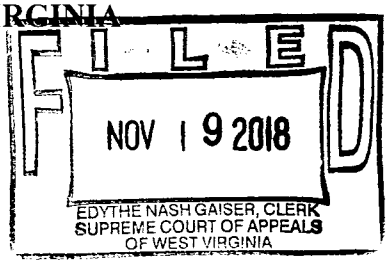
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 18-0605

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.

RESPONDENTS' BRIEF

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INTRODUCTION

With apologies to Charles Dickens, this is a Tale of Two Contracts. Both of them were between automobile dealer Crossroads Chevrolet, LLC ("Crossroads") on the one hand, and Respondents Freddie Reynolds and his wife, Shelby, on the other. The first contract — a credit application and release — ceased to exist and merged into the second contract — a Retail Installment Sale Contract ("RISC") — after Respondents' credit was approved and they came to terms with Crossroads for the purchase of a new pickup truck. Then, in exchange for payment in full for the truck, Crossroads assigned the right to receive Respondents' monthly payments under the RISC to Petitioner TD Auto Finance, LLC ("TDAF"), which financed the purchase. For all parties involved, it was the best of times.

Then Respondents fell behind on their payments, and the truck was repossessed. It was the worst of times, made all the worse by TDAF and Petitioners Focus Receivables Management, LLC, and Northstar Location Services, LLC. Petitioners are debt collectors that harassed Respondents seeking extra fees and costs that lawfully could not be collected, and whose incessant barrage of telephone calls and letters continued long after they were made aware that Respondents were represented by counsel. Respondents sued Petitioners under the West Virginia Consumer Credit and Protection Act, W. VA. CODE § 46A-1-101, *et seq.* ("WVCCPA"), the West Virginia Computer Crime and Abuse Act, W. VA. CODE § 61-3C-1, *et seq.*, for intentional infliction of emotional distress, and for common law invasion of privacy.

Petitioners' unlawful misconduct occurred while attempting to collect their assigned benefits under the RISC. The RISC, however, contained no agreement to arbitrate. Recognizing that stark reality, Petitioners insisted below that Respondents' claims against them be arbitrated as set forth in the credit application with Crossroads, to which (as a threshold matter) none of Petitioners were ***ever*** a party. Moreover, the credit application — which contained ***none*** of the

essential terms of the purchase transaction between Respondents and Crossroads — was explicitly merged into the RISC, which contained ***all*** the essential transactional terms. The circuit court recognized the fatal flaws in Petitioners' arguments and denied their motion to compel arbitration, ruling that the parties should be permitted to litigate their dispute in the courts, as the RISC contemplates.

COUNTERSTATEMENT OF THE CASE

The barebones credit application dated November 14, 2014, *see* A. 92-96, contained just enough personally identifiable information to permit Respondents' credit to be checked. It was signed only by Mr. and Mrs. Reynolds, for the stated reason of authorizing Crossroads "and any finance company, bank or other financial institution to which the Dealer submits my application ("you") to investigate my credit and employment history, obtain credit reports, and release information about your credit experience with me as the law permits." *Id.* at 94. The evident and overriding purpose of the application is to permit access to the applicants' credit reports both at the outset and later on, "[i]f an account is created," whereupon Crossroads was again authorized "to obtain credit reports" to review or collect on the account. *Id.*

Apart from the various authorizations afforded Crossroads as the dealer, the application stipulated that ***if*** Crossroads shared it with TDAF, Respondents would agree to the terms of the included arbitration provision, "**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 [TDAF]**." A. 94. There is no indication in the record how often Crossroads enlisted

TDAF as its agent for credit approval purposes, or that Respondents knew that TDAF would be used as such in their particular instance. [1]

The referenced arbitration provision, which appears on the final page of the application, purports to "significantly affect[]" the applicants' rights concerning the obtaining of credit reports and evaluation of creditworthiness in "any dispute" with Crossroads, TDAF, or any other agent to which either Crossroads or TDAF might submit the application. A. 96. Thus, had TDAF's investigation or evaluation given rise to a claim on behalf of Respondents under, for example, the federal Fair Credit Reporting Act, the dispute might have been "decided by arbitration and not in court." *Id.* (¶1). No part of the credit application contains any mention of the truck, its asking price, or the terms of payment, nor does it in any way commit either Respondents or Crossroads to the sales transaction.

Instead, the RISC was the operative agreement that governed the sale and financing of the truck. *See* A. 97-99. The RISC identified Respondents and Crossroads as the parties to the truck sale, reciting that Respondents' signatures evidenced their choice "to buy the vehicle on credit under the agreements in *this contract*." *Id.* at 97 (emphasis added). The RISC described the truck and set the purchase price, the amount financed, the interest rate, and the amount and date of onset of the monthly payments. Nothing in the RISC provided for spot delivery of the truck or otherwise indicated in any way that the sale was contingent on the future approval of credit. At the bottom of the last page, Crossroads, by its President's signature, assigned its beneficial interest in the executed contract to TDAF. *See Id.* at 99.

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[1] The statement that Respondents "signed a Credit Application authorizing TDAF to conduct a credit investigation," Pets. Br. at 2, is imprecise insofar as its truth is inevitably premised on occurrences after the fact. The credit application was provided Respondents by Crossroads, and that is the entity to which the authorizations were granted. TDAF was conditionally authorized to investigate Respondents' credit ***only*** in the event that Crossroads retained it to do so, and then ***only*** in its capacity as agent to permit Crossroads to fulfill the dealership's contractual obligation.

The RISC contained a host of other material terms. For example, Respondents granted a security interest in the truck which "secures payment of all you owe on this contract" and "also secures your other agreements in this contract." A. 98 (¶2.c). If the security interest were realized and the truck repossessed (and not redeemed) for non-payment, the proceeds from its sale would be applied to the outstanding loan balance. *See id.* (¶3.d-f). In the usual case, Respondents would be liable under the contract for any deficiency: "If the money from the sale is not enough to pay the amount you owe, you must pay the rest to us." *Id.* (¶3.f). In pursuit of such deficiency, the RISC permitted Crossroads or its assignee "to contact you in writing, by e-mail, or using prerecorded/artificial voice messages, text messages, and automatic telephone dialing systems, *as the law allows*." *Id.* at 99 (emphasis added).

Most significantly for purposes of this appeal, the RISC was fully integrated by virtue of an express and explicit 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.**

Id. (bold emphasis added) (the "Merger Clause"). The Merger Clause was set apart by a box from the remainder of the RISC, and Respondents were each required to sign it separately. *See id.* Finally, with respect to the interpretation and application of its terms, the RISC specified under the heading "Applicable Law" that "[f]ederal law and the law of the state of our address shown above [West Virginia] apply to this contract." *Id.* at 97. Respondents concur in Petitioners' recitation of the relevant procedural history. *See* Pets. Br. at 5.

SUMMARY OF ARGUMENT

Petitioners' Assignments of Error principally derive from the argument that the arbitration clause in the credit application cannot bind TDAF to the Merger Clause of the RISC subsequently executed between Respondents and Crossroads. That the parties to the credit application ***likewise*** were Respondents and Crossroads, however, is not subject to reasonable dispute, and the identity of parties to both contracts poses no hindrance to operation of the Merger Clause in accordance with their express intent. Even were TDAF deemed to have standing to enforce the credit application, the valid Merger Clause would yet bind TDAF as assignee of the beneficial interest under the RISC not only because the credit application was extinguished in its entirety, but also because Respondents' debt collection claims have nothing to do with the credit application and are not within the scope of its arbitration provision.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal involves assignments of error in the application of settled law to unique facts and circumstances. The questions presented are therefore appropriate for oral argument in accordance with Rule 19(a) of the West Virginia Rules of Appellate Procedure. Respondents believe that oral argument would benefit the Court and significantly aid the decisional process. As such, none of the criteria for deciding this appeal without oral argument, set forth in Rule 18(a), are applicable.

ARGUMENT

Standard of Review

Though Petitioners invoke the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, and the attendant public policy in favor of enforcing agreements to arbitrate, the law is clear that whether an arbitration agreement exists at all is a question of state law for the court. *See* syl. pt. 4, *Ruckdeschel v. Falcon Drilling Co., L.L.C.*, 225 W. Va. 450 (2010) ("'When a trial court is

required to rule upon a motion to compel arbitration pursuant to the [FAA], the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement.'" (quoting syl. pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250 (2010)).

With respect to the first issue, the court's task centers on the agreement's existence, rather than its substantive validity. *See Bluestem Brands, Inc. v. Shade*, 239 W. Va. 694, 699 (2017) ("[A]n agreement to arbitrate must contain the elements required for proper formation of any contract."); *Citizens Telecomm. Co. of W. Va. v. Sheridan*, 239 W. Va. 67, 73 (2017) ("If the contract defense exists under general state contract law principles, then it may be asserted to counter the claim that an arbitration agreement or a provision therein binds the parties." (citation and internal quotation marks omitted)). In line with the controlling federal law, the Supreme Court of Appeals of West Virginia has clarified that the trial court's inquiry extends to "whether an arbitration agreement is applicable." Syl. pt. 5, *Ruckdeschel*.

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), the Supreme Court of the United States reaffirmed that, in determining whether the parties agreed to arbitrate a dispute, courts "should apply ordinary state-law principles that govern the formation of contracts" (citations omitted)). In so deciding, courts must keep in mind that "[t]he FAA does not make all *arbitration clauses* in whatever writing enforceable; rather, it makes *arbitration agreements* enforceable." *Crown Pontiac, Inc. v. McCarrell*, 695 So. 2d 615, 617 (Ala. 1997) (emphasis in original). So, although there was indisputably an "arbitration clause" of uncertain effect appended to Respondents' credit application to Crossroads, the pertinent question is whether the circumstances here gave rise to an "arbitration agreement" between Respondents and TDAF,

foreclosing judicial resolution of a dispute in the collection of a debt allegedly due under the RISC following its assignment. At the end of the day, the FAA should not be so "liberally construed" as to impose an arbitration agreement where none ever existed, or even came close to existing.

I. RESPONDENTS' CREDIT APPLICATION WAS WITH CROSSROADS, NOT WITH TDAF.

The credit application is notable primarily for the vast swaths of blank space appearing on its first two pages. It contains only the essential personal information necessary to run a credit check. Respondents signed the application in two places: the first set of signatures merely confirmed their intent to apply for credit jointly; the second authorized ***Crossroads*** and its agents with which the dealer ***might*** share the application to investigate and evaluate Respondents' creditworthiness. Apart from the authorizations afforded Crossroads, the application stipulated that ***if*** the application were shared with TDAF at some future juncture, Respondents would ***then*** agree to the terms of the arbitration provision on the application's last page. But even then, the stated consideration for Respondents' conditional consent was merely the time, trouble, and cost of conducting the credit investigation.

The application was signed by Respondents and no one else, and nothing suggests that either of them suspected they were entering into any contract whatsoever with TDAF, and certainly not one binding either them or TDAF to any sort of obligation at that instant. *See* A. 160 (circuit court's observation that "[t]he negotiations concerning offers from the auto dealership cannot even begin until after the applicant's credit has been checked"). All Respondents agreed to do was to give ***Crossroads*** permission to check their credit in the event that they decided to enter into a contract with ***Crossroads*** to buy a truck in the future. TDAF was neither a party nor identified as such. Although the arbitration provision purported to apply ***if*** the application were later submitted to TDAF, there is no indication that Respondents were told that TDAF ***would*** be given their

application. It is impossible to conclude that any "meeting of the minds," which is "a *sine qua non* of all contracts," syl. pt. 2, *Triad Energy Corp. of W. Va., Inc. v. Renner*, 215 W. Va. 573, 600 S.E.2d 285 (2004), occurred between Respondents and TDAF as a result of Respondents filling out a credit application to be processed by Crossroads. *See, e.g., Quintech Sec. Consultants, Inc. v. Intralot USA, Inc.*, No. 2:11-cv-01689, 2011 WL 5105446, at *3 (D.S.C. Oct. 27, 2011) ("[A] party unknowingly named in an alleged contract clearly fails to satisfy the 'meeting of the minds' element." (citation omitted)).

The credit application is perhaps best characterized as a release — a discrete subspecies of contract — but, at bottom, it is a contract with Crossroads, not TDAF. In *Sheridan*, *supra*, this Court recognized that "[a] unilateral contract is established where one party makes a promissory offer and the other accepts by performing an act rather than by making a return promise." 239 W. Va. at 73, 799 S.E.2d at 150. Here, Crossroads offered to consider Respondents for an extension of credit, and Respondents accepted that offer by providing their background information and releasing any legal impediments to the dealership's use of that information. That Crossroads then turned to TDAF, among any number of options, to perform the actual credit-check and execute the dealership's part of the bargain is wholly insufficient to establish any contractual relationship between Respondents and TDAF.

Because it was not a party to the credit application, TDAF lacks standing to enforce the arbitration provision . *Cf. Gallagher v. Dupont*, 918 So. 2d 342, 347 (Fla. Dist. Ct. App. 2005) ("When a contract is designed solely for the benefit of the contracting parties, a third party cannot enforce its provisions even though the third party may derive some incidental or consequential benefit from the enforcement." (citation omitted)). TDAF's indisputable status as a ***nonparty*** to the credit application stands in direct contradiction to — and, indeed, cannot be reconciled with

— the essential premise of Petitioners' First Assignment of Error, *i.e.*, that the operation of the RISC's Merger Clause impermissibly "negated" the application's arbitration provision "entered into among [sic] different parties, Respondents and TD Auto Finance LLC." Pets. Br. at 1.[2]

II. THE MERGER CLAUSE QUITE SIMPLY EXTINGUISHED THE CREDIT APPLICATION BETWEEN RESPONDENTS AND CROSSROADS IN FAVOR OF THE SUPERSEDING RISC BETWEEN THE SAME TWO PARTIES.

A. By operation of its Merger Clause, the RISC entirely supplants the credit application.

The law provides that "[a]n integrated agreement is a writing or writings constituting a final expression of one of more terms of an agreement." RESTATEMENT (SECOND) OF CONTRACTS § 209(1) (1981).[3] Integrated agreements are accomplished through the inclusion of merger clauses, the operation of which are neither unusual nor unjust. The Merger Clause of the RISC here operates to integrate the parties' agreement concerning the purchase of the truck — including all the essential credit terms — and to thereby exclude the preliminary credit application. *See Frederick Bus. Props. Co. v. Peoples Drug Stores, Inc.*, 191 W. Va. 235, 240 n.2 (1994) (explaining that "[a] 'merger clause' is '[a] provision in a contract to the effect that the written

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[2] Although the circuit court did not rely on Petitioners' lack of standing to deny their motion to compel arbitration, this Court may affirm the ruling below on any alternative ground apparent from the record. *See, e.g., Adams v. Nissan Motor Corp. in U.S.A.*, 182 W. Va. 234, 240, 242, 387 S.E.2d 288, 294, 296 (affirming, on other grounds, circuit court's judgment entered on verdict for plaintiffs in lemon-law case). Though not material to its analysis, the court below stated in the "Background" section of its order that "[t]he credit application was between [Respondents] and [TDAF]." A. 158. That observation, as demonstrated by the foregoing discussion, is inaccurate and not binding on this Court regardless of whether it is deemed a finding of fact or a conclusion of law. *See, e.g., St. Mary's Med. Ctr., Inc. v. Steel of W. Va., Inc.*, 240 W. Va. 238, 244, 809 S.E.2d 708, 714 (W. Va. 2018) (recognizing that, in complex cases, "ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed *de novo*" (citations and internal quotation marks omitted)).

[3] With respect to questions of contract law yet to be definitively decided in West Virginia, the Supreme Court of Appeals recognizes the principles set forth in the Restatement (Second) of Contracts as authoritative. *See, e.g., Ryan v. Ryan*, 220 W. Va. 1, 5-6 (2006) (relying on Restatement to analyze contract issue revolving around mistake of fact, while noting adoption of Restatement position by other jurisdictions).

terms may not be varied by prior or oral agreements because all such agreements have been merged into the written document" (quoting BLACK'S LAW DICTIONARY 989 (6th ed. 1990)). "A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them." RESTATEMENT (SECOND) § 213(1). As to the question of arbitrability, the credit application is hopelessly and irrevocably inconsistent with the RISC: the first document evidences an agreement in the event of future contingencies to arbitrate a narrow class of disputes relating to threshold creditworthiness, and the second 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. The subsequent, integrated RISC controls here.

B. The credit application had nothing to do with Petitioners' collection efforts.

Though the credit application includes a tacked-on arbitration ***clause***, that gateway document manifestly does not encompass an arbitration ***agreement*** pertinent to the completed transaction. The only claims or disputes that the arbitration clause even arguably covers are those relating to the procurement of Respondents' credit reports and the initial evaluation of their creditworthiness. *See, e.g.*, *Anglin v. Tower Loan of Miss., Inc.*, 635 F. Supp. 2d 523 (S.D. Miss. 2009) (enforcing arbitration agreement as to borrower's claim that lender continued to obtain borrower's credit reports after customer relationship terminated, in violation of federal Fair Credit Reporting Act). Nothing in the credit application (including the arbitration provision) set forth any terms of the parties' subsequent sales transaction, such as the price of the truck, the applicable interest rate, the monthly payments, or the creditor's remedies in the event of default. Those terms are all in the RISC. *See* A. 160 (relating circuit court's finding that financing "is an entirely separate transaction from the actual sales agreement"). ***Only*** the RISC authorized collection of

any deficiency and specified the means thereof. And the RISC is a fully integrated contract that contains absolutely ***no*** agreement whatsoever to arbitrate.[4]

C. The circuit court's ruling was in line with indistinguishable cases from other jurisdictions.

Case authorities nationwide are in accord. Indeed, the court in *Duval Motors Co. v. Rogers*, 73 So. 3d 261 (Fla. Dist. Ct. App. 2011), concluded that an RISC with precisely the *same* language and *same* Merger Clause — which, as here, contained no arbitration provision — supplanted a Retail Buyer's Order ("RBO") entered into by the parties earlier that day, and which purported to require arbitration of any dispute. A merger clause, the court explained, is intended "to affirm the parties' intent to have the parol evidence rule applied to their contracts." *Id.* at 265 (citations and internal quotation marks omitted). The court flatly rejected the dealership's contention that the merger clause operated to prohibit proof of oral modifications solely, elaborating that the parol evidence rule "excludes *all* evidence extrinsic to a fully integrated contract." *Id.* (citation omitted) (emphasis added). The court acknowledged that "[t]he parol evidence rule is often characterized as excluding evidence of an oral agreement[, but] . . . . the evidence excluded under the rule includes *any* evidence outside the instrument that is considered the fully integrated contract." *Id.* at 265 n.3 (citations omitted) (emphasis added); *see* WILLISTON ON CONTRACTS 4th § 70:135

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[4] The preliminary nature of the credit application *vis à vis* the RISC readily distinguishes this situation from that confronted by the Court in *Bluestem*, *supra*. In that case, the plaintiff purchased Bluestem products through a credit agreement with financing entities. Bluestem was not a signatory to the credit agreement, which contained an arbitration provision. The plaintiff defaulted on the credit agreement, after which she was sued by a debt collector. The plaintiff then filed a third-party complaint against Bluestem, alleging that part of the debt was charged in violation of the WVCCPA. This Court held that, although Bluestem was not a party to the credit agreement, it could nonetheless avail itself of the arbitration provision because the plaintiff's claims derived exclusively from the enforcement of that agreement, such that she was estopped from denying its obligations regardless of who the signatory was. Here, though, the applicable contract is ***not*** the prefatory credit application — but the ***RISC***, the operative contract through which credit was extended and which contains all the terms of the purchase transaction. There is ***no*** claim arising from the credit application in this case.

("[E]ven though parol means verbal, it is not confined to the spoken world."); *accord Buckhannon Sales Co., Inc. v. Appalantic Corp.*, 175 W. Va. 742, 745 (1985) ("Under the parol evidence rule, a written contract is considered to merge all of the negotiations and representations made prior to execution, and extrinsic evidence is not available to alter or interpret language which is otherwise plain and unambiguous on its face." (citation and internal quotation marks omitted)); *Peoples Drug*, *supra*, at 240 n.2 (merger clause precludes variation of terms of integrated contract "by prior *or* oral agreements" (emphasis added)).

Examining the specific language of the *Duval Motors* merger clause (which, again, is *identical* to the one in the RISC here), the court observed that "it is clear that 'this contract' refers only to the RISC," and, "[m]ore importantly, the RISC does not refer to any other document as part of the contract." 73 So. 2d at 266. Thus, the court concluded, the RISC indeed contained the parties' "entire agreement," within which appeared no requirement to arbitrate. The court of appeals therefore held the RBO to have been merged into the RISC, affirming the trial court's denial of the dealership's motion to compel arbitration pursuant to the former. *Id.* at 269; *accord Weiszhaar v. Hampton Auto. Grp., Inc.*, No. 5:12-cv-46, 2012 WL 2034783, at *1 (N.D. Fla. June 6, 2012) (denying dealership's motion to compel arbitration as controlled by *Duval Motors*, "which construed nearly identical terms in a Retail Installment Sales Contract").

The same result was reached on similar facts by the appellate court in *HHH Motors, LLP v. Holt*, 152 So. 3d 745 (Fla. Dist. Ct. App. 2014), which, like the court in *Duval Motors*, affirmed the trial court's ruling denying arbitration. In *Holt*, the truck buyers executed a Retail Purchase Agreement ("RPA") containing an arbitration clause, after which they "immediately signed the RISC." *Id.* at 747. The RISC in *Holt* contained exactly the same Merger Clause as the one here and in *Duval Motors*, with no agreement to arbitrate. Thus, "the RISC, which did not have an

arbitration clause, superseded the RPA, which did. And because the RISC appeared facially complete, no parol evidence could be considered." *Id.* The *Holt* court noted that the dealership was merely "being held to the language of its own concurrently-signed documents," such that "[i]f it intended for credit buyers to be subject to the arbitration clause [in the RPA], then it could have said so in the RISC, but did not." *Id.* at 748; *see Gonzalez v. Consumer Portfolio Servs., Inc.*, 66 Va. Cir. 43, 2004 WL 2334765 (Va. Cir. Ct. Sept. 2, 2004) (concluding that RISC with same Merger Clause and no arbitration clause superseded arbitration provision in prior Buyer's Order, and observing that "if there is any doubt in the interpretation of the agreements in question, the contract is to be construed against the party who has prepared the contract" (citation omitted)).

Proper resolution of this appeal — as was evident in *Duval Motors*, *Weiszhaar*, *Holt*, and *Gonzalez* — turns on three facts bearing on the vitality of an arbitration provision contained in a side agreement. Where there exists: (1) an executed complete agreement ; (2) fully integrated by virtue of a valid merger clause; (3) but no arbitration provision, a promise to arbitrate in a merged side agreement cannot be enforced. Indeed, it makes no difference whether the side agreement is executed before or after the integrated contract. *See Salvagne v. Fairfield Ford, Inc.*, 794 F. Supp. 2d 826, 833 (S.D. Ohio 2010) (enforcing RISC merger clause and pointing out that if dealership wished after-signed side agreement "to impose a condition subsequent on its deals, the RISC must clearly reach out and incorporate the [side] Agreement, not the other way around"). Here, the executed RISC was the complete agreement between Respondents and Crossroads, integrated by the Merger Clause — every bit as valid as similar RISCs with the same Merger Clause examined by other courts. To the extent that any doubt remains, the circuit court accurately resolved it through application of the familiar canon that "***the construction of a written instrument is to be taken strongly against the party preparing it.***" A. 160 (citations and internal quotation marks

omitted) (emphasis in original). And TDAF does not deny — indeed it embraces — authorship of the arbitration clause within the Crossroads credit application.[5]

D. The general principle that separate, contemporaneously executed agreements should be construed together has no application here.

The situation is not to be confused with one involving multiple agreements, executed more or less contemporaneously and required to be interpreted in tandem in order for the entire transaction to make sense. *See* RESTATEMENT (SECOND) OF CONTRACTS § 132 ("The memorandum [of a contract] may consist of several writings if one of the writings is signed and the writings in the circumstances clearly indicate that they relate to the same transaction."); *cf. State v. Estep*, 115 W. Va. 55, 175 S.E. 350, 351 (1934) ("Separate instruments executed at the same time, and ***relating to the same subject matter***, may be construed together and taken as one instrument." (citation and internal quotation marks omitted) (emphasis added)).

Courts are careful to distinguish the circumstances giving rise to the joint-construction rule from those present here. *See Crown Pontiac*, *supra*, 695 So. 2d at 617-18 (construction together of separate agreements rejected in presence of merger clause in one); *Duval Motors*, 73 So. 2d at 267 (noting that case authority cited by dealership approving joint construction of separate agreements "does not indicate that the RISC or any other document executed in conjunction with

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[5] The assertion in Petitioners' Third Assignment of Error that the credit application "unambiguously extended to any subsequently executed [RISC]," Pets. Br. at 1, is simply incorrect. The sole purpose of the credit application was to permit Respondents' suitability for financing to be investigated and evaluated. ***If*** it turned out that TDAF would do the investigating and evaluating, ***then*** the consideration given by Respondents would be their consent to the arbitration clause "in exchange for the time, effort, and expense in reviewing" the application (aside from the boilerplate "other valuable consideration" that TDAF has not attempted to identify). A. 94 (emphasis deleted). There is nothing in the credit application that can reasonably be read, construed, or interpreted to tether the credit-check transaction that ***might*** involve TDAF to any subsequent purchase transaction involving Crossroads. The application does refer to obtaining additional credit reports for "reviewing or taking collection action on the account," *id.*, but "the account" referred to in that instance can only be an account with ***Crossroads***, the other party to the contract, in the event that the dealership elected to finance the purchase itself.

the sale contained a merger clause"); *Holt*, 152 So. 3d at 748-49 (noting joint-construction rule but "find[ing] no legal error in the trial court's conclusion that the RISC and its merger clause operated to negate the arbitration clause in the RPA"); *Gonzalez*, 2004 WL 2334765, at *3 ("Defendant's argument that all documents are to be read together in a commercial transaction as part of one agreement cannot overcome the defendant's own language which contradicts its position . . . . [The dealership] "had every opportunity to include the arbitration provision in the [RISC]."). The *Gonzalez* court's latter observation was not lost on the circuit court: "If [TDAF] wanted to arbitrate disputes that arose from the sale of the [truck], then [it] should have included an arbitration agreement in the same document as the integration clause." A. 161.[6]

The key to understanding the difference between the situations is whether the documents sought to be construed together complement each other with consistent material terms regarding the same essential agreement, or, instead, whether there is tension between the two documents such that the one with the merger clause rationally signals which one takes precedence. *See Salvagne*, 794 F. Supp. 2d at 833-34 ("[G]iven that the RISC and the [side] Agreement contradict each other in material ways, the Court cannot see how they could be read as one contract."). Thus, even if the rule of joint construction is considered in this case, the credit application and the RISC did not "relat[e] to the same subject matter," as required by *Estep* for the rule to apply. Whereas the RISC encompassed the entirety of the sales transaction specific to the purchase of the truck,

[6] It seems fair to say that Crossroads and TDAF must do enough business together that Crossroads could be persuaded to include an effective arbitration provision within the form RISC. Or Crossroads could at least, as a condition of financing, submit to its customers a written and signed arbitration agreement on behalf of TDAF that, in compliance with the existing Merger Clause, explicitly details the parties' changes to the RISC. Such appears to have been the case in one of the cases cited by Petitioner, *Kates v. Chad Franklin Nat'l Auto Sales N., LLC*, No. 08-0384-CV-W, 2008 WL 5145942 (W.D. Mo. Dec. 1, 2008). But an arbitration provision is not like a flu virus: it does not routinely attach itself to everyone and everything left unprotected within its immediate vicinity. It is more like a vampire who must first be invited inside before it can pursue its desired course.

the credit application related only to the threshold investigation of creditworthiness and to the procurement of credit reports.

And there is fundamental, irreconcilable conflict between the two documents. In every commercial transaction, the parties' respective rights to have disputes resolved in a judicial forum is the rule by default, just as much a part of an underlying contract as the implied duties of good faith and fair dealing. Parties may, of course, agree to arbitrate in accordance with the express terms of the contract, but if the contract is silent as to arbitration, then arbitration may not be had unless both parties agreed to it after the fact. In that way, then, the credit application is patently at odds with the RISC, and the joint-construction rule cannot apply. Consequently, Petitioners' Second Assignment of Error, that the circuit court erred by ruling that the credit application "changed the contract entered into by and between Respondents and Crossroads," *i.e.*, the RISC, is demonstrably incorrectly and definitively rebutted.

Each and every authority Petitioners trot out as ostensibly supporting application of the joint-construction rule, *see* Pets. Br. 12-19, rests immediately or ultimately on the lack of conflict between or among the subject documents. *See Bank Julius Baer & Co., Ltd. v. Waxfield, Ltd.*, 424 F.3d 278, 283 (2d Cir. 2005) ("[W]e read the Merger Clause as providing that the Pledge Agreements supersede any previous agreements ***only to the extent that they conflict***."), *abrogated on other grounds by Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287 (2010); *Johnson ex rel. Johnson v. JF Enters., LLC*, 400 S.W.3d 763, 768-69 (Mo. 2013) (construing arbitration agreement and merger clause together where they can be "harmonized"); *Ritter v. Grady Auto. Grp., Inc.*, 973 So.2d 1058, 1064 (Ala. 2007) (distinguishing prior authority enforcing merger clause because, "[i]n this case, the terms of the purchase contract and the arbitration agreement present no such conflict"); *Najera v. David Stanley Chevrolet, Inc.*, 406 P.3d 592, 595-98 (Okla.

Ct. App. 2007) (harmonizing assortment of contemporaneously executed documents to discern no conflict between merger clause in one and arbitration provision in another where parties did not dispute that those documents were executed "as part of the same transaction," *id.* at 595).[7] There is manifestly ***no*** harmony to be had here between the RISC — which preserves to Respondents resort to a court of law and constitutional entitlement to a jury trial — and the arbitration clause of the credit application, which seeks to strip those rights. At the end of the day, the RISC is the operative, integrated contract governing the parties' dispute, and the RISC contains no mention of any agreement to arbitrate. Respondents' claims must therefore be adjudicated in a traditional juridical forum.

CONCLUSION

For all the reasons set forth above, Respondents respectfully request that this Court reject the instant appeal and uphold the circuit court's Order denying Petitioners motion to compel arbitration.

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[7] The short-form Order entered by the district court in *Walker v. Hyundai Capital Am., Inc.*, No. CV417-045, 2018 WL 1352173 (S.D. Ga. Mar. 15, 2018), relied for its holding on the equally cursory ruling in *Wells Fargo Auto Fin., Inc. v. Wright*, 698 S.E.2d 17 (Ga. Ct. App. 2010). Both cases stand for the general proposition that agreements "executed simultaneously . . . should be read and construed together." *Walker*, 2018 WL 1352173 at *2; *Wright*, 698 S.E.2d at 19. That quote in *Wright*, however, derives in turn from *Lovell v. Thomas*, 632 S.E.2d 456, 460 (Ga. Ct. App. 2006), in which no merger clause was present that could have caused any deviation from the general rule.