IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SAM A. ANTAR, Plaintiff, v. THE BORGATA HOTEL CASINO AND SPA, LLC; B ONLINE CASINO; BETMGM, LLC; MGM RESORTS INTERNATIONAL INC.; ENTAIN PLC; JOHN DOES 1-10; MARY DOES 1-10; and XYZ CORPORATIONS 1-10, Defendants.	CIVIL ACTION: 2:22-cv-05785-MCA-LDW

PLAINTIFF'S COMBINED MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO COMPEL ARBITRATION AND DISMISS THE AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM

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I. PRELIMINARY STATEMENT

The Defendants' decision to focus its briefs on demonizing a compulsive gambler is a shamefully outdated approach, and wholly irrelevant to disposition of the instant motions. The Defendants' effort to reframe the Amended Complaint as a scheme to shift blame from the Plaintiff to the Defendants is a complete mischaracterization of the dispute underlying this case. Nowhere does the Amended Complaint allege that the Plaintiff is blameless for his past transgressions -- but his past is not the issue in this litigation.

The key issue in this litigation is straightforward: Is it an unconscionable business practice for an online casino operator to target a consumer with enticements to gamble when the operator knows that consumer suffers from gambling addiction. To be clear, and unlike any case upon which Defendants rely, the question is not whether a casino operator is liable for passively permitting a compulsive gambler into its casino. Rather, the issue is the active and aggressive enticement of an addicted gambler with relentless, near-daily, personal and real-time text message enticements from a casino host employed and rewarded by Defendants for squeezing as much

money from the addicted gambler as they can -- until that person hits rock bottom.[1]

Defendants cling fecklessly to Taveras and an obsolete stereotype of the addicted gambler in support of its proposition that they can have no liability for their deplorable actions as a matter of law. Not only was Taveras decided 15 years ago in the prehistoric time before every consumer held instant access to a casino on their smartphone, both the law and psychiatry have been updated since that time to reflect a drastically evolved understanding of gambling addiction disorder.

Defendants' comparison of gambling addiction to over-shopping at the local mall is not only disgraceful in its ignorance in the year 2023, it is completely inconsistent with its classification alongside alcohol and opioid addiction by the American Psychiatric Association.

Moreover, casinos are now required to train their customer-facing employees to recognize the nature and symptoms of problem gambling behavior, and how to assist players in obtaining information regarding help for a gambling problem. Therefore unlike in Taveras back in 2008, there is now no question that casinos are equipped to identify problem gamblers and how to

[1] To this day, Defendants contact the Plaintiff on a regular basis with email enticements to gamble with subject headings such as "The Offer You Have Been Waiting For Is Here!"

point them in the right direction to get the information they need to recover from their addiction.

Finally, the Plaintiff is entitled to his Constitutional right to have these questions resolved by a court of law and a jury of his peers. The arbitration clause offered by Defendants lacks the most fundamental requirements of Atalese. The arbitration clause fails to inform the consumer that there is a difference between arbitration and court, and fails to inform the consumer that by submitting to arbitration they are waiving their right to court and a jury -- such an arbitration clause in a consumer contract is unenforceable without any further analysis.

II. STATEMENT OF MATERIAL FACTS

The Plaintiff's Statement of Facts is drawn from the allegations in the Amended Complaint ("Complaint"), which is incorporated by reference in full herein. Citations in this Statement of Facts are to the Paragraph numbers in the Complaint.

A. Introduction

The Plaintiff Sam Antar ("Plaintiff") was, and exhibited fundamental symptoms of being, a problem gambler at all times relevant to this action. ¶1. Problem gambling is classified by both the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders and World Health Organization's International Classification of Diseases as an addiction disorder. ¶2. The Defendants Borgata Hotel Casino and Spa, LLC, B Online Casino, Bet MGM LLC, MGM Resorts International Inc., and Entain PLC (collectively "Defendants") were trained to recognize the nature and symptoms of problem gambling behavior at all times relevant to this action. ¶3.

Defendants' involvement in the Plaintiff's addiction was not passive; Defendants knew Plaintiff was a problem gambler because from approximately June 2019 through January 2020, they engaged with him through email, telephone, and text message on an almost daily basis. ¶¶4-5. For example, from June 2019 through January 2020, Plaintiff and Defendants exchanged over 1,800 text messages which included relentless financial incentives, gifts, and various other forms of manipulation. ¶¶6, 8.

Plaintiff ultimately gambled close to thirty million dollars with Defendants in 2019 through a series of over 100,000 online bets, as his gambling addiction disorder grew worse and worse; the Defendants' relentless enticements of the Plaintiff to gamble when they knew he suffered and/or exhibited the signs of a problem gambler was an unconscionable commercial practice, in violation of the New Jersey Consumer Fraud Act. ¶¶9-10.

B. Defendants

The Borgata Hotel Casino and Spa, LLC ("the Borgata") is operated by MGM Resorts International, Inc., and is a limited liability company with a principal place of business at 1 Borgata Way in Atlantic City, New Jersey. ¶14. BetMGM, LLC ("BetMGM") is an online gaming and sports betting company that maintains exclusive access to all of MGM's online gaming via market leading brands, including the Borgata, and is a limited liability company located at Harborside Plaza 3, 210 Hudson Street in Jersey City, New Jersey. ¶16. MGM Resorts International, Inc. ("MGM RESORTS") is a hospitality and entertainment company that operates several online betting brands including the Borgata. ¶17.

Quinton Hogan ("Hogan") and Jerry Liang ("Liang") were each VIP Account Managers employed by the Defendants Borgata and BetMGM, responsible for retaining and maximizing the

profitability of VIP online gaming and gambling customers. ¶¶21-22. In or about 2019, the Borgata invited Plaintiff to be designated with "NOIR" VIP status, the highest available rewards status offered by Defendants. ¶¶24-25. The NOIR program provided Defendants precise records and data about Plaintiff and other patrons' online gambling patterns and behavior. ¶26. NOIR customers such as Plaintiff are even assigned a dedicated VIP host by Defendants. ¶27.

Hogan and Liang were assigned by the Defendants to be the Plaintiff's dedicated VIP host; Hogan from approximately June 7, 2019 through November 27, 2019, and Liang from approximately December 16, 2019 through January 16, 2020. ¶28. Hogan and Liang saw to it that in 2019, Plaintiff's online gambling activity exceeded $24 million, including more than $5 million in a 16-day period in January 2020. From May 2019 to January 2020, Plaintiff placed more than 100,000 online bets. ¶29.

C. Nature and Symptoms of Problem Gambling

Defendants were obligated by N.J.A.C. 13:69O-1.2(x) to implement training for employees who have direct contact with patrons via phone, e-mail, electronic chat, or other means on the recognition of the nature and symptoms of problem gambling behavior, and how to assist players in obtaining information regarding help for a gambling problem. ¶30. Defendants were at

all times relevant in full compliance with N.J.A.C. 13:69O-1.2(x). ¶31.

Such training is obligated by N.J.A.C. 13:69O-1.2(x) to occur at the start of an employee's employment, and at regular intervals thereafter. ¶32. Hogan and Liang were each employees with direct contact with patrons via phone, e-mail, electronic chat, or other means under N.J.A.C. 13:69O-1.2(x). ¶¶33-34.

The amount of money Plaintiff gambled with the Defendants between May 2019 and January 2020 was a fundamental and visible symptom of problem gambling; at all times relevant, Defendants knew how much money the Plaintiff was gambling, and knew it was a fundamental symptom of problem gambling. *See* ¶¶37-43.

The frequency with which Plaintiff gambled with the Defendants between May 2019 and January 2020 was a fundamental and visible symptom of problem gambling; at all times relevant, Defendants knew the frequency with which Plaintiff gambled, and knew it was a fundamental symptom of problem gambling. ¶¶44-50.

Plaintiff's "chasing" of his losses with the Defendants between May 2019 and January 2020 was a fundamental and visible symptom of problem gambling; at all times relevant, Defendants knew that Plaintiff frequently "chased" his losses, and knew it was a fundamental symptom of problem gambling. ¶¶51-57.

The Plaintiff's preoccupation with gambling, including but not limited to thinking of ways to get money with which to

gamble, between May 2019 and January 2020 was a fundamental and visible symptom of problem gambling; at all times relevant, Defendants knew of Plaintiff's preoccupation with gambling, and knew it was a fundamental symptom of problem gambling. ¶¶58-64.

The Plaintiff's lying to conceal the extent of his involvement with gambling and reliance on others to provide money to relieve his desperate financial situations caused by gambling was a fundamental and visible symptom of problem gambling; beginning with service of a *Subpoena Duces Tecum* on Defendants by the New Jersey Division of Criminal Justice on August 15, 2019, Defendants were on notice that Plaintiff was lying to conceal the extent of his involvement with gambling and/or relying on others to provide money to relieve his desperate financial situations caused by gambling, and that it was a fundamental symptom of problem gambling. ¶¶65-71.

At all times relevant, Defendants knew that a "cooling-off" period away from gambling was a recognized and fundamental way to help a problem gambler with his or her addiction, yet Liang's resume boasts of his ability to "convert lapsed VIP players." ¶¶73, 76-77. "Converting lapsed VIP players" is the targeting of problem gamblers for a premature termination of their cooling-off period; Defendants knew and rewarded Liang for "converting lapsed VIP players." ¶¶77-78. Liang's and Hogan's job description also included preventing VIP players, including

Plaintiff, from lapsing in the first place. ¶¶77-78; 83-84. Liang's and Hogan's jobs also included them maximizing the amount of money gamblers such as the Plaintiff gambled, and developing quasi-personal relationships with VIPs so that gamblers and Plaintiff trusted them. ¶¶85-88; 91-92.

D. Defendants' Enticements to Gamble

Between June 7, 2019 and January 16, 2020, the Plaintiff and Defendants exchanged more than 1,800 text messages. ¶94. Of the 223 days between June 7, 2019 and January 16, 2020, the Plaintiff and Defendants communicated on more than half -- at least 126. ¶95. The communications frequently began first thing in the morning, and continued throughout regular working hours, the subject of which was almost always financial bonuses, deposit incentives, and credits for past gambling losses. ¶¶96-97.

The Complaint provides precise details of approximately 50 specific enticements, often offering incentives in the thousands of dollars, from the Defendants to the Plaintiff to deposit money and continue gambling with the intent to nurture, expedite, and exacerbate the gambling addiction they knew Plaintiff suffered from. These enticements were sent directly to the Plaintiff's phone via text message from Hogan and Liang. *See* ¶¶98-219.

As one example, the Defendants sent Plaintiff a text message on July 9, 2019 asking if he wanted a $5,000 deposit match *per week*. ¶110. As another example, 47 text messages were exchanged between the Defendants and Plaintiff on a single day after Plaintiff told Defendants he intended to stop gambling. ¶123. As another example, Defendants chided Plaintiff on August 12, 2019: "[i]f you made deposits like you used to I can give you more…[y]our (sic) killing me here." ¶135. As another example, the Defendants sent the Plaintiff a text message on September 4, 2019 saying: "Hey Sammy I need you to deposit more." On January 6, 2020, the Defendants told Plaintiff: "Your bonus percentage is getting out of control and I'm going to need to keep it down" to encourage Plaintiff to deposit more money. ¶196.

The Defendants knew the Plaintiff was a problem gambler, and targeted him for these enticements because they knew he was vulnerable as a problem gambler. ¶¶221-226. The Defendants' creation, nurturing, expediting, and/or exacerbation of the Plaintiff's gambling addiction was the proximate cause, in whole or in part, of damages to the Plaintiff including, but not necessarily limited to, pecuniary losses in an amount to be determined at trial, inclusive of monies lost, severe emotional distress, and the complete devastation of the Plaintiff's professional, personal, and financial life. ¶227.

III. LEGAL ARGUMENT

A. The Arbitration Clause is Unenforceable Because it Fails the Most Fundamental Requirements of Atalese

The general principles favoring arbitrability expounded by the Defendants are meaningless in light of the fundamental deficiencies of their arbitration clause. Under New Jersey law, consumer contracts purporting to require arbitration are automatically unenforceable if the agreement does not inform the consumer that there is a difference between arbitration and court, and that by agreeing to arbitration they are waiving their constitutional right to a court and jury. The arbitration clause at issue in the instant litigation contains neither of these absolute requirements.

Even if this requirement had *arguendo* been met, the arbitration clause is unenforceable against the Plaintiff's claims because the agreement limits the clause to disputes arising from the contract -- but makes no reference to arbitrating statutory or common law claims.

i. Clear and Unambiguous Informed Consent Standard

The Courts have no authority to mandate that a consumer who never knowingly consented to arbitrate participate in arbitration. *See* Harper v. Amazon.Com Servs. Inc., 2022 U.S. Dist. LEXIS 228118, *12 (D.N.J. Dec. 19. 2022)("'If a party has

not agreed to arbitrate, the courts have no authority to mandate that he do so.'") *quoting* Bel-Ray Co. v. Chemrite (Pty.) Ltd., 181 F.3d 435, 444 (3d Cir. 1999). Stated another way, "the 'presumption in favor of arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties.'" Harper at *12 *quoting* Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 160 (3d Cir. 2009).

The arbitration clause at issue is a textbook demonstration of unenforceability, falling woefully short of nearly every relevant prerequisite established by Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014) and its progeny.

"'State law governs whether parties to a consumer contract have agreed to arbitrate their disputes.'" Bartz v. Weyerhaeuser Co., 2020 N.J. Super. Unpub. LEXIS 1640, (App. Div. Aug. 26, 2020) *quoting* Morgan v. Sanford Brown Inst., 225 N.J. 289, 294 (2016). "The right to a civil jury trial is guaranteed by the New Jersey constitution." Tedeschi v. D.N. Desimone Constr., Inc., 2017 U.S. Dist. LEXIS 69695, *7 (D.N.J. May 8, 2017) *citing* Morgan *citing* N.J. Const. art. I, ¶9.

It is well-settled law that without more, the appearance of a requirement to arbitrate does not place the average consumer on notice that they are waiving their constitutional right to go to court and have their dispute resolved by a jury of their peers.

"The absence of *any* language in the arbitration provision that plaintiff was waiving her statutory right to seek relief in a court of law renders the provision unenforceable." Atalese at 436. "'It is requisite to waiver of a legal right that there be a clear, unequivocal, and decisive act of the party…[w]aiver presupposes a full knowledge of the right and an intentional surrender…'" Atalese at 443 *quoting* W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152-53 (1958).

Such clarity is required because "a consumer who accepts arbitration 'is surrendering her common-law and constitutional right of access to the courthouse.'" Bartz v. Weyerhaeuser Co., 2020 N.J. Super. Unpub. LEXIS 1640, *7 (App. Div. Aug. 26, 2020) *quoting* Morgan v. Sanford Brown Inst., 225 N.J. 289, 294 (2016). "'The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue.'" Atalese at 444 *quoting* Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993).

"Whatever words compose an arbitration agreement, they must be clear and unambiguous that a consumer is choosing to arbitrate disputes rather than have them resolved in a court of law. In this way, the agreement will assure reasonable notice to the consumer." Tedeschi at *12 *citing* Atalese at 316. The same standard applies to an agreement's delegation clause. Bartz at *8 ("Even if there is a delegation clause, it, too, must

'satisfy the elements necessary for the formation of a contract under state law.'") *quoting* Morgan at 295.

It is presumed that a court, not an arbitrator, decides the issue of arbitrability. *See* Bartz at *8 ("'The law presumes that a court, not an arbitrator, decides any issue concerning arbitrability.'") *quoting* Morgan at 304. To be enforceable, a delegation clause, like the arbitration clause itself, must make it clear that the consumer is waiving his right to have the issue heard by a judge in a courtroom. *See* Bartz at *9-10 (Delegation unenforceable where "…it was not explained that once plaintiffs signed this contract, the courts effectively had no role for them in any dispute…"); *see also* Moon v. Breathless Inc., 868 F.3d 209, 213 (3d Cir. 2017)(holding delegation clause unenforceable where it failed to mention arbitrability).

While arbitration of course necessarily involves the waiver of a party's right to court and a jury, "an average member of the public may not know -- without some explanatory comment -- that arbitration is a substitute for the right to have one's claims adjudicated in a court of law." Atalese at 442. It is for this reason that "'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.'" Atalese at 442-43 *quoting* NAACP of Camden County E. v. Foulke Mgmt., 421

N.J. Super. 404, 424 (App. Div.) *certif. granted* 209 N.J. 96 *and appeal dismissed* 213 N.J. 47 (2013).

"At bottom, the judgment in Atalese, which declined to enforce the arbitration provision at issue, is rooted in the notion that mutual assent had not been achieved because the provision did not, in some fashion, explain that it was intended to be a waiver of the right to sue in court." Kernahan at 319 *citing* Atalese at 436.

Atalese provided examples of the language required for a finding of enforceability. *See* Martindale v. Sandvik, Inc., 173 N.J. 76, 85 (2002)(plaintiff agreed "to waive her right to a jury trial"); Griffin v. Burlington Volkswagen, Inc., 411 N.J. Super. 515, 518 (App. Div.2010)("by agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes"); Curtis v. Cellco Partnership, 413 N.J. Super. 26, 31 (App. Div.), *certif. denied*, 203 N.J. 94 (2010)("Instead of suing in court, we each agree to settle disputes [except certain small claims] only by arbitration. The rules in arbitration are different. There's no judge or jury, and review is limited…")

"Martindale, Griffin, and Curtis show that, without difficulty and in different ways, the point can be made that by choosing arbitration one gives up the 'time-honored right to

sue.'" Atalese at 445. Whatever language is used, it "must be clear and unambiguous" that both parties to the agreement understand that "there is a distinction between resolving a dispute in arbitration and in a judicial forum." Ibid.

In holding the arbitration clause in Atalese unenforceable, the New Jersey Supreme Court found that: a) the arbitration clause appeared on page nine of a twenty-three-page contract, b) the plaintiff was suing under the Consumer Fraud Act, "which explicitly provide(s) remedies in a court of law," c) there was no explanation in the clause that plaintiff was waiving her right to seek relief in court for a breach of statutory rights, d) the provision did not explain what arbitration is, "nor does it indicate how arbitration is different from a proceeding in a court of law," e) was not written in "plain language that would be clear and understandable to the average consumer that she is waiving statutory rights." Id. at 446.

In the instant matter, the arbitration clause suffers from precisely the same flaws found to be fatal to enforceability in Atalese. There is no mention of any kind in the Defendants' agreement that there is a difference between court and arbitration, and no mention of any kind that the agreement requires Plaintiff to give up all rights to the courthouse and a jury of his peers. Without clear and unambiguous notice of these things, the Plaintiff has not waived his Constitutional right to

a courthouse, judge, and a jury of his peers, and the arbitration provision is unenforceable.[2]

ii. Statutory and Common Law Claims are Outside the Scope of the Arbitration Clause Even if it Were *Arguendo* Enforceable

"[B]efore compelling any party to arbitrate pursuant to the FAA, a court must consider two 'gateway' questions: (1) 'whether the parties have a valid arbitration agreement at all' (i.e. its enforceability), and (2) 'whether a concededly binding arbitration clause applies to a certain type of controversy' (i.e. its scope)." In re Remicade (Direct Purchaser) Antitrust Litig., 938 F.3d 515 (3d Cir. 2019) *quoting* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416-17 (2019). "'Only those issues may be arbitrated which the parties have agreed shall be.'" Kernahan at 776-77 *quoting* In re Arbitration Between Grover & Universal Underwriters Ins. Co., 80 N.J. 221, 228 (1979).

Courts again apply state law contract principles to decide whether parties agreed to arbitrate a particular issue. *See* Moon

[2] The arbitration clause is even further unenforceable based on contractual principles of unconscionability because it entitles the prevailing party at arbitration to attorneys' fees and expenses. Such a clause is particularly unconscionable in the context of the CFA where the Legislature has purposefully included a one-way fee shifting provision in its legislation. Such a clause is certain to prevent the average consumer from pursuing a cause of action because the threat of paying the casino's attorney fees and expenses would be financially catastrophic. This is especially so where the arbitration clause requires the parties to utilize a retired judge or justice from JAMS -- an enormous expense which the average consumer would certainly not understand upon signing.

v. Breathless Inc., 868 F.3d 209, 213 (3d Cir. 2017)("'When deciding whether the parties agreed to arbitrate a certain matter [including arbitrability], courts generally…should apply ordinary state-law principles that govern the formation of contracts.'") *quoting* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

While the arbitration clause is not required to name the specific statute or common law right at issue, it will not be held to encompass a consumer's statutory or common law rights unless such rights are explicitly included. *See* Moon at 215 ("The Supreme Court of New Jersey found that the arbitration clause did not cover the doctor's statutory claims for three reasons. First, the clause did not reference statutory claims: 'Moreover, the language does not mention, either expressly or by general reference, statutory claims redressable by the LAD.'") *quoting* Garfinkle v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 134 (2001). The same result was reached in Atalese, where the Supreme Court of New Jersey found that the consumer had not waived her statutory rights, because "'the wording of the service agreement did not clearly and unambiguously signal to plaintiff that she was surrendering her right to pursue her statutory claims in court.'" Moon at 215-16 *quoting* Atalese at 448.

The Court found enforceability in Martindale only because the arbitration clause made no limiting reference to the contract, and specifically referenced the types of claims at issue: "I agree to waive my right to a jury trial in any action or proceeding related to my employment with the Employer…" Moon at 216 *citing* Martindale at 81. The difference in Martindale was that the arbitration provision "lacked a limiting principle, such as reference to an agreement, unlike Garfinkle." Moon at 216.

In Moon, the Third Circuit held that Garfinkle and Atalese governed the case at bar because the contract at issue was limited to disputes under the contract without any reference to statutory rights. Moon at 216. ("Here, the clause likewise only includes 'a dispute between [plaintiff] and [defendant] *under this agreement*")(emphasis added). "Here, the contract contains a limiting term because it directly references the Contract." Moon at 216-17.

It is a critical distinction that the fact plaintiff would not have engaged with the defendant but for the contract is *not* the test for whether the dispute arises under or relates to the agreement. The test is whether or not a plaintiff's claims necessarily implicate any rights under the contract. *See* Moon at 217 ("Despite the contract's employment provision, Moon's claims still *arise under* the FLSA and New Jersey statutes, not the

agreement itself…[b]ecause she relies 'solely on her statutory, rather than her contractual, rights to recovery…she may proceed on her FLSA claims without first seeking arbitration…and because Moon's claims arise under statutes rather than the Contract, we find that the arbitration clause does not cover Moon's statutory wage-and-hour claims.")(internal citation omitted). "[W]e are not swayed by the fact that (plaintiff's) antitrust claims could not exist but-for the Agreement; what is dispositive is that they cannot be adjudicated without 'reference to, and reliance upon it.'" In re Remicade at 524 *quoting* EPIX Holdings Corp. v. Marsh & McLennan Cos., 410 N.J. Super. 453, 475 (App.Div. 2009).

In the instant matter, Defendants claim that the Plaintiff's claims arise out of or relate to the agreement containing the arbitration provision because he could not have gambled if he had not indicated his assent to that agreement -- but that is not the proper test. The test is whether or not the Plaintiff's claims can be adjudicated without reference to or reliance upon the agreement -- and certainly they will be. In fact, there is no reference to the agreement in the entire Complaint. The Plaintiff's claim, that Defendants violated the CFA and committed common law negligence, is not rooted in or related to any claimed contractual right. Moreover, the arbitration provision contains a limiting clause constraining the provision to issues arising out of the agreement. As such,

the Plaintiff's claims arise out of statutory and common law, not the parties' terms and conditions.

iii. Rule 12(b)(6) versus Rule 56

The Defendants conclude with no examination that their motion should be heard without discovery under the Rule 12(b)(6) standard, rather than as a Rule 56 motion for summary judgment. Though the arbitration clause is plainly unenforceable under either standard, Defendants' conclusion is inaccurate. A motion to compel is properly examined under a motion for summary judgment standard when the Complaint and documents relied upon in the Complaint is unclear about whether the parties agreed to arbitration, or when the party opposing arbitration responds with facts sufficient to place the agreement to arbitrate at issue. *See* Brito v. LG Elecs. USA, Inc., 2023 U.S. Dist. LEXIS 53789, *8 (D.N.J. March 29, 2023)("The motion to dismiss standard will only be replaced by the motion for summary judgment standard if (1) the complaint - and documents relied on in the complaint - are unclear regarding whether the parties agreed to arbitrate; or (2) the non-moving party 'has responded…with additional facts sufficient to place the agreement to arbitrate in issue.'") *quoting* Guidotti v. Legal Helpers Debt Resolution, LLC, 716 F.3d 764, 774-76 (3d Cir. 2013).

The Rule 12(b)(6) standard is properly applied only "when it is apparent, 'based on the face of a complaint, and documents relied upon in the complaint,' that certain of a party's claims 'are subject to an enforceable arbitration clause.'" Harper at *13 *quoting* Guidotti at 776. "'The centerpiece of that framework is whether the existence of a valid agreement to arbitrate is apparent from the face of the complaint or incorporated documents.'" Harper at *13-14 *quoting* Singh v. Uber Techs, Inc., 939 F.3d 210, 218 (3d Cir. 2019).

Where the Complaint does not reference the arbitration clause or the document inside which that clause resides, the Court must apply the Rule 56 standard. *See* Triola v. Dolgencorp, LLC 2022 U.S. Dist. LEXIS 204085, *7 (D.N.J. Nov. 9, 2022)("The court must apply the Rule 56 standard because [plaintiff's] Amended Complaint does not mention the Arbitration Agreement.") "As a result, the Court must look beyond the Amended Complaint and consider other documents to determine whether an enforceable arbitration agreement exists." Ibid. *citing* Matczak v. Compass Grp. USA, 2022 U.S. Dist. LEXIS 32408, *2 (D.N.J. Feb. 24, 2022).

In the instant matter, the Complaint makes not even a single reference to the arbitration clause or the agreement inside which it resides. It is therefore not apparent based on the face of a complaint that any claim would be subject to the

arbitration clause, even if it were enforceable. As such, the proper standard is set forth in Rule 56, not Rule 12(b)(6).

B. The New Jersey Consumer Fraud Act

The predatory behavior described in the Plaintiff's Complaint is precisely the unconscionable conduct New Jersey's Consumer Fraud Act ("CFA") was created to eradicate and punish. The CFA is intentionally "one of the strongest consumer protection laws in the nation." It would be an absurd and unprecedented result if the CFA permitted the Defendants' to operate their scheme to prey on the vulnerability of consumers whom they know to be gambling addicts with impunity. This scheme included both the affirmative offer of relentless inducements, and the intentional withholding of information regarding obtaining information that would assist them to get help for their gambling addiction. The CFA was enacted by the Legislature and has consistently been interpreted by the Court to neutralize such a lack of good faith and fair dealing.

i. There is No Conflict with Regulation

The Defendants' proposition that the CFA does not apply to this case because casinos and gambling are a highly regulated industry has already been squarely addressed and soundly rejected by New Jersey's Appellate Division in a case alleging

unconscionable business practice through false advertising. "'The language of the CFA evinces a clear legislative intent that its provisions be applied broadly in order to accomplish its remedial purpose, namely, to root out consumer fraud.'" Bandler v. Landry's Inc., 464 N.J.Super. 311, 320 (App.Div. 2020) *quoting* Lemelledo v. Beneficial Management Corp., 150 N.J. 255, 264 (1997).

Such legislative purpose dictates a presumption that the "'CFA applies to covered practices, even in the face of other existing sources of regulation, which preserves the Legislature's determination to effect a broad delegation of enforcement authority to combat consumer fraud.'" Bandler at 321 *quoting* Lemelledo at 270. The CFA is only preempted by another source of regulation where there is a "'direct and unavoidable conflict between application of the CFA and application of the other regulatory scheme.'" Ibid.

In reversing the Superior Court's dismissal of plaintiff's CFA claim, the Court held there was no conflict between the CFA and the Casino Control Act because: "No special expertise vested in the Division (of Gaming Enforcement) is required to resolve the question. There is no direct 'direct and unavoidable conflict' between the CFA and CCA (Casino Control Act) provisions, let alone a 'patent and sharp' conflict as Lemelledo requires. There is no significant risk that the CFA and CCA 'as

applied, will work at cross-purposes.' We discern no legislative intent to preempt plaintiff's CFA or common law claims in Superior Court." Bandler at 324.

ii. The Acts Alleged are Unconscionable Business Practices

The CFA is remedial legislation which must be construed liberally in favor of the New Jersey consumers it was enacted to protect. *See* Cox v. Sears Roebuck & Co., 138 N.J. 2, 15 (1994)("Courts have emphasized that like most remedial legislation, the Act should be construed liberally in favor of consumers.")

Both affirmative acts and intentional omissions constitute unlawful practices under the CFA. *See* Cox at 17 *citing* N.J.S.A. 56:8-2. "A practice can be unlawful even if no person was in fact misled or deceived thereby." Cox at 17. While intent is immaterial for an affirmative act alleged to be unlawful under the CFA, a plaintiff must show that a defendant acted with knowledge when alleging an omission. Cox at 18.

"In reviewing the CFA, the Third Circuit has observed: [t]he CFA is intended to 'combat the increasingly widespread practice of defrauding the consumer.'" Marshall v. Verde Energy USA, Inc., 2020 U.S. Dist. LEXIS 184540, *22 (D.N.J. Oct. 5, 2020) *quoting* Alpizar-Fallas v. Favero, 908 F.3d 910, 915 (3d Cir. 2018) *quoting* Cox at 460. "In enacting the CFA, the New Jersey Legislature intended to 'give New Jersey one of the

strongest consumer protection laws in the nation.'" Marshall at *22 *quoting* Alpizar-Fallas at 915 *quoting* Cox at 460. "Therefore, its history 'is one of constant expansion of consumer protection,' Marshall at *23 *quoting* Alpizar-Fallas at 915 *quoting* Gennari v. Weichert Co. Realtors, 148 N.J. 582 (1997), and it should 'be construed liberally in favor of consumers.'" Marshall at *23 *quoting* Alpizar-Fallas at 915 *quoting* Cox at 461.

Unconscionability under the CFA is a purposefully malleable concept. *See* Rapoport v. Caliber Home Loans, Inc., 617 F.Supp.3d 241, 246 (D.N.J. 2022)("Unconscionability for purposes of the CFA is 'an amorphous concept obviously designed to establish a broad business ethic.'") *quoting* Cox v. Sears Roebuck & Co., 138 N.J. 2, 17-18 (1994). "Like the CFA itself, 'the word *unconscionable* must be interpreted liberally so as to effectuate the public purpose of the CFA.'" Yingst v. Novartis AG, 63 F. Supp. 3d 412, 416 (D.N.J. Nov. 24, 2014) *quoting* Associates Home Equity Services, Inc. v. Troup, 343 N.J.Super. 254, 278 (App. Div. 2001).

The term "unconscionable commercial practice" is not defined by the CFA. Ciser v. Nestle Waters North Am., Inc., 596 Fed. Appx. 157, 160 (3d Cir. 2015). But "[t]he New Jersey Supreme Court has instructed courts to 'pour content' into the term on a case-by-case basis." Ibid. *quoting* Kugler v. Romain,

58 N.J. 522 (1971). "The standard of conduct that the term 'unconscionable' implies is lack of 'good faith, honesty in fact and observance of fair dealing.'" Ciser at 161 *quoting* Cox at 462; *see also* D'Alessandro v. Ocwen Loan Servicing, LLC, 2018 U.S.Dist. LEXIS 86482, *12-13 (D.N.J. May 23, 2018)("The showing of an unreasonable business practice also entails a lack of good faith, fair dealing, and honesty.")

Holding a seller to the CFA's standards of good faith, fair dealing, and honesty is most important to protect those most susceptible to exploitation. *See* Kugler v. Romain, 58 N.J. 522, 544 (1971)("The standard of conduct contemplated by the unconscionability clause is good faith, honesty in fact and observance of fair dealing, and the need for application of that standard is most acute when the professional seller is seeking the trade of those most subject to exploitation-the uneducated, the inexperienced, and the people of low incomes.")(internal citations omitted). It is for these reasons that "[w]hether a particular practice is unconscionable must be determined on a case-by-case basis." Kugler at 543.

An unconscionable practice under the CFA evinces a capacity to mislead. Such capacity to mislead has not been defined, but is found absent in cases such as those involving breach of contract or warranty, garden-variety unfairness, and "mere dissatisfaction". Id. at 13. "Conduct that is merely unfair or

that causes consumer dissatisfaction is not necessarily an unconscionable commercial practice." Slinko-Shevchuk v. Ocwen Fin. Corp., 2015 U.S. Dist. LEXIS 33382, *16 (D.N.J. Mar. 18, 2015).

It is for this reason that a plaintiff "may not repurpose a breach of contract claim into an 'unconscionable commercial practice' claim under the CFA." Ciser at 161 *quoting* Fenwick v. Kay Am. Jeep, Inc., 72 N.J. 372, 378 (1977). "[T]he Legislature must have intended that substantial aggravating circumstances be present in addition to the breach." Cox at 18. The CFA is "'aimed at more than the stereotypic con man.'" Harnish v. Widener Univ. Sch. of Law 931 F. Supp. 2d 641, 651 (D.N.J. 2013) *quoting* Leon v. Rite Aid Corp., 340 N.J.Super. 462, 471 (App.Div. 2001).

For example, in Ciser the Court held the plaintiff was not misled under the CFA where his Complaint alleged only that he was improperly assessed a fully disclosed $15 late fee, while leaving open the possibility that a larger late fee might have been unconscionable. Ciser at 162 ("[t]he CFA requires some element of deceptive conduct, explicit or implicit, to be actionable as an unconscionable practice…[w]e reserve judgment on whether a late fee can be so large relative to actual costs so as to be intrinsically misleading.")

As another example, the District Court found that the consumer was not mislead and no unconscionable practice existed where Defendant charged Plaintiff $1.50 more for Excedrin Migraine than Excedrin Extra Strength despite the same ingredients in each. Yingst v. Novartis AG, 63 F. Supp. 3d 412 (D.N.J. Nov. 24, 2014). In another case submitted by Defendants, the Court found an absence of unconscionability because the plaintiff's claim "lacked any indication of deception or other aggravating circumstances that would place the business practice 'outside the norm of reasonable business practice in that it will victimize the average consumer.'" Slinko-Shevchuk at *18 *quoting* Turf Lawnmower Repair, Inc., v. Bergen Record Corp., 139 N.J. 392 (1995). In yet another of the cases submitted by Defendants, the Court held that Defendant's practices were not misleading or unconscionable because "the mere denial of insurance benefits to which the plaintiffs believed they were entitled does not comprise an unconscionable commercial practice." In re Van Holt, 163 F.3d 161, 168 (3d Cir. 1998).

A capacity to mislead and unconscionability has been found under circumstances such as where a plaintiff's Complaint "may possibly show a pattern to delay or thwart a process. The(se) facts at a minimum could show a lack of good faith." D'Alessandro at *13. A capacity to mislead and unconscionability has also been found where defendants were alleged to impose less

favorable credit terms on the plaintiffs than was merited by their credit history. Yingst at 417 *citing* Troup at 543.

The fact that an enticement is technically true does not mean it is not misleading and unconscionable. *See* Smajlaj v. Campbell Soup Co., 782 F.Supp.2d 84, 98 (D.N.J. 2011) ("[T]he fact that the labels were literally true does not mean they cannot be misleading to the average consumer.") *citing* Miller v. American Family Publishers, 284 N.J.Super. 67 (N.J.Super.Ch. 1995).

There is a close relationship between the definitions of fraud and unconscionability under the CFA. *See* Ciser at Fn5 ("In Kugler, the court emphasized the close relationship between fraud and unconscionability by quoting the following excerpt from a treatise on fraud…") "The Courts have always avoided hampering themselves by defining or laying down as a general proposition what shall be held to constitute fraud. Fraud is infinite in variety…[a]ll surprise, trick, dissembling and other unfair way that issued to cheat any one is considered fraud." Ibid. *quoting* Kerr, Fraud and Mistake, 1 (7th ed. [1952]). "The CFA's primary remedial purpose is to 'root out consumer fraud.'" Ciser at 161 *quoting* Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 255 (1997).

The question of whether a business practice is unconscionable is usually reserved for a jury. *See* Rapoport at

247 ("Ultimately, a jury must typically determine whether the challenged conduct falls outside a 'reasonable business practice.'" *quoting* Heyman v. Citimortgage, Inc., 2019 U.S. Dist. LEXIS 128238, *34 (D.N.J. June 27, 2019); Harnish at 648 ("'Often, the determination of whether business conduct stands outside the norm of reasonable business practice presents a jury question.'") *quoting* Hassler v. Sovereign Bank, 644 F.Supp. 2d 509, 514 (D.N.J. 2009)(internal quotations omitted).

In the instant matter, there can be no question that the Defendants' conduct as alleged in the Complaint rises above the level of a contract claim or mere fairness. None of the authority submitted by Defendants dismissed a CFA claim alleging predatory acts against a consumer that come remotely close to those alleged by the instant Plaintiff.

C. Negligence

Defendants' argument that they had no duty to the Plaintiff is based on woefully outdated law, and an inadequate analysis of the foreseeability of harm they caused him.

The threshold question in a negligence cause of action is whether a defendant owed the plaintiff a duty of care. *See* Leonard v. Golden Touch Transp. Of N.Y., Inc., 144 F.Supp. 3d 640, 644 (D.N.J. 2015)("'The threshold inquiry in a negligence action is whether the defendant owed the plaintiff a duty of

care.'") *quoting* Holmes v. Kimco Realty Corp., 598 F.3d 115, 118 (3d Cir. 2010). "'Under New Jersey law, whether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy.'" Leonard at 644 *quoting* Monaco v. Hartz Mountain Corp., 178 N.J. 401, 418 (2004).

"New Jersey common law is moving toward 'a broadening application of a general tort obligation to exercise reasonable care against foreseeable harm to others.'" Maran v. Victoria's Secret Stores, LLC, 417 F.Supp. 3d 510, 521 (D.N.J. 2019) *quoting* Butler v. Acme Markets, Inc., 89 N.J. 270, 277 (1982).

Foreseeability is the critical element of duty, defined as "'the knowledge of the risk of injury to be apprehended.'" Maran at 522 *quoting* Amentler v. 69 Main St., LLC, 2011 U.S. Dist. LEXIS 39103, *4 (D.N.J. Apr. 11, 2011). "In assessing whether imposition of such a duty would be fair and just, courts weigh and balance the following four factors: (1) the relationship of the parties, (2) the nature of the attendant risk, (3) the opportunity and ability to exercise care, and (4) the public interest in the proposed solution."(internal citation omitted).

i. Taveras

Defendants' extensive reliance on Taveras v. Resorts Int'l Hotel, Inc., 2008 U.S. Dist. LEXIS 71670 (D.N.J. Sept. 19, 2008)

is badly misplaced. The District Court's holding in Taveras is based on facts, law, and medical science wholly dissimilar from those present in the instant matter. Further, Taveras was not called upon to address the New Jersey Consumer Fraud Act, the act of the State's policymakers imposing a duty upon the Defendants to refrain from engaging in unconscionable commercial practices.

In Taveras, the Court framed the question before it as whether the casino had an affirmative duty to identify and exclude gamblers from its brick-and-mortar casinos who exhibited compulsive tendencies. Taveras at *14-15. The question addressed a passive casino who "continued to allow[3] (plaintiff) to gamble in spite of clear indications that she was a compulsive gambler…" Id. at *5. The Court expressed its finding, again in terms of a passive brick-and-mortar casino, that "the great weight of authority supports Defendants' position that common-law tort principles do not require casinos to rescue compulsive gamblers from themselves."

The Court's concern about requiring a casino to identify a compulsive gambler was eliminated by the enactment of N.J.A.C. 13:69O-1.2(x) in 2014, requiring casinos to implement training for employees who have direct contact with patrons via phone,

[3] Though the opinion makes reference to conventional casino enticements, these enticements form no part of the Court's analysis.

email, electronic chat, or other means on the recognition of the nature and symptoms of problem gambling behavior and how to assist players in obtaining information regarding help for a gambling problem. The enactment of N.J.A.C. 13:69O-1.2(x) also eliminates the concern expressed in Taveras about the lack of foreseeability of the dangers of compulsive gambling.

To be clear, the Plaintiff in the instant matter does not complain that the Defendants had an obligation to rescue him from himself, nor that the casinos are liable because they passively allowed him to gamble. The Plaintiff in the instant matter alleges a constant stream of aggressive, affirmative acts initiated by the Defendants to entice him to gamble when they knew he was a compulsive gambler -- none of which was present in Taveras. The Plaintiff's allegations all took place using real-time digital communication and an instantly available digital gambling platform on his smartphone which was not merely not present in Taveras, but unimaginable when the case was decided in 2008.

Moreover, the psychiatric understanding of compulsive gambling, cited by the Court in Taveras, has evolved dramatically in the fifteen years since that case was decided in 2008. Though the comparison has always been frustrating to the problem gambling community, the Court's comparison of a problem gambler and casino to "a duty on shopping malls and credit-card

companies to identify and exclude compulsive shoppers" was not wildly inconsistent with the understanding and characterization of problem gambling when Taveras was decided in 2008.

In 2008, *Pathological Gambling*, as it was then known, was categorized by the American Psychiatric Association's Diagnostic and Statistical Manual 4 ("DSM 4") as a "Disorder of Impulse Control." *See* DSM 4 at Pg. 18. Though this category of disorder did not include over-shopping as Taveras implied it did, it grouped pathological gambling together with conditions typically perceived less seriously and without sympathy such as kleptomania and pyromania. *See* DSM 4 at Pg. 18.

This classification changed five years after Taveras in the American Psychiatric Association's Diagnostic and Statistical Manual 5 ("DSM 5"), published in 2013. *See* DSM 5 at Pg. 481; 585, et seq. DSM 5 renamed Pathological Gambling as *Gambling Disorder*, and reclassified it under the category of "Substance-Related and Addictive Disorders." Ibid. Now under the heading of Substance-Related and Addictive Disorders, Gambling Disorder has since 2013 been in the same category as: a) alcohol disorders, b) opioid disorders, c) hallucinogen disorders, d) sedative disorders, e) stimulant disorders, and f) tobacco disorders. Ibid.

> Moving gambling disorder to the addictive disorders category was implemented based upon findings that the disorder is very similar to substance use disorders in

> terms of etiology, symptoms, course, correlates, and treatment approaches…[f]indings from neuroscience on brain functioning, activation, and differences in comparison with healthy controls are strikingly similar between substance use disorders and gambling disorder…[t]he move of gambling disorder to the addictive disorders category recognizes that gambling disorder and substance use disorders are frequently comorbid and share many of the same underlying etiological and sustaining factors…
>
> Clinical and Research Implications of Gambling Disorder in DSM-5, Jeremiah Weinstock and Carla J. Rash, Current Addiction Reports (Jun. 13, 2014).

With the reclassification by the American Psychiatric Association of gambling disorder in 2013, the Defendants' continued use of the comparison to the shopping mall over-shopper is manifestly outdated and dangerous. Moreover, the Court's concern in Taveras that a finding of liability "would in effect have no limits" is eliminated. A finding of liability in the instant matter certainly does not open limitless liability. It would merely hold businesses responsible when they specifically target for enticement alcoholics to continue and increase their drinking, opioid addicts to continue and increase their use of opioids, and so on. Such liability is not at all novel in the context of addictions classified as Substance-Related and Addictive Disorders by DSM 5.

D. Specificity, Group Pleading and Jurisdiction

As throughout their briefs, Defendants select favorable quotations from cases with little or no applicability to the instant matter. Defendants are of course correct that group pleading and lack of specificity which fails to place a defendant on notice of the allegations against it is impermissible. But a full reading of the cases cited by Defendants demonstrate that Plaintiff's Complaint far surpasses every relevant standard for his pleading at this stage of the litigation based on the specificity of the acts alleged and the fact, undisputed by Defendants, that Defendants are engaged in an interrelated enterprise. That Plaintiff does not know prior to discovery exactly how that interrelation is operated by the Defendants is both unsurprising and insufficient for dismissal of any Defendant or claim at the motion to dismiss stage.

As cited by Defendants, the purpose of Rule 8 is to provide fair notice to the parties so that they may properly prepare for trial. *See* Herman v. Carbon County, 248 F. App'x 442, 444 (3d Cir. 2007). *See also* Aruanno v. Main, 467 F. App'x 134, 137 (3d Cir. 2012)("…plaintiff must plead enough facts to provide the defendant with 'fair notice' of the claim and the 'grounds' on which the claim rests.")

In Aruanno, for example, the pro se plaintiff's Complaint was held to lack the requisite specificity where the tortious acts were alleged to have been perpetrated generally by unnamed

"personnel" of the Department of Corrections. Id. at 137. As another example, the Court in Sheeran v. Blyth Shipholding S.A., 2015 U.S. Dist. LEXIS 168019 (D.N.J. Dec. 16, 2015) held the Complaint to be an impermissible group pleading where the Plaintiff asserted "general common factual allegations" consisting of 24 alleged duties indiscriminately against a group of eight unrelated business entities.

The commonality between these and every other case dismissing a party or a claim at the Motion to Dismiss stage for group pleading or lack of specificity under the CFA is a lack of notice to each defendant as to the "who, what, when, where and how" of the fraud alleged against them. *See* In re Rockefeller Center Properties, Inc. Securities Litigation, 311 F.3d 198, 217 (3d Cir. 2002).

Such notice is not an issue when the defendants are interrelated business entities. In such circumstances, the defendants themselves are certainly aware of which of them did what under the dynamics of their interrelation; and the plaintiff is entitled to discovery so that they can understand the relationship as well. *See* In re Riddell Concussion Reduction Litig., 77 F.Supp. 3d 422, 433 (D.N.J. 2015)("Defendants do not dispute their interrelatedness, nor do they disclaim their alleged role in the manufacture, sale, or marketing of the [product]. The specific role of each defendant will be

elucidated through discovery to which the Plaintiffs are entitled because the allegations in the Amended Complaint are sufficient to provide notice under Rule 8.")

The District Court distinguished Ridell and other cases involving connected entities from the allegations against completely unrelated defendants in Sheeran: "Riddell, Capitol Records[4], and Toback[5] provide no support that collective-style pleading is permissible in this case, since there are no allegations that Defendants acted jointly or in concert or are closely related corporate entities, such that conduct by one may be ascribed to the others." Sheeran at *12.

In the instant matter, the Plaintiff's Complaint alleges the interrelation of the Defendants such that the conduct by one may be ascribed to all. Moreover, as in Ridell, Defendants do not claim to be distinct from each other, or factually unaffiliated with the acts underlying this action. Finally, unlike any case presented by the Defendants, the Plaintiff's Complaint describes the alleged acts of the Defendants with remarkable specificity including precisely what is required to overcome a motion to dismiss: the who, what, when, where and how of every unconscionable enticement.

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[4] Capitol Records LLC v. ReDigi Inc., 2014 U.S. Dist. LEXIS 122711 (S.D.N.Y. Sept. 2, 2014)

[5] Toback v. GNC Holdings, Inc., 2013 U.S. Dist. LEXIS 131135 (S.D. Fla. Sept. 13, 2013)

The Defendants' request for dismissal based on lack of jurisdiction must fail for the same reasons. The Plaintiff's Complaint clearly alleges that Defendants MGM and Borgata purposefully directed its activities at New Jersey, and that the claims in this litigation arise out of those contacts with this state. It is of no consequence that the Plaintiff is unable at this early point in the litigation to describe precisely what part each interrelated Defendant took in the unconscionable business practices alleged.

E. Unjust Enrichment

The Plaintiff does not oppose the Defendants' Motion to Dismiss the Complaint's Third Count alleging Unjust Enrichment.

IV. CONCLUSION

For the foregoing reasons, the Defendants' Motions to Compel and Dismiss should be denied in their entirety.

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