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INTRODUCTION

The New Jersey Business and Industry Association's (NJBIA's) *amicus curiae* brief does little to aid the resolution of this case. First, NJBIA urges the Court to adopt narrow criteria for determining if an arbitration clause is unconscionable that cannot be reconciled with the factors set forth in *Rudbart v. North Jersey Dist. Water Supply Comm'n*, 127 N.J. 344 (1992). Since the federal and State arbitration statutes put arbitration clauses on the same footing as other contracts, the Court should apply the *Rudbart* factors, not the narrowed NJBIA criteria, to Defendants' mandatory arbitration clause. Second, NJBIA's argument that consumer class actions are incompatible with and unnecessary in arbitration is factually baseless and contrary to decades of this Court's cases. Third, NJBIA's arguments endorsing limited discovery in arbitration ignore critical facts of this case, where a rule making discovery commensurate with the value of claims would apply to fact-intensive statutory claims alleging a multi-party scheme to evade State usury laws that resulted in small individual damages to consumers.

Finally, although NJBIA does not directly address this issue, Plaintiff *agrees* with the implied premise of its briefing that the Court (not an arbitrator) should assess the validity of the class arbitration ban and arbitral discovery limitations in determining whether Defendants' mandatory arbitration clause is unconscionable as it would apply these terms to Plaintiff's claims.

I. NJBIA'S STANDARDS FOR DETERMINING IF AN ARBITRATION CLAUSE IS UNCONSCIONABLE CANNOT BE SQUARED WITH NEW JERSEY CONTRACT LAW.

The Court should reject NJBIA's call for narrower standards to determine if an arbitration clause is unconscionable than those applied to other contracts under *Rudbart*. NJBIA argues (Brief at 14) that "[a]ny arbitration provision that is conspicuous and clearly written, reasonably disclosing the terms of the arbitration agreement, should satisfy the procedural-unconscionability test." *This is not New Jersey law*. In *Rudbart*, the Court looked at the following circumstances of contract formation in deciding whether a provision was unconscionable:

- (1) the "take-it-or-leave-it nature or the standardized form of the contract;"
- (2) the "subject matter of the contract;"
- (3) the "parties' relative bargaining positions;" and
- (4) the "degree of economic compulsion motivating the 'adhering' party."

127 N.J. at 356. While *Rudbart* synthesized these factors, the Court has long used these indicia of overwhelming bargaining power and lack of meaningful choice in deciding unconscionability.[1] The

[1] *See, e.g.*, *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 391 (1960) ("The gross inequality of bargaining position occupied by the consumer in the automobile industry is thus apparent. There is no competition among the car makers in the area of the express warranty."); *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 555 (1967) (invalidating real estate broker's contract-based commission based on "substantial

Court thus should reject NJBIA's request (Brief at 14) that it "not overly emphasize factors such as these," and instead should apply actual New Jersey law to Defendants' mandatory arbitration clause.[2]

As in New Jersey, courts in other states reject this "clear disclosure is enough" argument by looking for *either* lack of knowledge *or* lack of meaningful choice in contract formation. *See, e.g.*, *Alexander v. Anthony Int'l, LP*, 341 F.3d 256, 265 (3d Cir. 2003) ("Procedural unconscionability pertains to the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language. This element is generally satisfied if the agreement constitutes a contract of adhesion.") (citation omitted); *Armendariz v. Foundation Health Psychare Serv's, Inc.*, 6 P.3d 669, 690 (Cal. 2000) (procedural element of unconscionability focuses on "oppression or surprise due to unequal bargaining power")(citation omitted). These courts recognize what this Court has made

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inequality of bargaining power, position or advantage between the broker and the other party involved"); *Vasquez v. Glassboro Serv. Ass'n*, 83 N.J. 86, 103 (1980) (finding migrant farmworker's position "analogous to that of a consumer who must accept a standard-form contract to purchase needed goods and services.").

[2] This Court's requirement of meaningful consumer choice is especially important here in light of NJBIA's recognition (Brief at 5) that "with so many businesses turning to arbitration, those that do not find themselves at a competitive disadvantage." The record below (Pa595-600) bears out this observation about pervasive use of arbitration in the payday lending industry, and the resulting lack of consumer choice, just as was shown of the warranty waivers in *Henningsen*.

explicit, that the doctrine of unconscionability's purpose is:

> to make realistic the assumption of the law that the agreement has resulted from real bargaining between parties who had *freedom of choice* ***and*** *understanding* ***and ability to negotiate in a meaningful fashion***.

Kugler v. Romain, 58 N.J. 522, 544 (1971) (emphasis added). NJBIA's reformulated version of unconscionability would defeat this purpose, and thus should be rejected.

Likewise, the Court should reject NJBIA's narrowed version of substantive unconscionability. NJBIA recognizes (Brief at 19-20) that courts in New Jersey and elsewhere have struck contract terms (including arbitration clauses) that expressly strip parties of legal and equitable remedies or create one-sided obligations. *See*, *e.g.*, *Henningsen*, 32 N.J. at 404 (striking implied warranty waiver); *Alexander*, 341 F.3d at 267 (striking employer's arbitration clause banning punitive damages). NJBIA is wrong, however, in asking the Court (Brief at 20) to draw the line at these cases because it ignores a multitude of additional cases where this Court and others have found provisions unconscionable because they are *effectively* one-sided or exculpatory.

In *Shell Oil Co. v. Marinello*, 63 N.J. 402 (1973), the Court invalidated franchise contract provisions giving the parent company an absolute right to terminate the franchise on ten days' notice. *Marinello* held that these provisions were unconscionable because they were "the result of Shell's disproportionate bargaining

position and are grossly unfair." *Id.* at 409. In so finding, the Court rejected Shell's argument that the termination right was not unfair because *either* party could exercise it:

> It is a fallacy to state that the right of termination is bilateral. The oil company can always get another person to operate the station. It is the incumbent dealer who has everything to lose since, even if he had another location to go to, the going business and trade he built up would remain with the old station.

Id. The Court thus held that a facially neutral contract term can be so unreasonably one-sided in effect as to be unconscionable.[3]

Other courts have embraced this very rationale in holding arbitration clauses that ban consumer class actions unconscionable. In *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), the court held that class action waivers in adhesive form contracts would be unconscionable if applied to small-value consumer claims because they were both effectively exculpatory ***and unreasonably one-sided*** in favor of the lender that dictated these terms:

> Moreover, such class action or arbitration waivers are indisputably one-sided. 'Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover Bank, because credit card companies typically do not sue their customers in class action lawsuits.' Such one-sided, exculpatory contracts in a contract of adhesion, at least

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[3] *Cf. Lucier v. Williams*, 366 N.J. Super. 485, 492 (App. Div. 2004) ("We also focus our inquiry on whether the limitation is a *reasonable allocation of risk between the parties* or whether it runs afoul of the public policy disfavoring clauses which *effectively* immunize parties from liability for their own negligent actions.") (emphasis added).

> to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable.

Id. at 1109 (quoting *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101 (2002)).[4] These decisions striking no-class arbitration clauses thus echo this Court's holding in *Marinello* that facially bilateral adhesion contract terms with unreasonably one-sided effects are unconscionable. To the extent NJBIA's reformulated version of unconscionability would preclude such a finding, the Court should reject it as inconsistent with New Jersey law.

II. NJBIA'S ARGUMENT THAT CONSUMER CLASS ACTIONS ARE INCOMPATIBLE WITH ARBITRATION IS LEGALLY AND FACTUALLY BASELESS.

NJBIA's assertion that "public policy favors arbitration agreements more than class actions" (Brief at 25) is legally baseless and thus false. For over 30 years, this Court has held that class-wide relief is essential for vindicating many claims under New Jersey's Consumer Fraud Act (CFA), N.J.S.A. 56:8-2, *et seq*. *See*, *e.g.*, *Kugler v. Romain*, 58 N.J. at 538; *Strawn v. Canuso*, 140 N.J. 43, 67-68 (1995). Nothing in the federal or State arbitration statutes concerning ***forum*** selection conflicts with or

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[4] *See also Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003) ("It is difficult to imagine AT&T bringing a class action against its own customers . . ."); *Luna v. Household Finance Corp.*, 236 F. Supp. 2d 1166, 1179 (W.D. Wash. 2002) ("Although the Arbitration Rider's class action provision is nominally mutual, because there is no reasonable possibility that Household would institute a class action against its borrowers, the provision is effectively one-sided.").

outweighs New Jersey's public policy favoring the availability of class-wide ***relief*** for consumers with small-value claims. *Cf. Volt Info. Sciences, Inc. v. Bd. of Trustees of Stanford Univ.*, 489 U.S. 468, 476 n.5 (1989) ("[T]he FAA itself contains no provision designed to deal with the special practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate."). NJBIA's attempt to weigh the public policies favoring class actions and arbitration against one another is thus a false apples-to-oranges comparison that the Court should reject.

Likewise, NJBIA's assertion (Brief at 25) that "[c]lass-wide arbitration . . . eliminates the cost savings and expediencies that are the core benefit of arbitration" is factually baseless. The efficiency of class-wide arbitration must be measured *not* against any one individual arbitration, but against the thousands of proceedings that would be necessary to vindicate *all* the claims at stake in a consumer class action. *Cf. Discover Bank*, 113 P.3d at 1117 ("Classwide arbitration, as Sir Winston Churchill said of democracy, must be evaluated, not in relation to some ideal but in relation to its alternatives.") (citation omitted). When viewed in this light, the efficiency benefits of class-wide proceedings in arbitration are undeniable, just as they are for cases in court:

> The class action settlement eliminates not simply one trial on the merits, but potential pretrial discovery and trial in thousands, if not tens of thousands, of cases. The fact that there might be the need for considerable

> discovery or an in-depth settlement hearing hardly puts a dent in the overall efficiencies gained by approval of these complex settlements.

Brian Wolfman and Alan Morrison, "Representing the Unrepresented in Class Actions Seeking Monetary Relief," 71 N.Y.U. L. Rev. 439, 486 (1996). Class-wide proceedings thus would further, not undermine, the efficiency goals of arbitration.[5]

For proof that class proceedings not only can be, but *are* compatible with arbitration, one need only look at the American Arbitration Association's (AAA's) active class action docket. As of this writing, AAA lists over 100 cases being heard under its "Supplementary Rules for Class Arbitrations." *See* American Arbitration Association, "Class Arbitration Case Docket" (available at www.adr.org/Classarbitrationpolicy). The existence of these rules and over 100 putative or certified class arbitrations in one forum should disprove once and for all NJBIA's assertion that class proceedings are incompatible with arbitration.

After this assertion fails, NJBIA is left with its fallback argument (Brief at 25-27) that class actions are unnecessary because statutory attorney fee-shifting provisions give consumers and their lawyers ample incentive to file claims. This argument

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[5] *See Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 864-65 (Pa. Super. Ct. 1991) ("[T]here is no insurmountable obstacle to conducting an arbitration on a class-wide basis. In an appropriate case, such a procedure would undoubtedly be the fairest and most efficient way of resolving the parties' disputes.") (citation omitted).

too fails, however, because many of this Court's cases holding that class-wide relief is necessary to vindicate small-value consumer claims involved claims under fee-shifting statutes like the CFA. *See*, *e.g.*, *Strawn*, 140 N.J. at 68; *Riley v. New Rapids Carpet Center*, 61 N.J. 218, 222-25 (1972); *Kugler*, 58 N.J. at 538. The Court's explanation in *Riley* of why class actions are necessary for small-value CFA claims shows that the Act's attorney fee provision alone cannot give sufficient incentive for filing these claims:

> When the selling pitch is directed to the unsophisticated poor, the problem is heightened, for the dollar impact upon the victim is intensified and a society which provides for its poor itself feels the burden of the imposition. . . . If each victim were remitted to an individual suit, the remedy could be illusory for the individual loss may be too small to warrant a suit ***or the victim too disadvantaged to seek relief***. Thus the wrongs would go without redress . . .

Riley, 61 N.J. at 224-25 (emphasis added). The Court recognized that, without class relief, most injured consumers would never enforce their rights under the CFA because they are unaware of these rights and the resources for vindicating them.

Statutory attorney fees thus do not offset the need for class relief to make small-value consumer claims viable. While some courts have held otherwise, "[t]here is no indication other than these courts' unsupported assertions that, in the case of small individual recovery, attorney fees are an adequate substitute for the class action or arbitration mechanism." *Discover Bank*, 113 P.3d at 1110. The Court therefore should reject NJBIA's assertions

and reaffirm its longstanding recognition that class relief is critical for vindicating small-value CFA claims like those here.

III. NJBIA'S ARGUMENTS FOR LIMITING PARTIES' DISCOVERY RIGHTS IGNORE THE CRITICAL FACTS OF THIS CASE.

NJBIA's arguments about discovery rights in arbitration are harder to pinpoint because they are made at a generalized level without accounting for the perhaps unique facts and claims at issue in this case. Plaintiff does not take issue with NJBIA's general assertion (Brief at 21) that "[i]t is not unreasonable to place limits on discovery in arbitration." Nor does Plaintiff dispute that New Jersey's Uniform Arbitration Act (UAA), N.J.S.A. 2A:23B-1, *et seq.*, provides an appropriate framework for assessing discovery limitations, whether or not the Act applies directly in this case.[6]

Plaintiff does, however, dispute any claim that the discovery restrictions in Defendants' mandatory arbitration clause here comply with either the UAA or general unconscionability standards. As NJBIA realizes (Brief at 21), the UAA requires that discovery in arbitration be such as to "make the proceedings ***fair***, expeditious, and cost effective (N.J.S.A. 2A 23B-17(b)) (emphasis added), and must "tak[e] into account the needs of the parties to the arbitration proceedings" (N.J.S.A. 2A 23B-17(c)).[7] These statutory

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[6] Defendants argue (Brief at 35) that the UAA does not apply because their contract expressly references the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, *et seq.*, and Delaware law.

[7] The UAA also prohibits parties from imposing terms and conditions of arbitration that are barred by *any other state law*.

requirements are consistent with the recognition made by courts in New Jersey and elsewhere that informal tribunals must provide discovery that enables parties to vindicate their claims.[8] The Defendants' mandatory arbitration clause here would violate this requirement if applied to Plaintiff's claims in this case.

As Plaintiff has argued (Brief on the Merits at 22-23), Defendants' arbitration clause would deny her the discovery she needs to prove her factually intensive, but small-value statutory claims. Plaintiff alleges that Defendants conspired to evade New Jersey's usury laws by misrepresenting who the actual lender was (*see* **Pa10-11**), a claim requiring her to show how loan capital and default risk are allocated among these four corporate entities. Defendants' arbitration clause (**Pa185**) requires her to arbitrate these claims "under the Code of Procedure of the National Arbitration Forum ("NAF")." NAF's code provides for voluntary discovery (**Pa117**, NAF Rule 29A), while allowing an arbitrator to

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N.J.S.A. 2A:23B-4(a) ("[A] party to an agreement to arbitrate or to an arbitration proceeding may waive or, the parties may vary the effect of, the requirements of this act ***to the extent permitted by law***.") (emphasis added).

[8] *See, e.g.*, *State v. Hollup*, 253 N.J. Super. 320, 326 (App. Div. 1992) ("As our municipal courts mature and become responsible for the disposition of more complex . . . and more communally important cases, more formal practices become essential."); *Armendariz*, 6 P.3d at 684 ("[W]hether or not the employees in this case are entitled to the full range of discovery in [California's Arbitration Act], they are at least entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses . . . .").

order "disclosure of documents, sworn answers to not more than twenty-five written questions," "requests for admissions and requests for physical or mental examinations," *all of which* are governed by the *requirement* that "[t]he cost is commensurate with the amount of the Claim." (**Pa117-18**, NAF Rule 29(B)(2) *and* (C)(2)). Plaintiff claims actual damages in the amount of most of the $180 in interest she paid (**Pa113**) on three payday loan transactions. By forcing her to prove these complex claims with discovery tied to her *individual* damages (due to the ban on class relief), the terms of Defendants' arbitration clause would prevent Plaintiff from vindicating her rights under the CFA and other New Jersey consumer protection statutes.

Since NJBIA fails to address any of these facts concerning the actual discovery restrictions at issue, its briefing provides no basis for the Court to uphold these restrictions. Moreover, since these restrictions and the arbitration clause's ban on class-wide relief would prevent Plaintiff and putative class members from vindicating their statutory claims, the Court should hold based on well-established New Jersey law that Defendants' mandatory arbitration clause is unconscionable as it would apply here.

IV. NJBIA IS RIGHT TO ASK THAT THE COURT, NOT AN ARBITRATOR, RESOLVE THESE CHALLENGES TO DEFENDANTS' ARBITRATION CLAUSE.

Finally, Plaintiff agrees with the implied premise of NJBIA's arguments that courts, not arbitrators, must decide the validity of

terms barring class arbitration and limiting arbitral discovery in determining whether an arbitration agreement is unconscionable. (*See*, *e.g.*, Brief at 25: "A key issue in the validity of arbitration agreements is whether class-action lawsuits can be barred."). The requirement of "binding individual (and not class) arbitration" (**Pa185**) and the restrictive discovery rule in NAF's Code of Procedure are both terms of Defendants' mandatory arbitration clause. Under the FAA, a court (not an arbitrator) must resolve challenges to an arbitration clause's validity before it can enforce that clause. *See*, *e.g.*, *Prima Paint, Inc. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) ("A federal court may consider only issues relating to the making and performance of the agreement to arbitrate."); *Buckeye Check Cashing, Inc. v. Cardegna*, ___ S. Ct. ___, 2006 WL 386362 at *4-6 (Feb. 21. 2006) (reaffirming *Prima Paint* rule, applying it to cases in state court).[9]

This is why virtually every court that has addressed this type of challenge to an arbitration clause barring class claims has held that this waiver's validity is for the court to decide. *See*, *e.g.*, *Discover Bank*, 113 P.3d at 1115 (holding that class arbitration waiver may be unconscionable); *Gipson v. Cross Country Bank*, 354 F. Supp. 2d 1278, 1285-86 (M.D. Ala. 2005) (listing cases where courts

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[9] Plaintiff addresses the U.S. Supreme Court's *Buckeye* decision, which was issued after this Court held oral argument, at greater length in her separate response to Defendants' Rule 2:6-11(d) submission of February 23, 2006.

decided class arbitration waiver’s validity). Consistent with NJBIA’s briefing, the Court should hold the same thing here.

CONCLUSION

The Court should reaffirm longstanding New Jersey law protecting consumers against involuntary waivers of their statutory rights through non-negotiable and one-sided exculpatory contracts by holding that Defendants’ mandatory arbitration clause is unconscionable as it would apply to Plaintiff’s claims. The decision below should be reversed.

Respectfully submitted,

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JALIYAH MUHAMMAD, On her own Behalf and all Others Similarly Situated, Plaintiff/Appellant, v. COUNTY BANK OF REHOBOTH BEACH, DELAWARE, EASY CASH TELECASH AND MAIN STREET SERVICE CORPORATION, JOHN DOE AND JOHN ROE, Defendants/Respondents.	:	SUPREME COURT OF NEW JERSEY DOCKET NO.: 58,430 ON MOTION FOR LEAVE TO APPEAL FROM JULY 14, 2005 DECISION OF APPELLATE DIVISION ON INTERLOCUTORY REVIEW OF ORDER ENFORCING MANDATORY ARBITRATION CLAUSE Sat Below: Hon. Howard H. Kestin. P.J.A.D. Hon. Steven L. Lefelt, J.A.D. Hon. Joseph A. Falcone, J.A.D. SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-0558-04T3

SUPREME COURT OF NEW JERSEY
DOCKET No. 58,430

Plaintiff/Appellant's Brief in Response to *Amicus Curiae* New Jersey Business and Industry Association

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