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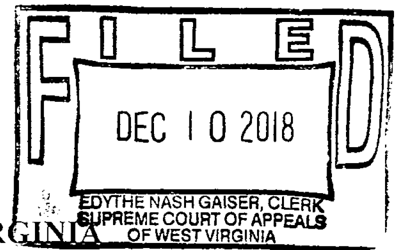

NO. 18-0605

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**

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

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I. SUMMARY OF REPLY ARGUMENT

The undisputed evidence is that Respondents, Freddie and Shelby Reynolds ("Respondents" or "Reynolds"), entered into a contract specifically applicable to TD Auto Finance LLC ("Petitioner" or "TDAF") which required that all controversies between the Respondents and Petitioners be submitted to binding arbitration. The contract stated (App. p. 34):

> This paragraph applies to applications to TD Auto Finance Only:
>
> **IN EXCHANGE FOR THE TIME, EFFORT AND EXPENSE IN REVIEWING YOUR APPLICATION AND OTHER VALUABLE CONSIDERATION, WHICH IS HEREBY ACKNOWLEDGED SOLELY 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 and underlining in original).

The Contract of Arbitration then clearly states in Paragraphs numbered 1 and 6 (App. p 36):

> 1. If any of us chooses, any dispute between or among us will be decided by arbitration and not in court.
>
> 6. 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 or relationship . . . shall, at the election of any of us . . . be resolved by a neutral, binding arbitration and not by a court action.

(underlining added).

Respondents' Brief attempts to distract from the clear language of the Contract of Arbitration by mischaracterizing or totally ignoring the terms of the written Arbitration

Agreement. Specifically, Respondents argue that (1) Respondents' Credit Application was with Crossroads Chevrolet and not with TDAF and thus, TDAF lacks standing to enforce the arbitration provision (Respondents' Brief p. 8) and (2) a Merger Clause contained in the Retail Installment Contract entered into by the Respondents extinguished the Arbitration Agreement (Respondents' Brief p. 9.)

In making their first argument, that TDAF lacks standing to enforce the Arbitration Agreement, Respondents overlook the express and explicit language of the document they in fact signed. The Arbitration Agreement which Respondents admit they signed specifically states:

> YOU [the Respondents] AGREE TO ALL OF THE TERMS OF THE TD AUTO FINANCE LLC CONTRACT OF ARBITRATION CONTAINED IN THIS AGREEMENT. (underlining added)

The document further states that Respondents:

> ACKNOWLEDGE THAT YOU [the Respondents] HAVE READ AND UNDERSTAND ALL OF ITS TERMS.

The fact that Respondents did in fact agree to arbitration with TDAF can be no clearer, and Respondents' attempt to claim otherwise is pure hogwash.

Secondly, Respondents argue that a Merger Clause contained in the Retail Installment Contract entered into by Respondents and Crossroads Chevrolet extinguished the separate, written Arbitration Agreement agreed to by Respondents. However, contrary to Respondents' desires, the Merger Clause did not "extinguish" the valid written agreement of the Respondents to arbitrate any claims between Respondents and Petitioners. Among other reasons, the language of the Arbitration Agreement specifically anticipated the execution of a "Retail Installment Agreement" and that arbitration would be applicable from any "resulting transaction or relationship" by and between Respondents and Petitioners. Furthermore, the Arbitration

Agreement specifically stated that it was applicable to (1) the Application, (2) any installment sale contract, and (3) any resulting transaction or relationship. Rather than being narrow in scope, the Arbitration Agreement was broad and all encompassing.

II. ARGUMENT

A. Petitioners presented to the Circuit Court and to this Court a valid, binding, written Arbitration Agreement specifically applicable to TDAF.

That Arbitration Agreement specifically provides that:

> 1. If any of us chooses, any dispute between or among us [Respondent and TDAF] will be decided by arbitration

and

> 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 an issue) ...which arises out of or relates to the application and Important Contract of Arbitration, any installment sale contract or lease agreement, or any resulting transaction or relationship . . . shall, at the election of any of us,... be resolved by a neutral, binding arbitration and not by a court action. . . .

(App. p. 36.) (underlining added).

The Arbitration Contract further and clearly states that the contract specifically applies to TDAF and the Reynolds. The contract states:

> For the purposes of this Important Contract of Arbitration, the term "TD Auto Finance" means TD Auto Finance LLC . . . . The term "us" or "our" means Applicant [Mr. Reynolds], Co-Applicant [Mrs. Reynolds] . . . and TD Auto Finance.

As previously set forth, the Respondents agreed that:

> **IN EXCHANGE FOR THE TIME, EFFORT AND EXPENSE IN REVIEWING YOUR APPLICATION AND OTHER VALUABLE CONSIDERATION, WHICH IS HEREBY ACKNOWLEDGED SOLELY BETWEEN YOU AND TD AUTO FINANCE LLC, YOU AGREE TO ALL OF THE**

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> **TERMS OF THE <u>TD AUTO FINANCE LLC CONTRACT OF ARBITRATION CONTAINED IN THIS APPLICATION</u> AND ACKNOWLEDGE THAT YOU HAVE READ AND UNDERSTAND ALL OF ITS TERMS.** (Bold and underlining in original).

Thus, the terms of the Arbitration Contract expressly apply to the Reynolds and Petitioners. As stated in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347 n.6 (2011), the "principal purpose" of the Federal Arbitration Act ("FAA") is to "ensure that private arbitration agreements are enforced according to their terms." The FAA's directive to federal and state courts "is mandatory" and 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.*, 307 F.3d 496, 500 (4th Cir. 2002). As further stated by this Court in *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."

Respondents foolishly attempt to wholly ignore the specific and unambiguous language of the Arbitration Agreement and try to mislead this Court into erroneously believing that the Arbitration Agreement does not mean what it says, but only applies for issues arising out of disputes involving the Application for financing. Nothing could be farther from the truth. The Respondents point to no language contained in the written document and so argue without citation to any fact contained in the record.

Contrary to what Respondents would like this Court to believe, the language of the written agreement directly references TDAF. Secondly, the language of the written agreement specifically anticipates the signing of a retail installment sale contract and a resulting transaction and relationship. The document states arbitration applies to "any claim or dispute" "which arises

out of or relates to" (1) "this Application", (2) "any installment sale contract" and (3) "any resulting transaction or relationship." There is absolutely no doubt that the written Arbitration Agreement is applicable to TDAF and its agents, and is broad and all encompassing.

As this Court stated in Syllabus Point 3 of *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E. 2d 626 (1962):

> It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.

Respondents are requesting this Court to make a new agreement for them – one which does not require arbitration. This Court should soundly reject such request and send this matter to arbitration where it belongs.

B. The Merger Clause in the Retail Installment Contract did not extinguish the Arbitration Agreement.

Respondents also urge this Court to find that a merger clause contained in a Retail Installment Sale Contract entered into by Respondents extinguished the separately entered into Arbitration Agreement. Respondents argue that:

> As to the question of arbitrability, the credit application is hopelessly and irrevocably inconsistent with the RISC: the first document [the Application, which includes the Arbitration Agreement] evidences an agreement in the event of future contingencies to arbitrate and narrow class of disputes relating to threshold credit worthiness, and the second [the Retail Installment Sales Contract] establishes that the parties intended any disagreement surrounding the purchase of and payment for the truck to be determined in the default forum for all such proceedings - a court of law. (Respondents' Brief p. 10).

Initially, Respondents would have this Court believe that the phrase "any dispute" as set forth in Paragraphs numbered 1 and 6 of the Arbitration Agreement, applies to a "narrow class of

disputes." Respondents are simply wrong—the word "any" is defined as an "indeterminate number of amount." Websters' II New Riverside University Dictionary (1988). A broader, more expansive word could not have been used. Secondly, Paragraph number 6 refers to "any claim or dispute" and then further alerted the Respondents that arbitration was required if the "claim or dispute". . . "arises out of or related to this application . . . .any installment sale contract or Loan Agreement, or <u>any resulting transaction or relationship</u>." Respondents would like for this Court to rewrite the Arbitration Agreement and ignore the expansive language used in Paragraphs numbered 1 and 6. Far from being limited to a narrow class of claims, the language of the Arbitration Agreement was expansive and all encompassing.

Respondents then—without citation to any part of any written document—state that "the parties intended any disagreement surrounding the purchase of and payment for the truck to be determined in the default forum for all such proceeding – a court of law." (Respondents' Brief p. 10). The problem with the Respondents' argument is that the Retail Installment Sales Contract does not so provide. The only resolution forum discussed in any document is that "arbitration" is the proper forum, and arbitration was required for "any resulting transaction or relationship."

The Respondents rely upon two Florida decisions, *Duval Motors Co. v. Roger*, 73 So. 3d 261 (Fla. Dist. Ct. App. 2011) and *HHH Motors, LLP v. Holt*, 152 So. 3d 745 (Fla. Dist. Ct. App. 2014). In *Duval* and *HHH Motors*, the Courts were faced with situations in which a car purchaser signed both a Retail Installment Sales Contract and a Retail Buyer's Order. In both cases, the Retail Installment Sales Contract contained a "merger clause". The arbitration clause was in a previously executed document. There was no separate Arbitration Agreement, and the document which contained the arbitration clause did not refer to a Retail Installment Sales Contract. A dispute arose as to terms of the Retail Installment Sales Contract, and the Courts

found that the "merger clause" in the Retail Installment Sales Contract controlled. Nothing in the Buyer's Order (the first of the signed documents) mentioned the Retail Installment Sales Contract or an ongoing relationship between the parties.

In the matter at bar, the Arbitration Agreement contemplated a Retail Installment Agreement being later executed and a "resulting transaction" and a continuing "relationship"—a situation wholly distinct from the matter faced by the *Duval* or *Holt* Courts. Furthermore, the United States Tenth Circuit Court of Appeals recently, in *Mooneyham v. BRSI, LLC*, 682 Fed. App'x 655, 2017 U.S. App LEXIS 4736 (10th Cir. 2017), cast doubt on the *Duval* and *HHH Motors* cases, refusing to adopt the reasoning in those cases. The *Mooneyham* Court stated:

> For the same reason, we reject plaintiffs' argument that this merger clause and a similar clause in the RPA preclude incorporation of the arbitration agreement into the overall transaction. And to the extent the extra-jurisdictional cases that plaintiffs cite relied on merger clauses in refusing to enforce arbitration agreements, we therefore decline to follow them.

Id. at n.3. (internal citations omitted). And, just this year, the Court of Appeals of Florida in a case more similar factually to the matter before this Court refused to follow the decisions in *Duval* and *HHH Motors*. The Court in *Lowe v. Nissan of Brandon, Inc.*, 235 So. 3d 1021 (Fla. Dist. Ct. App. 2018) was faced with a situation in which a Retail Installment Sales Contract contained a "merger clause" and no arbitration provision, but a previous "Arbitration Contract" had been executed. The *Lowe* Court found the Arbitration Agreement to be applicable despite the "merger clause" in the Retail Installment Sales Contract. *Id.* at 1028. The *Lowe* Court stated:

> That the Installment Contract contained a merger clause is not determinative; the law remains that "the existence of a merger clause does not *per se* establish that the integration of the agreement is total." *Duval Motors,* 73 So. 3d at 265 (quoting *Jenkins,* 913 So. 2d at 53). Where, as here, the Purchase Agreement merger clause states that the Purchase Agreement

> "compromise[s] the entire agreement affecting this sale," the Purchase Agreement is the operative document governing the entire "sale" or transaction. The Purchase Agreement specifically incorporates the Arbitration Agreement.
>
> Further, the merger clause of the Installment Contract at issue here mandates that the Installment Contract controls "this contract"-the financing terms and conditions contract. Cf. *HHH Motors*, 152 So. 3d at 748; *Duval Motors*, 73 So. 3d at 266. And a merger clause in one document contemporaneously executed with others does not necessarily preclude actions not contemplated by that document. *Michael Anthony Co. v. Palm Springs Townhomes*, 174 So. 3d 428, 433 (Fla. 4th DCA 2015), review denied, No. SC15-1831, 2016 Fla. LEXIS 203 (Fla. Jan. 29, 2016); see also *Hahamovitch v. Delray Prop. Invs., Inc.*, 165 So. 3d 676, 678 (Fla. 4th DCA 2015). ("As to the first claim, the merger clause would not bar a cause of action for fraud, and in this case the fraud involved the closing of the property and not the subsequent participation interests to which the merger clause applied.") The test for determining arbitrability of a particular claim under a broad arbitration provision is whether a 'significant relationship' exists between the claim and the agreement containing the arbitration clause, regardless of the legal label attached to the dispute." *Murphy v. Courtesy Ford, LLC*, 944 So. 2d 1131, 1133 (Fla. 3d DCA 2006) (quoting *Seifert*, 750 So. 2d at 637-38).

Lowe, 235 So. 3d at 1027.

Furthermore, in the case at hand, the Arbitration Agreement is between TDAF and Respondents. No Court decision cited by Respondents merged an agreement between a non-party to a contract (TDAF not being an original party to the Retail Installment Sales Contract) with an agreement specifically to another party (TDAF being specifically named in the Arbitration Agreement).

Similarly, Respondents rely upon *Gonzalez v. Consumer Portfolio Serv. Inc.*, 66 Va. Cir. 43 (Cir. Ct. 2004), but *Gonzalez* is not applicable. The *Gonzalez* Court relied upon the fact that a Buyer's Order (not a separate Arbitration Contract) was executed before a Retail Installment Sales Contract. The Circuit Court (not a Court of Appeals) held that "where two or more

documents are executed at the same time or contemporaneously between the same parties and in reference to the same subject matter", the second document controls. In this matter the Arbitration Contract was with TDAF and the Retail Installment Sale Contract was with another entity and only later assigned to TDAF. Additionally, the RISC and the Arbitration Agreement before this Court do not deal with the same subject matter. The *Gonzalez* decision was also distinguished in *Ramick v. Howard-GM II, Inc.*, 414 P.3d 397 (Okla. Civ. App. 2017). The *Ramick* Court found that since Virginia had a statutory scheme requiring a "Buyer's Order" during negotiations prior to entering into a Retail Installment Sales Contract, the Retail Installment Sales Contract controlled. *Id.* at 402. Thus, as explained by the Court in *Ramick*, the facts in *Gonzalez* are clearly distinguishable from the facts in this case.

Respondents made no attempt to discuss the cases cited by Petitioners in their opening brief and those cases are worthy of re-mentioning. As stated in *Johnson v. JF Enters.*, 400 S.W.3d 763, 768-69 (Mo. 2013), the Supreme Court of Missouri in reviewing a trial court's refusal to enforce an Arbitration Agreement found:

> 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 added) (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. (underlining added).

In *Walker v. Hyundai Capital Am., Inc.*, No. CV417-045, 2018 U.S. Dist. LEXIS 42876 (S.D. Ga. Mar. 15, 2018) the Court stated:

> 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.

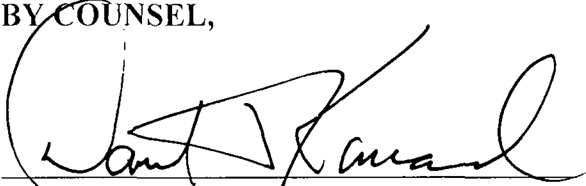
Id. at *5-6. (internal citations omitted).

CONCLUSION

Respondents would have this Court ignore the clear language of the Arbitration Agreement, and this Court must not do so, as the United States Supreme Court in *AT&T Mobility* has stated "private arbitration agreements are enforced according to their terms." Wherefore, the Petitioners respectfully request that the Order of the Circuit Court denying arbitration be reversed and this matter be set for arbitration as agreed.

Respectfully submitted,

TD AUTO FINANCE LLC,
FOCUS RECEIVABLES MANAGEMENT, LLC and
NORTHSTAR LOCATION SERVICES, LLC
BY COUNSEL,



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