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Case Number 162,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ASHLEY N. (REECE) ELIA,	)	
	)	
Plaintiff Below,	)	**No.: 162, 2014**
Appellant,	)	
	)	
v.	)	**Court Below:**
	)	**Superior Court in and For**
HERTRICH FAMILY OF	)	**Kent County**
AUTOMOBILE DEALERSHIPS, INC.,	)	**C.A. No.: K13C-06-036 RBY**
D/B/A/ HERTRICH'S CAPITOL,	)	
A corporation of the State of Delaware,	)	
	)	
Defendant Below,	)	
Appellee.	)	

APPELLANT'S OPENING BRIEF

MACELREE HARVEY, LTD.

/s/ Christopher J. Curtin
Christopher J. Curtin, Esquire
DE Bar ID. No.: 0226
5721 Kennett Pike
Centreville, DE 19807
Phone: (302) 654-4454
Facsimile: (302) 654-4454
eMail: ccurtin@macelree.com
Attorneys for: Ashley N. Elia,
Plaintiff Below, Appellant

Dated: May 19, 2014

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NATURE AND STAGE OF PROCEEDINGS

Ms. Reece, ("Reese") went to Hertrich, a used car dealer, ("Hertrich") specifically to purchase a 4 Wheel Drive SUV after bad experiences driving in snow. Hertrich's salesperson sold Reece a 2 Wheel Drive SUV by misrepresenting that it had 4 Wheel Drive, and that Reece was approved for financing at 8.8%. Hertrich noted it had "4wd" on the Sales Order. A26. A few days later, Hertrich required Ms. Reece to return the SUV or sign two new, different, Sales Orders, agreeing to higher interest, or no financing, A64; A74, because she was not approved for 8.8% financing. Each new Sales Order stated the SUV had "4wd."

In addition to misrepresenting the vehicle and the financing terms, the Sales Orders contain an arbitration clause, A28, requiring both parties to submit any "claim, dispute or controversy" to binding arbitration including State and Federal statutory consumer protections, and limiting some of her statutory remedies.

The formation of the contact and the enforceability of the arbitration clause are the subject of this appeal, because Hertrich treated the contract as conditioned upon obtaining 8.8% financing, and repudiated the contract by refusing to finance the sale as it agreed in the Sales Order. Hertrich never signed the new Sales Orders or the new arbitration clause as required by each of those clauses. A74.

Reece filed this suit on June 26, 2013. A4. In lieu of answering, Hertrich

moved to dismiss for "lack of subject matter jurisdiction," on August 22, 2013, because of the arbitration clause. A78. Reece answered the motion on September 6, 2013, alleging the unenforceability of the arbitration clause due to repudiation of the original contract; the failure of Hertrich to sign the post-repudiation Sales Orders; that the Sales Order was superseded by the integration clause in the financing agreement; the violation of the FTC's "One Document Rule" by placing a binding arbitration clause in a document other than the warranty, and the substantive and procedural unconscionability of the arbitration clause. A105.

Superior Court interpreted the arbitration clause as enforceable, and dismissed the case by order dated December 13, 2013, A116 without discovery, and without hearing argument. The trial court erred by not examining contract formation and repudiation for which it had jurisdiction; and further erred by interpreting the arbitration agreement, which is in the exclusive jurisdiction of Chancery Court.

Reece timely moved for reconsideration on December 19, 2013. A122. Hertrich responded on December 27, 2013. A128. Superior Court denied the motion for reconsideration on March 4, 2014. A150. Reece timely appealed on April 2, 2014.

This is Appellant Reece's Opening Brief.

SUMMARY OF ARGUMENT

I. The Arbitration Agreement is unenforceable because the entire contract was repudiated by Hertrich, indicating there was no meeting of the minds on the financing.

A. Hertrich repudiated the contract by refusing to finance the vehicle as agreed, a condition precedent to contract formation, as demonstrated when Hertrich demanded return of the vehicle or a higher interest rate, or sale without financing; refused to return the trade-in, and threatened repossession of the SUV.

1. Refusal or failure of the financing, a condition precedent to the contract's formation, means that no contract was formed, thus the arbitration clause was not entered.

2. Hertrich repudiated the entire for the failure of the financing. Repudiation occurs where, as here, there is outright refusal by a party to perform a contract or its conditions.

3. When one party repudiates a contract, the non-repudiating party is discharged from its obligation to perform.

B. Hertrich never signed the new Sales Orders or their Arbitration clauses.

1. Since Hertrich repudiated the original Sales Order, it was not formed.

2. Hertrich did not sign either the new arbitration clauses or the Sales Orders it required. The Sales Order and the arbitration clause each require Hertrich to sign.

3. Failure to sign the Sales Order or the Arbitration clause prevents the enforcement of the arbitration Clause.

II. The Financing document's integration clause, making it the "entire agreement" superseded the Sales Order, and contains no Arbitration clause.

III. Hertrich violated the Federal Magnuson Moss Act's "One Document Rule," which requires a "single" warranty document, and prohibits a pre-dispute arbitration clause which is not contained within the single warranty document. There is no single warranty document in this case, and none of the documents affecting warranty contain an arbitration clause. Since the arbitration clause is not in a warranty document, its enforcement is prohibited by the Magnuson Moss Act and regulations enacted by its authority.

IV. The arbitration clause is unconscionable because it is inconsistent with the Rules it specifies; it limits enforcement of statutorily guaranteed State and Federal consumer protection remedies and imposes burdensome costs on the consumer.

STATEMENT OF FACTS

This Statement of Facts is adapted from the Complaint, A5, and its exhibits: Hertrich is Mazda dealer selling new and used cars, including the used 2007 Mazda CX7 GT, (the "Automobile" or "SUV") sold to Ms. Reece. A6, ¶¶1, 2.

On September 16, 2010, Ms. Reece went to Hertrich to shop for a 4 wheel drive vehicle to replace her 2 wheel sedan. She told the sales representative that she was only looking for a 4 wheel drive vehicle for family to use in snow or wintry weather, including travel to upstate New York during winter months to visit family. She was trapped in snow in prior years. A5, ¶¶3, 38; A12. Reece relied on Hertrich to show her only 4 wheel drive vehicles. A5, ¶¶3, 37; A12.

Hertrich Represented That The Automobile Has 4 Wheel Drive.

The sales rep showed Reece the SUV and misrepresented to her that it had "All Wheel Drive," which is an automatic feature that engages all four wheels when slipping drive wheels were detected by its sensors. A6, ¶4. On September 16, 2010, Reece purchased the Automobile. A26. Reece traded her old sedan to purchase the SUV. Hertrich took and retained possession of her trade-in. A7.

Hertrich Represented That Reece Was Approved For 8.8% Financing.

Hertrich told Reece that she was approved for very favorable 8.8% financing, which with the "4wd" representation, induced her to sign the Retail Installment Sales Contract ("RISC 1"), the financing agreement. A60; A7, ¶3.

Hertrich prepared RISC 1 and listed itself as the Creditor, in contrast to the Sales Order, which names Wells Fargo as the lender. Compare A27 with A59. RISC 1 states that the annual percentage rate of purchase of the Automobile was 8.8% simple annual interest. A59. The RISC contains an "integration clause" stating that it is the "entire agreement between you and us relating to this contract." A61. RISC 1 does not contain an arbitration clause.

Hertrich never told Reece that anything about the sale was contingent. A7, ¶14; A31; A34.

The Arbitration Clause.

After describing the vehicle as "4wd" and the 8.8% financing, the Sales Order A27 contains an Arbitration Clause which states:

> "AGREEMENT TO ARBITRATE ANY CLAIMS. READ THE FOLLOWING ARBITRATION PROVISION CAREFULLY, IT LIMITS YOUR RIGHTS, INCLUDING YOUR RIGHT TO MAINTAIN A COURT ACTION. The parties to this agreement agree to arbitrate any claim, dispute or controversy, <u>including all statutory claims and any state or federal claims, that may arise under this agreement</u>. By agreeing to arbitration, the parties understand and agree that they are waving their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes. <u>Consumer Fraud</u>, Lemon Law, and Truth In Lending claims are just three examples of the various types of claims subject arbitration under this agreement. The parties also agreed to (i) waive any right to pursue any claims arising under this agreement, including statutory, state or federal claims, as a class action, or (ii) to have an arbitration under this agreement consolidated with any other arbitration or proceeding. <u>The arbitration shall be conducted in accordance with the Rules</u>

> of the American Arbitration Association[1] before a single arbitrator. The costs incurred in the arbitration process shall be shared equally[2] between the parties. Each party shall bear his or her own attorneys fees and costs associated with the arbitration. The arbitration shall take place at the address of the dealership listed above. The decision of the arbitrator shall be binding upon the parties. And further relief sought by either party will be subject to the decision of the arbitrator. THIS ARBITRATION PROVISION LIMITS YOUR RIGHTS, INCLUDING YOUR RIGHT TO MAINTAIN A COURT ACTION. PLEASE READ IT CAREFULLY, PRIOR TO SIGNING.
>
> Accepted by:
>
> Date Dealer or His Authorized Representative
>
> Date Customer Signature"

Emphases added. A27. Only the 9-16-2010 version of this Arbitration Clause was signed by Hertrich. A27. Compare A65 and A75.

Hertrich Repudiated The Sales Order And Contract.

On September 23, 2010, Hertrich contacted Reece and told her that financing at 8.8% interest, was not approved and demanded that Reece return to the dealership as soon as possible and sign new papers for the SUV at 13.59% simple annual interest. A8, ¶15; A27, A65. Hertrich told Reece that if she did not sign new papers at the higher interest rate, Hertrich would repossess the Automobile. Reece asked Hertrich to cancel the sale return her trade-in. Hertrich

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[1] The specific version of rules is not identified: Consumer Rules versus Commercial Rules.

[2] The AAA Consumer Arbitration Rules then in effect conflict with several of these terms as discussed i*nfra*. National Consumer Law Center, *Consumer Arbitration Agreements*, 6th ed. 2011 and Supp., §6.6.5.2; Appendix B. (Hereinafter cited as "*Consumer Arbitration Agreements* ").

stated it could not return the trade-in; and that Reece was bound by the contract and could not cancel the sale. On September 23, 2010, Reece returned to the Dealership and, under protest, signed the new Sales Order and RISC 2 at the higher interest rate, 13.59% annual Interest Rate. A26, A70; A9, ¶16.

The new Sales Order dated 9-23-2010, repeated the misrepresentation that the Automobile had 4 wheel drive, as did a third Sales Order prepared by Hertrich and signed by Reece that day. A73; A8, ¶17. Neither of the new Sales Orders nor the Arbitration clauses were signed by Hertrich, as required by the language of each. A65; A75.

On September 28, 2010, Reece financed the purchase of the Automobile through her bank at 9.87%. Reece paid Hertrich in full for the Automobile that day. A8-A9, ¶¶18-19.

In fact, the Automobile is 2 wheel drive and never had either "All Wheel Drive" or "4 Wheel Drive." A7, ¶ 7 . Reece discovered during the winter of 2012 that it was a 2 wheel drive SUV while trying to driving in snow. This Condition cannot be repaired. A9, ¶ 20.

Because of the Condition, the Automobile does not conform to the contract nor does it perform as would a 4 wheel drive SUV in snow and ice, for which it was purchased. The Condition substantially impairs the use, value, and safety of the Automobile to Reece in violation of its warranties. A9, ¶¶ 21-22.

Reece notified Hertrich and demanded that Hertrich cancel the sale and refund the money she paid for the SUV. Hertrich, to date, refused. A9, ¶¶ 23-24. Neither Reece nor Hertrich demanded arbitration to resolve the dispute over financing or the 2 wheel drive misrepresentation.

There Is No Single Warranty Document.

Hertrich delivered a number of separate documents containing or affecting warranties. No separate warranty document was included which incorporated all of the warranties. A7-8, ¶ 8. Reece alleges this violates the Magnuson Moss Act. A15.

First, was the manufacturer's "New Vehicle Limited Warranty." The SUV was still covered by the manufacturer's transferable "Powertrain Warranty" of 5 years and 60,000 miles, A6-7, ¶¶5, 9; A37; A40; A42.

Next, Hertrich provided the written FTC Used Car Buyer's Guide, A31, where Hertrich also warranted the "Power Train" of the Automobile for a period of 30 days or 1000 miles. A6.

Third, Hertrich sold as part of the sale of the Automobile, a 'Comprehensive," "New Vehicle Extended Service Agreement," A50-51, extending the manufacturer's warranty to 72 Months or 75,000 miles, for an additional cost of $1,785.00, (RISC1), A26, or $1,500.00 in (RISC 2 and 3), A64,

A74, which is listed on each Sales Order as part of the basis of the bargain. A26; A64; A74; A7, ¶ 9.

Finally, Hertrich expressly and in writing warranted by description[3] in the Sales Orders, that the Automobile's powertrain was "4wd." A26; A64; A74, A6.

Hertrichs also impliedly warranted, as a matter of law, that the Automobile and its Powertrain were "merchantable" under the contract description within the meaning of 6 *Del. C.* §2-314 (2) (a).[4] A7, ¶ 10,

Hertrichs impliedly warranted, as a matter of law, that the Automobile was "fit for [Reece's] particular purpose" within the meaning of 6 *Del. C.* §2-315. A7.

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[3] 6 *Del. C.* §2-313 states that "Express warranties by the seller are created as follows:… (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description."

[4] 6 *Del C.* §2-314 states: "(2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and…."

ARGUMENT I. THE PARTIES DID NOT FORM AN ENFORCIBLE ARBITRATION CLAUSE.

A. Question Presented: As discussed below in Plaintiffs Answer in Opposition Defendant Hertrich's Motion to Dismiss for Lack of Subject Matter Jurisdiction, "There is no applicable agreement to arbitrate, since … Hertrich repudiated the 9-16-10 Sales Order in favor of new, unsigned Sales Orders." A105.

B. The Standard and Scope of Review is *De Novo*. The Court reviews *de novo* the lower court's interpretation of a contract as well as the application of relevant law. *Parfi Holding AB v. Mirror Image Internet, Inc.,* 817 A.2d 149, 154 (Del. 2002). In that case the agreement, as here, included an arbitration clause. *See also, DMS Properties-First, Inc. v. P.W. Scott Associates, Inc.,* 748 A.2d 389, 391 (Del. Supr. 2000) (When an action is commenced under the Delaware Arbitration Act to enforce or enjoin an arbitration agreement, a question of contract formation and validity of the arbitration agreement "is decided by the Court of Chancery as a matter of contract law and reviewed by this Court *de novo.*").

In determining the facts, the Court will accept all well-pleaded allegations as true. The test for sufficiency of the complaint "is a broad one, that is, whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof." *Spence v. Funk,* 396 A.2d 967 (Del. 1978).

C. Hertrich Repudiated The Entire Contract, Invalidating The Arbitration Clause.

Arbitration is a mechanism of dispute resolution created by contract. Although policy favors alternate dispute resolution mechanisms such as arbitration, that "does not trump basic principles of contract interpretation." *Parfi Holding AB v. Mirror Image Internet, Inc*., 817 A.2d 149, 156 (Del. 2002). "A party cannot be forced to arbitrate the merits of a dispute…in the absence of a clear expression of such intent in a valid agreement…A party who has not agreed to arbitrate has a right to have the merits of dispute adjudicated *ab initio* by a court of competent jurisdiction." *DMS Properties-First, Inc. v. P.W. Scott Associates, Inc.*, 748 A.2d 389, 391 (Del. 2000); *Parfi Holding*, *supra*. "[A] party will suffer irreparable harm if compelled to arbitrate in the absence of any agreement to do so." *GTFM v. TKN Sales Inc*., 2000WL 364871, at *2 (S.D.N.Y. Apr 7, 2000) rev'd on other grounds, 257 F3d 35 (2d. Cir. 2001). *See also*, National Consumer Law Center, *Consumer Arbitration Agreements*, (6th ed 2011) §3.1.3 and cases cited at fn. 38.

The Arbitration Act states that an arbitration agreement is valid and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract, … and confers jurisdiction on the Chancery Court of the State to enforce it." 10 *Del. C.* §5701.

1. Hertrich's Repudiation of the Sale Invalidated the Purchase Agreement. Repudiation of a contract invalidates the contract. "[A]rbitration agreements are subject to the general principle of contract law that '[w]here a contracting party repudiates a contract, the non-breaching party is entitled to treat the contract as terminated, *i.e.*, as being at an end.'" *DaimlerChrysler Corp. v. Matthews*, 848 A.2d 577, 581-82 (Del. Ch. 2004), (interpreting a car purchase agreement incorporating a forced arbitration clause.)

a. Repudiating The Financing Violated A Condition Precedent To The Entire Contract. *Consumer Arbitration Agreements*, *supra.*, §5.7 explains:

> "A condition precedent contract is one that is not effective until a specified condition occurs. A condition subsequent contract is one that is effective, subject of being undone if a specified condition later occurs. For example, assume a consumer enters into a condition precedent contract with the dealer to purchase a car that does not become effective until the financing goes through. If the financing does not go through, the consumer never owned the car and the contract was never effective. In a condition subsequent sale, the dealer will have turned over title to the consumer and there is an agreement that, if the financing falls through, the consumer must return title to the dealer.
>
> In a condition precedent transaction, the contract was ever consummated if the condition precedent does not occur and an arbitration clause that was the contract is not effective."

In *Thompson v. Lithia Chrysler Jeep Dodge of Great Falls*, 185 P 3d 332 (Mont. 2008) the Supreme Court of Montana confronted this situation and held that the financing that fell through was a condition precedent, and no contract containing

the arbitration clause was formed, so the case had to proceed in court rather than arbitration. *See, also, Eady v. Bill Heard Chevrolet Co*., 274 F. Supp. 2d 1284 (M.D. Ala. 2003); *Ex Parte Payne*, 741 So.2d 398 (Ala. 1999) (Dealer said financing was approved.); *Ex Parte Horton Family Hous., Inc.*, 882 So. 2d 838 (Ala. 2003); *Easterling v. Royal Manufactured Hous., Inc*., 963 So.2d 399 (La. Ct. App. 2007)

Hertrich's Sales Order itself demonstrates that the Sales Order is a preliminary agreement, since it states on its face that: "…no credit has been extended to me for the purchase of this motor vehicle except as appears in writing on the face of this agreement." A27. Two of the Sales Orders identify lenders while the RISCs identify Hertrich. A27, A65. Language on the reverse demonstrates that the Sales Order is preliminary since it requires Reece to sign a RISC: "Purchaser agrees to sign any other forms or documents necessary to meet the terms and conditions of payment for the vehicle described in this Order." A28.1

b. Repudiating The Contract Left No Arbitration Clause. In *DaimlerChrysler v. Matthews, supra.*, Matthews purchased a new vehicle under a factory program that offered a discount to family members of employees, but required them to agree to a dispute resolution process that included binding arbitration, as well as non-binding arbitration if the purchaser requested it. Matthews requested non-binding arbitration of his Lemon-Law claims, but

DaimlerChrysler refused. Matthews sued in Superior Court, alleging violation of a number of consumer protection statutes. DaimlerChrysler sued in Chancery Court to enforce the binding arbitration clause. Chancery Court held that DaimlerChrysler repudiated the contract, and as a result Matthews was free to pursue his remedies in Superior Court.

Here, Hertrich repudiated the entire contract by refusing to sell Reece the Automobile under the terms of financing stated in the Sales Order; by demanding that Reece return the SUV because it could not place financing at the contracted 8.8% rate; and would not itself finance it in accordance with RISC 1, A58. Hertrich's actions demonstrate that financing was a condition precedent. It canceled the contract, and required Reece to sign a completely different document at higher interest; and Hertrich threatened to repossess the SUV. Before the sale Hertrich told Reece she was already approved for the 8.8% financing. A7, ¶13; s*ee*, Sales Order, A27.

Moreover, Hertrich was the lender identified in RISC 1. A60. Consequently, Hertrich also refused to finance as Lender under RISC 1.

Reece cancelled the sale and demanded return of her trade-in, but Hertrich refused cancellation under the U.C.C. A8-9, ¶5, 23-24; and refused to return her trade-in, telling Reece she was bound by the Sales Order that specified 8.8% financing, standing by its position that Hertrich was not was not bound, since

Hertrich did not have to provide the agreed financing, or return her trade-in, or resort to arbitration to resolve the dispute.

Where a contracting party repudiates a contract, the non-breaching party is entitled to treat the contract as terminated, *i.e.*, as being at an end. *Sheehan v. Hepburn*, 138 A.2d 810 (Del. Ch. 1958); *Mumford v. Long*, 1986 WL 2249 (Del. Ch., Feb. 21, 1986). Both cases are cited with approval in *DaimlerChrysler v. Matthews*, 848 A.2d 577 (Del. Ch. 2004).

"Repudiation" of a contract is an outright refusal by a party to perform a contract or its conditions. *Medek v. Medek, CMH, Inc.*, 2009 WL 2005365 (Del. Ch. July 1, 2009). The traditional rule of repudiation is that when one party repudiates a contract, the nonrepudiating party is discharged from its obligation to perform, and can seek damages for the repudiatory breach. *Id.* at * 12 (citing *Morgan v. Wells*, 80 A.2d 504, 506 (Del. Ch.1951); *Restatement (Second) of Contracts* § 225 (1981)); *Pouls v. Windmill Estates*, LLC, 2010 WL 2348648 (Del. Super. Ct. June 10, 2010).

Hertrich recognized that it canceled the first Sales Order, since it coerced Reece into signing a second Sales Order, RISC 2, at a higher interest rate, and a third Sales Order with no financing specified. These would not be necessary if Hertrich did not consider the first Sales contract to be at an end. Since Hertrich

repudiated the contract for the sale of the Automobile, it invalidated the contract that contained the Arbitration Clause.

2. Hertrich Did Not Sign Any Arbitration Agreement or Sales Order after Repudiating the 9-16-10 Contract. As discussed in Plaintiffs Answer in Opposition to Defendant Hertrich's Motion to Dismiss for Lack of Subject Matter Jurisdiction, "There is no applicable agreement to arbitrate, since … Hertrich repudiated the 9-16-10 Sales Order in favor of new, unsigned Sales Orders." A105. "Hertrichs' also forced Ashley to sign a *second* 9-23-10 Sales Order, which lists no lender, and is also not signed by Hertrichs'." The Sales Orders each state "THIS ORDER IS NOT VALID UNLESS SIGNED AND ACCEPTED BY DEALER OR HIS AUTHORIZED REPRESENTATIVE." A27, A65, A75. Consequently, the unsigned agreements are not enforceable because, by their own terms, which were supplied by the dealer, they lacked the required signature.

Hertrich did not sign either of the post-repudiation, forced arbitration clauses, either. A65, A75. The Dealer's signature is separately required by the terms of the Arbitration Clause: "The parties to this agreement agree…Accepted by: [Signature line] Date Dealer or his Authorized Representative" as well as the "customer" on the signature lines provided. Neither Sales Order 2, A65, nor Sales Order 3, A75 is signed by Hertrich as required by its form language.

Relying upon language similar to the above, the Court of Appeals of Missouri ruled that a second Sales Order containing a forced arbitration clause which had been signed by the purchaser but not by the dealer, failed to create a contract to arbitrate since it lacked mutuality.

> "The second purchase agreement expressly provides a signature line for the 'Manager's Approval.' Beneath this reference, the second purchase agreement states: '(Must Be Accepted By An Authorized Representative of the Dealer).' The very document [Dealer] sought to enforce negates the viability of a claim that a written contract was formed. In addition, the same document states "If Buyer is buying the Vehicle for cash (this includes a Buyer arranging Buyer's own financing from a party other than dealer), *this Agreement is not binding upon either Dealer or Buyer until signed by an authorized Dealer representative.*" (Emphasis in [original].) That language similarly supports the trial court's conclusion that until an authorized representative of the Dealer signed the second purchase agreement, no written contract was formed."

Bellemere v. Cable-Dahmer Chevrolet, Inc., 2013 WL 6858181 (Mo. Ct. App. Dec. 31, 2013), *reh'g* and transfer denied (Jan. 28, 2014), transfer denied (Mar. 25, 2014).

> "Even if the consumer signs the arbitration clause, if the other party does not sign it the provision may not be enforceable. For example, an arbitration provision in the buyers order may not be enforceable if the buyers order states that it is not valid unless signed by the dealer and the dealer fails to sign the buyers order."

Consumer Arbitration Agreements, supra., §5.2.2.4, examples at n. 36–37, include, *All State Home Mortgage, Inc. v. Daniel*, 977 A.2d 438 (Md. App. 2009) (Arbitration agreement stating that it became "effective and binding...when both

parties sign it" created a condition precedent to the contract's formation, and thus, in the absence of mortgagee's signature, there was no binding agreement.).

Delaware recognizes the need for a signed contract where the unsigned contract language requires it for contract formation. *E. S. Ianni Associates v. State*, 1985 WL 24927 (Del. Ch. Nov. 21, 1985) ("…the contractual language of the unexecuted contract sent to *Ianni* stated that a contract could arise only if a purchase order was approved by the Department of Finance. No purchase order was approved, nor was a contract signed-therefore, no binding contract ever came into being.").

Here, the Reece Sales Orders contain specific language that requires the dealer to sign both the Sales Order, and the forced arbitration clause. Since Hertrich repudiated the first and did not sign the second or third Sales Orders or the forced arbitration clauses, no agreement to arbitrate was formed.

Superior Court erred in deciding that the arbitration clause was valid and enforceable. The Superior Court should have denied the dealer's motion to Dismiss for Lack of Jurisdiction and permitted the case to proceed in Superior Court.

3. The Arbitration Clause Was Superseded By The Integration Clause of Each RISC Which Has No Arbitration Clause. As discussed below at A106-A108, in Plaintiff's Answer in Opposition Defendant Hertrich's Motion to Dismiss

for Lack of Subject Matter Jurisdiction, the Arbitration Clause in the original Sales Order could not be enforced since it conflicted with the integration clause of the financing agreement, RISC1 which contains no Arbitration clause. A59-62.

The later executed, superceding RISC states: "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." The term "contract" refers to the RISC, is the entire purchase and financing of the vehicle: "By signing this contract, you choose to buy the vehicle on credit under the agreements on the front and back of this contract." A59 (first paragraph). No other paper refers specifically to RISC 1, and it contains no arbitration agreement.

Sales Order 1, A26, also claims to be the "entire agreement," but it is not: it identifies Wells Fargo as the lender at 8.8%, not Hertrich, as in A59. Moreover, it states Reece must sign any additional papers to secure financing. A28, A28.1. This demonstrates Hertrich's intention to assign the RISC. Since Hertrich repudiated Sales Order 1, A26, and forced Ms. Reece to sign new, replacement papers, A64, Hertrich abandoned Sales Order 1. The new Sales Order 2 names Capital One as lender, and is <u>not</u> signed by Hertrich. A65. Hertrich also coerced Ms. Reece to sign a *second* 9-23-10 Sales Order 3, which lists no lender, and is also <u>not</u> signed by Hertrich. A71. The Sales Order forms all require the Dealer to sign both the Sales Order and the arbitration clause. Since Hertrich did not sign RISC 2 or 3,

Hertrich repudiated the only signed document that could add a new term to the RISC.

Cases from other jurisdictions hold that if a car dealer places an arbitration agreement in the sales order or other preliminary document, but not in the final RISC, the arbitration agreement is not part of the final transaction and is not binding on the consumer. *Lambert v. National Motors, Inc.*, 2011 W.L. 1704726 (D. Md. May 4, 2011) (Under Maryland's Single Document Rule and Retail Installment Sales Act, "The agreement within the four corners of the installment contract are the only agreements that apply to the transaction and the arbitration clause is not one of them."); *Duvall Motors Co. v. Rodgers*, 73 S. 3d 261 (Fla. Dist. Ct. App. 2011) (RISC did not contain an arbitration clause, although separate document did.); *Fazeli Imports, Ltd. v. Davis*, 2012 WL 243762 (Tex. App. Jan. 25, 2012) ("…the RI[S]C makes no reference to the parties engaging in arbitration to resolve any disputes or to incorporating any provision from the Buyer's Order or the Disclosure Agreement," so the court did not enforce the arbitration agreement.)

In *Patton v. Jeff Wyler Eastgate, Inc., 608 F. Supp. 2d 907, 915 (S.D. Ohio 2007)* (S.D. Ohio 2007), the court considered only the RISC in interpreting the parties rights and obligations in a vehicle purchase, and refused to enforce an agreement that allowed the dealer to cancel the sale if it could not place the financing with a lender where the RISC was in dealer's name. The *Patton* court

also held that the integration clause in the RISC and the inconsistencies between the RISC and the purchase order agreement rendered it impossible to read both documents as a coherent single contract. *Id. See also*, *Smith v. Steincamp,* 318 F.3d 775, 778 (7th Cir. 2003) (Court rejected the argument that if the consumer signs one contract containing an arbitration clause and another contract without the clause, the arbitration agreement applies to both contracts).

In *Duvall Motors Co. v. Rodgers*, 73 S. 3d 261 (Fla. Dist. Ct. App. 2011) the court also noted that prior signed documents not mentioned specifically in the RISC, were not incorporated by the integration clause of the RISC. *See also, Applied Energetics, Inc. v. NewOak Capital Markets, L.L.C.,* 645 F.3d 522, 525 (2d Cir. 2011) (preliminary agreement including arbitration clause but specifically contemplated subsequent agreement, which had integration clause and did not contain arbitration clause); and *Grey v. Am. MGMT Services*, 139 Cal. Rptr. 3d 210 (Cal. Ct. App. 2012) (employment agreement was an integrated contract and did not contain an arbitration agreement; the earlier arbitration agreement was superseded and no longer applied.)

Here, like all of the above cases, the Dealer wants the Court to enforce a forced arbitration clause from the separate, preliminary Sales Order, despite a separate, later financing agreement containing a later integration clause, but no arbitration agreement; where the Dealer repudiates the Sales Order; and replaced it

with another Sales Order 2 with a forced arbitration clause, (which the dealer did not sign as required by its own terms- as discussed below) and another RISC 2, again without any arbitration clause, which, again, is not signed by the dealer as required by *its* terms to change the RISC's terms. The dealer must not be permitted to enforce a forced arbitration clause under these circumstances.

ARGUMENT II: THE ARBITRATION CLAUSE VIOLATES THE MAGNUSSON MOSS "ONE DOCUMENT RULE."

A. Question Presented. As discussed by the parties below, at A108; A124-5, the arbitration clause is unenforceable because F.T.C. Rules authorized by the Magnuson Moss Act require that limitations on warranty remedies must be contained in a "single" warranty document, not the multiple documents with incomplete disclosures found in the present case. This was discussed in the Complaint at A15; A20- A23, (¶¶ 48(b), ¶53 (g), ¶56 (e), ¶57 (e)); then in Defendant's Motion to Dismiss at A80; and in the Plaintiff's Answer to Motion to Dismiss at A108.

B. The Standard And Scope Of Review Is As Stated Above.

C. Hertrich Cannot Compel Arbitration Of Written Warranty And Magnuson Moss Claims Pursuant To An Arbitration Clause That Is Not Included Within The Written Warranty. *DaimlerChrysler Corp. v. Matthews*, 848 A.2d 577 (Del. Ch. 2004) at 583 *et seq*. (extensive discussion.)

The "One Document Rule" flows from the Magnuson Moss Act, 15 *U.S.C.* Ch. 50. FTC Rules require that an arbitration clause, if any, be contained within in a single written warranty document. Here, there is no single warranty document, (itself a violation of 15 C.F.R. 701, A15), and of the several documents discussing warranty, none of them contain an arbitration clause:

- the FTC Used Car Buyer's Guide Warranty description, A31;
- the express written warranty by affirmation and description that the SUV sold to Ms. Reece had 4 wheel drive, A26, A64, A74;
- the manufacturer's express written warranty on the drive train, A42;
- the Service Contract, A50 – the existence of which prevents disclaimer of any implied warranty, 15 U.S.C. §2308(a); and
- the implied warranties of fitness and merchantability.

The FTC Buyer's Guide is a "Written Warranty."

The FTC Used-Car Buyers Guide, A31, satisfies the definition of a "written warranty" for purposes of analyzing the One Document Rule. 15 U.S.C. §2301 (6) (B) states:

> "The term 'written warranty' means – (B) Any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, -which written affirmation, promise … becomes part of the basis of the bargain between the supplier and a buyer for purposes other than resale of the product."

In this case, the Buyers Guide as filled out by Hertrich identifies the vehicle sold and that the Guide is a "Warranty." It further states the promise that

> "The dealer will pay [blank] % of labor and [blank] % of the parts for the covered systems that fail during the warranty period. Ask the dealer for a copy of the warranty document for a full explanation of warranty coverage, exclusions, and the dealership or obligations. …

SYSTEMS COVERED: POWER TRAIN-DURATION: 30 days or 1000 miles."

The language of this Buyer's Guide satisfies all elements of a "written warranty" under the Magnuson Moss Act. "[T]he Rule places an affirmative duty on dealers to ensure that the Buyer's Guide reflects the actual terms negotiated…." 60 Fed Reg. 62,195; 62,199 (Dec. 5, 1995). Moreover, a warrantor need not even intend to create a warranty. 6 *Del. C.* §2-313(2).

However, any informal dispute settlement mechanism like the arbitration clause must have been included in the Guide. In recognition of that, the Buyer's Guide invites the purchaser to "Ask the dealer for a copy of the warranty document for a full explanation of warranty coverage, exclusions and the dealer's repair obligations." A31. No document as described was provided to Ms. Reece or produced below. Since the arbitration clause is in a separate document, it violates the One Document Rule, and as a result, the arbitration clause is unenforceable.

In *DaimlerChrysler Corp. v. Matthews*, 848 A.2d 577 (Del. Ch. 2004) at 583 *et seq*., Chancery Court traced the legal authority for the One Document Rule.

- 15 U.S.C. §2310 (d)(1) authorizes "a consumer damaged by a failure of a supplier [such as a seller] to comply with <u>any obligation</u> under" that Chapter, a written warranty, [including the FTC Used Car Byer's Guide, A31]; State law implied warranty such as "merchantability" or "fitness," created by a

description as "4wd" that does not pass in the trade for "2wd" SUV) "may bring suit for damages and other legal and equitable relief," in State court.

- 15 U.S.C. §2302 (a) states: "In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, requires a written warranty to conspicuously disclose in simple and readily understood language the terms and conditions of such warranty," including "(8) Information respecting the availability of any informal dispute remedy;"
- 16 C.F.R. §701.3 requiring that a written warranty "shall clearly and conspicuously disclose in a *single* document in simple and readily understood language…" (3) what the warrantor will do in the event of a "failure to conform with the written warranty," and (6) information on the availability of informal dispute settlement mechanisms.

The Chancery Court in *DaimlerChrysler v. Matthews, supra,* held "…that the arbitration clause in the [separate] Claim Form is unenforceable as to Matthew's written warranty and [Magnuson Moss Warranty Act] claims because it is not included in the warranty." "With the exception of courts in Alabama, every court considering this issue has adopted the *[this]* approach. *Consumer Arbitration Agreements, supra.*, §4.3.2.7.3 citing Matthews, and others at n.131, , *e.g., TGB Marine, L.L.C. v. Midnight Express Powerboats, Inc.*, 2008 WL 3889578 at * 143

(S. D. Fla. Oct. 20, 2008) ("A warrantor's failure to comply with the single document rule precludes him from compelling arbitration of express warranty or MMWA claims, but does not impair arbitrability of other causes of action.") Similarly, this Court must not allow Hertrich to enforce the binding arbitration clause, because it is not in any single writing that contains a written warranty.

ARGUMENT III. THE ARBITRATION CLAUSE IS PROCEDURALLY OR SUBSTANTIVELY UNCONSCIONABLE.

A. Question Presented. As discussed in Plaintiffs Answer in Opposition to Defendant Hertrich's Motion to Dismiss for Lack of Subject Matter Jurisdiction, A105; A108, the arbitration clause is substantively and procedurally unconscionable because it limits the statutory remedies available to the consumer, is inconsistent with the rules that it cites to govern arbitration, since, it increases the cost to consumers.

B. The Standard and Scope of Review is *De Novo*. The Standard is the same as discussed in Argument I above. In addition, judicial "approval of the arbitration concept does not extend to any feature of a contract of adhesion, which, in whole or in part, is unconscionable within the meaning of 6 *Del.C.* § 2–303." *Worldwide Ins. Grp. v. Klopp*, 603 A.2d 788, 790 (Del. 1992).

C. The Arbitration Clause is Unconscionable. The Arbitration clause: does not identify which of AAA's arbitration rules apply; is inconsistent with AAA's Consumer Rules in their treatment of costs of arbitration; and limits statutory consumer protections, such as shifting of costs and attorney's fees, for all aspects of a case.

The Arbitration clause states that "The arbitration shall be conducted in accordance with the rules of the American Arbitration Association before a single

arbitrator." However, the arbitration clause conflicts with the AAA's 2005 "Supplementary Procedures for Consumer-Related Disputes" which were in effect on the date of the contract and the date of the dispute over the warranty:[5]

- The Clause states that "By agreeing to arbitration, the parties understand and agree that they are waving their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes."
    - The AAA Consumer Procedures state: "Parties can still take their claims to a small claims court." www.adr.org.
- The Clause states "The costs incurred in the arbitration process shall be shared *equally* between the parties." In addition to violation of statutory consumer protections this contrasts, the 2005 AAA Consumer Procedures state:
    - If the consumer's claim is greater than $10,000 but less than $75,000 the consumer is responsible for ½ the arbitrators fee up to $375.
    - But, if the consumer's claim exceeds $75,000, (as in this case) the consumer must pay an "Administrative Fee" in accordance with the

[5] The *Procedures* are reprinted at Nat'l Consumer Law Center, *Consumer Arbitration Agreements*, (6th ed., 2011) Appendix B.1.2, p. 377-9. ("*Consumer Arbitration Agreements*") and are available on the AAA website.

Commercial Fee Schedule of $1850 (Filing Fee) plus a $750 (Final Fee), both payable in advance but "Arbitrator compensation is not included in the schedule." The Business pays $975 and a case service fee $300, and the balance of the Arbitrator's fee.

- The consumer must also deposit ½ of the Arbitrators' compensation prior to the arbitration.
- The arbitrator's compensation rate is set forth on the panel biography provided to the parties when the arbitrator is appointed. (Provided only after the consumer pays the $2600 administrative fees.)

- The Arbitration clause states: "Each party shall bear his or her own attorneys fees and costs associated with the arbitration."
    - This conflicts with Delaware and Federal statutory law permitting shifting of attorneys fees for all aspects of the litigation process. 15 U.S.C. §2310(d). A party does not forego the substantive rights afforded by the statute by agreeing to arbitrate a statutory claim. *Mitsubishi Motors Corp., v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 628 (1985).

The substantial fees of arbitration are a deterrent to Consumer Arbitration, and are not mentioned in the Arbitration Clause. Hertrich provided none of the expense information to Ms. Reece when she was presented with the Sales Order

with the Arbitration clause. *See,* discussion of AAA arbitration fees in National Consumer Law Center, *Consumer Arbitration Agreements*, (6th ed. 2011) §6.6.2, fn 129-130; and §1.3.6, fn. 61, and authorities there cited discussing the obstacle presented by AAA fees, constituting substantive unconscionability. *See, e.g*. *Phillips v. Associates Home Equity Services, Inc.*, 179 F. Supp. 2d 840, 846-847 (N.D. Ill 2001). Without this information Ms. Reece's waiver of her right to trial by jury cannot be said to have been knowing and intelligent.

The disparity in and enormity of costs and fees and the failure to disclose them to Ms. Reece are but one reason the Arbitration clause is unconscionable. In the present case, State and Federal statutes permit a successful consumer to recover statutory remedies including costs and attorney's fees. National Consumer Law Center, *Automobile Fraud*, (4th. ed. 2011) § 10.3.5.4. ("*Auto Fraud*") (An "arbitration clause should not limit statutory attorney fees.") In *McCaskill v. SCI Management Corp.*, 298 F.3d 677, 680 (7th Cir. 2002) the court held an arbitration clause unconscionable and unenforceable because the arbitration clause prohibited the recovery of attorney's fees including the plaintiff's right to recover attorney's fees under Title VII.

Here, Reece alleged, breach of consumer warranty rights, Consumer Contract Act claims, and Magnuson-Moss Act claims. If Reece prevails, she is entitled to statutory remedies including attorney fees and costs. 6 *Del. C.* §2734(a),

and 15 U.S.C.A. §2310(d) (2). This conflicts with the arbitration clause directive that "Each party shall bear his or her own attorney fees and costs associated with the arbitration." That is a substantial portion of the attorney's fees that would be incurred. *See,* National Consumer Law Center, *Automobile Fraud* (4th ed. 2011) §10.3.5.3.

The Third Circuit stated in a Magnuson Moss case, that the fee shifting provision, based on time expended, as in any lodestar calculation, "assures counsel undertaking *socially beneficial litigation (as identified by the statutory fee shifting provision*) an adequate fee irrespective of the monetary value of the final relief." *In Re General Motors Corp. Pickup Truck Fuel Tank Products Liability,* 55 F.3d 768, 821 (1995) (emphasis added). *Consumer Warranty Law*, (4th ed. 2010) §2.7.6.4.

The purpose of an award of attorneys' fees in consumer protection cases is summarized by one commentator:

- A key purpose is to ensure that plaintiffs with bona fide claims are able to find lawyers to represent them.
- Fee shifting provisions promote the statue's underlying legislative purpose.
- The interests of both the business community and the public at large are best served by shifting the burden of expense of consumer fraud litigation onto

the shoulders of those whose unfair and fraudulent acts are responsible for the litigation in the first place.

- By encouraging consumers to act as private attorneys general, attorney fee awards reduce the burden on public enforcement agencies.
- Attorney fee provisions also discourage unfair or deceptive practices.

National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, (8th ed., 2012) §12.8.1, (numerous citations omitted.)

Attorneys fees under a fee shifting consumer protection statute are available not only for trial, but also for time spent on investigation, arbitration, settlement negotiation, as well as the other tasks necessary to litigation, as well as successful appeals. National Consumer Law Center, *Consumer Warranty Law*, (4th ed. 2010) §2.7.6.2-3.

The Forced Arbitration clause is procedurally and substantively unconscionable, since it limits statutory remedies; imposes higher costs to the consumer; benefits defendant by limiting fees and costs it would have to pay under the rules defendant specified; and is inconsistent with the description of the rules. Since it is unconscionable, it must not be enforced. The case should be remanded and permitted to proceed to discovery and trial.

CONCLUSION

Superior Court erred in enforcing the Arbitration clause since:

- The entire contract failed when the condition precedent of obtaining the contracted 8.8% interest rate for financing the purchase failed;
- The Defendant/dealer repudiated the entire contract;
- The second and third Sales Orders containing the forced arbitration clause were not signed by the dealer, as required by their own terms;
- The Arbitration clause violates the Magnuson Moss, "One Document Rule;"
- The Arbitration clause unconscionably limits statutory remedies and is inconsistent with the rules identified for arbitration.

As a result, the decision and order of the Superior Court should be reversed, remanded to Superior Court and permitted to proceed to trial.

Respectfully submitted,

MACELREE HARVEY, LTD.
/s/ Christopher J. Curtin
Christopher J. Curtin, Esquire
DE Bar ID. No.: 0226
5721 Kennett Pike
Centreville, DE 19807
Phone: (302) 654-4454
Facsimile: (302) 654-4454
eMail: ccurtin@macelree.com
Attorneys for: Ashley N. Elia,
Plaintiff Below, Appellant

Attachment A.

Order Upon Consideration Of Defendant's Motion To Dismiss
Dated 12-13-2013

Attachment B.

Order Upon Reconsideration Of Plaintiff's Motion For Reconsideration Of The Court's Grant Of Defendant's Motion To Dismiss Dated, March 4, 2014