MARIA AGUIRRE, ANDREA PALACIOS, AND LORENA VARAS V. CDL LAST MILE SOLUTIONS, LLC, SUBCONTRACTING CONCEPTS, LLC D/B/A SCI, ANTHONY CURCIO, AND KATTY PONCE

DOCKET NO. BER-L-1172-23

RIDER TO ORDER DATED JUNE 27, 2023

For the reasons set forth below, defendants CDL Last Miles Solutions, LLC, Subcontracting Concepts, LLC d/b/a SCI, Anthony Curcio, and Katty Ponce's motions to dismiss the plaintiffs' complaints and to compel individual arbitrations are DENIED.

CDL describes itself as a regional carrier, with 7 strategically located distribution centers, and a central sorting hub in Moonachie, NJ. Plaintiffs are "last mile" delivery drivers who deliver CDL's packages throughout the state. SCI is the "middleman," who connects delivery operators, like the Plaintiffs, to regional carriers like CDL. Plaintiffs are citizens of New Jersey, and all their work is completed within the state. Plaintiffs each individually signed an "Owner/Operator" agreement in connection to their engagement with SCI. These agreements were only signed by Plaintiffs and SCI. However, CDL is referenced as a "Logistics Broker" throughout the agreement. Each contract contained an arbitration agreement with nearly identical contents. The arbitration in the Palacios agreement reads as follows:

> "In the event of any dispute, claim, question, or disagreement arising from or relating to this agreement or the breach thereof... the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement... If resolution of the dispute is not reached within 60 days... disputes that are within the jurisdictional maximum for small claims will be settled in small claims court where the Owner/Operator resides.
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> All other disputes, claims, questions, or differences beyond the jurisdictional maximum for small claims courts and have not passed the statute of limitations within the locality of the Owner/Operator's

> residence will be finally settled by arbitration under the policies of the Federal Arbitration Act and New York State's Arbitration provisions."

Plaintiffs' complaint alleges several violations of New Jersey wage laws in connection to all individual "Owner/Operator" agreements.

Defendants argue that Plaintiffs' claims fall squarely within the scope of their "Owner/Operator" agreements, which compels Plaintiffs to arbitrate any dispute related to the agreement through binding arbitration under New York State arbitration provisions. Conversely, plaintiffs allege that the arbitration provisions in their "Owner/Operator" agreements are unenforceable as a matter of New Jersey public policy as the clauses, as written, fail to inform the parties that they are giving up their rights to go to court to settle their disputes, including the right to a trial by jury.

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim..." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the court determine that such allegations fail to state a claim upon which relief can be granted, the court must dismiss the claim. Id.

Under the New Jersey Court Rules, a Complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from an even obscure statement in the complaint, particularly if additional discovery is permitted. R. 4:6-2(e); See Pressler, Current N.J. Court Rules, Comment 4.1.1 to Rule 4:6-2(e), at 1513 (2016) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a complaint. See NCP Litigation Trust v. KPMG, LLP,

187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005). The test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." Printing Mart, 116 N.J. at 746. However, a "court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling the plaintiff to relief.: Sickles v Carbot Corp., 379 N.J. Super 100, 206 (App. Div. 2005).

As a threshold matter, this Court addresses the arbitration clause's enforceability. Courts should generally apply state-law contract principles to determine whether the parties agreed to arbitrate. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995). Accordingly, New Jersey law must be applied to determine if the arbitration clause, with a New York choice-of-law clause, is enforceable. In reviewing an arbitration agreement's validity in New Jersey, the agreement's terms "are to be given their plain and ordinary meaning." M.J. Paquet v. N.J. DOT, 171 N.J. 378, 396 (2002). Courts are tasked with discerning "the intent of the parties." Kieffer v. Best Buy, 205 N.J. 213, 223 (2011). If the meaning of a provision is ambiguous, the provision should be construed against the drafter because, "as the drafter, it chose the words that may be susceptible to different meanings." Id. 205 N.J. at 224. Roach v. BM Motoring, LLC, 228 N.J. 163, 174 (2017).

In New Jersey, decisional law over the past several decades has made clear that courts require a heightened showing of mutual assent whenever an average citizen is presented with a contract asking him or her to waive certain rights. Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001). "Arbitration provisions are commonplace in consumer contracts." Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430, 435 (2014). Such provisions must clearly state their purpose and be "sufficiently clear to a reasonable consumer." Id. at 436. However, "[n]o particular form of words is necessary to accomplish a clear and unambiguous waiver of rights." Id. at 444. With that in mind, "the affirmative policy of this

State, both legislative and judicial, favors arbitration as a mechanism of resolving disputes." Id. at 440. (quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 92 (2002)).

However, the preferential status for arbitration agreements "is not without limits." Garfinkel at 132. Courts may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract." Martindale, 173 N.J. at 85. Because arbitration involves a waiver of the right to pursue a case in a judicial forum, courts take particular care "in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent." NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 425 (App. Div. 2011). Mutual assent to an agreement "requires that the parties have an understanding of the terms to which they have agreed." Atalese, 219 N.J. at 442.

In Atalese, the New Jersey Supreme Court was concerned that some arbitration provisions may not reference the fact that arbitration is a substitute for the right to maintain an action in a court of law. Id. The Court noted that "no particular form of words" is necessary to accomplish a clear and unambiguous waiver of rights, but that they will "pass muster when phrased in plain language that is understandable to the reasonable consumer." Id. at 444. The plaintiff in Atalese brought statutory claims against the defendant, specifically for violations of the CFA and TCCWNA. The Court found the arbitration provision was unclear because "nowhere in the arbitration clause [was] there any explanation that plaintiff [was] waiving her right to seek relief in court for a breach of her statutory rights." Id. at 446. The arbitration provision specifically stated:

> **Arbitration**: In the event of any claim or dispute between Client and the USLSG related to this Agreement or related to any performance of any service of this Agreement, the claim or dispute shall be submitted to binding arbitration upon the request on the other party. The parties shall agree on a single arbitrator to resolve the dispute. The matter may be arbitrated either by the Judicial

> Arbitration Mediation Service or American Arbitration Association, as mutually agreed upon by the parties or selected by the party filing the claim. The arbitration shall be conducted in either the county in which the Client resides, or the closest metropolitan county. Any decision of the arbitrator shall be final and may be entered into any judgment in any court of competent jurisdiction. The conduct of the arbitration shall be subject to the then current rules of the arbitration service. The costs of arbitration, excluding legal fees, will be split equally or be born by the losing party, as determined by the arbitrator. The parties shall bear their own legal fees.

Id. at 437.

In Atalese, the Court stressed that "no prescribed set of words must be included in an arbitration clause to accomplish a waiver of rights." Id. at 447. However, there must be a clear and unambiguous statement that a consumer is opting to arbitrate disputes rather than resolving them in court:

> We do not suggest that the arbitration clause has to identify the specific constitutional or statutory right guaranteeing a citizen access to the courts that is waived by agreeing to arbitration. But the clause, at least in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute.
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> Id. at 446-47.

In the case at bar, the arbitration provision in question states:

> "In the event of any dispute, claim, question, or disagreement arising from or relating to this agreement or the breach thereof... the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement... If resolution of the dispute is not reached within 60 days... disputes that are within the jurisdictional maximum for small claims will be settled in small claims court where the Owner/Operator resides.
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> All other disputes, claims, questions, or differences beyond the jurisdictional maximum for small claims courts and have not passed the statute of limitations within the locality of the Owner/Operator's residence will be finally settled by arbitration in accordance with the

> policies of the Federal Arbitration Act and New York State's Arbitration provisions."

Based upon the language contained in the above provision, this Court finds that the arbitration clause is devoid of any language that would put the plaintiffs, without extensive knowledge of arbitration, on notice that they were waiving their right to a jury trial or having their disputes settled in court by signing the agreement. While the language of the provision makes clear that any dispute arising out of the contract will be arbitrated, it does not "unmistakably" establish that arbitration involves waiver to a jury trial. Atalese at 436. This Court finds "[t]he absence of any language in the arbitration provision that plaintiffs were waiving their statutory right to seek relief in a court of law renders the provision unenforceable." Atalese at 436. As the Atalese Court emphasized, "an average member of the public may not know -- without some explanatory comment -- that arbitration is a substitute for the right to have one's claim adjudicated in a court of law." Id. at 442. Courts take particular care "in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent." NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 425 (App. Div. 2011). No particular words are necessary, but the waiver [to a jury trial] must be clearly and unmistakably established. Id. at 444. See also, Flanzman v. Jenney Craig, Inc., 244 N.J. 119, 137 (2020). In reference to arbitration, the provision only states that disputes will be "finally settled by arbitration in accordance with the policies of the Federal Arbitration Act and New York State's Arbitration provisions." Atalese establishes that "arbitration" is not self-defining, and the provision in this case goes no further in defining the term.

It should also be noted that during oral argument, the defendants' counsel contended that the contested contracts did not need to explicitly state that the arbitration provision would waive the plaintiffs' right to a jury trial because plaintiffs were acting as representatives of their business when signing the contract, rather than as individuals. This Court does not find this

argument compelling. Each plaintiff is an individual delivery driver. The fact that one or more of the plaintiffs may operate their delivery business as a separate legal entity, rather than as individuals, does not imply that they possess the business acumen to comprehend the implications of arbitration. Even if evidence suggested that plaintiffs possessed sophisticated skills in business, there is no case law to support the notion that businesses are not entitled to the same clarity in arbitration provisions as individuals. Atalese.

Lastly, it should also be noted that this Court questioned the plaintiffs' counsel during oral argument regarding the fact that the contracts placed a great deal of emphasis on the arbitration clause by requiring the plaintiffs to initial next to the clause, and that each agreement contained the following words, in all capital letters, at the very end of the contract:

> "THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION AND CLASS-ACTION WAIVER WHICH AFFECTS YOUR LEGAL RIGHTS AND MAY BE ENFORCED BY THE PARTIES."

Despite the requirement that the plaintiffs initial next to the clause and the disclaimer set forth above in capital letters, this court agrees with plaintiffs' counsel contention that this language at the end of the document does nothing to broaden the scope of the class-arbitration waiver itself. Absent a clear explanation of what rights the plaintiffs were waiving, this language does not strengthen the defendants' argument. Simply put, if the arbitration clause falls short of explaining the actual rights the plaintiffs are waiving, writing a disclaimer in all capital letters does not cure the defect. Frankly, it's puzzling to this Court why the contract would go to great lengths to point out the existence of the arbitration clause yet fail to include simple language to explain what rights they were asking the plaintiffs to waive. Atalese was decided by the New Jersey Supreme Court in 2014, and there is no question that the analysis of whether an arbitration clause is enforceable

in New Jersey will be decided based upon New Jersey law and public policy. The Atalese Court set forth a clear roadmap for the defendants to follow when seeking to include a legally enforceable arbitration clause. All the contracts in this case were signed by the plaintiffs after 2014, and all three plaintiffs were New Jersey residents being asked to waive their rights in favor of New York law and binding arbitration. Again, New Jersey case law requiring an unambiguous waiver of the right to go to court and have a jury decide your dispute had existed for years, yet the arbitration clauses in the three most recent contracts signed by the plaintiffs are devoid of these fundamental requirements.

Accordingly, since the plaintiffs cannot be compelled to arbitrate, the class-action waivers tied directly to the clause are moot and do not stand in the way of plaintiffs pursuing a class-action case in court. The defendants' motions to dismiss the complaint pursuant to R. 4:6-2(e), and compel arbitration are DENIED for the reasons stated herein.