RECEIVED
Mar 11 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Daniel Coble, Circuit Court Judge

Appellate Case No. 2023-001034
Case No. 2022-CP-40-00654

Ethan Tyler Vanfossen and Corey J. Davis, on behalf of themselves and all others similarly situated ..... Respondents,

v.

Love Chevrolet Company..... Appellant,

FINAL REPLY BRIEF OF APPELLANT

Sarah T. Eibling, Esquire
Blake T. Williams, Esquire
Nelson Mullins Riley & Scarborough LLP
Post Office Box 11070
Columbia, South Carolina 29211
(803) 799-2000

Joseph G. Studemeyer, Esquire
Sudemeyer Law Firm
PO Box 1014
Irmo, SC 29063

Attorneys for Appellant Love Chevrolet Company

TABLE OF CONTENTS

Table of Authorities iii

Argument 1

I. The Agreements were binding over the delegation of "gateway matters," including regarding the enforceability of the Agreements. 1

II. The Agreements are valid and enforceable. 2

A. The Agreements contain the necessary terms to be an agreement to arbitrate. 3

B. The Agreements are not unconscionable. 5

C. The Agreements do not run afoul of public policy. 7

D. Love's alleged fraud does not constitute an additional sustaining ground. 8

E. The Court should reverse the circuit court and compel arbitration. 9

III. The circuit court committed reversible error by denying Love's motion to compel arbitration. 9

A. The circuit court failed to apply the Prima Paint doctrine and compel arbitration to allow an arbitrator to determine whether the dealer retained the right to compel arbitration after alleged assignment of the RISCs. 9

B. The circuit court erred in finding that both RISCs were assigned. 11

IV. The Agreements involve interstate commerce; thus, the FAA is applicable 12

V. Plaintiffs' claims do not arise out of the RISCs. 16

Conclusion 17

TABLE OF AUTHORITIES

Page(s)

Cases

Allied-Bruce Terminix Companies v. Dobson,
513 U.S. 265 (1995) 14

Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.,
361 S.C. 544, 606 S.E.2d 752 (2004) 8, 9

Chapman v. HHCSC, LLC,
No. 2:14-51-RMG, 2014 WL 12615706 (D.S.C. Dec. 29, 2014) 15

Cox v. Assisted Living Concepts, Inc.,
No. 6:13-00747, 2014 WL 1094394 (D.S.C. Mar. 18, 2014) 13

Damico v. Lennar Carolinas, LLC,
437 S.C. 596, 879 S.E.2d 746 (2022) 6

Dixon v. Pattee,
__ S.C. __, __ S.E.2d __, 2023 WL 8792809 (Ct. App. 2023) 6

Doe v. TCSC, LLC,
430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020) 2

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 2

Grant v. Magnolia Manor–Greenwood, Inc.,
383 S.C. 125, 678 S.E.2d 435 (2009) 4

Hengle v. Treppa,
19 F.4th 324 (4th Cir. 2021) 14

Hicks Unlimited, Inc., v. Unifirst Corp.,
439 S.C. 623, 889 S.E.2d 564 (2023) 14, 16

Irby v. S. Mgmt. Corp.,
No. 8:21-2653-HMH, 2021 WL 4711297 (D.S.C. Oct. 8, 2021) 14

Jefferies v. Certified Auto Ctr., LLC #2,
No. 7:16-3775-HMH, 2017 WL 10810592 (D.S.C. Feb. 8, 2017) 15

KBC Asset Mgmt. NV v. DXC Tech. Co.,
19 F.4th 601 (4th Cir. 2021) 15

Litman v. Cellco P'ship,
655 F.3d 225 (3d Cir. 2011).....8

M.B. Kahn Const. Co., Inc. v. SC Nat'l Bank of Charleston,
275 S.C. 381, 271 S.E.2d 414 (1980).....9

Masters v. KOL, Inc.,
431 S.C. 28, 846 S.E.2d 893 (Ct. App. 2020).....15

Munoz v. Green Tree Fin. Corp.,
343 S.C. 531, 542 S.E.2d 360 (2001).....13

New Prime Inc. v. Oliveira,
139 S. Ct. 532 (2019).....2

Owens v. Stirling,
438 S.C. 352, 882 S.E.2d 858 (2023).....12

PCS Nitrogen, Inc. v. Cont'l Cas. Co.,
436 S.C. 254, 871 S.E.2d 590 (2022).....13

Player v. Chandler,
299 S.C. 101, 382 S.E.2d 891 (1989).....3

Roberson v. Money Tree of Ala., Inc.,
954 F. Supp. 1519 (M.D. Ala. 1997).....15

Rota-McLarty v. Santander Consumer USA, Inc.,
700 F.3d 690 (4th Cir. 2012).....15

S.C. Pub. Serv. Auth. v. Great Western Coal (Kentucky), Inc.,
312 S.C. 559, 437 S.E.2d 22 (1993).....9

Sanders v. Savannah Highway Auto. Co.,
432 S.C. 328, S.E.2d 744, 746 (Ct. App. 2020).....10

Sanders v. Savannah Highway Auto. Co.,
440 S.C. 377, 892 S.E.2d 112 (2023).....3, 10, 11

Simpson v MSA of Myrtle Beach,
373 S.C. 14, 24, 644 S.E.2d 663 (2007).....4, 5, 6, 7

State v. Pagan,
369 S.C. 201, 631 S.E.2d 262 (2006).....13

Stoud v. J.D. Byrider,
228 F.3d 709 (6th Cir. 2000).....15

Walden v. Harrelson Nissan, Inc.,
399 S.C. 205, 731 S.E.2d 324 (Ct. App. 2012).....15

York v. Dodgeland of Columbia, Inc.,
406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013)..... *passim*

Zabinski v. Bright Acres Assocs.,
346 S.C. 580, 553 S.E.2d 110 (2001) 4, 5

Rules

Rule 9(b), SCRCP.....8

Statutes

9 U.S.C. § 2.....14

9 U.S.C. § 5.....4

S.C. Code Ann. § 15-48-10.....13, 16

Other Authorities

Black's Law Dictionary – Arbitrability (11th ed. 2019).....1

General Motors Financial Company, Inc.'s Form 8–K dated December 7, 2023,
https://www.sec.gov/ix?doc=/Archives/edgar/data/804269/000119312523290
415/d496882d8k.htm 15

Merriam-Webster Thesaurus, https://www.merriam-
webster.com/thesaurus/enforce (last visited Dec. 26, 2023).....3

ARGUMENT

The circuit court erred in denying Appellant Love Chevrolet's ("Love") Motion to Compel Arbitration by: (1) failing to apply the *Prima Paint* doctrine and compel this matter to arbitration for the arbitrator to decide gateway issues such as arbitrability; (2) determining that the Arbitration Agreements' ("the Agreements") independent function was extinguished upon their incorporation into Retail Installment Contracts ("RISC"); (3) finding the Arbitration Agreements were assigned where there was no supporting evidence for this finding; and (4) finding Plaintiffs' claims arise under the RISCs, not the Records of Purchase. This Court should reverse and remand with instructions to compel the dispute to arbitration.

I. The Agreements were binding over the delegation of "gateway matters," including regarding the enforceability of the Agreements.

In their brief, Plaintiffs first argue that "no one agreed that the gateway matters that were before the judge would be decided by an arbitrator, and it was proper for the judge to rule on the enforceability of the agreement." (Resp. Br. 6.) This is incorrect. The Agreements state that "***[a]ll*** gateway matters concerning the ***existence, applicability, and validity*** of this Agreement shall be resolved by the arbitrator." (Aff. of Ben Hoover & Exhibits; R. 145-148 (emphasis added). The issue of "arbitrability" is whether a binding arbitration agreement exists that applies to the claims at issue. *See* Black's Law Dictionary – Arbitrability (11th ed. 2019) ("The status, under applicable law, of a dispute's being or not being resolvable by arbitrators because of the subject matter."). Based on the plain language of the delegation clause, the parties clearly and unmistakably agreed to delegate the issue of whether Plaintiffs' claims fall within the scope of the Agreements to the Arbitrator.

Where the parties are silent on this issue, the FAA presumes parties intend that the court, rather than an arbitrator, will decide "gateway issues" related to arbitration, including whether the

arbitration agreement is valid and enforceable and whether it covers the parties' dispute. *Doe v. TCSC, LLC*, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020); *see First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). However, parties may choose to delegate these gateway issues to an arbitrator, and such a delegation is binding where it was clear and unmistakable. *Doe*, 430 S.C. at 608, 846 S.E.2d at 877 (quoting *Kaplan*, 514 U.S. at 944–45). "A delegation clause gives an arbitrator authority to decide even the initial question whether the parties' dispute is subject to arbitration." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019). Where a delegation occurs, the court retains "the right and duty to determine whether the delegation is valid and enforceable ***as long as the party resisting arbitration has made a direct and discrete challenge to the validity and enforceability of the delegation clause specifically***." *Doe*, 430 S.C. at 608, 846 S.E.2d at 877.

Here, Plaintiffs have not made a discrete challenge to the validity of the delegation clause. Instead, they merely quibble with its wording. This is not sufficient to show that the delegation clause is invalid. Instead, Plaintiffs contend that although the Agreements delegate matters concerning the "existence, applicability, and validity" of the Agreements to the arbitrator, it does not use the word "enforce" or its derivatives, and thus the issue of "enforcement" was not delegated. As detailed above, however, the delegation clause is very broad, and use of the specific word "enforcement" was not required for all questions related to arbitrability to be delegated to the arbitrator.[1] The broad delegation clause at issue here necessitates compelling the matter to arbitration so that the arbitrator may determine these gateway issues.

II. The Agreements are valid and enforceable.

[1] Applicability and enforceability are synonyms—in fact, the Merriam-Webster Thesaurus lists "apply" as a synonym of "enforce." Enforce, MERRIAM-WEBSTER THESAURUS, https://www.merriam-webster.com/thesaurus/enforce (last visited Dec. 26, 2023).

In an effort to avoid the Agreements and their delegation clauses, Plaintiffs raise several arguments as to whether the parties ever agreed to arbitrate in the first instance. *See Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 390–91, 892 S.E.2d 112, 119 (2023) (noting that challenges to the formation of a contract raise questions about whether the parties ever agreed to arbitrate and since arbitration is "strictly a matter of consent, it would be illogical for the arbitrator to resolve such a challenge"). Each of their arguments fails and should be rejected.

A. The Agreements contain the necessary terms to be an agreement to arbitrate.

Plaintiffs first assert that the parties did not enter into a valid agreement to arbitrate because essential terms are missing from the Agreements, and thus there was no meeting of the minds. (Resp. Br. 12.) Specifically, Plaintiffs argue that there is no agreement as to how the arbitrator is to be chosen or the applicable procedural rules. (Resp. Br. 14-15.)

"South Carolina common law requires that, in 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). In determining whether a valid arbitration agreement exists, "trial courts consider 'general contract defenses' to ensure a meeting of the minds to arbitrate existed, and that such an agreement was not the result of 'fraud, duress, [or] unconscionability.'" *York*, 406 S.C. at 78, 749 S.E.2d at 145 (quoting *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001)). Arbitration agreements have a strong presumption of validity in federal and state courts. *Simpson v MSA of Myrtle Beach*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

This Court's decision in *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013) is directly on point. In *York*, the plaintiff argued that the subject arbitration agreements were invalid because they omitted the following material terms: how an arbitrator is

chosen, what discovery rules apply, how arbitration fees are allocated, and how arbitration is initiated. *York*, 406 S.C. at 82, 749 S.E.2d at 146. The *York* plaintiff contended, therefore, that there was no meeting of the minds. *Id.* The Court rejected these arguments and found that the trial court did not err in compelling arbitration. As the Court explained, "the lack of a specified arbiter is not an omission of a material term." *Id.* at 82–83, 749 S.E.2d at 14. Moreover, the plaintiff had cited "no authority for the proposition that discovery rules, cost allocations, or arbitration initiation procedures are material terms that an arbitration agreement must explicitly designate," and found that "these terms are 'ancillary logistical' ones not required within an arbitration agreement." *Id.*

The *York* appellant cited *Grant v. Magnolia Manor–Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009) in support of her arguments. As the Court reasoned, however, *Grant* was a unique case where the parties' arbitration agreement required a specific entity to serve as the arbitrator but did not specify an alternate arbitrator or a mechanism for appointing an alternate. *York*, 406 S.C. at 82–83, 749 S.E.2d at 14. The *Grant* court held that a named arbitrator is a material term ***when one is specified within an agreement***, and that FAA Section 5's default mechanism for arbitrator selection does not apply when such a specification exists. *Id.* As the *York* court reasoned, however, these holdings are inapplicable when the contract does not specify a particular arbitrator. This is the precise situation to which Section 5 of the FAA governs. *See id.*; *see also* 9 U.S.C. § 5 (providing a mechanism to select an arbitrator when the agreement does not provide one).

Under this precedent, the "missing" terms identified by Plaintiffs regarding arbitration selection and the procedures of arbitration are "ancillary logistical" terms rather than material terms that would render the Agreements invalid. Therefore, Plaintiffs have failed to demonstrate that there was no meeting of the minds that wound render the Agreements unenforceable.

B. The Agreements are not unconscionable.

Plaintiffs next argue that enforcing the Agreements would be unconscionable. (Resp. Br. 15.) Specifically, Plaintiffs argue that the Agreements are contracts of adhesion, and they point to the unconscionability of agreements between a large retailer of automobiles and ordinary citizen-purchasers. (*Id.*)

Just as state law determines whether an agreement to arbitrate exists under the FAA, courts may invalidate arbitration agreements on general state law "contract defenses, such as fraud, duress, and unconscionability." *Zabinski*, 346 S.C. at 593, 553 S.E.2d at 116. "In South Carolina, unconscionability is '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.'" *York*, 406 S.C. at 85, 749 S.E.2d at 148 (quoting *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668). Indeed, unconscionability is "due to both an absence of meaningful choice *and* oppressive, one-sided terms." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (emphasis added). "Terms are oppressive when 'no reasonable person would make them and no fair and honest person would accept them.'" *York*, 406 S.C. at 88, 749 S.E.2d at 149–150 (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668). "'A party seeking to prove an arbitration agreement is unconscionable must allege he lacked a meaningful choice as to the arbitration clause specifically, not merely that he lacked a meaningful choice as to the contract as a whole.'" *Dixon v. Pattee*, __ S.C. __, __ S.E.2d __, 2023 WL 8792809 at *13 (Ct. App. 2023) (quoting *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 613, 879 S.E.2d 746, 755 (2022)). While an adhesion contract for the purchase of an automobile receives "considerable skepticism," it is not, per se, unconscionable. *York*, 406 S.C. at 86, 749 S.E.2d at 149 (quoting *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669–70).

Again, the *York* court addressed a similar argument to one that Plaintiffs assert. In examining unconscionability, it reasoned that the arbitration agreement found in the subject installment contract did not incorporate oppressive and one-sided terms. 406 S.C. at 92, 749 S.E.2d at 152. The agreement "did not preclude the arbitrator from awarding mandatory statutory remedies and it did not incorporate a lack of mutuality of remedies." *Id.* Moreover, provisions existed to advance filing and arbitrator fees for the purchaser and preserve certain self-help remedies for both parties. *Id.* Thus, the court concluded that the arbitration agreement did not incorporate oppressive and one-sided terms rendering it unconscionable even though "it exists within an adhesion contract and was tainted by a lack of meaningful choice." *Id.*

The Agreements at issue in this case are analogous to the one at issue in *York*. Love agreed to pay a portion of the filing fee and up to $1,500 of the arbitrator's fees, with the parties to share any other fees and costs equally. (Arbitration Agreements, Ex. A to Aff. in Supp. of Motion to Stay and Compel Arb.; R. 141, 142.) Moreover, like the agreement in *York*, the Agreements do not restrict the remedies that either party may recover or contain a lack of mutuality of remedies.[2] Therefore, because the Agreements are not oppressive or one-sided in their terms (and even provide for several benefits for the purchasers), their terms do not rise to the level where "no reasonable person would make them and no fair and honest person would accept them." *See York*, 406 S.C. at 85, 749 S.E.2d at 148 (quoting *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668).

Furthermore, Plaintiffs have submitted no evidence supporting that they were required to execute the Agreements in order to purchase a vehicle from Love. Additionally, Love Chevrolet

[2] In fact, the Agreements expressly provide that the arbitrator is bound by "governing local, state or federal law" and may award "damages or other relief allowed by governing law." (Arbitration Agreements, Ex. A to Aff. in Supp. of Motion to Stay and Compel Arb.; R. 141, 142.) Moreover, they state that the arbitrator "shall have the authority to award fees, costs, injunctive or equitable relief in accordance with this Agreement and applicable law." (*Id.*)

is just one of many automotive dealerships in the area, including several other Chevrolet/General Motors dealerships. Plaintiffs have not shown that there were no alternatives for purchasing the same or similar vehicles if they were unwilling to enter into the Arbitration Agreements.

For all these reasons, the Court should reject Plaintiffs' unconscionability arguments and find that the Agreements are valid and enforceable.

C. The Agreements do not run afoul of public policy.

Plaintiffs' third challenge to the Arbitration Agreements assert that they should be held invalid as against public policy. Specifically, Plaintiffs argue that the Agreements' class waiver provision undermines the public policy of promoting safety.[3]

In South Carolina, courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 555, 606 S.E.2d 752, 758 (2004). In *York*, the plaintiffs argued that the arbitration agreement's class action waiver rendered the agreement unenforceable as against public policy and their state law right to bring class action claims, including class arbitration claims. 406 S.C. at 92, 749 S.E.2d at 152. The *York* court disagreed, holding that "the provisions banning class arbitration in the present case cannot be invalidated based upon public policy considerations embodied within state law. Rather, the 'the arbitration clause[s] at issue here must be enforced according to [their] terms, which requires individual arbitration and forecloses class arbitration.'"

[3] Plaintiffs also take issue with the waiver of a right to trial by jury and the requirement that arbitration be held in the dealership's county of residence (Richland County). A jury trial waiver is, of course, an inherent component of any arbitration agreement. If a jury trial waiver was not permitted, no arbitration agreement could ever be enforced. Moreover, Plaintiffs are both citizens of Aiken County, South Carolina, (Compl. ¶¶ 1-2; R. 27), and thus are local to the Midlands. In any event, the venue statute already required Plaintiffs to litigate their claims in Love's county of residence (Richland County), and that is where they filed their Complaint. The Arbitration Agreements merely contemplate litigating in the same locale, and thus are not any more burdensome to the Plaintiffs than litigating in court would be.

York, 406 S.C. at 92, 749 S.E.2d at 153 (quoting *Litman v. Cellco P'ship*, 655 F.3d 225, 231 (3d Cir. 2011)). Therefore, as in *York*, the class action waiver included in the Agreements here does not render the Agreements unenforceable against public policy.

D. Love's alleged fraud does not constitute an additional sustaining ground.

Finally, Plaintiffs assert that Love's alleged fraud constitutes an additional sustaining ground for the circuit court's refusal to compel arbitration. This is entirely unsupported by the record. Plaintiffs did not even ***plead*** a fraud claim, much less submit evidence that would satisfy the special requirements for proving fraud in the inducement sufficient to invalidate the Arbitration Agreements.

To state a claim involving fraud, a claimant must plead the fraud element with particularity. *See* Rule 9(b), SCRCP (noting that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity"). The elements of fraud under South Carolina law require proof by "clear, cogent and convincing evidence" of:

> (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

M.B. Kahn Const. Co., Inc. v. SC Nat'l Bank of Charleston, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980).

A party seeking to avoid an arbitration agreement on the basis of fraud must prove "fraud in the inducement of the arbitration agreement." *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 551, 606 S.E.2d 752, 755 (2004). "Fraud as a defense to an arbitration clause ***must be fraud specifically as to the arbitration clause and not the contract generally***."

S.C. Pub. Serv. Auth. v. Great Western Coal (Kentucky), Inc., 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993) (emphasis added).

Plaintiffs did not introduce evidence sufficient to satisfy the elements of fraud in the inducement by a clear and convincing standard (or even a preponderance of the evidence standard for that matter). As noted, Plaintiffs did not even plead a fraud claim or argue fraud in relation to the contract as a whole, much less provide ***any*** evidence that Love made any misrepresentations regarding the Arbitration Agreements without which Plaintiffs would not have executed them. Therefore, Plaintiffs' fraud argument is not an appropriate additional sustaining ground, and the circuit court would have abused its discretion in finding that fraud warranted disregarding the Arbitration Agreements.

E. The Court should reverse the circuit court and compel arbitration.

For the reasons detailed above, the Arbitration Agreements signed by Plaintiffs are valid and enforceable as to Plaintiffs. This Court should reverse the circuit court and remand with instructions to compel the matter to arbitration.

III. The circuit court committed reversible error by denying Love's motion to compel arbitration.

A. The circuit court failed to apply the *Prima Paint* doctrine and compel arbitration to allow an arbitrator to determine whether the dealer retained the right to compel arbitration after alleged assignment of the RISCs.

Plaintiffs acknowledge that the circuit court's reasoning for denying Love's motion to compel arbitration was "based on assignability and *Sanders v. Savannah Highway Auto. Co.*, 432 S.C. 328, 332, 852, S.E.2d 744, 746 (Ct. App. 2020)." Although Plaintiffs attempt to avoid the

supreme court's reversal of *Sanders*, that case is dispositive of this matter and requires reversal here. *See Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 892 S.E.2d 112 (2023).

As Love detailed in its opening brief, in *Sanders* the supreme court found that the circuit court erred by refusing to apply the *Prima Paint* doctrine and compel arbitration to allow an arbitrator to determine whether a car dealer retained the right to compel arbitration pursuant to an arbitration agreement in a RISC after assignment of that RISC. *Sanders*, 440 S.C. at 392, 892 S.E.2d at 120-21.

Plaintiffs contend that *Sanders* does not control because the supreme court drew a distinction between the questions of whether an agreement to arbitrate was entered into by the parties at all and whether the admittedly existing agreement was still enforceable by a party that has assigned its rights away under the agreement. *See Sanders*, 440 S.C. at 387, 892 S.E.2d at 114. Plaintiffs further argue that the enforceability of the Agreements, including whether they are enforceable by Love post-assignment, was not a question delegated to an arbitrator here, unlike in *Sanders*.

These arguments fail to acknowledge the breadth of the supreme court's opinion and its applicability to the instant case. As the *Sanders* court explained, "the *Prima Paint* doctrine ***requires*** the arbitrator to decide whether the assignment extinguished [defendant's] right to compel arbitration." *Id.* at 380, 892 S.E.2d at 113 (emphasis added). In fact, the facts of *Sanders* were more favorable to the plaintiff than the facts here because there was no dispute in *Sanders* that the claims arose out of the RISC (the claims alleged misrepresentations by the dealership to the lender to obtain financing), the sole arbitration agreement at issue was contained in the RISC itself, and there was no dispute that all of the dealership's rights under the RISC had been assigned to the lender. *Id.* at 380-81, 892 S.E.2d at 113-14.

Because valid Arbitration Agreements exist here and gateway issues of arbitrability were delegated to the arbitrator, as detailed above, any questions regarding the effect of assignment **must** be reserved for the arbitrator under *Sanders* and the *Prima Paint* doctrine. This Court should reverse.

B. The circuit court erred in finding that both RISCs were assigned.

As noted, the circuit court should not have ruled on the impact of the assignments. However, even if the circuit court could have properly reached this issue, its finding that the Arbitration Agreements were assigned was an abuse of discretion and reversible error. Love presented the circuit court with evidence that Plaintiffs Davis and Vanfossen both executed a valid Arbitration Agreement with Love. However, the circuit court was not presented with any ***evidence*** that these Agreements were assigned to a third party.

Regarding Plaintiff Davis, the only contracts between Love and Davis ever presented to the circuit court were the Davis Arbitration Agreement and Record of Sale. (*See* Affidavit of Ben Hoover & Exhibits; Am. Answer & Ex. A – Records of Purchase; R. 145; 9; 15.) The Arbitration Agreements contain no assignment provision. Although counsel argued that the Davis Arbitration Agreement was incorporated into a retail installment contract that was subsequently assigned to GM Financial, there was no ***evidence*** presented to support this proposition. Plaintiffs did not attach the Davis RISC, their pleading was unverified (and did not mention any RISC in any event), and Plaintiffs did not submit any affidavits or supporting exhibits which would provide an evidentiary justification for the circuit court's factual finding. And, of course, it is well-established that "[t]he arguments of counsel are not evidence." *Owens v. Stirling*, 438 S.C. 352, 359, 882 S.E.2d 858, 862 (2023). Because there is no evidence in the record supporting the circuit court's finding that Love assigned its right to compel arbitration of Davis's claims to a third party, this court should reverse.

The only evidence in the record that even tangentially supports Plaintiffs' argument is the language in the Vanfossen RISC stating that: "Seller assigns its interest in ***this contract*** to GM Financial." (Vanfossen RISC, Ex. B to Resp. in Opp'n; R. 109-110) The Vanfossen RISC was not mentioned in Plaintiffs' complaint nor attached to their response to Love's motion to compel. At the hearing, Plaintiffs' counsel repeatedly referenced the RISCs executed by the Plaintiffs, and Love's counsel objected on the grounds that no RISC was properly before the Court. After the hearing concluded, the Plaintiffs filed a supplemental response that attached a copy of the RISC between Love and Vanfossen for the first time (note Plaintiffs never filed or attached a copy of any RISC between Love and Davis). Even assuming this document was properly before the court, again, it only referenced assignment of the Vanfossen RISC itself to GM Financial. Plaintiffs did not introduce any evidence, and relied solely on the arguments of counsel, to support their contentions: (1) that the Davis Arbitration Agreement was incorporated into the RISC and assigned with it (2) the Davis Arbitration Agreement lost any standalone effect as a result of the assignment and (3) that any RISC even existed between Love and Davis.

Although the question of whether the assignment of a contract is valid is a question of law, the question of whether a purported assignment occurred is a question of fact. *See PCS Nitrogen, Inc. v. Cont'l Cas. Co.*, 436 S.C. 254, 260, 871 S.E.2d 590, 593 (2022). Therefore, a finding as to whether a contract has been assigned must be supported by ***evidence***, and the court abuses its discretion where its conclusions of the circuit court lack evidentiary support. *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). For the reasons stated herein and in Love's opening brief, the circuit court's findings lacked the necessary evidentiary support and amounted to an abuse of discretion. This Court should reverse.

IV. The Agreements involve interstate commerce; thus, the FAA is applicable.

Plaintiffs' final argument raises, as an additional sustaining ground, that Love failed to show involvement of interstate commerce such that the FAA would apply. Plaintiffs contend that if the FAA does not apply, then the South Carolina Arbitration Act ("SCAA") governs, and the Agreements fail to meet its requirements.[4]

The FAA applies to any arbitration agreement that is executed in connection with a transaction involving interstate commerce in any way. *See* 9 U.S.C. § 2; *see also Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265, 281 (1995) (explaining that FAA applies to arbitration agreement involving transaction in interstate commerce, even if parties do not contemplate an interstate commerce connection). Under the FAA, a written agreement to arbitrate disputes which arises out of a contract involving transactions in interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Parties need not contemplate an interstate commerce connection for their arbitration agreements to be governed by the FAA.

Here, the Arbitration Agreements expressly state that they "evidence[] a transaction involving interstate commerce," and the parties acknowledged and agreed that the FAA "preempts state law and shall govern any arbitration" under the Agreements. (Aff. & Exhibit; R. 145; 141-142.) Courts consider such language evidence of the satisfaction of the interstate commerce

[4] Plaintiffs cite to the South Carolina [Uniform] Arbitration Act, S.C. Code Ann. § 15-48-10; however, that Act was preempted by *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001). In *Munoz*, our supreme court affirmed this court's unpublished opinion holding that the FAA applies and preempts our state Arbitration Act. *Munoz*, 343 S.C. at 537–38, 542 S.E.2d at 363. Thus, because the Agreements are governed by the FAA, the South Carolina Uniform Arbitration Act does not apply here. *Cox v. Assisted Living Concepts, Inc.*, No. 6:13-00747, 2014 WL 1094394, at *10-11 (D.S.C. Mar. 18, 2014) ("[E]ven where an arbitration agreement specifically states that the SCUAA is applicable, if the arbitration agreement is covered by the FAA and cannot be enforced under state law because of failure to comply with the notification requirements of the SCUAA, the FAA preempts the state law.").

requirement. *See Hengle v. Treppa*, 19 F.4th 324, 340 (4th Cir. 2021) (explaining that this type of language "confirms that, because the [contract] falls within the FAA's jurisdictional bounds, the FAA governs enforceability of the arbitration provision"); *Irby v. S. Mgmt. Corp.*, No. 8:21-2653-HMH, 2021 WL 4711297, at *3 (D.S.C. Oct. 8, 2021) (finding that interstate commerce applied where, among other things, the parties' contract stated that it "involves interstate commerce").

The supreme court recently cautioned in *Hicks Unlimited, Inc., v. Unifirst Corp.*, 439 S.C. 623, 630, 889 S.E.2d 564, 567 (2023) that the mere statement in an arbitration agreement that the FAA applies would not in and of itself be dispositive. However, it is well established that "contracts for the purchase and financing of a vehicle involve interstate commerce." *York*, 406 S.C. at 79, 749 S.E.2d at 145 (citing *Stoud v. J.D. Byrider*, 228 F.3d 709, 715 (6th Cir. 2000)).[5] Even a transaction involving the sale of a vehicle alone without financing would implicate interstate commerce because automobiles are instrumentalities of commerce regulated by Congress. *See Masters v. KOL, Inc.*, 431 S.C. 28, 37 n.8, 846 S.E.2d 893, 897 n.8 (Ct. App. 2020).

In addition to this well-established general rule, the transactions in this case plainly involved interstate commerce. The subject transactions involved vehicles built by General Motors in another state that were sold to Love (a dealership in South Carolina) who then sold them to customers with third-party financing secured through General Motors Financial (thus involving a

[5] *See also Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 208, 731 S.E.2d 324, 326 (Ct. App. 2012) ("There is no dispute the transaction here . . . involved interstate commerce as Mary is a South Carolina resident, Harrelson is a North Carolina corporation, the vehicle was manufactured in Tennessee, and financing was provided by Nissan-Infiniti LT of California"); *Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 697 (4th Cir. 2012) ("We agree with sister circuits, which have concluded that reliance upon funds from a foreign source in a transaction is sufficient to implicate the FAA."); *Chapman v. HHCSC, LLC*, No. 2:14-51-RMG, 2014 WL 12615706, at *1 (D.S.C. Dec. 29, 2014) ("[A]s an automobile financing agreement, the transaction in question, in the aggregate, affects interstate commerce."); *Roberson v. Money Tree of Ala., Inc.*, 954 F. Supp. 1519, 1523 (M.D. Ala. 1997) (interstate commerce existed where loans of Alabama borrowers were approved in Georgia and proceeds were wired from Georgia).

transfer of funds interstate).[6] Therefore, the transaction undoubtedly involved interstate commerce. *Cf. Jefferies v. Certified Auto Ctr., LLC #2*, No. 7:16-3775-HMH, 2017 WL 10810592, at *2 (D.S.C. Feb. 8, 2017) (finding that the transaction involved interstate commerce where: (1) an out-of-state lender provided financing and monies thus were transmitted across state lines and (2) the parties' agreement stated that the transaction involved interstate commerce and the FAA governed).

The *Hicks* case that Plaintiffs rely on is distinguishable. In that case, although the defendant was based in Massachusetts, it admitted that it had a place of business in Greenville County, and the only evidence before the trial court was that the defendant exclusively dealt with the South Carolina-based plaintiff through that office. *See Hicks*, 439 S.C. at 633, 889 S.E.2d at 569. Moreover, the agreement at issue in *Hicks* did not contain any language about whether interstate commerce was implicated. *Id.* at 634, 889 S.E.2d at 569–70. Although the agreement stated that it was governed by the FAA, it did not have an express statement that the contract "evidences interstate commerce."

Therefore, for all these reasons, the FAA applies in this case because the transaction involved interstate commerce.[7]

---

[6] General Motors Financial Company, Inc. is a Texas corporation with its principal place of business in Texas. General Motors Financial Company, Inc.'s Form 8–K dated December 7, 2023, https://www.sec.gov/ix?doc=/Archives/edgar/data/804269/000119312523290415/d496882d8k.htm. The Court may take judicial notice of this SEC filing. *See, e.g.*, *KBC Asset Mgmt. NV v. DXC Tech. Co.*, 19 F.4th 601, 607 (4th Cir. 2021) ("We may also take judicial notice of the content of relevant Securities and Exchange Commission ("SEC") filings and other publicly available documents included in the record.").

[7] Regardless, even if the transaction was governed by the SCAA rather than the FAA, the Arbitration Agreements satisfy the requirements for enforceability. The SCAA states that notice that a contract is subject to arbitration "shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." S.C. Code Ann. § 15-48-10. The Arbitration

V. Plaintiffs' claims do not arise out of the RISCs.

None of the allegations of Plaintiffs' complaint raise any issues with the terms of the financing for their transactions. In fact, their complaint does not even mention the terms "retail installment contract" or "financing."[8] Because Plaintiffs claims do not arise out of the RISCs, the alleged assignments of the RISCs does not impact whether their claims should be compelled to arbitration.

As Love detailed in its opening brief, Vanfossen and Davis both executed several documents ("transaction documents") to effectuate the purchase of their Silverados from Love. Despite only having one RISC before it at the time of its Order, the Court nevertheless found without citation to case law, statute, or any evidentiary support, and without any analysis, that the primary contract document was the RISC.[9] (*See* Order at 2; R. 5.) This was error. The Arbitration Agreements expressly state they are "incorporated into and made a part of all Contract(s)" between Love and Vanfossen or Davis. (Aff. in Supp. & Exhibit; R. 141-148.) "Contract(s)" is defined in the Arbitration Agreements to mean any agreement between Love and Vanfossen or Davis

---

Agreements here stated at the very top of the page in underlined capital letters "**ARBITRATION AGREEMENT**," thus satisfying the statutory requirements of the SCAA.

[8] Plaintiffs' brief states that the "crux" of their Complaint is that Love "routinely and in the regular course of its business overstates the towing capacity of the Silverados in its advertising and other representations to its customers, upon which it intends they rely[.]" (Pltf. Br. p. 8.) Plaintiff's complaint purports to state claims for: (1) violation of the dealer's act, (2) breach of warranty, and (3) negligent misrepresentation.

[9] As Love's opening brief detailed, Plaintiffs' claims arise out of the entire vehicle sale process, not the financing. To the extent they are contractually based (and only the breach of warranty claim would be), Plaintiffs claims arise out of the Records of Purchase, if anything. Love has consistently advanced this argument below. (*See* Mem. in Supp. of Mot. to Compel p.7; R. 134.) Love did not submit the Records of Purchase to the circuit court until after the hearing. However, it did not realize that the court would make a legally erroneous finding that the RISCs were the only governing contract documents (particularly where one RISC was never even made part of the record) prior to the Court's order.

"regarding the sale, lease, financing, service or maintenance of the Vehicle." (*Id.*) As Love has detailed, the circuit court erroneously failed to consider the basis of Plaintiff's claims, what contract, if any, gave rise to them, and whether the Arbitration Agreement pertaining to ***that*** contract was assigned.

Therefore, because Plaintiffs' claims do not arise out of the RISC, even if effect of the assignment of the RISCs was properly before the circuit court, the circuit court erred by finding that this rendered the Arbitration Agreements ineffective.

CONCLUSION

For the reasons stated in Love's opening brief and herein, this court should reverse the judgment of the circuit court and compel arbitration.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Blake T. Williams

Sarah T. Eibling
SC Bar No. 72607
E-mail: sarah.eibling@nelsonmullins.com
Blake T. Williams
S.C. Bar No. 100794
E-mail: blake.williams@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Love Chevrolet Company

March 11, 2024

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Daniel Coble, Circuit Court Judge

Appellate Case No. 2023-001034
Case No. 2022-CP-40-00654

RECEIVED
Mar 11 2024
SC Court of Appeals

Ethan Tyler Vanfossen and Corey J. Davis, on behalf of themselves and all others similarly situated ..... Respondents,

v.

Love Chevrolet Company..... Appellant,

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's final briefs comply with Rule 211(b), SCACR.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: *s/ Blake T. Williams*
Blake T. Williams
Sarah T. Eibling
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Appellant Love Chevrolet Company

Columbia, South Carolina
March 11, 2024

RECEIVED
Mar 11 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Daniel Coble, Circuit Court Judge

Appellate Case No. 2023-001034
Case No. 2022-CP-40-00654

Ethan Tyler Vanfossen and Corey J. Davis, on behalf of themselves and all others similarly situated ..... Respondents,

v.

Love Chevrolet Company ..... Appellant,

PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Love Chevrolet Company, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified, pursuant to the Supreme Court Order 2022-05-06-04.

Pleading(s): Final Brief of Appellant

Final Reply Brief of Appellant

Served:

David Andrew Maxfield, Esquire
Dave Maxfield, Attorney, LLC
PO Box 11865
Columbia, SC 29211-1865
dave@consumerlawsc.com

Andrew Sims Radeke, Esquire
Harrison, Radeker & Smith, P.A.
PO Box 50143
Columbia, SC 29250
drew@harrisonfirm.com

Attorneys for Ethan Tyler Vanfossen and Corey J. Davis

Joseph G. Studemeyer, Esquire
Studemeyer Law Firm
PO Box 1014
Irmo, SC 29063
greg@studemeyerlawfirm.com

Attorney for Love Chevrolet Company

s/ Meredith S. Keane
Meredith S. Keane
Senior Paralegal

Dated: March 11, 2024