No. 23-cv-1046

District of Columbia Court of Appeals

BDO USA, LLP,

Plaintiff/Counter-Defendant-Appellant,

– v. –

ERIC JIA-SOBOTA *and* JSCo Enterprises, Inc.,

Defendants/Counter-Plaintiffs-Appellees,

– v. –

BDO PUBLIC SECTOR LLC *and*

WAYNE BERSON,

Counter-Defendants-Appellants.

On Appeal from Orders of the Superior Court of the District of Columbia
Civil Action No. 2020 CA 2600 B
Judge Neal E. Kravitz

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LIST OF INTERESTED INDIVIDUALS AND ENTITIES

The following is a complete list of parties and their counsel in the trial court.

Plaintiffs and Counter-Defendants

BDO USA, P.C.
BDO Public Sector
LLC Wayne Berson

Defendants and Counter-Plaintiffs

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JSCO Enterprises, Inc.

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RULE 26.1 CORPORATE DISCLOSURE

JSCo Enterprises, Inc. does not have any parent corporation. No publicly held corporation owns 10% or more of its stock. JSCo Enterprises, Inc. is not a partnership.

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Defendants/Counter-Plaintiffs-Appellees Eric Jia-Sobota ("Jia-Sobota") and JSCo Enterprises, Inc. ("JSCo," and collectively with Jia-Sobota, the "Appellees"),[1] by counsel, hereby respond to the Opening Brief filed by Plaintiffs/Counter-Defendants-Appellants BDO USA, P.C. formerly known as BDO USA, LLP; BDO Public Sector, LLC; and Wayne Berson (collectively, "BDO"), and state as follows:

STATEMENT OF JURISDICITON

BDO appeals the Superior Court of the District of Columbia Civil Division's Order Denying BDO's Motion to Compel Arbitration Before the American Arbitration Association entered on December 4, 2023. "A denial of a motion to compel arbitration is considered final." *TRG Customer Sols., Inc. v. Smith*, 226 A.3d 751, 755 n.1 (D.C. 2020) (citation omitted). This Court has jurisdiction pursuant to D.C. Code § 11-721(a)(1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the trial court correctly ruled that the arbitration provision was inapplicable to this matter as one against a former partner and concerning issues external to the Partnership Agreement or to the Partnership and its affairs, as defined in the Partnership Agreement.

[1] Defendant JSCo Enterprises, Inc. was formerly known as A2Z Associates, Inc. doing business as Everglade Consultants. JSCo notified the Superior Court of its corporate name change on March 5, 2023.

2. Whether the trial court was correct in denying BDO's request to reform the arbitration provision and appoint a substitute arbitrator pursuant to 9 U.S.C. § 5 and CPLR § 7504 and based on concerns of unconscionability.

STATEMENT OF THE CASE

On May 26, 2020, BDO filed the underlying action for injunctive relief against Appellees. App. 2a. Appellees subsequently filed counterclaims against BDO. App. 107a.

On June 29, 2020, BDO filed a motion to dismiss Appellees' counterclaims and to compel arbitration. App. 7a. On July 1, 2020, Jia-Sobota filed a motion to stay arbitration. *Id.*

On September 2, 2020, trial court Judge Pasichow denied BDO's motion to compel arbitration and Jia-Sobota's motion to stay arbitration. App. 12a. The court declined to rule on the validity of the arbitration provision at issue, but instead ruled that BDO had waived its right to compel arbitration because the "[t]otality of the circumstances show that Plaintiff has gone beyond merely seeking a Preliminary Injunction."

On interlocutory appeal, this Court disagreed and reversed and remanded for further proceedings on October 6, 2022, regarding the validity and enforceability of the provision. App. 167a-201a.

On remand, BDO first attempted to reform the terms of its arbitration provision by moving the trial court to appoint the American Arbitration Association ("AAA") as arbitrator. The court denied BDO's motion, rejecting BDO's argument that the appointment "method" in the Partnership Agreement had failed. App. 202a-205a. Specifically, the court held that it lacked the power to compel arbitration before a new arbitrator not agreed to by the parties, and whereas the method "has not 'failed' within the meaning of the Federal Arbitration Act. App. 203a. Specifically, the court held that it lacked the power to compel arbitration before a new arbitrator not agreed to by the parties. App. 203a. The court further held that Jia-Sobota was entitled to a ruling on the validity of the provision, and BDO could not avoid such questions by proposing a substituted, unagreed arbitration provision. *Id.*

BDO then moved again to compel arbitration, once more through the AAA, on the basis that BDO unilaterally converted from a partnership to a professional corporation and has changed its arbitration provision to appoint the AAA in all subsequent agreements. On December 4, 2023, the trial court again denied BDO's motion to compel arbitration before the AAA because the arbitration provision did not cover disputes with former partners. The trial court did not address the question of unconscionability directly. BDO subsequently filed a Notice of Appeal. This Appeal followed.

STATEMENT OF THE FACTS

A. AWR Begins Discussions with BDO Regarding Acquisition.

Appellee Jia-Sobota has worked in the government contracting and consulting industry for more than 20 years. App. 213a (EJS Tr. 16:7-16). Jia-Sobota joined Argy Wiltse & Robinson ("AWR"), a small consulting and accounting practice focused on government contracting in the mid-2000s. App. 214a (EJS Tr. 22: 1-14.) After becoming a senior manager and eventually a partner at AWR, Jia-Sobota received a share of ownership interest in the firm around or about June 2012. App. 217a (EJS Tr. 45:13-19). Jia-Sobota's ownership interest was represented by one share of stock in AWR. App. 218a (EJS Tr. 48:5-8).

Then, in late summer or early fall of 2012, Jia-Sobota learned of conversations between AWR leadership and BDO regarding a potential acquisition. App. 218a (EJS Tr. 48:18-22). Paul Argy ("Argy") was the principal negotiator on behalf of AWR concerning the asset purchase with BDO. App. 220a (EJS Tr. 59:8-12). Jia-Sobota continuously expressed his personal concerns about the deal with Argy and Kellye Jennings ("Jennings"), two AWR leaders. App 222a (EJS Tr. 65:17-22; 66:11-22; 75:3-22). Notably, Jia-Sobota was concerned about making the leap to an international firm, given that his experience had only been with local firms. App. 222a (EJS Tr. 65:18-22; 66:1-16).

Despite discussions between BDO and AWR apparently commencing in August of 2012, Jia-Sobota did not receive the terms of the transaction until October. App. 219a (EJS Tr. 58:1-17). Feeling left in the dark, Jia-Sobota expressed apprehensions to Jennings and Argy about the ramifications of a deal between companies, noting a complete lack of experience in such matters, and an inability to amend the transaction's terms. App. 224a (EJS Tr. 76:19-22).

Jia-Sobota's worries about the agreement were compounded when Argy advised him that it would be a waste of time to retain counsel for review or alterations of the transaction terms. App. 232a (EJS Tr. 111:1-4). Specifically, Argy advised Jia-Sobota that he would be unable to make any changes to the terms of the asset purchase agreement, presumably due to his limited ownership in AWR (a single share). App. 232a (EJS Tr. 111:5-8). Due to Argy's recommendation, Jia-Sobota forewent the retention of counsel for review but remained extremely concerned about his inability to participate in any meaningful changes relating to the transaction and its terms. App. 234a (EJS Tr. 114:1-3).

Having not received the transaction terms until October 2012, several weeks before the deal was set to close, Jia-Sobota had little time to decide whether to sign the agreement for BDO partnership. App. 222a (EJS Tr. 65:21-22; 66:1-22). In fact, when Jia-Sobota first received documents relating to the transaction in October, including the First Supplemental Agreement ("FSA") and the BDO Partnership

Agreement (the "Agreement" or the "Partnership Agreement"), he was only given until November 1st to sign or walk away. App. 223a (EJS Tr. 66:7-10; 118:8-10).

Further, Jia-Sobota had no other viable employment opportunities that came about between the time he learned of the deal's likelihood, and the date of closing. App. 222a (EJS Tr. 65:21-22; 66:1-16; 114:10-20; 115:4-9). Jia-Sobota recalls signing the agreement for BDO partnership due to the absence of alternative opportunities and the inability to achieve similar compensation elsewhere. App. 234a (EJS Tr. 114:10-14). The deal between AWR and BDO closed on November 1 of 2012. App. 234a (EJS Tr. 114:4-6). As a result, Jia-Sobota became a BDO partner. App. 234a (EJS Tr. 114:7-8).

B. Jia-Sobota's Tumultuous Tenure at BDO.

Upon joining BDO as a partner, Jia-Sobota was a "Principal" in the company, later acquiring the title of "National Leader of Industry Specialty Services Group" ("ISSG"). App. 131a (Am. Countercl. ¶¶ 17-18). During his initial seven years at BDO, he transformed his group, which focused only on government contracts, into a broad industry practice. App. 131a (Am. Countercl. ¶ 18). Jia-Sobota was known as a top performer while at BDO, routinely receiving praise from managers and fellow employees for his leadership and development abilities. App. 131a (Am. Countercl. ¶ 19).

In 2019, Jia-Sobota and his team were engaged to assess compliance with respect to BDO's Public Sector Practice ("BDO PS"). After conducting an initial internal review of compliance and efficiency-related issues in early 2019, Jia-Sobota's team at ISSG met with BDO PS regarding requirements in government contracts to which BDO PS was not adhering. App. 135a-136a (Am. Countercl. ¶¶ 39-41). Receiving no clarity on the noncompliance, Jia-Sobota hired Jim Trickett, from his own pocket, an expert in the field of Cybersecurity Engineering to lead a compliance review team. App. 136a (Am. Countercl. ¶ 42-44).

It soon became increasingly clear to Jia-Sobota and his review team that BDO's noncompliance with federal regulations and standards posed substantial security, ethical, and fiduciary risks. App. 137a (Am. Countercl. ¶¶ 46-49). The internal review also unearthed that BDO was significantly misrepresenting the extent of their noncompliance, and, in fact, actively avoiding disclosure in violation of the False Claims Act ("FCA"). App. 137a-138a (Am. Countercl. ¶¶ 50-52).

In short, Jia-Sobota became alarmed and dismayed by BDO's affirmative efforts to conceal compliance violations, its avoidance of remedial measures and related investments, and unwillingness to come into compliance. App. 138a (Am. Countercl. ¶¶ 52-55). Throughout 2019 and into 2020, Jia-Sobota's review team persistently tried to address and correct these extraordinary noncompliance issues with BDO PS leadership without avail. App. 139a-143a (Am. Countercl. ¶ 59(a.-

aa.)). These efforts came to a head on February 21, 2020, as Jia-Sobota and Trickett met with BDO PS leaders, who displayed no inclination to remedy the grave shortcomings, even despite Trickett's warning of criminal penalty for their mistakes. App. 144a (Am. Countercl. ¶¶ 61-66).

C. After Persistent, Unsuccessful Remedial Attempts, Jia-Sobota Resigns.

Throughout the course of Jia-Sobota's efforts to bring BDO into compliance, persistently raising his team's findings with leadership, he experienced retaliation and constant pushback from BDO. App. 145a-146a (Am. Countercl. ¶¶ 70-76). Though the presumption within BDO was that Jia-Sobota would oversee and incorporate BDO PS into ISSG, he was eventually cast aside from the role. App. 146a-147a (Am. Countercl. ¶¶ 78-79). In fact, BDO chose an inexperienced, unqualified, and far less-skilled individual to assume these duties, not Jia-Sobota. App. 147a (Am. Countercl. ¶ 80). This move signaled to Jia-Sobota that BDO did not take any of his compliance concerns seriously over the past year, that he was being punished for determinedly raising the illegal conduct, and that he was now on his own. App. 148a (Am. Countercl. ¶¶ 82-84).

In early 2020, upon continued follow-up efforts from Jia-Sobota and his team on urgent compliance issues, a conversation with Paul Heiselmann -- a BDO managing partner and former Board Director – illuminated the scenario facing Jia-Sobota. App. 148a (Am. Countercl. ¶ 85). Heiselmann warned Jia-Sobota that

Wayne Berson, BDO's Chief Executive Officer, and other BDO leaders would force Jia-Sobota out of BDO if he continued down the path of raising compliance issues. App. 148a-149a (Am. Countercl. ¶ 86). In the coming weeks and months, Jia-Sobota was curiously assigned – but nonetheless took on – compliance planning, an area he had no experience in, and developed a robust plan. App. 149a-151a (Am. Countercl. ¶¶ 90-95). Additional issues continued to arise and external opinions on liability and risk mounted; yet BDO doggedly demonstrated a blatant unwillingness to address compliance and liability issues to any extent. App. 151a-152a (Am. Countercl. ¶¶ 96-100).

After months of witnessing BDO's willful ignorance continue (along with its blame-shifting onto Jia-Sobota), Jia-Sobota gave his notice of withdrawal from the partnership on April 7, 2020. App. 152a (Am. Countercl. ¶ 101). Jia-Sobota effected such withdrawal pursuant to Section 11.3 of the Partnership Agreement, which states, as follows:

> If a Partner is unavailable for service because of military draft or other operation of law, because of a leave of absence granted by the Chief Executive Officer, or for any other reason (other than retirement, death, or disability), his/her interest in the Partnership shall terminate at the close of the month in which he/she becomes unavailable.

App. 295a (§ 11.3).

Showing urgency for once, BDO quickly demanded return of firm-issued technology and cut off access to BDO accounts and systems. App. 152a-153a (Am.

Countercl. ¶ 102). The swift freezeout of Jia-Sobota prevented a transition of his duties, but more importantly, precluded resolution of the compliance issues. App. 153a (Am. Countercl. ¶ 103). BDO then refused any communication with Jia-Sobota upon effecting his resignation, including phone calls, emails about compliance concerns and transition matters, and even ignoring his inquiries regarding healthcare coverage. App. 153a (Am. Countercl. ¶ 103).

On April 30, 2020, after BDO's efforts had purposely and effectively made Jia-Sobota unavailable for service, Jia-Sobota emailed BDO, informing them as such, noting the terms of the Partnership Agreement and his now extinguished partnership interest. App. 154a (Am. Countercl. ¶¶ 105-106); App. 104a; App. 295a (§ 11.3). April 30 also marked the scheduled date of Jia-Sobota's scheduled Partnership bonus distribution for 2020, which was notably withheld by BDO. App. 325a. This non-payment of annual distribution amounts further illuminated Jia-Sobota's status as a terminated and then-*former* partner. *Id.*

D. Jia-Sobota Begins New Venture to the Chagrin of BDO.

Upon his forced resignation and termination as a partner by BDO, Jia-Sobota found it difficult to retain new employment, and the timing of the 2020 pandemic was of no assistance. App. 154a (Am. Countercl. ¶ 107). Jia-Sobota then started his own consulting business, EverGlade IP, striving to do things differently than BDO. App. 154a-155a (Am. Countercl. ¶¶ 108-110).

Carving a new role for himself in this latest endeavor, Jia-Sobota was extremely cautious not to run afoul of former BDO clients, even scrutinizing his client lists and conferring with counsel. App. 156a (Am. Countercl. ¶¶ 113-114). Despite now being a *former* partner, Jia-Sobota abstained from attempting to lure away or causing employees of BDO to leave its ranks for employment at EverGlade IP. App. 156a (Am. Countercl. ¶¶ 114-115). Yet, once information about EverGlade IP and Jia-Sobota's role became public knowledge, inquiries from BDO employees began to flood in, as former colleagues unilaterally initiated contact. App. 156a-157a (Am. Countercl. ¶ 116).

Despite going above and beyond his obligations to BDO as a *former partner*, at this point, BDO initiated a calculated public campaign against Jia-Sobota. App. 157a (Am. Countercl. ¶¶ 117-118). BDO began by reaching out to Jia-Sobota's *own* clients and rendering falsehoods about EverGlade's business. App. 157a (Am. Countercl. ¶ 119). Afterward, BDO ramped up its efforts, including the CEO Mr. Berson even falsely claiming he had proof via recorded conversations about illegal activity of EverGlade. App. 157a-158a (Am. Countercl. ¶¶ 119-120). These smear efforts continued up until the point of this action's filing on May 26, 2020. App. 157a-158a (Am. Countercl. ¶¶ 120-124).

E. BDO's Partnership Agreement.

When Jia-Sobota joined BDO, he executed a "Partnership Agreement" governing the terms and conditions of his employment with BDO. At no point did AWR and BDO negotiate or discuss in any material way the terms of the BDO Partnership Agreement, a 46-page document that includes a single paragraph arbitration provision on page 33 that was drafted by BDO. App. 303a (§ 14.7) (hereinafter "Section 14.7" or the "arbitration provision"). The arbitration provision has never been amended. App. 373a (JN Tr. 54:19-22; 60:1-8). The provision, containing no heading, states, in relevant part:

> Any controversy or dispute relating to this Agreement or the Partnership and its affairs or otherwise arising between a Partner and the Partnership, including but not limited to all common law or statutory claims, shall be resolved and disposed of in accordance with this section, except that (i) the Partnership and any Partner may seek provisional remedies from a court and (ii) any accounting provided for in this Agreement, to be conclusive, shall not be subject to this procedure, but shall be conclusive upon the Partners and the Partners agree and accept to be bound by any such accounting. Any dispute or controversy shall be considered and decided by an arbitration panel consisting of two (2) members of the Board of Directors (other than the Chief Executive Officer) selected by the Board of Directors and three (3) Partners from the Partnership's practice offices who are not members of the Board of Directors. The members of the arbitration panel shall be mutually agreed to by the Board of Directors and the parties to the controversy of dispute, provided that no member of the panel shall be from an office in which any complaining Partner was located at the time of the filing of the complaint, nor be otherwise involved in the controversy or dispute...

App. 306a (§ 14.7).

The arbitration provision is found in a singular paragraph on page 33 of a 46-page, single-spaced, small font contract applicable to all BDO partners. *Id.* The paragraph containing the provision is inconspicuously marked, labeled as "Dealings Among Partners." *Id.* Jia-Sobata, who was advised against retaining counsel for document and contractual review, signed the agreement as part of BDO's acquisition of AWR. App. 232a (EJS Tr. 111:5-8). Jia-Sobota neither agreed to the arbitration provision specifically, nor did he enjoy any role in the negotiation process between BDO and AWR. App. 234a (EJS Tr. 114:10-14). Jia-Sobota has no experience in reviewing or negotiating transaction documents, let alone of this magnitude. Rather, his experience was in cost accounting issues. App. 213a (EJS Tr. 16: 7-16).

After the cessation of Jia-Sobota's partner status on April 7, 2020, Jia-Sobota has at all times been a *former* partner of BDO, including at the time of and since this action's commencement. BDO blindly asserts Jia-Sobota "unsuccessfully" effected withdrawal. Appellant's Br. 8. However, as of the end of April 2020, BDO ceased treating Jia-Sobota as a partner by not making partnership allocations or distributions, thereby affirming he was a *former* partner when this suit was filed on May 26, 2020. App. 325a.

SUMMARY OF THE ARGUMENT

I. The arbitration provision in the Partnership Agreement does not apply here because this dispute concerns a *former* BDO partner and is outside the scope of

matters covered by the provision. App. 306a (§ 14.7). First, the language in both Section 14.7 and the Partnership Agreement as a whole is clear and unambiguous as it relates to the definition of "partner" versus "former partner." Mr. Jia-Sobota, upon effecting withdrawal from the Partnership Agreement on (at the latest) April 30, 2020, became a *former* partner. As such, this matter, which commenced on May 26, 2020, and well after Jia-Sobota's date of withdrawal, was one initiated against a *former* partner. As such, this matter falls outside the scope of Section 14.7. BDO can neither incorporate "former" into the reading of "partner" in Section 14.7, nor can it succeed in its "disjunctive" reading of the scope of matters covered therein.

Because former partners are expressly excluded from the Agreement's arbitration requirements and ramifications, and where the language defining the scope of covered disputes with partners is clear, Jia-Sobota is free of Section 14.7's arbitration provision. Upon consideration of the plain language and assignable meaning, combined with jurisdictional case law on-point with Jia-Sobota's contentions of inapplicability, it is clear BDO's arbitration provision does not apply here.

II. The arbitration provision is further unenforceable because of its clear unconscionability – with elements of both procedural and substantive unfairness on display – and BDO cannot skirt its invalidity by proposing a substitute arbitrator. First, while substantial elements of substantive unconscionability are alone

sufficient to invoke an "exceptional case" standard under New York law, procedural injustice is also notably present. The arbitration provision, hidden 33 pages into a single-spaced 46-page agreement, is tucked in a section titled "Dealings Among Partners." The arbitration provision is entirely devoid of conspicuous markings. Further, as it applies to Jia-Sobota, the facts of the transaction between AWR and BDO – and Jia-Sobota's absence from such discussions – illustrate procedural unfairness. Moreover, the provision, which names BDO's own partners and Board Members as arbitrators, creates a conflict of interest beyond accepted standards of enforceability. Section 14.7 is unenforceable as against Jia-Sobota.

Moreover, the provision at issue is exemplary of one identifying an exclusive arbitral forum, a scenario which provides no allowable judicial intervention for substitute arbiters. BDO cannot avoid the consequences of its drafting of an unconscionable provision by petitioning the Court for substitution of the AAA in lieu of the original arbitrators. Neither BDO's argument of "restructuring" in 2023 or its spiritless discussion of a "waiver" relating to Section 14.7 can bypass the unmistakable unenforceability of this provision.

III. The arbitration provision is further unenforceable against JSCo because JSCo was never a signatory to the Partnership Agreement. Absent an express agreement between the parties, BDO must invoke one of the limited theories enabling alternative enforcement, thereby showing that JSCo knowingly exploited the

provision. BDO makes no such efforts in its initial brief before this Court and is unequivocally unable to hold JSCo liable. BDO does not appear to dispute this in any way on appeal. Moreover, it should be recognized by this Court and all parties that any order to compel arbitration must exclude JSCo.

ARGUMENT

I. THE ARBITRATION PROVISION IS INAPPLICABLE TO THIS MATTER

A. Applicable Law in Interpreting the Arbitration Provision.

The language in the arbitration provision is unambiguous, and the lower court's reading of the language was correct in that the arbitration provision only applied to "Partners" and not "Former Partners," which is the case for Jia-Sobota. The question of whether BDO's claims against Jia-Sobota fall within the scope of the arbitration provision is decided according to "the ordinary rules of contract construction." *Tac Travel Am. Corp. v. World Airways, Inc.*, 443 F. Supp. 825, 827 (S.D.N.Y. 1978). This standard, provided by the FAA, specifically notes, the "extent [to which] the parties have agreed to arbitrate is to be determined here according to federal law." *Id.* As for the application of such agreements with respect to a prospective adversary, its terms "must be clear, explicit and unequivocal," not resting upon "implication or subtlety." *Thomas Crimmins Contracting Co. v. City of New York,* 542 N.E.2d 1097, 1099 (N.Y. 1989) *(*quoting *Waldron v. Goddess*, 461 N.E.2d 273, 274 (N.Y. 1984). Those components are of "even greater significance"

when determination of "all disputes is to take place before the employee of one contracting party." *Id.* Here, the BDO arbitration provision requires that the arbitration panel of three be comprised exclusively of BDO partners, or now post-conversion to a closely-held professional services corporation, its principals. BDO cannot meet this "clear, explicit and unequivocal" standard in asking this Court to accept its illogical construction of the arbitration provision.

In interpreting an arbitration provision, the FAA first imposes "certain rules of fundamental importance," including the "basic precept that arbitration is a 'matter of consent, not coercion.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 479 (1989)). With a presumptive consensual nature surrounding private dispute resolution, parties are permitted to limit arbitrable issues, agree on rules for proceedings, and "specify with *whom* they choose to arbitrate their disputes." *Id.* at 683. Affording such deference to structuring alternative disputes, such contractual freedoms preserve the FAA's central purpose: to ensure '"private agreements to arbitrate'" are effectuated only '"according to their terms.'" *Id.* (quoting *Volt* 489 U.S. at 479). The seminal issue here is what issues, if any, the parties agreed to arbitrate. Outside of the FAA, the interpretation of the arbitration provision would "generally" be a matter of state law, which would be New York law. *Stolt-Nielsen S.A.*, 559 U.S. at 681. Yet, regardless of whether the

FAA standards or New York law is applied, the result is the same: the arbitration provision is inapplicable.

The relevant portion of the Partnership Agreement states:

> Any controversy or dispute relating to this Agreement or the Partnership ***and*** its affairs or otherwise arising between a ***Partner*** and the Partnership, including but not limited to all common law or statutory claims, shall be resolved and disposed of in accordance with this section . . . . The determination of such arbitration panel shall be conclusive and binding on all the ***Partners***, and shall not be subject to further determination in any type of proceeding within or without the Partnership.

App. 306a (§ 14.7) (emphasis inserted). First, the provision only applies to a "Partner" or "Partners" and does not reference Former Partners such as Jia-Sobota. Second, the issues raised by BDO's complaint against Jia-Sobota do not meet the conjunctive test setting forth the scope of matters that are required to be arbitrated per the provision. BDO cannot satisfy either of the requirements set forth in Section 14.7 to compel arbitration.

B. Section 14.7 Encompasses Only Disputes with Partners.

1. BDO Cannot Impute an Alternative Meaning to "Partner" When "Former Partners" Are Identified Elsewhere.

The arbitration provision in Section 14.7 refers only to a "Partner" and "Partners." App. 304a (§ 14.7). Further, the title of this Article of the Partnership Agreement – Article XIV – is "Dealings Among Partners." App. 304a (Art. XIV) Section 14.7 is devoid of any express mention or reference to "former partners." App. 304a (§ 14.7).

Although BDO agrees with the clear language, it confoundingly contends, "the most that suggests is that the second half" of the initial sentence in Section 14.7 fails to cover former partner disputes. Appellant's Br. 19-20. But for the multitude of other "explicit references to *former* partners" in the partnership agreement, that claim might well hold water. App. 528a. (quoting Dec. 4, 2023, Order of the Superior Court of the District of Columbia) (emphasis added). Stemming from the inclusion of former partner reference in a preceding section (§ 14.5), this hollow argument was similarly rejected by the court below.[2] App. 529a. Instead, the absence of the qualifier "former" in Section 14.7, when stacked up against other provisions in the Partnership Agreement, is illustrative of the provision's bearing. In fact, the words "former partner" appear proximately, or are directly collated with, the singular "partner" throughout the document, but notably not in Section 14.7. *See* App. 293a (§ 10.3); App. 294a (§ 10.10); App. 303a (§§ 13.5, 13.6); App. 304a (§ 14.4); App. 306a (§ 14.6); App. 307a (§ 14.11). Indeed, the Partnership Agreement uses the phrases partners, former partners, or both throughout the document. BDO, as drafter

[2] "The definition of "Partner" in Section 14.5 uses the term 'herein'—rather than 'hereinbefore' and/or 'hereinafter'— thereby indicating that the definition applies only to Section 14.5. The partnership agreement, moreover, continues expressly to distinguish between partners and former partners after Section 14.5, further illustrating the parties' intention that the definition of "Partner" in Section 14.5 be applied only to that one section of the agreement." App. 529 (Dec. 4, 2023 Order of the Superior Court of the District of Columbia).

of the Partnership Agreement, explicitly made a decision not to include former partners in the arbitration provision as it did in many of the other sections.

2. BDO's Contentions of "Circumvention" Are Defeated by Its Own Drafting Decisions and True Meaning.

Upon noting the absence of ambiguity relating to the meaning of the term "partner" versus "former partner," this Court should next reach the "inescapable conclusion" that BDO "intended the omission" of former partners from Section 14.7. *Quadrant Structured Prod. Co. v. Vertin*, 16 N.E.3d 1165, 1172 (N.Y. 2014). Under New York law, this approach holds if "parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts" or imputed provisions. *Id.*[3] *See also In re Ore Cargo, Inc.,* 544 F.2d 80, 82 (2d Cir. 1976) (The failure of a sophisticated party to include a "specific reference" to a material term is subject to presumption of intentional exclusion). As the court properly held below, BDO's failure to incorporate "former partner" in the language of Section 14.7 is "strong

[3] Flowing from the maxim *expressio unius est exclusio alterius,* this implication under New York law is in accordance with modern interpretation of contracts. *See generally* Glen Banks, *New York Contract Law* § 10.13 [West's NY Prac Series 2006]. The Latin term has a literal meaning of "the expression of one thing is the exclusion of the other."

evidence that the arbitration provision is not intended to apply" to such parties. App. 528a.[4]

Moreover, a further reading into Section 14.7 conclusively demonstrates that BDO did not intend the arbitration provision to apply to former partners, and BDO's omission of former partners was clearly no mistake. The remaining portions of Section 14.7 refer only to "partners" on several occasions where former partners could have easily been inserted.

> The members of the arbitration panel shall be mutually agreed to by the Board of Directors and the parties to the controversy or dispute, provided that no member of the panel shall be from an office in which any **complaining Partner** was located at the time of filing of the complaint . . . The arbitration panel shall be selected as soon as possible after notice to the Partnership **by any Partner** that such controversy or dispute exists. The conduct of the arbitration shall be in accordance with such procedure as the Board of Directors adopts and communication **to the Partners**. *** The determination of such arbitration panel shall be conclusive and binding **on all the Partners** . . . ."

App. 304a (§ 14.7). The plain language of Section 14.7 uses only "Partner" and completely belies BDO's reading of the provision to incorporate former partners. If BDO meant the scope of arbitrable issues to include former partners, then certainly BDO would have referred to them somewhere (anywhere) in the section. But BDO

[4] "BDO . . . thus knew full well how to specify those parts of the agreement that were intended to apply to former partners. Provisions like Section 14.7 that refer only to partners therefore should be understood as intended to apply only to current partners, and not to former partners." App. 528a (Opinion of the Superior Court for the District of Columbia).

did not. This Court should read the plain text of Section 14.7 and agree with the lower court that Section 14.7 does not apply to former partners.

BDO next contends the trial court's reading too easily "circumvents" the provision, a notion that is swiftly debunked by the absence of the term "former partner" from the entire provision. Appellant's Br. 21. However, in this pitch, BDO derides the plain reading interpretation of Section 14.7, and notes that arbitration would be "required only if the complaining or defending partner remains a partner." *Id.* Ironically, this gripe with the trial court's finding – one that deployed context and ordinary meaning – is merely a qualm with its own drafting decisions. Nonetheless, the notion of "circumvention" is easily extinguished by "'discover[ing] the facts of [the] particular situation and . . . assess[ing] them in terms of the purposes . . . embodied in the' agreement." *United States v. Volvo Powertrain Corp.*, 854 F. Supp. 2d 60, 68 (D.D.C. 2012) (quoting Duncan Kennedy, *Form and Substance in Private Law Adjudication,* 89 Harv. L. Rev. 1685, 1689 (1976)). In fact, when a decree clearly expresses what it "meant to accomplish," circumvention would come only from substituting the court's own judgment in its place. *Id.* at 69. This Court should abstain from circumventing the clear omission of excluding former partners and affirm the trial court's finding that Section 14.7 applies only to current partners.

3. The Trial Court Gave Proper Meaning to the Provision, Correctly Refuting BDO's Attempt to Ascribe Alternative Applications.

Because the arbitration provision does not include former partners, BDO then asks this Court to read the scope of the arbitration to cover disputes that *could* involve former partners. The applicable section states: "**Any controversy or dispute relating to this Agreement or the Partnership and its affairs or otherwise arising between a Partner and the Partnership** . . ." App. 306a (§14.7) (emphasis added). BDO contends the use of the words "or otherwise" in Section 14.7 disjoins the section into two phrases, creating alternative applications on either side of separation. Appellant's Br. 14-21. An adoption of BDO's construction would invoke the existence of two "categories" of arbitrable disputes. In fact, BDO argues the language appearing before the phrase "or otherwise" sweeps in "any and every dispute pertaining in any way" to the Partnership Agreement or affairs. *Id.* at 15. This stance was not convincing to the lower court. Regarding BDO's assertion of two disjunctive phrases with the first "thus [applying] to a broader set of parties than the second," the lower court explicated stated that it "is not persuaded." App. 529a. Indeed, the phrase "arising between a Partner and the Partnership" is to be applied to the type of arbitrable dispute as set forth in the entire sentence. This Court should similarly refuse acceptance of BDO's "disjunctive" argument, which rests upon a misapplication of New York law and general literary construction.

i. *The Absence of a Comma Forecloses Any Argument of "Two-Prongs" in Section 14.7.*

By attesting that an "independent clause" is created by the conjunctive use of "or" in "or otherwise arising between a Partner and the Partnership," BDO ignores a "fundamental grammar rule" when the term "or" is used multiple times in a sentence. *In re China Fishery Grp. Ltd.*, 2023 WL 2435701, at *11 (Bankr. S.D.N.Y. Mar. 8, 2023). That rule, as omitted from BDO's relevant discussion, suggests "a comma must be placed before a conjunction introducing an independent clause." *Id.* This is particularly true because three conjunctions (all "or") appear in the same sentence. The insertion of a comma before "or otherwise" would have clearly indicated the beginning of a new clause with the usage of serial conjunctions (here, "or"). [5] In accompaniment with this general rule is the "corollary" approach to the issue: a court should refrain from reading a "contractual provision in a manner that renders the *absence* of a comma grammatically incorrect." *Id.*[6] BDO makes a similar

[5] In fact, the Partnership Agreement utilizes the serial-type comma in several other sections to introduce independent clauses, notably: App. 291a (§ 8.4); App. 292a (§ 9.4); App. 308a (§ 14.14(a)); App. 304a (§ 14.3).

[6] In *China Fishery Grp. Ltd.*, the appellants argued for the creation of a definitional bifurcation into "two 'independent clauses' by the conjunction 'or.'" *Id.* at 11. The court disagreed: "instead, the text should be analyzed as one long relative clause . . . that modifies the subjects of the overarching relative clause, 'order or judgment.'" *Id.*

mistake here, arguing to this Court for the imposition of a comma into a provision that it drafted and has utilized for years.[7]

It follows then, that for BDO's proposed interpretation of Section 14.7 to gain acceptance, the Court must go beyond the realms of ordinary rules of construction and literary meaning. It is true, however, as BDO purportedly contends, that "when coordinating conjunctions such as either/or are utilized, the alternative sentence elements are considered of equal significance." *Van Patten v. LaPorta*, 148 A.D.2d 858, 860 (N.Y. App. Div. 1989). Conveniently omitted from BDO's "category" argument is the importance of "the placement of a comma before the disjunctive 'or' indicates an intent to discriminate between the various parts of the sentence." *Id.*

The approach to literary construction undertaken by BDO requires this Court to ignore basic tenets of sentence structure and the canon against surplusage.[8] First, it is hardly a novel concept that "the use of a comma separates a series of words, phrases, or items in a list." *People v. Alford*, 2024 WL 1868901, at *3 (N.Y. Sup.

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[7] Where appellants in *China Fishery Grp. Ltd.*, like BDO here, argued the text at issue was "heavily negotiated in a process that lasted more than half a decade," the lower court found it "merely bolsters [respondent's] argument that the conjunction "'or'" does not introduce a second independent clause within the definition." *In re China Fishery Grp. Ltd.*, 2023 WL 2435701, at *11.

[8] "We have recognized that meaning and effect should be given to every word of a statute. 'Words are not to be rejected as superfluous where it is practicable to give each a distinct and separate meaning.'" *Leader v. Maroney, Ponzini & Spencer*, 761 N.E.2d 1018, 1024 (N.Y. 2001) (quoting *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 412 (N.Y. 1989)).

Ct. Apr. 19, 2024). Further, while the "application of proper comma usage" suggests an intent to "distinguish," it is also understood that "the absence" thereof "indicates that those terms are merely interchangeable." *Id.* As such, the "two-pronged" reading suggested by BDO runs afoul of the sensical interpretation of using a comma to demarcate the separateness of the clauses. Appellant's Br. 16. Instead, upon noting the absence of a comma, this Court should accord full meaning to each word in the provision and read the initial phrase of the sentence "in light of – and as limited by - the second." App. 530a.

Likewise, because no comma was used by BDO to expressly indicate separation, this Court could just as easily read the "and" to be the conjunction of the two clauses, requiring a conjunctive test. Under this reading, the dispute must relate to "[1] this Agreement or the Partnership **and** [2] its affairs or otherwise arising between a Partner and the Partnership." This interpretation would also bring this Court to the same correct conclusion as the trial court: that the dispute must arise between a Partner and the Partnership. Indeed, any reading of the provision that would require a current partner, and not a former partner, to arbitrate before three partners of BDO seems more reasonable in that BDO would want to keep its partner dispute in house and confidential.

ii. *The Words "Or" And "Otherwise" Merely Effect Limitation on the Scope of Section 14.7's Application.*

When combined, the words "or" and "otherwise" fail to materially alter the outlook of Section 14.7, and certainly do not act as "ones of enlargement," as BDO suggests. Appellant's Br. 15. Instead, the terms are linked together to establish the intended scope, and do not represent an inclusion of "every conceivable situation outside those stated." *Id.* at 16. In fact, where a provision or statute "places the word 'otherwise' just after the examples" or listed applications, it is surely for the purposes of covering only others that are "similar" to those listed. *Begay v. United States*, 553 U.S. 137, 144 (2008). Notably in *Begay*, the Court considered whether the appearance of "otherwise" in a criminal statute required other covered crimes to be at least highly "similar" to those listed. *Id.* The Court found that it did. The losing argument, put forth by the Government, asserted the specific references to statutory crimes "do not limit the scope of the clause," to which the Court responded: "we cannot agree." *Id.*[9] Here, as applied, the correct conclusion is to expand the clause only to other similar circumstances that denote disputes "between a Partner and the Partnership."

[9] *See e.g., Johnson v. United States*, 576 U.S. 591, 608 (2015): The "residual clause" in "violent felony" statutory definition was narrowed and proscribed according to listed offenses. *Id.* at 606. "The specific crimes listed in § 924(e)(2)(B)(ii) . . . offer a "baseline against which to measure the degree of risk" a crime must present to fall within that clause. *Id.* (Thomas, J., concurring).

The relevant discussion here is whether the arbitration provision applies to Jia-Sobota, a former partner. When proper weight is given to the language of Section 14.7 and the entirety of the Partnership Agreement, it does not. The implications of this accurate conclusion exclude from arbitrability "any and all disputes between BDO and former partners," as BDO correctly points out. Appellant's Br. 21. BDO asks this Court to disjoin the meaning of Section 14.7 for its convenience to amend drafting which unequivocally results in a more narrowly tailored arbitration provision. To achieve this, BDO looks past the meaning of the word "otherwise" and the express references to "Partner" and "the Partnership." App. 306a. Additionally, BDO fails to recognize that "Partner" is referenced four more times later in the same section where BDO could have easily added the phrase "former partners," but chose not to. Instead, as the trial court correctly noted, the first phrase "provides examples of the main types of disputes" to be arbitrated, while the latter "clarifies" the also-covered claims of less commonality. App. 531a.[10] Thus, the trial court correctly interpreted the limited scope in a manner consistent with the full reading of Section 14.7's language only referring to "Partners."

[10] *See also United States v. Sandlin*, 575 F. Supp. 3d 16, 25 (D.D.C. 2021) (When the clause at issue appears "in the same provision, not a separate subsection," the "'otherwise' clause forms part" of the definition itself) (discussing the clause at issue in *Begay.*).

C. The Trial Court Was Within Its Rights to Request Arguments on the Facts Underlying This Action's Central Issue.

BDO also takes issue with the trial court's correspondence to the parties on November 6, 2023 – prior to November 7 oral arguments – requesting discussion of Section 14.7's pertinence to former partners. Appellant's Br. 33; App. 449a. Specifically, BDO argues the court "*sua sponte* directed the parties" to address a "long ago" waived issue which was "never briefed by the parties." Appellant's Br. 22. However, first, this is a patent misstatement of fact: Appellees raised and briefed the issue that the Partnership Agreement did not apply to Jia-Sobota, who was a former partner, in its procedural unconscionability arguments in the lower court, and – as BDO admits – the parties argued the matter on November 7. Second, even if Appellees' briefing was insufficient to raise the issue, BDO's misapprehends the principle of party presentation. Indeed, in cherry-picking cases with grandiose statements to support its contentions of the trial court's purported "commandeering," BDO loses sight of the central question at issue in this case: whether the parties had an agreement to arbitrate.

1. Appellees Raised the Issue of Whether the Arbitration Provision Applied to Jia-Sobota, a Former Partner, in Their Briefing to the Trial Court.

In arguing that Appellees waived the argument that the arbitration provision did not apply to former partners, including specifically Jia-Sobota, BDO fails to carefully read Appellees' briefs to the trial court below. BDO asserts that the "trial

court manifestly abused its discretion by resolving the long running motion to compel arbitration on the basis of a contract-interpretation defense that Jia-Sobota had not raised and the parties did not brief." Appellant's Br. 31. However, Appellees' October 6, 2023 Memorandum of Law in Opposition to Plaintiff BDO USA, P.C.'s Motion to Compel Arbitration Before the American Arbitration Association states succinctly, "to apply the arbitration provision to Jia-Sobota, a former BDO partner, the arbitration provision itself must be read in conjunction with other provisions that define 'Partner' to include former partners." (Def.'s Mem. Opp. to Mot. Compel (Oct. 6, 2023).[11]) Appellees went on to focus on this as one aspect of the procedural unconscionability of the arbitration provision itself. As such, BDO's argument that this issue was not raised in the briefing to the trial court prior to its November 6 directive is factually incorrect.[12]

2. The Legal Theory of Whether the Arbitration Provision Applied to Former Partners Was Presented and Argued in the Trial Court.

Even if BDO were correct (it is not) that Appellees had failed to raise the issue of Jia-Sobota's status as a former partner to the trial court below (they did not), the trial court's inquiry into the scope and application of the arbitration provision was not limited to the parties' briefs. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S.

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[11] This memorandum was not included in the Appendix as it is "Excluded Material" under D.C. Ct. App. Rule 30(a)(2).

[12] Further, BDO fails to acknowledge that it was supplied the opportunity and did, in fact, argue the issue on November 7.

90, 99 (1991) ("When an issue . . . is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."); *accord United States ex rel. May v. Purdue Pharma, L.P.*, 737 F.3d 908 (4th Cir. 2013).

BDO cherry-picks language from the *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020), to suit its version of the party presentation principle. BDO cites to language from the decision that " '[federal courts] rely on the parties to frame the issues for decision' and assume only 'the role of neutral arbiter of matters the parties present.'" Appellant's Br. 31 (citing *id.*). However, BDO failed to recognize the Court's qualifying language that – e.g. - "a court is not hidebound by the precise arguments of counsel," and that "[t]he party presentation principle is supple, not ironclad. There are no doubt circumstances in which a modest initiating role for a court is appropriate." *Sineneng-Smith*, 590 U.S. at 376. These considerations certainly square with this Court's own rulings that "a court may consider an issue antecedent to . . . and ultimately dispositive of the dispute before it, even an issue the parties fail to identify and brief." *See e.g.*, *Outlaw v. United States*, 632 A.2d 408, 411 (D.C. 1993) (citing *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am.*, 508 U.S. 439, 447 (1993) (internal quotations and citations omitted)).

In this case, Appellees raised to the trial court the fact that Jia-Sobota was a former partner, rather than a current partner. Appellees raised the contract interpretation question to the trial court, stating that "to apply the arbitration provision to Jia-Sobota, a former BDO partner, the arbitration provision itself must be read in conjunction with other provisions that define 'Partner' to include former partners." (Def.'s Mem. Opp. to Mot. Compel (Oct. 6, 2023).) As such, the issue was raised and briefed to the trial court, and the trial court signaled (prior to hearing) that it would inquire of all parties – BDO, Jia-Sobota, and JSCo – regarding the arbitration provision's application to former partners like Jia-Sobota at hearing. And the trial court heard arguments from counsel regarding the matter. As such, this is not an instance where the trial court made a "radical transformation of th[e] case," as the Ninth Circuit did in *Sineneng-Smith*. 590 U.S. at 372. Rather, the trial court's inquiry was limited to the applicability of the arbitration provision. As such, the court simply asked BDO to demonstrate, as a matter of contract interpretation that the parties had agreed to arbitrate.

3. The Trial Court Merely Asked BDO to Meet Its Burden for a Motion to Compel, Which It Could Not.

As courts have repeatedly stated, an apparent "party to an agreement may not be compelled to arbitrate its dispute with another unless the evidence establishes the parties' clear, explicit and unequivocal agreement to arbitrate." *Scotti v. Tough Mudder Inc.*, 97 N.Y.S.3d 825, 831 (N.Y. Sup. Ct. 2019) (quotation and marks

omitted). The first step in the analysis, determining "whether the parties made a valid arbitration agreement," is not one that a court must undertake on its own. *Id.; see also See Bowmer v. Bowmer*, 406 N.E.2d 760, 762 (N.Y. 1980) (The burden for a moving party in compelling arbitration is hardly an elusive standard. Unless the agreement itself "expressly and unequivocally encompasses the subject matter" of a dispute, a party cannot be forced to "submit to arbitration."). Rather, in the context of a motion to compel, the "party seeking arbitration bears the burden of establishing that an agreement to arbitrate exists." *Id.* BDO, as the party so moving, bore this burden throughout the course of litigation. Jia-Sobota, as a former partner of BDO, is entitled to the court's drawing of "all inferences in favor of the non-moving party." *Id.*

BDO's contentions of the trial court's lack of "fairness" or "wasting" of judicial resources in requesting discussion on this issue is nonsensical. Appellant's Br. 25. These unfounded arguments look only to a symptom of this lengthy litigation – the court's desire for heightened clarity – and not the cause – BDO's utter failure to establish the existence of a valid agreement with Jia-Sobota. Thus, put in proper context, the notion that BDO lacked a "meaningful opportunity to respond" to an element of proof required from the outset of this litigation is unpersuasive.

II. THE ARBITRATION PROVISION IS FURTHER UNENFORCEABLE AS ONE EXHIBITING UNCONSCIONABILITY, AND BDO'S UNILATERAL REFORMATION ATTEMPT CANNOT BYPASS SUCH CONSEQUENCES.

A. The Arbitration Provision Is Unconscionable as a Matter of Law, and Is Thus Unenforceable Against Jia-Sobota.

The law makes clear under both CPLR 7503 and 9 U.S.C. § 4: "a party may resist enforcement" of an arbitration provision "on any basis that could provide a defense to or grounds for the revocation of any contract, including…unconscionability." *Matter of Teleserve Sys., Inc. (MCI Telecommunications Corp.)*, 230 A.D.2d 585, 592 (N.Y. App. Div. 1997). In the broad sense, the doctrine of unconscionability presupposes "some showing of an absence of meaningful choice" concerning one party, "together with contract terms which are unreasonably favorable to the other party." *Hojnowski v. Buffalo Bills, Inc.*, 995 F. Supp. 2d 232, 238 (W.D.N.Y. 2014) (quoting *Gillman v. Chase Manhattan Bank, N.A.,* 534 N.E.2d 824 (N.Y. 1988)).

New York law continues to generally require a showing of both procedural and substantive unconscionability to render a provision void and unenforceable. Procedural considerations concern the "contract formation process" and absences of genuine bargaining "choice," whereas substantive analysis turns on "the content of the contract." *State v. Wolowitz*, 96 A.D.2d 47, 68 (N.Y. App. Div. 1983). However, it can also be said that these two elements operate on a "sliding scale," with relevant analysis hinging upon a party's freedom of contractual choice. *Id.* In fact, "the more

questionable" the procedural factors and freedom of choice, "the less imbalance in a contract's terms should be tolerated and vice versa." *Id.* Through its focus on "the manner in which a contract is entered into," the doctrine of unconscionability is "designed to insure freedom of contract." *Id.*

1. The Arbitration Provision Is Substantively Unconscionable.

Substantive unconscionability, relating to the content of an arbitration agreement itself, asks whether its terms "are unreasonably unfavorable to one party" – typically the party seeking enforcement. *Buhrer v. BDO Seidman, LLP*, 2003 WL 22049503, at *2 (Mass. Super. July 7, 2003) (applying New York law to invalidate arbitration provision against former partner). As has been the approach under New York law for nearly 75 years, "no party to a contract, or someone so identified with the party" can be, even by agreement, "designated as an arbitrator to decide disputes under it." *Cross & Brown Co. v. Nelson*, 4 A.D.2d 501, 502 (N.Y. App. Div. 1957). Hardly a novel concept, the yielding of "power to an adverse party to decide disputes under the contract," aside from "outraging public policy," is also clearly "illusory." *Id.*

In *Cross*, the long-standing New York case on point, the Court rejected enforceability of a similar arbitration provision to BDO's here, noting "unless we

close our eyes to realities," the agreement is unduly oppressive. *Id.*[13] Though acknowledging the contractual freedoms inherent to settling disputes, discussion began and ended with the "well-recognized principle of 'natural justice': that a man may not be a judge in his own cause." *Id.* Further, *Cross* stands for yet another important proposition: the result which occurs upon recognition of such conflict-related substantive unconscionability. In fact, the solution is simple: "a party may stay arbitration where there is no valid contract to arbitrate." *Id.*

At issue here is the arbitration provision's empowerment of BDO's own management and partners to decide arbitrable disputes, particularly where BDO now purports it to govern a dispute with a former partner. App. 503a. Indeed, the arbiters appointed by Section 14.7 "are in fact BDO itself, thus creating the inherent inequity of having BDO serve as its own arbitrator to determine matters." *BDO Seidman v. Miller*, 949 S.W.2d 858, 861 (Tex. App. 1997).[14] In *BDO Seidman*, an identical provision to the case at bar was at issue, providing for five internal arbitrators – comprised of "three of BDO's board of directors, and two additional BDO partners." *Id.* Noting the stark similarities of BDO's provision and that in *Cross*, the court

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[13] The arbitration provision in *Cross* provided: "any dispute or difference as to any matter in this contract contained shall be settled by submitting the same to arbitration to the Board of Directors of the party of the first part (the employer), whose decision shall be final." *Cross*, 4 A.D.2d. at 502.

[14] The *Miller* court applied New York law, citing a valid choice of law provision in the underlying partnership agreement.

admonished the "inherent inequity of having BDO serve as its own arbitrator" in an action concerning monetary damages. *Id.* Consequently, such an agreement is unenforceable "on its face," and not merely a "contract to arbitrate, but an engagement to capitulate.'" *Id.* (quoting *Cross & Brown Co.*, 4 A.D.2d at 502).

2. The Arbitration Provision Is Procedurally Unconscionable.

While findings of contractual unconscionability "ordinarily" follow a showing of unfairness in both the bargaining process and a contract's terms, New York recognizes the possibility of "exceptional cases" abrogating this requirement. *Gillman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 829 (N.Y. 1988). In such instances, "a provision of the contract is so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone." *Id.* Though less common, the exceptional case scenario is exemplified whereas, "a contract that is 98 parts substantively unconscionable may require only two parts of procedural unconscionability to render it unenforceable and vice versa." *BDO USA, LLP v. Jia-Sobota*, 283 A.3d 699, 712 (D.C. 2022) (Deahl, J., concurring) (quoting 1 White, Summers & Hillman, Uniform Commercial Code § 5:16 (6th ed. 2021)).

While New York law avails Jia-Sobota of this sliding scale approach, the question of exceptional circumstances need not be reached. Rather, the facts of the parties' bargaining process exhibit the requisite factors of procedural unconscionability. Specifically, the focus here shifts to the use of "deceptive or high-

pressured tactics," the utilization of "fine print in the contract," the relative experience of the burdened party, "and whether there was disparity in the bargaining power." *Gillman*, at 791. In looking to the existence and extent of such factors, the court will require a showing that they arose in the contract *when made. Id.* at 792.

As noted by Judge Deahl, the "strongest sign of procedural unconscionability here" is the inconspicuous or "hidden" nature of "the most oppressive aspect of this arbitration clause – its application to former partners." *BDO USA, LLP,* 283 A.3d at 712. In fact, the provision does not appear until page 33 of the single-spaced, small font, 46-page agreement. App. 306a. Further, the section employs no such "large, bold and underlined font" to call attention to what is clearly a provision of grave importance to BDO in an otherwise "sprawling contract." *Id.* at 713; *See also Gillman,* 534 N.E.2d at 829 (The location and the size of print may, in a proper case, be factors bearing on procedural unconscionability.). As it relates to Jia-Sobota, the agreement was not signed until after he was advised against retaining counsel due to his single-share ownership and lack of bargaining power.

By the same token, Jia-Sobota had no role in the negotiations between BDO and AWR, having been effectively cut out from such conversations by AWR's principal negotiator, Paul Argy. Coupled with his inexperience in reviewing transactional and legal documents, there was little – if any – opportunity for Jia-Sobota to adequately understand and assume contractual ramifications.

Unfortunately for Jia-Sobota, having not received any alternative recruiting contacts or bona fide employment opportunities elsewhere, there was no choice but to execute these documents. These factors, when combined, not only exhibit cognizable procedural inequalities, but approach the status of an adhesion contract for Jia-Sobota.[15]

Regardless of the weight accorded to each of these respective considerations, this Court should find "at least two parts procedural unconscionability here" to push the "98 parts substantive unconscionability" past the line of voidability. *BDO USA, LLP,* 283 A.3d at 713. Moreover, Jia-Sobota failed to render assent to the arbitration provision in any meaningful manner. The disparity of bargaining power between BDO and Jia-Sobota is overwhelming, and the high-pressure tactics deployed by BDO personnel ensured this provision's execution and its consequences were inescapable.

B. BDO Cannot Sidestep Invalidity of the Arbitration Agreement by Attempting to Unilaterally Substitute AAA as Arbitrator.

The Court should also reject BDO's final argument that, even if the provision is unconscionable, the result should be limited to appointment of another "reputable

[15] "'Typical contracts of adhesion are standard-form contracts offered by large, economically powerful corporations to unrepresented, uneducated, and needy individuals on a take-it-or-leave-it basis with no opportunity to change the terms.'" *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 382 (S.D.N.Y. 2002) (quoting *Brower v. Gateway 2000,* 246 A.D.2d 246, 676 (N.Y. App. Div. 1998)).

arbitrator," not total renunciation. Appellant's Br. 28. In extending three makeshift lines of reasoning under this proposition, BDO refers this Court's attention to cases that are inapplicable. Yet, to understand Section 14.7's clear unconscionability is to understand BDO's argument surrounding appointment of a substitute arbitrator. Knowing that its provision is otherwise unenforceable, this pitch by BDO is an attempt to maneuver around the ramifications of drafting an arbitration provision appointing its own partners as the arbitrators. To allow BDO to escape its own bad act would simply encourage drafters to impose the most unconscionable provisions knowing an out exists under Section 5. This should be disfavored from a public policy and equitable perspective.

While the cases that BDO cites in this realm are relevant *facially*, none of the referenced decisions are based upon the distinctive facts specific to this court. It is true, as BDO contends, that New York law and FAA Section 5 both permit substitution of arbitrators in the event a "method" of appointment fails by a party's refusal to "avail himself of such method." [16] However, none of those operative conditions apply when an *entire* provision is itself unconscionable, and the drafting party seeks to cure the unconscionability. This is not an issue surrounding a singular line-item in a contract, or an easily severable methodology portion of an otherwise enforceable arbitration agreement. Rather, this is a scenario dealing with an entire

[16] 9 U.S.C. § 5; N.Y. CPLR § 7504.

provision and its unconscionability – a situation that does not provide for substitution. *See generally* 9 U.S.C. § 5 (limiting substitution to when the method fails).

1. Whether Jia-Sobota Abstained from Arbitral Nomination Is Irrelevant, as He Had No Duty to Comply.

Arbitration provisions are severable "from the remainder of the contract," as a matter of "substantive federal arbitration law." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010). Yet, this fact surely does not render them "unassailable" within the underlying contract. *Id.* In fact, upon a proper challenge to an agreement's validity under 9 U.S.C § 2, the "court must consider the challenge before ordering compliance with that agreement under § 4." *Id.; see also* 9 U.S.C. § 2 (Validity, irrevocability, and enforcement of agreements to arbitrate). As such, if an agreement, or provision therein, is rendered unenforceable, there is no binding duty of compliance upon the party against whom enforcement is sought. *See CBI Cap. LLC v. Mullen*, 2020 WL 4016018, at *6 (S.D.N.Y. July 16, 2020); *Ambush Alarm & Elecs., Inc. v. 606 Second Ave. Rest. Corp.*, 100 N.Y.S.3d 609 (N.Y. App. Term. 2018); *Crandall v. Smith*, 15 N.Y.S.2d 488, 491 (Sup. Ct. 1939); *Andre v. Gaines Berland, Inc.*, 1996 WL 383239, at *2 (S.D.N.Y. July 8, 1996).

More critically, the cases relied upon by BDO in support of its "cooperation" argument do not, in any way, support BDO's contentions. *See Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246 (N.Y. App. Div. 1998); *BP Exploration Libya Ltd. v.*

ExxonMobil Libya Ltd., 689 F.3d 481 (5th Cir. 2012). For example, in *Brower,* the court weighed the hardship imposed by "excessive fees" charged by the International Chamber of Commerce (ICC), the selected arbitrator via the provision. *Brower*, 246 A.D.2d at 256. Only after finding that the *costs* were unconscionable did the court allow for a substitute arbitrator to be appointed under 9 U.S.C. § 5. *Id.*[17] Similarly misguided, BDO next references *BP Exploration*, a case where the court noted, "no party challenges the notion that their underlying dispute is subject to binding arbitration per the agreements." F.3d at 489. Instead, resolving an "unworkable" contractual appointment procedure, the court simply settled the "parties' impasse over the selection of arbitrators." *Id.*

Contrary to BDO's contentions, Mr. Jia-Sobota's level of cooperation in the nomination process to the arbitral panel did not cause the "specified procedures" under Section 14.7 to fail. Appellant's Br. 29. Rather, BDO's own drafting decisions, creating an unconscionable agreement under New York law, is responsible for the provision's "failure." BDO's invocation of the FAA's Section 5 is wholly disingenuous, looking beyond the dispositive facts of its provision (unconscionability). Instead, BDO wishes this Court to shift the placement of blame upon Jia-Sobota for "refusal" to cooperate with a provision to which he is not bound.

[17] *Brower* did not discuss any other grounds for court designation of an arbitrator, pursuant to 9 U.S.C. § 5, other than that of "excessive costs." *Id.* at 255.

2. BDO's Offer of "Waiver" Is Not Permissible Where an Exclusive Arbitral Forum Is Invoked.

Grasping for another route around the unconscionability caused by its own drafting, BDO claims it effectively triggered "waiver" of its "panel selection provision" in Section 14.7. Appellant's Br. 30. This argument, mixing the concepts of severability and FAA Section 5 intervention, also misses the mark. While relevant law enables waiver of elements within an agreement, waiver is an equitable relief available to those that do not have unclean hands. BDO cites no New York or District of Columbia decisions which share the unique circumstances present here. Indeed, the tenant of equity is those who seek equity must do equity.[18] Because BDO is the sole party that caused the existence of the unconscionable arbitration provision, it cannot avail itself of the equitable remedy of waiver to cure the unconscionability and amend the provisions of Section 14.7.

To BDO's credit, however, there is no shortage of case law discussing judicial intervention pursuant to Section 5, with courts stepping in to effect appointment in varying scenarios. However, "none of these cases" under FAA-applicable agreements "stands for the proposition that district courts may use § 5 to circumvent the parties' designation of an *exclusive* arbitral forum." *In re Salomon Inc.*

[18] "Finally, and extremely relevant to the instant case, the party seeking equity must do equity, i.e., he must come into court with clean hands." *Pecorella v. Greater Buffalo Press, Inc.*, 107 A.D.2d 1064, 1065 (N.Y. App. Div. 1985.

Shareholders' Derivative Litig. 91 Civ. 5500 (RRP), 68 F.3d 554, 561 (2d Cir. 1995) (emphasis added). An exclusive forum is one the court reads as "providing for arbitration *only* before the [named arbitrator]." *Id.* Therefore, when the named forum requiring "particular arbitrators" for all disputes is "central to the parties' agreement to arbitrate," a court shall not "circumvent" this exclusive designation. *Id.*

Furthermore, BDO's waiver argument misapplies the correlated theory of severability. Here, a court will decide between "substituting a new term for the failed provision and refusing to enforce the agreement altogether." *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359, 1364 (N.D. Ill. 1990). In so choosing, the principal question concerns the "essence" of the agreement itself. *Id.* If the "essential term" is the overarching promise to arbitrate, then the "failure of one of the terms" will not prohibit enforcement. *Id.* Put another way, the court must decide whether: "it is clear that the failed term is not an ancillary logistical concern, "and is, instead, "as important a consideration as the agreement to arbitrate itself." *Id.* If a term constitutes the latter, it remains true that a court will refuse severance of the voided language, "and the entire arbitration provision will fail." *Id.* Here, the essence of the arbitration provision is that BDO's board of directors controls the process.

The Second Circuit, and consequently, New York law, has followed the *Merrill Lynch* approach to the "waiver" issue in this *exact context* since May of 1990

– a month after the original decision. *PaineWebber, Inc. v. Rutherford*, 903 F.2d 106, 108 (2d Cir. 1990).[19] It is clear then, where a "designated arbitral forum is integral" to the provision, a court may not impose a different arbitral forum on a party." *Crewe v. Rich Dad Educ., LLC*, 884 F. Supp. 2d 60, 76 (S.D.N.Y. 2012). In fact, an alternative forum is only available when an "agreement reflects a broader intention to arbitrate even if the designated forum or fora prove unavailable." *Id.* at 77. Absent a contingency for another "binding" venue for arbitration, such a provision will be construed as an exclusive provision, integral to the agreement in its entirety. *Id.*

BDO chose an unequivocal exclusive arbitral forum and procedure. Contrary to its own contentions in defending the panel selection provision, the invocation of BDO board members and partners goes beyond mere innocuous "mandatory language" commonly exhibited in other examples. Appellant's Br. 37. Rather, the problematic compulsory wording indicates a "dominant intent" of BDO to "arbitrate before particular arbitrators." *In re Salomon Inc.*, 68 F.3d at 561.[20] This specific method of panel selection formed the basis of the bargain for Section 14.7. Without it, the desire for arbitration of all such disputes defined therein would be far less

[19] Court held agreement providing that "arbitration be 'in accordance with the rules' of one of the [self-regulatory organizations]" of the securities industry prohibited substitution of AAA as arbitrator (non-SRO). *Id.*

[20] "Four years have elapsed, after all, since this suit began. While that delay may not be the defendants' fault, surely the plaintiffs are entitled to a speedy resolution of their claims." *In re Salomon Inc.*, 68 F.3d at 561.

advantageous for BDO. The waiver argument, and incidentally, the notion of severability, is inapplicable to this clause, and the entire arbitration provision must fail. *Id.*

3. BDO's "Restructuring" Is of No Relevancy as One in Name Only and Is Moot Against an Exclusive Forum Selection.

BDO lastly asserts an alternative ground for substitute arbitrator appointment, notably due to its change in "corporate structure." Appellant's Br. 34. This confounding assertion is easily discarded on three grounds. First, while BDO may have changed its corporate *identity*, the controlling principle is fiduciary capacity, which remains intact. Second, BDO did not change their "structure" until this litigation was well underway (over three years), making this effectively a moot point. Third, even if BDO's name-change bore any relevancy, FAA Section 5 still forecloses substitution of the forum.

The relevant question here under New York law is not whether a corporation's members are titled "partners," or some other identifier synonymous with governance rights. Rather, the inquiry is of "fiduciary duty," and, more specifically, whether the named arbitrator is "so identified with the party" as to be, "even though not in name, the party." *Buhrer v. BDO Seidman, LLP*, 2003 WL 22049503, at *3 (Mass. Super. July 7, 2003) (quoting *Cross & Brown Co. v. Nelson*, 4 A.D.2d 501, 502 (N.Y. App. Div. 1957)). Therefore, the fact BDO unilaterally decided to change its corporate structure in 2023 (three years into ongoing litigation), altering its titles away from

"partner," is of no consequence. No matter the positional name assigned by BDO structuring, it remains true that such individuals are qualified fiduciaries of the company.[21] As such, the same method of appointment proscribed in Section 14.7 still exists, and, in any event, continues to render the provision unenforceable through unconscionability.

Like its "waiver" argument, BDO commits another oversight in its Section 5 reading and application regarding the notion of restructuring. In fact, the two flailing arguments are both immediately dismissed, as "Section 5 nevertheless is inapplicable when the parties have specified an exclusive arbitral forum, but that forum is no longer available." *Dover Ltd. v. A.B. Watley, Inc.*, 2006 WL 2987054, at *5 (S.D.N.Y. Oct. 18, 2006). In examining the agreement, the key inquiry is whether the parties provided for arbitration "in a forum other than [the one designated]." *Id.* In the absence of evidence showing the parties' "joint desire to proceed...notwithstanding the unavailability of the intended forum," Section 5 cannot "override" the contract and require arbitration "elsewhere." *Id.* This analysis in BDO's provision is without difficulty, as the exclusivity of the provision can be deduced by Section 14.7's express language and the absence of a contingency forum. Therefore, the minutiae of BDO's re-naming or restructuring is immaterial against

[21] "We brush aside any metaphysical subtleties about corporate personality and view the agreement as one in which one of the parties is named as arbitrator." *Cross & Brown Co. v. Nelson*, 4 A.D.2d at 502.

applicable Federal and state law and the undeniable language of the provision before this Court.

III. JSCo Is Not Required to Arbitrate With BDO.

Lastly, BDO's attempt to force JSCo to arbitrate is without merit, as JSCo is not, and never was, a party to the Partnership Agreement. Though discussed only in passing by the lower court opinion and omitted entirely from substantive discussion in BDO's initial brief, it remains true that "unequivocal intent to arbitrate" precedes an enforceable provision. *Primavera Lab'ys, Inc. v. Avon Prod., Inc.*, 297 A.D.2d 505, 505 (N.Y. App. 2002) (quoting (*Primex Int'l Corp. v. Wal-Mart Stores*, Inc., 679 N.E.2d 624, 626 (N.Y. 1997)). In following this basic contractual principle, "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995). Here, given the absence of any semblance of an agreement between BDO and JSCo to arbitrate *any* issue between the parties, JSCo is not bound by the provision.

No debate exists that JSCo did not execute the Partnership Agreement. Furthermore, despite the Second Circuit's recognition that, "absent an express agreement," several "limited theories" exist which may bind a "nonsignatory" to an arbitration provision, no such concepts apply here. *Merrill Lynch Inv. Managers v. Optibase, Ltd*., 337 F.3d 125, 129 (2d Cir. 2003). Amongst those conditions are "'1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and

5) estoppel[22].'" *Id.* (quoting *Thomson–CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 780 (2d Cir.1995)). Given that JSCo was formed after Jia-Sobota's employment with BDO ceased, it thus has no connection with the Partnership Agreement. As such, none of these exceptions are cognizable under the facts before this Court. Moreover, given the absence of an express agreement and JSCo's failure to avail itself of any benefit derived from the Partnership Agreement, it cannot be forced into arbitration by BDO.

IV. Conclusion.

For the reasons stated herein, we respectfully ask this Court to affirm the trial court's ruling denying BDO's motion to compel arbitration.

June 7, 2024

Respectfully submitted,

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[22] To hold a nonsignatory liable "under the direct benefits theory of estoppel" the party must "knowingly exploit" the benefits of the provision, thereby receiving "direct benefits flowing directly from the agreement." *Belzberg v. Verus Invs. Holdings Inc.,* 999 N.E.2d 1130, 1134 (N.Y. 2013).

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2024, I electronically filed the foregoing document with the Clerk of the Court for the District of Columbia Court of Appeals using C-Track (Appellate E-Filing System), which will accomplish electronic notice and service for all participants who are registered users. A true and correct copy of the foregoing will also be served on Appellants via email to:

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