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| JONNA STROJAN on behalf of herself and others similarly situated,<br><br>Plaintiff-Respondent,<br><br>v.<br><br>EDISON MOTOR SALES, LLC d/b/a EDISON NISSAN and FRANK ESPOSITO,<br><br>Defendants-Appellants. | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br>DOCKET NO.: A-003367-24<br><br>ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY<br>DOCKET NO.: MID-L-1780-25<br><br>*Sat Below:*<br>Hon. Ana C. Viscomi, J.S.C. |

# DEFENDANTS-APPELLANTS' BRIEF

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## PRELIMINARY STATEMENT

This appeal challenges a trial court's refusal to enforce multiple arbitration agreements that Plaintiff, Jonna Strojan, knowingly signed during an automobile purchase. Plaintiff has never claimed she was confused or misled by these agreements. Nevertheless, the court below found the agreements had too many inconsistencies among them for the car buyer to have given her knowing consent to have any future dispute decided in arbitration and therefore declined to compel arbitration, effectively nullifying the parties' clear intent to arbitrate disputes on an individual (non-class) basis. This ruling contravenes both fundamental contract principles and New Jersey's strong public policy favoring arbitration. In truth, the variations among the several arbitration clauses here were anticipated and resolved by an express supersession clause—*a clause whose very purpose is to harmonize multiple contracts*. Ignoring that clause frustrates the parties' intent and undermines the effectiveness of arbitration agreements in standard consumer transactions.

All of the agreements in question plainly informed Plaintiff-Respondent that disputes would be resolved in arbitration and not in court. And each document contained an unambiguous class-action waiver in prominent terms. Far from confusing the consumer, the repetition of these provisions reinforced her understanding and assent. The inclusion of a supersession clause in the final

arbitration agreement ensured that any conflict in terms would be resolved in a predictable way, eliminating any genuine ambiguity. By refusing to enforce the agreements, the trial court elevated form over substance and rewarded a tactical "gotcha" argument at odds with the parties' true intent and meeting of the minds.

Reversal is warranted. Enforcing the arbitration agreements here will simply hold Plaintiff to her word—requiring her to pursue her claims in the agreed-upon arbitral forum on an individual basis, as she acknowledged multiple times in writing. Conversely, allowing her to avoid arbitration because of a duplicative form or immaterial drafting variation would undermine both the parties' intent and New Jersey's strong policy favoring arbitration. The Court should reject that result and enforce the agreements as written—compelling individual arbitration and barring class or representative claims in court.

## PROCEDURAL HISTORY

**Commencement of Action:** On March 24, 2025, Plaintiff filed a Complaint in the Law Division against defendants Edison Motor Sales, LLC d/b/a Edison Nissan ("Edison Nissan" or "the dealership") and its owner Frank Esposito (collectively, "Defendants") alleging consumer fraud and related claims in connection with her motor vehicle purchase. [Da003]. The Complaint is styled as a putative class action on behalf of similarly-situated customers, and

it seeks, among other remedies, treble damages and broad injunctive relief (including notice to other Edison Nissan customers). Id.

**Motion to Compel Arbitration:** On May 21, 2025, Defendants moved to dismiss the Complaint and compel arbitration pursuant to the parties' agreement. Defendants argued that Plaintiff had signed multiple documents at the time of sale which contained binding arbitration clauses and class-action waivers.

Plaintiff opposed the motion, arguing that the existence of multiple arbitration clauses in the transaction rendered her purported assent to arbitrate unclear or invalid. Plaintiff primarily relied on the Appellate Division's decision in NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404 (App. Div. 2011), which held that conflicting arbitration provisions across several car sale documents failed to evince a valid agreement to arbitrate. In response, Defendants emphasized that any inconsistencies between the clauses were expressly resolved by a supersession clause in one of the agreements (in contrast to Foulke where two of the agreements had supersession clauses that created a direct conflict).

**Trial Court Decision:** On June 19, 2025, the Honorable Ana C. Viscomi, J.S.C. denied Defendants' motion in its entirety. [Da001]. In her bench ruling, Judge Viscomi found the facts similar to Foulke and concluded that the multiple arbitration provisions were too inconsistent to reflect mutual consent by the

parties to arbitrate. [T15-9 through T23-10] The trial court held that no enforceable agreement to arbitrate had been formed. Id. It denied the motion to compel arbitration and also declined to dismiss the class allegations. Id.

On June 26, 2025, Defendants filed a Notice of Appeal as of right with respect to the denial of that branch of the motion seeking to compel arbitration, pursuant to R. 2:2-3(b)(8).[1] [Da070]. On July 1, 2025, Defendants filed an Amended Notice of Appeal to correct a deficiency in the caption. [Da075].

## STATEMENT OF FACTS

**The Transaction:** Plaintiff purchased a pre-owned 2021 Volkswagen Atlas from Edison Nissan on March 11, 2024, for a total price of approximately $28,581.44 (inclusive of taxes and fees). [Da026] She financed part of the purchase via a *Retail Installment Sale Contract* ("RISC") executed that day, which obligated her to make monthly payments to the creditor-lender (initially the dealership) over a set term. [Da046] As is customary in the auto sales industry, the dealership immediately assigned the RISC to a financing institution (in this case, Ally Bank—as reflected on page 5 of the RISC) [Da050] for

[1] A separate Motion for Leave to Appeal was filed with respect to the class action waiver issue (AM-000553-04) due to it being interlocutory. That motion was granted on August 8, 2025, and now the class action waiver issue is pending under docket number A-003916-24. Pursuant to the Order granting leave to appeal, the class action waiver appeal will be heard back-to-back with this arbitration appeal.

funding, with the assignment made "without recourse". Id. This means the dealership transferred all rights to payment under the RISC to the bank, and the dealership would no longer be a party to any disputes arising under the RISC's terms (aside from its role as the seller).

**Documents Signed and Arbitration Provisions:** In the course of the sale, Plaintiff signed four documents that contained arbitration provisions and accompanying class-action waivers—one of which, as stated below, the dealership is not a party to and therefore has no impact on this Court's analysis:

- **(1) The RISC (Finance Contract) [Da046]:** This standardized RISC form included a detailed arbitration clause. This clause advised Plaintiff in boldface that "EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN YOU AND USE DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL" and that "IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION IF INDIVIDUAL ARBITRATIONS." [Da049]. The Law 553 RISC is a standard form contract and the most widely used financing agreement in the sale of motor vehicles in the United States. [Da

084]. It is "[a]ccepted by virtually every major U.S. lender, including captive finance companies, banks, and credit unions." Id.

- **(2) The "Royal Guard" Theft Protection Limited Warranty [Da054, Da068]:** Plaintiff opted to purchase a theft-protection product, which came with its own limited warranty agreement issued by a third-party company, Royal Guard LLC ("Royal Guard"). Id. That warranty form also contained an arbitration provision (and class waiver) relating to disputes over the theft-protection product. Id. However, Edison Nissan *was not a party* to the Royal Guard warranty contract—the warranty was between Plaintiff and the third-party provider alone. The document itself was on Royal Guard letterhead and defines "we/us" as Royal Guard and reflects that the dealership's role was merely that of an authorized representative facilitating the sale. [Da068] Thus, any arbitration clause in this document is irrelevant to the dispute between Plaintiff and the dealership.
- **(3) The Dealership's Stand-Alone Arbitration Agreement [Da053]:** As is common in the industry, Edison Nissan had Plaintiff execute a separate Arbitration Agreement at the time of sale, on the dealership's own form, to directly cover any disputes between Plaintiff and the dealership. Id. This one page stand-alone arbitration agreement included a class-action waiver as well. Id. In it, both parties (the customer and dealership) agreed

to submit any disputes or claims between them to binding arbitration and to waive any right to participate in a class action. Id. Plaintiff signed this agreement, indicating her clear and uncoerced consent to its terms. Id.

- **(4) A Second Stand-Alone "Agreement to Arbitrate and Class Action Waiver" [Da058]:** In addition to the above, Plaintiff signed another arbitration agreement on the same day, also presented by the dealership. This second one-page stand-alone arbitration agreement is substantially similar to the first stand-alone arbitration agreement, and it appears that the inclusion of two stand-alone arbitration agreements in the transaction was a mere oversight by the dealership—with the second form representing a newer version of the first. Regardless, the terms in each of the stand-alone agreements are almost identical. Importantly, the second stand-alone arbitration agreement contains an express supersession clause which states that if any term of this arbitration agreement conflicts with a term in any other agreement between the parties, then this arbitration agreement shall govern to the extent of the conflict. Id. In other words, the clause gives this second agreement hierarchical priority on any arbitration-related term that might be inconsistent across the deal documents. By including this clause, the dealership ensured that any possible inconsistency among the various arbitration provisions would be

resolved by the terms of this agreement. Plaintiff likewise signed this superseding agreement, marking her fourth acknowledgment in one transaction that she was agreeing to arbitrate disputes on an individual basis.

**Rationale for Multiple Agreements – Industry Practice:** The presence of multiple arbitration clauses in Plaintiff's sale paperwork was not an attempt to confuse or overreach, but rather a byproduct of standard industry practice and lender requirements. Automobile dealers use the standardized RISC form (mandated by financing institutions) which often includes an arbitration clause largely for the benefit of the finance company assignee. Once the dealer immediately assigns the RISC to a bank (or other lender), the dealer itself is no longer a party to that financing contract. To ensure the dealer can compel arbitration of any claims *between the dealer and the customer*, the dealer has customers sign a separate arbitration agreement directly with the dealership. In fact, Edison Nissan had Plaintiff sign two such agreements here—a duplicative step that appears to have been inadvertent but nevertheless *reinforced* the message that arbitration was mutually agreed. This is a routine and transparent practice in auto sales—one designed to *prevent* confusion and forum disputes, not to create them. It is also typical for a car purchase to involve separate arbitration agreements covering different entities. Each stakeholder in the

transaction (dealer, lender, manufacturer, warranty provider, etc.) may include its own dispute resolution clause for disputes involving that party. Consequently, buyers sign many documents at sale, often with overlapping provisions (including arbitration clauses) tailored to specific aspects of the deal. This proliferation of documents is driven by compliance and practical necessity, not by any intent to mislead. Notably, all of the pertinent agreements—the RISC and both dealership arbitration forms—used plain language to explain that claims would not be heard in court. Plaintiff signed directly beneath these warnings. There is no suggestion that Plaintiff lacked the opportunity to read the documents or that the arbitration clauses were concealed. To the contrary, the provisions were so overt that Plaintiff had to acknowledge them by signature or initial on multiple occasions. This redundancy negates any notion that the terms were hidden or that Plaintiff was unaware of what she was signing.

**Plaintiff's Claims:** Approximately one year after the purchase, Plaintiff filed suit against the dealership and its owner, alleging various violations of the New Jersey Consumer Fraud Act ("CFA"), Truth-in-Consumer Contract Warranty and Notice Act, and related causes of action. [Da003]. In essence, Plaintiff claims the dealership failed to itemize certain documentary fees and engaged in deceptive sales practices with respect to the transaction. Id. For instance, Plaintiff claims that the dealership failed to itemize a 'documentary

fee' in the amount of $799. In reality, the dealership did, in fact, itemize the $799 documentary fee in the Motor Vehicle Retail Order (Clerical Fee - $320.00, Computer Fee - $260.00, Document Delivery Fee - $219.00) [Da026], Plaintiff just believes that it should have been itemized even further.

Plaintiff's Complaint seeks to represent a statewide class of customers and prays for damages and broad injunctive relief—including an injunction compelling the dealership to notify "any and all affected customers" of the alleged improper charges. Forcing Defendants into such relief (or even into defending a class action through trial) would be enormously damaging. The very reason Defendants bargained for class-action waivers *was to avoid the cost and exposure of aggregate litigation when disputes could be handled individually*. Plaintiff, for her part, faces no prejudice from arbitration—she can be made whole on an individual basis if her claims are proven, just as she could in Court. In short, enforcing the agreements to arbitrate will uphold the parties' reasonable expectations and prevent the significant harm of a sprawling class-action that both sides explicitly agreed to forgo as a condition of the transaction.

# LEGAL ARGUMENT

## I. THE PARTIES ENTERED INTO A CLEAR AND MUTUALLY ASSENTED-TO AGREEMENT TO ARBITRATE ALL DISPUTES ON AN INDIVIDUAL BASIS (T15 through T23)

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., states, in pertinent part, as follows:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . . .

9 U.S.C. § 2. The FAA reflects "a liberal policy favoring arbitration." Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1, 24 (1983). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability." Id.

The FAA's national policy "applie[s] in state as well as federal courts and foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements." Preston v. Ferrer, 552 U.S. 346, 353 (2008). "The FAA's displacement of conflicting state law is now well-established, and has been repeatedly reaffirmed." Id. (quoting Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995)).

Like the federal policy expressed by Congress in the FAA, "the affirmative policy of this State, both legislative and judicial, favors arbitration as a mechanism of resolving disputes." Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 133 (2020) (quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 85 (2002)). This endorsement of arbitration clauses has been codified by the Legislature in the New Jersey Arbitration Act, N.J.S.A. § 2A:23B-1 et seq., which provides that "an agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement shall be valid, enforceable and irrevocable . . . ." N.J.S.A. § 2A:23B-6(a); see also Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 440 (2014) ("The [FAA] and the nearly identical New Jersey Arbitration Act enunciate federal and state policies favoring arbitration.").

Basic contract principles also support the enforcement of an arbitration clause because "a submission to arbitration is essentially a contract, and the parties are bound to the extent of that contract." Local 462, Int'l Bhd. of Teamsters v. Charles Schaefer & Sons, Inc., 223 N.J. Super. 520, 525 (App. Div. 1988). As with any contract, "[a] court must look to the language of the arbitration clause to establish its boundaries." Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 188 (2013). And the terms of the arbitration clause "are to be given their plain and ordinary meaning." Roach v. BM Motoring, LLC, 228

N.J. 163, 174 (2017). "Because of the favored status afforded to arbitration, '[a]n agreement to arbitrate should be read liberally in favor of arbitration.'" Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001) (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)).

Here, the record establishes beyond genuine dispute that Plaintiff knowingly and voluntarily agreed four separate times to arbitrate any disputes arising from her purchase, and to waive any right to participate in a class action. The arbitration provisions at issue were not buried in fine print or written in legalese; they were plainly written, prominently placed, and in some instances boldfaced or capitalized to draw attention. For example, the RISC—the longest contract—included an "ARBITRATION PROVISION – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS" section alerting Plaintiff, in large type, that the clause would significantly affect her rights and that she should read it carefully before signing.

Similarly, the stand-alone arbitration agreements presented by the dealership were concise, one-page documents plainly stating that all disputes between the customer and dealer will be decided by binding arbitration and that the parties waive and give up the right to file or pursue claims in court, before a jury or a judge. In each such form, directly next to the signature line, bold text

explicitly warned that the customer is giving up the right to participate in any class proceeding. Plaintiff signed or initialed each of these provisions. There is no ambiguity whatsoever about what she was agreeing to: she clearly and unambiguously agreed to resolve any and all claims through individual arbitration. This satisfies the core requirements of mutual assent under New Jersey law. Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 442 (2014). Plaintiff here was given exactly such notice and clear terms—not just once, but multiple times.

Notably, Plaintiff has never certified or even asserted that she was *unaware* she was agreeing to arbitration. She did not claim below that she was confused by any alleged inconsistencies among the documents at the time of signing. All objective signs point to her understanding and acceptance of the arbitration terms—from her multiple signatures to the bold warnings she acknowledged. There was a true *meeting of the minds*: both Plaintiff and the dealership intended and agreed that any post-sale disputes would be handled in one forum (arbitration) and on an individual basis only.

Nor could Plaintiff contend that she did not understand what she was signing because there was a clear supersession clause in the second stand-alone agreement expressly stating which arbitration provision controlled in the event of a dispute between her and the dealership. Goffe v. Foulke Management Corp.,

238 N.J. 191, 212-213 (2019) ("Moreover, the argument that either plaintiff did not understand the import of the arbitration agreement and did not have it explained to her by the dealership is simply inadequate to avoid enforcement of these clear and conspicuous arbitration agreements that each signed . . . an enforceable contract exists where a written agreement is 'sufficiently definite in its terms that the performance to be rendered by reach party can be ascertained with reasonable certainty.'") (quoting W. Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958)); see also Gras v. Assocs. First Cap. Corp., 346 N.J. Super. 42, 56 (Super. Ct. App. Div. 2001) ("Failing to read a contract does not excuse performance unless fraud or misconduct by the other party prevented one from reading.").

The trial court nevertheless refused enforcement, not because of any lack of clarity in the text of a given clause, but because *between* the four documents there existed what the court perceived as inconsistencies. In other words, the court found a lack of mutual assent due to multiplicity—the idea that having several arbitration clauses in the packet, with some differences in detail, prevented the consumer from knowing what she was getting into. We address that rationale in the next Point, but it is critical to recognize that absent the multiple-document context, *each* of the arbitration agreements here would undoubtedly be enforceable on its face. Indeed, Plaintiff's agreements are as

clear or clearer than those upheld in numerous cases. For example, in Gras, 346 N.J. Super. 42, the court enforced an arbitration clause in a consumer loan contract which was "specific enough to inform plaintiffs that they were waiving their statutory rights to litigation in a court" (id. at 57)—a standard plainly met here. And in Martindale v. Sandvik, Inc., 173 N.J. 76, 94-95 (2002), the Supreme Court enforced an arbitration agreement that was clear and unambiguous about waiver of court rights (id. at 96)—exactly like the language before this Court. In short, the content and presentation of the arbitration terms in this case satisfy all requirements for an enforceable agreement under state law (and under the FAA's equal-treatment principle—i.e., that arbitration agreements must be treated the same as other contracts). Plaintiff's assent was real and informed.

The only remaining question, then, is whether the simultaneous existence of multiple arbitration provisions in the transaction somehow negates that assent. New Jersey appellate decisions have, in a few instances, voided arbitration clauses where conflicting provisions across multiple documents created fatal ambiguity. But as shown below, those cases are distinguishable—chiefly because, unlike here, the contracts lacked any clause resolving the conflicts and left the consumer guessing. Here, by contrast, the parties explicitly agreed on how to reconcile any discrepancies. Under these circumstances, the Court should enforce the agreements rather than nullify them.

## II. THE DIFFERENCES AMONG THE THREE ARBITRATION CLAUSES WERE RESOLVED BY THE CONTRACTS' SUPERSESSION CLAUSE (T15 through T23)

The trial court's refusal to compel arbitration rested almost entirely on NAACP of Camden Cty. East v. Foulke Management Corp., 421 N.J. Super. 404 (App. Div. 2011) and its predecessor Rockel v. Cherry Hill Dodge, 368 N.J. Super. 577 (App. Div. 2004). In those cases—each involving car sales—the Appellate Division found that multiple contract documents contained arbitration clauses with materially conflicting terms, resulting in a lack of mutual assent. Rockel had no supersession clause to reconcile its conflicting arbitration provisions, and Foulke contained two separate supersession clauses in different documents that created confusion. Neither case featured a single, clear controlling agreement as exists here, making both distinguishable from this case.

Defendants acknowledge the general principle that an arbitration agreement must be internally consistent enough to signal mutual assent. However, the situation at bar is fundamentally different from Rockel and Foulke. Unlike those cases, *the agreements here contain a specific mechanism to resolve any inconsistency—a supersession clause*. The *critical distinction* is that Plaintiff and the dealership explicitly agreed which terms would govern in the event of a conflict. They did not leave it up to a layperson (or a judge after the fact) to sort out which of multiple clauses might control. In the second stand-

alone arbitration form (the "Agreement to Arbitrate and Class Action Waiver") [Da058], the parties agreed that "*[i]f this Agreement conflicts with the terms of any other agreement between any of the Parties, the terms of this Agreement shall govern but only to the extent of the conflict.*". This type of clause is sometimes referred to as a supersession clause or "controlling agreement" clause. By its plain terms, it tells the consumer (and the courts) how to harmonize the various documents: the standalone arbitration agreement's provisions override others wherever there is a true conflict.

In fact, the Appellate Division recently upheld an arbitration agreement under closely analogous circumstances, emphasizing the curative effect of a supersession clause. In Cervalin v. Universal Global, Inc., No. A-0974-20, 2021 N.J. Super. Unpub. LEXIS 1392 (App. Div. July 6, 2021) [Da061], the plaintiff car-buyer had signed two agreements (a retail order and a finance contract) that both contained arbitration clauses. Much like here, the retail order's clause included a term providing that if another contract's arbitration clause conflicted with it, the other contract's clause would control. The Appellate Division found the two clauses to be 'clear and unambiguous' waivers of the right to litigate (id. at *10), and held that any minor differences between them were resolved by the supersession clause in the retail order. Id. at *14. Those differences were 'not sufficient to overcome the clear language waiving the right to sue' in court. Id.

at *13-14. Notably, the plaintiff in Cervalin did not claim any personal confusion about the multiple arbitration agreements; he argued only that the clauses were inconsistent on their face. See id. at *12. The court rejected that argument, enforcing the arbitration agreements because the supersession clause reconciled any discrepancies and the intent to arbitrate was clear. Cervalin aligns closely with the present case and confirms that where contracts provide a clear rule to resolve conflicting terms—and the consumer does not even allege confusion—an agreement to arbitrate remains valid and enforceable.

Likewise, in Guzman v. E. Coast Toyota, No. A-0726-19T1, 2020 N.J. Super. Unpub. LEXIS 1381 (Super. Ct. App. Div. July 13, 2020) [Da080], the trial court refused to compel arbitration because it found multiple arbitration provisions in a motor vehicle sale were inconsistent and ambiguous and therefore unenforceable. Id. at *1. The Appellate Division reversed because it found that there was a supersession clause in one of the documents stating that if there was a conflict between the documents, one of the documents would control. Id. at *5-9.

Supersession clauses are routinely enforced in contract law as a reflection of the parties' intent. Indeed, giving effect to a supersession clause is essential to avoiding uncertainty in multi-document transactions. Here, the supersession clause ensured that this arbitration form would override any inconsistent

provisions in the other sale documents. In other words, the consumer did not have to "pore through" each clause and guess which one applied; the contracts themselves supplied the answer—the standalone arbitration terms govern if there is a discrepancy. By including this coordinating clause, Defendants eliminated any possible inconsistencies among the various agreements. When Plaintiff signed the superseding agreement, it was her fourth acknowledgment of the same basic obligation (individual arbitration), and it *"negate[d] any notion that the [arbitration clause] was hidden in fine print."* Put simply, the supersession clause here was not a piece of boilerplate designed to confuse or obscure; it was a prominent feature of the agreement, written in plain language, that actually clarified the parties' understanding.

The trial court, following Foulke, did not address the supersession clause notwithstanding that Defendants argued in the trial court that the supersession clause resolved any inconsistency. This was a critical oversight. As discussed, arbitration agreements are treated just like any other contract and supersession clauses are routinely enforced by New Jersey courts to resolve inconsistencies among various documents. Far from masking a material deficiency, the supersession clause *cures* any potential deficiency by telling all parties which terms win out. It is not hidden in a maze of fine print; it is an explicit statement on the face of the one-page stand-alone arbitration agreement (immediately

above Plaintiff's signature). A reasonable consumer reading each document would thus have a clear understanding of which provision applied. Even the Foulke court acknowledged in principle that if inconsistencies are resolved by such a clause, they might not vitiate assent—it only refused to credit the clause there because there were two of them in separate documents and thus it was unclear which agreement controlled. Here, however, the single supersession clause makes it a straightforward task: the second arbitration agreement's terms govern all arbitration issues. There is no endless cross-referencing required; one need only look to that final agreement.

Additionally, public policy favors enforcing the supersession clause because it prevents gamesmanship. If courts ignore such clauses, it incentivizes plaintiffs to exploit any immaterial variation as an excuse to void arbitration entirely—even when it is obvious the parties intended to arbitrate. That undermines the strong state and federal policy favoring arbitration agreements. It would also discourage businesses from using multiple documents (even when required by lenders or practical necessity), or from including clarifying supersession language at all, since it could be deemed useless. Enforcing the clause, by contrast, holds consumers and businesses to their bargain while still protecting consumers from prejudice—because the clause *itself* protects the consumer by choosing one set of terms to follow. Refusing to enforce the

supersession clause is directly contrary to state contract law and is tantamount to holding that supersession clauses are unenforceable. Here, Plaintiff has not identified any prejudice from the existence of multiple clauses beyond the abstract argument that they could confuse someone. In practice, she was not misled in any way that affected her decision or her rights: she was repeatedly told about arbitration and waived court rights, and that is exactly what Defendants seek to enforce. There is no *unfair surprise* here. Conversely, refusing enforcement inflicts great prejudice on the dealership, which faces the very class action it contracted to avoid. Equity and policy tilt in favor of enforcing the parties' true agreement—which was, without question, to arbitrate disputes individually.

Moreover, under the FAA, a court must enforce a supersession clause in an arbitration agreement just as it would any other contract term. The United States Supreme Court has held that the FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 478 (1989). It is "a fundamental principal that arbitration is a matter of contract . . . [thus] courts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011). The Supreme Court has made clear that

state law cannot refuse to enforce an arbitration clause while enforcing the rest of the contract: "What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995). In short, the FAA demands that arbitration agreements (and any coordinating clauses like the supersession provision here) be enforced according to their terms. Just like any other contract, when there are multiple agreements a supersession clause controls. Refusing to give effect to the supersession clause directly conflicts with the FAA and thus would be preempted by federal law.

To the extent Foulke or Rockel could be read to invalidate an arbitration agreement even when a supersession clause eliminates the conflict, such a rule would conflict with the FAA's mandate of liberal enforcement of arbitration agreements and treating arbitration agreements just like any other contract. This Court should reverse the trial court's Foulke/Rockel approach in circumstances like ours, where the parties themselves resolved any discrepancies and manifested a clear intent to arbitrate (which is precisely what the Appellate Division did in Cervalin and Guzman).

In sum, the parties' intent to arbitrate is readily discerned from the four corners of the documents, especially reading them as a unit as the supersession

clause invites. This Court should not invalidate the arbitration agreement on the basis of the multiple-document format. Rather, it should do what a court normally does with integrated contracts: read them together, give effect to all provisions, and enforce the controlling terms as the parties agreed. Doing so here means recognizing that Plaintiff is bound to arbitrate her claims and may not serve as a class representative—precisely as she *promised in writing* on March 11, 2024.

## III. THE EXISTENCE OF MULTIPLE ARBITRATION AGREEMENTS WAS THE RESULT OF STANDARD BUSINESS PRACTICE—NOT DECEPTION—AND DOES NOT JUSTIFY VOIDANCE OF THE ARBITRATION OBLIGATION (T15 through T23)

Plaintiff's argument, accepted by the trial judge, essentially imputes something nefarious or fatally confusing about a consumer being asked to sign more than one arbitration agreement during a single transaction. But the reality is far more benign. The dealership was following ordinary protocol to ensure its rights were protected once the financing contract was assigned away. As noted, the RISC used here is a form required by lenders and it inherently anticipates that dealers might employ separate arbitration or waiver agreements for their own benefit. It is undisputed that Edison Nissan assigned Plaintiff's RISC to Ally Bank immediately (as reflected in the RISC) [Da050], meaning that any dispute Plaintiff had regarding the loan terms would likely be handled by Ally

(in arbitration per the RISC)—whereas any dispute she had with Edison Nissan would be independently arbitrable under an agreement between Plaintiff and the dealer. The stand-alone arbitration agreements served exactly that purpose.[2] There was nothing misleading about it. A reasonably informed consumer would understand that the standalone agreements were to ensure the dealer could compel arbitration of any issue between them, regardless of the RISC going to a third party.

It is also significant that Plaintiff bargained for and received something in exchange for these waivers: the dealership proceeded with the sale and financing under terms that included arbitration, presumably something favorable to the dealer (and potentially reflected in the pricing or willingness to enter the deal). Arbitration clauses in consumer sales are part of the overall bargain—businesses often value them and may, for example, refrain from adding certain fees or may expedite a deal because the risk of class litigation is mitigated. Plaintiff got the benefit of her purchase (the vehicle) and even now remains free to pursue all her claims (just in the agreed forum). This is not a case of hidden arbitration clauses tucked in an unread manual or hyperlink; Plaintiff physically signed multiple

[2] As noted above, it appears to have been a mistake that the dealership included two stand-alone agreements in its paperwork, with one of them likely representing a prior version of the same document. Regardless, the two agreements are substantially the same with both electing to resolve disputes through binding arbitration and waiving class action claims.

prominent agreements. It defies logic and fairness to suggest she did not assent to what she signed. Indeed, had the dealership used only the RISC and a single stand-alone arbitration agreement (with the supersession clause), there would be no plausible argument against enforcement. The inadvertent inclusion of an extra, duplicative arbitration form does not change the parties' understanding at all; it merely repeated what Plaintiff had already agreed to. Such a clerical redundancy should not give Plaintiff a windfall opportunity to evade her arbitration promise.

In conclusion on this Point, nothing about the presence of multiple arbitration agreements in this transaction warrants stripping those agreements of legal effect. The format was driven by practical necessity, not by any intent to deceive. The dealership gained nothing by having duplicative clauses except certainty that its arbitration rights were preserved. The Plaintiff, for her part, was amply notified and agreed each time. The Court should reject Plaintiff's invitation to find confusion where none genuinely existed. Minor drafting or administrative redundancies should not nullify an arbitration commitment that was, in substance, clear and mutually intended.

## CONCLUSION

Plaintiff signed her name to four separate promises to arbitrate and to refrain from pursuing class relief. The record is devoid of any evidence that

these promises were anything but knowing and voluntary. While the trial court was concerned about the effect of multiple documents, the parties themselves agreed how to handle multiple documents—by giving primacy to the final arbitration agreement's terms. In doing so, they demonstrated a mutual assent to one unified arbitration agreement, notwithstanding it being memorialized in more than one piece of paper. The law does not permit a party to evade such an agreement merely because of superficial inconsistencies or redundancy, especially where a contract clause (the supersession clause) resolves them.

New Jersey's policy favoring arbitration, and basic contract fairness, both dictate that Plaintiff be held to her agreements. She should not be allowed to proceed in court on a class action that she expressly waived, as that would both undermine the federal-state pro-arbitration policy and subject Defendants to precisely the prejudice they sought to avoid by contract.

Accordingly, Defendants-Appellants respectfully request that this Court reverse the trial court's order denying arbitration. The Court should direct that Plaintiff's claims be submitted to individual arbitration in accordance with the parties' agreements, and that the class-action allegations be dismissed or struck. Such a disposition upholds the parties' contractual expectations and the controlling legal principles that favor enforcing clear arbitration agreements.

BARON SAMSON LLP
*Attorneys for Defendants Edison Motor Sales, LLC d/b/a Edison Nissan and Frank Esposito*

By: */s/ Jase Brown*
JASE A. BROWN

Dated: October 29, 2025

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

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| JONNA STROJAN, on behalf of herself and others similarly situated,<br><br>Plaintiff- Respondent,<br><br>v.<br><br>EDISON MOTOR SALES, LLC d/b/a EDISON NISSAN and FRANK ESPOSITO,<br><br>Defendants-Appellants. | Case No. A-003367-24<br><br>On Appeal from an Order of The Superior Court of New Jersey, Law Division, Middlesex County<br>Case No. MID-L-1780-25<br>*Sat Below:* Ana C. Viscomi, J.S.C. |

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# PLAINTIFF-RESPONDENT'S BRIEF

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Submitted to the Court on October 10, 2025

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**Cases**

## PROCEDURAL HISTORY

On March 24, 2025, Plaintiff filed the Complaint in this matter asserting that the Defendants, a car dealership and its owner, adopted unlawful policies and practices in violation of the Consumer Fraud Act (CFA) including (1) misrepresenting non-certified used cars as "Certified Preowned" vehicles to induce sales and inflate prices and (2) adding documentary service fees to vehicle sale prices without identifying in writing any actual services performed in exchange for the fees, in violation of the CFA's Automotive Sales Practices Regulations. Da3. In addition to monetary relief, the Complaint seeks injunctive relief under the CFA, including a separate claim, at Count One, for an injunction requiring Defendants to cease the practice of representing non-certified used cars as "Certified Preowned" vehicles and to notify class members who already purchased misrepresented "Certified Preowned" vehicles that their cars are not in fact enrolled in any manufacturer certified preowned program and are not covered by an extended manufacturer warranty or other benefits associated with such programs. Da12-15.

On May 22, 2025, Defendants filed a motion to dismiss and compel arbitration, specifically based on an arbitration provision embedded in the retail installment sale contract (the "RISC") that Plaintiff signed during her transaction with Defendants on March 11, 2024 to finance her purchase of the vehicle. Pa7-8,

12-13,[1] The motion brief and supporting certification identified the RISC arbitration provision as the sole basis for the requested order to dismiss and compel arbitration and did not reference to disclose the existence of any other arbitration provisions signed by the parties. Pa12-13, Da43-50. Da43-50.[2]

In her opposition, filed on June 9, 2025, Plaintiff submitted two additional arbitration provisions that were included in the copies of the transaction documents provided to her at the conclusion of the sale, one in the form of a single-page standalone arbitration agreement ("SAA") entitled "Agreement to Arbitration Disputes" (Da53) and another contained in a Vehicle Theft Protection ("VTP") contract in a section captioned, "Agreement to Arbitrate any Claims." Da54. The opposition brief identified various inconsistencies in the terms of the RISC, SSA, and VTP arbitration provisions, and argued that the dealership's inclusion of three conflicting arbitration provisions in the transaction documents precluded mutual assent under Appellate Division precedents. Pa21-25 (citing, *inter alia*, *NAACP of*

[1] Plaintiff's appendix includes portions of the briefing below for the limited purpose of countering inaccuracies in Defendants' procedural history regarding the issues raised and basis of relief specified in their motion filing below. See R. 2:6-1(a)(2)(prohibiting briefing below "unless…the question of whether an issue was raised in the trail court is germane to the appeal).

[2] In the same filing, Defendants separately moved for enforcement of the RISC's purported "class waiver" provision and striking the Plaintiff's request for class certification "whether this case is adjudicated through arbitration or in court" (Pa10-12). The trial court's denial of this secondary request for relief is the subject of a separate appeal on leave granted, Case No. A-003916-24.

*Camden Cnty. E. v. Foulke Management*, 421 N.J. Super. 404, 424 (App.Div. 2011)(Finding lack of mutual assent to arbitrate disputes where car sale transaction documents included three "disparate arbitration provisions").

On June 13, 2025, Defendants filed a reply in which they submitted, for the first time, yet another purported arbitration provision, in form of a second standalone arbitration agreement ("SAA2", Da58) similar in format to the single-page SAA submitted by Plaintiff in her opposition filing (Da53), but with different terms. Unlike the other three arbitration provisions, the purported SAA2 included a "supersession clause" stating that the terms of the SAA2 supersede any conflicting terms in other agreements between the parties. Da58. In the reply brief, Defendants relied on the newly produced SAA2 to counter Plaintiff's challenge to mutual assent, arguing that the "supersession clause… eliminates any inconsistencies pertaining to arbitration in the other agreements" thus rendering *Foulke Management* and similar precedents inapplicable. Pa33. Notably, the reply certification and brief offered no explanation for Defendants' failure to disclose the purported SAA2 prior to their reply, or why they elected to move for enforcement of the RISC provision instead of the purported SAA2. Pa19-25.

On June 18, 2025, Plaintiff filed a letter objection and proposed surreply with supporting certification (Pa26, Da59), objecting to the SAA2 as improperly submitted for the first time on reply and requesting that it be disregarded, disputing

the authenticity and validity of the newly produced SAA2, requesting discovery relating to the SAA2's authenticity, and arguing that even if the SAA2 were authentic, the notion that a boilerplate supersession clause can cure the lack of mutual assent resulting from multiple, disparate arbitration provisions was considered and rejected in *NAACP v. Foulke Management Id.*

On June 19, 2025, the trial court heard oral argument, which began with Defendants' counsel apologizing for the Defendants' failure to produce or raise the SAA2 prior to their reply (T4:10 – 5:9) followed by a colloquy in which the court advised that it was granting leave for Plaintiff's surreply, admonished Defendants' conduct as "problematic" and warned that "the Court is certainly free not to consider that which [Defendants] have submitted in reply , which was not part of the original papers." T5:10 – 6:12. In response to the admonition and warning, Defendants counsel stated, "I can't apologize enough. But, Your Honor, you know, we don't have to even get to that document because the document upon which we rely, you know, clearly states… that class actions are waive both in court arbitration." T6:16 – 6:23. After advising the court that "we don't even have to get to the [SAA2]" Defendants' counsel did not raise or otherwise reference the purported SSA2's supersession clause during oral argument. T6:24 – 8:15; T14:21 – 15:5. The court's oral decision, placed on the record following oral argument, likewise did not reference or decide the arguments based on the supersession clause raised in Defendants' reply brief but

apparently abandoned at oral argument. T15:9 – 23:11. In the oral decision, the court denied Defendants' motion, finding that the multiple, conflicting arbitration and class waiver provisions precluded mutual assent, citing *NAACP v. Foulke Management. Id.*

## STATEMENT OF FACTS

On March 11, 2024, the Plaintiff, Jonna Strojan, purchased a used 2021 Volkswagen Atlas with 57,762 odometer miles (the "Atlas") from Defendant Edison Motor Sales, Inc. d/b/a Edison Nisson ("Edison Nissan") for a total sale price of $28,581.44 including fees and sales tax. Complaint (Da3), ¶ 12. During the sale presentation, Edison Nissan staff told Ms. Strojan that the Atlas was a "certified preowned" vehicle, and that it was in excellent condition with no problems or issues. ¶¶ 13, 18. The Motor Vehicle Retail Order (MVRO) signed by the parties likewise indicated that the Atlas was "CERTIFIED PREOWNED" for which $1,525 was being added to the total sale price. *Id.* ¶ 14, Exhibit A. Based on Edison Nissan's representations, Plaintiff reasonably believed that the Atlas was enrolled in a manufacturer certified preowned vehicle program, and had been thoroughly inspected and certified as meeting the condition standards associated with such programs, and was covered under an extended manufacturer's warranty associated with such programs. *Id.* ¶¶ 15 – 16. The MVRO form also included a standard provision imposing a $320 charge described as a "Clerical Fee" and a $260 charge

described as a "Computer Fee" each of which was identified as a "DOCUMENTARY FEE" but did not include a written itemization describing any specific services actually performed in exchange for the "Clerical Fee" or "Computer Fee," *Id.,* ¶ 17, See Exhibit A.

Within a week after the sale, Ms. Strojan began noticing a noxious odor inside the vehicle, and that the vehicle was not braking smoothly, so she made an appointment with Edison Nissan's service department. *Id.*, ¶¶ 21 – 22. Before the scheduled appointment, a storm occurred during which rainwater leaked through the roof of the vehicle, soaking the third-row seating and cargo areas. *Id.*, ¶ 23. After an initial failed attempt, Edison Nissan's service department eventually repaired the roof leak, as well as the braking issue. *Id.*, ¶ 30. When Ms. Strojan picked up the vehicle, Edison Nissan staff told her that the interior of the Atlas had been detailed and so she might notice a chemical odor which would fade in about a week. *Id.* ¶ 31.

Within a week or two after the repair, Ms. Strojan began noticing the smell of mold and/or mildew inside the vehicle, as the chemical smell from the detailing faded. *Id.,* ¶32. She then took the Atlas to Volkswagen of Freehold service department on April 24, 2024 to confirm that the leaking issue had been fully repaired and to diagnose the cause of the mold and/or mildew odor. *Id.,* ¶ 33, 34. Ms. Strojan advised Volkswagen of Freehold that the Atlas was a certified preowned

vehicle, but after checking the vehicle's records, the service staff told her that the Atlas was not registered as a certified preowned vehicle in Volkswagen's records. *Id.* ¶ 35, Exhibit B (Volkswagen of Freehold Invoice and Report noting, "Customer stated that the dealer told her it was a VW certified preowned vehicle and contract shows same. Verified VIN number through VW system and vehicle is NOT listed as a certified preowned…") Ms. Strojan was therefore required to pay for the inspection and related services out-of-pocket, in the amount of $277.22. *Id.,* ¶ 36.

After inspecting the Atlas, Volkswagen of Freehold prepared a report noting that the Edison Nissan did replace the faulty antenna seal that caused the leak, but the fabric "headliner was not replaced and is the source of the mildew smell." *Id.,*¶ 37, Exhibit B. The report recommended "replacing headliner" and disinfection and cleaning of other areas to address the mold/mildew issue and noted that Edison Nissan "removed the headliner to replace the seal and DID NOT replace the headliner which was where the water was leaking onto." *Id.,* ¶ 38, Exhibit. B (emphasis in original). The replacement of the headliner and other recommended services noted in the report will cost approximately $2,700, according to an estimate subsequently obtained by Plaintiff. *Id.,* ¶ 39.

## ARGUMENT

### I. Edison Nissan's use of multiple, inconsistent arbitration provisions in the same set of car sale transaction documents impaired the "clarity and internal consistency" necessary for mutual assent to a written arbitration agreement under New Jersey law.

### A. The arbitration provisions in the RISC, SAA, and VTP contracts[3] include various conflicting and inconsistent terms and collectively lack the clarity and internal consistency necessary for mutual assent under *NAACP v Foulke Management, Walker v. Route 18 Auto Group,* and *Rockel v. Cherry Hill Dodge.*

As with any other type of contract, formation of an arbitration agreement requires "mutual assent, as determined under customary principles of contract law." *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 442 (2014) *cert. denied*, 135 S.Ct. 2804 (2015). A party moving to compel arbitration "has the burden to prove, by a preponderance of the evidence, that [the opposing party] assented to" the purported arbitration agreement. *Midland Funding LLC v. Bordeaux*, 447 N.J. Super. 330, 336 (App.Div. 2016)(citing *Atalese*, 219 N.J. at 442-443). "[B]ecause arbitration involves a waiver of the right to pursue a case in a judicial forum, '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.'" *Atalese,* 219 N.J. at 442-43 (citing, *NAACP v. Foulke Management*, 421 N.J. Super. at 424. Before enforcing a purported agreement by which "a consumer waives constitutional or

[3] The purported SAA2 is excluded from the discussion in this section for reasons discussed in greater detail later in this brief including, (1) the motion below sought enforcement of the RISC only and the SAA2's purported existence was not disclosed until Defendants' reply, (2) the Defendants abandoned reliance on the SAA2 during oral argument and (3) Plaintiff has raised a dispute as to the authenticity and validity of the SAA2, which remains unresolved. As discussed under point heading II, even if the document were authentic and valid, its supersession clause would not cure the lack of clarity precluding mutual assent under *NAACP v. Foulke Management*.

statutory rights through a contractual waiver-of-rights provision, our courts have required a showing that the party 'has agreed clearly and unambiguously' to its terms.'" *Colon,* 459 N.J. Super. at 361 (citing *Atalese*, at 443 and *Leodori v. CIGNA Corp.*, 175 N.J. 293, 302 (2003)).

For mutual assent to be effective in a consumer transaction, the written "agreement must be sufficiently definite in its terms that the performance to be rendered by each party can be ascertained with reasonable certainty." *Kernahan v. Home Warranty Adm'r of Fla., Inc.*, 236 N.J. 301, 325 (2019). "Consequently, the clarity and internal consistency of a contract's arbitration provisions are important factors in determining whether a party reasonably understood those provisions and agreed to be bound by them." *Foulke Management*, 421 N.J. Super. at 425 (citations omitted). When deciding whether an arbitration provision in a "consumer contract meets standard of being written in clear and understandable manner, 'courts must take into consideration the guidelines set forth in [N.J.S.A. 56:12-10]'" of the Plain Language Act, including that "[c]onditions and exceptions to the main promise of the agreement shall be given equal prominence with the main promise, and shall be in at least 10 point type." *Kernahan*, at 301 N.J., at 326-27 (citing *Morgan v. Sanford Brown Inst*., 225 N.J. 289, 310 n.8 (2016) and N.J.S.A. 56:12-10(b)(3)).

Applying these principles, New Jersey courts have repeatedly held that where, as here, a car buyer is presented with transaction documents containing multiple

different arbitration provisions with inconsistent terms, there is insufficient "clarity and internal consistency" to support mutual assent to any written arbitration agreement under New Jersey law. *See Foulke Management,* 421 N.J. Super. at 410 (the inclusion of three "disparate arbitration provisions" in the same car sale documents rendered them "too confusing, too vague, and too inconsistent to be enforced."); *Walker v. Route 18 Auto Grp., LLC*, ___ N.J. Super. ___, 2025 N.J. Super. LEXIS 54 (App. Div. February 12, 2025, approved for publication July 10, 2025) (finding lack of mutual assent where car sale documents included two arbitration provisions with inconsistent terms regarding the arbitration forum, payment of arbitration fees, and appeal rights); *Rockel v. Cherry Hill Dodge*, 368 N.J. Super. 577, 583 (App. Div. 2004) (ruling that the dealership's "inclusion of two conflicting arbitration provisions in the contract documents confounds any clear understanding of the parties' undertaking" and renders both arbitration clauses unenforceable). As this Court recently explained in *Walker,*

> [I]f a matter involves "conflicting arbitration provisions set forth in multiple contract documents," the court is required to compare those provisions. Those provisions will be unenforceable if they do not comply with the "basic tenets of contract [*9] formation and interpretation."
>
> These may include: (1) "uncertain content of the parties' agreement to arbitrate"; (2) "the contracts' conflicting descriptions of the manner and procedure which would govern the arbitration proceedings"; (3) "the absence of a definitive waiver of plaintiffs' statutory claims"; and (4) "the obscure appearance and location of the arbitration provisions" in the agreements. The flaws must be viewed in their totality to

> determine if they "militate against the entry of an order requiring arbitration . . . ."

*Walker v. Route 18 Auto Grp., LLC*, slip op. at 9 – 10 (Pa48 - 49)(citing *NAACP v. Foulke Mgt,* 421 N.J. Super. at 428 and *Rockel* 368 N.J. Super. at 581).

In *Foulke Management*, as in this case, the dealership presented the buyer with "a stack of form documents" to sign, *Id.* at 410, three of which contained different arbitration clauses, with inconsistencies regarding various terms such as the "locale of the arbitration forum" and "costs of the arbitration and who will bear them." *Foulke Management,* at 431-35. The Court found that the "the disparate arbitration provisions" included in the same set of transaction documents "were too confusing, too vague, and too inconsistent to be enforced." *Id.* at 410. The Court further found, "It is unreasonable to expect a layperson to pore through the many arbitration provisions scattered within these multiple documents and discern which provisions are operative and exactly what they mean. *Id,* at 437.

Here, as in *Foulke* management, there are substantial inconsistencies between the arbitration provisions contained in three separate transaction documents, the RISC (Da49), the SAA (Da43), and VTP[4] (Da54), including inconsistencies

[4] Defendants claim that "Edison Nissan was not a party to the [VTP] contract" yet the document is signed by Edison Nissan, and there is nothing on the pages of the document given to Plaintiff that indicate Edison Nissan is not a party. However, it would make little difference to the mutual assent analysis if the VTP contract were between Plaintiff and a third-party affiliate of the dealership, because the RISC expressly *also* covers claims against such parties. See Da46 (requiring arbitration

regarding claims excluded from arbitration, choice of arbitration rules and administrator, arbitration location, the amount of arbitration fees to paid by the business rather than the consumer, the consumer's potential liability for the business arbitration costs, and inconsistent class waiver provisions.

Inconsistent terms excluding certain claims from arbitration: All three provisions initially define the scope of claims subject to arbitration broadly to include all claims "arising" from or "related" to the transaction but then specify *different* exclusions from arbitration. Most notably, the RISC excludes "injunctive" and "private attorney general" actions from arbitration (providing, "[t]he arbitrator may not preside over a … injunctive, or private attorney general action") while the SAA and VTP do not. The provisions also have substantially different small claims exclusions, with the VTP broadly excluding matters cognizable, but not necessarily filed in small claims court (requiring arbitration "EXCEPT for matters that may be taken to Small Claims Court"), the RISC excluding only claims actually filed and pending in small claims court, and the SAA providing for no small claims exclusion at all. Similarly, the SAA provides that claims under the New Car Lemon Law and Magnuson-Moss Warranty Act… are expressly excluded from arbitration," while the RISC and VTP contain no such exclusions.

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of any claim "which arises out… this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract").

Inconsistent terms regarding arbitration rules, administrator, and location: The RISC permits the consumer to choose between the American Arbitration Association (AAA) or National Arbitration and Mediation (NAM), while the SAA and VTP provide for only AAA rules and administration. The provisions also differ as to the place of arbitration, with the RISC requiring the arbitration hearing to be "conducted in the federal district in which [the consumer] reside[s]…[or] where this transaction was originated" which, for an in-state purchaser means anywhere within New Jersey, without regard to proximity to the consumer's residence, while the VTP provides that the "arbitration hearing will take place at a location convenient to" the consumer, and the SAA makes no reference to the place of arbitration.

Inconsistent terms regarding the dealership's payment of arbitration fees, as well as the consumer's exposure to liability for reimbursement: The RISC provides that business will advance all filing, administration, and arbitrator's fees up to a maximum of $5,000, while the VTP provides that the business will advance such fees without any limitation, and the SAA includes no provision for advancement of fees at all. The provisions also differ as to the consumer's exposure to liability for fees advanced by the business, with the RISC providing for reimbursement of advanced fees "if the arbitrator finds that any of your claims is frivolous under applicable law," and the VTP permitting the business to seek reimbursement without limitation as to the basis for the request.

Inconsistent class waivers: The three provisions contain materially different class waiver provisions, with the SAA waiver applying only to claims "the Parties have agreed to arbitrate," three of the four RISC waivers applying only to claims that are arbitrated and a fourth (buried in a small-type paragraph near the end of the arbitration provision) also applying to class actions in court, and the VTP applying to class actions in both court and arbitration.

These conflicts and inconsistencies are similar to, if not more substantial than those identified in *Foulke Management, Rockel,* and *Walker,* and, as in those cases, the "inclusion of [multiple] conflicting arbitration provisions in the contract documents confounds any clear understanding of the parties' undertaking" and renders [each] arbitration clauses unenforceable." *Rockel*, 368 N.J. Super. at 583.

While all the inconsistencies discussed earlier are significant, the RISC's exclusion from arbitration of "injunctive" and "private attorney general actions" is especially important because the Plaintiff has asserted claims falling under both exclusions. Count One of the complaint seeks an injunction requiring Edison Nissan to cease the practices of representing non-certified cars as "Certified Preowned" and to serve notice to class members who already purchased such vehicles to alert them that their cars are not in fact enrolled in a manufacturer certified preowned program and not covered by the extended warranty or other benefits associated with such programs. Da12-15. See *Laufer v. U. S. Life Ins. Co.*, 385 N.J. Super. 172, 184 (App.

Div. 2006)(Holding the CFA and R. 4:32-1(b)(2) authorized "limited injunctive relief [requiring U.S. Life to serve] notice to all other class members that "they do *not,* and have not had, nursing home coverage, . . . and that the court has declared that all the representations made . . . to the effect that there was a nursing home benefit included in class members' coverage were deceptive in violation of the Consumer Fraud Act"").

The RISC's exclusion from arbitration of any "private attorney general action" is even more significant because that term, as used by the New Jersey Supreme Court for nearly 30 years, includes *any* private CFA action under N.J.S.A. 56:8-19. See *Lemelledo v. Benefit Mgmt. Corp.*, 150 N.J. 255, 268 (1997)("in allowing for private suits [the CFA] contemplates that consumers will act as 'private attorneys general."); *Robey v. SPARC Grp. LLC*, 256 N.J. 541, 567 (2024)(CFA plaintiffs "act as 'private attorneys general,' …reliant on their ability to plead an ascertainable loss."); *Dugan v. TGI Fridays, Inc*., 231 N.J. 24, 90 (2017)(Albin, J., dissenting)("The CFA vests individuals with the power to act as private attorneys general as a separate enforcement mechanism."); *Steinberg v. Sahara Sam's Oasis*, LLC, 226 N.J. 344, 361 (2016)("under the Consumer Fraud Act, citizens are empowered to act as 'private attorneys general' in bringing civil actions to enforce the Act."); *Pinto v. Spectrum Chems. & Lab. Prods.*, 200 N.J. 580, 593 (2010)(CFA plaintiffs "serve as 'private attorneys general,' vindicating the

rights of defrauded consumers.”). As explained by the Appellate Division in *Jacobs v. Mark Lindsay & Son Plumbing & Heating, Inc.*, 458 N.J. Super. 194 (App. Div. 2019):

> More than twenty years ago, our Supreme Court declared that "in allowing for private suits in addition to actions instituted by the Attorney General, [N.J.S.A. 56:8-19] contemplates that consumers will act as 'private attorneys general.'" Thus, as a matter of public policy, the Legislature enacted fee-shifting… statutes like the CFA to induce competent counsel and advance the public interest through private enforcement of statutory rights that the government alone cannot enforce.

*Id.* at 211 (citing *Lemelledo,* 150 N.J. at 268). Thus, the RISC’s exclusion of any “private attorney general action” from arbitration would require that most of the claims asserted in this action be resolved in court rather than arbitration, unlike the other arbitration provisions included in the Defendants’ transaction documents. This stark inconsistency between the RISC and the other arbitration provisions, as well as the inconsistencies regarding choice of arbitration rules and administrator, the place of arbitration, the amount of arbitration fees to be paid by the dealership, the degree to which the consumer may be exposed to liability for the fees advanced by the dealership, and the applicability of class waivers to court proceedings, render them invalid for lack of mutual assent under *Rockel, Foulke Mangagment, and Walker*.

**B. Defendants' argument that Plaintiff "never certified or even asserted that she was *unaware* she was agreeing to arbitration" reflects a misunderstanding of *Atalese* and *NAACP v. Folke Management* which apply an objective standard to determine consumers' knowing assent based on the clarity and internal consistency of the arbitration provisions.**

The Defendants suggest that the Plaintiff, in order to challenge mutual assent under *Foulke Management* or *Atalese* and similar precedents must prove *subjective* lack of assent, complaining that "Plaintiff has never certified or even asserted that she was *unaware* she was agreeing to arbitration. She did not claim below that she was confused by any alleged inconsistencies among the documents at the time of signing." Db14. This reflects a basic misunderstanding of New Jersey caselaw which applies an objective standard to determine mutual assent to arbitration provisions in consumer contracts, based strictly on the objective "clarity and internal consistency" of the arbitration provisions as presented to the consumer. See *Walker v. Route 18 Auto Grp.*, slip op. at 6 ("For there to be a "meeting of the minds" on the essential terms, there must be "clarity and internal consistency of a contract's arbitration provisions.")(citing *NAACP v. Foulke Management*, at 424). See also *Atalese,* 219 N.J. at 444 ("Arbitration clauses—and other contractual clauses—will pass muster [with respect to a knowing assent] when phrased in plain language that is understandable to the reasonable consumer.")

> *Atalese* does not, as defendants contend, establish a subjective test for mutual assent for arbitration agreements. In *Atalese*, the Court stated that, "Mutual assent requires that the parties have an understanding of the terms to which they have agreed." *Atalese*, 219 N.J. at 442….

> *Atalese* requires courts to examine the relevant contractual language, and based on that language, determine whether mutual assent has been achieved.

*Defina v. Go Ahead & Jump 1,* 2019 N.J. Super. Unpub. LEXIS 1400, at *16-17 (App. Div. June 13, 2019).

## II. Defendants' arguments based on the purported SAA2's supersession clause should be rejected on several bases.

### A. Defendants' arguments based on the supersession clause in the purported SAA2 have not been preserved for appeal and should not be considered in reviewing the trial court's order denying the motion to dismiss and compel arbitration.

The Defendants' brief describes the procedural history of the motion on appeal as follows:

> **Motion to Compel Arbitration**: On May 21, 2025, Defendants moved to dismiss the Complaint and compel arbitration pursuant to the parties' agreement. Defendants argued that Plaintiff had signed multiple documents at the time of sale which contained binding arbitration clauses and class-action waivers.
>
> Plaintiff opposed the motion, arguing that the existence of multiple arbitration clauses in the transaction rendered her purported assent to arbitrate unclear or invalid… Plaintiff primarily relied on the Appellate Division's decision in *NAACP of Camden Cty. E. v. Foulke Mgmt. Corp*.... In response, Defendants emphasized that any inconsistencies between the clauses were expressly resolved by a supersession clause in one of the agreements (in contrast to Foulke where two of the agreements had supersession clauses that created a direct conflict).

Db3. This "history" materially misrepresents the parties' filings, particularly with respect to the purported second separate arbitration agreement (the SAA2) .

As an initial matter, it is untrue that in their motion filed "[o]n May 21, 2025, Defendants… argued that Plaintiff had signed multiple documents at the time of sale which contained binding arbitration clauses." The only document containing an arbitration provision identified in the May 21, 2025 motion filing was the RISC, which the Defendants relied on as the exclusive basis of their request to compel arbitration and dismiss the lawsuit. Da43, Pa7-9. The fact that there were "multiple documents…which contained an arbitration provision" was first called to the court's attention by Plaintiff in her opposition brief and certification, in which she attested that before she left the dealership after purchasing the vehicle, "an Edison Nissan representative gave me a stack of papers, which the representative told me were copies of the documents I signed that day" and noting that two of them, the SSA and VTP also contained arbitration provisions. Da51–52.

Most importantly, the Defendants' procedural history also fails to mention that the purported SAA2 with the supersession clause that Defendants rely upon so heavily on appeal was not raised or produced by Defendants until their reply filing. Da56-58, Pa27 and that Defendants' counsel effectively withdrew their arguments based on the SAA2's supersession clause during oral argument on June 19, 2025. More specifically, after the court admonished Defendants for raising the SAA2 for the first time on reply as "problematic" and warned that "the Court is certainly free not to consider that which they have submitted in reply , which was not part of the

original papers" (T5:10 – 6:12), Defendants' counsel responded, "I can't apologize enough. But, Your Honor, you know, we don't have to even get to that document because the document upon which we rely [the RISC] clearly states… that class actions are waived both in court arbitration." T6:16 – 6:23. After representing to the court that "we don't even have to get to the [SAA2]" Defendants' counsel kept his word and did not raise or otherwise reference the purported SSA2 or its supersession clause during oral argument. T6:24 – 8:15; T14:21 – 15:5. Thus, the court did not render a decision on Defendants' arguments premised on the SAA2's supersession clause previously raised in their replay brief, leaving this Court with no lower court ruling on those issues to review on appeal.

This Court has held that it will generally decline review of matters raised for the first time in a motion reply in the Law Division unless they "go to the jurisdiction of the trial court or concern matters of great public interest.'" *Berardo v. City of Jersey City*, 476 N.J. Super. 341, 354 (App. Div. 2023)(citing *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 (1973)(Noting that "). In *Berardo,* the Court found that

> …plaintiff did not raise [the issue on appeal] before the Law Division until his reply brief; "[r]aising an issue for the first time in a reply brief is improper." "[A]ppellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.' "

*Id.*, at 354. Although the Court found that "the issue was not raised properly before the trial court" it elected to consider it on appeal because the trial "court did address the issue in its opinion [and] [m]ore importantly, [it] raises novel legal questions regarding a matter of public interest, warranting our consideration." *Id.*

Here, the effect of the SAA2's supersession clause on the question of Plaintiff's knowing assent to the multiple, conflicting arbitration provisions "was not properly raised before the trial court" and, unlike the issues in *Berardo,* were not decided by the trial court in its oral decision, nor is it an issue of particular public importance. The issue should be treated as not properly preserved for appeal, and therefore waived.

**B. Even if the supersession clause issue had been properly raised below and preserved for appeal, affirmance would be warranted because the Court in *NAACP v. Foulke Management* held that a boilerplate supersession provision cannot mitigate the lack of clarity and confusion resulting from multiple, inconsistent arbitration provisions.**

The Defendants' argument that the SAA2's boilerplate supersession clause precludes a finding of lack of mutual assent based on multiple, inconsistent arbitration provisions was considered and categorically rejected by the Appellate Division in *NAACP v. Foulke Management.* in which the Court stated,

> Defendant further argues that the supersession clause in the SAD ameliorates the conflicts between the SAD and the RIC and the Addendum. Although the trial court agreed with this contention, we do not...
>
> It is unreasonable to expect a layperson to pore through the many arbitration provisions scattered within these multiple documents and discern which

> provisions are operative and exactly what they mean. *Material deficiencies in contract documents cannot be masked, to a consumer's disadvantage, with a boilerplate supersession clause.*

*Id.,* at 436-37 (emphasis added).

The unpublished decision cited by Defendant, *Cervalin v. Universal Glob*., 2021 N.J. Super. Unpub. LEXIS 1392 (App. Div. July 6, 2021), does not address or acknowledge *Foulke Management's* holding on this issue (and in fact does not cite or discuss *Foulke Management* at all, calling into question its instructional value as a non-citable, unpublished decision). In any event, *Cervalin* is distinguishable from the present case, both with respect to the specific terms of the "supersession clause" and the number of competing arbitration provisions and their relative inconsistency. In *Cervalin*, the Court was faced with two competing arbitration provisions (rather than the four provisions at issue here, including the disputed SAA2) which the Appellate Division found to have only "minor differences" (without further elaboration) insufficient to vitiate mutual assent (*Id.,* at *13), and "resolved by the supersession clause contained in the Retail Order" which provided,

> In the event that any claims are based on a lease, finance, or other agreement between the parties [that] contains a provision for arbitration of claims which conflicts with or is inconsistent with this arbitration provision, the terms of such other arbitration provision shall govern and control.

*Id.* at *12. This provision, unlike the supersession provision in the SAA2 here, provides for *complete supersession*, effectively eliminating the Retail Order

arbitration provision if a competing arbitration provision in a financing agreement or lease for the vehicle covers the same claims. The provision at least has the potential to simplify matters by *eliminating* and thus reducing the number of multiple, conflicting arbitration provisions.

By contrast, the SAA2 "supersession provision" expressly provides for the continued existence of multiple, overlapping arbitration and class waiver provisions, and limits supersession only to specific terms that conflict with the SAA2 and "only to the extent of the conflict":

> If this Agreement conflicts with the terms of any other agreement between any of the Parties, the terms of this Agreement shall govern but only to the extent of the conflict.

Thus, in order to ascertain the terms that they will be bound to by signing the multiple arbitration and class waiver provisions presented in Edison Nissan's transaction documents, consumers would be required to compare and cross-reference the RISC, SAA, and VTP to the SAA2 on a provision-by-provision basis to identify which provisions conflict with and are thus superseded by the SAA2, and which provisions do not conflict and so remain effective and enforceable. This is *exactly* what the Appellate Division rejected in *Foulke Management* when stating, "It is unreasonable to expect a layperson to pore through the many arbitration provisions scattered within these multiple documents and discern which provisions are operative and exactly what they mean." *Id.* at 437. As the Appellate Division noted in *Rockel v.*

*Cherry Hill Dodge* (which was cited in *Foulke Management*), "[t]he delicate balance between the policies of the CFA and the policy in favor of arbitration requires that the consumer be given reasonable notice of such provisions, that the provisions contain a clear waiver of statutory rights, and that the arbitration agreement be phrased in unambiguous terms."368 N.J. Super. 577, 586-87 (App. Div. 2004). If Defendants and their counsel could not determine which arbitration terms applied, the agreement is plainly ambiguous, and no clear waiver of Plaintiff's rights occurred.

**C. Even if the supersession clause issue had been properly raised below and preserved for appeal, affirmance would be warranted because the SAA2 is unenforceable due to Defendants failure to provide Plaintiff a copy of the document at the time of sale in violation of the Consumer Fraud Act (CFA) at N.J.S.A 56:8-2.22.**

Even if the Plaintiff had signed the SAA2, it would still be unenforceable under New Jersey law because the dealership failed to provide her with a copy of the document as required by N.J.S.A. 56:8-2.22. *See* Da59-60, Strojan Sur-Reply Certification, ¶¶ 1-6. N.J.S.A. 56:8-2.22 is a "CFA provision [that requires a seller] to provide the consumer with a full and accurate copy of [a] document [] presented [to the consumer] for signature." *Goffe v. Foulke Mgmt. Corp*., 454 N.J. Super. 260, 274 (App. Div. 2018), *rev'd on other grounds*, 238 N.J. 191 (2019). In *Goffe*, the Appellate Division held that a car dealership's failure to provide a copy of a signed

contract that contains an arbitration provision to the consumer precludes enforcement of the arbitration clause, explaining,

> Although the effect of a violation of N.J.S.A. 56:8- 2.22 has not been considered in any reported decision, we cannot imagine the Legislature imposed such a requirement without likewise anticipating a remedy for its violation. We conclude such a violation should be treated no differently than we have treated failures to provide written estimates as required by regulation [which under CFA precedent have] barred a seller's recovery for a violation of such a regulation.
> *Goffe*, 454 N.J. Super. at 274-75.

While the Appellate Division's order denying arbitration was eventually reversed on other grounds, the Supreme Court expressly did not overrule the Appellate Division's construction of N.J.S.A. 56:8- 2.22, under which a business's failure to provide a copy of a signed agreement bars its subsequent enforcement. *Goffe*, 238 N.J. at 213 ("[W]e do not opine on the merits of [the Appellate Division's] remedy for any alleged violation of N.J.S.A. 56:8-2.22.")[5] The SAA2 is therefore unenforceable under undisturbed Appellate Division precedent, regardless of its authenticity.

**D. Even if the SAA2's supersession clause could effectively restore clarity necessary for mutual assent, there remains an unresolved dispute over the authenticity of the document and of Plaintiff's purported signature, which**

[5] Rather, the Supreme Court held that because the plaintiff claimed that "she was not given copies of any of the documents she signed," her challenge under N.J.S.A. 56:8-2.22 was not specifically directed at the arbitration agreement (which she admittedly signed), but rather to "overall sale contract" and therefore must be decided by the arbitrator under the severability doctrine established by federal precedents . *Goffe*, 238 N.J. at 205, 213. Here, Plaintiff is alleging only that she did not receive a copy of the SAA2. *See* Da59 – 60, Strojan Sur-Reply Cert., ¶¶ 1 – 6.

**would require remand for discovery and adjudication of these issues, rather than reversal with instructions to compel arbitration.**

For reasons already stated in this brief, Defendants attempt to compel arbitration and dismiss class claims under the SAA2 can and should be rejected without reaching the issue of whether or not Plaintiff actually signed the SAA2. However, in the event the Court disagrees, the matter should be remanded for discovery and a plenary hearing on Plaintiff's challenge to the authenticity of the SAA. As stated in her sur-reply certification filed below, Plaintiff does not recall seeing or signing the SAA2, and did not receive a copy of the document in the packet of transaction documents provided to her at the time of sale. Da59-60. The authenticity of the SAA2 is further called into question by the Defendants' failure to provide a plausible explanation as to why a consumer would be asked to sign two different versions of a car dealership's "Agreement to Arbitrate Disputes" form (SAA and SAA2) during the same sale, and by the obviously self-serving nature of the document and the timing of Defendants' initial disclosure of its existence. Moreover, the SAA2 was submitted without competent foundation as an exhibit to the three-paragraph reply certification of the dealership's vice president Frank Tacket, who was not present during Plaintiff's transaction, stating, (1) that Tacket is Edison Nissan's vice president, (2) that Plaintiff purchased a car from Edison Nissan on March 11, 2024, and (3) that during the transaction, "Plaintiff…signed" the appended SAA2 and that the SAA2 was "created and maintained by Edison in the

ordinary course of business." Da56-57, Second Tacket Cert., ¶¶ 1 – 3. Notably, Mr. Tacket does not provide any factual foundation for his testimony that Plaintiff signed the SAA2. As stated in her sur-reply certification, Plaintiff does not recall a person named Frank Tacket being involved in or present during the sale at issue, which calls into question his first-hand knowledge that Plaintiff signed the SAA2. Da59-60, Strojan Sur-Reply Cert., ¶ 7.

"As the proponent of arbitration, defendants have the burden to establish the existence of an agreement to arbitrate between themselves and [plaintiff]." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc.*, 427 N.J. Super. 45, 59 (App. Div. 2012). A contested motion to compel arbitration is treated as a motion for summary judgment under R. 4:46 if, as is the case here,

> the complaint and its supporting documents are unclear regarding the agreement to arbitrate, or if the plaintiff has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate in issue.

*Goffe v. Foulke Mgmt. Corp*., 238 N.J. 191, 214 (2019)((citing *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 776 (3d Cir. 2013)). Under such circumstances, "the parties should be entitled to discovery under [the summary judgment rule] on the question of arbitrability before a court entertains further briefing on [the] question." *Id.* If, after discovery, there remain genuine "questions of fact concerning the mutuality of assent to the arbitration provision," those issues are "to be decided by the trial court" through a plenary hearing. *Knight v. Vivint*

*Solar Dev., LLC*, 465 N.J. Super. 416, 423, 427-28 (App. Div. 2020)(remanding the issue of formation and mutual assent to the trial court "for a plenary hearing," where the plaintiff contested seeing or signing the purported arbitration agreement that bore her apparent signature).

Therefore, if the Court is inclined to accept Defendants' arguments regarding their right to compel arbitration under the SAA2, Plaintiff requests that the case be remanded to conduct discovery on the issue of the parties' mutual assent to that document, including the issues identified herein.

## III. Defendants' arguments based on supposed "standard business practice" of the auto dealership industry relies on purported facts not in the record below and should be disregarded.

Defendants' argument under point heading III of its brief, essentially claiming that the use of multiple, different arbitration provisions is "standard business practice" and "ordinary protocol" in the dealership industry to ensure that the dealership has an arbitration agreement in place after the RISC is assigned to the financing company, has no basis in the record or reality. According to Defendants,

> [T]he RISC used here is a form required by lenders and it inherently anticipates that dealers might employ separate arbitration or waiver agreements for their own benefit. It is undisputed that Edison Nissan assigned Plaintiff's RISC to Ally Bank immediately (as reflected in the RISC) [Da065], meaning that any dispute Plaintiff had regarding the loan terms would likely be handled by Ally (in arbitration per the RISC)—whereas any dispute she had with Edison Nissan would be independently arbitrable under an agreement between Plaintiff and the dealer. The stand-alone arbitration agreements served exactly that purpose.

Db24 – 25. In fact, the RISC, in which the Edison Nissan is specifically identified on the initial page as "Seller-Creditor (sometimes "we" or "us" in this contract)" (Da46) broadly covers claims "between you and us [the dealership] our employees, agents, successors or assigns which arises out of your credit application, purchase or condition of this Vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract)" and also provides that the arbitration agreement "survives transfer" of the RISC. Da49. There is nothing in the language of the contract to suggest that the dealership assigns the ability to enforce the arbitration agreement on assignment of the RISC. In fact, it specifically provides that the provision applies to both "us" *and* "our…successors and assigns." Da49. The fact that Defendants specifically sought enforcement of the RISC arbitration provision in their initial motion filing below demonstrates conclusively that Defendants themselves do not agree with their own argument – they apparently believe that they remain empowered to enforce the RISC arbitration clause years after assigning the RISC.

The *actual* industry protocol, as suggested by the heading on the first page of the RISC, "Retail installment Sale Contract (with Arbitration Provision)" is for the major auto sales form companies (such as Reyolds and Reynolds, whose RISC form was used in Plaintiff's transaction) to offer versions of RISC forms with and without

arbitration provisions, so that dealerships that have their own arbitration provision can avoid the mistake that Defendants made.

## CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court affirm the lower court's ruling.

Respectfully submitted,

Dated: October 10, 2025

*s/Henry P. Wolfe*
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Counsel for the Plaintiff

| | |
|---|---|
| JONNA STROJAN on behalf of herself and others similarly situated,<br><br>Plaintiff-Respondent,<br><br>v.<br><br>EDISON MOTOR SALES, LLC d/b/a EDISON NISSAN and FRANK ESPOSITO,<br><br>Defendants-Appellants. | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br>DOCKET NO.: A-003367-24<br><br>ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY<br>DOCKET NO.: MID-L-1780-25<br><br>*Sat Below:*<br>Hon. Ana C. Viscomi, J.S.C. |

# REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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## I. THE ORDER OF PRECEDENCE CLAUSE IS A VALID, FREQUENTLY UTILIZED CONTRACT PROVISION TO RESOLVE CONFLICTS—THUS THE SAA2'S ARBITRATION TERMS MUST BE ENFORCED (T15 through T23)

### A. Supersession (order of precedence) clauses are standard, frequently used contract provisions to resolve inconsistencies—not create confusion.

The SAA2 here explicitly includes an order of precedence clause which states that "[i]f this Agreement conflicts with the terms of any other agreement between any of the Parties, the terms of this Agreement shall govern but only to the extent of the conflict." [Da058]. Importantly, the concept of one agreed set of terms superseding another is hardly unique to arbitration agreements—it is a staple of contract law and legislative drafting generally. See, e.g., In re Jasper Seating Co., Inc., 406 N.J. Super. 213, 218 (Super. Ct. App. Div. 2009); Kwon v. Mdtv Realty Ltd. Liab. Co., No. A-2380-20, 2023 N.J. Super. Unpub. LEXIS 781, *3 (Super. Ct. App. Div. May 24, 2023) [Da085]; N.J.S.A. 12A:4A-108; N.J.S.A. 13:18A-27.

### B. Courts consistently enforce conflict-resolution clauses, giving effect to the parties' chosen hierarchy.

When contracts explicitly stipulate which provision prevails in the event of a conflict, courts will honor that choice. As correctly noted by the Eleventh Circuit, "where a contract contains a conflict, but also includes a clause that

expressly resolves the conflict, *there is no ambiguity* . . . [and] *we are bound by the mechanism [the parties] have chosen*." Internaves de Mex. s.a. de C.V. v. Andromeda S.S. Corp., 898 F.3d 1087, 1094 (11th Cir. 2018) (emphasis added). Other courts concur that mere inconsistencies between contract documents do not defeat an agreement when the contract itself specifies which terms control. Waller v. Foulke Mgmt. Corp., Civil Action No. 1:10-cv-06342 (NLH), 2011 U.S. Dist. LEXIS 90591, *18-19 (D.N.J. Aug. 11, 2011) [Da093] (in a closely analogous car purchase transaction involving a RISC and a stand-alone arbitration agreement, the court held that "[a]lthough the two agreements contain conflicting provisions," the arbitration agreement's supersession clause resolved the ambiguity); Waller v. Foulke Mgmt. Corp., Civil Action No. 1:10-cv-06342 (NLH), 2012 U.S. Dist. LEXIS 36512, *7-10 (D.N.J. Mar. 16, 2012) [Da100] (same); Ragab v. Howard, 841 F.3d 1134, 1138 (10th Cir. 2016) (noting that "[c]ourts have granted motions to compel despite the existence of conflicting arbitration provisions when the contracts themselves provide the solution" but noting that none of the six arbitration agreements at issue included a supersession clause); see also CooperVision, Inc. v. Intek Integration Techs., Inc., 794 N.Y.S.2d 812, 817-18 (Sup. Ct. 2005) (discussing the use of multiple agreements in a transaction with each agreement serving its own purpose and

explaining that a conflicts clause was intended to reconcile any inconsistencies among the various agreements).

Against this backdrop, Plaintiff's portrayal of the supersession clause as ineffective or suspect is baseless. Defendants are not aware of *any* case—in New Jersey or elsewhere—holding that an otherwise valid arbitration agreement becomes unenforceable merely because multiple forms had to be reconciled with an order of precedence clause. By its terms, the SAA2 was meant to be the final and governing expression of the parties' arbitration agreement in this multi-stakeholder transaction. Viglione v. Frisina, No. A-5668-11T2, 2013 N.J. Super. Unpub. LEXIS 829, *21-22 (Super. Ct. App. Div. Apr. 11, 2013) [Da104] ("If the terms of a contract are clear, they are to be enforced as written . . . [c]ourts will not write a new contract for the parties or vary, enlarge, alter, or distort its terms for the benefit of one to the detriment of the other under the guise of judicial interpretation.").

### C. Cervalin, Guzman, Waller and Adamson Confirm the Arbitration Agreement's Enforceability; NAACP, Rockel and Walker are Distinguishable.

The enforceability of Plaintiff's arbitration/class waiver agreements is strongly supported by Cervalin v. Universal Glob., No. A-0974-20, 2021 N.J. Super. Unpub. LEXIS 1392 (App. Div. July 6, 2021) [Da061]; Guzman v. E. Coast Toyota, No. A-0726-19T1, 2020 N.J. Super. Unpub. LEXIS 1381 (App.

Div. July 13, 2020) [Da080]; Waller v. Foulke Mgmt. Corp., Civil Action No. 1:10-cv-06342 (NLH), 2012 U.S. Dist. LEXIS 36512 (D.N.J. Mar. 16, 2012) [Da100]; and Adamson v. Foulke Mgmt. Corp., No. 08-4819 (JBS/JS), 2009 U.S. Dist. LEXIS 30099 (D.N.J. Apr. 6, 2009) [Da113]. All four cases are directly on point where multiple arbitration agreements were involved in a car purchase transaction but one of the arbitration agreements included an order of precedence clause which stated that it controlled over the others—just as the SAA2 here includes an order of precedence clause.

Plaintiff (and the trial court), however, believes that NAACP of Camden Cnty. E. v. Foulke Management, 421 N.J. Super. 404 (App. Div. 2011); Rockel v. Cherry Hill Dodge, 368 N.J. Super. 577 (App. Div. 2004); Walker v. Route 18 Auto Grp., LLC, No. A-3085-23, 2025 N.J. Super. LEXIS 54 (App. Div. Feb. 12, 2025) [Da123] are controlling. The crucial difference, however, between those cases and this case is that *neither* Rockel nor Walker involved a supersession clause. And NAACP involved *two* dueling supersession clauses, so it was unclear which of the agreements controlled.

The Adamson v. Foulke Management case relied upon by the Defendants—a case arising from a car purchase at the very same dealer involved in NAACP—is particularly noteworthy. In Adamson, a consumer signed both a RISC and stand-alone arbitration agreement and later argued that the two

documents conflicted, relying on Rockel and similar cases. The court rejected that argument and compelled arbitration, reasoning that New Jersey law does not impose a rule of per se invalidity whenever two arbitration clauses are signed. The court stated: "It is certainly true . . . that a waiver of the right to sue must be clear and unmistakable. This does not mean, however, that an arbitration agreement (or agreements) must be entirely unambiguous to be enforceable, especially where, as here, some rights have been clearly waived." Adamson, 421 N.J. Super. at *18. Significantly, the Adamson court expressly disagreed with any reading of Rockel or Foulke that would nullify an arbitration agreement simply because more than one form was used: "To the extent that the New Jersey Appellate Division found that whenever a party signs two arbitration clauses of different scope there can be no binding arbitration agreement as to any claims, [this] is . . . unsupported by New Jersey jurisprudence." Id. at *21. Instead, the court in Adamson found that: "Plaintiff signed two separate arbitration agreements in which he clearly and unambiguously agreed to waive his right to bring the present claims before a court (and a jury). Whether other claims would also fall within the scope of these two agreements is of no matter to the present litigation." Id. at *20. In other words, because the specific claims before the court were plainly covered and the right to litigate them had been clearly waived,

the arbitration (and class waiver) agreement was enforceable—even if the two forms were not identical in every respect.

The Waller court likewise rejected Plaintiff's position, noting that:

> [T]he arbitration agreement expressly supersedes the RI[S]C. Unlike in NAACP where the addendum also had a superseding clause, the retail buyer order [here] has no such provision . . . . We do not suggest that defendants could not have been more careful in drafting the various documents governing the transaction at issue here. They clearly could have been and probably should be in the future. We hold only that the documents would have left a reasonable reader on notice that they had agreed to arbitration in New Jersey, the application of New Jersey law, and the opportunity for limited judicial review as set forth in the superseding arbitration agreement. These facts distinguish both the NAACP and Rockel cases.

Waller, 2012 U.S. Dist. LEXIS 36512 at *5, 11.

### D. Refusing to enforce the supersession clause would violate the FAA's equal treatment principle.

It bears emphasis that Plaintiff's invitation to treat the supersession clause as void or irrelevant runs afoul of the Federal Arbitration Act's core command. The FAA mandates that arbitration agreements be enforced "*save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U.S.C. § 2. This "equal treatment" principle means a court may not impose requirements or handicaps on arbitration contracts that are not applied to contracts generally. Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246, 251 (2017). Yet Plaintiff essentially asks this Court to do exactly that—to

disregard a standard contractual provision (the order of precedence clause) in the arbitration context even though such clauses are routinely enforced in non-arbitration contexts. If, hypothetically, the transaction documents had conflicting forum-selection clauses with a supersession term choosing one forum over the other, no one would suggest that the entire forum-selection agreement must fail for lack of mutual assent. A court would simply enforce the supersession clause and hold the parties to their chosen forum. The result should be no different for an agreement to arbitrate. Stripping the supersession clause of effect (solely because the contract involves arbitration) would reflect exactly the "judicial hostility" to arbitration that the FAA was designed to overcome. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

### E. Any Inconsistencies Among the Arbitration Agreements are Minor

The only provision in the arbitration agreements that Plaintiff has ever suggested was a "material" inconsistency, as opposed to "minor", is the provision in the RISC which states that:

> Any claim or dispute is to be arbitrated by a single arbitrator only on an individual basis and not as a plaintiff in a collective or representative action, or a class representative or member of a class on any class claim. The arbitrator may not preside over a consolidated, representative, class, collective, *injunctive, or private attorney general action*.

[Da049] (emphasis added). Plaintiff has suggested that this provision exempts actions from arbitration which involve either (a) private attorney general claims, or (b) injunctive claims. Plaintiff has taken the position that because her lawsuit includes both private attorney general claims (her CFA claims) and injunctive relief, the RISC is inconsistent with the other arbitration agreements because it expressly exempts those types of claims from arbitration and the other agreements do not. This is a complete misrepresentation and red herring.

The reason the RISC references those types of claims is because those types of claims are non-individual claims (i.e., Plaintiff seeks to benefit a class of other people with respect to those claims). Those claims are thus expressly included within the language regarding the waiver of class actions because the RISC is advising Plaintiff that she can *neither* participate in a class *nor* bring claims on behalf of others. There is ample caselaw supporting this and at least one out-of-state decision that is directly on point. The District of Arizona, in Pirone v. CMH Homes Inc., No. CV-19-08130-PCT-JJT, 2019 U.S. Dist. LEXIS 145600 (D. Ariz. Aug. 26, 2019) [Da133], stated as follows:

> A Consumer Fraud Act claim may seek to eliminate unlawful practices—such as false advertising or misleading pricing—on behalf of the public and thus benefit a large number of people. . . . But when a Consumer Fraud Act claim simply provides an individual consumer a remedy to counteract the disproportionate bargaining power often present in consumer transactions, it does not benefit a large number of people and thus does not act as a private attorney general action.

> Construing a private attorney general action as one benefitting a large number of people is consistent with the text of the Agreement itself, in which the parties agreed not to arbitrate "a class action, a representative action, or a private-attorney general action" claim. To the extent that Plaintiffs argue that a private attorney general action contemplates a consumer fraud claim benefitting only an individual, the canon of construction of *noscitur a sociis*—that a "term is interpreted in the context of the accompanying words"—teaches otherwise. . . . The distinguishing feature of a class or representative action is that they benefit a large number of people, and because the arbitration exception in the Agreement includes "a private attorney general action" together with class and representative actions, the intent of the exception must have been to address actions benefitting a large number or people.

Id. at *3-4; see also Delta Funding Corp. v. Harris, 189 N.J. 28, 59-60 (2006) (noting that a provision in an arbitration agreement which excepted private attorney general actions "prohibit[ed] borrowers from engaging in class actions or consolidated claims"); Bhoj v. OTG Mgmt., No. A-0628-21, 2022 N.J. Super. Unpub. LEXIS 1292, *7 (App. Div. July 18, 2022) [Da135] (citing to a provision in an arbitration agreement titled "NO CLASS ACTIONS" which excepted attorney general actions—confirming that attorney general actions are viewed as actions on behalf of a collective group); State, Dep't of Envtl. Prot. v. Standard Tank Cleaning Corp., 284 N.J. Super. 381, 411 (App. Div. 1995) (noting that a litigant which "bring[s] suit for the enforcement of legislation that services a broad public interest is sometimes referred to as a "private Attorney General.").

Thus contrary to Plaintiff's suggestion that the exception in the RISC for private attorney general actions and injunctive actions is a material inconsistency amongst the forms—that is not accurate. All three arbitration agreements waive class (collective) claims.

## II. PLAINTIFF'S REMAINING ARGUMENTS PROVIDE NO BASIS TO AVOID ARBITRATION (T15 through T23)

### A. Defendants properly raised the supersession clause, which is integral to the arbitration issue on appeal.

Plaintiff contends that the order-of-precedence clause in SAA2 was not properly raised below, suggesting that Defendants "waived" this argument by emphasizing it only on appeal. This is incorrect. In the trial court, Defendants submitted the SAA2 with their reply papers and explicitly argued that the SAA2 "supersedes" the other arbitration provisions. [Pa29a-33a]. The trial judge not only expressly accepted Plaintiff's sur-reply addressing the SAA2, but she also expressly acknowledged and considered the SAA2 in her bench ruling. T4-10 through T5-20 and T19-17 through T19-21. In fact, the judge described the SAA2 on the record (noting its title "Agreement to Arbitrate and Class Action Waiver" and Plaintiff's claim that she did not recall signing or receiving it) (id.) and nonetheless ruled against enforcement, relying on NAACP v. Foulke. T23-8 through T23-10. The record thus makes clear that the SAA2 and its supersession clause were squarely before the trial court, and the issue was

preserved. The supersession argument was raised in Defendants' reply brief and addressed in Plaintiff's sur-reply. [Pa29a-33a, Pa34a-38a]. Defense counsel's statement at oral argument that "we don't have to even get to that document [SAA2]" [T6:17-23] was not an abandonment of the point at all; it was an alternative argument, emphasizing that *even if* the court ignored SAA2, the class action waiver was consistent across all agreements and should be enforced. It was never a withdrawal of the supersession clause issue. Accordingly, Plaintiff's waiver/preservation argument provides no basis to deny arbitration.

**B. Plaintiff's claim that she was not given a copy of SAA2 is irrelevant because even if it were true, it would not be a violation of N.J.S.A. § 56:8-2.22. And even if it were a violation, the remedy for such violation would be a matter for the arbitrator to decide, not a bar to arbitration.**

In an effort to evade SAA2, Plaintiff asserts that the dealership violated the Consumer Fraud Act ("CFA") (N.J.S.A. 56:8-2.22) by failing to provide her a copy of that agreement at the time of sale. Even assuming that Plaintiff did not receive a copy of the SAA2 (notwithstanding her signature and her acknowledged receipt of the rest of the documents), this would not constitute a violation of N.J.S.A. 56:8-2.22 which reads as follows:

> It shall be an unlawful practice for a person in connection with a sale of merchandise to require or request the consumer to sign any document *as evidence or acknowledgment of the sales transaction, of the existence of the sales contract, or of the discharge by the person of any obligation to the consumer specified in or arising out of the transaction or contract*, unless he shall at the same time

> provide the consumer with a full and accurate copy of the document so presented for signature but this section shall not be applicable to orders placed through the mail by the consumer for merchandise.

N.J.S.A. 56:8-2.22 (emphasis added).

As expressly stated in the statute, the only copies of documents which are required to be given to the consumer are those *which are signed as evidence or acknowledgment of*: (1) *the sales transaction*, (2) *the existence of the sales contract*, or (3) *the discharge by the person of any obligation to the consumer specified in or arising out of the transaction or contract*. The SAA2 was not signed as evidence or acknowledgment of (1) a sales transaction; (2) the existence of the sales contract, or (3) the discharge of obligations owed to the consumer. The statutory language is clearly intended to require the provision of copies of documents such as (a) the retail order form, (b) the financing agreement, (c) the odometer disclosure, (d) warranty disclaimers, (e) delivery acknowledgments, etc. The plain language of the statute does not apply to the provision of copies of stand-alone arbitration agreements or other ancillary documents.[1] Because the statutory language is unambiguous, it must be enforced as written. DiProspero v. Penn, 183 N.J. 477, 492-93 (2005) (noting that when

[1] Defendants do not dispute that providing copies of such agreements is best practices. Defendants only argue that providing copies of such documents is not statutorily-required—and again, this assumes Plaintiff's allegation that she did not receive a copy of the SAA2 to be true, which Defendants dispute.

statutory language is unambiguous, the court must apply it as written); Richardson v. Bd. of Trs., 192 N.J. 189, 195 (2007) ("If the plain language [of a statute] leads to a clear and unambiguous result, then our interpretive process is over.").

Additionally, Plaintiff's argument that the New Jersey Supreme Court did not overturn the Appellate Division's ruling in Goffe v. Foulke Mgmt. Corp., 454 N.J. Super. 260 (App. Div. 2018) regarding the effect of a violation of N.J.S.A. 56:8-2.22 is simply not true. The Supreme Court *expressly* reversed the Appellate Division's ruling with regard to N.J.S.A. 56:8-2.22 because the Court found that it was an issue that should have been determined by the arbitrator—not the Appellate Division.[2] Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 213 (2019). Therefore, the Appellate Division's ruling that the proper remedy for a violation of N.J.S.A. 56:8-2.22 is to prevent the dealership from enforcing the document that they failed to provide a copy of to the plaintiff was expressly overruled.

Even if the Appellate Division in Goffe had not been expressly overruled, the decision should not be followed because it rests on a deeply flawed legal premise: that a dealership's failure to provide a duplicate copy of a contract

[2] The issue in this case should likewise be determined by an arbitrator, as held in Goffe.

renders the agreement itself unenforceable. That outcome transforms a ministerial documentation lapse into a contract formation defect, in direct conflict with the plain language of N.J.S.A. 56:8-2.22. The statute prohibits requesting a signature without providing a copy, but it does not remotely suggest that such a violation voids the entire agreement. Nevertheless, Goffe imposed that sweeping remedy, relying on analogy to unrelated "written estimate" cases and ignoring the FAA's command that arbitration agreements be placed on equal footing with all other contracts. Worse still, Goffe invites precisely the type of gamesmanship that Plaintiff appears to be engaging in here. In the trial court, Plaintiff omitted from the record the key pages of the VTP agreement that clearly show the dealer is not a party [Da051-052, Da054-55 with the omitted pages at Da068-069] and now she asserts that the signature on the SAA2 is "forged" and that she never received a copy. This is textbook strategic litigation: selectively withholding documents, casting baseless doubt on executed agreements, and leveraging technicalities to avoid arbitration. Under Goffe, such tactics could be rewarded with judicial nullification of an otherwise valid agreement—a result that would eviscerate the FAA's equal-treatment rule and incentivize parties to contrive post hoc defenses. That is exactly why the New Jersey Supreme Court reversed Goffe, reaffirming that copy-delivery disputes, even if styled as CFA violations, are for the arbitrator unless they go directly to the formation of the

agreement. This Court should likewise reject Goffe's rationale and enforce the arbitration agreement as signed.

## CONCLUSION

For the foregoing reasons, Defendants request that the trial court order be reversed and that arbitration be compelled in accordance with the parties' agreement.

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By: */s/ Jase Brown*
JASE A. BROWN

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