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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Resident Circuit Judge

APPELLANT CASE NO. 2017-000142

RECEIVED

MAY 26 2017

SC Court of Appeals

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

vs.

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

RECORD ON APPEAL

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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.

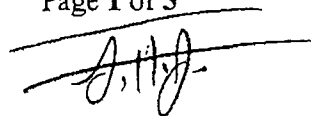
ORDER GRANTING MOTION
TO ALTER OR AMEND

2017 JAN 12 PM 1:46
CLERK OF COURT
HORRY COUNTY, SC

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

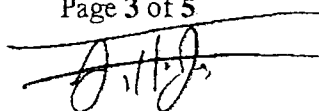
¹ The Plaintiff argued that there is no such entity known as the Commercial Arbitration Association. The Defendant does not dispute this assertion, but does argue that that one of the leading arbitration organizations, the American Arbitration Association, provides Commercial Arbitration Rules and Mediation 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 Green Holdings, 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.



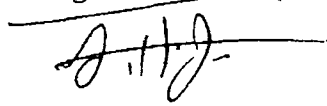
In addition, the Court finds that it must answer the threshold question of whether this matter will proceed as a bi-lateral arbitration between the named parties only or whether the Plaintiff may proceed in a representative capacity on behalf of a class of other persons similarly situated. Here, the 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.



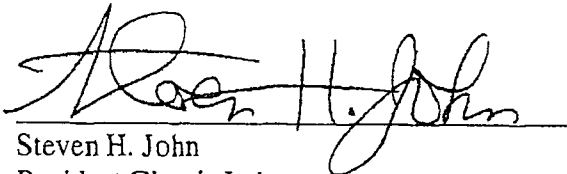
consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 687.

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

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 16-CP-26-937

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

FILED
HORRY COUNTY
2016 SEP 15 PM 3:07
MELANIE HUGGINS-WARD
CLERK OF COURT

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 South Carolina Uniform Arbitration Act. Defendant moved to stay the proceedings and compel bilateral arbitration. For the reasons stated herein, the Court hereby denies both motions and orders that the case proceed in Circuit Court.

The facts 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 conjunction 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.

15/3
[Signature]

The Plaintiff argued that there is no such entity known as the Commercial Arbitration Association. The Defendant did not dispute this assertion.

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.

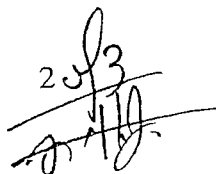
There are no other references to arbitration in the Contract of Sale and there are no other arbitration agreements contained in any other documents.

The Uniform Arbitration Act of South Carolina §15-48-10(a) states as follows:

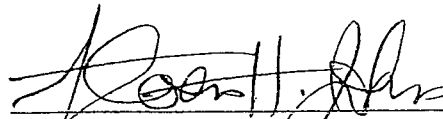
Notice that a Contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the Contract and unless such notice is displayed thereon, the Contract shall not be subject to arbitration.

The parties agree that the arbitration clauses in the Contract of Sale do not comply with the statute. The Appellate Courts have strictly construed the statute according to its literal meaning. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001) and Richland Horizontal Property Regime Homeowners Association, Inc. v. Sky Green Holdings, Inc., 392 S.C. 194, 708 S.E.2d 225 (S.C. App. 2011). The arbitration clauses are void because the language does not comply with the statute. Therefore, there is no agreement to arbitrate.

The Court hereby denies the Plaintiffs' Motion to Compel Arbitration under the South Carolina Uniform Arbitration Act and the Court denies the Defendant's Motion to Stay Proceedings and compel bilateral arbitration. This matter shall proceed in Circuit Court. The Plaintiff shall amend her complaint accordingly within thirty (30) days of this Order.

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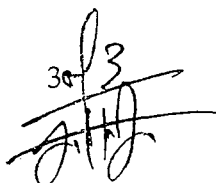
IT IS SO ORDERED.



The Honorable Steven H. John,
Resident Circuit Judge
Fifteenth Judicial Circuit

September 15 2016

Conway, SC

30/3


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.

DEFENDANT'S MOTION TO ALTER OR AMEND AND TO HOLD IN ABEYANCE

Pursuant to Rule 59, SCRCP, Thag, LLC, d/b/a Myrtle Beach Mitsubishi ("Defendant") hereby moves to alter or amend the Court's order dated and filed September 15, 2016 and mailed to the parties on September 19, 2016 (the "Order"). Defendant received written notice that the Order was to be filed on September 15, 2016, but did not receive the Order itself until September 22, 2016.

The Order denies the parties' respective motions to compel arbitration. As such, it is immediately appealable pursuant to S.C. Code Ann. § 15-48-200. Accordingly, Defendant asks that this action be held in abeyance pending the resolution of this motion and any subsequent appeal. This would include the filing of an amended complaint and any discovery.

The grounds for this motion to alter or amend are as follow:

1. Defendant agrees that the parties' agreement does not provide the notice required by S.C. Code Ann. § 15-48-10(a). However, invalid notice under this section does not render arbitration language void for purposes of the Federal Arbitration Act, 9 U.S.C. § 1, et seq. ("FAA"). *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 553 S.E.2d 110 (2001) ("Although the arbitration provision does not meet the technical requirements of section 15-48-10(a), the inquiry does not end there. Inextricably linked with the question of the applicability of section

15-48-10(a), is the impact of the FAA on this dispute.”). Thus, the Court’s Order should be amended to include consideration of whether the arbitration language at issue is valid under the FAA.

2. In the Order, the Court has improperly applied S.C. Code Ann. § 15-48-10(a) to find “the arbitration clauses are void” and to invalidate language that is enforceable under the FAA. This ruling was made on the Court’s own initiative—both parties had moved for arbitration, the dispute between them related to the nature of that arbitration. The Court denied both motions and instead ordered Plaintiff to file an amended complaint in the Circuit Court. This treatment of S.C. Code Ann. § 15-48-10(a) in the Order has been preempted by the FAA and is in error. As stated by the South Carolina Supreme Court, “[w]hile the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties’ agreement to arbitrate.” *Zabinski*, 346 S.C. at 592, 553 S.E.2d at 116.

As previously argued by the Defendant, courts are to order the arbitration of claims pursuant to the FAA “unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *AT&T Techs., Inc. v. Commc’ns Workers*, 475 U.S. 643, 650 (1986) (citation and internal quotation marks omitted) (emphasis added); see also *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007) (“Both state and federal policy favor arbitration of disputes and unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered.”) (citing *Zabinski*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19). The Court’s ruling fails to consider the FAA at all, instead addressing only the notice deficiency under S.C. Code Ann. § 15-48-10(a). This is in error. The Order should be amended to consider and address these arguments. When that analysis is undertaken, the Court should rule that there is a valid agreement to arbitrate for purposes of the FAA for the reasons previously provided by the Defendant.

3. The Court failed to address the Defendant’s request that any arbitration be bilateral only (and not prosecuted on behalf of a class). As previously argued by the Defendant, any arbitration in this case should be between the named parties and only the named parties.

4. Although there is no “Commercial Arbitration Association,” Defendant notes that one of the leading arbitration organizations, the American Arbitration Association, provides Commercial Arbitration Rules and Mediation Procedures for resolving commercial disputes. It is likely the parties intended to invoke that arbitration organization and those rules in the section referencing the “Commercial Arbitration Association.” In any event, the reference to the “Commercial Arbitration Association” should not render that arbitration provision void as it expresses a clear intent that any dispute be arbitrated.

CONCLUSION

For these reasons, the Court should reconsider its Order and compel bilateral arbitration consistent with the FAA. This motion will be supported by the laws of South Carolina and the

STATE OF SOUTH CAROLINA)

COUNTY OF Horry)

IN THE COURT OF COMMON PLEAS

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

Plaintiff(s))

vs.)

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

Defendant(s))

CIVIL ACTION COVERSHEET

Civil Action No.: 16-CP-26-

937

Submitted By: L. Sidney Connor, IV

Address: Kelaher, Connell, & Connor, P.C.

Post Office Drawer 14547

Surfside Beach, SC 29587

SC Bar #: 1363

Telephone #: (843) 238-5648

Fax #: (843) 238-5050

Other:

E-mail: sconnor@classactlaw.net

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|---|---|--|
| Contracts | Torts - Professional Malpractice | Torts - Personal Injury | Real Property |
| ☐ Constructions (100) | ☐ Dental Malpractice (200) | ☐ Conversion (310) | ☐ Claim & Delivery (400) |
| ☐ Debt Collection (110) | ☐ Legal Malpractice (210) | ☐ Motor Vehicle Accident (320) | ☐ Condemnation (410) |
| ☐ General (130) | ☐ Medical Malpractice (220) | ☐ Premises Liability (330) | ☐ Foreclosure (420) |
| ☐ Breach of Contract (140) | Previous Notice of Intent Case # | ☐ Products Liability (340) | ☐ Mechanic's Lien (430) |
| ☐ Fraud/Bad Faith (150) | 20 -NI- | ☐ Personal Injury (350) | ☐ Partition (440) |
| ☐ Failure to Deliver/
Warranty (160) | ☐ Notice/ File Med Mal (230) | ☐ Wrongful Death (360) | ☐ Possession (450) |
| ☐ Employment Discrim (170) | ☐ Other (299) | ☐ Assault/Battery (370) | ☐ Building Code Violation (460) |
| ☐ Employment (180) | | ☐ Slander/Libel (380) | ☐ Other (499) |
| ☐ Other (199) | | ☐ Other (399) | |

- | | | | |
|--|---|---|---|
| Inmate Petitions | Administrative Law/Relief | Judgments/Settlements | Appeals |
| ☐ PCR (500) | ☐ Reinstate Drv. License (800) | ☐ Death Settlement (700) | ☐ Arbitration (900) |
| ☐ Mandamus (520) | ☐ Judicial Review (810) | ☐ Foreign Judgment (710) | ☐ Magistrate-Civil (910) |
| ☐ Habeas Corpus (530) | ☐ Relief (820) | ☐ Magistrate's Judgment (720) | ☐ Magistrate-Criminal (920) |
| ☐ Other (599) | ☐ Permanent Injunction (830) | ☐ Minor Settlement (730) | ☐ Municipal (930) |
| | ☐ Forfeiture-Petition (840) | ☐ Transcript Judgment (740) | ☐ Probate Court (940) |
| | ☐ Forfeiture-Consent Order (850) | ☐ Lis Pendens (750) | ☐ SCDOT (950) |
| | ☐ Other (899) | ☐ Transfer of Structured
Settlement Payment Rights
Application (760) | ☐ Worker's Comp (960) |
| | | ☐ Confession of Judgment (770) | ☐ Zoning Board (970) |
| | | ☐ Petition for Workers
Compensation Settlement
Approval (780) | ☐ Public Service Comm. (990) |
| | | ☐ Other (799) | ☐ Employment Security Comm (991) |
| | | | ☐ Other (999) |

Special/Complex /Other

- ☐ Environmental (600) ☐ Pharmaceuticals (630)
☐ Automobile Arb. (610) ☒ Unfair Trade Practices (640)
☐ Medical (620) ☐ Out-of State Depositions (650)
☐ Other (699) ☐ Motion to Quash Subpoena in
an Out-of-County Action (660)
☐ Sexual Predator (510) ☐ Pre-Suit Discovery (670)

Submitting Party Signature:

Date: February 11, 2016

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 16-CP-26-_____

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.)

SUMMONS
(Class Action)

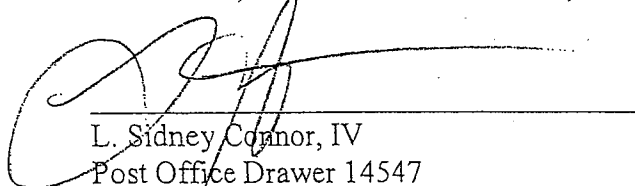
JURY TRIAL DEMANDED

FILED
HORRY COUNTY
2016 FEB 12 PM 2:49
MELANIE HUGGINS-WARD
CLERK OF COURT

TO: ABOVE-NAMED DEFENDANTS

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscriber or subscribers at his or their office at Suite 209, The Courtyard, 1500 U.S. Highway 17 North, Surfside Beach, South Carolina 29587 within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid; the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.

KELAHER, CONNELL & CONNOR, P.C.



L. Sidney Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
Attorneys for Plaintiff

February 11, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 16-CP-26-_____

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.)

COMPLAINT
(Class Action)

JURY TRIAL DEMANDED

FILED
HORRY COUNTY
2016 FEB 12 PM 2:49
MELANIE JUDGINS-WARD
CLERK OF COURT

The Plaintiff, complaining of the Defendant herein, would show and allege unto this Honorable Court as follows:

1. The named Plaintiff, Cali Alyson Emory, is a citizen and resident of the State of South Carolina, County of Horry.
2. The Defendant Thag, LLC, d/b/a Myrtle Beach Mitsubishi is a limited liability company organized and existing pursuant to the laws of the State of South Carolina, primarily doing business in Horry County, South Carolina.
3. This court has jurisdiction over the parties and subject matter of this case.

FACTUAL ALLEGATIONS

4. On or about May 28, 2014, Plaintiff purchased a new vehicle from the Defendant Myrtle Beach Mitsubishi.
5. The Defendant Myrtle Beach Mitsubishi had the Plaintiff sign a Purchase Agreement with a preprinted "closing fee" of \$499.00.
6. S.C. Code §37-2-307 (2000) provides as follows:

Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of Ten & No/100 (\$10.00) Dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

7. A closing fee is allowed only for the reimbursement of costs which are actually incurred by the dealer and necessary to the closing transaction. Freeman v. JLH Investments, LP, Opinion No. 27586 filed November 4, 2015, S.C. Sup. Ct.

CLASS ALLEGATIONS

8. Plaintiff brings this action in a representative capacity for all persons similarly situated pursuant to Rule 23 of the South Carolina Rules of Civil Procedure and S.C. Code §56-15-110(2).

9. The class consists of those persons who have purchased vehicles from Thag, LLC, d/b/a Myrtle Beach Mitsubishi and were charged a closing fee.

10. This class of persons is so numerous that joinder of all members is impracticable.

11. There are questions of law and fact common to the class.

12. The claims of the representative Plaintiff are typical of the claims of the entire class.

13. The representative Plaintiff will fairly and adequately protect the interests of the class.

14. The amount in controversy exceeds \$100 for each member of the class.

FOR A FIRST CLAIM (Negligence)

15. The allegations of Paragraph Nos. 1 through 14 are incorporated as if fully set forth herein.

16. The Defendant is subject to the Dealers Act, S.C. Code §§ 56-15-10, et seq.

17. The Defendant has negligently violated the Dealers Act in one or more of the following particulars:

- a. In failing properly to register with the Department of Consumer Affairs;
- b. In failing to include the closing fee in the advertised price of the motor vehicles which includes the window sticker of the vehicle;

- c. In failing to display the closing fee in a conspicuous location in the motor vehicle dealership;
- d. In failing to have any disclosure approved by the South Carolina Department of Consumer Affairs; and
- e. In charging a closing fee which does not represent closing costs actually incurred by the Defendant.

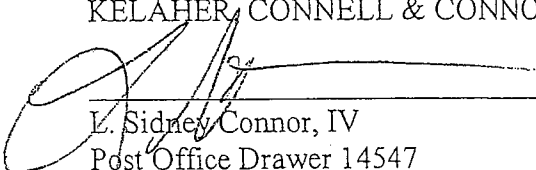
18. The aforementioned acts and omission's in violation of the Dealers Act were negligent, arbitrary, reckless, and willful.

19. Each class member has suffered damage in the amount of the closing fee.

20. Plaintiff prays for judgment against the Defendant for the amount of the closing fee for each class member, doubled pursuant to the Dealers Act, plus punitive damages up to three times the actual damages, plus costs and attorney's fees pursuant to the Dealers Act.

WHEREFORE, having fully pled her complaint, the Plaintiff prays for the relief as requested herein and for such other and further relief as this court may deem just and proper for the benefit of Plaintiff and all class members.

KELAHER, CONNELL & CONNOR, P.C.



L. Sidney Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
sconnor@classactlaw.net
Attorney for Plaintiff Class

February 11, 2016

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

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

Plaintiff(s))

vs.)

Thag, LLC, d/b/a Myrtle Beach Mitsubishi,
Defendant(s))

AMENDED
CIVIL ACTION COVERSHEET

Submitted By: L. Sidney Connor, IV
Address: Kelaher, Connell, & Connor, P.C.
Post Office Drawer 14547
Surfside Beach, SC 29587

SC Bar #: 1363
Telephone #: (843) 238-5648
Fax #: (843) 238-5050
Other:
E-mail: sconnor@classactlaw.net

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|---|--|
| ☐ Contracts
☐ Constructions (100)
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☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 ____-NI-_____
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☒ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in
an Out-of-County Action (660)
☐ Pre-Suit Discovery (670) | | |

Submitting Party Signature: _____

Date: June 15 2016

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 16-CP-26-937

HORRY COUNTY
2016 JUN 23 PM 2:40
KELAHAR, CONNELL & CONNOR
CLERK OF COURT

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.)

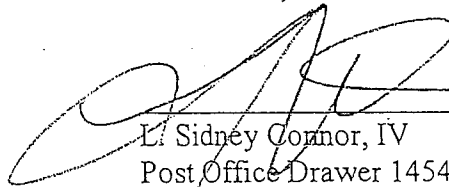
AMENDED SUMMONS
(Class Action)

IN ARBITRATION

TO: ABOVE-NAMED DEFENDANTS

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscriber or subscribers at his or their office at Suite 209, The Courtyard, 1500 U.S. Highway 17 North, Surfside Beach, South Carolina 29587 within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid; the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.

KELAHAR, CONNELL & CONNOR, P.C.



Li Sidney Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
Attorneys for Plaintiff

June 15, 2016

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 16-CP-26-937

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.)

**AMENDED COMPLAINT
(Class Action)**

IN ARBITRATION

HORRY COUNTY
2016 JUN 23 PM 2:49
FILED
CLERK OF COURT

The Plaintiff, complaining of the Defendant herein, would show and allege unto this Honorable Court as follows:

1. The named Plaintiff, Cali Alyson Emory, is a citizen and resident of the State of South Carolina, County of Horry.
2. The Defendant Thag, LLC, d/b/a Myrtle Beach Mitsubishi is a limited liability company organized and existing pursuant to the laws of the State of South Carolina, primarily doing business in Horry County, South Carolina.
3. This court has jurisdiction over the parties and subject matter of this case in arbitration pursuant to the South Carolina Uniform Arbitration Act §15-48-10 et. seq.

FACTUAL ALLEGATIONS

4. On or about May 28, 2014, Plaintiff purchased a new vehicle from the Defendant Myrtle Beach Mitsubishi.
5. The Defendant Myrtle Beach Mitsubishi had the Plaintiff sign a Purchase Agreement with a preprinted "closing fee" of \$499.00.
6. S.C. Code §37-2-307 (2000) provides as follows:

Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of Ten & No/100 (\$10.00) Dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the

motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

7. A closing fee is allowed only for the reimbursement of costs which are actually incurred by the dealer and necessary to the closing transaction. Freeman v. JLH Investments, LP, Opinion No. 27586 filed November 4, 2015, S.C. Sup. Ct.

CLASS ALLEGATIONS

8. Plaintiff brings this action in a representative capacity for all persons similarly situated pursuant to Rule 23 of the South Carolina Rules of Civil Procedure and S.C. Code §56-15-110(2).

9. The class consists of those persons who have purchased vehicles from Thag, LLC, d/b/a Myrtle Beach Mitsubishi and were charged a closing fee.

10. This class of persons is so numerous that joinder of all members is impracticable.

11. There are questions of law and fact common to the class.

12. The claims of the representative Plaintiff are typical of the claims of the entire class.

13. The representative Plaintiff will fairly and adequately protect the interests of the class.

14. The amount in controversy exceeds \$100 for each member of the class.

FOR A FIRST CLAIM (Negligence)

15. The allegations of Paragraph Nos. 1 through 14 are incorporated as if fully set forth herein.

16. The Defendant is subject to the Dealers Act, S.C. Code §§ 56-15-10, et seq.

17. The Defendant has negligently violated the Dealers Act in one or more of the following particulars:

a. In failing properly to register with the Department of Consumer Affairs;

- b. In failing to include the closing fee in the advertised price of the motor vehicles which includes the window sticker of the vehicle;
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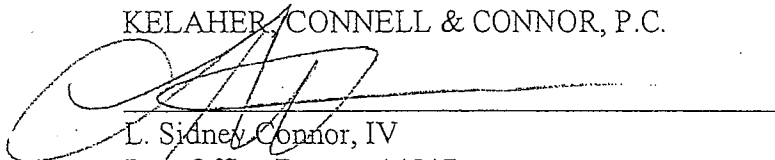
18. The aforementioned acts and omission's in violation of the Dealers Act were negligent, arbitrary, reckless, and willful.

19. Each class member has suffered damage in the amount of the closing fee.

20. Plaintiff prays for judgment against the Defendant for the amount of the closing fee for each class member, doubled pursuant to the Dealers Act, plus punitive damages up to three times the actual damages, plus costs and attorney's fees pursuant to the Dealers Act.

WHEREFORE, having fully pled her complaint, the Plaintiff prays for the relief as requested herein and for such other and further relief as this court may deem just and proper for the benefit of Plaintiff and all class members.

KELAHER, CONNELL & CONNOR, P.C.



L. Sidney Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
sconnor@classactlaw.net
Attorney for Plaintiff Class

June 15, 2016

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

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

Plaintiff(s)

vs.

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

Defendant(s)

CIVIL ACTION COVERSHEET

Civil Action No.: 16-CP-26-937

COPY

Submitted By: L. Sidney Connor, IV
Address: Kelaher, Connell, & Connor, P.C.
Post Office Drawer 14547
Surfside Beach, SC 29587

SC Bar #: 1363
Telephone #: (843) 238-5648
Fax #: (843) 238-5050
Other:
E-mail: sconnor@classactlaw.net

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
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- | | | | |
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Submitting Party Signature: _____

Date: September 22, 2016

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCPL, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 16-CP-26-937

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.)

SECOND AMENDED SUMMONS
(Class Action)

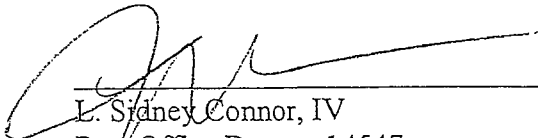
JURY TRIAL DEMANDED

2016 SEP 26 PM 2:16
CLERK OF COURT
HORRY COUNTY

TO: ABOVE-NAMED DEFENDANTS

YOU ARE HEREBY SUMMONED and required to answer the Second Amended Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Second Amended Complaint on the subscriber or subscribers at his or their office at Suite 209, The Courtyard, 1500 U.S. Highway 17 North, Surfside Beach, South Carolina 29587 within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Second Amended Complaint within the time aforesaid; the Plaintiff in this action will apply to the Court for the relief demanded in the Second Amended Complaint and judgment by default will be rendered against you for the relief demanded in the Second Amended Complaint.

KELAHHER, CONNELL & CONNOR, P.C.


L. Stanley Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
Attorneys for Plaintiffs

September 22, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 16-CP-26-937

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.)

SECOND AMENDED COMPLAINT
(Class Action)

JURY TRIAL DEMANDED

2016 SEP 26 PM 2:16
CLERK OF COURT
JUDICIAL CIRCUIT
FIFTEENTH

The Plaintiff, complaining of the Defendant herein, would show and allege unto this Honorable Court as follows:

1. The named Plaintiff, Cali Alyson Emory, is a citizen and resident of the State of South Carolina, County of Horry.
2. The Defendant Thag, LLC, d/b/a Myrtle Beach Mitsubishi is a limited liability company organized and existing pursuant to the laws of the State of South Carolina, primarily doing business in Horry County, South Carolina.
3. This court has jurisdiction over the parties and subject matter of this case.

FACTUAL ALLEGATIONS

4. On or about May 28, 2014, Plaintiff purchased a new vehicle from the Defendant Myrtle Beach Mitsubishi.
5. The Defendant Myrtle Beach Mitsubishi had the Plaintiff sign a Purchase Agreement with a preprinted "closing fee" of \$499.00.
6. S.C. Code §37-2-307 (2000) provides as follows:

Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of Ten & No/100 (\$10.00) Dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

7. A closing fee is allowed only for the reimbursement of costs which are actually incurred by the dealer and necessary to the closing transaction. Freeman v. JLH Investments, LP, Opinion No. 27586 filed November 4, 2015, S.C. Sup. Ct.

CLASS ALLEGATIONS

8. Plaintiff brings this action in a representative capacity for all persons similarly situated pursuant to Rule 23 of the South Carolina Rules of Civil Procedure and S.C. Code §56-15-110(2).

9. The class consists of those persons who have purchased vehicles from Thag, LLC, d/b/a Myrtle Beach Mitsubishi and were charged a closing fee.

10. This class of persons is so numerous that joinder of all members is impracticable.

11. There are questions of law and fact common to the class.

12. The claims of the representative Plaintiff are typical of the claims of the entire class.

13. The representative Plaintiff will fairly and adequately protect the interests of the class.

14. The amount in controversy exceeds \$100 for each member of the class.

FOR A FIRST CLAIM (Negligence)

15. The allegations of Paragraph Nos. 1 through 14 are incorporated as if fully set forth herein.

16. The Defendant is subject to the Dealers Act, S.C. Code §§ 56-15-10, et seq.

17. The Defendant has negligently violated the Dealers Act in one or more of the following particulars:

- a. In failing properly to register with the Department of Consumer Affairs;
- b. In failing to include the closing fee in the advertised price of the motor vehicles which includes the window sticker of the vehicle;

- c. In failing to display the closing fee in a conspicuous location in the motor vehicle dealership;
- d. In failing to have any disclosure approved by the South Carolina Department of Consumer Affairs; and
- e. In charging a closing fee which does not represent closing costs actually incurred by the Defendant.

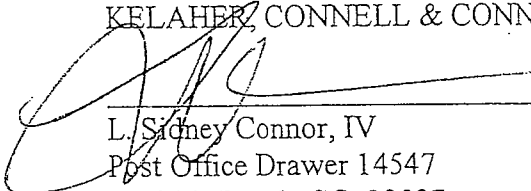
18. The aforementioned acts and omission's in violation of the Dealers Act were negligent, arbitrary, reckless, and willful.

19. Each class member has suffered damage in the amount of the closing fee.

20. Plaintiff prays for judgment against the Defendant for the amount of the closing fee for each class member, doubled pursuant to the Dealers Act, plus punitive damages up to three times the actual damages, plus costs and attorney's fees pursuant to the Dealers Act.

WHEREFORE, having fully pled her complaint, the Plaintiff prays for the relief as requested herein and for such other and further relief as this court may deem just and proper for the benefit of Plaintiff and all class members.

KELAHER, CONNELL & CONNOR, P.C.



L. Sidney Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
sconnor@classactlaw.net
Attorney for Plaintiff Class

September 22, 2016

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.

ANSWER OF DEFENDANT THAG, LLC, D/B/A MYRTLE BEACH MITSUBISHI

Thag, LLC, d/b/a Myrtle Beach Mitsubishi ("Defendant") hereby answers Cali Alyson Emory's ("Plaintiff") Complaint as follows:

**FIRST DEFENSE
(Arbitration)**

1. Plaintiff is precluded from proceeding on her Complaint, individually and in a representative capacity for all others similarly situated, in a judicial forum because, pursuant to an Arbitration Agreement May 28, 2014, Plaintiff agreed to arbitrate the claims she asserted in her Complaint, and Plaintiff's agreement to arbitrate is specifically enforceable pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16.

2. Thus, Plaintiff's Complaint should be stayed, and she should be compelled to submit her Complaint to arbitration.

SECOND DEFENSE
(General Denial)

3. Defendant denies each allegation of the Complaint that it does not expressly admit herein, and denies that Plaintiff is entitled to any amount, award or any other relief from Defendant.

4. On information and belief, Defendant admits the allegations of paragraph 1.

5. Answering the allegations of paragraph 2, Defendant admits that it is a limited liability company organized under the laws of South Carolina, and that it does business in Horry County, South Carolina.

6. Defendant denies the allegations of paragraph 3.

Factual Allegations

7. Defendant admits the allegations of paragraph 4.

8. Answering the allegations of paragraph 5, Defendant admits only that Plaintiff executed a Contract of Sale dated May 28, 2014, which included a closing fee of \$499.00 in the total price of the vehicle Plaintiff purchased.

9. Defendant admits the allegations of paragraph 6.

10. The allegations of paragraph 7 calls for a legal conclusion to which no response is required. To the extent a response is required, Defendant denies the allegations of paragraph 7.

Class Allegations

11. Answering the allegations of paragraphs 8-14, Defendant denies that Plaintiff will be able to prove all prerequisite requirements necessary to bring a class action lawsuit as contained in Rule 23, SCRCPP, and applicable case law.

**For a First Claim
(Negligence)**

12. In answering the allegations of paragraph 15, Defendant realleges the previous paragraphs of this Answer as fully as if repeated herein verbatim.

13. The allegations of paragraph 16 call for a legal conclusion, to which no response is required. To the extent a response is required, Defendant denies the allegations of paragraph 16.

14. Defendant denies the allegations of paragraphs 17 through 20.

15. Defendant denies that Plaintiff is entitled to the relief requested in her prayer for relief.

**THIRD DEFENSE
(Failure to State a Cause of Action)**

16. The Complaint fails to state facts sufficient to constitute a cause of action as to Defendant and should be dismissed pursuant to Rule 12(b)(6), SCRCP.

**FOURTH DEFENSE
(Acts of Third Parties)**

17. Plaintiff's claims for damages, if any, directly and proximately result, in whole or in part, from the intervening and superseding acts of third parties over whom Defendant had no control and is not responsible.

**FIFTH DEFENSE
(Comparative Negligence)**

18. Even if Defendant was negligent as alleged in the Plaintiff's Complaint, which is specifically denied, any damage suffered by the Plaintiff was due to her own comparative negligence so as to bar or partially bar any recovery in this matter.

SIXTH DEFENSE
(Estoppel by Silence/Consent)

19. Plaintiff's claims are barred by the doctrine of estoppel by silence. Plaintiff had a duty to inform Defendant of her objections to paying closing fees at the time of her vehicle closings.

20. Plaintiff voluntarily and intentionally relinquished her rights to object to the charging of a closing fee because her actions and conduct during the vehicle closings are inconsistent with her allegations in the Complaint.

21. Plaintiff's claims are further barred by the doctrine of consent because she consented to pay the closing fees after being informed of the fees prior to the vehicle closings. At no time prior to the filing of the Complaint did Plaintiff object to Defendant charging closing fees.

SEVENTH DEFENSE
(Voluntary Payment Doctrine)

22. Plaintiff knowingly and voluntarily paid the fee of which she now complains after it was conspicuously disclosed to her in writing on at least two documents signed by her. Plaintiff's claims are thus barred by the voluntary payment doctrine.

EIGHTH DEFENSE
(Injury Reasonably Avoidable)

23. Plaintiff's alleged injury was reasonably avoidable by her, in that she was aware of the closing fee and had the option of not purchasing the vehicle and paying the closing fee. Thus, Plaintiff's claims under S.C. Code Ann. § 56-15-110 are barred.

NINTH DEFENSE
(Exclusive Remedy)

24. The South Carolina Consumer Protection Code, S.C. Code § 37-1-101, *et seq.* provides the exclusive remedy for alleged violations of the Closing Fee Statute or any other legal or equitable claim alleging the improper charging of closing fees in motor vehicle sales and lease transactions, and thus Plaintiff may not pursue her claims under the Dealers' Act.

25. Furthermore, Plaintiff may not pursue her claims based on an alleged improper or illegal closing fee in a representative capacity, because the South Carolina Consumer Protection Code does not allow class or "group" actions. S.C. Code Ann. § 37-5-202(1).

TENTH DEFENSE
(Compliance with S.C. Code Ann. §§ 37-6-506(3), 37-6-104(4): Safe Harbor)

26. Closing fees charged in motor vehicle sales transactions are authorized under the provisions of the Closing Fee Statute. At all relevant times, Defendant has charged closing fees in conformity with the requirements and conditions of the Closing Fee Statute. Thus, pursuant to S.C. Code § 37-6-506(3) and § 37-6-104(4), Defendant should not be liable for actions which have not been considered violations of the Closing Fee Statute by the South Carolina Department of Consumer Affairs.

ELEVENTH DEFENSE
(Compliance with S.C. Code Ann. § 37-5-202(7): Good Faith Error)

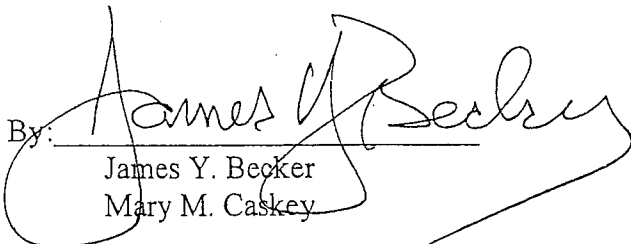
27. Defendant has never intended to violate any portion of the Dealer's Act, the South Carolina Consumer Protection Code, or the requirements, regulations, and administrative interpretations established by the South Carolina Department of Consumer Affairs with regard to the charging of a closing fee in motor vehicle sales and lease transactions. Defendant has established and maintained compliance procedures which are reasonably adapted to avoid any violation of the law. To the extent any violation occurred, it was not intentional and resulted

from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error. Plaintiff's claims are thus barred by the provisions of S.C. Code § 37-5-202(7).

TWELFTH DEFENSE
(Filed Rate Doctrine)

28. Pursuant to the 2001 Administrative Interpretation, Defendant, at all relevant times, has been required to and has filed and registered its closing fee with the South Carolina Department of Consumer Affairs, which is vested with authority to regulate the charging of closing fees by motor vehicle dealers and to determine what amount of closing fee is just and reasonable. The South Carolina Department of Consumer Affairs has accepted and approved the amount of the closing fees filed and registered by Defendant. Defendant has never exceeded the amount of the closing fee filed, registered, accepted, and approved by the South Carolina Department of Consumer Affairs. Thus, Plaintiff's claims are barred by the Filed Rate Doctrine as adopted by the South Carolina Supreme Court in *Edge v. State Farm Mutual Insurance Company*, 366 S.C. 511, 623 S.E.2d 387 (2005) and its progeny.

HAYNSWORTH SINKLER BOYD, P.A.

By: 

James Y. Becker
Mary M. Caskey

1201 Main Street, 22nd Floor (29201-3226)
Post Office Box 11889 (29211-1889)
Columbia, South Carolina
(803) 779-3080

Attorneys for Defendant

June 10, 2016

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.

**DEFENDANT THAG, LLC, D/B/A MYRTLE BEACH MITSUBISHI'S
ANSWER TO AMENDED COMPLAINT**

Thag, LLC, d/b/a Myrtle Beach Mitsubishi ("Defendant") hereby answers Cali Alyson Emory's ("Plaintiff") Amended Complaint as follows:

**FOR A FIRST DEFENSE
(General Denial)**

1. Defendant denies each allegation of the Complaint that it does not expressly admit herein, and denies that Plaintiff is entitled to any amount, award or any other relief from Defendant.
2. On information and belief, Defendant admits the allegations of paragraph 1.
3. Answering the allegations of paragraph 2, Defendant admits that it is a limited liability company organized under the laws of South Carolina, and that it does business in Horry County, South Carolina.
4. Defendant denies the allegations of paragraph 3. Further responding, Defendant states that Plaintiff is precluded from proceeding on her Complaint, individually and in a

representative capacity for all others similarly situated, in a judicial forum because, pursuant to an Arbitration Agreement May 28, 2014, Plaintiff agreed to arbitrate the claims she asserted in her Complaint, and Plaintiff's agreement to arbitrate is specifically enforceable pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16. Plaintiff is prohibited from pursuing her claims on behalf of a class in arbitration. See *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010); *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867 (2016).

Factual Allegations

5. Defendant admits the allegations of paragraph 4.

6. Answering the allegations of paragraph 5, Defendant admits only that Plaintiff executed a Contract of Sale dated May 28, 2014, which included a closing fee of \$499.00 in the total price of the vehicle Plaintiff purchased.

7. Answering the allegations of paragraph 6, Defendant states that S.C. Code Ann. § 37-2-307 was amended by Act No. 231, 2016 S.C. Acts ____, and the allegations of paragraph 6 do not correctly state the language of the statute. Further responding, Defendant states that the revised version of the statute should be applied retroactively in this case.

8. Defendant denies the allegations of paragraph 7.

Class Allegations

9. Answering the allegations of paragraphs 8-14, Defendant denies that Plaintiff will be able to prove all requirements to bring a class action lawsuit as contained in Rule 23, SCRCP, and applicable case law. Further responding, Defendant states that Plaintiff is prohibited from bringing her claims in a representative capacity because of her arbitration agreement with Defendant. Further responding, Defendant states that pursuant to S.C. Code Ann. § 37-5-202(3),

Plaintiff is prohibited from pursuing a claim for a violation of the Closing Fee Statute, S.C. Code Ann. § 37-2-307 in a class action.

**For a First Claim
(Negligence)**

10. In answering the allegations of paragraph 15, Defendant realleges the previous paragraphs of this Answer as fully as if repeated herein verbatim.

11. The allegations of paragraph 16 call for a legal conclusion, to which no response is required. To the extent a response is required, Defendant denies the allegations of paragraph 16.

12. Defendant denies the allegations of paragraphs 17 through 20.

13. Defendant denies that Plaintiff is entitled to the relief requested in her prayer for relief.

**FOR A SECOND DEFENSE
(Arbitration)**

14. Plaintiff is precluded from proceeding on her Complaint, individually and in a representative capacity for all others similarly situated, in a judicial forum because, pursuant to an Arbitration Agreement May 28, 2014, Plaintiff agreed to arbitrate the claims she asserted in her Complaint, and Plaintiff's agreement to arbitrate is specifically enforceable pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16.

15. Plaintiff is prohibited from pursuing her claims on behalf of a class in arbitration. *See Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010); *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867 (2016).

FOR A THIRD DEFENSE
(Failure to State a Cause of Action)

16. Plaintiff's claims fail to state facts sufficient to constitute a cause of action against Defendant.

FOR A FOURTH DEFENSE
(Exclusive Remedy)

17. The South Carolina Consumer Protection Code, S.C. Code § 37-1-101, *et seq.* provides the exclusive remedy for alleged violations of the Closing Fee Statute or any other legal or equitable claim alleging the improper charging of closing fees in motor vehicle sales and lease transactions, and thus Plaintiff may not pursue her claims under the Dealers' Act or under a theory of negligence.

18. Furthermore, Plaintiff may not pursue her claims based on an alleged improper or illegal closing fee in a representative capacity, because the South Carolina Consumer Protection Code does not allow class or "group" actions. S.C. Code Ann. § 37-5-202(3).

FOR A FIFTH DEFENSE
(Compliance with S.C. Code Ann. §§ 37-6-506(3), 37-6-104(4): Safe Harbor)

19. Closing fees charged in motor vehicle sales transactions are authorized under the provisions of the Closing Fee Statute. At all relevant times, Defendant has charged closing fees in conformity with the requirements and conditions of the Closing Fee Statute. Thus, Defendant should not be liable for actions which have not been considered violations of the Closing Fee Statute by the South Carolina Department of Consumer Affairs.

FOR A SIXTH DEFENSE
(Compliance with S.C. Code Ann. § 37-5-202(7): Good Faith Error)

20. Defendant has never intended to violate any portion of the Dealer's Act, the South Carolina Consumer Protection Code, or the requirements, regulations, and administrative

interpretations established by the South Carolina Department of Consumer Affairs with regard to the charging of a closing fee in motor vehicle sales and lease transactions. Defendant has established and maintained compliance procedures which are reasonably adapted to avoid any violation of the law. To the extent any violation occurred, it was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error. Plaintiff's claims are thus barred by the provisions of S.C. Code § 37-5-202(7).

**FOR A SEVENTH DEFENSE
(Comparative Negligence).**

21. Even if Defendant was negligent as alleged in the Plaintiff's Complaint, which is specifically denied, any damage suffered by the Plaintiff was due to her own comparative negligence so as to bar or partially bar any recovery in this matter.

**FOR AN EIGHTH DEFENSE
(Estoppel by Silence/Consent)**

22. Plaintiff's claims are barred by the doctrine of estoppel by silence. Plaintiff had a duty to inform Defendant if she had objections to paying closing fees at the time of her vehicle closings.

23. Plaintiff voluntarily and intentionally relinquished her rights to object to the charging of a closing fee because her actions and conduct during the vehicle closings are inconsistent with her allegations in the Complaint.

24. Plaintiff's claims are further barred by the doctrine of consent because she consented to pay the closing fees after being informed of the fees prior to the vehicle closings. At no time prior to the filing of the Complaint did Plaintiff object to Defendant charging closing fees.

FOR A NINTH DEFENSE
(Voluntary Payment Doctrine)

25. Plaintiff knowingly and voluntarily paid the fee of which she now complains after it was conspicuously disclosed to her in writing on at least two documents signed by her. Plaintiff's claims are thus barred by the voluntary payment doctrine.

FOR A TENTH DEFENSE
(Injury Reasonably Avoidable)

26. Plaintiff's alleged injury was reasonably avoidable by her, in that she was aware of the closing fee and had the option of not purchasing the vehicle and paying the closing fee. Thus, Plaintiff's claims under S.C. Code Ann. § 56-15-110 are barred.

FOR AN ELEVENTH DEFENSE
(Filed Rate Doctrine)

27. Pursuant to the 2001 Administrative Interpretation, Defendant, at all relevant times, has been required to and has filed and registered its closing fee with the South Carolina Department of Consumer Affairs, which is vested with authority to regulate the charging of closing fees by motor vehicle dealers and to determine what amount of closing fee is just and reasonable. The South Carolina Department of Consumer Affairs has accepted and approved the amount of the closing fees filed and registered by Defendant. Defendant has never exceeded the amount of the closing fee filed, registered, accepted, and approved by the South Carolina Department of Consumer Affairs. Thus, Plaintiff's claims are barred by the Filed Rate Doctrine as adopted by the South Carolina Supreme Court in *Edge v. State Farm Mutual Insurance Company*, 366 S.C. 511, 623 S.E.2d 387 (2005) and its progeny.

**FOR A THIRTEENTH DEFENSE
(Set-Off)**

28. Defendant is entitled to a credit in the form of a set-off of any unpaid amounts tendered to Plaintiff for her benefit, including but not limited to a credit for all amounts past due and owing on applicable loans or any amounts owing to Defendant as a result of judgments obtained by Defendant against Plaintiff, if any.

**FOR A FOURTEENTH DEFENSE
(Right to Recoupment and to Repayment as to Plaintiff)**

29. Defendant advanced sums of money to Plaintiff, which sums Plaintiff promised to repay in full, with interest at the rate agreed on by the parties.

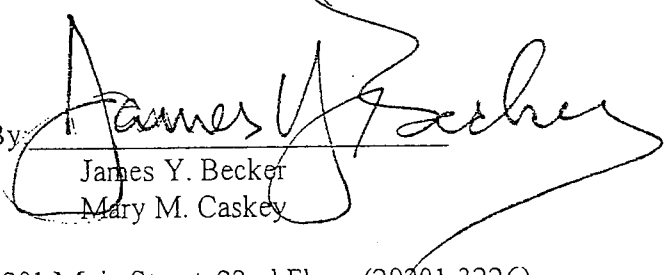
30. If the court grants Plaintiff the relief she seeks, Defendant will be entitled to repayment of any unpaid sums advanced to Plaintiffs, plus interest and the other relief allowed by the applicable loan documents, from any monetary award to Plaintiff.

WHEREFORE, having fully answered Plaintiff's Complaint and asserted its affirmative defenses, Defendant prays that this Court dismiss all claims against it with prejudice, and grant Defendant such other and further relief as this Court deems just and proper as to the above causes of action.

[signature on following page]

HAYNSWORTH SINKLER BOYD, P.A.

By:


James Y. Becker
Mary M. Caskey

1201 Main Street, 22nd Floor (29201-3226)
Post Office Box 11889 (29211-1889)
Columbia, South Carolina
(803) 779-3080

Attorneys for Defendant Thag, LLC, d/b/a Myrtle
Beach Mitsubishi

July 15, 2016

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.

ANSWER OF DEFENDANT THAG, LLC TO SECOND AMENDED COMPLAINT

Thag, LLC, d/b/a Myrtle Beach Mitsubishi ("Defendant") hereby answers Cali Alyson Emory's ("Plaintiff") Second Amended Complaint dated September 22, 2016 as follows:

**FIRST DEFENSE
(Arbitration)**

1. Plaintiff is precluded from proceeding on her Complaint, individually and in a representative capacity for all others similarly situated, in a judicial forum because, pursuant to an Arbitration Agreement May 28, 2014, Plaintiff agreed to arbitrate the claims she asserted in her Complaint, and Plaintiff's agreement to arbitrate is specifically enforceable pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16.

2. Thus, Plaintiff's Complaint should be stayed, and she should be compelled to submit her Complaint to arbitration.

3. Further, Defendant filed a Motion to Alter or Amend and to Hold in Abeyance (the "Motion") on September 26, 2016, requesting that this Action be held in abeyance pending the resolution of the Motion and any subsequent appeal. By answering the Second Amended

Complaint, Defendant does not waive any arguments or rights as set forth in the Motion, including but not limited to, any rights arising from the arbitration agreements between Plaintiff and Defendant, and Defendant's right to appeal any order resulting from the Motion.

**SECOND DEFENSE
(General Denial)**

4. Defendant denies each allegation of the Complaint that it does not expressly admit herein, and denies that Plaintiff is entitled to any amount, award or any other relief from Defendant.

5. On information and belief, Defendant admits the allegations of paragraph 1.

6. Answering the allegations of paragraph 2, Defendant admits that it is a limited liability company organized under the laws of South Carolina, and that it does business in Horry County, South Carolina.

7. Defendant denies the allegations of paragraph 3.

Factual Allegations

8. Defendant admits the allegations of paragraph 4.

9. Answering the allegations of paragraph 5, Defendant admits only that Plaintiff executed a Contract of Sale dated May 28, 2014, which included a closing fee of \$499.00 in the total price of the vehicle Plaintiff purchased.

10. Defendant admits the allegations of paragraph 6.

11. The allegations of paragraph 7 calls for a legal conclusion to which no response is required. To the extent a response is required, Defendant denies the allegations of paragraph 7.

Class Allegations

12. Answering the allegations of paragraphs 8-14, Defendant denies that Plaintiff will be able to prove all prerequisite requirements necessary to bring a class action lawsuit as contained in Rule 23, SCRCP, and applicable case law.

For a First Claim (Negligence)

13. In answering the allegations of paragraph 15, Defendant realleges the previous paragraphs of this Answer as fully as if repeated herein verbatim.

14. The allegations of paragraph 16 call for a legal conclusion, to which no response is required. To the extent a response is required, Defendant denies the allegations of paragraph 16.

15. Defendant denies the allegations of paragraphs 17 through 20.

16. Defendant denies that Plaintiff is entitled to the relief requested in her prayer for relief.

THIRD DEFENSE (Failure to State a Cause of Action)

17. The Complaint fails to state facts sufficient to constitute a cause of action as to Defendant and should be dismissed pursuant to Rule 12(b)(6), SCRCP.

FOURTH DEFENSE (Acts of Third Parties)

18. Plaintiff's claims for damages, if any, directly and proximately result, in whole or in part, from the intervening and superseding acts of third parties over whom Defendant had no control and is not responsible.

FIFTH DEFENSE
(Comparative Negligence)

19. Even if Defendant was negligent as alleged in the Plaintiff's Complaint, which is specifically denied, any damage suffered by the Plaintiff was due to her own comparative negligence so as to bar or partially bar any recovery in this matter.

SIXTH DEFENSE
(Estoppel by Silence/Consent)

20. Plaintiff's claims are barred by the doctrine of estoppel by silence. Plaintiff had a duty to inform Defendant of her objections to paying closing fees at the time of her vehicle closings.

21. Plaintiff voluntarily and intentionally relinquished her rights to object to the charging of a closing fee because her actions and conduct during the vehicle closings are inconsistent with her allegations in the Complaint.

22. Plaintiff's claims are further barred by the doctrine of consent because she consented to pay the closing fees after being informed of the fees prior to the vehicle closings. At no time prior to the filing of the Complaint did Plaintiff object to Defendant charging closing fees.

SEVENTH DEFENSE
(Voluntary Payment Doctrine)

23. Plaintiff knowingly and voluntarily paid the fee of which she now complains after it was conspicuously disclosed to her in writing on at least two documents signed by her. Plaintiff's claims are thus barred by the voluntary payment doctrine.

EIGHTH DEFENSE
(Injury Reasonably Avoidable)

24. Plaintiff's alleged injury was reasonably avoidable by her, in that she was aware of the closing fee and had the option of not purchasing the vehicle and paying the closing fee. Thus, Plaintiff's claims under S.C. Code Ann. § 56-15-110 are barred.

NINTH DEFENSE
(Exclusive Remedy)

25. The South Carolina Consumer Protection Code, S.C. Code § 37-1-101, *et seq.* provides the exclusive remedy for alleged violations of the Closing Fee Statute or any other legal or equitable claim alleging the improper charging of closing fees in motor vehicle sales and lease transactions, and thus Plaintiff may not pursue her claims under the Dealers' Act.

26. Furthermore, Plaintiff may not pursue her claims based on an alleged improper or illegal closing fee in a representative capacity, because the South Carolina Consumer Protection Code does not allow class or "group" actions. S.C. Code Ann. § 37-5-202(1).

TENTH DEFENSE
(Compliance with S.C. Code Ann. §§ 37-6-506(3), 37-6-104(4): Safe Harbor)

27. Closing fees charged in motor vehicle sales transactions are authorized under the provisions of the Closing Fee Statute. At all relevant times, Defendant has charged closing fees in conformity with the requirements and conditions of the Closing Fee Statute. Thus, pursuant to S.C. Code § 37-6-506(3) and § 37-6-104(4), Defendant should not be liable for actions which have not been considered violations of the Closing Fee Statute by the South Carolina Department of Consumer Affairs.

ELEVENTH DEFENSE
(Compliance with S.C. Code Ann. § 37-5-202(7): Good Faith Error)

28. Defendant has never intended to violate any portion of the Dealer's Act, the South Carolina Consumer Protection Code, or the requirements, regulations, and administrative interpretations established by the South Carolina Department of Consumer Affairs with regard to the charging of a closing fee in motor vehicle sales and lease transactions. Defendant has established and maintained compliance procedures which are reasonably adapted to avoid any violation of the law. To the extent any violation occurred, it was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error. Plaintiff's claims are thus barred by the provisions of S.C. Code § 37-5-202(7).

TWELFTH DEFENSE
(Filed Rate Doctrine)

29. Pursuant to the 2001 Administrative Interpretation, Defendant, at all relevant times, has been required to and has filed and registered its closing fee with the South Carolina Department of Consumer Affairs, which is vested with authority to regulate the charging of closing fees by motor vehicle dealers and to determine what amount of closing fee is just and reasonable. The South Carolina Department of Consumer Affairs has accepted and approved the amount of the closing fees filed and registered by Defendant. Defendant has never exceeded the amount of the closing fee filed, registered, accepted, and approved by the South Carolina Department of Consumer Affairs. Thus, Plaintiff's claims are barred by the Filed Rate Doctrine as adopted by the South Carolina Supreme Court in *Edge v. State Farm Mutual Insurance Company*, 366 S.C. 511, 623 S.E.2d 387 (2005) and its progeny.

THIRTEENTH DEFENSE
(Set-Off)

30. Defendant is entitled to a credit in the form of a set-off of any unpaid amounts tendered to Plaintiff for her benefit, including but not limited to a credit for all amounts past due and owing on applicable loans or any amounts owing to Defendant as a result of judgments obtained by Defendant against Plaintiff, if any.

FOURTEENTH DEFENSE
(Right to Recoupment and to Repayment as to Plaintiff)

31. Defendant advanced sums of money to Plaintiff, which sums Plaintiff promised to repay in full, with interest at the rate agreed on by the parties.

32. If the court grants Plaintiff the relief she seeks, Defendant will be entitled to repayment of any unpaid sums advanced to Plaintiffs, plus interest and the other relief allowed by the applicable loan documents, from any monetary award to Plaintiff.

WHEREFORE, having fully answered Plaintiff's Complaint and asserted its affirmative defenses, Defendant prays that this Court dismiss all claims against it with prejudice, and grant Defendant such other and further relief as this Court deems just and proper as to the above causes of action.

[signature on following page]

HAYNSWORTH SINKLER BOYD, P.A.

By: _____

James W. Becker
Mary M. Caskey

1201 Main Street, 22nd Floor (29201-3226)
Post Office Box 11889 (29211-1889)
Columbia, South Carolina
(803) 779-3080

Attorneys for Defendant

October 5, 2016

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 16-CP-26-937

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.)

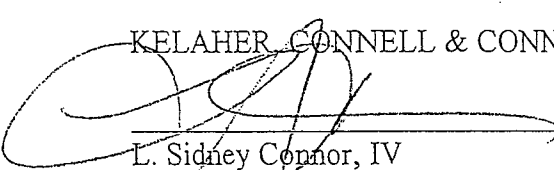
NOTICE OF MOTION AND MOTION
TO COMPEL ARBITRATION

HORRY COUNTY
2016 JUN 23 PM 4:02
MELANIE HOGGARD
CLERK OF COURT

TO: JAMES Y. BECKER, ATTORNEY FOR ABOVE-NAMED DEFENDANT

YOU WILL PLEASE TAKE NOTICE that on the tenth (10th) day after service hereof,
or as soon hereafter as counsel may be heard, counsel for the above-named Plaintiffs will move
before this Court for an Order Compelling Arbitration pursuant to the South Carolina Uniform
Arbitration Act. This Motion is based upon the law of South Carolina and the attached
Memorandum of Law.

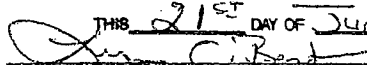
KELAHER, CONNELL & CONNOR, P.C.


L. Sidney Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
Attorneys for Plaintiffs

June 15, 2016

COPY

CERTIFICATE OF SERVICE
THE UNDERSIGNED HEREBY CERTIFIES THAT A TRUE COPY
OF THE FOREGOING PLEADING HAS BEEN SERVED UPON
OPPOSING COUNSEL BY MAILING A COPY PROPERLY
ADDRESSED WITH SUFFICIENT POSTAGE AFFIXED THERE TO

THIS 21ST DAY OF June 2016

L. SIDNEY CONNOR, IV
PO. DRAWER 14547
SURFSIDE BEACH, SC 29587
ATTORNEYS FOR Plaintiffs

RULE 11 CERTIFICATION

The attorney(s) below hereby certifies that either:

A. He/She has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion; or

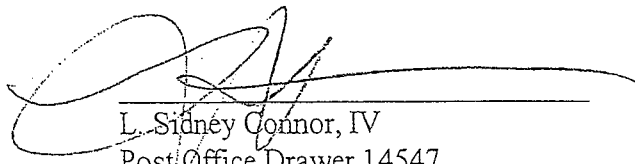
B. Such consultation would serve no useful purpose, or could not be timely held; or

C. Due to the nature of the motion, there is no duty to consult opposing counsel in that this is a motion:

- _____ a. To Dismiss
- _____ b. For Summary Judgment
- _____ c. For New Trial
- _____ d. For Judgment NOV

Horry County
2016 JUN 23 PM 4:02
CLERK OF COURT

KELAHHER, CONNELL & CONNOR, P.C.



L. Sidney Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587
(803) 238-5648
Attorneys for Plaintiff

June 15 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 16-CP-26-937

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.)

**MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO
COMPEL ARBITRATION**

HORRY COUNTY
2016 JUN 23 PM 4:02
CLERK OF COURT

The Plaintiff entered into a contract with the Defendant which requires arbitration. Please see Contract of Sale attached hereto and incorporated herein by reference.

The first page of the Contract provides for arbitration with the "Commercial Arbitration Association." An internet search has revealed no such organization known as the Commercial Arbitration Association and we are not familiar with any such organization.

On the back page of the Contract, Paragraph 10 provides 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.

The Contract specifically calls for arbitration pursuant to the South Carolina Uniform Arbitration Act. The Uniform Arbitration Act grants jurisdiction to the State Court to compel arbitration. See S.C. Code §15-48-20.

The Plaintiff requests this Court to order arbitration pursuant to the Uniform Arbitration Act of South Carolina. Plaintiff would show that the rules of the Uniform Arbitration Act of South Carolina and the Rules of the American Arbitration Association are similar but are unique in several respects. Therefore, the Plaintiff requests the Court to order that the arbitration

proceed pursuant to the South Carolina Uniform Arbitration Act rather than the rules of the American Arbitration Association.

The Contract is ambiguous in that it refers to three different arbitration forms:

1. The Commercial Arbitration Association;
2. The South Carolina Uniform Arbitration Act; and
3. The American Arbitration Association.

The Contract is one of adhesion and should be strictly construed against the author of the Contract which, in this case, is the Defendant. First of all, there is no such organization as the Commercial Arbitration Association and it is therefore impossible to comply with that provision. Secondly, the South Carolina Uniform Arbitration Act (UAA) is mentioned before the AAA and the contract specifically states that the arbitration shall be “pursuant to” the UAA. With regard to the American Arbitration Association, the Contract simply says “in accordance with the rules.” This ambiguity in arbitration forums should be resolved in favor of the Plaintiff.

The Uniform Arbitration Act has been specifically adopted by the State of South Carolina and confers jurisdiction on this court to assist in the arbitration process. For example, the UAA specifically provides that “an application to the court under this chapter shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for making and hearing of motions.” §15-48-170. There is no such similar protection under the American Arbitration Association. The South Carolina UAA also provides that the court has authority to order the parties to proceed with arbitration and to make a determination as to the legitimacy of arbitration agreements. §15-48-20. The UAA also provides rules for an arbitration hearing for presenting evidence and for making a record of testimony introduced at the hearing. §15-48-50. The rules of the American Arbitration Association are much less clear and do not offer the protection of making a record of testimony and evidence. The UAA also provides for joinder of parties to the arbitration. See §15-48-60. There is no such provision with the AAA.

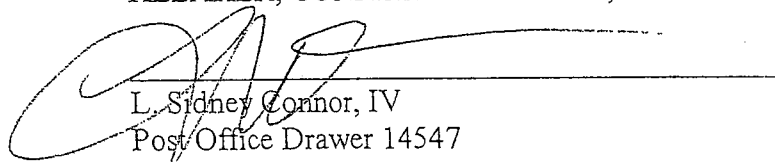
The UAA also provides for Subpoenas to be issued for the attendance of witnesses as well as the production of documents and for administering oaths. There is also a provision for enforcing subpoenas. The UAA also provides for depositions to be taken. See §15-48-80. There are no such similar provisions with the AAA. The UAA also provides that arbitrations must be completed in a time set by the court. See §15-48-90. The court has no such authority over the AAA which makes it possible for arbitration proceedings to languish for years in the AAA. The UAA also has provisions where the court has authority to consider changes of awards or corrections in awards. See §15-48-100. There is no similar provision with the AAA.

In short, there is an ambiguity in the contract as to the application of the Uniform Arbitration Act or the American Arbitration Association and that ambiguity should be resolved in favor of the person who did not draft the document, which in this case is the Plaintiff.

CONCLUSION

Because of an ambiguity in the contract, the Plaintiff requests this court to order arbitration to proceed pursuant to the Uniform Arbitration Act of South Carolina and not pursuant to the American Arbitration Association Rules.

KELAHHER, CONNELL & CONNOR, P.C.



L. Sidney Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
sconnor@classactlaw.net
Attorneys for Plaintiffs

June 15, 2016

CONTRACT OF SALE

431 Hospitality Lane
Myrtle Beach, SC 29579

We Care!



Myrtle Beach Mitsubishi

05/23/14

Date _____

843.796.9155

Fax 843.796.9159

COMPANY <u>Myrtle Beach Mitsubishi</u>		(H) <u>864.360.3593</u>	
PURCHASER <u>Cali Alyson Emory</u>		(W) <u>843.236.6606</u>	
CO-PURCHASER _____		(C) _____	
ADDRESS 1 <u>755 Burcale Rd Apt C0</u>		MAY 30 ENT'D	
ADDRESS 2 _____	CITY <u>Myrtle Beach</u>	STATE <u>SC</u>	ZIP <u>29579</u> COUNTY <u>Horry</u>
EMAIL _____	STK # <u>404</u>	☒ NEW ☐ USED	
YEAR <u>4</u>	MAKE <u>Mitsubishi</u>	MODEL <u>Lancer</u>	BODY TYPE <u>SEDAN</u> MILEAGE <u>13</u>
SALESPERSON <u>Dustin C Matz</u>		VIN # <u>JA32U2FU4EU017742</u>	
In case there is a used car or truck trade-in on this contract, the buyer guarantees title to be free and clear of any liens and encumbrances except as stated on the face of this order. Customer Signature: <u>Cali Emory</u> Date: <u>5/28/14</u>		SELLING PRICE \$ <u>21,200.00</u>	
		MFG. DISCOUNT _____ N/A	
		Extended Service Plan _____ N/A	
		ADD ON EQUIPMENT _____ N/A	
		_____ N/A	
TRADE 1 YEAR MAKE MODEL <u>2001 Mitsubishi Diamante</u> VIN# <u>6TMAP67P71T013162</u>	Gap	<u>650.00</u>	
MILEAGE <u>79418</u> COLOR _____ Balance _____ Leinholder	TOTAL PRICE OF VEHICLE	\$ <u>21,940.00</u>	
	TRADE-IN ALLOWANCE	- \$ <u>200.00</u>	
	DIFFERENCE	<u>21,740.00</u>	
TRADE 2 YEAR MAKE MODEL <u>N/A</u>	CLOSING FEE	+ \$ <u>499.00</u>	
VIN# _____	S.C. SALES TAX	+ \$ <u>300.00</u>	
MILEAGE _____ COLOR _____ Balance _____ Leinholder	TITLE, TAGS & REGISTRATION	\$ <u>69.00</u>	
	SALES SUB TOTAL	- \$ <u>22,508.00</u>	
N/A "USED CAR CONTRACTUAL DISCLOSURE STATEMENT" "THE INFORMATION YOU SEE ON THE WINDOW FORM (BUYER'S GUIDE) FOR THIS VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON THE WINDOW FORM OVERRIDES ANY CONTRARY PROVISION IN THE CONTRACT OF SALE."	CUSTOMER'S PAYOFF *	\$ _____	
	SALES TOTAL	= \$ <u>22,608.00</u>	
	PARTIAL PAYMENT	- \$ _____	
	# MFR. REBATE	- \$ <u>2,000.00</u>	
	# MFR. REBATE	- \$ _____	
	# MFR. REBATE	- \$ _____	
	CASH AMOUNT DUE AT DELIVERY	- \$ <u>2,000.00</u>	
	TOTAL BALANCE DUE (CASH OR FINANCED) =	\$ <u>20,608.00</u>	

BAILMENT AGREEMENT

This AGREEMENT is attached to and forms a part of that certain Sales Agreement between DEALER, and the undersigned Buyer(s), and concerns the above described vehicle. Pending credit approval of Buyer(s) by financing institution and completion of the delivery of said vehicle by Dealer is hereby made to Buyer(s) as a convenience to Buyer(s) and is subject to terms and conditions in said Sales Agreement and in the promissory note and security agreement, If any executed concurrently therewith, Said vehicle shall remain the property of the Dealer. Buyer(s) represent(s) that all statements made in their loan application are true and correct, and the Dealer makes delivery of said vehicle in reliance upon their truth and correctness. Any untrue or incorrect statement or any other misrepresentation of Buyer(s) in said application or in any other aforesaid documents shall entitle Dealer immediately to rescind the sale.

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 if in accordance with applicable law in any court having jurisdiction therein.

I have read and understand the terms and conditions of this Contract of Sale and agree that said terms and conditions comprise the entire Agreement pertaining to this purchase and that no other agreement of any kind, except as to financing, or any verbal understanding, or any promise whatsoever, will be recognized. I hereby acknowledge the receipt of a copy of this Contract of Sale.

X Cali Emory
Purchaser Signature Date 05/28/14

X [Signature]
Authorized Signature Date 05/28/14

X _____
Purchaser Signature Date 05/28/14

1. If the new vehicle is not tendered for delivery by the Dealer within thirty (30) days after the specified delivery date. Purchaser shall have the right to cancel this order. In such event Dealer's liability for any delay in delivery or for any failure to deliver shall be limited to the return to Purchaser of any cash payments and/or any used vehicle delivered to Dealer as initial or part payment. Dealer to have the option either to return used vehicle to Purchaser or to pay Purchaser for it on the basis set forth below in Paragraph 3 hereof.
2. If Dealer's regular selling price for the type or vehicle ordered is changed before delivery to Purchaser, Purchaser agrees to pay the new price or consent to the cancellation of this order upon return of Purchaser's cash payment and or any used vehicle delivered to dealer as initial or part payment. Dealer to have the option either to return the used vehicle to Purchaser or pay Purchaser for it on the basis set forth below in Paragraph 3 hereof.
3. It is expressly agreed that, in the event that this order should be cancelled pursuant to Paragraph 1 or Paragraph 2 hereof, any used vehicle which may have been received by the Dealer as initial or part payment of the purchase price of the new vehicle and sold by Dealer previous to such cancellation, shall be accounted for by Dealer at the price at which the used vehicle was sold less all expenses and charges for repairs and reconditioning, storage, handling, and selling, and not at the price which Dealer may have agreed to allow for the used vehicle if the new vehicle ordered herein had been duly delivered to and accepted by purchaser.
4. If full payment for new vehicle is not made with thirty days after notification that same is ready for delivery. Dealer may cancel this order and it is agreed that the advance deposit or proceeds of sale of used car taken in trade, as the case may be, may be retained by Dealer up to twenty percent of the sales price of new vehicle ordered, or if used car has been disposed of, Dealer shall have a lien thereon for such amount. Such retention of funds or lien shall constitute liquidated damages for Purchaser failure to complete full payment. Dealer may at its option, return such funds or used car and hold Purchaser liable for Dealer's loss or damage by reason of Purchaser's failure to complete such payment within 30 days.
5. If the used car is not to be delivered to the Dealer until the delivery of the new car, the used car shall be reappraised at the time and such reappraisal value shall determine the allowance made for such used car, but if such reappraisal value is lower than the original allowance shown on the reverse side hereof Purchaser may, if dissatisfied, with such reappraisal value, cancel this order, such right to cancel, however, must be exercised prior to the delivery of the new car to the Purchaser and the surrender of the used car to the Dealer. The Purchaser agrees to deliver the original bill of sale and the title to any used car traded herein along with the delivery of such used car, and Purchaser warrants such used car to be his property free and clear of all liens and encumbrances except as otherwise noted herein.
6. Purchaser agrees to furnish dealer documentation necessary to verify information contained in the credit application of purchaser. Purchaser acknowledges that it may take a few days for dealer to verify the credit of the purchaser and assign the contract. Purchaser understands that the lending institution has the ultimate authority to set the interest rate and down payment required on this loan. As an accommodation to purchaser, dealer may allow purchaser to take delivery of the vehicle prior to the time at which the dealer has confirmed or finalized credit or loan arrangements with the lending institution. If the sale to purchaser includes credit or financing obtained from such a lending institution, purchaser acknowledges that the sale of the subject vehicle is expressly conditional upon dealer's receipt of the proceeds of the loan from the lending institution. If for any reason dealer is unable to assign the contract to a lending institution, or the lending institution refuses to fund the loan, dealer shall notify purchaser of the situation and upon receiving notice, purchaser shall immediately return the vehicle to the dealer in the same condition as when sold. Dealer agrees that, in the event purchaser is required to return to the vehicle to the dealer as described herein, dealer shall restore to purchaser all consideration received by dealer in connection with the contract. If the dealer retains possession of purchaser's trade-in, if any, dealer shall return to purchaser the trade-in vehicle. If dealer has sold the trade-in vehicle, dealer shall pay to purchaser a sum to be determined as described in paragraph 3 of this contract, and payment of this sum to purchaser shall fully satisfy dealer's obligation with respect to the trade-in vehicle. In the event the subject vehicle is not immediately returned to dealer, dealer shall have the right to repossess the subject vehicle, and purchaser acknowledges that dealer, its agent, or contractor is authorized to enter upon purchaser's property for purposes of repossession, provided repossession can be accomplished without breach of the peace. Purchaser shall be liable to dealer for all expenses incurred by dealer in obtaining possession of the subject vehicle, to include reasonable attorney's fees. While in possession of purchaser, all terms of the contract, including those relating to the use of the vehicle and insurance for the vehicle shall be assumed by the purchaser. Purchaser shall pay all reasonable repair costs related to any damage sustained by the vehicle while in their possession.
7. Dealer shall be under no obligation to incorporate in the motor vehicle ordered any change or improvement incorporated in any other motor vehicle or make any allowance on account of such danger or improvement.
8. Any part or parts subject to replacement by the factory in accordance with the warranty printed below will be installed by the Dealer without charge for labor to the owner.
9. This order shall not constitute a contract until accepted in writing by the Dealer or his authorized representative and when so accepted is not transferable by Purchaser and can be transferred by Dealer only to another authorized dealer.
10. 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 S 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.

UNIFORM WARRANTY

(Uniform Warranties of Automobile Manufacturers Association under which Motor Vehicles are sold)

The Manufacturer warrants each new motor vehicle manufactured by it to be free from defects in material and workmanship under normal use and service, its obligation under this warranty being limited to making good at its factory any part of parts thereof, including all equipment or trade accessories (except tires) supplied by the Car Manufacturer, in accordance with said manufacturer's published warranty at the time of manufacture of the vehicle herein implied and of all other obligations or liabilities on its part, and it neither assumes nor authorizes any other person to assume for it any liability in connection with the sale of its vehicles.

"This warranty shall not apply to any vehicle which shall have been repaired or altered outside of an authorized service station in any way so as to the judgment of the Manufacturer, to affect its stability or reliability, not which has been subject to misuse, negligence, or accident.

"This warranty shall not apply to any vehicle which shall have been repaired or altered outside of an authorized service station in any way so as to the judgment of the Manufacturer, to affect its stability or reliability, not which has been subject to misuse, negligence or accident."

Dealer extends the foregoing warranty to the Purchaser regarding the car sold to the Purchaser hereunder in the same manner as if the word "Dealer" were substituted for the word "Manufacturer" therein, it being understood that the Dealer's obligation under this warranty without charge for the replacement labor. This warranty by the Dealer is expressly in lieu of all other warranties, expressed or implied, and of all other obligations or liabilities on the part of the Dealer, and the Dealer neither assumes nor authorizes any other person to assume for it any liability in connection with the sale of this vehicle.

Dealer recognizes the importance of efficient service to owners, and will provide Purchaser with a copy of Dealer's Owner's Service Policy at the time of delivery of vehicle to Purchaser.

The Owner's Service Policy provided for certain recommended inspection during the period in which warranties in effect. Purchaser should find the Owner's Service Policy of real value in securing their most satisfactory service from the motor vehicle.

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.

**DEFENDANT'S MOTION TO STAY PROCEEDINGS AND
COMPEL BILATERAL ARBITRATION AND
DEFENDANT'S MEMORANDUM IN OPPOSITION
TO MOTION TO COMPEL CLASS ARBITRATION**

Thag, LLC, d/b/a Myrtle Beach Mitsubishi ("Defendant") hereby moves for an order to stay Plaintiff Cali Alyson Emory's claims against Defendant and compel bilateral arbitration of Plaintiff's claims against Defendant. Defendant further submits this memorandum in opposition to the Motion to Compel Arbitration on behalf of a class filed by Plaintiff. This Motion and Memorandum is supported by the Affidavit of David Moorhead.

INTRODUCTION

On February 12, 2016, Plaintiff filed a Complaint, on behalf of herself and a proposed class of persons similarly situated, alleging that Defendant negligently charged closing fees in motor vehicle sales transactions. Plaintiff demanded a jury trial in her Complaint. In its Answer to Plaintiff's Complaint filed on June 14, 2016, Defendant asserted, as a defense, that Plaintiff agreed to arbitrate her individual claims against Defendant. In response, Plaintiff filed an Amended Complaint on June 15, 2016, purporting to sue, again on behalf of a class, in

arbitration. Plaintiff simultaneously filed a Motion to Compel Arbitration under the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, et seq. ("UAA"), seeking to compel arbitration on her claims and the claims of all the consumers she purports to represent.

Defendant does not dispute that Plaintiff is entitled to bilateral arbitration of her claims against Defendant, but Plaintiff's claims are subject to the Federal Arbitration Act, 9 U.S.C. § 1, et seq., and Plaintiff is not entitled to compel arbitration on behalf of a class.

1. Plaintiff's claims are not subject to arbitration under the South Carolina Arbitration Act:

Plaintiff signed two arbitration agreements. The first page of the Contract for sale contains the following arbitration agreement:

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 if in accordance with applicable law in any court having jurisdiction therein.

(Moorhead Aff., Exh. 1, at p. 1.)

The back of the Contract for sale contains a second arbitration agreement:

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.

(*Id.* at p. 2.)

Neither of the arbitration agreements comply with the UAA, which requires that a written agreement to arbitrate under the UAA "shall be typed in underlined capital letters, or rubber stamped prominently, on the first page of the contract." S.C. Code Ann. § 15-48-10(a). The statute further states that "unless such notice is displayed thereon the contract shall not be

subject to arbitration.” *Id.* The South Carolina Supreme Court has held that the terms of the UAA are “clear” and “the court must apply those terms according to their literal meaning.” *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 457, 476 S.E.2d 149, 151 (1996). The failure to comply with its requirements renders the agreement unenforceable under the UAA. *See, e.g., Zabinski v. bright Acres Associates*, 346 S.C. 580, 553 S.E.2d 110 (2001) (“The notice provision required by the [UAA] must be typed in underlined capital letters, or rubber stamped prominently, on the first page of the contract. No other variation is acceptable.”); *Richland Horizontal Property Regime Homeowners Ass’n v. Sky GreenHoldings, Inc.*, 392 S.C. 194, 708 S.E.2d 225 (Ct. App. 2011) (applying strict requirements of the UAA, and rejecting an arbitration agreement where notice that it was subject to the UAA was on the second page).

Here, it is indisputable that neither of the arbitration agreements is typed in underlined capital letters, or rubber stamped prominently. The arbitration agreement on the first page is in small size font at the bottom of page one, and is not underlined or in capitalized letters. The second arbitration is not on the front page at all, nor is it capitalized or prominently disclosed. As a result, neither of the arbitration agreements are valid under the UAA.

2. Plaintiff’s claims are subject to arbitration under the Federal Arbitration Act.

Although Plaintiff’s claims are not subject to arbitration under the UAA, they are subject to arbitration under the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (“FAA”).

Courts are to order the arbitration of claims “unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *AT&T Techs., Inc. v. Commc’ns Workers*, 475 U.S. 643, 650 (1986) (citation and internal quotation marks omitted) (emphasis added); *see also Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007) (“Both state and federal policy favor

arbitration of disputes and unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered.”) (citing *Zabinski*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19 (2001)). Further, the FAA requires courts to “rigorously enforce” arbitration agreements, *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985), so “the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.” *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 93 (2000) (citation omitted).

Under the FAA, a trial court’s task on a motion to compel arbitration is limited to answering two questions: (1) does a valid arbitration agreement exist between the parties, and (2) does the dispute at issue fall within the scope of the agreement? See 9 U.S.C. § 2; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626-28 (1985); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-77 (1995). If the answer to both questions is “yes,” then arbitration must be compelled.

(a) Plaintiff and Defendant entered into a valid arbitration agreement under the FAA.

To be enforceable under the FAA, the arbitration provision must be written and either designate the FAA as the governing law or involve interstate commerce. Here, there is no question that the parties entered into a written arbitration agreement and that the underlying transaction involves interstate commerce, so the arbitration agreement is subject to the FAA.

The FAA covers written arbitration provisions contained in a “contract evidencing a transaction involving commerce,” 9 U.S.C. § 2, and defines “commerce” as “commerce among the several States.” *Id.* § 1. “[T]he word ‘involving’ . . . signals an intent to exercise Congress’ commerce clause power to the full,” and the phrase “‘evidencing a transaction’ mean[s] only that the transaction . . . turn[s] out, *in fact*, to have involved interstate commerce,” even if the parties

did not contemplate an interstate commerce connection. *Dobson*, 513 U.S. at 280 (emphasis in original). Indeed, the United States Supreme Court has “interpreted the term ‘involving commerce’ in the FAA as the functional equivalent of the more familiar term ‘affecting commerce’ – words of art that ordinarily signal the broadest permissible exercise of Congress’ Commerce Clause power.” *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (citing *Dobson*, 513 U.S. at 273-74).

Accordingly, “the FAA encompasses a wider range of transactions than those actually ‘in commerce’ – that is, ‘within the flow of interstate commerce.’” *Id.* Therefore, Defendant need not identify any specific effect on interstate commerce, so long as “in the aggregate the economic activity in question would represent ‘a general practice . . . subject to federal control.’” *Id.* at 56-57 (citation omitted). “[T]he FAA does not impose a burden upon the party invoking the FAA to put forth specific evidence proving the interstate nature of the transaction.” *Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 697 (4th Cir. 2012) (citing *Maxum Founds, Inv. v. Salus Corp.*, 779 F.2d 974, 978 n. 4) (“Where . . . the party seeking arbitration alleges that the transaction is within the scope of the [FAA], and the party opposing application of the [FAA] does not come forward with evidence to rebut jurisdiction under the federal statute, we do not read into the [FAA] a requirement of further proof by the party invoking the federal law”).

With regards to this transaction, interstate commerce clearly exists because, among other things, the agreement involved a consumer credit arrangement between Plaintiff, a citizen of South Carolina, and RBS Citizens n/k/a Citizens Automobile Finance, Inc., a Rhode Island Corporation. Reliance upon funds from a foreign source in a transaction is sufficient to implicate the FAA. *Rota-McLarty*, 700 F.3d at 697 (“the broad impact on consumer automobile lending on the national economy’ is evident.”) Further, “[i]t cannot be seriously disputed that the

purchase of a new or used automobile from an automobile dealer is a transaction that involves interstate commerce.” *Montgomery Ford Lincoln Mercury, Inc. v. Hall*, 999 So. 2d 954 (Ala. App. 2008). Here, the vehicle was manufactured at its manufacturing plant in Japan, and transported through various states to the Dealership from the port in Baltimore, in order to be sold to Plaintiff. (Moorhead Aff. ¶ 4.) The purchase money for the vehicle was transferred electronically through banks located in Utah, California, and North Carolina, and ultimately received by the Dealership in Myrtle Beach, South Carolina. (*Id.* ¶¶ 4-5.) Thus, Plaintiff’s and the Dealership’s transaction clearly involved interstate commerce.

(b) Plaintiff’s claims fall within the scope of the arbitration agreement.

Plaintiff’s claims related to closing fees paid during the sale of her vehicle clearly fall within the scope of the arbitration agreements. Such a claim is clearly a claim or dispute “arising out of, in connection with, or relating to, the purchase of the above-described vehicle.” (*Id.* at Exh. 1, pp. 1-2.)

Thus, because Plaintiff and Defendant have a written agreement to arbitrate, the transaction involved interstate commerce, and because Plaintiff’s individual claims are within the scope of the arbitration agreements, her claims are subject to arbitration under the FAA.

3. Neither of the arbitration agreements allows Plaintiff to proceed to arbitration on a class-wide basis.

Although Plaintiff’s individual claims are subject to arbitration under the FAA, the arbitration agreements do not allow for class arbitration. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the United States Supreme Court reiterated its refusal to “force unwilling parties to arbitrate contrary to their expectations,” and announced a rule for determining whether an arbitration agreement permits class arbitration. 559 U.S. 662, 130 S. Ct. 1758 (2010). The Court found that “class arbitration changes the nature of arbitration to such a degree that it

cannot be presumed the parties consent to it by simply agreeing to submit their disputes to an arbitrator.” *Id.* at 685, 130 S. Ct. 1758. In discussing the differences between bilateral and class arbitration, the Fourth Circuit stated:

When parties agree to forgo their right to litigate in the courts and in favor of private dispute resolution, they expect the benefits flowing from that decision: less rigorous procedural formalities, lower costs, privacy and confidentiality, greater efficiency, specialized adjudicators, and—for the most part—finality. These benefits, however, are dramatically upended in class arbitration, which brings with it higher risks for defendants. *See Stolt-Nielsen*, 559 U.S. at 686–87, 130 S.Ct. 1758 (contrasting the high stakes of class-action arbitration with its limited scope of judicial review).

...

[I]n bilateral arbitration, the lack of rigorous procedural rules greatly increases the speed and lowers the cost of the dispute resolution, but in class arbitration, procedural formality is required, reducing—or eliminating altogether—these advantages. This is because the arbitrator must determine, before ruling on the merits, whether to certify the class, whether the named parties satisfy mandatory standards of representation and commonality, how discovery will function, and how to bind absent class members. [*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348–49(2011)]. In turn, costs and time increase. *See id.* (finding that the average bilateral arbitration begun between January and August 2007 reached a final disposition in four-to-six months, whereas none of the class arbitrations initiated as of September 2009 had resulted in a final merits award, and the average time from filing to resolution—through settlement, withdrawal, or dismissal, not judgment on the merits—was 630 days).

Dell Webb Communities, Inc. v. Carlson, 817 F.3d 867, 875-76 (4th Cir. 2016). Thus, the Supreme Court has ruled that parties cannot be forced to arbitrate on a class-wide basis absent “a contractual basis for concluding that the party agreed to do so.” *Stolt-Nielsen*, 589 U.S. 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. “We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, 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, it is indisputable that neither of the arbitration agreements include any agreement by Plaintiff or Defendant to class-wide arbitration. There is no reference to class actions or other term that would imply an agreement by either party to class-wide arbitration. As a result, Plaintiff should be compelled to bilateral arbitration only.

CONCLUSION

Based on the foregoing, Defendant requests that the Court issue an order:

- (a) denying Plaintiff’s Motion to Compel class-wide arbitration;
- (b) granting Defendant’s Motion to Compel bilateral arbitration; and
- (c) granting such other and further relief as may be just and proper.

HAYNSWORTH SINKLER BOYD, P.A.

By: _____

James Y. Becker
Mary M. Caskey

1201 Main Street, 22nd Floor (29201-3226)
Post Office Box 11889 (29211-1889)
Columbia, South Carolina
(803) 779-3080

Attorneys for Defendant Thag, LLC, d/b/a Myrtle
Beach Mitsubishi

August 17, 2016

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.

AFFIDAVIT OF DAVID MOORHEAD

I, David Moorhead after being duly sworn upon oath, testify as follows:

1. I am the General Manager for Thag, LLC d/b/a Myrtle Beach Mitsubishi (the "Dealership"), which is located in Myrtle Beach, South Carolina. I am familiar with the operations and transactions of the Dealership and have access to its business records.
2. On May 28, 2014, the Dealership entered into a Contract of Sale with Cali Alyson Emory (the "Customer") for the purchase of a new 2014 Mitsubishi Lancer, VIN # JA32U2FU4EU017742 (the "Vehicle"). A copy of the Contract of Sale is attached as Exhibit 1.
3. The Contract of Sale provided for a \$2,000 down payment, which consisted of two Mitsubishi rebates, a \$1,500 customer rebate, and a \$500 customer loyalty rebate. The customer did not pay any cash or deliver funds of any type for the down payment.
4. The Vehicle was manufactured by Mitsubishi ("Manufacturer"), at its manufacturing plant located in Japan and then shipped to the United States. The Vehicle was purchased by the Dealership on or about February 27, 2014 and was transported through various

states to the Dealership from the port in Baltimore, Maryland. The purchase money for the Vehicle was transferred electronically from the Dealership's bank account with Ally Bank, headquartered in Midvale, Utah, to the bank account of the Manufacturer, located in Cypress, California.

5. To finance the Customer's purchase of the Vehicle, the Customer and the Dealership entered into a Retail Installment Sale Contract, which was assigned to and funded by a loan from RBS Citizens, n/k/a Citizens Automobile Finance, Inc. (the "Lender"), a corporation organized and located in the state of Rhode Island. A copy of the Retail Installment Sale Contract is attached as Exhibit 2. The funds that the Dealership received from the Lender to pay for the Vehicle were drawn on a bank account maintained at BB&T, headquartered in Winston Salem, North Carolina.

6. Because the Customer never made a payment, the Lender demanded that the Dealership repurchase the Retail Installment Sale Contract and repay the amount loaned.

7. After the Customer refused to return the Vehicle or pay the balance owed on the Contract of Sale, the Lender repossessed the Vehicle.

8. The Dealership has never received the remaining amounts due under the Contract of Sale or the Retail Installment Sale Contract.

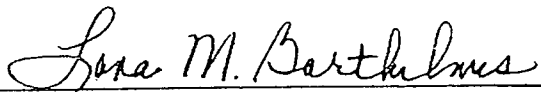
9. Since the Dealership began doing business in 2013, the Dealership has used a form Contract of Sale that is identical to the version presented to and signed by the Customer (Exhibit 1). All of the Dealership's Customers sign the same form Contract of Sale as part of each transaction.

Further affiant sayeth not:



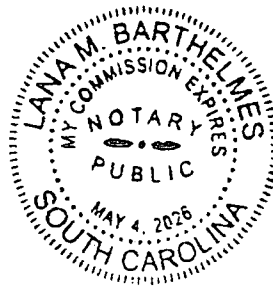
David Moorhead

Sworn to and subscribed before me
this 16 day of AUG., 2016



Notary Public, State of South Carolina

My commission expires 5-4-2026



CONTRACT OF SALE

431 Hospitality Lane
Myrtle Beach, SC 29579

We Care!



Myrtle Beach Mitsubishi

05/28/14

Date _____

843.796.9155
Fax 843.796.9159

COMPANY Myrtle Beach Mitsubishi		864.360.3593	
PURCHASER Cali Alyson Emory		(H) 843.236.6606	
CO-PURCHASER MAY 30 ENT'D		(W) _____	
ADDRESS 1 755 Burcafe Rd Apt G8		(C) _____	
ADDRESS 2 _____	CITY Myrtle Beach	STATE SC	ZIP 29579
EMAIL _____	STK# 404	COUNTY Horry	
YEAR 4	MAKE Mitsubishi	MODEL Lancer	BODY TYPE SEDAN
SALESPERSON Dustin C Matz		VIN# JA32U2FU4EU017742	MILEAGE 13
In case there is a used car or truck trade-in on this contract, the buyer guarantees title to be free and clear of any liens and encumbrances except as stated on the face of this order. Customer Signature: <i>Cali Emory</i> DATE 5/28/14		SELLING PRICE	\$ 21,200.00
		MFG. DISCOUNT	N/A
		Extended Service Plan	N/A
		ADD ON EQUIPMENT	N/A
			N/A
TRADE 1 YEAR 2001 MAKE Mitsubishi MODEL Diamante	Gap	650.00	
VIN# 8MHAP67P71T013162	TOTAL PRICE OF VEHICLE	\$ 21,940.00	
MILEAGE 79418 COLOR Leinholder	TRADE-IN ALLOWANCE	-\$ 200.00	
Balance N/A	DIFFERENCE	\$ 21,740.00	
TRADE 2 YEAR _____ MAKE _____ MODEL _____	CLOSING FEE	+ \$ 499.00	
VIN# _____	S.C. SALES TAX	+ \$ 300.00	
MILEAGE _____ COLOR _____	TITLE, TAGS & REGISTRATION	\$ 69.00	
Balance _____	SALES SUB TOTAL	-\$ 22,608.00	
N/A	CUSTOMER'S PAYOFF *	\$ N/A	
USED CAR CONTRACTUAL DISCLOSURE STATEMENT *THE INFORMATION YOU SEE ON THE WINDOW FORM (BUYER'S GUIDE) FOR THIS VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON THE WINDOW FORM OVERRIDES ANY CONTRARY PROVISION IN THE CONTRACT OF SALE.*	SALES TOTAL	= \$ 22,608.00	
	PARTIAL PAYMENT	- \$ N/A	
	# MFR. REBATE	- \$ 2,000.00	
	# MFR. REBATE	- \$ N/A	
	# MFR. REBATE	- \$ N/A	
	CASH AMOUNT DUE AT DELIVERY	- \$ 2,000.00	
	TOTAL BALANCE DUE (CASH OR FINANCED) *	= \$ 20,608.00	

BAILEMENT AGREEMENT

This AGREEMENT is attached to and forms a part of that certain Sales Agreement between DEALER, and the undersigned Buyer(s), and concerns the above described vehicle. Pending credit approval of Buyer(s) by financing institution and completion of the delivery of said vehicle by Dealer to Buyer(s) as a convenience to Buyer(s) and is subject to terms and conditions in said Sales Agreement and in the promissory note and security agreement, if any executed concurrently therewith. Said vehicle shall remain the property of the Dealer. Buyer(s) represents(s) that all statements made in their loan application are true and correct, and the Dealer makes delivery of said vehicle in reliance upon their truth and correctness. Any untrue or incorrect statement or any other misrepresentation of Buyer(s) in said application or in any other store said documents shall entitle Dealer immediately to rescind the sale.

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.

I have read and understand the terms and conditions of this Contract of Sale and agree that said terms and conditions comprise the entire Agreement pertaining to this purchase and that no other agreement of any kind, except as to financing, or any verbal understanding, or any promise whatsoever, will be recognized. I hereby acknowledge the receipt of a copy of this Contract of Sale.

X *Cali Emory* 05/28/14
Purchaser Signature

X *Dustin C Matz* 05/28/14
Authorized Signature

X _____
Purchaser Signature 05/28/14

EXHIBIT

1

1. If the new vehicle is not tendered for delivery by the Dealer within thirty (30) days after the specified delivery date. Purchaser shall have the right to cancel this order. In such event Dealer's liability for any delay in delivery or for any failure to deliver shall be limited to the return to Purchaser of any cash payments and/or any used vehicle delivered to Dealer as initial or part payment. Dealer to have the option either to return used vehicle to Purchaser or to pay Purchaser for it on the basis set forth below in Paragraph 3 hereof.
2. If Dealer's regular selling price for the type or vehicle ordered is changed before delivery to Purchaser, Purchaser agrees to pay the new price or consent to the cancellation of this order upon return of Purchaser's cash payment and/or any used vehicle delivered to dealer as initial or part payment. Dealer to have the option either to return the used vehicle to Purchaser or pay Purchaser for it on the basis set forth below in Paragraph 3 hereof.
3. It is expressly agreed that, in the event that this order should be cancelled pursuant to Paragraph 1 or Paragraph 2 hereof, any used vehicle which may have been received by the Dealer as initial or part payment of the purchase price of the new vehicle and sold by Dealer previous to such cancellation, shall be accounted for by Dealer at the price at which the used vehicle was sold less all expenses and charges for repairs and reconditioning, storage, handling, and selling, and not at the price which Dealer may have agreed to allow for the used vehicle if the new vehicle ordered herein had been duly delivered to and accepted by purchaser.
4. If full payment for new vehicle is not made with thirty days after notification that same is ready for delivery. Dealer may cancel this order and it is agreed that the advance deposit or proceeds of sale of used car taken in trade, as the case may be, may be retained by Dealer up to twenty percent of the sales price of new vehicle ordered, or if used car has been disposed of, Dealer shall have a lien thereon for such amount. Such retention of funds or lien shall constitute liquidated damages for Purchaser failure to complete full payment. Dealer may at its option, return such funds or used car and hold Purchaser liable for Dealer's loss or damage by reason of Purchaser's failure to complete such payment within 30 days.
5. If the used car is not to be delivered to the Dealer until the delivery of the new car, the used car shall be reappraised at the time and such reappraisal value shall determine the allowance made for such used car, but if such reappraisal value is lower than the original allowance shown on the reverse side hereof Purchaser may, if dissatisfied, with such reappraisal value, cancel this order, such right to cancel, however, must be exercised prior to the delivery of the new car to the Purchaser and the surrender of the used car to the Dealer. The Purchaser agrees to deliver the original bill of sale and the title to any used car traded herein along with the delivery of such used car, and Purchaser warrants such used car to be his property free and clear of all liens and encumbrances except as otherwise noted herein.
6. Purchaser agrees to furnish dealer documentation necessary to verify information contained in the credit application of purchaser. Purchaser acknowledges that it may take a few days for dealer to verify the credit of the purchaser and assign the contract. Purchaser understands that the lending institution has the ultimate authority to set the interest rate and down payment required on this loan. As an accommodation to purchaser, dealer may allow purchaser to take delivery of the vehicle prior to the time at which the dealer has confirmed or finalized credit or loan arrangements with the lending institution. If the sale to purchaser includes credit or financing obtained from such a lending institution, purchaser acknowledges that the sale of the subject vehicle is expressly conditional upon dealer's receipt of the proceeds of the loan from the lending institution. If for any reason dealer is unable to assign the contract to a lending institution, or the lending institution refuses to fund the loan, dealer shall notify purchaser of the situation and upon receiving notice, purchaser shall immediately return the vehicle to the dealer in the same condition as when sold. Dealer agrees that, in the event purchaser is required to return to the vehicle to the dealer as described herein, dealer shall restore to purchaser all consideration received by dealer in connection with the contract. If the dealer retains possession of purchaser's trade-in, if any, dealer shall return to purchaser the trade-in vehicle. If dealer has sold the trade-in vehicle, dealer shall pay to purchaser a sum to be determined as described in paragraph 3 of this contract, and payment of this sum to purchaser shall fully satisfy dealer's obligation with respect to the trade-in vehicle. In the event the subject vehicle is not immediately returned to dealer, dealer shall have the right to repossess the subject vehicle, and purchaser acknowledges that dealer, its agent, or contractor is authorized to enter upon purchaser's property for purposes of repossession, provided repossession can be accomplished without breach of the peace. Purchaser shall be liable to dealer for all expenses incurred by dealer in obtaining possession of the subject vehicle, to include reasonable attorney's fees. While in possession of purchaser, all terms of the contract, including those relating to the use of the vehicle and insurance for the vehicle shall be assumed by the purchaser. Purchaser shall pay all reasonable repair costs related to any damage sustained by the vehicle while in their possession.
7. Dealer shall be under no obligation to incorporate in the motor vehicle ordered any change or improvement incorporated in any other motor vehicle or make any allowance on account of such change or improvement.
8. Any part or parts subject to replacement by the factory in accordance with the warranty printed below will be installed by the Dealer without charge for labor to the owner.
9. This order shall not constitute a contract until accepted in writing by the Dealer or his authorized representative and when so accepted is not transferable by Purchaser and can be transferred by Dealer only to another authorized dealer.
10. 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 S 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.

UNIFORM WARRANTY

(Uniform Warranties of Automobile Manufacturers Association under which Motor Vehicles are sold)

The Manufacturer warrants each new motor vehicle manufactured by it to be free from defects in material and workmanship under normal use and service, its obligation under this warranty being limited to making good at its factory any part of parts thereof, including all equipment or trade accessories (except tires) supplied by the Car Manufacturer, in accordance with said manufacturer's published warranty at the time of manufacture of the vehicle herein implied and of all other obligations or liabilities on its part, and it neither assumes nor authorizes any other person to assume for it any liability in connection with the sale of its vehicles.

"This warranty shall not apply to any vehicle which shall have been repaired or altered outside of an authorized service station in any way so as to the judgment of the Manufacturer, to affect its stability or reliability, not which has been subject to misuse, negligence, or accident.

"This warranty shall not apply to any vehicle which shall have been repaired or altered outside of an authorized service station in any way so as to the judgment of the Manufacturer, to affect its stability or reliability, not which has been subject to misuse, negligence or accident."

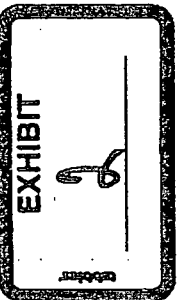
Dealer extends the foregoing warranty to the Purchaser regarding the car sold to the Purchaser hereunder in the same manner as if the word "Dealer" were substituted for the word "Manufacturer" therein, it being understood that the Dealer's obligation under this warranty without charge for the replacement labor. This warranty by the Dealer is expressly in lieu of all other warranties, expressed or implied, and of all other obligations or liabilities on the part of the Dealer, and the Dealer neither assumes nor authorizes any other person to assume for it any liability in connection with the sale of this vehicle.

Dealer recognizes the importance of efficient service to owners, and will provide Purchaser with a copy of Dealer's Owner's Service Policy at the time of delivery of vehicle to Purchaser.

The Owner's Service Policy provided for certain recommended inspection during the period in which warranties in effect. Purchaser should find the Owner's Service Policy of real value in securing their most satisfactory service from the motor vehicle.

RETAIL INSTALLMENT SALE CONTRACT SIMPLE FINANCE CHARGE

Dealer Number _____ Contract Number 3232



Buyer Name and Address (Including County and Zip Code) Cali Alyson Emory 755 Burcale Rd Apt G8 Myrtle Beach, SC 29579	Co-Buyer Name and Address (Including County and Zip Code) 	Creditor-Seller (Name and Address) Myrtle Beach Mitsubishi 431 Hospitality Lane Myrtle Beach SC 29579
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You, the Buyer (and Co-Buyer, if any), may buy the vehicle below for cash or on credit. By signing this contract, you choose to buy the vehicle on credit under the agreements on the front and back of this contract. You agree to pay the Creditor - Seller (sometimes "we" or "us" in this contract) the Amount Financed and Finance Charge in U.S. funds according to the payment schedule below. We will figure your finance charge on a daily basis. The Truth-in-Lending Disclosures below are part of this contract.

New/Used	Year	Make and Model	Vehicle Identification Number	Primary Use For Which Purchased
New	2014	Mitsubishi Lancer	JA32U2FU4EU017742	Personal, family, or household unless otherwise indicated below: ☐ business ☐ agricultural

FEDERAL TRUTH-IN-LENDING DISCLOSURES				
ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost you.	Amount Financed The amount of credit provided to you or on your behalf.	Total of Payments The amount you will have paid after you have made all payments as scheduled.	Total Sale Price The total cost of your purchase on credit, including your down payment of.
10.39 %	\$ 7,292.00	\$ 20,608.00	\$ 27,900.00	\$ 2,200.00

Your Payment Schedule Will Be:

Number of Payments	Amount of Payments	When Payments Are Due
72	387.50	Monthly beginning 07/12/14

Or As Follows:

Late Charge. If a payment is not received in full within 10 days after it is due, you will pay a late charge of 5% of the part of the payment that is late, with a minimum charge of \$7.00. The charge will not exceed \$17.50 if you bought the vehicle primarily for personal, family, or household use. We may charge the maximum and minimum late charge dollar amounts as allowed by S.C. Code Ann. 37-1-109 of the South Carolina Consumer Protection Code.

Prepayment. If you pay off all your debt early, you will not have to pay a penalty.

Security Interest. You are giving a security interest in the vehicle being purchased.

Additional Information: See this contract for more information including information about nonpayment, default, any required repayment in full before the scheduled date and security interest.

ITEMIZATION OF AMOUNT FINANCED

- Cash Price (including \$ 300.00 sales tax and \$ 499.00 closing fee) \$ 22,089.00(1)
- Total Downpayment =
 Trade-in 2001 Mitsubishi Diamante
 (Year) (Make) (Model)
 Gross Trade-In Allowance \$ 200.00
 Less Pay Off Made By Seller \$ N/A
 Equals Net Trade In \$ 200.00
 + Cash \$ N/A
 + Other Manufacturer's Rebate \$ 2,000.00
 (If total downpayment is negative, enter "0" and see 4f below) \$ 2,200.00(2)
 \$ 19,889.00(3)
- Unpaid Balance of Cash Price (1 minus 2) \$ 19,889.00
- Other Charges Including Amounts Paid to Others on Your Behalf
 (Seller may keep part of these amounts):
 A Cost of Optional Credit Insurance Paid to Insurance Company or Companies:
 Life \$ N/A
 Disability \$ N/A
 B Vendor's Single Interest Insurance Paid to Insurance Company \$ N/A
 C Other Optional Insurance Paid to Insurance Company or Companies \$ N/A
 D Optional Gap Contract \$ 650.00
 E Official Fees Paid to Government Agencies \$ N/A

Insurance. You may buy the physical damage insurance this contract requires (see back) from anyone you choose who is acceptable to us. You may also provide the physical damage insurance through an existing policy owned or controlled by you that is acceptable to us. You are not required to buy any other insurance to obtain credit unless the box indicating Vendor's Single Interest Insurance is required is checked below. If any insurance is checked below, policies or certificates from the named insurance companies will describe the terms and conditions.

Check the Insurance you want and sign below:

Optional Credit Insurance

- ☐ Credit Life: ☐ Buyer ☐ Co-Buyer ☐ Both
☐ Credit Disability: ☐ Buyer ☐ Co-Buyer ☐ Both

Premium:

Credit Life \$ N/A
 Credit Disability \$ N/A

Insurance Company Name N/A
 Home Office Address N/A

CONSUMER CREDIT INSURANCE IS NOT REQUIRED TO OBTAIN CREDIT AND WILL NOT BE PROVIDED UNLESS YOU SIGN AND AGREE TO PAY THE ADDITIONAL COST. Your decision to buy or not buy credit life insurance and credit disability insurance will not be a factor in the credit approval process. If you choose this insurance, the cost is shown in Item 4A of the Itemization of Amount Financed. Credit life insurance is based on your original payment schedule. This insurance may not pay all you owe on this contract if you make late payments. Credit disability insurance does not cover any increase in your payment or in the number of payments. Coverage for credit life insurance and credit disability insurance ends on the original due date for the last payment unless a different term for the insurance is shown below.

Other Optional Insurance

- ☐ N/A Type of Insurance N/A Term

Premium \$ N/A
 Insurance Company Name N/A

Home Office Address N/A

- ☐ N/A Type of Insurance N/A Term

Premium \$ N/A
 Insurance Company Name N/A

Home Office Address N/A

F. Government Taxes Not Included in Cash Price	\$	N/A
G. Government License and/or Registration Fees	\$	147.00
H. Government Certificate of Title Fees	\$	54.00
I. Other Charges (Seller must identify who is paid and describe purpose)	\$	15.00
to N/A for Prior Credit or Lease Balance	\$	N/A
to N/A for N/A	\$	N/A
to N/A for N/A	\$	N/A
to N/A for N/A	\$	N/A
to N/A for N/A	\$	N/A
to N/A for N/A	\$	N/A
to N/A for N/A	\$	N/A
to N/A for N/A	\$	N/A
to N/A for N/A	\$	N/A
to N/A for N/A	\$	N/A
Total Other Charges and Amounts Paid to Others on Your Behalf	\$	719.00 (4)
5. Amount Financed (3 + 4)	\$	20,608.00 (5)

Your decision to buy or not buy other optional insurance will not be a factor in the credit approval process. It will not be provided unless you sign and agree to pay the extra cost.

I want the optional credit insurance and other insurance checked above.

☒ Buyer Signature _____ Date _____

☒ Co-Buyer Signature _____ Date _____

☐ IF CHECKED, THE TERM OF OPTIONAL CREDIT INSURANCE IS LESS THAN THE TERM OF THIS CONTRACT, AS DESCRIBED ABOVE.

☒ Buyer Signature _____ Date _____

THIS INSURANCE DOES NOT INCLUDE INSURANCE ON YOUR LIABILITY FOR BODILY INJURY OR PROPERTY DAMAGE.

Returned Check Charge: You agree to pay a charge of \$30.00 if any check you give us is dishonored.

OPTION: ☐ You pay no finance charge if the Amount Financed, Item 5, is paid in full on or before N/A Year N/A. SELLER'S INITIALS _____

☐ If this box is checked, the following late charge applies to vehicles purchased primarily for business or agricultural use. If a payment is not received in full within _____ days after it is due, you will pay a late charge of \$_____ or _____ % of the part of the payment that is late, whichever is less.

If this box is not checked, the late charge in the "Federal Truth-in-Lending Disclosures" still applies.

☐ VENDOR'S SINGLE INTEREST INSURANCE (VSI Insurance): If the preceding box is checked, the Creditor requires VSI insurance for the initial term of the contract to protect the Creditor for loss or damage to the vehicle (collision, fire, theft). VSI insurance is for the Creditor's sole protection. This insurance does not protect your interest in the vehicle. You may choose the insurance company through which the VSI is obtained. If you elect to purchase VSI insurance through the Creditor, the cost of this insurance is \$ N/A and is also shown in Item 4B of the Itemization of Amount Financed. The coverage is for the initial term of the contract.

OPTIONAL GAP CONTRACT. A gap contract (debt cancellation contract) is not required to obtain credit and will not be provided unless you sign below and agree to pay the extra charge. If you choose to buy a gap contract, the charge is shown in Item 4D of the Itemization of Amount Financed. See your gap contract for details on the terms and conditions it provides. It is a part of this contract.

Term 72 Mos. Gap Care Advantage Name of Gap Contract _____

I want to buy a gap contract.

Buyer Signs X _____

NO COOLING OFF PERIOD

State law does not provide for a "cooling off" or cancellation period for this sale. After you sign this contract, you may only cancel it if the seller agrees or for legal cause. You cannot cancel this contract simply because you change your mind. This notice does not apply to home solicitation sales.

The Annual Percentage Rate may be negotiable with the Seller. The Seller may assign this contract and retain its right to receive a part of the Finance Charge.

HOW THIS CONTRACT CAN BE CHANGED. This contract contains the entire agreement between you and us relating to this contract. Any change to this contract must be in writing and we must sign it. No oral changes are binding. Buyer Signs X _____ Co-Buyer Signs X _____

If any part of this contract is not valid, all other parts stay valid. We may delay or refrain from enforcing any of our rights under this contract without losing them. For example, we may extend the time for making some payments without extending the time for making others.

See back for other important agreements.

NOTICE TO RETAIL BUYER: Do not sign this contract in blank. You are entitled to a copy of the contract at the time you sign. Keep it to protect your legal rights.

You agree to the terms of this contract. You confirm that before you signed this contract, we gave it to you, and you were free to take it and review it. You confirm that you received a completely filled-in copy when you signed it.

Buyer Signs X _____ Date 05/20/14 Co-Buyer Signs X _____ Date 05/20/14

Co-Buyers and Other Owners — A co-buyer is a person who is responsible for paying the entire debt. An other owner is a person whose name is on the title to the vehicle but does not have to pay the debt. The other owner agrees to the security interest in the vehicle given to us in this contract.

Other owner signs here X _____

Seller signs Nyrtla Beach Mitsubishi Date 5/20/14 By X Frank Barthelme Title Comp

Seller assigns its interest in this contract to RBS Citizens (Assignee) under the terms of Seller's agreement(s) with Assignee.

☐ Assigned with recourse ☒ Assigned without recourse ☐ Assigned with limited recourse

Seller Nyrtla Beach Mitsubishi By Frank Barthelme Title Comp

LAW FORM NO. 553-SC (REV. 10/13) U.S. PATENT NO. 6,042,702
 ©2012 The Reynolds and Reynolds Company. TO ORDER: call 1-800-368-7263 or visit www.reynolds.com
 THE PRINTER'S NAME AND ADDRESS ARE PRINTED ON THE BACK OF THIS CONTRACT. SEE THE BACK OF THIS CONTRACT FOR THE PRINTER'S NAME AND ADDRESS.

CUSTOMER COPY

OTHER IMPORTANT AGREEMENTS

1. FINANCE CHARGE AND PAYMENTS

- a. **How we will figure Finance Charge.** We will figure the Finance Charge on a daily basis at the Annual Percentage Rate on the unpaid part of the Amount Financed.
- b. **How we will apply payments.** We may apply each payment to the earned and unpaid part of the Finance Charge, to the Amount Financed, and to other amounts you owe under this contract in any order the law permits.
- c. **How late payments or early payments change what you must pay.** We based the Finance Charge, Total of Payments, and Total Sale Price shown on the front on the assumption that you will make every payment on the day it is due. Your Finance Charge, Total of Payments, and Total Sale Price will be more if you pay late and less if you pay early. Changes may take the form of a larger or smaller final payment or, at our option, more or fewer payments of the same amount as your scheduled payment with a smaller final payment. We will send you a notice telling you about these changes before the final scheduled payment is due.
- d. **You may prepay.** You may prepay all or part of the unpaid part of the Amount Financed at any time without penalty. If you do so, you must pay the earned and unpaid part of the Finance Charge and all other amounts due up to the date of your payment.
- e. **You may refinance a balloon payment.** A balloon payment is a scheduled payment that is more than twice as large as the average of your earlier scheduled payments. If you are buying the vehicle primarily for personal, family, or household use, you may refinance the balloon payment when due without penalty. The terms of the refinancing will be no less favorable to you than the terms of this contract. This provision does not apply if we adjusted your payment schedule to your seasonal or irregular income.

2. YOUR OTHER PROMISES TO US

- a. If the vehicle is damaged, destroyed, or missing. You agree to pay us all you owe under this contract even if the vehicle is damaged, destroyed, or missing.
- b. **Using the vehicle.** You agree not to remove the vehicle from the U.S. or Canada, or to sell, rent, lease, or transfer any interest in the vehicle or this contract without our written permission. You agree not to expose the vehicle to misuse, seizure, confiscation, or involuntary transfer. If we pay any repair bills, storage bills, taxes, fines, or charges on the vehicle, you agree to repay the amount when we ask for it.

c. **Security Interest**

You give us a security interest in:

- The vehicle and all parts or goods put on it;
- All money or goods received (proceeds) for the vehicle;
- All insurance, maintenance, service, or other contracts we finance for you; and
- All proceeds from insurance, maintenance, service, or other contracts we finance for you. This includes any refunds of premiums or charges from the contracts.

This secures payment of all you owe on this contract. It also secures your other agreements in this contract. You will make sure the title shows our security interest (lien) in the vehicle.

- b. ~~You may have to pay all you owe at once. If you break your promises (default) we may demand that you pay all you owe at once after we give you any notice the law requires. Default means:~~

- You do not make any payment when due; or
- You start a proceeding in bankruptcy or one is started against you or your property; you give false, incomplete, or misleading information on a credit application; or you break any agreements in this contract; except that if you bought the vehicle primarily for personal, family, or household use, we will only treat these events as defaults if they significantly impair the prospect of payment, performance, or realization of the collateral.

The amount you will owe will be the unpaid part of the Amount Financed plus the earned and unpaid part of the Finance Charge, any late charges, and any amounts due because you defaulted.

- c. **You may have to pay collection costs.** If we hire an attorney who is not our salaried employee to collect what you owe, you will pay the attorney's reasonable fee and court costs as the law allows. The maximum attorney's fee you will pay will be 15% of the amount you owe. You will also pay the reasonable expenses we incur in realizing on our security interest as the law allows.

- d. We may take the vehicle from you. If you default, we may take (repossess) the vehicle from you after we give you any notice the law requires. We may only take the vehicle if we do so peacefully without entering into a dwelling used as a current residence. If your vehicle has an electronic tracking device, you agree that we may use the device to find the vehicle. If we take the vehicle, any accessories, equipment, and replacement parts will stay with the vehicle. If any personal items are in the vehicle, we may store them for you at your expense. If you do not ask for these items back, we may dispose of them as the law allows.

- e. How you can get the vehicle back if we take it. If we repossess the vehicle, you may pay to get it back (redeem). We will tell you how much to pay to redeem. Your right to redeem ends when we sell the vehicle.

- f. We will sell the vehicle if you do not get it back. If you do not redeem, we will sell the vehicle. We will send you a written notice of sale before selling the vehicle. We will apply the money from the sale, less allowed expenses, to the amount you owe. Allowed expenses are expenses we pay as a direct result of taking the vehicle, holding it, preparing it for sale, and selling it. Attorney's fees and court costs the law permits are also allowed expenses. If any money is left (surplus), we will pay it to you unless the law requires us to pay it to someone else. If money from the sale is not enough to pay the amount you owe, you must pay the rest to us, unless the law provides otherwise. If you do not pay this amount when we ask, we may charge you interest at a rate not exceeding the highest rate permitted by applicable law.

- g. **What we may do about optional insurance, maintenance, service, or other contracts.** This contract may contain charges for optional insurance, maintenance, service, or other contracts. If we demand that you pay all you owe at once or we repossess the vehicle, we may claim benefits under these contracts and cancel them to obtain refunds of unearned charges to reduce what you owe or

we decide to buy physical damage insurance, we may either buy insurance that covers your interest and our interest in the vehicle, or buy insurance that covers only our interest. If we buy either type of insurance, we will tell you which type and the charge you must pay. The charge will be the cost of the insurance and a finance charge computed at the Annual Percentage Rate shown on the front of this contract. If the vehicle is lost or damaged, you agree that we may use any insurance settlement to reduce what you owe or repair the vehicle.

- e. What happens to returned insurance, maintenance, service, or other contract charges. If we get a refund of insurance, maintenance, service, or other contract charges, you agree that we may subtract the refund from what you owe.

3. IF YOU PAY LATE OR BREAK YOUR OTHER PROMISES

- a. You may owe late charges. You will pay a late charge on each late payment as shown on the front. Acceptance of a late payment or late charge does not excuse your late payment or mean that you may keep making late payments.

4. WARRANTIES, SELLER DISCLAIMS

Unless the Seller makes a written warranty, or enters into a service contract within 90 days from the date of this contract, the Seller makes no warranties, express or implied, on the vehicle, and there will be no implied warranties of merchantability or of fitness for a particular purpose.

This provision does not affect any warranties covering the vehicle that the vehicle manufacturer may provide.

5. Used Car Buyers' Guide. The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale.

Spanish Translation: Guía para compradores de vehículos usados. La información que ve en el formulario de la ventanilla para este vehículo forma parte del presente contrato. La información del formulario de la ventanilla deja sin efecto toda disposición en contrario contenida en el contrato de venta.

6. Servicing and Collection Contacts.

You agree that we may try to contact you in writing, by e-mail, or using prerecorded/artificial voice messages, text messages, and automatic telephone dialing systems, as the law allows. You also agree that we may try to contact you in these and other ways at any address or telephone number you provide us, even if the telephone number is a cell phone number or the contact results in a charge to you.

7. Applicable Law

Federal law and the law of the state of our address shown on the front of this contract apply to this contract.

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

The preceding NOTICE applies only to goods or services obtained primarily for personal, family, or household use. In all other cases, Buyer will not assert against any subsequent holder or assignee of this contract any claims or defenses the Buyer (debtor) may have against the Seller, or against the manufacturer of the vehicle or equipment obtained under this contract.

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.

DEFENDANT'S MOTION TO ALTER OR AMEND AND TO HOLD IN ABEYANCE

Pursuant to Rule 59, SCRPC, Thag, LLC, d/b/a Myrtle Beach Mitsubishi ("Defendant") hereby moves to alter or amend the Court's order dated and filed September 15, 2016 and mailed to the parties on September 19, 2016 (the "Order"). Defendant received written notice that the Order was to be filed on September 15, 2016, but did not receive the Order itself until September 22, 2016.

The Order denies the parties' respective motions to compel arbitration. As such, it is immediately appealable pursuant to S.C. Code Ann. § 15-48-200. Accordingly, Defendant asks that this action be held in abeyance pending the resolution of this motion and any subsequent appeal. This would include the filing of an amended complaint and any discovery.

The grounds for this motion to alter or amend are as follow:

1. Defendant agrees that the parties' agreement does not provide the notice required by S.C. Code Ann. § 15-48-10(a). However, invalid notice under this section does not render arbitration language void for purposes of the Federal Arbitration Act, 9 U.S.C. § 1, et seq. ("FAA"). See *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 553 S.E.2d 110 (2001) ("Although the arbitration provision does not meet the technical requirements of section 15-48-10(a), the inquiry does not end there. Inextricably linked with the question of the applicability of section

15-48-10(a), is the impact of the FAA on this dispute.”). Thus, the Court’s Order should be amended to include consideration of whether the arbitration language at issue is valid under the FAA.

2. In the Order, the Court has improperly applied S.C. Code Ann. § 15-48-10(a) to find “the arbitration clauses are void” and to invalidate language that is enforceable under the FAA. This ruling was made on the Court’s own initiative—both parties had moved for arbitration, the dispute between them related to the nature of that arbitration. The Court denied both motions and instead ordered Plaintiff to file an amended complaint in the Circuit Court. This treatment of S.C. Code Ann. § 15-48-10(a) in the Order has been preempted by the FAA and is in error. As stated by the South Carolina Supreme Court, “[w]hile the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties’ agreement to arbitrate.” *Zabinski*, 346 S.C. at 592, 553 S.E.2d at 116.

As previously argued by the Defendant, courts are to order the arbitration of claims pursuant to the FAA “unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *AT&T Techs., Inc. v. Commc’ns Workers*, 475 U.S. 643, 650 (1986) (citation and internal quotation marks omitted) (emphasis added); see also *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007) (“Both state and federal policy favor arbitration of disputes and unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered.”) (citing *Zabinski*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19). The Court’s ruling fails to consider the FAA at all, instead addressing only the notice deficiency under S.C. Code Ann. § 15-48-10(a). This is in error. The Order should be amended to consider and address these arguments. When that analysis is undertaken, the Court should rule that there is a valid agreement to arbitrate for purposes of the FAA for the reasons previously provided by the Defendant.

3. The Court failed to address the Defendant’s request that any arbitration be bilateral only (and not prosecuted on behalf of a class). As previously argued by the Defendant, any arbitration in this case should be between the named parties and only the named parties.

4. Although there is no “Commercial Arbitration Association,” Defendant notes that one of the leading arbitration organizations, the American Arbitration Association, provides Commercial Arbitration Rules and Mediation Procedures for resolving commercial disputes. It is likely the parties intended to invoke that arbitration organization and those rules in the section referencing the “Commercial Arbitration Association.” In any event, the reference to the “Commercial Arbitration Association” should not render that arbitration provision void as it expresses a clear intent that any dispute be arbitrated.

CONCLUSION

For these reasons, the Court should reconsider its Order and compel bilateral arbitration consistent with the FAA. This motion will be supported by the laws of South Carolina and the

United States, applicable case law, arguments of counsel, and any other material the Court may receive, including an appropriate memorandum of law. Defendant further incorporates and renews its arguments made in its filings and at the hearing on the motions. In the meantime, Defendant asks that this action be held in abeyance pending the resolution of this motion and any subsequent appeal.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

By: _____

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Mary M. Caskey

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Attorneys for Defendant Thag, LLC, d/b/a Myrtle
Beach Mitsubishi

September 13, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 16-CP-26-937

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.)

**PLAINTIFF'S REPLY TO DEFENDANT'S
MOTION TO ALTER OR AMEND
AND TO HOLD IN ABEYANCE**

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The Defendant has moved to alter or amend and to hold in abeyance this court's Order dated and filed September 15, 2016. The Order denies both parties' motions to compel arbitration. The Plaintiff agrees with the Defendant that the Order is immediately appealable and agrees that the Order should be modified in some particulars. Since the grounds for the Defendant's motion are stated in four numbered paragraphs, this reply will respond to each of the numbered paragraphs in order.

1. The Plaintiff agrees that in cases involving interstate commerce, the notice requirements of the South Carolina Uniform Arbitration Act cannot invalidate an otherwise valid arbitration agreement. If there is an otherwise valid enforceable arbitration agreement and the transaction involves interstate commerce, then the validity of the arbitration agreement is saved by the Federal Arbitration Act. (See Zabinski vs. Bright Acres Assocs., 346 S.C. 580, 533 S.E.2d 110 (2001) and cases cited therein.) Therefore, the Plaintiff agrees with the Defendant that the contract contains a valid enforceable arbitration agreement.

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2. The Plaintiff agrees that the court should consider the Federal Arbitration Act and the Plaintiff agrees, as stated in paragraph one, that the Federal Arbitration Act preempts state laws which would invalidate otherwise valid arbitration agreements.

3. Although this is the shortest paragraph in the Defendant's motion to alter, it is the most significant. While both the Plaintiff and the Defendant agree that the arbitration clause is valid, the parties disagree on whether the matter can proceed in arbitration on behalf of a class. The Defendant has requested the court to order "bilateral" arbitration (non-class). The Plaintiff maintains that the arbitrator may consider the Class allegations and may certify this as a class action.

The present case has been styled as a Class Action under the Dealers Act. The Dealers Act specifically provides for class actions. S.C. Code Ann. §56-15-110(2) provides "When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the Court, one or more may sue for the benefit of the whole, including actions for injunctive relief."

The South Carolina Supreme Court addressed class actions under the Dealer's Act in the case of Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394 (2010) (Herron I). The Court found that an Arbitration Agreement which prohibited class actions in direct contravention of the Dealers Act is against public policy. The Court noted that in addition to specifically providing for class actions, the Dealers Act also provides that "Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable." S.C. Code §56-15-130. The Court went on to hold, "Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act

and that any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable." (Emphasis added.) The Court affirmed the Trial Court's Order in result, denying the Motion to Compel Arbitration.

Shortly after the opinion in Herron I was issued, The United States Supreme Court published its opinion in the case of AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011). In Concepcion, The United States Supreme Court overturned a decision of the California Courts which invalidated a class action waiver in an arbitration provision based upon the preemption of the FAA. The United States Supreme Court then accepted certiorari on the Herron I case and remanded the Herron I case with instructions for the South Carolina Supreme Court to reconsider its opinion in Herron I in light of the Concepcion case. The South Carolina Supreme Court affirmed Herron I because the issue of preemption had not been preserved for review in the South Carolina proceedings. Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011). (Herron II). Preemption is not an issue in the present case because both parties agree that the arbitration clause is valid. Therefore, Herron I applies to this case with full force and effect.

The arbitration agreement in Herron I contained a class action waiver. But the Arbitration Agreement in the present case DOES NOT have a class action waiver. Therefore, the present case is EVEN STRONGER than Herron I and this Court has even more reason to deny the Defendant's request for bilateral arbitration.

The contract was entered in Horry County, South Carolina. Both parties are residents of South Carolina. Presumably, the Defendant has a South Carolina Dealer's license. The Defendant is subject to the Dealer's Act and is charged with knowledge of the Class Action provisions of the Act. All parties to the transaction are aware of the application of the Dealer's Act. Therefore, the Contract of Sale is NOT SILENT as to class actions. The Contract makes

specific reference to the application of South Carolina law, which would include the Dealer's Act and the provision for Class Actions. Therefore, this court cannot ignore the Class Action provision of the Dealer's Act. This Court should not order bilateral (non-class) treatment.

4. The Plaintiff agrees that the Defendant's poorly drafted reference to a non-existent "Commercial Arbitration Association" does not render the arbitration provision void. Since it is impossible to arbitrate this matter before a non-existent forum, the only logical conclusion is to accept the forum in paragraph 10 on the reverse page of the Contract of Sale, which specifies the forum as the South Carolina Uniform Arbitration Act. As argued in Plaintiff's initial brief, any ambiguity in the formation of the contract should be resolved in favor of the non-drafting party, which would be the Plaintiff. Any ambiguity between arbitration forums should be resolved in favor of the South Carolina Uniform Arbitration Act. The first part of the Arbitration provision on the reverse page 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(a))...

The paragraph goes on to make passing reference to the American Arbitration Association. But the first part of the paragraph is binding on the Defendant and requires arbitration ^{pursuant} to the South Carolina UAA.

The South Carolina UAA is a complete and comprehensive statute which sets forth all processes necessary to govern arbitration. It was derived from the Uniform Arbitration Act and adapted to the State of South Carolina. It was initially enacted in 1978 and has stood the test of time. The Legislature has had almost forty years to make any refinements and revisions which they may desire to the UAA. In short, it is a tried, true and tested method and forum for arbitration. The Contract of Sale drafted by the Defendant and presented to the Plaintiff as a

contract of adhesion. It specifically states that arbitration will be pursuant to the UAA. The Plaintiff is entitled to rely on this contractual provision between the parties.

The UAA has been adopted in 49 states. See UniformLaws.org. It is completely comprehensive in nature. It covers the validity of arbitration agreements, §15-48-10; the particular proceedings to compel or stay arbitration, §15-48-20; the method of appointment of arbitrators, §15-48-30; the conduct and record of the arbitration hearing, §15-48-50; the rules concerning joinder of parties, §15-48-60; representation by an attorney, §15-48-70; subpoenas, witnesses and depositions, §15-48-80; the method of delivering a decision, §15-48-90; any changes in the award by the arbitrator, §15-48-100; fees and expenses of arbitration, §15-48-110; the confirmation ^{of} ~~if~~ an award, §15-48-120; the vacating of an award, §15-48-130; the modification or correction of an award, §15-48-140; entry of judgment, §15-48-150, 160; the method of applications to court, §15-48-170; determining questions of law and fact, §15-48-180; venue, §15-48-190; and appeals, §15-48-200.

The UAA anticipates an action to be filed in the Circuit Court to address issues dealing with arbitration. Section 15-48-20(a) states “On the application of a party showing an agreement described in §15-48-10, and the opposing party’s refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.” (Emphasis added.)

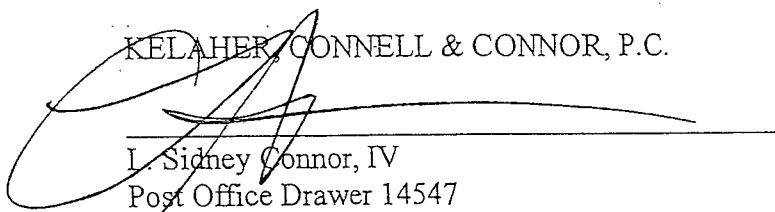
The UAA anticipates court involvement. The court cannot make any findings or order any action unless there is a filing with the Court. There is no other process stated in the UAA for filing the Arbitration Complaint. The only way to put these matters before the court is to file a

complaint in arbitration as the Plaintiff has done in this case. The UAA is a far superior forum for arbitration and the Plaintiff should be allowed to arbitrate under it and not forced to ~~go to~~ arbitrate through the AAA.

CONCLUSION

The plaintiff agrees that the Court should reconsider its Order and compel arbitration pursuant to the South Carolina Uniform Arbitration Act. The Plaintiff requests the Court to deny the Defendant's Motion for bilateral arbitration. The plaintiff would also request the Court to hold that Herron I requires the arbitrator to follow the Dealer's Act provision for class action treatment, especially since there is no class action waiver.

Respectfully submitted,


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October 11, 2016

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.

**DEFENDANT'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO ALTER OR
AMEND AND TO HOLD IN ABEYANCE**

Thag, LLC, d/b/a Myrtle Beach Mitsubishi ("Defendant") submits this reply in further support of its motion to alter or amend the Court's order dated and filed September 15, 2016. Plaintiff's response to the motion concedes two key points: (1) there is "a valid enforceable arbitration agreement;" and (2) the Federal Arbitration Act, 9 U.S.C. § 1, et seq. ("FAA") applies and preempts state law that would defeat otherwise valid arbitration agreements. Plaintiff further concedes the mandatory notice provisions of the South Carolina Uniform Arbitration Act ("SC Act") found in S.C. Code Ann. § 15-48-10(a) are not met. Given the application of the FAA and its preemption of state law to the extent it would invalidate arbitration pursuant to the FAA, the Court should compel the parties to engage in bilateral arbitration before the American Arbitration Association ("AAA").

Plaintiff inexplicably contends that the SC Act applies even though the notice provisions are not met. The SC Act is not an arbitration forum, like the AAA, which empanels qualified arbitrators and administers arbitration proceedings. The SC Act is a set of statutory rules,

analogous to the FAA, for enforcing arbitration provisions that are subject to the SC Act. As the Plaintiff concedes, there is no “agreement described in § 15-48-10” of the SC Act in this case, and thus, the provisions of S.C. Code Ann. § 15-48-20 do not apply and arbitration may not be compelled pursuant to the SC Act. Defendant has not waived this issue. Instead, Defendant has argued, and the Plaintiff agrees, that the FAA applies and arbitration should be compelled accordingly.

The FAA provides

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 5 (emphasis added). Here, the agreement provides in Paragraph 10 that arbitration will be conducted pursuant to the AAA rules, which include provisions relating to filing of demands and the selection of arbitrators. This is not a “passing reference” as suggested by the Plaintiff, but rather a clear indication of the rules applicable to any arbitration between the parties. There is nothing ambiguous about the parties’ agreement that the AAA rules apply.

As far as whether the arbitration should be on behalf of a class or bilateral arbitration between the named parties only, this issue has been addressed by the United States Supreme Court and the Fourth Circuit in interpreting the FAA. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 130 S. Ct. 1758 (2010); *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 875-76 (4th Cir. 2016). As set forth in *Stolt-Nielsen*, the question is “whether the parties *agreed to* authorize class arbitration.” *Id.* at 687 (emphasis in original).

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.

In this case, preemption and arbitrability under the FAA are squarely before the Court, and as a result, *Herron I* does not apply to this analysis.¹ Instead, and as previously argued, the parties’ agreement does not provide for class arbitration, and thus it may not be compelled. In discussing the differences between bilateral and class arbitration, the Fourth Circuit stated:

When parties agree to forgo their right to litigate in the courts and in favor of private dispute resolution, they expect the benefits flowing from that decision: less rigorous procedural formalities, lower costs, privacy and confidentiality, greater efficiency, specialized adjudicators, and—for the most part—finality. These benefits, however, are dramatically upended in class arbitration, which brings with it higher risks for defendants. *See Stolt-Nielsen*, 559 U.S. at 686–87, 130 S.Ct. 1758 (contrasting the high stakes of class-action arbitration with its limited scope of judicial review).

...

[I]n bilateral arbitration, the lack of rigorous procedural rules greatly increases the speed and lowers the cost of the dispute resolution, but in class arbitration, procedural formality is required, reducing—or eliminating altogether—these advantages. This is because the arbitrator must determine, before ruling on the merits, whether to certify the class, whether the named parties satisfy mandatory standards of representation and commonality, how discovery will function, and how to bind absent class members. [*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348–49(2011)]. In turn, costs and time increase. *See id.* (finding that the average bilateral arbitration begun between January and August 2007 reached a final disposition in four-to-six months, whereas none of the class

¹ Defendant further notes that the claim here differs from that in *Herron I* in that it alleges a single claim for negligence, and is only indirectly “styled as a [c]lass [a]ction under the Dealers Act.” Pltf. Reply at 2. Moreover, there are numerous reasons why a class action should not be certified under Rule 23 or the Dealers Act, but those issues are not presently before the Court.

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arbitrations initiated as of September 2009 had resulted in a final merits award, and the average time from filing to resolution—through settlement, withdrawal, or dismissal, not judgment on the merits—was 630 days).

Dell Webb Communities, Inc. v. Carlson, 817 F.3d 867, 875-76 (4th Cir. 2016). For this reason, parties cannot be forced to arbitrate on a class-wide basis absent “a contractual basis for concluding that the party agreed to do so.” *Stolt-Nielsen*, 589 U.S. 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. “We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, 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, it is indisputable that 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 agreement provides that it relates to “this contract” (§ 10) and that it is 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, there is no evidence the “parties *agreed to authorize* class arbitration” and Plaintiff should be compelled to bilateral arbitration only.

Plaintiff’s argument that the parties are imputed with knowledge of the Dealers’ Act is unavailing—if general knowledge that there might be some ability to bring a class action under some statute or rule was sufficient evidence of intent, courts could find that intent in every case given the general applicability of Rule 23 in state and federal courts. This cannot override the

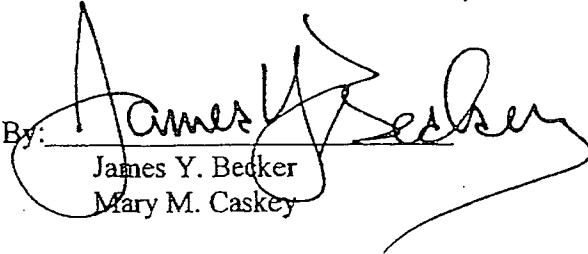
plain language of the agreement, which only relates to this buyer, this seller, and this vehicle, and the rulings of the United States Supreme Court and the Fourth Circuit in applying the FAA.

CONCLUSION

For these reasons and those presented previously, the Court should reconsider its Order and compel bilateral arbitration consistent with the FAA.

Respectfully submitted,

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By: 
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Attorneys for Defendant Thag, LLC, d/b/a Myrtle
Beach Mitsubishi

October 13, 2016

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

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 South Carolina Uniform Arbitration Act ("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..

The parties agree on three key points: (1) the mandatory notice provisions of the SC Act found in S.C. Code Ann. § 15-48-10(a) are not met; (2) there is a valid enforceable arbitration agreement;" and (3) the FAA applies and preempts state law that would defeat otherwise valid arbitration agreements. The parties disagree on the form the arbitration should take.

The Court 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

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 5 (emphasis added). Here, the agreement unequivocally provides in Paragraph 10 that arbitration will be conducted pursuant to the AAA rules, which include provisions relating to filing of demands and the selection of arbitrators. This is not a “passing reference” as suggested by the Plaintiff, but rather a clear indication of the rules applicable to any arbitration between the parties. There is nothing ambiguous about the parties’ agreement that the AAA rules apply.

As far as whether the arbitration should be on behalf of a class or bilateral arbitration between the named parties only, this issue 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, 130 S. Ct. 1758 (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.” *Id.* at 687 (emphasis in original). 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.

In this case, preemption and arbitrability under the FAA are squarely before the Court, and as a result, *Herron I* does not apply to this analysis. Instead, the Court looks to the guidance provided by the United States Supreme Court and the Fourth Circuit. In discussing the differences between bilateral and class arbitration, the Fourth Circuit stated:

When parties agree to forgo their right to litigate in the courts and in favor of private dispute resolution, they expect the benefits flowing from that decision: less rigorous procedural formalities, lower costs, privacy and confidentiality, greater efficiency, specialized adjudicators, and—for the most part—finality. These benefits, however, are dramatically upended in class arbitration, which brings with it higher risks for defendants. See *Stolt-Nielsen*, 559 U.S. at 686–87, 130 S.Ct. 1758 (contrasting the high stakes of class-action arbitration with its limited scope of judicial review).

...

[I]n bilateral arbitration, the lack of rigorous procedural rules greatly increases the speed and lowers the cost of the dispute resolution, but in class arbitration, procedural formality is required, reducing—or eliminating altogether—these advantages. This is because the arbitrator must determine, before ruling on the merits, whether to certify the class, whether the named parties satisfy mandatory standards of representation and commonality, how discovery will function, and how to bind absent class members. [*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348–49(2011)]. In turn, costs and time increase. See *id.* (finding that the average bilateral arbitration begun between January and August 2007 reached a final disposition in four-to-six months, whereas none of the class arbitrations initiated as of September 2009 had resulted in a final merits award, and the average time from filing to resolution—through settlement, withdrawal, or dismissal, not judgment on the merits—was 630 days).

Dell Webb Communities, Inc. v. Carlson, 817 F.3d 867, 875-76 (4th Cir. 2016). 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.” *Stolt-Nielsen*, 589 U.S. 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. "We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, 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 agreement 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. Any demand for arbitration filed by Plaintiff should be made pursuant to the AAA and shall be bilateral only.

IT IS SO ORDERED.

Steven H. John, Resident Circuit Judge for
the Fifteenth Judicial Circuit

Conway, SC

October __, 2016

CONTRACT OF SALE

431 Hospitality Lane
Myrtle Beach, SC 29579

We Care!



Myrtle Beach Mitsubishi

05/29/14

Date _____

843.796.9155

Fax 843.796.9159

COMPANY <u>Myrtle Beach Mitsubishi</u>		(H) <u>864.360.3593</u>	
PURCHASER <u>Cali Alyson Emory</u>		(W) <u>843.236.6606</u>	
CO-PURCHASER <u>MAY 30 ENT'D</u>		(C) _____	
ADDRESS 1 <u>755 Burcale Rd Apt 60</u>		CITY <u>Myrtle Beach</u>	STATE <u>SC</u>
ADDRESS 2 _____		ZIP <u>29579</u>	COUNTY <u>Horry</u>
EMAIL _____		STK# <u>404</u>	☒ NEW ☐ USED
YEAR <u>2014</u>	MAKE <u>Mitsubishi</u>	MODEL <u>Lancer</u>	BODY TYPE <u>SEDAN</u>
SALESPERSON <u>Dustin C Matz</u>		MILEAGE <u>13</u>	
VIN# <u>JA32U2FU4EU017742</u>			
In case there is a used car or truck trade-in on this contract, the buyer guarantees title to be free and clear of any liens and encumbrances except as stated on the face of this order. Customer Signature: <u>Cali Emory</u> DATE: <u>05/28/14</u>		SELLING PRICE \$ <u>21,200.00</u>	
		MFG. DISCOUNT _____	
		Extended Service Plan _____	
		ADD ON EQUIPMENT _____	
		Gap _____	
TRADE 1 YEAR <u>2001</u> MAKE <u>Mitsubishi</u> MODEL <u>Diamante</u>		TOTAL PRICE OF VEHICLE \$ <u>21,940.00</u>	
VIN# <u>6MHA67P71T013162</u>		TRADE-IN ALLOWANCE - \$ <u>200.00</u>	
MILEAGE <u>79418</u> COLOR <u>Leinholder</u>		DIFFERENCE <u>21,740.00</u>	
Balance <u>N/A</u>		CLOSING FEE + \$ <u>499.00</u>	
TRADE 2 YEAR _____ MAKE _____ MODEL _____		S.C. SALES TAX + \$ <u>300.00</u>	
VIN# _____		TITLE, TAGS & REGISTRATION \$ <u>63.00</u>	
MILEAGE _____ COLOR _____		SALES SUB TOTAL - \$ <u>22,608.00</u>	
Balance <u>N/A</u>		CUSTOMER'S PAYOFF * \$ _____	
"USED CAR CONTRACTUAL DISCLOSURE STATEMENT" "THE INFORMATION YOU SEE ON THE WINDOW FORM (BUYER'S GUIDE) FOR THIS VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON THE WINDOW FORM OVERRIDES ANY CONTRARY PROVISION IN THE CONTRACT OF SALE."		SALES TOTAL = \$ <u>22,608.00</u>	
		PARTIAL PAYMENT - \$ _____	
		# MFR. REBATE - \$ <u>2,000.00</u>	
		# MFR. REBATE - \$ _____	
		# MFR. REBATE - \$ _____	
		CASH AMOUNT DUE AT DELIVERY - \$ _____	
		TOTAL BALANCE DUE (CASH OR FINANCED) = \$ <u>20,608.00</u>	

WARRANTY AGREEMENT

This AGREEMENT is attached to and forms a part of that certain Sales Agreement between DEALER, and the undersigned Buyer(s), and concerns the above described vehicle. Pending credit approval of Buyer(s) by financing institution and completion of the delivery of said vehicle by Dealer is hereby made to Buyer(s) as a convenience to Buyer(s) and is subject to terms and conditions in said Sales Agreement and in the promissory note and security agreement, if any executed concurrently therewith. Said vehicle shall remain the property of the Dealer. Buyer(s) represent(s) that all statements made in their loan application are true and correct, and the Dealer makes delivery of said vehicle in reliance upon their truth and correctness. Any untrue or incorrect statement or any other misrepresentation of Buyer(s) in said application or in any other aforesaid documents shall entitle Dealer immediately to rescind the sale.

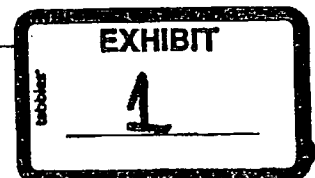
All claims, disputes, and other matters of any kind or nature in question arising out of, in connection with, or relating to, the purchase of the above described vehicle, shall be decided by arbitration in accordance with the Commercial Arbitration Association. The award by the arbitrator(s) shall be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

I have read and understand the terms and conditions of this Contract of Sale and agree that said terms and conditions comprise the entire Agreement pertaining to this purchase and that no other agreement of any kind, except as to financing, or any verbal understanding, or any promise whatsoever, will be recognized. I hereby acknowledge the receipt of a copy of this Contract of Sale.

X Cali Emory 05/28/14
Purchaser Signature

X _____ 05/28/14
Purchaser Signature

X Dustin C Matz 05/28/14
Authorized Signature



1. If the new vehicle is not tendered for delivery by the Dealer within thirty (30) days after the specified delivery date. Purchaser shall have the right to cancel this order. In such event Dealer's liability for any delay in delivery or for any failure to deliver shall be limited to the return to Purchaser of any cash payments and/or any used vehicle delivered to Dealer as initial or part payment. Dealer to have the option either to return used vehicle to Purchaser or to pay Purchaser for it on the basis set forth below in Paragraph 3 hereof.
2. If Dealer's regular selling price for the type or vehicle ordered is changed before delivery to Purchaser, Purchaser agrees to pay the new price or consent to the cancellation of this order upon return of Purchaser's cash payment and or any used vehicle delivered to dealer as initial or part payment. Dealer to have the option either to return the used vehicle to Purchaser or pay Purchaser for it on the basis set forth below in Paragraph 3 hereof.
3. It is expressly agreed that, in the event that this order should be cancelled pursuant to Paragraph 1 or Paragraph 2 hereof, any used vehicle which may have been received by the Dealer as initial or part payment of the purchase price of the new vehicle and sold by Dealer previous to such cancellation, shall be accounted for by Dealer at the price at which the used vehicle was sold less all expenses and charges for repairs and reconditioning, storage, handling, and selling, and not at the price which Dealer may have agreed to allow for the used vehicle if the new vehicle ordered herein had been duly delivered to and accepted by purchaser.
4. If full payment for new vehicle is not made with thirty days after notification that same is ready for delivery. Dealer may cancel this order and it is agreed that the advance deposit or proceeds of sale of used car taken in trade, as the case may be, may be retained by Dealer up to twenty percent of the sales price of new vehicle ordered, or if used car has been disposed of, Dealer shall have a lien thereon for such amount. Such retention of funds or lien shall constitute liquidated damages for Purchaser failure to complete full payment. Dealer may at its option, return such funds or used car and hold Purchaser liable for Dealer's loss or damage by reason of Purchaser's failure to complete such payment within 30 days.
5. If the used car is not to be delivered to the Dealer until the delivery of the new car, the used car shall be reappraised at the time and such reappraisal value shall determine the allowance made for such used car, but if such reappraisal value is lower than the original allowance shown on the reverse side hereof Purchaser may, if dissatisfied, with such reappraisal value, cancel this order, such right to cancel, however, must be exercised prior to the delivery of the new car to the Purchaser and the surrender of the used car to the Dealer. The Purchaser agrees to deliver the original bill of sale and the title to any used car traded herein along with the delivery of such used car, and Purchaser warrants such used car to be his property free and clear of all liens and encumbrances except as otherwise noted herein.
6. Purchaser agrees to furnish dealer documentation necessary to verify information contained in the credit application of purchaser. Purchaser acknowledges that it may take a few days for dealer to verify the credit of the purchaser and assign the contract. Purchaser understands that the lending institution has the ultimate authority to set the interest rate and down payment required on this loan. As an accommodation to purchaser, dealer may allow purchaser to take delivery of the vehicle prior to the time at which the dealer has confirmed or finalized credit or loan arrangements with the lending institution. If the sale to purchaser includes credit or financing obtained from such a lending institution, purchaser acknowledges that the sale of the subject vehicle is expressly conditional upon dealer's receipt of the proceeds of the loan from the lending institution. If for any reason dealer is unable to assign the contract to a lending institution, or the lending institution refuses to fund the loan, dealer shall notify purchaser of the situation and upon receiving notice, purchaser shall immediately return the vehicle to the dealer in the same condition as when sold. Dealer agrees that, in the event purchaser is required to return to the vehicle to the dealer as described herein, dealer shall restore to purchaser all consideration received by dealer in connection with the contract. If the dealer retains possession of purchaser's trade-in, if any, dealer shall return to purchaser the trade-in vehicle. If dealer has sold the trade-in vehicle, dealer shall pay to purchaser a sum to be determined as described in paragraph 3 of this contract, and payment of this sum to purchaser shall fully satisfy dealer's obligation with respect to the trade-in vehicle. In the event the subject vehicle is not immediately returned to dealer, dealer shall have the right to repossess the subject vehicle, and purchaser acknowledges that dealer, its agent, or contractor is authorized to enter upon purchaser's property for purposes of repossession, provided repossession can be accomplished without breach of the peace. Purchaser shall be liable to dealer for all expenses incurred by dealer in obtaining possession of the subject vehicle, to include reasonable attorney's fees. While in possession of purchaser, all terms of the contract, including those relating to the use of the vehicle and insurance for the vehicle shall be assumed by the purchaser. Purchaser shall pay all reasonable repair costs related to any damage sustained by the vehicle while in their possession.
7. Dealer shall be under no obligation to incorporate in the motor vehicle ordered any change or improvement incorporated in any other motor vehicle or make any allowance on account of such change or improvement.
8. Any part or parts subject to replacement by the factory in accordance with the warranty printed below will be installed by the Dealer without charge for labor to the owner.
9. This order shall not constitute a contract until accepted in writing by the Dealer or his authorized representative and when so accepted is not transferable by Purchaser and can be transferred by Dealer only to another authorized dealer.
10. 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 S 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.

UNIFORM WARRANTY

(Uniform Warranties of Automobile Manufacturers Association under which Motor Vehicles are sold)

The Manufacturer warrants each new motor vehicle manufactured by it to be free from defects in material and workmanship under normal use and service, its obligation under this warranty being limited to making good at its factory any part or parts thereof, including all equipment or trade accessories (except tires) supplied by the Car Manufacturer, in accordance with said manufacturer's published warranty at the time of manufacture of the vehicle herein implied and of all other obligations or liabilities on its part, and it neither assumes nor authorizes any other person to assume for it any liability in connection with the sale of its vehicles.

"This warranty shall not apply to any vehicle which shall have been repaired or altered outside of an authorized service station in any way so as to the judgment of the Manufacturer, to affect its stability or reliability, not which has been subject to misuse, negligence, or accident.

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Dealer extends the foregoing warranty to the Purchaser regarding the car sold to the Purchaser hereunder in the same manner as if the word "Dealer" were substituted for the word "Manufacturer" therein, it being understood that the Dealer's obligation under this warranty without charge for the replacement labor. This warranty by the Dealer is expressly in lieu of all other warranties, expressed or implied, and of all other obligations or liabilities on the part of the Dealer, and the Dealer neither assumes nor authorizes any other person to assume for it any liability in connection with the sale of this vehicle.

Dealer recognizes the importance of efficient service to owners, and will provide Purchaser with a copy of Dealer's Owner's Service Policy at the time of delivery of vehicle to Purchaser.

The Owner's Service Policy provided for certain recommended inspection during the period in which warranties in effect. Purchaser should find the Owner's Service Policy of real value in securing their most satisfactory service from the motor vehicle.

Sid Connor

From: Sid Connor
Sent: Thursday, December 08, 2016 2:32 PM
To: John, Steven H. Law Clerk (Elizabeth Collins); Becker, James
Cc: Caskey, Mary; Spruill, Sarah
Subject: RE: Cali Alyson Emory v. Myrtle Beach Mitsubishi 2016-CP-26-937
Attachments: Emory brief.pdf

Judge John, see attached brief, as requested in the email below.

Very Truly Yours,

Sid Connor

-----Original Message-----

From: John, Steven H. Law Clerk (Elizabeth Collins) [<mailto:SJohnLC@sccourts.org>]
Sent: Tuesday, November 22, 2016 1:14 PM
To: Becker, James; Sid Connor
Cc: Caskey, Mary; Spruill, Sarah
Subject: RE: Cali Alyson Emory v. Myrtle Beach Mitsubishi 2016-CP-26-937

Good afternoon,

Judge John has reviewed the responses of both parties. The Court agrees that the arbitration provision does not meet the requirements of the South Carolina statute. Further, the Court agrees that the FAA applies, allowing the provision to be held valid.

However, Judge John requests each party submit a written response by noon on December 9th addressing the following: (1) briefly clarify your position on the substantive law to apply to the arbitration, and (2) whether the issue of class-wide vs. bilateral arbitration is an issue of contract interpretation for the arbitrator or for the Court.

Thank you,

Elizabeth Collins
Law Clerk to the Honorable Steven H. John Circuit Judge for the 15th Judicial Circuit
Phone: (843) 915-6697
Fax: (843) 915-5859

-----Original Message-----

From: Becker, James [<mailto:jbecker@hsblawfirm.com>]
Sent: Wednesday, October 12, 2016 11:36 AM
To: John, Steven H. Law Clerk (Elizabeth Collins) <SJohnLC@sccourts.org>; Sid Connor <sconnor@classactlaw.net>
Cc: Caskey, Mary <mcaskey@hsblawfirm.com>; Spruill, Sarah <sspruill@hsblawfirm.com>
Subject: RE: Cali Alyson Emory v. Myrtle Beach Mitsubishi 2016-CP-26-937

Thank you, and we will send it to you via email tomorrow.

James Y. Becker | Attorney | Haynsworth Sinkler Boyd, P.A.

Lynn Benton

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Elizabeth Collins

Law Clerk to the Honorable Steven H. John Circuit Judge for the 15th Judicial Circuit

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Subject: RE: Cali Alyson Emory v. Myrtle Beach Mitsubishi 2016-CP-26-937

Thank you, and we will send it to you via email tomorrow.

James Y. Becker | Attorney | Haynsworth Sinkler Boyd, P.A.

1201 Main St., 22nd Floor, Columbia, South Carolina 29201-3232 jbecker@hsblawfirm.com | 803.540.7706

-----Original Message-----

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 16-CP-26-937

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.)
_____)

**PLAINTIFF'S BRIEF IN RESPONSE TO ISSUES
RAISED BY THE COURT REGARDING
DEFENDANT'S MOTION TO ALTER
OR AMEND AND TO HOLD IN
ABEYANCE**

The Defendant has moved to alter or amend and to hold in abeyance this court's Order dated and filed September 15, 2016. The Defendant has submitted a Memorandum in support of its Motion and the Plaintiff has replied to the Motion. The Court has requested the parties to address two issues as follows:

1. To clarify our position on which forum is appropriate for the arbitration; and
2. Whether the issue of Class Wide versus Bilateral Arbitration is an issue of contract interpretation for the arbitrator or for the Court.

1. Clarification of our position on which forum is appropriate for the arbitration.

The Plaintiff addressed this issue comprehensively under Item No. 4 in her Reply Brief. The Plaintiff believes that the appropriate arbitration forum is set forth in the South Carolina Uniform Arbitration Act. The arbitrator(s) would be chosen according to the SCUAA and the rules of the SCUAA would apply. The contract specifically states that the SCUAA is the appropriate forum. The SCUAA is also a more appropriate forum for the litigation of Class Action claims.

2. Whether the issue of Class Wide versus Bilateral Arbitration is an issue of contract interpretation for the arbitrator or for the Court.

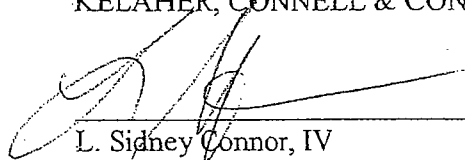
The issue of Class Wide versus Bilateral Arbitration is an issue to be decided by this Court. S.C. Code Ann. §15-48-20(a) states “On the application of a party showing an agreement described in §15-48-10, and the opposing parties’ refusal to arbitrate, the Court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the Court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.” (Emphasis added)

The Defendant has made a Motion for the Court to deny Class Wide Arbitration. The Defendant’s Motion to Deny Class Wide Treatment is essentially a motion to take away the Plaintiff’s right to class wide arbitration and is therefore in essence a “refusal to arbitrate” under §15-48-20(a). Since the Defendant refuses to arbitrate on a class wide basis, this issue has become a gateway issue to arbitration and placed squarely within this Court’s jurisdiction. This Court should order that the Arbitrator is required to arbitrate this matter as a Class Action pursuant to the Dealers Act and Rule 23.

In the case of Dell Webb Communities, Inc. v. Carlson, 817 F.3d 867 (4th Cir. 2016), the Fourth Circuit held in the context of Federal Rule 23 that, unless the parties clearly and unmistakably agree otherwise, whether an Arbitration Agreement provides for Class Arbitration is a matter for Judicial resolution. While Dell Webb is a Federal decision, the reasoning of Dell Webb certainly applies to this case because: 1) The contract itself does not deny class action treatment; 2) The Dealers Act specifically provides for Class Action treatment; and 3) The South Carolina Uniform Arbitration Act specifically provides that the Circuit Court has

jurisdiction to decide the validity and scope of arbitration. The issue of Class Wide versus Bilateral Arbitration is one for judicial determination.

KELAHER, CONNELL & CONNOR, P.C.



L. Sidney Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
sconnor@classactlaw.net
Attorney for Plaintiffs

December 8, 2016

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.

**DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN FURTHER SUPPORT OF ITS
MOTION TO ALTER OR AMEND AND TO HOLD IN ABEYANCE**

The Court has requested that the parties provide additional briefing on the following two issues: "(1) briefly clarify your position on the substantive law to apply to the arbitration, and (2) whether the issue of class-wide vs. bilateral arbitration is an issue of contract interpretation for the arbitrator or for the Court." In answering these questions, the Court should begin its analysis with the following three points on which the parties agree: (1) the mandatory notice provisions of the South Carolina Uniform Arbitration Act ("SC Act") found in S.C. Code Ann. § 15-48-10(a) are not met; (2) there is a valid enforceable arbitration agreement; and (3) the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA") applies and preempts state law that would defeat otherwise valid arbitration agreements.

1. What is the applicable law and arbitration forum?

This question is governed by the FAA, because the mandatory notice provisions of the SC Act have not been met. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 553 S.E.2d 110 (2001). The FAA provides

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 5 (emphasis added).

Here, the arbitration agreement provides in Paragraph 10 that arbitration will be conducted pursuant to the AAA rules, which include provisions relating to filing of demands and the selection of arbitrators. This is not a "passing reference" as suggested by the Plaintiff, but rather a clear indication of the rules applicable to any arbitration between the parties. Since the arbitration agreement does not satisfy the notice requirements of the SC Act, there is nothing ambiguous about the parties' agreement that the AAA rules apply.

In the alternative, if the Court finds that no method has been agreed by the parties, then as the FAA clearly provides, "upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator." In no event, however, will the SC Act apply given the failure to provide the required notice.

2. Is the issue of whether this matter should proceed as a bi-lateral or class arbitration a question of arbitrability to be resolved by the Court as part of its ruling on the parties' respective motions to compel arbitration?

The Fourth Circuit, applying the FAA, has answered this question:

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)). In *Dell Webb*, the Fourth Circuit reversed the District Court's failure to rule on this threshold issue of arbitrability as follows:

In this case, the parties did not unmistakably provide that the arbitrator would decide whether their agreement authorizes class arbitration. In fact, the sales agreement says nothing at all about the subject. Accordingly, the district court erred in concluding that the question was a procedural one for the arbitrator. We therefore reverse the district court's order denying Pulte's motion for partial summary judgment, vacate the judgment dismissing the Petition, and remand for further proceedings. On remand, the district court shall determine whether the parties agreed to class arbitration.

Id. at 877. *Accord Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3rd Cir. 2016) (holding that the availability of class arbitration is a substantive dispute for the court to decide); *Reed Elsevier, Inc. ex rel. Lexis Nexus Div. v. Crockett*, 734 F.3d 594, 2013 WL 5911219 (6th Cir. 2013), *cert. denied*, ___ U.S. ___, 134 S.Ct. 2291, 189 L.Ed.2d 173 (2014) (same).

The same rule should be applied in this case, and the Court should find that this action should proceed in bi-lateral arbitration before the AAA because the arbitration agreements here do not allow for class arbitration. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the United States Supreme Court reiterated its refusal to “force unwilling parties to arbitrate contrary

to their expectations,” and announced a rule for determining whether an arbitration agreement permits class arbitration. 559 U.S. 662, 130 S. Ct. 1758 (2010). The Court found that “class arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consent to it by simply agreeing to submit their disputes to an arbitrator.” *Id.* at 685, 130 S. Ct. 1758; *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 875-76 (4th Cir. 2016) (explaining the fundamental differences between bilateral and class arbitration).

Thus, the Supreme Court has ruled that parties cannot be forced to arbitrate on a class-wide basis absent “a contractual basis for concluding that the party agreed to do so.” *Stolt-Nielsen*, 589 U.S. 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. “We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, 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.

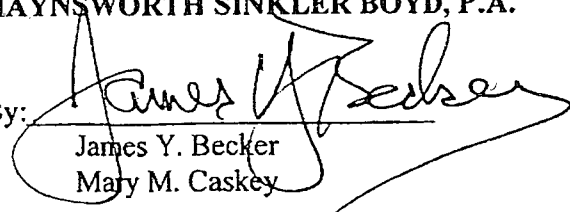
Here, it is indisputable that neither of the arbitration agreements include any agreement by the parties to class-wide arbitration. There is no reference to class actions or other parties or any other term that would imply an agreement to engage in class-wide arbitration. Instead, the parties’ agreement specifies that it relates only to “this contract” (§ 10) and that it is only between “DEALER, and the *undersigned* Buyer(s)” (BAILMENT AGREEMENT) (emphasis added) and applies only to disputes relating to “the above described vehicle.” As a result, Plaintiff should be compelled to bilateral arbitration only.

[signature on following page]

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

By:


James Y. Becker
Mary M. Caskey

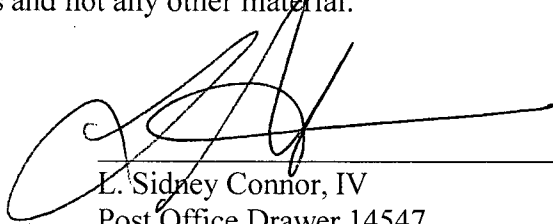
1201 Main Street, 22nd Floor (29201-3226)
Post Office Box 11889 (29211-1889)
Columbia, South Carolina
(803) 779-3080

Attorneys for Defendant Thag, LLC, d/b/a Myrtle
Beach Mitsubishi

December 8, 2016

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



L. Sidney Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587-4547
(843) 238-5648
Attorneys for Appellants

May 19, 2017

RECEIVED

MAY 26 2017

SC Court of Appeals