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IN THE SUPREME COURT OF FLORIDA

LES KROL,	**Fla. S. Ct. No.: SC19-952**
Petitioner	**DCA NO.: 5D18-2149**
v.	**Trial Ct. No. 2017-CA-049992**
GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD	
Respondent.	

APPENDIX TO APPELLANT'S INITIAL BRIEF

On Review from the Fifth District Court of Appeal

State of Florida

Jeremy Kespohl, Esquire
Florida Bar No. 035979
Theodore Greene, Esquire
Florida Bar No. 502634
MORGAN & MORGAN
76 South Laura Street #1100
Jacksonville, Florida 32202-3433
(904) 361-4416 Phone
(904) 361-4348 Facsimile
warrantygroupeservice@forthepeople.com
tfgreene3@msn.com
Attorneys for Petitioner

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IN THE CIRCUIT COURT IN AND FOR
BREVARD COUNTY, FLORIDA

Case No: 2017-CA-049992

LES KROL

Plaintiff,

v.

FCA US, LLC and

GIBSON AUTO SALES, INC.,
d/b/a GIBSON TRUCK WORLD

Defendants.
_____/

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the Petitioner/Plaintiff LES KROL, by and through his attorneys MORGAN & MORGAN, appeals to the Fifth District Court of Appeals the trial court's Order Granting Respondent/Defendant GIBSON AUTO SALES, INC.'s Motion to Compel Arbitration. This order is an immediately appealable interlocutory order. *See* Fla. R. App. P. 9.130(a)(3)(C)(iv); *see also Chalkin v. Parker Waichman LLP*, 42 Fla. L. Weekly D2165b (Fla. 2nd DCA 2017), *quoting Roth v. Cohen*, 941 So.2d 496, 499 (Fla. 3rd DCA 2006) (An order granting or denying a motion to compel arbitration is reviewed on appeal with a de novo standard of review). Pursuant to Rules 9.110(d) and Rule 9.160(c) a copy of said order is attached hereto as Exhibit 1.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a correct and true copy of the foregoing was sent via E-Filing this 2nd day of July, 2018 to: Yesica S. Liposky, Esq., Broad and Cassell, LLP, 100 North Tampa Street, Suite 3500, Tampa, FL 33602, yliposky@broadandcassel.com, rsickles@broadandcassel.com, knovak@broadandcassel.com, egarvey@broadandcassel.com, jlovins@broadandcassel.com; and, John Glenn, Esq., AndersonGlenn LLP, 2650 North Military Trail, Suite 430, Boca Raton, FL 33431, jglenn@asglaw.com, kdavidowitz@asglaw.com, hromeu@asglaw.com, roreilly@asglaw.com

MORGAN & MORGAN, P.A.

/s/ Jeremy Kespohl
JEREMY KESPOHL, Esquire
Florida Bar No. 035979
ANGELA THOMAS, Esquire
Florida Bar No. 871311
Attorneys for Plaintiff
76 South Laura Street, Suite 1100
Jacksonville, FL 32202
(904) 361-4416 Telephone
(904) 361-4348 Facsimile
jkespohl@forthepeople.com
For Service of Documents Only:
warrantygroupeservice@forthepeople.com

Exhibit 1

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA
CIVIL DIVISION

LES KROL,

Plaintiff,

Case No. 2017-CA-049992

v.

FCA US, LLC; and GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,

Defendants. /

ORDER GRANTING DEFENDANT'S MOTION TO STAY AND COMPEL ARBITRATION

This cause came before the Court on May 31, 2018 on Defendant's, Gibson Auto Sales, Inc. d/b/a Gibson Truck World ("Defendant"), Motion to Stay and Compel Arbitration, and upon this Court having reviewed the Motion and the Court file, and upon hearing argument of counsel for Plaintiff and Defendant, and being otherwise fully advised in the premises, this Court finds as follows:

1. On or about June 6, 2016, Plaintiff, Les Krol ("Plaintiff"), purchased a 2014 Dodge Ram 3500 bearing Vehicle Identification Number 3C63RRGL0EG108376 (the "Vehicle") from Defendant. As part of this transaction, Plaintiff contemporaneously executed and received multiple documents such as, a Buyer's Order, which included an arbitration agreement (the "Arbitration Agreement"), a Retail and Installment Sales Contract, a factory warranty, and an extended warranty. In relevant part, the Arbitration Agreement provides as follows:

> Dealer and customer agree that any controversy, claim, suit, demand, counterclaim, cross claim, or third party complaint, arising out of, or relating to this Order or the parties' relationship (whether statutory or otherwise), including, but not limited to any matter that may have induced the Customer to enter into any relationship with Dealer and any disputes regarding the validity or enforceability of this clause (collectively referred to as "Claim"), shall be submitted to final and binding arbitration ...

The arbitration shall be final and binding on all parties.

2. On or about November 1, 2017, Plaintiff filed this action against Defendant and FCA US, LLC for alleged violations of the Magnuson Moss Warranty Act ("MMWA") relating to claims arising out of Plaintiff's purchase of the Vehicle. Then, Defendant filed its Motion to Stay and Compel Arbitration (the "Motion") based on the Arbitration Agreement, and Plaintiff filed his Response and Amended Response in Opposition to the Motion. Defendant also filed its Affidavit in support of the Motion to authenticate the Arbitration Agreement and Notice of Filing case law in support of the Motion.

3. This Court held a hearing on the Motion on May 31, 2018 at which counsel for Plaintiff and Defendant personally appeared and respectively argued their positions. Defendant's counsel argued that the Motion should be granted because (1) there is a strong public policy favoring arbitration under the Federal Arbitration Act ("FAA") and Florida Arbitration Code ("FAC"), (2) arbitration agreements are broadly interpreted based on the well-recognized principle that "any doubts concerning arbitration should be resolved in favor of arbitration," and (3) courts in Florida and the Eleventh Circuit have compelled the arbitration of MMWA claims. *See Midwest Mutual Insurance Company v. Santlesteban*, 287 So.2d 665 (Fla. 1974) ("[C]ourts favor arbitration to expedite claims and reduce litigation."); *Grektorp v. City Towers of Fla., Inc.*, 644 So. 2d 613, 614 (Fla. 2d DCA 1994) ("Arbitration agreements are a favored means of dispute resolution"); *Beaver Coaches, Inc. v. Revels Nationwide R.V. Sales, Inc.*, 543 So. 2d 359, 362 (Fla. 1st DCA 1989) ("In the case of a particularly broad arbitration clause, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."); *Stacy David, Inc. v. Consuegra*, 845 So. 2d 303, 305 (Fla. 2d DCA 2003); *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002). Plaintiff's counsel argued that this Court should deny the Motion because (1) the Federal

Trade Commission ("FTC") had interpreted the MMWA and found such claims were not subject to binding arbitration; (2) this Court ought to defer to the FTC's interpretation based upon *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984); and (3) multiple courts had deferred to the FTC's interpretation of the MMWA and held that MMWA claims were not subject to binding arbitration. *See Kolev v. Euromotors West/The Auto Gallery*, 658 F.3d 1024 (9th Cir. 2011); *Seney v. Rent-A-Center, Inc.*, 738 F.3d 631 (4th Cir. 2013).

4. After the hearing on the Motion, Plaintiff filed his Notice of Supplemental Authority (the "Notice"). In the Notice, Plaintiff argued for the first time that the Motion should be denied because the Arbitration Agreement was not contained in the warranty itself and relied upon *Cunningham v. Fleetwood Homes of Georgia, Inc.*, 253 F.3d 611 (11th Cir. 2001) and *Porter v. Chrysler Group, LLC*, 2013 WL 6768218 (M.D. Fla. 2013). Then, Defendant filed its Response in Opposition to Defendant's Notice and Memorandum of Law (the "Response"). In its Response, Defendant argued that this Court should not consider Plaintiff's new and untimely arguments, that this Court should not follow *Cunningham* as it did not reflect the Eleventh Circuit's current position on the MMWA and had been distinguished based on *Davis*, and that Plaintiff's reliance on *Cunningham* ignored the principle that contemporaneously executed documents related to one transaction must be construed as one document. *See Davis*, 305 F.3d 1268; *Patriot Mfg., Inc. v. Jackson*, 929 So. 2d 997 (Ala. 2005); *Patriot Mfg., Inc. v. Dixon*, 399 F. Supp. 2d 1298 (S.D. Ala. 2005); *Wilson v. Terwillinger*, 140 So. 3d 1122, 1124 (Fla. 5th DCA 2014); *Dodge City, Inc. v. Byrne*, 693 So. 2d 1033, 1035 (Fla. 2d DCA 1997).

5. This Court has extensively reviewed all of Plaintiff's and Defendant's written submissions and oral arguments during the hearing.

6. In considering the Motion, this Court considers the following elements: "(1)

whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived. *Stacy David, Inc. v. Consuegra*, 845 So. 2d 303, 305 (Fla. 2d DCA 2003); *Fl-Evergreen Woods, LLC v. Robinson*, 135 So. 3d 331, 335 (Fla. 5th DCA 2013); *See also Gale Grp., Inc. v. Westinghouse Elec. Corp.*, 683 So. 2d 661, 663 (Fla. 5th DCA 1996) ("A court must compel arbitration where an arbitration agreement and an arbitrable issue exists, and the right to arbitrate has not been waived.").

7. This Court finds and the parties agree that there was a valid written agreement to arbitrate and that Defendant did not waive its right to arbitration. Thus, this Court's analysis will focus on the second element, i.e. whether an arbitrable issue exists.

8. In its analysis of the second element, this Court is particularly persuaded by the Eleventh Circuit's decision in *Davis* and rejects Defendant's argument that MMWA claims cannot be subject to binding arbitration. 305 F.3d 1268. In *Davis*, the Eleventh Circuit thoroughly analyzed the MMWA and concluded that nothing in the MMWA's text, legislative history, or purpose prohibited the arbitration of MMWA claims. 305 F. 3d at 1273-76. The court also analyzed the FTC regulations regarding the MMWA and concluded that such interpretation was no longer permissible due to the "Supreme Court's abandonment of its hostile attitude toward arbitration" and its "acknowledgement and continual enforcement of the strong federal policy toward arbitration." *Id.* at 1279-80. Thus, the Eleventh Circuit held that MMWA claims could be subject to binding arbitration. *Id.* at 1280.

9. This Court acknowledges that courts across the country conflict as to whether MMWA claims can be subject to binding arbitration and that Plaintiff and Defendant have cited to such cases in support of their respective positions. However, this Court finds *Stacy David* particularly relevant as it was the only case provided to this Court from a Florida District Court of

Appeal regarding the arbitrability of MMWA claims and where the Second District Court of Appeal compelled arbitration of MMWA claims. 845 So. 2d 303.

10. This Court also recognizes that the Arbitration Agreement has a broad arbitration clause. When interpreting the Arbitration Agreement, this Court follows the strong policy favoring arbitration and the broad interpretation that must be given to arbitration agreements and resolves any doubts concerning the scope of the Arbitration Agreement in favor of arbitration. *See Santiesteban*, 287 So.2d 665; *Grektorp*, 644 So. 2d 613; *Beaver Coaches, Inc.*, 543 So. 2d 359.

11. This Court also finds that Plaintiff's reliance on *Cunningham* is misplaced and is persuaded by Defendant's Response.

12. After fully considering Plaintiff's and Defendant's written submissions and oral arguments during the hearing, this Court finds that Defendant has satisfied all three elements to grant the Motion. This Court further finds that Plaintiff has failed to present sufficient evidence to show that the parties intended to exclude Plaintiff's claims from the Arbitration Agreement and rejects Plaintiff's argument that MMWA claims cannot be subject to binding arbitration.

Accordingly, it is hereby ordered and adjudged as follows:

13. Defendant's Motion to Stay and Compel Arbitration is hereby GRANTED. The parties are COMPELLED to arbitrate their dispute in accordance with the Arbitration Agreement and this action is STAYED pending completion of the arbitration of all issues between the parties.

DONE AND ORDERED in Chambers in Brevard County, Florida this 20 day of June, 2018.

STATE OF FLORIDA, COUNTY OF BREVARD
I HEREBY CERTIFY that the foregoing is a true copy of the original filed in this office and may contain redactions as required by law.
SCOTT ELLIS, Clerk of the Circuit Court
Date 7/2/18 By Kim Bandes

The Honorable Stephen Koons
Circuit Judge

Copies to: Yesica S. Liposky, Esq. 100 N. Tampa St., Ste. 3500, Tampa, FL 33612.
Jeremy Kespohl, Esq., 76 S. Laura St., Ste. 1100, Jacksonville, FL 32202.
Wilnar J. Julmiste, Esq., 2650 N. Military Trial, Ste. 430, Boca Raton, FL 33341.

District Court of Appeal
Fifth District
300 South Beach Street
Daytona Beach, Florida 32114
(386) 947-1500

ACKNOWLEDGMENT OF NEW CASE

DATE: July 03, 2018

STYLE: LES KROL v. FCA US, LLC AND GIBSON AUTO SALES, INC. D/B/A GIBSON TRUCK WORLD

5DCA#: 18-2149

The Fifth District Court of Appeal has received a Notice of Appeal reflecting a filing date of July 2, 2018.

The county of origin is Brevard.

The lower tribunal case number provided is 2017-CA-049992.

The filing fee is Billed - $300.

Case Type: Civil Other Non-Final

NOTICE: The Initial Brief in this nonfinal appeal **SHALL** be served within **FIFTEEN DAYS** of the filing of the Notice of Appeal. No record on appeal is to be transmitted to this Court unless so ordered by the Court. See Fla. R. App. P. 9.130(d) & (e).

The Fifth District Court of Appeal's case number must be utilized on all pleadings and correspondence filed in this cause. Moreover, ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

Pursuant to Administrative Order 5D18-02, effective May 1, 2018, attorneys are required to: (1) provide their client(s) with a copy of every motion for extension of time or notice of agreed extension of time the attorney files and (2) include a statement in the certificate of service on that motion or notice certifying that a copy of the motion or notice was provided to the client and the manner in which the copy was provided (i.e. by U.S. Mail, e-mail, or hand delivery). The State of Florida and governmental agencies are excluded from the requirements of this Administrative Order.

Any party who may properly proceed in this Court pro se, i.e., unrepresented by counsel, may find useful "The Pro Se [Self-Represented] Appellate Handbook," which is provided by the Appellate Practice Section of The Florida Bar (available at www.flabarappellate.org.).

Please review and comply with any handouts enclosed with this acknowledgment.

cc: Jeremy Kespohl Clerk Brevard Yesica S. Liposky
John Jason Glenn

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

LES KROL,
Appellant,

v. CASE NO. 5D18-2149

FCA US, LLC AND GIBSON AUTO SALES, INC. D/B/A GIBSON TRUCK WORLD,
Appellee.
_____/

DATE: July 03, 2018

BY ORDER OF THE COURT:

Inasmuch as Appellant commenced the above-styled cause by the filing of a Notice of Appeal in the lower court on July 2, 2018, but without the entry of an order of insolvency for appeal purposes or payment of the statutory filing fee, it is

ORDERED that Appellant shall, within twenty (20) days of the date of this Order, either file a certified copy of a lower court order of insolvency for appellate court purposes as required by Florida Rule of Appellate Procedure 9.430 or pay to this Court the filing fee of THREE HUNDRED DOLLARS ($300.00) pursuant to Florida Rules of Appellate Procedure 9.110(b) or 9.130(b) and Section 35.22, Florida Statutes. It is further

ORDERED that this case will not progress until this Order has been complied with and failure to comply with this Order may result in dismissal of this appeal sua sponte and without further notice. This Order does not toll the filing deadlines contained in the appellate rules.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Joanne P. Simmons
JOANNE P. SIMMONS, CLERK

cc:
Jeremy Kespohl

RECEIVED, 7/6/2018 10:09 AM, Joanne P. Simmons, Fifth District Court of Appeal

DISTRICT COURT OF APPEAL
FIFTH DISTRICT
STATE OF FLORIDA

LES KROL,

Appellant,

v.

FCA US, LLC; and GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,

Appellants.
_____ /

5DCA Case No. 18-2149

L.T. Case No. 2017-CA-049992

NOTICE OF APPEARANCE AS COUNSEL FOR APPELLEE GIBSON AUTO SALES, INC., D/B/A GIBSON TRUCK WORLD AND DESIGNATION OF E-MAIL ADDRESSES

Robert E. Sickles, Esq. and Yesica S. Liposky, Esq. with the law firm of Broad and Cassel LLP, hereby give notice of their appearance as counsel for **Appellee Gibson Auto Sales, Inc., d/b/a Gibson Truck World** in this action. In addition, pursuant to Fla. R. Jud. Admin 2.516(b)(1)(A), counsel for Appellee's email addresses for service in this case are as follows:

Primary: rsickles@broadandcassel.com
Secondary: knovak@broadandcassel.com
Secondary: egarvey@broadandcassel.com

Primary: yliposky@broadandcassel.com
Secondary: jlovins@broadandcassel.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 6, 2018, a true and correct copy of this document was served via e-mail on the following:

Jeremy Kespohl, Esq.
Morgan & Morgan, P.A.
76 South Laura Street, Suite 1100
Jacksonville, FL 32202
jkespohl@forthepeople.com
warrantygroupeservice@forthepeople.com

John J. Glenn, Esq.
Wilnar J. Julmiste, Esq.
ANDERSONGLENN LLP
2650 North Military Trial, Suite 430
Boca Raton, Florida 33341
jglenn@asglaw.com
julmiste@asglaw.com
kdavidowitz@asglaw.com
glenn@asglaw.com

s/ Robert E. Sickles, Esq.

Robert E. Sickles, P.A.
Florida Bar No. 167444
Yesica S. Liposky, Esq.
Florida Bar No. 119924
BROAD AND CASSEL LLP
100 North Tampa Street, Suite 3500
Tampa, FL 33602
Telephone: 813-225-3020
Facsimile: 813-225-3039
Primary: rsickles@broadandcassel.com
Primary: yliposky@broadandcassel.com
Secondary: knovak@broadandcassel.com
Secondary: egarvey@broadandcassel.com
Secondary: jlovins@broadandcassel.com
Counsel for Appellee Gibson Auto Sales, Inc., d/b/a Gibson Truck World

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

LES KROL,

Appellant,

v. CASE NO. 5D18-2149

FCA US, LLC AND GIBSON AUTO SALES, INC. D/B/A GIBSON TRUCK WORLD,

Appellees.
_____/

DATE: July 24, 2018

BY ORDER OF THE COURT:

IT APPEARING that the Appellant commenced this cause by filing a notice of appeal in the lower court on July 2, 2018, but failed to either file a certified copy of an order rendered by the lower tribunal declaring Appellant insolvent for purposes of appeal as required by Florida Rule of Appellate Procedure 9.430 or to pay the filing fee of THREE HUNDRED DOLLARS ($300.00) as required by Section 35.22, Florida Statutes, within the time provided for by this Court's July 3, 2018, Order, it is

ORDERED that the above styled cause is dismissed. See Williams v. State, 324 So. 2d 74, 77 (1975).

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Joanne P. Simmons
JOANNE P. SIMMONS, CLERK

cc:

Robert Eric Sickles Jeremy Kespohl Yesica S. Liposky

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

LES KROL,

Appellant,

v. CASE NO. 5D18-2149

FCA US, LLC AND GIBSON AUTO SALES, INC. D/B/A GIBSON TRUCK WORLD,

Appellees.
_____/

DATE: July 24, 2018

BY ORDER OF THE COURT:

IT APPEARING that the Appellant commenced this cause by filing a notice of appeal in the lower court on July 2, 2018, but failed to either file a certified copy of an order rendered by the lower tribunal declaring Appellant insolvent for purposes of appeal as required by Florida Rule of Appellate Procedure 9.430 or to pay the filing fee of THREE HUNDRED DOLLARS ($300.00) as required by Section 35.22, Florida Statutes, within the time provided for by this Court's July 3, 2018, Order, it is

ORDERED that the above styled cause is dismissed. See Williams v. State, 324 So. 2d 74, 77 (1975).

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Joanne P. Simmons
JOANNE P. SIMMONS, CLERK

cc:

Robert Eric Sickles Jeremy Kespohl Yesica S. Liposky

RECEIVED, 7/24/2018 6:06 PM, Joanne P. Simmons, Fifth District Court of Appeal

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

Brevard County Case No: 2017-CA-049992

LES KROL,

Appellant

v.

GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD

Appellee.

Appellate Case No:

APPELLANT'S INITIAL BRIEF

On Appeal from the Circuit Court of the
Fifteenth Judicial Circuit in and for
Palm Beach County Florida

Jeremy Kespohl, Esquire
Florida Bar No. 035979
Angela Thomas, Esquire
Florida Bar No. 871311
MORGAN & MORGAN
76 South Laura Street #1100
Jacksonville, Florida 32202-3433
(904) 361-4416 Phone
(904) 361-4348 Facsimile
warrantygroupeservice@forthepeople.com
Attorneys for Appellant

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II. STATEMENT OF THE CASE

Appellant LES KROL ("Appellant") filed his complaint in the underlying complaint on November 1, 2017, alleging several causes of action pursuant to the federal Magnuson-Moss Warranty Act ("MMWA"). *See* Appendix A-1. Appellant's complaint alleged breach of Express Warranty against FCA US LLC[1]. *Id.* Appellant's Complaint also alleged claims for Breach of Implied Warranty and Revocation of Acceptance against Appellee GIBSON AUTO SALES INC., D/B/A GIBSON TRUCK WORLD ("Appellee"). *Id.* Appellant's claims were all related to warranties he alleged to have received for his 2014 Dodge Ram 3500 pick-up truck, VIN: 3C63RRGL0EG108376, ("the subject vehicle") which he purchased from Appellee on June 6, 2016. *See* Appendix A-1.

On December 6, 2017, Appellee filed an Amended Motion to Stay and Compel Arbitration with the lower Court. *See* Appendix pp. A-2. Appellee claimed the right to arbitrate the claim pursuant to an arbitration agreement that was enclosed in the Retail Buyer's Order for the subject vehicle. *Id.* On December 8, 2017, Appellant filed a response in opposition to Appellee's Motion to Stay and Compel Arbitration alleging that his claims under the MMWA could not be subject to binding arbitration. *See* Appendix pp. A-3.

[1] FCA US, LLC was also a Defendant to Appellant's lawsuit at the trial level. However, Appellant has settled his claims against this party, and FCA US, LLC was not a party to the appealed order/motion to compel arbitration

The matter was set for a hearing with the lower Court on May 31, 2018. *See* Appendix pp. A-4. At 5:54 pm, the evening prior to the hearing, Appellee filed an affidavit in support of its Amended Motion to Stay and Compel Arbitration. *See* Appendix pp. A-5. On May 31, 2018, at 11:06 AM, less than three hours before the hearing, Appellee filed case law with the Court in support of its Amended Motion to Stay Litigation and Compel Arbitration. *See* Appendix pp. A-6

At approximately 2pm on May 31, 2018, the parties attended the hearing on and presented their respective positions to the lower Court. *See* Appendix pp. A-7. On June 1, 2018, Appellant filed a Notice of Supplemental Authority citing to additional case law/arguments in support of his opposition to Appellee's Motion to Stay Litigation and Compel Arbitration. *See* Appendix pp. A-8. On June 12, 2018, Appellee filed a response to Appellant's Notice of Supplemental Authority. *See* Appendix pp. A-9.

On June 21, 2018, the lower court entered an order granting Appellee's Amended Motion to Stay and Compel Arbitration. *See* Appendix pp. A-10. the Court ruled Appellant's claims under the MMWA could be subject to binding arbitration based on the Eleventh Circuit's decision in *Davis* v. *Southern Energy Homes, Inc.,* 305 F.3d 1268 (11th Cir. 2002) and the Second District Court of Appeal's Decision in *Stacy David, Inc.,* v. *Consuergra,* 845 So. 2d 303 (Fla. 2nd DCA 2003). *Id.* However, as explained *infra,* the 11th Circuit's decision in *David*

was fundamentally flaw and ignored/deviated from binding authority from the United States Supreme Court. Additionally, the *Consnergra* decision did not decide whether or not MMWA claims could be subject to binding arbitration, and instead simply mentioned the *Davis* decision in dicta.

III. STANDARD OF REVIEW

This Court has Jurisdiction over this appeal pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(v) which provides that appellate courts may review non-final orders that determine the entitlement of a party to arbitration. *See Florida Power Corp.* v. *City of Casselbeny*, 793 So.2d 1174 (Fla. 5th DCA 2001). An order granting a motion to compel arbitration is reviewed *de novo* by an appellate Court. *Extendicare Health Servs., Inc. v. Estate of Patterson*, 898 So. 2d 989, 990 (Fla. 5th DCA 2005); *Hirshenson* v. *Spaccio*, 800 So.2d 670 (Fla. 5th DCA 2001); *Ibis Lakes Homeowners Ass'n, Inc. v. Ibis Isle Homeowners Ass 'n, Inc.*, 102 So. 3d 722, 727 (Fla. 4th DCA 2012).

Furthermore, contrary to the position taken by Appellee at the underlying hearing in this matter, *See* A-7; as explained Infra, the Second District Court of Appeals did not address the issue of whether or not MMWA claims could be subject to binding arbitration in *Stacy David, Inc.*, v. *Consuergra, 845 So. 2d 303* (Fla. 2nd DCA 2003). Accordingly, this is not only a matter of first impression for this Court, but no other District Court of Appeal has ruled upon this issue of great

public importance to the millions of Florida consumers who have purchased, and will purchase, consumer products which are covered by the MMWA.

IV. SUMMARY OF THE ARGUMENT

Appellant's argument is that the MMWA prohibits binding arbitration. The MMWA requires that consumers go through non-binding Informal Dispute Resolution, if the warrantor maintains an approved Informal Dispute Resolution system, but does not allow for binding arbitration of a consumer's MMWA claims. This is because the intent behind the MWWA was to attempt to bring balance to the legal system in regard to handling of warranty claims which, prior to the MMWA, was shifted heavily in favor of warrantors. Thus, requiring consumers to submit their claims to binding arbitration would serve to undermine the intent of congress by shifting power back to the warrantors in regard to the handing of warranty disputes.

The MMWA, 15 U.S.C. §2301 *et seq.*, prohibits pre-dispute binding arbitration provisions in consumer contracts. The express language of the MMWA clearly indicates Congress' intent to preclude binding arbitration. The legislative history of the MMWA further reveals that Congress intended to prohibit binding arbitration in order to protect consumers from waiver of the remedies provided by the MMWA.

Further the Federal Trade Commission ("FTC"), who is charged with

interpreting and establishing rules for the MMWA, has for more than 40 years consistently interpreted the MMWA to prohibit binding arbitration. As explained more fully *infra,* in *Davis* v. *Southern Energy Homes, Inc.,* the Eleventh Circuit Court failed to properly apply the tests set out by the US Supreme Court regarding deference to the FTC decisions by altering significantly the applicable test. As a result, the Eleventh Circuit improperly failed to defer to the FTC's decisions regarding binding arbitration under the MMWA and its decision is invalid due to the Court's failure to comply with binding precedent. As a result, this Court should decline to follow the *Davis* decision, which is not binding upon this Court. Instead, as the FTC's interpretation is a reasonable construction of the MMWA, and is made in accordance with the powers that Congress granted to it, the Court must defer to the FTC's decision pursuant to the binding authority of the United States Supreme Court and over-rule the lower Court's decision that Appellant's MMWA claims are subject to binding arbitration.

Finally, to the extent that this Court is persuaded by the decisions of the Eleventh Circuit Court on this matter, this Court would still be required to overturn the lower Court's decision based upon the rulings of that Court. Pursuant to the Eleventh Circuit Court's decision in *Cunningham v. Fleetwood Homes of Georgia, Inc.,* which preceded its decision in *Davis,* an arbitration agreement that does not appear in the warranty at issue is invalid pursuant to the MMWA. The

Davis decision did not recede from or overrule *Cunningham*, which is still good law in the Eleventh Circuit. Furthermore, at least one Florida Appellate Court has held that the single document rule, the formed the basis for denying the request for arbitration in *Cunningham* is still in place in Florida regarding claims under the MMWA. Therefore, the lower court's ruling that Appellant's warranty claims were subject to binding arbitration should be reversed because the arbitration agreement in question was not contained in Appellee's warranty.

V. ARGUMENT

In *Shearson/Am. Express Inc.* v. *McMahon*, the US Supreme Court set forth the test for determining whether a statute precluded binding arbitration. *McMahon*, 482 U.S. at 227. Specifically the Supreme Court ruled that the mandate of the Federal Arbitration Act ("FAA"), that agreements to arbitrate should be enforced, can be overcome by a contrary instructions from Congress contained within a federal statute. *Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220 (1987) *see also Mitsubishi Motors Corp.* v. *Soler Chrysler- Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("Having made a bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."). The US Supreme Court has explained that FAA's intent is overridden where a statute's text, or legislative history, shows Congressional intent to do so, or where there is an inherent conflict between

requiring binding arbitration and the purpose of the statute. *McMahon,* 482 U.S. at 226-27. All of the standards laid out for finding the intent of the FAA is overridden by a federal statute apply to the MMWA.

As noted above, Congress' intent to prohibit arbitration may be found in the test, legislative history, or in a statute's underlying purpose. Accordingly, this Court is required to apply the tests laid out by the US Supreme Court in *Chevron U.S.A., Inc.* v. *Natural Res. Def Council, Inc.,* which provides the standard for analysis of the text and legislative history of a statute to determine Congressional intent. *Chevron U.S.A., Inc.* v. *Natural Res. Def Council, Inc.,* 467 U.S. 837, 842-43 (1984). *Chevron* detailed "a tool of statutory construction whereby courts are instructed to defer to the reasonable interpretations of expert agencies charged by Congress to fill any gap left, implicitly or explicitly, in the statutes they administer." *Am. Online, Inc.* v. *AT&TCorp,* 243 F.3d 812, 817 (4th Cir. 2001).

Under the *Chevron* analysis, this Court must apply a two-step inquiry in reviewing agency constructions of statutes.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. **First, always, is the question whether Congress has directly spoken to the precise question at issue.** If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at

> issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, **if** the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a *permissible* construction of the statute.
>
> The power of an administrative agency to administer a congressionally created … program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. **If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.** Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron, 467 US at 842-43 (citations, footnotes, and internal quotation marks omitted and emphasis added).

Under the first prong of *Chevron*, statutory construction is used to determine whether Congress expressed a clear intent on the issue in question. *Morgan* v. *Sebelius*, 694 F.3d 535, 537 (4th Cir. 2012); *Nat'l Elec. Mfrs. Ass'n* v. *U. S. Dep't of Energy*, 654 F.3d 496, 504 (4th Cir. 2011). However, if Congress' intent is not clear under the statute and if "Congress delegated authority to the agency generally to make rules carrying the force of law, and the agency interpretation claiming

deference was promulgated in the exercise of that authority," *United States* v. *Mead Corp.*, 533 U.S. 218, 226-27 (2001), then the Court must defer to the agency's reasonable construction of the ambiguous statutory provision. *See Household Credit Services, Inc.* v. *Pfennig*, 541 U.S. 232 (2004), *Elm Grove Coal Co.* v. *Dir., O.W.C.P.*, 480 F.3d 278, 292 (4th Cir. 2007); *Crutchfield v. U.S. Army Corps. of Engineers*, 325 F.3d 211, 218 (4th Cir. 2003). Therefore, even if this Court finds that the MMWA is ambiguous or silent as to binding arbitration, the FTC's gap-filling regulations are controlling unless "arbitrary, capricious, or manifestly contrary to the [MMWA]." *Id.* at 844.

A. Congress expressed its intent to prohibit binding arbitration in the text of the MMWA

Admittedly, Congress did not expressly include the term "binding arbitration" in the text of the MMWA. However, this is not where the analysis ends. In fact, inclusion of the term "binding arbitration" is not required, as Congress clearly and unambiguously indicated that consumers must retain the right to have disputes under the MMWA decided by a Court, not an arbitrator, after first resorting to any non-binding Informal Dispute Resolution ("IDR") procedure[2]. *See*

[2] Prior to the passage of the MMWA, the US Supreme Court described binding arbitration as informal, which is evidence of Congressional intent that arbitration under the MMWA be considered an informal dispute resolution procedure. *See e.g. United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (There the choice is between the adjudication of cases or controversies in

U.S.C. §2310(a)(3)(C).

Section 2310(a)(3)(C) of the MMWA states:

> (3) [Warrantors may establish an informal dispute settlement procedure which meets the requirements of the Commission's rules .... If –
>
> > (C) [the warrantor] incorporates in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty, then (i) the consumer may not commence a **civil action** ... unless he **initially** resorts to such procedure ....

15 U.S.C. § 2310(a)(3)(C) (emphasis added). Therefore, while the MMWA allows warrantors to establish IDR programs which consumers must resort to prior to filing a lawsuit with the Court, these IDR procedure cannot be binding on the consumer. *See Cunningham* v. *Fleetwood Homes of Georgia, Inc.,* 253 F.3d 611, 618-19 (11th Cir. 2001) (Congress' inclusion of word "initially" indicates subsequent civil action is permissible, "a possibility that binding arbitration does not anticipate").

Additionally, the terms of 15 U.S.C. §2310(a)(3)(C) expressly provide for commencement of a "civil action". Accordingly, the plain language of

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Court and the settlement of them in the more informal arbitration tribunal on the other); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 57, (1974) (the informality of arbitral procedure enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution); *Gilmer* v. *Interstate/Johnson lane Corp.,* 500 U.S. 20, 29 (1991) (referring to arbitration as an "informal" method of dispute resolution); *Mitsubishi,* 473 U.S. at 628 (by agreeing to arbitrate a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration.").

§2310(a)(3)(C) does not allow for binding arbitration, which would foreclose a consumer's right to pursue a civil action as provided for by the MMWA. Furthermore, 15 U.S.C. § 2310(d)(1) states that a consumer has the right to "bring **suit** for damages and other legal and equitable relief ... (A) in any **court of competent jurisdiction** in any State or the District of Columbia; or (B) in an appropriate **district court of the United States**, subject [to jurisdictional prerequisites]." 15 U.S.C. § 2310(d)(1)(A),(B) (emphasis added). Additionally, 15 U.S.C. § 2310(d)(2) also allows a prevailing consumer to recover attorneys' fees, costs and expenses as "determined by the **court**." 15 U.S.C. § 2310(d)(2) (emphasis added). The language of the MMWA in the above referenced sections leaves no doubt of congressional intent that a consumer's claims under the MMWA are to be adjudicated in a court of proper jurisdiction rather than by binding arbitration.

The MMWA also sought to protect consumers through strict regulation of the IDR process itself. Congress explicitly authorized the FTC to "fill gaps" in regard to the IDR processes and provisions by indicating that: "[t]he Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this title [15 U.S.C. § 2301 *et seq.*] applies." 15 U.S.C. § 2310(a)(2); *see also* 15 U.S.C. § 2310(a)(3) (a warrantor may establish an informal

dispute settlement procedure that "meets the requirements of [the FTC's] rules"). Section 2310(a)(2) provides the FTC with the specific authority to promulgate certain "minimum requirements" that a warrantor's Informal Dispute Resolution ("IDR") program must meet before a warrantor may require an aggrieved consumer to resort to IDR as a prerequisite to legal action. 15 U.S.C. §2310(a)(2).

Together these regulations were designed to ensure that IDR programs "not only look good on paper, but function effectively and fairly in practice" and that a given IDR mechanism "is fair and effective so that it **does not just represent another hurdle that the consumer is forced to surmount before being provided a meaningful avenue of redress**." Cong. Rec. 40711, 40712 (Dec. 18, 1974) (emphasis added). Accordingly, even assuming that Congress did not expressly address the requirement that the MMWA allow consumers to seek civil remedies in Court (which it clearly did), it authorized the FTC to establish such a requirement.

Based upon the foregoing, the text of the MMWA clearly indicates that by enacting it, Congress intended to preserve for consumers the right to bring suit and obtain specified legal relief through a formal civil action for breach of written or implied warranties, and preclude enforcement of binding arbitration clauses. Under the US Supreme Court's ruling in *Chevron*, because Congress has directly spoken to the precise question at issue, and its intent is clear, this Court must give effect to

Congressional intent and find that binding arbitration is not permissible for MMWA claims.

B. The legislative history establishes Congressional intent to prohibit binding arbitration of MMWA claims

As also explained by *Chevron* and its progeny, in addition to the text of the statute itself, this Court may also determine the intent of Congress based upon the legislative history of the MMWA. *McMahon,* 482 U.S. at 226; *Chevron,* 467 U.S. at 842-43. The legislative history demonstrates that Congress clearly intended to prohibit the use of binding arbitration clauses. As Congressman Moss, the named sponsor of the Act, explained in floor remarks regarding the MMWA:

> First, the bill provides the consumer with an economically feasible private right of action so that when a warrantor breaches his warranty or service contract obligations, the consumer can have effective redress. Reasonable attorney's fees and expenses are provided for the successful consumer litigant, and the bill is further refined so as to place a minimum extra burden on the **courts** by requiring as **a prerequisite to suit** that the purchaser give the (warrantor) reasonable opportunity to settle the dispute out of court, including the use of a fair and formal dispute settlement mechanism ...

119 Cong. Rec. 972 (1973) (statement of Rep. Moss)(emphasis added).

House Report 1107 ("Report") begins with an introduction which states that it was drafted "to provide minimum disclosure standard for written consumer

product warranties against defect or malfunction; to define minimum Federal content standards for such warranties; to amend the Federal Trade Commission Act in order **to improve its consumer protection activities** ...." H.R. Rep. No. 93-1107 (1974) *reprinted in* 1974 U.S.C.C.A.N. 7702 (emphasis added).

The next section of the House Report 1107 is the Purpose section:

> The purpose of this legislation is (1) to make warranties on consumer products more readily understood and enforceable, [and] (2) **to provide the Federal Trade Commission (FTC) with means of better protecting consumers** ....

Id. (emphasis added). House Report 1107 then reviewed and discusses the proposed legislation and individual sections of H.R. Rep. No. 93-1107, *reprinted in* 1974 U.S.C.C.A.N. 7702 (citing H.R. 7917, 93d Cong. (1974)). Title I includes definitions, minimum warranty requirements, remedies for consumers, power and authority of the FTC to develop rules for warrantors, and penalties the FTC would be enabled to impose for violations, and addresses informal dispute resolution. *Id.*

Subsection (4) of Title I of House Bill 7917 discusses establishment of rules by the FTC for informal dispute settlement procedures. *Id.* at 7703. Title I, subsection (4) states:

> Congressional endorsement is given to the establishment of informal dispute settlement procedures. **The FTC must prescribe rules applicable to any informal dispute settlement procedure which is incorporated in the**

> **terms of a warranty on a consumer product** A warrantor may make **initial** resort to such an informal dispute settlement procedure as a **condition precedent** to obtaining other remedies under title I of this legislation.

Id. (emphasis added). In regard to those "other remedies" under Title I, subsection (6) states:

> Any person damaged by the failure of a supplier to comply with any obligation under title I under a warranty or service contract would be authorized to **bring suit** in an **appropriate district court** of the United States ... or in any **State court** of competent jurisdiction ....

Id. at 7703-7704 (emphasis added).

The Report discussing Title I clearly indicates the intent of Congress to provide consumers better warranty protection for their products, and to allow consumers to file a lawsuit if their warranty dispute cannot be resolved. Such intent would without question be stymied by requiring consumers to submit their claims to binding arbitration.

Title II of House Bill 7917 discusses proposed amendments to the FTC Act. *Id.* at 7704. The Report details the proposed expansion of the FTC's powers and described that the proposed expansions were needed for consumer protection. *Id.* at 7705-7711 ("Background and Need – Consumer Protection Warranties"). The Report went on to explain that the legislation was required due to the mass production of good, and because of the increased failure of the manufacturers of these mass produced goods to honor their warranties. *Id.* at 7705. House Report

1107 noted that as the manufacturing industry expanded, consumers were more at risk, and needed more protection. "Paralleling the growth of acquisition of consumer products has been a growing concern of the American consumer." *Id.* at 7706.

The drafters of House Bill 7917 reviewed and took into consideration the recent findings of a Subcommittee on Commerce and Finance on consumer product warranties. *Id.* at 7711. The Subcommittee found there was a need to provide consumers with "access to reasonable and effective remedies where there is a breach of a warranty on a consumer product." *Id.* at 7711.

House Bill 7917 sought to extend the rulemaking authority and jurisdiction of the FTC in order to better allow it to regulate unfair or deceptive acts or practices in commerce. *Id.* at 7711. The FTC's jurisdiction was to be expanded to include matters affecting interstate commerce. *Id.* at 7713. The FTC was also to be given authority to administer and enforce cease and desist orders, and well as being given rule-making authority. *Id.* 7713-7716.

Section 110 of the Report addressed Remedies and the FTC's obligation to make rules governing IDR procedures. Section 110 states:

> In subsection (a) the Congress declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms. The Commission [FTC] must prescribe rules setting forth the requirements for any informal dispute settlement

> procedure which is incorporated in any written warranty on a consumer product.
>
> One or more suppliers could establish an informal dispute settlement procedure which is in accord with the FTC's rules. This procedure could be incorporated in a written warranty on a consumer product. The supplier could then require that the consumer must **initially resort to such procedure before bringing any action under section 110(d)** ....
>
> **An adverse decision in any informal dispute settlement proceeding would not be a bar to a civil action on the warranty involved in the proceeding**....

Id. at 7722-7723 (emphasis added).

Accordingly, the legislative history establishes that Congress enacted the MMWA to protect consumers, and that it was Congress' intent that the **IDR** process would help protect the rights of consumers, not prevent consumers for pursing their new rights in court. Accordingly, the legislative history further evidences that the MMWA does not allow for binding arbitration of claims brought by consumers.

C. FTC decisions that the MMWA prohibits binding arbitration are reasonable and must be granted deference by this Court

Notwithstanding the express language of the statute, and the unambiguous Congressional intent expressed by the legislative history of the MMWA, if this Court were to conclude that Congress has not "directly spoken to the precise question," of whether the MMWA prohibits binding arbitration of warranty claims,

the Court must proceed to the second prong of the *Chevron* analysis. *Chevron*, 467 U.S. at 842. Under the second prong of *Chevron*, the Court must determine if Congress delegated rulemaking authority to an administrative agency which resolved the statutory ambiguity based on a permissible construction of the statute. *Id.* at 843.

Congress expressly delegated broad rulemaking authority under the MMWA to the FTC.[3] Simply stated, Congress gave the FTC the express authority to elucidate specific provisions of the MMWA by creating specific regulations and rules. Pursuant to this authority, and the express delegation of gap-filling responsibilities by Congress, the FTC construed the MMWA as barring mandatory binding arbitration provisions[4]. *See* 16 C.F.R. §703.5(j); Rules, Regulations,

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[3] 15 U.S.C. §2302(a) (authorizing the FTC to prescribe rules on the contents of written warranties), §2302(b)(1)(A) (requiring the FTC to prescribe rules requiring providing consumers with warranty terms), §2302(b)(1)(B) (allowing the FTC to prescribe rules for conspicuous presentation of warranty information), §2302(b)(3) (allowing the FTC to prescribe rules for warranty extensions), §2304(b)(3) (FTC may by rule define the duties of warrantors regarding remedies under written warranty), §2310(a)(2) (FTC may prescribe rules for the minimum requirement for any informal dispute settlement procedure), §2310(a)(4) (FTC may review the operation of any dispute settlement procedure provided as prerequisite to pursuing a legal remedy).

[4] It is also notable that the Florida Attorney General has quoted with approval 16 C.F.R. § 703.50, in using the prohibiting on binding arbitration to similarly conclude that arbitrations pursuant to Section 703 are not binding on any participant. *See* 1985 Fla. Op. Atty. Gen. 88.

Statements and Interpretations Under Magnuson-Moss Warranty Act, 40 Fed. Reg. 60, 167, 60, 168, 60, 210 (Dec. 31, 1975); 16 C.F.R. § 700.8; 64 Fed.Reg. 19, 700-01, 19, 708-09 (1999).

In enacting the MMWA, Congress expressly delegated general rulemaking authority to the FTC. Pursuant to this authority, the FTC promulgated Rule 703, which provides that "[decisions of [any] Mechanism shall not be legally binding on any person," 16 C.F.R. §703.5(j), defining a "Mechanism" as an "informal dispute settlement procedure which is incorporated into the terms of a written warranty."[5] 16 C.F.R. §703.1(e). If a consumer "is dissatisfied with [a Mechanism's] decision or warrantor's intended actions, or eventual performance," the Rule states, then "legal remedies, including use of small claims court, may be pursued." *Id.* at § 703.5(g). As it was authorized to do by Congress pursuant to its rulemaking authority, the FTC "adopted] the position that the term 'mechanism' is appropriately read broadly, to encompass all non-judicial dispute resolution procedures, including arbitration." *Walton,* 298 F.3d at 481. Thus, binding arbitration is precluded by the plain language of the regulations specifying that mechanisms cannot be legally binding on any party. *Id.*

Moreover, when it published Rule 703, the FTC explained the following in response to public comments to include binding arbitration agreements:

> Several industry representatives contended that warrantors should be allowed to require consumers to resort to mechanisms whose decisions would be legally binding (e.g., binding arbitration). The Rule does not allow this for two reasons. First, as the Staff Report indicates, Congressional intent was that decisions of Section 110 Mechanisms not be legally binding. Second, even if binding mechanisms were contemplated by Section 110 of the Act, the [FTC] is not prepared, at this point in time, to develop guidelines for a system in which consumers would commit themselves, at the time of product purchase, to resolve any difficulties in a binding, but non-judicial, proceeding. The [FTC] is not now convinced that any guidelines which it set out could ensure sufficient protection for consumers.

Rules, Regulations, Statements, and Interpretations Under Magnuson-Moss Warranty Act, 40 Fed. Reg. 60,168, 60, 210 (Dec. 31, 1975) (emphasis added). The FTC's explanation concluded that "reference within the written warranty to any binding, non-judicial remedy is prohibited by the Rule and the Act." *Id.* at 60, 211.

In 1977, the FTC also promulgated Rule 700.8, which precludes a warrantor from "indicating] in any written warranty or service contract ... that the decision of the warrantor, service contractor, or any designated third party is final or binding in any dispute concerning the warranty or service contract." 16 C.F.R. § 700.8. The FTC made clear that any such statement that a decision is final or binding is "deceptive since section 110(d) of the Act gives state and federal courts jurisdiction over suits for breach of warranty and service contract." *Id.* This

interpretive rule under the MMWA further clarifies the FTC's consistent and longstanding position precluding pre-dispute binding arbitration.

In 1999, the FTC again confirmed its position that mandatory pre-dispute binding arbitration clauses are invalid under the MMWA. Rules, Regulations, Statements, and Interpretations Under Magnuson-Moss Warranty Act, 64 Fed. Reg. 19700, 19708-19709. The FTC explained:

> [T]he Commission determined that "reference within the written warranty to any binding, non judicial remedy is prohibited by the Rule and the Act." The Commission believes that **this interpretation continues to prohibit warrantors from including binding arbitration clauses in their contracts with consumers that would require consumers to submit warranty disputes to binding arbitration**.

Id (emphasis added).

The FTC further stated:

> The Commission based this decision on its analysis of the plain language of the Warranty Act. Section 110(a)(3) of the Warranty Act provides that if a warrantor establishes an informal dispute settlement mechanism that complies with Rule 703 and incorporates that informal dispute settlement mechanism in its written consumer product warranty, then "(t)he consumer may not commence a **civil action** (other than a class action) ... unless he initially resorts to such procedure." **This language clearly implies that a mechanism's decision cannot be legally binding**, because if it were, it would bar later court action. The House Report supports this interpretation by stating that **"fain adverse decision in any informal dispute settlement proceeding would not be a bar to a civil action on the warranty involved in**

> **the proceeding**." H.R. Rep. No. 93-1107 (1974), at 41 [1974 U.S.C.C.A.N. 7702, 7723].
>
> [T]he Commission determined that "reference within the written warranty to any binding, non-judicial remedy is prohibited by the Rule and the Act." 40 FR 60,168, 60,211 (1975). The Commission believes that this interpretation continues to be correct. Therefore, **the Commission has determined not to amend §703.5(h to allow for binding arbitration. Rule 703 will continue to prohibit warrantors from including binding arbitration clauses in their contracts with consumers that would require consumers to submit warranty disputes to binding arbitration**

Id. The FTC also explained that it was troubled by any statutory construction that "would enable warrantors and the retailers selling their products to avoid the requirements of the MMWA simply by inserting binding arbitration clauses in their sales contracts." Rules, Regulations, Statements, and Interpretations Under Magnuson-Moss Warranty Act, 64 Fed. Reg. 19700, 19709 & n. 72.

Most recently, in 2015, the FTC once again reaffirmed its position concerning binding arbitration by finding, "[T]he Commission reaffirms its long-held view that the MMWA disfavors, **and authorizes** the **Commission to prohibit, mandatory binding arbitration in warranties**." Rules, Regulations, Statements, and Interpretations Under Magnuson-Moss Warranty Act, 80 FR 42719 (2015) (emphasis added). Thus, despite multiple attempts to have the FTC change its position, the FTC has consistently found that MMWA claims are not subject to binding arbitration.

Under *Chevron*, this Court *must* defer to the reasonable interpretations of expert agencies charged by Congress to fill any statutory gap left in the statute they administer. *America Online, Inc,* 243 F.3d at 817. The second step of the *Chevron* inquiry requires the court to "afford controlling weight to an agency's reasonable interpretation even where [it] would have, if writing on a clean slate, adopted a different interpretation." *National Elec. Mfrs. Ass'n,* 654 F.3d at 505. Moreover, the court owes "substantial deference" when reviewing an agency's interpretation of its own regulations. *Sigma-Tau Pharmaceuticals, Inc.* v. *Schweiz,* 288 F.3d 141, 146 (4th Cir. 2002). Indeed, the Court's review in such cases is more deferential than that afforded under *Chevron. Id.*

The Supreme Court requires deference to an agency's reasonable interpretation "because of a presumption that Congress, when it left ambiguity in a statute for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *United States* v. *Deaton,* 332 F.3d 698, 711 (4th Cir. 2003). Thus, if the agency "fully and ably explains its course of inquiry, its analysis, and its reasoning sufficiently enough for [the Court] to discern a rational connection between its decision-making process and its ultimate decisions," the Court will let its decision stand. *Crutchfield,* 325 F.3d at 218. To conclude the agency's interpretation is reasonable,

the Court need not find that it is the only permissible construction, but only that the agency's understanding of the statute is a sufficiently rational one to preclude the Court from substituting its judgment for the agency's. *Deaton,* 332 F.3d at 711

It is important to note that the FTC's holdings and regulations from 1975 to present represent a *contemporaneous* regulatory interpretation of the MMWA. The US Supreme Court has found that an administrative interpretation "has peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450 (1978) (quoting *Norwegian Nitrogen Prods. Co.* v. *United States,* 288 U.S. 294, 315 (1933)).

The consistency of FTC's interpretations and regulations regarding binding arbitration is also significant. While agency interpretations that are revised over time are still entitled to *Chevron* deference, longstanding and consistent agency interpretations carry special weight. *See Smiley* v. *Citibank (South Dakota), N.A.,* 517 U.S. 735, 740 (1996) ("agency interpretations that are of long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist"); *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 274 (1974) ("a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration").

In this case Rule 703 was passed on December 31, 1975. As such, the Rule has stood for more than 40 year unchanged and is entitled to additional deference pursuant to the aforementioned precedent. This deference is especially elevated due to the fact that after an extensive review of the FTC's regulations in the warranty field, the FTC explicitly and repeatedly reaffirmed its position barring binding arbitration in MMWA cases. Rules, Regulations, Statements, and Interpretations Under Magnuson-Moss Warranty Act, 64 Fed. Reg. 19700, 19708-19709 (1999). Accordingly, there can be no question that the decision of the FTC in regard to the prohibition of binding arbitration of MMWA claims must be accorded a great deal of deference by this Court.

D. The Eleventh Circuit's decision concluding that MMWA claims are subject to binding arbitration disregards binding precedent

This Court should reject any argument that the FTC's construction is unreasonable or arbitrary or capricious in light of the Supreme Court's repeated holdings that Congress established a "liberal federal policy favoring arbitration agreements," when it enacted the FAA[6]. *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.,* 460 U.S. 1, 24 (1983). The FAA provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds

[6] It is important to note that the MMWA was passed 50 years after the enactment of the FAA. Ch. 213, 68 Pub. L. No. 68-401, 43 Stat. 883 (1925).

as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. However, the US Supreme Court explained in *McMahon* that the FAA's mandate to enforce arbitration agreements, "[l]ike any statutory directive, may be overridden by a contrary Congressional command." *McMahon*, 482 U.S. at 226.

The Eleventh Circuit relied upon *McMahon* to conclude that the MMWA does not overcome the FAA's presumption that courts should enforce arbitration agreements. *See Davis,* 305 F.3d at 1273, 1276-77. The Eleventh Circuit flatly ruled that the agency's rule prohibiting pre-dispute mandatory binding arbitration was an unreasonable construction of the statute. *Davis,* 305 F.3d at 1280. An even more extreme position was taken by the Fifth Circuit, who essentially over-ruled the US Supreme Court's decision in *Chevron* in regard to cases involving the FAA by bizarrely declaring that it need not even consider the reasonableness of the FTC rule, because Congress, through the FAA's pro-arbitration presumption enacted nearly a half-century before the MMWA, had "directly spoken to the precise question" whether a warrantor may mandate pre-dispute binding arbitration under the MMWA. *Walton,* 298 F.3d at 478 n. 14.

The decisions reached by the Fifth and Eleventh Circuits are based upon unsound and circular reasoning; fail to follow binding precedent of the US Supreme Court; and, both decisions disregard the most basic rules of statutory interpretation. As noted by Judge King, Chief Judge for the Fifth Circuit, in her

dissent in *Walton,* it is unprecedented to locate Congress' intent with respect to one statute by looking to "a prior, less specific statute." 298 F.3d at 483 (King, C.J., dissenting). Where the directives of two statutes create an apparent conflict, to identify Congressional intent in one statute by reference to a previously enacted and more general statute would violate two basic principles of statutory interpretation: first, that later enacted statutes take priority over older ones, and second, that more specific statutes control more general ones. *See* William N. Eskridge, Jr., *et al., Legislation and Statutory Interpretation* 282-83 (2d ed. 2006) (italics omitted); 2B N.J. Singer & J.D. Singer, *Sutherland Statutoiy Construction,* £51:5 at 499 (7th ed. 2012); *see also Brown & Williamson Tobacco Corp.* v. *FDA,* 153 F.3d 155, 162 (4th Cir. 1998) (reviewing traditional rules of statutory construction); *Farmer* v. *Employment Sec. Comm'n,* 4 F.3d 1274, 1284 (4th Cir. 1993) (specific statute closely applicable to substance of controversy at hand controls over more generalized provision).

Contrary to the implications made by the Fifth and Eleventh Circuit, the US Supreme Court did not decide the issue at hand in *McMahon.* Instead the Court stated that the FAA established a rebuttable presumption in favor of enforcing arbitration agreements **that Congress could override in any later statute by adopting a contrary Congressional command**. *McMahon,* 482 U.S. at 226 (emphasis added). Accordingly, the Fifth Circuit disregarded binding authority, as

well as well-established rules of statutory interpretation, in Finding that the adoption of the FAA, 50 years prior to the passage of the MMWA, established that Congress had "directly spoken to the precise question" of whether mandatory binding arbitration provisions are enforceable under the MMWA. *Walton,* 298 F.3d at 478.

Furthermore, as explained above, the FTC reasonably construed the statute's language, legislative history, and underlying purpose in concluding that binding arbitration was prohibited by the MMWA. *See* Section C *supra.* The FTC prohibited binding arbitration in its interpretive Rule 700.8 promulgated in 1977. 16 C.F.R. § 700.8. As was also explained above, for more than 40 years the FTC has upheld this interpretation while at the same time repeatedly rejecting requests to revise the rule to allow for binding arbitration. *See* Section C *supra.*

Additionally, the MMWA is unlike other statutes which the Supreme Court has found failed to rebut the FAA's presumption in favor of arbitration. Unlike the Sherman Antitrust Act of 1890, the Securities Act of 1933, and the Securities Exchange Act of 1934, the MMWA actually authorizes a federal agency, the FTC, to fill the gaps in the statute, construe the statute, and issue regulations. *See* Section C *supra.* Furthermore, none of the other statutes analyzed by the US Supreme Court have included text regarding an informal dispute resolution procedure, as the MMWA does. *See* 15 U.S.C. § 2310(a)(2). Also unlike the other

statutes that the Supreme Court analyzed, the MMWA expressly references a consumer's right to pursue claims or civil remedies in Court. *See* Section A *supra.* Finally, only the MMWA sought as its primary purpose to protect consumers from the predatory practices of manufacturers. *See* Section B *supra.* In contrast, the FAA's pro-arbitration policy is intended to expedite disputes through efficient, dispute-specific procedures, not to advance the interests of consumers. *See AT&T Mobility* v. *Concepcion,* 131 S. Ct. 1740, 1748 (2011) ("The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms *so as to facilitate streamlined proceedings."* (emphasis added)).

The Fifth Circuit did acknowledge that a contrary Congressional command could override the FAA and that, "according to the FTC's interpretation, binding arbitration is simply impermissible under the MMWA," before bizarrely modifying/disregarding the *Chevron* analysis by attempting to discern the intent of Congress in to the MMWA by analyzing the FAA, which was passed 50 years prior. *Walton,* 298 F.3d at 475.

In the *Walton* case, Chief Judge King dissent dissected the flawed logic that the *Davis* and *Walton* decisions were both based upon. Judge King explained:

> The question in the instant case is whether the informal dispute settlement mechanism provisions in §2310 of the MMWA express such a contrary Congressional command [to the FAA's presumption of arbitrability].

> The majority, however, concludes that Congress did not intend to express such a command *in the MMWA,* based on indicia of Congressional intent expressed *in the FAA.* Such circular logic is unpersuasive: the presumption of arbitrability becomes relevant *after* it is established that there is no contrary Congressional command. It is inappropriate to apply the presumption in ascertaining whether the statute in question contains such a command.
>
> The majority further argues that Congress could not possibly have intended for §2310's provisions regarding "informal dispute settlement procedures" to govern arbitration proceedings because "binding arbitration is not normally thought of as an informal procedure." Unlike the majority, I am extremely hesitant to conclude that Congress has directly addressed an apparent statutory ambiguity based on a judicial assumption about what a term "normally" means. In addition, even assuming the majority's understanding of the generally accepted meaning of "informal procedures" was persuasive indicia of Congress's intent in enacting the MMWA, it is not at all clear that the majority's conclusion that arbitration "is not normally thought of as an informal procedure" accurately reflects how "arbitration" was perceived at the time of the MMWA's enactment in 1974.

Id. at 483-84 (emphasis in original).

Similarly, the Court in *Koons Ford of Balt., Inc.* v. *Lobach,* also noted that the *Walton* and *Davis* decisions improperly attempted to exclude arbitration from falling under the umbrella of informal dispute settlement procedures in explaining:

> [W]hat was once an informal means of dispute resolution has now become more formal. Thus, the modem view of arbitration cannot

> be used to glean Congress's intent in enacting the MMWA more than thirty years ago when binding arbitration was considered something much different. Because arbitration was a precursor to litigation in 1975 and the precedent at the time that Congress enacted the MMWA was that arbitration disadvantaged the consumer, we hold that Congress did not intend for consumers to be forced to resolve their MMWA claims through binding arbitration ....

Koons Ford, 398 Md. at 62, 919 A.2d at 736-37 (emphasis in original). In fact, the majority of the Courts which have reviewed whether or not MMWA claims can be subject to binding arbitration have seized upon Judge King's dissent, in addition to following the *Chevron* precedent, in finding that binding arbitration is prohibited by the MMWA. *See e.g. Kolev* v. *Euromotors West/The Auto Gallery,* 658 F.3d 1024 (9th Cir. 2011), *opinion withdrawn,* 676 F.3d 867 (9th Cir. 2012); *Milicevic* v. *Fletcher Jones Imports, Ltd.,* 402 F.3d 912, 918 (9th Cir. 2005); *Breniser v. W. Recreational Vehicles, Inc.,* 2008 U.S. Dist. LEXIS 100807 (D. Or. 2008); *Higgs* v. *The Warranty Group,* 2007 U.S. Dist. LEXIS 50064 (S.D. Ohio 2007); *Rickard* v. *Teynor's Homes, Inc.,* 279 F. Supp. 2d 910 (N.D. Ohio 2003); *Browne v. Kline Tysons Imports, Inc.,* 190 F. Supp. 2d 827 (E.D. Va. 2002); *Koons Ford of Balt., Inc. v. Lobach,* 398 Md. 38, 63, 919 A.2d 722, 737 (2007); *In re Van Blarcum,* 19 S.W.3d 484 (Tex. App. 2000); *Simpson* v. *MSA of Myrtle Beach, Inc., 313* S.C. 14, 644 S.E.2d 663 (SC 2007); *Pitchford* v. *Oakwood Mobile Homes, Inc.,* 124 F. Supp. 2d 958 (W.D. Va. 2000). It is also

noteworthy that the Fourth Circuit Court of Appeals has ruled that MMWA claim can only be submitted to binding arbitration if the parties first go through an FTC approved non-binding arbitration program. *Seney* v. *Rent-A-Ctr., Inc.*, 738 F.3d 631 (4th Cir. 2013). There is currently no evidence in the record that Appellee maintains an FTC approved non-binding arbitration program.

E. The Second DCA did not decide whether or not the MMWA prohibits binding arbitration in *Consuergra*

At the hearing in this matter, Appellee took the position that the Second District Court of Appeals had previously ruled upon the instant issue in *Stacy David, Inc.*, v. *Consuergra*, 845 So. 2d 303 (Fla. 2nd DCA 2003), which was also cited in the Trial Court's order in this case. However, the Second DCA did not actually rule upon whether or not MMWA claims can be subject to binding arbitration. *Id.*

While the decision alluded to the fact that the plaintiff in that case had also brought a MMWA claim, the *Consuergra* case actually involved a fraud in inducement claims or negligent misrepresentations arising in the context of a contract to buy a car which contained a broad arbitration clause. *Beazer Homes Corp.* v. *Bailey*, 940 So. 2d 453, 461 (Fla. 5th DCA 2006). The primary holding in *Consuergra* was that fraud in the inducement claims regarding purchases of automobiles are dependent on the contract and are considered as arising out of or

relating to the contract. *Id.* Furthermore, as this Court noted, "[i]t is impossible to ascertain from the opinion whether Florida or federal law was applied." *Id* at 461. This would further establish that *Consuergra* did not issue any opinions in regard to the MMWA.

In fact, the trial court order appealed in *Consuergpa* does not appear in any way to deal with any issues regarding the MMWA. Instead, the finding in the Court's order states:

> The Court finds that the Plaintiffs tort claims do not arise from the contract and are not subject to arbitration. The Defendant's motion to dismiss and compel arbitration are therefore denied.

Consuegra v. Stacy David, Inc., No. 01-CA-7240, 2002 WL 34490602 (Fla. 13th Cir. Ct. 2002), *rev'd*, 845 So. 2d 303 (Fla. 2nd DCA 2003). Thus, not only did the Second DCA not rule on the issue of binding arbitration under the MMWA, it does not appear, based on the order appealed, that this issue was even before the Court.

As demonstrated above, the Trial Court erred in granting Appellee's Motion to Compel Arbitration based upon the *Davis* decision. Fortunately, the erroneous interpretations by the 11th Circuit, of both the FAA and MMWA, are not binding upon this Court. Furthermore, the *Consuegra* decision does not address meaning that no Florida Appellate Court has addressed the issue before this Court.

However, despite the lack of any valid guiding precedent, this Court is

bound by the US Supreme Court's decision in *Chevron* to recognize the FTC's long-standing rule and decisions that the MMWA prohibits binding arbitration. Accordingly this Court should find that the MMWA evinces a "contrary Congressional command" sufficient to override the FAA's presumption in favor of arbitration. *McMahon,* 482 U.S. at 226. Accordingly, this Court should reverse the Trial Court's Order Compelling Arbitration and remand the case with instructions to lift the stay and set the matter for a Jury trial, once the matter is at issue.

F. Appellee's failure to include the arbitration agreement in the warranty prohibits arbitration under the MMWA

As laid out above, Appellant maintains that the Court is not obligated to follow *Davis* as it is not binding upon this Court, as the decision is fundamentally flawed and legally unsupportable, and as because the Eleventh Circuit failed to followed the *Chevron* precedent. However, to the extent this Court is persuaded by the Eleventh Circuit's decisions regarding the MMWA, the Trial Court's decision is still erroneous and should be reversed.

Prior to the *Davis* decision, the Eleventh Circuit analyzed the issue of whether or not a MMWA claim was subject to binding arbitration in *Cunningham* v. *Fleetwood Homes of Georgia, Inc.,* 253 F.3d 611 (11th Cir. 2001). In *Cunningham* the 11th Circuit ruled that the MMWA requires any arbitration provision to be included in the actual warranty itself. *Id.* The Court

explained that the failure to include all terms and conditions of a written warranty covered by the MMWA, including any arbitration agreement, in a single document was a violation of the MMWA which invalidated the arbitration agreement at issue. *Id.* In this case the Appellee provided a written warranty at the time of sale, but the arbitration agreement was not contained within said written warranty. *See* A-1 and A-2.

Following the hearing on Appellee's Motion to Compel Arbitration, wherein Appellee leaned heavily upon the *Davis* decision, but before the proposed orders were submitted to the Trial Court, Appellant submitted a Notice of Supplemental Authority in support of his Opposition to Appellee's Motion to Stay and Compel Arbitration. *See* A-8. In his Supplemental Authority Appellant made his argument that, to the extent the Trial Court was inclined to consider decisions from the Eleventh Circuit, despite the many arguments raised for it not doing so, that the decision *Cunningham* v. *Fleetwood Homes of Georgia, Inc.*, would still require the denial of Appellee's Motion to Compel Arbitration.

Despite the fact that it had submitted and filed supporting case law for the hearing at issue less than three hours before the scheduled start time, Appellee argued that Appellant's Notice of Supplemental Authority was untimely. *See* A-9 and A-10. However, the Notice of Supplemental Authority was filed the day after the hearing, and nineteen days prior to the date the Trial Court issued its

order. *See* A-8 and A-10.

Appellee also argued in response to Appellant's Notice of Supplemental Authority that the *Cunningham* decision did not reflect the current position of Eleventh Circuit in regard to the MMWA, which it claimed was distinguished by *Davis. See* A-9 and A-10. Appellee represented that the current position of the Eleventh Circuit is that contemporaneously executed documents related to one transaction must be construed as one document. *Id.* However, in support of this proposition, with the exception of *Davis* itself, Appellee cited to only a single case that was decided by a Court within the 11th Circuit after the *Davis* decision, *Patriot Mfg., Inc.* v. *Dixon*, 399 F. Supp. 2d 1298, 1304 (S.D. Ala. 2005). However, the *Dixon* case appears to be completely invalid on it's face.

After a feeble and perplexing attempt to make some connection between the rulings in *Davis* and *Cunningham* in some way, *the* Dixon Court seemingly chose to improperly overrule the *Cunningham* decision, despite its complete lack of authority to do so. The Dixon Court stated as follows:

> … while the single document rule enjoys continued vitality, arbitration agreements lie beyond the scope of the disclosures required pursuant to that rule. That being the case, the Arbitration Agreement executed by Patriot and the Dixons does not fail for want of compliance with the single document rule even though the parties apparently agree that Patriot's warranty did not mention arbitration. Simply put, the single document rule (as set forth in §2302(a) and FTC regulations) does not require disclosure of the Arbitration Agreement within the

warranty

Patriot Mfg., Inc. v. *Dixon*, 399 F. Supp. 2d 1298, 1304 (S.D. Ala. 2005). The *Dixon* Court then went on to indicate:

> Simply put, the Court cannot assume that Congress and the FTC made a mistake in omitting arbitration agreements from the list of MMWA disclosures. Even if it could, the Court will not step outside the judicial role to assume the distinctly legislative responsibility of welding its own normative values onto the comprehensive statutory and regulatory regime giving rise to the single document rule.

Id at 1309–10. However, as pointed out above, the *Dixon* Court was bound by *Cunningham* and had no authority to overrule the decision of the Eleventh Circuit, even if it thought the *Cunningham* decision was improperly decided. Other than *Dixon*, the only other cases which Appellee provided in supports of its position that the Eleventh Circuit has receded from *Cunningham* were three state courts cases (an Alabama case and two Florida cases). As these are state court cases, they are of no relevance at all in regard to determining the current position of the Eleventh Circuit is on this matter.

In contrast to the position taken by Appellee, nothing in the *Davis* decision directly dealt with or modified the *Cunningham* decision. *See Davis* v. *Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002). In fact, simply Sherardizing the *Cunningham* case reveals that it is in fact still valid and binding law in the 11th

Circuit. Furthermore, following the *Davis* decision, in addition to many out of state and other federal courts outside the Eleventh Circuit, multiple Courts located in the 11th Circuit have continued to cite to *Cunningham* for the proposition that arbitration provisions must be contained within the warranty pursuant to the MMWA. *See Porter v. Chiysler Grp. LLC*, No. 6:13-CV-555-ORL-37, 2013 WL 6768218, at *1 (M.D. Fla. Dec. 19, 2013)(Davis is inapposite here, where the arbitration agreement was separate from and not referenced in the warranty; *Cunningham* thus controls). *TGB Marine, LLC* v. *Midnight Express Power Boats, Inc.*, No. 08-60940-CIV, 2008 WL 3889578, (S.D. Fla. 2008)(Aws is distinguished from *Cunningham* as that decision stated that the parties "signed a binding arbitration agreement contained within the manufactured home's written warranty.").

Furthermore, at least one Court in the Eleventh Circuit has criticized a Defendant for not bringing *Cunningham* to the Court's attention in regard to the single document issue. In *Porter* v. *Chrysler Grp. LLC*, the Middle District of Florida Judge stated:

> The Court is quite troubled by Defendant's utter failure to cite to *Cunningham,* which plainly controls the disposition of this motion. Defendant belatedly-and improperly-attempted to distinguish *Cunningham* in its motion for leave to file a reply, in which it pointed to *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir.2002). However, *Davis* does nothing to recede

from *Cunningham*, so this argument is unavailing.

Porter v. Chrysler Grp. LLC, No. 6:13-CV-555-ORL-37, 2013 WL 6768218, at *1 (M.D. Fla. 2013). Accordingly, Appellee's representations that the Eleventh Circuit has receded from *Cunningham* are without merit. In rejecting Appellant's argument regarding *Cunningham*, the Trial Court provided no analysis whatsoever. Instead, the Trial Court simply indicated that "[t]his Court also finds that Plaintiffs reliance on *Cunningham* is misplaced and is persuaded by Defendant's Response." *See* A-10.

Furthermore, even if Appellee was correct, and the Eleventh Circuit has receded from the single document rule, Florida Courts have not. The Third District Court of Appeals addressed the issues on the enforceability of an arbitration agreement that did not appear in the warranty at issue in *Larrain* v. *Bengal Motor Co.*, 976 So. 2d 12, 14 (Fla. 3rd DCA 2008). In that case the Court found the arbitration provision violated the single documents rule, and was therefore not enforceable under the MMWA because it was not included in the warranty itself. *Id.*

While, Appellant strongly argues that neither the Trial Court, nor this Court, should follow the flawed and unsupportable decisions of the Eleventh Circuit, to the extent either Court chooses to do so, it would clearly be error to take the *Davis* decision into account while ignoring *Cunningham* which, as

establishes above, is still valid and binding case law within the Eleventh Circuit. Furthermore, as illustrated by *Larrain*, Florida still enforced the single documents rule, which would prohibit arbitration of MMWA claims where the arbitration agreement is not included in the warranty itself.

Accordingly, as the arbitration agreement in question was not included in the warranty provided by Appellee, the Court erred in granting Appellee's Motion to Stay and Compel Arbitration. As a result, Appellant respectfully submits that this Court should reverse the Trial Court's Order and remand the case with instructions to lift the stay and set the matter for a Jury trial, once the matter is at issue. However, even if the Court determines that the failure to abide by the single document rule is sufficient to reverse the Trial Court's Order, Appellant would respectfully submit that the Court should still issue ruling upon the issues of whether MMWA claims may be submitted to binding arbitration as this is an issue of great public importance that has not yet been addressed by a Florida Appellate Court.

CONCLUSION

As a matter or first impression, and of great public importance, this Court should hold that binding arbitration is prohibited by the MMWA. Pursuant to the the US Supreme Court's *Chevron* analysis, such a decision is required based upon the text, intent, and legislative history of the MMWA. Furthermore, the *Chevron*

analysis requires such a result based upon the great deference this Court is required to give to the FTC regarding its decisions on the issue. Alternatively, pursuant to ***Cunningham*** and ***Larrain,*** the Court should reverse the Trial Court's decision as the arbitration agreement in question was not included in Appellee's Warranty, in violation of the MMWA. Wherefore, the Court should reverse and remand to the Circuit Court with instructions to set the matter for a jury trial, once the matter is at issue.

CERTIFICATE OF SERVICE

I hereby certify that I furnished a true and correct copy of the above and foregoing by electronic and US mail this 24th day of July, 2018 to: Yesica S. Liposky, Esq., Broad and Cassell, LLP, 100 North Tampa Street, Suite 3500, Tampa, FL 33602, yliposky@broadandcassel.com, rsickles@broadandcassel.com, knovak@broadandcassel.com,egarvey@broadandcassel.com, jlovins@broadandcassel.com.

MORGAN & MORGAN, P.A.

/s/ Jeremy Kesoohl
JEREMY KESPOHL, Esquire
Florida Bar No. 035979
ANGELA THOMAS, Esquire
Florida Bar No. 871311
Attorneys for Petitioner
76 South Laura Street, Ste 1100
Jacksonville, FL 32202
(904) 361-4416 Telephone
(904) 361-4348 Facsimile
jkespohl@forthepeople.com
For Service of Documents Only:
warrantygroupeservice@forthepeople.com

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

MORGAN & MORGAN, P.A.

/*si* Jeremy Kespohl
JEREMY KESPOHL, Esquire
Florida Bar No. 035979
ANGELA THOMAS, Esquire
Florida Bar No. 871311
Attorneys for Petitioner
76 South Laura Street, Ste 1100
Jacksonville, FL 32202
(904) 361-4416 Telephone
(904) 361-4348 Facsimile
jkespohl@forthepeople.com
For Service of Documents Only:
warrantygroupeservice@forthepeople.com

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IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

Brevard County Case No: 2017-CA-049992

LES KROL,

Appellate Case No: 18-2149

Appellant

v.

GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD

Appellee.

APPELLANT'S MOTION FOR ATTORNEY'S FEES AND COSTS

On Appeal from the Circuit Court of the
Fifteenth Judicial Circuit in and for
Palm Beach County Florida

Jeremy Kespohl, Esquire
Florida Bar No. 035979
Angela Thomas, Esquire
Florida Bar No. 871311
MORGAN & MORGAN
76 South Laura Street #1100
Jacksonville, Florida 32202-3433
(904) 361-4416 Phone
(904) 361-4348 Facsimile
warrantygroupeservice@forthepeople.com
Attorneys for Appellant

The Appellant LES KROL ("Appellant"), by and through his attorneys MORGAN & MORGAN, hereby submits this Motion for an order of entitlement to Appellate Attorneys' Fees and costs pursuant to Federal Rule of Appellate Procedure 9.400 and the federal Magnuson-Moss Warranty Act. In support thereof, Appellant states as follows:

I. BACKGROUND

On November 6, 2017, Appellant filed the underlying lawsuit against Appellee GIBSON AUTO SALES, INC., d/b/a GINBSON TRUCK WORLD ("Respondent") and Defendant FCA US LLC[1]. Appellant's underlying claims allege breaches of warranty in regard to a 2014 Ram 3500 Vehicle Identification Number 3C63RRGL0EG108376 which he purchased from Appellee. *See* Appendix, 1. On July 2, 2018, Appellant filed his Notice of Appeal regarding the Lower Court's Order on Appellee's Amended Motion to Stay and Compel Arbitration. On July 24, 2018, Appellant filed its initial brief in this matter. *See* Appellant's Initial Brief.

II. APPELLANT IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES PURSUANT TO THE MMWA

Appellant's underlying breach of warranty claims were brought pursuant to the federal Magnuson-Moss Warranty Act ("MMWA"), 15 USC §2301, *et. al*. The MMWA provides for an award of attorney's fees to a final prevailing consumer.

[1] Appellant has settled his claims against FCA US, LLC who is not a party to the instant appeal.

See 15 USC §2310(d)(2). Specifically, section 2310(d)(2) of the MMWA provides in relevant part:

> **If a consumer prevails** on an action brought under paragraph 1 of this subsection, he may be allowed as part of the judgment a sum equal to the amount of aggregate costs and expenses **(including reasonable attorney's fees based upon actual time expended)** determined by the court to have been reasonably incurred by Plaintiff for, or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorney's fees would be inappropriate.

15 USC §2310(d)(2)(emphasis added).

It is well-established that he MMWA allows a consumer to recover attorney's fees related to appellate proceedings. *Am. Honda Motor Co. v. Fontana*, 2007 WL 1427554, at *12 (Fla. 9th Cir. Ct. 2007); *McNiff v. Mazda Motor of Am., Inc.*, 892 N.E.2d 598, 605 (Ill. App. 2008); *Leavitt v. Monaco Coach Corp.*, 312, 616 N.W.2d 175, 187 (Mich. App. 2000). Accordingly, in the event that he prevails in these proceedings, Appellant seeks an order of entitlement to reasonable Appellate Attorneys' Fees and Costs as the prevailing party under the MMWA.

III. THE FEE-SHIFTING PROVISION OF THE MMWA REFLECTS THE INTENT OF CONGRESS TO ENCOURAGE PRIVATE ENFORCEMENT

In drafting the MMWA Congress recognized that without a fee-shifting provision, the MMWA would be virtually unenforceable. Accordingly, a fee-shifting provision was proposed by Senator Magnuson, a sponsor of the MMWA,

to allow for the private enforcement of the MMWA. In lobbying for inclusion of the fee-shifting provision, Senator Magnuson argued to Congress:

> Because enforcement of the warranty through the courts is prohibitively expensive, there exists no currently available remedy for consumers to enforce warranty obligations. If warrantors who did not perform as promised suffered direct economic detriment, they would have strong incentives to perform. **Therefore, there is a need to insure warrantor performance by monetarily [sic] penalizing the warrantor for non-performance and awarding the penalty to the consumer as compensation for his loss.** One way to effectively meet this need is by providing for reasonable attorneys' fees and court costs to successful consumer litigants, thus, making consumer resort to the court feasible.

Senate Report – No. 93-151, 93rd Congress, First Session, at pp.7-8 (1973) (emphasis added)

Congress agreed with Senator Magnuson and included a fee-shifting provision when it enacted the MMWA in 1975. *See* 15 U.S.C §2310 (d)(2). In construing the MMWA, several courts have also recognized the importance of the fee-shifting provision. It has been recognized that the fee-shifting provision of the MMWA "was intended to encourage consumers to pursue their legal remedies by providing them with access to legal assistance." *State Farm Fire and Casualty* v. Miller Electric Co., 231 III.App.3d 355, 359,596 N.E.2d 169, 171, 172 Ill. Dec. 890, 891 (2nd Dist. 1992). In *State Farm* the court noted that "without such assistance, consumers would frequently be unable to vindicate their warranty rights accorded by law." *Id*. At 359.

The United States' Seventh Circuit Court of Appeals has also recognized the importance of the fee-shifting provision of the MMWA. The Seventh Circuit declared that "statutory fee-shifting provisions reflect the intent of Congress to encourage private enforcement of the statutory substantive rights, be they economic or non-economic, through the judicial process." *Skelton v. General Motors Corporation*, 860 F.2d 250, 254, (7th Cir. 1988), quoting *Report of the Third Circuit Task Force, Court Awarded Attorney Fees* (Oct 8, 1988). The court further noted that the congressional intent found in the committee notes to the MMWA established that "this provision [fee-shifting] would make it economically feasible for consumers to pursue their remedies in state courts . . . [and] is designed to make it economically feasible to pursue consumer rights involving inexpensive consumer products." *Id*. At 256, *quoting* S.Rep.No. 986 92nd Cong, 1st Sess. 21, 117 Cong.Rec. 39614 (1971).

One of the purposes behind the MMWA is to provide, via an award of attorney's fees, a means for consumers to protect their right and obtain judgments where otherwise prohibited by monetary restraints. *Jordan v. Transnational Motors, Inc.,* 537 N.W. 2d 471 (Mich. Ct. App. 1995). Because the MMWA is remedial in nature, the provisions of the MMWA must be liberally construed to effectuate their intended goals. *Id.* Accordingly, Appellant, and his attorneys

Morgan & Morgan, should be rewarded for their efforts to enforce Appellant's right under the MMWA, including pursuing the instant appellate proceedings.

WHEREFORE, Appellant LES KROL hereby requests that this honorable Court enter an order holding that, pursuant to the federal Magnuson-Moss Warranty Act, Appellant is the entitled to recover reasonable attorney's fees and costs as the prevailing party in these appellate proceedings, in an amount to be determined by the Lower Court.

CERTIFICATE OF SERVICE

I hereby certify that I furnished a true and correct copy of the above and foregoing by electronic and US mail this 25th day of July, 2018 to: Yesica S. Liposky, Esq., Broad and Cassell, LLP, 100 North Tampa Street, Suite 3500, Tampa, FL 33602, yliposky@broadandcassel.com, rsickles@broadandcassel.com, knovak@broadandcassel.com,egarvey@broadandcassel.com, jlovins@broadandcassel.com.

MORGAN & MORGAN, P.A.

/s/ Jeremy Kespohl
JEREMY KESPOHL, Esquire
Florida Bar No. 035979
ANGELA THOMAS, Esquire
Florida Bar No. 871311
Attorneys for Appellant
76 South Laura Street, Ste 1100
Jacksonville, FL 32202
(904) 361-4416 Telephone
(904) 361-4348 Facsimile
jkespohl@forthepeople.com
For Service of Documents Only:
warrantygroupeservice@forthepeople.com

RECEIVED, 7/25/2018 12:53 PM, Joanne P. Simmons, Fifth District Court of Appeal

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

Brevard County Case No: 2017-CA-049992

LES KROL,

Appellate Case No:18-2149

Appellant

v.

GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD

Appellee.

APPENDIX TO APPELLANT'S INITIAL BRIEF

On Appeal from the Circuit Court of the

Fifteenth Judicial Circuit in and for

Palm Beach County Florida

Jeremy Kespohl, Esquire
Florida Bar No. 035979
Angela Thomas, Esquire
Florida Bar No. 871311
MORGAN & MORGAN
76 South Laura Street #1100
Jacksonville, Florida 32202-3433
(904) 361-4416 Phone
(904) 361-4348 Facsimile
warrantygroupeservice@forthepeople.com
Attorneys for Appellant

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CERTIFICATE OF SERVICE

I hereby certify that I furnished a true and correct copy of the above and foregoing by electronic and US mail this 24th day of July, 2018 to: Yesica S. Liposky, Esq., Broad and Cassell, LLP, 100 North Tampa Street, Suite 3500, Tampa, FL 33602, yliposky@broadandcassel.com, rsickles@broadandcassel.com, knovak@broadandcassel.com,egarvey@broadandcassel.com, jlovins@broadandcassel.com.

MORGAN & MORGAN, P.A.

/s/ Jeremy Kespohl
JEREMY KESPOHL, Esquire
Florida Bar No. 035979
ANGELA THOMAS, Esquire
Florida Bar No. 871311
Attorneys for Petitioner
76 South Laura Street, Ste 1100
Jacksonville, FL 32202
(904) 361-4416 Telephone
(904) 361-4348 Facsimile
jkespohl@forthepeople.com
For Service of Documents Only:
warrantygroupeservice@forthepeople.com

APPENDIX A-I

Filing # 63626782 E-Filed 11/01/2017 04:22:47 PM

IN THE CIRCUIT COURT IN AND
FOR BREVARD COUNTY, FLORIDA

CASE NO.:

LES KROL

Plaintiff,

v.

FCA US, LLC and

GIBSON AUTO SALES INC., D/B/A
GIBSON TRUCK WORLD,

Defendants.

_____/

COMPLAINT, JURY DEMAND, AND DISCOVERY REQUESTS

COMES NOW PLAINTIFF Les Krol, by and through his attorneys MORGAN & MORGAN, and hereby sues Defendants GIBSON AUTO SALES INC., D/B/A GIBSON TRUCK WORLD and FCA US, LLC (Collectively "the Defendants") and alleges and affirmatively states as follows:

PARTIES AND JURISDICTION

1. Plaintiff LES KROL ("Plaintiff') is an individual who was at all times relevant hereto a resident of Brevard County, Florida.

2. Defendants FCA US, LLC ("FCA"), is a foreign corporation authorized to do business in Brevard County, Florida, and is engaged in the manufacture, sale, and/or distribution of motor vehicles and related equipment and services.

3. FCA is also in the business of marketing, supplying and providing written warranties to consumers who purchase FCA's products through its authorized sales and service providers, including its sales and service providers in Brevard County, Florida.

4. Defendant GIBSON AUTO SALES INC., D/B/A GIBSON TRUCK WORLD ("Gibson Trucks") is a foreign corporation authorized to do business in Brevard County, Florida, and is engaged in the sale, repair, and distribution, of motor vehicles to consumers including, but not limited to, selling the subject vehicle to Plaintiff.

5. Gibson Trucks is also in the business of marketing, supplying and providing written warranties and service contracts to consumers who purchase motor vehicles from it

6. This is an action seeking damages in excess of $15,000.00, exclusive of attorneys' fees and court costs.

GENERAL ALLEGATIONS

7. On or about June 06, 2016, Plaintiff purchased from Gibson Trucks a 2014 Ram 3500 Vehicle Identification Number 3C63RRGL0EG108376 ("the subject vehicle"), manufactured and distributed by FCA, for valuable consideration. *See* Sales Documents, attached hereto as "Exhibit A".

8. The price of the subject vehicle, excluding collateral charges, registration charges, document fees, sales tax, bank charges and finance charges, totaled approximately $46,452.48. *See* Exhibit A.

9. Plaintiff avers that as a result of the ineffective repair attempts made by Gibson Trucks and FCA, and/or their authorized dealerships/sales and service providers, the subject vehicle contains unrepaired defects and cannot be utilized for personal, family and/or household **me.**

10. Gibson Trucks advertises products to consumers with the intent of encouraging consumers, including Plaintiff, to purchase products from it.

II. Gibson Trucks issued an express warranty providing coverage for specified

defects and failures, for specified periods of time or mileage following the purchase of the subject vehicle, as detailed in the terms and conditions of Gibson Trucks' warranty. *See* Gibson Trucks' Express Warranty, attached hereto as Exhibit B.

12. As Gibson Trucks was the seller of the subject vehicle, who provided an express warranty for the subject vehicle at the time of Plaintiffs purchase, it is not permitted to disclaim implied warranties related to the subject vehicle.

13. Accordingly, Gibson Trucks impliedly warranted that the subject vehicle was merchantable and fit for its intended purpose pursuant to Florida law.

14. At the time of purchase of the vehicle, Plaintiff also received the remainder of FCA's factory warranty for the subject vehicle, as well as purchasing an additional FCA extended warranty ("express warranties"). *See* FCA's Warranty Booklet, attached hereto as Exhibit C; and Extended Warranty attached hereto as Exhibit C.

15. FCA's express warranties provides coverage for defects in factory workmanship and materials, for specified periods of time or mileage. *See* Exhibits C and D.

16. Soon after Plaintiff took possession of the subject vehicle, Plaintiff experienced various defects and covered issues which substantially impaired the use, value and/or safety of the subject vehicle

17. Plaintiff contends that the subject vehicle suffers from various defects and nonconformities covered by Defendants' respective warranties including, but not limited to:

a. Defective engine;
b. Defective struts/shocks;
c. Defective brakes/rotors; and,
d. Any additional defects in the subject vehicle as reflected in the repair documents generated by Defendants or their service providers and in Defendants' internal repair records for the subject vehicle. *See* Repair

Orders attached hereto as Exhibit E

18. Plaintiff delivered the subject vehicle to Defendants and/or their authorized dealerships/sales and service providers seeking repairs on numerous occasions.

19. Plaintiff provided Defendants, and their dealerships/sales and service providers, sufficient opportunities to repair the subject vehicle.

20. Plaintiff contends Defendants and their authorized dealerships/sales and service providers have been unable or unwilling to remedy the covered issued with the subject vehicle in accordance with the terms of their respective warranties.

21. Plaintiff contends that the subject vehicle is not merchantable and not fit for its intended purpose.

22. Plaintiff has previously provided Defendants with notice and a reasonable opportunity to cure.

23. The limited remedies contained within FCA's express warranties have failed of their essential purpose entitling Plaintiff to seek any remedy available at law.

24. Plaintiff justifiably lost confidence in the subject vehicle's safety and/or reliability, and said defects/covered issues have substantially impaired the value of the subject vehicle to Plaintiff.

25. Said defects/covered issues could not have reasonably been discovered by Plaintiff prior to Plaintiffs acceptance of the subject vehicle.

26. Pursuant to the terms of its express warranty, FCA designated its authorized dealerships/ sales and service providers as the entities to receive notice of defects/covered issues in the subject vehicle for purposes of performing repairs on the subject vehicle.

27. FCA was further notified of the defects/covered issues in the subject vehicle as a result of the approval of claims and reimbursement to its authorized dealerships/sales and service

providers for the same.

28. Gibson Trucks was further notified of the defects/covered issues in the subject vehicle as a result of Plaintiff seeking repairs to the subject vehicle from it.

29. As a result of these defects/covered issues, and Defendants' failure to timely repair the same, Plaintiff notified Defendants of the defects/covered issues in writing prior to filing the instant lawsuit.

30. Plaintiff has been, and will continue to be, financially damaged due to Defendants' failure to comply with the provisions of their respective warranties.

31. Plaintiff was not provided with a copy of FCA's express warranties until after he took delivery of the subject vehicle.

32. Plaintiff was not offered a copy of FCA's factory warranty for review prior to his purchase of the subject vehicle.

33. The terms and conditions of FCA's express warranties are non-negotiable.

34. FCA's express warranties were not executed by Plaintiff.

35. FCA does not require or request that consumers execute any document indicating that they have reviewed, understood or agreed to the terms and conditions contained FCA's express warranties.

36. FCA does not require or request that consumers execute any document indicating or acknowledging that FCA seeks or intends to disclaim liability for incidental and consequential damages as a result of any breach of its express warranties.

37. The purported disclaimers of incidental and consequential damages contained in FCA's express warranties are not contained on the first page of the text of its express warranty.

38. The purported disclaimer of incidental and consequential damages contained in

FCA's express warranty is not specifically mentioned in the table of contents.

39. As a result of the foregoing, the disclaimers of incidental and consequential damages contained in FCA's express warranties are unconscionable.

COUNT I
BREACH OF WRITTEN WARRANTY
PURSUANT TO THE MAGNUSON-MOSS WARRANTY ACT
AGAINST DEFENDANT FCA

40. Plaintiff re-alleges and incorporates by reference paragraphs 1-39 of this Complaint, as though fully set forth herein.

41. The subject vehicle is a product intended primarily for personal, family, or household use.

42. The subject vehicle was manufactured, sold and purchased after July 4, 1975.

43. The subject vehicle was sold for more than ten dollars (S10.00).

44. Gibson Trucks is engaged in the business of selling vehicles to members of the general public, including, but not necessarily limited to, selling the subject vehicle to the Plaintiff.

45. FCA is a party engaged in the business of making a consumer product available to Plaintiff.

46. Gibson Trucks is a "merchant", within the meaning and definition of §672.104(1) and §672.314, Fla. Stat.

47. FCA is a "supplier" within the definition and meaning of 15 U.S.C. §2301(4), of vehicles and vehicle warranties, including, but not limited to the subject vehicle and warranty for the subject vehicle.

48. FCA is a "warrantor" within the meaning and definition of 15 U.S.C. §2301(5).

49. Gibson Trucks is a "seller" within the meaning and definition of §672.103(l)(d),

Fla. Stat.

50. Plaintiffs purchase of the subject vehicle included FCA US, LLC's express warranties covering defects in material or workmanship, comprising an undertaking in writing to repair or replace defective parts, or take other remedial action, free of charge to Plaintiff in the event that the subject vehicle suffered from defects in factory workmanship or materials, as set forth in, and subject to the terms and conditions of, FCA's express warranties.

51. Plaintiff received the subject vehicle during the duration of periods applicable to FCA's express warranties.

52. Plaintiff is entitled by the terms of FCA's express warranties covering the subject vehicle to enforce the obligations of said express warranty against FCA.

53. The Magnuson-Moss Warranty Act, Chapter 15 U.S.C.A., Section 2301, *et. seq.* ("MMWA") is applicable to FCA's express warranties, and Plaintiffs claims thereunder.

54. FCA's express warranties were part of the basis of the bargain for the sale of the subject vehicle to Plaintiff.

55. FCA offers express warranties covering its products in order to provide consumers with peace of mind in purchasing its vehicles.

56. Plaintiffs purchase of the subject vehicle was induced by, and Plaintiff relied upon, FCA's express warranties.

57. Plaintiff has met all of obligations and preconditions provided in, and required for enforcement of, FCA's express warranties.

58. As a direct and proximate result of FCA's failure to comply with the terms and conditions of its express warranties covering the subject vehicle, Plaintiff has suffered damages and, in accordance with 15 U.S.C. § 2310(d)(1), he is entitled to bring suit for such damages and

other legal and equitable relief.

59. If Plaintiff is determined to be the prevailing on the instant claim, he is entitled to recover reasonable attorneys' fees and costs from FCA related to the prosecution of this claim.

WHEREFORE, Plaintiff Les Krol prays for judgment against Defendant FCA US, LLC for:

a. Diminution in value of the subject vehicle;
b. Out of pocket cost of prior repairs related to warrantable items;
c. Cost of future repairs;
d. Incidental Damages;
e. Consequential Damages;
f. Pre-Judgment Interest;
g. Post Judgment Interest;
h. Reasonable attorneys' fees;
i. Taxable costs; and,
j. Such other and further relief that the Court deems just and appropriate.

COUNT II
BREACH OF IMPLIED WARRANTY
PURSUANT TO THE MAGNUSON-MOSS WARRANTY ACT
AGAINST DEFENDANT GIBSON TRUCKS

60. Plaintiff re-alleges and incorporates by reference paragraphs 1-39 of this Complaint, as though fully set forth herein.

61. Gibson Trucks is engaged in the business of selling vehicles to members of the general public, including, but not necessarily limited to, selling the subject vehicle to Plaintiff.

62. Gibson Trucks is a "merchant", within the meaning and definition of §672.104(1) and §672.314, Fla. Stat.

63. Gibson Trucks is a "supplier" within the definition and meaning of 15 U.S.C. §2301(4), of vehicles and vehicle warranties, including, but not limited to the subject vehicle and

warranty for the subject vehicle.

64. Gibson Trucks is a "warrantor" within the meaning and definition of 15 U.S.C. §2301(5).

65. Gibson Trucks is a "seller" within the meaning and definition of §672.103(l)(d), Fla. Stat.

66. Gibson Trucks is under a duty of "good faith", within the meaning and definition of §672.103(l)(b), Fla. Stat., meaning "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade".

67. Gibson Trucks was party to the sale contract for the subject vehicle whereby the subject vehicle was sold to Plaintiff.

68. Gibson Trucks was party to a retail installment and security agreement related to the financing of the sale of the subject vehicle to Plaintiff

69. By virtue of providing a written warranty applicable to the subject vehicle at the time of sale, Gibson Trucks is not permitted to disclaim or modify any implied warranties applicable to the subject vehicle pursuant to 15 U.S.C. §2308(a) and (b) and 2301§(6).

70. Pursuant to applicable law, Gibson Trucks impliedly warranted that the subject vehicle was of merchantable quality, and fit for its intended purpose.

71. Gibson Trucks breached the implied warranties for the subject vehicle as the subject was not merchantable and not fit for its intended purpose, and Gibson Trucks failed to remedy the defects in the subject vehicle within a reasonable amount of time.

72. As a direct and proximate result Gibson Trucks's breach of the implied warranties covering the subject vehicle, Plaintiff has suffered damages and is entitled to bring suit for such damages and other legal and equitable relief.

73. Plaintiff has met all of obligations and preconditions required for enforcement of the implied warranties for the subject vehicle.

74. If Plaintiff is determined to be the prevailing on the instant claim, he is entitled to recover reasonable attorneys' fees and costs from Gibson Trucks related to the prosecution of this claim.

WHEREFORE, Plaintiff LES KROL prays for judgment against Defendant GIBSON AUTO SALES INC D/B/A GIBSON TRUCK WORLD, for:

a. Diminution in value of the subject vehicle;
a. Out of pocket cost of prior repairs related to warrantable items;
b. Cost of future repairs;
c. Incidental Damages;
d. Consequential Damages;
e. Pre-Judgment Interest;
f. Post Judgment Interest;
g. Reasonable attorneys' fees;
h. Taxable costs; and,
i. Such other and further relief that the Court deems just and appropriate.

COUNT III
REVOCATION OF ACCEPTANCE
PURSUANT TO THE MAGNUSON-MOSS WARRANTY ACT
AGAINST DEFENDANT GIBSON TRUCKS

75. Plaintiff re-alleges and incorporates by reference paragraphs 1-39 and 61-74 of this Complaint, as though fully set forth herein.

76. This is an action for revocation of acceptance of goods valued in excess of 515,000.00 against Gibson Trucks pursuant to §672.608, Fla. Stat. (2003).

77. Gibson Trucks is engaged in the business of selling vehicles to members of the general public, including, but not necessarily limited to, selling the subject vehicle to Plaintiff.

78. Gibson Trucks is a "merchant", within the meaning and definition of §672.104(1) and §672.314, Fla. Stat.

79. Gibson Trucks is a "supplier" within the definition and meaning of 15 U.S.C. §2301(4), of vehicles and vehicle warranties, including, but not limited to the subject vehicle and warranty for the subject vehicle.

80. Gibson Trucks is a "warrantor" within the meaning and definition of 15 U.S.C. §2301(5).

81. Gibson Trucks is a "seller" within the meaning and definition of §672.103(l)(d), Fla. Stat.

82. Gibson Trucks is under a duty of "good faith", within the meaning and definition of §672.103(l)(b), Fla. Stat., meaning "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade".

83. Gibson Trucks was party to the sale contract for the subject vehicle whereby said vehicle was sold to Plaintiff.

84. Gibson Trucks was party to a retail installment and security agreement related to the financing of the sale of the subject vehicle to Plaintiff

85. At the time notice of revocation was given, the subject vehicle was in the same substantially defective condition as when it was delivered to Plaintiff.

86. Plaintiff has suffered substantial impairment in value because of the aforesaid defective conditions of the subject vehicle and Gibson Trucks 's failure to conform the subject vehicle all warranties, express or implied.

87. At the time of sale and delivery and acceptance, the defective conditions in the subject vehicle were not reasonably discoverable by the Plaintiff

88. Plaintiff relied upon the truthfulness of Gibson Trucks to disclose any defective conditions, as was their obligation of good faith pursuant to §671.203, Fla. Stat.

89. There is no adequate remedy at law for Plaintiff and legal remedy cannot cancel the aforesaid warranties and purchase agreement, and reimburse him for all of their damages in connection with the purchase of the subject vehicle.

90. As a direct and proximate result Gibson Trucks 's breaches of wanranty, Plaintiff has not received:

a. The use and value of the subject vehicle as represented;
a. Timely disclosure of material defects in the subject vehicle as required by Florida law;
b. The reasonable services due to Plaintiff under the warranties for the subject vehicle.

91. Plaintiff has met all of obligations and preconditions required to bring this claim for Revocation of Acceptance.

92. If Plaintiff is determined to be the prevailing on the instant claim, he is entitled to recover reasonable attorneys' fees and costs from Gibson Trucks related to the prosecution of this claim.

WHEREFORE, Plaintiff LES KROL prays for judgment against Defendant GIBSON AUTO SALES rNC D/B/A GIBSON TRUCK WORLD for:

a. Revocation of Acceptance;
a. Incidental Damages;
b. Consequential Damages;
c. Pre-Judgment Interest;
d. Post Judgment Interest;
e. Reasonable attorneys' fees;
f. Taxable costs; and,

u. Such other and further relief that the Court deems just and appropriate.

PLAINTIFF DEMANDS A TRIAL BY JURY.

Respectfully submitted this 1st day of November, 2017.

MORGAN & MORGAN, P.A.



JEREMY KESPOHL, Esquire
Florida Bar No. 035979
Attorneys for Plaintiff
76 South Laura Street, Ste 1100
Jacksonville, FL 32202
(904) 361-4416 Telephone
(904) 361-4345 Facsimile
jkespohl@forthepeople.com
For Service of Documents Only:
warrantygroupservice@forthepeople.com

EXHIBIT A

Oeaiei.NOmber -JVliO Anritmct Ntenbar -

Buyer Naina and A/tos	Co-Buyer Name and Address	Seller-Cret£ior (Nafrie and Afldre
in EfiOb 53*3 saW SC/BW ROCK&EIHJ&, BREYBftOV fcL 82		OIBSOH TOTfCK BCRI 2455 8OUTH dUi&NBC DU SANFORD, Fir 32773
Buyer« BWiMonth: June	Co-Buyer's Birth Month:	

Vbu, the Buyer (arid Co-Buyer, Ifjany) may buyrih vehicIftjMkMr Ibr cash or tifi crejiL By signing this contract, you choose to buy the vefck*a on eietti under the agreements on the front and back of this contract to pay the Seller-Creditor (sometimes "we" or "us" in this contract) the Amount Rnancad and Fkianpn Charge Iij U.5; tUnder according to the Payment Schedule below We will figure your finance charge on a da?/ basis at the BasaRaie of 5 & % gor yea rthe fnitW endingDiscjoBy r b/o ara part of this torrtracL

You have thoroughly in ected, a Maite approved the ucle in all respe

New/Usad/Demo	Vfear	Make and Model	(lbs.)	Vehicle tdentiflcatloft Number	Primacy Use For Which Purchased
USED	aon	RAH aSoo	V	3C63RAGL0EG108478	Personal/bmdy, orhoukehokjuntess otherwise indicated below: * O business ☐ agricultural ☐

You agree that we advised you whether, based on seller's knowledge, the vehicle was titled, registered, hr used as a tatfcab, police veWcTd, short lefrn rental or Is a vehicle that is rebuilt or assembled from parts, a kit car, a replica, a flood vehicle, or a rnanufacturer buy back.

FEDERAL TRUTH-IN-LENDING PISCLOSURES

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will awt you.	AimoUht Financed The amount of credit provided to you or on your behalf.	Total of Payments The amount you will have paid after you have made all payments as scheduled.	Total Sale Price The total cost of your purchase on credit, including your down payment of $ 700.00
5.19%	$ 6571.27	$ 26452.48	$ 33023.75	$ 33723.75

Your PaymentrSchodUleW1C&e:

Numbsrdt Payments	Amount of Payments	When Payments Are Due
TB	73S Bfr	Monthly beginning 7/21/2016

Or As Folldws:

late Charge. If payment is not received in full within 10 days after it is due, you will pay a late charge of 5 % of each installment.

Prepayment. If you pay off all your debt early, you may have to pay a penalty.

Security Interest. You are giving a security interest in the vehicle being purchased.

Additional Information: See this contract for more information including information about nonpayment, default, prepayment penalties, any required repayment in full before the scheduled date and security interest.

ITEMIZATION OF AMOUNT RNANCSJ

1	Cesh Price (inducing $ 2610.38 sales tax)	$ 28638.38 (1)
2	Total Oownpayment =	
	Gross Trade-In Abwonce	$ N/A
	Less Pay Ofl Mids By SsOsr W	$ N/A
	Equate Nat Tra S*In	$ N/A
	4 Cash	$ 700.00
	4 Other	$ N/A
	((totel dpwnpaymsnUs negfShe/eniar and see 4J below)	$ 700.00 pj
3	Unpaid Balance of Ca/h Pries (1 mkus 2)	$ 27938.38 (3)
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C	Other Optional Iniutetce Paid te Insuai Corepw br Corroa	WA
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% Insurance. Vbu may 6by ihe physical damage insur- ance this contract requires (see back) from anyone you choose who Is poosptable to us. Vbu am not required to buy any qibef insurance to obtain craft wleu «M bi imfiaftig Vendor > Single taterast iscJ tKSSJSS you the veWde of extend awfittoyou.

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Chech the Insurance you Went and sign below:

Optional Credit Insurance

☐ Credit Life ☐ Bbyer ☐ Co-Buyer ☐ Both

Term N/A

☐ Credit Disability ☐ Buyer ☐ Co-Buyer ☐ Both

Term N/A

Pmhlum:

Credit Life $ N/A

Credit Disability $ N/A

Inswance Company Name

Hpmp Office Addps*

Credit life insurance and credit disability insurance am not required to obtain credit. Your decision to buy or not to buy credit life insurance and credit disability insurance will not be a factor in the credit approval process. They will be provided unless you sign and agree to pay the extra cost. If you choose life insurance, the cost is shown in Item 4A of the Itemization of Amount Financed. Craft Mutual Life Insurance is based on your original payment schedule. The coverage may not pay all your new one if you contract to make late payments. Crafted Security Insurance does not offer any coverage in your state or in the number of payments.

d the brae above is chewed to Mate that you went aw® Be insurance, ftejwrwd and Hon the fcftcwifgecteiowi Bdgmimc

1. Vbu Understand that you have the option to ssdgraing any other policy or policies you Own or may procure for the purpose of covering Ws existing otcraft and that Vie policy need not be purchased from or through us to obtain the tension of credit.

X Buyer 6/19/ Dele

X Co-Buyer Date

2. Vbu tifldsraUnd fiat the cradtt OB coverage may be deterred A at the Ume of application, you are unable to engage in Employment or Qnttls to perform normal activities of a person of Ite age and sa. (You will not sign this acknowledgement if the proposed coverage fits your insurance policy does not cover Luhs marietta

X Buyer 6/16/ Date

X 6/16/

F Gwemmert Documentary Stamp Taxes $ -162.15

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3. You understand that the benefits under the policy will terminate when you reach a certain age and affirm that your age bacajmtetympfesantedgnflwappticatbnorpoflcy.

X 9/16/1 Buyer DM

X 6/16/Mt Co-Buyer Date

Other Optional Insurance

☐ Type ol huiuancs Term

Premiums N/A

Ins. Co. Name & Addrc

☐ Typeottnawa/W Tins

yewfy Ins. Co. Name & Addrase

D lypaononmm Term

Premium $ N/A

tns, CaNpma & Addrw

a Type or Insurance Term

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Ini. Ca Name & Address.

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Other optional insurance is not required to obtain credit. Your decision to buy or not buy other optional insurance will not be a factor in tha trad! appro** process. If w& no! be provided iRIne you agn and lgw b pay the vtra coel

feranl tie Insurance charted atm.

XL LC 8/16/1

Buyer Signature Date

X g/16/

Co-Buytr Signatore Dale

LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED IN THIS CONTRACT.

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CFZJQSiLGAP CONTRACT. A gap conked (debt csn» Mcn contracp reared to obtain creJfarti vM'ntit-fr phtiid cnsiiis gnc sign below and agree to pay the extra charge, if you choose to buy a gap contract, the charge is shown in Item 4D of the onef JirtfaTPttn Rnanoeo. Sw your pap oonrsa or tteteiq oil PIBI Brns and conaJDons SprcMdos. Sis ap&n of tU coniniEL

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Year Make JV\yr Model

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You assign to Seller all your right, title and interest in such trade-in vehicle(s). Except as expressly stated ASOtf hm B BfflrtfK o trKltHnVehfck&jhMHrfbwl wafcdd luiWhd lmp rbody fea o patoB ffi intfiiejepelr; grid wear 6t ptwfauriy Uerl ks a toxlctb, policevehlde, ifaf tehnrentol or Is av Ec & tidUt aswAled tmmperU krf tv/arej rtggd vehldf, br *memihctlitw buyteck.

Buyer Initials Co-Buyer Initials

Trade-In Payoff Agreement. Seller relied on information from you and/or the lienholder or lessor of your trade-in vehicle to arrive at the gross amount shown You u sla fiBamriija linMBnaS 12 In Tb nia m of Amount nced as the Pay Off Made by Seller. Seller agrees to pay the payoff amount shown above and in Item 2 to the lienholder or lessor of the trade-in vehicle, or its designee. If the actual payoff amount is more than the amount shown above and in Item 2 you must pay the Seller the excess on demand. If the actual payoff amount is less than the amount shown above and in Item 2 Seller will refund to you any overage Seller receives from your lienholders or lessor. Except as stated in the "NOTICE" on Mback olthisconbaU, anyastlpmeaofihhcontnd r/in not bo obligated to pay any fee Pay Off Made by Seller shovfft abow and hani 2 or any refund

Buyer Signature X Co-Buyar Bignattim X

Buyersijiutt Jiyi... Co-Bvyarsigniturax...

JUflYTOALWAIVER. By enterfhg thlxfvrtract, you agree lowaJvayaur right to trial by Jury.
Buyer SJgnafiirf... Co-Boyar Signature X...

SELLER'S RIGHTTO CANCEL - if Buyer and Co-buyer sjgri here, the provi#ion #of the Seller's Right to Cancel eecttonon the back, which gives the Seller the right to cancel if Seller ie unable to assign this contract wtifiin 30 days, win apply. If you fall to return the vehicle within tttaurs after receipt of the riotfoe of cancellation, you agree to pay Salter a charge of $ 25 per day from sjjtydit* otcyi£ Almio Aytil A ehicls 1$ returned ojr Apossessed.

BuVar Signs ... X Co-Buyar Signs

NO COOLING OFF PERIOD

State law does notprovide for a "cooling Off" orcancellatlon period for this sale. After you sign this contract, you may only cancel it if the seller agrees or for legdf cause. You cannot cancel this contract simply because you change your mind. This notice tibesifot apply to home solicitation sates.

The Annual Percentage Rate may be negotiate with the Seller. The Seller may assign this contract and retain its right to receive a part of the Finance Charge.

. HOW THIS CONTRACT CAN BE CHANGED. TNs mrtadcatehsjfe enfre agreement between you and 5 rdaflng to (Ns coitracL Any change to Bis contrad must be in wiling and we must sjiit No oral changes aabWiriB. BuyerStaits... Co-Buyer Signs JC...
tf any part of tHs contract is not valid, al other parts slavrafid. We fnSffclay or rafraNTfndm enforcing any of (Air rights under Ihfe contad without losing them. For example, we may extend the time for making some payments without exlendng be fin* (of making others.
See beck for other Important agreements.

NOTICE TO THE BUYER: a) Do not sign this contract before you read it or if it contains any blank spaces. b) Vbu are entitled to an exact copy *of* the contract you sign. Keep it to protect your legal rights.

You agree to the terms of this contract. You confirm that before you slgKed this contract, we gave It to you, and you were free to take it and review it You confimtthat you received a completely fllled-ki copy when you signed It.

Buyer Signp/X GLI... **Dale 6/16/is** **Co-Buyer Signs X**... **Oalw a/3 flfL;**

Co-Buyers and Other Owners — A buyer is a per... o is responsible for paying the entire #bt. An other owner is a p*800 **** ^ 1» on to life in to vehicle but does not have to pay the debt. The o... twff«ragrw Alirh security interest in the vehicle given to us hto contract.

Other owner rigna hare X...
Sailer Signs... M .67X5/16 oyX... JU...

Seller ess ^ ItsMerest to thfe contact to DELL9 £%&> toUiEtt SERVICE^ (Assignee) under the tenra o! Siler's egmementfs) with Assignee.

☐ Assigned with recourse ☒ Assigned without recourse ☐ Aialpted with Bmtod recourse

Seller... By... Title...

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REFERRAL
REPEAT CUST

Customs#: 305182
42195/47808

tjiooun iI\u/\I\ wwrvi/\L/
5455 South Orlando Drive
Sanford, FL 32773
Tbl. (407) 321-0660 *Fax* (407) 321-3322

STOCK NO
DATE 6/16/201»
SALESMAN LEONARDO FLORES
AdamWeicWl

RETAIL BUYER'S ORDER

ruxoiAia: LES KROL	DRJVEH SUC3iwft Ka: K640-520-52-201-0	nSOOTHR: e/1/1952	SOCIAE SECURITY NO.: 607-82-4329
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MXRIH: 5336 SAN SEBAS71AW WAY (ft420B	ItUAIL: LE5KROL2006?C3/\AiLCOM		cmr: ROCKLEDGE
COUNTY: BREVARD	JWJt: FL	ar: 32955	HOMS mOWS: (321) 482-2507 ·	Bunnai PIIOTVB: (574)882-2161
SERIAL HO.: 3C63RfK5LDEG108376	Q HEW ☐)©gB ☐ DEMO H3CI<		HUMIC: 35741	CYL
YEA*: 2014	UUI: RAM	TSBar: 3500	STYLE	fiMZNE	COLO*: YVH

USED VEHICLE DISCLOSURE

This used Vehicle has been previously drives by others usd Dealer has not made any representation regarding the Vehicleh history. Customer ,acknowledge*-that no representation has bees unde by aiy agent of Dealer (I) regarding the history condition, prior repair or maintenance, safety system or suitability of the Vehicle; or (ti) that it has or has not ever sustained damages prior to this Order, nor d^si Dealer have the obligation to make any such disclosure. Customer underetands that a/ie ibqy retain a thin^pany to provide information regarding the Vehicle* history and that Dealer epcourages Customer to do so. Customer may also malm arrangements to have the Vehicle inspected by a person of Customer* own choosing. Customer further acknowledges that Customer has test driven this Nfehlcle and It meets Customerh satisfaction or Customer has been afford an opportunity to do so, and has declined. Except as otherwise set forth on the window form (Buyer* Guide), Ihk Vehicle is sold "ASIS and WITH ALL FAULTS;* without any warranty and Dealer hereby expressly disclaims all warranties, either express or implied, Including any implied warranty of merchantability or fitness for a particular purpose, and neither itsumes nor authorizes any person to assume for it any liability in connection with the tale of the Vehicle. The infamuikm you see on the window form for this Vehicle is part of this cofttract/ordet Information on the window form overrides any contrary provisions In the conbictforder of side.

USED CAR BUYERS GUIDE. THE INFORMATION YOU SEE ON THE WINDOW FORM FOR THIS VEHICLE IS PART OF THIS CONTRACT INFORMATION ON THE WINDOW FORM OVERRIDES ANY CONTRARY PROVISIONS IN THE CONTRACT OF SALE.

GUiA RARA COUPRADOfiES DE VEHiCUtOS USADOS. LA INFORMATION QUE VE EN EL FOfiMULAHO DE LA VENttNILLA RARA ESTE VEHICULO FORMA RAfTTE DELFfiESENTE OONTHAIO. LA WFORMAOON DEL FORMULARIO DE LA VENTAMLLA DEM SW EFECTO TODA DISPOSOiN EN CONTRARIO CONTENIDA EN EI CONTRATO DE VENIA.

THiHHMN 1

☐ Private Trade

Year Make Model Color

VIN Mileage

1■ Lien to: Amount N& Good Thru

2* Lien to: Amount *WA* Good Thru

Authorized by:

rUAUF-Wt *i*

☐ Private Trade

Year Make Model Color

VIN Mileage

1" Lien to: Amount *UfA* Good Thru

2/\ Lien to: Amount NA. ¹ Good Thru

Authorized by:

Unless fpecifically identified by Customer in writing and signed ty (be parties, Customer represents and warrants the following regarding the Trade-In: (i) it was not involved in an accident; (ii) has not incurred *aay* body or major engine reppitfsj; and (ifi) H was not previously o police vehicle, a tfcricab, r-short-term leap (fdf Hus than 42 months), also referred to as a rental vehicle, a flood donoged, fraine damage/\ salvaged or a rebuilt vehicle Subject to the terms and conditions of this Order, Customer authorizes VIMIW t* immediately roll the Trade-In Customer over to the next

nun ILV-I: IM GRMATION J

Cash Price of Vehicle	42595j0G
Accessories	*m.*
	m
	m
	tilh
Subtotal	42595.00
Trade in Allowance	*m*
Nel Difference	42586.63
Dealer Ddhrmy Fee These charge* represent costs aad (softtto die dealer for ttcmi such u knpeatog, cfaotifg, amt Bdjttdfcig vehicles aad pirpariag deemaeats rdiied to file ole.	$625.00
FLOuiULAW Waste Tire and Lead Acid Battery Fee	auo
	MB
	m
Subtotal	43223.0S
Sales Tax	2593.35
Gounty Tax	*moti*
	m
FloridaTUk/\ Registration and Lkcme Fees (NewK£_TVans—Zj LJIWyaJi checked this is an ntimatc^	2S335
Ttode Pay-off	*m*
Subtotal	46894.73
	m
	m
Tire and Wheel	*m*
SenAigAgraamna:	*m*
SdesTaz on Agreement	*m*
Sates Tlx on Other Benefits	*m*
GRAND TOTAL	46894.73

will catue inch previously unknown lieo(s) and/or the understated amount of the disclosed Ues(s) to be satisfied within 72 hours of Dealer* notice to Customer in writing. If the vehicles) listed Is a Lease Walk Away, Customer understands that Dealer* agreement to take possession of it Is for convenience only and Dealer assumes no responsibility for its condition or any other obligation of Customer with respdet to that lease, such as remaining payments, caress miles or damage to vehicle, unless otherwise indicated In writing and signed by Dealer

Cuitomer _____ Cuiloaen _____

LIMITATION ACKNOWLEDGEMENTS

Dealer and Cuitomer agree that for any controversy, claim, suit, demand counterclaim, cross claim, or third party complaint, arising out of in connection with, or relating to this Order, any addendum or the parties* relationship (whether statutory or otherwise and **irrespective of whether Dealer terminated the Order): (a) Venue and jurisdiction shall lie exclusively in the County where Dealer is situated; (b) the parties irrevocably waive their right to a trial by jury in the event that the arbitration provision contained herein is** unenforceable for any reason; and (c) Customer shall not be entitled to recover ^mn Dealer any special damages, dareagri to property, damages for loss of use, loss of tinfe, IQSUtpn)(ili, ocJncpmeair^cQLfltberincidental damages, including bui ribt limited to vehicle rental charges. This Order is not evidence of any cash payment Cash payments are evidenced by a separate receipt documeph.

Customer: _____ Cuitomer _____

FINANCING NEGOTIATION **

Customer may secure financing through Dealer or a financing entity of Customer* choosing and Customer may be able to obtain more favorable financing from third parties. The retail installment soles contract ("RISC") to be entered Between Dealer and Customer, unless otherwise indicated in writing by Dealer, shall be immediately assigned fay Dealer to a bank / finance company (a) lace value or greater) which shill lhen bo the creditor to whom CustOcser shall be obligated under **the RISC. Customer also understands that: (i) the annual percentage rate (APR) for the installment sale of an automobile may be negotiated, and (ii) Dealer may receive some portion of the finance charge or receive other compensation for providing the** financing and selling other products and novices. Dealer may terminate this Order for any breach by customer, feud orttfber misrepresentation by Customer.

Customer: _____ Cuslomen _____

Down Payment	mm
Cash on Dctivny	m
BALANCE DUE	45394.73

15 DAY RETURN/EXCHANGE POLICY

i, LESKROL

PunJueda 2014 RAM 3500

yIN# 3C63HRGL0EG108376 on 6/16/2016

and fully understand that I have 15 days / 500 miles (which ever occurs first) to return/exchange the purchased vehicle. The vehicle can be return/exchange for a front line ready vehicle of the same value per Dealer's discretion. Promotional advertised and internet special vehicles are not eligible for return/exchange offer.

^ rehlcks that an accepted under the IS days / 300 mOe rriurotachaagt poHcy may ealy be *rnumcO/achMi^A* art tin *had* mum rtrerced/adtaard Iribraaureeandltlea n wax sold. THsptfey dots aa Uprfy to aayvchkltvtcrltcdla tbs ictnra/odian ^ Nocdwada, «l1 acbanm amfbul.

Customer: _____ Date 6/16/2016

Buxioeu Manager _____ Date: 6/16/2016

\, _____

purchased a _____

VIN# _____ on _____

AND I UNDERSTAND THAT I DO NOT HAVE A RETURN/EXCHANGE POLICY VEHICLE.

rmtnmgr _____ Data: _____

BatJnep Manger _____ Date: _____

normSlot fanDwurmLWugAVKRgAQaim wrocasTOOo AIX twnaiiaMs AW cowinioyscotfiAiwBQtt tig pinarAfwtgvn«cornfi» oaM3t »vsg*p*C BELOW; TOU ACioiomxocziKAr *txcwrr* ASOTTOwueAoofOWLcDcxn *m* wimw^THts ROTISUCTSTHI ttmai OUCH AKXF THAT YOU HAVE (voramro ON ACT ORAL ftimscTOHKK, raoMXSE oa AGMESTINT *NOT* CONTAINED WTHW TWO wurmpiftipinu out* « *HUT* KMHHC UNTIL EXECUTED BY DEALSB'S MANAGER. CUSTOMER UFIZUMS AWvojuuvn THAT ALL OCTORMATSON RAOVMSOTO DEALER IN CONNSCTION Win THISTRANSACTION tS CtWOLCIT AND ATCWLUZ. CI5TOMEB BAS Rcxn, UNDUSTANK AND AC O TS ALL I KWWOrQ Of THIS 0BDE1.

Customer* Signature _____ Co-Customer* Signature _____ Manager _____ 6/6/16 Ditr

EXHIBIT B

Gibson Truck World

1 Year Warranty

Stock # *33(?12-

Customer Name: ÉAd L-

Your new Gibson truck comes with our own Gibson warranty initial below to the terms and conditions:

* This warranty is valid in the continental U.S. only — * kL

• Our warranty deductible is 50/50 **(50% of OUR costs of parts and labor)** — LK

• All work must be performed at Gibson Truck World Unless prior authorization was given by Gibson Truck World service department — h IL

The limits are 12 months or 6000 miles Whichever comes first — L iV

, We cover only necessary repairs No custom repairs: Repairs on custom work you have done since your purchase are not covered — * A*

I have received a copy of shop investments (work) already performed by Gibson Truck World so I am aware of what items have been completed — LK

I have read and acknowledge the above warranty policies.

X [signature] — 06/14/16

Buyer Signature **Data**

Urn

Buyer Signature **Date**

GTW1YRWAR

EXHIBIT C



RAM

2014 Ram Truck 2500/350Q

WARRANTY INFORMATION

DIESEL

IMPORTANT

This booklet contains Chrysler Group LLC limited warranties. It should be kept in your vehicle and presented to your Dealer if any warranty service is needed.
The warranty text begins on page 4 of this booklet.

WARRANTY COVERAGE AT A GLANCE

DESCRIPTION	1 Yr/ 12, 000	2 Yr/ 24,000	3 Yr/ 36,000	3 Yr/ 50,000	3 Yr/ Unlimited	5 Yr/ 50,000	5 Yr/ 100,000	7 Yr/ 70,000	BYr/ 80,000	Lifetime
Basic Limited Warranty Coverage										
Special Extended Warranty Coverage										
Anti-Corrosion Perforation Limited Warranty:										
All Panels										
Outer Panels										
Cummins Diesel Engine Components										
Limited Warranty										
Powertrain Limited Warranty										
Federal Emission Warranty -										
Heavy Duty And Diesel										
Specified Components										
Noise Emission Warranty - Heavy Duty										

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1.1 Your Legal Rights Under These Limited Warranties

The warranties contained in this booklet are the only express warranties that Chrysler Group LLC (Chrysler) makes for your vehicle. These warranties give you specific legal rights. You may also have other rights that vary from state to state. For example, you may have some implied warranties, depending on the state where your vehicle was sold or is registered.

These implied warranties are limited, to the extent allowed by law, to the time periods covered by the express written warranties contained in this booklet.

If you use your vehicle primarily for business or commercial purposes, then these implied warranties do not apply and Chrysler completely disclaims them to the extent allowed by law. And the implied warranty of fitness for a particular purpose does not apply if your vehicle is used for racing, even if the vehicle is equipped for racing.

Some states do not allow limitations on how long an implied warranty lasts, so the above limitations may not apply to you.

1.1 Incidental and Consequential Damages Not Covered

Your warranties don't cover any incidental or consequential damages connected with your vehicle's failure, either while under warranty or afterward.

Examples of such damages include:

- lost time;
- inconvenience;
- the loss of the use of your vehicle;
- the cost of rental vehicles, gasoline, telephone, travel, or lodging;
- the loss of personal or commercial property; and
- the loss of revenue.

Some states don't allow incidental or consequential damages to be excluded or limited, so this exclusion may not apply to you.

2. What's Covered Under Chrysler Group LLC's Warranties

2.1 Basic Limited Warranty

A. Who Is Covered?

You are covered by the Basic Limited Warranty if you are a purchaser for use of the vehicle.

B. What's Covered

The Basic Limited Warranty covers the cost of all parts and labor needed to repair any item on your truck when it left the manufacturing plant that is defective in material, workmanship or factory preparation. There is no list of covered parts since the only exceptions are tires and Unwired headphones. You pay nothing for these repairs. These warranty repairs or adjustments — including all parts and labor connected with them — will be made by your dealer at no charge, using new or remanufactured parts.

C. Items Covered by Other Warranties

The following are covered by separate warranties offered by their makers. They are not covered by the Basic Limited Warranty:

- tires;
- Unwired headphones; or
- items added or changed after the truck left the manufacturing plant, such as accessories or protection products, or items changed because of customization or van conversion.

S

Be sure you get a copy of any warranty that applies to these items from your dealer, or from the maker of the product. You can find the tire and Unwired headphones warranty statements in your Owner's Literature Package.

D. Towing Costs Are Covered Under Certain Circumstances

The Roadside Assistance covers the cost of towing your truck to the nearest Chrysler, Dodge, Jeep or Ram dealer if your truck becomes disabled as a result of a mechanical breakdown. If you choose to go to another dealership, you will be responsible for the cost if the extra distance exceeds 10 miles. See Section 6.2 for information on how to get towing service in the United States and Canada.

E. When It Begins

The Basic Limited Warranty begins on either of the following dates, whichever is earlier:

- the date you take delivery of the truck; or
- the date when the truck was first put into service — for example, as a dealer "demo" or as a Chrysler company truck.

F. When It Ends

The Basic Limited Warranty lasts for 36 months from the date it begins or for 36,000 miles on the odometer, whichever occurs first. But the following items are covered only for 12 months or for 12,000 miles on the odometer, whichever occurs first:

- brakes (rotors, pads, linings, and drums);
- wiper blades;
- clutch discs or modular clutch assembly (as equipped);
- windshield and rear window; and
- wheel alignment and wheel balancing

G. Registration and Operation Requirements

The Basic Limited Warranty covers your truck only if:

- it was built for sale in the U.S.;
- it's registered in the U.S.;
- it's driven mainly in the U.S. or Canada; and
- it's operated and maintained in the manner described in your Owner's Manual.

H. If Your Truck Leaves the United States (We Include U.S. Possessions and Territories as Part of the United States for Warranty Purposes):

EXCEPT WHERE SPECIFICALLY REQUIRED BY LAW, THERE IS NO WARRANTY COVERAGE ON THIS TRUCK IF IT IS SOLD IN OR REGISTERED IN COUNTRIES OTHER THAN THE UNITED STATES.

This policy does not apply to trucks that have received authorization for export from Chrysler. Dealers may not give authorization for export. You should consult an authorized dealer to determine this truck's warranty coverage if you have any questions.

This policy does not apply to trucks registered to U.S. government officials or military personnel on assignment outside of the United States.

2.2 Cummins Diesel Engine Limited Warranty

A. Who Is Covered?

You are covered if your vehicle is equipped with a Cummins Diesel Engine.

B. What's Covered

The Cummins Diesel Engine Limited Warranty, covers ONLY the following engine parts and components:

- cylinder block and all internal parts
- cylinder head assemblies
- core plugs
- fuel injection pump & injectors
- gaskets and seals for listed components
- intake and exhaust manifold
- oil pan
- oil pump
- timing gear drive and/or chains and cover
- turbocharger housing and internal parts
- valve covers
- water pump and housing

C. How Long It Lasts

The Cummins Diesel Engine Limited Warranty lasts for up to 5 years or 100,000 miles on the odometer, whichever occurs first, calculated from the start date of the Basic Limited Warranty, as set forth in Section 2.1(E).

D. Towing Costs Are Covered

The Cummins Diesel Engine Limited Warranty covers the cost of towing your truck to the nearest Chrysler, Dodge, Jeep or Ram dealer if your vehicle cannot be driven because a covered part has failed. If you choose to go to another dealership, you will be responsible for the cost if the extra distance exceeds 10 miles. See Section 6.2 for information on how to get towing service in the United States and Canada.

2.3 Corrosion Warranty

A. Who Is Covered?

You are covered if you are a purchaser for use of the vehicle.

B. What's Covered

This warranty covers the cost of all parts and labor needed to repair or replace any sheet metal panels that get holes from rust or other corrosion. If a hole occurs because of something other than corrosion, this warranty does not apply. Cosmetic or surface corrosion — resulting, for example, from stone chips or scratches in the paint — is not covered. For more details on what isn't covered by this warranty, see 3.5.

C. How Long It Lasts

The Corrosion Warranty starts when your Basic Limited Warranty begins under 2.1(E). This warranty has two time-and-mileage limits:

- For sheet metal panels, the limit is 36 months, with no mileage limit.
- For an outer-body sheet metal panel — one that is finish-painted and that someone can see when walking around the truck — the limits are 5 years or 100,000 miles on the odometer, whichever occurs first.

2.4 Powertrain Limited Warranty

A. Who Is Covered?

You are covered by the Powertrain Limited Warranty if you are a purchaser for use of the vehicle.

B. What's Covered

The Powertrain Limited Warranty covers the cost of all parts and labor needed to repair a powertrain component listed in section 2.4.E below that is defective in workmanship and materials.

C. How Long It Lasts

The Powertrain Limited Warranty lasts for up to 5 years or 100,000 miles on the odometer, whichever occurs first, calculated from the start date of the Basic Limited Warranty, as set forth in Section 2.1(E).

D. Towing Costs Are Covered

The Powertrain Limited Warranty covers the cost of towing your vehicle to the nearest authorized Chrysler, Dodge, Jeep or Ram dealer if your vehicle cannot be driven because a covered part has failed.

If you choose to go to another dealership, you will be responsible for the cost if the extra distance exceeds 10 miles. See Section 6.2 for information on how to get towing service in the United States and Canada.

E. Parts Covered

The Powertrain Limited Warranty covers these parts and components of your vehicle's powertrain supplied by Chrysler Group LLC:

Transmission:

transmission case and all internal parts; torque converter; drive/flex plate; transmission range switch; speed sensors; pressure sensors; transmission control module; bell housing; oil pan; seals and gaskets for listed components only.

NOTE: MANUAL TRANSMISSION CLUTCH PARTS ARE NOT COVERED AT ANY TIME.

Rear Wheel Drive:

rear axle housing and all internal parts; axle shafts; axle shaft bearings; drive shaft assemblies; drive shaft center bearings; universal joints and yokes; seals and gaskets for listed components only.

Four-Wheel Drive (4X4):

transfer case and all internal parts; transfer case control module and shift mode motor assembly; axle housing and all internal parts; axle shafts; axle shaft bearings; drive shafts assemblies (front and rear); drive shaft center bearings; universal joints and yokes; disconnect housing assembly; seals and gaskets for the listed components only.

F. Other Provisions of This Powertrain Limited Warranty

All other terms of the New Vehicle Limited Warranty including the Section 1 (Your Rights Under These Limited Warranties) and Section 3 (What's Not Covered) apply to this Powertrain Limited Warranty.

2.5 Restraint System Limited Warranty (Vehicles sold and registered in the State of Kansas only)

For vehicles sold and registered in the State of Kansas, seatbelts and related seatbelt components are warranted against defects in workmanship and materials for 10 years, regardless of mileage. This warranty does not cover replacement of seatbelts and related components required as the result of collision.

3. What's Not Covered

3.1 Modifications Not Covered

A. Some Modifications Don't Void the Warranties But Aren't Covered

Certain changes that you might make to your truck do not, by themselves, void the warranties described in this booklet. Examples of some of these changes are:

- installing non-Chrysler Group LLC ("Chrysler") parts, components, or equipment (such as a non- Chrysler radio or speed control); and
- using special non-Chrysler materials or additives.

But your warranties don't cover any part that was not on your truck when it left the manufacturing plant or is not certified for use on your truck. Nor do they cover the costs of any repairs or adjustments that might be caused or needed because of the installation or use of non-Chrysler parts, components, equipment, materials, or additives.

Performance or racing parts are considered to be non-Chrysler parts. Repairs or adjustments caused by their use are not covered under your warranties.

Examples of the types of alterations not covered are:

- installing accessories — except for genuine Chrysler / MOPAR accessories installed by an authorized Chrysler, Dodge, Jeep or Ram dealer;
- applying rustproofing or other protection products;
- changing the vehicle's configuration or dimensions, such as converting the vehicle into a limousine or food service vehicle; or
- using any refrigerant that Chrysler has not approved.

B. Modifications That WILL Void Your Warranties

These actions will void your warranties:

- disconnecting, tampering with, or altering the odometer will void your warranties, unless your repairing technician follows the legal requirements for repairing or replacing odometers; or
- attaching any device that disconnects the odometer will also void your warranties.

3.2 Environmental Factors Not Covered

Your warranties don't cover damage caused by environmental factors such as airborne fallout, bird droppings, insect damage, chemicals, tree sap, salt, ocean spray, acid rain, and road hazards. Nor do your warranties cover damage caused by hailstorms, windstorms, tornadoes, sandstorms, lightning, floods, and earthquakes.

Your warranties do not cover conditions resulting from anything impacting the truck. This includes cracks and chips in glass, scratches and chips in painted surfaces, or damage from collision.

3.3 Maintenance Costs Not Covered

Your warranties don't cover the costs of repairing damage caused by poor or improper maintenance. Nor do they cover damage caused by the use of contaminated fuels, or by the use of fuels, oils, lubricants, cleaners or fluids other than those recommended in your Owner's Manual.

The warranties don't cover the costs of your truck's normal or scheduled maintenance — the parts and services that all trucks routinely need. Some of these parts and services, which your warranties don't cover, include:

- lubrication;
- engine tune-ups;
- replacing filters, coolant, spark plugs, bulbs, or fuses (unless those costs result from a covered repair);
- cleaning and polishing; and
- replacing worn wiper blades, worn brake pads and linings, or clutch linings.

3.4 Racing Not Covered

Your warranties don't cover the costs of repairing damage or conditions caused by racing, nor do they cover the repair of any defects that are found as the result of participating in a racing event.

3.5 Certain Kinds of Corrosion Not Covered

Your warranties don't cover the following:

- corrosion caused by accident, damage, abuse, or truck alteration;
- surface corrosion caused by such things as industrial fallout, sand, salt, hail, ocean spray, and stones;
- corrosion caused by the extensive or abnormal transport of caustic materials like chemicals, acids, and fertilizers; and
- corrosion of special bodies, body conversions, or equipment that was not on your truck when it left the manufacturing plant or was not supplied by Chrysler.

3.6 Other Exclusions

Your warranties don't cover the costs of repairing damage or conditions caused by any of the following:

- fire or accident;
- abuse or negligence;
- misuse — for example, driving over curbs or overloading;
- tampering with the emission systems, or with a part that could affect the emission systems;
- use of used parts, even if they were originally supplied by Chrysler (however, authorized Chrysler / MOPAR remanufactured parts are covered);
- windshield or rear window damage from external objects;

- any changes made to your truck that don't comply with Chrysler; or
- using any fluid that doesn't meet the minimum recommendations in your Owner's Manual.

3.7 Total Loss, Salvage, Junk, or Scrap Vehicles Not Covered

A truck has no warranty coverage of any kind if:

- the truck is declared to be a total loss by an insurance company;
- the truck is rebuilt after being declared to be a total loss by an insurance company; or
- the truck is issued a certificate of title indicating that it is designated as "salvage," "junk," "rebuilt," "scrap," or some similar word.

Chrysler will deny warranty coverage without notice if it learns that a truck is ineligible for coverage for any of these reasons.

3.8 Restricted Warranty

Your warranties can also be restricted by Chrysler. Chrysler may restrict the warranty on your truck if the truck is not properly maintained, or if the truck is abused or neglected, and the abuse or neglect interferes with the proper functioning of the truck. If the warranty is restricted, coverage may be denied or subject to approval by Chrysler before covered repairs are performed.

4. Other Terms of Your Warranties

4.1 Exchanged Parts May Be Used in Warranty Repairs

In the interest of customer satisfaction, Chrysler Group LLC ("Chrysler") may offer exchange service on some truck parts. This service is intended to reduce the amount of time your truck is not available for your use because of repairs. Parts used in exchange service may be new, remanufactured, reconditioned, or repaired, depending on the part involved.

All exchange parts that might be used meet Chrysler standards, and have the same warranties as new parts.

Examples of the kinds of parts that might be serviced in this way are:

- engine assemblies;
- transmission assemblies;
- instrument cluster assemblies;
- radios, tape, CD and DVD players;
- speedometers; and
- powertrain control modules.

To help control suspected ozone-depleting agents, the EPA requires the capture, purification, and reuse of automotive air-conditioning refrigerant gases. As a result, a repair to the sealed portion of your air-conditioning system may involve the installation of purified reclaimed refrigerant.

4.2 Pre-Delivery Service

A defect in or damage to the mechanical, electrical, sheet-metal, paint, trim, and other components of your truck may have occurred at the factory or while it was being shipped to the dealer.

Such a defect or damage is usually detected and corrected at the factory. In addition, dealers must inspect each truck before delivery. They repair any defects or damage detected before the truck is delivered to you.

4.3 Production Changes

Changes may be made in trucks sold by Chrysler and its dealers at any time without incurring any obligation to make the same or similar changes on trucks previously built or sold.

5. Emission Warranties Required By Law

5.1 Federal Vehicle Emission Warranty - 6.7L Diesel Equipped Heavy Duty Truck

A. Parts Covered for 5 Years or 50,000 Miles, Whichever Occurs First

Diesel equipped heavy duty trucks are 2500 and 3500 models only.

Federal law requires Chrysler to warrant the following emissions parts for 5 years or 50,000 miles, whichever occurs First.

- Air system controls;
- charge air cooler and associated plumbing;
- coolant temperature sensor;
- DEF system (includes tank, sensors, valves, pump, doser, control module and heater);
- engine speed, position sensor, and cam position sensor
- exhaust system (includes catalysts and sensors);
- electronic fuel injection system, including injector;
- exhaust manifold;
- exhaust gas recirculation valve and control system (includes EGR cooler);
- exhaust pipes (between exhaust manifold and last catalyst);
- fuel pump, fuel lines and fuel injectors;
- intake manifold;
- on-board diagnostic-system components;

- NOx sensors, Ammonia Sensor and associated modules;
- positive crankcase-ventilation (PCV) valve or orifice;
- powertrain control module;
- transmission-control module;
- turbocharger and turbocharger speed sensor;
- turbocharger compressor inlet air temperature/ pressure sensor; and
- wiring harness circuits connected at both ends to emissions warrantable components.

B. Parts Covered for 8 Years or 80,000 Miles, Whichever Occurs First

If your truck has one of the following parts, this Federal Emission Warranty covers that part for a period of 8 years or 80,000 miles, whichever occurs first, calculated from the start date of the Basic Limited Warranty as set forth in Section 2.1(E). The covered parts are:

- all catalysts
- powertrain control module
- transmission control module

5.2 Noise Emission Warranty - Heavy Duty Truck

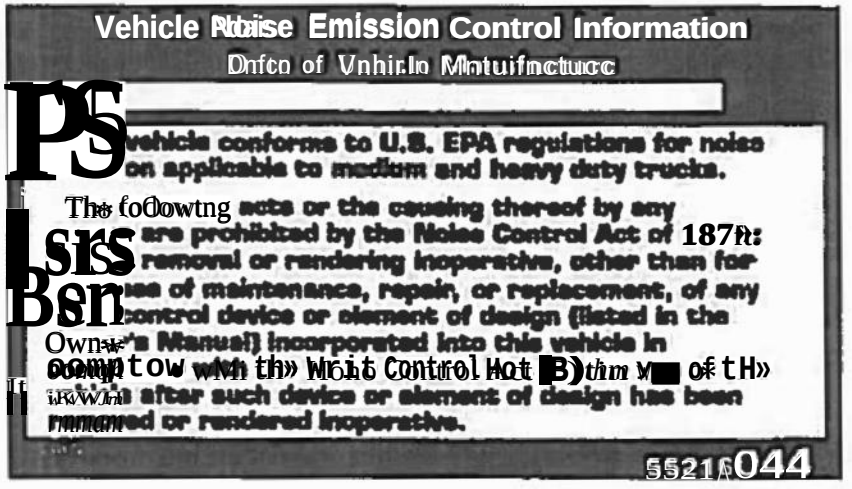
A. Description of Coverage

Chrysler Group LLC ("Chrysler") warrants that this vehicle as manufactured by Chrysler, was designed, built and equipped to conform to all applicable U.S. EPA Noise Control Regulations at the time it left Chrysler's control.

This warranty covers this vehicle as designed, built and equipped by Chrysler, and is not limited to any particular part, component or system of the vehicle manufactured by Chrysler. Defects in design, assembly or in any part, component or system of the vehicle as manufactured by Chrysler, which, at the time it left Chrysler's control, caused noise emissions to exceed Federal standards, are covered by this warranty for the life of the vehicle.

B. Products Warranted

All vehicles built over 10,000 lbs. Gross Vehicle Weight Rating and manufactured for sale and use in the United States are required to comply with the Federal Government's Exterior Noise Regulations. These vehicles can be identified by the Noise Emission Control Label located in the operator's compartment.



C. Tampering with Noise Control System Prohibited

Federal law prohibits the following acts or the causing thereof:

- the removal or rendering inoperative by any person, other than for purposes of maintenance, repair, or replacement, of any device or element of design incorporated into any new vehicle for the purpose of noise control prior to its sale or delivery to the ultimate purchaser or while it is in use; or
- the use of the vehicle after such device or element of design has been removed or rendered inoperative by any person.

Among those acts presumed to constitute tampering are the acts listed below:

- ***AIR CLEANER***

  removal of the air cleaner;

  removal of the air cleaner filter element from the air cleaner housing; or

  removal of the air ducting.

- ***EXHAUST SYSTEM***

  removal or rendering inoperative exhaust system components including the muffler or tailpipe.

- ***ENGINE COOLING SYSTEM***

  removal or rendering inoperative the fan clutch; or

  removal of the fan shroud.

6. How to Get Warranty Service

6.1 Where to Take Your Truck

A. In the United States (We Include U.S. Possessions and Territories as Part of the United States for Warranty Purposes):

Warranty service must be done by an authorized Chrysler, Dodge, Jeep or Ram dealer. We strongly recommend that you take your truck to your Selling Dealer. They know you and your truck best, and are most concerned that you get prompt and high quality service. If you move within the United States, warranty service may be requested from any authorized Chrysler, Dodge, Jeep or Ram dealer.

B. In Canada and Mexico:

If you are traveling temporarily in Canada or Mexico, and your truck remains registered in the United States, your Chrysler warranty still applies. Service may be requested at any authorized Chrysler, Dodge, Jeep or Ram dealership.

C. In a Foreign Country Outside of North America:

If you are traveling temporarily outside of North America, and your truck remains registered in the United States:

- You should take your truck to an authorized Chrysler, Dodge, Jeep or Ram dealer. They should give you the same warranty service you receive in the United States.

- If the authorized dealership charges you for repairs which you feel should be covered under your warranty, please get a detailed receipt for the work done. Make sure that this receipt lists all warranty repairs and parts that were involved. (This receipt will be similar to the one used by the dealer who normally services your truck.)
- When your truck returns to the United States, contact the Chrysler Customer Assistance Center (section 7.2) for reimbursement consideration. You will normally need to provide a copy of the receipt, your truck registration and any other relevant documents.
- Reimbursement will not be considered if the truck does not return to the United States.

D. If You Move:

If you move to another country, be sure to contact the Chrysler Customer Assistance Center (section 7.2) and the customs department of the destination country before you move. Vehicle importation rules vary considerably from country to country. You may be required to present documentation of your move to Chrysler in order to continue your warranty coverage. You may also be required to obtain documentation from Chrysler in order to register your truck in your new country.

E. Notice:

If your truck is registered outside of the United States, and you have not followed the procedure set out above, your truck will no longer be eligible for warranty coverage of any kind. (Trucks registered to United States government officials or military personnel on assignment outside of the U.S. will continue to be covered.)

6.2 How To Get Roadside Assistance Service - U.S. or Canada Only *

A. Who Is Covered:

You are covered by the Roadside Assistance services if you are a purchaser for use of the vehicle. The Roadside Assistance services lasts for 5 years or 100,000 miles on the odometer, whichever occurs first, calculated from the start date of the Basic Limited Warranty, as set forth in Section 2.1(E).

B. What To Do:

If your vehicle requires jump start assistance, out of gas/fuel delivery, tire service, lockout service or towing as a result of a mechanical breakdown, dial toll-free 1-800-521-2779. Provide your name, vehicle identification number, license plate number, and your location, including the telephone number from which you are calling. Briefly describe the nature of the problem and answer a few simple questions.

You will be given the name of the service provider and an estimated time of arrival. If you feel you are in an "unsafe situation", please let us know. With your consent, we will contact local police or safety authorities.

*** Towing services provided through Cross Country Motor Club, Inc., Medford, MA 02155, except in AK, CA, HI, OR, WI, and WY, where services are provided by Cross Country Motor Club of California, Inc., Medford,. MA 02155.**

C. Covered Services:

Flat Tire Service

If you are inconvenienced by a flat tire, we will dispatch a service provider to use your vehicle's temporary spare tire (if equipped) as recommended in your Owner's Manual. This is not a permanent flat tire repair.

Out of Gas/Fuel Delivery

Drivers can't always count on a gas station being nearby - especially when traveling away from home. Just call 1-800-521-2779, and we will dispatch a service provider to deliver a small amount of fuel (maximum 2 gallons) to get you to a nearby station.

Battery Jump Assistance

No time is a good time for a dead battery, but with Roadside Assistance, you don't have to worry about being stranded. We will dispatch a service provider to provide you with a battery jump anytime, day or night.

Lockout Service

Whether the keys are locked in your vehicle or frozen locks are keeping you from getting on your way, help is just a phone call away at 1-800-521-2779. This service is limited to providing access to the vehicle's seating area. It does not cover the cost of replacement keys.

Towing Service

Our towing service gives you peace of mind and confidence. If your vehicle becomes disabled as a result of a mechanical breakdown, Roadside Assistance will dispatch towing service to transport your vehicle to the closest authorized Chrysler, Dodge, Jeep or Ram dealer. If you choose to go to another dealership, you will be responsible for the cost if the extra distance exceeds 10 miles.

D. If Unable to Contact Roadside Assistance:

If you are unable to contact Roadside Assistance and you obtain towing services on your own, you may submit your original receipts from the licensed towing or service facility, for services rendered within 30 days of the occurrence. Be sure to include your vehicle identification number, odometer mileage at the time of service and current mailing address. We will process the claim based on vehicle and service eligibility. If eligible, we will reimburse you for the reasonable amounts you actually paid, based on the usual and customary charges for that service in the area where they were provided. Chrysler Group LLC's determination relating to reimbursement are final. Correspondence should be mailed to:

Chrysler Towing Assistance
P.O. Box 9145
Medford, MA 02155
Attention: Claims Department

6.3 Emergency Warranty Repairs

If you have an emergency and have to get a warranty repair made by someone other than an authorized Chrysler, Dodge, Jeep or Ram dealer, follow the reimbursement procedure in 6.1(C).

6.4 Getting Service Under the Federal Emission Warranties

A. Steps You Can Take, and How to Get More Information

To get warranty service – even if you're traveling – take your truck to any Chrysler, Dodge, Jeep or Ram dealer. (Chrysler recommends that you take your truck to a dealer who sells the same make of truck as yours.) That dealer will perform any warranty service without charging you for diagnosis, parts or labor.

If you think your dealer has wrongly denied you emission-warranty coverage, follow the steps described in 7.1. Chrysler will reply to you in writing within 30 days after receiving your complaint (or within the time limit required by local or state law). If the owner is not notified within 30 days that a warranty claim is denied, the manufacturer must repair the truck free of charge.

If you want more information about getting service under the Federal Emission Warranty, or if you want to report what you think is a violation of these warranties, you can contact:

Manager, Certification and Compliance
Division, Warranty Claims
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code 6403J
Washington, D. C. 20460

7. How to Deal with Warranty Problems

7.1 Steps to Take

A. In General

Normally, warranty problems can be resolved by your dealer's sales or service departments. That's why you should always talk to your dealer's service manager or sales manager first. But if you're not satisfied with your dealer's response to your problem, Chrysler Group LLC ("Chrysler") recommends that you do the following:

Step 1:

Discuss your problem with the owner or general manager of the dealership.

Step 2:

If your dealership still can't resolve the problem, contact the Chrysler Customer Assistance Center. You'll find the address in section 7.2.

B. What Chrysler Will Do

Once you have followed the two steps described in 7.1(A), a Chrysler representative at Chrysler headquarters will review your situation. If it's something that Chrysler can help you with, Chrysler will provide your dealer with all the information and assistance necessary to resolve the problem. Even if Chrysler can't help you, Chrysler will acknowledge your contact and explain Chrysler's position.

C. If Your Problem Still Isn't Resolved For Customers Residing in Arkansas, Idaho, Kentucky, Minnesota and Montana ONLY:

(NOTE: This Process is not available for residents of other states.)

If you can't resolve your warranty problem after following the two steps described in 7.1(A), and you live in Arkansas, Idaho, Kentucky, Minnesota or Montana ONLY, you can contact the Chrysler Group LLC Customer Arbitration Process in your area.

You may obtain a brochure describing Chrysler Group LLC's Customer Arbitration Process, including an application, by calling 1-866-726-4636. This service is strictly voluntary, and you may submit your dispute directly to the Customer Arbitration Process (CAP) at no cost. The CAP is administered by an independent dispute settlement organization and may be contacted in writing at the following address:

National Center for Dispute Settlement
P.O. Box 727
Mt. Clemens, MI 48046

The CAP reviews only vehicle disputes involving Chrysler Group LLC ("Chrysler") Limited Warranty or a Chrysler / Mopar Part Limited Warranty. The CAP does not review disputes involving the sale of a new or used vehicle, personal injury/property damage claims, disputes relating to design of the vehicle or part, or disputes which are already the subject of litigation.

The CAP will need the following information from you: 1) Legible copies of all documents and repair orders relevant to your case, 2) Vehicle identification number of your vehicle, 3) A brief description of your unresolved concern, 4) The identity of your servicing / selling dealer, 5) The date(s) of repair(s) and mileage at the time, 6) Current mileage, and 7) A description of the action you expect to resolve your concern.

Upon receipt of your request:

- The National Center for Dispute Settlement (NCDS) will acknowledge receipt of your request, by mail, within ten (10) days, and advise you whether or not your dispute is within the jurisdiction of the Process.
- When your request is within jurisdiction NCDS will request Chrysler and the dealer to present their side of the dispute. You will receive copies of their responses.
- While your dispute is pending NCDS or Chrysler may contact you to see if your case can be settled by agreement. If a settlement is offered to you, Chrysler will ask you to sign a form that contains that settlement. Your case will then be closed. There is no requirement for you to participate in this settlement process.
- If you requested an oral hearing, a decision-maker will contact you to arrange a convenient time and place for a hearing. Usually, this will be at a dealership near you.
- If you request a documents-only review, an NCDS panel will review and decide your case. Neither you, the dealer nor Chrysler need be present.
- NCDS will send you a written Statement of Decision. This statement will include the decision, any action to be taken by the dealer or Chrysler and the time by which the action must be taken. The decision will be binding on the dealer and Chrysler but not on you unless you accept the decision.
- If any action is required on the part of the dealer or Chrysler you will be contacted within ten (10) days after the date by which the dealer or Chrysler must act to determine whether performance has been rendered.

- The entire dispute settlement process will normally take no longer than 40 days.
- The CAP dispute settlement procedure does not take the place of any state or Federal legal remedies available to you. Whether or not you decide to submit your dispute to the Process, you are free to pursue other legal remedies.

D. Notice Under State Lemon Laws

Some states have laws allowing you to get a replacement truck or a refund of the truck's purchase price under certain circumstances. These laws vary from state to state. If your state law allows, Chrysler requires that you first notify us in writing of any service difficulty that you may have experienced so that we can have a chance to make any needed repairs before you are eligible for remedies provided by these laws. In all other states, we ask that you give us written notice of any service difficulty. Send your written notice to the Chrysler Customer Assistance Center at the address in 7.2.

7.2 Helpful Addresses and Telephone Numbers

Here are the addresses and telephone numbers of the Chrysler Customer Assistance Center that can help you wherever you happen to be. Contact the one that covers your area:

- **In the United States:**
  Chrysler Customer Assistance Center
  P.O. Box 21-8004
  Auburn Hills, Michigan 48321-8004
  Phone: (866) 726-4636

To contact Chrysler by email,
simply access the following website:
www.ramtrucks.com
(click on the "Contact Us" button)

- **In Canada:**
  Chrysler Canada, Inc.
  Customer Service
  Chrysler Centre
  P.O. Box 1621
  Windsor, Ontario N9A-4H6
  Phone: (800) 465-2001
- **In Mexico, contact the Customer Relations Office for Chrysler, Dodge, Jeep and Ram vehicles at:**
  1240 Prolongacion Paseo de la Reforma Av.
  Santa Fe, C.P. 05109
  Deleg. Cuajimalpa, Mexico
  Phone (in Mexico): (015) 5081-7568
  Phone (outside Mexico): (800) 505-1300
- **In Puerto Rico and U.S. Virgin Islands:**
  Customer Service
  Chrysler Group International Services LLC
  Box 191857
  San Juan, Puerto Rico 00919-1857
  Phone: (787) 782-5757
  Fax: (787) 782-3345

8. Optional Service Contract

Chrysler Group LLC's or Chrysler Service Contract Company LLC's optional service contracts offer valuable protection against repair costs when these warranties don't apply. They compliment but don't replace the warranty coverages outlined in this booklet. Several plans are available, covering various time-and-mileage periods and various sets of components. (Service contracts aren't available if you live in a U.S. possession or territory.) Ask your dealer for details.

9. Maintenance

9.1 General Information

It's your responsibility to properly maintain and operate your new truck. Follow the instructions contained in the General and Scheduled Maintenance Service guidelines in your Owner's Manual. Regular, scheduled maintenance is essential to trouble-free operation. If there is a dispute between you and Chrysler Group LLC ("Chrysler") concerning your maintenance of your truck, Chrysler will require you to provide proof that your truck was properly maintained.

For your convenience, Chrysler has prepared a Maintenance Log which is included in your Owner's Manual. You should use this Maintenance Log to keep track of scheduled maintenance, either by routinely having the repairs entered in your Maintenance Log, or by keeping receipts or other documentation of work you've had done on your truck in your Maintenance Log.

9.2 Where To Go For Maintenance

Chrysler recommends that you return to the dealer from whom you bought your truck for all maintenance service both during and after the warranty periods. Although you can get warranty service from any dealer who sells your particular make, returning to your selling dealer will help ensure that all your service needs are met and that you're completely satisfied. The dealership technicians are specifically trained to proficiently perform maintenance and repair procedures on your Chrysler Group LLC truck.

Authorized Chrysler, Dodge, Jeep or Ram dealers will help ensure that all your service needs are met and that you're completely satisfied.

Chrysler strongly recommends you use genuine Chrysler / MOPAR parts to maintain your truck.

NOTES

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[redacted]

Original Owner's Name

Street Address

City and State Zip Code

Vehicle Identification Number

Warranty Start Date (In-Service Date) Mileage at Delivery

Selling Dealer Code

City State

Second Owner's Name

Street Address

City and State Zip Code

Date of Second Purchase Mileage at Purchase

Third Owner's Name

Street Address

City and State Zip Code

Date of Third Purchase Mileage at Purchase

Warranty coverage applies to all vehicle owners. To protect you in the event of a recall or any questions concerning your warranty, please tell your dealer about any ownership or address change, and write the details here.



RAM SERVICE

STICK WITH THE SPECIALISTS*

DU

Chrysler Group LLC

*14D*241D-026-AB

Second Edition

Printed in U.S.A.

EXHIBIT D

MOPFW. VEHICLE PROTECTION
A PRODUCT OF FCA US LLC

PLAN # 41702955
Issued To:LES KROL
VEHICLE IDENTIFICATION NUMBER: 3C63RRGL0EG10B376

Your vehicle is covered by:

* 2 YEAR PRE-OWNED MAXIMUM CARE
(Option Code: XM2UNL2N Form Num: POMX515)

2 YEAR PRE-OWNED MAXIMUM CARE
EFFECTIVE: 07/02/2016
EXrIREF: 07/01/2018
SELLING DEALER: 41874 BONIFACE-HIERS CHRYSLER DODGE JEEP

Key Terras

"Covered Vehicle or Vahids - means the vehida that has the above referenced vehide identification number
"Dealer - means "authorized FCA US LLC franchise dealer", which indudes dealers of the Chrysler, Dodge, Jeep, Ram, SRT, FIAT and ALFA ROMEO vehida lines
"FCA US Vehide - means "Chrysler, Dodge, Jeep, Ram, SRT, FIAT or ALFA ROMEO brand vehides only"
"Mopar Vehide Protection (MVP) Plan - means a Plan offered and issued by FCA Service Contracts LLC.
"Plan - means this "2 YEAR PRE-OWNED MAXIMUM CARE" Service Contract
"we, us, our - means FCA Service Contracts LLC, formerly known as Chrysler Group Service Contracts LLC tha entity obligated to perform the obligations of this contract FCA Service Contracts LLC's contact Information is PO Box 2700, Troy, Mi 48007-2700; phone: 1-800-521-9922. FCA Service Contracts LLC Is a wholly-owned subsidiary of FCA US LLC, formerly known as Chrysler Group LLC.
"you, your - means the Plan purchaser

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A SERVICE CONTRACT: This Plan is a service contrad between you and us. The Plan protects you against major repair bills should a Vehide component covered by the Plan fail due to defects in material or workmanship. This Plan is not Insurance and is not part of the manufacturer's warranty. We are adely responsible (liable) for fulfillment of the provisions of the Plan.

Obligations of the provider under the Plan a·g backed by the full fp'lh credit of tha provider.

No Dtaler, Desler employee or our employee has the authority to modify or change any provision of this Plan. The express provisions of this Plan outline the sole benefits which we are obligated to provide; no other coverage is implied hereunder, and no coverage can be Implied due to an oral or written misrepresentation, error or omission.

IMPORTANT! The maximum benefit amount should a covered component of the Vehicle fail will be THE TOTAL COST OF THE REPAIRS PER VISIT LESS TFfe DEDUCTIBLE, OR THE CASH VALUE OF THE VEHICLE, WHICHEVER IS LESSI The cash value of the Vehide will be determined at the time of the covered repair and will be the average retail value as fisted in the current NADA Used Car Pricing Guide If at any time the repair costs for covered component/\) exceed the Vehide's cash value, your final Plan benefit will be our payment of the Vehide's cash value rather than the repair costs. Plan coverage and benefits will terminate automatically and immediately pursuant to this provision and vv will have no further obligations of any kind in respect to the terminated Plan.

This issuance of this Plan, unless otherwise prohibited by lew, shall not be deemed as a waiver of our right, or considered a restriction of our right to refuse to pay for service and/or to cancel the Plan should it subsequently be discovered that the vehicle for which the Plan was purchased was not eligible for Plan coverage.

NOTE: Place this Plan in your glove compartment or other secure place in the Vehicle. While your Vehicle is covered by this Plan, your Vehicle also may be covered by the manufacturer's warranty. For manufacturer's warranty coverage details, please refer to your warranty information booklet THIS PLAN DOES NOT COVER ANY REPAIRS OR SERVICES WHICH ARE COVERED BY THE MANUFACTURER'S WARRANTY.

OBTAINING PLAN SERVICE: To obtain service undor this Plan, you should return and present this contract to the Dealer who sold you the Plan. In the event you cannot return the Vehicle to the selling Dealer for service, you may request service from any Dealer within the United States, Canada, Guam, Puerto Rico or Mexico

IMPORTANT! SERVICE OBTAINED FROM A PERSON OTHER THAN AN AUTHORIZED DEALER IS NOT REIMBURSABLE UNDER THIS PLAN UNLESS AUTHORIZED BY US AND YOU RECEIVE AN AUTHORIZATION NUMBER BEFORE THE SERVICE IS PERFORMED. DEALERS CANNOT AUTHORIZE REPAIRS UNDER THIS PLAN. Authorized repairs will be made *using rtmanufacturad parts*. If remanufactured parts are not available, the Deafer will use new part*.

ELIGIBLE VEHICLES: Current model year and up to 12 model yoars prior covered by an active 5/60 Powertrain Limited Warranty or longer with no more than 125,000 miles of service are eligible for this Plan.

IMPORTANT! The following are not eligible for a Vehicle Protection Plan: Vehicles registered outside of the United States, Guam and Puerto Rico; right-hand drive vehicles (except vehicles manufactured by FCA US LLC); motor homes; taxis; limousines (except vehicles manufactured by FCA US LLC and vehicles placed In van pool service); emergency vehicles (ambulance, fire, police pursuit); vehicles used for postal service (except vehicles manufactured by FCA US LLC); vehicles used for dump truck or severe off-road use; vehicles converted from two to four-wheel drive; vehicles altered or converted from the original manufacturer's specifications; vehicles not used In accordance with manufacturer's specifications for payload and/or towing capacity; vehicles equipped with a diesel engine (except vehicles manufactured by FCA US LLC, Ford Motor Company, General Motors and Volkswagen); vehicles that operate on other than gasoHne or diesel fuel systems (Ia natural gas, electric); vehicles equipped with NorthStar engines; vehicles equipped with engines greater than 8 cylinders (except vehicles manufactured by FCA US LLC); vehicles with a gross weight (G.V.W.) of over 10,000 pounds; one-ton vehicles used for commercial use (such as Ram 3500 and trucks that are equivalent); ALL cab and chassis vehicles (Including pickups ordered with box delete option); vehicles where the manufacturer warranty has been voided or restricted by the manufacturer; vehicles that have been declared to be a total loss by any insurance company, are rebuilt after being declared a total loss, or are issued a title indicating that the vehicle Is designated as 'salvage', 'Junk', 'rebuilt' or words of similar Impact

WHEN PLAN COVERAGE STARTS AND ENDS: Plan coverage begins on the date you purchased the Plan for (I) a Vehicle component not covered by the manufacturer's warranty; (ii) Trip Interruption; (ill) Car Rental in respect to covered repairs when a replacement vehicle b not otherwise provided; and (iv) Taxi Reimbursement Plan coverage begins on the date the manufacturer's warranty ends for. (i) any Vehicle component covered under the manufacturer's warranty; and (11) Roadside Assistance.

Plan coverage expires on 07/01/2018.

S200.00 DEDUCTIBLE: You are responsible to pay only the first $200.00 of the total cost of the Vehicle's covered component repairs performed during each repair visit. Repairs not covered by the Plan are your responsibility. When state and/or local taxes are Imposed upon the cost of repairs, you agree to pay state and/or local taxes in addition to the deductible.

COVERAGE UNDER THE PLAN: WHAT IS COVERED? The Plan wifl pay the total cost (parts and labor) less a deductible per visit, to correct any of the following mechanical failures, caused by a defect In materials or workmanship of a covered component and are not covered by the vehicle's factory warranty. The only exceptions are those listed under "What Is not covered by the Plan*.

COMPONENTS COVERED BY THE PLAN INCLUDE (BUT ARE NOT LIMITED TO):

GASOLINE ENGINE: Cylinder Block and aH Internal Parts; Cylinder Head Assemblies; Timing Case, Timing Chain, Timing Belt, Gears and Sprockets; Variable Valve Timing Solenoids and Actuators; Harmonic Balancer; Oil Pump, Water Pump and Housing; Intake and Exhaust Manifolds; Flywheel with Starter Ring Gear, Core Plugs; Valve Covers; Oil Pan; Turbocharger Housing and Internal Parts: Turbocharger Wastegate Actuator; Supercharger; Fuel Injectors (excluding clogged Injectors); Serpentine Belt Tensioner; Seals end Gaskets

DIESEL ENGINE: Cylinder Block and all Internal Parts; Cylinder Head Assemblies; Timing Gears and Cover, Harmonic Balancer OH Pump; Water Pump and Housing; Intake and Exhaust Manifolds; Core Plugs; Valve Covers; Oil Pan; Turbocharger Housing and Internal Parts; Fuel Injection Pump and Injectors (excluding clogged Injectors); High Pressure Oil Pump; High Pressure Oil Ralls, Seals and Gaskets.

TRANSMISSION: Transmission Case and all Internal Parts; Torque Converter; Orive/Flex Plata; Transmission Range Switch; Transmission Control Module; BBH Housing; OH Pan; Gear Shifter and Shifter Mechanism; Seals and Gaskets.
NOTE: MANUAL TRANSMISSION CLUTCH PARTS ARE NOT COVERED AT ANY TIME.

FOUR-WHEEL DRIVE (4x4): Transfer Case and ail Internal Parts; Axle Housing and all Internal Parts; Axles Shafts; Axle Shaft Bearings; Drive Shafts Assemblies (Front and Rear); Drive Shaft Center Bearings; Wheel Bearings; Universal Joints and Yokes; Disconnect Housing Assembly; Seals and Gaskets.

ALL-WHEEL DRIVE (AWD): Power Transfer Unit and all Internal Parts; Viscous Coupler, Axle Housing and all Internal parts; Constant Velocity Joints and Boots; Rear Driveline Module; Drive Shall and Axle Shall Assemblies, Wheel Bearings; Differential Center Assembly and all Internal Parts: Output Bearing, Output Range; End Cover, Overrunning Clutch, Shill Motor; Vacuum Motor, Torque Tube; Pinion Spacer and Shim; Seals and Gaskets.

FRONT WHEEL DRIVE: Transaxle Case and all Internal Parts; Axle Shaft Assemblies; Constant Velocity Joints and Boots: Shifter Mechanism; Wheel Bearings; Differential Cover; OH Pan; TransaxJe Speed Sensors; Transaxle Solenoid Assembly; PRNDL Position Switch; Transaxle Electronic Controller, Torque Converter; Seals and Gaskets
NOTE: MANUAL TRANSMISSION CLUTCH PARTS ARE NOT COVERED AT ANY TIME

REAR WHEEL DRIVE: Rear Axle Housing and aH Internal Parts; Axle Shafts; Axle Shaft Bearings: Drive Shaft Assemblies; Drive Shaft Center Bearings; Universal Joints and Yokes; Seals and Gaskets.

STEERING: Steering Gear Housing and all Internal Parts; Power Steering Gear; Inner Tie Rods; Outer Tie Rods; Drag Link; Idler Arm; Pitman Arm; Steering Stabilizer; Power Steering Pump end Reservoir; Power Steering Motors; Power Steering Pump Cooler, Steering Shafts (upper and lower); Steering Shaft Lower Coupling; Telescoping Steering Column Motors; Rack and Pinion Assembly, Rack and Pinion Boots; Electronic Steering Motor; Seals and Gaskets

AIR CONDITIONING/HEATING: Factory or Manufacturer-authorized air conditioning InstaBations only. Air Conditioning Compressor; Clutch; Coil, Condenser, Front Evaporator; Rear Evaporator Receiver-Drier, Expansion Valve; HOBOS and Lines; Low Pressure Cut-off Switch; High Pressure Cut-off Switch; Clutch Cycling Switch; Front Instrument Panel Control Assembly; Rear Instrument Panel Control Assembly; Power Module; Blend Air Door Actuators and Motors; Housing, Front and Rear Air Conditionlng/Healer Blower Motor; Blower Motor Resistor; Heater Core; Seals and Gaskets.

ENGINE COOLING & FUEL: Cooling Fan, Clutch and Motor; Radiator; Coolant Temperature Switch; Fuel Pump; Water Pump and Housing; Active Grille Shutter System; Fuel Tank Sending Unit; Fuel Pressure Regulator; Fuel Pressure Sensor, Fuel Tank and Lines; Serpentina Balt Tensioner, Engine OH Cooler; Transmission Oil Cooler; EGR Cooler; Evaporative Emissions Leak Detection Pump and Monitor; Knock Sensor, Oxygen Sensor, Emissions Maintenance Reminder Module; Intake Air Temperature Sensor, Vapor Canister and Hoses; Seals and Gaskets.

FRONT SUSPENSION: Shocks; Shock Mounts; Struts; Strut Mounts, Bushings and Bearings; Upper and Lower Control Arms; Control Arm Bushings; Thrust Arms; Upper and Lower Ball Joints; Coil Springs; Torsion Bars; Air Suspension System; Front Wheel Bearings.

REAR SUSPENSION: Rear Leaf Springs; Rear Coil Springs; Auxiliary Springs; Spring Interilner; Spring Bushing; Spring Shackle; U-Bolt Rear Spring; Spring Hanger; Axle Trac Bar, Lateral Link Arm; Shocks; Shock Mount Plate; Struts; Strut Mounting Plates; Strut Bushings; Rear Trailing Arm Assembly; Rear Torsion Arms; Rear Torsion Bars: Rear Stabllizer/Sway Bar; Rear Stabilizer/Sway Bar Link; Rear Stabllizer/Sway Bdr Bushing; Rear Wheel Bearings.

BRAKES: Master Cylinder, Assist Booster; Wheel Cylinders; Disc Brake Calipers and Pistons; Brake Lines, Hoses, Fittings; Proportioning Valve; Seals and Gasketa.
NOTE: BRAKE SHOES, PADS, ROTORS, AND DRUMS ARE NOT COVERED AT ANY TIME.

ANTI-LOCK BRAKES (ABS): Brake System's Hydraulic Assembly; Pump Motor Assembly; Controller; Sensors and Relays; Seals and Gasketa.

ELECTRICAL Starter Motor and Solenoid; Generator (Alternator); Engine Control Module - (Single Module Engine Controller) (5MEC): Powertrain Control Module; Distributor; Ignition Module; Ignition Coll. Coll Pack Assembly; Voltage Regulator; Horn and Horn Pad; Transmission Control Module; All Wiring Harnesses; Electronic Fuel Injection System (excluding clogged injectors); Windshield Wiper Motor, Rear Window Wiper Motor, Wiper Control Module; Manually Operated Electrical Switches; Neutral Safety Switch. Temperature Sending Unit/Switch; Oil Level and Oil Pressure Sending Unit/Switch; Body Computer; Body Control Module; Factory Installed Radio, Speakers and Rear Entertainment Systems (Includes CD and DVD Player); Factory Installed Navigation Systems (excludes navigation disc); Audio Amplifier; Height Adjustment Compressor; Gateway Module; Ignition Module, Factory Installed U-Conned System.
NOTE: REMOTE TRANSMITTERS AND HEADPHONES ARE NOT COVERED AT ANYTIME.

INSTRUMENTATION: Electronic Instrument Cluster, Amp/Voltmeter Gauge; Fuel Gauge; Temperature Gauge; Tachometer; Oil Pressure Gauge; Turbo Gauge; Speedometer.

POWER GROUP: Rear Window Defroster; Power Window Motors; Power Window Flox Track; Power Antenna; Power Seat Motors, Power Door Locks end Linkage; Power Sliding Rear Window Motor and Regulator (Trucks); Power Sliding Door Motors; Power Uflgate; Vacuum Pump.

LUXURY GROUP: Keyless Entry Sensors and Receiver/Module; Trip Computer, Message Center; Overhead Electronic Vehicle Information Center, Overhead Electronic Compass/Temperature; Power Sunroof Motor; Convertible Top Motor; Electric Mirror Motor and Controls; Cruise Control Servo; Headlight Door Motor; Concealed Headlamp Module; Perk Assist Module; Park Assist Sensors; Beck Up Assist Camera; Door Latches; Heated Seat Systems; Factory Installed Remote Start System; Heated Steering Wheel; In-Vehlde Wireless Charging Station; USB Outlels; 120V Outlets.
NOTE: REMOTE TRANSMITTERS ARE NOT COVERED AT ANY TJMe.

ENGINE EMISSIONS: Air Pump; Air Supply Hose; Leak Detection Pump; Evaporative System Detector/Monitor; Vapor Canister; Air Injection Velve; EGR Valve; EGR Cooler; Aspirator Tube; Fuel Took Pressure Sensor EGR Tube; Purge Solenoid; Knock Sensor Oxygen Sensor, Diesel Exhaust Fluid (DEF) System.
NOTE: CATALYTIC CONVERTOR AND PARTICULATE FILTER ARE NOT COVERED.

SAFETY SYSTEMS: Airbags (excluding deployed airbags); Impact Sensors; Occupancy Sensors; Seatbelt Retractors, Seal Belt Buckles; Modules; Sensors; end Switches.
NOTE: AIR BAGS THAT HAVE BEEN DEPLOYED ARE NOT COVERED AT ANYTIME.

MOPAR ACCESSORIES: All electrical and mechanical Mopar accessories are covered provided they were installed by an authorized Dealer; Audio Systems (including Compact Disc Players); Sirius Satellite Radio; Speed Control; EVS (Security Systems); Clocks; Remote Trunk Release; Transmission OK Cooler; Remote Control Outside Mirrors; Power Sliding Rear Window Assembly (Trucks); Rear Seat Video Entertainment Systems (including DVD Players); Remote Start System (excluding transmitters); MoparConnecl
NOTE: MOPAR PERFORMANCE PARTS ARE NOT COVERED AT ANY TIME

OTHER PLAN BENEFITS: The Plan also provides the following Trip Interruption, First Day Rental, Rental Allowance. Taxi Reimbursement, and Roadside Assistance benefits.

TRIP INTERRUPTION: The Plan will pay up to $1,000 for lodging, meals, and emergency transportation such as tan, bus, or airline for you and your family If (1) your vahlde Is Inoperable due to a failure covered under this Plan or under the factory warranty, and (2) you are more than 100 miles from the address of record. Lodging, meals and car rental receipts must accompany a copy of repair bill and must be mailed to Vehlde Protection, PO. Box 2700, Troy, MchJgan 46007-2700.

FIRST DAY RENTAL First Day Rental Allowance provides $35.00 car rental allowance if the Vehide is to be serviced for any same day mechanical repair or maintenance service. Vehicles kept overnight are not eligible for First Day Rental. Please note: Excludes rental for bodywork to the exterior sheet metal/composite panel or frame collision repairs.

RENTAL ALLOWANCE: Rental Allowance will pay up to $35.00 per day for a rental any time repairs take overnight, and a component covered by the Plan or the manufacturer's 8asic or Powertrain Warranty fails.

The Plan will not pay for rental charges for a vehicle that is awaiting service or parts unless the vehicle is Inoperable due to a mechanical failure of a covered component, or unless continued operation would cause further damage.

The rental vehide must be obtained from a Dealer If a Dealer does not have rental vehldes available, you may obtain one from a licensed rental agency. Rental coverage Is subject to state end local laws and policies Imposed by the rental agency. Rental charges

in excess of the amount allowed by the Plan are your responsibility. The Plan Is not responsible for any refusal of a rental agency to rent a vehicle to you.

Total Rental Allowance per occurrence la a maximum of 5 days or $176.(10.

TAXI REIMBURSEMENT: Coverage starts on the data you purchase the Plan. The Plan provides up to a $35.00 for taxi cab fare, in lieu of First Day Rente) If the vehicle is to be serviced for any same day mechanical or maintenance service.

When a loaner car Is not available, or you are not eligible for a rental car, the Plan will pay up to $35.00 per day for taxi service, in lieu of car rental, any time mechanical repairs take overnight

Taxi receipts must be from a licensed taxi service provider. Taxi charges in excess of the amount allowed by the Plan are your responsibility.

Total Rental/Taxi Service Allowance per occurrence is a maximum of 5 days or $175.00,

ROADSIDE ASSISTANCE*

NOTE: YOU MUST CALL 086-517-4600 FOR THIS SERVICE

The Plan provides assistance due to a disablement caused by any mechanical failure and in addition, the Plan provides coverage for such Items as towing to the nearest Dealer or authorized repair facility, flat tire change (with your good spare), battery jump, out of gas delivery (maximum 2 gallons), lockout service La. keys locked In car or frozen lode, to a maximum of $100, per occurrence. Any expense beyond $100 Is your responsibility at the time and site of service. Towing assistance will be dispatched only far mechanical disablements which renders the vehicle Inoperative. (See exclusions under "THE PLAN WILL NOT COVER.*)

This service is provided to you as part of your Plan to minimize any unforeseen vehicle operation inconvenience snd is available 24 hours per day, 365 days per year.

HOWTO USE ROADSIDE ASSISTANCE": All required towing, roadside assistance, lockout, and other roadside assistance services described previously MUST BE ARRANGEO AT TIME OF OCCURRENCE through Roadside Assistance by calling 666-517-4500. You should be prepared to provide the representative with your name, your PIBH number, vehicle license plate number, your location Including the phone number you are calling from and a brief description of the problem.

In some cases, Roadside Assistance may authorize you or your Dealer to arrange for local service and will provide a reference number to do so. Your Plan will In these Instances provide reimbursement of up to $100 maximum per Roadside Assistance incident, provided that the claim contains: (A) A valid original receipt of payment from the tow/repair facility for the services rendered (Claims which contain other than original receipts may be denied.); (B) The Roadside Assistance reference number; and (C) Your valid Plan number. All Roadside Assistance claims that meet requirements should be mailed or faxed to:

Roadside Assistance
P.O. Box 9145
Medford, MA 02155
Attn: Claims Department
666-517-4500
FAX: 1-781-656-2691

ROADSIOE ASSISTANCE WILL NOT COVER SERVICES WHICH ARE SOLICITED WITHOUT FIRST CONTACTING ROADSIDE ASSISTANCE FOR PRIOR AUTHORIZATION.

*AIJ Roadside Assistance services are provided through Cross Country Motor Club, Inc, Thousand Oaks CA 91360, except in Alaska, California, Hawaii, Oregon, Wisconsin and Wyoming where services are provided through Cross Country Motor Club of California, Inc. Boston, MA 02155. Phone number 606-517-4500. Both collectively sometimes referred to as CCMC. CCMC acts merely as a dispatcher of referral service to persons or entities who provide the actual service These persons and/or entities are independent contractors. Accordingly, CCMC assumes no responsibility for the acts, errors, omissions, negligence, misconduct of such persons and/or entities. Alt persons availing themselves of the benefits of Roadside Assistance are to look solely to such persons and/or entities for liability arising in connection therewith, and not to CCMC.

DIAGNOSTIC CHARGES: You may be asked to authorize disassembly and/or diagnostics at the time your Vehicle repair order Is written. Your Plan covers disassembly end/or diagnostic charges IF the cause of failure Is a covered component under the terms of

the Plan. If the repair is not covered by the Plan, you will be responsible for paying the disassembly and/or diagnostic charges end non-covared repairs.

YOUR ADDITIONAL RESPONSIBILITIES: It is your responsibility to properly operate, care for and maintain the Vehicle as prescribed in the owner's manual supplied by the manufacturer. If you fail to properly operate, care for and maintain the Vehicle as prescribed in the owner's minus! supplied by the manufacturer, we may deny your claim under the Plan. You should retain all maintenance records and receipts to avoid any misunderstanding as to whether or not the maintenance services were performed as required.

We reserve the right to inspect the Vehicle, Investigate circumstances relating to the requested repairs In any manner, or demand proof of maintenance BEFORE repairs may begin or are authorised.

THE PLAN WILL NOT COVER, OR APPLY TO LOSS OR EXPENSE RESULTING FROM:

- Repairs or replacement of any component covered by any of the Vehicle manufacturer warranties, Certified Warranty, part manufacturer warranties or recall policies; roadside assistance, loaner vehicles or other services which are eligible to be covered by the Vehicle's manufacturer warranty or marketing programs;
- Repairs required as a mult of other than a manufacturing defect (such as a design defect or normal wear);
- Repair or replacement of any covered component when It has been determined that the condition existed prior to purchasing the Plan;
- Plan benefits whore the Vehicle odometer reading has been stopped or altered and/or the Vehicle's actual mileage cannot be readily determined;
- Brahe pads, shoes, rotors and drums am not covered at any time (regardless of causa of failure);
- Reimbursement of services/benefits that exceed the total number of services/allowance included In Plan Covarage;
- Battery and cables, any battery fora component, spark plugs and wires, lights (bulb, sealed beams, lenses), suspension alignment, whsel balancing, wiper blades, exhaust system components, heat shields and exhaust hangers; throttle body cleaning; evaporator deodorizing; carbon cleaning;
- Plan benefits necessary aa a result of (a) failure to properly care for or maintain the Vehicle; (b) fire, accident, abuse, vandalism, negligence or Act of God including but not limited to the Vehicle rendered inoperable due to snow, Ice or flood; (C) failure to property operate the Vehicle; (d) Vehicles that have been used or are being used for competitive speed events such as races or acceleration trials; (e) pulling a trailer that exceeds the rated capacity of the Vehicle or failure to adhere to the requirements for vehicles used to pull a trailer as outlined In the owner manual supplied by the manufacturer; (f) tampering with the emission system or with any parts that could affect that system; (g) use of dirty fluids, or fuels, refrigerants or other fluids which are not recommended by the manufacturer; (h) failure due to fluid contamination or sludge; (I) modifications not approved or recommended by the manufacturer; (j) overloading rated payload capacity of the Vehicle; (k) damage Incurred by off-road usage;
- Plan service obtained from other than a Dealer unless authorization Is first received from us. FCA U8 Vehicles must return to a FCA US LLC Dealer for Plan covered repairs; (Dealers cannot authorize repairs.)
- Repairs required as a result of use of other than the Vehicle manufacturer's parts during the term of the Plan, unless authorized by us;
- Repairs to a covered component caused by the failure of a non-covered component and/or an aftermarket Installation not performed by a Dealer, or any outslds Installation of "salvage or junk" components In conjunction with an Insurance or damage claim. Alt part Installations to satisfy such claims must be with new or factory authorized remanufactured components and parts;
- Bodily Injury or proparty damage arfalng or allegedly arising out of a defect in the design, manufacturer, materials or workmanship of a covered component;
- Any fines, fees or taxes which are associated with Impound towing as a result of actual or alleged violation of any tews or regulations;
- Plan benefits to Vehicles operated outefda of the United States, Canada, Guam, Puerto Rico and Mexico;
- Plan benefits to Vehicles registered outside of the United States, Guam and Puerto Rico;
- Exterior - tires; body sheet metal; glass; plastic lenses; paint; bright metal; bumpers; side-view mirrors (gists/ housing); wheel covers; steel wheels; aluminum wheels; rusted or frozen rims; weatherstrips; rust; water leaks; restricted drain tubes; wind noises; all outer body panels; spoilers; plastic and fiberglass body parte; vinyl tops; convertible top fabric; repairs or damage caused by environmental factors such ae acid rain, tree sap, salt or ocean •pray;
- Interior - trim; carpet; upholstery; dash pad; door and window hancfiea; knobs; buttons; moldings; arm rests and head liner, cargo cover;

- **Mechanical - manual dutch aaaombly; repairs to snow plows, winches and trellsr hitches regardless of their installation; damage to flywheel as a result of clutch failure;**
- **Shop supplies, waste disposal fees and materials;**
- **Maintenance services specified In tho owner* manual and the parts used In connection with such services;**
- **Repairs or replacement to components covered fay the Hybrid System Limited Warranty (refer to Warranty booklet for details);**
- **Portable Units Including but not limited to - key fobs; remote transmitters; headphones; I-Pods; GPS units; DVD players; laptop computers; cellular phones; any hand-held device; Navigation DVD;**
- **Repair or replacement of Performance parts, Performance enhancing parts;**
- **Any economic loss of any kind, Including but not limited to rental car expenses, consequential damages, Incidental damages, or other losses that relate in any manner to your use or loss of use of the Covered Vehicle.**

CANCELLATION AND TRANSFER POLICIES: During the term of the Plan, you have the option Io:

- CANCEL the remaining Plan coverage and receive a full or pro-rata refund or;
- **AUTHORIZE** TRANspgR of the remaining Plan coverage to the 1** subsequent owner.

Note: Refer to the cancellation/transfer policy section below for details.

CANCELLATION POLICY; If you are the original purchaser of the Plan, and coverage under the Plan has not expired or been terminated, you may cancel If you have not authorized transfer of Plan coverage to a new owner. To cancel *the* Plan *you may taka your Plan to any* Dealer. The Deafer will contact us to request termination of your conlred.

if your Vehicle is repossessed or rendered a total loss end your Plan was financed with your vehicle, your rights under this Plsn transfer to the lienholder. The lienholder Is then responsible or requesting termination of the Plan through the Dealer where the Plan was purchased. If the Plan was not financed, any refund due will be paid to you by check In your name from Us.

If there Is no Dealer In your area, mall your cancellation request along with your Ran Provisions, proof of payoff and current mileage on the Vehicle to:

Vehicle Protection
Cancellation Department
P.O. Box 2700
Troy, MI 46007-2700

Please specify the Option Code(s) you wtsh to cancel. Option codes can be found on the first page of this document below Option Description.

On cancellation requests by you within the first 60 days from the original purchase date of the Plan, the Contract Holder will be refunded the full amount paid for the Plan, provided no claims have been paid against the contract In the event a claim has been paid, the refund will be the full amount you paid for the Plan, less any claims paid.

After 60 days, If you cancel, your refund will be the foil amount you paid for the Ran, less a pro-rata adjustment for time or mileage used, whichever Is greater, less a cancellation fee as indicated below.

We reserve the right to cancel the Plan after Issuance should It be discovered that: (a) the Vehicle Is Ineligible or has been modified/altered to make It Ineligible after Plan coverage has been in effect; (b) failure of the customer to maintain the Vehicle as prescribed by the manufacturer; (c) the odometer has been tampered with or has not been repaired by the customer, (d) non-payment of premium or (e) the Vehicle Is registered outside of the of the United States, Guam, and Puerto Rico. Your refund will be based on the full amount you paid for the Plan, less a pro-rata adjustment for the time or mileage used, whichever is greater, less claims paid.

•Request* Received - The cancellation refund will be based on the date we receive written notification of the cancellation raquesL

A cancellation refund check will be made payable and Issued to you If no Hen exists. Whenever a Hen exists, the cancellation refund check will be made payable and issued to the lienholder.

CANCELLATION FEES
(Applies to the state where the Plan was purchased)

STATE	AMOUNT
Florida	5% of the refund amount

TRANSFER POLICY; The original purchaser may authorize transfer of coverage, provided the Plan has not been canceled. Remaining Plan coverage may be transferred to the first subsequent purchaser of the vehicle AT TIME OF VEHICLE SALE ONLY. Thereafter, the Plen la non-transferable.

To transfer this service contract, complete the attached transfer form. Be sure to include your signature. This means you are authorizing transfer of Plan coverage to the new owner. Transfer requests will not be processed; (a) without the signature of the owner for whom these Pten Provisions were originally issued; or (b) If received after 60 days from the date of vehicle ownership change.

You may taka your Plan with the completed transfer form and transfer fee to an authorized Dealer to process the Plan transfer or mall to:

VEHICLE PROTECTION
TRANSFER DEPARTMENT
P.O. BOX 2700
TROY, MI 48007-2700

The transfer fee Is as follows;

TRANSFER FEES
(Applies to the state where the Plan was purchased)

STATE	6MOUMI
Florida	$40

- Upon acceptance by Vehicle Protection, a new policy will be Issued to the new policy holder and a new set of Plan Provisions will be mailed confirming the transfer request

SPECIAL STATE NOTICES - FLORIOA

FCA Service Contracts LLC's License Number for the State of Florida Is; 65505. (This number applies to consumers who have purchased a Vehicle Protection Plan In the State of Florida.)

You may also cancel if Iha original purchaser has transferred coverage to you pursuant to the Transfer Policy prevision of this Plan.

The rata charged for this agreement is not subject lo regulation by the Florida Office of Insurance Regulation.

Notics to consumers who financed their contract through Ford Motor Credit Company (FMCC)
* The lots! of aH benefits payable under this Plan shall not exceed the purchase prira of the vettde.

NEED HELP OR ASSISTANCE WITH YOUR PLAN?
IS YOUR ADDRESS UP-TO-DATE?

PLEASE ACCESS OUR SELF-SERVICE WEBSITE FOR PLAN COVERAGE AND FREQUENTLY ASKED QUESTIONS AT:
www.moDarVBhlolonrotBctlop,,pm

You can also write to:
Mopar Vehicle Protection
P. O. Box 2700
Troy, MI «007-2700

Note: All requests mutt contain your Name, Plan Numbar, and Vehicle Identification Number

Toll-Free Telephone Assistance is Available
8:00 a.m. to 8:00 p.m. Eastern Time Monday through Friday
9:00 a.m. to 5:00 p.m. Eastern Time Saturday
1-800-521-9922 (In USA)
1-800-485-2001 (In Canada)

For 24-Hour Roadside Assistance Coverage
'Services dependant upon coverage purchased,
1-800-521-2778

TRANSFER FORM: SEE TRANSFER POLICY FOR DETAILS			
PUNMX 41702955	VEHCL6 tOENmCAUDN NO. 3C63RRGL0EG106376	OPTION coogst	
FORM MUST BE FILLED OUT COMPLETELY	CURRENT OOOUEIEJt READMQ (QUJT TENTHS)	CHECK MILES OR KILOMETERS LH.E6 UWLOMSTERS	
TRANSFER	**TRANSFER THE REMAINING COVERAGE FOR THE LISTED VEHICLE TO THE PERSON NAMED BELOW. ENCLOSED IS A CHECK OR MONEY ORDER FOR TtiE TRANSFER FEE AMOUNT.**		
TRANSFER FEE AMOUNT *	CHECK OR MONEY ORDER ENCLOSED (PAYABLE TO FCAUSL1X) U VISA (J MASTERCARD	CREDIT CARONO.	EXPIRATION DATE
NAME (PLEASE PAMT)		AREA CODS A TELEPHONE NO.	
ADDRESS		VEHICLE PURCHASERS SIGNATURE	DATE OF VEHICLE PURCHASE
CITY. STATE ■ ZIP		VEMCIE SELLER 6 SIGNATURE	

Notes:

Certain Options are not eligible for Transfer. Please refer to the Transfer Policy* paragraph for 'each Plan Option* to verify transfer eligibility.

Transfer fee applies for each option being transferred.

Please print the "Option Code(s) that you want transferred to a new owner In the 'Option Code* space provided above. Option Code(s) can be found on the first page of your Plan below Option Description.

This page left blank intentionally

BUYERS GUIDE

IAJgJRTAIW Spoken pron Λg/\Λdlfflgi/\, to enforce. Ask the dealer to put all promises in writin Λ* ΛMP this forn.

VEHICLE MAKE		VEAft	VW NUMBER
38612	uooa.	2/\4	3C63RRGL0EG108376

OEALCR STOCK NUMBER (OptfofuQ

WARRANTIES FOR THIS VEHICLE:

☐ **AS IS - NO WARRANTY**

YOU WILL PAY ALL COSTS FOR ANY REPAIRS. The dealer assumes no responsibility for any repairs regardless oLeny oral statements about the vehicle.

☑ **WARRANTY** LK 50 /-/4 50

☐ FULL STLIMITED WARRANTY. The dealer will pay ____% of the labor and ____% of the parts for the covered systems that fail during the warranty period. Ask the dealer for a copy of the warranty document for a full explanation of warranty coverage, exclusions, dntnfTB tiealer's repair obligations. Under state law, "implied warranties" may Λhreyou even more rights.

SYSTEMS COVERED:

LIMITED BUMPER TO BUMPER WARRANTY.
Dealer will cover 50% of our costs of parts and labor on Factory Issued pjms and lift kits. Warranty does not cover non-factory installed stereo equipment. Purchaser will cover the remaining 50%. ALL WORK MUST BE PERFORMED AT GIBSON TRUCK WORLD. ANY WARRANTED REPAIRS AUTHORIZED TO BE PREFORMED AT ANOTHER LOCATION REQUIRE PREAPPROVAL BY GIBSON TRUCK WORLD BEFORE REPAIRS ARE INITIATED. Customer must call Gibson Truck World prior to starting imy work covered under our Bumper to Bumper Wairanty.

DURATION:

This warranty covers a period of 12 months or 6000 miles of noimal driving conditions, whichever occurs first.

☐ SERVICE CONTRACT: A service contract is available at an extra charge on this vehicle. Ask for details as to coverage, deductible, price, and exclusions. If you buy a service contract within 90 days of the time of sale, stale law "Implied warranties" may give you additional rights.

PRE PURCHASE INSPECTION: ASK THE DEALER IF YOU MAY HAVE THIS VEHICLE INSPECTED BY YOUR MECHANIC EITHER ON OR OFF THE LOT.

SEE THE BACK OF THIS FORM for important additional Information, including a list of some major defects that may occur In used motor vehicles.



You CAN NOT have your truck diagnosed or serviced anywhere else and expect us to pay. NO EXCEPTIONS!! Verbal representations are worthless. If you initiate and approve repairs

WE WILL NOT PAY

Gibson Truck World's Costs for Rebuilt Transmissions

Stock # 34612

Dodge:	48 RE	=	51,300
	48 RED (Diesel)	=	51,500
Chevy:	4L60E	=	51,200
	4x4	=	51,300
	4L80E	=	51,300
	Alison	=	52,000
Ford:	4R100	=	51,300
	5R11	=	51,500

An additional $100 mil be charged for all 4-Wheel Drive Vehicles

Gibson Truck World will pay 50% of OUR cost of parts and labor.

If a Power Adder (programmer or chip) or Shift Kit is installed on the vehicle after purchase, If the vehicle is altered in any way and/or if the Exhaust System, including **removing catalytic converter or** emissions, has been modified and/or removed, the warranty will be voided

I understand that if I get my Gibson Truck repaired somewhere else other than at Gibson Truck World I must get approval from Gibson Truck World Service Department first and I will receive 50% off of the above prices.

Light bulbs in Cluster and Radio are not covered.
Non-Factory stereo equipment will not be covered.

X L. did

By signing this I acknowledge and agree to these terms

O&J/b//CD
Date

GTWREBUILDTRANS 11/13

Below is a list of some major defects that may occur in used motor vehicles.

Frame & Body
- Frame • creeks, corrective welds, or rusted through
- Doglraeks • bent or twisted frame

Engine
- Oil leakage, excluding normal seepage
- Cracked blook or heed
- Belts missing or Inoperable
- Knocks or misses related to camshaft litters and push rods
- Abnormal exhaust discharge

Transmission & Drive Shaft
- Impropsr fluid Isvol or leakage, secluding normal seepage
- Cracked or damaged case which Is visible
- Abnormal nolaa or vibration csused by faulty transmission or drive shaft
- Impropsr shifting or functioning In any gear
- Manual clutch stipe or chatters

Differential
- Impropsr fluid level or leakage excluding normal seepage
- Cracked or damaged houalng which Is visible
- Abnormal nolaa or vibration oauaad by faulty differential

Cooling System
- Leakage Including radiator
- Improperly functioning water pump

Electrical System
- Battery leakage
- Improperly functioning alternator, generator, battery, or starter

Fuel System
- Visible leakage

Inoperable Accessories
- Gauges or warning devices
- Air conditioner
- Hester & Defroster

Brake System
- Failure warning light broken
- Pedal not Ilrm under pressure (DOR spec)
- Not enough pedal reserve (DOT apse.)
- Doss not stop vehicle In straight tins j0OT spec.)
- Hoses damaged
- Drum or rotor too thin (Mfgr. Specs)
- Lining or pad thickness less than 1AJ2 Inch
- Power unit not operating or leaking
- Structural or mechanical parts damaged

Steering System
- Too much free play at steering wheel (DOT specs.)
- Free play In linkage mors than 1/4 Inch
- Steering gear blnda or Jams
- Front wheats aligned Improperly (DOT specs.)
- Power unit belle cracked or slipping
- PowcMjnIt fluidlevel Improper

6ueponaion System
- Ball joint seels damaged
- Structural parta bent or damaged
- Stabilizer bas disconnected
- Spring broken
- Shock absorber mounting loose
- Rubber bushings damaged or missing
- Radius rod damaged or missing
- Shock absorber leaking or functioning Improperly

Tires
- Tread depth less than 2/32 Inch
- Sizes mismatched
- Visible damage

Wheels
- Visible cracks, damage or repairs
- Mounting bolls loose or missing

Exhaust Syatam
- Laakaga

DEAUfl

ADDRESS

SEE FOR COMPLAINTS

CUSTOMER SIGNATURE (Dealer's Option) IIiiier/\iiPTowUdgvrocdstolthto Λ yPIQvIdvHPuckralngofeili Mit

IMPORTANT: The information on (his form Is part of any contract to buy this vehicle. Removal of this label before consumer purchase (except for purpose of test-driving) Is a violation of federal law (16 C.F.R. 455).

EXHIBIT E

Boniface-Hiers

Chrysler Dodge Jeep Ram

1775 E. Merritt Island Causeway
Merritt Island, FL 32952
Phone: 321-452-8181
Fax: 321-459-1301
DgService@bonffacBhlers.com
www.bonifacehters.com

SERVICE INVOICE

STATE OF FLORIOA REGISTRATIONI MV-04405

amowtRio B3876	ACMSOH CRAIG	1014	1092	MvaccDxre 01/06/17	Nvaato CHCS146291
LES KROL 5336 SAN SEBASTTAN WAY # H206 ROCKLEDGE, FL 32955	UIMUt		HLIAOt 120,248	ODUM /	STOCK MO.
	TtAK/UDftfiIUOOCL 14/RAM/3500/4WD CREW CAB 169"			DEUVCWOUI	OEurarMua
	VEHICLE LEL NCL 3C63RRGL0EG108376			BEHmaOLALERNQ	pAfibucnoMDOS
	F.T.E.NO.	raio.		R.aoaE 12/30/16	
DEPT PHONE 321-482-2S07	BUSINESS PHONE	GaMUMfB			MO: 120249

JOB# 1 CHARGES

LABOR

3# 1 OOCHZOOOw MULTI-POINT INSPECTION. INCLUDES INSPECTION OF THESE AND ADDITIONAL ITEMS (NOT LISTED). ASK YOUR SERVICE ADVISOR FOR DETAILS. TIRES/TIRE PRESSURE. WINDSHIELD WIPERS. EXHAUST SYSTEM. EXTERIOR LAMPS. COOLING SYSTEM HIXTURE7LEAKS. AIR FILTER. STEERING COMPONENTS, FLUID LEVELS. BELTS/HOSES. COHPLETED — TECH(S):1729 — WARRANTY

JOB# 1 TOTALS

JOB# 1 JOURNAL PREFIX CHCS JOB# 1 TOTAL 0.00

JOB# 2 CHARGES

LABOR

0# 2 09CHZ ENGINE CUSTOMER STATES THE ENGI HAS HISTORY AT GATOR. CSC DATA SCAN. HAS COOE P229F NOX SYSTEM PERFORMANCE. FUEL RUN UP NUMBER 1 CYLIJDER HIGH PERFORMANCE. REPLACE NUMBER ! INJECTOR AND FUEL TUBE. TEST DROVE OKAY NON. AUTH # PA USQ9441370103 CALLED IN FOR AUTH ERIC . — (Sita729 — WARRANTY

PARTS	QTY	FP	NUHBER	DESCRIPTION	UNIT ICE	
	1		5175565-AC	CONNECTOR 09004009		WARRANTY
	1		50B6668-AC	O RING NO 14099004		WARRANTY
	1		68210105-AA	INJECTOR 14099006		WARRANTY
	1		68210105-AA	CORE RETURN *		WARRANTY
	1		68031602-AA	O RING FU 74099004		WARRANTY
	1		68015004-AA	SEAL FUEL 14099004		WARRANTY
	1		68005465-AA	GASKET NO 14062002		WARRANTY
	1		68024672-AS	GASKET IN 14962002		WARRANTY
				TOTAL - PARTS		0.00

HISC	CODE	DESCRIPTION	timoi NO.	
	WD	WARRANTY DEDUCTIBLE	146291	WARRANTY
	UP	WARRANTY DEDUCTIBLE CUSTOMER	146291	200.00
		TOTAL - HISC		200.00

JOB# 2 TOTALS

HISC 200.00

JOB# 2 JOURNAL PREFIX CHCS JOB# 2 TOTAL 200.00

SHOP SUPPLIES AND HAZARDOUS WASTE DI8PO8AL CHARGES

This charge represents cosb and praHte to the motor vehicle repair tedfity for hems such as miscellaneous shop supplies andfor waste disposal [e.559.9C4(4))

The State of Florida requires a 81.00 tee to be collected for each new lire sold In the state [s.403.710] and a $1.50 tee to be collected lor each new or ramanutadured battery sold In die state. (8.403.71851

ALL PARTS NEW UNLESS OTHERWISE INDICATED

JAN 06 2017

PLEASE SEE REVERSE «OE FOfl ADDTTIDNAL INFORMATION.

CHRYSLER DODGE Jeep RAM MDPRR

Boniface-Hiers

Chrysler Dodge Jeep Ram

1775 E. Merritt Island Causeway
Merritt Island, FL 32952
Phone: 321-452-8181
Fax: 321-459-1301
DgService@bonifacehiers.com
www.bonifacehiers.com

SERVICE INVOICE

STATE OF FLORIDA REGISTRATION « MV-W405

CvSTOMMHa **33876**	AOVTSOft **CRAIG**	IM NU **1092**	KWCtofil **01/06/17**
LES KROL **5336 SAN SEBASTIAN WAY # H206** **ROCKLEOGE, FT. 32955**	UIMMI	UCSMSB NOi	duwt **120,248**
	YEAR / MAKE / MODEL **14/WM/3500/4WD CREW CAB 169"**		axon / OKUWtVOOt
	LO NCL **Tfc/e B R R G L 0,E &MO 3 7 6**		SCUJffO OtAttM MX
	F.TLNa	ftaMX	RCXMrg **12/30/16**
S5T-TR-2507	BUWCfflrHCX	S55353fiT	

JWvOCtm **CHCS146291**	
STOCK NO.	
OtUVOff UAH	
rSooucTSSwiyoF	

MO: 120249

IUIALb

* NEXT RECOMMENDS) SERVICE:
* 12/30/2016 / 120249 MI 00CHZ200 100000+ MILE SERVICE

[ ] CASH [ ] CHECK OC NO. [3
[ ] VISA [ ] MASTERCARD [ ] DISCOVER
[ ] AHER XPRESS [3 OTHER [ ] CHARGE

TOTAL LABOR....	0.00
TOTAL PARTS...;	0.00
TOTAL SUBLET...	0.00
TOTAL G.O.G....	0.00
TOTAL HISC CHG.	200.00
TOTAL HISC DISC	0.00
TOTAL TAX.....	14.00
TOTAL INVOICE $	**214.00**

SHOP SUPPLIES AND HAZARDOUS WASTE DISPOSAL CHARGES
This charge represents costs end profits to the motor vehicle repair facility lor Hems euch as miscellaneous shop supplies and/or waste disposal [3.559.004(4)]

The Slate of Florida requires a $1.00 lea to be coflectsd lor each new tiro sold In the state [s.403.716] and a $150 tee to be collected lor each new or remenufadured battery sold in the state. [a.403.7185].

ALL PARTS NEW UNLESS OTHERWISE INDICATED

CU5TOMEK bJuNAJURE

PAGE 2 OF 2 CUSTOMER COPY [END OF INVOICE) 0213pm

PLEASE SEE REVERSE SIDE FOR AOOmCF &fS®8&fiAtt8tJJI

Phone:
Email:
VIN2:
Vehicle: 2015 DODGE Charger

RO#: 143312
Repair Date: 10/01/2016
Service Advisor: Mccarty , I S74761M v
Service Technician: Filch , C S65259N

Survey Return Qatar ifl/Qp/SQdB
Return Type: Online
Language: English
Scored: Yes

Recommend	
How likely are you to recommend (BRAND) to a friend or colleague	m
Rate your satisfaction with your vehicle on a scale of 0 to 16	1
Rale your satisfaction with your expetience on a scale of 0 to 10	m
[redacted]	m
Repair Quality	
[redacted]	[redacted]
What was not fixed?	NA
Which best describes the type of work you had performed at the dealership?	NA
Thoroughness of work performed	[redacted]
Condition and cleanliness of your vehicle upon return	
Scheduling	
How did you schedule your appointment?	Did not make an appointment, just dropped by
How many days did you wait for your appointment?	NA
Rate your satisfaction with the # of days you waited for your appointment	NA
Ease of scheduling your service appointment	NA
Alternate Transportation	
Was it necessary to leave your vehicle?	No
Were you offered alternate forms of transportation?	NA

Treatment	
Service staff on making you feel valued	m
Length of time it took to complete this service	[redacted]
Courtesy and professionalism of the dealership personnel	m wrtten
Timeliness of drop-off process	m
Service Advisor Satisfaction	
Overall experience with Service Advisor	[redacted]
Did Ihe Service Advisor take the timB to thoroughly understand and document your service request(s)?	m
Did the Service Advisor provide a cost estimate prior to performing any work on your vehlde?	[redacted]
Did the Service Advisor provide you wlih progress and completion updates?	No
Accuracy of cost estimate	[redacted]
Service Pickup	
Were you provided a completed multipoint inspection report?	[redacted]
Did service personnel explain all completed work and applicable charges to you?	[redacted]
Fairness of charges	[redacted]
Accuracy of time estimate	[redacted]
Overall Dealership	
Quality of the dealership's facility in terms of comfort, cleanliness, and condition	[redacted] !
Respondent Information	
Gender	Male

[redacted]

aBKVILtinVUK.li

CHRYSLER 6 *THBBr

GATOR

CHRYSLER • DODGE • JEEP
840 SOUTH HARBOR CITY BLVD. (US1)
MELBOURNE, FLORIDA 32901
PHONE: (321) 724-8011 www.galorchrysler.nat

DODGE Jeep.

SALES * SERVICE • PARTS * BODY SHOP
STATE OF FLORIDA REGISTRATION ● MV79431

Fax Qot 7363?Aq
Cas.ac 2a si 3883 Er;cq

CUSTOMER NO. ±812A1 | tWBRA PRODELL 11064 | RO NO 4906 | INVOICE 12/27/16 | CARD ID 592

LES KROL
5336 SAN SEBASTIAN WAY # H-206
KOCKLEDGE, FL 32955-6802

GNDV46	MILEAGE 120,131	SR5TE7	STOWKI
trHUCif/Sluv pitsti. (6.7L/350	DCUVEfff DATE		BSivtHYMaST
K rt fa X 0 fc fa 0 8 3 7 6	miMaoiAHA*i.		RQSyteSjftS
FT tNa	RO Mfl	12/22/16	

321-482-2507 euiurtis iw»s TSSSSwii MO: 120159

?SIsScAZSP SfeCK ENQffE LT. Oft - TFCHCSii 11179 TT- Siife

CUSTOMER STATES THE CHECK ENGINE LIOfWStON COOES
P2560 ANO P1C54 LISTED
FORD COOES STORED-CAN NOT FAIL SCR MBbYTIC CONVERTER
CLEARED COOES AIffI DID NOT RETURN
NO REPAIRS AT THIS TIME NECESSARY

PARTS QTY FP-NUHBER DESCRIPTION UNIT PRICE

JOB # 1 TOTAL PARTS 0.00
JOB 9 1 TOTAL LABOR & PARTS 99.95

H 2 26CHZD HAINIENANCE OECLINEB TECH(S) IIO64 TFT:V:K:V 0!off
CUSTOMER DECLINED SCHEDULED MAINTENANCE
CUSTOMER DECLINED FACTORY REQUIRED HftINTEHANCE AT THIS TIHE

PARTS QTY FP-NUHBER DESCRIPTION UNIT RRICE

JOB # 2 TOTAL PARTS 0.00
JOB # 2 TOTAL LABQRrA PARTS 0.00

W 3 0ZCHZ09 STRUTV SHOKS JTECH(S) vII07& liMRANTY
CUSTOMER STATES 4IAS HAD ALIGNMENT ANO NEW TIRES. HAS HAD FRONT HIS WORK ON LOT SIDE DONE ALL AT OTHER DEALERS.
HE IS INDICATING THAT HE BELIEVES THE FRONT SHOCKTARE BAD SINCE THERE IS A BOUNCE IN FRONT END WHILE DRIVING
CHECK SUSPENSION ANO ADVISE
VERIFIED CONCERN F NO FRONT LEFT AMJ RIGHT SHOCKS TO BE WORN
REMOVED AND REPLACED BOTH FRONT SHOCKS

PARTS QTY FP-HUMOR DESCRIPTION WARRANTY
KB # 3 2 63190904-AB ABSBR PNG SUSPE 170

JOB f 3 TOTAL PWTSSr 0.00
JOB # 3 TOTAyABOR & PARTS 0.00

09 4 26CKZSI INSPECTION TECHIS) 11079 0.00
16 POINT INSPECTION - FREE WITH ANY OTHER SERVICE

PARTS QTY FP-NUHBER DESCRIPTION UNIT PRICE

JOB $ 4 TOTAL PAgjS 0.00
JOB # 4 TOTAL LABOR & PARTS 0.00

If 5HJZCHZD6 NOISE IN FRONT END TtCHIfS)YliO>9f1 vSF 5rStiHArtRANIY
UPON INSPECTION FOUND DRAG LINK IWER ENDS SQUEAKING AND HORN
WORN AND SQUEAKING
REMOVED ANO REPLACED DRAG LIN INNER END

PARTS QTY FP-HUMBER DESCRIPTION UNIT PRICE WARRANTY
XO # 5 1 68111304-AA SOCKET DRAG LIN. 190

SHOP SUPPLIES ANO HAZARDOUS WASTE DISPOSAL CHARGES
TOs charge represents costs and profits to the motor vehicle repair facility lor miscellaneous shop supplies or waste disposal

Ttta Stale of Ronda requires a $1.00 tea lo be collected far each new tire sold in the state [e 403.718) and a $1.50 fee lo be collected far each new or remanufactured battery sold in the state. (s. 403.7185].

ALL PARTS NEW UNLESS OTHERWISE INDICATED

3A AND
DEBBIE
DEC 28 2016
Initial

PAGE 1 OF 2 CUSTOMER COPY (CONTINUED ON NEXT PAGE) 04:49pm

CHRYSLSR

GATOR

CHRYSLER • DODGE • JEEP
840 SOUTH HARBOR CITY BLVD. (US1)
MELBOURNE, FLORIDA 32901
PHONE: (321) 724-6611 www.gatarchrysler.nel

& DODGE

Jeep.

CHRYSLER • DODGE • JEEP

BALES • SERVICE • PARTS • BODY SHOP

STATE OF FLORIDA RCASTRATION « UV7W3

fo* ©O) 736 3=3£3

Cos,nr. 30St5883 Ep'ca

CUSTOMER NO. 181241

LES KROL
5336 SAN SEBASTTAN WAY # H-206
ROCKLEDGE, FL 32955-6802

RESIDENCE PHONE 321-482-2507 BUSINESS PHONE

EASRA PftflBFLL iiiHi4 w>K4yub **VC 1K9*27/16 CRSSE10692

ulonjvffi GRBV46 «««120,131 5HITE7 STOCK XL

RUCK/3500 DIHAEL TR.71/260 OCUVERYOOC OEUVtRtMt£B

8CLUNQ DSALSt NO. PRO 08/03/13

F.T.Ewa RO HQ R.O 3ay22/ie

COMMENTS m: 120139

JCB 5 TOTAL PARTS Q.PD

JpB*#5? TOTAL LABOR & PARTS 0.00

DISC	CODE	DESCRIPTION	CONTROL NO	
pee # A	SS	SHOP SUPPLIES		10.00
MB 5	CEO	CHRY EXT CONTRACT DEO	a0692	200.00
JOB # 5	CEDW	CHRYSLER EXCT. CONTRACT DEDUCTIBLE	210692	WARRANTY
			TOTAL - HISC	210.00

TOTALS

ICE OUR COMPLETE LINE OF NEW AND USED CARS. TRUCKS, SUVS AND
CCESSORIES AT WWW.GATDRCHRYSLER.rCT
nsir US ON FACEBOOK P WWW.fACEBODK.COH/GATDRAUTDHDTIVEGROUP

TOTAIITJSBOR....	99.95
TOTAL >ART5....	0.00
TOTAL SUBLET....	0.00
TOTAL G.O.G....	0.00
TnTAUjtMTcr m:	210.00
TOTAL HISC DISC	0.M
TOTAL TAX.....*	20.15
TOTAL INVOICE $	330.10

PAID

CASH	*
CHECK#	*
VISA/HC	*
AMERICAN EXPRESS	*
DISCOVER	*
OEBIT/ATH	A
CHARGE	*
	*
OATE INT.	*

SHOP BUPPLIE8 AND HAZARDOUS WASTE DISPOSAL CHARGES
This charge represents costs and profits to the motor vehicle repair facility for miscellaneous shop supplies or waste disposal.

The Slate of Florida requires a SI.00 fee lobe collected for each new tire sold in lhe state (9.40X716) and a $130 fee to be collected for each now or remanufactured battery sold In ihe state. (8.40X7105).

ALL PARTS NEW UNLESS OTRERVPTSF INDICATED

PAGE 2 OF 2 CUSTOMER COPY (END OF INVOICE] 04:45pm

CUSTOMER #: 72261

277151

INVOICE

PAGE 1

Taylor
Chrysler Jeep
1497 N. Rt. 50
Bourbonnsta, tllinola 60914
MAIN OFFICE: B18-936-7900
PARTS DIRECT: 815.936-7915
FAX: B15-935-7919

LES KROL
5336 S SABASTIAN WAY
ROCK RIDGE, IL 6D914
HOME:321-482-2507 CONT:321-402-2507
BUS? CELL:

SERVICE ADVISOR: 28 SHARON HOLLIDAY

COLOR	YEAR	MAKE/MOOEL	ViN	LICENSE	MILEAGE IN / OUT	TAG
	14	RAM 3500	3C63RRGL0EG108376		107132/107132	T4S8

DEL. DATE	PROD. DATE	WARR. EXP.	PROMISED	PONO.	RATE	PAYMENT	INV. DATE
13NOV16 DD			WAIT 12NOV16		129.99	CASH	16NOV16

R.O. OPENED	READY	OPTIONS: DLR:44372 ENG:6.7_Liter_Turbo
09:31 12NOV16	14:11 16NOV16	

LINE OPCODE TECH TYPE HOURS	LIST	NET	TOTAL
E Multipoint inspection (according to maintenance interval)			
90 Multipoint inspection (according to maintenance interval)			
2831NSPA			(N/C)
107132			
PERFORM MULTI POINT INSPECTION			
NEEDS LF HUB, LF AXLESHAFT, REC 4X4 SERVICE, NEEDS FRONT PADS,			
ROTORS AND LF CALIPER WITH BRACKET			
**********			
F General Concern #1 TOW IN FROM MENZ. NEED TO CALL CUSTOMER ONCE			
VEHICLE GETS HERE AND GET CONCERNS. ABS LIGHT AND CEL I THINK.			
HAD NO APPT. JUST CALLED IN THIS MORNING (SAT MORNIN			
GC TOW TO SHOP			
283INSPA			(N/C)
**********			
G CUSTOMER HAS CODE FOR LOW ENGINE COOLANT			
CDM CUSTOMER DECLINED REPAIRS			
283INSPA			(N/C)
107132 SCANNED FOR CODES. FOUND STORED CODE FOR LOW COOLANT.			
CHECKED COOLANT LEVEL. FOUND COOLANT LEVEL FULL. PRESSURE TESTED			
SYSTEM, NO LEAK FOUND AT THIS TIME. ALSO HAD CODES FOR LEFT FRONT WHEEL			
SPEED SENSOR DUE TO BAD LF WHEEL HUB. C0031-62, C0031-2F, C0031-TD.			
ALSO HAS CODE FOR CRANKCASE FILTER RESTRICTION P1507. NEEDS CRANKCASE			
FILTER REPLACED. RETURNED VEHICLE TO CUSTOMER.			
**********			
H Brake Systems Concern Customer states front and started shaking			
squeaking noise left front left front axle very hot			
CAUSE: LEFT FRONT HUB BEARING LOOSE			
22450105 Hub and Bearing, Wheel . Replace Front,			
All or four wheel drive, Left side (1 .			
Semi-Skilled)			
283WARSC			(N/C)
1 68296958AA HUB-BRAKE			(N/C)
02130503 Shaft, Axle . Replace 23S.275 mm.Left (2			

WARRANTY DISCLAIMER: ALL PARTS AND ACCESSORIES ARE SOLD AND ALL REPAIRS ARE PROVIDED BY THE DEALERSHIP AS-IS. THE DEALERSHIP HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EXPRESS AND IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AND NEITHER ASSUMES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR IT ANY LIABILITY IN CONNECTION WITH THE SALE OF ANY PARTS OR ACCESSORIES OR ANY REPAIRS PERFORMED TO THIS VEHICLE. THE ONLY WARRANTIES ON PARTS AND ACCESSORIES OR REPAIRS ARE THOSE WHICH MAY BE OFFERED BY THE MANUFACTURER OR THE ORIGINAL PARTS DISTRIBUTOR AND ONLY SUCH MANUFACTURER OR DISTRIBUTOR SHALL BE LIABLE FOR PERFORMANCE UNDER SUCH WARRANTIES. CUSTOMER SHALL NOT BE ENTITLED TO RECOVER FROM DEALERSHIP ANY CONSEQUENTIAL DAMAGES.
MtETRCT tdm ncavtaraoiiMt cpaiumAttukMAOcs.uiuacitomoron.a»»«aotoMmi or use.iov
10★bulEi4»m iNff Lxfeefl | TgriMOMCHI AvtytrhM | torn** tf/KMou NS4 | 0K«1T<M
0 | I
Nvtirt Csitama 3 | 3
By signing below, you acknowledge that you were notified of and authorized the Dealership to perform the services listed (Urtud to Via took* and MIm tvuived (a*U1 tfw●jjtnumtt m taartfl annpUctd parts w nqutmt t) ■*J Hw uhd» ttwi twuwtttf to yap in exchange h* Tumwnvrut of the ★★★★i DUL
DATE CUSTOMER SIGNATURE AUTHORIZED DEALERS**3 REPRESENTATIVE SIGNATURE

*SHOP SUPPLY COSTS: We nive auetd a criMne ●qua! to 9% a! the total cost of labor and parts, nat te exceed 120.00, to tha HapoJr Order lor shop auppHaa uatd In connection with thta repair.

All PARTS ARE NEW UNLESS OTHERWISE INDICATED.

DESCRIPTION	TOTALS
LABOR AMOUNT	
PARTS AMOUNT	
GAS, OIL LUBE	
SUBLET AMOUNT	
MtSC. CHARGES *	
TOTAL CHARGES	
LESS INSURANCE	
SALES TAX	
PLEASE PAY	

CUSTOMER #* 72261

277151

INVOICE

1497 N. Rf. 50
Bourbonnafa, Itffnols 60914
MAIN OFFICE: 815-936-7900
PARTS OIRECT: 815-935-7815
FAX- 815-935-7919

LES KROL
5336 S SABASTIAN NAY
ROCK RIDGE, IL 60914
HOME:321-4B2-2507 CONT:321-482-2507
BUS: CELL:

PAGE 2

SERVICE ADVISOR: 28 SHARON HOLLIDAY

COLOR	YEAR	MAKE/MODEL	VIN	LICENSE	MILEAGE IN / OUT	TAG
	14	RAM 3500	3C63RRGL0EG108376		107132/107132	T45B

DEL. DATE	PHOD. DATE	WARR. EXP.	PROMISED	PO NO.	RATE	PAYMENT	INV. DATE
13NOV16 DC			WAIT 12NOVI6		129.99	CASH	16NOV16

R.O. OPENED	READY	OPTIONS:
09:31 12NOV16	14:11 16NOVI6	DLR:44372 ENG:6.7_Liter_Turbo

LINE OPCODE TECH TYPE HOURS	LIST	NET	TOTAL
- Skilled)			
2B3WARSC			(N/C)
1 68049152AB ADAPTOR-DISC BRAKE CALIPER			(N/C)
1 60049153AA PINKIT-DISC BRAKE			(N/C)
3 5086661AA BOLT-HEX FLANGE HEAD			(N/C)
1 68216197AA SHAFT-AXLE			(N/C)
1 4549625AE FLUID-BRAKE			(N/C)
01 NEC. TO REPLACE THE LEFT FRONT CALIPER, LEFT FRONT ROTOR AND BOTH FRONT BRAKE PADS			
2B3 CP		172.50	172.50
1 52122182AB ROTOR-BRAKE	177.00	177.00	177.00
1 68049148AA PAD KIT-FRONT DISC BRAKE	130.00	130.00	130.00
05810103 Caliper assembly, disc brake . Replace Front-Left (2 - Skilled)			
283WASSC			(N/C)
1 68049151AC CALIPER-DISC BRAKE			(N/C)
85410000 DIAGNOSTICS			
283WARSC			(N/C)
SUBL TOW TO SHOP PO#78059			
WARSC			(N/C)
SUBL SERVICE AGENT OWNED RENTAL			
WARSC			(N/C)
SUBL BALANCE OF TOW FROM MENZ			
CPQ		60.00	60.00
CUSTOMER PAY DEDUCTIBLE FOR LINE H			200.00
107132 FOUND LEFT FRONT HUB BEARING FAILED, SCORED OUTER AXLE SHAFT. FAILURE OF LEFT HUB BEARING ALSO CAUSED ROTOR TO GRIND INTO CALIPER AND MOUNTING BRACKET. REPLACED LEFT FRONT HUB BEARING, AXLE SHAFT, CALIPER, CALIPER BRACKET, FRONT PADS AND ROTORS. CLEARED CODES. TEST DROVE, ALL SYSTEMS OPERATING AS DESIGNED.			
**********			
I NOTE: CUSTOMER IS TRAVELSING THROUGH AND HAS A MAXCARE			
01 MISCELLANEOUS ADJUSTMENTS			
283INSPA			(N/C)

WARRANTY DISCLAIMER: ALL PARTS AND ACCESSORIES ARE SOLD AND ALL REPAIRS ARE PROVIDED BY THE DEALERSHIP AS IS. THE DEALERSHIP HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EXPRESS AND IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AND NEITHER ASSUMES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR IT ANY LIABILITY IN CONNECTION WITH THE SALE OF ANY PARTS OR ACCESSORIES OR ANY REPAIRS PERFORMED TO THE VEHICLE. THE ONLY WARRANTIES OR PARTS AND ACCESSORIES OR REPAIRS ARE THOSE WHICH MAY BE OFFERED BY THE MANUFACTURER OR THE ORIGINAL PARTS DISTRIBUTOR AND ONLY SUCH MANUFACTURER OR DISTRIBUTOR SHALL BE LIABLE FOR BREACHES OF SUCH WRITTEN WARRANTIES. CUSTOMER SHALL NOT BE ENTITLED TO RECOVER FROM THE DEALERSHIP ANY CONSEQUENTIAL DAMAGES, DAMAGE TO PROPERTY, DAMAGES FOR LOSS OF USE, LOSS OF TIME, LOSS OF MONEY OR ANYTHING OF ANY OTHER INCIDENTAL DAMAGES.

Otfefciri Eatkfttt* inm.tiTttfti	TBtai AJdMonJ Ckrtt Authorized	Afeimnd ●y/Tafcphonv N»4	Data & Tima
i	$		
RnM Cttiman $	$		

By rifle■u fata■. fawacVMtffla riui «eu nttt MMaflalw* arieriri flu tntUewip u awtwrrt m ntv^YoMi MavrjmtminMlcaaeriiMSTttirnMtrilatkarijfiaacMnw^v » fectcQ anv osteari avuai requested 6» ?»o tNYfrc«M »)r*fir l egwtrl jq)tu n)»calM■ tafMurmwun ®4 Amount Pm.

DATE CUSTOMER SIGNATURE AUTHORIZED DEALERSHIP REPRESENTATIVE SIGNATURE

*SHOP SUPPLY COSTS: We have added a charge (QUA) to 5% of the total cost of labor and parts, not to OKCOod $20.00, to tha Repair Order for shop sppp Nas usad fa connection wrth this ftp**.

AU PARTE ARE NEW UNLESS OTHERWISE INDICATED.

DESCRIPTION	TOTALS
LABOR AMOUNT	
PARTS AMOUNT	
GAS. OIL. LUBE	
SUBLET AMOUNT	
MSC. CHARGES *	
TOTAL CHARGES	
LESS INSURANCE	
SALES TAX	
PLEASE PAY	

CUSTOMER #: 72261

277151

INVOICE

PAGE 3

1497 N. fit. 60
Bourbonnrio, Iffinols 60914
MAIN OFFICE: 816-936-7900
PARTS DIRECT: 816-936-7916
FAX: 815-936-7919

LES KROL
S336 S SABASTIAN HAY
ROCK RIDGE, IL 60914
HOME:321-482-2507 CONT:321-482-2507
BUSt CELL: SERVICE ADVISOR: 28 SHARON HOLLIDAY

COLOR	YEAR	MAKE/MODEL	VJN	LICENSE	MILEAGE JN / OUT	TAG
	14	RAM 3500	3C63RRGL0EG108376		107132/107132	T458

DEL. DATE	PROD. DATE	WARR. EXP.	PROMISED	PO NO.	RATE	PAYMENT	INV. OATE
13NOVI6 DI			WAIT 12NOV16		129.99	CASH	16NOV16

R.O. OPENED	READY	OPTIONS: DLR:44372 ENG:6.7_Liter_Turbo
09:31 12NQV16	14:11 16NOV16	

LINE OPCODE TECH TYPE HOURS	LIST	NET	TOTAL
J** SERVICE AGENT OWNED RENTAL			
01 MISCELLANEOUS ADJUSTMENTS			
283INSPA			(N/C)

****

EST: 372.85 12NOV16 09:31 SA: 28

CUSTOMER PAY ENVIRONMENTAL SURCHARGE FOR REPAIR ORDER 5.00

NOTE: ADVISED CUSTOMER OF PLAY IN BALL JOINT CRANKCASE FILTER DIRTY AND 4X4 SERVICE- DECLINED

****

"THANK YOU" FOR COMING TO TAYLOR C-D** IF YOU ARE HAPPY - PLEASE TELL A FRIEND ** IF YOU ARE NOT HAPPY - PLEASE TELL US 1111.....
ALL MOPAR PARTS/REPAIRS ARE GUARANTEED FOR 2 YEARS OR 24,00 MILES.GUARANTEED FOR 90 DAYS
SURVEY MAY BE E-MAILED TO YOU.....

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Original Estimate (Parts & Labor)	Total Additional Cost Authorized	Approved By/Telephone No.:	Date & Time
$	$		
Revised Estimate	$		

I authorize the above repairs and agree to pay for same upon completion of repairs. An express mechanic's lien is acknowledged on vehicle to secure the amount of repairs thereto. [illegible]

DATE CUSTOMER SIGNATURE AUTHORIZED DEALERSHIP REPRESENTATIVE SIGNATURE

*SHOP SUPPLY COSTS: We have added a charge equal to 5% of the total cost of labor and parts, not to exceed $20.00, to the Repair Order for shop supplies used in connection with this repair.

All PARTS ARE NEW UNLESS OTHERWISE INDICATED.

DESCRIPTION	TOTALS
LABOR AMOUNT	172,50
PARTS AMOUNT	307.00
OAS. OH. LUBE	0.00
SUBLET AMOUNT	60,00
MSC. CHARGES *	205.00
TOTAL CHARGES	744,50
LESS INSURANCE	0.00
SALES TAX	19.50
PLEASE PAY	

Walmart AUTO CARE CENTER

»» nu**ru\. Afr UAU / 7
175 COUNTRY ROAD #6 WEST
ELKHART, IN 46514 US
(574)266-7448

483700 59366

Service Order:

DATE 11-01-2016	4AME KROL, LE5	5306 SANSAQCA WAY H20 ROCKLEDGE, FL 32955	PHONE# (321)482-2507
YEAR 2Q14	HAKE RAM	MODEL 3500	COLOR White (Pearl)
LICENSE GNDV46	ODOMETER 101134	CUSTOMER ARRIVAL TIME 2016-11-01 09:55 AM	SERVICE COMPLETED TIME 2016-11-01 11:09 AM

Service Description	Service
QS PIT CREW LOF - Oil - COMPLETE ,11.0 QT - Grease Finings - COMPLETE ,4 Ftngi - Oil Pressure - CHECKED - Oil Filter - REPLACED - Pre-Service Oil Che>* - CHECKED , Full - Battery Check - DECLINED Unsafe environment - Tire Pressure - Dual Drv in - CHECKED , 65 - Tire Pressure - Dual Pass In - CHECKED , 65 - Tire Pressure - Drv From - CHECKED , 80 - Tire Pressure - Dual Drv Out - CHECKED , 65 - Tire Pressure - Dual Pass Out - CHECKED , 65 - Tire Pressure - Pass From - CHECKED , 80 N/C WIPER BLADE INST - Wiper - Wiper Rear - NOT APPLICABLE	19.88 000

Merchandise Description	Quantity	Unit Price	Merchandise
Oil - Customer Provided	5.0	185	-9.25 Crt/\i
Oil Filter - Customer Provided	1	Z09	-2.09 Drill
DELV CON IQ 15W40 SM	1	3.67	3.67
DELV CON2.5G15W40 SM	1	30.97	30.97
FRAM OIL TG TG3976A	1	6.94	6.94
LUCAS OILSTABILZR	1	877	8.77

Customer Comments

Technician Comments
6.7L ENG PH3976. CANA TQJ7. PG.334.
TS-235.80.R17
OIL FILTER TC3976.
V1N. I3C63RRGL0EG108376
12QTS TOTAL. 11QTS OIL. 1 QT LUCAS

Total (Excluding Tax & Oovt Fees)	58.89

DISCLAIMER

I authorize the stated service tebecwplawl wiAhcaccnuiy materials.
I ova ncrmmion to operate ibe vehicle.
I UNDERSTAND:
1 Walmert is not responsible for losaManage to the rehkfeooteint left In It
2 Wklro»T does HOt UjpCCi tires 10 dcicnnine if they *wn* safe Only the service on the server order is perfonntd. Tires tie mt inspected far oonhtiomlbjt my effect se/ciy (free depth, cuts, punctures, sicking, bulges, nsd unevea tread weerj
1. Customers should *tomtt* their tires n prepay inflated, have tread depth grocer than 2/32* in all grooves, end hive no cats, punctures, cracking, bulges, or oneros need near.
An ceprtts medHide's hen Is hereby acknowledged on the above vehicle to secure the amount of services performed.
Driving eonditamu will affect the safety and performance of my tires.

11-01-20)6

CUSTOMER SIGNATURE DATE

I do asm and firify under»rod that *my* motor Vehicle had a low oil level when I brought If to Wet-Man for an oil change This wet pointed out to me, that t willingly requeued Wei Man to change die oil. I mil not hod wel-Mert responsible for any damage to my motor vehicle by the tow oil I«vd

SIGNED

DATE

COMMON TECHNICIAN COLTENf Ito
COURTESY TECHNICIAN: COLTON 1519
LOWER BAY TECHNICIAN COLTONTWO
MiSC TECHNICIAN BRANDON ISM
5ERVWRTR/GREETER. COOY 1123
UPPER BAYTOCHNICtAN BRANDON 034

IIAVE YOUR LUG NUTS RETORQUED AFTER THE FIRST 50 MILES.

CENTRAL FLORIDA DIESEL PERFORMANCE

1501 Lake Dr
Cocoa Fl. 32922
321-305-4963
MV-80581

Dale	Invoice #
1/9/2017	3235

PAID 1/2017

Customer
KroL Lcs 5336 San Scbastin way H206 RockJedge Fl 32955 321-482-2507

Miles In Out	Tag	Due Date	YR/MAKE/MODEL	Terms	Pay Method
120,667	GNDU46	1/9/2017	2014 Ram 3500	Due on receipt	

Item	Quantity	Description	Rate	Amount
Boniface	1	SCR Cat	1,145.00	1,145.00T
BonlfHce	1	Gasket	5.35	5J5T
Boniface	1	Gasket	19.35	19J5T
Boniface	1	Sleeve Kt	3.20	320T
MSL	**6**	Replace SCR Cat ad remove amonia sensor as per service bulletin	85.00	510.00T
Shop		Shop Supply Fee	2.50%	12.75T
Contract	I	Reprogram Vehicle ECM due to exhaust update	143.68	143.68T
		Sales Tax	7.00%	128.75

____ Month/ ____ Mile Warranty On AH Parts And Labor Unless Otherwise Specified.

Total	$1,968.08

PLEASE READ CAREFULLY, CHECK ONE OF THE STATEMENTS BELOW AND SIGN.
I UNDERSTAND UNDER STATE LAW I AM ENTITLED TO A WRITTEN ESTIMATE IF MY FINAL BILL WILL EXCEED SI00.
—I REQUEST A WRITTEN ESTIMATE.
—I DO REQUEST A WRITTEN ESTIMATE AS LONG AS THE COST DOES NOT EXCEEDS___, THE SHOP MAY NOT EXCEED THIS AMOUNT WITHOUT MY WRITTEN OR ORAL APPROVAL.
—I DO NOT REQUEST A WRITTEN ESTIMATE.
SIGNED_____
DATE_____

CURVSbdR Jeep MOWW

Bonirace-Hiers

Chrysler Dodge Jeep Rem

1775 E. Merritt Island Causeway
Merritt Island, FL 32952
Phone: 321-452-8181
Fax: 321-452-4114
MoparParts@bonifacehien.com
www.boniiacehiers.com

PARTS INVOICE

NO REFUNDS ON SPECIAL ORDERS OR ELECTRICAL ITEMS ALL RETURNS ARE SUBJECT TO A RESTOCKING CHARGE OF $20.00 OR 5% PER ITEM, WHICHEVER IS GREATER NO RETURNS AFTER 30 DAYS.

Due lo MANUFACTURER peris return policy, altered or damaged car tons, opened mouldings or paper packages wB not be returnable. Your cooperation wsl be appreciated. WE ARE NOT RESPONSIBLE FOR ANY LABOR ON PARTS NOT INSTALLED BY OUR SHOR

THANK YOU FOR THE OPPORTUNITY TO PROVIDE QUALITY MOPAR PARTS AND ACCESSORIES FOR ALL CHRYSLER, DODGE, AND JEEP NEW LOWER PRICES FOR MOPAR REMANUFACTURED ENGINES AND TRANSMISSIONS, 3 YEAR 100KWARR

10011		PENDING	ERIC EAGLEN	01/10/17	PQ18889 CHR

BILL TO retai1

SHIP TO

1	0	68292411-AA CONVERTER 14070004 CORE PRICE	PB1	1145.00	1145.00 500.00	1145.00 500.00
1	0	88065844-AB GASKET EX 14062002	018-A	2608	26.68	26.68

The factory warranty constitutes aft of the warranties with respect to the sale of this ftem/items. The seller hereby expressly disclaims all warranties, either express or Impfiod, Inducting any Implied warranty of merchantabffily or fitness for a particular purpose, and the sailer neither assumes nor authorizes any other person to assume lor it any liability in connection with sale of this Hem/Items.

"I hereby agree to pay the amount due as reflected In this invoice and further agree to pay a reasonable attorney's fee and costs Incurred In collecting any amounts duo as reflected b this Invoice."

REC'D. BY _____ NO REFUNDS WITHOUT THIS INVOICE

SUBTOTAL	1671.68
RESTOCK CHARGE	0.00
TAX	117.02
FREIGHT	0.00
PAY THIS AMOUNT	1788.70

12:06.47 ACCOUNTING COPY ** PRICE QUOTE ** NET502

PAGE 1 OF 1

PLEASE READ CAREFULLY, CHECK ONE OF THE STATEMENTS BELOW, AND SIGN:

I UNDERSTAND THAT, UNDER STATE LAW, 1 AM ENTITLED TO A WRITTEN ESTIMATE IF MY FINAL BILL WILL EXCEED $100.

_____ I REQUEST A WRITTEN ESTIMATE.

_____ I DO NOT REQUEST A WRITTEN ESTIMATE AS LONG AS THE REPAIR COSTS DO NOT EXCEED $_____. THE SHOP MAY NOT EXCEED THIS AMOUNT WITHOUT MY WRITTEN OR ORAL APPROVAL.

_____ I DO NOT REQUEST A WRITTEN ESTIMATE.

SIGNED_____ DATE_____

*LW Used R-Rebuilt RC/Reconditioned NC/ No Chg/Warranty

CITY	PART NO	DESCRIPTION	*	PRICE	EXTEND
		J>lxGhr&is /cMecjx et&VS			
		Al&*r ON*			
		BGfL CJUEA+J		116.00	
		BAD CONfreerf ew I t ^		St*7	
		MSEKG&LS&iTA/L. BAG			
		C&NY&CX70W		3X 00	
		TfjfLNO CJB/rtrtnG-		l&f. cC	
		au ffLr&fi. tfavSt /rG.		Jfi0.00	

Estimate good (or 30 days. Not responsible tor damage caused by Uuitt. fta nr acts of nature. t hereby authorize the above repairs, including sublet wort, along with Me necessary materials. You and your employees may operate my vehicle for the purpose of testing, Inspection and delivery at my risk. If I cancel repairs prior to their completion for xtiy reason, itsparoown and ruassemory tee of $_____ whine applied.

X_____ Me vilnjn

RESCUE AUTOMOTIVE
AUTO MECHANICS SERVICES
10531 E. COLONIAL DR.
ORLANDO, FL 32817

407-463-3237 407-658-9040
FLORIDA REGISTRATION: MV B0446

_____ month / _____ mile warranty on all partG and labor unless otherwise specified.

imeftaed Payment Method:
CASHftfCHECK O VISAOMCOAMEXO

Aot/n/n Tjmo:

Nama: /jEC <CO£_ Proposed Complotlon Doto:

***'*£&£ SteJe£6+9nW WAY*Hr2a£ HomoPh: 321-482-2507

City: ROCKEDGE sulfl; PL 2fP; 3X1SS~ Wodt Ph:

Other Authorised Person. <Phono:

Year/Mahe Jo/f/ Modal: RAM 3S*5O T»£AJ>y% Miles In:

VIN#: %(*_£$ H&GLOE.G!C827£ M4a» Oui:

Save Old Parts: ☐ Yes G No (Coro may apply)

Customers CompWnOProWem:

LABOR CHARGES BASED ON:
C FLAT RATE _____ ☐ HOURLY RATE _____
C BOTH APPLY _____

ESTIMATE/01AGNOST1C FEE:
$_____/OR HOURLY AT
&_____PER HOUR

Aatoftrefoo/$_____imfrymiyUrafod to vhkfriwtikh art not dtHptdwfthh 3 worttog dm of notification glconpheoe.

The following repairs were made to your vehicle:	Labor Charge	EST1MATEO REPAIR COST /SHOP SUPPLIES
		1
		CHARGE8:
		PARTS: $
		LABOR: • SHt.ty
		SUBLET / OTHER %
		••SHOP SUPPLES
		■••FEES t
		Subtotals
		Tat: $ 3S7S7
		TOTAL: $ 6X1.32

"fmcjufy#ivprovcom onapvvir to w nwgr rolvclo vtwrwsy for mscollanoous shop supplies ortiiuAiorvvH4i ••FwuinSfrJTrfHo JJIcorn for each new the xoit in the sat*c/Ftafito "FSMXJiMtum Wk* 4 $f SO tee to even nan oi fcnttrutMhHttt batter/ sotdln tho StHi itftorfe*

APPENDIX A-2

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA
CIVIL DIVISION

LES KROL

Plaintiff,

Case No. 2017-CA-049992

v.

FCA US, LLC; and GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,

Defendants.
_____ /

DEFENDANT'S AMENDED MOTION TO STAY AND COMPEL ARBITRATION
(amended only to attach complete exhibit)

Defendant, Gibson Auto Sales, Inc. d/b/a Gibson Truck World ("Gibson"), by and through its undersigned counsel and in accordance with the Florida Rules of Civil Procedure, hereby files this, its Amended Motion to Stay and Compel Arbitration and states as follows:

1. On or about November 1, 2017, Plaintiff, Les Krol ("Plaintiff"), filed this action against Gibson relating to claims that arise out of Plaintiff s purchase of a vehicle.

2. Particularly on or about June 6, 2016, Plaintiff purchased a 2014 Dodge Ram 3500 bearing Vehicle Identification Number 3C63RRGL0EG108376 (the "Vehicle") from Gibson. As part of this transaction, Plaintiff entered into and executed a Retail Buyer's Order, which included an arbitration agreement (the "Arbitration Agreement"). Attached hereto as ***Exhibit "A"*** is a true and correct copy of the Arbitration Agreement that was executed by Plaintiff.

3. According to the Arbitration Agreement:

> [A]ny controversy, claim, suit, demand, counterclaim, cross claim, or third party complaint, arising out of, or relating to this Order or the parties' relationship (whether statutory or otherwise), including, but not limited to any matter that may have induced the Customer to enter into a relationship with Dealer and any disputes regarding the

validity or enforceability of this clause (collectively referred to as 'Claim'), shall be submitted to final and binding arbitration...

4. Plaintiffs' Complaint alleges claims that all relate to Plaintiffs purchase of the Vehicle through the Retail Buyer's Order and the relationship between Plaintiff and Gibson. Further, the Arbitration Agreement also indicates that any challenge to the Arbitration Agreement must be decided in arbitration.

5. Based upon the nature of the claims, Plaintiffs claims are clearly encompassed by the broad language of the arbitration provision.

6. Pursuant to the Federal Arbitration Act and Section 682.03 of the Florida Statutes, Gibson is entitled to have the current matter stayed and have this Court enter an Order compelling the arbitration of all disputes between the parties, as contemplated by the arbitration provision.

WHEREFORE, Gibson respectfully requests that this Court enter an Order staying this matter and compelling the arbitration of all disputes between the parties, as provided for by the arbitration provision, together with such further relief as the Court deems just and proper.

s/ Robert E. Sickles, Esq.
Robert E. Sickles
Florida Bar No. 167444
Yesica S. Liposky, Esq.
Florida Bar No. 119924
BROAD AND CASSEL LLP
100 North Tampa Street, Suite 3500
Tampa, FL 33602
Telephone: 813-225-3020
Facsimile: 813-225-3039
Primary: rsickles@broadandcassel.com
Primary: vliposkv@broadandcassel.com
Secondary: knovak@broadandcassel.com
Secondary: egarvev@broadandcassel.com
Secondary: ilovins@broadandcassel.com
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 6, 2017, a true and correct copy of this document was served via e-mail on the following:

Jeremy Kespohl, Esq.
Morgan & Morgan, P.A.
76 South Laura Street, Suite 1100
Jacksonville, FL 32202
ikesDohl@forthepeople.com
warrantvgroupservice@foithepeople.com

s/ Robert E. Sickles, Esq.
Attorney

REFERRAL
REPEAT CUSr

Customer #:®5182
42195 MTGOfa

98

GIBSON TRUCK WORLD
3*** S o u l h Orfiindo Drive
Sanford, *ft*. 32773
Id. (407) 321-0660 **rax** (407) 311-3322

RETAIL HUYER'S ORDER

BT*C* ua 3SG12
DATE 6/16/2018
****msV**NAtlif** (SVyfezdK«l **ImNARD FDOics**

HpalVti» £XCJ*C Ku | («CCM Tunil 952 | ****ijuir£'*

5338 SAN SCDArmAM WAY #H306 | **ROCXIEDGE**

BREVARO | FL | 329SS | 1

icrancuept*osm* | **!a— aJg** | Qoc* | 35741

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APPENDIX A-3

IN THE CIRCUIT COURT IN AND FOR
BREVARD COUNTY, FLORIDA

CASE NO.:2017-CA-049992

LES KROL,

Plaintiff,

v.

FCA US. LLC AND
GIBSON AUTO SALES. INC..
D/B/A GIBSON TRUCK WORLD,

Defendants.
_____/

PLAINTIFFS RESPONSE IN OPPOSITION TO
DEFENDANT GIBSON AUTO SALES, INC'S
MOTION TO STAY AND COMPEL ARBITRATION

Plaintiff LES KROL ("Plaintiff"), by and through his attorneys MORGAN & MORGAN, hereby responds in opposition to Defendant GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD ("Defendant")/\ Motion to Stay and Compel Arbitration, and states as follows:

I. Defendant waiver the right to Arbitrate

Defendant's motion argues that Plaintiffs Complaint should be dismissed because the sales contract for the subject vehicle included an arbitration provision. *See* Defendant's Motion to Stay and Compel Arbitration. First, Plaintiff sent a demand letter to Defendant on June 29, 2017 putting Defendant on notice of their claims. *See* Demand Letter attached as Exhibit 1. In response to this letter, Defendant did not seek to invoke its right to arbitrate the dispute in writing, as required by the arbitration agreement, but instead denied liability. *See* Correspondence from Defendant attached as Exhibit 2.

II. MMWA claims may not be decided by Binding Arbitration

However, even if Defendant had not waived its alleged right to arbitrate this claim,

Defendant would still not be entitled to force Plaintiff to arbitrate his claims under the MMWA. Pursuant to its express language, Congress empowered the FTC to promulgate rules under the MMWA. 15 U.S.C. §2312(c) provides the FTC with the general authority to "promulgate rules" for the implementation of the MMWA. Section 2310 (a)(2) provided the FTC with the specific authority to promulgate certain "minimum requirements" that a warrantor's Informal Dispute Resolution ("IDR") program must meet before a warrantor may require an aggrieved consumer to resort to IDR as a prerequisite to legal action. 15 U.S.C. §2310(a)(2). Together these regulations were designed to ensure that IDR programs "not only look good on paper, but function effectively and fairly in practice" and that a given IDR mechanism "is fair and effective so that it does not just represent another hurdle that the consumer is forced to surmount before being provided a meaningful avenue of redress." Cong. Rec. 40711, 40712 (Dec. 18, 1974) (emphasis added).

The FTC has established regulations regarding MMWA informal dispute settlement procedures. *See* 16 C.F.R. § 703. In the parlance of FTC regulations, those informal dispute resolution procedures are referred to as the "Mechanism". 16 C.F.R. § 701(e) ("Mechanism means an informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of Title I of the Act applies, as provided in section 110 of the Act, 15 U.S.C. 2310."). The FTC's regulations go on to require of any informal dispute resolution that,

> (g) The Mechanism shall inform the consumer, at the time of disclosure required in paragraph (d) of this section that:
>
> > (1) If he or she is dissatisfied with its decision or warrantor's intended actions, or eventual performance, legal remedies, including use of small claims court, may be pursued;

16 C.F.R. § 703.5(g). By affirmatively stating that if a consumer is dissatisfied with the results of an informal dispute resolution such as arbitration they may pursue further legal remedies, the FTC requires access to these further remedies. The only logical consequence being that an informal dispute resolution cannot be binding because there would be no opportunity for a consumer to avail him or herself of such further remedies. Per this regulation the consumer, in this case Plaintiff, must be allowed to pursue further "legal remedies" if they are dissatisfied with the decision of the informal dispute resolution panel. *See* 16 C.F.R. § 703.5(g).

However, the FTC appears to have wanted to avoid any ambiguity on the issue whatsoever, and went on to specifically state that that arbitration decisions for MMWA claims shall not be binding, saying specifically,

> (j) Decisions of the Mechanism shall not be legally binding on any person. However, the warrantor shall act in good faith, as provided in § 703.2(g) of this part. In any civil action arising out of a warranty obligation and relating to a matter considered by the Mechanism, any decision of the Mechanism shall be admissible in evidence, as provided in section 110(a)(3) of the Act, 15 U.S.C. 2310(a)(3).

16 C.F.R. § 703.5(j) (emphasis added). Therefore clearly and unambiguously binding arbitrations are prohibited under the MMWA.

There are two reasons why the FTC created such specific rules regarding informal dispute resolution mechanisms, and why warrantors must abide by "more elaborate and more burdensome rales." First, warrantors fund the IDR mechanisms, and as such, are prone to exert influence on the mechanisms to ensure that the interests of the warrantors are met. *See Walton* v. *Rose Mobile Homes LLC*, 298 F.3d 470, 481 n.21 (5th Cir. 2002) (King, C.J., dissenting). The regulations are intended to prevent such pressure by ensuring the IDR mechanisms "are sufficiently insulated from the warrantor and the sponsor, so that the decisions of the members and the performance of the staff are not influenced by either the warrantor or the sponsor." *See*

Walton, 298 F.3d at 481 n.21 (King, C.J., dissenting). Second, the rules are required to level the playing field in light of the inherent inequity in the knowledge of the participating parties (*e.g.*, a consumer with no knowledge of the law participating in the process for the first time, versus a trained professional on the warrantor's side whose sole responsibility is to represent the warrantor in these proceedings). As Justice Blackmun opined in his partial dissent in *McMahon*, there is real risk of bias in an unsupervised process:

> As even the most ardent supporter of arbitration would recognize, the arbitral process at best places the investor on an equal footing with the securities-industry personnel against whom the claims are brought. Furthermore, there remains the danger that, at worst, compelling an investor to arbitrate securities claims puts him in a forum controlled by the securities industry.

Shearson/American Express Inc. v. *McMahon*, 482 U.S. 220, 260 (1987).

Because of the risks inherent in any non-judicial forum, Congress specifically delegated supervisory authority to the FTC, which has repeatedly and continuously prohibited any binding effect for any dispute resolution mechanisms.[1] Section 2310(a)(2) of the MMWA delegates to the Federal Trade Commission rulemaking authority regarding warrantor-established informal dispute settlement mechanisms which are incorporated into the terms of a written warranty. 15 U.S.C. 2310 (a)(2). Under the powers vested in the FTC by Congress in enacting the MMWA, the Commission has consistently held that mandatory binding arbitration is prohibited by the plain language of the MMWA. Moreover, pursuant to United States Supreme Court law regarding Congressional delegation of authority to agencies and the concomitant authority of those agencies' regulations, FTC regulations regarding administration of the MMWA have the force and effect of federal law. *See Chevron*, 467 U.S. 837. 843-44 (1984); and *Household*

[1] **It is also notable that the Florida Attorney General has quoted with approval 16 C.F.R. § 703.5(f), in using the prohibition on binding arbitration to conclude that arbitrations pursuant to Section 703 are not binding on any participant. *See* 1983 Fla. Op. Atty. Gen. 88 (opining that a manufacturer is not bound by the decisions of the Florida Lemon Law Board).**

Credit Services, Inc. v. Pfennig, 541 U.S. 232 (2004).

In 1999 the FTC requested comments on its rules and guides interpreting and implementing the MMWA "as part of a regulatory review program, under which it reviews rules and guides periodically in order to obtain information about the costs and benefits of the rules and guides under review, as well as their regulatory and economic impact." 64 Fed. Reg. 19700, 19700 (Apr. 22, 1999). "After careful review of the comments received in response" to its request, the FTC decided to retain the interpretations and rules without change. The FTC wrote:

> [T]he Commission determined that "reference within the written warranty to any binding, non judicial remedy is prohibited by the Rule and the Act" The Commission believes that this interpretation continues to prohibit warrantors from including binding arbitration clauses in their contracts with consumers that would require consumers to submit warranty disputes to binding arbitration.

64 Fed. Reg. 19700, 19708-19709. The FTC went on to describe that it was troubled by any statutory construction that "would enable warrantors and the retailers selling their products to avoid the requirements of the MMWA simply by inserting binding arbitration clauses in their sales contracts." 64 Fed. Reg. 19700, 19709 & n. 72.

And just recently, in July of this year, the FTC reaffirmed its position concerning binding arbitration, *see* 80 FR 42719 (July 20, 2015), saying, "[T]he Commission reaffirms its long-held view that the MMWA disfavors, and authorizes the Commission to prohibit, mandatory binding arbitration in warranties." *Id.* As such, it is abundantly clear that binding arbitration agreements of the sort asserted by Defendant is impliedly prohibited by 16 C.F.R. § 703.5(g), and expressly prohibited by 16 C.F.R. § 703.5(j), and therefore cannot be enforced in this context

A. The legislative history of the MMWA as detailed by the Ninth Circuit in the *Kolev* decision as well as substantial case law prohibit binding arbitration.

The case of *Kolev* v. *Euromotors West/The Auto Gallery*, 658 F.3d 1024 (9th Cir. 2011)

is very insightful regarding the legislative history of the MMWA, and strongly suggests that Plaintiff should prevail in their effort to enforce the Federal Trade Commission's bar on mandatory arbitration under the MMWA.[2] In that case the Ninth Circuit found that the MMWA "on its face is ambiguous as to whether pre-dispute mandatory binding arbitration provisions are valid under the MMWA, [therefore] we conclude that the FTC's construction that they are not is reasonable." *Kolev*, 658 F.3d at 1031.

In discussing the legislative history behind the MMWA, the Ninth Circuit described Congress' intent in saying "[. . .] Congress sought to address the extreme inequality in bargaining power that vendors wielded over consumers by "providing consumers with access to reasonable and effective remedies" for breaches of warranty, and by 'providing] the Federal Trade Commission (FTC) with means of better protecting consumers.' H.R.Rep. No. 93–1107, at 24 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7702." *Kolev*, 658 F.3d at 1027. Additionally, the Ninth Circuit identified "the House Subcommittee Staff Report as evidence that '[congressional intent was that decisions of Section 110 Mechanisms not be legally binding.' 40 Fed.Reg. at 60210. The Subcommittee Staff Report on which the FTC based its independent interpretation of Congress's intention makes clear that consumers must be made aware of their rights, including their right to pursue litigation, because otherwise 'the fate of aggrieved consumers usually rests with the seller/manufacturer and its willingness to live up to its promises.' 120 Cong. Rec. 31,318 (1974)." *Kolev*, 658 F.3d at 1028.

This legislative history supports the *Kolev* Court's endorsement of the FTC's ban on mandatory binding arbitration, saying "The FTC's reliance on such legislative history in seeking to implement Congress's intent is the first reason that its rule barring judicial enforcement of pre-

[1] Note that this opinion is not being used for its holding, rather for its discussion of the MMWA's legislative history, as the opinion was *sua sponte* withdrawn by the Ninth Circuit pending a decision by the California Supreme Court. *Kolev*, 676 F.3d 867 (9th Cir. 2012).

dispute mandatory binding arbitration agreements is a reasonable construction of the MMWA." *Kolev*, 658 F.3d at 1027.

Rickard v. Teynor's Homes, Inc., 279 F. Supp.2d 910 (N.D. Ohio 2003), also supports Plaintiffs position. There, the court determined that the MMWA bars enforcement of binding arbitration agreements. In that case the plaintiffs filed suit in part under the MMWA against the manufacturer of their manufactured home. The defendant moved to dismiss pursuant to a binding arbitration agreement. That court considered the MMWA's purpose and legislative history, as well as the FTC's regulations on binding arbitration agreements. It then applied *Chevron* deference to "defer to the FTC's expertise and interpretation of the statute. Thus, the [MMWA] precludes enforcement of binding arbitration agreements for claims under a written warranty." *Id* at 921. Therefore the court denied defendant's motion to dismiss as regards those plaintiffs' MMWA claims.

B. Courts must defer to the FTC's Regulations unless they are arbitrary, capricious, or manifestly contrary to the statute under the United States Supreme Court's decisions in *Chevron U.S.A. Inc.* v. *Natural Res. Defense Council, Inc.* and *Household Credit Services, Inc.* v. *Pfennig*, 467 U.S. 837, 843-44 (1984) and 541 U.S. 232 (2004).

The foregoing demonstrates that Congress intended that arbitrations would be governed by the MMWA's provisions and the FTC rules, and *had to be non-binding*. Even if an alternative construction could somehow be placed upon the statute, this Court should defer to the interpretation of the MMWA per the FTC rules.

The United States Supreme Court stated the relevant principles as follows:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress

> has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
>
> The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron U.S.A. Inc. v. *Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (citations, footnotes, and internal quotation marks omitted) (emphasis added).

In *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232 (2004), the Supreme Court reiterated the *Chevron* principles.[3] In determining what effect this Court must give to the FTC's regulations, this Court must first determine whether "Congress has directly spoken to the precise question at issue." *Id.* at 233 (citing *Chevron*, 467 U.S. at 842). "If so, courts, as well as the agency, 'must give effect to the unambiguously expressed intent of Congress.'" *Id.* (quoting *Chevron*, 467 U.S. at 842-43). "However, whenever Congress has 'explicitly left a gap for the agency to fill,' the agency's regulation is 'given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* (quoting *Chevron*, 467 U.S. at 843-44).

[3] In *Household Credit Services*, the Supreme Court overturned a Sixth Circuit Court of Appeals' decision wherein the Sixth Circuit declined to follow a regulation imposed by the Federal Reserve Board interpreting the Truth in Lending Act In reversing the Circuit Court, the Supreme Court admonished the Sixth Circuit by noting, "In holding that Regulation Z conflicts with § 1605's definition of the term 'finance charge,' the Court of Appeals ignored our warning that 'judges ought to refrain from substituting their own interstitial lawmaking for that of the [Board].'" *Id.* at 462 (quoting *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. at 555, 568 (1980)).

What *Chevron* and *Household Credit* Services instructs is that if Congress explicitly left a gap for the agency to fill, the agency's regulation is controlling unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44; *Household Credit Services*, 158 L. Ed. 2d at 459. Even if Congress just implicitly left a gap, the agency's regulation is controlling unless it is "unreasonable." *Chevron*, 467 U.S. at 843-44.4

Congress also explicitly authorized the FTC to fill gaps in the MMWA's provisions for informal dispute settlement provisions: "The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this title [15 U.S.C. § 2301 *et seq.*] applies." 15 U.S.C. § 2310(a)(2); *see also* 15 U.S.C. § 2310(a)(3) (a warrantor may establish an informal dispute settlement procedure that "meets the requirements of [the FTC's] rules"). Even assuming that Congress did not address the requirement that the procedure allow for civil remedies – which it clearly did – it authorized the FTC to establish that requirement. Under *Chevron* and *Household Credit Services*, the FTC's regulations are given "controlling weight" unless they are "arbitrary, capricious, or manifestly contrary to the statute."

Congress' statutory protection for consumers requires the formulation of policy and the making of rules to fill any gaps. Congress delegated its authority for the MMWA to the FTC. *Chevron* emphasized that a court is required to defer to the agency's expertise regarding the most appropriate way to effectuate the goals of a statute that it administers:

*** In this instance, Congress has spoken to the precise question at issue. As indicated above, 15 U.S.C. § 2310(a)(3) states that, if the warrantor complies with the statute and "meets the requirements of [the FTC] rules," the consumer may be required to resort to the warrantor's informal dispute settlement procedure "before pursuing any legal remedy under this section", and that the consumer would need to initially resort to that procedure before "commenc[ing] a civil action ... under subsection (d) of this section." 15 U.S.C. § 2310(a)(2), (3). *See also* 15 U.S.C. § 2310(d)(1) (subject to subsection (aX3) and the subsection on class actions, a consumer damaged by a warrantor "may bring suit for damages or other legal or equitable relief"). The statutory text would be wholly meaningless if the warrantor could bar a consumer from "pursuing any legal remedy" or "commenc[ing] a legal action" under the Warranty Act It is clear that Congress intended that a consumer could sue after submitting to a procedure that complied with the FTC rules.**

> [T]he principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.
>
> ... If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

Id. at 844-45 (citations and internal quotation marks omitted).

It is worth stressing that the FTC's regulations from 1975 represent a *contemporaneous* regulatory interpretation of the MMWA. An administrative interpretation "has peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Zenith Radio Corp. v. United States,* 437 U.S. 443, 450 (1978) (quoting *Norwegian Nitrogen Prods. Co.* v. *United States,* 288 U.S. 294, 315 (1933)).

The consistency of FTC's interpretation concerning binding arbitration is also significant. While agency interpretations that are revised over time are certainly entitled to *Chevron* deference, *see Rust v. Sullivan,* 500 U.S. 173, 186 (1991), longstanding and consistent agency interpretations carry special weight *See Smiley* v. *Citibank (South Dakota), N.A.,* 517 U.S. 735, 740 (1996) ("agency interpretations that are of long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist"); *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 274 (1974) ("a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration").

While agency interpretations that are revised over time are certainly entitled to deference,

longstanding and consistent agency interpretations carry special weight. *See NLRB v. Bell Aerospace Co. Div. Textron, Inc.*, 416 U.S. 267, 274-274 (1974) ("[A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration."); *see also Smiley* v. *Citibank (South Dakota)*, 517 U.S. 735, 740 (1996) (observing that "agency interpretations that are of long standing come before us with a certain 'credential of reasonableness' since it is rare that error would long persist").

In this case Rule 703 was passed on December 31, 1975. As such that Rule is entitled to a credential of reasonableness. This deference is especially elevated due to the fact that after an extensive review of the FTC's regulations in the warranty field, the FTC explicitly reaffirmed its position barring binding arbitration in MMWA cases. 64 Fed. Reg. 19700, 19708-19709 (April 22, 1999).

In short, the language of both the statute and the regulations, especially in light of the deference required by *Chevron*, *Household Credit Services*, and other United States Supreme Court decisions, requires that controlling weight be given to the FTC's rules prohibiting *any* binding dispute resolution mechanism. Failure to defer to the FTC regulations is contrary to Congressional intent and delegation, and a violation of the Supremacy Clause of the United States Constitution.

III. Defendant's Arbitration Claim fails even in the minority jurisdictions that allow for binding Arbitration of MMWA claims

While the majority of jurisdiction who have analyzed the issues have found that the MMWA bars binding arbitration, a few state and federal courts have permitted binding arbitration of MMWA claims, under certain conditions. The Fourth Circuit Court of Appeals has held that a party may compel binding arbitration, but only if a dispute was first subject to a non-binding informal dispute mechanism as provided for in the MMWA. *See Seney* v. *Rent-A-*

Center, Inc., 738 F.3d 631, 632 (4th Cir. 2013). The court held that "while the FTC regulations do permit binding arbitration ***after*** the parties have engaged in informal dispute resolution, the regulations prohibit binding arbitration ***before*** the parties have so engaged." ***Id***. "Thus, under the FTC regulations, if the parties first engage in nonbinding dispute resolution, a warrantor may ***then*** require **a** consumer dissatisfied with the 'mechanism' decision to submit to binding arbitration." ***Id***. at 634, ***citing*** 40 Fed.Reg. at 60, 211 (emphasis added).[5] The court explained that the FTC ban on binding arbitration applies only if the parties fail to first proceed through a nonbinding dispute resolution mechanism. ***See Id***.

Plaintiff could not submit their claim to non-binding informal dispute resolution before filing the instant action because Defendant's agreement does not call for non-binding arbitration. Furthermore, upon information and belief, Defendant does not utilize an informal dispute resolution program for Florida residents which have been approved under the FTC guidelines. As Defendant does not maintain a non-binding informal dispute resolution mechanism in the State of Florida, even in the minority jurisdictions that allow binding arbitration of MMWA cases, it would not be permitted to require consumers to submit their claims to binding arbitration. Defendant has simply failed to comply with the conditions precedent that could allow for binding arbitration under the MMWA in these jurisdictions.

WHEREFORE Plaintiff LES KROL respectfully requests that the Court enter an order denying Defendant GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK. WORLD's Motion to Stay and Compel Arbitration, granting Plaintiff any other relief the Court deems appropriate.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a correct and true copy of the foregoing was sent via E-

[5] **Plaintiff are not arguing that binding arbitration would be allowed if Defendant offered non-binding arbitration first, but merely addressing the possibility that this Court may adopt the same position as the Fourth Circuit in *Seney* v. *Rent-A-Center, Inc.*, 738 F.3d 631, 632 (4th Cir. 2013). Per Plaintiffs discussion *infra*, it is Plaintiffs contention that the Magnuson-Moss Warranty Act prohibits binding arbitration in all contexts. .**

Filing this 14th day of December, 2017 to: Yesica S. Liposky, Esq., Broad and Cassell, LLP, 100 North Tampa Street, Suite 3500, Tampa, FL 33602, yliposky@broadandcassel.com, rsickles@broadandcassel.com, knovak@broadandcassel.com, egarvey@broadandcassel.com, jIovins@broadandcassel.com; and, John Glenn, Esq., AmdersonGlenn LLP, 2650 North Military Trail, Suite 430, Boca Raton, FL 33431, jglenn@asglaw.com, kdavidowitz@asglaw.com, hromeu@asglaw.com. 'roreilIy@asglaw.coni'

MORGAN & MORGAN, P.A.

/s/ Jeremy Kesnohl
JEREMY KESPOHL, Esquire
Florida Bar No. 035979
Attorneys for Plaintiff
76 South Laura Street, Ste 1100
Jacksonville, FL 32202
(904) 361-4416 Telephone
(904) 361-4348 Facsimile
jkespohl@forthepeople.com
For Service of Documents Only:
warrantygroupeservice@forthepeople.com

EXHIBIT 1

I

MORGAN & MORGAN*

Attorneys At Law

SUITE 1100
TO SOUTH LAURA STREET
JACKSONVILLE, a 32202-9433
(004) 308-2722
FAX: (904) 388-7877
FAX: (904) 388-7878

June 29, 2017

SENT VIA FEDERAL EXPRESS TO:
FCA US, LLC.
Chrysler Customer Assistance Center
1000 Chrysler Drive
Auburn Hills, MI 48326

Tracking No.: 8115 8930 5214

SENT VIA FEDERAL EXPRESS TO:
FCA MOPAR VEHICLE WORLD HEADQUARTERS
Customer Care
26311 Lawrence Ave.
Center Line, MI 48015

Tracking No.: 8115 8930 5203

SENT VIA REGULAR MAfT. Tfl:
GIBSON TRUCK WORLD
3455 South Orlando Dr.
Sanford, FL 32773

Customer:	**Les Krol**
Vehicle:	**2014 Ram 3500**
VIN:	**3C63RRGL0EG108376**
Dealer:	**Gibson Truck World**

Dear Madam/Sir:

Please be advised that this office represents Les Krol regarding his claims against your company pursuant to the federal Magnuson-Moss Warranty Act. Mr. Krol's claims stem from his purchase of a 2014 Ram 3500 warranted by your company. Please direct all future contacts and

correspondence regarding this matter to our office. Having been formally notified of our representation, you *are instructed not to contact our client under any circumstances*. If you fail to act in conformity with this directive, iqjunctive relief will be sought against you.

Additionally, you are hereby notified that any settlement made with our client must include compensation for all statutory and other relief available to a consumer, including attorneys' fees and costs. If you settle directly with our client, and do not make arrangements for payment of fees and costs, we will file suit against you. In addition, you are hereby notified of our attorneys' fees lien in regard to this matter.

My client has retained us with regard to numerous defects and non-conformities present in the subject vehicle, which are still present after numerous unsuccessful repair attempts. These defects and non-conformities include, but are not limited to:

1. Defective engine;
2. Defective struts/shocks;
3. Defective brakes/rotors; and,
4. All additional complaints made by our client, whether or not they are contained in your company's records or on any dealer repair orders.

My client has already given you and your authorized service sales and service providers multiple opportunities to correct the issues with the subject vehicle, but it remains In a defective state.

The defects and non-conformities listed above constitute a substantial impairment of the use, value and/or safety of the subject vehicle. Your failure and/or refusal to repair said defects and non-conformities in accordance with the terms of your warranty, constitutes a breach of warranty entitling ray client to recovery. *See Rastaedt* v. *Mercedes-Benz USA, LLC*, 63 So. 3d 41 (Fla. 4th DCA 2011); *Ocana v. Ford Motor Company*, 992 So. 2d 319 (Fla. 3d DCA 2008); *Zelyony v. Porsche CarsN. Am., Inc.*, 2008 U.S. Dist. LEXIS 31439 (S.D. Fla. 2008).

To the extent that my client has not already placed you on notice, you are hereby notified that your failure to successfully repair the defects and non-conformities in the subject vehicle constitutes a breach of your warranty. The repair history for the subject vehicle clearly shows that you have been unable or unwilling to correct the defect and nonconformities, after being a reasonable opportunity to do so. Accordingly, your warranty has failed of its essential purpose, and my client is entitled to seek any remedy available at law. See *Frank Griffin Volkswagen, Inc.*

v. *Smith*, 610 So. 2d 597 (Fla. 1st DCA 1992); *Burns v. DaimlerChrysler*, 914 So.2d 451 (Fla. 4th DCA 2006).

Pursuant to Uniform Commercial Code § 2-711(3), my client has a security interest in the vehicle for return of the amounts described herein, plus expenses in hnndling and inspecting the subject vehicle. Unless you agree to repurchase my client's vehicle, and return all payments made by my client, my client will hold the car and use it to the extent necessary to preserve it, to protect the security interest, and to minimize your damages. Moreover, my client needs return of the monies listed above before a substitute vehicle can be acquired. In addition, any attempt by you or your agents to repossess the subject vehicle will be wrongful and may subject you to liability for conversion and for wrongful repossession under Uniform Commercial Code §9-503 and §9-507, as well as any other applicable slate and federal remedies.

It is my client's contention that you have already been provided with suflicient opportunities to cure the breach of warranty. However, if you are interested in making an additional attempt to cure the breach of warranty, my client has authorized me to demand that you repurchase the subject vehicle and pay $2,000.00 for my client's attorneys' fees and costs in order to resolve this mntter. My client will also agree to execute a mutually agreed upon release agreement as a condition of settlement.

If I do not hear from you within ten (10) days of your receipt of this correspondence, 1 will presume you are uninterested in making any further attempts to cure the breach of warranty and/or otherwise attempting to resolve this matter, and we will proceed with litigation. Thank you for your time and attention to this matter, and I look forward to the receipt of your prompt responses.

Sincerely,

JeienJy.lCespohl, Esquire
Morgarf & Morgan

Please Respond To:
Karie Salvi
Case Manager to Jeremy Kespohl
ksalvi@forlheoeoole.com
(904) 361-4436 Direct One
(904) 361-4321 Facsimile

EXHIBIT 2

KELLY CARY LAW, P.A.

Licensed in FL & SC

July 11, 2017

Morgan & Morgan
Jeremy Kespohl
76 South Laura Street, Suite 1100
Jacksonville, FL 32202-3433

Re: Les Krol

Dear Mr. Kespohl:

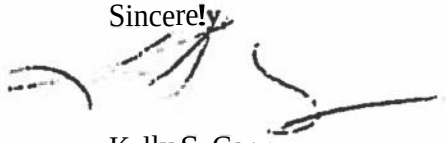
Please be advised that this firm has the pleasure of representing Gibson Truck World and all future communication should be addressed to my attention. I am in receipt of your letter dated June 29, 2017. It came as quite a surprise to my client since they have not heard from Mr. Les Krol in over a year.

Mr. Krol contacted Gibson Truck World over a year ago regarding having his 2014 Ram 3500 repaired. He was advised at that time that the repair was covered by the manufacturer warranty that was in full effect when he purchased the vehicle. Gibson Truck World could not address the problem as it was under warranty and he needed to take the truck to a Dodge dealership for repair. Which my client can only assume he did.

Mr. Krol later purchased an extended warranty from another dealership to cover his vehicle, which again we can only assume provided the coverage he paid for. Again, my client has not heard from your client in over a year. Gibson Truck World did not provide an extended warranty. The vehicle was covered by the manufacturer warranty and then an extended warranty. Gibson Truck World is unaware of any mechanical problems with his vehicle or why you would believe my client would have any liability for any such issues.

Feel free to call me or email me if you wish to discuss this matter.

Sincerely,



Kelly S. Cary

cc: client

1219 Roxboro Road
Longwood, FL 32750
407-334-0453
Kelly@KellyCarylaw.com

APPENDIX A-4

Filing # 70356614 E-Filed 04/06/2018 01:22:27 PM

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA
CIVIL DIVISION

LES KROL

Plaintiff,

Case No. 2017-CA-049992

v.

FCA US, LLC; and GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,

Defendants.
_____ /

DEFENDANT'S NOTICE OF HEARING

PLEASE TAKE NOTICE that the undersigned will call up for hearing *Defendant's Amended Motion to Stay and Compel Arbitration* before the Honorable Stephen Koons, Circuit Judge, at the Moore Justice Center, 2825 Judge Fran Jamieson Way, Viera, Florida on May **31, 2018 at 2:00 p.m.,** or as soon thereafter as counsel may be heard.

Time Reserved: 45 minutes

/s/ Yesica S. Linosky, Esq.
Robert E. Sickles, P.A.
Florida Bar No. 167444
Yesica S. Liposky, Esq.
Florida Bar No. 119924
BROAD AND CASSEL LLP
100 North Tampa Street, Suite 3500
Tampa, FL 33602
Telephone: 813-225-3020
Facsimile: 813-225-3039
Primary: rsickles@broadandcassel.com
Primary: vliposkv@broadandcassel.com
Secondary: knovak@broadandcassel.com
Secondary: ilovins@broadandcassel.com
Secondary: egarvev@broadandcassel.com
Counsel for Defendant Gibson Auto Sales, Inc., d/b/a Gibson Tmck World

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 6, 2018, a true and correct copy of this document was served via e-mail on the following:

Jeremy Kespohl, Esq.
Morgan & Morgan, P.A.
76 South Laura Street, Suite 1100
Jacksonville, FL 32202
jkespohl@forthepeople.com
warrantvgroupservice@forthepeople.com

Wilnar J. Julmiste, Esq.
ANDERSONGLENN LLP
2650 North Military Trial, Suite 430
Boca Raton, Florida 33341
julmiste@asglaw.com
KDavidowit2@asglaw.com

/s/ Yesica S. Liposky, Esq.
Yesica S. Liposky, Esq.
Florida Bar No. 119924

APPENDIX A-5

Filing # 72857428 E-Filed 05/30/2018 05:54:48 PM

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA
CIVIL DIVISION

LES KROL,

Plaintiff,

Case No. 2017-CA-049992

v.

FCA US, LLC; and GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,

Defendants.
_____ /

DEFENDANT'S NOTICE OF FILING

Defendant, Gibson Auto Sales, Inc., d/b/a Gibson Truck World, by and through its undersigned counsel, hereby files its Affidavit in Support of Defendant's Motion to Stay Litigation and Compel Arbitration.

/s/ Yesica S. Liposky
Robert E. Sickles, Esq.
Florida Bar No. 167444
Yesica S. Liposky, Esq.
Florida Bar No. 119924
BROAD AND CASSEL LLP
100 North Tampa Street, Suite 3500
Tampa, FL 33602
Telephone: 813-225-3020
Facsimile: 813-225-3039
Primary: rsickles@broadandcassel.com
Primary: yliposky@broadandcassel.com
Secondary: knovak@broadandcassel.com
Secondary: egarvey@broadandcassel.com
Secondary: jlovins@broadandcassel.com
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 30, 2018, a true and correct copy of this document was served via email on the following:

Jeremy Kespohl, Esq.
Morgan & Morgan, P.A.
76 South Laura Street, Suite 1100
Jacksonville, FL 32202
jkespohl@forthepeople.com
warrantygroupservice@forthepeople.com

Wilnar J. Julmiste, Esq.
ANDERSONGLENN LLP
2650 North Military Trial, Suite 430
Boca Raton, Florida 33341
julmiste@asglaw.com
KDavidowitz@asglaw.com

/s/ Yesica S. Liposky, Esq.
Florida Bar No. 119924

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA
CIVIL DIVISION

LES KROL,

Plaintiff,

Case No. 2017-CA-049992

v.

FCA US, LLC; and GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,

Defendants.
_____ /

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION TO STAY LITIGATION AND COMPEL ARBITRATION

Kim G Robinson in his capacity as Controller at Gibson Auto Sales Inc., d/b/a Gibson Truck World, (hereinafter "Gibson"), personally appeared before me, the undersigned authority, and being duly sworn and deposed, states as follows:

1. I am over the age of 18 and have personal knowledge of the facts set forth herein based on my position as Controller at Gibson and the business records of Gibson.

2. I have worked at Gibson for 21 years, and during this time, have been able to acquire an understanding of Gibson's general business practices, operations, and record keeping systems.

3. Gibson maintains business records, including records pertaining to Les Krol (hereinafter "Plaintiff"). Said records, including the records referenced in this Affidavit and/or attached as Exhibits to this Affidavit, were made at or near the time of the event or occurrence, recorded by, or from information transmitted by, a person with knowledge of those matters, are

kept in the ordinary course of the regularly conducted business activities of Gibson, and were made by Gibson as a regular practice in the course of its regularly conducted business activities.

4. Through my position at Gibson, I have personal knowledge of Gibson's record keeping systems and procedures, and understand how to use Gibson's systems to obtain information on specific customers, accounts, and transactions. 1 understand and can accurately comprehend the information contained in Gibson's files and records, and regularly use and rely on such information as part of my job duties.

5. Through my position at Gibson, I have personal knowledge of and understand the process in which dealerships sell used motor vehicles to customers, as well as the documents the customers sign in connection with the transaction.

6. Through my position at Gibson, I have personal knowledge of and understand the process in which Gibson provides customers with financing to purchase used motor vehicles.

7. Through my position at Gibson, I know that customers who purchase vehicles from Gibson, voluntarily sign an Arbitration Agreement as part of the package of documents they sign to purchase their vehicle.

8. I personally reviewed Gibson's records relating to Plaintiff prior to signing this Affidavit. I am also familiar with the claims being alleged against Gibson by the Plaintiff in the above-styled litigation. I have also reviewed Gibson's Motion to Stay Litigation and Compel Arbitration and Amended Motion to Stay Litigation and Compel Arbitration.

9. Based on the foregoing, I am a qualified and authorized to declare and certify the facts outlined in this Affidavit on behalf of Gibson.

10. On or about June 16, 2016, Plaintiff purchased a used 2014 Dodge Ram 3500 Truck and signed a Buyer's Order, retail installment sales contract (the "RISC"), and Arbitration Agreement as part of that transaction.

11. The Buyer's Order, RISC, and Arbitration Agreement were signed contemporaneously as part of the same package of documents reviewed and signed by the Plaintiff to the purchase his vehicle.

12. True and correct copies of the Buyer's Order, RISC, and Arbitration Agreement are attached hereto as *Composite Exhibit A*. Gibson maintains a deal file related to the Plaintiffs purchase of the subject vehicle, and I attest that the documents attached hereto are identical copies of the documents contained in Gibson's deal file.

13. By signing the Arbitration Agreement, Plaintiff agreed to the terms of the Arbitration Agreement. Among other things, Plaintiff agreed to submit all "Claims" to binding arbitration.

AFFIANT FURTHER SAYETH NAUGHT.

GIBSON AUTO SALES INC., d/b/a
GIBSON TRUCK WORLD,

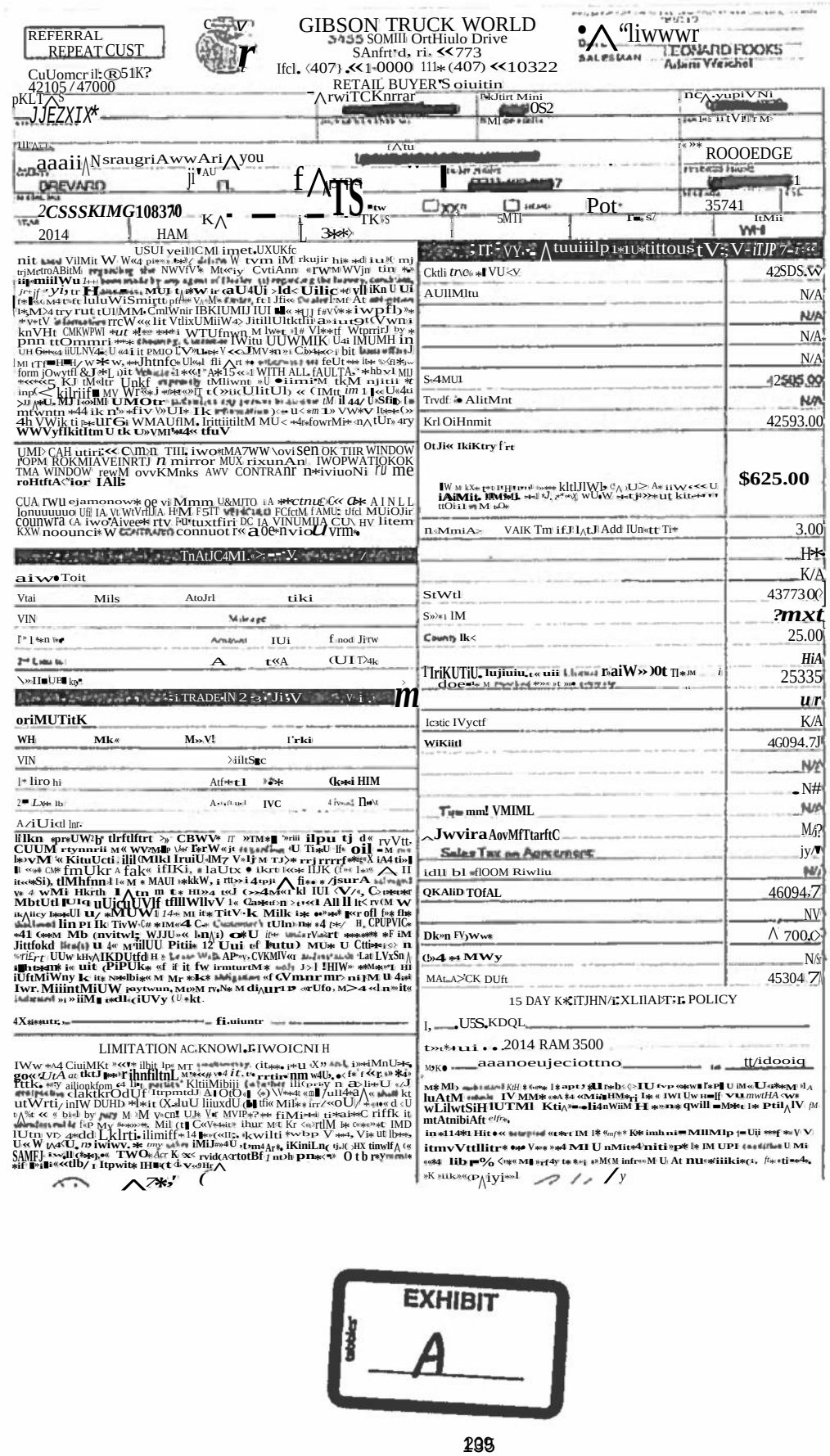
By: _____

Title: _____

The foregoing instrument was acknowledged before me this 25th day of May, 2018, by _____, as _____ of Gibson Auto Sales Inc., d/b/a Gibson Truck World, who is (personally known Jb me or produced _____ as identification aud WlT6 3id take an oath.

_____
Notary Public
My Commission Expires: 4-20-25

CHRISTINA M. WOODALL
Commission # GG 0817«
Expires April 3, 2021
Bondvd Thai T<<y Fite buwinct 800-385-7019



GIBSON TRUCK WORLD
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LIMITATION AC.KNOWl.J:IWOICNI H

EXHIBIT A

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SIMPLE FINANCE CHARGE

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FEDERALTRUTH-IN-LENDtNG DISCLOSURES

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Or As FoBqws:

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APPENDIX A-6

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IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA
CIVIL DIVISION

LES KROL,

Plaintiff, Case No. 2017-CA-049992

v.

FCA US, LLC; and GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,

Defendants.
_____ /

DEFENDANT'S NOTICE OF FILING

Defendant, Gibson Auto Sales, Inc., d/b/a Gibson Truck World, by and through its undersigned counsel, hereby Files the attached case law in support of Defendant's Amended Motion to Stay Litigation and Compel Arbitration.

/s/ Yesica S. Liposky
Robert E. Sickles, Esq.
Florida Bar No. 167444
Yesica S. Liposky, Esq.
Florida Bar No. 119924
BROAD AND CASSEL LLP
100 North Tampa Street, Suite 3500
Tampa, FL 33602
Telephone: 813-225-3020
Facsimile: 813-225-3039
Primary: rsickles@broadandcassel.com
Primary: yliposky@broadandcassel.com
Secondary: knovak@broadandcassel.com
Secondary: egarvey@broadandcassel.com
Secondary: jlovins@broadandcassel.com
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 31, 2018, a true and correct copy of this document was served via email on the following:

Jeremy Kespohl, Esq.
Morgan & Morgan, P.A.
76 South Laura Street, Suite 1100
Jacksonville, FL 32202
jkespohl@fortheDeople.com
warrantvgroupservice@forthepeople.com

Wilnar J. Julmiste, Esq.
ANDERSONGLENN LLP
2650 North Military Trial, Suite 430
Boca Raton, Florida 33341
julmiste@asglaw.com
KDavidowitz@asglaw.com

A/ Yesica S. Linosky, Esq.
Florida Bar No. 119924

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Disagreement Recognized by State Farm Fire and Cas. Co. v. Liceat Fla.App. 3 Dist., February 1, 1995

287 So.2d 665
Supreme Court of Florida.

MIDWEST MUTUAL INSURANCE COMPANY, Petitioner,
v.
William SANTIESTEBAN, a minor, by and through his father and next friend, Theodore Santiesteban, and Theodore Santiesteban, Individually, Respondents.

No. 42880.
Dec. 12, 1973.
Rehearing Denied Jan. 31, 1974.

Synopsis
Declaratory judgment action to enforce arbitration award entered upon claim for uninsured motorist protection. The Circuit Court, Dade County, Ralph O. Cullen, J., entered summary judgment enforcing arbitration award, and insurer appealed. The District Court of Appeal affirmed, 266 So.2d 102, and insurer applied for certiorari. The Supreme Court, Dekle, J., held that insurer which conceded liability upon first policy, which applied to motorcycle which minor plaintiff was riding when plaintiff was injured, was not liable upon second policy, as to which plaintiff was listed not as an insured but as a 'principal operator if other than the named insured', where operator was neither an 'insured' nor a 'relative resident of the same household/ as the policy required for coverage.

Certiorari granted, opinion quashed with directions to remand for entry of judgment for insurer.

Boyd, J., concurred in part and dissented in part and filed opinion in which Carlton, C.J., and Ervin, J., joined.

West Headnotes (7)

[1] Insurance
Ambiguity in general

Insurance
Construction or enforcement as written

An unambiguous contract of insurance does not require construction and must be given effect as written.

15 Cases that cite this hcadnotc

[2] Insurance
Persons Covered

Insurance
Uninsured or underinsured motorist coverage

Operator of friend's motorcycle, who was injured by an uninsured motorist and who recovered under insurance policy issued which covered the friend's motorcycle, could not recover under a second policy issued to a third party, which listed operator not as an insured but as a "principal operator if other than the named insured", where injured operator was neither an "insured" nor a "relative resident of the same household," which was required for coverage under the second policy.

Cases that cite this headnote

[3] Insurance
Adjustment, appraisal, or arbitration

Insurer which admitted coverage on first policy but denied it as to second policy could not be said to have waived defenses as to noncoverage by proceeding to arbitration, where insurer at all times conceded liability under its policy on motorcycle being ridden by injured plaintiff, but where insurer was equally adamant that there was no additional coverage under second policy on another motorcycle, and where insurer never moved from that position, so that entry of attorney fee and costs, along with the additional $10,000 on the second policy by the arbitrators, was without foundation and could not stand.

5 Cases that cite this headnote

[4] Alternative Dispute Resolution

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^ Arbitration favored; public policy

Courts favor arbitration to expedite claims and reduce litigation.

3 Cases that cite this headnote

[5] Insurance
Matters subject to arbitration

Challenge of coverage of an insurance policy presents exclusively a judicial question which may not be decided by arbitration.

18 Cases that cite this headnote

[6] Insurance
Adjustment, appraisal, or arbitration

Where nothing arbitrators could have done in relation to dispute over insurance policies could have affected the disputed coverage, participation by insurer in the arbitration proceedings could not possibly constitute a waiver of whether or not there was coverage, which was an issue which was continuously controverted by the insurer.

5 Cases that cite this headnote

[7] Insurance
Insurer's refusal as condition for recovery

Where insurer voluntarily paid the 510,000 limit of policy prior to institution of insurer's action in the circuit court, insureds were not entitled to an award of attorney fees or costs. F.S.A. § 627.428.

1 Cases that cite this headnote

Attorneys and Law Firms

*666 James E. Tribble of Blackwell, Walker, Gray & Powers, Miami, for petitioner.

Edward A. Perse of Horton & Perse, and Fuller, Brumer, Moss & Cohen, Miami, for respondents.

Opinion

DEKLE, Justice.

In this cause for review on certiorari from the Third District's affirmance of the plaintiffs' summary judgment,[1] we consider plaintiffs' (respondents') claims for the uninsured motorist coverage of SI0,000 under each of two separate insurance policies. Both were issued by petitioner insurance company; one was upon a friend's Honda motorcycle which the minor plaintiff was riding. The $10,000 is conceded since plaintiff was admittedly injured by an uninsured motorist, and the respondent insurance company at all times admitted liability under this policy. The company steadfastly denied, however, any coverage under a 'limited policy' issued on another Honda motorcycle to one Dennis F. Mahfuz, 6820 S.W. 19th Ter., Miami, Fla., 33155, with a 'Loss Payee' clause payable to Commercial Credit Corp.

The only was the injured minor figures in the 'Mahfuz' policy is being listed-not as an insured-but as 'principal operator if other than named insured.' This was prior to the new 18-year-old statute;[2] whether the vehicle was thus titled and insured for purposes of liability contingencies or a conditional sales contract or whatever reason, the actual ownership of the motorcycle and 'the insured' under the policy was Dennis Mahfuz, a 'stranger' to respondents insofar as any relationship under this policy is concerned and who resides at a different address.

We might have a different result here except for the fact that the injured plaintiff was not 'a resident of the same household' as that of the named insured Dennis Mahfuz, as was the case in Mullis v. State Farm Mutual Automobile Ins. Co., 252 So.2d 229 (Fla.1971), wherein this Court held that the uninsured motorist coverage was available there, where the injured party 'was a resident member of the household of the named insured.' This is a critical distinction in our case in which the injured minor had, for whatever reasons, a different residence than that of the owner and insured, Mr. Mahfuz, and the policy expressly listed a separate residence address for the 'principal operator', namely, the minor plaintiff here.

[1] [2] There is therefore no 'relative resident in the same household' relationship as the essential predicate which was the criterion in Mullis and without which the double recovery sought is without a basis. In this respect, Mullis stated: (p. 233 of 252 So.2d)

This, of course, would not be the case (coverage) as to other persons potentially covered who are Not in the class of the Named insured and relatives resident in the Mullis Household. These latter arc protected only if they receive bodily injury due to the negligence of an uninsured motorist while they occupy the insured automobile of the named insured with his permission or consent/ (emphasis added)

The District Court thus misapplied and misconstrued the holding in Mullis; this is one basis for conflict.[3] Moreover, there is *667 direct conflict with Boyd v. United States Fidelity & Guaranty Co., 256 So.2d 1 (Fla.1971), and Rigel v. Nat'l Casualty Co., 76 So.2d 285 (Fla.1954), holding that an unambiguous contract of insurance does not require construction, and must be given effect as written. It should have been here. There was no ambiguity in the Mahfuz policy under which the additional $10,000 is sought, wherein the minor plaintiff was listed as 'principal operator' and was neither an 'insured' nor 'relative resident in the same household' nor did he 'occupy the insured vehicle' as a basis for uninsured motorist coverage under Mullis. The District Court's transposing of 'principal operator' to 'insured' was without foundation; this creates conflict with the principles announced in Boyd and Rigel.

WAIVER

[3] Secondly, the trial court had held and the District Court agreed that the insurance company by proceeding to arbitration waived its defenses as to non-coverage, citing Volkswagen Ins. Co. v. Taylor, 201 So.2d 624 (Fla.App.lst 1967). V.W. is not controlling. In the present cause there are two distinct claims and policies applying. Boyd v. United States Fidelity & Guaranty, Supra. The insurance company at all times conceded its liability under its policy on the motorcycle being ridden by the injured plaintiff; it was equally adamant that there was NO additional coverage under the policy on the other motorcycle. It never waivered from that position. By advance letter it expressly rejected submitting to arbitration regarding the additional policy claimed to be applicable; prior to the arbitration hearing the insurance company by further letter offered policy limits of the policy on the motorcycle being operated and insisted that this was the only policy applicable to the claim under arbitration. Under these circumstances there was hardly a waiver since insurer's position was consistent at all times under the one applicable policy and at no time did it consent to the arbitration in any other respect. Accordingly, the entry of an attorney's fee and costs, along with the additional $10,000 on the second policy by the arbitrators was without foundation and cannot stand.

[4] [5] (6] There was no requirement under these circumstances for the insurer to seek to enjoin the arbitration proceedings. The courts favor arbitration to expedite claims and reduce litigation. Nothing the arbitrators could have done could affect the disputed Coverage; thus, participation in the arbitration proceedings could not possibly constitute a waiver of the continuously controverted coverage. A 'waiver' of nothing is no waiver. It is a Brutum fulmen. A challenge of Coverage is exclusively a Judicial question and may not be decided by arbitration. Netherlands Ins. Co. v. Moore, 190 So.2d 191 (Fla.App.lst 1966).

Volkswagen involved only a Single policy and therefore is not controlling in a situation where there is a second policy as here;

Volkswagen further was a defense on the Terms of the single policy whereas Sub judice there is no claim of a breach of policy provisions as in Volkswagen. The challenge is upon a complete absence of coverage as to the second vehicle.

[7] Accordingly, certiorari is granted and the opinion of the District Court is quashed with directions to remand for entry of judgment for petitioner. The petitioner having voluntarily paid the $10,000 limit of the Benham policy prior to institution of plaintiffs' action in the circuit court, plaintiffs are not entitled to an award of attorney's fees or costs. Fla.Stat. s 627.0127, F.S.A.

It is so ordered.

ROBERTS, ADKINS and McCAIN, JJ., concur.

BOYD, J., concurring in part, dissenting in part, in which CARLTON, C.J., and ERVIN, J., concur.

BOYD, Justice (concurring in part; dissenting in part).

I agree with the majority view that petitioner Midwest Insurance Company was not *668 liable under the Mahfuz policy. The injured respondent, William Santiesteban, was not an insured, nor a member of the insured's family living in his household, and the Mahfuz motorcycle was not involved in the wreck. Since respondent does not meet any of the requirements stated in our Mullis opinion, he had no right to recover.

The basis for my dissent is that to escape liability under the claim of respondent, the petitioner should have refused arbitration, and filed a complaint in the trial court. Petitioner cannot submit to arbitration, and then challenge the results, except for reasons permitted under Section 682.14, Florida Statutes, F.S.A. None of these reasons have been shown in this case, and the arbitration finding, although contrary to the established law, must prevail. Having no lawful basis to reverse the decision of the arbitration, the trial court and the District Court of Appeal reached the correct result.

CARLTON, C.J., and ERVIN, J., concur.

All Citations

287 So.2d 665

Footnotes

1 **266 So.2d 102.**

2 **Ch. 73-21, Laws of Florida 1973.**

3 **Pinkerton-Hays Lbr. Co. v. Pope, 127 So.2d 441 (Fla.1961); McBurnette v. Playground Equipment Corp., 137 So.2d 563 (Fla.1962).**

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644 So.2d 613
District Court of Appeal of Florida,
Second District

Bo G. GREKTORP, Anita W. Grektorp, and Movado Realty, Inc., a Florida corporation, Appellants,
v.
CITY TOWERS OF FLORIDA, INC., a Florida corporation, and City Gardens of Indian Rocks, Inc., a Florida corporation, Appellees.

No. 93–00876.
|
Nov. 9, 1994.

Synopsis

Employer brought action against employee, employee's wife, and corporation owned by employee and wife alleging, inter alia, breach of fiduciary duty by employee. The Circuit Court, Hillsborough County, Perry A. Little, J., denied employee's motion to compel arbitration, and employee appealed. The District Court of Appeal, Campbell, Acting C.J., held that employer's claim that employee breached his Fiduciary duty by engaging in real estate transactions with his wife and corporation and by receiving commissions on those dealings was within scope of arbitration clause of employment contract.

Reversed and remanded.

West Headnotes (4)

[1] Alternative Dispute Resolution
Arbitration favorcd;public policy
Alternative Dispute Resolution
Construction in favor of arbitration

Arbitration agreements are favored means of dispute resolution and doubts concerning scope of arbitration clauses should generally be resolved in favor of arbitration.

2 Cases that cite this headnote

[2] Alternative Dispute Resolution
Construction

Scope of arbitration clause depends on language used in clause.

Cases that cite this headnote

[3] Alternative Dispute Resolution
Employment disputes

Employer's claim that employee breached his fiduciary duty by engaging in real estate transactions with his wife and corporation owned by employee and wife and by receiving commissions on those dealings was within scope of arbitration clause of employment contract providing for submission to arbitration of "any controversy" between employee and employer "involving the construction or application of any of the terms, provisions, or conditions" of contract.

1 Cases that cite this headnote

(4) Appeal and Error
Course and conduct of trial

District Court of Appeal would quash portion of order denying, in employer's action against employee, employee's wife, and corporation owned by employee and wife, motion by wife and corporation to abate action, even though such denial was normally revicwable only by certiorari, and would direct that motion be reconsidered on remand; Court had reversed denial of employee's motion to compel arbitration of employer's breach of fiduciary duty claim against him, and all matters on appeal arose out of same nonfinal order. West's F.S.A. § 682.03(3).

1 Cases that cite this headnote

Attorneys and Law Firms

*613 Marsha Griffin Rydberg and Richard Thomas Petitt of Rydberg, Goldstein & Bolves, P.A., Tampa, for appellants.

Stevan T. Northcutt of Levine, Hirsch, Segal! & Northcutt, P.A., Tampa, for appellees.

Opinion

CAMPBELL, Acting Chief Judge.

Appellant, Bo G. Grektorp, appeals the nonfinal order that denied his motion to compel arbitration. Appellants, Anita Grektorp and Movado Realty, Inc., appeal that portion of the same order that denied their motion to abate the proceedings pending arbitration. Although appellants also appeal that portion of the nonfina! order that denied their motion to dismiss, we do not address that issue since the denial of a motion to dismiss is not an appealable order.

Appellees, City Towers of Florida, Inc. and City Gardens of Indian Rocks, Inc., filed an amended complaint alleging that City Towers' president, Bo Grektorp, had breached his fiduciary duties to them, which arose out of his employment contract, by engaging in real estate transactions with his wife, Anita, and with Movado Realty, Inc., a corporation owned by the Grcktorps, and by receiving commissions from those dealings contrary to the contractual interests of appellees.

Bo Grektorp moved to compel arbitration of appellees' claims against him pursuant to *614 an arbitration clause contained in his employment contract. That clause provides that "any controversy between the Employee and Employer involving the construction or application of any of the terms, provisions, or conditions of this Agreement shall on the written request of either party served be submitted to arbitration as per rules and regulations of the American Arbitration Association." The court denied appellant's motion to compel arbitration.

[1] [2] [3] Arbitration agreements are a favored means of dispute resolution, and doubts concerning the scope of arbitration clauses should generally be resolved in favor of arbitration. *CSE, Inc. v. Barron,* 620 So.2d 808, 809 (Fla. 2d DCA 1993). The scope of an arbitration clause depends on the language used in the clause. We construe the arbitration clause here, insofar as it refers to "*any* controversy ... involving the construction or *application* of *any* of the terms, provisions, or conditions of this Agreement ...," to reflect a broad arbitration agreement. (Emphasis added.) *See CSE, Inc.* We, therefore, reverse that portion of the order on appeal that denied appellant Bo Grektorp's motion to compel arbitration.

[4] As to the appeal by appellants Anita Grektorp and Movado Realty, Inc. of the denial of their motion to abate, that matter is normally rcviewablc only by certiorari. However, due to the posture of this case and the fact that the matters that are the subject of this appeal all arise out of the same nonfinal order, we quash that portion of the order denying the motion to abate and, on remand, direct that that motion be reconsidered in light of this opinion and section 682.03(3), Florida Statutes (1991).

ALTENBERND and QUINCE, JJ., concur.

All Citations

644 So.2d 613, 19 Fla. L. Weekly D2373

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KeyCtte Yellow Flag - Negative Treatment
Distinguished by Perdido Key Island Resort Development, L.L.P. v. Regions Bank, Fla.App. 1 Dist., January 13, 2012

543 So.2d 359
District Court of Appeal of Florida,
First District.

BEAVER COACHES, INC., Appellant,
v.
REVELS NATIONWIDE
R.V. SALES, INC., Appellee.

No. 88-3075.
|
May 12, 1989.

Synopsis
Vehicle dealer brought action against manufacturer to recover for breach of provision in franchise agreement giving exclusive territory to dealer and for violation of Franchise Fraud Act. The Circuit Court, Clay County, William Wilkes, J., refused to compel arbitration. Manufacturer appealed. The District Court of Appeal, Joanos, J., held that: (1) limitation of remedies clause outside of arbitration clause did not limit arbitrator's powers or remedies, and (2) claims alleging breach of Franchise Fraud Act were arbitrable.

Reversed and remanded.

West Headnotes (4)

[1] Alternative Dispute Resolution
Scope of Relief
Alternative Dispute Resolution
Particular Issues or Questions

Limitation of remedies clause outside of arbitration clause did not limit arbitrator's powers or remedies; arbitrator could determine whether limitation of remedies provision was valid.

5 Cases that cite this headnote

[2] Alternative Dispute Resolution
Existence and Validity of Agreement
Alternative Dispute Resolution
Matters to Be Determined by Court

Claims of adhesion, unconscionability, waiver of judicial remedy without knowledge, and lack of mutuality should be resolved in arbitration so long as they do not pertain to arbitration clause itself.

2 Cases that cite this headnote

[3] Alternative Dispute Resolution
Disputes and Matters Arbitrable Under Agreement

Claims that vehicle manufacturer violated Franchise Fraud Act by misrepresenting exclusivity of dealer's sales territory and by failing to disclose intentions to establish dealerships beyond ability of market to sustain them were arbitrable under clause requiring arbitration of all disputes arising from and relating to contract; there was no contention that arbitration clause was itself fraudulently induced. West's F.S.A. §§ 817.416, 817.416(2)(a) 3.

7 Cases that cite this headnote

[4] Alternative Dispute Resolution
Disputes and Matters Arbitrable Under Agreement

In case of particularly broad arbitration clause, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. 9 U.S.C.A. § 1 et seq.

7 Cases that cite this headnote

Attorneys and Law Firms

*360 James L. Simon, Steven L. Brannock and Stacy D. Blank of Holland & Knight, Tampa, for appellant.

Dana G. Bradford of Gallagher, Baumer, Mikals, Bradford, Cannon & Walters, P.A., Jacksonville, for appellee.

Opinion

JOANOS, Judge.

Pursuant to Rule 9.130(a)(3)(C)(v), Florida Rules Appellate Procedure, Beaver Coaches, Inc. has appealed from a non-final order denying the arbitrability of certain claims filed against it by Revels Nationwide R.V. Sales, Inc. We reverse.

The parties entered into a Dealer and Service Agreement (Agreement) wherein Revels was appointed an authorized dealer of Beaver's recreational vehicles. A specific territory was designated in the contract, and Beaver agreed "that as long as (Revels] is not in default under this agreement, during the term of this agreement, Beaver will not appoint any other dealer in the Territory."

Revels subsequently filed a complaint against Beaver alleging, in Count I, that Beaver had breached the exclusivity provision by authorizing other dealers to market their vehicles in Revels' territory. Consequential damages were alleged and sought in the form of lost profits and sales, floor plan and financing costs, and funds invested into the dealership. Count II of the complaint alleged violation of Section 817.416, Florida Statutes (the Florida Franchise Fraud Act), in that Beaver knowingly misrepresented that the contractually designated territory would be exclusive to Revels in order to induce Revels' execution of the contract, and further failed to disclose its intention to establish additional dealerships beyond the ability of the market area to sustain them; the same consequential damages were alleged and sought.

Paragraph 21(a) of the Agreement provides that:

> Disputes and other matters in question between Beaver and (Revels] arising out of, or relating to this agreement, shall be decided by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect unless the parties mutually agree otherwise.

Pursuant to this provision, Beaver filed a "Demand for Arbitration and Motion to Dismiss or to Slay or Abate Proceedings Pending Arbitration." The motion alleged that the Federal Arbitration Act, 9 U.S.C. § I, *et seq*,, was applicable to the contract (which Revels does not dispute) and that, given the strong federal policy favoring arbitration and the broad language of the contract's arbitration clause, the court was obliged to move the parties to arbitration.

At the hearing on the motion, Revels pointed out that the damages sought in both counts of its complaint exceeded the limitation of remedies found in Paragraph 8 of the Agreement, which provided that "except as otherwise expressly provided in this agreement, no consequential damages, incidental damages or other indirect or special damages or loss" would be recoverable by either party for a breach of the Agreement. Revels then noted that Paragraph *361 14 of the Agreement appeared to permit Beaver, upon any breach by Revels, to pursue the very remedies from which Revels was barred by Paragraph 8. It maintained that, whereas a court was free to declare the limitation of remedies therefore unenforceable for lack of mutuality and award the damages sought, an arbitrator could not award a remedy which was excluded by the contract, citing *Alco Standard Corp.* v. *Benelal,* 345 F.Supp. 14 (E.D.Pa.1972).

With regard to Count II of the complaint, Revels further argued that, because it alleged violation of a statutory duty, imposed by Section 817.416, not to fradulently induce franchise contracts, the acts complained of did not "arise from or relate to" the Agreement so as to place the allegations within the Agreement's arbitration clause.

The trial judge adopted Revels' arguments as to both counts of the complaint. With regard to Count I, the court found, as a matter of law, that, when read in conjunction with Paragraph 14, the Agreement's limitation of remedies clause was void for lack of mutuality. The court relied on *Alco, supra,* to hold that, while a court of law was free to make such a finding and refuse to enforce the contractual limitations clause, thus enabling it to award the damages sought by Revels in Count I, an arbitrator could not go beyond that clause to award those damages. Arbitrability was therefore denied as to Count I.

The court further found that, because Revels sought the same damages in Count II as in Count I, the foregoing conclusion served to bar arbitrability as to that count as well. The court went on to note that the statutory duty of a franchisor not to make misrepresentations with regard to the franchise were provided by law and were independent

of any agreement between the franchisor and franchisee. The violations of that duty alleged in Count II, therefore, did not "arise out of or relate to" the Agreement herein, putting the alleged violations outside the scope of the arbitration clause. Arbitrability was thereupon denied as to Count II as well.

[1] First of all, we find that the trial court herein incorrectly expanded the holding in *Alco, supra,* to mean that, whenever the contract as a whole, as opposed to the arbitration agreement within that contract, contains a limitation of remedies clause, an arbritrator is limited by the provisions of that clause in the remedies he can afford.

The contract at issue in *Alco* was an agreement to indemnify from damages of "loss, cost or expense deemed to have been incurred as the result of a determination of a Primary Claim", which was defined in terms of money damages. The contract's arbitration clause provided only for "the right to submit any disputed Primary Claim for final determination by the arbitrator." Hence, the arbitration clause itself, by its limitation to "Primary Claims" with their own contractually defined remedy, and not the contract as a whole, limited the remedy that could be granted by the arbitrator. The *Alco* court held no more than that: "The powers of arbitrators arise out of *the agreement ... submitting the dispute to them* [i.e., the arbitration agreement], and they arc limited to act only on those issues and to fashion only those remedies which the agreement itself permits." *Alco* at 21–22 (emphasis supplied). Therefore, the trial court's reading of *Alco* to mean that a limitation of remedies *outside of the arbitration clause* limits the arbitrator's powers was erroneous. Because no limitation of remedies is contained within the broad arbitration clause involved herein, the denial of arbitrability in reliance on *Alco* must be reversed.

[2] This holding also serves to reconcile *Alco* with case law holding that, while an arbitrator should be bound by a specific agreement of the parties barring consequential damages, he can depart therefrom if he expresses as a separate determination in the award that the provision is unconscionable. *Farkar Co.* v. *R.A. Hanson Disc, Ltd.,* 604 F.2d 1, 2 (2d Cir.1979). Revels pointed out at oral argument that the trial court did not find the limitation invalid as unconscionable, but for lack of mutuality. However, assuming that this is a distinction with a difference, claims of *362 adhesion, unconscionability, waiver of judicial remedy without knowledge and *lack of mutuality,* so long as they do not pertain to the arbitration clause itself, should be resolved in arbitration. *Benoay v. Prudential–Bache Securities, Inc.,* 805 F.2d 1437, 1441 (11th Cir.1986) (emphasis supplied).

As noted above, Count II of the complaint alleged violations of Section 817.416, Florida Statutes, in that 1) Beaver knowingly misrepresented that the contractually designated territory would be exclusive to Revels in order to induce Revels' execution of the contract, and 2) failed to disclose its intention to establish additional dealerships beyond the ability of the market area to sustain them. Consequential damages similar to those in Count I were alleged and sought. Based on the damages claim, the court denied arbitrability as to Count II in reliance on *Alco* and, as explicated above, denial on that ground was erroneous. However, arbitrability was also denied as to this count on the ground that the violations alleged therein were based on Section 817.416, Florida Statutes, independently of the contract herein, and hence such allegations did not "arise from or relate to" the contract so as to fall within the provisions of the arbitration clause.

[3] We note first of all that fraudulent inducement to enter into a franchise agreement by misrepresentations regarding exclusivity of sales territory is not proscribed by Section 817.416, and hence is not subject to the trial court's specific objection as to this count of the complaint. Further, it is well-established that "arbitration clauses are 'separable' from the contracts in which they arc imbedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 402, 87 S.Ct. 1801, 1805, 18 L.Ed.2d 1270 (1967); *Physicians Weight Loss Centers of America, Inc.* v. *Payne,* 461 So.2d 977, 978 n. 3 (Fla. 1st DCA 1984). The *Prima Paint* court denominated as "broad" an arbitration clause providing that "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration...." *Prima Paint,* 388 U.S. at 398, 87 S.Ct. at 1803. The instant arbitration clause states that "[disputes and other matters in question between Beaver and [Revels] arising out of or relating to this agreement, shall be decided by arbitration...." Because we find the instant clause at least as broad in scope as that set forth in *Prima Paint,* and because there is no contention herein that the arbitration clause itself was fraudulently induced, Revels'

contention that Beaver fraudulently induced the contract by misrepresentations of territory exclusivity is clearly arbitrable.

[4] We make the same finding with regard to Section 817.416(2)(a) 3, Florida Statutes, governing Revels' allegation that Beaver intentionally misrepresented its intentions to sell more franchises than was reasonable to expect the market area for the particular area to sustain. First of all, any time a contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT & T Technologies, Inc. v. Communications Workers of America,* 475 U.S. 643, 650, 106 S.Ct. 1415, 1419, 89 L.Ed.2d 648 (1986). In the case of a particularly broad arbitration clause, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. *AT & T* at 650, 106 S.Ct. at 1419.

We cannot say, given the breadth of the arbitration clause quoted above, requiring arbitration of ail disputes not only "arising from" but "relating to" the instant contract, that the clause is not "susceptible of an interpretation" that covers this dispute regarding Beaver's conduct with regard to the franchise agreement. Revels argues that the "presumption of arbitrability" should not apply in that arbitration of the statutory claim would violate public policy, i.e., the contract's limitation of remedies *363 clause would prohibit an arbitrator from awarding any statutory damages which are outside the limitations clause. This rationale, as has been shown, is without merit.

Further, at least one other Florida court, when faced with the refusal of a trial court to compel arbitration with regard to a misrepresentation in violation of Section 817.416, Florida Statutes, has reversed and remanded with directions to compel arbitration on that issue. *See Doctors Associates, Inc. v. McCrory,* 501 So.2d 126, 127 (Fla. 2d DCA 1987).

Based on the foregoing, the order of the trial court denying Beaver's "Demand for Arbitration and Motion to Dismiss or to Stay or Abate Proceedings Pending Arbitration" is reversed and this cause is remanded with directions to enter an order compelling arbitration on all counts.

THOMPSON and ZEHMER, JJ., concur.

All Citations

543 So.2d 359, 14 Fla. L. Weekly 1162

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KeyCitc Yellow Flag - Negative Treatment
Distinguished by Kaplan v. Divosta Homes, L.P., Fla.App. 2 Dist., May 23, 2008

845 So.2d 303
District Court of Appeal of Florida,
Second District.

STACY DAVID, INC., d/b/a Brandon Mitsubishi, a Florida corporation, Appellant,
v.
Jennifer CONSUEGRA and Francisco A. Consuegra, Appellees.

No. 2D02-1243.
May 16, 2003.

Synopsis
Car buyers brought claim against dealer, asserting negligent misrepresentation, several counts of intentional fraud, rescission, breach of express warranty, breach of implied warranty, and deceptive and unfair trade practices in connection with purchase of car. Dealer brought motion to compel arbitration. The Circuit Court, Hillsborough County, Manuel A. Lopez, A.C.J., denied the motion. Dealer appealed. The District Court of Appeal, Altenbernd, C.J., held that: (1) claims arose from contract and thus were subject to broad arbitration clause in contract; (2)buyers waived claim that their rescission of contract rendered arbitration clause unenforceable; and (3) dealer's failure to sign retail order did not render arbitration clause invalid.

Reversed and remanded.

West Headnotes (7)

[1] Alternative Dispute Resolution
Scope and Standards of Review
An order denying a motion to compel arbitration is generally reviewed de novo.

7 Cases that cite this headnote

[2] Alternative Dispute Resolution
Validity
Alternative Dispute Resolution
Disputes and Matters Arbitrable Under Agreement
Alternative Dispute Resolution
Waiver or Estoppel
In determining whether a dispute is subject to arbitration, courts consider at least three issues: (1) whether a valid written agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitration was waived.

5 Cases that cite this headnote

[3] Alternative Dispute Resolution
Disputes and Matters Arbitrable Under Agreement
A broad form arbitration clause such as "any controversy or claim arising out of or relating to" a contract may require arbitration of tort issues including issues of fraud.

7 Cases that cite this headnote

[4] Alternative Dispute Resolution
Sales Contracts Disputes
Car buyers' consumer claim against car dealer, including negligent misrepresentation, fraud, rescission, breach of warranty, and unfair and deceptive trade practices, arose from contract, and thus buyers were required to arbitrate claims under contractual provision requiring arbitration of "any controversy or claim arising out of or relating to" the contract; all claims were dependent upon the existence of a contractual relationship between the parties.

7 Cases that cite this headnote

[5] Alternative Dispute Resolution
Disputes and Matters Arbitrable Under Agreement
Deciding whether a particular claim is covered by a broad arbitration provision requires a determination of whether a significant relationship exists between the claim and the

agreement containing the arbitration clause, regardless of the legal label attached to the dispute.

8 Cases that cite this headnote

[6] Alternative Dispute Resolution
To Submission

Car buyers waived claim that their unilateral recision of contract with dealer rendered arbitration clause in contract unenforceable; theory was neither pleaded in complaint nor otherwise raised in the record, buyers did not allege separate claim that arbitration clause itself was invalid under the separability doctrine, and buyers affirmatively alleged a claim for breach of an express contractual warranty.

1 Cases that cite this headnote

[7] Alternative Dispute Resolution
Writing, Signature, and Acknowledgment

Arbitration clause in contract between car buyers and dealer was not invalid due dealer's failure to sign retail order; record reflected that dealer executed other documents associated with sale, there was evidence that order was a valid contract enforceable against dealer once it arranged for buyers to sign agreement, and buyers admitted that they executed the arbitration agreement.

1 Cases that cite this headnote

Attorneys and Law Firms

*304 Andrew F. Russo of Rywant, Alvarez, Jones, Russo & Guyton, P.A., Tampa, for Appellant.

Theresa I. Wigginton of Theresa I. Wigginton, P.A., Brandon, for Appellees.

*305 Cynthia S. TunniclfT and Julius F. Parker, III, of Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., Tallahassee, for Amicus Curiae Florida Automobile Dealers Association.

Opinion

ALTENBERND, Chief Judge.

Stacy David, Inc., d/b/a Brandon Mitsubishi, appeals a nonfinal order denying a motion to compel arbitration of a consumer claim initiated by Jennifer and Francisco A. Consuegra. We conclude that the triai court was overly restrictive in applying the guidelines discussed in *Seifert* v. *U.S. Home Corp.*, 750 So.2d 633 (Fla.1999), to exclude certain tort and statutory issues from arbitration. Accordingly, we reverse and remand to the trial court to submit these claims to arbitration.

On January 25, 2001, the Consuegras went shopping for a new car at Brandon Mitsubishi. They decided to purchase a new 2001 Mitsubishi Eclipse RT. To complete the purchase, the Consuegras signed several documents including a retail order for a motor vehicle and a retail installment contract. The retail order contained an arbitration clause, which was placed in a conspicuous box immediately above the signature lines. In all capital letters, it stated:

> ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS CONTRACT OR THE BREACH THEREOF, SHALL ONLY BE SETTLED BY ARBITRATION IN HILLSBOROUGH COUNTY, FLORIDA IN ACCORDANCE WITH THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION, AND JUDGEMENT UPON THE AWARD RENDERED BY THE ARBITRATOR(S) MAY BE ENTERED IN ANY COURT HAVING JURISDICTION THEREOF. THE ARBITRATION COST TO BE SPLIT EQUALLY BETWEEN BRANDON MITSUBISHI/HYUNDAI & CUSTOMER.

While driving home in the car, the Consuegras noticed that the steering wheel was not aligned properly and that the headlights were off center. They immediately returned to Brandon Mitsubishi. For the first time, the sales representative informed them that the vehicle had sustained damage while being unloaded at the dealership. The Consuegras attempted to void the transaction. Brandon Mitsubishi refused to rescind the contract or

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accept return of the automobile. However, Brandon Mitsubishi did agree to do certain repairs on the vehicle. Brandon Mitsubishi also agreed to pay the Consuegras S800 and provide an additional feature worth S350. The Consuegras thereafter signed a disclosure that the car had been in an accident and repaired back to factory standards. [1]

On August 24, 2001, the Consuegras filed a nine-count complaint against Brandon Mitsubishi. The complaint alleged negligent misrepresentation, several counts of intentional fraud, rescission, breach of express warranty, breach of implied warranty, violation of the Magnuson-Moss Act, [2] and violation of the Florida Deceptive and Unfair Trade Practices Act. [3] Brandon Mitsubishi responded to the complaint with a motion to compel arbitration. The trial court denied the motion to compel arbitration as to all counts on the ground that the tort claims were not subject *306 to arbitration. Brandon Mitsubishi filed this appeal from the nonfinal order.

[1] [2] An order denying a motion to compel arbitration is generally reviewed de novo. *See Hirshenson v. Spaceio,* 800 So.2d 670 (Fla. 5th DCA 2001). In determining whether a dispute is subject to arbitration, courts consider at least three issues: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived. *See Seifert,* 750 So.2d at 636. In this case, only the second issue is disputed.

[3] The arbitration clause in this case employs the phrase "any controversy or claim arising out of or relating to" a contract. It is well-established that such a broad form arbitration clause may require arbitration of tort issues including issues of fraud. *See Micronair, Inc. v. City of Winter Haven,* 800 So.2d 622 (Fla. 2d DCA 2001); *Simpson v. Cohen,* 812 So.2d 588 (Fla. 4th DCA 2002).

[4] [5] On appeal, the Consuegras argue that their causes of action do not arise from the contract. We disagree. Deciding whether a particular claim is covered by a broad arbitration provision requires a determination of whether a significant relationship exists between the claim and the agreement containing the arbitration clause, regardless of the legal label attached to the dispute. *Seifert,* 750 So.2d at 637-38. In *Seifert,* the supreme court attempted to draw a clearer line between personal injury claims that may be exempt from arbitration and the types of torts that may be arbitrated. *hi* at 641. The supreme court explained that tort claims based on duties owed to the general public as a matter of common law or public policy may fall outside an arbitration clause, but that tort claims based on duties that are dependent upon the existence of the contractual relationship between the parties are normally arbitrable. *Seifert,* 750 So.2d at 640-41.

Prior to *Seifert,* case law existed that enforced arbitration clauses in the context of a purchase of a used automobile even when the plaintiff alleged fraud or deceptive trade practices. *See Passerrello v. Robert L. Lipton, Ittc.,* 690 So.2d 610 (Fla. 4th DCA 1997); *Value Car Sales, Inc. v. Bouton,* 608 So.2d 860 (Fla. 5lh DCA 1992). *Seifert* did not overrule this case law. The fact that the automobile in this case is new is not a factor that should require different rules of arbitrability. In this type of consumer claim, the duties alleged under theories such as fraud in the inducement of a contract, fraud in the performance of a contract, or negligent misrepresentation are duties dependent upon the existence of a contractual relationship between the parties. Because the Consuegras' claims implicate the contractual agreement, the allegations are considered "arising out of or relating to" the agreement, thus subjecting the claims to arbitration.

After *Seifert,* the case law has required arbitration of claims under the Florida Deceptive and Unfair Trade Practices Act. *Aztec Med. Servs., Inc. v. Burger,* 792 So.2d 617, 618 (Fla. 4th DCA 2001). Likewise, the Eleventh Circuit has required arbitration of claims under the Magnuson-Moss Act. *See Davis v. S. Energy Homes, Inc.,* 305 F.3d 1268 (11th Cir.2002). [4] Thus, no count of the Consuegras' complaint appears *307 to fall outside the arbitration agreement.

[6] On appeal, the Consuegras also argue that the arbitration clause is unenforceable because they unilaterally rescinded the contract or because Brandon Mitsubishi did not execute the retail order. We note that these theories were neither pleaded in their complaint nor otherwise raised in the record contained in the appendix. The Consuegras have not alleged a separate claim that the arbitration clause itself is invalid under the separability doctrine, and have affirmatively alleged a claim for breach of an express contractual warranty. Because the Consuegras failed to specifically attack the arbitration clause the claims are properly submitted to

arbitration. *See Ronbeck Constr. t\ Savanna Club Corp.*, 592 So.2d 344 (Fla. 4th DCA 1992); *Manning* v. *Interfuture Trading, Inc.*, 578 So.2d 842 (Fla. 4th DCA 1991); *John B. Goodman LP.* v. *THF Constr., Inc.*, 321 F.3d 1094 (11th Cir.2003). *Cf. R.B.F. Mgmt. Co.* v. *Sunshine Towers Apartment Residences Ass'n,* 352 So.2d 561, 562 (Fla. 2d DCA 1977) (holding that arbitration could not be compelled where plaintiff sought only rescission, and there was "no claim for damages in any of the five counts of the complaint"). This case is also distinguishable from *Henderson v. Coral Springs Nissan, Inc.*, 757 So.2d 577 (Fla. 4th DCA 2000), in which the dealership sought to enforce an arbitration clause after it had rescinded the contract and repossessed the car.

[7] The Consuegras point out that the retail order was not signed by Brandon Mitsubishi; however, the documents in the record reflect that Brandon Mitsubishi executed other documents associated with this sale. The retail order not only has lines for a business manager's approval or a sales manager's acceptance, but it also contains a blank provision stating: "This order is not valid unless signed and accepted by _____." Thus, it appears that this document may have become a valid contract enforceable against Brandon Mitsubishi once it arranged for the customer to sign the agreement. Given that the Consuegras admit that they executed the arbitration agreement, nothing in this record suggests they have any right to avoid this agreement in this context. *Cf Terminix InTl Co.* v. *Ponzio,* 693 So.2d 104 (Fla. 5th DCA 1997) (enforcing arbitration agreement against nonsignatory third-party beneficiaries).

Reversed and remanded.

NORTHCUTT and DAVIS, JJ., concur.

All Citations

845 So.2d 303, 28 Fla. L. Weekly D1184

Footnotes

1 **Because the record in this nonfinal appeal is limited, this statement of facts is based on allegations in the pleadings and on the content of the various documents involved in the sales transaction.**

2 **See 15 U.S.C. § 2310 (2001).**

3 ***See* § 501.204, Fla. Stat. (2001).**

4 **After the trial court ruled in the Consuegras' case, the supreme court held that even a personal injury claim could still be subject to arbitration under the guidelines established in *Seifert. See Sears Authorized Termite & Pest Control, Inc. v. Sullivan,* 816 So.2d 603 (Fla.2002).**

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KeyCite Yellow Flag - Negative Treatment
Disagreed With by Kolcv v. Eurymotors West/Tbc Auto Gallery, 9th Cir.(Cal.), September 20, 2011

305 F.3d 1268
United States Court of Appeals,
Eleventh Circuit.

Michael Shane DAVIS, Heather N. Davis, Plaintiffs–Appellees,
v.
SOUTHERN ENERGY HOMES, INC., a corporation, Defendant–Appellant,
Bilo Homes, Inc., a corporation, David L. Smitherman, Defendants.

No. 0x–13831.
|
Sept. 19, 2002.

Synopsis
Purchasers of manufactured home sued manufacturers in state court, asserting claims for breach of express and implied warranties, violations of Magnuson–Moss Warranty–Trade Commission Act (MMWA), negligent and wanton repair, and fraud. Manufacturer removed case to federal court. The United States District Court for the Middle District of Alabama, No. 01-00415-CV-S-N, Ira DeMent, J., denied manufacturer's motion to compel arbitration. Manufacturer appealed. The Court of Appeals, Dubina, Circuit Judge, held that the MMWA permits the enforcement of valid binding arbitration agreements within written warranties, abrogating *Boyd v. Homes of Legend, Incr, Wilson v. Waverlee Homes, Inc.; Rhode v. E & T Invs., Inc.*

Reversed and remanded.

West Headnotcs (16)

[1] Alternative Dispute Resolution
Scope and standards of review
The Court of Appeals reviews a district court's order denying a motion to compel arbitration *de novo*.

4 Cases that cite this headnote

[2] Alternative Dispute Resolution
Review
Manufacturer did not waive its right to appeal by acknowledging to district court that district court was bound by its holding in prior case that Magnuson–Moss Warranty–Trade Commission Act (MMWA) prohibited binding arbitration, where manufacturer argued in its initial motion and brief to district court that prior case, and cases it relied upon, were incorrect. Magnuson–Moss Warranty—Federal Trade Commission Improvement Act, § 101 et seq., 15 U.S.C.A. § 2301 ct scq.

8 Cases that cite this headnote

[3] Alternative Dispute Resolution
Statutory rights and obligations
The Magnuson–Moss Warranty–Trade Commission Act (MMWA) permits the enforcement of valid binding arbitration agreements within written warranties; abrogating *Boyd v. Homes of Legend, Inc.*, 981 F.Supp. 1423; *Wilson v. Waverice Homes, Inc.*, 954 F.Supp. 1530; *Rhode v. E & T Invs., Inc.*, **6** F.Supp.2d 1322. Magnuson–Moss Warranty—Federal Trade Commission Improvement Act, § 101 et seq., 15 U.S.C.A. § 2301 et seq.

9 Cases that cite this headnote

[4] Antitrust and Trade Regulation
Warranties and Service Contracts
Congress passed the Magnuson–Moss Warranty–Trade Commission Act (MMWA) in response to an increasing number of consumer complaints regarding the inadequacy of warranties on consumer goods. Magnuson–Moss Warranty—Federal Trade Commission Improvement Act, § 101 et seq., 15 U.S.C.A. § 2301 et seq.

6 Cases that cite this headnote

[5] Alternative Dispute Resolution

Arbitration favored; public policy

Congress enacted the Federal Arbitration Act (FAA) to reverse the longstanding judicial hostility towards arbitration and to place arbitration agreements on the same footing as other contracts. 9 U.S.C.A. § 1 et seq.

4 Cases that cite this headnote

[6] Alternative Dispute Resolution
Statutory rights and obligations

Generally, a court should enforce an arbitration agreement according to its terms, and no exception exists for a cause of action founded on statutory rights.

9 Cases that cite this headnote

[7] Alternative Dispute Resolution
Statutory rights and obligations

Unless Congress has clearly expressed an intention to preclude arbitration of a statutory claim, a party is bound by its agreement to arbitrate.

5 Cases that cite this headnote

[8] Alternative Dispute Resolution
Agreements to Arbitrate

Arbitration agreements, like any other contracts, are subject to general contract law and defenses.

1 Cases that cite this headnote

[9] Alternative Dispute Resolution
Statutory rights and obligations

The Court of Appeals is to consider three factors in determining whether Congress intended to preclude arbitration of a statutory claim: (1) the text of the statute; (2) its legislative history; and (3) whether an inherent conflict between arbitration and the underlying purposes of the statute exists.

15 Cases that cite this headnote

[10] Alternative Dispute Resolution
Evidence

The party opposing the enforcement of an agreement to arbitrate a statutory claim has the burden of showing that Congress intended to preclude arbitration of the statutory claim.

8 Cases that cite this headnote

[11] Alternative Dispute Resolution
Statutory rights and obligations

In applying the *McMahon* test for determining whether Congress intended to preclude arbitration of a statutory claim, questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.

5 Cases that cite this headnote

[12] Alternative Dispute Resolution
Unconscionability

Unequal bargaining power alone is not a sufficient reason to never enforce an arbitration agreement of a statutory claim; inequality in bargaining power is a procedural question that courts should analyze on a case by case basis.

Cases that cite this headnote

[13] Alternative Dispute Resolution
Statutory rights and obligations

Congress did not directly address binding arbitration in text or legislative history of Magnuson–Moss Warranty–Trade Commission Act (MMWA), and, thus, Court of Appeals, in deciding whether to defer to Federal Trade Commission (FTC) regulations prohibiting binding arbitration of written warranty claims arising under MMWA, was required to proceed to second step of *Chevron* analysis, i.e., reasonableness of FTC's construction. Magnuson–Moss Warranty—Federal Trade Commission Improvement Act, § 101 et seq., 15 U.S.C.A. § 2301 et seq.; 16 C.F.R. §§ 701.1–703.8.

30 Cases that cite this headnote

[14] Alternative Dispute Resolution
Statutory rights and obligations

Federal Trade Commission (FTC) regulations prohibiting binding arbitration of written warranty claims arising under Magnuson–Moss Warranty–Trade Commission Act (MMWA) were unreasonable in light of Supreme Court's acknowledgment and continual enforcement of strong federal policy toward arbitration, and Court of Appeals thus was not required to defer to regulations under ***Chevron***. Magnuson–Moss Warranty —Federal Trade Commission Improvement Act, § 101 et seq., 15 U.S.C.A. § 2301 et seq.; 16 C.F.R. §§ 701.1–703.8.

21 Cases that cite this headnote

[15] Administrative Law and Procedure
Deference to agency in general

While Court of Appeals was required under ***Chevron*** to defer to federal agency's legislative regulations if they were reasonable, agency's interpretive regulations were only entitled to respect to extent they had power to persuade.

Cases that cite this headnote

(16] Alternative Dispute Resolution
Statutory rights and obligations

A statute's provision for a judicial forum does not preclude enforcement of a binding arbitration agreement under the Federal Arbitration Act (FAA). 9 U.S.C.A. § I et seq.

25 Cases that cite this headnote

Attorneys and Law Firms

*1269 W. Scott Simpson, Birmingham, AL, James C. Pennington, Amy Elizabeth Glenos, Ogletree, Deakins, *1270 Nash Smoak & Stewart, P.C., Birmingham, AL, for Defendant–Appellant.

G. Houston Howard, II, Howard, Dunn, Howard & Howard, Wetumpka, AL, for Plaintiffs–Appellees.

Appeal from the United States District Court for the Middle District of Alabama.

Before ANDERSON and DUBINA, Circuit Judges, and MILLS*, District Judge.

Opinion

DUBINA, Circuit Judge:

The important question presented in this appeal is whether the Magnuson–Moss Warranty Act permits or prohibits the enforcement of pre-dispute binding arbitration clauses within written warranties. We hold that the Magnuson–Moss Warranty Act permits binding arbitration and that a written warranty claim arising under the Magnuson–Moss Warranty Act may be subject to a valid pre-dispute binding arbitration agreement.

I. BACKGROUND

In October 1999, Michael Shane Davis and Heather N. Davis ("the Davises") purchased a manufactured home constructed by Southern Energy Homes, Inc. ("Southern"). When the Davises purchased the home, they signed a binding arbitration agreement contained within the manufactured home's written warranty. The Davises later discovered multiple defects in the home and notified Southern of the problems. After Southern failed to correct the defects to the Davises' satisfaction, the Davises filed suit in the Circuit Court of Lowndes County, Alabama, asserting claims for breach of express and implied warranties, violations of the Magnuson–Moss Warranty–Trade Commission Act ("MMWA" or "the Act"), negligent and wanton repair, and fraud. Southern removed the case to federal court and, in lieu of an answer, filed a Motion to Dismiss or, in the Alternative, to Compel Arbitration. The district court, relying on its prior decision in ***Yeomans*** v. ***Homes of Legend, Inc.***, 2001 WL 237313, No. 00–D–824–N (M.D.Ala. March 5, 2001), which found that the MMWA prohibits binding arbitration, denied Southern's motion. Southern timely appealed the district court's order denying Southern's Motion to Compel Arbitration.

II. ISSUES

(1) Whether Southern waived its right to appeal the district court's order denying its Motion to Compel Arbitration when Southern conceded that the district court was bound by its prior decision in *Yeomans*.

(2) Whether the Magnuson–Moss Warranty Act permits or precludes enforcement of binding arbitration agreements with respect to written warranty claims.

III. STANDARD OF REVIEW

[1] We review a district court's order denying a motion to compel arbitration *de novo*. *Cunningham* v. *Fleetwood Homes of Ga., Inc.*, 253 F.3d 611, 614 (11th Cir.2001) (citing *Paladino* v. *Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir.1998)).

IV. DISCUSSION

A. *Waiver of Right to Appeal*

[2] The Davises contend that Southern waived its right to appeal by acknowledging to the district court that the court *1271 was bound by its prior holding in *Yeomans*. We disagree that Southern waived its right to appeal. Southern argued in its initial motion and brief to the district court that *Yeomans* and the cases *Yeomans* relies upon are incorrect. Southern, therefore, maintained its position and did not waive its right to appeal. Thus, we must consider the merits of this appeal.

B. *The MMWA and Binding Arbitration of Written Warranty Claims*

In this appeal, Southern argues that, based upon the strong federal policy of enforcing valid arbitration agreements under the Federal Arbitration Act ("FAA"), the Davises must submit their written warranty claims to binding arbitration rather than file suit for breach of warranty. To support this argument, Southern notes that the Supreme Court continually enforces binding arbitration agreements of statutory claims and argues that the MMWA is similar to these other statutes because nothing in the MMWA's text, legislative history, or underlying purposes evinces that Congress intended to preclude binding arbitration of written warranty claims. Southern also asserts that the Federal Trade Commission's ("FTC") regulations and interpretations, which prohibit binding arbitration of MMWA claims, are unreasonable, and thus, we should accord them no deference.

The Davises, conversely, assert that arbitration is an improper forum for MMWA claims and that the Act's language, legislative history, and underlying purposes compel a conclusion that dispute settlement procedures cannot be binding under the MMWA. The Davises argue that § 2310(a) of the MMWA, which states that consumers must resort to a warrantor's informal dispute settlement mechanism *before* commencing a civil action, necessarily implies that the decision of any informal settlement procedure may not be binding. They reason that Congress' use of different terminology to describe the settlement procedures of § 2310(a) throughout the MMWA's text and legislative history, combined with the absence of any statutory definition for the terms, establishes that Congress used the terms "dispute settlement procedures" and "dispute settlement mechanisms" only as generic terms, and thereby included binding arbitration as a type of alternative dispute resolution procedure. The Davises also argue that this court must defer to the FTC regulations, which reject binding arbitration of written warranty claims arising under the MMWA, because the FTC reasonably interpreted the MMWA in these regulations.

[3] We recognize that state and federal courts are sharply divided on whether the MMWA permits pre-dispute binding arbitration of written warranty claims. *Compare Boyd v. Homes of Legend, Inc.*, 981 F.Supp. 1423 (M.D.Ala.1997), *remanded on jurisdictional grounds*, 188 F.3d 1294 (11th Cir.1999), *Wilson v. Wavertee Homes, Inc.*, 954 F.Supp. 1530 (M.D.Aia.1997), *Rhode v. E & T Invs., Inc.*, 6 F.Supp.2d 1322 (M.D.Ala.1998), *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F.Supp.2d 958 (W.D.Va.2000), *Parkerson* v. *Smith*, 817 So.2d 529 (Miss.2002), *Browne v. Kline Tysons Imports, Inc.*, 190 F.Supp.2d 827 (E.D.Va.2002), *and Borowiec* v. *Gateway 2000, Inc.*, 331 Ill.App.3d 842, 265 Ill.Dec. 218, 772 N.E.2d 256 (2002), *with Southern Energy Homes, Inc.* r. *Ard*, 772 So.2d 1131 (Ala.2000), *Results Oriented, Inc. v. Crawford*, 245 Ga.App. 432, 538 S.E.2d 73 (2000), *affd* 273 Ga. 884, 548 S.E.2d 342 (2001), *In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480 (Tex.2001),

and Howell v. Cappaert Manufactured Nous., Inc., 819 So.2d 461 (La.App.2002). The Fifth Circuit is the only circuit court to directly address this issue and, in a divided panel decision, it held that the MMWA permits binding arbitration. *1272 *See Walton v. Rose Mobile Homes LLC,* 298 F.3d 470 (5th Cir.2002).[1] After a thorough review of the MMWA and its legislative history, the FAA and the Supreme Court's application of the FAA to other federal statutes, we conclude that the MMWA permits the enforcement of valid binding arbitration agreements within written warranties.

1. *MMWA*

[4] Congress passed the MMWA in 1975 in response to an increasing number of consumer complaints regarding the inadequacy of warranties on consumer goods. *See* H.R.Rep. No. 93–1107 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7705–11. The purpose of the MMWA is "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products...." 15 U.S.C. § 2302(a) (1994). In order to advance these goals, § 2310(d) of the MMWA provides a statutory private right of action to consumers "damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract...." *Id.* § 2310(d)(1). Consumers may sue for a MMWA violation in either state or federal court. *Id.*

In order to encourage settlements by means other than civil lawsuits, § 2310(a) allows a warrantor to include a provision for an informal dispute settlement mechanism in a warranty. *Id.* § 2310(a)(3); *see also* H.R.Rep. No. 93–1107 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7722 ("Congress declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms."). Although the MMWA docs not define "informal dispute settlement procedure," it does provide that if a warrantor incorporates a § 2310(a) informal dispute settlement procedure into the warranty, the provision must comply with the minimum requirements that the FTC prescribes. 15 U.S.C. § 2310(a)(2). If the informal dispute settlement procedure properly complies with the FTC's minimum requirements, and if the written warranty requires that the consumer "resort to such procedure before pursuing any legal remedy under this section respecting such warranty, the consumer may not commence a civil action ... under subsection (d) of this section unless he initially resorts to such procedure...." *Id.* § 2310(a)(3).

2. *FAA*

[5] Congress enacted the FAA in 1925 to reverse the longstanding judicial hostility towards arbitration and "to place arbitration agreements on the same footing as other contracts." *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 122 S.Ct. 754, 761, 151 L.Ed.2d 755 (2002) (citing *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 24, 111 S.Ct. 1647, 1651, 114 L.Ed.2d 26 (1991)). Section 2 of the FAA provides:

> A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, *1273 or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1994). The Supreme Court has interpreted § 2 of the FAA as "a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hasp. v. Mercury Conslr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983).

[6] [7] [8] Generally, a court should enforce an arbitration agreement according to its terms, and no exception exists for a cause of action founded on statutory rights. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626–27, 105 S.Ct. 3346, 3354, 87 L.Ed.2d 444 (1985) (holding that "the Act itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability"). In every statutory right case that the Supreme Court has considered, it has upheld binding arbitration if the statute creating the right did not *explicitly* preclude arbitration. *See*

Gilmer, 500 U.S. at 35, 111 S.Ct. at 1657 (holding that courts should enforce binding arbitration agreements regarding claims arising under the ADEA); *Rodriguez de Quijas v. ShearsonlAmerican Express, Inc.*, 490 U.S. 477, 484–86, 109 S.Ct. 1917, 1921–22, 104 L.Ed.2d 526 (1989) (holding that courts should enforce pre-dispute agreements to arbitrate claims under the Securities Act of 1933); *ShearsonlAmerican Express, Inc. v. McMahon*, 482 U.S. 220, 238, 242, 107 S.Ct. 2332, 2343, 2345–46, 96 L.Ed.2d 185 (1987) (holding that courts should enforce pre-dispute agreements to arbitrate Securities Exchange Act of 1934 claims and Racketeer Influenced and Corrupt Organizations Act claims); *Mitsubishi Motors Corp.*, 473 U.S. at 628–40, 105 S.Ct. at 3355–61 (holding that courts should enforce arbitration of Sherman Antitrust Act claims in international transactions). "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp.*, 473 U.S. at 628, 105 S.Ct. at 3354–55. Thus, unless Congress has clearly expressed an intention to preclude arbitration of the statutory claim, a party is bound by its agreement to arbitrate. *Id.*[2]

3. *McMahon Test*

[9] [10] [11] Turning to whether Congress intended to preclude arbitration of a statutory claim, we follow the Supreme Court's *McMahon* test. *McMahon*, 482 U.S. at 226–27, 107 S.Ct. at 2337–38. In *McMahon*, the Supreme Court instructed us to consider three factors in deducing Congress' intent: (1) the text of the statute; (2) its legislative history; and (3) whether "an inherent conflict between arbitration and the underlying purposes [of the statute)" exists. *Id.* at 227, 107 S.Ct. at 2338. The party opposing the enforcement of the arbitration agreement has the burden of showing that Congress intended to preclude arbitration of the statutory claim. *Id.* In applying the *McMahon* test, "questions of arbitrability must be addressed with a healthy regard for the federal policy *1274 favoring arbitration." *Gilmer*, 500 U.S. at 26, 111 S.Ct. at 1652 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24, 103 S.Ct. at 941). Thus, we analyze each factor in turn to determine whether Congress clearly expressed an intention to preclude binding arbitration of MMWA claims.

a. McMahon Factor One: MMWA's Text

The MMWA's text does not expressly prohibit arbitration and, in fact, fails to directly mention either binding arbitration or the FAA. Nevertheless, the Davises argue that the MMWA reserves strictly a judicial forum for consumers by providing a private right of action for consumers. The Supreme Court, however, has held that a statute's provision for a private right of action alone is inadequate to show that Congress intended to prohibit arbitration. *Gilmer*, 500 U.S. at 29, 111 S.Ct. at 1653–54 (rejecting the argument that binding arbitration is improper "because it deprives claimants of the judicial forum provided for by the ADEA"). As the Fifth Circuit recently recognized, "binding arbitration generally is understood to be a *substitute* for filing a lawsuit, not a prerequisite." *Walton*, 298 F.3d at 475 (citing *Mitsubishi Motors Corp.*, 473 U.S. at 628, 105 S.Ct. at 3354) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum."). Furthermore, the fact that the MMWA grants a judicial forum with concurrent jurisdiction in state and federal courts for MMWA claims is insufficient evidence that Congress intended to preclude binding arbitration. *See McMahon*, 482 U.S. at 227, 107 S.Ct. at 2338 (rejecting the argument that compulsory arbitration under the Securities Exchange Act of 1934 is improper because the statute provides that "[t]hc district courts of the United States ... shall have exclusive jurisdiction of violations of this title ...."); *see also Gilmer*, 500 U.S. at 29, 111 S.Ct. at 1654 (noting that Congress' grant of concurrent jurisdiction in state and federal courts for ADEA claims is consistent with binding arbitration because "arbitration agreements, Mike the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise' ") (quoting *Rodriguez de Quijas*, 490 U.S. at 483, 109 S.Ct. at 1921).

The Davises also argue that because § 2310(d) lists only two exceptions to the private right of action, the internal dispute settlement procedure referenced in § 2310(a) and the class action exception referenced in § 2310(e),[3] Congress intended to preclude any other method of dispute resolution, including binding arbitration. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S.

11, 19–20, 100 S.Ct. 242, 247, 62 L.Ed.2d 146 (1979) ("[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.") (internal quotations and citations omitted). The § 2310(a) exception to a consumer's private right of action states that, if a warrantor establishes an informal dispute settlement procedure, a consumer must resort to the procedure "before pursuing any legal remedy under this section respecting such warranty." 15 U.S.C. § 2310(a)(3)(c). Section 2310(a) also states that "the consumer may not commence a civil action ... unless he initially resorts to such procedure" and that "[i]n any civil action arising out of a warranty obligation and relating to a matter *1275 considered in such a procedure, any decision in such procedure shall be admissible in evidence." *Id.* Based on this language, the Davises assert that Congress intended to allow only non-binding alternative dispute resolution procedures. We disagree.

In *Cunningham v. Fleetwood Homes of Ga., Inc.*, we noted that the district court erred "in concluding that, standing alone, the presence of the non-binding § 2310 mechanism in the statutory text requires the conclusion that Magnuson–Moss claims may not be the subject of binding arbitration agreements." 253 F.3d 611, 619 (11th Cir.2001). The fact that the MMWA regulates § 2310(a) informal dispute settlement procedures does not mean that the Act precludes a court from enforcing a valid binding arbitration agreement. *See id.* at 620 (noting that a statute's provision for one out-of-court settlement mechanism does not necessarily preclude the enforcement of all alternative mechanisms); *see also Gilmer*, 500 U.S. at 29, 111 S.Ct. at 1654 (holding that the ADEA's provision for "out-of-court dispute resolution" is not inconsistent with permitting arbitration under the FAA and that it even "suggests that out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress"). Thus, we are unpersuaded that Congress intended to bar binding arbitration agreements in the language of the MMWA.

b. McMahon Factor Two: Legislative History

The second factor the Supreme Court instructs us to examine in determining Congress' intent to preclude the application of the FAA is the MMWA's legislative history. *See McMahon*, 482 U.S. at 226–27, 107 S.Ct. at 2338. Like the MMWA's text, its legislative history only addresses "internal dispute settlement procedures;" it never directly addresses the role of binding arbitration or the FAA. In trying to show that Congress intended to bar binding arbitration, the Davises rely on the MMWA's House Report, which notes that "[a]n adverse decision in any informal dispute settlement proceeding would not be a bar to a civil action on the warranty involved in the proceeding." H.R.Rep. No. 93–1107 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7723.4 The Davises argue that Congress considered all methods of dispute resolution, including arbitration, *1276 before allowing warrantors to pursue only informal, non-binding settlement procedures. After a thorough reading of the MMWA's legislative history, we disagree.

The Davises have proved only that the MMWA's legislative history is ambiguous at most. When considering a preliminary draft of the MMWA, the Senate reflected that "it is Congress' intent that warrantors of consumer products cooperate with government and private agencies to establish informal dispute settlement mechanisms that take care of consumer grievances without the aid of litigation *or formal arbitration*." S.Rep. No. 91–876, at 22–23 (1970) (emphasis added). As the Fifth Circuit concluded, "there is still no evidence that Congress intended binding arbitration to be considered an informal dispute settlement procedure. Therefore the fact that any informal dispute settlement procedure must be non-binding, does not imply that Congress meant to preclude binding arbitration, which is of a different nature." *Walton*, 298 F.3d at 476. In *McMahon*, the Supreme Court upheld binding arbitration even though the Securities Exchange Act of 1934's legislative history implied that Congress intended to adopt the *Wilko* attitude that arbitration is an inadequate forum in which to enforce statutory claims. *McMahon*, 482 U.S. at 238, 107 S.Ct. at 2343. Any congressional intent to prohibit arbitration in the MMWA's legislative history is considerably less clear than the legislative history of the Securities Exchange Act of 1934, which the Supreme Court held did not prohibit binding arbitration in *McMahon*. In light of this ambiguity, the Davises fail to carry their burden of showing a clear congressional intent to prohibit binding arbitration of MMWA claims. Thus, given the absence of any meaningful legislative history barring binding arbitration, coupled with the unquestionable federal policy favoring arbitration, we conclude that Congress

did not express a clear intent in the MMWA's legislative history to bar binding arbitration agreements in written warranties.

c. McMahon Factor Three: The MMWA's Underlying Purposes

The last *McMahon* factor requires us to examine the purposes of the MMWA to determine whether the MMWA and the FAA conflict. *See McMahon*, 482 U.S. at 226–27, 107 S.Ct. at 2337–38. The MMWA expressly states three purposes: "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products." 15 U.S.C. § 2302(a). These purposes are not in conflict with the FAA. In fact, the Supreme Court has repeatedly enforced arbitration of statutory claims where the underlying purpose of the statutes is to protect and inform consumers. *See, e.g., Basic Inc. v. Levinson*, 485 U.S. 224, 234, 108 S.Ct. 978, 985, 99 L.Ed.2d 194 (1988) (stating that a fundamental purpose of the Securities Acts is the disclosure of information to potential investors); *Rodriguez de Quijas*, 490 U.S. at 485–86, 109 S.Ct. at 1922 (holding that parties may arbitrate Securities Act of 1933 claims); *McMahon*, 482 U.S. at 242, 107 S.Ct. at 2345 (holding that parties may arbitrate Securities Exchange Act of 1934 claims). "[E]ven claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute serves its function." *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 90, 121 S.Ct. 513, 521, 148 L.Ed.2d 373 (2000) (citations omitted) (holding that parties may arbitrate Truth in Lending Act claims). Consumers can adequately vindicate their rights arising under the MMWA and written warranties in an arbitral forum. *1277 *See Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280, 115 S.Ct. 834, 842, 130 L.Ed.2d 753 (1995) ("Congress, when enacting [the FAA], had the needs of consumers ... in mind."). Thus, we conclude that the MMWA's consumer protection goals do not conflict with the FAA.

[12] The MMWA's legislative history also indicates that Congress was concerned with addressing the unequal bargaining power between warrantors and consumers with the enactment of the MMWA, thus creating another possible purpose.[5] Unequal bargaining power alone, however, is not a sufficient reason to never enforce an arbitration agreement of a statutory claim. *Gilmer*, 500 U.S. at 33, 111 S.Ct. at 1655 (stating that "[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable ..."). Inequality in bargaining power is a procedural question that courts should analyze on a case by case basis. *Id.; see also McMahon*, 482 U.S. at 230–31, 107 S.Ct. at 2339–40. Thus, unequal bargaining power, like the three declared purposes of the MMWA, does not create such a conflict with the FAA so as to prohibit binding arbitration of MMWA claims.

4. *FTC Regulations and the Chevron Test*

The Davises further argue that we must defer to the FTC regulations, which prohibit binding arbitration. Section 2310(a) authorizes the FTC to promulgate regulations for the MMWA's internal dispute settlement procedures. 15 U.S.C. § 2310(a)(2). The FTC defines "mechanism" as "an informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of Title I of the Act applies, as provided in section 110 of the Act." 16 C.F.R. § 703.1(c) (2002). The FTC has clearly stated that the mechanism is only a precursor to litigation and never binding. *Id.* § 700.8 ("A warrantor shall not indicate in any written warranty or service contract either directly or indirectly that the decision of the warrantor, service contractor, or any designated third party is final or binding in any dispute concerning the warranty or service contract."). Specifically, the FTC regulations provide that "[decisions of the Mechanism shall not be legally binding on any person." *Id.* § 703.5(j). In its interpretive regulations, the FTC has defined "mechanism" broadly, to include all non-judicial resolution procedures, including arbitration. *See* 40 Fed.Reg. 60167, 60210 (1975) (stating that binding arbitration is a "*mechanism* [ ] whose decisions would be legally binding"); *see also* 40 Fed.Reg. 60618, 60211 (1975) (stating that a "reference within the written warranty to any binding, non-judicial remedy is prohibited by the Rule and the Act").

In determining whether we should defer to the FTC's interpretation of the MMWA, we look to the Supreme Court's decision of *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court docs not simply impose its own construction on the statute, as would be necessary in the *1278 absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 843–44, 104 S.Ct. at 2781–82. Under this instruction, we must first determine whether Congress directly addressed binding arbitration under the MMWA. *See id.* If Congress' intent is clear, our inquiry ends as we must uphold Congress' will. *Id.* If, however, Congress is silent or the statute is ambiguous, we must then decide if the FTC's interpretation is reasonable. *Id.*

a. Congress' intent

[13] "Addressing the first prong of the *Chevron* inquiry ... we begin by examining the language in the enforcement provision itself." *Smith* v. *BellSouth Telecomm.*, 273 F.3d 1303, 1307 (11th Cir.2001). After the previously illustrated thorough examination of the MMWA's text and legislative history, we conclude that Congress failed to directly address binding arbitration anywhere in the text or legislative history of the MMWA.[6] *See* discussion *infra* Parts IV.B.3.a–3.b. Because we believe the intent of Congress is unclear, we must proceed to the second prong of the *Chevron* analysis.

b. Reasonableness of the FTC's construction

[14] [15] The second prong of the *Chevron* inquiry requires us to determine whether the FTC's construction of the statute is reasonable. *See Chevron,* 467 U.S. at 843–44, 104 S.Ct. at 2781–82; *see also Amberg* v. *FDIC,* 934 F.2d 681, 687 (5th Cir.1991) ("[W]e will not bow our heads with closed eyes and walk away; rather we must still look at the [agency's interpretations] and see if they can be classified as reasonable.").[7] In determining whether the FTC regulations are reasonable, we look to the rationale behind the FTC's construction. In its legislative regulations, the FTC reasoned that a decision regarding the warranty dispute may not be binding because "section 110(d) of the Act gives state and federal courts jurisdiction over suits for breach of warranty and service contracts." 16 C.F.R. § 700.8. The FTC further explained that binding arbitration agreements are not allowed in written warranties for several reasons:

> First, as the Staff Report indicates, Congressional intent was that decisions of Section 110 Mechanisms not be legally binding. Second, even if binding Mechanisms were contemplated by Section 110 of the Act, the Commission is not prepared, at this point in time, to develop guidelines for a system in which consumers would commit themselves, at the *1279 time of product purchase, to resolve any difficulties in a binding, but non-judicial, proceeding. The Commission is not now convinced that any guidelines which it set out could ensure sufficient protection for consumers.
>
> 40 Fed.Reg. 60167, 60210 (1975). In light of the FTC's reasoning, we conclude its rationale is unreasonable and do not defer to it.

[16] In the legislative regulations, the FTC bases its construction on Congress' grant of concurrent jurisdiction. *See* 16 C.F.R. § 700.8. As we previously discussed, a statute's provision for a judicial forum does not preclude enforcement of a binding arbitration agreement under the FAA. *See infra* pp. 1273–74. Thus, the FTC's motive behind the legislative regulation is contradictory to Supreme Court rationale, and we conclude that its interpretation is unreasonable. *See McMahon,* 482 U.S. at 238, 107 S.Ct. at 2343 (refusing to follow Congress' prohibition of arbitration in the Securities Exchange Act of 1934's legislative history when Congress' motive was contradictory to Supreme

Court rationale). We also conclude that the FTC's additional rationale is unreasonable. Although the FTC First stated that it looked to a subcommittee staff report (which appears to no longer be attainable) to determine Congress's intent, the FTC continued, evincing its major concern that an arbitral forum will not adequately protect the individual consumers. The Supreme Court in *Afc Mahon,* however, rejected this same hostility shown by the SEC. 482 U.S. at 234 n. 3, 107 S.Ct. at 2341 n. 3 (declining to defer to the SECs interpretation of the Securities Exchange Act of 1934 based on the SECs *Wttko* attitude). Instead, the Supreme Court holds that arbitration is favorable to the individual. *See Allied-Bruce Terminix Cos.*, 513 U.S. at 279, 115 S.Ct. at 842-43 (noting that "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation.").

The dissent in *Walton,* which holds that the FTC regulations are reasonable, admits that "deference might be inappropriate if the FTC's concerns about the impact of binding arbitration on consumers were attributable to the Commission's reliance on the Supreme Court's expressed hostility towards arbitration in now-abandoned cases such as *Wilko.*" 298 F.3d at 476 (King, dissenting) (citing *McMahon,* 482 U.S. at 234 n. 3, 107 S.Ct. at 2341 n. 3) (declining to defer to the SECs interpretation of the Securities Exchange Act of 1934 based on the SECs admission that its actions were "based on the court of appeals decision following *Wilko,* ... that agreements to arbitrate Rule 10b-5 claims were not, in fact, enforceable"). The *Walton* dissent distinguishes this case from *McMahon* based on a recent FTC regulatory review statement:

> The Commission examined the legality and the merits of mandatory binding arbitration clauses in written consumer products warranties when it promulgated Rule 703 in 1975. Although several industry representatives at that time had recommended that the Rule allow warrantors to require consumers to submit to binding arbitration, the Commission rejected that view as being contrary to the congressional intent. *The Commission based this decision on its analysis of the plain language of the Warranty Act.*

298 F.3d at 487 (King, dissenting and adding emphasis) (quoting 64 Fed.Reg. 19700, 19708 (Apr. 22, 1999)). In the next paragraph, however, the FTC reaffirms its original rationale that it "is not prepared ... to develop guidelines for a system in which consumers would commit themselves, at the time of product purchase, to ***1280** resolve any difficulties in a binding, but non-judicial, proceeding. The Commission is not now convinced that any guidelines which it set out could ensure sufficient protection for consumers." 64 Fed.Reg. 19700, 19708 (Apr. 22, 1999) (citing 40 Fed.Reg. 60167, 60210 (1975)).[8] As we have previously explained, this interpretation is no longer valid based on the Supreme Court's abandonment of its hostile attitude toward arbitration. In light of the Supreme Court's acknowledgment and continual enforcement of the strong federal policy toward arbitration, we conclude this rationale to be based on an impermissible construction of the statute. Thus, wc conclude that the FTC's interpretation of the MMWA is unreasonable, and we decline to defer to the FTC regulations of the MMWA regarding binding arbitration in written warranties.

V. CONCLUSION

After a thorough review of the MMWA and the FAA, combined with the strong federal policy favoring arbitration, we hold that written warranty claims arising under the Magnuson-Moss Warranty Act may be subject to valid binding arbitration agreements. Accordingly, we reverse the judgment of the district court and remand this case for further proceedings consistent with this opinion.

REVERSED and REMANDED.

All Citations

305 F.3d 1268, 2002-2 Trade Cases P 73,814, 15 Fla. L. Weekly Fed. C 1053

Footnotes

* Honorable Richard Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.

1 In *Cunningham v. Fleetwood* Homes *of Ga.,* 253 F.3d 611 (11th Cir.2001), this court discussed binding arbitration of MMWA claims. We declined to resolve the question, however, because it was not necessary to the resolution of that case. 253 F.3d at 623–24 ("We are not required to and do not decide whether Magnuson–Moss makes arbitration agreements unenforceable as to all Magnuson–Moss claims. Nor it is necessary for us to determine whether warrantors may include binding arbitration provisions in the warranty itself.").

2 We understand that arbitration agreements, like any other contract, are subject to general contract law and defenses. "Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.' " *Mitsubishi Motors Corp.,* 473 U.S. at 627, 105 S.Ct. at 3354 (quoting 9 U.S.C. § 2 (1994)). In this opinion, however, we address only the enforcement of binding arbitration agreements under the MMWA absent such other general contract law considerations.

3 Section 2310(e) is irrelevant to the present discussion.

4 The Davises also assert that the Senate intended to bar binding arbitration in the following legislative history:

> For many years warranties have confused and misled the American consumer. A warranty is a complicated legal document whose full essence lies buried in myriads of reported legal decisions and in complicated State codes of commercial law. The consumer's understanding of what a warranty on a particular product means to him frequently does not coincide with the legal meaning.... Typically, a consumer today cannot bargain with consumer product manufacturers or suppliers to obtain a warranty or to adjust the terms of a warranty voluntarily offered. Since almost all consumer products sold today are typically done so with a contract of adhesion, there is no bargaining over contractual terms.

S. Rep. No. 93–151, quoted in 40 Fed.Reg. 60168 (1975). Although several other courts have found this language persuasive, *see, e.g., Boyd* v. *Homes of Legend, Inc.,* 981 F.Supp. 1423, 1439 (M.D.Ala.1997), we do not. Instead, we conclude that this passage only expresses Congress' concerns over the complexities of warranties and the unequal bargaining power between warrantors and consumers. The passage does not, however, prohibit binding arbitration. To hold otherwise would be to revert to a *Wilko* attitude towards arbitration. *See Rodriguez de Quijas,* 490 U.S. at 481, 109 S.Ct. at 1920 (To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.").

5 See note 4.

6 In *Walton,* the Fifth Circuit held that because Congress did not evince a clear intent to prohibit arbitration in the MMWA, "(t]he clear congressional intent in favor of enforcing valid arbitration agreements controls in this case." 298 F.3d at 478. Thus, believing that Congress' clear intent in passing the FAA controlled the MMWA, the majority opinion of *Walton* never reached the second prong of the Chevron analysis. *Id.* at 47B n. 14.

7 The *Chevron* standard of deference appears to apply only to the FTC's legislative regulations, and not to the FTC's interpretive regulations. *See Walton,* 298 F.3d at 474 n. 7 (discussing the level of deference for legislative regulations versus interpretive regulations). Thus, while we must defer to the legislative regulations in 16 C.F.R. §§ 701.1–703.8 (2002) if they are reasonable, the FTC's interpretive regulations are only "entitled to respect" to the extent they "have the power to persuade." *See Christensen* v. *Harris County,* 529 U.S. 576, 587, 120 S.Ct. 1655, 1663, 146 L.Ed.2d 621 (2000) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944)) (internal quotations omitted); see *also Walton,* 298 F.3d at 474 n. 7.

8 The FTC admits that, under the MMWA, "warrantors are not precluded from offering a binding arbitration option to consumers after a warranty dispute has arisen." 64 Fed.Reg. 19700, 19708 (Apr. 22, 1999) (citing 40 Fed.Reg. 60168, 60211 (1975)). As to pre-dispute binding arbitration, however, "(t]he Commission believes that [its original] interpretation continues to be correct." 64 Fed.Reg. 19700, 19708 (Apr. 22, 1999).

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APPENDIX A-7

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA
CIVIL DIVISION

CASE NO. 05-2017-CA-049992

LES KROL,
Plaintiff,
vs.
FCA US, LLC; and GIBSON AUTO SALES,
INC., d/b/a GIBSON TRUCK WORLD,

Defendants.

TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: May 31, 2018
TIME: 2:00 p.m. - 2:50 p.m.
PLACE TAKEN: Moore Justice Center
2825 Judge Fran Jamieson Way
Viera, Florida 32940
BEFORE: Honorable Stephen Koons

This cause came on to be heard at the time and place aforesaid, when and where the following proceedings were reported by:

Stephanie McGraw, RPR

A P P E A R A N C E S

For Plaintiff Les Krol:

MORGAN & MORGAN
BY: JEREMY KESPOHL, ESQUIRE
76 S. Laura Street
Suite 1100
Jacksonville, Florida 32202
(904) 398-2722
jkespohl@forthepeople.com

For Defendant Gibson Auto Sales, Inc., d/b/a Gibson Truck World:

BROAD AND CASSEL
BY: YESICA S. LIPOSKY, ESQUIRE
100 N. Tampa Street
Suite 3500
Tampa, Florida 33602
(813) 225-3035
yliposky@broadandcassel.com

P R O C E E D I N G S

THE COURT: Let me see if I got this right. Les Krol is your client and he bought this vehicle? What is it, a lemon? What happened?

MR. KESPOHL: That is a breach of warranty action under the Federal Mag-Moss Act. So there's been some defects, and we're alleging they were not repaired timely.

THE COURT: And you say that you dispute arbitration?

MS. LIPOSKY: Yes, Your Honor.

THE COURT: Okay. So that's — do we need to have a hearing?

All right. Your motion.

MS. LIPOSKY: Yes, Your Honor.

THE COURT: Go.

MS. LIPOSKY: Here you go, Your Honor. This is a hard copy of the motion to stay and compel arbitration and the affidavit authenticating the business records of Gibson Auto regarding this matter, and some case law we rely upon throughout my argument.

THE COURT: Where's Gibson? Is Gibson here locally?

MS. LIPOSKY: Actually, Your Honor, I'm not sure as to their exact location. I apologize for that.

THE COURT: That's all right.

MS. LIPOSKY: But anyways, as Your Honor stated we're here on the motion to stay and compel arbitration. As opposing counsel was mentioning, this all goes back to the sale of a car —

THE COURT: Truck.

MS. LIPOSKY: A truck.

THE COURT: 4500. A big one.

MS. LIPOSKY: Yes, Your Honor.

THE COURT: That's a big one. What was it, a dually?

MR. KESPOHL: I don't know. It is a diesel though.

MS. LIPOSKY: It's a big truck, Your Honor.

THE COURT: Okay.

MS. LIPOSKY: — by Mr. Krol from Gibson Auto. At the time of the sale of the vehicle, different contracts were entered into by the parties in order to finalize this sale.

If Your Honor looks at the motion to stay and compel arbitration, you will see the retail buyer's order. And in the back of that there are terms and

conditions.

Ultimately, Your Honor, if you look at the notice of filing, there is an affidavit of support over the motion to stay and compel arbitration. And again, you will see the retail buyer's order and the terms and conditions and the retail installment sales contract.

In the terms and conditions, Your Honor, there is an arbitration agreement between the parties. And I've actually reprinted that terms and conditions page in a little bit more legible —

THE COURT: Can I just ask you a quick question about that?

MS. LIPOSKY: Yes, Your Honor.

THE COURT: Did he initial that part of it when he bought it, you know, this arbitration provision?

MS. LIPOSKY: The terms and conditions, Your Honor, are in the back of the retail buyer's order.

THE COURT: So he's signing things and he's obviously not reading it. I assume he's not reading it. I mean, who reads these things, right?

MR. KESPOHL: Your Honor, I could probably cut down on this a little bit because we don't dispute the validity of the signed agreement. It's not the basis of our argument.

THE COURT: Okay.

Go ahead.

MS. LIPOSKY: And so, Your Honor, the arbitration agreement — again, I appreciate the fact that opposing counsel is willing to stipulate to the validity of it. And so you see the terms and conditions at the very bottom of the left-hand column you'll see the arbitration provision. And it is a broad arbitration provision covering all claims related to this purchase.

And, obviously, right, we have these claims that have been brought alleging violations of the Magnuson-Moss Warranty Act for these breaches of warranty related to the repairs of the truck.

And so, Your Honor, first, obviously, after the action was filed, we filed a motion to stay and compel arbitration. And when looking at a motion to stay and compel arbitration, this Court needs to focus on three things.

And that, Your Honor, is: First, we need to see if there is the existence of a valid arbitration agreement, which again in this case there's no dispute as to that. Two, we have to see if there is the existence of an arbitrable issue. And, three, if there is a waiver of rights to arbitrate that

agreement.

And here, Your Honor, I think we're going to focus really the argument well beyond the second issue, if there's an arbitrable issue. Because again, the parties are not disputing the validity of the arbitration agreement.

And I don't think opposing counsel will argue that we waive that right to arbitration. In fact, Your Honor, here immediately as soon as the action was filed, the motion to stay and compel arbitration was filed in response.

And so as to that second issue, Your Honor, the first case we have is the Midwest Mutual Insurance — that's in the packet that I provided to Your Honor. It's the Midwest Mutual Insurance Company versus Santiesteban. This is a Florida Supreme Court case. The citation for the court reporter is 287 So.2d 665.

And so the Florida Supreme Court tells us — and this is also from the United States Supreme Court — that the courts favor arbitration to expedite claims and reduce litigation. And that, Your Honor, is on page 3. That's Headnote 4, 5, and 6.

So, again, there is the Florida Arbitration

Code and then the Federal Arbitration Act. And when the Supreme Court -- the Florida Supreme Court and the U.S. Supreme Court have interpreted both of these. Again, they mention this policy of favoring arbitration because it provides the parties a way to resolve their issues outside of the court. There is a more expedient system.

And so then, Your Honor — this is from the Second DCA — the second case is the Grektorp versus City Towers of Florida, Inc. The citation for the court reporter is 644 So.2d 613.

And so again, Your Honor, this is another case interpreting what an arbitrable issue is and what isn't. And in that case, Your Honor, Grektorp moved to compel arbitration in the trial court and the trial courts denied that motion to stay and compel arbitration, and Grektorp goes ahead and appeals that decision to the Second DCA.

Again, the Second DCA tell us, on the second page of the case,

"Arbitration agreements are a favorite means of dispute resolution and doubts concerning the scope of arbitration clauses should generally be resolved in favor of arbitration."

And then it goes on to say,

"We construe the arbitration clause here insofar as it refers to any controversy involving the construction or application of any of the terms, provisions, or conditions of this agreement to reflect a broad arbitration agreement."

And so again, similarly to what we have here, Your Honor, you have a broad arbitration agreement and the policy favoring arbitration.

And then the last one, Your Honor, talking generally about arbitration agreements, we have the Beaver Coaches, Inc., versus Revels Nationwide RV Sales, Inc. It's a case from the First DCA, Your Honor, and the citation is 543 So.2d 359.

And so again, Your Honor, similarly we have a motion to stay and compel arbitration. The trial court denies it, and it gets sent to the First DCA, and the First DCA again says this is reversible error by the trial court, the motion to stay and compel arbitration should have been granted.

And so the First DCA tell us, Your Honor, on the last page and it says,

"First of all, any time a contract contains an arbitration clause, there's a presumption of arbitrability in the sense that an order to

arbitrate the particular agreements should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

"In the case of a broad arbitration clause, only the most forceful evidence of a purpose to exclude the claim for arbitration can prevail."

And then it goes on to say given that the broad language of that arbitration provision, that the trial court got it wrong and committed reversible error.

So again, Your Honor, this claim should be arbitrated unless the defendant can provide the most forceful evidence of a purpose to exclude this claim for arbitration. And it is our position, Your Honor, that that's simply not the case here.

Now, the defendant — excuse me, plaintiff has filed a response in opposition to the motion to stay and compel arbitration. And in it they claim that Magnuson-Moss warranty claims cannot be arbitrated. And they argue this because the FTC has interpreted the Magnuson-Moss Warranty Act and they have found that there cannot be binding arbitration in these types of claims.

And, Your Honor, that is actually not the position that courts in Florida have taken. And that, Your Honor, is actually the two cases that we have attached in this packet, and they were filed with the Court.

Most importantly, Your Honor, I think the one that touches specifically on the —

THE COURT: These that you've given me?

MS. LIPOSKY: Yes, Your Honor.

Most importantly, Your Honor, I think the Davis versus Southern Energy Homes case from the Eleventh Circuit specifically touches upon that. And this is a case from the Eleventh Circuit Court. The citation for the court reporter is 305 F.3d 1268.

And so, you know, the court specifically starts with,

"The important question presented in this appeal is whether the Magnuson-Moss Warranty Act permits or prohibits the enforcement of pre-dispute binding arbitration clauses within written warranties.

"We hold that the Magnuson-Moss Warranty Act permits binding arbitration and that a written warranty claim arising under the Magnuson-Moss Warranty Act may be subject to a valid

pre-dispute binding arbitration agreement."

THE COURT: Which circuit is that?

MS. LIPOSKY: This is from the Eleventh Circuit, Your Honor.

THE COURT: Okay. And this is in my packet here?

MS. LIPOSKY: Yes, Your Honor. That is the third or fourth case in that packet.

THE COURT: All right. So this is the Eleventh. So it's in our circuit.

MS. LIPOSKY: Yes, Your Honor.

And the plaintiff has cited two cases from other circuits. However, Your Honor, again, the Eleventh Circuit has taken the position that Magnuson-Moss Warranty claims can be taken — or can be covered by a binding arbitration agreement.

And in this decision, Your Honor — excuse me, in this opinion by the Eleventh Circuit, the Eleventh Circuit goes through all the arguments that are raised in opposition, in plaintiff's opposition to our motion to stay and compel arbitration regarding the steps that the FTC has taken regarding the legislative history of the Magnuson-Moss Warranty Act, the purpose of the Magnuson-Moss Warranty Act.

And, again, the Eleventh Circuit says that in the interpretation that the FTC has given is not a permissible interpretation.

So, Your Honor, here again in the Davis decision they go through all of these analyses. And so first, if you look at the — this is page 6 of the decision, Your Honor.

And so they say,

"Turning to whether Congress intended to preclude arbitration of a statutory claim, we follow the Supreme Court's McMahon test."

In McMahon, the Supreme Court instructed us to consider three factors in deciding Congress's intent: the text of the statute, its legislative history, and three, whether an inherent conflict between arbitration and an underlying purpose of the statute exists.

"The party opposing the enforcement of the arbitration agreement has the burden of showing that Congress intended to preclude arbitration of the statutory claim.

"In applying the McMahon test, questions of arbitrability must be addressed with a healthy regard for the federal policy" favoring arbitration.

"Thus, we analyze each factor in turn to determine whether Congress clearly expressed an intention to preclude binding arbitration of MMWA claims."

That's the Magnuson-Moss Warranty Act claim.

And so, Your Honor, the Eleventh Circuit goes through each of the factors and, again, goes and finds that each of the factors point to allowing arbitration, binding arbitration in these sorts of claims. So first it goes through the text of the statute and it says,

"...the text does not expressly prohibit arbitration and, in fact, fails to directly mention either binding arbitration or the FAA."

And then, Your Honor, it goes on to the legislative history and it analyzes the legislative history of the Magnuson-Moss Warranty Act. And again, it says,

"Like the Magnuson-Moss Warranty Act's text, its legislative history only addresses internal dispute settlement procedures. It never directly addresses the role of binding arbitration or the FAA.

"In trying to show that Congress intended to bar binding arbitration, the Davises rely on

the MMWA's House Report, which notes that an adverse decision in any informal dispute settlement proceeding would not be a bar to a civil action on the warranty involved in the proceeding."

And then it goes on, looking at that legislative history, and says,

"...given the absence of any meaningful legislative history barring binding arbitration, coupled with the unquestionable federal policy favoring arbitration, we conclude that Congress did not express a clear intent in the MMWA's legislative history to bar binding arbitration agreements in written warranties."

And then one more time, Your Honor, and the last factor in the McMahon test, they look at the underlying purpose of the statute. And, again, they look at the underlying purpose and they find that Congress did not intend for Magnuson-Moss Warranty Act claims to be barred from binding arbitration.

And then, Your Honor, it also looks at the FTC's interpretation because the FTC, as opposing counsel will tell you, has issued — the FTC's position is that there shouldn't be binding

arbitration in Magnuson-Moss Warranty Act claims.

However, Your Honor, the Eleventh Circuit has found that the interpretation given to the statute by the FTC is not a permissible interpretation. And so again they say,

"In determining whether the FTC regulations are reasonable, we look to the rationale behind the FTC's construction. In its legislative regulations, the FTC reasoned that a decision regarding the warranty dispute may not be binding because Section 110(d) of the Act gives state and federal courts jurisdiction over suits for breach of warranty and service contracts.

"The FTC further explained that binding arbitration agreements are not allowed in written warranties for several reasons."

And again, this is the FTC's position.

However, Your Honor, again, the Eleventh Circuit goes through the interpretation the FTC has given it. And it says,

"In the legislative regulations, the FTC bases its construction on Congress' grant of concurrent jurisdiction. As we previously discussed, a statute's provision for a judicial

forum does not preclude enforcement of a binding arbitration agreement under the FAA."

And so, again, Your Honor, the Eleventh Circuit has gone through this entire analysis of what claims can be arbitrated and what claims cannot be arbitrated. And this agrees with the FTC, and that's the current decision in the circuit.

Additionally, Your Honor, we also have a case from the Second DCA. That's the Stacy David, Inc., versus Consuegra. And the citation for that is 845 So.2d 303, where again, Your Honor — and actually citing back to the Davis decision from the Eleventh Circuit where Second DCA has a decision in appeal where the trial court denied a motion to stay and compel arbitration.

And one of the claims there, Your Honor, was a Magnuson-Moss Warranty Act, as well as other tort claims. And the trial court found that those claims could not be arbitrated, could not be subject to binding arbitration.

And, again, just like here, we had a very broad arbitration agreement. And again, the Second DCA goes back to mentioning that policy, a favoring arbitration, and saying that the trial court committed reversible error in finding that the

claims fraud — even though they were tort claims, even though they were Magnuson-Moss Warranty Act claims — should not have been arbitrated, and again, reverses the decision back to the trial court.

So, Your Honor, again, based on this favorable policy for arbitration that we have as told by the Florida Supreme Court, by the United States Supreme Court, and based on the guidance that the Eleventh Circuit Appellate Court as given us in how to interpret arbitration agreements and how to interpret these kinds of claims — the Magnuson-Moss Warranty Act claims and binding arbitration — I would ask this Court to find that this matter should be stayed and sent to arbitration.

Thank you, Your Honor.

THE COURT: Question. Is there a Fifth District opinion on this? You got the Second. You got the Eleventh. Is there a Fifth District case?

MS. LIPOSKY: I have not found a Fifth DCA case, Your Honor, interpreting the Davis versus Southern.

THE COURT: All right.

So you are Jeremy.

MR. KESPOHL: I am Jeremy, Your Honor, and I

represent the plaintiff. And I am going to address first quickly the two cases that they primarily rely upon and then get back into my argument and explain why the Court should not follow these decisions.

First, Stacy —

THE COURT: Before you do that, could you do something for me?

MR. KESPOHL: Sure.

THE COURT: It's been a while since — I'm a little familiar with the Moss-Magnuson. Tell me what that's about.

MR. KESPOHL: The federal Magnuson-Moss Warranty Act was an act that was passed in the 1970s by Congress. The reason for the act was warrantors around the country were giving consumers warranties, you know. And when they would go to make a claim, the warrantors would say, "You know what? Sue us. Who's going to take your case? Who's going to take a case that's worth a couple hundred, maybe a couple thousand dollars? Are you going to pay out of pocket for an attorney?"

So Congress came up with the federal Magnuson-Moss Warranty Act. And one of the provisions to aid consumers in pursuing their claims is a one-way fee-shifting provision in favor of the

consumer so that if a consumer prevails, they're entitled to recover their attorney's fees and costs. And that helped consumers be able to pursue their claims.

Mag-Moss doesn't essentially create any new causes of action. It strengthens state law. A lot of Mag-Moss — there are specific requirements in Mag-Moss, but many components of Mag-Moss defer to state law.

For example, implied warranties, they tell you to look to state laws. For remedies, they tell you to look to state law, things like that. But there are certain statutory requirements under the Mag-Moss that are a little bit different from state law.

THE COURT: Okay.

MR. KESPOHL: So getting back to the cases that were cited, first, the Stacy David case dealt with FDUTPA, didn't deal with the arbitrability of Mag-Moss specifically.

THE COURT: Dealt with what?

MR. KESPOHL: Sorry. Florida Unfair and Deceptive Trade Practices Act.

THE COURT: Okay.

MR. KESPOHL: That was the analysis in that

case. To my knowledge no Florida court has specifically ruled on the arbitrability of a Magnuson-Moss Warranty Act claim.

Now, it mentions that there were —

THE COURT: What about this Eleventh Circuit case?

MR. KESPOHL: Well, and I was getting to that. The problem with the Eleventh Circuit, Your Honor, is the Eleventh Circuit apparently really likes arbitration and they really like sending cases to arbitration.

THE COURT: We are in the Eleventh Circuit; aren't we?

MR. KESPOHL: However, the problem is they disregarded the dictates of the United States Supreme Court as I'm about to explain. And their decision represents a minority throughout the United States in both federal and state court.

So now the Florida Supreme Court, or the United States Supreme Court, hasn't ruled specifically: Can Mag-Moss cases be arbitrated?

Our position is the reason is they don't have to. There's plenty of guidance to the courts on how to address this issue.

Now, the primary issue we're dealing with here

is, is there an existence of an arbitrable issue? And our position is there is not because the statute does not allow for these types of claims to be arbitrated.

Now, the Supreme Court has come out and said that — when you're trying to decide this type of issue, the first thing you do, obviously, is you look at the statute, okay. And if the statute says the claim is not arbitrable or — you know, these cases apply to a whole host of different types of cases. So whatever the legal issue is, you first look to the statute and say, Does the statute address it?

In this case I think there is some argument that it does. But assuming for the sake of argument that it doesn't, the court says, The next thing you need to look at is did Congress give authority to an administrative agency to fill the gaps on that particular issue? And in this case, that's precisely what has happened.

The case primarily that I'm referring to that I gave you a copy of is Chevron versus Natural Reservation [sic] Defense Council, Inc. That is 467 US 837 from 1984. And what that deals with is the analysis that the Court should go through in

determining —

THE COURT: What's the tab on that?

MR. KESPOHL: It's going to be one of the first cases that's tabbed, I believe, Your Honor. Maybe the first case.

THE COURT: Statutes — maybe you could locate it.

MR. KESPOHL: I'd be happy to.

THE COURT: Please.

MR. KESPOHL: Yep, first case.

THE COURT: That was a case, not a statute. All right.

MR. KESPOHL: So the court stated that when a court reviews an agency's construction of a statute which it administers, it is confronted with two questions. First always is the question whether Congress has directly spoken to the precise question at issue.

As I said, we're not focusing on that because at least there has been some question by the courts as to whether they spoke specifically to the issue. So the Supreme Court went on to explain,

"If the statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's answer is

based on a permissible construction of the statute.

"If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.

"Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."

Now this is important because the cases that have ruled that these claims are arbitrable had not fully undergone that second analysis. They've kind of done their own thing there.

They've said, "Well, we think it's unreasonable because when you look at this other statute," but that's not what the Supreme Court told them to do.

The Supreme Court said, "You look at the statute and decide whether the agency's interpretation is arbitrary, capricious, or manifestly contrary to the statute."

The Eleventh Circuit didn't do that analysis. Instead, they looked at the FAA and found that the analysis was invalid based upon the FAA's preference

for arbitration, which is not what the United States Supreme Court asked them to do.

The court went on to say —

THE COURT: See if I got this right. Whatever my decision is in this case, it's going to the Fifth on a petition for writ of cert, right? Isn't that right?

MR. KESPOHL: Correct.

THE COURT: Yeah, that's what's going to happen.

MR. KESPOHL: Well, actually I would say no, Your Honor, because it hasn't happened yet.

THE COURT: Yeah. Well, I know, but I mean — you know, I'm either going to grant it or I'm not going to grant it. Go ahead.

And as such — I mean, what's the binding effect of the Eleventh Circuit here?

MR. KESPOHL: None. It's purely persuasive. And I think that the Supreme Court —

THE COURT: In the absence of other authority, I mean, isn't it, like, really persuasive?

MR. KESPOHL: I would say not, Your Honor, because I'd say the Supreme Court, the United States Supreme Court is absolutely binding and they've given you this analysis to follow.

THE COURT: And that case specifically deals with Moss Magnuson?

MR. KESPOHL: No, Your Honor, because they've laid out the standard that has been applied to multiple statutes. As you can see, I provided at least half a dozen.

THE COURT: This is a framework case you're telling me?

MR. KESPOHL: Correct, Your Honor. It gives you the instructions on how to analyze the applicability of an agency interpretation of the statute.

THE COURT: And the principles. I gotcha. Okay, I'm with you.

MR. KESPOHL: So the Supreme Court went on to explain that sometimes the legislative delegation to an agency on a particular issue is implicit rather than explicit.

"In such a case a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administration of an agency."

Again, that's precisely what the Eleventh Circuit did in the Davis case.

"The principle of deference to administrative

interpretation has been consistently followed by this court. Whenever decisions are as to a meaning or reach of a statute has involved reconciling conflicting policies and a full understanding of the force and statutory policy in a given situation is dependent upon more than ordinary knowledge respecting the matter subjected to agency regulations."

The Court also explained,

"If this choice represents a reasonable accommodation of conflicting policies that were submitted to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."

They went through -- and I'm not going to go through every case, but there are multiple cases we have provided you with with all different federal statutes where they've gone through the same two-step process.

And the Supreme Court has repeatedly said that where Congress has left a gap for an agency to fill, the agency's regulation is given controlling weight unless it's arbitrary, capricious, or manifestly

contrary to statute.

So if you look at the Magnuson-Moss Warranty Act, Section 2310(a)(2) says that the Federal Trade Commission will prescribe rules setting forth minimum requirements for any informal dispute resolution programs under the Magnuson-Moss Warranty Act.

15 USC 2312 says the Federal Trade Commission has general authority to promulgate rules for implementation of the Magnuson-Moss Warranty Act.

So the FTC did what was it was asked to do. It created rules. The rules refer to the IDR procedure as a mechanism, by the way. And one of these things it explicitly states is that if a customer is dissatisfied with the outcome of an informal dispute resolution procedure, they may pursue legal remedies. That implies it can't be nonbinding. But they don't allow for nonbinding informal dispute procedures.

They go on to say, however, to clarify it in 703.5(j), "Decisions of a mechanism shall not be legally binding on any person."

Furthermore, there had been multiple calls for the FTC to find that these cases may be submitted to finding arbitration. And I provided Your Honor with

several of the FTC analyses where they were asked to change their position. Since 1975, for over 40 years, the FTC has continually ruled that Mag-Moss cases may not be subject to binding arbitration.

In '99, they went through an analysis when they were requested to change the ruling, and the FTC explained,

"The commission determined that the reference within written warranty to any nonbinding, non-judicial remedy is prohibited by the Rule and the Act."

The commission believes that this interpretation continues to prohibit warrantors from including binding arbitration clauses in their contracts with customers that would require customers to submit warranty disputes to binding arbitration.

The FTC explained that it would be troubled if the statute were constructed in such a way that would allow warrantors and the retailers selling their products to avoid the requirements of the Magnuson-Moss Warranty Act by simply inserting binding arbitration clauses in their sales contract.

The FTC recently in 2015 reaffirmed its

position again and said the commission reaffirms its long-held belief that the Magnuson-Moss Warranty Act disfavors and authorizes the commission to prohibit mandatory binding arbitration and warranties.

So since 1975 the FTC has ruled repeatedly Mag-Moss cases can't be subject to binding arbitration.

That represents a —

THE COURT: Stop. Say it again. The Supreme Court what?

MR. KESPOHL: Excuse me. The Federal Trade Commission has ruled.

THE COURT: Thank you.

MR. KESPOHL: Excuse me.

THE COURT: All right.

MR. KESPOHL: So the reason I said "Supreme Court" is because the Supreme Court has held that an interpretation by an agency has particular weight when it involves a contemporaneous construction of the statute by the person charged with the responsibility of setting its machinery in motion of making the parts work efficiently and smoothly while they are yet new and untried.

Your Honor, like I said, they made this ruling in 1975, which was right around the time

Magnuson-Moss Warranty Act came out and they have consistently held the same thing. The Supreme Court has also held that longstanding, inconsistent agency interpretations carry special weight with the court.

And again, we've had over 40 years. We have cited to a number of cases and these cases, Smiley versus CitiBank, which is a federal case from South Dakota. NLRB versus Bell Aerospace, that's a U.S. Supreme Court — and these cases stand for the proposition that where an agency has consistently ruled one way, it's to be given a presumption of correctness and great weight by the courts.

We've also provided you with a whole list of cases. I think we've provided you with eight different cases where the courts have held exactly what we're arguing, that they've looked at cases like Davis, which by the way, the Davis decision they provided you with doesn't have a copy of the dissent.

The dissent says exactly the argument that we are providing, which is that the Eleventh Circuit chose to ignore what the Supreme Court told it to do. They did their own analysis, which they didn't have authority to do.

And then if you follow the analysis as the

Supreme Court instructed, you would have to find that the Mag-Moss claims cannot be arbitrable based upon the FTC regulations.

And what you'll notice about these cases that we provided you, Rickard versus Teynor's Homes, it's from federal court in Ohio; In Re: Van Blarcum, it's from the Texas Supreme Court; Koons Ford versus Baltimore, it's from Maryland Supreme Court.

THE COURT: No relation.

MR. KESPOHL: Browne versus Kline Tysons Imports is a Federal District Court in Virginia. Simpson is South Carolina Supreme Court. And Pitchford, which is West Virginia Federal Court.

They've all said — and they looked at Davis, and they chose to ignore what the Supreme Court told them to do. And if you follow the proper analysis, these claims cannot be subject to binding arbitration.

And we talked about the issue as far as not following the second prong, so I'm not going to go back over that. The other thing is, even in some of the courts — like I said, there's a minority of courts that have found these cases are subject to binding arbitration. There is one subset of those decisions that still would not allow for this case

to be arbitrated.

And specifically there's a case from the Fourth Circuit Court called Seney versus Rent-a-Center Inc. This court said that, "Yeah, we think it can be subject to binding arbitration." But they said it can only be subject to binding arbitration where you first go through the nonbinding arbitration that's discussed specifically in the statute. And, therefore, if this is no arbitration, there can be no binding arbitration.

First of all, Your Honor, I don't think there can be binding arbitration at all. I think that the FTC has ruled that. And I think the Supreme Court requires that the Court, unless it finds that that ruling is capricious or completely in opposite of what the statute's intent was, I think that should be enforced.

But my point here is, even one subset of minority of cases that has ruled they can be subject to the binding arbitration, this case would not be eligible for arbitration because there is no nonbinding procedure that the consumer could have first resorted to.

So again, Your Honor, I think if you follow the Supreme Court precedent — and we've provided

several cases that explain it, most notably Chevron — that second analysis is where the Court's decision should be based upon. The second part of the analysis is did Congress give authority to FTC to make this decision, which they clearly did, and then the question then becomes is it a reasonable interpretation?

And unless the Court finds it's completely unreasonable, capricious — I can't recall exactly what the language was — then the courts are supposed to treat it as if it was precedent pursuant to the Supreme Court. The Eleventh Circuit chose for whatever reason not to do this.

However, Your Honor, where the Eleventh Circuit fails to follow the binding precedent of the United States Supreme Court, that decision can be disregarded by this Court. In fact, it's only persuasive authority anyway.

Therefore, we're asking Your Honor to follow the decision of the United States Supreme Court and find that this Magnuson-Moss Warranty Act claim cannot be subject to binding arbitration.

MS. LIPOSKY: Your Honor, if I may, just a quick rebuttal?

THE COURT: Of course.

MS. LIPOSKY: Thank you, Your Honor.

First of all, the Stacy David case from the Second DCA, in that case, Your Honor, one of the claims that were brought specifically was a Magnuson-Moss Warranty Act claim. It was not just a Florida Deceptive and Unfair Trade Practices Act claim.

Specifically, one of the — it was rescission, breach of express warranty, breach of implied warranty, violation of the Magnuson-Moss Act, and violation of the Florida Deceptive and Unfair Trade Practices Act. And the Second DCA on page 307 specifically says,

"No count of the Consuegras' complaint appears to fall outside the arbitration agreement."

Then, Your Honor, opposing counsel has cited to various cases outside of the Eleventh Circuit where courts have denied the arbitration of Magnuson-Moss Warranty Act claims.

However, Your Honor, in the Eleventh Circuit we have — the Eleventh Circuit Court of Appeal has told us that Magnuson-Moss Warranty Act claims can be arbitrated under a binding arbitration agreement.

And, Your Honor, the key distinction here — and I think opposing counsel mentioned, right? —

Chevron is obviously a Florida Supreme Court case. It tells us how to interpret a statute, right? And so as we agree that Congress has not been clear here, so now we look at what the FTC has said.

And as counsel said at the very end, we look to see if the interpretation of FTC is reasonable. And the Eleventh Circuit specifically looks at that on the Davis decision on page 1278: Reasonableness of the FTC Construction.

And they find after looking at the legislative history, at the legislative intent, at the purpose of the statute, that the FTC's interpretation of the Magnuson-Moss Warranty Act and the Arbitration Act, that it was not a reasonable interpretation. And that is why they find that Magnuson-Moss Warranty Act claims can be bound to binding arbitration.

And, Your Honor, I would simply ask you to look at — if you're only going to look at one part of this decision, since that is really the basis of opposing counsel's claim, to just look at page 1278 and on, of the Eleventh Circuit's decision analyzing the FTC's interpretation and finding that it is not a reasonable interpretation, and, therefore, they are not bound by this unreasonable interpretation from the FTC.

THE COURT: All done?

MS. LIPOSKY: Yes, Your Honor. Thank you.

THE COURT: You're welcome.

You want me to read this, right?

MR. KESPOHL: If you would like, Your Honor.

THE COURT: No, no. You gave it to me.

MR. KESPOHL: Well, obviously I put it together, so I'd hoped you'd look at it. I hoped you would have had it last week to look at it.

THE COURT: That's all right. No problem.

Send me a proposed order.

Send me a proposed order.

I'll take a look at your stuff and I'll get you an order out. Send me a written order in writing. Don't email it to me. Mail it. And what I do is I sign one and I'll send it to the portal and you'll get a copy. All right? Everybody good with that?

MR. KESPOHL: Absolutely, Your Honor.

MS. LIPOSKY: Thank you, Your Honor. Is there a timeline when you want this by?

THE COURT: As soon as reasonably possible. The sooner, the better. I've got a little time to take a look at this the rest of the afternoon. So we're good to go.

(These proceedings were concluded at 2:50 p.m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF BREVARD)

I, STEPHANIE McGRAW, Registered Professional Reporter, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings, and that this transcript, pages 1 through 37, is a true and correct record of my stenographic notes.

Signed this 19th day of July, 2018.

_____

STEPHANIE MCGRAW
Registered Professional Reporter

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APPENDIX A-8

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IN THE CIRCUIT COURT IN AND FOR
BREVARD COUNTY, FLORIDA
Case No: 2017-CA-049992

LES KROL,
Plaintiff,

v.

SCA US, LLC and
GIBSON AUTO SALES, INC,
d/b/a GIBSON TRUCK WORLD,
Defendants

PLAINTIFFS NOTICE OF SUPPLEMENTAL AUTHORITY

COMES NOW Plaintiff LES KROL, by and through his attorneys MORGAN & MORGAN, and hereby provides this supplemental authority in support of Plaintiff's Response in Opposition to Defendant's Amended Motion to Dismiss and Compel Arbitration, and states as follows:

Plaintiff maintains his position that the Court should disregard *Davis* v. *Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002) as well as *Stacy* v. *Connsuegra* 845 SO.2d 303 (Fla. 2nd DCA 2003) (which simply cites to *Davis* without any analysis whatsoever) due to the *Davis* Court's failure to adhere to binding United States Supreme Court precedent. However, to the extent the Court is persuaded by the aforementioned authority, Plaintiff provides the below authority which establishes that the Court would still be required to deny Defendant's Motion pursuant to the 11th Circuits decisions on this matter.

First, Plaintiff has attached to this notice a copy of *Cunningham* v. *Fleetwood Homes of Georgia, Inc.*, 253 F.3d 611 (11th Cir. 2001). In *Cunningham* the 11th Circuit ruled that the Magnuson-Moss Warranty Act ("MMWA") requires any arbitration provision to be included in the actual warranty itself. *Id.* Accordingly, because the arbitration clause in question was not

contained within the warranty in question, the Court rules Defendant was not entitled to arbitration regard the MMWA claims. *Id.*

Additionally, Plaintiff attaches to this Notice a copy of *Porter v. Chrysler Group LLC*, 2013 WL 6768218 (M.D. FLA 2013). In *Porter* the Court followed the aforementioned *Cunninham* decision in finding that Defendant was not entitled to arbitration where the arbitration clause at issue was not included inside the applicable warranty. *Id.* Furthermore, the Court noted

> The Court is quite troubled by Defendant's utter failure to cite to *Cunningham*, which plainly controls the disposition of this motion. Defendant belatedly-and improperly-attempted to distinguish *Cunningham* in its motion for leave to file a reply, in which it pointed to *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir.2002). However, *Davis* does nothing to recede *fromCunningham*, so this argument is unavailing.

Id.

At the hearing on May 31, 2018, and in the Motion to Dismiss and Compel Arbitration, Defendant acknowledged that the arbitration provision was not contained in the express warranty given by Gibson Trucks, but was instead contained in the sales contract. *See* Exhibit A to Defendant's Amended Motion to Dismiss Thus, even is the Court were persuaded to follow the dictates of the 11th Circuit in regard to the instant motion, the Court would still be required to deny the Motion to Compel Arbitration based upon *Cunningham*.

CERTIFICATE OF SERVICE

I hereby certify that I furnished a true and correct copy of the above and foregoing by electronic mail this Is' day of June, 2018 to: Yesica S. Liposky, Esquire, Broad and Cassel, P.A., 100 North Tampa St, Suite 3500, Tampa, FI 33602 rsickles@broadandcasseI.com; yliposky@broadandcassel.com, knovak@broadandcassel.com, .

MORGAN & MORGAN, P.A.

/s/ Jeremy Kespohl
JEREMY KESPOHL, Esquire
Florida Bar No. 035979
Attorneys for Plaintiff
76 South Laura Street, Ste 1100
Jacksonville, FL 32202
(904) 361-4416 Telephone
(904) 361-4348 Facsimile
jkespohl@forthepeople.com
For Service of Documents Only:
warTantygroupeservice@forthepeopIe.com

253 F.3d 611
United States Court of Appeals,
Eleventh Circuit

Gary R. CUNNINGHAM, Delores Cunningham, Plaintiffs-Appellees,
v.
FLEETWOOD HOMES OF GEORGIA, INC., Defendant-Appellant.

NOS. 00-12225, 00-12510.
June 6, 2001.

Synopsis
Mobile home buyers sued seller and manufacturer in state court for fraud, negligence and breach of warranty. Defendants removed suit to federal court and moved to compel arbitration. The United Stales District Court for the Northern District of Alabama, No. 99-02605-CV-PT-E, Robert B. Propsl, J., compelled arbitration of all claims except breach of warranty claim against manufacturer. Manufacturer appealed. The Court of Appeals, Cox, Circuit Judge, held that Magnuson-Moss Warranty Act barred manufacturer from using its third-party beneficiary status under buyers' agreement with seller to compel arbitration of buyers' breach of warranty claims.

Affirmed.

West Hcudnotcs (7)

[1] Alternative Dispute Resolution v- Scope and Standards 0f Review
Court of Appeals reviews order denying motion to compel arbitration de novo.

1 Cases that cite this hcadnotc

[2] Alternative Dispute Resolution v- Statutory Rights and Obligations
Statutorily-creatcd causes of action arc no exception to Federal Arbitration Act (FAA) rule that arbitration agreements should be enforced according to their terms. 9 U.S.C.A. § 2.

8 Cases that cite this headnote

[3] Alternative Dispute Resolution o Statutory Rights and Obligations
Alternative Dispute Resolution Operation and Effect
Agreements to arbitrate are essentially forum-selection clauses, and by agreeing to arbitrate statutory claim, party does not forgo substantive rights afforded by statute; it only submits to their resolution in arbitral, rather than judicial, forum.

12 Cases that cite this hcadnotc

HI Alternative Dispute Resolution Statutory Rights and Obligations

In delcrmining whether Congress has limited or prohibited waiver of judicial forum for specific statutory claims, court must scrutinize statute's text and legislative history, and ascertain whether inherent conflict exists between enforcement of arbitration agreement and statute's underlying purposes.

2 Cases that cite this hcadnotc

[5] Alternative Dispute Resolution ⇐ As Ousting Jurisdiction of or Precluding Resort to Courts

Informal dispute settlement procedure available to warrantors under Magnuson-Moss Warranty Act is non-binding mechanism, which can serve at most as prerequisite, and not bar, to relief in court. Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, § 110(a)(3), 15 U.S.C.A. § 2310(a)(3).

32 Cases that cite this hcadnotc

(6) Alternative Dispute Resolution ⇐ Statutory Rights and Obligations

Magnuson-Moss Warranty Act barred mobile home manufacturer from using its third-party beneficiary status under buyers' agreement with seller to compel arbitration of buyers' breach of warranty claims where manufacturer had failed to disclose in warranty term or clause requiring buyers to utilize informal dispute resolution mechanism. Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, §§ 102, 110(a, d), 15 U.S.C.A. §§ 2302, 2310(a, d).

30 Cases that cite this hcadnotc

[7] Alternative Dispute Resolution ⇐ Statutory Rights and Obligations

Magnuson-Moss Warranty Act docs not bar warrantors and consumers from agreeing to bending arbitration after dispute has arisen between them. Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, § 101 el scq., 15 U.S.C.A. § 2301 cl scq.

27 Cases that cite this hcadnotc

Attorneys and Law Firms

*612 Jeffrey Patton Liscnby, Bradley, Aranl, Rose & White, LLP, Birmingham, AL, for Defendant-Appellant.

Earl Price Underwood, Jr., Anniston, AL, for PlaintifTs-Appellecs.

Appeals from the United States District Court for the Northern District of Alabama.

Before ANDERSON, Chief Judge, and HULL and COX, Circuit Judges.

Opinion

COX, Circuit Judge:

Fleetwood Homes of Georgia, Inc. (Fleetwood) appeals the district court's denial *613 of Fleetwood's motion to compel arbitration pursuant to 9 U.S.C. § 16(a).

I. FACTS

In April of 1998, Gary and Delores Cunningham (the Cunninghams) purchased a new mobile home manufactured by Fleetwood from Ronnie Smith's Home Center, Inc. (Ronnie Smith's). The mobile home came with a manufacturer's warranty, and, as a part of the sales transaction, the Cunninghams executed an arbitration agreement with Ronnie Smith's.[1] Shortly after the purchase and installation of the home, the Cunninghams contacted Ronnie Smith's and Fleetwood wilh a variety of complaints about defects in the home. Unsatisfied with the response, the Cunninghams filed suit.

II. PROCEDURAL HISTORY

The Cunninghams filed a complaint in Alabama circuit court alleging fraud, mental anguish and emotional distress, fraud in the inducement, negligence and wantonness, breach of contract, breach of express and implied warranties, breach of implied warranty of merchantability, violation of the Alabama Extended Manufacturer's Liability Doctrine, ALA.CODE 1975, § 6-5-500, *et seq.*, and violations of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301-2312. Fleetwood and Ronnie Smith's removed to federal district court on the basis of the Magnuson-Moss Warranty Act claims. *See* 28 U.S.C. & 1331, 1367 (1993).

Ronnie Smith's filed a motion to compel arbitration or in the alternative for dismissal, and Fleetwood subsequently joined in the motion. The district court, concluding that Fleetwood was a third-party beneficiary of the arbitration agreement but that the Magnuson-Moss Warranty Act precludes arbitration of the Cunninghams' written or express warranty claims, issued an order compelling arbitration of all claims except for the Magnuson-Moss claims for breach of written or express warranties. Fleetwood appeals.

III. ISSUE ON APPEAL

Fleetwood challenges the district court's conclusion that the Magnuson-Moss Warranty *614 Act-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (Magnuson-Moss), precludes Fleetwood from utilizing its third-party beneficiary status under the Ronnie Smith's-Cunningham arbitration agreement to compel binding arbitration of the Cunninghams' breach of written or express warranty claims. Wc assume for the purpose of deciding this case that Fleetwood is entitled to the benefit of the arbitration agreement.

IV. STANDARD OF REVIEW

[1] We review an order denying a motion to compel arbitration de novo. *Palodino* r. *Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir.1998).

V. CONTENTIONS OF THE PARTIES

Fleetwood notes that the Federal Arbitration Act (FAA) creates a presumption of validity for arbitration clauses, *see* 9 U.S.C. § 2, and argues that because Magnuson-Moss docs nothing to disturb the FAA's mandate, the arbitration agreement must be enforced according to its terms. *See Volt In/o. Scis., Inc. v. Bit ofTrs. of Leland Stanford, Jr. Unix*, 489 U.S. 468, 479, 109 S.Ct. 1248, 1255-56, 103 L.Ed.2d 488 (1989). Fleetwood acknowledges that the FAA may be

overridden by a contrary congressional command, but contends that an examination of the text, legislative history, and purpose of Magnuson-Moss reveals no evidence of a congressional intent to prevent the enforcement of arbitration agreements. *See ShcarsonlAmerican Express, Inc.* v. *McMahon,* 482 U.S. 220, 227, 107 S.Cl. 2332, 2337-38, 96 L.Ed.2d 185 (1987) (noting that Congress's intent to limit or prohibit waiver of a judicial forum for a particular claim will be deducible from a statute's text, legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes). The Cunninghams, on the other hand, argue that Magnuson-Moss and the rules promulgated by the Federal Trade Commission pursuant to Magnuson-Moss prohibit binding arbitration of warranty claims. Naturally, the Cunninghams contend that their view, not Fleetwood's, is supported by the legislative history and the stated purpose of Magnuson-Moss.

A. The Text of the Magnuson-Moss Warranty Act

For their analysis of the text of Magnuson-Moss, the Cunninghams rely on the reasoning of opinions from district courts within this circuit. *Sec, e.g., Boyd* r. *Homes of Legend,* 98! F.Supp. 1423, 1434-41 (M.D.Ala.1997); *Wilson* v. *Wavcrkc Homes, Inc.,* 954 F.Supp. 1530, 1537-39 (M.D.A!a.1997). The Cunninghams note that 15 U.S.C. § 2310(d) creates a statutory right of action for consumers "who [are] damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter or under a written warranty, implied warranty, or service contract...." 15 U.S.C. § 2310(d). Also, in § 2310(a) Magnuson-Moss provides for the inclusion of informal dispute settlement mechanisms within written warranties,[2] and delegates to the *615 Federal Trade Commission the authority to establish minimum requirements for these mechanisms. The Cunninghams argue that Magnuson-Moss prohibits binding arbitration by making § 2310(a)'s informal dispute settlement mechanism the only exception to the right of action created by § 2310(d); no other mechanisms arc permitted. In other words, in the Cunninghams' view Magnuson-Moss permits alternative dispute resolution, including arbitration, but only of the non-binding sort that fits the § 2310(a)(3) description and that complies with the rules promulgated by the Federal Trade Commission.[3] *See id.* § 2310(a)(2); 16 C.F.R. § 703.50) (1999).

Fleetwood argues that § 2310(a)(1) only encourages inclusion of informal dispute resolution mechanisms in written warranties, and does not preclude enforcement of agreements to resolve claims by binding arbitration. Under Fleetwood's reading of Magnuson-Moss, the mechanism described by § 2310(a) is not the only method of alternative dispute resolution available to warrantors and consumers, and the statutory cause of action created by § 2310(d) merely confers a right that can be waived by express agreement. In support of this line of argument, Fleetwood notes that Magnuson-Moss expressly states that nothing in the Act shall invalidate or restrict any right or remedy of a consumer under any other federal law. 15 U.S.C. § 2311(b). In Fleetwood's view, this provision necessarily includes the substantive portions of the FAA that protect the ability of contracting parties to enter into binding arbitration agreements.

B. The Legislative History of the Act

Fleetwood argues that the legislative history of Magnuson-Moss does not express a clear intent to prohibit binding arbitration, but that at most, it evidences an intention to prohibit warrantors from including binding informal dispute resolution mechanisms in written warranties. Because the arbitration agreement at issue here was not in the manufacturer's warranty, but was instead a part of the sales transaction between the buyer and the seller, Fleetwood contends that legislative history indicating concerns with the content of written warranties is inapplicable.

In response the Cunninghams note that at the time of Magnuson-Moss's passage members of Congress indicated that use of the informal dispute resolution mechanism was intended as only a prerequisite, and would not be a bar to a later civil action on the warranty. *See* H.R.REP. NO. 93-1107, (1974) *reprinted in* 1974 U.S.C.C.A.N. 7702, 7703. In keeping with their construction of the text, the Cunninghams interpret this statement as an indication that Congress expected that all informal dispute resolution mechanisms would be non-binding, as they would otherwise violate the provisions of the Act. In support the Cunninghams cite the regulations promulgated by the Federal Trade Commission pursuant

to the Act, which detail the particulars of the informal dispute resolution mechanism of § 2310(a), as well ns Ihe history of the regulations, which includes *616 statements by the Federal Trade Commission rejecting industry calls for the incorporation oflegally binding mechanisms. See 40 Fcd.Reg. 60,168, 60,211 (1975) (staling "reference within the written warranty to any binding, non-judicin! remedy is prohibited by the Rule and the Act."). Fleetwood's retort courteous is to repeat (hat none of the above applies to arbitration agreements not in the written warranty.

C. The Purpose of the Act

Fleetwood locates the purposes of Magnuson-Moss in the section detailing the Act's disclosure requirements, which reads: "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products." 15 U.S.C. § 2302(a). Fleetwood submits that enforcing seller-consumer arbitration agreements that make warrantors third-party beneficiaries does not conflict with these purposes. Fleetwood analogizes to the federal securities statutes, which share Magnuson-Moss's concern with the disclosure of information to consumers. Although, like Magnuson-Moss, the Securities Act of 1933 and the Securities Exchange Act of 1934 require disclosure to potential investors to prevent disinformation and fraud in a transactional context, the Supreme Court has held that claims brought under both acts can be subject to binding arbitration. *Rodriguez de Quijas* u *SheursonIAmvriatn Express, Inc.*, 490 U.S. 477, 485-86. 109 S.Ct. 1917, 1922. 104 L.Ed.2d 526 (1989) (Securities Act of 1933); *McMahon.* 482 U.S. at 238, 107 S.Ct. at 2343 (Securities Exchange Act of 1934). Fleetwood concludes that the same reasoning applies to Magnuson-Moss claims.

The Cunninghams note that the legislative history provides that Magnuson-Moss was passed at least in part to "provide[ ] the consumer with an economically feasible private right of action," *Wilson,* 954 F.Supp. at 1538 (quoting 119 CONG. REC. 972 (1973) (remarks of Congressman Moss)), and they argue that allowing Fleetwood to compel arbitration would force them to absorb costs that do not comport with the statutory policy of Magnuson-Moss. *See Paladuto* r. *Awet Computer Techs., Inc.,* 134 F.3d 1054, 1062 (11th Cir.1998) (finding conflict between statutory policy of Title VII and restrictive arbitration clause). Additionally, the Cunninghams argue that because Magnuson-Moss's purpose is to require manufacturers to include all information relevant to the warranty in the warranty itself, allowing Fleetwood to compel arbitration as a third-party beneficiary of the Ronnie Smith's-Cunningham agreement defeats the express purpose of the Act. The Cunninghams also submit that the absence of language in the warranty referencing the arbitration agreement is itself a violation of the Act, as Magnuson-Moss and the Federal Trade Commission regulations require full and conspicuous disclosure of the terms and conditions of the warranty. *See* 15 U.S.C. § 2302; 16 C.F.R. §§ 701.3, 703.2. Thus, the Cunninghams argue compelling arbitration on the basis of an arbitration agreement that is not referenced in the warranty[4] presents an inherent conflict with the Act's purpose of providing clear and concise warranties to consumers.

VI. DISCUSSION

A. The Federal Arbitration Act

[2] The Federal Arbitration Act, 9 U.S.C. § I, *et seep,* "plac[es] arbitration *617 agreements upon the same footing as other contracts." *McMahon,* 482 U.S. at 226-27, 107 S.Ct. at 2337 (citations omitted). The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Statutorily-created causes of action are no exception to the rule that arbitration agreements should be enforced according to their terms. *Mitsubishi Motors Corp. v. Soler Chryslcr-Plymouth, Inc.,* 473 U.S. 614, 626-27, 105 S.Ct. 3346, 3354, 87 L.Ed.2d 444 (1985).

[3] [4] Agreements to arbitrate are essentially forum-selection clauses, *Scherk v. Alberto-Culver Co.*. 417 U.S. 506, 519, 94 S.Ct. 2449, 2457, 41 L.Ed.2d 270 (1974), and by "agreeing to arbitrate a statutory claim, a party docs not forgo the substantive rights afiorded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi,* 473 U.S. at 628, 105 S.Ct. at 3354. However, Congress may limit or prohibit waiver of a judicial forum for

specific statutory claims. *McMahon,* 482 U.S. at 227, 107 S.Ct. at 2337. To deduce such an intent, reviewing courts must scrutinize a statute's text and legislative history, and ascertain whether an inherent conflict exists between enforcement of the arbitration agreement and the statute's underlying purposes. *Id.*, 482 U.S. at 227, 107 S.Ct. at 2337-38.

B. The Magnuson-Moss Warranty-Federal Trade Commission Improvement Act

Congress enacted the Magnuson-Moss Warranty Act "to improve the adequacy of information available to consumers, prevent deception, and [to] improve competition in the marketing of consumer products." 15 U.S.C. § 2302. Magnuson-Moss does not require manufacturers to provide warranties, but instead creates specific duties and liabilities for manufacturers that choose to do so. 16 C.F.R. § 700.03. The Act focuses primarily on written warranties for consumer products. [5]

The most significant provisions in Magnuson-Moss pertain to the disclosure of written consumer product warranty terms and conditions, the pre-sale availability of written warranty terms, the authorization of consumer suits for damages and other legal and equitable relief, and the procedures for creating informal dispute settlement mechanisms. *Sac* 15 U.S.C. §§ 2302-04, 2310. The Cunninghams argue that the text of these provisions evidences Congress's intention to prohibit or limit the waiver of judicial remedies for Magnuson-Moss claims. Wc turn first to § 2310, the civil action and informal dispute settlement mechanism section.

1. Section 2310: the Civil Action and Informal Dispute Settlement Mechanism

Section 2310 of Magnuson-Moss provides a statutory cause of action to consumers "damaged by the failure of a supplier, *618 warrantor, or service contractor to comply with [any obligation imposed by the Act] or under a written warranty, implied warranty or service contract." *Id* § 2310(d)(1). Suit may be brought in either state or federal court. [6] *Idl* The Act also permits class actions, and in an effort to encourage consumers to pursue claims, Magnuson-Moss allows prevailing consumer litigants to receive attorneys' fees and costs. *Id.* § 2310(d)(2), (e).

The Act also places certain impediments in the way of litigation-minded consumers. First, prior to bringing suit for breach of warranty, a consumer must give persons obligated under the warranty a reasonable opportunity to "cure" the failure to comply with the obligations at issue. *Id.* § 2310(c). Second, in order to bring suit in federal court, the amount in controversy must be at least $50,000, exclusive of interests and costs. [7] *Id.* § 2310(d)(1)(B), (d)(3)(B). Significantly, Magnuson-Moss also gives warrantors the ability to establish procedural prerequisites to a consumer's civil action.

To encourage the settlement of consumer disputes by means other than civil suits, § 2310 allows warrantors to include informal dispute settlement mechanisms in the warranty. *Id.* § 2310(a)(3). So long as the mechanism complies with the Act's requirements and the rules established by the Federal Trade Commission, [8] *id.* § 2310(a)(3)(B), and the written warranty contains the requirement that the consumer utilize the mechanism before pursuing a legal remedy, *id.* § 2310(a)(3)(C), warrantors can make the informal dispute settlement process a mandatory prerequisite to instituting a consumer suit in state or federal court. *Id.*

[5] The district court concluded that the informal dispute settlement procedure of § 2310(a)(3) is a non-binding mechanism, in that it serves at most as a prerequisite, and not a bar, to relief in court. We agree. The language of the section makes this clear when it states that, if a warrantor establishes a mechanism, "then ... the consumer may not commence a civil action ... unless he initially resorts to such procedure." *Id.* § 2310(a)(3). Congress's inclusion of the word "initially" in the proviso clause indicates that once a consumer has utilized the warrantor's conforming mechanism, a subsequent civil action is permissible [9] -a possibility that binding *619 arbitration does not anticipate. The legislative history buttresses this conclusion. One of the original sponsors of the bill explained that the informal dispute settlement mechanism was drafted as a possible "prerequisite to suit." 119 CONG. REC 972 (1973). Additionally, the Federal

Trade Commission, drafting regulations pursuant to the Act, has provided that "[d]ecisions of the Mechanism shall not be legally binding on any person." 16 C.F.R. § 703.5(j).

The Cunninghams contend, and the district court agreed, that the only permissible conclusion to be drawn from the text of § 2310 and the attendant legislative history is that Magnuson-Moss makes the non-binding § 2310 mechanism the sole exception to its guarantee of a consumer cause of action; these two alternatives eclipse the field of possibilities. Thus, binding arbitration agreements executed between buyer and seller that designate manufacturers as third-party beneficiaries violate the Act because they are binding, whether they are in the warranty or not, and they are therefore unenforceable. However, as Fleetwood notes, there is no explicit reference to binding arbitration in the statute, and a contrary conclusion is in fact permissible.

Since its decision in *Mitsubishi Motors* Carpf *v. Safer Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), which made clear the applicability of the FAA's mandate to statutorily-created causes of action, the Supreme Court has revisited similar arbitration issues in a variety of contexts.[10] A review of these cases convinces us that the district court was incorrect in concluding that, standing alone, the presence of the non-binding § 2310 mechanism in the statutory text requires the conclusion that Magnuson-Moss claims may not be the subject of binding arbitration agreements.

Aspects of § 2310 of Magnuson-Moss resemble provisions in statutory schemes previously considered in the Supreme Court's FAA jurisprudence. For instance, in *Gilmer* the Court noted that the ADEA establishes prerequisites to a claimant's civil action. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27, 111 S.Ct. 1647, 1653, 114 L.Ed.2d 26 (1991). First, ADEA claimants must file a charge with the Equal Employment Opportunity Commission (EEOC). *Id* The ADEA also requires the EEOC to "attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance ... through informal methods of conciliation, conference, and persuasion" before bringing an action. *Gilmer*, 500 U.S. at 27, 111 S.Ct. at 1653 (quoting 29 U.S.C. § 626(b)). This aspect of the ADEA is not unlike that portion of § 2310 which announces a "policy to encourage warrantors to establish [informal dispute settlement] procedures whereby consumer disputes are fairly and expeditiously settled," 15 U.S.C. § 2310(a)(1), and which obligates Magnuson-Moss claimants to first give *620 warrantors an opportunity to cure. *Id* § 2310(e). In *Gilmer*, however, the Supreme Court held that ADEA claims are arbitrable, in spite of the presence of an alternative settlement mechanism within the statute. This indicates that the presence of one type of non-judicial mechanism in the text does not necessarily preclude the possibility of all alternative mechanisms.[11] *See Southern Energy Homes, Inc.* v. *Lect* 732 So.2d 994, 1007 (Ala.1999) (See, J. dissenting).

However, while we are inclined to think that the presence of the non-binding § 2310 mechanism in the statutory text does not in and of itself mandate the conclusion that Magnuson-Moss renders binding arbitration agreements unenforceable, other key provisions of Magnuson-Moss, together with § 2310, cast considerable doubt on the propriety of the particular arrangement at issue here. These provisions include the requirements that significant conditions, limitations, and terms of the warranty be included in simple language in the warranty itself, and that the warranty must consist of a single, understandable document made available prior to sale to the consumer.

2. Section 2302: the Disclosure Requirements

Magnuson-Moss provides rules governing the content of warranties "[i]n order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products." 15 U.S.C. § 2302(a). The Act requires that any warrantor that chooses to provide a written warranty with a consumer product "shall ... fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty." *Id* The Act suggests the inclusion of thirteen items, among them: "[a] statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with [the] written warranty-at whose expense-and for what period of time," *id* § 2302(a)(4); "[a] statement of what the consumer must do and expenses he must bear," *id* §

2302(a)(5); "(exceptions and exclusions from the terms of the warranty," *id.* § 2302(a)(6); "(t]hc step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty," *id.* § 2302(a)(7); "(flnformation respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital, where the warranty so provides, that the purchaser may be required to resort to such procedures before pursuing any legal remedies in the courts," *id.* § 2302(a)(8); and "(t]he elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty." *hi* § 2302(a)(13). Magnuson-Moss delegates promulgation of specific disclosure requirements to the FTC, but requires that the terms of any written warranty be made available to the consumer or prospective consumer prior to sale. *hi* § 2302(a), (b)(1)(A).

The disclosure requirements established by the FTC pursuant to Magnuson-Moss arc codified at 16 C.F.R. § 701.3, and obligate warrantors to "dearly and conspicuously disclose (warranty terms] in a single document in simple and rcaidily understood language." 16 CF.R. § 701.3(a). Among these mandatory items, nondisclosure of which is a violation of both Magnuson-Moss and the Federal Trade Commission *621 Act as an unfair or deceptive act or practice,[13] 15 U.S.C. §§ 45(a)(1), 2310(b), the FTC includes: "[a] statement of what the warrantor will do in the event of a defect, malfunction or failure to conform with the written warranty ..." 16 C.F.R. § 701.3(a)(3); "[a] step-by step explanation of the procedure which the consumer should follow in order to obtain performance of any warranty obligation ..." *hi* § 701.3(a)(5); and "[ijnformalion respecting the availability of any informal dispute settlement mechanism...." *hi* § 701.3(a)(6). Tliis last requirement is echoed in § 703.2, which requires the warrantor to disclose "clearly and conspicuously at least the following information on the face of the written warranty: ... [a] statement of the availability of the informal dispute settlement mechanism." *hi* § 703.2(b)(1).

The comprehensive disclosure requirements of Magnuson-Moss arc an integral, if not the central, feature of the Act, perhaps eclipsing even the civil action and informal dispute resolution mechanisms in their importance to consumers. CURTIS R. REITZ, CONSUMER PROTECTION UNDER THE MAGNUSON-MOSS WARRANTY ACT 31 (1978). Prior to the passage of Magnuson-Moss, consumers had been inundated with problems concerning the complexity of warranties, complexity generated by the presence of misleading terms and incomplete disclosure on the part of warrantors. *See* 40 Fcd.Rcg. 60,168, 60.168 (Dec. 31, 1975). Magnuson-Moss's enactors anticipated that "(o]nc of the most important effects of this bill [would] be its ability to relieve consumer frustration by promoting understanding." *Id.* (citing 119 CONG. REC. 972 (1973) (remarks of Congressman Moss)); *see also* H.R. REP. NO. 93-1107, at I (1974) reprinted in 1974 U.S.S.C.A.N. 7702, 7702 (stating "(t]he purpose of this legislation is (I) to make warranties on consumer products more readily understood and enforceable").

Congress sought to remedy the situation by requiring that material terms be presented in clear language in a single document. The FTC, instructed to implement Congress's solutions to the perceived problems, crafted the disclosure requirements so that they might "inform the consumer of the full extent of his or her obligations under the warranty, and to eliminate confusion as to the necessary steps which he or she must take in order to get warranty performance." 40 Fed. Reg. 60,168, 60,175 (Dec. 31, 1975). The single document rule reinforces these concerns by requiring warrantors to present all information relevant to the warranty in one place, where it might be easily located and assimilated by the consumer. *hi* at 60,172. Significantly, the FTC, bringing its regulatory experience to the task, recognized that the omission of relevant terms Λ was as likely *622 to foster erroneous assumptions as inclusion of misleading terms, because "the failure to disclose all conditions, limitations, and exclusions as to product warranties renders any affirmative claims about warranties deceptive."[14] *Id.* at 60,170.

[6] Our preceding analysis commands the conclusion that Fleetwood's use of its third-party beneficiary status under the Ronnie Smith's-Cunningham agreement to compel arbitration where Fleetwood has failed to disclose in the warranty a term or clause requiring the Cunninghams to utilize an informal dispute resolution mechanism contravenes the text, legislative history, and purpose of the Magnuson-Moss Warranty Act. Fleetwood contends that neither Magnuson-Moss nor the rules promulgated by the FTC pursuant to Magnuson-Moss apply to agreements that are not incorporated into

the terms of the written warranty, like the arbitration agreement here. Whether Fleetwood is correct in this contention or not, Magnuson-Moss and the rules do apply to the content of written warranties, including omissions, and Fleetwood can not "do by [the] surrogate or vicarious means" of the Ronnie Smilh's-Cunningham arbitration agreement what Magnuson-Moss requires that it do directly: disclose in a single document all relevant terms of the warranty. *See IVilson* r. *U'avertce Homes, Inc.*, 954 F.Supp. 1530, 1539 (M.D.AIa.1997). Compelling arbitration on the basis of an arbitration agreement that is not referenced in the warranty presents an inherent conflict with the Ad's purpose Or providing clear and concise warranties to consumers.

Supreme Court decisions regarding the arbitrability of claims brought under the Securities Act of 1933 and the Securities Exchange Act of 1934, which also contain mandatory disclosure requirements, support our conclusion. *Rodrigue: de Quijas*, 490 U.S. at 485-86, 109 S.Cl. at 1922 (Securities Act of 1933); *McMahon*, 482 U.S. at 238, 107 S.Ct. at 2343 (Securities Exchange Act ofI934). In *McMahon* the Supreme Court examined a provision of the Securities Exchange Act that declared void "any provision waiving compliance with any provision ofjthc Act]." *McMahon*, 482 U.S. at 227-28, 107 S.Ct. at 2338 (quoting 15 U.S.C. § 78cc(a)). The respondents argued that this section forbade waiver of 15 U.S.C. § 78aa, which creates exclusive jurisdiction for federal district courts, and that therefore the waiver of a judicial forum in the arbitration agreement was unenforceable. The key to (he Court's analysis lies in its conclusion that § 7ßcc(n) only forbade waiver of "the substantive obligations imposed by the Exchange Act," and that because the jurisdictional provision of § 78aa "docs not impose any statutory duties, its waiver docs not constitute a waiver" of a substantive obligation. *623 *hi*, 482 U.S. at 228, 107 S.Cl. at 2338. For this reason, selection of an arbitral forum would not prevent enforcement of the statutory rights created by the Securities Exchange Act. *Id.* Similarly, in *Rodrigue: de Quijas*, the Supreme Court distinguished between substantive and procedural provisions of the Securities Act, and declined to extend the scope of a no-waiver provision to encompass the latter class. *Rodrigue: de Quijas*, 490 U.S. at 481-82, 109 S.Ct. at 1920-21.

Unlike the procedural provisions of *McMahon* and *Rodriguez de Quijas*, § 2302 of Magnuson-Moss and the rules promulgated by the FCC that Fleetwood seeks to avoid do in fact impose substantive obligations on manufacturers that choose to issue warranties, requiring clear disclosure of warranty terms in a single document. The substantive obligation must be met at the time the consumer receives the warranty in order to effectuate the concerns of Magnuson-Moss, and permitting warrantors to compel arbitration through a third party contractual arrangement that allows them to evade the substantive obligations imposed by the Act eviscerates Magnuson-Moss's core provisions.

It is clear from our earlier discussion that the Congressional purposes of avoiding consumer misinformation and deceptive practices arc effectuated where warrantors adhere to the requirements of Magnuson-Moss. Additional goals are also furthered in that adherence to uniform standards will foster Congress's purpose of "improv[ing] competition in the marketing of consumer products." 15 U.S.C. § 2302(a). As the FTC has noted, the "requirement of minimum uniformity in warranty disclosures should enable consumers to make valid and informed comparisons of warranties for similar products." 40 Fed.Reg. 60,168, 60,170 (Dec. 31, 1975). Allowing Fleetwood to condition the warranty by invoking an arbitration agreement executed by the buyer and seller confounds this purpose in that consumers confronted with warranties that do not contain arbitration clauses that are nonetheless subject to arbitration will have no basis for judging the suitability of a warranty. This is of particular concern because the warranty is issued unilaterally, and, as the enactors of Magnuson-Moss noted, a consumer cannot bargain with manufacturers to adjust the terms of a warranty offered voluntarily by the manufacturer "[t]he warranty provisions of [Magnuson-Moss] are not only designed to make warranties understandable to consumers, but to redress the ill effects resulting from the imbalance which presently exists in the relative bargaining power of consumers and suppliers of consumer products." *Id.* at 60,168 (quoting S.REP. NO. 93-151 (1973)). The unilateral nature of warranties by manufacturers makes full disclosure in a single document mandatory for the attainment of Congress's goals.

VII. CONCLUSION

[7] Because of the unique nature of the contractual arrangement at issue here, it is important that we describe what is and what is not decided on this appeal. First, the propriety of Ronnie Smith's and the Cunninghams' agreement to arbitrate the seller and buyer agreement is not before us. We are not required to and do not decide whether Magnuson-Moss makes arbitration agreements unenforceable as to all Magnuson-Moss claims.[15] Nor is it *624 necessary for us to determine whether warrantors may include binding arbitration provisions in the warranty itself. The only issue we are presented with here, and thus decide, is whether Fleetwood can utilize its third-party beneficiary status under the Ronnie Smith's-Cunningham arbitration agreement to compel binding arbitration of the Cunninghams' breach of written or express warranty claims against Fleetwood when there is no reference to binding arbitration in the warranty. Because we conclude that Fleetwood's failure to disclose in the warranty a term or clause requiring the Cunninghams to utilize an informal dispute resolution mechanism runs afoul of the disclosure requirements of the Magnuson-Moss Warranty Act, we affirm the district court's order declining to compel arbitration of the written or express warranty claims.

AFFIRMED.

All Citations

253 F.3d 611, 2001-2 Trade Cases P 73,324, 14 Fla. L. Weekly Fed. C 805

Footnotes

1 The text of the arbitration agreement, in pertinent part, provides as follows:

> This agreement for binding arbitration is this date entered between *Gary R Cunningham and Delores Cunningham* hereinafter called "Buyer" and *Ronnie Smith's Home Center Mobile Home Center*, a corporation, hereinafter called "Seller." ... Buyer and Seller agree, covenant and consent that any controversies or claims arising out of or in any way relating to the sale of the said mobile home and the negotiations leading up to the sale, whether in the nature of covenant, warranty, misrepresentation, rescission, any breach of contract, or other tort shall be settled solely by arbitration in accordance with the applicable Rules of the American Arbitration Association then in effect, and that judgment upon award rendered by the arbitrators may be entered in and enforceable by any court of competent jurisdiction. Buyer and Seller further agree that they shall submit any and all disputes, controversies and cases arising out of the negotiations for the sale and service of the mobile home, whether in the nature of contract, warranty or tort, to the decision of a three-person arbitration panel. Buyer and Seller agree that they shall be bound by the determination of the said arbitration panel.... It is further agreed by the parties that all rights, privileges and responsibilities under this agreement shall expressly inure to the benefit of the manufacturer of the said mobile home insofar as any claims may exist or thereafter arise against the manufacturer, including but not limited to, enforcement of the warranties, whether express or implied.

(R.1-28 at 2-3). In addition, the retail installment contract and security agreement conspicuously and explicitly detailed the parties' arbitration obligations. (R.1-28 at 4).

2 The text of the informal dispute settlement mechanism provision reads as follows: "(o)ne or more warrantors may establish an informal dispute settlement procedure which meets the requirements of the Commission's rules under paragraph (2). If-

> (A) a warrantor establishes such a procedure,
>
> (B) such procedure, and its implementation, meets the requirements of such rules, and
>
> (C) the incorporates in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty,

then (i) the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he initially resorts to such procedure...." 15 U.S.C. § 2310(a)(3).

3 The Federal Trade Commission, drafting regulations pursuant to the Act, has provided that "[d]ecisions of the Mechanism shall not be legally binding on any person." 16 C.F.R. § 703.5(j).

4 Fleetwood notes in its reply brief that the written warranty is not a part of the record in this appeal. However, it is undisputed that the warranty does not contain any reference to the arbitration agreement or to an informal dispute settlement mechanism.

5 Magnuson-Moss defines "written warranty" as "any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified

period of time, or ... any undertaking in writing in connection with the sale by a supplier of u consumer product to refund, repair, replace or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product." 15 U.S.C. 12301(6).

6 Magnuson-Moss does not restrict the ubility of consumers to pursue relief under Uniform Commercial Code or other state law theories, but merely establishes minimum federal standards within its limited ambit. 15 U.S.C. $ 2311(b), (c); *see also* HOWARD J. ALPERIN AND ROLAND F. CHASE, 2 CONSUMER LAW: SALES PRACTICES AND REGULATION $ 214 (1986) (describing design of Magnuson-Moss Warranty Act as complementing rather than superseding state warranty law).

7 Additionally, there is a S25 per claim requirement and there must be 100 named plaintiffs for Magnuson-Moss class actions. 15 U.S.C § 2310(d)(3)(A), (d)(3)(C).

8 As in other areas, Magnuson-Moss delegates to the Federal Trade Commission the prescription of minimum requirements for any informal dispute settlement procedure incorporated into the terms of u written warranty. 15 U.S.C. § 2310(a)(2). The detailed requirements may be found at 16 C.F.R. § 703.1-8, and include among other things, the duties of the warrantor, who can qualify as a member of n dispute resolution panel, how the process must be conducted, and the method for keeping records. *Sec* 16 C.F.R. § 703.1-8.

9 We do not consider here the possibility that a consumer may forgo utilization of the mechanism where the consumer pursues rights or remedies that arc not created by but arc actionable under Magnuson-Moss. *Sea* Rules, Regulations, Statements and Interpretations Under Magnuson-Moss Warranty Act, 40 Fcd.Rcg. 60,168, 60,194-95 (Dec. 31, 1975) (to be codified at 16 C.F.R. 701, *at seq.)* (discussing design of $ 703.2(b) as intending "to ensure that the consumer is not deceived into believing that prior resort to the Mechanism is required in all instances.").

10 *See, c.g., Circuit City Stores, Inc* v. *Adams,* 532U.S. 105, 121 S.Cl. 1302, 149 L.Ed 2d 234 (2001) (compelling arbitration of state court employment discrimination action); *Gilmer* r. *IntcrstatefJohnson Lane Corp.,* 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (compelling arbitration of Age Discrimination in Employment Act of 1967 claim); *Rodrigue: de Quijas* v. *ShcnrsonfAmerican Express, Inc* , 490 U.S. 477, 109 S.Cl. 1917, 104 L.Ed.2d 526 (1989) (compelling arbitration of Securities Act of 1933 claims, overruling *WUko* r. *Swan,* 346 U.S. 427, 74 S.Cl. 182, 98 L.Ed. 168 (1953)); *McMahon,* 482 U.S. 220, 107 S.Cl. 2332, 96 L.Ed.2d 185 (1987) (compelling arbitration of Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act claims).

11 Of course, there are discernible differences, both in the language and structure of the Magnuson-Moss Warranty Act and the ADEA. *Sec* 15 U.S.C. § 2301, *et seq ;* 29 U.S.C. § 621, *ct seq.*

12 For purposes of an FTC-instituted action, a warranty is deceptive if it "contains an affirmation, promise, description, or representation which is cither false or fraudulent, or which, in light of all of the circumstances, would mislead a reasonable individual exercising due care; or [if the warranty] fails to contain information which is necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care...." 15 U.S.C. § 2310(c)(2).

13 Magnuson-Moss's treatment ofinformal dispute resolution mechanism clauses in warranties is consistent with general contract law, in that arbitration clauses, like other kinds of forum selection clauses, are generally considered material terms under stale law variants of the Uniform Commercial Code. *Sec Coastal Indus., Inc* r. *Automatic Steam Prods. Corp.,* 654 F.2d 375 (5th Ctr.1981) (finding unilateral insertion of arbitration danse per sc alteration of the contract understate law); *General Instrument Corp.* v. *Tie M/g,, Inc ,* 517 F.Supp. 1231, 1234 (S.D.N.Y.1981) (finding forum selection clause materially alters contract for Connecticut corporation); *Lorbrovk Corp,* r. *G&T Industries, /nr.,* 162 A.D.2d 69, 562 N.Y.S.2d 978, 980 (1990) (discussing addition of forum selection term as material alteration to prior agreement); *see also* Michael A. Stiegul & Debra J. Williams, *The Battle of the Fonns: UCC Section 2-207, in* PLI COMMERCIAL LAW & PRACTICE COURSE HANDBOOK SERIES ORDER NO. A4-4297 at 6 (1990) (stating that "[i]t is generally recognized that a 'forum selection' clause 'materially alters' a contract within the meaning of U.C.C. § 2-207").

14 The FTC explains further that "absolute silence on a material fact may be deceptive where the public assumes from this silence that a state of facts exists when, in fact, affirmative disclosure would reveal that these assumptions are unfounded. In such instances, the consumer's normal and reasonably foreseeable expectations are exploited, and a false or misleading impression is created." 40 Fed.Reg. 60,168, 60,170 (Dec. 3!, 1975).

15 We also note, and the Cunninghams concede, that warrantors and consumers may agree to binding arbitration after a dispute has arisen between them. The Commission stated shortly after passage of the Act that nothing in Magnuson-Moss prevents warrantors from offering binding arbitration options to consumers after non-binding informal dispute settlement mechanisms have been completed. 40 Kcd.Reg. 60,168, 60.211 (1975). More recently the FTC has reiterated that warrantors are not

precluded from offering consumers a binding arbitration option after a warranty dispute has arisen. 60 Fed.Reg. 19,700, 19.708 (1999).

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2013 WL 6768218
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Orlando Division.

Robert Charles Justin PORTER and Eva Andrea Porter, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

CHRYSLER GROUP LLC, Defendant.

No. 6:13-cv-555-Orl-37GJK.

Dec. 19, 2013.

Attorneys and Law Firms

Adam T. Rabin, McCabe Rabin, PA, West Palm Beach, FL, Roy A. Kalricl, The Katriel Law Firm, San Diego, CA, for Plaintiffs.

Lara J. Tibbals, Robert M. Fulton, Hill Ward Henderson, PA, Tampa, FL, John W. Rogers, Kathy A. Wisniewski, Stephen A. D'Aunoy, Thompson Coburn, LLP, St. Louis, MO, for Defendant.

ORDER

ROY B. DALTON JR., District Judge.

*1 This cause is before the Court on the following:

1. Defendant Chrysler Group LLCs Motion [to] Compel Arbitration and Dismiss or Stay Case and Incorporated Memorandum of Law (Doc. 48), filed October 21, 2013;

2. Plaintiffs' Opposition to Defendant Chrysler Group LLCs Motion to Compel Arbitration and Dismiss or Stay Case (Doc. 51), filed November 7, 2013;

3. Defendant Chrysler Group LLCs Emergency Motion to Stay (Doc. 58), filed November 15, 2013;

4. Defendant Chrysler Group LLCs Amended Reply Brief in Support of Its Motion to Compel Arbitration and Dismiss or Stay Case (Doc. 61), filed November 22, 2013; and

5. Plaintiffs' Opposition to Defendant Chrysler Group LLC's Motion to Stay (Doc. 64), filed December 2, 2013.

Upon consideration, the Court finds that Defendant's motion to compel is due to be denied in part.

BACKGROUND

This Magnuson–Moss Warranty Act ("MMWA") claim arose when Plaintiffs bought an allegedly defective truck from a Chrysler dealership. (Doc. 40, ¶ 2.) The warranty provided by Defendant did not mention arbitration as it related to Plaintiffs.[1] (Doc. 8–1 .) However, at the time of purchase, Plaintiffs signed a separate "Arbitration Clause" agreeing to arbitrate any claims against the dealership or related third parties. (Doc. 48–K)

Defendant now moves to compel arbitration, arguing that it is a third-party beneficiary of that agreement. (Doc. 48.) It also moves to stay this case pending consideration 01' this motion. (Doc. 58.) Plaintiffs opposed both motions. (Docs.51, 64.) Defendant replied in support of its motion to compel. (Doc. 60.) This matter is ripe for the Court's adjudication.

STANDARDS

The Federal Arbitration Act provides that arbitration agreements are presumed to be valid and enforceable. 9 U.S.C. § 2. However, Congress may limit the use of such agreements in particular statutes. *See SltearsonlAm Express, Inc. v. McMahon,* 482 U.S. 220, 226, 107 S.Cl. 2332, 96 L.Ed.2d 185 (1987). It did so in the MMWA, which requires disclosure of information regarding "any informal dispute settlement procedure" in the warranty itself. 15 U.S.C. § 2302(a)(8). The U.S. Court of Appeals for the Eleventh Circuit 1ms accordingly held that the "failure to disclose in the warranty a term or clause requiring the [plaintiffs] to utilize an informal dispute resolution mechanism runs afoul of the disclosure requirements of the Magnuson–Moss Warranty Act." *Cunningham* \\ *Fleetwood Homes of* Gin., *Inc.*, 253 F.3d 611, 624 (11th Cir.2001). Thus, in an MMWA case, a third-party beneficiary cannot enforce an arbitration agreement if the terms of the agreement are not disclosed within the warranty. *See id.* (affirming the district court's denial of a third-party manufacturer's motion to compel because the dealer's arbitration agreement was separate from the warranty).

DISCUSSION

The Court is quite troubled by Defendant's utter failure to cite to *Cunningham,* which plainly controls the disposition of this motion. [2] Defendant bclatcdly-and improperly-attempted to distinguish *Cunningham* in its motion for leave to file a reply, in which it pointed to *Davis v. Southern Energy Homes.* /nr., 305 F.3d 1268 (11th Cir.2002). [3] (Doc. 52.) However, *Davis* does nothing to recede from *Cunningham,* so this argument is unavailing.

*2 *Cunningham* explicitly declined to address "whether warrantors may include binding arbitration provisions in the warranty itself." 253 F.3d at 623–24. However, Davis was presented with that precise question and answered it in the affirmative. 305 F.3d at 1272 ("[W]c conclude that the MMWA permits the enforcement of valid binding arbitration agreements *within written warranties."* (emphasis added)). Therefore, Davis is inapposite here, where the arbitration agreement was separate from and not referenced in the warranty; *Cunningham* thus controls.

Because the arbitration agreement was not contained within the warranty, it "runs afoul of the disclosure requirements" of the MMWA and cannot be enforced here. *See Cunningham,* 253 F.3d at 624. Defendant's motion to compel the MMWA claim is due to be denied. As such, Defendant's motion to stay the case pending disposition of the motion to compel is also due to be denied.

The Court notes that this ruling is made solely on the basis of the MMWA claim. The Court makes no findings with regard to the arbitrability of Plaintiffs' stale law breach of warranty claims in the absence of arbitration of the MMWA claim, as this issue was not fully briefed by the parties. The part of the motion seeking to compel arbitration of those claims is therefore due to be taken under advisement pending further briefing.

CONCLUSION

Accordingly, it is hereby ORDERED AND ADJUDGED:

1. Defendant Chrysler Group LLCs Motion [to] Compel Arbitration and Dismiss or Stay Case and Incorporated Memorandum of Law (Doc. 48) is DENIED IN PART AND TAKEN UNDER ADVISEMENT IN PART.

a. The part of the motion seeking to compel arbitration of the MMWA claim is DENIED.

b. The part of the motion seeking to compel arbitration of the state law breach of warranty claims is TAKEN UNDER ADVISEMENT.

c. On or before Monday, January 6, 2014, Defendant is DIRECTED to file a supplemental brief addressing the issue of whether the state law claims should be arbitrated, in light of the denial of the motion to compel arbitration of the MMWA claim.

d. On or before Thursday, January 23, 2014, Plaintiffs arc DIRECTED to respond to Defendant's supplemental brief.

2. Defendant Chrysler Group LLCs Emergency Motion to Stay (Doc. 58) is DENIED.

DONE AND ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 6768218

Footnotes

1 The warranty docs mention arbitration as it relates to purchasers in states other than Florida. (Doc. 8, p. 36.) However, this information is inapplicable to the instant Plaintiffs. (*Sec* Doc. 2, % 2 (noting that PlaintifTs bought their truck and reside in Florida).)

2 Because this motion turns on the application of *Cunningham*. the Court need not address PlaintifTs' waiver and estoppel arguments. (*See* Doc. 51, pp. 8–20.)

3 Plaintiff also cites *Patriot Manufacturing, Inc. r. Divan*, 399 F.Supp.2d 1298, 1303 (SD.Ala.2005), for the proposition that *Cunningham* is no longer good law in the Eleventh Circuit. (Doc. 52.) However. this Court must disagree in light of the fact that *Davis* expressly distinguished *Cunningham*, leaving its holding intact. *Davit*. 305 F.3d at 1272 n. 1.

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APPENDIX A-9

Filing # 73429848 E-Filed 06/12/2018 12:30:37 PM

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA
CIVIL DIVISION

LES KROL,

Plaintiff,

Case No. 2017-CA-049992

v.

FCA US, LLC; and GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,

Defendants.
_____ /

DEFENDANT'S RESPONSE TO PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY AND MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY AND COMPEL ARBITRATION

Defendant, Gibson Auto Sales, Inc., d/b/a Gibson Truck World ("Gibson Auto" or "Defendant"), by and through its undersigned counsel, hereby files this, its Response to Plaintiff's Notice of Supplemental Authority and Memorandum of Law in Support of Motion to Stay and Compel Arbitration, and in support thereof, states as follows:

Introduction

When analyzing Gibson Auto's Motion to Stay and Compel Arbitration (the "Motion"), this Court must consider the strong public policy in favor arbitration and the well-recognized principle that any doubts regarding the scope of an arbitration agreement must be resolved in favor of arbitration. This Court must also consider that in order to deny the Motion, Plaintiff, Les Krol ("Plaintiff") must bear a high burden and show that the parties expressly intended to exclude his claims from arbitration. However, Plaintiff failed to meet this burden. Further, the fact that Plaintiff brought claims under the Magnuson-Moss Warranty Act ("MMWA") must not change this Court's analysis because MMWA claims can be subject to binding arbitration and have repeatedly been compelled to binding arbitration. Additionally, Plaintiff's addition of a brand new argument

through his Notice of Supplemental Authority must not affect this Court's decision in compelling arbitration because *Cunningham* does not reflect the Eleventh Circuit's current view of the MMWA and Plaintiff's reliance on *Cunningham* ignores well-settled precedent regarding the manner in which contemporaneous documents must be construed. Accordingly, this Court must grant the Motion and compel Plaintiff's claims to arbitration.

Factual and Procedural Background

On or about June 6, 2016, Plaintiff purchased a 2014 Dodge Ram 3500 (the "Vehicle") from Gibson Auto through the execution of various documents. As part of Plaintiff's purchase of the Vehicle, Plaintiff executed a Retail Installment Sales Contract and Buyer's Order, which included an arbitration agreement (the "Arbitration Agreement"), and received a factory warranty and extended warranty. Pursuant to the Arbitration Agreement, Plaintiff and Gibson Auto agreed to arbitrate nearly any type of dispute that could arise between them. Specifically, the Arbitration Agreement indicates, in relevant part:

> Dealer and customer agree that any controversy, claim, suit, demand, counterclaim, cross claim, or third party complaint, arising out of, or relating to this Order or the parties' relationship (whether statutory or otherwise), including, but not limited to any matter that may have induced the Customer to enter into any relationship with Dealer and any disputes regarding the validity or enforceability of this clause (collectively referred to as "Claim"), shall be submitted to final and binding arbitration …
> The arbitration shall be final and binding on all parties.

After the purchase of the Vehicle, Plaintiff sued Gibson Auto and FCA US, LLC for alleged violations of the MMWA. In response, Gibson Auto filed its Motion based upon the Arbitration Agreement between the parties and an Affidavit in support of its Motion to authenticate the Arbitration Agreement. This Court held a hearing on May 31, 2018 on the Motion and reserved ruling. Then, on June 1, 2018, Plaintiff filed his Notice of Supplemental Authority raising new arguments in opposition to the Motion.

Legal Argument

Based on the clear language of the Arbitration Agreement and relevant cases applying the Federal Arbitration Act ("FAA") and Florida Arbitration Code ("FAC"), Plaintiff's claims set forth in its Complaint are subject to arbitration. As an initial matter and as argued during the hearing on the Motion, there is a strong public policy under the FAA and FAC favoring the enforcement of arbitration agreements. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Midwest Mutual Insurance Company v. Santiesteban*, 287 So.2d 665 (Fla. 1974) ("[C]ourts favor arbitration to expedite claims and reduce litigation."); *Grektorp v. City Towers of Fla., Inc.,* 644 So. 2d 613, 614 (Fla. 2d DCA 1994) ("Arbitration agreements are a favored means of dispute resolution"). When ruling on a motion to compel arbitration, courts consider the following elements under the FAA and FAC: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived. *Stacy David, Inc. v. Consuegra*, 845 So. 2d 303, 305 (Fla. 2d DCA 2003); *Fi-Evergreen Woods, LLC v. Robinson,* 135 So. 3d 331, 335 (Fla. 5th DCA 2013); *See also Gale Grp., Inc. v. Westinghouse Elec. Corp*., 683 So. 2d 661, 663 (Fla. 5th DCA 1996) ("A court must compel arbitration where an arbitration agreement and an arbitrable issue exists, and the right to arbitrate has not been waived.").

During the hearing on the Motion, counsel for the parties agreed that the first and third element to compel arbitration were satisfied, i.e. that there was a valid written agreement to arbitrate between the parties and that Gibson Auto had not waived its right to arbitration. However, counsel for Plaintiff and Gibson Auto disagreed on the second element, i.e. whether there was an arbitrable issue between the parties. As argued during the hearing, when analyzing the second element, this Court must give a broad interpretation to the Arbitration Agreement because "doubts concerning the scope of arbitration clauses should generally be resolved in favor of arbitration."

Grektorp, 644 So. 2d at 614; *Davis v. S. Energy Homes, Inc.,* 305 F.3d 1268 (11th Cir. 2002); *See also Hirshenson v. Spaccio,* 800 So. 2d 670, 674 (Fla. 5th DCA 2001) ("Courts generally favor arbitration as a means of alternative dispute resolution, and any doubt concerning the scope of the arbitration clause should be resolved in favor of arbitration."). In fact, the First District Court of Appeal has provided:

> any time a contract contains an arbitration clause, there is a presumption of arbitrability in the sense that **"[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." In the case of a particularly broad arbitration clause, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.**

Beaver Coaches, Inc. v. Revels Nationwide R.V. Sales, Inc., 543 So. 2d 359, 362 (Fla. 1st DCA 1989) (internal citations omitted).

Thus, this Court must resolve any doubts regarding the scope of the Arbitration Agreement in favor of arbitration and may only deny the Motion if Plaintiff presents the "most forceful evidence of a purpose to exclude [his claims] from arbitration." *See Grektorp,* 644 So. 2d at 614; *Hirshenson,* 800 So. 2d at 674; *Beaver Coaches,* 543 So. 2d at 362. Plaintiff attempted to meet this burden by claiming that his claims under the MMWA were not arbitrable issues based on the Federal Trade Commission's ("FTC") interpretation of the MMWA. Plaintiff argued that this Court should give deference to the FTC's interpretation of the MMWA and find that MMWA claims cannot be subject to binding arbitration. In support of such argument, Plaintiff heavily relied upon *Chevron, U.S.A.*, *Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984) and cases where courts held that MMWA were not subject to binding arbitration. However, Plaintiff failed to meet this burden because MMWA claims can and have been subject to binding arbitration as

argued by counsel for Gibson Auto during the hearing on the Motion. *See Stacy David,* 845 So. 2d at 305; *Davis,* 305 F.3d at 1270.

In *Stacy David*, the plaintiffs filed a lawsuit for multiple claims, including MMWA claims, after purchasing a new vehicle from defendant and finding multiple defects in the vehicle. 845 So. 2d at 305. In response, the defendant filed a motion to compel arbitration based on an arbitration agreement contained on the retail order for the vehicle, which provided that "any controversy or claim arising out of or relating to this contract or the breach thereof, shall only be settled by arbitration…" *Id.* The trial court denied the motion to compel arbitration. *Id.* at 305-306. On appeal, the Second District Court noted that "the Eleventh Circuit has required arbitration of claims under the Magnuson-Moss Act" and held that the trial court committed reversible error as "no count of the Consuegra's complaint appears to fall outside the arbitration agreement." *Id.* at 306-307. The court also explained that the arbitration agreement between the parties was broad and that the claims brought implicated the contract between the parties and were thus subject to arbitration. *Id.* at 306. *See also Five Points Health Care Ltd. v. Alberts,* 867 So. 2d 520, 522 (Fla. 1st DCA 2004) (reversing trial court order denying motion to compel arbitration and explaining that "[t]he 'arising out of or related to' language is broad enough to encompass claims of fraud or deceptive trade practices in the context of automobile sales, even when such claims are brought under the federal Magnuson-Moss Act and the Florida Deceptive and Unfair Trade Practice Act"); *Gatwood v. Hyundai Motor America*, 13 Fla. L. Weekly Supp. 988a (Fla. 20th Cir. Ct. 2006) (compelling arbitration of claims for alleged violations of the MMWA by a buyer of a vehicle against a manufacturer pursuant to the mandatory arbitration provision of the warranty and citing to other jurisdictions holding same).

Similarly, in *Davis*, the plaintiffs filed a lawsuit for alleged MMWA violations, among other claims, after purchasing a manufactured home from the defendant and finding defects in the home. 305 F. 3d at 1270. In response, the defendant removed the case to federal court, moved to compel arbitration, and the district court denied the motion finding that the MMWA prohibited binding arbitration. *Id.* On appeal, the Eleventh Circuit Court of Appeals addressed "whether the Magnuson-Moss Warranty Act permit[ted] or preclude[d] enforcement of binding arbitration agreements with respect to written warranty claims." *Id.* The court reversed the district court and provided that "[a]fter a thorough review of the MMWA and the FAA, combined with the strong federal policy favoring arbitration, we hold that written warranty claims arising under the Magnuson-Moss Warranty Act may be subject to valid binding arbitration agreements." *Id.* at 1280.

The Eleventh Circuit Court of Appeals began its analysis by applying the test set out by the Supreme Court in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) and considered the following factors to determine whether Congress intended to preclude arbitration of MMWA claims: "(1) the text of the statute; (2) its legislative history; and (3) whether 'an inherent conflict between arbitration and the underlying purpose of the statute' exists." *Davis,* 305 F.3d at 1273. The Court explained that "[t]he party opposing the enforcement of the arbitration agreement has the burden of showing that Congress intended to preclude arbitration of the statutory claim" and that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Id.* at 1273-74 (internal citations omitted). In analyzing the text of the MMWA, the court concluded that Congress did not intend to bar binding arbitration. *Id.* at 1274-75. The court explained that the text of the statute did not expressly prohibit arbitration, the existence of a judicial forum with concurrent jurisdiction was insufficient evidence of an intent to

preclude binding arbitration, and the fact that the MMWA permitted informal dispute settlement procedures did not prohibit the enforcement of binding arbitration. *Id.* As to the second factor, the court provided "given the absence of any meaningful legislative history barring binding arbitration, coupled with the unquestionable federal policy favoring binding arbitration, we conclude that Congress did not express a clear intent in the MMWA's legislative history to bar binding arbitration agreements in written warranties." *Id.* at 1276. Last, as to the purpose of the MMWA, the court concluded that the consumer protection goals of the MMWA did not conflict with binding arbitration and explained, "the Supreme Court has repeatedly enforced arbitration of statutory claims where the underlying purpose of the statutes is to protect and inform consumers." *Id.*

The court also analyzed *Chevron* and the adequate deference to be given to the FTC interpretation prohibiting binding arbitration in MMWA claims. *Davis,* 305 F.3d at 1277. The court found that Congress did not directly address the issue of binding arbitration and thus should give deference to the FTC regulations if the FTC's interpretation was reasonable. *Id.* at 1277-78. The court held that the FTC's interpretation was not reasonable because the granting of concurrent jurisdiction to state and federal courts did not preclude the enforcement of binding arbitration. *Id.* at 1278-79. More importantly, the court noted that the FTC's interpretation of the MMWA was based on a hostile view towards arbitration and that such interpretation was no longer permissible due to the "Supreme Court's abandonment of its hostile attitude toward arbitration" and its "acknowledgement and continual enforcement of the strong federal policy toward arbitration." *Id.* at 1279-80; *See also Walton v. Rose Mobile Homes LLC,* 298 F.3d 470 (5th Cir. 2002) (reversing order denying motion to compel arbitration and holding that the MMWA does not preclude binding arbitration of claims pursuant to a valid binding arbitration agreement).

As stated above, Plaintiff could only prevail in opposing the Motion if he presented the "most forceful evidence" of a purpose to exclude his MMWA claims from arbitration and bore the burden of showing that Congress intended to preclude arbitration of his MMWA claim. *See Beaver Coaches,* 543 So. 3d at 362; *Davis,* 305 F.3d at 1273-74. During the hearing on the Motion, Plaintiff's main argument revolved around the deference that this Court should give the FTC's interpretation regarding the MMWA and the prohibition of binding arbitration. However, the Eleventh Circuit Court of Appeals thoroughly analyzed the FTC's interpretation of the MMWA and the MMWA's text, legislative history, and purpose, and rejected the same argument raised by Plaintiff because the FTC's interpretation was not reasonable. Further, during the hearing on the Motion, counsel for Plaintiff failed to point to a single court in Florida that had deferred to the FTC's interpretation and held that MMWA claims could not be subject to binding arbitration. Plaintiff was also unable to distinguish the holdings of Florida's Second District Court of Appeal and the Eleventh Circuit Court of Appeals. Thus, due to the broad interpretation that must be given to arbitration agreements, the strong public policy favoring arbitration, and Plaintiff's failure to present the "most forceful evidence" of a purpose to exclude his MMWA claims from arbitration and bear his burden of showing that Congress intended to preclude arbitration of his MMWA claim, this Court must grant the Motion. *See Grektorp,* 644 So. 2d at 614; *Hirshenson*, 800 So. 2d at 674; *Beaver Coaches,* 543 So. 3d at 362; *Davis,* 305 F.3d at 1273-74.

Then, after the hearing on the Motion, Plaintiff for the first time argued that this Court should not grant the Motion because the Arbitration Agreement was not included in the warranty itself and relied upon *Cunningham v. Fleetwood*, 253 F.3d 611 (11th Cir. 2001). This is a completely new argument that was not addressed during the hearing on the Motion and thus should not be considered by this Court. However, to the extent that this Court finds *Cunningham*

persuasive, it is important to note that *Cunningham* reflected the previous interpretation of the MMWA by the Eleventh Circuit as it was decided prior to *Davis* and that *Cunningham* incorrectly classified binding arbitration as an informal dispute resolution mechanism.

In *Cunningham*, the court focused on the interplay between binding arbitration and the "informal dispute settlement mechanisms" permitted by section 2310 of the MMWA. 253 F.3d at 618-619. The court showed concern about the conflict between informal dispute resolution methods and binding arbitration, but noted that it was "inclined to think that the presence of the non-binding § 2310 mechanism in the statutory text does not in and of itself mandate the conclusion that Magnuson-Moss renders binding arbitration agreements unenforceable. *Id.* at 620. The court then went on to analyze the disclosure requirements under the MMWA and focused on the FTC regulations requiring the disclosure of informal dispute-settlement mechanisms. *Id.* at 621. The court concluded that the MMWA required the disclosure of informal dispute-settlement mechanisms in the warranty itself and that the arbitration agreement was unenforceable because it was not disclosed in the actual warranty. *Id.* at 623-24.

However, this Court should not follow the analysis in *Cunningham* because binding arbitration is not an informal dispute-settlement mechanism and thus the disclosure requirement for informal dispute-settlement mechanisms is inapplicable to binding arbitration agreements. *See Patriot Mfg., Inc. v. Jackson,* 929 So. 2d 997 (Ala. 2005). In fact, in *Davis*, the Eleventh Circuit held that binding arbitration did not conflict with the text, legislative history, or purpose of the MMWA and "explicitly rejected any notion that arbitration is equivalent to or a variety of an informal dispute-settlement mechanism." *Id.* at 1005; *Davis*, 305 F.3d at 1274-76. Further, the purpose of the MMWA is not frustrated by the enforcement of an arbitration agreement not

contained in the actual written warranty. 929 So. 2d at 1005. Specifically, the Supreme Court of Alabama provided:

> [**W]e consider a key feature of the rationale of *Cunningham* significantly undermined by *Davis*,** and the remainder of the *Cunningham* rationale insufficient to justify its holding, and **we no longer regard *Cunningham* as reliable authority on the question whether a stand-alone arbitration agreement may be used to compel arbitration.** The Magnuson–Moss Act requires disclosure in the warranty itself only "to the extent required by the rules of the [FTC]," and **the FTC has seen fit to require disclosure of required resort to an informal dispute-settlement mechanism, not the completely separate process of binding arbitration.**

Patriot Mfg., Inc. v. Jackson, 929 So. 2d 997, 1006 (Ala. 2005).

Cunningham was also criticized and disapproved of in *Patriot Mfg., Inc. v. Dixon,* 399 F. Supp. 2d 1298 (S.D. Ala. 2005); *See also Jones v. Gen. Motors Corp.,* 640 F. Supp. 2d 1124 (D. Ariz. 2009) (compelling arbitration of MMWA claims, explaining that nothing in the MMWA's text, legislative history, or purpose prohibited the arbitration of MMWA, and disapproving *Cunningham* based on *Davis).* In *Dixon*, the court analyzed *Cunningham*, *Davis*, and the MMWA and compelled arbitration of MMWA claims based on a standalone arbitration agreement. 399 F.2d 1298. The court first acknowledged the "single document rule" required by the MMWA and the requirement to disclose any informal dispute settlement mechanisms within that "single document." *Id.* at 1301-02. However, based on *Davis,* the court noted that "*Cunningham's* assumption that an arbitration agreement is an 'informal dispute settlement mechanism' for purposes of the MMWA's single document rule is no longer valid in this Circuit." *Id.* at 1303. The court then provided:

> In the wake of *Cunningham* and *Davis,* then, what is the present status of the MMWA's disclosure requirements? **Clearly, the single document rule remains alive and well. But the statutory and regulatory scheme does not require that *all* information having any bearing on the warranty must be disclosed within the**

> **warranty.** To the contrary, the MMWA—and more precisely § 2302(a)—plainly provides that a warrantor's required disclosures under the single document rule are limited to those specifically enumerated in the FTC regulations. **Those regulations do not identify arbitration agreements as items that must be disclosed, but they do mandate disclosure of 'informal dispute settlement mechanisms.' The *Davis* case, which is binding precedent to this Court, decided that arbitration agreements are not 'informal dispute settlement mechanisms' in the context of the MMWA.** Under this synopsis of the law, then, it is plain that, **while the single document rule enjoys continued vitality, arbitration agreements lie beyond the scope of the disclosures required pursuant to that rule.**

Id. at 1303–04.

Thus, this Court should not follow *Cunningham* because it does not reflect the Eleventh Circuit's current view of the MMWA. Instead, this Court should follow *Davis,* where the Eleventh Circuit analyzed and distinguished binding arbitration from the informal dispute settlement procedures laid out by the MMWA and held that MMWA were subject to binding arbitration. Further, as held in *Jackson* and *Dixons,* this Court should not follow *Cunningham* because the MMWA only requires disclosure of informal dispute settlement procedures and binding arbitration is not an informal dispute settlement procedure. Accordingly, this Court should disregard *Cunningham* and compel arbitration of Plaintiff's claims.

Further, even if this Court follows *Cunningham*, this Court must still compel arbitration because failure to do so would ignore the well-recognized principle that documents concurrently executed in the course of one transaction must be construed as a single document and the fact that the Second District Court of Appeals has compelled arbitration even when the arbitration agreement was not a part of the warranty itself. *See Wilson v. Terwillinger*, 140 So. 3d 1122, 1124 (Fla. 5th DCA 2014); *Dodge City, Inc. v. Byrne,* 693 So. 2d 1033, 1035 (Fla. 2d DCA1997); *Holcomb v. Bardill,* 214 So. 2d 522, 524 (Fla. 1st DCA1968); *Stacy David*, 845 So. 2d 303.

In *Wilson*, the Fifth District Court of Appeal held that a lease addendum providing for liquidated damages was enforceable against a tenant even though the lease itself did not contain such provisions and the statute required disclosure of such provisions in the lease. *Id.* at 1122-1124. The court noted that the addendum and lease were signed at the same time and executed as part of one transaction. *Id.* at 1124. Thus, the court concluded that when the parties "executed the lease and the addendum at the same time and as part of the same transaction, they intended the addendum and its provision for liquidated damages to be a part of the lease, thus sufficiently complying with the statutory provision 'as provided in the rental agreement.'" *Id.* at 1125. Further, in *Stacy David*, the Second District Court of Appeal compelled arbitration of a MMWA claim when the arbitration agreement was included in the retail order. *Stacy David,* 845 So. 2d at 305.

Here, like in *Wilson* and *Stacy David*, the mere fact that the Arbitration Agreement was not disclosed in the warranty itself must not affect this Court's analysis regarding this Motion. Like in *Wilson*, where the tenant contemporaneously executed the addendum and lease agreement as part of one transaction, here Plaintiff contemporaneously executed the warranty and Arbitration Agreement as part of the purchase of the Vehicle. Thus, like in *Wilson*, this Court must construe the Arbitration Agreement and warranty together and interpret them as one document. The analysis in *Wilson* is particularly relevant given that the Court considered the liquidated damages clause in the addendum to be a part of the lease itself and as sufficient to satisfy the statutory requirement of disclosure of such damages in the lease agreement itself. Here, this Court should follow the same analysis, construe the Arbitration Agreement and warranty documents as one, and thus sufficient to satisfy the disclosure requirement. This analysis is further supported by the fact that the Second District Court of Appeal has compelled arbitration of MMWA claims where the Arbitration Agreement was not disclosed in the warranty itself.

Accordingly, even if this Court is persuaded by *Cunningham*, this Court should construe the Arbitration Agreement and warranty as one document and sufficient to satisfy the disclosure requirements of the MMWA. Therefore, this Court must grant the Motion and compel arbitration of Plaintiff's MMWA claims.

WHEREFORE, Gibson Auto respectfully requests that this Court grant the Motion and enter an order staying the current litigation, directing the parties to arbitrate the disputes set forth in Plaintiff's complaint, and providing any further relief this Court deems just or necessary.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 12, 2018 a true and correct copy of this document was served via email on the following:

Jeremy Kespohl, Esq.
Morgan & Morgan, P.A.
76 South Laura Street, Suite 1100
Jacksonville, FL 32202
jkespohl@forthepeople.com
warrantygroupservice@forthepeople.com

Wilnar J. Julmiste, Esq.
ANDERSONGLENN LLP
2650 North Military Trial, Suite 430
Boca Raton, Florida 33341
julmiste@asglaw.com
KDavidowitz@asglaw.com

/s/ Yesica S. Liposky, Esq.
Robert E. Sickles, P.A.
Florida Bar No. 167444
Yesica S. Liposky, Esq.
Florida Bar No. 119924
BROAD AND CASSEL LLP
100 North Tampa Street, Suite 3500
Tampa, FL 33602
Telephone: 813-225-3020
Facsimile: 813-225-3039
Primary: rsickles@broadandcassel.com
Primary: yliposky@broadandcassel.com
Secondary: knovak@broadandcassel.com
Secondary: jlovins@broadandcassel.com
Secondary: egarvey@broadandcassel.com

APPENDIX A-10

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA
CIVIL DIVISION

LES KROL,

Plaintiff,

Case No. 2017-CA-049992

v.

FCA US, LLC; and GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,

Defendants.
_____ /

ORDER GRANTING DEFENDANT'S MOTION TO STAY AND COMPEL ARBITRATION

This cause came before the Court on May 31, 2018 on Defendant's, Gibson Auto Sales, Inc. d/b/a Gibson Truck World ("Defendant"), Motion to Slay and Compel Arbitration, and upon this Court having reviewed the Motion and the Court file, and upon hearing argument of counsel for Plaintiff and Defendant, and being otherwise fully advised in the premises, this Court finds as follows:

1. On or about June 6, 2016, Plaintiff, Les Krol ("Plaintiff"), purchased a 2014 Dodge Ram 3500 bearing Vehicle Identification Number 3C63RRGL0EG108376 (the "Vehicle") from Defendant. As part of this transaction, Plaintiff contemporaneously executed and received multiple documents such as, a Buyer's Order, which included an arbitration agreement (the "Arbitration Agreement"), a Retail and Installment Sales Contract, a factory warranty, and an extended warranty. In relevant part, the Arbitration Agreement provides as follows:

> Dealer and customer agree that any controversy, claim, suit, demand, counterclaim, cross claim, or third party complaint, arising out of, or relating to this Order or the parlies' relationship (whether statutory or otherwise), including, but not limited to any matter that may have induced the Customer to enter into any relationship with Dealer and any disputes regarding the validity or enforceability of this clause (collectively referred to as "Claim"), shall be submitted to final and binding arbitration ...

The arbitration shall be final and binding on all parties.

2. On or about November 1, 2017, Plaintiff filed this action against Defendant and FCA US, LLC for alleged violations of the Magnuson Moss Warranty Act ("MMWA") relating to claims arising out of Plaintiff s purchase of the Vehicle. Then, Defendant filed its Motion to Stay and Compel Arbitration (the "Motion") based on the Arbitration Agreement, and Plaintiff filed his Response and Amended Response in Opposition to the Motion. Defendant also filed its Affidavit in support of the Motion to authenticate the Arbitration Agreement and Notice of Filing case law in support of the Motion.

3. This Court held a hearing on the Motion on May 31, 2018 at which counsel for Plaintiff and Defendant personally appeared and respectively argued their positions. Defendant's counsel argued that the Motion should be granted because (1) there is a strong public policy favoring arbitration under the Federal Arbitration Act ("FAA") and Florida Arbitration Code ("FAC"), (2) arbitration agreements are broadly interpreted based on the well-recognized principle that "any doubts concerning arbitration should be resolved in favor of arbitration;" and (3) courts in Florida and the Eleventh Circuit have compelled the arbitration of MMWA claims. *See Midwest Mutual Insurance Company* v. *Santiesteban*, 287 So.2d 665 (Fla. 1974) ("[C]ourts favor arbitration to expedite claims and reduce litigation."); *Grektorp* v. *City Towers of Fla., Inc.*, 644 So. 2d 613, 614 (Fla. 2d DCA 1994) ("Arbitration agreements are a favored means of dispute resolution"); *Beaver Coaches, Inc.* v. *Revels Nationwide R.V. Sales, Inc.*, 543 So. 2d 359, 362 (Fla. 1st DCA 1989) ("In the case of a particularly broad arbitration clause, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."); *Stacy David, Inc. v. Consuegra*, 845 So. 2d 303, 305 (Fla. 2d DCA 2003); *Davis* v. *S. Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002). Plaintiffs counsel argued that this Court should deny the Motion because (1) the Federal

Trade Commission ("FTC") had interpreted the MMWA and found such claims were not subject to binding arbitration; (2) this Court ought to defer to the FTC's interpretation based upon *Chevron, U.S.A., Inc.* v. *Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984); and (3) multiple courts had deferred to the FTC's interpretation of the MMWA and held that MMWA claims were not subject to binding arbitration. *See Kolev* v. *Euromotors West/The Auto Gallery*, 658 F.3d 1024 (9th Cir. 2011); *Seney v. Rent-A-Center, Inc.*, 738 F.3d 631 (4th Cir. 2013).

4. After the hearing on the Motion, Plaintiff filed his Notice of Supplemental Authority (the "Notice"). In the Notice, Plaintiff argued for the first time that the Motion should be denied because the Arbitration Agreement was not contained in the warranty itself and relied upon *Cunningham* v. *Fleetwood Homes of Georgia, Inc.*, 253 F.3d 611 (11th Cir. 2001) and *Porter* v. *Chrysler Group, LLC*, 2013 WL 6768218 (M.D. Fla. 2013). Then, Defendant filed its Response in Opposition to Defendant's Notice and Memorandum of Law (the "Response"). In its Response, Defendant argued that this Court should not consider Plaintiffs new and untimely arguments, that this Court should not follow *Cunningham* as it did not reflect the Eleventh Circuit's current position on the MMWA and had been distinguished based on *Davis*, and that Plaintiffs reliance on *Cunningham* ignored the principle that contemporaneously executed documents related to one transaction must be construed as one document. *See Davis*, 305 F.3d 1268; *Patriot Mfg., Inc. v. Jackson,* 929 So. 2d 997 (Ala. 2005); *Patriot Mfg., Inc.* v. *Dixon,* 399 F. Supp. 2d 1298 (S.D. Ala. 2005); *Wilson v. Terwillinger*, 140 So. 3d 1122, 1124 (Fla. 5th DCA 2014); *Dodge City, Inc. v. Byrne,* 693 So. 2d 1033, 1035 (Fla. 2d DCA1997).

5. This Court has extensively reviewed all of Plaintiffs and Defendant's written submissions and oral arguments during the hearing.

6. In considering the Motion, this Court considers the following elements: "(1)

whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived. *Stacy David, Inc.* v. *Consuegra*, 845 So. 2d 303, 305 (Fla. 2d DCA 2003); *Fi-Evergreen Woods, LLC* v. *Robinson,* 135 So. 3d 331, 335 (Fla. 5th DCA 2013); *See also Gale Grp., Inc.* v. *Westinghouse Elec. Corp.*, 683 So. 2d 661, 663 (Fla. 5th DCA 1996) ("A court must compel arbitration where an arbitration agreement and an arbitrable issue exists, and the right to arbitrate has not been waived.").

7. This Court finds and the parties agree that there was a valid written agreement to arbitrate and that Defendant did not waive its right to arbitration. Thus, this Court's analysis will focus on the second element, i.e. whether an arbitrable issue exists.

8. In its analysis of the second element, this Court is particularly persuaded by the Eleventh Circuit's decision in *Davis* and rejects Defendant's argument that MMWA claims cannot be subject to binding arbitration. 305 F.3d 1268. In *Davis*, the Eleventh Circuit thoroughly analyzed the MMWA and concluded that nothing in the MMWA's text, legislative history, or purpose prohibited the arbitration of MMWA claims. 305 F. 3d at 1273-76. The court also analyzed the FTC regulations regarding the MMWA and concluded that such interpretation was no longer permissible due to the "Supreme Court's abandonment of its hostile attitude toward arbitration" and its "acknowledgement and continual enforcement of the strong federal policy toward arbitration." *Id.* at 1279-80. Thus, the Eleventh Circuit held that MMWA claims could be subject to binding arbitration. *Id.* at 1280.

9. This Court acknowledges that courts across the country conflict as to whether MMWA claims can be subject to binding arbitration and that Plaintiff and Defendant have cited to such cases in support of their respective positions. However, this Court finds *Stacy David* particularly relevant as it was the only case provided to this Court from a Florida District Court of

Appeal regarding the arbitrability of MMWA claims and where the Second District Court of Appeal compelled arbitration of MMWA claims. 845 So. 2d 303.

10. This Court also recognizes that the Arbitration Agreement has a broad arbitration clause. When interpreting the Arbitration Agreement, this Court follows the strong policy favoring arbitration and the broad interpretation that must be given to arbitration agreements and resolves any doubts concerning the scope of the Arbitration Agreement in favor of arbitration. *See Santiesteban*, 287 So.2d 665; *Grektorp*, 644 So. 2d 613; *Beaver Coaches, Inc.*, 543 So. 2d 359.

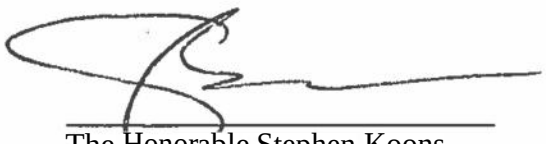
11. This Court also finds that Plaintiffs reliance on *Cunningham* is misplaced and is persuaded by Defendant's Response.

12. After fully considering Plaintiffs and Defendant's written submissions and oral arguments during the hearing, this Court finds that Defendant has satisfied all three elements to grant the Motion. This Court further finds that Plaintiff has failed to present sufficient evidence to show that the parties intended to exclude Plaintiffs claims from the Arbitration Agreement and rejects Plaintiffs argument that MMWA claims cannot be subject to binding arbitration.

Accordingly, it is hereby ordered and adjudged as follows:

13. Defendant's Motion to Stay and Compel Arbitration is hereby GRANTED. The parties are COMPELLED to arbitrate their dispute in accordance with the Arbitration Agreement and this action is STAYED pending completion of the arbitration of all issues between the parties.

DONE AND ORDERED in Chambers in Brevard County, Florida this 25th day of June, 2018.



The Honorable Stephen Koons
Circuit Judge

Copies to: Yesica S. Liposky, Esq. 100 N. Tampa St., Ste. 3500, Tampa, FL 33612.
Jeremy Kespohl, Esq., 76 S. Laura St., Ste. 1100, Jacksonville, FL 32202.
Wilnar J. Julmiste, Esq., 2650 N. Military Trial, Ste. 430, Boca Raton, FL 33341.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

LES KROL,

Appellant,

v. CASE NO. 5D18-2149

FCA US, LLC AND GIBSON AUTO SALES, INC. D/B/A GIBSON TRUCK WORLD,

Appellees.
_____/

DATE: July 31, 2018

BY ORDER OF THE COURT:

Upon consideration that the statutory filing fee has now been satisfied, but no motion to reinstate has been filed, Appellant is advised that Case Number 5D18-2149 remains closed. No action will be taken on the documents filed by Appellant on July 24 and 25, 2018.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Joanne P. Simmons
JOANNE P. SIMMONS, CLERK

cc:

Robert Eric Sickles Jeremy Kespohl Yesica S. Liposky

RECEIVED, 8/1/2018 10:29 AM, Joanne P. Simmons, Fifth District Court of Appeal

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

Brevard County Case No: 2017-CA-049992

LES KROL, **Appellate Case No: 18-2149**

Appellant

v.

GIBSON AUTO SALES, INC.,
d/b/a GIBSON TRUCK WORLD

Appellee.

APPELLANT'S MOTION TO REINSTATE APPEAL

On Appeal from the Circuit Court of the
Eighteenth Judicial Circuit in and for
Brevard County Florida

Jeremy Kespohl, Esquire
Florida Bar No. 035979
Angela Thomas, Esquire
Florida Bar No. 871311
MORGAN & MORGAN
76 South Laura Street #1100
Jacksonville, Florida 32202-3433
(904) 361-4416 Phone
(904) 361-4348 Facsimile
warrantygroupeservice@forthepeople.com
Attorneys for Appellant

The Appellant LES KROL ("Appellant"), by and through his attorneys MORGAN & MORGAN, hereby submits this Motion for Reinstatement of his appeal. In support thereof, Appellant states as follows:

1. Appellant filed his Notice of Appeal in this case on July 3, 2018; and, filed his Initial Brief on July 24, 2018. *See* Appellant's Notice of Appeal and Appellant's Initial Brief.

2. The Notice of Appeal, as well as all of the records filed with the Trial Court, listed Appellant Counsel's current contact information.

3. Prior to filing the Initial Brief in this matter, Counsel for Appellant was unaware that his e-filing account with this Court provided/listed contact information from/for Appellant Counsel's former employer.[1]

4. Accordingly, Counsel for Appellant did not receive any correspondence from the Court, or the Order to pay filing fee that was entered on July 3, 2018. [2]

5. Being unaware of the deadline for the deadline for payment of the filing fee, Counsel for Appellant had intended to send a check for the filing fee to the Court when he mailed a physical copy of the Initial Brief.

6. Upon learning of this issue, Counsel for Appellant immediately

[1] Counsel for Appellate had signed up for e-filing with other District Courts of Appeal since changing employment. However, he was unaware he had a e-filing account with this Court, let alone that it listed contact information from his prior employer.
[2] If Appellant Counsel's prior employer received these items, they were not forwarded to him.

contacted the clerk for the Fifth District Court of Appeal, explained the situation, and was advised by the Clerk's Office to proceed with sending the filing fee to the Court.

7. The Court received Appellant's filing fee in July 30, 2018.

8. Due to the error in regard Appellant Counsel's E-filing Account, which caused the order and notices to be sent to the wrong address, and because the filing fee has now been paid, Appellant respectfully submits that this Court should reinstate his appeal.

WHEREFORE, Appellant LES KROL hereby requests that this honorable Court enter an order reinstating his Appeal.

CERTIFICATE OF SERVICE

I hereby certify that I furnished a true and correct copy of the above and foregoing by electronic and US mail this 1st day of August, 2018 to: Yesica S. Liposky, Esq., Broad and Cassell, LLP, 100 North Tampa Street, Suite 3500, Tampa, FL 33602, yliposky@broadandcassel.com, rsickles@broadandcassel.com, knovak@broadandcassel.com,egarvey@broadandcassel.com, jlovins@broadandcassel.com.

MORGAN & MORGAN, P.A.

/s/ Jeremy Kespohl
JEREMY KESPOHL, Esquire
Florida Bar No. 035979
ANGELA THOMAS, Esquire
Florida Bar No. 871311
Attorneys for Appellant
76 South Laura Street, Ste 1100
Jacksonville, FL 32202
(904) 361-4416 Telephone
(904) 361-4348 Facsimile
jkespohl@forthepeople.com
For Service of Documents Only:
warrantygroupeservice@forthepeople.com

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

LES KROL,

Appellant,

v. CASE NO. 5D18-2149

FCA US, LLC AND GIBSON AUTO SALES, INC. D/B/A GIBSON TRUCK WORLD,

Appellee.
_____/

DATE: August 01, 2018

BY ORDER OF THE COURT:

ORDERED that the Motion for Reinstatement, filed August 1, 2018, is granted. The July 24, 2018, Order is withdrawn and the above styled appeal is reinstated. An Answer Brief, in any, is to be served within twenty days of the date hereof.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Joanne P. Simmons
JOANNE P. SIMMONS, CLERK

cc:
Robert Eric Sickles Jeremy Kespohl Yesica S. Liposky

RECEIVED, 8/7/2018 4:13 PM, Joanne P. Simmons, Fifth District Court of Appeal

DISTRICT COURT OF APPEAL
FIFTH DISTRICT
STATE OF FLORIDA

LES KROL,

Appellant,

v.

GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,

Appellee.
_____ /

Case No. 18-2149

L.T. Case No. 2017-CA-049992

APPELLEE'S RESPONSE IN OPPOSITION TO APPELLANT'S MOTION FOR ATTORNEY'S FEES

Appellee, Gibson Auto Sales, Inc. d/b/a Gibson Truck World ("Gibson Truck"), by and through its undersigned counsel, and pursuant to the Florida Rules of Appellate Procedure, hereby files this, its Response in Opposition to Appellant's Motion for Attorney's Fees filed with this Court on May 12, 2006, but never served on Appellee and states as follows:

1. On or about July 2, 2018, Appellant, Les Krol ("Appellant"), initiated this interlocutory appeal. Appellant sought the review of the trial court's non-final Order Granting Defendant's Motion to Compel Arbitration, which compelled the arbitration of Appellant's claims under the Magnuson Moss Warranty Act ("MMWA").

2. On or about July 24, 2018, this Court dismissed the appeal for failure to pay the filing fee.

3. On or about July 25, 2018, Appellants filed his Motion for Attorney's Fees and Costs (the "Motion") to recover his attorney's fees in pursuit of the instant appeal.

4. The Motion argues that the MMWA provides for an award of attorneys' fees to a consumer who finally prevails on the claims asserted. Thus, Appellant argues that he is entitled to his appellate attorney's fees under Rule 9.400 of the Federal Rules of Appellate Procedure because the MMWA creates a substantive basis for an award of attorneys' fees.

5. Appellant's claim ignores the fact that even if he were to prevail on this appeal, he would still not be the final prevailing party on the claims alleged in his Complaint against Gibson Truck. Instead, the instant appeal is an interlocutory appeal seeking to overturn the trial court's order compelling Appellant to arbitrate his MMWA claim. Thus, prevailing on this appeal would simply mean that Appellant does not have to arbitrate his claims, but does not make him the final prevailing party on the claims asserted.

6. Appellant's argument regarding his entitlement to attorney's fees ignores "the general rule that, in an interlocutory appeal, the party prevailing on the interlocutory appeal must also be the ultimately prevailing party in the trial court to

be entitled to a final judgment of appellate fees from the interlocutory appeal." *Sabina v. Dahlia Corp*., 678 So. 2d 822, 822–23 (Fla. 2d DCA 1996); *See also Allstar Builders Corporation, Inc. v. Zimmerman*, 706 So. 2d 92 (Fla. 3rd DCA 1998) ("In an interlocutory appeal, the party prevailing on the interlocutory appeal must also be the *ultimate prevailing party* in the trial court to be entitled to a final judgment of appellate fees from the interlocutory appeal. … The prevailing party for attorney's fees purposes is the party prevailing on the significant issues tried before the court.") (internal citations omitted); *Bridgestone/Firestone, Inc. v. Herron,* 828 So. 2d 414, 418 (Fla. 1st DCA 2002) ("Ordinarily, a prevailing party in an interlocutory appeal is not entitled to recover appellate attorney's fees for the appeal unless that party also prevails on the merits of the case in the proceeding on remand.").

7. Appellants' Motion for Attorney's Fees ignores the foregoing precedent and thus improperly asks for attorney's fees for the pending interlocutory appeal. Under current law, Appellant has no entitlement to attorney's fees if he were to prevail on this appeal and thus his Motion must be denied.

WHEREFORE, Appellee respectfully requests that this Court enter an Order denying Appellants' Motion for Attorneys' Fees and granting any further relief this Court deems just and proper.

Respectfully submitted on August 7, 2018.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 7, 2018, a true and correct copy of this document was served via e-mail and U.S. Mail on the following:

Jeremy Kespohl, Esq.
Angela Thomas, Esq.
Morgan & Morgan, P.A.
76 South Laura Street, Suite 1100
Jacksonville, FL 32202
jkespohl@forthepeople.com
warrantygroupeservice@forthepeople.com

/s/ Yesica S. Liposky, Esq.
Robert E. Sickles, Esq.
Florida Bar No. 167444
Yesica S. Liposky, Esq.
Florida Bar No. 119924
NELSON MULLINS BROAD AND CASSEL
100 North Tampa Street, Suite 3500
Tampa, FL 33602
Telephone: 813-225-3020
Facsimile: 813-225-3039
Primary: robert.sickles@nelsonmullins.com
Primary: yesica.liposky@nelsonmullins.com
Secondary: kim.novak@nelsonmullins.com
Secondary: eileen.garvey@nelsonmullins.com
Secondary: jessica.lovins@nelsonmullins.com

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

LES KROL,

Appellant,

v. CASE NO. 5D18-2149

FCA US, LLC AND GIBSON AUTO SALES, INC. D/B/A GIBSON TRUCK WORLD,

Appellees.
_____/

DATE: August 08, 2018

BY ORDER OF THE COURT:

Upon consideration of the August 1, 2018, Order reinstating Case Number 5D18-2149, the parties are advised that the Initial Brief, filed July 24, 2018; the Appendix, filed July 25, 2018; and the Motion for Attorney's Fees, filed July 25, 2018, were accepted for consideration upon issuance of the August 1, 2018, Order.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Joanne P. Simmons
JOANNE P. SIMMONS, CLERK

cc:

Robert Eric Sickles Jeremy Kespohl Yesica S. Liposky

RECEIVED, 8/8/2018 2:07 PM, Joanne P. Simmons, Fifth District Court of Appeal

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

Brevard County Case No: 2017-CA-049992

LES KROL,

Appellate Case No: 18-2149

Appellant

v.

GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD

Appellee.

APPELLANT'S REPLY TO APPELLEE'S RESPONSE IN OPPOSITION TO APPELLANT'S MOTION FOR ATTORNEY'S FEES AND COSTS

On Appeal from the Circuit Court of the
Eighteenth Judicial Circuit in and for
Brevard County Florida

Jeremy Kespohl, Esquire
Florida Bar No. 035979
Angela Thomas, Esquire
Florida Bar No. 871311
MORGAN & MORGAN
76 South Laura Street #1100
Jacksonville, Florida 32202-3433
(904) 361-4416 Phone
(904) 361-4348 Facsimile
warrantygroupeservice@forthepeople.com
Attorneys for Appellant

The Appellant LES KROL ("Appellant"), by and through his attorneys MORGAN & MORGAN, hereby submits this Reply to Appellee's Response in Opposition to Appellant's Motion for Attorneys' Fees and costs and, in support thereof, states as follows:

I. The Florida Rules of Appellate Procedure required Appellant to move for Attorneys' Fees and Cost during these proceedings

Appellee's Response appears to argue that Appellant's Motion for Attorney's Fees is premature because the instant matter involves an interlocutory appellate issues, and prevailing on the appeal would not make Appellant the prevailing party on the underlying claim under the federal Magnuson-Moss Warranty Act ("MMWA"). *See* Appellee's Response in Opposition to Appellant's Motion to Attorneys' Fees and Costs. However, Appellee's position seems to be based on a fundamental misunderstanding of Florida law as it applies to the appellate court procedures for seeking attorneys' fees.

Regardless of whether Appellant is entitled to recover appellant attorneys' fees under the MMWA now, or at some point in the future, Florida law required Appellant to file his Motion for Attorneys' Fees in order to avoid the risk that his appellate fees related to this matter were waived. A party who intends to seek attorneys' fees related to an appellate issues must file a separate motion for attorneys' fees with the Appellate Court. *See Florida Dep't. of Commerce, Div. of Risk Mgmt. v. Davies*, 379 So.2d 1313 (Fla. 1st DCA 1980) (request made in brief

on cross-appeal). The motion for attorneys' fees ***must be filed*** prior to the deadline for the reply brief. Florida Rule of Appellate Procedure 9.400(b); *N. Chamber Dev. Co. v. Weaver*, 508 So.2d 390, 390 (Fla. 4th DCA 1987); *Lobel v. Southgate Condo. Ass'n*, *Inc.*, 436 So.2d 170, 171 (Fla. 4th DCA 1983) (emphasis added).

A timely motion for attorneys' fees ***must*** be filed with the appellate court ***even if an award of attorneys' fees is mandated by the statute*** at issue. *Salley v. City of St. Petersburg*, 511 So.2d 975, 977 (Fla. 1987), *receded from on other grounds, United Services Auto. Ass'n v. Phillips*, 775 So. 2d 921, 922 (Fla. 2000)(emphasis added). *See also Sch. Bd. of Alachua County v. Rhea*, 661 So.2d 331, 332 (Fla. 1st DCA 1995). Even in regard to a MMWA claim, entitlement to appellate attorneys' fees must be determined by the appellate court and not the trial court. *Volkswagen of Am., Inc. v. Smith*, 690 So. 2d 1328, 1332 (Fla. 5th DCA 1997). Accordingly, Appellant's Motion for Appellate Attorneys' Fees was timely and appropriate pursuant to Florida law.

II. Appellant's entitlement to Appellate Attorney's Fees is not dependent upon his success on this Appeal

Also in contrast to the position taken by Appellee, Florida law does not require a party to succeed on the merits to be considered a "prevailing party". *Kamel v. Kenco/The Oaks at Boca Raton, LP*, No. 07-80905-CIV, 2008 WL 3471594, at *2 (S.D. Fla. 2008). Nor is it necessary for the trial court to first find Appellant to be the prevailing party in order for this Court to award him his

attorneys' fees related to this appeal. *See Spencer v. Barrow*, 752 So.2d 135, 138 (Fla. 2nd DCA 2000) ("We can perceive of many reasons why a right to fees in the trial court might be waived or not be sought, through either inadvertence or change of attorneys, or change of attitude or positions of the parties or otherwise, and such failure to seek fees at the trial level should not preclude a right to fees at the appellate level."). In fact, it is not even necessary for the Appellant to prevail on this appeal to recover attorneys' fees.

In *Aksomitas v. Maharaj*, the Fourth District Court of Appeals held a party who prevails on the "significant issues" in a case, who is entitled to recover attorneys' fees under a prevailing party attorneys' fee provision, may recover fees for an appeal, even if that party did not prevail on the appellate issue. *Aksomitas v. Maharaj*, 771 So.2d 541 (Fla. 4th DCA 2000). In reaching its ruling, the Fourth DCA considered the Florida Supreme Court's decision in *Moritz v. Hoyt Enter., Inc.*, which created the "significant issues" test for determining which party prevails in a prevailing party fee dispute. *Moritz v. Hoyt Enter., Inc.*, 604 So.2d 807 (Fla. 1992).

Under the significant issues test, the party who prevails on the "significant issues" of a case is the prevailing party for purposes of attorneys' fee assessment. *Id.* Based on its review and interpretation of *Moritz,* the Fourth DCA in *Aksomitas* found that even attorneys' fees related to an appellate issue in which

the moving party did not prevail can be included in the attorneys' fees assessed, as long as the party prevails on the "significant issues" at the end of the case. *Aksomitas v. Maharaj*, 771 So.2d 541 (Fla. 4th DCA 2000). The *Aksomitas* court stated that the new rule was intended to make prevailing parties "whole". *Id.*

Appellant acknowledges that this Court has declined to apply *Aksomitas* in the context of claims for attorneys' fees pursuant to Florida Statute §627.428. *See Nationwide Mut. Ins. Co. v. Nu-Best Diagnostic Labs, Inc.,* 810 So. 2d 514, 516 (Fla. 5th DCA 2002); *Grider-Garcia v. State Farm Mut. Auto.,* 14 So.3d 1120, 1122 (Fla. 5th DCA 2009). However, in the aforementioned cases, this Court found that the moving party was not entitled to appellate fees because Florida Statute §627.428 specifically required that a party to prevail on an appellate issue in order to recover their appellate attorneys' fees. *Id.* The Florida Supreme Court has also upheld aforementioned rulings of this Court, but that decision was also based upon the specific language of Florida Statute §627.428. *Brass & Singer, P.A. v. United Auto. Insurance Co.*, 944 So.2d 252 (Fla. 2006). Accordingly, neither this Court, or the Florida Supreme Court, has ruled on the applicability of *Aksomitas* in regard to a statute that does not specify a party must prevail on an appellate issue in order to recover appellate attorneys' fees and costs.

Furthermore, the MMWA does not specifically require that a party prevail on an appellate issue in order to recover attorneys' fees and costs. *See* 15 USC

§2310(d). In fact, the MMWA appears to indicate just the opposition. Specifically, the text of the MMWA states:

> If a consumer ***finally prevails*** in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (***including attorneys' fees based on actual time*** expended) determined by the court to have been ***reasonably incurred*** by the plaintiff for ***or in connection with*** the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

Id (emphasis added). Courts have also repeatedly ruled that the MMWA allows a party to recover attorneys' fees for related legal theories/claims involving the same set of fact, even where the consumer was ultimately unsuccessful in regard to those claims. *Chrysler Corp. v. Weinstein*, 522 So. 2d 894, 896 (Fla. 3rd DCA 1988); *Alvine v. Mercedes-Benz of N. Am.*, 620 N.W.2d 608 (S.D. 2001).

Allowing Appellant to recover appellate attorneys' fees is also consistent with furthering the MMWA's goal of providing consumers with legal assistance to enable them to be able to pursue their remedies for breach of warranty. *Melton v. Frigidaire*, 805 N.E.2d 322, 329 (Ill. App. 2004); *See also Berlak v. Villa Scalabrini Home for the Aged, Inc.*, 284 Ill. App. 3d 231, 243–44, 671 N.E.2d 768, 776 (Ill. App. 1996)(the trial court erred in refusing to consider plaintiff's supplemental petition for attorney's fees and costs covering the period of their post-trial representation).

Furthermore, even if this Court were to find that Appellant had to first prevail in his underlying MMWA claim in order to recover Appellant Attorney's fees, Florida law would still require that this Court at least enter a provisional or conditional attorneys' fees order allowing Appellant recover his appellate attorneys' fees in the event he prevails in the underlying litigation. *See Mainlands Constr. Co., Inc. v. Wen-Dic Constr. Co.*, *Inc*., 482 So. 2d 1369, 1371 (Fla. 1986). Accordingly, it is Appellant's position that, at a minimum, he is entitled to a provisional or conditional award of attorney's fees. However, if Appellant prevails on the instant appellate issue, it is Appellant's position that he is entitled to an award of attorneys' fees related to this appeal, even if he does not ultimately prevail on his underlying MMWA claim.

WHEREFORE, Appellant LES KROL hereby requests that this honorable Court enter an order holding that, pursuant to the federal Magnuson-Moss Warranty Act, Appellant is the entitled to recover reasonable attorney's fees related to these appellate proceedings, in an amount to be determined by the Lower Court.

CERTIFICATE OF SERVICE

I hereby certify that I furnished a true and correct copy of the above and foregoing by electronic and US mail this 8th day of August, 2018 to: Yesica S. Liposky, Esq., Broad and Cassell, LLP, 100 North Tampa Street, Suite 3500, Tampa, FL 33602, yliposky@broadandcassel.com, rsickles@broadandcassel.com, knovak@broadandcassel.com,egarvey@broadandcassel.com, jlovins@broadandcassel.com.

MORGAN & MORGAN, P.A.

/s/ Jeremy Kespohl .
JEREMY KESPOHL, Esquire
Florida Bar No. 035979
ANGELA THOMAS, Esquire
Florida Bar No. 871311
Attorneys for Appellant
76 South Laura Street, Ste 1100
Jacksonville, FL 32202
(904) 361-4416 Telephone
(904) 361-4348 Facsimile
jkespohl@forthepeople.com
For Service of Documents Only:
warrantygroupeservice@forthepeople.com

RECEIVED, 8/21/2018 4:02 PM, Joanne P. Simmons, Fifth District Court of Appeal

DISTRICT COURT OF APPEAL
FIFTH DISTRICT
STATE OF FLORIDA

LES KROL,

Appellant,

v.

GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,

Appellee.
_____ /

Case No. 18-2149

L.T. Case No. 2017-CA-049992

APPELLEE'S MOTION FOR EXTENSION OF TIME TO FILE AND SERVE ANSWER BRIEF

Appellee, Gibson Auto Sales, Inc. d/b/a Gibson Truck World ("Gibson Truck" or "Appellee"), by and through its undersigned attorneys and in accordance with the Florida Rules of Appellate Procedure, hereby files this, its Motion for Extension of Time to File and Serve its Answer Brief, and in support thereof, states as follows:

1. Appellee's Answer Brief is currently due August 21, 2018.

2. Counsel for Appellee has been working diligently, but requires additional time to finalize the Answer Brief.

3. Accordingly, Appellee respectfully requests that the deadline to file and serve the Answer Brief be extended by fifteen (15) days.

4. This is Appellee's first requested extension of time. This motion is being made in good faith and not for purposes of delay. Neither party will be prejudiced if the requested extension of time is granted.

5. The undersigned attempted to confer in good faith with counsel for Appellant via email regarding the relief requested in this motion. In response, the undersigned received an out-of-office automated reply.

WHEREFORE, Appellee respectfully requests that this Court enter an order granting this motion, extending the deadline for Appellee to file and serve its Answer Brief by fifteen (15) days, and granting Appellee such other and further relief as the Court deems just and proper.

RULE 9.300(a) CERTIFICATION

In accordance with Rule 9.300(a) of the Florida Rules of Appellate Procedure, the undersigned certifies that she has attempted to confer with counsel for Appellant regarding the extension of time requested by this motion via email. However, the undersigned received an out-of-office automated reply and Appellant's counsel has not yet responded to the email. It is currently unknown whether counsel for Appellant objects to the relief requested by this motion.

/s/ Yesica S. Liposky, Esq.
Yesica S. Liposky, Esq.
Florida Bar No. 119924

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 21, 2018, a true and correct copy of this document was served via e-mail and U.S. Mail on the following:

Jeremy Kespohl, Esq.
Angela Thomas, Esq.
Morgan & Morgan, P.A.
76 South Laura Street, Suite 1100
Jacksonville, FL 32202
jkespohl@forthepeople.com
warrantygroupeservice@forthepeople.com

/s/ Yesica S. Liposky, Esq.
Robert E. Sickles, Esq.
Florida Bar No. 167444
Yesica S. Liposky, Esq.
Florida Bar No. 119924
NELSON MULLINS BROAD AND CASSEL
100 North Tampa Street, Suite 3500
Tampa, FL 33602
Telephone: 813-225-3020
Facsimile: 813-225-3039
Primary: robert.sickles@nelsonmullins.com
Primary: yesica.liposky@nelsonmullins.com
Secondary: kim.novak@nelsonmullins.com
Secondary: eileen.garvey@nelsonmullins.com
Secondary: jessica.lovins@nelsonmullins.com
Counsel for Appellee

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

LES KROL,

Appellant,

v. CASE NO. 5D18-2149

FCA US, LLC AND GIBSON AUTO SALES, INC. D/B/A GIBSON TRUCK WORLD,

Appellees.
_____/

DATE: August 22, 2018

BY ORDER OF THE COURT:

ORDERED that the Motion for Extension of Time, filed August 21, 2018, is denied for failure to conform to the requirement of Administrative Order 5D18-02 ("Informing Clients When Seeking Extensions of Time") that any motion for extension of time contain a certificate of service that includes the statement that counsel has, that day, provided a copy of the motion or agreed notice to his/her client(s). See AO5D18-02 (available at www.5DCA.org). The denial is without prejudice to Appellee to file, within five days of the date hereof, an amended motion for extension of time that contains the requisite certification.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Joanne P. Simmons
JOANNE P. SIMMONS, CLERK

DISTRICT COURT OF APPEAL · FIFTH DISTRICT · STATE OF FLORIDA

cc:

Robert Eric Sickles Jeremy Kespohl Yesica S. Liposky

RECEIVED, 8/24/2018 3:35 PM, Joanne P. Simmons, Fifth District Court of Appeal

DISTRICT COURT OF APPEAL
FIFTH DISTRICT
STATE OF FLORIDA

LES KROL,

Appellant,

v.

GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,

Appellee.
_____ /

Case No. 18-2149

L.T. Case No. 2017-CA-049992

NOTICE OF AGREEMENT OF EXTENSION OF TIME FOR FILING ANSWER BRIEF

The undersigned counsel for Appellee, Gibson Auto Sales, Inc. d/b/a Gibson Truck World ("Appellee"), has agreed with counsel for Appellant, Les Krol, that the time for serving Appellee's Answer Brief may be extended for 15 days to September 10, 2018.

ADMINISTRATIVE ORDER AO5D18-02 CERTIFICATION

In accordance with this Court's Administrative Order, the undersigned certifies that she shall provide a copy of this Notice to her client on the same day as the filing of this Notice via e-mail.

/s/ Yesica S. Liposky, Esq.
Yesica S. Liposky, Esq.
Florida Bar No. 119924

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 24, 2018, a true and correct copy of this document was filed with the Court through eDCA and served on counsel named below via email and U.S. Mail, and, pursuant to Administrative Order AO5D18-02, was furnished to her client via email.

Jeremy Kespohl, Esq.
Angela Thomas, Esq.
Morgan & Morgan, P.A.
76 South Laura Street, Suite 1100
Jacksonville, FL 32202
jkespohl@forthepeople.com
warrantygroupeservice@forthepeople.com

/s/ Yesica S. Liposky, Esq._____
Robert E. Sickles, Esq.
Florida Bar No. 167444
Yesica S. Liposky, Esq.
Florida Bar No. 119924
NELSON MULLINS BROAD AND CASSEL
100 North Tampa Street, Suite 3500
Tampa, FL 33602
Telephone: 813-225-3020
Facsimile: 813-225-3039
Primary: robert.sickles@nelsonmullins.com
Primary: yesica.liposky@nelsonmullins.com
Secondary: kim.novak@nelsonmullins.com
Secondary: eileen.garvey@nelsonmullins.com
Secondary: jessica.lovins@nelsonmullins.com
Counsel for Appellee

RECEIVED, 9/10/2018 5:08 PM, Joanne P. Simmons, Fifth District Court of Appeal

DISTRICT COURT OF APPEAL
FIFTH DISTRICT
STATE OF FLORIDA

LES KROL,

Appellant,

Case No. 18-2149

v.

GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,

L.T. Case No. 2017-CA-049992

Appellee.
_____ /

APPELLEE'S NOTICE OF AGREEMENT OF EXTENSION OF TIME FOR FILING ANSWER BRIEF

The undersigned counsel for Appellee, Gibson Auto Sales, Inc. d/b/a Gibson Truck World ("Appellee"), has agreed with counsel for Appellant, Les Krol, that the time for serving Appellee's Answer Brief may be extended until September 17, 2018.

ADMINISTRATIVE ORDER AO5D18-02 CERTIFICATION

In accordance with this Court's Administrative Order, the undersigned certifies that she shall provide a copy of this Notice to her client on the same day as the filing of this Notice via e-mail.

/s/ Yesica S. Liposky, Esq.
Yesica S. Liposky, Esq.
Florida Bar No. 119924

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 10, 2018, a true and correct copy of this document was filed with the Court through eDCA and served on counsel named below via email and U.S. Mail, and, pursuant to Administrative Order AO5D18-02, was furnished to her client via email.

Jeremy Kespohl, Esq.
Angela Thomas, Esq.
Morgan & Morgan, P.A.
76 South Laura Street, Suite 1100
Jacksonville, FL 32202
jkespohl@forthepeople.com
warrantygroupeservice@forthepeople.com

/s/ Yesica S. Liposky, Esq.**_____**
Robert E. Sickles, Esq.
Florida Bar No. 167444
Yesica S. Liposky, Esq.
Florida Bar No. 119924
NELSON MULLINS BROAD AND CASSEL
100 North Tampa Street, Suite 3500
Tampa, FL 33602
Telephone: 813-225-3020
Facsimile: 813-225-3039
Primary: robert.sickles@nelsonmullins.com
Primary: yesica.liposky@nelsonmullins.com
Secondary: kim.novak@nelsonmullins.com
Secondary: eileen.garvey@nelsonmullins.com
Secondary: jessica.lovins@nelsonmullins.com
Counsel for Appellee

RECEIVED, 9/17/2018 11:52 PM, Joanne P. Simmons, Fifth District Court of Appeal

DISTRICT COURT OF APPEAL
FIFTH DISTRICT
STATE OF FLORIDA

LES KROL,

Appellant,

v.

GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,

Appellee.
_____ /

Case No. 18-2149

L.T. Case No. 2017-CA-049992

APPELLEE'S AMENDED NOTICE OF AGREEMENT OF EXTENSION OF TIME FOR FILING ANSWER BRIEF

The undersigned counsel for Appellee, Gibson Auto Sales, Inc. d/b/a Gibson Truck World ("Appellee"), has agreed with counsel for Appellant, Les Krol, that the time for serving Appellee's Answer Brief may be extended until September 18, 2018.

ADMINISTRATIVE ORDER AO5D18-02 CERTIFICATION

In accordance with this Court's Administrative Order, the undersigned certifies that she shall provide a copy of this Notice to her client on the same day as the filing of this Notice via e-mail.

/s/ Yesica S. Liposky, Esq.
Yesica S. Liposky, Esq.
Florida Bar No. 119924

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 17, 2018, a true and correct copy of this document was filed with the Court through eDCA and served on counsel named below via email and U.S. Mail, and, pursuant to Administrative Order AO5D18-02, was furnished to her client via email.

Jeremy Kespohl, Esq.
Angela Thomas, Esq.
Morgan & Morgan, P.A.
76 South Laura Street, Suite 1100
Jacksonville, FL 32202
jkespohl@forthepeople.com
warrantygroupeservice@forthepeople.com

/s/ Yesica S. Liposky, Esq.
Robert E. Sickles, Esq.
Florida Bar No. 167444
Yesica S. Liposky, Esq.
Florida Bar No. 119924
NELSON MULLINS
BROAD AND CASSEL
100 North Tampa Street, Suite 3500
Tampa, FL 33602
Telephone: 813-225-3020
Facsimile: 813-225-3039
Primary: robert.sickles@nelsonmullins.com
Primary: yesica.liposky@nelsonmullins.com
Secondary: kim.novak@nelsonmullins.com
Secondary: eileen.garvey@nelsonmullins.com
Secondary: jessica.lovins@nelsonmullins.com
Counsel for Appellee

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

LES KROL,

Appellant, **Case No. 5D18-2149**

v.

GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD

Appellee.

APPELLEE'S ANSWER BRIEF

On Appeal from the Circuit Court of the Fifteenth Judicial Circuit
In and for Palm Beach County, Florida

Robert E. Sickles, Esq.
Florida Bar No. 167444
Yesica S. Liposky, Esq.
Florida Bar No. 119924
NELSON MULLINS
BROAD AND CASSEL
100 North Tampa Street, Suite 3500
Tampa, FL 33602
Telephone: 813-225-3020
Facsimile: 813-225-3039
Primary: robert.sickles@nelsonmullins.com
Primary: yesica.liposky@nelsonmullins.com
Secondary: kim.novak@nelsonmullins.com
Secondary: eileen.garvey@nelsonmullins.com
Secondary: jessica.lovins@nelsonmullins.com
Counsel for Appellee

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ISSUE ON APPEAL

Whether the trial court correctly compelled the arbitration of claims pursuant to the Magnuson-Moss Warranty Act in light of the strong public policy in favor of arbitration agreements, the lack of complete Congressional intent to prohibit arbitration under the Magnuson-Moss Warranty Act, and the multiple courts that have compelled arbitration of Magnuson-Moss Warranty Act claims?

STATEMENT OF THE CASE AND FACTS

On or about June 6, 2016, Appellant, Les Krol ("Appellant"), purchased a 2014 Dodge Ram 3500 (the "Vehicle") from Gibson Auto Sales, Inc. d/b/a Gibson Truck World ("Gibson Auto"). *See* Appendix A-5. As part of the purchase of the Vehicle, Appellant executed a Retail Installment Sales Contract and Buyer's Order, which included an arbitration agreement (the "Arbitration Agreement"). *See Id.* Pursuant to the Arbitration Agreement, Appellant and Gibson Auto agreed to arbitrate nearly any type of dispute that could arise between them. *See Id.* Specifically, the Arbitration Agreement indicates, in relevant part:

> Dealer and customer agree that any controversy, claim, suit, demand, counterclaim, cross claim, or third party complaint, arising out of, or relating to this Order or the parties' relationship (whether statutory or otherwise), including, but not limited to any matter that may have induced the Customer to enter into any relationship with Dealer and any disputes regarding the validity or enforceability of this clause (collectively referred to as "Claim"), shall be submitted to final and binding arbitration …

The arbitration shall be final and binding on all parties.

See Id.

On or about November 1, 2017, Appellant filed a Complaint and Jury Demand for alleged violations of the Magnuson-Moss Warranty Act ("MMWA") in the Circuit Court of the Fifteenth Judicial Circuit in and for Brevard County, Florida. *See* Appendix A-1. In response, Gibson Auto filed its Motion to Stay and Compel Arbitration (the "Motion") based upon the Arbitration Agreement and its Affidavit in Support of the Motion, which authenticated the Arbitration Agreement. *See* Appendix A-2; Appendix A-5. Appellant filed a Response in Opposition to the Motion, in which he argued that his claims under the MMWA could not be subject to binding arbitration. *See* Appendix A-3.

At the hearing on the Motion, Gibson Auto explained that there were three elements to consider, (1) whether there was a valid arbitration agreement, (2) whether there was an arbitrable issue, and (3) whether there was a waiver of the right to arbitrate. *See* Appendix A-7, p. 6; Appendix A-10, p. 3-4. It is undisputed that Appellant signed an Arbitration Agreement with Gibson Auto and that Gibson Auto did not waive its right to arbitrate. *See* Appendix A-7, p. 5, 7; Appendix A-8, p. 4. Therefore, during the hearing on the Motion on May 31, 2018, the only issue for the court was whether Appellant's claims under the MMWA were arbitrable claims under the Arbitration Agreement. *See* Appendix A-7. During the hearing, Appellant

presented no case law from Florida or the Eleventh Federal Circuit holding that MMWA claims could not be arbitrated. *Id.* The day after the hearing on the Motion, Appellant filed his Notice of Supplemental Authority, in which he raised completely new arguments and case law that were not discussed during the hearing. *See* Appendix A-8. Then, Gibson Auto filed its Response to Appellant's Notice of Supplemental Authority and Memorandum of Law. *See* Appendix A-9.

On June 21, 2018, the lower court granted Gibson Auto's Motion and compelled arbitration of Appellant's claims. *See* Appendix A-10. In the Order Granting Defendant's Motion to Stay and Compel Arbitration (the "Order"), the trial court provided that it was particularly persuaded by *Davis v. S. Energy Homes, Inc.*, where the Eleventh Circuit Court of Appeals "thoroughly analyzed the MMWA and concluded that nothing in the MMWA's text, legislative history, or purpose prohibited the arbitration of MMWA claims." *See* Appendix A-10, p. 4. The trial court also acknowledged that there was a conflict between courts regarding the arbitrability of MMWA claims, but was particularly persuaded by *Stacy David, Inc. v. Consuegra*, 845 So. 2d 303 (Fla. 2d DCA 2003), where the Second District Court of Appeal compelled the arbitration of MMWA claims. *Id.*, p. 4-5. In fact, the trial court noted that *Consuegra* was the "the only case provided to [it] from a Florida District Court of Appeal regarding the arbitrability of MMWA claims." *Id.* The trial court also followed "the strong policy favoring arbitration agreements and the broad

interpretation that must be given to arbitration agreements and resolve[d] any doubts concerning the scope of the Arbitration Agreement in favor of arbitration." *Id.*, p. 5. Accordingly, the trial court rejected Appellant's arguments that MMWA claims could not be subject to binding arbitration and held that Gibson Auto satisfied all three elements necessary to grant the Motion and that Appellant failed to present sufficient evidence to show that the parties intended to exclude MMWA from the Agreement. *Id.* This appeal followed.

SUMMARY OF THE ARGUMENT

This Court must affirm the trial court because Appellant has failed to show that the trial court erred as a matter of law in following the only Florida District Court of Appeal decision presented to it regarding the arbitrability of MMWA claims. Specifically, the only District Court of Appeal decision presented to the trial court was from the Second District Court of Appeal, where the court compelled arbitration of MMWA claims. The trial court was bound by the Second District Court of Appeal decision and thus correctly followed it.

Florida's Second District Court of Appeal does not bind this Court, but it still should affirm the Order and hold that MMWA claims are subject to binding arbitration. When analyzing the Order, this Court must consider the strong public policy in favor of arbitration and the well-recognized principle that any doubts regarding the scope of an arbitration agreement must be resolved in favor of

arbitration. Due to this strong public policy, Appellant bears a heavy burden to prove that Congress expressly intended for MMWA claims to not be subject to binding arbitration. However, Appellant was unable to do so at the hearing on the Motion and still is unable to bear such burden today.

Appellant cannot bear his heavy burden to oppose arbitration, because nothing in the MMWA's plain text, legislative history, or purpose reflect Congress' intent to prohibit arbitration of MMWA claims. Courts across the country support this conclusion and thus have held that MMWA claims are subject to binding arbitration. Additionally, Appellant's reliance on the Federal Trade Commission's ("FTC") interpretation of the MMWA is equally inapplicable because the interpretation is impermissible and does not reflect the current policy favoring arbitration.

Last, Appellant's reliance on *Cunningham* for the argument that the Arbitration Agreement is unenforceable because it was not included in the warranty itself is equally meritless because *Cunningham* does not reflect the Eleventh Circuit's current view of the MMWA and ignores well-settled precedent regarding the manner in which contemporaneous documents must be construed.

Accordingly, this Court must affirm the trial court's Order compelling arbitration and hold that MMWA claims are subject to binding arbitration.

ARGUMENT

I. STANDARD OF REVIEW

"Whether a particular issue is subject to arbitration is generally considered a matter of contract interpretation, and, therefore, the standard of review is de novo." *Hirshenson v. Spaccio*, 800 So. 2d 670, 674 (Fla. 5th DCA 2001); *Stacy David, Inc. v. Consuegra*, 845 So. 2d 303, 306 (Fla. 2d DCA 2003). Further, the appellate court "review[s] the trial court's factual findings under a competent, substantial evidence standard." *See Lopez v. Ernie Haire Ford, Inc*., 974 So. 2d 517, 519 (Fla. 2d DCA 2008) (internal citations omitted).

It is important that the Order must be affirmed if the trial court reached the right result, even if for the wrong reasons. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979); *Berkman v. Miami Nat. Bank*, 143 So. 2d 535, 535 (Fla. 3d DCA 1962) ("It is…a recognized principle of appellate procedure that if a trial judge's order, judgment or decree can be sustained under any theory revealed by the record on appeal, notwithstanding the fact that the trial judge's order, judgment or decree may have been bottomed on an erroneous theory, the order, judgment or decree will be affirmed"). Because of the Tipsy Coachman Rule, "an appellee, in arguing for the affirmance of a judgment, is not limited to legal arguments expressly asserted as grounds for the judgment in the court below." *Malu v. Sec. Nat. Ins. Co.,* 898 So. 2d 69, 73 (Fla. 2005).

Additionally, Appellant has waived any argument not raised in his Initial Brief and that he cannot raise any new arguments in his Reply Brief. *See Polyglycoat Corp. v. Hirsch Distributors, Inc.,* 442 So. 2d 958, 960 (Fla. 4th DCA 1983) ("When points, positions, facts and supporting authorities are omitted from [the initial] brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy."); *Doe v. Baptist Primary Care, Inc.,* 177 So. 3d 669, 673 (Fla. 1st DCA 2015) ("An appellant who presents no arguments as to why a trial court's ruling is incorrect on an issue has abandoned the issue"); *Parker-Cyrus v. Justice Admin. Com'n*, 160 So. 3d 926, 928 (Fla. 1st DCA 2015) ("An argument may not be raised for the first time in a reply.").

II. THE TRIAL COURT CORRECTLY GRANTED THE MOTION TO STAY AND COMPEL ARBITRATION

A. The Trial Court Correctly Compelled the Arbitration of Claims under the Magnuson-Moss Warranty Act Based on Binding Precedent from Florida's Second District Court of Appeal

The Florida Supreme Court has made clear that "'the decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court.' Thus, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts." *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) (*citing Stanfill v. State,* 384 So.2d 141, 143 (Fla.1980).); *See also Mercury Ins. Co. of Fla. v. Coatney,* 910 So. 2d 925, 926 (Fla. 1st DCA 2005) ("In the absence of a supreme court decision on point, the trial court is bound to follow decisions of the district

courts of appeal, and where there is no decision on point from the district court for the subject circuit, the trial court is bound to follow precedents of other district courts of appeal."); *State v. Hayes,* 333 So. 2d 51, 53 (Fla. 4th DCA 1976) ("[I]t is logical and necessary in order to preserve stability and predictability in the law that, likewise, trial courts be required to follow the holdings of higher courts-District Courts of Appeal. The proper hierarchy of decisional holdings would demand that in the event the only case on point on a district court level is from a district other than the one in which the trial court is located, the trial court be required to follow that decision."). The Florida Supreme Court's instructions are directly applicable to this matter because the trial court correctly held that MMWA claims are subject to arbitration based on binding precedent from Florida's Second District Court of Appeal in *Stacy David, Inc. v. Consuegra*, 845 So. 2d 303 (Fla. 2d DCA 2003).

In *Consuegra*, the plaintiffs filed a lawsuit for multiple claims, including MMWA claims, after purchasing a new vehicle from defendant and finding multiple defects in the vehicle. 845 So. 2d at 305. In response, the defendant filed a motion to compel arbitration based on an arbitration agreement contained in the retail order for the vehicle, which provided that "any controversy or claim arising out of or relating to this contract or the breach thereof, shall only be settled by arbitration…" *Id.* The trial court denied the motion to compel arbitration. *Id.* at 305-306. On appeal, the Second District Court of Appeal relied on *Davis v. S. Energy Homes, Inc.,* 305

F.3d 1268 (11th Cir. 2002) and noted that "the Eleventh Circuit has required arbitration of claims under the Magnuson-Moss Act." *Id.* at 306. Then, the court held that the trial court committed reversible error because "no count of the Consuegra's complaint appears to fall outside the arbitration agreement." *Id.* at 306-307. The court also explained that the arbitration agreement between the parties was broad and that the claims brought implicated the contract between the parties and were thus subject to arbitration. *Id.* at 306.

As noted by the trial court in its Order, *Consuegra* was "the only case provided [to it] from a Florida District Court of Appeal regarding the arbitrability of MMWA claims." *See* Appendix A-10, p. 4-5. Thus, based on the clear instructions from the Florida Supreme Court and Florida District Courts of Appeal, the trial court was bound to follow *Consuegra* as it represented the law of Florida. *See Pardo*, 596 So. 2d at 666. Appellant has failed to show that the trial court erred as a matter of law in following the only precedent presented to it regarding the arbitrability of MMWA claims. Thus, on this ground alone, this Court should affirm the trial court's Order compelling arbitration of MMWA claims. Further, based on the additional grounds explained below, this Court should also hold that MMWA claims are subject to binding arbitration.

B. Appellant Cannot Bear the Heavy Burden of Proof to Avoid the Arbitration of his Claims due to the Strong Public Policy Favoring Arbitration

Arbitration is a favored means of dispute resolution under both state and federal law. The Federal Arbitration Act (the "FAA") provides that "a written arbitration provision…shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2. When interpreting the FAA, the United States Supreme Court has made clear that the "'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" *AT&T Mobility v. Concepcion*, 563 U.S. 333, 344 (2011). The FAA strongly favors the validity and enforceability of arbitration agreements and such agreements must be enforced according to their express terms in both federal and state courts, and regardless of whether the claims asserted arise under federal or state law. *See Id.* at 339; *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 1201 (2012); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012).

In fact, the United States Supreme Court has opined that the "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). The United States Supreme Court has also made clear that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive

rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Accordingly, based on the well-settled United States Supreme Court precedent, it is "clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

Similarly, the Florida Supreme Court has recognized the strong policy favoring arbitration under the Florida Arbitration Code (the "FAC"). *See Midwest Mutual Insurance Company v. Santiesteban*, 287 So.2d 665 (Fla. 1974) ("[C]ourts favor arbitration to expedite claims and reduce litigation."). This Court and its sister courts have also made clear that '[c]ourts generally favor arbitration as a means of alternative dispute resolution, and any doubt concerning the scope of the arbitration clause should be resolved in favor of arbitration. *Hirshenson v. Spaccio*, 800 So. 2d 670, 674 (Fla. 5th DCA 2001); *Larry Kent Homes, Inc. v. Empire of Am. FSA,* 474 So. 2d 868, 869 (Fla. 5th DCA 1985) ("[A]rbitration agreements are valid and enforceable and public policy favors arbitration as an alternative to litigation."); *Bill Heard Chevrolet Corp., Orlando v. Wilson,* 877 So. 2d 15, 18 (Fla. 5th DCA 2004) ("Public policy favors arbitration as an efficient means of settling disputes, because it avoids the delays and expenses of litigation."); *Grektorp v. City Towers of Fla., Inc.,* 644 So. 2d 613, 614 (Fla. 2d DCA 1994) ("Arbitration agreements are a favored

means of dispute resolution"); *Regency Grp., Inc. v. McDaniels,* 647 So. 2d 192, 193 (Fla. 1st DCA 1994) ("Public policy, however, favors arbitration because it is efficient and avoids the time delay and expense associated with litigation.").

Based on this strong public policy favoring arbitration, Florida courts have held that "all questions concerning the scope or waiver of the right to arbitrate should be resolved in favor of arbitration rather than against it." *Bill Heard Chevrolet,* 877 So. 2d at 18; *Ocwen Fin. Corp. v. Holman,* 769 So. 2d 481, 483 (Fla. 4th DCA 2000) ("Arbitration clauses are to be given the broadest possible interpretation in order to accomplish the purpose of resolving controversies outside of the courts."); *Hirshenson*, 800 So. 2d at 674; *Auchter v. Zagloul*, 949 So. 2d 1189, 1195 (Fla. 1st DCA 2007) ("[A]rbitration clauses are to be given the broadest possible interpretation in order to accomplish the purpose of resolving controversies out of court."). In fact, all "doubts concerning the scope of arbitration clauses should generally be resolved in favor of arbitration." *Grektorp,* 644 So. 2d at 614; *Davis v. S. Energy Homes, Inc.,* 305 F.3d 1268 (11th Cir. 2002). The First District Court of Appeal has spoken directly on this subject and provided:

> any time a contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." **In the case of a particularly broad arbitration clause, only the most**

> **forceful evidence of a purpose to exclude the claim from arbitration can prevail.**

Beaver Coaches, Inc. v. Revels Nationwide R.V. Sales, Inc., 543 So. 2d 359, 362 (Fla. 1st DCA 1989) (internal citations omitted) (emphasis added).

Due to well-settled precedent from the United States Supreme Court, the Florida Supreme Court, and Florida District Courts of Appeal regarding the strong public policy favoring arbitration, Appellant bears the burden of showing that his MMWA claims are not subject to arbitration and may only avoid arbitration if he presents the "most forceful evidence of a purpose to exclude the claim from arbitration." Appellant failed to bear this burden in the trial court and thus the trial court compelled the arbitration of his claims. Appellant also failed to completely address the strong public policy in favor of arbitration in his initial brief because Appellant still cannot bear this heavy burden. Thus, this Court must affirm the trial court's Order.

C. Congress Did Not Intend to Prohibit the Arbitration of Magnuson-Moss Warranty Act Claims

As stated above, in order for this Court to reverse the Order, Appellant must "show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 227 (1987). In order to determine whether Congress intended to prohibit the arbitration of Appellant's MMWA claims, Congress' intent must be deduced from

(1) the text of the statute; (2) the legislative history of the statute; or (3) from an inherent conflict between the statute's underlying purposes and arbitration. *Id.; Davis v. S. Energy Homes, Inc.,* 305 F.3d 1268, 1273–74 (11th Cir. 2002). An application of the *McMahon* test to the MMWA reveals that nothing in its text or legislative history reflect an intent to preclude binding arbitration of written warranty claims and that there is no inherent conflict between the purposes of the MMWA and binding arbitration. *Davis*, 305 F. 3d 1274-77; *See also Richardson v. Palm Harbor Homes, Inc*, 254 F3d 1321, 1325-27 (11th Cir 2001) (holding that the parties pre-dispute arbitration agreement was not rendered unenforceable by the MMWA and explaining that the text and history of the MMWA do not imply a silent supersedure of the FAA). Accordingly, because Congress did not intend to prohibit the arbitration of MMWA claims, this Court must affirm the trial court's Order and hold that MMWA are subject to binding arbitration.

i. The Text of the Magnuson-Moss Warranty Act Permits Arbitration

Appellant, based upon a strained interpretation of the text of 15 U.S.C. § 2310, incorrectly argued that this statutory provision precludes the use of binding arbitration agreements. *See* Initial Brief, p. 9-12. However, Appellant also admitted that nothing in the text of the MMWA expressly prohibits binding arbitration. *Id.* at 9. Appellant's concession is particularly important given that the United States Court of Appeals for the Eleventh Circuit Court has noted that "[i]n every statutory right

case that the Supreme Court has considered, it has upheld binding arbitration if the statute creating the right did not *explicitly* preclude arbitration." *Davis,* 305 F.3d at 1273 (*citing Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 24 (1991)); *See also In re Wiand,* Case No. 8:10-CV-71-T-17MAP, 2011 WL 4530203, at *6 (M.D. Fla. Sept. 29, 2011) (explaining that the burden to oppose arbitration is "daunting" and emphasizing that "[i]n every statutory right case the Supreme Court has considered, it has upheld binding arbitration if the statute creating the right did not *explicitly* preclude arbitration"). Further, when the plain language of the MMWA is examined, it becomes clear that Congress limited the use of "informal dispute settlement procedures" only, not binding arbitration. Thus, nothing in the plain language of the MMWA reflects Congress' intent to prohibit the arbitration of MMWA claims.

In *Davis*, the United States Court of Appeals for the Eleventh Circuit conducted an exhaustive analysis of the text of the MMWA. *Davis*, 305 F.3d 1274-75. The court determined that the text of the statute did not expressly prohibit arbitration, that the existence of a judicial forum with concurrent jurisdiction was insufficient evidence of an intent to preclude binding arbitration, and that the fact that the MMWA permitted informal dispute settlement procedures did not prohibit the enforcement of binding arbitration. *Id.* Thus, based on *Davis* alone, it is clear that nothing in the plain text of the MMWA prohibits arbitration. *See also Walton v.*

Rose Mobile Homes LLC, 298 F.3d 470, 475 (5th Cir. 2002) ("The text of the MMWA does not specifically address binding arbitration, nor does it specifically allow the FTC to decide whether to permit or to ban binding arbitration."); *Seney v. Rent-A-Ctr., Inc.,* 909 F. Supp. 2d 444, 451 (D. Md. 2012), *aff'd*, 738 F.3d 631 (4th Cir. 2013) ("Nothing in the MMWA's text expresses an intent by Congress to preclude binding arbitration as a means of resolving disputes under the statute.").

Further, in order for this Court to reverse the trial court's Order, this Court would be required to hold that binding arbitration is an informal dispute settlement procedure as only such settlement procedures were limited by Congress in the MMWA. Appellant has failed to present any case law expressly holding that binding arbitration is an informal dispute settlement procedure and instead relied on cases addressing the more informal rules used during an arbitration proceeding.

However, the Florida Supreme Court has concluded that there is a clear distinction between an informal proceeding and "a formal arbitration hearing pursuant to section 682.06, Florida Statutes." *Allstate Insurance Company v. Suarez*, 833 So. 2d 762, 765 (Fla. 2002). In *Suarez*, the Florida Supreme Court contrasted an appraisal procedure found in the parties' insurance policy, which it found to be an informal process, versus an arbitration proceeding pursuant to the FAC. *Id.* The Florida Supreme Court affirmed the Third District Court of Appeal and concluded "[i]t is difficult to imagine that a formal arbitration hearing was within the

contemplation of the parties when entering into the agreement." As a result, based on Florida Supreme Court precedent, this Court must hold that binding arbitration is a formal method of resolving disputes and thus not limited by the MMWA. *See also Walton,* 298 F.3d at 476 ("We also note that binding arbitration is not normally considered to be an 'informal dispute settlement procedure,' and it therefore seems to fall outside the bounds of the MMWA and of the FTC's power to prescribe regulations."); *Harrison v. Nissan Motor Corp.,* 111 F.3d 343, 351 (3rd Cir. 1997) ("holding that "the informal dispute resolution mechanism provided for [by the parties] does not constitute arbitration within the meaning of the FAA" and explaining that "if the drafters had intended this procedure to be cognizable under the FAA, then it is likely that they would have referred to it as 'arbitration' as opposed to an 'informal dispute resolution procedure'").

Accordingly, nothing in the plain text of the MMWA reflects Congress' intent to prohibit binding arbitration of MMWA claims and thus the first *McMahon* factor is satisfied in favor of permitting arbitration.

ii. The Legislative History of the Magnuson-Moss Warranty Act Permits Arbitration

Appellant, incorrectly focusing on the legislative history regarding the informal dispute settlement procedures, wrongly argued that the legislative history of the MMWA precludes the use of binding arbitration agreements between parties.

See Initial Brief, p. 12-17. However, Appellant does not cite to any legislative history discussing binding arbitration or the prohibition of arbitration to determine MMWA claims. Thus, at best, the legislative history of the MMWA is ambiguous as to Congress' intent regarding binding arbitration. As a result, the second *McMahon* factor is not present because the legislative history of the MMWA does not reflect Congress' intent to affirmatively prohibit arbitration of MMWA claims.

In *Davis*, the United States Court of Appeals for the Eleventh Circuit analyzed the legislative history of the MMWA. *Davis*, 305 F.3d 1275-76. The court explained that the MMWA's legislative history only addressed "internal dispute settlement procedures" and that it never directly addresses the role of binding arbitration or the FAA. *Id.* at 1275. Importantly, the court referenced an earlier version of the MMWA that reflected "Congress' intent that warrantors of consumer products cooperate with government and private agencies to establish informal dispute settlement mechanisms that take care of consumer grievances without the aid of litigation *or formal arbitration*." *Id.* at 1276 (emphasis in original). Therefore, it is clear that at one point Congress believed that informal dispute settlement mechanisms were something different from formal arbitrations.[1] However, the court provided, "[g]iven

[1] While the *Davis* court found the MMWA's legislative history was ambiguous as to Congress' intent, Gibson Auto contends that the legislative history of the MMWA reflects Congress' recognition of a difference between formal arbitration and informal dispute settlement mechanisms through this language.

the absence of any meaningful legislative history barring binding arbitration, coupled with the unquestionable federal policy favoring arbitration, we conclude that Congress did not express a clear intent in the MMWA's legislative history to bar binding arbitration agreements in written warranties." *Id.; See also Walton*, 298 F. 3d at 476-477 ("The legislative history does not specifically discuss the availability of arbitration … Consequently we must conclude that the legislative history here does not evidence a congressional intent to preclude arbitration of MMWA claims."); *Seney*, 909 F. Supp 2d at 452 ("The Seneys further interpret snippets of legislative history to support their argument, but these excerpts have no traction in light of the Supreme Court's analysis of a statutory right to sue in a judicial forum as being, without more, a nonexclusive expression of the manner in which a party may resolve a dispute.")

iii. The Lack of Inherent Conflict Between the Purpose of the Magnuson-Moss Warranty Act and Binding Arbitration Permits Arbitration

The purpose of the MMWA is "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products." 15 U.S.C. § 2302(a). The purpose of the FAA is "to ensure that private arbitration agreements are enforced according to their terms." *Concepcion*, 563 U.S. at 344. Appellant did not explicitly address the third *McMahon* factor in his Initial Brief. However, with respect to the final *McMahon*

factor, there is no conflict between the purpose of the FAA and the purpose of the MMWA.

When interpreting the purposes of these statutes, the United States Eleventh Circuit Court of Appeals explained that "[c]onsumers can adequately vindicate their rights arising under the MMWA and written warranties in an arbitral forum." *Davis*, 305 F.3d at 1276. Thus, the court concluded that "[t]hese purposes are not in conflict." *Id.* at 1277. The court also acknowledged that "the Supreme Court has repeatedly enforced arbitration of statutory claims where the underlying purpose of the statutes is to protect and inform consumers." *Id.*; *See e.g. Basic Inc. v. Levinson,* 485 U.S. 224, 234 (1988) (stating that a fundamental purpose of the Securities Acts is the disclosure of information to potential investors); *Rodriguez De & Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 485-486 (1989) (holding that parties may arbitrate Securities Act of 1933 claims); *McMahon*, 482 U.S. at 242 (holding that parties may arbitrate Securities Exchange Act of 1934 claims). Additionally, the court noted that claims under statutes intended "to further social policies" could also be arbitrated so long as the respective litigant may effectively vindicate his or her statutory cause of action in the arbitral forum. *Davis,* 305 F. 3d at 1276; *See also Greentree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79, 90 (2000)(holding that parties may arbitrate Truth and Lending Act claims); *Obremski v. Springleaf Financial Services, Inc.,* 2012 WL 3264521 (M.D. Fla. Aug 10, 2012)

(compelling arbitration of FCCPA, TCPA, and FCRA claims); *Owings v. T-Mobile USA, Inc.,* 978 F.Supp.2d 1215 (M.D. Fla. 2013) (compelling arbitration of claims arising under the FCCPA and TCPA); *Bolanos v. First Investors Servicing Corp.,* No. 10-23365-CIV, 2010 WL 4457347 (S.D. Fla. 2010) (compelling arbitration FDCPA claims).

Such a conclusion makes sense since, as will be further discussed in Section E below, courts across the country have compelled the arbitration of MMWA claims. *See also Walton,* 298 F.3d at 478 ("We do not see any inherent conflict between arbitration and these purposes. Consumers can still vindicate their rights under warranties in an arbitral forum. Warranties can provide adequate and truthful information to consumers, while also requiring binding arbitration.").

Therefore, after analyzing the MMWA and the *McMahon* test, this Court must hold that nothing in its text, legislative history, or purpose reflect a congressional intent to bar arbitration of MMWA claims. Accordingly, the trial court correctly compelled arbitration of Appellant's MMWA claims and the Order must be affirmed.

D. This Court Need Not Defer to the Federal Trade Commissions' Interpretation Regarding the Magnuson-Moss Warranty Act

As was argued by Gibson Auto during the hearing on the Motion, the trial court was correct in not deferring to the FTC's interpretation of the MMWA. Appellant incorrectly argued during the hearing on the Motion and in the Initial Brief

that the FTC's interpretation regarding binding arbitration must be given deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984). *See* Initial Brief, p. 9-25. This same argument was rejected by the Eleventh Circuit Court of Appeals in *Davis. Davis*, 305 F. 1277-80. Under *Chevron*, when a court reviews an agency's construction of a statute, the court must first ask the question of "whether Congress has directly spoken to the precise question at issue" and "[i]f the intent of Congress is clear, that is the end of the matter." *Id.* at 842. As further explained in Section C above, Congress has not directly spoken on the prohibition of arbitration of MMWA claims. Then, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Because the FTC's interpretation of the MMWA is not a permissible construction of the MMWA, the trial court and this Court must not defer to such interpretations. *Davis*, 305 F.3d 1278-80; *Jones v. Gen. Motors Corp*., 640 F. Supp. 2d 1124, 1139 (D. Ariz. 2009) ("[No deference is due the FTC's conclusion that it has the power to prohibit the formal resolution of claims through binding arbitration by virtue of its authority to regulate 'informal settlement' procedures.").

As a starting point, it is important to note that Congress only provided the FTC rulemaking authority concerning informal dispute settlement procedures. Specifically, in 15 U.S.C. § 2310(a), Congress "declare[d] it to be its policy to

encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms" and that the FTC "shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies." However, as explained in Section C above, binding arbitration is not an informal dispute settlement mechanism. Further, as noted by *Seney,* the FTC, during the rulemaking proceeding, acknowledged that there may be cases where the "warrantor and the consumer might want to agree to use a remedy such as binding arbitration instead of utilizing the mechanism." *Seney,* 909 F. Supp. 2d at 448, *aff'd,* 738 F.3d 631 (4th Cir 2013). The FTC responded by stating "[a]gain, nothing in the Rule precludes the parties from agreeing to use some avenue of redress other than the Mechanism if they feel it is more appropriate." 40 Fed. Reg. 60168, 60211 (1975). In *Seney*, the court also acknowledged that the FTC revisited 16 C.F.R. § 703.5(j) in 1999, but left both it and the FTC's interpretations of it unchanged. *Seney,* 909 F. Supp. 2d at 448, *aff'd,* 738 F.3d 631 (4th Cir 2013); 64 Fed. Reg. 19700, 19707–09 (1999).

The United States Circuit Court for the Eleventh Circuit Court of Appeals thoroughly analyzed the FTC's interpretation of the MMWA and the MMWA's text, legislative history, and purpose, and rejected the same argument raised by Appellant because the FTC's interpretation was not reasonable. *Davis*, 305 F.3d 1277-80. The

court found that Congress did not directly address the issue of binding arbitration and thus courts should only give deference to the FTC regulations if the FTC's interpretation was reasonable. *Id.* at 1277-78. The court held that the FTC's interpretation was not reasonable because the granting of concurrent jurisdiction to state and federal courts did not preclude the enforcement of binding arbitration. *Id.* at 1278-79. More importantly, the court noted that the FTC's interpretation of the MMWA was based on a hostile view towards arbitration and that such interpretation was no longer permissible due to the "Supreme Court's abandonment of its hostile attitude toward arbitration" and its "acknowledgement and continual enforcement of the strong federal policy toward arbitration." *Id.* at 1279-80.

Prior to *Davis,* the Eleventh Circuit Court had also analyzed the FTC's interpretation regarding the MMWA and court opinions relying on the same. *Richardson v. Palm Harbor Homes, Inc*., 254 F.3d 1321, 1324-26 (11th Cir. 2001). As to the courts relying on the FTC interpretation, the court noted that "even these courts do not suggest that the statute and its history show that Congress meant to supersede the FAA with respect to all consumer warranty claims." *Id.* at 1325. Further, like the trial court, courts across the country have concluded that the FTC's interpretation regarding the MMWA and arbitration are owed no deference. *See* Section E below.

Additionally, it is important to note that during the hearing, Appellant failed to cite to a single court in Florida that had deferred to the FTC's interpretation and held that MMWA claims could not be subject to binding arbitration. In the Initial Brief, Appellant again failed to cite to a single court in Florida that deferred to the FTC's interpretation. In contrast, Florida's Second District Court of Appeal has followed *Davis* and compelled the arbitration of MMWA claims. *Stacy David, Inc. v. Consuegra*, 845 So. 2d 303 (Fla. 2d DCA 2003).

Accordingly, this Court should not give any deference to the FTC's interpretation of the MMWA and instead hold that the trial court correctly compelled arbitration of Appellant's MMWA claims.

E. Most Appellate Courts Have Held that Magnuson-Moss Warranty Act Claims are Subject to Binding Arbitration

As has been explained in Section C above, there is nothing in the MMWA's text, legislative history, or purpose that reflect an intent to prohibit binding arbitration. Based on these principles, most appellate courts, including the Florida Second District Court of Appeal and the United States Court for the Eleventh Circuit, have repeatedly held that MMWA claims are subject to binding arbitration. Accordingly, just like these courts addressing the arbitrability of MMWA claims, the trial court correctly held that MMWA claims are subject to binding arbitration.

Unlike Appellant, Gibson Auto can rely on precedent from a Florida District Court of Appeal that has compelled the arbitration of MMWA claims. *See Stacy*

David, Inc. v. Consuegra, 845 So. 2d 303 (Fla. 2d DCA 2003). As more fully explained in Section A above, the Second District Court of Appeal held that the trial court committed reversible error in denying a motion to compel arbitration and concluded that "no count of the Consuegra's complaint [including claims under the MMWA] appears to fall outside the arbitration agreement." *Id.* at 306-307. *See also Five Points Health Care Ltd. v. Alberts,* 867 So. 2d 520, 522 (Fla. 1st DCA 2004) (reversing trial court order denying motion to compel arbitration and explaining that "[t]he 'arising out of or related to' language is broad enough to encompass claims of fraud or deceptive trade practices in the context of automobile sales, even when such claims are brought under the federal Magnuson-Moss Act and the Florida Deceptive and Unfair Trade Practice Act"); *Gatwood v. Hyundai Motor America*, 13 Fla. L. Weekly Supp. 988a (Fla. 20th Cir. Ct. 2006) (compelling arbitration of claims for alleged violations of the MMWA by a buyer of a vehicle against a manufacturer pursuant to the mandatory arbitration provision of the warranty and citing to other jurisdictions holding same).

The Eleventh Circuit Court of Appeals has also compelled the arbitration of MMWA claims.[2] As has been further explained in Section C and D above, in *Davis,*

[2] In his Initial Brief, Appellant argued that *Davis* disregards binding precedent. Tellingly, the only federal circuit opinion cited by Appellant holding that MMWA are not arbitrable has been withdrawn and cannot be cited as precedent. *See Kolev v. Euromotors West/The Auto Gallery*, 676 F. 3d 867 (9th Cir. 2012).

the Eleventh Circuit thoroughly analyzed the MMWA after the plaintiffs filed a lawsuit for alleged MMWA violations after purchasing a manufactured home from the defendant and finding defects in the home and the defendant moved to compel arbitration. 305 F. 3d at 1270. The Eleventh Circuit Court of Appeals held that the district court committed reversible error in denying the motion to compel arbitration of plaintiff's MMWA claims and concluded that "[a]fter a thorough review of the MMWA and the FAA, combined with the strong federal policy favoring arbitration, we hold that written warranty claims arising under the Magnuson-Moss Warranty Act may be subject to valid binding arbitration agreements." *Id.* at 1280. Following *Davis*, the United States District Court for the Southern District of Alabama has also granted a motion to compel arbitration of MMWA based on the "strong federal preference for arbitration of disputes" and acknowledging that formal arbitration is not an "informal dispute settlement mechanism" for purposes of the MMWA. *Patriot Mfg., Inc. v. Dixon,* 399 F. Supp. 2d 1298 (S.D. Ala. 2005).

Similarly, state supreme courts across the country have compelled arbitration of MMWA claims. For example, in *Abela*, the Michigan Supreme Court addressed the same question presently before this Court, "whether the [MMWA] prohibit[ed] enforcement of a binding arbitration agreement." *Abela v. General Motors Corporation*, 677 N.W. 2d 325, 326 (Mich. 2004). In that case, a consumer brought suit under the MMWA and other alleged violations, the defendant moved to compel

arbitration, and the trial court denied the motion based on its conclusion that the arbitration provision was contrary to the MMWA. *Id.* The Michigan Supreme Court, based upon *Walton* and *Davis,* recognized that the text, legislative history, and purpose of the MMWA did not show a congressional intent under the FAA to bar arbitration of MMWA claims. *Id.* at 327. Accordingly, the Michigan Supreme Court concluded the warranty claims were arbitrable, the arbitration provision was enforceable, and remanded the matter to the trial court for entry of an order for arbitration pursuant to the agreement. *Id. at 328.*

Additionally, the Alabama, Georgia, Texas, and Illinois Supreme Courts have held that MMWA are subject to binding arbitration. *See S. Energy Homes, Inc. v. Ard,* 772 So. 2d 1131, 1135 (Ala. 2000); *Results Oriented, Inc. v. Crawford*, 538 S.E. 2d 73 (Ga. Ct. App. 2000), *aff'd*, 548 S.E. 2d 342 (Ga. 2001); *In re American Homestar of Lancaster, Inc.*, 50 S.W. 3d 480 (Tex. 2001); *Borowiec v. Gateway 2000, Inc*., 808 N.E.2d 957 (Ill. 2004). Specifically, in *Ard,* the Alabama Supreme Court held "that the Magnuson–Moss Act does not invalidate arbitration provisions in a written warranty," compelled the arbitration of a MMWA claim, and explicitly adopted the dissent of *Lee v. Southern Energy Homes, Inc*., 732 So. 2d 994 (Ala. 1999). *Ard*, 772 So. 2d at 1135. Based on *Ard,* the Georgia Supreme Court affirmed the court of appeals' opinion compelling arbitration, which concluded "that the Magnuson-Moss Warranty Act does not preclude arbitration of express warranty

claims." *Crawford*, 538 S.E. 2d at 81, *aff'd* 548 S.E. 2d 342. Similarly, the Texas Supreme Court held that MMWA claims were subject to arbitration because there was "no clear congressional intent in the Magnuson–Moss Act to override the FAA policy favoring arbitration." *In re American Homestar of Lancaster,* 50 S.W. 2d at 492. Additionally, the Illinois Supreme Court, based on precedent from the Fifth, Eleventh, and Third Circuit, noted that "federal circuit courts of appeals are in agreement in their interpretation of [the MMWA]" and that "[b]ecause federal circuit court authority on the issue is uniform, we, too, hold that the Magnuson–Moss Act does not bar arbitration of a consumer's claims under the Act." *Borowiec,* 808 N.E.2d at 970.

Based on the precedent from Florida's Second District Court of Appeal, the United States Eleventh Circuit Court of Appeals, and various courts, it is clear that Appellant cannot establish that the trial court erred in compelling arbitration of his MMWA claims.

F. Arbitration is Appropriate Even Though The Arbitration Agreement Was Not Included in the Warranty Itself

After the hearing on the Motion, Appellant for the first time argued that the trial court should not have granted the Motion because the Arbitration Agreement was not included in the warranty itself and relied upon *Cunningham v. Fleetwood*, 253 F.3d 611 (11th Cir. 2001) and raised the same argument in his Initial Brief. *See* Initial Brief, p. 34-40. At the trial court level, Gibson Auto argued that Appellant's

argument was untimely and the trial court addressed this issue only briefly and noted that Appellant's reliance on *Cunningham* was misplaced. *See* Appendix A-10, p. 5. However, to the extent that this Court finds *Cunningham* persuasive, it is important to note that *Cunningham* reflected the previous interpretation of the MMWA by the Eleventh Circuit as it was decided prior to *Davis* and that *Cunningham* incorrectly classified binding arbitration as an informal dispute resolution mechanism. After *Cunningham*, the Eleventh Circuit made a clear distinction between binding arbitration and informal dispute settlement mechanism. *See Davis*, 305 F.3d at 1274-78.

In *Cunningham*, the court focused on the interplay between binding arbitration and the "informal dispute settlement mechanisms" permitted by section 2310 of the MMWA. 253 F.3d at 618-619. The court showed concern about the conflict between informal dispute resolution methods and binding arbitration, but noted that it was "inclined to think that the presence of the non-binding § 2310 mechanism in the statutory text does not in and of itself mandate the conclusion that Magnuson-Moss renders binding arbitration agreements unenforceable." *Id.* at 620. The court then went on to analyze the disclosure requirements under the MMWA and focused on the FTC regulations requiring the disclosure of informal dispute-settlement mechanisms. *Id.* at 621. The court concluded that the MMWA required the disclosure of informal dispute-settlement mechanisms in the warranty itself and that

the arbitration agreement was unenforceable because it was not disclosed in the actual warranty. *Id.* at 623-24.

However, this Court should not follow the analysis in *Cunningham* because binding arbitration is not an informal dispute-settlement mechanism and thus the disclosure requirement for informal dispute-settlement mechanisms is inapplicable to binding arbitration agreements. *See Patriot Mfg., Inc. v. Jackson,* 929 So. 2d 997 (Ala. 2005). In fact, in *Davis*, the Eleventh Circuit held that binding arbitration did not conflict with the text, legislative history, or purpose of the MMWA and "explicitly rejected any notion that arbitration is equivalent to or a variety of an informal dispute-settlement mechanism." *Id.* at 1005; *Davis*, 305 F.3d at 1274-76.

Further, the purpose of the MMWA is not frustrated by the enforcement of an arbitration agreement not contained in the actual written warranty. *Jackson,* 929 So. 2d at 1005. Specifically, the Supreme Court of Alabama provided:

> **[W]e consider a key feature of the rationale of *Cunningham* significantly undermined by *Davis*,** and the remainder of the *Cunningham* rationale insufficient to justify its holding, and **we no longer regard *Cunningham* as reliable authority on the question whether a stand-alone arbitration agreement may be used to compel arbitration.** The Magnuson–Moss Act requires disclosure in the warranty itself only "to the extent required by the rules of the [FTC]," and **the FTC has seen fit to require disclosure of required resort to an informal dispute-settlement mechanism, not the completely separate process of binding arbitration.**

Patriot Mfg., Inc. v. Jackson, 929 So. 2d 997, 1006 (Ala. 2005) (emphasis added).

Cunningham was also criticized and disapproved of in *Patriot Mfg., Inc. v. Dixon,* 399 F. Supp. 2d 1298 (S.D. Ala. 2005). In *Dixon*, the court analyzed *Cunningham*, *Davis*, and the MMWA and compelled arbitration of MMWA claims based on a standalone arbitration agreement. 399 F.2d 1298. The court first acknowledged the "single document rule" required by the MMWA and the requirement to disclose any informal dispute settlement mechanisms within that "single document." *Id.* at 1301-02. However, based on *Davis,* the court noted that "*Cunningham's* assumption that an arbitration agreement is an 'informal dispute settlement mechanism' for purposes of the MMWA's single document rule is no longer valid in this Circuit." *Id.* at 1303. The court then provided:

> In the wake of *Cunningham* and *Davis,* then, what is the present status of the MMWA's disclosure requirements? **Clearly, the single document rule remains alive and well. But the statutory and regulatory scheme does not require that *all* information having any bearing on the warranty must be disclosed within the warranty.** To the contrary, the MMWA—and more precisely § 2302(a)—plainly provides that a warrantor's required disclosures under the single document rule are limited to those specifically enumerated in the FTC regulations. **Those regulations do not identify arbitration agreements as items that must be disclosed, but they do mandate disclosure of 'informal dispute settlement mechanisms.' The *Davis* case, which is binding precedent to this Court, decided that arbitration**

> **agreements are not 'informal dispute settlement mechanisms' in the context of the MMWA.**
> Under this synopsis of the law, then, it is plain that, **while the single document rule enjoys continued vitality, arbitration agreements lie beyond the scope of the disclosures required pursuant to that rule.**

Id. at 1303–04; *See also Jones v. Gen. Motors Corp.,* 640 F. Supp. 2d 1124 (D. Ariz. 2009) (compelling arbitration of MMWA claims, explaining that nothing in the MMWA's text, legislative history, or purpose prohibited the arbitration of MMWA, and disapproving *Cunningham* based on *Davis).*

Thus, this Court should not follow *Cunningham* because it does not reflect the Eleventh Circuit's current view of the MMWA. This Court should also not follow *Larrain v. Bengal Motor Co.,* 976 So. 2d 12 (Fla. 3d DCA 2008) because it also relied on the Eleventh Circuit's former view of arbitration agreements as an informal dispute settlement mechanism. Additionally, Appellant failed to present *Larrain* to the trial court and is not binding on this Court. *See* Appendix A-7, Appendix A-8. In contrast, the trial court considered *Consuegra*, where the Second District Court of Appeal compelled arbitration of a MMWA claim when the arbitration agreement was included in the retail order. *Consuegra,* 845 So. 2d at 305.

Instead, this Court should follow *Davis,* where the Eleventh Circuit analyzed and distinguished binding arbitration from the informal dispute settlement procedures laid out by the MMWA and held that MMWA were subject to binding arbitration. Further, as held in *Jackson* and *Dixon,* this Court should not follow

Cunningham because the MMWA only requires disclosure of informal dispute settlement procedures and binding arbitration is not an informal dispute settlement procedure. Accordingly, this Court should disregard *Cunningham* and compel arbitration of Appellant's claims.

Further, even if this Court follows *Cunningham*, this Court must still compel arbitration because failure to do so would ignore the well-recognized principle that documents concurrently executed in the course of one transaction must be construed as a single document and the fact that the Second District Court of Appeal has compelled arbitration even when the arbitration agreement was not a part of the warranty itself. *See Wilson v. Terwillinger*, 140 So. 3d 1122, 1124 (Fla. 5th DCA 2014); *Dodge City, Inc. v. Byrne,* 693 So. 2d 1033, 1035 (Fla. 2d DCA 1997); *Holcomb v. Bardill,* 214 So. 2d 522, 524 (Fla. 1st DCA 1968); *Consuegra*, 845 So. 2d 303.

In *Wilson*, the Fifth District Court of Appeal held that a lease addendum providing for liquidated damages was enforceable against a tenant even though the lease itself did not contain such provisions and the statute required disclosure of such provisions in the lease. *Id.* at 1122-1124. The court noted that the addendum and lease were signed at the same time and executed as part of one transaction. *Id.* at 1124. Thus, the court concluded that when the parties "executed the lease and the addendum at the same time and as part of the same transaction, they intended the

addendum and its provision for liquidated damages to be a part of the lease, thus sufficiently complying with the statutory provision 'as provided in the rental agreement.'" *Id.* at 1125. Further, in *Consuegra*, the Second District Court of Appeal compelled arbitration of a MMWA claim when the arbitration agreement was included in the retail order. *Consuegra,* 845 So. 2d at 305.

Here, like in *Wilson* and *Consuegra,* the mere fact that the Arbitration Agreement was not disclosed in the warranty itself must not affect this Court's analysis regarding the Motion. Like in *Wilson*, where the tenant contemporaneously executed the addendum and lease agreement as part of one transaction, here Appellant contemporaneously executed the warranty and Arbitration Agreement as part of the purchase of the Vehicle. Thus, like in *Wilson*, this Court must construe the Arbitration Agreement and warranty together and interpret them as one document. The analysis in *Wilson* is particularly relevant given that the Court considered the liquidated damages clause in the addendum to be a part of the lease itself and as sufficient to satisfy the statutory requirement of disclosure of such damages in the lease agreement itself. Here, this Court should follow the same analysis, construe the Arbitration Agreement and warranty documents as one, and thus sufficient to satisfy the disclosure requirement. This analysis is further supported by the fact that the Second District Court of Appeal has compelled

arbitration of MMWA claims where the Arbitration Agreement was not disclosed in the warranty itself.

Accordingly, even if this Court is persuaded by *Cunningham*, this Court should construe the Arbitration Agreement and warranty as one document and sufficient to satisfy the disclosure requirements of the MMWA. Therefore, this Court must affirm the trial court's Order compelling arbitration.

CONCLUSION

The trial court correctly compelled arbitration because MMWA claims are subject to binding arbitration. First, this Court must affirm the Order because the trial court correctly followed binding precedent from Florida's Second District Court of Appeal compelling arbitration of MMWA claims. Second, this Court must also affirm the trial court's Order and hold that MMWA claims are subject to binding arbitration because Appellant cannot bear the heavy burden to oppose arbitration given the strong public policy in favor of arbitration and the well-recognized principle that any doubts regarding the scope of an arbitration agreement must be resolved in favor of arbitration. Third, Appellant cannot bear his heavy burden to oppose arbitration because because nothing in the MMWA's plain text, legislative history, or purpose reflect Congress' intent to prohibit arbitration of MMWA claims and Appellant's reliance on the FTC's interpretation is inadequate given the FTC's impermissible construction. Fourth, this Court must also affirm the Order based on

the precedent from courts across the country that have compelled arbitration of MMWA claims. Last, this Court must affirm the Order because, even though the Arbitration Agreement was not included in the warranty itself, arbitration is still appropriate given the Eleventh Circuit's current view of the MMWA and Florida precedent. Accordingly, this Court must affirm the trial court's Order compelling arbitration and hold that MMWA claims are subject to binding arbitration.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 18, 2018 a true and correct copy of this document was served via email on the following:

Jeremy Kespohl, Esq.
Angela Thomas, Esq
Morgan & Morgan, P.A.
76 South Laura Street, Suite 1100
Jacksonville, FL 32202
jkespohl@forthepeople.com
warrantygroupservice@forthepeople.com

/s/ Yesica S. Liposky
Robert E. Sickles, Esq.
Florida Bar No. 167444
Yesica S. Liposky, Esq.
Florida Bar No. 119924
NELSON MULLINS
BROAD AND CASSEL
100 North Tampa Street, Suite 3500
Tampa, FL 33602
Telephone: 813-225-3020
Facsimile: 813-225-3039
Primary: robert.sickles@nelsonmullins.com
Primary: yesica.liposky@nelsonmullins.com
Secondary: kim.novak@nelsonmullins.com
Secondary: eileen.garvey@nelsonmullins.com
Secondary: jessica.lovins@nelsonmullins.com
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Answer Brief is submitted in Times New Roman 14-point font, which satisfies the requirements of Florida Rules of Appellate Procedure and 9.210(a)(2).

/s/ Yesica S. Liposky

Robert E. Sickles, Esq.
Florida Bar No. 167444
Yesica S. Liposky, Esq.
Florida Bar No. 119924
NELSON MULLINS
BROAD AND CASSEL
100 North Tampa Street, Suite 3500
Tampa, FL 33602
Telephone: 813-225-3020
Facsimile: 813-225-3039
Primary: robert.sickles@nelsonmullins.com
Primary: yesica.liposky@nelsonmullins.com
Secondary: kim.novak@nelsonmullins.com
Secondary: eileen.garvey@nelsonmullins.com
Secondary: jessica.lovins@nelsonmullins.com
Counsel for Appellee

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IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

Brevard County Case No: 2017-CA-049992

LES KROL,

Appellant

v.

GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD

Appellee.

Appellate Case No: 18-2149

APPELLANT'S REPLY BRIEF

On Appeal from the Circuit Court of the
Eighteenth Judicial Circuit in and for
Brevard County Florida

Jeremy Kespohl, Esquire
Florida Bar No. 035979
Angela Thomas, Esquire
Florida Bar No. 871311
MORGAN & MORGAN
76 South Laura Street #1100
Jacksonville, Florida 32202-3433
(904) 361-4416 Phone
(904) 361-4348 Facsimile
warrantygroupeservice@forthepeople.com
Attorneys for Appellant

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I. APPELLEE MISREPRESENTS THE APPLICABILITY OF *STACY DAVID, INC., V. CONSUERGRA*

In a shocking lack of candor toward this court, Appellee again contends that *Stacy David, Inc., v. Consuergra,* ruled that claims brought under the federal Magnuson-Moss Warrant Act ("MMWA") may be subject to binding arbitration. Appellee's Answer Brief, Section II(A), pp. 7-9. Appellee went so far as to argue that "the trial court was bound to follow *Consuergra* as it represented the law of Florida". *Id at* pp. 9.

However, as explained in Appellant's initial brief, the *Consuergra* case did not address whether or not MMWA claims could be subject to binding arbitration. *See* Appellant's Initial Brief, Section V(E), pp. 32- 34. While Appellant concedes the consumer in *Consuergra* brought a MMWA claim, as one of several underlying claims, there was no analysis or finding made regarding binding arbitration in a MMWA case. *See Stacy David, Inc. v. Consuergra*, 845 So. 2d 303, 306–07 (Fla. 2nd DCA. 2003). The order appealed from the lower court, the text of the decision, and subsequent case law interpreting the decision all establish that *Consuergra* did not address binding arbitration under the MMWA. *See* Appellant's Initial Brief, Section V(E), pp. 33. *Consuergra* made no more than a passing reference to *Davis, which* does not even constitute dicta, let alone a binding authority. *See Consuergra*, 845 So. 2d at 306.

II. PUBLIC POLICY FAVORING ARBITRATION DOES NOT OVERCOME THE INTENT OF CONGRESS TO EXEMPT A STATUTE FROM ARBITRATION

Appellee next makes argument regarding the strong public policy supporting the enforcement of arbitration agreements. *See* Appellant's Answer Brief, Section II(B), pp. 10-13. Appellant does not dispute there is a general presumption in favor of the enforcement of arbitration agreements. However, while this presumption is strong, it is neither absolute nor insurmountable. In fact, the Supreme Court has explained that the goal of the Federal Arbitration Act ("FAA") was not to mandate non-judicial resolution of every dispute…" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

Furthermore, the Supreme Court has ruled that the FAA's mandate in favor of arbitration can be overcome by contrary instructions from Congress. *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987). As explained in Appellant's Initial Brief, the Supreme Court has provided explicit instructions/tests in *Chevron* and its progeny to determine the intent of Congress in regard to federal statutes. *See* Appellant's Initial Brief, Section V(C), pp. 17-25. Furthermore, the decisions of the Supreme Court referenced in Appellant's Initial Brief are binding upon all Florida Courts. *See James v. City of Boise, Idaho*, 136 S. Ct. 685, 686 (2016)(It is the responsibility of the US Supreme Court "to say what a [federal] statute means, and once the Court has spoken, it is the duty of other courts to

respect that understanding of the governing rule of law"). Contrarily, the *Davis* decision relied upon by Appellee is not binding on this Court. *See State v. Washington*, 114 So. 3d 182, 185 (Fla. 3rd DCA 2012)(the only federal court whose decisions bind state courts is the United States Supreme Court).

III. THE MMWA'S TEXT ESTABLISHES THE INTENT THAT CONSUMER CLAIMS TO BE RESOLVED AT TRIAL

Appellee claims that "Appellant also admitted that nothing in the text of the MMWA expressly prohibits binding arbitration" *See* Appellee's Answer Brief, Section II(c)(i), pp. 14. In contrast, Appellant's brief actually stated that "Congress did not expressly include the term 'binding arbitration' in the text of the MMWA." *See* Appellant's Initial Brief, Sections V(A), pp. 9-10. Additionally, contrary to the assertions made by Appellee, there is ample authority in the text of the MMWA supporting Congress' intent to prohibit binding arbitration of consumer claims. *See* Appellant's Initial Brief, Sections V(A), pp. 9-13.

Appellee's brief goes on to argue that "in every statutory right case that the Supreme Court has considered, it has upheld binding arbitration if the statute creating the right did not *explicitly* preclude arbitration." *See* Appellee's Answer Brief, Section II(c)(i), pp. 15; *Citing to Davis,* 305 F.3d at 1273. However, this is misleading as relatively few cases have addressed the issue of whether Congress expressed the intent to exempt a statute from the FAA. Furthermore, none of the prior cases examined involved a statute anything like the MMWA. *See Rodriguez*

de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477 (1989) (upheld arbitration in cases addressing the Securities Act of 1933 and Securities Exchange Act of 1934 because of existence of federal regulations approving of binding arbitration for claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) (claims under the Sherman Act could be subject to binding arbitration where the only argument advanced against arbitration was the "importance of the private damages remedy"); *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 238 (1987) (upholding arbitration of claims because there was nothing in the text or legislative history of statutes that even arguably showed congressional intent to override the FAA); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (U.S. 1991)(claims under the ADA could be subject to binding arbitration where Appellant relied *solely* upon the social policies of the statute and conceded no congressional intent to supplant FAA in the text or legislative history).

Appellee next argues that this Court would be required to "hold that binding arbitration is an informal dispute settlement procedure" in order to reverse the Trial Court's Decision. *See* Appellee's Answer Brief, Section II(c)(i), pp. 16. Appellee simply makes this declaration without any substantive explanation. *Id.* Following this peculiar declaration, Appellee cites to a Florida case distinguishing formal arbitration from an appraisal under Florida Statute §682.06. *Id* at 16-17; *See also Allstate Insurance Company v. Suarez*, 833 So.2d 762, 765 (Fla. 2002). Setting

aside the lack of explanation for why a case involving a Florida insurance statute is relevant to this matter, the arbitrability of the federal MMWA under the FAA must be decided pursuant to federal law. *See e.g. McKenzie Check Advance of Fla., LLC v. Betts*, 112 So.3d 1176, 1178 (Fla. 2013); *AT&T Mobility, LLC v. Concepcion,* 131 S. Ct. 1740, 1744 (2011). Thus, cases decided under Florida law are irrelevant to the instant matter.

Appellee then cites to *Harrison v. Nissan Motor Corp.,* for the proposition that the MMWA's informal dispute resolution mechanism did not constitute arbitration under the FAA. *See* Appellee's Answer Brief, Section II(c)(i), pp.17. However, the *Harrison* case dealt with issues related to a claim under Pennsylvania's Lemon Law. *See Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 345 (3d Cir. 1997). The Court in *Harrison* was determining whether a consumer was required to exhaust the available Informal Dispute Resolution Procedure ("IDR") procedures[1] available before bringing his lemon law claim; and, whether the FAA applied to the applicable informal dispute resolution procedure under the state lemon law. *See Harrison v. Nissan Motor Corp. in U.S.A.*, 111 F.3d 343, 345 (3d Cir. 1997). The *Harrison* decision addresses no substantive issues under the MMWA, exclusively examining issues regarding the consumer's state lemon law claim. *Id.*

[1] *Harrison* explains that the Court adopted the MMWA's IDR procedure as part of the state's lemon law. *See Harrison*, 111 F.3D at 345.

Further, assuming for the sake of argument that Appellee's position on this matter is correct, and Congress did not intend to prohibit binding arbitration of MMWA claims, then Appellant would pose a single question to both this Court and the Appellee: What was the purpose of expressly creating a mandatory non-binding IDR as condition precedent to bringing a claim under the MMWA? Congress included in the MWMA the option for warrantors to create a sanctioned IDR procedure (non-binding arbitration) which, if maintained in accordance with FTC regulation, would serve as a mandatory condition precedent to bringing a claim under the MMWA. *See* 15 U.S.C. §2310(a) and (e).

Under the MMWA's IDR program the consumer can reject the decision, enabling them move forward with litigation, and the manufacturer is required to make the program available to consumers free of charge. *See* 16 C.F.R. §703.3(a); 16 C.F.R. §703.3(j). However, under binding arbitration, consumers would be bound by the decision (with limited rights of appeal), the decision would cut off further liability for attorneys' fees, and the warrantor could make the consumer pay at least part of the cost of arbitration. Thus, if a warrantor can compel a consumer to submit to binding arbitration, why would they ever bother with non-binding arbitration?

It is a basic principle of statutory construction that Courts must not interpret a statute, or a portion of a statute, in a way that renders it "superfluous, void, or

insignificant". *TRW Inc. v. Adelaide Andrews*, 534 U.S. 19, 31 (2001)(emphasis added). A ruling that the MMWA allows binding arbitration would not eliminate the IDR program. However, the practical effect of a ruling would be to render the IDR program moot and meaningless.

IV. THE MMWA'S LEGISLATIVE HISTORY ESTABLISHES THE INTENT TO PROHIBIT BINDING ARBITRATION

Appellee next argues that the legislative history of the MMWA does not demonstrate Congress' intent to prohibit binding arbitration. *See* Appellee's Answer Brief, Section II(c)(ii), pp. 17-19. Once again, Appellee's argument is without merit.

During the late 1950s, multiple governmental agencies reported an unprecedented increase in consumer complaints regarding the failure of automobile manufacturers to honor their warranties. *See* H.R. REP. NO. 93-1107, at 25 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7708. The Federal Trade Commission ("FTC") reported that "as many letters were received by the FTC on this subject as on any other [subject] since the Commission was established in 1914." *Id., reprinted in* 1974 U.S.C.C.A.N. 7702, 7708.

In the face of the staggering amount of consumer complaints, the FTC began an investigation into these complaints concerning automobile warranties. *See id., reprinted in* 1974 U.S.C.C.A.N. 7702, 7708. In November of 1968, the FTC concluded its investigation finding that that the performance of warrantors was not

living up to the level of quality implied by their warranties. *See id.* at 26, *reprinted in* 1974 U.S.C.C.A.N. 7702, 7708. Additionally, two different US Presidents also took note of consumer warranty issues and made efforts at resolution. *Id.* at 26-27, *reprinted in* 1974 U.S.C.C.A.N. 7702, 7709.

In fact, the findings of a Task Force set up by President Johnson were substantially similar to the findings of the FTC regarding the validity of consumer complaints of poor performance by warrantors[2]. *Id.* at 26-27, *reprinted in* 1974 U.S.C.C.A.N. 7702, 7709. President Johnson's Task Force found that unenforceable and ambiguous warranties, along with routine and often unsupportable denials of warranty claims, had become the industry norm required for companies to stay competitive and profitable. *Id., reprinted in* 1974 U.S.C.C.A.N. 7702, 7709.

The Congressional Report regarding the MMWA indicated one of the primary purposes behind the passage of the act was ***to provide the FTC with better means of protecting consumers***. H.R. REP. NO. 93-1107, at 20 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7702 (emphasis added). In fact, the introduction for House Report 1107 indicates that one of the stated purposes was to ***amend the Federal Trade Commission Act*** in order ***to improve its consumer protection activities***..." H.R. Rep. No. 93-1107 (1974) *reprinted in* 1974 U.S.C.C.A.N. 7702

[2] President Johnson's Task Force was specifically regarding appliance warranties.

(emphasis added). Senators Warren Magnuson also stated in a 1973 speech that the MMWA was intended ***to give the FTC the power to aide consumers in dealing with warranty problems***. 119 CONG. REC. 967 (1973)(emphasis added). Finally, Appellant's Initial Brief cites to numerous other examples where the legislative history supports the Congressional intent to prohibit binding arbitration of MMWA claims and its delegation of Power to the FTC. *See* Appellant's Initial Brief, Section V(B), pp. 13-17.

V. THERE IS CONFLICT BETWEEN THE PURPOSE OF THE FAA AND THE PURPOSE OF THE MMWA

Appellee next contends that there is no conflict between the FAA and the MMWA. *See* Appellee's Answer Brief, pp. 19-21. As alluded to above, the primary purpose of the FAA is to ensure "that private arbitration agreements to arbitrate are enforced according to their terms". V*olt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 479 (1989). In contrast, the MMWA is a federal remedial statute aimed at protecting consumers from unscrupulous warrantors. *Skelton v. Gen. Motors Corp.*, 660 F.2d 311, 313 (7th Cir. 1981).

The history of the events leading to the passage of the MMWA as detailed more fully above, and in Appellant's Initial Brief, demonstrates that the MMWA was created as a way to balance a system where warrantors held a dominant position leaving consumers all but powerless to enforce their rights. *See* Section IV

supra; See also Appellant's Initial Brief, Section V(B), pp. 13- 17. The privatization of MMWA claims by permitting warrantors to require consumers to submit their claims binding arbitration would directly undermine the intent of Congress by ceding control over warranty disputes back to warrantors, which would begin the process of restoring the pre-MMWA status quo.

VI. *CHEVRON* REQUIRES THE COURT DEFER TO FTC INTERPRETATIONS OF THE MMWA

As detailed in Appellant's Initial Brief, the Supreme Court's decision in *Chevron* requires deference to the regulations passed by an administrative agency charged by Congress with interpretation of a federal Statute. *See* Appellant's Initial Brief, Section V(C), pp. 17-25. Appellee primarily relies upon the *Davis* decision in support of its argument that the Court should not grant deference to the FTC's decisions regarding the MMWA's prohibition of binding arbitration. *See* Appellee's Answer Brief, Section II (D), pp.21-25. However, the *Davis* Court did not properly perform the *Chevron* analysis as mandated by the Supreme Court.

The basis for the *Davis* Court finding that *Chevron* deference should not be shown to the FTC regulations was that its finding that the FTC's position was unreasonable, not based upon any conflict with the MMWA, but based upon the Court's belief that the regulations were based upon a general hostility towards arbitration. *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1279 (11th Cir. 2002). In support of this position, the Court cited to the 1975 FTC decision regarding

arbitration. However, not only had eth FTC renewed its ruling multiple times since 1975, nothing in the section cited by the Court could be reasonably interpreted to show a general hostility towards arbitration. *See Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1278–79 (11th Cir. 2002); *See also* 40 Fed.Reg. 60167, 60210 (1975).

The *Davis* Court then proclaimed "In light of the FTC's reasoning, we conclude its rationale is unreasonable and do not defer to it". *Davis*, 305 F. 3d at 1279. Accordingly, the *Davis* Court made assumptions as to the motivations of the FTC in passing the regulations without any evidence, or any other valid basis, to support their finding. In so doing, the Eleventh Circuit did the very thing that the Supreme Court explicitly forbid Courts from doing: it substituted its own construction of the MMWA in place of the reasonable interpretation of the FTC. *Chevron,* 467 US at 842-43

Appellee also argues that "Congress only provided the FTC rulemaking authority concerning informal dispute settlement procedures." *See* Appellee's Answer Brief, Section II (D), pp. 22-23. However, pursuant to the Magnuson-Moss Warranty-***Federal Trade Commission Improvement Act***, *see* 15 U.S.C. §2301 *et. seq.* (emphasis added), Congress delegated extensive powers to the FTC. *See* 15 U.S.C. §2302(a) (the power to proscribe rules regarding the required content of written warranties); §2302(b)(1)(A) (the power to proscribe rules

regarding requirements for providing a consumer with the terms of written warranty); 15 U.S.C. §2302(b)(1)(B) (the power to proscribe rules regarding presentation and posting of warranty information); 15 U.S.C. §2302(b)(3) (the power to proscribe rules regarding extension of the time warranties and service contracts to make up for time a consumer is deprived of his product because of a warrantor's failure to comply with its warranty terms); 15 U.S.C. §2302(c) (the power to proscribe rules regarding waiver of the condition that warrantors may not condition coverage on the use of a particular service or product); 15 U.S.C. §2302(d) (the power to proscribe rules regarding substantive warranty provisions that may be incorporated into warranties; 15 U.S.C. §2303(c) (the power to proscribe rules regarding waiver of requirement to designate a warranty as full or limited); 15 U.S.C. §2304(a)(4) (the power to proscribe rules regarding what constitutes a reasonable number of repair attempts); 15 U.S.C. §2304(b)(3) (the power to proscribe rules regarding defining the duties of warrantors in regard to different categories of products with full warranties); 15 U.S.C. §2306(a) (the power to proscribe rules regarding the manner in which the terms of service contracts shall be disclosed); 15 U.S.C. §2309(b) (the power to proscribe rules regarding rule-making procedures for warranties and practices regarding used vehicle); 15 U.S.C. §2310(a)(2) (the power to proscribe rules regarding minimum requirements for IDR procedures); 15 U.S.C. §2311(c)(2) (the power to proscribe

rules regarding whether or not more protective state statutes should govern instead of the MMWA); 15 U.S.C. §2310(a)(4) (the power to audit and review warrantors IDR procedures); 15 U.S.C. §2310(c)(1)(the power to seek injunctions or restraining orders against warrantors for violation of the MMWA).

Finally, Appellee notes that Appellant has not cited to a single Florida case where a Court has deferred to the FTC interpretation of the MMWA. *See* Appellee's Answer Brief, Section II(D), pp. 25. However, as Appellant has established prior, this is a matter of first impression for the Florida Appellate Courts. *See* Section I *supra; see also* Appellant's Initial Brief, Section V(E), pp. 32-34.

VII. THE MAJORITY OF THE COURTS TO ADDRESS THIS ISSUE HAVE FOUND THAT THE MMWA PROHIBITS BINDING ARBITRATION

Appellee next argues that most Appellate Courts to address this issue have declined to find that the MMWA prohibits binding arbitration. *See* Appellee's Answer Brief, Section II (E), pp. 25-29. However, this argument is quickly dispelled by virtue of simply mathematics. Appellee cites to eight cases, in six jurisdictions, where Courts have failed to show deference to the FTC regulations pursuant to *Chevron*.[3] *Id.* Contrarily, there are at least fourteen cases, from eight different jurisdictions where Courts have ruled that the MMWA prohibits binding

[3] As *Consuegra* did not rule on the issue, it is not included in this calculation. *See* Section I *supra.*

arbitration.[4]

VIII. THE MMWA's SINGLE DOCUMENT RULE REQUIRES REVERSAL

Appellee's final argument is regarding the inapplicability of the single document rule of the MMWA. *See* Appellee's Answer Brief, Section II (F), pp. 29-36. Appellee first argues that Appellant's argument on this matter was untimely. *Id* at 29-30. However, Appellant has already addressed this issue in its Initial Brief. *See* Appellant's Initial Brief, Section II, pp. 2; *See also* Appendix pp. A-5 thru A-10. Appellee has also provided no legal authority indicating that the submission of these cases was untimely or improper. *See* Appellee's Answer Brief, pp. 29-36.

Appellee also argues that *Cunningham* is no longer good law, and that the Court should not follow *Larrain v. Bengal Motor Co.,* on the same basis. *See* Appellee's Answer Brief, Section II (F), pp. 30-36. However, Appellant has already demonstrated in its initial brief that the *Davis* decision did not diminish

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[4] *Rickard v. Teynor's Homes, Inc.,* 279 F. Supp. 2d 910 (N.D. Ohio 2003); *Breniser v. W. Recreational Vehicles, Inc.*, 2008 WL 5234528 (D. Or. 2008); *Koons Ford of Balt, Inc. v. Lobach, 398 Md. 38 (*Md.Ct.Spec.App. *2006); Deer Auto. Grp., LLC v. Brown*, 163 A.3d 176, 181 (Md.Ct.Spec.App.2017); *Henry v. Gateway, Inc.*, 979 A.2d 287, 299 (Md.Ct.Spec.App.2009); *Parkerson v. Smith*, 817 So. 2d 529 (Miss. 2002); *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (SC 2007); *Kolev v. Euromotors West/The Auto Gallery,* 658 F.3d 1024 (9th Cir. 2011), *opinion withdrawn,* 676 F.3d 867 (9th Cir. 2012); *Milicevic v. Fletcher Jones Imports, Ltd.*, 402 F.3d 912, 918 (9th Cir. 2005); *Higgs v. The Warranty Group,* 2007 U.S. Dist. LEXIS 50064 (S.D. Ohio 2007); *Browne v. Kline Tysons Imports, Inc.,* 190 F. Supp. 2d 827 (E.D. Va. 2002); *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958 (W.D. Va. 2000); *Tucker v. Ford Motor Co.*, 2007 Va. Cir. LEXIS 24 (Va. Cir. Ct. 2007); *In re Van Blarcum*, 19 S.W.3d 484 (Tex. App. 2000).

Cunningham. See Appellant's Initial Brief, Section V(F), pp. 36-40. Furthermore, other Courts have utilized the single document rule to bar binding arbitration under similar circumstances. *See Harnden v. Ford Motor Co.*, 408 F. Supp. 2d 300 (E.D. Mich. 2004); *DaimlerChrysler Corp. v. Mathews*, 848 A.2d 577 (Del. Ch. Ct. 2004); *Larrain v. Bengal Motor Co., Ltd.*, 976 So.2d 12 (Fla. 3rd DCA 2008).

Appellee next argues that the *Larrain* decision is not binding upon this Court. *See* Appellant's Answer Brief, Section II (F), pp. 33. While it's true *Larrain* is not binding upon this Court, the decision was binding upon the Trial Court. *See Pardo v. State*, 596 So. 2d 665, 667 (Fla. 1992)(in the event the only appellate case on point is from a district other than the one in which the trial court is located, the trial court is still required to follow that decision).

Therefore, unless this Court intends to issue a ruling on an issue which is technically not currently before this court (as Appellee has not filed a counter-appeal regarding the application of the MMWA's single document rule) *Larrain* remains binding precedent upon all trial courts in Florida. Thus, the Trial Court's failure to follow *Larrain* in this case merits reversal in and of itself.

CERTIFICATE OF SERVICE

I hereby certify that I furnished a true and correct copy of the above and foregoing by electronic and US mail this 25th day of September, 2018 to: Yesica S. Liposky, Esq., Broad and Cassell, LLP, 100 North Tampa Street, Suite 3500, Tampa, FL 33602, yliposky@broadandcassel.com, rsickles@broadandcassel.com, knovak@broadandcassel.com,egarvey@broadandcassel.com, jlovins@broadandcassel.com.

MORGAN & MORGAN, P.A.

/s/ Jeremy Kespohl
JEREMY KESPOHL, Esquire
Florida Bar No. 035979
ANGELA THOMAS, Esquire
Florida Bar No. 871311
Attorneys for Petitioner
76 South Laura Street, Ste 1100
Jacksonville, FL 32202
(904) 361-4416 Telephone
(904) 361-4348 Facsimile
jkespohl@forthepeople.com
For Service of Documents Only:
warrantygroupeservice@forthepeople.com

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

MORGAN & MORGAN, P.A.

/s/ Jeremy Kespohl
JEREMY KESPOHL, Esquire
Florida Bar No. 035979
ANGELA THOMAS, Esquire
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76 South Laura Street, Ste 1100
Jacksonville, FL 32202
(904) 361-4416 Telephone
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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

LES KROL,

Appellant,

v. Case No. 5D18-2149

FCA US, LLC AND GIBSON AUTO SALES, INC. D/B/A GIBSON TRUCK WORLD,

Appellees.

_____/

Opinion filed May 10, 2019

Nonfinal Appeal from the Circuit Court for Brevard County,
Stephen R. Koons, Judge.

Jeremy Kespohl and Angela Thomas, of Morgan & Morgan, P.A., Jacksonville, for Appellant.

Robert E. Sickles and Yesica S. Liposky , of Nelson Mullins Broad and Cassel, Tampa, for Appellee, Gibson Auto Sales, Inc. d/b/a Gibson Truck World.

No Appearance for other Appellee.

ORFINGER, J.

Les Krol appeals an order compelling arbitration of the written warranty claims that he brought against Gibson Auto Sales, Inc. ("Gibson Auto") under the Magnuson-Moss

Warranty Act ("MMWA").[1] Because we conclude that the MMWA does not prohibit binding arbitration of written warranty claims and the arbitration agreement here does not violate Federal Trade Commission ("FTC") disclosure rules, we affirm the order compelling arbitration.

BACKGROUND

This case arises from Mr. Krol's purchase of a used truck from Gibson Auto. As part of the sale, the parties executed an installment sales contract and a separate retail purchase order that included a binding arbitration agreement for any dispute related to the truck's purchase.[2] Gibson Auto also extended an express written warranty on the truck.

A few months after purchasing the truck, Mr. Krol sued Gibson Auto under the MMWA, asserting several causes of action related to alleged defects in the truck that Gibson Auto was unable to remedy. In response, Gibson Auto moved to stay the proceedings and to compel arbitration in accordance with the parties' agreement. Mr. Krol opposed the motion, asserting the same arguments he makes in this appeal. Following a

[1] 15 U.S.C. §§ 2301-12 (2012).

[2] The arbitration clause in the retail buyer order states in full:

> Dealer and customer agree that any controversy, claim, suit, demand, counterclaim, cross claim, or third-party complaint, arising out of, or relating to this Order or the parties' relationship (whether statutory or otherwise), including, but not limited to any matter that may have induced the Customer to enter into any relationship with Dealer and any disputes regarding the validity or enforceability of this clause (collectively referred to as "Claim"), shall be submitted to final and binding arbitration . . . . The arbitration shall be final and binding on all parties.

hearing, the trial court entered an order granting Gibson's motion to stay and compelling arbitration.

ANALYSIS

We review a trial court's ruling on a motion to compel arbitration de novo. Tropical Ford, Inc. v. Major, 882 So. 2d 476, 478 (Fla. 5th DCA 2004). When deciding whether to compel arbitration according to an agreement, a trial court must consider: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999). Mr. Krol's appeal centers on the second factor. He argues that no arbitrable issue existed here because MMWA claims are exempt from binding arbitration. Alternatively, he posits that the arbitration agreement is unenforceable because it violates the FTC's disclosure rules since the arbitration clause does not appear in a single document with the other warranty terms.

I. The Arbitrability of MMWA claims.

The United States Supreme Court has not addressed whether MMWA claims are arbitrable, and state and lower federal courts are divided on the issue.[3] However, both

[3] Compare, e.g., Jones v. Gen. Motors Corp., 640 F. Supp. 2d 1124, 1143 (D. Ariz. 2009), S. Energy Homes, Inc. v. Ard, 772 So. 2d 1131, 1135 (Ala. 2000), Borowiec v. Gateway 2000, 808 N.E.2d 957, 970 (Ill. 2004), Abela v. Gen. Motors Corp., 677 N.W.2d 325, 327 (Mich. 2004), and In re Am. Homestar of Lancaster, Inc., 50 S.W.3d 480, 492 (Tex. 2001) (all holding MMWA claims are subject to binding arbitration), with Higgs v. Warranty Grp., No. C2-02-1092, 2007 WL 2034376, at *8 (S.D. Ohio July 11, 2007), Rickard v. Teynor's Homes, Inc., 279 F. Supp. 2d 910, 921 (N.D. Ohio 2003), Browne v. Kline Tysons Imps., Inc., 190 F. Supp. 2d 827, 831-33 (E.D. Va. 2002), Pitchford v. Oakwood Mobile Homes, Inc., 124 F. Supp. 2d 958, 962-65 (W.D. Va. 2000), and Koons Ford of Balt., Inc. v. Lobach, 919 A.2d 722, 737 (Md. 2007) (all holding MMWA claims are exempt from binding arbitration).

federal circuit courts to consider the issue have concluded that the MMWA does not prohibit binding arbitration of written warranty claims.[4] Davis v. S. Energy Homes, Inc., 305 F.3d 1268, 1272 (11th Cir. 2002) (holding that MMWA permits enforcement of binding arbitration agreements related to written warranties); Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 479 (5th Cir. 2002) (holding that "MMWA does not preclude binding arbitration of claims pursuant to a valid binding arbitration agreement, which the courts must enforce pursuant to the [Federal Arbitration Act]").[5] After considering the MMWA and its legislative history, the federal policy favoring binding arbitration, and the persuasive federal circuit court opinions, we conclude that the MMWA permits pre-dispute binding arbitration of written warranty claims.

A. MMWA.

Because product warranties often left consumers with "little understanding of the frequently complex legal implications of warranties on consumer products," 40 Fed. Reg.

[4] In Kolev v. Euromotors West/The Auto Gallery, 658 F.3d 1024 (9th Cir. 2011), the Ninth Circuit held that the MMWA prohibited pre-dispute binding arbitration on written warranty claims. But that opinion has since been withdrawn. See Kolev v. Euromotors W./The Auto Gallery, 676 F.3d 867 (9th Cir. 2012) ("The Opinion filed September 20, 2011, and appearing at 658 F.3d 1024 (9th Cir. 2011), is withdrawn. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit.") (citations omitted).

[5] In Florida, only the Second District Court of Appeal has commented on the arbitrability of MMWA claims. See Stacy David, Inc. v. Consuegra, 845 So. 2d 303 (Fla. 2d DCA 2003). In Consuegra, the Second District, though not specifically asked to decide whether MMWA claims are arbitrable, briefly addressed the issue when considering the validity of an arbitration agreement. Citing Davis, it found that "the Eleventh Circuit has required arbitration of claims under the Magnuson-Moss Act." Consuegra, 845 So. 2d at 306. Based on Davis, the court concluded that "no count of the [consumer's] complaint appears to fall outside the arbitration agreement." Id. at 306-07. The Second District then reversed the trial court's order and compelled arbitration of the buyer's MMWA claims. Id. at 306.

60168 (Dec. 31, 1975) (quoting S. Rep. No. 93-151 (1973)), Congress enacted the MMWA "[t]o provide minimum disclosure standards for written consumer product warranties; to define minimum federal content standards for such warranties; to amend the federal trade commission act in order to improve its consumer protection activities; and for other purposes." Magnuson-Moss Warranty-Federal Trade Comm'n Improvement Act, Pub. L. No. 93-637, § 356, 88 Stat. 2183 (1975). The MMWA requires warrantors to "fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty." 15 U.S.C. § 2302(a) (2012). It also creates a private right of action for those consumers who have been "damaged by the failure of a . . . warrantor . . . to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract." Id. § 2310(d)(1). An aggrieved consumer has the option to sue for damages and equitable relief in either state courts or federal district courts. Id. If the consumer prevails, he or she is entitled to attorney's fees and costs. Id. § 2310(d)(2).

Along with a private right of action, the MMWA encourages warrantors to settle consumer claims "fairly and expeditiously" through informal dispute settlement procedures. Id. § 2310(a). While the term "informal dispute settlement procedures" is not defined in the MMWA, Congress authorized the FTC to establish minimum requirements for any such procedures that are incorporated into the terms of a written warranty. Id. § 2310(a)(2). If a warrantor establishes an informal dispute settlement procedure, it may include within the written warranty "a requirement that the consumer resort to such procedure before pursuing any legal remedy." Id. § 2310(a)(3)(C). The FTC has broadly interpreted the term "informal dispute settlement procedures" to include both binding and

nonbinding arbitration, 16 C.F.R. § 700.8 (2015), and has adopted a regulation stating that informal dispute settlement procedures under the MMWA cannot be legally binding. 16 C.F.R. § 703.5(j) (2015).

B. Federal Policy.

Federal policy favors arbitration. In 1925, Congress enacted the Federal Arbitration Act ("FAA") "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). To this end, the FAA provides that

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2012).

The FAA establishes a "liberal federal policy favoring arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). The Supreme Court has interpreted this policy as establishing a strong presumption favoring the enforcement of binding arbitration agreements so that any doubts over whether an issue is arbitrable should be resolved in favor of arbitration. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). This presumption applies equally to statutory claims. Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987). Courts will enforce binding arbitration of statutory claims, unless Congress has expressed a clear

intention to preclude arbitration. Gilmer, 500 U.S. at 26. The party challenging arbitration bears the heavy burden of proving such congressional intent. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91-92 (2000).

C. The McMahon Test.

To determine whether Congress has intended to prohibit binding arbitration of a statutory claim, we apply the Supreme Court's McMahon test, which requires us to consider three factors to determine Congress's intent: "(1) the text of the statute; (2) its legislative history; and (3) whether 'an inherent conflict between arbitration and the underlying purposes [of the statute]' exists." Davis, 305 F.3d at 1273 (quoting McMahon, 482 U.S. at 226). To date, "[i]n every statutory right case that the Supreme Court has considered, it has upheld binding arbitration if the statute creating the right did not *explicitly* preclude arbitration."[6] Id.

Turning to the first McMahon factor, the text of MMWA does not expressly preclude or even mention "binding arbitration." Despite a lack of an express reference, Mr. Krol argues that Congress expressed its intention to prohibit binding arbitration in two ways. One, it created a right to commence a civil action for written warranty claims. Two, when Congress enacted the MMWA, arbitration—both binding and non-binding—was widely

[6] The Supreme Court has upheld binding arbitration agreements related to claims arising under the following federal statutes: Securities Act of 1933, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484-86 (1989), overruling Wilko v. Swan, 346 U.S. 427 (1953); Age Discrimination in Employment Act ("ADEA"), Gilmer, 500 U.S. at 35; Sherman Act, Mitsubishi, 473 U.S. at 628; Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organization Act ("RICO"), McMahon, 482 U.S. 220; Truth in Lending Act, Green Tree Financial Corp.-Alabama, 531 U.S. at 88-92; RICO, PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401 (2003); Credit Repair Organizations Act, CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); and the Fair Labor Standards Act, Epic Systems v. Lewis, 138 S. Ct. 1612 (2018).

considered an "informal" procedure. Hence, he posits that it was likely that Congress would have considered binding arbitration an informal dispute settlement procedure that would serve as a prerequisite to litigation that would be regulated by the FTC.

Both of these arguments fail. First, the provision of a private right of action alone does not establish Congressional intent to prohibit binding arbitration. Davis, 305 F.3d at 1274 (citing Gilmer, 500 U.S. at 29 (rejecting argument that binding arbitration is improper "because it deprives claimants of the judicial forum provided for by the ADEA")). Second, binding arbitration is not comparable to the informal dispute settlement procedures described in the MMWA because it is not a prerequisite to litigation—it is a *substitute* for litigation. Walton, 298 F.3d at 475; see Mitsubishi, 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

The second McMahon factor requires us to examine the MMWA's legislative history. Like the text, the legislative history does not suggest that binding arbitration is prohibited. Indeed, it implies the opposite. For instance, the Senate declared in its Conference Report that litigants may look to the courts and arbiters alike "to resolve 'actions' and to be the 'ultimate' means of resolving an MMWA claim." Jones v. Gen. Motors Corp., 640 F. Supp. 2d 1124, 1137 (D. Ariz. 2009) (citing S. Rep. No. 93-1408 (1974), as reprinted in 1974 U.S.C.C.A.N. 7755). The Senate Conference Report further explains 15 U.S.C. § 2304(a)(4)—the section of the MMWA that gives the FTC the ability to define what constitutes "a reasonable number of attempts" a warrantor must make to remedy a product defect before a refund or replacement must be provided—by stating that "if the [FTC] does not determine by rule what constitutes a reasonable number of

attempts in a given situation, then the parties or, *ultimately*, a third party (*arbiter* or judge) would decide." Id. (quoting S. Rep. No. 93-1408, as reprinted in 1974 U.S.C.C.A.N. at 7757) (emphases added). This explanation of 15 U.S.C. § 2304, which, among other things, authorizes the FTC to establish minimum standards regarding the duration of a warranty, consequential damage provisions, and conditions imposed by the warrantor, demonstrates that binding arbitration is permitted to resolve MMWA disputes. In fact, the same Conference Report recognizes that when there is no FTC rule regulating the reasonableness of a warrantor's duty, "the consumer could challenge the reasonableness of such requirement *by bringing an action for breach of warranty* and arguing that the warrantor had breached his full warranty obligation. The burden would then be upon the warrantor to establish before an *arbiter or in a court* that the requirement . . . was reasonable . . . ." Id. at 1138 (quoting S. Rep. No. 93-1408, as reprinted in 1974 U.S.C.C.A.N. at 7757). Thus, the legislative history suggests that Congress considered binding arbitration a reasonable alternative to civil litigation for resolving MMWA claims. At least, it does not suggest that binding arbitration is prohibited.

The third McMahon factor requires us to consider whether there is an underlying conflict between binding arbitration and the purposes of the MMWA. Mr. Krol argues that such a conflict exists, suggesting that binding arbitration of written warranty claims would undermine Congress's goals of protecting consumers and correcting the inequality in bargaining power between warrantors and consumers.

Neither of these goals overrides the strong federal policy favoring arbitration. To the first goal, the Supreme Court has repeatedly enforced binding arbitration of statutory claims where the purpose of the statute was consumer protection. See Davis, 305 F.3d

at 1276 (collecting cases). Nothing suggests that consumers are less able to vindicate their MMWA claims through arbitration than through civil litigation. To the second goal, unequal bargaining power alone will not preclude binding arbitration when Congress has not expressed clear intent to do so. See id. at 1277 (citing Gilmer, 500 U.S. at 33 (stating that "[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context")). Nothing here suggests that the inequality of bargaining power between consumers and warrantors is more substantial than in other instances when the Supreme Court has allowed binding arbitration.

D. The Chevron Test.

Notwithstanding the results of our McMahon analysis, Mr. Krol contends that since Congress gave the FTC rulemaking authority to enforce the MMWA, we must defer to its regulations prohibiting binding arbitration of MMWA written warranty claims. See 16 C.F.R. §§ 700.8, 703.5(j) (2015). Because Congress has given the FTC rulemaking authority regarding portions of the MMWA, we apply the two-prong test set forth in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), to determine whether we must defer to the FTC's interpretive regulations.

Chevron informs us to defer to the FTC's interpretive regulations prohibiting binding arbitration only if: (1) Congress has not directly spoken to the specific issue; and (2) the FTC's interpretation "is based on a permissible construction of the statute." 467

U.S. at 843. Because the MMWA does not speak to binding arbitration, we must only consider the test's second prong.[7]

State and federal courts are again divided over whether the FTC's reading of the MMWA is permissible. The only federal circuit court to consider the reasonableness of the FTC's interpretation has found it unreasonable. See Davis, 305 F.3d at 1279. For several reasons, we agree with Davis that the FTC's interpretation that the MMWA precludes binding arbitration is unreasonable.

First, for the FTC to have authority to regulate binding arbitration, we would have to accept the notion that Congress considered binding arbitration an informal dispute settlement mechanism. We do not. As our discussion of the McMahon test demonstrates, Congress appears to have understood binding arbitration to be a substitute for a judicial forum, not an informal dispute settlement mechanism.

Second, the FTC's prohibition of arbitration relies in part on the idea that by providing a judicial forum, Congress intended to preclude binding arbitration. The Supreme Court has been unwavering on this point—a statute's provision of a judicial forum does not show Congressional intent to prohibit arbitration. Thus, we too reject this notion.

Third, the FTC's ultimate rationale for prohibiting binding arbitration is rooted in the belief that an arbitral forum does not ensure consumer protection. For more than half a

[7] In Walton, the Fifth Circuit avoided Chevron's second prong by concluding that Congress spoke to binding arbitration when it expressed in the FAA a clear intention to favor enforcement of binding arbitration agreements. 298 F.3d at 475. We disagree and join the majority of courts who have concluded that Congress has not spoken directly to the permissibility of binding arbitration under the MMWA. See, e.g., Davis, 305 F.3d at 1278; Jones, 640 F. Supp. 2d at 1139; Higgs, No. C2-02-1092, 2007 WL 2034376, at *8; Lobach, 919 A.2d at 737.

century, the Supreme Court has not viewed arbitration as harmful to consumers, but instead as a proceeding that is adequate to protect consumers. See Davis, 305 F.3d at 1279 (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) (noting that "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation")). The Supreme Court has refused to defer to interpretive regulations prohibiting arbitration that have depended on the Court's formerly held view disfavoring arbitration. See, e.g., McMahon, 482 U.S. at 232-34 (rejecting SEC's interpretation of Securities Exchange Act of 1934 that binding arbitration agreements were prohibited). Given the Supreme Court's current view on arbitration, the FTC's continued hostility towards arbitration is unwarranted.

In sum, given the limited scope of the FTC's authority to regulate only non-binding, pre-dispute settlement procedures and the federal policy favoring arbitration enforcement, we conclude the FTC's prohibition of arbitration is based on an impermissible construction of the statute. As a result, we need not defer to the FTC's interpretive regulations, and instead, hold that MMWA claims can be subject to binding arbitration.

II. The FTC's Single Document Rule.

Mr. Krol also contends that the arbitration agreement here is unenforceable because it was in the retail purchase order and not in a single document along with the other warranty terms.[8]

[8] Under Florida law, when, as here, parties to a contract execute two or more documents at or near the same time and concern the same transaction or subject matter, the documents are generally construed together as a single contract. E.g., Mnemonics, Inc. v. Max Davis Assocs., 808 So. 2d 1278, 1280 (Fla. 5th DCA 2002); see Wilson v. Terwillinger, 140 So. 3d 1122, 1124 (Fla. 5th DCA 2014) (reiterating "contemporaneous

The MMWA requires that warrantors, providing a written warranty to a consumer, must "fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty." 15 U.S.C. § 2302(a) (2012). Congress delegated authority to the FTC to establish the items warrantors must disclose. In response, the FTC requires a warrantor to disclose nine material facts related to the warranty, one of which requires disclosure in the warranty of "[i]nformation respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with part 703 of this subchapter." 16 C.F.R. § 701.3(a)(6) (2015). The FTC has also established what has been called the single document rule, which requires warrantors to "clearly and conspicuously disclose [all warranty terms] in a single document in simple and readily understood language." Id. § 701.3(a). The purpose of the single document rule is to avoid consumer confusion.

In arguing that the single document rule required Gibson Auto to disclose the binding arbitration clause in the same document with the other warranty terms, Mr. Krol relies on Cunningham v. Fleetwood Homes of Georgia, 253 F.3d 611, 624 (11th Cir. 2001). In that case, a mobile-home manufacturer, as a third-party beneficiary of a stand-alone arbitration agreement, moved to compel arbitration of a consumer's warranty claims against the warrantor under the MMWA. 253 F.3d at 613. The Eleventh Circuit affirmed the trial court's order denying the manufacturer's motion, concluding that the stand-alone arbitration agreement violated the FTC's single document rule. In reaching this conclusion, the court emphasized that the MMWA and applicable FTC rules obligate

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instrument rule" and that origins "are of rather ancient vintage" and has been consistently applied since inception).

warrantors to "clearly and conspicuously disclose [warranty terms] in a single document in simple and readily understood language." Id. at 620 (quoting 16 C.F.R. § 701.3(a)). One such term obligates a warrantor to disclose "[i]information respecting the availability of any informal dispute settlement mechanism." Id. at 621. Interpreting the "informal dispute settlement mechanism" to include binding arbitration, the court found that the failure to include the binding arbitration agreement in the warranty document violated the FTC's disclosure requirements. Id. at 620.

The Third District Court of Appeal has adopted Cunningham's application of the single document rule. See Larrain v. Bengal Motor Co. Ltd., 976 So. 2d 12, 14 (Fla. 3d DCA 2008) (determining, based on Cunningham, that "clear language of the MMWA expresses Congress' intent that *any* arbitration agreement must be disclosed within the written warranty and not as a stand-alone document," and thereafter, holding that single subject rule governs disclosure of binding arbitration agreements) (emphasis added). However, we decline to do so.

Since Cunningham, state and federal district courts have divided over whether to apply the single document rule to binding arbitration agreements. Compare Jones, 640 F. Supp. 2d at 1143, Patriot Mfg., Inc. v. Dixon, 399 F. Supp. 2d 1298, 1304-09 (S.D. Ala. 2005), and Patriot Mfg., Inc. v. Jackson, 929 So. 2d 997, 1005-07 (Ala. 2005) (all holding single document rule does not require arbitration agreement be included in written warranty), with Porter v. Chrysler Grp. LLC, No. 6:13-CV-555-ORL-37, 2013 WL 6768218, at *1 (M.D. Fla. Dec. 19, 2013), TGB Marine, LLC v. Midnight Exp. Power Boats, Inc., No. 08-60940-CIV, 2008 WL 3889578, (S.D. Fla. 2008), Harnden v. Ford Motor Co.,

408 F. Supp. 2d 300, 307 (E.D. Mich. 2004), and Larrain, 976 So. 2d at 14 (all holding single document rule requires arbitration agreement to be included in written warranty).

The courts that have refused to follow Cunningham have done so by reasoning that its application of the single document rule rests on an incorrect understanding that the terms "binding arbitration" and "informal dispute settlement procedures" are interchangeable. See, e.g., Jones, 640 F. Supp. 2d at 1143; Dixon, 399 F. Supp. 2d at 1304-09; Jackson, 929 So. 2d at 1005-07. Instead, these courts conclude that the Eleventh Circuit subsequently reversed positions in Davis, making clear that binding arbitration is not an informal dispute settlement procedure or a prerequisite to litigation, a notion that also aligns with the Supreme Court's view of binding arbitration. See Mitsubishi, 473 U.S. at 628.

In Dixon, the District Court for the Southern District of Alabama best explained Davis's effect on both Cunningham's holding and on the single document rule, writing:

> In the wake of Cunningham and Davis, then, what is the present status of the MMWA's disclosure requirements? Clearly, the single document rule remains alive and well. But the statutory and regulatory scheme does not require that *all* information having any bearing on the warranty must be disclosed within the warranty. To the contrary, the MMWA—and more precisely § 2302(a)—plainly provides that a warrantor's required disclosures under the single document rule are limited to those specifically enumerated in the FTC regulations. Those regulations do not identify arbitration agreements as items that must be disclosed, but they do mandate disclosure of "informal dispute settlement mechanisms." The Davis case, which is binding precedent to this Court, decided that arbitration agreements are not "informal dispute settlement mechanisms" in the context of the MMWA.
>
> Under this synopsis of the law, then, it is plain that, while the single document rule enjoys continued vitality, arbitration agreements lie beyond the scope of the disclosures required pursuant to that rule.

399 F. Supp. 2d at 1303-04.

This reasoning is persuasive. Cunningham's application of the single document rule rests solely on the notion that binding arbitration is an informal dispute settlement procedure. If we accept this premise, we would need to then defer to the FTC's regulations prohibiting binding arbitration because as an informal dispute settlement mechanism, binding arbitration would then be subject to the FTC's rulemaking authority. This is a view that we do not accept.

The FTC's disclosure regulations do not explicitly mention binding arbitration. By enforcing an arbitration disclosure requirement that is not expressly included in the FTC's regulations, this Court would "encroach on the [MMWA's] statutory and regulatory framework by unilaterally constructing a judicial rule that neither Congress nor the FTC has seen fit to create." Dixon, 399 F. Supp. 2d at 1309. The MMWA "requires disclosure in the warranty itself only 'to the extent required by the rules of the [FTC],' and the FTC has seen fit to require disclosure of required resort to an informal dispute-settlement mechanism, not the completely separate process of binding arbitration." Jackson, 929 So. 2d at 1006. For these reasons, we hold that the FTC's single-document rule does not apply to binding arbitration agreements. We disagree with the Third District Court's opinion in Larrain and certify conflict.

AFFIRMED; CONFLICT CERTIFIED.

EVANDER, C.J. and SASSO, J., concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

LES KROL,

Appellant,

v. CASE NO. 5D18-2149

FCA US, LLC AND GIBSON AUTO SALES, INC. D/B/A GIBSON TRUCK WORLD,

Appellees.
_____/

DATE: May 10, 2019

BY ORDER OF THE COURT:

ORDERED that Appellant's Motion for Attorney's Fees and Costs, filed July 25, 2018, is denied.

I hereby certify that the foregoing is (a true copy of) the original Court order.

Joanne P. Simmons
JOANNE P. SIMMONS, CLERK

Panel: Judges Evander, Orfinger, and Sasso

cc:

Robert Eric Sickles Jeremy Kespohl Yesica S. Liposky

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL OR BY PETITION, AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION OR DECISION;

YOU ARE HEREBY COMMANDED THAT FURTHER PROCEEDINGS AS MAY BE REQUIRED BE HAD IN SAID CAUSE IN ACCORDANCE WITH THE RULING OF THIS COURT AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF FLORIDA.

WITNESS THE HONORABLE KERRY I. EVANDER, CHIEF JUDGE OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT, AND THE SEAL OF THE SAID COURT AT DAYTONA BEACH, FLORIDA ON THIS DAY.

DATE: June 03, 2019

FIFTH DCA CASE NO.: 5D 18-2149

CASE STYLE: LES KROL v. FCA US, LLC AND GIBSON AUTO SALES, INC. D/B/A GIBSON TRUCK WORLD

COUNTY OF ORIGIN: Brevard

TRIAL COURT CASE NO.: 2017-CA-049992

I hereby certify that the foregoing is
(a true copy of) the original Court mandate.

Joanne P. Simmons
JOANNE P. SIMMONS, CLERK

cc:

Robert Eric Sickles	Jeremy Kespohl	Yesica S. Liposky
Angela Thomas	Clerk Brevard	

Filing # 90596035 E-Filed 06/05/2019 10:27:37 AM

RECEIVED, 06/05/2019 10:28:29 AM, Clerk, Fifth District Court of Appeal

IN THE DISTRICT COURT OF APPEAL
FOR THE FIFTH DISTRICT
STATE OF FLORIDA

LES KROL,

Plaintiff / Appellant,

v.

FCA US, LLC and GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,

Appellee / Defendant.[1]

Appeal No. 5D18-2149

L.T. No. 05-2017-CA-049992

NOTICE OF APPEARANCE AS CO-COUNSEL

COMES NOW the undersigned attorney and gives notice of his appearance on behalf of the Plaintiff as co-counsel to Morgan & Morgan PA, attorneys of record for the Plaintiff/Appellant, to assist the firm in the prosecution of this matter.

Filings should be served on the undersigned at: tfgreene3@msn.com.

[1] FCA US, LLC is not an appellee in the instant appeal, as it resolved Plaintiff/Appellant's claims against it shortly after the underlying lawsuit was filed, and before this appeal was initiated. *See* Appellant's *Initial Brief* to the Fifth District at p. 1, FN1.

CERTIFICATE OF SERVICE

I certify that on **June 5, 2019** a true and correct copy of this filing was served by e-mail on the following person(s) pursuant to Fla. S. Ct. Order SC10-2101 and Rule 2.516(b)(1)(A) of the Florida Rules of Judicial Administration:

Yesica S. Liposky, Esquire
Nelson, Mullins, Broad & Cassell LLP
100 N. Tampa Street, Suite 3500
Tampa, FL 33602
Counsel for Gibson Auto Sales, Inc., at
yesica.liposky@nelsonmullins.com;
robert.sickles@nelsonmullins.com;
kim.novak@nelsonmullins.com;
eileen.garvey@nelsonmullins.com;
jessica.lovins@nelsonmullins.com.

Respectfully submitted,

/s/ Theodore F. Greene III .

Theodore F. Greene III, Esquire
Fla. Bar No. 0502634
Law Offices of Theodore F. Greene, LC
PO Box 720157
Orlando, FL 32872-0157
Phone: (407) 482-8212
e-mail: tfgreene3@msn.com
Co-Counsel with Morgan & Morgan PA,
attorneys for Plaintiff/Appellant

Filing # 90596286 E-Filed 06/05/2019 10:29:58 AM

IN THE DISTRICT COURT OF APPEAL
FOR THE FIFTH DISTRICT
STATE OF FLORIDA

LES KROL,

Plaintiff / Appellant,

v.

FCA US, LLC and GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,

Appellees / Defendant. [1]

Appeal No. 5D18-2149

L.T. No. 05-2017-CA-049992

RECEIVED, 06/05/2019 10:30:33 AM, Clerk, Fifth District Court of Appeal

NOTICE TO INVOKE DISCRETIONARY JURISDICTION OF THE FLORIDA SUPREME COURT

NOTICE IS GIVEN that Appellant/Petitioner, LES KROL, invokes the discretionary jurisdiction of the Florida Supreme Court to review the decision of this Court rendered in this appeal on May 10, 2019.

Pursuant to Rule 9.030(a)(2)(A)(vi) and Rule 9.120, the decision is within the discretionary jurisdiction of the Florida Supreme Court because the district court's decision certifies express and direct conflict with the decision of another district court of appeal on the same question of law. A copy of the decision under review is attached hereto as "Appendix A."

[1] FCA US, LLC is not an appellee in the instant appeal, as it resolved Plaintiff/Appellant's claims against it shortly after the underlying lawsuit was filed, and before this appeal was initiated. *See* Appellant's *Initial Brief* to the Fifth District at p. 1, FN1.

Dated June 5, 2019.

CERTIFICATE OF SERVICE

I certify that on **June 5, 2019** a true and correct copy of this filing was served by e-mail on the following person(s) pursuant to Fla. S. Ct. Order SC10-2101 and Rule 2.516(b)(1)(A) of the Florida Rules of Judicial Administration:

Yesica S. Liposky, Esquire
Nelson, Mullins, Broad & Cassell LLP
100 N. Tampa Street, Suite 3500
Tampa, FL 33602
Counsel for Gibson Auto Sales, Inc., at
yesica.liposky@nelsonmullins.com;
robert.sickles@nelsonmullins.com;
kim.novak@nelsonmullins.com;
eileen.garvey@nelsonmullins.com;
jessica.lovins@nelsonmullins.com.

Respectfully submitted,

/s/ Theodore F. Greene III .

Theodore F. Greene III, Esquire
Fla. Bar No. 0502634
Law Offices of Theodore F. Greene, LC
PO Box 720157
Orlando, FL 32872-0157
Phone: (407) 482-8212
e-mail: tfgreene3@msn.com
Co-Counsel with Morgan & Morgan PA,
attorneys for Plaintiff/Appellant

Appendix A-1

Krol v. FCA US LLC and Gibson Auto Sales, Inc.,
--- So.3d ---; 2019 Fla. App. LEXIS 7194; 2019 WL 2062796
(Fla. 5th DCA May 10, 2019)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

LES KROL,

Appellant,

v. Case No. 5D18-2149

FCA US, LLC AND GIBSON AUTO
SALES, INC. D/B/A GIBSON TRUCK WORLD,

Appellees.

_____/

Opinion filed May 10, 2019

Nonfinal Appeal from the Circuit Court
for Brevard County,
Stephen R. Koons, Judge.

Jeremy Kespohl and Angela Thomas, of Morgan & Morgan, P.A., Jacksonville, for Appellant.

Robert E. Sickles and Yesica S. Liposky , of Nelson Mullins Broad and Cassel, Tampa, for Appellee, Gibson Auto Sales, Inc. d/b/a Gibson Truck World.

No Appearance for other Appellee.

ORFINGER, J.

Les Krol appeals an order compelling arbitration of the written warranty claims that he brought against Gibson Auto Sales, Inc. ("Gibson Auto") under the Magnuson-Moss

Warranty Act ("MMWA").[1] Because we conclude that the MMWA does not prohibit binding arbitration of written warranty claims and the arbitration agreement here does not violate Federal Trade Commission ("FTC") disclosure rules, we affirm the order compelling arbitration.

BACKGROUND

This case arises from Mr. Krol's purchase of a used truck from Gibson Auto. As part of the sale, the parties executed an installment sales contract and a separate retail purchase order that included a binding arbitration agreement for any dispute related to the truck's purchase.[2] Gibson Auto also extended an express written warranty on the truck.

A few months after purchasing the truck, Mr. Krol sued Gibson Auto under the MMWA, asserting several causes of action related to alleged defects in the truck that Gibson Auto was unable to remedy. In response, Gibson Auto moved to stay the proceedings and to compel arbitration in accordance with the parties' agreement. Mr. Krol opposed the motion, asserting the same arguments he makes in this appeal. Following a

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[1] 15 U.S.C. §§ 2301-12 (2012).

[2] The arbitration clause in the retail buyer order states in full:

> Dealer and customer agree that any controversy, claim, suit, demand, counterclaim, cross claim, or third-party complaint, arising out of, or relating to this Order or the parties' relationship (whether statutory or otherwise), including, but not limited to any matter that may have induced the Customer to enter into any relationship with Dealer and any disputes regarding the validity or enforceability of this clause (collectively referred to as "Claim"), shall be submitted to final and binding arbitration . . . . The arbitration shall be final and binding on all parties.

hearing, the trial court entered an order granting Gibson's motion to stay and compelling arbitration.

ANALYSIS

We review a trial court's ruling on a motion to compel arbitration de novo. Tropical Ford, Inc. v. Major, 882 So. 2d 476, 478 (Fla. 5th DCA 2004). When deciding whether to compel arbitration according to an agreement, a trial court must consider: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999). Mr. Krol's appeal centers on the second factor. He argues that no arbitrable issue existed here because MMWA claims are exempt from binding arbitration. Alternatively, he posits that the arbitration agreement is unenforceable because it violates the FTC's disclosure rules since the arbitration clause does not appear in a single document with the other warranty terms.

I. The Arbitrability of MMWA claims.

The United States Supreme Court has not addressed whether MMWA claims are arbitrable, and state and lower federal courts are divided on the issue.[3] However, both

[3] Compare, e.g., Jones v. Gen. Motors Corp., 640 F. Supp. 2d 1124, 1143 (D. Ariz. 2009), S. Energy Homes, Inc. v. Ard, 772 So. 2d 1131, 1135 (Ala. 2000), Borowiec v. Gateway 2000, 808 N.E.2d 957, 970 (Ill. 2004), Abela v. Gen. Motors Corp., 677 N.W.2d 325, 327 (Mich. 2004), and In re Am. Homestar of Lancaster, Inc., 50 S.W.3d 480, 492 (Tex. 2001) (all holding MMWA claims are subject to binding arbitration), with Higgs v. Warranty Grp., No. C2-02-1092, 2007 WL 2034376, at *8 (S.D. Ohio July 11, 2007), Rickard v. Teynor's Homes, Inc., 279 F. Supp. 2d 910, 921 (N.D. Ohio 2003), Browne v. Kline Tysons Imps., Inc., 190 F. Supp. 2d 827, 831-33 (E.D. Va. 2002), Pitchford v. Oakwood Mobile Homes, Inc., 124 F. Supp. 2d 958, 962-65 (W.D. Va. 2000), and Koons Ford of Balt., Inc. v. Lobach, 919 A.2d 722, 737 (Md. 2007) (all holding MMWA claims are exempt from binding arbitration).

federal circuit courts to consider the issue have concluded that the MMWA does not prohibit binding arbitration of written warranty claims.[4] Davis v. S. Energy Homes, Inc., 305 F.3d 1268, 1272 (11th Cir. 2002) (holding that MMWA permits enforcement of binding arbitration agreements related to written warranties); Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 479 (5th Cir. 2002) (holding that "MMWA does not preclude binding arbitration of claims pursuant to a valid binding arbitration agreement, which the courts must enforce pursuant to the [Federal Arbitration Act]").[5] After considering the MMWA and its legislative history, the federal policy favoring binding arbitration, and the persuasive federal circuit court opinions, we conclude that the MMWA permits pre-dispute binding arbitration of written warranty claims.

A. MMWA.

Because product warranties often left consumers with "little understanding of the frequently complex legal implications of warranties on consumer products," 40 Fed. Reg.

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[4] In Kolev v. Euromotors West/The Auto Gallery, 658 F.3d 1024 (9th Cir. 2011), the Ninth Circuit held that the MMWA prohibited pre-dispute binding arbitration on written warranty claims. But that opinion has since been withdrawn. See Kolev v. Euromotors W./The Auto Gallery, 676 F.3d 867 (9th Cir. 2012) ("The Opinion filed September 20, 2011, and appearing at 658 F.3d 1024 (9th Cir. 2011), is withdrawn. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit.") (citations omitted).

[5] In Florida, only the Second District Court of Appeal has commented on the arbitrability of MMWA claims. See Stacy David, Inc. v. Consuegra, 845 So. 2d 303 (Fla. 2d DCA 2003). In Consuegra, the Second District, though not specifically asked to decide whether MMWA claims are arbitrable, briefly addressed the issue when considering the validity of an arbitration agreement. Citing Davis, it found that "the Eleventh Circuit has required arbitration of claims under the Magnuson-Moss Act." Consuegra, 845 So. 2d at 306. Based on Davis, the court concluded that "no count of the [consumer's] complaint appears to fall outside the arbitration agreement." Id. at 306-07. The Second District then reversed the trial court's order and compelled arbitration of the buyer's MMWA claims. Id. at 306.

60168 (Dec. 31, 1975) (quoting S. Rep. No. 93-151 (1973)), Congress enacted the MMWA "[t]o provide minimum disclosure standards for written consumer product warranties; to define minimum federal content standards for such warranties; to amend the federal trade commission act in order to improve its consumer protection activities; and for other purposes." Magnuson-Moss Warranty-Federal Trade Comm'n Improvement Act, Pub. L. No. 93-637, § 356, 88 Stat. 2183 (1975). The MMWA requires warrantors to "fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty." 15 U.S.C. § 2302(a) (2012). It also creates a private right of action for those consumers who have been "damaged by the failure of a . . . warrantor . . . to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract." Id. § 2310(d)(1). An aggrieved consumer has the option to sue for damages and equitable relief in either state courts or federal district courts. Id. If the consumer prevails, he or she is entitled to attorney's fees and costs. Id. § 2310(d)(2).

Along with a private right of action, the MMWA encourages warrantors to settle consumer claims "fairly and expeditiously" through informal dispute settlement procedures. Id. § 2310(a). While the term "informal dispute settlement procedures" is not defined in the MMWA, Congress authorized the FTC to establish minimum requirements for any such procedures that are incorporated into the terms of a written warranty. Id. § 2310(a)(2). If a warrantor establishes an informal dispute settlement procedure, it may include within the written warranty "a requirement that the consumer resort to such procedure before pursuing any legal remedy." Id. § 2310(a)(3)(C). The FTC has broadly interpreted the term "informal dispute settlement procedures" to include both binding and

nonbinding arbitration, 16 C.F.R. § 700.8 (2015), and has adopted a regulation stating that informal dispute settlement procedures under the MMWA cannot be legally binding. 16 C.F.R. § 703.5(j) (2015).

B. Federal Policy.

Federal policy favors arbitration. In 1925, Congress enacted the Federal Arbitration Act ("FAA") "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). To this end, the FAA provides that

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2012).

The FAA establishes a "liberal federal policy favoring arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). The Supreme Court has interpreted this policy as establishing a strong presumption favoring the enforcement of binding arbitration agreements so that any doubts over whether an issue is arbitrable should be resolved in favor of arbitration. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). This presumption applies equally to statutory claims. Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987). Courts will enforce binding arbitration of statutory claims, unless Congress has expressed a clear

intention to preclude arbitration. Gilmer, 500 U.S. at 26. The party challenging arbitration bears the heavy burden of proving such congressional intent. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91-92 (2000).

C. The McMahon Test.

To determine whether Congress has intended to prohibit binding arbitration of a statutory claim, we apply the Supreme Court's McMahon test, which requires us to consider three factors to determine Congress's intent: "(1) the text of the statute; (2) its legislative history; and (3) whether 'an inherent conflict between arbitration and the underlying purposes [of the statute]' exists." Davis, 305 F.3d at 1273 (quoting McMahon, 482 U.S. at 226). To date, "[i]n every statutory right case that the Supreme Court has considered, it has upheld binding arbitration if the statute creating the right did not *explicitly* preclude arbitration."[6] Id.

Turning to the first McMahon factor, the text of MMWA does not expressly preclude or even mention "binding arbitration." Despite a lack of an express reference, Mr. Krol argues that Congress expressed its intention to prohibit binding arbitration in two ways. One, it created a right to commence a civil action for written warranty claims. Two, when Congress enacted the MMWA, arbitration—both binding and non-binding—was widely

[6] The Supreme Court has upheld binding arbitration agreements related to claims arising under the following federal statutes: Securities Act of 1933, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484-86 (1989), overruling Wilko v. Swan, 346 U.S. 427 (1953); Age Discrimination in Employment Act ("ADEA"), Gilmer, 500 U.S. at 35; Sherman Act, Mitsubishi, 473 U.S. at 628; Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organization Act ("RICO"), McMahon, 482 U.S. 220; Truth in Lending Act, Green Tree Financial Corp.-Alabama, 531 U.S. at 88-92; RICO, PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401 (2003); Credit Repair Organizations Act, CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); and the Fair Labor Standards Act, Epic Systems v. Lewis, 138 S. Ct. 1612 (2018).

considered an "informal" procedure. Hence, he posits that it was likely that Congress would have considered binding arbitration an informal dispute settlement procedure that would serve as a prerequisite to litigation that would be regulated by the FTC.

Both of these arguments fail. First, the provision of a private right of action alone does not establish Congressional intent to prohibit binding arbitration. Davis, 305 F.3d at 1274 (citing Gilmer, 500 U.S. at 29 (rejecting argument that binding arbitration is improper "because it deprives claimants of the judicial forum provided for by the ADEA")). Second, binding arbitration is not comparable to the informal dispute settlement procedures described in the MMWA because it is not a prerequisite to litigation—it is a *substitute* for litigation. Walton, 298 F.3d at 475; see Mitsubishi, 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

The second McMahon factor requires us to examine the MMWA's legislative history. Like the text, the legislative history does not suggest that binding arbitration is prohibited. Indeed, it implies the opposite. For instance, the Senate declared in its Conference Report that litigants may look to the courts and arbiters alike "to resolve 'actions' and to be the 'ultimate' means of resolving an MMWA claim." Jones v. Gen. Motors Corp., 640 F. Supp. 2d 1124, 1137 (D. Ariz. 2009) (citing S. Rep. No. 93-1408 (1974), as reprinted in 1974 U.S.C.C.A.N. 7755). The Senate Conference Report further explains 15 U.S.C. § 2304(a)(4)—the section of the MMWA that gives the FTC the ability to define what constitutes "a reasonable number of attempts" a warrantor must make to remedy a product defect before a refund or replacement must be provided—by stating that "if the [FTC] does not determine by rule what constitutes a reasonable number of

attempts in a given situation, then the parties or, *ultimately*, a third party (*arbiter* or judge) would decide." Id. (quoting S. Rep. No. 93-1408, as reprinted in 1974 U.S.C.C.A.N. at 7757) (emphases added). This explanation of 15 U.S.C. § 2304, which, among other things, authorizes the FTC to establish minimum standards regarding the duration of a warranty, consequential damage provisions, and conditions imposed by the warrantor, demonstrates that binding arbitration is permitted to resolve MMWA disputes. In fact, the same Conference Report recognizes that when there is no FTC rule regulating the reasonableness of a warrantor's duty, "the consumer could challenge the reasonableness of such requirement *by bringing an action for breach of warranty* and arguing that the warrantor had breached his full warranty obligation. The burden would then be upon the warrantor to establish before an *arbiter or in a court* that the requirement . . . was reasonable . . . ." Id. at 1138 (quoting S. Rep. No. 93-1408, as reprinted in 1974 U.S.C.C.A.N. at 7757). Thus, the legislative history suggests that Congress considered binding arbitration a reasonable alternative to civil litigation for resolving MMWA claims. At least, it does not suggest that binding arbitration is prohibited.

The third McMahon factor requires us to consider whether there is an underlying conflict between binding arbitration and the purposes of the MMWA. Mr. Krol argues that such a conflict exists, suggesting that binding arbitration of written warranty claims would undermine Congress's goals of protecting consumers and correcting the inequality in bargaining power between warrantors and consumers.

Neither of these goals overrides the strong federal policy favoring arbitration. To the first goal, the Supreme Court has repeatedly enforced binding arbitration of statutory claims where the purpose of the statute was consumer protection. See Davis, 305 F.3d

at 1276 (collecting cases). Nothing suggests that consumers are less able to vindicate their MMWA claims through arbitration than through civil litigation. To the second goal, unequal bargaining power alone will not preclude binding arbitration when Congress has not expressed clear intent to do so. See id. at 1277 (citing Gilmer, 500 U.S. at 33 (stating that "[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context")). Nothing here suggests that the inequality of bargaining power between consumers and warrantors is more substantial than in other instances when the Supreme Court has allowed binding arbitration.

D. The Chevron Test.

Notwithstanding the results of our McMahon analysis, Mr. Krol contends that since Congress gave the FTC rulemaking authority to enforce the MMWA, we must defer to its regulations prohibiting binding arbitration of MMWA written warranty claims. See 16 C.F.R. §§ 700.8, 703.5(j) (2015). Because Congress has given the FTC rulemaking authority regarding portions of the MMWA, we apply the two-prong test set forth in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), to determine whether we must defer to the FTC's interpretive regulations.

Chevron informs us to defer to the FTC's interpretive regulations prohibiting binding arbitration only if: (1) Congress has not directly spoken to the specific issue; and (2) the FTC's interpretation "is based on a permissible construction of the statute." 467

U.S. at 843. Because the MMWA does not speak to binding arbitration, we must only consider the test's second prong.[7]

State and federal courts are again divided over whether the FTC's reading of the MMWA is permissible. The only federal circuit court to consider the reasonableness of the FTC's interpretation has found it unreasonable. See Davis, 305 F.3d at 1279. For several reasons, we agree with Davis that the FTC's interpretation that the MMWA precludes binding arbitration is unreasonable.

First, for the FTC to have authority to regulate binding arbitration, we would have to accept the notion that Congress considered binding arbitration an informal dispute settlement mechanism. We do not. As our discussion of the McMahon test demonstrates, Congress appears to have understood binding arbitration to be a substitute for a judicial forum, not an informal dispute settlement mechanism.

Second, the FTC's prohibition of arbitration relies in part on the idea that by providing a judicial forum, Congress intended to preclude binding arbitration. The Supreme Court has been unwavering on this point—a statute's provision of a judicial forum does not show Congressional intent to prohibit arbitration. Thus, we too reject this notion.

Third, the FTC's ultimate rationale for prohibiting binding arbitration is rooted in the belief that an arbitral forum does not ensure consumer protection. For more than half a

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[7] In Walton, the Fifth Circuit avoided Chevron's second prong by concluding that Congress spoke to binding arbitration when it expressed in the FAA a clear intention to favor enforcement of binding arbitration agreements. 298 F.3d at 475. We disagree and join the majority of courts who have concluded that Congress has not spoken directly to the permissibility of binding arbitration under the MMWA. See, e.g., Davis, 305 F.3d at 1278; Jones, 640 F. Supp. 2d at 1139; Higgs, No. C2-02-1092, 2007 WL 2034376, at *8; Lobach, 919 A.2d at 737.

century, the Supreme Court has not viewed arbitration as harmful to consumers, but instead as a proceeding that is adequate to protect consumers. See Davis, 305 F.3d at 1279 (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) (noting that "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation")). The Supreme Court has refused to defer to interpretive regulations prohibiting arbitration that have depended on the Court's formerly held view disfavoring arbitration. See, e.g., McMahon, 482 U.S. at 232-34 (rejecting SEC's interpretation of Securities Exchange Act of 1934 that binding arbitration agreements were prohibited). Given the Supreme Court's current view on arbitration, the FTC's continued hostility towards arbitration is unwarranted.

In sum, given the limited scope of the FTC's authority to regulate only non-binding, pre-dispute settlement procedures and the federal policy favoring arbitration enforcement, we conclude the FTC's prohibition of arbitration is based on an impermissible construction of the statute. As a result, we need not defer to the FTC's interpretive regulations, and instead, hold that MMWA claims can be subject to binding arbitration.

II. The FTC's Single Document Rule.

Mr. Krol also contends that the arbitration agreement here is unenforceable because it was in the retail purchase order and not in a single document along with the other warranty terms.[8]

[8] Under Florida law, when, as here, parties to a contract execute two or more documents at or near the same time and concern the same transaction or subject matter, the documents are generally construed together as a single contract. E.g., Mnemonics, Inc. v. Max Davis Assocs., 808 So. 2d 1278, 1280 (Fla. 5th DCA 2002); see Wilson v. Terwillinger, 140 So. 3d 1122, 1124 (Fla. 5th DCA 2014) (reiterating "contemporaneous

The MMWA requires that warrantors, providing a written warranty to a consumer, must "fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty." 15 U.S.C. § 2302(a) (2012). Congress delegated authority to the FTC to establish the items warrantors must disclose. In response, the FTC requires a warrantor to disclose nine material facts related to the warranty, one of which requires disclosure in the warranty of "[i]nformation respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with part 703 of this subchapter." 16 C.F.R. § 701.3(a)(6) (2015). The FTC has also established what has been called the single document rule, which requires warrantors to "clearly and conspicuously disclose [all warranty terms] in a single document in simple and readily understood language." Id. § 701.3(a). The purpose of the single document rule is to avoid consumer confusion.

In arguing that the single document rule required Gibson Auto to disclose the binding arbitration clause in the same document with the other warranty terms, Mr. Krol relies on Cunningham v. Fleetwood Homes of Georgia, 253 F.3d 611, 624 (11th Cir. 2001). In that case, a mobile-home manufacturer, as a third-party beneficiary of a stand-alone arbitration agreement, moved to compel arbitration of a consumer's warranty claims against the warrantor under the MMWA. 253 F.3d at 613. The Eleventh Circuit affirmed the trial court's order denying the manufacturer's motion, concluding that the stand-alone arbitration agreement violated the FTC's single document rule. In reaching this conclusion, the court emphasized that the MMWA and applicable FTC rules obligate

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instrument rule" and that origins "are of rather ancient vintage" and has been consistently applied since inception).

warrantors to "clearly and conspicuously disclose [warranty terms] in a single document in simple and readily understood language." Id. at 620 (quoting 16 C.F.R. § 701.3(a)). One such term obligates a warrantor to disclose "[i]information respecting the availability of any informal dispute settlement mechanism." Id. at 621. Interpreting the "informal dispute settlement mechanism" to include binding arbitration, the court found that the failure to include the binding arbitration agreement in the warranty document violated the FTC's disclosure requirements. Id. at 620.

The Third District Court of Appeal has adopted Cunningham's application of the single document rule. See Larrain v. Bengal Motor Co. Ltd., 976 So. 2d 12, 14 (Fla. 3d DCA 2008) (determining, based on Cunningham, that "clear language of the MMWA expresses Congress' intent that *any* arbitration agreement must be disclosed within the written warranty and not as a stand-alone document," and thereafter, holding that single subject rule governs disclosure of binding arbitration agreements) (emphasis added). However, we decline to do so.

Since Cunningham, state and federal district courts have divided over whether to apply the single document rule to binding arbitration agreements. Compare Jones, 640 F. Supp. 2d at 1143, Patriot Mfg., Inc. v. Dixon, 399 F. Supp. 2d 1298, 1304-09 (S.D. Ala. 2005), and Patriot Mfg., Inc. v. Jackson, 929 So. 2d 997, 1005-07 (Ala. 2005) (all holding single document rule does not require arbitration agreement be included in written warranty), with Porter v. Chrysler Grp. LLC, No. 6:13-CV-555-ORL-37, 2013 WL 6768218, at *1 (M.D. Fla. Dec. 19, 2013), TGB Marine, LLC v. Midnight Exp. Power Boats, Inc., No. 08-60940-CIV, 2008 WL 3889578, (S.D. Fla. 2008), Harnden v. Ford Motor Co.,

408 F. Supp. 2d 300, 307 (E.D. Mich. 2004), and Larrain, 976 So. 2d at 14 (all holding single document rule requires arbitration agreement to be included in written warranty).

The courts that have refused to follow Cunningham have done so by reasoning that its application of the single document rule rests on an incorrect understanding that the terms "binding arbitration" and "informal dispute settlement procedures" are interchangeable. See, e.g., Jones, 640 F. Supp. 2d at 1143; Dixon, 399 F. Supp. 2d at 1304-09; Jackson, 929 So. 2d at 1005-07. Instead, these courts conclude that the Eleventh Circuit subsequently reversed positions in Davis, making clear that binding arbitration is not an informal dispute settlement procedure or a prerequisite to litigation, a notion that also aligns with the Supreme Court's view of binding arbitration. See Mitsubishi, 473 U.S. at 628.

In Dixon, the District Court for the Southern District of Alabama best explained Davis's effect on both Cunningham's holding and on the single document rule, writing:

> In the wake of Cunningham and Davis, then, what is the present status of the MMWA's disclosure requirements? Clearly, the single document rule remains alive and well. But the statutory and regulatory scheme does not require that *all* information having any bearing on the warranty must be disclosed within the warranty. To the contrary, the MMWA—and more precisely § 2302(a)—plainly provides that a warrantor's required disclosures under the single document rule are limited to those specifically enumerated in the FTC regulations. Those regulations do not identify arbitration agreements as items that must be disclosed, but they do mandate disclosure of "informal dispute settlement mechanisms." The Davis case, which is binding precedent to this Court, decided that arbitration agreements are not "informal dispute settlement mechanisms" in the context of the MMWA.
>
> Under this synopsis of the law, then, it is plain that, while the single document rule enjoys continued vitality, arbitration agreements lie beyond the scope of the disclosures required pursuant to that rule.

399 F. Supp. 2d at 1303-04.

This reasoning is persuasive. Cunningham's application of the single document rule rests solely on the notion that binding arbitration is an informal dispute settlement procedure. If we accept this premise, we would need to then defer to the FTC's regulations prohibiting binding arbitration because as an informal dispute settlement mechanism, binding arbitration would then be subject to the FTC's rulemaking authority. This is a view that we do not accept.

The FTC's disclosure regulations do not explicitly mention binding arbitration. By enforcing an arbitration disclosure requirement that is not expressly included in the FTC's regulations, this Court would "encroach on the [MMWA's] statutory and regulatory framework by unilaterally constructing a judicial rule that neither Congress nor the FTC has seen fit to create." Dixon, 399 F. Supp. 2d at 1309. The MMWA "requires disclosure in the warranty itself only 'to the extent required by the rules of the [FTC],' and the FTC has seen fit to require disclosure of required resort to an informal dispute-settlement mechanism, not the completely separate process of binding arbitration." Jackson, 929 So. 2d at 1006. For these reasons, we hold that the FTC's single-document rule does not apply to binding arbitration agreements. We disagree with the Third District Court's opinion in Larrain and certify conflict.

AFFIRMED; CONFLICT CERTIFIED.

EVANDER, C.J. and SASSO, J., concur.

Filing # 90596286 E-Filed 06/05/2019 10:29:58 AM

IN THE DISTRICT COURT OF APPEAL
FOR THE FIFTH DISTRICT
STATE OF FLORIDA

LES KROL,

Plaintiff / Appellant,

v.

FCA US, LLC and GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,

Appellees / Defendant. [1]

Appeal No. 5D18-2149

L.T. No. 05-2017-CA-049992

RECEIVED, 06/05/2019 10:30:33 AM, Clerk, Fifth District Court of Appeal

NOTICE TO INVOKE DISCRETIONARY JURISDICTION OF THE FLORIDA SUPREME COURT

NOTICE IS GIVEN that Appellant/Petitioner, LES KROL, invokes the discretionary jurisdiction of the Florida Supreme Court to review the decision of this Court rendered in this appeal on May 10, 2019.

Pursuant to Rule 9.030(a)(2)(A)(vi) and Rule 9.120, the decision is within the discretionary jurisdiction of the Florida Supreme Court because the district court's decision certifies express and direct conflict with the decision of another district court of appeal on the same question of law. A copy of the decision under review is attached hereto as "Appendix A."

[1] FCA US, LLC is not an appellee in the instant appeal, as it resolved Plaintiff/Appellant's claims against it shortly after the underlying lawsuit was filed, and before this appeal was initiated. *See* Appellant's *Initial Brief* to the Fifth District at p. 1, FN1.

Dated June 5, 2019.

CERTIFICATE OF SERVICE

I certify that on **June 5, 2019** a true and correct copy of this filing was served by e-mail on the following person(s) pursuant to Fla. S. Ct. Order SC10-2101 and Rule 2.516(b)(1)(A) of the Florida Rules of Judicial Administration:

Yesica S. Liposky, Esquire
Nelson, Mullins, Broad & Cassell LLP
100 N. Tampa Street, Suite 3500
Tampa, FL 33602
Counsel for Gibson Auto Sales, Inc., at
yesica.liposky@nelsonmullins.com;
robert.sickles@nelsonmullins.com;
kim.novak@nelsonmullins.com;
eileen.garvey@nelsonmullins.com;
jessica.lovins@nelsonmullins.com.

Respectfully submitted,

/s/ Theodore F. Greene III .

Theodore F. Greene III, Esquire
Fla. Bar No. 0502634
Law Offices of Theodore F. Greene, LC
PO Box 720157
Orlando, FL 32872-0157
Phone: (407) 482-8212
e-mail: tfgreene3@msn.com
Co-Counsel with Morgan & Morgan PA,
attorneys for Plaintiff/Appellant

Appendix A-1

Krol v. FCA US LLC and Gibson Auto Sales, Inc.,
--- So.3d ---; 2019 Fla. App. LEXIS 7194; 2019 WL 2062796
(Fla. 5th DCA May 10, 2019)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

LES KROL,

Appellant,

v. Case No. 5D18-2149

FCA US, LLC AND GIBSON AUTO
SALES, INC. D/B/A GIBSON TRUCK WORLD,

Appellees.

_____/

Opinion filed May 10, 2019

Nonfinal Appeal from the Circuit Court
for Brevard County,
Stephen R. Koons, Judge.

Jeremy Kespohl and Angela Thomas, of Morgan & Morgan, P.A., Jacksonville, for Appellant.

Robert E. Sickles and Yesica S. Liposky , of Nelson Mullins Broad and Cassel, Tampa, for Appellee, Gibson Auto Sales, Inc. d/b/a Gibson Truck World.

No Appearance for other Appellee.

ORFINGER, J.

Les Krol appeals an order compelling arbitration of the written warranty claims that he brought against Gibson Auto Sales, Inc. ("Gibson Auto") under the Magnuson-Moss

Warranty Act ("MMWA").[1] Because we conclude that the MMWA does not prohibit binding arbitration of written warranty claims and the arbitration agreement here does not violate Federal Trade Commission ("FTC") disclosure rules, we affirm the order compelling arbitration.

BACKGROUND

This case arises from Mr. Krol's purchase of a used truck from Gibson Auto. As part of the sale, the parties executed an installment sales contract and a separate retail purchase order that included a binding arbitration agreement for any dispute related to the truck's purchase.[2] Gibson Auto also extended an express written warranty on the truck.

A few months after purchasing the truck, Mr. Krol sued Gibson Auto under the MMWA, asserting several causes of action related to alleged defects in the truck that Gibson Auto was unable to remedy. In response, Gibson Auto moved to stay the proceedings and to compel arbitration in accordance with the parties' agreement. Mr. Krol opposed the motion, asserting the same arguments he makes in this appeal. Following a

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[1] 15 U.S.C. §§ 2301-12 (2012).

[2] The arbitration clause in the retail buyer order states in full:

> Dealer and customer agree that any controversy, claim, suit, demand, counterclaim, cross claim, or third-party complaint, arising out of, or relating to this Order or the parties' relationship (whether statutory or otherwise), including, but not limited to any matter that may have induced the Customer to enter into any relationship with Dealer and any disputes regarding the validity or enforceability of this clause (collectively referred to as "Claim"), shall be submitted to final and binding arbitration . . . . The arbitration shall be final and binding on all parties.

hearing, the trial court entered an order granting Gibson's motion to stay and compelling arbitration.

ANALYSIS

We review a trial court's ruling on a motion to compel arbitration de novo. Tropical Ford, Inc. v. Major, 882 So. 2d 476, 478 (Fla. 5th DCA 2004). When deciding whether to compel arbitration according to an agreement, a trial court must consider: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999). Mr. Krol's appeal centers on the second factor. He argues that no arbitrable issue existed here because MMWA claims are exempt from binding arbitration. Alternatively, he posits that the arbitration agreement is unenforceable because it violates the FTC's disclosure rules since the arbitration clause does not appear in a single document with the other warranty terms.

I. The Arbitrability of MMWA claims.

The United States Supreme Court has not addressed whether MMWA claims are arbitrable, and state and lower federal courts are divided on the issue.[3] However, both

[3] Compare, e.g., Jones v. Gen. Motors Corp., 640 F. Supp. 2d 1124, 1143 (D. Ariz. 2009), S. Energy Homes, Inc. v. Ard, 772 So. 2d 1131, 1135 (Ala. 2000), Borowiec v. Gateway 2000, 808 N.E.2d 957, 970 (Ill. 2004), Abela v. Gen. Motors Corp., 677 N.W.2d 325, 327 (Mich. 2004), and In re Am. Homestar of Lancaster, Inc., 50 S.W.3d 480, 492 (Tex. 2001) (all holding MMWA claims are subject to binding arbitration), with Higgs v. Warranty Grp., No. C2-02-1092, 2007 WL 2034376, at *8 (S.D. Ohio July 11, 2007), Rickard v. Teynor's Homes, Inc., 279 F. Supp. 2d 910, 921 (N.D. Ohio 2003), Browne v. Kline Tysons Imps., Inc., 190 F. Supp. 2d 827, 831-33 (E.D. Va. 2002), Pitchford v. Oakwood Mobile Homes, Inc., 124 F. Supp. 2d 958, 962-65 (W.D. Va. 2000), and Koons Ford of Balt., Inc. v. Lobach, 919 A.2d 722, 737 (Md. 2007) (all holding MMWA claims are exempt from binding arbitration).

federal circuit courts to consider the issue have concluded that the MMWA does not prohibit binding arbitration of written warranty claims.[4] Davis v. S. Energy Homes, Inc., 305 F.3d 1268, 1272 (11th Cir. 2002) (holding that MMWA permits enforcement of binding arbitration agreements related to written warranties); Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 479 (5th Cir. 2002) (holding that "MMWA does not preclude binding arbitration of claims pursuant to a valid binding arbitration agreement, which the courts must enforce pursuant to the [Federal Arbitration Act]").[5] After considering the MMWA and its legislative history, the federal policy favoring binding arbitration, and the persuasive federal circuit court opinions, we conclude that the MMWA permits pre-dispute binding arbitration of written warranty claims.

A. MMWA.

Because product warranties often left consumers with "little understanding of the frequently complex legal implications of warranties on consumer products," 40 Fed. Reg.

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[4] In Kolev v. Euromotors West/The Auto Gallery, 658 F.3d 1024 (9th Cir. 2011), the Ninth Circuit held that the MMWA prohibited pre-dispute binding arbitration on written warranty claims. But that opinion has since been withdrawn. See Kolev v. Euromotors W./The Auto Gallery, 676 F.3d 867 (9th Cir. 2012) ("The Opinion filed September 20, 2011, and appearing at 658 F.3d 1024 (9th Cir. 2011), is withdrawn. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit.") (citations omitted).

[5] In Florida, only the Second District Court of Appeal has commented on the arbitrability of MMWA claims. See Stacy David, Inc. v. Consuegra, 845 So. 2d 303 (Fla. 2d DCA 2003). In Consuegra, the Second District, though not specifically asked to decide whether MMWA claims are arbitrable, briefly addressed the issue when considering the validity of an arbitration agreement. Citing Davis, it found that "the Eleventh Circuit has required arbitration of claims under the Magnuson-Moss Act." Consuegra, 845 So. 2d at 306. Based on Davis, the court concluded that "no count of the [consumer's] complaint appears to fall outside the arbitration agreement." Id. at 306-07. The Second District then reversed the trial court's order and compelled arbitration of the buyer's MMWA claims. Id. at 306.

60168 (Dec. 31, 1975) (quoting S. Rep. No. 93-151 (1973)), Congress enacted the MMWA "[t]o provide minimum disclosure standards for written consumer product warranties; to define minimum federal content standards for such warranties; to amend the federal trade commission act in order to improve its consumer protection activities; and for other purposes." Magnuson-Moss Warranty-Federal Trade Comm'n Improvement Act, Pub. L. No. 93-637, § 356, 88 Stat. 2183 (1975). The MMWA requires warrantors to "fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty." 15 U.S.C. § 2302(a) (2012). It also creates a private right of action for those consumers who have been "damaged by the failure of a . . . warrantor . . . to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract." Id. § 2310(d)(1). An aggrieved consumer has the option to sue for damages and equitable relief in either state courts or federal district courts. Id. If the consumer prevails, he or she is entitled to attorney's fees and costs. Id. § 2310(d)(2).

Along with a private right of action, the MMWA encourages warrantors to settle consumer claims "fairly and expeditiously" through informal dispute settlement procedures. Id. § 2310(a). While the term "informal dispute settlement procedures" is not defined in the MMWA, Congress authorized the FTC to establish minimum requirements for any such procedures that are incorporated into the terms of a written warranty. Id. § 2310(a)(2). If a warrantor establishes an informal dispute settlement procedure, it may include within the written warranty "a requirement that the consumer resort to such procedure before pursuing any legal remedy." Id. § 2310(a)(3)(C). The FTC has broadly interpreted the term "informal dispute settlement procedures" to include both binding and

nonbinding arbitration, 16 C.F.R. § 700.8 (2015), and has adopted a regulation stating that informal dispute settlement procedures under the MMWA cannot be legally binding. 16 C.F.R. § 703.5(j) (2015).

B. Federal Policy.

Federal policy favors arbitration. In 1925, Congress enacted the Federal Arbitration Act ("FAA") "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). To this end, the FAA provides that

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2012).

The FAA establishes a "liberal federal policy favoring arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). The Supreme Court has interpreted this policy as establishing a strong presumption favoring the enforcement of binding arbitration agreements so that any doubts over whether an issue is arbitrable should be resolved in favor of arbitration. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). This presumption applies equally to statutory claims. Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987). Courts will enforce binding arbitration of statutory claims, unless Congress has expressed a clear

intention to preclude arbitration. Gilmer, 500 U.S. at 26. The party challenging arbitration bears the heavy burden of proving such congressional intent. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91-92 (2000).

C. The McMahon Test.

To determine whether Congress has intended to prohibit binding arbitration of a statutory claim, we apply the Supreme Court's McMahon test, which requires us to consider three factors to determine Congress's intent: "(1) the text of the statute; (2) its legislative history; and (3) whether 'an inherent conflict between arbitration and the underlying purposes [of the statute]' exists." Davis, 305 F.3d at 1273 (quoting McMahon, 482 U.S. at 226). To date, "[i]n every statutory right case that the Supreme Court has considered, it has upheld binding arbitration if the statute creating the right did not *explicitly* preclude arbitration."[6] Id.

Turning to the first McMahon factor, the text of MMWA does not expressly preclude or even mention "binding arbitration." Despite a lack of an express reference, Mr. Krol argues that Congress expressed its intention to prohibit binding arbitration in two ways. One, it created a right to commence a civil action for written warranty claims. Two, when Congress enacted the MMWA, arbitration—both binding and non-binding—was widely

[6] The Supreme Court has upheld binding arbitration agreements related to claims arising under the following federal statutes: Securities Act of 1933, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484-86 (1989), overruling Wilko v. Swan, 346 U.S. 427 (1953); Age Discrimination in Employment Act ("ADEA"), Gilmer, 500 U.S. at 35; Sherman Act, Mitsubishi, 473 U.S. at 628; Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organization Act ("RICO"), McMahon, 482 U.S. 220; Truth in Lending Act, Green Tree Financial Corp.-Alabama, 531 U.S. at 88-92; RICO, PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401 (2003); Credit Repair Organizations Act, CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); and the Fair Labor Standards Act, Epic Systems v. Lewis, 138 S. Ct. 1612 (2018).

considered an "informal" procedure. Hence, he posits that it was likely that Congress would have considered binding arbitration an informal dispute settlement procedure that would serve as a prerequisite to litigation that would be regulated by the FTC.

Both of these arguments fail. First, the provision of a private right of action alone does not establish Congressional intent to prohibit binding arbitration. Davis, 305 F.3d at 1274 (citing Gilmer, 500 U.S. at 29 (rejecting argument that binding arbitration is improper "because it deprives claimants of the judicial forum provided for by the ADEA")). Second, binding arbitration is not comparable to the informal dispute settlement procedures described in the MMWA because it is not a prerequisite to litigation—it is a *substitute* for litigation. Walton, 298 F.3d at 475; see Mitsubishi, 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

The second McMahon factor requires us to examine the MMWA's legislative history. Like the text, the legislative history does not suggest that binding arbitration is prohibited. Indeed, it implies the opposite. For instance, the Senate declared in its Conference Report that litigants may look to the courts and arbiters alike "to resolve 'actions' and to be the 'ultimate' means of resolving an MMWA claim." Jones v. Gen. Motors Corp., 640 F. Supp. 2d 1124, 1137 (D. Ariz. 2009) (citing S. Rep. No. 93-1408 (1974), as reprinted in 1974 U.S.C.C.A.N. 7755). The Senate Conference Report further explains 15 U.S.C. § 2304(a)(4)—the section of the MMWA that gives the FTC the ability to define what constitutes "a reasonable number of attempts" a warrantor must make to remedy a product defect before a refund or replacement must be provided—by stating that "if the [FTC] does not determine by rule what constitutes a reasonable number of

attempts in a given situation, then the parties or, *ultimately*, a third party (*arbiter* or judge) would decide." Id. (quoting S. Rep. No. 93-1408, as reprinted in 1974 U.S.C.C.A.N. at 7757) (emphases added). This explanation of 15 U.S.C. § 2304, which, among other things, authorizes the FTC to establish minimum standards regarding the duration of a warranty, consequential damage provisions, and conditions imposed by the warrantor, demonstrates that binding arbitration is permitted to resolve MMWA disputes. In fact, the same Conference Report recognizes that when there is no FTC rule regulating the reasonableness of a warrantor's duty, "the consumer could challenge the reasonableness of such requirement *by bringing an action for breach of warranty* and arguing that the warrantor had breached his full warranty obligation. The burden would then be upon the warrantor to establish before an *arbiter or in a court* that the requirement . . . was reasonable . . . ." Id. at 1138 (quoting S. Rep. No. 93-1408, as reprinted in 1974 U.S.C.C.A.N. at 7757). Thus, the legislative history suggests that Congress considered binding arbitration a reasonable alternative to civil litigation for resolving MMWA claims. At least, it does not suggest that binding arbitration is prohibited.

The third McMahon factor requires us to consider whether there is an underlying conflict between binding arbitration and the purposes of the MMWA. Mr. Krol argues that such a conflict exists, suggesting that binding arbitration of written warranty claims would undermine Congress's goals of protecting consumers and correcting the inequality in bargaining power between warrantors and consumers.

Neither of these goals overrides the strong federal policy favoring arbitration. To the first goal, the Supreme Court has repeatedly enforced binding arbitration of statutory claims where the purpose of the statute was consumer protection. See Davis, 305 F.3d

at 1276 (collecting cases). Nothing suggests that consumers are less able to vindicate their MMWA claims through arbitration than through civil litigation. To the second goal, unequal bargaining power alone will not preclude binding arbitration when Congress has not expressed clear intent to do so. See id. at 1277 (citing Gilmer, 500 U.S. at 33 (stating that "[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context")). Nothing here suggests that the inequality of bargaining power between consumers and warrantors is more substantial than in other instances when the Supreme Court has allowed binding arbitration.

D. The Chevron Test.

Notwithstanding the results of our McMahon analysis, Mr. Krol contends that since Congress gave the FTC rulemaking authority to enforce the MMWA, we must defer to its regulations prohibiting binding arbitration of MMWA written warranty claims. See 16 C.F.R. §§ 700.8, 703.5(j) (2015). Because Congress has given the FTC rulemaking authority regarding portions of the MMWA, we apply the two-prong test set forth in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), to determine whether we must defer to the FTC's interpretive regulations.

Chevron informs us to defer to the FTC's interpretive regulations prohibiting binding arbitration only if: (1) Congress has not directly spoken to the specific issue; and (2) the FTC's interpretation "is based on a permissible construction of the statute." 467

U.S. at 843. Because the MMWA does not speak to binding arbitration, we must only consider the test's second prong.[7]

State and federal courts are again divided over whether the FTC's reading of the MMWA is permissible. The only federal circuit court to consider the reasonableness of the FTC's interpretation has found it unreasonable. See Davis, 305 F.3d at 1279. For several reasons, we agree with Davis that the FTC's interpretation that the MMWA precludes binding arbitration is unreasonable.

First, for the FTC to have authority to regulate binding arbitration, we would have to accept the notion that Congress considered binding arbitration an informal dispute settlement mechanism. We do not. As our discussion of the McMahon test demonstrates, Congress appears to have understood binding arbitration to be a substitute for a judicial forum, not an informal dispute settlement mechanism.

Second, the FTC's prohibition of arbitration relies in part on the idea that by providing a judicial forum, Congress intended to preclude binding arbitration. The Supreme Court has been unwavering on this point—a statute's provision of a judicial forum does not show Congressional intent to prohibit arbitration. Thus, we too reject this notion.

Third, the FTC's ultimate rationale for prohibiting binding arbitration is rooted in the belief that an arbitral forum does not ensure consumer protection. For more than half a

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[7] In Walton, the Fifth Circuit avoided Chevron's second prong by concluding that Congress spoke to binding arbitration when it expressed in the FAA a clear intention to favor enforcement of binding arbitration agreements. 298 F.3d at 475. We disagree and join the majority of courts who have concluded that Congress has not spoken directly to the permissibility of binding arbitration under the MMWA. See, e.g., Davis, 305 F.3d at 1278; Jones, 640 F. Supp. 2d at 1139; Higgs, No. C2-02-1092, 2007 WL 2034376, at *8; Lobach, 919 A.2d at 737.

century, the Supreme Court has not viewed arbitration as harmful to consumers, but instead as a proceeding that is adequate to protect consumers. See Davis, 305 F.3d at 1279 (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) (noting that "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation")). The Supreme Court has refused to defer to interpretive regulations prohibiting arbitration that have depended on the Court's formerly held view disfavoring arbitration. See, e.g., McMahon, 482 U.S. at 232-34 (rejecting SEC's interpretation of Securities Exchange Act of 1934 that binding arbitration agreements were prohibited). Given the Supreme Court's current view on arbitration, the FTC's continued hostility towards arbitration is unwarranted.

In sum, given the limited scope of the FTC's authority to regulate only non-binding, pre-dispute settlement procedures and the federal policy favoring arbitration enforcement, we conclude the FTC's prohibition of arbitration is based on an impermissible construction of the statute. As a result, we need not defer to the FTC's interpretive regulations, and instead, hold that MMWA claims can be subject to binding arbitration.

II. The FTC's Single Document Rule.

Mr. Krol also contends that the arbitration agreement here is unenforceable because it was in the retail purchase order and not in a single document along with the other warranty terms.[8]

[8] Under Florida law, when, as here, parties to a contract execute two or more documents at or near the same time and concern the same transaction or subject matter, the documents are generally construed together as a single contract. E.g., Mnemonics, Inc. v. Max Davis Assocs., 808 So. 2d 1278, 1280 (Fla. 5th DCA 2002); see Wilson v. Terwillinger, 140 So. 3d 1122, 1124 (Fla. 5th DCA 2014) (reiterating "contemporaneous

The MMWA requires that warrantors, providing a written warranty to a consumer, must "fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty." 15 U.S.C. § 2302(a) (2012). Congress delegated authority to the FTC to establish the items warrantors must disclose. In response, the FTC requires a warrantor to disclose nine material facts related to the warranty, one of which requires disclosure in the warranty of "[i]nformation respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with part 703 of this subchapter." 16 C.F.R. § 701.3(a)(6) (2015). The FTC has also established what has been called the single document rule, which requires warrantors to "clearly and conspicuously disclose [all warranty terms] in a single document in simple and readily understood language." Id. § 701.3(a). The purpose of the single document rule is to avoid consumer confusion.

In arguing that the single document rule required Gibson Auto to disclose the binding arbitration clause in the same document with the other warranty terms, Mr. Krol relies on Cunningham v. Fleetwood Homes of Georgia, 253 F.3d 611, 624 (11th Cir. 2001). In that case, a mobile-home manufacturer, as a third-party beneficiary of a stand-alone arbitration agreement, moved to compel arbitration of a consumer's warranty claims against the warrantor under the MMWA. 253 F.3d at 613. The Eleventh Circuit affirmed the trial court's order denying the manufacturer's motion, concluding that the stand-alone arbitration agreement violated the FTC's single document rule. In reaching this conclusion, the court emphasized that the MMWA and applicable FTC rules obligate

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instrument rule" and that origins "are of rather ancient vintage" and has been consistently applied since inception).

warrantors to "clearly and conspicuously disclose [warranty terms] in a single document in simple and readily understood language." Id. at 620 (quoting 16 C.F.R. § 701.3(a)). One such term obligates a warrantor to disclose "[i]information respecting the availability of any informal dispute settlement mechanism." Id. at 621. Interpreting the "informal dispute settlement mechanism" to include binding arbitration, the court found that the failure to include the binding arbitration agreement in the warranty document violated the FTC's disclosure requirements. Id. at 620.

The Third District Court of Appeal has adopted Cunningham's application of the single document rule. See Larrain v. Bengal Motor Co. Ltd., 976 So. 2d 12, 14 (Fla. 3d DCA 2008) (determining, based on Cunningham, that "clear language of the MMWA expresses Congress' intent that *any* arbitration agreement must be disclosed within the written warranty and not as a stand-alone document," and thereafter, holding that single subject rule governs disclosure of binding arbitration agreements) (emphasis added). However, we decline to do so.

Since Cunningham, state and federal district courts have divided over whether to apply the single document rule to binding arbitration agreements. Compare Jones, 640 F. Supp. 2d at 1143, Patriot Mfg., Inc. v. Dixon, 399 F. Supp. 2d 1298, 1304-09 (S.D. Ala. 2005), and Patriot Mfg., Inc. v. Jackson, 929 So. 2d 997, 1005-07 (Ala. 2005) (all holding single document rule does not require arbitration agreement be included in written warranty), with Porter v. Chrysler Grp. LLC, No. 6:13-CV-555-ORL-37, 2013 WL 6768218, at *1 (M.D. Fla. Dec. 19, 2013), TGB Marine, LLC v. Midnight Exp. Power Boats, Inc., No. 08-60940-CIV, 2008 WL 3889578, (S.D. Fla. 2008), Harnden v. Ford Motor Co.,

408 F. Supp. 2d 300, 307 (E.D. Mich. 2004), and Larrain, 976 So. 2d at 14 (all holding single document rule requires arbitration agreement to be included in written warranty).

The courts that have refused to follow Cunningham have done so by reasoning that its application of the single document rule rests on an incorrect understanding that the terms "binding arbitration" and "informal dispute settlement procedures" are interchangeable. See, e.g., Jones, 640 F. Supp. 2d at 1143; Dixon, 399 F. Supp. 2d at 1304-09; Jackson, 929 So. 2d at 1005-07. Instead, these courts conclude that the Eleventh Circuit subsequently reversed positions in Davis, making clear that binding arbitration is not an informal dispute settlement procedure or a prerequisite to litigation, a notion that also aligns with the Supreme Court's view of binding arbitration. See Mitsubishi, 473 U.S. at 628.

In Dixon, the District Court for the Southern District of Alabama best explained Davis's effect on both Cunningham's holding and on the single document rule, writing:

> In the wake of Cunningham and Davis, then, what is the present status of the MMWA's disclosure requirements? Clearly, the single document rule remains alive and well. But the statutory and regulatory scheme does not require that *all* information having any bearing on the warranty must be disclosed within the warranty. To the contrary, the MMWA—and more precisely § 2302(a)—plainly provides that a warrantor's required disclosures under the single document rule are limited to those specifically enumerated in the FTC regulations. Those regulations do not identify arbitration agreements as items that must be disclosed, but they do mandate disclosure of "informal dispute settlement mechanisms." The Davis case, which is binding precedent to this Court, decided that arbitration agreements are not "informal dispute settlement mechanisms" in the context of the MMWA.
>
> Under this synopsis of the law, then, it is plain that, while the single document rule enjoys continued vitality, arbitration agreements lie beyond the scope of the disclosures required pursuant to that rule.

399 F. Supp. 2d at 1303-04.

This reasoning is persuasive. Cunningham's application of the single document rule rests solely on the notion that binding arbitration is an informal dispute settlement procedure. If we accept this premise, we would need to then defer to the FTC's regulations prohibiting binding arbitration because as an informal dispute settlement mechanism, binding arbitration would then be subject to the FTC's rulemaking authority. This is a view that we do not accept.

The FTC's disclosure regulations do not explicitly mention binding arbitration. By enforcing an arbitration disclosure requirement that is not expressly included in the FTC's regulations, this Court would "encroach on the [MMWA's] statutory and regulatory framework by unilaterally constructing a judicial rule that neither Congress nor the FTC has seen fit to create." Dixon, 399 F. Supp. 2d at 1309. The MMWA "requires disclosure in the warranty itself only 'to the extent required by the rules of the [FTC],' and the FTC has seen fit to require disclosure of required resort to an informal dispute-settlement mechanism, not the completely separate process of binding arbitration." Jackson, 929 So. 2d at 1006. For these reasons, we hold that the FTC's single-document rule does not apply to binding arbitration agreements. We disagree with the Third District Court's opinion in Larrain and certify conflict.

AFFIRMED; CONFLICT CERTIFIED.

EVANDER, C.J. and SASSO, J., concur.

Filing # 90596286 E-Filed 06/05/2019 10:29:58 AM

IN THE DISTRICT COURT OF APPEAL
FOR THE FIFTH DISTRICT
STATE OF FLORIDA

LES KROL,

Plaintiff / Appellant,

v.

FCA US, LLC and GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,

Appellees / Defendant. [1]

Appeal No. 5D18-2149

L.T. No. 05-2017-CA-049992

RECEIVED, 06/05/2019 10:30:33 AM, Clerk, Fifth District Court of Appeal

NOTICE TO INVOKE DISCRETIONARY JURISDICTION OF THE FLORIDA SUPREME COURT

NOTICE IS GIVEN that Appellant/Petitioner, LES KROL, invokes the discretionary jurisdiction of the Florida Supreme Court to review the decision of this Court rendered in this appeal on May 10, 2019.

Pursuant to Rule 9.030(a)(2)(A)(vi) and Rule 9.120, the decision is within the discretionary jurisdiction of the Florida Supreme Court because the district court's decision certifies express and direct conflict with the decision of another district court of appeal on the same question of law. A copy of the decision under review is attached hereto as "Appendix A."

[1] FCA US, LLC is not an appellee in the instant appeal, as it resolved Plaintiff/Appellant's claims against it shortly after the underlying lawsuit was filed, and before this appeal was initiated. *See* Appellant's *Initial Brief* to the Fifth District at p. 1, FN1.

Dated June 5, 2019.

CERTIFICATE OF SERVICE

I certify that on **June 5, 2019** a true and correct copy of this filing was served by e-mail on the following person(s) pursuant to Fla. S. Ct. Order SC10-2101 and Rule 2.516(b)(1)(A) of the Florida Rules of Judicial Administration:

Yesica S. Liposky, Esquire
Nelson, Mullins, Broad & Cassell LLP
100 N. Tampa Street, Suite 3500
Tampa, FL 33602
Counsel for Gibson Auto Sales, Inc., at
yesica.liposky@nelsonmullins.com;
robert.sickles@nelsonmullins.com;
kim.novak@nelsonmullins.com;
eileen.garvey@nelsonmullins.com;
jessica.lovins@nelsonmullins.com.

Respectfully submitted,

/s/ Theodore F. Greene III .

Theodore F. Greene III, Esquire
Fla. Bar No. 0502634
Law Offices of Theodore F. Greene, LC
PO Box 720157
Orlando, FL 32872-0157
Phone: (407) 482-8212
e-mail: tfgreene3@msn.com
Co-Counsel with Morgan & Morgan PA,
attorneys for Plaintiff/Appellant

Appendix A-1

Krol v. FCA US LLC and Gibson Auto Sales, Inc.,
--- So.3d ---; 2019 Fla. App. LEXIS 7194; 2019 WL 2062796
(Fla. 5th DCA May 10, 2019)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

LES KROL,

Appellant,

v. Case No. 5D18-2149

FCA US, LLC AND GIBSON AUTO
SALES, INC. D/B/A GIBSON TRUCK WORLD,

Appellees.

_____/

Opinion filed May 10, 2019

Nonfinal Appeal from the Circuit Court
for Brevard County,
Stephen R. Koons, Judge.

Jeremy Kespohl and Angela Thomas, of Morgan & Morgan, P.A., Jacksonville, for Appellant.

Robert E. Sickles and Yesica S. Liposky , of Nelson Mullins Broad and Cassel, Tampa, for Appellee, Gibson Auto Sales, Inc. d/b/a Gibson Truck World.

No Appearance for other Appellee.

ORFINGER, J.

Les Krol appeals an order compelling arbitration of the written warranty claims that he brought against Gibson Auto Sales, Inc. ("Gibson Auto") under the Magnuson-Moss

Warranty Act ("MMWA").[1] Because we conclude that the MMWA does not prohibit binding arbitration of written warranty claims and the arbitration agreement here does not violate Federal Trade Commission ("FTC") disclosure rules, we affirm the order compelling arbitration.

BACKGROUND

This case arises from Mr. Krol's purchase of a used truck from Gibson Auto. As part of the sale, the parties executed an installment sales contract and a separate retail purchase order that included a binding arbitration agreement for any dispute related to the truck's purchase.[2] Gibson Auto also extended an express written warranty on the truck.

A few months after purchasing the truck, Mr. Krol sued Gibson Auto under the MMWA, asserting several causes of action related to alleged defects in the truck that Gibson Auto was unable to remedy. In response, Gibson Auto moved to stay the proceedings and to compel arbitration in accordance with the parties' agreement. Mr. Krol opposed the motion, asserting the same arguments he makes in this appeal. Following a

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[1] 15 U.S.C. §§ 2301-12 (2012).

[2] The arbitration clause in the retail buyer order states in full:

> Dealer and customer agree that any controversy, claim, suit, demand, counterclaim, cross claim, or third-party complaint, arising out of, or relating to this Order or the parties' relationship (whether statutory or otherwise), including, but not limited to any matter that may have induced the Customer to enter into any relationship with Dealer and any disputes regarding the validity or enforceability of this clause (collectively referred to as "Claim"), shall be submitted to final and binding arbitration . . . . The arbitration shall be final and binding on all parties.

hearing, the trial court entered an order granting Gibson's motion to stay and compelling arbitration.

ANALYSIS

We review a trial court's ruling on a motion to compel arbitration de novo. Tropical Ford, Inc. v. Major, 882 So. 2d 476, 478 (Fla. 5th DCA 2004). When deciding whether to compel arbitration according to an agreement, a trial court must consider: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999). Mr. Krol's appeal centers on the second factor. He argues that no arbitrable issue existed here because MMWA claims are exempt from binding arbitration. Alternatively, he posits that the arbitration agreement is unenforceable because it violates the FTC's disclosure rules since the arbitration clause does not appear in a single document with the other warranty terms.

I. The Arbitrability of MMWA claims.

The United States Supreme Court has not addressed whether MMWA claims are arbitrable, and state and lower federal courts are divided on the issue.[3] However, both

[3] Compare, e.g., Jones v. Gen. Motors Corp., 640 F. Supp. 2d 1124, 1143 (D. Ariz. 2009), S. Energy Homes, Inc. v. Ard, 772 So. 2d 1131, 1135 (Ala. 2000), Borowiec v. Gateway 2000, 808 N.E.2d 957, 970 (Ill. 2004), Abela v. Gen. Motors Corp., 677 N.W.2d 325, 327 (Mich. 2004), and In re Am. Homestar of Lancaster, Inc., 50 S.W.3d 480, 492 (Tex. 2001) (all holding MMWA claims are subject to binding arbitration), with Higgs v. Warranty Grp., No. C2-02-1092, 2007 WL 2034376, at *8 (S.D. Ohio July 11, 2007), Rickard v. Teynor's Homes, Inc., 279 F. Supp. 2d 910, 921 (N.D. Ohio 2003), Browne v. Kline Tysons Imps., Inc., 190 F. Supp. 2d 827, 831-33 (E.D. Va. 2002), Pitchford v. Oakwood Mobile Homes, Inc., 124 F. Supp. 2d 958, 962-65 (W.D. Va. 2000), and Koons Ford of Balt., Inc. v. Lobach, 919 A.2d 722, 737 (Md. 2007) (all holding MMWA claims are exempt from binding arbitration).

federal circuit courts to consider the issue have concluded that the MMWA does not prohibit binding arbitration of written warranty claims.[4] Davis v. S. Energy Homes, Inc., 305 F.3d 1268, 1272 (11th Cir. 2002) (holding that MMWA permits enforcement of binding arbitration agreements related to written warranties); Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 479 (5th Cir. 2002) (holding that "MMWA does not preclude binding arbitration of claims pursuant to a valid binding arbitration agreement, which the courts must enforce pursuant to the [Federal Arbitration Act]").[5] After considering the MMWA and its legislative history, the federal policy favoring binding arbitration, and the persuasive federal circuit court opinions, we conclude that the MMWA permits pre-dispute binding arbitration of written warranty claims.

A. MMWA.

Because product warranties often left consumers with "little understanding of the frequently complex legal implications of warranties on consumer products," 40 Fed. Reg.

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[4] In Kolev v. Euromotors West/The Auto Gallery, 658 F.3d 1024 (9th Cir. 2011), the Ninth Circuit held that the MMWA prohibited pre-dispute binding arbitration on written warranty claims. But that opinion has since been withdrawn. See Kolev v. Euromotors W./The Auto Gallery, 676 F.3d 867 (9th Cir. 2012) ("The Opinion filed September 20, 2011, and appearing at 658 F.3d 1024 (9th Cir. 2011), is withdrawn. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit.") (citations omitted).

[5] In Florida, only the Second District Court of Appeal has commented on the arbitrability of MMWA claims. See Stacy David, Inc. v. Consuegra, 845 So. 2d 303 (Fla. 2d DCA 2003). In Consuegra, the Second District, though not specifically asked to decide whether MMWA claims are arbitrable, briefly addressed the issue when considering the validity of an arbitration agreement. Citing Davis, it found that "the Eleventh Circuit has required arbitration of claims under the Magnuson-Moss Act." Consuegra, 845 So. 2d at 306. Based on Davis, the court concluded that "no count of the [consumer's] complaint appears to fall outside the arbitration agreement." Id. at 306-07. The Second District then reversed the trial court's order and compelled arbitration of the buyer's MMWA claims. Id. at 306.

60168 (Dec. 31, 1975) (quoting S. Rep. No. 93-151 (1973)), Congress enacted the MMWA "[t]o provide minimum disclosure standards for written consumer product warranties; to define minimum federal content standards for such warranties; to amend the federal trade commission act in order to improve its consumer protection activities; and for other purposes." Magnuson-Moss Warranty-Federal Trade Comm'n Improvement Act, Pub. L. No. 93-637, § 356, 88 Stat. 2183 (1975). The MMWA requires warrantors to "fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty." 15 U.S.C. § 2302(a) (2012). It also creates a private right of action for those consumers who have been "damaged by the failure of a . . . warrantor . . . to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract." Id. § 2310(d)(1). An aggrieved consumer has the option to sue for damages and equitable relief in either state courts or federal district courts. Id. If the consumer prevails, he or she is entitled to attorney's fees and costs. Id. § 2310(d)(2).

Along with a private right of action, the MMWA encourages warrantors to settle consumer claims "fairly and expeditiously" through informal dispute settlement procedures. Id. § 2310(a). While the term "informal dispute settlement procedures" is not defined in the MMWA, Congress authorized the FTC to establish minimum requirements for any such procedures that are incorporated into the terms of a written warranty. Id. § 2310(a)(2). If a warrantor establishes an informal dispute settlement procedure, it may include within the written warranty "a requirement that the consumer resort to such procedure before pursuing any legal remedy." Id. § 2310(a)(3)(C). The FTC has broadly interpreted the term "informal dispute settlement procedures" to include both binding and

nonbinding arbitration, 16 C.F.R. § 700.8 (2015), and has adopted a regulation stating that informal dispute settlement procedures under the MMWA cannot be legally binding. 16 C.F.R. § 703.5(j) (2015).

B. Federal Policy.

Federal policy favors arbitration. In 1925, Congress enacted the Federal Arbitration Act ("FAA") "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). To this end, the FAA provides that

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2012).

The FAA establishes a "liberal federal policy favoring arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). The Supreme Court has interpreted this policy as establishing a strong presumption favoring the enforcement of binding arbitration agreements so that any doubts over whether an issue is arbitrable should be resolved in favor of arbitration. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). This presumption applies equally to statutory claims. Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987). Courts will enforce binding arbitration of statutory claims, unless Congress has expressed a clear

intention to preclude arbitration. Gilmer, 500 U.S. at 26. The party challenging arbitration bears the heavy burden of proving such congressional intent. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91-92 (2000).

C. The McMahon Test.

To determine whether Congress has intended to prohibit binding arbitration of a statutory claim, we apply the Supreme Court's McMahon test, which requires us to consider three factors to determine Congress's intent: "(1) the text of the statute; (2) its legislative history; and (3) whether 'an inherent conflict between arbitration and the underlying purposes [of the statute]' exists." Davis, 305 F.3d at 1273 (quoting McMahon, 482 U.S. at 226). To date, "[i]n every statutory right case that the Supreme Court has considered, it has upheld binding arbitration if the statute creating the right did not *explicitly* preclude arbitration."[6] Id.

Turning to the first McMahon factor, the text of MMWA does not expressly preclude or even mention "binding arbitration." Despite a lack of an express reference, Mr. Krol argues that Congress expressed its intention to prohibit binding arbitration in two ways. One, it created a right to commence a civil action for written warranty claims. Two, when Congress enacted the MMWA, arbitration—both binding and non-binding—was widely

[6] The Supreme Court has upheld binding arbitration agreements related to claims arising under the following federal statutes: Securities Act of 1933, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484-86 (1989), overruling Wilko v. Swan, 346 U.S. 427 (1953); Age Discrimination in Employment Act ("ADEA"), Gilmer, 500 U.S. at 35; Sherman Act, Mitsubishi, 473 U.S. at 628; Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organization Act ("RICO"), McMahon, 482 U.S. 220; Truth in Lending Act, Green Tree Financial Corp.-Alabama, 531 U.S. at 88-92; RICO, PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401 (2003); Credit Repair Organizations Act, CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); and the Fair Labor Standards Act, Epic Systems v. Lewis, 138 S. Ct. 1612 (2018).

considered an "informal" procedure. Hence, he posits that it was likely that Congress would have considered binding arbitration an informal dispute settlement procedure that would serve as a prerequisite to litigation that would be regulated by the FTC.

Both of these arguments fail. First, the provision of a private right of action alone does not establish Congressional intent to prohibit binding arbitration. Davis, 305 F.3d at 1274 (citing Gilmer, 500 U.S. at 29 (rejecting argument that binding arbitration is improper "because it deprives claimants of the judicial forum provided for by the ADEA")). Second, binding arbitration is not comparable to the informal dispute settlement procedures described in the MMWA because it is not a prerequisite to litigation—it is a *substitute* for litigation. Walton, 298 F.3d at 475; see Mitsubishi, 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

The second McMahon factor requires us to examine the MMWA's legislative history. Like the text, the legislative history does not suggest that binding arbitration is prohibited. Indeed, it implies the opposite. For instance, the Senate declared in its Conference Report that litigants may look to the courts and arbiters alike "to resolve 'actions' and to be the 'ultimate' means of resolving an MMWA claim." Jones v. Gen. Motors Corp., 640 F. Supp. 2d 1124, 1137 (D. Ariz. 2009) (citing S. Rep. No. 93-1408 (1974), as reprinted in 1974 U.S.C.C.A.N. 7755). The Senate Conference Report further explains 15 U.S.C. § 2304(a)(4)—the section of the MMWA that gives the FTC the ability to define what constitutes "a reasonable number of attempts" a warrantor must make to remedy a product defect before a refund or replacement must be provided—by stating that "if the [FTC] does not determine by rule what constitutes a reasonable number of

attempts in a given situation, then the parties or, *ultimately*, a third party (*arbiter* or judge) would decide." Id. (quoting S. Rep. No. 93-1408, as reprinted in 1974 U.S.C.C.A.N. at 7757) (emphases added). This explanation of 15 U.S.C. § 2304, which, among other things, authorizes the FTC to establish minimum standards regarding the duration of a warranty, consequential damage provisions, and conditions imposed by the warrantor, demonstrates that binding arbitration is permitted to resolve MMWA disputes. In fact, the same Conference Report recognizes that when there is no FTC rule regulating the reasonableness of a warrantor's duty, "the consumer could challenge the reasonableness of such requirement *by bringing an action for breach of warranty* and arguing that the warrantor had breached his full warranty obligation. The burden would then be upon the warrantor to establish before an *arbiter or in a court* that the requirement . . . was reasonable . . . ." Id. at 1138 (quoting S. Rep. No. 93-1408, as reprinted in 1974 U.S.C.C.A.N. at 7757). Thus, the legislative history suggests that Congress considered binding arbitration a reasonable alternative to civil litigation for resolving MMWA claims. At least, it does not suggest that binding arbitration is prohibited.

The third McMahon factor requires us to consider whether there is an underlying conflict between binding arbitration and the purposes of the MMWA. Mr. Krol argues that such a conflict exists, suggesting that binding arbitration of written warranty claims would undermine Congress's goals of protecting consumers and correcting the inequality in bargaining power between warrantors and consumers.

Neither of these goals overrides the strong federal policy favoring arbitration. To the first goal, the Supreme Court has repeatedly enforced binding arbitration of statutory claims where the purpose of the statute was consumer protection. See Davis, 305 F.3d

at 1276 (collecting cases). Nothing suggests that consumers are less able to vindicate their MMWA claims through arbitration than through civil litigation. To the second goal, unequal bargaining power alone will not preclude binding arbitration when Congress has not expressed clear intent to do so. See id. at 1277 (citing Gilmer, 500 U.S. at 33 (stating that "[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context")). Nothing here suggests that the inequality of bargaining power between consumers and warrantors is more substantial than in other instances when the Supreme Court has allowed binding arbitration.

D. The Chevron Test.

Notwithstanding the results of our McMahon analysis, Mr. Krol contends that since Congress gave the FTC rulemaking authority to enforce the MMWA, we must defer to its regulations prohibiting binding arbitration of MMWA written warranty claims. See 16 C.F.R. §§ 700.8, 703.5(j) (2015). Because Congress has given the FTC rulemaking authority regarding portions of the MMWA, we apply the two-prong test set forth in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), to determine whether we must defer to the FTC's interpretive regulations.

Chevron informs us to defer to the FTC's interpretive regulations prohibiting binding arbitration only if: (1) Congress has not directly spoken to the specific issue; and (2) the FTC's interpretation "is based on a permissible construction of the statute." 467

U.S. at 843. Because the MMWA does not speak to binding arbitration, we must only consider the test's second prong.[7]

State and federal courts are again divided over whether the FTC's reading of the MMWA is permissible. The only federal circuit court to consider the reasonableness of the FTC's interpretation has found it unreasonable. See Davis, 305 F.3d at 1279. For several reasons, we agree with Davis that the FTC's interpretation that the MMWA precludes binding arbitration is unreasonable.

First, for the FTC to have authority to regulate binding arbitration, we would have to accept the notion that Congress considered binding arbitration an informal dispute settlement mechanism. We do not. As our discussion of the McMahon test demonstrates, Congress appears to have understood binding arbitration to be a substitute for a judicial forum, not an informal dispute settlement mechanism.

Second, the FTC's prohibition of arbitration relies in part on the idea that by providing a judicial forum, Congress intended to preclude binding arbitration. The Supreme Court has been unwavering on this point—a statute's provision of a judicial forum does not show Congressional intent to prohibit arbitration. Thus, we too reject this notion.

Third, the FTC's ultimate rationale for prohibiting binding arbitration is rooted in the belief that an arbitral forum does not ensure consumer protection. For more than half a

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[7] In Walton, the Fifth Circuit avoided Chevron's second prong by concluding that Congress spoke to binding arbitration when it expressed in the FAA a clear intention to favor enforcement of binding arbitration agreements. 298 F.3d at 475. We disagree and join the majority of courts who have concluded that Congress has not spoken directly to the permissibility of binding arbitration under the MMWA. See, e.g., Davis, 305 F.3d at 1278; Jones, 640 F. Supp. 2d at 1139; Higgs, No. C2-02-1092, 2007 WL 2034376, at *8; Lobach, 919 A.2d at 737.

century, the Supreme Court has not viewed arbitration as harmful to consumers, but instead as a proceeding that is adequate to protect consumers. See Davis, 305 F.3d at 1279 (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) (noting that "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation")). The Supreme Court has refused to defer to interpretive regulations prohibiting arbitration that have depended on the Court's formerly held view disfavoring arbitration. See, e.g., McMahon, 482 U.S. at 232-34 (rejecting SEC's interpretation of Securities Exchange Act of 1934 that binding arbitration agreements were prohibited). Given the Supreme Court's current view on arbitration, the FTC's continued hostility towards arbitration is unwarranted.

In sum, given the limited scope of the FTC's authority to regulate only non-binding, pre-dispute settlement procedures and the federal policy favoring arbitration enforcement, we conclude the FTC's prohibition of arbitration is based on an impermissible construction of the statute. As a result, we need not defer to the FTC's interpretive regulations, and instead, hold that MMWA claims can be subject to binding arbitration.

II. The FTC's Single Document Rule.

Mr. Krol also contends that the arbitration agreement here is unenforceable because it was in the retail purchase order and not in a single document along with the other warranty terms.[8]

[8] Under Florida law, when, as here, parties to a contract execute two or more documents at or near the same time and concern the same transaction or subject matter, the documents are generally construed together as a single contract. E.g., Mnemonics, Inc. v. Max Davis Assocs., 808 So. 2d 1278, 1280 (Fla. 5th DCA 2002); see Wilson v. Terwillinger, 140 So. 3d 1122, 1124 (Fla. 5th DCA 2014) (reiterating "contemporaneous

The MMWA requires that warrantors, providing a written warranty to a consumer, must "fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty." 15 U.S.C. § 2302(a) (2012). Congress delegated authority to the FTC to establish the items warrantors must disclose. In response, the FTC requires a warrantor to disclose nine material facts related to the warranty, one of which requires disclosure in the warranty of "[i]nformation respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with part 703 of this subchapter." 16 C.F.R. § 701.3(a)(6) (2015). The FTC has also established what has been called the single document rule, which requires warrantors to "clearly and conspicuously disclose [all warranty terms] in a single document in simple and readily understood language." Id. § 701.3(a). The purpose of the single document rule is to avoid consumer confusion.

In arguing that the single document rule required Gibson Auto to disclose the binding arbitration clause in the same document with the other warranty terms, Mr. Krol relies on Cunningham v. Fleetwood Homes of Georgia, 253 F.3d 611, 624 (11th Cir. 2001). In that case, a mobile-home manufacturer, as a third-party beneficiary of a stand-alone arbitration agreement, moved to compel arbitration of a consumer's warranty claims against the warrantor under the MMWA. 253 F.3d at 613. The Eleventh Circuit affirmed the trial court's order denying the manufacturer's motion, concluding that the stand-alone arbitration agreement violated the FTC's single document rule. In reaching this conclusion, the court emphasized that the MMWA and applicable FTC rules obligate

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instrument rule" and that origins "are of rather ancient vintage" and has been consistently applied since inception).

warrantors to "clearly and conspicuously disclose [warranty terms] in a single document in simple and readily understood language." Id. at 620 (quoting 16 C.F.R. § 701.3(a)). One such term obligates a warrantor to disclose "[i]information respecting the availability of any informal dispute settlement mechanism." Id. at 621. Interpreting the "informal dispute settlement mechanism" to include binding arbitration, the court found that the failure to include the binding arbitration agreement in the warranty document violated the FTC's disclosure requirements. Id. at 620.

The Third District Court of Appeal has adopted Cunningham's application of the single document rule. See Larrain v. Bengal Motor Co. Ltd., 976 So. 2d 12, 14 (Fla. 3d DCA 2008) (determining, based on Cunningham, that "clear language of the MMWA expresses Congress' intent that *any* arbitration agreement must be disclosed within the written warranty and not as a stand-alone document," and thereafter, holding that single subject rule governs disclosure of binding arbitration agreements) (emphasis added). However, we decline to do so.

Since Cunningham, state and federal district courts have divided over whether to apply the single document rule to binding arbitration agreements. Compare Jones, 640 F. Supp. 2d at 1143, Patriot Mfg., Inc. v. Dixon, 399 F. Supp. 2d 1298, 1304-09 (S.D. Ala. 2005), and Patriot Mfg., Inc. v. Jackson, 929 So. 2d 997, 1005-07 (Ala. 2005) (all holding single document rule does not require arbitration agreement be included in written warranty), with Porter v. Chrysler Grp. LLC, No. 6:13-CV-555-ORL-37, 2013 WL 6768218, at *1 (M.D. Fla. Dec. 19, 2013), TGB Marine, LLC v. Midnight Exp. Power Boats, Inc., No. 08-60940-CIV, 2008 WL 3889578, (S.D. Fla. 2008), Harnden v. Ford Motor Co.,

408 F. Supp. 2d 300, 307 (E.D. Mich. 2004), and Larrain, 976 So. 2d at 14 (all holding single document rule requires arbitration agreement to be included in written warranty).

The courts that have refused to follow Cunningham have done so by reasoning that its application of the single document rule rests on an incorrect understanding that the terms "binding arbitration" and "informal dispute settlement procedures" are interchangeable. See, e.g., Jones, 640 F. Supp. 2d at 1143; Dixon, 399 F. Supp. 2d at 1304-09; Jackson, 929 So. 2d at 1005-07. Instead, these courts conclude that the Eleventh Circuit subsequently reversed positions in Davis, making clear that binding arbitration is not an informal dispute settlement procedure or a prerequisite to litigation, a notion that also aligns with the Supreme Court's view of binding arbitration. See Mitsubishi, 473 U.S. at 628.

In Dixon, the District Court for the Southern District of Alabama best explained Davis's effect on both Cunningham's holding and on the single document rule, writing:

> In the wake of Cunningham and Davis, then, what is the present status of the MMWA's disclosure requirements? Clearly, the single document rule remains alive and well. But the statutory and regulatory scheme does not require that *all* information having any bearing on the warranty must be disclosed within the warranty. To the contrary, the MMWA—and more precisely § 2302(a)—plainly provides that a warrantor's required disclosures under the single document rule are limited to those specifically enumerated in the FTC regulations. Those regulations do not identify arbitration agreements as items that must be disclosed, but they do mandate disclosure of "informal dispute settlement mechanisms." The Davis case, which is binding precedent to this Court, decided that arbitration agreements are not "informal dispute settlement mechanisms" in the context of the MMWA.
>
> Under this synopsis of the law, then, it is plain that, while the single document rule enjoys continued vitality, arbitration agreements lie beyond the scope of the disclosures required pursuant to that rule.

399 F. Supp. 2d at 1303-04.

This reasoning is persuasive. Cunningham's application of the single document rule rests solely on the notion that binding arbitration is an informal dispute settlement procedure. If we accept this premise, we would need to then defer to the FTC's regulations prohibiting binding arbitration because as an informal dispute settlement mechanism, binding arbitration would then be subject to the FTC's rulemaking authority. This is a view that we do not accept.

The FTC's disclosure regulations do not explicitly mention binding arbitration. By enforcing an arbitration disclosure requirement that is not expressly included in the FTC's regulations, this Court would "encroach on the [MMWA's] statutory and regulatory framework by unilaterally constructing a judicial rule that neither Congress nor the FTC has seen fit to create." Dixon, 399 F. Supp. 2d at 1309. The MMWA "requires disclosure in the warranty itself only 'to the extent required by the rules of the [FTC],' and the FTC has seen fit to require disclosure of required resort to an informal dispute-settlement mechanism, not the completely separate process of binding arbitration." Jackson, 929 So. 2d at 1006. For these reasons, we hold that the FTC's single-document rule does not apply to binding arbitration agreements. We disagree with the Third District Court's opinion in Larrain and certify conflict.

AFFIRMED; CONFLICT CERTIFIED.

EVANDER, C.J. and SASSO, J., concur.

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FIFTH DISTRICT

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Robert E. Sickles and Yesica S. Liposky , of Nelson Mullins Broad and Cassel, Tampa, for Appellee, Gibson Auto Sales, Inc. d/b/a Gibson Truck World.

No Appearance for other Appellee.

ORFINGER, J.

Les Krol appeals an order compelling arbitration of the written warranty claims that he brought against Gibson Auto Sales, Inc. ("Gibson Auto") under the Magnuson-Moss

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This case arises from Mr. Krol's purchase of a used truck from Gibson Auto. As part of the sale, the parties executed an installment sales contract and a separate retail purchase order that included a binding arbitration agreement for any dispute related to the truck's purchase.[2] Gibson Auto also extended an express written warranty on the truck.

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[1] 15 U.S.C. §§ 2301-12 (2012).

[2] The arbitration clause in the retail buyer order states in full:

> Dealer and customer agree that any controversy, claim, suit, demand, counterclaim, cross claim, or third-party complaint, arising out of, or relating to this Order or the parties' relationship (whether statutory or otherwise), including, but not limited to any matter that may have induced the Customer to enter into any relationship with Dealer and any disputes regarding the validity or enforceability of this clause (collectively referred to as "Claim"), shall be submitted to final and binding arbitration . . . . The arbitration shall be final and binding on all parties.

hearing, the trial court entered an order granting Gibson's motion to stay and compelling arbitration.

ANALYSIS

We review a trial court's ruling on a motion to compel arbitration de novo. Tropical Ford, Inc. v. Major, 882 So. 2d 476, 478 (Fla. 5th DCA 2004). When deciding whether to compel arbitration according to an agreement, a trial court must consider: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999). Mr. Krol's appeal centers on the second factor. He argues that no arbitrable issue existed here because MMWA claims are exempt from binding arbitration. Alternatively, he posits that the arbitration agreement is unenforceable because it violates the FTC's disclosure rules since the arbitration clause does not appear in a single document with the other warranty terms.

I. The Arbitrability of MMWA claims.

The United States Supreme Court has not addressed whether MMWA claims are arbitrable, and state and lower federal courts are divided on the issue.[3] However, both

[3] Compare, e.g., Jones v. Gen. Motors Corp., 640 F. Supp. 2d 1124, 1143 (D. Ariz. 2009), S. Energy Homes, Inc. v. Ard, 772 So. 2d 1131, 1135 (Ala. 2000), Borowiec v. Gateway 2000, 808 N.E.2d 957, 970 (Ill. 2004), Abela v. Gen. Motors Corp., 677 N.W.2d 325, 327 (Mich. 2004), and In re Am. Homestar of Lancaster, Inc., 50 S.W.3d 480, 492 (Tex. 2001) (all holding MMWA claims are subject to binding arbitration), with Higgs v. Warranty Grp., No. C2-02-1092, 2007 WL 2034376, at *8 (S.D. Ohio July 11, 2007), Rickard v. Teynor's Homes, Inc., 279 F. Supp. 2d 910, 921 (N.D. Ohio 2003), Browne v. Kline Tysons Imps., Inc., 190 F. Supp. 2d 827, 831-33 (E.D. Va. 2002), Pitchford v. Oakwood Mobile Homes, Inc., 124 F. Supp. 2d 958, 962-65 (W.D. Va. 2000), and Koons Ford of Balt., Inc. v. Lobach, 919 A.2d 722, 737 (Md. 2007) (all holding MMWA claims are exempt from binding arbitration).

federal circuit courts to consider the issue have concluded that the MMWA does not prohibit binding arbitration of written warranty claims.[4] Davis v. S. Energy Homes, Inc., 305 F.3d 1268, 1272 (11th Cir. 2002) (holding that MMWA permits enforcement of binding arbitration agreements related to written warranties); Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 479 (5th Cir. 2002) (holding that "MMWA does not preclude binding arbitration of claims pursuant to a valid binding arbitration agreement, which the courts must enforce pursuant to the [Federal Arbitration Act]").[5] After considering the MMWA and its legislative history, the federal policy favoring binding arbitration, and the persuasive federal circuit court opinions, we conclude that the MMWA permits pre-dispute binding arbitration of written warranty claims.

A. MMWA.

Because product warranties often left consumers with "little understanding of the frequently complex legal implications of warranties on consumer products," 40 Fed. Reg.

[4] In Kolev v. Euromotors West/The Auto Gallery, 658 F.3d 1024 (9th Cir. 2011), the Ninth Circuit held that the MMWA prohibited pre-dispute binding arbitration on written warranty claims. But that opinion has since been withdrawn. See Kolev v. Euromotors W./The Auto Gallery, 676 F.3d 867 (9th Cir. 2012) ("The Opinion filed September 20, 2011, and appearing at 658 F.3d 1024 (9th Cir. 2011), is withdrawn. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit.") (citations omitted).

[5] In Florida, only the Second District Court of Appeal has commented on the arbitrability of MMWA claims. See Stacy David, Inc. v. Consuegra, 845 So. 2d 303 (Fla. 2d DCA 2003). In Consuegra, the Second District, though not specifically asked to decide whether MMWA claims are arbitrable, briefly addressed the issue when considering the validity of an arbitration agreement. Citing Davis, it found that "the Eleventh Circuit has required arbitration of claims under the Magnuson-Moss Act." Consuegra, 845 So. 2d at 306. Based on Davis, the court concluded that "no count of the [consumer's] complaint appears to fall outside the arbitration agreement." Id. at 306-07. The Second District then reversed the trial court's order and compelled arbitration of the buyer's MMWA claims. Id. at 306.

60168 (Dec. 31, 1975) (quoting S. Rep. No. 93-151 (1973)), Congress enacted the MMWA "[t]o provide minimum disclosure standards for written consumer product warranties; to define minimum federal content standards for such warranties; to amend the federal trade commission act in order to improve its consumer protection activities; and for other purposes." Magnuson-Moss Warranty-Federal Trade Comm'n Improvement Act, Pub. L. No. 93-637, § 356, 88 Stat. 2183 (1975). The MMWA requires warrantors to "fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty." 15 U.S.C. § 2302(a) (2012). It also creates a private right of action for those consumers who have been "damaged by the failure of a . . . warrantor . . . to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract." Id. § 2310(d)(1). An aggrieved consumer has the option to sue for damages and equitable relief in either state courts or federal district courts. Id. If the consumer prevails, he or she is entitled to attorney's fees and costs. Id. § 2310(d)(2).

Along with a private right of action, the MMWA encourages warrantors to settle consumer claims "fairly and expeditiously" through informal dispute settlement procedures. Id. § 2310(a). While the term "informal dispute settlement procedures" is not defined in the MMWA, Congress authorized the FTC to establish minimum requirements for any such procedures that are incorporated into the terms of a written warranty. Id. § 2310(a)(2). If a warrantor establishes an informal dispute settlement procedure, it may include within the written warranty "a requirement that the consumer resort to such procedure before pursuing any legal remedy." Id. § 2310(a)(3)(C). The FTC has broadly interpreted the term "informal dispute settlement procedures" to include both binding and

nonbinding arbitration, 16 C.F.R. § 700.8 (2015), and has adopted a regulation stating that informal dispute settlement procedures under the MMWA cannot be legally binding. 16 C.F.R. § 703.5(j) (2015).

B. Federal Policy.

Federal policy favors arbitration. In 1925, Congress enacted the Federal Arbitration Act ("FAA") "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). To this end, the FAA provides that

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2012).

The FAA establishes a "liberal federal policy favoring arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). The Supreme Court has interpreted this policy as establishing a strong presumption favoring the enforcement of binding arbitration agreements so that any doubts over whether an issue is arbitrable should be resolved in favor of arbitration. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). This presumption applies equally to statutory claims. Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987). Courts will enforce binding arbitration of statutory claims, unless Congress has expressed a clear

intention to preclude arbitration. Gilmer, 500 U.S. at 26. The party challenging arbitration bears the heavy burden of proving such congressional intent. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91-92 (2000).

C. The McMahon Test.

To determine whether Congress has intended to prohibit binding arbitration of a statutory claim, we apply the Supreme Court's McMahon test, which requires us to consider three factors to determine Congress's intent: "(1) the text of the statute; (2) its legislative history; and (3) whether 'an inherent conflict between arbitration and the underlying purposes [of the statute]' exists." Davis, 305 F.3d at 1273 (quoting McMahon, 482 U.S. at 226). To date, "[i]n every statutory right case that the Supreme Court has considered, it has upheld binding arbitration if the statute creating the right did not *explicitly* preclude arbitration."[6] Id.

Turning to the first McMahon factor, the text of MMWA does not expressly preclude or even mention "binding arbitration." Despite a lack of an express reference, Mr. Krol argues that Congress expressed its intention to prohibit binding arbitration in two ways. One, it created a right to commence a civil action for written warranty claims. Two, when Congress enacted the MMWA, arbitration—both binding and non-binding—was widely

[6] The Supreme Court has upheld binding arbitration agreements related to claims arising under the following federal statutes: Securities Act of 1933, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484-86 (1989), overruling Wilko v. Swan, 346 U.S. 427 (1953); Age Discrimination in Employment Act ("ADEA"), Gilmer, 500 U.S. at 35; Sherman Act, Mitsubishi, 473 U.S. at 628; Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organization Act ("RICO"), McMahon, 482 U.S. 220; Truth in Lending Act, Green Tree Financial Corp.-Alabama, 531 U.S. at 88-92; RICO, PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401 (2003); Credit Repair Organizations Act, CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); and the Fair Labor Standards Act, Epic Systems v. Lewis, 138 S. Ct. 1612 (2018).

considered an "informal" procedure. Hence, he posits that it was likely that Congress would have considered binding arbitration an informal dispute settlement procedure that would serve as a prerequisite to litigation that would be regulated by the FTC.

Both of these arguments fail. First, the provision of a private right of action alone does not establish Congressional intent to prohibit binding arbitration. Davis, 305 F.3d at 1274 (citing Gilmer, 500 U.S. at 29 (rejecting argument that binding arbitration is improper "because it deprives claimants of the judicial forum provided for by the ADEA")). Second, binding arbitration is not comparable to the informal dispute settlement procedures described in the MMWA because it is not a prerequisite to litigation—it is a *substitute* for litigation. Walton, 298 F.3d at 475; see Mitsubishi, 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

The second McMahon factor requires us to examine the MMWA's legislative history. Like the text, the legislative history does not suggest that binding arbitration is prohibited. Indeed, it implies the opposite. For instance, the Senate declared in its Conference Report that litigants may look to the courts and arbiters alike "to resolve 'actions' and to be the 'ultimate' means of resolving an MMWA claim." Jones v. Gen. Motors Corp., 640 F. Supp. 2d 1124, 1137 (D. Ariz. 2009) (citing S. Rep. No. 93-1408 (1974), as reprinted in 1974 U.S.C.C.A.N. 7755). The Senate Conference Report further explains 15 U.S.C. § 2304(a)(4)—the section of the MMWA that gives the FTC the ability to define what constitutes "a reasonable number of attempts" a warrantor must make to remedy a product defect before a refund or replacement must be provided—by stating that "if the [FTC] does not determine by rule what constitutes a reasonable number of

attempts in a given situation, then the parties or, *ultimately*, a third party (*arbiter* or judge) would decide." Id. (quoting S. Rep. No. 93-1408, as reprinted in 1974 U.S.C.C.A.N. at 7757) (emphases added). This explanation of 15 U.S.C. § 2304, which, among other things, authorizes the FTC to establish minimum standards regarding the duration of a warranty, consequential damage provisions, and conditions imposed by the warrantor, demonstrates that binding arbitration is permitted to resolve MMWA disputes. In fact, the same Conference Report recognizes that when there is no FTC rule regulating the reasonableness of a warrantor's duty, "the consumer could challenge the reasonableness of such requirement *by bringing an action for breach of warranty* and arguing that the warrantor had breached his full warranty obligation. The burden would then be upon the warrantor to establish before an *arbiter or in a court* that the requirement . . . was reasonable . . . ." Id. at 1138 (quoting S. Rep. No. 93-1408, as reprinted in 1974 U.S.C.C.A.N. at 7757). Thus, the legislative history suggests that Congress considered binding arbitration a reasonable alternative to civil litigation for resolving MMWA claims. At least, it does not suggest that binding arbitration is prohibited.

The third McMahon factor requires us to consider whether there is an underlying conflict between binding arbitration and the purposes of the MMWA. Mr. Krol argues that such a conflict exists, suggesting that binding arbitration of written warranty claims would undermine Congress's goals of protecting consumers and correcting the inequality in bargaining power between warrantors and consumers.

Neither of these goals overrides the strong federal policy favoring arbitration. To the first goal, the Supreme Court has repeatedly enforced binding arbitration of statutory claims where the purpose of the statute was consumer protection. See Davis, 305 F.3d

at 1276 (collecting cases). Nothing suggests that consumers are less able to vindicate their MMWA claims through arbitration than through civil litigation. To the second goal, unequal bargaining power alone will not preclude binding arbitration when Congress has not expressed clear intent to do so. See id. at 1277 (citing Gilmer, 500 U.S. at 33 (stating that "[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context")). Nothing here suggests that the inequality of bargaining power between consumers and warrantors is more substantial than in other instances when the Supreme Court has allowed binding arbitration.

D. The Chevron Test.

Notwithstanding the results of our McMahon analysis, Mr. Krol contends that since Congress gave the FTC rulemaking authority to enforce the MMWA, we must defer to its regulations prohibiting binding arbitration of MMWA written warranty claims. See 16 C.F.R. §§ 700.8, 703.5(j) (2015). Because Congress has given the FTC rulemaking authority regarding portions of the MMWA, we apply the two-prong test set forth in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), to determine whether we must defer to the FTC's interpretive regulations.

Chevron informs us to defer to the FTC's interpretive regulations prohibiting binding arbitration only if: (1) Congress has not directly spoken to the specific issue; and (2) the FTC's interpretation "is based on a permissible construction of the statute." 467

U.S. at 843. Because the MMWA does not speak to binding arbitration, we must only consider the test's second prong.[7]

State and federal courts are again divided over whether the FTC's reading of the MMWA is permissible. The only federal circuit court to consider the reasonableness of the FTC's interpretation has found it unreasonable. See Davis, 305 F.3d at 1279. For several reasons, we agree with Davis that the FTC's interpretation that the MMWA precludes binding arbitration is unreasonable.

First, for the FTC to have authority to regulate binding arbitration, we would have to accept the notion that Congress considered binding arbitration an informal dispute settlement mechanism. We do not. As our discussion of the McMahon test demonstrates, Congress appears to have understood binding arbitration to be a substitute for a judicial forum, not an informal dispute settlement mechanism.

Second, the FTC's prohibition of arbitration relies in part on the idea that by providing a judicial forum, Congress intended to preclude binding arbitration. The Supreme Court has been unwavering on this point—a statute's provision of a judicial forum does not show Congressional intent to prohibit arbitration. Thus, we too reject this notion.

Third, the FTC's ultimate rationale for prohibiting binding arbitration is rooted in the belief that an arbitral forum does not ensure consumer protection. For more than half a

[7] In Walton, the Fifth Circuit avoided Chevron's second prong by concluding that Congress spoke to binding arbitration when it expressed in the FAA a clear intention to favor enforcement of binding arbitration agreements. 298 F.3d at 475. We disagree and join the majority of courts who have concluded that Congress has not spoken directly to the permissibility of binding arbitration under the MMWA. See, e.g., Davis, 305 F.3d at 1278; Jones, 640 F. Supp. 2d at 1139; Higgs, No. C2-02-1092, 2007 WL 2034376, at *8; Lobach, 919 A.2d at 737.

century, the Supreme Court has not viewed arbitration as harmful to consumers, but instead as a proceeding that is adequate to protect consumers. See Davis, 305 F.3d at 1279 (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) (noting that "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation")). The Supreme Court has refused to defer to interpretive regulations prohibiting arbitration that have depended on the Court's formerly held view disfavoring arbitration. See, e.g., McMahon, 482 U.S. at 232-34 (rejecting SEC's interpretation of Securities Exchange Act of 1934 that binding arbitration agreements were prohibited). Given the Supreme Court's current view on arbitration, the FTC's continued hostility towards arbitration is unwarranted.

In sum, given the limited scope of the FTC's authority to regulate only non-binding, pre-dispute settlement procedures and the federal policy favoring arbitration enforcement, we conclude the FTC's prohibition of arbitration is based on an impermissible construction of the statute. As a result, we need not defer to the FTC's interpretive regulations, and instead, hold that MMWA claims can be subject to binding arbitration.

II. The FTC's Single Document Rule.

Mr. Krol also contends that the arbitration agreement here is unenforceable because it was in the retail purchase order and not in a single document along with the other warranty terms.[8]

[8] Under Florida law, when, as here, parties to a contract execute two or more documents at or near the same time and concern the same transaction or subject matter, the documents are generally construed together as a single contract. E.g., Mnemonics, Inc. v. Max Davis Assocs., 808 So. 2d 1278, 1280 (Fla. 5th DCA 2002); see Wilson v. Terwillinger, 140 So. 3d 1122, 1124 (Fla. 5th DCA 2014) (reiterating "contemporaneous

The MMWA requires that warrantors, providing a written warranty to a consumer, must "fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty." 15 U.S.C. § 2302(a) (2012). Congress delegated authority to the FTC to establish the items warrantors must disclose. In response, the FTC requires a warrantor to disclose nine material facts related to the warranty, one of which requires disclosure in the warranty of "[i]nformation respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with part 703 of this subchapter." 16 C.F.R. § 701.3(a)(6) (2015). The FTC has also established what has been called the single document rule, which requires warrantors to "clearly and conspicuously disclose [all warranty terms] in a single document in simple and readily understood language." Id. § 701.3(a). The purpose of the single document rule is to avoid consumer confusion.

In arguing that the single document rule required Gibson Auto to disclose the binding arbitration clause in the same document with the other warranty terms, Mr. Krol relies on Cunningham v. Fleetwood Homes of Georgia, 253 F.3d 611, 624 (11th Cir. 2001). In that case, a mobile-home manufacturer, as a third-party beneficiary of a stand-alone arbitration agreement, moved to compel arbitration of a consumer's warranty claims against the warrantor under the MMWA. 253 F.3d at 613. The Eleventh Circuit affirmed the trial court's order denying the manufacturer's motion, concluding that the stand-alone arbitration agreement violated the FTC's single document rule. In reaching this conclusion, the court emphasized that the MMWA and applicable FTC rules obligate

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instrument rule" and that origins "are of rather ancient vintage" and has been consistently applied since inception).

warrantors to "clearly and conspicuously disclose [warranty terms] in a single document in simple and readily understood language." Id. at 620 (quoting 16 C.F.R. § 701.3(a)). One such term obligates a warrantor to disclose "[i]information respecting the availability of any informal dispute settlement mechanism." Id. at 621. Interpreting the "informal dispute settlement mechanism" to include binding arbitration, the court found that the failure to include the binding arbitration agreement in the warranty document violated the FTC's disclosure requirements. Id. at 620.

The Third District Court of Appeal has adopted Cunningham's application of the single document rule. See Larrain v. Bengal Motor Co. Ltd., 976 So. 2d 12, 14 (Fla. 3d DCA 2008) (determining, based on Cunningham, that "clear language of the MMWA expresses Congress' intent that *any* arbitration agreement must be disclosed within the written warranty and not as a stand-alone document," and thereafter, holding that single subject rule governs disclosure of binding arbitration agreements) (emphasis added). However, we decline to do so.

Since Cunningham, state and federal district courts have divided over whether to apply the single document rule to binding arbitration agreements. Compare Jones, 640 F. Supp. 2d at 1143, Patriot Mfg., Inc. v. Dixon, 399 F. Supp. 2d 1298, 1304-09 (S.D. Ala. 2005), and Patriot Mfg., Inc. v. Jackson, 929 So. 2d 997, 1005-07 (Ala. 2005) (all holding single document rule does not require arbitration agreement be included in written warranty), with Porter v. Chrysler Grp. LLC, No. 6:13-CV-555-ORL-37, 2013 WL 6768218, at *1 (M.D. Fla. Dec. 19, 2013), TGB Marine, LLC v. Midnight Exp. Power Boats, Inc., No. 08-60940-CIV, 2008 WL 3889578, (S.D. Fla. 2008), Harnden v. Ford Motor Co.,

408 F. Supp. 2d 300, 307 (E.D. Mich. 2004), and Larrain, 976 So. 2d at 14 (all holding single document rule requires arbitration agreement to be included in written warranty).

The courts that have refused to follow Cunningham have done so by reasoning that its application of the single document rule rests on an incorrect understanding that the terms "binding arbitration" and "informal dispute settlement procedures" are interchangeable. See, e.g., Jones, 640 F. Supp. 2d at 1143; Dixon, 399 F. Supp. 2d at 1304-09; Jackson, 929 So. 2d at 1005-07. Instead, these courts conclude that the Eleventh Circuit subsequently reversed positions in Davis, making clear that binding arbitration is not an informal dispute settlement procedure or a prerequisite to litigation, a notion that also aligns with the Supreme Court's view of binding arbitration. See Mitsubishi, 473 U.S. at 628.

In Dixon, the District Court for the Southern District of Alabama best explained Davis's effect on both Cunningham's holding and on the single document rule, writing:

> In the wake of Cunningham and Davis, then, what is the present status of the MMWA's disclosure requirements? Clearly, the single document rule remains alive and well. But the statutory and regulatory scheme does not require that *all* information having any bearing on the warranty must be disclosed within the warranty. To the contrary, the MMWA—and more precisely § 2302(a)—plainly provides that a warrantor's required disclosures under the single document rule are limited to those specifically enumerated in the FTC regulations. Those regulations do not identify arbitration agreements as items that must be disclosed, but they do mandate disclosure of "informal dispute settlement mechanisms." The Davis case, which is binding precedent to this Court, decided that arbitration agreements are not "informal dispute settlement mechanisms" in the context of the MMWA.
>
> Under this synopsis of the law, then, it is plain that, while the single document rule enjoys continued vitality, arbitration agreements lie beyond the scope of the disclosures required pursuant to that rule.

399 F. Supp. 2d at 1303-04.

This reasoning is persuasive. Cunningham's application of the single document rule rests solely on the notion that binding arbitration is an informal dispute settlement procedure. If we accept this premise, we would need to then defer to the FTC's regulations prohibiting binding arbitration because as an informal dispute settlement mechanism, binding arbitration would then be subject to the FTC's rulemaking authority. This is a view that we do not accept.

The FTC's disclosure regulations do not explicitly mention binding arbitration. By enforcing an arbitration disclosure requirement that is not expressly included in the FTC's regulations, this Court would "encroach on the [MMWA's] statutory and regulatory framework by unilaterally constructing a judicial rule that neither Congress nor the FTC has seen fit to create." Dixon, 399 F. Supp. 2d at 1309. The MMWA "requires disclosure in the warranty itself only 'to the extent required by the rules of the [FTC],' and the FTC has seen fit to require disclosure of required resort to an informal dispute-settlement mechanism, not the completely separate process of binding arbitration." Jackson, 929 So. 2d at 1006. For these reasons, we hold that the FTC's single-document rule does not apply to binding arbitration agreements. We disagree with the Third District Court's opinion in Larrain and certify conflict.

AFFIRMED; CONFLICT CERTIFIED.

EVANDER, C.J. and SASSO, J., concur.

5DCA CERTIFICATION

I hereby certify that the foregoing is a true and correct copy of the instrument(s) filed in this office.

Witness my hand and official seal this June 5, 2019.

Joanne P. Simmons, Clerk of the Fifth District Court of Appeal.

By: /s/ Kathy Palmere

KERRY I. EVANDER
CHIEF JUDGE

RICHARD B. ORFINGER
JAY P. COHEN
WENDY W. BERGER
F. RAND WALLIS
BRIAN D. LAMBERT
JAMES A. EDWARDS
ERIC J. EISNAUGLE
JOHN M. HARRIS
JAMIE R. GROSSHANS
MEREDITH L. SASSO
JUDGES

DISTRICT COURT OF APPEAL
FIFTH DISTRICT
300 SOUTH BEACH STREET
DAYTONA BEACH, FLORIDA 32114
(386) 947-1500 COURT
(386) 255-8600 CLERK

JOANNE P. SIMMONS
CLERK

CHARLES R. CRAWFORD
MARSHAL

June 5, 2019

Hon. John A. Tomasino, Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1927

Re: Krol
vs
FCA US, LLC & Gibson Auto

Appeal No. 5D18-2149
Trial Court No: 2017-CA-049992
Trial Court Judge: STEPHEN R. KOONS

Dear Hon. Tomasino:
Attached is a certified copy of the Notice Invoking the Discretionary Jurisdiction of the Supreme Court pursuant to Rule 9.120, Florida Rules of Appellate Procedure, along with a copy of this Court's opinion or decision relevant to this case.

☐ The filing fee prescribed by Section 25.241(3), Florida Statutes, was received by this court and will be forwarded.

☒ The filing fee prescribed by Section 25.241(3), Florida Statutes, was not received by this Court.

☐ Petitioner/Appellant has been previously determined insolvent by this Circuit Court or our court.

No filing fee is required because:

☐ Summary Appeal (Rule 9.141)
☐ Unemployment Appeals Commission
☐ Habeas Corpus
☐ Juvenile case
☐ Other 35.22(3)

Sincerely,

JOANNE P. SIMMONS, CLERK
By: /s/ Kathy Palmere
Deputy Clerk
Attachments
cc Theodore F. Greene, III Jeremy Kespohl Angela Thomas Yesica S. Liposky Robert E. Sickles John Tomasino

Supreme Court of Florida

Office of the Clerk
500 South Duval Street
Tallahassee, Florida 32399-1927

JOHN A. TOMASINO
CLERK
MARK CLAYTON
CHIEF DEPUTY CLERK
JULIA BREEDING
STAFF ATTORNEY

PHONE NUMBER: (850) 488-0125
www.floridasupremecourt.org

ACKNOWLEDGMENT OF NEW CASE

June 11, 2019

RE: LES KROL vs. FCA US, LLC, ET AL.

CASE NUMBER: SC19-952
Lower Tribunal Case Number(s): 5D18-2149; 052017CA049992XXXXXX
Lower Tribunal Filing Date: 6/5/2019

The Florida Supreme Court's case number must be utilized on all pleadings and correspondence filed in this cause. The Court has received the following documents reflecting a filing date of 6/5/2019.

Notice to Invoke Discretionary Jurisdiction seeking review of opinion dated May 10, 2019.

Filers can now pay the $300 filing fee through the portal. To pay this fee, go to the "Document" page after entering the case number. On the "Documents" page, after clicking the "Add" button, navigate to the "Pay Fee" category. Select the "PAY CASE FILING FEE - $300", then go to the bottom of the page and upload a one-page Filing Fee Paid letter, stating that you are paying the fee through the portal. The fee amount and the fields to enter the payment information will be on the "Review and Submit" page. Your fee must be paid within ten days.

tr
cc:
YESICA S. LIPOSKY
ROBERT E. SICKLES
THEODORE F. GREENE III
HON. JOANNE P. SIMMONS, CLERK

Supreme Court of Florida

MONDAY, NOVEMBER 25, 2019

CASE NO.: SC19-952
Lower Tribunal No(s).:
5D18-2149; 052017CA049992XXXXXX

LES KROL vs. FCA US, LLC, ET AL.

Petitioner(s) Respondent(s)

The Court accepts jurisdiction of this case.

Petitioner's initial brief on the merits must be served on or before December 16, 2019; respondent's answer brief on the merits must be served thirty days after service of petitioner's initial brief on the merits; and petitioner's reply brief on the merits must be served thirty days after service of respondent's answer brief on the merits.

The Clerk of the Fifth District Court of Appeal must file the record which must be properly indexed and paginated on or before January 24, 2020. The Clerk may provide the record in the format as currently maintained at the district court, either paper or electronic.

CANADY, C.J., and LABARGA, LAWSON, LAGOA, and MUÑIZ, JJ., concur.

Oral argument will be set by separate order. Counsel for the parties will be notified of the oral argument date approximately sixty days prior to oral argument.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

kj

Served:

YESICA S. LIPOSKY
ROBERT E. SICKLES
THEODORE F. GREENE III
HON. JOANNE P. SIMMONS, CLERK

CERTIFICATE OF CLERK

STATE OF FLORIDA
COUNTY OF VOLUSIA

I hereby certify that pages 004 through 526 are true and correct copies of the instrument(s) filed in this office in the case of:

LES KROL,

Appellant,

vs.

Supreme Court Case No: SC19-952
Fifth DCA Case No: 5D18-2149
Circuit Case No: 2017-CA-049992

FCA US, LLC AND GIBSON AUTO SALES, INC., D/B/A GIBSON TRUCK WORLD,

Appellees.
_____/

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of Appeal, Fifth District, on the 16th day of December, 2019, at Daytona Beach, Florida.

JOANNE P. SIMMONS, CLERK OF THE FIFTH DISTRICT COURT OF APPEAL

By: /s/ Sheila N. Stanbro
Chief Deputy Clerk

Filing # 100210471 E-Filed 12/12/2019 11:45:02 AM

IN THE SUPREME COURT OF FLORIDA

LES KROL,

Appellant,

v.

GIBSON AUTO SALES, INC., d/b/a GIBSON TRUCK WORLD,
Appellee.
_____/

Fla. S. Ct. No.: SC19-952

DCA NO.: 5D18-2149
Trial Ct. No. 2017-CA-049992

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APPELLANT'S UNOPPOSED MOTION FOR EXTENSION OF TIME FOR FILING OF HIS INITIAL BRIEF

The Appellant LES KROL, hereby move for an extension of time for the filing of the Initial Brief on the Merits in this cause, pursuant to Fla. R. P. 9.300. In support of this motion, the Appellant states:

1. The order of this Court entered on November 25, 2019, set the deadline for Appellant to file its initial brief as December 16, 2019.

2. Due to the impending holiday season, and Appellant Counsel's obligations in his other cases, Appellant is requesting a thirty (30) day extension of time to file and serve his initial brief.

3. This Motion for Extension of Time is made in good faith and not for purposes of delay.

4. Counsel for Appellant has consulted with Counsel for Appellee GIBSON AUTO SALES, INC. d/b/a GIBSON TRUCK WORLD ("Appellee")

who has indicated Appellee does not oppose the instant motion.

WHEREFORE Appellant LES KROL respectfully requests that this Court enter an order extending the time for serving and filing the Appellant's Initial Brief on the Merits by thirty (30) days.

CERTIFICATE OF SERVICE

I hereby certify that I furnished a true and correct copy of the above and foregoing by on electronic mail this 12h day of December 2019 to: Yesica Liposky, Esquire, Nelson Mullins Broad and Cassel, 100 North Tampa Street, Suite 3500, Tampa, FL 33602, Yesica.liposky@nelsonmullins.com

MORGAN & MORGAN, P.A.

/s/ Jeremy Kespohl
JEREMY KESPOHL, Esquire
Florida Bar No. 035979
ANGELA THOMAS, Esquire
Florida Bar No. 871311
Attorneys for Plaintiff
76 South Laura Street, Ste 1100
Jacksonville, FL 32202
(904) 361-4416 Telephone
(904) 361-4348 Facsimile
jkespohl@forthepeople.com
For Service of Documents Only:
warrantygroupeservice@forthepeople.com

Supreme Court of Florida

FRIDAY, DECEMBER 13, 2019

CASE NO.: SC19-952
Lower Tribunal No(s).:
5D18-2149; 052017CA049992XXXXXX

LES KROL vs. FCA US, LLC, ET AL.

Petitioner(s) Respondent(s)

Petitioner's motion for extension of time is granted and petitioner is allowed to and including January 15, 2019, in which to serve the initial brief on the merits. Multiple extensions of time for the same filing are discouraged. Absent extenuating circumstances, subsequent requests may be denied.

All other times will be extended accordingly.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

ks
Served:

YESICA S. LIPOSKY
ROBERT E. SICKLES
ANGELA DIANE THOMAS
THEODORE F. GREENE III
JEREMY ALAN KESPOHL