STEPHANIE PORTER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Respondent-Respondent, v. AUTOBAY LLC, MAURICE RACHED, UNITED AUTO CREDIT CORPORATION and JOHN DOES 1-10, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003606-23 Civil Action **ON APPEAL FROM:** SUPERIOR COURT OF NEW JERSEY LAW DIVISION – CIVIL PART GLOUCESTER COUNTY DOCKET NO. GLO-L-994-24 Sat Below: Hon. Benjamin D. Morgan, J.S.C. Submitted: March 31, 2025

BRIEF OF APPELLANTS AUTOBAY LLC AND MAURICE RACHED

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PRELIMINARY STATEMENT

On May 20, 2024, Respondent Stephanie Porter ("Respondent") purchased a 2011 Chevrolet Camaro (the "Vehicle") from Appellant Autobay LLC ("Appellant") for a purchase price of approximately $13,000. In connection with the purchase and sale, Respondent executed a Service Contract, Retail Installment Contract, and Buyer's Order, among other documents (collectively the "Contract"). The Contract was presented to Respondent by Appellant and executed simultaneously. As is common with Vehicle purchases, each document addressed different aspects of the sale, including, but not limited to:

(1) **The Service Contract**: This document includes, *inter alia*, details regarding covered parts and repair obligations for specific parts of the Vehicle, together with precise directives as to how to obtain repairs of the vehicle. Importantly, the arbitration provision is outlined in two areas of this document. First, at the outset of Section 8 "Arbitration Provision", which contains specific directives concerning arbitration, the document implores the signatory to "**READ THE FOLLOWING ARBITRATION PROVISION [ ] CAREFULLY. IT LIMITS CERTAIN OF YOUR RIGHTS, INCLUDING YOUR RIGHT TO GO TO COURT."** (emphasis in original). Second, immediately below Respondent's signature on the first page of the document, the document refers to the arbitration provision, emphasizing that the signatory is voluntarily electing to waive the right to litigation.

(2) **The Retail Installment Sales Contract and Security Agreement (RISC):** Respondent financed the vehicle. Accordingly, the RISC outlines the terms of the financing and includes an itemization of the amount financed. The Service Contract and its terms is acknowledged and referenced in Section 6, Itemization of Amount Financed, paragraph "y," and in Section 8, Additional Protections, in which Respondent affirmatively confirmed that she chose to execute the Service Contract via a check box and signature.

(3) **The Buyer's Order**: This document outlines all of the pertinent information related to the sale, like the specific vehicle information, dealer/seller statutory obligations, itemization of the sale, including the downpayment amount. Significantly, the Buyer's Order explicitly clarifies that the language of the RISC controls any inconsistencies between the RISC and Buyer's Order.

All three of these documents comprise the Contract executed between Respondent and Appellant for the purposes of Respondent's purchase of the Vehicle. Notably, Respondent voluntarily chose to finance the vehicle and chose to purchase the optional Service Contract, therefore, Respondent affirmatively agreed to the Arbitration Provision at issue in this matter. Further, none of these documents make sense standing alone – they were all executed simultaneously and reference each other for one purpose – Respondent's purchase of the Vehicle.

The New Jersey Supreme Court strongly favors arbitration, particularly in the context of car purchases. The Court has reasoned that, as here, when a purchaser has executed a clear arbitration agreement with a car seller, the courts must honor this contract. Specifically, the New Jersey Supreme Court has long directed that "[a]n agreement to arbitrate should be read liberally in favor of arbitration." Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993).

Further, the Appellate Court has upheld that in circumstances such as this, where multiple sales contract documents in a used car sale constituted an integrated agreement, the arbitration provision in the RISC was enforceable. Stollsteimer v. Foulke Mgmt. Corp., No. A-1182-17T3, 2018 N.J. Super. Unpub. LEXIS 1514, at

*7 (App. Div. June 26, 2018). In Stollsteimer, a car purchaser executed both the RISC that contained an arbitration provision and the separate Service Contract simultaneously in the purchase of a vehicle. The Appellate Court agreed with the seller that all sales documents were executed simultaneously for the same purpose – the purchase of a vehicle – and therefore the arbitration provision in the RISC was applicable and enforceable. The trial court erred in not dismissing the Complaint and sending this matter to arbitration.

Moreover, Respondent's Complaint should be stricken as duplicative, vexatious, and incomprehensible. As outlined below, the Complaint falls wildly short of such a standard. At the very least, Respondent should be directed to proffer a Complaint with clear allegations and causes of action to enable Appellant to provide clear responses and to evaluate the strengths and weaknesses of such a pleading. As written, the Complaint is nearly impossible to decipher.

PROCEDURAL HISTORY

On August 6, 2024, Respondent filed a prolix 85-page, boilerplate Complaint, purportedly as a class action, asserting claims arising out of and relating to Respondent's purchase of the Vehicle for $12,000.00 from Appellant, AutoBay, LLC ("AutoBay"). (Da0020-30). After the Appellants obtained an extension of time to respond to the Complaint, the Appellants filed a motion to dismiss the Complaint and compel arbitration. (Da0195-196). In the alternative, Appellant's motion sought to strike portions of the Respondent's duplicative, vexatious and ambiguous Complaint. (Da0002-3). The Respondent filed its opposition on November 26, 2024, and Appellants filed their reply, after adjournment, on December 30, 2024. (Da0201-203; Da0323-324). The Court conducted oral argument on the motion on January 3, 2025, and entered its Order and Decision on January 13, 2025. (Da0001-0013). This appeal followed. (Da0378-383).

STATEMENT OF FACTS

A. Respondent Executed a Contract with an Arbitration Provision.

In connection with the purchase and sale of the Vehicle, Respondent executed eleven (11) sales documents on March 20, 2024, including the Buyer's Order, the RISC, the Retail Installment Sales Contract and Security Agreement (RISC) Addendum, the Service Contract, and the Guaranteed Asset Protection (GAP) Waiver. (Da0099-109; Da0150-173).

i. The Service Contract and Arbitration Provision

Respondent executed the Service Contract in connection with the purchase of the Vehicle from AutoBay for a purchase price of $12,000.00. (See Da167-173). Immediately below Respondent's signature, the vehicle service contract states, in pertinent part:

> This Vehicle Service Contract contains an arbitration provision. It limits certain of **YOUR** rights, including **YOUR** right to obtain relief or damages through court action. Purchase of this Vehicle Service Contract is not required in order to purchase or finance a motor vehicle. [(Da167)(emphasis in original)].

The Arbitration Provision, Section 8 of the Service Contract provides, in full and with emphases in original:

> **SECTION 8. ARBITRATION PROVISION**
>
> **READ THE FOLLOWING ARBITRATION PROVISION ("PROVISION") CAREFULLY. IT**

LIMITS CERTAIN OF YOUR RIGHTS, INCLUDING YOUR RIGHT TO GO TO COURT. THIS PROVISION DOES NOT APPLY TO A COVERED BORROWER AS DEFINED BY FEDERAL MILITARY LENDING ACT REGULATIONS. (Da172).

Except for matters that may be taken to small claims court or as otherwise provided in this Contract, any controversy or **CLAIM** arising out of or relating to it, or to its breach, shall be settled by binding arbitration administered by the American Arbitration Association (the "AAA") in accordance with the rules and provisions of its most appropriate dispute resolution program then in effect. Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction to enter such a judgment. **YOU** and **WE** acknowledge that this Contract evidences a transaction involving interstate commerce. The Federal Arbitration Act will govern the interpretation, enforcement, and proceedings pursuant to this Contract's arbitration provisions.

1. **In no event will YOU have the right to file or participate in a class action or any other collective proceeding against us. Only a court, and not arbitrators, can determine the validity of this class action waiver.**

2. Subject to the preceding paragraph, **YOU** and **WE** consent to have arbitration under this Contract joined with any other arbitration between **YOU**, on the one hand, and us, our agent, our administrator and/or the insurer backing **OUR** obligations under this Contract, on the other hand, to the extent the disputes are related, and joinder is reasonably feasible. The combined arbitration will be governed by this Contract's arbitration provisions unless that is not practical. In that case, it will be governed by the other arbitration provisions.

3. If the AAA is not available to administer this Contract's arbitration, **WE** will select another generally recognized arbitration administrator, reasonably acceptable to **YOU**. The arbitration will be under that administrator's rules, subject to any contrary provisions of this Contract.

4. If **YOU** dispute a **CLAIM** determination under this Contract, **YOU** must initiate arbitration or, when applicable, a court proceeding within sixty (60) calendar days following the determination. If **YOU** have exercised **YOUR** right to seek satisfaction from an insurer backing our obligations under this Contract, the sixty (60) days will be measured from the insurer's determination. **YOUR** failure to meet this requirement will deny **YOU** the right to dispute the determination. In no event may arbitration or a court proceeding arising out of or relating to this Contract, or to its breach, be brought more than two (2) years after this Contract has expired.

5. These **PROVISIONS** will survive the termination of this Contract and apply to cover any controversy, **CLAIM**, or dispute **YOU** may have with an insurer backing **OUR** obligations under this Contract.

   If this Contract is found not to be subject to arbitration, any legal proceeding with respect to a dispute will be tried before a judge in a court of competent jurisdiction. YOU and WE waive the right to a jury trial in any such proceeding.

(See Da172). (emphasis in original).

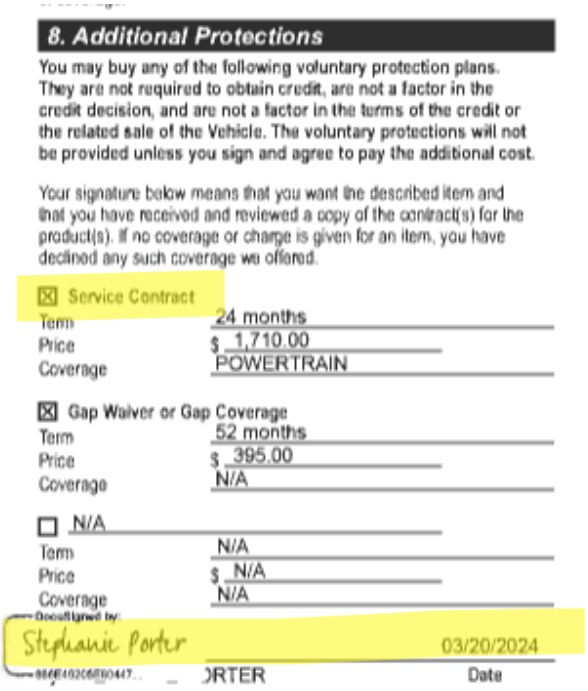
ii. The Buyer's Order

Respondent executed a Buyer's Order that states the price of the vehicle and states that "in the event that you and we enter into a retail installment contract for the financing of the purchase of the Vehicle, the terms of the retail installment

contract control any inconsistencies between this Contract and the retail installment contract." (See Da100-102).

iii. Retail Installment Sales Contract and Security Agreement (RISC)

Respondent financed the vehicle by executing the RISC on March 20, 2024. See Da103-109). The RISC specifically refers to the Service Contract that contains the Arbitration Provision. Respondent affirmatively added 24 month "powertrain" coverage to her purchase through selecting the checkbox for "Service Contract," totaling $1,710.00. (See Da105). The exact visual is depicted below:



8. Additional Protections

You may buy any of the following voluntary protection plans. They are not required to obtain credit, are not a factor in the credit decision, and are not a factor in the terms of the credit or the related sale of the Vehicle. The voluntary protections will not be provided unless you sign and agree to pay the additional cost.

Your signature below means that you want the described item and that you have received and reviewed a copy of the contract(s) for the product(s). If no coverage or charge is given for an item, you have declined any such coverage we offered.

☒ Service Contract
Term 24 months
Price $ 1,710.00
Coverage POWERTRAIN

☒ Gap Waiver or Gap Coverage
Term 52 months
Price $ 395.00
Coverage N/A

☐ N/A
Term N/A
Price $ N/A
Coverage N/A

DocuSigned by:
Stephanie Porter 03/20/2024
ORTER Date

Indeed, the RISC states: "Your signature below means that you want the described item and that you have received and reviewed a copy of the contract(s) for the product(s)." Id. In other words, by affirmatively checking the Service Contract

box, the RISC expressly incorporated the Service Contract and its terms, which contained the Arbitration Provision, into it together with the Buyers Order.

B. Respondent Admits that All Sales Documents are Incorporated into one Contract.

All three of the sales documents outlined above – the Service Contract, the Buyer's Order and the RISC – all comprise one contract for the purchase of the Vehicle. Respondent's Complaint acknowledges this: "[t]his dispute involves **a contract** for the vehicle and any services sold therewith by the dealer and problems arising following that sale." (See Da20, at ¶ 7). (emphasis added). Likewise, Respondent defines the term "sales documents" as "[a]ll sales documents that the dealer gave Respondents for the sale, **collectively**." (See Da16) (emphasis added)).

Indeed, numerous paragraphs in the Complaint use the term "the contract" when referring to various contract documents. Cf. (See Da20-73, at ¶¶ 16, 131, 133, 155, 179, 192, 194, 238, 240, 262). Notably, when seeking to claim purported violations of statute or implied warranties the Respondent refers to "the contract" as opposed to individual contract documents, including contracts regarding service. (Da0068-73). Respondent also acknowledges that the vehicle and services are sold together. ("The vehicle and any services sold therewith […]"). (Da20).

AutoBay offered the Service Contract to the Respondent with the sale of the Vehicle and Respondent accepted the terms. (Da167-173).

C. The Terms of the Contract Include an Arbitration Provision.

In the Service Contract, AutoBay is defined as the "Selling Dealer." Further, AutoBay has rights under the Service Contract, which specifically include: (1) accepting the return of the covered vehicle (Da168); (2) reporting any information to the Selling Dealer that is incorrect within the Service Contract; (Id.) (3) requiring an inspection of the Vehicle prior to any repair being made (Da168-169); and (5) accepting a cancellation request from the Respondent, which (Da169).

D. Respondent's Complaint Alleges Claims Under the Contract.

Respondent's Complaint asserts claims arising out of and relating to the Service Contract. At page 5, the Complaint invokes the "Service Contracts Act", abbreviated in the Complaint as "SCA." Respondent identifies a litany of fictitious defendants including "automotive mechanics, automotive repair shops, … vehicle inspectors, [and] technicians." (Da0018).

As to the Service Contract itself, Respondent alleged wrongdoing in the alleged advertising of the warranty. (Da0021-22). There followed a litany of claims regarding the repair of the vehicle. (Da0024-25). However, the record is devoid of Respondent's reporting of these claims in the manner required by the Service Contract. Indeed, "[Respondent] never placed any claims for coverage under the service contract with the service contract business whose name appears on the service contract Protective Administrative Services, Inc." (Da0199 at ¶ 11). Further,

"[Respondent] never filed any lawsuits or arbitration demands against the service contract business whose name appears on the service contract Protective Administrative Services, Inc." (Id. at ¶ 13).

E. Respondent's Proposed Class Would Likewise Be Subject to the Contract.

Respondent waived any claim to a class action lawsuit through her multiple signatures in the Contract. Any purported class is subject to the Contract and therefore the Arbitration Provision, which calls for arbitration and waiver of class claims. (Da173). The Arbitration Provision specifically states, in bold: "**In no event will YOU have the right to file or participate in a class action or any other collective proceeding against us. Only a court, and not arbitrators, can determine the validity of this class action waiver**". Id.

F. Facts Regarding Appellant's Alternative Argument Involve Respondent's Duplicative, Vexatious and Ambiguous Pleading That Does Not Comply with New Jersey Rules.

The 85-page Complaint begins with a definition section, a section of factual allegations that contains 53 paragraphs, an unusual section regarding CFA applicability totaling 41 paragraphs, and then concludes with 11 Counts comprising a shocking 169 paragraphs. In sum, it is impossible to determine the causes of action against Appellant. (Da0014-98).

i. Definitions Section

Respondent defines several terms differently than the statutes cited throughout the Complaint. For example, the terms "documentary services" and "document fee" are terms used in the Complaint to describe fees allegedly charged in violation of the Automotive Sales Practices Act ("ASP"). Respondent does not rely on the defined terms as set forth in the ASP ("documentary service" and "documentary service fee"), but Respondent instead creates new definitions its Compliant that differ from the definitions in the ASP. For example, ASP does not define a "document fee", but defines a "documentary service fee" as "any monies or other things of value which an automotive dealer accepts from a consume in exchange for documentary service." In contrast, Respondent defines "document fee" as "the document fee sold to plaintiff with the vehicle, if applicable." Cf. N.J.A.C. 13:45A-26B.1 with p. 3, ¶ 1E; cf. also N.J.A.C. 13:45A-26B.3 with (Da0015-18).

Further, the Complaint is riddled with the use of terms that differ from the terms used in its definition section, such as the use of "document**ary** fee**s**." (rather than "document fee" or "documentary service fee"), and "documentary service **fees**" (rather than "document fee"). See Da0020-21; Da0026; Da48).

Additionally, Counts 1 through 5 and Count 10 of the Complaint improperly combine multiple named defendants – the dealership and the owner, Maurice Rached – into the collective term "dealer defendants." (Da0034-76).

Moreover, for many defined terms, the end of the definition includes the phrase "if applicable" which leads to significant confusion as to whether this term is applicable and indicates that that the Complaint is a form that is recycled and reused by the Respondent's counsel. (Da0015-18). The most critical example of how this impacts the pleading is found within the definition of "the guide or the buyers [sic] guide." (Id. at 1(L)). Respondent's definition is: "the buyers [sic] guide that was provided to Respondents (**or** supposed to be so provided), **if applicable**[.]" Id. (emphasis added). This definition is nonsensical and cannot be reasonably responded to when included as a factual allegation in the Complaint.

iii. Consumer Fraud Act ("CFA") Applicability Section

The Complaint includes 41 paragraphs regarding CFA applicability containing citations to law and conclusory statements regarding purported applicability. (Da0027-33). In essence, this provision is a brief written by counsel.

iv. Counts

The Respondent asserts 11 Counts in the Complaint. Count provisions that are unnecessary and lengthy quotations or citations to law include: paragraphs 105-117; 120; 122-124; 126; 128; 129; 130; 138-142; 144; 150-151; 165-167; 175 -176 and 178; 184-191; 198 – 199; 215; 247-254; 257-258; 260-261. (Da0034-73). Respondent's paragraph 120 is a four-page long recitation of what purports to be Federal Trade Commission's guide in a single Complaint paragraph. (Da0038-41).

Further, paragraph 138 is solely a quote from case law with questionable applicability to this matter. (Da0045). ("Under modern conditions the ordinary layman, on responding to the importuning of colorful advertising, has neither the opportunity nor the capacity to inspect or to determine the fitness of an automobile for use...."). Additional examples of unnecessary provisions include: paragraph 124 (a page-long paragraph); paragraph 142 (a page-long paragraph seemingly identical to that of 124); and paragraph 165 (another 4-page paragraph with subparts demarcated with bullet points, rather than with numbers or letters for quick identification or reference).

In sum, it is impossible to determine what is being alleged against Appellant.

v. General Deficiencies Throughout the Complaint

Finally, as written, Appellant must contend with following additional issues throughout the Complaint:

1) Typographical/scrivener's errors, including that paragraphs 1(A) - 1(J) are repeated (Da0015-16); and the numbering of the paragraphs is incorrect (there are no paragraphs 224 through and including 233);

2) The "Respondents" are stated as "individuals with an address of 219 Leona Court, Woodbury, New Jersey, 08096," even though there is only one Respondent and there is no putative class with a single address;

3) Numerous paragraphs assert duplicative information in lengthy paragraphs. For example, paragraphs 124, 128, 129, 130, and 142 all repeat definitions of the terms "as is", "warranty," and "service contract." (Da0041-46);

4) Defined terms are not capitalized or otherwise set apart from any regular phrase (i.e. the defined term "the sale" and the general phrase "the sale")(Da0015-16); and

5) The various purported Counts include multiple causes of action and violations of multiple statutory schemes in an incomprehensible manner. (See Da0034-56) (seeking CFA or "per se" CFA violations).

These errors add to what is already an indecipherable, indiscernible, and incoherent Complaint, making it virtually impossible to Answer.

STANDARD OF REVIEW

When reviewing a denial of a motion to dismiss where the validity of an arbitration agreement is in question, appellate courts review the trial court's ruling de novo and "apply a plenary standard of review and owe no deference to the trial court's conclusions." Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011) (internal quotations omitted); Barr v. Bishop Rosen & Co., 442 N.J. Super 599, 605 (App. Div. 2015). Appellate courts apply the same standard under Rule 4:6-2(e) that governed the trial court. Id. Pursuant to R. 4:6-2(e), a complaint that fails to state a cause of action upon which relief may be granted should be dismissed. See Jenkins v. Region Nine Housing Corp., 306 N.J. Super. 258, 263 (App. Div. 1997), certif. denied, 153 N.J. 405 (1998). Where there is no legal basis for relief and further discovery would not provide one, dismissal is proper under R. 4:6-2(e). Camden County Energy Recovery Assocs. v. New Jersey Department of Environmental Protection, 320 N.J. Super. 59, 64 (App. Div. 1999), aff'd o.b. 170 N.J. 246 (2001).

Here, the Complaint should be dismissed because Respondent improperly filed this matter in the Superior Court of New Jersey contrary to her obligations under the Contract. Accordingly, Appellants respectfully request that this Court dismiss the Complaint in its entirety, so the parties can proceed in arbitration, pursuant to the enforceable Arbitration Provision.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS AND COMPEL ARBITRATION BECAUSE THE PARTIES CONTRACTED TO RESOLVE THEIR DISPUTES THROUGH ARBITRATION (Da8-10).

The trial court erred when it found that the Contract constituted separate agreements rather than one Contract, and then on that basis, it held that the Arbitration Provision did not apply to the claims at issue in this case. (Da0008-10). Not only did Respondent expressly agree to the terms of an integrated Contract that required her to arbitrate, rather than litigate, but she also admitted in her Complaint that the sales documents that she signed constituted one contract. (See Da20, at ¶ 7). In other words, Respondent would not have been permitted to take possession of the Vehicle if she did not execute the sales documents in their entirety and all documents relate to the same thing – the purchase of the Vehicle. Respondent herself admits that the documents amount to one contract, as defined in her Complaint. Id. ("This dispute involved a contract for the vehicle and any services therewith by the dealer and problems arising following that sale.")

Respondent affirmatively opted into the Arbitration Provision included in the Service Contract, which referenced and incorporated the other sales documents including the Buyer's Order and the RISC. (See Da105). Accordingly, arbitration

must be compelled under the terms of the Contract, and Respondent's complaint must be dismissed.

A. The Sales Documents Collectively Constitute One, Integrated Contract (Da100-109; Da0167-172).

Whether parties have agreed to arbitrate their claims is a question of law. Board of Education of Bloomfield v. Bloomfield Education Ass'n., 251 N.J. Super. 379, 383 (App. Div. 1990), aff'd, 126 N.J. 300 (1991); Moreira Constr. Co. v. Township of Wayne, 98 N.J. Super. 570, 575 (App. Div.), certif. denied, 51 N.J. 467 (1968). Basic principles of contract formation and interpretation govern arbitration agreements. Kernahan, 236 N.J. at 307. An agreement to arbitrate, like any other contract, "must be the product of mutual assent, as determined under customary principles of contract law." NAACP of Camden County East v. Foulke Management Corp., 421 N.J. Super. 404, 424 (App. Div. 2011), certif. granted, 209 N.J. 96 (2011), appeal dismissed, 213 N.J. 47 (2013). Under well-established contract law, "where the agreement is evidenced by more than one writing, all of them are to be read together and construed as one contract, and all the writings executed at the same time and relating to the same subject-matter are admissible in evidence." Lawrence v. Tandy & Allen, Inc., 14 N.J. 1, 7 (1953) (internal quotations omitted).

Here, Respondent executed the Buyer's Order, RISC, and Service Contract simultaneously on March 20, 2024. (Da100-109; Da0167-172). Each of the agreements relate to the same subject-matter – the purchase of the Vehicle. The sales

documents are all part and parcel of the same, single transaction. Indeed, the purchase and sale cannot be fragmented into multiple transactions, and Respondent acknowledges this in her Complaint that the sales documents are collectively one Contract. (Da0020).

Notably, the agreements were designed as integrated. The RISC and Buyer's Order are integrated as a conflict with their terms are resolved by the terms of the RISC. (Da0104). The RISC and Service Contract are also integrated in that financing of the Service Contract is included within the RISC, including default provisions which allow for the re-collection of the vehicle if the Service Contract is not paid timely. (Da0103-105).

Accordingly, the sales documents must be read together and construed as one contract, just as the Respondent admits in her Complaint.

B. The Trial Court Erred in Finding that the Service Contract Was Not Incorporated into the RISC (Da6-10).

Basic principles of contract formation and interpretation govern arbitration agreements. Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 307 (2019). Courts permit contractual terms to be incorporated by reference by applying the Quinn analysis: "[F]or there to be a proper and enforceable incorporation by reference of a separate document," (1) the incorporated document "must be described in such terms that its identity may be ascertained beyond doubt" and (2) "the party to be bound by the terms must have had 'knowledge of and assented to the

incorporated terms.'" Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 533 (App. Div. 2009) (quoting 4 Williston on Contracts § 30:25 (Lord Ed. 1999)); Bacon v. Avis Budget Grp., Inc., 959 F.3d 590, 600 (3d Cir. 2020) (citation omitted). Here, the sales documents are incorporated by reference, contained a clear arbitration agreement that Respondent opted into at the same time that she executed all other components of the sales documents to purchase a vehicle.

i. The Sales Documents Were Incorporated Because They Were Described in Such Terms that Their Identity Was Ascertained Beyond Doubt (Da10).

The Appellate Division clarified this issue in the car-purchasing context Stollsteimer v. Foulke Mgmt. Corp., No. A-1182-17T3, 2018 N.J. Super. Unpub. LEXIS 1514, at *7 (App. Div. June 26, 2018), where multiple sales contract documents in a used car sale constituted an integrated agreement, incorporating an enforceable arbitration provision. Indeed, in Stollsteimer, respondents purchased a new motor vehicle from defendant. Id. at *1. In purchasing the car, the respondents signed three contract documents, including a retail installment sales contract (RISC) and an arbitration agreement and class action waiver. Id. *1 and *2. The Appellate Division agreed with the motion judge that all three documents were executed at the same time and related to the same subject-matter – the Respondents' purchase of the vehicle. Id. at *7. Thus, the Court held that the contract documents were incorporated. Ibid.

Importantly, the Court found that a similarly clear and unambiguous arbitration provision was enforceable. Ibid. Federal Courts have also relied upon the analysis of Bacon and Stollsteimer for similar determinations that several separate documents (in used car sales purchases and in other contexts) are integrated into one sales contract and the terms are incorporated. Divalerio v. Best Care Lab., Civil Action No. 20-17268 (FLW), 2021 U.S. Dist. LEXIS 194896, at *33 (D.N.J. Oct. 8, 2021); see also Guia v. World CDJR LLC, No. 18-4294, 2019 U.S. Dist. LEXIS 66271, at *11 (E.D. Pa. Apr. 17, 2019).

Here, like in Stollsteimer, the RISC and Service Contract – containing the Arbitration Provision – were part of the sale contract documents that Respondent executed simultaneously for the purchase of the Vehicle. (Da0100-109; Da0167-172). Indeed, the RISC and Service Contract were signed on the same date as the purchase of the subject vehicle. Id. Further, the terms of the Service Contract states, "VEHICLE SERVICE CONTRACT MUST BE PURCHASED AT TIME OF SALE OF THE VEHICLE." (emphasis in original). Ibid. Moreover, Respondent acknowledges the validity of the Service Contract and the sale contract documents and does not contest that the Service Contract contains the Arbitration Provision. (Da0197-199).

Respondent opted to purchase the Service Contract and accepted the terms by executing the document. (Da0105). ("Your signature below means that you want the

described item and that you have received and reviewed a copy of the contract for the products."). Id. Further, the RISC contains the 24 month "powertrain" coverage to her purchase through selecting the checkbox for "Service Contract," totaling $1,710.00. Id. Additionally, the cost of the Service Contract ($1,710.00) is included in the terms for the financed amount. (Da0104).

Critically, if the Respondent failed to pay the cost of the Service Contract as financed under the RISC, it would be a default under 9.7 of the RISC. (Da0105). In fact, absent from the Service Contract is an independent default provision. (Da167-172). The Service Contract is explicitly intertwined with the RISC, sufficiently described, and therefore incorporated under the first prong of the Quinn analysis. (Da0105).

To rid of any doubt as to incorporation, the foregoing analysis comports with the clear requirements of the Quinn analysis – "the incorporated document 'must be described in such terms that its identity may be ascertained beyond doubt'." Quinn, 410 N.J. Super. at 533. Indeed, the Service Contract is explicitly described in numerous locations in the RISC and intertwines default and remedy provisions. Thus, the trial court erred in not finding that the arbitration provision would implicitly apply to all parties named in all three contracts, thus barring the concept of incorporation. (Da10). The trial court never considered the foregoing facts in its analysis, nor did its decision align with the case law cited above, nor did it

distinguish them. The opinions of Bacon and Stollsteimer, Divalerio, and Guia all run contrary to the trial court's holding.

ii. The Respondent Assented to the Service Contract Containing the Arbitration Provision (Da167-172).

The second prong of the Quinn analysis requires assent to incorporated terms. Specifically, Quinn states "the party to be bound by the terms must have had 'knowledge of and assented to the incorporated terms.'" Quinn, 410 N.J. Super. at 533. "Where a party affixes his signature to a written instrument, such as a release, a conclusive presumption arises that he read, understood and assented to its terms and he will not be heard to complain that he did not comprehend the effect of his act in signing." Peter W. Kero, Inc. v. Terminal Const. Corp., 6 N.J. 361, 368 (1951).

Here, Respondent cannot escape being bound by terms contained in the Arbitration Provision, which she affixed her signature, let alone where she did so three separate times. (Da167-172). The trial court erred in concluding that because each agreement had its own heading and signature, each of the sales documents should be considered separate contracts.

The Court inexplicably rejected that the contract documents were all handed to Respondent by AutoBay. Further, the trial court ignored critical facts previously explained supra including: (1) Respondent identify es the collection of all sales documents as "contract"; (2) the Buyer's Order subordination to the RISC; (3) the Buyer's Order inclusion of the cost of the Service Contract within its line

itemization; (4) the RISC's reference to the Service Contract; (5) the RISC's incorporation of financing of the Service Contract and default provisions; (6) the Guaranteed Asset Protection Waiver is explicitly incorporated into the other documents (Da166); and (7) the FTC Regulations (16 CFR §455.3) state that the Buyer's Guide is incorporated into the contract. (Da0100-109; Da0160-172). All these critical facts show that the sales documents were provided to the Respondent at the same time, for the same purpose, and are collectively incorporated into one agreement to effectuate the sale of the Vehicle. The trial court acknowledged that all of the terms of each agreement were executed by the Respondent showing her assent. Instead of leaving the agreements to their explicit language regarding incorporation and the circumstances surrounding the execution of the documents, the trial court improperly cast those facts aside and found that the Respondent would find that "Autobay was not part of the Service Contract." (Da0006-10). This Court should instead rely on the plain text of the agreements and the circumstances surrounding the execution of the agreements to find that the agreements were incorporated collectively into one contract.

C. The Trial Court Erred in Holding that Appellants Are Not Third-Party Beneficiary of the Service Contract Because the Defendants Have a Right to Performance. (Da11-12).

Here, the trial court erred in finding, "the Service Contract fails to name AutoBay, LLC." (Da0008). Appellants respectfully submit that the trial court failed

to adequately review the Service Contract which clearly lists, "AutoBay" as the "Selling Dealer." (Da0167). As the "Selling Dealer," Appellants were conferred multiple benefits under the Service Contract as third-party beneficiaries.

Indeed, "[n]onsignatories of a contract ... may compel arbitration or be subject to arbitration if the nonparty is ... a third[-]party beneficiary to the contract." As Respondent admits, "[t]he contractual intent to recognize a right to performance in the third person is the key." Broadway Maint. Corp. v. Rutgers State Univ., 90 N.J. 253, 259 (1982); Ross v. Lowitz, 222 N.J. 494, 513 (2015)). Ultimately, the real test is whether the contracting parties intended that a third-party receive a benefit which might be enforced in the courts. Pollack v. Quick Quality Rests., Inc., 452 N.J. Super. 174, 185-86 (App. Div. 2017) (emphasis added). **The contract need not specifically identify the [the third-party]**, as long as the pertinent provisions of the contract and the surrounding circumstances demonstrate that the parties intended the [third-party] to receive a direct benefit from the contract. Id. (emphasis added).

In Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174 (2013), the New Jersey Supreme Court acknowledged that a non-signatory to an arbitration agreement might be compelled to arbitrate based on principles of agency or other legal theories. Id. at 187. The Court explained that the "United States Supreme Court has recognized that, in the context of arbitration, traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the

corporate veil, alter ego, incorporation by reference, third party beneficiary theories, waiver and estoppel." Ibid. In other words, in assessing whether parties can be compelled to arbitrate, courts can use principles of contract law even in the absence of an express arbitration clause. Crystal Point Condo. Ass'n v. Kinsale Ins. Co., 466 N.J. Super. 471, 484-85 (App. Div. 2021), rev'd on other grounds, 251 N.J. 437 (2022) (citing Hirsch, 215 N.J. at 188-89).

The trial court found that the Appellants are not third-party beneficiaries because there is no mention of AutoBay within the Service Contract. (Da0008). However, the Appellate Court has concluded that third-party beneficiary status is conferred upon the contract regardless of whether the party is specifically named. See Pollack, 452 N.J. Super. at 185-86. In fact, the Appellant (referred to as "Selling Dealer") has many rights under the Service Contract, including: (1) accepting the return of the covered vehicle;(2) reporting any information to the Selling Dealer that is incorrect within the Service Contract; (3) requiring an inspection of the Vehicle prior to any repair being made; and (5) accepting a cancellation request from the Respondent, which establishes the effective date of cancellation and date of refund. (Da0167-172).

The Respondent was well aware of the import and involvement of the "Selling Dealer" (Appellant AutoBay) in the Service Contract and it was reasonable to contemplate further involvement in any arbitration that could be brought relating to

same. Indeed, any claim under the Service Contract would need to include the Selling Dealer, especially where the dispute involves whether the claim is covered and whether the particular issue with the Vehicle was from prior to the purchase of the Vehicle at the dealership. Accordingly, the Defendants are third-party beneficiaries of the Service Contract, inclusive of the Arbitration Provision.

POINT II

THE TRIAL COURT ERRED WHEN DECIDED THAT THE ARBITRATION PROVISION DID NOT APPLY TO RESPONDENT'S CLAIMS BROUGHT IN THE COMPLAINT BECAUSE RESPONDENT ASSENTED TO THE TERMS OF THE ARBITRATION PROVISION AND THE TERMS APPLY TO THE CLAIMS IN RESPONDENT'S COMPLAINT. (Da9).

The Arbitration Provision of the Contract is indisputably enforceable because it expressly provides for arbitration and the Respondent's waiver of a judicial forum, including involvement in class actions. (Da0172). An arbitration clause must satisfy the requirements set forth in Atalese, such that the arbitration clause must be (1) "phrased in plain language that is understandable to the reasonable consumer"; (2) clearly and unambiguously explain that by choosing arbitration, the "Respondent is giving up her right to bring her claims in a court or have a jury resolve the dispute."; and (3) must explain that the consumer is giving up her right to bring her claims in court or have a jury resolve the dispute. Atalese v. U.S. Legal Services Group. L.P., 219 N.J. 430, 440-447 (2014). Courts do not require specific language for a waiver provision to be enforceable; instead, the provision must plainly state that there is a

difference between resolving a dispute in arbitration and in a judicial forum. Kernahan, 236 N.J. Super. at 323; Atalese, 219 N.J. 430 (2014).

A. The Respondent Assented to Arbitration by Accepting the Terms of the Arbitration Provision in the Service Contract. (Da167).

The trial court accepted the Respondent's argument that she did not assent to arbitrate her claims because the Service Contract is limited to claims between her and the Service Contract Obligor. (Da0005). However, Respondent clearly executed the Service Contract containing the express terms of the Arbitration Provision, including the Selling Dealer's rights enforceable therein. (Da0167-172). Immediately below the Respondent's signature, the Service Contract states, in pertinent part: "This Vehicle Service Contract contains an arbitration provision. It limits certain of **YOUR** rights, including **YOUR** right to obtain relief or damages through court action." (Da0167). (emphasis in original).

Absent in the Arbitration Provision is language limiting its application to the Respondent and the Service Contract Obligor, nor is the following provision limited to an agreement between the Service Contract Obligor and the Respondent.

> Except for matters that may be taken to small claims court or as otherwise provided in this Contract, any controversy or **CLAIM** arising out of or relating to it, or to its breach, shall be settled by binding arbitration administered by the American Arbitration Association (the "AAA") in accordance with the rules and provisions of its most appropriate dispute resolution program then in effect.

(Da0172). In fact, it specifically states that "any controversy or **CLAIM** arising out of or relating to it, or to its breach, shall be settled by binding arbitration." Id. (emphasis in original).

Likewise, the Respondent acknowledged and assented to waive class action claims that are precisely at issue in the case. Id. The Arbitration Provision explicitly states that Respondent cannot bring class action claims. The terms are set forth below: "In no event will YOU have the right to file or participate in a class action or any other collective proceeding against us. Only a court, and not arbitrators, can determine the validity of this class action waiver." Id. (emphasis in original).

In light of the foregoing, the Respondent agreed to the terms of the Service Contract and RISC, thereby assenting to the Arbitration Provision and should not be permitted to back out of her obligations now by claiming not to have read it. Santana v. SmileDirectClub, LLC, 475 N.J. Super. 279, 286 (App. Div. 2023); McGinty v. Jia Wen Zheng, No. A-1368-23, 2024 N.J. Super. Unpub. LEXIS 2203, at *24 (App. Div. Sep. 20, 2024) (citing Skuse v. Pfizer, Inc., 244 N.J. 30, 46 (2020); quoting Riverside Chiropractic Grp. v. Mercury Ins. Co., 404 N.J. Super. 228, 238 (App. Div. 2008) ("[A]s a general rule, 'one who does not choose to read a contract before signing it cannot later relieve himself [or herself] of its burdens.'").

B. The Terms of the Arbitration Provision Apply to the Respondents Allegations in Her Complaint. (Da9).

New Jersey courts have consistently held that the "[a]rbitrability of a particular claim depends not upon the characterization of the claim, but upon the relationship of the claim to the subject matter of the arbitration clause." Jansen v. Salomon Smith Barney, 342 N.J. Super. 254, 258 (App. Div.), certif. denied, 170 N.J. 205 (2001) (internal citations omitted).

Here, pursuant to the Contract, Respondent agreed to proceed with the claims brought in her Complaint only in arbitration. The transaction was formed on this basis. Specifically, in the Arbitration Provision in the Contract states:

> **READ THE FOLLOWING ARBITRATION PROVISION ("PROVISION") CAREFULLY. IT LIMITS CERTAIN OF YOUR RIGHTS, INCLUDING YOUR RIGHT TO GO TO COURT. THIS PROVISION DOES NOT APPLY TO A COVERED BORROWER AS DEFINED BY FEDERAL MILITARY LENDING ACT REGULATIONS.**
>
> 1. **In no event will YOU have the right to file or participate in a class action or any other collective proceeding against us. Only a court, and not arbitrators, can determine the validity of this class action waiver**.

(Da0172) (emphasis in original). This language is plain, clear, in bold, and the provision governing limitations on Respondent's right to sue is in all capital letters. The Arbitration Provision explicitly states the waiver of a jury trial and recourse to the courts. Moreover, it highlights the severity and seriousness of the provision by

directing the signatory to "**READ THE FOLLOWING ARBITRATION PROVISION CAREFULLY"** in bold and all caps font. Id. (emphasis in original). The Arbitration Provision expressly provides the scope of Respondent's waiver – in bold and capital letters – which is "any controversy or CLAIM arising out of or relating to [the Service Contract], or to its breach." Id.

In this case, the claims asserted by Respondent are covered by the Arbitration Provision. Indeed, the Service Contract specifically provides coverage for those mechanical issues referenced in the Complaint or could be implicated by such allegations: (i.e. power train assembly, brake systems, air conditioning, electronic ignition module, door lock switch, alternator, gaskets of covered parts, etc.) (Da0170). In fact, the Complaint and the July 23, 2024 report by Richard Roth attached to the Complaint, states that there are issues with each of the foregoing vehicle parts/assemblies. (Da0024-25).

Further, statutory and regulatory claims are also waived by the Arbitration Provision. The Complaint invokes the Service Contracts Act (N.J.S.A. 56:12-87, et seq.); Used Car Lemon Law (N.J.S.A. 56:8-67, et. seq.); Motor Vehicle Inspection Law (N.J.S.A. 39:10-26, et seq.); and the Automotive Repair Regulations (N.J.S.A. 13:45A-26C.1 et seq.) (Da0017-18). All of these statutes involve vehicle mechanical issues or warranty claims, just like the Respondent's Complaint. ((See Da0021)(relating to advertising the warranty, relating to the Service Contract)_;

((see also, Da0024-25)(relating to repairs to the Vehicle)). Further, a litany of fictitious defendants specifically claiming that "automotive mechanics, automotive repair shops, … vehicle inspectors, [and] technicians" may be identified as parties. (Da0019). There can be no question that Respondent knew that these claims, whether statutory or not, were directly within the waiver provided in the Arbitration Provision of the Service Contract, through the plain language used in the Arbitration Provision.

Moreover, Respondent cannot escape the requirement to arbitrate because she failed to communicate with the Service Contract Obligor or the Appellants regarding her vehicle as required by the terms of the Contract, or because she failed to bring claims against the Service Contract Obligor in this litigation. (Da0197-199). Instead, the analysis requires the court to consider the relationship of the claim to the subject matter of the Arbitration Provision. Jansen, 342 N.J. Super. 258.

Consumer fraud claims also fall within the scope of the Arbitration Provision. Yet, Respondent's complaint asserts that a documentary service was overcharged. Such an assertion is directly related to the purchase and sale of the Vehicle and the Service Contract being that it was a document prepared by the Appellants, the clerical costs of which is directly contested by the Respondent. Respondent cannot escape the fact that the Arbitration Provision is broad and includes all of its claims in this case. Accordingly, this Court should not ignore the enforceable Arbitration

Provision within the integrated Contract, and the law set forth by the New Jersey courts permitting this litigation to proceed.

For the foregoing reasons, the claims asserted in the Complaint must be arbitrated. The Appellants respectfully request that this Appellate Court overturn the trial court's order and decision, dismiss the Complaint, and compel Respondent to arbitrate any and all claims against them before the AAA.

POINT III

THE TRIAL COURT ERRED WHEN IT DECIDED PLAITNIFF'S CLAIMS MUST BE RESOLVED IN LITIGATION RATHER THAN IN ARBITRATION DESPITE COURT'S ACCEPTANCE THAT ARBITRATION IS THE FAVORED FORUM FOR DISPUTE RESOLUTION (Da6-11).

Arbitration is a favored method of dispute resolution both at the Federal level and in New Jersey. See, e.g., Atalese, 219 N.J. at 440 (2014); Martindale v. Sandvik, Inc., 173 N.J. 76, 84-85 (2002); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006). Respondent contends that the court decides mutuality of assent. The courts have a long-standing opinion that "[a]n agreement to arbitrate should be read liberally in favor of arbitration." Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993). See J. Baranello & Sons, Inc. v. Davidson & Howard Plumbing & Heating, Inc., 168 N.J. Super. 502, 507 (App. Div. 1979) (citing Moreira Constr. Co. v. Township of Wayne, 98 N.J. Super. 570, 576 (App. Div. 1968). **Any doubts concerning the**

scope of the arbitration agreement, *i.e.*, what issues are arbitrable, **must be resolved in favor of arbitration**. See Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630 n. 5 (2009) (stating that "we have said many times that federal law requires that 'questions of arbitrability … be addressed with a healthy regard for the federal policy favoring arbitration"; quoting in part, Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)) (emphasis added).

Here, the trial court expressed doubt as to the scope of the Arbitration Provision. (Da0008-10). In sum, in New Jersey, arbitration is favored and any doubts about the scope of the arbitration agreement must be resolved in favor of arbitration. Arthur Anderson LLP, 556 U.S. at 630. If the trial court doubted that Respondent's reasonable understanding would have led to the conclusion that Appellant was not a party to the Service Contract or that as the Selling Dealer, Respondent would not have third-party beneficiary status, the doubt should be resolved in the forum of arbitration, not litigation.

POINT IV

THE TRIAL COURT ERRED IN FINDING THAT THE HEIGHTENED PLEADING STANDARD FOR FRAUD WAS THE APPLICABLE STANDARD FOR DETERMINING WHETHER PLAINTIFF'S VEXATIOUS COMPLAINT WAS VIOLATIVE OF PLEADING REQUIREMENTS. (Da12-13).

The Complaint should be stricken as duplicative, vexatious, and incomprehensible. A proper pleading is "simple, concise and direct." R. 4:5-7. It is

undeniable that Plaintiff's Complaint is prolix and consists of allegations that are repetitive, purely legal citations and multiple pages long. For example, the Respondent pursues four (4) Counts of CFA violations (Counts 1 through 4) that repeatedly cite the same statutory duties, without explaining how those duties apply to individual parties, how the claims are distinct, or even which claim applies to which party. (Da0034-56). These claims appear to overlap substantially, but the vagueness makes it impossible to say for certain. The Respondent should not be permitted to pursue such unintelligible claims.

Critically, Counts 1 through 5 and Count 10 of the Complaint improperly combine multiple named defendants – the dealership and the owner, Maurice Rached – into the collective term "dealer defendants" which is an improper form of pleading and makes these paragraphs factually inconsistent, legally objectionable, vague, and unintelligible. These Counts seek liability and damages from "dealer defendants," despite differing standards for the dealer and the owner.

The Complaint is also too confusing to satisfy notice pleading standards. Entire portions of the complaint are copied and pasted repeatedly, usually with minor changes (but sometimes with no changes at all). Compounding the prolixity are numerous paragraphs that are just propositions of law and citations to caselaw, which are neither "statement[s] of facts on which the claim is based, showing that the pleader is entitled to relief," nor "demand[s] for judgment for the relief to which

the pleader claims entitlement." R. 4:5-2; see also Van Sickell v. Margolis, 109 N.J. Super. 14, 18 (App. Div. 1969), aff'd o.b., 55 N.J. 355 (1970) ("the pleader's conclusions of law are not admissions of facts.").

Finally, to the extent that there exist actual factual allegations buried between the misleading definitions and regurgitated verbiage, they are inconsistent and confusing. On the whole, the prolix Complaint is so riddled with problems that it is "abusive of the court." R. 4:6-4(b). Specifically, the Appellants seek to have the Court dismiss or strike the pleading in light of the following issues:

A. Paragraphs 1(AA) – (JJ) (the Definitions Section)(Da15-18).

These paragraphs should be stricken because: (1) definitions of terms contrary to statutory definitions; (2) improperly combine multiple definitions in one term; (3) defined terms including the phrase "if applicable"; and (4) definitions without reference to pages set forth in the Exhibit A to the Complaint. Any admission to a Complaint paragraph for an improperly defined term allows the Respondent to conflate the admission with a violation of the statute. These paragraphs must be stricken because they are ambiguous, contradictory, and incomprehensible.

B. The CFA Applicability Section (Da27-33).

In essence, this entire section is a brief written by counsel. It is purely used to prejudice the Appellants, such that any person reading the complaint assumes that the uncontested citations to law purport actual CFA liability. This section consists

of unnecessary citations to case law, sections of the CFA, and conclusory statements based on Respondent's own interpretation, or misinterpretation, of the law. This is the incorrect forum for legal argument and as such results in prejudice to the defendants that must be stricken.

C. Paragraphs in the Counts (Da34-76).

Paragraphs throughout the 11 Counts of the Complaint are pled using unnecessary quotations or citations to law that do not constitute factual allegations. Most egregious, is Respondent's paragraph 120, which is a four-page long recitation of what purports to be Federal Trade Commission's guide in a single Complaint paragraph. There can be no reasonable argument that a four-page long paragraph devoid of any factual allegation and quoting another source's text comports with the requirements of R. 4:5-7 – to be "simple, concise and direct." (Da0038-41).

Another example is paragraph 138, which is simply a quote from case law of limited applicability, if any, to this matter. ((See Da00450)("Under modern conditions the ordinary layman, on responding to the importuning of colorful advertising, has neither the opportunity nor the capacity to inspect or to determine the fitness of an automobile for use....")). Additional examples of the unnecessary provisions of the Counts include: paragraph 124 (a page-long paragraph); paragraph 142 (a page-long paragraph seemingly identical to that of 124); and paragraph 165

(another 4-page paragraph with subparts demarcated with bullet points, rather than with numbers or letters for quick identification or reference).

The Appellants therefore ask this Court to dismiss or strike paragraphs of the Complaint to prohibit Respondent from pleading those vexatious and duplicative allegations and citations to law, as outlined herein. Respondent must replead in a manner consistent with R. 4:5-7: "simple, concise and direct." Doing so will not only comport with the Rule and this Court's direction for simplicity, but it will also conserve judicial resources by assisting the Court to understand the Respondent's claims and allowing the Appellants to answer those (and only those) allegations. It will also aid in resolving any discovery disputes and move the case efficiently towards resolution. This is especially true in light of an eventual attempt by Respondent's counsel to seek class certification and summary judgment on these currently incomprehensible allegations. Accordingly, the Appellants respectfully request that this Court strike the Complaint in full under R. 4:6-4(b) and order a proper repleading.

The trial court erred in failing to consider any of the foregoing arguments and paragraphs cited above. Instead, it simply relied on the Respondent's argument that the provisions (even those citing purely law, such as the 40 paragraph CFA Applicability section) were necessary to meet the heightened fraud pleading

standard. (Da0013). None of the foregoing provisions are necessary to meet the heightened fraud pleading standard, so the trial court's decision should be reversed.

CONCLUSION

The Arbitration Provision is clear – directing Respondent in bolded, capital letters, to read it prior to executing because Respondent assented to arbitration and waived her right to a class action. As outlined, Respondent executed the sales documents comprising the Contract three times, evidencing her understanding and acknowledgment of the Arbitration Provision and the Contract, as one integrated document at large. All of the components of the Contract were executed simultaneously and therefore are considered one contract under New Jersey Law. The Arbitration Provision is valid and, given New Jersey's long-standing favor of arbitration provisions, the Appellants respectfully urge that the Complaint be dismissed in its entirety, with prejudice, pursuant to R. 4:6-2(e), and the Respondent be ordered to proceed to arbitration.

Furthermore, the Complaint is vexatious and prolix in violation of R. 4:6-4(b), and the Appellants respectfully request that the Court dismiss (or strike portions of) the pleading if it is not dismissed in its entirety.

Respectfully submitted,

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Dated: March 31, 2025

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STEPHANIE PORTER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARY SITUATED,
PLAINTIFF-RESPONDENT,
V.
AUTOBAY LLC, MAURICE RACHED, UNITED AUTO CREDIT CORPORATION AND JOHN DOES 1-10,
DEFENDANTS-APPELLANTS.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-1528-24
ON APPEAL FROM ORDERS FILED 1-13-25 IN THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CIVIL PART, GLOUCESTER COUNTY
DOCKET NO. GLO-L-994-24
SAT BELOW: HON. BENJAMIN D. MORGAN, J.S.C.

SUBMITTED 4-30-25

BRIEF OF PLAINTIFF-RESPONDENT

Counsel Of Record For Plaintiff-Appellant:	Lewis G. Adler Lee M. Perlman Paul DePetris
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E. ABBREVIATIONS USED HEREIN

For brevity's sake, hereafter plaintiffs shall use the following abbreviations:

- This particular case - this case or the case.
- Plaintiffs identified above - plaintiffs.
- AUTOBAY LLC, the dealer – the dealer.
- MAURICE RACHED, the owner of the dealer – the owner.
- The dealer and owner collectively – the dealer defendants.
- The salesperson that sold the vehicle for the dealer, if applicable – the salesperson.
- UNITED AUTO CREDIT CORPORATION, the lender financing the vehicle – the lender.
- John Does 1-10 – fictitious parties named to the arbitration demand – the Does.
- Plaintiffs and the dealer defendants collectively – the parties.
- The 2011 CHEVROLET CAMARO vehicle which is the subject of this dispute and that plaintiffs bought from the dealer - the vehicle.
- The dealer's dealership located at, 4436 Route 130 North, Burlington, New Jersey 08106 – the dealership.
- The sale that is the subject of this case - the sale.
- The buyer's order for the sale of the vehicle and any services sold

therewith – the buyer's order.

- The retail installment sale contract for the vehicle, if applicable – the RISC or the contract.
- The documentary services sold to plaintiffs with the vehicle – the services or the documentary services.
- The document fee sold to plaintiffs with the vehicle, if applicable – the document fee.
- The registration/title fees sold to plaintiffs with the vehicle, if applicable – the government fees
- The service contract sold with the vehicle, if applicable – the service contract.
- The service contract business named on the service contract, if applicable – the service contract business.
- The advertisement advertising the vehicle for sale, if applicable – the advertisement.
- The price tag for the vehicle displayed at the dealership relative to the vehicle (or if not displayed there, that should have been so displayed) – the price tag.
- The buyers guide that was provided to plaintiffs (or supposed to be so provided), if applicable – the guide or the buyers guide.

- The warranty that the dealer issued with the vehicle at time of sale, if applicable – the warranty.
- All sales documents that the dealer gave plaintiffs for the sale, collectively – the sales documents.
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- The expert's report about the vehicle – the report.The arbitration clause that is the subject of this case – the clause.
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County – the trial court.

- The Superior Court of New Jersey, Appellate Division – the court or this court.

PRELIMINARY STATEMENT

In this consumer protection case against a dealer and its owner involving the dealer's sale of a vehicle to plaintiff and the bank financing the sale, must plaintiff arbitrate the case? This doesn't involve a challenge to the sales contract for the vehicle – i.e., plaintiff doesn't dispute purchasing the vehicle or services related thereto. Instead, plaintiff says there was no assent to arbitrate the case because the parties never entered into an arbitration agreement covering the dispute. Nevertheless, defendants attempted to enforce an arbitration clause contained in a service contract between plaintiff and a service contract business. Dissatisfied with the court's refusal to enforce the arbitration clause of that third party contract not covering the dispute, defendants seek reversal of the order denying a motion to dismiss and to compel arbitration. Plaintiff agrees with the trial court's determination that there was an absence of assent to arbitration and therefore, asks this court to affirm the trial court's decision on the orders.

Aside from seeking to compel arbitration, defendants sought dismissal of the complaint because it was supposedly over pled. However, in this heightened pleading atmosphere, defendants failed to offer any cases whatsoever to support this position and the trial court correctly found otherwise.

PROCEDURAL HISTORY[1]

On 1-23-23, plaintiff filed a putative class action complaint in the Superior Court of New Jersey, Law Division, Civil Part, Camden County against defendants, pleading these causes of action:

Count	Cause Of Action
1	MVAP, FTC REGULATIONS & UCLL DISCLOSURES FAILURE TO GIVE BUYERS GUIDE - PER SE CFA VIOLATIONS
2	UCLL MECHANICAL CONDITION NONDISCLOSURES - PER SE CFA VIOLATIONS
3	ASP VIOLATIONS - PER SE CFA VIOLATIONS
4	SECTION 2 CFA VIOLATIONS
5	BREACH OF CONTRACT
6	VIOLATION OF THE COVENANT OF GOOD FAITH AND FAIR DEALING
7	BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY
8	PROMISSORY ESTOPPEL

[1] 1T refers to the transcript of hearing dated 1-3-25 on the motion to dismiss complaint and compel arbitration.

9	IMPLIED WARRANTY OF GOOD WORKMANSHIP
10	TCCWNA VIOLATION
11	CLAIMS AGAINST THE DOES ONLY

Da14-Da98. This case involves multiple causes of action pled for statutory violations and none whatsoever pertaining to the breach of the service contract. Da14-Da98. The complaint demands a jury trial. 65a. The complaint does not include any claims pled against any service contract businesses. Da14-Da98, §2. The complaint does not name any service contract business as a defendant to the case. 179a, §3.

On 11-1-24, defendants filed a motion to dismiss complaint and compel arbitration. Da195a. On 11-26-24, plaintiff filed opposition to the aforesaid motion. Da197-Da322. On 1-3-25 the court held oral argument on the aforesaid motion. 1T1. On 1-13-25, the trial court filed an order denying the motion. Da1-Da3. On 1-30-25, the trial court filed a consent order staying proceedings. Da384-Da385. On 1-28-25, defendants filed a notice of appeal. Da378-Da383.

STATEMENT OF FACTS

This dispute involves the sale of a vehicle to plaintiff by the dealer via a contract assigned to the lender. Da14-Da98. The complaint does not include any claims pled against any service contract businesses or name any such businesses as party defendants. Da14-Da98. The bottom of the first page of the service contract names Protective Administrative Services, Inc. as the "obligor". Da167. Page 2 of the service contract states:

- This is a Vehicle Service Contract between the **SERVICE CONTRACT HOLDER** and the **OBLIGOR.**
- **"OBLIGOR", "WE", "US"** or **"OUR"** means the entity obligated to perform under this Vehicle Service Contract.
- **"SELLING DEALER"** means the Dealer described as such on this Vehicle Service Contract.
- **"SERVICE CONTRACT HOLDER," "YOU,"** and **"YOUR"** mean the owner designated as such on this Vehicle Service Contract.

Da168. The service contract does not state that it is between the selling dealer of the vehicle and plaintiffs. Da167-Da173. The service contract does not state that the selling dealer of the vehicle is the obligor under the contract. Da167-Da173. The service contract does not state that the selling dealer and plaintiffs agreed to arbitrate any disputes between the parties. Da167-Da173. Plaintiff never had any

dealings with the service contract business whose name appears on the service contract – Protective Administrative Services, Inc. Da199, §10. Plaintiff never placed any claims for coverage under the service contract with the service contract business whose name appears on the service contract –Protective Administrative Services, Inc. Da199, §11. Plaintiffs never had any disputes with the service contract business whose name appears on the service contract – Protective Administrative Services, Inc. Da199, §12. Plaintiffs never filed any lawsuits or arbitration demands against the service contract business whose name appears on the service contract – Protective Administrative Services, Inc. Da199, §13. Plaintiffs weren't given any document from the dealer that refers to plaintiffs agreeing to any arbitration of disputes with the dealer. Da199, §15. Finally, the arbitration clause fails to refer to any agreement to arbitrate statutory claims such as those at play here:

> Except for matters that may be taken to small claims court or as otherwise provided in this Contract, any controversy or claim arising out of or relating to it, or to its breach, shall be settled by binding arbitration administered by the American Arbitration Association (the "AAA") in accordance with the rules and provisions of its most appropriate dispute resolution program then in effect.

Da172, Section 8.

LEGAL ARGUMENT[2]

A. THE STANDARD OF REVIEW

An order compelling or deny arbitration is appealable once entered, regardless of if that order adjudicates all issues.[3] A trial court's factual findings are reviewed for an abuse of discretion, being binding on appeal if supported by adequate, substantial, credible evidence.[4] The validity of an arbitration agreement is a question of law.[5] The standard of review of a trial court's grant of a motion to dismiss under R. 4:6-2(e) is the same as that employed by the trial court[6] - i.e., the complaint is searched in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taken, with every reasonable inference accorded to plaintiff.[7]

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[2] Because federal court decisions are not binding on this Court regardless of whether they are published, see *In re Contest of Nov. 8, 2011,* 210 *N.J.* 29, 45 (2012), there is nothing precluding plaintiff from citing to unpublished federal court opinions. *Daniels v. Hollister Co*., 440 N.J. Super. 359, n. 7 (App. Div. 2015).

[3] *GMAC v. Pittella*, 205 N.J. 572, 587 (2011).

[4] See *Cumberland Farms, Inc. v. N.J. Dep't of Env't. Prot.*, 447 N.J. Super. 423, 437-38 (App. Div. 2016).

[5] *Atalese v. U.S. Legal Services Group*, 219 N.J. 430 (2014), cert. denied, 135 S. Ct. 2804 (2015).

[6] *Prudential Prop. & Cas. Ins. Co. v. Boylan*, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998).

[7] *Printing Mart v. Sharp Electronics Corp*., 116 N.J. 739, 746 (1989).

I. THE TRIAL COURT PROPERLY FOUND THAT THE ARBITRATION CLAUSE IN THE SERVICE CONTRACT DIDN'T BIND PLANTIFF TO ARBITRATE CLAIMS WITH DEFENDANTS

(Da1-Da13; 1T3-1T13)

This case doesn't involve a challenge to the contract as a whole – plaintiff doesn't dispute purchasing the vehicle or services related thereto. Da14-Da98. Nor does this involve questions of whether documents were signed. Da14-Da98. Instead, plaintiff says there was no assent to arbitrate the case with defendants (Da199, §15) and the trial court agreed, rejecting defendants' argument that defendants could enforce the arbitration clause contained in the service contract, which is clearly between plaintiff and the service contract business:

> The question before the court is not whether the arbitration provision is enforceable, but whether Defendant Autobay may utilize that provision against Plaintiff to compel such arbitration.
>
> ***
>
> Here, the Service Contract states, in more than one instance, it is only between Plaintiff and Protective Administrative Services, Inc. Ex. A, 69. The Service Contract fails to name "Autobay, LLC" on the document, unlike the case for the RISC and the Buyer's Order which do specifically name Autobay, LLC. Ex. A, 86, 90.

Specific language in the Service Contract states:

"This contract is between YOU and the OBLIGOR and provides coverage as indicated above."

"OBLIGOR,' 'WE,' 'US,' OR 'OUR' means the entity obligated to perform under this Vehicle Services Contract…the obligor is Protective Administrative Services, Inc."

"[T]he obligor is Protective Administrative Services, Inc."

"YOU and WE consent to have arbitration under this Contract"

"This is a vehicle service contract between the SERVICE CONTRACT HOLDER and the OBLIGOR."

"SERVICE CONTRACT HOLDER,' 'YOU,' AND 'YOUR' means the owner designated as such on this Vehicle Service Contract."

From these excerpts, the court finds it clear that the Service Contract is only between Plaintiff and Protective Administrative Services, Inc., and not Defendant Autobay. In reading and signing the Service Contract, Plaintiff would not have read any plain language that could objectively indicate to a reasonable consumer that she was expressly waiving her right to a judicial forum in a dispute with an unnamed party to the contract. Rather, in reading the plain language of the Service Contract, Plaintiff would have understood she waived her right to a judicial forum only with Protective Administrative

Services, Inc. The fact that she may have signed other contracts with other parties does not alter this language or Plaintiff's reasonable understanding. For example, Plaintiff herself states that she "never filed any lawsuits or arbitration demands against the service contract business whose name appears on the service contract – Protective Administrative Services, Inc.," indicating she was aware of the Arbitration Agreement. Certif. of Plaintiff, ¶ 13. This court cannot create a different contract than that which the parties agreed to perform.

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Furthermore, in looking at the Buyer's Order and the RISC, the definitions specifically include Defendant Autobay by listing the "dealer" and "seller" as the other party to the contracts. This would reasonably indicate to Plaintiff that two of three agreements pertained to Defendant Autobay, and the third agreement pertained to Protective Administrative Services, Inc.

As an alternative argument, Defendant Autobay explains the arbitration provision was incorporated into the RISC and the Buyer's Order by reference. This would require this court to find Plaintiff signed all three (3) contracts at the same time, and by doing so, agreed that the arbitration provision in one would implicitly apply to all parties named in all 3 contracts. The court cannot do this.

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Each of the three (3) documents possesses its own headings that include the parties' names, as well as a definition section, and label the provisions from "1." This indicates that each agreement, each having its own signatures from the parties, are all separate agreements. Though Defendant Autobay may have been the party that handed over the Service Contract, that is not indicative that Defendant Autobay is part of that contract. Rather, from the plain reading of the contract, it is clear that Defendant Autobay was not part of the Service Contract. Nor is there anything in the agreements showing an express intent to incorporate all of each other's terms into the other agreements.

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Alternatively, Plaintiff asserts that she is not bound to the arbitration clause because Autobay, LLC is not a third-party beneficiary of the Service Contract.

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In looking at the Arbitration Clause in the Service Contract, there is no mention of Defendant Autobay. In looking further at the Service Contract, the terms indicate the agreement is between only Plaintiff and Protective

> Administrative Services, Inc, and there are no contract terms that indicate Defendant Autobay would be part of the Service Contract. In considering the circumstances of all three (3) agreements, Plaintiff has two agreements with Defendant Autobay and the Service Contract was specifically between Plaintiff and Protective Administrative Services, Inc. There is nothing to indicate an intent by the parties to make Defendant Autobay a third-party beneficiary to the Service Contract.

Da6; Da8-Da12 (citations omitted). "[T]his court does not lightly disturb factual findings of the lower tribunal."[8]

This case is quite similar to *Nawrocki v. J&J Auto Outlet*, A-2813-22 (App. Div. Nov 03, 2023), in which this court recently rejected the efforts of the defense firm representing defendants to challenge another complaint against a car dealer and its owners on the same grounds. There, the Appellate Division refused to enforce an arbitration clause between the service contract business and the plaintiffs. *Nawrocki v. J&J Auto Outlet*, A-2813-22 (App. Div. Nov 03, 2023). For the same reasons expressed in that case, defendants aren't permitted to compel arbitration in this case:

> In this case, the trial court found the requisite mutual assent to

[8] *Desmidt v. Desmidt*, 130 N.J.Eq. 23, 20 A.2d 424 (N.J. 1941).

> arbitrate was lacking between plaintiff and defendants since only plaintiff and USPC were parties to the Service Contract, which is the sole document containing an arbitration clause. We agree. By its plain terms, the Service Contract is an agreement between only plaintiff and USPC. Nor is Auto Concepts a party to the Service Contract simply because it signed as a dealer representative. The plain language of the Service Contract does not indicate that the arbitration clause is applicable to defendants.

Nawrocki v. J&J Auto Outlet, A-2813-22 (App. Div. Nov 03, 2023).

Moreover, in this case, as in *Nawrocki*, the arbitration clause fails to refer to any agreement to arbitrate statutory claims such as those at play here:

> Except for matters that may be taken to small claims court or as otherwise provided in this Contract, any controversy or claim arising out of or relating to it, or to its breach, shall be settled by binding arbitration administered by the American Arbitration Association (the "AAA") in accordance with the rules and provisions of its most appropriate dispute resolution program then in effect.

Da172, Section 8. Likewise, in *Nawrocki*, this court explained:

> Even if we were to read the documents as a collective whole as suggested by defendants, the arbitration provision is not enforceable as to plaintiff's statutory claims against them based upon application of New

> Jersey law. The absence of any language in the arbitration agreement constituting a waiver of plaintiff's statutory rights is fatal to its enforceability as to the claims against defendants which primarily assert violations of consumer protection statutes. The arbitration clause does not contain any plain language objectively understandable to a reasonable consumer that expressly waives the consumer's ability to litigate statutory rights. Since "'[a]n effective waiver requires a [consumer] to have full knowledge of [her] legal rights' before she relinquishes them," the arbitration clause at issue is not tantamount to a waiver of plaintiff's statutory rights to sue Auto Concepts and the individual defendants.
>
> *Atalese*, 219 N.J. at 447 (alterations in original).

Nawrocki v. J&J Auto Outlet, A-2813-22 (App. Div. Nov 03, 2023)(additional citation omitted).

As the party bearing the burden to prove plaintiff's assent to arbitration,[9] defendants had to come forward with evidence to support the motion and failed to do so. The trial court's result was correct and didn't result in reversible error.[10] It bears repeating that a trial court's factual findings are reviewed for an abuse of discretion, being binding on appeal if supported by adequate, substantial, credible

[9] *Midland Funding v. Bordeaux*, 447 N.J. Super. 330, 336 (App. Div. 2016).
[10] *Moon v. Lewis*, 116 N.J.L. 521, 185 A. 12 (N.J. 1936)("[I]t is a well-known rule, needing no citation of authorities, that harmless error is not reversible error.").

evidence.[11] As detailed above, that evidence is clearly present in this case and therefore, the appeal must fail. Moreover, assuming for argument's sake that an ambiguity exists in the service contract, the writing is to be strictly construed against the draftsman.[12]

This case is an excellent demonstration of the principle that mutual assent determines if a case is arbitrable – without it, there can be no arbitration.[13] The party seeking to compel arbitration bears the burden of establishing that a dispute is subject to arbitration.[14] Further, because venue of this case is presently laid in New Jersey, its law applies to the issue of whether there was assent to the terms – including the choice of law clause contained in the terms. State law governs whether the parties formed a contract to arbitrate their disputes.[15] Agreement to any of the terms requires assent.[16] Nor is the court able to rewrite a contract or

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[11] See *Cumberland Farms, Inc. v. N.J. Dep't of Env't. Prot.*, 447 N.J. Super. 423, 437-38 (App. Div. 2016).
[12] See *M.J. Paquet, Inc. v. NJ Dept. of Transp*., 171 N.J. 378 (2002)(citations omitted).
[13] *Atalese v. U.S. Legal Services Group*, 219 N.J. 430, 442 (2014), cert. denied, 135 S. Ct. 2804 (2015).
[14]. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc.*, 427 N.J. Super. 45, 59 (App. Div. 2012).
[15] *Morgan v. Sanford Brown Inst*., 225 N.J. 289 (2016).
[16] *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 442, 448 (2014), *cert. denied*, 135 S. Ct. 2804 (2015).

refashion its composition as given to plaintiff (i.e., complete or incomplete) to require assent to terms.[17]

Parties to an arbitration agreement are bound only to the extent of their agreement.[18] They can't be required to submit a dispute to arbitration which they never agreed to submit.[19] The Appellate Division explained that: "because arbitration provisions are often embedded in contracts of adhesion, courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent."[20] Consequently, "courts take particular care in assuring the knowing assent of both parties to arbitrate."[21] This "particular care" is not the product of animus against arbitration but of New Jersey's waiver-of rights requirements as to all contracts.[22] "A court may not rewrite a contract to broaden the scope of arbitration."[23] A valid waiver of

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[17.] *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 168 N.J. 124, 132 (2001).
[18].*Singer v. Commodities Corp.*, 292 N.J. Super. 391, 402 (App. Div. 1996).
[19]*Angrisani v. FT Ventures, L.P.*, 402 N.J. Super. 138 (App. Div. 2008).
[20]*NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp*., 421 N.J. Super. 404, 431 (App. Div. 2011), *appeal dismissed*, 213 N.J. 47 (2013).
[21] *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 441 (2014), cert. denied,.__ U.S. __, 135 S. Ct. 2804, 192 L. Ed.2d 847 (2015).
[22]*Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 441 (2014), cert. denied,.__ U.S. __, 135 S. Ct. 2804, 192 L. Ed.2d 847 (2015).
[23]*Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 168 N.J. 124, 132 (2001).

statutory claims in favor of arbitration requires the parties to "agree[] clearly and unambiguously to arbitrate the disputed claim."[24].

The trial court initially resolves the issues of fact pertaining to the formation of the arbitration provision.[25] "Formation of an arbitration agreement, however, is an issue of fact 'to be decided by the trial court.'"[26] In the absence of proof of an arbitration agreement covering the sale, the terms are unenforceable against plaintiff because of the lack of mutual assent.[27] For an arbitration agreement to be valid, it must provide "clear and unambiguous language that the plaintiff is waiving his right to sue or go to court to secure relief" as to the party seeking to enforce the clause.[28] Moreover, neither the court nor opposing counsel may impose their familiarity of the law on the lay plaintiff.[29] Therefore, defendants' attempt to compel arbitration correctly failed.

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[24]*Leodori v. Cigna Corp., 175 N.J. 293*, 300-02, cert. denied, 540 U.S. 938, 124 S. Ct. 74, 157 L. Ed. 2d 250 (2003).
[25]*Morgan v. Sanford Brown Inst*., 225 N.J. 289, 295-296 (2016)
[26] *Knight v. Vivint Solar Dev., LLC*, 465 N.J. Super. 416, 426, 428 (App. Div. 2020), cert. denied, 246 N.J. 222 (2021) and cert. denied, 246 N.J. 223 (2021).
[27] *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 442, 448 (2014), *cert. denied*, 135 S. Ct. 2804 (2015).
[28] *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430 (2014), *cert. denied*, 135 S. Ct. 2804 (2015).
[29]*Bacon v. Avis Budget Grp., Inc.*, No. 16-5939 (KM) (JBC), 2017 U.S. Dist. LEXIS 88868 (D.N.J. June 9, 2017), aff'd *Bacon v. Avis* Budget Group, Inc., 959 F.3d 590 (3d Cir. 2020). Clarity cannot be dispensed with so lightly. See *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 79, 119 S. Ct. 391, 396, 142 L. Ed.2d 361, 371 (1999).

II. THE COURT CORRECTLY HELD THAT THE SERVICE CONTRACT BUSINESS AND ITS ARBITRATION CLAUSE HAS NOTHING TO DO WITH THE CASE AND THAT DEFENDANTS WEREN'T ENTITLED COMPEL ARBITRATION VIA THE THIRD PARTY SEVICE CONTRACT (Da1-Da13; 1T3-1T13)

Since plaintiff never used the service contract business nor joined the service contract business to the case, there is no reason for anyone to seek arbitration in this case. This case involves multiple causes of action pled for statutory violations pled against defendants and none whatsoever pertaining to the breach of the service contract. Da14-Da98. Simply put, this case is not encompassed by the arbitration clause and therefore, arbitration of this case isn't mandated. The causes of action and parties to the complaint – none of which are focused on the service contract business – clearly indicate that the actions or inactions of the service contract business are irrelevant to this case. Moreover the "central purpose" of plaintiff's vehicle purchase didn't hinge on the presence or absence of an arbitration agreement.[30]

Nor did defendants meet the burden to compel plaintiff to arbitrate the case via the third party service contract. As explained above, that contract is between

[30] *NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp*., 421 N.J. Super. 404 (App. Div. 2011), *appeal dismissed*, 213 N.J. 47 (2013).

plaintiff and the service contract. The burden to compel arbitration as to a nonsignatory is generally high and courts are typically reluctant to do so, because "a court may not rewrite a contract to broaden the scope of arbitration."[31] The New Jersey Supreme Court instructs:[32]

> The scope of the arbitration is dependent solely on the provisions and conditions mutually agreed upon in the parties' agreement.… Stated another way,
>
> > the duty to arbitrate, and the scope of the arbitration, are dependent solely on the parties' agreement. The parties may shape their arbitration in any form they choose and may include whatever provisions they wish to limit its scope. The parties have the right to stand upon the precise terms of their contract; the court may not rewrite the contract to broaden the scope of arbitration or otherwise make it more effective.

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[31]. *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 168 N.J. 124, 132 (2001).

[32]. *Badiali v. N.J. Mfrs. Ins., Grp.* 220 N.J. 544, 556 (2015)(citations omitted)

The service contract business has nothing whatsoever to do with the causes of action pled in this case. Moreover, as explained by one District Court:[33]

> The New Jersey Supreme court has rejected the intertwinement theory as sufficient to compel arbitration, . . . and the courts in this District are split on the issue. *Compare Deering v. Graham*, No. 14-3435, 2015 WL 424534, at *7 (D.N.J. Jan. 30, 2015) (compelling arbitration between non-signatories because of the "inextricable connection between plaintiff's . . . claims and the signatories and nonsignatories to her agreements"), *with Sicily by Car*, 2015 WL 2403129, at *5 (requiring non-signatory defendant to establish detrimental reliance in order to compel arbitration).

The *Nawrocki* court similarly refused to enforce a service contract based on a car dealer's intertwinement theory:

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[33]. *Joaquin v. DirecTV Grp. Holdings, Inc.*, No. 15-8194, 2016 U.S. Dist. LEXIS 116312, at *15, *16 (D.N.J. Aug. 30, 2016)**.** The court explained: "While there is a connection between Plaintiff's claims against the Lonstein Defendants and her claims against DIRECTV, the claims also differ in that Plaintiff bases her claims against the Lonstein Defendants on the correspondence she received from them, which threatened legal action, and bases her claims against DIRECTV on their representations and conduct during the course of Plaintiff's time as a DIRECTV customer . . . . Further, the Court finds the *Hirsch* and *Sicily by Car* line of cases, which require detrimental reliance to compel non-signatories to arbitrate, persuasive . . . . As the Lonstein Defendants have not asserted that they detrimentally relied on the arbitration agreement between DIRECTV and Plaintiff, the Court does not find it appropriate to compel Plaintiff to arbitrate her claims against the Lonstein Defendants."

> The Supreme Court has also made it clear that claims that are tangential to those covered under an arbitration clause are not required to be resolved through arbitration. "Stated simply, we reject intertwinement as a theory for compelling arbitration when its application is untethered to any written arbitration clause between the parties, evidence of detrimental reliance, or at a minimum an oral agreement to submit to arbitration." *Hirsch*, 215 N.J. at 192-93. Therefore, any argument that the arbitration clause applies to plaintiff's complaint against defendants based upon being intertwined with a claim that could be subject to arbitration with USPC is foreclosed under New Jersey law.

Nawrocki v. J&J Auto Outlet, A-2813-22 (App. Div. Nov 03, 2023). New Jersey courts are reluctant to enforce arbitration clauses contained in a third party contract, as shown by these additional examples:

- Plaintiff sued manufacturer of product purchased on Amazon.com and manufacturer tried to enforce Amazon.com's arbitration agreement that stated: "any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration." The language failed to clearly and unambiguously convey that plaintiff and Amazon intended that the benefit of arbitration should be conferred to third

parties, like Logitech, who sell their products through the website. Indeed, the arbitration agreement, contained with the Conditions of Use, didn't explicitly mention that Logitech or any other seller would be bound by the arbitration clause.[34]

- Plaintiff lost money invested in securities that were part of a "Ponzi" scheme. The dispute involved plaintiff's accounting firm, an investment planning business and a broker-dealer handling securities transactions and the latter tried to compel the accounting firm and investment planning business to proceed to arbitration. Plaintiff never sought to arbitrate their disputes with either of those other parties, neither of whom detrimentally relied on plaintiff's conduct. Therefore, compelling them to do so would result in an injustice contrary to the equitable estoppel doctrine's intent.[35]
- Putative class action lawsuit by small business owners claimed sellers of satellite cable television services engaged in fraudulent scheme to collect fees and compel membership. The defendant lawyers allegedly involved in the scheme—by sending out demand letters to collect fees—while not

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[34]. *Shapiro v. Logitech, Inc.*, No. 17-00673 (FLW) (TJB), 2019 U.S. Dist. LEXIS 15138, at *14 (D.N.J. Jan. 31, 2019).

[35]. *Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174 (2013)(refusing to apply equitable estoppel to compel plaintiff to arbitrate claims against a nonsignatory in the absence of proof that such entity relied to its detriment on the plaintiff conduct).

signatories to the contracts, argued that their claims were intertwined with their client the merchant and the business owners—both signatories.[36]

- Vehicle buyers sued vehicle manufacturer for alleged defects and manufacturer attempted to use selling dealers' purchase and lease arbitration clauses to compel arbitration. Because the manufacturer was not a party to those contracts, it could not enforce their arbitration clauses. Also, equitable estoppel did not apply because there were no allegations of a close relationship between the parties.[37]

Defendants failed to identify binding cases on point supporting the novel position that a car dealer may enforce an arbitration clause in a service contract.

[36]. *Joaquin v. DirecTV Grp. Holdings, Inc.*, No. 15-8194, 2016 U.S. Dist. LEXIS 116312 (D.N.J. Aug. 30, 2016).
[37]. *In re Volkswagen Timing Chain Prod. Liab. Litig*., No. 16-2765 (JLL), 2017 U.S. Dist. LEXIS 70299 (D.N.J. May 8, 2017).

III. THE NEW JERSEY AND UNITED STATES SUPREME COURTS AGREE THAT ARBITRATION ISN'T A BETTER METHOD FOR RESOLVING DISPUTES THAN LITIGATION BUT RATHER, THAT ARBITRATION BE PLACED ON A COEQUAL FOOTING WITH LITIGATION AND IN THESE CIRCUMSTANCES, ARBITRABILITY IS DECIDED BY THE COURT

(Da1-Da13; 1T3-1T13)

In consumer transactions, as a creature of contracts and not of the Legislature,[38] today, arbitration agreements are not "favored" over other contracts, being no better or worse than other types of contracts, and therefore aren't accorded greater or lesser deference.[39] The highest courts now accept that Congress and the Legislature never intended to favor one kind of contract over the other but simply recognize arbitration as an alternate and equal forum to litigation and preclude courts from singling out and invalidating arbitration agreements for

[38] See, e.g., *Atalese v. U.S. Legal Services Group*, 219 N.J. 430 (2014), cert. denied, 135 S. Ct. 2804 (2015)(a state can't subject an arbitration agreement to more burdensome requirements than other contractual provisions).

[39] *Goffe v. Foulke Mgmt. Corp.*, 238 N.J. 191, 208, 208 A.3d 859 (2019)("Thus, Congress intended 'to place arbitration agreements upon the same footing as other contracts....'")(citation omitted). See also *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (citation omitted).

the wrong reasons.[40] For example, federal courts are not allowed to create arbitration-specific variants of federal procedural rules based on a preference for arbitration, including rules favoring arbitration over litigation.[41]

Arbitration is a creature of contract.[42] The route to arbitration lies via contracts whereby parties knowingly consent to arbitration and where, as here, there is no proof of such assent between the litigants, there is no need to second guess the trial court's conclusion that plaintiff never agreed to arbitrate the case with defendants. This case involved a challenge to the existence of a binding arbitration clause – a gateway issue for the court.[43] The question here is one for the court – i.e., whether the parties formed an arbitration agreement or agreed to be bound to an arbitration clause contained in a contract.[44] Further, "to overcome the judicial-resolution presumption, there must be 'clea[r] and unmistakabl[e]" evidence "that the parties even agreed to arbitrate in the first instance.[45] "[I]f a valid arbitration agreement does not exist, then an arbitrator is 'out of the

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[40] See *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022); *Roach v. BM Motoring, LLC*, 228 N.J. 163, 174, 155 A.3d 985 (2017).
[41] See *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022).
[42] *Kimm v. Blisset, LLC*, 388 N.J. Super.. 14, 25 (App. Div. 2006), certif. denied, 189 N.J. 428 (2007).
[43]. See *Goffe v. Foulke Mgmt. Corp.*, 238 N.J. 191, 209 (2019).
[44]. *Morgan v. Sanford Brown Inst*., 225 N.J. 289 (2016); *Goffe v. Foulke Mgmt. Corp.*, 238 N.J. 191 (2019).
[45] See *Morgan v. Sanford Brown Inst*., 225 N.J. 289 (2016).

picture.'"[46] Accordingly, in this case the issues of arbitrability is for the Court to resolve.[47] Any presumption in favor of arbitration "does not apply to the determination of whether there is a valid agreement to arbitrate between the parties."[48]

Were the court to decide that the clause is enforceable in whole or part, it would conflict with the freedom to enter into contracts discussed in *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 442, 448 (2014), *cert. denied*, 135 S. Ct. 2804 (2015). The latest Supreme Court case about class action waivers confirms that contractual waivers of rights are enforceable provided they meet the requirements of *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 442, 448 (2014), *cert. denied*, 135 S. Ct. 2804 (2015):

> As a matter of general contract law, the inquiry is the same regardless of whether a contract contains an arbitration provision.

Pace v. Hamilton Cove, 258 N.J. 82, 317 A.3d 477 (2024). "A court may not rewrite a contract to broaden the scope of arbitration."[49] A valid waiver of statutory claims in favor of arbitration requires the parties to "agree[] clearly and

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[46] *Corchado v. Foulke Management Corp.*, No. 15-6600 (JBS/JS) Slip. Op. (D.N.J. May 6, 2016).
[47] See *Morgan v. Sanford Brown Inst*., 225 N.J. 289 (2016).
[48] *Kirleis v. Dickie, McCartney & Chilcote, P.C.*, 560 F.3d 156, 160 (3d Cir. 2009).
[49] *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 168 N.J. 124, 132 (2001).

unambiguously to arbitrate the disputed claim."[50]. That didn't occur here via the service contract, which fails to encompass the dispute arising via the complaint.

[50]*Leodori v. Cigna Corp.,* 175 N.J. 293, 300-02, cert. denied, 540 U.S. 938, 124 S. Ct. 74, 157 L. Ed. 2d 250 (2003).

IV. THE COMPLAINT WAS SUFFICIENTLY PLED TO SURVIVE DISMISSAL

(Da1-Da13; 1T3-1T13)

Under R. 4:6-2(e), the moving defendant bears the burden that it is entitled to the complaint's dismissal and "all doubt must be resolved against the moving party".[51] Defendant failed to find a single biding case in which a court decided that a complaint like that filed here failed because it was too detailed or because it contained a section of abbreviated terms or otherwise. Defense brief, p. 34-39. Instead, defendants cite a single case - *Van Sickell v. Margolis*, 109 N.J. Super. 14, 18 (App. Div. 1969), aff'd o.b., 55 N.J. 355 (1970). *Van Sickell* was not a CFA case pled under the heightened pleading requirements under R. 4:6-2(e), but a bodily injury negligence case:

> Plaintiffs brought suit against both Margolis and Holmes charging, in separate counts, negligence by each of them in the maintenance of the sidewalk.

Van Sickell v. Margolis, 262 A.2d 209, 109 N.J.Super. 14, 16 (App. Div. 1969). Moreover, the issue in *Van Sickell* had noting whatsoever to do with a failure to

[51] *Raskulinecz v. Raskulinecz*, 141 N.J. Super. 148, 154 (Law Div. 1976)(citations omitted).

sufficiently plead a complaint but rather, with errors committed at trial, resulting in the reversal of a no cause verdict against the plaintiff:

> Plaintiffs appeal from a judgment entered on a jury verdict of no cause for action in favor of the defendant Abe Margolis.
>
> ***
>
> We are satisfied that defendant's counsel's improper remarks, in the light of those of the trial court in overruling plaintiffs' objection, had a clear capacity to produce an unjust result in this case and constituted prejudicial error.

Van Sickell v. Margolis, 262 A.2d 209, 109 N.J.Super. 14, 16, 18 (App. Div. 1969). Clearly, notwithstanding their burden to do so, defendants failed to point to any caselaw supporting their position. New Jersey courts deem waived any points that a party fails to sufficiently brief[52] and neither the court nor plaintiff, as the responding party, are obliged to guess as to the arguments that might support the appeal.[53] Nor should the court permit defendants to cure its failure to brief the reasons supporting the appeal by raising new arguments for the first time via a reply brief, because a party may not advance a new argument in a reply brief.[54]

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[52] *Zavodnick v. Leven*, 340 N.J. Super. 94, 103 (App. Div. 2001)(indicating that the failure to present an argument relating to an appeal renders that appeal "abandoned").

[53] *State v. Lefante*, 103 A.2d 585, 14 N.J. 584 (1954).

[54] *Bouie v. N.J. Dept. of Community Affairs*, 407 N.J. Super. 518, 525, n.1 (App. Div. 2009) (“a party may not advance a new argument in a reply brief”).

Assuming that defendants successfully briefed an argument that the complaint was somehow facially deficient, scrutiny of the complaint would reveal that the complaint is sufficient plead to withstand dismissal. Rule 4:5-7 requires that "[a]ll pleadings shall be liberally construed in the interest of justice." Even where certain key words are not used or "more by way of facts regarding the [cause of action] would have been enlightening," a complaint will survive provided it fairly apprises the adversary of the claims and issues in dispute.[55] "[W]hen reviewing pleadings to determine whether a cause of action has been stated, courts search 'the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim....'"[56] Not all the claims are subject to heightened pleading and therefore, as to those claims the challenged pleading need only provide "simple, concise and direct" allegations in its complaint, R. 4:5-7. When deciding whether the complaint states a valid claim, a court should dismiss the complaint only if its "factual allegations are palpably insufficient to support a claim upon which relief can be granted."[57] Dismissal is approached with great caution and granted only in

[55] *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 76-77 (1990).
[56] *Velop, Inc. v. Kaplan*, 301 N.J. 32, 56 (App. Div. 1997)(citation omitted).
[57] *Rieder v. State Dept. of Trans*., 221 N.J. Super. 547, 552 (App. Div. 1987).

the rarest of instances.[58] Plaintiff's role is "not to prove the case but only to make allegations, which, if proven, would constitute a valid cause of action."[59]

By denying dismissal of the complaint for failure to state viable claims, the trial court correctly held that the complaint did exactly what was required:

> Plaintiff argues the CFA requires a higher pleading standard where the factual allegations must be plead with specificity; therefore, the extensive factual allegations are necessary. In pleading CFA claims, the Plaintiffs are alleging fraud claims. *Hoffman v. Hampshire Labs, Inc.*, 405 N.J. Super. 105, 112 (App. Div. 2009). CFA claims are "subject to the heightened pleading standard in Rule 4:5-8(a), which requires that the 'particulars of the wrong…shall be stated insofar as practicable." *Robey v. SPARC Grp. LLC*, 256 N.J. 541, 554 (2024). Pursuant to R. 4:5-8(a), pleading fraud requires that "[i]n all allegations of misrepresentation, fraud, mistake, breach of trust, willful default or undue influence, particulars of the wrong, with dates and items, if necessary, shall be stated insofar as practicable. Malice, intent, knowledge, and other conditions of the mind of a person may be alleged generally."

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[58] *Printing Mart-Morristown v. Sharp Elec. Corp.*, 116 N.J. 739, 771-72 (1989).
[59] *Leon v. Rite Aid Corp*., 340 N.J. Super. 462, 472 (App. Div. 2001). See also *Printing Mart v. Sharp Elecs.Corp.*, 116 N.J. 739, 746 (1989)("…in determining whether dismissal under Rule 4:6-2(e) is warranted, the court should not concern itself with the plaintiff's ability to prove its allegations.").

> The court finds Plaintiff alleges extensive factual allegations pursuant to the CFA to specify the alleged fraudulent actions of Defendant Autobay. Though the Complaint is substantial, Defendant Autobay incorrectly asserts the pleading standard in R. 4:5-7 as a basis for dismissal. This pleading standard states "[e]ach allegation of a pleading shall be simple, concise and direct, and no technical forms of pleadings are required." However, Plaintiff bears the burden of alleging Fraud, which requires a more detailed pleading because the CFA claims. This standard requires the pleading to contain specificity as to the actions of the individuals that are allegedly fraudulent. Furthermore, "all pleadings shall be liberally construed in the interest of justice," and in considering this pleading, it is apparent that Plaintiff has alleged all known facts to provide this court and Defendant Autobay with specificity. Any concerns about specific allegations can be flushed out further during discovery.

There is little doubt that failing to sufficiently plead has dire consequences - i.e., dismissal of the complaint. *Robey v. SPARC Grp. LLC*, 256 N.J. 541 (2024). It would be perverse indeed to fault plaintiff for overpleading their claims when they fear dismissal for a want of sufficient allegations.

CONCLUSION

The court should affirm the trial court's order denying the motion to dismiss the complaint and compel arbitration and remand for the case to proceed on its merits.

Respectfully submitted,

DATED: April 30, 2025

/S/ PAUL DEPETRIS

PAUL DEPETRIS

STEPHANIE PORTER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Respondent-Respondent, v. AUTOBAY LLC, MAURICE RACHED, UNITED AUTO CREDIT CORPORATION and JOHN DOES 1-10, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003606-23 Civil Action **ON APPEAL FROM:** SUPERIOR COURT OF NEW JERSEY LAW DIVISION – CIVIL PART GLOUCESTER COUNTY DOCKET NO. GLO-L-994-24 Sat Below: Hon. Benjamin D. Morgan, J.S.C. Submitted: March 31, 2025

APPELLANTS' REPLY BRIEF

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POINT I

THE TRIAL COURT ERRED IN FINDING A LACK OF ASSENT BY THE PLAINTIFF BECAUSE THE FINDING WAS BASED UPON MISINTERPRETED FACTS AND FLAWED ANALYSIS. (Da8-10).

Respondent limits its opposition to a challenge of assent and foregoes dispute regarding the "contract as a whole," the purchase and sale of the Vehicle[1], whether the documents were signed, or whether the documents were incorporated. Respondent's Opp. Br., 7.

A. The Service Contract Is Incorporated into the Contract.

Respondent omits any analysis of Quinn. Id. "[F]or there to be a proper and enforceable incorporation by reference of a separate document, the incorporated document must be described in such terms that its identity may be ascertained beyond doubt and the party to be bound by the terms must have had 'knowledge of and assented to the incorporated terms." Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 533 (App. Div. 2009).

The shaky foundation of Respondent's assent argument crumbles where the arbitration clause is incorporated with the other contract documents. Indeed, Respondent cannot escape being bound by the terms contained in an agreement to

[1] All capitalized terms are given the same meaning as those in Appellants' initial brief (hereinafter "App. Br.")

which she affixed her signature. See Peter W. Kero, Inc. v. Terminal Const. Corp., 6 N.J. 361, 368 (1951) ("where a party affixes his signature to a written instrument […] a conclusive presumption arises that he read, understood and assented to its terms and he will not be heard to complain that he did not comprehend the effect of his act in signing."). Yet, Respondent's opposition fails to rebut that the Service Contract is incorporated together under Quinn and that this case should follow the opinions of Bacon, Stollsteimer, Divalerio, and Guia, all of which find that separate documents (in used car sales purchases and in other contexts) were integrated into one sales contract and the terms were incorporated. See App. Br. 20-21, Point I(B)(i).

Instead, the Plaintiff's arguments rest upon the unsteady pillars of an unpublished and distinguishable case, Nawrocki v. J&J Auto Outlet, A-2813-22, 2023 N.J. Unpub. LEXIS 1962 (App. Div. Nov. 3, 2023), where *unlike the case at bar*, there was no Retail Installment Sales Contract ("RISC") or analysis from that court regarding incorporation. Respondent's argument obfuscates the Nawrocki decision and then misapplies it to this case. In fact, the following facts demonstrate that the contract documents were intended to be, and was in fact, a collection of documents incorporated into one Contract:

1) Respondent admits in her Complaint that she signed the collection of documents (including the RISC, Buyer's Order and Service Contract) and that all of them constituted one contract. (See Da20, at ¶ 7);

2) Respondent executed the Buyer's Order, RISC, and Service Contract simultaneously on March 20, 2024. (Da100-109; Da0167-172);

3) In the event there are any inconsistencies between the Buyer's Order and the RISC – the terms of the RISC controls. The RISC in turn specifically references the Service Contract. (Da103-109);

4) Respondent was required by the very first line of the Service Contract to execute the document at the same time as the purchase of the vehicle. (Da167) ("VEHICLE SERVICE CONTACT MUST BE PURCHASED AT TIME OF SALE OF THE VEHICLE");

5) Respondent would not have been permitted to take possession of the Vehicle if she did not execute the sales documents collectively for the purchase of the vehicle. (Da103-109; Da167-172);

6) Respondent acknowledges the validity of the Service Contract and the sale contract documents and does not contest that the Service Contract contains the Arbitration Provision. (Da0197-199);

7) Respondent affirmatively opted to purchase the Service Contract and accepted the terms by executing the document. (Da0105). ("Your signature below means that you want the described item and that you have received and reviewed a copy of the contract for the products.");

8) The RISC contains the 24 month "powertrain" coverage to her purchase through selecting the checkbox for "Service Contract," totaling $1,710.00. (Da103-109);

9) The cost of the Service Contract ($1,710.00) is included in the itemization of charges in the RISC and the terms for the financed amount in the RISC and Buyer's Order. (Da0104);

10) If the Respondent failed to pay the cost of the Service Contract as financed under the RISC, it would be a default under 9.7 of the RISC. (Da0105);

11) Absent from the Service Contract is an independent default provision. (Da167-172);

12) The Service Contract is explicitly intertwined with the RISC, sufficiently described, and therefore incorporated under the first prong of the Quinn analysis. (Da0105);

13) The Guaranteed Asset Protection Waiver is explicitly incorporated into the other documents and is itemized on both the Buyers Order and RISC (Da166); and

14) The FTC Regulations (16 CFR §455.3) state that the Buyer's Guide is incorporated into the contract. (Da0100-109; Da0160-172).

Accordingly, the Service Contract was clearly intended to be incorporated into the rest of the contract documents that were signed simultaneously. The Nawrocki holding is distinguishable because similar facts were not analyzed in the context of incorporation.

B. The Terms of the Service Contract Apply to Plaintiff's Claims.

Next, Respondent's argument that she failed to assent to arbitrate with AutoBay falls short (with or without incorporation) because the Service Contract terms apply to Respondent's claims against AutoBay. Indeed, the Service Contract states "This Vehicle Service Contract contains an arbitration provision. It limits certain of YOUR rights, including YOUR right to obtain relief or damages through court action." (Da167) (emphasis in original)). Further, the Service Contract states, "Except for matters that may be taken to small claims court or as otherwise provided in this Contract, **any controversy or CLAIM arising out of or relating to it, or to its breach**, shall be settled by binding arbitration." (Da0172) (bold and underlined terms emphasized). Moreover, the "Selling Dealer" under the Service Contract is

therefore undoubtedly AutoBay. (Da167-172). While Respondent's opposition argues that the "Selling Dealer" defined in the Service Contract was not defined as Appellant, AutoBay, Respondent fails to explain who else it could possibly be when she purchased the Vehicle that was subject to the terms of the Service Contract from AutoBay, and she signed this contract simultaneously with all other contract documents referring to AutoBay as the dealer or seller. (Respondent's Opp. Br., 7).

Additionally, AutoBay also has rights as the Selling Dealer under the Service Contract, to include: (1) accepting the return of the covered vehicle See Pl. Compl. Ex. A, 70, ¶ 2; (2) reporting any information to the Selling Dealer that is incorrect within the Service Contract; Id. at 70, ¶ 3; (3) accepting the return of the Vehicle; Id. at Section 3, ¶ 2; (4) requiring an inspection of the Vehicle prior to any repair being made Id. at 71, Section 3, ¶5; and (5) accepting a cancellation request from the Respondent, which establishes the effective date of cancellation and date of refund.

Furthermore, the arbitration provision unquestionably applies to the claims at issue in this case. Respondent invokes the "Service Contracts Act" ("SCA") and identifies a fictitious defendants including "automotive mechanics, automotive repair shops, … vehicle inspectors, [and] technicians." (Da0018). As to the Service Contract itself, Respondent alleged wrongdoing in the alleged advertising of the warranty (Da0021-22) and made claims regarding the repair of the vehicle. (Da0024-

25). All these facts were ignored by the trial court when it reached its conclusion that the provision somehow did not apply to AutoBay.

Respondent argues that the arbitration provision did not apply because Respondent failed to join Protective Administrative Services, Inc. (Da9). The analysis requires consideration of the *contract terms and claims* not the *parties*. See App. Br. 20-21, Point I(B)(i) (discussing Atalese, Quinn, Bacon, Stollsteimer, Divalerio, and Guia). Indeed, Respondent's failure to sue Protective Administrative Services, Inc. is of no moment where the arbitration provision applies to the claims against Appellants in the litigation.

C. Appellants Can Enforce the Arbitration Provision as Non-Signatories.

Cases cited by Respondent confirm that a non-signatory can be bound to an arbitration agreement. Sicily by Car S.P.A v. Hertz Global Holdings, Inc., 2015 U.S. Dist. LEXIS 65751 (D.N.J. May 20, 2015) and Joaquin v. DIRECTV Grp. Holdings, Inc., Civil Action No. 15-8194 (MAS) (DEA), 2016 U.S. Dist. LEXIS 116312, *14 (D.N.J. Aug. 30, 2016).

In Sicily, the plaintiff, an Italian corporation entered into a license agreement with Dollar Thrifty, which granted plaintiff an exclusive license for car rental reservations in Italy made through Dollar Thrifty's reservation systems. The defendant, Hertz, later acquired Dollar Thrifty. Hertz was a non-signatory to the contract containing the arbitration provision. After Dollar Thrifty terminated its

agreement with the plaintiff, Hertz moved to compel arbitration. In determining whether Hertz, a non-signatory, could enforce the arbitration provision, the Court first analyzed the pertinent portions of the contract at issue, which read "the parties agree to submit any claim, controversy or dispute *arising out of or relating to* this Agreement (and attachments) or the relationship created by this Agreement prior to bringing a claim [to court]." Id. at *9 (emphasis added).

The Sicily court ultimately found that the claims at issue related to the agreement and there was detrimental reliance, holding "pursuant to Hirsch, Hertz has demonstrated detrimental reliance and established that, as a non-signatory, it is entitled to enforce the license agreement's arbitration provision as a matter of equitable estoppel." Id. at *14; see also App. Br. at 25-26 (discussing Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174 (2013)).

Here, just like Sicily, the Respondent took deliberate action by placing the Service Contract squarely at issue through invoking the "Service Contracts Act;" identifying "automotive mechanics, automotive repair shops, … vehicle inspectors, [and] technicians" as fictitious defendants (Da0018); advertising of the warranty (Da0021-22); and bringing claims regarding the repair of the vehicle. (Da0024-25)).

In fact, the arbitration clause at issue is almost identical to the clause in Sicily in so far as it states that it applies to any claims "relating to" the Service Contract. (Da167-172). Similarly to Sicily, Respondent's choice in bringing these claims

forces Appellants to defend against claims which essentially arise out of the Service Agreement. Also like Sicily, Appellants must act based on Respondent's decision to assert claims that directly relate to the Service Agreement, yet, to its detriment, proceed in a manner which allows Respondent to avoid the alternative dispute resolution procedure. Lastly, allowing Respondent to assert claims which embrace certain provisions of the Service Contract but repudiate others would impose unfairness against Appellants that the doctrine of equitable estoppel is precisely tailored to address. Accordingly, this case follows suit with Sicily and the arbitration provision should be enforceable against Appellants.

In Joaquin, the Court noted that upon finding that a valid agreement to arbitrate exists, the court must then determine whether the particular dispute falls within the scope of the arbitration agreements at issue (in that case, as they related to two cable companies). The defendant cable company's arbitration provisions Joaquin, included "any legal or equitable claim relating to this Agreement, any addendum, or [the customer's] Service." Joaquin, at *18. Ultimately, the Court concluded that the plaintiff's claims related to both of the cable agreements and that, therefore, they must be arbitrated. It denied the motion to compel arbitration by the defendant law firm, who admitted that there was no arbitration agreement between it and the plaintiff, which is distinguishable from the case at bar.

Here, the contract documents are incorporated into one document; the terms of the arbitration provision are enforceable; detrimental reliance is present; and the Respondent should not be permitted to back out of her obligations now. Santana v. SmileDirectClub, LLC, 475 N.J. Super. 279, 286 (App. Div. 2023); McGinty v. Jia Wen Zheng, No. A-1368-23, 2024 N.J. Super. Unpub. LEXIS 2203, at *24 (App. Div. Sep. 20, 2024) (citing Skuse v. Pfizer, Inc., 244 N.J. 30, 46 (2020); quoting Riverside Chiropractic Grp. v. Mercury Ins. Co., 404 N.J. Super. 228, 238 (App. Div. 2008) ("[A]s a general rule, 'one who does not choose to read a contract before signing it cannot later relieve himself [or herself] of its burdens.'").

POINT II

THE TRIAL COURT ERRED IN ITS CONCLUSION THAT AUTOBAY WAS NOT A THIRD-PARTY BENEFICIARY (Da9).

New Jersey law confirms that "[n]onsignatories of a contract ... may compel arbitration or be subject to arbitration if the nonparty is ... a third[-]party beneficiary to the contract." Hirsch, 215 N.J. at 188. "Ultimately, the real test is whether the contracting parties intended that **a third-party should receive a benefit which might be enforced in the courts**." Pollack v. Quick Quality Rests., Inc., 452 N.J. Super. 174, 185-86 (App. Div. 2017) (emphasis added). Moreover, "**[t]he contract need not specifically identify the [the third-party]**, as long as the 'pertinent provisions of the contract and the surrounding circumstances' demonstrate that the

parties intended the [third-party] to receive a direct benefit from the contract." Id. (emphasis added).

In assessing whether parties can be compelled to arbitrate, courts can use principles of contract law even in the absence of an express arbitration clause. See Hirsch; see also Crystal Point Condo. Ass'n v. Kinsale Ins. Co., 466 N.J. Super. 471, 484-85 (App. Div. 2021), rev'd on other grounds, 251 N.J. 437 (2022) (citing Hirsch, 215 N.J. at 188-89).

Here, Respondent has failed to rebut that AutoBay as the defined Selling Dealer has rights and benefits under the Service Contract. The trial court concluded that the Appellants are not third-party beneficiaries because there is no mention of AutoBay within the Service Contract. (Da0008). However, the court should have continued its analysis because New Jersey law direct that "[t]he contract need not specifically identify the plaintiff," as long as the "pertinent provisions of the contract and the surrounding circumstances" demonstrate the parties intended the plaintiff to receive a direct benefit from the contract. See Pollack, 452 N.J. Super. at 185-86.

Notably, AutoBay has many rights under the Service Contract, which Respondent did not rebut. See infra, at 5. Respondent was aware of the import and involvement of AutoBay as the "Selling Dealer" in the Service Contract as the rights specifically conferred to the Selling Dealer are explicitly set forth in the contract document. It was also reasonable to contemplate further involvement in any

arbitration that could be brought relating to same, especially in light of the fact that these documents were explicitly required to be signed at the same time. (Da167).

Indeed, any claim under the Service Contract would need to include the Selling Dealer, especially where the dispute involves whether the claim is covered and whether the particular issue with the vehicle was from prior to the purchase of the vehicle at the dealership. Accordingly, AutoBay is a third-party beneficiary of the Service Contract, inclusive of the Arbitration Provision.

POINT III

THE TRIAL COURT ERRED IN DECIDING THAT THE ARBITRATION PROVISION DID NOT APPLY TO THE STATUTORY CLAIMS IN THIS CASE (Da9).

Respondent argues that statutory and regulatory claims are waived by the express terms of the arbitration provision. However, in Gras v. Assocs. First Capital Corp., 346 N.J. Super. 42, 56, (App. Div. 2001), the Appellate Division found sufficient an arbitration provision that stated: "READ THIS ARBITRATION AGREEMENT CAREFULLY. IT LIMITS CERTAIN OF YOUR RIGHTS, INCLUDING YOUR RIGHT TO MAINTAIN A COURT ACTION."

Here, similar to Gras, the arbitration provision states, in pertinent part:

> **READ THE FOLLOWING ARBITRATION PROVISION ("PROVISION") CAREFULLY. IT LIMITS CERTAIN OF YOUR RIGHTS, INCLUDING YOUR RIGHT TO GO TO COURT.**

> 1. **In no event will YOU have the right to file or participate in a class action or any other collective proceeding against us. Only a court, and not arbitrators, can determine the validity of this class action waiver**.

(Da0172) (emphasis in original). Further, as explained in Appellants' initial brief, the Complaint invokes the following statutes which relate to the Service Contract: Service Contracts Act (N.J.S.A. 56:12-87, et seq.); Used Car Lemon Law (N.J.S.A. 56:8-67, et. seq.); Motor Vehicle Inspection Law (N.J.S.A. 39:10-26, et seq.); and the Automotive Repair Regulations (N.J.S.A. 13:45A-26C.1 et seq.) (Da0017-18) ((See Da0021)(relating to advertising the warranty, relating to the Service Contract); ((see also, Da0024-25)(relating to repairs to the Vehicle)).

Finally, the arbitration differs substantially from the Nawrocki case upon which Respondent relies. Unlike Nawrocki, this case's arbitration provision expressly waives the clients' right to bring statutory claims related to the Service Contract. As the arbitration provision is legally sufficient, it should be enforced here.

POINT IV

RESPONDENT'S ARGUMENT THAT ARBITRATION IS ON EQUAL FOOTING WITH LITIGATION IMPROPERLY IGNORES THAT ARBITRATION HAS LONG BEEN FAVORED IN THE LAW (Da6-11).

It is undisputable that arbitration is a favored method of dispute resolution both at the Federal level and in New Jersey. See, e.g., Atalese, 219 N.J. at 440 (2014); Martindale v. Sandvik, Inc., 173 N.J. 76, 84-85 (2002); AT&T Mobility LLC

v. Concepcion, 563 U.S. 333, 339 (2011); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006).

Respondent contends that the contract must be enforced as any other contract and cites to Morgan v. Sundance, Inc. 142 S. Ct. 1708 (2022). However, the Morgan holding is entirely inapplicable. Instead, Morgan stands for the principle that a federal court is not authorized to invent special, arbitration-preferring procedural rules. Here, the Respondent has not asked the federal courts to treat this arbitration provision different than any other contract or invent procedural rules. Accordingly, Respondent's argument misses the mark entirely.

Further, Respondent cites Pace v. Hamilton Cove, 258 N.J. 82 (2024) to argue that the inquiry is the same regardless of whether a contract contains an arbitration provision. The court in Pace considered whether a class action waiver without an arbitration provision is enforceable. This is entirely inapplicable here because the arbitration provision includes a class action waiver. Respondent's opposition has done nothing to rebut the courts' long-standing favoring of arbitration or that "**[a]ny doubts concerning the scope of the arbitration agreement**, *i.e.*, what issues are arbitrable, **must be resolved in favor of arbitration**. See Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630 n. 5 (2009) (quoting in part, Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)) (emphasis added); see also Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993). See J. Baranello

& Sons, Inc. v. Davidson & Howard Plumbing & Heating, Inc., 168 N.J. Super. 502, 507 (App. Div. 1979) (citing Moreira Constr. Co. v. Township of Wayne, 98 N.J. Super. 570, 576 (App. Div. 1968).

POINT V

RESPONDENT FAILS TO REBUT THAT THE COMPLAINT SHOULD BE DISMISSED BASED ON VARIOUS PLEADING DEFICIENCIES.

The Respondent failed to rebut that the Complaint is riddled with (1) unnecessary, duplicative and lengthy citations to case law; (2) definitions that are contrary to statutes; and (3) improperly combine multiple named defendants. The Complaint contains a "CFA Applicability Section" (Da27-33) which only recites case law. This section contains no "statement[s] of facts on which the claim is based, showing that the pleader is entitled to relief," nor "demand[s] for judgment for the relief to which the pleader claims entitlement." R. 4:5-2; see also Van Sickell v. Margolis, 109 N.J. Super. 14, 18 (App. Div. 1969), aff'd o.b., 55 N.J. 355 (1970) ("the pleader's conclusions of law are not admissions of facts."). Further, several paragraphs are multiple pages long that are mere citation to law or statutes: Paragraphs 138, 124, 142, and 165. These paragraphs provide nothing by way of compliance with the heightened pleading standard for fraud under R. 4:5-8(a).

Respondents also do not rebut Appellant's argument that the definitions used in the Complaint are, in fact, contrary to the statutory definitions and may confuse

or prejudice Appellants in this case. Indeed, any admission to a Complaint paragraph for an improperly defined term allows the Respondent to conflate the admission with a violation of the statute. These paragraphs must be stricken.

Lastly, Counts 1 through 5 and Count 10 of the Complaint improperly combine multiple named defendants – the dealership and the owner, Maurice Rached – into the collective term "dealer defendants" which is an improper form of pleading and makes these paragraphs factually inconsistent, legally objectionable, vague, and unintelligible.

Respondents reach the conclusion that Appellants are unable to cite authority that justifies the dismissal of their assertions; yet, they ignore completely that providing an unintelligible complaint fails to state a cause of action. See R. 4:6-2.

CONCLUSION

For these reasons, the Appellants respectfully urge that the Complaint be dismissed in its entirety, with prejudice, pursuant to R. 4:6-2(e), and the Respondent be ordered to proceed to arbitration. Furthermore, the Complaint is vexatious and prolix in violation of R. 4:6-4(b), and the Appellants respectfully request that the Court dismiss (or strike portions of) the pleading if it is not dismissed in its entirety.

Respectfully submitted,

By: */s/ Deena M. Crimaldi*
Deena M. Crimaldi

Dated: May 14, 2025