PREPARED BY THE COURT

BROTHERS GENERAL CONSTRUCTION & PAINTING, LLC, Plaintiff, v. TOCCI BUILDING CORPORATION, INC. Defendant.	SUPERIOR COURT OF NEW JERSEY UNION COUNTY: LAW DIVISION DOCKET NO.: UNN-L-941-18 CIVIL ACTION **OPINION**

Scott I. Fegley, Esq. of the Fegley Law Firm on behalf of Plaintiff Brothers General Construction & Painting, LLC

Gary J. Repke, Jr. Esq. of Cohen Seglias Pallas Greenhall & Furman, P.C. on behalf of Defendant Tocci Building Corporation, Inc.

The Honorable Robert J. Mega, J.S.C.

The present matter is before the Court on plaintiff, Brothers General Construction & Painting, LLC's (hereinafter "Brothers General") motion seeking to estop defendant, Tocci Building Corporation, Inc. (hereinafter "Tocci") from asserting the arbitration clause in the parties' contract and Defendant's cross-motion to compel arbitration and stay the underlying action.[1] The motions are opposed.

I. Facts

By way of background, the underlying matter arises out of a construction project for the construction of an Embassy Suites Hotel in Berkley Heights, New Jersey (hereinafter the "Project"). The Project is located at 250 Connell Drive, Berkley Heights, New Jersey (hereinafter the "Subject Premises"). At all times relevant to the underlying action, the owner of the Subject Premises was Connell Hospitality LLC (hereinafter "Connell Hospitality").

[1] Tocci withdrew its Rule 1:4-8 demand that Brothers dismiss its Complaint on the basis that it does not have a contract with Brothers in connection with the Project. Accordingly, the portion of Brothers General's motion seeking to estop Tocci from denying its contract with Brothers General is moot and will not be addressed herein.

As set forth in Brothers General's Complaint, Plaintiff is a New Jersey limited liability company with its principal place of business located at 193 Tenby Chase Drive, No. T271, Delran, New Jersey 08075. Tocci is a Massachusetts corporation with its principal place of located at 660 Main Street, Woburn, Massachusetts 01801.

On or about January 19, 2015, Connell retained Tocci to perform certain construction management and general contracting services in connection with the Project (hereinafter the "Connell-Tocci Prime Contract").

In furtherance of the Connell-Tocci Prime Contract, Tocci entered into a subcontract with Brothers General on or about April 2, 2015 (hereinafter the "Tocci-Brothers General Subcontract" or "Subcontract"). See Certification of Scott I. Fegley, Esq. ("Fegley Cert."), Ex. B.

Pursuant to the Tocci-Brothers General Subcontract, Brothers General was hired to perform the painting and wall covering finishes for the Project. Id. at p. 3. Brothers General's scope of work included: sealed concrete and special coatings, painting, and mockup. Id. The total contract price after execution of approved changed orders was $378,597.63.

In relevant part, Section 11.3 of the Tocci-Brothers General Subcontract states:

> If the Trade-Contractor [Brothers General] has made Application for Payment as required, the Construction Manager [Tocci] will process such Application for Payment in accordance with this Agreement [the Tocci-Brothers General Subcontract] and will pay the Trade Constractor [Brothers General] promptly after the Construction Manager [Tocci] is paid for the Work contained therein by the Owner [Connell Hospitality]: **Payment by the Owner [Connell Hospitality] to the Construction Manager [Tocci] for Work included in-any Application for Payment shall be a condition precedent to Construction Manager's [Tocci's] obligation to make payment for such Work to the Trade Contractor [Brothers General]**. Retainage will be in accordance with Paragraph 2.1.
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> Id. at p. 18, § 11.3 (emphasis added).

Of particular importance to the subject motion is paragraph of the rider to the Tocci-Brothers General Subcontract (the "Rider"), which contains the disputed arbitration provision. The full text of paragraph R.16 states:

> Trade Contractor [Brothers General] shall have no claim for additional compensation for any act, omission, or discretion of the Owner [Connell Hospitality] whatsoever, except to the extent that the Construction Manager [Tocci] shall, pursuant to the provisions of the General Contract,

have a claim against the Owner [Connell Hospitality]. The Trade Contractor [Brothers General] agrees to be bound by the decision of the Architect and/or Owner [Connell Hospitality] and further agrees that any decision or determination reached by any authority duly constituted or appointed under the terms of the Contract Documents or by any Court of competent jurisdiction involving the Interpretation or construction of the terms and provisions of any of the Contract Documents and/or the manner that the Construction Manager [Tocci] shall be determinative and conclusive, and the Trade Contractor [Brothers General] will be bound thereby to the Construction Manger [Tocci] to the same extent and in the same manner that the Construction Manager [Tocci] is bound to the Owner [Connell Hospitality]. **The Trade Contractor [Brothers General] further agrees to become a party to and to be bound by any proceeding involving the Construction Manger [Tocci], the Architect, or the Owner [Connell Hospitality] to the extent that such proceedings involve any of the rights or obligations of the Trade Contractor [Brothers General] under the subcontract.** In the event of any dispute, controversy, or claim between the Construction Manager [Tocci] and the Trade Contractor [Brothers General], The Trade Contractor [Brothers General] agrees to proceed with the work or extra work without delay and without regard to such dispute, controversy, or claim or the pendency of any proceeding in relation to the same. The failure of the Trade Contractor [Brothers General] to comply with the provisions of this paragraph shall constitute a material breach of this agreement with all the remedies of the Construction Manager [Tocci] provided for in this Article 16. **Nothing in this Agreement shall be constituted as providing the Trade Contractor [Brothers General] with any specific provision(s) for dispute resolution or arbitration other than those specifically granted herein notwithstanding the existence of any such provision in the Owner [Connell Hospitality] – Construction Manager [Tocci] agreement. However, at the election of Construction Manager[Tocci], the parties agree to arbitrate any such claim or dispute in accordance with Construction Industry Rule of the American Arbitration Association and the locale shall be Boston, Massachusetts. This Agreement to arbitrate, if so elected, shall be specifically enforceable under the prevailing arbitration law.**

Id. at R.16 (emphasis added, not in original). [2]

On or about February 22, 2017, Connell Hospitality sent Tocci a Notice of Termination. Tocci disputed the alleged basis for its "wrongful termination" and purportedly requested to meet with Connell in an effort to complete the remaining work on the Project. However, on March 2,

[2] A copy of R.16 is annexed hereto as Exhibit A

2017, Connell Hospitality demanded Tocci vacate the Subject Premises. Tocci complied with Connell Hospitality's request and last performed work on the Project on March 2, 2017.

Thereafter, Tocci claims that it made repeated demands of payment from Connell Hospitality, which Connell Hospitality refused. As a result, Tocci filed a construction lien claim against Connell Hospitality and the Subject Premises on March 28, 2017. In addition, Tocci served Connell with a demand for arbitration before the American Arbitration Association ("AAA") on May 13, 2017.

In answering Tocci's Arbitration Demand, Connell Hospitality made certain allegations implicating the work performed by Brothers General on the Project. Specifically, Connell Hospitality alleged that Brothers General was "undercapitalized[,]" "unqualified[,]" "woefully understaffed[,]" and provided "poor workmanship" on the Project. Connel further alleged that there were "large sunken pockets, uneven surfaces, bowing and rough textures" on certain building walls, which Brothers General was responsible. Moreover, Connell Hospitality alleged that Brothers General painted and/or installed wall coverings "on various services before those surfaces were properly taped, spackled, cleaned and otherwise ready to receive paint and/or wall covering." Furthermore, Connell Hospitality alleged that "[g]ouges, overspray and mud [were] visible under installed wallcoverings" causing a significant amount of work to be "rejected and redone[.]" Finally, Connell Hospitality alleged that Brothers General had painted "many surfaces that were not ready to be painted" and that such efforts were examples of the "hundreds of unremedied defects" and "substandard work" that needed to be remediated.

Based on Connell Hospitality's allegations, and pursuant to Rule 7 of the AAA's Construction Industry Rules, Tocci filed a Request for Joinder of Additional Parties (hereinafter the "Joinder Request"), citing to paragraph R.16 of the Subcontract.

By correspondence dated July 31, 2017, Tocci served the Joinder Request on Brothers General by regular mail and notified it that if it objected to the joinder that it was required to file a written objection with the AAA within fourteen (14) days.

The AAA sent Brothers General a second letter via email informing it of Tocci's Joinder Request and stating that any objection to same must be filed by August 16, 2017.

Both the Joinder Request and AAA's August 2, 2017 letter were sent directly to Brothers General, not to its attorney. As a result, Brothers General's counsel states that he was not aware of Brothers General's involvement in the arbitration until April 4, 2018, when his client

forwarded him an email from AAA it believed it was receiving "for informational purposes." Brothers General's counsel notes that Tocci was aware that his office represented Brothers General, which is evidenced by the fact that Tocci's Counsel provided his office with a copy of Brothers General subcontract and Tocci's construction lien. See Fegley Cert., Ex. I. Nonetheless, Brothers General does not dispute receipt of Tocci's Joinder Request or the subsequent communications from the AAA. Brothers General did not file an objection to the Joinder Request within the requisite 14-day period and as a result were joined as an additional party to the arbitration proceeding captioned AAA No. 01-17-0002-8158, for the reasons set forth in the written decision issued by the arbitrator on November 7, 2017. See Fegley Cert., Ex. H.

The AAA sent a copy of same to Brothers General via email on November 7, 2017. See Repke Cert., Ex. 4. Following Brothers General's joinder to the arbitration proceedings, Brothers General continued to receive various email correspondence from the AAA regarding arbitrator selection and motion practice without objection.

On March 15, 2018, Brothers General commenced the underlying action by filing its Complaint against Tocci. Brothers General's Four-Count Complaint asserts causes of sounding in:

Count I:	Breach of Contract;
Count II:	Unjust Enrichment;
Count III:	Violations of the New Jersey Prompt Payment Act; and
Count IV:	Breach of Implied Covenant of Good Faith and Fair Dealing.

Tocci filed its Answer and Affirmative Defenses on March 23, 2018.

Prior thereto, Tocci served a demand upon Brothers General, pursuant to Rule 1:4-8, demanding Brothers General voluntarily dismiss their Complaint as a result of the now contested arbitration provision contained in the Tocci-Brothers General Subcontract. Brothers General declined to do so. The instant motions followed.

II. Arguments of the Parties

Brothers General argues that the arbitration provision at issue is unenforceable as it was not made aware of its existence. While Brothers General concedes it is not an "average member of the public[,]" it contends that even a more sophisticated commercial subcontractor is entitled to some notice of the presence of an arbitration clause in an agreement. Brothers General contends that it should not be required to comb through pages of "fine print" to identify an

arbitration clause. Brothers General notes that neither the Tocci-Brothers General Subcontract nor the Rider contain an index referencing the arbitration agreement or a heading identifying same.

Brothers General further argues that the disputed arbitration provision fails because it does not clearly and unambiguously inform it of its right to pursue its claims in a judicial forum. Specifically, Brothers General argues that arbitration clause at issue fails to explain what arbitration is and how it is different from a proceeding in a court of law.

Moreover, Brothers General contends that it is unclear that the scope of the arbitration provision covers the underlying dispute. Brothers General concedes in a footnote that the provision contains language that requires it to become a party to any proceeding involving the Construction Manager, Architect or Owner. However, Brothers General again contends that the language is buried in the midst of paragraph R.16 and is not sufficiently conspicuous nor does it refer to arbitration and therefore does not clearly and unambiguously inform it of the waiver of its rights.

In opposition, Tocci contends that the arbitration provision at issue is valid and enforceable. Tocci argues that the scope of the arbitration provision unequivocally includes the contract claims asserted by Brothers in this matter.

Furthermore, Tocci argues that Brothers General's claims that it lacked notice are without merit. Tocci notes that Brothers General does not cite any case law or authority in New Jersey or elsewhere requiring an arbitration clause to be uniquely identified by a descriptive heading or index. Instead, Tocci contends that such a rule of law would run afoul of the well-recognized precedent in this State that focuses on the clarity of the terms in the clause itself and the liberal construction thereof.

Moreover, Tocci argues that the Court should not excuse Brother General's lack of diligence in reviewing the full contents of the contract it voluntarily signed. Tocci argues that absent the existence of fraud or misconduct, a party's failure to read a contract does not excuse performance.

As to its cross-motion, Tocci argues that Brothers General should be compelled to arbitrate, and the present matter should be stayed pending the outcome of the arbitration proceedings. Tocci notes that the basis for recovery sought by Brothers General is expressly conditioned upon the outcome of the arbitration proceeding with Connell before the AAA. Tocci

further notes that under the Tocci-Brothers General Subcontract, Brothers is not entitled to receive payment from Tocci unless and until Tocci receives such payment from Connell for Brothers General's work.

In reply, Brothers General again argues that the language contained in the arbitration provision is legally deficient. Brothers General again notes that the disputed language is weaved in among other language that does not concern arbitration nor is it bolded or otherwise distinguished in any other manner to draw attention to its waiver of rights.

In sur-reply, Tocci argues that the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 et seq., does not give this Court the power to remove a properly joined party from a pending arbitration proceeding. Tocci posits that such an argument must be made and decided by the AAA.

III. Discussion

The strong "public policy of this State favors arbitration as a means of settling disputes that otherwise would be litigated in a court." Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 556 (2015) (citing Cty. Coll. of Morris Staff v. Cty. Coll. of Morris Staff Ass'n, 100 N.J. 383, 390 (1985)). The Federal Arbitration Act ("FAA"), 9 U.S.C.A §§ 1 to 16, "expresses a national policy favoring arbitration." Morgan v. Sanford Brown Inst., 225 N.J. 289, 304 (2016). The FAA requires courts to "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (citation omitted). The New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -22, follows these same principles. Atalese v. U.S. Legal Servs. Grp., L.P. 219 N.J. 430, 441 (2014) (citing Leodori v. CIGNA Corp., 175 N.J. 293, 302, cert. denied, 540 U.S. 938 (2003). Accordingly, the existence of a valid and enforceable arbitration agreement poses a question of law. Barr v. Bishop Rosen & Co., Inc., 442 N.J. Super. 599, 605 (App. Div. 2015) (citing Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013)).

In light of the fact that arbitration agreements are generally favored under the law, an agreement to arbitrate is read "liberally in favor of arbitration." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001) (citing Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993). However, this preferential status "is not without limits." Garfinkel, 168 N.J. at 132. In determining whether the parties agreed to arbitrate, courts

generally apply state-law contractual principles. First Optics of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995). "An agreement to arbitrate, like any other contract, 'must be the product of mutual assent, as determined under customary principles of contract law.'" Atalese, 219 N.J. at 442 (citation omitted). "Mutual assent requires that the parties have an understanding of the terms to which they have agreed." Id. at 313. "This requirement of a 'consensual understanding' about the rights of access to the courts that are waived in the agreements has led our courts to hold that clarity is required." Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 37 (App. Div. 2010) (citation omitted).

"'By its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in Court." Atalese, 219 N.J. at 442 (citation omitted). The Atalese Court noted that "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 claim adjudicated in a court of law." Id. Accordingly, 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." Id. at 436. However, "[n]o magical language is required to accomplish a waiver of rights in an arbitration agreement." Morgan, 225 N.J. at 309.

New Jersey courts have upheld arbitration clauses "phrased in various ways when those clauses have explained that arbitration is a waiver of the right to bring suit in a judicial forum." Atalese, 219 N.J. at 444. See, e.g., Martindale v. Sandvik, Inc. 173 N.J. 76, 81-82 (2002) (upholding arbitration clause stating that "all disputes relating to [the party's] employment...shall be decided by an arbitrator" and that party "waive[ed] [her] right to a jury trial"); Curtis v. Cellco P'ship, 413 N.J. Super. 25, 31 (App. Div.), certif. denied, 203 N.J. 94 (2010) (upholding arbitration agreement, which stated that parties "agree to settle disputes...only by arbitration" and not by "suing in court" and explained that rules in arbitration are different," "no judge or jury" is present, and "review is limited"); Griffin v. Burlington Volkswagen, Inc., 411 N.J. Super. 515, 518 (App. Div. 2010) (enforcing arbitration clause stating that parties, by agreeing to arbitration, waived "their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes"); But cf. Morgan, 225 N.J. at 311-12 (invalidating arbitration provision where student enrollment agreement failed to explain "in some sufficiently broad way or otherwise that arbitration was a substitute for having disputes and legal claims resolved before a judge or jury").

In the present matter, the Tocci-Brothers General Subcontract is the 1991 edition of the standard form agreement produced and approved by the Associated General Contractors of Massachusetts. In relevant part, the Subcontract is comprised of a twenty-five-page form agreement and a fourteen-page Rider attached thereto. Both the form agreement and Rider were executed by the parties.

Page one of the Subcontract clearly indicates that: "*THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES: CONSULTATION WITH AN ATTORNEY IS ENCOURAGED WITH RESPECT TO ITS MODIFICATION*[.]" Plaintiff does not contend and there is nothing in the record to suggest that Brothers General was not afforded, nor did they seek the opportunity to retain an attorney to review the Subcontract.

The arbitration provision at issue is not referenced in the twenty-five-page Tocci-Brothers General Subcontract. The "Detailed Table of Contents" does not identify the existence of an arbitration provision. Similarly, the Rider does not contain an index or table of contents. Paragraph R.16 does not contain a heading denoting the existence of an arbitration provision therein. Unlike paragraph R.15 - which immediately precedes paragraph R.16 and is conspicuously entitled "CHANGE ORDER AUTHORIZATION[,]" - paragraph R.16 is not distinguished in any way. The Court notes that a number of the provisions contained in the rider are conspicuously labeled/titled. See e.g. R.15; R.22; R.23; R.24; R.25; R.26; R.27; R.30; R.31; pp. 8-14. Moreover, paragraph R.16 does not solely address the issue of arbitration. Instead, the paragraph first appears to address the issue of additional compensation. Brothers General argues that this lack of conspicuousness is fatal as it did not have notice of the arbitration provision.

For support, Brothers General relies upon the 2nd Circuit Court of Appeals decision in Specht v. Netscape Commc'ns Corp. 306 F.3d 17, 32 (2d Cir. 2002). In that case, the court considered three consolidated, putative class action claims brought by consumer plaintiffs against defendant Netscape. Id. at 21. In relevant part, the Specht court considered the applicability of an arbitration provision contained in the license terms of downloadable software made available to consumers for no charge. In that regard, the court concluded that "where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to the place consumers on inquiry of constructive notice of these terms." Id. at 32. Brothers General analogizes this holding to the present matter and argues that there is "no reason to assume every subcontractor of any

size is going to retain counsel to comb through the provisions of the contract looking for possible pitfalls and waivers of rights." Brothers General also cites to the decisions in Curtis and Gras v. Assocs. First Capital Corp., 346 N.J. Super. 42, 56 (App. Div. 2001), wherein the Appellate Division noted the existence of "easily noticeable" or otherwise distinguishable language that alerted the parties of the existence of an arbitration provision.

Brothers argues that the instant matter is distinguishable from the Appellate Division's unpublished opinion in Columbus Circle NJ LLC v. Island Construction Co., LLC, 2017 N.J. Super. Unpub. LEXIS 606 (App. Div. March 13, 2017), in which the Appellate Division considered an arbitration provision contained in a contract between David Kovacs, the LLC plaintiff's sole member, and defendant construction company. In that case, the parties entered into a contract to build a $1.96 million-dollar beach home on Bayfront property owned by the LLC. Id. at *1. The parties signed the Standard AIA Form A101-2007, which was supplemented with the General Conditions AIA Form A201-2007, and included Section 13.2, entitled "BINDING DISPUTE RESOLUTION[,]"where an "X" was marked next to "Arbitration pursuant to Section 15.4 of AIA Document A201-2007," rather than the choice "Litigation in a court of competent jurisdiction." Id. Disputes over the cost of the project arose and the contract was terminated. Id.

The LLC plaintiff filed suit, and the defendant construction company moved to dismiss based on the arbitration provision. Id. The trial court granted the defendant's motion, and the appellate division affirmed on appeal. Id. at *2. In doing so, the Appellate Division noted that the concerns in Atalese were not present as the case did not involve "a consumer contract of adhesion where one party possess superior bargaining power and was the more sophisticated party," but "[r]ather, it was a negotiated agreement between sophisticated business entities..." Id. at *3 (citing Delta Funding Corp. v. Harris, 189 N.J. 28, 40 (2006)). The court found that the AIA contract form "clearly informed the LLC it was making the choice to waive litigation in court in favor or arbitration," and in assessing "whether the LLC and Kovacs understood their choice, it was obviously relevant that they were sophisticated and represented by counsel and an owner's representative." Id. at *6.

The issues raised by Brothers General as to the lack of conspicuousness are not solely determinative. As Tocci notes, Brothers General does not cite any case law or binding authority in the State of New Jersey or elsewhere requiring an arbitration clause, such as R.16, to be

uniquely identified by a "descriptive heading" or "index." Rather, Tocci argues that the Court's focus should be on the clarity of the terms in the clause itself.

In this regard, Brothers General argues that R.16's language is deficient as it fails to clearly inform it of the rights it is waiving. For support, Brothers General cites to the New Jersey Supreme Court's decision in Atalese. In that case, a consumer seeking debt relief entered into a contract containing an arbitration provision which "made no mention that plaintiff waived her right to seek relief in court." 219 N.J. at 435, 437. Plaintiff consumer filed suit against U.S. Legal Services Group, L.P., ("USLSG") which promised to provide debt-adjustment services, for fraud, and USLSG, L.P. moved to compel arbitration. Id. at 309. The arbitration provision in question was on page nine, paragraph sixteen, in a twenty-three-page service contract: "In the event of any claim or dispute between Client and USLSG related to this Agreement or related to any performance of any services related to this Agreement, the claim or dispute shall be submitted to binding arbitration upon the request of either party upon the service of that request on the other party." Id. at 310. The New Jersey Supreme Court held that the arbitration provision was unenforceable:

> Nowhere in the arbitration clause is there any explanation that plaintiff is waiving her right to seek relief in court for a breach of her statutory rights. The contract states that either party must submit any dispute to "binding arbitration," that "[t]he parties shall agree on a single arbitrator to resolve the dispute," and that the arbitrator's decision "shall be final and may be entered into judgment in any court of competent jurisdiction." The provision does not explain what arbitration is, nor does it indicate how arbitration is different from a proceeding in a court of law. Nor is it written in plain language that would be clear and understandable to the average consumer that she is waiving statutory rights. The clause here has not of the langue our courts have found satisfactory in upholding arbitration provisions – clear and unambiguous language that the plaintiff is waiving her right to sue or go to court to secure relief....[t]he 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."
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> Id. at 315.

The present matter is distinguishable from Atalese. Atalese is a consumer case. Neither Brothers General nor Tocci are average members of the public. This is not a consumer contract. This is not a contract of adhesion where one party possessed superior bargaining power and was the more sophisticated party. To the contrary, the contract was negotiated between sophisticated business entities with years of experience in the industry. Brothers General was not forced to

enter into the Subcontract. They had ample opportunity to review the terms contained therein and could have retained counsel to review same. As such, the standard articulated in Atalese may not be applicable in this context. While agreements between sophisticated business entities may be permitted more leeway, the Court looks to the aforementioned principles for guidance as it interprets the enforceability of R.16.

Viewing the pertinent language of R.16 in isolation, the Court finds that the scope of the agreement clearly encompasses the underlying dispute. The relevant langue states:

> **The Trade Contractor [Brothers General] further agrees to become a party to and to be bound by any proceeding involving the Construction Manger [Tocci], the Architect, or the Owner [Connell Hospitality] to the extent that such proceedings involve any of the rights or obligations of the Trade Contractor [Brothers General] under the subcontract.**

Brothers General reliance on the decisions in Barr and Garfinkle does not alter this conclusion. These cases are distinguishable from the instant matter as they concern the waiver of statutory rights. Here, there is no doubt that Brothers General agreed to become a party and to be bound by **any proceeding** involving Tocci, the Architect, or the Connell Hospitality to the extent that such proceeding involve any rights or obligations of Brothers General under the Tocci-Brothers General Subcontract. As previously mentioned, Brothers General conceded to same in a footnote in its brief. Therefore, it is clear that this broad language encompasses the underlying claims in this case.

Moreover, the Court questions whether R.16 sufficiently explains what rights Brothers General is waiving by agreeing to arbitrate. The language in R.16 is wholly dissimilar from the language considered by the Appellate Division in Columbus Circle. In fact, there is no reference to litigation in a court whatsoever in R.16. Again, the pertinent language of the clause states:

> Nothing in this Agreement shall be constituted as providing the Trade Contractor [Brothers General] with any specific provision(s) for dispute resolution or arbitration other than those specifically granted herein notwithstanding the existence of any such provision in the Owner [Connell Hospitality] – Construction Manager [Tocci] agreement. However, at the election of Construction Manager[Tocci], the parties agree to arbitrate any such claim or dispute in accordance with Construction Industry Rule of the American Arbitration Association and the locale shall be Boston, Massachusetts. This Agreement to arbitrate, if so elected, shall be specifically enforceable under the prevailing arbitration law.

While no magical language is required to accomplish a waiver of rights in an arbitration agreement, it is clear that this provision would not satisfy the heightened consumer standard set forth in Atalese. However, as previously stated application of such a standard in a case involving sophisticated business entities would not be appropriate. Instead, the Court searches the disputed provision for some simple explanation that arbitration is a waiver of the right to bring suit in a judicial forum. The Court finds such a general statement as R.16 clearly indicates that at the election of Tocci that the "parties agree to arbitrate any such claim or dispute in accordance with Construction Industry Rule of the American Arbitration Association and the locale shall be Boston, Massachusetts. This Agreement to arbitrate, if so elected, shall be specifically enforceable under the prevailing arbitration law." The quoted provision clearly establishes that a dispute amongst the parties will be subject to arbitration at Tocci's election. R.16 sets forth that Construction Industry Rules of the AAA shall govern and that locale shall be Boston, Massachusetts. It is clear that the "[a]greement to arbitrate" is enforceable under the prevailing arbitration law. While R.16 does not specifically reference waiver of a trial in a judicial forum the aforementioned language is sufficient to explain to a sophisticated party that arbitration is a waiver of the right to a judicial determination.

Viewing R.16's language in insolation supports a finding that the aforementioned language is enforceable. However, the Court is once again forced to consider the provision as it appears in the Rider. In doing so, questions of conspicuousness are once again raised. The fact that the operable language related to arbitration is intermingled with language unrelated to arbitration creates an ambiguity. This ambiguity is further complicated by the fact that R.16 does not denote the presence of an arbitration agreement with a heading or other descriptive designation. There is no reference to an arbitration provision in the table of contents. The arbitration provision is not contained in a stand-alone paragraph. Accordingly, when viewed in totality there is a question as to whether Brothers General had notice of this key provision that effects their rights.

Notwithstanding these deficiencies, the Court cannot turn a blind eye to the fact that Brothers General has already been joined to the AAA arbitration. Brothers General was properly served with Tocci's Joinder Request pursuant to Rule 7 of the AAA's Construction Industry

Rules.[3] Brothers General failed to timely object to same. Brothers General had a second opportunity to object to Tocci's Joinder Request, but it once again failed to do so. Brothers General does not dispute receipt of Tocci's Joinder Request or the subsequent communications from the AAA. Brothers is a party to the AAA arbitration and as such has waived its right to seek the instant relief. While Brothers is free to raise the aforementioned arguments before the AAA arbitrator, it is unclear that this Court has the authority to remove a properly joined party from an arbitration provision. The Court notes that Brothers General will be afforded every opportunity to litigate its claims in the AAA arbitration. In fact, AAA has incentive to do so as the sufficiency of its work has been called into question.

Moreover, the outcome of the AAA arbitration will determine what monies if any are owed to Brothers General by Tocci. The Court again notes that section 11.3 of the Subcontract states **Payment by the Owner [Connell Hospitality] to the Construction Manager [Tocci] for Work included in-any Application for Payment shall be a condition precedent to Construction Manager's [Tocci's] obligation to make payment for such Work to the Trade Contractor [Brothers General]**. Accordingly, staying the underlying matter pending the outcome of the AAA arbitration is appropriate.

IV. Conclusion

Based on the foregoing, Brothers General's motion to estop defendant, Tocci from asserting the arbitration clause is **DENIED**. Tocci's cross-motion compelling arbitration and staying the underlying matter pending the result of same is **GRANTED**.

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[3] AAA R-7(c) states, in relevant part: To request joinder of parties, the requesting party must file with the AAA a written request to join parties to an existing arbitration which provides the names and contact information for such parties, names and contact information for the parties' representatives, if known, and supporting reasons for such request. The party requesting joinder shall be responsible for simultaneously providing a copy of the joinder request and supporting reasons to all parties to the arbitration and the party or parties sought to be joined.

EXHIBIT A

Contractor, Trade Contractor's sub-subcontractors, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, the indemnification obligation under this paragraph shall not be limited by a limitation on amount or type of damages, compensation, or benefits payable by or for

Trade Contractor or Trade Contractor's sub-subcontractors under workers' or workmen's compensation acts, disability benefit acts, or other employee benefit acts.

R.15 CHANGE ORDER AUTHORIZATION Note: The Construction Manager's project manager, superintendent and field personnel are authorized to verify, not authorize, time and material charges only. Authorization and acceptance of liability for any work deemed to be extra to this contract which entitles the Trade Contractor to a contract adjustment must be signed by an officer of the Construction Manager.

R.16 Trade Contractor shall have no claim for additional compensation for any act, omission, or discretion of the Owner whatsoever, except to the extent that the Construction Manager shall, pursuant to the provisions of the General Contract, have a claim against the Owner. The Trade Contractor agrees to be bound by the decision of the Architect and/or Owner and further agrees that any decision or determination reached by any authority duly constituted or appointed under the terms of the Contract Documents or by any Court of competent jurisdiction involving the interpretation or construction of the terms and provisions of any of the Contract Documents and/or the manner that the Construction Manager shall be determinative and conclusive, and the Trade Contractor will be bound thereby to the Construction Manager to the same extent and in the same manner that the Construction Manager is bound to the Owner. The Trade Contractor further agrees to become a party to and to be bound by any proceeding involving the Construction Manager, the Architect, or the Owner to the extent that such proceedings involve any of the rights or obligations of the Trade Contractor under the subcontract. In the event of any dispute, controversy, or claim between the Construction Manager and the Trade Contractor, the Trade Contractor agrees to proceed with the work or extra work without delay and without regard to such dispute, controversy, or claim or the pendency of any proceeding in relation to the same. The failure of the Trade Contractor to comply with the provisions of this paragraph shall constitute a material breach of this agreement with all the remedies of the Construction Manager provided for in this Article 16. Nothing in this Agreement shall be construed as providing the Trade Contractor with any specific provision(s) for dispute resolution or arbitration other than those specifically granted herein notwithstanding the existence of any such provisions in the Owner - Construction Manager agreement. However, at the election of the Construction Manager, the parties agree to arbitrate any such claim or dispute in accordance with the Construction Industry Rules of the American Arbitration Association and the locale shall be Boston, Massachusetts. This Agreement to arbitrate, if so elected, shall be specifically enforceable under the prevailing arbitration law.

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R.17 Change the 17th word of Paragraph 3.3.1 from two to one.

R.18 In Paragraph 9.1.6 insert the words "...prior to starting his work", in the second line after the words "Construction Manager".

R.19 Change Paragraph 16.2.1, the sixth line, from Five (5) days to Two (2) days.

R.20 Retainage, per Article 11, Paragraph 11.3.3, shall be ten percent (10%).

R.21 No periodic or final payment will be deemed due until the Trade Contractor submits a fully executed Lien Release on the form attached hereto as "Attachment A".

R.22 FOREIGN CORPORATIONS: All Foreign (non-Massachusetts) corporations, partnerships, and individual DBA's are required by the Commonwealth of Massachusetts to certify with the Massachusetts Department of Revenue (D.O.R.) and post required security in the form of a surety bond or check. Upon satisfaction of this requirement, the D.O.R. will issue a Foreign Corporation Certificate, a copy of which is to be forwarded to the Construction Manager (C.M.). Until receipt of the certificate, the C.M. will retain an additional five- percent (5%) retainage.