**HONORABLE THOMAS J. BUCK, J.S.C.**
MIDDLESEX COUNTY COURT HOUSE
56 PATERSON STREET
COURTROOM 307
NEW BRUNSWICK, NEW JERSEY 08903

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| JOAO A. SILVA,<br><br>Plaintiff,<br><br>v.<br><br>JACOBS ENGINEERING GROUP, INC.,<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br>MIDDLESEX COUNTY<br>DOCKET NO. MID-L-7167-15<br><br>CIVIL ACTION<br><br>**WRITTEN DECISION** |

On November 6, 2019, during the trial of Silva v. Jacobs, after deliberations began by the Jury but before the verdict, Plaintiff and Defendant entered into a high/low agreement. The particulars of this agreement were in writing and referred to as the November 5, 2019 letter of AIG. The particulars of this agreement are unambiguous and provides "terms of this agreement are confidential." The Jury then returned a verdict in open Court. The amount of the verdict fell between the "high" and "low" of the agreement. After the Jury was excused, Defendant moved to seal the verdict. Over Plaintiff's objection this Court sealed the verdict and ordered the parties not to reference the verdict amount in any motion practice. Plaintiff now moves to unseal the verdict.

A high/low agreement is a settlement of which the defendant agrees to pay the Plaintiff a minimum recovery in return for the Plaintiff's agreement to accept a maximum amount regardless of the outcome of the Trial. Black's Law Dictionary 795 (9th Edition 2009). Any outcome between the agreement limit is to be accepted by the parties. Benz v. Fires, 269 N.J. Super. 574, 578-79 (App. Div. 1994). A high-low settlement agreement is a

settlement contract and subject to the rules of contract interpretation. Malick v. Seaview Lincoln Mercury, 398 N.J. Super. 182,186,190 (App. Div. 2008).

In Serrico v. Rothberg, 234 N.J. 168 (2018), the New Jersey Supreme Court held that a high/low agreement is a settlement subject to the rules of contract interpretation based upon the expressed intent of the parties in the context of the agreement.

In Serrico, the Plaintiff, after a high/low agreement had been entered into, sought attorney's fees and other legal expenses pursuant to R. 4:58. In denying said request, the Supreme Court noted that Courts enforce contracts based upon the intent of the parties, the expressed terms of the contracts, the surrounding circumstances and the underlying purpose of the contracts, Id. citing In Re: County of Atlantic 230 N.J. 237 (2017), quoting Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2004).

> "A reviewing Court must consider contractual language in the context of the circumstances at the time of drafting and . . . apply a rational meaning in keeping with the expressed general purpose. [i]f the contract into which the parties have entered is clear than it must be enforced as written. Where the agreement is ambiguous, Courts will consider the parties' practical construction of the contract as evidence of their intention and as controlling weight in determining a contract's interpretation." Id. 230 N.J. at 254-55.

A high low agreement is a settlement between the parties. The final determination as to the specific amount of the settlement is determined by the Jury, however, the terms and conditions of the contract of settlement apply.

Here the terms of the contract entered into between Plaintiff and Defendant are clear and provides "terms of this agreement are confidential." In applying a rational meaning to this condition, this Court was compelled to seal the verdict as to comply with the terms of the contract.

Plaintiff now raises a significant public question, concerning sealed verdicts.

In this state, all proceedings shall be conducted in open Court, and no record may be sealed except for good cause. R. 1:2-1. What constitutes good cause is governed by a standard of reasonableness. Hammock, supra, 142 N.J. at 376, 662 A.2d 546. The Hammock Court explained the standard to determine when a Court record or proceeding may be sealed.

There is a presumption of public access to documents and materials filed with a Court in connection with civil litigation. That right exists under the common law as to the litigants and the public...[T]he right of access is not absolute. Under both the common law and the First Amendment, a Court may craft a protective order. [T]he strong common law presumption of access must be balanced against the factors militating against access. The burden is on the person who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption. Documents containing trade secrets, confidential business information and privileged information may be protected from disclosure. [Id. at 375-76, 662 A.2d 546 (internal quotation omitted)].

The presumption of public access applies to all non-discovery pretrial motions, and attaches to all "materials, documents, legal memoranda and other papers 'filed' with the Court that are relevant to any material issue involved in the underlying litigation (not simply relevant to a particular motion) regardless of whether the trial Court relied on them in reaching its decision on the merits." Id. at 381, 662 A.2d 546. The presumption applies regardless of the disposition of the motion. *Ibid.*

To determine whether to seal the record, the Court must conduct a "flexible balancing process . . . to determine whether the need for secrecy substantially outweighs the presumption of access." *Ibid.* The burden of proof rests with the person who seeks to overcome the "strong presumption of access" to establish "by a preponderance of the

evidence that the interest in secrecy outweighs the presumption." *Ibid.* That need for secrecy "must be demonstrated with specificity as to each document. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient. Id. at 381-82, 662 A.2d 546. The evidence must demonstrate "why public access to the document should be denied currently rather than rely on the fact that a protective order was entered earlier." Id. at 382, 662 A.2d 546.

Whether to seal or unseal documents is addressed to the discretion of the trial Court. Id. at 380, 662 a.2d 546. In exercising that discretion, the Court must be guided by the good cause standard. Id. at 380-83, 662 A.2d 546. The standard "recognizes a very strong presumption in favor of public access." Id. at 386, 662 A.2d 546.

This Court must conduct a flexible balancing process to determine whether the need to keep the terms of the high/low agreement secret substantially outweighs the presumption of access.

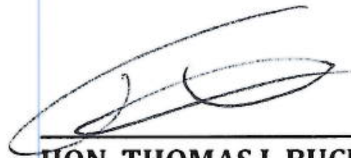
Here, Defendants have an interest in the contractual obligations evidenced by the letter of November 5, 2019, that specifically includes a provision that the terms are confidential. New Jersey has a strong public policy in favor of settlements. Department of Public Advocate v. N.J. Board of Public Utilities, 206 N.J. Super. 523, 528 (App. Div. 1985); Pascarella v. Bruck, 190 N.J. Super. 118, 125 (App. Div. 1983), certif. den., 94 N.J. 600 (1983); Jannarone v. W.T. Co., 65 N.J. Super. 472, 476 (App. Div. 1961), certif. den., 35 N.J. 61 (1961); Honeywell v. Bubb, 130 N.J. Super. 130 (App. Div. 1974). Courts will therefore "strain to give effect to the terms of a settlement wherever possible." Dept. Pub. Adv., 206 N.J. Super. at 528. "An agreement to settle a lawsuit is a contract which, like all contracts, may be freely entered into, and which a Court, absent a demonstration of 'fraud or other compelling circumstances' shall honor and enforce as it does other contracts." Pascarella v. Bruck, 190 N.J. Super. at 124-

125. The balancing test that this Court must employ therefore, is between the strong public policy to enforce a settlement and the strong presumption in favor of public access. "Mere deprivation of the right to enforce a contractual obligation is not, without an additional showing of serious harm, sufficient to override the public's right of access to the Courts," Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984). But a flexible balancing process adaptable to different circumstances must be conducted to determine whether the need for secrecy substantially outweighs the presumption of access, Hammock by Hammock v. Hoffman-LaRoobe, Inc., 142 N.J. 356 at 381 (1995).

Here, during all settlement negotiations, Defendant demanded that the settlement be confidential. Plaintiff objected to confidentiality (and the amount of the settlement) until the Jury began deliberations. Plaintiff and Defendant put the terms of the high/low agreement on the record and referenced a letter that contained the specific terms, one of these terms was confidentiality. A plain reading of this agreement would necessitate any verdict remaining confidential. Defendant would not have entered into this agreement if confidentiality was not agreed to. The agreement being enforced has a strong public policy as one of its' provisions provides that the parties waive any appeals, ending further litigation, which is a significant public interest. A settling party has an interest in not having made public, the amounts it was willing to pay or the amount that it ultimately paid to resolve a case. Plaintiff also agreed to confidentiality with all other settling Defendants in this matter and therefore it would be inconsistent that confidentiality only be denied as to this specific Defendant.

In balancing the issues, this Court finds that the verdict must be public as the public's right to access is subject to a strong presumption. It should also be noted that as the verdict was read in open court with members of the public present, that specific information is

already public information and it would be impossible to put that genie back in the battle. Therefore, the verdict amount is public and the verdict sheet shall not be sealed.



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