IN THE SUPREME COURT OF OHIO

TRUNORTH WARRANTY PROGRAMS OF NORTH AMERICA, Appellant, vs. AJZ'S HAULING, LLC, Appellee.	)	CASE NO. 2022-0750 On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District, Case No. CA 20 109632

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLANT TRUNORTH WARRANTY PROGRAMS OF NORTH AMERICA

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INTRODUCTION

Claim preclusion (also called res judicata) is a bedrock of American jurisprudence, similar to double jeopardy in criminal cases, which protects parties (even losing parties) from endless, serial litigation after issuance of a final order resolving their litigated dispute. Only in the rarest of circumstances, not present in this case, should such litigation be able to be recommenced after such a final order.

In this case, Appellant TruNorth Warranty Programs of North America ("TruNorth") was the recipient of a final appealable order in its favor. Both Appellee AJZ's Hauling, LLC ("AJZ") and the Eighth Appellate District expressly concede this point. *See AJZ's Hauling, LLC v TruNorth Warranty Programs of North America*, 8th Dist. No. 109632, 2021-Ohio-1190, ¶¶29-30. They simply contend that the final order is not worthy of enforcement because it was "unfair" or simply wrong. In the legal landscape envisioned by AJZ: "res judicata does not apply when fairness and justice would not support it". (AJZ's Memorandum in Opposition to Jurisdiction, p. 7). Under such threadbare and brazen disregard for finality, AJZ presumably believes that it can relitigate the issue over and over until it gets a result that it believes is "fair" (or the courts run out of patience).

Claim preclusion allows for some exceptions—but, as explained below, such exceptions are necessarily very narrow and far from the facts of this case. The reason for this is simple. Litigants should all be given an opportunity to have their day in court. But once that day has come and gone, and a final decision has resolved the case, then they cannot return to court to try their hand again because they did not like the outcome or thought it "unfair". If anything is "unfair", such a proposition is.

In this case, the final order is one compelling arbitration. Tomorrow, it could be a civil

rights judgment. Or an electoral contest. Or a dispute over a will. Or a divorce or a child custody or support decree. Or a post-conviction petition. Pick your pet legal issue. It is not safe from AJZ's argument. Nothing is ever final under AJZ's argument.

Final orders are "final" where important rights and responsibilities are defined. Parties may then avail themselves of whatever appellate review they may have. If they do not, then, absent exceptional circumstances not present in this case, they may not collaterally attack such a final order. If this prohibition is lightly abandoned to the siren song of "equity", then all Ohioans, no matter their politics, persuasion, pedigree or perch, will suffer.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is a statewide organization whose wide array of members consist of attorneys, supervisory or managerial employees of insurance companies, and corporate executives of other corporations who devote a substantial portion of their time to the defense of civil damage lawsuits and the management of insurance claims brought against individuals, corporations and governmental entities. For over fifty years, OACTA has long been a voice in the ongoing effort to ensure that the civil justice system is fair and efficient by promoting predictability, stability, and consistency in Ohio's constitutional safeguards, statutory laws, and legal precedents.

OACTA's mission is to provide a forum where its members can work together and with others on common problems to propose and develop solutions that will promote and improve the fair and equal administration of justice in Ohio. OACTA strives for stability, predictability and consistency in Ohio's case law and jurisprudence. On issues of importance to its members, OACTA has filed amicus curiae briefs in significant cases before federal and state courts in Ohio advocating and promoting public policy and sharing its perspective with the judiciary on matters

that will shape and develop Ohio law.

OACTA's appearance as *amicus* in this case and its submission of this *amicus* brief pursuant to S.Ct.Prac.R. 16.06 in support of TruNorth is premised upon the simple fact that, absent exceptional circumstances, final orders should be final.

STATEMENT OF THE CASE AND FACTS

OACTA adopts the Statement of the Case and Facts set forth in TruNorth's Merit Brief.

LAW AND ARGUMENT

PROPOSITION OF LAW NO. I: Res Judicata [claim preclusion] mandates that once the appellate period lapses on a final order, the issue is decided. Thus, a trial court lacks jurisdiction to reconsider a final order in a subsequent proceeding. However, the Eighth District allowed the "unjust" exception to swallow the rule.

Introduction

The application of claim preclusion is a question of law that this Court reviews de novo. *See Payne v. Cartee*, 111 Ohio App.3d 580, 586, 676 N.E.2d 946 (4th Dist. 1996)

Claim preclusion has four elements: (1) a prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action. *Ohio ex rel. Boggs v. City of Cleveland*, 655 F.3d 516, 520 (6th Cir. 2011).[1]

[1] Ohio law and federal law are identical with respect to all issues pertinent to this case. *Compare Grava v. Parkman Twp*. 73 Ohio St.3d 379, 653 N.E.2d 226 (1995) (Ohio law follows the Restatement) *with J.Z.G. Resources, Inc. v. Shelby Ins. Co*. 84 F.3d 211, 213-215 (6th Cir. 1996)(federal law follows the Restatement); *Wilkins v. Jakeway*, 183 F.3d 528, 535 (6th Cir. 1999)(same); *Prewett v. Weems*, 749 F.3d 454, 462 (6th Cir. 2014)(same); *In re Caldwell*, 917 F.3d 891, 894 (6th Cir. 2019)(same). The similarities have caused legal commentators to note that Ohio's claim preclusion principles "appear to be almost identical to the federal model" (with the exception of certain mutuality concepts not at issue in this case). *See* Note, *Administrative Res Judicata in Ohio: A Suggestion for the Future*, 37 Clev. St. L. Rev. 595, 600 (1989); 63 Ohio Jur.3d Judgments §353.

In this case, there is no question that all four elements exist. Therefore, claim preclusion should apply.

Where claim preclusion applies, a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action. *Grava*, at syllabus. Despite this controlling legal authority, the Eighth Appellate District held that "equity" allowed AJZ to sue TruNorth again on the same issues.

Thus, the principal question in this case is whether there should be an "equitable" exception to the application of claim preclusion in this case. For the reasons that follow, the answer is no.

Ohio follows the Restatement's approach to claim preclusion.

Ohio has adopted certain legal principles when it comes to claim preclusion. In *Grava*, 73 Ohio St.3d at 382, this Court held that:

> Today, we expressly adhere to the modern application of res judicata [claim preclusion], as stated in 1 Restatement of the Law 2d, Judgments (1982) ["Restatement"], Sections 24-25, and hold that a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject of the previous action.

This approach has been recognized and applied by courts applying Ohio law for claim preclusion since *Grava*. *See e.g. William Powell Co. v. Nat'l. Indemn. Co*., 18 F.4th 856, 870 (6th Cir. (Oh.) 2021)(relying upon *Grava* to hold that "Ohio has adopted the Restatement view of [claim preclusion]").

Ohio courts have also recognized that *Grava* implicitly adopted the Restatement's entire approach to claim preclusion—including its exceptions and limitations. *Ohio Ky. Oil Corp. v. Nolfi*, 5th Dist. No. 2013CA00084, 2013-Ohio-5519, ¶¶19-27.

The Restatement has express exceptions and limits to claim preclusion: none is applicable to this case.

The Restatement balances the needs of finality with the flexibility to create a narrow band of circumstances in which strict application of claim preclusion is softened or made consistent with important public policies. These are found under Rule 26 of the Restatement. The only provision of Rule 26 that is potentially applicable to the facts of this case, is Rule 26(f).[2]

The 26(f) Exception provides, in pertinent part:

> **§26 Exceptions to the General Rule Concerning Splitting**
>
> (1) When any of the following circumstances exists, the general rule of §24[3] does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
>
> * * *
>
> (f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.
>
> (2) In any case described in (f) of Subsection (1), the plaintiff is required to follow the procedure set forth in §§78-82.

The Restatement describes the 26(f) Exception as comprising "a small category of cases in which the policies supporting merger or bar may be overcome by other significant policies . . .

[2] The other exceptions in Rule 26 include: (a) the defendant has agreed or acquiesced that the plaintiff may split the claim; (b) the first court to judgment reserved the plaintiff's right to maintain the second action; (c) subject matter jurisdiction or other restriction precluded the plaintiff from relying upon all claims in the first action; (d) the judgment in the first action is plainly inconsistent with a statutory or constitutional scheme that would permit claim splitting; and (e) the plaintiff is permitted by law to sue for past and prospective damages in separate actions.

[3] In pertinent part, §24 provides: "When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger and bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, of series of connected transactions, out of which the action arose."

based on a clear and convincing need". 26(f) Exception, comment *i*. "Such cases are extremely rare". *Id.* Furthermore, the categories of illustrative cases given by the Restatement are completely dissimilar from the instant case, ie. cases involving penal custody, divorce, child custody battles and civil commitment of the mentally ill. Likewise, there has been, and can be, no plausible suggestion made that the prior final judgment in this case failed to yield a coherent disposition. Nothing close to any of these examples exists in this case.

Rather, this case involves a garden variety breach of warranty claim with a favored arbitration clause.[4] The weight of authority correctly holds that such garden variety claims are not implicated by the 26(f) Exception. *See e.g. Yung-Kai Lu v. University of Utah*, No. 2:16-CV-51-CW, 2018 WL 3993458 (D. Utah Aug. 21, 2018), *2; *Cagan v. Village of Angel Fire*, 137 N.M. 570, 113 P.3d 393 (2005), ¶37; *Regions Fin. Corp. v. Marsh USA, Inc*., 310 S.W.3d 382, 399-400 (Tenn. Ct. App. 2009); *Faulkner v. Caledonia County Fair Ass'n*. 178 Vt. 51, 869 A.2d 103 (2004), ¶¶19-20; *Creatail HK Ltd. v. Ty, Inc*., 2018 IL App (1st) 180747-U, 2018 WL 6829149 (Dec. 26, 2018), ¶¶27-29; *Ellis v. Ford Motor Co*., 628 F.Supp. 849, 855-856 (D. Mass. 1986); *Merdes & Merdes, P.C. v. Leisnoi, Inc*., 410 P.3d 398, 407-408 (Sup. Ct. Alaska 2018).

The rarity of the application of the 26(f) Exception is punctuated by its procedural preconditions: "In any case described in (f) of Subsection (1), the plaintiff is ***required*** to follow the procedure set forth in §§78-82." (emphasis added). These preconditions clarify that AJZ cannot just unilaterally declare "injustice" to trigger the 26(f) Exception as a basis to avoid otherwise clear application of claim preclusion. It first must follow the procedures set forth in §§78-82 of the Restatement.

[4] Both Ohio and federal law strongly favor enforcement of arbitration clauses. *See e.g. Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, ¶27, FN1.

These mandatory procedures are divided into two categories—judgments rendered in the same state (§§78-80) and judgments rendered in another state (§§81-82). Only §§78-80 are pertinent to this case. These procedures build upon each other and are manifestly designed to prevent what AJZ is attempting here.

As preliminary matter, §78 required AJZ to seek relief from the prior final judgment by means of a post-judgment motion pursuant to Ohio Civ. R. 60(B)("Relief from a judgment must be obtained by means of a motion for that purpose in the court that rendered the judgment unless relief may be obtained more fully, conveniently or appropriately by some other procedure"). As explained by comment *a*. to §78:

> Modern rules of procedure generally provide for a motion for relief from a judgment. The contemporary prototype is Rule 60(b) of the Federal Rules of Civil Procedure, but state procedural systems have analogous provisions . . . The 60(b) type of motion is the preferred procedure for attacking a judgment.

Many reasons are given for this approach, including the generally recognized superiority of the original court to determine whether its original judgment was valid and the principle of comity between courts. *Id.* Simply put, giving the first court to judgment the opportunity to decide whether its judgment should be limited promotes fairness and limits the ability of litigants to pit courts against each other on the same transaction. Even though the second action was brought in the same court, AJZ never sought such relief in this case.

This does not mean that any Civ. R. 60(B) motion filed by AJZ would have been granted had it been timely filed. Nor would such a motion have been a substitute for appeal of the prior judgment. *Worthington v. BWC*, 2d Dist. No. 2020-CA-10, 2021-Ohio-978, ¶21. Nor could AJZ's subsequent legal action be considered tantamount to "reconsideration" of its prior judgment because the trial court was divested of jurisdiction to "reconsider" its prior judgment once the time

for appeal had run. *Pitts v. Ohio Dept. of Transp*., 67 Ohio St.2d 378, 379-381, 423 N.E.2d 1105 (1981); *Kauder v. Kauder*, 38 Ohio St.2d 265, 266-267, 313 N.E.2d 797 (1974). It simply means that it is undisputed that AJZ failed to invoke a necessary predicate to the relief that AJZ seeks now.

Other options were also possible. §79 provides that if "adequate relief cannot be obtained with equal convenience by motion in the original action, as stated in §78", then AJZ could have sought relief from the final judgment through an independent action to restrain enforcement of the judgment, to declare the judgment ineffective or similar relief. Again, however, it is undisputed that AJZ neither sought relief in the original action nor filed an independent action to attack the validity of the prior final judgment. Accordingly, AJZ did not comply with §79 in this case.

Finally, §80 provides that relief from the final judgment could have been obtained in the current action "if other means of obtaining relief from the judgment are unavailable" or "the convenient administration of justice would be served by determining the question of relief" in this action. However, comment *a.* to §80 makes clear §80 is not a substitute for a motion in the first action and "the circumstances in which relief may be granted in this context are relatively limited":

> Generally speaking, it is inappropriate to consider the merits of an attack on a judgment when that attack is made in the course of a subsequent action in which the judgment is relied on as a basis of claim or defense. To consider the merits of the attack in such a context is to contravene the general principle that relief from a judgment should be sought in the court that rendered the judgment. See § 78. It also complicates the subsequent action.

Collectively, these procedures are notable because they preclude AJZ's ability to summarily invoke the 26(f) Exception. If there was some part of the prior final judgment that should have been limited so as to preclude the application of claim preclusion in this case under the 26(f) Exception, AJZ was obligated to pursue the procedures set forth above. AJZ did not do so, and it is too late to do so now.

Simple "equity" is insufficient to invoke the 26(f) Exception.

AJZ is not the first litigant to cry "equity" to avoid the plain application of claim preclusion. This refrain has been unsuccessfully invoked in many cases—often with reference to the 26(f) Exception.

For example, in *Buck v. Thomas M. Cooley Law Sch.*, 597 F.3d 812, 819 (6th Cir. 2010), the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") rejected the contention that the 26(f) Exception should be applied to avoid claim preclusion even though it meant that the plaintiff would be unable to fulfill her dream of becoming an attorney, explaining:

> Plaintiff complains that application of res judicata here would work a "manifest injustice" because she is unable to fulfill her desire to become an attorney. A litigant's suffering the consequences of a prior adverse ruling does not compel the application of this exception. To indulge such reasoning would create an exception that swallows the rule. Plaintiff has not established that her situation falls within the "small category of cases," Restatement (Second) of Judgments § 26, comment i, that qualify for a manifest injustice exception.

Buck, 597 F.3d at 819.

Likewise, in *Wheeler v. Dayton Police Dept.*, 807 F.3d 764, 767-768 (6th Cir. 2015), without directly addressing the 26(f) Exception, the Sixth Circuit also rejected a "manifest injustice" argument premised upon public policy, explaining:

> Wheeler, last of all, alleges that claim preclusion would violate "public policy" if applied here. But the Supreme Court has cautioned against making equitable exceptions to traditional claim-preclusion principles, *see Moitie*, 452 U.S. at 399–402, 101 S.Ct. 2424, and Wheeler has not offered any sound reason for ignoring standard claim-preclusion rules here. Sure, he maintains that barring this lawsuit will infringe on his "right to petition the government." Appellant's Br. 19. But that right guarantees only Wheeler's ability to *file* a lawsuit, *see Borough of Duryea v. Guarnieri*, 564 U.S. 379, 131 S.Ct. 2488, 2494, 180 L.Ed.2d 408 (2011); it does not displace claim preclusion or other procedural bars once the case gets here. Nor do the public policies underlying § 1983 cut against claim preclusion in cases filed under that statute. *See Castorr v. Brundage*, 674 F.2d 531, 536–37 (6th Cir.1982). Nor do we see how barring these claims will result in "manifest injustice." Appellant's Br. 22–23. A "grave

> injustice" does not result when courts apply "accepted principles of [claim preclusion]," *Moitie*, 452 U.S. at 401, 101 S.Ct. 2424, especially when Wheeler offers no good reason for failing to include these allegations in his earlier complaint.

Wheeler, 807 F.3d at 768.

Such analysis directly relied upon that of the United State Supreme Court in *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 400-402, 101 S.Ct. 2424 (1981). In *Moitie*, 452 U.S. at 401, the Supreme Court of the United States rejected equitable exceptions to claim preclusion, explaining:

> The Court of Appeals also rested its opinion in part on what it viewed as "simple justice." But we do not see the grave injustice which would be done by the application of accepted principles of res judicata. "Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*." *Heiser v. Woodruff*, 327 U.S. 726, 733, 66 S.Ct. 853, 856, 90 L.Ed. 970 (1946). The Court of Appeals' reliance on "public policy" is similarly misplaced. This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Traveling Men's Assn.*, 283 U.S. 522, 525, 51 S.Ct. 517, 518, 75 L.Ed. 1244 (1931). We have stressed that "[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts...." *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S.Ct. 506, 507, 61 L.Ed. 1148 (1917).

Moreover, the Rule 26 exceptions and processes in the Restatement render the raw application of brute "equitable" power unnecessary. When exceptions should exist, this Court has been successful in fostering their development. For instance, in *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), this Court noted the grave injustice and constitutional concerns that could arise with respect to application of claim preclusion barring delayed claims of ineffective

assistance of counsel in post-conviction appeals. To remedy this problem, this Court successfully advocated for new appellate procedures that permitted such claims to be brought without unduly conflicting with general claim preclusion. 63 Ohio St.3d at 66, FN 6. As a result, App. R. 26(B) was created. *See generally State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608 (addressing App. R. 26(B) and *Murnahan*). This is how the rule of law should work.

The cases relied upon by the Eighth Appellate District to justify its equitable exception to claim preclusion are patently inapplicable to this case.

In the proceedings below, the Eighth Appellate District ostensibly relied upon four Ohio decisions for the proposition that "it is unreasonable or unjust to strictly apply the doctrine of res judicata": (1) *State v. Linen*, 8th Dist. Nos. 74070/74071, 200 WL 218387 (Patton, J., dissenting); (2) *Murnahan, supra*; (3) *State ex rel Estate of Miles v. Piketon*, 121 Ohio St.3d 231, 2009-Ohio-786; and (4) *Davis v. Wal-Mart Stores, Inc.*, 93 Ohio St.3d 488, 756 N.E.2d 657 (2001). *See AJZ's Hauling, LLC*, 2021-Ohio-1190, ¶33. In reality, for the reasons that follow, none of these decisions supports the holding of the Eighth Appellate District.

First, neither *Murnahan* nor *Linen* applies. Indeed, in Judge Patton's dissenting opinion in *Linen*, he actually held exactly the opposite of what the Eighth Appellate District ascribes to his dissent: "I do not find it 'unjust' to apply *res judicata*. I respectfully dissent." *Id.*, at *7 (italics in original). If the attribution was meant to refer to the lead opinion,[5] that is of no help to AJZ either. Rather, the case involved the same issue as *Murnahan*: whether claim preclusion should bar delayed claims of ineffective assistance of counsel in post-conviction appeals. *Murnahan* and *Linen* represented the type of case which might trigger the Rule 26(f) Exception due to the impact

[5] There was no majority opinion. The lead opinion was written by Judge Anne Kilbane. Judge James D. Sweeney concurred in judgment only with a separate concurring opinion. Judge Patton dissented.

the application of claim preclusion might have on a convicted criminal who does not learn that he or she may have been deprived of the constitutional right to effective assistance of counsel until claim preclusion has attached. This is no longer an issue in Ohio following the promulgation of App. R. 26(B). Moreover, the instant case—with its garden variety arbitration order-- has none of the nuanced constitutional complications for criminal defendants that were present in *Linen* or *Murnahan*. Thus, neither *Linen* nor *Murnahan* support AJZ's argument for a broad equitable exception to claim preclusion.

Second, in *Piketon*, this Court held that claim preclusion would not be applied against the Village of Piketon ("Village") where the Village was not a party to an earlier action where judgment was obtained against the Village's former police chief because the Village's interests were not sufficiently represented by the former police chief for privity to apply and bind the Village. *Id*., ¶¶11-30. It was the lack of privity that caused this Court to note: "The binding effect of res judicata has been held not to apply when fairness and justice would not support it." *Id.*, ¶30. This Court's holding was about whether claim preclusion applied in the first place because the Village was neither a party nor a privy to a party to the first action that resulted in the prior judgment. This is a far cry from the adoption of a broad equitable exception to claim preclusion.

Finally, in *Wal-Mart*, this Court addressed whether a claim for spoliation may be brought after the primary action had gone to final judgment. *Id*., at syllabus. This Court concluded that when evidence of spoliation is not discovered until after the conclusion of the primary action, then the spoliation claim does not arise from the same transaction or occurrence as the underlying claim as to render claim preclusion applicable. 93 Ohio St.3d at 489-491. Again, *Wal-Mart* was about whether the elements of claim preclusion were met in the first place, not about the adoption of a broad equitable exception to claim preclusion.

The stark conclusion is that there is little or no support for the broad equitable exception announced upon by the Eighth Appellate District. The reason why is not hard to discern. Such a rule would eviscerate claim preclusion. Every final judgment could be weighed in a subsequent action to determine if it was fair and equitable. Neither AJZ nor the Eighth Appellate District explain how this might be done without undermining the entire notion of finality. Nor do they explain why such a rule should be created when AJZ so clearly had a right to appeal the prior judgment in this case—but simply failed to do so.

> **PROPOSITION OF LAW NO. II:** R. C. 2711.03 mandates that a trial court hold an evidentiary hearing on a motion to compel arbitration. Yet, this notwithstanding, there is an existing conflict between appellate districts on whether an oral or evidentiary hearing is mandatory necessitating this Court to settle the dispute.

OACTA adopts the argument set forth in TruNorth's Merit Brief in support of Proposition of Law No. II.

CONCLUSION

Based upon the foregoing, any attempt to invoke equity to avoid claim preclusion in this case was well answered by the Sixth Circuit: "[T]here is nothing unfair about applying the principle in this case, where 'any injustice is self-perpetuated and certainly does not rise to the level of nullifying res judicata.'" *Talismanic Properties, LLC v. City of Tipp City, Ohio,* 742 Fed. Appx. 129, 133 (6th Cir. 2018). Simply put, there is no reason why AJZ should be able to invoke equity to avoid the result of its failure to appeal the first judgment.

As Judge Sutton observed in *Wheeler*: "[C]laim preclusion at all events, bitter though the medicine may be, applies to all final judgments . . . A 'grave injustice' does not result when courts apply 'accepted principles of [claim preclusion]'". 807 F.3d at 767-768. To the contrary, it would be unjust to shield AJZ from the natural and foreseeable consequences of its actions.

In the final analysis, AJZ has failed to "clearly and convincingly" show any "extraordinary

reason" that outweighs the application of standard claim preclusion principles in this case. This conclusion is bolstered by the fact that AJZ failed to make even minimal effort to comply with the mandatory pre-requisites of the 26(f) Exception described above.

Accordingly, this Court should reverse the Eighth Appellate District and remand this case to the trial court to order this case to arbitration.

Respectfully submitted,

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