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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellant Case No. 2023-001053
Lower Court Case No. 2021-CP-23-00244

Dealer Financial Holdings, LLC, Steve Lanzl, and Daniel B. Haight, Appellants,

v.

Penland Automotive, LLC and Charles W. Penland, Jr., Respondents.

FINAL BRIEF OF RESPONDENTS

KENISON, DUDLEY & CRAWFORD, LLC

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STATEMENT OF FACTS

2016

In 2016, Penland Automotive, LLC ("Penland Automotive"), Charles W. Penland, Jr. ("Charles Penland"), Penland Properties II, LLC (collectively, "Respondent" or "Penland"), and Dealer Financial Holdings, LLC ("DFH") entered into a Loan and Security Agreement dated November 21, 2016 (the "Financing Agreement"), pursuant to which Penland Automotive borrowed money from DFH in the form of cash advances to Penland Automotive to purchase used car inventory for resale in its used car business. (R. 100).[1] The Financing Agreement established the lending relationship between DFH and Penland by which DFH lent money for floor financing. (R. 100).

The 2016 Agreement had three signature lines which required the signatures of the personal guarantor, the owner of Penland Automotive, and the mortgagee, Penland Properties. All of those signatures were and could only be signed by one person: Charles Penland. Charles Penland signed the 2016 Agreement on behalf of Penland Automotive. He also and separately signed the personal guaranty on behalf of himself and a mortgage on behalf of Penland Properties II.[1]

Between 2016 and 2019 the agreements were modified several times in writing and always with the knowledge, negotiation, and signature of Charles Penland. The amendments were in writing with the same signatories: DFH and Charles Penland. (R. 72). It was never, and could never be, amended or revived by a non-signatory.

2019

The parties' lending relationship continued pursuant to the Loan Documents and

[1] A copy of the 2016 Agreement is attached to Defendants' Answer and Counterclaims as Exhibit A. (R. 100)

subsequent written amendments from their inception until on or about February 20, 2019, when the Comptroller for Penland Automotive requested DFH to, "As of 2/20/2019 Penland Automotive requests to close and deactivate our floorplan. We no longer need the services of Dealer Financial. Please forward all reserves fees to Penland Automotive." (R. 83). The account was closed, and the reserves were returned to Penland Automotive. DFH also ultimately satisfied the mortgage on Penland Properties and all of Plaintiffs' reserves were returned. (R. 86). The parties had no business relationship for sixteen (16) months.

2020

In June of 2020, Penland Automotive was forced to quickly find a new floor plan financing company due to economic issues with its floor plan financing company due to Covid. It obtained favorable terms from Upstate Auto Auction, which did not charge the fees and costs DFH charged; however, Upstate Auto Auction found that DFH had never cancelled a UCC-1 lien since the DFH account was closed in February of 2019. (R. 72). Upstate Auto Auction required the removal of that lien which arguably wrongly gave DFH first priority to any collateral over Upstate Auto Auction. Penland Automotive asked DFH to remove the lien. (R. 72). Instead of removing the lien, DFH began negotiating with Penland Automotive to renew their business relationship. In the summer of 2020, the parties began negotiating a new relationship. Defendant Haight promised a new Agreement and terms were forthcoming. (R. 97). In July of 2020, the parties tentatively began working together based upon verbal and written representations of Dan Haight and DFH that they would be sending "new documents" outlining the terms of the relationship. Charles Penland expected the terms to be the same as Upstate Auto Auction – which DFH promised – and expected new Loan and Security documents. (R. 97).

Separately, Dan Haight, Steve Lanzl, and John Bethea prepared and reviewed new Loan

and Security documents which contained different terms than those which had been verbally promised by DFH, but never sent those document or terms and conditions to Penland Automotive. (R. 93). DFH sent a letter to Plaintiffs that a new contract would be prepared and forwarded to Plaintiffs with new "proposed terms and conditions" and referenced the "execution of new binding documents." (R. 97).

At the expiration of 30 days, Penland Automotive was invoiced for fees and curtailments which it had not agreed to. Penland Automotive Comptroller, Karen Willis, emailed DFH for an explanation. (R. 125). No explanation was received, but DFH agreed to postpone those fees and curtailments until October 1. (R. 130). Tim Yarger also asked John Bethea for the terms and conditions. (R. 125).

In October, DFH again invoiced for fees and curtailments which Penland Automotive had not agreed to pay and again would not produce new documents detailing the agreement or terms and conditions. Throughout this period of time, Penland Automotive asked DFH representative John Bethea for those documents and John Bethea could not get them from Dan Haight or DFH. (R. 130). On October 8, the issue came to a head when Dan Haight falsely stated that no new Loan and Security documents had been drafted and DFH intended to rely on the 2016 Loan and Security Agreement and terms and conditions. (R. 68). After disagreements about those documents and the terms of any new agreement, the relationship ended on October 8, 2020, with DFH claiming that a non-signatory to the 2016 Loan and Security Agreement, Tim Yarger, verbally agreed to the parties reusing the 2016 Agreement. Mr. Haight could not identify which of the modifications to the 2016 documents made between 2016-2019 were also included in the verbal agreement. The Respondents rejected Mr. Haight's new and sudden position that the 2016 agreements were renewed.

That evening DFH repossessed cars from Penland Automotive's car lot despite Penland Automotive being "in trust" and owing no money to DFH as concluded by a DFH audit of Penland Automotive the week before. (R. 72). Despite claiming that no new agreement was necessary, and the 2016 agreement was renewed, the next day, Steve Lanzel and Dan Haight followed Charles Penland to a busy auto auction and in front of auctioneers, wholesalers, peers, colleagues, competitors, and friends demanded and that Mr. Penland sign new documents in order to get his cars back. (R. 72). During that conversation, Dan Haight waived a piece of paper and allegedly stated that Penland was "out of trust." [2] (R. 72).

The next day, Dan Haight and DFH sent a letter to Penland Automotive's creditors informing them they had repossessed Penland Automotive's cars and intended to sell them – despite knowing that Penland Automotive was not late, in default, or "out of trust." (R. 72). John Bethea testified that having cars repossessed and being labeled "out of trust" was severely damaging to a car dealer's reputation in the industry.

At the time, Mr. Yarger was the General Manager of Penland Automotive. Mr. Yarger was not an owner or representative of Penland Properties II and does not claim to have any authority to bind Charles Penland to a personal guaranty. No other person ever signed any agreements with DFH other than Charles Penland, nor could they as no employee was authorized to sign the agreement on behalf of Penland Automotive and Charles Penland is the only person who could sign a personal guaranty or a on behalf of Penland Properties.

Further, although Defendants claim the 2016 Agreement was revived verbally, Defendants have not stated which of the amended versions of the agreement was allegedly revived. The 2016 Agreement was amended four times in writing – but Plaintiffs cannot set forth which of those

[2] "Out of trust" is an industry terms used to describe a dealer who has sold a car (collateral for the loan) but not paid back his floor plan lender – essentially theft or fraud.

amendments was allegedly renewed for the 2020 agreement and, again, it is nowhere in writing. (R. 72).

I. TIMELINE

Nov. 21, 2016	Penland Automotive, Charles Penland, Penland Properties, and Defendant DFH entered into the 2016 Agreement, pursuant to which DFH agreed to make cash advances to or for the benefit of Penland Automotive for the purpose of purchasing used car inventory.[3] The agreement was amended several times in writing. (R. 100). In addition, the 2016 Agreement set forth obligations between DFH and Charles Penland (a personal guarantor) and Penland Properties II (real estate collateral mortgage) and was signed separately by each of those parties. Those obligations were with separate entities from the automobile dealership (Penland Automotive) and required separate signatures.
April 2, 2018	The 2016 Agreement is amended in writing. (R. 84).
Feb. 20, 2019	Plaintiffs ended the relationship with Defendants and asked for the account to be closed and deactivated, the UCC-1 collateral filing to be removed, and its reserve fees to be returned. (R. 83).
June of 2020	The parties begin negotiating renewal of their relationship.
July 6, 2020	Defendant Haight drafted a letter indicating that a new contract would be prepared and forwarded to Plaintiffs. (R. 97). Defendant Haight of DFH drafted proposed new terms for the Loan and Security Agreement which he shared with Defendant Lanzl and independent DFH contractor, John Bethea. (R. 93). However, those new terms and conditions were never shared with Plaintiffs.
Aug. and Sept. 2020	Plaintiffs request clarification of the terms and conditions of the parties' agreement and expresses confusion over invoicing sent from DRH to Penland Automotive. (R. 125-131).
October 2020	When pressed by Plaintiffs, DFH claims the 2016 Agreement was "renewed" verbally by Penland Automotive employee Tim Yarger. DFH claims the 2020 relationship is ruled by the 2016 Agreement despite no negotiation or discussion with the parties and the signatories to the 2016 Agreement or no written agreement to that

[3] The agreement was amended several times in writing. (R. 72).

effect between Charles Penland, Penland Automotive, or Penland Properties II.

PROCEDRUAL POSTURE

Plaintiffs Penland Automotive, LLC and Charles W. Penland, Jr. filed this lawsuit against Defendants DFH, LLC, Steve Lanzel and Daniel B. Haight on January 18, 2021. Plaintiffs brought the following causes of action: (1) breach of covenant of good faith and fair dealing; (2) unfair trade practices; (3) conversion; (4) breach of verbal contract; (5) recission of verbal contract; (6) fraudulent inducement to enter a contract; (7) negligent misrepresentation; and (8) defamation *per se*. In response, Defendants filed their Answer and Counterclaim on March 31, 2021, with counterclaims arising solely out of the alleged breach of the 2016 Agreement.

On April 13, 2021, Defendants filed a Motion to Strike Jury Demand alleging that Respondents waived their rights to a jury trial in the Loan Documents. After the Court heard arguments from the parties at a hearing on June 29, 2021, the Court denied Defendants' Motion to Strike pursuant to an Order filed on July 28, 2021. Specifically, the Court held that there was "a genuine issue of material fact exist[ed] relating to the continued applicability of the 2016 Loan Documents to the reopened floorplan financing relationship in 2020[.]" DFH filed a Renewed Motion to Strike Jury Demand on September 28, 2022. A hearing on DFH's Renewed Motion was held on January 4, 2023, before the Honorable J. Derham Cole. (Tr. of Hrg. p. 1) (R. 209. On June 1, 2023, Judge Cole entered a Form 4 Order denying DFH's Renewed Motion to Strike Jury Demand. (Order June 1, 2023) (R. 7). This appeal followed.

STANDARD OF REVIEW

"Whether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). Appellate courts may decide questions of law with no particular deference to the circuit court's findings. *Id.* at 15, 690 S.E.2d at 772-73. Although a party may waive the right to a jury trial by contract, "[s]uch a waiver must be strictly construed as the right to trial by jury is a substantial right." *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 63-64, 566 S.E.2d 863, 866 (Ct. App. 2002) (citing *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992). *See also Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 332, 755 S.E.2d 437, 443 (2014).

ARGUMENT

I. The Essential and Material Terms of any Purported 2020 Agreement are so Unclear that there cannot be a Meeting of the Minds

There is no valid written agreement between the parties and therefore no waiver of a jury trial. "[I]n order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (citing *Hughes v. Edwards*, 265 S.C. 529, 220 S.E. (2d) 231 (1975)) (emphasis in original). "This 'meeting of minds' required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known." *Id*. (citation omitted).

The 2016 agreement was closed and terminated and cannot control the parties' renewed relationship in 2020. The "verbal renewal" alleged by DFH is (1) not in writing; (2) unclear regarding the contracting entities, collateral, and terms; (3) indisputably not accepted by Penland Properties or personal guarantor Charles Penland; and (4) unclear and ambiguous as Penland Automotive immediately and repeatedly contacted DFH asking for the new documents and a explanation of terms. There was no "meeting of the minds."

As noted above, the 2016 Agreement was amended multiple times in writing between 2016 and 2019. Charles Penland always signed those amendments. Tim Yarger never signed those amendments or any other contracts on behalf of Penland Automotive. In 2019, the loan, security agreement, personal guaranty, and mortgage were cancelled and all of Respondents' reserves were returned. Appellants contend that the 2016 Agreement was renewed by verbal agreement in 2020. However, it is unclear whether Appellants contend that the 2016 Agreement or one of the multiple amendments was the agreement that was renewed. It is also unclear if the personal guaranty, mortgage, or other documents were "renewed," and which parties were

bound by the agreement. John Bethea, an independent contractor with DFH, testified that Mr. Haight told him Penland Automotive did not understand what or why they were being charged the prices DFH was charging. (J. Bethea Depo., pp. 101-104)(R. 168). Additionally, Mr. Bethea testified that it was unclear which contract – the terms of the 2016 Agreement or its multiple amendments – controlled the 2020 agreement. (J. Bethea Depo, pp. 101-104)(R. 168).

All of the allegedly wrongful conduct in this case arises out of actions taken by DFH based upon the alleged 2020 verbal agreement after the 2016 contracts and documents and their amendments were completely closed and ended. Despite its position today, Respondent promised and created terms and new documents in 2020 which were never shared or executed. Now, finding itself in a position where it loaned money with no written agreement, terms, rights, or security interests it is taking an illogical and unsupportable position that somehow, despite no knowledge by the parties bound to it, that the 2016 Agreements were renewed. The renewal, and therefore enforceability, rights, and obligations under it is the issue in this case which must be determined before the court can determine whether the actual terms are enforceable.

Further, the cases cited by Appellants in support of waiver of a jury trial do not cite a dispute over the existence of a contract. Instead, in those cases, there was no dispute regarding the existence and execution of the agreements. The only issues in those cases were whether the undisputed contract and its terms were enforceable in light of considerations of equity, unconscionability, or scope of the clause. Here, the entire agreement, its execution, and its enforceability is in dispute leaving its validity, terms, rights and obligations, and jury waiver as a question for the fact finder.

The main issue, which Appellants ignore, is whether the 2016 agreement, which was indisputably ended and closed, could be renewed and enforced without the knowledge of, consent to, or execution by the parties to it. It would seem, based upon the undisputed fact that

it was secret and therefore neither accepted nor executed, there could be no meeting of the minds and therefore was never "renewed" and is unenforceable. As such, the agreement itself must be validated and found enforceable before the trial court, or this court, can find that the waiver of jury trial is enforceable. Because the existence and enforceability of the ENTIRE "verbal renewal" is in dispute the Circuit Court's Order should be affirmed.

II. The 2020 Agreement is Barred by the Statute of Frauds

It is undisputed that Charles Penland did not, individually or on behalf of Penland Automotive sign an agreement in 2020, nor did Charles Penland sign a mortgage or personal guaranty. As there is no agreement in writing, DFH's arguments and 2020 contract is barred by the statute of frauds, S.C. Code Ann. § 32-3-10 (the "Statute of Frauds"). The Statute of Frauds provides, in pertinent part, as follows:

> No action shall be brought whereby:
>
> …
>
> (2) To charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person;
>
> …
>
> (4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; or
>
> (5) To charge any person upon any agreement that is not to be performed within the space of one year from the making thereof;
>
> Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

Appellants' Counterclaim includes a claim for Suit on Guaranty against Charles Penland. Clearly, subsection (2) of the Statute of Frauds which provides that agreements for a party to answer for the debt or default of another person must be in writing applies to the Guaranty. As provided by the Statute of Frauds, no action may be brought against Plaintiffs ***unless*** there is a written agreement signed by the party to be charged. Defendants have brought

a counterclaim against Plaintiffs Penland Automotive and Charles Penland. Neither of these parties signed a written agreement renewing the 2016 Agreement in 2020.

Further, the 2016 Loan and Security Agreement included a mortgage, thus invoking paragraph 4 - To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them. It also contains a demand note and a power of attorney. Therefore, the Statute of Frauds applies, and Plaintiffs' "agreement" is barred and unenforceable.

The security agreement in the alleged 2020 "agreement" is unenforceable pursuant to the S.C. Code § 36-9-203:

> (b) Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to the collateral only if:
>
> (1) value has been given;
>
> (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
>
> (3) one of the following conditions is met:
>
> (A) the debtor has ***authenticated*** a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;
>
> (B) the collateral is not a certificated security and is in the possession of the secured party under Section 36-9-313 pursuant to the debtor's security agreement;
>
> (C) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Section 36-8-301 pursuant to the debtor's security agreement; or
>
> (D) the collateral is deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents and the secured party has control under Section 36-7-106, 36-9-104, 36-9-105, 36-9-106, or 36-9-107 pursuant to the debtor's security agreement.

(Emphasis added).

Because the alleged agreement was not authenticated by the debtors, the 2020

agreement does not satisfy the requirements of S.C. Code § 36-9-203, and thus is unenforceable.

III. Tim Yarger Did Not Have Authority to Bind Any of The Alleged Obligors

Tim Yarger never signed or had authority to sign any contracts on behalf of Charles Penland, Penland Automotive, or Penland properties. Appellants contend that Tim Yarger, the then-General Manager of Penland Automotive, verbally agreed to reuse the terms of the 2016 agreement. However, Mr. Yarger did not have authority to bind Penland Automotive or the other alleged obligors, Penland Properties II and Charles Penland. The 2016 Agreement and the written amendments were all signed by Charles Penland on behalf of himself and his solely owned companies, Penland Automotive and Penland Properties II. Mr. Yarger did not sign any of these agreements on behalf of the debtors.

An agency relationship may be established by evidence of actual or apparent authority. *See Fochtman v. Clanton's Auto Auction Sales*, 233 S.C. 581, 106 S.E.2d 272 (1958); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 566, 813 S.E.2d 292, 304 (Ct. App. 2018). "The existence of an agency relationship is determined by the relation, the situation, the conduct, and the declarations of the party sought to be charged as principal. *Hodge* at 565-566 (quoting *Langdale v. Carpets*, 395 S.C. 194, 201, 717 S.E.2d 80, 83 (Ct. App. 2011)). Further, "[i]t is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority." *Id*. (citation omitted). "[A]n agency may not be established solely by the declarations and conduct of an alleged agent." *Id*. at 566 (Citations omitted).

The elements of apparent agency are: (1) purported principal consciously or impliedly represented another to be his agent; (2) third party reasonably relied on the representation; (3) third party detrimentally changed his or her position in reliance on the representation. *See Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 409 S.E.2d 769 (1991). "The doctrine of apparent authority focuses on the principal's manifestation to a third party that the agent has certain

authority." *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292 (1996). Additionally, "[a]pparent authority must be established based upon manifestations by the principal, not the agent." *Shropshire v. Prahalis*, 309 S.C. 70, 419 S.E.2d 829 (Ct. App. 1992).

Respondents have failed to submit any evidence that the alleged obligors consciously or impliedly represented Mr. Yarger to be their agent with respect to this transaction and that Defendants reasonably relied on the purported representation. As Mr. Yarger lacked actual or apparent authority, his alleged verbal agreement to renew the 2016 Agreement did not bind the obligors.

Even if the court finds Tim Yarger had apparent authority, he could never bind Charles Penland individually or Penland Properties II – therefore the agreement is either completely invalid or invalid as to those two parties and their right to a Jury Trial remains.

IV. The Jury Waiver Provision Is Unenforceable

The jury waiver provision is one-sided and oppressive and therefore unconscionable. Pursuant to S.C. Code § 36-2-302, a contract or any clause of a contract may be attacked at law if it was unconscionable at the time it was made. S.C. Code § 36-2-302. If the court finds that a contract clause is unconscionable, the court may refuse to enforce the contract clause or limit the application of the unconscionable clause to avoid any unconscionable result. *Id*. "Unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them, and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25 (2007) (citing *Carolina Care Plan, Inc. v. United HealthCare Servs. Inc.*, 361 S.C. 544, 554 (2004)). In determining unconscionability of a specific contractual provision, South Carolina Courts may consider "the cumulative effect of a number of oppressive and one-sided provisions." *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 15 (Ct. App. 2013), aff'd 417 S.C. 42, 790 S.E.2d 1 (2016).

DFH carefully drafted oppressive, overbroad and one-sided provisions that attempted to abrogate its' liability while simultaneously ensuring for itself a clear advantage to bind and enforce against Respondents. The waiver provisions were unconscionable because they attempted to disclaim DFH's liability and unconscionably restricted Respondents' right and method to bring suit.

The Financing Agreement contains the following language:

> TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH GRANTOR AND DFH HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY, AND AFTER AN OPPORTUNITY TO CONSULT WITH INDEPENDENT LEGAL COUNSEL, (A) **WAIVE ANY AND ALL RIGHTS TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING IN CONNECTION WITH THIS AGREEMENT, ANY RELATED AGREEMENT, THE LIABILITIES, ALL MATTERS CONTEMPLATED HEREBY AND DOCUMENTS EXECUTED IN CONNECTION HEREWITH, AND ANY AND ALL CAUSES OF ACTION IN ANY WAY RELATING TO ANY MATTER BETWEEN THEM WHETHER ARISING FROM OR RELATING TO THIS AGREEMENT OR ANY RELATED AGREEMENT, OR ARISING FROM ALLEGED EXTRA- CONTRACTUAL FACTS PRIOR TO, DURING, OR SUBSEQUENT TO THIS AGREEMENT** AND REGARDLESS OF THE LEGAL THEORY UPON WHICH SUCH MATTER IS ASSERTED, AND (B) AGREE NOT TO SEEK TO CONSOLIDATE ANY SUCH ACTION WITH ANY OTHER ACTION IN WHICH A JURY TRIAL CANNOT BE, OR HAS NOT BEEN, WAIVED. EACH GRANTOR CERTIFIES THAT NEITHER DFH NOR ANY OF ITS REPRESENTATIVES, AGENTS OR COUNSEL HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT DFH WOULD NOT IN THE EVENT OF ANY SUCH PROCEEDING SEEK TO ENFORCE THIS WAIVER OF RIGHT TO TRIAL BY JURY.

The language in this clause is so broad that even according to Appellants it wouldn't just control disputes over the 2016 agreement but also "(1) all disputes related to the Financing Agreement, (2) any and all causes of action "in any way relating to any matter" involving the parties, and (3) all causes of action arising from or related to "extra-contractual facts … subsequent to" the Financing Agreement. Essentially, the unambiguous language states that if these parties are going to engage in business with one another, whether under the specific

Financing Agreement originally executed in 2016 or through some future arrangement, DFH and Penland agree to a jury trial waiver." (Appellate Brief). Appellant further opines that "the specific language of the jury trial waiver is broader than just the specific contract in which it is included, it governs any relationship or any business between DFH and Penland." (Appellate Brief).

As stated by Appellants' themselves, Appellants are attempting to use the 2016 contracts, which were clearly cancelled and closed, to govern ANY relationship or business between ALL of the parties forever. This was not negotiated, interpreted, or understood by Respondents and is overly broad.

For instance, the defamation cause of action is brought by Charles Penland individually due to Appellants' derogatory correspondence about the dealership and Mr. Penland and Appellants' conduct in following Mr. Penland to his place of work at an auction with the alleged intention of embarrassing him or forcing him to sign NEW documents. This conduct by all Appellants was never, nor could ever be reasonably foreseeable such that the parties intended that the 2016 contracts, which were cancelled, would continue to govern Appellants' conduct in defaming Mr. Penland in 2020 or frankly forever. This is unconscionable and overly broad and should not be enforced.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court to affirm the Order of Judge Cole. Appellants have put the proverbial cart before the horse. Respondents demand the court enforce the 2016 agreements before the fact finder establishes the existence of a "verbally renewed agreement" in 2020. As Respondent vehemently denies any "verbally renewed agreement" and has filed testimony and evidence that this agreement was never shared, accepted, or executed the appeal is premature and misplaced. Appellant must first prove the existence of and validity of any agreement – which it cannot do – before it can be enforced and, therefore, Judge Cole's Order should be affirmed.

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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