ALEXANDER WALKER, on behalf of himself and those similarly situated, Plaintiffs, v. ROUTE 18 AUTO GROUP d/b/a ROUTE 18 CHRYSLER JEEP DODGE RAM, LLC; WILLIAM MCDONAGH AND MICHAEL SALERNO, Defendants.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003085-23 T2 TRIAL COURT DOCKET NO: MID-L-6318-23 Sat Below: Hon. Ana C. Viscomi, J.S.C. Civil Action

BRIEF OF APPELLANT-DEFENDANTS ROUTE 18 AUTO GROUP, WILLIAM MCDONAGH AND MICHAEL SALERNO

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PRELIMINARY STATEMENT

When plaintiff purchased a car from defendant Route 18 Auto, he signed a clear and concise Arbitration Agreement ("the Agreement"). He also signed a Retail Installment Sales Contract ("RISC"), a loan agreement that contained an arbitration clause. However, with his knowledge and consent, Route 18 immediately assigned the RISC "without recourse" to the lender, Valley National Bank, transferring all of Route 18's rights under the RISC, including its right to arbitrate.

After plaintiff filed his complaint in Superior Court, defendants moved to compel arbitration under the Agreement. Plaintiff opposed the motion, arguing that the Agreement and the RISC conflicted and, under ***NAACP of Camden County East v. Foulke Mgmt. Corp.***, 421 N.J. Super. at 404 (App. Div. 2011), *appeal dismissed*, 213 N.J. 47 (2013)("***NAACP***"), the Law Division should deny the motion.

Based simply on the fact that there were two arbitration agreements, the Law Division concluded that the facts here were "overwhelmingly similar" to those in ***NAACP*** and refused to enforce the Agreement.

The court's opinion contains little reasoning or analysis and identifies few real factual similarities with ***NAACP***. Most important, the court completely ignored the legal effect of the assignment "without recourse."

On its face, the Agreement is legally enforceable. As a result, this Court should reverse and order arbitration.

PROCEDURAL HISTORY

On November 8, 2023, plaintiff filed a six-count complaint. [DA013-36][1] Individually, plaintiff claims that defendants failed "to sell the Jeep at the advertised price of $34,000," sold it instead "at a price of $36,770.56, $2,770 more than the advertised price" and "failed to provide Plaintiff with the registration and license plates for in excess of a month after he purchased the Jeep."

As a potential class representative, plaintiff claims:

(1) Violations of the New Jersey's Consumer Fraud Act, Automotive Sales Practices Regulations," Truth-in-Consumer Contract, Notice and Warranty Act for:

(a) "Defendants' regular practice of assessing their customers a documentary fee in violation of the "which prohibits motor vehicles from assessing and charging for such fees without listing each specific service provided in exchange for the fee and an itemized price for each specific service"; and

(b) "Defendants regular practice of assessing and collecting from their customers title and registration fees in excess of the fees charged by and remitted to the appropriate state's Motor Vehicle Commission."

[DA014, ¶¶ 2, 3] Significantly, there is no claim under or arising out of the RISC.[2]

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[1] "DA" refers to document page numbers in defendants' first Appendix.

[2] All of plaintiff's claims stem from the Motor Vehicle Retail Order ("MVRO") that has no arbitration provision and is subject to Route 18's Agreement. *See* ¶¶ 39 [DA019], 44-56 [DA019-21], 72-78 [DA022-23], 96-106 [DA026-27], 128-31. [DA030-31] The complaint only refers to the RISC's arbitration provision briefly. *See* ¶¶ 25-27 [DA017]

On December 21, 2023, defendants moved to dismiss the complaint and to compel arbitration under Route 18's Agreement. [DA001-33] On January 9, 2024, plaintiff opposed the motion, arguing that both the Agreement and the RISC's arbitration provision applied; the agreements conflicted and were of no legal effect under ***NAACP***; and the case should proceed in Superior Court. On February 9, 2024, defendants filed their reply. [DA037-44] On March 1, 2024, the Court heard oral argument on the motion. [Appendix T-1]

On May 20, 2024, the Law Division denied defendants' motion. [DA050-51] As a result, defendants have appealed.

STATEMENT OF FACTS

A. The Sale.

On September 13, 2023, plaintiff bought a used 2020 Jeep Grand Cherokee Overland 4x4 (with 36,610 miles) for a total of $40,356.44 (selling price: $36,770.26; document fees: $798; CT tax (6.35%): $2,385.59; registration/title: $402.59). [MVRO, DA008; RISC, DA045-49] He received a trade-in allowance of $18,000 (for a 2018 Jeep Grand Cherokee, with 67,553 miles), and the dealership paid off his existing loan, $23,451.20. [DA008] According to the RISC, he financed the remaining $45,807.65, payable in 76 monthly payments of $776.28. [DA045]

As part of the sale, plaintiff signed Route 18's own Arbitration Agreement. [DA011] He also signed the RISC that had an arbitration provision. [DA048] By signing the RISC, plaintiff stated that he knew and approved the immediate assignment of Route 18's and his own rights, liabilities and obligations under the RISC "**without recourse**" to the lender, Valley National Bank. [DA049] As a result, when plaintiff filed his complaint, Route 18's only right to arbitrate was contained in its Agreement.

B. Route 18's Arbitration Agreement.

Route 18's Agreement provides, in relevant part:

Please review—Important—Affects your legal rights

1. **Either you or we may choose to have any dispute between us decided by arbitration and not in court or by jury trial.**
2. **If a dispute is arbitrated, you will give up your right to participate as a class representative or class member on any class claim you may have against us including any right to class arbitration or any consolidation of individual arbitrations.**
3. **Discovery and rights to appeal in arbitration are generally more limited than in a lawsuit, and other rights that you and we would have in court may not be available in arbitration.**

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arise out of or relate to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this arbitration clause shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose one of the following arbitration organizations and its applicable rules, the National Arbitration Forum, Box 50191, Minneapolis, MN 55405-0191 (www.adrforum.com), the American Arbitration Association, 335 Madison Avenue, Floor 10, New York, NY 10017-4605 (www.adr.org), or any other organization that you may choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration organization or visiting its website. (Emphasis in original)

[DA011]

C. The Court's Opinion and Order.

The court's "Statement of Reasons" denying defendants' motion is fairly brief.

It states, *in toto* and as it appears in the court's order:

> The court relies upon ***NAACP of Camden County East v. Foulke Corp.***, 421 *N.J.* Super. 404 (App. Div. 2011). The facts in this case are overwhelmingly similar. Here, the plaintiff signed a SAD [separate arbitration document] and a RISC, which was assigned to third-party financer, Valley National Bank. The assignment is irrelevant where, as here, relying upon ***NAACP***, there is still a line for the seller/dealer to sign, which the defendant did in this case. Nowhere in the RISC does it state that the buyer, plaintiff herein, loses any rights it has against the assignor, nor was there any release. The clauses that defendant point to [*sic*] indicate that the Buyer will not assert any claims or defenses against the assignee, Valley National, that it may have against the Seller. The "assigned without recourse" language does not explicitly state, nor can it be interpreted that buyer/plaintiff loses all claims he has against the assignor through the assignment. In ***NAACP***, plaintiff was presented and was required to sign numerous documents including a RISC, a SAD, and a motor vehicle retail order. The RISC signed by the plaintiff was assigned to a third-party financing company. The other two documents contained arbitration agreements. The Appellate Division noted that "the clarity and internal consistency of a contract's arbitration provisions are important factors in determining whether a party reasonably understood those provisions and agreed to be bound by then." ***NAACP***, at 425. Ultimately, relying on the US Supreme Court decision in ***AT&T Mobility LLC v Concepcion*** [563 U.S. 333 (2011)], the court found that "state courts remain free to decline to enforce an arbitration provision by invoking traditional legal doctrines governing the formation of a contract and its interpretation. . . . We must decide whether there was mutual assent to the arbitration and its interpretation provisions in the dealership's contract documents." ***Id.*** The court ultimately found that the arbitration provisions in the RISC, the addendum and the SAD were "too plagued with confusing terms and inconsistencies to put a reasonable consumer on fair notice of their intended meaning." ***Id.*** at 431. The court specifically rejected the defendant's contention that there was no actual conflict in the purchase documents because the dealership was only a party to the SAD and not a party to the RISC. That is precisely the same argument advanced by the defendant in this case. As such the motion is **denied**. (Emphasis in original) [DA050-51]

ARGUMENT

I. THE LAW DIVISION ERRED IN HOLDING THAT THE FACTS ARE "OVERWHELMINGLY SIMILAR" TO *NAACP* AND IN IGNORING: (A) THE ASSIGNMENT OF THE RISC; (B) THE FAA; AND (C) THE CASE LAW REQUIRING ARBITRATION.

In denying defendants' motion to dismiss and compel arbitration, the Law Division erred in holding that: (1) the facts of this case were "overwhelmingly similar" to those in ***NAACP***; (2) Route 18's Agreement was unenforceable because its provisions and the RISC were "too plagued with confusing terms and inconsistencies to put a reasonable consumer on fair notice of their intended meaning"; and (3) the assignment "without recourse" of the RISC was "irrelevant." [DA051]

The court reached these conclusions without any real factual or legal analysis, any comparison of the Agreement and the RISC or any discussion of the law relating to the assignment. [DA051]

Upon further review, it is clear that the factual and legal differences between this case and ***NAACP*** are significant, and the assignment was important. As a result, the Law Division was wrong, and this Court should reverse and order arbitration.

A. The Legal Standard for Upholding Arbitration Agreements.

Arbitration is a matter of contract. ***NAACP***, 421 N.J. Super. at 424. Interpretation of a contract, including an arbitration clause, is reviewed *de novo*.

Cerciello v. Salerno Duane, Inc., 473 N.J. Super. 248, 257 (App. Div. 2022), *certif. denied*, 252 N.J. 183-84 (2023); ***Goffe v. Foulke Mgmt. Corp.***, 238 N.J. 191, 207 (2019); ***Kieffer v. Best Buy***, 205 N.J. 213, 222 (2011). "Whether a contractual arbitration provision is enforceable is a question of law, and we need not defer to the interpretative analysis of the trial . . . courts unless we find it persuasive." ***Skuse v. Pfizer, Inc.***, 244 N.J. 30, 46 (2020), *quoting* ***Kernahan v. Home Warranty Adm'r of Fla., Inc.***, 236 N.J. 301, 316 (2019). Accordingly, the review here is *de novo*.

There is a "strong preference to enforce arbitration agreements." ***Roach v. BM Motors Inc.***, 228 N.J. 163, 177 (2017), *quoting* ***Hirsch v. Amper Fin. Servs., LLC***, 215 N.J. 174, 186 (2013). In ***Roach***, the New Jersey Supreme Court explained that "Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C.A. 1 to 16, to reverse the longstanding judicial hostility towards arbitration agreements and to place arbitration agreements upon the same footing as other contracts. ***Gilmer v. Interstate/Johnson Lane Corp.***, 500 U.S. 20, 24 [] (1992)."[3] 228 N.J. at 177. Noting "the strong preference" for arbitration, the Court upheld the plaintiffs' arbitration agreements. ***Id.*** at 173-74, 180. *See* ***Cerciello v. Salerno Duane***, *supra*; ***Gras v.***

[3] In ***Roach***, the Court quoted Section 2 of the ***FAA***. It states: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be **valid, irrevocable, and enforceable**, save upon such grounds as exist at law or in

Associates First Capital Corp., 346 N.J. Super. 41, 45-46, 47-48 (App. Div. 2001).

In the thirteen years since ***NAACP***, New Jersey courts "have upheld arbitration clauses phrased in various ways when those clauses have explained that arbitration is a waiver of the right to bring suit in a judicial forum." ***Atalese v. U.S. Legal Servs. Grp.***, 219 N.J. 430, 444-45 (2014), *cert. denied*, 576 U.S. 1004 (2015). *See also* ***Cerciello v. Salerno Duane***, *supra*; ***Gras v. Associates First Capital Corp.***, *supra*. For example, in ***Martindale v. Sandvik, Inc.***, 173 N.J. 76, 81-82, 96 (2002), the Supreme Court upheld an arbitration agreement in which a plaintiff agreed "to waive [her] right to a jury trial" and that stated "all disputes relating to [her] employment . . . shall be decided by an arbitrator." *See* ***Atalese,*** 219 N.J. at 444-45. The Court stressed that "arbitration agreement not only was clear and unambiguous, it was also sufficiently broad to encompass reasonably plaintiff's statutory causes of action." ***Id.***

In this case, defendants have asserted that Route 18's Agreement falls squarely within the U.S. Supreme Court's holding in ***AT&T Mobility LLC v. Concepcion***, *supra*. Its language is plain and unconfusing. It is written in bold type and large block letters to stand out. It tells the customer that either party – the buyer or the seller – may request arbitration. It explains that, if there is a request for arbitration, an arbitrator – not a court or jury – will decide the dispute. Finally, it says the customer

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equity for revocation of any contract." (Emphasis added) 215 N.J. at 173.

is giving up the right to participate as a class representative or class member in any class action in court or in arbitration or to consolidate the case with any other case. [DA011]

But the Law Division did not address this language or perform any analysis. Instead, the court noted that there were two arbitration agreements and, based on that fact alone, concluded that they were "too plagued with confusing terms and inconsistencies to put a reasonable consumer on fair notice of their intended meaning." [DA051] The court was wrong for several reasons.

B. Route 18 Assigned All its Rights, Liabilities and Obligations under the RISC to Valley National Bank.

Initially, the Law Division dismissed defendants' assignment of the RISC to Valley National Bank with a blanket statement that: "The facts in this case are overwhelmingly similar" to the facts in ***NAACP***. [DA051] The court explained that: "Here, the plaintiff signed a SAD [separate arbitration document] and a RISC, which was assigned to third-party financer, Valley National Bank. The assignment is irrelevant where, as here, relying upon ***NAACP***, there is still a line for the seller/dealer to sign, which the defendant did in this case. Nowhere in the RISC does it state that the buyer, plaintiff herein, loses any rights it has against the assignor . . . ." [DA051]

The court added that, in ***NAACP***: "The court specifically rejected the defendant's contention that there was no actual conflict in the purchase documents because the dealership was only a party to the SAD and not a party to the RISC. That is precisely the same argument advanced by the defendant in this case." [DA051]

While the Law Division correctly stated Route 18's position, it ignored the law of assignment, misstated the facts and overstated our case's similarity with ***NAACP***.

1. The Assignment "Without Recourse" Terminated Route 18's Right to Arbitrate Under the RISC.

The court did not address the law relating to assignment. [DA051] That law undercuts the court's conclusion.

An assignment, especially "without recourse," affects the assignor's rights, liabilities and obligations under a contract. Under New Jersey law, "Assignment of a right is a manifestation of the assignor's intention to transfer it under which the assignor's right to performance by the obligor is extinguished in whole or in part, and the assignee acquires a right to such performance." ***Restatement 2d of Contracts*** § 317. A contract may assign rights from one party to another, ***Id.***, and the effect of an assignment is to "**extinguish the right in the assignor** and recreate the same right in the assignee." (Emphasis added) ***Selective Ins. Co. of America v. Hudson East***, 416 N.J. Super. 418, 425-26 (App. Div. 2010).

Specifically, an assignment "**without recourse**" means that the other party, in this case the plaintiff, cannot "hold the assignor personally liable on the contract of assignment." ***Hyman v. Sun Ins. Co.***, 70 N.J. Super. 96, 101 (App. Div. 1961). It also means that the assignor has no right remaining under the contract. ***Id.***

Here, plaintiff agreed to the assignment. It divested Route 18 of any legal rights under the RISC, including its right to arbitrate. As a result, the Law Division erred in calling the assignment "irrelevant."

2. The RISC Advised Plaintiff that He Lost Rights Against Route 18.

The Law Division also stated: "Nowhere in the RISC does it state that the buyer, plaintiff herein, loses any rights it has against the assignor . . . The 'assigned without recourse' language **does not explicitly state, nor can it be interpreted that buyer/plaintiff loses all claims he has against the assignor through the assignment**." (Emphasis added) [DA051]

This statement is not true. On its face, the RISC told plaintiff that Route 18 was assigning it "without recourse" to Valley National Bank. [DA049] Right below plaintiff's signature, the RISC states:

> Seller **assigns** its interest in this contract to: Valley National Bank (**Assignee**) under the terms of Seller's agreements) with **Assignee**. (Emphasis added)

[DA049] Right below that is an "X" in the box stating: "**Assigned without**

recourse." Route 18's manager signed below that. [DA049]

The RISC also told plaintiff he had the same rights against the "holder," Valley National Bank, that he had had against Route 18. On the first page, in bold type and capital letters, it states:

> **NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR HEREUNDER.** (Bold emphasis in original; Underline Emphasis added)

[DA045] The last page also told plaintiff that, by signing:

> **You agree to the terms of this contract. You confirm that before you signed this contract, we gave it to you, and you were free to take it and review it. You acknowledge that you have read all pages of this contract, including the arbitration provision on page 4, before signing below. You confirm that you received a completely filled-in copy when you signed it.** (Emphasis in original)

[DA049]

Together, these provisions told plaintiff, and could easily be interpreted as telling plaintiff, that, by signing plaintiff agreed, the assignment was "without recourse" – he lost his right to proceed against defendants **under the RISC**, "**including the arbitration provision on Page 4**"; but he retained those same rights against Valley National Bank, instead of against Route 18. [DA049] He stated that

he had read the RISC and that he knew about and understood the assignment. [DA049]

As a result, the Law Division erred in concluding that the RISC did not tell plaintiff that he lost his rights against defendants under the RISC. Because the RISC no longer applied to plaintiff's relationship with Route 18, any conflict between the Agreement and the RISC relating to arbitration is meaningless and irrelvant.[4]

3. *NAACP* Did Not Address the Legal Effect of the Assignment There.

In its opinion, the Law Division noted that: "In ***NAACP***, plaintiff was presented and was required to sign numerous documents including a RISC, a SAD, and a motor vehicle retail order. **The RISC signed by the plaintiff was assigned to a third-party financing company.**" (Emphasis added) [DA051]

The Law Division added that: in ***NAACP***, "the court specifically rejected the defendant's contention that there was no actual conflict in the purchase documents because the dealership was only a party to the SAD and not a party to the RISC. This is precisely the same argument advanced by the defendant in this case." [DA051]

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[4] Further, despite plaintiff's explicit invitation to compare the Agreement and the RISC, the Law Division did not compare or analyze them. [DA051] The court just echoed ***NAACP***'s conclusion that the Agreement and the RISC were "too plagued with confusing terms and inconsistencies" to provide plaintiff notice of their intended meaning. [DA051] The court's opinion provides no basis for that conclusion.

This statement is not true. In ***NAACP***, the Supreme Court only said that: "By signing the RI[S]C, defendant accepted the retail contract and assigned it to a third party financing company . . . ." ***NAACP***, 421 N.J. Super. at 413.[5]

That's it! The Court did not go farther. It did not say whether the assignment was with or without recourse. And it does not appear that the defendant pressed the matter – probably because there were several other relevant documents at issue. [6]

Clearly, the Supreme Court did not discuss the effect of the assignment, much less reject "precisely the same argument advanced by the defendants in this case." By including this as an "overwhelmingly similar," the Law Division erred.

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[5] The Court also noted that: "The financing company is not a party to this litigation." 421 N.J. Super. at 445 n.3. There is no other reference to it.

[6] After summarizing the sale, the Supreme Court added: "Plaintiff agreed to those terms and signed numerous form documents, including: (1) a retail installment contract (the "RIC"); (2) a so-called GAP addendum (the "Addendum") (3) a separate arbitration document (the "SAD"); (4) a general consumer notice (the "consumer notice"); (5) a motor vehicle retail order (the "MVROA"); (6) a document containing certain waivers by the purchaser (the "waiver document"); and (7) a spot delivery agreement (the "spot delivery agreement"). The first three of these documents contained arbitration provisions." (Emphasis added) *NAACP*, 421 N.J. Super. at 411. The Court also noted that: "According to its text, the [GAP] Addendum applied to 'the customer/borrower . . . and the dealer/creditor . . . or if assigned[,] with the assignee.' It included a signature line for the 'dealer/creditor.'" 421 N.J. Super. at 413. As a result, even though the RIC was assigned, this provision still conflicted with the SAD. **In our case, there are only two relevant documents: the Agreement and the RISC. Plaintiff agreed to assignment of the RISC. And there is no provision similar to the GAP Addendum.**

C. The Appellate Division Has Enforced an Arbitration Agreement Under Similar Facts.

Even if there were no assignment, the more recent holding in ***Stollsteimer v. Foulke Mgmt. Corp.***, 2018 N.J. Super. Unpub. LEXIS 1514 (App. Div. 2018),[7] would require the same result – arbitration. In ***Stollsteimer***, the Appellate Division rejected arguments identical in substance to plaintiff's here. As in this case, plaintiffs signed a RISC, an MVRO and a separate arbitration agreement. ***Id.*** But the Law Division granted defendant's motion to compel arbitration, and the Appellate Division affirmed.

The Appellate Division stated that: "[W]here [an] agreement is evidenced by more than one writing, all of them are to be read together and construed as one contract, and all the writings executed at the same time and relating to the same subject-matter are admissible in evidence." ***Id.*** at ***5-6**, *quoting* ***Lawrence v. Tandy & Allen, Inc.***, 14 N.J. 1, 7 (1953); *citing* ***Gould v. Magnolia Metal Co.***, 207 Ill. 172 (Ill. 1904). The Court added that, where several writings constitute one instrument, "the recitals in one may be explained, amplified, or limited by reference to the other." ***Id.*** at 6, *quoting* ***Schlossman's, Inc. v. Radcliffe***, 3 N.J. 430, 435 (1950).

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[7] We understand that this decision is unpublished. But its reasoning and the authorities cited are sound and compelling.

The Court also held that arbitration is a matter of contract [***Id.***; ***NAACP***, 421 N.J. Super. at 424] and echoed the "strong preference to enforce arbitration agreements." ***Id.***, *quoting* ***Hirsch***, 215 N.J. at 186. The Court then proceeded to determine whether the contract's arbitration provision is valid and enforceable. ***Id.***; ***Martindale v. Sandvik, Inc.***, 173 N.J. at 83.

In the end, the Appellate Division agreed that the three sales documents formed a single, integrated contract.[8] Plaintiffs signed the documents (the MVRO, RISC and arbitration agreement) at the same time, and they all related to the same subject-matter. ***Id.*** The Court held that the arbitration agreement was enforceable and affirmed the order, compelling arbitration.[9]

Similarly, in this case, plaintiff signed an MVRO that expressly integrated and incorporated "any attachments," including Route 18's Agreement and the RISC. Route 18's Agreement is similar to what the Court enforced in ***Stollsteimer***. Here, the

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[8] Plaintiff's MVRO here states: "Customer agrees that this Order on the face and on the reverse side and any attachments to it includes all the terms and conditions. If a sale, Customer further agrees that this Order cancels and supersedes any prior agreements and, as of this date, singed by Dealer or authorized agent, comprises the complete and exclusive statement of the terms of the agreement between Customer and Dealer." [DA011]

[9] Assignment was not a factor. And even though, as here, plaintiff argued that the separate arbitration agreement and the RISC conflicted, the Court did not find that argument persuasive. ***Stollsteimer***, *supra.* at ***5-6**.

assignment weighs even more heavily in favor of enforcing the Agreement and sending the case to arbitration.

For identical reasons, this Court should reverse the Law Division here and compel arbitration.

CONCLUSION

Because Route 18's Agreement is clear and unambiguous, Route 18 has no right to arbitrate under the RISC and plaintiff has made no claim under the RISC, the Court should enforce the Agreement, dismiss the complaint and order the case to arbitration.

Respectfully submitted,

Michael V. Gilberti

Dated: August 15, 2024

Superior Court of New Jersey
Appellate Division

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Docket No. A-003085-23

ALEXANDER WALKER, on behalf of himself and those similarly situated *Plaintiff-Respondent*, v. ROUTE 18 AUTO GROUP LLC d/b/a ROUTE 18 CHRYSLER JEEP DODGE RAM, LLC; WILLIAM MCDONAGH AND MICHAEL SALERNO, *Defendants-Appellants,*	CIVIL ACTION On appeal from the Superior Court Of New Jersey Law Division, Middlesex County Trial Court Docket No. HUD-L-1096-23 Sat Below: Hon. Ana C. Viscomi, J.S.C

PLAINITFF-RESPONDENT'S BRIEF

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Submitted October 14, 2024

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PROCEDURAL HISTORY

The Plaintiff, Alexander Walker, filed his Complaint below on November 8, 2023, asserting claims on behalf of himself and a proposed class of other customers based on alleged violations of the Consumer Fraud Act (CFA) by Defendant Route 18 Auto Group LLC and its principals (collectively "Route 18 Auto"), including overcharging the Plaintiff and other car purchasers for official title and registration fees, adding unspecified documentary service fees to vehicle sale prices, failing to honor advertised vehicle pricing, and failing to timely transfer title to the purchaser. Da013-036. The Complaint noted that the documents used for the Plaintiff's transaction included two different arbitration provisions, one in the form of a single-page document encaptioned "Arbitration Clause" (Da11, the "separate arbitration document" or "SAD") and another embedded in the parties' Retail Installment Sale Contract (Da44-49, the "RISC") but asserted that neither was valid or enforceable under New Jersey caselaw holding that "multiple arbitration provisions provided to a consumer are not enforceable when they are confusing and inconsistent." Da17 (at paras. 24-27, citing *NAACP of Camden County East v. Foulke Management Corp.*, 421 N.J. Super. 404, 424-25 (App.Div.), certif. granted, 209 N.J. 96, (2011), and appeal dismissed, 213 N.J. 47 (2013)).

On December 3, 2023, Defendants filed a motion to dismiss and compel arbitration, seeking judicial enforcement of the SAD only, without referencing or acknowledging the second arbitration provision embedded in the RISC. Da001, Da003-036, Pa1[1].

On September 12, 2023, the Plaintiff filed opposition to the motion asserting, as he did previously in the Complaint, that the transaction documents included a second, inconsistent arbitration provision embedded in the RISC, and that the separate arbitration document the Defendants sought to enforce was invalid for lack of mutual assent under *NAACP of Camden County* and other precedents. Pa8. In support of this argument, the opposition brief listed and discussed various conflicts between the terms of the two arbitration provisions. Pa16-21.

On February 9, 2024, the Defendants filed a reply brief in which they addressed the RISC arbitration provision for the first time, arguing the dealership's assignment of the RISC to a third-party, Valley National Bank, effectively left the standalone arbitration provision as the sole operative arbitration agreement between the parties, thus rendering inapplicable *NAACP of Camden County* and similar cases addressing multiple, inconsistent arbitration provisions. Pa27. The reply brief did not directly contest or address the Plaintiff's general contention that

[1] The parties' briefs below are included in the Plaintiff's Appendix pursuant to R. 2:6-1(a)(2) because they are pertinent to the Plaintiff's arguments for limitation of scope of this appeal set forth under point heading III, *infra*.

the two arbitrations provisions contained various conflicting terms, nor did it counter or even acknowledge the specific, inconsistent terms listed and discussed in the Plaintiff's opposition brief. *Id.*

On February 14, 2024, the Plaintiff filed a surreply letter brief objecting to the introduction of new arguments regarding the RISC arbitration provision for the first time on reply after failing to acknowledge or address the issue in their moving brief. Pa34.

On March 1, 2024, the judge below heard oral argument, during which she admonished the Defendants for apparent "gamesmanship" in failing to address the RISC arbitration provision in their moving brief but indicated that she would nonetheless consider the arguments on that issue raised in their reply brief. T7-3 – T8-25. As with their moving and reply briefs, the Defendants' oral argument did not directly contest or address the Plaintiff's contention that the SAD and RISC arbitration provisions were inconsistent, confusing, and thus invalid *NAACP of Camden County*, but instead relied exclusively on the Defendants' contention that the dealership's assignment of the RISC effectively eliminated any possible conflicts between the two arbitration provisions. T12-12 – T13-3.

On May 20, 2024, the trial court issued an order denying the Defendants' motion, with a written "Statement of Reasons." Da050-051.

COUNTERSTATEMENT OF FACTS

As alleged in the Complaint, on September 13, 2023, purchased a used 2020 Jeep Grand Cherokee from Route 18 Auto, after responding to an advertisement for the vehicle. Da07. Although the Defendants advertised the vehicle with a list price of $34,000, the sales document they prepared included a base sale price of $36,770.36, reflecting an unexplained $2,770.36 markup. *Id.* The sales document also added a charge of $450 to the total sale price for a "Registration/Title Fee" which reflected a $150 overcharge of the $300 official fee to transfer title and register the vehicle to the Plaintiff. Da021-023. An additional $577.00 was added to the total sale price for a charge described only as "Clerical Fee" without identifying what services were performed in exchange for the $577. Da19-20.

After the purchase, Route 18 Auto failed to provide the Plaintiff with permanent registration and license plates within the until October 26, 2023, which was two weeks after the non-renewable temporary registration and license plates had expired. Da018. As a result, the Plaintiff was forced to rent a car to commute to work at his own expense, for which he paid $664.16. Da18. He also had to continue to maintain insurance on the Jeep while being unable to drive it during the two-week period, at a cost of $90.52. *Id.*

On November 8, 2023, after retaining counsel, the Plaintiff filed the present action, asserting putative class claims for damages and other relief under the CFA,

Truth in Consumer Contract Warranty and Notice Act, and Declaratory Judgment Act for the Registration/Title Fee overcharges and the unitemized "Clerical Fee," which the Complaint asserts constitute violations of the CFA and the New Jersey Automotive Sales Practices Regulations. Da27-31. The Complaint also asserts two non-class claims on behalf of the Plaintiff only, seeking remedies under the CFA for the Route 18 Auto's overcharge of $2,770.36 in excess of the advertised price of the Jeep, in violation of the Motor Vehicle Advertising Practices Regulations, and for its failure to timely transfer title and provide registration and license plates to the Plaintiff, in violation of the New Jersey Motor Vehicle Certificate of Ownership Law.

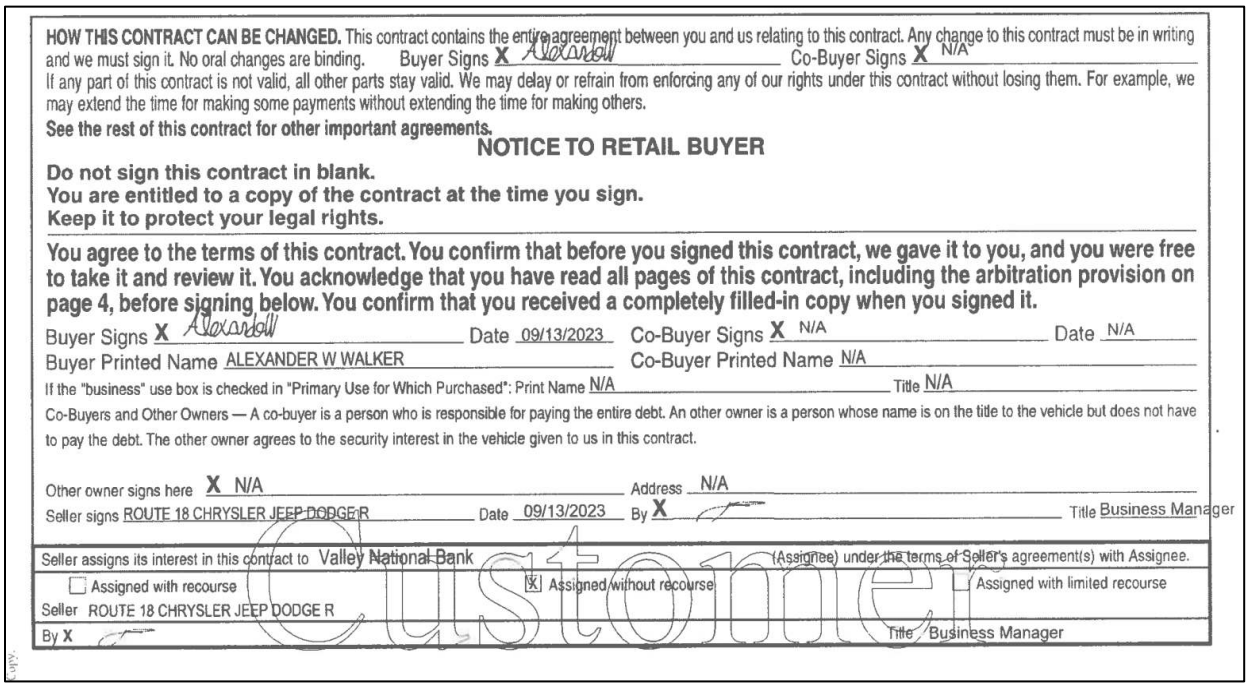
LEGAL ARGUMENT

I. The trial court properly held that Route 18 Chrysler's post-sale assignment of the Retail Installment Sale Contract was irrelevant to the issue of whether the two arbitration provisions with conflicting terms precluded the clarity and lack of ambiguity necessary for a consumer's knowing assent to an arbitration agreement under New Jersey caselaw. (Da50-51)

A. The Defendants are incorrect as a matter of law that Route 18 Chrysler's assignment of the RISC meant that it was "not a party" to the RISC or its embedded arbitration provision.

As stated in their brief, the Defendants contend "that there was no actual conflict in the purchase documents because the dealership was only a party to the SAD and not a party to the RISC." Db11. They claim that Route 18 Chrysler was "not a party to the RISC" or its embedded arbitration provision

because the RISC contained a section at the end, below the Plaintiff's signature line, indicating that the dealership would be assigning its interests in the RISC "without recourse" to a third party, Valley National Bank. Db11-12. The text relied upon by the Defendants appears in the last four lines of the final page of the RISC (Db49), as depicted in figure 1.



HOW THIS CONTRACT CAN BE CHANGED. This contract contains the entire agreement between you and us relating to this contract. Any change to this contract must be in writing and we must sign it. No oral changes are binding. Buyer Signs X Alexander W Walker Co-Buyer Signs X N/A
If any part of this contract is not valid, all other parts stay valid. We may delay or refrain from enforcing any of our rights under this contract without losing them. For example, we may extend the time for making some payments without extending the time for making others.
See the rest of this contract for other important agreements.

NOTICE TO RETAIL BUYER

Do not sign this contract in blank.
You are entitled to a copy of the contract at the time you sign.
Keep it to protect your legal rights.

You agree to the terms of this contract. You confirm that before you signed this contract, we gave it to you, and you were free to take it and review it. You acknowledge that you have read all pages of this contract, including the arbitration provision on page 4, before signing below. You confirm that you received a completely filled-in copy when you signed it.

Buyer Signs X Alexander W Walker Date 09/13/2023 Co-Buyer Signs X N/A Date N/A
Buyer Printed Name ALEXANDER W WALKER Co-Buyer Printed Name N/A
If the "business" use box is checked in "Primary Use for Which Purchased": Print Name N/A Title N/A
Co-Buyers and Other Owners — A co-buyer is a person who is responsible for paying the entire debt. An other owner is a person whose name is on the title to the vehicle but does not have to pay the debt. The other owner agrees to the security interest in the vehicle given to us in this contract.

Other owner signs here X N/A Address N/A
Seller signs ROUTE 18 CHRYSLER JEEP DODGE R Date 09/13/2023 By X Title Business Manager

Seller assigns its interest in this contract to Valley National Bank (Assignee) under the terms of Seller's agreement(s) with Assignee.
☐ Assigned with recourse ☒ Assigned without recourse ☐ Assigned with limited recourse
Seller ROUTE 18 CHRYSLER JEEP DODGE R
By X Title Business Manager

Figure 1

According to the Defendants, assignment of the RISC "without recourse" both "divested Route 18 of any legal rights under the RISC, including its right to arbitrate" *and* caused the Plaintiff to "los[e] his right to proceed against defendants under the RISC, 'including the arbitration provision on Page 4,' [while] retain[ing] those same rights against Valley National Bank, instead of against Route 18." Db11-13.

This argument, in addition to being of limited relevance to the standards established in *NAACP of Camden County* and related caselaw (as discussed further under point heading I.B), relies on obvious misstatements of the very "law of assignment" the Defendants accuse the trial court of ignoring. Db11.

First, the Defendants' arguments are contrary to the well-established principle that "*assignment does not discharge the original [promisor]*, but merely transfers the duty to the assignee as an *additional obligor*." *Fusco v. Union City*, 261 N.J. Super. 332, 337 (App. Div. 1993) (emphasis added, citing 15 *Williston on Contracts* § 1867A (3d ed. 1972)). "A party 'cannot relieve himself of the obligations of a contract without the consent of the obligee.'" *Id.* (quoting *Riley v. New Rapids Carpet Center*, 61 N.J. 218, 224 (N.J. 1972)).

For Plaintiff to have "lost his right to his right to proceed against defendants under the RISC…arbitration provision" as the Defendants' claim, a novation, rather than a mere assignment, would have been required. *Fusco*, 261 N.J. Super., at 336-337. As this Court has explained,

> [A] novation "is a substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty." *Restatement (Second) of Contracts*, § 280 at 377 (1981). A novation "necessarily involves the immediate discharge of an old debt or duty, or part of it and the creation of a new one." 15 *Williston On Contracts*, § 1865 at 587. The extinguishment of the original duty is fundamental to a novation, because a subsequent breach gives no right of action against the initial obligor. *See Restatement (Second) of Contracts*, Comments to § 280 at 378. In contrast, *an*

> *assignment does not discharge the original [obligor], but merely transfers the duty to the assignee as an additional obligor.* 15 Williston On Contracts, § 1867A, at 604.

Id. at 336-37 (emphasis added).

While there is clearly no express novation in the RISC or in any of the other transaction documents, the Defendants arguments suggest that the Plaintiff entered into an implied novation by signing the RISC when the assignment endorsement box at the bottom of the document stated that the dealership would be assigning the contract "without recourse" to a third-party bank. Db12 (claiming the Plaintiff "agreed to the assignment"). However, under New Jersey law, a novation requires "*a 'clear and definite intention on the part of all concerned*' that it is the purpose of the agreement to substitute a new [obligor] for the old one." *Fusco*, 261 N.J. Super., at 337 (emphasis added, citing *Tolland v. Lista*, 46 N.J.Super. 272, 277 (App.Div.1957)). Importantly, "the burden of proof rests on the defendant to show the intention by the obligee to discharge the original [obligor]. *Id.* (citing *Mayfair Farms. v. Kruvant Enterprises Co.*, 64 N.J.Super. 465, 475 (App.Div.1960)). The Defendants have not offered or identified any such proof.

The text referencing the assignment appears in a separate box appearing at end of the document, *after* Plaintiff's signature line, which simply provides a short affirmation and single signature line for the *seller* to endorse contract for

assignment. Da48; see also figure 1, *infra*. It is clearly not part of the contract between the parties, as it does not set forth any rights or duties for the Plaintiff, nor does it include a signature line for the Plaintiff or anything else to suggest that the Plaintiff "agreed" to the assignment, much less a novation, which, again, requires the Defendants to prove "a *'clear and definite intention* on the part of all concerned' that it is the purpose of the agreement to substitute a new [obligor] for the old one." *Fusco*, 261 N.J. Super., at 337 (emphasis added).

The Defendants rely heavily on the assignment's designation as "without recourse" as supposed proof that Plaintiff "lost his right to his right to proceed against defendants under the RISC." Db12. However, this argument reflects a basic misconception of the term "without recourse" which simply means the assignor transfers its rights without liability to the assignee for nonpayment or other breach of the contract by the original debtor/promisor. See *Black's Law Dictionary* 1740 (9th ed. 2009) (defining "without recourse" as "without liability to subsequent holders."). The Defendants claim, incorrectly, that assignment "without recourse" means that the original debtor/promisor loses his rights against the assignor, and suggest that this meaning is supported by precedent:

> [A]n assignment "without recourse" means that the other party, in this case the plaintiff [Walker], cannot "hold the assignor personally liable on the contract of assignment." *Hyman v. Sun Ins. Co.*, 70 N.J. Super. 96, 101 (App. Div. 1961)

Db12. However, this partial quote from the *Hyman* decision blatantly misrepresents the *actual* passage, in which the Court held that the plaintiff, an assignee of a mortgage secured by a building that had destroyed in a fire, had an insurable interest in the property because he stood to "suffer loss by its destruction" due, in part, to the fact that he took assignment of the mortgage "without recourse." *Hyman*, 70 N.J. Super. at 100-101. In the passage partially quoted by the Defendants, the Court noted,

> He had taken an assignment of a mortgage payment without recourse. That meant that he [the plaintiff-assignee] could not *hold the assignor personally liable on the contract of assignment*… He was subject, therefore, to a risk of suffering a pecuniary loss if the mortgaged premises were destroyed.

Hyman, 70 N.J. Super. at 101(portion quoted by the Defendants emphasized). Thus, *Hyman* stated only that assignment "without recourse" means that the *assignee* (the plaintiff, who "had taken assignment") cannot hold the *assignor* personally liable under the contract; it said absolutely *nothing* about a non-assigning "other party, in this case the plaintiff" as the Defendants misstate in their brief.

The Defendants further attempt to support the notion that Plaintiff "lost his right to his right to proceed against defendants under the RISC" by pointing to a notice on the first page that states,

> NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO…

Db13. This notice, which is mandated in all consumer credit contracts by the Federal Trade Commission (FTC) Preservation of Consumers' Claims and Defenses Rule (also known as the FTC Holder Rule), at 16 C.F.R. § 433.2[2], speaks only to assignees' liability for a consumer's claims against the seller-assignor. It does *not* state or suggest any sort of corresponding extinguishment of the seller-assignor's liability to the consumer for the same claims, as the Defendants argue. Db13-14. In fact, this Court has considered and rejected the argument that the FTC Holder Rule permits sellers or other holders consumer credit contracts to immunize themselves from liability by simply transferring the contract to another assignee. *Assocs. Home Equity Servs., Inc. v. Troup*, 343 N.J. Super. 254, 277 (App. Div. 2001) (holding a party liable under the FTC Rule despite its pre-suit assignment of the contract, explaining,

[2] The purpose of the rule is to protect consumers debtors from abuses of the "holder in due course doctrine [which ordinarily] insulates a good faith holder in due course of a negotiable instrument from almost all claims and defenses that the debtor could assert against the original creditor." *Scott v. Mayflower Home Improvement Corp.*, 363 N.J. Super. 145, 153 (N.J. Super., Law Div. 2001). The FTC Holder Rule "modified the holder in due course doctrine by providing, 'Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained with the proceeds hereof…" *Id.* (citing 16 C.F.R. § 433.2).

"We cannot accept the proposition that the FTC contemplated that such result would not attach simply because of a subsequent assignment of the loan.")

B. The assignment of the RISC did not mitigate the confusion, lack of clarity, and ambiguity caused by the Defendants' inclusion of two different, inconsistent arbitration provisions in the same set of transaction documents.

The Defendants' have remained fixated on their claim that Route 18 Auto's was no longer a "party to" the RISC arbitration provision after assignment of the RISC, without even attempting to explain how, even if true, this is relevant to the question of whether Route 18 Auto's inclusion of two conflicting arbitration provisions in the contract documents rendered them both invalid for lack of mutual assent under New Jersey caselaw. Regardless of Route 18 Auto's status after assignment of the RISC, the fact remains that *at the time of the sale,* when Route 18 Auto presented the transaction documents to the Plaintiff for his signature, the documents contained two disparate arbitration provisions, both purporting to be specifically between Route 18 Auto and the Plaintiff. Da11, Da45 (page 1 of RISC, defining terms "Seller-Creditor" and "we" as Route 18 Auto), Da48 (page 4, providing "YOU OR WE" may compel arbitration of disputes). See *Barr v. Bishop Rosen & Co., Inc.*, 442 N.J. Super. 599, 607 (App. Div. 2015)(mutual assent to an arbitration provision requires "clarity… at the time of

formation.")(citing *Atalese v. U.S. Legal Serv. Grp., L.P.*, 219 N.J. 430, 445 (2014), cert. denied, 135 S.Ct. 2804 (2015)).

As discussed in further detail under point heading IV, *infra,* the inquiry under *NAACP of Camden County* and similar precedents is whether, *at the time of signing*, the inclusion of two arbitration provisions with inconsistent terms resulted in the terms of any specific arbitration provision being too ambiguous, unclear, and confusing to support the Plaintiff's knowing assent to either of the provisions. See *Kernahan v. Home Warranty Adm'r of Fla., Inc.*, 236 N.J. 301, 322 (2019)("A consumer cannot be required to arbitrate when it cannot fairly be ascertained… that she knowingly assented to the provision's terms…"); *Atalese v. U.S. Legal Serv. Grp., L.P.*, 219 N.J. 430, 442 (2014), cert. denied, 135 S.Ct. 2804 (2015)("Arbitration clauses—and other contractual clauses—will pass muster when phrased in plain language that is *understandable to the reasonable consumer*.")(emphasis added); *NAACP of Camden Cty. E. v. Foulke Mgmt. Corp.*, 421 N.J. Super. 404, 425, 24 A.3d 777, 790 (App. Div. 2011) ("[T]he clarity and internal consistency of a contract's arbitration provisions are important factors in determining whether a party reasonably understood those provisions and agreed to be bound by them."). The Defendants presumably do not dispute that Route 18 Auto *was* a party to the RISC arbitration provision at the time the dealership and the Plaintiff signed the documents containing the two disparate arbitration

provisions, which is when the Plaintiff either did or did not knowingly assent to the SAD provision that the Defendants seek to enforce.

The Defendants' suggestion that the ambiguity and confusion resulting from presenting the Plaintiff with two, inconsistent arbitration provisions was somehow mitigated by the presence of Route 18 Auto's endorsement for assignment "without recourse" on the last page of the RISC is not credible. As noted earlier, knowing assent in the context of a consumer transaction requires that the arbitration provision be "phrased in plain language that is *understandable to the reasonable consumer*." *Atalese*, 219 N.J. at 442. See also *Kernahan*, 236 N.J. at 327 ("It is unreasonable to expect a lay consumer to parse through the contents of this small-font [arbitration] provision to unravel its material discrepancies.") The notion that a lay consumer should be expected to discern which of the two arbitration provisions was the operative provision for disputes with Route 18 Auto based on the words "without recourse" appearing in an assignment endorsement section on the last page of the RISC is belied by the fact that even licensed attorneys, such as Defendants' counsel, could not accurately explain the meaning of the term "without recourse," as discussed earlier, under point heading I.A.

Finally, the Defendants overlook the fact that the two arbitration provisions cover the *same* disputes, and so the confusion and lack of clarity caused their conflicting terms remains, even if the Defendants were not incorrect that the RISC

assignment endorsement "told" the Plaintiff that Route 18 Auto both list their right to "proceed…under the RISC, 'including the arbitration provision on Page 4,' but that [the Plaintiff] retained those same rights against Valley National Bank." (Db13) The SAD requires arbitration of

> Any claim or dispute… between you and us [Route 18 Auto] or our employees, agents, successors or assigns, which arise out of or relate to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract)

Da11. The RISC arbitration provision requires arbitration of

> Any claim or dispute… between you and us [defined as Route 18 Auto on page 1 of the RISC] or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this Vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract)

Da48. The Defendants make no attempt to explain how specifying which party has the right to *enforce* the RISC arbitration provision clarifies the conflicting terms between two arbitration provisions which, by their own terms, cover an identical universe of claims. For example, the SAD provision expressly covers claims and disputes between the Plaintiff and Valley National Bank ("between you and…our…assigns") yet the Defendants acknowledge that the Plaintiff "retained…rights [to enforce the RISC arbitration provision] against Valley National Bank. Db13. So, even if assignment of the RISC somehow deprived

Route 18 Auto and the Plaintiff of the right to enforce the RISC arbitration provision against each other, from the Plaintiff's perspective, the two provisions still contain materially conflicting provisions applicable to the same claims. If anything, assigning two different parties as enforcers of different arbitration provisions with conflicting terms that cover the same claims between the same parties only adds an another layer of confusion and amiguity.

II. The trial court properly disregarded the Defendants' secondary argument for enforcement under an unpublished and entirely inapposite case, *Stollsteimer v. Foulke Management Group*, which the Defendants mischaracterized as addressing "arguments identical in substance to plaintiff's here." (not decided below).

In the trial court and again in their brief on appeal, the Defendants cite to an unpublished decision, *Stollsteimer v. Foulke Management Corp.*, 2018 N.J. Super. Unpub. LEXIS 1514 (App. Div. 2018), in which they falsely claim the Court considered and "rejected arguments identical in substance to plaintiff's here." Db16. In fact, *Stollsteimer* is entirely inapposite, and did not even involve a transaction with multiple, inconsistent arbitration provisions. The Defendants' rambling two-page summary of the unpublished decision describes no "arguments identical in substance to plaintiff's here," much less the Court's rejection of such arguments, and sheds no light on why the case is relevant to the Plaintiff's arguments or the trial court's ruling, or why the

Defendants cited it in their brief. Db16-17. Thus, the Defendants' citation to and "argument" based on the *Stollsteimer* case were properly disregarded by the trial court.

In *Stollsteimer,* the plaintiff purchased a car and signed three documents, a Motor Vehicle Retail Order (MVRO), a Retail Installment Sale Contract (RISC) and a separate arbitration agreement. After the sale, the plaintiff sued the dealership in court, the dealership moved to compel arbitration under the separate agreement, the trial court granted the motion, and the plaintiff appealed. *Stollsteimer*, at *3-7. The Court affirmed, holding that because they were signed at the same time, in the same transaction, and referenced each other, "the MVRO, RISC, and arbitration agreement signed by plaintiffs constitute a single, integrated contract." *Id.* *7. The Court then confirmed that the arbitration provision was written in sufficiently clear language to satisfy the standards set forth in *Atalese*. *Id.*, at 7-9.

There is absolutely nothing in the decision stating or suggesting that there were any arbitration provisions in the transaction documents other than the separate arbitration provision. Nor is there any discussion or ruling involving the effect of multiple, inconsistent arbitration provisions. In short, the Defendants representation to the Court that *Stollsteimer* considered and rejected "arguments identical in substance to plaintiff's here," is false.

III. The Defendants failed to raise, and thus failed to preserve for appeal, any substantive arguments directly responding to the Plaintiff's arguments and the trial court's ruling that the two conflicting arbitration provisions vitiated mutual assent under New Jersey caselaw (not decided below).

A. The Defendants' failure to raise any substantive arguments in the trial court beyond their assertion that *NAACP of Camden County* was inapplicable due to assignment of the RISC should limit review to that issue only.

New Jersey appellate courts will generally "decline to consider questions or issues not properly presented to the trial court *when an opportunity for such a presentation is available.*" *Chirino v. Proud 2 Haul, Inc.*, 458 N.J. Super. 308, 318 (App. Div. 2017)(emphasis added)(citing *State v. Witt*, 223 N.J. 409, 419 (2015) and *State v. Robinson*, 200 N.J. 1, 20 (2009)). See also *US Bank Nat. Ass'n v. Guillaume*, 209 N.J. 449, 483 (2012)("Because the [defendants] did not raise their argument…in the trial court or the Appellate Division, we need not consider it.")

The record below shows that Defendants failed to directly address the arguments raised by Plaintiff, and accepted by the trial court, that inclusion of two conflicting arbitration provisions in the transaction documents vitiated the mutual assent under to the separate arbitration provision under *NAACP of Camden County* and similar caselaw, despite repeated opportunities to do so. Instead, the Defendants steadfastly insisted that *NAACP of Camden County*

caselaw was inapplicable due to the dealership's assignment of the RISC, without contesting the Plaintiff's arguments or otherwise addressing the issues of whether the two arbitration contained materially conflicting terms, and without addressing the issue of whether or those conflicting terms would have precluded mutual assent under *NAACP of Camden County* if the RISC had not been assigned. Of particular note is the Defendnats failure to respond to or acknowledge the specific conflicts listed and discussed at length in the Plaintiff's brief in opposition to the motion below. Pa16-21

In addition to failing to raise arguments in the trial court to challenge or directly address Plaintiff's assertions regarding lack of mutual assent to the SAD arbitration provision under *NAACP of Camden County*, the Defendants also failed to request or raise arguments for any form of relief other than enforcement of the SAD arbitration agreement as drafted. For example, the Defendants did not request or argue in the alternative for enforcement of the arbitration provision with terms most favorable to the Plaintiff, or for modification of the SAD or RISC arbitration provisions to attempt to harmonize their conflicts. Instead, the Defendants have steadfastly requested enforcement of the SAD arbitration provision, as drafted, and no other form of relief.

As noted earlier, New Jersey "appellate courts will decline to consider questions or issues not properly presented to the trial court *when an opportunity for such a presentation is available*…" *Chirino,* 458 N.J.Super.,.at 318 (emphasis added). The Defendants had repeated opportunities to raise alternative arguments and to directly address the Plaintiff's arguments and trial court's holding under *NAACP of Camden County*, yet they have decided to forgo them each time. As discussed earlier, the Complaint explicitly set forth the fact that there were two, different arbitration provisions, and disclosed the Plaintiff's legal position that they were both invalid *NAACP of Camden Count*y. Da17, para. 27. Yet the Defendants failed to avail themselves of the opportunity to address the issue of multiple, inconsistent arbitration provisions in their initial motion brief below. Pa1. In fact, the Defendants failed to address or even acknowledge the existence of the RISC arbitration provision in their moving brief, resulting in the trial judge admonishing the Defendants for apparent "gamesmanship" during oral argument. T7-3 – T8-25. The Defendants had another opportunity to directly address the import of the two, conflicting arbitration provision in their reply brief, after the Plaintiff had fully briefed his arguments for lack of mutual assent under *NAACP of Camden County*, including a lengthy discussion specifying and discussing the various conflicts between the two provisions. Pa16-21. Again, the Defendants

opted to not directly contest or address these arguments in their reply brief, and instead focused exclusively on their contention that there was only one operative arbitration provision due to the assignment of the RISC. Pa27. The Defendants' oral argument below similarly focused exclusively on the Defendants' contention that the dealership's assignment of the RISC effectively eliminated any possible conflicts between the two arbitration provisions. T12-12 – T13-3.

In short, other than their contention that there was only one operative arbitration provision due to assignment of the RISC, the Defendants have raised *no substantive arguments at all* in the trial court that challenge or directly address the Plaintiff's factual and legal arguments for lack of mutual assent under *NAACP of Camden County* despite having had repeated opportunities to do so. The Defendants have therefore failed to preserve any such arguments for appeal, and the trial court's order should be affirmed without further review if this Court affirms the trial court's ruling rejecting the Defendants' arguments based on assignment of the RISC.

B. The Defendants' failure to raise any substantive arguments in their appeal brief beyond their assertion that *NAACP of Camden County* was inapplicable due to assignment of the RISC should preclude the Defendants from raising any such arguments for the first time in their reply brief.

The Defendants' appeal brief likewise focuses almost exclusively on their argument that *NAACP of Camden County* and similar caselaw is

inapplicable due to assignment of the RISC, while failing to directly counter or address the Plaintiff's underlying arguments regarding the materially conflicting terms of the two arbitration agreements, and the consequential lack of mutual assent to the SAD arbitration provision under *NAACP of Camden County*. The Defendants should therefore be precluded from raising any such arguments for the first time in their reply brief or in oral argument on appeal. See *Bouie v. N.J. Dep't of Comm. Affairs*, 407 N.J. Super. 518, 525-26 n.1 (App. Div. 2009) (stating that "a party may not advance a new argument in a reply brief[,]" and finding that an argument raised for the first time in a reply brief "was abandoned"); *Bacon v. N. J. State Dep't of Educ.*, 443 N.J. Super. 24, 38 (App. Div. 2015) ("We generally decline to consider arguments raised for the first time in a reply brief."). The Defendants' reply brief should be limited in scope to reply to arguments in Plaintiff's brief responding to the arguments in the Defendants' initial brief.

The Plaintiff this acknowledges that the factual and legal bases of his arguments against mutual assent to the SAD under *NAACP of Camden County* are addressed in this brief, under point heading IV, *infra*, but only out of an abundance of caution, in the event the Court disagrees with the Plaintiff's primary argument that these issues were not properly preserved for appeal (or reply). However, a precautionary response to an argument not raised in an

appellant's initial brief does *not* revive an argument or issue that was not properly reserved for appeal or reply, as the federal Cout of Appeals for the Seventh Circuit explained,

> [T]o find that one party's argument was preserved because his *opponent* defended against it out of an abundance of caution would be to punish the opponent for being more thorough. We decline to impose such a rule, and [the appellant] points to no cases that support its adoption.

Williams v. Dieball, 724 F.3d 957, 962-63 (7th Cir. 2013)(emphasis in original).

IV. The trial court properly ruled that the Defendants' inclusion of two arbitration provisions with inconsistent terms in the Plaintiff's transaction documents precluded mutual assent to the specific arbitration provision the Defendants moved to enforce below. (Decided below at Da050-051)

"An agreement to arbitrate, like any other contract, 'must be the product of mutual assent, as determined under customary principles of contract law.'" *Atalese v. U.S. Legal Serv. Grp., L.P.*, 219 N.J. 430, 442 (2014), cert. denied, 135 S.Ct. 2804 (2015)(quoting *NAACP of Camden County,* supra, 421 N.J.Super. at 424). Therefore, a party seeking judicial enforcement of an arbitration provision "has the burden to prove, by a preponderance of the evidence, that [the opposing party] assented to it." *Midland Funding LLC v. Bordeaux*, 447 N.J. Super. 330, 336 (App.Div. 2016)(citing *Atalese* at 442-443). See also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc.*, 427 N.J. Super. 45, 59 (App. Div.

2012)("As the proponent of arbitration, defendants have the burden to establish the existence of an agreement to arbitrate between themselves and [plaintiff].")

"Mutual assent requires that the parties have an understanding of the terms to which they have agreed." *Atalese*, 219 N.J. at 442. "A consumer cannot be required to arbitrate when it cannot fairly be ascertained… that she knowingly assented to the provision's terms…" *Kernahan v. Home Warranty Adm'r of Fla., Inc.*, 236 N.J. 301, 322 (2019). "Consequently, the clarity and internal consistency of a contract's arbitration provisions are important factors in determining whether a party reasonably understood those provisions and agreed to be bound by them." *NAACP of Camden County,* 421 N.J. Super. at 425.

Applying these principals, New Jersey courts have held that that a car dealership's use of multiple documents with conflicting arbitration provisions may preclude the "clarity and internal consistency" necessary to support assent to arbitration in a consumer transaction. *See NAACP of Camden Cty. E.*, 421 N.J. Super. at 410 (ruling that three "disparate arbitration provisions" in the same transaction "were too confusing, too vague, and too inconsistent to be enforced."); *Rockel v. Cherry Hill Dodge*, 368 N.J. Super. 577, 583 (App. Div. 2004) (ruling that the dealership's "inclusion of two conflicting arbitration provisions in the contract documents confounds any clear understanding of the parties' undertaking"

and precludes the consumer's knowing assent to ether of the two arbitration provisions).

In *NAACP of Camden County*, as in this case, the dealership presented the buyer with "a stack of form documents" to sign as part of the purchase. *Id.* at 410. Three of the documents contained arbitration clauses, with inconsistencies regarding various terms including "locale of the arbitration forum," "the time limit in which arbitration must be initiated," and the "costs of the arbitration and who will bear them." *NAACP of Camden County,* at 431-35. The Court found that the "the disparate arbitration provisions" contained in the separate documents "were too confusing, too vague, and too inconsistent to be enforced." *Id.* at 410. The Court in *NAACP of Camden County* explained, "It is unreasonable to expect a layperson" to review different arbitration provisions in "multiple documents and discern which provisions are operative and exactly what they mean." *Id,* at 437.

Here, as in *NAACP of Camden County* and *Rockel*, there are substantial inconsistencies between the separate arbitration document ("SAD," Da11) that the Defendants sought to enforce in their motion below, and the arbitration provision embedded in the Retail Installment Sale Contract signed by Route 18 Auto and the Plaintiff. Da44-49. These inconsistences include, without limitation, the following:

Agreed upon arbitration forums. The choice of arbitration forum is a critical one, as it determines the rules, procedure, location, cost, format of the proceedings

to determine the Plaintiff's claims and substantive rights, as well as the pool of potential arbitrators who will decide the claims. The SAD provides a right to choose from two, specified arbitration forums, the National Arbitration Forum (NAF) or the American Arbitration Association (AAA). Da11. By contrast, the RISC arbitration provision does not provide a right to choose the NAF, but instead provides a right to choose between the AAA and forum called National Arbitration and Mediation (NAM). Da48.

Party entitled to choose the forum. The two arbitration provisions also contain conflicting terms for selecting between the two specified arbitration forums. The SAD provides the consumer the exclusive right to choose between the two forums. Da48 ("You may choose one of the following arbitration [forums]"). The RISC provision permits either party to choose the forum. Da11 ("You or we may choose…")

The amount arbitration fees and costs to be paid by the consumer. The SAD provides, "We will advance your filing, administration, service or case management fee and your arbitrator or hearing fee all *up to a maximum of $1500*" with the buyer to pay any arbitration fees billed to him in excess of that amount. Da11 (emphasis added). By contrast, the RISC more generously provides:

> We will pay the filing, administration, service or case management fee and the arbitrator or hearing fee *up to a maximum of $5,000, unless the law or the rules of the chosen arbitration organization require us to pay more*.

Da48 (emphasis added). This $3,500 difference in the amount of financial burden borne by the consumer represents a clear, substantial, and material conflict between the two arbitration provisions.

The consumer's risk of liability for reimbursement of arbitration fees paid by the business. The RISC arbitration clause provides that arbitration fees and costs advanced by the seller "may be reimbursed in whole or in part by decision of the arbitrator if the arbitrator finds that any of your claims is frivolous under applicable law." Da48. By contrast, the SAD provides that arbitration fees advanced by the seller, "may be reimbursed by decision of the arbitrator at the arbitrator's discretion" without any requirement that the consumer's claims be found to be frivolous, or any other stated standards or limits to the arbitrator's broad "discretion" to shift the cost of arbitration to the consumer.

The right to appeal the arbitrator's award. The rights and scope of appeal vary significantly between the RISC arbitration provision and the SAD. The RISC arbitration clause provides that "[a]ny award by the arbitrator shall be in writing and will be final and binding on all parties, subject to any limited right to appeal under the Federal Arbitration Act." Da48. By contrast, the SAD provides that "[t]he arbitrator's award shall be final and binding on all parties, *except that in the event the arbitrator's award* for a party is $0 or against a party is in excess of $100,000, or *includes an award of injunctive relief against a party, that party may*

request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel" Da48 (emphasis added). Thus, the RISC provides for essentially no right for substantive review or rehearing, consistent with the provisions and purpose of the FAA, while the SAD provides for an automatic right for an entirely new arbitration before a larger (and necessarily more expensive) arbitration panel if the original arbitrator rules against the business in *any* claim for injunctive relief or for monetary relief exceeding $100,000 (not a staggering figure in a consumer action, as it presumably includes enhanced damages and statutory attorney fees and costs typically available under consumer fee shifting statutes, such as the CFA). These provisions are obviously in substantial conflict, and of a high level of materiality, especially given that the Complaint here explicitly requests various forms of injunctive relief, which is an available remedy in private actions under the CFA, at N.J.S.A. 56:8-19. Da34-35 (Prayer for Relief, paras. c., e., f, and g).

Arbitration of claims for injunctive relief. The RISC arbitration clause provides, "The arbitrator may not preside over a[n]...injunctive…action. You expressly waive any right you have to arbitrate a[n]…injunctive action." Da48. This waiver of arbitration of injunctive claims necessarily implies that the RISC permits consumers to file claims for injunctive relief in court. By contrast, the SAD includes no similar restriction against arbitration of claims for injunctive relief, and in fact

contemplates such claims by providing a right to the seller to an automatic "do-over" before a three-arbitration panel whenever a consumer prevails on a claim for injunctive relief, as described in the preceding paragraph. Again, these terms are in direct conflict, and of significant materiality given the claims for injunctive relief asserted in this action.

Whether the arbitrator is bound by applicable statute of limitations. The SAD provides that "[t]he arbitrator shall apply governing substantive law in making an award" Da11. The RISC provides "[t]he arbitrator shall apply governing substantive law *and the applicable statute of limitations.*" Da48 (emphasis added). These provisions are inconsistent and unclear, and leaves the consumer with uncertainty as to whether the arbitrator is free to expand or contract otherwise applicable statutes of limitations under the SAD but not under the RISC arbitration provision.

The scope of class waiver. The SAD provides that "[y]ou expressly waive any right you may have to *arbitrate a class action*.", while the arbitration provision in the RISC provides "[y]ou agree that you expressly waive any right you may have for a *claim or dispute to be resolved on a class basis in court or in arbitration.*" These provisions are inconsistent, as the SAD provides for waiver of the right to a class action only in the context of arbitration, whereas the RISC arbitration clause provides for a class waiver in arbitration *and* in court. Plaintiff is

still able to bring a class action in court based on the SAD, allowing him access to the litigation process to obtain relief for himself and the class, but is limited to only his individual claims in arbitration and court based on the arbitration provision in the RISC. See *Pace v. Hamilton Cove*, 258 N.J. 82 (2024)(holding class action waivers generally enforceable if not exculpatory).

These above-described inconsistencies and conflicts between the terms of two arbitration provisions that Route 18 Auto included in the Plaintiff's transaction documents are similar in both nature and materiality to those identified by the Court in *NAACP of Camden County* and *Rockel*. Route 18 Auto's "inclusion of two conflicting arbitration provisions in the contract documents confounds any clear understanding of the parties' undertaking" and renders both arbitration clauses unenforceable for lack of mutual assent. *Rockel*, 368 N.J. Super. at 583. In any event, the presentation of the conflicting RISC arbitration provision for the Plaitniff's signature during the sale precludes the Plaintiff's knowing assent to the terms of the SAD arbitration provision the Defendants moved to enforce below, and as our Supreme Court has stated, "A consumer cannot be required to arbitrate when it cannot fairly be ascertained… that she knowingly assented to the provision's terms…" *Kernahan v. Home Warranty Adm'r of Fla., Inc.*, 236 N.J. 301, 322 (2019).

CONCLUSION

The Defendants contention that Route 18 Auto's assignment of the RISC somehow extinguished the embedded arbitration provision is incorrect as a matter of New Jersey law, and in any event is irrelevant to the question of whether the inclusion of two, conflicting arbitration provisions in the Plaintiff's transaction documents vitiated the Plaintiff's knowing assent to the SAD arbitration provision under *NAACP of Camden County* and similar precedents. Because the Defendants failed to make any other substantive arguments to counter the Plaintiff's arguments or challenge the trial court's ruling that there was no mutual assent to the SAD arbitration provision due to the presence of a second, inconsistent arbitration provision, the trial court's ruling on that issue has not been preserved for appeal, and should be affirmed on that basis. In any event, the trial court's ruling was correct and consistent with *NAACP of Camden County* and related precedents, and should be affirmed on that basis as well.

THE DANN LAW FIRM, PC
Attorneys for Appellants

By: Henry P. Wolfe
Henry P. Wolfe

Dated: October 14, 2024

ALEXANDER WALKER, *et al.*, Plaintiffs, v. ROUTE 18 AUTO GROUP d/b/a ROUTE 18 CHRYSLER JEEP DODGE RAM, LLC; WILLIAM MCDONAGH AND MICHAEL SALERNO, Defendants.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003085-23 T2 TRIAL COURT DOCKET NO: MID-L-6318-23 Sat Below: Hon. Ana C. Viscomi, J.S.C. Civil Action

REPLY BRIEF OF APPELLANT-DEFENDANTS ROUTE 18 AUTO GROUP, WILLIAM MCDONAGH AND MICHAEL SALERNO

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PRELIMINARY STATEMENT

Unhappy with the fact that he signed, and agreed to, the assignment "without recourse" of the Retail Installment Sales Contract ("RISC")[1] to the lender, Valley National Bank, plaintiff makes a several factually dubious and legally unsupported claims. He even tries to reinterpret the law of assignment in his favor.

However, because:

(1) Plaintiff knowingly and voluntarily agreed to the assignment;

(2) Assigning the RISC extinguished defendants' right to arbitrate under it; and

(3) Its only option to arbitrate was under Route 18's own Agreement with plaintiff,

the Court should reverse the Law Division and send this case to arbitration.

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[1] The fact that plaintiff has made no claim under the RISC against Route 18 adds weight to defendants' position. [DA013-36]

LEGAL ARGUMENT

I. BECAUSE PLAINTIFF KNOWINGLY AND VOLUNTARILY AGREED TO THE ASSIGNMENT OF THE RISC, THERE IS NO CONFLICT IN ARBITRATION AGREEMENTS.

Plaintiff misinterprets or misstates defendants' argument regarding the RISC. [Plaintiff's Brief ("Pltf. Br."), pp. 5-8] In the preliminary statement to defendants' initial brief, we stated: "Route 18 immediately assigned the RISC 'without recourse' to the lender, Valley National Bank, transferring all of Route 18's rights under the RISC, including its right to arbitrate." [Defendants' Brief, p. 1] All of defendants' arguments were made within that context.

A. Assignment of the RISC Extinguished Defendants' Rights Under It, including their Right to Arbitrate.

Initially, plaintiff argues that: "'*assignment does not discharge the original [promisor]*, but merely transfers the duty to the assignee as an *additional obligor*.' ***Fusco v. Union City***, 261 N.J. Super. 332, 337 (App. Div. 1993) (emphasis added, citing 15 *Williston on Contracts* § 1867A (3d ed. 1972)). 'A party "cannot relieve himself of the obligations of a contract without the consent of the obligee."' ***Id.*** (quoting ***Riley v. New Rapids Carpet Center***, 61 N.J. 218, 224 (N.J. 1972))." (Emphasis in original) [Pltf. Br., p. 7]

It is true, in one sense, that "without recourse" means the assignee cannot "hold the assignor personally liable on the contract of assignment." ***Hyman v. Sun Ins. Co.***, 70 N.J. Super. at 101.

But plaintiff's argument is only half right, as it applies here. "Assignment of a right is a manifestation of the assignor's intention to transfer it under which the assignor's right to performance by the obligor is extinguished in whole or in part, and the assignee acquires a right to such performance." ***Restatement 2d of Contracts*** § 317. A contract may assign rights from one party to another, ***Id.***, and the effect of an assignment is to "extinguish the right in the assignor and recreate the same right in the assignee." (Emphasis added) ***Selective Ins. Co. of America v. Hudson East***, 416 N.J. Super. 418, 425-26 (App. Div. 2010).

In this instance, defendants are asserting only that, when they assigned the RISC to the lender, they extinguished all their rights, including their right to arbitrate, against plaintiff and against the lender under it. As a result, they could only seek arbitration under Route 18's Agreement.

Going a step farther, if defendants had tried to invoke any right to arbitrate under the RISC, plaintiff undoubtedly would have argued that defendants had no right because they assigned the RISC.

B. Plaintiff Clearly Agreed to the Assignment.

Next, plaintiff argues that: "For Plaintiff to have 'lost his right to his right to proceed against defendants under the RISC . . . arbitration provision' as the Defendants' claim, a novation, rather than a mere assignment, would have been required. ***Fusco***, 261 N.J. Super., at 336-337." [Pltf. Br., p. 7] To reach this result, plaintiff suggests that he did not agree to the assignment and that it was not a part of the contract.[2] [Pltf. Br., pp. 8-9]

This claim is a distortion. Plaintiff signed the "NOTICE TO RETAIL BUYER" ("the NOTICE") on the RISC. Just above his signature, the NOTICE states:

> **You agree to the terms of this contract. You confirm that before you signed this contract, we gave it to you, and you were free to take it and review it. You acknowledge that you have read all pages of this contract, including the arbitration provision on page 4, before signing below. You confirm that you received a completely filled-in copy when you signed it.** (Emphasis added)

[DA049] Just below his signature, the RISC states: "Seller assigns its interest in this contract to Valley National Bank . . . under the terms of Seller's agreement(s) with Assignee." ***Id.*** It also states: "Assigned without recourse." ***Id.***

He also signed the RISC on each page, which undercuts his claim that he only

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[2] Plaintiff asserts that: "The text referencing the assignment appears in a separate box appearing at the end of the document, *after* Plaintiff's signature line, which simply provides a short affirmation and single signature line for the *seller* to endorse contract for assignment." [Pltf. Br., pp. 8-9[

selectively signed the RISC and that the assignment required an additional signature. [DA045-49] Nowhere in the contract does it state, suggest or imply that any additional signature is necessary or that any portion of the contract is excepted or excluded. Plainly, and contrary to his claim, plaintiff signed, knew about and knowingly and voluntarily agreed to assignment.

And once plaintiff agreed to the assignment, defendants had no further rights against him under the RISC, including the right to arbitrate. As a result, their only recourse was Route's 18 Agreement. There is/was no need to create a novation to reach that result.

C. The Assignment is an Integral of the RISC.

Plaintiff then goes a step farther. He argues, without authority, that the provision permitting assignment of the RISC "is clearly not part of the contract between the parties, as it does not set forth any rights or duties for the Plaintiff, nor does it include a signature line for the Plaintiff or anything else to suggest that the Plaintiff 'agreed' to the assign . . . ." [Pltf. Br., p. 9] This argument is artificial and frivolous.

In addition to the fact that he signed the RISC multiple times, this argument ignores the plain and simple facts that:

(1) Under the MVRO, the main sale contract, the RISC is an integral part of the

purchase because it provides plaintiff's payment [DA008];

(2) The RISC is a contract that contains mutual promises between the parties as consideration for, and establishing, their rights and duties, especially regarding payment. [DA045-49]. In fact, plaintiff signed each page, ***Id.***;

(3) The NOTICE is an integral part of the RISC, not a separate provision requiring separate consideration [DA049]; and

(4) By signing the RISC and the NOTICE, plaintiff agreed to all provisions of the RISC, including the assignment.

Legally, it is beyond dispute that: "where [an] agreement is evidenced by more than one writing, all of them are to be read together and construed as one contract, and all the writings executed at the same time and relating to the same subject-matter are admissible in evidence." ***Lawrence v. Tandy & Allen, Inc.***, 14 N.J. 1, 7 (1953); *citing* ***Gould v. Magnolia Metal Co.***, 207 Ill. 172 (Ill. 1904). Where several writings constitute one instrument, "the recitals in one may be explained, amplified, or limited by reference to the other." ***Schlossman's, Inc. v. Radcliffe***, 3 N.J. 430, 435 (1950).

Factually, plaintiff and defendants executed the MVRO and RISC at the same time, and they deal with the same subject-matter, plaintiff's purchase. On its front page, sandwiched between plaintiff's signatures, the MVRO states:

> Customer agrees that this Order on the face and on the reverse side **and any attachments to it includes all the terms and conditions**, if a sale,

> Customer further agrees this Order cancels and supersedes any prior agreements and as of the date signed by Dealer or authorized agent, comprises the complete and exclusive statement of the terms of the agreement between Customer and Dealer. (Emphasis added) [DA008]

The RISC is inextricably intertwined with, and a necessary and essential part of, the deal. [DA045-49] It contains the mutual promises between the parties regarding payment. ***Id.*** Without it, plaintiff could not have driven the car off the dealer's lot. And as a result of the assignment, he has made his payments directly to the lender. Any disputes relating to payment are/were between plaintiff and the lender – not with defendants.[3]

Finally, the assignment was part of the consideration supporting the mutual promises for the RISC. [DA049] Plaintiff cites no authority permitting the surgical severance of a term of a contract when it is part of the agreed-upon consideration.

Against this backdrop, plaintiff's claim that the assignment provision is not a part of the transaction is legally and factually baseless.

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[3] Plaintiff's Holder Rule argument does not apply here because plaintiff has made claim against defendants under the RISC that would trigger the Rule. [DA013-36] It would affect the rights of the plaintiff against the assignee, in this case Village National Bank. [Pltf. Br., p. 11] He has asserted direct claims against defendants under the MVRO. And those claims will continue to exist whether this case is resolved in arbitration or in court.

D. The Law Division Did Not Explain Its Conclusion Regarding Confusion and Ambiguity.

Next, plaintiff argues that: "The assignment of the RISC did not mitigate the confusion, lack of clarity and ambiguity caused by Defendants' inclusion of two different, inconsistent arbitration provisions in the same set of transaction documents." [Pltf. Br., pp. 12-16]

In denying defendants' motion to dismiss and compel arbitration, the Law Division held that Route 18's Agreement was unenforceable because its provisions and the RISC were "too plagued with confusing terms and inconsistencies to put a reasonable consumer on fair notice of their intended meaning." [DA051]

But the court did no factual or legal analysis, provided no explanation and did not compare the terms of the Agreement and the RISC to support this conclusion. [DA051] The court simply called the assignment "irrelevant" and ignored it. ***Id.***

Contrary to the court's conclusion, the assignment was legally-effective; the assignment removed any competing terms and conditions relating to arbitration; and there was, and could be, no confusion.

Route 18's Agreement is clear and unambiguous:

Please review—Important—Affects your legal rights

1. **Either you or we may choose to have any dispute between us decided by arbitration and not in court or by jury trial.**

2. **If a dispute is arbitrated, you will give up your right to participate as a class representative or class member on any class claim you may have against us including any right to class arbitration or any consolidation of individual arbitrations.**
3. **Discovery and rights to appeal in arbitration are generally more limited than in a lawsuit, and other rights that you and we would have in court may not be available in arbitration.**

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arise out of or relate to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this arbitration clause shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose one of the following arbitration organizations and its applicable rules, the National Arbitration Forum, Box 50191, Minneapolis, MN 55405-0191 (www.adrforum.com), the American Arbitration Association, 335 Madison Avenue, Floor 10, New York, NY 10017-4605 (www.adr.org), or any other organization that you may choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration organization or visiting its website. (Emphasis in original)

[DA011]

E. The Appellate Division Has Enforced a Similar Arbitration Agreement Under Similar Facts.

Even if there were no assignment, ***Stollsteimer v. Foulke Mgmt. Corp.***, 2018 N.J. Super. Unpub. LEXIS 1514 (App. Div. 2018), and the authorities it cites, would

require the same result – arbitration. The Appellate Division rejected identical arguments to plaintiff's here. Just like this case, plaintiff signed a RISC, an MVRO and a separate arbitration agreement. ***Id.*** Significantly, the Law Division granted defendant's motion to compel arbitration, and the Appellate Division affirmed.

The Court agreed that a contract "evidenced by more than one writing, all of them are to be read together. . . ." ***Id.*** at ***5-6**, *quoting* ***Lawrence v. Tandy & Allen, Inc.***, 14 N.J. 1, 7 (1953); *citing* ***Gould v. Magnolia Metal Co.***, 207 Ill. 172 (Ill. 1904). Arbitration is a matter of contract [***Id.***; ***NAACP of Camden County East v. Foulke Mgmt. Corp.***, 421 N.J Super 404, 424 (App. Div. 2011), *appeal dismissed*, 213 N.J. 47 (2013)], and that there is a "strong preference to enforce arbitration agreements." ***Id.***, *quoting* ***Hirsch v. Amper Fin. Servs., LLC***, 215 N.J. 174, 186 (2013).

Finally, the Court viewed the three sales documents (the MVRO, RISC and arbitration agreement) as part of a single, integrated contract, signed at the same time, and relating to the same subject-matter. ***Id.*** As a result, the arbitration agreement was enforceable.

That is exactly what happened here. Plaintiff signed an MVRO, Route 18's Agreement and the RISC all at the same time. And Route 18's Agreement is similar to what the Court enforced in ***Stollsteimer***.

But our case is even stronger due because the assignment removed any

competing agreement. For identical reasons, this Court should reverse the Law Division here and compel arbitration.

F. This Court Should Decline to Hear the Claims Raised in Point III of Plaintiff's Brief Because Plaintiff Did Not Raise Them in the Law Division.

In Point III of his brief, plaintiff argues that defendants failed to raise and preserve any substantive arguments responding to plaintiff's arguments that the trial court's ruling vitiated mutual assent. [Pltf. Br., pp. 18-23] He even states "not decided below" in the table of contents. And the Law Division did not decide them. [DA050-51]

As a result, this Court should decline to address these issues because plaintiff did not raise them before the Law Division. ***Selective Ins. Co. of Am. v. Rothman***, 208 N.J. 580, 586 (2012); ***Nieder v. Royal Indem. Ins. Co.***, 62 N.J. 229, 234 (1973); ***State v. Sims***, 466 N.J. Super. 346, 361 (App. Div. 2021); ***Fuhrman v. Mailander***, 466 N.J. Super. 572, 596 (App. Div. 2021); ***Pannucci v. Edgewood Park Sr. Hous.***, 465 N.J. Super. 403, 409-10 (App. Div. 2020).

Further, plaintiff has waived these arguments. ***Cole v. Jersey City Med. Ctr.***, 215 N.J. 265 (2013); ***Largoza v. FKM Real Estate Holding, Inc.***, 474 N.J. Super. 61 (App. Div. 2022).

More important, none of them affects the factual or legal support for

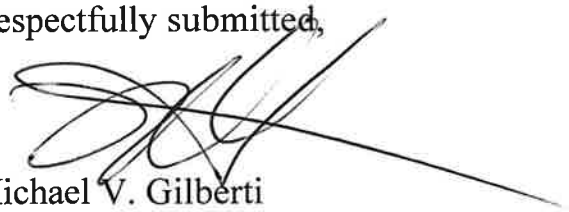
defendants' arguments above that the court did decide. [DA050-51]

Finally, Point IV of plaintiff's brief simply reargues its previous points from a different angle. In response, defendants incorporate their argument on the assignment to counter these arguments.

CONCLUSION

Because Route 18 has no right to arbitrate under the RISC, its Agreement is clear and unambiguous, and plaintiff has made no claim under the RISC, the Court should enforce the Agreement, dismiss the complaint and order the case to arbitration.

Respectfully submitted,



Michael V. Gilberti

Dated: October 22, 2024