STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE) TWELFTH JUDICIAL CIRCUIT
) CASE NO.: 2015-CP-21-3521

Sunday Kay Murphy, individually and in a representative capacity for all others similarly situated,

Plaintiffs,

vs.

Five Star Florence, LLC,

Defendant.

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SC Court of Appeals

ORDER DENYING PLAINTIFF'S MOTION TO COMPEL STATE ARBITRATION AND GRANTING DEFENDANT'S MOTIONS TO STAY PROCEEDINGS AND COMPEL FEDERAL ARBITRATION

THIS MATTER came before the Court on Tuesday, February 14, 2017, at the Florence County Courthouse. L. Sidney Connor, IV, Esq., appeared for Plaintiff; Sarah P. Spruill, Esq., appeared for Defendant. Plaintiff moved to compel arbitration under the South Carolina Uniform Arbitration Act and Defendant moved to stay the proceedings and to compel arbitration under the Federal Arbitration Act. For the reasons set forth below, the Court denies Plaintiff's Motion to Compel Arbitration and grants Defendant's Motions to Stay Proceedings and Compel Arbitration.

BACKGROUND

The underlying transaction in this case involves Plaintiff's purchase of a new 2015 Chevrolet Silverado from Defendant on July 31, 2015. Pursuant to that purchase, Plaintiff signed several documents, two of which are relevant here: the Purchase Order and the Arbitration Agreement. On December 22, 2015, Plaintiff filed this class action complaint under the Dealers Act, S.C. Code Section 56-15-10, et seq., alleging she and others similarly situated were charged an illegal closing fee in the amount of $699.00. In her Complaint, Plaintiff demanded arbitration pursuant to the South Carolina Uniform Arbitration Act (SCUAA). Defendant subsequently filed

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Dan Paul O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

an Answer and moved to stay the proceedings and to compel arbitration pursuant to the Federal Arbitration Act (FAA).

Arbitration is referenced at two different places in the Purchase Order and is the entire subject of the Arbitration Agreement. The first arbitration clause appears on the front page of the Purchase Order. Situated near the top of the page, that clause, printed in bold, underlined letters, states the following:

> **This contract is subject to arbitration under the South Carolina Uniform Arbitration Act, S.C. Code 15-48-10 et seq.**

The second arbitration clause appears on the reverse side of the Purchase Order. There is a paragraph at the bottom of the page entitled "**Arbitration Required by This Agreement**" which provides, in pertinent part:

> The parties agree that . . . *[i]f the transaction involves interstate commerce, arbitration as described hereunder shall be governed solely by the Federal Arbitration Act, 9 U.S.C. section 1, et seq, and the South Carolina Arbitration Act shall not apply.* Arbitration shall be administered by the American Arbitration Association under its Commercial Arbitration Rules, or such other arbitrator as may be mutually agreeable to the parties. . . .

[Emphasis added.] The third arbitration "clause" appears as a separate document entitled "ARBITRATION AGREEMENT" which provides, in pertinent part, the following:

> **PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS**
>
> 1. **EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.**
>
> 2. **IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.**

> **3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.**
>
> . . . Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. . . . Any arbitration under this Arbitration Agreement shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et.seq.) and not by any state law concerning arbitration. . . . If any part of this Arbitration Agreement, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Agreement shall be unenforceable. This Arbitration Agreement is part of any retail installment sale contract or lease agreement you sign and any related credit, vehicle sales, or lease documents.

[Emphasis in original.]

While both Plaintiff and Defendant agree that the matter is to be arbitrated, the parties disagree as to the appropriate rules and forum. Plaintiff argues that the first arbitration clause controls and arbitration should proceed under the SCUAA, while Defendant argues that the first arbitration clause is invalid and arbitration should proceed under the FAA according to the second and third arbitration clauses. The Court will address each clause in turn.

DISCUSSION

The question of arbitrability of a claim is an issue for the courts. Partain v. Upstate Auto. Grp., 386 S.C 488, 689 S.E.2d 602 (2010). At the outset, this Court recognizes that there is a strong presumption in favor of the validity of arbitration agreements because the policy of the United States and of South Carolina is to favor arbitration of disputes. Zabinski v. Bright Acres

Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (citing AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)).

A. The first arbitration clause.

Defendant argues that the first arbitration clause is invalid because it fails the notice requirement set forth in S.C. Code Section 15-48-10 because the font was not in capital letters ("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."). Plaintiff argues that the first clause is valid because it is sufficient and comprehensive and should thus control over the other conflicting arbitration clauses. The Court agrees with Defendant.

The appellate courts of South Carolina have strictly construed the notice provision set forth in Section 15-48-10(a) and have invalidated arbitration agreements that do not comply. See, e.g., Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996) (holding that the terms of section 15-48-10(a) are clear, and those terms must be applied according to their literal meaning); Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001) (reiterating that no other variation of the notice requirement is acceptable); Richland Horizontal Prop. Regime Homeowners Ass'n v. Sky GreenHoldings, Inc., 392 S.C. 194, 708 S.E.2d 225 (Ct. App. 2011) ("While we acknowledge the strength of [the public policy favoring arbitration], we adhere to the even stronger mandate that we apply the plain language of a statute.").

Here, it is undisputed that the first arbitration clause does not adhere strictly to Section 15-48-10(a) because it is not typed in capital letters. That, however, does not end the inquiry; inextricably linked with the question of the applicability of Section 15-48-10 is the impact of the

FAA on this dispute. See Soil Remediation at 458, 476 S.E.2d at 151; Zabinksi at 590, 553 S.E.2d 115.

The FAA declares a liberal policy favoring arbitration. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Section 2 of the Act states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. In the case Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 116 S.Ct. 1652, 134 L.E.2d 902 (1996), the United States Supreme Court interpreted this statute in light of Montana's Code Section 27-5-114(4), whose language, at the time, was nearly identical to South Carolina's 15-48-10(a):

> [G]enerally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2. Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed "upon the same footing as other contracts." Montana's § 27-5-114(4) directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus displaces the Montana statute with respect to arbitration agreements covered by the Act.

Id. at 687 (citations omitted) (emphasis in original). "Because section 15-48-10(a) singles out arbitration agreements, it directly conflicts with section 2 of the FAA." Soil Remediation at 459, 476 S.E.2d at 152. Therefore, if the arbitration agreement in the instant controversy is covered by

the FAA, then Casarotto directly controls, and the FAA preempts S.C. Code Section 15-48-10(a). Id.

For the FAA to apply, the commerce involved in the contract must be interstate or foreign. Id. at 460, 476 S.E.2d at 152 (citing Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993)). Both parties agree that the contract at issue involves interstate commerce. Furthermore, South Carolina case law provides that "an arbitration agreement that complies with the FAA and that exists within a contract to purchase or finance a vehicle preempts any *state arbitration-specific law* that would otherwise invalidate the arbitration agreement. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 79, 749 S.E.2d 139 (Ct. App. 2013) (emphasis in original) (citing Stout v. J.D. Byrider, 228 F.3d 709, 715 (6th Cir. 2000) (holding contracts for the purchase and financing of a vehicle involve interstate commerce); Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22 n. 1, 644 S.E.2d 663, 667 n. 1 (2007) (finding a vehicle trade-in contract involves interstate commerce)). The presence of interstate commerce requires the application of the FAA to the instant arbitration agreement; therefore, per Casarotto, I find that the FAA preempts S.C. Code Ann. Section 15-48-10(a) in this matter.

B. The second arbitration clause.

Because the Court has found that the FAA preempts the SCUAA in this case, it is not necessary to delve into Plaintiff's arguments regarding the second arbitration clause.

C. The Arbitration Agreement

The third arbitration "clause" is a completely separate document signed and dated on the same date as the Purchase Order. Plaintiff contends that this separate document, entitled "Arbitration Agreement," is null and void based on principles of contract law and public policy.

Defendant argues that the Agreement is valid and enforceable under the FAA and that Plaintiff, by signing the document, agreed to be bound by its terms.

At the heart of the parties' disagreement is whether this dispute can be brought as a class action. Class actions are addressed at multiple points in the Arbitration Agreement, to wit:

> IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.
>
> . . .
>
> Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. . . . If any part of this Arbitration Agreement, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Agreement shall be unenforceable.

i. Validity of the Arbitration Agreement Under Contract Law

As an initial matter, the Court addresses the question of whether the Arbitration Agreement should be considered at all in light of applicable principles of contract law. Again, the FAA's "centerpiece provision makes a written agreement to arbitrate 'in any maritime transaction or a contract evidencing a transaction involving commerce . . . valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for revocation of any contract.*'" Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625, 105 S.Ct. 3346, 3353 (1985) (quoting 9 U.S.C. § 2) [emphasis added]. Therefore, "[g]eneral contract principles of state law apply to arbitration clauses governed by the FAA." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001).

Here, Plaintiff raises several objections as to why the Arbitration Agreement should be found null and void. First, she argues that specific language from the Purchase Order cancels, supersedes, and excludes any other statements. The Court does not agree. The front page of the Purchase Order provides as follows, in pertinent part:

> Purchaser agrees that this Order, including all the terms on **BOTH THE FACE AND REVERSE SIDE HEREOF,** any Bailment Agreement, and any retail installment sales contract . . . reflecting the above transaction cancel and supercede [sic] any prior agreement or contract and comprise the complete and exclusive statement of the terms of this transaction.

[Emphasis in original.] The clear terms of the language of the Purchase Order state that any *prior* agreement or contract between the parties is cancelled and superseded. Here, the Arbitration Agreement was signed by Plaintiff on the same date as the purchase Order, and is therefore not a prior agreement or contract.

Next, Plaintiff asserts that the Arbitration Agreement is not valid because there is no reference to it in the Purchase Order. While these documents certainly do not purport to be an example of best practice in contract drafting, the law does not require every subsequent or contemporaneous agreement to be cross-referenced with other documents; thus, Plaintiff's argument on this point fails.

The Court finds that the Arbitration Agreement appears valid on its face and can thus move forward to examine the merits of its contents.

ii. State and Federal Law Regarding Arbitration of Class Actions

A brief discussion of state and federal law regarding arbitration of class actions is helpful to understand the issues at play in the instant case.

Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394 (2010) ("Herron I") is the preeminent state case on this topic. The facts are quite similar to the case at bar. There, Christine

and Michael Watts entered into a contract with Century BMW for the purchase of a car; that contract included an arbitration agreement with a class action waiver. Id. at 529. The Wattses subsequently filed a class action suit against Century BMW alleging the dealership had charged illegal administrative fees in violation of the Dealers Act. Id. at 530. Century BMW moved to compel arbitration pursuant to the terms of the agreement; the trial court denied that motion, and Century BMW appealed. Id. On appeal, the Supreme Court of South Carolina held that a ban on class actions is unenforceable on public policy grounds, explaining:

> The purpose of the Dealers Act is consumer protection. Damages are typically small in individual consumer cases, thereby discouraging plaintiffs from bringing individual actions. Our Legislature recognized this and expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act . . . The Dealers Act further provides: "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. Section 56-15-130. 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.

Id. at 535-36. The Court went on to explain that normally this illegal provision would be severed from an otherwise valid contract so the remaining terms could be enforced; however, here, Century BMW unambiguously stated at oral argument that its intent was for the arbitration agreement to stand or fall as a whole. Id. at 536-37. Century BMW appealed to the United States Supreme Court.

Meanwhile, the United States Supreme Court Case was deciding what would become the seminal case on this topic, AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011). There, the Court considered the enforceability of a California judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts. Vincent and Liza Concepcion sued AT&T over a

small amount of money—$30.22 in sales tax—and later consolidated their complaint with a putative class action in the United States District Court for the Southern District of California. Id. at 337. AT&T moved to compel arbitration under the terms of its contract with the Concepcions, which included a class action waiver. Id. The Concepcions opposed the motion, arguing the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed classwide procedures. Id. at 337-38. The District Court, later affirmed by the Ninth Circuit Court of Appeals, agreed with the Concepcions, relying on a decision of the California Supreme Court in Discover Bank v. Superior Court, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005). The Discover Bank rule, which held waivers of class actions in contracts of adhesion to be unconscionable and unenforceable, had been frequently applied to find arbitration agreements unconscionable in California. Id. at 340. In a 5-4 opinion, the Supreme Court reversed the judgment of the Ninth Circuit, holding that California's Discover Bank rule was preempted by the FAA because it interfered with arbitration and stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. at 352. Justice Scalia, writing for the majority, further explained that class arbitration "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." Id. at 348.

Shortly after the Concepcion opinion was issued, the United States Supreme Court granted cert on Herron I and "remanded to the Supreme Court of South Carolina for further consideration in light of [Concepcion]." Sonic Auto., Inc. v. Watts, 563 U.S. 971 (2011). The "Herron II" opinion was solely about issue preservation, and reinstated the Herron I decision after concluding 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), cert. denied, 132 S.Ct. 2436 (2012).

Thus, it appears that current South Carolina law stands in stark contrast to the United States Supreme Court Concepcion decision. South Carolina law would strike down the class action waiver in the instant case as against public policy, while the United States Supreme Court would allow it. However, under the Supremacy Clause of the United States Constitution, any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

"The FAA reflects the overarching principle that arbitration is a matter of contract. Courts must rigorously enforce arbitration agreements according to their terms[.]" Am. Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304, 2306 (2013) (internal quotations and citations omitted). Here, as in Herron I, the drafter of the Arbitration Agreement has made it abundantly clear that it wishes the Arbitration Agreement to stand or fall as a whole based on the enforceability of the class waiver. The Agreement explicitly states: "If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Agreement shall be unenforceable." Under existing state law, the class action waiver would fail under the clear public policy of our Legislature, ringing the death knell for the entire Agreement per its own terms. However, because our Supreme Court did not have the opportunity to reconsider Herron I in light of Concepcion due to the lack of issue preservation in that case, this Court looks to Concepcion for precedent. Pursuant to that opinion, the Supreme Court of the United States would find a waiver of class action valid and enforceable. Thus, the Court finds that the Arbitration Agreement in this case is valid and enforceable.

CONCLUSION

The Court finds that the transaction between Plaintiff and Defendant is subject to Federal Arbitration. The Court also finds the Arbitration Agreement to be legally enforceable. Based on the foregoing and after full consideration of the issues herein, IT IS HEREBY ORDERED that Defendant's Motion to Stay Proceedings and to Compel Arbitration under the FAA is GRANTED.

AND IT IS SO ORDERED.

The Honorable Thomas A. Russo
Presiding Judge for the Twelfth Judicial Circuit

Aug. 2 2017
Florence, South Carolina

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