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ANNEMARIE MORGAN and TIFFANY DEVER, Plaintiffs/Petitioners, v. SANFORD BROWN INSTITUTE, CAREER EDUCATION CORPORATION, INC., MATTHEW DIACONT, GREG LNU, SALVATORE COSTA, JANET YOUNG, KRISTA HOLDEN, AND JOHN DOES 1-5, Defendants/Respondents.	DOCKET NO. A-31-14 (075074) ON PETITION FOR CERTIFICATION TO THE NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION DOCKET NO.: A-452-13T4 ON APPEAL FROM AN ORDER OF SUPERIOR COURT, LAW DIVISION - CAMDEN COUNTY DOCKET NO.: CAM-L-1898-13 CIVIL ACTION SAT BELOW: HON. MARIE LIHOTZ, P.J.A.D. HON. RICHARD HOFFMAN, J.A.D. HON. LOUIS MELONI, J.S.C.

BRIEF OF PROPOSED AMICI CURIAE NEW JERSEY CIVIL JUSTICE INSTITUTE AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

On the Brief:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

CASES

STATUTES

STATEMENT OF INTEREST OF AMICUS CURIAE

The New Jersey Civil Justice Institute ("NJCJI," or "The Institute") has a strong interest in the clear, predictable, and fair application of the law. NJCJI is a statewide, nonpartisan association of over 100 individuals, businesses, and trade and professional organizations dedicated to improving New Jersey's civil justice system. The Institute believes that a balanced civil justice system and the enforcement of agreements to engage in alternative dispute resolution fosters public trust and motivates professionals, sole proprietors, and businesses to provide safe and reliable products and services, while ensuring that injured people are compensated fairly for their losses. Such a system is critical to ensuring fair resolution of conflicts, maintaining and attracting jobs, and fostering economic growth in New Jersey.

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.

Many of *amici's* members and affiliates regularly employ arbitration agreements in their contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policy reflected in the Federal Arbitration Act ("FAA"), *amici's* members have structured millions of contractual relationships around arbitration agreements. Accordingly, *amici* have a strong interest in advocating against rules that treat arbitration agreements less favorably than other contracts.

Amici therefore seek leave to participate in the within appeal and submit this Brief both in support of that application and on the merits.

PRELIMINARY STATEMENT

This matter presents an important question regarding the status of predispute agreements to arbitrate in the State of New Jersey.

By enacting the Federal Arbitration Act ("FAA"), Congress reversed long-standing judicial hostility to and suspicion of arbitration as a means to resolve disputes. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). The FAA embodies a clear federal policy favoring arbitration agreements, and states may not adopt rules for enforcing such agreements

that are more stringent than the rules governing other contracts.

However, New Jersey courts have increasingly analyzed predispute arbitration agreements under the framework applicable to waivers of substantive rights. These decisions refuse to enforce agreements to arbitrate unless the claimant's consent to do so is deemed to be clear and unambiguous; an acceptance of an offer to arbitrate is not enough. In recent jurisprudence, this principle has been extended and applied to require that the arbitration agreement confirm, in detail, that the signatory understands that he or she will not have a right to trial by jury or a judicial forum in which to resolve the dispute. Imposing such requirements creates a special rule for the enforcement of arbitration agreements, thereby embodying a preference against arbitration.

The present case presents the Court with the opportunity to align New Jersey jurisprudence with the FAA and federal authority. This Court granted certification in this matter to determine whether plaintiffs can be compelled to arbitrate all claims related to their enrollment agreements, including their Consumer Fraud Act claims, under the terms of the arbitration agreement. Morgan v. Sanford Brown Inst., 220 N.J. 265 (2015). Since the arbitration clause here does not waive the Consumer Fraud Act claim, and simply selects an arbitral forum for its

resolution, there is no waiver and the only question is whether, consistent with New Jersey contract law, the plaintiff accepted a sufficiently definite offer made by the defendant to arbitrate any and all disputes. Accordingly, *amici* respectfully submit that this Court should follow clear federal jurisprudence and affirm the Appellate Division's holding.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici accept the statement of facts and procedural history as presented in Respondents' Brief in Opposition to Certification.

LEGAL ARGUMENT

I. NEW JERSEY'S TREATMENT OF PREDISPUTE AGREEMENTS TO ARBITRATE AS WAIVERS OF THE RIGHT TO LITIGATE IN COURT CONTRAVENES THE FEDERAL ARBITRATION ACT AND UNITED STATES SUPREME COURT PRECEDENT.

A. New Jersey courts have viewed agreements to arbitrate with disfavor, as waivers of substantive rights.

It is well-established, under both federal and New Jersey precedent, that arbitration does "not require [one] to forgo any substantive rights, but merely change[s] the forum in which the claim [will] be heard." Quigley v. KPMG Peat Marwick LLP, 330 N.J. Super. 252, 259 (App. Div. 2000) (citing Gilmer, supra, 500 U.S. at 26). In other words, "[a]rbitration is a substitution, by consent of the parties, of another tribunal for the tribunal provided by the ordinary processes of law[.]" Barcon Assocs., Inc. v. Tri-County Asphalt Corp., 86 N.J. 179, 187 (1981)

(citations and internal quotation marks omitted); see also Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 131 (2001).

Consistent with these principles, New Jersey courts have long acknowledged that parties may agree to have their disputes heard in arbitration. See generally Barcon, supra, 86 N.J. at 186. Central to that principle is that "only those issues may be arbitrated which the parties have agreed shall be." Grover v. Universal Underwriters Ins. Co., 80 N.J. 221, 229 (1979). "Because of the favored status afforded to arbitration, '[a]n agreement to arbitrate should be read liberally in favor of arbitration.'" Garfinkel, supra, 168 N.J. at 132 (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)).

Nevertheless, New Jersey courts have increasingly framed the enforceability of an arbitration agreement as a waiver of a substantive right. Indeed, predispute agreements to arbitrate have been compared to waivers of statutory rights (1) to file a grievance, Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ., 78 N.J. 122 (1978), (2) to a hearing following refusal to renew a license, Christ Hosp. v. Dep't of Health and Senior Servs., 330 N.J. Super. 55 (App. Div. 2000), and (3) under the Condominium Act, Amir v. D'Agostino, 328 N.J. Super. 141 (Ch. Div. 1998). See Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 443-44 (2014).

Accordingly, New Jersey courts have not evaluated arbitration provisions under ordinary contract principles (i.e., offer and acceptance, and whether the offer is sufficiently definite to be enforced. See Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992)). Instead, using the waiver rubric, New Jersey courts have enforced arbitration provisions only where the plaintiff's intent to arbitrate is demonstrated to be both clear and unambiguous. See, e.g., Atalese, supra, 219 N.J. at 442 ("[A]rbitration involves a waiver of the right to pursue a case in a judicial forum[.]"); Garfinkel, supra, 168 N.J. at 132 ("The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." (citation and internal quotation marks omitted)); Quigley, supra, 330 N.J. Super. at 271 (same); NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 425 (App. Div. 2011) ("By its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in court.").

Framing arbitration agreements as a waiver of rights, New Jersey courts have applied the "clear and unambiguous" standard in a way that disfavors arbitration - which the courts, of late, have taken to extremes. Recently, in Atalese, the Court refused to enforce a standard arbitration clause because it did not explain that "arbitration" meant that "plaintiff is waiving her

right to seek relief in court," the plain meaning of the word "arbitration" notwithstanding. 219 N.J. at 446. This Court held that the words composing an arbitration agreement "must be clear and unambiguous that a consumer is choosing to arbitrate disputes rather than have them resolved in a court of law." Id. at 447.[1]

Other cases have similarly applied a heightened type of scrutiny to agreements that simply selected an arbitral forum, and did not surrender any substantive claims or rights. In Garfinkel, for example, the Court declined to enforce an arbitration clause in a Law Against Discrimination claim, holding that "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." 168 N.J. at 135. See also Foulke, supra, 421 N.J. Super. at 425 ("[B]ecause arbitration provisions are often embedded in contracts of adhesion, courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent." (citations omitted)); Gras v. Assocs. First Capital Corp., 346 N.J. Super. 42, 54 (App. Div. 2001) ("Waiver of statutory rights provisions in arbitration agreements must be

[1] *Amici* have submitted an amicus brief in support of the petition for certiorari to the United States Supreme Court filed in the Atalese matter.

clear and explicit." (citation omitted)); Quigley, supra, 330 N.J. Super. at 271 ("'A clause depriving a citizen of access to the courts should clearly state its purpose,' especially where the choice is to arbitrate disputes rather than litigate them." (citing Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)).

B. New Jersey's view of arbitration as a waiver of substantive rights contravenes the FAA and other federal precedent because it makes negative value judgments about arbitration that are impermissible under those authorities.

New Jersey courts' consistent treatment and classification of arbitration agreements as waivers of a right, requiring detailed disclosures in order to prove a clear and unambiguous intent, violates the FAA and contravenes United States Supreme Court precedents interpreting the FAA.

Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts[.]" Gilmer, supra, 500 U.S. at 24 (citations omitted). See also Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2308-09 (2013); EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002).

Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any

contract." 9 U.S.C. § 2. This mandate "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" Perry v. Thomas, 482 U.S. 483, 489 (1987) (citing 9 U.S.C. § 2). See also Preston v. Ferrer, 552 U.S. 346, 353 (2008) ("Section 2 declares a national policy favoring arbitration of claims that parties contract to settle in that manner." (citing Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (internal quotation marks omitted))); Perry, supra, 482 U.S. at 489 ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements[.]" (citation omitted)). The effect of section 2 of the FAA is to create a "body of federal substantive law of arbitrability" that is enforceable in both state and federal courts. Perry, supra, 482 U.S. at 489.

The final provision of section 2, referred to as the "Savings Clause," "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011) (citations and internal quotations marks omitted). By enacting this language,

"Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (citing Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974)). In effect, section 2 prohibits states from imposing "prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." Preston, supra, 552 U.S. at 356.

In Concepcion, the Supreme Court applied these principles to hold that a California rule of unconscionability forbidding class waivers in adhesion contracts "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA" and stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and, therefore, was preempted by the FAA. 131 S. Ct. at 1748, 1753 (citation and internal quotation marks omitted). There, plaintiffs brought a claim arising from a contract for the sale and servicing of cellular telephones, which provided for arbitration of all disputes between the parties and, further, that all claims must be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." Id. at 1744.

The plaintiffs contended that the arbitration agreement was unconscionable under California law because it disallowed class action procedures. Id. at 1745. The Court emphasized that "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." Id. at 1748. In finding that California's unconscionability rule as applied "interferes with arbitration," the Court held that it was preempted by the FAA. Id. at 1750, 1753. Since one of the fundamental attributes of arbitration is the ability to "limit with whom a party will arbitrate its disputes," California's rule precluding individual arbitration necessarily "interfere[d] with" and was premised on a "judicial hostility towards" arbitration, and was therefore preempted by the FAA. Id. at 1747, 1749, 1750 (emphasis in original).

Similarly, framing arbitration agreements as a waiver of substantive rights creates a more difficult standard for enforcement of such agreements than for the law of contracts generally. Clearly, this waiver analysis is premised on "judicial hostility towards arbitration" and for that reason runs afoul of the FAA and federal precedent. Id. at 1747. Like the California unconscionability doctrine at issue in Concepcion, this approach represents a general judicial

assessment that arbitration is inferior to a judicial forum in preserving substantive rights.

In advancing this framework, New Jersey courts stand in direct contravention of the FAA and Supreme Court precedent, which promote a "liberal federal policy favoring arbitration agreements." See Perry, supra, 482 U.S. at 489 (citation and internal quotation marks omitted). Further, New Jersey courts have cast serious doubt on the Supreme Court's contention that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626-27 (1985).

The present case provides this Court with the opportunity to align New Jersey law with the FAA and federal precedent. Because states are prohibited from promulgating rules and value judgments that treat arbitration with disfavor, New Jersey should enforce such agreements under general principles of contract (i.e., offer and acceptance) rather than under the restrictive standard applicable to waivers of substantive rights. Accordingly, this Court should treat plaintiffs' Consumer Fraud Act claims no differently with respect to arbitration than plaintiffs' other claims. The arbitration

clause at issue here did not waive plaintiffs right to bring a Consumer Fraud Act claim, as opposed to selecting an arbitral forum for its resolution.

For these reasons, and in order to avoid encroachment on federal precedent, *Amici* respectfully submit that the decision of the Appellate Division should be affirmed.

Respectfully submitted,

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By: _____
Gavin J. Rooney, Esq.

Dated: April 8, 2015