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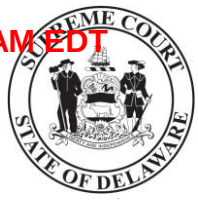

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S ANSWERING BRIEF

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DATED: 6/18/14

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NATURE OF PROCEEDINGS

This is an appeal from the Superior Court's order granting Defendant Below/Appellee Hertrich Family of Automobile Dealerships, Inc., d/b/a Hertrich's Capital's ("Hertrich") Motion to Dismiss for Lack of Subject Matter Jurisdiction based on the Plaintiff Below/Appellant, Ashley N. (Reese) Elia ("Appellant"), entering into a valid and enforceable arbitration agreement to have disputes arising from the subject motor vehicle sale resolved by arbitration under the Rules of the American Arbitration Association. The Superior Court held that the claims asserted in the Appellant's Complaint constituted the exact claims intended to be covered by the agreement to arbitrate, thereby divesting the Superior Court of subject matter jurisdiction.

The Appellant's claims arise from the purchase of a 2007 Mazda CX7 GT (the "Vehicle") on September 16, 2010, from Hertrich. Appellant's Complaint alleged that she went to Hertrich for the purpose of purchasing a four wheel drive vehicle. Appellant's Complaint further alleged that misrepresentations were made by a Hertrich sales person that the Vehicle was a four wheel drive vehicle when it was actually two wheel drive. According to Appellant, she purchased the vehicle under the pretense that it was four wheel drive but approximately two years later discovered that it was actually two wheel drive.

On June 26, 2013, the Appellant filed a Complaint in the Superior Court in and for Kent County alleging Breach of Contract/Breach of Expressed Written Warranty, Breach of Implied Warranty of Merchantability, Breach of Implied Warranty of Fitness for a Particular Purpose, Consumer Contracts Act Violation, a Magnuson Moss Act claim, and Consumer Fraud. Based on the agreement to arbitrate, Hertrich file a Motion to Dismiss for Lack of Subject Matter Jurisdiction.

The Superior Court found the mandatory arbitration agreement was valid and enforceable and that the claims asserted by the Appellant were the type of claims required to be arbitrated. As such, the Superior Court held that it lack subject matter over the Appellant's Complaint and dismissed her suit. The Superior Court further held that the Magnuson Moss Warranty Act and associated regulations did not apply to Appellant's action because her claim was not for failure to repair under a warranty for defects but rather an erroneous description of the Vehicle.

Appellant filed a Motion for Reconsideration of the Court's Grant of Defendant's Motion to Dismiss. In her Motion for Reconsideration, Appellant argued that the Superior Court lacked subject matter jurisdiction over the arbitration clause and, therefore, the Superior Court could not have made the determination that it lacked subject matter jurisdiction over her Complaint. Appellant also argued that the Superior Court overlooked her argument regarding the applicability of the Magnuson Moss Warranty Act. The Superior Court denied the Appellant's Motion

for Reconsideration, finding that it is clearly within the purview of the Superior Court to determine whether or not it has subject matter jurisdiction over a plaintiff's complaint. The Superior Court also reiterated that the Magnuson Moss Warranty Act clearly did not apply to the Appellant's Complaint. Based on the foregoing, the Appellant filed this appeal. This is Hertrich's Answering Brief on Appeal, requesting that the Superior Court's order granting Hertrich's Motion to Dismiss for Lack of Subject Matter Jurisdiction be affirmed.

SUMMARY OF ARGUMENT

I. Denied. The parties entered into a valid and enforceable contract which expressly provided for mandatory arbitration for the claims brought by the Appellant.

A. Denied. The parties entered into a valid and binding contract, which required the Appellant to pay the balance of the sales contract within forty eight hours. When the Appellant did not pay the balance of the Vehicle within forty eight hours, she was in breach of the sales contract.

1. Denied. The financing was not a condition precedent to the sales contract's formation. The sales contract was formed when the parties signed the document and the Appellant took possession of the Vehicle.

2. Denied. Hertrich fully performed under the sales contract by transferring possession of the Vehicle to the Appellant, subject to her promise to pay, and therefore did not repudiate the sales contract.

3. Denied. In this present suit, Hertrich did not repudiate the sales contract and the Appellant was not discharged from her obligations under the sales contract.

B. Admitted that the record below reflects that the amended sales contract and second amended sales contract were not signed by Hertrich. The parties' actions following the sale of the Vehicle, however, establish the Hertrich intended to be bound by the terms of the sales contract, including the arbitration clause.

1. Denied. The parties entered into a valid and binding sales contract, which Hertrich did not repudiate. Furthermore, the parties' course of conduct following the sale of the Vehicle, however, establish the Hertrich intended to be bound by the terms of the sales contract, including the arbitration clause.

2. Admitted that the record below reflects that the amended sales contract and second amended sales contract were not signed by Hertrich. The parties' course of conduct following the sale of the Vehicle, however, establish the Hertrich intended to be bound by the terms of the sales contract, including the arbitration clause.

3. Denied. The sales contract is still enforceable against the Appellant because she voluntarily signed it and expressly

agreed to have her claims arising out of the purchase of the Vehicle arbitrated.

II. Denied. Under Delaware law, related contemporaneously executed documents should be read together to determine the intent of the parties.

III. Denied. The Magnuson Moss Warranty Act does not apply to all express written warranties, including statements in sales contracts, and, therefore, had no applicability to the Appellant's Complaint. Appellant did not allege failure to repair a defect under an expressed warranty that would fall within the purview of the Magnuson Moss Warranty Act.

IV. Denied. The agreement to arbitration is not *per se* unconscionable merely because it contains a fee-splitting provision nor is so one-sided to make it unconscionable in light of Delaware's strong public policy in favor of arbitration.

STATEMENT OF FACTS

The underlying suit arises out of the sale of a 2007 Mazda CX7 GT (the "Vehicle") on September 16, 2010, by Hertrich to Appellant. (A4-A6). Appellant took possession of the Vehicle on September 16, 2010, and has maintained possession of the Vehicle ever since. (A7-A8, ¶14). As part of Appellant's purchase of the Vehicle, she executed a sales contract (the "Sales Contract"). (A26-A29). The Sales Contract contains a provision, signed by the Appellant, agreeing to binding arbitration under the rules of the American Arbitration Association as the forum for dispute resolution of all claims, including statutory claims. (A27). The binding arbitration clause, in its entirety, states as follows:

> **AGREEMENT TO ARBITRATE ANY CLAIMS. READ THE FOLLOWING ARBITRATION PROVISION CAREFULLY, IT LIMITS YOUR RIGHTS, INCLUDING YOUR RIGHT OT MAINTAIN A COURT ACTION**
>
> The parties to this agreement agree to arbitrate any claim, dispute or controversy, including all statutory claims and any state or federal claims, that may arise under this agreement. By agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes. Consumer Fraud, Lemon Law, and Truth-in-Lending claims are just three examples of the various types of claims subject to arbitration under this agreement. The parties also agree to (i) waive any right to pursue any claims 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. The arbitration shall be conducted in accordance with the Rules of the American Arbitration Association before a single arbitrator. The costs incurred in the arbitration process shall be shared equally between the parties. Each

> party shall bear his or her own attorney 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. Any further relief sought by either party will be subject to the decision of the arbitrator.

(the "Arbitration Clause"). (A27). The Sales Contract was also signed by a representative of Hertrich. (Id.)

The Sales Contract states that the Appellant "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). The Sales Contract also required the Appellant to "pay the balance due on the terms specified . . . within 48 hours." (A28). Finally, the Sales Contract states that "[t]he front and back of this Order comprise the entire agreement affecting *this purchase* and no other agreement or understanding of any nature concerning same has been made or entered into, or will be recognized." (A27)(emphasis added).

Separate and distinct from the Sales Contract, the Appellant also executed a form finance contract (the "Finance Contract") on September 16, 2010, contemporaneously with the Sales Contract. (A59-A62). The Finance Contract states that "You, the Buyer . . . may buy the vehicle below for cash or on credit. By signing this contract, you choose to buy the vehicle on credit under the agreements on the front and back of this contract." (A59). The Finance Contract is only necessary if the vehicle is being purchased on credit. (Id.) The Finance Contract

continues on to layout the terms of financing, how interest is calculated, securitization of financing, etc. (A59-A62). The Finance Contract was being financed by, and assigned to, Wells Fargo Dealer Services, Inc. ("Wells Fargo"). (A60).[1] The Sales Contract also noted that the Vehicle purchase was being financed by Wells Fargo. (A27). The Finance Contract contains the following clause:

> 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.

(A60)(emphasis added). Financing through Wells Fargo Dealer Services, Inc. under this Finance Contract was ultimately unsuccessful. (A8, ¶15).

Because financing by Wells Fargo was unsuccessful, Hertrich and Appellant attempted to finance the purchase of the Vehicle through Capital One Auto Finance ("Capital One") on September 23, 2010. (A64-72). The Appellant executed an amended Sales Contract (the "Amended Sales Contract"), which amended the financier to reflect Capital One as the new financier. (A64). The Amended Sales Contract contained the identical Arbitration Clause as the original Sales Contract. (Id.) Appellant also executed an amend Finance Contract (the "Amended Finance

[1]At the bottom of the Finance Contract (A60), it very faintly states "Seller assigns its interest in this contract to Wells Fargo Dealer Services, Inc."

Contract") based on the Capital One financing terms, which indicated that it would be assigned to Capital One. (Id.)

Ultimately the Appellant decided to obtain her own financing through Dover Federal Credit Union and to not go through with the Capital One financing. (A8, ¶18). A second amended Sales Contract (the "Second Amended Sales Contract") was executed by the Appellant on September 23, 2010, presumably based on the Appellant's private financing through Dover Federal Credit Union. (A74-A77). The Second Amended Sales Agreement contained the identical Arbitration Clause as that contained in the original Sales Agreement and the Amended Sales Agreement. (Id.) The Second Amended Sales Agreement indicated that the purchase of the Vehicle would be can and not financing was listed. (Id.) A second amended Finance Contract was not executed or necessary because the private financing was considered a cash deal. (*See generally* A74-A77).

According to the Appellant, approximately two years after she took possession of the Vehicle, she discovered that it was two wheel drive and not four wheel drive. (A9, ¶ 23). Upon discovering that the Vehicle was two wheel drive, the Appellant alleged that she contacted Hertrich demanding that the sale of the Vehicle be canceled and the money she paid for the Vehicle be refunded. (A9, ¶23). The Appellant alleged that Hertrich refused to refund her the money paid for the

Vehicle and she remains in possession of it today. As a result of the foregoing, the Appellant filed this suit against Hertrich.

ARGUMENT

I. THE PARTIES ENTERED INTO A BINDING SALES CONTRACT WHICH EXPRESSLY PROVIDED FOR MANDATORY ARBITRATION FOR THE CLAIMS BROUGHT BY THE APPELLANT

A. QUESTION PRESENTED

Whether the Superior Court's ruling that the parties entered into a valid and enforceable arbitration agreement, which resulted in the Superior Court lacking subject matter jurisdiction over Appellant's Complaint, should be affirmed in light of Delaware's strong public policy in favor of arbitration? These issues were preserved in the trial court in Hertrich's Motion to Dismiss for Lack of Subject Matter Jurisdiction (A78-A82) and Hertrich's Response to Plaintiff's Motion for Reconsideration. (A128-A131).

B. STANDARD AND SCOPE OF REVIEW

On the question of subject matter jurisdiction, the standard of review by this Court is whether the trial court correctly formulated and applied legal principles. *Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 997 (Del. 2004) (internal citations omitted). The scope of review is *de novo*. *Id.*

C. MERITS OF ARGUMENT

The Superior Court should be affirmed because the parties entered into a valid and enforceable contract which expressly contained a mandatory arbitration clause. It is well settled that Delaware Courts and Delaware public policy favor arbitration.

"Delaware courts strive to honor the reasonable expectations of the parties and ordinarily resolve any doubt as to arbitrability in favor of arbitration." *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 155-56 (Del. 2002) (citing *SBC Interactive, Inc. v. Corp. Media Partners*, 714 A.2d 758 (Del. 1998)). Delaware's "Uniform Arbitration Act reflects a policy designed to discourage litigation, to permit parties to resolve their disputes in a specialized forum more likely to be conversant with the needs of the parties and the customs and usages of a specific industry than a court of general legal or equitable jurisdiction, and to provide for the speedy resolution of disputes in order that work may be completed without undue delay." *Pettinaro Const. Co., Inc. v. Harry C. Partridge, Jr., & Sons, Inc.*, 408 A.2d 957, 961 (Del. Ch. 1979).

1. Hertrich did not Repudiate the Sales Contract

Appellant entered into a valid and binding Sales Contract with Hertrich, which contained the Arbitration Clause, on September 16, 2010. Under the terms of the Sales Contract, Hertrich was required to sell the Appellant the Vehicle for the agreed upon price. Hertrich performed its obligation under the Sales Contract by turning over possession and title of the Vehicle to the Appellant based on her promise to pay. Specifically, Appellant was required to "pay the balance due on the terms specified . . . within 48 hours." The Sales Contract indicated that the Appellant was to finance the purchase of the Vehicle through Wells Fargo. In order for the

Appellant to comply with her promise in the Sales Contract, she executed the Finance Contract to obtain the Wells Fargo financing. When the Wells Fargo financing was not approved, the Appellant was in breach of the Sales Contract by failing to pay the balance due within forty eight hours. In order to mitigate its damages, Hertrich attempted to obtain alternative financing for the Appellant through Capital One. The Appellant agreed to the Capital One financing and executed the Amended Sales Contract, including the Arbitration Clause, and the Amended Finance Agreement. The Appellant ultimately executed the Second Amended Sales Contract, which listed the purchase of the Vehicle as a cash deal. The Appellant fulfilled her obligation under the Contract when she paid Hertrich the purchase price of the vehicle through funding from Dover Federal Credit Union.

a. Financing was not a Condition Precedent to the Formation of the Sales Contract

Under Delaware law, the "formation of a contract requires a bargain in which there is manifestation of mutual assent to the exchange and consideration." *United Health Alliance, LLC v. United Med., LLC*, 2013 WL 6383026, at *6 (Del. Ch. Nov. 27, 2013)(citations omitted). The parties must come to a complete meeting of the minds, i.e., each must mutually assent to all essential terms. *Id.* Delaware courts apply the objective theory of contracts. *Id.* As such, "a contract's construction should be that which would be understood by an objective, reasonable third party."

Id. "Overt manifestations of assent rather than subjective intent control contract formation." *Id.*

For the first time, the Appellant argues that the financing was a condition precedent to the Sales Contract. The Appellant's argument that the financing was a condition precedent to the Sales Contract formation is paradoxical to her argument that Hertrich repudiated the Sales Contract. If a condition precedent to contract formation fails, no contract is formed and there can be no repudiation. Regardless, the Appellant relies on *Thompson v. Lithia Chrysler Jeep Dodge of Great Falls, Inc.*, 185 P.3d 332, 334 (Mont. 2008) for the proposition that financing was a condition precedent to contract formation is unavailing. In *Thompson*, the contract at issue contained the following language:

> If this transaction is to be a retail installment sale, then this order is not a binding contract to the dealer and dealer shall not be obligated to sell until approval of the terms hereof is given by a bank or finance company willing to purchase a retail installment contract between the parties hereto based on such terms. If this approval is obtained, however, this order is a binding contract.

Id. at 339. The *Thompson* Court held that because the financing, on the terms initially proposed, was not approved, no contract was formed based on the aforementioned language contained in the contract. *Id.* at 340. The Appellant also cites *Eady v. Bill Heard Chevrolet Co.*, 274 F. Supp. 2d 1284, 1285 (M.D. Ala. 2003) for the same proposition as *Thompson*. The finance agreement in *Eady*, however,

contained the following language: "the sale of the vehicle described in this contract and the extension of credit is subject to final credit approval and is not valid until such approval." *Id.*; *see also Ex parte Payne*, 741 So. 2d 398, 400 (Ala. 1999) (containing language in that contract that "the transaction is not consummated until (a) approving in writing by . . . a responsible Bank or Finance Company).

This case is significantly distinguishable from the case law cited by the Appellant. Here, the Sales Contract did not contain language that would suggest that it was conditioned on approval from the bank or financier, which the *Thompson* and *Eady* cases found to be dispositive in determining the finance approval was a condition precedent to the contract formation. Instead, the parties entered into the Sales Contract in which Hertrich would turn over possession and title of the Vehicle to the Appellant based on the Appellant's promise to pay. Therefore, because financing was not a condition precedent to the formation of the Sales Contract, its terms must be enforced.

b. The Arbitration Clause is Enforceable Because the Appellant Unequivocally Agreed to it as Part of the Bargain

As the Superior Court correctly held, the parties entered into a valid and enforceable agreement, which included that Arbitration Clause. As stated above, the Appellant was under a contractual obligation to pay the balance of the Vehicle purchase within forty eight hours of its availability for delivery. Appellant took

possession of the Vehicle on September 16, 2010, and because the initial financing was not approved, she was required to seek alternate financing, initially through Capital One and eventually through Dover Federal Credit Union. Each time the Appellant revised the financing for the purchase of the vehicle, she executed another Sales Contract containing the identical Arbitration Clause and expressly agreeing to arbitrate all claims arising out of the purchase.

The Appellant argues that *Matthews* supports her position that the Sales Contract was repudiated. *DaimlerChrysler Corp. v. Matthews*, 848 A.2d 577 (Del. Ch. 2004). In *Matthews*, however, the purchaser first sought to resolve his dispute with DaimlerChrysler through the arbitration provision of the applicable contract. *Id.* at 579-80. DaimlerChrysler refused the purchaser's pre-litigation attempt to resolve the dispute through arbitration. *Id.* Once the purchaser initiated civil litigation, DaimlerChrysler attempted to compel the very arbitration provision that they refused to comply with pre-litigation. *Id.* at 580. Based on those specific facts, the Court of Chancery held that DaimlerChrysler repudiated the arbitration provision of the contract and could not compel arbitration against the purchaser. *Id.* at 581.

In the present case, Hertrich has never refused or denied an attempt by the Appellant to submit her complaints to arbitration. The Appellant has not alleged that she ever attempted to submit her complaints to arbitration. Despite executing the Sales Contract on three separate occasions and expressly agreeing to arbitration,

the Appellant is now suggesting that she should not be held to the terms of Sales Contract. The Appellant seeks to avoid the express terms of the Sales Contract despite the fact that she has retained the benefit of the Sales Contract, i.e. the ownership and use of the Vehicle. Where, as here, the Appellant expressly agreed to submit her claims to arbitration and has retained the benefit of the Sales Contract, the Superior Court must be affirmed.

2. The Unsigned Sales Contract is Still Enforceable against the Appellant based on her Signature and the Parties' Course of Conduct

"The fact that the contract is not signed by the party seeking enforcement does not render it immature or deprive it of the requisite mutuality of enforcement if signed by the [opposing party]." *Loureiro v. Copeland*, 2006 WL 2685582 (Del. Super. Aug. 21, 2006). For example, the Superior Court has held that unsigned change orders to a contract were enforceable despite a contract provision requiring change orders to be signed by all parties. *Nason Const., Inc. v. Bear Trap Commercial*, LLC, 2008 WL 4216149, at *3 (Del. Super. Aug. 6, 2008). The *Nason* Court relied on the fact that the party seeking strict compliance with the contract language knew of the change orders and received the benefit of the work performed under the change orders. *Id.*

The present case is also distinguishable from the *E. S. Ianni Associates v. State* case cited by the Appellant. 1985 WL 24927 (Del. Ch. Nov. 21, 1985). In *E. S.*

Ianni Associate, the plaintiff bid on a state of Delaware construction contract. *Id.* at *1. Although the plaintiff's bid was recommended for the state contract, the contract was never actually finalized and the state reopened the biding process. *Id.* In an earlier and more in depth opinion regarding on the contract at issue in *E. S. Ianni Associates*, the Court of Chancery stated that "[i]t is quite clear from the language of the unexecuted contract supplied to [plaintiff], the bid Specifications, and Delaware law, that no contract could arise until a purchase order was approved by the Department of Finance." *E. S. Ianni Associates v. State*, 1985 WL 21139, at *2 (Del. Ch. Aug. 27, 1985). The Court further noted that the required purchase order was never even issued by the state. *Id.* Therefore, the court concluded that no contract was formed and the state was free to reopen the biding process. *Id.*

In the present case, there was a meeting of the minds to create a valid and enforceable contract. After executing the Sales Contract and Finance Contract, the Appellant took possession of the vehicle and has retained possession of it ever since. Although the Finance Contract had to be modified because the Appellant was not approved by the original financier, the deal remained that the Appellant would purchase the Vehicle from Hertrich. Unlike the plaintiff in *E. S. Ianni Associates*, the parties' course of conduct make it clear that the contract existed because the Appellant kept the Vehicle and paid for it. Furthermore, unlike *E. S. Ianni Associates*, the person against whom the Sales Contract is being enforced is an actual

signatory of it. The Appellant retained the benefit of the Sales Contract, i.e. ownership and use of the Vehicle, and only three years after the Sales Contract does she argue that it was invalid. As such, the Superior Court's finding of a binding and enforceable contract must be affirmed.

3. The Sales Contract and the Finance Contract were Executed Contemporaneously and Should be Read Together

Under Delaware law, related contemporaneous documents should be read together to determine the intent of the parties. *Ashall Homes Ltd. v. ROK Entm't Grp. Inc.*, 992 A.2d 1239, 1250 (Del. Ch. 2010) (citing *Crown Books Corp. v. Bookstop, Inc.*, 1990 WL 26166, at *1 (Del. Ch. Feb. 28, 1990)(holding that "in construing the legal obligations created by [a] document, it is appropriate for the court to consider not only the language of that document but also the language of contracts among the same parties executed or amended as of the same date that deal with related matters.")); *see also*, Restatement (Second) of Contracts § 202 (2) (1981) ("A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.")

In the present case, the Sales Contract and Finance Contract where executed contemporaneously on September 16, 2010, by the Appellant and Hertrich. The Sales Contract was the operative agreement regarding the sale of the Vehicle to the Appellant. The Finance Contract was the mechanism by which the Appellant was going to fund the purchase of the Vehicle. The Finance Contract dealt with the

financing of the Vehicle and was not executed for the purpose, as the Appellant now argues, to supersede the terms of the Sales Contract. In fact, the integration clause in the Finance Contract, expressly states that "[t]his contract contains the entire agreement between you and us *relating to this contract*." Therefore, the integration clause in the Finance Contract would be limited to negotiations and agreements related to financing and not the Sales Contract. The Amended Sales Contract and the Amended Finance Contract were also executed contemporaneously and should be read together. The Second Amended Sales Contract was executed separately and does not have companion finance agreement because it was cash transaction with not financing through Hertrich.

Even assuming, *arguendo*, that the integration clause in the Finance Contract or the Amended Finance Contract had related to the Sales Contract, the arbitration provision is still enforceable. For example, the Court of Chancery in *Li v. Standard Fiber, LLC*, stated that the plaintiff's argument "fell short" that the integration clause contained in an advancement and indemnification agreement nullified the arbitration agreement in prior contracts between the parties because "cases examining this issue have concluded that a standard integration clause in a later agreement, with no arbitration clause, does not overcome an earlier agreement that contains a valid arbitration provision." 2013 WL 1286202, at *7 (Del. Ch. Mar. 28, 2013). Therefore, where the contemporaneously executed documents must be read as a

whole, the Superior Court's holding that the parties entered into an enforceable agreement to arbitrate must be affirmed.

II. THE SUPERIOR COURT CORRECTLY HELD THAT THE MAGNUSON MOSS WARRANTY ACT DOES NOT APPLY TO THE MISIDENTIFIED VEHICLE AT ISSUE

A. QUESTION PRESENTED

Whether the Superior Court correctly held that the Magnuson Moss Warranty Act is inapplicable to the Appellant's causes of action because she does not allege a claim for failure to repair under a written warranty for defects in the Vehicle? These issues were preserved in the trial court in Hertrich's Motion to Dismiss for Lack of Subject Matter Jurisdiction. (A78-A82) and Hertrich's Response to Plaintiff's Motion for Reconsideration. (A128-A131).

B. SCOPE OF REVIEW

When resolving an issue of statutory construction, the Supreme Court's scope of review is whether the Superior Court erred as a matter of law in formulating or applying legal precepts. *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 66 (Del. 1993). On appeal, questions of law are reviewed *de novo*. *Pipher v. Parsell*, 930 A.2d 890, 892 (Del. 2007).

C. MERITS OF ARGUMENT

The Superior Court should be affirmed because it correctly held that the Magnuson Moss Warranty Act (the "MMWA") does not apply to the Appellant's cause of action. As the Superior Court succinctly stated, "it is clear that the MMWA does not apply to this action . . ." Appellant alleges, incorrectly, in her Complaint

and on appeal that the Arbitration Clause is unenforceable as a result of a violation of the "single document rule" created by the Federal Trade Commission (the "FTC") through regulations regarding warranties covered under the MMWA. According to the Appellant, 16 C.F.R. 701.3 requires informal dispute methods to be contained in a single document with a written warranty. While Appellant may be correct that an alternative dispute provision must be included in the written warranty, it would only be applicable to written warranty claims, which is not the basis for the Appellant's Complaint. The Appellant's Complaint was based on the allegation that the Vehicle was misidentified as four wheel drive when it was actually a two wheel drive vehicle.

The MMWA does not apply to this action, as Appellant's claims are not alleging a failure to repair under a warranty for defects in the vehicle. A written warranty under the MMWA is defined as:

> any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time

15 U.S.C. § 2301(6)(A). The MMWA does not apply to all statements in sales contracts. *Simmons v. Taylor Childre Chevrolet-Pontiac*, 629 F.Supp. 1030 (M.D. Ga. 1986)(finding that no MMWA claim arose regarding the identification of a vehicle as "new" in a sales contract, when it was not allegedly new).

The FTC even acknowledges that product descriptions are not covered by the MMWA. 16 C.F.R. 700.3.[2] A product that is delivered with the wrong description but is still functional for its purpose is not defective. *See Baccellieri v. HDM Furniture Indus., Inc.*, 2013 WL 1088338 (Del. Super. Feb. 28, 2013) (plaintiffs ordered a right arm sectional sofa, but a left arm sectional sofa was delivered; the Court held it was not defective in that meaning). The *Baccellieri* Court stated as follows:

> A car with a defective motor clearly cannot be used for its intended purpose—transportation. An incorrectly configured sectional sofa is still fit for use as furniture. This case is more analogous to a situation in which a customer orders a car with gray leather upholstery, and a dealership erroneously instructs the manufacturer to build the car with black cloth upholstery. The car clearly would not be what the customer ordered and the customer properly could reject the car. Nevertheless, the car would still be merchantable and function as transportation—the particular purpose for which it was intended.

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[2] "Certain representations, such as energy efficiency ratings for electrical appliances, care labeling of wearing apparel, and other product information disclosures may be express warranties under the Uniform Commercial Code. However, these disclosures alone are not written warranties under this Act. Section 101(6) provides that a written affirmation of fact or a written promise of a specified level of performance must relate to a specified period of time in order to be considered a "written warranty." A product information disclosure without a specified time period to which the disclosure relates is therefore not a written warranty." 16 C.F.R. 700.3(a)

Id. at *6; *see also Brazil v. Dole Food Co., Inc.*, 935 F. Supp. 2d 947, 966 (N.D. Cal. 2013) (dismissing plaintiff MMWA claims because alleged misbranded products as "All Natural" and "100% Natural" are product descriptions and not warranties against defects that would be covered by the MMWA).

The Appellant's reliance on *DaimlerChrysler Corp. v. Matthews*, is misplaced. In *Matthews*, the purchaser of a vehicle was "experiencing problems with [his] vehicle, he took it to the dealer on numerous occasions" and was unable to get the problems resolved by the dealer. *Id.* at 579. The purchaser in *Matthews* filed suit based on the dealer's failure to remedy the problems he was experiencing with the vehicle and DaimlerChrysler in turn sought to compel arbitration. *Id.* As then Vice Chancellor Strine stated, "I agree that DaimlerChrysler's failure to reference the binding arbitration provision in the warranty renders that provision unenforceable as to [the] claims arising under the written warranty or the MMWA . . ." *Id.* at 581. Vice Chancellor Strine continued on to note that "[v]iolation of the one-document rule alone would not prevent DaimlerChrysler from compelling arbitration of Matthews' other claims-i.e., his Lemon Law, implied warranty, and Consumer Fraud Act claims-as precedent suggests that a purchaser may be compelled to arbitrate claims other than written warranty and MMWA claims even if the arbitration clause is not in the warranty." *Id.* at 588 n.53.

In this case, Appellant's claims arise out of an alleged erroneous description of the Vehicle as "4WD" in the Sales Contract. Appellant claims that she believed the Vehicle was 4WD and it was in fact 2 wheel drive. Appellant's claims do not arise out of allegations of a defect and failure to repair under a written warranty, and do not fit the description of a warranty under the MMWA. A product that is delivered with the wrong description but is still functional for its purpose is not defective. Similar to *Baccellieri*, Appellant's allegations surround a description of the Vehicle in the Sales Contract, not a defective part that Hertrich has failed to repair under a warranty. In fact, the Appellant's Complaint did not allege that she attempted to have Hertrich "repair" the Vehicle under a warranty. As the MMWA does not apply to the claims in this case, any associated FTC rules would not preclude proper application of the Arbitration Clause to the Appellant's remaining claim; as such, the Superior Court should be affirmed.

III. THE SUPERIOR COURT MUST BE AFFIRMED WHERE THE ARBITRATION CLAUSE IS NOT UNCONSCIONABLE

A. QUESTION PRESENTED

Whether the Arbitration Clause containing mutuality of obligations between the parties is unconscionable in light of Delaware's strong public policy in favor of the enforceability of arbitration agreements? This issue was preserved in the trial court in Appellant's Response to Hertrich's Motion to Dismiss for Lack of Subject Matter Jurisdiction. (A105-A109).

B. SCOPE OF REVIEW

Contract interpretation is treated as a question of law even though it is analytically a question of fact. *Casey Employment Servs., Inc. v. Dali*, 634 A.2d 938 (Del. 1993). On appeal, questions of law are reviewed *de novo*. *Pipher v. Parsell*, 930 A.2d 890, 892 (Del. 2007).

C. MERITS OF THE ARGUMENT

The Superior Court should be affirmed in its ruling that the Arbitration Clause is not unconscionable so as to render it unenforceable. Under Delaware law, for a contract provision to be "unconscionable", "there must be an absence of meaningful choice and contract terms unreasonably favorable to one of the parties. Superior bargaining power alone without the element of unreasonableness does not permit a finding of unconscionability or unfairness." *Tulowitzki v. Atl. Richfield Co.*, 396 A.2d 956, 960 (Del. 1978) "A contract is unconscionable if it is such as

no man in his senses and not under delusion would make on the one hand, and as no honest or fair man would accept, on the other. *Id.* (citations omitted). For a contract clause to be unconscionable, its terms must be "so one-sided as to be oppressive." *Id.*

Under Federal law, the mere existence of fee-splitting in the arbitration agreement does not render it unenforceable. The Appellant cites to *McCaskill v. SCI Mgmt. Corp.* 298 F.3d 677, 680 (7th Cir. 2002) (a 1-1-1 decision), for the proposition that "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." (Appellant's Opening Br. 32). Contrary to the Appellant's assertion, however, the court in *McCaskill* stated that "because [defendant] conceded the agreement is unenforceable, we need not proceed any further into an examination of whether Title VII's fee-shifting provisions override an arbitration agreement." *McCaskill*, 298 F.3d at 680. Instead, the overwhelming consensus among Federal Circuit Courts is that the existence of a fee-splitting provision in an arbitration agreement does not render the agreement unenforceable, even where there is a statutory right for the plaintiff to recover attorneys' fees. *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1259 (11th Cir. 2003) (listing cases from the majority of Federal Circuit Courts

holding that fee-splitting or "loser pay" provisions of an arbitration clause does no render it unenforceable *per se*).

Even under Delaware law an agreement to arbitrate is not rendered unenforceable merely because it has a fee-splitting provision. Under Delaware law the cost arbitration is permitted to be allocated between the parties by the agreement to arbitration. Specifically, the Delaware Uniform Arbitration Act states that "*[u]nless otherwise provided in the agreement to arbitrate*, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award." 10 *Del. C.* § 5712. Furthermore, because of Delaware's strong public policy in favor of arbitration, this Court has stated that it is "highly inappropriate if this Court were to find a contract unconscionable because it adheres to the declared public policy of this State." *Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 913 (Del. 1989).

The Arbitration Clause is not unconscionable and is therefore enforceable. The Appellant went to Hertrich to purchase the Vehicle, although she could have gone to any car dealer to make her purchase. The Appellant voluntarily executed each of the Sales Contracts, all including the Arbitration Clause. The Appellant has not plead or argued that she objected to the inclusion of the Arbitration Clause at the time she executed the Sales Contract. The Appellant received the benefit of executing the Sales Contract by taking and retaining possession of the Vehicle. It

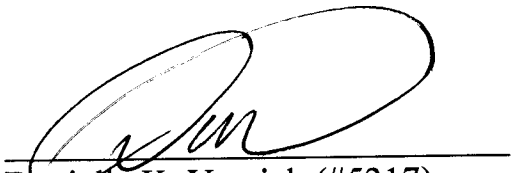
was not until nearly three years after the Appellant took possession of the Vehicle that she complained of the "unconscionable" nature of the Arbitration Clause and only in the face of a motion to dismiss her Complaint based on the Arbitration Clause.

Nothing about the language of the Arbitration Clause can be deemed unconscionable. The mere fact that the Arbitration Clause contains a fee-splitting provision would not be "so one sided as to be oppressive" as required by Delaware law to be deemed unconscionable. In fact, the Arbitration Clause applies equally to the Appellant as it does to Hertrich and is not one-sided at all. Furthermore, even the Delaware Uniform Arbitration Act permits parties to an arbitration agreement to apportion arbitration fees between the parties. Finally, as stated in *Musnick*, the fact that the Arbitration Clause provides that each side pay their own attorneys' fees does not make the Arbitration Clause unconscionable or unenforceable. Because Delaware public policy favors arbitration, the Arbitration Clause contains mutuality of obligations, and is not otherwise unenforceable, the Superior Court must be affirmed.

CONCLUSION

For the reasons stated herein, Defendant Below/Appellee, Hertrich Family of Automobile Dealerships, Inc., d/b/a Hertrich's Capitol requests this Court to enter an order affirming the Superior Court's order granting its Motion to Dismiss for Lack of Subject Matter Jurisdiction.

TYBOUT, REDFEARN & PELL



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