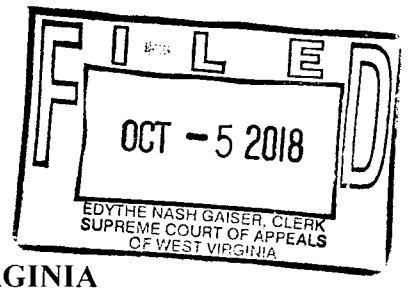

NO. 18-0605

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TD AUTO FINANCE LLC, FOCUS RECEIVABLES MANAGEMENT, LLC
AND NORTHSTAR LOCATION SERVICES, LLC
Defendants Below, Petitioners

v.

FREDDIE REYNOLDS and SHELBY REYNOLDS,
Plaintiffs Below, Respondents

From the Circuit Court of Mercer County, West Virginia
Civil Action No. 17-C-372-MW

BRIEF OF PETITIONERS TD AUTO FINANCE LLC, FOCUS RECEIVABLES MANAGEMENT, LLC AND NORTHSTAR LOCATION SERVICES, LLC

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I. ASSIGNMENTS OF ERROR

1. The Circuit Court improperly held that a merger clause in a Retail Installment Contract executed by and between Respondents and a non-party, Crossroads Chevrolet LLC, negated a separate, earlier Contract of Arbitration entered into among different parties, Respondents and TD Auto Finance LLC ("TDAF").

2. The Circuit Court improperly held that the Contract of Arbitration executed by Respondents changed the contract entered into by and between Respondents and Crossroads Chevrolet LLC.

3. The Circuit Court failed to give effect to the Contract of Arbitration's clear and concise provisions which unambiguously extended to any subsequently executed Retail Installment Contract.

II. STATEMENT OF THE CASE

A. Factual Background

Freddie and Shelby Reynolds ("Respondents" or "Reynolds") filed a four (4) count Complaint against TDAF, Focus Receivables Management, LLC and Northstar Location Service, LLC (jointly "Petitioners"), asserting alleged violations of the West Virginia Consumer Credit and Protection Act, the West Virginia Computer Crime and Abuse Act, Intentional Infliction of Emotional Distress and Common Law Invasion of Privacy.[1] App. P. 1

The actions complained of arose out of the collection efforts of the Petitioners when they attempted to collect on the defaulted auto loan of the Respondents. App. P. 5.

The Reynolds purchased an automobile from Crossroads Chevrolet LLC. App. P. 65. As part of this purchase, the Reynolds signed two separate contracts. First, the Reynolds signed a Credit Application authorizing TDAF to conduct a credit investigation. App. P. 66-70. Second, the Reynolds executed a Retail Installment Sale Contract (hereafter the "RISC"). App. P. 63. The RISC was then assigned to TDAF. App. P. 65.

The Credit Application executed by the Reynolds provides, in part (App. P. 68):

> This paragraph applies to applications to TD AUTO Finance Only:
> **IN EXCHANGE FOR THE TIME, EFFORT, AND EXPENSE IN REVIEWING YOUR APPLICATION AND FOR OTHER VALUABLE CONSIDERATION, WHICH IS HEREBY ACKNOWLEDGED, SOLELY AS BETWEEN YOU AND TD AUTO FINANCE LLC, YOU AGREE TO ALL OF THE TERMS OF THE TD AUTO FINANCE LLC CONTRACT OF ARBITRATION CONTAINED IN THIS APPLICATION AND ACKNOWLEDGE THAT YOU HAVE READ AND UNDERSTAND ALL OF ITS TERMS.** (Bold in original)

* * *

[1] After the filing of the Complaint and the Circuit Court's Order denying the Respondents' Motion to Compel Arbitration, Respondents amended their Complaint to assert a Class Action Claim for alleged violation of the West Virginia Consumer Credit Protection Act. (App. P. 162)

The Contract of Arbitration attached to the Credit Application contemplated the subsequent RISC and states in full as follows (hereinafter the "Arbitration Agreement" or "Contract of Arbitration"):

IMPORTANT CONTRACT OF ARBITRATION

The following Important Contract of Arbitration significantly affects Applicant's, Co-Applicant's or Guarantor's (individually or collectively "you" or "your") rights in any dispute with Dealer, TD Auto Finance LLC and any finance company, bank, or other financial institution to which the Dealer or TD Auto Finance LLC submits this application. Please read this carefully before signing this application and Important Contract of Arbitration.

For the purposes of this Important Contract of Arbitration, the term "TD Auto Finance" means TD Auto Finance LLC and any finance company, bank, or other financial institution to which Dealer or TD Auto Finance LLC submits this application. The terms "us" or "our" means the Applicant, Co-Applicant, Guarantor, and Dealer, and TD Auto Finance.

1. If any of us chooses, **any dispute** between or among us will be decided by arbitration and not in court.
2. If a dispute is arbitrated, each of us will give up the right to a trial by a court or a jury trial.
3. Each of us agrees to give up any right to bring a class-action lawsuit or class arbitration, or to participate in either as a claimant, and each of us agrees to give up any right to consolidate our arbitration with the arbitration of others.
4. The information that can be obtained in discovery from each other or from third persons in an arbitration is generally more limited than in a lawsuit.
5. Other rights that each of us have in court may not be available in arbitration.
6. **Any claim or dispute, whether in contract, tort or otherwise** (including any dispute over the interpretation, scope, or validity of this Important Contract of Arbitration or the arbitrability of any issue), between our employees, parents, subsidiaries, affiliate companies, agents, successors or assignees, **which arises out of or relates to** this application and Important Contract of Arbitration, **any installment sale contract** or lease agreement, or any resulting transaction or relationship (including any such relationship with third parties who do not sign this application and Important Contract of Arbitration) shall, at the election of any of us (or the election of any such third party), be resolved by a neutral, binding arbitration and not by a court action. Any claim or dispute is to be arbitrated on an individual basis and not as a class action. Whoever first demands arbitration may choose to proceed under the rules of the American Arbitration Association, 1633 Broadway, 10th Floor, New York, New York 10019, www.adr.org, or any other arbitration association you choose that is acceptable to us.

7. Whichever rules are chose, the arbitrator shall be an attorney or retired judge and shall be selected in accordance with the applicable rules. The arbitrator shall apply the law in deciding the dispute. Unless the applicable rules require otherwise, the arbitration award shall be issued without written opinion. The arbitration hearing shall be conducted in the federal district in which you reside. If you demand arbitration first, you will pay the arbitration filing fees or case management fees required by the applicable rules up to $215, and Dealer or TD Auto Finance will pay any additional initial filing fee or case management fee. Dealer or TD Auto Finance will pay the whole filing fee or case management fee if Dealer or TD Auto Finance demands arbitration first. Dealer or TD Auto Finance will pay the arbitration costs and fees for the first day of arbitration, up to a maximum of eight hours. The arbitrator shall decide who shall pay any additional costs and fees. Nothing in this paragraph shall prevent any party from requesting that the applicable arbitration entity reduce or waive the fees any of us are required to pay, or that requesting any of us to voluntarily pay an additional share of said fees, based upon the financial circumstances of any party or the nature of the claim.
8. This application and Important Contract of Arbitration evidences a transaction involving interstate commerce. Any arbitration under this application and Important Contract of Arbitration shall be governed by the Federal Arbitration Act (9 U.S.C. 1, et seq). Judgment upon the award rendered may be entered in any court having jurisdiction.
9. Notwithstanding this application and Important Contract of Arbitration, you, Dealer, TD Auto Finance, and our employees, parents, subsidiaries, affiliate companies, agents, successors, and assignees retain the right to exercise self-help remedies and to seek provisional remedies from a court, pending final determination of the dispute by the arbitrator. None of us waives the right to arbitrate by exercising self-help remedies, filing suit, or seeking or obtaining provisional remedies from a court.
10. If any clause within this Important Contract of Arbitration, other than clause 3 or any similar provision dealing with class action, class arbitration or consolidation, is found to be illegal or unenforceable, that clause will be severed from this Important Contract of Arbitration, and the remainder of this Important Contract of Arbitration will be given full force and effect. If any part of clause 3 or any similar provision dealing with class action, class arbitration or consolidation, is found to be illegal or unenforceable, then this entire Important Contract of Arbitration, and the remaining provisions of this application shall be given full force and effect as if this Important Contract of Arbitration had not been included in this application.

App. P. 70. (emphasis added)

Petitioners, Focus Receivables Management, LLC and Northstar Location Services, LLC are alleged agents of TDAF used in the collection of the debt of Respondents. App. P. 7.

All Petitioners filed a Motion to Compel Arbitration and Stay Proceedings (App. P. 19) and the Circuit Court of Mercer County denied that Motion. App. P. 157. The denial of the Motion to Compel Arbitration and Stay Proceedings is the subject of this Appeal.

Defendants seek the reversal of the Order denying the Motion to Compel Arbitration and seek to have the matter arbitrated as agreed to by Respondents.

B. Procedural History

On October 13, 2017, the Respondents filed this civil action in the Circuit Court against Petitioners, alleging violation of the (1) West Virginia Consumer Credit and Protection Act, (2) West Virginia Computer Crime and Abuse Act, (3) Intentional Infliction of Emotional Distress, and (4) Common Law Invasion of Privacy. On November 17, 2017, Petitioners served its Motion to Dismiss, or, in the Alternative, Compel Arbitration (the "Motion") on counsel for Respondents. App. P. 19. On February 28, 2018, Petitioners filed a "Supplemental Basis for Motion to Compel Arbitration. App. P. 71. The Motion was briefed and the Circuit Court heard oral argument on May 23, 2018. App. P. 130. On June 29, 2018, the Circuit Court entered an Order denying Petitioners' Motion (the "Order"). App. P. 157. It is from this Order that Petitioners' appeal is pending.

III. SUMMARY OF ARGUMENT

The primary issues to be decided in this appeal are straightforward. "In exchange for the time, effort and expense of TDAF reviewing your [Respondents'] application and for other valuable consideration", Respondents signed an Arbitration Agreement that would govern any disputes that the Respondents may have with TDAF or its agents and TDAF is seeking to have this Court enforce that right to arbitration agreed to by Respondents.

In denying Petitioners' Motion, the Circuit Court erroneously found that

> "a valid arbitration agreement did not exist between the parties due to an integration clause that was included in the RISC. This integration clause prohibits the prior credit application's arbitration agreement from being included in the final agreement." [App. P. 161].

As shown below, the Circuit Court (1) improperly found a "merger clause" contained in a contract between a non-party and Respondents to control (2) ignored that the clear fact that the Arbitration Agreement did not change any terms of the financing agreement entered into by Respondents, and (3) failed to give effect to the unambiguous language of the Arbitration Agreement that a financing agreement would be entered into.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners submit that oral argument is unnecessary in this case. The appeal presents no novel questions of West Virginia law, or unique factual or procedural issues. The dispositive issues in this case have previously been authoritatively decided by this Court and the United States Supreme Court, and the Circuit Court's Order simply misapplies the law to undisputed facts. The facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process will not be significantly aided by oral argument A memorandum decision reversing the Circuit Court's decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

V. ARGUMENT

A. Jurisdiction

Pursuant to *Credit Acceptance Corp. v. Front*, "an order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine." Syl. Pt. 1, 231 W. Va. 518, 745 S.E.2d 556 (2013). Petitioners appeal the June 8, 2018 Order Denying Defendant's Motion to Dismiss, or, in the Alternative, Compel

Arbitration from the Circuit Court of Mercer County, West Virginia and an immediate appeal of this Order is proper.

B. Standard of Review.

On appeal to this Court, "'review of whether [an] [arbitration] [a]greement represents a valid and enforceable contract is *de novo*.'" *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 663, n.12, 724 S.E.2d 250, 267 n.12 (2011), *vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 132 S. Ct. 1201 (2012) ("Brown I") (quoting *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 772, 613 S.E.2d 914, 920 (2005)). Likewise, "[i]nterpreting a statute [. . .] presents a purely legal question subject to *de novo* review." Syl. Pt. 1, *Fountain Place Cinema 8, LLC v. Morris*, 227 W. Va. 249, 707 S.E.2d 859 (2011); Syl. Pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996). "Generally, findings of fact are reviewed for clear error [. . .] ." Syl. Pt. 1, in part, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996). "However, ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed *de novo*." *Id.*

The issues to be decided in this appeal concern legal questions of statutory construction and contract interpretation. There is no dispute concerning the background facts relevant to the appeal of these particular issues. Accordingly, this Court reviews the legal conclusions of the Circuit Court *de novo*, and the Circuit Court's final order and ultimate disposition under an abuse of discretion standard.

C. The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, mandates that this dispute was to be compelled to arbitration for resolution.

Where a dispute that is referable to arbitration pursuant to a written agreement is improperly filed in state or federal court, the FAA mandates that "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4. Similarly, in such circumstances, the FAA requires that the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement. . . ." 9 U.S.C. § 3.

The FAA reflects a strong and "liberal" public policy in favor of the strict enforcement of arbitration agreements by the terms set forth in such agreements. *See AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 339 (2011). In fact, this Court has reiterated the strong public policy under both federal and state law recognizing the benefits of arbitration as a forum of dispute resolution. *See Parsons v. Halliburton Energy Servs.*, 237 W. Va. 138, 146, 785 S.E.2d 844, 852 (2016) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983)) ([The FAA], "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."); W. Va. Code § 55-10-2 (acknowledging "a well-established federal policy in favor of arbitral dispute resolution" because arbitration "offers in many instances a more efficient and cost-effective alternative to court litigation."). "Arbitration is also favored because it unburdens crowded court dockets." *Id.*

Under the FAA, agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. A party's ability to challenge a valid arbitration agreement is extremely limited; only

"[g]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 of the FAA." *Strawn v. AT&T Mobility, Inc.*, 593 F. Supp. 2d 894, 898 (S.D. W. Va. 2009) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996)); *see also Concepcion*, 563 U.S. at 343 ("Although § 2's savings clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives.").

Indeed, the "principal purpose" of the FAA is "to ensure that private arbitration agreements are enforced according to their terms." *Concepcion*, 563 U.S. at 347 n.6; *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010). The FAA's directive to federal and state courts "is mandatory" and, therefore, courts have "no choice but to grant a motion to compel arbitration where a valid arbitration agreement exists and the issues in a case fall within its purview." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002); *see also Hightower v. GMRI, Inc.*, 272 F.3d 239, 241 (4th Cir. 2001). The United States District Court for the Southern District has stated simply that "[a]fter the court decides that a particular dispute is covered by an arbitration clause, the court may not proceed to consider the merits of the case and must immediately send the case to arbitration." *Twin Head Recovery, LLC v. JHJ, LLC*, No. 5:09-cv-00572 2010 U.S. Dist. LEXIS 86037 at *8 (S.D. W. Va. Aug. 20, 2010). (internal citations omitted).

Pursuant to "the federal policy favoring arbitration," "any doubts concerning the scope of arbitrable issues" are resolved "*in favor of arbitration.*" *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir. 2005) (emphasis added); *see also State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 360, 752 S.E.2d 372, 391 (2013) ("consistent with [the FAA], courts

must rigorously enforce arbitration agreements according to their terms") (citing *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233, 133 S. Ct. 2304, 2309, 186 L. Ed. 2d 417, 424 (2013)).

As recently stated in *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1616 (2018) the Supreme Court of the United States stated: (Syllabus Point a)

> The Arbitration Act requires courts to enforce agreements to arbitrate, including the terms of arbitration the parties select. See 9 U.S.C. §§2, 3, 4. These emphatic directions would seem to resolve any argument here. The Act's saving clause-which allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," §2-recognizes only "'generally applicable contract defenses, such as fraud, duress, or unconscionability,'" *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339, not defenses targeting arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration," *id.*, at 344. By challenging the agreements precisely because they require individualized arbitration instead of class or collective proceedings, the employees seek to interfere with one of these fundamental attributes.

Thus, as seen, arbitration is to be liberally construed in favor of arbitration and in this matter the Circuit Court improperly denied Petitioners' request for arbitration by (1) finding that a merger clause continued in the financing documents executed by Respondents with a non-party and then assigned to TDAF negated the Contract of Arbitration signed by Respondents for the benefit of TDAF, (2) ignoring the fact that the Contract of Arbitration did not change any of the terms of the financing documents signed by Respondents and (3) failing to give effect to the Contract of Arbitration provisions which unambiguously acknowledged that a financing document would be executed.

D. The Circuit Court improperly held that a merger clause in a Retail Installment Contract executed by and between Respondents and a non-party, Crossroads Chevrolet LLC, negated a Contract of Arbitration entered into by Respondents with TDAF.

The Circuit Court wrongfully determined that "a valid Arbitration Agreement did not exist between the parties due to an integration clause that was included in the RISC." App. P. 161.

The Credit Application signed by Respondents directly with TDAF explicitly provides **that "in exchange for the time, effort and expense in reviewing your application"... "you agree to all of the terms of the TD Auto Finance LLC Contract of Arbitration."** App. P. 68. The Contract of Arbitration also incorporated the subsequent RISC and clearly states in Paragraph 6 (App. P. 70) that:

> "(6) **Any claim or dispute**, whether in contract, tort or otherwise (including any dispute over the interpretation, scope, or validity of this Important Contract of Arbitration or the Arbitrability of any issue)... **which arising out of... any installment sale contract**... or any resulting transaction or relationship (including any such relationship with third parties who do not sign this Application and Important Contract of Arbitration) shall, at the election of any of us... be resolved by a neutral, binding Arbitration and not by a court action."

Instead of recognizing the clear unambiguous language that the Contract of Arbitration expressly incorporated in the RISC, the Circuit Court improperly flipped the analysis and held that a "merger clause" contained in the RISC, which was between Respondents and a **non-party** negated the clear language of the Arbitration Agreement. The "merger clause" in the RISC executed by the Reynolds stated (hereafter referred to as the "Merger 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. Buyer Signs /s/ Shelby Reynolds. Co-Buyer Signs /s/ Freddie Reynolds. (underlining added).

App. P. 65.

A "merger clause", also known as an "integration clause" and "entire agreement clause", is defined by Black's Law Dictionary, Ninth Edition 2009, as:

> "A contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract. – Also termed merger clause; entire agreement clause." (emphasis supplied).

Multiple Courts have held that a Merger Clause does not prohibit or negate the viability of a previously reached Arbitration Agreement even if executed by the same parties, and in this matter, the Merger Clause was in a contract with a non-party (and then assigned to TDAF) and the Arbitration Contract was directly with TDAF. (App. P. 68). As the Circuit Court found factually "the credit application was between Plaintiffs [Reynolds] and TD Auto Finance" (App. P. 158) and the "RISC was between Plaintiffs [Reynolds] and the auto dealership" App. P. 158.

In *Johnson v. JF Enters, LLC,* 400 S.W.3d 763, 768-69 (Mo. 2013), the Supreme Court of Missouri reversed the Trial Court's refusal to enforce an agreement to arbitrate because it was contained in a prior executed document and not in the Retail Installment Sale Contract executed by the auto Plaintiff (auto Purchaser). The Court held:

> Merger clauses are express statements of the merger doctrine and are intended to prevent extrinsic evidence of other agreements from influencing the interpretation of a final written contract, preserving the sanctity of written contract. . . In this case, the intent of the parties is demonstrated by all the documents the parties signed contemporaneously. To protect the sanctity of the parties' written contract, all the provisions in the writings can and should be harmonized and given affect, including a valid arbitration agreement. (underlining applied) (citations omitted).

The Missouri Court further stated:

> As a part of the sales transaction, the purchaser signed numerous documents at a single setting, including the sale agreement, the installment contract containing a merger clause, an arbitration agreement and numerous other documents. Contrary to the parties'

> arguments, contemporaneously signed documents will be construed together and harmonized if possible. Only if documents cannot be harmonized will inconsistent provisions be construed against the drafter.

Id. at 764. (emphasis added).

The Court then expressly found the "merger clause" contained in the Retail Installment Sale Contract to be inapplicable.

Similarly, in *Najera v. David Stanley Chevrolet, Inc.,* 406 P.3d 592 (Okla. Civ. App. 2017) in quoting a Federal Tenth Circuit case, *Mooneyham v. BRSI, LLC*, 682 F. App'x 655 (10th Cir. 2017), the Court of Appeals in Oklahoma reversed a Trial Court's denial of a Motion to Compel Arbitration and stated:

> (1) [o]n its face, "the arbitration agreement constitutes a 'comprehensive provision [that] appears to cover each of [the buyers'] claims"; [t]the parties' conduct and [ ] the documents they executed, evince a single transaction" despite "occurring over two days"; (2) the purported merger clause in the retail installment sale contract – which states, as in the present case, that "[t]his contains the entire agreement between you and us relating to the contract" – "applies only to the RISC itself—that is, the clause precludes incorporation of other agreements into the RISC," but "the clause doesn't preclude incorporation of other agreements into the transaction as a whole . . . ."

Earlier this year the United States District Court for the Southern District of Georgia in *Walker v. Hyundai Capital Am., Inc.*, No. CV417-045 2018 U.S. Dist. LEXIS 42876 (S.D. Ga. March 15, 2018) ordered a matter to arbitration in which the Retail Installment Sale Contract was entered into by the Plaintiff and the Defendant's financing company (Hyundai Capital) and an earlier agreement containing an arbitration previously had been executed by and between the Plaintiff and the automobile dealer (Savannah Hyndai). The District Court quoted a decision from a Georgia Court of Appeals (*Wells Fargo Auto Fin., Inc. v. Wright*, 698 S.E.2d 17 (Ga. Ct. App. 2010)) and held:

> That court rejected Mr. Wright's argument that the merger clause in the RISC stating that it was the entire agreement between the parties operation to preclude Wells Fargo from enforcing the separate arbitration agreement, which was neither assigned to, or signed by Wells Fargo . . . [T]he Georgia Court of Appeals concluded that "as the retail sales contract, installment contract, and the Agreement were executed simultaneously, they should be read and construed together.
>
> In the Court's opinion there is little material difference between this case and *Wright*. Plaintiff finds herself in an almost identical situation. She executed both the RISC and a separate Purchase Agreement, which contained a broad arbitration clause. [ ] Defendant, as assignee of the RISC, now seeks to invoke the arbitration clause contained in the Purchase Agreement. Plaintiff has failed to offer any meaningful distinction that would convince the Court that the outcome in this case should be any different than *Wright*. Accordingly, Defendants' Motion to Compel must be granted.

Id at *5-6.

Thus, as seen above, a "merger clause" contained in the RISC did not cancel the broad Arbitration Agreement separately agreed to by the Respondents.

E. The Circuit Court improperly held that the Contract of Arbitration executed by Respondents changed the contract entered into by and between Respondents and Crossroads Chevrolet LLC.

The Circuit Court also failed to consider, or ignored the fact, that the Contract of Arbitration didn't change the RISC entered into by Respondents and the assigned, TDAF. The merger clause provides that:

> "This contract contains the entire agreement between you and us relating to the contract. Any change to the contract must be in writing and we must sign it." App. P. 65.

In the present case, the Contract of Arbitration did not, in any manner, effect a change to the RISC executed by the Respondent. The RISC identifies the buyer (Shelby Reynolds); the co-buyer (Freddie Reynolds); the seller/creditor (Crossroads Chevrolet LLC); the vehicle purchased

(a new Chevrolet Silverado); the amount being financed ($46,811.18); monthly payments (75 at $729.32 per month); various other promises related to financing (Page 2 of 3 of the Retail Installment Sale Contract), and assignment of the RISC to TDAF (Page 3 of the RISC) App. P. 63. At no time and in no manner did the RISC mention arbitration or the manner in which any dispute would be resolved. The RISC being wholly silent as to dispute resolution, the Contract of Arbitration does not change any term or condition contained in the Retail Installment Sale Contract and the "merger clause" is not applicable.

In *Najera v. David Stanley Chevrolet, Inc.*, the Court of Civil Appeals of Oklahoma had before it a Purchase Agreement which had an arbitration clause, but the subsequently executed Retail Installment Sale Contract did not have such a provision. The lower court found that since the Retail Installment Sale Contract was executed last, the arbitration was not applicable. The Court of Appeals reversed and found:

> Perhaps more importantly, however, the Purchase Agreement and the RISC can be readily harmonized. Paragraph 12 of the Purchase Agreement, quoted above, provides that "all written contracts relating to the same transaction . . . between the same parties, and made as part of substantially the same transaction . . . shall be taken together and read as one document setting forth the terms of the parties agreement." It further provides that, "[t]o the extent that any of the terms among the various documents are inconsistent, the financing agreement [i.e., the RISC] shall supersede any directly conflicting rights, language or terms." This language is entirely consistent with the language in the RISC providing that "[the RISC] contains the entire agreement between you and us relating to [the RISC]. Any change to [the RISC] must be in writing and we must sign it." Both the Purchase Agreement and the RISC set forth the parties' intent that, where any inconsistency exists among the various documents with the terms of the RISC, the RISC controls as to all rights, language or terms set forth in the RISC. However, as stated above, the Purchase Agreement contains a dispute resolution clause and the RISC does not. Thus, there is no inconsistency between the Purchase Agreement and the RISC as to dispute resolution.

> We conclude the RISC standing alone does not constitute the parties' entire agreement in this case, and Najera's claims are subject to the arbitration agreement.

Najera, 406 P.3d at 597-98.

In *Ritter v. Grady Auto Group, Inc.*, 923 So. 2d 1058 (Ala. 2007) the Alabama Supreme Court held:

> Because the arbitration agreement is a collateral agreement, distinct from the purchase contract, the merger clause in the purchase contract does not invalidate the arbitration agreement. The two contracts are separate: one governs the sale of the vehicle, and the other governs the resolution of disputes between the dealer and the buyer. They are two separate contracts and are to be considered as one. *Southern Guaranty,* 46 Ala. App. At 459, 243 So 2d at 721. Therefore, the merger clause in the purchase contract does not render the arbitration agreement inapplicable.

Id. at 1065.

And the Federal District Court in *Kates v. Chad Franklin Nat'l Auto Sales North, LLC,* No. 08-0384-CV-W-FJG 2008, U.S. Dist. LEXIS 97117 (W.D. Mo. Dec. 1, 2008) enforced an arbitration agreement and held:

> [A]rbitration agreements that are separate from an underlying purchase or financing agreement are not unusual and are routinely enforced. (*See, e.g. Johnson v. 21st Mortg. Corp., Case No. 2:07cv355KS-MTP, 2008 U.S. Dist. LEXIS 98662, 2008 WL 906817 (S.D. Miss. April 3, 2008); Howard v. Wells Fargo Minnesota, NA, Case No. 1:06CV2821, 2007 U.S. Dist. LEXIS 70099, 2007 WL 2778664 (N.D. Ohio September 21, 2007); Hemphill v. Coldwell Banker Real Estate Corp., Case No. 4:05CV169-P-D, 2007 U.S. Dist. LEXIS 83700, 2007 WL 3244793 (N.D. Miss. November 1, 2007*).) The Court further finds that the merger clause does not prohibit the forming of a separate arbitration agreement contemporaneously with the other contracts in this matter. (*See In re Union Fin. Svcs. Gp., Inc., 325 B.R. 816 (Bky. E.D. Mo. 2004); Ramierez-Baker v. Beazer Homes, Inc., 2008 WL 2523368, 2008 U.S. Dist. LEXIS 83867 (E.D. Cal. June 20, 2008*).) Therefore, the Court finds the Arbitration Agreement should apply, as plaintiff's actions demonstrate an intent to be bound by the Arbitration Agreement and the Arbitration

> Agreement was not "merged out" of the contract between the parties.

The United States Court of Appeals for the Second Circuit in *Bank Julius Baer & Co. v. Waxfield*, 424 F.3d 278 (2d Cir. 2005) reversed a District Court's failure to dismiss an action and send to arbitration as a result of the District Court's erroneous understanding of a "merger clause".

The *Waxfield* Court stated:

> Waxfield first argues that the Pledge Agreements' [the document signed last] Merger Clause effectively voided the Arbitration Agreement because it "supersedes *all* prior agreements." (emphasis added). We disagree, although we concede that a literal reading of the Clause would lead to that result.
>
> First, as a legal matter, that is not the way that merger clauses are typically understood. Rather, a merger clause acts only to require full application of the parol evidence rule to the writing in question – here, the Pledge Agreement. See *Albany Sav. Bank, FSB v. Halpin*, 117 F. 3d 669, 672 (2d Cir. 1997). But "enforcement of the parties' obligations to arbitrate disputes... does not implicate the parol evidence rule in connection with the [Pledge Agreements] and, hence, is not precluded by the merger clause in that writing." *Primex Int'l Corp. v. Wal-Mart Stores*, 89 N.Y. 2d 594, 600, 679 N.E. 2d 624, 627, N.Y. S. 2d 385, 388 (1997). Indeed, *Primex* was decided in favor or arbitration on almost exactly the same facts as this appeal: there was an agreement to arbitrate that provided that "any and all disputes arising out of, under or in connection with this Agreement including, without limitation, the validity, interpretation, performance and breach thereof shall be settled by arbitration," and a later agreement that contained a merger clause that provided that "all prior discussions, agreements, understandings or arrangements, whether oral or written, are merged herein and this document represents the entire understanding between the parties." *Id.* at 596-97 (first alteration in original) (emphasis omitted). Still, the New York Court of Appeals found that the later-enacted merger clause did not destroy the earlier agreement to arbitrate. *Id.* at 599.

Waxfield, 424 F.3d at 283.

Thus, as demonstrated in *Primex* and *Waxfield*, the "merger clause" contained in the RISC did not negate the broad Arbitration Agreement agreed to by the Respondents.

Thus, as seen above, Courts have routinely held that a "merger clause" in a Retail Installment Sale Contract does not negate an arbitration provision in a previously executed document. In those cases, as in the case presently before this Court, the arbitration agreement does not "change" the terms of the Retail Installment Sale Contract, the arbitration agreement merely provides a forum for dispute resolution. Here, the Circuit Court did not find any change. In fact, the Circuit Court held that "the credit application and the RISC do not relate to the same subject matter" (App. P. 159), and the fact that an arbitration provision could have also been included in the RISC document ignores that the Arbitration Agreement between Respondents and Petitioners already provided for arbitration related to "any transaction or relationship" between Respondents and Petitioners.

F. The Circuit Court failed to give effect to the Contract of Arbitration's clear and concise provisions which unambiguously extended to any subsequently executed Retail Installment Contract.

The Circuit Court also failed to give effect to the Contract of Arbitration's clear and concise provisions which unambiguously extended to any subsequently executed retail installment contract and thus the Circuit Court's ruling should be overruled.

The Contract of Arbitration specifically provides that:

> "Any claim or dispute, whether in contract, tort or otherwise..., which arises out of or relates to this Application and Important Contract of Arbitration, any installment sale contract... or any resulting transaction on relationship... shall... be resolved by a neutral, binding arbitration and not by a court action."

The Circuit Court wholly ignored the provisions of the Contract of Arbitration that recognized and acknowledged that an installment sale contract would subsequently be entered

into. As the *Johnson v. JF Enters, LLC* Court stated "the interest of the parties is demonstrated by all the documents the parties signed contemporaneously. To protect the sanctity of the parties' written contract, all the provisions in the writing can and should be harmonized and given effect, including a valid arbitration agreement." *Johnson*, 400 S.W.3d at 769.

And in *Bank Julius Baer & Co. v. Waxfield* the United States Court of Appeals found:

> It makes little sense to read the Merger Clause as destroying previous contractual relationships, when the Incorporation Clause specifically says that the Pledge Agreement is cumulative of other agreements. Were the Court to read the Merger Clause in the way urged by Waxfield, the Incorporation Clause would have no meaning – a result forbidden by ordinary precepts of contract interpretation."

Waxfield, 424 F.3d at 283.

In the case at hand, the Arbitration Contract clearly recognized that the RISC would be executed. The Circuit Court was clearly wrong in failing to harmonize the Arbitration Contract and the RISC and the Circuit Court's reading would wholly eliminate the clear language in the Arbitration Agreement recognizing that the RISC would be executed – a result forbidden by ordinary precepts of contract interpretation. The Arbitration Contract must be given its due and the matter should be referred to arbitration.

VI. CONCLUSION

Based on the foregoing, Petitioners respectfully request that this Honorable Court reverse the June 8, 2018 Order of the Circuit Court of Mercer County, West Virginia, and remand this case back to the Circuit Court for dismissal so that the parties may arbitrate their dispute.

Respectfully submitted,

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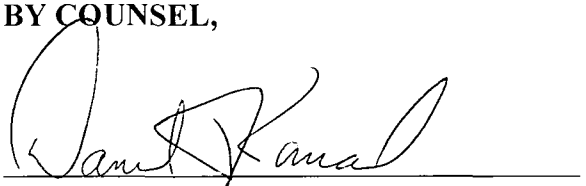
NORTHSTAR LOCATION SERVICES, LLC
BY COUNSEL,



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