ARGUMENT

POINT I

THE COURT SHOULD GRANT LEAVE TO APPEAL IN THE INTEREST OF JUSTICE BECAUSE THE TRIAL COURT'S DECISION CONTRAVENES ESTABLISHED FEDERAL AND STATE CONSTITUTIONAL LAW AND RESOLVING THE ISSUE NOW WILL SUBSTANTIALLY CONSERVE THE TIME AND EXPENSE OF THE PARTIES AND THE COURT.

The Appellate Division "may grant leave to appeal, in the interest of justice, from an interlocutory order of a court." R. 2:2-4 (emphasis added). Interlocutory appeals are appropriate where a trial court's decision is "palpably wrong, unfair or unjust." Bandel v. Friedrich, 122 N.J. 235, 238 (1991). Unlike interlocutory appeals attempting to correct "minor injustices" such as orders granting or denying discovery, courts are inclined to grant leave where the appeal "will . . . substantially conserve the time and expense of the litigants and the courts." Romano v. Maglio, 41 N.J. Super. 561, 567 (App. Div. 1956).

This Court should permit defendants leave to appeal in the interest of justice. In granting plaintiff's motion to strike defendants' jury demand, the trial court completely disregarded defendants' constitutional right to a jury trial. Indeed, the trial court did not even address that fundamental right. Instead of evaluating whether the purported waiver clauses contained in the preprinted lease were a knowing and intelligent waiver of defendants' right to a jury trial, the trial court

simply presumed that they were valid, and placed the burden on defendants to "set forth sufficient facts to warrant invalidating the jury waiver provision[s]." (Da16). That ruling is "palpably wrong, unfair and unjust" under established federal and state constitutional law and requires reversal.

Ensuring defendants' right to trial by a jury of their peers is particularly significant here. Defendants allege in their Amended Answer and Counterclaim that plaintiff has engaged in unconscionable business practices and has pursued a palpably unreasonable amount of damages in purporting to enforce the adhesion contract at issue. (See Da20).

Resolving defendants' right to a jury trial now also will substantially conserve the time and expense of the parties and the court. A successful appeal on this issue at the end of a bench trial would render the entire proceedings meaningless and require a retrial before a jury. That would unduly prolong this litigation and prejudice defendants. The Court should grant defendants leave to appeal.

POINT II

THE PURPORTED JURY WAIVER CLAUSES ARE UNENFORCEABLE AS A MATTER OF LAW.

A. THE RIGHT TO A JURY TRIAL IS A FUNDAMENTAL CONSTITUTIONAL RIGHT PROTECTED BY THE UNITED STATES AND NEW JERSEY CONSTITUTIONS.

The Seventh Amendment to the United States Constitution and Article 1, Paragraph 9 of the New Jersey Constitution protect the right to jury trial as a fundamental right. Although a person can waive that right pursuant to a contractual provision, the waiver must be knowing, voluntary, and intelligent, and courts will indulge every presumption against waiver. Johnson v. Zerbst, 304 U.S. 458 (1938); Dreiling v. Peugeot Motors of America, Inc., 539 F. Supp. 402, 403 (D. Col. 1982); Fairfield Leasing Corp. v. Techni-Graphics, Inc., 256 N.J. Super. 538, 543 (Law Div. 1992).

In view of the strong presumption against the waiver of a fundamental constitutional right, a party asserting the validity of a contractual waiver provision has a heavy burden of proving that the provision is clear and conspicuous and that the opposing party knowingly, intelligently, and voluntarily agreed to waive his or her right to a jury trial. Dreiling, 539 F. Supp. at 403; Standard Wire & Cable Co. v. Ameritrust Corp., 697 F. Supp. 368, 375 (C.D. Cal. 1988) ("for a jury trial waiver to be effective, it must be knowing, voluntary and intelligent"); Morgan Guaranty Trust Co. of New York v. Crane, 36 F. Supp.2d 602, 603-04 (S.D.N.Y.

1999) (emphasizing that contract provisions waiving the right to jury trial are "narrowly construed, and the requirement of knowing, voluntary, intentional waiver is strictly applied"); Cooperative Finance Ass'n, Inc. v. Garst, 871 F. Supp. 1168, 1172 (N.D. Iowa 1995) (emphasizing that for a jury trial waiver contained in a contract to be effective, "the party waiving the right must do so 'voluntarily' and 'knowingly'"); cf. Fuentes v. Shevin, 407 U.S. 67 (1972)(emphasizing that "a waiver of constitutional rights in any context must, at the very least, be clear"); Leasing Services Corp. v. Crane, 804 F.2d 828, 832-33 (4th Cir. 1986) ("where waiver is claimed under a contract executed before litigation is contemplated, . . . the party seeking enforcement of the waiver must prove that consent was both voluntary and informed"); Luis Acosta, Inc. v. Citibank, N.A., 920 F. Supp. 15, 18-19 (D. Puerto Rico 1996) (holding that the right to a jury trial can be waived, "but only with difficulty, and the waiver must be clear and unequivocal").

B. A NON-NEGOTIATED JURY WAIVER PROVISION, BURIED IN A PREPRINTED CONTRACT OF ADHESION AND ENTERED INTO WITHOUT THE ASSISTANCE OF COUNSEL, IS NOT A KNOWING AND INTELLIGENT WAIVER OF THE CONSTITUTIONAL RIGHT TO A JURY TRIAL.

Plaintiff produced nothing in the trial court below to demonstrate that the purported jury waiver clauses contained in the equipment lease at issue were clear and conspicuous and a knowing and intelligent waiver of defendants' constitutional right to a jury trial. Plaintiff's preprinted equipment lease fits the

classic definition of a "contract of adhesion," and the purported waiver clauses – buried on the back side of the form lease and in the last paragraph of the personal guaranty -- are a far cry from clear and conspicuous. (Da5-6). In addition, plaintiff presented no evidence that defendants, who were not represented by counsel, were even aware of the provisions let alone that they were bargained-for terms of the parties' agreement. (See Da3-4). Indeed, the only evidence presented below demonstrates that they clearly were not. (Da13-14). The waiver is unenforceable as a matter of law.

1. Plaintiff's Preprinted Equipment Lease is a Contract of Adhesion.

Even the trial court recognized that plaintiff's preprinted form lease is a "contract of adhesion." (Da15). In Gras v. Associates First Capital Corporation, 346 N.J. Super. 42 (App. Div. 2001), certif. denied, 171 N.J. 445 (2002), the Appellate Division considered the validity of an arbitration agreement that accompanied loan documents to which the plaintiffs had agreed. The court emphasized that a contract of adhesion

> is defined as "[a] contract where one party . . . must accept or reject the contract . . . . "[T]he essential nature of a contract of adhesion is that it is presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the 'adhering' party to negotiate except perhaps on a few particulars."

Id. at 48 (quoting Rudbart v. North Jersey Dist. Water Supply Comm'n, 127 N.J. 344, 353, cert. denied sub nom., First Fid. Bank v. Rudbart, 506 U.S. 871 (1992)).

Under those principles, the Appellate Division stated that “we have little reservation in concluding that [the arbitration agreements] were contracts of adhesion . . . .” Id.

In Rudbart, the Supreme Court considered the validity of a notice by publication clause contained in project notes. The court concluded that the project notes

> unquestionably fit our definition of contracts of adhesion. That is, they were presented to the public on standardized printed forms, on a take-it-or-leave-it basis without opportunity for purchasers to negotiate any of the terms.

127 N.J. at 354.

In Fairfield Leasing, the court addressed a contract and guaranty very similar to plaintiff’s preprinted lease in this case. The court easily concluded that the agreement was a contract of adhesion:

> The agreement is a standardized form contract containing 23 paragraphs. U-Vend prepared it. The jury waiver provision is contained in the last part of the twenty-second paragraph, which also contains a merger clause and a no-modification clause. The guarantee, which is part of the agreement, contains the jury waiver clause on lines 21 to 23 of a 25-line paragraph. The letters of the single-spaced contract and guarantee are 1/10 of a centimeter in height, or approximately one-half the size of the letters produced by the typical typewriter. It is a classic example of a document which has been prepared with the intent that it neither be negotiated nor read.

256 N.J. Super. at 540.

Much like the preprinted form contracts considered in Fairfield Leasing, Gras, and Rudbart, plaintiff's preprinted, mass-produced form lease contains over thirty-four, single-spaced paragraphs with letters approximately 1/16 of an inch in height. (Da5-6).

Plaintiff presented the lease to defendants on a "take-it-or-leave-it" basis. The lease even contains an "Agreement Number," handwritten in as "001-12772-004," to distinguish it from plaintiff's many other preprinted contracts. (Da5). The only information that pertains specifically to defendants is the term of the lease and the monthly rental payment – which are handwritten on the preprinted form. (Da5).

Defendants did not have any opportunity to negotiate the terms of the lease and they did not have the assistance of counsel. (Da14). In sum, plaintiff's preprinted equipment lease fits squarely within the definition of a contract of adhesion under established New Jersey law.

2. The Jury Waiver Provisions Contained in the Preprinted Adhesion Contract Are Not Clear and Conspicuous and Plaintiff Has Not Produced Any Evidence that the Provisions were Bargained-for Terms of the Lease of which Defendants were Aware.

Courts addressing contractual clauses similar to the ones at issue here have refused to uphold them as a knowing and intelligent waiver of the constitutional right to a jury trial where they are inconspicuously contained in a contract of

adhesion and the party asserting the validity of the waiver fails to demonstrate that they were bargained-for terms of the parties' agreement. In Fairfield Leasing, for example, the court held that a non-negotiated jury waiver clause contained in a "standardized form contract entered into without assistance of counsel" was not a knowing and intelligent waiver of the right to jury trial. 256 N.J. Super. at 543. Much like plaintiff's preprinted lease, the lease in Fairfield Leasing contained twenty-three paragraphs and was prepared by the plaintiff's assignor. The contract was single-spaced and the letters were approximately one-half the size of the letters produced on the typical typewriter. Id. at 540.

Similarly, in National Equipment Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2nd Cir. 1977), the court concluded that a waiver provision "literally buried in the eleventh paragraph of a fine-print sixteen clause" equipment lease was insufficient to overcome the strong presumption against the waiver of the defendant's constitutional right to a jury trial:

> . . . it is clear that Hendrix did not have any choice but to accept the NER contract as written if he was to get badly needed funds. This gross inequality of bargaining power suggests, too, that the asserted waiver was neither knowing nor intentional.

Id. at 258.

In Luis Acosta, the court held that the defendant had not carried its burden of proving that the plaintiff knowingly and voluntarily waived his right to a jury trial:

> Citibank has provided no evidence whatsoever as to the parties' specific negotiations over the waiver, the conspicuousness of the provision, nor the parties' relative bargaining power.
>
> . . . there is also evidence pointing against a knowing and voluntary waiver, for the waiver clause is not in boldface and is buried at the end of the contract. The Court therefore holds that the waiver has not been proven to have been knowing and voluntary . . . .

Id. at 18-19.

In an analogous situation, in Fuentes v. Shevin, 407 U.S. 67 (1972), the United States Supreme Court held unenforceable a contractual provision waiving due process rights regarding the deprivation of property. Id. at 94. The Court emphasized that the "terms were parts of printed form contracts, appearing in relatively small type and unaccompanied by any explanations clarifying their meaning." Id. The Court emphasized that "a waiver of constitutional rights in any context must, at the very least, be clear." Id. at 95 (emphasis supplied). The Court emphasized further that there "was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining terms."

> The purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale. The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.

Id. See also Gaylord Dept. Stores of Alabama v. Stephens, 404 So.2d 586, 588 (Ala. 1981) (refusing to enforce a purported waiver of jury trial clause in an operating agreement that "appear[ed] to be a New Jersey form contract with boiler plate provisions. The jury waiver provision is buried in paragraph thirty-four in a contract containing forty-six paragraphs; the equality of the bargaining power of the parties is questionable; and it does not appear that the waiver by Stephens was intelligently or knowingly made").

Like the insufficient waiver clauses considered by those courts, the waiver provisions buried in plaintiff's preprinted equipment lease are insufficient to demonstrate a knowing and intelligent waiver of defendants' constitutional right to a jury trial. Although the waiver provisions are in capital letters, they are not clear and conspicuous. They are not set apart from the other single-spaced provisions of the preprinted lease and they remain approximately 1/16 of an inch in height. (Da5-6).

Any reasonable person easily could miss those inconspicuous provisions. Indeed, the provision purporting to pertain to defendant is buried on the back side of the form lease in paragraph twenty-four -- a side that contains no handwritten information, initials, or signatures of any kind. (Da6). It is doubtful whether defendants even had an opportunity to review the information on the back side, much less the jury waiver provision itself. Similarly, the provision contained in the

personal guaranty is on the last line of the last paragraph and appears only after a five-line discussion of, among other things, the payment of expenses, consent to jurisdiction, and conflict of laws. (Da5).

Plaintiff did not explain or highlight the clauses to defendants in any manner, (Da14), and it presented no evidence in the trial court below that defendants were aware of the waiver clauses, let alone that the clauses were bargained-for terms of the parties' agreement. (Da3-4). See Fuentes, 407 U.S. at 94; Luis Acosta, 920 F. Supp. at 18-19.

3. None of the Factors that Traditionally Demonstrate a Knowing and Intelligent Waiver of the Right to Jury Trial are Present in this Case.

Courts that have upheld contractual waiver of jury trial provisions have done so only where most if not all of the following factors were present: (1) the contract was negotiable, (2) the waiver clause was clear and conspicuous, (3) the bargaining power of the parties was relatively equal, (4) the party opposing the waiver possessed some level of business acumen, and (5) the party opposing the waiver was represented by counsel.

In Leasing Service Corp., for example, the court upheld a waiver provision in an equipment lease where the defendants "were manifestly shrewd businessmen who had been in a generally successful drilling business for sixteen years." 804 F.2d at 833. The court emphasized that the "circumstances surrounding the lease

negotiations . . . reveal both the Crane's general business acumen and their specific understanding of the Equipment Lease Agreement":

> The Crane's engaged in protracted negotiations with Nesbit at the Cranes' shop, while a Nesbit competitor waited outside in the event the Cranes did not obtain a favorable agreement. Fred Crane's wife reviewed the two page lease agreement closely enough to locate, object to, and have lined out the provision in the middle of the document which granted the lessor a security interest in all other assets belonging to the lessee. Finally, the Cranes' insistence on the execution of the handwritten agreement which limited the lessor's remedies in the event of a default indicates their understanding of the situation and of their interests.

Id. See also Standard Wire & Cable, 697 F. Supp. at 375 (noting that at the time the guarantees containing the waiver provisions were signed, "plaintiffs were represented by counsel, and their counsel reviewed and made revisions to other parts of the documents"); Morgan Guaranty Trust, 36 F. Supp.2d at 604 (upholding waiver of jury trial provision where "there is no indication that the terms of the note were not negotiable" and the defendant "successfully negotiated changes to provisions drafted by Morgan" in another margin account application to which the parties had agreed); Cooperative Finance Ass'n, 871 F. Supp. at 1172 (upholding waiver provision where it is "set off in a paragraph of its own . . . and near the end of a short document" and where the defendant "freely admitted that he is a sophisticated and experienced businessman, and nothing in the record suggests that [he] could not have negotiated any provision of the contract"); Bonfield v. Aamco

Transmissions, Inc., 717 F. Supp. 589, 595 (N.D. Ill. 1989)(concluding that "it is plain that [plaintiff] knowingly and intelligently waived his right" to jury trial where the wavier provision was expressly discussed, the plaintiff was an experienced businessman, and the plaintiff was represented by counsel).

None of those factors are present in this case. Plaintiff's preprinted form lease was not negotiable, the inconspicuous waiver provisions are not set apart from the remainder of the single-spaced document, and defendants were not represented by counsel. Plaintiff presented no evidence in the trial court below that defendants were even aware of the waiver provisions let alone that the provisions were bargained-for terms of the parties' agreement. Indeed, the only evidence presented in the trial court below demonstrates otherwise. (Da14). Plaintiff presented nothing that even suggests that its bargaining power – as a sophisticated and powerful lessor of copier equipment – was relatively equal with that of defendants, two individuals attempting to operate a homegrown printing business. (See Da3-4). In short, plaintiff failed to carry its "heavy burden" of demonstrating that the purported waiver provisions were clear and conspicuous and a knowing, intelligent, and voluntary waiver of defendants' constitutional right to a jury trial. The Court should reverse the decision below.

C. THE TRIAL COURT'S DECISION COMPLETELY IGNORES DEFENDANTS' CONSTITUTIONAL RIGHT TO A JURY TRIAL AND IMPROPERLY PLACES THE BURDEN ON DEFENDANTS TO "SET FORTH SUFFICIENT FACTS TO WARRANT INVALIDATING" THE NON-NEGOTIATED ADHESION CLAUSES.

The trial court's decision completely ignores defendants' constitutional right to a jury trial. The trial court should have required plaintiff, as the party asserting the validity of the waiver clauses, to prove that the clauses were clear and conspicuous and a knowing and intelligent waiver of defendants' constitutional rights. See cases discussed in Point II (A), supra. Instead, the trial court effectively gave the non-negotiated adhesion clauses a presumption of validity and placed the burden on defendants to "set forth sufficient facts to warrant invalidating the jury waiver provision." (Da16). That ruling contravenes established state and federal constitutional law.

The trial court's reliance on Rudbart and Gras to "uphold" the "validity" of the purported waiver provisions is misplaced. Those cases considered the validity of provisions contained in adhesion contracts, but the provisions in those cases were clear and conspicuous, unlike the provision at issue here.

In Gras, for example, the arbitration agreements "were specific enough to inform plaintiffs that they were waiving their statutory rights to litigation in a court." 346 N.J. Super. at 57. Unlike the inconspicuous clauses buried in the middle of plaintiff's preprinted equipment lease, the arbitration agreements

considered in Gras were separate agreements that accompanied each loan agreement signed by the plaintiffs. Id. at 46. Each arbitration agreement also "carried a legend at the beginning of the agreement in uppercase letters stating: READ THIS ARBITRATION AGREEMENT CAREFULLY. IT LIMITS CERTAIN OF YOUR RIGHTS, INCLUDING YOUR RIGHT TO MAINTAIN A COURT ACTION." Id. That same caution was repeated at the end of the agreement "immediately before the signatures of both plaintiffs." Id. at 57. Cf. Young v. Prudential Ins. Co. of America, Inc., 297 N.J. Super. 605 (App. Div. 1997) (noting that the arbitration provision contained in a securities registration application contained the caution "READ CAREFULLY" and "larger, white on black type, only a few inches above six numbered paragraphs that include, as paragraph five, the arbitration clause"); Allgor v. Travelers Ins. Co., 280 N.J. Super. 254, 263 (App. Div. 1995) (upholding the validity of an arbitration clause contained in an insurance contract because it is "clearly visible and is in clear, plain language in a form approved by the Commissioner [of Insurance]").

Thus, the primary issue in Gras and Rudbart was, despite the clear nature of the contractual provisions at issue (notice by publication in Rudbart and mandatory arbitration in Gras), should the court nevertheless refuse to enforce the provisions as a matter of public policy. The trial court's citation of those same "public policy" factors in purporting to uphold the "validity" of plaintiff's jury waiver

provisions in this case essentially put the cart before the horse. It upheld the "validity" of the waiver provisions on public policy grounds without first addressing the more fundamental question of whether the provisions were clear and conspicuous and a knowing and intelligent waiver of defendants' constitutional right to a jury trial. The Court should reverse the decision below.