IN THE SUPREME COURT OF FLORIDA

LES KROL,

Petitioner

v.

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

Respondent.

Fla. S. Ct. No.: SC19-952

DCA NO.: 5D18-2149

Trial Ct. No. 2017-CA-049992

PETITIONER'S 'S INITIAL BRIEF

On Review from the Fifth District Court of Appeal

State of Florida

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I. STATEMENT OF THE CASE

Petitioner LES KROL ("KROL") purchased a Ram 3500 Crew Cab pickup truck from Respondent GIBSON AUTO SALES INC., d/b/a GIBSON TRUCK WORLD ("GIBSON AUTO") in June 2016. AR at 7.[1] Both the manufacturer and GIBSON AUTO issued separate written warranties on the truck. ***Id.*** Soon after KROL took possession of the vehicle, it exhibited substantial defects in its engine, suspension, and brake systems. AR at 81-82. Both written warranties instructed KROL to bring the subject vehicle to GIBSON AUTO for repair. AR at 82-83; AR at 99; AR at 127. In compliance with the warranties, KROL repeatedly brought the vehicle back for repairs. Neither the vehicle manufacturer nor GIBSON AUTO (who also served as the agent for repairs for the manufacturer) were able to repair the vehicle to good working order. AR at 81-82; Having afforded GIBSON AUTO a reasonable opportunity to repair the vehicle, and growing increasingly frustrated when it failed to repair the vehicle, KROL filed suit. KROL alleged various claims for breach of warranty, including breach of written warranty under the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, 15 USC §§ 2301-2312 ("MMWA"). ***See, e.g.***, AR at 7-8, AR 27; AR 70; AR 84-90.

[1] The appellate record will be referred to herein as "AR" followed by page citations.

The MMWA allows "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to…bring suit for damages and other legal and equitable relief. *See* 15 USC §2310(d)(1); *see also American Honda Motor Co., Inc.* v. *Cerasani*, 955 So.2d 543, 545-546 (Fla. 2007) ("MMWA authorizes a lawsuit for damages and other equitable relief by 'a consumer who is damaged by the failure of a supplier, warrantor, or service contractor'"); *Mady* v. *DaimlerChiysler Corp.*, 59 So.3d 1129, 1132 (Fla. 2011) (same).

The manufacturer answered the complaint, but GIBSON AUTO moved to compel binding arbitration of the claims against it. AR at 175. GIBSON AUTO's purported basis for seeking arbitration was an arbitration agreement that was located on the back side of the Buyer's Order for the subject vehicle, printed in what appears to be a 4-point micro-font. AR at 179. The front of the document does not state that an arbitration clause is printed on the back. AR at 177-178. Moreover, the written warranty GIBSON AUTO provided doesn't reference or include an arbitration clause in the "single document" of the warranty. AR at 99.

KROL opposed binding arbitration on three grounds. First, FTC regulations prohibit binding arbitration of claims brought under the MMWA. AR at 181-192; AR at 325-326 Second, even where FTC regulations permit non-judicial resolution, the requirement must be contained within the written

warranty itself to be enforceable, i.e., contained in a "single document". AR at 291-292; AR at 326 Third, courts are required to defer to FTC. AR at 181-192; AR at 325-32

The matter was set for a hearing with the trial court on May 31, 2018. AR at 201. At 5:54 pm, the evening prior to the hearing, GIBSON AUTO filed an affidavit in support of its Amended Motion to Stay and Compel Arbitration. AR at 204-239. On May 31, 2018, at 11:06 AM, less than three hours before the hearing, GIBSON AUTO filed case law with the Court in support of its Amended Motion to Stay Litigation and Compel Arbitration. AR at 215- 241.

At approximately 2:00 pm on May 31, 2018, the parties attended the hearing on and presented their respective positions to the lower Court. AR at 243. On June 1, 2018, KROL filed a Notice of Supplemental Authority citing to additional case law/arguments in support of his opposition to KROL's Motion to Stay Litigation and Compel Arbitration. AR at 291 - 308. GIBSON AUTO responded to KROL's supplemental authority by arguing, among other things, that it was not timely submitted, despite the late nature in which it has submitted its prior filings AR at 310 - 322.

On June 21, 2018, the trial court entered an order granting GIBSON AUTO's Amended Motion to Stay and Compel Arbitration. AR at 324 - 328. The

Trial Court ruled KROL'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.*,[2] and *Stacy David, Inc.*, v. *Consuergra? Id.* KROL timely appealed the trial court's ruling. AR at 4-5. The issues before the Fifth District Court of Appeal were whether the MMWA permitted binding arbitration of breach of warranty claims[4], and if so whether or not the trial court erred in failing to apply the Federal Trade Commission's regulation requiring that an arbitration provision must be contained within the written warranty itself in order to be enforceable (the "single document rule") as held by the Third District Court of Appeals in *Larrain* v. *Bengal Motor Co.*, which was the only controlling decision on this matter at the time, and as such was binding upon the trial court at the time. AR 18 – 68; *see also Krol* v. *FCA US, LLC*, 273 So. 3d 198 (Fla. 5th DCA 2019); *Larrain v. Bengal Motor Co.*, 976 So. 2d 12, 14 (Fla. 3rd DCA 2008). GIBSON AUTO did not cross appeal any issue. AR at 358-404; *Krol v. FCA US, LLC, 213* So. 3d 198 (Fla. 5th DCA 2019).

The Fifth District Court of Appeals (herein after "district court") ruled that MMWA claims may be subject to binding arbitration pursuant to the Eleventh

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[2] *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002)
[3] *Stacy David, Inc.*, v. *Consuergra*, 845 So. 2d 303 (Fla. 2nd DCA 2003).
[4] Petitioner does not seek review of the issue of whether or not a MMWA claim may be subject to binding arbitration in this appeal.

Circuit's decision in *Davis*. AR 431-440. Furthermore, despite the fact that the issue had not been appealed or cross-appealed to the Court, the Fifth DCA also rejected the holding of the Third DCA in *Larrain* and found that the MMWA's "single-document" rule did not prohibit arbitration in the instant case. AR 440-444.

II. STANDARD OF REVIEW

The Supreme Court has jurisdiction to review a decision of a district court that expressly and directly conflicts with that of another district court. *See* Article V§ 3(b)(3) of the Florida Constitution. Rule 9.030 gives effect to that by providing, the "discretionary jurisdiction of the supreme court may be sought to review...decisions of district courts…certified to be in direct conflict with decisions of other district courts of appeal." *See* Fla. R. App. P. 9.030(a)(2)(A)(vi). The decision appealed certifies direct conflict with a decision of the Third District on the same issue of law. Therefore, the Supreme Court may exercise jurisdiction. *See* Padovano, Florida Appellate Practice, § 3:11, p. 80 (West 2014) (certification creates jurisdiction); *see also* State v. Vickery, 961 So.2d 309, 312 (Fla. 2007).

III. SUMMARY OF THE ARGUMENT

In holding that a consumer may be compelled to submit breach of warranty

claims to binding arbitration, even where the arbitration agreement is not contained within the written warranty itself, the Fifth District disregarded the intent and plain language of the MMWA, the Federal Trade Commission ("FTC") regulations enacted pursuant to it, the holding of the Eleventh Circuit in *Cunningham* v. *Fleetwood Homes of Georgia*, 253 F.3d 611 (11th Cir. 2001), and the Third District's holding in *Larrain v. Bengal Motor Co. Ltd.*, 976 So.2d 12 (Fla. 3rd DCA 2008). Thus, the Petitioner respectfully submits that this Court should reject the reasoning of the lower court, and follow the holding of the Third District Court in *Larrain*, by finding the MMWA's single document rule prohibits binding arbitration where the arbitration agreement is not contained within the written warranty itself.

IV. ARGUMENT

In *Shearson/Am. Express Inc.* v. *McMahon*, the United States Supreme Court set forth the test for determining whether a statute precluded binding arbitration. *McMahon*,482 U.S. 220, 227 (1987). Specifically the US 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, Congressional intent to prohibit arbitration may be found in the text, 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).

A. The MMWA expressly requires any binding arbitration provision be included in the written warranty

The text of the MMWA lays out specific terms and conditions which must be included within the text of the written warranty itself. The aforementioned requirements have become known as the single document rule. *See Cunningham* v. *Fleetwood Homes of Georgia, Inc.,* 253 F.3d 611, 622 (11th Cir. 2001) ("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.") (emphasis added); *see also Larrain* v. *Bengal Motor Co. Ltd.*, 976 So.2d 12, 14 (Fla. 3rd DCA 2008) ("The single document rule was promulgated by the FTC through authority delegated to it by Congress in the MMWA.").

During the late 1950s, multiple governmental agencies reported an unprecedented increase in consumer complaints regarding the failure of automobile manufacturers to honor their warranties. SeeH.R. REP. NO. 93-1107, at 25 (1974), *reprinted* /« 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*rid.*, *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 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.

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[5]. *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 that one of the primary purposes behind the passage of the act was ***to provide the FTC with better means of protectine 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 (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***

[5] President Johnson's Task Force was specifically regarding appliance warranties.

dealing with warranty problems. 119 CONG. RJEC. 967 (1973)(emphasis added).

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.

In 1975, Congress enacted the Magnuson-Moss Federal Trade Commission Warranty Act Magnuson-Moss Warranty Federal Trade Commission Improvement Act to improve the adequacy of information available to consumers, prevent deception, and advance competition. 15 U.S.C. § 2302(a). As noted above, prior to the passage of the MMWA, consumers had been inundated with problems concerning the complexity of written warranties generated by the presence of misleading terms and incomplete disclosures. *Cunningham* v. *Fleetwood Homes of*

Georgia, Inc., 253 F.3d 611, 621 (11th Cir. 2001). Thus, the MMWA provides:

> **Full and conspicuous disclosure of terms and conditions; additional requirements for contents**
>
> In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. Such rules may require inclusion in the written warranty of any of the following items among others:
>
> ...
>
> (4) A statement of what the warrantor will do in the event of a ... failure to conform with such written warranty...
> (5) A statement of what the consumer must do...
> ...
> (7) The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty...
> ...
> (9) A brief, general description of the legal remedies available to the consumer.
> ...

15 U.S.C. §2302(a).

In addition to the disclosure requirements specifically detailed in its text,

the MMWA also indicates:

> The Commission [FTC] may prescribe rules for determining the manner and form in which information with respect to any written warranty...shall be clearly and conspicuously presented or displayed so as not to mislead the reasonable, average consumer....

See 15 USC § 2302(b)(1)(B). The FTC has exercised the express delegation of rulemaking authority granted to it by Congress by issuing rules with respect to the information that must be disclosed within the text of a written warranty. Specifically, the FTC rules state:

> [A] written warranty...shall clearly and conspicuously disclose in a single document in simple and readily understood language, the following items of information:
>
> ...
>
> (3) A statement of what the warrantor will do in the event of a... failure to conform with the written warranty...;
>
> ...
>
> (5) A step-by-step explanation of the procedure which the consumer should follow in order to obtain performance of any warranty obligation...;
>
> (6) Information respecting the availability of any informal dispute settlement mechanism elected by the warrantor....

See 16 CFR §701.3(a)(emphasis added). In creating these rules, the FTC determined that the items that must be disclosed are material facts about the warranty, the non-disclosure of which would be deceptive or misleading. *See* 64 Fed. Reg. 19,700, 19,701 (Apr. 22, 1999).

The text of the MMWA, and the FTC rules, state that, within the text of the warranty itself, a warrantor is required to disclose: what a consumer must do in the event of a breach, the procedure a consumer must follow to obtain performance, a description of the Consumer's legal remedies, and information regarding any informal dispute resolution procedure. These requirements without question would require a warrantor to disclose a binding arbitration provision within the text of its written warranty. In fact, it has been held that nondisclosure of non-judicial dispute resolution "is a violation of both Magnuson-Moss and the Federal Trade Commission Act as an unfair or deceptive act or practice". Cunningham at 620-621; *see also Sorter* v. *Chrysler Group LLC*, 2013 U.S. Dist. LEXIS 178173 * 3 (MD Fla. 2013) ("Congress may limit the use of [arbitration] agreements in particular statutes. It did so in the MMWA, which requires disclosure of information…in the warranty itself."). Therefore, even when the specific circumstances permitting a warrantor to impose binding arbitration upon a consumer are met, the arbitration agreement must be contained within the text of the written warranty to be valid pursuant to the MMWA's single document rule.

B. The majority position is that binding arbitration provisions must be included within the written warranty

The overwhelming majority of the Courts to examine the issue, including courts in Florida, have found that the MMWA's single document rule requires any arbitration provision to be included within written warranty itself. In 2001, the Eleventh Circuit Court of Appeals examined this very issue for the first time in *Cunningham* v. *Fleetwood Homes of Georgia, Inc.,* 253 F.3d 611 (11th Cir. 2001).

The *Cunningham* court explained that the MMWA requires significant terms and conditions of the warranty to be included "in simple language in the warranty itself." *Id* (relying on 15 U.S.C. §2302(a)). The disclosure requirements established by the FTC, pursuant to the MMWA, obligate warrantors to clearly and conspicuously disclose warranty terms in a single document. *Id* at 621 (relying on 16 C.F.R. § 701.3 (2002)). The court found that these disclosure requirements were an integral feature of MMWA, and that the warrantor had failed to meet those requirements by not disclosing the arbitration agreement within the warranty itself. *Id* at 622.

The *Cunningham* court went on to explain that compliance with these disclosure requirements is mandatory to achieve the purpose that Congress intended to serve because, prior to the passage of the MMWA, consumers had been

inundated with problems concerning the complexity of written warranties generated by the presence of misleading terms and incomplete disclosures. *Cunningham*, 253 F.3d at 621. The court found that "[t]he 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 a consumer." *Id.* (relying on 40 Fed. Reg. 60,168, 60,175 (Dec. 31, 1975)). The Court further explained that an arbitration clause, like any forum selection clause, is a material fact regarding the warranty. *Id* at 622. Accordingly, "[compelling arbitration on the basis of an arbitration agreement that is not referenced in the warranty presents an inherent conflict with the . . . purpose of [Magnuson-Moss]." Id. Therefore, *Cunningham* court ruled that the Congress intended to override the FAA's mandate to enforce arbitration agreements that are not contained within the warranty. *Id,*

It is important to note that nothing in the Eleventh Circuit's subsequent decision in *Davis v. Southern Energy Homes, Inc.*, modified or reversed 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 still valid and binding law in the Eleventh Circuit. Moreover, after the *Davis* decision, multiple Courts within the Eleventh Circuit have continued to cite

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. 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.*, 2008 WL 3889578 at *4 n.3 (S.D. Fla. 2008) (A warrantor's failure to comply with the single document rule precludes him from compelling arbitration of express warranty or MMWA claims).

Furthermore, at least one Court within the jurisdiction of the Eleventh Circuit Court of Appeals has criticized a warrantor for not bringing *Cunningham* to the Court's attention in a case involving a single document rule issue. In *Porter* v. *Cluysler Grp. LLC*, the Court 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. *Chiysler Grp. LLC*, No. 6:13-CV-555-ORL-37, 2013 WL 6768218, at *1 (M.D. Fla. 2013). Accordingly, any argument that the Eleventh Circuit has receded from *Cunningham* are without merit.

Moreover, prior to the decision being appealed in the instant matter, the decision in *Larrain v. Bengal Motor Co.,* represented Florida law in regard to the single document rule. In *Larrain,* similar to the court in *Cunningham,* the Third District Court of Appeals noted that:

> The MMWA was enacted "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) (2006). It was implemented to combat "an increasing number of consumer complaints regarding the inadequacy of warranties on consumer goods." *Davis* v. *S. Energy Homes, Inc.,* 305 F.3d 1268, 1272 (11th Cir.2002). Thus, the Federal Trade Commission ("FTC") enacted the single document rule, which requires that the terms and conditions of the written warranty be "fully and conspicuously disclose[d] in simple and readily understood language...." 15 U.S.C. § 2302(a)

Larrain v. *Bengal Motor Co.,* 976 So. 2d 12, 14 (Fla. 3rd DCA 2008). The *Larrain* Court then went on to explain:

> The disclosure requirements set forth by the FTC are central to the purposes of the MMWA. By not disclosing material terms, such as an arbitration agreement, within the written warranty we would be promoting confusion and complexity to warranties, which the MMWA was designed to avoid. "The single document rule ... [requires] warrantors to present all information relevant to the warranty in one place, where it might be easily located and assimilated by the consumer." *Cunningham* v. *Fleetwood Homes of Ga., Inc.,* 253 F.3d 611, 621 (11th Cir.2001).

Larrain, 976 So. 2d at 14.

Based on the foregoing, the *Larrain* Court found the "clear language of the MMWA expressed Congress' intent that any arbitration agreement must be disclosed within the written warranty and not as a stand-alone document." *Id.* Therefore the Court reversed the Trial Court's Order granting the Motion to Compel arbitration. *Id.*

Ironically, prior to its ruling in the instant case, even the Fifth District Court of Appeals had previously indicated that the single document rule required an arbitration provision be contained within a written warranty. *See Tropical Ford, Inc. v. Major*, 882 So. 2d 476, 479 (Fla. 5th DCA 2004) ("Tropical Ford properly concedes that the trial court correctly ruled that since the arbitration clause was not included within the warranty provision as required by the Magnuson–Moss Warranty Act the arbitration clause is not enforceable as to Major's warranty count"). Thus, prior to the flawed decision of the Fifth District Court of Appeals in the instant matter, for approximately fifteen years Florida law had required an arbitration provision be provided with a written warranty. *See Tropical Ford, Inc.* v. *Major*, 882 So. 2d 476, 479 (Fla. 5th DCA 2004) and *Larrain* v. *Bengal Motor Co.*, 976 So. 2d 12, 14 (Fla. 3rd DCA 2008). Additionally, the law in the Eleventh Circuit Court of Appeals has remained the same since *Cunningham* was

decided approximately nineteen years ago.

The aforementioned rulings above are not the only instances of a Court finding an arbitration agreement invalid pursuant to the MMWA's single document rule. In fact, the majority of the courts throughout the Country to examine the issues have reached the same result as *Larrain* and *Cunningham*. *See Hamden* v. *Ford Motor Co.*, 408 F. Supp. 2d 300 (E.D. Mich. 2004)(because the arbitration agreement violates the MMWA's rule that warranty agreements be in one single document, the arbitration agreement is not enforceable as to the warranty claims); *DaimlerChrysler Corp.* v. *Mathews*, 848 A.2d 577 (Del. Ch. Ct. 2004)(the arbitration clause is unenforceable as to the MMWA claims because it is not included in the warranty); *Bond* v. *Cricket Communications, LLC*, 2017 WL 9981654 (D. Md. 2017) (Plaintiffs written warranty claims cannot be compelled to arbitration, because no arbitration agreement is set forth, or even referenced, in the warranty); *See also Cunningham* v. *Fleetwood Homes of Georgia, Inc.*, 253 F.3d 611 (11th Cir. 2001); *Porter* v. *Chrysler Group, LLC*, 2013 WL 6768218 (M.D. Fla. 2013); *TGB Marine, LLC* v. *Midnight Express Power Boats, Inc.*, 2008 WL 3889578 at *4 n.3 (S.D. Fla. 2008); *Tropical Ford, Inc.* v. *Major*, 882 So. 2d 476, 479 (Fla. 5th DCA 2004) and *Larrain* v. *Bengal Motor Co.*, 976 So. 2d 12, 14 (Fla. 3rd DCA 2008).

The aforementioned decisions have all relied heavily upon the fact that one of the central purposes of the MMWA was to protect consumers by requiring that key warranty terms be provided within a single document. As explained by the Court in *DciimlerChrysler Corp.* v. *Matthews* Court:

> Even if Congress adopts (or the FTC acquiesces in) the view expressed in *Walton* and *Davis* that binding arbitration provisions are permissible, it simply cannot be that either body would permit warrantors to hide such provisions—which by definition deprive a consumer of his right to judicial review of his claims—in a stack of paperwork handed to him at the time of sale, while also requiring warrantors to disclose in the warranty itself any nonbinding informal dispute settlement procedure that at most would defer the consumer's right to judicial review until the consumer first resorted to such procedure. It should not be presumed that the federal authorities would enact an incoherent policy of consumer protection. Indeed, a fair reading of 15 U.S.C. §§ 2302(a)(8) and (9) refutes any argument that Congress harbored such a bizarre intent.

DaimlerChrysler Corp. v. *Matthews*, 848 A.2d 577, 587–88 (Del. Ch. 2004).

CONCLUSION

A ruling by this Court that a warrantor can require consumers to submit their MMWA claims to binding arbitration without including the arbitration agreement/provision within the written warranty would serve to undermine one of the primary purposes behind the passage of the MMWA. Therefore, it is the Petitioner's position that, consistent with the majority position taken throughout

the country, and what was previously the law of Florida for fifteen years prior to the instant matter, this Court should resolve the conflicting decisions of the District Courts of Appeal by restoring the law of Florida to its prior position by finding any binding arbitration provision not contained within the tenns of the written warranty itself is invalid pursuant to the MMWA's single document rule.

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 14th day of January, 2020 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.

CERTIFICATE OF COMPLIANCE

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

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