

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

RECEIVED
FEB 16 2018
SC Court of Appeals

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

vs.

Five Star Florence, LLC..... Respondent

RECORD ON APPEAL

L. Sidney Connor, IV
KELAHHER, CONNELL & CONNOR, P.C.
Post Office Drawer 14547
Surfside Beach, SC 29587-4547
(843) 238-5648
sconnor@classactlaw.net

ATTORNEYS FOR APPELLANT

Sarah P. Spruill, Esquire
Haynsworth Sinkler Boyd, P.A.
Post Office Box 2048
Greenville, SC 29602
864-240-3200
Spruill@hsblawfirm.com

John H. Tiller, Esquire
Amy F. Bower, Esquire
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 4th Floor
Charleston, SC 29401
843-722-3366
jtiller@hsblawfirm.com
abower@hsblawfirm.com

ATTORNEYS FOR RESPONDENT

INDEX

Order Denying Appellant’s Motion to Compel State Arbitration and Granting Defendant’s Motions to Stay Proceedings and Compel Federal Arbitration, filed August 2, 2017.....1

Appellant’s original Complaint, filed December 22, 2015.....13

Respondent’s original Answer, filed March 4, 2016.....17

Appellant’s Motion to Compel Arbitration filed March 28, 2016.....25

Respondent’s Motion to Stay Proceedings and Compel Arbitration filed March 4, 2016.....51

Appellant’s Supplemental Memorandum in Support of Plaintiff’s Motion to Compel Arbitration and In Opposition to the Defendant’s Motion to Stay Proceeding.....76

Transcript of Hearing on 02/14/2017.....85

Certificate of Counsel.....109

STATE OF SOUTH CAROLINA)

FILED

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

COUNTY OF FLORENCE)

2017 AUG -2 PM 2:10 CASE NO.: 2015-CP-21-3521

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

Plaintiffs,)

vs.)

Five Star Florence, LLC,)

Defendant.)

**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

CERTIFIED: A TRUE COPY

Sarah P. Spruill
CLERK OF COURT C.P. & G.S.
COUNTY OF FLORENCE, 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; Zabinski 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).

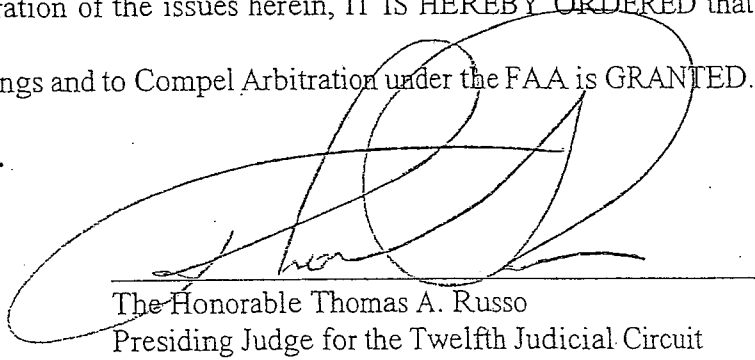
Thus, it appears that current South Carolina law stands in stark contrast to the United States Supreme Court Concepcion decision. South Carolina law would strike down the class action waiver in the instant case as against public policy, while the United States Supreme Court would allow it. However, under 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

FILED
2017 AUG -2 PM 2:17
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, SC

CERTIFIED: A TRUE COPY
Carol Ann O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C. 12

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
CASE NO.: 15-CP-21_____

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

Plaintiffs,)

vs.)

Five Star Florence, LLC,)

Defendant.)

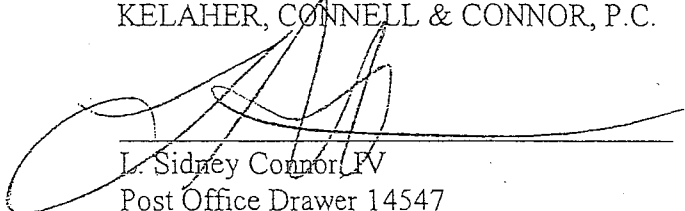
**SUMMONS
(Class Action)
ARBITRATION**

FILED
CLERK
2015 DEC 22 PM 1:29

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 Plaintiffs

December 9, 2015

CERTIFIED: A TRUE COPY



CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
CASE NO.: 15-CP-21 3521

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

Plaintiffs,)

vs.)

Five Star Florence, LLC,)

Defendant.)

COMPLAINT
(Class Action)
ARBITRATION

2015 DEC 22 PM 1:29
CLERK
FLORENCE

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

1. The named Plaintiff, Sunday Kay Murphy, is a citizen and resident of the State of South Carolina, County of Horry.
2. The Defendant Five Star Florence, LLC is a limited liability company organized and existing pursuant to the laws of the State of South Carolina, primarily doing business in Florence, South Carolina through several dealership locations.
3. This court has jurisdiction to monitor this case under the South Carolina Uniform Arbitration Act, S.C. Code §§15-48-10, et seq.

FACTUAL ALLEGATIONS

4. On or about July 31, 2015, Plaintiff purchased a new vehicle from the Defendant Five Star Florence, LLC.
5. The Defendant Five Star Florence, LLC had the Plaintiff sign a Purchase Agreement with a preprinted "closing fee" of \$699.00.
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

CERTIFIED: A TRUE COPY

Carole Ann Sypa

CLERK OF COURT C.P. & G.S.
14 FLORENCE COUNTY, S.C.

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.

8. According to the Purchase Agreement, this action is subject to arbitration pursuant to the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10 et. seq.

CLASS ALLEGATIONS

9. 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).

10. The class consists of those persons who have purchased vehicles from Five Star Florence, LLC and were charged a closing fee.

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

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

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

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

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

FOR A FIRST CLAIM (Negligence)

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

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

18. 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.

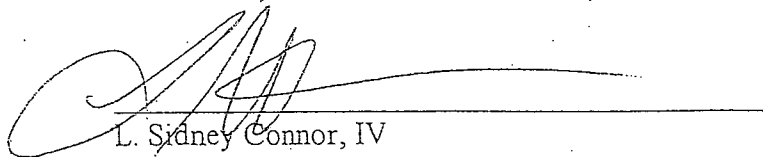
19. The aforementioned acts and omission's in violation of the Dealers Act were negligent, intentional, arbitrary, reckless, and willful.

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

21. 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

December 9, 2015

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)
)
Sunday Kay Murphy, individually and in a)
representative capacity for all others,)
similarly situated,)
)
Plaintiff,)
)
v.)
)
Five Star Florence, LLC,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2015-CP-21-3521

**DEFENDANT'S ANSWER TO
PLAINTIFF'S COMPLAINT**

Defendant Five Star Florence, LLC ("Defendant") hereby answers the Plaintiff's 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 dated July 31, 2015, 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. In the Arbitration Agreement dated July 31, 2015, Plaintiff also gave up her right to participate as a class representative or class member on any class claim.

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

5. In answering the allegations of paragraph 2, Defendant would admit that it is a limited liability company organized and existing under the laws of the State of South Carolina, primarily doing business in Florence, South Carolina. Defendant denies the remaining allegations of paragraph 2.

6. Defendant denies the allegations of paragraph 3.

7. Defendant admits the allegations of paragraph 4.

8. In answering the allegations of paragraph 5, Defendant would admit that the closing fee for Plaintiff's vehicle purchase was \$699.00. Defendant denies the remaining allegations of paragraph 5.

9. Defendant does not believe paragraph 6 requires a response from it. However, to the extent any response is required, Defendant would agree that paragraph 6 cites the language of S.C. Code Ann. § 37-2-307. Defendant denies paragraph 6 to the extent it alleges or implies it breached the provisions of S.C. Code Ann. § 37-2-307.

10. Defendant contends paragraph 7 contains conclusions of law which Defendant is neither required to admit nor deny. To the extent any response is required, Defendant denies the same.

11. Defendant denies the allegations of paragraph 8. In answering the allegations of paragraph 8, Defendant would further state that the transaction involved interstate commerce and, pursuant to the Arbitration Agreement, the Federal Arbitration Act applies.

12. In answering the allegations of paragraphs 9, 10, 11, 12, 13, 14, and 15, Defendant would allege that Plaintiff has waived her right to participate as a class representative or class member in the Arbitration Agreement she signed on July 31, 2015. As such, Defendant denies the allegations of paragraphs 9, 10, 11, 12, 13, 14, and 15.

13. In answering the allegations of paragraph 16, Defendant realleges the previous paragraphs of this Answer as fully as if repeated herein verbatim.

14. Defendant contends paragraph 17 contains conclusions of law which Defendant is neither required to admit nor deny. To the extent any response is required, Defendant denies the same.

15. Defendant denies the allegations of paragraph 18 and its subparts.

16. Defendant denies the allegations of paragraph 19.

17. In answering the allegations of paragraphs 20 and 21, Defendant would allege that Plaintiff has waived her right to participate as a class representative or class member in the Arbitration Agreement she signed on July 31, 2015. As such, Defendant denies the allegations of paragraph 20 and 21.

THIRD DEFENSE
(Failure to State a Cause of Action)

18. 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), SCRCF.

FOURTH DEFENSE
(Waiver of Right to Class Action)

19. Pursuant to the express provisions of the Arbitration Agreement dated July 31, 2015, Plaintiff waived her right to participate as a class representative or class member of any class claim against Five Star. As such, Plaintiff is not entitled to proceed in a representative capacity for all other similarly situated.

FIFTH DEFENSE
(Failure to Meet Rule 23, SCRCP Requirements)

20. For a further defense, Plaintiff has not pleaded and proven, and will not be able to prove, all prerequisite requirements necessary to bring a class action lawsuit as contained in Rule 23, SCRCP, and applicable case law.

21. The requirements of Rule 23 include proof that the class is so numerous that joinder of all members is impracticable, that there are questions of law or fact common to the class, that the claims or defenses of the representative parties are typical of the claims or defenses of the class, that the representative parties will fairly and adequately protect the interests of the class, and that in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds \$100 for each member of the class.

SIXTH DEFENSE
(Acts of Third Parties)

22. 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.

SEVENTH DEFENSE
(Comparative Negligence)

23. 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.

EIGHTH DEFENSE
(Estoppel by Silence/Consent)

24. 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.

25. 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.

26. 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.

NINTH DEFENSE
(Equitable Defenses)

27. Plaintiff's claims are barred by all equitable doctrines available to Defendant, including, but not limited to, laches, ratification, unclean hands, waiver, estoppel, and unjust enrichment.

TENTH DEFENSE
(Voluntary Payment Doctrine)

28. 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.

ELEVENTH DEFENSE
(Injury Reasonably Avoidable)

29. 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.

TWELFTH DEFENSE
(Exclusive Remedy)

30. 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.

31. 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).

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

32. Closing fees charged in motor vehicle sales transactions, are authorized under the provisions of the Closing Fee Statute and regulated by the 2001 Administrative Interpretation, which interprets the Closing Fee Statute and establishes certain requirements and conditions for motor vehicle dealers to charge closing fees in motor vehicle sales and lease transactions. At all

relevant times, Defendant has charged closing fees in conformity with the requirements and conditions of the 2001 Administrative Interpretation. Thus, pursuant to S.C. Code § 37-6-506(3) and § 37-6-104(4), Defendant should not be liable for actions which, prior to any South Carolina Supreme Court interpretation, have not been considered violations of the Closing Fee Statute by the South Carolina Department of Consumer Affairs. Any interpretation adopted by the South Carolina Supreme Court regarding Defendant's compliance with the Closing Fee Statute should affect future transactions only and Defendant should be held harmless for any actions based on the Department of Consumer Affairs' prior rules and interpretations.

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

33. 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).

FIFTEENTH DEFENSE
(Filed Rate Doctrine)

34. 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.



John H. Tiller

Amy F. Bower

Haynsworth Sinkler Boyd, P.A.

134 Meeting Street, 4th Floor

Charleston, SC 29401

(843) 722-3366

jtiller@hsblawfirm.com

abower@hsblawfirm.com

*Attorneys for Defendant
Five Star Florence, LLC*

Charleston, South Carolina

March 4, 2016

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS
TWENTY-FIRST JUDICIAL CIRCUIT
CASE NO.: 15-CP-21-3521

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

Plaintiffs,)

vs.)

Five Star Florence, LLC,)

Defendant.)

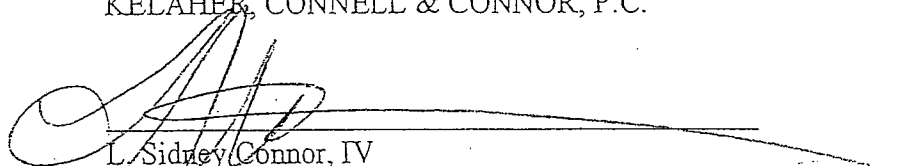
**NOTICE OF MOTION AND MOTION
TO COMPEL ARBITRATION**

FILED
2016 MAR 23 11:11
COMMISSIONER OF COURTS
FLORENCE COUNTY, SOUTH CAROLINA

TO: JOHN H. TILLER AND AMY F. BOWER, ATTORNEYS FOR DEFENDANT

YOU WILL PLEASE TAKE NOTICE that, on April 12, 2016 at 9:30 a.m., 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 under the South Carolina Uniform Arbitration Act. This motion is based upon S.C. Code Ann. §15-48-20(a) and as further set forth in the attached Memorandum.

KELAHER, CONNELL & CONNOR, P.C.



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

March 23, 2016

ATTACHED: A TRUE COPY
L. Sidney Connor, IV
COMMISSIONER OF COURTS
FLORENCE COUNTY, SC

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

KELAHER, CONNELL & CONNOR, P.C.

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

March 23, 2016

FILED
MAR 28 AM 11:13
CLERK OF COURT
FLORENCE COUNTY, S.C.

DETERMINED A TRUE COPY
Clerk of Court
CLERK OF COURT OF S.C.
FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS
TWENTY-FIRST JUDICIAL CIRCUIT
CASE NO.: 15-CP-21-3521

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

vs.)

Five Star Florence, LLC,)
)
Defendant.)

MEMORANDUM IN SUPPORT
OF PLAINTIFF'S MOTION TO COMPEL
ARBITRATION AND IN OPPOSITION TO
THE DEFENDANT'S MOTION TO
STAY PROCEEDINGS

2016 MAR 28 AM 11:11
COMMON PLEAS
FLORENCE

The Plaintiff filed her Complaint in the Court of Common Pleas seeking arbitration pursuant to the South Carolina Uniform Arbitration Act (UAA). The Defendant filed an Answer and moved to stay the proceedings and to compel arbitration "pursuant to the Federal Arbitration Act." While both the Plaintiff and Defendant agree that the matter is to be arbitrated, the parties disagree as to the appropriate rules and forum. The Defendant has moved to stay this proceeding and asks the Court to order arbitration in a forum not prescribed by the Uniform Arbitration Act. The Plaintiff moves that the matter be arbitrated according to the UAA.

Arbitration appears at three (3) different places in the documents provided to the court. The FIRST arbitration clause appears on the front page of the Purchase Order (Exhibit A, attached.) 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."

CLERK OF COURT
FLORENCE COUNTY, S.C.

The THIRD arbitration clause appears on a separate document entitled "ARBITRATION AGREEMENT." (Exhibit B, attached.) The Defendant's brief discusses only the THIRD clause and fails to mention either of the arbitration clauses contained in the Purchase Order.

The Plaintiff requests this Court to find that the FIRST arbitration clause directing arbitration pursuant to the South Carolina Uniform Arbitration Act is valid and enforceable. The Plaintiff also requests the court to find that 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 Plaintiff would further ask this court to declare that the THIRD clause is invalid based on the reasons listed herein. The Plaintiff would then ask the Court to order arbitration to proceed forward pursuant to the South Carolina Uniform Arbitration Act.

I. The FIRST arbitration clause is valid and enforceable and stands on its own.

A. 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 Defendant and presented to the Plaintiff as a contract of adhesion. It specifically states that arbitration will be pursuant to the UAA. The Plaintiff 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.

B. 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 Plaintiff is not seeking to avoid arbitration. On the contrary, the Plaintiff 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.

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

The Defendant goes to great lengths to state that arbitration is enforceable pursuant to the FAA by making extensive arguments concerning interstate commerce and attaching an Affidavit related to interstate commerce. Interstate commerce is not, however, 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 Defendant’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 Plaintiff is not seeking to avoid arbitration. The Plaintiff concedes that the FIRST arbitration clause on the front of the Purchase Order is valid. The Plaintiff’s complaint asks for arbitration. Therefore, since the Plaintiff 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.

D. Arbitration pursuant to the UAA is initiated by filing an Arbitration Complaint in Circuit Court.

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 the Plaintiff files 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 Plaintiffs have done in this case.

II. 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 requires arbitration even if the notice requirements of state law are not met. Therefore, the statement is essentially meaningless, and does not change the choice of arbitration forum 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 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.

III. The **THIRD** arbitration clause presented in a separate document labeled “Arbitration Agreement” is not valid.

A. 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 Defendants 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.

B. The **THIRD** arbitration clause is not valid because there is no reference to it in either the Purchase Order or the Retail Installment Sales Contract.

As stated above, the Purchase Order and the RISC comprise 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 or the RISC 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.

C. The **THIRD** arbitration clause is not valid because it cancels itself with self-defeating words.

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 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 ^CConcepcion, 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 Plaintiff has specifically requested arbitration. The Plaintiff agrees that the Purchase Order drafted by the Defendant specifically provides for arbitration pursuant to the South Carolina UAA. The Plaintiff is not trying to avoid arbitration. Ironically, it is the Defendant who is trying to defeat its own agreement to arbitrate. The Defendant is the one trying to subvert the State and Federal policy favoring arbitration by adding self-defeating words.

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." It is irrelevant to this case that preemption was not preserved in Herron I, because preemption is not an issue in the present case. 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 South Carolina Supreme Court would hold the class action waiver of the THIRD clause to be void as against public policy because it violates the specific class action provisions in the Dealers Act. Such a decision would not be preempted by the FAA because the result would be to proceed to arbitration, which is exactly what was intended by the FAA. Therefore,

the so called "Arbitration Agreement" is rendered void and unenforceable by its own terms and the parties still end up in arbitration, pursuant to the FIRST arbitration clause contained in the Purchaser Order.

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. The purpose was not to defeat arbitration clauses, or to frustrate the purposes of the FAA.

D. 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 Defendant to choose between the two would create an unfair advantage for the

dealer. It is unconscionable for the Defendant 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 Defendant 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 Defendant dealer will pay the Plaintiff'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 Defendant might advocate following the SECOND arbitration clause. By doing so, the Defendant 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 Defendant 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 Defendant the unilateral option to choose those matters which it would like to arbitrate. The Defendant deems it advantageous to arbitrate small matters at a high cost to individual Plaintiffs. On the other hand, when it comes to class wide arbitration, the Defendant does not want any arbitration but would rather litigate a class action in State Court where it has the advantage of State Court rules and an appeals process. (Indeed, Class wide arbitration has proved to be fair and beneficial to class Plaintiffs in some

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 Defendant gets to force the Plaintiff 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 Defendant wants arbitration as long as arbitration favors the Defendant. But, if the arbitration forum turns out not to favor the Defendant, then the Defendant would like 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 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 non-arbitration forums. This case is entirely different because the Plaintiff is actually requesting and demanding arbitration. Therefore, the Plaintiff is not seeking to frustrate the purposes of the FAA and in fact the end result of Plaintiff'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.

E. 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. Most notably, the South Carolina Rules provide for three arbitrators, one arbitrator to be chosen by the Plaintiff and one to be chosen by the Defendant 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.

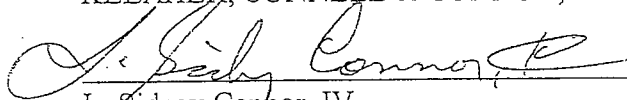
Thirdly, the SECOND arbitration clause specifically states "each party shall pay its own costs." In direct conflict with this provision, the THIRD clause provides that the dealer will pay administration and case management fees up to a maximum of \$5,000. These two provisions are completely irreconcilable and at odds with one another. The Defendant wants to 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 Defendant 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 Plaintiff "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.

CONCLUSION

The Plaintiff requests this Court to find that the FIRST arbitration clause directing arbitration pursuant to the South Carolina Uniform Arbitration Act is valid and enforceable. The Plaintiff also requests the court to find that 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 Plaintiff would further ask this court to declare that the THIRD clause is invalid. The Plaintiff would then ask the Court to order arbitration to proceed forward pursuant to the South Carolina Uniform Arbitration Act.

KELAHER, CONNELL & CONNOR, P.C.



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

March 23, 2016

CONTINUED FROM THE FRONT

Purchaser accepts delivery of the vehicle sold by Dealer as described herein. If the vehicle purchased is a new vehicle: (a) Purchaser certifies and warrants to Dealer that Purchaser is not purchasing the vehicle for export or for principal use outside the United States, (b) Purchaser certifies and warrants to Dealer that Purchaser is not purchasing the vehicle for resale, and (c) Purchaser acknowledges that the vehicle has a manufacturer's window sticker which has not been removed, altered or rendered illegible prior to delivery of the vehicle to Purchaser.

Purchaser will pay the balance for the Vehicle on the terms specified in this Order and accept delivery of the Vehicle within forty-eight hours after Purchaser has been notified that it is ready. In the event Purchaser fails to take delivery of the Vehicle when notified, Purchaser's deposit may be retained as liquidated damages for Dealer's expense and efforts in the matter, and Dealer may dispose of the Vehicle without any liability to Purchaser whatsoever.

If an allowance on a trade-in Vehicle is involved in this purchase, in the event the trade-in vehicle is delivered to Dealer and this Order is thereafter cancelled, Dealer will return the trade-in to Purchaser upon receipt of payment for Dealer's reasonable charges for storage and for any repairs made by Dealer while the trade-in vehicle was in Dealer's possession. If the trade-in vehicle has been sold by Dealer before said cancellation, Dealer will pay Purchaser the net proceeds for such sale, less a selling commission of 15% and less any expense incurred by Dealer in storing, conditioning and advertising the trade-in vehicle for sale. If the trade-in vehicle is not delivered to Dealer until Purchaser receives the within ordered Vehicle, the trade-in vehicle will be subject to reappraisal and Dealer's appraisal at the time of delivery will be the allowance for the trade-in vehicle.

The Purchaser agrees to immediately pay the amount, if any, by which the actual payoff on the traded vehicle exceeds the payoff set forth herein. Purchaser further acknowledges that Dealer has relied on the certifications set forth herein and is entitled to recover any damages which may arise should such certifications be false or misleading. Alternatively, Dealer may, at its option, declare this contract null and void with no title passing to Purchaser and Purchaser will take the trade-in vehicle back and return, immediately and in full, any consideration received for the trade-in vehicle (including, without limitation, the vehicle sold to Purchaser together with reasonable sums due for any damages sustained by that vehicle while in the Purchaser's possession.)

Cash or trade-in vehicle, or proceeds from the sale of such trade-in vehicle, accepted as a deposit on this Order shall be held in trust by Dealer until delivery of the within ordered Vehicle is effected.

It is expressly agreed that Purchaser will acquire no right, title or interest in or to the Vehicle which Purchaser agrees to purchase hereunder until such Vehicle is delivered to Purchaser and either the full purchase price is paid in cash or a satisfactory deferred payment agreement is executed by the parties hereto and accepted by a mutually agreed finance company or bank, the terms of which shall thereafter be controlling.

The price quoted is for immediate delivery. If the price of the Vehicle or any accessories should be changed by the Manufacturer before the vehicle has been delivered to Purchaser, then this Order shall be construed as if the changed price were originally inserted herein or, at Purchaser's Option, this Order may be annulled.

Dealer shall not be liable for failure to deliver or delay in delivering the Vehicle covered by this Agreement where such failure or delay is due, in whole or in part to any cause beyond Dealer's control and without the default or negligence of Dealer.

If the vehicle trade in or new Vehicle herein ordered is driven by any of Dealer's employees at the request of Purchaser it shall be so driven at Purchaser's risk.

Purchaser acknowledges that there may have been certain transit and/or storage damage to the Vehicle sold by Dealer herein and Purchaser hereby releases Dealer from any and all claims arising out of such transit and/or storage damage.

It is understood there is no relationship of principal and agent between Dealer and the manufacturer of the Vehicle and that Dealer is not authorized to act, or attempt to act, or represent itself directly or by implication, as agent of the manufacturer, on in any manner assume or create, or attempt to assume or create any obligation on behalf of or in the name of the manufacturer.

THE ONLY WARRANTIES APPLYING TO THIS VEHICLE ARE THOSE OFFERED BY THE MANUFACTURER. DEALER MAKES NO WARRANTY OF ITS OWN ON THIS VEHICLE. DEALER HAS NO AUTHORITY TO MAKE ANY REPRESENTATION OR PROMISE ON BEHALF OF THE MANUFACTURER OF THIS VEHICLE OR TO MODIFY THE TERMS OF LIMITATIONS OF THE MANUFACTURER'S WARRANTY IN ANY WAY.

THE INFORMATION YOU SEE ON THE BUYER'S GUIDE FOR THIS VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON THE BUYER'S GUIDE OVERRIDES ANY CONTRARY PROVISION IN THE CONTRACT OF SALE.

If the vehicle described herein is a used vehicle, same may have been obtained as a trade-in vehicle, purchased from a wholesaler, purchased at auction or obtained by other means. As such, neither the dealership nor any employee can be knowledgeable as to the history of such vehicle. No employee is authorized to make any representation as to whether the vehicle has ever been wrecked or otherwise damaged nor to make any representation concerning the quality or nature of any repair. By executing this Order, Purchaser acknowledges that he has not relied on any such representation.

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 shall be deemed to require

~~LAW~~ LAW-ARB

Fig. B/13

ARBITRATION AGREEMENT

Customer Name Sunday Murphy Date 7-31-15
Deal Number 510516 VIN 1GCRCEH3FZ342682

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, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase, lease, or condition of the vehicle, any retail installment sale contract or lease agreement or any resulting transaction or relationship (including any such relationship with third parties who do not sign your purchase, lease agreement, or financing contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Agreement shall not apply to such claim or dispute. 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. You may choose the American Arbitration Association, 1633 Broadway, 10th Floor, New York, New York 10019 (www.adr.org), or any other organization to conduct the arbitration subject to our approval. You may get a copy of the rules of an arbitration organization by contacting the organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law and the applicable statute of limitations. The arbitration hearing shall be conducted in the federal district in which you reside unless the Seller-Creditor is a party to the claim or dispute, in which case the hearing will be held in the federal district where this transaction was originated. We will pay your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of \$5000, unless the law or the rules of the chosen arbitration organization require us to pay more. The amount we pay may be reimbursed in whole or in part by decision of the arbitrator if the arbitrator finds that any of your claims is frivolous under applicable law. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this Arbitration Agreement, then the provisions of this Arbitration Agreement shall control. 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. Any award by the arbitrator shall be in writing and will be final and binding on all parties, subject to any limited right to appeal under the Federal Arbitration Act.

You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies, such as repossession, or by filing an action to recover the vehicle, to recover a deficiency balance, or for individual injunctive relief. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Agreement shall survive the cancellation, termination, payoff or transfer of any retail installment sale contract or lease agreement, and any related credit, vehicle sale, or lease documents. 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 sale, or lease documents.

Sunday R. Murphy
Buyer

Buyer

Five Star Florence LLC

Dealer

STATE OF SOUTH CAROLINA)
)
 COUNTY OF FLORENCE)
)
 Sunday Kay Murphy, individually and in a)
 representative capacity for all others)
 similarly situated,)
)
 Plaintiff,)
)
 v.)
)
 Five Star Florence, LLC,)
)
 Defendant.)
 _____)

IN THE COURT OF COMMON PLEAS
 CIVIL ACTION NO. 2015-CP-21-3521

**DEFENDANT’S MOTION TO STAY PROCEEDINGS
AND TO COMPEL ARBITRATION**

Defendant Five Star Florence, LLC (“Five Star”) hereby moves for an order to stay proceedings and to compel arbitration of Plaintiff Sunday Kay Murphy’s, individually and in a representative capacity for all other similarly situated, (“Plaintiff”) Complaint because Plaintiff contractually committed to submit her claims to arbitration pursuant to the Federal Arbitration Act (the “FAA”), 9 U.S.C. §§ 1-16.

Five Star bases this motion on the arguments contained herein and upon the Affidavit of Robert Bucker (the “Aff.”), which is attached hereto, and the following grounds:

ALLEGED FACTS

Plaintiff alleges that Five Star violated the South Carolina Dealers Act and S.C. Code Ann. § 37-2-307 (the “Closing Fee Statute”) by (1) failing to properly register with the Department of Consumer Affairs; (2) failing to include the closing fee in the advertised price of the motor vehicles which includes the window sticker of the vehicle; (3) failing to display the closing fee in a conspicuous location in the motor vehicle dealership; (4) failing to have any

disclosure approved the South Carolina Department of Consumer Affairs; and (5) in charging a closing fee which does not represent closing costs actually incurred by Five Star.

The Underlying Purchase

On July 31, 2015, Plaintiff purchased a new 2015 Chevrolet Silverado, VIN number 1GCRCPEH3FZ342682, (the "Vehicle") for \$34,659.00 from Five Star, a copy of the Retail Installment Contract ("Installment Contract") is attached as **Exhibit A**. The total amount financed for the Vehicle was \$26,468.00 and the lienholder is SunTrust Bank.

The Arbitration Agreement

As part of Plaintiff's Vehicle purchase, she signed a separate Arbitration Agreement, a copy of the Arbitration Agreement is attached as **Exhibit B**. This Arbitration Agreement was signed by Plaintiff on the date she purchased the Vehicle. The Arbitration Agreement provides in pertinent part:

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 A 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, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase, lease, or condition of the vehicle, any retail installment sale contract or lease agreement or any resulting transaction or relationship (including

any such relationship with third parties who do not sign your purchase, lease agreement, or financing contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Agreement shall not apply to such claim or dispute. 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. You may choose the American Arbitration Association, 1633 Broadway, 10th Floor, New York, New York 10019 (www.adr.org), or any other organization to conduct the arbitration subject to our approval. You may get a copy of the rules of an arbitration organization by contacting the organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law and the applicable statute of limitations. The arbitration hearing shall be conducted in the federal district in which you reside unless the Sell-Creditor is a party to the claim or dispute, in which case the hearing will be held in the federal district where this transaction was originated. We will pay your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of \$5000, unless the law or the rules of the chosen arbitration organization require us to pay more. The amount we pay may be reimbursed in whole or in part by decision of the arbitrator if the arbitrator finds that any of your claims is frivolous under applicable law. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this Arbitration Agreement, then the provisions of this Arbitration Agreement shall control. **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.** Any award by the arbitrator shall be in writing and will be final and binding on all parties, subject to any limited right to appeal under the Federal Arbitration Act.

See Exhibit B (emphasis added).

ARGUMENT

By signing the Arbitration Agreement, Plaintiff agreed to be bound by the Arbitration Agreement. The Arbitration Agreement is valid and enforceable under the FAA, so Plaintiff must submit her claims to binding arbitration.

I. THE COURT MUST INTERPRET THE ARBITRATION AGREEMENT IN FAVOR OF ARBITRATION.

Both federal and South Carolina law have strong public policy that favors arbitration. See *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (“The policy of the United States and South Carolina is to favor arbitration of disputes.”). The FAA reflects “both a ‘liberal federal policy favoring arbitration,’ and the ‘fundamental principle that arbitration is a matter of contract.’” *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citations omitted). Section 2 of the FAA embodies the national policy favoring the arbitration of disputes:

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

Id. (citing 9 U.S.C. § 2 (emphasis added)); accord *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443-44 (2006).

The purpose of the FAA is “to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by state courts or legislatures.” *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984) (citation omitted). “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983); *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

“Agreements to arbitrate that fall within the scope and coverage of the [FAA] must be enforced in state and federal courts. State courts, then, ‘have a prominent role to play as enforcers of agreements to arbitrate.’” *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) (citing *Vaden v. Discover Bank*, 556 U.S. 49, 59, 129 S. Ct. 1262 (2009)) (emphasis added).

Accordingly, the Court should resolve any doubt as to the arbitrability of Plaintiff's claims in favor of arbitration. The United States Supreme Court and other courts throughout the country routinely enforce pre-dispute arbitration agreements in consumer contracts like the one here between Plaintiff and Five Star.¹

II. THE ARBITRATION AGREEMENT MUST BE ENFORCED BECAUSE THE ARBITRATION AGREEMENT IS VALID UNDER THE FAA AND PLAINTIFF'S CLAIMS FALL WITHIN ITS SCOPE.

Under the FAA, a trial court's task on a motion to compel arbitration is limited to answering two questions: (1) whether a valid arbitration agreement exist between the parties, and (2) whether the dispute at issue falls 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 Five Star entered into a valid arbitration agreement.

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. *See* 9 U.S.C. § 2 (stating that the FAA applies to written arbitration provisions contained in a "contract evidencing a transaction involving commerce . . ."). Plaintiff and Five Star entered into a written Arbitration Agreement, that it designates the FAA as the governing law, and that the underlying

¹ *See, e.g., CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012) (credit card agreement); *Concepcion*, 563 U.S. 333 (consumer cell phone contract); *Buckeye Check Cashing*, 546 U.S. 440 (2006) (consumer deferred deposit agreement); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (finance contract for purchase of mobile home); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (consumer home improvement loan); *Dobson*, 513 U.S. 265 (termite protection contract); *Scott v. EFN Invs., LLC*, 312 F. App'x 254 (11th Cir. 2009) (consumer sales contract for the purchase of a vehicle); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d. 553 (7th Cir. 2003) (home equity loan); *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302 (4th Cir. 2001) (home improvement loan agreement); *Johnson v. W. Suburban Bank*, 225 F.3d 366 (3d Cir. 2000) (consumer lending agreement).

purchase of the Vehicle involves interstate commerce. Thus, the FAA applies to and governs the parties' Arbitration Agreement.

1. **The Arbitration Agreement is in writing and provides that the FAA controls.**

It is undisputed that Plaintiff and Five Star entered into a written agreement to arbitrate. By signing the separate Arbitration Agreement, Plaintiff is charged with full knowledge and assent to its contents:

A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. A person signing a document is responsible for reading the document and making sure of its contents. Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it. One who signs a written instrument has the duty to exercise reasonable care to protect himself. The law does not impose a duty on [a financial institution] to explain to an individual what he could learn from simply reading the document.

Regions Bank v. Schmauch, 354 S.C. 648, 663-64, 582 S.E.2d 432, 440 (Ct. App. 2003) (citations and internal quotation marks omitted) (holding that the guarantor of a loan could not avoid the effect of the guaranty agreement claiming that she did not read the agreement). Accordingly, a written arbitration agreement exists between the parties.

In the Arbitration Agreement, Plaintiff and Five Star unquestionably agreed that the FAA governs. The Arbitration Agreement provides:

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.

(**Exhibit B** (emphasis added); Aff.)

The United States Supreme Court has recognized that "parties [to an arbitration agreement] are generally free to structure their arbitration agreements as they see fit," and may "specify by contract rules under which that arbitration will be conducted." *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989). Because "[a]rbitration is a matter of contract," courts

should “therefore rigorously enforce arbitration agreements according to their terms, including terms that specify with whom [the parties] choose to arbitrate their disputes and the rules under which that arbitration will be conducted.” *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (citations omitted); see *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (The FAA “leaves no place for the exercise of discretion by a [trial] court, but instead mandates that [trial] courts *shall* direct the parties to proceed to arbitration . . .”). Therefore, the terms of the parties’ Arbitration Agreement choosing the FAA as the governing law must be enforced.

2. Plaintiff’s purchase of her vehicle involved interstate commerce.

Even had the Arbitration Agreement not expressly chosen the FAA to govern, it would nevertheless apply here. 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. *Allied-Bruce Terminix*, 513 U.S. at 280 (emphasis in original); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (stating, unless the parties agreed to the contrary, the FAA applies to any transaction involving interstate commerce, regardless of whether the parties contemplated an interstate transaction.”

The purchase and financing of a vehicle involves interstate commerce. As such, an arbitration agreement that complies with the FAA and that exists within a contract to purchase or finance a vehicle, or is a separate document within the purchase package, preempts any state

arbitration-specific law that would otherwise invalidate the arbitration agreement. *See 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 vs. 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); *Zabinski*, 346 S.C. at 590, 553 S.E.2d at 116 (stating the FAA supersedes state arbitration-specific law that would invalidate an arbitration agreement). Interstate commerce clearly exists in this case because, among other things, the Vehicle was purchased and a financing agreement was entered into, which is a transaction that involved interstate commerce.

In sum, Plaintiff and Five Star expressly agreed that the FAA governs the Arbitration Agreement and the purchase of a vehicle involves interstate commerce. Accordingly, the written Arbitration Agreement is valid and enforceable under the FAA, and the only question remaining is whether Plaintiff's claims fall within the scope of the Arbitration Agreement, which they do.

B. Plaintiff's claims are subject to arbitration under the clear and unmistakable terms of the Arbitration Agreement.

A court should not deny a request to arbitrate an issue unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Drews Distrib., Inc. v. Silicon Gaming, Inc.*, 245 F.3d 347, 349-50 (4th Cir. 2001) (citations omitted); *accord S.C. Pub. Serv. Auth. v. Great W. Coal (Ky), Inc.*, 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993) (citing *Mitsubishi Motors*, 473 U.S. 614)). The presumption in favor of arbitration "is particularly strong when the arbitration clause in question is broad," as it is in this case. *AT&T Techs.*, 475 U.S. at 650. Further, "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp. - Ala. v. Randolph*, 531 U.S. 79, 91-92 (2000). The burden is not met by "generalized attacks on

arbitration that rest on ‘suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.’” *Id.* at 89-90.

1. **The arbitrator must decide any threshold dispute concerning the validity or enforceability of the Arbitration Agreement.**

In 2010, the United States Supreme Court confirmed the rule for determining who—between a court and an arbitrator—decides challenges to the validity and enforceability of an agreement to arbitrate. See *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). Typically, whether parties have an enforceable arbitration agreement covering their dispute is an issue the court must decide. *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 295 (2010); *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83-84 (2002). However, when the arbitration agreement expressly delegates to an arbitrator the decision concerning the enforceability and scope of the arbitration agreement, the arbitrator—not the court—has exclusive authority to determine these issues. See *Rent-A-Center*, 561 U.S. at 68-69.

In *Rent-A-Center*, the United States Supreme Court recognized the right of parties to “agree to arbitrate ‘gateway’ provisions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.” *Id.* (citing *Howsam*, 537 U.S. at 83-85); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003). If the court concludes that the parties intended such a delegation, its work is finished and arbitration must be compelled without addressing the merits of any challenge to arbitrability. *Id.*

In this case, the parties expressly agreed to arbitrate, “[a]ny claim or dispute, whether in contract, tort statute or otherwise **(including the interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute)** . . .” (Exhibit B (emphasis added)). As a result, the arbitrator, rather than the Court, must consider whether the Arbitration Agreement encompasses Plaintiff’s claims, as well as any arguments Plaintiff may muster

against the validity or enforceability of the Arbitration Agreement, and the Court's role should be limited to compelling arbitration so that the arbitrator may decide these "gateway" issues of arbitrability.

Because there can be no serious dispute as to the clear and unmistakable delegation of the threshold issues to the arbitrator, the Court's work is finished and it must compel arbitration. *See* 561 U.S. at 68-69; *Byrd*, 470 U.S. at 218; *MCE Auto v. Wetherald*, No. 6:10-cv-00409, 2010 U.S. Dist. LEXIS 134416, at *13 (D.S.C. Dec. 17, 2010).

2. Even absent the delegation clause, Plaintiff's claims clearly fall within the scope of the Arbitration Agreement.

Even if the Arbitration Agreement did not contain a delegation clause, Plaintiff's Complaint is still squarely covered by the Arbitration Agreement. South Carolina courts have determined that when deciding whether an arbitration agreement encompasses a dispute, "a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *S.C. Pub. Serv. Auth.*, 312 S.C. at 563, 437 S.E.2d at 25.

More specifically, "broadly-worded" arbitration agreements may apply to disputes when a "significant relationship" exists between the claims for which arbitration is sought and the contract that contains the arbitration clause. *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119. Further, as set forth above, it is well established that any doubts concerning the scope of an arbitration clause should be resolved in favor of arbitration. *Id.* at 597, 553 S.E.2d at 118; *Mitsubishi Motors*, 473 U.S. at 626. As the United States Supreme Court has stated,

Where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

AT&T Techs., 475 U.S. at 650.

The Arbitration Agreement is worded broadly to include all claims and disputes raised by Plaintiff. Plaintiff claims that Five Star *negligently* violated the South Carolina Dealers Act and Closing Fee Statute by (1) failing to properly register with the Department of Consumer Affairs; (2) failing to include the closing fee in the advertised price of the motor vehicles which includes the window sticker of the vehicle; (3) failing to display the closing fee in a conspicuous location in the motor vehicle dealership; (4) failing to have any disclosure approved the South Carolina Department of Consumer Affairs; and (5) in charging a closing fee which does not represent closing costs actually incurred by Five Star. *See* Plaintiff's Complaint, attached as **Exhibit C**. Plaintiff has sued Five Star for the tort of negligence and the alleged negligence arising out of Plaintiff and Five Star's Retail Installment Contract. As such, Plaintiff's claims are clearly covered by the Arbitration Agreement because the Arbitration Agreement governs "[a]ny claim or dispute, whether in contract, tort, statute or otherwise . . ." (**Exhibit B**).

In sum, the Arbitration Agreement encompasses all claims and issues raised in the Complaint, and the Complaint thus falls within the scope of the Arbitration Agreement. Plaintiff agreed to be bound by the Arbitration Agreement, and the Arbitration Agreement requires Plaintiff to submit her claims to binding arbitration.

CONCLUSION

"The policy of the United States and [South Carolina] is to favor arbitration of disputes." *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). The Arbitration Agreement indisputably encompasses the issues and claims set forth in the Complaint and complies with the requirements of the FAA. To hold otherwise would rewrite the Arbitration Agreement and disregard well-established United States Supreme Court jurisprudence.

Therefore, this action should be immediately stayed to permit arbitration, and the Court should enforce the Arbitration Agreement and grant Five Star's motion to compel arbitration.

Accordingly, Five Star requests that this Court enter an order requiring Plaintiff to submit the Complaint to arbitration within 60 days of the filing of the Order granting Five Star's motion to compel arbitration and, if Plaintiff fails to submit the Complaint to arbitration within that time period, ordering the dismissal of the Complaint with prejudice.

HAYNSWORTH SINKLER BOYD, P.A.



John H. Tiller
Amy F. Bower
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 4th Floor
Charleston, SC 29401
(843) 722-3366
jtiller@hsblawfirm.com
abower@hsblawfirm.com

*Attorneys for Defendant
Five Star Florence, LLC*

Charleston, South Carolina

March 3, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)
)
Sunday Kay Murphy, individually and in a)
representative capacity for all others)
similarly situated,)
)
Plaintiff,)
)
v.)
)
Five Star Florence, LLC,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2015-CP-21-3521

AFFIDAVIT OF ROBERT BUCHNER

I, Robert Buchner, after being duly sworn upon oath, testify as follows:

1. I am the General Manager of Five Star Florence, LLC ("Five Star").
2. In my role as General Manager, I am familiar with Five Star's general business practices, particularly those transacted in interstate commerce. Specifically, I am familiar with and have information on the vehicles Five Star orders to sell. I am also familiar with the business records Five Star maintains for the sales of vehicles. I have reviewed the records for the 2015 Chevrolet Silverado, Vin No. 1GCRCPEH3FZ342682, that Sunday Kay Murphy ("Murphy") purchased on July 31, 2015 ("Vehicle"). I base this affidavit upon my review of these records and upon my own personal knowledge.
3. The Vehicle that Murphy purchased, and financed, requires interstate commerce and has a substantial interstate connection.
4. The Vehicle was purchased by Five Star for its lot from General Motors LLC, which is headquartered in Detroit, Michigan. The Certificate of Origin for the Vehicle that is

executed by General Motors LLC in Detroit, Michigan indicates the purchase by Five Star was "the first transfer of such new vehicle in ordinary trade and commerce."

5. The Vehicle was shipped by General Motors LLC to CSX Dixiana Railyard in Columbia, South Carolina by way of train.

6. The Vehicle was then transported by Eminent Transport LLC, an interstate trucking company, from GM Columbia, South Carolina to Five Star in Florence, South Carolina.

7. When Murphy purchased the Vehicle, she financed a majority of the purchase price through SunTrust. The financing of the vehicle involved interstate commerce as SunTrust's address on Murphy's Buyers Order is a Wilmington, Ohio post office box.

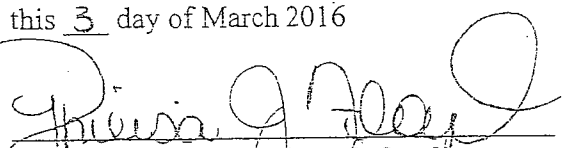
8. Moreover, before Murphy could purchase the Vehicle, she had to have proof of automobile insurance, which also involved interstate commerce. First, Government Employees Insurance Company ("GEICO") issued a verification of insurance on letterhead noting its location as Washington, DC. Second, the Insurance Agent's address on a subsequent form is noted as 1 GEICO Center, Macon, GA 31295.

9. Murphy also executed an Appearance Protection Warranty Registration Form during the purchase of the Vehicle. The warranty program involves interstate commerce as it is administered by Siskin Enterprises, Inc., P.O. Box 58, Salt Lake City, Utah 84110.



Robert Buchner

Sworn to and subscribed before me
this 3 day of March 2016



Notary Public, State of South Carolina
My commission expires My commission expires
2-27-21

EXHIBIT A

**VEHICLE INSTALLMENT SALE CONTRACT
SIMPLE FINANCE CHARGE**

Dealer Number _____ Contract Number W0510510

Buyer Name and Address (Including County and Zip Code) SUNDAY KAY MURPHY 2011 PHOENIX DR CORWAY HORRY NC 29570	Co-Buyer Name and Address (Including County and Zip Code)	Seller-Creditor (Name and Address) FIVE STAR FLORENCE 2199 DAVID HOLEAD FLORENCE FLORENCE SC 29501
--	--	---

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 Seller - Creditor (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	2015	CHEVLET SUVTRAC	16CR0PEH3P7342692	Personal, family, or household unless otherwise indicated below <input type="checkbox"/> business <input type="checkbox"/> agricultural <input type="checkbox"/>

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 \$ 650.00
2.76 %	\$ 2,702.00	\$ 26,469.00	\$ 30,170.00	\$ 30,820.00

Your Payment Schedule Will Be:

Number of Payments	Amount of Payments	When Payments Are Due
04	347.27	Monthly beginning SEPTEMBER 14, 2015

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 \$7.20. The charge will not exceed \$18.00 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

1 Cash Price (including \$ 34,000 sales tax and \$ 650.00 closing fee) \$ 34,650.00 (1)

2 Total Downpayment =

Trade-in	2009 KIA SORENTO	
(Year)	(Make)	(Model)
Gross Trade-In Allowance		\$ 6,150.00
Less Pay Off Made By Seller		\$ N/A
Equals Net Trade In		\$ 6,150.00
+ Cash		\$ N/A
+ Other <u>REBATE</u>		\$ 3,500.00
(If total downpayment is negative, enter "0" and see 4i below)		\$ 9,650.00 (2)
		\$ 25,000.00 (3)

3 Unpaid Balance of Cash Price (1 minus 2)

4 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	\$ N/A
Disability	\$ N/A	\$ 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 \$ N/A

E Official Fees Paid to Government Agencies

to	for	\$ N/A
to	for	\$ N/A
to	for	\$ N/A
to	for	\$ N/A

F Government Taxes Not Included in Cash Price \$ N/A

G Government License and/or Registration Fees \$ N/A

H Government Certificate of Title Fees \$ 59.00

I Other Charges (Seller must identify who is paid and describe purpose)

to	for	\$ N/A
to	for	\$ N/A
to	TOTAL WARRANTY	\$ 1,400.00
to	for SERVICE UNIT	\$ N/A
to	for CAR CARE	\$ N/A
to	for FORD INWARD	\$ N/A
to	for	\$ N/A
to	for	\$ 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 on this loan. Lending Vendor's Single Interest Insurance is required. Check 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 \$ _____

Credit Disability \$ _____

Insurance Company Name _____

Home Office Address _____

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 4i of the Itemization of Amount Financed. This 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

Type of Insurance _____ Term _____

Premium \$ _____

Insurance Company Name _____

Home Office Address _____

Type of Insurance _____ Term _____

Premium \$ _____

Insurance Company Name _____

Home Office Address _____

Other optional insurance is not required to obtain credit. 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 07/29/15

Life	S	N/A
Disability	S	N/A
B Vendor's Single Interest Insurance Paid to Insurance Company	S	N/A
C Other Optional Insurance Paid to Insurance Company or Companies	S	N/A
D Optional Gap Contract	S	N/A
E Official Fees Paid to Government Agencies	S	N/A
to for	S	N/A
to for	S	N/A
to for	S	N/A
F Government Taxes Not Included in Cash Price	S	N/A
G Government License and/or Registration Fees	S	N/A
H Government Certificate of Title Fees	S	39.00
I Other Charges (Seller must identify who is paid and describe purpose)	S	N/A
to for Prior Credit or Lease Balance	S	N/A
to for	S	N/A
to TOTAL PAYMENT for SERVICE CHG	S	1,459.00
to for CAR USE	S	N/A
to for ROAD FEE	S	N/A
to for	S	N/A
to for	S	N/A
to for	S	N/A
to for	S	N/A
to for	S	N/A
to for	S	N/A
to for	S	N/A
Total Other Charges and Amounts Paid to Others on Your Behalf	S	1,459.00 (5)
5 Amount Financed (3 + 4)	S	20,400.00 (5)

Premium \$ _____
Insurance Company Name _____
Home Office Address _____

Other optional insurance is not required to obtain credit. 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 07/31/2015

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 _____, Year _____. 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 N/A days after it is due, you will pay a late charge of \$ N/A 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 \$ _____ 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 N/A Mos. Name of Gap Contract _____

I want to buy a gap contract.

Buyer Signs

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 Co-Buyer Signs

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 Date 07/31/2015 Co-Buyer Signs Date _____

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 Address _____
Seller signs _____ Date 07/31/2015 By Title _____

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

Assigned with recourse Assigned without recourse Assigned with limited recourse

FIVE STAR FLORENCE

Seller _____ By _____ Title _____

LAW FORM NO. 553-SC (REV. 2013) U.S. PATENT AND TRADE OFFICE
COPY: The Reynolds and Reynolds Company 50 DEER CREEK DRIVE, EVANSTON, IL 60120-3150, USA 800-331-9222
THE PRINTED MATTER HAS NO WARRANTY, EXPRESS OR IMPLIED, AS TO CONTENT OR FITNESS FOR PURPOSE OF THIS FORM. CONSULT YOUR OWN LEGAL COUNSEL.

DEALER COPY

EXHIBIT B

LAW LAW-ARB

Pg. 8/13

ARBITRATION AGREEMENT

Customer Name Sunday Murphy Date 7-31-15
Deal Number 510516 VIN 1GCRCEH3FZ342682

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, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase, lease, or condition of the vehicle, any retail installment sale contract or lease agreement or any resulting transaction or relationship (including any such relationship with third parties who do not sign your purchase, lease agreement, or financing contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Agreement shall not apply to such claim or dispute. 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. You may choose the American Arbitration Association, 1633 Broadway, 10th Floor, New York, New York 10019 (www.adr.org), or any other organization to conduct the arbitration subject to our approval. You may get a copy of the rules of an arbitration organization by contacting the organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law and the applicable statute of limitations. The arbitration hearing shall be conducted in the federal district in which you reside unless the Seller-Creditor is a party to the claim or dispute, in which case the hearing will be held in the federal district where this transaction was originated. We will pay your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of \$5000, unless the law or the rules of the chosen arbitration organization require us to pay more. The amount we pay may be reimbursed in whole or in part by decision of the arbitrator if the arbitrator finds that any of your claims is frivolous under applicable law. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this Arbitration Agreement, then the provisions of this Arbitration Agreement shall control. 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. Any award by the arbitrator shall be in writing and will be final and binding on all parties, subject to any limited right to appeal under the Federal Arbitration Act.

You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies, such as repossession, or by filing an action to recover the vehicle, to recover a deficiency balance, or for individual injunctive relief. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Agreement shall survive the cancellation, termination, payoff or transfer of any retail installment sale contract or lease agreement, and any related credit, vehicle sale, or lease documents. 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 sale, or lease documents.

Sunday R. Murphy
Buyer

Buyer

Five Star Florence LLC
Dealer
By: [Signature]

EXHIBIT C

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
CASE NO.: 15-CP-21

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

Plaintiffs,)

vs.)

Five Star Florence, LLC,)

Defendant.)

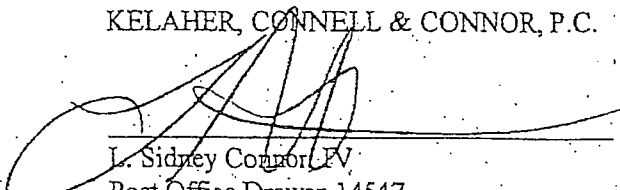
**SUMMONS
(Class Action)
ARBITRATION**

FILED
2015 DEC 22 PM 1:29
COMMERCIAL DIVISION
FLORENCE COUNTY, SC

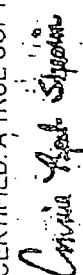
TO: ABOVE-NAMED DEFENDANTS

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
Post Office Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
Attorneys for Plaintiffs

December 9, 2015

CERTIFIED: A TRUE COPY

CYNTHIA A. SPIVEY
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
CASE NO.: 15-CP-21 3521

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

Plaintiffs,)

vs.)

Five Star Florence, LLC,)

Defendant.)

COMPLAINT
(Class Action)
ARBITRATION

FILED
2015 DEC 22 PM 1:29
CONNIE BEECHER
CLERK OF COURT
FLORENCE COUNTY, S.C.

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

1. The named Plaintiff, Sunday Kay Murphy, is a citizen and resident of the State of South Carolina, County of Horry.
2. The Defendant Five Star Florence, LLC is a limited liability company organized and existing pursuant to the laws of the State of South Carolina, primarily doing business in Florence, South Carolina through several dealership locations.
3. This court has jurisdiction to monitor this case under the South Carolina Uniform Arbitration Act, S.C. Code §§15-48-10, et seq.

FACTUAL ALLEGATIONS

4. On or about July 31, 2015, Plaintiff purchased a new vehicle from the Defendant Five Star Florence, LLC.
5. The Defendant Five Star Florence, LLC had the Plaintiff sign a Purchase Agreement with a preprinted "closing fee" of \$699.00.
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

CERTIFIED: A TRUE COPY

Connie Beecher

CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

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.

8. According to the Purchase Agreement, this action is subject to arbitration pursuant to the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10 et seq.

CLASS ALLEGATIONS

9. 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).

10. The class consists of those persons who have purchased vehicles from Five Star Florence, LLC and were charged a closing fee.

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

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

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

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

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

FOR A FIRST CLAIM (Negligence)

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

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

18. 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.

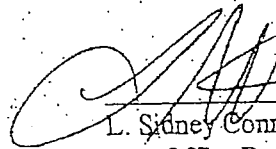
19. The aforementioned acts and omission's in violation of the Dealers Act were negligent, intentional, arbitrary, reckless, and willful.

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

21. 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

December 7, 2015

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS
TWENTY-FIRST JUDICIAL CIRCUIT
CASE NO.: 15-CP-21-3521

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

Plaintiffs,)

vs.)

Five Star Florence, LLC,)

Defendant.)

**SUPPLEMENTAL
MEMORANDUM IN SUPPORT
OF PLAINTIFF'S MOTION TO COMPEL
ARBITRATION AND IN OPPOSITION TO
THE DEFENDANT'S MOTION TO
STAY PROCEEDINGS**

FILED
2017 FEB - 9 PM 4: 03
DORIS POULOS GHARA
CLERK OF COURT & G.S.
FLORENCE COUNTY, S.C.

In the Plaintiffs' initial Motion and Supporting Memorandum, the Plaintiff establishes that there are three purported arbitration clauses at issue in this case. The initial Memorandum establishes that the FIRST and SECOND arbitration clauses contained within the four corners of the Purchase Order are valid and should be read consistently with one another so as to make the South Carolina Uniform Arbitration Act applicable to this case. The THIRD arbitration clause which has a class action waiver is not valid for the numerous reasons stated in the initial brief and should be completely disregarded.

When considering the appropriate forum for this case, the Plaintiff 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 matter should be arbitrated with the AAA, it is important for the Court to note that the AAA set up to handle class actions. On October 8, 2003, the AAA adopted "Supplementary Rules Class Arbitrations." Please see Rules attached to this Supplemental Memorandum. The AAA

CERTIFIED: A TRUE COPY
Doris Poulos Ghara
CLERK OF COURT & G.S.
FLORENCE COUNTY, S.C.

COPY

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

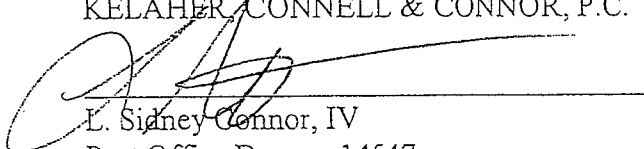
that consumers are particularly vulnerable to abusive fees charged by dealers and therefore specifically provides for consumers to band together to seek justice against these unscrupulous charges and activities. The FIRST and SECOND arbitration clauses contained in the purchase agreement in this case 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.

Therefore, the FIRST and SECOND Arbitration Clauses are not silent as to class arbitration in two respects:

1. The Dealers Act specifically provides for class arbitrations; and
2. The Second Clause specifically references the AAA which has rules for class arbitrations.

Respectfully Submitted,

KELAHER, CONNELL & CONNOR, P.C.



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

February 7, 2017

Supplementary Rules for Class Arbitrations

Rules Effective October 8, 2003
Fees Effective January 1, 2010

Table of Contents

<u>1. Applicability</u>	1
<u>2. Class Arbitration Roster and Number of Arbitrators</u>	2
<u>3. Construction of the Arbitration Clause</u>	2
<u>4. Class Certification</u>	2
<u>5. Class Determination Award</u>	3
<u>6. Notice of Class Determination</u>	4
<u>7. Final Award</u>	4
<u>8. Settlement, Voluntary Dismissal, or Compromise</u>	5
<u>9. Confidentiality; Class Arbitration Docket</u>	5
<u>10. Form and Publication of Awards</u>	5
<u>11. Administrative Fees and Suspension for Nonpayment</u>	6
<u>12. Applications to Court and Exclusion of Liability</u>	6

1. Applicability

- (a) These Supplementary Rules for Class Arbitrations ("Supplementary Rules") shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ("AAA") where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules. These Supplementary Rules shall also apply whenever a court refers a matter pleaded as a class action to the AAA for administration, or when a party to a pending AAA arbitration asserts new claims on behalf of or against a class or purported class.
- (b) Where inconsistencies exist between these Supplementary Rules and other AAA rules that apply to the dispute, these Supplementary Rules will govern. The arbitrator shall have the authority to resolve any inconsistency between any agreement of the parties and these Supplementary Rules, and in doing so shall endeavor to avoid any prejudice to the interests of absent members of a class or purported class.
- (c) Whenever a court has, by order, addressed and resolved any matter that would otherwise be decided by an arbitrator under these Supplementary Rules, the arbitrator shall follow the order of the court.

2. Class Arbitration Roster and Number of Arbitrators

- (a) In any arbitration conducted pursuant to these Supplementary Rules, at least one of the arbitrators shall be appointed from the AAA's national roster of class arbitration arbitrators.
- (b) If the parties cannot agree upon the number of arbitrators to be appointed, the dispute shall be heard by a sole arbitrator unless the AAA, in its discretion, directs that three arbitrators be appointed. As used in these Supplementary Rules, the term "arbitrator" includes both one and three arbitrators.

3. Construction of the Arbitration Clause

Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

4. Class Certification

(a) Prerequisites to a Class Arbitration

If the arbitrator is satisfied that the arbitration clause permits the arbitration to proceed as a class arbitration, as provided in Rule 3, or where a court has ordered that an arbitrator determine whether a class arbitration may be maintained, the arbitrator shall determine whether the arbitration should proceed as a class arbitration. For that purpose, the arbitrator shall consider the criteria enumerated in this Rule 4 and any law or agreement of the parties the arbitrator determines applies to the arbitration. In doing so, the arbitrator shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described. The arbitrator shall permit a representative to do so only if each of the following conditions is met:

- (1) the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (4) the representative parties will fairly and adequately protect the interests of the class;
- (5) counsel selected to represent the class will fairly and adequately protect the interests of the class; and
- (6) each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class

members.

(b) Class Arbitrations Maintainable

An arbitration may be maintained as a class arbitration if the prerequisites of subdivision (a) are satisfied, and in addition, the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

- (1) the interest of members of the class in individually controlling the prosecution or defense of separate arbitrations;
- (2) the extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class;
- (3) the desirability or undesirability of concentrating the determination of the claims in a single arbitral forum; and
- (4) the difficulties likely to be encountered in the management of a class arbitration.

5. Class Determination Award

- (a) The arbitrator's determination concerning whether an arbitration should proceed as a class arbitration shall be set forth in a reasoned, partial final award (the "Class Determination Award"), which shall address each of the matters set forth in Rule 4.
- (b) A Class Determination Award certifying a class arbitration shall define the class, identify the class representative(s) and counsel, and shall set forth the class claims, issues, or defenses. A copy of the proposed Notice of Class Determination (see Rule 6), specifying the intended mode of delivery of the Notice to the class members, shall be attached to the award.
- (c) The Class Determination Award shall state when and how members of the class may be excluded from the class arbitration. If an arbitrator concludes that some exceptional circumstance, such as the need to resolve claims seeking injunctive relief or claims to a limited fund, makes it inappropriate to allow class members to request exclusion, the Class Determination Award shall explain the reasons for that conclusion.
- (d) The arbitrator shall stay all proceedings following the issuance of the Class Determination Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Class Determination Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Class Determination Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Class Determination Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.
- (e) A Class Determination Award may be altered or amended by the arbitrator before a final award is rendered.

6. Notice of Class Determination

- (a) In any arbitration administered under these Supplementary Rules, the arbitrator shall, after expiration of the stay following the Class Determination Award, direct that class members be provided the best notice practicable under the circumstances (the "Notice of Class Determination"). The Notice of Class Determination shall be given to all members who can be identified through reasonable effort.
- (b) The Notice of Class Determination must concisely and clearly state in plain, easily understood language:
 - (1) the nature of the action;
 - (2) the definition of the class certified;
 - (3) the class claims, issues, or defenses;
 - (4) that a class member may enter an appearance through counsel if the member so desires, and that any class member may attend the hearings;
 - (5) that the arbitrator will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded;
 - (6) the binding effect of a class judgment on class members;
 - (7) the identity and biographical information about the arbitrator, the class representative(s) and class counsel that have been approved by the arbitrator to represent the class; and
 - (8) how and to whom a class member may communicate about the class arbitration, including information about the AAA Class Arbitration Docket (see Rule 9).

7. Final Award

The final award on the merits in a class arbitration, whether or not favorable to the class, shall be reasoned and shall define the class with specificity. The final award shall also specify or describe those to whom the notice provided in Rule 6 was directed, those the arbitrator finds to be members of the class, and those who have elected to opt out of the class.

8. Settlement, Voluntary Dismissal, or Compromise

- (a) (1) Any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of an arbitration filed as a class arbitration shall not be effective unless approved by the arbitrator.
 - (2) The arbitrator must direct that notice be provided in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.
 - (3) The arbitrator may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.
- (b) The parties seeking approval of a settlement, voluntary dismissal, or compromise under this Rule must submit to the arbitrator any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.
- (c) The arbitrator may refuse to approve a settlement unless it affords a new opportunity to request

exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

- (d) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires approval under this Rule. Such an objection may be withdrawn only with the approval of the arbitrator.

9. Confidentiality; Class Arbitration Docket

- (a) The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances. However, in no event shall class members, or their individual counsel, if any, be excluded from the arbitration hearings.
- (b) The AAA shall maintain on its Web site a Class Arbitration Docket of arbitrations filed as class arbitrations. The Class Arbitration Docket will provide certain information about the arbitration to the extent known to the AAA, including:
 - (1) a copy of the demand for arbitration;
 - (2) the identities of the parties;
 - (3) the names and contact information of counsel for each party;
 - (4) a list of awards made in the arbitration by the arbitrator; and
 - (5) the date, time and place of any scheduled hearings.

10. Form and Publication of Awards

- (a) Any award rendered under these Supplementary Rules shall be in writing, shall be signed by the arbitrator or a majority of the arbitrators, and shall provide reasons for the award.
- (b) All awards rendered under these Supplementary Rules shall be publicly available, on a cost basis.

11. Administrative Fees and Suspension for Nonpayment

- (a) A preliminary filing fee of \$3,350 is payable in full by a party making a demand for treatment of a claim, counterclaim, or additional claim as a class arbitration. The preliminary filing fee shall cover all AAA administrative fees through the rendering of the Clause Construction Award. If the arbitrator determines that the arbitration shall proceed beyond the Clause Construction Award, a supplemental filing fee shall be paid by the requesting party. The supplemental filing fee shall be calculated based on the amount claimed in the class arbitration and in accordance with the fee schedule contained in the AAA's Commercial Arbitration Rules.
- (b) Disputes regarding the parties' obligation to pay administrative fees or arbitrator's compensation pursuant to applicable law or the parties' agreement may be determined by the arbitrator. Upon the joint application of the parties, however, an arbitrator other than the arbitrator appointed to decide the merits of the arbitration, shall be appointed by the AAA to render a partial final award solely related to any disputes regarding the parties' obligations to pay administrative fees or arbitrator's compensation.
- (c) If an invoice for arbitrator compensation or administrative charges has not been paid in full, the AAA

may so inform the parties in order that one of them may advance the required deposit. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

- (d) If an arbitration conducted pursuant to these Supplementary Rules is suspended for nonpayment, a notice that the case has been suspended shall be published on the AAA's Class Arbitration Docket.

12. Applications to Court and Exclusion of Liability

- (a) No judicial proceeding initiated by a party relating to a class arbitration shall be deemed a waiver of the party's right to arbitrate.
- (b) Neither the AAA nor any arbitrator in a class arbitration or potential class arbitration under these Supplementary Rules is a necessary or proper party in or to judicial proceedings relating to the arbitration. It is the policy of the AAA to comply with any order of a court directed to the parties to an arbitration or with respect to the conduct of an arbitration, whether or not the AAA is named as a party to the judicial proceeding in which the order is issued.
- (c) Parties to a class arbitration under these Supplementary Rules shall be deemed to have consented that judgment upon each of the awards rendered in the arbitration may be entered in any federal or state court having jurisdiction thereof.
- (d) Parties to an arbitration under these Supplementary Rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action seeking damages or injunctive relief for any act or omission in connection with any arbitration under these Supplementary Rules.

© 2011 American Arbitration Association, Inc. All rights reserved. These Rules are the copyrighted property of the American Arbitration Association (AAA) and are intended to be used in conjunction with the AAA's administrative services. Any unauthorized use or modification of these Rules may violate copyright laws and other applicable laws. Please contact 800.778.7879 or websitemail@adr.org for additional information.

OSTATE OF SOUTH CAROLINA)	
)	COURT OF COMMON PLEAS
COUNTY OF FLORENCE)	2015-CP-21-03521
)	
)	
)	
Sunday Kay Murphy, individually)	
capacity for all others similyly))	
similarly situated)	
)	
vs.)	TRANSCRIPT OF RECORD
)	
Five Star Florence, LLC)	
DEFENDANT)	February 14, 2017

B E F O R E :

THE HONORABLE THOMAS A. RUSSO, JUDGE.

A P P E A R A N C E S :

L. SIDNEY CONNOR, IV, ESQ.
Attorney for the Plaintiff

SARAH P. SPRUILL, ESQ.
Attorney for the Defendant

KESHIA REED
Official Court Reporter

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

I N D E X

(WHEREUPON, no witnesses called.)

1 THE COURT: Next matter I got is Sunday Kay
2 Murphy vs. Five Star.

3 MS. SPRUILL: Yes, Your Honor. I see it shows
4 up as two motions, but they are pretty heavily entwined.

5 THE COURT: Okay.

6 MS. SPRUILL: I think mine was filed first. I'm
7 Sarah Spruill here on behalf of Five Star.

8 MR. CONNOR: Sid Connor here on behalf of the
9 plaintiff.

10 MS. SPRUILL: May it please the Court.

11 THE COURT: Yes, ma'am.

12 MS. SPRUILL: You want me to come to the podium
13 or can I talk from right here?

14 THE COURT: Wherever you're more comfortable is
15 fine.

16 MS. SPRUILL: I'm happy right here if that's
17 okay with Your Honor.

18 THE COURT: Yeah, that will be fine.

19 MS. SPRUILL: So what you have here -- and Mr.
20 Connor will correct me if I say we agree on something we
21 don't, but both parties have move to compel arbitration.
22 The question is what form that arbitration's going to take
23 and what law applies to it. You will see in the papers
24 this stems from the 2015 purchase of the Chevy Silverado.
25 The purchase order has two references to arbitration in

1 it. On the front page, there is a provision. It's
2 underlined, but it's in lower case letters saying this
3 contract is subject to arbitration under the South
4 Carolina Uniform Arbitration Act. Then on the back of
5 that it says that arbitration is required by the agreement
6 and then among other things it says if the transaction
7 involves interstate commerce and, I think, we agree that
8 the purchase of a car does involve interstate commerce.
9 Arbitration as described hereunder shall be governed
10 solely by the Federal Arbitration Act 9 USC Section 1 in
11 sec. And the South Carolina Arbitration Act shall not
12 apply.

13 Then there's a provision at the bottom of that
14 that says nothing contained herein shall be deemed to
15 require arbitration by any entity not a party to the
16 purchase order. Then as part of the same transaction
17 executed at the same time, so it's not a prior document.
18 It's a contemporaneous document. There is a separate
19 arbitration agreement and that arbitration agreement
20 includes a delegation clause that specifies any claim or
21 dispute whether a contract, tort, statute or otherwise
22 including the interpretation and scope of this arbitration
23 agreement and the arbitrability of the claim or dispute
24 and also includes a provision that says that arbitration
25 under this agreement will be governed by the federal act.

1 And lastly it has an incorporation clause that clause ties
2 it back to the purchase order that says this arbitration
3 agreement is part of any retail installment sale contract
4 or lease agreement you signed and any credit related --
5 credit vehicle sale or lease documents. So those are the
6 three places that arbitration is mentioned. Mr. Connor's
7 going to try to argue to you that this needs to proceed
8 under the South Carolina Arbitration Act.

9 I'm going to argue -- am arguing that it can't
10 proceed under the South Carolina act because it flunks the
11 notice or requirement set forth in section 15-48-10
12 because it's not in all capital letters. And our case law
13 has made it clear that that notice provision is to be
14 strictly construed. And if you flunk that notice
15 provision, the case that say it best is the Zabinsky case.
16 In Zabinsky, it says if you flunk the South Carolina
17 Notice Provision, you're backed out in the Federal
18 Arbitration Act. So our argument is that there is an
19 agreement to arbitrate here pursuant to the Federal
20 Arbitration Act. And given the language in the
21 arbitration agreement under U.S. Supreme Court precedent
22 and the Rent-A-Center case, we got a valid delegation
23 clause that says that anything about arbitrability clause
24 or the claims or anything else is going to be determine by
25 the arbitrator, so your job is done. All you have to do

1 in this case is stay the action filed by Mr. Connor and
2 compel arbitration pursuant to the federal act. I think
3 it's going to be triple A arbitration. But if Your Honor
4 finds for some reason there's not an agreement as to the
5 form, Your Honor, under the federal act can specify the
6 form, but that is our argument.

7 You're going to hear from the other side he has
8 brought this action pursuant to the South Carolina
9 Dealer's Act. The South Carolina Dealer's Act there has
10 been a very long standing series of cases that were
11 assigned to Judge Early including a trip all the way to
12 U.S. Supreme Court on issues similar to this one and that
13 case is Herron. You're going to hear about Herron.
14 Interestingly, when the U.S. Supreme Court got it and
15 said, no, look all these class arbitration cases this
16 doesn't look right to us, gets remanded to the South
17 Carolina Supreme Court. And the South Carolina Supreme
18 Court says pre-emption under the federal act has not been
19 raised, while I am here to raise pre-emption under the
20 federal act.

21 We think this is very clearly a case where the
22 South Carolina act cannot apply because you flunk the
23 notice provision, so we're under the FAA. And
24 unfortunately for Mr. Connor he at a later date will have
25 to make those arguments that somehow there is not a class

1 action waiver in this case because that's ultimately what
2 he's trying to do. He's trying to bring a class action
3 where there is no agreement to argue the class issues in
4 arbitration and there is a valid class, but your job for
5 today as I see it is to find there's a valid agreement
6 under the Federal Arbitration Act, compel that arbitration
7 and step back and let the arbitrators figure the rest out.

8 THE COURT: All right.

9 MS. SPRUILL: And I'll let Mr. Connor speak. I
10 would reserve a reply if Your Honor will allow.

11 THE COURT: Yes, ma'am.

12 Mr. Connor.

13 MR. CONNOR: Your Honor, we do agree more than
14 we disagree on this, but where we disagree is obviously
15 the crux of the matter. I would like to hand up to you,
16 so we have some reference point, the various arbitration
17 provisions, if I might?

18 THE COURT: Yes, sir.

19 MR. CONNOR: This is the purchase order and the
20 backside as well and this is the separate form arbitration
21 agreement. I'm going to confess to you this is a rather
22 baffling area of the law because it's one of the few areas
23 in South Carolina law where it's almost -- it's controlled
24 by the United States Supreme Court and the decisions have
25 been numerous in the past 20 years. This is just a few of

1 them right here. Fundamentally, South Carolina has an
2 arbitration act, South Carolina Arbitration Act, that
3 you're aware and it has some notice requirements. You
4 have to put it in certain capital letters on top of the
5 page and those type of things. And from a validity
6 standpoint, if it doesn't meet those requirements,
7 typically the cases have involved consumers who come in
8 and say, it doesn't meet those requirements we object to
9 it. And until federal pre-emption became hot in the early
10 '90's and early 2000's, our Supreme Court of South
11 Carolina almost universally overturned an arbitration
12 agreement that didn't meet every jot in that requirement.

13 There are no cases that I'm aware of where the
14 flip side is true where the person who wrote the contract
15 comes in and says I wrote it so badly, that it doesn't
16 comply with the statute, therefore I'm out of it. I don't
17 have to comply with these terms. And, I think, this will
18 obviously probably be that case. I think what -- I like
19 to draw the Court's attention is the distinction between a
20 determination of the validity of the arbitration agreement
21 and in determining the correct procedure because the
22 Federal Arbitration Act is simply preempts a rule that
23 would otherwise invalidate the arbitration clause. What
24 the Federal Arbitration Act does is reinstitute the
25 clause. It doesn't do away with it, which is what the

1 defendant wants to do in this case. Because there's three
2 clauses in this case, the first clause is on the front
3 page of the agreement right at the top says this contract
4 is subject to arbitration under the South Carolina Uniform
5 Arbitration Act. My client's fine with that, no problem
6 with it. They're tending to object to their own --
7 failure to meet the code. We're not objecting to that.
8 On the back at the bottom is the second arbitration
9 clause, this arbitration clause fleshes out the one on the
10 front, but it becomes a little bit confusing because it
11 refers to the American Arbitration Association, which
12 brings an interesting issue because there's a difference
13 between applying a law to enforce arbitration and choosing
14 a forum.

15 For example, the triple A is a standardized
16 forum for arbitration. We all know what it is. It's been
17 around many years. 2003, they adopted a whole set of
18 rules for class actions, so it's an acceptable forum.
19 It's very popular. If you have a lawyer there, you
20 probably get a fair shake. If you don't have a lawyer
21 there, well the statics aren't very good, but then there's
22 the Federal Arbitration Act.

23 And the Federal Arbitration Act has a procedure,
24 but it's not very detailed. The Federal Arbitration Act
25 was enacted in 1925 as a response to various federal

1 courts around the nation basically saying we hate
2 arbitration. We're going to find every reason we can to
3 overturn arbitration in the federal system. So the
4 Federal Arbitration Act was enacted to say wait a minute
5 we're going to honor these things. It was initially
6 enacted for shipping. Nobody really had it in mind that
7 it would apply to consumer cases. So through the years
8 the Supreme Court has consistently interpreted the Federal
9 Arbitration Act as pre-exempting a state law that would
10 otherwise overturn an arbitration clause. And that's
11 where we find ourselves ever since the early 2000's in
12 South Carolina as lawyers have started making that
13 argument that the FAA overturns excuse me -- that if an
14 arbitration clause doesn't meet the South Carolina notice
15 requirements, it doesn't matter because FAA pre-exempts
16 it, but what they don't say is they don't substitute the
17 FAA for the clause. They simply validate the clause.
18 They simply say look the notice is irrelevant, the clause
19 applies. They're trying to rip the clause out and say we
20 can't apply it.

21 Well, my client signed an agreement with that
22 clause in it and with the clause on the back. Quite
23 frankly a written -- a supplemental memorandum which
24 basically says I don't really mind if we go to the triple
25 A. It doesn't matter to me whether we're South Carolina

1 or triple A. I don't know what a Federal Arbitration Act
2 proceeding would be even under the third clause, which is
3 a separate agreement. It still refers to the triple A.
4 So she's right I do get a choice of the triple A if I want
5 that. The crux of what -- the thing we don't agree on
6 here today is the validity of the third clause. That's
7 the crucial question here today.

8 The third clause is the separate agreement that
9 says arbitration agreement. I would note as an entry
10 point that this agreement doesn't meet the South Carolina
11 rule either. It doesn't have it in all caps at the top as
12 it's suppose to. So if they want to invalidate clauses
13 and say they're no good at all for failing to meet the
14 notice requirements, this was not any good either, but
15 there's a lot more reasons that this clause doesn't apply
16 and the first two do. And I spent 20 pages in my brief
17 and several pages in supplemental brief going over.
18 There's lots and lots of reasons. I'll be happy to go
19 over it, but I don't think -- unless, you want to give me
20 that much time here today, so it's in the briefs.

21 THE COURT: I don't mind, but I ---

22 MR. CONNOR: I do encourage the Court and the
23 Court's assistance to read those things because it's a
24 rather complicated situation all together. It's
25 something that's hard to explain here in 20 minutes.

1 Fundamentally, I think though that what we're relying on
2 is if you look at the bottom of the purchase order, the
3 purchase order at the bottom says purchaser agrees that
4 this order including all terms on both the face and
5 reserve side hereof and any bailment agreement of retail
6 sales contract and there is a risk retail sales contract,
7 but it doesn't have an arbitration clause in it, so it's
8 irrelevant to the discussion here today. For the purpose
9 of this order et cetra et cetra reflecting the above
10 transaction cancel and supercede any prior agreement or
11 contract and comprise the complete and exclusive statement
12 of the terms of this transaction. Purchaser further
13 agrees that this order shall not be combine et cetra et
14 cetra. What we're stating here today is my client relied
15 on the arbitration clause as stated in the four corners of
16 this document. My client relied on the language at the
17 bottom that said this is it. This is the exclusive
18 agreement. My client relied on the fact that she could
19 seek arbitration pursuant to this agreement not pursuant
20 to the additional agreement for which there was no
21 consideration. So we would urge the Court to validate the
22 first clause here on the front, the second clause on the
23 back, on the four corners of this purchase order, and
24 determine and rule that the third clause of the
25 arbitration agreement is not valid and not enforceable.

1 Now, that's perfectly within your power because
2 it's simply a matter of contract. The Supreme Court case
3 is on the Federal Arbitration Act all say that we want to
4 do whatever we can to encourage arbitration. We aren't
5 asking for arbitration, so our result does not discourage
6 arbitration. Our result encourages arbitration.

7 Another thing I would mention to you this third
8 arbitration agreement is written really primarily to avoid
9 the exposure of class actions and to get to that point let
10 me show you what's on the first page of the purchase
11 order. If you look at the purchase order, there's a
12 closing fee of \$699. It's in bold print and it's apart of
13 the agreement. So what happens is when a person goes to
14 Five Star and they purchase a car, they reach some kind of
15 handshake deal on the parking lot with the car. And after
16 this handshake deal is reached and they think, well, I can
17 buy this car for \$30,000. They walk into the finance
18 office and they're handed this document. And all of
19 sudden the car is not \$30,000 is \$30,699 because of that
20 closing fee.

21 There was a class action -- the Freeman class
22 action was tried in South Carolina. It was won by the
23 plaintiff's on that issue. It's a three million dollar
24 result with a two million dollar attorney's fee. It was
25 taken up to the South Carolina Court of Appeals and

1 Supreme Court and affirmed. So the Court has said this is
2 a good class action. This is something you can sue on and
3 it's been done. And in another case tried and lost, I
4 will mention that, so it's a 50/50 deal right now, but
5 this action that's been undertaken by this dealership is
6 something that we believe violates the Dealer's Act.
7 The -- specifically just to give you a little bit of
8 background, there was a closing fee statute enacted in the
9 year 2000, which basically said you can charge a closing
10 fee, but you got to have four things. You got to apply to
11 the South Carolina Department of Consumer affairs. You
12 got to pay \$10 and you got to post a notice in a
13 conspicuous place in your dealership, not done in this
14 case. And you have to on all the advertised prices of
15 your vehicle, you have to post that you charge a closing
16 fee and what it is, that too was not done in this case.
17 So the underlying case is a very strong case. It's a
18 strong case against this fee.

19 If they can defeat class actions on this, they
20 can continue to charge this fee and not worry about it at
21 all. If we get one or two cases that fall through the
22 cracks, they will gladly pay me to get rid of those. What
23 they're trying to avoid is class actions. What they want
24 to do is continue this activity with no worry about being
25 held accountable for it, that's exactly what this

1 dealership wants to do. This fee by the way is \$699.
2 It's the highest fee that I have seen in the entire state
3 by 100's of dollars. This is an egregious amount that
4 they're charging. The arbitration written agreement the
5 third clause that I referred to is specifically written to
6 avoid class actions. It states you can't bring a class
7 action. And even goes on to state at the bottom, it says
8 if a class -- if a waiver of class action rights is deemed
9 or found to be unenforceable for any reason, and they're
10 referring to the Herron case that counsel was referring to
11 before, in a case in which class action allegations have
12 been made, the remainder of this arbitration agreement
13 shall be unenforceable. In other words, they're trying to
14 defeat the liberal federal policy under the Federal
15 Arbitration Act. They're saying look we want arbitration,
16 but if the Court or an arbitrator or anybody finds that we
17 can't waive class actions, that the consumer can't waive
18 them. We don't want it any more because we don't want the
19 arbitrator certifying a class because there's no appeal.
20 And we definitely don't want to be in a situation where
21 there's no appeal. So they want their cake and they want
22 to eat it too in this case.

23 Going back to the Herron case real quickly. The
24 South Carolina Supreme Court found and Herron won. All
25 this is in the brief found in Herron one that the class

1 action waiver was not valid because it violated the public
2 policy of the State of South Carolina because the Dealer's
3 Act is one of the few statutes we have in the state that
4 have its own class action provision built into it. It's
5 so important in the Dealer's Act to be able to sue dealers
6 in a class that that provision they don't rely on Rule 23.
7 They put it right in the act. So based on that our
8 Supreme Court has said because of that that shows a strong
9 public policy in favor of the class actions. The lawyers
10 in that case did not argue pre-emption of the FAA, went up
11 too on appeal.

12 In the meantime, the Concepcion case was heard
13 and decided -- the Supreme Court sent it back and said,
14 hey, revisit this issue based Concepcion by what we say.
15 And Herron two like I don't know months later the South
16 Carolina Supreme Court said it doesn't matter we rule the
17 same way, because as lawyers in the other case didn't
18 argue pre-emption, which leaves the door open for what
19 would happen if in fact pre-emption were argued which is
20 this case and that's the case you have before you. So you
21 see where we're going with this. Anyway the -- I believe
22 the huge distinction if you read all the Supreme Court
23 cases, if you read our Supreme Court cases, the huge
24 distinction in this is number one we're seeking
25 arbitration. We're not trying to avoid it. And number

1 two there is a public policy stated by our Supreme Court
2 in favor of class arbitrations under the Dealer's Act.
3 And the only cause of action, I brought only one cause of
4 action is under the Dealer's Act. It's a single cause of
5 action. There's nothing else in it. So you got our work
6 cut out for you. I apologize for laying all this on you,
7 but that's pretty much our case.

8 THE COURT: Okay.

9 MS. SPRUILL: Your Honor, it's not as
10 complicated as he made it sound.

11 THE COURT: I'm curious as the -- why your
12 client drafts this document and then says it's not worth
13 the paper it's written on?

14 MS. SPRUILL: Now, that I don't know.

15 THE COURT: You represent them.

16 MS. SPRUILL: I know, I know, but I suspect
17 what they have is a series of forms that didn't get
18 updated as the law, but I don't know that. And I don't
19 want to talk out of turn.

20 THE COURT: Sure.

21 MS. SPRUILL: But a couple of things I want to
22 address as an initial matter under the Rent-A-Center case
23 from U.S. Supreme Court when you see that delegation
24 clause everybody's conceding arbitration is appropriate.
25 I believe he's conceded triple A's appropriate.

1 Arbitrator takes care of the rest. But to go a step past
2 that because I'm so closely tied up with it. When you
3 look at that Freeman case, he was talking about -- and you
4 looking at the lawyer who represented the dealership,
5 that's me. I'm going to raise a couple of distinctions
6 between that case and this one. There was no arbitration
7 clause and there was no class waiver. In addition, Mr.
8 Connor failed to mention to you that the closing fee statute
9 has since been amended to close this loophole. Mr. Connor
10 also failed to mention that the Dealer Act is derived from
11 the old Federal Dealer Day and Court Act and it long
12 predates South Carolina's enactment of Rule 23. There
13 were lots of class action provisions in the South Carolina
14 code that predated Rule 23. This was one of them. This
15 is not some kind of fundamental right.

16 In addition, those dealer cases Freeman was one
17 of hundreds. They were all assigned to Judge Early. Judge
18 Early after Herron two issued an order in the Carol vs.
19 Toyota of Greenville case that denied most of the
20 arguments Mr. Connor has presented here this morning and
21 found action was properly submitted to arbitration and
22 that the class waiver was appropriate.

23 One last point I would raise is if for some
24 reason the Court wants to get into the merits of
25 arbitribility, there are two factors that you need to

1 consider. The South Carolina Act and I apologize I don't
2 have the whole arbitration code with me. I think it's the
3 next section. I think it's section 20. You have to meet
4 the requirements of section ten to invoke arbitration
5 under section 20. So I believe Mr. Connor's argument is
6 going to be proven and correct. I don't think there is a
7 distinction based on who's pursuing the arbitration as to
8 the mandatory nature of the notice provision in invoking
9 the South Carolina Act.

10 But in addition under the Federal Arbitration
11 Act the Fourth Circuit has very recently held in no
12 uncertain terms that -- and the case is Dell Webb. That
13 in order to have a class arbitration, you have to have
14 agreed to class arbitration. It's sort of the converse of
15 what Mr. Connor's arguing. Instead they say you have to
16 have some intent to have done it and here when you look at
17 this agreement, it is very clear that this purchase order
18 is only intended to bind these parties. So if for some
19 reason the Court wants to get into arbitribility, I would
20 tell you under the FAA and Fourth Circuit precedent Dell
21 Webb is going to compel that it be bilateral arbitration
22 rather than class arbitration.

23 If Your Honor's interested, I have a very recent
24 order from Judge John on that point. Mr. Connor is
25 counsel. He has already appealed it. We don't know the

1 answer, but I am happy to pass that up as well. That case
2 is a little different. It didn't have the arbitration
3 waiver. It didn't have the class waiver in the
4 arbitration provision and it didn't have a delegation
5 clause. So Judge John needed to go there. I still take
6 the position that Your Honor doesn't, so that's what we
7 would argue. Unless, the Court has questions, I will take
8 my seat.

9 THE COURT: Okay. All right.

10 MR. CONNOR: Your Honor, since we both had
11 motions may I reply to her motion?

12 THE COURT: Sure.

13 MR. CONNOR: Thank you, Your Honor. Just a
14 couple of things. She said that the closing fee statute
15 has recently been amended and closes this loophole. I
16 would respectfully disagree. The closing fee statute was
17 amended in response to all these class actions. We were
18 all concerned that they were going to take away the class
19 action provision of the Dealer's Act, that was not done,
20 which is really the only thing that concern me about that
21 change.

22 The change in the law was basically to say to
23 the dealers look we're going to presume some validity to
24 the number of \$229. If you charge a closing fee of \$229,
25 we're going to presume that you have administrative fees

1 that will back that up that would allow you to charge
2 that. If you want more than \$229, you go apply to the
3 South Carolina Department of Consumer Affairs for a
4 greater number. And experience has shown that the South
5 Carolina Department of Consumer Affairs routinely grants
6 any number. I mean, they granted \$699 for Pete's sake
7 with no proof behind it that I can tell, so that's the
8 material change that I'm aware of in the statute. You
9 still have to file with the consumer affairs. You still
10 have to pay \$10. You still have conspicuous notice and
11 still has to be on the advertise price. So I don't think
12 it close any loophole for this case. I think it's also
13 irrelevant because it was enacted about the same time this
14 case was filed. And there's a four-year statute of
15 limitations, so that case goes back four years to the time
16 it was filed. Certainly, the statute didn't apply there.
17 I know they're going to make the argument it does, but
18 they argued that in the legislation until they were blue
19 in the face. They wanted a clause in there to make it
20 retroactive and they didn't get it. So they going to
21 argue it and that's what she say is closing the loophole,
22 but it's not in the statute, so there is no loophole
23 close.

24 Then she mentions Dell Webb. And I was
25 wondering if they were going to argue Dell Webb because

1 it's a two-edge sword. Dell Webb in the Fourth Circuit is
2 a decision from 2016, which basically clarifies for the
3 Fourth Circuit and the Supreme Court hasn't taken this
4 issue yet. It's really up in the air whether the Court
5 determines whether a matter can be arbitrated as a class
6 or whether that's sent to the arbitrator. Dell Webb said
7 unless it's clearly set out in the arbitration agreement,
8 the Court is the gatekeeper to arbitration and the Court's
9 going to make that decision. So in this case the third
10 clause does have a provision that says the arbitrator's
11 going to have to sign it, but if the third clause is
12 invalid, that decision's out the window. So at this point
13 sitting before you today, neither one of us really know
14 how to argue that. I don't -- if you declare the third
15 clause is out the window, one of us may come back and seek
16 a motion too for the Court to determine whether we can
17 proceed in a class form in arbitration or we may gamble
18 that the arbitrator may do it, but that's not technically
19 before you today. Nobody's argued it. It's not in any
20 briefs. So I agree with counsel that that's not one of
21 the things you have to decide today.

22 THE COURT: Well, let me get your thoughts on

23 ---

24 MS. SPRUILL: Yes, Your Honor.

25 THE COURT: If your position is that this

1 doesn't meet the notice requirement, then I'm assuming you
2 taken the same position on the third arbitration that it
3 doesn't meet it either?

4 MS. SPRUILL: It's certainly a valid agreement
5 under the Federal Act. When you look at Zabinsky, it's
6 very clear just because you fail under South Carolina Act
7 doesn't mean you don't have an agreement to arbitrate.
8 You look then to the Federal Arbitration Act, that's my
9 whole argument, Your Honor.

10 THE COURT: Okay.

11 MS. SPRUILL: All of this is valid under the FAA
12 and that third -- that arbitration agreement has a clear
13 delegation clause which says the arbitrators figure
14 everything else out.

15 THE COURT: All right. Well, thank you for the
16 homework. I appreciate it.

17 MR. CONNOR: Sorry about that, Judge.

18 THE COURT: No, that's fine. But I will take
19 this under advisement and review anything that you
20 submitted.

21 MR. CONNOR: Thank you.

22 MS. SPRUILL: Thank you, Your Honor.

23 END OF REQUESTED TRANSCRIPT

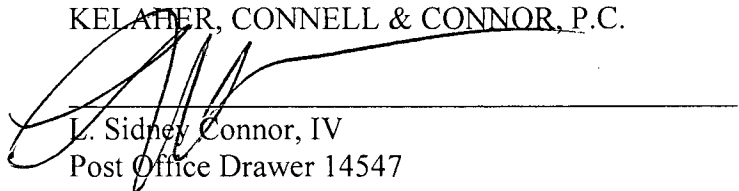
24

25

CERTIFICATE OF COUNSEL

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

KELAMER, CONNELL & CONNOR, P.C.



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

February 14, 2018

RECEIVED

FEB 16 2018

SC Court of Appeals