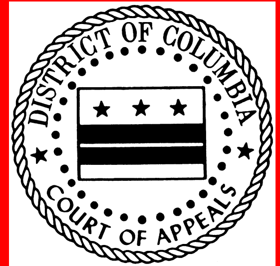

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No. 22-CV-524

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

**RESPONSIVE BRIEF OF
APPELLEE TROY CAPITAL, LLC**

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

Appellant

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APPELLEE TROY CAPITAL, LLC'S RULE 28(a)(2)(B) CERTIFICATION:

Pursuant to Rule 28(a)(2)(B), Appellee Troy Capital, LLC, through undersigned counsel, certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Respectfully submitted:

/s/ Colleen P. Reilly

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JURISDICTIONAL STATEMENT

On July 6, 2022, in ruling on the issues on remand from this Court, the trial court considered the evidence and found that Troy Capital, LLC ("Troy") and Protas, Spivok & Collins, LLC ("Protas") are assignees of the arbitration agreement between Andre Brown and First Investors Servicing Corporation ("FISC"). JA 20; Supp. App. 00471.[1] Consistent with the remand order, the trial court further determined that the arbitrator will address the delegable issues of arbitrability, including waiver and unconscionability. JA 29-42; Supp. App. 00462-00476. The trial court stayed the counterclaims against Troy and Protas and ordered that the matter be sent to arbitration. JA 24-25.[2] Mr. Brown filed a notice of appeal of the order granting stay and compelling arbitration. JA 10.

An appeal from an order compelling a consumer to arbitrate with a commercial entity based on an arbitration clause in an alleged adhesion contract is appealable as an interlocutory order under D.C. Code Section 11-721 (a)(2)(A) (2018). *Andrew v. Am. Imp. Ctr.*, 110 A.3d 626, 636 (D.C. 2015). Accordingly, this Court has jurisdiction over this appeal.

[1] "Supp. App." refers to the Appellees' Supplemental Appendix filed on November 17, 2022.

[2] "JA" refers to the Joint Appendix filed by Mr. Brown on October 18, 2022.

COUNTER-STATEMENT OF THE ISSUES

On February 18, 2022, the D.C. Court of Appeals remanded specific issues to the trial court. JA 29-42. On remand the trial court was directed to determine (1) whether Troy and Protas are assignees of the arbitration agreement between Mr. Brown and FISC; and in the event this Court finds that Mr. Brown's account was among those transferred to Troy, (2) determine whether the question of waiver by litigation should be determined by the arbitrator; and, (3) determine whether the issue of unconscionability should be determined by an arbitrator, and if not, hold an evidentiary hearing to resolve the factual issues necessary to the resolution of Mr. Brown's unconscionability claim. See JA 29-42.

Thus, the issues properly on appeal are as follows:

1. Whether the trial court properly found that Troy and Protas are assignees of the arbitration agreement between Mr. Brown and FISC?
2. Whether the trial court properly found that this issue of waiver by litigation should be determined by the arbitrator?
3. Whether the trial court properly found that the issue of unconscionability should be determined by the arbitrator?

COUNTER-STATEMENT OF THE CASE

Appellee Troy filed a Complaint through its counsel Appellee Protas in D.C. Superior Court on November 13, 2017 against Appellant Mr. Brown. JA 43-51.

Troy's Complaint sought a judgment against Mr. Brown for a principal sum of $12,975.47 stemming from an unpaid deficiency balance on a car loan originally obtained by Mr. Brown on May 21, 2011. *Id.*

On April 24, 2018, Mr. Brown filed his "Class Counterclaims for Damages and for Incidental Relief" ("Counterclaim") against Troy and Protas. Mr. Brown's Counterclaim pursued the following four class action claims: violation of 16 DCMR § 300, *et seq.* (AFRA); violation of the Fair Debt Collection Practices Act (FDCPA); violation of the D.C. Consumer Protection Act (DCCPPA); and accounting. JA 63-85. Additionally, the Counterclaim pursued four claims on behalf of Brown individually: violation of the D.C. Debt Collection Law (DCDCL); malicious prosecution; and abuse of process. *Id.*

On May 25, 2018, Mr. Brown filed a Motion to Amend Counterclaims and for Leave to Add Third-Party Defendants. Supp. App. 00019-00051. Attached to that Motion was Mr. Brown's "First Amended Counterclaims for Damages and for Injunctive Relief". *Id*. On June 4, 2018, Protas filed a motion to compel arbitration. On June 5, 2018, Troy also filed a motion to compel arbitration. JA 89-103 and Supp App. 00060-00077.

On June 22, 2018, the trial court held a hearing on all pending motions wherein the court granted Mr. Brown's Motion to Amend Counterclaims and granted the motions to compel arbitration filed by Troy and Protas. JA 283; Supp. App.

00078-00141. Mr. Brown moved for reconsideration of the order compelling arbitration and was denied. JA 286-288. Mr. Brown noted his first appeal. Supp. App. 00006.

On February 18, 2022, the D.C. Court of Appeals remanded the case to the trial court to "make further findings regarding whether Troy and Protas are assignees of the arbitration agreement between Mr. Brown and FISC. The remand order directed that in the event the trial court determines that Mr. Brown's account was among those transferred to Troy, the trial court should address the issues of waiver and unconscionability under applicable law. JA 41-42. In addressing the issue of waiver, "[o]n remand, if Troy ultimately establishes that it was the assignee of Mr. Brown's account and thus that there was an arbitration agreement between Troy and Mr. Brown, the trial court should indicate whether it is committing the question of waiver by litigation to the arbitrator." JA 36-37.

On April 22, 2022 the trial court held a hearing to discuss a plan to address the issues on remand. Supp. App. 00164-00172. During that hearing, the trial court highlighted the D.C. Court of Appeals references to the fact that while the "documents supplied by Appellees included notarized bills, they did not specifically identify Mr. Brown or his account." Supp. App. 00166. In response, counsel for Troy acknowledged that they would be able to submit the additional documentation concerning Mr. Brown and his account as well as a supporting affidavit. Supp. App.

00167. The trial court stated that in advance of the hearing on the issues on remand, the parties could each file a written explanation brief. Supp App. 00169-170. On remand the parties each provided explanation briefs to the trial court. Supp. App. 00189-00205; 00206-00216; and 00217-00281. On June 8, 2022 Brown filed his joint response to Troy and Protas respective explanation briefs. Supp App. 00301-00329. Also, on June 8, 2022, Troy and Protas each filed their own responses to Brown's explanation brief. Supp. App. 00330-00338 and 00340-00348.

On June 29, 2022, the trial court held a hearing intended to address the specific issues on remand. The trial court was unable to read the Asset Schedule supplied by Troy demonstrating that Brown's account was among those transferred to it. Supp. App. 00376-00377. Accordingly, it was requested that Troy resubmit a legible copy of the document for the trial court's review. *Id.* The trial court specifically advised Brown that the supplementation of the record was a result of an effort to comply with the directives of the D.C. Court of Appeals. Supp. App. 00380. In accordance with the trial court's directives at the June 29, 2022 hearing, Troy submitted a legible copy of the Asset Schedule demonstrating that Brown's account was among those assigned to Troy. See Supp. App. 00385-00461.

On July 6, 2022, the trial court held an additional hearing finding that the documents provided by Troy were sufficient to establish Mr. Brown's account had been assigned to Troy and Protas and that there was a valid enforceable arbitration

agreement between the parties. JA 20-21; Supp. App. 00471-00472. Specifically, the trial court found, "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 binding between the parties here." JA 20; Supp. App. 00471. The trial court held that the "counterclaims against Troy and Protas should be stayed, and that 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" and "unconscionability." JA 25; Supp. App. 000476.

Thereafter on July 11, 2022, Mr. Brown filed his notice of appeal. JA 10.

COUNTER-STATEMENT OF FACTS

The Statement of Facts in Mr. Brown's Opening Brief only addressed proceedings and issues raised at the time the trial court entered its June 22, 2018, Order staying the matter and compelling arbitration. Appellant's Combined Opening Brief, pp. 10-20. Mr. Brown appealed the June 22, 2018, Order, which appeal was fully brief by the parties, and ruled on by this Court in the February 18, 2022 Memorandum Opinion and Judgment. JA 29-42. Mr. Brown's Statement of Facts fails to address any of the issues or evidence presented to or considered by trial court on remand from this Court's Memorandum Opinion and Judgment. Thus, Troy

submits the following statement of facts relevant to the issues and evidence presented to and considered by the trial court on remand:

I. Troy's Statement of Undisputed Facts

On May 21, 2011, Mr. Brown executed a Retail Installment Contract with First Investors Financial Services (FIFS) to finance his purchase of a Hyundai Azera. JA 44-47; JA 30. On two occasions, Mr. Brown signed loan modification agreements with a subsidiary of FIFS, First Investors Servicing Corporation (FISC) to extend the loan period. JA 92-95, 122-124 and JA 30. Both of the modification agreements contained identical arbitration clauses:

> "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…. Any claim shall, at your or our election, be resolved by neutral, binding arbitration and not by a 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…. 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.

JA 93-94, 122-123, 30-31. The Arbitration Clause also states that "this agreement shall survive any termination, payoff or transfer of any loan or contract between you and us." JA 93-94, 122-123.

In 2013, Mr. Brown fell behind on his payments and FISC seized and sold his vehicle leaving a deficiency of $15,159.17. JA 46 and JA 31. In May of 2014, FIFS sold the account to Crown Asset Management, LLC ("Crown"). JA 47 and 117. Thereafter, in December of 2016, Crown sold its Accounts Receivables to Troy. JA 119.

On the prior appeal, this Court found that FISC was the original party to the arbitration agreement, which covered FISC's "employees, agents, successors or assigns." JA 33, 92-94, 121-123. This Court further found that while the bills of sale showed that account had been transferred from FIFS to Crown and then from Crown to Troy, the attachments referenced in the bill of sale, which purportedly contain lists of account numbers were not included. See JA 33, 47, 117, and 119. This Court acknowledged that complete versions of these documents might identify Troy as an assignee of FIFS's interest in Mr. Brown's account and of the right to compel arbitration and reasoned that a remand was in order to permit Troy an opportunity to prove that it specifically was assigned Mr. Brown's account." JA 33-34 and 34 FN 6.

On remand to the trial court Troy submitted the affidavit of its Chief Executive Officer, Rance Willey, to establish that it purchased Mr. Brown's car loan account at issue. JA 172-175. The affidavit was based on Mr. Willey's personal knowledge of the transactions. JA 172, ¶ 3.

Mr. Willey testified in his affidavit that on December 19, 2016, Troy entered into an Accounts Receivable Purchase Agreement ("Purchase Agreement") with Crown. *Id.,* ¶ 4, JA 176-188, Exhibit 1. Mr. Willey signed the Purchase Agreement on behalf of Troy. *Id.* The Purchase Agreement and its exhibits were made at the time of the transaction, and are records made and kept in the regular course of business of Troy. *Id.* Under the Purchase Agreement, Troy purchased certain Auto Deficiency charge off accounts ("Accounts") from Crown. *Id.*, Exhibit 1, ¶ 2.1. Within the Purchase Agreement Crown represented and warranted as follows:

> [Crown] is the sole owner of the Accounts and has full right to transfer and sell its rights therein. [Crown] has not made any prior assignment, transfer, or sale of any of its ownership rights in the Accounts or Account Documents.

Id., Exhibit 1, ¶ 7.3.

The Accounts purchased by Troy were identified on an Asset Schedule provided by Crown. JA 173, ¶ 4, JA 176-188, Exhibit 1, ¶ 2.3. Crown provided Troy the Asset Schedule in the form of an electronic spreadsheet which summarized the information for each of the individual Accounts. *Id.*

The Asset Schedule specifically identified Mr. Brown's account as one of the accounts purchased by Troy at line 753 of the spreadsheet. JA 173, ¶ 6, JA 189-212, Exhibit 2; *see also* Supp. App. 00385-00461. The Asset Schedule listed that Mr. Brown's loan was originated by "First Investors Financial Services, Inc." with an account number of 50900148286040001, based on a 5/21/2011 contract, involving the financing for the purchase of a "2006 Hyundai Azera." JA 173., ¶ 7; *see also* Supp. App. 00385-00461, specifically 00391, 00397, 00404 and 00409.

In addition to the Asset Schedule, as required by the Purchase Agreement, Crown provided Troy with Account Documents related to each of the Accounts purchased by Troy. JA 173, ¶ 9, Exhibit 1, ¶ 3.1. The Account Documents for Mr. Brown's account confirmed the information contained in the Asset Schedule. Among the Account Documents provided by Crown for Mr. Brown's account were the May 21, 2011 Retail Installment Sale Contract, the Application for Payment Extension signed by Mr. Brown on February 2, 2012 and the Application for Payment Extension signed by Mr. Brown on October 29, 2012. *Id*. These documents were provided to Troy by Crown at the time of the closing of the Purchase Agreement, and were received and maintained by Troy in the course of its regularly conducted business activities. JA 174, ¶ 10.

The Retail Installment Sale Contract was signed by Mr. Brown on May 21, 2011, and reflects that he financed the purchase of a 2006 Hyundai Azera. JA 174,

¶ 11, JA 214-215, Exhibit 4. This is consistent with the information provided by Crown in the Asset Schedule. The Retail Installment Sale Contract also indicates that the Vehicle Identification Number for the vehicle financed by Mr. Brown was KHHFC46F2GA136665. *Id.* Finally, the Retail Installment Sale Contract indicates that the contract was assigned to First Investors Financial Services ("FIFS"). *Id.*

Crown also provided Troy with a copy of the Bill of Sale and Assignment from the May 15, 2014 Account Purchase Agreement between Crown and FIFS. JA 174*,* ¶ 8, JA 213, Exhibit 3. The Bill of Sale, the Asset Schedule and representation and warranty by Crown at paragraph 7.3 of the Purchase Agreement provided Troy with assurance and proof that Mr. Brown's account had been acquired by Crown from FIFS; and properly transferred to Troy.

Among the Account Documents from Mr. Brown's account provided by Crown to Troy was the Application for Payment Extension signed by Mr. Brown on February 7, 2012. JA 174*,* ¶ 12, JA 216-219, Exhibit 5. The Application for Payment Extension specifically referenced and applied to the Contract dated "5/21/2011," which corresponds to the date of the Retail Installment Sale Contract. *Id*. The February 2, 2012, Application for Payment Extension also references account number 5000014826040001. *Id.*

The February 7, 2012, Application for Payment Extension is between FISC and Mr. Brown; and indicates that "FISC is the duly authorized servicer of the

Contract and has authorization to enter into this Agreement. *Id.* Thus, FISC was the agent authorized FIFS to service the May 21, 2011, Retail Installment Sale Contract that had been assigned to FIFS. The February 2, 2012, Application for Payment Extension contains the arbitration clause at issue here. *Id.*

Crown also provided to Troy a subsequent Application for Payment Extension signed by Mr. Brown on October 31, 2012. JA 174*,* ¶ 12, JA 220-223, Exhibit 6. The material terms of the October 31, 2012 Application for Payment Extension were the same as the February 2, 2012, Application for Payment Extension. The October 31, 2012 Application for Payment Extension also specifically referenced and applied to the Contract dated "5/21/2011," which corresponds to the date of the Retail Installment Sale Contract. *Id.* The October 31, 2012, Application for Payment Extension also references account number 5000014826040001.[3] *Id.* The October 31, 2012, 2012, Application for Payment Extension is also between FISC and Mr. Brown; and indicates that "FISC is the duly authorized servicer of the Contract and has authorization to enter into this Agreement. *Id.* Thus, FISC was the agent of FIFS authorized to service the May 21, 2011, Retail Installment Sale Contract that

[3] On November 4, 2013, FISC provided notice to Mr. Brown that "the 3rd digit of your account number changed to a 9." JA 175, ¶ 14, JA 224, Exhibit 7. Thus, Mr. Brown's account number changed from 50000148286040001 to 50900148286040001, which is the account number reflected in the Asset Schedule for Mr. Brown's account.

had been assigned to FIFS. The October 31, 2012, Application for Payment Extension contains the arbitration clause at issue here. *Id.*

The evidence in the record before the trial court on remand, including the Purchase Agreement, Asset Schedule, Account Documents and Bill of Sale and Assignment between Crown and FISC conclusively establish that Mr. Brown's original account with FIFS, including the Application for Payment Extension dated February 2, 2011 and October 31, 2011, was assigned to Troy.

STANDARD OF REVIEW

This Court reviews the trial court's granting of Appellees' motions to compel arbitration *de novo*. *Bank of Am.*, *N.A. v. District of Columbia*, 80 A.3d 650, 667 (D.C. 2013); *Woodroof v. Cunningham*, 147 A.3d 777, 787 (D.C. 2016) ("We review *de novo* 'whether a particular dispute is arbitrable.'") (internal citations omitted); *Giron v. Dodds*, 35 A.3d 433, 437 (D.C. 2012) (Discussing that the issue of whether a valid arbitration agreement exists "is a question of law that we review *de novo*"). "When the trial court sits as the trier of fact, we review its factual findings under the 'clearly erroneous' standard." *Bank of Am., N.A.*, 80 A.3d at 667 (internal citations omitted). "We accord the trial court's factual findings considerable deference, and we will not reverse them unless plainly wrong or without evidence to support it." *Id.* This Court "review[s] mixed questions of law and fact under our usual deferential standard of review for factual findings (applying either the clearly erroneous or

substantial evidence standard of review) and [apply] *de novo* review to the ultimate legal conclusions based on those facts." *Caison v. Project Support Services, Inc.*, 99 A.3d 243, 248 (D.C. 2014) (internal citations omitted).

SUMMARY OF ARGUMENT

The scope of this appeal is limited to the specific issues that this Court ordered the trial court to consider on remand. In following this Court's order, the trial court properly considered evidence submitted by Troy on the issue of whether Troy and Protas are assignees of the arbitration agreement between Mr. Brown and FISC. The trial court's factual findings that Troy proved the arbitration agreement was assigned to Troy and Protas is supported by the evidence and not plainly wrong. Upon establishing that Troy and Protas are assignees to the arbitration agreement, the trial court properly held that it was committing the question of waiver by litigation to the arbitrator. Additionally, the court properly held that factual findings on the issue of unconscionability were also subject to the arbitration agreement, and properly submitted the issue of unconscionability to the arbitrator.

Mr. Brown's attempt to re-argue the issues raised and deciding in the prior appeal is not proper and should not be considered by this Court. Moreover, Mr. Brown's attempt to seek a ruling on the merits on his claims of waiver and unconscionability is not proper as the trial court did not rule on the merits on those issues.

ARGUMENT

I. Troy and Protas Are Assignees of the Arbitration Agreement

A. Trial Court Properly Considered Evidence Submitted by Troy

Mr. Brown's Combined Opening Brief does not contend that the evidence submitted by Troy do not support that Troy was an assignee of his account, but rather, Mr. Brown argues that it is somehow improper for the trial court to permit Troy to submit clarifying documents on remand that substantiate the fact that Troy is an assignee of Mr. Brown's account. Appellant's Combined Opening Brief, p. 12. This Court remanded the case because the record was unclear as to whether Mr. Brown's account was assigned to Troy:

> The trial 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 document 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 transfer and thus do not establish that Troy held Mr. Brown's account*.
>
> \- - -
>
> Indeed, we remand the case so that trial court may address *whether Troy can prove that it specifically was assigned Mr. Brown's account*.

JA 33-34, FN. 6 (emphasis added). If this Court did not intend to allow Troy to introduce additional evidence in support of its argument, it would have simply ruled that Troy had not carried its burden and found for Mr. Brown. Instead, this Court remanded the case "so that trial court may address *whether Troy can prove that it specifically was assigned Mr. Brown's account*." *Id.* This Court's February 18, 2022, Memorandum Opinion and Judgment specifically permitted Troy the opportunity to prove on remand whether it was assigned Mr. Brown's account. *Id.* Thus, the trial court properly permitted Troy to submit additional evidence and properly considered the evidence submitted.

In fact, based on the language of this Court's February 18, 2022, Memorandum Opinion and Judgment, the trial court was required to permit Troy the opportunity to prove that it was specifically assigned Mr. Brown's account. Under the mandate rule, "an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania R.R. Co.,* 334 U.S. 304, 306, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948).

Mr. Brown's reliance on *Morgan v. Sundance, Inc.*, 212 L. Ed. 2d 753, 142 S. Ct. 1708, 1713 (2022), is misplaced. This Court did not create a "special, arbitration-preferring procedural" rule in remanding "the case so that trial court may address whether Troy can prove that it specifically was assigned Mr. Brown's account." JA 34, FN. 6. Moreover, Mr. Brown cited no authority limiting this Court's ability to

order a trial court on remand to permit a party the opportunity to provide further proof of an issue. The case cited by Mr. Brown, *Scott v. BSA,* 43 A.3d 925 (D.C. 2012), does not stand for this proposition. To the contrary, it suggests that this Court retains the discretion to provide for such an order on remand.

B. The Affidavit Submitted by Troy and the Related Exhibits Were Admissible.

As acknowledged by Mr. Brown in his Combined Opening Brief, "the procedure to resolve 'deni[als] of the existence of the agreement to arbitrate' under the Arbitration Act mirrors the familiar summary judgment procedure." Appellant's Combined Opening Brief, citing *Haynes v. Kuder,* 591 A.2d 1286, 1290 (D.C. 1991). Rule 56(c)(1)(A), D.C. Superior Court Rules of Civil Procedure, provides that a party asserting a fact on summary judgment may rely on affidavits to support the assertion. Further, "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Rule 56(c)(4), D.C. Superior Court Rules of Civil Procedure.

The affidavit of Rance Willey, submitted by Troy, in support of its assertion that it is an assignee of the arbitration contract with Mr. Brown meets these requirements. In his affidavit, Mr. Willey testified that he is the Chief Executive Officer of Troy, and that his affidavit was based on his personal knowledge. JA 172, ¶¶ 3 and 4. Moreover, he testified that he signed the Purchase Agreement between

Troy and Crown whereby Troy purchased Mr. Brown's account. *Id.,* ¶ 4. Clearly, Mr. Willey is competent to testify on the matters in his affidavit, and he testimony is based on his personal knowledge.

The Purchase Agreement and its attachments are admissible pursuant to Rule 43-I(a), D.C. Superior Court Rules of Civil Procedure, which provides that document is not excluded by the rule against hearsay if "(1) the record was made at or near the time by – or from information transmitted by – someone with knowledge; (2) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (3) making the record was a regular practice of that activity; (4) all these conditions are shown by the testimony or another qualified witness or by other means as may be provided by statute; and (5) the opponent does not show that the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness."

Mr. Willey testified in his affidavit that the Purchase Agreement and its exhibits were made at the time of the transaction between Troy and Crown, that the records were made in the regular course of such transactions by Troy, and are kept in the regular course of business of Troy. JA 172, ¶ 4. Mr. Willey also established the proper foundation that the Exhibit 1 to his affidavit was a true and accurate copy of the Purchase Agreement. *Id.*

Significantly, Mr. Willey testified that the Asset Schedule attached to the Purchase Agreement was provided to Troy by Crown as part of the transaction, and that Exhibit 2 to his affidavit was a true and accurate copy of the Asset Schedule provided by Crown. JA 173, ¶¶ 5 and 6. Mr. Willey testified that the accounts listed on the Asset Schedule were purchased by Troy from Crown as part of the Purchase Agreement. JA, 173, ¶ 5. Mr. Willey further testified that item number 753 on the Asset Schedule reflected the loan account for Mr. Brown, which Troy purchased as part of the transaction with Crown. *Id.*

Mr. Willey testified that in addition to the Asset Schedule, at the time of the closing of the sale, Crown provided Troy with a copy of the Bill of Sale and Assignment between Crown and FIFS, and that Exhibit 3 to his affidavit was a true and accurate copy of the Bill of Sale. JA 173, ¶ 8. Mr. Willey also testified that the other exhibits to the Purchase Agreement, including a copy of Mr. Brown's Retail Installment Sale Contract, the Application for Payment Extension signed by Mr. Brown on February 7, 2012, and the Application for Payment Extension signed by Mr. Brown on October 29, 2012 which were provided by Crown at the time of the closing of the transaction and that the respective exhibits attached to Mr. Willey's affidavit were true and accurate copies of the documents. JA 173-174, ¶¶ 9-13.

Mr. Willey's affidavit establishes the foundation for the authenticity of the Purchase Agreement and its associated exhibits. Moreover, the affidavit establishes

the Rule 43-I standards for their admissibility. It is significant that under the terms of the Purchase Agreement, Crown specifically warranted "the accuracy and completeness of the data" contained in the Asset Schedule. JA 176. Crown also warranted that it "is the sole owner of the Accounts and has full right to transfer and sell its rights herein." JA 180, ¶ 7.3. To the extent that Troy may not have had personal knowledge of Asset Schedule and the accounts listed on the Asset Schedule, the warranty and representations by Crown are sufficient to establish the admissibility of the documents under the business records exception to the hearsay rule. *See Meaders v. United States*, 519 A.2d 1248, 1255 (D.C. 1986) *citing In re D.M.C.,* 503 A.2d 1280, 1282-1283 (D.C.1986).

Mr. Willey's affidavit and attached exhibits were admissible and properly considered by the trial court.

C. Troy Capital is an Assignee of the Rights to Mr. Brown's Account, and Therefore Can Enforce the Arbitration Agreement.

The right to freely assign is presumed, *Bradenburger & Davis, Inc. v. Estate of Lewis,* 771 A.2d 984, 987 (D.C. 2001), and an assignee generally holds the same rights and remedies as the assignor. *Woodland Ltd. P'ship v. Wulff,* 868 A.2d 860, 863 (D.C. 2005). "Our judicial preference for free assignability is such that '[u]nless a contract contains 'clear and unambiguous language' prohibiting an assignment, [we will not] honor attempts to restrict the right to assign freely." *Id*. (internal citations omitted). "Under general principles of contract law the assignee of an

interest has the same rights as the assignor and, as a result, the assignee can enforce those rights by the same remedies available to the assignor." *Woodland L.P. v. Wulff*, 868 A.2d 860, 863 (D.C. 2005).

The evidence submitted by Troy to the trial court on remand established that Troy is an assignee to Mr. Brown's arbitration agreement. The evidence submitted in the record, including the affidavit of Rance Willey, the Purchase Agreement, Asset Schedule, Account Documents and Bill of Sale and Assignment between Crown and FISC, conclusively establish that Mr. Brown's original account with FIFS, including the Application for Payment Extension dated February 2, 2011 and October 31, 2011, was assigned to Troy. See JA 172-224, Supp. App. 00385-409. Specifically, the Asset Schedule which was provided by Crown to Troy as part of the Purchase Agreement, which lists Mr. Brown's account at line 753, satisfies the inquiry that Mr. Brown's account was transferred to Troy, and thus the arbitration agreement assigned to Troy. JA 189-212, Supp. App. 00385-409. The other account documents, including the May 21, 2011 Retail Installment Sale Contract between FIFS and Mr. Brown, the Application for Payment Extension between FISC and Mr. Brown on February 2, 2021 and the Application for Payment Extension between FISC and Mr. Brown on October 29, 2012, and the Bill of Sale between FIFS and Crown, provide further support for the fact that Mr. Brown's account which included the arbitration agreement was assigned to Troy. JA 172-224. Further, there should

be no question that FISC was an authorized agent of FIFS. In the prior appeal by Mr. Brown, this Court deferred to the trial court's finding that FISC was a subsidiary of FIFA. Additionally, the two Application for Payment Extensions, which contain the arbitration agreement, specifically disclose that FISC was the "duly authorized servicer" of the original account for Mr. Brown with FIFS. JA216 and 220.

Based on this evidence, the trial court held, "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 binding between the parties here." JA 20; Supp. App. 00471. The trial court's finding that Troy was an assignee of Mr. Brown's arbitration agreements was not "plainly wrong" and was supported by the evidence. *See Bank of Am., N.A.*, 80 A.3d at 667. This Court should provide "considerable deference" to the trial court's factual findings and affirm the trial court's decision.

D. The Trial Court Properly Referred the Matter to Arbitration to Resolve the Remaining Issues of Waiver and Unconscionability.

"The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Wolff v.*

Westwood Mgmt., LLC, 558 F.3d 517, 520 (D.C. Cir. 2009) (interpreting arbitrability under the FAA).

"The Supreme Court has recognized…that parties can agree to arbitrate gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Sakyi v. Estee Lauder Companies, Inc.*, 308 F.Supp.3d 366, 377 (D.D.C. 2018) (quotations omitted) (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010)). Courts will find that a party has agreed that arbitrators should decide arbitrability if there is clear and unmistakable evidence of such an agreement. *See Sakyi*, 308 F. Supp. At 377 (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am*., 475 U.S. 643, 649 (1986)); *see also Howsam v. Deam Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). The Supreme Court recently reaffirmed that it "has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long a the parties' agreement does so by 'clear and unmistakable' evidence. *Henry Schein, Inc. v. Archer & White Sales, Inc.* 139 S. Ct. 524, 530 202 L. Ed. 2d 480 (2019).

Here, the Arbitration Clause specifically provides that "[a]ny arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. Section 1 et seq.) and not by any state law concerning arbitration." JA 121-124 and 126-129; Supp. App. 00268-276 and 00277-280. Under the Federal Arbitration Act,"

arbitration is a matter of contact, and courts must enforce arbitration contracts according to their terms." *Henry Schein Inc.,* 139 S. Ct. at 529, 202 L.Ed. 2d 480 (2019). As the language of the Arbitration Clause here broadly encompasses "all claims" and it clearly and unmistakably delegates threshold issues of arbitrability to the arbitrator.

1. The trial court properly committed the question of waiver by litigation to the arbitrator.

In the February 18, 2022, Memorandum Opinion and Judgment, this Court directed that, "[o]n remand, if Troy ultimately establishes that it was the assignee of Mr. Brown's account and thus that there was an arbitration agreement between Troy and Mr. Brown, the trial court should indicate whether it is committing the question of waiver by litigation to the arbitrator." JA 36-37. As discussed above, the trial court properly found that Troy was the assignee of Mr. Brown's account and that there was an arbitration agreement between Troy and Mr. Brown. JA 20; Supp. App. 00471. Thus, as directed by this Court on remand, the trial court properly held that consistent with the broad language of the arbitration clause it was committing the question of waiver by litigation to the arbitrator. JA 24-25; Supp. App. 00475-00476.

2. The trial court properly committed the question of unconscionability to the arbitrator.

This Court, in acknowledging the possibility that unconscionability should be considered by the arbitrator, directed the trial court to decide the delegation question on remand. JA 38 at FN. 9.

The issue of whether the arbitration agreement contains a delegation clause only comes into play once the court has ruled that a valid contract was formed. See § 19:13 Arbitration provision—Delegation clause, 1 Commercial Arbitration § 19:13, citing *Granite Rock Co. v. International Broth. of Teamsters*, 561 U.S. 287, 299–301, 130 S. Ct. 2847, (2010). Once a Court finds that a contract to arbitrate was formed then the Court determines whether there is a valid delegation clause in the arbitration agreement. See *Id*. Here, Mr. Brown disputed that the arbitration agreement was assigned to Troy, as such the Court needed to address that issue prior to turning to the issue of arbitrability. On remand, Troy submitted evidence which the trial court found was sufficient to that it was an assignee of the arbitration agreement, which by its plain language delegated the threshold arbitrability questions to the arbitrator. JA 20; Supp. App. 00471

The Arbitration Clause in question states in pertinent part:

> "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.

> **<u>“Claim” shall have the broadest possible interpretation.</u>**

JA 93-94, 122-123, 30-31 (emphasis added).

“[W]here a party challenges the arbitrability of a dispute, it is the very authority of the arbitrator to decide that is at issue, and the presumption is that the court must first settle the basic contractual question, unless the parties “clearly and unmistakably provide otherwise.” *Woodland*, 868 A.2d at 864. But once that basic question has been resolved in favor of arbitration…it is for the arbitrator to resolve other “gateway” matters that the parties “would likely expect” that the arbitrator would decide. *Id.* at 865. This includes “procedural questions which grow out of the dispute and bear on its final disposition,” and “allegations of waiver, delay, or a like defense to arbitrability.” *Id.* Where the language of the agreement to arbitrate is broad, questions as to waiver should be submitted to the arbitrator. *See Woodland*, 868 A.2d at 865 (discussing broad agreement to arbitrate “any dispute arising under or related to” a partnership agreement, and that the question of waiver should be submitted to arbitrator).

Here, the language of the arbitration clause broadly encompasses all “claims” and unmistakably delegates threshold issues of arbitrability to the arbitrator. Moreover, nowhere February 18, 2022, Memorandum Opinion and Judgment did this Court hold that Troy waived its right to delegate the threshold issues of arbitrability and unconscionability, and in fact, the order on remand specifies that

the trial court is to decide whether such issues are to be decided by the trial court or be submitted to an arbitrator. JA 38 at FN. 9.

The issue of unconscionability is a potential defense to arbitrability. Thus, the issue of unconscionability is properly decided by the arbitrator. As clearly held by the United States Supreme Court, "the presumption is that the arbitrator should decide "allegation[s] of waiver, delay, or a like defense to arbitrability." *Howsam,*537 U.S. at 84, 123 S. Ct. at 592. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *TD Auto Fin., LLC v. Bedrosian,* 609 S.W. 3d 763, 771 (Mo. Ct. App. 2020)(citing, *Schein,* 139 S. Ct. at 529). A court may not override the contract. *Id.* Here, the language of the Arbitration Clause clearly and unmistakably delegates threshold issues of arbitrability to the arbitrator. Similar to *T.D. Auto Fin., LLC,* Troy has raised arbitrability issues of unconscionability which pursuant to the party's agreement, must be reserved for the arbitrator.

The trial court acted properly and consistent with the direction of this Court in deciding that that issue of unconscionability should be decided by the arbitrator.

E. Scope of This Appeal is Limited

In the February 18, 2022, Memorandum Opinion and Judgment, this Court limited the issues on remand for the trial court to determine: (1) whether Troy and Protas are assignees of the arbitration agreement between Mr. Brown and FISC; and

in the event that the trial court found that Mr. Brown's account was among those transferred to Troy, (2) determine whether the question of waiver by litigation should be determined by the arbitrator; and, (3) determine whether the issue of unconscionability should be determined by an arbitrator, and if not, hold an evidentiary hearing to resolve the factual issues necessary to the resolution of Mr. Brown's unconscionability claim. JA 29-42. The Memorandum Opinion and Judgment resolved all other issues raised by the parties on the appeal. Mr. Brown did not petition this Court for a Rehearing En Banc, as permitted by Rule 35, Rules of the District of Columbia Court of Appeals. Thus, the February 18, 2022, Memorandum Opinion and Judgment is a final ruling on the issues raised by the parties on the appeal, and thus became the law of the case, subject to resolution of the specific issues sent back to the trial court on remand.

Rather than appeal the limited issues on remand, Mr. Brown has sought to revisit the same arguments previously before this Court on his prior appeal. Mr. Brown erroneously argued that he "is forced to appeal the same question for the second time to the Court." Appellant's Combined Opening Brief, p. 19. Mr. Brown's intention to reargue the prior appeal is reflected in the Statement of Facts in Mr. Brown's Opening Brief which only addressed proceedings and issues raised at the time the trial court entered its June 22, 2018, Order, which was the subject of the prior appeal. See Appellant's Combined Opening Brief, pp. 10-20.

Mr. Brown's argument in Section A of his Combined Opening Brief improperly seeks a ruling on whether Troy and Protas waived their rights to arbitration through litigation conduct. Appellant's Combined Opening Brief, pp. 23-40. The trial court did not make a finding on the substantive issue of waiver through litigation, but instead, as directed by this Court held that it was committing the question of waiver by litigation to the arbitrator. JA 24-25; Supp. App. 00475-00476. Similarly, in Sections B. iv. and D of Mr. Brown's Combined Opening Brief improperly seeks a ruling that the arbitration agreement is unconscionable. Appellant's Combined Opening Brief, pp. 60-62, 66-81. As with the waiver issue, the trial court did not make a finding on the substantive issue of unconscionability, but instead committed the question of unconscionability to the arbitrator. JA 24-25; Supp. Ap. 00475-00476. It is axiomatic that a party cannot appeal an issue that was not before the trial court. The only issues concerning waiver and unconscionability that are properly on appeal are whether the trial court's decision to commit those issues for decision by the arbitrator was clearly erroneous.

Finally, in sections B. ii, iii and v of Appellant's Combined Opening Brief (pp. 47-60 and63-63), Mr. Brown seeks to reopen issues that were raised during his first appeal and resolved when this Court issued the February 18, 2022, Memorandum Opinion and Judgment. Mr. Brown's attempt to relitigate these issues violates the law of the case doctrine which provides that "when a case is appealed

and remanded, the decision of the appellate court establishe[s] the law of the case, which must be followed by the trial court on remand." *Does I through III v. D.C.,* 593 F. Supp. 2d 115, 122 (D.D.C. 2009)(citing *Griffin v. United States,* 935 F.Supp. 1, 5 (D.D.C.1995). Moreover, the issues argued in section B. ii, iii and iv, were not before trial court on remand, thus there is no ruling to appeal.

The current appeal is limited to the specific issues that the trial court was directed to resolve on remand. Mr. Brown's arguments outside of the issues on remand are of no moment.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should affirm the trial court's finding that Troy and Protas are assignees of Mr. Brown's arbitration agreement and compelling arbitration, delegating the questions of arbitrability including waiver and unconscionability to the arbitrator and staying the proceeding pending the results of arbitration.

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 Troy Capital, 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 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 Troy Capital, 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.

Colleen P. Reilly
Signature

22-CV-0524
Case Number(s)

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