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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2021-001489

Stivers Brothers Automotive, Inc., Appellant,

v.

W. Warner Peacock and Peacock Automotive, LLC, Respondents.

RECORD ON APPEAL

STUDEMAYER LAW FIRM, P.C.

/s/ J. Gregory Studemeyer
J. Gregory Studemeyer
7478 Carlisle Street
Post Office Box 1014
Irmo, South Carolina 29063
803-393-4399
SC Bar #5416

DOUGLAS JENNINGS LAW FIRM, LLC

/s/ J. Michael Baxley
J. Michael Baxley
225 Seven Farms Drive, Suite 202
Charleston, S.C. 29492-8353
843-408-0070
SC Bar #591

Attorneys for Appellant

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Richland
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP4001934

Stivers Brothers Automotive Inc
PLAINTIFF(S)

W Warner Peacock et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);
☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ STAYED DUE TO BANKRUPTCY
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Plaintiff's Motion for Continuance (filed on March 18, 2020) is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/22/2021 .

Bradford Neal Martin for W Warner Peacock,Peacock Automotive Llc
Laura Wilcox Howle Teer for W Warner Peacock,Peacock Automotive Llc
Ryan Gregory Studemeyer for Stivers Brothers Automotive Inc
Joseph Gregory Studemeyer for Stivers Brothers Automotive Inc
Bradford Neal Martin for W Warner Peacock,Peacock Automotive Llc
Laura Wilcox Howle Teer for W Warner Peacock,Peacock Automotive Llc

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Richland Common Pleas

Case Caption: Stivers Brothers Automotive Inc vs W Warner Peacock , defendant, et al
Case Number: 2020CP4001934
Type: Order/Electronic Form 4

So Ordered

Jocelyn Newman

Electronically signed on 2021-03-22 19:29:19 page 3 of 3

STATE OF SOUTH CAROLINA
COUNTY OF Richland
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP4001934

Stivers Brothers Automotive Inc
PLAINTIFF(S)

W Warner Peacock et al
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IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Following a hearing on March 23, 2021, conducted via Cisco WebEx,

Plaintiff's Second Motion to Enlarge Time (filed on 8/14/20) is GRANTED.

Plaintiff's Motion to Stay and/or Enlarge Time (filed on 12/23/20) is GRANTED.

Plaintiff's Motion to Serve Second Amended Complaint (filed on 2/5/21) is DENIED.

Plaintiff's Second Motion to Compel (filed on 2/5/21) is DENIED, except that Defendants shall respond to item #2 of Plaintiff's First Request to Produce within 15 days of the Court's entry of a Confidentiality Order regarding the same.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/24/2021 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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Richland Common Pleas

Case Caption: Stivers Brothers Automotive Inc vs W Warner Peacock , defendant, et al
Case Number: 2020CP4001934
Type: Order/Electronic Form 4

So Ordered

Jocelyn Newman

Electronically signed on 2021-03-24 11:54:13 page 3 of 3

ELECTRONICALLY FILED - 2021 Mar 24 12:49 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

STATE OF SOUTH CAROLINA
COUNTY OF Richland
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP4001934

Stivers Brothers Automotive Inc
PLAINTIFF(S)

W Warner Peacock et al
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☐ Other

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IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Following a hearing on March 23, 2021, conducted via Cisco WebEx,
Plaintiff's Motion for Judgment on the Pleadings (filed on 2/5/21) is DENIED.
Defendants' Motion for Judgment on the Pleadings (filed on 12/8/20) is DENIED.
Defendants' Motion to Seal (filed on 12/4/20) is GRANTED, and the two Asset Purchase Agreements in question shall be subject to a confidentiality order which is to be entered by the Court.
Defendants' Motion for Summary Judgment (filed on 12/4/20) contains numerous arguments. The motion is DENIED as to Plaintiff's alleged failure to prove or to mitigate damages. The remainder of the motion is TAKEN UNDER ADVISEMENT.

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Richland Common Pleas

Case Caption: Stivers Brothers Automotive Inc vs W Warner Peacock , defendant, et al
Case Number: 2020CP4001934
Type: Order/Electronic Form 4

So Ordered

Jocelyn Newman

Electronically signed on 2021-03-24 12:05:14 page 3 of 3

ELECTRONICALLY FILED - 2021 Mar 24 1:07 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

STATE OF SOUTH CAROLINA
COUNTY OF Richland
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP4001934

Stivers Brothers Automotive Inc
PLAINTIFF(S)

W Warner Peacock et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This Order shall amend the Court's Form 4 Order entered on March 24, 2021, as follows:

Defendants' Motion for Judgment on the Pleadings is GRANTED. Defendants' counsel shall prepare a proposed order for the Court regarding the same.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/25/2021 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCP.



Richland Common Pleas

Case Caption: Stivers Brothers Automotive Inc vs W Warner Peacock , defendant, et al
Case Number: 2020CP4001934
Type: Order/Electronic Form 4

So Ordered

Jocelyn Newman

Electronically signed on 2021-03-25 09:25:51 page 3 of 3

ELECTRONICALLY FILED - 2021 Mar 25 9:32 AM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	C/A NO. 2020-CP-40-01934
STIVERS BROTHERS AUTOMOTIVE, INC.,	)	
	)	
	)	
Plaintiff,	)	ORDER
v.	)	
	)	
W. WARNER PEACOCK and PEACOCK	)	
AUTOMOTIVE, LLC,	)	
	)	
Defendants.	)	

This matter is before the Court on Defendants' Motion for Judgment on the Pleadings.

PROCEDURAL HISTORY

The parties entered into two Asset Purchase Agreements (APAs) to buy automobile dealerships owned by Plaintiff on January 7, 2020. Defendant asserted Plaintiff failed to preserve the goodwill of the businesses until the time of closing and to provide relevant financial information as required under the APAs. Defendants contend that as a result, Peacock Automotive terminated the APAs on March 27, 2020.

Plaintiff filed its Complaint on April 13, 2020 and an Amended Complaint on July 2, 2020 alleging Defendants breached the APAs. Both the Complaints alleged causes of action for Declaratory Judgment, Breach of Contract, Breach of Contract Accompanied by a Fraudulent Act, Violation of the Dealer's Act, an untitled Cause of Action against Warner Peacock, and Veil Piercing. Defendants timely filed Answers and Counterclaims to the Complaint and the Amended Complaint.

Plaintiff's Fourth Cause of Action alleged that Defendants' conduct in breaching the APAs violated the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act ("Dealers

Act"). S.C. Code §56-15-10 et seq. (2005). Plaintiff's Amended Complaint alleged specific violations of S.C. Code §§56-15-30 and 40(i) in that Defendants' actions were unfair methods of competition and unfair and deceptive. Defendants filed a Motion for Judgment on the Pleadings on December 9, 2020 requesting the dismissal of Plaintiff's cause of action for violation of the Dealers Act.

Plaintiff filed its own Motion and Memorandum for Judgment on the Pleadings and Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings on February 5, 2021. Plaintiff then filed a Supplemental Memorandum on March 12, 2021. Defendants filed a Reply Memorandum on Wednesday, March 17, 2021, in compliance with my Order that all Memoranda for Motions pending before me be filed the Wednesday before the week of the hearing. Plaintiff filed a second Supplemental Memorandum on Friday, March 19, 2021.

Plaintiff then sent a four page letter to the Court on Monday, March 22, 2021, which included copies of all of the pleadings, affidavits, and discovery in the case. Also, the letter enclosed copies of three Circuit Court Orders that Plaintiff's counsel submitted to "throw light upon the issues before the Court" with respect to the Motions for Judgment on the Pleadings.

Based on the Motions and Memoranda filed before me, the pleadings, Plaintiff's submissions, and oral arguments, I make the following findings of fact and conclusions of law.

MOTION STANDARD

Any party may move for a judgment on the pleadings under Rule 12(c) SCRCP, *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687, S.E.2d 47 (2009). A judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if resolved in its favor. *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E. 2d 338, 339 (1991).

S.C. CODE § 56-15-80

Stivers sued Peacock Automotive and Warner twice for specific performance of each of “two separate Asset Purchase Agreements (APAs)” for the purchase of its Chevrolet and Hyundai/Genesis dealerships in Columbia, South Carolina. Stivers’ Complaint was filed on April 13, 2020 and its Amended Complaint was filed three months later on July 2, 2020. Plaintiff’s claims regarding the Dealers Act arise from the alleged breach of the APAs. (Complaint, ¶s 68-76, Amended Complaint ¶s 82-90).

Section 56-15-80 is headed “Agreements to which chapter applies.” It states in pertinent part:

The provisions of this chapter shall apply to all written or oral agreements between a manufacturer, wholesaler or distributor with a motor vehicle dealer . . . and all other such agreements in which the manufacturer, wholesaler or distributor has any direct or indirect interest.

S.C. Code § 56-15-80.¹

Section 80 is clear and unambiguous. When the statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and the court must apply the statute according to its literal meaning, *Sloan v. Hardee*, 371 S. C. 495, 498, 640 S.E. 2d 457, 459 (2007).

The canon of construction “*expressio unius est exclusio alterius*” or “*inclusio unius est exclusio alterius*” holds that “to express or include one thing implies the exclusion of another, or of the alternative.”” *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578 (2000) citing Black’s Law Dictionary 602 (7th ed. 1999).” *See also Brown v. State*, 343 S.C. 342, 349, 540 S.E.2d 846, 850 (2001) (“Thus, the maxim of *expressio unius est exclusio alterius* ... applies to exclude day care centers from falling within the statute since day care centers are not expressly included.”).

¹ Plaintiff argues that the South Carolina Unfair Trade Practice Act (SCUTPA) is analogous to the Dealers Act and supports an interpretation of the Dealers Act that one dealer may sue another. I find the SCUTPA differs from the Dealers Act in that it does not contain a provision similar to §56-15-80.

I therefore conclude the Legislature intended to exclude contractual relationships between dealers when it did not expressly include such contracts in § 56-15-80.

I must also look to the essence of the Plaintiff's claim to determine whether it is actionable under the Dealers Act. *Ferguson v. Charleston Lincoln Mercury*, 564 S.E.2d 94, 349 S.C. 558 (2002) is instructive. The South Carolina Supreme Court was asked to consider whether Mrs. Ferguson could recover under the Dealers Act for allegedly fraudulent acts committed against her husband. The Court recognized the Dealers Act encompasses multiple causes of action. *Id.* at fn. 2 ("The Dealers Act has a wide ambit and covers causes of action not rooted in fraud and deceit...."). The Court found the essence of Mr. Ferguson's allegation was that CLM misled him into paying more for the car than he should have paid and that it concealed the overcharge either through intentionally deceptive actions or through grossly negligent disclosure practices. The Court therefore held that allegations of such fraud and deceit were exempted from the general survival statute and did not survive Mr. Ferguson's death. The Court further found it was irrelevant whether Ferguson labeled CLM's actions as unfair, misleading, or deceptive.

In the present case, Plaintiff alleges:

The Defendants engaged in conduct designed to deceive or mislead prompted by an interested or sinister motive, including but not limited to, using the current environment and breaching the APAs to renegotiate the terms.

Amended Complaint ¶ 89. I find the essence of the Plaintiff's claim against Defendants arises from the alleged breach of the APAs, and therefore it is excluded from the Dealers Act.

LEGISLATIVE INTENT

In Section 1 of the 1972 Act No. 1237 the South Carolina Legislature provides:

The General Assembly finds that the distribution of motor vehicles in the State of South Carolina vitally affects the general economy of the State and the public interest and public welfare, and in the exercise of its police power, it is necessary to regulate motor vehicle manufacturers, distributors, dealers and their

representatives doing business in South Carolina in order to prevent frauds, impositions and other abuses upon its citizens.

Plaintiff argues that the use of the word “citizens” in the 1972 Act indicates that the Act applies to the relationships between dealers; however, the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect. *SC States Ports Author. v. Jasper County*, 368 S.C. 388, 398, 629 S.E. 2d. 624, 629 (2006). The use of the word “citizens” in Section 1 of the 1972 Act does not alter the specific provisions of § 56-15-80 to mean the Act applies to a contract dispute between two dealers.

The South Carolina Supreme Court has made it clear that the purpose of the Act is consumer protection. See *Herron v. Century BMW*, 378 S.C. 525, 693 S.E.2d 394, 399 (2010).² The Act contains provisions to protect dealers from manufacturers and distributors, due to the unequal bargaining power between the parties. The Act also contains general provisions to protect consumers from dealers.

I have considered Plaintiff’s arguments that § 56-15-46 and § 56-15-320 indicate that the Act applies to actions by one dealer against another; however, I find these Sections inapplicable to the present case. Section 56-15-46 requires that the manufacturer give notice of its intent to establish a new motor vehicle dealership or relocate a dealership within 10 miles of an existing dealership of the same make. The burden under this Section is on the manufacturer and not the potentially competing dealer.

S.C. Code § 56-15-320 is limited in its scope to recovery under a dealer’s surety bond. The Supreme Court found that clear intent of the Legislature was to provide only the owner of a motor

² The Act does not define “consumer.” The South Carolina Consumer Protection Code defines a consumer as “buyer, lessee, or debtor to whom credit is extended in a consumer transaction.” S.C. Code § 37-1-301(10). The inclusion of legal entities in the definition of “person” under S.C. Code Ann. § 56-15-10 does not indicate that these entities are not consumers, as vehicles can be purchased in the name of a corporation or other entity. Plaintiff does not claim to be a consumer in the present action.

vehicle, or the owner's legal representative, with a cause of action against the surety on a bond issued pursuant to that statute. *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, --, 476 S.E.2d 690, 692 (1996). Plaintiff is not seeking to recover under Peacock's surety bond for a loss it claims as the owner of a motor vehicle; therefore, this provision is inapplicable.

The parties in this case are dealers who have sophisticated businesses and were engaged in arms-length transactions with one another. They do not need the added protection provided by the Dealers Act in this factual scenario. The Legislature made clear in the exclusionary language of §56-15-80 that it did not intend to regulate agreements between two dealers under the Act.

READING THE ACT AS A WHOLE

The Act must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect. *SC States Ports Author. v. Jasper County*, 368 S.C. 388, 398, 629 S.E. 2d. 624, 629 (2006).

Reading all of Chapter 15 together requires § 56-15-40(1) to be interpreted within the whole Chapter. It provides:

(1) It shall be deemed a violation of paragraph (a) of Section 56-15-30 for any manufacturer, factory branch, factory representative, distributor, or wholesaler, distributor branch, distributor representative or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public.

This section allows a dealer to bring an action for another dealer's fraudulent act under § -320, (against the dealer's surety bond and if the dealer owns the automobile), but § -80 does not allow a dealer to bring an action regarding a written or oral agreement against another dealer.

Likewise, reading § 56-15-110, as a whole, which provides in part:

(1) In addition to temporary or permanent injunctive relief as provided in Section 56-15-40(3)(c), any person who shall be injured in his business or property by reason of anything forbidden in this chapter may sue therefor in the court of common pleas

together with Section 80 requires that an oral or written agreement between two dealers does not fall under “anything forbidden in this chapter.” This is consistent not only with the rule of interpretation that all Sections be read together, but also with the rule that a specific statutory provision prevails over a more general one. *Wooten ex rel. Wooten v. S.C. Dep’t of Transp.*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999).

CASES CITED BY THE PLAINTIFF

Plaintiff cites a number of cases between customers and dealers and argues that because those cases “involved a contract” that was not between a manufacturer and a dealer, the South Carolina Courts have expanded the scope of the Dealers Act to include any breach of contract claim involving a dealership. While it is true that a contract is involved in all customer purchases, the cases cited by Plaintiff do not address the application of the Dealers Act to a contract dispute between two dealers.

Plaintiff’s citation to other Richland County Orders is also unpersuasive. The outcomes of these other cases are not precedential. *See Ford v. Beaufort Cnty. Assessor*, 398 S.C. 508, 730 S.E.2d 335 (Ct. App. 2012) (“Trial or inferior court decisions are not precedents binding other courts, including appellate courts or other judges of the same trial court.”). Further, none of the defendants in the cases cited by Plaintiff objected to the application of the Dealers Act on the grounds that § 56-15-80 applied only to contracts between dealers and manufacturers or distributors. Defendants, in contrast, have denied Plaintiff is entitled to protection under the Act from actions of other dealers based on the language of the Chapter.

Finally, I find *Tober Foreign Motors, Inc. v. Better Oldsmobile, Inc.*, 381 N.E.2d 908 (1978), cited by Plaintiff, does not stand for the proposition that one dealer can sue another under the Massachusetts Dealers Act. Reiter was an established Oldsmobile franchise in Springfield

Massachusetts. General Motors sent Reiter a letter of intent to establish a competing dealership in the area. Reiter's suit for injunctive relief against GM and Tober failed, and the issue before the Supreme Judicial Court of Massachusetts was the constitutionality of the statute. In considering the statute, the Massachusetts Court recognized it was "essentially an act for the protection of consumers" and that it was "designed to protect franchisees from having to succumb to dictation by manufacturers . . ." *Id.* at 913. The Massachusetts Court does not suggest the statute was designed to protect motor vehicle dealers from one another.

CONCLUSION

The South Carolina Dealers Act provides protections for its citizens for certain acts related to the automobile industry. The Act enumerates the circumstances under which protections are provided to various citizens of South Carolina, including automobile dealers, owners of automobiles, and consumers. The rules of statutory construction compel the Court to apply the plain meaning of § 56-15-80 and to find that the Dealers Act is not applicable to agreements between two dealers.

Defendants' Motion for Judgment on the Pleadings is therefore GRANTED and Plaintiff's cause of action under the Dealers Act is dismissed.

AND IT IS SO ORDERED.

The Honorable Jocelyn Newman
Presiding Judge

_____, South Carolina This ____ day of _____, 2021.



Richland Common Pleas

Case Caption: Stivers Brothers Automotive Inc vs W Warner Peacock , defendant, et al
Case Number: 2020CP4001934
Type: Order/Other

So Ordered

Jocelyn Newman

Electronically signed on 2021-11-12 12:06:48 page 9 of 9

ELECTRONICALLY FILED - 2021 Nov 12 2:23 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

STATE OF SOUTH CAROLINA
COUNTY OF Richland
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP4001934

Stivers Brothers Automotive Inc
PLAINTIFF(S)

W Warner Peacock et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCF; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ STAYED DUE TO BANKRUPTCY
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

The remainder of Defendant's Motion for Summary Judgment (filed on 12/4/20) that was taken under advisement (Form 4 Order filed on 3/24/21) is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/12/2021 .

Bradford Neal Martin for W Warner Peacock,Peacock Automotive Llc
Laura Wilcox Howle Teer for W Warner Peacock,Peacock Automotive Llc
John Michael Baxley for Stivers Brothers Automotive Inc
Ryan Gregory Studemeyer for Stivers Brothers Automotive Inc
Joseph Gregory Studemeyer for Stivers Brothers Automotive Inc
Bradford Neal Martin for W Warner Peacock,Peacock Automotive Llc
Laura Wilcox Howle Teer for W Warner Peacock,Peacock Automotive Llc

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCP.

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Richland Common Pleas

Case Caption: Stivers Brothers Automotive Inc vs W Warner Peacock , defendant, et al
Case Number: 2020CP4001934
Type: Order/Electronic Form 4

So Ordered

Jocelyn Newman

Electronically signed on 2021-11-12 14:43:25 page 3 of 3

ELECTRONICALLY FILED - 2021 Nov 12 4:01 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2020-CP-40-_____
STIVERS BROTHERS	)	
AUTOMOTIVE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	COMPLAINT
W. WARNER PEACOCK,	)	
MARY KAYE PEACOCK,	)	
KEN GRIFFEY, JR.,	)	
JAY BRENNAN, and	)	
PEACOCK AUTOMOTIVE, LLC,	)	
	)	
Defendants.	)	

The Plaintiff above named, complaining of the Defendants herein, would respectfully show unto the Court:

INTRODUCTION

1. The distribution of motor vehicles in South Carolina is regulated to prevent frauds, impositions, and other abuses upon citizens of South Carolina by manufacturers, distributors, dealers and their representatives doing business in South Carolina.

2. The Plaintiff has lawfully engaged in the business of selling and servicing new Chevrolet and Hyundai motor vehicles and used motor vehicles in Richland County, South Carolina since August 4, 2017, and its affiliated dealerships maintained a presence and lawfully conducted business in Richland, Lexington, and Sumter Counties, South Carolina from 1989 until 2011.

3. Peacock Automotive, LLC has engaged in the motor vehicle business in South Carolina under various names including NRAM Holdings, LLC, Coastal States Automotive

Group, LLC, and New River Auto Mall, LLC since March 26, 2007.

4. According to its website, Peacock Automotive, LLC currently operates Audi, Volkswagen, Subaru, Land Rover, Jaguar, Porsche, Genesis, Hyundai, Chrysler, Jeep, Dodge, RAM, and FIAT motor vehicle dealerships in Jasper County, Jaguar and Land Rover dealerships in Lexington County, and a Hyundai dealership in Richland County, South Carolina; Volkswagen, Hyundai, and Genesis dealerships and a Used Car & Truck Center in Savannah, Georgia; and a Ford dealership on the Maitland/Winter Park line just north of Orlando, Florida.

5. According to its website, Peacock Automotive, LLC operates as Peacock-Griffey Automotive in Florida.

6. According to its website, Major League Baseball Hall of Fame member, Ken Griffey, Jr., a resident of Orlando, is a shareholder [sic] in Peacock Automotive, LLC and Peacock-Griffey Automotive.

7. Peacock Automotive, LLC seeks the benefit of identifying its officers and shareholders [sic] under "Peacock by the people" on its website, and by allowing their names to be used for that purpose, those individuals must share the burden of Peacock Automotive, LLC's conduct.

8. Among "Peacock by the priorities" listed on its website, Peacock Automotive, LLC lists "Ethics and honesty" as its *second* priority.

9. As more fully set forth herein, Peacock Automotive, LLC has engaged in unethical and unlawful conduct in Richland County, South Carolina and has caused the Plaintiff to suffer significant monetary damages.

10. The Plaintiff brings this action for declaratory relief, equitable relief including specific performance, and for damages as a result of the foregoing unlawful acts.

PARTIES

11. The Plaintiff is a domestic corporation, maintaining its principal place of business in the County of Richland, State of South Carolina.

12. According to Peacock Automotive, LLC's website, Defendants, W. Warner Peacock ("Warner Peacock") and Mary Kaye Peacock ("M.K. Peacock"), are residents of Beaufort County, State of South Carolina and Windermere, Florida.

13. Upon information and belief, Defendant, Ken Griffey, Jr. ("Griffey, Jr."), is a resident of Orlando, Florida.

14. Upon information and belief, Defendant, Jay Brennan ("Brennan"), is a resident of Orlando, Florida.

15. Defendant, Peacock Automotive, LLC ("Peacock Automotive"), is a limited liability company, organized and existing under the laws of the State of Florida, conducting business in the Counties of Jasper, Lexington, and Richland, State of South Carolina.

JURISDICTION AND VENUE

16. This Court has jurisdiction over the parties and the subject matter of this action pursuant to S.C. Code Ann. Sections 56-15-20, 36-2-802, and 36-2-803.

17. Venue is proper in Richland County pursuant to S.C. Code Ann. Sections 15-7-30(F)(1) and (2) since the Plaintiff maintained its principal place of business in Richland County at the time these causes of action arose and since the most substantial part of the act or omission giving rise to these causes of action occurred in Richland County. Venue is also proper under S.C. Code Ann. Section 56-15-140.

SUBSTANTIVE ALLEGATIONS

18. On January 7, 2020, the Plaintiff and Peacock Automotive entered into two

separate Asset Purchase And Sale Agreements ("APAs"), one for the assets of the Plaintiff's Chevrolet dealership located at 111 Newland Road, Columbia, South Carolina 29229, and the other for the assets of the Plaintiff's Hyundai dealership located at 101 Newland Road, Columbia, South Carolina 29229.

19. Both parties were sophisticated business entities, capable of assessing their respective risks with the transactions.

20. The Plaintiff entered into the APAs recognizing that the assets could increase in value or that the prospect of selling them could become less favorable.

21. Peacock Automotive entered into the APAs recognizing that the assets could decrease in value or that the prospect of acquiring them could become less favorable.

22. Each APA provided for the payment by Peacock Automotive to the Plaintiff of the sum of THREE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$3,500,000) for a total of SEVEN MILLION DOLLARS (\$7,000,000) in addition to the purchase of certain new motor vehicles, certain service loaners, all fixed assets, certain parts and accessories, all unopened oil and grease drums and bulk oil and fluid, and certain work in process.

23. Representatives of the Plaintiff and Peacock Automotive had specific discussions concerning the Plaintiff's intention to acquire another dealership with the proceeds of the transaction.

24. Each APA likewise required Peacock Automotive to enter into an assignment of Lease Agreement with the owners of the Premises.

25. The current term of the Lease Agreement extends through December 24, 2024.

26. The Lease Agreement allows the Plaintiff to terminate on December 24, 2021, by providing written notice on or before December 24, 2020.

27. The annual Base Rent payable under the Lease Agreement is One Million Two Hundred Fifty-Three Thousand Five Hundred Twenty and 84/100 Dollars (\$1,253,520.84), payable in monthly installments equal to One Hundred Four Thousand Four Hundred Sixty and 07/100 Dollars (\$104,460.07), in advance on or before the first day of each Lease Month during the Term.

28. In addition to the annual Base Rent payable under the lease, property taxes of One Hundred Seventy Three Thousand Eight Hundred Sixty Five and 25/100 Dollars (\$173,865.25) and insurance premiums of One Hundred Seventeen Thousand Nine Hundred Fifty One and 69/100 Dollars (\$117,951.69) are due and payable annually.

29. Each APA required Peacock Automotive to submit applications to the manufacturer within 20 days of receiving applications from the manufacturers and to use its best efforts in good faith to obtain required approvals at the earliest date practicable, but no later than one hundred and five (105) days after the effective date, January 7, 2020.

30. Each APA required Peacock Automotive to keep the existence of the APAs confidential, but Warner Peacock failed to do so.

31. Neither APA contained a "force majeure" clause.

32. On March 13, 2020, in response to the Covid-19 pandemic, the President of the United States declared that an emergency existed nationwide under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

33. On March 26, 2020, Ordinance No.: 2020-034, "An Emergency Order Declaring a Stay Home Stay Safe for the City of Columbia, South Carolina" ("the Ordinance") was issued by Mayor Stephen K. Benjamin and Columbia City Council.

34. The Ordinance provides that individuals "shall stay in their homes and not travel

through or congregate in the streets, sidewalks, waterways and/or public spaces in the City of Columbia, including establishments that hold a City of Columbia business licenses [sic] except for the purposes of working at or conducting business with the attached list of businesses (hereinafter "Essential Service" or "Essential Services").

35. Exhibit A to the Ordinance defines twelve types of "essential services" including, *inter alia*, vehicle sales and automotive repair.

36. Notwithstanding the plain language of the Ordinance and the exceptions thereto, on March 27, 2020, Warner Peacock provided written notice of termination of the APAs to the Plaintiff suggesting that the following conditions precedent to closing had not been met:

- a. "We" do not believe the current conditions existing in the Columbia, SC area permit the Seller to comply with these requirements, as the Dealership's [sic] business cannot now or for the foreseeable future operate in the ordinary course;
- b. Columbia's issuance of a stay in place order is an order of the type that qualifies pursuant to Section 16(h) to materially adversely affecting [sic] the Subject Assets; and
- c. "We" have requested the February 2020 financial records and Seller has failed to provide such records.

37. In his notice of termination, Warner Peacock also requested that "Shutts Bowen LLP, in its capacity as escrow agent, return the \$100,000 deposit which was made in connection with this proposed transaction".

38. On the same day, the South Carolina Attorney General issued an Opinion that local government cannot exercise the emergency powers delegated to the Governor by the General Assembly and that unauthorized exercise of such emergency powers could subject political subdivisions to liability at the behest of a private citizen with requisite legal standing.

39. As set forth herein, all of Warner Peacock's asserted reasons for termination were

merely pretextual.

40. At all times, notwithstanding the Defendants' "belief", the Plaintiff has continued to operate in the ordinary course of business.

41. By its terms, the Ordinance does not apply to the Plaintiff's business.

42. Even if the Plaintiff was not excepted from the provisions of the Ordinance, the South Carolina Attorney General determined that the action taken by the Mayor and Council was not an authorized exercise of emergency powers delegated to the Governor by the General Assembly.

43. The Defendants have had electronic access to the Plaintiff's financial records since January 15, 2020.

44. The real reason for the Defendants' purported termination is the ongoing Covid-19 pandemic, notwithstanding the lack of a "force majeure" clause in the APAs.

45. The Defendants now wish to shift the burden they knowingly and voluntarily undertook in the APAs to the Plaintiff because closing on the transactions now appears less favorable to them.

46. The Defendants failed and refused and continue to fail and refuse to promptly submit to the manufacturers all forms, applications, and other documents which the manufacturers require to consider approval of the transactions.

47. The Plaintiffs will further show that Warner Peacock has raised new claims in an effort to avoid the commitments made to the Plaintiff, including an inability to arrange for inventory financing and an inability to speak with the Chevrolet Zone Manager, neither of which are included as conditions precedent in the nearly 30 pages of each APA drafted by counsel for the Defendants.

48. On April 3, 2020, a demand for adequate assurance of performance was made to the Defendants pursuant to S.C. Code Ann. Section 36-2-609.

49. The Defendants have failed and refused and continue to fail and refuse to comply with their implied covenant of good faith and fair dealing and to provide adequate assurance of performance as requested.

FOR A FIRST CAUSE OF ACTION
(declaratory judgment)

50. Each and every previous allegation is realleged herein in the same manner and to the same extent as if repeated.

51. This cause of action is brought pursuant to the Uniform Declaratory Judgments Act, S.C. Code Ann. Section 15-53-10, et seq.

52. The Plaintiff is a person interested under a written contract or other writing constituting a contract whose rights, status or other legal relations are affected by a statute and/or contract and seek to have determined questions of construction or validity arising under the statute and/or contract and obtain a declaration of rights, status or other legal relations thereunder.

53. In addition thereto, the issues herein are of such public importance as to require their resolution for future guidance.

54. As set forth herein, a real or actual controversy exists between the Plaintiff and the Defendants.

55. The Defendants, Warner Peacock, M.K. Peacock, Griffey, Jr., and Brennan, are "persons" as defined by S.C. Code Ann. Section 56-15-10(n) and all of the Defendants are "dealers" or "motor vehicle dealers" as defined by S.C. Code Ann. Section 56-15-10(h).

56. The Plaintiff is a citizen of South Carolina entitled to protection from frauds, impositions, and other abuses by dealers or motor vehicle dealers as contemplated by 1972 S.C. Acts 2419, 1972 Act No. 1237 hereafter "Act No. 1237").

57. Based upon the foregoing, the Plaintiff is informed and believes that it is entitled to a declaration that the APAs between the Plaintiff and the Defendants remain valid and enforceable contracts, notwithstanding the Defendants' purported termination for pretextual reasons.

FOR A SECOND CAUSE OF ACTION
(breach of contract)

58. To the extent not inconsistent herewith, each and every previous allegation is realleged herein in the same manner and to the same extent as if repeated.

59. The Plaintiff and the Defendants entered into valid and binding contracts.

60. The Plaintiff elected to forgo an opportunity to purchase real estate in Richland County to relocate the assets and to exercise the right to early termination of the Lease Agreement in reliance upon the Defendants' obligations under the APAs.

61. The APAs have been partly carried into execution by the Plaintiff with the approbation of the Defendants.

62. The Plaintiff has performed its obligations under the APAs and remains able and willing to perform under the APAs.

63. The Defendants have breached the contracts, placing the Plaintiff in the untenable position of having to exercise its right to early termination of the Lease Agreement and selling the assets at a "fire sale" without a place of business, immediately acquiring real estate and trying to construct a facility on or before December 24, 2021, or continuing to pay rent, property taxes, and insurance while continuing to market the assets in the current environment, in the

wake of Warner Peacock's breach of the confidentiality provisions.

64. The Plaintiff has been damaged by the Defendants' breach and will continue to suffer damage in the future caused by the breach.

65. Both APAs provide for specific performance together with any other remedies at law or equity.

66. Both APAs provide that if any action shall be brought by any party to recover any sums hereunder, or for or on account of any breach of, or to enforce or interpret any of the covenants, terms or conditions of this Agreement, then the prevailing party shall be entitled to recover costs and expenses incurred in such action, including reasonable attorney's fees.

67. Based upon the foregoing, the Plaintiff is informed and believes that it is entitled to an order requiring specific performance of each APA, an award of actual damages if specific performance can not be had, and an award of costs and expenses including a reasonable award of attorney's fees.

FOR A THIRD CAUSE OF ACTION
(violation of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act "RMDDA")

68. To the extent not inconsistent herewith, each and every previous allegation is realleged in the same manner and to the same extent as if repeated.

69. Among other things, Act No. 1237, now codified in Chapter 15 of Title 56 of the South Carolina Code as Regulation of Manufacturers, Distributors, and Dealers ("RMDDA"), includes certain definitions and declares certain conduct to be unlawful.

70. Specifically, S.C. Code Ann. Section 56-15-30 declares unfair methods of competition and unfair or deceptive acts or practices as defined by Section 56-15-40 to be unlawful.

71. More specifically, S.C. Code Ann. 56-15-40(1) deems it a violation of Section 56-15-30 for, among others, a dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public.

72. As set forth herein, the Defendants have engaged in unfair methods of competition and unfair and deceptive acts or practices declared unlawful by S.C. Code Ann. 56-15-30.

73. Moreover, the Defendants have engaged in malicious action which is arbitrary, in bad faith, or unconscionable and which has caused and continues to cause damage to the Plaintiff.

74. The Defendants acts were unreasonable, capricious or nonrational, not according to any legitimate reason or judgment and dependent upon will alone.

75. The Defendants engaged in conduct designed to deceive or mislead prompted by an interested or sinister motive, including but not limited to, using the current environment and threatening to breach the APAs to renegotiate the terms of the APAs.

76. Based upon the foregoing, the Plaintiff is informed and believes that it is entitled to judgment for double the actual damages by it sustained, the cost of suit, including a reasonable attorney's fee, and an award of punitive damages, not to exceed three times the actual damages.

FOR A FOURTH CAUSE OF ACTION

77. To the extent not inconsistent herewith, each and every previous allegation is realleged herein in the same manner and to the same extent as if repeated.

78. At all times herein mentioned, Warner Peacock had intimate knowledge of all of the facts and circumstances concerning the APAs between the Plaintiff and Peacock Automotive.

79. Warner Peacock has intentionally procured the breach of the APAs between the Plaintiff and Peacock Automotive.

80. Warner Peacock has no justification for interfering in the contractual relations between the Plaintiff and Peacock Automotive.

81. As a result of Warner Peacock's interference, the Plaintiff has suffered and will continue to suffer actual and consequential damages.

82. Warner Peacock has wantonly, willfully, and maliciously interfered with the Plaintiff's contractual relations with Peacock Automotive.

83. Based upon the foregoing, the Plaintiff is informed and believes that it is entitled to judgment against Warner Peacock for both actual and punitive damages.

**FOR A FIFTH CAUSE OF ACTION
(veil piercing)**

84. To the extent not inconsistent herewith, each and every previous allegation is realleged herein in the same manner and to the same extent as if repeated.

85. The individual Defendants have attempted to use Peacock Automotive to protect fraud, justify wrong, or defeat public policy.

86. The interests of Peacock Automotive and the individual Defendants are identical, and one is the alter ego of the other.

87. This Court should inquire into the observation of formalities by Peacock Automotive including but not limited to whether it was adequately capitalized, paid dividends, was or is insolvent, siphoning of funds by the dominant shareholders or members, whether other officers or directors performed their official functions, whether it maintained appropriate records, and whether it was merely a façade for the operations of the dominant shareholders or members.

88. The Plaintiff will show that allowing Peacock Automotive to benefit from marketing the celebrity status of at least one of its shareholders [sic] without requiring the individual Defendants to share in the burden of its conduct would result in injustice and

fundamental unfairness.

WHEREFORE, the Plaintiff prays for declaratory relief, equitable relief in the form of specific performance, for an award of both actual and punitive damages, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

STUDEMEYER LAW FIRM, P.C.

By: s/J. Gregory Studemeyer
J. Gregory Studemeyer
SC Bar #5416
7478 Carlisle Street
Post Office Box 1014
Irmo, South Carolina 29063
803-393-4399

Attorney for the Plaintiff

Irmo, South Carolina
April 13, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	C/A NO. 2020-CP-40-01934
STIVERS BROTHERS AUTOMOTIVE, INC.,	)	
	)	ANSWER AND COUNTERCLAIMS
	)	OF DEFENDANTS PEACOCK
Plaintiff,	)	AUTOMOTIVE, LLC AND
v.	)	W. WARNER PEACOCK
	)	
W. WARNER PEACOCK, MARY KAYE	)	
PEACOCK, KEN GRIFFEY, JR., JAY	)	
BRENNAN, and PEACOCK	)	
AUTOMOTIVE, LLC,	)	
	)	
Defendants.	)	

Defendants Peacock Automotive, LLC (hereafter "Peacock Automotive"), and W. Warner Peacock answering and counterclaiming to the Plaintiff's Complaint, would respectfully show the Court as follows:

INTRODUCTION AND UNDERLYING FACTS

1. Peacock Automotive has built a strong reputation by providing high quality vehicle sales and service to the consumers in the state of South Carolina.
2. In its effort to provide better service in the Columbia, South Carolina area, Peacock Automotive explored the potential purchase of two dealerships from Plaintiff, one a Chevrolet dealership and the other a Hyundai/Genesis dealership. Critical to any potential purchase is the honest and fair disclosure by the selling dealership of the financial condition and net profit of the business and the continued running of the business with best efforts and in good faith until closing without any loss in goodwill caused by seller or an unexpected intervening event.
3. Plaintiff assured Defendant Peacock Automotive through several representations, that it was operating two highly successful dealerships (Chevrolet and Hyundai/Genesis) making

approximately \$2 million dollars of net profits each year.

4. The purchase price of any dealership in the automotive industry crucially relies upon the honesty and integrity of the seller in representing the true value of his dealerships and presenting honest and accurate financial information that does not misrepresent their net profits and financial health. Trusting the representations made by Plaintiff, Peacock Automotive signed two contingency contracts (the “Asset Purchase Agreements”) on January 7, 2020 for the potential purchase of the Chevrolet and Hyundai/Genesis dealerships.

5. Critical to the closing of such an important financial transaction is the protection, in good faith, of the selling dealerships’ net profitability and goodwill, which requires the selling party to operate its business during the interim period in a manner that protects the most valuable assets being purchased.

6. The importance of Plaintiff’s conducting the business in a way that protects Peacock Automotive was so important that the parties agreed specifically in the Asset Purchase Agreements (the “APAs”) that Plaintiff would continue to operate these businesses in the ordinary course and promise to maintain and preserve the business and goodwill of the dealerships (Section 15(a) and 15 (b) of the APAs). Plaintiff further promised in writing that it would bear the risk of loss or damage to any of the dealerships’ Subject Assets until closing, including any loss occasioned by an unexpected intervening event (Section 24(q)).

7. While Peacock Automotive has every right to rely upon the honesty and integrity of Plaintiff and its required duty to perform the APAs in good faith and fair dealing, the APAs themselves provided further protection in that Plaintiff promised to provide full access to its books and records and a true and accurate representation of its net profit and financial condition (Section 15(c) and Section 16(f) of the APAs).

8. Plaintiff has not kept its word regarding its financial position. This first surfaced when Peacock Automotive discovered that Plaintiff had improperly inflated the value of its fixed assets early in the negotiations.

9. Plaintiff continued its disinformation campaign by failing to provide the financial records for November and December, prior to Peacock Automotive's signing of the APAs.

10. Plaintiff never provided the November financial records and did not provide December financial records until February, and January financial records only came at the end of the month of February. Peacock Automotive's review of which indicated that Plaintiff was not operating in the ordinary course or preserving the net profitability and represented goodwill of the dealerships.

11. Peacock Automotive requested the February financials numerous times which Plaintiff promised to do so, however it never honored its word. Peacock Automotive suspects that these February financials would prove that Plaintiff was operating outside the ordinary course and was failing to preserve the net profitability and goodwill of the business.

12. By March, the world had changed since the signing of the APAs in early January. The Coronavirus (COVID-19) pandemic had infected over a million people, killing thousands, and upending ordinary life. Slowing the spread of COVID-19 and minimizing human suffering was of utmost importance. As a result, state-imposed "shelter-in-place" laws and mandated closure of non-essential retail businesses became the new normal. This obviously impacted the average consumer, making even essential businesses unable to operate at expected levels. In the ordinary course, such a devastating and unanticipated circumstance caused irreparable damage to Plaintiff's business assets, a risk of loss that Plaintiff promised to bear (Section 24(q)).

13. When Plaintiff continued to break its word, Peacock Automotive had no alternative

but to terminate the APAs on March 27, 2020.

14. Plaintiff, instead of acknowledging its responsibilities, has decided to sue, including several individuals personally who were not even parties to the APAs. In response, Peacock Automotive seeks justice in placing the responsibility where it belongs: with Plaintiff.

FOR A FIRST DEFENSE TO ALL CAUSES OF ACTION
(AS TO ALL DEFENDANTS)

15. All allegations not expressly admitted are denied.

16. Peacock Automotive admits that the motor vehicle business is not only subject to legislative directives but also that each contract in South Carolina implies the duty of good faith and fair dealing, in answer to Paragraph 1.

17. Peacock Automotive admits that Plaintiff operates dealerships in Richland County, in answer to Paragraph 2.

18. Peacock Automotive admits that it has conducted significant business with the South Carolina public for many years, under various business names in answer to Paragraph 3.

19. Peacock Automotive admits that it successfully has operated several car dealerships in answer to Paragraph 4.

20. The allegations of Paragraph 5 are admitted.

21. Answering Paragraph 6, as a limited liability company Peacock Automotive, LLC has owners of membership shares commonly referred to as "members" or "shareholders." The reference to "shareholders" on its website is a common usage meaning "owners." George Kenneth Griffey, Jr. is a member of Swingman NRAM, LLC, which is a member of Peacock Automotive, LLC.

22. The allegations of Paragraph 7 are denied.

23. Answering Paragraph 8, Peacock Automotive admits that it lists its priorities on its

website as being: 100% customer satisfaction; Ethics and honesty; Empowered, helpful employees; long-term good over-short term profits; and Commitment to community. These priorities are of equal importance.

24. The allegations of Paragraph 9 are denied.

25. Peacock Automotive, not Plaintiff, has been damaged, due to Plaintiff's broken promises; Plaintiff has rejected specific performance but instead pursues damages in this lawsuit, in answer to Paragraph 10.

26. The allegations of Paragraph 11 are admitted.

27. The allegations of Paragraph 12 are denied.

28. The allegations of Paragraph 13 are admitted upon information and belief.

29. The allegations of Paragraph 14 are admitted upon information and belief.

30. The allegations of Paragraph 15 are admitted.

31. Defendants admit so much of Paragraph 16 as it alleges this Court has jurisdiction over Peacock Automotive, LLC and Warner Peacock. The remaining allegations of Paragraph 16 are denied.

32. Defendant does not have sufficient information to admit or deny the allegations of Paragraph 17 and therefore denies them.

33. Peacock Automotive signed the APAs for the dealerships listed in Paragraph 18 in reliance upon Plaintiff keeping its oral and written word, in answer to Paragraphs 18 and 19.

34. Peacock Automotive entered into the APAs upon Plaintiff's oral and written assurances that it would operate the dealerships in the ordinary course and maintain and preserve the business and goodwill, and bear any risk of loss or damage to its assets, which Plaintiff has failed to do, all in answer to Paragraphs 20 and 21.

35. Peacock Automotive admits the amount of the Purchase Price in the APAs, which was based on the honest and faithful representations and performance of the APAs by Plaintiff, in answer to Paragraph 22.

36. Defendants admit only that Edward Stivers, a representative of Plaintiff, mentioned in passing Plaintiff's purchase of another dealership, not specifying whether such had occurred already or was to occur, and Defendants deny engaging in any specific discussions concerning Plaintiff's use of proceeds, answering Paragraph 23.

37. Peacock Automotive only agreed to an assignment of Plaintiff's Lease Agreement upon Plaintiff's faithful performance of its promises in the APAs, in answer to Paragraph 24.

38. Peacock Automotive makes reference to the Lease Agreement, in answer to Paragraphs 25, 26, 27 and 28.

39. The allegations of Paragraph 29 are admitted.

40. Peacock Automotive admits that the APAs contain a confidentiality provision, which Peacock Automotive denies it violated and denies was violated by any member, manager, officer or agent or anyone else acting with authority on behalf of Peacock Automotive.

41. The allegations of Paragraphs 31, 32, 33, 34 and 35 are admitted.

42. Peacock Automotive admits so much of Paragraph 36 as alleges it sent a termination letter to Plaintiff on March 27, 2020 and that it stated several conditions precedent that Plaintiff had not met.

43. The allegations of Paragraph 37 are admitted.

44. Defendants admit that the South Carolina Attorney General issued an advisory Opinion on March 27, 2020 that was supplemented on March 29, 2020. The Opinions concluded that extraordinary powers delegated to the Governor may only be exercised by the Governor but

that municipal ordinances are presumed to be constitutional and must be enforced unless set aside by a court of competent jurisdiction, all answering Paragraph 38.

45. The allegations of Paragraphs 39 and 40 are denied.

46. Plaintiff is subject to Columbia's Stay Home Stay Safe Ordinance as it pertains to essential businesses, and it also affects potential customers, answering Paragraph 41.

47. Peacock Automotive denies that the South Carolina Attorney General found that municipal stay at home orders were unenforceable absent a court order finding them unconstitutional, answering Paragraph 42.

48. The allegations of Paragraphs 43, 44, 45 and 46 are denied.

49. Defendants assert the breach of contract by Plaintiff, all unfulfilled conditions precedent to closing contained in the APAs that were jointly drafted by counsel for both parties, and all affirmative defenses contained herein, and deny that it has raised "new claims in an effort to avoid the commitments made to the Plaintiff, answering Paragraph 47.

50. Peacock Automotive denies that a statutory provision governing the sale of goods, S.C. Code §36-2-609 applies to the sale and purchase of automotive dealerships, despite Plaintiff's attorney's assertion in its letter dated April 3, 2020, answering Paragraph 48.

51. The allegations of Paragraph 49 are denied.

52. Peacock Automotive realleges its previous answers and defenses to the previous paragraphs of the Complaint where not inconsistent, answering Paragraph 50.

53. The allegations of Paragraphs 51, 52, 53 and 54 are denied.

54. Defendants admit so much of Paragraph 55 as alleges Warner Peacock, Mary Kaye Peacock, Ken Griffey, Jr., and Jay Brennan are "persons" as defined by S.C. Code § 56-15-10(n) but denies that these individuals, with the exception of Warner Peacock, are "dealers" or "motor

vehicle dealers” as defined by S.C. Code §56-15-10(h).

55. Answering Paragraph 56, Defendants admit Plaintiff is a citizen of South Carolina. Defendants are unable to admit or deny the remainder of Paragraph 56 as pled, due to lack of sufficient information and therefore deny same.

56. The allegations of Paragraph 57 are denied.

57. Peacock Automotive realleges its previous answers and defenses to the previous paragraphs of the Complaint where not inconsistent, answering Paragraph 58.

58. The allegations of Paragraph 59 are denied.

59. Peacock Automotive does not have sufficient information to admit or deny the allegations of Paragraph 60 due to lack of sufficient information and therefore deny same.

60. Peacock Automotive denies that Plaintiff has, in good faith and fair dealing, performed its obligations and conditions precedent to the APAs, answering Paragraph 61.

61. The allegations of Paragraphs 62, 63 and 64 are denied.

62. Peacock Automotive admits the APAs provide for specific performance, however Plaintiff has refused, in answer to Paragraph 65.

63. The allegations of Paragraph 66 are admitted and Defendants are therefore seeking to recover their costs and expenses including reasonable attorney’s fees

64. The allegations of Paragraph 67 are denied.

65. Peacock Automotive realleges its previous answers and defenses to the previous paragraphs of the Complaint where not inconsistent, answering Paragraph 68.

66. The allegations of Paragraphs 69, 70 and 71 are admitted.

67. The allegations of Paragraphs 72, 73, 74, 75 and 76 are denied.

68. Peacock Automotive realleges its previous answers and defenses to the previous

paragraphs of the Complaint where not inconsistent, answering Paragraph 77.

69. At all times relevant to the matters contained in the Complaint and this Answer and Counterclaim, Warner Peacock was acting in his capacity as Manager, CEO and President of Peacock Automotive, and not in his individual capacity, and his knowledge of the facts and circumstances concerning the APAs between Plaintiff and Peacock Automotive is knowledge obtained and used in that representative capacity, answering Paragraph 78.

70. The allegations of Paragraph 79 are denied.

71. Peacock Automotive and Warner Peacock deny the allegation of “interfering in the contractual relations between the Plaintiff and Peacock Automotive,” answering Paragraph 80 and, further answering, the APAs were lawfully terminated.

72. The allegations of Paragraphs 81, 82 and 83 are denied.

73. Peacock Automotive realleges its previous answers and defenses to the previous paragraphs of the Complaint where not inconsistent, answering Paragraph 84.

74. The allegations of Paragraphs, 85, 86, 87, and 88 are denied.

FOR A SECOND DEFENSE AS TO ALL DEFENDANTS
(FAILURE TO STATE A CLAIM)

75. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

76. Plaintiff has failed to state a claim upon which relief may be granted as to the First Cause of Action (Declaratory Judgment), which should be dismissed pursuant to Rule 12(b)(6), SCRCP, upon the grounds that the First Cause of Action (a) does not allege a justiciable controversy for the Court to decide, since it rests upon an alleged breach of contract that has already occurred, there being no future uncertainty for the Court to resolve, and (b) it is improper in the

present action since advisory opinions are inappropriate and adequate remedies at law exist, Rule 12(f), SCRCF.

77. Plaintiff has failed to state a claim upon which relief may be granted as to the Second Cause of Action (Breach of Contract), which should be dismissed pursuant to Rule 12(b)(6), SCRCF, upon the grounds that: (a) Plaintiff fraudulently induced Peacock Automotive to sign the APAs and therefore, they are void, and (b) Plaintiff breached the APAs by not providing the financial records to which Peacock Automotive was entitled, not preserving the business and goodwill of Plaintiff's dealerships, and not operating the dealerships in the ordinary course of business.

78. Plaintiff has failed to state a claim upon which relief may be granted as to the Third Cause of Action (South Carolina Regulation of Manufacturers, Distributors and Dealers Act) upon the grounds that Plaintiff has failed to plead any facts showing that these Defendants engaged in any action that was arbitrary, in bad faith, or unconscionable.

79. Plaintiff has failed to state a claim upon which relief may be granted as to the Fifth Cause of Action (Veil Piercing), which should be dismissed pursuant to Rule 12(b)(6), SCRCF, upon the grounds that Plaintiff has failed to plead any facts showing that Peacock Automotive, LLC failed to observe corporate formalities.

FOR A THIRD DEFENSE
(UNCLEAN HANDS)

80. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

81. To the extent that Plaintiff seeks equitable relief from Defendants, Plaintiff's own inequitable conduct constitutes unclean hands and therefore bars the granting of equitable relief to Plaintiff.

FOR A FOURTH DEFENSE
(FRAUD IN THE INDUCEMENT)

82. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

83. Plaintiff misrepresented its net profit and financial condition and that it was acting in the ordinary course of business.

84. Plaintiff's representation was material to each of the APAs.

85. Plaintiff knew its representations were false or acted in reckless disregard for the truth.

86. Plaintiff intended that Peacock Automotive act upon its representations and Peacock Automotive did act upon those representations.

87. Peacock Automotive had a right to rely upon Plaintiff's representations.

88. Peacock Automotive has been injured as consequent and proximate result of its reliance on Plaintiff's representations.

89. Plaintiff's claims are barred by its fraudulent inducement.

FOR A FIFTH DEFENSE
(FAILURE OF CONDITIONS PRECEDENT TO CLOSING)

90. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

91. Plaintiff failed to meet all the conditions precedent in the APAs, including the following:

A. Plaintiff failed to conduct the Dealership's business in the ordinary course to preserve the goodwill value of the Dealerships which was the basis for the purchase price under the APAs.

B. Plaintiff failed to use best efforts to operate and preserve the business and goodwill of the Dealerships which was the basis for the purchase price under the APAs.

C. Plaintiff failed to provide complete and accurate financial statements and data to Peacock Automotive.

D. Plaintiff warranted and represented at paragraph 13(1) of the APAs that all financial statements and data furnished by the Plaintiff to the Buyer "are true and accurate representations of the financial condition of the Plaintiff as of the date of such statements or reports." Furthermore, under paragraph 15(a) of the APAs, Plaintiff agreed that it would not take any action which would cause any representation or warranty made in the APAs to be incorrect in any material respect if such representation or warranty were made on any date from the Effective Date of the APAs through and including the Closing Date. Moreover, pursuant to paragraphs 16(e) and (f) of the APAs, all of the Plaintiff's representations and warranties "shall be true and correct in all material respects on the Closing Date." Plaintiff's false and misleading financial data presented to Peacock Automotive breached the representations and warranties under the APAs.

E. Plaintiff agreed to assume the risk of loss or damage to the dealership assets that may occur before closing.

92. Plaintiff's failure to meet all the conditions precedent relieves Peacock Automotive of any duty to purchase the Dealerships and acts as a complete bar to Plaintiff's claims.

FOR A SIXTH DEFENSE
(WAIVER)

93. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

94. Some or all of the claims asserted by Plaintiff are barred by the doctrine of waiver.

95. Plaintiff entered into the APAs that provided certain rights to Plaintiff, as set forth in the APAs, and known to Plaintiff, subject to all terms and conditions precedent contained therein.

96. Plaintiff has voluntarily and intentionally abandoned and relinquished its rights under the APAs.

97. Therefore, to the extent Plaintiff suffered damages, which is denied, they are barred.

FOR A SEVENTH DEFENSE
(EQUITABLE ESTOPPEL)

98. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

99. Some or all of the claims asserted by Plaintiff are barred by the doctrine of equitable estoppel.

100. Plaintiff had knowledge of Peacock Automotive's right to rely on the representations in the disclosed financial statements of Plaintiff.

101. Plaintiff intended that Peacock Automotive rely on its acts or omissions concerning Plaintiff's financial statements and financial matters that were withheld from Peacock by Plaintiff's refusal to send the financial statements.

102. Peacock Automotive was ignorant of the true facts concerning the net profitability of the Dealerships and Peacock Automotive detrimentally relied on financial statements provided by Plaintiff which misrepresented the net profitability and therefor, the goodwill of the two dealerships Plaintiff hoped to sell.

FOR AN EIGHTH DEFENSE
(LIQUIDATED DAMAGES)

103. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

104. Plaintiff's claim and sole remedy, in the event it is entitled to recover damages, is limited to the recovery of liquidated damages in the amount of \$100,000, which shall serve as liquidated damages for both APAs pursuant to paragraph 20(d) of the Chevrolet APA and paragraph 20 of the Hyundai APA.

FOR A NINTH DEFENSE
(FAILURE TO MITIGATE)

105. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

106. To the extent Plaintiff suffered damages, which is denied, Plaintiff failed to mitigate its damages.

107. To the extent Plaintiff failed to mitigate its damages, they are barred.

FOR A TENTH DEFENSE
(PLAINTIFF'S MATERIAL BREACHES OF THE APAS)

108. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

109. Plaintiff's claims are precluded and the APAs were lawfully terminated because of Plaintiff's material breaches of the APAs which caused the failure of the conditions precedent to closing set forth in Paragraph 91 above.

110. The APAs were lawfully terminated as a consequence of Plaintiff's material breaches of the APAs which acts as a complete bar to Plaintiff's claims.

FOR AN ELEVENTH DEFENSE
(PEACOCK AUTOMOTIVE'S LAWFUL
TERMINATION OF THE APAS)

111. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

112. Plaintiff's claims are precluded and the APAs were lawfully terminated because of Plaintiff's material breaches of the APAs including:

- A. Section 15(a) - Plaintiff failed to conduct the Dealerships' business in the ordinary course to preserve the goodwill value of the Dealerships which was the basis for the purchase price.
- B. Section 15(b) – Plaintiff failed to use best efforts to operate and preserve the business and goodwill of the Dealerships which was the basis for the purchase price.
- C. Section 15(c) – Plaintiff failed to provide the February Financial Statements and documents for the Dealerships to Peacock Automotive.
- D. Plaintiff warranted and represented at paragraph 13(1) of the APAs that all financial statements and data furnished by Plaintiff to the Buyer “are true and accurate representations of the financial condition of Plaintiff as of the date of such statements or reports.” Furthermore, under paragraph 15(a) of the APAs, Plaintiff agreed that it would not take any action which would cause any representation or warranty made in the APAs to be incorrect in any material respect if such representation or warranty were made on any date from the Effective Date of the APAs through and including the Closing Date. Moreover, pursuant to paragraphs 16(e) and (f) of the APAs, all of the Plaintiff's representations and warranties “shall be true and correct in all material respects on the Closing Date.” Plaintiff's false

and misleading financial data presented to Peacock Automotive breached the representations and warranties under the APAs.

- E. Plaintiff admitted by oral and written statements made to Peacock Automotive by its President, Edward M. Stivers, III, currently ongoing mismanagement at the Dealerships, shows Plaintiff's failure to operate the Dealerships in the ordinary course and Plaintiff's failure to use best efforts to maintain and preserve the business and goodwill value of the Dealerships, which was the basis for the purchase price.

113. The APAs were lawfully terminated as a consequence of Plaintiff's fraud in the inducement and material breaches of the APAs and acts as a complete bar to Plaintiff's claims.

FOR A TWELFTH DEFENSE
(NO LEGAL BASIS FOR CLAIMS AGAINST INDIVIDUAL
NON-PARTIES TO THE APAs)

114. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

115. The individuals named as Defendants are not parties to the APAs.

116. Plaintiff's claims against the individual Defendants are precluded because they are not parties to the APAs.

117. Plaintiff's claims against the individual Defendants should be dismissed with prejudice because they are not parties to the APAs.

FOR A THIRTEENTH DEFENSE
(PEACOCK AUTOMOTIVE AUTOMOTIVE'S ACTIONS WERE LAWFUL,
REASONABLE AND UNDERTAKEN IN GOOD FAITH)

118. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

119. Plaintiff's claims are precluded and should be dismissed with prejudice because all of the actions of Peacock Automotive were lawful, reasonable and undertaken in good faith.

FOR A FOURTEENTH DEFENSE
(WARNER PEACOCK AUTOMOTIVE DID NOT VIOLATE THE
CONFIDENTIALITY PROVISION OF THE APAs)

120. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

121. W. Warner Peacock did not breach the confidentiality provision of the APAs, therefore, Plaintiff's claim for the breach of a confidentiality provision is precluded and should be dismissed with prejudice.

FOR A FIFTEENTH DEFENSE
(IMPOSSIBILITY OF PERFORMANCE)

122. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

123. The APA's were lawfully terminated and Plaintiff's claims are precluded as a consequence of the unanticipated, unforeseen and historic COVID-19 Pandemic, the worldwide, statewide, and local states of emergency declared by local, state, federal and worldwide governments and response thereto and the principle of impossibility of performance.

FOR A SIXTEENTH DEFENSE
(IMPRATICABILITY OF PERFORMANCE)

124. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

125. The APAs were lawfully terminated and Plaintiff's claims are precluded as a consequence of the unanticipated, unforeseen and historic COVID-19 Pandemic, the worldwide, statewide, and local states of emergency declared by local, state, federal and worldwide

governments and response thereto and the principle of impracticality of performance.

FOR A SEVENTEENTH DEFENSE
(FRUSTRATION OF PURPOSE AND FUNDAMENTAL
BASIS FOR PARTIES' BARGAIN)

126. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

127. The APAs were lawfully terminated and Plaintiff's claims are precluded as a consequence of the unanticipated, unforeseen and historic COVID-19 Pandemic, the worldwide government states of emergency and response thereto and the frustration of purpose and fundamental basis of the parties' bargain set forth in the APAs.

FOR AN EIGHTEENTH DEFENSE
(NO DAMAGES SUFFERED BY PLAINTIFF)

128. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

129. Plaintiff's claims are precluded because it has suffered no damages as a consequence of the claims set forth in the Complaint.

FOR A NINETEENTH DEFENSE
(NO DAMAGES CAUSED BY DEFENDANTS)

130. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

131. Plaintiff's claims are precluded because it has suffered no damages caused by any wrongful actions of the Defendants.

FOR A TWENTIETH DEFENSE
(NO RIGHT TO RECOVER SPECIAL

INDIRECT OR PUNITIVE DAMAGES)

132. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

133. Plaintiff's claims to special, indirect or punitive damages are precluded by the express terms of paragraph 24(1)(3) of the APAs.

FOR A TWENTY-FIRST DEFENSE
(CONSTITUTIONAL DEFENSE)

134. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

135. Any award of punitive damages against Defendants will violate rights guaranteed to it by the Constitution of the State of South Carolina for the following reasons:

- A. Any award of punitive damages violates the prohibition against excessive fines under Article 1, Section 15 of the Constitution of South Carolina; and
- B. Any award of punitive damages violates the guarantee of due process found in Article I, Section 3 of the Constitution of South Carolina because of a lack of objective guidelines on which a jury might base its award and further that such guidelines as exist are arbitrary and void for vagueness.

FOR A TWENTY-SECOND DEFENSE
(CONSTITUTIONAL DEFENSE)

136. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

137. Any award of punitive damages against Defendants will violate its rights guaranteed to it under the Constitution of the United States for the following reasons:

- A. Any award of punitive damages violates the prohibition of excessive fines found in the Eighth Amendment of the Constitution of the United States as applied to the states by way of the due process clause of the Fourteenth Amendment of the Constitution of the United States; and
- B. Any award of punitive damages violates the guarantee of due process found in the Fourteenth Amendment to the Constitution of the United States because of the lack of objective guidelines in which a jury might base its award and further than such guidelines as do exist are arbitrary and void for vagueness.

FOR A TWENTY-THIRD DEFENSE
(RISK OF LOSS)

138. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

139. Plaintiff contractually agreed to retain the risk of any loss or damage to the dealership assets through the closing date.

FOR A FIRST COUNTERCLAIM
(BREACH OF CONTRACT)

140. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

141. Peacock Automotive and Plaintiff entered into two Asset Purchase Agreements on January 7, 2020.

142. Stivers agreed in Section 15(a) of the APAs:

From the Effective Date of this Agreement to the Closing Date (the "Interim Period"), unless Buyer consents otherwise in writing, Seller will conduct the Dealership's business only in the ordinary course . . .

Section 15(b) similarly required:

During the Interim Period, Seller agrees to use its best efforts: to maintain and preserve the business and goodwill of Seller with respect to the Dealership; to maintain and preserve its present relationships with its vendors, suppliers, customers and other third parties; and to retain until Closing (subject to Sections 6(c) and 6(e) above) any employees as to whom Buyer has indicated an interest in hiring after Closing. The foregoing shall not be construed to authorize Seller to make any commitments on behalf of Buyer or otherwise to create any legal obligation of Buyer of any kind.

143. To ensure that Plaintiff was operating in the ordinary course and preserving its good will, it promised to provide access to its books and records (Section 15(c)) and that all data furnished to Peacock Automotive was a true and accurate representation of its financial condition (Section 10(h)).

144. Plaintiff breached the APAs by failing to conduct its business in the ordinary course, failing to preserve its business and goodwill, and failing to provide access to its books and records to Peacock Automotive.

145. Stivers and Peacock Automotive agreed that if the Chevrolet purchase did not close due to no fault of Peacock Automotive, the \$100,000 escrow would be returned to Peacock Automotive.

146. Peacock Automotive has been injured as a result of Plaintiff's breach.

147. Peacock Automotive is informed and believes that it is entitled to a return of the escrow, an award of actual damages, and an award of costs and expenses including a reasonable award of attorney's fees, as allowed by both APAs.

FOR A SECOND COUNTERCLAIM
(BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT)

148. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

149. Plaintiff breached the APAs by providing financial statements to Peacock

Automotive, LLC that contained misleading financial results that falsely inflated the net profitability and goodwill value of Plaintiff's dealerships.

150. Plaintiff had fraudulent intent relating to the breaching of the contract when it repeatedly refused to provide additional financials, which would have shown that the Plaintiff's dealerships were not generating \$2 million per year in net profit and were not being operated in the ordinary course of business.

151. Plaintiff engaged in fraudulent acts that accompanied a breach of contract by providing misleading financial statements and refusing to provide other financial statements which Peacock Automotive had a contractual right to receive.

FOR A THIRD COUNTERCLAIM
(FRAUD IN THE INDUCEMENT)

152. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

153. Any potential purchase of a dealership is based on the representation of Seller as to the net profitability of the dealership.

154. Plaintiff represented the \$2 million net profitability, financial condition and value of its dealerships' goodwill, and that it was acting in the ordinary course of business.

155. Plaintiff's representations were false and were material to the contract.

156. Plaintiff knew its representations were false or acted in reckless disregard for the truth.

157. Plaintiff intended that Peacock Automotive act upon its representations regarding its \$2 million net profitability, goodwill value, financial condition and operations in the signing of the APAs, and Peacock Automotive did act upon those representations.

158. Peacock Automotive had a right to rely, and did rely, upon Plaintiff's

representations, and was ignorant of their falsities.

159. Peacock Automotive has been injured as a consequent and proximate result of its reliance on Plaintiff's representations.

160. Peacock Automotive is entitled to actual and punitive damages.

FOR A FOURTH COUNTERCLAIM
(NEGLIGENT MISREPRESENTATION)

161. Peacock Automotive and W. Warner Peacock reassert and incorporate each and every allegation in its prior defenses, except as inconsistent herein.

162. Plaintiff represented the \$2 million net profitability, financial condition and value of its dealerships' goodwill, and that it was acting in the ordinary course of business.

163. Plaintiff's representations were false and were material to the contract.

164. Plaintiff had a pecuniary interest in making the statement.

165. Plaintiff owed a duty of care to see that it communicated truthful information to Peacock Automotive.

166. Plaintiff breached its duty by failing to exercise due care.

167. Peacock Automotive justifiably relied on Stiver's representations.

168. Peacock Automotive has been injured as a consequent and proximate result of its reliance on Plaintiff's representations.

169. Peacock Automotive is entitled to actual and consequential damages.

PRAYER FOR RELIEF

WHEREFORE, Defendants W. Warner Peacock and Peacock Automotive, LLC pray the Court to:

- i. Enter an Order declaring that Plaintiff shall have and recover nothing from these Defendants;

- ii. Enter an Order in favor of these Defendants in their counterclaims, for an award of both actual and punitive damages against Plaintiff, including the expenses of this action, including reasonable attorney's fees;
- iii. Tax the costs of this action against Plaintiff; and
- iv. Provide such other relief as may be just and proper.

June 5, 2020

Respectfully submitted,

s/Bradford N. Martin

Bradford N. Martin, Esq. (SC Bar No. 3658)

Laura W. H. Teer, Esq. (SC Bar No. 16698)

BRADFORD NEAL MARTIN & ASSOCIATES, P.A.

Post Office Box 10410

Greenville, South Carolina 29603

864.552.9990

864.552.9992 (facsimile)

**ATTORNEYS FOR DEFENDANTS
PEACOCK AUTOMOTIVE, LLC AND
W. WARNER PEACOCK**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2020-CP-40-01934
STIVERS BROTHERS	)	
AUTOMOTIVE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	REPLY
W. WARNER PEACOCK,	)	
MARY KAYE PEACOCK,	)	
KEN GRIFFEY, JR.,	)	
JAY BRENNAN, and	)	
PEACOCK AUTOMOTIVE, LLC,	)	
	)	
Defendants.	)	

The Plaintiff, not waiving but specifically reserving its rights pursuant to its motion to strike, replying to the Answer and Counterclaims of Defendants, W. Warner Peacock and Peacock Automotive, LLC, would respectfully show that:

AS TO THE FIRST THROUGH TWENTY THIRD DEFENSES

1. The Plaintiff reaffirms and reiterates all of the allegations contained in the complaint.

AS TO THE COUNTERCLAIMS

2. Each and every allegation not hereinafter admitted, qualified, or explained is denied and strict proof is demanded thereof.

3. As to the allegations contained in paragraph 140, the Plaintiff reasserts its previous responses thereto.

4. The allegations in paragraph 141 are admitted.

5. As to the allegations contained in paragraphs 142 and 143, the Plaintiff craves

reference to the entire contracts for their exact terms and provisions and context. Any allegations contained in paragraphs 142 and 143 inconsistent herewith are denied.

6. The allegations in paragraph 144 are denied.

7. As to the allegations contained in paragraph 145, the Plaintiff craves reference to the entire contracts for their exact terms and provisions and context. Any allegations contained in paragraph 145 inconsistent herewith are denied.

8. The allegations contained in paragraphs 146 and 147 are denied.

9. As to the allegations contained in paragraph 148, the Plaintiff reasserts its previous responses thereto.

10. The allegations contained in paragraphs 149, 150, and 151 are denied.

11. As to the allegations contained in paragraph 152, the Plaintiff reasserts its previous responses thereto.

12. The allegations contained in paragraph 153 are denied.

13. As to the allegations contained in paragraph 154, the Plaintiff craves reference to the entire contracts for their exact terms and provisions and context. Any allegations contained in paragraph 154 inconsistent herewith are denied.

14. The allegations contained in paragraphs 155, 156, 157, 158, 159, and 160 are denied.

15. As to the allegations contained in paragraph 161, the Plaintiff reasserts its previous responses thereto.

16. As to the allegations contained in paragraph 162, the Plaintiff craves reference to the entire contracts for their exact terms and conditions and context. Any allegations contained in paragraph 162 inconsistent herewith are denied.

17. The allegations contained in paragraph 163 are denied.
18. The allegations contained in paragraphs 164 and 165 are admitted.
19. The allegations contained in paragraph 166 are denied.
20. The allegations contained in paragraphs 167, 168, and 169 are denied.

WHEREFORE, having fully replied to the Answer and Counterclaims, the Plaintiff prays that same be dismissed with costs, that it be given judgment on its Complaint, and for such other and further relief as the Court may deem just and proper.

STUDEMEYER LAW FIRM, P.C.

By: s/J. Gregory Studemeyer
J. Gregory Studemeyer
SC Bar #5416
7478 Carlisle Street
Post Office Box 1014
Irmo, South Carolina 29063
803-393-4399
Attorney for the Plaintiff

Irmo, South Carolina

July 1, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2020-CP-40-01934
STIVERS BROTHERS	)	
AUTOMOTIVE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	NOTICE OF DISMISSAL
W. WARNER PEACOCK,	)	AS TO DEFENDANTS,
MARY KAYE PEACOCK,	)	MARY KAYE PEACOCK,
KEN GRIFFEY, JR.,	)	KEN GRIFFEY, JR., and
JAY BRENNAN, and	)	JAY BRENNAN
PEACOCK AUTOMOTIVE, LLC,	)	(not ending action)
	)	
Defendants.	)	

WHEREAS, this action was initiated by the filing of a complaint on April 13, 2020; and

WHEREAS, Defendants, Mary Kaye Peacock, Ken Griffey, Jr., and Jay Brennan, have filed neither an answer nor a motion for summary judgment;

NOTICE IS HEREBY GIVEN that the Plaintiff dismisses the above entitled action without prejudice as to Defendants, Mary Kaye Peacock, Ken Griffey, Jr., and Jay Brennan, pursuant to Rule 41 of the South Carolina Rules of Civil Procedure. This action will continue as to Defendants, W. Warner Peacock and Peacock Automotive, LLC.

The Clerk of the above-entitled Court is requested to enter this dismissal in the records of the Court.

Signature on following page.

STUDEMAYER LAW FIRM, P.C.

By: s/J. Gregory Studemeyer
J. Gregory Studemeyer
SC Bar #5416
7478 Carlisle Street
Post Office Box 1014
Irmo, South Carolina 29063
803-393-4399
Attorney for the Plaintiff

Irmo, South Carolina
July 2, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2020-CP-40-01934
STIVERS BROTHERS	)	
AUTOMOTIVE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	AMENDED COMPLAINT
W. WARNER PEACOCK	)	
and PEACOCK AUTMOTIVE, LLC,	)	
	)	
Defendants.	)	

The Plaintiff above named, complaining of the Defendants herein, would respectfully show unto the Court:

INTRODUCTION

1. The distribution of motor vehicles in South Carolina is regulated to prevent frauds, impositions, and other abuses upon citizens of South Carolina by manufacturers, distributors, dealers and their representatives doing business in South Carolina.
2. The Plaintiff has lawfully engaged in the business of selling and servicing new Chevrolet and Hyundai motor vehicles and used motor vehicles in Richland County, South Carolina since August 4, 2017, and its affiliated dealerships maintained a presence and lawfully conducted business in Richland, Lexington, and Sumter Counties, South Carolina from 1989 until 2011.
3. The Plaintiff and its affiliates have owned and operated various dealerships including Ford, Lincoln, Mercury, Mazda, Chrysler, Dodge, Jeep, RAM, Mitsubishi, Subaru, and Suzuki in Missouri, Iowa, South Carolina, Georgia, and Alabama.
4. Peacock Automotive, LLC has engaged in the motor vehicle business in South

Carolina under various names including NRAM Holdings, LLC, Coastal States Automotive Group, LLC, and New River Auto Mall, LLC since March 26, 2007.

5. Peacock Automotive, LLC, directly or through affiliates, operates Audi, Volkswagen, Subaru, Land Rover, Jaguar, Porsche, Genesis, Hyundai, Chrysler, Jeep, Dodge, RAM, FIAT, and Subaru motor vehicle dealerships in Jasper County, Jaguar and Land Rover dealerships in Lexington County, and Hyundai and Genesis dealerships in Richland County, South Carolina.

6. As more fully set forth herein, Peacock Automotive, LLC has engaged in unethical and unlawful conduct in Richland County, South Carolina and has caused the Plaintiff to suffer significant monetary damages.

7. The Plaintiff brings this action for declaratory relief, equitable relief including specific performance, and for damages as a result of the foregoing unlawful acts.

PARTIES

8. The Plaintiff is a domestic corporation, maintaining its principal place of business in the County of Richland, State of South Carolina.

9. Upon information and belief, Defendant, W. Warner Peacock, ("Warner Peacock") is a native of Florida.

10. Warner Peacock purports to be a resident of both Florida and South Carolina.

11. Warner Peacock has represented that he moved to Florida in November of 2019.

12. Warner Peacock was served at his home in Bluffton, South Carolina with copies of the summons and complaint by Deputy M. Tannuzi of the Beaufort County Sheriff's Office on April 28, 2020.

13. Defendant, Peacock Automotive, LLC ("Peacock Automotive"), is a limited

liability company, organized and existing under the laws of the State of Florida, conducting business, directly or through affiliates, in the Counties of Jasper, Lexington, and Richland, State of South Carolina.

14. Peacock Automotive also conducts business in Georgia and Florida.

15. Peacock Automotive has admitted in the matter of Barone v. Jaguar Land Rover North America, LLC, Peacock Automotive, LLC d/b/a Land Rover Hilton Head, and Coastal States Automotive Group, LLC d/b/a Land Rover Hilton Head pending in Jasper County (Case No. 2020-CP-27-00017) that its principal place of business is in Jasper County, South Carolina, and is judicially estopped from suggesting otherwise in this matter.

16. Peacock Automotive's Chief Operating Officer, Jim Thayer, resides in and maintains an office in South Carolina.

17. The bulk of Peacock Automotive's activity takes place in South Carolina.

JURISDICTION AND VENUE

18. This Court has jurisdiction over the parties and the subject matter of this action pursuant to S.C. Code Ann. Sections 56-15-20, 36-2-802, and 36-2-803.

19. Venue is proper in Richland County pursuant to S.C. Code Ann. Section 15-7-30(F)(1) since the most substantial part of the act or omission giving rise to these causes of action occurred in Richland County. Venue is also proper under S.C. Code Ann. Section 56-15-140.

SUBSTANTIVE ALLEGATIONS

20. Beginning in the Spring of 2019, the Plaintiff and the Defendants began engaging in discussions about exchanging and/or acquiring one or more of the other's dealerships.

21. Specifically, recognizing that the Columbia market was not big enough to support

two Hyundai franchises, that the Plaintiff had been a successful Ford dealer, and that Peacock Automotive was underperforming with its Ford dealership in Florida, the Plaintiff and the Defendants discussed exchanging the Plaintiff's Chevrolet and Hyundai dealerships for the Defendants' Ford dealership in Florida.

22. Thereafter, the parties discussed the sale and/or acquisition of the other's Columbia area Hyundai dealerships.

23. In the Fall of 2019, when an opportunity for another Ford franchise presented itself to the Plaintiff in Alabama, the Plaintiff resumed discussions with the Defendants about the potential sale of its Columbia area dealerships.

24. The Plaintiff furnished the Defendants with detailed financial information about the operation of the dealerships.

25. Before any letter of intent or APA was signed, the Defendants' Chief Financial Officer visited the Plaintiff's Columbia area dealerships to inspect the assets and to engage in due diligence.

26. On January 7, 2020, the Plaintiff and Peacock Automotive entered into two separate Asset Purchase And Sale Agreements ("APAs"), one for the assets of the Plaintiff's Chevrolet dealership located at 111 Newland Road, Columbia, South Carolina 29229, and the other for the assets of the Plaintiff's Hyundai dealership located at 101 Newland Road, Columbia, South Carolina 29229.

27. Both parties were sophisticated business entities, capable of assessing their respective risks with the transactions.

28. The Plaintiff entered into the APAs recognizing that the assets could increase in value and that the prospect of selling them could become less favorable.

29. Peacock Automotive entered into the APAs recognizing that the assets could decrease in value or that the prospect of acquiring them could become less favorable.

30. Each APA provided for the payment by Peacock Automotive to the Plaintiff of the sum of THREE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$3,500,000) for a total of SEVEN MILLION DOLLARS (\$7,000,000), in addition to the purchase of certain new motor vehicles, certain service loaners, all fixed assets, certain parts and accessories, all unopened oil and grease drums and bulk oil and fluid, and certain work in process.

31. Representatives of the Plaintiff and Peacock Automotive had specific discussions concerning the Plaintiff's intention to acquire another dealership with the proceeds of the transaction.

32. Each APA required Peacock Automotive to enter into an assignment of Lease Agreement with the owners of the Premises.

33. When the APAs were signed, term of the Lease Agreement extended through June 24, 2024.

34. When the APAs were signed, the Lease Agreement allowed the Plaintiff to terminate on December 24, 2021, by providing written notice on or before December 24, 2020.

35. The annual Base Rent payable under the Lease Agreement was One Million Two Hundred Fifty-Three Thousand Five Hundred Twenty and 84/100 Dollars (\$1,253,520.84), payable in monthly installments equal to One Hundred Four Thousand Four Hundred Sixty and 07/100 Dollars (\$104,460.07), in advance on or before the first day of each Lease Month during the Term.

36. In addition to the annual Base Rent payable under the lease, property taxes of One Hundred Seventy Three Thousand Eight Hundred Sixty Five and 25/100 Dollars (\$173,865.25)

and insurance premiums of One Hundred Seventeen Thousand Nine Hundred Fifty One and 69/100 Dollars (\$117,951.69) were due and payable annually.

37. Each APA required Peacock Automotive to submit applications to the manufacturer within 20 days of receiving applications from the manufacturers and to use its best efforts in good faith to obtain required approvals at the earliest date practicable, but no later than one hundred and five (105) days after the effective date, January 7, 2020.

38. Each APA required Peacock Automotive to keep the existence of the APAs confidential.

39. The Defendants failed to keep the existence of the APAs confidential.

40. Neither APA contained a “force majeure” clause.

41. On March 13, 2020, in response to the Covid-19 pandemic, the President of the United States declared that an emergency existed nationwide under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

42. On March 26, 2020, Ordinance No.: 2020-034, “An Emergency Order Declaring a Stay Home Stay Safe for the City of Columbia, South Carolina” (“the Ordinance”) was issued by Mayor Stephen K. Benjamin and Columbia City Council.

43. The Ordinance provided that individuals “shall stay in their homes and not travel through or congregate in the streets, sidewalks, waterways and/or public spaces in the City of Columbia, including establishments that hold a City of Columbia business licenses [sic] except for the purposes of working at or conducting business with the attached list of businesses (hereinafter “Essential Service” or “Essential Services”).

44. Exhibit A to the Ordinance defines twelve types of “essential services” including, *inter alia*, vehicle sales and automotive repair.

45. Notwithstanding the plain language of the Ordinance and the exceptions thereto, on March 27, 2020, Warner Peacock emailed a purported notice of termination of the APAs to the Plaintiff, a copy of which is attached hereto and incorporated herein by reference as Exhibit A, suggesting that the following conditions precedent to closing had not been met:

- a. "We" do not believe the current conditions existing in the Columbia, SC area permit the Seller to comply with these requirements, as the Dealership's [sic] business cannot now or for the foreseeable future operate in the ordinary course;
- b. "We" also believe Columbia's issuance of a stay in place order is an order of the type that qualifies pursuant to Section 16(h) to materially adversely affecting [sic] the Subject Assets; and
- c. "we" have requested the February 2020 financial records and Seller has failed to provide such records.

46. In his purported notice of termination, Warner Peacock also requested that "Shutts Bowen LLP, in its capacity as escrow agent, return the \$100,000 deposit which was made in connection with this proposed transaction".

47. On the same day, the South Carolina Attorney General issued an Opinion that local government cannot exercise the emergency powers delegated to the Governor by the General Assembly and that unauthorized exercise of such emergency powers could subject political subdivisions to liability at the behest of a private citizen with requisite legal standing.

48. As set forth herein, all of Warner Peacock's asserted reasons for termination were plainly pretextual.

49. At all times, notwithstanding the Defendants' "belief", the Plaintiff has continued to operate in the ordinary course of business.

50. By its terms, the Ordinance does not apply to the Plaintiff's business.

51. Even if the Plaintiff was not excepted from the provisions of the Ordinance, the

South Carolina Attorney General determined that the action taken by the Mayor and Council was not an authorized exercise of emergency powers delegated to the Governor by the General Assembly.

52. The Defendants had electronic access to the Plaintiff's financial records from January 15, 2020, beyond the date of the purported termination.

53. The real reason for the Defendants' purported termination is the ongoing Covid-19 pandemic, notwithstanding the lack of a "force majeure" clause in the APAs.

54. The Defendants wish to shift the burden they knowingly and voluntarily undertook in the APAs to the Plaintiff because closing on the transactions now appears less favorable to them.

55. The Defendants failed and refused to promptly submit to the manufacturers all forms, applications, and other documents which the manufacturers required to consider approval of the transactions.

56. The Plaintiffs will further show that Warner Peacock raised subsequent claims in an effort to avoid the commitments made to the Plaintiff, including an inability to arrange for inventory financing and an inability to speak with the Chevrolet Zone Manager, neither of which are included as conditions precedent in the nearly 30 pages of each APA initiated by counsel for the Defendants.

57. On April 3, 2020, a demand for adequate assurance of performance was made to the Defendants pursuant to S.C. Code Ann. Section 36-2-609.

58. The Defendants failed and refused and continue to fail and refuse to comply with their implied covenant of good faith and fair dealing and to provide adequate assurance of performance as requested.

**FOR A FIRST CAUSE OF ACTION
(declaratory judgment)**

59. Each and every previous allegation is realleged herein in the same manner and to the same extent as if repeated.

60. This cause of action is brought pursuant to the Uniform Declaratory Judgments Act, S.C. Code Ann. Section 15-53-10, et seq.

61. The Plaintiff is a person interested under a written contract or other writing constituting a contract whose rights, status or other legal relations are affected by a statute and/or contract and seek to have determined questions of construction or validity arising under the statute and/or contract and obtain a declaration of rights, status or other legal relations thereunder.

62. In addition thereto, the issues herein are of such public importance as to require their resolution for future guidance.

63. As set forth herein, a real or actual controversy exists between the Plaintiff and the Defendants.

64. Warner Peacock is a "person" as defined by S.C. Code Ann. Section 56-15-10(n) and both of the Defendants are "dealers" or "motor vehicle dealers" as defined by S.C. Code Ann. Section 56-15-10(h).

65. The Plaintiff is a citizen of South Carolina entitled to protection from frauds, impositions, and other abuses by dealers or motor vehicle dealers as contemplated by 1972 S.C. Acts 2419, 1972 Act No. 1237 hereafter "Act No. 1237").

66. Based upon the foregoing, the Plaintiff is informed and believes that it is entitled to a declaration that the APAs between the Plaintiff and the Defendants remain valid and

enforceable contracts, notwithstanding the Defendants' purported termination for pretextual reasons.

**FOR A SECOND CAUSE OF ACTION
(breach of contract)**

67. To the extent not inconsistent herewith, each and every previous allegation is realleged herein in the same manner and to the same extent as if repeated.

68. The Plaintiff and the Defendants entered into valid and binding contracts.

69. The Plaintiff elected to forgo an opportunity to purchase real estate in Richland County to relocate the assets and to exercise the right to early termination of the Lease Agreement in reliance upon the Defendants' obligations under the APAs.

70. The APAs were partly carried into execution by the Plaintiff with the approbation of the Defendants.

71. The Plaintiff performed its obligations under the APAs.

72. The Defendants have breached the contracts, placing the Plaintiff in the untenable position of having to exercise its right to early termination of the Lease Agreement and selling the assets at a "fire sale" without a place of business, immediately acquiring real estate and trying to construct a facility on or before December 24, 2021, or continuing to pay rent, property taxes, and insurance while continuing to market the assets in the current environment, in the wake of the Defendants' breach of the confidentiality provisions.

73. The Plaintiff has been damaged by the Defendants' breach and will continue to suffer damage in the future caused by the breach.

74. Both APAs provide for specific performance together with any other remedies at law or equity.

75. Both APAs provide that if any action shall be brought by any party to recover any

sums hereunder, or for or on account of any breach of, or to enforce or interpret any of the covenants, terms or conditions of the APAs, then the prevailing party shall be entitled to recover costs and expenses incurred in such action, including reasonable attorney's fees.

76. Based upon the foregoing, the Plaintiff is informed and believes that it is entitled to an order requiring specific performance of each APA, an award of actual damages if specific performance can not be had, and an award of costs and expenses including a reasonable award of attorney's fees.

FOR A THIRD CAUSE OF ACTION
(breach of contract accompanied by a fraudulent act)

77. To the extent not inconsistent herewith, each and every previous allegation is realleged herein in the same manner and to the same extent as if repeated.

78. The Defendants had fraudulent intent related to the breaching of the contracts.

79. The Defendants secured the Plaintiff's financial information by leading the Plaintiff to believe that they wished to purchase the Plaintiff's assets.

80. The Defendants failed and refused to provide both General Motors and Hyundai the information required to secure franchisor approval and attempted to fabricate other pretextual justifications to avoid performance of their obligations under the APAs.

81. Based upon the foregoing, the Plaintiff is informed and believes that it is entitled to an award of both actual and punitive damages.

FOR A FOURTH CAUSE OF ACTION
(violation of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act "RMDDA")

82. To the extent not inconsistent herewith, each and every previous allegation is realleged in the same manner and to the same extent as if repeated.

83. Among other things, Act No. 1237, now codified in Chapter 15 of Title 56 of the

South Carolina Code as Regulation of Manufacturers, Distributors, and Dealers ("RMDDA"), includes certain definitions and declares certain conduct to be unlawful.

84. Specifically, S.C. Code Ann. Section 56-15-30 declares unfair methods of competition and unfair or deceptive acts or practices as defined by Section 56-15-40 to be unlawful.

85. More specifically, S.C. Code Ann. 56-15-40(1) deems it a violation of Section 56-15-30 for, among others, a dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public.

86. As set forth herein, the Defendants have engaged in unfair methods of competition and unfair and deceptive acts or practices declared unlawful by S.C. Code Ann. 56-15-30.

87. Moreover, the Defendants have engaged in malicious action which is arbitrary, in bad faith, or unconscionable and which has caused and continues to cause damage to the Plaintiff.

88. The Defendants acts were unreasonable, capricious or nonrational, not according to any legitimate reason or judgment and dependent upon will alone.

89. The Defendants engaged in conduct designed to deceive or mislead prompted by an interested or sinister motive, including but not limited to, using the current environment and breaching the APAs to renegotiate the terms.

90. Based upon the foregoing, the Plaintiff is informed and believes that it is entitled to judgment for double the actual damages by it sustained, the cost of suit, including a reasonable attorney's fee, and an award of punitive damages, not to exceed three times the actual damages.

FOR A FIFTH CAUSE OF ACTION

91. To the extent not inconsistent herewith, each and every previous allegation is realleged herein in the same manner and to the same extent as if repeated.

92. At all times herein mentioned, Warner Peacock had intimate knowledge of all of the facts and circumstances concerning the APAs between the Plaintiff and Peacock Automotive.

93. Warner Peacock intentionally procured the breach of the APAs between the Plaintiff and Peacock Automotive.

94. Warner Peacock has no justification for interfering in the contractual relations between the Plaintiff and Peacock Automotive.

95. As a result of Warner Peacock's interference, the Plaintiff has suffered and will continue to suffer actual and consequential damages.

96. Warner Peacock wantonly, willfully, and maliciously interfered with the Plaintiff's contractual relations with Peacock Automotive.

97. Based upon the foregoing, the Plaintiff is informed and believes that it is entitled to judgment against Warner Peacock for both actual and punitive damages.

**FOR A SIXTH CAUSE OF ACTION
(veil piercing)**

98. To the extent not inconsistent herewith, each and every previous allegation is realleged herein in the same manner and to the same extent as if repeated.

99. Warner Peacock has attempted to use Peacock Automotive to protect fraud, justify wrong, or defeat public policy.

100. The interests of Peacock Automotive and Warner Peacock are identical, and one is the alter ego of the other.

101. This Court should inquire into the observation of formalities by Peacock

Automotive including but not limited to whether it was adequately capitalized, paid dividends, was or is insolvent, siphoning of funds by the dominant shareholders or members, whether other officers or directors performed their official functions, whether it maintained appropriate records, and whether it was merely a façade for the operations of the dominant shareholders or members.

102. The Plaintiff will show that insulating Warner Peacock and Peacock Automotive's other members from liability for their wrongdoing while operating through their Florida limited liability company, conducting business in South Carolina, would result in injustice and fundamental unfairness.

WHEREFORE, the Plaintiff prays for declaratory relief, equitable relief in the form of specific performance, for an award of both actual and punitive damages, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

STUDEMAYER LAW FIRM, P.C.

By: s/J. Gregory Studemeyer
J. Gregory Studemeyer
SC Bar #5416
7478 Carlisle Street
Post Office Box 1014
Irmo, South Carolina 29063
803-393-4399

Attorney for the Plaintiff

Irmo, South Carolina
July 2, 2020

PEACOCK AUTOMOTIVE, LLC
265 Drivers way
Hardeeville, SC 29927

March 27, 2020

Stivers Brothers Automotive, Inc.
Attn: Edward M. Stivers, III
4000 Eastern Boulevard
Montgomery, Alabama 36116

Delivered by:
Electronic mail

Re: Proposed Sale of certain assets of STIVERS BROTHERS AUTOMOTIVE, INC, a
South Carolina corporation.

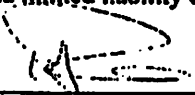
Dear Mr. Stivers:

Reference is made to that certain Asset Purchase Agreement (the "Hyundai APA") dated January 7, 2020, by and between Stivers Brothers Automotive, Inc., a South Carolina corporation ("Seller"), and Peacock Automotive, LLC, a Florida limited liability company ("Buyer") for the sale of certain assets used in Seller's Hyundai Genesis dealership, and that certain Asset Purchase Agreement (the "Chevrolet APA") and, collectively with the Hyundai APA, the "Agreements") dated January 7, 2020, by and between Seller and Buyer for the sale of certain assets used in Seller's Chevrolet Dealership. All capitalized terms used herein and not otherwise defined, have the meanings ascribed thereto in the Agreements.

Section 15 of the Agreements requires Seller to conduct the Dealership's business in the ordinary course, as well as use best efforts to operate and preserve the business and goodwill of the Seller. We do not believe the current conditions existing in the Columbia, SC area permit the Seller to comply with these requirements, as the Dealership's business cannot now or for the foreseeable future operate in the ordinary course. We also believe Columbia's issuance of a stay in place order to be an order of the type that qualifies pursuant to Section 16(h) to materially adversely affecting the Subject Assets. Further, we have requested the February 2020 financial records and Seller has failed to provide such records. Due to the failure of these conditions precedent to Closing, notice is hereby given of the termination of the Hyundai APA and the Chevrolet APA. By copy of this letter, I am requesting Shutts Bowen LLP, in its capacity as escrow agent, to return the \$100,000.00 deposit which was made in connection with this proposed transaction, as provided in Section 20(c) of the Chevrolet APA.

Very truly yours,

PEACOCK AUTOMOTIVE, LLC, a
Florida limited liability company

By: 
W. Warner Peacock, President

cc: McBride Law LLC
Attn: Richard L. McBride Jr.
184 Taliaferro Trail, Suite B
Montgomery, Alabama 36117
rick@mcbridelawllc.com

Exhibit A

ORIGINALS 17385448.3

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

STIVERS BROTHERS AUTOMOTIVE,
INC.,

Plaintiff,

v.

W. WARNER PEACOCK and PEACOCK
AUTOMOTIVE, LLC,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT

) C/A NO. 2020-CP-40-01934

) ANSWER AND COUNTERCLAIMS
) OF DEFENDANTS PEACOCK
) AUTOMOTIVE, LLC AND
) W. WARNER PEACOCK TO
) PLAINTIFF'S AMENDED
) COMPLAINT

Defendants Peacock Automotive, LLC (hereafter "Peacock Automotive"), and W. Warner Peacock, answering and counterclaiming to the Plaintiff's Amended Complaint, would respectfully show the Court as follows:

INTRODUCTION AND UNDERLYING FACTS

1. Peacock Automotive has built a strong reputation by providing high quality vehicle sales and service to the consumers in the state of South Carolina.
2. In its effort to provide better service in the Columbia, South Carolina area, Peacock Automotive explored the potential purchase of two dealerships from Plaintiff, one a Chevrolet dealership and the other a Hyundai/Genesis dealership. Critical to any potential purchase is the honest and fair disclosure by the selling dealership of the financial condition and net profit of the businesses and the continued running of the businesses with best efforts and in good faith until closing without any loss in goodwill caused by seller or an unexpected intervening event.
3. Plaintiff assured Defendant Peacock Automotive through several representations, that it was operating two highly successful dealerships (Chevrolet and Hyundai/Genesis) representing approximately \$2 million dollars of net profits each year.

4. The purchase price of any dealership in the automotive industry crucially relies upon the honesty and integrity of the seller in representing the true value of its dealerships and presenting honest and accurate financial information that does not misrepresent their net profits and financial health. Trusting the representations made by Plaintiff, Peacock Automotive signed two contingency contracts (the "Asset Purchase Agreements") on January 7, 2020 for the potential purchase of the Chevrolet and Hyundai/Genesis dealerships.

5. Critical to the closing of such important financial transactions are the protection, in good faith, of the selling dealerships' net profitability and goodwill, which requires the selling party to operate its business during the interim period in a manner that protects the most valuable assets being purchased.

6. The importance of Plaintiff's conducting the businesses in a way that protects Peacock Automotive was so important that the parties agreed specifically in the Asset Purchase Agreements (the "APAs") that Plaintiff would continue to operate these businesses in the ordinary course and promise to maintain and preserve the business and goodwill of the dealerships (Section 15(a) and 15 (b) of the APAs). Plaintiff further promised in writing that it would bear the risk of loss or damage to any of the dealerships' Subject Assets until closing, including any loss occasioned by an unexpected intervening event (Section 24(q)).

7. While Peacock Automotive has every right to rely upon the honesty and integrity of Plaintiff and its required duty to perform the APAs in good faith and fair dealing, the APAs themselves provided further protection in that Plaintiff promised to provide full access to its books and records and a true and accurate representation of its net profit and financial condition (Section 15(c) and Section 16(f) of the APAs).

8. Plaintiff has not kept its word regarding its financial position, net profitability, goodwill value, ongoing management and operation of the dealerships in the ordinary course, and

its best efforts to maintain the goodwill value of the dealerships prior to closing.

9. Plaintiff continued its disinformation campaign by failing to provide the financial records for November and December prior to Peacock Automotive's signing of the APAs.

10. Plaintiff never provided the November financial records and did not provide December financial records until February, and January financial records only came at the end of the month of February. Peacock Automotive's review of which indicated that Plaintiff was not operating in the ordinary course or preserving the net profitability and represented goodwill of the dealerships.

11. Peacock Automotive requested the February financials numerous times which Plaintiff promised to do so, however it never honored its word prior to the termination of the APAs. Peacock Automotive believes that these February financials would show substantial losses and prove that Plaintiff was operating outside the ordinary course and was failing to preserve the net profitability and goodwill of the businesses. Peacock Automotive further believes that the February financials will also prove that the Plaintiff's representations regarding the net profitability of its dealerships were false.

12. By March, the world had changed since the signing of the APAs in early January. The Coronavirus (COVID-19) pandemic had infected over a million people, killing thousands, and upending ordinary life. Slowing the spread of COVID-19 and minimizing human suffering was of utmost importance. As a result, state-imposed "shelter-in-place" laws and mandated closure of non-essential retail businesses became the new normal. This obviously impacted the average consumer, making even essential businesses unable to operate at expected levels. Such a devastating and unanticipated circumstance caused substantial damage to Plaintiff's business assets, a risk of loss that Plaintiff promised to bear (Section 24(q)).

13. When Plaintiff continued to break its word, Peacock Automotive had no alternative

but to terminate the APAs on March 27, 2020.

14. Plaintiff, instead of acknowledging its responsibilities, has decided to sue, including several individuals personally who were not even parties to the APAs.¹ In response, Peacock Automotive seeks justice in placing the responsibility where it belongs: with Plaintiff.

FOR A FIRST DEFENSE TO ALL CAUSES OF ACTION
(AS TO ALL DEFENDANTS)

15. All allegations not expressly admitted are denied.

16. Defendants admit that the motor vehicle business is not only subject to legislative directives but also that each contract in South Carolina implies the duty of good faith and fair dealing, in answer to Paragraph 1.

17. Defendants admit that Plaintiff operates dealerships in Richland County, in answer to Paragraph 2.

18. Defendants do not have sufficient information to admit or deny the allegations of Paragraph 3, and therefore denies them.

19. Peacock Automotive admits that it has conducted significant business with the South Carolina public for many years, under various business names in answer to Paragraph 4.

20. Peacock Automotive admits that it successfully has operated several car dealerships in answer to Paragraph 5.

21. The allegations of Paragraph 6 are denied.

22. Paragraph 7 is a summary of Plaintiff's causes of action and needs no answer.

PARTIES

23. The allegations of Paragraph 8 are admitted upon information and belief.

24. The allegations of Paragraph 9 are admitted.

¹ Plaintiff has now unilaterally dismissed Defendants Ken Griffey, Jr., Jay Brennan and Mary Kaye Peacock.

25. Warner Peacock admits he owns a residence in both South Carolina and Florida, in answer to Paragraph 10.

26. The allegations of Paragraphs 11, 12, 13, and 14 are admitted.

27. The allegations of Paragraph 15 are irrelevant and call for legal conclusions.

28. The allegations of Paragraphs 16 and 17 are admitted.

JURISDICTION AND VENUE

29. Defendants admit the allegations of Paragraphs 18 and 19.

SUBSTANTIVE ALLEGATIONS

30. Defendants admit negotiations began in the spring of 2019 for the purchase of Plaintiff's Columbia, South Carolina dealerships, in answer to Paragraph 20.

31. Defendants deny the allegations of Paragraphs 21 and 22.

32. Defendants admit negotiations took place in the fall of 2019, in answer to Paragraph 23.

33. Defendants admit that some, but not the most important, financial data was furnished, in answer to Paragraph 24.

34. Defendants deny the allegations of Paragraph 25.

35. Peacock Automotive signed the APAs for the dealerships referred to in Paragraph 26 in reliance upon Plaintiff keeping its oral and written word, in answer to Paragraphs 26 and 27.

36. Peacock Automotive entered into the APAs upon Plaintiff's oral and written assurances that it would operate the dealerships in the ordinary course and maintain and preserve the business and goodwill, and bear any risk of loss or damage to its assets, which Plaintiff has failed to do, all in answer to Paragraphs 28 and 29.

37. Peacock Automotive admits the amount of the Purchase Price in the APAs, which was based on the honest and faithful representations and performance of the APAs by Plaintiff, in

answer to Paragraph 30.

38. Defendants admit only that Edward Stivers, a representative of Plaintiff, mentioned in passing Plaintiff's possible purchase of another dealership, not specifying whether such had occurred already or was to occur, and Defendants deny engaging in any specific discussions concerning Plaintiff's use of proceeds, answering Paragraph 31.

39. Peacock Automotive only agreed to an assignment of Plaintiff's Lease Agreement upon Plaintiff's faithful performance of its promises in the APAs, in answer to Paragraph 32.

40. Defendants make reference to the Lease Agreement, in answer to Paragraphs 33, 34, 35, 36 and 37.

41. The allegations of Paragraph 38 are admitted.

42. Defendants admit that the APAs contain a confidentiality provision, which Defendants deny they violated and deny it was violated, in answer to Paragraph 39.

43. The allegations of Paragraphs 40, 41, 42, 43 and 44 are admitted.

44. Defendants admit so much of Paragraph 45 as alleges it sent a termination letter to Plaintiff on March 27, 2020 and that it stated several conditions precedent that Plaintiff had not met.

45. The allegations of Paragraph 46 are admitted.

46. Defendants admit that the South Carolina Attorney General issued an advisory Opinion on March 27, 2020 that was supplemented on March 29, 2020. The Opinions concluded that extraordinary powers delegated to the Governor may only be exercised by the Governor but that municipal ordinances are presumed to be constitutional and must be enforced unless set aside by a court of competent jurisdiction, all answering Paragraph 47.

47. The allegations of Paragraphs 48 and 49 are denied.

48. Plaintiff is subject to Columbia's Stay Home Stay Safe Ordinance as it pertains to

essential businesses, and it also affects potential customers, in answer to Paragraph 50.

49. Defendants deny that the South Carolina Attorney General found that municipal stay at home orders were unenforceable absent a court order finding them unconstitutional, in answer to Paragraph 51.

50. The allegations of Paragraphs 51, 53, 54 and 55 are denied.

51. Defendants assert the breach of contract by Plaintiff, all unfulfilled conditions precedent to closing contained in the APAs that were jointly drafted by counsel for both parties, and all affirmative defenses contained herein, and deny that it has raised “new claims in an effort to avoid the commitments made to the Plaintiff,” answering Paragraph 56.

52. Defendants deny that a statutory provision governing the sale of goods, S.C. Code §36-2-609 applies to the sale and purchase of automotive dealerships, despite Plaintiff’s attorney’s assertion in its letter dated April 3, 2020, in answer to Paragraph 57.

53. The allegations of Paragraph 58 are denied.

FIRST CAUSE OF ACTION (DECLARATORY JUDGMENT)

54. Defendants reallege its previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent, in answer to Paragraph 59.

55. Defendants deny that this matter is appropriate for Declaratory Judgment in answer to Paragraph 60.

56. The allegations of Paragraphs 61, 62 and 63 are denied.

57. Defendants admit the allegations of Paragraph 64.

58. Answering Paragraph 65, Defendants admit Plaintiff is a citizen of South Carolina. Defendants are unable to admit or deny the remainder of Paragraph 65 as pled, due to lack of sufficient information and therefore deny same.

59. The allegations of Paragraph 66 are denied.

**SECOND CAUSE OF ACTION
(BREACH OF CONTRACT)**

60. Defendants reallege its previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent, in answer to Paragraph 67.

61. The allegations of Paragraph 68 are denied.

62. Defendants do not have sufficient information to admit or deny the allegations of Paragraph 69 due to lack of sufficient information and therefore deny same.

63. Defendants deny that Plaintiff has, in good faith and fair dealing, performed its obligations and conditions precedent to the APAs, in answer to Paragraph 70.

64. The allegations of Paragraphs 71, 72, and 73 are denied.

65. Defendants admit the APAs provide for specific performance, however Plaintiff has refused, in answer to Paragraph 74.

66. The allegations of Paragraph 75 are admitted and Defendants are therefore seeking to recover their costs and expenses including reasonable attorney's fees

67. The allegations of Paragraph 76 are denied.

**THIRD CAUSE OF ACTION
(BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT)**

68. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent, answering Paragraph 77.

69. The allegations of Paragraphs 78, 79, 81, 81 are denied.

**FOR A FOURTH CAUSE OF ACTION
(VIOLATION OF SOUTH CAROLINA REGULATION OF MANUFACTURERS,
DISTRIBUTORS, AND DEALERS' ACT "RMDDA")**

70. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent, answering Paragraph 82.

71. Defendants admit the allegations of Paragraphs 83, 84 and 85.

72. The allegations of Paragraphs 86, 87, 88, 89 and 90 are denied.

FIFTH CAUSE OF ACTION

73. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent, in answer to Paragraph 91.

74. At all times relevant to the matters contained in the Amended Complaint and this Answer and Counterclaims, Warner Peacock was acting in his capacity as Manager, CEO and President of Peacock Automotive, and not in his individual capacity, and his knowledge of the facts and circumstances concerning the APAs between Plaintiff and Peacock Automotive is knowledge obtained and used in that representative capacity, in answer to Paragraph 92.

75. The allegations of Paragraph 93 are denied.

76. Peacock Automotive and Warner Peacock deny the allegation of “interfering in the contractual relations between the Plaintiff and Peacock Automotive,” answering Paragraph 94 and, further answering, the APAs were lawfully terminated.

77. The allegations of Paragraphs 95, 96, and 97 are denied.

FOR A SIXTH CAUSE OF ACTION (VEIL PIERCING)

78. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent, answering Paragraph 98.

79. The allegations of Paragraphs, 99, 100, 101, and 102 are denied.

FOR A SECOND DEFENSE AS TO PLAINTIFF’S FIRST, SECOND THIRD, FOURTH, AND SIXTH CAUSES OF ACTION (FAILURE TO STATE CLAIMS)

80. Defendants reallege their previous answers and defenses to the previous Paragraphs of the Amended Complaint where not inconsistent.

81. Plaintiff has failed to state a claim upon which relief may be granted as to the First Cause of Action (Declaratory Judgment), which should be dismissed pursuant to Rule 12(b)(6), SCRCP, upon the grounds that the First Cause of Action (a) does not allege a justiciable controversy for the Court to decide, since it rests upon an alleged breach of contract that has already occurred, there being no future uncertainty for the Court to resolve, and (b) it is improper in the present action since advisory opinions are inappropriate and adequate remedies at law exist, Rule 12(f), SCRCP.

82. Plaintiff has failed to state a claim upon which relief may be granted as to the Second Cause of Action (Breach of Contract), which should be dismissed pursuant to Rule 12(b)(6), SCRCP, upon the grounds that: (a) Plaintiff fraudulently induced Peacock Automotive to sign the APAs and therefore, they are void, and (b) Plaintiff breached the APAs by not providing the financial records to which Peacock Automotive was entitled, not preserving the business and goodwill of Plaintiff's dealerships, and not operating the dealerships in the ordinary course of business.

83. Plaintiff has failed to state a claim upon which relief may be granted as to the Third Cause of Action (Breach of Contract Accompanied by a Fraudulent Act), which should be dismissed pursuant to 12(b)(6), SCRCP, upon the grounds that Plaintiff has failed to plead a separate fraudulent act accompanied by the alleged breach.

84. Plaintiff has failed to state a claim upon which relief may be granted as to the Fourth Cause of Action (South Carolina Regulation of Manufacturers, Distributors and Dealers Act) upon the grounds that Plaintiff has failed to plead any facts showing that these Defendants engaged in any action that was arbitrary, in bad faith, or unconscionable.

85. Plaintiff has failed to state a claim upon which relief may be granted as to the Sixth Cause of Action (Veil Piercing), which should be dismissed pursuant to Rule 12(b)(6), SCRCP,

upon the grounds that Plaintiff has failed to plead any facts showing that Peacock Automotive failed to observe corporate formalities.

FOR A THIRD DEFENSE TO ALL CAUSES OF ACTION
(UNCLEAN HANDS)

86. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

87. To the extent that Plaintiff seeks equitable relief from Defendants, Plaintiff's own inequitable conduct constitutes unclean hands and therefore bars the granting of equitable relief to Plaintiff.

FOR A FOURTH DEFENSE AS TO ALL CAUSES OF ACTION
(FRAUD IN THE INDUCEMENT)

88. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

89. Plaintiff misrepresented its net profit and financial condition and that it was acting in the ordinary course of business.

90. Plaintiff's representation was material to each of the APAs.

91. Plaintiff knew its representations were false or acted in reckless disregard for the truth.

92. Plaintiff intended that Defendants act upon its representations and Peacock Automotive did act upon those representations.

93. Defendants had a right to rely upon Plaintiff's representations.

94. Defendants have been injured as consequent and proximate result of its reliance on Plaintiff's representations.

95. Plaintiff's claims are barred by its fraudulent inducement.

FOR A FIFTH DEFENSE TO ALL CAUSES OF ACTION
(FAILURE OF CONDITIONS PRECEDENT TO CLOSING)

96. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

97. Plaintiff failed to meet all the conditions precedent in the APAs, including the following:

A. Plaintiff failed to conduct the Dealerships' businesses in the ordinary course to preserve the goodwill value of the Dealerships which was the basis for the purchase price under the APAs.

B. Plaintiff failed to use best efforts to operate and preserve the business and goodwill of the Dealerships which was the basis for the purchase price under the APAs.

C. Plaintiff failed to provide complete and accurate financial statements and data to Defendants.

D. Plaintiff warranted and represented at paragraph 13(1) of the APAs that all financial statements and data furnished by the Plaintiff to the Buyer "are true and accurate representations of the financial condition of the Plaintiff as of the date of such statements or reports." Furthermore, under paragraph 15(a) of the APAs, Plaintiff agreed that it would not take any action which would cause any representation or warranty made in the APAs to be incorrect in any material respect if such representation or warranty were made on any date from the Effective Date of the APAs through and including the Closing Date. Moreover, pursuant to paragraphs 16(e) and (f) of the APAs, all of the Plaintiff's representations and warranties "shall be true and correct in all material respects on the Closing Date." Plaintiff's false and misleading financial data presented to Defendants breached the representations and warranties under the APAs.

E. Plaintiff agreed to assume the risk of loss or damage to the dealership assets that may occur before closing.

98. Plaintiff's failure to meet all the conditions precedent relieves Defendants of any duty to purchase the Dealerships and acts as a complete bar to Plaintiff's claims.

FOR A SIXTH DEFENSE AS TO ALL CAUSES OF ACTION
(WAIVER)

99. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

100. Some or all of the claims asserted by Plaintiff are barred by the doctrine of waiver.

101. Plaintiff entered into the APAs that provided certain rights to Plaintiff, as set forth in the APAs, and known to Plaintiff, subject to all terms and conditions precedent contained therein.

102. Plaintiff has voluntarily and intentionally abandoned and relinquished its rights under the APAs.

103. Therefore, to the extent Plaintiff suffered damages, which is denied, they are barred.

FOR A SEVENTH DEFENSE AS TO ALL CAUSES OF ACTION
(EQUITABLE ESTOPPEL)

104. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

105. Some or all of the claims asserted by Plaintiff are barred by the doctrine of equitable estoppel.

106. Plaintiff had knowledge of Defendants' right to rely on the representations in the disclosed financial statements of Plaintiff.

107. Plaintiff intended that Defendants rely on its acts or omissions concerning Plaintiff's financial statements and financial matters that were withheld from Defendants by Plaintiff's refusal to send the financial statements.

108. Defendants were ignorant of the true facts concerning the net profitability of the Dealerships and Peacock Automotive detrimentally relied on financial statements provided by Plaintiff which misrepresented the net profitability and therefor, the goodwill of the two dealerships Plaintiff hoped to sell.

FOR AN EIGHTH DEFENSE AS TO ALL CAUSES OF ACTION
(LIQUIDATED DAMAGES)

109. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

110. Plaintiff's claim and sole remedy, in the event it is entitled to recover damages, is limited to the recovery of liquidated damages in the amount of \$100,000, which shall serve as liquidated damages for both APAs pursuant to paragraph 20(d) of the Chevrolet APA and paragraph 20 of the Hyundai APA.

FOR A NINTH DEFENSE AS TO ALL CAUSES OF ACTION
(FAILURE TO MITIGATE)

111. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

112. To the extent Plaintiff suffered damages, which is denied, Plaintiff failed to mitigate its damages.

113. To the extent Plaintiff failed to mitigate its damages, they are barred.

FOR A TENTH DEFENSE AS TO ALL CAUSES OF ACTION
(PLAINTIFF'S MATERIAL BREACHES OF THE APAS)

114. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

115. Plaintiff's claims are precluded and the APAs were lawfully terminated because of Plaintiff's material breaches of the APAs which caused the failure of the conditions precedent to closing set forth in Paragraph 96 above.

116. The APAs were lawfully terminated as a consequence of Plaintiff's material breaches of the APAs which acts as a complete bar to Plaintiff's claims.

FOR AN ELEVENTH DEFENSE AS TO ALL CAUSES OF ACTION
(DEFENDANTS' LAWFUL
TERMINATION OF THE APAS)

117. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

118. Plaintiff's claims are precluded and the APAs were lawfully terminated because of Plaintiff's material breaches of the APAs including:

- A. Section 15(a) - Plaintiff failed to conduct the Dealerships' business in the ordinary course to preserve the goodwill value of the Dealerships which was the basis for the purchase price.
- B. Section 15(b) – Plaintiff failed to use best efforts to operate and preserve the business and goodwill of the Dealerships which was the basis for the purchase price.
- C. Section 15(c) – Plaintiff failed to provide the February Financial Statements and documents for the Dealerships to Peacock Automotive.

D. Plaintiff warranted and represented at paragraph 13(1) of the APAs that all financial statements and data furnished by Plaintiff to the Buyer “are true and accurate representations of the financial condition of Plaintiff as of the date of such statements or reports.” Furthermore, under paragraph 15(a) of the APAs, Plaintiff agreed that it would not take any action which would cause any representation or warranty made in the APAs to be incorrect in any material respect if such representation or warranty were made on any date from the Effective Date of the APAs through and including the Closing Date. Moreover, pursuant to paragraphs 16(e) and (f) of the APAs, all of the Plaintiff’s representations and warranties “shall be true and correct in all material respects on the Closing Date.” Plaintiff’s false and misleading financial data presented to Defendants breached the representations and warranties under the APAs.

E. Plaintiff admitted by oral and written statements made to Defendants by its President, Edward M. Stivers, III, currently ongoing mismanagement at the Dealerships, shows Plaintiff’s failure to operate the Dealerships in the ordinary course and Plaintiff’s failure to use best efforts to maintain and preserve the business and goodwill value of the Dealerships, which was the basis for the purchase price.

119. The APAs were lawfully terminated as a consequence of Plaintiff’s fraud in the inducement and material breaches of the APAs and acts as a complete bar to Plaintiff’s claims.

FOR A TWELFTH DEFENSE AS TO ALL CAUSES OF ACTION
(NO LEGAL BASIS FOR CLAIMS AGAINST INDIVIDUAL
NON-PARTY TO THE APAs)

120. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

121. The individual named as Defendant is not a party to the APAs.

122. Plaintiff's claims against the individual Defendant are precluded because he is not a party to the APAs.

123. Plaintiff's claims against the individual Defendant should be dismissed with prejudice because he is not a party to the APAs.

**FOR A THIRTEENTH DEFENSE AS TO ALL CAUSES OF ACTION
(DEFENDANTS' ACTIONS WERE LAWFUL, REASONABLE AND UNDERTAKEN IN
GOOD FAITH)**

124. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

125. Plaintiff's claims are precluded and should be dismissed with prejudice because all of the actions of Defendants were lawful, reasonable and undertaken in good faith.

**FOR A FOURTEENTH DEFENSE AS TO ALL CAUSES OF ACTION
(DEFENDANTS DID NOT VIOLATE THE
CONFIDENTIALITY PROVISION OF THE APAs)**

126. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

127. Defendants did not breach the confidentiality provision of the APAs, therefore, Plaintiff's claim for the breach of a confidentiality provision is precluded and should be dismissed with prejudice.

**FOR A FIFTEENTH DEFENSE AS TO ALL CAUSES OF ACTION
(IMPOSSIBILITY OF PERFORMANCE)**

128. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

129. The APA's were lawfully terminated and Plaintiff's claims are precluded as a consequence of the unanticipated, unforeseen and historic COVID-19 Pandemic, the worldwide,

statewide, and local states of emergency declared by local, state, federal and worldwide governments and response thereto and the principle of impossibility of performance.

FOR A SIXTEENTH DEFENSE AS TO ALL CAUSES OF ACTION
(IMPRATICABILITY OF PERFORMANCE)

130. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

131. The APAs were lawfully terminated and Plaintiff's claims are precluded as a consequence of the unanticipated, unforeseen, and historic COVID-19 Pandemic, the worldwide, statewide, and local states of emergency declared by local, state, federal, and worldwide governments, and response thereto, and the principle of impracticality of performance.

FOR A SEVENTEENTH DEFENSE AS TO ALL CAUSES OF ACTION
(FRUSTRATION OF PURPOSE AND FUNDAMENTAL
BASIS FOR PARTIES' BARGAIN)

132. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

133. The APAs were lawfully terminated and Plaintiff's claims are precluded as a consequence of the unanticipated, unforeseen and historic COVID-19 Pandemic, the worldwide government states of emergency and response thereto, and the frustration of purpose, and fundamental basis of the parties' bargain set forth in the APAs.

FOR AN EIGHTEENTH DEFENSE AS TO ALL CAUSES OF ACTION
(NO DAMAGES SUFFERED BY PLAINTIFF)

134. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

135. Plaintiff's claims are precluded because it has suffered no damages as a consequence of the claims set forth in the Amended Complaint.

**FOR A NINETEENTH DEFENSE AS TO ALL CAUSES OF ACTION
(NO DAMAGES CAUSED BY DEFENDANTS)**

136. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

137. Plaintiff's claims are precluded because it has suffered no damages caused by any wrongful actions of the Defendants.

**FOR A TWENTIETH DEFENSE AS TO ALL CAUSES OF ACTION
(NO RIGHT TO RECOVER SPECIAL, INDIRECT, OR PUNITIVE DAMAGES)**

138. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

139. Plaintiff's claims to special, indirect, or punitive damages are precluded by the express terms of paragraph 24(1)(3) of the APAs.

**FOR A TWENTY-FIRST DEFENSE AS TO ALL CAUSES OF ACTION
(CONSTITUTIONAL DEFENSE)**

140. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

141. Any award of punitive damages against Defendants will violate rights guaranteed to it by the Constitution of the State of South Carolina for the following reasons:

- A. Any award of punitive damages violates the prohibition against excessive fines under Article 1, Section 15 of the Constitution of South Carolina; and
- B. Any award of punitive damages violates the guarantee of due process found in Article I, Section 3 of the Constitution of South Carolina because of a lack of objective guidelines on which a jury might base its award and further that such guidelines as exist are arbitrary and void for vagueness.

FOR A TWENTY-SECOND DEFENSE AS TO ALL CAUSES OF ACTION
(CONSTITUTIONAL DEFENSE)

142. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

143. Any award of punitive damages against Defendants will violate its rights guaranteed to it under the Constitution of the United States for the following reasons:

- A. Any award of punitive damages violates the prohibition of excessive fines found in the Eighth Amendment of the Constitution of the United States as applied to the states by way of the due process clause of the Fourteenth Amendment of the Constitution of the United States; and
- B. Any award of punitive damages violates the guarantee of due process found in the Fourteenth Amendment to the Constitution of the United States because of the lack of objective guidelines in which a jury might base its award and further than such guidelines as do exist are arbitrary and void for vagueness.

FOR A TWENTY-THIRD DEFENSE AS TO ALL CAUSES OF ACTION
(RISK OF LOSS)

144. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

145. Plaintiff contractually agreed to retain the risk of any loss or damage to the dealership assets through the closing date.

FOR A FIRST COUNTERCLAIM
(BREACH OF CONTRACT)

146. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

147. Peacock Automotive and Plaintiff entered into two Asset Purchase Agreements on

January 7, 2020.

148. Stivers agreed in Section 15(a) of the APAs:

From the Effective Date of this Agreement to the Closing Date (the "Interim Period"), unless Buyer consents otherwise in writing, Seller will conduct the Dealership's business only in the ordinary course . . .

Section 15(b) similarly required:

During the Interim Period, Seller agrees to use its best efforts: to maintain and preserve the business and goodwill of Seller with respect to the Dealership; to maintain and preserve its present relationships with its vendors, suppliers, customers and other third parties; and to retain until Closing (subject to Sections 6(c) and 6(e) above) any employees as to whom Buyer has indicated an interest in hiring after Closing. The foregoing shall not be construed to authorize Seller to make any commitments on behalf of Buyer or otherwise to create any legal obligation of Buyer of any kind.

149. To ensure that Plaintiff was operating in the ordinary course and preserving its good will, it promised to provide access to its books and records (Section 15(c)) and that all data furnished to Peacock Automotive was a true and accurate representation of its financial condition (Section 10(h)).

150. Plaintiff breached the APAs by failing to conduct its business in the ordinary course, failing to preserve its business and goodwill, and failing to provide access to its books and records to Peacock Automotive.

151. Stivers and Peacock Automotive agreed that if the Chevrolet purchase did not close due to no fault of Peacock Automotive, the \$100,000 escrow would be returned to Peacock Automotive.

152. Peacock Automotive has been injured as a result of Plaintiff's breach.

153. Peacock Automotive is informed and believes that it is entitled to a return of the escrow, an award of actual damages, and an award of costs and expenses including a reasonable award of attorney's fees, as allowed by both APAs.

FOR A SECOND COUNTERCLAIM
(BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT)

154. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

155. Plaintiff breached the APAs by providing financial statements to Peacock Automotive, LLC that contained misleading financial results that falsely inflated the net profitability and goodwill value of Plaintiff's dealerships.

156. Plaintiff had fraudulent intent relating to the breaching of the contract when it repeatedly refused to provide additional financials, which would have shown that the Plaintiff's dealerships did not have net profitability of \$2 million per year as represented and were not being operated in the ordinary course of business, and with best efforts to preserve the business and goodwill of Plaintiff's dealerships.

157. Plaintiff engaged in fraudulent acts that accompanied a breach of contract by providing misleading financial statements and refusing to provide other financial statements which Peacock Automotive had a contractual right to receive.

FOR A THIRD COUNTERCLAIM
(FRAUD IN THE INDUCEMENT)

158. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

159. Any potential purchase of a dealership is based on the representation of Seller as to the net profitability of the dealership.

160. Plaintiff represented the \$2 million net profitability per year, financial condition and value of its dealerships' goodwill, and that it was acting in the ordinary course of business.

161. Plaintiff's representations were false and were material to the contract.

162. Plaintiff knew its representations were false or acted in reckless disregard for the

truth.

163. Plaintiff intended that Peacock Automotive act upon its representations regarding its \$2 million net profitability, goodwill value, financial condition and operations in the signing of the APAs, and Peacock Automotive did act upon those representations.

164. Peacock Automotive had a right to rely, and did rely, upon Plaintiff's representations, and was ignorant of their falsities.

165. Peacock Automotive has been injured as a consequent and proximate result of its reliance on Plaintiff's representations.

166. Peacock Automotive is entitled to actual and punitive damages.

FOR A FOURTH COUNTERCLAIM
(NEGLIGENT MISREPRESENTATION)

167. Defendants reallege their previous answers and defenses to the previous paragraphs of the Amended Complaint where not inconsistent.

168. Plaintiff represented the \$2 million net profitability, financial condition and value of its dealerships' goodwill, and that it was acting in the ordinary course of business.

169. Plaintiff's representations were false and were material to the contract.

170. Plaintiff had a pecuniary interest in making the statement.

171. Plaintiff owed a duty of care to see that it communicated truthful information to Peacock Automotive.

172. Plaintiff breached its duty by failing to exercise due care.

173. Peacock Automotive justifiably relied on Stiver's representations.

174. Peacock Automotive has been injured as a consequent and proximate result of its reliance on Plaintiff's representations.

175. Peacock Automotive is entitled to actual and consequential damages.

PRAYER FOR RELIEF

WHEREFORE, Defendants W. Warner Peacock and Peacock Automotive, LLC pray the Court to:

- i. Enter an Order declaring that Plaintiff shall have and recover nothing from these Defendants;
- ii. Enter an Order in favor of these Defendants in their counterclaims, for an award of both actual and punitive damages against Plaintiff, including the expenses of this action, including reasonable attorney's fees;
- iii. Tax the costs of this action against Plaintiff; and
- iv. Provide such other relief as may be just and proper.

July 17, 2020

Respectfully submitted,

s/Laura W.H. Teer
Bradford N. Martin, Esq. (SC Bar No. 3658)
Laura W. H. Teer, Esq. (SC Bar No. 16698)
BRADFORD NEAL MARTIN & ASSOCIATES, P.A.
Post Office Box 10410
Greenville, South Carolina 29603
864.552.9990
864.552.9992 (facsimile)

**ATTORNEYS FOR DEFENDANTS
PEACOCK AUTOMOTIVE, LLC AND
W. WARNER PEACOCK**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2020-CP-40-01934
STIVERS BROTHERS	)	
AUTOMOTIVE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	REPLY TO ANSWER AND
	)	COUNTERCLAIMS OF DEFENDANTS
W. WARNER PEACOCK	)	PEACOCK AUTOMOTIVE, LLC AND
and PEACOCK AUTOMOTIVE, LLC,	)	W. WARNER PEACOCK TO
	)	PLAINTIFF'S AMENDED COMPLAINT
Defendants.	)	

The Plaintiff, replying to the Answer And Counterclaims of Defendants Peacock Automotive, LLC And W. Warner Peacock To Plaintiff's Amended Complaint, would respectfully show that:

AS TO THE INTRODUCTION AND UNDERLYING FACTS

1. Paragraphs 1-14 should be stricken as redundant, immaterial, or impertinent pursuant to Rule 12(f), SCRCP.

AS TO THE FIRST THROUGH TWENTY THIRD DEFENSES

2. The Plaintiff reaffirms and reiterates all of the allegations contained in the Amended Complaint.

AS TO THE COUNTERCLAIMS

3. Each and every allegation not hereinafter admitted, qualified, or explained is denied and strict proof is demanded thereof.
4. As to the allegations contained in paragraph 146, the Plaintiff reasserts its previous responses thereto.
5. The allegations contained in paragraph 147 are admitted.

6. As to the allegations contained in paragraphs 148 and 149, the Plaintiff craves reference to the entire contracts for their exact terms and provisions and context. Any allegations contained in paragraphs 148 and 149 inconsistent herewith are denied.

7. The allegations contained in paragraph 150 are denied.

8. As to the allegations contained in paragraph 151, the Plaintiff craves reference to the entire contracts for their exact terms and provisions and context. Any allegations contained in paragraph 151 inconsistent herewith are denied.

9. The allegations contained in paragraphs 152 and 153 are denied.

10. As to the allegations contained in paragraph 154, the Plaintiff reasserts its previous responses thereto.

11. The allegations contained in paragraphs 155, 156, and 157 are denied.

12. As to the allegations contained in paragraph 158, the Plaintiff reasserts its previous responses thereto.

13. The allegations contained in paragraph 159 are denied.

14. As to the allegations contained in paragraph 160, the Plaintiff craves reference to the entire contracts for their exact terms and provisions and context. Any allegations contained in paragraph 160 inconsistent herewith are denied.

15. The allegations contained in paragraphs 161, 162, 163, 164, 165, and 166 are denied.

16. As to the allegations contained in paragraph 167, the Plaintiff reasserts its previous responses thereto.

17. As to the allegations contained in paragraph 168, the Plaintiff craves reference to the entire contracts for their exact terms and conditions and context. Any allegations

contained in paragraph 168 inconsistent herewith are denied.

18. The allegations contained in paragraph 169 are denied.
19. The allegations contained in paragraphs 170 and 171 are admitted.
20. The allegations contained in paragraph 172 are denied.
21. The allegations contained in paragraphs 173, 174, and 175 are denied.

WHEREFORE, having fully replied to the Answer And Counterclaims of Defendants Peacock Automotive, LLC And W. Warner Peacock To Plaintiff's Amended Complaint, the Plaintiff prays that the same be dismissed with costs, that it be given judgment on its Amended Complaint, and for such other and further relief as the Court may deem just and proper.

STUDEMAYER LAW FIRM, P.C.

By: s/J. Gregory Studemeyer
J. Gregory Studemeyer
SC Bar #5416
7478 Carlisle Street
Post Office Box 1014
Irmo, South Carolina 29063
803-393-4399
Attorney for the Plaintiff

Irmo, South Carolina

July 29, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	C/A NO. 2020-CP-40-01934
STIVERS BROTHERS AUTOMOTIVE, INC.,	)	
	)	
Plaintiff,	)	
v.	)	
	)	MOTION FOR EARLY NEUTRAL EVALUATION
W. WARNER PEACOCK and PEACOCK AUTOMOTIVE, LLC,	)	
	)	
Defendants.	)	
	)	

TO: STIVERS BROTHERS AUTOMOTIVE, INC. AND ITS ATTORNEY J. GREGORY STUDEMAYER, ESQ:

Please take notice that the undersigned, as counsel for Defendants, will move before the Chief Administrative Judge for the Fifth Judicial Circuit, at such time and place as the Court may direct, for an Order requiring an early neutral evaluation under the provisions of Rules 14 through 17, South Carolina Rules of Alternative Dispute Resolution. The grounds for this Motion are as follows:

1. Plaintiff and Defendants have been involved in litigation since April 13, 2020, with Plaintiff filing a Complaint and Amended Complaint, and Defendants filing Motions to Dismiss certain Defendants and Answers and Counterclaims. Further, five Motions were heard on Friday, July 24, 2020 by the Hon. Casey Manning, Judge of the Fifth Judicial Circuit, and decisions are pending. The controversy revolves around the sale of two car dealerships in Columbia, South Carolina.

2. The Plaintiff and Defendants have been involved in settlement negotiations resulting in a proposed Asset Purchase Agreement by Defendants for one of the disputed dealerships, a Hyundai dealership in Columbia. The monetary amounts (including attorney's fees)

have been agreed, and the only remaining issues with respect to the APA is the timing requirements under the Contract.

3. The other dealership involved in this litigation, a Chevrolet dealership in Columbia, is under an APA with another party and is about to close. Therefore, in consideration of early resolution of this case and judicial economy, Defendants respectfully move at this Court appoint a neutral under the provisions of Rules 14 through 17 of the Alternative Dispute Resolution Rules.

July 30, 2020

Respectfully submitted,

s/Bradford N. Martin

Bradford N. Martin, Esq. (SC Bar No. 3658)

Laura W. H. Teer, Esq. (SC Bar No. 16698)

BRADFORD NEAL MARTIN & ASSOCIATES, PA

Post Office Box 10410

Greenville, South Carolina 29603

864.552.9990

864.552.9992 (facsimile)

ATTORNEYS FOR DEFENDANTS

W. WARNER PEACOCK AND

PEACOCK AUTOMOTIVE, LLC

Rule 11 Certification

The undersigned, attorney for the moving party, certifies that he has attempted in good faith to communicate with opposing counsel in an effort to resolve the issues contained herein, and has been unsuccessful.

July 30, 2020

Respectfully submitted,

s/Bradford N. Martin

Bradford N. Martin, Esq. (SC Bar No. 3658)

Laura W. H. Teer, Esq. (SC Bar No. 16698)

BRADFORD NEAL MARTIN & ASSOCIATES, PA

Post Office Box 10410

Greenville, South Carolina 29603

864.552.9990

864.552.9992 (facsimile)

ATTORNEYS FOR DEFENDANTS

W. WARNER PEACOCK AND

PEACOCK AUTOMOTIVE, LLC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	C/A NO. 2020-CP-40-01934
STIVERS BROTHERS AUTOMOTIVE, INC.,	)	
	)	
	)	<u>PEACOCK AUTOMOTIVE AND</u>
Plaintiff,	)	<u>WARNER PEACOCK'S MOTION AND</u>
v.	)	<u>MEMORANDUM FOR</u>
	)	<u>JUDGMENT ON THE PLEADINGS</u>
W. WARNER PEACOCK and PEACOCK AUTOMOTIVE, LLC,	)	
	)	
	)	
Defendants.	)	
_____	)	

TO: STIVERS BROTHERS AUTOMOTIVE, INC. AND ITS ATTORNEY J. GREGORY STUDEMEYER, ESQ:

The Defendants, Peacock Automotive, LLC ("Peacock Automotive"), and W. Warner Peacock ("Warner"), by and through their undersigned attorneys and pursuant to Rule 12(c), SCRCF, move the Court for judgment on the pleadings that, as a matter of law, the South Carolina Dealers Act does not apply to the subject dispute between two dealers. Therefore, there is no issue of fact raised by this cause of action that would entitle the Plaintiff to judgment if resolved in Plaintiff's favor.

I. THE DEALERS ACT IS NOT APPLICABLE TO CONTRACT DISPUTES BETWEEN DEALERS

A. Judgment on the Pleadings Standard

Any party may move for a judgment on the pleadings under Rule 12(c) SCRCF. *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47 (2009). A judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if

resolved in Plaintiff's favor. *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991).

B. The APAs are Outside the Scope of S.C. Code § 56-15-80.

Stivers sued Peacock Automotive and Warner twice for specific performance of each of "two separate Asset Purchase Agreements (APAs)" for the purchase of its Chevrolet and Hyundai/Genesis dealerships in Columbia, South Carolina. Stivers' Complaint was filed on April 13, 2020 and its Amended Complaint was filed three months later on July 2, 2020. Plaintiff's claims regarding the Dealers Act arise from the alleged breach of the APAs. (Complaint, ¶s 68-76, Amended Complaint ¶s 82-90).

Contracts between two motor vehicle dealers are not within the scope of the South Carolina Dealers Act. The Act expressly limits the agreements to which the Act applies:

The provisions of this chapter shall apply to all written or oral agreements between a manufacturer, wholesaler or distributor with a motor vehicle dealer including, but not limited to, the franchise offering, the franchise agreement, sale of goods, services or advertising, leases or mortgages of real or personal property, promises to pay, security interests, pledges, insurance contracts, advertising contracts, and all other such agreements in which the manufacturer, wholesaler or distributor has any direct or indirect interest.

S.C. Code Ann. § 56-15-80.

The APAs are clearly between two motor vehicle dealers, and not between a dealer and a manufacturer, wholesaler, or distributor. "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature," and "[w]hen a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Sloan v. Hardee*, 371 S.C. 495, 498-99, 640 S.E.2d 457, 459 (2007) (citations omitted). The canon of construction "expressio unius est exclusio alterius" or "inclusio unius est exclusio alterius" holds that "to express or include one thing implies the

exclusion of another, or of the alternative.'" *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578 (2000) citing Black's Law Dictionary 602 (7th ed. 1999)." By omitting any reference to agreements between dealers, the South Carolina Legislature clearly did not intend for § 56-15-80 to apply to such agreements.

Other Courts have found the Dealers Act does not apply to persons who do not have a contract with a manufacturer, wholesaler or distributor. In *Carolina Trucks & Equip., Inc. et al v. Volvo Trucks North America, Inc.* C.A. 3:02-2605-10, D.S.C. * 10 (May 22, 2003), the South Carolina District Court (Perry, J) found that individual shareholders and officers of a dealership did not have standing against the manufacturer where they were not individual parties to the Dealer Agreement.

The Supreme Court of Massachusetts likewise held that a prospective franchisee, claiming the loss associated with the inability to obtain the franchise, did not have standing to sue the franchiser. *Beard Motors, Inc. v. Toyota Motor Distributors, Inc. et al.*, 395 Mass. 428, 480 N.E.2d 303 (1985). Two dealers with equal bargaining power do not require protections beyond those that may ordinarily be available for a breach of contract. The Massachusetts court found the Legislature's intent under its statute was "to protect motor vehicle franchisees and dealers from the type of injury to which they had been susceptible by virtue of the inequality of their bargaining power and that of their affiliated manufacturers and distributors." *Id.* at 306.

In *Hand v. Chrysler Corp.*, 30 F.Supp.2d 667 (D. Vt. 1998), the Federal District Court also found the Vermont statute, read as a whole, involved arrangements between the manufacturer and a new motor vehicle dealer, not a prospective purchaser. Therefore, the Hands, who were not a party to such an agreement, did not come under the statute unless they could establish themselves as consumers.

C. Stivers is not a Consumer to Which the Dealers Act may Otherwise Afford Protection.

Plaintiff may argue that it is afforded protection by the Dealers Act under § 56-15-110. Although § 56-15-10 defines “person” to include a corporation, South Carolina courts have made clear that the purpose of the Act is consumer protection. *See Herron v. Century BMW*, 378 S.C. 525, 693 S.E.2d 394, 399 (2010) (“The purpose of the Dealers Act is consumer protection.”). The Act is not intended to protect two motor vehicle dealers in their transactions with one another.

The Act does not define the term “consumer;” however, the South Carolina Supreme Court in *Bruce v. Blalock*, 241 S.C. 155, 127 S.E.2d 439 (1962) cited to other jurisdictions in deciding whether the Water District was a consumer:

A comprehensive definition of the term is as follows:

‘Consumer is one who uses economic goods and so diminishes or destroys their utilities; opposed to producer; and ‘consume’ means to use up, expend, waste, devour, with synonyms of destroy, swallow up, engulf, absorb, waste, exhaust, spend, expend, squander, lavish, dissipate, burn up.’ *See Ex parte Mehlman*, 127 Tex.Cr.R. 257, 75 S.W.2d 689; *Union Portland Cement Co. v. State Tax Commission*, 110 Utah 135, 170 P.2d 164; *St. Paul & Tacoma Lumber Co. v. State*, 40 Wash.2d 347, 243 P.2d 474.

The South Carolina Consumer Protection Code defines a consumer as “buyer, lessee, or debtor to whom credit is extended in a consumer transaction.” S.C. Code § 37-1-301(10). Defendants, not the Plaintiff, would more aptly be defined as consumers under this definition. Plaintiff is not a consumer; thus, the Dealers Act is not designed to protect its interests against another dealer.

WHEREFORE, Defendants move the Court for the entry of judgment on the pleadings finding that the Dealers Act is not applicable to the present matter and dismissing this cause of action as a matter of law.

DATED this 9th day of December, 2020.

Respectfully submitted,

s/Bradford N. Martin

Bradford N. Martin, Esq. (SC Bar No. 3658)
Laura W. H. Teer, Esq. (SC Bar No. 16698)
BRADFORD NEAL MARTIN & ASSOCIATES, PA
Post Office Box 10410
Greenville, South Carolina 29603
864.552.9990
864.552.9992 (facsimile)
ATTORNEYS FOR DEFENDANTS
PEACOCK AUTOMOTIVE, LLC AND
W. WARNER PEACOCK

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2020-CP-40-01934
	)	
STIVERS BROTHERS	)	
AUTOMOTIVE, INC.,	)	
	)	PLAINTIFF'S MOTION AND
	)	MEMORANDUM FOR
Plaintiff,	)	JUDGMENT ON THE PLEADINGS
	)	AND MEMORANDUM IN
	)	OPPOSITION TO DEFENDANTS'
v.	)	MOTION FOR JUDGMENT ON
	)	THE PLEADINGS
	)	
W. WARNER PEACOCK	)	
and PEACOCK AUTOMOTIVE, LLC,	)	
	)	
Defendants.	)	

TO: BRADFORD N. MARTIN, ESQ., ATTORNEY FOR THE DEFENDANTS:

The Plaintiff, Stivers Brothers Automotive, Inc. ("Stivers"), reserving its right to amend and supplement its complaint, by and through its undersigned attorneys, moves for judgment on the pleadings pursuant to Rule 12(c), SCRCP, that as a matter of law, the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (the "Dealers Act"), S.C. Code Ann. §§ 56-15-10 et seq., applies to the Plaintiff's claims against the Defendants for frauds, impositions, and other abuses committed upon the Plaintiff, a citizen of South Carolina. This memorandum is submitted in support thereof and in opposition to the Defendants' motion for judgment on the pleadings.

BACKGROUND

On August 4, 2017, Stivers began operating Chevrolet and Hyundai dealerships in Richland County, South Carolina (collectively, the "Columbia dealerships"). Defendant Peacock Automotive, LLC ("Peacock Automotive") also operates a Hyundai dealership in Richland

County. In the spring of 2019, the parties recognized that the Columbia market was not big enough to sustain both of their respective Hyundai (“Hyundai”) franchises.

On January 7, 2020, Stivers and Peacock Automotive entered into two separate Asset Purchase and Sale Agreements (the “APAs”) for the sale of Stivers’ Columbia dealerships to Peacock Automotive. Each APA provided for the payment by Peacock Automotive to Stivers of the sum of \$3,500,000.00 for a total of \$7,000,000.00, in addition to the price of the assets of the dealerships. Each APA also required Peacock Automotive to enter into an assignment of lease agreement with the owners of the premises.

Each APA required Peacock Automotive to submit applications to General Motors and Hyundai for approval of the proposed transfer of ownership of the franchises within twenty days of receipt, but no later than 105 days after January 7, 2020. The Defendants never submitted all of the required information in order to secure approval. Neither APA contained a “force majeure” clause, yet the Defendants attempted to terminate the APAs on March 27, 2020, based on the COVID-19 pandemic.

This action was commenced on April 13, 2020. In its amended complaint, Stivers alleged that Peacock Automotive sabotaged the transactions by failing to pursue approval of the manufacturers and the landlord and by inventing pretext to justify termination after the COVID-19 outbreak. Stivers sought a declaration that the APAs between the parties remained valid and enforceable contracts, notwithstanding the Defendants’ purported termination of the contracts for pretextual reasons. In addition, Stivers brought causes of action for breach of contract, breach of contract accompanied by a fraudulent act, violation of the Dealers Act, tortious interference, and veil piercing.

On December 9, 2020, the Defendants filed a motion for judgment on the pleadings, seeking a ruling that the Dealers Act does not apply to a contract dispute between motor vehicle dealers. Specifically, the Defendants asserted that because the APAs were outside the scope of S.C. Code Ann. § 56-15-80, then the Dealers Act did not apply to this action. The Defendants further asserted that the Dealers Act did not afford protection to Stivers because the Dealers Act is exclusively a consumer protection act.

The Defendants erroneously assert that Stivers' claim for violation of the Dealers Act may not arise out of the same conduct that gave rise to its other causes of action, including breach of contract and breach of contract accompanied by a fraudulent. As Justice Toal observed in Taylor v. Nix, 307 S.C. 551, 416 S.E.2d 619 (1992), a case where the plaintiff brought causes of action for breach of warranty, strict liability, and violation of the Dealers Act, "several causes or action" may be joined which "may be alternative theories of recovery for the same conduct." See also Adams v. Grant, 292 S.C. 581, 358 S.E.2d 142 (1986).

In the amended complaint, the Plaintiff alleges that the Defendants violated S.C. Code Ann. §§ 56-15-30 and 56-15-40, not S.C. Code Ann. § 56-15-80. Accordingly, whether the APAs are within the scope of S.C. Code Ann. § 56-15-80 is immaterial, and certainly not grounds for a motion for judgment on the pleadings in favor of the Defendants. In fact, based on the legislative intent and a comprehensive reading of the Dealers Act, it is clear that Stivers may bring a cause of action under the Act, and the Plaintiff, rather than the Defendants, is entitled to judgment on the pleadings.

LAW

A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to

judgment. Brown v. United Insurance Company of America, 268 S.C. 254, 233 S.E.2d 298 (1977). A judgment on the pleadings is in the nature of a demurrer. Id. All properly pleaded factual allegations are deemed admitted for purposes of the consideration of a demurrer. Crowe v. Domestic Loans, Inc., 242 S.C. 310, 130 S.E.2d 845 (1963). When a fact is well-pleaded, “whatever inference of law or conclusion of fact that may properly arise therefrom are to be regarded as embraced in the averment.” Id.

Moreover, a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. Baldwin v. Sanders, 266 S.C. 394, 223 S.E.2d 602 (1976). Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties. Manning v. Dial, 271 S.C. 79, 245 S.E.2d 120 (1978). Furthermore, a judgment on the pleadings is considered to be a drastic procedure by our courts. U.S. Casualty Company v. Hiers, 233 S.C. 333, 104 S.E.2d 561 (1958).

Any party may move for a judgment on the pleadings under Rule 12(c), SCRPC. Sapp v. Ford Motor Co., 386 S.C. 143, 687 S.E.2d 47 (2009); *see also* Nationwide Mut. Fire Insurance Company v. Caine, 2020 WL 4432876 (D.S.C. 2020) and Jasper County Board of Education v. Jasper Counter Council, et al., 2013-CP-27-00362 (Order dated September 25, 2013). A judgment on the pleadings is proper where pleadings entitle a party to judgment without proof, by disclosure of all facts, where the pleadings present no issue of fact or merely an immaterial issue. Rosenthal v. Unarco Indus., Inc., 278 S.C. 420, 297 S.E.2d 638 (1982).

ARGUMENT

1. STIVERS IS A “PERSON” ENTITLED TO PROTECTION UNDER THE DEALERS ACT FROM UNFAIR OR DECEPTIVE ACTS, AND ARBITRARY, BAD FAITH, OR UNCONSCIONABLE CONDUCT

In its amended complaint, Stivers alleges that the Defendants engaged in unfair or

deceptive acts in violation of S.C. Code Ann. § 56-15-30, and actions which were arbitrary, in bad faith, or unconscionable in violation of S.C. Code Ann. § 56-15-40(1). The Defendants assert that because the APAs are not subject to S.C. Code Ann. § 56-15-80, then none of the other provisions of the Dealers Act apply, and Stivers is not entitled to bring a claim pursuant to §§ 56-15-30 and -40.

The Defendants' motion presents an issue of statutory interpretation. The cardinal rule of statutory interpretation for a court is to ascertain the intent of the legislature and to give it effect. Knotts v. S.C. Dept. of Natural Resources, 348 S.C. 1, 558 S.E.2d 511 (2002). In ascertaining the intention of the legislature, the court need not look beyond words of the statute to ascertain the intention of the legislature when it appears on the face of the statute. Wright v. Colleton County School Dist., 301 S.C. 282, 391 S.E.2d 564 (1990). As the Court of Appeals recently stated in Fairfield Waverly, LLC v. Dorchester County Assessor, Appellate Case No. 2017-000569:

"We do not look at statutes in isolation. Instead, we consider how the statutes operate with each other when striving to arrive at any one statute's proper meaning."

"In construing statutory language, the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." Duke Energy Corp v. S.C. Dep't of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016). Statutory provisions should be given reasonable and practical construction consistent with the purpose of the *entire* act. See Stephen v. Avins Const. Co., 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct. App. 1996). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342,, 713 S.E.2d 278, 283 (2011). This is obviously inconsistent with cherry-

picking certain provisions to the exclusion of others.

S.C. Code Ann. § 56-15-40(1) prohibits manufacturers, distributors, and *motor vehicle dealers* from engaging in action which is arbitrary, in bad faith, or unconscionable. S.C. Code Ann. § 56-15-10(h) defines “motor vehicle dealers” as “any *person* who sells or attempts to effect the sale of any motor vehicle.” “Person” is defined by S.C. Code Ann. § 56-15-10(n) as:

“a natural person, *corporation, partnership, trust, or other entity*, and, in case of an entity, it shall include any other entity in which it has a majority interest or effectively controls *as well as the individual officers, directors, and other persons in active control of the activities of each such entity.*”

Based on these definitions, it is clear that both Defendants¹ are “motor vehicle dealers,” and Stivers² is a “person” for purposes of the Dealers Act.

2. S.C. CODE ANN. § 56-15-80 DOES NOT “EXPRESSLY LIMIT THE AGREEMENTS TO WHICH THE DEALERS ACT APPLIES”

The Defendants suggest that S.C. Code Ann. § 56-15-80 “expressly limits the agreements to which the Dealers Act applies” to contracts between manufacturers and motor vehicle dealers.³

S.C. Code Ann. § 56-15-80 states the following:

“The provisions of this chapter shall apply to all written or oral agreements between a manufacturer, wholesaler or distributor with a motor vehicle dealer including, but not limited to, the franchise offering, the franchise agreement, sales of goods, services or advertising, leases or mortgages of real or personal property, promises to pay, security interests, pledges, insurance contracts, advertising contracts, construction or installation contracts, servicing contracts, and all other such agreements in which the manufacturer, wholesaler, or distributor has any direct or indirect interest.”

While S.C. Code Ann. § 56-15-80 provides a specific right of action in favor of motor vehicle dealers against manufacturers, wholesalers, or distributors, by its very words, it *does not*,

¹ See Answer and Counterclaims of Defendants Peacock Automotive, LLC and W. Warner Peacock to Plaintiff's Amended Complaint, paragraphs 20 and 74.

² Amended Complaint, paragraph 2.

³ Peacock Automotive and Warner Peacock's Motion and Memorandum for Judgment on the Pleadings, p. 2.

as suggested by the Defendants, exclusively limit the application of Chapter 15 to contracts between manufacturers and motor vehicle dealers. There are no terms whatsoever contained within S.C. Code Ann. § 56-15-80, or anywhere else for that matter, suggesting that the legislature meant for this section to act as any sort of “express limitation.”

In fact, nearly every case ever decided under the Dealers Act involved a contract that was *not* a contract between a manufacturer and a dealer. *See Grant v. Chevrolet*, 431 S.C. 279, 847 S.E.2d 806 (Ct. App. 2020); *Brown v. Dick Smith Nissan, Inc.*, 414 S.C. 101, 777 S.E.2d 208 (2015); *Freeman v. J.L.H. Investments, LP*, 414 S.C. 362, 778 S.E.2d 902 (2015); *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 748 S.E.2d 221 (2013); *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 750 S.E.2d 78 (2013); *Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 664 S.E.2d 83 (Ct. App. 2008); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007); *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006); *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564 S.E.2d 94 (2002); *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 536 S.E.2d 399 (Ct. App. 2000); *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997); *Taylor v. Nix*, 307 S.C. 551, 416 S.E.2d 619 (1992); *Southern Nat. Leasing Corp. v. Hall*, 306 S.C. 92, 410 S.E.2d 577 (Ct. App. 1991); *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 404 S.E.2d 200 (1991); *Columbia (SC) Teachers Federal Credit Union v. Newsome Chevrolet-Buick*, 303 S.C. 162, 399 S.E.2d 444 (Ct. App. 1990); *Adams v. Grant*, 292 S.C. 581, 358 S.E.2d 142 (Ct. App. 1986). Similar to Stivers’ claims in this case, all of the above involved claims against motor vehicle dealers for action that was arbitrary, in bad faith, or unconscionable and forbidden by S.C. Code Ann. § 56-15-40(1). The appellate courts of this State could not have been wrong in the application of the Dealers Act to contracts not limited to those described in S.C. Code Ann. § 56-15-80 that many

times.

3. THE INTENTION OF THE LEGISLATURE WHEN PROMULGATING THE DEALERS ACT WAS NOT MERELY TO PROTECT CONSUMERS, BUT TO PROTECT DEALERS AS WELL

Although the Defendants assert that the Dealers Act is a consumer protection statute,⁴ *most* of the provisions of the Dealers Act are explicitly intended to protect motor vehicle dealers, not consumers. *See* S.C. Code Ann. § 56-15-45 (protecting motor vehicle dealers from unfair competition by manufacturers); S.C. Code Ann. § 56-15-46 (protecting motor vehicle dealers from unfair competition *by other motor vehicle dealers* of the same line-make); S.C. Code Ann. § 56-15-47 (allowing motor vehicle dealers to designate a successor in the event of death or incapacity of the dealer); S.C. Code Ann. § 56-15-50 (requiring manufacturers to provide motor vehicle dealers with delivery and preparation obligations prior to delivery of new motor vehicles to retail buyers); S.C. Code Ann. § 56-15-60 (requiring manufactures and/or distributors to fulfill warranty agreements and compensate motor vehicle dealers adequately and fairly); S.C. Code Ann. § 56-15-65 (preventing manufacturers and/or distributors from requiring or coercing a motor vehicle dealer to change location of the dealership or to make any substantial alterations to the premises or facilities); S.C. Code Ann. § 56-15-70 (preventing manufacturers or distributors from imposing unreasonable restrictions on motor vehicle dealer's right to transfer, sell, renew, terminate, or purchase franchise); S.C. Code Ann. § 56-15-75 (preventing manufacturers and/or distributors from requiring or coercing a motor vehicle dealer to refrain from managing, investing in, or acquiring another make or line of new motor vehicles); S.C. Code Ann. § 56-15-85 (permitting motor vehicle dealers to contract with an on-line electronic service to provide motor vehicles to consumers); S.C. Code Ann. § 56-15-90 (preventing manufacturers from

⁴ Peacock Automotive and Warner Peacock's Motion and Memorandum for Judgment on the Pleadings, p. 4.

failing to renew franchise agreements on terms equally available to all motor vehicles of the same line, terminating a franchise or unreasonably restricting the transfer of a franchise); S.C. Code Ann. § 56-15-95 (preventing a manufacturer from terminating or cancelling a franchise or selling agreement without due cause); S.C. Code Ann. § 56-15-96 (requiring manufacturers to use fair, reasonable, and equitable standards to measure dealership performance and apply it uniformly among other similarly situated dealers); S.C. Code Ann. § 56-15-98 (preventing a manufacturer or distributor from unreasonably altering a motor vehicle dealer's area of responsibility); and S.C. Code Ann. § 56-15-100 (requiring manufacturers or distributors to offer discounts, refunds, and other offers to all of its dealers within the relevant market area).

The cardinal rule of statutory interpretation is to determine the intent of the legislature. Georgia-Carolina Bail Bonds v. County of Aiken, 354 S.C. 18, 579 S.E.2d 334 (Ct. App. 2003). All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 612 S.E.2d 719 (Ct. App. 2005).

The Dealers Act was originally promulgated as Act No. 1237 in the 1972 Statutes at Large of South Carolina. Section 1 reads as follows:

"The General Assembly finds that the distribution of motor vehicles in the State of South Carolina vitally affects the general economy of the State and the public interest and public welfare, and in the exercise of its police power, it is necessary to regulate motor vehicle manufacturers, distributors, dealers and their representatives doing business in South Carolina in order to *prevent frauds, impositions, and other abuses upon its citizens.*"

The Defendants admit that the Plaintiff is a *citizen* of South Carolina. (Answer and Counterclaims of Defendants Peacock Automotive, LLC and W. Warner Peacock to Plaintiff's Amended Complaint, par. 58).

It is clear that the legislative purpose of the Dealers Act was not to simply protect consumers,⁵ as the Defendants suggest. Accordingly, S.C. Code Ann. § 56-15-10 defines the “person” to whom protection is afforded under the Act as not only natural persons, but also corporations, partnerships, trusts, and other entities. Had the legislature intended to limit protection to consumers, it would have done so. Instead, it used the word “person” and defined it to include consumers as well as business entities. Stivers is a citizen of South Carolina, maintaining its principal place of business in Richland County, and is entitled to protection from violations of S.C. Code §§ 56-15-30 and 56-15-40 as a “person” for purposes of the Dealers Act.

The South Carolina Unfair Trade Practices Act (“UTPA”), S.C. Code Ann. § 39-5-10, et seq., could likewise be characterized as a “consumer protection” act. The UTPA, like the Dealers Act, declares “unfair or deceptive acts” to be unlawful, and defines a “person” to whom protection is afforded as “natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity.” South Carolina courts, however, have ruled that one business entity can sue another and recover damages under the UTPA. Global Protection Corp v. Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (Ct. App. 1998); Daisy Outdoor Advertising Company, Inc. v. Abbott, 322 S.C. 489, 473 S.E.2d 47 (1996); Charleston Lumber Co., Inc. v. Miller Housing Corp., 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995). By analogy, a corporate motor vehicle dealer can sue a Florida limited liability company conducting business as a motor vehicle dealer in South Carolina under the Dealers Act.

In essence, the Defendants are asking this Court to hold as a matter of law that Stivers, a corporation, cannot sue Peacock Automotive, a motor vehicle dealer, under the Dealers Act.⁶

⁵ Peacock Automotive and Warner Peacock’s Motion and Memorandum for Judgment on the Pleadings, p. 4

⁶ The Defendants “move the Court for judgment on the pleadings that, as a matter of law, the South Carolina Dealers Act does not apply to the subject dispute between two dealers.” Peacock Automotive and Warner Peacock’s Motion and Memorandum for Judgment on the Pleadings, p. 1.

However, the legislature has already decided that a “person” for purposes of the Dealers Act can be a “corporation.” S.C. Code Ann. § 56-15-10. The Defendants suggest that the Court should ignore the plain language of the statute and engage in judicial legislation.

As the Supreme Court of South Carolina stated in Hatchett v. Nationwide Mut. Ins. Co., 244 S.C. 425, 137 S.E.2d 608 (1964):

“There is a marked distinction between liberal construction of statutes, by which courts, from the language used, the subject-matter, and the purposes of those framing them, find out their true meaning, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced. The former is a legitimate and recognized rule of construction, while the latter is judicial legislation, forbidden by the construction provisions distributing the powers of government among three departments, the legislative, the executive, and the judicial.”

The Defendants rely upon a case from a distant forum, Beard Motors v. Toyota Motor Distributors, Inc., et al, 395 Mass. 428, 480 N.E.2d 303 (1985) for the proposition that only franchised dealers have standing to bring suit under the Dealers Act. Stivers owns and operates Hyundai and Genesis franchises in Richland County, so standing is clearly not an issue.

By implication, however, the Defendants also assert that Massachusetts’ version of the Dealers Act involves a similar statutory scheme, which is correct.⁷ M.G.L.A. 93 § 4(a) makes perfectly clear that a motor vehicle dealer may sue another motor vehicle dealer under Massachusetts’ version of the Dealers Act. In fact, in Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc., 376 Mass. 313 381 N.E.2d 908 (1978), that is precisely what happened. In Tober, the court repeatedly stated that provisions of Chapter 93B were *intended to protect motor vehicle dealers*.

⁷ M.G.L.A. 93 B § 3(a): “Unfair methods of competition and unfair or deceptive acts or practices, as defined in section 4, are hereby declared unlawful.” M.G.L.A. 93B § 4(a): “It shall be a violation of subsection (a) of section 3 for any manufacturer, distributor, franchisor representative or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to the manufacturer, distributor, franchise representative, motor vehicle dealer or to the public.

The Defendants also cite Hand v. Chrysler Corp., 30 F.Supp.2d 667 (D. Vt. 1988) for the proposition that Vermont's version of the Dealers Act required controversies to exist between a manufacturer and a motor vehicle dealer. However, VT ST T. 9 § 4083, et seq., could not be more different than South Carolina's Dealers Act. Specifically, Vermont's Dealers Act, unlike the Massachusetts and South Carolina version, *does not* declare unfair methods of competition and unfair or deceptive acts to be unlawful, and *does not* provide a cause of action against a motor vehicle dealer for engaging in actions which are arbitrary, in bad faith, or unconscionable. Therefore, Hand is entirely inapplicable.

On the other hand, the Dealers Act has been applied in the Richland County Court of Common Pleas to claims by one automobile dealer against another. In Dick Dyer & Associates, Inc. v. Moore's Cars, LLC, 2014-CP-40-03041, the plaintiff motor vehicle dealer sold a new Mercedes-Benz automobile to the defendant motor vehicle dealer, and in connection therewith, the plaintiff disclosed certain export policies established by Mercedes-Benz USA, LLC ("MBUSA"). These policies prohibited the export of the automobile within thirteen months of sale, and the defendant agreed to indemnify the plaintiff if MBUSA assessed chargebacks against it for violation of the policy, even if the automobile was exported by a subsequent transferee of the defendant. After the plaintiff sold the defendant the automobile, the defendant sold it at an auction, and the automobile was exported outside of the United States, resulting in MBUSA assessing chargebacks against the plaintiff.

The court concluded as a matter of law that the defendant motor vehicle dealer violated §§ 56-15-30 and 56-15-40 of the Dealers Act by "engaging in conduct that was arbitrary, i.e., acts which were unreasonable, capricious or non-rational; not done according to reason or judgment; dependent upon will alone." In other words, the court concluded that breaching the

export agreement was a violation of the Dealers Act. The court awarded the plaintiff motor vehicle dealer double actual damages and the cost of the suit, including a reasonable attorney's fee.

Dick Dyer & Associates, Inc. clearly establishes that a motor vehicle dealer can sue another motor vehicle dealer under the Dealers Act and recover damages in Richland County. *See also Mathes Auto Sales, Inc. v. Dixons Automotive, Inc., et al.*, 2016-CP-40-06794 (defendant motor vehicle dealer sued under §§ 56-15-30 and -40 of the Dealers Act for misappropriating plaintiff motor vehicle dealer's line of credit; plaintiff motor vehicle dealer awarded double actual damages, punitive damages, and attorney's fees).

4. STIVERS IS ENTITLED TO ASSERT ANY AND ALL CAUSES OF ACTION THAT ARISE OUT OF THE DEFENDANTS' CONDUCT, AND IS NOT REQUIRED TO ELECT BETWEEN REMEDIES UNTIL AFTER TRIAL

The Defendants assert that contract disputes are just that, and may not result in liability under the Dealers Act. Two South Carolina cases establish that the same conduct can result in liability for both breach of contract and a violation of the Dealers Act.

In Adams v. Grant, 292 S.C. 581, 358 S.E.2d 142 (Ct. App. 1988), the buyer of a used car sued a motor vehicle dealer for revocation of acceptance or for breach of warranty, both actions arising out of a contract, and also for violating § 56-15-40(1) of the Dealers Act. In Adams, the buyer alleged that the vehicle had defects which substantially impaired its value, and that the motor vehicle dealer reneged on a promise to repair all of the defects because it did not "have that much tied up in the car."

The Court of Appeals affirmed judgment in favor of the buyer on the revocation of acceptance and breach of warranty claims, as well as claims under the Dealers Act. Specifically, the Court found that the motor vehicle dealer's conduct could be found by the jury to constitute

action which is “arbitrary, in bad faith, or unconscionable and which causes damages to any of the parties” under S.C. Code Ann. § 56-15-40(1), as well as a breach of the underlying contract.

Furthermore, the court found that the buyer was not required to elect between the available remedies at law before the verdict was rendered. In other words, “when the facts alleged entitle a party to alternative remedies, he should have a full opportunity to prove his claim to some form of relief” at trial. In this case, the Plaintiff is likewise entitled to have the full opportunity at trial to present its claims based on alternative theories, notwithstanding whether those theories involve the same underlying facts.

In Taylor v. Nix, *supra*, the lessees of an automobile sued the lessor motor vehicle dealer and manufacturer for breach of warranty, strict liability and violation of the Dealers Act. In Taylor, the lessees alleged that the Porsche 928S had a multitude of defects discovered shortly after they took possession of the vehicle. The lessees further alleged that the motor vehicle dealer and manufacturer flippantly dismissed and refused to address the presence of exhaust fumes in the passenger compartment and excessive heat radiating from the console between the two front seats, despite the lessees taking the vehicle to the dealer at least fourteen times in twenty-six months.

The Supreme Court of South Carolina remarked that “frequently, as in the case at bar, several causes of action are joined which may be unrelated or *may be alternative theories of recovery for the same conduct.*” The Court concluded that the Plaintiffs’ actual damages under the breach of warranty and strict liability claims also constituted actual damages under the Dealers Act. In this case, Stivers is entitled to assert multiple theories of recovery, including but not limited to breach of contract and violation of the Dealers Act, and may elect to recover damages arising out of the same conduct under any of these alternative theories.

CONCLUSION

Based upon the foregoing, the Plaintiff's motion for judgment on the pleadings should be granted, and the Defendants' motion for judgment on the pleadings should be denied. The Dealers Act is intended to, *inter alia*, regulate dealers to prevent frauds, impositions, and other abuses upon citizens of South Carolina. The Defendants admit that they are dealers (Answer and Counterclaim, par. 57) and that that the Plaintiff is a citizen of South Carolina (Answer and Counterclaim, par. 58).

Moreover, the Plaintiff is a "person" as defined by S.C. Code Ann. § 56-15-10(n) and a party contemplated by S.C. Code Ann. § 56-15-40(1) who has been injured in its business or property by violations of the Dealers Act by the Defendants, and may sue therefore in the court of common pleas and recover double the actual damages by it sustained and the cost of the suit, including a reasonable award of attorney's fees under S.C. Code Ann. § 56-15-110. This principle has already been applied in the Richland County Court of Common Pleas in Dick Dyer v. Moore's Cars and Mathes Auto Sales, Inc. v. Dixons Automotive, Inc., et al., supra. Judicial legislation to the contrary is neither warranted nor authorized.

Based upon the foregoing, the Plaintiff is entitled to judgment on the pleadings. The Dealers Act applies to Stivers' claims against the Defendants for action which is arbitrary, in bad faith, or unconscionable and forbidden by S.C. Code Ann. § 56-15-40(1).

Signatures on following page.

STUDEMAYER LAW FIRM, P.C.

/s/ Ryan G. Studemeyer

**J. Gregory Studemeyer
Ryan G. Studemeyer
7478 Carlisle Street
P.O. Box 1014
Irmo, S.C. 29063
(803) 393-4399
Attorneys for Plaintiff**

Irmo, South Carolina

February 5, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2020-CP-40-01934
STIVERS BROTHERS	)	
AUTOMOTIVE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	MOTION TO SERVE A SECOND
W. WARNER PEACOCK,	)	AMENDED AND SUPPLEMENTAL
and PEACOCK AUTOMOTIVE, LLC,	)	COMPLAINT
	)	
Defendants.	)	

TO: BRADFORD N. MARTIN, ESQ., ATTORNEY FOR DEFENDANTS:

The Plaintiff, by and through its undersigned counsel, hereby moves pursuant to Rules 15(a) and 15(d), SCRPC to serve a second amended and supplemental complaint setting forth transactions or occurrences or events which have happened since the date of the original complaint. A copy of the second amended and supplemental complaint is attached hereto and incorporated herein by reference.

The undersigned certifies that consultation with opposing counsel would serve no useful purpose. Notwithstanding overwhelming authority for the proposition that such motions should be freely granted, the Plaintiff surely anticipates that this motion will be opposed.

STUDEMAYER LAW FIRM, P.C.

By: s/J. Gregory Studemeyer
J. Gregory Studemeyer
SC Bar #5416
7478 Carlisle Street
Post Office Box 1014
Irmo, South Carolina 29063
803-393-4399
Attorney for the Plaintiff

Irmo, South Carolina
February 5, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2020-CP-40-01934
STIVERS BROTHERS	)	
AUTOMOTIVE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	SECOND AMENDED AND
	)	SUPPLEMENTAL COMPLAINT
W. WARNER PEACOCK	)	
and PEACOCK AUTOMOTIVE, LLC,	)	
	)	
Defendants.	)	

The Plaintiff above named, complaining of the Defendants herein, would respectfully show unto the Court:

INTRODUCTION

1. The distribution of motor vehicles in South Carolina is regulated to prevent frauds, impositions, and other abuses upon *citizens* of South Carolina by manufacturers, distributors, *dealers* and their representatives doing business in South Carolina.
2. The Plaintiff is a *citizen* of South Carolina.
3. The Plaintiff has lawfully engaged in the business of selling and servicing new Chevrolet and Hyundai motor vehicles and used motor vehicles in Richland County, South Carolina since August 4, 2017¹, and its affiliated dealerships maintained a presence and lawfully conducted business in Richland, Lexington, and Sumter Counties, South Carolina from 1989 until 2011.
4. The Plaintiff and its affiliates have owned and operated various franchises including Ford, Lincoln, Mercury, Mazda, Chrysler, Dodge, Jeep, RAM, Mitsubishi, Subaru, and

¹ The Plaintiff closed on the sale of its Chevrolet assets to a third party on October 5, 2020.

Suzuki in Missouri, Iowa, South Carolina, Georgia, and Alabama.

5. Defendant, Peacock Automotive, LLC ("Peacock Automotive") has engaged in the motor vehicle business in South Carolina under various names including NRAM Holdings, LLC, Coastal States Automotive Group, LLC, and New River Auto Mall, LLC since March 26, 2007.

6. Peacock Automotive directly or through affiliates, operates Audi, Volkswagen, Subaru, Land Rover, Jaguar, Porsche, Genesis, Hyundai, Chrysler, Jeep, Dodge, RAM, FIAT, and Subaru franchises in Jasper County; Jaguar and Land Rover dealerships in Lexington County; and Hyundai and Genesis dealerships in Richland County, South Carolina.

7. As more fully set forth herein, the Defendants have engaged in unethical and unlawful conduct in Richland County, South Carolina and have caused the Plaintiff to suffer significant monetary damages.

Frauds, impositions, and other abuses

8. Peacock Automotive competes with the Plaintiff in the Columbia market.

9. Beginning in the Fall of 2019, the Defendants represented to the Plaintiff that they were serious about acquiring the Plaintiff's Columbia area Chevrolet and Hyundai dealerships.

10. Over the course of several months, Peacock Automotive entered into confidentiality agreements, letters of intent, and asset purchase agreements ("APAs") (collectively, "agreements") with the Plaintiff, all of which included confidentiality provisions.

11. The agreements allowed the Defendants access to the Plaintiff's nonpublic and/or confidential, proprietary information.

12. After stringing the Plaintiff along for over six (6) months, the Defendants sabotaged the transactions and breached the confidentiality provisions.

13. Thereafter, the Defendants invented pretext for the purported termination of the APAs.

14. After suit was filed, the Defendants pivoted from righteous indignation and threats of sanctions to pleas for mediation.

15. Thereafter, the Defendants orchestrated an attempt to fabricate defenses by vacillating between feigned offers to purchase and counterclaims for fraud.

16. The Plaintiff brings this action for declaratory relief and for damages as a result of the foregoing unlawful acts.²

PARTIES

17. The Plaintiff is a domestic corporation, maintaining its principal place of business in the County of Richland, State of South Carolina.

18. Defendant, W. Warner Peacock ("Warner Peacock"), is a native of Florida and is a member and manager of Peacock Automotive.

19. Warner Peacock is a resident of the County of Beaufort, State of South Carolina.³

20. Peacock Automotive is a limited liability company, organized and existing under the laws of the State of Florida, conducting business, directly or through affiliates, in the Counties of Jasper, Lexington, and Richland, State of South Carolina.⁴

² Initially, the Plaintiff sought specific performance. When the Defendants failed to meet five (5) post-breach deadlines to execute a new APA, the Plaintiff determined that specific performance was not possible and abandoned its demand for specific performance.

³ At the commencement of this action, Warner Peacock was confused about his state of residence. Initially, he denied that he was a resident of Beaufort County. (Complaint, par. 12; Answer And Counterclaims, par. 27). He represented that he had moved back to Florida in November of 2019. (Amended Complaint, par. 11; Answer And Counterclaims To Amended Complaint, par. 26). He was served at his home in Bluffton, South Carolina with copies of the summons and complaint by Deputy M. Tannuzi of the Beaufort County Sheriff's Office on April 28, 2020. (Amended Complaint, par. 12; Answer And Counterclaims To Amended Complaint, par. 26).

⁴ Peacock Automotive has admitted in the matter of Barone v. Jaguar Land Rover North America, LLC, Peacock Automotive, LLC d/b/a Land Rover Hilton Head, and Coastal States Automotive Group, LLC d/b/a Land Rover Hilton Head in Jasper County (Case No. 2020-CP-27-00017) that its principal place of business is in Jasper County, South Carolina. Peacock Automotive admits that its Chief Operating Officer, Jim Thayer, resides in and maintains an office in South Carolina and that the bulk of its activity takes place in South Carolina. (Amended Complaint, par.

21. Two of Peacock Automotive's other investors and managers, J. Gregory Humphries ("Humphries") and John M. Brennan ("Brennan"), are lawyers who reside in Orlando, Florida.

22. Humphries, Brennan, and Warner Peacock contend that their communications are privileged and their operating agreement is confidential.

23. Peacock Automotive also conducts business in Georgia and Florida.

JURISDICTION AND VENUE

24. This Court has jurisdiction over the parties and the subject matter of this action pursuant to S.C. Code Ann. Sections 56-15-20, 36-2-802, and 36-2-803.

25. Venue is proper in Richland County pursuant to S.C. Code Ann. Section 15-7-30(F)(1) since the most substantial part of the act or omission giving rise to these causes of action occurred in Richland County. Venue is also proper under S.C. Code Ann. Section 56-15-140.

SUBSTANTIVE ALLEGATIONS

26. Beginning in the Spring of 2019, the Plaintiff and the Defendants began engaging in discussions about exchanging and/or acquiring one or more of the other's dealerships.

27. Recognizing that the Columbia market was not big enough to support two Hyundai franchises, that the Plaintiff had been a successful Ford dealer, and that Peacock Automotive was underperforming with its Ford dealership in Florida, the Plaintiff and the Defendants discussed exchanging the Plaintiff's Chevrolet and Hyundai dealerships for the Defendants' Ford dealership in Florida.

28. Thereafter, the parties discussed the sale and/or acquisition of the other's Columbia

16 and 17; Answer And Counterclaims To Amended Complaint, par. 28).

area Hyundai dealerships.

29. In the Fall of 2019, when an opportunity for another Ford franchise presented itself to the Plaintiff in Alabama, the Plaintiff resumed discussions with the Defendants about the potential sale of its Columbia area dealerships.

30. To facilitate their discussions, the Defendants executed Confidentiality Agreements on September 6, 2019.

31. Representatives of the Plaintiff and Peacock Automotive had specific discussions concerning the Plaintiff's intention to acquire another dealership in Alabama with the proceeds of the transaction.

32. The Plaintiff furnished the Defendants with proprietary information about the operation of the dealerships and continued to do so on a monthly basis.

33. On October 8, 2019, the Defendants' Chief Financial Officer visited the Plaintiff's Columbia area dealerships to inspect the assets and to engage in due diligence.

34. After two months of access to the Plaintiff's proprietary information, on or about November 7, 2019, the Defendants submitted a Letter of Intent ("LOI") to purchase the Plaintiff's Columbia area dealerships.

35. Humphries, a partner at Shutts & Bowen, LLP, in Orlando was tasked with preparing contracts for the purchase and sale of the Plaintiff's Columbia area dealerships.⁵

36. Humphries communicated directly with the Plaintiff's attorney, Richard L. McBride, Jr., of Montgomery, Alabama.⁶

37. Humphries never disclosed that he had a financial interest in Peacock Automotive as a member, manager, or investor.

⁵ Affidavit of J. Gregory Humphries filed December 4, 2020, par. 4.

⁶ Affidavit of J. Gregory Humphries filed December 4, 2020, par. 5.

38. The APAs drafted by Humphries designated Humphries' law firm, Shutts & Bowen, LLP, as Escrow Agent.

39. On January 7, 2020, after four months of access to the Plaintiff's proprietary information, the Plaintiff and Peacock Automotive entered into two separate APAs, one for the assets of the Plaintiff's Chevrolet dealership located at 111 Newland Road, Columbia, South Carolina 29229 ("the Chevrolet APA"), and the other for the assets of the Plaintiff's Hyundai dealership ("the Hyundai APA") located at 101 Newland Road, Columbia, South Carolina 29229.⁷

40. Upon information and belief, thereafter, Peacock Automotive delivered the sum of One Hundred Thousand Dollars (\$100,000) as an escrow deposit to Shutts & Bowen, LLP.

41. Peacock Automotive failed to disclose that one of its members, managers, and investors would be serving as escrow agent over its own money through Humphries' law firm.

42. The Plaintiff and Peacock Automotive were sophisticated business entities, capable of assessing their respective risks with the transactions.

43. The Plaintiff entered into the APAs recognizing that the assets could increase in value and that the prospect of selling them could become less favorable.

44. Peacock Automotive entered into the APAs recognizing that the assets could decrease in value and that the prospect of acquiring them could become less favorable.

45. Each APA provided for the payment by Peacock Automotive to the Plaintiff of the sum of THREE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$3,500,000) for a total

⁷ In their Answer And Counterclaims To The Complaint, and in their Answer And Counterclaims To The Amended Complaint, for purposes of their 20 plus defenses, the Defendants contend that they were simply exploring the possibility of acquiring the two dealerships to provide better service to consumers in Columbia. (Answers And Counterclaims, par. 1 and 2). For purposes of their 4 counterclaims, Peacock Automotive asserts that it entered into two Asset Purchase Agreements.

of SEVEN MILLION DOLLARS (\$7,000,000), in addition to the purchase price of certain new motor vehicles, certain service loaners, all fixed assets, certain parts and accessories, all unopened oil and grease drums and bulk oil and fluid, and certain work in process.

46. The Chevrolet APA required the Plaintiff to finance \$2,000,000 of the purchase price by accepting a promissory note from Peacock Automotive guaranteed by Warner Peacock.

47. Each APA required Peacock Automotive to submit applications to the manufacturer within 20 days of receiving applications from the manufacturers and to use its best efforts in good faith to obtain required approvals at the earliest date practicable, but no later than one hundred and five (105) days after the effective date, January 7, 2020.

48. Each APA required Peacock Automotive to enter into an assignment of Lease Agreement with the owners of the Premises.

49. When the APAs were signed, the term of the Lease Agreement extended through June 24, 2024, but authorized the Plaintiff to terminate on December 24, 2021, by providing written notice on or before December 24, 2020.

50. The annual Base Rent payable under the Lease Agreement was One Million Two Hundred Fifty-Three Thousand Five Hundred Twenty and 84/100 Dollars (\$1,253,520.84), payable in monthly installments equal to One Hundred Four Thousand Four Hundred Sixty and 07/100 Dollars (\$104,460.07), in advance on or before the first day of each Lease Month during the Term.

51. In addition to the annual Base Rent payable under the Lease Agreement, property taxes of One Hundred Seventy Three Thousand Eight Hundred Sixty Five and 25/100 Dollars (\$173,865.25) and insurance premiums of One Hundred Seventeen Thousand Nine Hundred Fifty One and 69/100 Dollars (\$117,951.69) were due and payable annually.

52. Paragraph 15(c) of each APA provided that, "During the Interim Period (defined by Paragraph 15(a) as "From the Effective Date of this Agreement to the Closing Date) Buyer may, at its sole expense, conduct such investigations, inspections and examinations of the Subject Assets and the Dealership's operations as Buyer may deem appropriate; and Seller shall give Buyer and its agents, attorneys and representatives reasonable access during non-working hours to such of the premises and Seller's properties, books, records and documents as Buyer may reasonably request.

53. Thereafter, on January 15, 2020, in accordance with a request from Peacock Automotive, the Plaintiff provided Peacock Automotive's CPA firm unfiltered and unfettered 24/7 access to its dealer management system.

54. In addition, in response to complaints by Peacock Automotive about the expense of securing documents from its CPA firm, the Plaintiff provided additional documents to Peacock Automotive as an accommodation.

55. Each APA required Peacock Automotive to keep the existence of the APAs confidential.

SABOTAGE

56. Peacock Automotive failed to promptly submit to General Motors and Hyundai all forms, applications, and other documents which they required to consider approval of the transactions as required by Section 5 of each APA.

57. Peacock Automotive failed to acknowledge receipt of or to respond to drafts of a proposed assignment and amendment of the lease provided by the owner of the Premises.

58. The Defendants failed to keep the existence of the APAs confidential.

59. Neither APA contained a "force majeure" clause.

PRETEXT

60. On March 13, 2020, in response to the COVID-19 pandemic, the President of the United States declared that an emergency existed nationwide under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

61. On March 18, 2020, “the big three” manufacturers, FCA US LLC, Ford, and General Motors, shut down production.

62. On March 23, 2020, the Dow Jones Industrial Average plunged to its lowest level since November 8, 2016.

63. The value of the Plaintiff’s Columbia area dealerships was declining rapidly in value.

64. The prospect of closing on the transaction no longer seemed favorable to Peacock Automotive.

65. Peacock Automotive and its investors began looking for a way to avoid its obligations under the APAs.

66. On March 26, 2020, Ordinance No.: 2020-034, “An Emergency Order Declaring a Stay Home Stay Safe for the City of Columbia, South Carolina” (“the Ordinance”) was issued by Mayor Stephen K. Benjamin and Columbia City Council.

67. The Ordinance provided that individuals “shall stay in their homes and not travel through or congregate in the streets, sidewalks, waterways and/or public spaces in the City of Columbia, including establishments that hold a City of Columbia business licenses [sic] except for the purposes of working at or conducting business with the attached list of businesses (hereinafter “Essential Service” or “Essential Services”).

68. Exhibit A to the Ordinance defines twelve types of “essential services” including,

inter alia, vehicle sales and automotive repair.

69. Notwithstanding the plain language of the Ordinance and the exceptions thereto, within 24 hours of its enactment, and without so much as a phone call, on March 27, 2020, Humphries and/or his associate prepared a purported notice of termination (ORLDOCS 175854483) signed by Warner Peacock, a copy of which is attached hereto and incorporated herein by reference as Exhibit A, suggesting that the following conditions precedent to closing had not been met:

- a. "We" do not believe the current conditions existing in the Columbia, SC area permit the Seller to comply with these requirements, as the Dealership's [sic] business cannot now or for the foreseeable future operate in the ordinary course;
- b. "We" also believe Columbia's issuance of a stay in place order is an order of the type that qualifies pursuant to Section 16(h) to materially adversely affecting [sic] the Subject Assets; and
- c. "we" have requested the February 2020 financial records and Seller has failed to provide such records.

70. A copy of the purported notice of termination was thereafter emailed by Humphries' associate to the Plaintiff and its attorney in Alabama with a copy to Humphries.

71. Peacock Automotive had no right to terminate as it was not free from substantial default itself, having substantially breached as set forth above, and nothing in the APAs authorized unilateral termination.

72. In the purported notice of termination, Warner Peacock also requested that Humphries' law firm, "Shutts Bowen LLP [sic], in its capacity as escrow agent, return the \$100,000 deposit which was made in connection with this proposed transaction".

73. On the same day, the South Carolina Attorney General issued an Opinion that local government cannot exercise the emergency powers delegated to the Governor by the

General Assembly and that unauthorized exercise of such emergency powers could subject political subdivisions to liability at the behest of a private citizen with requisite legal standing.

74. As set forth herein, all of the asserted excuses for termination were plainly pretextual, and Peacock Automotive's failure to communicate with the Plaintiff's landlord about assuming the lease, failure to use its best efforts in good faith to obtain manufacturer approvals at the earliest date practicable, and failure to maintain the confidentiality of the APAs were intended to sabotage the transactions.

75. At all times, notwithstanding the Defendants' "belief", the Plaintiff continued to operate in the ordinary course of business.

76. By its terms, vehicle sales and automotive repair were excepted from the Ordinance.

77. Even if the Plaintiff had not been excepted from the provisions of the Ordinance, the South Carolina Attorney General determined that the action taken by the Mayor and Council was not an authorized exercise of emergency powers delegated to the Governor by the General Assembly.

78. The Defendants had electronic access to the Plaintiff's financial records from January 15, 2020, beyond the date of the purported termination.

79. The real reason for the Defendants' purported termination was the ongoing COVID-19 pandemic, notwithstanding the lack of a "force majeure" clause in the APAs.

80. The Defendants attempted to shift the burden they knowingly and voluntarily undertook in the APAs to the Plaintiff because closing on the transactions appeared less favorable to them.

81. On March 30, 2020, and again on April 2, 2020, the Plaintiff protested Peacock

Automotive's request to its Florida lawyer and undisclosed member, manager, and investor, Humphries, to return the \$100, 000 deposit.

SUBSEQUENT PRETEXT

82. On April 3, 2020, a demand for adequate assurance of performance was made to the Defendants.

83. The Defendants failed and refused and continue to fail and refuse to comply with their implied covenant of good faith and fair dealing, and to provide adequate assurance of performance.

84. Thereafter, Warner Peacock raised subsequent claims in an effort to avoid the commitments made to the Plaintiff, including an inability to arrange for inventory financing and an inability to speak with the Chevrolet Zone Manager, neither of which were included as conditions precedent in the nearly 30 pages of each APA drafted by Humphries.

85. On or about April 7, 2020, Warner Peacock requested an open-ended or indefinite suspension of the APAs to allow him to close at a later date on a "to be determined basis".

86. The Plaintiff advised that such an arrangement was not practical given the status of the lease as more fully described herein, and the restrictions, requirements, and covenants set forth in the APAs.

87. On April 13, 2020, this action was initiated by the filing of a summons and complaint.

88. On April 21, Defendants' local counsel was advised of the Plaintiff's intention to extend the Lease Agreement in an effort to mitigate its damages.

89. On April 22, 2020, Peacock Automotive advised that it was unwilling to make a facility investment required by Hyundai and that the Plaintiff's proposed extension of the lease

for one year would serve to end any further negotiations.

THE MULLIGAN

90. On April 29, 2020, after the Defendants' initial suggestion of mediation had been declined and over two weeks after suit had been filed, the Defendants, through local counsel, emailed a "SUPPLEMENTAL NOTICE OF TERMINATION" (#40576067 v1), a copy of which is attached hereto and incorporated herein by reference as Exhibit B, setting forth additional excuses, including allegations of misrepresentation, for breaching the APAs.

PLAINTIFF'S ATTEMPT TO MITIGATE

91. On June 4, 2020, the Plaintiff entered into a Fourth Amendment To Lease Agreement And Reaffirmation Of Guaranty to extend the lease for a period of one year to preserve its right to occupy the premises where it conducted the Chevrolet and the Hyundai businesses.

92. The extension required the Plaintiff to continue paying rent, taxes, and insurance on the premises which Peacock Automotive was obligated to assume as of April 18, 2020, 105 days after the Effective Date of each APA.

93. Thereafter, in a further effort to mitigate its damages, the Plaintiff entered into a confidential asset purchase agreement with a third party for the sale of its Chevrolet dealership.

THE JUNE CHARADE

94. On June 4, 2020, before the ink had dried on the APA with the third party for the Chevrolet dealership, and notwithstanding the Defendants' previous suggestions of misrepresentation, Humphries submitted a new Letter of Intent ("LOI") (ORLDOCS 17754974), a copy of which is attached hereto and incorporated herein by reference as Exhibit C, representing Peacock Automotive's interest in acquiring the assets of the Plaintiff's Hyundai and Genesis ("Hyundai") dealership.

95. The Defendants' LOI was not submitted in good faith.

96. Rather than demonstrating an interest in acquiring the Plaintiff's Hyundai dealership, the Defendants attempted to trick the Plaintiff into conceding that the prior APAs had been terminated rather than breached, and attempted to limit their exposure for breaching the APAs to \$500,000.

97. Humphries emailed the LOI to the Plaintiff's broker, advising that the LOI would expire if not accepted within 5 business days.

98. Notwithstanding the 5 business days time limit, the Defendants filed and served an answer and counterclaim on the following day, weeks before responsive pleadings were due, accusing the Plaintiff of fraud and suggesting that "the world had changed because of the coronavirus (Covid-19) pandemic" and that the very same business it offered to purchase for the second time just two days earlier, had been irreparably damaged.⁸

99. Thereafter, notwithstanding the filing of counterclaims for fraud, the Defendants continued their attempts to mislead the Plaintiff about their feigned interest in acquiring the Hyundai assets.

100. On June 22, 2020, the Plaintiff advised the Defendants that it was not interested in their non-binding LOI, but instead presented an APA setting forth the terms upon which it would be willing to sell its Hyundai assets.

101. The Defendants feigned an interest in the new APA for the purpose of securing further proprietary information from the Plaintiff that was not then available through discovery.

102. The Defendants were afforded several days within which to execute the APA.

103. The Defendants requested, and the Plaintiff provided portions of another financial

⁸ Answer And Counterclaims, par. 12.

statement.

104. Rather than using the financial statement for its intended purpose, the Defendants were engaging in informal discovery with no intention of ever executing the new Hyundai APA or remitting the earnest money to the Plaintiff.

105. Notwithstanding several extensions of the deadline by the Plaintiff, and notwithstanding the Defendants' efforts to establish how reasonable they were, the Defendants failed and refused to sign and return the APA.

106. Negotiations on the new APA ceased on June 27, 2020, when Humphries declared an impasse.

THE JULY CHARADE

107. Thereafter, on July 3, 2020, in another effort to appear reasonable, the Defendants began a second post-counterclaim negotiation to purchase the Plaintiff's Hyundai assets.

108. On July 15, 2020, the Plaintiff submitted yet another APA to the Defendants setting forth the terms upon which the Plaintiff was willing to sell its Hyundai assets.

109. The Defendants were told that the Plaintiff intended to hire a new general manager on July 15, 2020, and would not negotiate a sale of the Hyundai Dealership business after making that hire.

110. Again, notwithstanding additional extensions of a deadline, the Defendants failed and refused to sign and return the APA.

111. Negotiations on the new APA ceased for the second time.

112. Two days later, the Defendants filed and served their Answer And Counterclaims Of Defendants Peacock Automotive, LLC And W. Warner Peacock to Plaintiff's Amended Complaint.

113. Eight days later, after negotiations had ceased and the Plaintiff had hired a new general manager, the Defendants submitted a revised version of the new Hyundai APA signed by Warner Peacock dated July 23, 2020, knowing full well that the deadline had already expired.

114. Thereafter, on July 30, 2020, again knowing full well that negotiations had ceased on July 15, 2020, the Defendants sought an order requiring an early neutral evaluation suggesting that the parties had been involved in settlement negotiations resulting in a proposed Asset Purchase Agreement.

115. The Defendants represented that they wanted to use the early neutral evaluation to discuss settlement.

THE OCTOBER CHARADE

116. On or about October 26, 2020, following the closing of the confidential APA for the sale of the Plaintiff's Chevrolet dealership to a third party, the Defendants submitted yet another APA for the Hyundai assets signed by Warner Peacock.

THE DECEMBER CHARADE

117. Thereafter, the parties agreed to appear before John E. Cuttino, Esq. in Columbia for an early neutral evaluation.

118. The Plaintiff's shareholders travelled from Montgomery, Alabama and Atlanta, Georgia, respectively, to comply with the court-ordered ENE.

119. Warner Peacock did not appear in person for the ENE.

120. Instead, Brennan, one of the Florida lawyer/investors attended on behalf of Peacock Automotive.

121. After spending 10 hours engaged in the ENE, no offer whatsoever was made.

122. The Plaintiff is informed and believes that the Defendants used the ENE to size up

the Plaintiff and to engage in informal discovery.

123. Three days later, the Defendants filed a motion for summary judgment seeking specific performance of the Hyundai APA that they breached with their "termination letter" dated March 27, 2020.

124. Thirty-Two days later, the Defendants filed a notice of intent to withdraw motion for specific performance and subsequently withdrew it.

125. Upon information and belief, the frauds, impositions, and other abuses upon the Plaintiff, a citizen of South Carolina, set forth above, is conduct intended to be prevented by the Act Regulating Manufacturers, Distributors, and Dealers.

FOR A FIRST CAUSE OF ACTION
(declaratory judgment)

126. Each and every previous allegation is realleged herein in the same manner and to the same extent as if repeated.

127. This cause of action is brought pursuant to the Uniform Declaratory Judgments Act, S.C. Code Ann. Section 15-53-10, et seq.

128. The Plaintiff is a person interested under a written contract or other writing constituting a contract whose rights, status or other legal relations are affected by a statute and/or contract and seek to have determined questions of construction or validity arising under the statute and/or contract and obtain a declaration of rights, status or other legal relations thereunder.

129. In addition thereto, the issues herein are of such public importance as to require their resolution for future guidance.

130. As set forth herein, a real or actual controversy exists between the Plaintiff and the Defendants.

131. Warner Peacock is a “person” as defined by S.C. Code Ann. Section 56-15-10(n) and both of the Defendants are “dealers” or “motor vehicle dealers” as defined by S.C. Code Ann. Section 56-15-10(h).

132. Based upon the foregoing, the Plaintiff is informed and believes that it is entitled to a declaration that the APAs between the Plaintiff and the Defendants were valid and enforceable contracts, notwithstanding the Defendants’ purported termination for pretextual reasons, and that it is a citizen of South Carolina entitled to protection from frauds, impositions, and other abuses by dealers or motor vehicle dealers as contemplated by 1972 S.C. Acts 2419, 1972 Act No. 1237 hereafter “Act No. 1237”).

FOR A SECOND CAUSE OF ACTION
(breach of contract)

133. To the extent not inconsistent herewith, each and every previous allegation is realleged herein in the same manner and to the same extent as if repeated.

134. The Plaintiff and the Defendants entered into valid and binding contracts.

135. The Plaintiff elected to forgo an opportunity to purchase real estate in Richland County to relocate the assets and to exercise the right to early termination of the Lease Agreement in reliance upon the Defendants’ obligations under the APAs.

136. The APAs were partly carried into execution by the Plaintiff with the approbation of the Defendants.

137. The Plaintiff performed its obligations under the APAs.

138. The Defendants breached the contracts, and placed the Plaintiff in the untenable position of having to exercise its right to early termination of the Lease Agreement and selling the assets at a “fire sale” without a place of business, immediately acquiring real estate and trying to construct a facility on or before December 24, 2021, or continuing to pay rent, property

taxes, and insurance while continuing to market the assets in the current environment, in the wake of the Defendants' breach of the confidentiality provisions.

139. The Plaintiff has been damaged by the Defendants' breach and will continue to suffer damage in the future caused by the breach, including but not limited to, the difference between the contract price of the Hyundai assets and the fair market value on the date of the breach, additional rent, taxes, and insurance paid and payable under the lease and extension, incidental, and consequential damages.

140. Both APAs provide for, *inter alia*, any remedies at law or equity.

141. Any attempt to limit the Plaintiff's remedies in the APAs drafted by Humphries violate S.C. Code Ann. Section 56-15-130, are deemed against public policy, and are void and unenforceable.

142. Both APAs provide that if any action shall be brought by any party to recover any sums hereunder, or for or on account of any breach of, or to enforce or interpret any of the covenants, terms or conditions of the APAs, then the prevailing party shall be entitled to recover costs and expenses incurred in such action, including reasonable attorney's fees.

143. Based upon the foregoing, the Plaintiff is informed and believes that it is entitled to an award of actual damages and an award of costs and expenses including a reasonable award of attorney's fees.

FOR A THIRD CAUSE OF ACTION
(breach of contract accompanied by a fraudulent act)

144. To the extent not inconsistent herewith, each and every previous allegation is realleged herein in the same manner and to the same extent as if repeated.

145. The Defendants had fraudulent intent related to the breaching of the contracts.

146. The Defendants secured the Plaintiff's financial information by leading the Plaintiff

to believe that they wished to purchase the Plaintiff's assets.

147. The Defendants sabotaged the APAs by failing and refusing to provide General Motors and Hyundai the information required to secure franchisor approval and by failing to respond to Plaintiff's lessor regarding assignment and/or assumption of the Lease Agreement, and attempted to fabricate other pretextual justifications to avoid performance of their obligations under the APAs.

148. Based upon the foregoing, the Plaintiff is informed and believes that it is entitled to an award of both actual and punitive damages.

FOR A FOURTH CAUSE OF ACTION
(violation of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act "RMDDA")

149. To the extent not inconsistent herewith, each and every previous allegation is realleged in the same manner and to the same extent as if repeated.

150. Among other things, Act No. 1237, now codified in Chapter 15 of Title 56 of the South Carolina Code as Regulation of Manufacturers, Distributors, and Dealers ("RMDDA"), includes certain definitions and declares certain conduct to be unlawful.

151. Specifically, S.C. Code Ann. Section 56-15-30 declares unfair methods of competition and unfair or deceptive acts or practices as defined by Section 56-15-40 to be unlawful.

152. More specifically, S.C. Code Ann. 56-15-40(1) deems it a violation of Section 56-15-30 for, among others, a dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public.

153. As set forth herein, the Defendants have engaged in unfair methods of competition and unfair and deceptive acts or practices declared unlawful by S.C. Code Ann. 56-15-30.

154. Moreover, the Defendants have engaged in malicious action which is arbitrary, in bad faith, or unconscionable and which has caused and continues to cause damage to the Plaintiff.

155. The Defendants' acts were unreasonable, capricious or nonrational, not according to any legitimate reason or judgment and dependent upon will alone.

156. The Defendants engaged in conduct designed to deceive or mislead prompted by an interested or sinister motive, including but not limited to, using the current environment and breaching the APAs to renegotiate the terms.

157. Based upon the foregoing, the Plaintiff is informed and believes that it is entitled to judgment for double the actual damages by it sustained, the cost of suit, including a reasonable attorney's fee, and an award of punitive damages, not to exceed three times the actual damages.

FOR A FIFTH CAUSE OF ACTION
(intentional interference with contracts)

158. To the extent not inconsistent herewith, each and every previous allegation is realleged herein in the same manner and to the same extent as if repeated.

159. At all times herein mentioned, Warner Peacock had intimate knowledge of all of the facts and circumstances concerning the APAs between the Plaintiff and Peacock Automotive.

160. Warner Peacock intentionally procured the breach of the APAs between the Plaintiff and Peacock Automotive.

161. Warner Peacock had no justification for interfering in the contractual relations between the Plaintiff and Peacock Automotive.

162. As a result of Warner Peacock's interference, the Plaintiff has suffered and will continue to suffer actual, incidental, and consequential damages.

163. Warner Peacock wantonly, willfully, and maliciously interfered with the Plaintiff's

contractual relations with Peacock Automotive.

164. Based upon the foregoing, the Plaintiff is informed and believes that it is entitled to judgment against Warner Peacock for both actual and punitive damages.

**FOR A SIXTH CAUSE OF ACTION
(veil piercing)**

165. To the extent not inconsistent herewith, each and every previous allegation is realleged herein in the same manner and to the same extent as if repeated.

166. Warner Peacock and his confederates have attempted to use Peacock Automotive to protect fraud, justify wrong, or defeat public policy.

167. The interests of Peacock Automotive and its members, managers, and investors are identical, and one is the alter ego of the other.

168. This Court should inquire into the observation of formalities by Peacock Automotive including but not limited to whether it was adequately capitalized, paid dividends, was or is insolvent, siphoning of funds by the dominant shareholders or members, whether other officers or directors performed their official functions, whether it maintained appropriate records, and whether it was merely a façade for the operations of the dominant shareholders or members.

169. The Plaintiff will show that insulating Warner Peacock and Peacock Automotive's other members, managers, and investors from liability for their wrongdoing while operating through their Florida limited liability company, conducting business in South Carolina, would result in injustice and fundamental unfairness.

WHEREFORE, the Plaintiff prays for declaratory relief, for an award of both actual and punitive damages, for a reasonable award of attorney's fees, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

STUDEMEYER LAW FIRM, P.C.

**By: s/J. Gregory Studemeyer
J. Gregory Studemeyer
SC Bar #5416
7478 Carlisle Street
Post Office Box 1014
Irmo, South Carolina 29063
803-393-4399**

Attorney for the Plaintiff

Irmo, South Carolina

February 5, 2021

PEACOCK AUTOMOTIVE, LLC
265 Drivers way
Hurdeeville, SC 29927

March 27, 2020

Stivers Brothers Automotive, Inc.
Attn: Edward M. Stivers, III
4000 Eastern Boulevard
Montgomery, Alabama 36116

Delivered By:
Electronic mail

Re: Proposed Sale of certain assets of STIVERS BROTHERS AUTOMOTIVE, INC, a South Carolina corporation.

Dear Mr. Stivers:

Reference is made to that certain Asset Purchase Agreement (the "Hyundai APA") dated January 7, 2020, by and between Stivers Brothers Automotive, Inc., a South Carolina corporation ("Seller"), and Peacock Automotive, LLC, a Florida limited liability company ("Buyer") for the sale of certain assets used in Seller's Hyundai Genesis dealership, and that certain Asset Purchase Agreement (the "Chevrolet APA") and, collectively with the Hyundai APA, the "Agreements") dated January 7, 2020, by and between Seller and Buyer for the sale of certain assets used in Seller's Chevrolet Dealership. All capitalized terms used herein and not otherwise defined, have the meanings ascribed thereto in the Agreements.

Section 15 of the Agreements requires Seller to conduct the Dealership's business in the ordinary course, as well as use best efforts to operate and preserve the business and goodwill of the Seller. We do not believe the current conditions existing in the Columbia, SC area permit the Seller to comply with these requirements, as the Dealership's business cannot now or for the foreseeable future operate in the ordinary course. We also believe Columbia's issuance of a stay in place order to be an order of the type that qualifies pursuant to Section 16(h) to materially adversely affecting the Subject Assets. Further, we have requested the February 2020 financial records and Seller has failed to provide such records. Due to the failure of these conditions precedent to Closing, notice is hereby given of the termination of the Hyundai APA and the Chevrolet APA. By copy of this letter, I am requesting Shuttis Bowen LLP, in its capacity as escrow agent, to return the \$100,000.00 deposit which was made in connection with this proposed transaction, as provided in Section 20(c) of the Chevrolet APA.

Very truly yours,

PEACOCK AUTOMOTIVE, LLC, a
Florida limited liability company

By: 
W. Warner Peacock, President

cc: McBride Law LLC
Attn: Richard L. McBride Jr.
184 Taliaferro Trail, Suite B
Montgomery, Alabama 36117
rick@mcbridelawllc.com

Exhibit A

ORIGINALS 17585448.3

PEACOCK AUTOMOTIVE, LLC
265 Drivers Way
Hardeeville, SC 29927

April 29, 2020

Via email: eds@Stiversauto.onmicrosoft.com
Stivers Brothers Automotive, Inc.
Attn: Edward M. Stivers, III
4000 Eastern Boulevard
Montgomery, Alabama 36116

Delivered By:
Electronic Mail

RE: Proposed Sale of certain assets of STIVERS BROTHERS AUTOMOTIVE, INC.,
a South Carolina corporation
SUPPLEMENTAL NOTICE OF TERMINATION

Dear Mr. Stivers:

Reference is made to that certain Asset Purchase Agreement (the "Hyundai APA") dated January 7, 2020, by and between Stivers Brothers Automotive, Inc., a South Carolina corporation ("Seller"), and Peacock Automotive, LLC, a Florida limited liability company ("Buyer") for the sale of certain assets used in Seller's Hyundai Genesis dealership, and that certain Asset Purchase Agreement (the "Chevrolet APA" and, collectively with the Hyundai APA, the "Agreements") dated January 7, 2020, by and between Seller and Buyer for the sale of certain assets used in Seller's Chevrolet Dealership. All capitalized terms used herein and not otherwise defined, have the meanings ascribed thereto in the Agreements.

Sections 15(a) and (b) of the Agreements require Seller to conduct the Dealerships' business in the ordinary course, as well as use best efforts to operate and preserve the business and goodwill of the Seller which was the basis for the purchase price under the Agreements. The Seller has failed to provide the February financial statements and off statement financial reports to confirm its ongoing compliance with these obligations as required by paragraph 15(c) of the Agreement. Peacock Automotive also believes that the Seller's March and April financial statements and reports will show further deterioration of the business and goodwill value of the Seller's business. Moreover, verbal and written information and admissions you made to Jim Thayer concerning mismanagement of the Dealerships establish that Seller has failed to operate in the ordinary course of business and failed to use its best efforts to maintain and preserve the business and goodwill of Seller. Based on Seller's additional breach of these conditions precedent to Closing, supplemental notice is hereby given (in conjunction with Peacock Automotive's March 27, 2020 notice) of the termination of the Hyundai APA and the Chevrolet APA.

Exhibit B

#40576067 v1

Edward M. Stivers, III
April 29, 2020
Page two

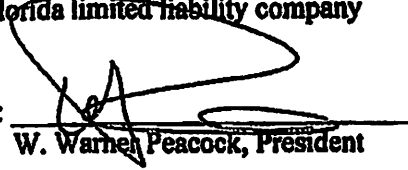
In addition, the business and goodwill of the Seller were materially inflated by presenting income and deferring expenses to distort and overstate the net profitability and goodwill value of the Dealerships' business prior to the execution of the Agreements. This was the basis for determining the purchase price under the Agreements. These material misrepresentations unlawfully induced the execution of the Agreements rendering the Agreements void and unenforceable.

Finally, the global Covid-19 pandemic further diminished the business and goodwill value of the Seller such that the initial purpose and basis for the Agreements was completely frustrated and the basis for the parties' bargain no longer existed.

By copy of this letter, I am requesting Shutts Bowen LLP, in its capacity as escrow agent, to return the \$100,000.00 deposit which was made in connection with this proposed transaction, as provided in Section 20(c) of the Chevrolet APA.

Very truly yours,

PEACOCK AUTOMOTIVE, LLC,
a Florida limited liability company

By: 
W. Warner Peacock, President

cc: McBride Law, LLC
Attn: Richard L. McBride Jr., Esq.
184 Taliaferro Trail, Suite B
Montgomery, Alabama 36117
rick@mcbriidelawllc.com

Studemeyer Law Firm, P.C.
Attn: J. Gregory Studemeyer, Esq.
7478 Carlisle Street
Irmo, South Carolina 29063
greg@studemeylawfirm.com

PEACOCK AUTOMOTIVE, LLC
265 Drivers Way
Hardeeville, South Carolina 29927

June 4, 2020

Stivers Brothers Automotive, LLC
D/B/A Stivers Hyundai
4000 Eastern Boulevard
Montgomery, Alabama 36116

**Re: Letter of Intent to Purchase the Business and Certain Assets
of Stivers Brothers Automotive, LLC**

Dear Mr. Stivers:

This letter of intent will set forth our understanding concerning the general terms upon which Peacock Automotive, LLC, a Florida limited liability company (referred to herein as the "**Buyer**"), or its assigns, would be prepared to acquire from Stivers Brothers Automotive, LLC, a South Carolina limited liability company (collectively referred to herein as the "**Seller**"), the business and certain related assets utilized in the operations of Stivers Hyundai and Genesis (the "**Dealership**").

- (1) **Definitive Asset Purchase Agreement.** The parties shall enter into a Definitive Asset Purchase Agreement (the "**Agreement**") incorporating the provisions of this letter containing representations and warranties as set forth in the terminated Hyundai APA between the parties which was dated January 7, 2020 (the "**Terminated Agreement**"). Upon execution of such Agreement, the Seller shall notify the manufacturer of the Agreement, and the Buyer shall promptly make or cause to be made application for issuance of a franchise(s) to operate the Dealership.
- (2) **Purchase of Certain Assets.** The tangible business assets of the Seller, to be acquired by the Buyer are hereinafter set forth in this paragraph:
 - A. The inventory of all untitled new and certain demonstrator 2020 and later model year Hyundai and Genesis motor vehicles in the Seller's inventory at the Closing Date to be purchased as set forth in the Terminated Agreement.
 - B. Parts and Accessories: Buyer agrees to purchase Seller's entire inventory of new, unused, non-obsolete and undamaged Hyundai and Genesis parts and accessories as that inventory exists on the Closing Date, on the terms set forth in the Terminated Agreement.
 - C. All used, remarketed and company vehicles in the Seller's inventory on the Closing Date shall be purchased as set forth in the Terminated Agreement.
 - D. Hyundai and Genesis Service Loaners (2019 and later model year) shall be purchased as provided in the Terminated Agreement.

Exhibit C

E. Fixed Assets (including leasehold improvements), all supplies on hand including gas, oil and grease inventory and all work-in-process in the service department and body shop shall be purchased as set forth in the Terminated Agreement.

(3) Payment of Purchase Price. The Aggregate Purchase Price shall be determined and payable in cash as follows:

- The purchase price for the tangible assets described in paragraph (2) at Closing; plus
- Three Million Five Hundred Thousand and 00/100 Dollars (\$3,500,000.00) for the business and intangible assets of the Dealership, or "blue sky," to be paid in cash at Closing.

(4) Other Provisions. The Agreement would contain such other provisions as provided in the Terminated Agreement, except as specifically modified by the provisions set forth in this LOI, which would be incorporated into the Agreement.

(5) Closing Conditions and Termination. The Agreement to be executed by the parties shall provide that the sale shall be closed not later than Ten (10) business days following receipt of notice of all approvals required in subparagraphs A and B below. The parties shall use their best efforts in good faith to obtain required approvals at the earliest date practicable on or before ninety (90) days after execution of the Agreement (the "Closing Date Deadline").

The consummation of the transaction contemplated hereby is subject to the conditions set forth in the Terminated Agreement, (excepting those relating to the simultaneous closing of the purchase of the Chevrolet dealership), including, but not limited to finalization of the assumption of the Existing Lease.

(6) Real Property. The Buyer will assume that portion of the existing lease of the land and buildings on which the Dealership operates (the "Existing Lease") on such terms as set forth in the Terminated Agreement.

(7) Escrow. The Agreement shall provide that upon execution of the Agreement, the Buyer will deposit into escrow with Seller's counsel earnest money in the amount of Five Hundred Thousand Dollars (\$500,000.00). This deposit shall be credited toward the purchase price at Closing and shall only be refundable in the event of the default of the Seller.

Except with respect to the undertakings of the parties set forth below, which are intended by each of the parties to be legally binding agreements, the parties agree that this letter is intended to serve only as an expression of the parties' mutual intent with respect to the transaction contemplated hereby and none of the parties shall have any obligation with respect to the transaction contemplated hereby except pursuant to the definitive Agreement referred to above.

Neither party shall disclose this letter or its contents, or the transaction proposed hereby, to third parties (other than its representatives, accountants, counsel, and/or applicable financing institutions, who will all be bound by this paragraph) unless required to do so by applicable law or regulation, rule of a

Mr. Stivers
June 4, 2020
Page 3

securities exchange, or in order to obtain any required waiver or consent of a third party to the transaction.

The Buyer and the Seller will each be responsible for and each bear all of its own costs and expenses (including any broker's or finder's fees and the expenses of its representatives) incurred at any time in connection with pursuing or consummating the transaction proposed in this letter.

The Seller shall deliver to the Buyer a first draft of the Agreement, incorporating the provisions of this letter and containing representations and warranties customary in transactions of this type, within five (5) days after the date this letter is executed by both parties. Upon receipt by the Buyer of the first draft of the definitive Agreement, the Buyer and the Seller shall negotiate in good faith to agree upon the form and substance of the definitive Agreement within ten (10) days after such delivery.

[SIGNATURES APPEAR ON THE FOLLOWING PAGE.]

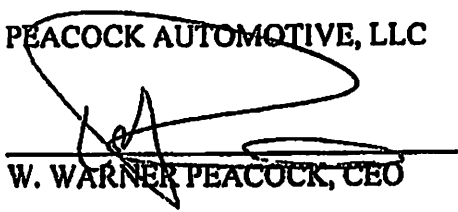
ELECTRONICALLY FILED - 2021 Feb 05 1:11 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

Mr. Stivers
June 4, 2020
Page 4

If Seller is in agreement with the foregoing, please so indicate by having the enclosed copy of this letter executed as hereinafter indicated and return same to me.

Very truly yours,

PEACOCK AUTOMOTIVE, LLC



W. WARNER PEACOCK, CEO

AGREED AND ACCEPTED THIS
____ DAY OF JUNE, 2020.

STIVER BROTHERS AUTOMOTIVE,
LLC

By: _____
Name: _____
Title: _____

ELECTRONICALLY FILED - 2021 Feb 05 1:11 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2020-CP-40-01934
STIVERS BROTHERS	)	
AUTOMOTIVE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	MOTION FOR CONTINUANCE
	)	
W. WARNER PEACOCK	)	
and PEACOCK AUTOMOTIVE, LLC,	)	
	)	
Defendants.	)	
	)	

TO: BRADFORD N. MARTIN, ESQ., ATTORNEY FOR DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorney for the Plaintiff, will move before the Honorable L. Casey Manning, Chief Administrative Judge of the Court of Common Pleas for the Fifth Judicial Circuit, for an order granting a continuance of a hearing scheduled for March 23, 2021, at 9:30 AM before the Honorable Jocelyn Newman on Defendants' motions for summary judgment, to seal, and for judgment on the pleadings, and Plaintiff's second motion to enlarge time, motion to alter or amend, motion to stay or enlarge time, second motion to compel, cross-motion for judgment on the pleadings, and motion to serve a second amended and supplemental complaint.

The undersigned will show that three hearings are scheduled before the instant hearing and that the following additional documents were filed just before the Wednesday afternoon deadline listed on the notices of hearing issued on March 3, 2021:

Defendants' Reply Memorandum In Support Of Its Motion For Summary Judgment;

Defendants' Reply Memorandum In Opposition To Plaintiff's Second Motion To Compel;

W. Warner Peacock And Peacock Automotive, LLC's Reply To Plaintiff's Memorandum In Opposition To Defendants' Motion And Memorandum To Seal;

Defendants' Reply Memorandum In Support Of Its Motion For Judgment On The Pleadings;
and

Defendants' Response To Plaintiff's Motion For [sic] Second Amended Complaint

The undersigned will show that the above documents span some 92 pages. In addition, counsel for the Defendants have submitted an additional 60 pages of documents by email to Judge Newman to consider in connection with Defendants' motion to seal.

The undersigned will show that given other responsibilities of the Court and counsel, three (3) business days is insufficient time for both the Court and counsel to digest all of Defendants' Eleventh

Hour submissions, and the authority cited therein, and to address all of the pending motions in less than the two (2) hours set aside for the hearing.

Based upon the foregoing, the undersigned moves for a continuance until such time as the Court can schedule an in-person status conference and consider the Plaintiff's second motion to designate as complex to be filed in connection herewith.

The undersigned certifies that consultation with opposing counsel would serve no useful purpose.

STUDEMAYER LAW FIRM, P.C.

By: s/J. Gregory Studemeyer
J. Gregory Studemeyer
SC Bar #5416
7478 Carlisle Street
Post Office Box 1014
Irmo, South Carolina 29063
803-393-4399
Attorney for the Plaintiff

Irmo, South Carolina
March 18, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2020-CP-40-01934
	)	
STIVERS BROTHERS	)	
AUTOMOTIVE, INC.,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MEMORANDUM IN
	)	SUPPORT OF MOTION TO SERVE
v.	)	AMENDED AND SUPPLEMENTAL
	)	COMPLAINT
	)	
W. WARNER PEACOCK	)	
and PEACOCK AUTMOTIVE, LLC,	)	
	)	
Defendants.	)	

INTRODUCTION

On February 5, 2021, the Plaintiff filed a motion to serve a second amended and supplemental complaint in the above-captioned action pursuant to Rules 15(a) and 15(d), SCRCF. This memorandum is submitted in support thereof.

BACKGROUND

On August 4, 2017, the Plaintiff, Stivers Brothers Automotive, Inc. ("Stivers"), began operating Hyundai and Chevrolet dealerships in Richland County, South Carolina at 101 Newland Road and 111 Newland Road ("the Columbia dealerships"). Defendant, Peacock Automotive, LLC ("Peacock Automotive"), also operates a Hyundai dealership in Richland County.

In the spring of 2019, the parties recognized that the Columbia market was not big enough to sustain both of their competing Hyundai franchises. Beginning in the fall of 2019, the Defendants represented to Stivers that they were serious about acquiring the Columbia dealerships. To facilitate their discussions, the Defendants executed Confidentiality Agreements on September 6, 2019. Representatives of Stivers and Peacock Automotive had specific

discussions about Stivers' intention to acquire a Ford franchise in Alabama with the proceeds of the transaction. Stivers furnished the Defendants with proprietary information about the operation of the Columbia dealerships and continued to do so on a monthly basis.

On October 8, 2019, Peacock Automotive's Chief Financial Officer visited the Columbia dealerships to inspect the assets and to engage in due diligence. After two months of access to Stivers' proprietary information, on or about November 7, 2019, Peacock Automotive submitted a Letter of Intent ("LOI") to purchase the Columbia dealerships.

J. Gregory Humphries ("Humphries"), a partner at Shutts & Bowen, LLP, in Orlando was tasked with preparing contracts for the purchase and sale of Stivers' Columbia dealerships. Humphries communicated directly with Stivers' attorney, Richard L. McBride, Jr. ("McBride") of Montgomery, Alabama. Humphries never disclosed that he had a financial interest in Peacock Automotive as a member, manager, or investor. The APAs drafted by Humphries designated Humphries' law firm, Shutts & Bowen, LLP, as Escrow Agent.

On January 7, 2020, after four months of access to Stivers' proprietary information, Stivers and Peacock Automotive entered into two separate Asset Purchase and Sale Agreements (the "APAs") for the purpose of Peacock Automotive acquiring the Columbia dealerships. Upon information and belief, thereafter, Peacock Automotive delivered the sum of One Hundred Thousand Dollars (\$100,000) as an escrow deposit to Shutts & Bowen, LLP. Peacock Automotive failed to disclose that one of its members, managers, and investors would be serving as escrow agent over its own money through Humphries' law firm.

Each APA provided for the payment by Peacock Automotive to Stivers of the sum of \$3,500,000.00 for a total of \$7,000,000.00, in addition to the purchase price of certain new motor vehicles, certain service loaners, all fixed assets, certain parts and accessories, all unopen oil and

grease drums and bulk oil and fluid, and certain work in progress. The Chevrolet APA required Stivers to finance \$2,000,000 of the purchase price by accepting a promissory note from Peacock Automotive guaranteed by Warner Peacock.

Each APA required Peacock Automotive to submit applications to the manufacturers within 20 days of receiving applications from the manufacturers and to use its best efforts in good faith to obtain required approvals at the earliest date practicable, but no later than one hundred and five (105) days after the effective date, January 7, 2020.

Each APA also required Peacock Automotive to enter into an assignment of lease agreement with the owners of the premises upon which both Columbia dealerships were operated. When the APAs were signed, the lease agreement extended through June 24, 2024, but authorized Stivers to terminate on December 24, 2021, by providing written notice on or before December 24, 2020. The annual Base Rent under the Lease Agreement was One Million Two Hundred Fifty-Three Thousand Five Hundred Twenty and 84/100 Dollars (\$1,253,520.84), payable in monthly installments equal to One Hundred Four Thousand Four Hundred Sixty and 07/100 (\$104,460.07), in advance on or before the first day of each Lease Month during the Term.

In addition to the annual Base Rent payable under the Lease Agreement, property taxes of One Hundred Seventy Three Thousand Eight Hundred Sixty Five and 25/100 Dollars (\$173,865.25) and insurance premiums of One Hundred Seventeen Thousand Nine Hundred Fifty One and 69/100 Dollars (\$117,951.69) were due and payable annually.

Paragraph 15(c) of each APA provided that, "During the Interim Period (defined by Paragraph 15(a) as "From the Effective Date of this Agreement to the Closing Date) Buyer may, at its sole expense, conduct such investigations, inspections and examinations of the Subject

Assets and the Dealership's operations as Buyer may deem appropriate; and Seller shall give Buyer and its agents, attorneys and representatives reasonable access during non-working hours to such of the premises and Seller's properties, books, records, and documents as Buyer may reasonably request. Thereafter, on January 15, 2020, in accordance with a request from Peacock Automotive, Stivers provided Peacock Automotive's CPA firm unfiltered and unfettered 24/7 access to its dealer management system. In addition, in response to complaints by Peacock Automotive about the expense of securing documents from its CPA firm, Stivers provided additional documents to Peacock Automotive as an accommodation.

Peacock failed to promptly submit to General Motors and Hyundai all forms, applications, and other documents which they required to consider approval of the transactions as required by Section 5 of each APA. Peacock failed to acknowledge receipt of or respond to drafts of a proposed assignment and amendment of the lease provided by the owners of the premises upon which the Columbia dealerships were located.

Each APA required Peacock Automotive to keep the existence of the APAs confidential. The Defendants failed to honor the confidentiality of the APAs by disclosing their existence to another automobile dealer in the Columbia area.

Neither APA contained a "force majeure" clause. On March 13, 2020, in response to the COVID-19 pandemic, the President of the United States declared that an emergency existed nationwide under the Robert T. Stafford Disaster Relief Act and Emergency Assistance Act. On March 18, 2020, the "big three" manufacturers, FCA US LLC, Ford, and General Motors, shut down production. On March 23, 2020, the Dow Jones Industrial Average plunged to its lowest level since November 8, 2016.

The value of the Columbia dealerships was declining rapidly in value. The prospect of closing on the transaction no longer seemed favorable to Peacock Automotive. As a result, Peacock Automotive and its members began looking for a way to avoid its obligations under the APAs.

On March 26, 2020, Ordinance No.: 2020-034, "An Emergency Order Declaring a Stay Home Stay Safe for the City of Columbia, South Carolina" (the "Ordinance") was issued by Mayor Stephen K. Benjamin and Columbia City Council. The Ordinance provided that individuals "shall stay in their homes and not travel through or congregate in the streets, sidewalks, waterways and/or public spaces in the City of Columbia, including establishments that hold a City of Columbia business licenses [sic] except for the purpose of working at or conducting business with the attached list of businesses (hereinafter "Essential Service" or "Essential Services"). Exhibit A to the Ordinance defines twelve types of "essential services" including, *inter alia*, vehicle sales and automotive repair.

Notwithstanding the plain language of the Ordinance and the exceptions thereto, within 24 hours of its enactment, and without so much as a phone call, on March 27, 2020, Humphries and/or his associate prepared a purported notice of termination signed by Warner Peacock, suggesting that the following conditions precedent to closing had not been met:

- a. "We" do not believe the current conditions existing in the Columbia, SC area permit the Seller to comply with these requirements, as the Dealership's [sic] business cannot now or for the foreseeable future operate in the ordinary course;
- b. "We" also believe Columbia's issuance of a stay in place order is an order of the type that qualifies pursuant to Section 16(h) to materially adversely affecting [sic] the Subject Assets; and
- c. "We" have requested the February 2020 financial records and Seller has failed to provide such records.

A copy of the purported notice of termination was thereafter emailed by Humphrics' associate to Stivers and McBride with a copy to Humphries. Peacock Automotive had no right to terminate as it was not free from substantial default itself, having substantially breached the APAs as set forth above, and nothing in the APAs authorized unilateral termination. In the purported notice of termination, Warner Peacock also requested that Humphries' law firm, "Shutts Bowen LLP [sic], in its capacity as escrow agent, return the \$100,000 deposit which was made in connection with this proposed transaction."

All of the asserted excuses for termination were plainly pretextual, and Peacock Automotive's failure to communicate with Stivers' landlord about assuming the lease, failure to use its best efforts in good faith to obtain manufacturer approvals at the earliest date practicable, and failure to maintain the confidentiality of the APAs were intended to sabotage the transactions. Furthermore, notwithstanding the Defendants' "belief," Stivers continued to operate in the ordinary course of business; by its terms, vehicle sales and automotive repair were excepted from the Ordinance. The Defendants also had electronic access to Stivers' financial records from January 15, 2020, beyond the date of the purported termination.

The real reason for the Defendants' purported termination was the ongoing COVID-19 pandemic, notwithstanding the lack of a "force majeure" clause in the APAs. The Defendants attempted to shift the burden they knowingly and voluntarily undertook in the APAs to the Plaintiffs because closing on the transactions appeared less favorable to them.

On April 3, 2020, a demand for adequate assurance of performance was made to the Defendants. The Defendants failed to provide adequate assurance of performance, and thereafter, Warner Peacock raised subsequent claims in an effort to avoid to the commitments made to the Stivers, including an inability to arrange for inventory financing and an inability to

speaking with the Chevrolet Zone Manager, neither of which were included as conditions precedent in the nearly 30 pages of each APA drafted Humphries.

On April 7, 2020, Warner Peacock requested an open-ended or indefinite suspension of the APAs to allow him to close at a later date on a “to be determined basis.” Stivers advised that such an arrangement was not practicable given the status of the lease, and the restrictions, requirements, and covenants set forth in the APAs.

This action was filed on April 13, 2020, and on April 21, 2020, the Defendants’ local counsel was advised of Stiver’s intention to extend the Lease Agreement in an effort to mitigate its damages. On April 22, 2020, Peacock Automotive advised that it was unwilling to make a facility investment required by Hyundai and that Stivers’ proposed extension of the lease for one year would serve to end any further negotiations.

On April 29, 2020, the Defendants, through local counsel, emailed a “SUPPLEMENTAL NOTICE OF TERMINATION” setting forth additional excuses for their failure to perform under the APAs, including allegations of misrepresentation.

On June 4, 2020, Stivers entered into a Fourth Amendment to Lease Agreement and Reaffirmation of Guaranty to extend the lease for another year to preserve its right to occupy the premises where it operated the Columbia dealerships, with the option to terminate early on December 24, 2022, by providing written notice on or before December 24, 2021. The extension required Stivers to continue paying rent, taxes, and insurance on the premises which Peacock Automotive was obligated to assume as of April 18, 2020, 105 days after the Effective Date of each APA. Thereafter, in a further effort to mitigate its damages, Stivers entered into a confidential asset purchase agreement with a third party for the sale of its Chevrolet dealership.

On June 4, 2020, before the ink had dried on the APA with the third party for the sale of the Chevrolet dealership, and notwithstanding the Defendants' previous suggestions of misrepresentation, Humphries submitted a new Letter of Intent ("LOI") representing Peacock Automotive's interests in acquiring the assets of Stivers' Hyundai and Genesis (collectively, "Hyundai") dealership. However, the LOI attempted to trick Stivers into conceding that the prior APAs had been *terminated* rather than *breached*, and attempted to limit the Defendants' exposure for breaching the APAs to \$500,000.00.

Humphries emailed the LOI to Stivers' broker, advising that the LOI would expire if not accepted within 5 business days. Notwithstanding the 5 business days term, the Defendants filed and served an answer and counterclaim the following day, weeks before responsive pleadings were due, accusing Stivers of fraud and suggesting that "the world had changed because of the coronavirus (Covid-19) pandemic" and that the very same business it offered to purchase for the second time just two days earlier had been irreparably damaged.

Thereafter, notwithstanding the filing of counterclaims for fraud, the Defendants continued their attempts to mislead Stivers about their feigned interest in acquiring the Hyundai assets. On June 22, 2020, Stivers advised the Defendants that it was not interested in the LOI, but instead presented an APA setting forth the terms upon which it would be willing to sell its Hyundai assets (the "New Hyundai APA").

The Defendants were afforded several days within which to execute the New Hyundai APA, and were able to secure further proprietary information from Stivers that was not then available through discovery. The Defendants requested, and Stivers provided portions of another financial statement. Notwithstanding several extensions of the deadline by Stivers, the

Defendants failed to sign and return the New Hyundai APA. Negotiations ceased on June 27, 2020, when Humphries declared an impasse.

On July 3, 2020, in an apparent effort to appear reasonable, the Defendants began a second post-counterclaim negotiation to purchase Stivers' Hyundai assets. On July 15, 2020, Stivers submitted a revised version of the New Hyundai APA to the Defendants setting forth the terms upon which it was willing to sell its Hyundai assets. The Defendants were told that Stivers intended to hire a new general manager on July 15, 2020, and would not negotiate a sale of the Hyundai dealership assets after making that hire. Again, notwithstanding additional extensions of the deadline, the Defendants failed and refused to sign and return the New Hyundai APA. Negotiations ceased for the second time.

Eight days later, after negotiations had ceased and the Plaintiffs had hired a new general manager, the Defendants submitted a further revised version of the New Hyundai APA signed by Warner Peacock dated July 23, 2020, knowing full well that that deadline had already expired. On or about October 26, 2020, following the closing of the confidential APA for the sale of Stivers' Chevrolet dealership to a third party, the Defendants submitted yet another APA for the Hyundai assets signed by Warner Peacock.

However, Stivers had already hired a new general manager, had paid hundreds of thousands of dollars in rent payments to the landlord that it would have never paid had Peacock Automotive consummated the original APAs or the New Hyundai APA, and simply no longer trusted the Defendants after it failed to meet five (5) post-breach deadlines to execute a new APA.

RELEVANT PROCEDURAL HISTORY

On April 13, 2020, this action was initiated by the filing of a summons and complaint. Stivers named Peacock Automotive, Warner Peacock, and other shareholders of Peacock Automotive as defendants. Stivers sought declaratory relief, equitable relief including specific performance, and actual damages. Stivers asserted causes of action for a declaratory judgment, breach of contract, violation of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (the Dealers Act), tortious interference, and veil piercing. On June 5, 2020, the Defendants filed an answer and counterclaim, denying the material allegations of the complaint or that Stivers was entitled to specific performance, and asserting counterclaims against Stivers for breach of contract, breach of contract accompanied by a fraudulent act, fraud in the inducement, and negligent misrepresentation.

On July 2, 2020, Stivers filed a notice of dismissal as to defendants Mary Kaye Peacock, Ken Griffey, Jr. and Jay Brennan. That same day, Stivers filed an amended complaint, again seeking declaratory relief, equitable relief including specific performance, and actual damages. Stivers asserted causes of action for a declaratory judgement, breach of contract, breach of contract accompanied by a fraudulent act, violation of the Dealers Act, tortious interference, and veil piercing. In addition, Stivers attached a copy of the Defendant's March 27, 2020 Notice of Termination as Exhibit A to the Amended Complaint.

On July 17, 2020, after the final deadline for negotiations concerning the New Hyundai APA had expired, the Defendants filed an answer and counterclaim to the amended complaint, denying the material allegations of the complaint or that Stivers was entitled to specific performance, and asserting counterclaims against Stivers for breach of contract, breach of

contract accompanied by a fraudulent act, fraud in the inducement, and negligent misrepresentation.

On July 30, 2020, again knowing full well that negotiations had ceased on July 15, 2020, the Defendants filed a motion for an Order requiring an early neutral evaluation (“ENE”) under the provisions of Rules 14 and 17 of the South Carolina Rules of Alternative Dispute Resolution. The Defendants suggested that the parties had been involved in settlement negotiations resulting in a proposed asset purchase agreement, and represented that they wanted to use the ENE to discuss settlement. On October 2, 2020, the Honorable Alison Renec Lee granted the Defendants’ motion and ordered the parties to participate in ENE.

On October 22, 2020, Judge Manning issued an order granting Stivers’s motion to compel as to Plaintiff’s First Set of Interrogatories to the Defendants and Plaintiff’s First Request to Produce to Defendants, filed July 1, 2020, and denying the Defendants’ motion for protective order and stay of discovery.

On December 1, 2020, the parties participated in an ENE at Gallivan White & Boyd, P.A., 1201 Main Street, Columbia, SC 29201. John E. Cuttino, Esq., served as the evaluator. Stivers’ shareholders traveled from Montgomery, Alabama and Atlanta, Georgia, respectively, to comply with the court-ordered ENE. Warner Peacock did not appear in person for the ENE; instead, John M. Brennan (“Brennan”), an Orlando, Florida-based attorney and shareholder of Peacock Automotive attended on behalf of the organization. After approximately 10 hours of discussion, no offer whatsoever was made by the Defendants and the parties remained at an impasse. Stivers is informed and believes that the Defendants used the ENE to size it up and to engage in informal discovery.

Within 72 hours of the ENE, on December 4, 2020, counsel for the Defendants served Stivers' counsel with the preprepared discovery responses ordered to be produced pursuant to Judge Manning's order dated October 22, 2020, and filed a preprepared motion for summary judgment. The motion for summary judgment sought to compel specific performance of the Hyundai APA, even though the Defendants had twice denied that the Plaintiffs were entitled to specific performance. (Answer and Counterclaim ¶ 64, Answer and Counterclaim to Amended Complaint ¶ 67). The Defendants' motion for summary judgment further sought the dismissal of Stivers' remaining claims or for dismissal of Stivers' amended complaint with prejudice for failure to mitigate its damages, attorneys' fees, and costs, and for failure to prove any damages as a consequence of the alleged breach of the APAs.

On January 18, 2021, the Defendants filed an Amendment of Defendants' Motion for Summary Judgment (the "Amendment"). The purpose of the Amendment was to withdraw their demand for specific performance from their motion for summary judgment.

STANDARD OF REVIEW

Rule 15(a), SCRCP, provides:

"A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and *leave shall be freely given when justice so requires and does not prejudice any other party*. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading, whichever period may be the longer, unless the court otherwise orders." (*emphasis added*).

"This rule strongly favors amendments and the court is encouraged to freely grant leave to amend." Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 286, 607 S.E.2d 711, 717

(Ct. App. 2005)(citing Jarrell v. Seaboard Sys. R.R., Inc., 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987)). “Rule 15(a) is substantially the same as the Federal Rule,” Rule 15(a), SCRPC notes, and the Supreme Court of the United States has referred to the Rule’s “freely given” provision as a “mandate” that “is to be heeded.” Patton v. Miller, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017)(citing Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 226 (1962)).

The party opposing the motion to amend has the burden of establishing prejudice. Collins Entertainment, Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005). The prejudice that Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it. Tanner v. Florence County Treasurer, 336 S.C. 552, 558-59, 521 S.E.2d 153, 156 (1999).

Rule 15(d), SCRPC provides:

“Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, *permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented*, whether or not the original pleading is defective in its statement of a cause of action or defense. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.” (*emphasis added*).

“Even though a supplemental pleading is technically different than a motion to amend the pleadings under Rule 15(a), the standard for granting or denying these motions is the same.”

Tanner, 336 S.C. at 558, 521 S.E.2d at 156. Therefore, “South Carolina case law interpreting Rule 15(a), SCRPC, is authoritative” when analyzing a motion to supplement under Rule 15(d), SCRPC. Id.

ANALYSIS

1. **THE COURT SHOULD GRANT THE PLAINTIFF'S MOTION TO SERVE A SECOND AMENDED AND SUPPLEMENTAL COMPLAINT BECAUSE LEAVE TO AMEND OR SUPPLEMENT IS INTENDED TO BE FREELY GRANTED AND BECAUSE THE DEFENDANTS WILL SUFFER NO PREJUDICE AS A RESULT**

Stivers proposes to amend and supplement the amended complaint filed July 2, 2020.

The proposed Second Amended and Supplemental Complaint does not assert any further cause of action against the Defendants. Instead, the proposed Second Amended and Supplemental Complaint contains additional factual allegations based on events that transpired after the filing of the Amended Complaint and incorporates information provided by the Defendants' limited discovery responses served on December 4, 2020.

- a. **Events that Transpired after July 2, 2020**

Paragraphs 107 – 124 describe events that transpired after Stivers filed its amended complaint on July 2, 2020. The allegations concern further negotiations between the parties regarding the sale of Stivers' Hyundai assets which was initiated by the Defendants but never resulted in a consummated asset purchase agreement.

Specifically, these paragraphs discuss how Stivers, at the behest of the Defendants, submitted another revised Hyundai APA to the Defendants setting forth the terms upon which it was willing to sell its Hyundai assets. The Defendants were informed that Stivers intended to hire a new general manager on July 15, 2020, and that Stivers would not entertain any further negotiations after that date. Once again, the Defendants failed and refused to sign and return the Hyundai APA.

These paragraphs also describe how the Defendants attempted to appear "reasonable" by submitting further revised Hyundai APAs signed by Warner Peacock on or about July 23, 2020,

and October 26, 2020, knowing that the deadline for negotiations had expired. These paragraphs provide the context for Stivers' refusal to entertain any further negotiations. Stivers had hired the new general manager, paid hundreds of thousands of dollars in rent to the landlord that it would have never paid had Peacock Automotive consummated the original APAs or the New Hyundai APA, and simply no longer trusted the Defendants after it failed to meet five (5) post-breach deadlines to execute a new APA.

The allegations provide additional factual support for Stivers' cause of action against the Defendants for violating the Dealers Act which was included in the original complaint and the amended complaint. Specifically, these allegations supplement Stivers' claim that the Defendants have engaged in unfair and deceptive actions by refusing to submit a signed APA until after final negotiations had ceased and insisting upon participation in an ENE for ten hours to engage in informal discovery rather than attempt to settle the case. The Defendants will not be prejudiced by the addition of these allegations because they will receive sufficient notice of the issues to be tried and have the opportunity to refute them.

b. Information Provided by Defendants' Discovery Responses Served on December 4, 2020

Paragraphs 21-22 and 35-41 are based on the revelation from the Defendants' discovery responses that Humphries, who was tasked with preparing the APAs for the sale of Stivers' Columbia dealerships, happens to be member, manager, or investor in Peacock Automotive. The APAs drafted by Humphries designated Humphries' law firm, Shutts & Bowen, LLP, as Escrow Agent. In other words, the escrow funds never left the custody or control of Peacock Automotive. This is further evidence that the Defendants acted in bad faith in violation of the Dealers Act as asserted by Stivers in the original and amended complaints.

Paragraphs 56, 71, and 74 assert that Peacock Automotive defaulted under the APAs by failing to submit all forms, applications, and documents to General Motors and Hyundai required to consider approval of the transfer of ownership of the Columbia dealerships as required by Section 5 of each APA. This was confirmed by Defendants' Responses to Plaintiff's First Requests for Production of Documents, Bates # PA 1705 – 1708, and PA – 1755 – 1757.¹ This is further evidence that the Defendants breached the APAs as asserted by Stivers in the original and amended complaints.

Once again, the Defendants will not be prejudiced by the addition of these allegations because they will receive sufficient notice of the issues to be tried and have the opportunity to refute them.

CONCLUSION

For the foregoing reasons, the Plaintiff's motion should be granted.

STUDEMAYER LAW FIRM, P.C.

/s/ Ryan G. Studemeyer

J. Gregory Studemeyer
S.C. Bar No.: 5416
Ryan G. Studemeyer
S.C. Bar No.: 102578
7478 Carlisle Street
P.O. Box 1014
Irmo, S.C. 29063
(803) 393-4399
Attorneys for Plaintiff

Irmo, South Carolina

March 4, 2021

¹ Attached as Exhibit A

EXHIBIT A

From: Linda Simons <linda.simons@gm.com>
Sent: Wednesday, March 25, 2020 1:54 PM
To: Lauren Burns
Cc: Diane Reinhart; Warner Peacock
Subject: FW: Items needed for CR#78390
Attachments: 1036 Form_021020.pdf

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Lauren,

I hope this email finds you and your family well and safe, these are crazy times we are all experiencing. I sent the NWCS and Total Funds needed to show GM on March 6, 2020 but have not received anything back. I have gone through the file for the Buy-Sell and below is a list of items still needed:

- Board resolutions (should reflect the name of your Candidate as Dealer /Operator with minimum 15% ownership and list names of all other contractual positions that have been approved)-The one that you provided did not mention the approval of Warner as the Dealer Operator with 43.4% ownership.
- Source of Funds \$5,714,000 (Cash, Promissory note, Loan commitment letter, Gift letter, Meeting minutes or resolution for any funds coming from an affiliated company, etc.)
- Fill out DCICR templates completely and submit. (Missing Source of Funds Information)
- Please send Submission Acknowledgement form from CR 78390 (You will be able to print this once you complete the Change Request and submit it)
- Buyer executed Open Account form (see attached)

Please let me know if you have any questions. Be safe.

Thank you,
 Linda

Linda M. Simons
 Contract Manager – Southeast Region

General Motors
 100 Renaissance Center
 Mail Code 482-A16-C66
 Detroit, MI 48265-1000

Phone: (313) 665-0185
 Fax: (313) 221-9702

linda.simons@gm.com

Please do not send the General Motors Dealer Contract Group sensitive information (i.e. financial account information, social security numbers, etc.) from your personal e-mail address (Yahoo, Hotmail, Gmail, AOL, etc.). General Motors cannot be responsible for information sent from outside of its network. The MyFax number to send documents is 313.221.9702. This line goes directly to your Contract Manager's system so they may be processed as quickly as possible. Thank you.

Nothing in this message is intended to constitute an electronic signature unless a specific statement to the contrary is included in this message.

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GM ASSIGNMENT OF OPEN ACCOUNT AND REQUEST FOR ELIGIBLE PARTS AND ACCESSORIES TERMINATION ASSISTANCE

Region	<u>South East</u>	Dealer City & State	<u>Columbia, South Carolina</u>
Terminating BAC	<u>309632</u>		

Sections I, II & III must be completed and returned to General Motors

Section I - Open Account (Please select Option A or B and check the appropriate box)	
☒	Option A: Refund Open Account to Terminating Dealer The current GM Dealer Sales and Service Agreement(s) ("Dealer Agreement(s)") in effect between the undersigned Terminating Dealer and GM has been or will be terminated, and GM is hereby authorized and directed by the Terminating Dealer to refund any balance due, or to become due, in the Terminating Dealer's Open Account to the undersigned Terminating Dealer. Please send Refund Check to: Street Address: <u>4050 Eastern Blvd.</u> Phone Number: <u>803-513-7330</u> City: <u>Montgomery</u> State: <u>AL</u> Zip: <u>36116</u>
☐	Option B: Assign Open Account to Replacement Dealer 1. Holdback funds are part of the Open Account and <u>cannot be assigned separately</u> . If the undersigned Terminating Dealer selects this Option B to assign its Open Account to the undersigned Replacement Dealer, it automatically assigns all funds in it, including Holdback. 2. The balance of dealer contributions in the GM Co-op Advertising Account are part of the Open Account and <u>cannot be assigned separately</u> . If the undersigned Terminating Dealer selects this Option B to assign its Open Account to the undersigned Replacement Dealer, it automatically assigns all funds in it, including GM Co-op dealer contributions. 3. The undersigned Replacement Dealer agrees to, and will, assume total responsibility for all debts that accrue to the Open Account assigned by the Terminating Dealer. The Replacement Dealer agrees that all debts and credits accruing to the Terminating Dealer's Open Account are automatically transmitted to the Replacement Dealer's Open Account. The parties should review the Terminating Dealer's Open Account and the assignment thereof so there are no misunderstandings. The undersigned Terminating Dealer hereby assigns, transfers, and sets over to the undersigned Replacement Dealer all right, title, and interest in and to any balance, due or to become due, in the undersigned Terminating Dealer's Open Account. GM is hereby authorized to pay such balances to the Replacement Dealer. In accepting this assignment of the Terminating Dealer's Open Account, the undersigned Replacement Dealer agrees that, in addition to any right to set off provided by law, all moneys or accounts due to the Terminating and/or Replacement Dealer shall be considered net of the Terminating and/or Replacement Dealers' indebtedness to GM and its subsidiaries, and GM may deduct any amounts due or to become due from the Terminating and/or Replacement Dealer to GM and its subsidiaries, or any amounts held by GM, from any sums or accounts due or to become due from GM to the Terminating and/or Replacement Dealer.
Section II - Request for Eligible Parts and Accessories Termination Assistance (Please select Option C or D and check the appropriate box)	
Pursuant to Article 15.2.4 of the Dealer Agreement(s), the current GM Parts Terms of Sale Bulletin and GM Dealer Parts and Accessories Policies and Procedures Manual, and/or applicable law, the Terminating Dealer may be eligible for Parts and Accessories termination assistance. The Terminating Dealer must (1) select either Option C or Option D below.	
☒	Option C: Settlement to Terminating Dealer The undersigned Terminating Dealer hereby invokes its Parts and Accessories termination assistance rights pursuant to the Dealer Agreement(s) and the current GM Parts Terms of Sale Bulletin and GM Dealer Parts and Accessories Policies and Procedures Manual. The Terminating Dealer hereby requests that any amounts to be paid by GM for such Parts and Accessories termination assistance will be paid to the Terminating Dealer's Open Account. The Terminating Dealer agrees that any such amounts are not of the Terminating Dealer's indebtedness to GM and its subsidiaries. Upon selection of this Option C and GM's receipt of a Data Access Authorization form, GM will advise the Terminating Dealer of the amount and terms of settlement for eligible Parts and Accessories inventory upon the Terminating Dealer's termination of the Dealer Agreement(s). However, if Option B is checked above, any amount to be paid by GM to the Terminating Dealer for such Parts and Accessories termination assistance will be paid to the Replacement Dealer's Open Account, and the Replacement Dealer agrees that any such amounts are not of the Terminating and Replacement Dealers' indebtedness to GM and its subsidiaries.
☐	Option D: Assignment to the Replacement Dealer The undersigned Terminating Dealer hereby invokes its Parts and Accessories termination assistance rights pursuant to the Dealer Agreement(s) and the current GM Parts Terms of Sale Bulletin and GM Dealer Parts and Accessories Policies and Procedures Manual. The Terminating Dealer hereby assigns its aforementioned Parts and Accessories termination assistance rights to the Replacement Dealer, and the Terminating Dealer requests that any amount to be paid by GM for such Parts and Accessories termination assistance will be paid to the Replacement Dealer's Open Account, and the Replacement Dealer agrees that any such amounts are not of the Terminating and Replacement Dealers' indebtedness to GM and its subsidiaries. Upon selection of this Option D and GM's receipt of a Data Access Authorization form, GM will advise the Replacement Dealer of the amount and terms of the settlement of the eligible Parts and Accessories inventory upon the Terminating Dealer's termination of the Dealer Agreement(s).

GM ASSIGNMENT OF OPEN ACCOUNT AND REQUEST FOR ELIGIBLE PARTS AND ACCESSORIES TERMINATION ASSISTANCE

ELECTRONICALLY FILED - 2021 Mar 04 12:18 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

Section III - Unfilled Parts Orders (Please check the appropriate box)

☐

Yes, cancel all unfilled parts orders

☒

No, Do NOT cancel all unfilled parts orders

Silver Motors Automotive Date: 2/11/2020
 Seller, Terminating Dealer Company Name: _____
 Authorized Representative Name: Edward H. Silvers, III Signature: [Signature]
 Terminating Dealer's Email Address: eds@silvermotors.com

Buyer, Replacement Dealer Company Name: _____ Date: _____
 Authorized Representative Name: _____ Signature: _____
 Terminating Dealer's Email Address: _____



April 14, 2020

Linda M. Simons
Contract Manager – SE Region
General Motors
100 Renaissance Center
Mail Code 482-A16-C66
Detroit, MI 48265-1000

RE: Stivers – Peacock Chevrolet Buy/Sell – Dealer Package CR#78390

Dear Linda,

Please accept this letter and formal notification that we are unable to secure the following items for the General Motors Buy/Sell Dealer Application due to circumstances surrounding COVID-19:

Source of Funds - \$5,714,000
Submission Acknowledgement Form (cannot be completed without source of funds)

Please feel free to contact me with any questions or concerns.

Sincerely,

W. Warner Peacock
President & CEO
407-739-9207



April 14, 2020

Kathy Chappell
Dealer Development
Genesis Motor America
3025 Chastain Meadows Parkway Suite 100
Marietta, GA 30066

RE: Stivers – Peacock Genesis of East Columbia Buy/Sell – Dealer Package DP20682

Dear Kathy,

Please accept this letter and formal notification that we are unable to secure the following items for the Genesis Motor America Buy/Sell Dealer Application due to circumstances surrounding COVID-19:

Bank Flooring Letter
Certification of Initial Deposit of Funds
Flooring Worksheet

Please feel free to contact me with any questions or concerns.

Sincerely,

W. Warner Peacock
President & CEO
407-739-9207



April 14, 2020

Kathy Chappell
Dealer Development
Hyundai Motor America
3025 Chastain Meadows Parkway Suite 100
Marietta, GA 30066

RE: Stivers – Peacock Hyundai East Columbia Buy/Sell – Dealer Package DP12964

Dear Kathy,

Please accept this letter and formal notification that we are unable to secure the following items for the Hyundai Motor America Buy/Sell Dealer Application due to circumstances surrounding COVID-19:

Bank Flooring Letter
Certification of Initial Deposit of Funds
Flooring Worksheet
Source of Funds Summary

Please feel free to contact me with any questions or concerns.

Sincerely,

W. Warner Peacock
President & CEO
407-739-9207

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2020-CP-40-01934
	)	
STIVERS BROTHERS	)	
AUTOMOTIVE, INC.,	)	
	)	
	)	PLAINTIFF'S SUPPLEMENTAL
	)	MEMORANDUM IN SUPPORT OF
	)	MOTION FOR JUDGMENT ON THE
Plaintiff,	)	PLEADINGS AND IN OPPOSITION
	)	TO DEFENDANTS' MOTION FOR
	)	JUDGMENT ON THE PLEADINGS
v.	)	
	)	
W. WARNER PEACOCK	)	
and PEACOCK AUTMOTIVE, LLC,	)	
	)	
Defendants.	)	

On February 5, 2021, the Plaintiff, Stivers Brothers Automotive, Inc. ("Stivers"), filed a motion for judgment on the pleadings that, as a matter of law, the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (the "Dealers Act"), S.C. Code Ann. §§ 56-15-10 et seq., applies to the subject dispute between the parties. Stivers submitted a memorandum in support thereof and in opposition to the Defendants' motion for judgment on the pleadings.

Stivers now supplements its memorandum based on the argument below.

ARGUMENT

1. THE DEALERS ACT IS NOT EXCLUSIVELY A CONSUMER PROTECTION STATUTE, IT HAS BEEN INTERPRETED TO EXTEND RELIEF TO AUTOMOBILE DEALERS AS WELL

Although the Defendants assert that the Dealers Act is exclusively a consumer protection statute,¹ and does not afford automobile dealers any relief from violations of the Dealers Act by other automobile dealers, South Carolina case law suggests otherwise.

¹ Peacock Automotive and Warner Peacock's Motion and Memorandum for Judgment on the Pleadings, p. 4.

In Connecticut Indemn. Co. v. Burdette Chrysler Dodge Corp., 317 S.C. 406, 453 S.E.2d (Ct. App. 1994), Burdette Chrysler Dodge Corp. (“Burdette”), an automobile dealer, transferred ownership of eleven used motor vehicles to another automobile dealer, Eagle Auto Sales (“Eagle Auto”). Eagle Auto paid Burdette for six of the motor vehicles with checks that were returned for insufficient funds and never attempted to pay Burdette for the other five motor vehicles.

Burdette filed a claim under Eagle Auto’s motor vehicle dealer bond issued by Connecticut Indemnity Company (“Connecticut”). Pursuant to S.C. Code Ann. § 56-15-320(2), each applicant for licensure as an automobile dealer must furnish a surety bond “as indemnification for any loss or damage suffered by an owner of a motor vehicle.”

The Court of Appeals affirmed that the trial court properly held that Burdette, an automobile dealer, was an “owner of a motor vehicle” within the meaning of § 56-15-320(2). The Court of Appeals cited American European Garage Servs., Inc. v. National Fire Ins. Co. of Hartford, 427 So.2d 772 (Fla. Dist. Ct. Ap. 1983), wherein the Florida court held that automobile dealers who purchased vehicles from other automobile dealers were included within the meaning of the word “customer” in the context of Florida’s motor vehicle dealer bond statute, F.S.A. § 320.27.

The Court of Appeals held, despite Connecticut’s argument to the contrary, that § 56-15-320(2) of the Dealers Act “does not limit recovery under a motor vehicle dealer bond simply to consumers.” 317 S.C. at 408, 453 S.E.2d at 904. The Court of Appeals further explained that if “the legislature intended to preclude a motor vehicle dealer from being considered an ‘owner of a motor vehicle,’ the legislature would have used a less inclusive term to define those who could recover under a motor vehicle bond.” Id.

Furthermore, the Court stated that § 56-15-320(2) “allows recovery by anyone, not just

certain defined motor vehicle owners, for any loss or damage suffer by reason of the violation by [a] dealer...of *any* of the provisions of [chapter 15].” The Court remanded the matter to the trial court with instructions to determine whether Eagle Auto violated “any provision of chapter 15, particularly section 56-15-40.” In doing so, the Court of Appeals in Burdette clearly affirmed that an automobile dealer may be liable to another automobile dealer for a violation of S.C. Code Ann. § 56-15-40.

The Burdette decision is based on sound reasoning; where the legislature has opted to use inclusive terms in a remedial statute, recovery should not be precluded against certain classes of litigants. In fact, the Dealers Act’s definition of “person” in S.C. Code Ann. § 56-15-10(n) is so inclusive that it expressly incorporates a “corporation, partnership, trust, or other entity” as well as a “naturalized person.” It therefore follows that the Court of Appeals in Burdette remanded the case to the trial court to determine whether Burdette Chrysler Dodge Corp., an automobile dealer, was entitled to recover damages from Eagle Auto, another automobile dealer, under S.C. Code Ann. § 56-15-40 .

CONCLUSION

Based upon the foregoing, the Plaintiff is entitled to judgment on the pleadings. It is clear from the Burdette decision that the Dealers Act applies to claims brought by automobile dealers against other automobile dealers, including claims brought under S.C. Code Ann. § 56-15-40.

Signature appears on the following page

STUDEMAYER LAW FIRM, P.C.

/s/ Ryan G. Studemeyer

J. Gregory Studemeyer
Ryan G. Studemeyer
7478 Carlisle Street
P.O. Box 1014
Irmo, S.C. 29063
(803) 393-4399
Attorneys for Plaintiff

Irmo, South Carolina

March 12, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	C/A NO. 2020-CP-40-01934
STIVERS BROTHERS AUTOMOTIVE,	)	
INC.,	)	
	)	DEFENDANTS' REPLY
	)	MEMORANDUM IN SUPPORT OF ITS
	)	MOTION FOR JUDGMENT ON THE
	)	PLEADINGS
Plaintiff,	)	
v.	)	
W. WARNER PEACOCK and PEACOCK	)	
AUTOMOTIVE, LLC,	)	
	)	
Defendants.	)	

I. PLAINTIFF'S ALLEGATIONS

Plaintiff is attempting to stretch the Dealers Act far beyond its intended purpose, and files a Supplemental Memorandum citing a case to this Court that has been overruled by the South Carolina Supreme Court.¹ Plaintiff's only claims regarding the Dealers Act arise from the alleged breach of the APAs, which are only between two dealers, not a manufacturer and dealer. (Complaint, ¶¶ 68-76, Amended Complaint ¶¶ 82-90). In particular, Paragraph 89 of the Amended Complaint alleges:

The Defendants engaged in conduct designed to deceive or mislead prompted by an interested or sinister motive, including but not limited to, using the current environment and breaching the APAs to renegotiate the terms.

Plaintiff is not seeking to recover under a bond required by §56-15-320.

¹ Plaintiff's three-page Supplemental Memorandum filed on March 12, 2021 relies exclusively on *Connecticut Indemn. Co. v. Burdette Chrysler Dodge Corp.*, 317 S.C. 406, 453 S.E. 2d[sic](Ct. App. 1994). The South Carolina Supreme Court overruled this case in *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 476 S.E. 2d 690(1996)(We now overrule Burdette to the extent it recites that the latter part of §56-15-320 allows recovery by anyone, not just motor vehicle owners).

The Dealers Act Chapter is §56-15-10 through 600. Section 80 clearly and unambiguously limits the Chapter to agreements between manufacturers and dealers only. Therefore, a 12(c) motion to dismiss applies to this dispute arising out of non-covered agreements.

II. STATUTORY CONSTRUCTION DOES NOT SUPPORT APPLYING THE ACT TO CONTRACT DISPUTES BETWEEN TWO DEALERS

The South Carolina Dealers Act has been found to apply to two types of relationships: those between a dealer and a manufacturer, distributor, or wholesaler, and those between a customer and a dealer, manufacturer, or distributor. Neither the 1972 Act, the provisions of the Dealers Act, nor South Carolina common law suggests that a dealer needs special protection from another dealer.

Section 56-15-80 is headed “Agreements to which chapter applies.” It goes on to state:

The provisions of this chapter apply to all written ... agreements between a manufacturer, wholesaler or distributor with a motor vehicle dealer...”

Therefore, Plaintiff’s agreement with another dealer clearly is not covered by this Chapter, which is the Dealers Act. Sections 56-15-30 and 40 are part of the Chapter. Therefore, the plain reading of the statute excludes Plaintiff’s objections to its contracts with another dealer.

There are essentially five rules of statutory construction that apply:

1. The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature *Sloan v. Hardee*, 371 S. C. 495, 498, 640 S.E. 2d 457, 459 (2007);
2. When the statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and the court must apply the statute according to its literal meaning, *Id.*;
3. In interpreting a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation, *Id.*;
4. The statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect. *SC States Ports Author. v. Jasper County*, 368 S.C. 388, 398, 629 S.E. 2d. 624, 629 (2006); and

5. To express or include one thing implies the exclusion of another, or of the alternative. *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578 (2000) citing Black's Law Dictionary 602 (7th ed. 1999).

A. The Intent of the Legislature was to Protect Dealers from the Acts of Manufacturers and Distributors.

Section 56-15-80 clearly applies to the entire Dealers Act Chapter. The Dealers Act Chapter includes sections 30 and 40 upon which Plaintiff is trying to stretch to cover these agreements. There is no question that consumers are protected from dealers and dealers are protected from manufacturers. This is the statutory interpretation to give effect to the intent of the legislature.

The Dealers Act contains numerous provisions to protect dealers from manufacturers and distributors, due to the unequal bargaining power between the parties. Plaintiff claims that §56-15-46 protects dealers from unfair competition by other motor vehicle dealers; however, the statute only requires that the manufacturer give notice of its intent to establish a new motor vehicle dealership or relocate a dealership within 10 miles of an existing dealership of the same make. The burden of proving an "existing dealership is not providing adequate representation of the line-make motor vehicle and that the new or relocated dealership is necessary to provide the public with reliable and convenient sales and service within that area" as an exception to the radius limitation is on the manufacturer and not the potentially competing dealer. Thus, the intent of the legislature was not to give added protection to a dealer in a dispute with another dealer.

B. The Terms of the Dealers Act are Clear and Unambiguous on Their Face, and There is no Room for Statutory Construction.

Section 56-15-80 clearly applies to written agreements between a manufacturer and a dealer. It does not apply to agreements between dealers.

The canon of construction “expressio unius est exclusio alterius” or “inclusio unius est exclusio alterius” holds that “to express or include one thing implies the exclusion of another, or of the alternative.” *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578 (2000) citing Black’s Law Dictionary 602 (7th ed. 1999).” *See also Brown v. State*, 343 S.C. 342, 349, 540 S.E.2d 846, 850 (2001) (“Thus, the maxim of expressio unius est exclusio alterius ... applies to exclude day care centers from falling within the statute since day care centers are not expressly included.”).

The Legislature intended to exclude contractual relationships between dealers when it did not expressly include such contracts in § 56-15-80:

The provisions of this chapter shall apply to all written or oral agreements between a manufacturer, wholesaler or distributor with a motor vehicle dealer . . . and all other such agreements in which the manufacturer, wholesaler or distributor has any direct or indirect interest.

S.C. Code § 56-15-80.

The Southern District of New York, applying Massachusetts motor vehicle franchise law analogous to the South Carolina Act for agreements “which arise under any written or oral agreement between the manufacturer or distributor with a motor vehicle dealer,”² found disputes arising from a settlement agreement were not governed by Massachusetts Dealers law where GPB conceded it was not a dealer³ as defined by the state franchise laws and VWoA had plausibly alleged that the involved Dealerships were not parties to the settlement agreement. *Volkswagen Grp. of Am. v. GPB Capital Holdings*, 20 Civ. 1043 (S.D. N.Y. February 8, 2021).

Therefore, the clear and unambiguous language of the statute creates no room for statutory construction and the Court is required to apply the statute according to its literal meaning: its

² Mass. Gen. Laws Ann. ch. 93B § 11.

³ GPB, an “alternative asset management firm” based in New York, decided to invest in motor vehicle dealerships. A GPB-Related Entity acquired an ownership interest in a Volkswagen franchised dealership in Massachusetts, without the prior notice to VWoA required by the dealership’s franchise agreement. VWoA then issued a notice of termination to the franchise, resulting in litigation in New York state court.

literal meaning is not to allow a dealer to sue another dealer arising out of the contract between the two.

C. Giving the Words Their Plain and Ordinary Meaning Results in Finding that a Dealer to Dealer Contract is Not Covered.

The statute's language is clear: it applies to written agreements between a manufacturer and dealer, and not between written agreements between a dealer and a dealer. Applying this rule of statutory construction leads to the inescapable conclusion that Plaintiff's Dealers Act cause of action must be dismissed. The statute as a whole and sections which are part of the same general statutory law together leads to one inevitable conclusion.

The only way to read the entire chapter in unison and give effect to section 80 (which limits contracts between dealers and manufacturers only) is to limit unfair actions to the contracts that the entire chapter is designed to apply to.

D. Section 1 of the 1972 Act does not Automatically Afford Protection to Dealers Under Every Other Section of the Act.

Plaintiff claims that the use of the word "citizens" in the 1972 Act indicates that the Act applies to the relationships between dealers. Dealers are provided many protections under the Act from manufacturers and distributors. The use of the word "citizens" in Section 1 of the 1972 Act does not alter the specific provisions of the Act to mean the Act applies to a contract dispute between two dealers.

E. The Definition of "Person" Under the Act does not Expand the Application of the Act.

As to general allegations under 56-15-40(1)(a), South Carolina courts have made clear that the purpose of the Act is consumer protection. See *Herron v. Century BMW*, 378 S.C. 525, 693 S.E.2d 394, 399 (2010). Dealers are sophisticated businesses engaged in arms-length transactions with one another. The inclusion of legal entities in the definition of "person" under S.C. Code

Ann. § 56-15-10 does not indicate that these entities are not consumers, as vehicles can be purchased in the name of a corporation or other entity. In the present case, Plaintiff is not a consumer to whom protection is afforded under the Act.

III. S.C. CODE § 56-15-80 APPLIES TO THE FACTS AS ALLEGED BY STIVERS

Plaintiff cannot avoid § 56-15-80 by not alleging a violation of this Section. This is not a matter of election of remedies as Plaintiff suggests. It cannot elect a remedy that is not available. The Court should look to the essence of the Plaintiff's claim to determine whether it is actionable under the Dealers Act. *Ferguson v. Charleston Lincoln Mercury*, 349 S.C. 558, 564 S.E.2d 94, (2002) is instructive.

The South Carolina Supreme Court was asked to consider whether Mrs. Ferguson could recover under the Dealers Act for allegedly fraudulent acts committed against her husband. The Court recognized the Dealers Act encompasses multiple causes of action. *Id.* at fn. 2 ("The Dealers Act has a wide ambit and covers causes of action not rooted in fraud and deceit...."). The Court found the essence of Mr. Ferguson's allegation was that CLM misled him into paying more for the car than he should have paid and that it concealed the overcharge either through intentionally deceptive actions or through grossly negligent disclosure practices. The Court therefore held that allegations of such fraud and deceit were exempted from the general survival statute and did not survive Mr. Ferguson's death. The Court further found it was irrelevant whether Ferguson labeled CLM's actions as unfair, misleading, or deceptive.

In the present case, Plaintiff claims that it was damaged when Peacock improperly terminated the APAs. The Dealers Act applies to causes of action arising from a contract if the contract falls under the provisions of § 56-15-80. Stivers argument that it is not subject to § 56-15-80 ignores its own Amended Complaint in which it alleges:

The Defendants engaged in conduct designed to deceive or mislead prompted by an interested or sinister motive, including but not limited to, using the current environment and breaching the APAs to renegotiate the terms.

Amended Complaint ¶ 89. Plaintiff is bound by its pleadings. *Charleston Cty. Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 425, 559 S.E.2d 362, 364 (Ct. App. 2001). Labeling the breach as deceptive does not alter the essence of Plaintiff's claim. The Dealers Act does not apply to the breach of an agreement between two dealers, even when it is claimed that the breach occurred in bad faith.

IV. THE CONSUMER CASES CITED BY THE PLAINTIFF ARE NOT ANALOGOUS

Plaintiff cites a number of cases between customers and dealers and argues that because those cases "involved a contract" that was not between a manufacturer and a dealer, the South Carolina Courts have expanded the scope of the Dealers Act to include any breach of contract claim involving a dealership.

While it is true that a contract is involved in all customer purchases, the cases cited by Plaintiff do not address the application of the Dealers Act to a contract dispute between two dealers. Further, the mere fact that a consumer Plaintiff had a contract with the dealer does not mean the Plaintiff alleged that a violation of the Dealers Act stemmed from a breach of that contract. *See e.g. Freeman v. J.L. H. Investments, LP*, 414 S.C. 362, 778 S.E.2d 902 (2015) (alleging violation of the Act because closing fee was unfairly and arbitrarily imposed); *Estate of Carr ex re: Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 664 S.E.2d 83 (alleging misleading explanation regarding the ultimate disposition of insurance premiums violated the Act); *Adams v. Grant*, 292 S.C. 581, 358 S.E.2d 142 (Ct. App. 1986) (alleging Act was violated when dealership warranted to make all repairs and then refused to do so because it "did not have that much tied up

in the car"); *Southern Nat. Leasing Corp. v. Hall*, 306 S.C. 92, 410 S.E.2d 577 (Ct. App. 1991) (claiming Southern failed to disclose car was gray market).

V. BURDETTE HAS BEEN OVERRULED

Connecticut Indem. Co. v. Burdette Chrysler Dodge Corp., 317 S.C. 406, 453 S.E.2d 902, (Ct. App. 1994) (cited in Plaintiff's Supplemental Memorandum)⁴ is likewise distinguishable and has been overruled. S.C. Code § 56-15-320 is limited in its scope to recovery under a dealer's surety bond. Not only does *Connecticut Indem. Co.* deal only with recovery under a surety bond, but also the South Carolina Supreme Court overruled the decision. The Supreme Court subsequently found the Court of Appeals' finding in *Connecticut Indem. Co.* that S.C. Code § 56-15-320 allows recovery "by anyone" was incorrect. *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, --, 476 S.E.2d 690, 692 (1996).

The Supreme Court found the clear intent of the Legislature was to provide only the owner of a motor vehicle, or the owner's legal representative, with a cause of action against the surety on a bond issued pursuant to that statute. The Court made this finding based on the language in Section 56-15-320 that the purpose of a dealer's bond is to indemnify "for loss or damage suffered by an owner of a motor vehicle, or his legal representative" and because the statute specifically states that "[a]n owner or his legal representative who suffers the loss or damage has a right of action against the ... dealer's ... surety upon the bond." Plaintiff is not seeking to recover under Peacock's surety bond for a loss it claims as the owner of a motor vehicle.

⁴ Plaintiff wrongfully claim that Defendants assert that the Dealer's Act is exclusively a consumer protection statute. §56-15-80 explicitly states that it applies to contracts between a manufacturer and a dealer, which Defendants cite on p. 2 of its Motion and Memorandum.

VI. THE SOUTH CAROLINA UNFAIR TRADE PRACTICE ACT DOES NOT SUGGEST THE DEALERS ACT APPLIES IN THE PRESENT CASE

The South Carolina Unfair Trade Practice Act (SCUTPA) differs from the Dealers Act in that it does not contain a provision similar to §56-15-80. Even if the SCUTPA were analogous, it is clear that a mere breach of contract, without more, does not constitute a violation of the SCUTPA, even if done intentionally. *Key Co. v. Fameco Distribs., Inc.*, 292 S.C. 524, 526, 357 S.E.2d 476, 478 (Ct. App. 1987). The Court recognized that without this restriction “every intentional breach of a contract within a commercial setting would constitute an unfair trade practice and thereby subject the breaching party to treble damages. *Id.* at 527, 357 S.E.2d at 478.

Similarly, the heightened damages available under the Dealers Act are not meant to apply to contracts between dealers who are able to negotiate on equal footing with each other. Rather the Act only applies to contracts with manufacturers or distributors, where there is unequal bargaining power. Plaintiff, by contrast, is claiming to have been damaged by Peacock’s termination of the APAs.

VII. OTHER CASES CITED BY PLAINTIFF ARE NOT APPLICABLE

Tober Foreign Motors, Inc. v. Better Oldsmobile, Inc., 381 N.E.2d 908 (1978), cited by Plaintiff, does not stand for the proposition that one dealer can sue another under the Massachusetts Dealers Act. Reiter was an established Oldsmobile franchise in Springfield Massachusetts. General Motors sent Reiter a letter of intent to establish a competing dealership in the area. Reiter’s suit for injunctive relief against GM and Tober failed, and the issue before the Supreme Judicial Court of Massachusetts was the constitutionality of the statute. In considering the statute, the Massachusetts Court recognized it was “essentially an act for the protection of consumers” and that it was “designed to protect franchisees from having to succumb to dictation by manufacturers

...” *Id.* at 913. The Massachusetts Court does not suggest the statute was designed to protect motor vehicle dealers from one another.

Plaintiff argues that other Richland County Orders demonstrate that the Dealers Act is applicable in the present case. The outcomes of these other cases are not precedential. *See Ford v. Beaufort Cnty. Assessor*, 398 S.C. 508, 730 S.E.2d 335 (Ct. App. 2012) (“Trial or inferior court decisions are not precedents binding other courts, including appellate courts or other judges of the same trial court.”); *Higgins v. MUSC*, 326 S.C. 592, 600, 486 S.E.2d 269, 273 (Ct. App. 1997). Also, it is error for a Circuit Court to rely only on conclusions in other Circuit Court Orders.

None of the defendants in the cases cited by Stivers objected to the application of the Dealers Act on the grounds that § 56-15-80 applied only to contracts between dealers and manufacturers or distributors. Defendants, in contrast, have denied Plaintiff is entitled to protection under the Act from actions of other dealers based on the clear language of the Chapter.

Finally, the plaintiff in *Mathes Auto Sales, Inc. v. Morris, et al.*, C.A. No. 2016-CP-40-6794 did not allege the defendant’s breach of a contract was the violation of the Dealers Act. Rather, the plaintiff alleged defendants violated the Dealers Act by a wrongful appropriation of plaintiff’s credit line to buy a vehicle. That issue is not before the Court in the present case.

VIII. CONCLUSION

The Dealers Act is not a bludgeon that can be used indiscriminately in any action in which a dealer is involved. The heightened damage provisions (and attorneys fees) of the Dealers Act provide protections to citizens of South Carolina the Legislature felt could be subject to certain abuses related to the distribution of motor vehicles. The statutory construction of the Act and the subsequent case law makes clear that the citizens for whom protection is afforded are those in an unequal bargaining position. This means that dealers are afforded protections against

manufacturers, distributors, and wholesalers with whom they are on unequal footing. Stivers and Peacock, as two sophisticated business entities, dealt with one another in an equal, arms-length transaction. They (through their lawyers) mutually established the terms of the APAs and the remedies available for any alleged breach. The Dealers Act was not intended to apply to such a transaction. Therefore, Defendants respectfully request that their Motion for Judgment on the Pleadings as to the Dealers Act be granted and Plaintiff's Motion be denied.

DATED this 17th day of March, 2021.

Respectfully submitted,

s/Bradford N. Martin

Bradford N. Martin, Esq. (SC Bar No. 3658)

Laura W. H. Teer, Esq. (SC Bar No. 16698)

BRADFORD NEAL MARTIN & ASSOCIATES, PA

Post Office Box 10410

Greenville, South Carolina 29603

864.552.9990

864.552.9992 (facsimile)

ATTORNEYS FOR DEFENDANTS

PEACOCK AUTOMOTIVE, LLC AND

W. WARNER PEACOCK

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	C/A NO. 2020-CP-40-01934
STIVERS BROTHERS AUTOMOTIVE,	)	
INC.,	)	
	)	DEFENDANTS' RESPONSE TO
Plaintiff,	)	PLAINTIFF'S MOTION FOR SECOND
v.	)	AMENDED COMPLAINT
	)	
W. WARNER PEACOCK and PEACOCK	)	
AUTOMOTIVE, LLC,	)	
	)	
Defendants.	)	
_____	)	

I. INTRODUCTION

Plaintiff's Motion to Amend its Complaint for a second time is another example of its desire for retribution, not justice. In a case filed almost a year ago, with two Complaints already served demanding specific performance (that Defendants have agreed to), amending yet again would not be only unjust, but prejudicial. The proposed "Complaint" removes for the first time Plaintiff's demand for specific performance and is further evidence of Plaintiff's complete lack of damage and failure to mitigate.

Rule 15(a), SCRCF, sets forth the standard for granting motions to amend a pleading. It provides:

A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party. (emphasis added).

Rule 15(d) provides:

Upon motion of the party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading . . . (emphasis added)

The grant or denial of a motion to amend is within the Court's discretion. *See Skydive Myrtle Beach, Inc. v. Horry Cty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 588 (2019). ("A trial court has discretion to deny a motion to amend if the party opposing the amendment can show a valid reason for denying the motion."). Thus, it is in the power of this Court to deny this unjust and prejudicial Motion.

A. Peacock Offers Specific Performance in Response to Plaintiff's Demand.

Stivers Brothers and Peacock Automotive are sophisticated businesses that have bought and sold dealerships on multiple occasions. Peacock terminated the APAs after it alleged that Plaintiff failed to maintain the goodwill of the business and provide required financial information. Plaintiff claims that the Peacock's termination was a breach of the APAs.

Plaintiff filed its Complaint on April 13, 2020 and asked for specific performance and an award of actual damages if specific performance could not be had (Complaint ¶ 67). In its Amended Complaint, filed three months later on July 2, 2020, Plaintiff again requested specific performance and only requested damages if specific performance could not be had. (Amended Complaint ¶ 76)

Peacock offered specific performance and the parties were negotiating the terms when, on July 14th, Plaintiff set a negotiation deadline for the following day and then refused to accept specific performance after Warner Peacock was not available to meet the less than 24-hour deadline. (Exhibit A, Affidavit of J. Gregory Humphries and Exhibit B, Affidavit of Richard L. McBride, Jr.).

On July 23, 2020 and October 26, 2020, Peacock Automotive submitted signed APAs to Stivers for the purchase of the Hyundai/Genesis dealership for the full price but better terms than

the initial Peacock Automotive APA for the Stivers' Hyundai/Genesis dealership. (Exhibit A, Affidavit of J. Gregory Humphries) Plaintiff declined to execute and close these two Hyundai/Genesis APAs which would completely avoid its alleged damages, attorneys' fees and costs. Plaintiff rejected its own requested relief of specific performance. On December 4, 2020 Defendants, once again, offered to stipulate to specific performance. Again, Plaintiff declined to accept the offer.

The fact that Plaintiff declined to mitigate its damages does not make Defendants' offers disingenuous. *See Schiavi Mobile Homes, Inc. v. Gironda*, 463 A.2d 722 (Me. 1983) (finding when Palmer's conversation with Frank Gironda, Sr., revealed that he had a party willing to pay the full price of the mobile home, the retailer had a duty to pursue this opportunity to minimize the effects of the breach regardless of whether the father made a valid "offer".) Even if Plaintiff was correct that Defendants breached, it had a duty to accept specific performance (which it alleged to be the required remedy in ¶ 76) to minimize any effects of the breach.

B. Plaintiff Attempts to Intimidate and Embarrass the Defendants.

Plaintiff has attempted to embarrass and intimidate Defendants from the start of this action. It personally named Mary Kaye Peacock as a Defendant despite knowing that she was the "chief cultural officer" for Peacock Automotive and not involved in the decision to terminate the APAs, or as a member. Plaintiff then had her personally served at her home, even after her counsel agreed to accept service on her behalf. Defendants were therefore required to file a Motion to Dismiss Mary Kaye.

Plaintiff additionally sued two of Peacock Automotive's other members individually based solely on the inclusion of their names as members on Peacock's website. These individuals were not residents of South Carolina and not subject to personal jurisdiction within the state. After

Defendants' strenuous objections, and the need to file a Motion and expend unnecessary attorney's fees, Plaintiff finally removed all individual Defendants other than Warner Peacock from the action.

C. Plaintiff's Actions are Inconsistent and Meant to Harass the Defendants.

Plaintiff objected to Defendants' Motion for a Confidentiality Agreement, but now refuses to produce information regarding its sale of the Chevrolet store (which is relevant to its alleged damages) on the grounds that the information is confidential. Plaintiff further refuses to disclose its damages to Defendants yet insists on perpetuating this action.

Plaintiff alleges that Defendants breached the APAs by sharing confidential information regarding the sale (Amended Complaint ¶¶ 38-39) but objects to Defendants' Motion to Seal to maintain their confidentiality. Plaintiff also boldly misstates confidential ENE information in its proposed Second Amended Complaint and its Memorandum in Support in clear violation of ADR Rule 8.

Most puzzling, Plaintiff demanded specific performance as its primary remedy for ten months, established a less than 24-hour deadline to agree upon an APA, refused Defendant's multiple offers of specific performance, and now wants to amend the Complaint, dropping its specific performance demand, and to characterize Peacock's offers as a "sham." When Plaintiff thought its dealership had little value, it wanted to force Peacock Automotive to purchase it; but when it was clear that the dealership would be profitable, it changed its mind and wants to keep the dealership, with all the profits, and recover damages as if the dealership was a total loss. This is clearly unjust and prejudicial.

Therefore, Defendants object to Plaintiff's Motion to Amend ten months after filing its original Complaint.

II. THE MOTION TO AMEND WOULD BE FUTILE

A trial court may deny a motion to amend if the amendment would be clearly futile. *See Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) ("Although leave to amend should generally be 'freely given,' ... it may be denied where the proposed amendment would be futile."), *rev'd on other grounds*, 401 S.C. 1, 736 S.E.2d 242 (2012).

Defendants previously filed a Motion for Summary Judgment based on Plaintiff's failure to mitigate and lack of damages and a Motion for Judgment on the Pleadings as to Plaintiff's cause of action for violation of the Dealers Act. Plaintiff's Motion to Amend should be held in abeyance until the Court has ruled upon Defendants' Motions.

A. *Jennings* is on Point.

In *Jennings, supra.*, Mr. Jennings alleged that his wife, daughter-in-law, and a private investigator violated the Stored Communications Act when they viewed emails from his Yahoo account related to an affair in which he was engaged. After amending his Complaint once, Jennings requested leave from the court to amend a second time to add his wife's attorney as a defendant on the grounds that he had received the email communications from his wife. The court found liability under the Stored Communications Act extended only to those who improperly accessed an account. Because Jennings did not allege the lawyer accessed his account, the court found adding the lawyer would be futile, as he would be entitled to summary judgment if added. *Jennings v. Jennings*, 389 S.C. 190, 697 S.E.2d 671 (Ct. App. 2010). Likewise, if Defendants are entitled to Summary Judgment, the Motion to Amend would be futile.

B. *Higgins* is on Point.

In *Higgins v. Medical University of South Carolina*, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997), Higgins filed a medical malpractice action against MUSC and several doctors. The Court of Appeals found the doctors immune under S.C. Code § 15-78-70 and granted their Rule 12(b)(6) motion to dismiss. The Court of Appeals considered whether to grant the plaintiff leave to amend following the 12(b)(6) dismissal but determined that any amendment claiming the doctors were paid by University Medical Services and not by MUSC would ultimately be futile. *Higgins v. Medical University of South Carolina*, 486 S.E.2d 269, 326 S.C. 592 (Ct. App. 1997).

In the present case, Plaintiff's proposed amendments are futile. Plaintiff's claims regarding improper termination of the APAs do not come under the Dealers Act. Plaintiff's proposed supplemental allegations in its amended Paragraphs 82-124 are irrelevant to Plaintiff's claims as they occurred after the termination of the APAs. See *Tricat Industries, Inc. v. Harper*, 748 A.2d 48 (Md. App. 2000) (finding that withholding documents, even if it constituted a breach, after the contract was terminated for cause, was irrelevant to whether cause existed for the termination.)

Further, Defendants are entitled to summary judgment due to Plaintiff's lack of damage and failure to mitigate its damages. Plaintiff's proposed amendment does not alter the essence of its claims that it has been damaged as a result of Peacock's termination of the APAs, which is not covered by the Dealers Act, or its failure to prove damage or mitigate; therefore, any amendment would be futile.

III. THE MOTION TO AMEND IS NOT MADE IN GOOD FAITH

Plaintiff submitted the Affidavit of Richard L. McBride, Jr. on October 12, 2020 admitting that the parties reached an agreement as to almost all of the terms of a new APA for the purchase of the Hyundai/Genesis stores when Plaintiff imposed a deadline on Defendants on July 14th for

the following day and announced that it would not negotiate the terms beyond that deadline. (Exhibit B, Affidavit of Richard McBride).

Plaintiff's allegations in its proposed Second Amended Complaint (§§ 91-124) (removing its demand for specific performance) that Peacock's offers of settlement were disingenuous are akin to a sham affidavit when it previously admitted it terminated negotiations despite continuing to demand specific performance in its pleadings for ten months. *See Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (providing "a court may disregard a subsequent affidavit as a 'sham,' that is, as not creating an issue of fact ..., by submitting the subsequent affidavit to contradict that party's own prior sworn statement"); *McMaster v. Dewitt*, 411 S.C. 138, 144, 767 S.E.2d 451, 454 (Ct. App. 2014) (holding a trial court must exercise discretion to determine whether to accept a "sham" affidavit).

The District Court for the Eastern District of Pennsylvania found a motion for an amended complaint can operate in the same manner as a sham affidavit. *See Simpson v. Temple Univ.*, C.A. No. 18-2272 (E.D. Pa. August 1, 2019). The Court found "[f]or all practical purposes, Plaintiff seeks to amend her complaint as a predicate to opposing the pending motion for summary judgment" and denied the motion to amend the complaint, which contradicted prior testimony. *Id.* at *5.

It is not just for Plaintiff to allege Peacock's offers of specific performance were made in bad faith when it has previously admitted that it simply decided not to consider the offers. This proposed Complaint is not made in good faith.

IV. THE PROPOSED SECOND AMENDED COMPLAINT CONTAINS IMPROPER MATERIAL

A. Improper Inclusion of Footnotes.

Plaintiff's proposed inclusion of footnotes throughout the Complaint does not comply with Rule 10(b) SCRCF requiring "consecutive numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances."

B. Immaterial and Impertinent Allegations.

The proposed amendment is subject to a Rule 12(f) Motion to Strike as "redundant, immaterial, impertinent, or scandalous matter." The following are some examples of the inclusion of improper material in the proposed Second Amended Complaint:

- a. The statements in footnote 3 regarding Warner Peacock's state of residence is immaterial as he did not object to personal jurisdiction. This footnote is meant only to prejudice the Defendant;
- b. Proposed paragraphs 21 and 22 regarding investors in Peacock Automotive who are not parties to the action are immaterial and meant to harass and intimidate those individuals by naming them within the pleading;
- c. Paragraphs 37, 41, 72, and 81 are further attempts to cast aspersions against Humphries who is not a Defendant in this case. Plaintiff does not claim Humphries breached his duties as an escrow agent and absconded with the funds. Nor does Plaintiff claim he represented himself as a neutral party or that he had a duty to disclose his membership in Peacock Automotive. Whether he was a member of Peacock Automotive is irrelevant to Plaintiff's claims;
- d. Footnote 7 attempts to mischaracterize the allegations and defenses contained in Defendants' Answer and Counterclaim. Rule 8, SCRCF provides for "a short

and plain statement of the facts showing that the pleader is entitled to relief’.

An amended complaint is not intended as a forum for commenting on the answer or counterclaims.

- e. Proposed Paragraph 69 includes another reference to Humphries and an allegation that he or someone in his law firm prepared the termination letter signed by Warner Peacock. It is immaterial whether Peacock Automotive had the assistance of its counsel in preparing the letter.

It is not just to allow these proposed amendments that, if allowed, will be subject to a Rule 12(f) Motion.

C. Improper References to Confidential Early Neutral Evaluation.

ADR Rule 15(d) applies Rule 8 of the ADR Rules regarding confidentiality to neutral evaluations. Rule 8(a) provides that communications during a mediation settlement conference shall be confidential. Plaintiff has breached this Rule by referring to the ENE negotiations in the proposed Second Amended Complaint (¶¶ 117-122), and in its Memorandum in Support. Not only is this a violation subject to sanctions under Rule 10(b) ADR, but it also places Defendants in an untenable position of having to violate the Rules itself in order to defend against false statements made by the Plaintiff.¹ Not only is it not just to allow the inclusion of these allegations, it is prohibited by the Court’s Rules.

V. CONCLUSION

Plaintiff is attempting to take a breach of contract action between two sophisticated businesses and turn it into a personal vendetta. When the Hyundai/Genesis dealerships became

¹ For example, Plaintiff is aware that Warner Peacock had been exposed to an individual with COVID-19 and appeared by Zoom in order to comply with the CDC recommendations.

profitable, Plaintiff determined that it would rather keep the dealerships and realize the profits than allow Defendants to have the profits, yet it still desires to punish the Defendants. After ten months of demanding specific performance, (which Defendants agreed to on many occasions), Plaintiff now wants to file an improper Second Amended Complaint, omitting specific performance in an attempt to avoid the consequences of its own choices. It is not just to allow Plaintiff to amend its Complaint a second time, include improper material in the pleading, and continue with this action when it has failed to mitigate its damages or to present any evidence of damages.

Defendants respectfully request that Plaintiff's Motion to Amend be denied.

DATED this 17th day of March, 2021.

Respectfully submitted,

s/Bradford N. Martin

Bradford N. Martin, Esq. (SC Bar No. 3658)

Laura W. H. Teer, Esq. (SC Bar No. 16698)

BRADFORD NEAL MARTIN & ASSOCIATES, PA

Post Office Box 10410

Greenville, South Carolina 29603

864.552.9990

864.552.9992 (facsimile)

ATTORNEYS FOR DEFENDANTS

PEACOCK AUTOMOTIVE, LLC AND

W. WARNER PEACOCK

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	C/A NO. 2020-CP-40-01934
STIVERS BROTHERS AUTOMOTIVE,	)	
INC.,	)	AFFIDAVIT OF
	)	J. GREGORY HUMPHRIES
Plaintiff,	)	
v.	)	
	)	
W. WARNER PEACOCK and PEACOCK	)	
AUTOMOTIVE, LLC,	)	
	)	
Defendants.	)	
	)	

PERSONALLY APPEARED before me, the undersigned, who being duly sworn, deposes and states as follows:

1. I am over the age of 18 and competent to make this Affidavit.
2. Except for matters stated upon information and belief, I have personal knowledge of the facts contained in this Affidavit.
3. I am an attorney at law practicing in the area of corporate transactions in Orlando Florida. The firm of Shutts & Bowen, LLP has acted as a transactional counsel on behalf of Peacock Automotive, LLC regarding the purchase of the Hyundai dealership in Columbia from Stivers Brothers Automotive, Inc.
4. I have represented the Defendants for many years and was tasked with preparing contracts for the purchase and sale of two Columbia, South Carolina motor vehicles dealerships owned by the Stivers (Chevrolet and Hyundai/Genesis).
5. I communicated directly with Stivers' attorney Rick McBride, Jr., of Montgomery Alabama.

6. After the original APAs of January 7, 2020 were terminated by letter of March 27, 2020, I contacted Mr. McBride to discuss the purchase of the Hyundai/Genesis dealership.

7. I prepared a formal Letter of Intent ("LOI") and transmitted it to Mr. McBride on June 11, 2020 for the purchase of the Hyundai/Genesis dealership.

8. I received a counter proposal Asset Purchase Agreement from Mr. McBride on June 22, 2020.

9. I sent a signed APA to Mr. McBride on July 23 for the purchase of the Hyundai/Genesis dealership. (Exhibit A) The new APA provided that the payment would be all cash up front, that Purchaser would assume any extensions of the lease that Stivers had entered into, and would provide an additional payment of up to \$200,000 for Seller's attorneys' fees and costs.

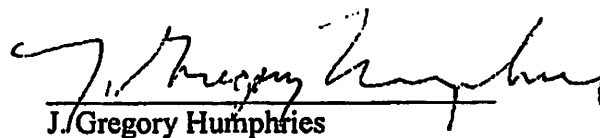
10. I once again sent an executed APA to Mr. McBride on behalf of my clients on October 26, 2020. (Exhibit B)

11. Both Agreements were executed would have been effective upon signing by the Seller.

12. Despite the fact that the price was the same as agreed to in January, and the terms were more favorable to Stivers, I never received a signed APA in response.

13. It is my belief that Stivers sold the Chevrolet dealership to another purchaser and that sale closed one or about October 7, 2020. (Exhibit C)

FURTHER AFFIANT SAYETH NOT.


J. Gregory Humphries

SWORN TO before me this 4th
day of December, 2020.
Tracy Augustyni
Notary Public for Florida
My Commission Expires: _____



TRACY AUGUSTYNI
Commission # GG 308524
Expires May 20, 2023
Bonded Thru Budget Notary Services

From: J. Gregory Humphries
Sent: Thursday, July 23, 2020 3:50 PM
To: Rick McBride Jr. (rick@mcbridelawllc.com)
Subject: Stivers/Peacock

Rick, In an effort to continue to seek resolution of our clients dispute, I am attaching a revised version of the contract to sell the Columbia Hyundai dealership, together with a signature page executed by Mr. Peacock. As you can see in the attached redline, we have made a few revisions that deal with the logistics of the process of obtaining approvals and closing on the acquisition. We have also eliminated the Chevy Transaction contingency which has perhaps resolved itself at this point as you are closer to consummating that transaction. If your clients would like to move forward pursuant to this contract, please advise prior to COB on Monday July 27. If we do not have an acceptance by that time, then the offer shall automatically be withdrawn.

Any questions, let me know. Thanks, Greg



J. Gregory Humphries
Partner

Shutts & Bowen LLP

300 South Orange Avenue, Suite 1600 | Orlando, FL 32801

Direct: (407) 835-6940 | Fax: (407) 849-7240

E-Mail | [Biography](#) | [V-Card](#) | [Website](#)

Exhibit A to
Affidavit of J. Gregory Humphries

Asset Purchase and Sale Agreement dated July 23, 2020

To be filed pursuant to Motion to Seal dated December 4, 2020

ELECTRONICALLY FILED - 2020 Dec 07 3:40 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

From: J. Gregory Humphries <JHumphries@shutts.com>
Sent: Monday, October 26, 2020 1:14 PM
To: Rick McBride Jr. (rick@mcbriidelawllc.com) <rick@mcbriidelawllc.com>
Cc: John M. "Jay" Brennan <Jay.Brennan@gray-robinson.com>
Subject: Peacock Stivers - Hyundai

This message originated outside of GrayRobinson.

Rick, We understand that you have had a successful closing on the Chevrolet dealership in Columbia. In light of that matter being concluded, we would again like to advance our offer to purchase the Hyundai dealership. Attached is an APA executed by Mr. Peacock. We assume to attorney fee issue can now be quantified and will incorporate if you can provide the info. I have also attached a marked copy to the last document we sent to you. Any questions, let me know. Thanks, Greg



J. Gregory Humphries
Partner

Shutts & Bowen LLP

300 South Orange Avenue, Suite 1600 | Orlando, FL 32801

Direct: (407) 835-6940 | Fax: (407) 849-7240

[E-Mail](#) | [Biography](#) | [V-Card](#) | [Website](#)

Exhibit B to
Affidavit of J. Gregory Humphries

Asset Purchase and Sale Agreement dated October 26, 2020

To be filed pursuant to Motion to Seal dated December 4, 2020

ELECTRONICALLY FILED - 2020 Dec 04 3:40 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

10/7/2020

Jim Hudson Automotive acquires Chevrolet dealership in Columbia | Business | coladaily.com

https://www.coladaily.com/business/jim-hudson-automotive-acquires-chevrolet-dealership-in-columbia/article_e22bcef8-0853-11eb-b698-4fb37b1abb91.html

FEATURED

Jim Hudson Automotive acquires Chevrolet dealership in Columbia

Karamie Hallman
Oct 7, 2020

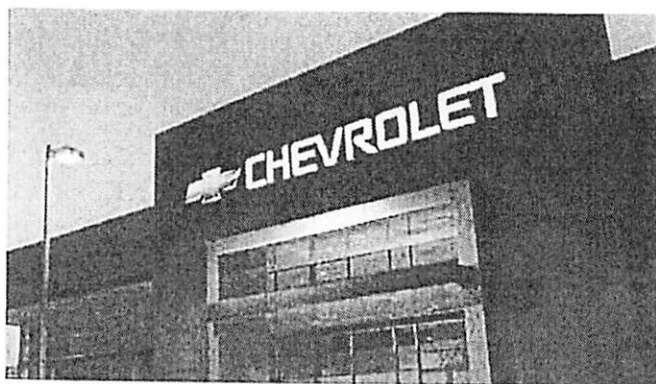


Photo from jimhudsonchevy.com

Jim Hudson Automotive Group has just opened a Chevrolet Dealership in Columbia. The family-owned company purchased what was formerly Stiver's Chevrolet and officially opened its doors to customers under the new ownership Tuesday. The dealership is located at exit I-20 and Clemson Road in Columbia.

According to company officials, this is the automotive group's second dealership acquisition for the year after opening Jim Hudson Acura in August, located in Augusta.

The dealership is equipped to provide all Chevrolet Certified vehicle services, as well as offer the area a large selection of both new and certified pre-owned Chevrolet vehicles.

The Jim Hudson Automotive Group has been serving the Midlands since 1980, and has built its brand on a dedication to 100% customer satisfaction in every facet of its business, according to company representatives.

The Group represents nine of the industry's brands: Ford, Toyota, Lexus, Audi, Cadillac, Buick, GMC, Acura and now Chevrolet, as well as a vast selection of used and certified pre-owned vehicles of all makes and models.

More information about the new dealership can be found at jimhudsonchevy.com.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
STIVERS BROTHERS	)	CASE NO. 2020-CP-40-01934
AUTOMOTIVE, INC.,	)	
	)	
Plaintiff	)	
	)	
v.	)	AFFIDAVIT
	)	
W. WARNER PEACOCK,	)	
and PEACOCK AUTOMOTIVE, LLC,	)	
	)	
Defendants	)	

Personally appeared before me, the undersigned, who first being duly sworn, deposes and says:

1. He is attorney for the Plaintiff.
2. He represented the Plaintiff in the negotiation, preparation, and execution of that certain Asset Purchase and Sale Agreement, dated January 7, 2020 (the "Chevrolet Purchase Agreement"), between Plaintiff and Defendant Peacock Automotive, LLC (the "LLC"), for the purchase by Defendant LLC of Plaintiff's Chevrolet dealership business located at 111 Newland Road in Columbia, South Carolina (the "Chevrolet Dealership").
3. He also represented the Plaintiff in the negotiation, preparation, and execution of that certain Asset Purchase and Sale Agreement, dated January 7, 2020 (the "Hyundai Purchase Agreement"), between Plaintiff and Defendant LLC for the purchase by Defendant LLC of Plaintiff's Hyundai dealership business located at 101 Newland Road in Columbia, South Carolina (the "Hyundai Dealership").
4. On March 30, 2020, he received a letter via e-mail from the Defendants' counsel, addressed to the Plaintiff and dated March 27, 2020, in which the Defendant LLC notified Plaintiff that the Defendant LLC was terminating the Chevrolet Purchase Agreement and the Hyundai Purchase Agreement.
5. On June 11, 2020, he received a proposed Letter of Intent (the "Letter of Intent") via e-mail from the Defendant's counsel, addressed to the Plaintiff, in which the Defendant LLC, made a new offer to purchase the Plaintiff's Hyundai Dealership business.
6. Plaintiff advised him that the Plaintiff was not agreeable to the terms of the Defendant LLC's Letter of Intent and instead instructed him to prepare, for presentation to the Defendants, a new Asset Purchase and Sale Agreement for the sale of the Plaintiff's Hyundai Dealership business to the Defendant LLC that contained terms the Plaintiff was willing to accept (the "New Hyundai Purchase Agreement").

EXHIBIT B

7. He prepared said New Hyundai Purchase Agreement and, after receiving approval of the same from the Plaintiff, presented it to the Defendant's counsel via e-mail on June 22, 2020. Within said e-mail to counsel, and upon instruction from the Plaintiff, he advised counsel that, among other things, (1) Plaintiff was not interested in signing the Letter of Intent, (2) there was not much room for negotiation in the attached New Hyundai Purchase Agreement, and (3) the Defendant LLC had until 12:00 p.m. EST on Friday, June 26, 2020, to accept the New Hyundai Purchase Agreement.

8. Following delivery of the New Hyundai Purchase Agreement to Defendants' counsel, he and Defendants' counsel negotiated certain changes in said Agreement that were proposed by Defendant's counsel. He and Defendants' counsel could not resolve all items at issue by the 12:00 p.m. EST deadline on Friday, June 26, 2020, that Plaintiff gave Defendants, so, at Plaintiff's instruction, he notified Defendants' counsel that Plaintiff was willing to extend its deadline for acceptance and execution of the New Hyundai Purchase Agreement to 5:00 p.m. EST on Friday June 26, 2020.

9. Plaintiff ultimately accepted some of the changes that Defendants' counsel proposed to the New Hyundai Purchase Agreement, but did not accept others. In an e-mail sent by him to Defendants' counsel at 5:46 p.m. CST on Friday, June 26, 2020, he advised Defendants' counsel that Plaintiff would not agree to further changes to the New Hyundai Purchase Agreement and, at Plaintiff's instruction, notified Defendants' counsel that Plaintiff was willing to extend its deadline for acceptance and execution of the New Hyundai Purchase Agreement (as modified by the changes accepted by Plaintiff) until 12:00 p.m. EST on Monday, June 29, 2020.

10. On Saturday, June 27, 2020, he received an e-mail from Defendants' counsel advising that Defendants' counsel believed that the parties were at an impasse with respect to the New Hyundai Purchase Agreement.

11. Later that Saturday, he notified Plaintiff of Defendants' counsel's e-mail, and, in response to Defendants' counsel's e-mail, Plaintiff advised him that Plaintiff would return their focus to the ongoing litigation between Plaintiff and Defendants.

12. On or about Tuesday, June 30, 2020, he received a phone call from Defendants' counsel in which Defendants' counsel expressed his desire to revisit negotiation of the New Hyundai Purchase Agreement. As a follow up to that call, Defendants' counsel sent him an e-mail on Friday, July 3, 2020, in which Defendants' counsel listed what Defendants' counsel believed to be the outstanding issues remaining between the parties with respect to the New Hyundai Purchase Agreement.

13. On Monday, July 6, 2020, he advised Plaintiff of his recent communications with Defendants' counsel, and in response thereto, Plaintiff agreed to re-open negotiations with Defendant LLC concerning the New Hyundai Purchase Agreement.

14. Thereafter, he negotiated additional changes to the New Hyundai Purchase Agreement with Defendants' counsel. During these negotiations, Plaintiff advised him that Plaintiff would not agree to some of the changes requested by Defendants' counsel.

15. In an e-mail to Defendants' counsel on Tuesday, July 14, 2020, he advised Defendants' counsel that Plaintiff would not agree to certain of Defendants' requested changes. In that same e-mail, he also advised Defendants' counsel that Plaintiff had plans to hire a new general manager for the Hyundai Dealership on Wednesday, July 15, 2020, and would not negotiate a sale of the Hyundai Dealership business after making that hire. As a result, and at Plaintiff's instruction, he advised Defendants' counsel at the end of that e-mail that Plaintiff must have an executed New Hyundai Purchase Agreement no later than 9:00 a.m. CST on Wednesday, July 15.

16. In a later e-mail to Defendants' counsel on Tuesday, July 14, he advised Defendant's counsel, at Plaintiff's instruction, that if Defendant LLC agreed to certain terms in the New Hyundai Purchase Agreement, Plaintiff would extend the deadline to sign the New Hyundai Purchase Agreement to 5:00 p.m. CST on Wednesday, July 15, 2020, and extend the time to fund the escrow thereunder to 12:00 p.m. CST on Thursday, July 16, 2020.

17. Following his various communications with Defendants' counsel, he revised the New Hyundai Purchase Agreement pursuant to the instructions of Plaintiff and delivered the newly revised New Hyundai Purchase Agreement to Defendants' counsel in an e-mail on Wednesday, July 15, 2020. In that e-mail, he notified Defendants' counsel, at Plaintiff's instruction, that the attached revised New Hyundai Purchase Agreement was not negotiable and that Plaintiff was giving Defendant LLC until 6:00 p.m. CST that night to execute the same and until 1:00 p.m. CST the next day to fund the escrow thereunder.

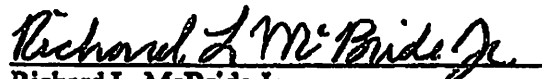
18. In a later e-mail on July 15, 2020, Defendants' counsel requested that he make several additional changes to the New Hyundai Purchase Agreement, and, after his consultation with Plaintiff, Plaintiff agreed to most of the requested changes. Thereafter, in a reply e-mail to Defendants' counsel, he sent a further revised version of the New Hyundai Purchase Agreement to Defendants' counsel.

19. Later that same night, on July 15, 2020, he sent an e-mail to Defendants' counsel in which he, at Plaintiff's instruction, again extended Plaintiff's deadline for the execution of the further revised New Hyundai Purchase Agreement by Defendant LLC to 8:00 p.m. CST that night.

20. At 7:57 p.m. CST the same night, he received an e-mail from Defendants' counsel advising that Defendants' counsel could not get a hold of Warner Peacock to sign the further revised New Hyundai Purchase Agreement.

21. After receipt of the 7:57 p.m. e-mail from Defendants' counsel, he advised Plaintiff of Defendants' counsel's e-mail, and, in response, Plaintiff advised him that Plaintiff would not entertain further negotiations with Defendants as to the New Hyundai Purchase Agreement.

Further, the deponent sayeth not.


Richard L. McBride Jr. 10-10-20

STATE OF ALABAMA)
)
COUNTY OF MONTGOMERY)

I, the undersigned authority, a Notary Public in and for said state at large, hereby certify that Richard L. McBride Jr., whose name is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day that, being informed of the contents of the above and foregoing instrument, he executed the same voluntarily on the day the same bears date.

Given under my hand and official seal of office this 10th day of October, 2020.



Tanesha Barron
NOTARY PUBLIC
My Commission Expires: 08/21/2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2020-CP-40-01934
	)	
STIVERS BROTHERS	)	
AUTOMOTIVE, INC.,	)	
	)	
	)	PLAINTIFF'S SUPPLEMENTAL
	)	MEMORANDUM IN SUPPORT OF
	)	MOTION FOR JUDGMENT
	)	ON THE PLEADINGS AND
Plaintiff,	)	IN OPPOSITION TO DEFENDANTS'
	)	MOTION FOR JUDGMENT ON THE
	)	PLEADINGS
v.	)	
	)	
W. WARNER PEACOCK	)	
and PEACOCK AUTMOTIVE, LLC,	)	
	)	
Defendants.	)	

1. THE BURDETTE DECISION HAS NOT BEEN OVERRULED ON ANY OF THE GROUNDS FOR WHICH THE PLAINTIFF HAS CITED IT

The Defendants assert that the "Plaintiff is attempting to stretch the Dealers Act far beyond its intended purpose, and files a Supplemental Memorandum citing a case to this Court that has been overruled by the South Carolina Supreme Court." The Defendants' argument is disingenuous and attempts to mislead this Court.

Of course, the Defendants are referring to Connecticut Indemn. Co. v. Burdette Chrysler Dodge Corp., 317 S.C. 406, 453 S.E.2d 902 (Ct. App. 1994). The thrust of the Burdette decision was that an automobile dealer was adjudged to be the "owner of a motor vehicle" within the meaning of S.C. Code Ann. § 56-15-320(2), and that S.C. Code Ann. § 56-15-320(2) of the Dealers Act "does not limit recovery under a motor vehicle dealer bond simply to *consumers*." The Defendants have frequently argued that the Dealers Act is a consumer protection act.

In Burdette, the Court of Appeals rationalized that "if the legislature intended to preclude

a motor vehicle dealer from being considered an 'owner of a motor vehicle,' the legislature would have used a less inclusive term to define those who could recover under a motor vehicle bond." Most importantly, the Burdette Court remanded the matter to the trial court with instructions to determine whether an automobile dealer violated S.C. Code Ann. § 56-15-40. Stivers has alleged that Defendant Peacock Automotive, LLC ("Peacock Automotive") violated this provision.

The Defendants duplicitously assert that Burdette has been overruled in its entirety. This is plainly and demonstrably false. To support this misguided assertion, the Defendants cite Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996).

In Altman, an automobile auction wholesaler sought to recover against an automobile dealer's surety bond for the value of dishonored checks used to pay for vehicles purchased by the automobile dealer. The Defendants needlessly concern themselves with dicta from Burdette that the Supreme Court in Altman ruled was "incorrect."¹ The Supreme Court did not reverse the remainder of Burdette, as the Court indicated in footnote 4:

We now overrule Burdette to the extent it recites that the latter part of § 56-15-320 allows recovery by anyone, not just motor vehicle owners, for loss or damages suffered as a result of a dealer violating any of the provisions in Chapter 15 of Title 56.

The holding in Burdette that a motor vehicle dealer, who sold or transferred motor vehicles to another dealer, was "an owner of a motor vehicle" within the meaning of § 56-15-320(2) is still the law in South Carolina.

¹ The Burdette opinion stated: "During oral argument before this court, however, Burdette's counsel suggested Eagle Auto also violated the latter part of Section 56-15-320(2). This part, as can be gleaned from the material quoted above, allows recovery *by anyone*, not just certain defined motor vehicle owners, for 'any loss or damage suffered by reason of the violation by [a] dealer ... of any of the provisions of [chapter 15].'"

2. THIS IS NOT MERELY A BREACH OF CONTRACT CASE

No matter how many times the Defendants repeat the same mantra, this is not simply a breach of contract case. In the Amended Complaint, Stivers asserted six separate and distinct cause of action: declaratory judgment; breach of contract; breach of contract accompanied by a fraudulent act; violation of the Dealers Act; tortious interference; and veil piercing.

The Defendants continually hone in on S.C. Code § 56-15-80 as a “get out of jail free card” in order to try to defeat Stivers’ causes of action for violation of the Dealers Act. Contrary to the Defendants’ suggestions, on its face, S.C. Code Ann. § 56-15-80 *does not* preclude an automobile dealer from suing another automobile dealer under the entirety of Chapter 15 of Title 56 merely because they were once in privity of contract with one another. The Defendants have cited no case law or statutes to this effect because none exist.

Stivers has not cited S.C. Code Ann. § 56-15-80 in any of its pleadings or memoranda as the basis for which it seeks relief under the Dealers Act. Instead, Stivers has frequently invoked S.C. Code Ann. § 56-15-30 and S.C. Code § 56-15-40. Regardless, the Defendants cannot hide behind S.C. Code § 56-15-80 for arbitrary, bad faith, or unconscionable conduct cited in the Second Amended Complaint and subsequent memoranda which occurred *after* the APAs were breached.

As the Defendants are most certainly aware, time has not stood still since the APAs were breached, and Stivers has filed a motion to file a supplemental and second amended complaint. If granted, even more of the Defendants’ post-breach violations of the Dealers Act will be brought to light, to which S.C. Code Ann. § 56-15-80 most certainly will not apply.

CONCLUSION

Based upon the foregoing, the Plaintiff is entitled to judgment on the pleadings.

STUDEMAYER LAW FIRM, P.C.

/s/ Ryan G. Studemeyer

J. Gregory Studemeyer
Ryan G. Studemeyer
7478 Carlisle Street
P.O. Box 1014
Irmo, S.C. 29063
(803) 393-4399
Attorneys for Plaintiff

Irmo, South Carolina

March 19, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2020-CP-40-01934
	)	
STIVERS BROTHERS	)	
AUTOMOTIVE, INC.,	)	
	)	
	)	
	)	PLAINTIFF'S MOTION TO
	)	ALTER OR AMEND AND
Plaintiff,	)	MEMORANDUM IN SUPPORT
	)	
v.	)	
	)	
W. WARNER PEACOCK	)	
and PEACOCK AUTMOTIVE, LLC,	)	
	)	
Defendants.	)	

TO: BRADFORD N. MARTIN, ESQ., ATTORNEY FOR DEFENDANTS:

PLEASE TAKE NOTICE that Stivers Brothers Automotive, Inc. ("Stivers"), through its undersigned counsel, will move before the Honorable Jocelyn Newman, on the tenth (10th) day after service hereof, or at such other time and place as is convenient to the Court, for an order pursuant to Rule 59(e) SCRPC. This motion is based upon the pleadings, answers to interrogatories, admissions on file, affidavits, the letters submitted by counsel for the parties,¹ the transcript of the proceedings², the South Carolina Rules of Civil Procedure, and such other and further case and statutory law as may be appropriate.

INTRODUCTION

At the risk of further recrimination by the Court and opposing counsel, the undersigned moves the Court to alter or amend the Form 4 Orders issued on March 24, 2021, and March 25,

¹ Attached as Exhibits A - I

² The undersigned has secured an excerpt of the proceedings and has made arrangements with the court reporter to furnish the entire transcript.

2021.

The practice of law can be a messy business. The last thing judges want to do is to referee a dispute between lawyers. Notwithstanding the unpleasant nature of such disputes, sometimes it becomes necessary.

Not only do judges have to determine issues of fact and law in litigation, they necessarily have to determine if the lawyers appearing before them are trustworthy. Unfortunately, simply having a law degree or even a license to practice does not allow lawyers to corner the market on credibility or virtue.³

³Counsel for Defendants has asserted that the suggestion that the Defendants are gaslighting the Court is outrageous and a violation of the Lawyer's Oath. Gaslighting was demonstrated in Defendants' Objections To Plaintiff's Motion To Stay And/Or Enlarge Time And Notice Of Intent To Withdraw Motion For Specific Performance In Ten (10) Days filed January 5, 2021, wherein counsel for the Defendants asserted that "Plaintiff twice informed the Court that it would need 30 days following the receipt of Defendants' discovery responses to respond to Defendants' requests."

That is not remotely close to what was set forth in Plaintiff's Second Motion to Enlarge Time. The Plaintiff did not "inform the Court" of anything. Rather, the Plaintiff moved "for an order enlarging the time within which to respond or object to W. Warner Peacock And Peacock Automotive, LLC's Second Request to Produce to Plaintiff dated August 12, 2020, and answer or object to Defendants' First Request To Admit To Plaintiff dated August 14, 2020, until 30 days after the Defendants answer[ed] Plaintiff's First Set Of Interrogatories To The Defendants, respond[ed] to Plaintiff's First Request To Produce to Defendants, and respond[ed] without objections to Plaintiff's First Request For Admission To Defendants dated April 17, 2020, and served upon Defendants on even date." As of the filing of this motion to alter or amend, the Plaintiff has still not received complete answers to its discovery requests nearly a year after serving them!

Counsel for the Defendants also sent a letter to the Court dated March 15, 2021, and made a similar argument at the hearing. Counsel for Defendants argued in his memoranda in support of his motion for summary judgment and at the hearing that the Plaintiff had failed to answer discovery within 30 days. Counsel for Defendants suggested that Judge Manning had already ruled on Plaintiff's second motion to enlarge time in his order filed on October 22, 2020.

Plaintiff's second motion to enlarge time was filed on September 14, 2020. The first sentence of Judge Manning's order, drafted by counsel for the Defendants, begins with, "This matter came before me on July 24, 2020". Thus, counsel for the Defendants knew that Judge Manning could not have ruled upon a motion that wasn't filed until 48 days later that Judge Manning never heard.

Additional examples of gaslighting appear in footnotes in the proposed second amended and supplemental complaint to which Defendants objected. Other examples appear in the memoranda submitted which can be specified if need be.

Other than Defendants' motion for protection, almost every issue in this case has been contested with memoranda in opposition. Remarkably, counsel for Defendants did not contest the claim that he had reneged on a consent order to clarify Judge Lee's ruling on his motion for early neutral evaluation. Judge Lee vacated her previous order without a hearing on March 22, 2021, in response to a letter from the undersigned dated the same day.

The Advance Sheets published on a weekly basis demonstrate that lawyers are no different than anyone else. Sometimes they do things that the Supreme Court could have never imagined when they were admitted to the Bar. Just as Judas Escariot handed over Jesus to the chief priests for 30 pieces of silver over two thousand years ago, some lawyers are willing to argue that the Earth is flat for an hourly fee.

Lawyers, like used car salesmen, are rewarded based upon production. Former Columbia lawyer, Claude M. Scarborough, once said, "the practice of law is like a pie eating contest, and the winner gets more pie." No matter how busy lawyers are, we rarely turn down the opportunity to take a new case from an existing client or to attract new clients with our accomplishments.

Perhaps, for this reason, judges must necessarily view arguments from lawyers with considerable skepticism. Perhaps, this is also a reason why judges can't make rulings on motions for summary judgment based upon statements of the lawyers. Rather, judges are required under Rule 56 to base their rulings upon the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits submitted. Otherwise, judges would have to make findings on the credibility of the lawyers, an enormous challenge, especially in a case like this one in which the judge is not familiar with the lawyers.

In this case, not only must the Court evaluate the credibility of the lawyers, the Court is also called upon to evaluate the credibility of the lawyers represented by counsel for Defendants. Two of Peacock Automotive, LLC's members, managers, investors, and controlling persons are also lawyers. Notwithstanding their law degrees and licenses to practice law in Florida, they are still "dealers" or "motor vehicle dealers" and "persons" as those terms are defined in S.C. Code

Ann. Sections 56-15-10 subsections (h) and (n).

The Defendants claim that their law degrees and Florida licenses, bar, so to speak, any investigation into the communications among all members, managers, investors, and controlling persons of Peacock Automotive, LLC under the attorney-client privilege. In the same manner as our appellate courts have authorized piercing the corporate veil in situations where dominant shareholders seek to protect fraud, justify wrong, or defeat public policy resulting in injustice and fundamental unfairness, the Plaintiff contends that Peacock Automotive, LLC and its members, managers, investors, and controlling persons have abused and seek to further abuse the attorney-client privilege to protect fraud, justify wrong, and defeat public policy resulting in injustice and fundamental unfairness.

Given how contentious this matter has been so far, it does not require a quantum leap to imagine how a deposition of any of the members, managers, investors, or controlling persons will proceed. After name, rank, and serial number, the Plaintiff reasonably anticipates objections and claims of attorney-client privilege to frustrate discovery after hundreds if not thousands of dollars have been spent on travel to Orlando, where the two Florida lawyers/dealers practice, meals, accommodations, and court reporter's fees. Nor does it require a quantum leap to imagine another hearing on a motion for a protective order arising out of the assertion of the privilege.

BACKGROUND

On March 3, 2021, the parties' respective counsel received notice that a hearing would take place on the following motions on March 23, 2021: Stivers' (second) motion to compel filed February 5, 2021; Stivers' motion for judgment on the pleadings filed February 5, 2021; Stivers' motion to file a second amended and supplemental complaint filed February 5, 2021; Stivers' motion to stay or enlarge time filed December 23, 2020; Defendants' motion for judgment on the

pleadings filed December 9, 2020; Defendants' motion to seal filed December 4, 2020; and Defendants' motion for summary judgment filed December 4, 2020.

The emailed notices advised counsel that the hearing would be conducted by video-conferencing through Cisco Webex and requested that any briefs or memoranda be filed the Wednesday before the week of the hearing (March 17, 2021). The notices also advised that all requests for continuances must be in writing with a \$25.00 filing fee and received by the Chief Administrative Judge prior to the hearing.

Throughout the afternoon of March 17, 2021, Defendants' counsel bombarded Plaintiff's counsel and the Court by filing the following "reply memoranda":

- Defendants' Reply Memorandum In Support of Its Motion for Summary Judgment;
- Defendants' Reply Memorandum In Opposition To Plaintiff's Second Motion To Compel;
- W. WARNER PEACOCK AND PEACOCK AUTOMOTIVE, LLC's Reply To Plaintiff's Memorandum In Opposition To Defendants' Motion And Memorandum To Seal;
- Defendants' Reply Memorandum In Support Of Its Motion For Judgment On The Pleadings; and
- Defendants' Response To Plaintiff's Motion For [sic] Second Amended Complaint.

Immediately, the undersigned notified the Court by letter dated March 17, 2021, of Defendants' eleventh hour filing and advised of his intention to move for a continuance in accordance with the hearing notices. On March 18, 2021, Plaintiffs' counsel moved for a continuance.

The Defendants' 152 pages of memoranda and documents submitted under seal, while filed within the time limit prescribed, clearly violated the spirit of the Court's request. Plaintiff's counsel asserted that *neither it nor the Court* should be expected to review and prepare for arguments concerning that volume of additional memoranda and documents under seal before

March 23, 2021. Furthermore, supposing it was possible, Defendants' counsel had argued new legal theories without affording Plaintiff's counsel an opportunity to respond.

Most of the pending motions were filed on behalf of the Defendants *over three months prior with supporting memoranda*. In other words, Defendants' counsel intentionally sandbagged Plaintiff's counsel by failing to raise the legal theories it *actually* intended to argue at the hearing until it was too late for the Plaintiff to respond or prepare.

At 8:22 AM on March 23, 2021, the Court issued a Form 4 Order denying Plaintiff's motion for a continuance. Therefore, the Court and counsel proceeded with the hearing just over an hour later.

At the beginning of the hearing, Defendants' counsel regaled the Court with a story about trying his first case in front of the Honorable Matthew J. Perry, Jr., the first African-American United States District Judge for the District of South Carolina. Who doesn't revere Judge Perry? Not even Eddie Haskell could have done a better job. The Court patiently and warmly received counsel's sycophantic attempt to gain favor, even though it pertained to subject matter that had absolutely nothing to do with the matter before the Court. The Court fell for it.

Plaintiff's counsel, however, was baffled when it received considerable scorn from the Court for having filed a motion for continuance. For the entirety of the hearing, it was apparent that the Court was upset with Plaintiff's counsel.

Ostensibly, the Court misinterpreted the suggestion that it was not *reasonable* for the Court to be expected to review the Defendants' eleventh-hour memoranda and documents submitted under seal to mean that Plaintiff's counsel did not believe that the Court *could* do so. What was simply meant as a courtesy was somehow construed as an attack on the Court's intelligence.

The Court also made it clear that it was incensed by Plaintiff's counsel bringing to the Court's attention a decision constituting persuasive authority issued by the Honorable Clifton Newman in Best Auto, Inc. v. Roberts, et al., C.A. No. 2010-CP-40-3158. Plaintiff's counsel represented the plaintiff automobile dealer in Best Auto, arising out of the alleged breach of a contract, wherein Judge Clifton Newman approved a settlement agreement based on the defendants' violations of the Dealers Act.

This order was cited not because a relative of the Court decided it, but because it directly refuted Defendants' argument that in a case arising out of a breach of contract, the contract must be one limited to those identified in § 56-15-80 in order for the defendant to be liable under the Dealers Act. Moreover, this order was not provided in isolation; Plaintiff's counsel also provided similar orders issued in Richland County by the Honorable L. Casey Manning and the Honorable Joseph M. Strickland which constituted similar persuasive authority.

Nevertheless, the Court suggested that the letters submitted were "condescending" and that it was "a bit illogical and to some extent, disingenuous" to move for a continuance. The Court's subsequent rulings, including the refusal to grant leave to amend and supplement the complaint despite the liberal standard encouraging courts to allow amendments, reflected prejudice towards the Plaintiff. The Court set out to demonstrate that she was capable of making her own independent decision, even if it was contrary to three previous decisions by senior judges in Richland County, and even if it was wrong.

LAW

The proper procedure for correcting factual errors in an order is to file a motion to alter or amend pursuant to the South Carolina Rules of Civil Procedure. Doe v. Doe, 324 S.C. 492, 478

S.E.2d 853 (Ct. App. 1996); see also Heins v. Heins, 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001) (discussing the “error correcting function of a Rule 59(e) motion”).

Adverse rulings alone, even if erroneous, are insufficient to establish a trial judge’s bias or prejudice. Butler v. Sea Pines Plantation Co., 282 S.C. 113, 317 S.E.2d 464 (1984). The record must show prejudice, bias, capricious disbelief or prejudgment. Id.

Pursuant to Rule 501 of the South Carolina Appellate Court Rules, Code of Judicial Conduct, Canon 2(B), “a judge shall not allow family ... to influence the judge’s judicial conduct or judgment.” Pursuant to Canon 3(B)(5), “a judge shall perform judicial duties without bias or prejudice.” Canon 3(E)(1) requires that “a judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” Specifically, pursuant to Canon 3(E)(1)(a), the judge must disqualify herself where “the judge has a personal bias or prejudice concerning a party or a party’s lawyer.”

As the South Carolina Court of Appeals observed in Barnes v. Jones Chevrolet Co., Inc., 292 S.C. 607, 358 S.E. 2d 156 (1987):

We, however, observe that in the management and control of a trial, the trial judge should avoid intemperate language, both in what he says and how he says it; constant vigilance in avoiding the appearance of partiality, anger, and impatience is required of trial judges who should be conscious at all times that the high office of a judge of the Court of Common Pleas requires a temperament consonant with the high calling of the judiciary. A trial judge, however, is but human; absolute perfection in judicial temperament and conduct, though much desired, is a goal seldom, if ever, achieved.

If the Court had already concluded that counsel for the Plaintiff had been “condescending”, “illogical”, “and to some extent, disingenuous”, then the Court should have disqualified herself then, or should vacate her previous orders and do so now.

ANALYSIS

In this case brought under the Dealers Act, Peacock Automotive, LLC seeks a pass for engaging in action which is arbitrary, in bad faith, or unconscionable and which causes damages to any of the parties or to the public, because the “person” who was injured in his business or property by anything forbidden in the Dealers Act, also happens to be a dealer.

Moreover, Peacock Automotive, LLC contends that since two of its members, managers, and investors are also Florida lawyers, all of their communications are shielded by the attorney-client privilege, even if the privilege is used to protect fraud, justify wrong, and defeat public policy, resulting in injustice and fundamental unfairness.

1. DENIAL OF PLAINTIFF’S MOTION TO SERVE A SECOND AMENDED AND SUPPLEMENTAL COMPLAINT

On February 5, 2021, the Plaintiff moved to serve a second amended and supplemental complaint. The Court denied the Plaintiff’s motion in a Form 4 Order issued on March 24, 2021.

Rule 15(a), SCRCP, provides:

“A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and *leave shall be freely given when justice so requires and does not prejudice any other party*. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading, whichever period may be the longer, unless the court otherwise orders.” *(emphasis added)*.

Rule 15(d), SCRCP provides:

“Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, *permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a cause of action or defense*. If the court deems it advisable that the

adverse party plead thereto, it shall so order, specifying the time therefor.” *(emphasis added)*.

“Even though a supplemental pleading is technically different than a motion to amend the pleadings under Rule 15(a), *the standard for granting or denying these motions is the same.*” Tanner v. Florence County Treasurer, 336 S.C. 552, 558-59, 521 S.E.2d 153, 156 (1999). Therefore, “South Carolina case law interpreting Rule 15(a), SCRCP, is authoritative” when analyzing a motion to supplement under Rule 15(d), SCRCP. Id. *(emphasis added)*.

“This rule strongly favors amendments and the court is encouraged to freely grant leave to amend.” Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005). The Supreme Court of the United States has referred to the Rule’s “freely given” provision as a “mandate” that “is to be heeded.” Patton v. Miller, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017)(citing Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 226 (1962)). *(emphasis added)*.

The party opposing the motion to amend has the burden of establishing prejudice. Collins Entertainment, Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005). The prejudice that Rule 15 envisions is a **lack of notice that the new issue is to be tried and a lack of opportunity to refute it.** Tanner v. Florence County Treasurer, 336 S.C. 552, 558-59, 521 S.E.2d 153, 156 (1999). *(emphasis added)*.

This matter has not been placed upon the trial roster. Prejudice to the Defendants is not a factor.

In the absence of prejudice to the other party, there must be “a substantial reason to deny it.” Patton, 420 S.C. at 490, 804 S.E.2d at 262. “In the absence of proper reason, such as bad faith, undue delay, or prejudice, a denial of leave to amend is an abuse of

discretion.” Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988). (emphasis added).

A court’s decision to deny a motion to amend **should not be based on the court’s perception of the merits of an amended complaint.** Patton, 420 S.C. at 490-491, 804 S.E.2d at 262. In *rare* cases, however, a trial court may deny a motion to amend if the amendment would be “clearly futile.” Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019). (emphasis added). In this case, the court denied the Plaintiff’s motion to serve a second amended and supplemental complaint based on the Defendants’ argument that doing so would be “clearly futile.”

In Spence v. Spence, 368 S.C. 106, 131, 628 S.E.2d 869, 877 (2006), the majority stated that an amendment would be “clearly futile” where the plaintiff “**failed to present any additional factual allegations or a different theory of recovery which may give rise to a cause of action upon which relief may be granted.**” (emphasis added).

It was incumbent upon the Court to conduct an analysis to determine whether the amendment would in fact be futile. Skydive Myrtle Beach, Inc., 426 S.C. at 183, 826 S.E.2d at 589. In Skydive Myrtle Beach, Inc., the South Carolina Supreme Court “stress[ed] the difficulty of determining whether allowing an amendment to a pleading would be futile without examining the proposed amendment.” Id.

- a. **The proposed Second Amended And Supplemental Complaint clearly presented additional factual allegations and a theory of recovery which gave rise to a cause of action under the Dealers Act**

This action was initiated by the filing of a summons and complaint on April 13, 2020, shortly after the Defendants breached the subject asset purchase agreements (“APAs”). On July 2, 2020, the Plaintiff filed an amended complaint. The next day, on July 3, 2020, the Defendants

initiated a second round of negotiations in an apparent attempt to appear reasonable. The arbitrary, bad faith, and unconscionable conduct that transpired thereafter gave rise to the additional allegations that the Plaintiff incorporated into its proposed second amended and supplemental complaint.

These new allegations were based on events that transpired almost immediately after July 2, 2020, and information gained from the limited discovery provided by the Defendants on December 2, 2020, that was simply unavailable until after the filing of the amended complaint, and clearly galvanized a claim arising under the Dealers Act. In other words, these new factual allegations clearly distinguished this case from a mere contractual dispute arising under § 56-15-80 as the Defendants have attempted to characterize it ad nauseum.

Specifically, paragraphs 107-124 describe events which transpired after the filing of the amended complaint on July 2, 2020. These paragraphs:

- Discuss how the Defendants acted unconscionably by luring Stivers into entering another round of negotiations, which resulted in Stivers producing more sensitive financial information to its in-town competition and *still* did not result in a signed APA (the Defendants used this information and made arguments on the basis of it without supporting affidavits at the hearing);
- Provide context to Stivers' refusal to entertain the July 23, 2020, and October 26, 2020, APAs proposed by the Defendants after negotiations ceased July 15, 2020, which the Defendants have alleged was a failure to mitigate its damages⁴;

⁴ The untimely post-breach/post-counterclaim APAs submitted by the Defendants were never intended to benefit the Plaintiff. Those documents were submitted under seal by the Defendants and were intended for the Defendants' benefit.

The July APA was intended to influence Judge Lee in connection with Defendants' Motion For Early Neutral Evaluation. Notwithstanding the fact that settlement negotiations ceased on July 15, 2020, the Defendants suggested in their motion filed July 30, 2020, that, "The Plaintiff and Defendants have been involved in settlement negotiations resulting in a proposed Asset Purchase Agreement by Defendants for one of the disputed dealerships, a Hyundai dealership in Columbia".

The October APA was intended to influence the evaluator at the Early Neutral Evaluation. Counsel for Defendants admitted having submitted a written position statement to the evaluator without providing a copy to the undersigned.

This was not an original thought. The Defendant in Ward v. Dick Dyer and Associates, Inc., 304 S.C. 152, 403 S.E.2d 310 (1991) attempted a similar maneuver.

- Describe the extent of the damages inflicted upon Stivers as a result of the Defendants' failure to consummate an APA within a reasonable amount of time after the initial breach of the APAs described in the original and amended complaints;
- Reveal how the Defendants have acted in bad faith and abused the civil process.

Paragraphs 21-22, 35-41, 56, 71, and 74 were based upon revelations from the Defendants' discovery responses received on December 4, 2020, along with their motion for summary judgment. Specifically, these paragraphs:

- Demonstrate the bad faith efforts of the Defendants to maintain control of the escrow funds by designating Shutts & Bowen, LLP as the escrow agent.
- Demonstrate how Peacock Automotive, LLC deliberately concealed the fact that J. Gregory Humphries was a member, manager, and investor in Peacock Automotive, LLC;⁵
- Prove that as a consequence of designating Humphries' law firm as the escrow agent, the funds, if ever deposited, never left the custody or control of the Defendants;
- Reveal how Peacock Automotive arbitrarily refused to submit all forms, applications, and documents to General Motors and Hyundai at the same time that the COVID-19 pandemic became a national concern in order to back out of the APAs.

Accordingly, based upon the "freely given" provision of Rule 15, which the Supreme Court of the United States has declared is a "mandate" to be "heeded," the fact that the Defendants cannot possibly demonstrate the type of prejudice envisioned in Tanner, and cannot demonstrate that an amended and supplemental complaint would be "clearly futile," the Court should alter or amend its Form 4 Order dated March 24, 2021, and permit Stivers to file a second amended and supplemental complaint.

"Fraud," shall include...the following:... a promise or representation not made honestly and in good faith...§56-15-10(m).

⁵ "Fraud," shall include . . . an intentional failure to disclose a material fact. §56-15-10(m).

2. DENIAL OF PLAINTIFF'S SECOND MOTION TO COMPEL COMPLETE ANSWERS TO INTERROGATORIES

On February 5, 2021, the Plaintiffs filed a second motion to compel the Defendants to provide complete answers to interrogatories. The Court denied the Plaintiff's motion in a Form 4 Order issued on March 24, 2021.

The Honorable L. Casey Manning previously issued an order dated October 22, 2020, granting Stivers' initial motion to compel. The Plaintiffs filed the second motion to compel after the Defendants' refused to answer interrogatories # 14-15, 21, and 26-31 based on the attorney-client privilege.

Specifically, the Defendants asserted that *all* communications between Warner Peacock, J. Gregory Humphries ("Humphries"), and John M. Brennan ("Brennan"), who happen to be Florida attorneys as well as members/managers/investors and controlling persons of Peacock Automotive, LLC, were privileged. While the attorney-client privilege is intended to protect communications where legal advice is sought from an attorney in his capacity as such, information does not become privileged merely because it was communicated to an attorney. In re Mt. Hawley Insurance Company, 427 S.C. 159, 829 S.E.2d 707 (2019). The Defendants blanketly asserted that the privilege applied to:

- Any and all communications prior to execution by Defendant Warner Peacock of the APAs which are the subject of this action;⁶
- Any and all communications regarding negotiations between Defendant Warner Peacock and Stivers Brothers about the APAs;⁷
- Any and all communications with Defendant Warner Peacock concerning his letter to Plaintiff dated March 27, 2020, purporting to terminate the APAs;⁸
- Any and all communications Defendant Warner Peacock had with anyone concerning the letter from Richard L. McBride, Jr., Esq. to John Cameron E. Katz, Esq. and J. Gregory Humphries, Esq, dated March 30, 2020;⁹

⁶ Interrogatory # 14

⁷ Interrogatory # 15

⁸ Interrogatory # 21

⁹ Interrogatories # 26-27

- Any and all communications Defendant Warner Peacock had with anyone concerning the letter from Richard L. McBride, Jr., Esq. to John Cameron E. Katz, Esq. and J. Gregory Humphries, Esq. dated April 2, 2020.¹⁰
- Any and all communications Defendant Warner Peacock had with anyone concerning the letter from Ryan G. Studemeyer, Esq., dated April 3, 2020 (“demand for adequate assurance of performance”).¹¹

While South Carolina bestows significant weight to the attorney-client privilege, the privilege is not absolute. In re Mt. Hawley Insurance Company, 427 S.C. at 168, 829 S.E.2d at 712. Generally, the party claiming the privilege has the burden of establishing the confidential nature of the communication. Id. Furthermore, *the party asserting the privilege has the initial burden* to make a prima facie showing that the communications in question are privileged (*emphasis added*). Id. 427 S.C. at 169, 829 S.E.2d at 713. The Defendants never met their burden, nor did the Court even bother to make an inquiry into this matter.

Clearly, the Defendants have abused, and will continue to abuse, the attorney-client privilege, and the Court should not have allowed the attorney-client privilege to apply to situations that are clearly out of bounds—like communications between shareholders related to company business. It simply defies logic to suggest that *any and all* communications between Warner Peacock and his fellow members/managers/investors, Brennan and Humphries, are privileged. The Court completely overlooked the fact that Brennan and Humphries have a proprietary interest in Peacock Automotive, LLC! This result would protect Peacock Automotive, LLC from all communications, no matter how interested or sinister.

As a result of the Court’s ruling, Stivers is prejudiced by the lack of an opportunity to gather evidence to prove its case, and now there is no reason to expect that the Defendants will cooperate at a deposition based on the Court’s endorsement of their groundless objections to

¹⁰ Interrogatories # 28-29

¹¹ Interrogatories # 30-31

discoverable information. Moreover, the Court's ruling establishes a dangerous precedent by suggesting that a corporation or a limited liability company can thwart the broad scope of discovery as long as a shareholder or a member happens to be an attorney.

3. GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

On December 9, 2020, the Defendants moved for judgment on the pleadings that the Dealers Act does not apply to this action. The Defendants have frequently characterized this case as merely a breach of contract action and have speculated that S.C. Code Ann. § 56-15-80¹² precludes any dealer from bringing any cause of action under the Dealers Act.

The Court *denied* the Defendants' motion in a Form 4 Order filed on March 24, 2021. On March 25, 2021, without explanation, the Court filed another Form 4 Order amending the March 24, 2021, Form 4 Order and *granting* the Defendants' motion for judgment on the pleadings.

A judgment on the pleadings is in the nature of a demurrer. Brown v. United Insurance Company of America, 268 S.C. 254, 233 S.E.2d 298 (1977). All properly pleaded factual allegations are deemed admitted for purposes of the consideration of a demurrer. Crowe v. Domestic Loans, Inc., 242 S.C. 310, 130 S.E.2d 845 (1963). A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment. Brown, supra.

A judgment on the pleadings is considered to be a drastic procedure by our courts. U.S. Casualty Company v. Hiers, 233 S.C. 333, 104 S.E.2d 561 (1958). A complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. Baldwin v. Sanders, 266 S.C. 394, 223 S.E.2d 602 (1976).

¹² One might also speculate that §56-15-80 is a naked attempt to avoid forum selection and choice of law clauses in franchise agreements with foreign manufacturers and distributors.

Of course, had the Court properly granted the Plaintiff's motion to serve a second amended and supplemental complaint, this issue would have been moot—the additional factual allegations and legal theories alleged therein would have galvanized a claim under S.C. Code Ann. §§ 56-15-30 and 56-15-40 of the Dealers Act, which are the provisions that the Plaintiffs have repeatedly asserted apply to this action.

Nevertheless, the Court granted the Defendants' motion, ostensibly based on the argument that this is merely a breach of contract action as the Defendants suggest, and the assertion that S.C. Code Ann. § 56-15-80 precludes an action brought by one automobile dealer against another.

S.C. Code Ann. § 56-15-80 provides:

"The provisions of this chapter shall apply to all written or oral agreements between a manufacturer or distributor with a motor vehicle dealer including, but not limited to, the franchise offering, the franchise agreement, sales of goods, services or advertising, leases or mortgages of real or personal property, promises to pay, security interests, pledges, insurance contracts, advertising contracts, construction or installation contracts, servicing contracts, and all other such agreements in which the manufacturer, wholesaler, or distributor has any direct or indirect interest."

However, no case has *ever* been decided by any court anywhere which determines the meaning and application of this statute. In other words, Defendants' counsel could not cite any case law in support of *his* exceedingly narrow interpretation that this statute entirely precludes dealers from bringing actions against other dealers, yet the Court nevertheless accepted his outlandish interpretation.

- a. This Court construed S.C. Code Ann. § 56-15-80 in isolation, without reading the Dealers Act as a whole and construing the same general statutory scheme together so that each section is given effect**

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). However, all

rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011).

In ascertaining legislative intent, *“a court should not focus on any single section or provision and should consider the language of the statute as a whole.”* Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690 692 (1996). (emphasis added). As the Court of Appeals recently stated in Fairfield Waverly, LLC v. Dorchester County Assessor, Appellate Case No. 2017-000569:

“We do not look at statutes in isolation. Instead, we consider how the statutes operate with each other when striving to arrive at any one statute’s proper meaning.” (emphasis added).

In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). A comprehensive reading of the Dealers Act as a whole in a manner that harmonizes with its subject matter and accords with its general purposes demonstrates that the Court erred by granting the Defendants’ motion for judgment on the pleadings. In other words, this Court erroneously interpreted S.C. Code Ann. § 56-15-80 in isolation.

The Dealers Act is contained in S.C. Code Ann. § 56-15-10 to -600. These sections must be read together in a manner that accords with its general purpose.

S.C. Code Ann. § 56-15-110(1) provides:

“In addition to temporary or permanent injunctive relief as provided in Section 56-15-40(3)(c), any *person* who shall be injured *in his business* or property by reason *of anything forbidden in this chapter* may sue therefor in the court of

common pleas and shall recover double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (emphasis added).

S.C. Code Ann. § 56-15-10(n) defines "person" as:

"A natural person, *corporation, partnership, trust, or other entity*, and, in case of an entity, it shall include any other entity in which it has a majority interest or effectively controls as well as the individual officers, directors and other persons in active control of the activities of such entity." (emphasis added).

Clearly, the Dealers Act is not limited to consumer protection as the Defendants suggest.

S.C. Code Ann. § 56-15-110(1) provides relief to any "person," which is defined by S.C. Code Ann. 56-15-10(n) to include not just natural persons, but to corporations and other entities as well. Therefore, there is no question that Stivers is a "person" for purposes of S.C. Code Ann. §§ 56-15-110(1) and 56-15-10(n).

If the legislature had intended for the Dealers Act to only apply to consumers, it would not have included the phrase "**who shall be injured in his business**" in § 56-15-110(1). It is impossible to envision a scenario in which a consumer would be "injured in his business" by reason of a violation of the Dealers Act.

§ 56-15-110 further provides that any person may bring an action under the Dealers Act by reason "of anything forbidden in this chapter." Pursuant to § 56-15-30(a), "unfair methods of competition and unfair or deceptive acts or practices as defined in Section 56-15-40 are hereby declared to be unlawful. In other words, they are "forbidden in [this] chapter."

S.C. Code Ann. § 56-15-40(1) provides:

"It shall be deemed a violation of paragraph (a) of Section 56-15-30 for any manufacturer, factory branch, factory representative, distributor, or wholesaler, distributor branch, distributor representative or *motor vehicle dealer* to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damages to any of the parties or to the public." (emphasis added).

There is no dispute that Peacock Automotive, LLC is a “motor vehicle dealer,” or that Stivers is a “person” for purposes of the Dealers Act which alleges that it has been “injured in its business” by Peacock Automotive, LLC engaging in action which is “arbitrary, in bad faith, or unconscionable” and “which causes damages to any of the parties or the public.”

The Defendants have argued ad nauseum that the Dealers Act is a consumer protection act which affords no protection to automobile dealers unless they are involved in a contract identified in § 56-15-80. In their proposed Order, the Defendants have cited Herron v. Century BMW, 378 [sic] S.C. 525, 693 S.E.2d 394, 399 (2010) for support. Herron was vacated in 2011.

The Plaintiff cited three examples of persuasive authority to the contrary decided here in Richland County that suggest otherwise,¹³ but the Court was not persuaded.

If the plain language of Sections 56-15-10, 56-15-20, 56-15-30, 56-15-40, and 56-15-110 were not enough, Section 56-15-320(B) demonstrates that the Dealers Act is applicable in actions between dealers.

Specifically, § 56-15-320(B) states that:

"The bond must be conditioned upon the applicant or licensee complying with the statutes applicable to the license and as indemnification for loss or damage suffered by an owner of a motor vehicle . . . by reason of fraud practiced or fraudulent representation made in connection with the sale or transfer of a motor vehicle by a licensed dealer . . . or loss or damage suffered by reason of the violation by the dealer . . . of this chapter. *An owner who suffers the loss or damage has a right of action against the dealer . . . and against the dealer's . . . surety upon the bond and may recover damages as provided in this chapter.* (emphasis added).

In Connecticut Indemn. Co. v. Burdette Chrysler Dodge Corp., 317 S.C. 406, 453 S.E.2d 902 (Ct. App. 1994)(overruled on *other* grounds¹⁴), the Court of Appeals held that a motor

¹³ Best Auto, Inc. v. Roberts, et al., C.A. No. 2010-CP-40-3158; Dick Dyer & Associates, Inc. v. Moores Cars, LLC, C.A. No. 2014-CP-40-03041; Mathes Auto Sales, Inc. v. Pro Bowl Motors, Inc., et al., C.A. No. 2016-CP-40-06794

¹⁴ Defendants' counsel duplicitously asserts that Burdette has been overruled in its entirety based on Mid-State Auto Auction of Lexington, Inc. v. Altman, *supra*. In Altman, the Supreme Court made it clear that it was only overruling

vehicle dealer was an “owner of a motor vehicle” within the meaning of § 56-15-320(B), and that the Dealers Act “does not limit recovery under a motor vehicle dealer bond simply to *consumers*.”

Based on the clear language of the statute—read in consonance with the entirety of the Dealers Act, the Court of Appeals in Burdette also remanded the matter to the trial court to determine whether the defendant automobile dealer had also violated S.C. Code Ann. § 56-15-40. The Court of Appeals plainly recognized that a dealer could be liable to another dealer under § 56-15-40, in a case that never once mentioned § 56-15-80.

Based on the foregoing, the Court should alter or amend its Form 4 Order dated March 25, 2021, and permit Stivers to proceed with its cause of action against the Defendants under the Dealers Act.

CONCLUSION

Stivers submits that the Court should alter or amend its Form 4 Orders issued on March 24, 2021, and March 25, 2021.

Specifically, the Court should amend its Form 4 Order issued on March 24, 2021, to grant Stivers’ motion to serve a second amended and supplemental complaint, and to grant Stivers’ second motion to compel complete answers to interrogatories. Amending and supplementing the complaint will not be “clearly futile” under the standard propounded in Spence, and would cause no prejudice to the Defendants as envisioned by the Tanner decision.

The Defendants should further be compelled to answer interrogatories # 14-15, 21, and 26-31 and to cease abusing the attorney-client privilege to protect fraud, justify wrong, and

Burdette “to the extent it recites that the latter part of § 56-15-320 allows recovery by anyone, not just motor vehicle owners, for loss or damages suffered as a result of a dealer violating any of the provisions in Chapter 15, Title 56.”

defeat public policy, resulting in injustice and fundamental unfairness. No rational, impartial person could possibly consider the notion that Humphries and Brennan, as members, managers, and investors with a proprietary stake in Peacock Automotive, LLC, have *exclusively* provided legal advice to Warner Peacock and/or Peacock Automotive, LLC in their capacity as Florida attorneys and not as members, managers, and investors.

The Court should also amend its Form 4 Order issued on March 25, 2021, to deny the Defendants' motion for judgment on the pleadings. Rather than reading the Dealers Act as a whole and construing the same general statutory scheme together so that each section is given effect as the legislature intended, the Court read § 56-15-80 in isolation as Defendants' counsel intended. In effect, the Court took the bait and engaged in judicial legislation to re-write § 56-15-110 to state:

“... any person, *other than a dealer, no matter how big or how small*, who shall be injured in his business or property by anything forbidden in this chapter may sue therefore in the court of common pleas and shall recover double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee.”

As a result, the Court erroneously interpreted one section out of the entirety of Title 56, Chapter 15 and construed it to mean that one dealer cannot sue another dealer under the Dealers Act, despite the lack of any case law in support of this proposition. In fact, the Court completely disregarded case law from this very circuit to the contrary.

Signature appears on the following page

STUDEMAYER LAW FIRM, P.C.

/s/ J. Gregory Studemeyer

J. Gregory Studemeyer

Ryan G. Studemeyer

7478 Carlisle Street

P.O. Box 1014

Irmo, S.C. 29063

(803) 393-4399

Attorneys for Plaintiff

Irmo, South Carolina

April 2, 2021



STUDEMEYER LAW FIRM

7478 Carlisle Street | Post Office Box 1014
Irmo, South Carolina 29063
(803) 393-4399

J. Gregory Studemeyer
greg@studemeylawfirm.com

Ryan G. Studemeyer
ryan@studemeylawfirm.com

March 12, 2021

via email jnewmansc@sccourts.org
and Confirmed by U.S. Mail

The Honorable Jocelyn Newman
1701 Main Street, Room 223
P.O. Box 192
Columbia, South Carolina 29202-0192

Re: Stivers Brothers Automotive, Inc. v. W. Warner Peacock and
Peacock Automotive, LLC
Case No.: 2020-CP-40-01934

Dear Judge Newman:

My son and I represent the Plaintiff in this case and the Defendants are represented by Bradford N. Martin and Laura W. H. Teer of Greenville.

We received a number of hearing notices on March 3, 2021, indicating that certain pending motions are scheduled before your Honor on March 23, 2021, beginning at 9:30 AM. Having begun my review of these motions, I felt it appropriate to bring the following matters to the Court's attention so that the Court will be in a position to make the best use of the time set aside for these motions.

First, the Plaintiff's second motion to enlarge time filed on September 14, 2020, is still pending but is not listed on the motion roster. I either need opposing counsel's consent or a ruling to establish that my responses to Defendants' second request to produce and responses to Defendants' first request to admit were timely served in accordance with Rule 6(b).

Second, the Plaintiff's motion to alter or amend filed on October 12, 2020, is still pending but is not listed on the motion roster. Initially, a proposed consent order resolving this motion was submitted to Judge Lee. Subsequently, opposing counsel filed a memorandum in opposition. If opposing counsel withdraws his objection and if Judge Lee signs the proposed order, this motion can be resolved. Otherwise, I need a ruling on this motion to address certain matters that might otherwise be construed as findings without evidentiary support.

Next, I'm not sure why the motions are listed in the order in which they are listed on the motion roster. I am prepared to address them in the order listed. If the Court will entertain these motions in

EXHIBIT A

ELECTRONICALLY FILED - 2021 Apr 02 1:52 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

The Honorable Jocelyn Newman
March 12, 2021
Page 2

some other order, such as based on the date of filing, it would be helpful to know in advance for purposes of preparation.

Finally, as the Court may already recognize, these are complicated and contentious matters. Unless the Court is thoroughly familiar with all of these matters before the hearing commences, then sufficient time has probably not been set aside to hear them.

Thank you for your willingness to consider these matters in advance.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Gregory Studemeyer". The signature is stylized with a large, looping initial "J" and "G".

J. Gregory Studemeyer

cc: Bradford N. Martin, Esq. via email and Confirmed by U.S. Mail
Laura W. H. Teer, Esq. via email and Confirmed by U.S. Mail

BRADFORD NEAL MARTIN & ASSOCIATES, PA
ATTORNEYS AT LAW

Post Office Box 10410 (29603)
201 West McBee Avenue, Suite 302
Greenville, South Carolina 29601

bmartin@bunlaw.com
Phone: (864) 552-9990
FAX: (864) 552-9992

March 15, 2021

Via email jnewmansc@sccourts.org and US Mail
The Honorable Jocelyn Newman
1701 Main Street
Room 223
Columbia, SC 29202

RE: *Stivers Brothers v. Peacock Automotive et al*
C/A No. 2020-CP-40-01934

Dear Judge Newman:

My firm represents the Defendants in the above matter, and I write to respond to a recent letter sent to you by Plaintiff's counsel in this case.

The March 23, 2021 Docket lists all the pending Motions which this Court can hear. Plaintiff's Motion to Alter or Amend Judge Lee's October 2, 2020 Order is a matter that must be heard by Judge Lee. *Shirley's Iron Works, Inc. v. City of Union, S.C., Gilbert Grp. LLC*, 403 S.C. 560, 743 S.E.2d 778 (2013) ("This State has a long-standing rule that one judge of the same court cannot overrule another.")

Plaintiff's Second Motion to Stay and/or Enlarge was made part of its Third Motion, which is scheduled to be heard by the Court. After Plaintiff's Second Motion to Enlarge its time to answer was filed on September 14, 2020, Judge Manning issued his October 22nd Order granting Plaintiff's request to answer Defendants' discovery within 30 days after receiving Defendants' responses. Plaintiff's Third Motion to Stay and/or Enlarge Time, filed on December 23, 2020, recognizes a January 3rd response deadline. We would agree that this Order applied to both the first and second Motions to Enlarge and that Plaintiff's responses to all discovery were due 30 days after Defendants' responses were served on December 4, 2020.

The parties are currently fourth on the Court's 9:30 a.m. roster with the next cases scheduled at 2 p.m. The first three cases are scheduled for a total of 35 minutes. Assuming the first three cases may take an hour to be heard, this would still afford the Court more than two hours to hear the Motions.

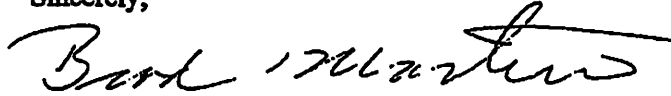
The Docket lists the Motions in reverse chronological order, which may not be the order in which the Court intends to hear them. Defendants' Motions for Judgment on the Pleadings and for Summary Judgment are the earliest filed Motions on the docket and, as dispositive Motions, may eliminate the need for hearing the remaining Motions.

EXHIBIT B

The Hon. Jocelyn Newman
March 15, 2021
Page 2

Please let us know your preference for hearing the Motions. Thank you for your consideration of these matters.

Sincerely,

A handwritten signature in cursive script, appearing to read "Brad N. Martin".

Bradford N. Martin

BNM/pm

cc: J. Gregory Studemeyer, Esq. *via email and US Mail*
Ryan G. Studemeyer, Esq. *via email and US Mail*

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STUDEMEYER LAW FIRM

7478 Carlisle Street | Post Office Box 1014
Irmo, South Carolina 29063
(803) 393-4399

J. Gregory Studemeyer
greg@studemeylawfirm.com

Ryan G. Studemeyer
ryan@studemeylawfirm.com

March 17, 2021

via email jnewmanse@sccourts.org
and Confirmed by U.S. Mail

The Honorable Jocelyn Newman
1701 Main Street, Room 223
P.O. Box 192
Columbia, South Carolina 29202-0192

Re: Stivers Brothers Automotive, Inc. v. W. Warner Peacock and
Peacock Automotive, LLC
Case No.: 2020-CP-40-01934

Dear Judge Newman:

I received notices of hearing on several motions in the above referenced matter on March 3, 2021. A hearing is scheduled before your Honor for next Tuesday morning at 9:30 AM. The notices requested that any briefs or memoranda be filed the Wednesday before the week of the hearing. Opposing counsel has cleverly decided to wait until this afternoon to dump the following documents on me with insufficient time to respond:

Defendants' Reply Memorandum In Support Of Its Motion For Summary Judgment;

Defendants' Reply Memorandum In Opposition To Plaintiff's Second Motion To Compel;

W. Warner Peacock And Peacock Automotive, LLC's Reply To Plaintiff's Memorandum In Opposition To Defendants' Motion And Memorandum To Seal;

Defendants' Reply Memorandum In Support Of Its Motion For Judgment On The Pleadings;

Defendants' Response To Plaintiff's Motion For [sic] Second Amended Complaint

As suggested earlier this week, these are complicated and contentious matters. If neither I nor the Court had anything else to do, there might be time to address all of these matters in the three business days before he hearing.

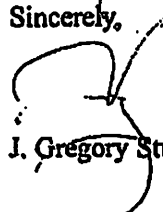
EXHIBIT C

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The Honorable Jocelyn Newman
March 17, 2021
Page 2

As suggested in the hearing notices, I plan to file a motion for a continuance in the morning to allow sufficient time to address these matters. I just wanted to give your Honor a heads up on my intentions.

Sincerely,



J. Gregory Studemeyer

cc: The Honorable L. Casey Manning via email and Confirmed by U.S. Mail
Bradford N. Martin, Esq. via email and Confirmed by U.S. Mail
Laura W. H. Teer, Esq. via email and Confirmed by U.S. Mail

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BRADFORD NEAL MARTIN & ASSOCIATES, PA
ATTORNEYS AT LAW

Post Office Box 10410 (29603)
201 West McBee Avenue, Suite 302
Greenville, South Carolina 29601

bmartin@bnmlaw.com
Phone: (864) 552-9990
FAX: (864) 552-9992

March 18, 2021

Via email jnewmunsc@sccourts.org and US Mail

The Honorable Jocelyn Newman
1701 Main Street
Room 223
Columbia, SC 29202

RE: *Stivers Brothers v. Peacock Automotive et al*
C/A No. 2020-CP-40-01934

Dear Judge Newman:

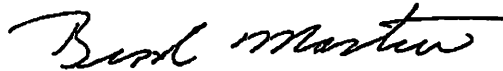
I need to respond to Mr. Studemeyer's most unusual letter of March 17th. It is indeed puzzling that he objects to my following of this Court's instructions to "file any briefs or memorandums the Wednesday before the week of the hearing..."

There is no unfair surprise to the Plaintiff in this case.. Defendant filed memoranda with its Motions in December and Plaintiff already has filed thorough briefs in response. Defendants' March 17th filings regarding the Motion for Judgment on the Pleadings, for Summary Judgment, and to Seal were in reply to those briefs.

The remaining Motions to Amend Plaintiff's Complaint a second time and to Compel Discovery are Plaintiff's Motions. Again, Plaintiff has filed Memoranda in support of its positions and Defendants have timely responded.

The Court's filing preferences indicate the time before a hearing the Court believes is appropriate for parties to file briefs and Defendants have filed their responsive briefs within that time. Certainly, six days is plenty of time to prepare for motions in this almost one year old case. Finally, any Motion for Continuance can only be addressed by the Chief Administrative Judge.

Sincerely,



Bradford N. Martin

BNM/pm

cc: The Hon. L. Casey Manning, *via email and US Mail*
J. Gregory Studemeyer, Esq. *via email and US Mail*
Ryan G. Studemeyer, Esq. *via email and US Mail*

EXHIBIT D



Greg Studemeyer <greg@studemeyerlawfirm.com>

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Stivers v. Peacock / CA No. 2020-CP-40-01934

2 messages

Peggy McComb <pmccomb@bnmlaw.com>

Thu, Mar 18, 2021 at 4:24 PM

To: "Newman, Jocelyn Law Clerk (Chandra Stallworth)" <jnewmanlc@sccourts.org>,
"jnewmansc@sccourts.org" <jnewmansc@sccourts.org>Cc: Brad Martin <bmartin@bnmlaw.com>, Laura Teer <lteer@bnmlaw.com>, Greg Studemeyer
<greg@studemeyerlawfirm.com>, Ryan Studemeyer <ryan@studemeyerlawfirm.com>, Heather Watford
<heather@studemeyerlawfirm.com>

Ms. Stallworth,

We are putting together a courtesy binder for Judge Newman of the
Motions and Responses for the hearings next Tuesday.

Would you please let me know if she would prefer to receive these
tomorrow or Monday.

Thank you for your assistance.

*Peggy McComb**Legal Assistant*

Bradford Neal Martin & Associates, PA

Post Office Box 10410 (29603)

201 West McBee Avenue, Suite 302

Greenville, South Carolina (29601)

864.552.9990

864.552.9992 fax

pmccomb@bnmlaw.com

EXHIBIT E

4/1/2021

studemeyerlawfirm.com Mail - Stivers v. Peacock / CA No. 2020-CP-40-01934

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Newman, Jocelyn Law Clerk (Chandra Stallworth) <jnewmanlc@sccourts.org> Fri, Mar 19, 2021 at 8:50 AM

To: Peggy McComb <pmccomb@bnmlaw.com>

Cc: Brad Martin <bmartin@bnmlaw.com>, Laura Teer <lteer@bnmlaw.com>, Greg Studemeyer <greg@studemeyerlawfirm.com>, Ryan Studemeyer <ryan@studemeyerlawfirm.com>, Heather Watford <heather@studemeyerlawfirm.com>

Good morning:

Please submit the courtesy binder no later than Monday, March 22nd. If you have any additional questions feel free to let me know.

Respectfully,

Chandra Austin Stallworth, Ph.D., J.D.

Law Clerk to The Honorable Jocelyn Newman

1701 Main Street, Suite 223

Columbia, SC 29202

Phone: 803-576-1780

jnewmanlc@sccourts.org

From: Peggy McComb <pmccomb@bnmlaw.com>

Sent: Thursday, March 18, 2021 4:24 PM

To: Newman, Jocelyn Law Clerk (Chandra Stallworth) <jnewmanlc@sccourts.org>; Newman, Jocelyn Secretary (Ebony Martin) <jnewmansc@sccourts.org>

Cc: Brad Martin <bmartin@bnmlaw.com>; Laura Teer <lteer@bnmlaw.com>; Greg Studemeyer <greg@studemeyerlawfirm.com>; Ryan Studemeyer <ryan@studemeyerlawfirm.com>; Heather Watford

4/1/2021

studemeyerlawfirm.com Mail - Stivers v. Peacock / CA No. 2020-CP-40-01934

<heather@studemeyerlawfirm.com>

Subject: Stivers v. Peacock / CA No. 2020-CP-40-01934

*** EXTERNAL EMAIL: This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

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BRADFORD NEAL MARTIN & ASSOCIATES, PA
ATTORNEYS AT LAW

Post Office Box 10410 (29603)
201 West McBee Avenue, Suite 302
Greenville, South Carolina 29601

bmartin@bnmlaw.com
Phone: (864) 552-9990
FAX: (864) 552-9992

March 18, 2021

Via Overnight Mail
The Honorable Jocelyn Newman
Richland County Courthouse
1701 Main Street
Room 223
Columbia, SC 29202

RE: *Stivers Brothers v. Peacock Automotive et al*
C/A No. 2020-CP-40-01934

Dear Judge Newman:

Enclosed for your review for the March 23, 2021 Motions Roster is a binder of the following documents:

Defendants' Motion for Summary Judgment
Defendants' Amendment to Motion for Summary Judgment
Plaintiff's Opposition to Motion for Summary Judgment
Defendants' Reply in Support of Motion for Summary Judgment

Defendants' Motion for Judgment on the Pleadings
Plaintiff's Motion and Memorandum for Judgment on the Pleadings and Memorandum in
Opposition to Defendants' Motion for Judgment on the Pleadings
Plaintiff's Supplemental Memorandum in Support of Motion for Judgment
on the Pleadings and Opposition to Defendants' Motion
Defendants' Reply in Support of Motion/Judgment on the Pleadings

Defendants' Motion to Seal
Plaintiff's Memorandum in Opposition to Motion to Seal
Defendants' Reply in Support of Motion to Seal

Plaintiff's Motion to Stay or Enlarge Time
Defendants' Objection to Motion to Stay

Plaintiff's Motion to Serve Second Amended Complaint
Plaintiff's Memorandum in Support of Second Amended Complaint
Defendants' Opposition to Second Amended Complaint

EXHIBIT F

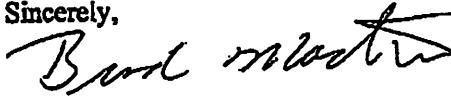
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The Hon. Jocelyn Newman
March 18, 2021
Page 2

Plaintiff's Second Motion to Compel
Plaintiff's Memorandum in Support of Motion to Compel
Defendants' Opposition to Motion to Compel

We look forward to discussing these matters with you on Tuesday.

Sincerely,



Bradford N. Martin

BNM/pm
Enclosures

cc: J. Gregory Studemeyer, Esq. (w/out enclosures) *via email only*
Ryan G. Studemeyer, Esq. (w/out enclosures) *via email only*

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3/18/2021

studemeyerlawfirm.com Mail - Stivers v. Peacock



Greg Studemeyer <greg@studemeyerlawfirm.com>

Stivers v. Peacock.

Thu, Mar 18, 2021 at 10:53 AM

Greg Studemeyer <greg@studemeyerlawfirm.com>

To: CManningLC@sccourts.org

Cc: Brad Martin <bmartin@bnmlaw.com>, Laura Teer <lteer@bnmlaw.com>, Peggy McComb <pmccomb@bnmlaw.com>, "Newman, Jocelyn Law Clerk (Chandra Stallworth)" <jnewmanlc@sccourts.org>, jnewmansc@sccourts.org, Ryan Studemeyer <ryan@studemeyerlawfirm.com>

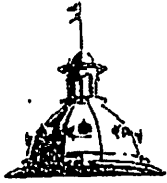
Dear Mr. Shiver:

Attached are copies of a motion for continuance and receipt for payment of the filing fee in the matter of Stivers Brothers Automotive, Inc. v. W. Warner Peacock, et al. I'm seeking a continuance of a hearing scheduled before Judge Newman on Tuesday at 9:30 AM.

Please bring this matter to Judge Manning's attention at your earliest convenience. I understand that this motion can be granted without a hearing pursuant to paragraph (c)(4) of the Order RE: Operation of the Trial Courts During the Coronavirus Emergency (As Amended March 4, 2021) (Appellate Case No. 2020-000447).

Thanks,

Greg



J. Gregory Studemeyer
Studemeyer Law Firm

7478 Carlisle Street | P.O. Box 1014

Irmo, SC 29063

www.studemeyerlawfirm.com

Office: (803) 393 4399 | Cell: (803) 397 5676

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MOTION FOR CONTINUANCE and accompanying documents.pdf
369K

EXHIBIT G

ELECTRONICALLY FILED - 2021 Apr 02 1:52 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2020-CP-40-01934
STIVERS BROTHERS	)	
AUTOMOTIVE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	MOTION FOR CONTINUANCE
	)	
W. WARNER PEACOCK	)	
and PEACOCK AUTOMOTIVE, LLC,	)	
	)	
Defendants.	)	

TO: BRADFORD N. MARTIN, ESQ., ATTORNEY FOR DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorney for the Plaintiff, will move before the Honorable L. Casey Manning, Chief Administrative Judge of the Court of Common Pleas for the Fifth Judicial Circuit, for an order granting a continuance of a hearing scheduled for March 23, 2021, at 9:30 AM before the Honorable Jocelyn Newman on Defendants' motions for summary judgment, to seal, and for judgment on the pleadings, and Plaintiff's second motion to enlarge time, motion to alter or amend, motion to stay or enlarge time, second motion to compel, cross-motion for judgment on the pleadings, and motion to serve a second amended and supplemental complaint.

The undersigned will show that three hearings are scheduled before the instant hearing and that the following additional documents were filed just before the Wednesday afternoon deadline listed on the notices of hearing issued on March 3, 2021:

Defendants' Reply Memorandum In Support Of Its Motion For Summary Judgment;

Defendants' Reply Memorandum In Opposition To Plaintiff's Second Motion To Compel;

W. Warner Peacock And Peacock Automotive, LLC's Reply To Plaintiff's Memorandum In Opposition To Defendants' Motion And Memorandum To Seal;

Defendants' Reply Memorandum In Support Of Its Motion For Judgment On The Pleadings;
and

Defendants' Response To Plaintiff's Motion For [sic] Second Amended Complaint

The undersigned will show that the above documents span some 92 pages. In addition, counsel for the Defendants have submitted an additional 60 pages of documents by email to Judge Newman to consider in connection with Defendants' motion to seal.

The undersigned will show that given other responsibilities of the Court and counsel, three (3) business days is insufficient time for both the Court and counsel to digest all of Defendants' Eleventh

Hour submissions, and the authority cited therein, and to address all of the pending motions in less than the two (2) hours set aside for the hearing.

Based upon the foregoing, the undersigned moves for a continuance until such time as the Court can schedule an in-person status conference and consider the Plaintiff's second motion to designate as complex to be filed in connection herewith.

The undersigned certifies that consultation with opposing counsel would serve no useful purpose.

STUDEMAYER LAW FIRM, P.C.

**By: s/J. Gregory Studemeyer
J. Gregory Studemeyer
SC Bar #5416
7478 Carlisle Street
Post Office Box 1014
Irmo, South Carolina 29063
803-393-4399
Attorney for the Plaintiff**

**Irmo, South Carolina
March 18, 2021**

3/18/2021

studemeyerlawfirm.com Mail - Accepted Notice: Your filing, Re: 2020CP4001934 - (140) Breach of Contract - Motion/Continuance, was a...



Heather Watford <heather@studemeyerlawfirm.com>

Accepted Notice: Your filing, Re: 2020CP4001934 - (140) Breach of Contract - Motion/Continuance, was accepted

1 message

efiledonotreply@sccourts.org <efiledonotreply@sccourts.org>

Thu, Mar 18, 2021 at 10:29 AM

To: greg@studemeyerlawfirm.com

Cc: heather@studemeyerlawfirm.com

To: Joseph Gregory Studemeyer greg@studemeyerlawfirm.com
From: efiledonotreply@sccourts.org
Date: 2021-03-18 10:23:52.117
Subject: Your electronic filing, Re: 2020CP4001934 - (140) Breach of Contract - Motion/Continuance, was accepted by CIRCUIT COURT.

Case Number: 2020CP4001934

Case Type: (140) Breach of Contract

Document Type: Motion/Continuance

Reason(s): (none provided)

--- CONFIDENTIALITY NOTICE --- This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

ELECTRONICALLY FILED - 2021 Apr 02 1:52 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

Payment Receipt Confirmation

Your payment was successfully authorized. Your credit or debit card will not be charged until the Clerk of Court accepts your filing.

Receipt Contact Information

Contact Name Richland County -
Common Pleas -
40002 - E-Filings

Transaction Summary**Receipt Confirmation**

Description	Amount
Richland County - Common Pleas - 40002 - E-Filings	\$30.00
ServiceFee*SC.GOV	\$1.74
TOTAL	\$31.74

The online price of items or services purchased through SC.GOV, the state's official Web portal, includes funds used to develop, maintain, enhance and expand the service offerings of the state's portal.

Customer Information

Customer Name Joseph Gregory **Receipt Date** 3/18/2021
 Studemeyer **Receipt Time** 10:26:33 AM EDT
Local Reference ID F_3508081_4636

Payment Information

Payment Type	Credit Card	Credit Card Num...	*****8494
Credit Card Type	VISA	Order ID	115433348
		Name on Credit ...	J. Gregory Studemeyer

Billing Information

Billing Address	Studemeyer Law Firm	Phone Number	803-393-4399
Address 2	PO Box 1014	This receipt has been emailed to the address below.	
Billing City, State	Irmo, SC		
ZIP/Postal Code	29063	Email Address	greg@studemeyerlawfirm.com
Country	US		



STUDEMEYER LAW FIRM

7478 Carlisle Street | Post Office Box 1014
Irmo, South Carolina 29063
(803) 393-4399

J. Gregory Studemeyer
greg@studemeyerlawfirm.com

Ryan G. Studemeyer
ryan@studemeyerlawfirm.com

March 22, 2021

via email jnewmansc@sccourts.org
and HAND-DELIVERED

The Honorable Jocelyn Newman
1701 Main Street, Room 223
P.O. Box 192
Columbia, South Carolina 29202-0192

Re: Stivers Brothers Automotive, Inc. v. W. Warner Peacock and
Peacock Automotive, LLC
Case No.: 2020-CP-40-01934

Dear Judge Newman:

In my letter dated March 12, 2021, I tried to prepare the Court for the fact that this is a difficult, paper intensive, and contentious matter. I have moved on two occasions for designation of this case as complex. Perhaps, you will understand why, on or before Tuesday's hearing.

I received an email from Ms. McComb, Brad Martin's legal assistant, on March 19, 2021, with a copy of a letter from Brad to you dated March 18, 2021, without enclosures, indicating that he had sent a binder to you with copies of motions and memoranda. These documents were not listed in the order the motions are listed on the roster. Rather, it appears that the binder is arranged in such a manner as to presume that the Court will entertain the Defendants' motions before entertaining any of the Plaintiff's motions.

I get it. According to his letter to you dated March 15, 2021, Brad assumes that if you rule in his favor on his motions for summary judgment and for judgment on the pleadings, my motion to serve a second amended and supplemental complaint will never be heard. By the same token, if my motion to serve a second amended and supplemental complaint is heard first and granted, Brad's motions for summary judgment and for judgment on the pleadings will be moot. This was why I asked for the Court's guidance in my letter dated March 12, 2021.

I trust that the Court will not rule on any motions until both parties have been heard. I also trust that the Court will make sure that neither party is prevented from making a full presentation by the

EXHIBIT H

ELECTRONICALLY FILED - 2021 Apr 02 1:52 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

The Honorable Jocelyn Newman
 March 22, 2021
 Page 2

filibuster of the other party.

I am providing copies of the following documents that were filed prior to the motions for summary judgment and judgment on the pleadings and would ask that you insert them in chronological order in the binder:

Plaintiff's Second Motion To Enlarge Time filed September 14, 2020;

proposed Amended And Restated Order Relating To Complex Case Designation And Early Neutral Evaluation submitted to Judge Lee on October 12, 2020 (consent order);

Motion To Alter Or Amend filed October 12, 2020;

Memorandum In Opposition To Plaintiff's Motion To Alter Or Amend filed October 19, 2021.

Since any ruling on a motion for summary judgment under Rule 56, SCRCP requires the Court to consider the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and those items were apparently omitted from the binder, I am providing the following documents so that they might be added to give the Court a complete record to consider:

Amended Complaint filed July 2, 2021;

Answer And Counterclaims Of Defendants Peacock Automotive, LLC And W. Warner Peacock To Plaintiff's Amended Complaint filed July 17, 2020;

Reply To Answer And Counterclaims Of Defendants Peacock Automotive, LLC And W. Warner Peacock To Plaintiff's Amended Complaint filed July 29, 2021;

Affidavit of Richard L. McBride, Jr. filed October 12, 2020;

Affidavit of J. Gregory Humphries filed December 4, 2020;

Plaintiff's First Set Of Interrogatories To The Defendants filed March 15, 2021;

W. Warner Peacock And Peacock Automotive, LLC's Response To Plaintiff's First Set Of Interrogatories filed March 12, 2021;

Plaintiff's Second Request For Admission To Defendants filed March 12, 2021;

Defendants' Responses To Plaintiff's Second Request For Admission filed March 12, 2021;

Plaintiff's Responses To Defendants' First Request To Admit filed March 19, 2021;

Plaintiff's Responses To Defendants' Second Request To Admit filed March 19, 2021

Also, since one of the issues to be determined is whether the underlying asset purchase

The Honorable Jocelyn Newman
 March 22, 2021
 Page 3

agreements are ambiguous, and both parties have referred to them in their pleadings and memoranda, I am providing the following documents:

ASSET PURCHASE AND SALE AGREEMENT (CHEVROLET) dated January 7, 2020, filed March 19, 2021; and

ASSET PURCHASE AND SALE AGREEMENT (HYUNDAI) dated January 7, 2020, filed March 19, 2021.

With respect to the cross-motions for judgment on the pleadings, I am providing the following orders that, while not binding, may throw light upon the issues before the Court:

Order For Judgment issued by the Honorable Clifton Newman in the matter of Best Auto, Inc. v. Gary D. Roberts, et al. (Case No. 2010-CP-40-3158) filed May 30, 2012;

Order For Judgment issued by the Honorable L. Casey Manning in the matter of Dick Dyer & Associates, Inc. v. Moore's Cars, LLC, et al (Case No. 2014-CP-40-03041) filed July 7, 2015; and

Order For Judgment issued by the Honorable Joseph M. Strickland in the matter of Mathes Auto Sales, Inc. v. Otis Morris, Jr., et al (Case No. 2016-CP-40-6794) filed June 20, 2018.

As the Court can readily discern, the legal arguments advanced by the parties on every issue are in stark contrast. For example, while the Plaintiff seeks both actual and punitive damages in its amended complaint, the Defendants assert in their answer and counterclaim that any award of punitive damages violates both the Constitutions of South Carolina and the United States. Nonetheless, the Defendants seek an award of punitive damages in their prayer for relief.

Someone is providing accurate and reliable information. Someone is gaslighting the Court. Perhaps, the Court should review the memoranda and verify citations of authority to determine what information is reliable, and what information is not.

I've done my best to suggest that two (2) hours or less will be insufficient to address all of the matters before the Court. Although I'm no speed reader, I've read these asset purchase agreements several times and it still takes me about an hour to read and digest each one of them. You are being asked to review these two (2) fully executed agreements and two (2) additional agreements that were rejected by the Plaintiff submitted in connection with Defendants' motion to seal.

Brad and I have had an opportunity to grow up with this case over the past 11 months. In my opinion, it is completely unreasonable to suggest that any judge can give this matter the attention it deserves in the time scheduled for the hearing.

Judge Manning and Judge Lee have already had to deal with this case on a piecemeal basis. I encourage the Court to grant my motion for continuance, take the time to review and digest all of the documents that have been presented, reschedule a hearing when the Court is familiar with all of these matters, and retain jurisdiction over this case in the interest of judicial economy.

The Honorable Jocelyn Newman
March 22, 2021
Page 4

Thank you in advance for your assistance and cooperation.

Sincerely,



J. Gregory Studemeyer

cc: Bradford N. Martin, Esq. via email and Confirmed by U.S. Mail
Laura W. H. Teer, Esq. via email and Confirmed by U.S. Mail

ELECTRONICALLY FILED - 2021 Apr 02 1:52 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

3/22/2021

studemeylawfirm.com Mail - Stivers Brothers Automotive, Inc. v. W. Warner Peacock and Peacock Automotive, LLC Case No.: 2020-C...



Heather Watford <heather@studemeylawfirm.com>

ELECTRONICALLY FILED - 2021 Apr 02 1:52 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

Stivers Brothers Automotive, Inc. v. W. Warner Peacock and Peacock Automotive, LLC Case No.: 2020-CP-40-01934

1 message

Heather Watford <heather@studemeylawfirm.com>

Mon, Mar 22, 2021 at 10:26 AM

To: aleelc@sccourts.org

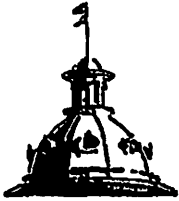
Cc: jnewmansc@sccourts.org, bmartin@bnmlaw.com, lteer@bnmlaw.com

Judge Lee:

Good morning.

Please see attached letter from Greg Studemeyer regarding the above matter.

Thank you,



Heather Watford
Legal Assistant
Studemeyer Law Firm

7478 Carlisle Street | P.O. Box 1014
Irmo, SC 29063
www.studemeylawfirm.com
(803) 393 4399

Letter to The Honorable Alison Renee Lee.pdf
236K

EXHIBIT I



STUDEMEYER LAW FIRM

7478 Carlisle Street | Post Office Box 1014
Irmo, South Carolina 29063
(803) 393-4399

J. Gregory Studemeyer
greg@studemeylawfirm.com

March 22, 2021

Ryan G. Studemeyer
ryan@studemeylawfirm.com

via email alcele@sccourts.org
and Confirmed by U.S. Mail

The Honorable Alison Renee Lee
Circuit Court Judge
Fifth Judicial Circuit
P.O. Box 192
Columbia, South Carolina 29202-0192

Re: Stivers Brothers Automotive, Inc. v. W. Warner Peacock and
Peacock Automotive, LLC
Case No.: 2020-CP-40-01934

Dear Judge Lee:

I need your help. Judge Jocelyn Newman is scheduled to hear a number of motions in the above matter on March 23, 2021, at 9:30 AM. One of two motions not listed on the roster is a motion to alter or amend that I filed on October 12, 2021, addressing your Order Relating To Complex Case Designation And Early Neutral Evaluation filed on October 2, 2021.

Opposing counsel and I entered into a consent order to address my concerns about that order. Recognizing that you likely would not have an opportunity to review the consent order before the deadline for filing a Rule 59(c) motion, I filed a motion on October 12, 2021. Subsequently, opposing counsel reneged on his consent and filed a memorandum in opposition on October 19, 2021.

Attached is a copy of an email from opposing counsel granting me permission to affix his electronic signature on the consent order. Also attached is a copy of the cover letter I forwarded to you with the proposed consent order dated October 12, 2021.

Opposing counsel suggests that no one other than you can address this matter. He and I have rarely agreed upon anything in this case, but he *might* be right this time. His consent should be sufficient for any judge, but out of an abundance of caution, and as a matter of comity, I would ask that you address it first. Perhaps, you can help Judge Newman avoid one of several pending motions in this case by addressing this one.

ELECTRONICALLY FILED - 2021 Mar 22 1:52 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

The Honorable Alison Rence Lee
March 22, 2021
Page 2

Thank you in advance for your assistance and cooperation.

Sincerely,



J. Gregory Studemeyer

Enclosures

cc: The Honorable Jocelyn Newman via email and Confirmed by U.S. Mail
Bradford N. Martin, Esq. via email and Confirmed by U.S. Mail
Laura W. H. Teer, Esq. via email and Confirmed by U.S. Mail

ELECTRONICALLY FILED - 2021 Apr 02 1:52 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

10/10/2020

studemeyerlawfirm.com Mail - Stivers v. Peacock



Greg Studemeyer <greg@studemeyerlawfirm.com>

Stivers v. Peacock

Brad Martin <bmartin@bnmlaw.com>
To: Greg Studemeyer <gesquire54@gmail.com>

Fri, Oct 9, 2020 at 5:21 PM

Sent from my iPhone

Begin forwarded message:

From: Brad Martin <bmartin@bnmlaw.com>
Date: October 9, 2020 at 5:01:05 PM EDT
To: Brad Martin <bmartin@bnmlaw.com>
Subject: RE: Stivers v. Peacock

Permission granted.

From: Brad Martin
Sent: Friday, October 9, 2020 3:10 PM
To: John M. "Jay" Brennan <Jay.Brennan@gray-robinson.com>
Subject: FW: Stivers v. Peacock

FYI

[Quoted text hidden]

ELECTRONICALLY FILED - 2021 Apr 02 1:52 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934



STUDEMEYER LAW FIRM

7478 Carlisle Street | Post Office Box 1014
Irmo, South Carolina 29063
(803) 393-4399

J. Gregory Studemeyer
greg@studemeylawfirm.com

Ryan G. Studemeyer
ryan@studemeylawfirm.com

October 12, 2020

via email alcesc@sccourts.org
and Confirmed by U.S. Mail

The Honorable Alison Renee Lee
Chief Administrative Judge
Fifth Judicial Circuit
P.O. Box 192
Columbia, South Carolina 29202-0192

Re: Stivers Brothers Automotive, Inc. v. W. Warner Peacock and
Peacock Automotive, LLC
Case No.: 2020-CP-40-01934

Dear Judge Lee:

Enclosed herewith is a proposed consent order in the above referenced matter for your review and consideration.

Today is my deadline for filing a motion to alter or amend. I recognize that is not your problem.

I also recognize that this is not likely your top priority for today. For that reason, I will plan to file a motion to alter or amend by the close of business today to protect myself, anticipating that it may be days or even weeks before you have an opportunity to consider this proposed order.

ELECTRONICALLY FILED - 2021 Apr 02 1:52 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

The Honorable Alison Rence Lee
October 12, 2020
Page 2

In keeping with my agreement with opposing counsel, if or when you sign this proposed order, I will withdraw my motion.

Thank you in advance for your assistance and cooperation.

Sincerely,



J. Gregory Studemeyer

Enclosure

cc: Bradford Neal Martin, Esq. via email bmartin@bnmlaw.com
and Confirmed by U.S. Mail
Aleksander E. Ferguson, Esq. via email aleelc@sccourts.org
Mr. Edward M. Stivers, III
Mr. John S. Stivers, Sr.

ELECTRONICALLY FILED - 2021 Apr 02 1:52 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

ORIGINAL

1 STATE OF SOUTH CAROLINA
 2 IN THE COURT OF COMMON PLEAS
 3 FIFTH JUDICIAL CIRCUIT

4 COUNTY OF RICHLAND

5 Civil Action No. 2020-CP-40-01934

6 STIVERS BROTHERS AUTOMOTIVE,)
 7 INC.,)
 8 vs. Plaintiff,) TRANSCRIPT
 9 W. WARNER PEACOCK, et al,) OF
 10 Defendant.) PROCEEDINGS

11 -----/

12 March 23, 2021

13 B E F O R E:

14 HONORABLE JOCELYN NEWMAN
 15 RICHLAND COUNTY COURTHOUSE
 COLUMBIA, SOUTH CAROLINA

16 A P P E A R A N C E S:

17 For the Plaintiff:

18 THE STUDEMEYER LAW FIRM
 7478 Carlisle Street
 19 Irmo, South Carolina 29063
 20 BY: J. GREGORY STUDEMEYER, Attorney at Law and
 R. GREGORY STUDEMEYER, Attorney at Law

21 For the Defendant:

22 BRADFORD NEAL MARTIN & ASSOCIATES, P.A.
 201 West McBee Avenue
 23 Greenville, South Carolina 29601
 24 BY: BRADFORD NEAL MARTIN, Attorney at Law and
 LAURA W. H. TEER, Attorney at Law

25 BY: Karen A. Kocsis, CCR

1 THE COURT: This is numbers two through eight
2 on today's roster. Stiver Brothers Automotive
3 verses -- essentially it's Peacock Automotive, LLC.
4 Actually -- yeah, when you're not speaking, my clerk
5 is going to help me out with keeping y'all muted
6 because we sometimes get some feedback.

7 So let's see. So there's several motions on
8 the roster today. There was also a motion for a
9 continuance that was filed last week. You should
10 have seen as of this morning that motion for
11 continuance was denied.

12 I've also read a number of letters submitted by
13 counsel for both parties. I have intentionally not
14 responded to them because as a court of record, you
15 have -- one very important tenant of this Court is
16 that it is a court of record and I do not decide
17 motions or any other substantive matters by letter
18 or e-mail or anywhere outside of the record. So I
19 have intentionally failed to respond to those, but I
20 have read each of them, each and every condescending
21 word, but I'm prepared to go forward.

22 As I said, I've denied the motion for a
23 continuance. And I'll just tell you, I found it to
24 be a bit illogical and to some extent, disingenuous.
25 Counsel was ill-prepared, or would not be prepared,

1 had insufficient time to prepare to argue motions
2 today because of some optional filings that were
3 made within the deadline -- or prior to the deadline
4 set by the Court, but did have time to send numerous
5 letters, e-mails and other correspondence to the
6 Court, to my office. Frankly, I think if there was
7 a shortage of time, it would have been better spent
8 preparing for the hearings rather than writing
9 letters and e-mails to the Court.

10 I respective of all that, I am prepared to go
11 forward with all of the motions beginning with the
12 motion to amend the complaint, because I think that
13 will -- that could delay, resolve, postpone, bare on
14 the procedural posture of a number of the other
15 motions. If that is granted, certainly you'll want
16 to probably file a new motion for a judgment on the
17 pleadings or revised motions for summary judgment.
18 To some extent, there aren't huge differences. I
19 don't know.

20 Anyway, but we will between begin there with
21 Mr. Studemeyer and a motion to amend the complaint a
22 second time.

23 So, Mr. Studemeyer, let me hear from you.

24 MR. G. STUDEMEYER: I don't have my hands on
25 this particular motion. So I'm going to step aside

1 and I'm going to let him step in.

2 THE COURT: All right. This is Ryan
3 Studemeyer?

4 MR. R. STUDEMEYER: Yes, Your Honor.

5 THE COURT: Who is co-counsel with Greg. All
6 right. Let me hear from you.

7 MR. G. STUDEMEYER: Thank you, Your Honor. Ryan
8 Studemeyer and I represent Stivers Brothers
9 Automotive. I think who I will refer to as Stivers
10 Brothers.

11 Just to give you a quick rundown about what
12 this case is about. On January the 7th of 2020,
13 Stivers Brothers entered into two asset purchase
14 agreements to sell their Chevrolet and Hyundai
15 dealers to Peacock.

16 THE COURT: Let me just interrupt really
17 quickly. You know, I am happy for whatever you want
18 to put on the record but I just want to know -- I'm
19 familiar with the case.

20 MR. R. STUDEMEYER: Okay.

21 THE COURT: Although the senior Mr. Studemeyer
22 didn't think it was possible for me to be ready for
23 motion hearings or possibly adequately to do my job,
24 I suppose. I am familiar with case. I know about
25 the allegations and to the extent you wanted to only

1 alleging that. So there is no new thing here
2 whatsoever. This amended complaint is at the last
3 minute, the 11th hour is a very clever attempt to
4 avoid the inevidentable. And the inevidentable is,
5 when these contracts were terminated on March 27th
6 much to the relief of the automotive industry, the
7 wonderful thing was that the dealerships became very
8 profitable because people were at home, they were
9 weren't going on vacations. They were getting money
10 and they said, you know what, we need a new car. We
11 can afford the payments of a new car and the sale of
12 cars exploded all throughout the country in May,
13 June, July and August. So what's really happened
14 here and when the negotiations re-began, they
15 produced to us a document that we put in the record
16 that the Hyundai store in Columbia for Stivers made
17 over \$100,000 in just the month of May alone. So
18 what we have here is a futile attempt to try to keep
19 this thing going on. The truth of the matter is,
20 they have no damages.

21 In fact, the reason why you don't have an
22 affidavit from Mr. Stivers saying I lost money
23 because he probably made a fortune. The fact that
24 the sale didn't occur was one of the best things
25 that ever happened to him. And what happened is

1 whether this quote, charade, end quote, needs to
2 come to an end.

3 THE COURT: All right. Young Mr. Studemeyer.
4 That was -- the last part there was really the first
5 thing that stood out at me is this talk about the
6 early neutral evaluation, but even before that the
7 things that have happened since July 2nd, I guess
8 beginning on July 3rd. Are those not attempts at
9 resolution of pending litigation? I mean, I
10 hesitate to use word the "settlement" because I
11 don't know that that is exactly what it was, but
12 because litigation had commenced and these are
13 actions, really back and forth about the very
14 subject of the litigation, are these not settlement
15 efforts? I mean certainly the early neutral
16 evaluation is, but even before that, are those not
17 settlement efforts and if so how is it proper to
18 include those in an amended complaint?

19 MR. R. STUDEMEYER: Well, Your Honor I think
20 that is what the defendants wanted to appear as and
21 that is precisely why we requested to file this
22 amended and supplemental pleadings.

23 Once you see the shenanigans that went on here,
24 Your Honor, five deadline extensions, seven months
25 of negotiations after the initial breach took place

1 in March, our clients continued to negotiate with
2 the defendants from March until the middle of July
3 trying to get a deal done, and every single time,
4 you know, they accommodated these defendants and
5 thought they had a deal done, the defendants would
6 kick the can down the road even further. They
7 couldn't be expected to negotiate forever. And they
8 drew a line in the sand because frankly they were
9 tired of it. And I don't think that they were
10 required to continue to negotiate with these
11 defendants when there was no indication that they
12 would ever execute an agreement. And remember, they
13 had an executed agreement back in January that they
14 breached. So trust was simply not a factor weighing
15 in the defendants favor at that point.

16 So I would submit, Your Honor, that these were
17 not settlement negotiations. In fact, our
18 supplemental and amended pleading does point out --
19 in fact, Stivers Brothers and Peacock Automotive are
20 competitors. They compete in the same market and
21 the longer this dragged on, the longer they kept
22 getting important financial information from my
23 client without consummating an agreement. This was
24 simply to the prejudice of Stivers Brothers. They
25 kept handing over proprietary information to their

1 competitor and an agreement wasn't getting signed.
2 It was to their detriment to continue to believe
3 that the defendants would actually consummate and
4 perform under an APA. And I did fill out my duty of
5 candor. I should point out that I am not the ivy
6 league attorney that opposing counsel was referring
7 to.

8 THE COURT: You should have taken that one.
9 Look.

10 MR. R. STUDEMEYER: I should have. I think it
11 was my duty to admit that one. If it wasn't already
12 apparent.

13 THE COURT: I would never have known the
14 difference.

15 MR. R. STUDEMEYER: Thank you, Your Honor.

16 THE COURT: But truly, I think that this
17 amendment is futile. I do understand that your
18 client may claim some additional damages as a result
19 of the back and forth that continues to occur, and I
20 don't think that is inappropriate. And I think that
21 certainly defendants are on notice that the damages
22 could be -- you know, they are not quantified in the
23 amended complaint as it is. Certainly they are not
24 quantified. There is no number put on them in the
25 amended complaint, but I think all of that goes to

1 the issue of damages, but to include what really are
2 settlement negotiations to some extent, particularly
3 where there is a demand for specific performance in
4 the amended complaint, right, and so they come back
5 and forth about this, these are settlement
6 negotiations. They are not appropriate for
7 pleadings, and so the motion to amend the complaint
8 is denied because they are futile.

9 Now, to the extent there is some debate at
10 trial about failure to mitigate damages, certainly
11 all that opens the door to what happened after
12 July 2nd.

13 MR. MARTIN: Okay.

14 THE COURT: Because you got to be able to
15 defend and explain efforts to mitigate once that
16 becomes an issue, but I just don't know that any of
17 that is appropriate for an amended complaint at this
18 juncture. So that motion is respectfully denied.

19 MR. R. STUDEMEYER: Thank you, Your Honor.

20 THE COURT: All right. Let's then move onto
21 the motion to compel. I guess really these are both
22 plaintiff's motions so we'll do them sort of back to
23 back. There's a motion to stay and then there is a
24 motion to compel. Motion to stay or enlarge time,
25 sorry, because they really both have to do with the

1 probably affirm whatever you decide. But just
2 because it has never been raised before does not
3 make it wrong.

4 Stivers is not a consumer. They are not an
5 owner of an automobile going against a surety bond.
6 Stivers is suing for termination of the APAs.

7 If they were suing under the bond, 320 would
8 apply, but they haven't sued our surety. They could
9 have, or "surety." I know Mr. Studemeyer said I
10 didn't pronounce it correctly. So it is clearly a
11 case involving a contact between one dealer and
12 another dealer and 80 says, agreements to which this
13 chapter applies and it doesn't include these
14 agreements. Therefore, that particular cause of
15 action needs to come out.

16 THE COURT: Yeah. I understand your argument,
17 Mr. Studemeyer, but I'm granting defendant's motion
18 for judgment on the pleadings as to cause of action
19 and I ask Mr. Martin to prepare a proposed order.

20 In that regard, based on 15 -- I'm sorry --
21 56-15-80 and the inclusion of those terms implies
22 inclusion of others and you know, I'm looking
23 through all the cases cited by Mr. Studemeyer. None
24 of those is a dealer versus dealer case. You know,
25 we maybe making law here. But I think that

1 Mr. Martin is correct in his argument and for that
2 reason, I'm ruling in defendant's favor on that
3 issue.

4 Now, tell me what is -- Mr. Studemeyer, I kind
5 of didn't understand plaintiff's motion for judgment
6 on the pleadings. It mostly seems like opposition
7 to defendant's motion for judgment on the pleadings.
8 Am I wrong or am I overlooking something there?

9 MR. G. STUDEMEYER: Well, Your Honor, I think
10 both of those felt strongly that judgment on the
11 pleadings should be entered in our respective favor.
12 And so since the issue was raised by Mr. Martin, you
13 know, he says, I'm entitled to judgment on the
14 pleadings. Our responses will -- you know, we
15 actually think we're entitled to judgment on the
16 pleadings both because of a plain reading of the
17 statute, you know, and I don't want to abuse the
18 privilege here, but I do want to add this: If I
19 understand the argument about the exclusio unius
20 thing, I get that. What I would ask the Court to
21 take another look at is the Ford versus Beaufort
22 County case that Mr. Martin raised. It says, all
23 rules, (reading) All rules of statutory construction
24 are subservient to the one that the legislative
25 intent must prevail and can reasonably be discovered

1 in the language used and that language must be
2 construed that the light of the intended purpose.

3 THE COURT: Mr. Studemeyer, I'm happy for you
4 to file a motion for reconsideration once you
5 receive my written order, but the Court decided and
6 counsel shall not continue to argue an issue after
7 the Court has ruled. Let me just say, the ancillary
8 matter that under all circumstances, plaintiff's
9 motion for judgment on the pleadings would have been
10 denied, for what that is worth. I don't know that
11 it was ever appropriate. Even if defendant's motion
12 was denied, I don't think that automatically means
13 that plaintiff's motion should be denied. That is a
14 whole separate issue. I mean I'm ruling on this as
15 a matter of law. That almost takes us into summary
16 judgment where we're going next because there are
17 some denials, you know as I went through the amended
18 complaint and the answer thereto. It's not as
19 though defendant's admitted everything within that
20 cause of action. That might have been great for
21 judgment on the pleadings, or at least the most
22 material portions of it, but there is significant
23 denials there. I don't know whether those will
24 become important so much in summary judgment, but I
25 would have nevertheless denied plaintiff's motion

1 for judgment on the pleadings. That is independent
2 of the rulings on --

3 MR. G. STUDEMEYER: I understand.

4 THE COURT: All right. So the last big chunk
5 is summary judgment. And yes, sir.

6 MR. G. STUDEMEYER: Can we take another short
7 bathroom break?

8 THE COURT: All right. Let's take ten minutes.

9 MR. MARTIN: Thank you, Judge.

10 (Brief recess.)

11 THE COURT: We're back on the record for
12 defendant's motion for summary judgment.

13 MR. MARTIN: May it please the Court, and thank
14 you so much for the health and comfort break.

15 THE COURT: Absolutely.

16 MR. MARTIN: This motion is very important.
17 And it really has three driving forces. The first
18 one is; Stivers has failed to present any evidence
19 of damages. You know the rule about summary
20 judgments. You know that all the causes of action
21 require an essential element of damages and our
22 first position is there have been no damages. As
23 far as how burden of proof works in a summary
24 judgment. Once the party moving for summary
25 judgment meets the initial burden of showing an



Richland County
Fifth Judicial Circuit
Court Rosters



Summary Court Dockets South Carolina Judicial Department Home Page Return To Roster Selection

Court Agency	40002	Judge	Newman	Roster Description	MOTION ROSTER MARCH 23, 2021
Roster Type	Motions Non Jury Roster	Roster Begin Date	03/23/2021	Roster End Date	03/23/2021
Roster Id	1660	Roster Begin Time	9:30 AM		

Attorney Bar Number

Case #

Filed From

Filed Thru

Search

Print Version

#	Scheduled Date	Start Time	Duration Hrs:Mins	Description	Filing Party	Filed Date	Case / Case Caption	Sub Type	Plaintiff Attorney	Defendant Attorney	Not
1	03/23/2021	9:30 AM	0:15	Motion/Dismiss	S C Department Of Education-DEF	12/21/2020	2020CP4005394 William Watkins vs Crystal Shante Wilson, defendant, et al	Personal Injury 350	Johnny J. Stewart Jr. (843) 297-8485	Sheneka S. Lodenqual (803) 254-4035 James B. Lybrand Jr. (803) 252-0500 x310 Dwayne Traynor Mazyck (803) 254-4035	
2	03/23/2021	9:30 AM	0:15	Motion for Entry of Default Judgment	Corderia Weeks-PLT	01/18/2021	2020CP4004434 Tiffany Lindsey, plaintiff, et al vs Simpson Huggins Hyatt	Motor Veh Accid 320	Jerry Leo Finney (803) 254-7408		
3	03/23/2021	9:30 AM	0:10	Motion/Compel Discovery Responses	Richland School District Two-PLT	12/22/2020	2019CP4005715 Richland School District Two vs Lechase Construction Services, defendant, et al	Constructions 100	Allen D. Smith (803) 254-4035	Thomas Frank Dougall (803) 865-8858 F. Cordes Ford IV (843) 722-3400 Michal Kalwajty (803) 338-4783 J. Brendan Kelley (864) 643-7258 Edward Wade Mullins III (803) 252-2692	
4	03/23/2021	9:30 AM		Motion/Compel	Stivers Brothers Automotive Inc-PLT	02/05/2021	2020CP4001934 Stivers Brothers Automotive Inc vs W Warner Peacock, defendant, et al	Breach of Cont 140	Joseph Gregory Studemeyer (803) 393-4399 Ryan Gregory Studemeyer (803) 393-4399	Bradford Neal Martin (864) 552-9990 Laura Wilcox Howle Teer (864) 552-9990	
5	03/23/2021	9:30 AM		Motion/Judgment on the Pleadings And Memorandum In Oppositio	Stivers Brothers Automotive Inc-PLT	02/05/2021	2020CP4001934 Stivers Brothers Automotive Inc vs W Warner Peacock, defendant, et al	Breach of Cont 140	Joseph Gregory Studemeyer (803) 393-4399 Ryan Gregory Studemeyer (803) 393-4399	Bradford Neal Martin (864) 552-9990 Laura Wilcox Howle Teer (864) 552-9990	
6	03/23/2021	9:30 AM		Motion To Serve A Second Amended and Supplemental Complaint	Stivers Brothers Automotive Inc-PLT	02/05/2021	2020CP4001934 Stivers Brothers Automotive Inc vs W Warner Peacock, defendant, et al	Breach of Cont 140	Joseph Gregory Studemeyer (803) 393-4399 Ryan Gregory Studemeyer (803) 393-4399	Bradford Neal Martin (864) 552-9990 Laura Wilcox Howle Teer (864) 552-9990	
7	03/23/2021	9:30 AM	0:15	Motion To Stay And/Or To Enlarge Time	Stivers Brothers Automotive Inc-PLT	12/23/2020	2020CP4001934 Stivers Brothers Automotive Inc vs W Warner Peacock, defendant, et al	Breach of Cont 140	Joseph Gregory Studemeyer (803) 393-4399 Ryan Gregory Studemeyer (803) 393-4399	Bradford Neal Martin (864) 552-9990 Laura Wilcox Howle Teer (864) 552-9990	
8	03/23/2021	9:30 AM	0:30	Motion/Judgment on the Pleadings	W Warner Peacock-DEF	12/09/2020	2020CP4001934 Stivers Brothers Automotive Inc vs W Warner Peacock, defendant, et al	Breach of Cont 140	Joseph Gregory Studemeyer (803) 393-4399 Ryan Gregory Studemeyer (803) 393-4399	Bradford Neal Martin (864) 552-9990 Laura Wilcox Howle Teer (864) 552-9990	
9	03/23/2021	9:30 AM	0:15	Motion To Seal	W Warner Peacock-DEF	12/04/2020	2020CP4001934 Stivers Brothers Automotive Inc vs W Warner Peacock, defendant, et al	Breach of Cont 140	Joseph Gregory Studemeyer (803) 393-4399 Ryan Gregory Studemeyer (803) 393-4399	Bradford Neal Martin (864) 552-9990 Laura Wilcox Howle Teer (864) 552-9990	
10	03/23/2021	9:30 AM	0:30	Motion/Summary Judgment	W Warner Peacock-DEF	12/04/2020	2020CP4001934 Stivers Brothers Automotive Inc vs W Warner Peacock, defendant, et al	Breach of Cont 140	Joseph Gregory Studemeyer (803) 393-4399 Ryan Gregory Studemeyer (803) 393-4399	Bradford Neal Martin (864) 552-9990 Laura Wilcox Howle Teer (864) 552-9990	
11	03/23/2021	2:00 PM	0:30	Motion/Compel Discovery Responses	Nathan E Hardwick III-DEF	12/22/2020	2020CP4000196 Jessie White vs Nathan E Hardwick III	Motor Veh Accid 320	Barry B. George (803) 254-7222 Palge B George (803) 400-1219	John Alexander Hooks (803) 254-5445 x218	
12	03/23/2021	2:00 PM	0:15	Motion/Quash Boyd Management Inc's Subpoena To The SC	Tamera Holmes-PLT	12/22/2020	2019CP4006473 Tamera Holmes, plaintiff, et al vs New Town & Country Apartments LLC, defendant, et al	Personal Injury 350	Michelle Parsons Kelley (803) 576-3736 Steven James Pugh (803) 771-4400	Matthew Todd Carroll (803) 454-7730 Brandon Robert Gottschall (803) 256-2233 x7132 Robert Holmes Hood Jr. (843) 577-4435 Maryrose Lyle Pritchard (843) 577-1230 Damon Christian Włodarczyk (803) 700-0002	
13	03/23/2021	2:00 PM	0:15	Motion/Compel Defendant's	Gregory Blake-PLT	12/22/2020	2020CP4001246 Gregory Blake	Motor Veh Accid 320	Kenneth Emanuel Berger (803) 790-2800	Karl Stephen Brehner (803) 771-6600	

Court Roster Details

				Limited Medical Records			vs Stephanie Ruprecht		And title John Johnson (803) 64-4099	John Martin Grantland (803) 454-1237	
14	03/23/2021	2:00 PM	0:30	Motion/Summary Judgment	Synovus Bank-PLT	12/22/2020	2020CP4000688 Synovus Bank vs Ronald L Cooper , defendant, et al	Debt Collection 110	Mary M Caskey (803) 779-3080 Kathleen McDavid Muthig (803) 540-7732 Clara Elizabeth Weston (803) 540-7874	Brian L. Boger (803) 252-2880	
15	03/23/2021	2:00 PM	0:30	Motion/Compel	Parler R Montorish- DEF	12/22/2020	2020CP4003726 Sara C Thompson vs Parler R Montorish , defendant, et al	Motor Veh Accid 320	Eliza G Lynch (803) 771-3100	Cheslyne Shea Brighthop (803) 227-4323	
16	03/23/2021	2:00 PM		Motion/Enlarge Time Period to Answer	Eric M Pinckney- DEF	02/02/2021	2020CP4004967 Blanca Rodriguez vs Eric M Pinckney , defendant, et al	Breach of Cont 140	Robert Sam Phillips (803) 726-4269	Eric M Pinckney (803) 446-3997	
17	03/23/2021	2:00 PM		Motion/Withdraw As Counsel	Blanca Rodriguez- PLT	01/27/2021	2020CP4004967 Blanca Rodriguez vs Eric M Pinckney , defendant, et al	Breach of Cont 140	Robert Sam Phillips (803) 726-4269	Eric M Pinckney (803) 446-3997	
18	03/23/2021	2:00 PM	1:0	Motion/Strike Answer & Counterclaims & Answer to Motion to A	Blanca Rodriguez- PLT	01/05/2021	2020CP4004967 Blanca Rodriguez vs Eric M Pinckney , defendant, et al	Breach of Cont 140	Robert Sam Phillips (803) 726-4269	Eric M Pinckney (803) 446-3997	
19	03/23/2021	2:00 PM		Amended Complaint and Motion for Leave to Add Counterclaims	Eric M Pinckney- DEF	12/22/2020	2020CP4004967 Blanca Rodriguez vs Eric M Pinckney , defendant, et al	Breach of Cont 140	Robert Sam Phillips (803) 726-4269	Eric M Pinckney (803) 446-3997	
20	03/23/2021	2:00 PM		Motion to Recuse Plaintiffs Counsel of Record	Eric M Pinckney- DEF	12/22/2020	2020CP4004967 Blanca Rodriguez vs Eric M Pinckney , defendant, et al	Breach of Cont 140	Robert Sam Phillips (803) 726-4269	Eric M Pinckney (803) 446-3997	

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

**STIVERS BROTHERS
AUTOMOTIVE, INC.,**

Plaintiff

v.

**W. WARNER PEACOCK,
and PEACOCK AUTOMOTIVE, LLC,**

Defendants

**IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CASE NO. 2020-CP-40-01934**

AFFIDAVIT

Personally appeared before me, the undersigned, who first being duly sworn, deposes and says:

1. He is attorney for the Plaintiff.
2. He represented the Plaintiff in the negotiation, preparation, and execution of that certain Asset Purchase and Sale Agreement, dated January 7, 2020 (the "Chevrolet Purchase Agreement"), between Plaintiff and Defendant Peacock Automotive, LLC (the "LLC"), for the purchase by Defendant LLC of Plaintiff's Chevrolet dealership business located at 111 Newland Road in Columbia, South Carolina (the "Chevrolet Dealership").
3. He also represented the Plaintiff in the negotiation, preparation, and execution of that certain Asset Purchase and Sale Agreement, dated January 7, 2020 (the "Hyundai Purchase Agreement"), between Plaintiff and Defendant LLC for the purchase by Defendant LLC of Plaintiff's Hyundai dealership business located at 101 Newland Road in Columbia, South Carolina (the "Hyundai Dealership").
4. On March 30, 2020, he received a letter via e-mail from the Defendants' counsel, addressed to the Plaintiff and dated March 27, 2020, in which the Defendant LLC notified Plaintiff that the Defendant LLC was terminating the Chevrolet Purchase Agreement and the Hyundai Purchase Agreement.
5. On June 11, 2020, he received a proposed Letter of Intent (the "Letter of Intent") via e-mail from the Defendant's counsel, addressed to the Plaintiff, in which the Defendant LLC, made a new offer to purchase the Plaintiff's Hyundai Dealership business.
6. Plaintiff advised him that the Plaintiff was not agreeable to the terms of the Defendant LLC's Letter of Intent and instead instructed him to prepare, for presentation to the Defendants, a new Asset Purchase and Sale Agreement for the sale of the Plaintiff's Hyundai Dealership business to the Defendant LLC that contained terms the Plaintiff was willing to accept (the "New Hyundai Purchase Agreement").

EXHIBIT B

7. He prepared said New Hyundai Purchase Agreement and, after receiving approval of the same from the Plaintiff, presented it to the Defendant's counsel via e-mail on June 22, 2020. Within said e-mail to counsel, and upon instruction from the Plaintiff, he advised counsel that, among other things, (1) Plaintiff was not interested in signing the Letter of Intent, (2) there was not much room for negotiation in the attached New Hyundai Purchase Agreement, and (3) the Defendant LLC had until 12:00 p.m. EST on Friday, June 26, 2020, to accept the New Hyundai Purchase Agreement.

8. Following delivery of the New Hyundai Purchase Agreement to Defendants' counsel, he and Defendants' counsel negotiated certain changes in said Agreement that were proposed by Defendant's counsel. He and Defendants' counsel could not resolve all items at issue by the 12:00 p.m. EST deadline on Friday, June 26, 2020, that Plaintiff gave Defendants, so, at Plaintiff's instruction, he notified Defendants' counsel that Plaintiff was willing to extend its deadline for acceptance and execution of the New Hyundai Purchase Agreement to 5:00 p.m. EST on Friday June 26, 2020.

9. Plaintiff ultimately accepted some of the changes that Defendants' counsel proposed to the New Hyundai Purchase Agreement, but did not accept others. In an e-mail sent by him to Defendants' counsel at 5:46 p.m. CST on Friday, June 26, 2020, he advised Defendants' counsel that Plaintiff would not agree to further changes to the New Hyundai Purchase Agreement and, at Plaintiff's instruction, notified Defendants' counsel that Plaintiff was willing to extend its deadline for acceptance and execution of the New Hyundai Purchase Agreement (as modified by the changes accepted by Plaintiff) until 12:00 p.m. EST on Monday, June 29, 2020.

10. On Saturday, June 27, 2020, he received an e-mail from Defendants' counsel advising that Defendants' counsel believed that the parties were at an impasse with respect to the New Hyundai Purchase Agreement.

11. Later that Saturday, he notified Plaintiff of Defendants' counsel's e-mail, and, in response to Defendants' counsel's e-mail, Plaintiff advised him that Plaintiff would return their focus to the ongoing litigation between Plaintiff and Defendants.

12. On or about Tuesday, June 30, 2020, he received a phone call from Defendants' counsel in which Defendants' counsel expressed his desire to revisit negotiation of the New Hyundai Purchase Agreement. As a follow up to that call, Defendants' counsel sent him an e-mail on Friday, July 3, 2020, in which Defendants' counsel listed what Defendants' counsel believed to be the outstanding issues remaining between the parties with respect to the New Hyundai Purchase Agreement.

13. On Monday, July 6, 2020, he advised Plaintiff of his recent communications with Defendants' counsel, and in response thereto, Plaintiff agreed to re-open negotiations with Defendant LLC concerning the New Hyundai Purchase Agreement.

14. Thereafter, he negotiated additional changes to the New Hyundai Purchase Agreement with Defendants' counsel. During these negotiations, Plaintiff advised him that Plaintiff would not agree to some of the changes requested by Defendants' counsel

15. In an e-mail to Defendants' counsel on Tuesday, July 14, 2020, he advised Defendants' counsel that Plaintiff would not agree to certain of Defendants' requested changes. In that same e-mail, he also advised Defendants' counsel that Plaintiff had plans to hire a new general manager for the Hyundai Dealership on Wednesday, July 15, 2020, and would not negotiate a sale of the Hyundai Dealership business after making that hire. As a result, and at Plaintiff's instruction, he advised Defendants' counsel at the end of that e-mail that Plaintiff must have an executed New Hyundai Purchase Agreement no later than 9:00 a.m. CST on Wednesday, July 15.

16. In a later e-mail to Defendants' counsel on Tuesday, July 14, he advised Defendant's counsel, at Plaintiff's instruction, that if Defendant LLC agreed to certain terms in the New Hyundai Purchase Agreement, Plaintiff would extend the deadline to sign the New Hyundai Purchase Agreement to 5:00 p.m. CST on Wednesday, July 15, 2020, and extend the time to fund the escrow thereunder to 12:00 p.m. CST on Thursday, July 16, 2020.

17. Following his various communications with Defendants' counsel, he revised the New Hyundai Purchase Agreement pursuant to the instructions of Plaintiff and delivered the newly revised New Hyundai Purchase Agreement to Defendants' counsel in an e-mail on Wednesday, July 15, 2020. In that e-mail, he notified Defendants' counsel, at Plaintiff's instruction, that the attached revised New Hyundai Purchase Agreement was not negotiable and that Plaintiff was giving Defendant LLC until 6:00 p.m. CST that night to execute the same and until 1:00 p.m. CST the next day to fund the escrow thereunder.

18. In a later e-mail on July 15, 2020, Defendants' counsel requested that he make several additional changes to the New Hyundai Purchase Agreement, and, after his consultation with Plaintiff, Plaintiff agreed to most of the requested changes. Thereafter, in a reply e-mail to Defendants' counsel, he sent a further revised version of the New Hyundai Purchase Agreement to Defendants' counsel.

19. Later that same night, on July 15, 2020, he sent an e-mail to Defendants' counsel in which he, at Plaintiff's instruction, again extended Plaintiff's deadline for the execution of the further revised New Hyundai Purchase Agreement by Defendant LLC to 8:00 p.m. CST that night.

20. At 7:57 p.m. CST the same night, he received an e-mail from Defendants' counsel advising that Defendants' counsel could not get a hold of Warner Peacock to sign the further revised New Hyundai Purchase Agreement.

21. After receipt of the 7:57 p.m. e-mail from Defendants' counsel, he advised Plaintiff of Defendants' counsel's e-mail, and, in response, Plaintiff advised him that Plaintiff would not entertain further negotiations with Defendants as to the New Hyundai Purchase Agreement.

Further, the deponent sayeth not.


Richard L. McBride Jr. 10-10-20

STATE OF ALABAMA)
 :
COUNTY OF MONTGOMERY)

I, the undersigned authority, a Notary Public in and for said state at large, hereby certify that Richard L. McBride Jr., whose name is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day that, being informed of the contents of the above and foregoing instrument, he executed the same voluntarily on the day the same bears date.

Given under my hand and official seal of office this 10th day of October, 2020.



Tanesha Barron
NOTARY PUBLIC
My Commission Expires: 08/21/2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	C/A NO. 2020-CP-40-01934
STIVERS BROTHERS AUTOMOTIVE, INC.,	)	
	)	AFFIDAVIT OF
	)	J. GREGORY HUMPHRIES
Plaintiff,	)	
v.	)	
	)	
W. WARNER PEACOCK and PEACOCK AUTOMOTIVE, LLC,	)	
	)	
Defendants.	)	
_____	)	

PERSONALLY APPEARED before me, the undersigned, who being duly sworn, deposes and states as follows:

1. I am over the age of 18 and competent to make this Affidavit.
2. Except for matters stated upon information and belief, I have personal knowledge of the facts contained in this Affidavit.
3. I am an attorney at law practicing in the area of corporate transactions in Orlando Florida. The firm of Shutts & Bowen, LLP has acted as a transactional counsel on behalf of Peacock Automotive, LLC regarding the purchase of the Hyundai dealership in Columbia from Stivers Brothers Automotive, Inc.
4. I have represented the Defendants for many years and was tasked with preparing contracts for the purchase and sale of two Columbia, South Carolina motor vehicles dealerships owned by the Stivers (Chevrolet and Hyundai/Genesis).
5. I communicated directly with Stivers' attorney Rick McBride, Jr., of Montgomery Alabama.

6. After the original APAs of January 7, 2020 were terminated by letter of March 27, 2020, I contacted Mr. McBride to discuss the purchase of the Hyundai/Genesis dealership.

7. I prepared a formal Letter of Intent ("LOI") and transmitted it to Mr. McBride on June 11, 2020 for the purchase of the Hyundai/Genesis dealership.

8. I received a counter proposal Asset Purchase Agreement from Mr. McBride on June 22, 2020.

9. I sent a signed APA to Mr. McBride on July 23 for the purchase of the Hyundai/Genesis dealership. (Exhibit A) The new APA provided that the payment would be all cash up front, that Purchaser would assume any extensions of the lease that Stivers had entered into, and would provide an additional payment of up to \$200,000 for Seller's attorneys' fees and costs.

10. I once again sent an executed APA to Mr. McBride on behalf of my clients on October 26, 2020. (Exhibit B)

11. Both Agreements were executed would have been effective upon signing by the Seller.

12. Despite the fact that the price was the same as agreed to in January, and the terms were more favorable to Stivers, I never received a signed APA in response.

13. It is my belief that Stivers sold the Chevrolet dealership to another purchaser and that sale closed one or about October 7, 2020. (Exhibit C)

FURTHER AFFIANT SAYETH NOT.


J. Gregory Humphries

SWORN TO before me this 4th
day of December, 2020.
Tracy Augustyni
Notary Public for Florida
My Commission Expires: _____



TRACY AUGUSTYNI
Commission # GG 306524
Expires May 20, 2023
Bonded Thru Budget Notary Service

Exhibit A
to Affidavit of J. Gregory Humphries

ELECTRONICALLY FILED - 2020 Dec 04 3:11 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

From: J. Gregory Humphries
Sent: Thursday, July 23, 2020 3:50 PM
To: Rick McBride Jr. (rick@mcbriedelawllc.com)
Subject: Stivers/Peacock

Exhibit A
to Affidavit of J. Gregory Humphries

Rick, In an effort to continue to seek resolution of our clients dispute, I am attaching a revised version of the contract to sell the Columbia Hyundai dealership, together with a signature page executed by Mr. Peacock. As you can see in the attached redline, we have made a few revisions that deal with the logistics of the process of obtaining approvals and closing on the acquisition. We have also eliminated the Chevy Transaction contingency which has perhaps resolved itself at this point as you are closer to consummating that transaction. If your clients would like to move forward pursuant to this contract, please advise prior to COB on Monday July 27. If we do not have an acceptance by that time, then the offer shall automatically be withdrawn.

Any questions, let me know. Thanks, Greg



J. Gregory Humphries
Partner

Shutts & Bowen LLP

300 South Orange Avenue, Suite 1600 | Orlando, FL 32801

Direct: (407) 835-6940 | Fax: (407) 849-7240

[E-Mail](#) | [Biography](#) | [V-Card](#) | [Website](#)

ELECTRONICALLY FILED - 2020 Dec 04 3:11 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

**Exhibit A to
Affidavit of J. Gregory Humphries**

Asset Purchase and Sale Agreement dated July 23, 2020

To be filed pursuant to Motion to Seal dated December 4, 2020

ELECTRONICALLY FILED - 2020 Dec 04 3:11 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

From: J. Gregory Humphries <JHumphries@shutts.com>
Sent: Monday, October 26, 2020 1:14 PM
To: Rick McBride Jr. (rick@mcbriidelawllc.com) <rick@mcbriidelawllc.com>
Cc: John M. "Jay" Brennan <Jay.Brennan@gray-robinson.com>
Subject: Peacock Stivers - Hyundai

This message originated outside of GrayRobinson.

Rick, We understand that you have had a successful closing on the Chevrolet dealership in Columbia. In light of that matter being concluded, we would again like to advance our offer to purchase the Hyundai dealership. Attached is an APA executed by Mr. Peacock. We assume to attorney fee Issue can now be quantified and will incorporate if you can provide the Info. I have also attached a marked copy to the last document we sent to you. Any questions, let me know. Thanks, Greg



J. Gregory Humphries
Partner

Shutts & Bowen LLP

300 South Orange Avenue, Suite 1600 | Orlando, FL 32801

Direct: (407) 835-6940 | Fax: (407) 849-7240

[E-Mail](#) | [Biography](#) | [V-Card](#) | [Website](#)

**Exhibit B to
Affidavit of J. Gregory Humphries**

Asset Purchase and Sale Agreement dated October 26, 2020

To be filed pursuant to Motion to Seal dated December 4, 2020

ELECTRONICALLY FILED - 2020 Dec 04 3:11 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

10/7/2020

Jim Hudson Automotive acquires Chevrolet dealership in Columbia | Business | coladaily.com

ELECTRONICALLY FILED - 2020 Dec 04 3:11 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001934

https://www.coladaily.com/business/jim-hudson-automotive-acquires-chevrolet-dealership-in-columbia/article_e22bcef8-0853-11eb-b698-4fb37b1abb91.html

FEATURED

Jim Hudson Automotive acquires Chevrolet dealership in Columbia

Karamie Hallman
Oct 7, 2020

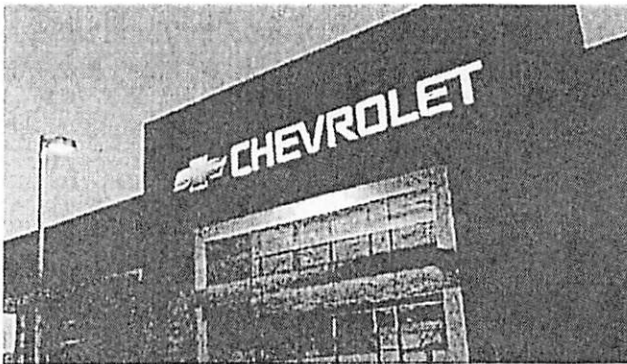


Photo from jimhudsonchevy.com

Jim Hudson Automotive Group has just opened a Chevrolet Dealership in Columbia. The family-owned company purchased what was formerly Stiver's Chevrolet and officially opened its doors to customers under the new ownership Tuesday. The dealership is located at exit I-20 and Clemson Road in Columbia.

According to company officials, this is the automotive group's second dealership

acquisition for the year after opening Jim Hudson Acura in August, located in Augusta.

The dealership is equipped to provide all Chevrolet Certified vehicle services, as well as offer the area a large selection of both new and certified pre-owned Chevrolet vehicles.

The Jim Hudson Automotive Group has been serving the Midlands since 1980, and has built its brand on a dedication to 100% customer satisfaction in every facet of its business, according to company representatives.

The Group represents nine of the industry's brands: Ford, Toyota, Lexus, Audi, Cadillac, Buick, GMC, Acura and now Chevrolet, as well as a vast selection of used and certified pre-owned vehicles of all makes and models.

More information about the new dealership can be found at jimhudsonchevy.com.

RECEIVED

Aug 19 2022

SC Court of Appeals

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

August 5, 2022

STUDEMAYER LAW FIRM, P.C.

/s/ J. Gregory Studemeyer

J. Gregory Studemeyer

7478 Carlisle Street

Post Office Box 1014

Irmo, South Carolina 29063

803-393-4399

SC Bar #5416

DOUGLAS JENNINGS LAW FIRM, LLC

/s/ J. Michael Baxley

J. Michael Baxley

225 Seven Farms Drive, Suite 202

Charleston, S.C. 29492-8353

843-408-0070

SC Bar #591

Attorneys for Appellant