

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

Case No. 2016-CP-26-00937

Cali Alyson Emory, individually and in a representative capacity for all others similarly situated,

Plaintiffs,

vs.

Thag, LLC, d/b/a Myrtle Beach Mitsubishi,

Defendant.

ORDER GRANTING MOTION TO ALTER OR AMEND

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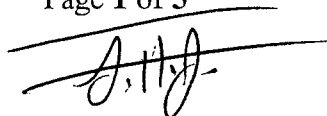
SC Court of Appeals

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CLERK OF COURT
HORRY COUNTY, S.C.

Having fully considered the motion of Thag, LLC, d/b/a Myrtle Beach Mitsubishi (“Defendant”) to alter or amend the Court’s order dated and filed September 15, 2016, the Court hereby grants the motion and withdraws and replaces its earlier order, as follows:

This matter came to be heard before me at the Horry County Courthouse on Wednesday, September 7, 2016. Attorney L. Sidney Connor, IV appeared for Plaintiff and Attorney James Y. Becker appeared for the Defendant. Plaintiff moved to compel arbitration pursuant to the Uniform Arbitration Act of South Carolina, S.C. Code §§ 15-48-10, *et seq.* (“SC Act”). Defendant moved to stay the proceedings and compel bilateral arbitration pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, *et seq.* For the reasons stated herein, the Court holds (1) that the SC Act does not apply, (2) that the FAA applies, and (3) the Court will appoint Karl Folkens as the arbitrator pursuant to Section 5 of the FAA.

The facts pertinent to these motions are not in dispute. The Plaintiff purchased a vehicle from the Defendant pursuant to a Contract of Sale. The Contract of Sale makes reference to



arbitration at the bottom of the front page as well as Paragraph No. 10 of the reverse page. On the front page in the second paragraph under a heading labeled BAILMENT AGREEMENT is the following language:

All claims, disputes, and other matters of any kind or nature in question arising out of, in connection with, or relating to, the purchase of the above described vehicle, shall be decided by arbitration in accordance with the Commercial Arbitration Association. The award by the arbitrator(s) shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction therein.¹

Paragraph 10 on the reverse side of the Contract of Sale states as follows:

Any controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled in the County Seat where the dealership is located by arbitration pursuant to the Uniform Arbitration Act of South Carolina (S.C. Code § 15-48-10) in accordance with the Rules of the American Arbitration Association, and judgment of the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof.

There are no other references to arbitration in the Contract of Sale and there are no other arbitration agreements contained in any other documents.

The Parties agree that there is a valid, enforceable arbitration agreement, but disagree on the form and procedure to be followed in the arbitration. The SC Act provides as follows in § 15-48-10(a):

Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first

¹ The Plaintiff argued that there is no such entity known as the Commercial Arbitration Association. The Defendant does not dispute this assertion, but does argue that that one of the leading arbitration organizations, the American Arbitration Association, provides Commercial Arbitration Rules and Mediation Procedures for resolving commercial disputes. Defendant suggests it is likely the parties intended to invoke that arbitration organization and those rules in the section referencing the "Commercial Arbitration Association." The Court disagrees with the Plaintiff's interpretation, but in any event, the reference to the "Commercial Arbitration Association" should not render the arbitration provision void as it expresses a clear intent that any dispute be arbitrated.

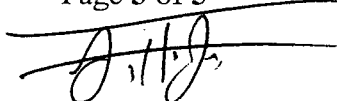


page of the contract and unless such notice is displayed thereon, the contract shall not be subject to arbitration.

The appellate courts of South Carolina have strictly construed the notice provision and invalidated arbitration agreements that did not comply. *See, e.g., Zabinski v. Bright Acres Associates*, 346 S.C. 580, 553 S.E.2d 110 (2001); *Richland Horizontal Property Regime Homeowners Ass'n v. Sky GreenHoldings, Inc.*, 392 S.C. 194, 708 S.E.2d 225 (Ct. App. 2011). The parties concede that the arbitration clauses in the Contract of Sale do not comply with above notice provision; therefore, the SC Act does not apply.

The Plaintiff argues that the procedures established in the SC Act should control the administration of the arbitration. The Defendant argues that the parties agreed to use the American Arbitration Association and its rules for administering the arbitration. The Court finds that the intent of the parties as to the appropriate arbitration rules was ambiguous and no express agreement to use a particular arbitration administrator or rules was displayed in the arbitration agreement.

The Court further finds that its rulings must be guided by the FAA as the mandatory notice provisions of the SC Act have not been met. The FAA provides that if the arbitration agreement does not provide “a method of naming or appointing an arbitrator” then “the court shall designate and appoint an arbitrator . . . who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein.” 9 U.S.C. § 5. In this case, the Court finds that the agreement is ambiguous with respect to the “method of naming or appointing an arbitrator or arbitrators or an umpire.” Therefore, as directed in 9 U.S.C. § 5, the Court appoints Karl Folkens as arbitrator, with the consent of the parties.



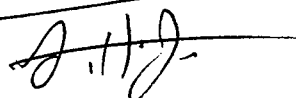
In addition, the Court finds that it must answer the threshold question of whether this matter will proceed as a bi-lateral arbitration between the named parties only or whether the Plaintiff may proceed in a representative capacity on behalf of a class of other persons similarly situated. Here, the Court is persuaded by the following recent holding applying the FAA from the Fourth Circuit Court of Appeals:

Because the primary goal in enforcing an arbitration agreement is to discern and honor party intent, and because of the fundamental differences between bilateral and class arbitration—which change the nature of arbitration altogether—we hold that whether parties agree to class arbitration is a gateway question for the court.

Dell Webb Communities, Inc. v. Carlson, 817 F.3d 867, 869 (4th Cir. 2016) *cert. denied sub nom. Carlson v. Del Webb Communities, Inc.* (U.S. Dec. 5, 2016)).

The issue of bilateral or class-wide arbitration has been addressed by the United States Supreme Court and the Fourth Circuit. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010); *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 875-76 (4th Cir. 2016). Under these cases, the question before the Court is “whether the parties *agreed to* authorize class arbitration.” *Stolt-Nielsen S.A.* at 687 (emphasis in original).² Thus, parties cannot be forced to arbitrate on a class-wide basis absent “a contractual basis for concluding that the party agreed to do so.” *Id.* at 684. Further, “[a]n implicit agreement to authorize class-action arbitration, [] is not a term that the arbitrator may infer solely from the fact of the parties’ agreement to arbitrate.” *Id.* at 685. As stated by the Supreme Court, “[w]e think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume,

² This issue was not addressed in *Herron v. Century BMW*, 387 S.C. 525, 693 S.E.2d 394 (2010) (“Herron I”), *cert. granted, judgment vacated sub nom. Sonic Auto., Inc. v. Watts*, 563 U.S. 971, 131 S. Ct. 2872, 179 L. Ed. 2d 1184 (U.S.S.C. 2011), and *opinion reinstated*, 395 S.C. 461, 719 S.E.2d 640 (2011) (“Herron II”) because the South Carolina Supreme Court there found that the issue of federal preemption by operation of the FAA was not preserved. *Herron II*, 395 S.C. at 470, 719 S.E.2d at 644-45.



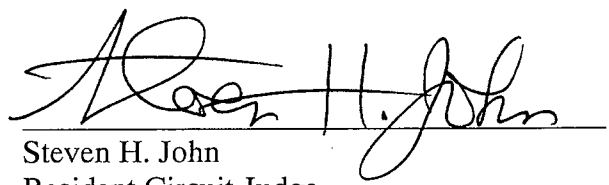
consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 687.

Here, the parties' agreement does not include any reference to class-wide arbitration, class actions, or any other language that would suggest an agreement by either party to engage in class-wide arbitration. Instead, the Contract of Sale provides that it relates to "this contract" (§ 10) and that is it between "DEALER, and the undersigned Buyer(s)" (BAILMENT AGREEMENT) and applies to disputes relating to "the above described vehicle" (*Id.*). Nothing about the agreement suggests that it relates to any other claim or parties, much less a class-wide arbitration. As a result, the parties have only agreed to submit disputes for bilateral arbitration.

CONCLUSION

The Court hereby grants Defendant's motion to alter or amend and withdraws its earlier order. The Court further grants the Defendant's Motion to Stay Proceedings and Compel Bilateral Arbitration and denies Plaintiff's Motion to Compel Arbitration under the SC Act. The parties are directed to conduct bilateral arbitration before Karl Folkens consistent with the FAA, within 90 days of the entry of this order, or as the arbitrator may otherwise direct.

IT IS SO ORDERED.


Steven H. John
Resident Circuit Judge
Fifteenth Judicial Circuit

January 11, 2017.
Conway, South Carolina

