

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Automobile and Truck  
Dealers Association,

Plaintiff,

v.

South Carolina Department of Consumer  
Affairs,

Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No: 2022-CP-40-05552

**RECEIVED**

**Feb 17 2026**

**SC Court of Appeals**

**ORDER GRANTING PLAINTIFF’S REQUEST FOR DECLARATORY RELIEF**

**Introduction**

The South Carolina Supreme Court has defined “arbitrary” as “acts which are unreasonable, capricious or nonrational; not done according to reason or judgment; depending on will alone.”<sup>1</sup> With that definition in mind, this Court first turns to the very telling testimony of Sims Floyd, Jr. Floyd testified that on May 26, 2022, he met with the agency administrator and general counsel of the Department of Consumers Affairs to discuss an ongoing issue his organization, SCADA, was having with the DCA. He testified that the purpose of this meeting was to seek guidance and clarification from the government agency so that he could inform his organization on how to conduct themselves under the laws and regulations of the industry. According to him, the meeting took an odd turn when the administrator and general counsel looked at each other and stated in a somewhat “humorous” way, “Do you want to give it to him, or do you want me to?” Perplexed, Plaintiff testified that he looked to his own counsel for guidance.

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<sup>1</sup> *Taylor v. Nix*, 307 S.C. 551, 555, 416 S.E.2d 619, 621 (1992).

Thereafter, the DCA parties slid a piece of paper across the table towards the Plaintiff. This piece of paper was none other than a subpoena. The subpoena was not just for information related to SCADA but also requested information of the individual members of the organization and associate members.

At trial, DCA moved to suppress this subpoena on the grounds that it was too prejudicial and that the DCA was merely following standard legal procedure of issuing a subpoena. In a vacuum, yes. But in context, no. Suppressing this subpoena and the meeting where it happened would be the General Sessions equivalent of excluding the confession because it was too clarifying, too inculpatory, too damning. DCA argued that they were merely following the letter of the law, and the literal letter of the law allowed all such conduct. But government agencies work for the public benefit, and the pattern of actions by the agency throughout this time period were not based on a reasonable mission and were dependent on will alone. Just as any business who takes advantage of consumers here in South Carolina can expect the heavy hand of the law to swiftly correct any detrimental behavior, those same businesses can and should expect the heavy hand of the law to apply the law evenly, reasonably, and fairly to all.<sup>2</sup>

### **BACKGROUND**

This matter came before the Court for a non-jury trial from October 8 - 10, 2025. Plaintiff South Carolina Automobile and Truck Dealers Association (“SCADA”) seeks declaratory relief against Defendant South Carolina Department of Consumer Affairs (the “Department”) related to (1) the Department’s investigations of 20 SCADA member dealerships for compliance with S.C. Code Ann. § 37-2-307 (2016) (the “Closing Fee Statute”) from March 2 to December 6, 2022; (2) the Department’s February 18, 2022, Memorandum to South Carolina motor vehicle dealers

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<sup>2</sup> This Court commends the excellent work of private counsel for DCA throughout this litigation. But the facts are the facts.

entitled “Misleading and Deceptive Motor Vehicle Dealer Practices”; and (3) the Department’s social media activities directed at the automobile dealer industry from February 24, 2022 through December 12, 2022. SCADA alleges that these activities were arbitrary and capricious, i.e., the Department acted unreasonably or without consideration of relevant factors or appropriate justification, exceeded its statutory authority, or otherwise acted improperly under the relevant provisions of the South Carolina Consumer Protection Code, S.C. Code 37-1-101 *et seq.*

The South Carolina Uniform Declaratory Judgments Act (the “Act”), S.C. Code Ann. §§ 15-53-10 to -140, grants “[c]ourts of record within their respective jurisdictions” the “power to declare rights, status and other legal relations whether or not further relief is or could be claimed. . . . The declaration may be either affirmative or negative in form and effect.” S.C. Code Ann. § 15-53-20. Under the Act,

Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute, . . . and obtain a declaration of rights, status or other legal relations thereunder.

S.C. Code Ann. § 15-53-30. “[The] purpose [of the Act] is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.” S.C. Code Ann. § 15-53-130. As explained in further detail below, the Court grants Plaintiff’s request for declaratory relief.

SCADA is a South Carolina nonprofit association organized in 1937 to represent the interests of its members, which are manufacturer-franchised new car and truck dealers. SCADA’s membership presently includes approximately 272 franchised new car and truck dealers, located throughout South Carolina.

The Department’s conduct giving rise to this action began with the issuance of its February 18, 2022, memorandum regarding “Misleading and Deceptive Motor Vehicle Dealer Practices,”

which presented the Department's views on dealerships' advertising and sales practices and its interpretation of the Closing Fee Statute. Shortly thereafter, on February 24, 2022, the Department began a social media campaign targeting motor vehicle dealers, "sounding the alarm on several misleading and deceptive motor vehicle dealer practices," inviting consumer complaints, inaccurately reporting increasing consumer complaints, complaining of "junk" fees, and denigrating the automobile dealer industry with a "#DontGetDuped" hashtag on Twitter. These posts appeared on three social media platforms (Twitter, Facebook, and Nextdoor).

On March 2, 2022, the Department began conducting on-site, and often unannounced, investigations into dealerships' advertising and sales practices in hopes of uncovering these allegedly deceptive practices. The Department called these intrusive investigations "compliance reviews" and claimed they were conducted to confirm compliance with the Closing Fee Statute. Through these "compliance reviews," the Department sought broad access to the dealerships' books, records, and profit information, and requested information unrelated to determining whether a dealership complied with the Closing Fee Statute.

The Department justified its invasive investigatory tactics by claiming that it had received an increasing number of consumer complaints related to "motor vehicles." Based on the Department's own consumer complaint registry data, however, this rationale is false. The Department's representations that rising consumer complaints necessitated and justified its investigations under the Closing Fee Statute were a pretext for conducting what amounted to warrantless searches of dealer sales and advertising records conducted as fishing expeditions seeking information that the Department could portray as misleading and deceptive practices. Throughout this process, the Department acted arbitrarily and capriciously, exceeded and misused

its statutory authority for verifying compliance with the Closing Fee Statute, and otherwise failed to comply with statutes limiting its investigatory powers.

### **RELEVANT PROCEDURAL HISTORY**

SCADA brought this action on September 20, 2022, on behalf of its member dealers, seeking declaratory relief regarding the Department's conduct. On November 16, 2022, the Department filed an Amended Answer and Counterclaim for civil conspiracy against SCADA, alleging that it conspired with its members to deny the Department access to dealers' "books, accounts, and records that are required to be provided pursuant to the closing fee statute." On May 12, 2023, the Court dismissed the counterclaim, finding that the Department lacked the statutory authority to bring such a claim under the South Carolina Consumer Protection Code, S.C. Code Ann. § 37-1-101 *et seq.* (the "Code"), because SCADA is not a "creditor," "consumer," "debtor," or "person" subject to regulation by the Code as those terms are defined in S.C. Code Ann. § 37-1-301, nor does SCADA engage in "consumer credit transactions made in this State." S.C. Code Ann. § 37-1-201(1) and (7).

On June 9, 2023, the Department moved to dismiss SCADA's complaint, alleging lack of standing and mootness. The Department claimed that this action is moot because the Closing Fee Statute was amended on May 16, 2023, and any decision from this Court would be advisory. The Department also argued that SCADA failed to establish associational standing because it did not allege a concrete, particularized injury to itself or to any of its members. In its order dated September 25, 2023, the Court denied the Department's motion, remarking that "the Department was using the [prior version of the] Closing Fee Statute in an arbitrary and capricious manner for investigations."

### **STATUTORY FRAMEWORK**

#### **I. The Department's Regulatory Authority and Investigatory Powers**

The Department, through its Administrator, is responsible for administering and enforcing the provisions of the Code. The Code gives the Department regulatory authority over licensed motor vehicle dealers in two areas relevant here: (1) closing fees in motor vehicle sale or lease transactions pursuant to the Closing Fee Statute; and (2) motor vehicle dealer advertising practices, S.C. Code Ann. §§ 37-2-304, -308.

The Department is authorized to conduct “investigations” as to acts that are “subject to action by the administrator” as follows:

If the administrator has *probable cause* to believe that a person has engaged in an act which is subject to action by the administrator, [s]he may make an investigation to determine if the act has been committed, and, to the extent necessary for this purpose, may administer oaths or affirmations, and, upon [her] own motion or upon request of any party, may subpoena witnesses, compel their attendance, adduce evidence, and *require the production of any matter which is relevant to the investigation, including . . . documents, or other tangible things* and the identity and location of persons having knowledge of relevant facts, or any other matter *reasonably calculated to lead to the discovery of admissible evidence.*

S.C. Code Ann. § 37-6-106(1) (emphasis added). This provision is limited to matters where there is probable cause, and the language relating to the permissible scope of the investigation mirrors that found in Rule 26(a), SCRCF. The provision is not a general right to investigate any matter at the whim of the Administrator or to request information that is beyond the scope of the Department’s regulatory authority.

The Department may also conduct investigations pursuant to S.C. Code § 37-6-106 to determine whether a person has engaged in deceptive or unfair trade practices. S.C. Code § 37-6-118, entitled “Investigation of unfair trade practices in consumer transactions,” states:

- (1) *Whenever the administrator receives a complaint* against a person pertaining to any consumer transaction arising out of the production, promotion or sale of consumer goods and services, and:
  - (a) *the person against whom the complaint is made fails to respond to a written inquiry* made by the administrator concerning the complaint within the time limitation set forth in the inquiry; or

(b) the administrator has *probable cause* to believe that the person complained of has or is engaged in market practices or a course of conduct which is fraudulent, illegal, deceptive or unfair, the administrator may, subject to Section 37-6-105, conduct an investigation of the complaint pursuant to Section 37-6-106 to determine if that person has engaged in such market practices or course of conduct.<sup>3</sup>

(emphasis added). Again, this is not a general right to investigate. It is limited to matters where a complaint has been filed or where there is probable cause to suspect a violation, and the protocol is as set forth in § 37-6-106.

## II. The Dealer Advertising Statute

The Code also governs advertisements and statements “made in the course of soliciting for the sale or lease of a motor vehicle in a newspaper, magazine, or on radio, television, or the Internet.” S.C. Code Ann. § 37-2-308 (A)(1) (the “Dealer Advertising Statute”). This code section prohibits advertising “in a manner that is false, deceptive, or misleading, or that misrepresents a vehicle offered for sale.” S.C. Code Ann. § 37-2-308 (C). And it requires that “[d]iscounts or savings on the sale or lease of a new motor vehicle indicated in an advertisement must be those that are deducted from the Manufacturer’s Suggested Retail Price as stated on the Monroney Sticker.” S.C. Code Ann. § 37-2-308 (D) (emphasis added).

The Dealer Advertising Statute does not contain any provision that provides the Department with access to a dealer’s business information. Rather, it provides that “[p]enalties and hearing rights for violations of this section are governed by the provisions of Section 37-6-108.” *Id.* § 37-2-308 (K). Accordingly, “*after notice*, the administrator may order a . . . person subject to this title to cease and desist from engaging in violations” of the Code. S.C. Code Ann.

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<sup>3</sup> This statute further provides that if the South Carolina Attorney General or the Federal Trade Commission investigates or seeks sanctions against the person that is the subject of the complaint, “the administrator shall automatically stay any pending investigation” and shall dismiss its action or investigation “if the other action is dismissed with prejudice or results in a final judgment granting or denying the claim asserted.” S.C. Code Ann. § 37-6-118(1)(b).

§ 37-6-108(A) (emphasis added). And “a respondent aggrieved by an order of the administrator may request a contested case before the Administrative Law Court in accordance with the Administrative Law Court’s rules of procedure.” *Id.* “Additionally, the department must send notices . . . to motor vehicle dealers who have violated the provisions of Section 37-2-308 *by mail.*” *Id.* (emphasis added.)

### III. The Closing Fee Statute<sup>4</sup>

The purchase of a motor vehicle is a complex and highly regulated transaction, requiring significant work on the part of the dealer. These transactions frequently involve trade-in vehicles and liens on those vehicles, registration, financing, and titling of multiple vehicles, sometimes in multiple states, as well as retail installment financing to assist the consumer with purchasing the vehicle. Given this complexity, the Closing Fee Statute allows motor vehicle dealers to charge consumers a closing fee to recover the dealer’s “closing activity” costs and expenses i.e., the costs associated with the “administrative and financial work needed to transfer the motor vehicle to the consumer . . . including, but not limited to, compliance with all state, federal, and lender requirements, preparation and retrieval of documents, protection of the private personal information of the consumer, records retention, and storage costs.” S.C. Code Ann. § 37-2-307(B) and (C)(3) (2016).

The statutory requirements for a dealer to charge a closing fee are (1) paying a registration fee (not to exceed \$25) and registering the fee with the Department each year on or before January 31, (2) including the closing fee in the advertised price of the motor vehicle, (3) disclosing the closing fee on the retail sales contract, and (4) displaying notice of the closing fee in a conspicuous

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<sup>4</sup> The Closing Fee Statute was amended in 2023 after the commencement of this lawsuit. 2023 Act No. 45 (H.3952), Section 1, eff May 16, 2023. The version of the statute at issue here is the 2016 version.

location in the motor vehicle dealership. S.C. Code Ann. § 37-2-307(A) (2016). If a dealer wishes to charge a closing fee in excess of \$225, the dealer must submit an “Addendum” with the registration providing the following information regarding the dealer’s closing activity costs: (1) an explanation of the method used to calculate the proposed closing fee; (2) all supporting documents used in calculating the proposed closing fee; and (3) an analysis specifying the component amount of the proposed closing fee associated with each of the factors set forth in S.C. Code Ann. § 37-2-307(C)(3)(a)-(e) (2016).

For registrations exceeding \$225, the Department “*may* review the amount of the [proposed] closing fee for reasonableness.” The criteria for this non-mandatory review are as follows:

In determining the reasonableness of a closing fee, the department *shall allow* the following items to be included in a reasonable closing fee:

- (a) *all administrative expenses, costs, staff, supplies, materials, and financial work* needed to transfer the motor vehicle to the consumer and to procure the closing of the motor vehicle transaction; . . .
- (b) to comply with all state, federal, and lender requirements; . . .
- (c) the preparation and retrieval of documents; . . .
- (d) the protection of the private personal information of the consumer; and . . .
- (e) records retention and storage costs of such records.

S.C. Code Ann. § 37-2-307(C)(1) and (3) (2016) (emphasis added).

To review a registration for reasonableness, the Department must notify the Dealer in writing of its intent to conduct a formal review of the dealer’s proposed closing fee within thirty days of receipt of the application; otherwise, the Dealer may charge the closing fee set forth in its registration. S.C. Code Ann. § 37-2-307 (2016). For purposes of conducting the reasonableness review of the dealer’s proposed closing fee, “[t]he [D]epartment shall have access to a motor vehicle dealer’s books, accounts, and records *to determine if the dealer is complying with the*

*provisions* of [the Closing Fee Statute], and this *financial* information must be kept confidential and privileged from disclosure, except as provided by law.” *Id.* at (E)(1) and (2) (emphasis added).

In a memorandum dated December 12, 2017, to “South Carolina Automobile Dealers” from Carrie Lybarker, the Department’s Administrator, regarding the “annual filing of motor vehicle closing fee,” the Department clarified the scope of its permissible access to the dealer’s financial information:

The Department relies on the accuracy and good faith of the information provided for closing fees in excess of \$225.00. *We may, however, audit the dealer’s books, accounts, and records to verify the information provided with the filing and determine if the dealer is in compliance with the closing fee statute.* Thus, even if the Department permitted a dealer to charge a closing fee in excess of \$225.00 previously, the Department could require refunds to consumers if portions of the closing fee are found to be unreasonable upon further investigation.

#### **FINDINGS OF FACT**<sup>5</sup>

#### **I. The Department’s administration and enforcement of the Dealer Advertising Statute prior to March 2022.**

The Dealer Advertising Statute establishes advertising requirements and prohibitions related to motor vehicle sales and leases and creates specific penalties for dealers who violate the statute. From 2011 through the end of 2021, and consistent with § 37-6-108(A), the Department sent letters to motor vehicle dealers regarding advertising violations, including alleged failures to include the closing fee in the advertised price of the vehicle as required by the Closing Fee Statute. The Department “conduct[ed] advertising reviews as complaints [were] received and resources permit[ted]. Historically, if violations were noted, [the Department] would send a letter to the

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<sup>5</sup> To the extent that any finding of fact in this Order would be more properly identified as a conclusion of law, it should be considered as such. To the extent that any conclusion of law in this Order would be more properly identified as a finding of fact, it should be considered as such.

dealer identifying any violations contained in the advertisement.” (Plf. Exh. 1 at 4.)<sup>6</sup> Between 2017 and 2023, the Department issued letters to Dealers regarding 1,424 cited violations of the Dealer Advertising Statute and 412 requests for clarification. “Clarification letters are predominantly closing fee related (e.g., dealer’s website does not state whether closing fee is included or excluded, so [the] letter asks dealer to ‘please confirm that it is included.’)” (*Id.* at 17.)

Nineteen percent of the “vehicle-related advertising violations [from 2017 through 2021] occurred because the dealer specifically stated in the advertisement that the advertised price *excluded* the closing fee, which violates the statutory requirement to include the closing fee in the advertised price.” (*Id.* at 4.) Over time, the Department’s advertising “notices to dealers prompted the dealers to correct their website language to reflect that the advertised price includes the closing fee.” (*Id.*) This is borne out by the Department’s count of vehicle related advertising letters sent by year, which were highest in 2017 and 2018 and, shortly after the Closing Fee Statute was amended in mid-2016 and declined significantly in 2019 and 2020. In 2020, advertising letters to dealers were essentially the same as in all of 2019. There was an increase of 81 such letters (46%) in 2021.

Pointing only to a single email from a consumer dated August 27, 2020, the Department claimed that “during the pandemic, [it] received formal complaints and informal reports<sup>7</sup> from consumers that dealers were refusing to honor the statement that the advertised price includes the closing fee.” (*Id.*) In early 2022, the Department departed from its past practice and ignored the statutory requirement to investigate advertising complaints by giving notice of the complaint to

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<sup>6</sup> Plaintiff’s Exhibit 1 is the February 22, 2023 letter and attachments from Mr. Roger Hall, Esq., the Department’s Acting Administrator and Deputy Consumer Advocate to The Honorable John R. McCravy regarding Senate Bill 483 and House Bill 3952.

<sup>7</sup> The Department claims that “informal reports” come from consumers “who refused to buy the vehicle” but nevertheless call and “report the dealer” to the Department.

the dealer by mail. “Due to an uptick in reports and complaints related to *vehicle advertising*, instead of sending additional letters, [the Department] began conducting compliance reviews of motor vehicle dealers.” (*Id.* at 5.) The Department sent no advertising letters in 2022, and only one in 2023, indicating that in 2022, the Department stopped enforcing the Dealer Advertising Statute as it had for the previous 11 years.

## **II. The Department’s administration and enforcement of the Closing Fee Statute prior to March 2022.**

From July 2016 through February 2022, the Department conducted approximately 88 reasonableness reviews of dealers proposed closing fees. The Department verified compliance with the requirements of the Closing Fee Statute by conducting “inspections” at the dealership. During this time, the Department conducted 398 such inspections without any meaningful objection or resistance. These inspections were made through both announced and unannounced visits to the dealership by one or two Department investigators. The typical inspection took only approximately 30 minutes at the dealership.

The Department’s Deputy Chief Investigator, Ms. Joni Green, testified that during the inspections, the investigators visually confirmed that the dealer’s closing fee certificate issued by the Department was displayed in a conspicuous place(s) in the dealership premises. The investigators also reviewed “8 to 10 buyer’s orders”<sup>8</sup> randomly selected by dealer personnel from the current closing fee renewal period. (Plf. Exh. 1 at 6.) The investigators examined only one line on the buyer’s orders to confirm that the closing fee disclosed on the buyer’s order matched the closing fee approved by the Department. The closing fee inspections were conducted on dealers that charged closing fees of \$225 or less and if the dealer charged a closing fee over \$225, the

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<sup>8</sup> A “buyer’s order” is an industry term for the motor vehicle sale and purchase agreement between the dealer and the buyer.

Department might obtain verification of some information provided in the dealer's closing fee application, such as the square footage of the dealer's premises devoted to records storage for sale and lease transaction documents. Ms. Green testified the other Department investigators who played a role in these inspections followed the same procedure as she did.

### **III. Conditions in the South Carolina and national motor vehicle marketplace in early 2022.**

At trial, Plaintiff's Executive Vice President, Sims Floyd, testified to the very high demand and very low supply of motor vehicles and vehicle parts for sale in early 2022 that was present in both the South Carolina and national markets. The Covid-19 pandemic caused historic levels of disruption in the marketplace for both sales and servicing of motor vehicles. Dealer lots, usually filled with new and used cars and trucks for sale, were mostly empty. Customers were waiting in line for transport trucks to arrive with vehicles for sale, with most, if not all, of those vehicles already pre-sold. Customers in line would offer even higher prices to buy the pre-sold vehicles coming off the transport trucks. Dealers outside the state were buying vehicles from South Carolina dealers to sell them at higher prices in other areas of the country. New vehicles were routinely selling for more than the manufacturer's suggested retail price ("MSRP"). Many used vehicles were selling at new car MSRPs. These conditions persisted through at least mid-2023.

### **IV. The Department's February 18, 2022, memorandum regarding "Misleading and Deceptive Motor Vehicle Dealer Practices."**

On February 18, 2022, the Department issued a memorandum to all "South Carolina Motor Vehicle Dealers" regarding "Misleading and Deceptive Motor Vehicle Dealer Practices." The memorandum addresses three topics: adding extra or additional fees to the advertised price, inflating official fees in the contract, and using MSRP for used cars. The additional fees added to the advertised price are "adjusted market value fees," i.e., amounts over MSRP charged by some dealers due to the well-known post-pandemic shortage of and high consumer demand for new and

used motor vehicles for sale, and “[Dealer] add-on fees, (e.g., refurbishment fee, inspection fee, security system).” (Plf. Exh. 2 at 3.)

“Inflating official fees in the contract” is the second topic. Official fees are defined in the Code as “fees and charges prescribed by law which actually are or will be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest related to a consumer credit sale, consumer lease, or consumer loan.” S.C. Code Ann. § 37-1-301(17)(a)(i). The memorandum stated that the Department “has learned that motor vehicle dealers are inflating official fees when listing them on the consumer contract.” (Plf. Exh. 2 at 3.) The memorandum included an example of a “Title Processing Fee” of \$50, which the Department stated is prohibited and “must be included in the dealer’s closing fee or absorbed by the dealer as a cost of doing business.” (*Id.*) In other words, “[a]ny costs for administrative work to transfer [title to] the vehicle, therefore, must be included in the dealers’ closing fee.” (*Id.* at 3-4.)

The final topic in the memorandum is “dealers representing discounts on used vehicles as savings off of the MSRP,” which the Department stated is improper because South Carolina law requires “[d]iscounts or savings on the sale or lease of a new motor vehicle indicated in an advertisement must be those that are deducted from the” MSRP. (*Id.* at 4.) Even though every used motor vehicle starts out as a new motor vehicle with a MSRP, the Department decreed that MSRP is “not applicable to used cars,” and for this reason using MSRP in an advertisement of a new vehicle “is deceptive and misleading” and “a violation of Section 37-2-308(C).” (*Id.*)

The memorandum is primarily concerned with vehicle advertising and does not mention any consumer complaints regarding closing fees. The memorandum only mentions the Closing Fee Statute in conjunction with the subject of “inflating” official fees, and what dealer costs should be included in the dealer’s closing fee. The memorandum does not mention any of the four

principal requirements of the Closing Fee Statute: registering the fee with the Department, posting the fee in the dealership premises, including the fee on the sales contract, and including the fee in any advertised price.

**V. The Department’s social media posts regarding motor vehicle dealers.**

The Department claims that “[f]rom the beginning of the COVID pandemic [early 2020] and continuing throughout 2021 and 2022, [it] saw an uptick in complaints related to motor vehicles,” so it “began posting more often on this topic.” (Plf. Exh. 1 at 3.) The Department’s social media posts appeared on three social media platforms: Twitter, Facebook, and the Nextdoor app. The content of the Department’s motor vehicle related posts in 2021 and 2022 are listed in chronological order in the Department’s report to the South Carolina House Legislative Oversight Committee. (Plaintiff’s Exhibit 1 at 9.) There were nine such posts in 2021. All of them were neutral in tone and presented education for consumers about buying a car or additional insurance products.

Beginning on February 24, 2022, the Department’s social media posts regarding motor vehicle dealer practices increased in volume and changed in tenor. There were 27 motor vehicle related posts between February 24 and December 12, 2022, a 300% increase. The Department began using derogatory language and frequently insinuated that car dealerships were misleading and deceptive in their sales practices, using language like: “sounding the alarm;” “misleading and deceptive practices;” “increasing vehicle related complaints;” “beware;” “extra fees;” “inflated” costs; “junk fees;” and “Don’t get duped.” The Department also began using its social media posts to solicit consumer complaints regarding motor vehicle sales and lease transactions. Shortly after appearing at a hearing before the South Carolina General Assembly’s House Legislative Oversight Committee on February 23, 2023, the Department deleted all of these posts from all three social media platforms.

## **VI. The Department's Closing Fee Investigations.**

### **A. Conduct of the investigations.**

Shortly after issuing the February 18, 2022, memorandum, the Department began a series of closing fee "investigations" of SCADA member dealers on March 2, 2022. The Department called these investigations "compliance reviews," even though they were a much higher level and more in-depth than the closing fee inspections conducted prior to this time. The Department described the so-called compliance review as "a deeper dive" into a dealer's books, accounts, and records, and ultimately commenced 20 such investigations of SCADA member dealers, with the last one commencing on December 6, 2022. Only SCADA member dealers were investigated in this manner.

The stated purpose of the Department's closing fee investigations was to review the dealer's compliance with the Closing Fee Statute. The Department claims that the investigations were prompted and justified by a significant increase in the number of consumer complaints against automobile dealers regarding alleged improper and unfair fees and unfair and deceptive sales practices. The evidence did not bear out this explanation.

The Department began sending two investigators to SCADA member dealerships during weekday operating hours to make random, unannounced visits. The investigators wore shirts and jackets with a printed logo on the chest pocket, similar in appearance to a police badge. These printed logos include the word "investigator."

The closing fee investigations at the dealership premises typically lasted from two to three hours. The investigators demanded a list of all completed motor vehicle sale or lease transactions during the prior 90-day period. The investigators then randomly picked up to 30 transactions from the list and demanded that the dealership produce information from the sale or lease transaction

files, also known as “deal jackets,” for those transactions so that the investigators could review them while at the dealership.

The investigators also interviewed dealer personnel, asking for information about vehicles sold above the MSRP or “market adjustment premiums;” “front-end” products such as additional equipment and accessories sold with the vehicle; “back-end” F&I products such as extended service contracts, warranty and vehicle protection packages; Guaranteed Asset Protection (“GAP”) contracts, insurance products; and other fees and charges such as reconditioning fees, non-tax fees, and advertising methods unrelated to the closing fees. The Department investigators also required that the dealership provide each deal’s “pencil sheet” which is an initial sales worksheet used by a salesperson to outline the vehicle pricing, payment options, and other financial details and serves as the starting point for sale negotiations. The Department’s Deputy Chief Investigator, Joni Green, testified that the investigators questioned the dealership personnel about every line on the buyer’s orders. Under questioning from Plaintiff’s counsel, Ms. Green and the Department’s Chief Investigator, Ken Middlebrooks, admitted that these items have nothing to do with verifying a dealer’s compliance with the Closing Fee Statute.

The investigators took copies of the requested documents back to their offices for further review and often communicated again with dealer personnel by phone or email requesting additional information and documents. The investigators then prepared an “Investigator’s Notes” memorandum. In many cases, the memoranda indicated that the investigators referred the matter to staff attorneys for further review and advice regarding additional information that might be needed from the dealership. These memoranda demonstrate that the investigations involved many subjects other than closing fees.

Middlebrooks and Green conducted the first investigation with a dealership in Spartanburg. Emails produced by the Department indicate that while driving to the dealership premises early in the morning of the investigation, Middlebrooks communicated with the Department's investigative analyst about a past complaint against the dealership. The analyst informed Middlebrooks that the dealership's business assets had been sold to a new owner, and that there were no consumer complaints against the new owner.<sup>9</sup> The analyst also confirmed that he "did not see anything" on the dealer's website "that would constitute a violation (yet)." (Plf. Exh. 21 at 3.) Nevertheless, the investigators went forward with the closing fee investigation of the new owner.

Middlebrooks also testified to a practice of "Secret Shopping," which he had used in the past and utilized in at least one of the 20 closing fee investigations. This practice involved impersonating a consumer wishing to purchase a vehicle and engaging in email and text communications with the dealer's sales personnel to obtain sales quotes for vehicles, which the investigator did not intend to purchase and did not purchase. The investigator then used this information during an unannounced, on-site closing fee investigation and interview with the dealer's personnel, without revealing that he had previously inquired about and received quotes for a particular vehicle.

For many of the Department's closing fee investigations, the Department, in at least two instances through letters from its staff attorneys, requested or received "a total of charges for front gross (or additional services, products or add-ons not listed on the Monroney Sticker [i.e., manufacturers window sticker on new vehicles]), the back gross (or warranty, service contracts,

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<sup>9</sup> According to the consumer complaint data produced by the Department, there were no consumer complaints against the dealership in 2020 or 2021 regarding vehicle advertising or sales.

GAP products or the like).” (Plf. Exhs. 13 at 1, 14 at 1.) Information from the Department’s compliance review files indicates that such requests were made in at least nine of the investigations. As noted above, the Department’s investigators both admitted that such information was irrelevant to the subject of closing fees.

**B. Department retaliation for failure to provide information.**

When dealerships pushed back on the *scope* of information requested by the Department, the Department threatened the dealerships with various sanctions for failing to provide the information. For example, both Dick Smith Infiniti and Coastal Nissan (which was represented by counsel) provided the Department with the information it requested but omitted consumer identifying information such as names or VIN numbers. Neither dealership refused to cooperate with the Department. The Department, nevertheless, responded in a hostile manner, threatening each dealership with “revocation of the permit to charge closing fees” for “non-compliance with the [Closing Fee] statute by withholding access to records.” (Plf. Exhs. 15 at 2, 16 at 2.) Despite the dealership’s good faith dispute with the Department’s request, the Department threatened a penalty of \$2,500 that may only be enforced only for repeated and intentional violations. *See* S.C. Code Ann. § 37-6-108(E)(1) (“If the violator is found to have violated *repeatedly and intentionally* a provision of this title, the violator must be fined in an amount not to exceed two thousand five hundred dollars.” (emphasis added)).

For three other dealerships who were represented by legal counsel and resisted the Department’s requests for information, including profit information, the Department revoked each dealership’s closing fee permit or certificate, prohibiting each dealership from continuing to charge the closing fee the Department had previously approved. *See* Fred Anderson Toyota of Charleston (*SCDCA v. Anderson Charleston, LLC*, ALC Dkt. No. 22-ALJ-30-0287-CC (Aug. 24, 2022)); Jim Hudson Buick (*SCDCA v. Jim Hudson Buick GMC Cadillac, Inc.*, ALC Dkt. No. 22-ALJ-30-0152-

CC), and Jim Hudson Cars of Lexington (*SCDCA v. Jim Hudson Cars of Lexington*, S.C., LLC, 22-ALJ-30-0153-CC). The word “revoke” or “revocation” does not appear anywhere in the Closing Fee Statute. *See* S.C. Code Ann. § 37-2-307. In fact, the Closing Fee Statute only permits the Department, during the reasonableness review of a dealer’s closing fee application above \$225, to either “require the [closing] fee to be reduced or require the motor vehicle dealer to submit a new fee for review.” S.C. Code Ann. § 37-2-307 (2016).

The revocation of their right to charge closing fees placed each of these dealerships in the unfortunate and unjustified position of losing significant revenue, while incurring mounting legal expenses to resist the Department’s requests for information, which the dealerships believed in good faith that the Department was not entitled to receive.<sup>10</sup>

In issuing these administrative orders, the Department relied on its authority under section 37-6-108(A) which provides:

After notice, the administrator may order a creditor, a person acting on his behalf, or a person subject to this title ***to cease and desist from engaging in violations of this title***. A respondent aggrieved by an order of the administrator may request a contested case before the Administrative Law Court in accordance with the Administrative Law Court’s rules of procedure.

S.C. Code Ann. § 37-6-108(A) (emphasis added). In this instance the only possible “violation of this title” was refusing to disclose certain information, which the dealerships reasonably believed that they were not statutorily required to provide based on the advice of legal counsel.

The Department had no basis to believe that any of these five dealerships were “violating this title” based on consumer complaints. The Fred Anderson Toyota dealership had no consumer complaints in the Advertising, Credit Sales, New or Used Motor Vehicle categories during 2020

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<sup>10</sup> The Department presented evidence that the revocation of two of the dealer’s rights to charge closing fees lasted only one day, but SCADA’s Executive Vice President testified that the threat of having the Department do this to other dealers in the future permeated the industry and had a chilling effect.

and 2021. The same is true for the Coastal Nissan and Dick Smith Infiniti dealerships, who cooperated after receiving the Department's warning letters.

While the Jim Hudson Buick and Jim Hudson Ford dealerships had a small number of complaints in those categories, none of the complaints involved improper fees or closing fees, and all had been resolved as "Satisfied – Adequate Business Response" or "Satisfied – Consumer Satisfied." five of the six complaints were closed in 2020 or 2021 and the sixth was closed on January 5, 2022, months before the compliance reviews were initiated against these dealerships on April 26, 2022.

### **C. Analysis of the Department's Consumer Complaint Data.**

As an initial note, the home page of the Department's Complaint Filing System provides the following precautions for using a business's consumer complaint history:

Users should judge a business's complaint history primarily on the disposition of the complaints and not on the number of complaints or on the fact that a complaint was filed. Several factors, including a company's size and volume of transactions, may affect the likelihood of a consumer complaint being filed. The number of complaints about a business may not be a reliable measure as to whether it is appropriately conducting business.

Bearing that in mind, the evidence submitted at trial included a spreadsheet containing data the Department produced from its "complaint system of closed [consumer] complaints containing 'motor vehicle' in the complaint description." The spreadsheet is entitled "Copy of Ad Hoc Report (6-3-16 to 11-3-22)." The spreadsheet contains data on approximately 3,210 consumer complaints from June 3, 2016 to November 3, 2022, in numerous categories involving the advertising, sale, financing, repair, repossession, and rental of new and used motor vehicles. The Ad Hoc Report spreadsheet contains complaints against approximately 1,515 different businesses, including numerous used motor vehicle dealerships, which are not SCADA members, as well as banks, finance companies, insurance companies, service and repair companies, towing companies, and

auto body shops. SCADA introduced numerous demonstrative exhibits based on its analysis of the data.

For all consumer complaints in all complaint categories in the Ad Hoc Report, the volume of complaints for the period 2016 to 2022 peaked in 2017, with a total of 611, and declined to 479 complaints in 2018 and lower levels in each succeeding year. Notably, the increase in complaints during 2020 was a total of only 5 complaints, or a 1% increase. During 2021, there was an increase of only 22 complaints, or a 5% increase. The total complaints *decreased* during 2022 by 30 complaints, or 7%, to 416.

Selecting only the complaints in the categories of Advertising, Credit Sales, New Cars, and Used Motor Vehicles, which aligns more closely with SCADA member dealers' advertising and sales activities, and which are the only types of complaints relevant to this litigation, yields a total of 1,509 complaints, and shows an even sharper decrease in complaints during the 2016 to 2022 period. Notably, the volume of these types of complaints were even at a total of 191 in 2019 and 2020, and then declined by 10% in 2021 to 171, and by another 14% in 2022.

For the 20 SCADA member dealers subjected to the Department's closing fee investigations, there were a total of 102 complaints in the Ad Hoc Report database. The complaint data for these 20 dealers for all complaint categories reflects only 20 complaints in 2017 and lower numbers in each successive year. The total numbers of complaints for this smaller group are low enough that percentage changes from year to year are essentially meaningless. Complaints increased from a total of 12 in 2020 to 15 in 2021, and 16 in 2022.

For this group of 20 dealers and selecting again for only the consumer complaints in the motor vehicle categories of Advertising, Credit Sales, New Cars, and Used Motor Vehicles yields a total of not less than 8 and not more than 12 complaints in any year during the 2016 to 2022

period. The changes in total complaints in these complaint categories for this group from year to year is again essentially meaningless due to the small total numbers of complaints.

If the data analysis is further confined to the complaints against the 20 dealers subjected to closing fee investigations in the Advertising, Credit Sales, New Cars, and Used Motor Vehicles categories during 2020 and 2021, there are only 19 total complaints, involving only 7 of the 20 dealers. None of the complaints mention “closing fees.” Thus, 13 of those dealers had not been the subject of any consumer complaints in the Advertising, Credit Sales, New Cars, and Used Motor Vehicles categories during 2020 and 2021, and none of the 20 dealers had any complaints regarding closing fees.

Of the 102 consumer complaints filed against the 20 dealerships subject to closing fee investigations, the “Complaint Status” column of the complaint record indicates the following:

- 83 were closed by the Department prior to January 1, 2022, and one of those was a duplicate.
- 72 were closed or resolved as “Adequate Business Response” or “Consumer Satisfied” designation.
- 4 were marked for “Information” only.
- 1 was “undetermined,” and
- Only 2 were designated “unsatisfied.”

Deputy Chief Investigator Green testified regarding a spreadsheet, created by an in-house attorney of the Department on or about February 22, 2022, *before* the first compliance review started [on March 2, 2022]. The spreadsheet contains data on 153 consumer complaints. Notably, every single one of these complaints is in the “Advertising – Motor Vehicles” category, 113 of the complaints were initiated prior to January 1, 2020, and every single complaint was “closed” prior to the onset of closing fee investigations on March 2, 2022. 110 of the complaints were marked “Satisfied – Adequate Business Response” or “Satisfied – Consumer Satisfied.” Only two

complaints were marked as “Unsatisfied,” and only one of those complaints involved a South Carolina dealer. That complaint was closed on July 17, 2020.

The Department’s Acting Administrator and Deputy Consumer Advocate, Roger Hall, testified that the Department based its decision to commence closing fee investigations on a steep rise in “vehicle-related” complaints, calls, and consumer tips, particularly during February 2021. Under questioning from Plaintiff’s counsel, Mr. Hall admitted that “vehicle-related” meant any type of call regarding motor vehicles, including complaints about repairs and service and other matters unrelated to advertising and fees. Mr. Hall also admitted that the increase in logged calls during February 2021 was a total of only 20 calls, from a monthly average of 15-20 calls. These consumer calls are logged, but copies of these logs were not produced in evidence at trial.

Chief Investigator Middlebrooks also testified that the Department based its initiation of closing fee investigations on consumer complaints, calls, and tips that he had personally reviewed upon referral from elsewhere within the Department. By early 2022, he had accumulated a file with approximately 11 such complaints, but all of them related to market value premiums, or prices above MSRP due to the pandemic-related vehicle shortages.

### **CONCLUSIONS OF LAW**

**I. The Department’s Closing Fee Compliance Reviews were arbitrary and capricious, a misuse of the Department’s statutory authority under the Closing Fee Statute, and were investigations conducted without a consumer complaint or probable cause.**

“The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible.” *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000). And “[s]tatute[s] must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction.” *Higgins v. State*, 307 S.C. 446, 415 S.E.2d 799 (1992). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and

accords with its general purpose. *Koenig v. South Carolina Dep't of Pub. Safety*, 325 S.C. 400, 480 S.E.2d 98 (Ct.App.1996).

At trial, the Department boldly claimed that it could use the Department's authority under S.C. Code Ann. § 37-2-307(E)(1) allowing "access to a dealer's books, accounts, and records" for any reason or no reason and without any consumer complaint or probable cause. In effect, the Department claims that this section gives it carte blanche access to a motor vehicle dealer's sale and lease transaction files and other financial information. This interpretation of the statutory provision is irreconcilable with other statutory provisions limiting the Department's general investigatory powers and ignores federal and state constitutional limitations on governmental powers. The Department's position is patently absurd and contrary to law.

The Department also wrongly, but deliberately, avoids calling the closing fee "compliance reviews" what they really were – intrusive investigations amounting to a warrantless search. The U.S. and South Carolina Constitutions both protect the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," requiring warrants supported by probable cause (a reasonable belief that a crime or other violation of law has occurred, or such evidence exists) and describing the objects of the search with particularity. U.S. Const. amend. IV.

Courts have recognized the importance of maintaining the discretionary powers of governmental agencies while ensuring accountability through statutory and constitutional safeguards and generally do not interfere with the discretionary powers of governmental agencies to initiate investigations unless there is evidence of fraud, abuse of power, or unreasonable or capricious conduct. *Orr v. Clyburn*, 277 S.C. 536, 542, 290 S.E.2d 804, 807 (1982). This principle

underscores the importance of adhering to statutory and procedural requirements in government investigations.

For example, the investigatory power provided to the Department regarding Preened Funeral Contracts providers is specific:

*The department may at any reasonable time and shall at least once every two years investigate the books, records, and accounts of each provider with respect to its trust funds and for that purpose may require the attendance of and examine under oath all persons whose testimony the department may require.* The department shall investigate a provider's books, records, and accounts if the department has reason to believe or has received a complaint alleging that the provider has violated the provisions of this chapter.

S.C. Code Ann. § 32-7-70 (B) (emphasis added).

This grant of investigatory power and the mandate to investigate at least once every 2 years differs significantly from the language provided in the Closing Fee Statute. S.C. Code Ann. 37-2-307(E)(1). Here, the Department's use of the Closing Fee Statute's limited statutory provision to conduct its broad ranging and intrusive investigations of the 20 SCADA member dealers exceeded the Department's authority and was otherwise arbitrary and capricious. The Court finds that the Department's interpretation of the Closing Fee Statute does not comport with the plain language of the statute, particularly when compared with other provisions of the Code.

**II. The Department's access to books and records under the Closing Fee Statute is limited to the Department's reasonableness review of the dealer's proposed closing fee.**

The Closing Fee Statute was implemented to authorize a dealership to charge a closing fee and to outline the process for a dealership to charge that fee. Most of the statute explains the Department's regulatory authority to review the closing fee applications for reasonableness. The statute lists certain factors that the Department may review when determining the reasonableness of a closing fee, most of which refer to "administrative expenses" or other "costs" and "financial information" related to processing a vehicle sale.

The Department's ability to access books, accounts, and records provided in § 37-2-307(E)(1) was meant to apply *only* during the Department's review of a dealership's proposed closing fee for reasonableness. The statute then permits the Department access to a dealership's "books, accounts, and records" as part of that assessment. It is only logical that the statute would give the Department authority to confirm the actual costs a dealership incurs to understand whether a proposed fee to recover those costs from the consumer are reasonable. It is illogical and unreasonable to claim this statute gives the Department unfettered access to a dealership's books and records, at any time, for any reason, or for no reason at all. A closer look at subsection E(1) and E(2) in combination, evidences this point:

(E)(1) The Department of Consumer Affairs shall administer and enforce the subject of motor vehicle dealer closing fees including, but not limited to, this section. . . . The department shall have access to a motor vehicle dealer's books, accounts, and records *to determine if the dealer is complying with the provisions of this section*, and this financial information must be kept confidential and privileged from disclosure, except as provided by law.

(2) *If the department determines that a closing fee is not reasonable*, the department shall issue a written order detailing the department's findings. The department may require the fee to be reduced or require the motor vehicle dealer to submit a new fee for review. If the department finds that a closing fee is not reasonable, the motor vehicle dealer may request a hearing in accordance with the Administrative Procedures Act.

S.C. Code Ann. § 37-2-307(E) (emphasis added).

Subsections (E)(1) and (E)(2) must be read together to determine each provision's proper scope. These subsections are structurally and logically married because they are joined under one larger subsection, subsection (E). The language of (E)(2) also supports this reading as it discusses the Department's reasonableness review of the closing fee and begins with the word "if" which must be qualified by the preceding subsection (E)(1). *See* Black's Laws Dictionary ("[T]he word "if" often introduces a condition that must be fulfilled before a specific right or obligation arises."). It logically follows that (E)(2) must be related to (E)(1). Reading those provisions together, along

with the entire statutory framework, clarifies that the Department's access to books and records is only for the Department to determine "if" the closing fee is reasonable – something it must do during its reasonableness review.

The Administrator's December 17, 2017, memorandum to South Carolina Motor Vehicle Dealers regarding the "Annual Filing of Motor Vehicle Closing Fees" acknowledges this important limitation on the Department's right of access.

The Department relies on the accuracy and good faith of the information provided for closing fees in excess of \$225.00. ***We may, however, audit the dealer's books, accounts, and records to verify the information provided with the filing and determine if the dealer is in compliance with the closing fee statute.***

(Def. Exh. 5 at 3.) (Emphasis added.)

The statute's limited grant of authority does not give the Department access to a dealership's books and records at any time for any reason. Once the Department has reviewed the dealership's closing fee application for reasonableness and approved the closing fee, there is no reason for the Department to need carte blanche access to a dealership's books and records. Accordingly, there was no justifiable reason for the Department to seek access to these dealerships' books, accounts, and records in the way that it did beginning in March 2022 by conducting compliance reviews. This is especially true as the Department had, since 2016, reviewed dealer compliance with the Closing Fee Statute 398 times through "closing fee inspections" and without combing through dealers' sales and financial information that had no bearing on compliance with the Closing Fee Statute.

Finally, and as described further below, accepting the Department's interpretation of the broad scope of its access to dealer books, accounts and records under the Closing Fee Statute, would have the unintended and impermissible effect of eliminating the applicability of S.C. Code Ann. §§ 37-6-106 and 37-6-118 to Department investigations of motor vehicle dealers.

**III. The Department's requests for documents exceeded what was permitted under the Closing Fee Statute.**

A dealership complies with the Closing Fee Statute by providing notice to the Department of the maximum amount the dealer intends to charge, paying a registration fee, including the closing fee in the advertised price, and displaying the closing fee certificate in a conspicuous place in the dealership. The Department already reviewed and approved the 20 dealerships' closing fees prior to commencing the closing fee investigations. Accordingly, the only information the Department needed to review to ensure compliance was whether the closing fee certificate was in plain view, whether the closing fee was included in the advertised price, and whether the closing fee was included on the sales contract. To ensure compliance, the Department only needed to enter the dealership to view the closing certificate and obtain the advertised price and the sales contract for several deals. In fact, this was the process the Department followed prior to March 2022, when the Department began conducting "compliance reviews." As discussed above, the compliance reviews went well beyond the permissible scope of review under the Closing Fee Statute.

**IV. The Department needed probable cause to conduct its "Compliance Reviews" under S.C. Code Ann. § 37-6-106.**

Having established that the conduct at issue exceeded the Department's authority under the Closing Fee Statute, the Court next turns to the Department's general investigative authority. The Department, through the Administrator, is granted the power to investigate whether a "person has engaged in an act which is subject to action by the administrator," provided there is *probable cause* to believe a violation of the Consumer Protection Code has occurred. S.C. Code Ann. § 37-6-106(1). This statute, among others, governs the Department's general authority to investigate possible violations of the Code, including possible violations of the Closing Fee Statute. *See* S.C. Code Ann. § 37-2-307 (2016).

Because § 37-6-106(1) governs the Administrator's *general* authority to enforce the Code, its requirements must be reasonably applied to all of the statutes that the Administrator is charged with enforcing. Reading and construing the sections as one, if the Department initiates an investigation against a dealership to determine whether it "has engaged in an act which is subject to action," the Department must have probable cause irrespective of whether the Department can access its books and records for the limited purpose of conducting a reasonableness review as outlined in the Closing Fee Statute.

The Department continuously refers to its investigations as "Compliance Reviews." Despite the Department's label, these "Compliance Reviews" can only be considered investigations. *Compare* Findings of Fact, section II *with* section VI.A *supra*. Prior to March 2022, the Department conducted less intrusive "inspections" to verify compliance with the Closing Fee Statute. For 398 such inspections, the Department requested only "1 to 2 sheets of paper for each sale" and, if the closing fee was over \$225.00, the Department "may obtain verification of some information providing in filing."

Then, on March 2, 2022, the Department began "Compliance Reviews." As discussed above, these investigations differed dramatically from previous closing fee compliance activity, both in terms of appearance and in terms of the information sought. To justify these investigations, the Department claimed an "uptick in reports and complaints related to vehicle-related advertising." (Plf. Exh. 1 at 3.) A review of the Department's own data, however, establishes that the Department's justification was purely pretextual. *See* Finding of Fact, section VI *supra*. The Department did not have probable cause to initiate the Closing Fee Investigations against these 20 SCADA member dealerships.

This pretext is bolstered by the timing of the investigations, beginning shortly after the Department issued its February 18, 2022, memorandum concerning deceptive and misleading sales tactics. The Department's memorandum is clear the Department was not looking at Closing Fee Statute violations, but overall sales and advertising issues at dealerships. As set forth above, the Department has the ability to conduct an investigation into a dealership for an alleged unfair or deceptive sales practice, *if it had a consumer complaint or other probable cause*. S.C. Code Ann. § 37-6-118. But lacking a complaint or probable cause, the Department decided to claim authority under the Closing Fee Statute instead. This was completely improper.

**V. The Department misused its power and otherwise acted improperly in conducting the Closing Fee Investigations.**

As described above, when dealerships pushed back on the *scope* of information requested by the Department, the Department retaliated against the dealerships with various threats and sanctions for failing to provide the information. In doing so, the Department acted arbitrarily and capriciously and misused its authority under § 37-6-108(A). The Department's threats to revoke, or actual revocation of, the dealerships' closing fee permit lacks any basis in the Code. Each of the 5 dealerships submitted their notice to charge a closing fee to the Department, and the Department reviewed each dealership's closing fee for reasonableness and *approved* the dealership's closing fee permit based on their review. The Department does not have the authority to later revoke those permits simply to force the dealerships to produce information that does not pertain to compliance with the Closing Fee Statute.

**VI. The Department's February 18, 2022, memorandum is arbitrary and is not grounded in any applicable statutory authority.**

On February 18, 2022, the Administrator sent a written memorandum to "Motor Vehicle Dealers" regarding "Misleading and Deceptive Motor Vehicle Practices." The memorandum cites extensively to the Dealer Advertising Statute. The Court finds that the Department exceeded its

statutory power by attempting through a memorandum to establish arbitrary and capricious “rules” that SCADA and its member dealerships must follow.

The memorandum is not a properly promulgated “rule” under S.C. Code Ann. § 37-6-402(5). A “rule” is defined as “authorized by this title that applies generally and implements, interprets or prescribes law or policy.” *Id.* To adopt a rule, the Department provides notice to the public and “afford[s] all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing.” S.C. Code Ann. § 37-6-404(1)(a) and (b). For substantive rules, the Code requires a “hearing must be granted if requested by twenty-five persons, by a governmental subdivision or agency, or by an association having not less than twenty-five members,” such as SCADA. *Id.* at (b). Although the Department sets forth specific rules directed at dealerships, the Department did not follow the required procedure to do so in this case.

Nor is the memorandum an administrative interpretation provided by the Department pursuant to Regulation R 28-26 of the Department’s Rules and Regulations, which allows “any person” to request that the Administrator “issue an administrative interpretation of any provision of the Code or any Rule or Regulation issued pursuant thereto.” The memorandum was not done at anyone’s request. Instead, the Department *sua sponte* issued the memorandum. As a result, the directives to motor vehicle dealers in the memorandum have no binding legal effect and are nothing more than the Administrator’s opinion of what motor vehicle dealers should do.

Certain directives in the memorandum are also arbitrary, unreasonable, and an abuse of the Administrator’s discretion. For example, the Memorandum complains of “market value premiums,” i.e., an increase in the sale price of the vehicle due to the acknowledged post pandemic shortage of new and used motor vehicles for sale. The memorandum then dictates that “dealers should clearly disclose the adjusted market value fee as a separate line item charged on top of the

MSRP.” (Plf. Exh. 2 at 2.) However, the Dealer Advertising Statute provides only that “[d]iscounts or savings on the sale or lease of a new motor vehicle indicated in an advertisement must be those that are *deducted* from the Manufacturer’s Suggested Retail Price.” S.C. Code Ann. § 37-2-308 (D) (emphasis added). The market value premium is not a discount or a savings on the sale or lease that is deducted from the MSRP.

The memorandum also takes aim at using the MSRP in relation to advertising for used vehicles stating:

The Department is aware of dealers representing discounts on used vehicles as savings off of the MSRP. South Carolina law requires “[d]iscounts or savings on the sale or lease of a *new* motor vehicle indicated in an advertisement must be those that are deducted from the [MSRP] as stated on the Monroney Sticker.” Section 37-2-308(D) (emphasis added). MSRP, however, is not applicable to used cars and using MSRP to represent or advertise the value of a used vehicle is deceptive and misleading, a violation of Section 37-2-308(C). Further, advertising or representing to a consumer that the sales price reflects a discount or savings off of the MSRP is deceptive and misleading, a violation of Section 37-2-308(C). (Emphasis in original.) (Plf. Exh. 2 at 4.)

SCADA’s Executive Vice President testified at trial that in 2022 many used vehicles were selling at MSRP. Moreover, all used vehicles had an MSRP when new, and the MSRP of the vehicle when new could be important information to a consumer when buying the vehicle as used. Furthermore, simply because § 37-2-308(D) requires discounts or savings on *new* vehicles to be indicated in a vehicle advertisement as a deduction from MSRP, does not mean that a similar method may not be utilized in advertisements for used vehicles. This is especially true when, subsection F of the same statute requires that “[w]hen the price of a motor vehicle is quoted, the advertisement must clearly identify the motor vehicle as new or used and include the make, model, and year” of the vehicle. S.C. Code Ann § 37-2-308(F). The Department’s prohibition against using the MSRP in relation to advertisements regarding used vehicle is thus not supported by the

plain language of the statute and is otherwise arbitrary and unreasonable, especially given the extraordinary conditions in the industry at the time.

Finally, the Memorandum declares that “Title Processing Fee[s]” of \$35 and \$50 charged by two different dealers “are prohibited.” (Plf. Exh. 2 at 3.) “If the dealer wants to charge a consumer for the dealer’s costs for processing the transfer of title, this cost must be included in the dealer’s closing fee or absorbed by the dealer as a cost of doing business.” (*Id.*) If the fee could be included in the dealer’s closing fee but was not, then it certainly is not unfair, deceptive, or misleading to disclose the fee separately and charge the consumer for it. And it is arbitrary and capricious for the Department to declare that a business “must absorb [certain costs] as a cost of doing business.” (*Id.*)

This directive is not based on any statutory authority and is contrary to court precedent. While the Closing Fee Statute allows dealers to charge closing fees upon certain conditions, it does not prohibit dealers from charging other fees in a motor vehicle sales transaction. There is no statutory basis for the Department to prohibit dealers from charging any fee other than a closing fee. *S.C. Dep’t of Consumer Affs. v. Rent-A-Ctr., Inc.*, 345 S.C. 251, 254, 547 S.E.2d 881, 883 (Ct. App. 2001) (rejecting argument that fees not specifically allowed by the SC Consumer Protection Code are prohibited by negative implication); *cited with approval in Jinks v. Sea Pines Resort, LLC*, No. 9:21-CV-00138-DCN, 2022 WL 3691391, at \*3 (D.S.C. Aug. 25, 2022), *aff’d*, No. 22-2013, 2025 WL 2319657 (4th Cir. Aug. 12, 2025). The Department then implemented this improper “rule” by requiring one dealership to refund 603 customers the \$50.00 title processing fee, costing the dealership a total of \$30,150.00. In other words, unless a business practice is arbitrary, unfair, deceptive, or unconscionable and not otherwise specifically prohibited by statute or rule, then the Department has no basis to prohibit it.

**VII. The Department exceeded its statutory authority by publicly disparaging the automobile dealer industry and SCADA members through its social media campaign.**

One of the purposes of the Code is “to protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, *having due regard for the interests of legitimate and scrupulous creditors*. S.C. Code Ann. § 37-1-102 (emphasis added). The Department failed to properly strike this balance when publishing derogatory social media posts and its “#DontGetDuped” social media campaign.

As addressed above, the Department rarely posted about the automobile industry prior to 2022. Then, in February 2022, the Department’s posts increased dramatically, and the Department began using derogatory language insinuating that car dealerships were misleading and deceptive in their sales practices.

For example, on August 17, 2022, the Department posted an announcement for a Special Wednesday Webinar for a “Consumer Forum on Car Buying” that had a banner entitled “Don’t Get Duped by the Dealer when Buying a Car.” Ultimately, the “Don’t Get Duped” tagline stuck, and the Department implemented a social media campaign under the hashtag “#DontGetDuped.” The campaign’s name explicitly gives little regard to “scrupulous” dealerships and insinuates that car dealerships are out to “dupe” or otherwise trick their customers. The Department’s social media activity lacked regard for “legitimate and scrupulous” dealerships and painted the entire automobile industry, including SCADA members, as swindlers out to trick their customers. Allowing a *government agency* to denigrate the industries it regulates is improper and unfair. Engaging in this type of activity clearly fails to meet the Department’s statutory requirement to act with “due regard for the interests of legitimate and scrupulous creditors.” S.C. Code Ann. § 37-1-102 (d).

## CONCLUSION

Upon consideration of the testimony and evidence submitted at trial and the record herein, the applicable law, and the arguments of the parties' counsel at trial, the Court concludes that Plaintiff is entitled to declaratory judgment.<sup>11</sup>

Specifically, the Court finds that the Department exceeded or misused its statutory authority and otherwise acted arbitrarily, capriciously, and improperly in the following particulars:

(1) conducting "compliance review" investigations of 20 SCADA member dealerships for compliance with the Closing Fee Statute;

(2) issuing the February 18, 2022, memorandum to South Carolina motor vehicle dealers entitled "Misleading and Deceptive Motor Vehicle Dealer Practices;" and

(3) publishing the social media posts directed at the automobile dealer industry from February 24 through December 12, 2022.

**AND IT IS SO ORDERED.**

*[Judge's signature page to follow]*

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<sup>11</sup> The Court's declarations are made based on the Parties' pleadings as refined by the pre-trial briefing and the arguments and evidence presented at trial. To the extent the declarations are not an identical match to the Plaintiff's prayer for relief in its Amended Complaint, the Court finds that these declarations were adequately addressed in the Plaintiff's pre-trial brief and were tried by "express or implied consent of the parties" and "shall be treated in all respects as if they had been raised in the pleadings" as contemplated by Rule 15(B), SCRCF. The Court hereby deems the prayer amended to conform to the evidence.



Richland Common Pleas

**Case Caption:** South Carolina Automobile And Truck Dealers Association vs South Carolina Department Of Consumer Affairs

**Case Number:** 2022CP4005552

**Type:** Order/Other

So Ordered

s/ Daniel Coble, 2774