STATE OF MICHIGAN

COURT OF APPEALS

LORETTA GAYLE GALEA,

Plaintiff-Appellant,

v

FCA US LLC, JIM REIHL'S FRIENDLY CHRYSLER JEEP, INC., and US BANK NA,

Defendants-Appellees.

FOR PUBLICATION
March 13, 2018
9:00 a.m.

No. 334576
Oakland Circuit Court
LC No. 2016-150986-NZ

Before: GLEICHER, P.J., and GADOLA and O'BRIEN, JJ.

GADOLA, J.

In this vehicle warranty dispute, plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(7) on the basis that the parties had entered a valid and enforceable arbitration agreement. We affirm.

I. FACTS AND PROCEDURAL HISTORY

In 2014, plaintiff purchased a new Jeep Cherokee from Jim Reihl's Friendly Chrysler Jeep, Inc. The vehicle was manufactured by defendant FCA US LLC. In her complaint, plaintiff alleged that the vehicle experienced numerous defects and nonconformities within the time and mileage limits of the manufacturer's express warranty, which required extensive service, substantially impaired the value of the vehicle to plaintiff, and irreparably shook her confidence in the vehicle. In January 2016, plaintiff filed a complaint alleging breach of express and implied warranties, revocation of acceptance under Michigan's Uniform Commercial Code (UCC), MCL 440.2101 *et seq*., and violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq*. Plaintiff also alleged that the vehicle dealer violated Michigan's Motor Vehicle Service and Repair Act, MCL 257.1301 *et seq*., and that the vehicle manufacturer violated Michigan's new motor vehicle warranties act, MCL 257.1401 *et seq*. Finally, plaintiff asserted holder liability against the finance company, US Bank NA.

Defendants Jim Reihl's Friendly Chrysler Jeep, Inc. and FCA US LLC moved for summary disposition under MCR 2.116(C)(7), with which US Bank NA later joined, asserting that plaintiff's lawsuit was barred by an agreement to submit any warranty disputes to binding arbitration. According to defendants, plaintiff agreed to arbitration in exchange for obtaining a discount through Chrysler's "Employee Friends Program." Defendants attached to their motion

a "Pricing and Acknowledgment" form bearing plaintiff's signature, which contained the following language:

> The Chrysler Employee Friends Program allows eligible purchasers to obtain a new vehicle at a substantial discount. I understand that, in consideration for this discount, I will not be able to bring a lawsuit for any warranty disputes relating to this vehicle. Instead, I agree to submit any and all disputes through the Chrysler Vehicle Resolution Process, which includes mandatory arbitration that is binding on both Chrysler and me.

The form also stated in all-caps lettering near the top of the page: "THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES." Defendants argued that the signed agreement to arbitrate was presumptively valid, that the burden of proving non-arbitrability was on plaintiff as the party seeking to avoid arbitration, and that the arbitration agreement was enforceable under both state and federal law, including the Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq.*

Plaintiff asserted that she did not voluntarily participate in the discount program, that the vehicle dealer fraudulently obtained a control number under the name of someone she did not know to secure the discount, and that she never saw the discount program documents during the purchase transaction. Plaintiff further argued that, under the Federal Arbitration Act (FAA), 9 USC 1 *et seq*., the trial court was required to hold a summary trial to decide the factual disputes regarding whether plaintiff voluntarily agreed to arbitration. Finally, plaintiff argued that the Federal Trade Commission (FTC) had promulgated rules stating that mandatory, binding arbitration was prohibited under the MMWA and that the arbitration clause was unenforceable because it was not contained within the four corners of the warranty document.

In reply, defendants argued that, in *Abela v Gen Motors Corp*, 469 Mich 603; 677 NW2d 325 (2004), the Michigan Supreme Court rejected both the single-document rule and the FTC's conclusion that the MMWA barred agreements for binding arbitration of claims covered by the MMWA. Defendants also argued that the arbitration clause was valid and enforceable because plaintiff admitted that she received a copy of the sales document that contained the arbitration clause, she obtained a discount in exchange for the agreement to arbitrate, and she signed all of the relevant documents to complete the transaction.

Following a hearing, the trial court issued an order granting defendants' motion for summary disposition. The trial court concluded that there was no factual dispute regarding the agreement to arbitrate, noting that plaintiff did not dispute signing the arbitration acknowledgment form. The court also concluded that the rules promulgated by the FTC did not supersede binding Michigan caselaw, which held that binding arbitration agreements are permitted under the MMWA. Finally, the court rejected plaintiff's contention that the arbitration agreement was invalid under the single-document rule, concluding that such a requirement was rejected by the Michigan Supreme Court in *Abela*.

II. STANDARD OF REVIEW

We review de novo a trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(7). *Hicks v EPI Printers, Inc*, 267 Mich App 79, 84; 702 NW2d 883 (2005). A motion under MCR 2.116(C)(7) is appropriately granted when a claim is barred by an agreement to arbitrate. *Maiden v Rozwood*, 461 Mich 109, 118-119 n 3; 597 NW2d 817 (1999). "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Id.* at 119. However, "a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id*. Whether an arbitration agreement exists and is enforceable is a legal question that we review de novo. *Hicks*, 267 Mich App at 84.

III. VOLUNTARY AGREEMENT TO ARBITRATE

Plaintiff first argues that the trial court erred by granting summary disposition in favor of defendants because she did not knowingly participate in the employee friends discount program and did not receive a substantial discount on her vehicle. Plaintiff also argues that the trial court erred by failing to hold a summary hearing under 9 USC 4 of the FAA because there were material questions of fact regarding whether she voluntarily agreed to arbitration. We disagree.

"An arbitration agreement is a contract by which the parties forgo their rights to proceed in civil court in lieu of submitting their dispute to a panel of arbitrators." *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 577; 552 NW2d 181 (1996). When assessing whether a dispute must be submitted to arbitration, courts must first "determine whether an arbitration agreement has been reached by the parties." *Horn v Cooke*, 118 Mich App 740, 744; 325 NW2d 558 (1982). A contract to arbitrate does not exist unless it was formed by the mutual assent of the parties. *Id*. "A party cannot be required to arbitrate an issue he has not agreed to submit to arbitration." *Id.* "The determination of whether an arbitration contract exists is for the courts to decide, applying general contract principles." *Id.* at 744-745.

"Michigan law presumes that one who signs a written agreement knows the nature of the instrument so executed and understands its contents." *Watts v Polaczyk*, 242 Mich App 600, 604; 619 NW2d 714 (2000). "Moreover, mere failure to read an agreement is not a defense in an action to enforce the terms of a written agreement." *Id*. Plaintiff's signature appears on a one-page document that clearly states in conspicuous language and font that plaintiff is entering an agreement to arbitrate in exchange for a friends and family discount. Plaintiff does not deny signing this document, nor does she assert that her signature was obtained under duress. Accordingly, plaintiff has not set forth any arguments to persuade us that she did not knowingly and voluntarily enter the arbitration agreement.

We also find unpersuasive plaintiff's argument that inadequate consideration supported the arbitration agreement because she paid more than the manufacturer's suggested retail price for the vehicle. Both a dealer worksheet, which plaintiff signed, and an incentives configuration form that are part of the lower court record indicate that the discount was applied to plaintiff's purchase of the vehicle. Plaintiff offered no evidence to the contrary below or on appeal.

Plaintiff therefore has not shown failure of the consideration given in exchange for the agreement to arbitrate.

Plaintiff also contends, citing MCL 440.2204(1) of Michigan's UCC, that the arbitration agreement is invalid because she signed the arbitration agreement on May 31, 2014, while she made the down payment on the vehicle on April 17, 2014. MCL 440.2204(1) states the following: "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Nothing in this section precludes additional terms in subsequent documents from becoming part of a sales contract. Plaintiff's argument that the arbitration agreement could not have been part of the sales contract because it was not signed until May 31, 2014, is therefore without merit.

Finally, plaintiff argues that she was entitled to a summary hearing under 9 USC 4. This statute provides a mechanism for a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided in such agreement." 9 USC 4. Plaintiff highlights the following language: "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." 9 USC 4. Defendants correctly point out that Michigan does not have an equivalent rule. Further, 9 USC 4 is inapplicable because this action is not in federal district court and plaintiff is not a party aggrieved by an alleged failure to arbitrate. Rather, plaintiff is seeking to avoid arbitration. Plaintiff offers no authority that this section of the United States Codes applies in Michigan courts, and in fact, she cites contrary authority from the United States Supreme Court instructing courts to apply state-law contract principles to questions concerning whether an agreement to arbitrate exists. See *First Options of Chicago, Inc v Kaplan*, 514 US 938, 944; 115 S Ct 1920, 1924; 131 L Ed 2d 985 (1995) ("[W]hen deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state law principles that govern the formation of contracts."). Plaintiff has not shown that the trial court erred by refusing to hold a summary hearing under 9 USC 4.

IV. BINDING ARBITRATION OF MMWA CLAIMS

Plaintiff next argues that the trial court erred by refusing to apply the 2015 FTC rule barring binding arbitration of MMWA claims. The MMWA, 15 USC 2301 *et seq.*, is a federal statute dealing with consumer product warranties. This case involves 15 USC 2310, which concerns "informal dispute settlement procedures." The statute states the following:

> (1) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.
>
> (2) The [Federal Trade] Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies. Such rules shall provide for participation in such procedure by independent or governmental entities. [15 USC 2310(a).]

The statute goes on to state that, if an informal dispute settlement procedure complies with the FTC's rules and is properly included in a written warranty, "the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he initially resorts to such procedure[.]" 15 USC 2310(a)(3)(C). The statute also states, "In any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence." *Id.*

In 1999, the FTC interpreted these sections to mean that an informal dispute settlement mechanism (IDSM) could not be binding. Federal Trade Commission, *Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act*, 64 Fed Reg 19700, 19708, § C.2 (April 22, 1999). The FTC reasoned that the statute implied that a valid IDSM could not foreclose litigation because of Congress's use of the phrase "unless he initially resorts to such procedure." *Id.* The FTC also noted that the statute addressed the admissibility of IDSM decisions in subsequent litigation, further implying that an IDSM could not foreclose future litigation. *Id.* In 2015, the FTC reaffirmed this position, noting that, "[s]ince the issuance of the 1999 FRN, courts have reached different conclusions as to whether the MMWA gives the Commission authority to ban mandatory binding arbitration in warranties." Federal Trade Commission, *Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act*, 80 Fed Reg 42710, 42719, § B.4(d) (July 20, 2015).

In 2004, the Michigan Supreme Court squarely addressed the issue of whether binding arbitration agreements are permissible under the MMWA in *Abela*, 469 Mich 603. In *Abela*, the plaintiff purchased a 1999 Chevrolet truck from a General Motors dealership under the defendant's employee purchase plan, which offered him a discount because of his wife's employment with General Motors. *Id.* at 605. As part of the purchase contract, the plaintiff was required to sign an agreement requiring him to submit any warranty disputes to binding arbitration. *Id.* The truck subsequently developed a number of problems, which led to costly repairs. *Id.* The plaintiff and his wife filed suit against General Motors, raising claims under the MMWA and Michigan consumer protection law. *Id.* General Motors moved for summary disposition, and the trial court denied the motion, holding that agreements to submit to binding arbitration were prohibited under the MMWA. *Id.* On appeal, this Court reversed, citing two federal circuit court opinions as binding precedent for the proposition that the MMWA allows compulsory, binding arbitration of written warranty claims. *Id.* at 605-606. The Michigan Supreme Court agreed with the Court of Appeals' ultimate conclusion, but disagreed that the circuit court cases cited by this Court were binding on Michigan Courts. *Id.* at 606. The Supreme Court stated: "Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." *Id.* (citations omitted). The Supreme Court then stated the following:

> Although the federal courts of appeals decisions are not binding, we nevertheless affirm the decision of the Court of Appeals. We have examined the decisions in *Walton v Rose Mobile Homes LLC*, 298 F3d 470 (CA 5, 2002), and *Davis v Southern Energy Homes, Inc*, 305 F3d 1268 (CA 11, 2002), and find their analyses and conclusions persuasive. Both decisions carefully examined the MMWA and the FAA, and both concluded that the text, the legislative history, and the purpose of the MMWA did not evidence a congressional intent under the FAA to bar agreements for binding arbitration of claims covered by the MMWA.

> Persuaded by these analyses of the federal courts of appeals, we conclude that plaintiffs' agreement with defendant to address the warranty claim through defendant's dispute resolution process, including mandatory arbitration, is enforceable. [*Abela*, 469 Mich at 607.]

We are bound by the Michigan Supreme Court's decision in *Abela*. The 2015 action of the FTC merely affirms its previous position regarding compulsory, binding arbitration, which the *Abela* court rejected. Congress has not amended the MMWA in any manner that would affect the binding character of *Abela*. Accordingly, we reject plaintiff's contention that we are bound to follow the FTC rule prohibiting compulsory, binding arbitration of MMWA claims.

V. SINGLE-DOCUMENT RULE

Finally, plaintiff argues that FTC regulations prohibit enforcement of the arbitration agreement because the agreement was not included as part of the warranty document. Under the authority delegated by Congress in 15 USC 2302, the FTC promulgated rules regarding the content of written warranties. 16 CFR 701.3. These rules state, in relevant part, the following:

> (a) Any warrantor warranting to a consumer by means of a written warranty a consumer product actually costing the consumer more than $15.00 shall clearly and conspicuously disclose in a single document in simple and readily understood language, the following items of information:
>
> * * *
>
> (6) Information respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with part 703 of this subchapter[.] [16 CFR 701.3.]

Although the parties agree that the arbitration clause was not part of the warranty document, defendants argue that the Michigan Supreme Court rejected the single-document rule in *Abela*. Plaintiff conversely argues that, although *Abela* involved an arbitration agreement that was outside of the warranty document, the single-document rule was not discussed by the Supreme Court and implicit conclusions are not binding precedent. See *People v Heflin*, 434 Mich 482, 499 n 13; 456 NW2d 10 (1990) ("[J]ust as obiter dictum does not constitute binding precedent . . . 'implicit conclusions' do [not as well]."). Although we agree that implicit conclusions are not binding precedent and that the Michigan Supreme Court in *Abela* did not directly address the issue of whether the single-document rule bars enforcement of a binding arbitration provision that was not contained in the warranty document, the Supreme Court's analysis in *Abela* compels us to conclude that the single-document rule does not apply to an agreement to undergo binding arbitration.

In *Abela*, 469 Mich at 607, our Supreme Court stated that it was persuaded by the "analyses and conclusions" of the Fifth Circuit Court of Appeals in *Walton*, 298 F3d 470, and the Eleventh Circuit Court of Appeals in *Davis*, 305 F3d 1268, to conclude that the MMWA does not prohibit binding arbitration of MMWA claims. In *Walton*, the Fifth Circuit explained the following regarding the meaning of the phrase "informal dispute settlement procedures" as used in the MMWA:

> The text of the MMWA does not specifically address binding arbitration, nor does it specifically allow the FTC to decide whether to permit or to ban binding arbitration. Although the MMWA allows warrantors to require that consumers use "informal dispute settlement procedures" before filing a suit in court, and allows the FTC to establish rules governing these procedures, it does not define "informal dispute settlement procedure." However, the MMWA does make clear that these are to be used before filing a claim in court. Yet binding arbitration generally is understood to be a substitute for filing a lawsuit, not a prerequisite.
>
> * * *
>
> [B]inding arbitration is not normally considered to be an "informal dispute settlement procedure," and it therefore seems to fall outside the bounds of the MMWA and of the FTC's power to prescribe regulations. We thus conclude that the text of the MMWA does not evince a congressional intent to prevent the use of binding arbitration. [*Walton*, 298 F3d at 475-476.]

Then, in *Davis*, the Eleventh Circuit stated the following regarding the scope of the same phrase:

> When considering a preliminary draft of the MMWA, the Senate reflected that "it is Congress' intent that warrantors of consumer products cooperate with government and private agencies to establish informal dispute settlement mechanisms that take care of consumer grievances without the aid of litigation or *formal arbitration*." S Rep No 91-876, at 22-23 (1970) (emphasis added). As the Fifth Circuit concluded, "there is still no evidence that Congress intended binding arbitration to be considered an informal dispute settlement procedure. Therefore, the fact that any informal dispute settlement procedure must be non-binding, does not imply that Congress meant to preclude binding arbitration, which is of a different nature." *Walton*, 298 F3d at 476. [*Davis*, 305 F3d at 1276.]

We agree with the analyses set forth in *Walton* and *Davis*, which our Supreme Court accepted as persuasive in *Abela*, and conclude that binding arbitration is not an informal dispute settlement procedure or mechanism within the meaning of the MMWA. Rather, binding arbitration is a formal, final adjudication that acts as a substitute for a judicial forum, not merely a prerequisite to it.[1] Agreements to submit to binding arbitration therefore fall outside the FTC's rule-making authority under the MMWA, and the single-document rule does not apply to binding arbitration agreements. See 15 USC 2310(a) ("The [FTC] shall prescribe rules setting forth the minimum

[1] Excluding binding arbitration from the concept of an informal dispute settlement procedure further makes sense of the provisions in the MMWA stating that a consumer "may not commence a civil action . . . unless he initially resorts to such procedure," and that, "[i]n any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence." 15 USC 2310(a)(3)(C). Both of these provisions contemplate that an informal dispute settlement procedure is a prerequisite, not a substitute, for the judicial decision-making process.

requirements for an *informal dispute settlement procedure* which is incorporated into the terms of a written warranty . . .") (emphasis added); see also 16 CFR 701.3(6) (stating that "information respecting the availability of any *informal dispute settlement mechanism*" must be included in a single warranty document) (emphasis added). Accordingly, the parties' binding arbitration agreement is enforceable despite the fact that the agreement was not included as part of a single warranty document.

Affirmed.

/s/ Michael F. Gadola
/s/ Colleen A. O'Brien

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GLEICHER, J. (*concurring in part and dissenting in part*).

Plaintiff Loretta Galea contends that her brand new Jeep Cherokee turned out to be a lemon. She sued the dealer who sold it and the bank that financed the deal, asserting a variety of warranty claims. The defendants countered with a signed arbitration agreement. Galea argues that the Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq.*, prohibits binding arbitration of warranty disputes. This argument collides with *Abela v Gen Motors Corp*, 469 Mich 603; 677 NW2d 325 (2004), in which the Supreme Court held directly to the contrary. But Galea also maintains that by failing to mention arbitration, her warranty violated the single-document rule embodied in 16 CFR 701.3, a Federal Trade Commission (FTC) regulation implementing the MMWA. This omission, Galea insists, takes arbitration off the table.

The majority interprets the Supreme Court's analysis in *Abela* to mean that a binding arbitration provision need not be included in a vehicle warranty. But *Abela* never mentions the single-document rule, and neither do the two federal cases guiding the *Abela* majority's memorandum opinion. The only appellate federal case squarely addressing the issue holds that arbitration agreements outside a warranty are not enforceable. *Cunningham v Fleetwood Homes of Georgia, Inc*, 253 F3d 611 (CA 11, 2001). I believe *Cunningham*'s reasoning should prevail over the equivocal dicta on which the majority relies, and respectfully dissent.

I

Congress passed the MMWA in 1975, as a remedy for inadequate and misleading warranties on consumer goods. *Davis v Southern Energy Homes, Inc*, 305 F3d 1268, 1272 (CA 11, 2002). Senator Frank Moss, one of the act's sponsors, explained on the Senate floor that " '[b]y making warranties of consumer products clear and understandable through creating a uniform terminology of warranty coverage, consumers will for the first time have a clear and

concise understanding of the terms of warranties of products they are considering purchasing.' " Steverson & Munter, *Then and Now: Reviving the Promise of the Magnuson-Moss Warranty Act*, 63 U Kan L Rev 227, 229 n 6 (2015), quoting 120 Cong Rec 40711 (1974).

The act encourages warrantors to let consumers know exactly what to do when a product fails. The second section of the MMWA (only definitions occupy the first) highlights the act's *disclosure* function:

> In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. [15 USC 2302(a).]

This paragraph delegates to the FTC ("the Commission") the authority to make rules advancing Congress's information-sharing goal. The principle guiding the rule-making, as expressed in the balance of the text of 15 USC 2302(a), is that a warrantor must advise a consumer of the practical components of a warranty in language that the consumer can easily find and understand. "The comprehensive disclosure requirements of [the MMWA] are an integral, if not the central, feature of the [a]ct, perhaps eclipsing even the civil action and informal dispute resolution mechanisms in their importance to consumers." *Cunningham*, 253 F3d at 621.

The act commanded the FTC to consider 10 "items" as fodder for informational regulations. 15 USC 2302(a). The "items" include very basic matters such as "[t]he identification of the names and addresses of the warrantors," § 2302(a)(1), "[t]he identity of the party or parties to whom the warranty is extended," § 2302(a)(2), and "[t]he products or parts covered," § 2302(a)(3). Also included in the list are: "[i]nformation respecting the availability of any informal dispute settlement procedure offered by the warrantor," § 2302(a)(8), and "[a] brief, general description of the legal remedies available to the consumer," § 2302(a)(9).

The FTC implemented its charge by promulgating 16 CFR 701.3(a), which obliges warrantors to "clearly and conspicuously disclose in a single document" all information relevant to enforcement of a warranty:

> Any warrantor warranting to a consumer by means of a written warranty a consumer product actually costing the consumer more than $15.00 shall clearly and conspicuously disclose in a single document in simple and readily understood language, the following items of information. . . .

The mandatory disclosures that must appear in a single document are nine in number. The most pertinent here are:

> (6) Information respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with part 703 of this subchapter;

(7) Any limitations on the duration of implied warranties, disclosed on the face of the warranty as provided in . . . 15 USC 2308 . . .;

(8) Any exclusions of or limitations on relief such as incidental or consequential damages . . .;

(9) A statement in the following language:

This warranty gives you specific legal rights, and you may also have other rights which vary from State to State. [16 CFR 701.3.]

Read together, these provisions communicate that warrantors must thoroughly advise consumers of the contours of their legal rights and remedies.

The majority and I part company regarding whether the term "informal dispute settlement mechanism" encompasses binding arbitration in the context of the single-document rule. The FTC has expressed that a binding arbitration agreement qualifies as an "informal dispute settlement mechanism" and is not permitted by the MMWA. See 16 CFR 703.5(j); *Davis*, 305 F3d at 1277 (compiling federal register citations). The FTC's rejection of arbitration as an acceptable mechanism was the subject of the two federal appellate opinions on which *Abela* relies. But subsections (6), (7) and (8) concern a consumer's right to *notice* about available legal remedies, not whether some remedies are barred. Galea contends that a mandatory arbitration of a warranty dispute falls within these notice requirements, and I agree.

II

Galea's complaint alleges that the warranty on her vehicle did not include an arbitration provision. Defendants have not rebutted this allegation. The arbitration agreement they seek to enforce is instead contained in a "Friends Program Pricing and Acknowledgement Form" bearing Galea's signature and advising that in consideration for the discount she received on her vehicle, she agreed to arbitrate any warranty disputes:

> The Chrysler Employee Friends Program allows eligible purchasers to obtain a new vehicle at a substantial discount. **I understand that, in consideration for this discount, I will not be able to bring a lawsuit for any warranty disputes relating to this vehicle. Instead, I agree to submit any and all disputes through the Chrysler Vehicle Resolution Process, which includes mandatory arbitration that is binding on both Chrysler and me.** Before initiating this binding arbitration, I will attempt to resolve the dispute (1) at the dealership, (2) through the Customer Assistance Center. . . . . I represent to Chrysler that before purchasing or leasing a vehicle under this Program, I received and read the Program Rules and Provisions ("Rules"), specifically including a document entitled "Vehicle Resolution Process – Binding Arbitration" . . . . [Emphasis in original.]

The referenced "Official Program Rules" document is eight pages long and covers a number of subjects including the "program overview," the characteristics of the employees and others eligible for discounted pricing, and "dealer reimbursement." Pages six through seven address arbitration and other dispute resolution processes:

> **Dispute Resolution Process – Binding Arbitration:**
>
> Friends program participants must follow the Vehicle Resolution Process summarized below for warranty disputes regarding a vehicle purchased or leased under the Program.
>
> Experience has shown that most problems can be resolved by taking the following steps:
>
> 1. Attempt to resolve problems with dealership management.
>
> 2. If additional help is needed, contact Chrysler's Customer Assistance Center at 1-800-992-1997.
>
> 3. If still unable to resolve the problems satisfactorily, the last stage is binding arbitration. Contact NCDS (National Center for Dispute Settlement) at 1-866-937-2461 for further information.
>
> 1. ARBITRATION
>
> Arbitration is a process by which two or more parties resolve a dispute through the use of a third party neutral. As a condition of participation in the program, employees, retirees and eligible family members agree that binding arbitration is solely and exclusively the final step for resolving any warranty dispute concerning the vehicles purchased or leased under the Program. **They may not bring a separate lawsuit**. . . .
>
> . . . NCDS reviews only vehicle disputes involving Chrysler's Limited Warranty on a Chrysler vehicle. If the complaint is eligible, the customer has the option to select either an oral presentation with a single dispute settler or a "documents only" review by a panel of three decision-makers. . . .

The warranty for Galea's vehicle occupies a separate booklet and consumes approximately 30 pages. Toward the end is a five-page section titled "How to Deal With Warranty Problems." Arbitration is not mentioned. The first "remedy" suggested is to "talk to your dealer's service manager or sales manager," and if unsuccessful, "[d]iscuss your problem with the owner or general manager of the dealership." If that does not work, the warranty offers that the consumer should "contact the Chrysler Customer Assistance Center. You'll find the address in section 7.2."

By omitting any mention of the legal remedies available (including binding arbitration), the warranty on Galea's Jeep violates the single-document rule.

III

The majority reads *Abela* to mean that "[a]greements to submit to binding arbitration . . . fall outside the FTC's rule-making authority under the MMWA," and therefore, "the single document rule does not apply to binding arbitration agreements." My disagreement hinges on the interpretation of subsection (6) of the FTC's implementing regulation, which declares that a warranty must include "[i]nformation respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with part 703 of this subchapter." 16 CFR 701.3(6). The majority holds that in *Abela* the Supreme Court rejected the single-document rule, even though the subject was not raised or even mentioned in the opinion.

Abela's rationale rests on two decisions rendered by two federal appellate courts, the Courts of Appeal for the Fifth and Eleventh Circuits. The majority asserts that those two cases hold that arbitration is not an "informal dispute settlement procedure," and extrapolates from there to a conclusion that the single-document rule does not require mention of arbitration in a warranty. Here is the paragraph from *Abela* that guides the majority's analysis:

> Although the federal courts of appeals decisions are not binding, we nevertheless affirm the decision of the Court of Appeals. We have examined the decisions in *Walton v Rose Mobile Homes LLC*, 298 F3d 470 (CA 5, 2002), and *Davis v Southern Energy Homes, Inc*, 305 F3d 1268 (CA 11, 2002), and find their analyses and conclusions persuasive. Both decisions carefully examined the MMWA and the [Federal Arbitration Act], and **both concluded that the text, the legislative history, and the purpose of the MMWA did not evidence a congressional intent under the FAA to bar agreements for binding arbitration of claims covered by the MMWA.** Persuaded by these analyses of the federal courts of appeals, we conclude that plaintiffs' agreement with defendant to address the warranty claim through defendant's dispute resolution process, including mandatory arbitration, is enforceable. [*Abela*, 469 Mich at 607 (emphasis added).]

This paragraph, and the highlighted portion in particular, do not support (or even speak to) the proposition advanced by the majority. *Abela* holds that Congress did not intend the MMWA to bar binding arbitration. *Walton* and *Davis* express the same holding. The majority seizes on obiter dictum in *Walton* and *Davis* positing that the FTC improperly nixed binding arbitration as an available remedy by mistakenly interpreting arbitration as an "informal dispute settlement procedure." That dicta, the majority concludes, means that "[a]greements to submit to binding arbitration . . . fall outside the FTC's rule-making authority under the MMWA, and the single-document rule does not apply to binding arbitration agreements. A warranty need not inform the consumer that his or her legal rights are limited to binding arbitration."

I submit that the majority over-reads all three cases and incorrectly treats dicta as precedent. None of the three cases erase notice of binding arbitration from the single-document rule and none contradict *Cunningham*. Further, an analysis of the single-document rule rests on

an entirely different legal framework. That framework supports that a warrantor must notify a consumer in the warranty that any breach of warranty claim must be submitted to binding arbitration.

A

I begin with *Cunningham* because it is a decision of the same court that decided *Davis*, one of the two cases relied on by the majority.

The *Cunningham* plaintiffs purchased a motor home. They sued for breach of warranty and also raised other claims. The defense moved to compel arbitration. The parties presented two issues to the federal court of appeals: whether the MMWA prohibits binding arbitration, and whether the warranty violated the single-document rule by omitting any reference to binding arbitration. The Court concluded that the informal dispute resolution procedures mentioned in the act were "prerequisites" to a lawsuit rather than substitutes barring other procedures, such as arbitration. *Cunningham*, 253 F3d at 618-619. This conclusion rested on the court's analysis of the legislative history of the MMWA and abundant United States Supreme Court jurisprudence standing for the proposition that "the presence of one type of non-judicial mechanism in the text does not necessarily preclude the possibility of alternative mechanisms." *Id*. at 620. The Court spent little time on this subject, however, because it found another aspect of the case dispositive—the single-document rule. The court explained:

> [W]hile we are inclined to think that the presence of the non-binding § 2310 mechanism in the statutory text does not in and of itself mandate the conclusion that [the MMWA] renders binding arbitration agreements unenforceable, other key provisions of [the MMWA], together with § 2310, cast considerable doubt on the propriety of the particular arrangement at issue here. These provisions include the requirements that significant conditions, limitations, and terms of the warranty be included in simple language in the warranty itself, and that the warranty must consist of a single, understandable document made available prior to sale to the consumer. [*Id*.]

In other words, the Eleventh Circuit in *Cunningham* found that although the "informal dispute settlement procedure" language of the statute could not be construed as a *bar* to arbitration, it nevertheless compelled that a mandatory arbitration be included in a single warranty document.

This is so because context matters. When considered as an impediment to arbitration, the phrase does not do enough work to supplant the presumption in favor of arbitration described throughout United States Supreme Court caselaw. When considered as part of a regulation governing the content of a warranty, the phrase embraces arbitration because the FTC says it does. In the *notice* context, the FTC makes the rules.

The *Cunningham* Court had no difficulty concluding that in contrast with the "procedural protections" of arbitration found in federal law, "§ 2302 of [the MMWA] and the rules promulgated by the FCC . . . do in fact impose substantive obligations on manufacturers that choose to issue warranties, requiring clear disclosure of warranty terms in a single document." *Id*. at 623. The Court drew this conclusion from the legislative history and purpose of the act,

emphasizing that the MMWA was remedial legislation intended to counteract complex, misleading warranty language: "Congress sought to remedy the situation by requiring that material terms be presented in clear language in a single document." *Id*. at 621. At Congress's behest, the FTC "crafted the disclosure requirements so that they might 'inform the consumer of the full extent of his or her obligations under the warranty, and to eliminate confusion as to the necessary steps which he or she must take in order to get warranty performance.' " *Id*. (citation omitted). The FTC understood that a warranty omitting relevant terms was just as unhelpful as a warranty written in a complicated or misleading way. "The single document rule reinforces these concerns by requiring warrantors to present all information relevant to the warranty in one place, where it might be easily located and assimilated by the consumer. *Id*. The Court concluded, "Compelling arbitration on the basis of an arbitration agreement that is not referenced in the warranty presents an inherent conflict with the [a]ct's purpose of providing clear and concise warranties to consumers." *Id*. at 622.

B

I turn next to *Davis*, also decided by the Eleventh Circuit. Judge Anderson signed both *Cunningham* and *Davis*, a fact that should not be lost in the caselaw shuffle. Had the results in these two cases been incompatible, one would expect that Judge Anderson would have called that fact to a reader's attention. But he did not, and they are not incompatible because *Davis*'s holding is sharply limited: "We hold that the [MMWA] *permits* binding arbitration and that a written warranty claim arising under the [MMWA] may be subject to a valid pre-dispute binding arbitration agreement." *Davis*, 305 F3d at 1270 (emphasis added). *Cunningham* is cited several times in *Davis*, never disapprovingly. Although the majority locates in *Davis* a snippet of text citing another case (*Walton*) for the proposition that arbitration was not considered by Congress as "an informal dispute settlement procedure," the case does not stand for that proposition. Rather, the *Davis* Court painstakingly analyzed the question of arbitrability under the MMWA based on two lines of federal caselaw: *Shearson/American Express, Inc v McMahon*, 482 US 220; 107 S Ct 2332; 96 L Ed 2d 185 (1987), and *Chevron USA, Inc v Natural Resourse Defense Council, Inc*, 467 US 837; 104 S Ct 2778; 81 L Ed 2d 694 (1984).

These cases present the tests used by the federal courts to ascertain whether Congress intended to preclude arbitration of a statutory claim (*McMahon*) and whether an agency regulation merits a federal court's deference (*Chevron*). The *Davis* Court determined that Congress did not clearly express in the MMWA the intent to preclude binding arbitration. *Davis*, 305 F3d at 1272. It further found that the FTC's belief to the contrary was unreasonable and not worthy of deference. *Id*. at 1280. This analysis does not undermine *Cunningham*'s conclusion that to be enforceable, a binding arbitration provision must be included in a warranty. The FTC's opinion that arbitration is barred received no deference, but its view that a warranty must describe the legal remedies available to a consumer did. *Davis* and *Cunningham* peacefully coexist in the Eleventh Circuit because they address different legal issues in a readily reconcilable way.

C

Now to *Walton*, a two-to-one decision of the Fifth Circuit. Like *Davis*, *Walton* does not discuss the single-document rule. Also like *Davis*, the analysis presented in *Walton* rests on *McMahon* and *Chevron*. In dictum, the Court observed, "We also note that binding arbitration is not normally considered to be an 'informal dispute settlement procedure,' and it therefore seems to fall outside the bounds of the MMWA and of the FTC's power to prescribe regulations." *Walton*, 298 F3d at 476.[1] This rather tentative conclusion about the common understanding of an "informal dispute settlement procedure" appears at the end of an extended discussion of the first of the *McMahon* factors, whether in drafting the MMWA Congress spoke to the issue of arbitration. I respectfully submit that the majority errs by elevating this dicta to a rule of law that the FTC lacked the authority to consider arbitration as a remedy that must be included in a single warranty document.[2]

IV

When it comes to the information that must be included in a warranty, the real question presented is: who makes the rules? The answer is incontrovertible: Congress entrusted the FTC with the authority to decide what information a warranty must contain. 15 USC 2302(a). The FTC promulgated a regulation mandating that the availability of any "informal dispute settlement procedure" must be disclosed "clearly and conspicuously in a single document." 16 CFR 701.3(a)(6). The FTC has taken the position that arbitration is an "informal dispute settlement procedure" for that purpose. *Abela*, *Walton*, and *Davis* hold that a consumer may be compelled to arbitrate. But none of those cases considered whether the FTC could properly require that an arbitration agreement be included in the warranty. In the federal appellate courts, only *Cunningham* has reached that issue, and its verdict supports Galea.

The single-document rule furthers an important congressional objective: notifying consumers about their warranty rights. Including all relevant information in a single location allows a consumer to easily locate her remedies. When a warranty dispute erupts, there is no more important piece of information to a consumer than: what do I do now? If a consumer is limited to binding arbitration, it follows that this information must be included in the warranty. That is what both Congress and the FTC intended. Holding otherwise dilutes a critical protection of the MMWA and contradicts its history and purpose. Based on defendant Reihl's violation of

[1] Ironically, our Supreme Court disagrees and most assuredly views arbitration as an "informal" dispute resolution procedure: "By narrowing the grounds upon which an arbitration decision may be invaded, the court rules preserve the efficiency and reliability of arbitration as an expedited, efficient, and informal means of private dispute resolution." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991).

[2] The holding in *Walton* does not speak to whether arbitration is or is not an "informal dispute settlement procedure": "We therefore hold that the text, legislative history, and purpose of the MMWA do not evince a congressional intent to bar arbitration of MMWA written warranty claims." *Walton*, 298 F3d at 478.

the single-document rule, I would reverse the circuit court's order sending the case to arbitration and would remand for a trial.

/s/ Elizabeth L. Gleicher