United States Court of Appeals

for the

Third Circuit

Case No. 23-3177

CHARLES L. ADLER; GRANT ADLER; C.M. ADLER, LLC,

Appellants,

– v. –

GRUMA CORPORATION, DBA Mission Foods;
GUERRERO MEXICAN FOOD PRODUCTS, Etc,

Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY IN CASE NO. 3-22-CV-06598
HONORABLE ROBERT KIRSCH

BRIEF FOR DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. Civ. P. 26.1 and Third Circuit L.A.R. 26.1, Defendant-Appellee Gruma Corporation d/b/a Mission Foods *and* d/b/a Guerrero Mexican Food Products ("Gruma")* certifies as follows by the undersigned:

1) All parent corporations: Gruma S.A.B. de C.V.

2) All publicly held companies that hold 10% or more of the party's stock: Gruma S.A.B. de C.V.

3) There is no publicly held corporation which is not a party to this proceeding before the Court that has a financial interest in the outcome of the proceeding.

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*As noted on page 1 of the District Court's Opinion (JA009) at n.1, Plaintiffs-Appellants docketed two defendants instead of one. Gruma Corporation does business under two trade names: Mission Foods and Guerrero Mexican Food Products. Accordingly, while this Court lists Gruma as Appellants, we refer, as did the District Court, to Gruma as a single Defendant-Appellee.

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STATEMENT OF THE ISSUES PRESENTED

1. Does the parties' agreement require the application of Texas law and the Federal Arbitration Act ("FAA"), as needed, to determine the enforceability of the arbitration provisions?

2. Did the District Court properly conclude that, under Section 187 of the Restatement (Second) of Conflict of Laws, Texas law applies, not New Jersey law?

3. Because the Texas Arbitration Act ("TAA") is an independent basis on which to determine the enforceability of the arbitration provision, was there any need for the District Court to determine whether the FAA is also applicable or if the exemption in Section 1 of the FAA applies?

4. Do all of the Appellants' claims for relief fall within the scope of the arbitration provision?

5. Is the question of whether the Appellants are interstate transportation workers within the meaning of the exemption in Section 1 of the FAA moot because the TAA provides an independent basis to compel arbitration?

6. Are the individual Appellants bound to arbitrate their claims under the direct-benefits estoppel doctrine?

7. Does the TAA apply to the Appellants' New Jersey Franchise Practices Act claim and does the FAA *also* apply as needed to preempt any applicable New Jersey statute banning arbitration of claims under that state law?

CONCISE STATEMENT OF THE CASE

The Complaint (JA030–074) alleges that Plaintiffs-Appellants Charles L. Adler, Grant Adler, and C. M. Adler, LLC (collectively, "Plaintiffs") are New Jersey-based distributors and franchisees of Gruma Corporation, which has its principal place of business in Texas and supplies food products to Plaintiffs to distribute to store accounts.[1] Plaintiffs allege they have been misclassified as independent contractors instead of employees, and were also franchisees who were improperly terminated. The Complaint asserts separate claims under the federal minimum wage and hour law; the New Jersey wage and hour, wage payment, and wage notice laws; the New Jersey franchise practices statute; and New Jersey common law for rescission, unjust enrichment, and breach of the covenant of good faith and fair dealing. All of those claims are expressly based on the terms of an agreement referred to in the Complaint as the "Store Door Distributor Agreement" ("SDDA") – a distribution agreement that Plaintiffs annex to their Complaint as

[1] As noted on page 1 of the District Court's November 13, 2023 Opinion at n.1 (JA009), Plaintiffs docketed two defendants instead of one. Gruma Corporation does business under two trade names: Mission Foods and Guerrero Mexican Food Products. Accordingly, while this Court lists Gruma as Appellants, we refer, as did the District Court, to Gruma as a single Defendant-Appellee.

Exhibit A (JA075–108). The SDDA includes an arbitration clause and a choice of law provision.[2]

Plaintiffs acknowledge in paragraph 17 of their Complaint that the SDDA contains an arbitration clause. JA035. The arbitration provision for claims that are not class action claims is found in Subsection 15.*i*.ii. of the SDDA and sets forth a broad scope of claims subject to arbitration, as more fully discussed *infra* in Part IV of the Argument. The SDDA sets forth the contractual JAMS arbitration procedures in Subsection 15.*i*.iv. JA097.

The SDDA also contains a choice of law provision in Subsection 15.k, which provides that Texas law governs and the FAA shall also apply, as needed, to uphold the validity or enforceability of the arbitration provisions of the SDDA, as more fully discussed *infra* in Part I of the Argument.

Plaintiffs allege in paragraph 18 of the Complaint that Gruma has "a principal place of business in the United States, located at 5601 Executive Dr. #800, Irving, Texas 75038." JA036. In connection with Gruma's motion to compel arbitration, it filed the Declaration of Ron Anderson ("Anderson Decl."),

[2] Gruma has not yet answered the Complaint. When it does, it will deny all of the claims for relief, showing that Plaintiffs' relationship with Gruma, since the date in 2014 when the SDDA was signed, has been and remained a valid independent contractor relationship under contract and in practice, and that Plaintiffs are not franchisees. Nothing in this brief is intended to waive any defense or position regarding the inapplicability of the FAA to any of Plaintiffs or the inapplicability of the federal and state laws alleged in the Complaint as applied to any of Plaintiffs.

Vice President of Retail Sales for Gruma Corporation, setting forth the basis for Texas being selected as the state law governing the SDDA. JA111–113.

Although the SDDA is signed by one of the Plaintiffs, C. M. Adler LLC (*see* JA099, where it was signed by Mary Adler as the "CFO" for C. M. Adler, LLC), there are abundant allegations throughout their Complaint that the SDDA governs the relationship between Gruma and all of the Plaintiffs. *See* JA031, 036, 042–047, 061, 066, 069–70, 071 (Compl. ¶¶ 5, 20, 38–39, 43, 48–49, 52, 58(h), 58(p), 133, 163, 176–77, 179, 190).[3] There are over 60 express references throughout the Complaint to the words "SDDA," "Store Door Distributor Agreement," "Store Door Distribution Agreement," and "distribution agreement."

On February 13, 2023, Gruma filed a motion to dismiss and compel arbitration. *See* ECF No. 7. After full briefing by the parties, District Court Judge Robert Kirsch granted the motion in an Opinion dated November 13, 2023. JA009–029 (the "Opinion"). The District Court also issued an Order dated the

[3] For example, paragraph 38 of the Complaint provides as follows:

> 38. Notably, the SDDA provided *plaintiffs* with a license to use defendant's "Marks" or trademarks and brand names, as well as to sell defendant's products and to use other proprietary rights of the defendant as set forth in the SDDA. SDDA Sections 1(k), (m), (n), *etc.*

JA042 (Compl. ¶ 38) (first emphasis added).

same date that "Plaintiffs shall submit their claims to arbitration in accordance with the parties' agreement to arbitrate" and that the case is dismissed. JA007–008. Plaintiffs filed a Notice of Appeal on December 8, 2023. JA006.

SUMMARY OF THE ARGUMENT

One of the linchpins of Plaintiffs' appeal is based on a new argument, not raised below, that the choice of law section of the SDDA, found in Section 15.k. entitled "Governing Law," says something that materially deviates from its plain meaning. The short, two-sentence choice of law provision designates Texas law to govern the SDDA in the first sentence and provides in the second sentence that the FAA "shall *also apply as needed* to uphold the validity or enforceability of the arbitration provisions of this Agreement." JA098 (SDDA at 23) (emphasis added). Plaintiffs construct an argument that focuses on only two isolated words in the second sentence of the Governing Law clause – the words "as needed" – to the exclusion of all other words in that sentence, and wholly disregards the first sentence as if it did not exist. Based on this distortion of the choice of law provision in the SDDA, they argue that "the parties specified the FAA – *and only the FAA* – as the law governing the 'validity or enforceability of the arbitration provisions'…." Opening Br. at 25 (emphasis added). This new argument, not advanced to the District Court, is little more than a tortured interpretation that would render meaningless many of the words in the choice of law provision.

Essentially, Plaintiffs ask this Court to re-write the Governing Law provision in the SDDA in a manner that departs from a Supreme Court case they cite that directs the courts to construe choice of law provisions as a whole to render them consistent with each other.

Next, Plaintiffs argue that the District Court erred in concluding that Texas law applies to the arbitration provisions under the Restatement (Second) of Conflict of Laws (1969, rev. 1971) (the "Restatement"). The parties agree that Section 187(b) of the Restatement sets forth the applicable legal test for determining whether a contractual choice of law provision will be enforced according to its terms designating a particular state's laws to govern. It requires a party seeking to overturn the parties' choice of law to establish three elements. As applied to the facts of this case, the first element of the Restatement test focuses on whether New Jersey has a "materially greater interest" than Texas in the outcome of the dispute.

The District Court analyzed that element and concluded that while Texas and New Jersey each have valid interests in their laws being applied, New Jersey's interest is not materially greater than the interests of Texas. That holding is consistent with the most widely-cited Third Circuit decision on this subject as well as several other decisions from the District of New Jersey. The District Court reviewed those cases in detail. Plaintiffs essentially ignore those cases, arguing

that New Jersey has a materially greater interest than Texas simply because the application of Texas law may run counter to a fundamental New Jersey public policy. The District Court cited another district court decision in this Circuit that rejected that very argument by Plaintiffs.

The District Court also correctly followed other decisions in the District of New Jersey concluding that where the forum state does not have a materially greater interest (the first element of the Restatement test), there is no need to examine the second element of the Restatement test, which addresses the forum state's public policy, or the final element of that test.

Plaintiffs argue that the SDDA's choice of law provision cannot be applied to their statutory claims. The District Court properly noted that although Texas law governs the enforceability and validity of the arbitration provisions in the SDDA, that choice of law provision does not preclude Plaintiffs from pursuing their New Jersey statutory claims, albeit in arbitration.

Plaintiffs next argue that the District Court failed to follow a recent Third Circuit case, suggesting the court should first consider whether the arbitration exemption in Section 1 of the FAA is applicable before determining if Texas arbitration law applies under the SDDA's choice of law provision. Plaintiffs did not raise this case below, but in any event misinterpret its holding. That decision plainly states that the proper procedure is for a district court to *first* determine if a

state arbitration law provides an independent basis on which to determine the enforceability of the arbitration clause, before examining the FAA exemption – that is precisely what the District Court did.

Plaintiffs further argue that the language in the SDDA's arbitration clause is limited to claims for breach of contract and does not cover statutory claims. This argument is belied by the wording of the arbitration provision in the SDDA, which is regarded as broad in cases decided under the TAA and FAA. In addition, the manner by which Plaintiffs assert their statutory and other claims for relief, and the way in which they rely upon the language in the SDDA for literally every one of their claims, underscores why all of their claims fall squarely within the language of the arbitration clause covering claims that "aris[e] out of or relat[e] to" the SDDA. JA096 (SDDA at 21). Indeed, every one of their claims (other than their claim for violation of the New Jersey Franchise Practices Act), is based on their argument that Gruma has misclassified Plaintiffs as independent contractors instead of employees because the company allegedly exercised direction and control over them through the various provisions in the SDDA. While Plaintiffs insist that they are not suing to enforce the SDDA, their franchise claim is premised on their allegation that Gruma impermissibly terminated the SDDA, which they characterize as a franchise agreement. Their claim for breach of the implied covenant of good faith and fair dealing also seeks to enforce the SDDA

based on Plaintiffs' acknowledgement that such covenant is implied in every contract under New Jersey law. Plaintiffs cannot have it both ways.

To the extent Plaintiffs argue that the District Court erred by delegating the issue of arbitrability to the arbitrator because Gruma did not raise that argument below, the District Court had such authority to make such delegation and, in any event, this Court can make that determination *de novo*.

Plaintiffs argue that they are interstate transportation workers who qualify for the arbitration exemption in Section 1 of the FAA. However, that argument is moot because, even if Plaintiffs may be characterized as such workers, the TAA provides an independent basis to compel arbitration, as the District Court properly found.

They also argue that the District Court erred in finding that the individual Plaintiffs, neither of whom signed the SDDA, were bound to the arbitration provisions in the SDDA under the Texas direct-benefits estoppel doctrine. Although the individual Plaintiffs argue that they are not using the SDDA to support their claims, their assertion is undermined by their extensive reliance on clauses within the SDDA in an effort to establish the necessary direction and control to support their assertion that they have been misclassified as independent contractors. As the District Court notes in the Opinion, Plaintiffs cite to the SDDA over 60 times in their Complaint. JA013 (Opinion at 5). Perhaps recognizing that

the direct-benefits doctrine eviscerates the individual Plaintiffs' argument that they are not bound to the arbitration provisions, they advance a new argument (not raised below) that a recent U.S. Supreme Court case does away with the Texas direct-benefits estoppel doctrine. Their reasoning, however, is wholly unpersuasive and unsupported by any Texas cases.

Lastly, Plaintiffs argue that the New Jersey Franchise Practices Act bars arbitration of claims under that law. But Plaintiffs ignore the fact that the TAA governs the arbitration of such claims under the SDDA's Governing Law provisions. Plaintiffs also claim that the FAA's Section 1 arbitration exemption applies because they are interstate transportation workers, yet they overlook the fact that the Section 1 exemption only applies to contracts of employment, not franchise agreements – and the franchise law only governs franchise agreements, not employment contracts.

ARGUMENT

I. THE GOVERNING LAW SECTION OF THE SDDA PROVIDES THAT TEXAS LAW AND THE FAA, AS NEEDED, SHALL ALSO APPLY TO DETERMINE THE ENFORCEABILITY OF THE ARBITRATION PROVISIONS

Section 15(k) of the SDDA contains its choice of law provision, which provides as follows:

> k. Governing Law.
>
> This Agreement shall be governed by and construed in accordance with the laws of the State of Texas. The Federal Arbitration Act, 9 U.S.C. § 1 et seq. shall *also apply as needed* to uphold the validity or enforceability of the arbitration provisions of this Agreement.

JA098 (SDDA at 23) (emphasis added.) Despite the plain language of the provision, on appeal Plaintiffs seek to construct a new and tortured argument that the SDDA's Governing Law provision specifies that *only* the FAA – and not Texas Arbitration Act ("TAA") – shall apply to the SDDA's arbitration provisions. *See* Opening Br. at 13 (concluding its "First" ground for reversal by stating that "the SDDA provides that arbitration issues will be governed only by the FAA, not Texas law."); *see also id.* at 25 ("Thus, … the parties specified the FAA – and only the FAA – as the law governing the 'validity or enforceability of the arbitration provisions'….").

In an effort to bolster that argument – which Plaintiffs never raised below – they conspicuously avoid in the Argument section of their opening brief any reference to the entire wording of the SDDA's Governing Law section (also referred to below as the choice of law provision). To that end, on pages 22–26 of their brief, the only reference Plaintiffs make to the actual wording of the choice of law provision is on page 24 of their opening brief at footnote 3, which quotes out

of context *only two words* from the Governing Law section. Specifically, footnote 3 states:

> The phrase "as needed" does not change this. Rather, that phrase merely reflects that the FAA is the law chosen to govern should a particular eventuality – questions about arbitration – arise. This phrase can't mean that the FAA applies only if state law doesn't because, as explained, the FAA is the starting point for questions of arbitration, not a backup for state law. *Supra* Part I(B)."

Plaintiffs' effort to characterize the provision through an isolation of the phrase "as needed" is misplaced because it fails to consider the entire wording of that second sentence: *i.e.*, "shall *also* apply as needed ...." By focusing only on two of the five key words and eschewing any reference to the word "also," Plaintiffs seek to change the plain meaning of the choice of law provision. Essentially, their strained interpretation effectively removes and gives no meaning to the word "also." That word would be superfluous if the language did not mean "in addition to," or "plus," or "as well as," or some other word of a conjunctive nature – and the conjunctive is Texas law, which is referred to in the prior sentence.

Further, under Plaintiffs' characterization of the choice of law provision, the language "as needed to uphold the validity or enforceability of the arbitration provisions of this Agreement" would be meaningless. If Texas law does not *also* apply to the arbitration provisions, but rather only the FAA does (as Plaintiffs

argue), there would have been no point to use the words "as needed." If Texas law did not apply, the FAA would absolutely be needed, as there otherwise would be no law that governed the arbitration provisions.[4]

Boiled down to its essence, Plaintiffs essentially are seeking to re-write the second of the two sentences in the Governing Law section to say: "The Federal Arbitration Act, 9 U.S.C. § 1 et seq. shall ~~*also*~~ only *apply* ~~*as needed*~~ to uphold the validity or enforceability of the arbitration provisions of this Agreement." They cannot re-write the language in the SDDA to suit their arguments.

Plaintiffs cite to and rely upon the Supreme Court case of *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58–64 (1995), to argue that the SDDA's Governing Law provision's reference to Texas law has no application to the arbitration clause. But the applicable language in *Mastrobuono* differs in a dispositive manner from the language here. In *Mastrobuono,* the first sentence of two sentences in the choice of law provision stated that the agreement "shall be governed by the laws of the State of New York" while the second sentence was independent of and wholly unconnected to the first sentence, stating that any controversy arising out of the agreement "'shall be settled by arbitration' in accordance with the rules of the National Association of Security Dealers (NASD)

[4] As set forth in Section V of this brief, *infra,* if Plaintiffs argue that Texas law in the form of the TAA does not apply to Plaintiffs' claim under the New Jersey Franchise Practices Act, then the FAA would apply as needed.

and/or the American Stock Exchange." *Id*. at 58–59. Unlike the language in the second sentence of the SDDA's Governing Law section, which provides that the FAA shall "*also* apply *as needed*," the language in the second sentence in *Mastrobuono*'s choice of law provision was expressly limited only to the NASD and American Stock Exchange rules.

Unlike in *Mastrobuono*, where the Court observed that neither the first nor second sentence in the choice of law section "intrudes upon the other," the second sentence in the SDDA here "intrudes upon" and is linked to the first sentence by the reference to the word "also." *Id*. at 64. Thus, the second sentence in the choice of law section in *Mastrobuono* is independent of the first sentence, but that is not the case with the second sentence of the Governing Law section here because the word "also" would otherwise have no context, leading to the question: what other law *also* applies? Plainly, the answer is Texas law.[5] The Court in *Mastrobuono*

[5] Plaintiffs' citation to *Oberwager v. McKechnie Ltd.*, 351 F. App'x 708, 711 (3d Cir. 2009), addressed a different issue but, in any event, undermines their argument in much the same way *Mastrobuono* does. *See* Opening Br. at 24. *Oberwager* deals with whether parties can "contract out of the FAA and select alternate rules to govern arbitration proceedings between them," and if so, whether they can accomplish that with a "generic choice-of-law provision, standing alone." *Oberwager*, 351 F. App'x at 710. The court in *Oberwager* answered that question by focusing on the language of the choice of law clause as written to determine if there was an intent to opt out. While the first sentence in the Governing Law clause here is a generic choice of law provision, the use of the word "also" in the second sentence expressly connects the two sentences in a manner that provides that the FAA *also* applies to the arbitration provisions as needed, in addition to Texas law.

also stated that while each sentence should first be considered separately, "the more important inquiry …[is] the meaning of the two provisions taken together." *Mastrobuono,* 514 U.S. at 59 (citing Restatement (Second) of Contracts § 202(2) (1979) ("A writing is interpreted as a whole")); *see also id.* at 63 (a "cardinal principle of contract construction [is] that a document should be read to give effect to all its provisions and to render them consistent with each other"). Ultimately, while Plaintiffs cite to *Mastrobuono,* they have failed to heed the thrust of the Supreme Court's opinion in that case.

Finally, in the District Court proceedings, Plaintiffs never raised this argument they assert on appeal—i.e., that the second sentence of the Governing Law section states that only the FAA applies to the arbitration provisions and not Texas law. Instead, Plaintiffs below simply argued that New Jersey law – not Texas law – should apply to the arbitration provisions, because in their view "the SDDA's choice of law provision violates New Jersey public policy." JA014 (Opinion at 6). Therefore, Plaintiffs have waived that argument by failing to raise it below. But regardless of whether it has been waived or not, Plaintiffs' new argument cannot withstand even a cursory review of the SDDA's choice of law section, which states clearly that both Texas law and also the FAA apply, as needed, to determine the validity and enforceability of the arbitration provisions.

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT, UNDER SECTION 187 OF THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS, TEXAS LAW APPLIES – NOT NEW JERSEY LAW

In its motion to compel arbitration, Gruma quoted from and relied on Section 187 of the Restatement, which the Supreme Court of New Jersey follows when interpreting a contractual choice of law provision. *See* ECF No. 7-1 (Gruma's Br. in Supp. of Mot. to Compel at 11–15) (citing to *Instructional Sys., Inc. v. Comput. Curriculum Corp.*, 614 A.2d 124, 133–34 (N.J. 1992) and other cases). In its Opinion granting Gruma's motion to compel, the District Court likewise referenced Section 187 of the Restatement and *Instructional Sys., Inc.*, stating that "[o]rdinarily, when parties to a contract have agreed to be governed by the laws of a particular state, New Jersey will uphold the contractual choice if it does not violate New Jersey's public policy." JA014 (Opinion at 6) (quoting *Instructional Sys., Inc.*, 614 A.2d at 133, and *Gen. Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 331 n.21 (3d Cir. 2001)).

The District Court continued, noting that under the formulation set forth in Section 187 of the Restatement as adopted in *Instructional Sys., Inc.*, "the law of the state chosen by the parties – in this case, Texas – will govern unless one of [two] exceptions applies." JA014 (Opinion at 6). After reciting the two exceptions, the District Court reasoned that the first exception did not apply.[6]

[6] Plaintiffs do not challenge this determination on appeal.

JA014–015 (Opinion at 6–7). The District Court then stated that it must therefore determine whether the second exception, which is found in Section 187(b) of the Restatement, applies. *Id.* In doing so, the District Court noted that the courts in the District have explained that the second exception has three elements:

> In order for the Court to determine that this exception applies, the Court must find the following three elements: (1) New Jersey has a materially greater interest than Texas in the outcome of this dispute; (2) application of Texas law would be contrary to a fundamental public policy of New Jersey; and (3) absent a valid and enforceable choice of law clause, New Jersey law would apply. *Howmedica Osteonics Corp. v. Howard*, No. 19-19254, 2022 WL 16362464, at *6 (D.N.J. Oct. 28, 2022) (citing *Diversant, LLC v. Carino*, Civ. No. 18-3155, 2018 WL 1610957 at *3 (D.N.J. Apr. 2, 2018); *see also Rosenberg v. Hotel Connections, Inc.*, No. 21-4976, 2022 WL 7534445, at *4 (D.N.J. Oct. 13, 2022).

JA015 (Opinion at 7). The District Court then continued: "Where the first element has not been established, the Court need not reach the second and third elements. *Howmedica Osteonics Corp*., 2022 WL 16362464, at *8 (citing *Diversant, LLC*, 2018 WL 1610957, at *4)." *Id.* This point is noteworthy – even if the application of Texas law would in any way be contrary to a fundamental public policy of New Jersey (the second element), that issue is not pertinent unless New Jersey's interests in the dispute are materially greater than the interests of Texas.

The District Court's Opinion also noted that, to determine if any state has a materially greater interest than the other, "New Jersey courts focus on the dispute-

related contacts or relationships with the relevant states." JA015 (Opinion at 7) (quoting *Rosenberg*, 2022 WL 7534445, at *4). The District Court then recounted Plaintiffs' contacts and relationships with New Jersey, noting that New Jersey is where they work, reside, ran their route, and maintained their warehouse to receive, store, distribute, and sell Gruma products. JA016 (Opinion at 8). The District Court did not give short shrift to Plaintiffs or the interests of New Jersey, noting that this case involves protections expressly afforded to citizens of New Jersey, that Plaintiffs claim injury and causes of action arising in New Jersey, and seek to enforce New Jersey law against acts and conduct by an out-of-state corporation. *Id.*

Thereafter, the District Court referenced the contacts and relationships that this case has with Texas, including the fact that Gruma maintains its corporate headquarters in that state, where its "business affairs in the United States are centered, especially as it relates to independent contractors like [Plaintiffs]." *Id.* (quoting from ECF No. 7-1 (Gruma's Br. in Supp. of Mot. to Compel at 7)). The District Court then recited, in footnote 4 of its Opinion, a multitude of business activities in which Gruma engages in Texas pertaining to this lawsuit:

> developed its policy and practice of designating distributors as independent contractors; coordinates and carries out the process of drafting and enforcing SDDAs with independent distributors ... ; coordinates the purchase and distribution of its products by independent distributors; employs its senior leadership staff, finance

> employees, and its senior operation employees, and manages those employees that interact with independent distributors ... ; creates and maintains customer relationships with customers to which independent distributors distribute its products; determines prices for its products purchased by independent distributors; employs its technical team that assists with issues related to the independent distributors' use of [Gruma computers] ... ; coordinates logistical efforts for utilizing third-party carriers that are responsible for delivering product to the warehouses of independent distributors (like [Plaintiffs]) ... ; and remits payment to independent distributors ... and sends yearly Form 1099s to such distributors.

JA016 (Opinion at 8). Before weighing the contacts and relationships of New Jersey and Texas to determine if one state had a materially greater interest in the outcome of the dispute, the Court first addressed and discussed the facts and holding of a Third Circuit case that has become the most often cited case from this Court applying Section 187 of the Restatement: *Coface Collections N.A. Inc. v. Newton*, 430 F. App'x 162 (3d Cir. 2011).

In *Coface*, the plaintiff was a national company incorporated in Delaware that sought to enforce a choice of law provision designating Delaware law, whereas the defendants lived, worked, and signed the agreement in Louisiana. *Coface*, 430 F. App'x at 163–64. In the District Court's Opinion, it observed that the Third Circuit in *Coface* "found that the defendants' geographical ties did not lead to the conclusion that Louisiana had a materially greater interest than Delaware," and rejected defendants' argument that Louisiana law should apply.

JA016 (Opinion at 8). The District Court added that "[c]ourts in the Third Circuit have also observed that, for the materially greater interest test, 'a company's connection to a state is greater when it is headquartered there.'" JA016–017 (Opinion at 8–9).[7]

The District Court then noted that "numerous cases in this district have also upheld choice of law provisions where one party works and resides in one state and the other party is headquartered or incorporated in the other state." JA017 (Opinion at 9). Judge Kirsch noted that "Courts have explained that, in these cases, neither state has a materially greater interest than the other that would overcome the parties' choice of law provision." *Id.*

The District Court then discussed in great length three additional cases applying Restatement Section 187. *See* JA017–018 (Opinion at 9–10). The first, *Chemetall US Inc. v. Laflamme,* No. 16-cv-780, 2016 WL 885309 (D.N.J. Mar. 8, 2009), involved an individual party who was a resident of Indiana who worked in

[7] Gruma did not take the position that a party's residence or headquarters in a state is alone sufficient under Section 187 of the Restatement to warrant a court upholding a choice of law provision selecting the laws of that state to govern, and the District Court Opinion does not suggest that residence alone would be sufficient. In any event, the Declaration of Ron Anderson (JA111–013) set forth a multitude of contacts and activities in Texas, beyond the company being headquartered in that state, pertaining to Gruma's relationship with distributors such as C. M. Adler LLC. The District Court included most of them in footnote 5 on page 8 of the Opinion (JA016). Thus, this is not a case where the only factor favoring a choice of law is a party's residence or headquarters.

that state, serviced Indiana customers, and received and executed the contract in Indiana, while the other party was a company was a company headquartered in New Jersey and had an interest in enforcing its rights to its confidential information in New Jersey, which the parties chose as their choice of law. *Id.*, at *7–8. Citing *Coface*, the *Chemetall* court found that Indiana did not have a materially greater interest than New Jersey and, therefore, the parties' contractual choice of law controlled. *Id.*, at *8.

The next case reviewed by the District Court was *Diversant, LLC v. Carino*, No. 18-cv-3155, 2018 WL 1610957 (D.N.J. Apr. 2, 2018). In *Diversant*, the plaintiff company was headquartered in New Jersey, the parties' contract (which included a New Jersey choice of law provision) was prepared in New Jersey, the plaintiff substantially performed its obligations under the agreement in New Jersey, and the company maintained a cloud storage facility in New Jersey, whereas the defendant was a California resident who signed and performed the contract exclusively in California and managed a book of business entirely comprised of California clients. *Diversant, LLC*, 2018 WL 1610957, at *3–4. Citing *Coface* and *Chemetall*, the court in *Diversant* found that California did not have a materially greater interest than New Jersey and, therefore, upheld the parties' contractual choice of law. *Id.*, at *4.

The final case the District Court addressed was *Rosenberg v. Hotel Connections, Inc.*, No. 21-cv-4976, 2022 WL 7534445 (D.N.J. Oct. 13, 2022). There, the plaintiff was a citizen of New Jersey, negotiated and signed the contract in New Jersey, worked in New Jersey, and brought claims in New Jersey under New Jersey law. *Rosenburg*, 2022 WL 7534445, at *3–4. However, the defendant was incorporated in New York, conducted business in New York, and the parties' contract designated New York law as the choice of law. *Id.*, at *4. As the District Court noted in its Opinion, the court in *Rosenberg* explained that, "while New Jersey had a substantial interest in the dispute, its interest was not materially greater than that of New York ...." *Id.*, at *5. The court therefore upheld the parties' contractual choice of law.[8]

The District Court then analyzed the interests of New Jersey and Texas. *See* JA018–019 (Opinion at 10–11). After noting that Plaintiffs failed to cite or address the Restatement test and focused instead on whether the parties'

[8] Another case reaching a similar conclusion is *Howmedica Osteonics Corp. v. Howard,* No. 19-cv-19254, 2022 WL 16362464 (D.N.J. Oct. 28, 2022). In *Howmedica*, the individual parties lived in California, worked primarily in that state, and the alleged wrongs occurred in California; in contrast, the corporate party and its senior leadership team were at last partially based in New Jersey, some of its research and development, finance, and operations employees were based in New Jersey, and some of its equipment and inventory was shipped to New Jersey, leading the district court judge in that case to conclude that neither state had a materially greater interest than the other, citing *Chemetall* and *Diversant*. 2022 WL 16362464, at *7–8.

contractually chosen law violates New Jersey's public policy, the Opinion quoted from another district court case in this Circuit, *SKF USA Inc. v. Okkerse*, 992 F. Supp. 431, 441 (E.D. Pa. 2014), which held that "'[i]t is not enough to assert that [New Jersey] has a greater interest simply because the application of [Texas] law runs counter to a fundamental [New Jersey] policy.'" JA019 (Opinion at 11) (quoting *SKF USA Inc.*, 992 F. Supp. at 441). Judge Kirsch concluded that although New Jersey plainly has an interest in the matter, it was not materially greater than that of Texas, especially where the parties had agreed to apply Texas law, where Gruma was headquartered in Texas, and where its business affairs pertaining to its contractual relationship was performed at its corporate offices in Texas. JA019 (Opinion at 11). The District Court then found that Texas law applied and concluded that it "therefore need not proceed to the second and third elements of the analysis under subsection (b) of the Restatement test." JA020–021 (Opinion at 12–13).

The four district court decisions discussed by Judge Kirsch – *Chemetall*, *Diversant*, *Howmedica,* and *SKF* – all cite to the Third Circuit's decision in *Coface*. Yet Plaintiffs chose not to make any reference in their opening brief to *Coface*. Instead, Plaintiffs cite repeatedly to *Homa v. American Express Co*., 558 F.3d 225 (3d Cir. 2009), a case involving a *class* arbitration clause, even though that case was thereafter abrogated by the U.S. Supreme Court in *AT&T Mobility*

LLC v. Concepcion, 563 U.S. 333 (2011). That 2009 decision in *Homa* was then discarded by this Court when it affirmed a district court order reinstating an earlier order compelling arbitration on an *individual* basis. *Homa v. Am. Express Co.*, 494 F. App'x 191, 198 (3d Cir. 2012).[9]

Finally, the District Court held that even if it were to reach the second element of the test, enforcement of the choice of law provision would not violate any New Jersey public policy because, among other reasons, nothing would prevent Plaintiffs from asserting *in arbitration* any claims arising under New Jersey statutes. JA020 (Opinion at 12). As Judge Kirsch stated: "The fact that the arbitration clause may require Plaintiffs to arbitrate their statutory claims is 'of no moment.'" *Id.* (quoting *Rockware v. ETZ Hayim Holding, Inc*, No. 20-cv-4399, 2020 WL 7640917, at *2 (D.N.J. Dec. 23, 2020)). *See also Martindale v. Sandvik, Inc.*, 800 A.2d 872, 882 (N.J. 2002) ("having agreed to arbitrate, the parties should

[9] The 2009 decision in *Homa* was based in large part on the Third Circuit's view, now abrogated by the U.S. Supreme Court, that a class arbitration waiver would effectively preclude a New Jersey consumer from relief under the New Jersey Consumer Fraud Act where the plaintiff had a "low value" claim, and for that reason alone would have little or no relevance to the issues in this case if it had not been abrogated and discarded after *Concepcion*. *Homa*, 558 F.3d at 233. The 2009 decision in *Homa* continues to be cited by courts, but only to the extent it recites the general proposition of law enunciated in *Instructional* that was likewise cited by the District Court on page 6 of the Opinion (JA014), or for the general proposition of law that a federal court will apply the choice of law rules of the forum state. *Homa*, 558 F.3d at 227. To the extent Plaintiffs rely on the 2009 *Homa* decision for any other purpose, such reliance is misplaced.

be bound to that agreement unless ... the statutory claim cannot be vindicated in an arbitral forum"). Plaintiffs have completely overlooked this point, arguing throughout their brief that New Jersey public policy, as expressed in the statutes included in their claims for relief, would somehow be compromised if Plaintiffs could not pursue such claims in court. The District Court correctly dismissed this concern, concluding that Plaintiffs could still pursue those claims, albeit in arbitration.[10]

III. BECAUSE THE TAA IS AN INDEPENDENT BASIS ON WHICH TO DETERMINE THE ENFORCEABILITY OF THE ARBITRATION CLAUSE, THERE WAS NO NEED FOR THE DISTRICT COURT TO HAVE DETERMINED WHETHER THE FAA IS ALSO APPLICABLE OR IF THE EXEMPTION IN SECTION 1 OF THE ACT APPLIES

On appeal, Plaintiffs argue that the District Court was required under *Harper v. Amazon.com Services, Inc.*, 12 F.4th 287, 293–94 (3d Cir. 2021), to first

[10] Plaintiffs also argue that a 2019 law supports their public policy argument. Their opening brief contains a subsection entitled, "New Jersey has a fundamental policy against arbitrating statutory claims." Opening Br. at 31. Plaintiffs base this argument on a 2019 law, N.J.S.A. § 10:5-12.7(a), which provides that "[a] provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable." *See* Opening Br. at 32. But even if this broad prohibition covered the SDDA, which Gruma disputes vigorously, Section 6 of the law provides that it "shall apply to all contracts and agreements entered into, modified, renewed, or amended *on or after the effective date*" of the law (i.e., March 18, 2019). *See* Act of Mar. 18, 2019, P.L. 2019, ch. 39 § 6 (West) (emphasis added). As noted in the Complaint, the SDDA was signed *over five years earlier* – on March 7, 2014. JA039 (Compl. ¶ 25); *see also* JA076 (SDDA at 1). In any event, Plaintiffs did not raise this argument below in its briefing to the District Court.

determine if the Section 1 exemption in FAA applies. Opening Br. at 22. But their argument is based on a misapplication of *Harper*. In that case, the Third Circuit vacated the district court's judgment denying Amazon's motion to compel arbitration and remanded the case to the district court to determine, as a threshold matter, whether state law provides an independent basis for arbitration separate and apart from the FAA. *Harper*, 12 F.4th at 287. According to *Harper*, this procedure will avoid the delays and burdens of discovery as to whether the plaintiffs are a class of workers who are exempt from arbitration under Section 1 of the FAA. *Id.* at 295–96. As the *Harper* Court stated, "state law arbitration questions must be resolved before turning to questions of fact and discovery [related to the FAA's Section 1 exemption from arbitration]." *Id.*

Plaintiffs nonetheless argue in their opening brief that the District Court was obligated under *Harper* to have determined whether the "[FAA] § 1 exemption applies (it does), or that its application is 'murky' (it is not)," and that it "did neither." Opening Br. at 22. That argument, however, is contrary to the Third Circuit's reasoning in *Harper*, which as noted above is that "state law arbitration questions must be resolved *before* turning to questions [related to the FAA]." *Harper*, 12 F.4th at 295–96 (emphasis added). The procedure enunciated in *Harper* is precisely what the District Court followed here when it concluded, after a thorough seven-page analysis, that Texas law applies to the arbitration clause.

JA021 (Opinion at 13). This is exactly what Gruma argued to the District Court.[11] Once the District Court determined that Texas law applies, there was no need for the court to determine whether Plaintiffs qualified as a matter of law for the Section 1 exemption or if he would need to order discovery before he could decide if the exemption applied.

The remainder of Plaintiffs' argument about *Harper* underscores their flawed view of the Governing Law provisions of the SDDA. Plaintiffs assert that "[b]ecause the SDDA does not specify any state law, Texas or otherwise, to govern the enforcement of the arbitration agreement, it was error for the court to effectively rewrite the agreement and compel arbitration." Opening Br. at 23. But, as discussed above, this view of the SDDA's choice of law provision is based on Plaintiffs' misdirected focus on two isolated words of the Governing Law section,— not the entire section including the express language stating that the FAA "shall *also* apply as needed." JA098 (SDDA at 23) (emphasis added). Plaintiffs' assertion that the District Court chose to "rewrite" the arbitration

[11] On page 13 of its Reply Brief (ECF No. 15), Gruma stated: "Plaintiffs argue that the motion to compel arbitration should be denied because the FAA exempts them from arbitration under the interstate transportation worker exemption in 9 U.S.C. § 1. This argument fails for two reasons. First, this motion is not based solely on the FAA. It is also based on the TAA, which provides a separate and independent basis upon which to compel arbitration…. Second, even if this motion was based solely under the FAA, which is it not, Plaintiffs are not interstate transportation workers under the FAA."

provisions of the SDDA is not only without merit, but it is exactly what Plaintiffs themselves have attempted to do in their opening brief, arguing "the parties specified the FAA – and only the FAA – as the law governing the 'validity or enforceability of the arbitration provisions.'" Opening Br. at 25. In any event, Plaintiffs' argument that the District Court failed to follow *Harper* is not only meritless but also is a new argument, first being raised on appeal; accordingly, it has been waived.

IV. ALL OF PLAINTIFFS' CLAIMS, INCLUDING THEIR STATUTORY CLAIMS, ARE ARBITRABLE AS THEY EACH FALL WITHIN THE SCOPE OF THE ARBITRATION CLAUSE.

Plaintiffs argue that the arbitration clause only covers claims for breach of contract and does not cover statutory claims. This argument fails for a number of reasons. First, the language in the arbitration section of the SDDA is regarded as broad under the TAA and the FAA. Second, the way Plaintiffs' assert their statutory and other claims place them squarely within the language of the arbitration clause.

A. The SDDA's arbitration clause is regarded as broad under the TAA and the FAA.

Section 15.*i*.ii. of the SDDA contains an arbitration provision, which provides as follows:

ii. Non-Class Claims

> … *[A]ny and all … claims and causes of action arising out of or relating to this Agreement* (including, without limitation, matters relating to this Subsection 15(*i*) regarding arbitration, matters relating to performance, breach, interpretation, meaning, construction, or enforceability of all or any part of this Agreement, and all claims for rescission or fraud in the inducement of this Agreement) *shall be resolved by arbitration through J.A.M.S/Endispute ("JAMS")* as provided in Subsection 15(*i*) (iii) below. [12]

JA096 (SDDA at 21) (emphasis added).[13]

Under Texas law, all doubts regarding the question of arbitrability are resolved in favor of arbitration. *Prudential Secs. Inc. v. Marshall*, 909 S.W.2d 896, 899 (Tex. 1995). Where an arbitration agreement employs language such as "any claim arising out of or related to the Contract," such language is "construed as

[12] The reference in this Subsection 15.*i.*ii. to Subsection 15.*i*.iii. is a typo and should have referred to Subsection 15.*i*.iv., which addresses arbitration procedures under JAMS.

[13] Plaintiffs unreasonably suggest that the language in the arbitration clause is narrow, asserting that it is equivalent to the arbitration provision in *Moon v. Breathless Inc.*, 868 F.3d 209 (3d Cir. 2017): "This Court [in *Moon*] has construed an arbitration provision with language strikingly similar to the SDDA's as covering only contractual disputes, not statutory wage claims. *See Moon*, 868 F.3d at 217-18 …." Opening Br. at 52. But the actual wording of the arbitration clause in *Moon* reveals that it was rather narrow, limited to disputes *under* the parties' agreement: "In a dispute between Dancer and Club under this Agreement, either may request to resolve the dispute by binding arbitration." *Moon*, 868 F.3d at 212. In any event, the *Moon* arbitration provision is plainly not "strikingly similar to" and not nearly as broad as the language in the SDDA, which covers disputes "arising out of or relating to this Agreement."

evidencing the parties' intent to be inclusive rather than exclusive." *Centex/Vestal v. Friendship W. Baptist Church*, 314 S.W.3d 677, 685–86 (Tex. Ct. App. 2010). In such cases, arbitration should be compelled absent some "positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.'" *In re Dillard Dep't Stores,* 186 S.W.3d 514, 516 (Tex. 2006) (quoting *Prudential Secs. Inc.*, 909 S.W.2d at 899).

The Third Circuit has similarly concluded that "the terms 'arising out of' or 'relating to' [in] a contract [is] indicative of an 'extremely broad' agreement to arbitrate any dispute relating in any way to the contract." *In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515, 523 (3d Cir. 2019) (quoting *Curtis v. Cellco P'ship*, 992 A.2d 795, 802 (N.J. Super. Ct. App. Div. 2010)). For example, the Third Circuit in *Remicade* found that statutory antitrust claims "relate to" the parties' agreement that established their commercial relationship between the parties including the setting of drug prices, noting: "Such broad clauses have been construed to require arbitration of any dispute between the contracting parties that is connected in any way to their contract." *Id*. The Third Circuit explained that a claim only needs to have "some 'logical or causal connection' to the agreement to be related to it." *Id.* at 524 (quoting *John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1074 (3d Cir. 1997)).

Plaintiffs unreasonably suggest that the language in the arbitration clause is narrow, asserting that it is equivalent to the arbitration provision in *Moon v. Breathless Inc.*, 868 F.3d 209 (3d Cir. 2017): "This Court [in *Moon*] has construed an arbitration provision with language strikingly similar to the SDDA's as covering only contractual disputes, not statutory wage claims. *See Moon*, 868 F.3d at 217-18 …." Opening Br. at 52. But the actual wording of the arbitration clause in *Moon* reveals that it was rather narrow, limited to disputes *under* an agreement: "In a dispute between Dancer and Club under this Agreement, either may request to resolve the dispute by binding arbitration." *Moon*, 868 F.3d at 212. In any event, the *Moon* arbitration provision is plainly not "strikingly similar to" and not as broad as the language in the SDDA, which covers disputes "arising out of or relating to this Agreement."

Finally, while Plaintiffs assert that the arbitration clause is not effective under New Jersey law, Gruma has established that New Jersey law does *not* apply to the SDDA because, under the Section 187(2) of the Restatement and applicable case law, New Jersey does not have a materially greater interest in this litigation than does Texas. Accordingly, pursuant to the SDDA, Texas arbitration law applies (along with the FAA, to the extent needed for enforcement of the arbitration clause).

B. The manner in which Plaintiffs articulated all of their claims falls squarely within the broad language of the arbitration clause.

Plaintiffs cannot in good faith argue that *any* of their asserted claims do not "aris[e] out of or relat[e] to this Agreement (including, without limitation, matters ... relating to performance, breach, or enforceability of all or any part of this Agreement, and all claims for rescission or fraud in the inducement of this Agreement) ...." JA096 (SDDA at 21). The very manner in which Plaintiffs characterize and describe all 14 of their "counts" in the Complaint, including those based on New Jersey and federal law, unquestionably "arise out of" or "relate to" the store door distributorship relationship that is the subject of the SDDA. Those counts are each addressed below in three groups: employment claims (comprising Plaintiffs' federal and state law counts pertaining to minimum wage and overtime, wage payments and deductions, wage notice, and retaliation); a state franchise law claim; and state common law claims (comprising Plaintiffs' counts for rescission, unjust enrichment, and breach of the implied covenant of good faith and fair dealing).

1. Plaintiffs' employment claims all arise out of or relate to the SDDA because Plaintiffs base each of them on Gruma's rights and Plaintiffs' contractual obligations set forth in the SDDA.

Paragraph 20 of the Complaint alleges that "plaintiffs…are designated as so-called 'independent contractors' *under the parties' SDDA*." JA036 (Compl. ¶ 20)

(emphasis added). Paragraph 21 alleges that "[i]n so doing, Gruma has misclassified plaintiffs as 'independent contractors,' rather than 'employees.'" JA036 (Compl. ¶ 21). Paragraph 23 also alleges: "All the while ... Gruma has exercised a high degree of control and oversight of plaintiffs' activities, such that the use of the term 'independent contractors' *in the SDDA* is absolutely meaningless and not representative of the actual relationship between the parties." JA037 (Compl. ¶ 23) (emphasis added). The Complaint devotes over six full pages of allegations relating to the SDDA. *See, e.g.,* JA043–046 (Compl. ¶¶ 44–60) (Section entitled "*The SDDA Agreement* and the Realities of the Employer-Employee Relationship Between Defendant and Plaintiffs" (emphasis added) and section entitled "The Misclassification of Plaintiffs as 'Independent Contractors' – and the Many Indicia of the True Employer-Employee Relationship.").

Each of Plaintiffs' first nine causes of action are brought under the federal Fair Labor Standards Act ("FLSA") and various New Jersey wage statutes; it is a given that such statutes only protect workers who are "employees" and not independent contractors. Throughout the Complaint, Plaintiffs repeatedly make express references to the SDDA. *See, e.g.*, JA043–046 (Compl. ¶¶ 48–52, 56–58, including any subparagraphs.[14] All such references seek to support their allegation

[14] Plaintiffs specifically refer to the SDDA in subparagraphs 58(b), (h), (p), and (q). In subparagraphs 58(e), (f), (g), (i), (k), (*l*), (r) and (s), Plaintiffs make indirect references to the SDDA by alleging that Gruma retains or has the right to approve,

that Gruma, including through the SDDA itself, directs and controls Plaintiffs and obligates them to work in a manner that they assert is consistent with "employee" status instead of an independent contractor relationship. The large number of direct and indirect references to the SDDA in the Complaint overwhelmingly demonstrate that Plaintiffs have based their claims under federal and state wage laws on numerous provisions contained in the SDDA. Thus, Plaintiffs cannot argue that those claims do not arise out of or relate to the SDDA.[15] Plaintiffs are openly and repeatedly using the SDDA in their Complaint in an effort to show that they are employees in order to assert their wage and hour, wage payment, wage notice, and retaliation claims – all of which are only available to "employees."

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disapprove, require, prohibit, or limit the activities of Plaintiffs. Other paragraphs throughout the Complaint likewise focus on provisions in the SDDA that purportedly give Gruma the right to direct and control the performance of plaintiffs and, as such, are alleged to be further indicia of an employer-employee relationship. *See, e.g.,* JA042, 043–044, JA061 (Compl. ¶¶ 37, 39, 48–49, 51, 52, 133).

[15] Not only do Plaintiffs allege that Gruma misclassified them as independent contractors by directing and controlling their work by means of the provisions in the SDDA, they also seek relief for "improper deductions and withholdings from wages" (Count III) based on the provisions in the SDDA. JA056–57 (Compl. ¶¶ 99–110). Plaintiffs allege in paragraph 52 of the Complaint that "the *SDDA* mandates that the plaintiffs purchase and supply their own delivery trucks, insurance, and requires that the plaintiffs use exclusively the defendant's hand-held devices ...." JA044 (Compl. ¶ 52) (emphasis added). Count V for "failure to reimburse expenses" has similar allegations based on the provisions of the SDDA that requires distributors to pay for their own expenses. *See, e.g.,* JA059–060 (Compl. ¶ 123).

The two retaliation claims (Counts VIII and IX of the Complaint) not only are based on the assertion that Plaintiffs are employees and not independent contractors, but also premised on their allegation that Gruma "terminat[ed] plaintiffs" by terminating the SDDA. JA063–065 (Compl. ¶¶ 145–54). Plaintiffs also incorporate by reference all of their prior paragraphs of the Complaint including paragraphs 67 and 72 (JA 050–051) referring to the May 9, 2022 letter from Gruma terminating the SDDA.

To remedy their allegation that the allegedly retaliatory termination of the SDDA violated federal and state wage laws, Plaintiffs rely further upon the SDDA when they seek "actual damages incurred as a result of defendant's *wrongful termination of the SDDA*." *See* JA074 (Compl. at item (g) of "Relief Requested" (emphasis added).[16]

2. Plaintiffs' Franchise Practices Act claim refers to and necessarily requires a "written arrangement" – the SDDA

Paragraphs 34 to 44 and 174 to 193 of the Complaint assert Plaintiffs' claims for "Violations of New Jersey Franchise Practices Act (N.J.S.A. § 56:10-1, *et seq*.)" in Count XIII of the Complaint. JA041–043, 069–072 (Compl. ¶¶ 34–44, 174–93). Plaintiffs allege that "the *SDDA* provided plaintiffs with a license to use

[16] There are two item (g)'s in the "Relief Requested" on page 45 of the Complaint (JA074). The one seeking damages for alleged wrongful termination of the SDDA is the first of the two item (g)'s.

defendant's 'Marks' or trademarks and brand names, as well as to sell defendant's products and use other proprietary rights of the defendant as set forth in the SDDA." *See* JA042 (Compl. ¶ 38) (emphasis added); *see also* JA069–070 (Compl. ¶¶ 176–77). Plaintiffs further allege that "the plaintiffs' purchase of the distributorship route constituted the purchase of a 'franchise' within the meaning of the … New Jersey Franchise Practices Act ...." JA070 (Compl. ¶ 183). They additionally allege that Gruma "elected to terminate the SDDA 'without cause,'" and (like their retaliation claims) refer to Exhibit B annexed to the Complaint to support their claim under the New Jersey Franchise Practices Act ("NJFPA"). *See* JA050–051, 070 (Compl. ¶¶ 67, 184); JA110 (Compl., Ex. B).

Plaintiffs' reliance on the SDDA is an essential element of their NJFPA claim, inasmuch as the definition of a "franchise" under the Act "means a *written arrangement* ... in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics ... in the marketing of goods ...." N.J.S.A. § 56:10-3.a (emphasis added). Thus, this claim for relief is wholly dependent upon the existence of the SDDA and Gruma's election to terminate the SDDA, which they characterize as a "franchise agreement" more than a half dozen times in their opening brief.[17] Notably, as part of their requested

[17] *See, e.g.,* Opening Br. at 36, n.6 (asking this Court to assume the SDDA is a franchise agreement).

relief, plaintiffs ask this Court to reinstate them as franchisees and award their route back, which was conveyed to them under the terms of the SDDA. *See* JA072 (Compl. ¶ 193).

3. Plaintiffs' common law claims are also based upon and seek relief under the SDDA

Count X of the Complaint, which seeks "Rescission," specifically references the SDDA on five occasions. It alleges in paragraph 157 (JA065) that to the extent the SDDA classifies plaintiffs as independent contractors, it is "improper and inaccurate." *See also* JA066 (Compl. ¶ 160) (alleging the classification of distributors as independent contractors is an "unlawful business practice."). Paragraph 163 of the Complaint (JA066) specifically seeks to rescind "*those portions* [of the *SDDA*] that violate law" (emphasis added). Plaintiffs do not seek rescission of the entire SDDA or the arbitration provisions in the SDDA, only those provisions that they claim to violate law. Indeed, as noted earlier, in item (g) of the "Relief Requested" (JA074), plaintiffs seek damages for "defendant's *wrongful termination* of the *SDDA*" (emphasis added), which is specifically covered in Subsection 15(*i*)(ii) that includes "all claims for rescission." JA096 (SDDA at 21).

Count XI of the Complaint for "Unjust Enrichment" is also based on "defendant's conduct in misclassifying plaintiffs as independent contractors." JA067 (Compl. ¶ 165). Similar to Count X, this count is based in large measure on

those "portions" of the SDDA that Plaintiffs allege throughout the Complaint constitute direction and control over Plaintiffs' performance of their distribution services.

Count XIV of the Complaint for "Breach of the Covenant of Good Faith and Fair Dealing" seeks relief based on Gruma's actions that allegedly "deprive[d] these Plaintiffs of their right to receive the benefits *under their distribution agreements*." JA072 (Compl. ¶ 195) (emphasis added). Plaintiffs also allege that Gruma breached "the covenant of good faith and fair dealing implied in every *contract* under New Jersey law." *Id.* Such claim is predicated upon the existence of the SDDA (i.e., a contract). In their opening brief, however, Plaintiffs seem to have overlooked this essential element of a claim for breach of the implied covenant of good faith and fair dealing, arguing that they are not seeking to "enforce the SDDA." Opening Br. at 45. The Complaint, however, contradicts their position on appeal when Plaintiffs allege that Gruma acted in a manner "depriving plaintiffs of the benefit of the *contract* to which they were entitled, and breached the covenant of good faith and fair dealing implied in that *contract* under New Jersey law." JA073 (Compl. ¶ 197) (emphasis added).

In sum, Plaintiffs' employment, franchise, and common law claims all rely upon and seek relief under the SDDA. Indeed, as noted by the District Court, Plaintiffs not only attached the SDDA to the Complaint, they also made specific

reference to it over 60 times throughout the Complaint. JA013 (Opinion at 5). Each and every one of Plaintiffs' claims arise out of and/or relate to the SDDA.

C. The District Court did not err in delegating issues of arbitrability to the arbitrator; in any event, this Court can determine arbitrability *de novo*.

Plaintiffs argue that the District Court erred by delegating the question of arbitrability to the arbitrator and by failing to make that decision itself. Plaintiffs argue that because Gruma did not assert that there was a delegation clause in the SDDA or otherwise seek to have the question of arbitrability sent to the arbitrator for determination, the District Court should have decided the question itself.

The District Court was well within its authority to compel arbitration and delegate the issue of arbitrability to the arbitrator based upon the language in the SDDA's arbitration clause and the Fifth Circuit's decision in *Maravilla v. Gruma Corp.*, 783 F. App'x 392, 395 (5th Cir. 2019) (per curiam). *See* JA025–026 (Opinion at 17–18). In the event this Court concludes that the District Court did not have such authority in view of Plaintiffs' assertion that Gruma did not make such argument below, this Court can now determine whether the claims asserted by Plaintiffs are covered by the SDDA's arbitration clause. As Plaintiffs concede in their opening brief, this Court reviews *de novo* an order granting a motion to compel arbitration. S*ee* Opening Br., at 15 n.2. This Court has before it all the

facts it needs to make that determination in view of the allegations in the Complaint and the SDDA that Plaintiffs attached thereto.

As set forth above herein, each of Plaintiffs' causes of action – as a matter of law – arises out of and/or relates to the SDDA. Accordingly, to the extent this Court finds the District Court committed any error, Gruma respectfully requests that this Court review the question of arbitrability *de novo* and find that each of the claims for relief are arbitrable. A decision to remand this issue to the District Court may otherwise result in yet a second appeal to this Court on that issue.

V. THE QUESTION OF WHETHER PLAINTIFFS ARE INTERSTATE TRANSPORTATION WORKERS WITHIN THE MEANING OF THE EXEMPTION IN SECTION 1 OF THE FAA IS MOOT BECAUSE THE TAA PROVIDES AN INDEPENDENT BASIS TO COMPEL ARBITRATION

Gruma argued to the District Court in support of its motion to compel arbitration that "the TAA ... provides a separate and independent ground upon which to compel arbitration." ECF No. 15 (Reply Br. at 13). The District Court agreed, stating that "the Court will apply Texas law to determine whether the SDDA's arbitration provision is enforceable." JA021 (Opinion at 13).

Plaintiffs nonetheless argue that the District Court erred "by compelling arbitration without first addressing whether the FAA exemption applied, which it does." Opening Br. at 17. Because the District Court correctly found that the TAA applies, Plaintiffs' argument that they are interstate transportation workers

because they "play a direct and necessary role in the flow of Gruma's products in interstate commerce" (Opening Br. at 21) is moot.

However, in the event this Court concludes that this issue is ripe for appeal, it is incumbent upon Gruma to bring to the Court's attention that on April 12, 2024, the U.S. Supreme Court set forth a standard for the Section 1 exemption, requiring that a worker must be "actively ... engaged in transportation of goods across borders via the channels of interstate commerce." *Bissonnette v. LePage Bakeries Park St., LLC,* 144 S.Ct. 905 (2024) (quoting *Southwest Airlines Co. v. Saxon,* 596 U.S. 450, 458 (2022)). None of the Plaintiffs are "actively engaged" in this type of interstate transportation activity.

As Gruma noted in its motion to compel arbitration, Charles Adler's own Declaration focused on a multitude of activities that have nothing to do with the interstate transportation of goods. He stated that he sells, markets, and services Gruma products; services and maintains Gruma accounts; places product orders; puts the product on supermarket shelves and displays; removes stale products; keeps up the relationships with the accounts; and sells displays and presents sale items to Gruma accounts. ECF No. 15 (Reply Br. at 14); *see also* JA123–24 (Adler Decl. ¶ 24). Even though Charles Adler characterized transportation as a "large component of what I did," his Declaration confirms that any transportation of products undertaken by Plaintiffs is merely incidental to Plaintiffs' marketing,

sales, and service activities. JA124 (Adler Decl. ¶ 25); ECF No. 15 (Reply Br. at 14). In view of *Bissonnette,* Plaintiffs are not "actively engaged" in transportation of goods across borders via interstate commerce.

Plaintiffs will undoubtedly argue in their reply brief that they are "actively engaged" in transportation of goods across state lines. Thus, this case is one that, in the absence of an independent state law basis for arbitration, may have headed to burdensome and costly discovery and motion practice over the question of whether Plaintiffs are "actively engaged" in the interstate transportation of goods. Fortunately, the procedure set forth in the Third Circuit's *Harper* case, discussed in Point III above, provides a far more efficient way for this case to proceed at this point in the litigation: a determination as to whether Texas law provides an independent basis to compel arbitration. That is precisely what the District Court did here: concluding "Texas law applies to the SDDA, and the Court will apply Texas law to determine whether the SDDA's arbitration provision is enforceable." JA021 (Opinion at 13).

Because the District Court properly concluded that the TAA would be used to determine the enforceability of the SDDA's arbitration provision, the status of Plaintiffs as interstate transportation workers under Section 1 of the FAA is not relevant, moot, and at most, an academic exercise. Therefore, despite Plaintiffs'

argument that the District Court erred by failing to determine the applicability of the exemption under Section 1 of the FAA, it committed no such error.

VI. UNDER THE DIRECT-BENEFITS ESTOPPEL DOCTRINE, THE INDIVIDUAL PLAINTIFFS ARE ALSO BOUND TO ARBITRATE THEIR CLAIMS.

Plaintiffs argue in their opening brief that the District Court erred in concluding that, under the Texas direct-benefits estoppel doctrine, the individual plaintiffs are bound by the SDDA's arbitration provision even though they did not sign the SDDA. *See* Opening Br. at 40–46; JA023–024 (Opinion at 15–16). That argument, however, is undermined by their own characterization of the relevant issue under the direct-benefits estoppel doctrine. As set forth on page 46 of their opening brief, Plaintiffs state: "Thus, the relevant question is whether the individual Adlers seek to benefit from the SDDA *in this litigation*, not whether the SDDA created their relationship with Gruma in the first place." Opening Br. at 46 (emphasis added). Plaintiffs also state: "Because the individual Adlers do not seek to enforce or benefit from the SDDA, the district court erred in concluding that they can be required to arbitrate under an agreement they did not sign." *Id.* Yet, as noted above in Point IV and as elaborated below, Plaintiffs are wrong. The Complaint is clear that the individual Plaintiffs are seeking to benefit from the SDDA in this litigation and they rely extensively upon the SDDA in asserting their claims. For that reason, the District Court quickly

dispatched this argument by Plaintiffs and correctly found that "[i]n this case, the individual Plaintiffs have pursued claims in this Court based on the SDDA." JA023 (Opinion at 15).

In reaching its conclusion, the District Court listed nearly a dozen paragraphs of the Complaint in which "Plaintiffs seek relief 'on behalf of *all* plaintiffs [including the individual Adlers].'" *Id.* (emphasis added). The Opinion continues:

> In addition, the Complaint makes clear that the individual Plaintiffs acted as parties to the SDDA during the performance of the agreement, stating that Plaintiffs Charles and Grant Adler worked full-time as Gruma franchisees and employees, that "each of the above-named plaintiffs was or is a 'franchisee' of Gruma," that "each of the above-named plaintiffs was or is an 'employee' of Gruma," and that "each of the above-named plaintiffs services and distributes Gruma products." (*Id.* ¶¶ 25-28.)

JA023–024 (Opinion at 15–16). Relying on *Bailey v. HealthSouth Corp.*, No. 15-cv-57, 2017 WL 664445, at *5 (E.D. Tex. Jan. 26, 2017, *report and recommendation adopted*, No. 15-cv-57, 2017 WL 661964 (E.D. Tex. Feb. 16, 2017), which cites to Texas Supreme Court cases, the District Court found that "the individual Plaintiffs, regardless of whether they formally signed the SDDA,

are bound by same." JA024 (Opinion at 16). Judge Kirsch then concluded that "an arbitration agreement exists between the parties." *Id.*[18]

Notably, Plaintiffs do not seek to demonstrate how the District Court's finding on this point was erroneous, instead relying on their generalized and unsupported statement that they "do not seek to enforce or benefit from the SDDA." Opening Br. at 46. In addition to the District Court's references to the Complaint, there are a host of other patent efforts by the individual Plaintiffs to seek the benefits of the SDDA, as expressly stated in their Complaint. For example, they seek a judgment "reinstating and restoring plaintiffs to their route and compensating plaintiffs for all actual damages incurred as a result of defendant's *wrongful termination of the SDDA*." JA074 (Compl. at first item (g) of "Relief Requested" at 45) (emphasis added). Likewise, in Count X of their Complaint, the individual Plaintiffs assert a common law claim for rescission, yet they do not seek to rescind the entire SDDA, only select "portions" of it.[19]

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[18] The Third Circuit's equitable estoppel doctrine is nearly identical to Texas law. As noted in *Invista S.A.R.L. v. Rhodia, S.A.*, 625 F.3d 75, 85 (3d Cir. 2010), equitable estoppel "prevents a non-signatory from 'cherry-picking' the provisions of a contract that it will benefit from and ignoring other provisions that don't benefit it or that it would prefer not to be governed by (such as an arbitration clause)." *See also Griswold v. Coventry First LLC,* 762 F. 3d 264, 273 (3d Cir. 2014) (same).

[19] As asserted in the Complaint, the individual Plaintiffs assert that portions of the SDDA are "against public policy, unconscionable, and thus unenforceable ... and those portions that violate law are subject to rescission." JA066 (Compl. ¶ 163).

Similarly, in their good faith and fair dealing claim (Count XIV), the individual Plaintiffs allege that Gruma "deprive[d] these plaintiffs of their right to receive the benefits under *their distribution agreements*" and "breached the covenant of good faith and fair dealing implied in every *contract* under New Jersey law." JA072–073 (Compl. ¶¶ 195, 196) (emphasis added).

In sum, the facts here fit squarely within the doctrine of direct-benefits estoppel: the signatory and two non-signatories refer to, rely upon, and seek relief based on a contract plaintiffs seek to enforce, at least in part, yet seek to escape from the arbitration provisions therein. Simply put, the individual Plaintiffs cannot "hav[e] [their] contract and defeat[] it too." *Bailey*, 2017 WL 664445, at *5.[20]

Finally, Plaintiffs argue that the Texas direct-benefit cases on which the District Court relied upon have been "abrogated" by the U.S. Supreme Court's decision in *Morgan v. Sundance*, 596 U.S. 411 (2022). This argument has no merit. In *Morgan*, the Supreme Court dispensed with a showing of prejudice in

[20] Further, case law under the direct-benefits estoppel doctrine in Texas also authorizes courts to require a non-signatory to arbitrate under an agreement containing an arbitration clause where the non-signatory has received benefits under the agreement. *See, e.g., In re Weekley Homes, L.P.*, 180 S.W. 3d 127, 135 (Tex. 2005); *Specialty Select Care Ctr. of San Antonio v. Juiel*, No. 04-14-00514-CV, 2016 WL 3944834, at *4–5 (Tex. Ct. App. July 20, 2016). The individual Plaintiffs readily acknowledge in the Complaint (in connection with Counts I, III, and V) that they "received earnings on product sales" as a result of the license in the SDDA to sell Gruma products. *See* JA053, 057, 060 (Compl. ¶¶ 84, 106, 125); JA039 (Compl. ¶ 27).

order to establish waiver by one who litigates in the face of an arbitration provision. That situation in wholly inapposite to the circumstances here, where the individual Plaintiffs are relying upon the SDDA for their claims for relief yet at the same time are seeking to disclaim one of the terms of the agreement – arbitration of disputes. In any event, none of the Texas cases cited by Plaintiffs on pages 42–45 of their opening brief address *Morgan*'s impact (if any) on the direct-benefits estoppel doctrine. Further, a number of Texas courts that have had reason to assess or apply *Morgan* in waiver cases have stated that Texas may not necessarily reach the same conclusion as did the U.S. Supreme Court in *Morgan* and have observed that the Supreme Court of Texas has not yet addressed *Morgan* on the waiver issue. *See, e.g., Fidelity Auto Grp., LLC v. Hargroder*, No. 09-23-00098-CV, 2024 WL 1098244, at *8 n.3 (Tex. Ct. App. Beaumont, Mar. 14, 2024); *Eades v. Doe 1*, No. 04-22-00472-CV, 2023 WL 9007839, at *4 n.2 (Tex. Ct. App. San Antonio, Dec. 29, 2023).[21]

[21] In any event, Plaintiffs did not raise below the argument that the direct benefits estoppel doctrine has in any way been "abrogated" by *Morgan*. Therefore, Plaintiffs waived this argument on appeal.

VII. THE TAA APPLIES TO THE NEW JERSEY FRANCHISE PRACTICES ACT CLAIM; THE FAA "SHALL ALSO APPLY AS NEEDED" AND WOULD PREEMPT ANY APPLICABLE STATUTE BARRING ARBITRATION OF NJFPA CLAIMS

Count XIII of the Complaint is a claim for violation of the New Jersey Franchise Practices Act ("NJFPA") and is premised on Plaintiffs' allegation that the SDDA is a franchise agreement under the NJFPA. JA069–072 (Compl. ¶¶ 174–93). Plaintiffs argue that New Jersey has a fundamental public policy against arbitration clauses found in franchise agreements governed by the NJFPA. They rely upon *Kubis & Perszyk Assocs. v. Sun Microsys., Inc.*, 680 A.2d 618, 627 (N.J. 1996), for the proposition that forum-selection clauses "are 'presumptively invalid' in franchise agreements [in New Jersey]." Opening Br. at 36. Stating that "[c]ourts have interpreted *Kubis* and this presumption to apply to *arbitral* forum-selection clauses too," Plaintiffs argue that "Gruma cannot overcome the presumption against arbitration clauses in franchise agreements." Opening Br. at 36 (citing *Doctor's Assocs., Inc. v. Hamilton,* 150 F.3d 157, 163 (2d Cir. 1998)).

Gruma disputes that the SDDA is a franchise agreement under the NJFPA or that the NJFPA applies. But, even if Plaintiffs are correct that the SDDA is a franchise agreement under the NJFPA, the SDDA's arbitration provisions are governed by the parties' contractual choice of law provision. That section of the SDDA designates Texas law (i.e., the TAA) and also the FAA, "as needed to uphold the validity or enforceability of the arbitration provisions of this

Agreement." JA098. As Judge Kirsch stated, "the Court will apply Texas law [under the contractual choice of law provision] to determine whether the SDDA's arbitration provision is enforceable." JA021 (Opinion at 13). *See* Point I, *supra*. Notably, while the TAA exempts some contracts from its provisions, it does not exempt franchise agreements. *See* Tex. Civ. Prac. & Rem. Code § 171.002. Accordingly, Plaintiffs' NJFPA claim is subject to arbitration under the TAA.

In addition to Texas arbitration law applying to the SDDA, the "Governing Law" section of the SDDA provides that the FAA "shall also apply as needed …." JA098 (SDDA at 23). Plaintiffs do not dispute that the FAA applies, yet in an effort to avoid the FAA's preemption of state laws limiting arbitration, such as the arbitration bar under the NJFPA, they argue in that "preemption is not a concern if the SDDA is exempt from the FAA." Opening Br. at 35, n.5. This argument, however, overlooks the fact that the plain language of the exemption in Section 1 of the FAA simply does not apply to franchise agreements, and it disregards decades of New Jersey decisions that the New Jersey franchise law arbitration bar is indeed preempted by the FAA.

Since 1997, the courts in New Jersey and this Circuit have held that the arbitration bar in the NJFPA "violates the Supremacy Clause and is preempted by the FAA." *Cent. Jersey Freightliner, Inc. v. Freightliner Corp.*, 987 F.Supp. 289, 300 (D.N.J. 1997); *see also Navraj Rest. Grp., LLC v. Panchero's Franchise Corp.*,

No. 11-cv-7490 (PGS), 2013 WL 4430837, at *6 (D.N.J. Aug. 15, 2013) (citing *Allen v. World Inspection Network Int'l, Inc.,* 911 A.2d 484 (N.J. Super. Ct. App. Div. 2006), *cert. denied*, 944 A.2d 28 (2007)); *Martin, Inc. v. Henri Stern Watch Agency*, No. 11-cv-1602 (CCC), 2012 WL 1455229, at *3 (D.N.J. Apr. 25, 2012); *B & S Ltd. v. Elephant & Castle Int'l, Inc.*, 906 A.2d 511, 519 (N.J. Super. Ct. 2006).

Plaintiffs evidently are seeking to escape the significance of these cases by arguing that the SDDA (which they argue is a franchise agreement under their NJFPA claim) is exempt from the FAA under Section 1 of that Act. This argument, however, ignores the plain language of the Section 1 exemption in the FAA, which states: "nothing herein contained shall apply to *contracts of employment* of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). The NJFPA does not cover or regulate contracts of employment; rather, it only covers and regulates franchise agreements.

The NJFPA defines a franchise as a license agreement for the purpose of marketing goods. *See* N.J. Rev. Stat. § 56:10-3 (defining "Franchise" as a "written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of

goods or services at wholesale, retail, by lease, agreement, or otherwise."). Nowhere in that definition is there anything other than a reference to a license to market goods; *i.e.*, it does not cover or regulate employment or employment contracts or arrangements. The arbitration bar in the NJFPA, by the very nature of that law regulating franchises, only bars arbitration of franchise agreements; it does not bar arbitration of employment contracts. While the exemption in Section 1 of the FAA exempts contracts of employment covering interstate transportation workers from being arbitrated pursuant to that federal law, it does not exempt franchise agreements from arbitration under the FAA. For these reasons, any arbitration bar in the NJFPA covering franchise agreements *is* preempted by the FAA and cannot forestall arbitration of Plaintiffs' NJFPA claim. That claim is subject to arbitration by both the TAA and the FAA.

CONCLUSION

For the foregoing reasons, Gruma respectfully requests this Court to affirm the District Court's order compelling arbitration and dismissing the complaint.

Dated: May 7, 2024

Respectfully submitted,

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CERTIFICATE OF TYPE-VOLUME LIMITATIONS AND TYPEFACE REQUIREMENTS, BAR MEMBERSHIP, AND ELECTRONIC VIRUS CHECK

Counsel for Defendant-Appellee Gruma Corporation d/b/a Mission Foods and d/b/a Guerrero Mexican Food Products hereby certifies that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 12,859 words (as calculated by the word processing system used to prepare this brief), excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman style font.

3. Pursuant to Local Appellate Rule 28.3(d), I signed this brief as an active member in good standing of the Bar of the Court of Appeals for the Third Circuit.

4. Pursuant to Local Appellate Rule 31.1(c), the text of the brief filed electronically is identical to the text in the paper copies of the brief, and a virus detection program, Cisco Secure Endpoint, was run on the electronic file containing this brief and no virus was detected.

Dated: May 7, 2024

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on May 7, 2024. I further certify that copies of the foregoing were transmitted to all counsel of record via CM/ECF.

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