No. 22-CV-0524

DISTRICT OF COLUMBIA COURT OF APPEALS

ANDRE BROWN,

Appellant,

v.

TROY CAPITAL, LLC, *et al.*,

Appellees.

ON APPEAL FROM THE SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA (CIVIL DIVISION)
2017 CA 007634 C

RESPONSIVE BRIEF OF APPELLEE PROTAS, SPIVOK & COLLINS, LLC

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PARTICIPANT LIST PURSUANT TO RULE 28(a)(2)(A)

Pursuant to Rule 28(a)(2)(A) of the Rules of the District of Columbia Court of Appeals, the following is a list of all parties and counsel in the trial and appellate proceedings:

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULES 26.1(a) AND 28(a)(2)(B)

Pursuant to Rules 26.1(a) and 28(a)(2)(B), Appellee Protas, Spivok & Collins, LLC certifies that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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[1] Authorities upon which we chiefly rely are marked with asterisks.

JURISDICTIONAL STATEMENT PURSUANT TO RULE 28(a)(5)

On remand the Superior Court held the Arbitration Clause is applicable and binding on the parties to this appeal. Supp. App. 00471, 475. This Court has recognized, that "under circumstances where a consumer is claiming that the arbitration clause in a contract of adhesion is unconscionable, the (alleged) injury is serious enough" so that this Court has jurisdiction to consider an appeal under D.C. Code § 11-721(a)(2)(A). *Andrew v. Am. Imp. Ctr.*, 110 A.3d 626, 636 (D.C. 2015). Accordingly, this Court has jurisdiction over this appeal.

COUNTER-STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. This appeal is limited. On February 18, 2022, this Court vacated in part and remanded for further proceedings to determine whether Troy and Protas are assignees of the Arbitration Clause and, if so, to address the issues of waiver and unconscionability. After holding an evidentiary hearing, did the Superior Court properly conclude that Troy and Protas established that they were the assignees of Mr. Brown's account, a valid Arbitration Clause existed, and then committed the remaining questions of waiver and unconscionability to an arbitrator, consistent with this Court's recognition?

2. This Court also ordered that on remand the Superior Court should clarify which, if any, of Mr. Brown's Class Counterclaims are stayed pending arbitration. On July 6, 2022, did the Superior Court correctly resolve the Arbitration Clause is applicable and Mr. Brown's Class Counterclaims are stayed?

STATEMENT OF THE CASE[2]

On November 13, 2017, Protas, as counsel of record for Troy, filed a Complaint against Mr. Brown in the Civil Division of the Superior Court of the District of Columbia to collect a deficiency balance of $12,975.47 that Mr. Brown owed from a May 21, 2011, Retail Installment Contract for the purchase of a vehicle ("the Contract"). Supp. App. 00010-18.[3] On April 24, 2018, Mr. Brown filed Class Counterclaims for Damages and for Incidental Relief against Protas and Troy. JA 63-85. On May 25, 2018, Mr. Brown filed a Motion to Amend Counterclaims and for Leave to Add Third-Party Defendants. Supp. App. 00019-59.

Protas filed a Motion to Dismiss Counterclaims and Compel Arbitration on June 4, 2018. Supp. App. 00060-68. On June 5, 2018, Troy filed a Motion to Compel Arbitration and Stay Proceedings. Supp. App. 00069-77. On June 22, 2018, the Superior Court granted Mr. Brown's Motion to Amend Counterclaims orally during a status hearing. Supp. App. 00127. Also during the June 22, 2018, hearing, the Superior Court orally granted both Protas' and Troy's Motions to Compel

[2] In Mr. Brown's 83-page Brief there is no Statement of the Case section as required by Rule 28(a)(7).

[3] References to the Appellees' Supplemental Appendix filed on November 17, 2022, concurrently with a Partial Consent Motion for Leave are abbreviated "Supp. App." References to the Joint Appendix filed by Mr. Brown on October 18, 2022, are abbreviated "JA." Troy and Protas were required to file their own Appellee Supplemental Appendix because Mr. Brown, through counsel, refused to include parts designated by Troy and Protas in the Joint Appendix. Supp. App. 00512-31.

Arbitration and stayed the proceeding. Supp. App. 00139. The Superior Court also issued a written order granting Troy's Motion to Compel Arbitration and Stay Proceedings on June 22, 2018. JA 283.

On July 20, 2018, Mr. Brown filed a Notice of Appeal to this Court. Supp. App. 00006. The Brown Appeal I was styled as *Brown v. Troy Capital, LLC, et al.*; No. 18-CV-797 ("the Brown Appeal I"). On February 18, 2022, this Court issued its Memorandum Opinion and Judgment which resolved the Brown Appeal I ("the Remand Order"). *Brown v. Troy Capital, LLC, et al.*; No. 18-CV-797, Mem. Op. & J. (D.C. Feb. 18, 2022).

The Remand Order set forth "[w]e vacate in part and remand for further proceedings to determine whether the arbitration agreement applies to this dispute and, if it does, whether the agreement is unconscionable." *Id*. at 2. Specifically, this Court remanded for the Superior Court to make further findings regarding: (1) whether Troy and Protas are assignees of the arbitration agreement between Mr. Brown and First Investors Servicing Corporation ("FISC"); (2) if Troy established that it was the assignee of Mr. Brown's account and that there was an arbitration agreement between Troy and Mr. Brown, this Court directed the Superior Court to indicate whether it is committing the question of waiver by litigation to the arbitrator; and (3) if the Superior Court determined on remand that the arbitration rights were validly assigned and that further court proceedings are appropriate, it

should hold an evidentiary hearing to resolve the factual issues for the resolution of Mr. Brown's unconscionability claim. *Id*. at 8-9, 13, *and* 14. This Court expressly authorized the Superior Court to delegate the resolution of the issues of waiver and unconscionability to an arbitrator. *Brown v. Troy Capital, LLC, et al.*; No. 18-CV-797, Mem. Op. & J. at 8 *and* 10 at n.9 (D.C. Feb. 18, 2022).

The Superior Court conducted a scheduling conference on April 22, 2022, and scheduled a date for a hearing for a substantive discussion on the Remand Order. Supp. App. 00164-172. Additionally, the Superior Court set a briefing schedule for the filing of written explanations of the issues on remand. Supp. App. 00169-170.

Mr. Brown failed to disclose to this Court, and failed in to include in his Joint Appendix despite the request of Troy and Protas, that the Superior Court had extensive briefing submitted by all parties before the two hearings for oral argument regarding the issues on remand. Specifically, as requested by the Superior Court, the parties each submitted briefs regarding the issues on remand and each party filed a responsive brief to the arguments raised by the other parties. Supp. App. 00189-205 (Mr. Brown's Explanation of Path Forward as Fixed by the Court of Appeals February 18, 2022 Remand Order and Exhibit); Supp. App. 00206-16 (Protas' Brief Regarding Issues on Remand and Exhibit); Supp. App. 00217-81 (Troy's Brief Regarding Issues on Remand and Exhibits); Supp. App. 00301-29 (Mr. Brown's Response to Troy and Protas' Proposed Remand Path); Supp. App. 00330-39

(Troy's Response to Andre Brown's Explanation of Path Forward); *and* Supp. App. 00340-48 (Protas' Response to Andre Brown's Explanation of Path Forward). Then, the Superior Court conducted hearings on June 29, 2022, and July 6, 2022. Supp. App. 00367-84 *and* Supp. App. 00463-79.

Pursuant to this Court's directive on remand as set forth in the Remand Order, which the Superior Court tracked as it was read into the record, the Superior Court resolved the following in the July 6, 2022, hearing: (1) "there is an arbitration agreement that is binding between the parties here" (Supp. App. 00471); (2) the arbitrator will address the question of waiver (Supp. App. 00476); and (3) the arbitrator will address the issue of unconscionability (Supp. App. 00476). The Superior Court also stayed the case and set a status hearing to monitor the progress with arbitration. Supp. App. 00476. Mr. Brown did not proceed with arbitration. Instead, on July 11, 2022, Mr. Brown filed a Notice of Appeal which commenced the instant, second appeal. Supp. App. 00480-511.

COUNTER-STATEMENT OF THE FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

The scope of this appeal is limited. This case was previously on appeal before this Court in the Brown Appeal I. The Brown Appeal I was resolved with the Remand Order which directed the Superior Court to make further findings on three limited topics: whether Troy and Protas are assignees of the Arbitration Clause

between Mr. Brown and FISC, whether there was waiver by litigation, and whether the arbitration agreement is unconscionable. *Brown v. Troy Capital, LLC, et al.*; No. 18-CV-797, Mem. Op. & J. at 13-14 (D.C. Feb. 18, 2022). This Court also provided the Superior Court with the option to refer the questions of waiver and unconscionability to the arbitrator. *Id*. at 8 *and* 10 at n.9. The Superior Court accepted this Court's option and referred the questions of waiver and unconscionability to the arbitrator. Supp. App. 00475-76. Thus, the facts relevant to the issues submitted for review in this appeal are limited to the applicability of the Arbitration Clause to Troy, Protas, and Mr. Brown and the assignment of Mr. Brown's account to Troy.

Mr. Brown executed the Contract with First Investors Financial Services ("FIFS") to finance his purchase of a Hyundai Azera. Supp. App. 00145-48. Mr. Brown executed two identical Applications for Payment Extensions on his vehicle loan with FISC, one on February 7, 2012, and another on October 29, 2012. Supp. App. 00154-57 *and* Supp. App. 00159-62. The Applications for Payment Extension both provide:

> I/we understand that if this Application for Payment Extension is approved, the following terms and conditions shall apply:
>
> AGREEMENT: As indicated herein, "Customer" mean the customer(s) named above and "Contract" means that certain credit agreement serviced by First Investors

> Corporation ("FISC") for the above-referenced Account Number, and any related security interest, dated 5/21/2011. FISC is the duly authorized servicer of the Contract and has authorization to enter into this Agreement. Customer has submitted an Application for Payment Extension and has authorized FISC to extend the due date on the Contract by 1 month(s). Pursuant to Customer's request, FISC hereby agrees to amend the Contract and grant a payment extension for the above referenced account as follows….
>
> By signing the Application for Payment Extension, You acknowledge and agree that (i) this payment extension does not satisfy or cancel the obligation created by the Contract, and except as indicated herein, all other terms and conditions of the Contract remain unchanged and in full force and effect until the Contract is paid in full…. Customer further agrees to the terms and conditions of the Arbitration Clause below.

Supp. App. 00154, 159.

The Applications for Payment Extensions that Mr. Brown signed both contain an Arbitration Clause. The Arbitration Clause begins "[i]n this Arbitration Clause, 'you' refers to the consumer(s) signing below; 'we,' 'us' and 'our' refer to First Investors Servicing Corporation." Supp. App. 00155, 160. The Arbitration Clause then provides:

> "Claim" means any claim or dispute, whether in contract, tort, statute or otherwise (including the validity, enforceability, interpretation and scope of this clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates in any way to the servicing and collection of your contract served by us. "Claim" shall

> have the broadest possible interpretation. Any claim shall, at your or our election, be resolved by neutral, binding arbitration and not by court action, except that any claim that the class action waiver is unenforceable shall be for the court, and not for the arbitrator, to decide. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action.

Supp. App. 00155, 160.

Importantly, the Arbitration Clause sets forth in bold and underlined font: **"<u>You expressly waive any right you may have to arbitrate a class action (this is referred to in this Arbitration Clause as the class action waiver.</u>"** *Id*. (emphasis in original) (internal quotations omitted). The Federal Arbitration Act ("FAA") governs any arbitration under the Arbitration Clause. Supp. App. 00156, 161. Mr. Brown "may choose one of the following arbitration organizations and its applicable rules: the National Arbitration Forum, … the American Arbitration Association … or, any other organization you may choose subject to our approval." Supp. App. 00155, 160. Further, the Arbitration Clause specifically provides Mr. Brown an option to opt out of the Arbitration Clause:

> You may opt out of this Arbitration Clause by sending written notice of your election to do so. The notice must be signed by all borrowers and must be postmarked no later than 10 days after the date of this transaction…. Your decision to opt out of this Arbitration Clause will have no adverse effect on your account.

Supp. App. 00156, 161. Finally, just above the line where Mr. Brown signed indicating his acknowledgement that he read the Arbitration Clause and agreed to its terms, the Arbitration Clause concludes:

> **PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS** – EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER OF ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARIBTRATIONS. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT. OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

Supp. App. 00156, 161 (emphasis in original). Importantly, Mr. Brown agreed that "[t]his agreement shall survive any termination, payoff or transfer of any loan or contract between you and us." Supp. App. 00156, 161.

FIFS conveyed all of its "rights, title and interest in and to the Accounts" to Crown Asset Management, LLC. Supp. App. 00150. Crown Asset Management, LLC then "assign[ed] all rights, title and interest of Seller in and to those certain Accounts" to Troy. Supp. App. 00152.

In the Remand Order, this Court advised "[i]ndeed, we remand the case so that the Superior Court may address whether Troy can prove that it specifically was assigned Mr. Brown's account." *Brown v. Troy Capital, LLC, et al.*; No. 18-CV-797, Mem. Op. & J. at n.6 (D.C. Feb. 18, 2022). In doing so, this Court referenced:

> The Superior Court record in this case contains the documents Protas attached to its reply: notarized bills of sale showing that FIFS sold accounts to Crown and Crown sold accounts to Troy. These bills of sale do not specifically identify Mr. Brown or his account, and the attachments they reference, which purportedly contain lists of account numbers, are not included. While complete versions of these documents might identify Troy as an assignee of FIFS's interest in Mr. Brown's account and of FISC's accompanying right to compel arbitration, the portions that are in the record do not show the particular accounts that were transferred and thus do not establish that Troy held Mr. Brown's account.

Id. at 5-6.

On June 29, 2022, during a hearing the Superior Court directed counsel for Troy to submit a legible copy of documents contained within the record "to see whether or not Mr. Brown's account is among those accounts transferred to Troy, based on the bills of sales that were attached to the motion, or to the pleading that the Court of Appeals saw when it reviewed the case." Supp. App. 00377.

Consistent with this Court's directive, on June 29, 2022, counsel for Troy sent an e-mail to the Superior Court and copied all counsel of record with an "attached [] legible pdf and an Excel spreadsheet of Exhibit 2 which was referenced at paragraph

6 of the Affidavit of Rance Willey filed in support of Plaintiff/Counter-Defendant Troy Capital, LLC's Brief Regarding Issues on Remand." Supp. App. 00385-461. During the hearing on July 6, 2022, the Superior Court analyzed the Troy Capital Excel Sheet and noted "[a]nd for the record, this is a six-page document and there's an entry on the 6th page which is -- which is relevant to our conversation here. Specifically, on line 753." Supp. App. 00468. Line 753, the line referred to by the Superior Court, is highlighted in yellow (as in the original) and located at Supp. App. 00391, 397, 403, 409 and in a larger format at Supp. App. 00422, 435, 448, 461 – all of which were attached to the e-mail sent to the trial counsel which copied all counsel of record.

The Superior Court resolved "I do find, based on this information, that had been previously submitted in a form that was not legible because of the small print and to which the Court of Appeals refers in its slip opinion, suffices to show that there is an arbitration agreement that is biding between the parties here." Supp. App. 00471. The Superior Court also resolved "consistent with the broad language of the clause, and the interpretation of what is governed under the Federal Arbitration Act, both by the D.C. Circuit and by the Supreme Court, that the arbitrator in this case will address the question of waiver. The arbitrator in this case will address the issue of unconscionability." Supp. App. 00476.

SUMMARY OF THE ARGUMENT

This Court remanded this case to the Superior Court for further proceedings on delineated issues. This Court did not limit the method or means the Superior Court could employ to "address whether Troy can prove that it specifically was assigned Mr. Brown's account." *Brown v. Troy Capital, LLC, et al.*; No. 18-CV-797, Mem. Op. & J. at n.6 (D.C. Feb. 18, 2022). The Superior Court resolved "[h]aving considered the written arguments of counsel with their oral supplements, having looked at the arbitration clause at issue, considering the guidance provided by the Court of Appeals in its remand order; my conclusions are as follows. Number one, that the arbitration clause is applicable . . ." Supp. App. 00475.

The Superior Court determined Troy was properly assigned Mr. Brown's account. As Troy's undisputed agent, Protas is also entitled to the application of the Arbitration Clause based on the express language of the Arbitration Clause Mr. Brown signed. Last, as expressly permitted by this Court, the Superior Court delegated the remaining two issues on remand, waiver and unconscionability, to an arbitrator. Thus, resolution of the merits of Mr. Brown's allegations of waiver an unconscionability are not ripe for resolution in this appeal.

ARGUMENT

I. Standard of Review

This Court reviews the grant of a motion to compel arbitration *de novo*. *Bank of Am., N.A. v. District of Columbia*, 80 A.3d 650, 667 (D.C. 2013). This Court reviews factual findings under the "clearly erroneous standard" when "the trial court sits as the trier of fact." *Id*. (internal citations and quotations omitted). Importantly, this Court "accord[s] the trial court's factual findings considerable deference, and we will not reverse them unless plainly wrong or without evidentiary support." *Id*.

II. The Superior Court Correctly Resolved All Issues Set Forth in the Remand Order.

a. The Superior Court Complied with This Court's Directives in the Remand Order.

During the hearings on June 29, 2022, and July 6, 2022, the Superior Court followed the Remand Order in sequence, read this Court's instructions into the record, and took great care to address each item this Court instructed the Superior Court to address. Supp. App. 00366-84 *and* Supp. App. 00462-79. Pursuant to Rule 28(j) of the Rules of the District of Columbia Court of Appeals, Protas hereby joins and adopts by reference the arguments made by Troy in its Responsive Appellee Brief filed on November 17, 2022, regarding the Superior Court's proper consideration of evidence submitted by Troy, the affidavit submitted by Troy and the related exhibits were admissible, Troy is an assignee of the rights to Mr. Brown's

account and can enforce the Arbitration Clause, and the Superior Court properly referred the issues of waiver and unconscionability to arbitration. D.C. Ct. App. Rule 28(j) (2022).

b. The Arbitration Clause Independently Applies to Protas, as the Undisputed Agent of Troy.

Protas is independently entitled to arbitration under the Arbitration Clause executed between Mr. Brown and FISC as Protas is an undisputed agent of Troy. Mr. Brown expressly agreed to a "broad" Arbitration Clause covering "any claim or dispute" arising out of the collection of the debt. Supp. App. 00155, 160. FISC was the original party to the Arbitration Clause, which covered FISC's "employees, agents, successors or assigns." *Id*. Further, twice in filings with the Superior Court Mr. Brown represented that "[a]t all times [Protas] was acting within the scope of its authority and Troy exercised control over [Protas] in the filing of suits against District of Columbia consumers. Troy exercised control over [Protas'] activities." JA 65 at ¶ 5 (Mr. Brown's Class Counterclaims) *and* Supp. App. 00026 at ¶ 7 (Mr. Brown's First Amended Class Counterclaims).

As a result, Protas, as Troy's agent, has a right to elect arbitration and the Arbitration Clause should be honored as the right to freely assign is presumed. *Brandenburger & Davis, Inc. v. Estate of Lewis*, 771 A.2d 984, 987 (D.C. 2001). Moreover, Protas is entitled to the benefit of the Arbitration Clause due to its agency with Troy, which the Superior Court resolved was properly assigned Mr. Brown's

account. *Woodland Ltd. P'ship v. Wulff*, 868 A.2d 860, 863 (D.C. 2005) (holding an assignee generally holds the same rights and remedies as the assignor).

In the Remand Order this Court set forth:

> The arbitration agreement provides for arbitration of "any claim or dispute, whether in contract, tort, statute or otherwise . . . between you and us or our employees, agents, successors or assigns, which arises out of or relates in any way to the servicing and collection of your contract." If Troy is an assignee of FIFS and FISC, Mr. Brown's claims against Troy arise out of or relate to the contract, and are thus covered by the arbitration agreement. Furthermore, Protas argued in pleadings that it was Troy's agent. Thus, the language of the arbitration clause could cover Mr. Brown's counterclaims against Troy and Protas as long as sufficient evidence demonstrated that Troy validly was assigned the rights and remedies initially held by FIFS and FISC.

Brown v. Troy Capital, LLC, et al.; No. 18-CV-797, Mem. Op. & J. at n.5 (D.C. Feb. 18, 2022).

In response, on remand, the Superior Court correctly determined:

> And also, when it comes to the counterclaims, as I believe I read earlier in Footnote 5 of Page 6, the last sentence of that footnote reads, thus the language of the arbitration clause should cover Mr. Brown's counterclaims against Troy and Protas as long as sufficient evidence demonstrated that Troy (indiscernible) and remedies initially held by FIFS and FISC.
>
> Having considered the written arguments of counsel with their oral supplements, having looked at the arbitration clause at issue, considering the guidance provided by the

> Court of Appeals in its remand order; my conclusions are as follows.
>
> Number one, that the arbitration clause is applicable. Number two, that because it is applicable, the counterclaims against Troy and Protas should be stayed; and consistent with the broad language of the clause, and the interpretation of what is governed under the Federal Arbitration Act, both by the D.C. Circuit and by the Supreme Court, that the arbitrator in this case will address the question of waiver. The arbitrator in this case will address the issue of unconscionability.

Supp. App. 00475-76.

Thus, as directed by this Court, the Superior Court held sufficient evidence demonstrated that Troy was validly assigned the rights and remedies initially held by FIFS and FISC, thus, the Superior Court correctly determined the Arbitration Clause applies to the parties in this case and is equally applicable to Protas as it is Troy.

III. Mr. Brown's Class Counterclaims Are Stayed.

In the Remand Order, this Court directed in part "[o]n remand, the trial court should clarify which, if any, of Mr. Brown's counterclaims are stayed pending arbitration." *Brown v. Troy Capital, LLC, et al.*; No. 18-CV-797, Mem. Op. & J. at n.7 (D.C. Feb. 18, 2022). As required, on July 6, 2022, the Superior Court held that because the Arbitration Clause was applicable "the counterclaims against Troy and Protas should be stayed." Supp. App. 00476. Pursuant to Rule 28(j) of the Rules of the District of Columbia Court of Appeals, Protas hereby joins and adopts by

reference the arguments made by Troy in its Responsive Appellee Brief filed on November 17, 2022, regarding the stay of Mr. Brown's Class Counterclaims. D.C. Ct. App. Rule 28(j) (2022).

IV. Despite the Limited Nature This Court Set Forth in the Remand Order, Mr. Brown Attempts to Expand the Scope of This Interlocutory Appeal.

The Remand Order set forth "[w]e vacate in part and remand for further proceedings to determine whether the arbitration agreement applies to this dispute and, if it does, whether the agreement is unconscionable." *Brown v. Troy Capital, LLC, et al.*; No. 18-CV-797, Mem. Op. & J. at 2 (D.C. Feb. 18, 2022). Specifically, this Court remanded for the Superior Court to make further findings regarding: (1) whether Troy and Protas are assignees of the arbitration agreement between Mr. Brown and FISC; (2) if Troy established that it was the assignee of Mr. Brown's account and that there was an arbitration agreement between Troy and Mr. Brown, this Court directed the Superior Court to indicate whether it is committing the question of waiver by litigation to the arbitrator; and (3) if the Superior Court determined on remand that the arbitration rights were validly assigned and that further court proceedings are appropriate, it should hold an evidentiary hearing to resolve the factual issues for the resolution of Mr. Brown's unconscionability claim. *Brown v. Troy Capital, LLC, et al.*; No. 18-CV-797, Mem. Op. & J. at 8-9, 13, *and* 14 (D.C. Feb. 18, 2022). Thus, this appeal is limited to the issues raised on remand,

as determined by this Court, and is not an opportunity for Mr. Brown to relitigate, for a second time, the same issues he presented to this Court in the Brown Appeal I and were not part of the instructions to the Superior Court for further proceedings.

Mr. Brown attempts to expand the scope of this appeal and limited remand in his 83-page Brief and repeats some of the same arguments he previously made to this Court in the Brown Appeal I. By way of example, in the Brown Appeal I, Mr. Brown argued "The Superior Court Erred in Finding that the RISC was Amended in Contradiction with the Plain Language of the Merger Clause." Brown Br. in Brown Appeal I at 2, 26 (March 18, 2019). The Remand Order does not direct the Superior Court to make additional findings and conduct additional proceedings regarding the merger clause and thus the Superior Court made no findings on this issue on remand. In this appeal, Mr. Brown argues "The RISC is not amended to include the 'arbitration clause' based on the merger clause requiring signature of the 'assignee,' FISC is not the 'assignee' of the RISC making the decision below reversible error." Brown Br. at iii, 56 (October 18, 2022) (quotations original).

The following arguments raised by Mr. Brown in his Brief are outside the scope of the Remand Order and were not part of the further proceedings this Court directed the Superior Court to conduct:

- The Arbitration Clause is not enforceable, there is no chain of title, and FISC has not right to assign its rights to other entities (Brown Br. at pp. 42, 47-56);

- The Contract was not amended to include the Arbitration Clause based on the merger clause (Brown Br. at pp. 56-60);

- New material terms were added that denied Constitutional Rights, there was no mutuality, and the Contract is illusory making it unenforceable (Brown Br. at pp. 58-60);

- To challenge the delegation clause is cost prohibitive (Brown Br. at pp. 61-62);

- Troy and Protas materially breached the Arbitration Clause (Brown Br. at p. 62);

- The Superior Court erred in finding a waiver of Mr. Brown's class action rights (Brown Br. at pp. 63-66); and

- The merits of Mr. Brown's arguments regarding procedural and substantive unconscionability (Brown Br. at pp. 66-81).

This Court should disregard Mr. Brown's foregoing arguments regarding issues that were not part of this Court's limited Remand Order for further proceedings with the Superior Court. This Court previously had all issues raised by Mr. Brown before it in the Brown Appeal I. Further, all arguments Mr. Brown had regarding this case should have been asserted in the Brown Appeal I. Upon review the record, the Briefs, and oral arguments in the Brown Appeal I, this Court remanded this case to the Superior Court for three limited issues. As a matter of fairness and judicial economy,

Mr. Brown should be estopped from raising arguments that are not within the scope of this Court's Remand Order.

Additionally, Mr. Brown contends "[t]he trial court reversibly erred in finding the 'waiver of class action rights' enforceable." Brown Br. at pp. 63-66. Yet, the Superior Court did not make this finding. In fact, in the Remand Order this Court set forth:

> We note some confusion about which claims are subject to arbitration. In its motion to compel arbitration, Troy specifically asked the court to "compel[] arbitration of all claims asserted by [Mr. Brown] individually and on behalf of a purported class." Protas asked the court to "compel arbitration of the 'Counterclaims.'" The trial court ordered arbitration but did not rule on the validity of the clause's class action waiver clause or on the request to certify class action litigation. When Mr. Brown's counsel asked about the status of the underlying collections claim, the trial court responded, "Everything is stayed until arbitration takes place." The trial court's written order directed "that all counterclaims asserted by Mr. Brown individually and on behalf of a purported class are to be submitted to arbitration." On remand, the trial court should clarify which, if any, of Mr. Brown's counterclaims are stayed pending arbitration.

Brown v. Troy Capital, LLC, et al.; No. 18-CV-797, Mem. Op. & J. at n.7 (D.C. Feb. 18, 2022). Following this Court's directive, on July 6, 2022, the Superior Court held that because the Arbitration Clause was applicable "the counterclaims against Troy and Protas should be stayed." Supp. App. 00476. Thus, Mr. Brown's argument that the Superior Court allegedly ruled that he waived his right to a class action is

erroneous and outside the scope of this Court's directive to the Superior Court on remand.

Finally, the Superior Court unambiguously referred the questions of waiver and unconscionability to an arbitrator. Supp. App. 00475-76. This Court expressly authorized the Superior Court to refer these two questions to an arbitrator. *Brown v. Troy Capital, LLC, et al.*; No. 18-CV-797, Mem. Op. & J. at 8 *and* 10 at n.9 (D.C. Feb. 18, 2022). Nonetheless, Mr. Brown dedicates a significant portion of his Brief to the merits of these two issues and his position on whether there was a waiver and the alleged unconscionability of the agreements Mr. Brown signed. *See e.g.,* Brown Br. at Arguments A.i, A.ii, A.iii, B.iv, B.v, D.i, *and* D.ii. This Court should affirm the Superior Court's referral of the issues of issues of waiver and unconscionability to an arbitrator and the merits of these issues should not be resolved in this appeal as they are not ripe.

CONCLUSION

This Court should affirm the Superior Court's determination that Troy and Protas established that they were assigned Mr. Brown's account; there is a binding Arbitration Clause on Mr. Brown, Troy, and Protas; the stay of Mr. Brown's Counterclaims; and that the arbitrator will resolve the issues of waiver and unconscionability. As a result, this Court should affirm the Superior Court so this matter can proceed with an arbitrator.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of November 2022, the foregoing Responsive Brief of Appellee Protas, Spivok & Collins, LLC was served on the D.C. Court of Appeals Clerk by electronic filing, pursuant to Administrative Order 1-18, EFS 1. Pursuant to this Court's Operations Order filed on August 4, 2022, which addresses this Court's operations through January 31, 2023, "[t]he court has suspended the requirement for filing paper copies of electronically filed documents." Last, a copy of the foregoing Responsive Brief of Appellee Protas, Spivok & Collins, LLC was served via electronic filing pursuant to Administrative Order 1-18, EFS 9, on:

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Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

Channing L. Shor
Signature

22-CV-0524
Case Number(s)

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