2025 ADR DAY – PROVEN STRATEGIES TO GET BETTER RESULTS IN MEDIATION AND SETTLEMENT

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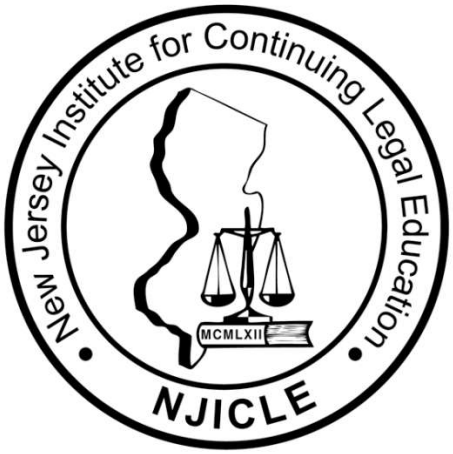

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2025 ADR DAY – PROVEN STRATEGIES TO GET BETTER RESULTS IN MEDIATION AND SETTLEMENT

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In cooperation with the New Jersey State Bar Association **Dispute Resolution Section** and the **Justice Marie L. Garibaldi American Inn of Court**

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7 Questions to Ask Before Saying Yes to a Law Firm Merger

When two law firms announce their merger, the press releases always sound the same: "strategic combination," "enhanced client service," "expanded capabilities." What don't they mention? Research shows that one-third to one-half of all mergers fail due to cultural misalignment and poor strategic fit.
The difference between merger excitement and merger success comes down to asking the right questions before you shake hands. Because while getting bigger might sound appealing, success depends on finding the right match, not just any match.

If you're a small to mid-size firm considering a merger, here are the critical questions that separate smart strategic moves from expensive mistakes.

QUESTION #1:
What problem are we solving?

Start with the "why" behind the deal.

The best mergers have a clear strategic rationale that extends beyond simply growing larger. The right reasons include succession planning, client-driven expansion needs, or accessing resources that will genuinely improve your practice.

Your clients may be requesting capabilities you don't have. You may need better back-end support, more marketing resources, or associates to handle growing demand. Perhaps you're considering retirement in the next few years and would like a structured succession plan.

These are solid foundations for a merger conversation.

If you're using a merger as a life raft when your firm isn't profitable or is struggling financially, that could be a sign of the wrong reason to move forward. If that's the case, you won't have much leverage in negotiations, and you're probably not going to get the value you're hoping for.

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QUESTION #2:
How will your clients and referral partners benefit?

Will your clients benefit from this move, or will it create barriers? Consider how the rate structures will align. If you've built your practice on accessibility and the new firm charges significantly higher rates, you could lose clients.

Another important piece to think about is referral relationships. If you're currently referring work to other firms and they're reciprocating, joining a full-service firm might mean you're expected to keep everything in-house, potentially damaging valuable referral sources you've spent years cultivating. In turn, those firms might not want to refer to you anymore if they think their clients might leave to bring the work they're handling to your new firm.

QUESTION #3:
Will this partnership work?

Cultural due diligence is the most critical component of any merger. The financials might look great on paper, but if the cultures don't align, no one will likely be happy with the outcome.

Ask yourself honestly: Are you prepared for the shift from being an independent decision-maker to being part of a larger organization? Some firm leaders thrive in collaborative environments, while others find the consensus-building and committee structures frustrating or stifling.

You should also discuss expectations regarding billable hours and availability. If you're accustomed to the flexibility of running your firm (think taking vacations when you want, attending your kids' baseball games, and setting your schedule), but the new firm requires minimum billable hours for partners, that's a significant lifestyle change.

QUESTION #4:
Does the firm have the resources your practice needs?

It's easy to get excited about access to more resources, but dig deeper. If you need more associates to handle your growing caseload, do they have associates available, or will you be competing with other partners for limited resources? What kind of technology infrastructure (case management software, billing platforms, marketing tools) do they rely on, and what's the plan behind them?

Many firms also overlook the practical considerations tied to their brand. What will happen to your online brand you've built up over time?

If you've spent years building your firm's online presence and search rankings, you'll want to understand the plan for preserving that value in the transition. This might involve working with internal IT or a consultant to integrate your existing web presence with the new firm's platform, so discuss the approach and any associated costs upfront.

QUESTION #5:
How does the firm approach collaboration and cross-selling?

This question is a big one because collaboration and cross-selling only work if the firm's structure supports it. How does the firm collaborate across practice areas? Is cross-selling financially motivated and incentivized through the compensation structure?

If partners aren't rewarded for referring work internally, or if the origination credit system disincentivizes referrals, then you might get fewer referrals as part of your compensation than anticipated. Even if you're introducing a new practice area to the firm or one that complements others, without the right internal culture surrounding internal referrals, it's best to underestimate the number of referrals.

QUESTION #6:
What does the long term look like?

Due diligence goes beyond the headline numbers most people look at first. A key place to start is looking at the equity structure. Many firms require new partners to start as non-equity partners for at least a year before being considered for equity status, so clarify the timeline and requirements for equity partnership.

And a very important question as part of that is, will a buy-in be required? And if you want to leave, what are the procedures for departure and return of any capital contributions?

This is also where you need to ask about mandatory de-equitization policies. While firms can't legally force retirement based solely on age, many have policies that strongly encourage partners to step back at a certain point.
If you're planning to work for many more years, you want to know what the expectations are.

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QUESTION #7:
What does your timeline look like?

You're part of this equation, so don't gloss over how a merger would impact your professional trajectory.

This is especially important if retirement is on the horizon for you. A merger typically works best if you're planning to stay for at least one to two years before retirement. Less than a year probably isn't worth the disruption, and you need sufficient runway to ensure the integration's success.

For partners considering their options, understanding what your book of business is worth is crucial to these negotiations. Many firm owners underestimate their value, which puts them at a disadvantage in merger discussions.

When you should walk away from a merger

Some red flags should immediately end the conversation. If there are ongoing ethics issues with any of the partners, or if you discover significant conflict of interest problems that can't be resolved, those are clear signs to walk away.
If the firm's long-term strategic vision doesn't align with yours, or if you realize they're looking for something different from what you can provide, it's better to end discussions early.

Remember, you have alternatives. Strategic co-counsel relationships, targeted expansions, or building specific capabilities internally might serve your needs better than a full merger. Sometimes, finding the right lateral partner hire can solve your growth challenges without the complexity of a complete merger.

The most successful mergers aren't about finding the biggest platform or the most prestigious name

They're about finding the right strategic partner that enhances what you've built while setting you up for the future you want.

Getting it wrong can cost you clients, team members, and years of building the practice you love. Getting it right can accelerate your growth and create opportunities you couldn't achieve alone.

The key is asking the tough questions before you're emotionally invested in the outcome. Just as finding your exact right, perfect-fit firm as an individual partner requires careful evaluation and honest assessment of what you need, so too does finding the right merger partner.

About Us

Gillman Strategic Group is a boutique recruiting firm that works exclusively with law firm partners. The firm helps partners evaluate whether their current platform still aligns with their goals—and, when it doesn't, guides them through a confidential and strategic lateral process.

Gillman Strategic Group's primary focus is supporting law firm partners and groups. Most of the firm's clients are not conducting an active job search; they are high-performing partners asking nuanced questions about compensation, support, culture, or succession planning.

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Is A Merger the Right Move for Your Law Firm?

If you're reading this, you're likely at a crossroads with your boutique law firm or solo practice.

Maybe you're tired of handling every administrative task, from ordering printer toner to managing the books.

Perhaps you're watching larger competitors attract the associate talent you desperately need.

Or you might be looking ahead to retirement, wondering what will happen to the practice you've built when you're ready to step away.

These struggles are a common factor behind small law firm owners considering a merger by larger firms as a strategic solution. What was once rare—small firms absorbed into larger entities—has become a path for growth and succession in today's legal landscape.

But is a merger the right move for your particular situation? The answer isn't straightforward. While a merger can solve issues that keep you up at night, it's not a universal remedy and comes with considerations that require careful thought.

Problems that a merger can solve for small law firms

A merger offers several benefits to small law firms, from building a high-performing team to tapping into better resources and support. The key to success is knowing where your needs and priorities lie.

Staffing and recruitment challenges

Finding and retaining top legal talent is one of the biggest hurdles for small firms. Larger firms typically have more established recruitment pipelines, attractive compensation packages, and prestigious brands that draw quality associates and support staff.

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Make sure you think about where you'll fall on the priority list for hiring. Some platforms are great at recruiting, but if all that energy goes to other groups, it could lead to more frustrations. Because you have the most leverage on the way in, that is the time to extract a promise from the firm about how they will hire to support your practice.

Geographic expansion and practice areas

If your clients have needs beyond your geographic reach or outside your practice areas, joining a larger firm with a national or international platform can be transformative.

Make sure you think about how the firm collaborates. If the firm's cross-office collaboration is weak or client relationships are tightly siloed, you may still be stuck on an island. Ask how matters get shared across practices and who gets credit when they do.

Infrastructure and technology

Larger firms often have already invested in modern legal technology and updated facilities, which gives you access to superior infrastructure without the capital investment.

Make sure you think about what the resources mean for your work practically. New resources sound great until you're forced onto systems that don't work for your workflows. Find out what tools they use, how much control you'll have, and how they handle onboarding for new teams.

Administrative and executive support

Larger firms typically have dedicated C-suite executives, marketing departments, IT specialists, and accounting teams that can free you to focus on what you do best: serving clients and growing your practice.

Make sure you think about your need for autonomy. At some firms, every decision—budgets, branding, even who can touch your bio—goes through three layers of approval. If you're used to moving fast, ask how much autonomy you'll keep.

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Cross-selling opportunities

Instead of referring matters outside your firm (and losing that revenue), you can refer to colleagues within your new organization, often receiving origination credit and strengthening client relationships.

Make sure you think about how cross-selling will play out. Cross-selling only works if your partners follow through. Look closely at their origination structure to make sure they get rewarded financially, and talk to other laterals. Do they share work, or just talk about it?

Problems that a merger doesn't solve for small law firms

The problems above represent significant barriers for growth and expansion for smaller law firms, and a merger can go a long way toward removing them. But there are certain problems that being a merger can't solve for a small practice.

Referral-based practice conflicts

If your boutique practice relies heavily on referrals from other law firms in areas like trust and estates, family law, IP, or specialized litigation, those referral sources may dry up after a merger by a full-service firm. Firms that previously sent you business might see you as a competitor once you're part of a full-service operation. This requires a careful cost-benefit analysis of what you might gain versus lose.

Alternative to a merger: Instead of joining a full-service firm, consider investing in your internal operations. Hiring targeted support, such as a fractional COO, experienced associate, or outsourced admin, can relieve day-to-day pressure without disrupting your referral flow.

Rate structure incompatibility

If your client base is price-sensitive and you currently bill at $500 an hour, moving to a firm where comparable partners bill at $1,000 an hour could be problematic. Your clients might balk at the increased rates, potentially undermining the book of business that made you valuable to the merger.

Alternative to a merger: If your clients are rate-sensitive, moving to a higher-billing platform could price you out of your practice. Instead, focus on increasing profitability where you are. That could mean streamlining overhead, improving collections, or narrowing

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Vanity over strategy

Consider whether client needs or prestige factors drive your desire for a national platform. If your practice serves primarily local clients with only occasional matters in other jurisdictions, carefully evaluate whether the complexity of joining a larger organization is necessary.

Alternative to a merger: Sometimes, strategic co-counsel relationships or targeted expansions might better serve your clients than a complete a merger. Focus on what will genuinely enhance your client service capabilities rather than what might look impressive on your letterhead.

Before pursuing an a merger, ask yourself these five critical questions:

1. Will my clients benefit from the move, or will it create barriers like conflicts or rate increases?
2. Does the potential firm you'd merge with have the specific resources my practice needs to grow?
3. Am I prepared for the cultural shift from being an independent decision-maker to being part of a larger organization?
4. Have I analyzed the true economics, including any special billing arrangements with current clients?
5. Does the other firm's long-term strategy align with my vision for my practice?

Short-term succession planning

A merger can be an excellent strategy for succession planning when you have 1-2 years before retirement. However, if you're looking at a merger but only have less than a year before stepping away, the disruption of moving your practice likely won't be worth it. Additionally, many firms won't be interested because your client relationships and referral sources are what make your practice valuable...but there might not be enough time for them to benefit from them if you're walking away after just a few months.

Alternative to a merger: If you have 5+ years before retirement, consider bringing in a junior partner and training them to work side by side before gradually leaving your firm to them. This approach requires more time to build the relationship, transfer knowledge, and ensure they can handle your clients.

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Focus on fit, not just the merger

The most successful mergers happen when there's a clear strategic rationale beyond simply "getting bigger." Whether accessing specialized expertise, solving succession challenges, or providing better client service, your motivation for joining a larger platform should be specific and well-defined.

Remember that being a merger today doesn't necessarily mean losing your autonomy. Many larger firms understand that the value in merging with a boutique practice lies in the relationships, expertise, and client trust you've built. The best mergers preserve what makes your practice special while providing the resources to help it thrive.

If you're considering whether a merger is right for your firm, an experienced legal recruiting professional can help you evaluate options objectively and find the exact right, perfect-fit firm that aligns with your goals and values.
After all, the success of any merger ultimately depends on finding the right match, not just any match. Want to explore what that might look like for you? We're here to help.

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Law Firm Merger Due Diligence: What to Expect and How to Prepare

For small and mid-size law firms considering a merger, the due diligence process can feel daunting. The firm you want to merge into will examine everything—your financials, your client relationships, your practice management systems, your track record. They'll want answers to questions you may not have thought about in years.

And you'll be juggling all of it while still running your practice and serving clients.

The firms that come out ahead are the ones that prepare early. They know what potential merger partners will ask for, they've organized their documentation, and they can answer questions confidently instead of scrambling. That preparation doesn't just make the process smoother—it positions you to negotiate better terms...without it taking over your life.

Why law firm due diligence is different

Law firm mergers aren't like other business combinations. Along with merging assets and operations, you're combining professional service relationships, partnership cultures, and ethical obligations that can't be easily quantified on a balance sheet.

One of the biggest differences is that your clients aren't assets that automatically transfer with the sale. Law firm clients choose their counsel based on personal relationships and trust. That means the entire valuation hinges on whether your clients will actually follow you, which makes partner economics and client loyalty central to any deal.

Legal professional ethics add another layer of complexity. Conflict checks can make or break a potential combination before you even get to the financial terms. If a major client of yours directly opposes a major client of theirs, that's not always a problem you can negotiate around.
And beyond conflicts, you're dealing with trust account reconciliations that need to be squeaky clean, bar compliance in multiple jurisdictions, and professional responsibility rules that don't exist when you're buying a widget company.

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What to expect: The process and timeline

Due diligence can take 30 to 90 days, though complex deals can easily run longer.

A potential merger partner will examine everything from individual partner profitability to your technology stack to your malpractice history. The firms that move through due diligence fastest are those that organize their documentation before initiating conversations.

What to expect: The partnership economics deep dive

When potential firms evaluate your firm, they'll start with a granular analysis of partner profitability. Your individual metrics determine your value to them—both what you'll be paid and what role you'll play in the combined firm.

They aren't just evaluating whether your clients will follow you. They're also looking at whether you'll be productive and profitable once you're there, which affects your compensation tier and the type of support you'll receive.
They'll focus on two key areas: how profitable each partner actually is, and how strong your client relationships really are.

Partner profitability analysis

A firm will examine individual partner metrics to understand where the value is coming from. They'll look at areas like

- **Individual performance metrics:** They'll analyze individual billing and collections, as well as how effectively partners delegate work to associates.
- **Business development approach:** They'll dig into how your firm allocates origination versus working credit. This reveals whether your firm values business development over service delivery. Potential merger partners want to understand whether joining partners are rainmakers, service partners, or both, because that affects how you'll fit into their compensation structure and what kind of support you'll need. Understanding how partners make more money through origination credit helps clarify what is being evaluated.
- **Succession planning:** Firms look at how close partners are to retirement, examine existing partner buyout obligations, and calculate how many partners might retire in the next five to ten years. Capital account balances and unfunded retirement obligations can significantly impact deal terms.

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Client relationship assessment

If you're looking to combine with a firm, they'll need to understand the strength and transferability of client relationships—because if your clients won't follow you, your book of business doesn't actually exist. They'll examine critical areas:

- **Conflict analysis** evaluates whether there are client conflicts between major relationships. When conflicts exist, they don't always end the conversation, but they require creative solutions—or force difficult decisions about which clients matter more.
- **Client origination history by partner** looks at who brought in the business initially and who maintains those relationships today.
- **Matter-level profitability analysis** shows which practices and clients generate real profit versus those that look good on paper but have poor realization rates.

What to expect: Practice management systems review

After partner profitability and client relationships, a firm needs to know if your firm can function within its infrastructure. Incompatible systems slow down integration and add costs that may reduce deal value.

Technology stack compatibility

Every firm uses different combinations of research platforms, document management systems, and client relationship management tools. The compatibility—or incompatibility—of these systems affects integration costs and timelines. Another factor to consider is the tech learning curve that can present itself; while it's not typically a deal-breaker, if teams are used to a specific practice management system or database search tool, adjusting to a new system can slow down integration.

Time and billing system compatibility is particularly critical. If your firm uses a completely different platform, the cost and complexity of migrating years of billing data can be substantial.

Integrating conflict-checking databases also presents unique challenges. Merging these databases requires careful attention to ethical obligations and potential conflicts that might not surface until systems are combined.

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Trust accounting and compliance

While the specifics of trust account management vary by state, every firm will scrutinize your IOLTA account procedures and reconciliation practices. They'll review your trust accounting controls and any history of compliance issues.
State bar compliance history, CLE tracking, and attorney admission status might seem routine, but problems in these areas can signal deeper organizational issues. Even minor violations can complicate the merger process and affect valuations.

What to expect: Malpractice and risk assessment

Once a firm understands what you bring to the table, it looks at potential liabilities. Malpractice claims and ethical violations cost potential merger partners money and damage their reputation, so professional liability is carefully scrutinized.

Professional liability review

Firms will assess malpractice history for patterns, not just settlements. They'll see if claims cluster in certain practice areas, stem from specific partners, or reveal systemic problems with matter management. They'll also examine current coverage limits and tail coverage obligations that could follow the merger.

Client complaints and grievances also matter, even if they never turned into formal claims. A pattern of complaints can reveal problems with how the firm manages client expectations or handles difficult relationships.

Ethics and bar compliance

Malpractice claims can happen even at well-run firms. But ethics violations are a different story—they may signal problems with judgment and compliance, which is why firms look for any history of:

- Attorney disciplinary history, even if matters were resolved favorably. The pattern matters more than the outcome.
- Unauthorized practice of law, such as attorneys practicing in jurisdictions where they're not admitted.
- Fee-splitting arrangements and referral fee agreements to ensure compliance with professional rules.

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How to prepare: Financial documentation

Getting your financials organized is vital—messy financial documentation lowers your valuation because firms discount what they can't verify, and it weakens your negotiating position if you're scrambling to answer basic questions.

Law firm financial statements

Start with three to five years of financial statements. A potential merger partner wants to see trends, not snapshots, and they'll focus on metrics that reveal how your firm actually operates.

The first issue they'll tackle is getting your numbers into a format they can actually evaluate. Many smaller firms run on a cash basis for tax purposes, but the other firm in a potential merger needs accrual-based financials to see the full picture. If your receivables are aging past 90 days or you have significant unbilled work-in-process, those are red flags about collection practices and billing discipline.

What they're really trying to determine is whether your firm's profitability will survive the merger. Realization rates reveal whether you're actually collecting what you bill—the industry average is 88% for mid-sized firms.

Rates below 80% can signal problems with pricing, client satisfaction, or billing practices. Consistent write-offs matter too—the average law firm writes off 18% of revenue, which directly impacts whether your reported profitability reflects reality.

Partner compensation documentation

Once a firm understands your firm's overall financial health, it'll want to see how that money flows to individual partners. Understanding your compensation structure becomes critical here. Document the following:

- **Draw versus distribution history** to show cash flow patterns and how consistently the firm meets partner compensation obligations
- **Origination credit formulas** that are written down and consistently applied—informal or inconsistent systems raise red flags about internal disputes
- **Lateral partner guarantee** obligations representing future liabilities that the firm will inherit
- **Performance management and compensation adjustment policies** that show how partners are evaluated and rewarded

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How to prepare: Client and matter management

Your client base represents the core value of your firm. Without portable clients who will follow you to the combined firm, you have much less leverage in negotiations—and potentially no deal at all.

Know where your revenue comes from

Prepare a three-year analysis of your top 20 clients by revenue. High client concentration—especially when one client accounts for more than 30% of revenue—raises concerns about stability and portability. Industry concentration can be both a strength and a weakness. While specialization can command premium rates, overreliance on a single industry makes your practice more vulnerable to sector downturns.

Show how you're addressing rate pressure through alternative fee arrangements or efficiency improvements, and review any client portability agreements or non-compete clauses that might affect partner mobility post-merger. For more guidance on documenting your client relationships, consider how firms will evaluate the portability of your work.

Understand which matters actually make money

Create an inventory of contingency fee matters with realistic assessments of outcomes and timing. Flat-fee arrangements need a profitability analysis to show they're not loss leaders. Pro bono commitment levels matter more than you might think—while pro bono work enhances reputation, excessive pro bono without a strategic purpose can concern profit-focused merger partners.
Document your matter budgeting processes and track record managing scope creep and overruns.

How to prepare: Partnership structure documentation

Your partnership agreement and organizational documents govern how a merger actually works, including who needs to approve it, what buyout obligations exist, and what tax implications partners may face.

Governance documents

Pull together all organizational documents: articles of incorporation, certificates of formation, bylaws, and operating agreements. Review your partnership agreement and amendments carefully. Those outdated provisions you've been handling informally? They matter now.

Voting rights and equity ownership structures determine how decisions get made during and after the merger. Withdrawal and expulsion provisions demonstrate how easily partners can exit if they are dissatisfied with the outcome.

Tax structure implications

Partnership mergers often carry tax complications that vary depending on the deal structure. Partners may recognize taxable gain if liability allocations shift or if the firm has assets, such as unbilled receivables. Your K-1 distribution history helps tax advisors model what individual partners might owe.

Guaranteed payment arrangements and phantom income—where partners owe taxes on allocated income they haven't actually received—can freeze support for an otherwise strong deal. Get ahead of these issues so partners know what tax consequences to expect.

How to prepare: Integration planning documents

The firm you want to combine with has to evaluate whether integration will work operationally. Mismatched systems and structures can create costs that reduce deal value.

Attorney and staff

Document your associate class composition, billing rates, and career progression. Paralegal utilization rates show whether you're leveraging staff effectively. The economics of staff attorneys —if you use them—need a clear explanation.

Support staff ratios matter too. Some firms operate with one secretary per partner, while others share support among multiple attorneys. These operational differences affect integration costs.

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Office and lease obligations

Your lease terms might represent a liability or an asset depending on the market and merger structure. Document sublease potential if you have excess space, or space constraints if you're bursting at the seams.

Office space per attorney, library requirements, and conference room availability affect whether physical integration is feasible. Technology infrastructure investments—recent upgrades or needed improvements—impact integration budgets.

Positioning Your Firm for Success

Law firm mergers succeed or fail based on preparation. Understanding what the due diligence process entails allows you to prepare strategically rather than scramble reactively.

Whether you're considering a merger for growth, succession planning, or better positioning, knowing what's coming and preparing accordingly can mean the difference between favorable terms and a deal that doesn't reflect your firm's true value. Success comes from aligning your preparation with the strategic frameworks that make rainmakers successful.

Ready to explore your options? Let's discuss how to position your firm for the merger process you deserve—one that recognizes not just your current value but your future potential.

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Succession Planning at Law Firms: Issues and Strategies

Succession planning at law firms – is your firm prepared for the future? If the answer is "No," then it is part of the 60% of mid-sized law firms in the same boat.

Issues Law Firms Face in Succession Planning

As the wave of baby-boomers who entered the legal profession in the '70s and '80s nears retirement, succession planning has become a real issue at the majority of law firms. Most law firms, big and small, have practicing lawyers in their 60s and 70s – many of whom also bring in most of the firm's business. These senior partners own the client relationships and provide mentorship for junior partners. Their departure can lead to loss of business and gaps in management.

Still, most law firms fail to institutionalize a proper succession planning framework for several reasons. Discussing retirement with senior partners is difficult.

The average age of a senior partner in America's top 200 law firms is 52. About 3 percent of senior partners are 71 to 88 years old. Senior partners are often reluctant to retire because they have helped establish the firm. Everybody looks up to them because they're the major rainmakers and sometimes even the founders of the firm. In addition to respect, they're also earning hefty paychecks. It's hard to let go.

Other partners find it awkward to bring up retirement with a colleague whose efforts have helped build the firm and develop their careers.

The Complications of Succession Planning

The second reason why law firms don't plan for succession is that it's not easy. Succession planning involves more than just partners. The whole firm and its clients are affected by the departure of a senior partner.

From the organization's perspective, a firm losing a senior partner is at the risk of losing stability and continuity. Without succession planning, however, a law firm might lose some of the senior partner's clients, contacts, goodwill, reputation, and knowledge when he or she retires.

From the client's perspective, it's critical to have service continuity, which depends upon commitment, service quality, and personal relationships. A succession plan must address the clients' concerns by planning a timely transition from the retiring partner to the succeeding one.

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Strategies for Succession Planning

To overcome these challenges and institutionalize succession planning, a law firm must balance the interests of the retiring partner, the clients, and the firm itself. Here are a few strategies that work.

Make Retirement a Part of Career Planning

Retirement should figure regularly during discussions, performance reviews, and counseling sessions within the firm. When the partners reach a certain seniority level, a transitioning program should become available to them. The program should include annual discussions about their short- and long-term plans including retirement, post-retirement goals and expectations, their practices, clients, and the transitioning of their knowledge and contacts to successors.

Identify and Groom Future Leaders

Most law firm senior partners are Baby Boomers planning to retire within the next decade or so. It can be a big blow when a firm loses several rainmakers and mentors within a short span of years. To prevent losing revenues, clients, and expertise, law firms should make transitioning a part of human resource management. Identify and groom future leaders so that they're ready to assume the roles of the retiring partners as smoothly as possible.

Provide Individual Support to Retiring Partners

Senior partners may resist accepting help and support because they're reminded that they're nearing the end of their careers. But it becomes easier when they've been preparing for the inevitable for years. Personalized coaching and mentoring by outside professionals and the firm's retired partners, peer group discussions, and access to a library of resources for making the transition less disturbing will help the process.

Have Continuing Post-Partnership Roles

Consider having permanent roles for retired partners, making them advisers, mentors, or ambassadors. Discuss with your partners and establish criteria for different roles. Post-partnership roles can allay their fear of idleness and provide valuable input from people who've 'been there, done that!'

If your firm doesn't currently have a succession plan in place, this is definitely something to put on the priority list. Spending some time planning now will help avoid serious issues in the future.

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About Us

Gillman Strategic Group is a boutique recruiting firm that works exclusively with law firm partners. The firm helps partners evaluate whether their current platform still aligns with their goals—and, when it doesn't, guides them through a confidential and strategic lateral process.

Gillman Strategic Group's primary focus is supporting law firm partners and groups. Most of the firm's clients are not conducting an active job search; they are high-performing partners asking nuanced questions about compensation, support, culture, or succession planning.

Founded by a former practicing attorney, Gillman Strategic Group brings both legal industry insight and practical strategy to each engagement. The team manages targeted research, discreet outreach, and firm introductions so that partners can stay focused on their clients while exploring what's possible.

Contact us

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MEDIATING THE CONSTRUCTON CASE

1. INTRODUCTION:

A. Negotiation – Court program

B. Submit a Case –AAA or Jams or otherwise.

C. Mega Cases

D. Hard or Soft

E. Getting to Yes – Fisher & Patton & Ury

F. Ethics – Model Standards of Conduct

G. Who blinks first

2. Who should attend

1. Lawyer(s)

2. Clients with Settlement Authority
   a. Contractors - Subcontractors
   b. Professionals – Engineer and Architect

3. Experts

4. Insurance Representatives

5. Fees – retainer?

3. Where should it be Held and When should it be Held

1. Neutral site

2. Sufficient rooms –Breakout

3. Zoom–Face to Face

4. When – Sufficient Time But …

5. All parties together

6. How long?

4. **Selection of the Mediator**

    1. Judge or Neutral – Experience

    2. AAA or JAMS or Neutral Academy

    3. In-State or Out

    4. Experience and Confidence

    5. Impartiality

    6. Tough or Mild – Afraid to Provide Own Feelings

    7. Mediation Agreement

5. Position Papers:

1. Exchange?

2. Length and substance

3. Attachments – Contracts – Reports – Pleadings

4. Facts

5. Legal arguments– Consumer Fraud–Home Improvement–

6. Who should speak? Afraid to speak up

1. Lawyer, Client(s)

2. Experts

3. Antagonize – client v. lawyer

4. Client Preparation – right or wrong – overall objectives

5. KNOW THE CASE:

1. FACTS

2. LAW:
    a. Standing
    b. Contract –Mediation pre condition
    c. Warranty Claims
    d. Implied Warranties - Waivers
    e. Express Warranty
    f. No Damage for Delay
    g. Pay When Paid
    h. Negligence or Strict Liability
        i. Economic Loss
3. Insurance
    a. Claims Made or
    b. Indemnification
    c. Fraud
    d. Duty to defend v. duty to indemnify
    e. More than one insured

4. Bankruptcy

5. Spoliation

6. Types of Construction Disputes

1. Organize the litigants
2. Owner-contractor – subs - design

7. Advocacy

8. DAMAGES

1. Statutes of Limitation

2. Hard Damages

3. Consequential Damages

4. Collectability

5. Consumer Fraud

6. Liquidated Damages

7. Delay Damages – experts

8. Not dealing with personal injury

9. BEING USED AS THE MEDIATOR

1. Know him or her

2. Convince the mediator as to the validity of your claims.

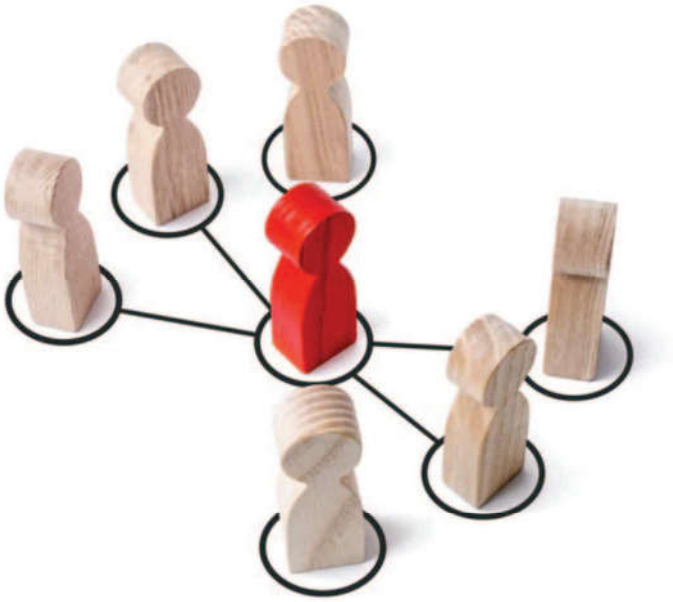
3. Speaking to the Mediator

4. Recognizing His/Her neutrality

10. GIVING UP–NEVER

1. They may come back
2. Maintain your availability
3. In writing

11. Mediator AS Arbitrator



A Litigator's Plea

A Little Planning When Drafting an Arbitration Clause Can Save a Lot of Time, Money and Headache

By Robert Bartkus and James Harry (JH) Oliverio

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JAMES HARRY (JH) OLIVERIO *is a partner at Anselmi & Carvelli, LLC where he litigates a wide variety of complex commercial matters on behalf of corporate and individual clients in the state and federal courts of New York and New Jersey. He also regularly counsels clients on corporate governance, regulatory, and employment issues. JH is a graduate of Providence College (2010) and Roger Williams University School of Law (2013), where he served as managing editor of the* Roger Williams University Law Review.

As an arbitrator assigned to commercial cases and "recovering" litigator, an attorney who routinely litigates issues of arbitrability, and regular readers of current New Jersey federal and state court opinions, we routinely see arbitration clauses with fatal defects. Although arbitration, especially among sophisticated commercial parties, is intended to provide a private, less expensive, and quicker alternative to litigation, the intent of the parties can be frustrated by easily avoided drafting errors. Even the most experienced transactional attorney can fall into traps when the unique aspects of arbitration are involved. To cite Justice Pashman, arbitration is "meant to be a substitute for and not a springboard for litigation.'"[1]

Checklists—familiar to airplane pilots and other mechanical equipment operators—have been adopted for legal matters. Once the transactional attorney becomes familiar with the client's business, the nature of the business-to-business (B2B) transaction, and the possible points of friction in the client's soon-to-be relationship, a few checklist suggestions may ease the steps for drafting and implementing the dispute resolution clause:

- **NEVER** simply pull an old arbitration or other alternative dispute resolution (ADR) clause from another contract, form book, or the internet. Arbitration law, especially related to the enforceability of clauses, is subject to frequent, often significant statutory and case law changes. Just as one would consider changes in the relevant tax law or trade regulations, one should do the same for any ADR clause.

Calling in a litigator or arbitration specialist should be second nature, just as consulting with tax or trade specialists. As a painful example, in 2014 the New Jersey Supreme Court in *Atalese v. U.S. Legal Servs. Grp. L.P.*[2] clarified that waivers of the right to a jury or court determination must be set out clearly and unambiguously in an arbitration clause. Since then, countless thousands of lawyer hours and client fees have been spent litigating whether an ADR clause meets the *Atalese* standard, when it might have been easier, certainly for contracts drafted post *Atalese*, to include appropriate waiver language, even if not strictly required for business transactions.[3] While the proliferation of litigation over this issue may be, in part, due to the *Atalese* Court's recognition that there is no magic language that qualifies as a clear and unambiguous waiver of rights, subsequent case law is replete with examples that have been held valid, as well as terms found to be improper resulting in the denial of arbitration.[4]

- **AVOID BOILERPLATE** in the rest of the contract that might affect the client's arbitration rights, or at least be aware of the potential interaction between standard transactional language and arbitration, so one may work around any potential conflict. Jurisdictional, third-party beneficiary, assignment, and integration clauses regularly create issues. For example, in a case between Re/Max fanchisees, a panel of the New Jersey Appellate Division held the defendant franchisee had no right to compel the plaintiff franchisee to arbitrate its claims under the plaintiff's franchise agreement that required mediation and, if unsuccessful, arbitration of disputes between Re/Max franchisees because the contract also contained a clause barring a third-party beneficiary's reliance on the agreement.[5] In another case, the Third Circuit held a plaintiff was not required to arbitrate his claims where the parties' operating agreement contained a jurisdictional clause vesting exclusive jurisdiction of disputes in the federal and state courts of Delaware because the ADR provision applied to disputes "except as otherwise provided in [the agreement]." The Third Circuit reasoned the ADR clause could not be given its plain-meaning effect without rendering the jurisdictional clause superfluous.[6]
- **ALWAYS** be aware of the consequences of the arbitration law, forum and forum rules inserted in the clause. Just as one would not blithely choose New York law to govern the business aspects of the transaction without knowing the effect of General Obligations Law sections, such as interest rates, so one should be aware that choosing New Jersey arbitration law or the Federal Arbitration Act (FAA) may affect the client's rights.[7] Remember that New Jersey's arbitration law is the default absent a specific election (unless there is FAA preemption). Likewise, different arbitration forums may have different or unexpected rules and protocols. An often-overlooked provision of the American Arbitration Association (AAA) Commercial (and other) Rules permits an arbitrator to award legal fees when the parties request fees in their demand—even though not otherwise available. As another example, does the client really want the hearsay or court discovery rules to apply, despite the effect that choice will have on the arbitration—*i.e.*, delay. Where the client's expressed preference for a particular procedure, *e.g.*, federal rules of evidence or discovery, conflicts with the rules of the forum, the arbitrator may have discretion to choose between them unless the choice is restricted.
- **REMEMBER** that even in a B2B transaction the buyer may be considered a "consumer" under the CFA or designated arbitral forum's rules. If so, an unconscionable provision, *e.g.*, limitations on statutory rights or remedies, time-limitations, and certain fee-shifting provisions, may be stricken or (if egregious) result in arbitration being denied by the court or refused by the forum (for disapproved provisions). Such "consumer" B2B Terms and Conditions may be submitted to some forums in advance to be sure they do not run afoul of the forum's protocols.
- **CONSIDER** whether to exclude arbitration for some issues, *e.g.*, litigating collections in small claims court, or to elect the forum's internal appellate panel rules when a party considers requiring a three-person arbitration panel. Consider having only one arbitrator at the first arbitration as it may be more economical and expeditious than three. Designating a non-existent forum, or imposing impossible qualifications for the arbitrator, or an unrealistic timeframe for arbitrator selection can lead to disaster. While an arbitration provision need not designate a specific arbitrator, forum and rules,[8] the failure to do so can lead to court action and unwanted delay. A short sentence providing for jurisdiction and a means of service of a demand, if not indicated in a forum rule, can avoid the loss of one benefit of arbitration: cooperation and informality rather than strict procedural rules.
- **RECOGNIZE** that there remain questions regarding many arbitration issues. For example, most courts have held that the forum's rules control such issues as who—judge or arbitrator—decides arbitrability and jurisdictional issues. Where, however, an ADR clause references a forum's rules as controlling the arbitration, the issue

as to whether that reference itself qualifies as an enforceable delegation provision remains debatable and has not been finally decided. Thus, a full delegation clause may be worth the extra ink.

- **CLARITY** is just as important in drafting the ADR clause as in any other aspect of the document. Although arbitration may be viewed by courts as a favored means of dispute resolution for business disputes, these clauses still are governed by ordinary contract principles (and in the context of consumer contracts, The Plain Language Review Act).[9] Thus, one court held that a two-step clause (mediation then arbitration) failed because the language confused mediation rules with arbitration rules.[10] In other cases, the use of convoluted multi-clause sentences led to confusion—and the entire clause not being enforced.[11]
- **COMPLEXITY** is the enemy. Once a dispute arises, the other party may not be as enthusiastic about arbitration! Therefore, it is imperative to avoid a complex clause with long sentences and clauses; multiple steps; and overly detailed provisions that may give rise to enforcement issues. While complex, long-term joint venture and similar relationships may warrant complex ADR provisions—because the parties have a shared interest in having the relationship continue—most business-to-business contracts and Terms and Conditions do not warrant the same treatment. The major arbitration forums have basic provisions that can be tailored to specific needs without increasing enforcement problems. In *Achey v. Cellco Partnership,*[12] the court threw out a tailored bellwether arbitration process which was used in the consumer context, in lieu of class actions or the forum's own Mass Arbitration Rules, because it was found to be unfair and overly complex. Forum rules are usually drafted with both claimants and respondents at the table, and are issue-tested to avoid the *Achey* problem.
- **DOUBLE-CHECK** the ADR provision's scope language. Using the term "under this agreement" may be interpreted as limiting arbitration to contract disputes and preclude arbitration of statutory or termination issues.[13]
- **MULTIPLE** documents in a transaction, or series of transactions, regularly create problems for drafters. Where a relationship begins with a "master agreement"—whether named as such—the application of the arbitration clause in the standard terms and conditions should be clearly cross-referenced in the subsidiary documents, such as purchase orders, confirmations, or indemnification agreements. Multiple contracts with disparate dispute-resolution provisions may result in the denial of arbitration.[14] Failing to reference the initial "master" or "intake" agreement in the ancillary documents may doom arbitration, where only the first contained the arbitration clause.
- **CONFIDENTIALITY** is considered a benefit of arbitration, but absent specific agreement on confidentiality in the arbitration clause or later agreement, normal (less protective) privacy rules will govern.
- **AWARD:** The ultimate result of the arbitration may require enforcement in court. Therefore, jurisdiction waivers or other protective clauses may be appropriate. Do not be surprised that any court action may require public disclosure of the award; specifying a summary or simple award may assist if that is a problem for the client.

By using a simple checklist, the extra time spent carefully reviewing your arbitration clauses—or updating them as changes in the law occur—will be well worth it. And your client will thank you. ■

Endnotes

1. *Barcon Assocs., Ins. Co. v. Tri-County Asphalt Corp.*, 86 N.J. 179, 187 (1981) (quoting *Korshalla v. Liberty Mut. Ins. Co.*, 154 N.J. Super. 235, 240 (Law Div. 1977)).
2. *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430 (2014).
3. *See Cnty. of Passaic v. Horizon Healthcare Servs., Inc.*, 474 N.J. Super. 498 (App. Div. 2023) (sophisticated parties to a lawyer-negotiated contract exempt from *Atalese*).
4. *See, e.g., Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119 (2020) (valid waiver language found in arbitration clause); *Guc v. Raymours Furniture Co.*, No. A-3452-20, 2022 N.J. Super. Unpub. LEXIS 395 (App. Div. Mar. 11, 2022) (time-limitation provision in arbitration agreement rendered agreement unconscionable and unenforceable).
5. *Castle Realty Mgmt. v. Burbage*, No. A-5399-15T4, 2017 N.J. Super. Unpub. LEXIS 1748 (App. Div. Jul. 13, 2017).
6. *Pei Chuang v. OD Expense LLC*, 742 Fed. Appx. 670 (3d Cir. 2018).
7. *See Strickland v. Foulke Mgmt. Corp.*, 475 N.J. Super. 27, 290 A.3d 1259 (App. Div. 2023) (selection of FAA to govern the arbitration frustrated the parties' intention to impose a strict standard of review over the arbitrator's legal determinations).
8. *See Flanzman*, 244 N.J. at 134-35.
9. N.J.S.A. 56:12-1, et seq.
10. *See Kernahan v. Home Warranty Adm'r of Florida, Inc.*, 236 N.J. 301 (2019).
11. *See NAACP of Camden County East v. Foulke Mgmt. Corp.*, 421 N.J. Super. 404 (App. Div. 2011) (multiple documents with inconsistent arbitration terms; motion to compel denied).
12. *See Achey v. Cellco Partnership*, 475 N.J. Super. 446 (App. Div. 2023).
13. *See Moon v. Breathless Inc.*, 868 F.3d 209 (3d Cir. 2017).

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Attorney for Petitioner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOHN LAPAGLIA, an individual,

Petitioner,

vs.

VALVE CORPORATION, a corporation.

Respondent.

Case No. 3:25-cv-00833-RBM-DDL

Miscellaneous (Arbitration vacatur)

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS FIRST AMENDED PETITION TO VACATE ARBITRATION AWARD

Petitioner John LaPaglia ("Mr. LaPaglia" or "Petitioner") respectfully submits this Opposition to Respondent Valve Corporation's ("Valve" or "Respondent") Motion to Dismiss the First Amended Petition to Vacate Arbitration Award (the "Motion"). Dismissal is unwarranted because this Court has subject matter jurisdiction.

I. PRELIMINARY STATEMENT

Valve's motion to dismiss for lack of subject matter jurisdiction is meritless and represents yet another instance in Valve's ongoing pattern of dilatory litigation tactics. The First Amended Petition (the "Petition") asks this Court to compel a new, fair arbitration on the ground that the arbitrator exceeded his authority and to vacate the improper award. Rather than respond to the merits of Mr. LaPaglia's claims, Valve attempts to manufacture a jurisdictional defect, and in doing so focuses on principles and case law that is unrelated to supplemental and diversity jurisdiction. Valve's reliance on such irrelevant principles and inapposite case law is a transparent attempt to distract from the settled legal standard governing diversity jurisdiction in actions to vacate arbitration awards.

Valve relies heavily on *Badgerow v. Walters*, 596 U.S. 1 (2022), a case addressing the limits of federal question jurisdiction under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 9 and 10. *Badgerow*'s holding, that vacatur actions under the FAA require an additional jurisdictional hook, does not divest this action of jurisdiction because the court has both diversity jurisdiction and supplemental jurisdiction over the claim. As explained below, *Badgerow* has no bearing on the analysis of supplemental jurisdiction, or the jurisdictional amount required under § 1332.

In the Ninth Circuit, the amount in controversy in FAA-related proceedings is measured by the financial stake of the party seeking relief, including any attorneys' fees recoverable under statute or contract. Respondent misconstrues this standard and relies on *Tesla Motors, Inc. v. Balan*, 134 F.4th 558 (9th Cir. 2025), where the petitioner did not seek and had no right to attorneys' fees; rather, the *Tesla* petitioner merely sought to confirm an arbitration award of zero dollars.

This Court has original jurisdiction over Mr. LaPaglia motion to compel arbitration and supplemental jurisdiction over Mr. LaPaglia's motion to vacate the improper arbitration award.

Further, Mr. LaPaglia satisfied the $75,000 jurisdictional threshold, and Valve has not shown otherwise. The Court should recognize Valve's Motion for what it is: precisely the kind of procedural gamesmanship that Congress sought to deter when it permitted antitrust plaintiffs to recover attorneys' fees in the first place. Accordingly, this Court has subject matter jurisdiction and should deny Valve's Motion.

II. FACTUAL AND PROCEDURAL BACKGROUND

Personal Computer ("PC") game sales generate tens of billions of dollars annually, the overwhelming majority of which flows through one company, Valve Corporation.

Valve's share of the PC game market is so great because Valve's online game store, Steam, dominates the distribution of PC games. Just like with music on iTunes, third-party PC game developers provide their games on Steam, and consumers purchase these games on Steam, with Steam functioning as a middleman. But unlike the market for music, with competitor platforms like Spotify, Steam is the only place most PC games can be purchased.

Mr. LaPaglia is a consumer of PC games and filed a claim demanding compensation for the higher prices he paid as a result of Valve's antitrust violations. He also filed a claim for breach of warranty stemming from a defective PC game he had purchased. This claim was unique to Mr. LaPaglia and not shared by the other claimants before Arbitrator Saydah. At the time he brought his dispute, he requested filing fees from Valve. Valve refused, noting that "Valve agrees to reimburse those when its subscribers 'seek $10,000 or less…'" but Mr. LaPaglia "seeks not only compensatory damages, but punitive damages, costs, attorneys' fees, and injunctive relief." Declaration of William Bucher ("Bucher Decl."), Exhibit 4.

The consolidated hearing before Arbitrator Saydah was held in-person in La Jolla, California in December 2024. Dkt. No. 1-2 (Exhibit 1). Without Mr. LaPaglia's consent, Arbitrator Saydah consolidated Mr. LaPaglia's claims with 22 other individuals who alleged antitrust and state law unfair competition claims against Valve. Mr. LaPaglia did not consent to this consolidation at the preliminary hearing.

The resulting consolidated hearing bore little resemblance to the individual, fair arbitration Mr. LaPaglia had contracted for. With so many consumer claims being consolidated, the vast

majority of witnesses were consumers testifying as to their use of Steam. Only 3 of 18 witnesses addressed the antitrust claims—an expert for each side and one witness that Valve chose. Arbitrator Saydah refused to enforce any subpoenas issued for the appearance of Valve employees. During the arbitration, Mr. LaPaglia testified to and presented evidence supporting his claim that Valve sold him a defective PC game and refused to refund it. Valve also cross-examined Mr. LaPaglia on this claim. But Arbitrator Saydah did not address this claim at all in his decision.

Most troublingly, Arbitrator Saydah refused to let Mr. LaPaglia offer into evidence an expert report which established Valve's overwhelming market share. Dkt. No. 1-3 (Exhibit 2). 1700-05; Dkt. No. 1-4 (Exhibit 3), 1780-88. Arbitrator Saydah had originally ordered that the report be produced, Valve refused to produce it, but then Valve was forced to produce the report to Mr. LaPaglia's counsel in a *different* arbitration *during* the final merits hearing before Arbitrator Saydah. Yet, despite previously ordering its production, and although the report was sitting on Mr. LaPaglia's counsel's computer in the arbitration, Arbitrator Saydah refused to let Mr. LaPaglia's counsel offer it into evidence. *Id.*

During breaks in the arbitration, Arbitrator Saydah told the parties he wanted to issue a decision quickly because he had a trip scheduled to the Galapagos islands. Dkt. No. 1-6 (Declaration of William Bucher). Arbitrator Saydah also revealed that he used AI to write articles for him. *Id.* The hearing took place over 10 days, generating a 2,000-page transcribed record. *Id.* The final post-hearing brief was submitted on December 23, 2024, and the Award, at 29 pages long, was issued 15 days later (with Christmas and New Years in the middle) on January 7, 2025, when Arbitrator Saydah was scheduled to leave for the Galapagos. *Id.*

The award bore the hallmarks of AI drafting. For example, it mixes up simple facts, such as when it describes a children's game as one with "mature content like horror elements." When ChatGPT is asked whether the now-public portions of the award were written by a human or AI, ChatGPT concludes the opinion was most likely written by AI.[1] Dkt. No.1-6 (Affidavit of David Jaffe).

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[1] Because ChatGPT is not a secure, closed-loop platform, only a publicly available portion of the award was queried, rather than Mr. LaPaglia's entire award.

III. LEGAL STANDARD

Under § 1367(a), federal courts may exercise jurisdiction over state law claims that are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C.A. § 1367 "A state law claim is part of the same case or controversy when it shares a 'common nucleus of operative fact' with the federal claims and the state and federal claims would normally be tried together." *Bahrampour v. Lampert*, 356 F.3d 969, 978 (9th Cir. 2004).

Although § 1367(c) permits district courts to decline supplemental jurisdiction in certain circumstances—such as when state law claims predominate or when all federal claims are dismissed—the Ninth Circuit has emphasized that the exercise of supplemental jurisdiction is strongly encouraged when the federal and state claims are closely intertwined. *See Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997) (en banc) (noting that courts may decline supplemental jurisdiction only if one of the § 1367(c) factors is met).

In addition, under 28 U.S.C. § 1332, federal courts may exercise diversity jurisdiction over a dispute between citizens of different states with an amount in controversy that exceeds $75,000. To justify dismissal pursuant to Rule 12(b)(1), "it must appear to a legal certainty that the claim is really for less than the jurisdictional amount." *Crum v. Circus Circus Enters.,* 231 F.3d 1129, 1131 (9th Cir. 2000) (internal quotations omitted). As the Ninth Circuit has repeatedly held, the "sum claimed by the plaintiff controls so long as the claim is made in good faith." *Id.*; *see also Farrell v. Verbero Sports, Inc.*, No. 21-CV-01610-GPC-MSB, 2022 WL 4092675, at *2 (S.D. Cal. Jan. 5, 2022). "To justify dismissal of a claim originally filed in federal court on the basis that the alleged amount in controversy is insufficient to confer jurisdiction, the Court applies the 'legal certainty' test, which requires that it appears to a legal certainty that the claim is really for less than the jurisdictional amount." *Hammett v. Sherman*, No. 19CV605-LL-AHG, 2022 WL 4793495, at *3 (S.D. Cal. Sept. 30, 2022) (internal citation omitted). In evaluating whether the amount in controversy requirement is met, "We hold that where an underlying statute authorizes an award of attorneys' fees, either with mandatory or discretionary language, such fees may be included in the amount in controversy." *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998)

The "Ninth Circuit has recently reiterated that when a statute or contract provides for the recovery of attorneys' fees, prospective attorneys' fees must be included in the assessment of the amount in controversy." *Bolger-Linna v. Am. Stock Transfer & Tr. Co., LLC*, No. 3:24-CV-00539-RBM-VET, 2024 WL 4713905, at *8 (S.D. Cal. Nov. 7, 2024) (internal quotations omitted).

IV. THIS COURT HAS SUBJECT MATTER JURISDICTION TO COMPEL ARBITRATION PURSUANT TO FAA § 4 AND SUPPLEMENTAL JURISDICTION TO VACATE THE PRIOR AWARD PURSUANT TO FAA § 10.

A federal court has jurisdiction over a petition to compel arbitration under FAA § 4 if the court would have jurisdiction over the underlying dispute. *See Vaden v. Discover Bank*, 556 U.S. 49, 62 (2009); *see also Badgerow v. Walters*, 596 U.S. 1, 5, 142 S. Ct. 1310, 1314, 212 L. Ed. 2d 355 (2022) (same). Thus, when an arbitration arises out of a dispute involving alleged violations of the Sherman Act, 15 U.S.C. § 2—a federal statute that provides original federal question jurisdiction under 28 U.S.C. § 1331—federal courts would have original jurisdiction over the motion to compel arbitration under § 4 of the FAA. *See, e.g.*, *United Food & Com. Workers Loc. Union Nos. 137, 324, 770, 899, 905, 1167, 1222, 1428, & 1442 v. Food Emps. Council, Inc.*, 827 F.2d 519, 523 n. 4 (9th Cir. 1987) (noting that "federal jurisdiction exists" when adjudicating disputes under the Sherman Act).

The motion to vacate the prior arbitration award, though brought under FAA § 10, falls within the Court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a). The motion to vacate is not a separate, freestanding action; it arises from the same underlying arbitration proceeding that Mr. LaPaglia now seeks to reopen through the motion to compel. Both motions—to vacate and to compel—are functionally intertwined and logically sequenced parts of the same dispute.

In *Badgerow v. Walters*, the Supreme Court clarified that federal jurisdiction over FAA § 9 and § 10 motions must be based on the application itself, not merely the underlying substantive dispute. 596 U.S. 1 (2022). But *Badgerow* did not involve a motion to compel arbitration under FAA § 4, and notably, the Court left untouched the "look-through" approach authorized for § 4 motions in *Vaden v. Discover Bank*, 556 U.S. 49 (2009). Because this Court has original jurisdiction over the § 4 motion under *Vaden*, it may exercise supplemental jurisdiction over the

related § 10 motion without contradicting the holding in *Badgerow*.

Moreover, declining to consider the § 10 motion while adjudicating the § 4 motion would undermine the goals of judicial economy and risk inconsistent results. The FAA is designed to offer an integrated, efficient framework for courts to supervise arbitration proceedings—not to splinter related motions across multiple forums or procedural tracks. Here, the motion to compel and the motion to vacate are not merely connected in time or subject matter; they are inextricably linked components of the same underlying dispute. Forcing the parties to litigate them separately would create unnecessary procedural fragmentation and could undermine coherent judicial oversight. Exercising supplemental jurisdiction over the § 10 motion ensures that the Court can resolve the parties' arbitration-related disputes in a unified, orderly manner, consistent with both the structure of the FAA and the principles underlying § 1367(a).

Accordingly, this Court has subject matter jurisdiction over the motion to compel arbitration under § 4 and should exercise supplemental jurisdiction over the motion to vacate under § 10.

V. THE COURT HAS DIVERSITY JURISDICTION TO VACATE THE ARBITRATION AWARD AND COMPEL REHEARING

In addition to original and supplemental jurisdiction, this Court has subject matter jurisdiction to adjudicate the Petition under § 1332(a). The parties are citizens of different states, and the Petition expressly states that "the amount at stake includes the attorney's fees" and "easily exceeds $75,000." Dkt. 7 at 2. Valve does not dispute that diversity of citizenship is properly alleged. Dkt. 11-1 at 11. Instead, Valve argues only that the jurisdictional amount has not been met. *Id*. To support this argument, Valve misstates the law by contending that the attorneys' fees sought by Mr. LaPaglia should not be included in the Court's assessment of the amount in controversy. *Id*. Seemingly recognizing the weakness of this position, Valve further argues that the attorneys' fees sought are not reasonable simply because they exceed the underlying damages. As explained below, both arguments are without merit.

A. The Amount in Controversy for Diversity Jurisdiction Purposes Includes Statutorily Mandated Attorneys' Fees.

As set forth above and in the Petition, the amount in controversy for diversity jurisdiction is the total amount sought by the petitioner. The Ninth Circuit consistently holds that when attorneys' fees are authorized by contract or statute, they are properly included in the calculation of the amount in controversy under 28 U.S.C. § 1332. *See, e.g.*, *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155 (9th Cir. 1998) ("We hold that where an underlying statute authorizes an award of attorneys' fees, either with mandatory or discretionary language, such fees may be included in the amount in controversy."); *Fritsch v. Swift Transp. Co. of Ariz., LLC*, 899 F.3d 785, 794 (9th Cir. 2018) (the Ninth Circuit has "long held (and reiterated in *Chavez*) that attorneys' fees awarded under fee-shifting statutes or contracts are included in the amount in controversy.").

In seeking dismissal of the Petition, Valve contends that the amount in controversy is zero dollars—the amount of the arbitrator's award—and asserts that under *Badgerow v. Walters*, 596 U.S. 1 (2022) and *Tesla Motors, Inc. v. Balan*, 134 F.4th 558 (9th Cir. 2025), this Court may not "look through" the Petition to consider attorneys' fees. Dkt. 11-1 at 12 (internal quotations omitted). However, this argument contradicts Valve's position at the inception of this dispute and misstates both the legal standard and the holdings of the cited cases.

First, Valve initially denied Mr. LaPaglia's request for reimbursement of filing fees at the outset of this dispute, stating that "Valve agrees to reimburse those when its subscribers 'seek $10,000 or less…'" but Mr. LaPaglia "seeks not only compensatory damages, but punitive damages, costs, attorneys' fees, and injunctive relief. That plainly amounts to more than $10,000 per demand." Bucher Decl., Exhibit 4. By acknowledging that the amount in controversy includes attorneys' fees, Valve effectively conceded their inclusion in the valuation of the dispute. Now, however, Valve reverses its position, arguing that the amount Mr. LaPaglia seeks cannot include such fees.

Second, *Badgerow* clarified that Section 10 of the FAA does not, on its own, confer federal question jurisdiction, but federal courts may still adjudicate motions to vacate arbitration awards that have an independent jurisdictional basis. Importantly, this holding is limited to ***federal***

question jurisdiction under § 1331. The Court reaffirmed that diversity jurisdiction remains a valid and independent basis for subject matter jurisdiction, and its decision does not, therefore, disturb the well-established principles governing ***diversity*** jurisdiction under § 1332. *Id.* at 9 (noting that an "obvious place" to look for an "independent jurisdictional basis" would be in the petition and whether "it shows that the contending parties are citizens of different States (with over $75,000 in dispute)").

Thus, where, as here, the face of the Petition makes clear that the parties are "diverse" and the "attorney's fees at stake easily exceeds $75,000," diversity jurisdiction exists. Dkt. 1 at 1-2. Courts in this Circuit have continued to recognize that attorneys' fees may be included in the amount in controversy calculation following *Badgerow*. For example, in *Cox Wootton Lerner, Griffin & Hanson LLP v. Ballyhoo Media Inc.*, the court found that "under *Badgerow*, Cox LLP's application sufficiently alleges diversity jurisdiction" where "the petition states that the ***attorneys' fees and costs*** to be awarded are for a total of $496,583.15, exceeding the $75,000 amount in controversy requirement." No. 22-CV-00534-CAS, 2022 WL 2132126, at *3 (C.D. Cal. June 13, 2022) (emphasis added). That court confirmed that including the attorneys' fees in its calculation of the jurisdictional amount does not require it to "look at the underlying substantive dispute," or 'look through' the petition. *Id.*

The jurisdictional analysis is no different in *Cox* simply because a different party prevailed in the underlying arbitration and the attorneys' fees sought were awarded. What matters for jurisdictional purposes is not the value of the arbitration award itself, but what the petitioner is seeking from the court—in this case, an award of damages and attorneys' fees. Federal Courts have repeatedly held that the amount in controversy is the amount sought by a plaintiff. *Theis Rsch., Inc. v. Brown & Bain*, 400 F.3d 659, 664 (9th Cir. 2005) ("The question presented to us thus boils down to whether the $200 million Theis sought to recover by its complaint is the amount in controversy under 28 U.S.C. § 1332(a), or whether the amount in controversy must be measured by the zero dollar arbitration award Theis sought to vacate. We are satisfied that the amount in controversy is the amount Theis sought to recover by its complaint."); *Halliburton Energy Servs., Inc. v. Foord*, No. CV1910481PAMAAX, 2020 WL 2124030, at *3 (C.D. Cal. Jan. 27, 2020)

(finding that the amount sought in the underlying proceeding, and not a $0 arbitration award, "determines the amount in controversy"); *Peraton Gov't Commc'ns, Inc. v. Hawaii Pac. Teleport LP*, No. 21-15395, 2022 WL 3543342, at *1 (9th Cir. Aug. 18, 2022) (reaffirming *Theis* post-*Badgerow*, noting that "[i]n *Theis*, we held that the amount in controversy was 'the amount [Plaintiff] sought to recover by its complaint,' not 'the zero dollar arbitration award [Plaintiff] sought to vacate.' *Id.* at 664. Here, the amount at stake in the underlying litigation is at least approximately $1.5 million, the amount that Peraton sought to confirm in the district court. Thus, the amount in controversy was sufficient to establish diversity jurisdiction."); *Schulcz v. Rocket Mortg., LLC*, No. 1:24-CV-00189-SAB, 2025 WL 926208, at *2 (E.D. Cal. Mar. 27, 2025) ("The amount in controversy is 'simply an estimate of the total amount in dispute,' and may include compensatory damages, punitive damages, and attorneys' fees when authorized by statute."). Thus, in the context of a motion to confirm or vacate an arbitration award pursuant to Sections 9 and 10 of the FAA, the amount in controversy is the amount sought by the petitioner and not the amount of the underlying arbitration award. Creating a new rule that makes the arbitration award the measure of the jurisdictional amount for diversity jurisdiction would require overturning decades of case law and would have the bizarre effect of permitting losing defendants in antitrust arbitrations access to federal courts while foreclosing that same option for losing plaintiffs.

Finally, *Tesla* does not overturn the well-established Ninth Circuit precedent recognizing that statutory or contractually required attorneys' fees are properly included in the amount in controversy for purposes of diversity jurisdiction. *Tesla* involved a petition to confirm an arbitration award of zero dollars where the petitioner did not seek attorneys' fees. As noted above, the relevant inquiry in determining the jurisdictional amount is the amount placed in controversy by the plaintiff or petitioner. In *Tesla*, that amount was zero dollars. Here, by contrast, the Petitioner seeks both damages and attorneys' fees, which together satisfy the amount in controversy requirement.

Valve's critique of the cases cited in the Petition is misguided. *Fritsch v. Swift Transp. Co. of Ariz., LLC* establishes that when attorneys' fees are recoverable by statute, they are properly included in determining the amount in controversy for purposes of diversity jurisdiction. 899 F.3d

785, 793 (9th Cir. 2018). And *McCluskey v. Airbnb, Inc.* confirms that the amount in controversy is the amount sought by the petitioner, not the amount of the arbitration award. No. CV 19-9613 PA (PJWX), 2020 WL 2542616, at *3 (C.D. Cal. Jan 7, 2020). Neither *Fritsch* nor *McCluskey* has been abrogated by *Badgerow* or *Tesla*. In fact, as the court held in *Cox Wootton Lerner, Griffin, & Handson LLP v. Ballyhoo Media Inc*., including attorneys' fees in the assessment of the amount in controversy is entirely consistent with *Badgerow* and *Tesla*. 2022 WL 2132126, at *3.

In addition, *Costco Wholesale Corp. v. Hoen* supports the proposition that fee shifting is mandatory under 15 U.S.C. § 26, which, under *Fritsch*, means that attorneys' fees are properly included in an assessment of the amount in controversy for diversity jurisdiction cases. 538 F.3d 1128, 1136 (9th Cir. 2008). And *Shannon Assocs. LLC v. MacKay* simply reiterates that, for purposes of diversity jurisdiction, the amount in controversy is the amount at stake—not the arbitration award—regardless of the form that stake takes in a given case. No. C 09-4184 CW, 2009 WL 4756569, at *2 (N.D. Cal. Dec. 8, 2009). These cases are applicable and have not been overruled by *Badgerow* or *Tesla*.

On the other hand, the cases cited by Valve do not address whether attorneys' fees are included for the purposes of the determining the amount in controversy. For example, in *NantKwest, Inc. v. Merck KGaA*, rather than seeking damages and statutorily mandated attorneys' fees, the plaintiff sought only injunctive and declaratory relief. No. 19-CV-1266-L-MSB, 2020 WL 13579225 (S.D. Cal. Feb. 10, 2020). The court dismissed the action, noting that the "collateral effect" following adjudication cannot satisfy the amount in controversy requirement. *Id.* at *2. In *Kamath v. PayPal, Inc.*, the court dismissed the action because the "factual allegations are completely divorced from" the requested $10.5 million damage award sought. No. 23-CV-03636-NC, 2023 WL 9233484, at *2 (N.D. Cal. Nov. 6, 2023), *report and recommendation adopted*, No. 5:23-CV-03636-EJD, 2023 WL 9233496 (N.D. Cal. Dec. 1, 2023). As a result, the court believed the amount sought was not alleged in good faith. Similar reasoning applied in *Poorsina v. Wells Fargo Bank, N.A*., where the court found that the complaint lacked facts supporting the claimed damages or connecting the harm to the defendant's conduct. No. 21-CV-05098-DMR, 2021 WL 4133866, at *5 (N.D. Cal. Sept. 10, 2021. Notably, none of these cases addressed whether

attorneys' fees made available by statute should be included in calculating the amount in controversy for diversity jurisdiction in petitions to vacate an arbitration award.

B. Mr. LaPaglia has Sufficiently Alleged the Amount in Controversy Exceeds the Jurisdictional Threshold.

The amount in controversy far exceeds the $75,000 threshold required for diversity jurisdiction. Valve argues, without support, that attorneys' fees of at least $65,199.84 could not be reasonable because it exceeds the total damages sought. Dkt. 11-1 at 15. That, however, is not the test for reasonableness, in antitrust cases or otherwise. "A court generally determines a reasonable fee by calculating the 'lodestar' amount… which is 'the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'" *Nerio Mejia v. O'Malley*, 120 F.4th 1360, 1364 (9th Cir. 2024) (internal citations omitted); *see also In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941–42 (9th Cir. 2011) (same). This approach reflects the principle that fee awards should compensate for the actual work required to litigate complex antitrust claims, regardless of the monetary value of the damages sought.

This methodology ensures that prevailing plaintiffs in antitrust actions are fully compensated for the time and effort required to prosecute claims that serve significant public interests. The lodestar figure may then be adjusted upward or downward based on various factors, including the complexity of the case, the results obtained, and the public benefit conferred. For example, in *U.S. Airways, Inc. v. Sabre Holdings Corp.*, a jury issued a verdict of $1, trebled to $3, for defendant's antitrust violations. 11 Civ. 2725 (LGS), 2023 WL 3749995 (S.D.N.Y. June 1, 2023). The court then adopted the magistrate's recommendation that the plaintiff's petition for $139,183,723.42 in attorneys' fees be granted, on a preliminary basis, subject to potential downward adjustment following a hearing.[2] Courts do not reduce fee awards solely because they exceed the damages awarded or sought. *See Knutson v. Daily Rev., Inc.*, 479 F. Supp. 1263, 1268 (N.D. Cal. 1979) (noting that a rule that would limit attorneys' fees in antitrust cases to a

[2] The case settled before the court ruled on how much, if any, the petitioner's request for $139,183,723.42 should be reduced.

proportion of the damages awarded "may not comport with the legislative purpose underlying Section 4 of the Clayton Act of encouraging the private vindication and enforcement of the antitrust laws" and noting that "[w]here a case involves relatively low monetary damages but nevertheless contains potentially important legal precedent, the percentage approach may offer insufficient incentive for the private bar to prosecute such litigation").

Tying attorneys' fees to the amount of damages sought would undermine the enforcement of antitrust laws by creating a perverse incentive for defendants to prolong litigation and drive up costs. If fee recovery were constrained by the size of the damages claim, well-resourced defendants could exploit this disparity by engaging in scorched-earth tactics, knowing that plaintiffs with limited financial resources would be deterred from pursuing valid claims. This would effectively insulate anticompetitive conduct from accountability, particularly in cases involving injunctive relief or market harms that are difficult to quantify but costly to prove. The lodestar approach prevents this strategic abuse by ensuring that prevailing plaintiffs can recover fees commensurate with the effort necessary to vindicate important statutory rights, regardless of the ultimate damages award.

In this case, Valve has not demonstrated to a legal certainty, as it must to prevail on a motion to dismiss for lack of subject matter jurisdiction, that the amount in controversy is less than the jurisdictional threshold. Put another way, attorneys' fees of at least $65,200 are entirely reasonable and sought in good faith by Mr. LaPaglia. The matter has been pending for over eighteen months, involves complex antitrust issues, and culminated in a two-week long hearing. Dkt. 11-1 at 7. Moreover, Valve cannot credibly argue that such fees are unreasonable. Valve has retained Skadden Arps, one of the most expensive law firms in this country, to represent its interests in this matter. Not only has Valve spared no expense in defending this matter, but its counsel has consistently prolonged the proceedings, including by manufacturing a jurisdictional defect and engaging in unnecessary motion practice before addressing the actual merits of the Petition. Given the scope and duration of the arbitration, as well as the firm Valve has retained and the litigation tactics employed by that firm, it is highly likely that Valve's own legal fees far exceed those incurred by Mr. LaPaglia.

VI. CONCLUSION

For the foregoing reasons, this Court has supplemental jurisdiction over the FAA § 10 motion to vacate because it has original jurisdiction over the related motion to compel arbitration under FAA § 4. In addition, this Court independently has diversity jurisdiction over the entire Petition because the parties are diverse and the amount in controversy is over $75,000. Accordingly, this Court has subject matter jurisdiction and should deny Valve's Motion.

Dated: July 14, 2025

Respectfully submitted,
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO

JOHN LAPAGLIA, an individual,

Petitioner,

v.

VALVE CORPORATION, a corporation,

Respondent.

NO.: 3:25-cv-00833-RBM-DDL

RESPONDENT'S REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED PETITION TO VACATE ARBITRATION AWARD

Judge: Hon. Ruth Bermudez Montenegro

Date: July 28, 2025
Time: 9:30 a.m.
Courtroom: 5B, 5th Floor

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I. PRELIMINARY STATEMENT

Petitioner's Opposition to Valve's motion to dismiss the "Amended Petition" is based on three demonstrably false premises:

First, Petitioner wrongly suggests that he has brought a "related motion to compel arbitration under FAA § 4" (ECF No. 16 at 14) that provides this Court with subject matter jurisdiction—specifically, federal question and supplemental jurisdiction—over his Amended Petition to vacate an arbitral award under § 10 of the FAA. That is nonsense: Petitioner has brought no motion to compel under § 4. His Amended Petition does not mention § 4, and it alleges none of the requirements for relief under § 4. Nor could it: A prerequisite for relief under § 4 is that the respondent failed, neglected, or refused to arbitrate. Here, Petitioner acknowledges that Valve arbitrated (under a reservation of rights) and that the arbitration is complete. Notably, the King County Superior Court in Washington recently confirmed the very award Petitioner seeks to vacate. *See Valve Corp. v. LaPaglia*, No. 25-2-06159-1 SEA (Wash. Super. Ct. June 30, 2025).[1] Petitioner concedes this Court lacks federal question jurisdiction but for his nonexistent § 4 motion. *See Badgerow v. Walters*, 596 U.S. 1 (2022). The Court lacks supplemental jurisdiction for the same reason: there is no § 4 motion that could be the tether for the exercise of supplemental jurisdiction. *See Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 805 (9th Cir. 2001).

Second, the Opposition wrongly contends that Valve has argued that attorneys' fees are not included in assessing the amount in controversy for diversity purposes. (ECF No. 16 at 7, 9.) Not so. Rather, Valve pointed out that the amount in controversy must be assessed based on the face of the Amended Petition—*i.e.*, looking at the relief sought from this Court. It *cannot* be based on (i) the relief Petitioner sought in the parties' underlying arbitration, or (ii) the relief that the Petitioner might intend to seek if the arbitration were reopened, whether that relief consists of damages, attorneys' fees, or anything else. This is

[1] Despite actively prosecuting this action in the wrong forum, Petitioner never appeared in the action Valve filed to confirm the award in Washington state court—a court that had jurisdiction—or opposed Valve's petition to confirm in that court.

because the Court cannot "look through" the Amended Petition to the parties' underlying arbitration to assess its diversity jurisdiction. *See Tesla Motors, Inc. v. Balan*, 134 F.4th 558, 561 (9th Cir. 2025). Accordingly, the Court should not consider Petitioner's claim for attorneys' fees as part of the amount in controversy—not because attorneys' fees are specifically exempted from consideration, but because Petitioner sought them in arbitration, not from this Court. The Opposition fails to address this well-settled rule.

Third, the Opposition wrongly asserts that Petitioner has sought an award of damages and attorneys' fees from this Court, which Petitioner argues must be taken into account in assessing the amount in controversy. (ECF No. 16 at 9, 10.) In fact, the only relief Petitioner has sought from this Court is that the Court vacate a zero-dollar arbitral award and reopen arbitration proceedings. (ECF No. 11-1 at 12.) If Petitioner receives damages or attorneys' fees, it will be from a hypothetical future arbitrator, not from this Court. But the Court cannot "look through" the Amended Petition to any underlying arbitration to assess jurisdiction. So what could happen in a hypothetical future arbitration is irrelevant to this Court's jurisdiction. *See Tesla*, 134 F.4th at 561.

The Opposition thus fails to demonstrate that this Court has subject matter jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("It is to be presumed that a cause lies outside [the federal court's] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." (citation omitted)). Therefore, the Court should dismiss the Amended Petition.

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION

A. The Petition Does Not Seek to Compel Arbitration Under § 4 of the FAA, So § 4 Cannot Provide a Basis for Federal Question Jurisdiction

As Valve's Motion shows, this Court lacks federal question jurisdiction. (ECF No. 11-1 at 9-11.) Petitioner seeks to invoke federal question jurisdiction by arguing that "[a] federal court has jurisdiction over a petition to compel arbitration under FAA § 4 if the court would have jurisdiction over the underlying dispute," and noting that the "underlying dispute" in arbitration included claims under the federal Sherman Act. (ECF No. 16 at 6:8-9.) But § 4 does not create a basis for jurisdiction here.

While the Opposition repeatedly references "the § 4 motion" (*e.g.*, ECF No. 16 at 6-7), the Amended Petition is plainly not a "§ 4 motion." The Amended Petition does not reference § 4 or seek relief under § 4, let alone allege § 4 as a basis for jurisdiction. (*See* ECF No. 11-1 at 9-10; *see also* ECF No. 7 at 2-3 (identifying only diversity as basis for jurisdiction).) Nor is the Amended Petition called, "Petition to Compel Arbitration." Rather, the only FAA provision that the Amended Petition mentions is § 10. Section 10 permits the Court to vacate an arbitration award under certain circumstances and "direct a rehearing by the arbitrators" if certain criteria are met. 9 U.S.C. § 10(a), (b). That is the relief Petitioner seeks here. (ECF No. 7 ("First Amended Petition to Vacate Arbitration Award and to Reopen Arbitration for a Rehearing"); *id.* at 1, 11.)

Nor does the Amended Petition seek to compel arbitration within the meaning of § 4. Section 4 of the FAA provides that a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate" may petition a federal court to direct arbitration to "proceed in the manner provided for in [the parties' arbitration] agreement." 9 U.S.C. § 4. "By its plain terms," § 4 "conditions a district court's authority to compel arbitration upon a showing that a party has failed, neglected, or refused to arbitrate." *Jones v. Starz Ent., LLC*, 129 F.4th 1176, 1181 (9th Cir. 2025). The Amended Petition does not allege that Valve "failed, neglected, or refused to arbitrate" or ask the Court to compel arbitration on that basis. It alleges the opposite—that the parties engaged in a full arbitration process, culminating in the arbitrator issuing a final award. (ECF No. 7 at 4.)

While the Amended Petition asks the court to "compel the arbitration be conducted individually and not in a consolidated fashion" (ECF No. 7 at 2), this is not a request under § 4. The Ninth Circuit has definitively held that § 4 is not a proper vehicle to challenge the consolidation of arbitration proceedings and compel individual arbitration. *See Jones*, 129 F.4th at 1180. In *Jones*, the plaintiff brought a motion to compel individual arbitration under § 4, arguing that, because the arbitration provider had consolidated thousands of individual arbitrations, the defendant had "refused to arbitrate individually with [the plaintiff] as mandated by" the parties' agreement. *Id.* at 1181. The court rejected the motion,

holding that the plaintiff failed to "make the threshold showing required under § 4" because the defendant "has engaged in the arbitration process at every step of the way." *Id.* at 1181, 1183. The Amended Petition fails to clear that same threshold.

Section 4 is therefore wholly inapplicable here. Petitioner appears to be trying to further amend his Amended Petition through his Opposition. This is inappropriate. *See Birch v. Family First Life, LLC*, 2023 WL 2940020, at *7 (S.D. Cal. Apr. 13, 2023) ("It is axiomatic that the complaint may not be amended by briefs in opposition to a motion to dismiss." (citation omitted)); *Jackson v. Loews Hotels, Inc.*, 2019 WL 6721637, at *3 (C.D. Cal. July 24, 2019) (same and granting motion to dismiss for lack of subject matter jurisdiction). The Amended Petition raises no issue of federal law, and this Court lacks federal question jurisdiction over it. (*See* ECF No. 11-1 at 9-11.)

B. The Court Does Not Have Supplemental Jurisdiction Over Petitioner's § 10 Petition

While § 10 of the FAA authorizes a party to an arbitration agreement to petition a federal court for relief, that section "does not itself create jurisdiction" over the dispute. *Badgerow*, 596 U.S. at 4. "Rather, the federal court must have . . . an 'independent jurisdictional basis' to resolve the matter." *Id.*; *see also Tesla*, 134 F.4th at 560. The "independent jurisdictional basis" cannot arise from the claims at issue in the underlying arbitration; it must appear on the face of the petition itself. *Badgerow*, 596 U.S. at 4-5. Petitioner's Opposition concedes that this is the legal standard. (ECF No. 16 at 6.)

Petitioner's attempt to invoke this Court's supplemental jurisdiction as an "independent jurisdictional basis" is without merit. (ECF No. 16 at 8.) Section 1367 provides for supplemental jurisdiction over "claims that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). "The statute's plain language makes clear that supplemental jurisdiction may only be invoked when the district court has a hook of original jurisdiction on which to hang it." *Herman*, 254 F.3d at 805 ("supplemental jurisdiction cannot exist without original jurisdiction"). Because, as shown *supra* Part II.A, the Petition does not, and cannot, seek relief under § 4, the Court lacks original jurisdiction

over the Amended Petition. It therefore also lacks supplemental jurisdiction.

Because the Court has no supplemental jurisdiction, it need not consider Petitioner's contentions about why the Court should invoke supplemental jurisdiction under § 1367(c). (ECF No. 16 at 5, 7.) Those considerations apply only if the Court has discretion to exercise supplemental jurisdiction in the first place, and here it does not. *See Herman*, 254 F.3d at 806 (distinguishing between discretionary power to decline supplemental jurisdiction under § 1367(c) and lacking supplemental jurisdiction under § 1367(a) and concluding, "if the court dismisses for lack of subject matter jurisdiction, it has no discretion and must dismiss all claims").

C. This Court Lacks Diversity Jurisdiction

1. The Amount in Controversy Must Be Assessed on the Face of the Petition, Not By Looking to Any Underlying Arbitration

As Valve's Motion demonstrates, *Badgerow* requires that the amount in controversy be based on the face of the Petition, not an amount at issue in an underlying arbitration. (ECF No. 11-1 at 12-13.)[2] Petitioner argues that *Badgerow* is "limited to *federal question* jurisdiction under § 1331." (ECF No. 16 at 8-9.) That is not true. In *Tesla*, the Ninth Circuit recognized that *Badgerow* applies in diversity cases. *See Tesla*, 134 F.4th at 561. Nor is the rationale of *Badgerow* so limited: *Badgerow* based its holding on the plain language of § 10, concluding the statutory text did not permit a court to "look through" to the underlying arbitration to assess jurisdiction. *Badgerow*, 596 U.S. at 12. There is no reason that this rule derived from the language of § 10 would apply only to federal question cases.

Petitioner argues that *Badgerow* "reaffirmed that diversity jurisdiction remains a valid and independent basis for subject matter jurisdiction." (ECF No. 16 at 9.) *Badgerow* stated that diversity jurisdiction would exist under § 10 if "the face of the application itself" shows the diversity requirements satisfied. *Badgerow*, 596 U.S. at 9. Nothing in *Badgerow*

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[2] Petitioner argues that, in the underlying arbitration, Valve stated that Petitioner sought "more than $10,000" in his arbitration demand, when considering attorneys' fees and other items of relief Petitioner sought. (ECF No. 16 at 8.) This is irrelevant. "[M]ore than $10,000" is not the same as more than $75,000, and, as demonstrated in the Motion and herein, the amount in controversy in the underlying arbitration does not determine the amount in controversy before this Court.

suggests that diversity jurisdiction could be assessed for a § 10 petition by "looking through" to the underlying arbitration. In fact, *Badgerow* says the opposite. *Id.* at 4.

Petitioner argues that "attorneys' fees may be included in the amount in controversy calculation following *Badgerow*." (ECF No. 16 at 9.) But the amount in controversy, including any attorneys' fees, must be assessed based on the relief the Petition seeks from the court, not the relief sought in the underlying arbitration or to be sought in a hypothetical future arbitration (whether that arbitral relief is damages, attorneys' fees, or anything else). (ECF No. 11-1 at 12.) That distinction is fatal to Petitioner's argument.

Indeed, *Cox Wootton Lerner, Griffin & Handson LLP v. Ballyhoo Media Inc.*, 2022 WL 2132126, at *2-3 (C.D. Cal. June 13, 2022), on which Petitioner seeks to rely (ECF No. 16 at 9), illustrates that distinction. In *Cox*, the court concluded that the "face of the petition has established an independent basis for subject-matter jurisdiction" where the petition sought to confirm an arbitral award awarding $496,583.15 in attorneys' fees. *Id.* at 4. The court's jurisdiction was not based on what the petitioner sought in arbitration or might seek in a future arbitration; it was based on the value of the existing arbitral award the court was asked to confirm. Other courts have followed the same approach. *See Floyd v. ELCO Admin. Servs. Co.*, 2025 WL 1507095, at *3-4 (N.D. Cal. May 27, 2025) (court could not "look through" the petition to amounts plaintiff could have recovered on his counterclaims that were rejected in arbitration because "this Court need only determine if the *final amount granted in the arbitration award* exceeds the amount in controversy requirement" (emphasis added)).

None of the cases that Petitioner cites supports a different result. *See, e.g.*, *Theis Rsch., Inc. v. Brown & Bain*, 400 F.3d 659, 664 (9th Cir. 2005) (pre-*Badgerow*, plaintiff contemporaneously brought not only a petition to vacate a zero-dollar arbitral award, but also a complaint seeking $200 million in damages for substantially the same claims asserted in the underlying arbitration); *Halliburton Energy Servs., Inc. v. Foord*, 2020 WL 2124030, at *3 (C.D. Cal. Jan. 27, 2020) (pre-*Badgerow* case incorrectly considering amount sought in underlying arbitration); *Peraton Gov't Commc'ns, Inc. v. Hawaii Pac.*

Teleport LP, 2022 WL 3543342, at *1 (9th Cir. Aug. 18, 2022) (confirming arbitral award of attorneys' fees and costs of at least $1.5 million); *Schulcz v. Rocket Mortg., LLC*, 2025 WL 926208, at *2 (E.D. Cal. Mar. 27, 2025) (addressing amount in controversy in an action not involving petition under § 10).

Petitioner argues that the rule established by *Badgerow* "would have the bizarre effect of permitting losing defendants in antitrust arbitrations access to federal courts while foreclosing that same option for losing plaintiffs." (ECF No. 16 at 10.) It would not. In the case of the "losing defendants," the prevailing plaintiffs could also invoke federal jurisdiction to confirm the award, assuming it exceeded $75,000. In the case of "losing plaintiffs," the prevailing defendants also could not invoke federal jurisdiction to confirm the zero-dollar award. *See Tesla*, 134 F.4th at 561. The availability of federal jurisdiction depends not on whether the party is a plaintiff or defendant, but on whether the amount in controversy is met based on the face of the petition. That the principle is even-handed is demonstrated by this very case: Valve did not go to federal court to confirm the zero-dollar awards in its favor, but sought (and obtained) confirmation of those awards in state court.

In any event, such policy-based arguments have no place in the Court's jurisdictional analysis. In *Badgerow*, the Court rejected arguments that it should permit "looking through" to the underlying arbitration for § 10 petitions because it would provide a "uniform jurisdictional rule" and avoid "'clos[ing] the federal courthouse doors to many' post-arbitration motions." *See Badgerow*, 596 U.S. at 16. The Court concluded, "It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction." *Id.* (citation omitted).

2. The Relief Sought on the Face of the Petition Does Not Satisfy the Amount in Controversy Requirement

The relief sought on the face of the Amended Petition does not satisfy the amount in controversy requirement. As Valve's Motion explains, the entirety of the relief that Petitioner seeks from this Court is to vacate a zero-dollar arbitration award and to reopen arbitration proceedings. (ECF No. 11-1 at 12-13.) This is not sufficient to establish jurisdiction. *See Tesla*, 134 F.4th at 561 ("On its face, a petition to confirm a zero-dollar

award cannot support the amount in controversy requirement."); *Floyd*, 2025 WL 1507095, at *4 (post-*Telsa* and *Badgerow*, the question is "if the final amount granted in the arbitration award exceeds the amount in controversy requirement").

Petitioner seeks to distinguish *Tesla*, arguing that it "involved a petition to confirm an arbitration award of zero dollars where the petitioner did not seek attorneys' fees." (ECF No. 16 at 10.) But the same is true here: Petitioner does not seek attorneys' fees *from this Court.* He seeks only that the Court reopen the arbitration hearing so Petitioner can seek fees from an arbitrator in some future arbitration. (ECF No. 7 at 2, 12.) To base subject matter jurisdiction on that hypothetical future arbitration would be to "look through" the Petition to the underlying arbitration to assess that jurisdiction—something both *Badgerow* and *Tesla* have made clear the Court may not do. (ECF No. 11-1 at 12-13.) The Opposition ignores this principle.

Much of Petitioner's Opposition is devoted to the unremarkable proposition that "when attorneys' fees are authorized by contract or statute," they count toward the amount in controversy requirement. (ECF No. 16 at 8.) But that is irrelevant here: the statute the Amended Petition invokes—the FAA—does not authorize attorneys' fees; the Amended Petition does not invoke a contract permitting attorneys' fees; and Petitioner does not seek an award of attorneys' fees from this Court. None of the cases Petitioner cites involved either the FAA or a plan to seek attorneys' fees from a hypothetical future arbitrator rather than from the Court. *See, e.g.*, *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155-56 (9th Cir. 1998) (addressing California statute permitting court to award attorneys' fees, not FAA); *Bolger-Linna v. Am. Stock Transfer & Tr. Co.*, 2024 WL 4713905, at *8 (S.D. Cal. Nov. 7, 2024) (addressing attorneys' fees requested pursuant to Section 496(c) of the Penal Code, not FAA); *Fritsch v. Swift Transp. Co. of Ariz.*, 899 F.3d 785, 794 (9th Cir. 2018) (addressing jurisdiction under Class Action Fairness Act, not the FAA).[3]

[3] The authorities cited in the Amended Petition do not help Petitioner. (ECF No. 16 at 10-11.) He argues that *Fritsch*, 899 F.3d at 794, shows that "when attorneys' fees are recoverable by statute," they are included in the amount in controversy. True, but irrelevant: Petitioner seeks relief under the FAA, which does not provide for attorneys' fees. Petitioner *(cont'd)*

Petitioner argues that "[w]hat matters for jurisdictional purposes" is "what the petitioner is seeking from the court—in this case, an award of damages and attorneys' fees." (ECF No. 16 at 9-10.) Again, Petitioner is seeking neither an award of damages nor attorneys' fees from this Court. The only relief Petitioner seeks from this Court is to vacate the zero-dollar award and reopen the arbitration. Any award of damages or attorneys' fees would be granted, if at all, not by the Court, but by some future arbitrator. To consider such hypothetical future fees would be to impermissibly "look through" to the underlying arbitration. (ECF No. 11-1 at 12-13.)

3. Petitioner Cannot Be Awarded Enough Attorneys' Fees to Meet the Jurisdictional Threshold in Any Event

Even if this Court could consider attorneys' fees hypothetically available in an arbitration for jurisdictional purposes—which it cannot—Petitioner has failed to establish that the amount of attorneys' fees that might potentially be awarded in a hypothetical future arbitration would satisfy the amount in controversy. Petitioner argues that attorneys' fees are calculated based on the "lodestar amount . . . which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." (ECF No. 16 at 12 (citation omitted).) But this Court need not decide whether an arbitrator would award the lodestar amount or consider Petitioner's citation-free policy arguments in support of the lodestar measure (*id.* at 12-13), because the Amended Petition contains *no facts at all* about Petitioner's counsel's lodestar amount. The Amended Petition says nothing about the number of hours counsel spent on Petitioner's case or the reasonable hourly rate. (*Id.*)[4] It

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argues that *McCluskey v. Airbnb, Inc.*, 2020 WL 2542616, at *3 (C.D. Cal. Jan. 7, 2020), pre-*Badgerow*, "confirms the amount in controversy is the amount sought by the petitioner, not the amount of the arbitration award." Again, irrelevant: Here, the "amount sought by the petitioner" from this Court is zero. Petitioner argues that *Costco Wholesale Corp. v. Hoen*, 538 F.3d 1128, 1136 (9th Cir. 2008), holds that "fee shifting is mandatory under 15 U.S.C. § 26." Yet again, irrelevant: The antirust fee shifting statute "is not now at issue" as it may have been in the underlying arbitration. *Badgerow*, 596 U.S. at 18. Finally, Petitioner argues that *Shannon Assocs. LLC v. MacKay*, 2009 WL 4756568, at *3 (N.D. Cal. Dec. 8, 2009)—also pre-*Badgerow*—shows that "the amount in controversy is the amount at stake—not the arbitration award." Once again, irrelevant. The amount in controversy here based on the face of the Amended Petition is zero.

[4] If the lodestar amount were applied, any attorney fee award for Petitioner would have to be based on the time spent on *Petitioner's* arbitration, not the arbitrations of other claimants

(cont'd)

alleges only that the "underlying arbitration was heavily litigated" and included a two-week hearing, and concludes that the amount of attorneys' fees "easily exceeds $75,000." (ECF No. 7 at 3.)

Petitioner argues, without citation to any authority whatsoever, that Valve must demonstrate "to a legal certainty" that "the amount in controversy is less than the jurisdictional threshold" to "prevail on a motion to dismiss for lack of subject matter jurisdiction." (ECF No. 16 at 13.) To the contrary, Petitioner bears the burden of proving this Court has jurisdiction. *See Kokkonen*, 511 U.S. at 377. Petitioner's conclusory assertions—including his irrelevant speculation about Valve's counsel fees (ECF No. 16 at 13)—do not meet this burden. *See Poorsina v. Wells Fargo Bank, N.A.*, 2021 WL 4133866, at *5 (N.D. Cal. Sept. 10, 2021) (burden was on plaintiff to allege facts supporting conclusory amount in controversy allegation).

III. CONCLUSION

For the foregoing reasons, this Court lacks subject matter jurisdiction over the Petition. Valve respectfully requests that the Court dismiss the Amended Petition in its entirety with prejudice pursuant to Rule 12(b)(1).

DATED: July 21, 2025

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: */s/ Virginia F. Milstead*
Virginia F. Milstead
Attorneys for Respondents
Valve Corporation

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who also lost. (ECF No. 7 at 4); *see Magill v. DIRECTV, LLC*, 2017 WL 8894320, at *3 (C.D. Cal. June 23, 2017) (rejecting the contention that "work done on behalf of several different plaintiffs with individual lawsuits, some indisputably unsuccessful, can be fully recovered through the victory of one such lawsuit"). The Amended Petition alleges nothing about time spent on Petitioner's individual arbitration.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2044-23

NATALIA KRONFELD,

Plaintiff-Appellant,

v.

ELLIOTT MALONE and
LAW OFFICES OF ELLIOTT
MALONE, ESQ., LLC,

Defendants/Third-Party
Plaintiffs-Respondents,

v.

ROMAN GAMBOURG,
GAMBOURG & BORSEN,
LLC, a/k/a GAMBOURG
LAW GROUP, and ELENA
GAMBOURG,

Third-Party Defendants.

APPROVED FOR PUBLICATION
October 1, 2025
APPELLATE DIVISION

Submitted September 9, 2025 – Decided October 1, 2025

Before Judges Gilson, Firko, and Vinci.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-4946-19.

Lawrence H. Kleiner, LLC, attorney for appellant (Lawrence H. Kleiner, of counsel and on the briefs).

Tompkins, McGuire, Wachenfeld & Barry, LLP, attorneys for respondents (Matthew P. O'Malley, of counsel and on the brief).

The opinion of the court was delivered by

VINCI, J.A.D.

Plaintiff Natalia Kronfeld appeals from a July 7, 2023 order denying her eighth motion to extend discovery, an August 4, 2023 order denying her motion for reconsideration of that order, and a September 22, 2023 order granting summary judgment in favor of defendants Elliot Malone, Esq. and the Law Offices of Elliot Malone, Esq., LLC. (collectively Malone). We affirm.

We also address the scope of our decision in Hollywood Café Diner, Inc. v. Jaffee, 473 N.J. Super. 210 (App. Div. 2022), to clarify that its limitation on the applicability of the exceptional circumstances standard set forth in Rule 4:24-1(c) applies only when an arbitration or trial date is set administratively by notice prior to the conclusion of the discovery period. We now hold that once an arbitration or trial date is set by a judge in a discovery end date (DED) extension or case management order entered after expiration of the applicable initial period of discovery set forth in Rule 4:24-1(a), no extension of the discovery period may be permitted unless exceptional circumstances are shown.

I.

Plaintiff alleges Malone committed legal malpractice in connection with an underlying legal malpractice action against Snyder & Sarno, LLC and individual attorneys of the firm (collectively Sarno), who represented plaintiff in an earlier divorce action filed against her by her ex-husband in 2012. In 2015, on the eve of trial in the divorce action, the parties reached a settlement agreement that was placed on the record. Plaintiff was questioned extensively about the settlement agreement and told the court she understood the terms of the agreement and did not want to go to trial.

Following the settlement, plaintiff refused to pay Sarno's legal fees in the amount of approximately $148,000. Sarno filed a motion in the divorce action to recover its legal fees. On July 14, 2017, following a multi-day plenary hearing, the court entered an order granting Sarno's fee application in its entirety. The Family Part judge found plaintiff's testimony, particularly her "professed lack of proficiency in English," was "not credible." Plaintiff appealed from that order, and we affirmed. Fradkov v. Kronfeld, No. A-5419-16 (App. Div. Jan. 31, 2019).

In 2016, while the fee application was pending, plaintiff sued Sarno for legal malpractice. In 2017, after the attorney who filed the malpractice action

changed firms and could no longer handle the case, plaintiff retained Malone. Malone filed an amended complaint alleging Sarno failed to "obtain or investigate evidence to establish the true and complete holdings and valuations of [her ex-husband's] business interests" and "place any accountant in a position to provide a complete, accurate, and up-to-date valuation."

The amended complaint alleged, "without a forensic analysis and complete assessment of [her ex-husband's] holdings, [Sarno] could not properly consider the amount to which [plaintiff] was entitled." As a result, plaintiff did "not receiv[e] by way of settlement or final judgment that to which she was entitled to by way of equitable distribution, alimony[,] and child support."

Following discovery and motion practice, the parties participated in mediation. Prior to the first day of mediation on September 17, 2018, Malone provided plaintiff with a chart of potential settlement amounts ranging from $500,000 to $1.25 million showing expenses, fees, and her anticipated net recovery. During a second mediation session the following week, plaintiff agreed to settle her claims against Sarno for $975,000. She also agreed to pay Sarno $100,000 to resolve the fee dispute, which included the initial award of $148,000 plus approximately $90,000 in additional fees for the plenary hearing.

On July 2, 2019, plaintiff filed this action against Malone. She alleged Malone "failed to do any of the necessary discovery on the multiple marital businesses and . . . ignored [her] multiple requests . . . to undertake discovery on the sale of the company by her ex-husband to Google." Also, one of the financial experts Malone retained, Anthony Ambrosio, failed to include one of her ex-husband's businesses in his report, and Malone failed to correct that error. "As a result, this business was never included in the expert report, mediation, and the settlement." Plaintiff also alleged Malone failed to properly advise her of the tax implications of the settlement and "improperly paid . . . Sarno without [her] authorization."

On September 16, 2019, Malone filed an answer and counterclaim, and plaintiff filed an answer to the counterclaim on October 1. The parties subsequently exchanged written discovery and began conducting depositions.

On October 12, 2020, plaintiff filed her first motion to extend discovery, which was granted on October 30. The DED was extended to March 31, 2021. On December 23, 2020, plaintiff filed her second motion to extend discovery, which was granted on January 8, 2021, extending the DED to June 30, 2021. On April 26, 2021, she filed her third motion, which was granted on May 14, extending the DED to October 28, 2021. Her fourth motion to extend, filed

February 3, 2022, was granted on February 18, and the DED was extended to June 25, 2022. On April 19, 2022, plaintiff filed her fifth motion to extend, which was granted on May 13, extending the DED to October 23, 2022.

On August 22, 2022, plaintiff filed her sixth motion to extend discovery. On September 9, the court entered an order granting the motion, extending the DED 120 days until February 20, 2023, and scheduling trial for April 24, 2023.

On February 17, 2023, three days before the end of the discovery period, plaintiff filed her seventh motion to extend discovery. The motion sought to extend the DED 120 days to June 20. Malone opposed the motion.

The Civil Presiding Judge heard oral argument on March 23. Plaintiff's counsel argued discovery was complex and "[s]ome of this has gotten delayed [because of his] absence for medical treatment." "We need to complete the dep[osition] of [plaintiff], and then . . . the dep[osition] of . . . Malone, and then we need to serve expert reports, and that gets us to the finish line."

The judge was "a little surprised that after [the] trial date[was] set in September that there[was] an application in February to extend discovery." He was "sympathetic to [counsel's] health issues, but . . . [they] had discussions before about" those issues. The judge "permit[ted] the final extension of discovery." He cautioned counsel, "if it do[es not] happen, do[not] come back."

Counsel stated he "understood." The judge entered an order extending the discovery period to June 20, 2023, as requested. Specifically, he ordered "[d]epositions of the parties to be completed by April 6, 2023; . . . [p]laintiff's expert reports be served by May 4, 2023; [Malone's] expert reports be served by June 5, 2023; [and] [e]xpert depositions [be] completed by June 20, 2023." The trial date was adjourned to September 18, 2023.

On June 21, after the June 20 deadline for completion of discovery expired, plaintiff filed an eighth motion to extend discovery. Plaintiff argued "[her] primary counsel's health issues, compounded by COVID[-19,] and the inherent complexity of this case qualify as exceptional circumstances to permit [an] extension of discovery." Plaintiff also contended that "[b]ased on the wording of the March 23 order, it does not appear a discovery end date was set when discovery was extended[.]"

On July 7, after hearing oral argument, the judge entered an order denying the motion to extend discovery supported by an oral opinion and written statement of reasons. He determined:

> this [c]ourt . . . ha[s] been very tolerant of the health issues, but as [the court] had indicated in March at the time [the court] entered an order extending discovery, . . . it was time for this to be done and . . . [the court] thought [it] made it pretty clear then

> on the record how the [c]ourt felt about what needed to get done.
>
> . . . .
>
> Quite frankly, [the court] made it clear in March, … [it was] going to permit the final extension of discovery, if it do[es not] happen, do[not] come back. [The court] meant it when [it] said it, and that was the seventh discovery extension. There has now been almost 1,300 days of discovery and, despite these things, . . . they do[not] get done.
>
> [The court] do[es not] see exceptional circumstances in the face of a trial date. Quite frankly, [the court] see[s] whatever the opposite of that would be . . . . [The court] see[s] . . . a client who certainly did not want to proceed in this case with any sense of urgency or any sense of pace and created continuing delays for all involved, the court[is] not going to reward that at this point.
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> So [the court] [does not] see where the exceptional circumstances factors are met. It[is] unfortunate, but . . . at some point . . . there has to be some effect to orders, and [the court] made it clear then and it was[not] followed.

In his July 7, 2023 order, the judge explained:

> The present application fails to demonstrate exceptional circumstances warranting a further extension which is the standard with a [t]rial [d]ate having been set.
>
> The delays and inability to complete the discovery is the result of the plaintiff's failure to comply and cooperate with the scheduling of depositions . . . .

> Furthermore, this is not a basis to extend or an exceptional circumstances standard. Part of what is sought in the request for extension is to conduct another full day of deposition of . . . Malone despite [there] having been two full days already conducted. The timing of the defense deposition was the product of plaintiff's failure to cooperate in the discovery process.
>
> There having been seven [DED] extensions[,] the court does not find exceptional circumstances to warrant the[] relief sought [herein].

Plaintiff moved for reconsideration, reiterating the same arguments and contending her counsel was entitled to a reasonable accommodation because of his health issues. Also, "the extension will not prejudice anyone and we are told there is a civil trial backlog anyway." On August 4, 2023, the judge entered an order denying the motion for reconsideration, finding "the court has been both understanding and accommodating of the health concerns of counsel. To utilize such concern as a basis for reconsideration is a distortion of the record and wholly inappropriate."

On August 25, Malone moved for summary judgment arguing discovery was completed and plaintiff failed to serve an expert report in support of her claims of legal malpractice. Plaintiff's counsel filed a certification in opposition to the motion. Plaintiff did not file a response to Malone's statement of material facts, a counterstatement of material facts, or a brief.

Counsel's certification, dated September 12, 2023, repeated certain allegations made in plaintiff's complaint without citations to the record, and repeated the arguments previously considered and rejected by the presiding judge. Counsel attached the report of a handwriting expert, previously served on May 3, 2023, "who opined that Ambrosio's signature on his expert report [served in the underlying Sarno litigation] was forged." Counsel also attached the report of plaintiff's legal malpractice expert, Jared M. Lans, Esq., dated September 7, 2023, which counsel "received [that day]." Counsel filed a separate certification "pursuant to R[ule] 4:17-7 pertaining to the expert report of [Lans]" contending "the information required for the amendment [to plaintiff's answers to interrogatories] was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date."[1]

On September 22, 2023, after hearing oral argument, a different judge entered an order granting Malone's motion for summary judgment supported by a comprehensive oral opinion. The motion judge found plaintiff's opposition was procedurally deficient because:

> counsel's certification submitted in opposition . . . contains facts that are not within counsel's personal knowledge or factual allegations, which can[not] be considered and totally fails to meet

[1] The copy of the certification in the appellate record is unsigned and undated.

> Rule 4:46-2, which requires that to present an issue of material fact, you have to comply with the [R]ule.
>
> There should have been a response to the movant's statement of material facts. There was none, so all of those facts are deemed admitted.
>
> [I]f plaintiff wanted to submit a counter statement, [she] was required under the rule to submit a statement of material facts that corresponded to the rule and had citations to the record and attached record exhibits on which [she] relied.

The motion judge noted because the presiding judge denied the motion to extend the DED, "[t]he current state of the case is that there is no [legal malpractice] expert report and no expert report permitted[.]" She found "[t]his is not a common knowledge case," as a "jury could not conclude legal malpractice without [an] expert report."

The motion judge rejected counsel's contention that the Lans report could not have been served before the expiration of the discovery period because "there was nothing in . . . Lans'[s] report relying on facts that occurred recently, and . . . nothing to explain why . . . it was not available." The report "should have been available by the exercise of reasonable diligence earlier, and [she] view[ed] the issue as really an attempt to . . . serve it in defiance of [the presiding judge's] orders." This appeal followed.

II.

On appeal, plaintiff argues: (1) the judge employed the wrong standard in denying her motion to extend discovery; (2) the judge's failure to find exceptional circumstances was an abuse of discretion; and (3) the motion judge improperly granted summary judgment. Specifically, plaintiff contends: (1) the motion judge erred by refusing to consider Lans's report; (2) the motion judge "entirely ignored" the report of her handwriting expert "that proved . . . Malone forged the signature of . . . Ambrosio in the report he obtained in the underlying action;" (3) Malone "violated RPC 3.3 by his lack of candor;" and (4) "[t]he breach of conduct by [Malone] was so egregious" expert testimony was unnecessary.

III.

A trial court's discovery rulings are "entitled to substantial deference." DiFiore v. Pezic, 254 N.J. 212, 228 (2023) (citing State v. Stein, 225 N.J. 582, 593 (2016)). We "generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion[,] or its determination is based on a mistaken understanding of the applicable law." Rivers v. LSC P'ship, 378 N.J. Super. 68, 80 (App. Div. 2005) (citing Payton v. N.J. Tpk. Auth., 148 N.J. 524, 559 (1997)).

The judge correctly determined plaintiff was obligated to show exceptional circumstances in support of her eighth motion to extend discovery. Rule 4:24-1(c) provides a motion to extend discovery "shall . . . be made returnable prior to the conclusion of the applicable discovery period" and "if good cause is . . . shown, the court shall enter an order extending discovery." However, "[n]o extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown."

Plaintiff's motion to extend discovery was filed on June 21, 2023, after trial dates were fixed in the September 9, 2022 and March 23, 2023 orders. As expressly set forth in Rule 4:24-1(c), because a trial date was fixed, no extension of the DED was permitted absent a showing of exceptional circumstances.

Plaintiff's reliance on Hollywood Café is unavailing for two reasons. First, the exceptional circumstances standard applied to her motion to extend because it was untimely. Rule 4:24-1(c) requires a motion to extend be "made returnable prior to the conclusion of the applicable discovery period." Plaintiff's motion was filed on June 21, after the discovery period expired on June 20, and was not returnable until July 7.[2] In Hollywood Café, we determined when, as

[2] Plaintiff appears to argue the motion was timely because the judge did not set a new DED in the July 7 order. That argument is without merit. The July 7

here, the moving party seeks an extension after the discovery period has ended and after a trial date has been set, the court may grant the extension only upon a showing of exceptional circumstances. 473 N.J. Super. at 217.

Second, even if the motion was timely filed, Hollywood Café does not mandate application of the good cause standard under the facts of this case. In Hollywood Café, the court "sent the parties notice that trial was set" prior to the expiration of the initial period of discovery set forth in Rule 4:24-1(a). Id. at 214. We noted the administrative "practice of sending out arbitration and trial notices before the end of discovery . . . causes obvious tension among a series of rules designed to foster trial date certainty." Id. at 220. We concluded "when the court chooses to send out arbitration and trial notices during the discovery period, judges evaluating a timely motion to extend discovery may not utilize the exceptional circumstances standard." Ibid.

Plaintiff misinterprets Hollywood Café and misconstrues its applicability to this case. Unlike the administrative notice sent in Hollywood Café, here trial dates were set in the sixth and seventh DED extension orders entered by judges

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order plainly established June 20, 2023, as the final day for discovery. Even if the DED was not administratively adjusted, which we cannot determine from the record before us, the applicable discovery period was established in the July 7 order, and it concluded on June 20.

who were responsible for the management of the case. Nothing in our decision in Hollywood Café is intended to minimize the significance and effect of trial dates set by judges in discovery extension or case management orders. Hollywood Café applies only when an arbitration or trial date is set by notice sent as an administrative tool prior to the conclusion of discovery. We hold that when a motion to extend discovery is filed after a judge sets an arbitration or trial date in a DED extension or case management order entered after expiration of the applicable initial period of discovery set forth in Rule 4:24-1(a), the exceptional circumstances test applies.[3]

We are satisfied the judge did not misapply his discretion by finding plaintiff failed to show exceptional circumstances. Under the exceptional circumstances standard, the movant must demonstrate:

> (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; and (4) the

[3] In Hollywood Café, we recognized "a court could render meaningless the 'good cause' standard applicable to motions to extend discovery that are timely filed . . . by simply assigning an arbitration or trial date early in the litigation." 473 N.J. Super. at 218 (emphasis added). We are confident, however, judges will not misapply their discretion by setting arbitration or trial dates before it would be appropriate to do so. As in this case, for example, where the court did not set a trial date until the sixth order extending discovery.

> circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.
>
> [Hollywood Café, 473 N.J. Super. at 217 (emphasis omitted) (quoting Rivers, 378 N.J. Super. at 79).]

The judge properly considered the relevant factors and determined plaintiff failed to show exceptional circumstances. Contrary to plaintiff's claim, the judge did not disregard counsel's medical condition. Rather, he and the judge who granted prior discovery extensions attempted to accommodate counsel's needs by granting seven discovery extensions and twice adjourning the trial date. Moreover, the judge also found the delays in the case were the fault of "a client who certainly did not want to proceed . . . with any sense of urgency . . . and created continuing delays for all involved," including by failing to "comply and cooperate with the scheduling of depositions." There is no basis for us to disturb the judge's decision.

IV.

We are convinced the motion judge correctly granted summary judgment. Our review of a trial court's grant or denial of a motion for summary judgment is de novo. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). Like the trial court, we consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a

rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "By its plain language, Rule 4:46-2 dictates that a court should deny a summary judgment motion only where [a] party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill, 142 N.J. at 529 (emphasis omitted).

Pursuant to Rule 4:46-2(a), a party moving for summary judgment must file a "statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted." Rule 4:46-2(b) mandates "a party opposing the motion shall file a responding statement either admitting or disputing each of the facts in the movant's statement." "[A]ll material facts in the movant's statement which are sufficiently supported will be deemed admitted . . . unless specifically disputed by citation [to the portion of the motion record] demonstrating the existence of a genuine issue as to the fact." Ibid. "An opposing party may also include in the responding statement additional facts that the party contends are material and as to which there exists a genuine issue[,]" "together with citations to the motion record." Ibid.

Rule 4:46-5(a) provides "an adverse party may not rest upon the mere allegations or denials [in] the pleading[s], but must respond by affidavits meeting the requirements of R[ule] 1:6-6[4] . . . setting forth specific facts showing that there is a genuine issue for trial." Mere annexation to the response to the motion of an exhibit list or the exhibits themselves, without more, does not constitute compliance with the rule. Lyons v. Twp. of Wayne, 185 N.J. 426, 435 (2005). The party opposing the motion has the affirmative duty of responding in accordance with the rule. Polzo v. Cnty. of Essex, 196 N.J. 569, 586 (2008).

We are unpersuaded by plaintiff's claim that the motion judge failed to consider the legal malpractice expert report prepared by Lans and served for the first time in opposition to Malone's motion. That report was served on September 12, 2023, more than four months after the May 4, 2023 deadline passed for plaintiff's expert reports, nearly three months after the end of discovery, and in direct contravention of the presiding judge's July 7 order. As the motion judge aptly noted, under "[t]he current state of the case . . . [plaintiff

[4] Rule 1:6-6 states affidavits must be "made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify."

did not have a legal malpractice] expert report and no expert report [was] permitted."

She correctly determined plaintiff's opposition to Malone's motion for summary judgment was fatally defective. Plaintiff did not file a response to the statement of material facts or a counterstatement of material facts as required by Rule 4:46-2(a) and (b). The certification counsel filed merely repeated allegations set forth in plaintiff's complaint to which he was not competent to testify without citation to evidence in the record in violation of Rule 1:6-6 and Rule 4:46-2(b).

In addition, the motion judge correctly found Malone was entitled to summary judgment because "[t]his is not a common knowledge case" and "a jury could not conclude legal malpractice without [expert testimony]." This case involves complex claims of legal malpractice. They include claims relating to the underlying matrimonial litigation handled by Sarno, the subsequent litigation of a claim of malpractice allegedly committed by Malone while pursuing a claim against Sarno, alleged conflicts of interest created by Malone, and plaintiff's settlement of both underlying actions, including her understanding of the tax consequences of the settlements based on allegedly improper tax advice from Malone.

It is well-settled expert testimony is generally required in legal malpractice cases. Buchanan v. Leonard, 428 N.J. Super. 277, 288 (App. Div. 2012) (noting "'the duties a lawyer owes to [a] client are not known by the average juror[.]'") (quoting Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64, 78 (App. Div. 2007)). Without expert testimony, plaintiff's legal malpractice claims against Malone failed as a matter of law.

Plaintiff's contention the motion judge "entirely ignored" the report of her handwriting expert "that proved . . . Malone forged the signature of . . . Ambrosio in the report he obtained in the underlying action" lacks merit. In fact, no such argument was made in opposition to Malone's motion. Rather, plaintiff argued her handwriting expert opined Ambrosio's signature may have been forged, not that it was forged by Malone. Plaintiff's claim Malone forged the signature finds no support in the report of her handwriting expert or any other competent evidence properly identified in opposition to Malone's motion for summary judgment.

To the extent we have not specifically addressed any of plaintiff's remaining arguments, it is because they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2974-23

OCEAN COUNTY, DEPARTMENT OF CORRECTIONS,

Plaintiff-Respondent,

v.

POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL 258,

Defendant-Appellant.

Argued September 11, 2025 – Decided October 16, 2025

Before Judges Berdote Byrne and Jablonski.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-0714-24.

Michael P. DeRose argued the cause for appellant (Crivelli, Barbati & DeRose, LLC, attorneys; Michael P. DeRose, on the briefs).

Robert D. Budesa argued the cause for respondent (Berry, Sahradnik, Kotzas & Benson, attorneys; Robert D. Budesa, on the brief).

PER CURIAM

Petitioner, Policemen's Benevolent Association Local 258 (the PBA), seeks reversal of the trial court's order vacating an arbitration award that granted a correctional police officer holiday pay consistent with a collective bargaining agreement, for the period of time the officer was on leave and receiving workers' compensation benefits pursuant to N.J.S.A. 34:15-12. We conclude the arbitrator's decision was, at minimum reasonably debatable, constraining us to vacate the trial court's order. Based on the language of the collective bargaining agreement, the holiday pay was a benefit the officer was entitled to receive pursuant to the collective bargaining agreement, was not compensation in lieu of wages, and therefore not preempted by the Worker's Compensation Act (Act) N.J.S.A. 34:15-1 to 34:15-146. Accordingly, we vacate the trial court's order and reinstate the arbitration award.

I.

The facts before us are undisputed. The PBA is the exclusive representative of all correctional police officers employed by respondent, Ocean County. The County and PBA are parties to collective negotiations agreements (Agreements), for relevant purposes effective from July 1, 2019, through June 30, 2022, and July 1, 2022, through June 30, 2025.[1]

[1] The language of Article 12, the article at issue, is identical in both agreements.

Correctional police officer Maria Adamopoulos was on workers' compensation leave due to a work-related injury from approximately January of 2022 through January of 2023. Upon her return from injury leave in January of 2023, Adamopoulos had anticipated receiving holiday pay from the County for the thirteen holidays that fell within the time she was out on workers' compensation leave. During prior periods when Adamapolos had been out on leave (not for a work-related injury), she had received holiday pay. However, upon her return to work, she was denied full holiday pay by the County for those days denoted as holidays in the Agreement. The PBA filed a grievance seeking payment for those thirteen holidays that occurred while she was out on workers' compensation leave, pursuant to Article 12 of the Agreements. The County took the position Adamopoulos had received the correct amount of pay to which she was entitled, including payment of those thirteen holidays as part of the work week at the rate of 70%, because "employees on workers compensation receive 70% of their rate of pay for 40 hours per pay period." The PBA countered Adamopoulos was entitled to 100% of her pay for applicable holidays based on the express language of Article 12. The County posited "holidays are a part of the pay week, not an additional payment above the 40 hours for which a full-time employee is paid." They then asserted there is "nothing in Article 12 [of

the Agreement] requiring an officer to be paid at 100% of their pay while on workers compensation" and the provision says "pay" as opposed to "full pay" or "full rate." The County set forth a chart listing the holidays that occurred during Adamopoulos's workers compensation leave, asserting she was paid for each holiday directly by the County at the rate of 100% during her first sixty (60) days of workers' compensation leave, and then through her periodic workers' compensation payments, or temporary total disability payments, at a rate of 70%, for the remaining time she was out on injury leave.

The PBA explained it was not challenging the mathematical calculation of the temporary disability wages for the time in question because it was not seeking compensation for the officer's work-related injury, but rather it was seeking her receipt of holiday pay, a benefit unrelated to disability benefits.

The matter proceeded to a hearing before Arbitrator James M. Cooney, Esq. The arbitrator ruled the PBA had met its burden of proof and the County had violated Article 12 of the Agreement with respect to the officer's entitlement to holiday pay, ordering the County to promptly compensate Adamopoulos for all holidays that had occurred while she was on workers' compensation leave at 100% of her regular rate of pay.

The arbitrator specifically found Article 12 of the parties' Agreement was clear and unambiguous. He further ruled the Act and its exclusivity provision did not preempt the recovery sought by the PBA. The arbitrator noted the County had not cited any authority to demonstrate an employee surrenders contractual benefits not related to wage compensation for an injury covered by workers' compensation benefits while out of work on such leave. He accepted the PBA's position it was not seeking compensation for Adamopoulos as payment for her work-related injury, but instead as a contractual benefit available to all members covered by the Agreement. He therefore found the Act did not preempt the payment of holiday pay pursuant to the Agreement.

The County filed an order to show cause before the trial court seeking to vacate the arbitration award, arguing the relief afforded by the arbitrator was preempted by the exclusivity provisions of the Act. The trial court granted the County's order to show cause and vacated the arbitration award, finding it was procured by undue means pursuant to N.J.S.A. 2A:24-8 and it was against public policy because it conflicted with the Act and the Act's calculation of temporary benefits. It concluded "temporary disability benefits are paid in lieu of wages." This appeal ensued.

II.

The standards guiding our review are well known. "Arbitration is a favored form of dispute resolution, whose usefulness for labor-management issues is well-recognized in this [S]tate." Borough of E. Rutherford v. E. Rutherford PBA Loc. 275, 213 N.J. 190, 201 (2013) (citing Middletown Twp. PBA Loc. 124 v. Twp. of Middletown, 193 N.J. 1, 10 (2007)). Arbitration of public sector labor disputes, in particular, is meant to "be a fast and inexpensive way to achieve final resolution of such disputes and not merely 'a way-station on route to the courthouse.'" PBA, Loc. No. 11 v. City of Trenton, 205 N.J. 422, 429 (2011) (quoting Linden Bd. of Educ. v. Linden Educ. Ass'n, 202 N.J. 268, 276 (2010)).

"Consistent with the salutary purposes that arbitration as a dispute-resolution mechanism promotes, courts grant arbitration awards considerable deference." E. Rutherford PBA, 213 N.J. at 201. Therefore, "an arbitrator's award resolving a public sector dispute will be accepted so long as the award is 'reasonably debatable.'" Borough of Carteret v. Firefighters Mut. Benevolent Ass'n, Loc. 67, 247 N.J. 202, 211 (2021) (quoting E. Rutherford PBA, 213 N.J. at 201-02). An award is "reasonably debatable if it is 'justifiable' or 'fully supportable in the record.'" PBA, Loc. No. 11, 205 N.J. at 431 (quoting Kearny

PBA Loc. No. 21 v. Town of Kearny, 81 N.J. 208, 223-24 (1979)). "Under the 'reasonably debatable' standard, a court reviewing an arbitration award 'may not substitute its own judgment for that of the arbitrator, regardless of the court's view of the correctness of the arbitrator's position.'" Middletown Twp. PBA Loc. 124, 193 N.J. at 11 (quoting N.J. Transit Bus Operations, Inc. v. Amalgamated Transit Union, 187 N.J. 546, 554 (2006)). "Put differently, if two or more interpretations of a labor agreement could be plausibly argued, the outcome is at least reasonably debatable." Firefighters Mut. Benevolent Ass'n, Loc. 67, 247 N.J. at 212.

Although a court's standard of review of a public arbitration award is highly deferential, the New Jersey Arbitration Act, N.J.S.A. 2A:24-1 to -11, provides four limited, statutory bases for vacating an arbitration award:

> a. Where the award was procured by corruption, fraud or undue means;
>
> b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;
>
> c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;

> d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final[,] and definite award upon the subject matter submitted was not made.
>
> [N.J.S.A. 2A:24-8.]

At issue is the language of Article 12 of the Agreement, which states:

> **ARTICLE 12**
>
> **HOLIDAYS**
>
> Each full-time Officer covered by this Agreement shall enjoy the following holidays with pay, to be observed on the dates specified each January by the Board of Chosen Freeholders:
>
> **Group A**
> Christmas Day
> New Year's Day
> Thanksgiving Day
> July 4th
> Memorial Day
> Labor Day
>
> **Group B**
> Columbus Day
> Veteran's Day
> General Election Day
> Martin Luther King Day
> Presidents' Day
> Good Friday
>
> Should the Board of Chosen Freeholders designate a different date for the County celebration of New Year's Day, July 4th and Christmas, said designation shall not apply to members of this Bargaining unit.

Amongst each shift and regardless of unit assignment, requests for holiday time off for those holidays designated within "Group A" shall be awarded based upon Departmental Seniority by rotation. Requests for holiday time off for those holidays designated within "Group B" shall be awarded based upon Departmental Seniority by rotation within the Unit and within each shift requested. The holiday selection processes will be completed after the annual shift bidding process is completed but prior to the actual changing of shifts for the new year.

In the event any Officer covered by this Agreement is required by the Warden to perform duties on any of the holidays enumerated above or on Easter Sunday, whether scheduled or call-in situations, he/she shall be compensated as set forth below:

A. All work performed on a holiday shall be compensated at a rate equal to two and one-half times (2-1/2X) the rate of pay which would apply on a normal workday. The eight (8) hours regular day's pay shall always count toward the 2-1/2X rate of pay. Specific examples follows:

1. Employee scheduled to work eight (8) hours on a holiday who actually works the eight (8) hours.

8 hours (regular pay@ straight time) = 8 hours
8 hours @ 1-1/2X =12hours
TOTAL PAY 20 hours

2. Employee scheduled to work eight (8) hours on a holiday who actually works the sixteen (16) hours:

8 hours @ straight time = 8 hours
8 hours @ 1-1/2X = 12 hours
8 hours @ 2-2/2X = 20 hours

TOTAL PAY 40 hours

3. Employee not scheduled because of a holiday who is called in to perform two (2) hours' work:

8 hours @ straight time	= 8 hours
4hours (min. call back) @1-1/2X	= 6 hours
TOTAL PAY	14 hours

4. Employee not scheduled to work because of a holiday who is called in to perform ten (10) hours work:

8 hours @ straight time hours	=8 hours
8 hours @ 1-1/2X	= 12 hours
8 hours @ 2-2/2X	= 5 hours
TOTAL PAY	25 hours

We conclude the arbitrator's award is reasonably debatable and the trial court erred in vacating the award. The language of Article 12 of the Agreement states all full-time employees subject to the Agreement shall receive holiday pay, regardless of whether they are actually working on that holiday or not. The issue of whether holiday pay represents a wage, which may be preempted by the Act, or a benefit, which is conferred to employees in addition to any wages, is reasonably debatable, particularly given the accompanying language in Article 12 granting additional wages to those employees who work on the holiday.

The arbitrator's decision, holding holiday pay is not compensation, which may be preempted by the Act, but rather a benefit that continues to accrue during any officer's period of disability leave, was not procured by undue means and is

not against public policy. Had the holiday pay been available only to those employees who actually worked on that date, the court's interpretation of holiday pay as compensation preempted by the workers' compensation act's "payment in lieu of wages" language would have been persuasive. However, the plain language of Article 12 demonstrates employees who work on those holidays are entitled to hourly wages, above the payment of the negotiated benefit. It is undisputed employees on workers' compensation leave continue to accrue any manner of benefits, including vacation time, sick time, deferred compensation, and payments of medical insurance benefits, during their periods of leave. At minimum, the arbitrator's decision was reasonably debatable.

We are also persuaded by Adamopolous's argument that the prior course of conduct between the County and the PBA made it incumbent upon the County to specifically exclude holiday pay for those employees partaking in workers' compensation leave if it sought to do so. The County does not deny it paid full holiday pay to employees who were on other forms of leave, including to Adamopoulos in the past. Had it wished to exclude holiday pay to those employees specifically on workers' compensation leave, it could have explicitly negotiated such a limitation in the Agreement. The mere existence of a statute or regulation related to a given term or condition of employment in a collective

bargaining agreement does not automatically preclude negotiations as to that term. See In re Local 195, IFPTE 88 N.J. 393 (1982). The lack of any qualifying or limiting language in Article 12 of the Agreement, coupled with language awarding additional hourly wages to those employees who work on the holidays, supports our conclusion the arbitrator's award was not procured by undue means or against public policy.

The trial court's order of April 26, 2024, is reversed. The arbitrator's award of December 24, 2023, is reinstated. We do not retain jurisdiction.

I hereby certify that the foregoing is
a true copy of the original on file in
my office.

M.C. Harley

Clerk of the Appellate Division

Link to New Jersey Courts

https://portal.njcourts.gov/CIVILCaseJacketWeb/pages/civilCaseSummary.faces?cid=1

Link to Law360 article

https://www.law360.com/pulse/articles/2403183/judges-say-ai-can-t-replace-human-judgment-in-courts

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0978-24

AGNIESZKA DRUPKA,

Plaintiff-Respondent,

v.

EASTERN INTERNATIONAL COLLEGE and BASHIR MOHSEN,

Defendants-Appellants.

———————————————————

Argued June 16, 2025 – Decided June 26, 2025

Before Judges Sabatino, Perez Friscia and Bergman.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-0475-23.

Steven I. Adler argued the cause for appellants (Mandelbaum Barrett, PC, attorneys; Steven I. Adler and Michael C. Polychronis, of counsel and on the briefs).

Steven D. Cahn argued the cause for respondent (Cahn & Parra, PA, attorneys; Steven D. Cahn, on the brief).

PER CURIAM

Defendants Eastern International College ("Eastern") and Bashir Mohsen appeal from the November 8, 2024 Law Division order denying their motion to compel arbitration of plaintiff Agnieszka Drupka's employment claims. Having reviewed the record, parties' arguments, and applicable legal principles, we affirm.

I.

Eastern operated a private educational institution of higher learning with campuses in Belleville and Jersey City. Mohsen was Eastern's chief executive officer. In October 2014, Eastern initially hired Drupka as an accountant, and in 2017, Eastern promoted her from chief operating officer to acting campus director.

After working at Eastern for over seven years, Drupka resigned in April 2022 because Mohsen allegedly engaged in a course of sexual harassment and discrimination against her. In January 2023, Drupka filed a complaint alleging defendants violated: the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -50; the New Jersey Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14; and Pierce.[1] She specifically averred defendants:

[1] Pierce v. Ortho Pharm. Corp., 84 N.J. 58 (1980).

"created a hostile work environment directed at" her as a woman; retaliated against her after complaining of unlawful discriminatory conduct; and constructively terminated her employment.

On May 8, 2023 defendants moved before the trial court to compel arbitration of Drupka's employment claims. In support of their motion, defendants submitted an employment agreement, which Drupka purportedly entered, witnessed, and signed. The employment agreement (the first agreement) contains arbitration provisions and is titled "AT-WILL EMPLOYMENT AGREEMENT WAIVER OF RIGHT TO LITIGATE AND ALL DISPUTES GO TO ARBITRATION FOR SALARIED EMPLOYEE (NOT HOURLY)." The first agreement has handwritten in Drupka's position as campus director and "Acting President" scratched out. The first eight pages are double spaced. Drupka's initials appear differently on each page, and there are two pages numbered nine. The first page nine is blank, and the other is the document's last page, which is single-spaced with Drupka's signature, and was witnessed and dated March 7, 2019. Further, page eight ends in the middle of a sentence. In support of defendants' motion to compel arbitration, Mohsen certified that Drupka signed the first agreement, which "contain[ed] a very broad

arbitration clause" that "cover[ed] all claims arising out of or related to her employment, including employment claims."

On May 15, in opposition to the motion to compel arbitration, Drupka certified she did not sign the first agreement. Drupka represented that the first agreement was fraudulently altered, and "[t]he signature page at the end of th[e] document c[ame] from a proper employment agreement signed in March of 2019." She certified that "on the last day [she] was physically present for work at Eastern," Mohsen directed her to sign an agreement that looked similar to the first agreement. Drupka declined, believing "he was attempting to get [her] to sign so he could fire [her], and [she] would not be able to sue."

In a second certification dated August 21, Mohsen again certified Drupka signed the first agreement. In support of this contention, Mohsen alleged the arbitration "clause [wa]s contained in agreements employees signed both before and after" Drupka's employment. His certification failed to address why other agreements submitted as evidence varied from the first agreement. Mohsen's certification referenced George Caceres, Esq.'s, Eastern's former chief equal employment opportunity officer and legal liaison, certification. Caceres certified that: "there was an arbitration clause in each and every one of" Eastern's employment agreements; Drupka had "signed an [a]greement . . . in

[his] presence"; and he "would only sign the agreement if it was signed and initialed in front of [him]."

On August 25, Caceres clarified in a second certification that after reviewing the alleged first agreement, he: noticed "there [we]re two pages numbered . . . nine"; was "not at all familiar with the initials on the bottom left of pages one to eight"; noted "there [we]re inconsistencies in the spacing between the sentences on the document"; observed "that from page one to eight, there [wa]s one setting of the spacing . . . different from the spacing of the sentencing on the signature page nine"; and saw "there [wa]s a missing section." While he could authenticate his and plaintiff's signature on the last page, Caceres stated he "would not [have] allow[ed] any person to initial or sign the agreement" with the missing section, blank page, and two page nines.

On September 20, after argument on the motion, the court determined a plenary hearing was necessary to resolve authenticity questions surrounding the first agreement and whether the arbitration clause was enforceable. Thereafter, defendants moved to compel Drupka's deposition, limited to whether there was an enforceable arbitration agreement, which the court granted.

On November 22, 2023, defendants' counsel alerted Drupka's counsel that another signed employment agreement was located. The newly-discovered

employment agreement (the second agreement) also includes arbitration provisions and is titled "AT-WILL EMPLOYMENT AGREEMENT." Defendants discovered the second agreement "within a 'zip file'" attached to an email Drupka had sent on November 18, 2019. The second agreement: is nine pages; has similar line spacing throughout; and appears to have the same exact last page as the first agreement. Notably, the arbitration section is titled "ARBITRATION IS MANDATORY" and is the only section heading title in all caps, as the other section headings are underlined and bolded. Also, paragraph nine of the second agreement's arbitration section is the only paragraph in the second agreement without justified margins.

At her deposition, Drupka testified that she only signed two agreements during her employment with Eastern. She remembered signing "documents" in October 2014 and an employment agreement later in March 2019, which contained an arbitration clause but not the arbitration language in the first or second agreements she alleged defendants fraudulently altered. Drupka specifically recalled her signed 2019 employment agreement's content because she had "a week prior to . . . signing" to review it. Drupka maintained she had "read it[,] and it was very clear to [her] that . . . just a minor issue . . . would be delegated to arbitration," and she was not "waiving all [her] rights in terms of

not being able to file the lawsuit in case of discrimination." Further, she testified that near the time she "went out on a second [disability] leave on April 25," she saw a copy of the first agreement Mohsen was wrongly alleging she had signed. Specifically, Drupka stated she "saw it on the last day, but . . . around two weeks prior [to] that . . . Mohsen was calling [her] . . . and telling [her] that [she] ha[d] to sign an employment agreement." Drupka recalled telling Mohsen she was "not going to sign [an] employment agreement because [she] already signed the employment agreement." She further testified that, at the time, Mohsen "said this [wa]s a new one with the new enhanced arbitration clause."

Drupka testified that after Mohsen tried to force her to sign a different agreement, she filed "a complaint . . . with the chief of staff Dr. Southard."[2] Drupka allegedly told Dr. Southard that Mohsen was chasing her "down and trying to [have her] sign a new employment agreement" because he was "trying to take away rights from [her]." She also alleged Mohsen had previously threatened her. Drupka relayed that Mohsen stated if she ever tried "to do something or go after him, . . . he w[ould] create evidence, would destroy" her, and would "send [her] to jail." Drupka also addressed the second agreement, alleging: defendants copied and pasted the second agreement's arbitration

[2] Dr. Southard's first name is not in the record.

paragraph into the document; she remembered her employment agreement did not waive all claims from court; she had no recollection of the arbitration language; and her initials were not accurate. She testified both purported agreements were altered, as evidenced by Eastern's failure to produce the original document. Drupka noted that some Eastern employees had included modified arbitration paragraphs in their employment agreements because Eastern had changed the arbitration provision after losing a lawsuit. Drupka explained that in 2019, an Eastern employee filed a lawsuit that started "the whole arbitration clause issue," because the prior arbitration language "was deemed to be invalid."

At the November 2024 plenary hearing, the court heard testimony from: defendants' counsel, Michel Polychronis, Esq.; Mohsen; and Drupka. Polychronis testified to receiving a November 18, 2019 email that had an attached "zip folder with documents." Polychronis opened the folder containing employment agreements. He reviewed and compared the second agreement's arbitration provisions Drupka allegedly signed to other employees' agreements with arbitration provisions. He stated, "[T]hey were very similar." Polychronis advised he was given access to Drupka's emails, spoke with Mohsen, and found

the zip folder in one of Drupka's sent emails. Polychronis testified that he "d[id not] know" if "someone else modified any of the documents."

Drupka testified the second agreement contained her signature on page nine, but she was never given that agreement to sign. She asserted that for about two weeks prior to her last day of work, Mohsen was "harassing" her to "sign a new employment agreement." She refused to sign the agreement after reviewing it, and she maintained the agreement he showed her was similar to the first agreement. Drupka testified to entering an employment agreement but was adamant she did not sign the second agreement with what she maintained were altered arbitration provisions. Drupka was steadfast that: she never entered the first or second agreement; the signed page nine attached to defendants' offered agreements was from the actual agreement she had entered; and the obvious discrepancies in defendants' proffered agreements showed she entered neither agreement.

Mohsen testified to finding the first agreement in Drupka's office and that Drupka entered into the agreement because he recalled that she incorrectly listed her employment title as acting president. Regarding the second agreement, he testified that Drupka "issued the [employment] contract." He conceded on

cross-examination that Caceres was responsible for drafting the employment agreements. Mohsen denied requesting Drupka sign a different agreement.

After the hearing, the court issued an order accompanied by an oral opinion denying defendants' motion to compel. The court found there was "a big question mark" whether the parties entered an employment agreement with a binding arbitration provision. After observing the witnesses and considering the evidence, the court found defendants failed to produce an authentic agreement warranting it to compel arbitration. The court observed that defendants represented Drupka signed two different employment agreements. It specifically found the first agreement appeared "cobbled together" and "incomplete." Regarding the second agreement, which defendants produced as a PDF, the court noted defendants provided no forensic evidence establishing the purported agreement, as presented, was unaltered. Ultimately, the court found there were "too many questions revolv[ing] . . . [around] the[] two agreements for [it] . . . to say . . . there[wa]s a binding agreement" between the parties to arbitrate, and defendants failed to authenticate either agreement.

On appeal, defendants contend reversal is warranted because the court: (1) "was required to compel arbitration because [Drupka] failed to set forth a specific challenge to the operative agreement's arbitration provision"; (2) erred

in failing to make sufficient factual findings "concerning the enforceability of the operative agreement and the parties' agreement to arbitrate"; (3) erroneously focused solely on the "incomplete agreement," the first agreement, while ignoring vital testimony about an enforceable arbitration provision in the second agreement; (4) erred in refusing to order arbitration because the court ignored clear and conspicuous evidence that the second agreement contained an enforceable arbitration clause.

II.

Orders compelling or denying arbitration are treated as final orders for purposes of appeal. R. 2:2-3(3); GMAC v. Pittella, 205 N.J. 572, 582 n.6 (2011). "Whether a contractual arbitration provision is enforceable is a question of law, and we need not defer to the interpretative analysis of the trial . . . court[] unless it is persuasive." Gayles v. Sky Zone Trampoline Park, 468 N.J. Super. 17, 23 (App. Div. 2021) (alteration in original) (quoting Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 316 (2019)). "When 'construing an arbitration provision of a contract,' . . . a de novo standard of review is applicable." Kopec v. Moers, 470 N.J. Super. 133, 159 (App. Div. 2022) (quoting Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 446 (2014)).

A trial court's factual findings are reviewed for an abuse of discretion. See Cumberland Farms, Inc. v. N.J. Dep't of Env't. Prot., 447 N.J. Super. 423, 437-38 (App. Div. 2016). "Factual findings premised upon evidence admitted in a bench trial 'are binding on appeal when supported by adequate, substantial, credible evidence.'" Potomac Ins. Co. of Ill. ex rel. OneBeacon Ins. v. Pa. Mfrs.' Ass'n Ins. Co., 215 N.J. 409, 421 (2013) (quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). Further, we will "'not disturb the factual findings and legal conclusions of the trial [courts]' unless convinced that those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Allstate Ins. Co. v. Northfield Med. Ctr., P.C., 228 N.J. 596, 619 (2017) (quoting Griepenburg v. Township of Ocean, 220 N.J. 239, 254 (2015)).

"When reviewing a motion to compel arbitration, courts apply a two-pronged inquiry: (1) whether there is a valid and enforceable agreement to arbitrate disputes; and (2) whether the dispute falls within the scope of the agreement." Wollen v. Gulf Stream Restoration and Cleaning, LLC, 468 N.J. Super. 483, 497 (App. Div. 2021) (citing Martindale v. Sandvik, Inc., 173 N.J. 76, 83, 92 (2002)). Generally, arbitration cannot be compelled unless the parties freely entered into an agreement to arbitrate. See Marchak v. Claridge

Commons, 134 N.J. 275, 281-82 (1993); see also Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 179 (2013). "[T]he party seeking to enforce . . . [an agreement to arbitrate] . . . has the burden to prove, by a preponderance of the evidence, that [the non-enforcing party] assented to it." Midland Funding LLC v. Bordeaux, 447 N.J. Super. 330, 336 (App. Div. 2016).[3]

"The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, and the New Jersey Arbitration Act (NJAA), N.J.S.A. 2A:23B-1 to -[36], represent a legislative choice 'to keep arbitration agreements on "equal footing" with other contracts.'" Ogunyemi v. Garden State Med. Ctr., 478 N.J. Super. 310, 315 (App. Div. 2024) (quoting Roach v. BM Motoring, LLC, 228 N.J. 163, 174 (2017)). "Under both statutes, 'arbitration is fundamentally a matter of contract,' and should be regulated according to general contract principles." Ibid. (quoting Antonucci v. Curvature Newco, Inc., 470 N.J. Super. 553, 561 (App. Div. 2022)).

Under the FAA, "a state may not 'subject an arbitration agreement to more burdensome requirements than those governing the formation of other contracts,'" or invalidate the agreement through "state-law 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement

[3] We have considered the parties' post-argument supplemental letter briefs regarding the burden of proof submitted upon our request.

to arbitrate is at issue.'" Skuse v. Pfizer, Inc., 244 N.J. 30, 47 (2020) (first quoting Leodori v. Cigna Corp., 175 N.J. 293, 302 (2003); and then quoting Atalese, 219 N.J. at 441). The FAA, however, does not bar all state-law defenses and "specifically permits states to regulate contracts, including contracts containing arbitration agreements under general contract principles." Ibid. (quoting Martindale, 173 N.J. at 85).

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFA), Pub. L. No. 117-90, § 2(a), 136 Stat. 26, 26-27 (2022) (codified at 9 U.S.C. §§ 401-402), which was enacted on March 3, 2022, amended the FAA to prohibit the enforcement of arbitration agreements for "conduct constituting a sexual harassment dispute." 9 U.S.C. § 402(a). The EFA provides that "no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under . . . State law and relates to the sexual assault dispute or the sexual harassment dispute." Ibid. A "predispute arbitration agreement" is defined as "any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement." 9 U.S.C. § 401(1). The amendment applies to any claim arising or accruing after the EFA's enactment on March 3, 2022. Pub. L. No. 117-90, § 3, 136 Stat. 28 (Mar. 3, 2022).

The New Jersey Legislature codified its endorsement of arbitration agreements in the NJAA. See Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006). The NJAA was enacted to "advance arbitration as a desirable alternative to litigation and to clarify arbitration procedures in light of the developments of the law in this area," Rappaport v. Pasternak, 260 N.J. 230, 247 (2025) (quoting S. Judiciary Comm. Statement to S. 514 (Dec. 9, 2002)), and "is nearly identical to the FAA," Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 133 (2020) (quoting Arafa v. Health Express Corp., 243 N.J. 147, 167 (2020)).

III.

Defendants contend the court erred in denying their motion to compel arbitration and not making sufficient factual and credibility findings. Defendants specifically argue: Drupka failed to sufficiently challenge the validity of the second agreement; the evidence before the court weighed in favor of finding that the parties entered an employment agreement with an enforceable arbitration provision; and the court wrongly focused on the incomplete first agreement in denying the motion to compel. We disagree.

After considering the evidence admitted at the plenary hearing, the court found defendants failed to present a valid employment agreement with an enforceable arbitration provision to warrant compelling arbitration. It

specifically determined defendants did not sufficiently authenticate either presented agreement. Undisputedly, defendants failed to produce an original signed employment agreement and had presented two separate agreements that the court was not "convinced" the parties legitimately entered.

Remarking that it already afforded the parties "a period of time to conduct discovery" on the arbitration issues, the court found defendants proffered agreements with "too many discrepancies." The court noted defendants had not shown Drupka entered an agreement to arbitrate or "waived her right to a jury trial." It found "too many questions . . . involving the[] two agreements for the Court to say . . . there[wa]s a binding agreement" to arbitrate. The court highlighted that Polychronis only testified to having found the zip folder with the second agreement after receiving "access to [Drupka's] laptop," "look[ing] at the laptop," and "look[ing] at the sent folders." It reasoned defendants failed to produce a "forensic examination of [Drupka's] computer," which would have included a review of the "metadata to see who touched the" second agreement and "who made changes to the document." The court also found it troubling that Mohsen failed to sufficiently explain why he attested that the first agreement was the operative agreement.

We are mindful that we review de novo a court's construction of an arbitration agreement and its "determinations, premised on the testimony of witnesses and written evidence at a bench trial, in accordance with a deferential standard." Nelson v. Elizabeth Bd. of Educ., 466 N.J. Super. 325, 336 (App. Div. 2021) (quoting D'Agostino v. Maldonado, 216 N.J. 168, 182 (2013)). "When reviewing the trial court's exercise of discretion, we do not 'decide whether the trial court took the wisest course, or even the better course, since to do so would merely be to substitute our judgment for that of the lower court[,]' which is an improper course of action." Burns v. Hoboken Rent Leveling & Stabilizing Bd., 429 N.J. Super. 435, 443 (App. Div. 2013) (alteration in original) (quoting Gillman v. Bally Mfg. Corp., 286 N.J. Super. 523, 528 (App. Div. 1996)) (internal quotation marks omitted).

After reviewing the record and the court's decision, we discern no error in its findings and ultimate conclusion that defendants failed to demonstrate Drupka entered an employment agreement containing an enforceable arbitration provision. We concur that defendants failed to meet their burden of demonstrating a valid arbitration agreement by a preponderance of the evidence because the agreements had significant discrepancies and inconsistencies. Further, it is undisputed Mohsen represented both agreements were the operating

agreement, casting doubt on the agreements' authenticity. The court's denial of defendants' motion to compel is sufficiently supported by the evidence.

As an independent basis for affirmance, Drupka argues that the application of the EFA bars "[e]nforcement of any arbitration agreement" because she claims "unlawful harassment, discrimination, retaliation, and sexual harassment, all based upon [her] gender or sex," which last occurred on April 8, 2022. See Bogey's Trucking & Paving, Inc. v. Indian Harbor Ins. Co., 395 N.J. Super. 59, 64 n.3 (App. Div. 2007) (stating "an alternative argument for affirmance . . . can be raised without cross-appeal"). The court did not reach the EFA argument because defendants failed to present an authenticated arbitration agreement. The court reasoned that it did not need to "interpret[] the language within the agreement" and decide whether the EFA applied until it was "first convinced that what[had] been presented" was "in fact the operative agreement." The court correctly determined that it was unnecessary to reach Drupka's EFA arguments, and we therefore decline her invitation to address its application on appeal.

To the extent that we have not addressed defendants' remaining contentions, they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing is
a true copy of the original on file in
my office.

M.C. Harley

Clerk of the Appellate Division

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3657-21

EAST ORANGE EDUCATIONAL SUPPORT PROFESSIONALS' ASSOCIATION and EAST ORANGE MAINTENANCE ASSOCIATION,

Plaintiffs-Respondents/
Cross-Appellants,

v.

EAST ORANGE BOARD OF EDUCATION,

Defendant-Appellant/
Cross-Respondent.

———————————————————

Argued January 16, 2024 – Decided February 25, 2025

Before Judges Gilson and DeAlmeida.

On appeal from the Superior Court of New Jersey, Chancery Division, Essex County, Docket No. C-000053-22.

Ramon E. Rivera argued the cause for appellant/cross-respondent (Antonelli Kantor Rivera, PC, attorneys;

Ramon E. Rivera, of counsel; Lawrence M. Teijido and Madelaine P. Hicks, on the briefs).

Sanford R. Oxfeld argued the cause for respondents/cross-appellants (Oxfeld Cohen, PC, attorneys; Sanford R. Oxfeld and William P. Hannan, of counsel and on the brief).

The opinion of the court was delivered by

DeALMEIDA, J.A.D.

Defendant East Orange Board of Education (Board) appeals from the June 16, 2022 order of the Chancery Division to the extent it confirms an arbitration award of extra compensation to the Board's custodial employees who reported to work when school facilities were closed to students during the COVID-19 state of emergency. The award was based on a contractual provision entitling custodial employees to extra compensation when they work on days when "schools are closed for an emergency."

We conclude the arbitration award of extra compensation to the Board's custodial employees conflicts with the public policy embodied in N.J.S.A. 18A:7F-9(e)(1). That statute, enacted at the start of the COVID-19 state of emergency, provides that when school facilities are closed for an extended period due to a state of emergency, school employees shall be compensated "as if the school facilities remained open for any purpose . . . ." As a result, we

reverse the June 16, 2022 order to the extent it confirms the arbitration award of extra compensation to custodial employees and remand for entry of an order vacating that aspect of the arbitration award.

Plaintiffs East Orange Educational Support Professionals' Association (SPA) and East Orange Maintenance Association (MA) (collectively the Unions) cross-appeal from the June 16, 2022 order to the extent it confirms the arbitration award denying extra compensation to the Board's maintenance employees who reported to work during the COVID-19 state of emergency. Because the Unions' complaint asked the trial court to confirm the arbitration award in its entirety, the trial court declined to hear the Unions' challenge to the portion of the arbitration award denying extra compensation to the Board's maintenance employees. We agree with the trial court's conclusion that the Unions did not raise a challenge to the arbitration award concerning maintenance employees in the trial court. We therefore dismiss the cross-appeal.

I.

On March 9, 2020, the Governor declared a state of emergency concerning the COVID-19 pandemic. Exec. Order No. 103 (Mar. 9, 2020). The COVID-19 state of emergency ended on July 4, 2021. Exec. Order No. 244 (June 4, 2021).

During the COVID-19 state of emergency, East Orange school facilities were closed to students, with the exception of September and October 2020, and two weeks in 2021. While school facilities were closed, students received virtual instruction. However, other activities, including providing lunches to students, continued to take place at school facilities. In addition, some Board personnel, such as administrators and office staff, were periodically present at school facilities. The Board's custodial, security, and maintenance employees regularly reported in person to school facilities to work.

On April 14, 2020, the Governor enacted L. 2020, c. 27, parts of which were later codified as amendments to N.J.S.A. 18A:7F-9. The statute provides in relevant part:

> Nothing in subsection b., c., or d. of this section [permitting virtual instruction of students] shall be construed to limit, supersede or preempt the rights, privileges, compensation, remedies, and procedures afforded to public school employees or a collective bargaining unit under federal or State law or any provision of a collective bargaining agreement entered into by a school district. In the event of the closure of the schools of a school district due to a declared state of emergency . . . for a period longer than three consecutive school days, public school employees covered by a collective negotiations agreement shall be entitled to compensation, benefits, and emoluments as provided in the collective negotiations agreement as if the school facilities remained open for any purpose and for any time lost as a result of school closures or use of

> virtual or remote instruction, except that additional compensation, benefits, and emoluments may be negotiated for additional work performed.
>
> [N.J.S.A. 18A:7F-9(e)(1).]

SPA is the collective bargaining representative of the Board's custodial employees. MA is the collective bargaining representative of the Board's security and maintenance employees. At the times relevant to this appeal, the three categories of employees were covered by separate collective bargaining agreements (CBA) with the Board.

Article XXIII, Subsection B of the CBA for custodial employees provided in relevant part:

> Emergency School Closings
>
> 1. Custodians who do not work on any day when schools are closed for an emergency shall not be paid and shall be docked an amount equal to one (1) day of pay.
>
> 2. Custodians who do work on any day when schools are closed for an emergency shall be paid 1 1/2 times their salary in addition to their regular day of pay.

Article XIII, "Emergency School Closing," of the CBA for security employees provided:

> The Board agrees to compensate all security personnel for their regular day[']s pay whenever schools are closed for reasons of emergency. A regular day is

> defined as the number of hours contained in a normal work day for the security staff member involved. All members of the Union required to work during a State of Emergency, as declared by the Governor, shall be compensated time and one-half.

Article VII, Section 9 of the CBA for maintenance employees provided in relevant part:

> Emergency School Closings
>
> . . . .
>
> c. Maintenance personnel who are on the roster and who work on any day when schools are closed for an emergency shall be paid 1.5 times their salary, in addition to their regular pay for the day.
>
> . . . .
>
> k. The above provisions shall not apply on any day when the Governor of the State of New Jersey, or the Mayor of East Orange, or the Mayor of the Town in which the employee resides declares a "State of Emergency."

From March 13, 2020, to July 13, 2020, the Board paid its custodial, security, and maintenance employees one-and-one-half times their regular pay, in addition to their regular pay, for the time they worked while school facilities

were closed to students. The Board did not change this practice when N.J.S.A. 18A:7F-9(e)(1) was enacted on April 14, 2020.[1]

After the Board stopped paying custodial, security, and maintenance employees more than their regular pay for working while school facilities were closed to students, SPA and MA filed three grievances, one for each category of employees, with the Public Employees Relations Commission. The Commission combined the grievances into one arbitration proceeding. The issue presented to the arbitrator was: "Did the [Board] violate the CBAs when, on July 13, 2020, it ceased paying additional pay to employees covered by this grievance? If so, what should be the remedy?"

On January 16, 2022, the arbitrator issued a written opinion and award. The arbitrator identified the principal issue as whether the Board's schools were closed within the meaning of the CBAs during the COVID-19 state of emergency. The Unions argued schools were closed because students were not permitted to enter school facilities for instruction. The Board argued schools

[1] It is not clear why the Board paid security employees one-and-one-half times their regular pay, in addition to their regular pay, given that the CBA for security employees provides they will be compensated at a rate of time and one-half for their work during a state of emergency. The Unions contend the Board's payment of security employees at the higher rate during emergency school closures was a longstanding practice, despite the clear language in the CBA.

were not closed because instruction took place virtually, some employees were present at school facilities, and the Board provided students lunch at school facilities. In addition, the Board argued the CBAs did not contemplate extra compensation for states of emergency that closed school facilities for extended periods of time.

The arbitrator interpreted the CBAs to mean schools were closed when school facilities were not open for the in-person instruction of students. In addition, the arbitrator considered the April 2020 amendment to N.J.S.A. 18A:7F-9. He determined N.J.S.A. 18A:7F-9(e)(1) is "not entirely clear" but "its purpose would appear to be to protect bargaining unit employees from losses – not additional pay – sustained due to closures longer than three days." He continued, "[e]ven less clear is the legislature's authority to invalidate my jurisdiction which springs from the parties' agreement to interpret and render an award based solely on that agreement."

In Part I of his decision, the arbitrator determined the Board violated the custodial employees' CBA when it stopped paying them extra compensation for the time they worked while schools were closed to students during the COVID-19 state of emergency.

In Part II of his decision, the arbitrator determined the Board violated the security employees' CBA when it stopped paying them extra compensation for the time they worked while schools were closed to students during the COVID-19 state of emergency. However, he decided security employees were entitled to compensation at a rate of time-and-a-half under their CBA. The arbitrator rejected MA's argument security employees were entitled to be paid at the rate of one-and-a-half times their regular pay, in addition to their regular pay, the Board erroneously paid them at the start of the COVID-19 state of emergency and during past emergencies. The arbitrator declined to adopt a rate of compensation at odds with the plain language of the CBA based on the Board's past practices.

In Part III of his decision, the arbitrator determined the maintenance employees' CBA unequivocally states they are not entitled to extra compensation for work performed when the Governor has declared a state of emergency. The arbitrator determined it is undisputed the Governor declared a COVID-19 state of emergency, which remained in place from March 9, 2020, to July 4, 2021, precluding the maintenance employees' claim for extra compensation.

The arbitrator entered an award: (1) directing the Board to pay its custodial employees one-and-a-half times their pay, in addition to their regular pay, for time working while school facilities were closed to students during the COVID-19 state of emergency; (2) directing the Board to pay its security employees one-and-a-half times their pay for time working while school facilities were closed to students during the COVID-19 state of emergency and denying the security employees' grievance for a higher amount of extra compensation; and (3) denying the maintenance employees' grievance for extra compensation.

The Unions subsequently filed a complaint and order to show cause in the Chancery Division seeking to confirm the arbitration award. The Unions acknowledged in their complaint that the arbitrator denied, in part, the security employees' grievance, and denied the maintenance employees' grievance. The complaint, however, did not challenge Parts II and III of the arbitration award. To the contrary, the complaint states the security employees "are entitled to an additional 1/2 times their regular rate of pay for the period March 9, 2020, to July 4, 2020"[2] and does not allege maintenance employees are entitled to extra

[2] The complaint appears to contain a typographical error, as the grievance sought a finding they are entitled to extra compensation for the period March 9, 2020, to July 4, 2021.

compensation. In addition, the complaint alleges "[t]here exist no grounds to vacate the [arbitration] award."

In a footnote of a cover letter accompanying the order to show cause, MA purported to reserve the right to seek an order vacating Part III of the arbitration award. The footnote stated:

> In making the admission that the custodial employees were denied their claim by the arbitrator, [MA] reserves the right to move for vacation of any part of the arbitrator's award in which it was not fully successful, but only in the event the Board opposes this application and seeks to have any part of the award . . . vacated.

The Board subsequently filed an answer denying the relief sought by the Unions was warranted. Although the Board did not file a counterclaim, in its "wherefore" clause it requests the court vacate the arbitration award in its entirety. However, in the brief it filed in response to the order to show cause, the Board argued the arbitration award should not be vacated in its entirety, but confirmed as to Parts II and III. Because the Unions also sought to confirm those Parts of the arbitration award in their complaint, the Board limited the arguments in its brief to vacating Part I of the award.

Three weeks later, the Unions submitted a reply brief that, for the first time, sought to vacate Part III of the award. In their letter, the Unions stated:

> To put it more succinctly, [p]laintiffs submit this brief seeking the following relief:
>
> • Confirm [P]art [I] of the Award sustaining the grievance in regard to custodial staff;
>
> • Confirm Part [II] of the Award sustaining the grievance, in part, in regard to security staff; and
>
> • Vacate Part [III] of the Award denying the grievance in regard to maintenance staff and granting the relief sought in the grievance.

On June 16, 2022, the court heard oral argument. At the start of the hearing, counsel for the Unions stated:

> Judge, procedurally, it's our position, our primary position that the award of the arbitrator is unimpeachable. That it should be confirmed in every respect. And I say that knowing that we've lost in full one-third of the award. But I don't think that that is subject to being challenged.
>
> What I did do and the submission I made initially was if the Board is going to take the position that any part of this award can be vacated than we're going to say that the third part of the [award], which we did lose, and which I do believe quite honestly whether I'm in favor of it or not should be confirmed. But if the [c]ourt is going to get behind the face of the award [then] I want to be heard to vacate only that part of the award dealing with the [MA], which is the only part of the award that we lost in full.

The Board's counsel objected to the Unions "attempting to . . . chang[e] . . . position midstream" by seeking to vacate Part III of the arbitration award in its reply brief.

The trial court agreed with the Board. Noting that it would not "address a backup position[,]" the court stated "what was to be addressed today is what is in the verified complaint. The verified complaint seeks affirmance of the entire award. That's what you responded to and that's what I'll hear you on."

On June 16, 2022, the trial court issued an oral opinion confirming the arbitration award. The court found the decision to be well reasoned and its outcome reasonably debatable. The court did not discuss N.J.S.A. 18A:7F-9(e)(1) in detail, finding only that the award "is not contrary to any law, regulation[,] precedent" or public policy.

A June 16, 2022 order: (1) confirms the arbitration award in its entirety; (2) directs the Board to pay custodial employees one-and-a-half times their regular pay, in addition to the regular pay, for time they worked while school facilities were closed to children during the COVID-19 state of emergency; and (3) directs the Board to pay security employees one-and-a-half times their regular pay for time they worked while school facilities were closed to children during the COVID-19 state of emergency.

The Board thereafter filed an appeal, arguing the trial court erred when it confirmed the arbitration award. The Board argues the arbitration award is contrary to N.J.S.A. 18A:7F-9(e)(1), which unequivocally requires the Board to compensate its employees as if school facilities had been open during the COVID-19 state of emergency. The Board argues the statute embodies the public policy of the State that school employees and school districts maintain steady and predictable compensation during extended school facility closures as if the school facilities had remained open for any purpose.

The Unions filed a cross-appeal, arguing the trial court erred when it did not vacate Part III of the arbitration award. The Unions contend the arbitrator exceeded his authority by denying the maintenance employees' grievance based on an interpretation of their CBA no party proffered at the arbitration. The Unions argued that during the arbitration hearing they had on standby witnesses who negotiated the maintenance employees' CBA and would have called those witnesses had the Union relied on subsection (k) of Article VII, Section 9 of the agreement. According to the Unions, those witnesses were prepared to testify that subsection (k) was intended by the parties to the CBA to apply to circumstances not present during the COVID-19 state of emergency.

The Board argues the Unions are barred from pursuing their cross-appeal, but if permitted to do so, we should entertain the Board's challenge to the trial court's order confirming Part II of the award.

II.

"New Jersey jurisprudence favors 'the use of arbitration to resolve labor-management disputes.'" Linden Bd. of Educ. v. Linden Educ. Ass'n, 202 N.J. 268, 275-76 (2010) (quoting N.J. Tpk. Auth. v. Local 196, I.F.P.T.E., 190 N.J. 283, 291 (2007)). "Arbitration is intended to provide 'a speedy and inexpensive' means to settle disputes." Id. at 276 (citing Bd. of Educ. of Alpha v. Alpha Educ. Ass'n, 190 N.J. 34, 42 (2006)).

"Judicial review of an arbitration award is very limited, and 'the arbitrator's decision is not to be cast aside lightly.'" Ibid. (quoting Alpha Educ. Ass'n, 190 N.J. at 42). We review the trial court's decision with respect to the confirmation of an arbitration decision de novo. Minkowitz v. Israeli, 433 N.J. Super. 111, 136 (App. Div. 2013) (quoting Manger v. Manger, 417 N.J. Super. 370, 376 (App. Div. 2010)).

"In the public sector, an arbitrator's award will be confirmed 'so long as the award is reasonably debatable.'" Linden Bd. of Educ., 202 N.J. at 276 (quoting Middletown Twp. PBA Local 124 v. Twp. of Middletown, 193 N.J. 1,

11 (2007)). An award is reasonably debatable if it is "justifiable" and "fully supportable in the record." Policemen's Benevolent Ass'n v. City of Trenton, 205 N.J. 422, 431 (2011) (quoting Kearny PBA Local # 21 v. Town of Kearny, 81 N.J. 208, 223-24 (1979)). Under the reasonably debatable standard, "a reviewing court may not substitute its own judgment for that of the arbitrator, regardless of the court's view of the correctness of the arbitrator's interpretation." N.J. Transit Bus Operations, Inc. v. Amalgamated Transit Union, 187 N.J. 546, 554 (2006).

Under the New Jersey Arbitration Act, N.J.S.A. 2A:24-1 to -11, an arbitration award under a collective bargaining agreement shall be vacated:

> a. Where the award was procured by corruption, fraud, or other undue means;
>
> b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;
>
> c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;
>
> d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.
>
> [N.J.S.A. 2A:24-8(a) to (d).]

Whether or not the arbitrator exceeded their authority "entails a two-part inquiry: (1) whether the agreement authorized the award, and (2) whether the arbitrator's action is consistent with applicable law." Borough of E. Rutherford v. E. Rutherford PBA Local 275, 213 N.J. 190, 212 (2013). A court "may vacate an award if it is contrary to existing law or public policy." Middletown Twp. PBA Local 124, 193 N.J. at 11 (quoting N.J. Tpk. Auth., 190 N.J. at 294).

"For purposes of judicial review of labor arbitration awards, public policy sufficient to vacate an award must be embodied in legislative enactments, administrative regulations, or legal precedents . . . ." Ibid. (quoting N.J. Tpk. Auth., 190 N.J. at 295). An arbitration award may not be vacated as contrary to public policy "based on amorphous considerations of the common weal." Ibid.

The Board argues the June 16, 2022 order confirming the award of extra compensation to custodial employees violates public policy as embodied in N.J.S.A. 18A:7F-9(e)(1). We agree.

It is well settled that the primary purpose of "statutory interpretation is to determine and 'effectuate the Legislature's intent.'" State v. Rivastineo, 447 N.J. Super. 526, 529 (App. Div. 2016) (quoting State v. Shelley, 205 N.J. 320, 323 (2011)). We start by considering "the plain 'language of the statute, giving the terms used therein their ordinary and accepted meaning.'" Ibid. (quoting

Shelley, 205 N.J. at 323). Where "the Legislature's chosen words lead to one clear and unambiguous result, the interpretive process comes to a close, without the need to consider extrinsic aids." Ibid. (quoting Shelley, 205 N.J. at 323). We do "not 'rewrite a plainly-written enactment of the Legislature [or] presume that the Legislature intended something other than that expressed by way of the plain language.'" Id. at 529-30 (alteration in original) (quoting Marino v. Marino, 200 N.J. 315, 329 (2009)). However, "[a]n enactment that is part of a larger statutory framework should not be read in isolation, but in relation to other constituent parts so that a sensible meaning may be given to the whole of the legislative scheme." Vitale v. Schering-Plough Corp., 447 N.J. Super. 98, 115 (App. Div. 2016) (quoting Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558, 572 (2012)).

N.J.S.A. 18A:7F-9(e)(1) is unequivocal:

> In the event of the closure of the schools of a school district due to a declared state of emergency . . . for a period longer than three consecutive school days, public school employees covered by a collective negotiations agreement shall be entitled to compensation, benefits, and emoluments as provided in the collective negotiations agreement as if the school facilities remained open for any purpose . . . .

Where, as was the case with the COVID-19 state of emergency, school facilities are closed for more than three consecutive school days, school

employees are to be compensated pursuant to the terms of their CBA "as if the school facilities remained open for any purpose." The statute requires the Board's custodial employees to be compensated as if the Board's school facilities had been open from March 9, 2020, to July 4, 2021.

The purposes of the statute are evident. Through enactment of 18A:7F-9(e)(1), the Legislature introduced financial certainty and stability in an otherwise fluid situation. The statute was enacted shortly after the start of the COVID-19 state of emergency. It is common knowledge the COVID-19 pandemic's impact on the operation of public schools was dramatic. Access to school facilities for instruction was extremely limited. The few occasions when school facilities reopened proved short lived. N.J.S.A. 18A:7F-9(e)(1) both ensured school employees would be compensated as if school facilities remained open, regardless of the vagaries of the pandemic, and limited the financial exposure of school districts for extra compensation arising from school facility closures, which prior to the COVID-19 state of emergency, would not have reasonably been expected to endure for over a year.

We are not persuaded by the Unions' argument the statute is intended only to prevent employee losses associated with a state of emergency, and not to prevent employees from receiving extra compensation during a state of

emergency as provided in a CBA. Nothing in the plain language of the statute supports this interpretation of the law. In addition, N.J.S.A. 18A:7F-9(e)(1) permits school employees to receive "additional compensation, benefits, and emoluments to be negotiated for additional work performed" during extended school facility closures. The Board's custodial employees do not argue they performed additional work beyond their regular assignments during the COVID-19 state of emergency. They sought to be paid time-and-a-half, in addition to their regular pay, for performing their regular duties for the duration of the year-and-a-half-long COVID-19 state of emergency.

Nor do we agree with the Unions' argument that N.J.S.A. 18A:7F-9(e)(1)'s protection of the "rights, privileges, compensation, remedies, and procedures afforded to public school employees or a collective bargaining unit under . . . any provision of a collective bargaining agreement entered into by a school district" supports Part I of the arbitration award. The custodial employees' rights under their CBA are protected by N.J.S.A. 18A:7F-9(e)(1). Under the statute, the custodial employees have a right to be compensated pursuant to the terms of their CBA "as if the school facilities remained open for any purpose" during the COVID-19 state of emergency.

Part I of the arbitration award is directly contrary to N.J.S.A. 18A:7F-9(e)(1) and its embodiment of public policy. The two cannot be harmonized. The arbitrator's interpretation of the statute as permitting custodial employees to receive extra compensation because the school facilities were closed to students is not reasonably debatable. "[A]rbitrators cannot be permitted to authorize litigants to violate either the law or those public-policy principles that government has established by statute, regulation or otherwise for the protection of the public." Weiss v. Carpenter, Bennett & Morrissey, 143 N.J. 420, 443 (1996).

We therefore reverse the June 16, 2022 order to the extent it confirms Part I of the arbitration award. We remand to the trial court for entry of an order vacating Part I of the arbitration award.

The Board seeks to reverse the June 16, 2022 order to the extent it confirmed Part II of the arbitration award only if the Unions are permitted to challenge the trial court's confirmation of Part III of the award in their cross-appeal. We turn, therefore, to the cross-appeal.

We agree with the trial court's conclusion the Unions' Chancery Division complaint sought to confirm the arbitration award in its entirety. If the Unions believed the arbitrator erred in Part III of his award by considering an

interpretation of the maintenance employees' CBA not offered by either party, they were free to include in their complaint a demand that Part III of the award be vacated. They did not do so. A footnote in a cover letter accompanying an order to show cause is not an appropriate method to "reserve" the right to file a claim not previously included in a complaint. Nor is a reply brief filed after the opposing party had completed its briefing the appropriate avenue to raise for the first time a substantive claim for relief not included in a complaint. We see no error in the trial court's decision not to consider the Unions' challenge to Part III of the arbitration award.

We note the record belies the Unions' argument the Board did not raise subsection (k) of Article VII, Section 9 of the maintenance employees' CBA before the arbitrator. The Board's post-hearing brief filed with the arbitrator quotes subsection (k) and argues that it "clearly demonstrates" the maintenance employees are not entitled to extra compensation when the Governor has declared a state of emergency. The Unions made the strategic decision not to call their witnesses with respect to subsection (k) and did not request a reopening of the hearing after receiving the Board's post-hearing brief.

We are also doubtful the Unions could have convinced the arbitrator or the trial court to award extra compensation to the Board's maintenance

employees in light of the unequivocal language of subsection (k), regardless of what the drafters of the agreement may have intended. When a contract is unambiguous, evidence intended to contradict the clear terms of the agreement is inadmissible. See Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 303 (1953) ("Where the parties have made the writing the sole repository of their bargain, there is the integration which precludes evidence of antecedent understandings and negotiations to vary or contradict the writing."). Because the Unions did not perfect a challenge to Part III of the arbitrator's award, we dismiss the cross-appeal.

Because we conclude the trial court did not err when it declined to consider the Unions' challenge to Part III of the arbitration award, the Board does not seek review of the trial court's confirmation of Part II of the award.

Reversed in part and remanded for further proceedings consistent with this opinion. The cross-appeal is dismissed. We do not retain jurisdiction.

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NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2044-23

NATALIA KRONFELD,

Plaintiff-Appellant,

v.

ELLIOTT MALONE and
LAW OFFICES OF ELLIOTT
MALONE, ESQ., LLC,

Defendants/Third-Party
Plaintiffs-Respondents,

v.

ROMAN GAMBOURG,
GAMBOURG & BORSEN,
LLC, a/k/a GAMBOURG
LAW GROUP, and ELENA
GAMBOURG,

Third-Party Defendants.

APPROVED FOR PUBLICATION
October 1, 2025
APPELLATE DIVISION

Submitted September 9, 2025 – Decided October 1, 2025

Before Judges Gilson, Firko, and Vinci.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-4946-19.

Lawrence H. Kleiner, LLC, attorney for appellant (Lawrence H. Kleiner, of counsel and on the briefs).

Tompkins, McGuire, Wachenfeld & Barry, LLP, attorneys for respondents (Matthew P. O'Malley, of counsel and on the brief).

The opinion of the court was delivered by

VINCI, J.A.D.

Plaintiff Natalia Kronfeld appeals from a July 7, 2023 order denying her eighth motion to extend discovery, an August 4, 2023 order denying her motion for reconsideration of that order, and a September 22, 2023 order granting summary judgment in favor of defendants Elliot Malone, Esq. and the Law Offices of Elliot Malone, Esq., LLC. (collectively Malone). We affirm.

We also address the scope of our decision in Hollywood Café Diner, Inc. v. Jaffee, 473 N.J. Super. 210 (App. Div. 2022), to clarify that its limitation on the applicability of the exceptional circumstances standard set forth in Rule 4:24-1(c) applies only when an arbitration or trial date is set administratively by notice prior to the conclusion of the discovery period. We now hold that once an arbitration or trial date is set by a judge in a discovery end date (DED) extension or case management order entered after expiration of the applicable initial period of discovery set forth in Rule 4:24-1(a), no extension of the discovery period may be permitted unless exceptional circumstances are shown.

I.

Plaintiff alleges Malone committed legal malpractice in connection with an underlying legal malpractice action against Snyder & Sarno, LLC and individual attorneys of the firm (collectively Sarno), who represented plaintiff in an earlier divorce action filed against her by her ex-husband in 2012. In 2015, on the eve of trial in the divorce action, the parties reached a settlement agreement that was placed on the record. Plaintiff was questioned extensively about the settlement agreement and told the court she understood the terms of the agreement and did not want to go to trial.

Following the settlement, plaintiff refused to pay Sarno's legal fees in the amount of approximately $148,000. Sarno filed a motion in the divorce action to recover its legal fees. On July 14, 2017, following a multi-day plenary hearing, the court entered an order granting Sarno's fee application in its entirety. The Family Part judge found plaintiff's testimony, particularly her "professed lack of proficiency in English," was "not credible." Plaintiff appealed from that order, and we affirmed. Fradkov v. Kronfeld, No. A-5419-16 (App. Div. Jan. 31, 2019).

In 2016, while the fee application was pending, plaintiff sued Sarno for legal malpractice. In 2017, after the attorney who filed the malpractice action

changed firms and could no longer handle the case, plaintiff retained Malone. Malone filed an amended complaint alleging Sarno failed to "obtain or investigate evidence to establish the true and complete holdings and valuations of [her ex-husband's] business interests" and "place any accountant in a position to provide a complete, accurate, and up-to-date valuation."

The amended complaint alleged, "without a forensic analysis and complete assessment of [her ex-husband's] holdings, [Sarno] could not properly consider the amount to which [plaintiff] was entitled." As a result, plaintiff did "not receiv[e] by way of settlement or final judgment that to which she was entitled to by way of equitable distribution, alimony[,] and child support."

Following discovery and motion practice, the parties participated in mediation. Prior to the first day of mediation on September 17, 2018, Malone provided plaintiff with a chart of potential settlement amounts ranging from $500,000 to $1.25 million showing expenses, fees, and her anticipated net recovery. During a second mediation session the following week, plaintiff agreed to settle her claims against Sarno for $975,000. She also agreed to pay Sarno $100,000 to resolve the fee dispute, which included the initial award of $148,000 plus approximately $90,000 in additional fees for the plenary hearing.

On July 2, 2019, plaintiff filed this action against Malone. She alleged Malone "failed to do any of the necessary discovery on the multiple marital businesses and . . . ignored [her] multiple requests . . . to undertake discovery on the sale of the company by her ex-husband to Google." Also, one of the financial experts Malone retained, Anthony Ambrosio, failed to include one of her ex-husband's businesses in his report, and Malone failed to correct that error. "As a result, this business was never included in the expert report, mediation, and the settlement." Plaintiff also alleged Malone failed to properly advise her of the tax implications of the settlement and "improperly paid . . . Sarno without [her] authorization."

On September 16, 2019, Malone filed an answer and counterclaim, and plaintiff filed an answer to the counterclaim on October 1. The parties subsequently exchanged written discovery and began conducting depositions.

On October 12, 2020, plaintiff filed her first motion to extend discovery, which was granted on October 30. The DED was extended to March 31, 2021. On December 23, 2020, plaintiff filed her second motion to extend discovery, which was granted on January 8, 2021, extending the DED to June 30, 2021. On April 26, 2021, she filed her third motion, which was granted on May 14, extending the DED to October 28, 2021. Her fourth motion to extend, filed

February 3, 2022, was granted on February 18, and the DED was extended to June 25, 2022. On April 19, 2022, plaintiff filed her fifth motion to extend, which was granted on May 13, extending the DED to October 23, 2022.

On August 22, 2022, plaintiff filed her sixth motion to extend discovery. On September 9, the court entered an order granting the motion, extending the DED 120 days until February 20, 2023, and scheduling trial for April 24, 2023.

On February 17, 2023, three days before the end of the discovery period, plaintiff filed her seventh motion to extend discovery. The motion sought to extend the DED 120 days to June 20. Malone opposed the motion.

The Civil Presiding Judge heard oral argument on March 23. Plaintiff's counsel argued discovery was complex and "[s]ome of this has gotten delayed [because of his] absence for medical treatment." "We need to complete the dep[osition] of [plaintiff], and then . . . the dep[osition] of . . . Malone, and then we need to serve expert reports, and that gets us to the finish line."

The judge was "a little surprised that after [the] trial date[was] set in September that there[was] an application in February to extend discovery." He was "sympathetic to [counsel's] health issues, but . . . [they] had discussions before about" those issues. The judge "permit[ted] the final extension of discovery." He cautioned counsel, "if it do[es not] happen, do[not] come back."

Counsel stated he "understood." The judge entered an order extending the discovery period to June 20, 2023, as requested. Specifically, he ordered "[d]epositions of the parties to be completed by April 6, 2023; . . . [p]laintiff's expert reports be served by May 4, 2023; [Malone's] expert reports be served by June 5, 2023; [and] [e]xpert depositions [be] completed by June 20, 2023." The trial date was adjourned to September 18, 2023.

On June 21, after the June 20 deadline for completion of discovery expired, plaintiff filed an eighth motion to extend discovery. Plaintiff argued "[her] primary counsel's health issues, compounded by COVID[-19,] and the inherent complexity of this case qualify as exceptional circumstances to permit [an] extension of discovery." Plaintiff also contended that "[b]ased on the wording of the March 23 order, it does not appear a discovery end date was set when discovery was extended[.]"

On July 7, after hearing oral argument, the judge entered an order denying the motion to extend discovery supported by an oral opinion and written statement of reasons. He determined:

> this [c]ourt . . . ha[s] been very tolerant of the health issues, but as [the court] had indicated in March at the time [the court] entered an order extending discovery, . . . it was time for this to be done and . . . [the court] thought [it] made it pretty clear then

> on the record how the [c]ourt felt about what needed to get done.
>
> . . . .
>
> Quite frankly, [the court] made it clear in March, … [it was] going to permit the final extension of discovery, if it do[es not] happen, do[not] come back. [The court] meant it when [it] said it, and that was the seventh discovery extension. There has now been almost 1,300 days of discovery and, despite these things, . . . they do[not] get done.
>
> [The court] do[es not] see exceptional circumstances in the face of a trial date. Quite frankly, [the court] see[s] whatever the opposite of that would be . . . . [The court] see[s] . . . a client who certainly did not want to proceed in this case with any sense of urgency or any sense of pace and created continuing delays for all involved, the court[is] not going to reward that at this point.
>
> So [the court] [does not] see where the exceptional circumstances factors are met. It[is] unfortunate, but . . . at some point . . . there has to be some effect to orders, and [the court] made it clear then and it was[not] followed.

In his July 7, 2023 order, the judge explained:

> The present application fails to demonstrate exceptional circumstances warranting a further extension which is the standard with a [t]rial [d]ate having been set.
>
> The delays and inability to complete the discovery is the result of the plaintiff's failure to comply and cooperate with the scheduling of depositions . . . .

> Furthermore, this is not a basis to extend or an exceptional circumstances standard. Part of what is sought in the request for extension is to conduct another full day of deposition of . . . Malone despite [there] having been two full days already conducted. The timing of the defense deposition was the product of plaintiff's failure to cooperate in the discovery process.
>
> There having been seven [DED] extensions[,] the court does not find exceptional circumstances to warrant the[] relief sought [herein].

Plaintiff moved for reconsideration, reiterating the same arguments and contending her counsel was entitled to a reasonable accommodation because of his health issues. Also, "the extension will not prejudice anyone and we are told there is a civil trial backlog anyway." On August 4, 2023, the judge entered an order denying the motion for reconsideration, finding "the court has been both understanding and accommodating of the health concerns of counsel. To utilize such concern as a basis for reconsideration is a distortion of the record and wholly inappropriate."

On August 25, Malone moved for summary judgment arguing discovery was completed and plaintiff failed to serve an expert report in support of her claims of legal malpractice. Plaintiff's counsel filed a certification in opposition to the motion. Plaintiff did not file a response to Malone's statement of material facts, a counterstatement of material facts, or a brief.

Counsel's certification, dated September 12, 2023, repeated certain allegations made in plaintiff's complaint without citations to the record, and repeated the arguments previously considered and rejected by the presiding judge. Counsel attached the report of a handwriting expert, previously served on May 3, 2023, "who opined that Ambrosio's signature on his expert report [served in the underlying Sarno litigation] was forged." Counsel also attached the report of plaintiff's legal malpractice expert, Jared M. Lans, Esq., dated September 7, 2023, which counsel "received [that day]." Counsel filed a separate certification "pursuant to R[ule] 4:17-7 pertaining to the expert report of [Lans]" contending "the information required for the amendment [to plaintiff's answers to interrogatories] was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date."[1]

On September 22, 2023, after hearing oral argument, a different judge entered an order granting Malone's motion for summary judgment supported by a comprehensive oral opinion. The motion judge found plaintiff's opposition was procedurally deficient because:

> counsel's certification submitted in opposition . . . contains facts that are not within counsel's personal knowledge or factual allegations, which can[not] be considered and totally fails to meet

[1] The copy of the certification in the appellate record is unsigned and undated.

> Rule 4:46-2, which requires that to present an issue of material fact, you have to comply with the [R]ule.
>
> There should have been a response to the movant's statement of material facts. There was none, so all of those facts are deemed admitted.
>
> [I]f plaintiff wanted to submit a counter statement, [she] was required under the rule to submit a statement of material facts that corresponded to the rule and had citations to the record and attached record exhibits on which [she] relied.

The motion judge noted because the presiding judge denied the motion to extend the DED, "[t]he current state of the case is that there is no [legal malpractice] expert report and no expert report permitted[.]" She found "[t]his is not a common knowledge case," as a "jury could not conclude legal malpractice without [an] expert report."

The motion judge rejected counsel's contention that the Lans report could not have been served before the expiration of the discovery period because "there was nothing in . . . Lans'[s] report relying on facts that occurred recently, and . . . nothing to explain why . . . it was not available." The report "should have been available by the exercise of reasonable diligence earlier, and [she] view[ed] the issue as really an attempt to . . . serve it in defiance of [the presiding judge's] orders." This appeal followed.

II.

On appeal, plaintiff argues: (1) the judge employed the wrong standard in denying her motion to extend discovery; (2) the judge's failure to find exceptional circumstances was an abuse of discretion; and (3) the motion judge improperly granted summary judgment. Specifically, plaintiff contends: (1) the motion judge erred by refusing to consider Lans's report; (2) the motion judge "entirely ignored" the report of her handwriting expert "that proved . . . Malone forged the signature of . . . Ambrosio in the report he obtained in the underlying action;" (3) Malone "violated RPC 3.3 by his lack of candor;" and (4) "[t]he breach of conduct by [Malone] was so egregious" expert testimony was unnecessary.

III.

A trial court's discovery rulings are "entitled to substantial deference." DiFiore v. Pezic, 254 N.J. 212, 228 (2023) (citing State v. Stein, 225 N.J. 582, 593 (2016)). We "generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion[,] or its determination is based on a mistaken understanding of the applicable law." Rivers v. LSC P'ship, 378 N.J. Super. 68, 80 (App. Div. 2005) (citing Payton v. N.J. Tpk. Auth., 148 N.J. 524, 559 (1997)).

The judge correctly determined plaintiff was obligated to show exceptional circumstances in support of her eighth motion to extend discovery. Rule 4:24-1(c) provides a motion to extend discovery "shall . . . be made returnable prior to the conclusion of the applicable discovery period" and "if good cause is . . . shown, the court shall enter an order extending discovery." However, "[n]o extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown."

Plaintiff's motion to extend discovery was filed on June 21, 2023, after trial dates were fixed in the September 9, 2022 and March 23, 2023 orders. As expressly set forth in Rule 4:24-1(c), because a trial date was fixed, no extension of the DED was permitted absent a showing of exceptional circumstances.

Plaintiff's reliance on Hollywood Café is unavailing for two reasons. First, the exceptional circumstances standard applied to her motion to extend because it was untimely. Rule 4:24-1(c) requires a motion to extend be "made returnable prior to the conclusion of the applicable discovery period." Plaintiff's motion was filed on June 21, after the discovery period expired on June 20, and was not returnable until July 7.[2] In Hollywood Café, we determined when, as

[2] Plaintiff appears to argue the motion was timely because the judge did not set a new DED in the July 7 order. That argument is without merit. The July 7

here, the moving party seeks an extension after the discovery period has ended and after a trial date has been set, the court may grant the extension only upon a showing of exceptional circumstances. 473 N.J. Super. at 217.

Second, even if the motion was timely filed, Hollywood Café does not mandate application of the good cause standard under the facts of this case. In Hollywood Café, the court "sent the parties notice that trial was set" prior to the expiration of the initial period of discovery set forth in Rule 4:24-1(a). Id. at 214. We noted the administrative "practice of sending out arbitration and trial notices before the end of discovery . . . causes obvious tension among a series of rules designed to foster trial date certainty." Id. at 220. We concluded "when the court chooses to send out arbitration and trial notices during the discovery period, judges evaluating a timely motion to extend discovery may not utilize the exceptional circumstances standard." Ibid.

Plaintiff misinterprets Hollywood Café and misconstrues its applicability to this case. Unlike the administrative notice sent in Hollywood Café, here trial dates were set in the sixth and seventh DED extension orders entered by judges

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order plainly established June 20, 2023, as the final day for discovery. Even if the DED was not administratively adjusted, which we cannot determine from the record before us, the applicable discovery period was established in the July 7 order, and it concluded on June 20.

who were responsible for the management of the case. Nothing in our decision in Hollywood Café is intended to minimize the significance and effect of trial dates set by judges in discovery extension or case management orders. Hollywood Café applies only when an arbitration or trial date is set by notice sent as an administrative tool prior to the conclusion of discovery. We hold that when a motion to extend discovery is filed after a judge sets an arbitration or trial date in a DED extension or case management order entered after expiration of the applicable initial period of discovery set forth in Rule 4:24-1(a), the exceptional circumstances test applies.[3]

We are satisfied the judge did not misapply his discretion by finding plaintiff failed to show exceptional circumstances. Under the exceptional circumstances standard, the movant must demonstrate:

> (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; and (4) the

[3] In Hollywood Café, we recognized "a court could render meaningless the 'good cause' standard applicable to motions to extend discovery that are timely filed . . . by simply assigning an arbitration or trial date early in the litigation." 473 N.J. Super. at 218 (emphasis added). We are confident, however, judges will not misapply their discretion by setting arbitration or trial dates before it would be appropriate to do so. As in this case, for example, where the court did not set a trial date until the sixth order extending discovery.

> circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.
>
> [Hollywood Café, 473 N.J. Super. at 217 (emphasis omitted) (quoting Rivers, 378 N.J. Super. at 79).]

The judge properly considered the relevant factors and determined plaintiff failed to show exceptional circumstances. Contrary to plaintiff's claim, the judge did not disregard counsel's medical condition. Rather, he and the judge who granted prior discovery extensions attempted to accommodate counsel's needs by granting seven discovery extensions and twice adjourning the trial date. Moreover, the judge also found the delays in the case were the fault of "a client who certainly did not want to proceed . . . with any sense of urgency . . . and created continuing delays for all involved," including by failing to "comply and cooperate with the scheduling of depositions." There is no basis for us to disturb the judge's decision.

IV.

We are convinced the motion judge correctly granted summary judgment. Our review of a trial court's grant or denial of a motion for summary judgment is de novo. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). Like the trial court, we consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a

rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "By its plain language, Rule 4:46-2 dictates that a court should deny a summary judgment motion only where [a] party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill, 142 N.J. at 529 (emphasis omitted).

Pursuant to Rule 4:46-2(a), a party moving for summary judgment must file a "statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted." Rule 4:46-2(b) mandates "a party opposing the motion shall file a responding statement either admitting or disputing each of the facts in the movant's statement." "[A]ll material facts in the movant's statement which are sufficiently supported will be deemed admitted . . . unless specifically disputed by citation [to the portion of the motion record] demonstrating the existence of a genuine issue as to the fact." Ibid. "An opposing party may also include in the responding statement additional facts that the party contends are material and as to which there exists a genuine issue[,]" "together with citations to the motion record." Ibid.

Rule 4:46-5(a) provides "an adverse party may not rest upon the mere allegations or denials [in] the pleading[s], but must respond by affidavits meeting the requirements of R[ule] 1:6-6[4] . . . setting forth specific facts showing that there is a genuine issue for trial." Mere annexation to the response to the motion of an exhibit list or the exhibits themselves, without more, does not constitute compliance with the rule. Lyons v. Twp. of Wayne, 185 N.J. 426, 435 (2005). The party opposing the motion has the affirmative duty of responding in accordance with the rule. Polzo v. Cnty. of Essex, 196 N.J. 569, 586 (2008).

We are unpersuaded by plaintiff's claim that the motion judge failed to consider the legal malpractice expert report prepared by Lans and served for the first time in opposition to Malone's motion. That report was served on September 12, 2023, more than four months after the May 4, 2023 deadline passed for plaintiff's expert reports, nearly three months after the end of discovery, and in direct contravention of the presiding judge's July 7 order. As the motion judge aptly noted, under "[t]he current state of the case . . . [plaintiff

[4] Rule 1:6-6 states affidavits must be "made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify."

did not have a legal malpractice] expert report and no expert report [was] permitted."

She correctly determined plaintiff's opposition to Malone's motion for summary judgment was fatally defective. Plaintiff did not file a response to the statement of material facts or a counterstatement of material facts as required by Rule 4:46-2(a) and (b). The certification counsel filed merely repeated allegations set forth in plaintiff's complaint to which he was not competent to testify without citation to evidence in the record in violation of Rule 1:6-6 and Rule 4:46-2(b).

In addition, the motion judge correctly found Malone was entitled to summary judgment because "[t]his is not a common knowledge case" and "a jury could not conclude legal malpractice without [expert testimony]." This case involves complex claims of legal malpractice. They include claims relating to the underlying matrimonial litigation handled by Sarno, the subsequent litigation of a claim of malpractice allegedly committed by Malone while pursuing a claim against Sarno, alleged conflicts of interest created by Malone, and plaintiff's settlement of both underlying actions, including her understanding of the tax consequences of the settlements based on allegedly improper tax advice from Malone.

It is well-settled expert testimony is generally required in legal malpractice cases. Buchanan v. Leonard, 428 N.J. Super. 277, 288 (App. Div. 2012) (noting "'the duties a lawyer owes to [a] client are not known by the average juror[.]'") (quoting Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64, 78 (App. Div. 2007)). Without expert testimony, plaintiff's legal malpractice claims against Malone failed as a matter of law.

Plaintiff's contention the motion judge "entirely ignored" the report of her handwriting expert "that proved . . . Malone forged the signature of . . . Ambrosio in the report he obtained in the underlying action" lacks merit. In fact, no such argument was made in opposition to Malone's motion. Rather, plaintiff argued her handwriting expert opined Ambrosio's signature may have been forged, not that it was forged by Malone. Plaintiff's claim Malone forged the signature finds no support in the report of her handwriting expert or any other competent evidence properly identified in opposition to Malone's motion for summary judgment.

To the extent we have not specifically addressed any of plaintiff's remaining arguments, it is because they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

EXHIBIT A

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June 15, 2020

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RE: Pami Realty, LLC v. Locations XIX, Inc. d/b/a Locations Construction

Dear Counsel:

The following is the Arbitrator's written decision in the above referenced claim. The matter was arbitrated to conclusion with in-person Arbitration dates of December 11, 2019 and February 13, 2020. In addition, with the consent of both parties the Arbitrator spent a short amount of time trying to settle this claim. Both sides agreed that they would waive any potential conflict of interest, caused by the brief settlement discussion. When the settlement discussions proved unproductive the Arbitration continued to conclusion.

Claimant, Locations XIX (hereinafter "Locations") claims $358,194.50 for moneys due under the contract with Respondent. Pami Realty, (hereinafter "Pami") for construction work on property owned by Pami. Pami has filed a counterclaim, alleging that the work done was

defective and unfinished, requiring Pami to hire a contractor to finish the work. Pami also asserts that the Locations delay caused consequential damages.

After reviewing the evidence and testimony, the Arbitrator finds that Pami did not give Locations notice of any defective or incomplete work as required under the contract.

The first issue to be decided is the 12/14/14 contract purchase price of $130,000 marked P-5 during the hearing. Pami contends that the $130,000.00 paid under P-5 was a down payment included in the 8/30/15 contract for $1,559,100.00 marked P-1 at the Hearing. Locations responds by pointing out that P1 and P5 are 2 separate contracts. In addition, Locations contends there is nothing in either contract that states, suggests or implies that the $130,000.00 from P-5 was to be a down payment for P-1, or that their was any intention, that P-5 was a down payment for P-1.

I find that the $130,000.00 was not a down payment of the purchase price contained in P-1 for the following reasons. When looking at P-1 and P-5 there is nothing in either contract that states or even references that P-5 is a down payment for P-1. One would expect P-1 to set forth a $130,000.00 deduction or credit at the minimum.

In addition, Pami did not raise the issue until 2018 when the parties became adversaries. In fact when the parties and their attorneys met to discuss payments owed by Pami to Locations and Pami agreed to make a payment for $200,000.00, Pami still did not raise the issue of a $130,000.00 credit.

Finally, if one were to accept Pami's reliance on Section 4.4 of P-1 as evidence that P-1 subsumed P-5 and therefore Pami should got a credit for $130,000.00, then why was the value assigned to "Demo of Structures and Tree Remove" only $39,000.00 as opposed to $130,000.00. Location's explanation is more logical. Chuck Jablonski explained the schedule of values

contained the reference to demolition and site clearing at the direction of First Bank's attorneys for purposes of structuring the loan.

More importantly, the schedule of values had no bearing of Locations scope of work under either P-1 or P-5. Whereas the scope of the work was separate and distinct under both contracts. The scope of the work under P-5 was for demolition and site clearing, the scope of the work under P-1 was for site work and construction of a shell building.

The Arbitrator finds that the Testimony of Dominick Caruso, was of little value. Caruso did not read the parties contract or the architectural and engineering plans. Caruso also did not give any notice to Locations of any defective or incomplete work.

The Arbitrator finds that the Testimony of Pami's owner Pasquale Parascandolo lacked credibility and was unpersuasive. The Arbitrator finds the Testimony of Chuck Jakoboski to be highly credible. As indicated below, Parascandolo's testimony regarding the $130,000.00 demonstrated numerous credibility issues. In addition, Parascandolo's testimony not to engage its architect to administer the job or payments was obviously done to save money. To suggest that Chuck advised Parascandolo not to pay an architect to do the final inspection, something Chuck adamantly denies, makes no sense. In fact, Chuck testified he advised Parascandolo to get the architect.

PAMI decided not to engage its architect to administer the job or payments. Instead, the parties engaged in a course of dealing whereby Locations would submit a payment request for work performed to PAMI'S lender, First Bank, then First Bank would send a bank representative to the property to inspect the work performed, then First Bank would issue payment to PAMI and then PAMI would then issue payment to Locations. This course of dealing lasted until February 2018, when PAMI refused to pay Locations for its payment requisition of $183,750.

(P-6). This led to meetings between the parties and their attorneys in March 2018 to discuss the substantial monies owed to Locations for work performed and the remaining items of contract work to be completed. PAMI, who was then represented by Robert McGowan, Esq., finally made a payment of $200,000 in May 2018 so that Locations could pay its subcontractors. Locations and its subcontractors proceeded to work the summer months of 2018. However, in late August it again appeared that Pasquale was refusing to make any further payments, and on August 29, 2018, a meeting in a Dunkin Donuts store near the property took place. At that meeting, which was attended by Pasquale, Tony Aldorasi, Chuck, Bill Bori and Karen McDonough (Locations' bookkeeper), Pasquale refused to pay the money owed for work completed and would not discuss payment of the necessary, extra work on the sewer and water main connections still in process. As Bill Bori testified, he handed Pasquale a proposed change order of the extra work going on, and Pasquale threw it to the ground. In fact, Pasquale asked Bill Bori to go outside and, once outside, asked Bori to reduce Locations bill and give Chuck a "haircut" by taking the money out of Chuck's pay. Pasquale's intention to stiff Locations was then crystal clear. In response, Locations filed a construction lien claim for monies owed for worked performed. Nonetheless, Locations continued to perform the extra work and completed it in October 2018.

Throughout the entire job, neither PAMI nor its agents gave any notice, verbal or otherwise, to Locations of any defective or incomplete contract work or any opportunity to repair and complete. Moreover, PAMI and its agents never issued any notice of default to Locations, and they did not terminate Locations' services. Even Dominick Caruso, who was hired in September 2018 to act as PAMI's construction manager, did not give Locations any such notice. In fact, he never even met Chuck or in any way communicated with him, and it was not until

PAMI filed Caruso's January 2019 certification in its Superior Court action to discharge Locations' construction lien claim (filed in September 2018) that PAMI claimed for the first time that certain work was defective and incomplete.

The Arbitrator found Parascandolo's testimony to be evasive and often purposely non-responsive. Parascandolo's testimony that Chuck had just gotten divorced and used the $130,000.00 to buy an expensive truck was an example of Parascandolo's attempt to mislead the Arbitrator.

Article 12.2.2.1 of the parties (Contract) requires Pami to provide notice of an problem with Location's work. This was never done. In addition, under article 14.22 written notice was required to terminate the contract. This was not done.

The 2015 contract explicitly provided that Location would deliver the shell building within 8 months from commencement. Section 3.3. Pami argues Location breached the contract since the project was not completed to well after the 8 month period. While Location does not dispute the terms of the contract, Locations argues that the 8 month completion date is not applicable for primarily 2 reasons.

1.) The 8 month completion was a mistake, since it was obvious that the work contemplated in P-1, would be impossible to complete in 8 months and 2.) That Pami waived the provision by its course of conduct throughout the construction of the project.

The Arbitrator finds that Location was not bound by the 8 month completion time stated in the contract. Pami did not express any problem with the progress of the job until the October 2017 meeting and even then he did not seek to hold Locations in default, but simply urged Locations to move forward and complete the work. Ironically, Pami was in default of its payment obligations thru 2018 and expected Locations to pay their sub contractors with their

own money. Through all of this Pami did not provide Locations with any written notice that Locations had violated the "8 months time period" of the contract or that their was any issue with the quality of Locations work.

DAMAGES

The Arbitrator finds that Locations had satisfied their burden of proof and is awarded $282, 494.50 pursuant to the terms of the contract P-1. This decision is based on the following: Looking at the totality of the evidence, the balance tips clearly in favor of Location for reasons stated, and the Arbitrator found Locations witness credible and straight forward. On the other hand, the Arbitrator found Pami's witnesses evasive and lacking credible. The Arbitrator highlights additional facts. The quality and workmanship of Locations work was essentially undisputed. Pami never gave Locations any written notice about the work taking too long before Pami would pay Locations the bank would inspect the work and then pay Pami. There was no evidence tha the inspections ever noted any problem of any kind. Pami made a $200,000 payment to Locations in May 2018 after a number of meeting with the parties and their attorneys.

EXTRA WORK

It is undisputed that the water and sewer main connections were not in the original site plans. Clearly this caused extra work for Locations. It is also clear that Parascandolo was given notice of the need for this work and did not object. According Location is awarded $65,700.00 for said work.

Locations is also claiming between $10,000- $20,000 for extra work for signage/awnings. Locations has not satisfied their burden of proof and this claim is denied.

TOMPKINS, McGUIRE, WACHENFELD & BARRY

COUNTERCLAIM

Pami is seeking damages by way of counterclaim, alleging defective or unfinished work. Pami has failed to prove its allegations in P-8, P-9, P-10 and P-13. There is no competent testimony to support the claims in P-8, 9, 10 and 13. In addition, parts of the above noted items were not the responsibility of Locations. For example, the alleged roof issues in D-8 were the responsibility of Pami's plumbing and roofing contractors. In D-12 Pami alleges damages for not filling open trenches with concrete. Again, Caruso's Testimony was unpersuasive and Chuck Jablonski's reasoning was credible. Regarding Pami's claim of electrical services, the Arbitrator finds Chuck's Testimony far more credible than Caruso's. Same goes for the claim for bollards. Caruso admitted he did not read the architect's plans.

Pami's claims for clean up of the site are too speculative.

Pami has not proved that Locations is responsible for Caruso's contract. Pami has failed to establish that Caruso's work was within the terms of the contract. Pami did not set forth a basis for the $20,000.00 claimed by Caruso and again Caruso did not read the contract, architectures and engineering plans. Pami is entitled to a credit of $850 for the water main test.

In addition to the above Locations objected to Pami's claim for damages on basis that Pami failed to provide notice of any defective or unfinished work and give Locations an opportunity to repair or complete same. Pami had a contratural obligation to provide notice prior to asserting any claims. The notice provision of the contract bar the claims set forth in Pami's counterclaim.

Pami's claims for delay-related damages is denied for the following reasons. The Arbitrator finds as a matter of law, that the mutual waiver of consequential damages pursuant to the contract article 12.1.6 prohibits this claim.

In addition, Pami through its conduct waived the substantial completion date for reasons previously expressed above.

Finally Pami is estopped from awarding any delay damages based on its own default in payment obligations. Also, Pami's delay damages claim did not meet its burden of proof and was too speculative. The Arbitrator also finds that Locations successfully proved that its work was not defective or incomplete.

According, the arbitrator finds for Locations and awards Locations $342,494.50. The Arbitrator declines to award attorneys fees or interest.

Very truly yours.

Hon. Dennis F. Carey, III

Hon. Dennis F. Carey III (Ret.)
For TOMPKINS, McGUIRE, WACHENFELD & BARRY

DFC: jmc

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2718-22

PAMI REALTY, LLC,

Plaintiff-Appellant/
Cross-Respondent,

v.

LOCATIONS XIX, INC. d/b/a
LOCATIONS CONSTRUCTION,

Defendant-Respondent/
Cross-Appellant.

———————————————

Submitted April 28, 2025 – Decided October 21, 2025

Before Judges Gummer and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-5845-18.

Ferrara Law Group, PC, attorneys for appellant/cross-respondent (Ralph P. Ferrara and Kevin J. Kotch, of counsel and on the briefs).

Post Polak, PA, attorneys for respondent/cross-appellant (David L. Epstein and Kathryn A. Kopp, on the briefs).

The opinion of the court was delivered by

GUMMER, J.A.D.

In Pami Realty, LLC v. Locations XIX Inc., 468 N.J. Super. 546, 561 (App. Div. 2021), we reversed orders denying defendant's motion to confirm an arbitration award and granting plaintiff's cross-motion to vacate the award. We remanded the case with instructions the trial court conduct an evidentiary hearing to resolve factual disputes regarding whether the parties had "agreed the arbitrator could participate in settlement discussions and resume his role as arbitrator." Id. at 559. After conducting the evidentiary hearing on remand, the trial court found that the parties had agreed the arbitrator could participate in settlement discussions and resume his role as arbitrator and that the arbitrator had not exceeded his authority in issuing an award in defendant's favor. The court entered an order granting the motion to confirm the arbitration award and denying the cross-motion to vacate it. It also entered an order of final judgment, in the amount awarded by the arbitrator but without post-judgment interest.

Plaintiff appeals the orders, contending the court erred in permitting the arbitrator to testify at the evidentiary hearing, in its assessment of the burden of proof, and in finding the parties had an agreement. Defendant cross-appeals the order of judgment, arguing the court erred in not awarding post-judgment

interest. We conclude the trial court erred in not awarding post-judgment interest in part, reverse that aspect of the order of judgment, and remand with instructions to issue an amended order of judgment that includes a partial award of post-judgment interest consistent with this opinion. Perceiving no other errors or abuse of discretion, we otherwise affirm.

I.

The procedural history of this case, which we detailed in Pami, 468 N.J. Super. at 550-55, is well known to the parties. We focus on the aspects of that history that are particularly relevant to this appeal.

Following our remand of the case, the trial court conducted a case management conference. The court framed the issue before it as: "[d]id the parties agree or not agree that the arbitrator could interrupt the arbitration proceedings and mediate . . . and then return, if that [mediation] was unsuccessful." In response, plaintiff's counsel asserted "even though we're the plaintiff in this case, . . . the burden now shifts to the defendant to prove that that agreement was changed and that the parties . . . agreed to it." Defense counsel replied it was plaintiff's "burden to present . . . evidence about why [it] think[s] the arbitration award is invalid."

The court referenced and quoted from the following portion of our opinion:

> The agreement between the parties and the arbitrator provided that "[e]xcept on basic procedural matters, the parties (and their representatives) shall have no ex parte communications with the Arbitrator concerning the arbitration." Although the agreement did not reference mediation, it contained the following provisions regarding settlement:
>
> > 4. Your client(s) and/or representative(s) of your client(s) with authority to settle must be either present at the arbitration or immediately available by phone to facilitate any settlement discussions and decisions.
> >
> > 5. The parties agree that all discussions, if any, concerning settlement remain confidential, and that no party shall subpoena the Arbitrator to testify concerning statements made by anyone during the arbitration or during settlement discussions. Nor will any party subpoena documents generated by or during the arbitration. The parties will defend the Arbitrator from any subpoena(s) issued by third parties, or reimburse the Arbitrator for such defense, at the Arbitrator's discretion.
>
> [Id. at 550-51.]

The court again addressed the question before it: "Did the parties agree to depart from the arbitration hearing, attempt mediation, and with the arbitrator

becoming, in effect, a mediator and if it was unsuccessful, did they agree that the arbitrator would resume the hearing he was conducting and continue?" It initially commented "plaintiff is now contesting the award so, it's plaintiff's burden" but then stated "[i]t's really nobody's burden. It's really, the [c]ourt has to determine from the witnesses what happened." The court explained that we had remanded the case for "a fact hearing to determine whether or not the arbitrator was given authority to conduct mediation and then return to his role as arbitrator, if the mediation was unsuccessful." It found, "that's what we're here for."

During the conference, the court also addressed whether the arbitrator could testify during the evidentiary hearing. In Pami, we held:

> We are, and the motion judge should be, mindful that the agreement retaining the arbitrator provided "no party shall subpoena the Arbitrator to testify concerning statements made by anyone during the arbitration or during settlement discussions." We leave it to the motion judge to determine the meaning and application of that provision under the present circumstances and the structure and scope of the evidentiary hearing, with the understanding that the point of the hearing is to resolve the parties' conflicting factual contentions regarding whether they agreed the arbitrator could participate in settlement discussions and resume his role as arbitrator.
>
> [Id. at 559-60.]

In deciding whether the arbitrator could testify, the trial court recognized that "the general prohibitions against a neutral testifying are that the neutral cannot comment on the substance of what occurred during the arbitration or evidence or any of the substantive disputes between the parties." The court determined the arbitrator was "a competent witness because the issue in this case has to do with a determination of his jurisdiction." The court held the arbitrator could testify only about the "procedural issue" of whether the parties had agreed he could resume his role as arbitrator after mediating the case. The court directed that the arbitrator could not "answer any questions about how he formulated his decision" or about "the substance of the mediation, . . . the reasons why the parties mediated, what did they say, what did they do." The court also found the issue before the court regarding whether the parties had an agreement concerning the arbitrator's role "require[d] the testimony of" the arbitrator.

During the hearing, the arbitrator testified that when the issue of him mediating the case arose during the arbitration, the "first thing [he] emphasized to them was that [he] would need both of them to waive any objection of [him] mediating." According to the arbitrator, he "made sure [he] emphasized to them how important that consent was" and "made it clear before [they] started . . . the settlement talks . . . that they would have to consent not only to [him] mediating

it, but if it did not settle, to [him] continuing to arbitrate the case . . . ." The arbitrator testified he told the parties if they did not consent, they "either could continue with the arbitration or they could get . . . another mediator to mediate the case . . ." and made it "crystal clear" that without their consent, he could not mediate the case and then continue as arbitrator if the parties did not settle the case. In addition to testifying the parties had consented to him resuming his role as arbitrator after mediating the case, the arbitrator stated that no one had complained about him resuming his role as arbitrator after the unsuccessful mediation efforts until he informed the parties he was rendering an arbitration award in favor of defendant.

Plaintiff's counsel testified that after counsel had completed the examination of a witness at around lunch time, the arbitrator came into plaintiff's "breakout room" and stated, "arbitration is over for today and we're going to settle the case." Counsel denied discussing with the arbitrator a possible dual role as arbitrator and mediator and denied the arbitrator had asked for the parties' consent to act as both. He confirmed he had agreed to continue the arbitration after the unsuccessful mediation effort and had not objected to the arbitrator

acting as both mediator and arbitrator until after the arbitrator advised the parties he was issuing an arbitration decision in defendant's favor.[1]

In his testimony, defense counsel denied the arbitrator had tried to force the parties into having settlement discussions and testified the arbitrator had made it "very clear" to the parties "that if he was going to assist the parties in these settlement discussions and if it didn't work out, the parties were agreeing that he would continue as arbitrator." He did not recall the specific language the arbitrator had used but testified that "it was very clear that the parties were agreeing to engage in settlement instructions with the clear understanding that the parties were agreeing that if the settlement discussions didn't work out that [the arbitrator] would continue as arbitrator."

Another attorney who had represented defendant at the arbitration testified the arbitrator had said if the parties wanted to proceed with him acting as mediator, they would "have to waive any conflict." According to that attorney, the arbitrator stated that if the parties waived the conflict, they would proceed with the mediation but if they did not waive it, the arbitrator could not "go

[1] In response to an objection to this line of questioning, the court permitted defense counsel to "inquire as to the . . . actions after the mediation failed. Those are the facts. They go to credibility and they're relevant." Consistent with Pami, 468 N.J. Super. at 560, the court held "[w]hether . . . [p]laintiff through its counsel waived anything, . . . is not relevant at all."

forward" as mediator. The attorney testified plaintiff's counsel had consented on behalf of plaintiff. Defendant's principal also testified during the evidential hearing. He confirmed the arbitrator had obtained consent from the parties to continue in his role as arbitrator if the mediation failed.

On February 15, 2023, the court placed a decision on the record granting defendant's motion to confirm the arbitration award and denying plaintiff's cross-motion to vacate it. On February 23, 2023, the court entered an order with a statement of reasons memorializing that decision. In its oral decision and written statement of reasons, the court made detailed credibility determinations regarding the witnesses who had testified during the evidentiary hearing on remand. We do not need to repeat those determinations here. In sum, the court found the arbitrator's and defendant witnesses' testimony "more reasonable and credible" than plaintiff's counsel's testimony. The court concluded:

> [The arbitrator] properly raised the issue of settlement during the arbitration hearing; that at the time counsel obtained consent from their respective parties, the [a]rbitrator addressed all parties in person; that the [a]rbitrator specifically and clearly informed all counsel and parties, at the same time, that for him to be involved in any way in settlement discussions, he needed the agreement of both parties that, if settlement discussions failed, he could resume the arbitration hearing; that neither party, nor any attorney, raised any objection to this agreement; and that all parties and

> counsel agreed that the [a]rbitrator could continue the arbitration hearing if settlement was unsuccessful.

The court "answer[ed] in the affirmative that 'the parties agreed the arbitrator could participate in settlement discussions and resume his role as arbitrator,'" (quoting Pami, 468 N.J. Super. at 559). Finding the arbitrator had not exceeded his authority, the court granted the motion to confirm the arbitration award pursuant to N.J.S.A. 2A:23B-22 and denied the cross-motion to vacate the award under N.J.S.A. 2A:23B-23(a)(4).

On March 29, 2023, pursuant to N.J.S.A. 2A:23B-25(a), the court entered an order of final judgment, awarding a judgment in defendant's favor and against plaintiff "in the amount of the June 15, 2020 Arbitration Award . . . namely, $342,494.50." As stated in the order, the court declined to grant post-judgment interest "because the monies were placed in a trust account, and the final judgment is not the arbitration award."

This appeal and cross-appeal followed.

II.

"Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review." 160 W. Broadway Assocs., LP v. 1 Mem'l Drive, LLC, 466 N.J. Super. 600, 610 (App. Div. 2021) (quoting Seidman v. Clifton Sav. Bank, SLA, 205 N.J. 150, 169 (2011)). "[W]e

do not disturb the factual findings . . . of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice . . . ." Ibid. (quoting Seidman, 205 N.J. at 169).

"In reviewing the judge's findings, '[w]e do not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence.'" Ibid. (alteration in original) (quoting Mountain Hill, LLC v. Twp. of Middletown, 399 N.J. Super. 486, 498 (App. Div. 2008)). "Deference is particularly appropriate when the court's findings depend on credibility evaluations made after a full opportunity to observe witnesses testify, Cesare v. Cesare, 154 N.J. 394, 412 (1998), and the court's 'feel of the case.'" Accounteks.Net, Inc. v. CKR Law, LLP, 475 N.J. Super. 493, 503 (App. Div. 2023) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). "[A] trial court's evidentiary rulings are entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment." State v. Singh, 245 N.J. 1, 12 (2021) (alteration in original) (quoting State v. Nantambu, 221 N.J. 390, 402 (2015)).

However, "we owe no deference to the judge's interpretation of the law and the legal consequences that flow from established facts." 160 W. Broadway Assocs., 466 N.J. Super. at 498 (citing Manalapan Realty, LP v. Twp. Comm.

of Manalapan, 140 N.J. 366, 378 (1995)). Thus, "[w]e review de novo a trial court's legal conclusions, . . . including decisions to affirm or vacate arbitration awards." Pami, 468 N.J. Super. at 556; see also Sanjuan v. Sch. Dist. of W. N.Y., 256 N.J. 369, 381 (2024) (reviewing de novo a decision on a motion to vacate an arbitration award, while "be[ing] mindful of New Jersey's 'strong preference for judicial confirmation of arbitration awards'" (quoting Middletown Twp. PBA Loc. 124 v. Township of Middletown, 193 N.J. 1, 10 (2007))).

Plaintiff argues the court erred in permitting the arbitrator to testify during the evidentiary hearing on remand. Plaintiff contends the New Jersey Arbitration Act (the Act), N.J.S.A. 2A:23B-1 to -36, and the parties' arbitration agreement prohibited the arbitrator from testifying. We disagree.

In reaching that conclusion, we are guided by principles of statutory and contract interpretation. See Roach v. BM Motoring, LLC, 228 N.J. 163, 174 (2017) (finding "arbitration agreements . . . are contracts governed by principles of contract law"). "The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language." Garden State Check Cashing Serv., Inc. v. Dep't of Banking & Ins., 237 N.J. 482, 489 (2019) (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)). "If a statute's plain language is clear, we apply that plain meaning and

end our inquiry." Ibid.; see also Sanchez v. Fitness Factory Edgewater, LLC, 242 N.J. 252, 260 (2020) (holding, "we need delve no deeper than the act's literal terms." (quoting State v. Gandhi, 201 N.J. 161, 180 (2010))). When a court interprets a contract, "[t]he plain language of the contract is the cornerstone of the interpretive inquiry; 'when the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result.'" Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 616 (2020) (quoting Quinn v. Quinn, 225 N.J. 34, 45 (2016)).

Applying those principles to the evidence in the record, we perceive no legal error or abuse of discretion in the court's decision to allow the arbitrator to testify. The Act prohibits an arbitrator from testifying about "any statement, conduct, decision, or ruling occurring during the arbitration proceeding." N.J.S.A. 2A:23B-14(d) (emphasis added). The parties' arbitration agreement provided discussions "concerning settlement" would be confidential and barred the parties from compelling an arbitrator to "testify concerning statements made by anyone during the arbitration or during settlement discussions." The court prohibited the arbitrator from testifying about his arbitration decision, "the substance of the mediation," and the parties' statements and actions during the mediation. The court carefully limited the arbitrator's testimony to the direct

procedural issue before the court: "whether the parties [had] agreed the arbitrator could participate in settlement discussions and resume his role as arbitrator." Pami, 468 N.J. Super. at 559. Counsel for both parties confirmed the arbitrator had raised the idea of the parties engaging in settlement negotiations during a break in the arbitration. The arbitrator did not testify about the substance of the settlement discussions or decisions he made in the arbitration. On that record, neither the plain language of the Act nor the arbitration agreement prohibited the arbitrator from testifying about the limited issue allowed by the court.

Plaintiff argues the court erred in its assessment of the burden of proof to be applied at the evidentiary hearing on remand. Plaintiff contends defendant bore the burden of proof because "it was in [defendant's] interest to establish an agreement that the arbitrator could continue after he had conducted the mediation." But the applicable statutory language does not support that conclusion.

Defendant moved to confirm the arbitration award under N.J.S.A. 2A:23B-22. That statute permits a party, on receiving notice of an arbitration award, to "file a summary action with the court for an order confirming the award, at which time the court shall issue a confirming order unless the award

is modified or corrected pursuant to section 20 or 24 of this act or is vacated pursuant to section 23 of this act." N.J.S.A. 2A:23B-22 (footnotes omitted). To prevail on its motion, that's what defendant had to establish.

Plaintiff cross-moved to vacate the arbitration award pursuant to N.J.S.A. 2A:23B-23(a)(4), which permits a party to file a summary action asking the court to vacate an arbitration award if "an arbitrator exceeded the arbitrator's powers." To prevail on its cross-motion, that's what plaintiff had to establish. And it failed to do so.

Moreover, even if, as plaintiff contends, defendant bore the burden of proving the parties had agreed the arbitrator could participate in settlement discussions and then resume his role as arbitrator, defendant met that burden. The purpose of the evidentiary hearing was clear from our opinion in Pami, 468 N.J. Super. at 559, as well as the court's consideration of that opinion during the post-remand case management conference. The parties had notice and a full and fair opportunity to present evidence they believed supported their respective positions. After considering the evidence presented and the credibility of the testimony of the witnesses called by each party, the court rendered factual findings, concluding the parties had agreed the arbitrator could participate in settlement discussions and then resume his role as arbitrator. Those factual

findings were supported by "adequate, substantial, credible evidence," and we have no basis to disturb them. Satz v. Satz, 476 N.J. Super. 536, 549 (App. Div. 2023) (quoting Cesare, 154 N.J. at 411-12). Accordingly, we affirm the February 23, 2023 order granting defendant's motion to confirm the June 15, 2020 arbitration award and denying plaintiff's cross-motion to vacate it. We also affirm the aspect of the March 29, 2023 order of final judgment entering judgment in favor of defendant and against plaintiff.

We turn now to defendant's cross-appeal. Defendant argues the court erred by declining to award post-judgment interest in the order of judgment. Defendant contends that, pursuant to Rule 4:42-11(a), it was entitled to an award of post-judgment interest accruing from the date of the arbitration award, June 15, 2020, through the date the award was confirmed, February 15, 2023.

Rule 4:42-11(a) governs the award of post-judgment interest. It provides that "[e]xcept as otherwise ordered by the court or provided by law, judgments, awards and orders for the payment of money, taxed costs and attorney's fees shall bear simple interest as" further set forth in the rule. R. 4:42-11(a) (emphasis added). "[I]t is well established that 'a judgment creditor is entitled to post-judgment interest at the rate specified in [Rule] 4:42-11(a) absent an extraordinary and equitable reason.'" C.E. v. Elizabeth Pub. Sch. Dist., 481 N.J.

Super. 172, 178-79 (App. Div. 2025) (second alteration in original) (quoting Marko v. Zurich N. Am. Ins. Co., 386 N.J. Super. 527, 532 (App. Div. 2006)). "[T]he grant of post-judgment interest is ordinarily not an equitable matter within the court's discretion but is, as a matter of longstanding practice, routinely allowed." Id. at 180 (quoting Marko, 386 N.J. Super. at 531). That longstanding practice was "codified by Rule 4:42-11(a)." Id. at 179.

"[P]ost-judgment interest cannot start to run until the precise amount of money damages is fixed." Bd. of Educ. of Newark v. Levitt, 197 N.J. Super. 239, 248 (App. Div. 1984). In the context of arbitration awards, "interest . . . usually relates back to the date of the award." Jefferson Twp. v. Toro Dev. Corp., 199 N.J. Super. 459, 469 (App. Div. 1985). In this case, the amount of money damages was set by the arbitrator in the June 15, 2020 arbitration award.

A litigant is entitled to post-judgment interest "as of right." R. Jennings Mfg. Co., v. Northern Elec. Supply Co., 286 N.J. Super. 413, 416 (1995); see also C.E., 481 N.J. Super. at 180 (same). However, courts retain discretion to modify awards based on equitable considerations. See Baker v. Nat'l State Bank, 353 N.J. Super. 145, 173 (App. Div. 2002) (holding a trial court may vary the post-judgment interest award "in the interests of equity"); Jefferson, 199 N.J. Super. at 469 (recognizing Rule 4:42-11(a) permits a court to adjust a

post-judgment interest award "due to the special nature of the situation before him [or her]"). In Jefferson, 199 N.J. Super. at 469, we described the following as "special circumstances" that may justify departing from the "usual rule" regarding post-judgment interest:

> Had the parties settled for a specified sum with the implied consideration that the funds would be expeditiously secured and paid over, or if the amount to be paid was proceeds of a nonproductive asset which was to be sold, so that the paying party was not retaining funds which generated income to the date set for payment, or if other matters were present that warranted a departure from this interest rule, a trial judge could so direct.

However, if "the circumstances are such that elimination or modification of post-judgment interest is unwarranted," a trial court must award post-judgment interest. Marko, 386 N.J. Super. at 532.

In the order of judgment, the court declined to award post-judgment interest "because the monies were placed in a trust account, and the final judgment is not the arbitration award." The court presumably was referencing the parties' agreement, as memorialized in a May 15, 2019 consent order, that "pending completion of the arbitration proceeding between the parties and the issuance of an arbitration award," plaintiff would "deposit the sum of $274,924.37 in good funds into the attorney trust account of its attorneys . . . in

lieu of the bond referenced in the parties' settlement agreement" and defendant, on receiving proof of deposit of those funds, would "take the necessary steps to discharge the subject construction liens." The parties also agreed that if defendant prevailed in the arbitration proceeding, plaintiff's law firm would pay the deposited funds directly to defense counsel "to satisfy the arbitration award." They did not agree to the payment of post-judgment interest in addition to the deposited funds.

Given the parties' agreement as memorialized in the May 15, 2019 consent order, we perceive no abuse of discretion in the court's decision not to award post-judgment interest on the $274,924.37 dollars defendant agreed would be held in plaintiff's counsel's attorney trust account pending the completion of the arbitration. That agreement constituted special circumstances warranting departure from the usual rule concerning post-judgment interest. The agreement to deposit the funds in the attorney trust action "implied condition that the funds would be expeditiously secured and paid over" and, although defendant did not have the benefit of those funds during the arbitration proceedings, neither did plaintiff. Jefferson, 199 N.J. Super. at 469.

But, of course, the arbitration award exceeded the amount of the deposited funds by $67,570.13, and the special circumstances involving the deposited

funds do not apply to the additional amount awarded by the arbitrator. Accordingly, the court abused its discretion in failing to award post-judgment interest on the amount of the arbitration award that exceeded the amount of the deposited funds. Thus, we reverse the aspect of the March 29, 2023 order of final judgment denying any award of post-judgment interest and remand with instructions the trial court calculate post-judgment interest pursuant to Rule 4:42-11(a) on the $67,570.13 of the arbitration award that exceeded the deposited funds and issue an amended order of judgment including that award of post-judgment interest.

Affirmed in part; reversed in part; and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing is
a true copy of the original on file in
my office.

M.C. Harley

Clerk of the Appellate Division

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JENIL SHETH, **Plaintiff,** **v.** **ARTECH LLC AND VERIZON COMMUNICATIONS, INC.,** **Defendants.**	Civ. No. 2:25-cv-1205 (WJM) **OPINION**

In this employment discrimination action, Defendant Artech LLC ("Artech") and Verizon Communications, Inc. ("Verizon") (together "Defendants") move to compel arbitration pursuant to 9 U.S.C. § 4 and to stay this action pending outcome of the arbitration pursuant to 9 U.S.C. § 3. ECF No. 5. The Court decides the matter without oral argument. Fed. R. Civ. P. 78(b). For the reasons stated below, Defendants' motion to compel arbitration is **denied** as to Verizon and **granted** as to Artech. Defendants' request to stay this action pending resolution of the arbitration is **granted**.

I. BACKGROUND

Artech is a full-service staffing firm. Defs. Statement of Facts, ¶ 1, ECF No. 5-1. Verizon is a telecommunications company that contracted with Artech in its search for a temporary contractor to serve as "Project Manager – III." *Id.* at ¶ 3. Plaintiff interviewed with Verizon and was notified on March 31, 2021 by Artech that he had been selected by Verizon for the position of "Technical Project Manager - III." *See* Mot. to Compel, Ex. D. On April 7, 2021, Plaintiff signed an Employment Agreement with Artech indicating that Plaintiff was hired by Artech as "Project Manager – III" starting on April 12, 2021 and that he was required to perform "specialized work" for Artech's "Client." *See id.* at Ex. A at ¶ 1, ECF No. 5-2. Plaintiff acknowledged and agreed that he was "not an employee of any Client" and that he was hired as a "Consultant/Contractor" for a "client engagement or for a specific project or task, of limited duration." *Id.* at ¶¶ 4, 13. While Plaintiff's wages would be paid by Artech, Plaintiff was to work at the Client's site, the same hours as Client's employees, and "adhere to all applicable policies, procedures and rules of both Employer and Client." *Id.* at ¶ 11. The parties also agreed to an arbitration provision stating in pertinent part:

> … Employee explicitly agrees that any dispute in any matter related to Employee's employment with ARTECH, which the parties are unable to resolve through direct discussion, regardless of the kind or type of dispute

> (excluding claims for unemployment insurance, worker's compensation, or any matter within the jurisdiction of the Labor Commissioner), shall be exclusively subject to final and binding arbitration pursuant to the provisions of New Jersey Permanent Statutes section 2A:24-1, et seq. .... Such arbitration shall be held in Morristown, New Jersey.
>
> EMPLOYEE AGREES AND UNDERSTAND THAT BY AGREEING TO THIS BINDING ARBITRATION PROVISION, EMPLOYEE VOLUNTARY SURRENDER THEIR RIGHTS TO CIVIL LITIGATION, A TRIAL BY JURY AND ANY ASSOCIATED RIGHTS OF APPEAL.

Id. at ¶ 19 ("Arbitration Clause").

Plaintiff went on paternity leave on May 6, 2024. Compl., ¶ 48. On June 11, 2024, Artech advised Plaintiff that his employment with Verizon had been terminated. *Id.* at ¶ 52. Subsequently, Plaintiff filed suit on January 9, 2025 in state court against both Artech and Verizon under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2611(A)(1) and the New Jersey Family Leave Act ("NJFLA"), N.J.S.A. § 34:11B-9, alleging discriminatory termination as well as retaliation and interference with his right to take paternity leave. After removing this action from state court, Defendants now move to compel arbitration pursuant to the Arbitration Clause and to stay this action pending resolution of the arbitration.

II. DISCUSSION

A. Motion to Compel Arbitration[1]

The Federal Arbitration Act (FAA) evidences a "'national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts.'" *In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515, 519 (3d Cir. 2019) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). "Before compelling a party to arbitrate pursuant to the FAA, a court must determine that (1) there is an agreement to arbitrate and (2) the dispute at issue falls within the scope of that agreement." *Century Indem. Co. v. Certain Underwriters at Lloyd's, London*, 584 F.3d 513, 523 (3d Cir. 2009). A court is required to order that the parties proceed with arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. By contrast, "[i]f a party has not agreed to arbitrate, the courts have no authority to mandate that he do so." *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 444 (3d Cir. 1999). The "party resisting arbitration bears the burden of proving that

[1] The parties cite to New Jersey state or federal caselaw within this Circuit. Thus, the Court will do likewise. *See Flintkote Co. v. Aviva PLC*, 769 F.3d 215, 220 (3d Cir. 2014).

the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp. Ala. v. Randolph,* 531 U.S. 79, 91 (2000).

1. Applicable Standard

When it is clear from the face of the complaint that the claims at issue are subject to an enforceable arbitration provision, then "a motion to compel arbitration should be considered under a Rule 12(b)(6) standard without discovery's delay." *Guidotti v. Legal Helpers Debt Resol., L.L.C.*, 716 F.3d 764, 776 (3d Cir. 2013) (citation and internal quotes omitted)). In contrast, if arbitrability is unclear on the face of the complaint or if the plaintiff has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate in issue, a summary judgment standard applies and the motion to compel must be denied pending limited discovery on the issue of arbitrability. *Id.* (quoting *Somerset Consulting, LLC v. United Capital Lenders, LLC*, 832 F. Supp. 2d 474, 482 (E.D. Pa. 2011)). The parties agree that the Court should apply a summary judgment standard. *See* Def. Mot. at 6; Pl. Opp. at 1-3.

Under the summary judgment standard, a court may allow discovery if "a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d); *Dowling v. City of Philadelphia,* 855 F.2d 136, 140–41 (3d Cir.1988) ("a party seeking further discovery in response to a summary judgment motion submit an affidavit specifying, for example, what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained."). In this case, Plaintiff states that he did not knowingly assent to arbitrate any claims against Verizon but fails to provide an affidavit to support that contention or specify what information he seeks from limited discovery. Absent a "factual dispute, there is nothing to discover and thus no need to delay a decision on the motion to compel." *Young v. Experian Info. Sols., Inc.*, 119 F.4th 314, 319-20 (3d Cir. 2024) (citing *Guidotti* 716 F.3d at 767, 780 (noting genuine dispute of material facts as to whether customer received agreement such that meeting of minds occurred on agreement to arbitrate)). Discovery is not necessary to decide the pending motions.

2. Whether Parties Agreed to Arbitrate

To decide whether the parties have agreed to arbitrate any disputes, generally courts apply "ordinary state-law principles that govern the formation of contracts." *In re Remicade,* 938 F.3d at 524 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). Plaintiff maintains that there was no mutual assent because the arbitration agreement does not indicate the forum for arbitration or who would bear the cost of arbitration. The Court disagrees that those are sufficient to demonstrate a lack of mutual assent.

First, "the parties' omission of a designated arbitral institution or general process for selecting an arbitration mechanism or setting ... [does] not warrant the invalidation of an arbitration agreement. Parties who have expressed mutual assent to the arbitration of their disputes instead of a court proceeding may choose to defer the choice of an arbitrator to a later stage, when they will be in a position to assess the scope and subject of the dispute, the complexity of the proposed arbitration, and considerations of timing and cost." *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119, 140-41 (2020)); *see e.g., Robbins v. Playhouse Lounge*, No. 19-08387, 2021 WL 2525709, at *12 (D.N.J. June 21, 2021). Notably, "New Jersey law, through the New Jersey Arbitration Act, explicitly provides default provisions for the selection of an arbitrator, which 'may operate in the absence of contractual terms prescribing such procedures." *Robbins v. Playhouse Lounge,* No. 19-08387, 2021 WL 2525709, at *11 (D.N.J. June 21, 2021) (citing *Flanzman,* 244 N.J. at 139). "Those provisions, found at N.J.S.A. 2A:23B-11-15, provide a mechanism for the selection of an arbitrator that can fill the gaps found in an arbitration agreement." *Id.*

Second, Defendants have advised that they will pay all of the arbitrator's fees and expenses. *See* Defs.' Mot. at 5. Thus, Plaintiff cannot argue that he bears even the speculative risk of incurring substantial arbitration costs. *See Green Tree Fin. Corp.,* 531 U.S. 79. The Arbitration Clause's silence as to who bears the cost of arbitration is alone "plainly insufficient to render it unenforceable." *See id.*

Finally, Plaintiff merely notes in passing that the Arbitration Clause does not highlight the difference between arbitration and litigation. However, the Arbitration Clause expressly and clearly states that "EMPLOYEE AGREES AND UNDERSTAND[S] THAT ... EMPLOYEE VOLUNTARY SURRENDER THEIR REIGHTS TO CIVIL LITIGATION, A TRIAL BY JURY AND ANY ASSOCIATED RIGHTS OF APPEAL." "'When a party enters into a signed, written contract, that party is presumed to understand and assent to its terms, unless fraudulent conduct is suspected.'" *GAR Disability Advocs., LLC v. Taylor,* 365 F. Supp. 3d 522, 527 (D.N.J. 2019) (citing *Stelluti v. Casapenn Enters., LLC,* 203 N.J. 286 (2010)). There is no allegation of fraud here. The agreement to arbitrate is valid and enforceable.

3. Whether Verizon Can Enforce Arbitration Clause

To the extent the arbitration agreement is valid and enforceable, Plaintiff claims that he did not knowingly waive his right to a jury trial for any disputes with Verizon because Verizon is not mentioned by name in the arbitration agreement and is not a signatory to the agreement. Defendants posit that Verizon can enforce the Agreement as a third-party beneficiary. Indeed, arbitration agreements may bind non-signatories when "traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Arthur Andersen LLP v. Carlisle,* 556 U.S. 624, 631 (2009) (internal quotation marks omitted).

a. *Third-Party Beneficiary*

"[W]hether seeking to avoid or compel arbitration, a third party beneficiary has been bound by contract terms where its claim arises out of the underlying contract to which it was an intended third party beneficiary." *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.,* 269 F.3d 187, 195 (3d Cir. 2001). To "determine[] the existence of 'third-party beneficiary' status, the inquiry 'focuses on whether the parties to the contract intended others to benefit from the existence of the contract, or whether the benefit so derived arises merely as an unintended incident of the agreement.'" *Ross v. Lowitz,* 222 N.J. 494, 513 (2015) (citing *Broadway Maint. Corp. v. Rutgers,* 90 N.J. 253, 259 (1982)). The intent of the parties is derived "'from an examination of the contract and a consideration of the circumstances attendant to its execution.'" *Mut. Ben. Life Ins. Co. v. Zimmerman,* 783 F. Supp. 853, 866–67 (D.N.J.), *aff'd,* 970 F.2d 899 (3d Cir. 1992) (citing *Rieder Communities, Inc. v. Twn. Of North Brunswick,* 227 N.J. Super. 214, 222 (App. Div. 1988)).

Although Verizon is not explicitly named in the Employment Agreement, it is clearly an Artech "Client." However, no language or other evidence demonstrates that Verizon is an intended rather than incidental third-party beneficiary. *See Wafula v. Artech Info. Sys., LLC,* No. A-1160-20, 2022 WL 17366274 (N.J. Super. Ct. App. Div. Dec. 2, 2022).[2] In *Wafula,* the plaintiff signed an employment agreement with defendant staffing agency Artech Information Systems, LLC (AIS), in which she agreed to work for AIS's "Client" and comply with the policies, procedures, rules, and directions of any client AIS assigned to her. *Id.* at *1. That employment agreement contained an arbitration clause, the relevant portions of which are identical to the one at issue. After being terminated by Sandoz where AIS assigned her to work, the plaintiff sued AIS and Sandoz for violation of state discrimination law. Although Sandoz was not a signatory to the employment agreement, it moved to compel arbitration arguing that it had "significant control" over "virtually every aspect of" the plaintiff's assignment pursuant to the terms of the employment agreement. *Id.* at *2. Nonetheless, the trial court denied the motion to compel finding that the record did not show that the plaintiff intended to confer a "significant and direct" benefit to Sandoz. *Id.* The Appellate Division affirmed.

As in *Wafula,* the Employment Agreement here contains terms and conditions directed by or subject to review by Artech and/or the Client but makes clear that Plaintiff is "not an employee of any Client." Employment Agreement, ¶ 4. *See also e.g., Diomande v. Toyota Motor Mfg., Kentucky, Inc.,* No. 14-171, 2015 WL 1468091, at *4 (E.D. Ky. Mar. 30, 2015) (concluding that client of staffing agency was not third-party beneficiary of employment contract between staffing agency and employee noting staffing agency's

[2] While unpublished state court decisions are non-binding and New Jersey state court decisions should generally not be cited, *see* N.J. Court Rule 1:36-3, the court "may consider unpublished state court opinions as persuasive authority 'when predicting state law.'" *Noye v. Johnson & Johnson Servs., Inc.,* 765 F. App'x 742, 747 n.8 (3d Cir. 2019) (citing *Taransky v. Sec'y of U.S. Dep't of Health & Human Servs.,* 760 F.3d 307, 317 n.9 (3d Cir. 2014)).

efforts "to draw a distinction between itself, as [plaintiff's] employer, and its client."). Moreover, the wording of the Arbitration Clause to arbitrate "any dispute in any matter related to Employee's employment with ARTECH" is silent as to Artech's clients. *Compare with, e.g., Dunkley v. Mellon Investor Servs.*, No. 06-3501, 2007 WL 3025730, at *1, n.2 (D.N.J. Oct. 15, 2007) (finding that non-signatory client of staffing agency was intended third-party beneficiary of arbitration agreement between employee and staffing agency where parties agreed to arbitrate "[a]ny disputes arising out of or relating to the actions of Volt [the staffing agency] or any assignment or termination of any assignment, *including disputes arising out of or related to the actions of Volt's customers (or customer's employees)*." (emphasis added)).

Finally, Verizon and Artech are sophisticated commercial entities and if Verizon was intended to be covered by the Arbitration Clause, that "could have easily been accomplished with additional direct and express language as contemplated and required by our caselaw when an individual is giving up certain rights with respect to dispute resolution." *Wafula*, 2022 WL 17366274, at *2. In sum, there is no evidence to indicate that Verizon was an intended third-party beneficiary.

b. *Equitable Estoppel*

Under equitable estoppel, "courts have bound a signatory to arbitrate with a non-signatory" where there is a "'close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract ... and [the fact that] the claims were intimately founded in and intertwined with the underlying contract obligations.'" *E.I. DuPont de Nemours & Co.*, 269 F.3d at 199 (citing *Thomson–CSF, S.A. v. American Arbitration Assoc.*, 64 F.3d 773, 779 (2d Cir. 1995)). Defendants' reliance on *Egan v. Regeneron Pharms. Inc.*, No. 22-CV-1981, 2023 WL 1997444, at *5 (D.N.J. Feb. 10, 2023) is unavailing. There, the court held that non-signatory defendant, Regeneron, could enforce the arbitration agreement between the plaintiff and her employer, MMI, a staffing agency based on Regeneron's "close relationship" between it and MMI as alleged "joint employers." The "close relationship" is based on equitable estoppel principles, which do not apply to the case at bar because Defendants have not shown detrimental reliance. *See Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 193 (2013) ("Estoppel cannot be applied solely because the parties and claims are intertwined … Further, the doctrine of equitable estoppel does not apply absent proof that a party detrimentally rely on another party's conduct."). Thus, Defendant's motion to compel arbitration is **denied** as to Verizon.

4. Scope of Arbitration Agreement

Inasmuch as "federal law applies to the interpretation of arbitration agreements," once a court has found that there is a valid agreement to arbitrate, regardless of whether the action is in a federal or a state court the determination of whether "a particular dispute

is within the class of those disputes governed by the arbitration clause ... is a matter of federal law." *Century Indem. Co.,* 584 F.3d at 524 (citing *China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corp.,* 334 F.3d 274, 290 (3d Cir. 2003)).

The Arbitration Clause provides for arbitration of "any dispute in any matter related to Employee's employment with ARTECH ... regardless of the kind or type of dispute" excluding specific claims not at issue here. As explained by the Third Circuit, "New Jersey '[c]ourts have generally read the terms 'arising out of' or 'relating to' [in] a contract as indicative of an 'extremely broad' agreement to arbitrate any dispute relating *in any way* to the contract.'" *In re Remicade,* 938 F.3d at 523 (emphasis added) (citing *Curtis v. Cellco P'ship,* 413 N.J. Super. 26 (App. Div. 2010)). Where the arbitration clause at issue is broad, the presumption of arbitrability is particularly applicable. *Battaglia v. McKendry,* 233 F.3d 720, 725 (3d Cir. 2000). Moreover, Plaintiff has not specifically disputed Defendants' assertion that statutory claims fall within the scope of the arbitration agreement. *See Zeller-Landau v. Sterne Agee CRT, LLC,* No. 17-3962, 2018 WL 334970, at *5 (E.D. Pa. Jan. 9, 2018) ("Courts within the Third Circuit have held that broad arbitration clauses in employment agreements encompass statutory claims."); *see e.g., Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 26 (1991) (affirming that agreement to arbitrate "any dispute, claim or controversy" subjected statutory Age Discrimination and Employment Act claim to arbitration). Accordingly, Defendant's motion to compel arbitration is **granted** as to Artech.

B. Motion for Stay

Section 3 of the FAA provides in pertinent part that where there is a written arbitration agreement, the court "*shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added). Under this express language, a court has "no discretion to dismiss a case where one of the parties applies for a stay pending arbitration." *Lloyd v. HOVENSA, LLC,* 369 F.3d 263, 269 (3d Cir. 2004) (holding district court was obligated to grant stay once it decided to order arbitration). That plain statutory text requires a court to stay the proceeding as to claims against Artech. *Smith v. Spizzirri,* 601 U.S. 472, 476 (2024).

In contrast, a mandatory stay is inapplicable to the claims against Verizon. *See Mendez v. Puerto Rican Int'l Companies, Inc.,* 553 F.3d 709, 715 (3d Cir. 2009) ("in order for a party to be the subject of a mandatory stay pending arbitration under Section 3 of the FAA, that party must have committed itself to arbitrate one or more issues in suit."). The Court does, however, have discretion to control its docket and stay litigation pending the outcome of arbitration. *Id.* at 712 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 20, n. 23 (1983)). "[A] court may stay proceedings in the interest of efficiency where the issues in arbitration are related to (if not strictly dispositive of) the issues before the court. *Neal v. Asta Funding, Inc.,* No. 13-3438, 2014 WL 131770, at *5

(D.N.J. Jan. 6, 2014). Plaintiff's FMLA and NJFLA claims against both Artech and Verizon are based on the same set of facts. He alleges that "Defendants" misclassified and denied him benefits, "unlawfully tried to dissuade him from taking his entitled leave," retaliated against him, and "imposed an additional unanticipated level of anxiety" on him. Compl. ¶¶ 13, 28, 33, 35, 49, 50, 60, 63. When the arbitration and litigation involve overlapping issues, "it would be inadvisable to have these intertwined claims proceed simultaneously in court and in arbitration; such a procedure would be rife with opportunities for mutual interference, inconsistent rulings, and general procedural confusion." *Neal,* 2014 WL 131770, at *5; *see also Salerno Med. Assocs., LLP v. Riverside Med. Mgmt., LLC,* 542 F. Supp. 3d 268, 283 (D.N.J. 2021) (citing *Neal,* 2014 WL 131770, at *4). Given that the facts and claims here are inextricably intertwined, the Court will grant a discretionary stay as to the claims against Verizon pending resolution of the arbitration against Artech.

III. CONCLUSION

For the reasons noted above, Defendants' motion to compel arbitration is **denied** as to Verizon and **granted** as to Artech. Defendants' request to stay this action is **granted.**

WILLIAM J. MARTINI, U.S.D.J.

Date: June 5, 2025

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About the Panelists…

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Robert E. Bartkus is Of Counsel to Anselmi & Carvelli, LLP in Morristown, New Jersey, and New York City. With more than 35 years of experience in multiparty business and international arbitration and litigation, he has represented major United States financial institutions, foreign governments and trading companies, and Fortune 100 consumer goods, industrial, insurance/reinsurance, insurance brokerage, medical/dental device, pharmaceutical and chemical companies. From commercial litigation he has transitioned into being a mediator arbitrator and special master.

Mr. Bartkus is admitted to practice in New Jersey, New York and California (inactive), and before the United States District Court for the District of New Jersey, the Southern and Eastern Districts of New York, and the Northern and Central Districts of California; the Second and Third Circuit Courts of Appeals; and the United States Supreme Court. He is Past Chair of the New Jersey State Bar Association's Federal Practice and Procedure Section, Past Vice Chair of the Association's International Law Section and has been a member of the New York State Bar Association's Commercial and Federal Practice and Alternative Dispute Resolution Sections. He has been a member of the California State Bar Association and the American Bar Association's Litigation and Intellectual Property Sections, and is Past Chair of the District X Fee Arbitration Committee and a former member of the District X Ethics Committee. Mr. Bartkus has been a member of the Association of the Federal Bar of the State of New Jersey and the Editorial Board of the *New Jersey Law Journal*. Elected a Fellow of the College of Commercial Arbitrators and the National Academy of Distinguished Neutrals, he has served as Vice President and Director of the Historical Society of the United States District Court for the District of New Jersey, is an arbitrator with the American Arbitration Association and an arbitrator and mediator for the United States District Court.

Editor and co-author of *New Jersey Federal Civil Procedure* (ALM Media/N.J. Law Journal Books), Mr. Bartkus is a co-author of the *New Jersey Arbitration Handbook* (2016-2023, Law Journal Press) and *Interim Measures for US Arbitration* (Juris 2022), and is a frequent contributor of articles on federal civil practice and procedure to the *New Jersey Law Journal* and other publications. He has also lectured on these topics for ICLE and other organizations, and has been listed in *Who's Who in America* and *Who's Who in American Law*.
He is also a Master of the John Lifland Intellectual Property American Inn of Court and the Justice Marie L. Garibaldi ADR American Inn of Court, which awarded him its Richard K. Jeydel Award in 2020.

Mr. Bartkus received his B.A., with honors, from Swarthmore College and his J.D. from Stanford Law School, where he was a Teaching Assistant, Articles Co-Editor of the *Stanford Law Review* and the recipient of the 1976 Irving Hellman, Jr. Special Award. He also served as an officer in the United States Navy.

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Honorable Glenn Berman, JSC (Ret.) is Of Counsel to Greenbaum Rowe Smith & Davis LLP in the firm's Iselin, New Jersey, office, and focuses in mediation, arbitration and discovery management. He retired from the Superior Court in 2013, having served in several capacities for the court, including Presiding Judge of the Family Part, Acting Presiding Judge of the Criminal Part and Acting Assignment Judge. He was specially designated to preside over New Jersey's 2012 landmark cyberbullying case, *New Jersey State v. Dharun Ravi*.

Admitted to practice in New Jersey and before the United States District Court for the District of New Jersey and the United States Supreme Court, Judge Berman served as a Middlesex County Prosecutor from 1998-2002. He is a Fellow of the American Bar Foundation and a member of the New Jersey State Bar Association, where he serves on the Executive Committee of the Family Law Section and is a member of the Business Law Section and several committees. A former Trustee of the Middlesex County Bar Association and Foundation, Judge Berman is a former member of the New Jersey Supreme Court Family Practice Committee and the District VIII Ethics and Fee Arbitration Committees. He also sits on the American Arbitration Association's Employment and Commercial Panels.

Judge Berman is a member of the Aldona E. Appleton Family Law American Inn of Court and Past President of the Halpern-Furman American Inn of Court, Somerset and Morris Counties. He has lectured for ICLE, the New Jersey State Bar Association and other organizations, and is the recipient of several honors, including the Middlesex County Bar Association's Robert J. Cirafesi Chancery Practice Award in 2023.

Judge Berman received his B.A., with honors, from Gettysburg College and his J.D. from Case Western Reserve Law School, where he was a member of the Editorial Board of the *Case Western Reserve Law Review*.

Dean L. Burrell is Principal of Burrell Dispute Resolution in Morristown, New Jersey, and a nationally-known labor and employment attorney and neutral with expertise gained as a litigator for the National Labor Relations Board, major law firms, and major domestic and international corporations. He has been a neutral, a union local president and a management-side practitioner, and a leader in the minority labor and employment bar. Mr. Burrell began his career in government service as the staff attorney for the District of Columbia Public Employee Relations Board, and as a Field Attorney and litigator with the NLRB and its Special Litigation Branch. He was president of Local 5 of the NLRB Union and Shop Steward with the NLRB Professional Association.

Admitted to practice in New Jersey and Pennsylvania, Mr. Burrell is Past President of the Arizona chapter of the Labor Employment Relations Association (LERA), Past President of the Garden State Bar Association and has been a member of the New Jersey State Bar Association Labor and Employment Law Executive Committee, where he has been Co-Coordinator of the ADR Subcommittee. He has been a member of the Labor and Employment and ADR Sections of the American, National and New York State Bar Associations, and Chair of the NJSBA Minorities in the Profession Section. Mr. Burrell is a mediator for the New Jersey Courts, a qualified mediator for the Equal Employment Opportunity Commission (EEOC) and has mediated employment discrimination claims for the Arizona State Attorney General's Office. His arbitration and fact-finding panels include those of the American Arbitration Association, the New Jersey State Board of Mediation, the Financial Industry Regulatory Authority (FINRA) and the Nuclear Regulatory Commission Whistleblower Panel.

Mr. Burrell has taught labor law at the Arizona Summit Law School and legal writing at the American University Washington College of Law. A Master of the Bench, Reitman Labor and Employment Law American Inn of Court, he has lectured for professional organizations.

Mr. Burrell received his B.S from the Cornell University School of Industrial & Labor Relations, his J.D. from Washington College of Law and his LL.M. in Labor and Employment Law from Georgetown University Law Center. He completed the Labor Arbitrator Development Program at Cornell University ILR School's Scheinman Institute for Conflict Resolution.

Honorable Karen M. Cassidy, AJSC (Ret.) is Of Counsel to Bramnick, Grabas, Arnold & Mangan, LLC in Scotch Plains, New Jersey, where she primarily provides mediation and arbitration services in civil matters as well as acting as a Special Adjudicator. Appointed to the Union County bench in 2000, she served in the Civil and Family Divisions, was Presiding Judge of the Family Division from 2005-2009 and was subsequently appointed Assignment Judge in 2009 by Chief Justice Stuart Rabner.

While on the bench Judge Cassidy served on numerous Supreme Court Committees and was Chair of the Supreme Court Committee on Women in the Courts. As Assignment Judge she was a member and eventually Chair of the Judicial Council, which is charged with the management of all trial courts in the state, and she also chaired a number of other committees. Prior to her appointment to the bench she was a Partner in Connell Foley and was a Certified Civil Trial Attorney.

Judge Cassidy has lectured for ICLE, the New Jersey State Bar Association and several other professional groups. She is the recipient of several honors, including the Union County Bar Association Professional Lawyer of the Year Award and the Women's Initiative and Leaders in the Law (WILL) Award bestowed by the New Jersey Women Lawyers Association.

Judge Cassidy received her undergraduate degree, *cum laude*, from The American University and her J.D. from George Washington University's National Law Center. She was Law Clerk to the Honorable Edward W. Beglin, Jr., AJSC, Union County.

Honorable Lisa F. Chrystal, P.J.F.P. (Ret.) is counsel to Brach Eichler, LLC in Roseland, New Jersey, where she concentrates her practice in alternative dispute resolution, mediation and arbitration, and discovery management. She is a former Presiding Judge, Family Division, Union County, and sat in Elizabeth, New Jersey. Appointed to the bench in 2000 by Governor Christine Todd Whitman, she also sat in the Civil Division.

Prior to her appointment to the bench, Judge Chrystal maintained a solo litigation practice in Scotch Plains, New Jersey. She also served as Assistant Union County Counsel and was a civil litigator for two law firms before opening her own office. Judge Chrystal served on the Supreme Court Model Jury Charge Committee and is a former Co-Chair of the Union County Minority Concerns Committee. A former Trustee of the Union County Bar Association, she is a member of the Supreme Court Committee on Diversity, Equity and Inclusion, and a former member of the Supreme Court Family Practice Committee, where she served on the FM/FD Subcommittee. Judge Chrystal is a member of the New Jersey State and Union County Bar Associations, and serves on the Executive Committee of the NJSBA Family Law Section. She has also served on the Family Subcommittee on Mentoring of New Judges.

A former Master of the Richard J. Hughes American Inn of Court, Judge Chrystal is a Master of the Barry I. Croland American Inn of Court and The Justice Virginia Long Hudson County American Inn of Court. She has trained newly-appointed judges and those transferring to the Family Division in the Comprehensive Judicial Orientation Program (C.J.O.P.) and co-authored the judges' "Dissolution Manual." Judge Chrystal has taught CLE classes for the Union County Bar Association and Ethics for Trial Attorneys for ICLE, and was an Adjunct Legal Writing Instructor at Seton Hall Law School. In 2022 she was the recipient of the prestigious William J. McCloud Award bestowed by the Union County Bar Association, which recognizes significant contributions to the administration of justice in the Family Part.

Judge Chrystal is a graduate of Syracuse University and a *cum laude* graduate of Seton Hall University School of Law.

David Cinotti practices with Pashman Stein Walder Hayden P.C. in Hackensack, New Jersey.

Joel Clymer practices with Greenbaum Rowe Smith & Davis LLP in Iselin, New Jersey.

Michelle M. Cresti is a Partner in Macce & Cresti, P.C. in Clinton, New Jersey, where she has represented clients in automobile negligence, general negligence, landlord-tenant matters, municipal court defense, elder law and real estate matters. She has served as Public Defender in the Bethlehem, Lebanon and Glen Gardner Joint Municipal Court, and has been an arbitrator and mediator in the Superior Court of New Jersey and in private matters.

Admitted to practice in New Jersey and New York, Ms. Cresti has been a member of the New Jersey State and Hunterdon County Bar Associations, and has served as President and Trustee for the latter. She is Past Chair of the NJSBA Dispute Resolution Section, a former Co-Chair of the NJSBA Automobile and No-Fault Committee and has been Co-Chair of the Hunterdon County Bar Association Elder Law Section. Prior to opening her own law office in 1998 she was an associate with several firms and concentrated her practice in civil litigation.

Ms. Cresti received her B.S. from Rutgers University and her J.D. from Villanova University, Charles Widger School of Law. She served as a Law Clerk to the Honorable Robert Garrenger, J.S.C, and as a Judicial Law Clerk to the Honorable Robert Quackenboss, J.S.C.

Steven J. Curtis, J.D., PMP, CSM, CC, UPSP, ITIL is with the Broadwell Group in Marietta, Georgia.

Dennis A. Estis is a Partner in Greenbaum Rowe Smith & Davis LLP in Iselin, New Jersey. He concentrates his practice in condominium and community association law and complex commercial litigation, with a particular focus on construction law, public entity law and dispute resolution.

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey, the Third Circuit Court of Appeals and the United States Supreme Court, Mr. Estis is a Fellow of the American Bar Foundation, the College of Community

Association Lawyers and the National Conference of Bar Presidents, and a Charter Fellow of the Litigation Counsel of America and the Construction Lawyers Society of America. He is a former Director of the New Jersey State Bar Association Dispute Resolution Section and Past Chair of the NJSBA Equity Jurisprudence Committee, and has been a Qualified Civil Mediator, Superior Court of New Jersey, since 1998. Past President of the Middlesex County Bar Association, he is a former Trustee of the Middlesex County Bar Foundation, a Senior Trustee of the New Jersey Institute of Local Government Attorneys and a member of the New Jersey Builders Association and the Community Associations Institute.

Co-author of *New Jersey Condominium and Community Association Law* (Gann Law Books, 2025), Mr. Estis's articles have appeared in *Practical Law* and other publications, and he has lectured for ICLE, the New Jersey State and Middlesex County Bar Associations, and other organizations. He is the recipient of the Arthur H. Miller Lawyer Achievement Award, the Robert J. Cirafesi Chancery Practice Award and the David Pavlovsky Service to the Bar Award—all bestowed by the Middlesex County Bar Association—as well as numerous other honors.

Mr. Estis received his B.A. from Johns Hopkins University and his J.D. from New York University School of Law. He was a law clerk to the Honorable Samuel Allcorn, Superior Court of New Jersey, Appellate Division.

Perry Farhat is Director of Diversity, Equity & Inclusion for RWJBarnabas Health in Cherry Hill, New Jersey.

Rachel S. Fischer practices with Proskauer Rose, LLP in New York City.

Yvette Gibbons is the owner and President of Employment Compliance Strategies®, LLC in South Orange, New Jersey, where she has counseled clients in all aspects of employment law and related litigation. She has represented numerous clients in federal, state and administrative courts and counseled clients in wrongful discharge with Title VII, the *American with Disabilities Act*, the *Family and Medical Leave Act*, the *Equal Pay Act*, the WARN Act, civil rights violations and other federal and state employment legislation. She has also served as a federal arbitrator for the District of New Jersey and the New Jersey State Board of Mediation, and has served on the District of New Jersey's Mediation Panel.

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern District of New York, and the Third Circuit Court of Appeals, Ms. Gibbons is Past President of the Essex County Bar Association and has been a member of the American Bar Association's Labor and Employment Law Section and the New Jersey Association of Professional Mediators (NJAPM). She is a Director and member of the Board of Trustees of the Essex County Legal Aid Association as well as a member of the Federal Historic Society of the United States District Court for the District of New Jersey. She frequently conducts in-house employment training for management, supervisory and non-supervisory employees, on topics including litigation avoidance, employment compliance, discrimination, harassment, gender-based issues, workplace violence and bias training.

Ms. Gibbons received her B.S from Montclair State University, attended Rutgers Business School and received her J.D. from the University of Virginia School of Law, where she served on the Editorial Board of the *Virginia Law Review.* She was Law Clerk to the Honorable Joseph A.

Greenway, Jr., U.S.D.J., District of New Jersey, the Honorable Ronald J. Hedges, U.S.M.J., District of New Jersey, and the Honorable Leander J. Shaw, Jr., Justice, Supreme Court of Florida.

Jennifer Gillman is founder and President of the Gillman Strategic Group, LLC in Westfield, New Jersey.

Ayesha Krishnan Hamilton established the Hamilton Law Firm, P.C. in Princeton, New Jersey, and concentrates her practice in business and employment law, including commercial litigation and business transactions. She is experienced in all phases of litigation, including conducting depositions, mediations, arbitrations and trials.

Ms. Hamilton is admitted to practice in New Jersey, New York and Pennsylvania, and before the United States District Court for the District of New Jersey, the Southern and Eastern Districts of New York and the Eastern and Middle Districts of Pennsylvania. She has been a Trustee of the New Jersey State and Mercer County Bar Associations, and has served on the NJSBA Diversity Committee and Commission on Racial Equity in the Law. Past Chair of the NJSBA Solo Small Firm Section, Ms. Hamilton has been Chair of the Mercer County Bar Association's Diversity Committee, Co-Chair of the Association's Civil Practice Committee, and a member of the Employment Law Committee of the New Jersey Association for Justice. She is a member of the National Employment Lawyers Association and the National Association of Women Business Owners. In 2020 Ms. Hamilton was appointed to serve on the State Bar's Judicial and Prosecutorial Appointments Committee (JPAC), vetting candidates for the New Jersey Governor's Office. She was named the NJSBA Solo/Small Firm Attorney for the Year in 2021.

Ms. Hamilton received her B.A. from Case Western Reserve University and her J.D. from Case Western Reserve University Law School.

Joseph J. Hocking practices at the Law Office of Joseph J. Hocking in Denville, New Jersey.

Josh Irons is CEO of River Avenue Digital in Springfield, New Jersey.

Honorable Ellen L. Koblitz, PJAD (Ret.) is Special Counsel in the Alternative Dispute Resolution, Appellate Advocacy, Criminal Defense and Family Law Practices at Pashman Stein Walder Hayden P.C. in Hackensack, New Jersey. She focuses her practice in the mediation and arbitration of family, chancery and civil matters, and is a former Presiding Judge of the Appellate Division.

While on the bench Judge Koblitz served on numerous New Jersey Supreme Court committees and was Chair of the Supreme Court Judicial Education Committee and several other committees. She is a former Vice President of the New Jersey chapter of the Association of Family and Conciliation Courts (NJ-AFCC) and a member of the New Jersey State Bar Association Family Law Section, the Association of Criminal Defense Lawyers-New Jersey (ACDL-NJ), Women Lawyers in Bergen County and the Hudson and Bergen County Bar Associations.

President of the Barry Croland Family Law American Inn of Court, Judge Koblitz is an Adjunct Professor at Rutgers University School of Law. She has lectured for ICLE and other organizations, and is the recipient of the NJSBA Family Law Section's Eugene D. Serpentelli Award and several other honors.

Judge Koblitz received her B.A. from the University of Chicago and her J.D. from Yale Law School.

Honorable Robert B. Kugler, U.S.D.J. (Ret.) joined JAMS in New York City after serving approximately 32 years on the bench as a United States District Court Judge and Magistrate Judge for the District of New Jersey. Retiring from the bench in 2024, he serves as an arbitrator, mediator, special master/referee and neutral evaluator.

Judge Kugler is admitted to practice in New Jersey and before the United States District Court for the District of New Jersey, the Third Circuit Court of Appeals and the United States Supreme Court. He served as a member and Chair of the U.S. Judicial Conference Committee on the Administrative Office of U.S. Court and was a member of the Third Circuit Court of Appeals Commission on Race & Ethnicity.

Judge Kugler has lectured for professional and community organizations nationwide. He was the 2024 John F. Gerry Award bestowed by the Camden County Bar Association (for humanitarianism and outstanding contributions to the administration of justice in New Jersey) as well as several other honors.

Judge Kugler received his B.A., *summa cum laude*, from Syracuse University and his J.D., with honors, from Rutgers School of Law-Camden. He was Law Clerk to the Honorable John F. Gerry, United States District Court for the District of New Jersey.

Robert E. Margulies is a Principal in the Jersey City, New Jersey, firm of Schumann Hanlon Margulies LLC. He has been the managing member of The Resolution Group, a high-level mediation and arbitration practice, and has also maintained a full law practice with a concentration in litigation, commercial matters, personal injury, civil rights, employment and discrimination, insurance, products liability and appellate practice.

Admitted to practice in New Jersey, New York and Massachusetts (inactive), and before the United States District Court for the District of New Jersey and the Southern and Eastern Districts of New York; the First, Second, Third and Tenth Circuit Courts of Appeals; the United States Tax Court and the United States Supreme Court, Mr. Margulies is a member of the American and New Jersey State Bar Associations, and a past President of the Hudson County Bar Association. He has also been a member of the Supreme Court of New Jersey Arbitration Advisory Committee and Complementary Dispute Resolution Committee, where he has served as Chair of the Civil Mediation Subcommittee. Receiving accreditation as a Mediator from the Center for Effective Dispute Resolution in 2011, Mr. Margulies served for 7 years on the NJSBA Judicial and Prosecutorial Appointments Committee and is Past Chair of the NJSBA Dispute Resolution Section and the Executive Committee of the General Council. He is Past President of the Association of County Bar Presidents, a Fellow of the American Bar Foundation and on the roster of the American Arbitration Association as an arbitrator/mediator.

A court-approved mediator since 1995, Mr. Margulies has been the principal lecturer for ICLE in mediation and arbitration for more than two decades. He is a former Master of the Hudson American Inn of Court and the Family Law American Inn of Court, and Executive Director and a founder and Master of the Justice Marie L. Garibaldi American Inn of Court for Alternative Dispute Resolution. Mr. Margulies was an Adjunct Professor at Seton Hall Law School, where he taught advanced mediation, and has taught negotiation at Peking University in Beijing for EMBA students. The recipient of the 2006 Distinguished Service Award bestowed by ICLE, he is also the 2003 recipient of the Boskey Award as ADR Practitioner of the Year and the 2011 Jeydel Award for ADR Excellence from the Garibaldi American Inn of Court.

Mr. Margulies received his A.B. from Duke University and his J.D. from Suffolk University Law School. He served in the U.S. Army as a 1st Lieutenant in the Medical Service Corps from 1968 to 1971, with a tour of duty in Vietnam.

Bruce P. Matez, APM practices with Weir Greenblatt Pierce LLP in Haddonfield, New Jersey. He concentrates his practice in ADR matters, including mediation, arbitration, Collaborative Divorce and out-of-court settlement negotiations. He is a trained Collaborative Divorce professional, an approved *R*. 1:40 Post MESP Economic Mediator and has been appointed by the court and colleagues as a Parenting Coordinator and Guardian *ad Litem* for minor children.

A former member of the Executive Committee of the New Jersey State Bar Association Family Law Section, Mr. Matez also serves on the Family Law Committees of the Camden, Burlington and Gloucester County Bar Associations. He is Past President of the New Jersey Association of Professional Mediators (NJAPM), a founding member of the South Jersey Collaborative Divorce Professionals (a.k.a. BetterWayDivorce), the Justice Marie Garibaldi American Inn of Court for Alternative Dispute Resolution and a member of several other professional and community organizations.

Mr. Matez was a founding member of the Thomas S. Forkin Family Law American Inn of Court, served on the organization's Executive Committee from 1997-2009 and is a Master *emeritus*. He has lectured for ICLE and the Camden County Bar Association, taught family law mediation and family law motion practice at Rutgers Law School-Camden, and in 2018 was the recipient of the Honorable Joseph M. Nardi, Jr. Award for his commitment to the practice of law encouraging and exemplifying civility, humility, compassion and a moral/ethical obligation to the welfare of children and families, in general. In 2022 he was the recipient of the Richard Jeydel Award bestowed by the Justice Marie Garibaldi American Inn of Court.

Mr. Matez received his undergraduate degree from the University of Maryland, College Park, where he was elected to *Phi Beta Kappa*, and his J.D. from Villanova University School of Law. He clerked for the Honorable Samuel D. Natal, J.S.C., Family and Criminal Parts, Camden County.

Julien Musolino, Ph.D. is a cognitive scientist, public speaker, author and Associate Professor at Rutgers University in New Brunswick, New Jersey, where he holds a dual appointment in the Psychology Department and the Center for Cognitive Science.

Dr. Musolino's research has been funded by the National Institutes of Health and National Science Foundation. The author of *The Soul Fallacy: What Science Shows We Gain from Letting Go of Our Soul Beliefs*, he is the author of numerous scientific articles, has lectured in

the United States and worldwide, has appeared on national television, and has been a guest on radio and podcast programs.

Born and raised in France, Dr. Musolino studied at the University of Geneva (Switzerland), the University of North Wales, Bangor (United Kingdom), the University of Maryland and the University of Pennsylvania.

Zaid Qasim is Assistant County Counsel, Passaic County, in Paterson, New Jersey.

Honorable Siobhan A. Teare, J.S.C. (Ret.) retired in 2025 as a Judge of the Superior Court, Vicinage 5, and sat in Newark, New Jersey.

Prior to her judicial appointment in 2005, Judge Teare was Director of Legal Management for the University of Medicine and Dentistry of New Jersey. Past President of the Garden State Bar Association, she served on the Supreme Court Committee of the Americans With Disabilities Act and the Supreme Court Arbitration Advisory Committee.

Judge Teare received her B.A. from Tufts University and her J.D. from Rutgers School of Law-Newark.

Neethi Vasudevan practices with Seiden Freed LLC in Pennington, New Jersey.

Cindy Ball Wilson, Wilson Family Law LLC in Chatham, New Jersey, devotes her practice exclusively to family and matrimonial law. Her broad expertise spans mediation, collaboration and litigation; and she handles high-net-worth clients with complex compensation needs and those who are facing financial challenges.

Admitted to practice in New Jersey and Maryland, and before the United States District Court for the District of New Jersey, Ms. Wilson is an approved family mediator in ten New Jersey counties and an Early Settlement Panelist in Morris and Union Counties. She has been Secretary and President of the New Jersey Collaborative Law Group, a member of the New Jersey State Bar Association's Dispute Resolution and Family Law Sections, and a member of the Family Law Sections of the Morris and Union County Bar Associations. She is also a member of the New Jersey Association of Professional Mediators (NJAPM), the International Academy of Collaborative Professionals and the New Jersey Women Lawyers Association.

A member of the Barry I. Croland American Inn of Court, Ms. Wilson serves on the Executive Committee of the Justice Garibaldi American Inn of Court. She has been a guest lecturer on family law mediation topics at Seton Hall Law School and is the recipient of several honors.

Ms. Wilson received her B.A. from Rutgers University and her J.D. from Seton Hall Law School. While in law school, she was a law clerk for the New Jersey Office of the Attorney General in the Division of Youth and Family Services (currently Child Protection & Permanency) and worked on cases involving abused and neglected children. After graduating law school, she was Law Clerk to Chief Judge Louise G. Scrivener, Family Division, Sixth Judicial Circuit, Montgomery County, Maryland, where she lectured about gun possession in domestic violence cases.

Melissa S. Woods practices with Cohen Weiss & Simon, LLP in New York City.