JONNA STROJAN on behalf of herself and others similarly situated, Plaintiff-Respondent, v. EDISON MOTOR SALES, LLC d/b/a EDISON NISSAN and FRANK ESPOSITO, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003916-24 ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY DOCKET NO.: MID-L-1780-25 *Sat Below:* Hon. Ana C. Viscomi, J.S.C.

DEFENDANTS-APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

Even though the various purchase documents in this case contained some differing language in their arbitration clauses, they were uniform and unequivocal in one critical respect: each and every agreement included a clear class action waiver. There is no inconsistency whatsoever in those class action waiver provisions—all of the contracts expressly informed Plaintiff that she was giving up any right to participate in a class proceeding. New Jersey law treats such class action waivers as distinct contractual provisions, analytically separate from the agreement to arbitrate. Accordingly, even if the arbitration clauses might be deemed unenforceable due to inconsistencies (a point Defendants dispute), the class action waivers should still be given full effect on their own. Of course, if the arbitration provisions are ultimately determined to be enforceable in the companion arbitration appeal (A-003367-24) (which Defendants believe they should be), the class action waiver provisions would clearly be enforceable in that circumstance as well.

The trial court's refusal to enforce the class action waivers here was legal error. By allowing Plaintiff's class claims to proceed despite her multiple, written promises to the contrary, the court nullified the parties' clearly expressed intent and rewarded a tactical *"gotcha"* argument that finds no support in law or equity. Enforcing the class action waivers in these circumstances simply holds

Plaintiff to her word, requiring her to pursue any claims on an individual basis as she agreed—multiple times—in writing. Conversely, allowing her to escape those agreements would undermine the parties' contractual expectations and unjustly expose Defendants to class action litigation that Plaintiff expressly promised she would not pursue. For these reasons, and as detailed below, the class action waiver provisions should be enforced, resulting in the dismissal of all class allegations and requiring Plaintiff's claims to proceed, if at all, on an individual basis only.

PROCEDURAL HISTORY

Commencement of Action: Plaintiff Jonna Strojan filed her Complaint on March 24, 2025, in the Superior Court of New Jersey, Law Division, Middlesex County (MID-L-1780-25). [Da003]. The Complaint pleads consumer fraud and related statutory causes of action arising from Plaintiff's March 2024 vehicle purchase, and it is styled as a putative class action on behalf of other similarly situated customers. Id. Among other relief, the Complaint seeks treble damages and broad injunctive remedies under the New Jersey Consumer Fraud Act and related statutes. Id.

Motion to Dismiss: On May 21, 2025, Defendants Edison Motor Sales, LLC (d/b/a Edison Nissan) and Frank Esposito moved to dismiss the Complaint and compel arbitration pursuant to the parties' written agreements. [Da 087]. In

the same motion, Defendants sought to dismiss Plaintiff's class action claims due to class action waivers Plaintiff signed in connection with her vehicle purchase. Id.

Trial Court Decision: The motion was heard on June 19, 2025 by the Honorable Ana C. Viscomi, J.S.C. Following oral argument, Judge Viscomi denied Defendants' motion in its entirety. [Da001]. In a ruling from the bench, the court found the situation similar to NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404 (App. Div. 2011) and concluded that the multiple arbitration provisions signed by Plaintiff were too inconsistent with each other to reflect a true "meeting of the minds" to arbitrate. [T15:9–23:10]. The court held that no enforceable agreement to arbitrate had been formed and therefore refused to compel arbitration. Id. For the same reason, the court also declined to enforce the class action waivers, thereby permitting Plaintiff's putative class claims to proceed in court despite her signed waivers. Id.

Appellate Proceedings: Defendants promptly sought appellate review of both aspects of the trial court's ruling. First, on June 26, 2025, Defendants filed a Notice of Appeal as of right [Da095] from the denial of the motion to compel arbitration (docketed as App. Div. No. A-003367-24), pursuant to R. 2:2-3(b)(8). Separately, because the trial court's refusal to enforce the class action waiver was an interlocutory determination, Defendants moved for leave to

appeal that issue (App. Div. No. AM-000553-24). The Appellate Division granted leave on August 8, 2025 [Da085], and the class waiver issue is now proceeding under a merits docket (App. Div. No. A-003916-24) by leave granted. The class waiver appeal has been scheduled to be heard back-to-back with the related arbitration appeal, given the overlapping facts and legal questions. [Da085].

STATEMENT OF FACTS

The Transaction: On March 11, 2024, Plaintiff purchased a pre-owned 2021 Volkswagen Atlas from Edison Nissan. [Da026]. She financed a portion of the purchase through a standard Retail Installment Sales Contract ("RISC") executed that day, which obligated her to make monthly payments over a set term. [Da046]. As set forth below, it is customary in the auto sales industry that the dealership immediately assigns the RISC to a third-party financing institution. Consistent with that practice, Edison Nissan assigned Plaintiff's RISC to Ally Bank almost immediately (as reflected on page 5 of the RISC). [Da050].

Documents Signed – Arbitration Clauses and Class Waivers: In the course of the March 11, 2024 sale, Plaintiff signed four separate documents that contained dispute resolution provisions—each with an arbitration clause accompanied by a class action waiver. These documents were as follows:

- **Retail Installment Sales Contract (RISC)** [Da046] – This multi-page financing agreement included a detailed arbitration provision on the fourth page. The clause unequivocally states in its final paragraph that: "*You agree that you expressly waive any right you may have for a claim or dispute to be resolved on a class basis in court or in arbitration*." [Da049]. At the top of the arbitration provision, in bold and capitalized lettering, it likewise states 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 . . ." [Da049]. In other words, the class action waiver applies to *all claims* in arbitration or in court. It is noteworthy that this RISC is a widely used form contract (the standard "LAW 553" form), accepted by virtually every major auto finance company in the nation. [Da084].
- **The Dealership's Stand-Alone Arbitration Agreement** [Da053]**:** In addition to the RISC, Edison Nissan had Plaintiff execute a separate one-page document titled "Agreement to Arbitrate Disputes". [Da053]. It is common in the industry for dealers to utilize such stand-alone arbitration agreements to cover disputes directly between the customer and the dealership (especially since, as noted, the dealer ceases to be a

party to the RISC once it is assigned to a lender). Plaintiff signed this stand-alone arbitration agreement, which bound both the customer and the dealership to submit any disputes between them to binding arbitration. This agreement likewise states in bold, capitalized letters that it includes a "CLASS ACTION WAIVER" and that "*[b]y signing this Agreement, the Customer acknowledges his/her/their understanding that this Agreement requires that he/she/they must give up any right to participate in any way in a class action against the Dealer arising out of claims that the Parties have agreed to arbitrate*." Id. The only claims that were not to be arbitrated under the agreement were New Car Lemon Law claims and Magnuson-Moss Warranty Act claims, which are *not* the type of claims asserted by the Plaintiff in this litigation.[1] Id.

[1] These claims were excluded from the scope of the arbitration agreement to ensure the arbitration agreement's enforceability. See, e.g., N.J.S.A. § 56:12-39 (consumer not required to resort to any informal dispute procedure before filing a New Car Lemon Law action in court); N.J.S.A. § 56:12-48 (any waiver or limitation of New Car Lemon Law rights by contract "shall be void"); Raesly v. Grand Hous., Inc., 105 F. Supp. 2d 562, 573 (S.D. Miss. 2000) ("[T]he general provisions of the [FAA] are superseded by the subsequent and specific provision in the Magnuson-Moss Act by which Congress has prohibited the inclusion in written warranties of clauses calling for binding arbitration."); Harrison v. Nissan Motor Corp. in U.S.A., 111 F.3d 343, 351-52 (3d Cir. 1997) (explaining that the MMWA's reference to informal dispute-resolution mechanisms—which produce non-binding decisions unless the consumer agrees—demonstrates that

- **A Second Stand-Alone "Agreement to Arbitrate and Class Action Waiver"** [Da058]**:** In what appears to have been an inadvertent redundancy, Plaintiff's sale paperwork also included a second one-page arbitration agreement presented by the dealership on the same day. This second stand-alone agreement titled "AGREEMENT TO ARBITRATE AND CLASS ACTION WAIVER" is substantially similar to the first; in fact, it likely represents a slightly updated version of the same form, resulting in both versions being signed. [Da058]. Regardless of how it came about, the material terms in the two stand-alone agreements are almost identical—each requires individual (non-class) arbitration of disputes and contains a clear class action waiver. The second stand-alone agreement states in bold lettering that "*The Parties agree that, by entering into this Agreement, they are expressly waiving all rights to file or pursue claims in court before a jury or judge, and also waiving any rights to bring, maintain or participate in any class action in court or in arbitration*." Id. The second stand-alone agreement also contains one additional feature of great importance: an express *supersession clause* that gives it hierarchical priority in the

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Congress did not intend for mandatory binding arbitration to be imposed in lieu of a consumer's lawsuit for breach of warranty).

event of any conflict among the contracts. Specifically, this clause provides that if any term of the second arbitration agreement conflicts with a term in any other agreement between the parties, then the second arbitration agreement "*shall govern*" to the extent of the conflict. Id. In other words, the contracts themselves supplied a built-in rule to resolve any discrepancy: the terms of this final arbitration form would override any inconsistent provisions in the other sale documents. By including this coordinating clause, the dealership ensured that any possible inconsistency among the various arbitration provisions would be resolved by the terms of the final agreement.

- **The "Royal Guard" Theft Protection Limited Warranty** [Da054, Da068]**:** As part of her purchase, Plaintiff opted to buy a third-party theft-protection product, which came with its own limited warranty agreement issued by an outside company, Royal Guard, LLC. This warranty form also contained an arbitration provision (with a class action waiver) governing disputes related to the theft-protection product. [Da054]. However, Edison Nissan was *not* a party to the Royal Guard warranty contract. The Royal Guard document—printed on the provider's letterhead [Da054]—defines the obligor "we/us" as Royal Guard (not the dealership). [Da068]. The dealership's role was merely

to facilitate the sale as an authorized seller of that product. Because the Royal Guard agreement is strictly between Plaintiff and a third-party provider, any arbitration clause in that document is irrelevant to disputes between Plaintiff and the dealership. Even so, it bears noting that the Royal Guard form itself *also* includes a conspicuous class action waiver: it expressly states that "*YOU and WE also agree not to bring or participate in a class action, class arbitration or to consolidate a claim between YOU and US with any other claim*." [Da054]. Thus, while this fourth arbitration clause was present in Plaintiff's transaction, it has no bearing on whether Plaintiff and Edison Nissan reached a clear agreement to arbitrate and waive class actions *between themselves* (since the dealership was not a party to the Royal Guard contract).

Post-Sale Claims: Approximately one year after the purchase, Plaintiff filed the lawsuit underlying this appeal, naming the dealership and its owner as defendants. [Da003]. The Complaint alleges various violations of the New Jersey Consumer Fraud Act (CFA), the Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA), and related causes of action. [Da003]. In essence, Plaintiff claims the dealership engaged in deceptive practices and violated certain automotive sales regulations—for example, by failing to itemize certain

documentary fees and by allegedly misrepresenting the vehicle as "Certified Pre-Owned" despite it not being enrolled in a manufacturer's CPO program. Id. She seeks to represent a class of other customers with purportedly similar grievances. Id. For purposes of this appeal, the key point is that Plaintiff's claims all arise from her March 2024 purchase—a transaction in which, as detailed above, she expressly agreed to arbitrate any claims on an individual basis and not to participate in any class proceedings.

LEGAL ARGUMENT

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

The trial court erred by failing to enforce the class action waiver provisions in Plaintiff's contracts. Even accepting *arguendo* the court's finding that the arbitration clauses in the various documents were inconsistent with each other, the waiver of class action rights was *uniform* across all agreements and is independently binding. New Jersey law is clear that a class action waiver is a separate contractual term that must be evaluated on its own merits, apart from any arbitration requirement. See, e.g., Cerciello v. Salerno Duane, Inc., 473 N.J. Super. 249, 258-59 (App. Div. 2022) (in a substantially similar car purchase case, the Appellate Division held that the plaintiff had clearly and unmistakably waived her class action rights and that "Defendants' inability to compel

arbitration does not affect plaintiff's [simultaneous] waiver of her right to pursue a class action in court"). Furthermore, the New Jersey Supreme Court has expressly rejected the notion that a class action waiver must be paired with an arbitration clause to be enforceable. In Pace v. Hamilton Cove, 258 N.J. 82 (2024), the Court observed that class waivers are frequently paired with arbitration provisions to prevent class arbitration; however, "that does not mean that an arbitration provision is necessary to a class waiver's enforceability." Id. at 98 (emphasis added); see also id. at 88 (each class waiver is to be assessed under ordinary contract principles, such as unconscionability, on a case-by-case basis). In other words, the absence of (or a problem with) an arbitration provision does not render a class action waiver *per se* invalid. So long as the waiver was clearly worded, knowingly agreed to, and not void on standard contract law grounds, it should be enforced according to its terms. Pace, 258 N.J. at 99-100 (affirming that New Jersey law supports contractual waivers of even important rights, provided the waiver is clear and voluntary). Here, the class action waivers in Plaintiff's agreements were plainly written, prominently displayed, and substantively fair—and Plaintiff has never contended otherwise. There is no statute, public policy, or equitable doctrine that forbids consumers from waiving participation in class actions in this context. Accordingly, the

waivers should have been enforced according to their terms, requiring Plaintiff's claims to proceed, if at all, on an individual basis.

Indeed, the record establishes beyond genuine dispute that Plaintiff knowingly and voluntarily agreed—on multiple occasions—to forgo any right to proceed as part of a class. Each of the documents she signed contained an unambiguous provision waiving class actions, and each waiver was called to her attention in a conspicuous manner. For example, the RISC warned in bold, all-caps text 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" and that "*you expressly waive any right you may have for a claim or dispute to be resolved on a class basis in court or in arbitration*." [Da049]. Similarly, the dealership's one page stand-alone Arbitration Agreement stated clearly in bold lettering that she was signing a "CLASS ACTION WAIVER" and that "*By signing this Agreement, the Customer agrees to waive (give up) his/her/their right to participate as a Representative or Member of any class of claimants*" for any arbitrable claims against the dealer. [Da053]. And the second one-page stand-alone agreement—which was essentially a duplicate of the first—includes a bold heading at the top which states "CLASS ACTION WAIVER" and states in bold in the final paragraph immediately above the signature line that the customer "*agree[s]* . .

. they are expressly waiving all rights to file or pursue claims in court before a jury or judge, and also waiving any rights to bring, maintain or participate in any class action in court or in arbitration." [Da058]. Even the unrelated Royal Guard warranty form (between Plaintiff and the third-party warranty company) included the mandate that "*YOU and WE also agree not to bring or participate in a class action [or] class arbitration*." [Da068]. In short, *every* contract that Plaintiff signed in connection with her purchase told her, in one way or another, that any dispute would be resolved only in an individual capacity and that she was waiving her class action rights.

This uniformity of the class waiver language across the agreements is not coincidental—it reflects the parties' unmistakable mutual intent. The waivers in each document use essentially the same terminology to convey the same point, reinforcing to the consumer (*through repetition*) that she is relinquishing any right to be part of a class proceeding. Notably, the class waiver phrasing in these contracts closely tracks the language that was upheld in Cerciello v. Salerno Duane, supra. In Cerciello, the motor vehicle retail order signed by the plaintiff informed her in large, bold print that she was waiving the right to pursue a class action in either court or arbitration. Cerciello, 473 N.J. Super. at 253. The Appellate Division in that case enforced the waiver, ruling that the defendants' breach of the arbitration agreement (which made arbitration unavailable) "does

not eradicate the other provisions to which [the plaintiff] agreed—namely the waiver of the right to pursue a class action in court." Id. at 257-59. That outcome mirrors the scenario here: regardless of the status of arbitration, Plaintiff's waiver of class action rights remains intact and binding.

Crucially, Plaintiff herself has never disputed that she agreed to these class action waivers or claimed that she misunderstood them. At no point in the proceedings below did Plaintiff certify or assert that she was unaware she was waiving the ability to participate in a class action. She did not contend that the waiver language was hidden, confusing, or beyond her comprehension. In fact, Plaintiff's opposition in the trial court focused solely on the *legal* argument that multiple arbitration forms could, in theory, negate mutual assent; she did *not* claim any personal confusion about the meaning of the class waiver terms. All of the objective evidence points to her understanding and acceptance of those terms—from her multiple signatures and initials placed next to boldface warnings, to the absence of any allegation that she protested or even questioned the waivers. In short, there was a true meeting of the minds on this issue: both Plaintiff and the dealership intended and agreed that any post-sale disputes would be handled on an individual basis and that Plaintiff would not serve (or seek to serve) as a class representative.

Enforcing the class action waivers in this case does not deprive Plaintiff of any substantive right or remedy. She remains free to pursue whatever claims she may have—but only in her own name, not on behalf of a class. As the New Jersey Supreme Court has noted, a class action waiver *"does not function[] . . . as an exculpatory clause"* because claimants can still vindicate the same rights individually (and the Consumer Fraud Act even provides for attorneys' fees and treble damages to incentivize individual suits). Pace, 258 N.J. at 108. Holding Plaintiff to her agreement simply ensures that she proceeds in the *individualized* manner that she knowingly chose. Under New Jersey law, her class action waiver is just as enforceable as any other contractual waiver (including, for example, a jury trial waiver), so long as it was clearly and voluntarily made. Id. at 99-100. Since that is plainly the case here, the class action waivers must be given effect. The trial court's decision to allow Plaintiff's class claims to move forward—despite her multiple written waivers—cannot be sustained.

II. ANY VARIATIONS AMONG THE AGREEMENTS WERE RESOLVED BY THE SUPERSESSION CLAUSE, SO THE CLASS ACTION WAIVERS REMAIN ENFORCEABLE (T15 through T23)

Plaintiff's primary argument against enforcement of the parties' agreement was that the presence of several different arbitration clauses, with varying wording, precluded a true meeting of the minds. The trial court accepted this argument, essentially concluding that the multiplicity of agreements created

fatal confusion or inconsistency. However, that rationale ignores the controlling significance of the *supersession clause* included in the second stand-alone agreement. The parties themselves agreed *in advance* how to handle the situation of multiple documents: they explicitly provided that the terms of the final arbitration agreement "*shall govern*" if there was any conflict among the contracts. [Da058]. This contractual solution eliminated any genuine conflict or uncertainty. Under fundamental contract principles, such a clause must be given effect as written—and the trial court's failure to do so was a critical error and ignored the FAA's equal treatment (a/k/a equal footing) rule (AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 333 (2011)) requiring arbitration agreements to be treated in the same manner as any other contract.

New Jersey courts routinely enforce superseding or merger clauses in multi-document contracts so long as the clauses are clear, because they represent the parties' intent on how to reconcile any inconsistent terms. Far from being obscure boilerplate, a supersession clause is a straightforward and important feature in a transaction with multiple writings—it tells all parties which document's terms will control if there is a discrepancy. Here, the second stand-alone arbitration agreement's supersession clause was plainly visible (immediately above Plaintiff's signature line) and stated in simple terms that its arbitration terms would control over any others in the event of conflict. Thus, a

reasonable consumer who read the documents would have a clear understanding of which provision applied—namely, the terms of the final, superseding arbitration form. Plaintiff signed directly beneath this very clause, confirming her agreement to the hierarchy it established.

The Appellate Division has already recognized that when contracts include a supersession clause to harmonize multiple arbitration provisions, any arguable differences among those provisions do not vitiate the parties' mutual assent. In Cervalin v. Universal Glob., No. A-0974-20, 2021 N.J. Super. Unpub. LEXIS 1392 (App. Div. July 6, 2021) [Da061], a case closely on point, a car buyer signed two contracts (a retail order and a finance contract) each containing an arbitration clause. Id. at *1-6. Much like here, one of the clauses included a term providing that if another contract's arbitration clause conflicted with it, the other contract's clause would control. Id. at *8. The Appellate Division in Cervalin found both clauses to be clear and unambiguous waivers of the right to litigate in court. Id. at *7. The court then held that any differences between the two clauses were resolved by the supersession clause—and therefore 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 having multiple arbitration agreements; he argued only that the clauses were facially inconsistent. Id. at *12. The Appellate

Division rejected that argument and enforced the arbitration agreement (including its class waiver), emphasizing that the supersession clause reconciled any discrepancies and that the intent to arbitrate on an individual basis was clear. Id. at *13-14. Cervalin thus confirms that where, as here, the contracts themselves provide a clear rule to resolve any conflicting terms—and the consumer does not even allege actual confusion—an agreement to forgo class litigation remains valid and enforceable.

Similarly, in Guzman v. E. Coast Toyota, No. A-0726-19T1, 2020 N.J. Super. Unpub. LEXIS 1381 (App. Div. July 13, 2020) [Da080], the Appellate Division confronted a car sale with multiple arbitration clauses that a trial court had deemed "inconsistent and ambiguous." Id. at *1. The Appellate Division reversed, noting that one of the documents contained a supersession clause expressly stating that if there was a conflict between the documents, a designated agreement's arbitration terms would control. Id. at *8. Because of that clause, the court found the agreements could be read in harmony and enforced according to their terms. Id. ("Accordingly, even if there were inconsistencies or conflicts between the Retail Order and the Installment Contract, the Installment Contract governs."). In short, Guzman recognized—just as Cervalin did—that a clear supersession clause in one agreement will dictate which terms prevail, thereby avoiding any ambiguity as to what the parties ultimately agreed upon.

These authorities reflect a common-sense principle: supersession clauses are enforced as written because they give effect to the parties' intent and prevent uncertainty in multi-document transactions. Enforcing such clauses (just as courts would in any other contract scenario—as required by the FAA's equal treatment principle) is essential to carrying out the reasonable expectations of the contracting parties. Ragab v. Howard, 841 F.3d 1134, 1138 (10th Cir. 2016) (citing to New Jersey's Foulke case and holding that six different, inconsistent arbitration provisions could not be enforced but suggesting that if any of the six agreements had a supersession clause the supersession clause would resolve the discrepancy). Here, the supersession clause ensured that one agreed set of arbitration terms (the final stand-alone agreement's terms) would override any inconsistent provision elsewhere in the paperwork. Thus, Plaintiff did not have to parse through each document and guess which provisions would apply; the contracts themselves supplied the answer. By including this coordinating clause—and by having Plaintiff sign directly beneath it—Defendants resolved any potential inconsistency among the various agreements. When Plaintiff signed the superseding agreement, it became her fourth acknowledgment of the *very same* basic obligation (to resolve disputes solely on an individual basis), negating any notion that the class waiver was hidden or that she was unclear about what she was signing. In short, the supersession clause was not an

afterthought or trick; it was a prominent, plainly worded term that actually clarified the parties' understanding and confirmed their mutual intent.

Unlike the scenario in Foulke, where dueling supersession clauses in different documents left the parties' intent impossible to discern, here there was only *one* supersession clause and it definitively resolved any potential conflict. The trial court failed to appreciate this crucial distinction. By treating the case as if it were governed by Foulke, the court overlooked the fact that in our transaction there was no "battle of superseding clauses"—the single supersession provision in the second arbitration form made it straightforward which terms controlled. A reasonable customer reviewing Plaintiff's signed documents would therefore know exactly which terms apply in the end—namely, the terms of the superseding agreement.

By ignoring the supersession clause, the trial court effectively rewarded gamesmanship and allowed an unfair result. If courts were to brush aside clear contractual clauses like this, it would incentivize plaintiffs to exploit any minor variation among contract documents as a means to evade obligations that they plainly agreed to. Here, Plaintiff has identified no tangible prejudice arising from the existence of multiple agreements—aside from an abstract assertion that a person *"could"* have been confused. There is no evidence that she herself was actually misled or that signing an extra (duplicative) form affected her decision-

making in any way. She was repeatedly given the same information—that disputes would be arbitrated and no class actions could be brought—and that is exactly what Defendants seek to enforce. There was no element of surprise or trickery. On the other hand, refusing to enforce the supersession clause and class waiver inflicts clear prejudice on the dealership: it now faces the very class action litigation that it contracted to avoid. Basic fairness and ordinary contract law both favor enforcing the parties' true agreement in this circumstance—which, without question, was to resolve disputes on an individual basis and not to engage in any class litigation.

In sum, even when one views all of the sale documents together (rather than analyzing the class waiver in isolation), the conclusion remains that Plaintiff knowingly agreed to proceed on an individual, non-class basis. Reading the contracts as a unit—as the supersession clause invites—one finds a consistent and mutually intended waiver of class action rights. The trial court should not have invalidated the parties' agreement merely because it was memorialized in more than one piece of paper. Instead, the court should have done what courts normally do with integrated contracts: read them together, give effect to *all* provisions (including the coordinating clause), and enforce the controlling terms as the parties agreed. Doing so here means recognizing that Plaintiff is bound to pursue any claims *in her individual capacity only*—

precisely as she promised on March 11, 2024. The trial court's refusal to enforce the class action waiver elevates form over substance and cannot be reconciled with the governing law.

III. THE USE OF MULTIPLE AGREEMENTS IS STANDARD INDUSTRY PRACTICE—NOT AN INTENT TO DECEIVE (T15 through T23)

It is common industry practice for car purchases to be memorialized in multiple documents. Dealers customarily have buyers sign an initial Motor Vehicle Retail Order (MVRO) (or similar purchase agreement) outlining the vehicle, price, and dealer-specific terms (sometimes including arbitration provisions); a separate Retail Installment Sales Contract (RISC) to finance the purchase, which is generally intended for assignment to a third-party lender; a warranty agreement or other add-on product agreement which covers add-on products; and many times a standalone arbitration agreement to cover disputes between the dealer and the buyer. See, e.g., Stollsteimer v. Foulke Mgmt. Corp., No. A-1182-17T3, 2018 N.J. Super. Unpub. LEXIS 1514, *3 (App. Div. June 26, 2018) [Da 089] (discussing an MVRO, RISC and stand-alone arbitration agreement in car purchase transaction); Kennamer v. Ford Motor Credit Co. LLC, 153 So. 3d 752, 755-56 (Ala. 2014) (discussing a RISC arbitration clause, stand-alone arbitration agreement and mentioning a retail-buyer's order); Harnden v. Ford Motor Co., 408 F. Supp. 2d 300, 304 (E.D. Mich. 2004)

(discussing arbitration provisions in a stand-alone arbitration agreement and separate warranty agreement); Lyles v. Santander Consumer USA Inc., 263 Md. App. 583, 591 (2024) (discussing a retail-buyer's order and stand-alone arbitration agreement); Signor v. GWC Warranty Corp., No. A-0949-17T2, 2018 N.J. Super. Unpub. LEXIS 1160, *1-3 (App. Div. May 17, 2018) [Da 093] (discussing automobile warranty company arbitration provision); Nawrocki v. J&J Auto Outlet, No. A-2813-22, 2023 N.J. Super. Unpub. LEXIS 1962, *2 (App. Div. Nov. 3, 2023) [Da 097] (same).

Far from any deceptive intent, the use of multiple agreements is meant to ensure that each party (dealer, lender, warranty or other add-on product provider, etc.) is bound only by the terms relevant to them. In this case, Edison Nissan had Plaintiff sign two stand-alone arbitration agreements. This appears to have been an inadvertent oversight, with the second form likely being a newer version of the first. Regardless, both arbitration forms are virtually identical, so the second merely duplicated and reinforced the mutually agreed understanding that disputes would be resolved through arbitration (with no class actions).

All of the pertinent agreements here—the RISC and both dealership arbitration forms—used clear and conspicuous language to convey that disputes would not be heard in court and would proceed only on an individual (non-class)

basis. Each document prominently highlighted the waiver of court and class-action rights, and Plaintiff signed or initialed directly beneath these warnings.

There is no indication in the record that Plaintiff lacked an opportunity to read the documents or that any arbitration clause was hidden in fine print. To the contrary, the arbitration and class waiver provisions were so prominent that Plaintiff had to acknowledge them multiple times with her signature or initials. This redundancy negates any notion that the terms were concealed or that Plaintiff was unaware of what she was agreeing to.

Indeed, had the dealership used only two documents—the RISC and a single stand-alone arbitration agreement containing a supersession clause—there would be no plausible argument against enforcing the arbitration and class action waiver provisions. The inadvertent inclusion of an extra, duplicative arbitration form does not change the parties' understanding; it merely repeated what Plaintiff had already agreed to. Such a clerical redundancy should not allow Plaintiff to escape her contractual promise to arbitrate disputes and to forgo class litigation.

In sum, the use of multiple documents in this transaction was a legitimate and customary practice, not a deceptive tactic. Any minor variations among the documents were cured by the supersession clause, ensuring that only the intended terms govern. Plaintiff received the benefit of her bargain (the vehicle,

financed on the terms set forth in the RISC), and Defendants are entitled to the benefit of theirs (enforcement of the agreed dispute-resolution provisions, including the class action waiver). The Court should reject Plaintiff's invitation to invalidate standard industry contract procedures. Instead, consistent with the authorities cited above, the Court should enforce the parties' agreements as written.

IV. IF DEFENDANTS PREVAIL IN THE ARBITRATION APPEAL, THE CLASS WAIVERS ARE ENFORCEABLE IN THAT CONTEXT AS WELL (T15 through T23)

Finally, if this Court determines in the companion appeal (A-003367-24) that the arbitration provisions must be enforced (which Defendants believe they should be), then the class action waivers would be enforceable in that circumstance as well. Each arbitration clause Plaintiff signed contains an express class waiver, and therefore any order compelling arbitration would also require that arbitration proceed on an individual basis only. Thus, whether analyzed independently as freestanding contractual provisions or as terms included within enforceable arbitration agreements, the result is the same: Plaintiff cannot pursue class claims.

CONCLUSION

Plaintiff agreed, in multiple signed documents, that any claims against Defendants would be pursued only on an individual basis and never as part of a

class action. Those class waivers were clear, consistent across all the contracts, and enforceable on their own under the principles confirmed in Pace and Cerciello. Even if one views the waivers as elements of the broader arbitration agreements, the supersession clause resolved any differences in wording among the documents—meaning there was no genuine inconsistency in what the parties mutually assented to. The supersession clause would be enforceable in any other contractual context and should therefore should also be enforced here under the FAA's equal footing rule. Because the class action waivers are binding and unambiguous, the class allegations in the Complaint should have been dismissed.

Defendants–Appellants respectfully request that this Court reverse the trial court's Order of June 19, 2025, insofar as it refused to enforce the class action waiver and enter an order upholding the parties' agreements. In practical effect, the Court's ruling should direct that Plaintiff's claims be resolved on an individual basis only, as per the agreements. This means that the class action allegations in Plaintiff's Complaint must be dismissed or stricken, and Plaintiff should be required to pursue any claims in her individual capacity (whether in arbitration pursuant to the parties' contract or, if necessary, in court—but *without* any class allegations). Such a disposition will vindicate the parties'

contractual expectations and adhere to the controlling legal principles that mandate enforcement of clear agreements to forgo class proceedings.

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 2, 2025

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

❖ ❖ ❖

JONNA STROJAN, on behalf of herself and others similarly situated, Plaintiff- Respondent, v. EDISON MOTOR SALES, LLC d/b/a EDISON NISSAN and FRANK ESPOSITO, Defendants-Appellants.	Case No. A-003916-24 On Appeal by Leave Granted from an Order of The Superior Court of New Jersey, Law Division, Middlesex County Case No. MID-L-1780-25 *Sat Below:* Ana C. Viscomi, J.S.C.

PLAINTIFF-RESPONDENT'S BRIEF ON APPEAL

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Submitted to the Court on October 29 , 2025

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AUTHORITIES

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 sought 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, or alternatively to dismiss claims for class relief, based exclusively on dispute resolution provisions contained in a retail installment sale contract ("RISC")

signed by the parties during the March 11, 2024 sale . Pa7-8, 12-13.[1] The motion brief and supporting certification identified the RISC as the only basis for the relief requested and did not reference or disclose the existence of any other contracts containing arbitration or class waiver provisions. Pa12-13, Da43-50. Da43-50.

In her opposition, filed on June 9, 2025, Plaintiff submitted two additional arbitration provisions with class waivers 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 encaptioned, "Agreement to Arbitrate any Claims." Da54. The opposition brief identified various inconsistencies in the terms of the RISC, SSA, and VTP arbitration provisions and class waivers, and argued that the dealership's inclusion of conflicting waiver-of-rights provisions in the transaction documents precluded mutual assent under New Jersey precedents. Pa21-25 (citing, *inter alia*, *NAACP of Camden Cnty. E. v. 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").

[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).

On June 13, 2025, Defendants filed a reply in which they submitted, for the first time, yet another purported arbitration provision and class waiver, in the 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 *NAACP v. 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 objecting to the SAA2 as improperly submitted for the first time on reply. Pa26, Da59. The letter included a proposed surreply and supporting certification in which Plaintiff disputed the authenticity of the newly produced SAA2, requested discovery relating to the SAA2's authenticity, and argued that even if the SAA2 were authentic, its boilerplate supersession clause

would not "resolve" the lack of clarity and resulting from multiple, disparate arbitration provisions under *NAACP v. Foulke Management*. *Id.*

On June 19, 2025, the trial court heard oral argument on the motion to dismiss. T3-1 – T15-8. Argument began with Defendants' counsel apologizing for Defendants' failure to raise the SAA2 prior to their reply (T4-10–T5-9) but clarifying that Defendants were not relying on the SAA2, stating,

> But, Your Honor, you know, we don't have to even get to that Document [the SAA2] because the document upon which we rely [the RISC], you know, clearly states -- and my argument is -- I'd like to focus on the class action waiver for purposes of this oral argument. It clearly states and plainly states that class actions are waived both in court [and] arbitration.

T6-17–T6-23. After advising the court that "we don't even have to get to" the SAA2, counsel kept to his word and did not raise or otherwise reference the SAA2's supersession clause during oral argument. T6-24–T8-15; T14-21–T15-5. Accordingly, Plaintiff's counsel did not "even have to get to" the challenges to the SSA2's authenticity and validity raised in Plaintiff's surreply, or her request for discovery on those issues. T8-16–T14-20. And the trial court, in its oral decision placed on the record following argument, likewise did not reach the issues that Defendants initially raised in their reply brief involving the purported supersession clause, but subsequently abandoned at oral argument. T15-9–T23-11. Nor did the court have to get to the factual disputes raised by Plaintiff over the authenticity and validity of the purported SAA2. *Id.*

In its decision, the court denied Defendants' motion, finding that the multiple, conflicting arbitration and class waiver provisions dispersed throughout the RISC and other transaction documents precluded the clarity required for a consumer's mutual assent to a contractual waiver of rights as to both arbitration of disputes and waiver of class action rights, citing *NAACP v. Foulke Management. Id.* T15:9 – 23:11. The court then filed an order on June 19, 2025, denying the motion to dismiss in its entirety. Da1. On June 26, 2025, Defendants filed a notice of appeal (Da95) from the portion of the June 19, 2025 order denying their request to compel arbitration, which is appealable as of right under *R.* 2:2-3(b)(8). The Defendants separately initiated the present appeal by way of motion for leave to appeal the portion of the June 19, 2025 order denying their request to dismiss claims for class relief, which was granted on August 8, 2025. Da85. The appeal of the arbitration decision is pending separately before the Court under docket number A-003367-24 but has been designated to be heard "back-to-back" with the present appeal. Da85

STATEMENT OF FACTS

On March 11, 2024 Plaintiff Jonna Strojan ("Plaintiff" or "Ms. 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 price of $28,581.44, including fees and sales tax. Complaint (Da3), ¶ 12. During the sales presentation, Edison Nissan staff told Ms. Strojan that the Atlas was

a "certified pre-owned" 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 stated 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 pre-owned program, 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 also included a $320 "Clerical Fee" and a $260 "Computer Fee", each identified as a "DOCUMENTARY FEE," but it did not include a written itemization describing any specific services performed in exchange for those fees. *Id.,* ¶ 17, See Exh. A.

Within a week of the sale, Ms. Strojan began noticing a strong odor inside the vehicle and that it was not braking smoothly, so she made an appointment with Edison Nissan's service department. *Id.*, ¶¶ 21 – 22. Before the appointment, a storm occurred and rainwater leaked through the roof, 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 and braking issue. *Id.*, ¶ 30. When Ms. Strojan picked up the vehicle, Edison Nissan staff told her that the interior had been

detailed and so she might notice a chemical odor that would dissipate within about a week. *Id.* ¶ 31.

Within a one to two weeks after the repair, Ms. Strojan began noticing a mold and/or mildew odor inside the vehicle as the chemical smell from the detailing dissipated. *Id.,* ¶32. On April 24, 2024, she brought the Atlas to the Volkswagen of Freehold service department to confirm that the leak had been fully repaired and to diagnose the source of the odor. *Id.,* ¶ 33, 34. Although Ms. Strojan advised Volkswagen of Freehold that the Atlas was a certified preowned vehicle, the service staff, after checking the vehicle's records, told her the Atlas was not registered as certified preowned vehicle in Volkswagen's system. *Id.* ¶ 35, Exh. 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…") As a result, Ms. Strojan was 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 concluding that Edison Nissan replaced 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, Exh. B. The report recommended "replacing headliner" and disinfecting and cleaning other affected areas to address the mold/mildew condition, and further

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). According to an estimate later obtained by Plaintiff, the cost to replace the headliner and perform the other recommended services is approximately $2,700. *Id.,* ¶ 39.

ARGUMENT

I. The class waiver provision that defendant moved to enforce below, embedded in the "Arbitration Provision" of the parties' "Retail Installment Sale Contract," did not clearly and unambiguously establish plaintiff's waiver of her right to pursue a class action outside of arbitration, and so did not waive her right to pursue a class action in court.

A. The purported class waiver failed to clearly and unambiguously put plaintiff on notice that it applied outside of the "Arbitration Provision" in which it appeared, and otherwise failed to sufficiently notify plaintiff that she was giving up her right to pursue a class action in both court and arbitration.

A contractual waiver of the right to pursue a class action in court is subject to the same "clear and unambiguous" waiver standard applicable to arbitration provisions and all other contractual waiver provisions under New Jersey law. *Pace v. Hamilton Cove*, 258 N.J. 82, 101-02, 106 (2024)(citing *Atalese v. U.S. Legal Servs. Grp.*, L.P., 219 N.J. 430, 443 (2014)). *See also Skuse v. Pfizer, Inc.*, 244 N.J. 30, 48 (2020)("Our jurisprudence has stressed that when a contract contains a waiver of rights --whether in an arbitration or other clause -- the waiver 'must be clearly and unmistakably established.'" *Id.* (citing *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219

N.J. 430, 444 (2014) *cert. denied*, 135 S.Ct. 2804 (2015)). While "class actions advance several important policy goals" they may still be waived "provided that the requisite procedural safeguards surrounding the waiver are met." *Pace,* 258 N.J. at 99 (citations omitted).

In a consumer transaction, the "procedural safeguards surrounding the waiver" require that the contract be "'written in a simple, clear, understandable and easily readable way' as required by the CFA, N.J.S.A. 56:12-2, and [must] clearly and unambiguously put [consumers] on notice that they could only proceed with a lawsuit against defendants on an individual basis." *Pace*, 258 N.J. at 106 (citing *Atalese*, 219 N.J. at 444, 447). When deciding whether a waiver-of-rights 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 v. Home Warranty Adm'r of Fla., Inc.*, 236 N.J. 301, 325 (2019) (citing *Morgan v. Sanford Brown Inst*., 225 N.J. 289, 310 n.8 (2016) and N.J.S.A. 56:12-10(b)(3)).

To determine if a contractual waiver-of-rights agreement has been validly formed, a court must "take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that

assent'" based on the content and form of the contract itself. *Atalese,* 219 N.J. at 442-43 (citing, *NAACP v. Foulke Management*, 421 N.J. Super. at 424). "Consequently, the clarity and internal consistency of a contract's [waiver-of-rights] 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).

Thus, where a class waiver provision is embedded in an agreement to resolve disputes in arbitration rather than in court, the provision may still apply to disputes in court, but *only if* it provides clear and unambiguous notice that the consumer "cannot pursue a class action in arbitration *or in court*" and informs the consumer that "the waiver applie[s] whether [claims are brought] in an arbitration or before a court." *Cerciello v. Salerno Duane, Inc*., 473 N.J. Super. 249, 258-59 (App. Div. 2022)(emphasis added). In *Cerciello*, the Court held that even though the arbitration provision in the parties' car sale contract was unenforceable due to the dealership's failure to pay arbitration fees, the class waiver provisions embedded in the arbitration provision were nonetheless enforceable in subsequent court proceedings *because of the following facts*:

> In large, bold, capitalized print, directly below the purchase price and a signature line, and again above the document's second signature line, the consumer is informed they cannot pursue a class action in arbitration *or in court*…. The class action waiver contained in the arbitration agreement was clear and unambiguous [as to its applicability in court and not just arbitration].

Id. at 258 (citing *Atalese* at 447). The prominent, bold language referenced in this passage warned that by signing on the adjacent signature lines, the consumer "**WAIVES THE RIGHT…TO PURSUE A CLASS ACTION IN COURT OR IN ARBITRATION**." *Cerciello* at 258 (emphasis in original).

Applying these precedents, the class waivers embedded in the "ARBITRATION PROVISION" of the RISC (the only contract Defendants moved to enforce below) does not come close to providing the consumer with sufficiently clear and unambiguous notice that she was waiving her right to represent a class in court and not just in arbitration, as required under *Cerciello* and *Pace.* The RISC arbitration provision appears in a box on the lower half of page 4 of the 5 page RISC in a box containing three numbered, capitalized, bold type warnings, followed by three lengthy paragraphs of text appearing in very small, non-emphasized font, significantly smaller than the text of the main contract outside the arbitration provision box. Da49. Within this half-page box full of small print provisions, appear four different sentences addressing waiver of class claims. The first, and by far the most prominent, appears in the second of the three capitalized, bold warnings near the top of the box, stating,

> **2. <u>IF A DISPUTE IS ARBITRATED</u>, 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 OF INDIVIDUAL ARBITRATIONS.

Da49 (emphasis in original, except for underlining). This language expressly notifies the consumer that the waiver of "your right to participate as a class representative or class member" applies only "IF A DISPUTE IS ARBITRATED" and does not state or suggest that the waiver applies "if a dispute is litigated in court." *Id.*

The second reference to waiver of class rights appears in the body of the arbitration provision, near the middle of the first paragraph, and reads, "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." Da49 (emphasis added). The third reference to waiver of class rights appears two sentences later in the same paragraph, stating, "You expressly waive any right you may have to *arbitrate* a consolidated, representative, class, [or] collective…. action.**"** *Id.* (emphasis added). Notably, each of these waiver provisions, like the bold, capitalized waiver provision near the top of the arbitration box, notify the consumer that the class waiver applies specifically to arbitration proceedings, without any language stating or suggesting that the waiver applies in court, or in any other context outside of the arbitration proceedings provided for in the RISC's arbitration provision.

It is not until the fourth reference to waiver of class rights, which appears in toward the end of the third paragraph in non-emphasized, very small print (described

by the trial court as "tiny," at T17-7) that the waiver is purported to extend to class actions in court, and not just in arbitration as stated in the three previous iterations, including the prominent bold, capitalized waiver provision near the top of the box. Da49. The sentence's reference to class actions in court is further obscured by the fact that it is immediately followed by a sentence that refers to the provision as "this class arbitration waiver." *Id.* The sentence, as it appears within the third paragraph of the RISC's "Arbitration Provision" (except in 14 instead of 6 point font) reads as follows:

> You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate any related or unrelated claims by filing any action in small claims court, or by using sell-help remedies, such as repossession, or by tiling an action to recover the vehicle, to recover a deficiency balance, or for individual or statutory public injunctive relief. Any court having jurisdiction may enter judgment on the arbitrators award. This Arbitration Provision shall survive any termination, payoff or transfer of this contract. If any part of this Arbitration Provision, other than waivers of class rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. You agree that you expressly waive any right you may have for a claim or dispute to be resolved on a class basis in court or in arbitration. If a court or arbitrator finds that this class arbitration waiver is unenforceable for any reason with respect to a claim or dispute in which class allegations have been made, the rest of this Arbitration Provision shall also be unenforceable.

Da49. Thus, the only reference to waiver of the right to represent a class "in court" appears once, in non-emphasized, sub-8-point font, embedded within a paragraph of unrelated terms, after three earlier statements that define the waiver solely as

applying to arbitration (including a boldface, call-caps admonition that applies only "IF A DISPUTE IS ARBITRATED.") *Id.* Compounding the ambiguity and lack of clarity, the sentence immediately following the lone mention of court refers back to "this class arbitration waiver," further obscuring the only reference to a waiver of class actions in court. *See Kernahan v. Home Warranty Adm'r of Fla., Inc.*, 236 N.J. 301, 326-27 (2019) (a contractual waiver of a consumer's rights must be "written in clear and understandable manner [and] 'courts must take into consideration the guidelines set forth in [*N.J.S.A.* 56:12-10]'" prescribing 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.") (citing *Morgan v. Sanford Brown Inst*., 225 N.J. 289, 310 n.8 (2016) and N.J.S.A. 56:12-10(b)(3)).

Thus the RISC clearly does not contain a sufficiently "clear and unambiguous" waiver of the right to pursue a class action in court under the standards set forth in *Atalese*, *Kernahan*, *Foulke Management*, and similar precedents. As noted in *Foulke Management*, and alluded to in *Kernahan*, determining whether a contractual waiver of rights provision is sufficiently clear and unambiguous requires consideration of, among other things the "contracts' conflicting descriptions of the [waiver provision]" and the "obscure appearance and location of the [waiver] provisions." *NAACP v. Foulke Management*, 421 N.J. Super. at 429.

B. The multiple, inconsistent class waiver provisions embedded in various arbitration agreements disbursed throughout Defendants' car sale documents were insufficiently clear and unambiguous to support a consumer's knowing assent to a contractual waiver of the right to pursue a class action in court.

New Jersey courts have held that that a car dealership's use of multiple documents with conflicting arbitration provisions may preclude the "clarity and internal consistency" necessary to support a consumer's effective assent to waiver of the right to pursue claims in court. *See NAACP v. Foulke Management,* 421 N.J. Super. at 410 (ruling that three "disparate arbitration provisions" in the same transaction "were too confusing, too vague, and too inconsistent to be enforced."); *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); *Walker v. Route 18 Auto Grp., LLC*, __ N.J.Super __ , 2025 N.J. Super. LEXIS 54, at *1 (App. Div. February 12, 2025)(aproved for Publication July 10, 2025)(finding lack of mutual assent where two arbitration provisions were signed during the same car sale because they contained different terms that were "disbursed [throughout] two documents and vary substantially.")

Because New Jersey law treats arbitration provisions like any other other waiver-of-rights provisions, the same principles that this Court applied to multiple,

conflicting arbitration provisions in *Rockel, NAACP v. Foulke Management,* and *Walker* apply equally where there are multiple, conflicting class waiver provisions. Thus, the RISC's lack of a clear and unambiguous waiver of the right to pursue class actions *in court* is exacerbated by the presence of different class waivers in several other transaction documents with terms that are inconsistent with the RISC.

Here, the RISC, SAA, and VTP contracts contain materially different class wavier provisions. The SAA's waiver applies only to claims "the Parties have agreed to arbitrate" and does not reference waiver of the right to pursue class actions in court, while the VTP purports to waive class actions in both court and arbitration. As discussed earlier, three of the four class-waiver statements embedded in the RISC apply only to arbitrated, and a fourth - presented in tiny print and buried in a paragraph toward the end of the arbitration provision, immediately followed by a sentence referring to the wavier as "the class arbitration waiver" - also purports to bar class actions in court.

The purported SAA2 document raised for the first time in Defendants' reply below does not change this analysis. As an initial matter, Plaintiff contests the authenticity and validity of the SAA2. Even if its boilerplate "supersession clause" could mitigate the confusion caused by multiple, inconsistent class waivers, issues of formation and authenticity would require discovery and fact-finding before any such document could be enforced to preclude the Plaintiff's class claims. Plaintiff

has also challenged SAA2's enforceability on the ground that she was not given a copy of the purported contract at the time of sale, in violation of the CFA, at N.J.S.A. 56:8-2.22. Pa28

In any event, even assuming authenticity, Defendants' reliance on a supersession clause to cure a lack of mutual assent arising from multiple, inconsistent waiver-of-rights provisions was considered and rejected by the Appellate Division in *NAACP v. Foulke Management*. The court explained that although the trial court credited a supersession clause to resolve conflicts among documents, it did not agree:

> 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 [waiver of rights] 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., 421 N.J. Super at 436-37 (emphasis added).

C. 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.

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 argument misstates New Jersey caselaw. New Jersey 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, impose a subjective test for mutual assent. As *Atalese* explains, "[m]utual assent requires that the parties have an understanding of the terms to which they have agreed." *Atalese*, 219 N.J. at 442. Courts therefore examine the contractual language itself 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.

Defendants' brief misstates the procedural history of the motion practice at issue. It is inaccurate to assert that Defendants' May 21, 2025 motion sought dismissal "pursuant to the parties' written agreements." Db3. As filed, the May 21 motion relied exclusively on the RISC and did not reference any other documents as bases for enforcement. The existence of multiple documents containing arbitration provisions was first brought to the court's attention by Plaintiff in her opposition brief and certification, in which she attested that, before leaving the dealership, an Edison Nissan representative provided her with a stack of documents said to be copies of what she had signed that day, and that at least two of those documents—the SAA and the VTP—also included arbitration clauses. *See* Da51–52.

Most critically, the purported second Standalone Arbitration Agreement containing a supersession clause (SAA2)—the very provision Defendants now rely on most heavily on appeal—was neither identified nor produced with Defendants' opening motion. It first appeared in Defendants' reply filing. See Da56-58. At oral argument on June 19, 2025, after the court admonished Defendants for raising SAA2 for the first time on reply as "problematic" and cautioned 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–T6-12), Defendants' counsel effectively withdrew reliance on SAA2, stating: "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 [and] arbitration." T6-16–T6-23. Counsel then proceeded without further reference to SAA2 or its supersession clause. *See* T6-24–T8-15; T14-21–T15-5. The trial court, accordingly, did not adjudicate Defendants' arguments premised on SAA2's supersession clause, leaving no ruling on those issues for this Court to review. In reliance on the Defendants' abandonment of their arguments premised on the SAA2, the Plaintiff did not advance her dispute over the SAA2's authenticity or the need for discovery on that issue, as raised in her surreply, and the Court did not rule on those issues.

This Court generally declines to consider arguments raised for the first time in a reply below 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, by contrast, 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 was not preserved and should be deemed waived on appeal.

B. Even if the 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.

Defendants' argument that the SAA2's boilerplate supersession cures the lack of mutual assent based on multiple, inconsistent arbitration provisions was squarely considered and 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), neither cites nor addresses *Foulke Management's* and thus has limited persuasive value. In any event, *Cervalin* is distinguishable. There, the Court confronted only two competing arbitration provisions (rather than the four provisions at issue here, including the disputed SAA2) which it characterized – without elaboration – as having "minor differences" insufficient to defeat 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. That clause effected complete

supersession in the event of conflict, potentially simplifying the contractual landscape by eliminating duplicative or inconsistent provisions.

By contrast, the SAA2 "supersession provision" expressly preserves 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. if the 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.")[4] 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 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.

[4] 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 (emphasis added). Here, Plaintiff is alleging only that she did not receive a copy of the SAA2. *See* Da59 – 60, Strojan Sur-Reply Cert., ¶¶ 1 – 6.

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 SAA2. 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." 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. 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)." 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. In fact, it specifically provides that the provision applies to both "us" *and* "our…successors and assigns." Da49.

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.

It should also be noted that Plaintiff does not "impute something nefarious" about Defendants' use of multiple, conflicting arbitration, as Defendants claim in their brief. Da24. Although it does not matter what Defendants' motive was for maintaining this practice (what matters is the lack of clarity and internal consistency of the documents themselves), Plaintiff believes it is likely the product of carelessness.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' motion, or in the affirmative, affirm the lower court's ruling.

Respectfully submitted,

Dated: October 29, 2025 *s/Henry P. Wolfe*

Henry P. Wolfe
The Dann Law Firm, P.C.
Counsel for the Plaintiff

JONNA STROJAN on behalf of herself and others similarly situated, Plaintiff-Respondent, v. EDISON MOTOR SALES, LLC d/b/a EDISON NISSAN and FRANK ESPOSITO, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003916-24 ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY DOCKET NO.: MID-L-1780-25 *Sat Below:* Hon. Ana C. Viscomi, J.S.C.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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LEGAL ARGUMENT

I. PLAINTIFF CLEARLY AGREED TO WAIVE ANY RIGHT TO PARTICIPATE IN A CLASS ACTION (T15 through T23)

All the sale documents that Plaintiff signed on March 11, 2024 contained express class action waivers—written in plain language and prominently identified.

A. The Class Action Waiver Language in Every Agreement is Consistent and Unambiguous

The RISC contained a dispute resolution clause with an unmistakable class action waiver. In a bold, all-capital-letter notice, the RISC warned: "PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS . . . EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN YOU AND US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL . . . 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." [Da049]. Immediately below this language it says "[If a dispute is arbitrated], [y]ou expressly waive any right you may have to arbitrate a consolidated, representative, class, collective, injunctive, or private attorney general action." Id. A couple of paragraphs later it says "You and we retain the right to seek remedies in small claims court . . . Neither you nor we waive the right to arbitrate

any related or unrelated claims by filing any action in small claims court, or by using self-help remedies such as repossession." Id. Later in that same paragraph it states that "*[y]ou agree that you expressly waive any right you may have for a claim or dispute to be resolved on a class basis in court or in arbitration*." Id. (emphasis added). Therefore, the RISC is unequivocally clear that Plaintiff is waiving her class action rights in *both* arbitration and court.

The first one-page stand-alone arbitration agreement ("SAA1") likewise states in large, bold font "CLASS ACTION WAIVER" and immediately below states that "By signing this Agreement, the Customer acknowledges his/her/their understanding that this Agreement requires that he/she/they must give up any right to participate in any way in a class action against the Dealer arising out of claims that the Parties have agreed to arbitrate." [Da053]. Under the SAA1, the parties agreed to arbitrate *all* claims except New Car Lemon Law and Magnuson-Moss Warranty Act claims (id.)—neither of which are asserted by Plaintiff in this litigation. [Da003].

Finally, the one-page second stand-alone arbitration agreement ("SAA2") is titled "AGREEMENT TO ARBITRATE AND CLASS ACTION WAIVER" and states in bold immediately above the signature line that "The Parties agree that, by entering into this Agreement, they are expressly waiving any rights to

bring, maintain or participate in any class action in court or in arbitration." [Da058].

In short, all three agreements were unequivocally clear that Plaintiff was agreeing to waive her right to bring her claims as part of a class action, in court or in arbitration. There are no inconsistencies among the class action waiver provisions and Plaintiff cannot credibly cite to any. Plaintiff's argument that the class waiver provisions in the RISC are ambiguous is belied by the fact that this exact same RISC (or substantially similar) has been upheld by numerous courts in New Jersey and elsewhere. See, e.g., Mayes v. Sign Drive, LLC, No. A-1167-24, 2025 N.J. Super. Unpub. LEXIS 1259 (App. Div. July 10, 2025) [Da102]; Kamineni v. Tesla, Inc., No. 19-14288 (RBK/KMW), 2020 U.S. Dist. LEXIS 1329 (D.N.J. Jan. 6, 2020) [Da106]; Perez v. Leonard Auto. Enters., BER-L-5882-16, 2016 N.J. Super. Unpub. LEXIS 2631 (App. Div. Dec. 8, 2016) [Da111]; Trainor v. Chrysler Capital, No. A-1997-19, 2021 N.J. Super. Unpub. LEXIS 2202 (App. Div. Sep. 20, 2021) [Da115]; Wolf v. Nissan Motor Acceptance Corp., Civil Action No. 10-cv-3338 (NLH)(KMW), 2011 U.S. Dist. LEXIS 66649 (D.N.J. June 22, 2011) [Da119]. Notably, the court in Perez, which dealt with an arbitration provision almost identical to the one in this matter, noted that the arbitration provision in Perez was "vetted by [AAA], which maintains a Consumer [Arbitration] Clause Registry . . . [a]ccording to

the website, the AAA only registers consumer clauses after review and finding that the clause substantially and materially complies with the due process standards of the Consumer Due Process Protocol." Perez, 2016 N.J. Super. Unpub. LEXIS 2631 at *7-8.

B. The Class Action Waiver was Conspicuously Disclosed, Despite Plaintiff's Font Size Objection

Plaintiff's opposing brief does not seriously contend that the wording of the class waiver is unclear. Instead, Plaintiff argues that the waiver in the RISC was presented in "tiny print" and thus was not sufficiently conspicuous for her assent to be knowing. This argument fails for several reasons. First, Plaintiff ignores the fact that the RISC's arbitration provision—including the waiver—was prefaced by a boldface, all-caps warning advising her: "ARBITRATION PROVISION, PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS." [Da049]. Plaintiff further ignores the fact that *immediately* above her signature on page 5, the RISC states in large, bold text that "You acknowledge that you have read all pages of this contract, including the arbitration provision on page 4, before signing below." [Da050]. These prominent warnings undermine any claim that the class action waiver was "buried" or hidden.

Second, whatever the RISC's typography, any conceivable lack of conspicuousness in that document was cured by the stand-alone Class Action Waiver agreements that Plaintiff also signed. Those one-page forms were

presented separately for signature. Each bore a large, bold heading announcing the "CLASS ACTION WAIVER". [Da053, Da058]. As the federal court observed in Adamson v. Foulke Mgmt. Corp., No. 08-4819 (JBS/JS), 2009 U.S. Dist. LEXIS 30099 (D.N.J. Apr. 6, 2009) [Da 126]:

> In the present case, though the RI[S]C arbitration agreement is by no means prominent, the separate arbitration agreement is a separate document, which warns in bold and capital letters at both the beginning and the end of the agreement that the customer, by signing, is limiting his "right to maintain a court action," and expressly lists the disputes covered (including federal and state statutory claims). . . . *Plaintiff cannot avoid arbitration where he signed two arbitration agreements, both of which cover the disputes in question here, and at least one of which was a prominent document, clearly marked and intended to draw his attention to the rights he had waived. As a consequence, there exists a valid contract to arbitrate Plaintiff's claims in this action against Defendants Foulke and Triad*.

Id. at *21-22 (emphasis added). Third, the RISC at issue was not some bespoke contract drafted to trick consumers—it was a pre-printed, standard form in wide use, created by Reynolds & Reynolds. If the formatting of that form (including its arbitration clause) violated New Jersey's consumer contract requirements, one would expect to see courts routinely invalidating it. Yet, Defendants are not aware of a single case that has done so.

C. The Class Waiver Provisions are Severable and Remain Effective Even If Arbitration Fails

All three arbitration agreements (RISC, SAA1 and SAA2) include severability provisions which state that if any part of the arbitration provision is

found to be unenforceable, the remaining parts shall remain enforceable. [Da049, Da053, Da058]. Wolf v. Nissan Motor Acceptance Corp., Civ. A. No. 10-cv-3338 (NLH)(KMW), 2011 U.S. Dist. LEXIS 66649, *22 (D.N.J. June 22, 2011) [Da119] (noting that provisions within an arbitration agreement can be severed in accordance with a severability clause). As stated in the opening brief, Pace v. Hamilton Cove, 258 N.J. 82 (2024) and Cerciello v. Salerno Duane, Inc., 473 N.J. Super. 249 (App. Div. 2022) likewise confirm that class action waivers are viewed independently of the arbitration provisions. See also Adamson, 2009 U.S. Dist. LEXIS 30099 at *18 [Da126] (noting that an arbitration provision does not have to be entirely unambiguous to be enforceable—"especially where, as here, some rights have been clearly waived. In fact, where the ambiguous provisions do not speak to Plaintiff's consent to waive his right to bring the present claims to court, any ambiguities are left to be resolved by the arbitrator."). Therefore, even if the arbitration provision itself is found to be unenforceable, the class waiver language remains enforceable.

D. The Vehicle Theft Protection Contract is Irrelevant to this Dispute and Was Not Considered by the Trial Court

Defendants are not a party to the VTP. [Da054, Da068]. And the trial court did not consider the VTP in issuing its ruling. [T15:9-23:10]. Therefore, Plaintiff's reference and citation to the VTP is irrelevant and should be disregarded. Even if this Court did not disregard the VTP, the VTP likewise

includes a class action waiver and is therefore consistent with the other three arbitration agreements. [Da054].

II. MULTIPLE AGREEMENTS DID NOT UNDERMINE MUTUAL ASSENT OR THE ENFORCEABILITY OF THE WAIVER (T15 through T23)

A. Cervalin, Guzman, and Adamson Confirm Enforceability of the Class Action Waiver; 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]; and Adamson v. Foulke Mgmt. Corp., No. 08-4819 (JBS/JS), 2009 U.S. Dist. LEXIS 30099 (D.N.J. Apr. 6, 2009) [Da 126]. All three 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 one of the agreements 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) [Pa40] are controlling. The one 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. The court noted that any ambiguities in the agreements which did not pertain to the waiver of the right to go to court were matters for the arbitrator to resolve and did not undermine the threshold enforceability of the arbitration pact. Id. at *18-19. 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 waiver) agreement was enforceable—even if the two forms were not identical in every respect.

III. PLAINTIFF'S REMAINING ARGUMENTS LACK MERIT (T15 through T23)

A. Defendants Did Not "Waive" Their Right to Enforce the SAA2

Plaintiff contends that the order of precedence clause in SAA2 was not "preserved" below because Defendants did not emphasize it until this appeal. This is incorrect. Defendants submitted the SAA2 with their motion reply and explicitly argued that the SAA2 "supersedes" the other arbitration provisions. [Pa27]. And the trial judge expressly accepted plaintiff's sur-reply and

addressed the import of the SAA2 in her bench ruling. In accepting the sur-reply, the colloquy was as follows:

> THE COURT: Yeah. You know, I appreciate that. I've heard that before in terms of corporations, insurance companies, whatever, that they think they know what you need, and they send you what they think, and then they get the opposition and it's like, oh, by the way, I have – look at this, I found this too.
>
> MR. SAMSON: Yeah.
>
> THE COURT: You know, and so that's problematic, and that's why I had no issue with the surreply which, within the surreply requested permission.

[T5:10-20]. And then in her bench ruling, the trial judge expressly acknowledged and considered the SAA2 which had been submitted in connection with the Defendants' reply brief:

> THE COURT: So the Court looks to three documents at play herein, and the first is the RISC, the Retail Installment Sales Agreement . . .
>
> We then go to another document which was purportedly signed by the plaintiff, and this one is called – it's a single-page document and it's called an agreement to arbitrate disputes . . .
>
> Then we turn to the third document which the plaintiff in her certification says, I don't remember signing this, being given a – or being given a copy of it . . . So this is a single-page document dated that day, and in bold all-cap letters under Edison Motor Sales, it indicates, "Agreement to arbitrate and class action waiver." . . .

[T15:23-19:17]. Therefore, notwithstanding Plaintiff's argument to the contrary, the record clearly reflects that the trial court accepted the SAA2 and

corresponding sur-reply, both of which she considered in issuing her bench ruling. And the supersession clause argument was expressly raised and addressed in both the reply brief and the sur-reply. [Pa27, Pa34]. Counsel's statement to the trial court regarding the SAA2 that "we don't have to even get to that Document" [T6:17-18] was in no way an abandonment or waiver of his arguments regarding the SAA2 as argued by Plaintiff. Rather, he was arguing that the trial court could avoid having to address the issue if it wished because the class action waivers in all the agreements were consistent and therefore should have been enforced, even if the court would not consider the SAA2. Counsel's entire statement was "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 – and my argument is – I'd like to focus on the class action waiver for purposes of this oral argument. It clearly states . . . that class actions are waived both in court [and in] arbitration." [T6:17-23].

B. Failure to Provide a Copy of One Form Does Not Invalidate Plaintiff's Assent

In an effort to evade the 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 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 suggestion that the authenticity of SAA2 is "disputed" and warrants remand for discovery is unfounded. She never squarely challenged the signature's genuineness below; she said she didn't recall signing [Da059]—a far cry from claiming it was forged. The fact that she does not recall signing is certainly not a surprise—it would take a true unicorn of a consumer to recall the multiple documents they signed in connection with a car purchase transaction more than a year after-the-fact (or even two days later, for that matter). New Jersey law does not require an evidentiary hearing absent some evidence of fraud or forgery, which is lacking here. Plaintiff's signature on the SAA2 appears identical to her signatures on the other documents. In any case, even if the Court had concerns about the SAA2's execution, the appropriate

[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.

remedy would be to compel a narrow evidentiary proceeding on that discrete formation issue—*not* to refuse arbitration entirely.

Finally, 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. Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 216 (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 the plaintiff with a copy of 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 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 by judicial fiat, 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 to it [Da051-055], 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.

CONCLUSION

For the foregoing reasons, Defendants request that the trial court order be reversed and that the class action waiver be enforced in accordance with the parties' agreement.

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

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