THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Thomas A. Russo, Presiding Judge

APPELLATE CASE NO. 2017-001720

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

vs.

Five Star Florence, LLC..... Respondent

APPELLANT'S INITIAL BRIEF

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II. DID THE TRIAL COURT ERR IN FINDING THE CLASS ACTION WAIVER TO BE VALID AND ENFORCEABLE?

STATEMENT OF THE CASE

I. Procedural History

The Appellant filed her Complaint in the Court of Common Pleas seeking arbitration pursuant to the procedural rules of the South Carolina Uniform Arbitration Act (UAA). The Respondent filed an Answer and moved to stay the proceedings and to compel arbitration pursuant to the procedural rules of the Federal Arbitration Act (FAA). While both the Appellant and Respondent agree that the matter is to be arbitrated, the parties disagree as to the appropriate procedural rules. The Trial Court ordered arbitration under the procedural rules of the FAA and declared the class action waiver to be valid. The Appellant has appealed, requesting this Court to order arbitration under the UAA and to declare the class action waiver to be void and unenforceable.

II. The Trial Court Order.

The Trial Court denied the Appellant's Motion for Arbitration under the UAA and granted the Respondent's Motion for Arbitration under the FAA. In doing so, the Trial Court misconstrued the law concerning Federal preemption. The Trial Court has confused the issue of Federal preemption with the application of the procedural rules of the Federal Arbitration Act. These two issues are separate and independent. On the one hand, if there is interstate commerce, the FAA will preempt State law, but only if that State law, has the effect of denying arbitration. Preemption does not mean, however, that the procedural rules of the FAA would be triggered. In this particular case, the Appellant is not trying to avoid arbitration.

The Appellant has no objection to the technical errors in the state arbitration clause. THESE ERRORS ARE THE SOLE RESPONSIBILITY OF THE RESPONDENT AUTO DEALER WHO DRAFTED THE DOCUMENT. The Respondent has no standing to complain

of errors in its own documentation. The Appellant has no objection to the technical errors in the arbitration disclosure. These errors are technical only in terms of the font size of the lettering and the placement of the lettering. The Respondent has no standing to object to these errors because it created the errors. The Appellant chooses not to object to the errors and chooses to proceed to arbitration under the South Carolina Uniform Arbitration Act.

Federal preemption does not come into play because Federal preemption applies only where a state law would defeat arbitration. The FAA has no preference over whether arbitration proceeds under the FAA Rules or under the State Arbitration Rules. The FAA protects arbitration in general. The Trial Court's ruling essentially allows the Respondent to take advantage of its own errors to its own benefit. By allowing this matter to proceed under the State Arbitration Rules, the Federal purposes of arbitration are met and the language of the contract is honored.

All of the cases in the State of South Carolina that deal with FAA preemption involve cases where the consumer was attempting to avoid arbitration altogether. The present case is very different. The consumer is not trying to avoid arbitration. The consumer is trying to enforce the very language of the contract itself without regard to the disclosure requirements of the South Carolina Uniform Arbitration Act. These disclosure requirements were violated by the Respondent and not the Appellant.

The Trial Court also held that, in spite of Herron I, "The Supreme Court of the United States would find a waiver of class action valid and enforceable." In drawing that conclusion, however, the Trial Court failed to consider the case of DirecTV v. Imburgia, 577 U.S. ___ (2015). That case is discussed in detail below. The bottom line, however, is that if a state law makes a class action waiver unenforceable that state law would be invalid if, 1) it defeated the

Federal purpose of arbitration and if, 2) that state law was intended to defeat arbitration. In this case, neither of those factors is present. The Appellant has moved for arbitration. Therefore the Federal policy favoring arbitration is not defeated at all. Secondly, the Dealers Act provision for class actions is not intended to defeat arbitration. The Dealers Act provides a non-waivable right to class actions under any contract with or without an arbitration agreement. Since the Dealers Act is not directed at defeating arbitration, it would be a valid state law which would provide consumers with a non-waivable right to proceed as a class action, even in arbitration.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO COMPEL ARBITRATION UNDER THE PROCEDURAL RULES OF THE UAA AND GRANTING RESPONDENT'S MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION UNDER THE PROCEDURAL RULES OF THE FAA.

The Arbitration Clauses

Arbitration appears at three (3) different places in the sales documents. The FIRST arbitration clause appears on the front page of the Purchase Order. (Exhibit A) The FIRST clause states, in bold letters, with underlining, 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.**"

The THIRD arbitration clause appears on a separate document entitled "**ARBITRATION AGREEMENT.**" (Exhibit B)

The FIRST arbitration clause directing arbitration pursuant to the South Carolina Uniform Arbitration Act is valid and enforceable. The SECOND arbitration clause on the reverse side of the Purchase Order is supplemental and explanatory, but to the extent that it conflicts with the arbitration clause on the front page, any conflicts must be resolved in favor of the FIRST clause on the front page. The THIRD clause is invalid for a number of reasons. The Trial Court erred in finding the FIRST Clause to be invalid.

A. The FIRST arbitration clause.

The FIRST ARBITRATION Clause is valid and enforceable.

1. The FIRST arbitration clause is sufficient and comprehensive.

The front page of the Purchase Order contains the following language:

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

This statement is sufficient in itself to bind the parties to arbitration. It is a complete and comprehensive statement of arbitration because the South Carolina Uniform Arbitration Act 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 Purchase Order was drafted by the Respondent and presented to the Appellant as a contract of adhesion. It specifically states that arbitration will be pursuant to the UAA. The Appellant should be able to rely on this contractual provision between the parties, especially since this notice is contained on the front side of the Purchase Order.

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 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.

By contrast, the Federal Arbitration Act provides very few procedural and appellate processes concerning arbitration. In fact, the FAA anticipates that the parties will stipulate to their own procedures. For example, 9 U.S. Code §4 provides that a party may seek an Order directing an arbitration and that the Order would direct that "such arbitration proceed in the manner provided for in such an agreement." And further, in the same paragraph, if a federal jury finds that a valid arbitration agreement was made "The court shall make an Order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof." 9 U.S. Code §5 discusses the appointment of arbitrators and states specifically "if in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such methods shall be followed...." The FAA continually refers back to the parties' contract for the procedural terms of the arbitration. The FAA was never intended to be a complete procedural guide to arbitration. The UAA, however, is exactly that. Therefore, the FIRST arbitration clause is sufficient and comprehensive. It stands on its own.

2. The FAA does not preempt a valid enforceable arbitration clause.

"The general rule is that the FAA does not preempt state procedural law relating to arbitration." Henderson v. Summerville Ford-Mercury, Inc., 405 S.C. 440, 748 S.E.2d 221 (2013), citing 6 C.J.S. Arbitration §32 (2004), and Volt Info. Sciences v. Bd. Of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 477 n.6 (1989). "There is no federal policy favoring arbitration under a certain set of procedural rules and the federal policy is simply to ensure the enforceability of private agreements to arbitrate." Toler's Cove Homeowners Association v. Trident Construction Co., 355 S.C. 605, 611, 586 S.E.2d 581, 584 (2003). "The FAA's

substantive provisions apply to arbitration in federal or state courts, but a state's procedural rules apply in state court unless they conflict with or undermine the purpose of the FAA." Henderson, 748 S.E.2d at 226-27.

The United States Supreme Court has ruled on numerous occasions that if a State law would work to invalidate an otherwise valid arbitration agreement then the State law would be preempted by the FAA. See, e.g., Southland Corp. v. Keating, 465 U.S. 1 (1984). The United States Supreme Court has specifically recognized, however, that the parties to a contract are free to provide for arbitration under rules established by State arbitration laws rather than the FAA. Volt Info. Sciences, Inc. v. Bd. Of Trs. Of Leland Stanford Jr. Univ., 489 U.S. 468 (1989). The United States Supreme Court has stated that while the FAA preempts State laws that invalidate the parties' arbitration agreement, "It does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the [FAA] itself." Volt, 489 U.S. at 448.

The South Carolina Supreme Court has ruled that "State procedural rules that do not undermine the enforceability of an otherwise valid contract to arbitrate may be deemed to have been incorporated into a contract through choice of law provisions." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110, 116 (S.C. 2001). In the present case, the Appellant is not seeking to avoid arbitration. On the contrary, the Appellant is seeking to enforce arbitration pursuant to a clear and unambiguous clause on the front page of the Purchase Order. The choice of State law arbitration rules will be enforced as long as this choice does not frustrate the Federal Arbitration Act. See Volt, 489 U.S. 468.

In the present case, the Purchase Order specifically provides that the procedure to be followed is pursuant to the UAA. As discussed above, this act is comprehensive in nature and

provides for adequate procedures to conduct arbitration. Therefore, according to the terms of the Purchase Order, this matter must proceed to arbitration under the South Carolina Uniform Arbitration Act.

3. Interstate commerce does not require the application of the FAA.

The Appellant has stipulated that interstate commerce is not an issue in this case. There is no question that the purchase of a vehicle in today's economy involves interstate commerce. But the fact that interstate commerce is involved does not exclude the application of the South Carolina Uniform Arbitration Act. In Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539 n. 2, 542 S.E.2d 360, 363, n.2 (2001), the Court noted, "State law was therefore preempted to the extent it would have invalidated the arbitration agreement. The parties to a contract are otherwise free to agree that our state Arbitration Act will apply and this agreement shall be enforceable even if interstate commerce is involved." (First emphasis in original. Second emphasis added.) The Respondent's argument concerning preemption applies only to situations where state court rules would act to defeat arbitration. See Bradley v. Brentwood Homes, Inc. 398 S.C. 447, 730 S.E.2d 312 (2012). For example, the South Carolina UAA has certain requirements for the printing of the notice of arbitration in contracts, including the font size, the underlining, and whether it is prominently displayed. See S.C. Code §15-48-10(a). In contracts which involve interstate commerce, the FAA will not allow these notice requirements to defeat an otherwise valid arbitration agreement. Munoz. In other words, the FAA will pre-empt state court rules if those rules would frustrate the liberal Federal policy favoring arbitration.

In this particular case, however, the Appellant is not seeking to avoid arbitration. The Appellant concedes that the FIRST arbitration clause on the front of the Purchase Order is valid. The Appellant's complaint asks for arbitration. Therefore, since the Appellant has conceded to

the validity of the contractual agreement on the front page of the Purchase Order, preemption is not an issue. The purposes of the FAA have not been frustrated and the doctrine of preemption does not come into play on the issue of whether the case is subject to arbitration.

4. The Respondent has no standing to object to the validity of the first arbitration clause.

The South Carolina Uniform Arbitration Act has certain requirements for the printing of notice of arbitration in contracts, including the font size, the underlining, and whether it is prominently displayed. See S.C. Code §15-48-10(a). The purpose of these requirements is to disclose to the consumer the fact that the agreement calls for arbitration and that the consumer will be waiving his or her right to a jury trial. There is no purpose served in these requirements for providing any disclosure or notice to the automobile dealer especially since the automobile dealer wrote the document. But the Respondent (automobile dealer) in this case is attempting to turn the disclosure requirement on its head. The dealer has complained to the Trial Court that its disclosure of arbitration under its own contract does not meet the disclosure requirements of the Arbitration Act. The Respondent (automobile dealer) then makes the audacious argument that since it failed to provide disclosure (presumably to itself) with the correct size print that it should now have the privilege of taking advantage of its own failure by somehow invalidating its own arbitration clause. Such an argument is patently absurd. The disclosure requirements of the Uniform Arbitration Act are solely to protect the interest of the consumer and to provide disclosure and notice to the consumer that the agreement contains an arbitration clause. The disclosure requirements of the Uniform Arbitration Act are not intended to be a tripping mechanism for the dealer to use on the consumer. Only the consumer has the right to object to an arbitration clause which fails to meet the technical requirements of the Uniform Arbitration

Act. The dealer who wrote the document has no standing to object to the failure of its own disclosure.

All of the cases dealing with this issue in the South Carolina Appeals Courts and in the Federal Courts involve FAA preemption of arbitration agreements where the party who did not draft the agreement is attempting to avoid arbitration. The Appellant has not been able to locate even one case where the party who drafted the arbitration agreement is attempting to get out of State Court Arbitration because the drafter failed to comply with the technical requirements of a statute. Therefore, none of the cases cited by the Court below or by the Respondent are applicable to this particular fact situation.

5. The FAA validates the application of the UAA.

Section 2 of the Federal Arbitration Act declares that the UAA arbitration provision "shall be valid." Section 2 of the FAA states as follows:

> ... 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. (Emphasis added.)

The language in Section 2 above is the language from the FAA that is used by the Courts to preempt state laws which would invalidate an arbitration agreement. The language of this statement is essential to understanding the proper result in this case. It is important to note that the preemption clause does not state "If an arbitration agreement fails to meet the technical requirements of state law, then the arbitration agreement is replaced by the procedural rules of the Federal Arbitration Act." This is in fact what the Trial Court below ruled and it is what the Respondent is arguing. That is not, however, what Section 2 of the FAA states.

Section 2 clearly states that unless there exists grounds at law or in equity for the revocation of the arbitration clause that would apply across the board to any contract then that

particular arbitration clause "shall be valid, irrevocable, and enforceable... ." The FAA never intended to replace a state arbitration provision with the procedural rules of the Federal Arbitration Act. Preemption of Section 2 simply means that the state arbitration clause as it exists will be enforced even if the letters are not capitalized or if the clause is not in the correct location on the contract. It does not follow that the arbitration clause would be completely invalidated and replaced by the procedural rules of the FAA. This is exactly the opposite result from what the FAA intended. The FAA does not intend to replace the clause but it intends to validate the clause. Therefore, the Trial Court was in error in finding that the arbitration clause in the contract calling for arbitration under the South Carolina Uniform Arbitration Act must be replaced by the procedural rules of the FAA. In fact, Section 2 of the FAA states exactly the opposite, that the arbitration clause shall be validated and it shall be enforceable. Therefore, the first arbitration clause on the first page of the contract is in fact valid and enforceable pursuant to the very terms of the FAA.

B. The SECOND arbitration clause.

The SECOND ARBITRATION clause which is presented at the bottom of the reverse page of the Purchase Order is mostly supplemental and explanatory and therefore enforceable except for one conflicting provision which is ambiguous and unenforceable.

> On the reverse of the Purchase Order is the following language:
>
> **Arbitration Required by This Agreement.** The parties agree that, prior to the exercise of any other remedy allowed by law, any dispute, controversy, or claim arising out of or relating to the sale of the motor vehicle, negotiations for its purchase (including claimed fraudulent inducement), financing of its purchase (if any), or to this Purchase Order or to any other agreement between the parties relating to the motor vehicle (including the parties' retail installment sales contract if any), shall be submitted to binding arbitration; however, claims arising under the federal Magnusson Moss Warranty Act are not subject to arbitration. If 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. Such arbitration shall be conducted within 100 miles of the location of the sale of the motor vehicle. Each party shall pay its own costs. Any judgment on the award rendered by the arbitrator in such binding arbitration may be entered in any court having jurisdiction thereof. Nothing contained herein shall be deemed to require arbitration by any entity not a party to this Purchase Order.

After providing for arbitration under the UAA in the FIRST clause, the reverse side of the Purchase Order adds language that is ambiguous and confusing, as to the arbitration forum: "If the transaction involves interstate commerce, arbitration as described hereunder, shall be governed solely by the Federal Arbitration Act...." The apparent shift from the UAA to the FAA is meaningless since there is no question that the purchase of an automobile involves interstate commerce. The statement appears to be directed at the issue of preemption. The underlying meaning of the statement is, "If this contract somehow does not meet the arbitration notice requirements of the South Carolina UAA, which we agreed to on the front side, we still wish for the matter to be arbitrated because any of our mistakes in notice are pre-empted by the FAA." Such a statement is simply a restatement of what we know the law to be. It is well settled that when there is interstate commerce, the FAA validates the arbitration clause even if the notice requirements of state law are not met. Therefore, the statement is essentially meaningless, and does not change the choice of the procedural rules for arbitration from the UAA to the FAA.

Furthermore, if arbitration "shall be governed solely by the Federal Arbitration Act" then the SECOND clause becomes even more confusing by going on to state that "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." These statements are mutually

exclusive. Either the arbitration shall be governed "solely" by the procedural rules of the FAA or it will be conducted and governed by the AAA, or "such other arbitrator as may be mutually agreeable to the parties." These alternatives cannot co-exist. These options are extremely confusing and, in essence, incomprehensible. On the other hand, the FIRST clause on the front page of the Purchase Order is simple, direct, and unambiguous: "This contract is subject to arbitration under the South Carolina Uniform Arbitration Act."

South Carolina law states that any ambiguities in a contract must be resolved against the drafter of the document. Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 274 S.E.2d 423 (1981), quoting 17A C.J.S. Contracts §324, with approval:

> "(A)mbiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage.
>
> The reason for the rule of strict construction against the party preparing the contract is that one who speaks or writes can, by exactness of expression, more easily prevent mistakes in meaning more than one with whom he is dealing, and that he who has brought the agreement into existence and is thus primarily responsible for its inadequacy should justly suffer for its shortcomings."

The U.S. Supreme Court has applied the same rule of ambiguous contract construction in Arbitration. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995).

With regard to the Purchase Order in question, the statement on the front page of the Purchase Order is clear and unambiguous and provides for arbitration pursuant to the UAA. That simple statement is then confused and undermined by the ambiguous provision on the back of the Purchase Order which provides a default to the FAA or the AAA or some other arbitrator. This confusing and ambiguous statement on the reverse of the Purchase Order cannot be reconciled with the clear statement on the front of the Purchase Order because there is no

situation under which the contract would not involve interstate commerce and therefore the reference to the South Carolina UAA on the front page would be deceptive and misleading. This ambiguity must be resolved in favor of the clear and plain meaning of the FIRST arbitration clause found on the front of the Purchase Order providing for arbitration under the UAA.

When considering the appropriate forum for this case, the Appellant has argued that the South Carolina Uniform Arbitration Act provides the appropriate forum. The SECOND arbitration clause, however, does make reference to the American Arbitration Association. Should the Court determine that the SECOND clause on the Purchase Agreement takes precedence over the FIRST clause on the front page of the Purchase Agreement and that this matter should be arbitrated with the AAA, it is important for the Court to note that the AAA is set up to handle class actions. On October 8, 2003, the AAA adopted "Supplementary Rules for Class Arbitrations." (Please see Rules attached to the Appellant's Supplemental Memorandum.) The AAA is well equipped to handle class actions and anticipates handling class arbitrations for consumer cases.

Because the Defendant drafted the SECOND arbitration clause and specifically addresses the AAA, the Defendant is aware that the AAA has supplementary rules for class arbitrations and by referencing the AAA, the Defendant has implicitly consented to class arbitrations under the AAA Supplementary Rules for Class Arbitrations.

In Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010), the U.S. Supreme Court held that imposing class arbitration on parties who have not agreed to authorize class arbitration was inconsistent with the Federal Arbitration Act. The arbitration clause in Stolt-Nielsen was "silent" as to class action treatment in arbitration. In the present case, however, the FIRST and SECOND arbitration clauses are not silent as to class action treatment.

The FIRST and SECOND arbitration clauses do speak to Class Arbitrations in two respects. First, as discussed above, the SECOND clause designates the AAA as the arbitration forum and the AAA has specific rules for Class Arbitration. Second, the Dealers Act regulates the contract and the Dealers Act specifically provides for class treatment.

The entire agreement between the dealer and the purchaser is subject to the provisions of the South Carolina Manufacturers, Distributors and Dealers Act (Dealers Act). The Dealers Act is very specific in terms of the rights of consumers to band together in a class action. 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." This is a specific consumer remedy recognizing that some losses suffered by consumers may be so small that the loss would not warrant the filing of a single action. The Dealers Act recognizes that consumers are particularly vulnerable to abusive fees charged by dealers and therefore specifically provides for consumers to band together to seek justice against these unscrupulous charges and activities. The FIRST and SECOND arbitration clauses contained in the purchase agreement in this case cannot be read separately from the requirements and the protections provided by the Dealers Act. These protections are presumed to be a part of any contract and therefore the FIRST and SECOND arbitration clauses are not silent as to whether a class action can be brought in arbitration.

C. The THIRD arbitration clause.

The THIRD arbitration clause presented in a separate document labeled "Arbitration Agreement" is not valid.

1. **The THIRD arbitration clause is not valid because under the Dealers Act a consumer has a right to bring a class action and any attempted waiver of that right is against public policy.**

Generally speaking, arbitration agreements which involve interstate commerce will be enforceable under the Federal Arbitration Act. Section 2 of the FAA, however, provides for an exception to this general rule. Section 2 states as follows:

> That 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 exists at law or in equity for the revocation of any contract.

The last phrase of Section 2 is known as the "savings clause." This clause provides an exception to the general rule of enforcing arbitration agreements. In the State of South Carolina, one of the grounds for revoking or invalidating "any contract" is that the contract is unconscionable. Unconscionability of an arbitration agreement was the main point of discussion in the case of Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). Our Supreme Court found the arbitration clause in that case to be unconscionable for a number of reasons and invalidated the entire arbitration agreement. The arbitration agreement could not be saved under the doctrine of preemption because of the savings clause of Section 2 of the FAA. There were elements in the arbitration agreement in Simpson that would have been found unconscionable in any agreement, not just an arbitration agreement.

In the present case, the same savings clause applies to public policy. Because the Dealers Act specifically provides for the consumers right to bind together in a class action and because of the public policy considerations involved in disputes between consumers and automobile dealers, our Supreme Court has specifically held that a class action waiver in an automobile dealer

contract is in violation of the Dealers Act and therefore against public policy. Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394 (2010) (Herron I). The court in Herron I did not limit its holding to arbitration agreements. The public policy considerations of class actions under the Dealers Act would apply to any contract and not just to arbitration agreements. Since these public policy considerations would apply to any contract and not just arbitration agreements, the consumer's right to participate in a class action as granted by the Dealers Act satisfies the "grounds as exists at law or in equity for the revocation of any contract."

2. The THIRD arbitration clause is not valid because it contains self-defeating language.

The separate document labeled "Arbitration Agreement" contains the following pertinent language:

> 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. [Emphasis added.]

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 Dealers Act makes the class action waiver unenforceable. Therefore, the self-defeating words of the Third Arbitration clause makes that clause unenforceable.

The South Carolina Supreme Court addressed class action waivers 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).

In 2015, the United States Supreme Court once again overturned a California decision denying arbitration. In DirecTV v. Imburgia, 577 U.S. ____ (2015), the Court addressed an arbitration clause which contained a class action waiver with a self-defeating clause. The waiver specified that the entire arbitration provision was unenforceable if the "law of your state" made class-action waivers unenforceable. The lower court reasoned that since the law of California

did not allow class action waivers, and since that rule was the "law of your state" the entire arbitration agreement was unenforceable by its own self-defeating terms. The Supreme Court disagreed, reasoning that the lower court had asked the wrong question. The court stated, "Thus the underlying question of contract law at the time [the lower court] made its decision was whether the 'law of your state' included invalid California law. We must now decide whether answering that question in the affirmative is consistent with the [FAA]." (Emphasis in original.) Id. at ____.

Citing Concepcion, the Court concluded that the California law against class waivers was invalid because it did not place arbitration agreements on equal footing with all contracts. The California law targeted arbitration agreements. The Court held, "After examining the grounds upon which the Court of Appeal rested its decision, we conclude that California courts would not interpret contracts other than arbitration contracts the same way. Rather, several considerations lead us to conclude that the court's interpretation of this arbitration contract is unique, restricted to that field." Id. at ____. Therefore, the self-defeating clause was not triggered and the arbitration clause was valid.

The facts of the present case, however, are very different from the facts of DirecTV. The first and foremost distinction is that DirecTV and prior cases concerned the States' attempts to defeat arbitration altogether, which would frustrate the liberal Federal Policy in favor of arbitration as set forth in the FAA. In the present case, however, the Appellant has specifically requested arbitration. The Appellant agrees that the Purchase Order drafted by the Respondent specifically provides for arbitration pursuant to the South Carolina UAA. The Appellant is not trying to avoid arbitration.

The second distinguishing mark of the present case is that the self-defeating words of the THIRD clause are entirely different from that of DirecTV. The THIRD clause states, "if a waiver of class action rights is deemed or found to be unenforceable for any reason, ...the remainder of this Arbitration Agreement shall be unenforceable." (Emphasis added.) The fact that the class action waiver is in direct violation of a state statute (Herron I) is certainly a sufficient "reason" for the waiver to be found "unenforceable."

Even though the self-defeating words render the THIRD clause unenforceable, they have no effect on the FIRST arbitration clause. The THIRD arbitration clause states that the remainder of "this Arbitration Agreement" shall be unenforceable. "This" Arbitration Agreement refers only to the separate document known herein as the THIRD clause. The self-defeating words do not address the FIRST arbitration clause found in the Purchase Order. Since there remains a valid arbitration clause, the purposes of the FAA are not frustrated.

The Third distinction is that the class action provision of the Dealers Act applies to all situations which arise under the Act. It does not single out arbitration as the California law did in DirecTV. The class action provision of The Dealers Act would trump a class action waiver in any contract to purchase a vehicle, with or without an arbitration clause. The Dealers Act was adopted in 1962, long before arbitration became popular. In 1962, the South Carolina legislature could not possibly have intended to single out arbitration class action waivers, because there is no evidence that such waivers existed at the time. The purpose of providing for class actions under the Dealers Act was most certainly to provide a practical economical remedy for a large group of car buyers who have suffered the same type harm. Herron I. The purpose was not to defeat arbitration clauses, or to frustrate the purposes of the FAA.

3. The THIRD arbitration clause is not valid because it is unconscionable.

Title 9 U.S.C. §2 of the Federal Arbitration Act provides that an Arbitration Agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The South Carolina Supreme Court has held an automobile dealer arbitration clause may be invalid and unenforceable if its terms are unconscionable. See Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). In the present case, the THIRD clause entitled "Arbitration Agreement" is unconscionable because it attempts to supplant the complete and valid arbitration agreement in the Purchase Order.

To allow two separate and conflicting Arbitration Agreements to exist at the same time and to allow the Respondent to choose between the two would create an unfair advantage for the dealer. It is unconscionable for the Respondent to create two or more conflicting Arbitration Agreements and then to have the right to pick which agreement it desires to follow in the event of a claim. The very fact that a separate document entitled "Arbitration Agreement" exists at all is in itself unconscionable.

The unfairness in allowing the Respondent to choose which clause to follow is readily apparent when the conflicting provisions are compared. The SECOND arbitration clause on the reverse of the Purchase Order provides that "each party shall pay its own costs." This provision is in direct conflict with the THIRD arbitration clause which provides that the Respondent dealer will pay the Appellant's filing, administration, service, and case management fees up to a maximum of Five Thousand ($5,000) Dollars. In a case of lesser significance than the one at bar, the Respondent might advocate following the SECOND arbitration clause. By doing so, the Respondent could discourage a claimant from bringing a small claim because the SECOND clause requires the claimant to pay her own costs of arbitration. To leave this option in the hands

of the Respondent through two mutually exclusive and entirely inconsistent arbitration clauses is unconscionable.

Another unfair choice is found in the self-defeating words of the THIRD clause. (See discussion in C, above.) These self-defeating words give the Respondent the unilateral option to choose those matters which it would like to arbitrate. The Dealer may deem it advantageous to arbitrate small matters at a high cost to individual consumers. On the other hand, when it comes to class wide arbitration, the dealer may not want any arbitration but may rather litigate a class action in State Court where it has the advantage of State Court rules and an appeals process. (Class wide arbitration has proved effective in other cases. See e.g. Oxford Health Plans, LLC v. Sutter, 569 U.S. ___ (2013), where the U.S. Supreme Court allowed an arbitrator's class certification to stand.)

This provision is not only self-defeating, but it makes the entire document labeled "Arbitration Agreement" to be non-mutual. The Respondent gets to force the Appellant into costly arbitration in small claims while having the option of State Court for class claims. This non-mutual choice is unfair and unconscionable. The Respondent can elect arbitration which favors the Respondent. But, if the arbitration forum turns out not to favor the Respondent, then the Respondent may elect to void the entire arbitration contract and be allowed to litigate in State Court.

This particular case can be distinguished from a long line of United States Supreme Court cases cited by the Respondent, which call into question a state's reason for declaring any particular arbitration clause to be unenforceable under State law. See AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011) and cases cited therein. The reason is quite simple. None of those cases involved a choice between two arbitration clauses. All of those cases involved a

choice between arbitration and judicial forums. This case is entirely different because the Appellant is actually requesting and demanding arbitration. Therefore, the Appellant is not seeking to frustrate the purposes of the FAA and in fact the end result of Appellant's Motion to Compel Arbitration would further the Federal policy of arbitration. Therefore, the preemption aspects of the Federal Arbitration Act have no bearing on the Court's enforcement of the FIRST arbitration clause on the front page of the Purchase Order.

4. The THIRD arbitration clause is not valid because there is no reference to it in the Purchase Order.

As stated above, the Purchase Order is the complete and exclusive statement of the terms of the purchase and sale of this vehicle. Perhaps the separate document labeled "Arbitration Agreement" could be saved or incorporated if in fact there were some reference in the Purchase Agreement to its existence. But, in fact, there is not. There is not a single mention anywhere in the Purchase Order as to the existence of any addendum which would supersede, modify, alter, amend or otherwise change in any way the valid and enforceable and complete Arbitration Agreement contained within the four corners of the Purchase Agreement.

There is an entire section on the back of the Purchase Order devoted to the explanation of arbitration. This SECOND arbitration clause contains over 220 words and terms and none of them refer to or address any addendum or separate "Arbitration Agreement." The SECOND arbitration clause on the back of the Purchase Order deals with numerous issues including the types of conflicts to be included in arbitration, the Purchase Order, the RISC, the nature of arbitration being binding, the exemption of claims under the Federal Magnusson Moss Warranty Act, the South Carolina Arbitration Act, the distance that the arbitration must be held from the sale of the motor vehicle, the payment of costs, entry of judgment in a court of competent jurisdiction and the involvement of third parties in the arbitration process. Nowhere does this

arbitration clause contain even the slightest hint of a reference to any additional "agreement" between the parties.

5. The THIRD arbitration clause is not valid because it is irreparably in conflict with the arbitration provisions contained within the four corners of the Purchase Order.

There are at least four serious conflicts between the Purchase Order and the THIRD arbitration clause.

Initially, the FIRST arbitration clause of the Purchase Order provides that the South Carolina Uniform Arbitration Act shall apply. The THIRD clause is directly at odds with this provision. The THIRD clause states "You may choose the American Arbitration Association..., or any other organization to conduct the arbitration subject to our approval." There is no provision to apply the South Carolina UAA. These two provisions are in direct conflict and cannot be reconciled. For example, the South Carolina Rules provide for three arbitrators, one arbitrator to be chosen by the Appellant and one to be chosen by the Respondent and a third arbitrator to be chosen by the two arbitrators. S.C. Code §15-48-30. The rules of the AAA, however, provide for only one arbitrator. These two provisions are mutually exclusive and cannot be reconciled.

Secondly, the FIRST and SECOND arbitration clauses contained within the four corners of the Purchase Order do not contain any class action waiver. Implicit in the Purchase Order is the understanding that the law of the State of South Carolina must be followed. This law would include the law of the Dealers Act which specifically provides for class action treatment. Therefore, the arbitration provisions contained within the four corners of the Purchase Order are not "silent" on the issue of class actions. Cf. Bazzle v. Green Tree Fin. Corp., 351 S.C. 244, 569 S.E.2d 349 (2002), vacated and remanded by Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444

(2003). By contrast, the THIRD arbitration clause attempts to violate the public policy of the State of South Carolina and specifically invalidate the will and intent of the legislature with regard to class actions under the Dealers Act. The Purchase Order and the THIRD clause are in direct conflict on class treatment. This difference is such a serious conflict as to completely invalidate the THIRD clause.

Thirdly, the SECOND arbitration clause specifically states "each party shall pay its own costs." In direct conflict with this provision, the THIRD clause provides that the dealer will pay administration and case management fees up to a maximum of $5,000. These two provisions are completely irreconcilable and at odds with one another. The Respondent can choose which one applies to any particular case. Such a choice gives the dealer an unfair advantage. Having two different provisions, one in the Purchase Order and one in a separate document, would give the Respondent the option of choosing the provision that most benefits the dealer depending on the claim. (See discussion above.)

Lastly, the Purchase Order unequivocally requires arbitration whereas the THIRD clause permits arbitration on certain conditions. The provisions on the reverse of the Purchase Order state that "any dispute, controversy or claim... shall be submitted to binding arbitration...." (Emphasis added.) In other words, arbitration is mandatory. The THIRD clause, however, provides "optional" arbitration "at your or our election" thus making the choice of arbitration executory in nature. Even on this point, however, the so called "Arbitration Agreement" is at odds with itself. If the Appellant "chooses" arbitration, that choice will be nullified if in fact the class action waiver provision is found to be void or unenforceable. Thus, the THIRD clause is not only in direct conflict with the four corners of the Purchase Order, but it is also in conflict with itself.

6. The THIRD arbitration clause is not valid because the Purchase Order cancels, supersedes and excludes any other statements.

The front page of the Retail Purchase Order provides at the bottom, just above the signature lines, in pertinent part, as follows:

> 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 supersede any prior agreement or contract and comprise the complete and exclusive statement of the terms of this transaction. [Emphasis in original.]

By its own terms, the Purchase Order unequivocally states that the terms contained in the Purchase Order (the face and reverse side) and the Retail Installment Sales Contract (RISC) comprise the "complete and exclusive statement" of the contract between the parties.

The Respondents have put forth a so called "arbitration agreement" which is a separate document from the Purchase Order. By the very express and exclusive terms of the Purchase Order itself, this separate document is extraneous to the four corners of the Purchase Order and to the RISC. The Purchase Order specifically states that the Purchase Order would "cancel and supersede" any other agreement or contract.

II. THE TRIAL COURT ERRED IN FINDING THE CLASS ACTION WAIVER TO BE VALID AND ENFORCEABLE.

On Page 11 of the Trial Court's Order, the Trial Court stated "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."

The Trial Court made a misguided leap from the United States Supreme Court's holding in Concepcion to finding that the class action waiver in this particular case is valid and enforceable. There are a number of important distinctions separating these cases which would dictate a different result.

In the present case, the class action waiver is in direct contravention of the public policy of South Carolina as stated in the Dealers Act which applies to all contracts not just arbitration clauses. Section 2 of the Federal Arbitration Act provides that an arbitration agreement "Shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract." The United States Supreme Court has interpreted the savings clause of this section to mean that a state law which invalidates class action waivers cannot defeat arbitration clauses if that state law applies to arbitration agreements and not to contracts in general. In other words, the savings clause can only be invoked for arbitration-neutral state law requirements. For example, the South Carolina Uniform Arbitration Act requires that the disclosure of an arbitration clause be in certain size font and placed at a certain location on the contract. Numerous cases have held that these technical requirements of the Uniform Arbitration Act cannot defeat arbitration when there is interstate commerce because the Uniform Arbitration Act is specifically directed at arbitration. The Dealers Act is completely the opposite. The provision for class actions in the Dealers Act is not directed at arbitration. It is a general rule that would apply to any contract for the purchase and sale of a vehicle. See discussion in Section I.C. above and the extensive discussion of DirecTV v. Imburgia, 577 U.S. ____ (2015).

The Respondent dealership is quite aware that the class action waiver is in violation of the Dealers Act and is not valid. The dealership has even prepared its own fate. The dealership has written the arbitration clause to state "We want to violate the Dealers Act and trample the consumers' rights by not allowing the consumer to have the right to proceed in a class action, but on the other hand, if we are found guilty we would like to pronounce our own sentence. Our sentence should be that all arbitration clauses will be invalid and we want to go back to trial court where we can have the right to appeal any class action ruling." The temerity of the dealer

in this case is mind boggling. The dealer knows that he is violating state law and stripping the consumer of important rights and then attempts to declare that, if he is caught doing this, then he wants a do over. This Court should not tolerate such arrogance. The fact of the matter is the dealer cannot trample the consumer's important rights to band together in a class action.

Federal preemption does not come into play. The Trial Court has misinterpreted the intent of Federal preemption under the Federal Arbitration Act and the Respondent has attempted to misapply it to this case. The purpose of Federal preemption is to ensure that arbitration takes place in some form or fashion. The FAA does not necessarily default arbitration to the rules of the FAA especially not if rules are already provided by a state arbitration statute. In this case, Federal preemption does not come into play at all because the Appellant has specifically requested arbitration. The Appellant is not trying to get out of arbitration but is trying to enforce arbitration. The arguments concerning preemption are completely gratuitous to the case. They mean nothing in the context of what the Appellant is asking for.

CONCLUSION

The Appellant requests this court to reverse the Trial Court Order. This court should order Arbitration to proceed under the UAA and should find the THIRD arbitration clause to be invalid and the class action waiver to be void against Public Policy.

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November 27, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Thomas A. Russo, Presiding Judge

APPELLATE CASE NO. 2017-001720

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

vs.

Five Star Florence, LLC..... Respondent

PROOF OF SERVICE

PERSONALLY appeared before me, Shelia, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served the **Initial Brief of Appellant Sunday Kay Murphy and Appellant's Designation of Matter To Be Included on the Record On Appeal** on the Respondent, through its attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Sarah P. Spruill, Esquire
Haynsworth Sinkler Boyd, P.A.
Post Office Box 2048
Greenville, SC 29602

Date of Mailing: November 28th, 2017

Lynn C. Benton

SWORN to before me this
28th day of November, 2017

Notary Public for South Carolina
My Commission Expires: 6/17/24

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November 27, 2017

Ms. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Sunday Kay Murphy, individually and in a representative capacity for all others similarly situated v. Five Star Florence, LLC
Appellate Case No.: 2017-001720

Dear Ms. Kitchings:

Enclosed please find the following:

1. The original and a copy of Initial Brief of Appellant Sunday Kay Murphy;
2. The original and a copy of Appellant's Designation of Matter to Be Included on the Record On Appeal;
3. The original and a copy of Proof of Service of same.

Please file the originals and return a clocked copy of each of these documents in the envelope provided for your convenience.

I am, by copy of this letter, serving the same upon counsel of record.

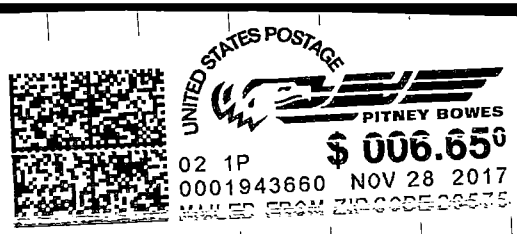
With best wishes, I remain

Sincerely yours,

L. Sidney Connor, IV

LSCIV:lb
Enclosures

cc w/encl.: Sarah P. Spruill, Esquire



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