No. 22-2948

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DANA JENNINGS AND JOSEPH FURLONG, Individually and on Behalf of Others Similarly Situated

Plaintiffs-Appellees

v.

CARVANA, LLC,

Defendant-Appellant

On Appeal from the United States District Court
For the Eastern District of Pennsylvania, No. 5:21-cv-05400,
Before the Honorable Eward G. Smith, District Judge

APPELLEES' RESPONSE BRIEF

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INTRODUCTION

This action concerns the unfair or otherwise deceptive practices of Appellant Carvana LLC ("Carvana") related to the sale of vehicles to Appellees Dana Jennings and Joseph Furlong ("Appellees") (and other similar situated persons) as part of its on-line, vehicle sales business. While Carvana agreed as part of its standard, uniform retail installment contracts or "RISCs" with Appellees to provide certain title and registration services as part of the Appellees' vehicle purchases, Carvana breached those promises. It turns out that Appellees' Carvana experiences are not unique. Public records reveal that Carvana fails to provide timely registration and title services in at least ten percent of its sales (if even at all) in which it has promised to do so. Neither Appellees, nor any other reasonable person purchasing vehicles in the twenty-first century would anticipate that Carvana would not be able to perform a basic function it agreed to do in its contracts within thirty days of a vehicle purchase—i.e., provide the permanent registration and title to the vehicle it sells and for which it collects money from consumer purchasers to pay public officials to title and register said vehicles as part of their financing agreements.

Since for whatever reason Carvana does not seem able to timely and properly register and title a material portion of the vehicles it sells, it issues multiple temporary tags and registrations from states other than where the purchasers

actually purchased the vehicles. Here, both Appellees purchased vehicles for personal use from Carvana and both signed their respective standard and uniform RISCs drafted and prepared by Carvana. Their RISCs were each expressly subject to the laws of Pennsylvania and in both RISCs Carvana agreed and was paid to provide Appellees permanent title and registration services. Over the course of many months Carvana continued to issue Appellees unauthorized 'temporary' tags, not from Pennsylvania but from other states that had no connections to the transactions; in Appellee Jennings situation, this pattern continued for almost two years after her purchase; and for Appellee Furlong it took Carvana a year and half to finally provide the permanent title and registration to his vehicle. Neither received the agreed upon promise until well after this action was commenced.

Not wishing for its conduct and practices subject to Appellees' claims to be reviewed by any court, Carvana seeks instead to compel all of Appellees' claims into arbitration even though its standard, uniform RISC it drafted and utilized with both Appellees (and others similarly situated): (i) does not contain any agreement to arbitrate and (ii) provides a standard, uniform "integration clause" that explains "Your and our entire agreement is contained in this [RISC]." Carvana bases its theory not on the RISC but upon a separate document it drafted but elected not to incorporate into its standard and uniform RISC as it could have done.

In the district court, Carvana sought to (i) compel Appellees' claims to arbitration, or in the alternative, (ii) have their claims dismissed. Here, Carvana appeals its purported right to arbitration and changes its theory for dismissal to a new argument (not even properly before the Court). However, Carvana's arguments fail for the reasons stated herein (and as held by the district court).

Last year the Supreme Court explained the Court's role in a situation just like this action as follows:

> the FAA's "policy favoring arbitration" does not authorize federal courts to invent special, arbitration-preferring procedural rules. *Moses H. Cone*, 460 U.S. at 24, 103 S.Ct. 927. Our frequent use of that phrase connotes something different. "Th[e] policy," we have explained, "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 302, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) (internal quotation marks omitted). Or in another formulation: The policy is to make "arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation. See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218–221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985)….
>
> Section 6 of the FAA provides that any application under the statute—including an application to stay litigation or compel arbitration—"shall be made and heard in the manner provided by law for the making and hearing of motions" (unless the statute says otherwise). A directive to a federal court to treat arbitration applications "in the manner provided by law" for all other motions is simply a command to apply the usual federal procedural rules, including any rules relating to a motion's

> timeliness. Or put conversely, it is a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration.

Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1713-1714 (2022).

When considering an effort to compel arbitration, as in Carvana argued to the district court,

> the FAA "creates substantive federal law regarding the enforceability of arbitration agreements, requiring courts to place such agreements upon the same footing as other contracts," *Arthur Andersen*, 556 U.S. at 630, 129 S.Ct. 1896 (internal quotation marks and citation omitted), it does not "alter background principles of state contract law regarding the scope of agreements," *id.*

JA138.

Hence, "[s]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally" *Perry v. Thomas*, 482 U.S. 483, 492 at FN 9 (1987). Thus, it remains for state law to determine whether a valid contract requiring arbitration exists as Carvana itself stated in its underlying motion below.

Simply put, Carvana seeks to evade *Morgan* by not even candidly addressing it while at the same time pursuing a novel, custom made rule in this appeal to favor its arbitration theory which ignores Pennsylvania contract and statutory law that applies to every other motor vehicle installment dealer doing business in the Commonwealth. Appellees urge the Court to affirm the district court's sound, rational application of Pennsylvania law governing all RISCs and to reject Carvana's

efforts to have Appellees' claims dismissed. While clearly Carvana wishes its standard, uniform RISC was different than what agreed, its desire to interpret the Federal Arbitration Act ("FAA") in a way that ignores the binding precedent of *Morgan* is simply disingenuous and misguided. Finally, Appellees and the hundreds of Carvana customers who were subjected to Carvana's broken promises and otherwise unfair and deceptive conduct should be allowed to proceed with their claims.

JURISDICTIONAL STATEMENT

Appellees agree, based solely upon Carvana's Notice of Removal, that the district court had subject matter jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C. §§ 1332(d), 1441 and 1452. JA3. Thus, this Court has appellate jurisdiction over the district court's denial of Carvana's motion to compel arbitration under the FAA, 9 U.S.C. § 16(a)(1).

Appellees object,[1] however, to Carvana's merits argument raised in its opening brief for the first time in this action to which the Court does not have pendent appellate jurisdiction. Even if it had done so,

> If "we are confronted with two similar, but independent, issues," there is no need for pendent appellate jurisdiction so long as "resolution of

[1] Without waiving this objection, Appellees address Carvana's misplaced, merits arguments *infra* to protect their claims and the claims of other Carvana customers who have been subjected to its unfair and deceptive practices. *See* Argument § E *infra*.

> the non-appealable order would require us to conduct an inquiry that is distinct from ... the inquiry required to resolve solely the [appealable] issue." *Id.* (quoting *Myers v. Hertz Corp.*, 624 F.3d 537, 553–54 (2d Cir. 2010) (citation omitted)). Simply put, if we can adjudicate the appealable order "without venturing into otherwise nonreviewable matters, we have no need—and therefore no power—to examine" those matters. *Id.* at 131 (internal quotation marks and citations omitted).

O'Hanlon v. Uber Techs., Inc., 990 F.3d 757, 765 (3d Cir. 2021).

Alternatively, Appellees object to consideration of Carvana's merits arguments since "[n]ormally, orders denying motions to dismiss are not immediately appealable. Such orders do not terminate the litigation and, hence, are not ordinarily final orders within the meaning of 28 U.S.C. § 1291." *Tara M. by Kantner v. City of Philadelphia*, 145 F.3d 625, 627 (3d Cir. 1998). They may, some limited circumstances not apparent here, be "under the so-called 'collateral order' if the issues are "effectively unreviewable on appeal from a final judgment" and other factors. *Id.*

Finally, Carvana's arbitration appeal is timely. The district court issued a Memorandum Opinion and Order denying its motion to compel arbitration on September 30, 2022. JA1-17. Carvana filed a timely notice of appeal on October 17, 2022. JA18-19.

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether the neutral statutory and common law contractual rules governing every motor vehicle installment sales contract in the

Commonwealth of Pennsylvania may be avoided to permit Carvana's purported right to arbitration?

2. Whether the Motor Vehicle Sales Finance Act ("MVSFA"), 12 Pa.C.S. § 6201, *et seq.*, requires all material agreements between an installment seller and buyer, including non-financing terms, to be contained in a single document retail installment contract ("RISC")? *See* JA1-2, JA8-12.

Assuming the Court has pendent appellate jurisdiction or jurisdiction based upon the collateral order doctrine to consider Carvana's merits appeal:

3. Whether the district court erred by not dismissing Appellees' statutory and contract claims based upon Carvana's broken promises and unfair and deceptive conduct of selling vehicles without a basis to provide timely title and registration for which it accepted monies to do. *See* JA13-15.

STATEMENT OF THE CASE

A. APPELLEES' TRANSACTIONS

Appellees allege their shared car buying experience involving Carvana promising and agreeing to collect title, plate, and registration fees to be paid to public officials in their RISCs for the purpose of acquiring permanent title and registration of the vehicles sold by Carvana. JA78, JA80 (AC ¶¶ 12-13, 24-25). Appellees relied upon the RISC and Carvana's promises to have the vehicle properly registered in the Commonwealth of Pennsylvania as evidenced by the agreements in the RISC, trade-

in of prior vehicles, and payments on the purchased vehicles. JA78, JA80(AC ¶¶ 15, 26). Appellees were deceived into relying upon Carvana's promises because Carvana concealed by omission that its standard business practices routinely breached the aforesaid promises by delaying permanent title and registration by Carvana through unlawful issuance of temporary tags from multiple state jurisdictions other than Pennsylvania. JA79, JA80-81 (AC ¶¶ 17-19, 21, 28-29, 31). Carvana's pattern and practice in relation to these broken promises and otherwise unfair or deceptive conduct involves many others just like the Appellees. JA81-99 (AC ¶¶ 32-167); JA272-73 at FN 1-2.

The Appellees' RISCs each specified that they were subject to Pennsylvania law. JA52 & 58. In addition, each RISC also stated that it was the entire agreement between the parties. JA54 & 61.

As a result of CARVANA's foregoing acts and omissions, Appellees and other consumers have been damaged by Carvana's breach of its promises in the sale and finance of vehicles to the Plaintiffs, and it has been unfairly enriched by receiving fees for services it never timely and lawfully performed. As a direct proximate result of Carvana's unfair conduct in breach of its promises to them, Plaintiffs were denied lawful ownership and operation of the subject vehicles purchased from Carvana. JA79, JA81-99 (AC ¶¶ 21, 32-167). In addition, Carvana's failure to timely register cars as it promised and received money to do –

sometimes for a period exceeding two (2) years - causes consumers to be questioned and sometimes arrested or detained by law enforcement while driving the temporarily registered cars. JA89-90 (AC ¶¶ 92-96).

The RISCs which were presented to the Appellees as part of their purchase transactions are standard, uniform contracts drafted by Carvana. JA50-55, JA57-62. The RISCs are each subject to the laws of Pennsylvania. JA52 & 58. Neither RISC contains any purported agreement to arbitrate. JA50-55, JA57-62. Both RISC's contain a clear, unambiguous integration clause which states: "Your and our entire agreement is contained in this [RISC]." JA54& 61. Neither of the RISCs were ever amended. JA78, JA80 (AC ¶¶ 13, 25).

The experience of the Appellees is part of Carvana's common and uniform practices with other customers. Multiple states (i.e., including Michigan, North Carolina, and Illinois) have pursued public enforcement actions against Carvana for this conduct involving hundreds of persons. JA272-73 (cited in FNs 1-2). In Maryland, public records reveal at least 10% of Carvana customers in that state failed to receive permanent registration and title to vehicles. JA273 at FN 2. Sixty-four consumers provided testimony to the District Court below confirming the pattern as well. JA272 (FN1). Unfortunately, based on these public records and unopposed testimony, Appellees' Carvana experiences are not isolated.

B. PROCEDURAL HISTORY

This action commenced in the state court on November 5, 2021 and was removed to the district court based on CAFA on December 9, 2021 (JA3, 23). Thereafter, Carvana moved to compel arbitration and to dismiss Appellees' claims (JA109-35, JA152-68), which the Appellees opposed (JA136-51, JA169-200). A hearing on Carvana' motion was held on June 7, 2022. JA208-70. Thereafter, the district denied the relief sought by Carvana on September 30, 2022. JA16-17. On October 13, 2022 Carvana filed its notice of appeal (JA18-20) and moved to stay the district court proceedings (JA39-40). On October 31, 2022 Appellees opposed the stay (JA27) and also moved for class certification since there is no real dispute of material fact precluding early class certification and Carvana's problems have continued even after the commencement of this action (JA27, JA271-82). On November 2, 2022, the district court granted Carvana's motion to stay the proceedings before it pending this appeal. JA39-40. At no time has Carvana sought leave to appeal the district court's denial of its non-arbitration, merits theories. JA21-27.

In the district court, Carvana generally presented and advanced the following arguments in support of its effort to compel Appellees' claims to arbitration: (i) its purported Retail Purchase Agreement ("RPA") and not the RISC controlled its relationship with Appellees notwithstanding the well pled allegations of the Appellees' complaint and RISC (JA123-25, JA157-59, JA217-18, JA221-22,

JA248-50); (ii) Georgia law and not Pennsylvania law, including common law, governed Carvana's uniform retail installment contracts signed in Pennsylvania (JA119, JA123, JA126, JA157, JA161-62, JA220-21, JA225-26); (iii) there should be a presumption to enforce any purported arbitration agreement over litigation even when the purported arbitration agreement is not enforceable under neutral, state laws governing classes of contracts just like the MVSFA and the common law on contracts (JA124-25, JA127-29, JA157, JA162-64 JA212-13, JA215, JA222-24, JA261); and (iv) that no deference is due to the rulings of Pennsylvania appellate courts interpreting the material state law at issue here including the MVSFA and common law (JA126-29, JA159-61, JA215, JA218-20, JA248-53, JA255).

Alternatively, Carvana generally argued to the district court that Appellees' claims should be dismissed by claiming: (i) its RISCs do not involve any contract agreement for Carvana to "permanently license and register the vehicles in exchange for the fees it charges and collected" as part of the transaction for that purpose; (ii) Carvana owes no duty of good faith and fair dealing to the Appellees related to the RISC; and (iii) Appellees' statutory claims under the Pennsylvania's Unfair Trade Practice Consumer Protection Law ("UTPCPL") do not apply to its sales practices in the Commonwealth or based on its unenforceable RPA. *See generally* JA129-33, JA164-66, JA261-66).

Applying the well pled facts and arguments of the parties, the district court found Carvana's separate RPA was unenforceable since: (i) "[u]nder Pennsylvania's single-document rules, the RPA and arbitration agreement are subsumed by the RISC and thus are not independently enforceable (JA1); and (ii) Carvana's standard RISC "inexplicably []failed to incorporate either the arbitration agreement or the RPA into" its terms as permitted by the common law (JA1).[2] While not identifying *Morgan* in its decision, but embracing its holding and rationale, the district court also correctly explained that "[n]otwithstanding the liberal federal policy favoring arbitration agreements…federal preemption will not save the otherwise unenforceable arbitration agreements" relied upon by Carvana. JA2. And the district court correctly recognized that "state law" determines whether there is a "valid arbitration agreement" that may be enforced. JA11.

As to Carvana's alternative efforts to have the Plaintiff's breach of contract claims and statutory claims dismissed, the district court denied the motion and found that the well pled allegations in Plaintiff's Amended Complaint "sufficiently alleges violations of both breach of contract and violations of the UTPCPL." JA13-14.

[2] Although not relevant for these Appellees, the district court agreed that a Carvana customer who purchases a vehicle for cash and without any installment agreement would be compelled to arbitration under the RPA. JA11.

C. HISTORY, PURPOSE, AND STRUCTURE OF THE MVSFA

The expressed scope of the MVSFA "relates to motor vehicle sales finance." 12 Pa.C.S. § 6201.[3] In addition, long ago, the Superior Court explained the legislative purpose of the MVSFA as follows:

> to bring under the supervision of the Commonwealth all persons engaged in the business of extending consumer credit in conjunction with the installment sale of motor vehicles and to insure honest and efficient consumer credit service for installment purchasers * * *. These and like statements in the preamble indicate that the Act is directed at the correction of abuses in installment sales under fictional instruments…

M. M. Waterbor, Inc. v. Livingood, 117 A.2d 790, 792 (Pa. Super. Ct. 1955) (cleaned up).

Further,

> In enacting the MVSFA, the Pennsylvania legislature determined and declared as a matter of legislative finding…
>
> > That an exhaustive study by the Joint State Government Commission discloses nefarious, unscrupulous and improper practices in the financing of the sale of motor vehicles in this Commonwealth which are unjustifiably detrimental to the consumer and inimical to the public welfare. Such practices prevail not only among some sellers, but also among some [others]…

[3] *Kelly v. Santander Consumer USA Inc.*, No. CV 20-3698, 2021 WL 518434, at *1 (E.D. Pa. Feb. 10, 2021)("The MVSFA was originally found in Chapter 7 of Title 69 of Purdon's Statutes. In 2014, it was repealed and recodified in Chapter 62 of Title 12 of the Pennsylvania Consolidated Statutes").

> That consumers, because of these legal technicalities and because of their unequal bargaining position, are at the mercy of unscrupulous persons and are being intolerably exploited in the installment purchase of motor vehicles. Such exploitation is evident in…unconscionable practices respecting execution of contracts….

Raleigh v. Credit Mgmt. Co., 549 A.2d 605, 606 (Pa. Super. Ct. 1988) (cleaned up). *See also* *Indus. Valley Bank & Tr. Co. v. Nash*, 502 A.2d 1254, 1262 (Pa. Super. Ct. 1985) ("The [MVSFA] was passed instead to correct the abuses as set forth above in the 'Findings and declarations of policy' section of the Act and those findings and declarations must be given weighty consideration when the Act is being interpreted"); *Gibbs v Titelman*, 502 F.2d 1107, 1110 (3d Cir. 1974)("Unquestionably the legislature of Pennsylvania, in enacting the MVSFA, comprehensively sought to regulate the area of automobile financing…The statute simply permits what private parties have agreed upon")(FNs omitted).

Relevant to this action, the MVSFA applies to "installment sales contracts" which generally involve:

> A contract for the retail sale of a motor vehicle, or a contract that has a similar purpose or effect, whether or not the installment seller has retained a security interest in the motor vehicle or has taken collateral security for a buyer's obligation, if:
>
> > (i) all or part of the purchase price is payable in two or more scheduled payments subsequent to the making of the contract; or (ii) a buyer undertakes to make two or more scheduled payments or deposits that may be used to pay all or part of the purchase price.

12 Pa.C.S. § 6202(1).[4]

In addition, the MVSFA requires that "[a]n installment sale contract **shall**: (1) be in writing; (2) contain **all the agreements between a buyer and an installment seller** relating to the installment sale of the motor vehicle sold; (3) be signed by the buyer and seller; and (4) **be complete as to all essential provisions before the buyer signs the contract**." 12 Pa.C.S. § 6221 (emphasis added).[5]

More specifically, the MVSFA also requires that "[a]n installment sale contract shall contain the following…items in writing and in a clear and conspicuous

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[4] Specifically excluded from the scope of MVSFA's regulation of "installment sales contracts" are: (i) licensed activities under the Consumer Discount Company Act or the Banking Code Act (12 Pa.C.S. § 6209), (ii) certain "sale or contract for sale upon an open book account[s])(12 Pa.C.S. § 6202(exclusion from definition of "installment sales contract" at ¶ 4), and (iii) certain "right[s] to acquire possession of goods under a lease" (12 Pa.C.S. § 6202(exclusion from definition of "installment sales contract" at ¶ 4). None of these express exclusions apply to Carvana's RISCs with the Appellees.

[5] Carvana seeks to narrow the scope of 12 Pa.C.S. § 6221 to have it apply only to terms related to "financing." Carvana Br. 38-44. In other words, it asks the Court to establish special exemptions to the plain language of the MVSFA which the Court cannot do. *See* Argument A *infra*. The plain language of § 6221(a)(2) provides that "[a]n installment contract **shall**…contain **all the agreements** between a buyer and an installment seller **relating to the installment sale** of the motor vehicle sold" (emphasis added). That broad language is simply not on its face limited to financing terms. This Court's precedent recognizes that "[t]he term 'relate' means 'to show or establish a logical or causal connection between.' Webster's Third New International Dictionary (Unabridged) 1916 (1991)" *Bobb v. Att'y Gen. of U.S.*, 458 F.3d 213, 219 (3d Cir. 2006). So, then by its plain text § 6221 applies to all agreements with any causal connection with the sale. Carvana's desire for a novel, pro-arbitration interpretation is simply not justified. *Morgan*, 142 S. Ct. at 1713-13.

manner, with each component of each subparagraph listed separately…(v) Other charges necessary or incidental to the sale or financing of a motor vehicle…which the seller contracts to retain, receive or pay on behalf of the buyer." 12 Pa.C.S. § 6222(5).[6] In addition, "[c]osts and charges under sections 6222 (relating to contents) and 6242 (relating to other costs included in amount financed) shall be separately itemized in an installment sale contract as to their nature and amounts." 12 Pa.C.S. § 6224. Also, generally under the MVSFA "[a] buyer may not validly waive through an action, agreement or statement any provision of this chapter intended to protect a buyer of a motor vehicle." 12 Pa.C.S. § 6234(a). Also, "any purported waiver effected by a contractual choice of the law of another jurisdiction contained in an installment sale contract, shall be deemed contrary to public policy and is void and unenforceable." *Id.* at § 6234(b).

Nowhere in the MVSFA does the statute address any purported rights to arbitration specifically or even address arbitration agreements at all. *See generally* 12 Pa.C.S., Pt. V, Ch. 62. *See also* The Proposed Pennsylvania Consumer Code: The Motor Vehicle Sales Finance Act, Report of the Advisory Committee on the

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[6] Of note, all RISCs completed in Pennsylvania must also have a required statement related to the consumer's rights under the UTPCPL 12 Pa.C.S. § 6222(9). But Carvana's RISCs with the Appellees omit the required statement altogether. JA50-55, JA57-62.

Consumer Credit Code (November 2006)(which does not discuss arbitration in one place as an issue intended to be addressed by MVSFA).

SUMMARY OF THE ARGUMENT

This appeal concerns two core issues for the Court. First, the Court has to consider Carvana's invitation to fashion a custom-made rule in favor of arbitration which would prevent the underlying claims from proceeding in a single action with others in similar situation around the country. Second, to accomplish Carvana's aims, the Court will also have to disregard the neutral, statutory and common law principles governing the installment sale of vehicles to the Appellees and others similarly situated. Carvana drafted RISC agreements which are clear and unambiguous. However, here Carvana requests that the Court add terms to those standard contracts which is not the role for a court interpreting contracts like those between these Parties. The district court reviewed the arguments and followed the law and should be affirmed and Carvana's effort to compel Appellees' claims to arbitration should be rejected since Carvana waived and forfeited such right in its standard and uniform RISCs.

The Court also needs to address whether Carvana's impermissible effort to pursue an interlocutory appeal is without justification. Its motion to dismiss was denied below and it has no right to appeal that decision without leave of the Court or a jurisdictional basis to do so. Yet, like its misguided effort to have the Court rewrite its contracts by adding terms it chose not to include, Carvana ignores normal

appellate practice rules and procedures and assumes the Court will address the merits of Appellees' claims. Even if the Court has proper jurisdiction over merits issues, Appellees have stated proper claims against Carvana and dismissal of their well pled claims is not justified.

STANDARD OF REVIEW

In *Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 450–51 (3d Cir. 2011), the Court summarized the appropriate standard of review related to whether or not the district court erred in failing to grant a motion to compel as follows:

> [W]e have jurisdiction in this case under the FAA to hear an appeal from the District Court's order denying a request to stay the proceedings pending arbitration...*See* 9 U.S.C. § 16(a)(2); *Zimmer v. CooperNeff Advisors, Inc.*, 523 F.3d 224, 228 (3d Cir.2008) (citing 9 U.S.C. § 16(a)(1)).
>
> We exercise plenary review over…"questions of law concerning the applicability and scope of arbitration agreements"…*Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 200 (3d Cir.2010) (internal quotation marks and citations omitted). To the extent that a district court makes factual findings in making these determinations, we review its findings for clear error. *Id.*

As for Carvana's effort to address the merits of Appellees' claims and the district court denial of its alternative motion to dismiss, the burden of establishing this Court's limited pendent appellate jurisdiction rests with it alone as the appellant. *Compare* *Morgan v. Thornhill*, 78 U.S. 65, 69 (1870)("the burden is on the appellants to show that an appeal lies in their case"); *E.E.O.C. v. PJ Utah, LLC*, 822

F.3d 536, 542 (10th Cir. 2016); *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 551 (1st Cir. 2005).

Assuming *arguendo* the Court exercises its discretion to even consider Carvana's merits arguments for dismissal of Plaintiffs' claims, the Court shall "conduct a plenary review of the District Court's order granting a motion to dismiss for failure to state a claim, *Gelman v. State Farm Mut. Auto. Ins. Co.*, 583 F.3d 187 (3d Cir. 2009), and 'accept as true the allegations of the complaint,' *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 452 (2012)." *Burrell v. Staff*, 60 F.4th 25, 33 (3d Cir. 2023)(cleaned up).

ARGUMENT

A. THE MVSFA GOVERNS ALL RISCS ENTERED INTO IN PENNSYLVANIA; PURPORTED AGREEMENTS WHICH DO NOT COMPLY WITH MVSFA ARE NOT ENFORCEABLE CONTRACTS UNDER THE PLAIN LANGUAGE OF STATE STATUTORY LAW

As summarized above (*see* § History, Purpose, and Structure of the MVSFA *supra*), the MVSFA comprises of neutral, non-specific terms "related to motor vehicle sales finance." 12 Pa.C.S. § 6201. Thus, the MVSFA "may be applied to invalidate arbitration agreements" and other provisions which fail to comply with its mandatory requirements for all RISCs executed in Pennsylvania. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). *See also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("arbitration is simply a matter of contract

between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration").

Put another way, nothing in the MVSFA prevents persons in the position of Carvana here from complying with the requirements of the act by including a desired agreement to arbitrate in their standard and uniform RISC agreement with customers. In fact, other similar actors who enter into RISCs on a routine basis do just that, as they are required to do under the MVSFA. *See e.g.*, JA172-74, JA185, JA200. Before the district court and here, Carvana asks for it to be excused from having complied with MVSFA's mandatory requirement that its "installment sale contract[s]...contain all the agreements between a buyer and an installment seller relating to the installment sale of the motor vehicle sold [and] be complete as to all essential provisions before the buyer signs the contract." 12 Pa.C.S. § 6221.[7] While Carvana wishes for such a judicial exemption to be established in its favor, its remedy is not here with this Court but with the Legislature who also barred such purported waivers to the mandatory requirements of "any provision of [MVSFA]

[7] Carvana attempts to distinguish its own "unscrupulous tactics" of selling vehicles and promising timely, permanent title and registration as part of the sale and financing, but it is unable to provide such basic services for ten percent of its sales with that of "exorbitant interest rates for financing" as if one problem is worse than the other. Carvana Br. 3. No reasonable person purchases a vehicle from a licensed dealer expecting the car to be unusable legally without the proper registration and title for months and months while they are making payments on their loan. All such similar "unscrupulous tactics" are subject to Pennsylvania law and the laws of Pennsylvania's sister states in the twenty-first century.

intended to protect a buyer of a motor vehicle." 12 Pa.C.S. § 6234(a).[8] *Compare* *Livingood*, 117 A.2d at 792; *Raleigh*, 549 A.2d at 606; *Nash*, 502 A.2d at 1262; *Gibbs*, 502 F.2d at 1110.

Carvana forfeited its purported right when it failed to apparently review Pennsylvania law which governs its business. Courts may not fix a party's chosen contractual terms and promises it itself elected. Yet now, after Carvana's conduct and practices at issue in this action are brought before a court, it wishes the actual enforceable contract had said something different or included terms Carvana failed to include in the first instance.

Pennsylvania law does not favor Carvana's tortured reading of the statute's installment contract definition. Carvana Br. at 21-48. "Generally speaking, the best indication of legislative intent is the plain language of a statute." *Commonwealth v. Gilmour Manufacturing Co.*, 822 A.2d 676, 679 (Pa. 2003) (citations omitted). "Furthermore, in construing statutory language, '[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage....'" *Id.* (quoting 1 Pa.C.S. § 1903) and "[w]hen the words of a

[8] The statute does expressly exempt certain categories of transactions from its scope. 12 Pa.C.S. §§ 6202, 6209. In light of those express exclusions, it is not the role of a court to add to the list of exclusions. *Compare* *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616–17 (1980). Carvana's argument that 12 Pa.C.S. § 6242 creates an exception to the MVSFA's one document rule is plain wrong. Carvana Br. 40, 46. If the Legislature had actually intended to create such an exception in § 6242 it would have done so just like it did in §§ 6202, 6209.

statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b); *see also* *Scheipe v. Orlando*, 739 A.2d 475, 478 (Pa. 1999). Here, as recognized by the District Court "the MVSFA requires that for the purchase of a vehicle through an installment contract, *all* agreements must be within the RISC." JA11 (emphasis in original).[9]

Carvana also wildly claims the Federal Arbitration Act (FAA) preempts the neutral MVSFA. Carvana Br. at 49-51. This argument is simply misplaced and designed to create a novel exception to neutral contract laws which govern Carvana's RISCs with the Appellees and are not permitted. *Morgan*, 142 S. Ct. at 1713-14.

To advance its preemption argument, Carvana relies upon *KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 50 (1st Cir. 1999) in which the court considered whether the FAA preempted a state law requirement about the location of where any arbitration proceeding should take place. The court concluded the state prohibition for only in-state arbitration proceedings "presents an obstacle to the achievement of the full purposes and ends

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[9] Even assuming *arguendo* some ambiguity in the statute's definitional language, Carvana nonetheless misunderstands the legislative purpose of the MVSFA by advancing arguments which are simply inconsistent with those purposes. *Livingood*, 117 A.2d at 792; *Raleigh*, 549 A.2d at 606; *Nash*, 502 A.2d at 1262; *Gibbs*, 502 F.2d at 1110 (all explaining the remedial purposes of the statute); 12 Pa.C.S. § 6202. Common sense and common-sense notions of fairness dictate that the goal of efficiency is hardly served by a consumer being compelled to analyze three unincorporated documents rather than one document for all materials terms of an installment sale as Carvana confusingly suggests.

which Congress set out to accomplish in enacting the FAA." *Id.* Unlike the neutral, state law contractual requirements at issue in this case, *KKW Enterprises* concerned a statute which directly and expressly concerned the parties' arbitration agreement term addressing the "venue in which arbitration is to take place." *Id.* While courts may re-write arbitration agreements in light of the FAA based on state laws impeding the purposes of the FAA, they are not permitted to rewrite neutral contractual provisions which did not discriminate against arbitration for the purpose of fashinging a novel pro-arbitration result to imply preemption. *Morgan*, 142 S. Ct. at 1713-14.[10]

Carvana's arguments here conflate validity of an arbitration agreement with the issue of whether an arbitration agreement was entered into at all. The former is province of federal law, the latter state law. The cases it cites in support of its arguments are squarely concerned with validity of an arbitration agreement acknowledged by the parties as existing between them, but which, in some aspect, runs afoul of state law. Here, plaintiffs argue that state statutory law, the MVSFA, invalidates the arbitration clause between the parties because that term, just like any other term not included in the RISC, is invalidated. In the *KKW Enters. V. Gloria Jean's* case cited by Carvana, the issue was whether the Rhode Island Franchise

[10] Carvana's reliance on *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (Carvana Br. at 50), fails for the same reasons.

Investment Act should be construed to prohibit any provision in a franchise agreement which designates a forum for arbitration outside of Rhode Island, and thereby obstructs the full purposes and ends of the FAA. Similarly, in *Doctor's Assocs. v. Hamilton*, commercial parties sought to dispute forum and choice of law restrictions under the New Jersey franchise law in an otherwise acknowledged arbitrable controversy. The issue in both cases is inapposite to the instant case where agreement to arbitration under state law is disputed, not whether the arbitration agreement acknowledged by both parties can be abrogated by state law otherwise.

Carvana also seems to argue that its RPA, rather than its RISC, is the actual foundational document for analysis of the Appellees' sale transactions. Carvana argues that because the RPA repeats one if the financing terms for each transaction – i.e., the Finance Charge – the documents therefore incorporate each other. This argument stands the MVSFA's purpose on its head, by making a separate document (i.e., Carvana's RPA) which contains only *some* of the installment related information required by the MVSFA in every installment contract rather than the RISC which contains all that the statute requires.

It should be noted that the MVSFA does not just protect consumers; it also protects Carvana's competitors to make sure all RISCs in Pennsylvania are "complete as to all essential provisions" and "contain all the agreements between a buyer and an installment seller." 12 Pa.C.S. § 6221. These mandatory requirements

level the marketplace among all installment sellers. Concerning its remedial scheme, the Pennsylvania Supreme Court recognized the importance of such uniform protections in *Danganan v. Guardian Prot. Servs.*, where it explained if it narrowed the application of any consumer protection statutes, "honest businesses could be placed at a competitive *disadvantage* competing against a business that generates revenue from unlawful acts that violate the statute." 179 A.3d 9, 13 (Pa. 2018) (cleaned up) (emphasis in original).

Because Pennsylvania's MVSFA is neutral as to arbitration issues in its statutory text, the District Court found that Carvana's separate and unincorporated arbitration agreement document is not enforceable since it is not within or incorporated by the RISC itself. JA8-11. To avoid this sound reasoning, Carvana seeks to divert the Court from the primacy of the RISC. Carvana claims that common law contract principles of express and implicit incorporation require the RISC, RPA, and Arbitration Agreement be interpreted as a collective single contract under the MVSFA's "installment contract" definition. Carvana prefers this argument rather than the single required RISC document because its RISC does not conform with the MVSFA's legislative purpose. This argument is simply misplaced and misleading. *See* § History, Purpose, and Structure of the MVSFA *supra*. *See also* *M. M. Waterbor, Inc. v. Livingood*, 117 A.2d 790, 792 (Pa. Super. Ct. 1955) (holding the MVSFA required a "strict construction").

Next, Carvana claims the title and registration fees Carvana collected to pay to public officials are only itemized in the RPA, not the RISC. As a result of its own self-induced failure to follow Pennsylvania law, Carvana further argues Appellees are estopped from pursuing their claims based on the RISC that identifies these fees in total but which violates the MVSFA by not itemizing them specifically. Carvana Br. at 20, 51-52. In advancing this argument, Carvana effectively concedes its standard, uniform RISC violates two other provisions of the MVSFA. 12 Pa.C.S. § 6222(5)(requiring that "Taxes" and "Other charges normally included in the delivered purchase price of a motor vehicle" be identified in "a clear and conspicuous manner" on the RISC); 12 Pa.C.S. § 6224 (requiring that "[c]osts and charges under sections 6222 (relating to contents) and 6242 (relating to other costs included in amount financed) **shall be separately itemized in an installment sale contract** as to their nature and amounts")(emphasis added). So, in addition to asking the Court to add terms to its clear, unambiguous integration clause which the Court cannot do (*see* Argument § B *supra*), Carvana wishes for the Court overlook its failure to comply with other mandatory provisions of the MVSFA which it simply cannot do.[11]

[11] Another way Carvana seeks for the Court to overlook the actual record is its disingenuous suggestion that "[t]he district court never addressed the effect of invalidating the RPAs on Plaintiffs' claims." Carvana Br. 16. The district court's opinion did in fact address this issue directly. JA11-12. It specifically found "[t]he RISCs…do not mention the existence of either of the RPAs or the arbitration

Finally, the results-oriented approach sought by Carvana simply conflicts with *Morgan* and as this Court just explained, it would impermissibly create a "'novel rule[] to favor arbitration over litigation.'" *White v. Samsung Elecs. Am., Inc.*, 61 F.4th 334 (3d Cir. 2023) (quoting *Morgan*).

The district court was correct in its review and holding where it aptly stated:

> For any agreement in an installment contract of a vehicle, regardless of the subject matter, the MVSFA sets the same requirements. Despite the federal government and Pennsylvania's "healthy regard for the federal policy favoring arbitration" *Taylor*, 147 A.3d at 509, the MVSFA does not come in direct conflict with the FAA and thus, is not preempted. *See also Epic Sys. Corp.*, 138 S. Ct. at 1622 (noting contract defenses that treat arbitration agreements equally to all other agreements will fall within the FAA's saving clause).
>
> The MVSFA treats arbitration agreements no differently than any other contractual provision. 12 Pa. C.S. § 6221. The MVSFA's requirement that all agreements be found in the RISC is a generally applicable contract defense and provides equal treatment to arbitration agreements. *Cf. Epic Sys. Corp.*, 138 S. Ct. at 1622 (requiring equal treatment for arbitration contracts to satisfy the saving clause of the FAA). The RISCs, here, do not mention the existence of either the RPAs or the arbitration agreements. To the contrary, they contain integration clauses that state the RISCs contain the complete agreement of the parties. Here, under the MVSFA's rule for installment sales for vehicles, the RPA and Arbitration agreements are subsumed into the RISC and are not independently enforceable.

JA11-12.

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agreements. To the contrary, they contain integration clauses that state the RISCs contain the complete agreement of the parties…the RPA and Arbitration agreements are subsumed into the RISC and are not independently enforceable." JA12. However, the district court also recognized that the RPAs could be enforceable in different situations involving "non-installment sales of vehicles." JA11.

Based upon the foregoing, Appellees request the Court affirm this holding of the district court and find since MVSFA governs all RISCs entered into in Pennsylvania, Carvana's side agreements not included in the RISCs themselves (directly or even by incorporation) do not comply with the MVSFA and therefore are not enforceable contracts under the neutral, plain language of state, statutory law.

B. CARVANA'S RISC "INTEGRATION CLAUSE" SAYS WHAT IT MEANS AND MEANS WHAT IT UNAMBIGUOUSLY SAYS

Under the common law of contracts in Pennsylvania and nearly every other of its sister states, a contractual

> integration clause which states that a writing is meant to represent the parties' entire agreement is also a clear sign that the writing is meant to be just that and thereby expresses all of the parties' negotiations, conversations, and agreements made prior to its execution….
>
> Once a writing is determined to be the parties' entire contract, the parol evidence rule applies and evidence of any previous oral or written negotiations or agreements involving the same subject matter as the contract is almost always inadmissible to explain or vary the terms of the contract.

Yocca v. Pittsburgh Steelers Sports, Inc., 854 A.2d 425, 436-37 (Pa. 2004). *See also Allegheny Cnty. v. Allegheny Cnty. Prison Emp. Indep. Union*, 381 A.2d 849, 853-54 (Pa. 1977) (rejecting an expanded view of a contract to include rights "implicitly incorporated into it…when the contract includes a broad clause to the effect that the agreement as written is the complete agreement between the parties" and the so-called implicit rights were not included).

Here, the standard, uniform integration clause used by Carvana's RISCs with the Appellees reads as follows:

> **Entire Agreement.** Your and our entire agreement is contained in this Contract. There are no unwritten agreements regarding this Contract. Any change to this Contract must be in writing and signed by you and us.

JA54, JA61.

Within that clause, the term "Contract" is defined in the RISC as "referring to this Retail Installment Contract and Security Agreement." JA52, JA59. Nowhere in the RISC is there any mention or incorporation of any other papers which contain Carvana's purported arbitration agreement. *See generally* JA50-55, 57-62.

> Traditionally, the general rule that prohibits a court from rewriting the parties' agreement while purporting to construe it also prevents a court from adding terms or provisions to the contract. Additional obligations or undertakings may not be imposed on a party under the guise of interpreting or construing a contract. A court may not, by interpretation or construction, engraft on a contract a limitation or restriction that is inconsistent with the expressed or apparent object of the parties.

11 WILLISTON ON CONTRACTS, COURTS MAY NOT REWRITE THE CONTRACT—ADDING TO THE CONTRACT; SUPPLYING OMITTED ESSENTIAL TERMS § 31:6 (4th ed., May 2022 update)(FNs omitted).

Pennsylvania courts are in accord with these core principles of contract interpretation. *Cup v. Ampco Pittsburgh Corp.*, 903 F.3d 58, 64 (3d Cir. 2018)("extrinsic evidence…[may] be admitted, if at all, only to resolve an ambiguity

in the [contract]…and should not be used to add terms to a contract that is plausibly complete without them").

While Carvana admitted to the district court that its contractual provisions could be easily updated to do what it wished the original contract did (JA250-51) and expressly incorporates its separate arbitration agreements, the unambiguous language of its integration clause used with the Appellees and all the putative class members states otherwise. JA54, JA61. There is nothing ambiguous about the provision which states, "Your and our **entire agreement** is contained in this Contract." *Id.* (emphasis added).[12] Carvana's efforts to add terms to incorporate documents not contained within the RISC itself is not a power this Court generally has and there is no just basis for the Court to fix Carvana's drafted contractual terms. *Cup*, 903 F.3d at 64; 11 WILLISTON ON CONTRACTS § 31:6. *See also Vine v. Com., State Employees' Ret. Bd.*, 9 A.3d 1150, 1161–62 (Pa. 2010) (deferring to the statutory "text as the Legislature actually wrote it, and that doing so is particularly advisable where judicially inserting new words would substantively alter its meaning

[12] Carvana claims Appellees seek to rewrite the terms of their agreement with Carvana. Carvana Br. 21. However, the truth is Carvana is the party asking the Court to rewrite the terms it drafted in its standard and uniform RISC that covered the Parties "entire agreement." It is a clever tactic to project blame on the Appellees for its own voluntary election, but the Court cannot rewrite the Parties' agreed upon terms in the RISC which are clear and unambiguous. *See* Argument § A.

and application") (cleaned up).[13] *Thomas Assocs. Investigative & Consulting Servs., Inc. v. GPI LTD., Inc.*, 711 A.2d 506, 509 (Pa. Super. Ct. 1998) ("as Justice Benjamin Cardozo explained: 'We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it.' *Anderson v. Wilson*, 289 U.S. 20, 27, 53 S.Ct. 417, 420, 77 L.Ed. 1004 (1933)").

Even if there were any ambiguities[14] in Carvana's standard and uniform integration clause in every one of its RISCs, they would be construed against the drafter of the contract—i.e., Carvana. *Wert*, 124 A.3d at 1259. *Compare* 1 Pa.C.S. § 1921(b)("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit").

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[13] As if to gain sympathy for the terms it desires as opposed to the terms it agreed, Carvana also argues that its seven-day cancellation policy outside the RISC's terms is voided under the Appellees' plain language application of the MVSFA. Carvana Br. 18, 35. Therefore, if affirmed, Carvana reasons consumers would be harmed. *Id.* at 35. Carvana's cancellation policy is not before the Court and raising it for the first time on appeal is not appropriate. Further, the policy might have some benefit for consumers if Carvana had disclosed at the time of sale or any time during the seven-day cancellation period that its unable to provide timely title and registration in ten percent of the sales it engages (if at all). But Carvana made no such disclosures and consumers suffered a variety of consequences for Carvana's omissions.

[14] "An ambiguity is present if the contract may reasonably be construed in more than one way." *Wert v. Manorcare of Carlisle PA, LLC*, 124 A.3d 1248, 1259 (Pa. 2015).

Based upon the foregoing, the plain, unambiguous language of Carvana's selected "integration clause" says exactly what it means: "Your and our entire agreement is contained in this Contract." JA54, JA61. The Court should decline Carvana's invitation to rewrite the terms of the RISC.

C. THE COMMON LAW AND THE MVSFA ARE CONSISTENT; BY THE PLAIN LANGUAGE AND APPLICABLE LAW GOVERNING CARVANA'S RISCS IT FORFEITED ANY TERM NOT INCLUDED IN THE RISC ITSELF

As accurately stated by Carvana's RISCs with the Appellees, the RISC "is governed by the law of Pennsylvania." JA52, JA58. This is expressly consistent with the MVSFA which states, "any purported waiver effected by a contractual choice of the law of another jurisdiction contained in an installment sale contract, shall be deemed contrary to public policy and is void and unenforceable." 12 Pa.C.S. § 6234(b). *See also* 12 Pa.C.S. §§ 6208, 6236.

In Pennsylvania, "'[i]n order to abrogate a common[ ]law principle, the statute must "speak directly" to the question addressed by the common law.' *In re Rodriguez*, 587 Pa. 408, 900 A.2d 341, 345 (2003)." *Propel Charter Sch. v. Dep't of Educ.*, 243 A.3d 322, 331 (Pa. Commw. Ct. 2020)(cleaned up). Here, the mandatory requirements of the MVSFA speak directly to the mandatory requirements for every "installment sales contract" between Carvana and a customer in Pennsylvania including Appellees. *Livingood*, 117 A.2d at 792; *Raleigh*, 549 A.2d at 606; *Nash*, 502 A.2d at 1262; *Gibbs*, 502 F.2d at 1110 (all explaining the

remedial purposes of the statute); 12 Pa.C.S. § 6202. But also relevant to this case, the terms at issue are consistent between the common law and the MVSFA and are not in conflict.

Under the common law, parties to a contract such as Carvana's standard, uniform RISCs (JA54, JA61), are permitted to utilize a standard, uniform integration or incorporation clause to expand or limit the scope of a contract. *See* Argument § B *supra*. The MVSFA has some limits on such rights not relevant to this action and Carvana's standard, uniform integration clause. Put another way, incorporation by implication as Carvana's argues, just like under the common law, is not permitted since an "integration clause which states that a writing is meant to represent the parties' entire agreement is also a clear sign that the writing is meant to be just that and thereby expresses all of the parties' negotiations, conversations, and agreements made prior to its execution." *Yocca*, 854 A.2d at 436-37.

Carvana asks the Court to ignore the contractual term it drafted in the RISC's standard, uniform integration clause. Carvana Br. 22-24. However, it is settled law that when "the meaning of a written contract without any guide other than knowledge of the simple facts on which, from the nature of language in general, its meaning depends, the terms of the contract will be deemed unambiguous." Without a basis in the RISC itself, based upon its broad, clear and unambiguous integration clause, there is no basis to look to any other documents which are not referenced in the RISC

or even incorporated into the RISC. *Cup*, 903 F.3d at 64; 11 WILLISTON ON CONTRACTS § 31:6. *See also* *Kripp v. Kripp*, 849 A.2d 1159, 1163 (Pa. 2004) ("When the terms of a contract are clear and unambiguous, the intent of the parties is to be ascertained from the document itself…When, however, an ambiguity exists, parole evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is patent, created by the language of the instrument, or latent, created by extrinsic or collateral circumstances")(cleaned up); *J.C. Penney Co. v. Giant Eagle, Inc.*, 813 F. Supp. 360, 367 (W.D. Pa. 1992), aff'd, 995 F.2d 217 (3d Cir. 1993)(same).[15] The case of *Dunn v. B & B Auto.*, No. CIV.A. 12-377, 2012 WL 2005223 (E.D. Pa. June 5, 2012) is illustrative of Appellees' point. In *Dunn*, the court found that the parties' agreed upon RISC subject to the MVSFA, unlike Carvana's RISCs with the Appellees here, integrated the separate arbitration agreement. The *Dunn* court explained, "the Arbitration Agreement was not disguised within a separate document outside the provisions of the RISC. Rather, it was expressly included by reference and prepared so as to clearly alert the parties of

[15] Carvana relies upon *Scott v. Bryn Mawr Arms, Inc.*, 312 A.2d 592, 597 (Pa. 1973) to claim all agreements at the time of a transaction should be considered. Carvana Br. 27. While *Scott* does make that statement it goes on later to hold that "the plain terms of the agreement of the parties as written" barred the admission of "[e]vidence of prior or contemporaneous understandings between the parties." *Id.* So, *Scott* actually supports the Appellees view of the facts before the Court in this action.

their obligation to arbitrate disputes involving the RISC if so desired by either party." *Id.* at *4 (emphasis added). *See Kent v. DriveTime Car Sales LLC*, No. 2:20-CV-02529-KSM, 2020 WL 3892978, at *3 (E.D. Pa. July 10, 2020)(the installment agreement specifically incorporated the separate arbitration agreement into its terms).[16]

Conversely, other courts have routinely found (just like the district court did here) that when parties to an installment sale contract agree to a RISC which limits the scope of an integration clause to the specific contract, parol evidence and other documents will not be enforceable. In *Knight v. Springfield Hyundai*, 81 A.3d 940, 944 (Pa. Super. Ct. 2013),[17] the RISC at issue "contain[ed] an integration clause, which stated: 'This Contract contains the entire agreement between you and us relating to this contract.'" The Superior Court rejected the effort to rewrite the RISC

[16] Seemingly overlooking the holdings in *Dunn* and *Kent*, Carvana argues that its arbitration agreement is clearer for the consumer by being in a separate document rather than lengthening the RISC with additional arbitration terms. Carvana Br. 18. Given its failure to sell cars with the ability to provide timely title and registration, Carvana's altruistic, after-the-fact argument should frankly be viewed with some skepticism.

[17] Carvana claims *Knight* is "unpublished" and not deserving of any consideration as a "thinly briefed case." Carvana Br. 19. This is another example of Carvana's inability to understand Pennsylvania law and practice. *Knight* is published in both the Superior Court Reporter and West's Atlantic Reporter (2013 Pa. Super. 309, 81 A.3d 940) where Carvana could have reviewed it and its progeny before drafting their standard and uniform RISCs but apparently did not.

and add terms not included by the parties themselves and provided this analysis which applies here:

> [The RISC's] integration clause…states that it is "the entire agreement" between Dealer and Knight….The [separate document] contained an arbitration agreement, but the RISC did not. Thus, we conclude there was no enforceable arbitration agreement between Knight and Appellees, and the trial court erred as a matter of law by granting Appellees' Preliminary Objections and submitting the case to binding arbitration.

Id. at 948-49. *See also* *Gregory v. Metro Auto Sales, Inc.*, 158 F. Supp. 3d 302, 305 (E.D. Pa. 2016) (applying *Knight* to deny arbitration motion); *Mount v. Peruzzi of Langhorne LLC*, No. CV 21-2166, 2021 WL 3708714, at *3 (E.D. Pa. Aug. 20, 2021)(same); *Zentner v. Brenner Car Credit, LLC*, 273 A.3d 1033 (Pa. Super. Ct. 2022), appeal denied, 282 A.3d 688 (Pa. 2022)(same); *Earley v. JMK Assocs.*, No. CV 18-760, 2018 WL 11305388, at *1 (E.D. Pa. Sept. 5, 2018)(applying the *Knight* rationale and narrow integration clause in relation to a Pennsylvania home improvement contract subject to statutory requirements).

As shown *supra*, the Appellees do not believe the common law and the MVSFA are in conflict. Under the common law, courts will not add words to clear, unambiguous contractual agreements like "Your and our **entire agreement** is contained in this Contract" (JA54, JA61). Like the common law, the MVSFA also requires enforcement of the terms actually agreed to in the RISC. 12 Pa.C.S. § 6221. Under the MVSFA other purported agreements not expressly incorporated into the

parties' agreement are not enforceable. *See* 12 Pa.C.S. § 6234 (a buyer "may not validly waive through an action, agreement or statement any provision of this chapter intended to protect a buyer of a motor vehicle" and any such purported waiver "shall be deemed contrary to public policy and is void and unenforceable"). Under the common law, just like the cases enforcing arbitration agreements which expressly incorporate another document (i.e., *Dunn* and *Kent)*, a contract which expressly references other documents will be enforced (subject to other laws like MVSFA governing the transaction). The Superior Court summarized modern, common law in this regard as follows, "The terms of a contract include terms in documents that a signed contract document specifically and clearly identifies and expressly incorporates by reference." *In re Est. of Atkinson*, 231 A.3d 891, 899 (Pa. Super. Ct. 2020).

Relatedly, Carvana attempts to support its common law implication arguments by applying Pennsylvania's requirements mandating delivery by car sellers to car buyers of other standard sale documents including the agreement of sale, odometer statements, and warranty and other documents. Carvana Br. 33. More specifically, it argues that these other requirements for disclosure of certain sale terms by providing a copy of the agreement means that Legislature, in drafting the plain language of the MVSFA, did not actually establish a single document disclosure of an installment sale's material terms. Carvana Br. 33-34. This

argument is a simple red herring and should be disregarded. The Legislature has so explained in the code itself: "Statutes in pari materia shall be construed together, if possible, as one statute." 1 Pa.C.S. § 1932(b). *See also* *In re Mancini*, 390 B.R. 796, 802 (Bankr. M.D. Pa. 2008)(cititing *in pari materia* cannon in relation to MVSFA); *Swartley v. Harris*, 40 A.2d 409, 411 (Pa. 1944)("It is a fundamental principle that all statutes in pari materia, relating to the same subject, shall be construed concurrently when possible"). Because Carvana misconstrues completely the intent of the MVSFA, it unsurprisingly asks the Court to look to other statutes which related to its relationships with Appellees and every other customer and conclude those other statutes change the plain language of the MVSFA.[18] That construction simply fails on its face. 1 Pa.C.S. § 1932(b); *Swartley*, 40 A.2d at 411.

[18] The MVSFA is concerned with the ***agreement*** for the installment sale of motor vehicles in the Commonwealth of Pennsylvania. Odometer disclosures required by 37 Pa. Code §301.4(a)(3) concern the sale of cars but do not involve installment sales contracts. Rather the odometer disclosure is a duty imposed upon the seller/creditor by law but does not implicate any agreement between buyer and seller/creditor. In addition, extended warranty agreements or GAP insurance agreements are also not material to agreements between buyer and seller related to the installment purchase. Rather, GAP agreements are material to the agreement terms between the buyer and GAP insurance underwriter and do not implicate any agreement between buyer and seller/creditor under the scope of the MVSFA. Moreover, the MVSFA explains these related disclosures are separate and apart from the required terms of the MVSFA. 12 Pa.C.S. § 6221(e)(2)(iii).

Appellees ask the Court to reject Carvana's effort to cast doubt on the MVSFA based on common law interpretations of contract and find a conflict between the two, so as to compel Appellees' claims to arbitration. To the contrary, based upon the authorities cited above, the MVSFA and the common law separately and also when read together bar Carvana's new desire to rewrite its contracts by judicial amendments. Carvana waived the right it now claims to have by not drafting its own standard, uniform contracts with different terms. It simply is not the Court's job to correct Carvana's choice of words in its RISCs. Rather, the Court may only interpret their Parties' actual agreement which expressed their "entire agreement" within each RISC and did not incorporate any arbitration agreement in its RISC. JA54, JA61.

D. THIS COURT IS ALSO REQUIRED TO FOLLOW THE DECISIONS OF THE INTERMEDIATE STATE APPELLATE COURTS IN THE ABSENCE OF CONVINCING EVIDENCE THAT THE HIGHEST COURT OF THE STATE WOULD DECIDE DIFFERENTLY.

Knowing the state court case law, as well as the majority of district court opinions from multiple cases including this case, does not support its view of how the plain language of its drafted RISC should be interpreted, Carvana invites the Court to conclude the *Knight* decision is not "binding" or "persuasive." Carvana Br. 14. As Carvana's knows, the Supreme Court explained long ago

> where jurisdiction rests on diversity of citizenship, federal courts, under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, must follow the decisions of

> intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently.

Stoner v. New York Life Ins. Co., 311 U.S. 464, 467 (1940).[19] *U.S. Underwriters Ins. Co. v. Liberty Mut. Ins. Co.*, 80 F.3d 90, 93 (3d Cir. 1996) ("The rulings of intermediate appellate courts must be accorded significant weight and should not be disregarded absent a persuasive indication that the highest state court would rule otherwise…In the current case, existing decisions of Pennsylvania's intermediate appellate court provide ample guidance for us to resolve this dispute"). *See also Gruber v. Owens-Illinois Inc.*, 899 F.2d 1366, 1369–70 (3d Cir. 1990).

Here, the arbitration issues presented to the Court by the Parties' arguments based upon either the plain language of the RISC or the requirements of the MVSFA are settled law. Decisional law on the key issues related to common law contracts interpreting "integration clauses," a court's inability to add terms to an unambiguous contract, and the election not to expressly incorporate any other agreements into the RISCs cannot be meaningfully disputed. *See* Argument § A *supra*. In addition, the developed decisional law of the Superior Court and also various district courts also views the MVSFA strictly says exactly what it means: "Your and our entire agreement is contained in this Contract." JA54, JA61. *See* Argument § B.

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[19] This action is before the Court on Carvana's removal based upon CAFA. JA3, JA23.

The Court should decline Carvana's invitation to rewrite the terms of the RISC to incorporate documents and papers Carvana chose not to include in the first instance. *Knight* and its progeny of cases since either have (i) compelled arbitration based upon broad RISCs which expressly incorporate or integrate separate agreements into their terms (which Carvana was aware of but declined to follow in its form contract) or (ii) denied motions to compel arbitration where RISCs expressly contain the "entire agreements" between the parties which do not include arbitration rights (just like Carvana's standard RISCs before the Court in this action). *See e.g.* *Dunn*, 2012 WL 2005223, *Kent*, 2020 WL 3892978, *Knight*, 81 A.3d 940, *Gregory*, 158 F. Supp. 3d 302, *Mount*, 2021 WL 3708714, *Zentner*, 273 A.3d 1033. All of these decisions are settled and consistent with the longstanding common law and/or the plain language of MVSFA.

Carvana argues that a single case of the Supreme Court of Pennsylvania, *Calderoni v. Berger*, 50 A.2d 332 (Pa. 1947) trumps the favorable *Knight* progeny relied upon by Superior Court in multiple instances as well as the District Court below and in many of other instances. Carvana Br. 24-25, 36. *Calderoni* is simply distinguishable for three reasons and is not on all fours with the facts of this matter. First, *Calderoni* concerned transactions from 1939 (*Calderoni*, 50 A.2d at 332) which was before the MVSFA was effective in 1947 (Motor Vehicle Sales Finance Act, Act of June 28, 1947, P.L. 1110, §§ 1–37). Second, none of the three documents

in *Calderoni* contained an unambiguous, integration or incorporation clause like that which is before the court in this action; rather, the three documents consisted of (i) "sales agreement dated March 21, 1939 [which] recited the terms of sale," (ii) a "bailment lease, dated April 1, 1939," and (iii) "receipt signed by defendant and delivered to plaintiff was dated April 1, 1939." *Calderoni* 50 A.2d at 332. The receipt did "acknowledge[] receipt of the used automobile taken in part payment, the cash payments, and recites the terms of the sales agreement. It also notes the name of the finance corporation and how the installments are to be paid." *Id.* Given the ambiguities between the three documents, the court reasoned parol evidence was required to determine "what the contact between the parties was." *Id.* at 333. Third, modern common law now recognizes that "[i]t is well-settled that parol evidence is not admissible to alter or vary the terms of a contract which has been reduced to an integrated writing." *Lenzi v. Hahnemann Univ.*, 664 A.2d 1375, 1379 (1995). "A contract is integrated if it represents a final and complete expression of the parties' agreement…Where a contract purports to be a complete legal obligation without any doubt as to its object or extent, it is presumed to reflect the whole legal right of the parties." *Id.* (cleaned up). Here, the parties' RISCs clearly state they amount to the "entire agreement" between them. JA54, JA61. Therefore, the parol evidence considered in *Calderoni* does not apply since the RISCs are integrated, final and complete expressions of the Parties' agreed upon terms. *Lenzi*, 664 A.2d at 1379.

Since it cannot find a persuasive basis to ignore the plain language of the MVSFA, Pennsylvania common law on contracts which applies to its agreements, and the *Knight* progeny consistently relied upon by Superior Court and various district courts, Carvana also asks the Court to consider caselaw from other jurisdictions which is distinguishable from the law and facts in this case. Carvana Br. 28, 36, 37, 49, 53. For example, in *Ford v. Antwerpen Motorcars Ltd.*, 117 A.3d 21, 26 (Md. 2015), unlike this case, the "RISC contain[ed] an integration provision [and]…incorporate[d] by reference the Buyer's Order and its arbitration provision." The holding therefore in *Ford* is based on a factually different situation and rulings from this case.[20] In addition, *Farrell v. Rd. Ready Used Cars, Inc.*, No. 3:17-CV-2030 (JCH), 2018 WL 1936143, at *6 (D. Conn. Apr. 24, 2018) involved claims based solely on charges identified in the side agreement containing the arbitration provision. Here in contrast, Appellees base their claims on their RISCs and the charges identified on the RISCs which are the only enforceable contracts under Pennsylvania law – which is expressly incorporated into the RISCs. JA52, JA58. *See*

[20] *Ford* also relied upon the Fourth Circuit's opinion in *Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 700 (4th Cir. 2012) which identified based upon the facts before it that the buyer failed to "establish that the RISC's integration clause prevents reading both [the RISC and separate arbitration agreement] together as a single agreement. Here, Appellees have shown *supra* that Pennsylvania contract law controls and the integration clause used in in Carvana's standard RISCs is unambiguous and parol evidence cannot be applied. *See* Argument § B *supra*.

Argument § A. While Carvana wishes to transform Appellees' claims to some other claim not before the Court, that wish disregards the principle that a plaintiff is the master of his complaint, not the defendant. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).[21] Finally, the contract at issue in *Scott v. Forest Lake Chrysler-Plymouth-Dodge*, 611 N.W.2d 346, 348 (Minn. 2000), the contract before that court was conditional and "stated, 'If DEALER is arranging credit for YOU, this CONTRACT is not valid until you accept[ ] the credit extended.'" *Id.* (emphasis in original). In other words, the contract in *Scott* expressly incorporated a separate agreement related to the "credit extended." Here, again the Parties agreed the Appellees' RISCs involve the "entire agreement." JA54, JA61.

As the party challenging the decisions of the Pennsylvania Superior Court and those that flow from it, Carvana has the burden to show the Supreme Court of Pennsylvania would not follow the persuasive settled law established by *Knight* and its progeny. Its arguments below and in its opening brief here failed to do so and as such Carvana has forfeited waived its right to show otherwise. There is no convincing evidence before the Court to support Carvana's desired result. To the

[21] Carvana tries to transform Plaintiff's actual claims by claiming "[t]he RPA is the only document that requires Carvana to title, license, and register Plaintiffs' vehicles." Carvana Br. 5. That statement is simply false and obscures that the fees are identified and part and parcel to each RISC which shows the sums financed. JA50-55, JA57-62.

contrary, the longstanding common law established by the Supreme Court of Pennsylvania and plain language of MVSFA suggests otherwise. *Yocca*, 854 A.2d at 436-37; *Allegheny Cnty. Prison Emp.*, 381 A.2d at 853-54).[22]

At bottom, Carvana asks the Court to do that which the Court is not authorized to do—i.e., create a novel rule in favor of arbitration when the law is settled that Carvana has no arbitration right with these Appellees based upon its own standard and uniform contract in which it chose not to incorporate or integrate any other agreements. Having waived that opportunity, it is not the Court's role to rewrite the RISCs to avoid the law that applies. *Morgan*, 142 S. Ct. at 1713-14.

The persuasive effect of Carvana's analysis is blunted by it ignoring other jurisdictions which support the plain language of the MVSFA and nearly unanimous application of the MVSFA's contractual requirements and Pennsylvania common law. For example, in *Rugumbwa v. Betten Motor Sales*, 136 F. Supp. 2d 729, 733 (W.D. Mich. 2001) the court held that "the clear language of [Michigan's statutory

[22] Further, after the decision in *Zentner*, 273 A.3d 1033, reaffirming *Knight*, a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was sought and denied. 282 A.3d 688. The relevant question presented there was "whether the courts below erred in concluding the parties' arbitration agreement was unenforceable under *Knight*…and Pennsylvania law." If the Supreme Court had wished to review *Knight* and its progeny it could have done so but declined the invitation—the same invitation Carvana asks this Court to undertake. While typically a denial of an allowance of appeal has little impact, here it does offer some additional evidence that Supreme Court would rule no differently that the Superior Court has already ruled in *Knight*, and *Zentner* or how the district court ruled below in this case.

scheme] envision the execution of a single, comprehensive installment contract containing all of the agreements made by the parties with regard to the subject matter of the retail installment sale"). *See also* *Lozada v. Dale Baker Oldsmobile, Inc.*, 197 F.R.D. 321, 339 (W.D. Mich. 2000). The wording of their installment sale statutes regarding motor vehicles mimics the Pennsylvania MVSFA. Michigan law in pertinent part requires that "[e]very retail installment sale of a motor vehicle shall be evidenced by an instrument in writing . . . The written instrument shall contain all of the agreements of the parties made with reference to the subject matter of the retail installment sale . . ." Mich. Comp. Laws § 566.302. *See also* Mich. Comp. Laws § 492.112(a) ("An installment sales contract shall be in writing, and shall contain all of the agreements between the buyer and the seller relating to the installment sale of the motor vehicle sold...").

E. ASSUMING THE COURT HAS JURISDICTION TO EVEN CONSIDER CARVANA'S MERITS ARGUMENT, THE APPELLEES HAVE STATED WELL PLED CLAIMS

In the final section of its brief, Carvana raises merits arguments addressed by the Court below. Carvana Br. at 51-54. Carvana's arguments concerning whether Plaintiff's claims are viable do not invoke any interlocutory appeal issue regarding arbitration under the FAA, and are not relevant to its appeal. In any event, Appellant's arguments are without merit.

Appellant first attempts to deflect the Court from the operative RISC by reference to the RPA which itemizes the title/registration fees and other fees paid to public officials, while the RISC does not and instead only totals these charges. Carvana Br. at 51-52. To support its position, Appellant argues that because the RPA itemizes the charges rather than the RISC, the RPA contains Appellants obligations, and because of this is the agreement under which the Appellees' claims should have arisen. *Id.*[23] Appellant is incorrect, because as described *supra* in Argument § A, the RISC, not the RPA, contained the essential terms of the parties' agreements and controls.

> To state a claim for breach of contract, the plaintiff must establish: "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." *Gorski v. Smith*, 812 A.2d 683, 692 (Pa. Super. Ct. 2002).

Stein v. Matheson, 539 F. Supp. 3d 463, 472 (E.D. Pa. 2021).

Here, the well pled facts show that the Plaintiffs each entered into a RISC contract with Carvana subject to Pennsylvania law as discussed herein. Carvana

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[23] Appellant makes an additional argument that estoppel prevents Plaintiffs from seeking to enforce contractual terms under the RPA while also avoiding its arbitration clause. Carvana Br. at 51-52. As discussed *supra* at Argument § A, the RPA is not the same contract as the RISC, as it does not contain the material terms Appellees under which Appellees have commenced this action. Therefore, equitable estoppel does not apply. *See Griswold v. Coventry First LLC*, 762 F.3d 264, 274 (3d Cir. 2014) (holding that for equitable estoppel to apply, the claims must have been directly based on the specific agreement involved rather than a side agreement).

breached those enforceable contracts by failing to timely obtain permanent registration(s), and as a result Plaintiffs paid sums to Carvana for title/registration services not performed as agreed. These unrefunded fees paid under the RISC terms constitute damages from the breach and, relatedly, also breaches the MVSFA:

> (e) Costs not disbursed. -- Costs that are collected from a buyer or included in the buyer's obligation under an installment sale contract but that are not disbursed by the seller as contemplated shall be immediately refunded or credited to the buyer.

12 Pa.C.S. § 6242(e)

In addition, Appellant's authorities cited are distinguishable from the facts presented here. In *Lowe v. Nissan of Brandon, Inc.* – a case decided in a Florida state court – the RPA at issue expressly stated that it was the entire agreement and expressly incorporated the RISC. 235 So.3d 1021, 1022-23 (Fla. Dist. Ct. App. 2018). Conversely here, the Appellees' RISCs stated that each represented the entire agreement between the parties. JA54. JA61. Because the RPA in *Lowe* is materially dissimilar to the RPA and RISC in this case, the Court should disregard the comparison. Appellant also relies on *Farrell* as supporting its claim that an agreement other than a RISC should govern when it reflects fees paid for a disputed service. Carvana Br. at 53. However, *Farrell* is distinguishable because it involved a situation where none of the disputed fees were reflected on the purchaser's RISC, but all were contained on the purchase order. *Farrell v. Rd. Ready Used Cars, Inc.*,

No. 3:17-CV-2030 (JCH), 2018 WL 1936143, at *5 (D. Conn. Apr. 24, 2018). These facts are dissimilar to the Appellees' case, where the fees paid to public officials were included in the RISC – albeit not itemized as required by the MVFSA.

Appellant further argues that the MVSFA does not require the itemization of fees to appear in one document, and therefore excluding the itemization from the RISC was acceptable. Carvana Br. at 53-54. Appellant suggests that its failure to follow the MVSFA's requirement that the RISC itemize these charges is justified by the language of §§ 6222(5)(v) and 6224 of the MVSFA – which it argues requires only the summary line item for fees to public officials in the RISC. However, § 6224's quoted language contradicts this interpretation insofar as it references these itemized incidental charges in the plural form:

> Costs and charges under sections 6222 (relating to contents) and 6242 (relating to other costs included in amount financed) shall be separately itemized in an installment sale contract as to their nature and **amounts**.(emphasis added)

One of the incidental fees to be itemized is, "**Fees paid to public officials (incl. filing fees).**" JA51, JA59**.** Therefore, Plaintiffs have properly stated their breach of contract claims against Carvana.

Appellant's conduct also sufficiently states a violation of the prohibition of unfair and deceptive practices under Pennsylvania's UTPCL. "[T]the mere existence of a contract between two parties does not" turn a claim "for injury or loss

suffered as the result of actions of the other party in performing the contract" into "one for breach of contract." *Bruno v. Erie Ins. Co.*, 106 A.3d 48, 69 (Pa. 2014). Instead, "the nature of the duty alleged to have been breached, as established by the underlying averments supporting the claim in a plaintiff's complaint, [is] the critical determinative factor in determining whether the claim is truly one in tort, or for breach of contract." *Id.* at 68 (footnote omitted). If "the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the Case law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort." *Id.* (citations omitted).

Therefore, Appellees have properly stated their UTPCPL claims against Carvana. The District Court was correct not to dismiss the Appellees' claims, and the Court should disregard Carvana's attempt to have the claims dismissed on appeal.

CONCLUSION

This Court should affirm the judgment of the District Court.

Dated: March 28, 2023

Respectfully submitted,

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COMBINED CERTIFICATIONS

1. CERTIFICATE OF BAR MEMBERSHIP

I, Phillip Robinson, counsel for Appellees Dana Jennings and Joseph Furlong, hereby certify pursuant to Rule 28.3(d) that I am a member in good standing of the bar of the Court of Appeals for the Third Circuit.

2. CERTIFICATE OF TYPEFCASE AND WORD COUNT

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32.1, I hereby certify that the foregoing brief contains 12,873 words as counted using the word-count feature in Microsoft Word 365, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 and a 14-point Times New Roman font.

3. CERTIFICATE OF IDENTICAL BRIEFS

Pursuant to Local Rule 31.1(c), I certify that the text of the electronic and hard copy forms of this brief are identical.

4. CERTIFICATE OF VIRUS CHECK

Pursuant to Local Rule 31.1(c), I certify that a virus check of the electronic PDF version of this brief was performed using the Norton360 version updated as of March 27, 2023 and according to that program no virus was detected.

Dated: March 27, 2023

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