APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

SUPREME COURT OF NEW JERSEY
A-66 September Term 2020
085263

[Filed December 9, 2021]

Horizon Blue Cross Blue Shield of New Jersey,	)
Plaintiff-Respondent,	)
v.	)
Speech & Language Center, LLC and Chryssoula Marinos-Arsenis,	)
Defendants-Appellants.	)

O R D E R

The Court having considered this matter further and having determined that certification was improvidently granted;

It is ORDERED that the within appeal is dismissed. The enforceability of section 3.8 of the settlement agreement – which states that "the judgment debt will be a non-dischargeable debt, pursuant to 11 U.S.C.

§ 523(a)(2) in the event of a bankruptcy" – is for the Bankruptcy Court to resolve if a bankruptcy petition is filed.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 7th day of December, 2021.

s/_____
CLERK OF THE SUPREME COURT

APPENDIX B

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1353-19T2

[Filed December 16, 2020]

HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY,	)
Plaintiff-Respondent,	)
v.	)
SPEECH & LANGUAGE CENTER, LLC, and CHRYSSOULA MARINOS-ARSENIS,	)
Defendants-Appellants.	)

Argued November 17, 2020 – Decided December 16, 2020

Before Judges Fisher and Gilson.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-0281-15.

Michael Confusione argued the cause for appellants (Hegge & Confusione, LLC, attorneys; Michael Confusione, of counsel and on the briefs).

Patricia A. Lee argued the cause for respondent (Connell Foley LLP, attorneys; Patricia A. Lee, of counsel and on the brief; Jaimee A. Glinn, on the brief).

PER CURIAM

Defendants appeal an order that compelled them to execute a settlement agreement. Because we agree with the trial judge that defendants freely and voluntarily entered into the agreement and then failed to execute it, we affirm.

The record reveals that defendant Chryssoula Marinos-Arsenis is a licensed speech-language pathologist and owner of defendant Speech & Language Center, LLC, which provides speech-related therapy to patients. Plaintiff Horizon Blue Cross Blue Shield filed suit against defendants in 2014, alleging a "scheme to submit false and fraudulent insurance claims," and seeking a significant amount of damages on claims based on the New Jersey Insurance Fraud Prevention Act, N.J.S.A. 17:33A-1 to -34, as well as fraud, negligent misrepresentation, breach of contract, and unjust enrichment.

After years of litigation, the parties earnestly engaged in settlement negotiations the month prior to

their September 2019 trial date. In a proceeding in open court on August 30, 2019, the parties advised the trial judge that they had settled the case, that the material terms of their agreement were contained in a term sheet referred to throughout the proceeding,[1] and that the parties would thereafter draft and sign a formal agreement based on the term sheet. The judge placed defendant Arsenis under oath and questioned her about her willingness to settle:

> THE COURT: Okay. Ma'am, you've heard . . . both counsel put on the record that you've reached an amicable resolution of this matter, is that true?
>
> MS. ARSENIS: Yes.
>
> THE COURT: And you understand the terms of that settlement are memorialized in the agreement[2] that was referenced by counsel, correct?
>
> MS. ARSENIS: Yes.
>
> THE COURT: You've had a chance to see that?
>
> MS. ARSENIS: Yes.
>
> THE COURT: Okay. You've had a chance to go over it [the term sheet] with your counsel, correct?
>
> THE WITNESS: Yes.

---

[1] That document was not marked as an exhibit, an oversight defendants have attempted to take advantage of. See n. 3, below.

[2] Referring to the term sheet.

THE COURT: And that includes [defense counsel] who's seated with you today?

MS. ARSENIS: Yes.

THE COURT: And your son, who is not an attorney of record, but he is an attorney, and he's seated next to you at counsel table, correct?

MS. ARSENIS: Yes.

THE COURT: Okay. Do you understand the terms?

MS. ARSENIS: Yes.

THE COURT: Have you voluntarily agreed to them?

MS. ARSENIS: Yes.

THE COURT: You understand that it resolves this matter in full, correct?

MS. ARSENIS: Yes.

THE COURT: And that, of course, you had the opportunity to have a trial in this matter heard by a jury, you do you understand that?

MS. ARSENIS: Yes.

THE COURT: You could have done better than what you've done in that agreement, or you could have done worse, do you understand that?

MS. ARSENIS: Yes.

THE COURT: With a jury it's always a possibility, correct?

MS. ARSENIS: Yes.

> THE COURT: By settling the matter, you understand you're waiving your right to a jury trial and accepting those settlement terms as an amicable resolution of the matter, do you understand that?
>
> MS. ARSENIS: Yes.

Despite confirming under oath that the parties had reached a settlement that would be memorialized in a formal agreement consisting of all the provisions contained in the term sheet, defendants later refused to execute the more formal settlement agreement, causing plaintiff to move in the trial court for relief. As revealed by the motion papers, defendants' recalcitrance was based on the inclusion of a clause that would ostensibly govern the parties' agreement if defendant Arsenis filed a bankruptcy petition. The formal settlement agreement that defendants refused to sign declared that "[i]n the event" defendant Arsenis filed a bankruptcy petition prior to the full payment of her obligation to plaintiff, she agreed "not to contest the non-dischargeability of any remaining settlement payment obligation." This identical phrase appears in the term sheet. The bankruptcy clause in the unsigned settlement agreement also expressed that defendant Arsenis

> agrees and intends that the judgment debt will be a non-dischargeable debt, pursuant to 11 U.S.C. § 523(a)(2) in the event of a bankruptcy, or in any similar proceeding.

The term sheet contains an identical provision.

The trial judge granted plaintiff's motion for reasons discussed in a written opinion, and defendants appeal. Defendants contend that the judge erred because: (1) defendant Arsenis "agreed to settle plaintiff's claims to avoid further legal expense and stop the bleeding – not to acknowledge 'fraud' as the Final Settlement Agreement provides"; (2) "[t]he record does not show that the actual party, [defendant] Arsenis, agreed to a reference [in the settlement agreement] to fraud"; and (3) the judge "should have struck the offending non-dischargeability terms as unenforceable and void." We reject these arguments and affirm.

In explaining our disposition, we should start with an understanding of what plaintiff was after when moving in the trial court. Plaintiff entitled its motion as one seeking to "enforce" a settlement. While that label is not inaccurate, it is capable of being misunderstood. What plaintiff sought, despite the motion's moniker, was simply to have defendants do what they promised to do: sign an agreement that was faithful to the term sheet. The motion did not seek, and this appeal does not require us to decide, whether the settlement agreement should or will be "enforced" if the bankruptcy clause should be triggered in the future.

In a solemn proceeding at which both parties were represented by counsel, defendant Arsenis took the oath and swore to a superior court judge that she freely and voluntarily entered into a settlement that obligated her execution of a written agreement that included the provisions in the term sheet, including the bankruptcy provision. There's no dispute about that.

And there's no dispute that the drafted settlement agreement adhered to the term sheet. As for those provisions that provoked defendants' failure to sign, the settlement agreement contains – word for word – what was contained in the term sheet. So, there was no legitimate impediment to the entry of an order compelling execution of the settlement agreement; defendants' first and second arguments are, therefore, without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(2).[3]

We do not reach defendants' third argument because our courts "do not render advisory opinions or function in the abstract." Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107 (1971). Defendant Arsenis's agreement about the debt's non-dischargeability has no significance until she files a bankruptcy petition. If, at that time – should it ever occur – the parties dispute whether the debt is dischargeable, a bankruptcy court will have to consider whether federal policies and legal principles preclude the enforcement of what defendant Arsenis "agree[d] and intend[ed]" in executing the settlement agreement

---

[3] We make note of two other aspects of these arguments falling within the first two points. First, defendants contend that plaintiff did not demonstrate that the term sheet included in the appendix is the same term sheet referred to during the August 30, 2019 proceeding. We find this contention frivolous, particularly when defendants never filed an opposing certification in the trial court claiming there was some other term sheet. Second, defendants argue that, in resolving the controversy, the judge should have conducted an evidentiary hearing. There was, however, no genuine dispute about what defendants agreed to sign, so this argument is also without merit.

about dischargeability. This appeal does not require that we opine on this interesting but unripe issue.[4]

To summarize, the only real issue in controversy is whether plaintiff was entitled to an order compelling defendants to sign what they had agreed to sign. We hold that plaintiff is entitled to that relief without deciding whether the settlement agreement's non-dischargeability provisions may ultimately be enforced by a bankruptcy court should defendant Arsenis ever file a bankruptcy petition.

The order under review is affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/_____
CLERK OF THE APPELLATE DIVISION

---

[4] Mindful of the limitations imposed by Rule 1:36-3, we note only for historical purposes, and not for precedential purposes, that the Court of Appeals for the Third Circuit considered the issue nearly thirty years ago but neither reached a consensus nor published their opinions. Judge Cowen wrote an opinion, in which Chief Judge Sloviter joined, that affirmed a bankruptcy court determination that a party could not consent, in an earlier action in another court, to the non-dischargeability of a debt or judgment, while Judge Weis disagreed for reasons expressed in his dissent. Cheripka v. Republic Ins. Co., 1991 U.S. App. LEXIS 30343 (3d Cir. 1991). Thereafter, a majority of the Third Circuit's active judges voted to rehear the matter in banc and, in doing so, vacated the three-judge panel's opinions and its judgment. Cheripka v. Republic Ins. Co., 1992 U.S. App. LEXIS 898 (3d Cir. 1992). Later, because the court 's twelve judges were "equally divided" on the question, the bankruptcy court order was affirmed. Cheripka v. Republic Life Ins. Co., 1992 U.S. App. LEXIS 38449 (3d Cir. 1992). The court seems not to have taken up the issue since.

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION/SOMERSET COUNTY
Docket No.: SOM-L-281-15
CIVIL ACTION

[Filed November 15, 2019]

HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY,	)
Plaintiff,	)
v.	)
SPEECH & LANGUAGE CENTER, LLC.; CHRYSSOULA MARINOS-ARSENIS; et al	)
Defendants.	)

ORDER

THIS MATTER having been opened to the Court by Connell Foley LLP, attorneys for Plaintiff Horizon Blue Cross Blue Shield of New Jersey ("Horizon") for an Order enforcing the settlement term sheet that Defendants acknowledged on the record before the Court on August 30, 2019 ("Term Sheet"), together with attorney's fees incurred in filing this motion; and the Court having considered the moving papers in support of and in opposition thereto; and for good cause shown

IT IS on this 15th day of November, 2019;

ORDERED that Horizon's Motion to Enforce the Settlement is GRANTED in accordance with the Court's opinion which is attached hereto and made a part hereof; and

IT IS FURTHER ORDERED that a copy of this Order shall be served upon all counsel of record within seven (7) days from the date hereof.

s/_____
THOMAS C. MILLER, P.J.Cv.

XXX OPPOSED

SEE ATTACHED STATEMENT OF REASONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION/SOMERSET COUNTY
Docket No.: SOM-L-281-15
CIVIL ACTION

Horizon Blue Cross Blue Shield of New Jersey,	)
Plaintiff,	)
vs.	)
Speech & Language Center, LLC; Chryssoula Marinos-Arsenis; John Does 1-10 and ABC Corporations 1-10	)
Defendants.	)

PLAINTIFF'S MOTION TO ENFORCE
OPPOSED
RETURNABLE: NOVEMBER 8, 2019

I. PARTIES AND RELIEF SOUGHT

Plaintiff, Horizon Blue Cross Blue Shield of New Jersey ("Plaintiff" or "Horizon") by and through its counsel, Patricia A. Lee, Esq. and Jaime A. Glinn, Esq. of Connell Foley, LLP, moves to enforce Defendants' agreement to the material terms of the settlement agreement entered into between the parties. Plaintiff has filed a reply dated November 4, 2019 which has been considered by the Court.

Defendants, Speech & Language Center, LLC and Chryssoula Marinos-Arsenis ("Defendants") by and through their counsel, Elliot D. Ostrove, Esq. of Epstein Ostrove, LLC, oppose the Plaintiff's Motion.

II. PLAINTIFF'S PRELIMINARY STATEMENT

Plaintiff, Horizon Blue Cross Blue Shield of New Jersey ("Horizon") moves to Enforce the Settlement Agreement and Enforce Litigants' Rights against Defendants Speech & Language Center, LLC ("SLC") and Chryssoula Marinos-Arsenis ("Ms. Arsenis") collectively, "Defendants").

Plaintiff frames this Motion as one that deals with one type of clause appearing as an express, material term included on a Term Sheet that was attested to by the Defendants through the Defendant Ms. Arsenis on the record and under oath on August 30, 2019. Plaintiff indicates that the disputed language is simply the citation to the specific bankruptcy code subsection that affords grounds for Horizon to except the debt owed by Defendants as settlement of the instant litigation from the dischargeability powers of the bankruptcy court. Interestingly, Defendants do not contest that the non-dischargeability of the settlement debt was a material and agreed-to term in the settlement. As part of the Term Sheet, the parties agreed that the statutory citation would be included in a formal written settlement agreement and a warrant to confess judgment to be prepared at a later date. Defendants agreed as part of the Term Sheet to act in good faith and execute the settlement agreement and warrant to confess judgment documents within 10 business days. Plaintiff asserts that the Defendants' refusal to execute

the documents is unreasonable, and the Term Sheet as written must be enforced in order to ensure that the settlement debt is subject to the full breadth of the parties' agreement as to non-dischargeability. Plaintiff contends that, as the only applicable subsection is the one cited in the Term Sheet, Defendants' position renders meaningless their agreement to the bankruptcy provisions, which were clearly acknowledged as material and mandatory to Horizon's global agreement to resolve and dismiss its claims.

Plaintiff asserts that the law does not support the Defendants' unreasonable attempt to renege on the defined and material terms agreed to by the parties. A settlement is a contract and that contract will be enforced under our Court's jurisprudence, particularly where the defaulting party's agreement is evidenced by a defined and specifically negotiated listing of material terms that was contemporaneously affirmed under oath on the record before the Court. According to the Plaintiff, the law abhors this type of fast and loose conduct, which runs directly counter to our State's strong public policy favoring settlements and finality of litigation.

Accordingly, Plaintiff advocates that this Court should uphold and enforce the settlement reached by the parties, as set forth in the settlement agreement drafted by Horizon, and order the execution of all necessary paperwork on the Defendants' behalf in she continues in her refusal. Horizon further seeks an award of attorney's fees for time spent in dealing with what Plaintiff characterizes as the Defendants' unreasonable position and in moving to enforce this

settlement Agreement. The parties' Term Sheet specifically provided that Horizon would be entitled to seek its reasonable fees upon Defendants' default, which includes the default in providing the necessary executed documents to effectuate the bankruptcy and confession of judgment provisions. If granted, Horizon indicates that it will submit a certification in support of its request for fees.

III. SUMMARY OF DEFENDANTS' POSITION

Defendants indicate that the sole impediment to the Arsenis Defendants signing a settlement agreement is Plaintiff Horizon Blue Cross Blue Shield of New Jersey's ("Horizon") insistence that the agreement contain a provision that is void as against public policy. The Arsenis Defendants request that the Court strike the unenforceable terms from the settlement agreement (paragraphs 3.8 and 11.2(v)), proposed affidavit for confession of judgment (paragraphs 3, 4 and final sentence of paragraph 2), and confession of judgment so that this matter can be put to rest.

IV. PLAINTIFF'S STATEMENT OF FACTS

This matter arises from a Complaint filed by Horizon against Defendants alleging statutory and common law fraud, as well as other causes of action. The matter had been set for a firm trial date as of September 3, 2019. With the encouragement of the Court, the parties engaged in intensive settlement negotiations during the entire month of August.

On the morning of Friday, August 30, 2019, the last business day before the trial was to commence, counsel for Horizon, Patricia Lee, and counsel for Defendants,

Peter Katz, along with Ms. Arsenis and SLC's corporate counsel, Spyros Arsenis, appeared before this Court to place on the record Ms. Arsenis' confirmation under oath that she had voluntarily agreed to the material terms set forth on the Term Sheet that was the subject of negotiation and close involvement of the Court over several weeks. (See Certification of Patricia A. Lee ("Lee Cert."), Exhibit A (hereinafter, "Term Sheet")). On the record, all counsel acknowledged that they had received a copy of the Term Sheet from the Court's clerk, and that they acknowledged that the document represented the final agreed-to material terms on which Horizon agreed to release its substantial claims for fraud, among other claims, against Defendants. While it was indicated that the parties would be preparing a written agreement that may have some ancillary language that is typically included, the record was made clear that the terms as written on the Term Sheet were the material terms and that Ms. Arsenis had voluntarily agreed to them.

Notwithstanding this, nearly two weeks after that appearance, and in response to the draft written agreement promptly sent by Horizon, Defendants asserted through counsel that they would refuse to execute the written settlement agreement as well as documents in support of a warrant to confess judgment because the documents contained the bankruptcy subsection pertaining to the fraud exception for dischargeability. Plaintiff submits that the Defendants' refusal is unreasonable and a breach of the Term Sheet. Indeed, the Term Sheet set forth as a clear material term that Defendants agree that the debt owed to Horizon shall not be dischargeable in

bankruptcy pursuant to the specific subsection pertaining to fraud and further that Horizon shall be permitted to use any confidential information as necessary to assert its fraud exception rights. Plaintiff avers that this language was heavily negotiated, including with handwritten notations made before the recitation on the record at Court, and was not a clause that was left open for further negotiation.

Notably, the language at section 6(i) of the Term Sheet states:

> In the event Ms. Arsenis files for bankruptcy prior to payment in full of the obligation to Horizon, Ms. Arsenis agrees not to contest the non-dischargeability of any remaining settlement payment obligation owed to Horizon. Ms. Arsenis further agrees to provide Horizon with an executed and notarized statement, as part of the Confession of Judgment form; that Ms. Arsenis agrees not to contest Horizon's allegations so that a Confession of Judgment may be entered without the necessity of introducing evidence or the conduct of a trial. Ms. Arsenis agrees and intends that the judgment debt will be a non-dischargeable debt, pursuant to 11 U.S.C. § 523(a)(2) in the event of a bankruptcy, or in any similar proceeding. (Emphasis Added)

(See Lee Cert. Exhibit A). Also, the language at section 9(a) of the Term Sheet states:

> The parties warrant and agree that neither they nor anyone acting on their behalf will disclose the terms of this Agreement, or any information disclosed, discussed or produced with respect to the

settlement negotiation to any third party or any organization or entity. In addition, Horizon's Special Investigations Unit and its Legal Department, and Defendants, shall make no comment to any non-party commercial carrier (including Aetna) or governmental payer or agency, except as indicated herein, other than to refer to the public docket and that the matter was amicably settled. Notwithstanding the foregoing, the Parties hereto shall be permitted to disclose the terms of settlement: (i) to such of their officers, directors, employees, agents and representatives as need to know such Confidential Information in connection with their participation in the administration of this Settlement Agreement or matters related to this Settlement Agreement; (ii) to the extent required by applicable laws and regulations, by subpoena or similar legal process, or by court order; (iii) as reasonable to enforce the terms of this Settlement Agreement should that ever be necessary; (iv) to defend against any claim for enforcement of this Settlement Agreement brought against any party to this Settlement Agreement and/or prosecute a non-dischargeability complaint in bankruptcy court relating to the Defendants' settlement debt pursuant to 11 U.S.C. § 523 (a)(2); (v) to the extent such Confidential Information becomes publicly available other than as a result of a breach of this Settlement Agreement; (vi) to Horizon's self-funded customers, the State Health Benefits Program; the Federal Employee Program, or other Blue Plans that receive a distribution related to this settlement; (vii) to the Defendants' accountants or professionals for tax or other

> business purpose; (viii) to the extent the other party hereto shall have consented to such disclosure in writing. (Emphasis Added)

(Id.). Horizon has followed that agreed-to language in the drafts of the Settlement Agreement (see Lee Cert., Ex. B, paragraphs 3.8 and 11.2)[1], and the warrant to confess judgment and affidavit of Ms. Arsenis in support of same attached thereto.

At the meet and confer session between the parties, the Defendants indicate that they do not dispute that they agreed to waive any right to contest dischargeability or to submit any proofs to the bankruptcy court. They also did not dispute that the non-dischargeability of the debt was a material term to the settlement. Defendants only disputed the actual citation to the fraud exception. Defendants' proposed solution is to have Horizon or the Court select another provision from the bankruptcy code that would allow for non-dischargeability; however, the Plaintiff avers that the reality is that the fraud subsection is the only one that both applies and was made expressly part of the Term Sheet. Defendants have not pointed to any alternative provision in the code that would be applicable and only indicates that it is the Plaintiff's burden to find one.

---

[1] The Settlement Agreement includes the warrant to confess judgment documents as an attachment, as well as a listing of 8 current Horizon patients at Exhibit B and the proposed Stipulation of Dismissal at Exhibit C. These documents have all been accepted by Defendants, save for the bankruptcy code language.

Plaintiff argues that the Defendants have provided no reasonable basis to warrant disregarding the clear settlement terms reached through counsel, and which were further attested to on the record before the Court. Plaintiff also indicates that while there is no need to look beyond the Term Sheet, communications from the undersigned counsel leading up to the final agreement made clear that the bankruptcy dischargeability language was a material term. Mr. Katz was well aware of Horizon's position when he sent an email on the morning of August 28th saying that Horizon's last terms discussed were accepted by the Defendants, that there would be, no need for a trial, and asking Horizon to prepare the settlement agreement. (See Lee Cert., Exhibit D). Notably, in correspondence exchanged just two days before on August 26, 2019, the Plaintiff's counsel made clear that Horizon would not accept deletion of any material parts of the bankruptcy non-dischargeability language affecting Horizon's exception rights. (Id. at Exhibit C).

After the parties appeared before this Court on August 30, 2019, the case was marked as dismissed/ settled. (See Lee Cert, Exhibit E). Shortly thereafter, Defendants confirmed that they no longer were represented by Mr. Katz, and that all communications should be directed through Spyros Arsenis, Esq., the son of Ms. Arsenis. While the parties have attempted to meet and confer on several occasions, including with facilitation from the Court, Defendants, through their counsel, have refused to reconsider their position.

V. COURT'S DECISION

1. Regarding the Disputed Clauses in The Term Sheet Citing the Bankruptcy Code, and the corollary and consistent terms in the Written Settlement Agreement and Attachments, are Enforceable

a) General Statement of the Law

In New Jersey, "'settlement of litigation ranks high in our public policy.'" Pascarella v. Bruck, 190 N.J. Super. 118, 125 (App. Div. 1983) (citing Jannarone v. W.T. Co., 65 N.J. Super. 472, 476 (App. Div. 1961)). The policy of enforcing settlements comes from "'the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone,'" and thus courts "'strain to give effect to the terms of a settlement wherever possible.'" Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008) (citations omitted). Courts do not usually "inquire into the adequacy or inadequacy" of consideration in a settlement agreement. See Pascarella, 190 N.J. Super. at 125. Settlement agreements are contracts and are upheld pursuant to contract law, and should therefore be enforced unless there are compelling circumstances or fraud. See Brundage, 195 N.J. at 601 (citations omitted).

Specifically, "[w]here the parties agree upon the essential terms of a settlement, so that the mechanics can be 'fleshed out' in a writing to be thereafter executed, the settlement will be enforced

notwithstanding the fact the writing does not materialize because a party later reneges." Lahue v. Pio Costa, 263 N.J. Super. 575, 596 (App. Div. 1993). The party moving to enforce the settlement agreement has the burden of proving that the parties have entered into an agreement, and "a hearing is to be held to establish the facts unless the available competent evidence, considered in a light most favorable to the non-moving party, is insufficient to permit the judge, as a rational factfinder, to resolve the disputed factual issues in favor of the non-moving party." Amatuzzo v. Kozmiuk, 305 N.J. Super. 469, 474-475 (App. Div. 1997).

In Lahue v. Pio Costa, the Appellate Division enforced an oral settlement agreement regarding a variety of specific transactions and terms despite defendant's contention that the agreement was only the beginning of the settlement. See Lahue, 263 N.J. Super at 596. The parties had attempted to work out a settlement prior to trial, but ultimately came into court on the date of trial and continued negotiations. Id. at 581. Drafts of documents needed to effectuate the settlement had also been sent around prior to the date of trial. Id. at 583. On the trial date, the parties were not able to work out a settlement in court, but continued discussions later in the evening. See id. at 586-87. Plaintiff's counsel argued that, after speaking with defense counsel, he believed a settlement had been reached, and instructed the court of such. Id. at 587. Defendant later reneged on the purported agreement, and Plaintiff filed a motion to enforce the settlement, which was granted by the trial judge. See id. at 579. Defendant appealed and refused to execute

the documents necessary to effectuate the settlement. Id. Plaintiff successfully filed a motion to compel execution of the relevant documents, which Defendant appealed as well. Id. The Appellate Division heard the appeals and affirmed the decisions of the trial court. Id. The trial judge commented that the settlement discussions went on all afternoon and there had been a variety of settlement proposals. Id. at 593. Therefore, the trial judge found that the agreement that was arrived at on the evening of the trial date was a complete settlement agreement, despite defendant's contention that it was just the broad parameters of the settlement and more negotiations were necessary, Id. at 595-96. The Appellate Division noted that the parties had agreed to essential terms of the settlement, which should thus be enforced. Id. at 596-97.

Here, the terms in the Settlement Agreement were subject to extensive negotiations, and were ultimately agreed to and place on the record before this Court. The Court also confirmed the voluntariness of Ms. Arsenis' agreement to the terms as written on the Term Sheet at that time. It was addressed on the record that the terms were understood and agreed to as the material terms of the settlement, even if the parties needed to craft additional ancillary language. Those issues are clearly undisputed.

b) Defendants' Arguments[2]

In support of their position, the Defendants argue that the offending term in the settlement document is

[2] The Court has included the Defendants' arguments virtually verbatim for completeness of the record.

the purported waiver of the Arsenis Defendants" right to obtain a discharge in bankruptcy, which Plaintiff attempts to support by a citation to 11 U.S.C. §523(a)(2). The Defendants argue that even though she agreed to the term, and that the term was a material part of the party's settlement agreement, some courts have held that such provisions are void as against public policy, including the Court of Appeals for the Third Circuit. In support of that proposition, Defendants cite to the following cases, Cheripka v. Republic Ins. Co., 1991 U.S. App. LEXIS 30343 at *15 (3d Cir.) (holding that clause in a settlement agreement providing that a debt is non-dischargeable under 11 U.S.C. 523(a)(2) is void as against public policy), aff'd 1992 U.S. App. LEXIS 38449 (3d Cir.) (en banc). See also, Lichtenstein v. Barbanel, 2005 U.S. App. LEXIS 29479 at *468 (6th Cir.); In re: Nichollis, 2010 Bankr. LEXIS 4542 at *7 (Bankr. E.D.N.Y.) (same); In re: Cole, 226 B.R. 647, 652 (B.A.P. 9 Cir. 1998) (same); In re: Koehler, 2011 Bankr. LEXIS 3444 at *9 (Bankr. D.Neb.) (same); In re: Tooley, 2007 Bankr. LEXIS 1213 at 5-6 (Bankr. D.N.J.) (same, "state court did not have jurisdiction to determine non-dischargeability"); In re: Kroen, 280 B.R. 347, 352 (Bankr. D.N.J. 2002) (same). Defendants further offer that in In Re: Kline, the United States Bankruptcy Court for the Eastern District Pennsylvania, cited to the Third Circuit's opinion in Cheripka and held:

> To the contrary, the long-held, virtual reverence shown to a debtor's general discharge of debt requires the opposite conclusion no such waiver of the right to a discharge can be countenanced. I therefore reject Plaintiff's argument that, as a

> matter of public policy, Debtor's waiver of the discharge of Plaintiff's legal fees must be enforceable and should be enforced.

In Re: Kline, 520 B.R. 168,173 (Bankr. E.D. Pa. 2014).

In that same vein, the Defendants point out that the New Jersey Supreme Court re-affirmed the long-standing principal that courts cannot enforce a contract that violates public policy. Sun Life Assur. Co. v. Wells Fargo Bank, N.A., 238 N.J.157 (2019). The Arsenis Defendants respectively submit that this principal applies with particular force to the motion at hand because the Arsenis Defendants are resisting the unlawful contract provision and the Plaintiff is asking this Court to impose it over their objection.

The Defendants also contend that the Court need not invalidate the settlement in its entirety. Rather, Defendants propose that the Court can strike the unenforceable provisions while enforcing the remainder. Jacob v. Norris, McLaughlin & Marcus, 128 N.J. 10, 36 (1991); Cameron v. Int'l Alliance of Theatrical Stage Employees, 119 N.J. Eq. 557, 589 (E. & A. 1936); Jones v. Gabrielan, 52 N.J. Super. 563, 572 (App. Div. 1958) (striking portion of a contract that was void as against policy while enforcing the remainder).

In this matter, the Defendants contend that the Plaintiff loses nothing by striking a provision that it should have known is void while the parties retain the benefit of an otherwise unremarkable settlement.[3]

---

[3] The Defendants do not explain how the Plaintiff should have known it was void, yet the Defendants were not aware of that same principle.

The Defendants' position ignores the fact that the provision in issue was always a key component in its negotiations with the Defendants. Plaintiff indicates that it would not have even considered the settlement terms that were eventually agreed to unless they were assured that the Defendant was not able to contest dischargeability.

Notwithstanding the Plaintiff's position, the Defendants frame the issue by nothing that all parties agreed during the August 30, 2019 court conference that a written agreement incorporating additional non-material terms would follow. The Arsenis Defendants now argue, for the first time, that the terms providing that the debt is non-dischargeable could not have been material to Plaintiff, as the provision is void, unenforceable, and against public policy. Therefore, Defendants submit that assuming, arguendo, a settlement agreement was placed on the record during the August 30, 2019 court conference[4], the agreement does not, and as a matter of law and public policy cannot, include a waiver of non-dischargeability, whether premised on a citation to 11 U.S.C. §523(a)(2) or otherwise.

Defendants also argue that in addition to being void as against public policy, the citation to 11 U.S.C. §523(a)(2) is incompatible with the non-admission of liability provisions of the putative settlement agreement. Defendants point out that as is clear from the proposed confidential Settlement Agreement and Mutual Release (hereinafter, the Settlement

[4] Which it was

Agreement") drafted by Plaintiff's counsel, Horizon concurred with the Arsenis Defendants' denial of wrongdoing. In fact, Defendants contend that the Settlement Agreement contains an extensive non-admission of liability clause, providing:

> The Parties acknowledge and agree that this Agreement is being entered into, and the consideration is being paid, in full compromise and settlement of disputed claims for the purpose of avoiding further dispute, trouble, litigation and expense by each party. This Agreement and the settlement it represents does not constitute an admission by the Parties of any violation of any federal, state, or local law or duty whatsoever, whether based in statute, common law, or otherwise, or of any liability, and the Parties expressly deny any such violation or liability. Nothing in this Agreement, nor any act or omission relating thereto is or shall be considered an admission, concession, acknowledgement or determination of any alleged liability. Rather, this Agreement has been entered into without any admission, concession, acknowledgement or determination of any liability or non-liability whatsoever, and has no precedential or evidentiary value except in connection with enforcing the terms of this Agreement. The Parties further agree that no party shall be considered a "prevailing party" for any purpose, including for purposes of any fee-shifting or cost-shifting statute.

(Emphasis added)

Notwithstanding its citation to that provision, Defendants acknowledge, of course, that such non-admission of liability clauses are a routine part of settlement agreements. Indeed, most settlements would be impossible without them.

In their sur-reply, Defendants further assert (1) that they communicated the unacceptability of any settlement term referencing an admission to fraud, false pretenses, false representation, or actual fraud to counsel for Horizon prior to August 30, 2019 and (2) that Defendants have made no such admission.

c) Plaintiff's Position

Plaintiff contends that the Defendants have no reasonable basis to assert that they did not agree to the material terms of the settlement as stated in sections 6(i) and 9(a) of the Term Sheet regarding non-dischargeability of the debt. Plaintiff asserts that the argument that Defendants and their counsel were unaware that the specific bankruptcy citation correlated to the dischargeability exception for fraud is without merit. In fact, that the language can be called up with a simple Google search, Plaintiff's counsel has certified that she had explicit conversations on multiple occasions with Mr. Katz regarding the statutory citation correlating to the fraud exception. (See Lee Cert., ¶¶6-9). In fact, Plaintiff points out that earlier versions of the agreement contained the exact language from the statute written out in the bankruptcy section of the Term Sheet.

Specifically, the statutory language states that there is an exception to discharge in bankruptcy "for

money, property, services, or an extension, renewal, or refinancing credit, to the extent obtained by- (A) false pretense, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. . ." 11. U.S.C. § 523(a)(2). The original clause proposed as a material settlement term stated:

> Ms. Arsenis agrees and intends that the judgment debt will be a non-dischargeable debt, pursuant to 11 U.S.C. § 523(a)(2) in the event of a bankruptcy, or in any similar proceeding. Horizon retains the right to present evidence, including all discovery from this litigation, to establish in any bankruptcy proceeding that Ms. Arsenis's settlement debt arose out of false pretenses, a false representation and/or actual fraud, thereby rendering the debt non-dischargeable

(See Lee Cert. ¶7). However, it was agreed to replace the language in the Term Sheet with the statutory citation as a compromise. (Id. at ¶¶7-9 and Exhibit A). Notably, at the courthouse on August 30th, the parties also agreed to add a second reference to that same bankruptcy citation within the confidentiality clause. (Id. at Exhibit A, ¶9(a)). Mr. Katz initially confirmed Defendants' understanding and acceptance of the final document, and later Ms. Arsenis agreed to each of these clauses when she attested to her voluntary and knowing entry in the settlement agreement on the record. The parties acknowledged that they still had to work out some ancillary language does not excuse Ms. Arsenis from being bound to the material terms as

agreed to on the record before this Court. The ancillary language that has been added has not presented any issues or disputes between the parties that are before the Court in this Motion.

Those facts are undisputed.

For those reasons, Plaintiff submits that the Court should enforce sections 6(i) and 9(a) of the Term Sheet as written, and compel compliance with the requirements of the Term Sheet including the execution of all necessary documents.

In its reply, Plaintiff further asserts that (1) Defendants concede the voluntariness and materiality of the dischargeability terms of the Settlement Term Sheet and fail to properly raise a claim for severability of the dischargeability terms and that (2) Defendants' public policy defense is within the exclusive jurisdiction of the bankruptcy courts and that fraud as a basis for a settlement debt can be considered in a non-dischargeability action.

d) Courts Analysis and Decision

There can be no dispute in this case that as part of the settlement agreement made between the parties that the parties agreed to the terms stated in sections 6(1) and 9(a) of the Term Sheet. Those terms addressed the party's agreement regarding the dischargeability of the debt. There can be no plausible argument that the Defendants were not aware of those terms or that those terms were not material terms. In fact, those terms were material terms during the entire settlement negotiations as well as the settlement terms that were placed on the record before the Court.

It is also uncontradicted that even earlier versions of the agreement contained the exact language from the statute written out in the bankruptcy section of the Term Sheet.

Specifically, the statutory language states that there is an exception to discharge in bankruptcy "for money, property, services, or an extension, renewal, or refinancing credit, to the extent obtained by- (A) false pretense, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. . ." 11. U.S.C. § 523(a)(2). The original clause proposed as a material settlement term stated:

> Ms. Arsenis agrees and intends that the judgment debt will be a non-dischargeable debt, pursuant to 11 U.S.C. § 523(a)(2) in the event of a bankruptcy, or in any similar proceeding. Horizon retains the right to present evidence, including all discovery from this litigation, to establish in any bankruptcy proceeding that Ms. Arsenis's settlement debt arose out of false pretenses, a false representation and/or actual fraud, thereby rendering the debt non-dischargeable

(See Lee Cert. ¶7). However, it was agreed to replace the language in the Term Sheet with the statutory citation as a compromise. (Id. at ¶¶7-9 and Exhibit A). Notably, at the courthouse on August 30th, the parties also agreed to add a second reference to that same bankruptcy citation within the confidentiality clause. (Id. at Exhibit A, ¶ 9(a)). Mr, Katz initially confirmed Defendants' understanding and acceptance of the final

document, and later Ms. Arsenis agreed to each of these clauses when she attested to her voluntary and knowing entry in the settlement agreement on the record. The parties acknowledged that they still had to work out some ancillary language does not excuse Ms. Arsenis from being bound to the material terms as agreed to on the record before this Court. The ancillary language that has been added has not presented any issues or disputes between the parties that are before the Court in this Motion.

Those facts are undisputed.

(i) Defendants do not dispute the material terms

Based upon the Defendants' response, it can be said that there is no dispute that as part of the material terms, Defendants agreed, by virtue of the specific language cited in the bankruptcy code § 523(a)(2), that the settlement debt was properly characterized as one that arose out of Horizon's claims based on Defendants' fraudulent conduct. Defendants' crafty wordsmithing to avoid their agreement should not prevail, as it was clear from the parties' negotiated terms, after extensive exchanges amongst counsel and the Court, that there be no confusion down the road that the settlement debt arose from Horizon's claims for fraud which were asserted in the state court action. What Defendants are apparently seeking now is to renege on their express and voluntary agreement, and have this Court make a premature ruling with respect to how a Bankruptcy Court may view the parties' agreement to characterize the debt as one arising from Horizon's fraud claims.

Defendants have apparently abandoned their prior claim that there was no voluntary agreement by Defendants to the provisions in the Settlement Term Sheet; specifically the clauses referencing their agreement that the debt owed to Horizon arose from claims that fall within the fraud exception for dischargeability under the Bankruptcy Code. In doing so, Defendants have failed to contest the key arguments made in Horizon's brief in support of its Motion to Enforce Settlement. Specifically, Defendants have not opposed Horizon's arguments that: (a) the settlement Term Sheet and draft written agreement contained the material terms of the settlement; (b) Defendants' agreed to these terms voluntarily and with adequate representation of counsel; and (c) this Court has the power to exercise injunctive and equitable power to appoint an agent to execute the documents on behalf of Ms. Arsenis.[5]

Given the detailed history of the negotiations and post-settlement conferences, new defense counsel's assertions made with no factual certification or cross-motion can hardly surmount the overwhelming evidence that Defendants voluntarily agreed to the language at issue after ample opportunity to consult with counsel and to be heard by the Court. In fact, Defendants' then counsel had conversations on multiple occasions with regards to the statutory citation; and earlier versions of the agreement had the exact language from the statute written out in the

[5] The Defendants do dispute that there should be an award of counsel fees and costs since they believe that their legal arguments will be prevailing.

bankruptcy section of the Term Sheet. Because Defendants did not supply Plaintiffs' counsel or the Court with a copy of the transcript from the proceeding on August 30, 2019, they presumably have conceded that same would not have furthered their interests in abandoning their express agreement to the material terms negotiated at length and with the assistance of competent counsel and the Court. The understanding and voluntary entry into the Settlement Agreement, which acknowledged that the settlement debt arose out of Horizon's fraud claims, was confirmed by Ms. Arsenis.

Where Defendants essentially concede that the terms are material, they cannot now avoid the terms of the settlement while maintaining the remainder of the parties' agreement. Procedurally, Defendants cannot defeat Horizon's motion where they have filed no affirmative motion for relief establishing a basis to avoid the settlement agreement. Moreover, contrary to Defendants' arguments, the Term Sheet as agreed upon by the parties does not contain a severability provision. Nor does the draft written Settlement Agreement. Courts have refused to vacate settlement agreements absent compelling circumstances or fraud, and absent "clear and convincing proof" that an agreement should be vacated. Nolan v. Lee Ho, 120 N.J. 465, 472 (1990). Defendants have not alleged that there was fraud or any other compelling circumstance here that would warrant the vacating of the Settlement Agreement. (See Lee Reply Cert. ¶3).

(ii) Did the Plaintiff engage in conduct to hold the Defendants "in terrorem" so as to dissuade them from filing for Bankruptcy?

Horizon, argues that to the contrary, the parties' negotiations contemplated that should Defendants file for bankruptcy prior to making full payment of the settlement debt, Horizon would be entitled to file a non-dischargeability complaint. When filing such a complaint, the parties agreed that Horizon would be able to present all proofs - including confidential discovery from this action - to meet its burden to show dischargeability. As Defendants no longer contest the voluntariness of their agreement to the nature of the debt as falling within the bankruptcy exception for fraud, such terms will be given whatever consideration is necessary depending on the arguments raised by the parties at that time.

(iii) Does the Parties' settlement terms call for a Consent Judgment to be entered by this Court on the issue of "dischargeability"?

It is settled law that the United States Bankruptcy Court has exclusive jurisdiction to determine dischargeability of debts under § 523(a)(2). See Mattson v. Hawkins (In re Hawkins), 231 B.R. 222, 231 (D.N.J. 1999); In re GEO Specialty Chems., Ltd., 577 B.R. 142, 180 (Bankr. D.N.J. 2017); Graham v. IRS (In re Graham); 973 F.2d 1089, 1096 (3d Cir. 1992). Congress intended to allow the relevant dischargeability determination (i.e., whether a debt arose out of fraud) to take place in the Bankruptcy

Court, not to force it to occur earlier in state court at a time when nondischargeability concerns are not directly in issue and neither party has a full incentive to litigate them. See Brown v. Felsen, 442 U.S. 127, 134 (1979).

The dischargeability of a debt in bankruptcy where the debtor may have committed fraud but the alleged fraud claim has been settled before the debtor's bankruptcy filing is an open question of a Bankruptcy Court to decide. The United States Supreme Court has concluded that a Bankruptcy Court can look behind a settlement agreement to the underlying facts to determine whether the original debt was obtained by fraud and whether that original fraud so infects the debt as settled as to render it nondischargeable. See id. at 138-39 (holding that "the bankruptcy court is not confined to a review of the judgment and record in the prior state-court proceedings when considering the dischargeability of respondent's debt."); Archer v. Warner, 538 U.S. 314, 321-23 (2003) (holding that the reasoning of Brown applies equally to cases where the parties resolve their dispute by way of a settlement agreement rather than awaiting a judgment from the state court); see also Sukola v. Nader, 2012 Bankr. LEXIS 2067, 2012 WL 1614856, at *3 (Bankr. D.N.J. May 9, 2012) (Lee Reply Cert. Ex. A) ("[T]he doctrine of claim preclusion does not prevent a bankruptcy court from looking outside the record of a state court proceeding and subsequent documents involved in a settlement agreement to determine whether a debt was obtained by fraud") (citing Brown and Archer)); Hodges v. Buzzeo, 365 B.R. 578, 583 (Bankr. W.D.Pa. 2007) (holding that the creditor and debtor's settlement

agreement did not preclude examination into the underlying facts to determine whether Plaintiffs' claims are nondischargeable, and that the underlying facts reflect that the obligation arises from common law fraud).

Archer v. Warner settled a circuit split regarding the treatment of settlement agreements in nondischargeability proceedings. 538 U.S. at 318-19. The Archers sued the Warners for fraud in connection with the sale of a manufacturing company. Id. at 317. The parties settled the lawsuit for $300,000 payable from the Warners to the Archers. Id. In exchange, the Archers released the Warners from "any and every right, claim, or demand," presently held or that might later accrue. Id. The Warners paid $200,000 and executed a promissory note for the balance of $100,000. Id. When the Warners failed to make the first payment on the promissory note; the Archers filed a lawsuit in state court. Id. at 317-18. The Warners subsequently filed a chapter 7 bankruptcy petition. Id. at 318. The Archers filed a complaint for nondischargeability of the debt on the promissory note under § 523(a)(2)(A). Id. The bankruptcy court ruled that the settled debt was dischargeable, and the Fourth Circuit affirmed. Id. The matter was appealed to the Supreme Court. Id.

At the Supreme Court, the majority of the Justices agreed with the Fourth Circuit that the settlement debt was the "only . . . relevant debt." Id. at 319. However, they went on to hold that the settlement debt could "also amount to a debt for *money obtained by fraud*." Id. at 318-19 (emphasis in original). The Fourth Circuit had relied on a "novation theory" to conclude

that the settlement debt entirely replaced the original debt. Id. at 318. While stating that the Archers' settlement agreement "may have worked a kind of novation," the Supreme Court ultimately determined that, "[a]s a matter of logic, . . . the Fourth Circuit's novation theory cannot be right," relying on the earlier decision in Brown v. Felsen. Id. at 320, 323.

The Archer court explained that the factual circumstances in Brown were the following:

> (1) Brown sued Felsen in state court seeking money that (Brown said) Felsen had obtained through fraud; (2) the state court entered a consent decree embodying a stipulation providing that Felsen would pay Brown a certain amount; (3) neither the decree nor the stipulation indicated the payment was for fraud; (4) Felsen did not pay; (5) Felsen entered bankruptcy; and (6) Brown asked the Bankruptcy Court to look behind the decree and stipulation and to hold that the debt was nondischargeable because it was a debt for money obtained by fraud.

Id. at 319 (citing Brown, 442 U.S. at 128-29). In Brown, as in Archer, the Supreme Court confronted a split among the circuits. Id. The issue was whether res judicata, i.e., claim preclusion, prevented bankruptcy courts in exception to discharge litigation from looking behind a settlement incorporated in a state court judgment "to uncover the nature of the claim" that led to the entry of the subject judgment. Id. The Supreme Court unanimously held that "[c]laim preclusion did not prevent the Bankruptcy Court from looking beyond

the record of the state-court proceeding and the documents that terminated that proceeding. . . in order to decide whether the debt at issue. . . was a debt for money obtained by fraud." Id. at 320 (citing Brown, 442 U.S. at 138-39). Accordingly, where a complaint for dischargeability is filed, the proper form to deal with any arguments over the settlement agreement terms and their impact on dischargeability is before the Bankruptcy Court, which clearly has the ability to look past the record and consider all evidence so that it can make an independent determination as to the proofs underlying Horizon's fraud claims.

For those reasons, the Court will enforce sections 6(i) and 9(a) of the Term Sheet as written, and compel compliance with the requirements of the Term Sheet including the execution of all necessary documents.

The agreement between the parties is not conclusive as to the dischargeability or non-dischargeability of the debt. That determination is within the province of the Bankruptcy Court. In fact, all of the cases cited by the Defendants are Bankruptcy Court decisions that addressed that issue in the context of the facts of those cases.

That same principle applies here. In the settlement, Defendants have agreed not to context dischargeability. Defendants have also agreed to execute a Confession of Judgment in a form that memorializes the settlement agreement. Lastly, Defendants have agreed that the judgment will be non-dischargeable pursuant to 11 U.S.C. §523(a)(2) in the event of a bankruptcy. The non-dischargeability of the debt is not determined by the agreement between the parties, but instead by the

Bankruptcy Court itself if it finds that the Plaintiff has offered the requisite proofs. Defendants have not agreed to have the judgment be non-dischargeable since that determination is within the province of the Court. The Defendants have only agreed – as they may – that, they have expressed their intention that the debt be non-dischargeable. The party's agreement as to that issue does not violate public policy in this Court's view. In any event, that determination is ultimately up to the Bankruptcy Court if and when it ever has to address the issue

> *(iv) Does the Defendants' policy arguments also fail because the parties' agreement contained language permitting Horizon to present proof of fraud before the Bankruptcy Court so that it cannot be said to be any usurpation of the Bankruptcy Court's power to the ultimate decision make as to dischargeability?*

The Court also finds that Defendants have not established that the material terms are against public policy insofar as they allow Horizon to preserve its argument that the debt arose from its fraud claims and to retain the right to present all confidential and non-confidential proofs from this action if and when necessary in a future bankruptcy proceeding to establish that the Defendants' conduct underlying those claims constitutes "false pretenses, a false representation, or actual fraud" pursuant to § 523(a)(2)(A). The Settlement Term Sheet reflects the

parties' agreement that Horizon shall be permitted to present its fraud proofs unchallenged by Defendants that the settlement debt is nondischargeable under 11 U.S.C. §§ 523(a)(2)(A). While the parties cannot obligate the Bankruptcy Court to accept the parties' stipulation of nondischargeability as sole evidence that the debt arises from fraud, at the same time the stipulation makes it clear that the debt is tied to the specific bankruptcy exception for fraud by explicitly citing to § 523(a)(2)(A) in two separate sections of the Term Sheet. There can be no question that Horizon's original claims underlying the Settlement Agreement sounded in fraud, nor can there now be any argument that the parties' agreement was silent with respect to categorizing the debt as falling within the scope of the fraud exception. The net effect of the parties' agreement is that Horizon shall be unencumbered in its obligation and ability to demonstrate to the Bankruptcy Court that the debt memorialized in the Settlement Agreement arose from fraud, and thus is nondischargeable under § 523(a)(2)(A).

In moving to enforce the Agreement, and require the execution of the required papers, Horizon was not asking that this Court rule on how a future Bankruptcy Court will address the parties' agreement, and nor should the Court do so. The case law cited by Defendants in their Opposition also does not support such action by the Court. These authorities emanating out of the Bankruptcy Courts only serve to bolster Horizon's argument that it is the Bankruptcy Court that needs to address any arguments if and when the issue becomes ripe. The decisions also support a legal holding that Horizon does not dispute; namely, that the

Bankruptcy Court must make a determination regarding the dischargeability of a 11 U.S.C.S. § 523(a)(2) claim not withstanding a state court pre-petition agreement that the settlement debt is one that falls within the enumerated exception.[6] Horizon does not intend to rely solely on the settlement terms as its affirmative proof of fraud - rather, there is ample evidence from this lawsuit that will serve as proof of each element of the fraud requirements, including confidential information which the parties agreed that Horizon may use without any contest by Defendants. Thus, this Court finds that there is no reason for this Court to prematurely rule on what force and effect any stipulation by the parties will have ultimately on dischargeability of the settlement debt, particularly where there is no claim asserted by Horizon that the stipulation will preclude the Bankruptcy Court from any independent fact finding.

For those reasons, the Court finds that the Plaintiffs Motion to have the settlement agreement, including the disputed clauses in the Term Sheet that cite the Bankruptcy Code and the corollary and consistent terms in the written settlement agreement are enforceable.

---

[6] Defendants also impermissibly rely on cases that are from non-binding jurisdictions and/or unpublished. The main unpublished case cited, Cheripka v. Republic Ins. Co. (In re Cheripka), No. 91-3249, 1991 U.S. App. LEXIS 30343 (3d Cir. Dec. 31, 1991), was actually vacated, 1992 U.S. App, LEXIS 898, No. 91- 3249 (3d Cir. Jan. 22, 1992), and then affirmed by an equally divided court en banc without opinion, No. 91-3249 (3d Cir. Feb. 24, 1992).

2. Can and should the Court use its Broad and Discretionary Power to Afford Horizon Equitable and Injunctive Relief to Ensure that the Settlement is Enforced?

Rule 4:59-2(a) of the New Jersey Court Rules provides,

> If a judgment or order directs a party to perform a specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of such defaulting party by some other person appointed by the court, and the act when so done shall have like effect as if done by the defaulting party.

Rule 1:10-3 also allows a litigant to seek relief, and allows for the court to award attorney's fees in its discretion when a party is granted relief under the Rule. Relief under Rule 1:10-3 can be granted without a showing of "an intention to disobey" or "willful disobedience" which would be otherwise necessary to find civil contempt. In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 17 (2015) (citing Lusardi v. Cutris Point Prop. Owners Ass'n, 138 N.J. Super. 44, 49 (App. Div. 1975), and N.J. Dep't of Health v. Roselle, 34 N.J. 331, 347 (1961)). More specifically, courts have compelled signing of other documents relevant to a settlement agreement, and have even appointed "special court agents" to sign documents on behalf of another person. See Delaney v. Dykstra, Nos. A-1115-16T2, A-3246-16T2, A-5523-17T1, 2019 N.J. Super. Unpub. LEXIS 1765 (App. Div. Aug. 12, 2019) (upholding the lower court's appointment of a special court agent to sign

documents required for the settlement to go forward) (Lee Cert., Exhibit F); see generally Perez v. Tapanes, 2019 N.J. Super. Unpub. LEXIS 1187 (App. Div. May 23, 2019) (upholding the lower court's decision to enforce the settlement agreement and compel defendant to sign a QDRO) (Lee Cert., Exhibit G); but see Williamson v. Boehringer-Ingelheim Pharm., Inc., No. A-6291-10T1, 2012 N.J. Super. Unpub. LEXIS 523 (App. Div. Mar. 12, 2012) (upholding settlement agreement but vacating the provision compelling plaintiff to sign an Agreement and Release because the lower court did not analyze whether the provision of the Agreement and Release exceeded the scope of the settlement) (Lee Cert., Exhibit H). Alternatively, judgment can be deemed self-executing. Roselin v. Roselin, 208 N.J. Super. 612, 618 (App. Div. 1986). According to the New Jersey Constitution,

> Subject to rules of the Supreme Court, the Law Division and the Chancery Division shall each exercise the powers and functions of the other division when the ends of justice so require, and legal and equitable relief shall be granted in any cause so that all matters in controversy between the parties may be completely determined.

N.J. Const., art. VI, § 3, Para 4. See also Ward v. Merrimack Mut. Fire Ins. Co., 312 N.J. Super. 162, 169-170 (App. Div. 1998) ("[T]he rule granting a Chancery Division judge ancillary jurisdiction over legal matters is equally applicable to a Law Division judge to adjudicate ancillary equity matters.").

Here, the Defendants and Ms. Arsenis have refused to sign the Settlement Agreement and the warrant to

confess judgment and affidavit in support of same. The warrant to confess judgment documents are material and necessary part of the agreed-to settlement terms. In fact, the written term sheet here is detailed and explicit and evidences that extensive negotiations occurred between the parties' counsel on the phrasing of the subject provisions. There is no reasonable debate that Ms. Arsenis was given the opportunity to review the final terms, to consult with both Mr. Katz and Mr. Spyros as her and SLC's counsel, and to make any objections to the terms during the questioning on the record before this Court.[7] The facts all lead to the conclusion that the language was knowingly and voluntarily agreed upon.

In fact, this Court concluded as such when the matter was placed on the record before the Court. Regardless of Ms. Arsenis' intentions in refusing to sign the documents and thereby effectuate the settlement, Horizon submits that it should be able to enforce the settlement and be awarded the relief sought. For those reasons, the Plaintiff requests that if Ms. Arsenis refused to abide by the Court's Order to enforce the settlement agreement and to sign the necessary documents that this Court appoint an agent or proxy to sign the Settlement Agreement and warrant to confess judgment documents (attached as Exhibit B to the Lee Certification), including the warrant to confess judgment, on behalf of Ms. Arsenis should she fail to execute and deliver same within 7 days.

---

[7] Both Mr. Arsenis and Mr. Katz were present in Court with Ms. Arsenis when the settlement was placed on the record.

Alternatively, Horizon proposes that the documents should be deemed self-executing upon Ms. Arsenis' failure to sign within 7 days, as specified in the proposed form of Order.

The Court agrees that if the Defendants do not affix their signatures on the settlement agreement by November 21, 2019 the Court will appoint her son Spyros Arsenis to execute the documents on her behalf. In fact, the Court will order that the documents be signed by Mrs. Arsenis, or if she fails to do so, by her son.

3. Should the Court Award Horizon its Reasonable Attorneys' Fees and Costs?

Plaintiff reminds the Court that the Term Sheet at section 11(b) provided that "Horizon shall be entitled to seek recovery of its reasonable attorneys' fees and costs incurred as a result of Defendants' default under the agreement." Further, Rule 1:10-3 allows for an award of fees and costs to the successful movant. Considering that Horizon had negotiated for the execution in good faith of the written settlement agreement and all required documents within 10 business days from the confirmation of the terms on the record on August 30, 2019. Horizon therefore seeks an Order allowing it to recover reasonable fees and costs upon submission of its counsel's certification detailing the fees and costs incurred to enforce the Settlement, to be submitted within 10 days or such other deadline set by the Court.

The Court will reserve on the issue of fees until such time as the settlement agreement and related documents are signed by the Defendants. Since the

Court has set a deadline to November 21, 2019 for the Defendants to sign the documents, Plaintiff's counsel will advise the Court on November 22, 2019 if the documents are signed or not. At that time, the Court will consider whether to issue a fee award.

CONCLUSION

For the reasons set forth in the Court's opinion, Plaintiff's to enforce the Settlement which sets forth relief to ensure the Settlement documents are executed and that Horizon may recover its reasonable fees and costs incurring in the enforcement of its rights is GRANTED.