JANELL GOFFE, Plaintiff-Respondent, v. FOULKE MANAGEMENT CORP., t/a CHERRY HILL TRIPLEX/CHERRY HILL MITSUBISHI & ANTONIO (TONY) SALISBURY, Defendants-Petitioners.	SUPREME COURT OF NEW JERSEY DOCKET NO. 081258 On Appeal From: SUPRIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NOS. A-2658-16T4, A-2569-16T4
SASHA ROBINSON and TIJUANA JOHNSON, Plaintiff-Respondent, vs. MALL CHEVROLET, INC., Defendants-Petitioners.	Sat below: Clarkson S. Fisher, Jr., P.J.A.D. Douglas M. Fasciale, J.A.D. Thomas W. Sumners, Jr., J.A.D.

BRIEF OF *AMICI CURIAE* CONSUMERS LEAGUE OF NEW JERSEY AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES

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I. INTEREST OF *AMICI CURIAE*

Amici Curiae are non-profit membership organizations devoted to protecting consumers from exploitation in the credit marketplace, including advocacy for the enactment and enforcement of strong and effective state consumer protection laws. *Amici* recognize that consumers, particularly the low-income or credit-challenged, find it difficult to purchase and finance a car on reasonable terms. This exposes these vulnerable consumers to exploitative practices by car dealers. *Amici* have assisted in state legislative efforts to enact protections for consumers, and have filed numerous *amicus curiae* briefs urging courts to uphold these protections.

The Consumers League of New Jersey ("CLNJ") is a nonprofit, membership organization founded in 1900. The CLNJ has been a member organization of the National Consumers League and the Consumer Federation of America, both of Washington D.C. For over one hundred years, the League has educated consumers about the opportunities and dangers in the marketplace, and has advocated for the rights of consumers in this Court and others throughout New Jersey.

The National Association of Consumer Advocates ("NACA") is a non-profit group of attorneys and advocates committed to promoting consumer justice and curbing abusive business practices that bias the marketplace to the detriment of

consumers. NACA's membership is comprised of over 1,500 private, public sector, and legal services lawyers, law professors, and other consumer advocates from across the country. NACA has established itself as one of the most effective advocates for the interests of consumers in this country.

Amici Curiae's interest in this case stems from their members' expertise in the consumer protection issues presented by the Court, and from their New Jersey members' concerns regarding questions certified to this Court. For years, *Amici* have been assisting victims of abusive automotive sales and other lending transactions. In doing this work, *Amici* have relied to a large extent on the New Jersey Consumer Fraud Act ("NJCFA"), N.J.S.A. 56:8-1 *et seq.*, which was passed to "give New Jersey one of the strongest consumer protection laws in the nation." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 555 (2009). *Amici* believe that the valuable protections of the NJCFA should be enforced in suits both by the state and by consumers acting as "private attorneys general."

Moreover, *Amici* strongly believe the constitutional right to seek a civil remedy in the courts is fundamental to placing consumers on a level playing field with powerful companies in legal disputes. Contracts containing arbitration clauses preclude many consumers from obtaining adequate legal

representation and their "day in court." When sellers withhold contract documents from buyers, the consumer is often left in the dark about important details of the transaction, including arbitration. At issue in this case is the fundamental principle underlying both contract law and arbitration law: that parties may not be forced to abide by a contract – arbitration or otherwise – to which they have not had the opportunity to meaningfully review.

II. LEGAL ARGUMENT

A. NEW JERSEY TRIAL COURTS HAVE THE IMPORTANT ROLE OF POLICING WHETHER ARBITRATION AGREEMENTS ARE FORMED UNDER STATE LAW

1. Car Dealers' History with the Use of Forced Arbitration Demonstrates Why Courts Require Adherence to State Law

In 2002, the nation's car dealers lobbied Congress arguing that mandatory binding arbitration clauses are unfair when forced upon the dealers by auto manufacturers. *See* Carl J. Chiappa & David Stoelting, *Tip of the Iceberg - New Law Exempts Car Dealers from Federal Arbitration Act*, 22 FRANCHISE L.J. 219, 219 (2003). Citing a "disparity in bargaining power" the dealers decried the manufacturers' "inherently coercive and one-sided contracts of adhesion" and persuaded Congress to carve out an exemption for them from the Federal Arbitration Act ("FAA"). *Id.*; 15 U.S.C. § 1226.

Ironically, car dealers to this day routinely include in consumers' sales paperwork a provision that allows the dealer to seek to dismiss any legal action the consumer brings against it in favor of private arbitration. "Dealers include [arbitration] provision[s] in order to limit their exposure to class actions, punitive damage awards, discovery, juries, and public disclosure of their illegal practices." NATIONAL CONSUMER LAW CENTER, AUTOMOBILE FRAUD Ch. 10.3.5.1 (6th ed. 2018).

According to the National Consumer Law Center, the nation's foremost authority on consumer protection law, some examples of common illegal practices by car dealers include:

- Bait and switch advertising and pricing;
- Odometer fraud - tampering with or misstating a car's mileage;
- Salvage fraud - hiding that a car was declared salvage due to a prior collision, fire, or flooding (e.g. as a result of Hurricane Sandy);
- Undisclosed damage to new or used cars;
- Lemon laundering - where manufacturers buy back a problem car from one consumer then pass it on to another without disclosing its history;
- Failure to disclose mechanical problems;
- "Yo-yo" sales, where a customer is sent home with a vehicle, but the dealer later demands the vehicle back if it dealer cannot sell the installment contract "paper" for a sufficiently advantageous price; and

- Bogus fees, extra charges, and add-ons that inflate the agreed-upon sales price.

See NATIONAL CONSUMER LAW CENTER, AUTOMOBILE FRAUD Ch. 1.2-1.3 (6th ed. 2018). The common thread among these frauds is the concealment of the accurate terms of the deal from the consumer.

The victims of such unfair tactics are often those already living on the margins - the unsophisticated, the young and inexperienced, the elderly, or the credit-challenged. *See, e.g.*, CONSUMER FEDERATION OF AMERICA, 2017 CONSUMER COMPLAINT SURVEY REPORT at pp. 11-15 (July 30, 2018), *available at* https://consumerfed.org/wp-content/uploads/2018/07/2017-consumer-complaint-survey-report.pdf; Jinkook Lee & Horacio Soberon-Ferrer, *Consumer Vulnerability to Fraud: Influencing Factors*, 31 J. CONSUMER AFF. 70 (Mar. 2005) (finding that "consumers were more susceptible to fraud if they were older, poor, less educated, and/or living without spouse"). Due to disparities in subject knowledge and bargaining power, most consumers have few options when facing a car dealer's take-it-or-leave it arbitration clause.

As the car dealers acknowledged back in 2002, forced arbitration is indeed highly consequential.[1] A forced

[1] *Amicus Curiae* in support of the petitioners, the New Jersey Coalition of Automotive Retailers ("NJ CAR"), was

arbitration provision causes the consumer to waive her right to use the court system to remedy her disputes, a right enshrined in both the federal and New Jersey constitutions. *See* U. S. Const. amend. VII; N.J. Const. art. I, ¶9 (trial by jury "inviolate"). Because of the potential waiver of this time-honored right, disputes about a consumer's alleged consent to arbitrate must be scrutinized by a court to determine whether an arbitration agreement was formed under state law principles.

2. Arbitration Agreements are not Validly Formed where Consumers are Not Effectively Advised of their Rights

It is often said that that both the New Jersey Arbitration Act and its federal counterpart (the "FAA") favor arbitration as an alternative method for resolving legal disputes. However, it is crucial to note that this preference for arbitration "is not without limits." Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 187 (2013)(quoting Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001)).

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proudly at the vanguard when car dealers lobbied Congress for special treatment to "restore fundamental fairness for dealers" by exempting their disputes with manufacturers from the FAA. *See NJ CAR Leadership Participates in NADA's Washington Conference*, NEWS LETTER BULLETIN No. 20 (N.J. Coalition of Auto. Retailers, Trenton, N.J.), Oct. 8, 2002, *available at* http://www.njcar.org/members/newsletter/pastNewsLetters/NewsLetterNo20-2002-10-08.htm (last visited Dec. 6, 2018).

Importantly, the FAA and our state act "permit[] states to regulate . . . arbitration agreements under general contract principles," and a court may invalidate an arbitration clause "'upon such grounds as exist at law or in equity for the revocation of any contract.'" Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430, 441-42 (2014); see also 9 U.S.C. §2; N.J.S.A. 2A:23B-6a. "When deciding whether the parties agreed to arbitrate a certain matter ..., courts generally ... should apply ordinary state-law principles that govern the formation of contracts." First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

As such, state courts have an important role in policing arbitration agreements to ensure that consumers (or employees, or investors) are not bound by forced arbitration agreements unless they entered in willingly upon mutual consent, i.e. there was a "a meeting of the minds." Atalese, 219 N.J. at 442. "Mutual assent requires that the parties have an understanding of the terms to which they have agreed. An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights." Id.

The NJCFA is a consumer protection law of general application to all manner of contracts. The NJCFA requires a signed acknowledgment or waiver to be given at the time of signing to alert consumers to their rights. N.J.S.A. 56:8-

2.22. Failure to give a copy of the document evidences that the consumer was not alerted that they may be waiving their rights to take disputes to court. Where this important state law is not followed, no valid agreement to arbitrate is formed.

B. NJCFA'S REQUIREMENT THAT CONTRACT COPIES BE PROVIDED SERVES AN IMPORTANT ROLE IN PREVENTING CONSUMER CONFUSION

1. Concealment of Important Contract Documents Enables Consumer Fraud

When it enacted the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 *et seq.*, the legislature crafted a law with "broad remedial power to root out fraud in its myriad, nefarious manifestations." Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 255, 265 (1997). The Act and its "provisions are [to be] construed liberally in favor of the consumer to accomplish its deterrent and protective purposes." Lettenmaier v. Lube Connection, Inc., 162 N.J. 134, 139 (1999). The section of the NJCFA at issue in this case states:

> It shall be an unlawful practice for a person in connection with a sale of merchandise to require or request the consumer to sign any document as evidence or acknowledgment of the sales transaction, of the existence of the sales contract, or of the discharge by the person of any obligation to the consumer specified in or arising out of the transaction or contract, unless he shall at the same time provide the consumer with a full and accurate copy of the document so presented for signature but this section shall not be applicable to orders placed through the mail by the consumer for merchandise.

N.J.S.A. 56:8-2.22. This provision was passed to ensure "that both parties to a sales transaction are alert to their respective rights and are able to maintain adequate records as a basis for enforcing those rights." Assembly Commerce and Industry Committee Statement, No. A234 (1982).

As noted above, common illegal practices in the auto sales industry - bait and switch, undisclosed damage, truth-in-lending violations, and "yo-yo" sales are frauds of mis-disclosure or non-disclosure, where the dealer conceals the accurate terms of the transaction from the consumer. Auto sales transactions are rushed, confusing, and stressful events for the consumer. N.J.S.A. 56:8-2.22 was specifically passed to combat concealment of contract documents and to foster knowing consent to sales transactions. This valuable disclosure requirement was passed to ensure that the consumer has a copy of the documents she signed to take home with her. This enables the consumer to review the sale and finance contracts for accuracy at the time of sale, and later, in the unhurried confines of her home. If necessary, these key documents can help establish if she was defrauded.

New Jersey courts have held that failure to provide NJCFA-mandated documents in similar contexts rendered those alleged agreements unenforceable. See Scibek v. Longette, 339 N.J. Super. 72 (App. Div. 2001); Huffmaster v. Robinson, 221 N.J.

Super. 315 (Law Div. 1986). Thus, failure to give a copy of the arbitration agreement to the consumer at the time of sale should prevent a seller from enforcing an arbitration agreement. The Appellate Division's holding in this respect furthers the important public policy behind the NJCFA and follows the established body of law interpreting the Act.

NJCFA Section 56:8-2.22 goes hand-in-hand with the strong public policy of New Jersey in ensuring that parties who agree to arbitrate have reached a "meeting of the minds," have "an understanding of the terms to which they have agreed," and have "full knowledge of [their] legal rights and intent to surrender those rights." Atalese, 219 N.J. at 442. Giving the consumer a copy of the arbitration agreement they allegedly signed allows for informed decision making.

By marked contrast, withholding an arbitration clause (as well as other contract documents) is a recipe to sow confusion and enable fraud. Enforcing the terms of an arbitration agreement withheld from the consumer allows the merchant to benefit from the very concealment made unlawful by Section 56:8-2.22. To permit a merchant to enforce an unlawful agreement - in the face of its failure to provide a copy as required by the NJCFA - "would strip the Consumer Fraud Act of the gravitas intended by the Legislature as a remedial

statute." See Artistic Lawn & Landscape Co., Inc. v. Smith, 381 N.J. Super. 75, 89 (Law Div. 2005).

2. The Facts of this Case Amply Demonstrate Why Section 56:8-2.22 Must be Applied

The plaintiffs below allege they were victims of frauds of concealment, which were accomplished by the petitioner dealerships withholding the contract disclosure documents from them. Janell Goffe was victimized by a "yo-yo" sale, whereby she signed documents which were never given to her. Goffe was later called back to the dealership, told financing had fallen through, and that her down payment and her monthly payments would increase, causing her to lose her initial $250 down payment. (Pa77, #6-16). Sasha Robinson was told by the dealer she had two days to rescind a purchase, but was given no contract documents at signing. When she returned two days after purchase to rescind, the dealer refused, telling Robinson she was bound by the documents she signed (but was not given). As a result, Robinson suffered the loss of her $1000 deposit (Pa39-40, #18-27) and use of her car that she traded-in (jointly owned by her mother Tijuana Johnson)(Pa68). Both plaintiffs brought NJCFA claims for these significant losses under N.J.S.A. 56:8-19.

Withholding of contract documents enables the types of fraud that caused the losses alleged here. Nonetheless, the

defendants/ petitioners and their *Amicus* now argue for the first time that a *separate* claim for an ascertainable loss of money or property stemming directly from the failure to be given contract documents (including the arbitration clause) in violation of Section 56:8-2.22 must be established. (See e.g. NJ CAR Br. at p. 13). The dealers' argument is untenable.

An NJCFA claim is established where a consumer-fraud plaintiff, like respondents here, "prove[] both an unlawful practice under the Act and an ascertainable loss." Cox v. Sears Roebuck & Co., 138 N.J. 2, 15-16 (1994). Moreover, other available relief can be combined with an award of NJCFA damages in an appropriate case. See Weinberg v. Sprint Corp., 173 N.J. 233, 253 (2002) (NJCFA "allows a private cause of action to proceed for all available remedies, including an injunction, whenever" plaintiff asserts a bona fide NJCFA claim). There is no question that ascertainable losses under the NJCFA have been alleged in this case, so the consumers can invoke the protections of the damages section as well as Section 56:8-2.22. Regardless, even if there is some perceived infirmity in the consumers' NJCFA claims (and there is not), they are still entitled to invoke the NJCFA defensively, in opposition to the arbitration motion. See Assocs. Home Equity Servs., Inc. v. Troup, 343 N.J. Super. 254, 271-72 (App. Div. 2001) (defendants were permitted to assert an equitable recoupment

defense, even though an affirmative NJCFA claim against the plaintiff was time barred).

The policies behind both NJCFA Section 56:8-2.22 and the Courts' requirement for the knowing waiver of important rights both militate for finding no valid arbitration agreement where a copy is not given to the consumer. Endorsing the petitioners' arguments would render Section 56:8-2.22 a nullity, and allow the dealers to profit from their unfair practice.

3. Section 56:8-2.22 is Necessary in the E-Sign Era

The contract-delivery requirement of NJCFA Section 56:8-2.22 is all the more important in our increasingly technological age where consumer contracts can be signed electronically, or "e-signed." Contracts that were once on paper are now on iPads and other electronic media. This transition has made consumer fraud easier because, absent a statute, consumers are often not given paper documents in hand, and instead are forced to rely predominantly on the representations of the salesperson.

When contracts are electronic, consumers face a heightened risk of falling victim to crooked merchants. This heightened risk was explained succinctly by consumer advocate Rosemary Shahan, president and founder of Consumers for Auto Reliability and Safety:

> Unscrupulous car dealers and shady lenders love e-contracting . . . . The combination of all-electronic transactions and high-pressure sales tactics at the car dealership, which are aimed at consumers who are often tired and feeling rushed after hours of haggling and test-driving cars, make it much easier for dealers and crooked lenders to get away with fraud, forgery and other flim-flam.

Diana Hembree, *Car Dealers E-Contract Abuse Alert: How Car Dealers Can Fake Your Auto Loan*, FORBES (Apr. 15, 2017), https://www.forbes.com/sites/dianahembree/2017/04/15/e-contract-abuse-alert-how-car-dealers-can-fake-your-auto-loan/#15fe68ec65c5. This common sense fact - that consumers who are drained of willpower are more likely to have impaired decision-making abilities - is borne out in the scientific literature. Roy F. Baumeister et al., *Free Will in Consumer Behavior: Self-Control, Ego Depletion, and Choice*, 18 J. Consumer Psychol. 1 (2008). This is all the more reason for a copy of contract documents to be provided at the time of signing, and is a testimony to the wisdom of the statute.

Concealment or withholding of e-signed documents is not limited to the auto sales industry. For example, door-to-door sales scams on a mass scale in New Mexico prompted an enforcement action by the Attorney General of that state. *Press Release and Complaint, AG Balderas Sues Massive Solar Company for Defrauding New Mexicans & Jeopardizing Their Home Ownership* (Mar. 8, 2018), *available at*

https://www.nmag.gov/uploads/PressRelease/48737699ae174b30ac51a7eb286e661f/AG_Balderas_Sues_Massive_Solar_Company_for_Defrauding_New_Mexicans___Jeopardizing_Their_Home_Ownership.pdf. The New Mexico action - filed in March 2018 - alleges that the defendant door-to-door sales company solicited contracts with 20-year terms from thousands of consumers using "electronic devices that do not provide consumers with an adequate opportunity to review the lengthy, complex and detailed contracts." Id. at p. 2. The Attorney General alleged that the company did not provide consumers physical copies of the contracts, which were anywhere from 14 to 20 pages long. Id. at pp. 10-11. Instead, the company misrepresented the terms of the deal and enticed consumers into "utilizing an 'e-signature' on an electronic tablet, substantially impacting the consumers' ability to understand the terms of the 20 year" contract. Id. at pp. 9, 11.

The increased importance of Section 56:8-2.22 is even more magnified by the void of consumer protection legislation in the area of e-signing. In 2000, Congress passed the E-Sign Act, which creates a number of requirements for obtaining consumer consent to e-sign a contract. 15 U.S.C. § 7001(c)(1)(C)(ii). But the Act itself clarifies that the failure to abide by these requirements is not itself fatal to the validity or enforceability of such consumer contract. Id.

§ 7001(c)(1). In fact, courts have consistently held that the E-Sign Act "contains no rights-creating language and manifests no intent to create either a private right or remedy." Levy-Tatum v. Navient & Sallie Mae Bank, No. 15-3794, 2016 WL 75231, at *5 (E.D. Pa. Jan. 7, 2016) (emphasis in original); see also Stephens v. Bank of Am. Home Loans, Inc., No. 16-660, 2017 WL 4322816, at *4 (E.D.N.C. Sept. 28, 2017). Instead of creating consumer rights, the E-sign Act merely ensures for the seller that e-signed contracts "cannot be denied legal effect merely because they are in electronic form." Levy-Tatum, 2016 WL 75231, at *5.

But for laws like N.J.S.A. 56:8-2.22, unscrupulous lenders can and do complete a paper or electronic contract and hide the terms from a consumer. They do so by not emailing the signed agreement, sending it to a bogus or deliberately mistyped email address, by failing to print it out, or otherwise failing to deliver a copy to the consumer in a form they can keep. The public policy of the state of New Jersey is served by enforcing the dictates of N.J.S.A. 56:8-2.22 to hold that arbitration agreements not given to consumers at the time of signing are unenforceable.

C. COURTS MUST RESOLVE FACT DISPUTES ABOUT FORMATION BEFORE THEY CAN COMPEL ARBITRATION; DEALERS' ACKNOWLEDGMENTS MUST BE WEIGHED AGAINST THE CONSUMERS' SWORN CERTIFICATIONS

1. Guidotti Tracks New Jersey Law and Sets the Correct Standard for Resolving Fact Disputes

Both of the plaintiffs here certified under oath that they did not receive a copy of an arbitration agreement at the time of sale. Both defendants claim they delivered one, and cite a signed acknowledgment of receipt with an arbitration clause. The Appellate Division correctly recognized that these fact disputes should result in remand to the Law Division for limited discovery and even a trial on the question of formation of a valid agreement to arbitrate. The Appellate Division broke no new ground when it adopted the Third Circuit's analysis in Guidotti v. Legal Helpers Debt Resolution, 716 F. 3d 764 (3d Cir. 2013), which sets the correct standard for evaluating such motions.

Guidotti sets a two-tier standard of review when considering motions to compel arbitration. If the complaint clearly shows that a party's claim is subject to an enforceable arbitration clause, the court will use a motion to dismiss (Fed. R. Civ. P. 12(b)(6)) standard. The motion to dismiss standard would be inappropriate, however, where "the opposing party has come forth with reliable evidence that is more than a mere naked assertion . . . that it did not intend to be bound by the arbitration agreement, even though on the face of the pleadings it appears that it did." Id. at 774. In such

circumstances, "the parties should be entitled to discovery on the question of arbitrability before a court entertains further briefing." Id. at 776.

After a period of discovery, the court may entertain a renewed motion to compel arbitration, this time judging it by applying the summary judgment standard (Fed. R. Civ. P. 56). Id. The court "shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law" Fed. R. Civ. P. 56(a). The party opposing the motion must "demonstrate, by means of citations to the record, that there is a genuine dispute as to the enforceability of the arbitration clause." Guidotti, 716 F.3d at 776 (quotations omitted). If summary judgment is inappropriate, and there remains "a genuine dispute as to the enforceability of the arbitration clause, the court may then proceed summarily to a trial" on the question. Id. at 776.

Just as the New Jersey Arbitration Act largely parallels the FAA, a motion to dismiss for failure to state a claim under N.J. Rule 4:6-2(e) is "New Jersey's analogue to Federal Rule of Civil Procedure 12(b)(6)." Velasquez v. Franz, 123 N.J. 498, 508 (1991). Similarly, Federal Rule 56 is "the counterpart to New Jersey Rule 4:46" governing summary judgment. Dairy Stores, Inc. v. Sentinel Pub. Co., Inc., 104

N.J. 125, 155 (1986). The Third Circuit's framework in Guidotti echoes familiar standards used day in and day out by the trial courts of this state.

The framework articulated in Guidotti has been cited and followed by state and federal courts throughout the country. See e.g. Nicosia v. Amazon.com, Inc., 834 F.3d 220, 231 (2d Cir. 2016); City of Benkelman, Nebraska v. Baseline Eng'g Corp., 867 F.3d 875, 882 (8th Cir. 2017); see also Gullett v. Kindred Nursing Centers W., L.L.C., 241 Ariz. 532, 542, 390 P.3d 378, 388 (Ariz. Ct. App. 2017) ("it is the prerogative and obligation of courts to determine the validity of an arbitration agreement prior to enforcement… which cannot be done properly without an adequate vetting of the issue").

Guidotti is a sensible standard for addressing fact disputes about whether there is an enforceable agreement to arbitrate. The Appellate Division correctly endorsed using the Guidotti standard in New Jersey courts.

2. The Dealers' Acknowledgments are Mere Evidence, Like the Consumers' Certifications, Which must be Weighed by the Trier of Fact

The car dealers argue that the consumers' allegations that they did not receive a copy of the arbitration agreement "should not be enough to defeat" the executed arbitration agreement and acknowledgment of receipt. (See e.g. NJ CAR Br. at pp. 10-13). In essence, the dealers are asking this Court

to consider their signed acknowledgment to create an irrebuttable presumption of receipt.[2]

There is no basis in law or fact to consider the dealers' acknowledgment to be any better evidence than the consumers' sworn certifications in opposition. If anything, the opposite should be true - unlike the acknowledgments, the consumers' certifications are signed under oath, upon penalty of perjury. Falsely swearing that documents were not given carries great risk to the declarant.

While reliance on such acknowledgments might be common in the auto lending industry (NJ CAR Br. at p. 12), so are instances in which unscrupulous car dealers cheat or withhold contract documents from consumers. (See Section II.A.1. *supra*). Recognizing this, N.J.S.A. §56:8-2.22 exists to mandate copies be given upon pain of it being an unfair practice. Rather than create a presumption, Section 56:8-2.22 operates to reduce or eliminate the value of any signed acknowledgment where the consumer alleges she did not receive it.

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[2] A presumption is a mandatory inference that discharges the burden of producing evidence as to a fact (i.e. receipt of the arbitration agreement) when another fact (the acknowledgment) has been established. See N.J.R.E. 301; Shim v. Rutgers, 191 N.J. 374, 386 (2007).

Useful comparison can be made to the treatment of signed acknowledgments under another consumer protection law, the federal Truth in Lending Act ("TILA"). 15 U.S.C. §1601 *et seq.*[3] TILA mandates that lenders provide to borrowers certain "material disclosures" revealing the cost of credit, the amount financed, the finance charge, the annual percentage rate, and the total sale price. 15 U.S.C. § 1638(a); 12 C.F.R. § 226.18. For covered mortgage loans, TILA also requires the lender to deliver two copies of a properly filled out notice of right to cancel ("Notice"). 12 C.F.R. § 226.23(a), (b). Lenders often have the borrower sign an acknowledgment of receipt of disclosures at closing. By the statute's very terms, TILA considers that signed acknowledgment to create a "rebuttable presumption of delivery of required disclosures." 15 U.S.C. § 1635(c).

In Cappuccio v. Prime Capital Funding LLC, a trial court instructed the jury that "[i]n a TILA case, *something more than just the testimony of the borrower* is needed to rebut the presumption that she received two copies of the Notice" of her

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[3] The purpose of TILA is "to assure meaningful disclosure of credit terms . . . and to protect the consumer against inaccurate and unfair practices." 15 U.S.C. §1601; Rossman v. Fleet Bank (R.I.) N.A., 280 F.3d 384, 390 (3d Cir. 2002). "Congress enacted TILA to guard against the danger of unscrupulous lenders taking advantage of consumers through fraudulent or otherwise confusing practices." Ramadan v. Chase Manhattan Corp., 156 F.3d 499, 502 (3d Cir. 1998).

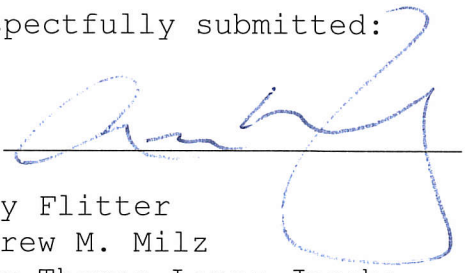
right to rescind a home mortgage. 649 F.3d 180, 189 (3d Cir. 2011) (emphasis added). The Third Circuit found the instruction to be in error, holding that "the testimony of a borrower alone," that she did not receive the requisite notice, was "sufficient to overcome TILA's presumption of receipt." Id. at 190 (emphasis added). This was so "even if the [testimony] is 'self-serving' in the sense of supporting the [witness's] own legal claim or interest." Id. The court reasoned that the plaintiff's testimony related directly to a material issue in her TILA claim, and was based on her personal knowledge. Id. Accordingly, her testimony overcame the presumption, leaving to the jury "the decision of whether to credit her testimony, or that of [defendant's] witnesses[,]" who testified that the requisite notices were given. Id.

As recognized in Cappuccio, acknowledgment of receipt in the consumer context can be challenged with the consumer's testimony alone. Far from a mere "naked assertion," a sworn certification is of ample force to create disputed material fact sufficient to defeat summary judgment and warrant a trial on the question. That proposition is even clearer here, where there is no statutory presumption for the consumer to meet with conflicting evidence. The dealers' signed acknowledgement in this case is, at best, competing evidence to be weighed against the signed certifications.

III. CONCLUSION

New Jersey state courts must ensure that a consumer has made an informed and knowing waiver before compelling arbitration. To that end, the public policy of this state dictates that sellers give consumers copies of arbitration clauses they allegedly signed. The fact dispute here about whether the requisite copies were given prevented dismissing this matter to arbitration, and the Appellate Division was correct in remanding this case for limited discovery, further briefing, and a trial if necessary on whether a valid agreement to arbitrate was formed under state law.

Respectfully submitted:

By: 

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