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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Daniel Coble
Circuit Court Judge

Appellate Case No. 2025-000704

Case No. 2022-CP-40-00654

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

v.

Love Chevrolet Company, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242(f) of the South Carolina Appellate Court Rules, Respondent Love Chevrolet Company ("Love") submits this Return opposing Ethan Vanfossen and Corey Davis' (collectively "Petitioners")[1] Petition for a Writ of Certiorari seeking review of the Court of Appeals' decision in the above captioned matter. *See Vanfossen v. Love Chevrolet*, Op. No. 2025-UP-003 (S.C. Ct. App. filed Jan. 2, 2025).

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR; *see also S.C. Dep't of Soc. Servs. v. Benjamin*, 430 S.C. 235, 236, 844 S.E.2d 373 (2020) ("This Court has held it will grant certiorari to the court of appeals only where special reasons justify the exercise of that discretion."). No such special and important reasons are present in this case. The Court of Appeals correctly applied this Court's precedent in reversing the circuit court's denial of Love's motion to stay and compel arbitration. For the reasons stated herein, the Court should deny certiorari and permit the well-reasoned decision of the Court of Appeals to stand.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals properly apply this Court's decision in *Sanders v. Savannah Highway Automotive Company* in holding that whether the purported assignment of the retail installment contracts for the subject motor vehicle transactions extinguished Love's right to compel arbitration is for an arbitrator to decide?

2. Did the Court of Appeals properly reject Petitioners' Federal Arbitration Act ("FAA") argument where applicability of the FAA was not at issue below and there was sufficient evidence that the transactions involved interstate commerce?

3. Did the Court of Appeals act within its discretion by declining to address the remaining issues raised by Petitioners following its holding regarding *Sanders*?

4. Do Love's other appellate grounds represent additional sustaining grounds supporting the Court of Appeals' reversal of the circuit court?

[1] This Return is limited to Vanfossen and Davis's transactions with Love only as they are the only named Petitioners. As Petitioners acknowledge, the circuit court has not certified a class.

COUNTER-STATEMENT OF THE CASE

As the Court of Appeals correctly found, the arbitrator must determine the effect of the alleged assignment of Petitioners' Retail Installment Sale Contracts ("RISCs") to GM Financial pursuant to this Court's holding in *Sanders v. Savannah Highway Automotive Company*, 440 S.C. 377, 892 S.E.2d 112 (2023).

The Petition complicates the relevant history of this case, particularly the arguments advanced by Love and the respective lower courts' holdings. As such, Love provides a brief statement to orient the Court.

I. The parties and this dispute.

On August 29, 2020, Petitioner Ethan Tyler Vanfossen ("Vanfossen") asserts that he came to Love's automobile dealership and purchased a 2020 Chevrolet Silverado 1500 which Love advertised and represented had a towing capacity of 12,000 lbs. (Compl. ¶¶ 13-14; R. 29.) According to Vanfossen, he later discovered that the actual towing capacity of the truck he purchased was 6,600 lbs. (*Id.*) Similarly, on September 7, 2020, Petitioner Corey J. Davis ("Davis") alleges he also purchased a 2020 Chevrolet Silverado 1500 from Love based on Love's advertisements and representations of the truck's 12,000-lb. towing capacity. (*Id.* ¶¶ 20-21; R. 30.)

In purchasing their trucks, each Petitioner signed a Record of Purchase and they both contend they entered into a Retail Installment Sale Contract ("RISC") to finance their respective truck.[2] (*See* Vanfossen and Davis Records of Purchase, Ex. A to Am. Answer; R. 15-20.) Petitioners also both executed standalone Arbitration Agreements. (*See* Aff. in Supp. of Motion to Stay and Compel & Ex. A – Arbitration Agreements; R. 145-48.)

[2] As noted below, Petitioner Davis's purported RISC was never made part of the record.

Both Arbitration Agreements provide that "[a]ll 'gateway matters' concerning the existence, applicability, and validity" of the Arbitration Agreements "shall be resolved by the arbitrator." (*See* Arbitration Agreements; R. 147-48.) Each Arbitration Agreement further states that it is "incorporated into and made a part of all Contract(s) as defined in th[e Arbitration] Agreement." (*Id.*) Finally, they define "Contract(s)" as "any agreement(s) between [Vanfossen or Davis] and [Love] regarding the sale, lease, financing, service or maintenance of the Vehicle." (*Id.*)

Petitioners initiated the underlying action by filing their Complaint on February 7, 2022, asserting claims for violation of the Dealer's Act, breach of express and implied warranties, and negligent misrepresentation. (*See generally* Compl.; R. 32-34.)

II. Love's motion to compel arbitration and related proceedings.

On April 14, 2022, Love filed a Motion to Stay and Compel Arbitration with a supporting affidavit attaching the Arbitration Agreements executed by Petitioners. (Mot. to Compel; Aff. in Supp. & Exhibit; Mem. in Supp. of Mot. to Compel; R. 128-38, 143-48.) Love asserted that because it had entered into binding Arbitration Agreements governed by the FAA with both Petitioners which delegated all gateway issues to the arbitrator for determination, its motion should be granted.[3] (*See generally* Mem. in Supp.; R. 128-38.)

On November 9, 2022, Petitioners filed a Response in Opposition without any supporting exhibits, which they later re-filed with exhibits on April 13, 2023.[4] (*See* Responses in Opp'n; R.

[3] Love also contended that even if the Arbitration Agreements did not have delegation clauses, arbitration should still be compelled because Plaintiffs' claims fell within the scope of the valid and enforceable Arbitration Agreements, which were not unconscionable. (*See id.* pp. 5-9; R. 132-36.)

[4] Petitioners submitted a copy of the RISC between Love and Vanfossen as an exhibit to their memorandum but never submitted any RISC between Love and Davis. (*See* Vanfossen RISC, Ex. B to Resp. in Opp'n; R. 109-10.)

87-127.) Petitioners contended that Love assigned all its rights to compel arbitration when it assigned the RISCs to GM Financial. (*Id.* at 5-6; R. 91-92.) Petitioners highlighted the Arbitration Agreements' "incorporation" language, asserting that the definition of "contracts" included the RISCs. They contended that the Vanfossen RISC identified Love as the Seller-Creditor, stated that it "contains the entire agreement between [buyer] and [Love] relating to this contract," and that since the RISC was assigned to GM Financial, this extinguished Love's rights to compel arbitration under the Arbitration Agreement. (Resp. in Opp'n pp. 5-6; R. 91-92.) Petitioners also raised several other challenges to the Arbitration Agreements, including that: (1) the delegation clause was inapplicable and (2) that the Arbitration Agreements were procured by fraud, were unconscionable, and violated public policy. (*Id*. pp. 7-16; R. 93-102.)

The circuit court held a hearing on April 17, 2023, and issued an Order denying Love's motion on May 12, 2023, finding that Love's assignment of the subject RISCs to GM Financial extinguished its right to enforce the Arbitration Agreements. (Order Denying Mot. to Stay and Compel Arbitration; R. 4-8.) As to Petitioners' other arguments, the court stated that it: "does ***not*** find that the Arbitration Agreement is unenforceable because it was procured by fraud, is unconscionable, or violates public policy." (*Id.* at 4; R. 7 (emphasis added).) However, as the court explained, since Love's motion was "denied based on assignability," it would not "address these claims any further." (*Id.*).

On May 22, 2023, Love filed a Motion to Alter or Amend asserting that: (1) Plaintiffs presented no evidence of any assignment as to Petitioner Davis; (2) the standalone Arbitration Agreements had not been assigned and retained their effectiveness; and (3) Love retained other contracts (*e.g.* the Records of Purchase) with Petitioners that also incorporated the Arbitration Agreements under which arbitration should be compelled. (Mot. to Alter or Amend; R. 75-86.) On

June 6, 2023, the circuit court issued an Order denying Love's motion. (Order Denying Mot. to Alter or Amend; R. 1-3.)

Importantly, all the proceedings before the circuit court predated this Court's Opinion reversing the Court of Appeals in *Sanders*. The circuit court entered its Order denying reconsideration on June 6, 2023, and this Court issued its Opinion in *Sanders* on July 26, 2023.

III. Proceedings before the Court of Appeals and its Opinion.

Love appealed, contending that the circuit court: (1) should have applied the *Prima Paint* doctrine to allow an arbitrator to decide what impact, if any, the assignments had on Love's right to compel arbitration in accordance (as this Court held in *Sanders*); (2) erred by determining that the Arbitration Agreements' independent function was extinguished upon their incorporation into the RISCs, and (3) erred by finding Petitioners' claims arise under the RISCs, not the Records of Purchase. In response, *inter alia*, Petitioners argued: (1) this case is distinguishable from *Sanders* in that the parties did not agree to have the gateway matter of enforceability to be determined by an arbitrator and (2) several other bases on which the circuit court might have correctly denied Love's motion.

Following oral argument, on January 2, 2025, the Court of Appeals issued an opinion reversing the circuit court, finding that whether Love retained an enforceable contractual right to arbitration after the purported assignments is a matter for an arbitrator to decide, not a court, under *Sanders*. *See* Op. No. 2025-UP-003 pp. 3-4. The Court of Appeals "decline[d] to address any remaining issues" raised by Petitioners. Petitioners then submitted their Petition for a Writ of Certiorari. *Id.* at 4.

ARGUMENT

A writ of certiorari will be granted only where there are "special and important reasons." Rule 242(b), SCACR; *see also Benjamin*, 430 S.C. at 236, 844 S.E.2d 373. Rule 242(b) identifies the following nonexclusive factors for the Court to consider in assessing whether certiorari is appropriate: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; and (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the Supreme Court of the United States. Rule 242(b), SCACR.

No such special and important reasons are present in this case, nor does any other reason exist warranting this Court's discretionary review. The Petition does not attempt to articulate why this matter fits within any of these factors and instead simply contends that the Court of Appeals is wrong. However, this argument lacks merit for the reasons set forth below because the Court of Appeals correctly applied applicable precedent. The Court should deny certiorari.

I. The Court of Appeals did not misinterpret or misapply this Court's *Sanders* decision.

The circuit court denied Love's motion to compel arbitration "based on assignability and *Sanders v. Savannah Highway Auto. Co.*, 432 S.C. 328, 332, 852 S.E.2d 744, 746 (Ct. App. 2020)." (Order at 2; R. 5.) In *Sanders*, the Court of Appeals held that once a party assigns a contract containing an arbitration clause, it may no longer rely on that clause to compel arbitration. *Sanders*, 432 S.C. 332, 852 S.E.2d 746-47. At the time of the circuit court's Order, certiorari was still pending in *Sanders*. This Court then issued an opinion reversing the Court of Appeals in *Sanders*,

finding that the circuit court should have applied the *Prima Paint* doctrine[5] and compelled arbitration to allow an arbitrator to determine whether the subject auto dealer retained the right to compel arbitration after assignment of the RISC. *Sanders*, 440 S.C. at 391, 892 S.E.2d at 119.

Therefore, applying this directly applicable precedent, the Court of Appeals held that regardless of whether the purported assignments may have extinguished Love's right to compel arbitration, under *Sanders*: "[C[hallenges pertaining to 'whether [a] contract continued to exist after a certain point in time' are issues for the arbitrator to decide. This includes a challenge as to whether the party seeking to compel arbitration assigned and thereby lost its right to compel arbitration." Op. No. 2025-UP-003 p.2 (quoting *Sanders*, 440 S.C. at 391, 892 S.E.2d at 119). The Court of Appeals applied *Sanders* as it was required to do here – it did not misapprehend its "scope and meaning" as the Petition states. (Pet. p. 6.)

In *Sanders*, as is the case here, the issue was not about whether a valid contract had been formed in the first place. Rather, the question was who should determine whether said contract continued to exist following assignment. *Sanders*, 440 S.C. at 388-91, 892 S.E.2d at 118-19. After a thoughtful analysis of existing case law, this Court held that under the *Prima Paint* doctrine the arbitrator ***"must*** decide the gateway question of whether [defendant] retained the right to compel arbitration after assignment of the RISC." *Id*. at 119-20, 892 S.E.2d at 392.

[5] In *Prima Paint*, the plaintiff alleged the defendant fraudulently induced it to enter a contract containing an arbitration provision. The plaintiff did not challenge the arbitration provision directly, but rather claimed the provision was void because the encompassing contract was void. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 338 U.S. 395 (1967). The defendant moved to stay pending arbitration, which the lower court granted. The matter eventually made its way to the Supreme Court, which held that "the arbitrator had to resolve the plaintiff's claim" because the FAA restricts the judiciary's role and "a court may consider only issues relating to the making and performance of the agreement to arbitrate." *Sanders*, 440 S.C. at 385, 892 S.E.2d at 116 (quoting *Prima Paint Corp.*, 388 U.S. at 404).

Here, Petitioners opposed Love's motion to compel arbitration by contending that "Love's right to compel arbitration was extinguished by its contract assignment to GM Financial," and the circuit court agreed (Pltfs. Resp. in Opp'n pp. 5-6; Order Denying Mot. to Compel pp. 3-4, R. 6-7, 91-92.) The holding of *Sanders* is on all fours and required the Court of Appeals to reverse the circuit court's holding to allow an arbitrator to decide whether Love retains enforceable Arbitration Agreements following the assignments. Thus, Court of Appeals' opinion is aligned with precedent.

Contrary to Petitioners' contention, delegation is a separate question that the Court of Appeals did not reach here. *See* Op. No. 2025-UP-003 p.4 ("We decline to address any remaining issues."). This is consistent with *Sanders*, where the Court explained that the applicability and effect of the delegation clause was a separate issue which it need not reach in light of its holding on the assignment issue. *See Sanders*, 440 S.C. at 391-92, 892 S.E.2d at 119 ("In light of our holding, we need not consider Petitioners' delegation clause argument."). Therefore, Petitioners' contention that *Sanders* was "driven by the particular contractual language at issue and not by a rule that enforceability challenges based on assignment are always, or even usually, the purview of an arbitrator," (Pet. pp. 8-9), is simply not correct. Applicability of the *Prima Paint* doctrine is an entirely different question from whether gateway issues such as arbitrability have been delegated to the arbitrator.

Finally, Petitioners wrongly contend that this issue was "unpreserved" and that the Court of Appeals improperly reversed on that basis. The effect of the Court of Appeals' *Sanders* opinion and the *Prima Paint* doctrine was extensively argued at the hearing before the circuit court and the circuit court expressly ruled on the issue. (*See* Hearing Transcript 5:5-6:8, 9:23-12:11, 23:14-19; Order Denying Mot. to Compel pp. 2-4; R. 5-7, 45-46, 49-52.) Therefore, it was raised to and ruled upon by the trial court, which is all that was required to preserve the issue. *See, e.g.*, *State v. Oxner*,

391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) (reciting this principle). Additionally, the appellate Courts' review is *de novo* in any event, *see Chassereau v. Glob.-Sun Pools, Inc.*, 363 S.C. 628, 631, 611 S.E.2d 305, 307 (Ct. App. 2005), and there was a change in law which post-dated the circuit court proceedings via the Supreme Court's reversal in *Sanders*.

Again, Petitioners misread *Sanders* in attempt to trigger this Court's discretionary review. *Sanders*, however, is directly on point, and the Court of Appeals correctly applied its holding. If the contract arises under the FAA and a party claims the party seeking to compel arbitration lacks a contractual right to do so because of an assignment (which relates to the validity of a contract as a whole rather than the arbitration agreement specifically) such issue must be decided by an arbitrator. *Sanders*, 440 S.C. at 391, 892 S.E.2d at 119; *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006). Therefore, contrary to Petitioners' contention, the Court did not issue a "self-contradictory opinion." (Pet. p. 13.)

For all of these reasons, Petitioners arguments attacking the Court of Appeals' application of *Sanders* are without merit and certiorari should therefore be denied.

II. The Court of Appeals did not misapprehend Petitioners' Federal Arbitration Act argument.

Petitioners next contend that the Court of Appeals "misapprehended" their argument about Love's failure to prove the applicability of the FAA to these transactions. The Court of Appeals properly rejected this ground because: (1) it was not raised below and (2) it was contradicted by the record evidence in any event.

First, as noted, Petitioners did not raise this additional sustaining ground to the lower court. In the proceedings below, they never disputed that the Federal Arbitration Act applied. While issue preservation is not mandatory for an additional sustaining ground, the Court of Appeals could have appropriately ignored this argument on that basis alone. *See I'On, LLC v. Town of Mt. Pleasant*,

338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) (explaining that appellate courts are reluctant to rely on additional sustaining grounds not raised to the lower court as resolving a case on such a ground could be perceived as "unfair or unwise").

However, the Court of Appeals addressed the issue anyway, noting that: "even if this issue was preserved, [Petitioners'] argument cannot prevail on the merits. Precedent explains that, unless the parties have contracted otherwise, 'the FAA applies . . . to any arbitration agreement regarding a transaction that *in fact* involves interstate commerce.'" Op. No. 2025-UP-003 pp. 2-3 (quoting *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001)). The Court of Appeals further noted: "Multiple cases recognize the sale and financing of an automobile as involving interstate commerce." *Id.* (citing *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 79, 749 S.E.2d 139, 145 (Ct. App. 2013); *Masters v. KOL, Inc.*, 431 S.C. 28, 37 n.6, 846 S.E.2d 893, 897 n.6 (Ct. App. 2020)).

The *Hicks Unlimited, Inc., v. Unifirst Corp.*, 439 S.C. 623, 630, 889 S.E.2d 564, 567 (2023) case that Petitioners rely on is inapposite. 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, *id.* at 628, 889 S.E.2d at 566, it did not have an express statement that the contract "evidences interstate commerce." The court found this isolated statement about the FAA "governing" to not be sufficient to support that interstate commerce was involved in light of the other facts supporting that the transaction was intra-state only. *Id.* at 632, 889 S.E.2d at 568.

Here, the Arbitration Agreements expressly state that they "***evidence[] a transaction involving interstate commerce***," in addition to providing that the parties acknowledge and agree that the FAA "preempts state law and shall govern any arbitration" under the Agreements.[6] (Arbitration Agreements; R. 147-48 (emphasis added).) Furthermore, the transactions in this case plainly involved interstate commerce. The subject transactions concerned 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 transfer of funds interstate).[7] *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).

Therefore, for both reasons noted above, the Court of Appeals properly addressed and rejected Petitioners' FAA argument, and this Court should deny certiorari.

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[6] Courts consider such language evidence of the satisfaction of the interstate commerce 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").

[7] 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.").

III. The Court of Appeals acted within its discretion in deciding not to address any allegedly additional sustaining grounds.

"It is within the appellate court's discretion whether to address any additional sustaining grounds." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716 (2000); *see also Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 438, 472 S.E.2d 612, 615 (1996) (reversing lower court and declining to discuss additional sustaining grounds). Petitioners argue *Sanders* is not dispositive and the Court of Appeals should have affirmed on other sustaining grounds; however, Petitioners do not argue the Court of Appeals abused its discretion or lacked discretion (and thus was required) to consider the additional or remaining issues. Moreover, many of Appellants' additional sustaining grounds were not raised to the circuit court and were properly disregarded on that basis as well. *See I'On*, 338 S.C. at 421, 526 S.E.2d at 724 ("***Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it"*** (emphasis added)).

Before the circuit court, Petitioners contended that that the Arbitration Agreements: (1) should not be enforced because they were procured by Love's alleged fraud and misrepresentation, (2) are unconscionable, and (3) are against public policy. The circuit court rejected all of these arguments, finding that "[it] does not find that the Arbitration Agreement is unenforceable because it was procured by fraud, is unconscionable, or violated public policy." (Order Denying Mot. to Compel Arbitration p. 4; R. 7.)

On appeal, Petitioners shifted their position to raise several new arguments: (1) the Arbitration Agreements "do[] not contain necessary terms to be an agreement to arbitrate" (validity of the arbitration agreements), (2) the "outrageous nature of Love Chevrolet's bait-and-switch conduct provides grounds for the denial of its motion," and (3) Love "failed to show involvement

of interstate commerce, and the [Arbitration Agreements] fail to meet the requirements of the South Carolina Arbitration Act." (*See* Br. of Respondents pp. 11-13, 21-24.)

The Court of Appeals properly exercised its discretion not to address Petitioners' new arguments that were not raised below and, as Love detailed in its Reply Brief below, each was without merit in any event.[8] This Court should deny certiorari.

IV. Love's other appellate arguments represent additional sustaining grounds supporting reversal of the circuit court and, therefore, the denial of certiorari.

A. The parties delegated gateway matters, including enforceability of the Arbitration Agreement to an arbitrator.

The Arbitration Agreements state that "***[a]ll*** gateway matters concerning the ***existence, applicability, and validity*** of this Agreement shall be resolved by the arbitrator." (Arbitration Agreements; R. 147-48 (emphasis added).) Based on the plain language of the delegation clauses, the parties clearly and unmistakably agreed to delegate the issue of whether Petitioners' claims fall within the scope of the Arbitration Agreements to the arbitrator. Therefore, this is an additional basis upon which the Court of Appeals could have reversed the circuit court's denial of Love's motion to compel arbitration.

Parties may choose to delegate gateway issues—including whether the arbitration agreement is valid and enforceable and whether it covers the parties' dispute—to an arbitrator, and such a delegation is binding where it was clear and unmistakable. *Doe v. TCSC, LLC*, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995)). Petitioners did not make a discrete challenge to the validity of the delegation clause. Instead, Petitioners contended generally that although the Arbitration Agreements delegate matters concerning the "existence, applicability, and validity" of the

[8] Love's arguments from its prior briefing are incorporated by reference herein in full.

Agreements to the arbitrator, they do not use the word "enforce" or its derivatives, and thus the issue of "enforcement" was not delegated. 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.[9] The broad delegation clause at issue here necessitates compelling the matter to arbitration so that the arbitrator may determine all gateway issues. The Court of Appeals could have appropriately reversed for this reason as well.

B. The Arbitration Agreement's independent function was not extinguished upon its incorporation into the RISC.

The mere fact that a separate contract incorporates another agreement by reference does not render the incorporated document without independent effect. The circuit court's conclusion that Love's assignment of the RISC to GM Financial caused Love to be stripped of all rights to compel arbitration was grounded in a misapprehension of the phrase "incorporated into and made a part of." This additional error by the circuit court also supported reversal here.

The Arbitration Agreements provided the incorporation language, stating that they were incorporated and made part of "all Contract(s)" between Love and Vanfossen or Davis. The definition of "Contracts" included as "any agreement . . . regarding the sale, lease, financing, service or maintenance of the Vehicle." (*Id.*) The Arbitration Agreements were, therefore, intended to provide additional terms ***to the RISC, the Record of Purchase, and any other agreement*** between Love and Vanfossen or Davis. When the Arbitration Agreements were incorporated and made a part of all contracts between Love and Vanfossen or Davis, they were not rendered a nullity but instead continued to exist and operate as they did before their incorporation into the RISCs and retained the effectiveness.

[9] 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).

Therefore, the circuit court also erred in denying Love's motion to compel arbitration on the basis that assignment of the RISCs affected Love's rights to compel arbitration. This would have also formed an appropriate basis for reversal by the Court of Appeals and supports denial of certiorari.

C. The Arbitration Agreements were not assigned because there was no manifestation of intent by Love to do so.

Neither the Arbitration Agreements nor any of the other contract documents manifested an intent by Love to transfer the Arbitration Agreements to a third party. An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance. *Moore v. Weinberg*, 373 S.C. 209, 219–20, 644 S.E.2d 740, 745 (Ct. App. 2007) (quoting Restatement (Second) of Contracts § 317(1) (1981)). For an assignment to occur, there must be "(1) an assignor; (2) an assignee; and (3) transfer of control of the thing assigned from the assignor to the assignee." *Donahue v. Multimedia, Inc.*, 362 S.C. 331, 338, 608 S.E.2d 162, 165 (Ct. App. 2005).

The Arbitration Agreements between Love and the Petitioners contain no terms suggesting that Love intended to assign the Arbitration Agreements to any other party. (Aff. in Supp. of Mot. to Compel & Ex. A – Arbitration Agreements; R. 145-48.)) They do not list Love as an assignor, do not list an assignee, and do not indicate any intent by Love to transfer control of the Arbitration Agreement to any party. (*Id.*)

The RISC that Love and Vanfossen executed, by way of contrast, clearly and conspicuously provides only that "Seller assigns its interest in ***this contract*** to GM Financial." (Vanfossen RISC, Ex. B to Resp. in Opp'n; R. 109-10.) (emphasis added). Therefore, the RISC plainly indicates an assignor ("Seller"), an assignee ("GM Financial"), and the contract assigned

from the assignor to the assignee ("***this contract***"). (*See id.*) The words "this contract," construed in their "plain, ordinary, and popular sense," can only mean the RISC alone.[10]

Therefore, although the RISCs incorporated the Arbitration Agreements' terms, the only assignment was as to the RISC itself. It was error for the circuit court to hold otherwise and this represents an additional basis for reversal and denying certiorari.

D. Petitioners' claims arise under the Records of Purchase, not the RISC.

Vanfossen and Davis both executed several documents to effectuate the purchase of their Silverados from Love.[11] The primary transaction documents that were presented to the circuit court here were the Records of Purchase for the trucks along with Vanfossen's RISC. Without citation to case law, statute, or any evidentiary support, and without any analysis, Petitioners and the circuit court simply assumed the RISCs were the key documents: "As in nearly every vehicle transaction in this state where financing is involved, the primary contract document is a [RISC]. The RISC contains all terms of the purchase and financing." (Pls.' Resp. at 5; *see also* Order at 2 (adopting Petitioners' self-serving statement almost verbatim, stating "[a]s customary in vehicle transactions in South Carolina, the primary contract document for the vehicle purchases is a [RISC].")).

Unlike a RISC, however, a contract of sale – Records of Purchase – must be executed in every vehicle transaction regardless of the need for financing. A RISC, on the other hand, is involved ***only*** when a vehicle is financed. Thus, the RISCs would only be the controlling contract

[10] Again, the purported RISC between Love and Davis is not in the record.

[11] *Cf. Tripp v. Charlie Falk's Auto Wholesale Inc.*, 290 F. App'x 622, 623 (4th Cir. 2008) (explaining the transaction documents included "the Buyer's Order [equivalent to the Record of Purchase in this case]; the Motor Vehicle Installment Sale Contract, which included the Truth–in–Lending Disclosures, the Promissory Note, and the Security Agreement (the "credit contract"); the Re–Assignment of Title by Virginia Motor Vehicle Dealer Form (the "Re–Assignment Form"); a document entitled "Important Notice;" and the Application for Certificate of Title and Registration.").

documents if Petitioners claims ***arose out of their financial obligations***, which is not the case here. *See Harnden v. Ford Motor Co.*, 408 F. Supp. 2d 300, 306 (E.D. Mich. 2004).

Petitioners claim that Love violated the Dealer's Act, breached express and implied warranties, and engaged in negligent misrepresentation regarding the Silverados' towing capacity. (*See generally* Compl.; R. 32-34.) Petitioners do not claim, for instance, that Love misrepresented the terms of their financing contract. Their claims ***entirely*** arise out of the Silverados' towing capacity, which has nothing to do with Petitioners' obligations under a financing agreement. Therefore, to the extent they arise out of contract, Petitioners' claims arise out of the Records of Purchase, not the RISCs.

The circuit court further erred by failing to assess which of the transaction documents governed Petitioners' claims before engaging in any arbitrability analysis. This error also supports reversal and denial of certiorari.

E. At a minimum, arbitration should have been compelled on Davis' claims.

Finally, the circuit court was never presented with evidence that ***any*** contract between Love and Petitioner Davis was assigned to a third party. Although Petitioners argued that Davis also executed a RISC, that document was not submitted to the circuit court and Davis did not establish this fact via verified pleading or affidavit testimony. Without evidence Davis executed a RISC or that an assignment occurred, the circuit court erred by finding that an assignment (of which there was no proof) eliminated Love's right to compel arbitration of Davis's claims. This further supports reversal as to Davis's claims and denial of certiorari.

F. These additional sustaining grounds support that the Court of Appeals properly reversed the circuit court.

Each of these additional sustaining grounds offers a separate and distinct reason upon which the circuit court's decision could have been reversed. Therefore, considering the

overwhelming support for reversal, the Court of Appeals' decision was proper and should be permitted to stand. Certiorari is not necessary or warranted here.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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June 5, 2025

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Daniel Coble
Circuit Court Judge

Appellate Case No. 2025-000704

Case No. 2022-CP-40-00654

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

v.

Love Chevrolet Company, ... Respondent.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, 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): Return to Petition for Writ of Certiorari

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Eileen Hindman
Senior Administrative Assistant

Dated: June 5, 2025

From: Eileen Hindman
To: Supreme Court Filings
Cc: dave@consumerlawsc.com; Drew Radeker; greg@studemeyerlawfirm.com; Sarah Eibling; Blake Williams; Meredith Keane
Subject: Ethan Tyler Vanfossen v. Love Chevrolet Company - Appellate Case No. 2025-000704
Date: Thursday, June 5, 2025 12:04:29 PM
Attachments: 2025.06.05 Return to Petition for Writ of Certiorari - Vanfossen v. Love 2025-000704.pdf
2025.06.05 Proof of Service - Vanfossen.pdf

Good afternoon,

Attached for filing in the above matter please find Respondent Love Chevrolet Company's Return to Petition for Writ of Certiorari and Proof of Service.

By copy to all counsel, I am serving them with the same.

Thank you.

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