IN THE SUPREME COURT OF FLORIDA

LES KROL,

Petitioner,

v.

FCA US LLC and 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 AMENDED BRIEF ON JURISDICTION

On Petition for Review from the

Fifth District Court of Appeal

State of Florida

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I. TABLE OF CONTENTS

Appendix

IV. TABLE OF CITATIONS

Case Law

Florida Constitution

Statutes

Regulations

Florida Rules of Procedure

Treatises

III. STATEMENT OF THE CASE & FACTS

Petitioner purchased a Ram 3500 Crew Cab pickup truck from Respondent in June 2016.[1] Both the manufacturer and Respondent issued separate written warranties on the truck.[2] The truck came with the remainder of the manufacturer's original warranties and Respondent's separate 12-month/6,000-mile warranty.[3] Soon after Petitioner took possession of the vehicle, it exhibited defects in its engine, suspension, and brakes.[4] Both warranties instructed Petitioner to bring the vehicle to Respondent for repair.[5] After Respondent was unable and/or refused to repair the vehicle,[6] Petitioner filed suit seeking relief under the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, 15 USC §§ 2301-2312 ("MMWA").[7] The federal Act 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

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[1] AR at 6 (Note: The appellate record is contained in the appendix to the consumer's initial brief to the Fifth District, and will be referred to herein as "AR" followed by page citations.)
[2] AR at 6-7; *see also* AR at 25 & 82-85 and AR at 27-70.
[3] AR at 25; *see also* AR at 82-85.
[4] AR at 7; *see also* AR at 87-98.
[5] AR at 53; AR at 25.
[6] *Id*.
[7] *See, e.g.,* AR at 11, 13, 15.

damaged by the failure of a supplier, warrantor, or service contractor'"); Mady v. DaimlerChrysler Corp., 59 So.3d 1129, 1132 (Fla. 2011) (same).

The manufacturer answered the complaint, but Respondent moved to compel binding arbitration of the claims against it.[8] The arbitration "agreement" Respondent relied on is on the back side of the Buyer's Order, printed in what appears to be a 4-point micro-font.[9] The front of the document does not state that an arbitration clause is printed on the back.[10] Moreover, the written warranty Respondent provided doesn't reference or include an arbitration clause in the "single document" of the warranty.

Petitioner opposed binding arbitration on three grounds. First, FTC regulations prohibit binding arbitration of claims brought under the MMWA.[11] 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".[12] Third, courts are required to defer to FTC

[8] AR at 100-105.
[9] The manufacturer did not seek to compel a non-judicial resolution, as it cannot claim third-party beneficiary status to Respondent's putative arbitration "agreement". *See* Esmurdoc v. DaimlerChrysler Corp., 934 So.2d 486 (Fla. 3rd DCA). The manufacturer also doesn't maintain an FTC-approved non-judicial resolution program in Florida. AR at pp. 59-60. The manufacturer quickly resolved Petitioner's claims. *See Initial Brief* to Fifth District at p. 1, FN 1.
[10] *See* front of Retail Buyer's Order at AR at 22-23.
[11] AR at 107-113; *see also Initial Brief* to the Fifth District at 13-25.
[12] AR at 217-218; *see also Initial Brief* to the Fifth District at 34-40.

regulations under the *Chevron* doctrine, and the FTC prohibits binding arbitration of disputes brought under the federal Act[13]

IV. SUMMARY OF ARGUMENT

In holding that a consumer may be compelled to submit breach of warranty claims to binding arbitration even where the written warranty doesn't require it, the Fifth District disregarded the 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), which followed those regulations, and the Third District's holding in Larrain v. Bengal Motor Co. Ltd., 976 So.2d 12 (Fla. 3rd DCA 2008), which followed both the FTC regulations and Cunningham. Additionally, there are compelling policy reasons for affirming the Third District and reversing the Fifth. Petitioner requests the Court accept jurisdiction to resolve the certified conflict.

V. ARGUMENT.

1. The Court has jurisdiction, as the decision of the Fifth District certifies direct conflict with a decision of the Third District on the same issue of law.

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

[13] AR at 107-113; AR at 217-218; AR at 169-215; *see also Initial Brief.*

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.[14]

2. The Act and FTC regulations mandate that any requirement of non-judicial resolution be included within the warranty to be enforceable.

Even if a warrantor can impose binding arbitration, the requirement still has to be contained *in the written warranty* to be valid.[15] The MMWA provides that

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

See 15 USC § 2302(b)(1)(B). Pursuant to the statute, the FTC requires that:

> **[A] written warranty…shall clearly and conspicuously disclose <u>in a single document</u>** 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…;

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[14] *See* Padovano, Florida Appellate Practice, § 3:11, p. 80 (West 2014) (certification creates jurisdiction); *see also* <u>State v. Vickery</u>, 961 So.2d 309, 312 (Fla. 2007).

[15] AR at 217-218; *see also Initial Brief* to the Fifth District at 34-40.

> (6) Information respecting the availability of any informal dispute settlement mechanism elected by the warrantor….

See 16 CFR§ 701.3(a). The requirement that all terms and conditions that apply to the warranty be included within the written warranty itself has become known as the "single document rule".[16] 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".[17] Since the arbitration clause isn't contained in Respondent's warranty, it is invalid under both the MMWA and FTC regulations.

3. Courts are required to defer to FTC regulations where they are not arbitrary, capricious, or manifestly contrary to the statute.

Even if the MMWA doesn't, itself, expressly mandate that to be enforceable a requirement of arbitration must be included in the written warranty, the FTC does require it, and under the *Chevron* doctrine courts are required to defer to FTC regulations reasonably interpreting the Act and addressing this issue.[18] The FTC

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[16] *See* Cunningham, 253 F.3d at 622 ("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.").

[17] Cunningham at 620-621; *and see* Porter 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.").

[18] AR at 110-111; *see also Initial Brief* to the Fifth District at 7-34. The *Chevron doctrine,* is taken from Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 US 837, 843-844 (1984), which holds where Congress is silent on an

has enacted regulations that expressly require that, in order for *any* requirement of non-judicial resolution to be enforceable (whether binding or not), the warrantor must include the requirement within the single document of the written warranty itself.[19] Given that the regulation at issue was enacted pursuant to authority expressly granted to the FTC by the MMWA, and that the regulation is consistent with both the plain language and the intent of the Act, courts are required to defer to the FTC's regulations as a valid requirement of federal law.[20]

4. The Fifth District's ruling is legally unsound and disregards existing federal and Florida case law. [21]

Although the Fifth District relied on the Eleventh Circuit in Davis v. Southern Energy Homes, Inc., 305 F.3d 1268 (11th Cir. 2002) to conclude the Act does not prohibit binding arbitration, it improperly disregarded the Eleventh Circuit's decision in Cunningham. In Cunningham, the Eleventh Circuit relied on the FTC's "single document rule" and made clear that binding arbitration may only be required if the clause requiring it is included in the warranty itself.

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issue, but grants regulatory authority to an agency to determine the matter, a court shall defer to the agency's regulations "unless they are arbitrary, capricious, or manifestly contrary to the statute".

[19] *See* 16 CFR § 701.3 ("a written warranty [on] a consumer product…shall clearly and conspicuously disclose in a single document in simple and readily understood language, the following items").

[20] *See* FN 18.

[21] The Fifth District's decision is attached hereto at Appendix "A".

Cunningham, 253 F.3d at 621-22. The Fifth District recognized that the Third District followed Cunningham, but said, "However, we decline to do so".

5. The holding in Krol does violence to both the plain language and the intent of the federal Act.

The decision in Krol not only undermines the statutory text, but neuters the intent of Congress to require conspicuous disclosure and prevent deception. It's no accident the Act's second section is "Rules Governing Contents of Warranties". *See* 15 USC § 2302. This section requires full and conspicuous disclosure of all terms and conditions of the warranty, and empowers the FTC to enact regulations to effectuate the requirement.

> **In order to improve the adequacy of information available to consumers [and] prevent deception**…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**.

See 15 USC § 2302(a). The very next sub-section expressly empowers the FTC to determine the method and manner in which information must be disclosed:

> **The Commission may prescribe rules for determining the manner and form in which information with respect to any written warranty of a consumer product shall be clearly and conspicuously presented** or displayed so as not to mislead the reasonable, average consumer, when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing.

See 15 USC § 2302(b)(1)(B). One of the rules the FTC enacted requires all of the terms and conditions associated with the warranty and its enforcement be contained within the single document of the warranty itself. Not only is the plain language of the statute clear that any warranty-related information must be clearly and conspicuously disclosed, but so is the FTC's authority to make rules to give full effect to that requirement. Furthermore, the FTC's requirement of the single-document rule is a patently logical regulatory method of achieving it. "The comprehensive disclosure requirements of Magnuson-Moss are an integral, if not the central, feature of the Act". *See* Cunningham, 253 F.3d at 621.

6. The holding in Krol runs afoul of the intent of Congress to require conspicuous disclosure of a warranty's terms and conditions.

This case illustrates perfectly why, even where other courts have held binding arbitration can be imposed on consumers, they've held that the single document rule requires that any such provision be included clearly and conspicuously in the written warranty: so arbitration clauses like the one at issue here can't be foisted upon unsuspecting consumers through trickery or worse. Consider the arbitration clause at issue here: the supposed arbitration "agreement" is on the back side of the Buyer's Order; there's no direct reference to the arbitration clause on the front side of even that document to call the consumer's attention to the provision on the back side; the arbitration clause isn't signed or initialed by the consumer to indicate he even saw it, let alone agreed to it; the

arbitration clause is printed in a font that seems patently designed to minimize the chance of having the consumer see, read, or understand it; and there isn't a single reference on the face of the written warranty that indicates the consumer should look to *any* another document, let alone the back side of one, to determine how and where he may enforce his warranty rights.

That is exactly why the statute mandates clear and conspicuous disclosure, and why the FTC logically regulated that all conditions applicable to the written warranty must be in the warranty itself, and not hidden somewhere else. If not corrected, the Fifth District's holding will leave Florida's consumers to the mercy of warrantors who issue written warranties but actively create loopholes and obstacles to their enforcement. That is exactly what the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act was enacted to prevent.

7. The holding in Krol is contrary to well-established rules governing the interpretation of consumer statutes.

It is well-established that consumer protection laws should be interpreted liberally, not narrowly.[22] Not only did the Fifth District fail to give a "liberal" or "expansive" interpretation to the statute, but in fact its decision construes the Act

[22] *See* King v. King Motor Co. of Ft. Lauderdale, 780 So.2d 937, 941 (Fla. 4th DCA 2001) (expansive interpretation "is consistent with policy that a statute 'enacted in the public interest' should be given a 'liberal construction in favor of the public.'"); and Dep't of Envtl. Regulation v. Goldring, 477 So.2d 532, 534 (Fla. 1985) ("The provisions of statutes enacted in the public interest should be given a liberal construction in favor of the public.").

in such a way as to actively undermine it. In fact, within the context of the very statute at issue here, this Court recently held, "[i]n construing [the] statute, this Court endeavors to effectuate legislative intent, which is primarily derived from the language used in the enactment. Cerasani, 955 So.2d at 545. As this Court explained that intent, "**Congress enacted the MMWA to enhance the enforceability of warranties on consumer products and protect the 'ultimate user of the product**.'" Id at 545 (emphasis added). The decision in Krol does *nothing* to protect consumers, and actually allows warrantors to hide important terms necessary to enforce the warranty in documents outside of the warranty.

8. The Fifth District cannot properly pick and choose how it will apply Eleventh Circuit holdings.

To achieve the result it wanted, the Fifth District relied on one decision of the Eleventh Circuit (which allows binding arbitration under certain circumstances) while ignoring another decision (holding that one pre-condition to enforcement of a binding arbitration clause is that it must be included directly within the written warranty itself). If the Eleventh Circuit's decisions are to be given effect in this matter, then both decisions must be taken into account and applied to the facts of this case in a way that, while encumbering consumers in one way, at least protects them from abuse in a logically related and legally corresponding way.

VI. CONCLUSION.

WHEREFORE, Petitioner prays the Court will accept jurisdiction.

CERTIFICATE OF SERVICE [1]

I certify that on **June 17, 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:

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CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

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[1] Plaintiff resolved his claims against the vehicle manufacturer, FCA US LLC, prior to his appeal to the district court, so FCA's counsel is not included on service.

INDEX TO APPENDIX

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.

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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.
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> 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.