UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANGELA ROBERTS, *Plaintiff*, -against- UNLOCK PARTERNSHIP SOLUTIONS AOI, INC., CLEAR EDGE TITLE INC., ABC INC 1-10, AND JOHN DOE 1-10, *Defendants*.	ORAL ARGUMENT REQUESTED Case No.: 24-cv-01374-CPO-AMD

MEMORANDUM OF LAW IN OPPOSITION TO UNLOCK'S MOTION TO DISMISS AND TO COMPEL ARBITRATION

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INTRODUCTION

Reverse mortgages are risky financial products that can lead to homeowners losing equity that they spent years building up or being forced out of their homes entirely. In the riskiest kind of reverse mortgage, a lender offers a percentage of the home's value as a lump sum. That money is secured by a mortgage, giving the lender power of foreclosure. Then, when one of certain triggering conditions occurs—often (1) sale of the home, (2) death of the homeowner, or (3) the homeowner moves out—the lender is repaid a much larger sum, frequently based on the value of the home. In the meantime, the homeowner is on the hook for all the costs of the home, including taxes, insurance, and repairs, on penalty of foreclosure.

The dangers of reverse mortgages have been extensively catalogued by courts and commentators alike. They often target homeowners who managed to build up value in their home but have fallen into dire financial straits. Because this is an especially vulnerable population and because reverse mortgages require the homeowner to bear all of the costs of keeping up the home, estimates are that nearly *twenty percent* of reverse mortgages are at risk of default and foreclosure. Even when the worst does not occur, once repayment is triggered, the homeowner loses much of the value of their home, and their children lose the chance to inherit the home.

Because of these risks, Congress, agencies, and state legislatures have regulated reverse mortgages. That includes interest rate caps to avoid disproportionate returns,

disclosure requirements so homeowners know what they are getting into, and limits on terms that would force people out of their homes. These protections are crucial for homeowners, but they also cut into profits. So less scrupulous companies try to evade those protections.

Enter Unlock, a financial technology company based in San Francisco. Unlock created a "forward sale" product—a reverse mortgage designed to try to evade federal and state laws protecting homeowners. Under Unlock's contract, a homeowner gets a lump sum amounting to about 44% of the value of her home. The contract is secured by a mortgage, giving Unlock the power of foreclosure. Then, if the homeowner sells the home, dies, moves out, or a 10-year term expires, she must pay either 70% of the value of her home or the initial payment plus 18% annual interest. In the meantime, the homeowner must cover 100% of the taxes, insurance, and repairs—again on pain of foreclosure. Nonetheless, Unlock doesn't comply with federal and state laws governing reverse mortgages. And Unlock's contract even tries to make homeowners agree that federal and state lending laws don't apply.

That's just what happened to Angela Roberts, the plaintiff in this case. Ms. Roberts has owned her home in Willingboro, New Jersey, since 2015. After having trouble paying her property taxes, Ms. Roberts was facing foreclosure and the loss of all the money she had invested in her home. Desperate to find a way to save her home, she accepted a lump sum from Unlock that was supposedly equal to about

44% of the value of her home. Now she is trapped in a high-cost reverse mortgage that violates federal and state law in multiple ways, including a rate of interest three times the legal limit and a provision that will force her out of her home in ten years.

In an effort to escape this financial straightjacket, Ms. Roberts brought this suit. Unlock, however, is now trying to force her into arbitration. That request is flawed for three independent reasons. *First*, under federal law, a mortgage cannot include a mandatory arbitration requirement. *Second*, the arbitration clause here is procedurally and substantively unconscionable. This was a take-it-or-leave-it contract of adhesion; the parties' bargaining positions were highly unequal; Ms. Roberts was under serious economic compulsion; and the arbitration provisions are not just convoluted and confusing, they are full of substantively unconscionable provisions. And *third*, Ms. Roberts's claims do not fall within the scope of the arbitration provisions.

For these reasons, Unlock's motion to compel arbitration should be denied.

STATEMENT OF THE CASE

A. Reverse mortgages are risky financial products that can lead people to lose their homes or the home equity they spent years building up.

Scholars, legislatures, and expert agencies have overwhelmingly concluded that reverse mortgages pose a serious threat to homeowners. These complex financial products target homeowners who own their homes but are unable to pay

mounting bills. Reverse mortgages hold out the promise of a lump sum of money to help the homeowner out of their immediate financial distress, in exchange for which the lender often receives a disproportionate payout from the value of the home. In too many cases, people can even lose their homes. This creates a "significant risk of abuse by lenders, and the consequences of reverse mortgages can be unclear at the time of signing, but disastrous for mortgagors." *James B. Nutter & Co. v. Namahoe*, 528 P.3d 222, 236 (Haw. 2023).[1]

1. To understand why, it is necessary to understand how reverse mortgages work. While products can vary, they generally have the following key features:

Cash advance against equity in home. The homeowner receives "one or more advances." 15 U.S.C. § 1602(cc)(1). A particularly risky form of reverse mortgage involves a lump-sum up-front payment to an individual based on the value of their home. *See* Nick Penzenstadler & Jeff Kelly Lowenstein, *Seniors Were Sold a Risk-free Retirement with Reverse Mortgages. Now They Face Foreclosure.*, USA Today (June 11, 2019), https://perma.cc/28FB-JSDS. This number will seem high to a cash-strapped homeowner, but the reason the number is so high is that her house is being put on the line—and the lender intends to get paid back far more than it offered.

[1] Unless otherwise noted, all internal quotation marks, citations, alterations, brackets, and ellipses have been omitted from quotations throughout this brief.

Secured by a mortgage. A "mortgage, deed of trust, or equivalent consensual security interest is created against the consumer's principal dwelling." 15 U.S.C. § 1602(cc). This means that the lender has the power of foreclosure.

Payment is triggered by certain events, such as sale, moving out, or death. Reverse mortgages require payment upon certain triggering conditions. "[P]ayment of any principal, interest, and shared appreciation or equity is due and payable (other than in the case of default) only after—(A) the transfer of the dwelling; (B) the consumer ceases to occupy the dwelling as a principal dwelling; or (C) the death of the consumer." 15 U.S.C. § 1602(cc)(2). Some reverse mortgages also have a term of years, but federal law prohibits lenders from using such a term to force a consumer to repay the loan before the other conditions would be triggered. *Comment for 1026.33 - Requirements for Reverse Mortgages*, Consumer Financial Protection Bureau, cmt. 33(a)(2)(2), https://perma.cc/7NEP-PMPK. This ensures reverse mortgages do not force people out of their homes before they would otherwise leave.

Homeowners must pay for taxes, insurance, and repairs on the home, with failure to do so resulting in default. *See, e.g.*, Sarah B. Mancini & Odette Williamson, *Reversing Course: Stemming the Tide of Reverse Mortgage Foreclosures Through Effective Servicing and Loss Mitigation*, 26 Elder L.J. 85, 87–88, 92, 100, 104 (2018). If the homeowner fails to cover such costs, the lender can then make what are often

termed "advance[s]" that can drive the homeowner even further into debt and put them at greater risk of foreclosure. *Id.* at 101–02, 104.

2. "This transaction for cash at the expense of ownership of one's home—the largest and most significant asset most Americans possess—has significant ramifications." *Namahoe*, 528 P.3d at 236. Too often, people "tend to take out these loans as a last resort" in a moment of financial distress, and without fully understanding how these products work or what they will owe. Mancini & Williamson, *Reversing Course*, 26 Elder L.J. at 119–123. For example, with a reverse mortgage tied to equity in the home, if the housing market improves over time, as it tends to do, in just a few years the company will receive far more equity in the home than the initial sum it paid the homeowner.[2]

Reverse mortgages can also end up forcing people out of their homes. Some experts have projected that nearly 18% of reverse mortgages are at risk of default and foreclosure. Mancini & Williamson, *Reversing Course*, 26 Elder L.J. at 87. These homeowners "are deprived of the chance to pass on their homes and other property to their children and other heirs, leading to gutted city blocks, and less overall wealth." *Namahoe*, 528 P.3d at 236.

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[2] *See generally All-Transactions House Price Index for New Jersey*, Federal Reserve of St. Louis, (August 14, 2024), https://perma.cc/Z3DH-NBTP (citing data from U.S. Federal Housing Finance Agency); *see also All-Transactions House Price Index for the United States*, Federal Reserve of St. Louis, (August 14, 2024), https://perma.cc/8H6W-9V5V (same).

3. Because of the "significant risks of abuse by lenders and inadequate understanding of reverse mortgage agreements," these products "are subject to stringent rules and regulations promulgated by both federal and state authorities." *Namahoe*, 528 P.3d at 236. Federal law requires disclosures, 12 C.F.R. § 1026.33, including more demanding disclosure requirements for high-rate mortgages like the 18% interest rate mortgage here, 15 U.S.C. § 1639(b); *see also* Dkt. 11 at 6.

New Jersey further requires that only licensed mortgage lenders can offer these products. N.J.S.A. § 46:10B-18. The lender cannot charge more than 6% interest if the rate is not specified (as is the case here, where Unlock's contract claims there is no interest rate, Ex. C at 37). N.J.S.A. § 31:1-1(a); N.J.A.C § 3:1-1.1.[3] And New Jersey requires disclosures and protections for mortgages generally, *see generally* N.J.S.A. § 17:11C-75, as well as high-cost mortgages, *see* N.J.S.A. § 46:10B-26.

B. Unlock's reverse mortgage product.

These regulations provide needed protection for homeowners before they are trapped by these risky products. But these laws also cut into profits, so companies try to create reverse mortgage products that skirt the rules.

That is Unlock's business model. Unlock is a financial technology company headquartered in San Francisco. Dkt. 11 at 1; *see also* Ex. C at 51. Unlock designed a

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[3] Unless otherwise specified, all citations to exhibits refer to exhibits attached to the Declaration of Angela A. Roberts. All citations to the Unlock contract, Ex. C, refer to the page number of the contract itself, rather than the pdf.

"forward sale" product that is designed with unerring precision to work like a reverse mortgage while trying to evade protections for homeowners. Ex. C at 1. Unlock's product functions in a way that should now be familiar.

1. Cash advance against equity in home. Unlock gives the homeowner a cash advance in the form of an "Investment Payment." Ex. C at 2. Just like many other reverse mortgages, this amount is a percentage of the value of the home, in this case 44%. *Id.*

Secured by a mortgage. The contract is secured by a "mortgage" on the home, giving Unlock the power of foreclosure. Ex. D at 1; *see also* Ex. C at 1.

Payment is triggered by events including sale, moving out, and death. The homeowner is required to pay Unlock out of the equity of the home if she: (1) sells the property, (2) moves out, (3) dies, or (4) the contract's 10-year term expires. Ex. C at 2, 26. Upon these events, the homeowner must pay Unlock 70% of the equity in the home or the advance plus 18% annual interest, whichever is less. *Id.* at 2.[4] The contract also contains a 10-year "Expiration Date," which only makes the product more dangerous. *Id.* at 2. As explained above, under federal law, expiration dates cannot cause the contract to mature before the other triggering conditions. *See*

[4] Because Unlock requires an initial $3,451.86 "Origination Fee," the actual money the homeowner receives is several thousand dollars less than the "Investment Payment." Ex. C at 2 (emphasis added).

supra 5. With Unlock, however, after 10 years, a homeowner must either buy out Unlock or the company forces the sale of the home. Ex. C at 12.

Homeowners must pay for taxes, insurance, and repairs on the home, with failure to do so resulting in default. Even though Unlock has secured 70% of the equity in the home, homeowners are required to shoulder 100% of the costs of maintaining Unlock's investment. Ex. C at 6–7, 24–25, 32–33, 48. Otherwise, Unlock can foreclose on the home or make "protective advances," which themselves accrue interest. *Id.* at 30–31. That is precisely the dynamic that causes so many other reverse mortgages to default. *See, e.g.*, Mancini & Williamson, *Reversing Course*, 26 Elder L.J. at 87.

2. Not only is Unlock's product structured to operate like a reverse mortgage but evade the laws, its own contract reflects this goal. The contract includes a provision asserting that "to the fullest extent possible … the Unlock Agreement is not subject to any federal, state and/or local law concerning consumer credit, including, without limitation, usury ceilings, disclosures, and any other requirements, restrictions, limitations or prohibitions set forth in such laws." Ex. C at 37.

Getting homeowners to sign these reverse mortgages is just the first step in Unlock's business model. The company then bundles and securitizes these residential

mortgage contracts and sells them to investors.[5] These offerings have sold for $197 million and $224 million apiece.[6] Unlock tells its investors that there is "$9+ Trillion" in home equity that is currently "untapped"—in other words, in the hands of homeowners who paid for it.[7] And despite Unlock's assertion that the company is not engaged in mortgage lending, its 2023 offering was awarded the "Residential Mortgage Backed Security of the Year."[8]

C. In a moment of serious financial distress, Ms. Roberts is locked into Unlock's contract.

Angela Roberts has owned her home in Willingboro, New Jersey, since 2015. Roberts Decl. ¶¶ 1–3. She is a first time homeowner and was proud to have been able to use her savings to buy her home free and clear. *Id.* ¶ 3. She hoped that this home would provide a financial anchor for herself and her minor son. *Id*. Because this was the first time she owned a home, however, she did not understand just how high her property tax obligations would be. *Id.* ¶ 4. In 2016, Ms. Roberts began to have trouble paying those taxes. *Id.* By 2021, the township had sold the tax certificate to a third party, who had commenced foreclosure proceedings. *Id.* ¶ 5.

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[5] *Unlock Technologies and Saluda Grade Announce Close of Second Rated Home Equity Agreement Securitization*, Unlock Technologies, (Apr. 5, 2024) https://perma.cc/Y9VY-UBAE.

[6] *Id.*

[7] *Investors*, Unlock Partnership Solutions, https://perma.cc/Y9EH-Q3T9.

[8] *Saluda Grade Awarded both RMBS Issuer of the Year and RMBS Deal of the Year at the 2024 GlobalCapital US Securitization Awards*, Business Wire, (May 20, 2024), https://perma.cc/ZN6X-TTKY.

Under New Jersey law at the time, even though the cost for Ms. Roberts to redeem her tax certificate was only $54,062.67, if her home was foreclosed she would not be entitled to any of the surplus from the sale.[9] This meant that her entire investment and source of financial security would be lost.

Desperate to avoid this disaster for herself and her son, she searched online for loans. Roberts Decl. ¶ 9. She learned about Unlock and applied. *Id.* ¶ 10. She never met with anyone from Unlock in person and had no opportunity to negotiate the terms of the contract before signing. *Id.* ¶ 17. Ms. Roberts thought she was getting a loan she would be able to pay back in a few years. *Id.* ¶ 20. She did not understand that she would be forced out of her home in 10 years, as the whole reason she entered into the contract was to save her home. *Id.* ¶ 21. In exchange for an advance payment of $111,610—which was equivalent to 44% of the supposed value of the home minus a $3,452 fee—she signed away either 70% of the value of her home or the advance plus 18% interest. Ex. C at 2.

That means Ms. Roberts will lose those tens of thousands of dollars in the value of her home, all while paying the costs to maintain the value of Unlock's loan. And at the time of sale, she would be responsible for thousands of dollars in closing costs, including "recording fees and costs, credit reports, reconveyance fees, escrow

[9] *See* The Working Grp., Report of the New Jersey Judiciary Working Group on Tax Sale Foreclosures, 3 (2024), https://perma.cc/TJW2-DMSV (summarizing prior law).

fees, title report and insurance fees, federal, state, local and documentary transfer taxes, and real estate broker and other sales commissions." Ex. C at 8, 54.

To try to escape this financial trap, Ms. Roberts brought suit against Unlock in New Jersey Superior Court. Unlock then removed to this Court.

LEGAL STANDARD

"[B]efore compelling arbitration pursuant to the Federal Arbitration Act, a court must determine that (1) a valid agreement to arbitrate exists, and (2) the particular dispute falls within the scope of that agreement." *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 160 (3d Cir. 2009). When a motion to compel arbitration can be decided based only on "the face of a complaint, and documents relied upon in the complaint," it is evaluated under the Rule 12(b)(6) standard. *Guidotti v. Legal Helpers Debt Resol., L.L.C.*, 716 F.3d 764, 776 (3d Cir. 2013). However, "if the plaintiff has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate in issue, then the parties should be entitled to discovery on the question of arbitrability before a court entertains further briefing on the question." *Id.* Then, once the relevant evidentiary record has been established, the court will evaluate the motion "under a summary judgment standard." *Id.*

SUMMARY OF ARGUMENT

I. Under the Truth in Lending Act and its implementing regulations, "[n]o residential mortgage loan … may include terms which require arbitration." 15 U.S.C.

§ 1639c(e)(1); *see also* 12 C.F.R. § 1026.36(h)(1). Similarly, a residential mortgage loan cannot "bar a consumer from bringing an action in … court [based on] any alleged violation of … Federal law." 15 U.S.C. § 1639c(e)(3); *see also* 12 C.F.R. § 1026.36(h)(2). These provisions prohibit Unlock from compelling arbitration here.

Unlock's contract meets the statutory definition of residential mortgage loan, as it is a "consumer credit transaction … secured by a mortgage." 15 U.S.C. § 1602(dd)(5). Unlock extended an advance to Ms. Roberts, and "defer[red] payment" until certain triggering conditions. § 1602(f). In addition to meeting the general definition of a residential mortgage loan, Unlock's loan also meets TILA's specific definition of a reverse mortgage, a form of residential mortgage loan. § 1602(cc). The forced arbitration clause is thus invalid and unenforceable.

II. Unlock's arbitration clause is also unenforceable because it is unconscionable under New Jersey law. *See Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 200 (3d Cir. 2010) ("In addressing a claim that an arbitration clause is unconscionable, [federal courts] apply the ordinary state law principles … of the involved state"). The procedural unconscionability is severe. This was "a contract of adhesion" that Ms. Roberts had no chance to negotiate, she faced serious "economic compulsion," the parties were in highly unequal "bargaining positions," and the dispute resolution provisions are full of complex and confusing terms. *Pace v. Hamilton Cove*, 317 A.3d 477, 489 (N.J. 2024). The substantive unconscionability here is also high, because the

dispute resolution clauses are riddled with terms that New Jersey courts have consistently held are unconscionable, including waivers of statutory remedies, one-sided limits on liability that favor the stronger party, and provisions that deter individuals from seeking to vindicate their rights. *See infra* 29–34.

The "cumulative effect of the various unconscionable terms" and this procedural unconscionability is to make the "entire arbitration agreement … permeated by unconscionability" and therefore unenforceable. *Achey v. Cellco P'ship*, 293 A.3d 551, 557–58, 560 (N.J. Sup. Ct. App. Div. 2023) ; *see also Nino*, 609 F.3d at 202 (same). At the very least, Ms. Roberts has "brought forth sufficient facts to place the agreement to arbitrate in issue" and this Court should allow the opportunity for discovery into arbitrability. *Robert D. Mabe, Inc. v. OptumRX*, 43 F.4th 307, 329–30 (2022).

III. Finally, Unlock's motion should be denied for the independent reason that the arbitration clause does not cover any of Ms. Roberts's claims, which all arise under federal and state statutes. Under New Jersey law, an arbitration clause must "clearly and unambiguously signal to plaintiff that she was surrendering her right to pursue her statutory claims in court." *Moon v. Breathless Inc.*, 868 F.3d 209, 215–16 (3d Cir. 2017). When an arbitration clause does not state that a person must arbitrate her statutory claims but identifies other claims she must arbitrate, that is insufficiently clear and unambiguous, and "the consumer had not waived her statutory rights by

signing this arbitration provision." *Id.* That is the case here, where the arbitration clause only covers claims "ARISING OUT OF, RELATING TO, OR RESULTING FROM THE UNLOCK AGREEMENT OR THE PROPERTY." Ex. C at 34. Because this references other kinds of claims, "not statutory rights," it does not "clearly and unambiguously signal to plaintiff that she was surrendering her right to pursue her statutory claims in court." *Moon*, 868 F.3d at 215–16.

At the very least, the arbitration clause expressly exempts requests for injunctive relief, Ex. C at 35, which Ms. Roberts has sought on each claim, *see* Dkt. 11 at 6–10. Those requests for relief can thus proceed in court.

ARGUMENT

I. The Truth in Lending Act and its regulations prohibit mandatory arbitration in residential mortgage loan contracts like this.

Both the Truth in Lending Act and its implementing regulations ban forced arbitration clauses in residential mortgage loan contracts. "No residential mortgage loan … may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction." 15 U.S.C. § 1639c(e)(1); *see also* 12 C.F.R. § 1026.36(h)(1). And "[n]o provision of any residential mortgage loan … shall be applied or interpreted so as to bar a consumer from bringing an action in … court [based on] any alleged violation of … Federal law." 15 U.S.C. § 1639c(e)(3); *see also* 12 C.F.R. § 1026.36(h)(2). As a matter of law, Unlock's product is a residential mortgage loan

under the statutory and regulatory definitions. As a result, Unlock cannot force Ms. Roberts to arbitrate her claims.

A. Unlock's contract is a residential mortgage loan under the text of the TILA and Regulation Z.

Despite Unlock's conclusory assertion (at 2) that its product is not a loan, the product fits the definition of a residential mortgage under TILA and its implementing regulation, Regulation Z.

1. Under TILA, a "residential mortgage loan" is defined broadly as "*any* consumer credit transaction … secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling." 15 U.S.C. § 1602(dd)(5) (emphasis added). Here, Unlock's contract is secured by a "mortgage." Ex. D at 1 (registered mortgage granting Unlock a lien on Ms. Roberts's home); *see also* Ex. C at 1.

Unlock's loan to Ms. Roberts also counts as "*any* consumer credit transaction." A transaction qualifies whenever (1) "credit is offered or extended" to (2) "a natural person," and (3) "the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. § 1602(i); *see also* 12 C.F.R. § 1026.2(12). The word "any" indicates this definition must be read "expansively." *Smith v. Berryhill*, 587 U.S. 471, 479 (2019).

Unlock's contract meets that definition. (1) It includes an offer of credit, defined as "the right granted by a creditor to a debtor to defer payment of debt or to

incur debt and defer its payment." 15 U.S.C. § 1602(f); *see also* 12 C.F.R. § 1026.2(14). Unlock granted Ms. Roberts such a right when it gave her an advance of $111,610, and then deferred repayment of that debt until certain triggering events allow the company to cash in on its 70% equity stake in her home. Ex. C at 2–3, 5–6. (2) Ms. Roberts is a natural person. And (3) Ms. Roberts's home—the "property" that is "the subject of the transaction" here—is for "personal," "family," or "household purposes." *See* Dkt. 11 at 6–7. All these components add up to the contract being a residential mortgage loan.

2. Further evidence that Unlock's product qualifies as a "residential mortgage loan" under section 1639c(e)(1) is that a neighboring provision of TILA includes reverse mortgages as a form of residential mortgage loan—and Unlock's loan meets TILA's definition of a reverse mortgage. *See Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 210 (3d Cir. 2008) ("[I]n addition to the statutory language itself," courts "take account of … the broader context of the statute as a whole."). A "reverse mortgage" exists where: (1) a homeowner is given "one or more advances"; (2) the company receives security through "[a] mortgage, deed of trust, or equivalent consensual security interest … against the consumer's principal dwelling"; and (3) any "any principal, interest, and shared appreciation or equity is due and payable" upon either a default or: "(A) the transfer of the dwelling; (B) the consumer ceases to occupy the dwelling as a principal dwelling; or (C) the death of the consumer." 15

U.S.C. § 1602(cc); *accord* 12 C.F.R. § 1026.33(a). Reverse mortgages can also have term limits, although only if those term limits will not force the person out of their home. *See supra* 5.

Unlock's contract meets the definition for this particular kind of residential mortgage loan. (1) Unlock gave Ms. Roberts an advance. Ex. C at 2. (2) In exchange, Ms. Roberts provided a mortgage on her home. Ex. D. at 1. And (3) Unlock's ability to access the equity in Ms. Roberts's home is triggered by "death," "sale of the [p]roperty," any other "[d]efault" such as moving out, or if the 10-year term runs out. Ex. C at 5–6. At that point, Ms. Roberts must pay back the money she received, either through 70% of the value of her home or the initial payment and 18% interest. Ex. C at 4–6. Accordingly, Unlock's product is not just a residential mortgage loan on its own terms, it also meets the specific definition of a reverse mortgage.

3. If any uncertainty remained, courts "construe[]" TILA and Regulation Z "liberally in favor of the consumer." *Rossman v. Fleet Bank (R.I.) Nat'l Ass'n*, 280 F.3d 384, 394 (3d Cir. 2002). "Congress enacted TILA to guard against the danger of unscrupulous lenders taking advantage of consumers through fraudulent or otherwise confusing practices." *Ramadan v. Chase Manhattan Corp.*, 156 F.3d 499, 502 (3d Cir. 1998). And section 1639c's limit on mandatory arbitration offers two safeguards meant to "preserv[e] consumers' ability to seek redress through the court system after a dispute arises" out of their residential mortgage loans. Loan Originator

Compensation Requirements Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 11,280, 11,400 (Feb. 15, 2013).

Accordingly, Unlock's product is residential mortgage loan, and "[n]o residential mortgage loan … may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction." 15 U.S.C. § 1639c(e)(1); *see also* 12 C.F.R. § 1026.36(h)(1). Nor can any "provision of any residential mortgage loan … be applied or interpreted so as to bar a consumer from bringing an action in … court [based on] … any alleged violation of … Federal law." 15 U.S.C. § 1639c(e)(3); *see also* 12 C.F.R. § 1026.36(h)(2). Unlock therefore "may not compel arbitration" of Ms. Roberts's claims. *Lyons v. PNC Bank, Nat'l Ass'n*, 26 F.4th 180, 191 (4th Cir. 2022) (applying 15 U.S.C. § 1639c(e)(3) to deny motion to compel arbitration).

B. Unlock has provided no justification for disregarding the statutory and regulatory text and context.

Nothing Unlock says in its brief or its contract warrants departing from this conclusion. While Ms. Roberts has consistently argued that this contract is a residential mortgage loan under TILA and that the forced arbitration provisions are thus invalid, *see* Dkts. 11, 18, 21, Unlock simply asserts without explanation (at 2) that its contract "is not a loan." Unlock does not "cite specific record evidence or legal authority addressing similar facts." *Feshovets v. Att'y Gen. United States*, 666 F.

App'x 157, 162 (3d Cir. 2016). Such "barebones assertions waive rather than raise an argument." *Id.*

Waiver aside, however, there is nothing to warrant departing from TILA and Regulation Z's definitions. Unlock's contract includes a clause titled "Not A Loan." Ex. C at 37. This clause asserts that the contract isn't a loan because Ms. Roberts supposedly does not have an "obligation" to repay the advance or make "periodic payments" on "principal, interest, or any other finance charges." *Id.*; *see also id.* at 1, 3. But "[s]tatutory definitions control the meaning of statutory words." *Burgess v. United States*, 553 U.S. 124, 129 (2008). Since TILA and Regulation Z "declare[] what" a residential mortgage loan "means," their definition "excludes any [other] meaning." *Id.* at 130. And as explained above, Unlock's loan satisfies this definition.

Further, "substance, rather than [] form," is what matters when "determin[ing] whether a given transaction constitutes a loan." *Karns Prime & Fancy Food, Ltd. v. Comm'r of Internal Revenue*, 494 F.3d. 404, 408 (3rd Cir. 2007). And the substance of Unlock's contract is a loan. Unlock gave Ms. Roberts a little under 44% of the value of her home in exchange for a future payment of 70% of the value of her home (or repayment of the advance plus 18% interest). If that's not a loan, then any payday lender in the country could evade lending laws by creating a "forward sale" agreement giving someone 44% of their paycheck up front in exchange for a future payment of either 70% of their paycheck (or the advance itself plus interest).

Contrary to the assertion in Unlock's contract, the lack of periodic payments doesn't distinguish this from any other reverse mortgage, since "payment" on a reverse mortgage is always "due and payable … *only after*" a triggering event occurs, not periodically in the interim. 12 C.F.R. § 1026.33(a). And that payment can take the form of "principal, interest, or shared appreciation *or equity*." 12 C.F.R. § 1026.33(a) (emphasis added); *see also* 15 U.S.C. § 1602(cc).

Equally unavailing is Unlock's claim that because it "may lose all or a portion of" the advance, it is not a loan. Ex. C at 37. Any nonrecourse loan secured by property, like a reverse mortgage, can lose money if the property value drops. *See Nonrecourse*, Black's Law Dictionary (11th ed. 2019). And any reverse mortgage tied to "equity" can lose money if the home loses value. 15 U.S.C. § 1602(cc).

Plus, Unlock has done everything to ensure that it will be repaid, plus interest. The company gets either: (a) its initial advance with 18% interest, or (b) 70% of the value of the home. In the first case, Unlock makes money. In the second case, Unlock makes money unless the house drops in value by 39%.[10] In New Jersey, that's far more than home prices fell even during the absolute worst stretch of the 2008 crash.[11]

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[10] Unlock only loses money if 70% of the final value of the house is less than Unlock's advance (minus fees). For that to happen, the ending home value would need to be less than $159,442, which is 61% of the initial value. *See* Ex. C at 2.

[11] Between the peak of the market in Q1 2007 and the trough in Q2 2012, New Jersey home prices dropped by 22%. *All-Transactions House Price Index for New Jersey*, Federal Reserve of St. Louis, (August 14, 2024), https://perma.cc/Z3DH-NBTP.

C. If there are any factual questions about whether Unlock's contract is a residential mortgage loan, Unlock's motion must be denied and discovery permitted.

TILA and Regulation Z thus make clear, as a matter of law, that Unlock's contract is a residential mortgage loan subject to the ban on forced arbitration. To the extent this Court believes that question requires more factual development, however, Unlock's motion should be denied and discovery granted. *See Guidotti*, 716 F.3d at 780; *Singhal v. Unison Agreement Corp.*, 2023 WL 2734230, at *5 (S.D. Fla. 2023) (allowing case about loan similar to Unlock's to "proceed through discovery" because a "question of fact" remained as to whether "the substance of the transaction rather than the form" made the product a loan).

II. The arbitration clause is unconscionable and unenforceable.

Even if Unlock's arbitration clause weren't barred by federal law, it would still be unenforceable because it is unconscionable as a matter of New Jersey law. *See, e.g.*, *Nino*, 609 F.3d at 200 ("In addressing a claim that an arbitration clause is unconscionable, [federal courts] apply the ordinary state law principles … of the involved state"). Ms. Roberts had no opportunity to negotiate the terms of Unlock's contract, making it is a "a contract of adhesion" "presented on a take-it-or-leave-it

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Nationwide, home prices dropped by 19%. *All-Transaction House Price Index for the United States*, Federal Reserve, https://perma.cc/8H6W-9V5V. These public records from the Federal Reserve are subject to judicial notice. *See, e.g.*, *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000).

basis … without opportunity for the adhering party to negotiate except perhaps on a few particulars." *Pace*, 317 A.3d at 489 Contracts of adhesion "necessarily involve[] some measure of procedural unconscionability," *id.*, and therefore a "sharpened inquiry concerning unconscionability is necessary when a contract of adhesion is involved," *Muhammad v. Cnty. Bank of Rehoboth Beach, Delaware*, 912 A.2d 88, 97 (N.J. 2006).

This heightened inquiry includes consideration of four factors, called the *Rudbart* factors, which cover both "the procedural and substantive aspects of a contract of adhesion." *Pace*, 317 A.3d at 489. These are "(1) the subject matter of the contract, (2) the parties' relative bargaining positions, (3) the degree of economic compulsion motivating the adhering party, and (4) the public interests affected by the contract." *Id.*

Each of those factors points in the same direction here. Unlock, a multimillion-dollar company, locked Ms. Roberts into this contract when she was in dire financial straits and desperate to save her home. The arbitration provisions are complex, convoluted, and contradictory. And they are replete with terms that New Jersey courts have consistently held are substantively unconscionable. The "cumulative effect of the various unconscionable terms" and this procedural unconscionability make the "entire arbitration agreement … permeated by unconscionability." *Achey*,

293 A.3d at 557–58, 560. The arbitration clause is therefore "unenforceable." *Id.* at 560.

At the very least, Ms. Roberts has come forward with evidence that, "when read in the light most favorable" to her, makes it "plausible" that the dispute resolution provisions are "unconscionable." *Robert D. Mabe*, 43 F.4th at 329. Accordingly, this Court should, at the very least, allow the opportunity for discovery into "the question of arbitrability." *Id.*

A. The subject matter of home mortgages poses heightened unconscionability concerns.

As to the first factor, subject matter, home mortgages are an area where concerns about unconscionability are especially acute. Here, "the subject matter of the contract concern[s] one of the most significant aspects of a person's life, namely [her] home." *Block v. Longstreet*, 2007 WL 4472122, at *7 (N.J. Sup. Ct. App. Div. Dec. 24, 2007) (unpub.). That is supported by the New Jersey Legislature's determination that heightened protections for consumers are necessary in the context of mortgages and foreclosures, since it is the "the public policy of this State" that homeowners should be able to "keep their homes." N.J.S.A. § 2A:50-54; *see also See, e.g.*, *Est. of Ruszala ex rel. Mizerak v. Brookdale Living Cmtys., Inc.*, 1 A.3d 806, 820 (N.J. Sup. Ct. App. Div. 2010) (looking to legislative protections in relevant area in analyzing first *Rudbart* factor). Regulating mortgages is "essential for the protection of the citizens,"

especially when it comes to protecting against "unfair, deceptive, and fraudulent practices." N.J.S.A. § 17:11C-52.

And even more specifically, this is also an area where the New Jersey legislature has emphasized the importance of access to courts, *see* N.J.S.A. § 46:10B-26, as has Congress, *see* 15 U.S.C. § 1639c(e)(1). The subject matter of the contract therefore weighs in favor of unconscionability.

B. There was severe procedural unconscionability given the extreme imbalance in bargaining positions, high degree of economic compulsion, and confusing contractual terms.

The second and third *Rudbart* factors, "relative bargaining positions" and "degree of economic compulsion," are measures of "procedural unconscionability." *Pace*, 317 A.3d at 489. In evaluating procedural unconscionability, New Jersey law also looks generally to the "particular setting existing during the contract formation process," including whether the contract has "hidden or unduly complex contract terms." *Muhammad*, 912 A.2d at 96. Here, each of these considerations weighs strongly in favor of unconscionability.

1. It is hard to imagine more unequal "relative bargaining positions" than the facts of this case. *Pace*, 317 A.3d at 489. Unlock is a multimillion-dollar financial technology company that operates in over a dozen states.[12] The company has been

[12] *About*, Unlock Partnership Solutions, Inc., (August 15, 2024) https://perma.cc/Z45Q-EVW8; *Investors,* Unlock Partnership Solutions, Inc., (August 15, 2024), https://perma.cc/Y9EH-Q3T9.

so successful that it is currently bundling its lucrative loan contracts into securities that are worth hundreds of millions of dollars. *See supra* 10. On the other side of the transaction is Ms. Roberts, a first-time homeowner facing foreclosure and the loss of the entire value of her home. Roberts Decl. ¶¶ 4–7.

2. The same goes for "degree of economic compulsion." *Pace*, 317 A.3d at 489. The New Jersey Supreme Court has recognized that economic compulsion exists when people urgently "need access to cash." *Muhammad*, 912 A.2d at 98 n.4. Here, unless Ms. Roberts could pay off her tax certificate, she would lose her home. Roberts Decl. ¶¶ 4–7. Once again, it is hard to think of a higher level of economic compulsion: "The possible loss of a home creates a dire economic circumstance because of both the loss of all accumulated equity in the home and the likelihood of permanent damage to one's credit rating if the mortgage is foreclosed." *Block*, 2007 WL 4472122, at *7.

3. On top of that, Unlock's arbitration clause is full of "unduly complex" and even contradictory terms. *Muhammad*, 912 A.2d at 96.

Take the following paragraph, titled "REMEDY":

> ARBITRATION SHALL BE THE SOLE, EXCLUSIVE AND FINAL *REMEDY* FOR ANY DISPUTE BETWEEN THE OWNER AND BENEFICIARY. *REMEDIES* THAT WOULD OTHERWISE BE AVAILABLE TO OWNER UNDER APPLICABLE FEDERAL, STATE OR LOCAL LAWS SHALL REMAIN AVAILABLE. THE ARBITRATOR WILL HAVE NO AUTHORITY TO AWARD PUNITIVE DAMAGES OR CONSEQUENTIAL DAMAGES.

Ex. C at 34–35 (emphases added). The first sentence confusingly establishes that a "remedy" means a dispute-resolution forum: Arbitration, it says, is a remedy. Then the second sentence says that "remedies" under "federal, state, or local laws" remain available. If the term "remedy" was being used consistently, that would seem to mean that other forums—*i.e.*, courts—remain available. Unlock may claim that "remedies" in the second sentence silently switches definitions: While in the first sentence it means forum, in the second sentence, Unlock might argue, it means damages or relief. But that is belied by the very next sentence, which states that punitive and consequential damages (remedies in the relief sense of the term) are *not* available. So, ultimately, it's unclear what that paragraph actually means: Does it allow a consumer to go to court, in which case Unlock's motion to compel fails under the terms of its own contract? Or does it seek to mislead homeowners into *thinking* court "remains" available when it isn't, in which case the clause is misleading?

The scope of the arbitration provision is also convoluted and confusing. One clause states that: "*OWNER* AGREES THAT ANY AND ALL CONTROVERSIES, CLAIMS, OR DISPUTES WITH [UNLOCK] … RELATING TO, OR RESULTING FROM THE UNLOCK AGREEMENT OR THE PROPERTY, SHALL BE SUBJECT TO BINDING ARBITRATION." Ex. C at 34 (emphasis added). But another clause of the contract states: "*YOU AND UNLOCK* HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY

AND IRREVOCABLY WAIVE ANY AND ALL RIGHTS EACH MAY HAVE TO A TRIAL BY JURY IN ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH THE UNLOCK AGREEMENT, OR ANY OTHER DOCUMENTS AND INSTRUMENTS EXECUTED IN CONNECTION HEREWITH." Ex. C at 39 (emphasis added). The first clause only states that Ms. Roberts agrees, the latter says that both parties agree. The scope of the waiver is also worded differently in the two provisions. This would leave any regular person confused as to who exactly is agreeing to what.

Further confusion comes from the fact that the contract states that arbitration will take place "UNDER THE ARBITRATION RULES OF JAMS, THE RESOLUTION EXPERTS (THE 'RULES')." Ex. C at 34. But then a paragraph later, the contract states that: "TO THE EXTENT THAT THE APPLICABLE JAMS' ARBITRATION RULES CONFLICT WITH THE RULES, THE RULES SHALL TAKE PRECEDENCE." *Id.* This suggests there is some separate set of rules beyond the JAMS rules, but the contract doesn't specify any.

Under New Jersey law, this thicket of confusing and contradictory provisions would be sufficient on its own to invalidate the contract. *See, e.g.*, *NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp.*, 24 A.3d 777, 797–98 (N.J. Sup. Ct. App. Div. 2011) ("[T]he cumulative effect of the many inconsistencies and unclear passages in the arbitration

terms … compel us to declare them unenforceable for lack of mutual assent.”). At the very least, it further supports a finding of procedural unconscionability.

C. The dispute resolution provisions are riddled with substantively unconscionable terms.

The final *Rudbart* factor, “the public interests affected by the contract,” focuses on “substantive” unconscionability, *Pace*, 317 A.3d at 489, such as “harsh or unfair one-sided terms,” *Muhammad*, 912 A.2d at 96. Here, the dispute resolution provisions are replete with terms that New Jersey courts have held are substantively unconscionable.

1. The contract contains unconscionable limits on damages. The contract states that “THE ARBITRATOR WILL HAVE NO AUTHORITY TO AWARD PUNITIVE DAMAGES OR CONSEQUENTIAL DAMAGES.” Ex. At C 36. The contract also states that “in no event will Unlock’s aggregate liability arising out of or related to the Unlock Agreement or the Property exceed the Investment Payment.” Ex. C at 40.

This is unconscionable several times over. Arbitration provisions may not “limit a consumer’s ability to pursue [a] statutory remedy.” *Delta Funding Corp. v. Harris*, 912 A.2d 104, 113 (2006); *see also Nino*, 609 F.3d at 203 (arbitration must “offer claimants the full scope of remedies available under” statutes). For example, Ms. Roberts has a statutory right to under New Jersey law to treble damages on her unfair practices claims, a remedy that the contract forecloses. N.J.S.A. § 56:8-19. Worse still,

"limits on compensatory damages have the insidious effect of permitting [defendants] to budget potential liability as a mere cost of doing business," and such limits unconscionably leave those harmed "unable to obtain the full measure of relief warranted by the evidence." *Ruszala*, 1 A.3d at 821–22.

Similarly, "[t]he preclusion of punitive damages touches upon the societal interest of expressing the community's disapproval of outrageous conduct." *Id.* As a result, an "arbitration agreement provision precluding the recovery of punitive damages [is] unenforceable." *Roman v. Bergen Logistics, LLC*, 192 A.3d 1029, 1036–37 (N.J. Sup. Ct. App. Div. 2018); *see also Ruszala*, 1 A.3d at 821–22.

2. The contract also unconscionably purports to waive Ms. Roberts's substantive rights under state and federal consumer protection laws in any arbitration. The contract states that "[t]o the fullest extent possible, Unlock and Owner agree that the Unlock Agreement is not subject to any federal, state and/or local law concerning consumer credit, including, without limitation, usury ceilings, disclosures, and any other requirements, restrictions, limitations or prohibitions set forth in such laws." Ex. C at 39. But these statutes protecting consumers and homeowners cannot be waived at all. *See, e.g.*, *Hojnowski v. Vans Skate Park*, 901 A.2d 381, 387 (N.J. 2006). The only purpose of such an unenforceable provision is to impermissibly "deter potential litigants" from asserting their rights. *Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 285 & n.17 (3d Cir. 2004).

The contract also provides that "Unlock may execute any of its duties under the Unlock Agreement by or through agents," yet "Unlock will not be responsible for the negligence or misconduct of any agent that Unlock selects." Ex. C at 40. Further, Ms. Roberts was required to "expressly waive any claims against any of Unlock's agents, assignees, affiliates, employees, directors or funding sources." *Id.* Thus, so long as Unlock acted through agents—as all companies do—Ms. Roberts loses her ability to hold anyone liable. But "a contract that releases liability from a statutorily-imposed duty" "violate[s] public policy" as a matter of New Jersey law. *Hojnowski*, 901 A.2d at 386–87.

3. These are not the only provisions that are "unconscionable" because they are "a deterrent to the vindication of [Ms. Roberts's] statutory rights." *Delta Funding*, 912 A.2d at 113; *see also Parilla*, 368 F.3d at 285 & n.17 (same); *see also Morrison v. Cir. City Stores, Inc.*, 317 F.3d 646, 658 (6th Cir. 2003) (companies "should not be permitted to draft arbitration agreements that deter a substantial number of potential litigants from seeking any forum for the vindication of their rights").

The contract's indemnification clause puts Ms. Roberts on the hook for Unlock's legal expenses for a wide range of claims, including claims brought by her, independent of the outcome of the litigation. She must:

> [I]ndemnify, defend and hold Unlock, its affiliates and their respective directors, officers, agents and employees harmless from, and against, any and all claims, damages, liabilities, actions and expenses (including,

> without limitation, attorneys' fees and costs) (collectively "Losses") arising out of or relating to: … (ii) any act or omission by You or Your agents; [or] (iii) the Property.

Ex. C at 38. This applies to "Losses between [Ms. Roberts] and Unlock." *Id.* at 38–39. In other words, for "any and all claims … relating to … the Property," Ms. Roberts must indemnify Unlock *even if* she brought those claims herself. *Id.*

The contract also contains an exceedingly broad definition of "Event of Default" that threatens to penalize homeowners for filing claims in court or challenging the enforceability of the dispute resolution terms. A default occurs if "[y]ou breach or fail to perform in accordance with *any provision* of the Unlock Agreement, or You take *any action* to … interfere with or negatively impact Unlock's rights." Ex. C at 27 (emphasis added). That would seem to include Ms. Roberts filing a claim in court, seeking punitive or consequential damages in arbitration, seeking to hold Unlock accountable for the actions of agents, or seeking to hold Unlock liable for more than the amount of the investment payment. And an "Event of Default" gives Unlock the power to seek damages, injunctive relief, specific performance, or force the sale of the property, among other "cumulative" remedies. Ex. C at 28–31.

Even if Unlock has not invoked the default or indemnification provisions (yet), a court must "determine unconscionability as of the time the contract was formed." *Parilla*, 368 F.3d at 285. And "[i]f the provision, as drafted, would deter potential litigants" from bringing their claims, "then it is unenforceable, regardless of whether,

in a particular case," the defendant invokes it. *Id.* at 285 n.17. Otherwise, a company could fill its contract with unconscionable terms that deter any homeowner from suing, then simply jettison those terms in the few cases where a homeowner is willing to brave that risk.

4. Worse still, many of these provisions are also "baldly one-sided" in favor of Unlock, the "stronger party." *Nino*, 609 F.3d at 207–08. As noted above, it's not even clear that the arbitration requirement applies to Unlock, since it is phrased only in terms of "Owner agrees." Ex. C at 34. But even if it did, many of the terms of that dispute resolution are "one-sided" in Unlock's favor. *Muhammad*, 912 A.2d at 96.

For starters, Ms. Roberts must indemnify Unlock and related entities for a broad range of claims and liabilities, with no corresponding duty on the side of Unlock or those entities. Ex. C at 38–39. "The plain language of the arbitration agreement thus provides a significant benefit to [Unlock's] related entities without any reciprocal benefit to [Ms. Roberts]." *Cook v. Univ. of S. California*, 321 Cal. Rptr. 336, 349 (Ct. App. 2024). Unlock's attempt to waive many consumer protection and disclosure laws is also clearly one-sided. Ex. C at 38. Ms. Roberts is also required to waive her claims against Unlock for the actions of its agents, as well as against the agents themselves—but Ms. Roberts is expressly liable for the actions of anyone acting on her behalf. Ex. C at 39.

The contract also includes a one-sided rule that stays deadlines—but only if *Unlock* is enjoined from enforcing its rights, not the other way around: "[I]f Unlock is stayed or enjoined from enforcing any of its rights under the Unlock Agreement, then any deadline or notice period prescribed in the Unlock Agreement is automatically stayed for the duration of such stay, injunction or legal prohibition." Ex. C at 40. An injunction that prevented Ms. Roberts from enforcing any of her rights would not have the same effect.

All told, "[t]he only conceivable purpose of [these] one-sided provisions is to stack the deck in [Unlock's] favor." *Nino*, 609 F.3d at 207–08. That is unconscionable. *Id.*

D. This procedural and substantive unconscionability render the arbitration clause unenforceable, or at the very least this case should proceed to discovery into arbitrability.

This case thus involves serious procedural and substantive unconscionability. In cases like this where "the cumulative effect of the various unconscionable terms" renders "the entire [arbitration] agreement … permeated by unconscionability," the arbitration agreement as a whole is "unenforceable." *Achey*, 293 A.3d at 560; *see also NAACP*, 24 A.3d at 798 (the proper course is to "sever the arbitration provisions from the parties' agreement as a whole"); *Nino*, 609 F.3d at 202 (refusing to enforce arbitration agreement permeated by "terms unreasonably favorable to [defendant], the stronger party"). That includes cases where the contract included a severability

clause, which is not dispositive when the unconscionability is this significant. *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 271 (3d Cir. 2003).

That result is particularly warranted here, where the procedural unconscionability is greater than in cases where the New Jersey Appellate Division has held that the entire arbitration clause cannot be enforced. For example, in *Achey*, the contract was for cell phone service, and the only procedural concern noted was that it was a contract of adhesion. 293 A.3d at 557.

As to the many substantively unconscionable provisions, these form "an unconscionable wall of protection for defendants from accountability for valid consumer fraud claims and cannot stand." *Achey*, 293 A.3d at 559. The only plausible reading of Unlock's repeated attempts to shield itself from liability is that "the party with excessive bargaining power" stacked the deck in its favor and included provisions to deter or prevent Ms. Roberts from invoking her rights. *Alexander*, 341 F.3d at 266; *see also Nino*, 609 F.3d at 202.

Courts "cannot give effect to an agreement to arbitrate afflicted by so much fundamental and pervasive unfairness." *Alexander*, 341 F.3d at 271. And courts have refused to sever even when there are fewer unconscionable provisions. *See Achey*, 293 A.3d at 558–60 (three provisions); *see also Nino*, 609 F.3d 191, 202–05 (three provisions); *Alexander*, 341 F.3d at 271 (four provisions).

At the very least, because Unlock "brought its motion to compel arbitration under the Rule 12(b)(6) standard" and Ms. Roberts has "brought forth sufficient facts to place the agreement to arbitrate in issue," this Court should allow the opportunity for discovery into arbitrability. *Robert D. Mabe*, 43 F.4th at 329–30.

III. Ms. Roberts's claims do not fall within the scope of the arbitration clause.

Finally, Unlock's motion should be denied for another, independent reason: The arbitration clause does not cover any of Ms. Roberts's claims, all of which arise under federal or state statutes. As Unlock acknowledges, in adjudicating whether to compel arbitration, "court must ascertain whether … 'the particular dispute falls within the scope of that agreement.'" Unlock Br. 5–6 (quoting *Aetrex Worldwide, Inc. v. Sourcing for You Ltd.*, 555 F. App'x 153, 154 (3d Cir. 2014)).[13]

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[13] Though Unlock expressly asks this Court to decide whether Ms. Roberts's claims fall within the scope of the arbitration clause (at 8–9), in the introduction to its brief—but nowhere else—Unlock briefly asserts that "an arbitrator, and not the Court, must determine whether Plaintiff's claims against Unlock fall within the scope of the arbitration provision under the FSEA." Unlock Br. 3. This barebones assertion is not accompanied by any further explanation or citation to authority, and it is inconsistent with the rest of Unlock's brief. It is therefore waived. *See, e.g., Feshovets*, 666 F. App'x at 162 ("[B]arebones assertions waive rather than raise an argument.").

Even putting waiver aside, the scope of the agreement goes to whether the dispute is "arbitrable," and under the Federal Arbitration Act, "courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *MZM Constr. Co. v. New Jersey Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 398 (3d Cir. 2020). Unlock does not identify any such clear and unmistakable evidence.

In doing so, "courts generally should apply ordinary state-law principles that govern the formation of contracts." *Moon v. Breathless Inc.*, 868 F.3d 209, 213 (3d Cir. 2017). And New Jersey law requires an arbitration clause to "clearly and unambiguously signal to plaintiff that she was surrendering her right to pursue her statutory claims in court." *Id.* 215–16. Unlock's arbitration clause does not meet this demanding standard.

A. The arbitration clause does not clearly and unambiguously cover Ms. Roberts's statutory claims.

1. "An agreement to arbitrate, like any other contract, must be the product of mutual assent, as determined under customary principles of contract law." *Atalese v. U.S. Legal Servs. Grp., L.P.*, 99 A.3d 306, 312–13 (2014). "[U]nder New Jersey law, any contractual waiver-of-rights provision must reflect that the party has agreed clearly and unambiguously" to its terms, and "because arbitration involves a waiver of the right to pursue a case in a judicial forum, courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent." *Id.* at 313. In addition, "every 'consumer contract' in New Jersey must 'be written in a simple, clear, understandable and easily readable way.'" *Id.* at 314 (quoting N.J.S.A. § 56:12–2). This applies to the scope of arbitration clauses, as "[o]nly those issues may be arbitrated which the parties have agreed shall be." *Id.* at 313, 316; *see also Moon,* 868 F.3d at 214; *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.*, 773 A.2d 665, 672 (N.J. 2001).

2. "To cover a statutory right under New Jersey law, an arbitration clause must" both "identify the general substantive area that the arbitration clause covers" and "reference the types of claims waived by the provision." *Moon*, 868 F.3d at 214. Though the clause "need not … mention the specific statutory rights at issue," it must nonetheless "clearly and unambiguously signal to plaintiff that she was surrendering her right to pursue her statutory claims in court." *Id.* at 215–16.

The New Jersey Supreme Court and the Third Circuit have consistently held that when the arbitration clause does not say that an individual must arbitrate statutory claims but identifies other claims she must arbitrate, "the consumer had not waived her statutory rights by signing this arbitration provision." *Moon*, 868 F.3d at 215–16. For example, statutory claims weren't covered by a provision stating that "any claim or dispute between [the plaintiff] and the [defendant] related to this Agreement or related to any performance of any services related to this Agreement." *Atalese*, 99 A.3d at 310.

Similarly, statutory claims weren't covered when the clause stated that "[i]n a dispute between [the plaintiff] and [the defendant] under this Agreement, either may request to resolve the dispute by binding arbitration." *Moon*, 868 F.3d at 212, 213–15. So too with a clause providing that "any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration." *Garfinkel*, 773 A.2d at 668. Such clauses "d[id] not mention, either expressly or by

general reference, statutory claims." *Moon*, 868 F.3d at 215. Instead, they "mentioned contract disputes," indicating that statutory claims were not covered. *Id.*

The same is true here. There is no "significant difference between these … formulations" and the arbitration clause in Unlock's contract, since all reference other claims but not statutory claims. *Id.* 216. The arbitration clause refers to: "ANY AND ALL CONTROVERSIES, CLAIMS, OR DISPUTES WITH BENEFICIARY … ARISING OUT OF, RELATING TO, OR RESULTING FROM THE UNLOCK AGREEMENT OR THE PROPERTY." Ex. C at 34.

Additionally, an arbitration clause, "at least in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute." *Moon*, 868 F.3d at 214. Here, the jury waiver clause states that the parties: "WAIVE ANY AND ALL RIGHTS EACH MAY HAVE TO A TRIAL BY JURY IN ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, *THE UNLOCK AGREEMENT*, OR *ANY OTHER DOCUMENTS AND INSTRUMENTS* EXECUTED IN CONNECTION HEREWITH." Ex. C at 39 (emphasis added). Once again, because these clauses reference other kinds of disputes, "not statutory rights," they do not "clearly and unambiguously signal to plaintiff that she was surrendering her right to pursue her statutory claims in court." *Moon*, 868 F.3d at 215–16.

B. Even if statutory claims were covered, Ms. Roberts's claims for injunctive relief are not.

Under the contract, "BOTH PARTIES AGREE THAT ANY PARTY MAY PETITION A COURT FOR INJUNCTIVE RELIEF." Ex. C at 35. Ms. Roberts sought equitable relief on each of her claims. *See* Dkt. 11 at 6–10 (seeking "equitable" relief). Those requests for relief are accordingly not subject to arbitration.

CONCLUSION

Unlock's motion to compel arbitration should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States District Court in the Court of New Jersey by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

s/ Edward Hanratty
Edward Hanratty