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	:	SUPREME COURT OF NEW JERSEY
AMY SKUSE,	:	DOCKET NO. _____
	:	
Plaintiff-Respondent,	:	Civil Action
	:	ON APPEAL FROM:
v.	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
PFIZER, INC., JOHN D. WITZIG, PAUL MANGEOT, and CONNIE CORBETT,	:	App. Div. Docket No. A-3027-17T4
	:	Sat Below:
	:	Hon. Jack M. Sabatino, J.A.C.
Defendants-Petitioners.	:	Hon. Michael J. Haas, J.A.C.
	:	Hon. Stephanie Ann Mitterhoff, J.A.C.

BRIEF IN SUPPORT OF PETITION FOR CERTIFICATION BY DEFENDANTS-PETITIONERS

On the Brief

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SHORT STATEMENT OF THE MATTER INVOLVED

Defendants-Petitioners respectfully petition this Court to review the final judgment of the Appellate Division reversing the trial court and denying their motion to compel arbitration with Pfizer's former employee, Amy Skuse.

The Appellate Division below held that continued employment is insufficient as a matter of law to manifest assent to an arbitration agreement under Leodori v. CIGNA Corp., 175 N.J. 293 (2003). The decision below expressly conflicts with a prior published decision of the Appellate Division which had reached the opposite conclusion. See Skuse v. Pfizer, Inc., --- N.J. Super. --- (App Div. 2019) (slip op. at 32-33) ("[W]e respectfully decline to follow our sister panel's ruling in [Jaworski v. Ernst & Young US LLP, 441 N.J. Super. 464, 474-75 (App. Div. 2015)].").

This case thus presents the precise circumstance under which "[c]ertification will be granted": The Appellate Division's published decision is in conflict with another published Appellate Division decision on the question of whether continued employment can manifest assent to an arbitration agreement. R. 2:12-4 ("Certification will be granted only ... if the decision under review is in conflict with any other decision of the same or a higher court").

This case also presents questions of general public importance which have not but should be settled by this Court:

the proper application of Leodori to the formation of arbitration agreements and, alternatively, whether New Jersey law, as applied by the Appellate Division in this case, is preempted by the Federal Arbitration Act ("FAA"). The importance of these questions is demonstrated by the list of employers for whom New Jersey state and federal courts have upheld continued employment as assent to an arbitration agreement in recent years – Ernst & Young, Neiman Marcus, BJ's Wholesale Club, Anheuser-Busch, Nordstrom, and Morgan Tire & Auto. The decision below broke with this line of authority, creating uncertainty as to the status of arbitration agreements in New Jersey. This Court's review is urgently needed.

This Court should grant certification, reverse the Appellate Division's decision, and reinstate the Law Division's order compelling arbitration.

QUESTION PRESENTED

Did Pfizer and Skuse form a valid arbitration agreement under New Jersey law? If not, does the FAA preempt the standard applied by the Appellate Division under New Jersey law?

ERRORS COMPLAINED OF

The Appellate Division erred by failing to affirm the Law Division's order concluding that a valid arbitration agreement was formed between Pfizer and Skuse under New Jersey law.

The Appellate Division erred by applying a heightened contract-formation standard, contrary to the FAA.

LEGAL ARGUMENT

POINT I

The Court Should Grant Certification To Resolve The Conflicting Case Law And Questions Of General Public Importance.

Certification is warranted because the Appellate Division's decision below applied the Leodori standard established by this Court in a manner that directly conflicts with the Appellate Division's prior holding in Jaworski, another published decision. As a result, conflicting precedent currently exists over the application of Leodori where the manner of assent to an arbitration agreement is continued employment by an at-will employee. R. 2:12-4; New Jersey Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 115 (2008) (granting certification where the case "present[s] a conflict between . . . Appellate Division [decisions]" because it "call[s] for an exercise of this Court's supervisory powers").[1] Should the Court allow this conflict to persist, employers, employees, and the lower courts will not know what the law of New Jersey is, which will lead to protracted litigation and appeals.

The Appellate Division here erred in its application of this Court's decision in Leodori and in failing to follow settled

[1] Similarly, the United States District Court for the District of New Jersey has split over the application of Leodori to arbitration agreements where assent is given by continued employment without opting out. See Horowitz v. AT&T Inc., 2019 U.S. Dist. LEXIS 60, * (D.N.J. Jan. 2, 2019) ("This District is split on whether the failure to opt out of an arbitration agreement after receiving notice is sufficient to signify intent to be bound by the arbitration agreement, with the pendulum weighing slighting more in favor of granting arbitration in such a situation.").

principles of contract law as applied by Jaworski and other courts. Guidance is also needed for the application of Leodori to electronic systems commonly used by employers to communicate with employees, which systems the Appellate Division derided. The fact that these issues have divided both the state and federal courts of New Jersey confirms that the question at issue is one "of general public importance which has not been but should be settled by the Supreme Court." R. 2:12-4.

Similarly, the question of whether Leodori and other tenets of New Jersey law applied by the Appellate Division are preempted by the FAA also presents a "question of general public importance which has not been but should be settled by the Supreme Court." R. 2:12-4. See Guidotti v. Legal Helpers Debt Resolution, L.L.C., 639 F. Appx. 824, 827 (3d Cir. Feb. 10, 2016) ("Whether these state law grounds [for evaluating arbitration agreements under Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 445-46 (2014), and New Jersey unconscionability law] remain viable as not preempted by the [FAA] presents an important and challenging question.").

POINT II

Upon Certification, The Court Should Conclude That Pfizer And Skuse Entered Into A Valid Arbitration Agreement.

A. The Parties' Actions And Communications Formed A Valid Arbitration Agreement.

Pfizer's Mutual Arbitration and Class Waiver Agreement ("Arbitration Agreement") was announced on May 5, 2016 in an email

from Chuck Hill, Pfizer's Chief Human Resources Officer, that bore the subject line "Pfizer's Mutual Arbitration and Class Waiver Agreement" and that exclusively discussed arbitration. (Da28-29).[2] It is undisputed that Skuse received this email.

The email explained "that arbitration will replace state and federal courts as the place where certain employment disputes are ultimately decided." (Da28). Mr. Hill wrote: "I request that you read the agreement and review the FAQs before acknowledging the agreement." (Da28). The words "agreement" and "FAQs" were linked to the documents themselves so that Skuse could access them directly from the email. (Da28, Da31-40). Mr. Hill stated: "All covered colleagues will be bound by the agreement as part of their continued employment at Pfizer. If you have any questions, I encourage you to review the FAQ's and/or refer your question to ArbitrationProgram@pfizer.com." (Da28).

The Arbitration Agreement was a stand-alone agreement, not a clause within a larger agreement or handbook, and provided that:

> [A]ll disputes, claims, complaints or controversies ("Claims") that you have now or at any time in the future may have against Pfizer . . . including claims relating to . . . wrongful discharge, discrimination and/or harassment claims, retaliation claims, . . . and any other claim under any federal, state, or local statute, constitution, regulation, rule, ordinance, or common law arising out of and/or directly or indirectly related to your . . . employment with the Company . . . are subject to arbitration pursuant to the terms of this Agreement and will be resolved by arbitration and NOT by a court

[2] "Da" refers to the Appendix filed by Defendants-Petitioners in the Appellate Division.

> or jury. THE PARTIES HEREBY FOREVER WAIVE AND GIVE UP THE RIGHT TO HAVE A JUDGE OR A JURY DECIDE ANY COVERED CLAIMS. (Da31).

The Agreement further provided as follows:

> **If you begin or continue working for the Company sixty (60) days after receipt of this Agreement, even without acknowledging this Agreement, this Agreement will be effective, and you will be deemed to have consented to, ratified and accepted this Agreement through your acceptance of and/or continued employment with the Company.** (Da35, ¶7(h)) (emphasis in original).

The FAQs posed and answered 19 different questions about arbitration and the Arbitration Agreement. The FAQs stated:

> The Arbitration Agreement is a condition of continued employment with the Company. If you begin or continue working for the Company sixty (60) days after receipt of this Agreement, it will be a contractual agreement that binds both you and the Company. (Da37, Q.4).

On May 6, 2016, Skuse received another email with the subject line: "Mutual Arbitration and Class Waiver Agreement and Acknowledgement (for iPad or PC) assigned to Amy Skuse," stating:

> You have been assigned the activity, Mutual Arbitration and Class Waiver Agreement and Acknowledgement (for iPad or PC) . . . **for the following reason: As a condition of your employment with Pfizer, you and Pfizer agree to individual arbitration as the exclusive means of resolving certain disputes relating to your employment.** This agreement is contained in the Mutual Arbitration and Class Waiver Agreement. It is important that you are aware of the terms of this Agreement. (Da7) (emphasis added).

The four-slide arbitration module explained the Arbitration Agreement, provided a direct link to the Arbitration Agreement, and enabled Skuse to print the Arbitration Agreement. (Da9-13). The first slide stated:

> As a condition of your employment with Pfizer, you and Pfizer agree to individual arbitration as the exclusive means of resolving certain disputes relating to your employment. This agreement is contained in the Mutual Arbitration and Class Waiver Agreement. It is important that you are aware of the terms of this Agreement. (Da10).

The third slide stated:

> I understand that I must agree to the Mutual Arbitration and Class Waiver Agreement as a condition of my employment. Even if I do not click here, if I begin or continue working for the Company sixty (60) days after receipt of this Agreement, even without acknowledging this Agreement, this Agreement will be effective, and I will be deemed to have consented to, ratified and accepted this Agreement through my acceptance of and/or continued employment with the Company. (Da12).

Below this language was a link stating, "CLICK HERE to acknowledge." (Da12). On June 9, 2016, Skuse completed her review of the online module and clicked the acknowledgment. (Da13; Da21; Da23). Skuse was then sent another email with the subject line: "Amy Skuse completed Mutual Arbitration and Class Waiver Agreement and Acknowledgement (for iPad or PC)." (Da21; 2T4:25 to 6:3).[3]

Skuse continued working for Pfizer for 13 months after the Arbitration Agreement became effective, and accepted the benefits of her continued employment, which was part of the consideration for the Arbitration Agreement. (Pa6; 2T4:15; 2T11:15).[4]

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[3] "1T" refers to the Transcript of oral argument, dated February 2, 2018; "2T" refers to the Transcript of the trial court's oral decision dismissing Plaintiff's Complaint, dated February 21, 2018. Both transcripts are included in the Appendix to this Petition. "Pa" refers to the Appendix filed by Plaintiff-Respondent in the Appellate Division.

[4] Skuse waived any right to contest the evidence submitted to the trial court by Defendants-Petitioners because in response to the motion Judge's offer

B. The Parties Formed A Valid Arbitration Agreement Consistent With Leodori As Recognized By Jaworski And Many Other Cases.

In Leodori, this Court held that where the plaintiff was asked to sign a document to memorialize his agreement to arbitrate but did not do so, the Court could not enforce the agreement "unless we find some other explicit indication that the employee intended to abide by that provision." 175 N.J. at 305.

The "Agreement" in Leodori did not state that the plaintiff agreed to arbitration, but rather that "I understand that ***by accepting employment and being eligible to receive increases in compensation and benefits, I am agreeing to the following two important terms of my employment*** described in You and CIGNA: ... (2) I will use the Company's internal and external employment dispute resolution processes to resolve legal claims against the Company-therefore rather than go to court…." Id. at 298 (emphasis added). The plaintiff conceded, and the Court acknowledged, that signing this "Agreement" of his "understand[ing]" would be assent to the arbitration agreement. Id. at 307 ("The parties would have effectuated such a policy in this case had defendant only obtained plaintiff's signature on the pre-printed Agreement that it attached to the 'You and CIGNA' handbook").

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of a plenary hearing, Plaintiff's counsel "waive[d] any right to a plenary hearing." (1T2:22-3:9, 1T4:16-6:23).

Because the express manner of assent to t arbitration policy in Leodori was a signature, however, and the plaintiff did not sign, and there was no other explicit indication that the employee intended to abide by that provision to overcome his failure to assent in the manner requested, the Court held there was no assent. Id. at 305-06. Leodori supports a finding of assent here because Skuse assented in the manner requested.

In Jaworski v. Ernst & Young US LLP, 441 N.J. Super. 464, 474-75 (App. Div. 2015), certif. denied, 223 N.J. 406 (2015), the Appellate Division held that one of the employees (Holewinski) had manifested his assent to arbitration by continuing his employment. The court found this conclusion was consistent with Leodori because the arbitration agreement in Leodori "contemplated [the employee]'s signature as a concrete manifestation of his assent," but the arbitration policy at issue in Jaworski stated that "***[a]n Employee indicates his or her agreement to the Program and is bound by its terms and conditions by beginning or continuing employment with [EY] after July 18, 2007."*** Id. (emphasis in original). The court held that because continued employment was the means of assent, Holewinski assented to the revised arbitration policy by continuing his employment. Id. at 474.

In this case, unlike Jaworski, the Appellate Division failed to enforce the arbitration agreement, claiming a lack of assent by Skuse. The court initially attempted to distinguish Jaworski on

the ground that Holewinski had signed a prior arbitration agreement, which indicated his agreement to changes to the arbitration agreement "by continuing his or her employment with [the employer] for at least three days after the notice is provided." (DPa32) (emphasis in original).[5] But this was not the basis for the holding in Jaworski, and, recognizing this, the panel below then disagreed with Jaworski, creating the current conflict. (DPa33) ("[W]e respectfully decline to follow our sister panel's ruling in Jaworski.").

Many other decisions have interpreted Leodori and New Jersey law consistent with Jaworski.[6] The trial court's finding that Skuse manifested assent is consistent with general contract

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[5] "DPa" refers to the Appendix to this Petition for Certification.

[6] See Fave v. Neiman Marcus Grp., 2014 N.J. Super. Unpub. LEXIS 1086, *3-4 (App. Div. May 13, 2014) (compelling arbitration where assent was manifested by continued employment after plaintiff signed an "ACKNOWLEDGEMENT FORM" that stated "[Employer] has advised me that if I accept or continue employment with [Employer], I am deemed to have accepted the Binding Arbitration Program."); Descafano v. BJ's Wholesale Club, Inc., No. 15-7883, 2016 WL 1718677, at *3 (D.N.J. Apr. 28, 2016) (finding acceptance of arbitration agreement through continued employment under Leodori where plaintiff signed an acknowledgement of "receipt" of arbitration agreement and "the forms accompanying the acknowledgment explain that continued employment would signify consent"); Nascimento v. Anheuser-Busch Cos., LLC, 2016 U.S. Dist. LEXIS 112858, at *5 (D.N.J. Aug. 24, 2016) (finding valid formation of arbitration agreement; "where an arbitration agreement states an employee accepts its terms by continued employment, the agreement will bind an employee who continues employment beyond the agreement's effective date."); Bourgeois v. Nordstrom, Inc., No. 11-2442, 2012 WL 42917, at *1 (D.N.J. Jan. 9, 2012) (compelling arbitration where employee manifested assent under Leodori by signing acknowledgement that "the Program becomes effective on December 1, 2004, for employees who are employed with Nordstrom on or after December 1, 2004," and continuing his employment after that date); Fields v. Morgan Tire & Auto., Inc., 2008 U.S. Dist. LEXIS 21788, *8 (D.N.J. Mar. 18, 2008) (under Leodori, plaintiff's continued employment and receipt of the benefits of employment constituted acceptance of arbitration agreement where employee acknowledged "he had received and had the opportunity to review" the arbitration agreement); Toma v. Ernst & Young, LLP, 2005 WL 8145778, *2 (D.N.J. Apr. 5, 2005) (same).

principles under New Jersey law, which require only that the elements of a contract be proven by a preponderance of the evidence,[7] that the offeror may designate the manner of assent,[8] and that acceptance may be by performance.[9]

C. The Court Below Erred By Refusing To Enforce The Arbitration Agreement Based On Settled Principles Of New Jersey Law.

The Appellate Division erred by refusing to enforce the Arbitration Agreement. Initially, the Arbitration Agreement easily satisfies this Court's standards for clarity by stating that covered claims "will be resolved by arbitration and NOT by a court or jury" and "THE PARTIES HEREBY FOREVER WAIVE AND GIVE UP THE RIGHT TO HAVE A JUDGE OR A JURY DECIDE ANY COVERED CLAIMS,"[10] and that the parties agreed to arbitrate "wrongful discharge, discrimination and/or harassment claims, retaliation claims, ... and any other claim under any federal, state, or local statute ...

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[7] Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016) (a plaintiff must prove that the "parties entered into a contract" by "a preponderance of the evidence").

[8] An "offeree must comply with [the] offeror's prescribed manner of acceptance to create [a] contract." Leodori, 175 N.J. at 306 (citing Restatement (Second) of Contracts § 60 (1981)).

[9] Association Group Life, Inc. v. Catholic War Veterans, 120 N.J. Super. 85, 95 (App. Div. 1971) ("An offer which invites acceptance by performance, rather than by a promissory acceptance, will give rise to a binding contract when the offeree begins the invited performance or tenders part of it."); Restatement (Second) of Contracts § 30 ("An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act.").

[10] Atalese, 219 N.J. at 447 (requiring that the arbitration "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").

arising out of and/or directly or indirectly related to your ... employment with the Company ... and/or termination of your employment with the Company."[11] (Da31).

The Appellate Division failed to credit this language and the other communications to Skuse when it derided the arbitration communications as "prosaic labels" and "inapt euphemism" because Pfizer used a training platform for completion of the Arbitration Agreement module. (DPa24-25). These statements are belied by the undisputed communications about the Arbitration Agreement. The program started with an email from a prominent executive bearing the subject line "Pfizer's Mutual Arbitration and Class Waiver Agreement." The stand-alone Arbitration Agreement linked to the email stated that "THE PARTIES HEREBY FOREVER WAIVE AND GIVE UP THE RIGHT TO HAVE A JUDGE OR A JURY DECIDE ANY COVERED CLAIMS," and agreed to arbitrate statutory claims. (Da31). Skuse was told "[i]f you begin or continue working for the Company sixty (60) days after receipt of this Agreement, it will be a contractual agreement that binds both you and the Company," (Da35). And Skuse acknowledged that she "underst[ood] that [she] must agree to the Mutual Arbitration and Class Waiver Agreement as a condition of [her] employment," and that "if [she] beg[a]n or continue[d]

[11] Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 135 (2001) ("To pass muster, however, a waiver-of-rights provision should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination.").

working for the Company sixty (60) days after receipt of this Agreement, even without acknowledging this Agreement, this Agreement will be effective, and [she would] be deemed to have consented to, ratified and accepted this Agreement through [her] acceptance of and/or continued employment with the Company." (Da12). There was nothing "prosaic," "inapt," or unclear about what Skuse was "accept[ing]" when she continued her employment 60 days later (and for the next 13 months after that).[12]

The Appellate Division took issue with the fact that the button Skuse clicked said "CLICK HERE to acknowledge," stating that "one might 'acknowledge' the high price of a new car without 'agreeing' to pay for it." (DPa27). But if you "acknowledge" that by driving the car off the lot, an agreement to pay that price "will be effective, and [you] will be deemed to have consented to, ratified and accepted [it]" (Da12), and if you then drive the car off the lot, you have done much more than simply observe the price, you have agreed to pay that price.

The Appellate Division also misconstrued Leodori to require "written or electronic" acceptance of an arbitration agreement, but there is no such requirement under Leodori or under the law.

[12] A comparison of the communications program by Pfizer to that of others where continued employment was found to manifest assent to an arbitration agreement reflects that Pfizer's program was unusually robust. Many companies simply send out an email. Pfizer's unusually robust program makes the Appellate Division's derision of the arbitration module, and its rank speculation that Pfizer "may have strategically decided to omit the word 'agree' from the click box because using that term might cause some employees to balk and to question the arbitration policy," all the more unfounded and inappropriate. (DPa29).

Leodori, 175 N.J. at 304-05 (contracts generally "do not need to be in writing to be enforceable"); see also Caley v. Gulfstream Aero. Corp., 428 F.3d 1359, 1370 (11th Cir. 2005) ("[T]he overwhelming weight of authority supports the view that no signature is required to meet the FAA's 'written' requirement.").

The Appellate Division stated that "[t]here is reason to doubt that all Pfizer employees who were sent the training module necessarily accessed and read the arbitration policy through the 'Resources' tab on the third slide" (DPa25), but the court was not asked to reach any conclusions about what "all Pfizer employees" did. The only relevant inquiry was what Skuse did and Pfizer submitted conclusive proof that she had received all of the communications, had completed the module relating to the Arbitration Agreement, and had clicked the acknowledgement. Skuse waived a plenary hearing to contest any part of those communications or her actions. (1T2:22-3:9, 1T4:16-6:23).

The Appellate Division cited to statistics about email usage and then took "judicial notice that, in order to deal with this deluge, people frequently skim (or scroll through without reading) written material sent to them digitally." (DPa22-23). This was not a proper application of judicial notice.[13] In any event, there

[13] See Lall v. Shivani, 448 N.J. Super. 38, 51 (App. Div. 2016) (denying request for judicial notice where "facts ... [were] not 'propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute'") (quoting N.J.R.E. 201(b)).

is nothing in the record to support the application of these statements to Skuse. Pfizer's communication program for the Arbitration Agreement – an email from a prominent executive focusing exclusively on the Arbitration Agreement, clear Arbitration Agreement, detailed FAQs, another email addressed to Skuse by name assigning her the required arbitration module, Skuse's completion of the arbitration module and acknowledgement, and the third confirming email – were plainly designed to call Skuse's attention to the Arbitration Agreement from among any other communications she received. The program ensured Skuse understood that she "must agree to the Mutual Arbitration and Class Waiver Agreement as a condition of [her] employment," and that "if [she] begin[s] or continue[s] working for the Company sixty (60) days after receipt of this Agreement, even without acknowledging this Agreement, this Agreement will be effective, and [she] will be deemed to have consented to, ratified and accepted this Agreement through [her] acceptance of and/or continued employment with the Company," so that if she continued her employment 60 days later, it would be an "explicit, affirmative agreement that unmistakably reflects the employee's assent." Leodori, 175 N.J. at 303. All of the elements of a contract were satisfied in this case and the Appellate Division should be reversed.

D. Alternatively, The Court Should Conclude That New Jersey Law Is Preempted By The FAA.

In the alternative, if the Court concludes that the Appellate Division correctly applied New Jersey law, the Court should hold that the heightened standards for forming "waiver-of-rights" agreements under New Jersey law are preempted by the FAA as applied to arbitration agreements.

In Leodori, the Court announced that "a valid waiver [of statutory rights] results only from an explicit, affirmative agreement that unmistakably reflects the employee's assent." Leodori, 175 N.J. at 303. The Court recognized that this was not a standard previously existing under New Jersey law but found that it "flows directly from existing case law." Id. at 303 ("If not already part of our jurisprudence, that view flows directly from existing case law.").

The Court did not announce the standard as applicable to all other contracts but rather as a special standard for waivers of statutory rights. Id. And although it was announced as a standard for an agreement waiving statutory rights whether or not in an arbitration agreement, the standard was first announced and applied to an arbitration agreement and the overwhelming application of the standard has been to arbitration agreements.

But even assuming that the standard applies to all waivers of statutory rights, the standard is still preempted by the FAA

because it is not a general contracting principle applicable to "all other contracts." Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1424 (2017) ("The Federal Arbitration Act (FAA or Act) requires courts to place arbitration agreements 'on equal footing with ***all*** other contracts.'") (quoting DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 468 (2015)) (emphasis added). Otherwise, a state could adopt a rule that contracts cannot waive statutory rights at all, and thereby preclude any arbitration agreements under its interpretation of statutory rights, which plainly would not survive the FAA. Kindred Nursing, 137 S. Ct. at 1428 ("As respondents have acknowledged, their reasoning would allow States to pronounce *any* attorney-in-fact incapable of signing an arbitration agreement," which would "wholly defeat" the FAA).

In AT&T Mobility v. Concepcion, 563 U.S. 333, 346 (2011), the Supreme Court of the United States held that California's "Discover Bank rule," which rendered most class waivers unconscionable, was preempted by the FAA. The plaintiffs argued that the rule was not preempted because unconscionability is a ground that "exist[s] at law or in equity for the revocation of any contract" and, alternatively, that the rule applied to all dispute resolution contracts including those prohibiting class waivers in court. Id. at 341. The Court still held that the rule was preempted because it stood as an obstacle to the full purposes and objectives of Congress under the FAA. Id. at 352.

This principle was reinforced in Kindred Nursing, where the Supreme Court held that the FAA preempted a Kentucky rule that invalidated arbitration agreements entered into by an attorney-in-fact unless the underlying power-of-attorney designation "clearly stated" that the attorney-in-fact had the authority to waive the principal's right to a jury trial. Kindred Nursing, 137 S. Ct. at 1426. The Kentucky Supreme Court had reasoned that the "clear statement" rule was not preempted because it applied whenever an agent attempted to waive "fundamental constitutional rights," not only to arbitration agreements. Id. at 1427. The Supreme Court held that the rule was nonetheless preempted because it "did exactly what Concepcion barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement – namely, a waiver of the right to go to court and receive a jury trial." Id.[14] See also Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018) (holding that even if the National Labor Relations Act rendered agreements with class waivers "illegal," it was insufficient to invalidate an arbitration agreement because it was not a doctrine that applied to "any contract").

The Third Circuit has likewise held that efforts to impose heightened contract formation standards on arbitration agreements

[14] The fact that Kindred Nursing involved a power-of-attorney provides no basis to distinguish it from this case. Nowhere in the decision does the Court rely on that fact for its conclusion; rather, its focus was on a judicial rule that disfavors arbitration agreements, and it relied on Concepcion, a traditional contract case, for its rule. Id. at 1425.

are preempted by the FAA, even where those standards have been applied outside of arbitration. See Seus v. John Nuveen & Co., 146 F.3d 175, 183-84 (3d Cir. 1998), overruled on other grounds by Green Tree Financial Corp. Alabama v. Randolph, 531 U.S. 79 (2000) (refusing to apply a "heightened knowing and voluntary standard" applicable to releases of ADEA claims to an arbitration agreement as "inconsistent with the FAA").

Notably, a standard under New York law that was almost identical to Leodori was held by the Second Circuit to be preempted by the FAA. Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela, 991 F.2d 42, 46 (2d Cir. 1993). The Second Circuit reasoned that "New York law requires that nonarbitration agreements be proven only by a mere preponderance of the evidence" and to require arbitration agreements to be proven with the "express, unequivocal agreement" standard was barred by the FAA. Id. As noted, New Jersey law provides that contracts generally must be proven only by a preponderance of the evidence, Globe Motor Co., 225 N.J. at 482. To the extent that Leodori requires a heightened showing, the rule is not applicable to "all other contracts" and is preempted. Kindred Nursing, 137 S. Ct. at 1424.[15]

[15] Although the Arbitration Agreement clearly satisfies the holding of Atalese requiring an arbitration agreement to give some indication that the parties are giving up the right to sue in court, the Appellate Division still found that no arbitration agreement was formed under Atalese. (DPa3). To the extent Atalese or any other principle of state law applies a similar heightened standard for assent to waiver-of-rights agreements, it likewise would be preempted by the FAA to the extent applied to arbitration agreements.

The Appellate Division below compounded the problem by misconstruing Leodori to preclude contract formation where the express manner of assent to an arbitration agreement set forth in the offer is continued employment by an at-will employee and to require "written or electronic" acceptance of an arbitration agreement. (DPa4).

Again, the parties formed a valid arbitration agreement even under Leodori, and, moreover, Leodori is distinguishable on its facts. But to the extent that this Court disagrees, this Court should hold that the FAA preempts heightened contract-formation standards from being applied to arbitration agreements. Under New Jersey law applicable to "any contract," 9 U.S.C. § 2, the parties entered into a binding arbitration agreement.

CONCLUSION

For all of these reasons, Defendants-Petitioners respectfully request that this Court grant the Petition for Certification and reverse the Appellate Division's judgment.

Dated: February 15, 2019

Respectfully submitted,

s/

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