutual assent" or a "meeting of the minds" on the clause and whether the clause was intended to be a waiver of the right to sue in court, just like the waiver of any other right.

As reiterated in Atalese, generally applicable state law contract principles are utilized to determine whether the contractual arbitration clause is enforceable.

> The Court has stressed that "[i]n the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute. Subsumed in this principle is the proposition that only those issues may be arbitrated which the parties have agreed shall be." In re Arbitration Between Grover & Universal Underwriters Ins. Co., 80 N.J. 221, 228, 403 A.2d 448 (1979). In respect of specific contractual language,

> "[a] clause depriving a citizen of access to the courts should clearly state its purpose. The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." Marchak, *supra*, 134 N.J. at 282, 633 A.2d 531. As we have stressed in other contexts, a party's waiver of statutory rights "must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively." Red Bank Reg'l Educ. Ass'n, *supra*, 78 N.J. at 140, 393 A.2d 267. In the same vein, a "court may not rewrite a contract to broaden the scope of arbitration[.]" Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc., 240 N.J.Super. 370, 374, 573 A.2d 484 (App.Div.1990).

Garfinkle v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001).

Atalese held that an arbitration agreement does not exist - - because there is no mutual assent to arbitrate - - when the arbitration clause in a consumer contract merely provides for "binding arbitration" and does not explain that there is a waiver of the right to proceed in court. The Court held that the phrase "binding arbitration" is not sufficient by itself because it does not convey to the average member of the public that he or she is giving up the right to have a claim adjudicated in court. The Atalese Court rejected the very argument made here by defendants that everyone understands "binding arbitration" to mean a waiver of the right to proceed in court. The Atalese Court held that, without the additional waiver of the "right to be in court"

language in the arbitration clause, the consumer cannot be held to have assented to arbitration or to have intentionally waived the right to be in court.

Just a few months ago, in Aguirre, the Appellate Division rejected the same arguments made by defendants here. It reaffirmed that Atalese was consistent with the FAA as the FAA "permits states to regulate contracts, including those containing arbitration provisions, using generally applicable state law such as that set forth in Atalese." 2024 WL 762467 at *1. It held that Atalese reflected "New Jersey's fundamental public policy of ensuring any waiver of the right to a jury trial is knowing, intelligent and voluntary." Id. It held that an arbitration clause which stated in all-caps that "THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION AND CLASS ACTION WAIVER WHICH AFFECTS YOUR LEGAL RIGHTS AND MAY BE ENFORCED BY THE PARTIES" and that "disputes that are within the jurisdictional maximum for small claims will be settled in small claims court" and that "all other disputes…will be finally settled by arbitration…" did not comply with Atalese because it did not explain that the plaintiffs were waiving the right to proceed in court. It distinguished Grandvue Manor, LLC v. Cornerstone Contracting Corp, 471 N.J. Super. 135 (App. Div. 2022), a case cited in Appellants' Brief, on the grounds that Grandvue did not involve a consumer contract, but rather a commercial contract. Finally, it held that the

agreements before it which "are closer to consumer contracts, as in Atalese, than commercial contracts, as in County of Passaic or Grandvue," Id. at *9, were not the product of a claimed "sophisticated negotiation" because they were on a standardized printed form, just like the SPA consumer contract in the case at bar. Id.

The United States Supreme Court decision in Kindred Nursing Centers, L.P. v. Clark, 581 U.S. 246 (2017) does not change the conclusion that Atalese is not preempted by or inconsistent with the FAA. Kindred is an application of the FAA principle that arbitration agreements are to be placed "on equal footing with all other contracts." 581 U.S. at 248. The New Jersey Supreme Court repeatedly has held that its Atalese decision puts arbitration agreements on equal footing with all other contracts. The issue in Kindred was that the Kentucky Supreme Court had adopted a rule for powers of attorney that applied only to arbitration contracts and not any other contracts. That is not the case here.

B. *Atalese* Applies Because The Transaction Here is A Consumer Transaction

There are three main categories of arbitration agreements considered by courts: consumer, employment, and commercial. *See* In Re Remicade, 938 F.3d 515, 525 (3d. Cir. 2019). As reflected in the Atalese, Kernahan, Skuse and

Flanzman decisions, the Atalese rule has been applied by the New Jersey Supreme Court to both consumer and employment arbitration agreements. While there appears to be a difference of opinion on whether and how the Atalese rule applies to an individually negotiated *commercial* contract between non-consumers, compare Drosos, supra, and Yura v. Monetti Homes LLC, 2022 WL 1617731 (App. Div. 2022) (Da1417) (on whether Atalese applied to a contract allegedly negotiated between two sophisticated commercial businesses, court held "we read nothing in Atalese to explicitly restrict its holding to consumer contracts") with County of Passaic v. Horizon Healthcare Servs., Inc., 474 N.J. Super. 498 (App. Div. 2023), there is no difference of opinion that Atalese applies to consumer contracts. Indeed, the Appellate Division in County of Passaic recognized that Atalese is fully applicable to consumer contracts.

Notably, the defendant in County of Passaic was represented by Connell Foley (Appellants' transactional counsel and counsel herein), and their Respondent's Brief filed in the Appellate Division in County of Passaic (Da 1421), acknowledged that Atalese applied to consumer transactions but that the County of Passaic was not a consumer and the transaction there was a commercial transaction.

Plaintiffs here are home buyers. They are consumers. Their contract to purchase a condominium unit was a consumer transaction. Defendants' motion

for summary judgment (just like their motion to Judge D'Elia in the other four actions) did not dispute that plaintiffs are consumers or that their real estate contract is a consumer transaction. Indeed, as noted earlier, the CFA defines a "consumer contract" as " a written agreement in which an individual… purchases real or personal property." (NJSA 56:12 – 1 (e)) and defendants admit that plaintiffs' contract to purchase is regulated by the New Jersey Department of Consumer Affairs. Since defendants did not argue below that plaintiffs' contract was a commercial contract rather than a consumer contract, they cannot do so here. Nieder v. Royal Indem. Ins. Co, 62 N. J. 229, 234 (1973) ("[i]t is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such presentation is available…").

Instead, defendants' motion below contended that (a) the Atalese standard did not apply because it was preempted by or inconsistent with the FAA, (b) the Atalese standard applies only to an "average" consumer and not a "sophisticated" consumer, and (c) the Atalese standard does not apply to a consumer represented by an attorney. All these contentions are repeated in their appellate brief and are without merit; and all were based upon their admission that the plaintiffs herein are consumers and that their contract is a consumer contract.

C. There is No "Sophisticated" Consumer Exception

Defendants argue that the Atalese standard does not apply to a "sophisticated" consumer because the Atalese Court reasoned that an "average member of the public may not know – without some explanatory comment – that arbitration is a substitute for the right to have one's claim adjudicated in a court of law." 219 N.J. at 442. Thus, defendants contend that Atalese only applies to "average" consumers, not to consumers who are above average or below average.

Of course, there is no such limitation in Atalese itself or in any cases applying it to consumer, employment or even commercial contracts. In fact, the application of Atalese to employment and commercial contracts demonstrates that Atalese is not limited to "average" consumers.

Defendants do not cite any case holding that Atalese is limited to consumers who are "average", or that it does not apply to "sophisticated" consumers. In fact, the Appellate Division has rejected that contention. E.g., Estate of Noyes v. Morano, 2019 WL 149521 at *5 (App. Div. 2019) (Da1383) (holding that the contract before it was a consumer contract and that "[d]efendants' argument that Noyes was a sophisticated business person and should have known that he would be waiving his right to a jury trial by signing the arbitration agreement has no merit"). Although there may be a difference

of opinion on whether Atalese applies to "sophisticated" *commercial* contracting parties in an individually negotiated commercial transaction (compare Drosos and Yura to County of Passaic), that is not the situation here.

In Atalese, there is no characterization of the specific plaintiff consumer as "average." In Flanzman and Skuse, there is no characterization of the specific plaintiff employees there as "average" or even any discussion about whether or not they were "sophisticated." There is no indication in Atalese that, in determining the enforceability of an arbitration clause in a consumer contract, the New Jersey Supreme Court wants the trial court to draw a distinction between an "average" consumer and a "sophisticated" consumer and to hold a hearing each and every time on the "sophistication" of the consumer and how smart the consumer is on his or her constitutional right to be in court whenever a major corporation and its counsel decline to do what Atalese plainly requires.

Instead, the Atalese Court clearly intended for its decision to apply to all consumer contracts and to provide a bright line rule for persons contracting with consumers - - an arbitration clause in those contracts must contain some language explaining that the consumer is waiving his or her right to have their claims heard in court or by a jury, so that it will be clear and unmistakable that the consumer is knowingly and intentionally waiving that right. The Atalese

Court did not state that this language would be excused from a form contract used with the entire public, as here, because the contract happened to be signed by an allegedly "sophisticated" rather than "average" consumer who walked through the 99 Hudson's sales office door. The clause must be sufficient for every consumer who walks through the door, regardless of the consumer's educational degree, experience, or I.Q.

In sum, defendants' allegation that plaintiffs are "sophisticated" consumers is wholly irrelevant to the Atalese analysis. Atalese requires the waiver language so that it is clear and unmistakable that a consumer knowingly waives his or her right to be in court. Even before Atalese, the New Jersey Supreme Court held in Garfinkle that it would not focus on a plaintiff's alleged "sophistication" to determine if an arbitration clause contained a clear and unequivocal waiver of statutory remedies in court. Garfinkle, *supra*, 168 N.J. at 136.

In Garfinkle, the arbitration clause was silent on the plaintiff's statutory remedies. The Court found that the clause's failure to encompass the claim was not excused by the fact that plaintiff was a doctor. "Irrespective of plaintiff's status or the quality of his counsel, the Court must be convinced that he actually intended to waive his statutory rights. An unambiguous writing is essential to such a determination." 168 N.J. at 136. The same is true here.

Atalese requires that there be language in the arbitration clause so that it is clear and unmistakable that the consumer actually intended to waive his or her right to be in court.

Even if there were a "sophisticated" consumer exception to the Atalese doctrine, which there is not, the question of whether these plaintiffs are "sophisticated" consumers would be a factual question requiring an evidentiary hearing. Yura, *supra* (hearing necessary to determine alleged "sophistication" of the **commercial** contracting parties). Defendants' mere assertions that the plaintiffs are "sophisticated" are not evidence, let alone undisputed evidence, and do not carry the day on a motion for summary judgment. Appellants' Brief contains no record citations for their argument that plaintiffs were "sophisticated" or had the ability to negotiate the form contract, and their Statement of Undisputed Material Facts does not allege "sophistication" or the ability to negotiate as undisputed facts. (Da331 - 351). To be sure, the only Certifications submitted by defendants in support of their motion were from their counsel, and counsel did not aver that the plaintiffs were "sophisticated" or that COA 99 Hudson was even willing to negotiate its form contract. (Da352 – 359, 427 - 432). Appellants' Brief even acknowledges that the POS and unit purchase agreements must "be uniform." (at p. 41). In

short, their factual contentions are woefully unsupported and disputed; and if somehow true, would be of no moment as a matter of law, anyway.

D. The Presence of Counsel For a Consumer Does not Defeat *Atalese*

Defendants contend that Atalese does not apply because the plaintiffs here were represented by counsel. The presence of real estate counsel representing plaintiffs in the transaction does not vitiate the Atalese analysis. The Appellate Division has so ruled in a condominium case squarely on point. Dispenziere v. Kushner Cos., 438 N.J. Super. 11, 19–20 (App. Div. 2014). Moreover, plaintiffs signed their SPA and received back the fully signed contract before they retained an attorney or were even given access to the POS.

In Dispenziere, the plaintiffs were 22 purchasers of condominium units in a real estate development who sued the developer for, *inter alia*, breach of contract and violations of the New Jersey Consumer Fraud Act. The defendant real estate developer moved to compel arbitration based on an arbitration clause set forth in each purchase agreement.

As here, the purchase agreement was a form contract contained in the Public Offering Statement. The purchase agreement was 17 pages and on the tenth page there appeared a clause providing that disputes "shall be heard and determined by arbitration before a single arbitrator of the American Arbitration

Association in Morris County, New Jersey." In the case at bar, the arbitration clause in plaintiffs' form contract likewise appears on page 10 of the 18 page form contract.

Applying Atalese, the Appellate Division reversed the trial court's decision (which was rendered before Atalese was decided) that had granted the motion to compel arbitration because the arbitration provision "was devoid of any language that would inform unit buyers such as plaintiffs that they were waiving their right to seek relief in a court of law." Id. at 18. The Appellate Division held that the fact that the plaintiffs were represented by counsel in entering into their purchase agreements did not "cure the inadequacy of the contractual arbitration provision." Id ("we reject defendants' contention that the presence of counsel during the real estate transaction suffices to cure the inadequacy of the contractual arbitration provision"). It stated:

> In seeking to enforce the arbitration provision, defendants point out that many of the plaintiffs were represented by counsel when they executed their purchase agreements. Defendants argue that these purchasers therefore had an opportunity, through counsel, to fully review the arbitration provision, object to its inclusion in the purchase agreement, and terminate the contract if they were not satisfied. We do not find this argument persuasive.

438 N.J. Super at 19. See also, Garfinkle, *supra*, 168 N.J. at 136. This is the identical argument made by Appellants here (Br. at 38, 46).[1]

Similarly, in Itzhakov v. Segal, 2019 WL 4050104 at *4 (App. Div. 2019) (Da1402) the Appellate Division held that Atalese was not limited to consumer and employment contracts and that the arbitration clause there did not meet the Atalese standard, even though the party was represented by counsel. ("[E]ven a sophisticated party, or one represented by counsel, will not be deemed to waive his or her rights – whether constitutional, statutory, or common-law – without clear and unambiguous language.") *See also* Estate of Noyes v. Morano, 2019 WL 149521 at *5 (App. Div. 2019), (observing that "the plaintiff's 'level of sophistication' or representation by counsel does not negate Atalese's requirement that a court find he 'actually intended to waive his statutory rights'"); Perkins v. Advance Funding, LLC, 2021 WL 4059861 at *6 (D.N.J. Sept. 7, 2021) (Da1410) ("the fact that Perkins was represented by counsel and that his counsel purportedly reviewed the terms of the agreements with him, does not negate the fact that the arbitration clause is

[1] Defendants' citation to Delaney v. Dickey, 244 N.J. 466 (2020) is puzzling. (App. Br. at 38). That case involved a legal malpractice action by the plaintiff client. The defendant attorney argued that the legal malpractice claim was arbitrable pursuant to an arbitration clause in the retainer agreement. The Court held that the arbitration clause was not enforceable because the attorney had not explained it to the client.

deficient as it does not contain 'clear and unambiguous language that [Perkins] is waiving [his] right to sue or go to court to secure relief.' "(footnote omitted, quoting Atalese).

E. The Waiver Language Must be in the Arbitration Clause Itself

The New Jersey Supreme Court has repeatedly held in Atalese, Kernahan, Skuse and Flanzman that there must be some words in the arbitration clause itself that inform a consumer that he or she is giving up the right to proceed in court. Atalese held that it is not enough to provide for "binding arbitration," just like Kernahan held it was not enough to just provide for "mandatory arbitration." See also, Bartz v. Weyerhaeuser Company, 2020 WL 5033356 (App. Div. 2020) (Da1618) (arbitration clause providing for arbitration "conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association as modified herein" was unenforceable under Atalese because the clause "does not mention waiving the right to trial by jury or the right of access to the courts").

The very reason that the Atalese Court required the waiver language is that a consumer does not understand that arbitration, by its nature, is a waiver of the right to be in court.

Here, defendants contend that the missing waiver language is contained on page iv of the 663 page POS. (Br. at 42). Of course, the POS was not

signed by the plaintiffs. Further, there is no evidence that plaintiffs agreed to or were even made aware of the POS provision on page iv. While defendants point out with great fanfare that plaintiffs initialed the inadequate Section 13 of the SPA, there are no initials appearing next to the language on page iv of the POS. That is because defendants did not make plaintiffs aware of the language. Hence, there was no mutual assent to the arbitration language hidden on page iv of the 663-page POS.

Finally, while plaintiffs did sign their SPAs, their SPAs specifically did not include the POS as a "Governing Document." Section 2 of the SPAs specifically states:

> The Unit and the Buyer's membership in the Association are subject to all of the terms of the Master Deed for 99 Hudson, a Condominium (the "Master Deed"), and the Association's Certificate of Incorporation, Bylaws and Rules and Regulations (all of which documents are from now on collectively called the "Governing Documents"). The Governing Documents and the exhibits thereto set forth the relative rights and obligations of the Buyer, the Association and other owners of units within the Development. Any amendments to the Governing Documents which are now or thereafter lawfully made will also be binding on the Buyer.

In sum, the voluminous POS is **not** incorporated into the parties' agreement as a "Governing Document" and it was **not** signed by the plaintiffs. The exclusion of the POS from the list of "Governing Documents", and the

fact that it was never signed by plaintiffs, precludes the Appellants from relying on the missing waiver language contained therein. Defendants do not cite a single case holding that the language required by Atalese can be inserted into a huge tome of a document which is separate from the arbitration clause and unsigned by the parties.

It is clear from Atalese and Kernahan that the language informing the consumer that the consumer is waiving his or her right to proceed in court must be in the arbitration clause itself and not in some separate, unsigned document, and that the consumer must "clearly assent" to the waiver of right to proceed in court. This was the law even before Atalese. In Leodori v. Cigna Corporation, 175 N.J. 293 (2003), the New Jersey Supreme Court stated that it was "called on solely to evaluate the enforceability of a waiver – of – rights provision contained in an employee handbook distributed by defendant." 175 N.J. at 295. While the handbook had been given to the plaintiff employee, the employee had not signed the separate form entitled "Employee Handbook Receipt and Agreement" which recited the policy contained in the handbook that he will submit disputes "to final and binding neutral third party arbitration" and that he "will not go to court."

The Court held that the waiver-of-rights contained in the handbook was not enforceable because there was no evidence the employee had actually

agreed to the provision. Id. at 302 – 303. The Court held that "a valid waiver results only from an explicit, affirmative agreement that unmistakably reflects the employee's assent." Id at 303. The Court said that it would not assume, infer or imply the employee's assent. "Without plaintiff's signature on the Agreement that accompanied the "You and Cigna" handbook, we cannot enforce the arbitration provision unless we find some other explicit indication that the employee intended to abide by that provision. No such indication appears in the record." Id. at 305. The mere fact that the employee knew of the policy was not enough. Id at 306. "The record, however, contains no one document or other piece of evidence that unmistakably reflects plaintiff's agreement to that policy." Id.

Grasser v. United Healthcare Corp. 343 N.J. Super. 241 (2001) is also squarely on point. There, the defendant employer claimed that the plaintiff employee had waived his right to file a discrimination complaint and instead had agreed to binding arbitration. The claim was premised on the employee having signed an "Employee Handbook Acknowledgement" by which he agreed to be bound by arbitration procedures in the employer's "Employment Arbitration Policy." That policy was summarized in a Handbook. The employer argued that "even if the signed Acknowledgement did not express a clear and unambiguous waiver of rights to file a LAD complaint, the

Handbook did contain such a statement and, by incorporation, satisfied the requirement that any such waiver by an employee be clear, specific and unambiguous." 343 N.J. Super. at 243. The Court disagreed. It found "that the reference in the Acknowledgement (the only document signed by plaintiff) did not satisfy that requirement, that defendant therefore did not meet its burden of demonstrating a knowing and binding waiver of plaintiff's right to maintain this suit" and that the lower court's denial of the motion to dismiss or compel arbitration was proper. Id. at 243 – 244.

The Court held that the Handbook could not supply the language missing in the signed Acknowledgement. Id. at 527 – 528. It reasoned as follows:

> Nor is the problem cured by a generalized reference to the Employee Handbook. While the Handbook language itself, if employed in a document signed by the employee, would seem sufficiently broad, clear and specific to cover plaintiff's complaint, that language was not in the document signed by plaintiff. Thus, so far as appears, the operative language was not in front of plaintiff when he signed a document which, according to defendant, had the effect of depriving [him]… of access to the courts" and waived his "time-honored right to sue." (citation omitted).
>
> It is not sufficient to claim, as defendant seems to claim, that by referring back to the Employee Handbook, plaintiff could have given more specific content to the vague language that he accepted when he signed the Acknowledgement. It is not enough to say on its face. That is precisely the kind of argument that was rejected in *Garfinkel, Quigley and Alamo.*

* * *

> So here, by referring to the Acknowledgement and the Handbook, one might be able to create a rational argument that the two documents, taken together, contain the requisite elements of a contract to resolve all issues such as alleged LAD violations by arbitration only. But that is not enough. *Alamo, Quiley and Garfinkel* make clear that more is needed than the bare bones of what might meet the technical requirements of a "contract." The language must be clear, distinct and unambiguous and must clearly demonstrate a knowing waiver. As the Court said in *Garfinkel*, one seeking to enforce such a provision must show that the plaintiff "actually intended" such a waiver and that the writing he signed was "unambiguous" in spelling out such a waiver.

One of the cases cited in Atalese was NAACP of Camden County East v. Foulke Management Corp., 421 N.J. Super 404 (App. Div. 2011), certif. granted, 209 N.J. 96 (2011), and appeal dismissed, 213 N.J. 47 (2013). There, the Court reversed the lower court's order compelling arbitration based upon parts of arbitration clauses contained in various form documents. The Court declared that:

> Moreover, 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. (citations omitted) This requirement of a 'consensual understanding' about the rights of access to the courts that are waived in the agreement has led our courts to hold that clarity is required." (citations omitted)

421 N.J. Super at 425.

Defendants cannot save their deficient SPA arbitration clause by arguing that the critically missing waiver-of-rights language is contained on page iv of the POS and that the entire 663 page POS is "incorporated by reference" in the SPA. The one other place in the POS referring to arbitration (p. 83) does not refer to a waiver-of-rights. The SPA does not alert the consumer that the POS contains anything important regarding arbitration or the waiver of the consumer's constitutional right to seek relief in a court. There is no evidence that any of the plaintiffs agreed to the waiver of the right to sue. Importantly, while the defendants required the purchasers to initial the SPA arbitration clause to evidence their assent, they did not require the purchasers to initial the POS language on page iv. Notably, as explained above, the POS was not included among the list of "Governing Documents" stated by defendants to consumers.

Defendants' attempt to "incorporate by reference" the waiver language, which the New Jersey Supreme Court has held is critical to there being mutual assent to and enforceability of an arbitration clause, is contrary to the Supreme Court's directive that the waiver needs to be knowing, intentional, clear and unmistakable and clearly evidenced by the consumer's assent. If anything, the language on page iv of the 663 page POS highlights that defendants knew of the

Atalese doctrine, but deliberately chose not to include the language in the contract (SPA) itself.

F. Plaintiffs Repeatedly Objected to the Arbitration and Did Not Waive Their Constitutional Right To Be In Court

Defendants' last argument is that the filing of the Answer and Counterclaims by plaintiffs' prior counsel with the AAA on March 28, 2023 - - the embryonic state of the arbitration - - constituted a waiver by plaintiffs of their constitutional right to be in court and of their right to object to the arbitration. (Br. at 51). As noted by the Motion Judge, the Answer challenged the arbitration and defendants ignore the repeated challenges by plaintiffs' new counsel starting April 7, 2023 (10 days later) to the validity of the arbitration clause under Atalese. Defendants' argument is wrong on the facts and the law.

COA 99 Hudson's arbitration demand was served on plaintiffs on March 14, 2023. On April 7, 2023, plaintiffs retained their present counsel. On April 7, 2023, April 25, 2023 and May 24, 2023, plaintiffs' present counsel wrote to the AAA and COA 99 Hudson's counsel that the arbitration clause was invalid under Atalese and that the AAA did not have jurisdiction. On June 12, 2023, the AAA notified the parties that it would proceed with the arbitration, until such time as the Superior Court said otherwise. On June 27, 2023, plaintiffs filed their Complaint herein asserting, *inter alia*, that the disputed arbitration

clause is unenforceable under Atalese and that the AAA arbitration should be enjoined. The arbitration has been stayed pending this appeal.

No case law is cited by defendants, and none has been found, holding that such an initial responsive filing constitutes a waiver of a party's constitutional right to be in court. The arbitration was and is in a preliminary state, and plaintiffs repeatedly objected to it.

The sole basis for defendants' argument is their quote from Wein v. Morris, 194 N.J. 364 (2008) that "[t]he court should consider the totality of circumstances to evaluate whether a party has waived the right to object to arbitration after the matter has been ordered to arbitration and arbitration is held." 194 N.J. at 383 – 384 (Br. at 51). Of course, in the case at bar, no arbitration has been held and if the "totality of circumstances" test was applied, it would be a factual issue defeating defendants' motion for summary judgment. Here, the "totality of circumstances" test does not need to be applied to determine that the mere filing of plaintiffs' Answer and Counterclaim in the arbitration on March 28, 2023, with their new counsel's repeated objections to the arbitration starting April 7, 2023, did not as a matter of law constitute a waiver of the right to object to the arbitration and the invalidity of the arbitration clause under Atalese.

Wein v. Morris involved the question of whether the parties' extensive five years of litigation in the courts constituted a waiver of contractual arbitration rights. Plaintiffs therein filed suit in Superior Court in November 1998, and the parties engaged in discovery that lasted until 2003. In May 2002, defendants moved to stay the lawsuit and to compel arbitration, but withdrew that motion before it was heard. The trial court, on the return date of summary judgment motions filed in 2003, *sua sponte* ordered binding arbitration in accordance with their contracts, to which both parties objected on the basis that arbitration had been waived. Neither party appealed, and a 16 day AAA arbitration hearing was subsequently held, resulting in an award.

The Appellate Division held that the trial court's order directing the parties to arbitration was improper because the parties had mutually waived arbitration, and the New Jersey Supreme Court affirmed. Those facts bear no resemblance to those in this case. Indeed, the test as stated in Wein is :

> [T]he court should consider the totality of circumstances to evaluate whether a party has waived the right to object to arbitration after the matter has been ordered to arbitration and arbitration is held. Some of the factors to be considered in determining the waiver issue are whether the party sought to enjoin arbitration or sought interlocutory review, whether the party challenged the jurisdiction of the arbitrator in the arbitration proceeding, and whether the party included a claim or cross-claim in the arbitration proceeding that was fully adjudicated.

194 N.J. at 383–84.

Here, plaintiffs sought to enjoin the arbitration, challenged the jurisdiction of the arbitration and no adjudication of plaintiffs' counterclaims has occurred. *See also*, Highgate Development v. Kirsh, 224 N.J. Super. 328 (App. Div 1988) (incorrectly cited by Appellants as 223 N.J. Super. 328) (the party made a binding election to arbitrate by not contesting the filing party's arbitration claim, filing a counterdemand for arbitration , demanding discovery and participating in the arbitration process through a five day hearing, over two years); N.J. Manufacturers Insurance Company v. Franklin, 160 N.J. Super. 292 (App.Div. 1978) (insured waived right to judicial determination of coverage question by its participation in arbitration and after arbitrator had decided issue of coverage). Moreover, the alleged waiver of a constitutional right herein is worthy of even more protection than the waiver of a contractual right as in Wein.

Even the mere filing of a lawsuit does not constitute a waiver of the right to arbitrate. Glens at Pompton Plains Condo. Ass'n, Inc. v. Kleeff, 2015 WL 9486151 (App. Div. 2015) (Da1389):

> In April 2012, Mr. Van Kleeff filed suit against plaintiff for breach of fiduciary duty and failure to perform, alleging plaintiff failed to adequately maintain the common area adjacent to defendants' property. Mr. Van Kleeff did not request ADR and the

> complaint was dismissed with prejudice for failure to state a claim.
>
> ***
>
> Mr. Van Kleeff's filing the previous lawsuit, ultimately dismissed for failure to state a claim, does not rise to the level of "an election which is binding" and determinative of a party's later attempt to litigate in a different forum. See id. at 334, 540 A.2d 861. Rather, defendants' "litigation conduct ... [was] consistent with [their] reserved right to arbitrate the dispute." See Cole, supra, 215 N.J. at 280.
>
> We therefore concur with the trial court that defendants did not waive and were not otherwise precluded from availing themselves of the statutory right of arbitral review.

Id at *1 and * 5- 6.

Although plaintiffs did so here, a party does not even have to try to enjoin or stay the proceeding in order to preserve its objection to jurisdiction. In Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503 (3d Cir. 1994), aff'd, 514 U.S. 938 (1995), the plaintiffs asserted an objection to jurisdiction, but subsequently withdrew the objections and participated in a discovery conference. The circuit court overturned the district court's holding that the plaintiffs had waived jurisdictional objections.

> Here, the Kaplans reasserted their jurisdictional objection before commencement of the arbitration proceedings and again, two years later, before the panel heard any evidence, as soon as activity in the case had resumed. The Kaplans did not waive their

> objections. They reasserted them regularly during the arbitration proceeding. Repeated objection was not required while the case lay dormant. Their participation in the 1990 discovery conference did not waive their objections to the arbitrators' jurisdiction. We cannot say that this act "clearly indicated [their] willingness to forego judicial review." Pennsylvania Power Co., 886 F.2d at 50.

Id. at 1511–12.

In this case, there is all the more reason for the Court to find no waiver of an objection to the AAA jurisdiction. In Wein, there was a "binding election" to litigate by participating in five years of litigation. In Highgate, there was a "binding election" to arbitrate by participating in a two year arbitration, with five days of hearings, with no objection. Neither was limited to the mere filing of an Answer, with repeated objections to AAA jurisdiction starting 10 days later. *See also* White v Kampner, 229 Conn 465, 641 A. 2d 1381 (1994). (The client, who asserted legal malpractice claim, did not waive his right to challenge the validity of arbitration clause by participating in arbitration, where arbitration took place only after client was ordered to arbitration, he had vigorously objected that he could not be compelled to participate in binding arbitration and he made continuing objections that fee disputes were governed by mandatory fee arbitration.)

POINT IV
DEFENDANTS' ARBITRATION CLAUSE PROVIDES ONLY FOR ARBITRATION "DURING THE WARRANTY PERIOD" WHICH HAS NOT YET OCCURRED

The SPA arbitration clause provides for "binding arbitration during the warranty period." (emphasis added.) Separate from the compelling Atalese deficiency, there is no obligation to arbitrate except "during the warranty period." Since there was no closing, no "warranty period" has commenced and, therefore, no obligation to arbitrate has commenced.

In addition, a reasonable consumer could understand such terminology as limiting the arbitration clause to claims covered by a warranty. Indeed, the SPA arbitration clause immediately follows Section 12 of the SPA which sets forth which limited warranties are being given by the defendants. None of those warranties cover the false advertising of the square footage of the units, and there is no warranty period associated with plaintiffs' claims herein. That is a very fair reading of the language. Moreover, since the arbitration clause was drafted by defendants and their counsel, it should be construed against them. Also, on this motion for summary judgment by defendants, this Court must consider the language of the arbitration clause in the light most favorable to plaintiffs. Kleine v. Emeritus at Emerson, *supra*, 445 N.J. Super at 152.

At a minimum, the arbitration clause is confusing and does not tell plaintiffs in plain language that their claims are even covered by the arbitration

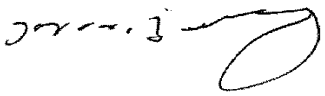
clause, in addition to its Atalese flaws. Indeed, in Atalese, one of the reasons that the Court held the arbitration clause to be unenforceable was that it was not "written in plain language that would be clear and understandable to the average consumer." 219 N.J. at 446. In Kernahan, the "confusing sentence order" in the purported arbitration clause also was one of the reasons given for the Court finding no mutual assent to arbitrate. 236 N.J. at 327.

CONCLUSION

For the foregoing reasons, the Superior Court's Order should be affirmed.

Respectfully submitted,

BIEBELBERG & MARTIN
Attorneys for Plaintiffs-Respondents



KEITH N. BIEBELBERG

Dated: November 13, 2024

JIA WANG and XIAODONG JIANG,

Respondents-Respondents,

vs.

COA 99 HUDSON, LLC, CHINA OVERSEAS AMERICA, INC. and THE MARKETING DIRECTORS, INC.,

Defendants-Appellants.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Docket No. A-003594-23

CIVIL ACTION

On Appeal From:
SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY

Docket No. Below: HUD-L-2296-23

Sat Below:
THE HON. KALIMAH H. AHMAD, J.S.C.

DEFENDANTS-APPELLANTS' REPLY BRIEF IN SUPPORT OF THE APPEAL

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PRELIMINARY STATEMENT

Respondents have no legitimate basis to challenge the formation of their contract to purchase the subject unit. Respondents wield the decision in Atalese to support a bright line holding that a particular clause in the Subscription Purchase Agreement ("SPA") (the arbitration provision) is unenforceable. In doing so, the Respondents urge this Court to ignore various longstanding contract principles to evade contract terms to which they freely agreed. That bright line "unenforceability" rule, ultimately adopted by the trial court, rests on an incorrect expansion of New Jersey law and is further preempted by the FAA as it is an arbitration-specific rule that disfavors such contracts and refuses to enforce them according to their terms. Our recent Supreme Court decisions apply a totality of the circumstances test which the trial court did not apply. When viewed within the totality of the evidence, the facts are plain – Respondents, after careful review and upon the advice of retained Counsel, signed, initialed, and knowingly assented to the Subscription and Purchase Agreement and its terms including the Arbitration Provision contained in the Public Offering Statement, a document incorporated by reference.

REPLY TO RESPONDENTS' STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellants respond briefly to address Respondents' procedural history and statement of facts, with additional treatment herein. Respondents selectively

quote to an oral motion ruling on September 10, 2021 of a different judge, in a different case, relating to an order that is not on appeal in this matter and omit critical portions of the transcript wherein Judge D'Elia expressly stated the early denial of the motion to compel arbitration was without prejudice, "not on the merits", was only "a procedural ruling," (Da98-99), and was made "with no real discovery" on the minimal record before him. (Da116). Further, Respondents have asserted numerous "facts" without citation to anything in the record below, and therefore those facts must be disregarded. See Opp. Br. at 9-12 (retention of counsel, no access to POS, with no citations to any affidavit; hearsay statements about no change to form contract allegedly by "COA" or "Connell Foley"; warranty period claims, with no citation to the contract terms).

LEGAL ARGUMENT

POINT I
THE RULING BELOW FRUSTRATES THE PURPOSE OF THE FEDERAL ARBITRATION ACT BY FAILING TO ENFORCE THE PARTIES' AGREEMENT ACCORDING TO ITS TERMS

There is no dispute that the Federal Arbitration Act ("FAA") governs the parties' arbitration agreement. Likewise, Supreme Court precedent interpreting the FAA prohibits conduct that conflicts with or frustrates its purpose. This is binding on our State Court. Nevertheless, Respondents have given short shrift to Appellants' valid argument that the trial court ruling runs afoul of the FAA by using an expansive application of the so-called "explicit waiver" test created

in Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430 (2014), to invalidate a broad, unambiguous agreement, entered into without compulsion by sophisticated parties contracting at arms' length, with ample opportunity for review, and aided by legal counsel of their own choosing.

The Opposition declares incorrectly, and without citation, that our Supreme Court has "repeatedly" decided that Atalese's "explicit waiver" test is not preempted by the FAA because it "puts arbitration agreements on equal footing with all other contracts." (Opp. Br. at 25). However, our Supreme Court has never directly addressed, in a majority opinion, whether Atalese's heightened standard for formation of arbitration agreements passes muster under the FAA. See Kernahan v. Home Warranty Adm'r of Florida, Inc., 236 N.J. 301, 327 (2019) (Albin, J., concurring) (noting majority sidestepped FAA preemption arguments). See also Guidotti v. Legal Helpers Debt Resolution, L.L.C., 639 Fed. Appx. 824, 826-27 (3d. Cir. 2016) (questioning if Atalese remains viable).

Despite the open preemption question, Respondents fail to explain how the Court's ruling in Kindred Nursing Centers L.P. v. Clark, 581 U.S. 246 (2017), would not pose a basis for reversal. The Kindred Nursing decision reaffirmed that the FAA "displaces any rule . . . covertly . . . disfavoring contracts that (oh, so coincidently) have the defining features of arbitration agreements." Id. at 1426. Justice's Albin's concurring opinion in Kernahan only

serves to highlight the public policy basis for his earlier majority opinion in Atalese, by focusing predominantly on the adhesional nature of contracts for needed goods and services as warranting an express waiver of the right to seek relief in a court of law. Kernahan, 236 N.J. at 327. But the parties' agreement here does not fall within that category of contracts, and therefore, should not be subject to disfavored treatment.

Indeed, the FAA does not distinguish between commercial contracts that may or may not fall within state consumer protection laws. Nor does the FAA allow for states to only enforce contracts that are believed to be written for the "average consumer." Instead, the FAA mandates that ordinary legal doctrines governing the formation of a contract and its interpretation be applied. What the lower court has done, like so many courts before it, is to assume that Atalese's express waiver requirement is in fact a rule of "general applicability," such as duress or unconscionability. Yet, Atalese covertly borrowed concepts from distinguishable cases to advance a policy-focused agenda which has resulted in the regular and frequent invalidation of freely-entered arbitration agreements, based on the speculative presumption that every person acting, with or without compulsion, who signs an unambiguous agreement does not understand what the phrase "binding arbitration" means. The universe of trial court cases

demonstrates continued grappling with the application of Atalese and has led to a plethora of inconsistent decisions.

Our Supreme Court has repeatedly stressed that Atalese does not require "magic words", and that mutual assent is determined "under customary principles of contract law." Kernahan, 236 N.J. at 319. But that pronouncement has done little to curb the overreach of challenging parties, like Respondents, from telling lower courts that no arbitration agreement can ever be enforceable unless there is in fact an explicit reference to either the word "court" or "jury." And worse still, Respondents continue to advocate two expansive readings of Atalese that launch the FAA preemption concern to the extreme.

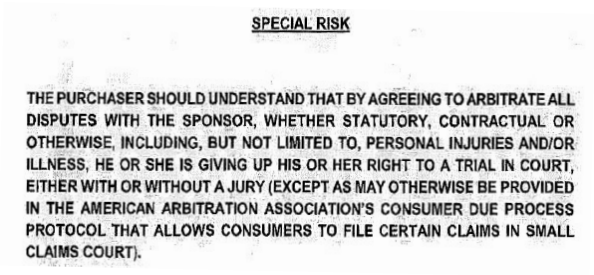
First, Respondents claim "there is no exception recognized by law for 'sophisticated parties' in consumer contracts." (Opp. Br. at 9 (citing Da1550) (citing Cnty. of Passaic v. Horizon Healthcare Servs., Inc., 474 N.J. Super. 498, 503-04 (App. Div. 2023)). The lower court distinguished cases with "commercial" contracts, but yet, the very consumer statute at issue explicitly applies, inter alia, to a "partnership, corporation, company, trust, business entity or association." N.J.S.A. 56:8-1. Notably, Respondents in signing the SPA agreed to become shareholders themselves in the non-profit condominium association, and agreed to a bevy of other risks, costs, and obligations, which are all part of the new, complex construction condominium transaction, which

required voluminous disclosures mandated by law. Considering the totality of the circumstances of the transaction, Respondents' sophistication should be considered, as well as their obligation to read all the contractual disclosures, even if they did not sign the agreement using a corporate form.

Respondents also improperly contend that a court must disregard the actual consent of the parties even if expressed in the entirety of the contract documents. Yet, our Supreme Court has held that courts may consider other language in the contract or related disclosures for "explanatory comment… that arbitration is a substitute for the right to have one's claim adjudicated in a court of law." Atalese, 219 N.J. at 442. A narrow view of enforceability based only on wording in a designated clause within the contract is not the standard. (Opp. Br. at 20-21).

Indeed, in Skuse v. Pfizer, Inc., 244 N.J. 30 (2020), the Court reversed the Appellate Division and held that "explanatory" emails and other materials, made clear the employee was bound to arbitrate all disputes if still employed beyond 60 days, even though no agreement was ever signed and even though the employee said she never read the materials sent to her via email. Id. at 51-52. Critically, the Skuse Court reaffirmed that "as a general rule, 'one who does not choose to read a contract before signing it cannot later relieve himself [or herself] of its burdens.'" Skuse, 244 N.J. at 54 (quoting Riverside Chiropractic

Grp. v. Mercury Ins. Co., 404 N.J. Super. 228, 238 (App. Div. 2008)). This decision clearly undermines Respondents' argument that they had no obligation to read the contract documents for any explanatory information, including the Public Offering Statement ("POS") incorporated by clear reference into the Subscription and Purchase Agreement ("SPA"), and identified at Exhibit A thereto. With Atalese only requiring "***some explanatory comment***" issuing notice and Skuse permitting explanations to exist in outside sources other than the arbitration provision itself, Appellants have clearly satisfied this burden. The seven (7) lines located in the POS on the page right after the foreword state:



SPECIAL RISK

THE PURCHASER SHOULD UNDERSTAND THAT BY AGREEING TO ARBITRATE ALL DISPUTES WITH THE SPONSOR, WHETHER STATUTORY, CONTRACTUAL OR OTHERWISE, INCLUDING, BUT NOT LIMITED TO, PERSONAL INJURIES AND/OR ILLNESS, HE OR SHE IS GIVING UP HIS OR HER RIGHT TO A TRIAL IN COURT, EITHER WITH OR WITHOUT A JURY (EXCEPT AS MAY OTHERWISE BE PROVIDED IN THE AMERICAN ARBITRATION ASSOCIATION'S CONSUMER DUE PROCESS PROTOCOL THAT ALLOWS CONSUMERS TO FILE CERTAIN CLAIMS IN SMALL CLAIMS COURT).

(Da569). Plainly, the "**SPECIAL RISK**" notice provides the explanation that arbitration is a substitute for "trial in court, with or without a jury," the required magic words Respondents rely upon. Id. By law, the POS must contain critical "guidance" and disclosures spelled out in 23 subsections. See N.J.A.C. § 5:26-4.2. Throughout the SPA and POS, Respondents were notified that careful review of the POS was needed before the expiration of the 7-day cancelation period. (Da12, Da13, Da26-Da27). Respondents were keenly aware that the agreement would be binding if they failed to terminate timely by exercising their

rights under the state-mandated attorney review or "study" period, or the 7-days automatic cancelation period. It is unfathomable, therefore, that the signed agreement here, with its extensive legal notices and explicit reference to the FAA, cannot meet that test by referring to a clearly identified and incorporated exhibit. See Caspi v. Microsoft Network, LLC, 323 N.J. Super. 118, 125-26 (1999) (enforced forum selection clause because conspicuously identified as available electronically) (citing Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 533 (App. Div. 2009)).

The trial court's ruling below failed to apply long-standing contract law principles, as explained further herein, which is fatal to its decision. Weaponizing Atalese to trump these principles and invalidate the parties' agreement is precisely the conduct that Kindred Nursing said the FAA commands all state courts to avoid. When standard contract principles are applied that place the parties' agreement on equal and fair footing with all other contracts, it is plain that the trial court's decision runs afoul of the FAA and must be reversed.

POINT II
THE FACTUAL RECORD BEFORE THIS COURT ESTABLISHES AN ENFORCEABLE AGREEMENT

Respondents neglect to engage in a meaningful discussion of the factual record because the totality of the evidence shows their assent to overcome the

heightened standard put in place by Atalese. Respondents do not dispute, with any citation to the record, their representation in writing they had read, understood, and agreed to the SPA's terms including the arbitration provision—both through their written signatures and initials on the SPA and through the letter their lawyer was authorized to send several weeks later that conveyed their approval of the agreement, and during the several years thereafter Respondents gave repeated assurances of their intention to proceed under the parties' agreement. These facts belie any attempt to paint the contract transaction as comparable to the agreement invalidated by our Supreme Court since Atalese was decided.

A. Appellants' position has always been that the agreement at issue is a commercial contract and is not a contract of adhesion.

The SPA and its incorporated documents, including the POS are a commercial contract that by operation of New Jersey Statute and Code mandates purchasers, like Respondents, possess the irrevocable opportunity to negotiate, cancel or terminate the agreement, with the assistance of Counsel.

Unlike Atalese, the SPA is not a contract of adhesion, and it certainly did not involve the purchase of a "needed" good or service. Rudbart v. N. Jersey Dist. Water Supply Com., 127 N.J. 344, 355 (1999). Instead, Buyers entered into an agreement wherein the closing date was estimated to occur more than two (2) years later. Moreover, Respondents assented to the commercial contract

when their attorney issued an email on January 11, 2018, communicating that attorney review is "hereby concluded." See Restatement (Third) of Agency: Apparent Authority § 2.03 (Am. Law Inst. 2006)); Sears Mortg. Corp. v. Rose, 134 N.J. 326, 338 (1993). Importantly, the POS also evidences the fact that the SPA was in fact negotiable, stating at page 83: "The terms of the sale and other provisions of an actual Subscription and Purchase Agreement entered into between the Developer and any given Purchaser **may vary**. . . **based upon negotiations between the parties**." (Da 655) (emphasis added).

Appellants have never conceded that the contract is a "consumer agreement" comparable to the kind in Atalese or its progeny. In fact, it is the converse, diametrically unlike the boilerplate, verbose, protracted, form contracts that are not "understandable to the reasonable consumer." Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430, 444 (2014). And unlike Atalese, this contract, as required by a regulatory scheme, provides the backdrop for the parties' transaction. See New Jersey Condominium Act, N.J.S.A. 46:8B-1 et seq.; PREDFDA, N.J.S.A. 45:22A-1, et seq.; N.J.A.C. 5:26–1.1 et seq. And Respondents were fully familiar with this type of heavily regulated real estate transaction having purchased two (2) condominium luxury units a month and a half prior in Jersey City. See State v. Silva, 394 N.J. Super. 270, 275 (App. Div. 2007) (holding that a court can take judicial notice facts that "cannot seriously

be disputed."). Through that transaction, buyers would have been keenly aware that the SPA and POS requires certain disclosures by law. See Van Duren v. Rzasa-Ormes, 394 N.J. Super. 254, 265 (App. Div. 2007) (parties were "highly sophisticated businesspeople.").

This agreement is also not a contract of adhesion that was drafted by a company who employs market forces to sell goods or services to consumers on a take-it-or-leave-it basis. Respondents were "free to accept or reject the terms proposed" in the SPA. See Dixon Mills Condo. Ass'n v. RGD Holding Co., LLC, 2018 N.J. Super. LEXIS 464, *6-7 (N.J. Super. App. Div. 2018) (agreeing with the lower court's conclusion that the arbitration provisions were not adhesive because the unit owners "were free to accept or reject the contract terms proposed by the sellers of [the units]," and there was "[a]bsolutely no proof . . . that the terms of the [SPA] were in any way non-negotiable.").

B. Even if Atalese applies, Appellants complied through notices given in the contract language considered under ordinary contract principles.

Respondents misleadingly claim any waiver language was "absent." This is incorrect. The arbitration provision, which undoubtedly fulfills the AAA Rules, is itself a waiver provision. It has always been incorporated by reference in the POS which is a governing document as set forth in the SPA – a document Respondents still do not deny reading, understanding or signing.

The arbitration provision was initialed, and the SPA was signed. While Respondents allege this "voluminous document" is irrelevant and cannot be considered because it was not signed, that is not actually the law. Respondents' reliance on Leodori is misplaced. 175 N.J. 293 (2003). This case raises no such considerations as in Leodori, as there is unmistakable assent by virtue of the signatures on the SPA. And there was no form the buyers were required to execute to confirm assent which was left unsigned; unlike the case with the "Review and Agreement" form in Leodori.

By law, a POS must be provided to a prospective purchaser by the contract date. It must be clear and concise, and disclose the rights, obligations, and restrictions of the purchaser. See N.J.A.C. 11:5-9.5. The POS was expressly incorporated by reference and set forth as Exhibit A in the SPA. (Da178) (stating "99 Hudson, a Condominium Public Offering Statement, including the Governing Documents. (Provided to Buyer separately; not attached; ***incorporated by reference"***) (emphasis added). Notably, right above the signature of Respondent Jia Wang in Section 22 is a "List of Exhibits" which states that the Public Offering Statement is "incorporated by reference" as Exhibit A "including the Governing Documents…Seller and the Buyer agree to the terms of this Agreement by signing below." [(Da176)] There was otherwise clear, conspicuous wording throughout the SPA, acknowledging the buyers were

given the opportunity to review the POS and they understood that it was incorporated by reference as an exhibit. (Da176; Da178). The page immediately following the table of contents and foreword contained prominent and obvious notice language explaining that binding arbitration involves a waiver of access to the court and a jury trial language.

Respondents were also on notice that careful review of the POS was required before the expiration of the 7-day cancelation period. (Da169, Da174). But, Respondents' affirmative claims rely on the POS which in cited more than a dozen paragraphs and concedes that the POS is a "governing document" by characterizing it as incorporated within the Master Deed. (Da2-3,7-8).

Similarly, Respondents below never addressed the significance of the AAA Construction Rules incorporated within the arbitration clause. Evidence of mutual assent is further augmented where the Respondents were represented by competent real estate counsel who is assumed to be familiar with these rules and the procedural differences from a court setting. Those Rules are also available online to the public and the Respondents made no claim they were unable to access them. See Roach v. BM Motoring, LLC, 228 N.J. 163, 172-73 (2017) (enforcing incorporated AAA rules as binding) (emphasis added); Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 763 (3d Cir. 2016); Preston v. Ferrer, 552 U.S. 346, 362–63 (2008).

Without prior mention or reliance below, Respondents seize onto a line in an unverified Answer filed in the AAA case, which the trial court did not cite in the context of the Atalese analysis, to establish a critical and absent fact from any verified statement in the record below – that Respondents did not "understand" the meaning of the binding arbitration provisions. (Da129). The sworn submissions of Respondents do not refute that they are highly educated/sophisticated, English-proficient individuals. See Stamato v. Morgan Stanley Smith Barney, 2020 N.J. Super. LEXIS 322 (App. Div. Feb. 13, 2020) (granting motion to compel arbitration based on the finding that the plaintiff – a former VP former VP executive was a sophisticated party within the meaning of Leodori and Atalese). Respondents had ample notice of the contract terms and gave their written, objective assent to them, any question about the enforceability of one term in the contract does not, and cannot, defeat the formation of the contract as a whole. See, e.g., Gras v. Assocs. First Cap. Corp., 346 N.J. Super. 42, 57 (App. Div. 2001).

POINT III
RESPONDENTS' "WARRANTY PERIOD" ARGUMENT IS A QUESTION FOR THE ARBITRATOR

Our Supreme Court has held that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." AT&T Techs. v. Communs.

Workers of Am., 475 U.S. 643, 649 (1986); see Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019). The SPA clearly addresses the Seller's obligations and express warranties provided with respect to the Unit. (Da167-169). Respondents' attempts to narrow how they categorize their claim does not remove it from what is expressly stated in the parties' agreement. Whether or not Respondents closed on the unit is irrelevant. Respondents cannot allege a CFA claim, and simultaneously contend that the dispute over an offer to sell which did result in a signed SPA are also insufficient to trigger a broad dispute resolution provision. If Respondents' reading of this section was true – that the arbitration period cannot commence prior to closing – then multiple portions of the SPA would be rendered superfluous. Therefore, the Panel should disregard Respondents' unsupported and inconsistent allegations as to the warranty period and leave any question about interpretation of that language for the arbitrator in accordance with the delegation provisions of the AAA Rules.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that the Court reverse the decision below and uphold the Arbitration Provision.

CONNELL FOLEY LLP

By: ***/s/ Leo J. Hurley, Jr.***
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Date: December 4, 2024