THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2016-CP-10-4112

Appellate Case No. 2017-001216

Jane Doe, an adult woman over the age of 18,

Respondent,

v.

TCSC, LLC, d/b/a Hendrick Toyota of North Charleston,

Appellant.

INITIAL REPLY BRIEF OF APPELLANT

YOUNG CLEMENT RIVERS, LLP
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While believing, most respectfully, that the merit of its appeal is already adequately demonstrated in its principal brief, in further support of its position, Hendrick makes the following point in reply to Doe:

ARGUMENT IN REPLY

1. The Arbitration Agreement was not properly found to be void *ab initio*; a contract to arbitrate did exist—and the circuit court erred in ruling otherwise.

In her counterargument to Argument I.A. in Hendrick's principal brief, Doe does not dispute the point that the Arbitration Agreement, by its plain terms, clearly and unmistakably provides that the threshold question of arbitrability is itself to be decided in arbitration, not in court; rather, Doe maintains that Hendrick's argument is trumped by "the more basic question of whether an enforceable contract even existed." (Doe Br. p. 11 ("Although *the Arbitration Agreement does state that it applies to 'the interpretation and scope' of itself*, it does not follow from that phrase that it also applies to the more basic question of whether an enforceable contract even existed.") (emphasis added); *see also id.* at p. 9 ("The inherent flaw with [Hendrick's] argument is that if there is no contract between the parties under general contract principles governing the formation of contracts, then the Arbitration Agreement cannot control the parties.").) And, of course, Doe contends the circuit court properly found the Arbitration Agreement

void *ab initio*, i.e., that no contract to arbitrate even existed. (*See generally* Doe Br. pp. 8-12.) Respectfully, Doe, like the circuit court, is incorrect.

To compel arbitration under the FAA, the moving party must show "(1) the existence of a dispute between the parties, (2) *a written agreement that includes an arbitration provision which purports to cover the dispute*, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the [other party] to arbitrate the dispute." *Whiteside v. Teltech Corp.*, 940 F.2d 99, 102 (4th Cir. 1991) (emphasis added). Here, our focus is on (2)—there never being any question as to whether Hendrick made the showing required by the other three.

In the proceedings below, Doe conceded that the Arbitration Agreement was genuine, that it was presented to her in conjunction with her 2011 car purchase from Hendrick, that she had the opportunity to read it before she signed it, and that she did in fact sign it. (*See generally* Aff. of Jane Doe.) And besides what Doe admitted, there is also what she did not argue: Never was it suggested that Doe's signature on the Arbitration Agreement was obtained via fraud, duress, or undue influence; nor was any question raised as to whether Doe had the capacity to contract or in any way lacked the ability to read and understand the Arbitration Agreement she voluntarily signed. Accordingly, Doe's signature on the Arbitration Agreement is not without legal consequence. *See Regions Bank v.*

Schmauch, 354 S.C. 648, 663-64, 582 S.E.2d 432, 440 (Ct. App. 2003) ("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.") (internal citations omitted).

Having properly moved to compel arbitration pursuant to the FAA, its motion based on a written agreement to arbitrate (i.e., the Arbitration Agreement) that, by Doe's own admission, was voluntarily executed and that is not only broad in scope[1] but also clear and unmistakable in providing that any questions of its "interpretation and scope . . . and [of] the arbitrability of any claim or dispute" are to be decided in arbitration, not in court, Hendrick duly demonstrated (2) above,

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[1] Regarding its scope, the pertinent language of the Arbitration Agreement begins, "*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) . . ." and thereafter employs expansive phrases like "which *arise out of or relates to*" and "*or any resulting transaction or relationship*." (Arbitration Agreement [in the record both as Exhibit A to Def's Mot. to Compel Arbitration and as an attachment to Aff. of Jane Doe] (emphasis added).) "Courts typically characterize arbitration agreements purporting to govern disputes 'arising out of or related to' the underlying contract between the parties as 'broad' arbitration clauses encompassing a wide range of issues." *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 n.2 (2007).

i.e., that "a written agreement that includes an arbitration provision which purports to cover the dispute a written agreement that includes an arbitration provision which purports to cover the dispute." *Whiteside*, 940 F.2d at 102 (4th Cir. 1991). Any further "question of arbitrability" should be decided in arbitration, not in court.

Essentially, Doe's premise is that, because she claimed the Arbitration Agreement is unenforceable, she effectively headed off Hendrick's argument at the pass, as it were, preventing operation of the Arbitration Agreement's clear and unmistakable language providing for arbitration of even the threshold question of arbitrability. But this is not so.

As explained in Hendrick's principal brief, while it is true that the *general* rule is that the gateway "question of arbitrability" is an issue for judicial determination, that rule is *inapplicable* where, as here, "the parties clearly and unmistakably provide otherwise." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)). And as the *Howsam* Court explained, "a gateway dispute *about whether the parties are bound by a given arbitration clause* raises a 'question of arbitrability' . . . ." 537 U.S. at 84 (emphasis added). Thus, Doe's premise is debunked: Even where there is a dispute about whether the parties are bound by a given arbitration clause to begin with, such a dispute is not necessarily for a court

to decide and, in fact, must be decided in arbitration, not in court, where the subject arbitration agreement clearly and unmistakably so provides, as the Arbitration Agreement does here.

The United States Supreme Court has already made clear that, because arbitration clauses are severable from the contracts in which they are contained, "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Buckeye Check Cashing, Inc., v. Cardegna*, 546 U.S. 440, 449 (2006). Conceptually, the instant case is analogous. In light of the clear and unmistakable language here providing for arbitration of the question of arbitrability itself, it is as if there is a severable arbitration clause embedded within the Arbitration Agreement.

And this result is all the more compelling when one considers that what Doe—and, following Doe's lead, the circuit court—frames as matters of contract formation are, in fact, matters of contract interpretation. None of these—not the supposed applicability of the Outrageous Torts Exceptions, not the supposed lack of a meeting of the minds, not the supposed unconscionability, not the supposedly separate and distinct nature of the events underlying the instant dispute—can be analyzed without getting into a question of the "interpretation and scope of th[e] Arbitration Agreement" and/or "the arbitrability of the claim or dispute." In other words, to borrow from constitutional law parlance, Doe's challenge to the

Arbitration Agreement is not at all "facial," it is purely "as applied." Doe's argument is not really that the Arbitration Agreement could not apply to any dispute, just that it does not apply to this one. The clear and unmistakable language of the Arbitration Agreement, however, says that this question, i.e., whether the Arbitration Agreement covers this dispute, is to be determined in arbitration, not in court, and the circuit court erred in ruling otherwise.

CONCLUSION

For the foregoing reasons, along with, of course, those set forth in its principal brief, Hendrick asks this Honorable Court to reverse the circuit court and stay this lawsuit in favor of arbitration, or remand the case to the circuit court with instructions for it to do so.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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Dated: 3/5/18

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Appellant, TCSC, LLC, d/b/a Hendrick Toyota of North Charleston, hereby certify that the **INITIAL BRIEF OF APPELLANT** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on March 5, 2018, properly posted for delivery to the following addressees:

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March 5, 2018

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Re: Jane Doe vs. TCSC, LLC d/b/a Hendrick Toyota of North Charleston
Appellate Case No. 2017-001216
Case No.: 2016-CP-10-4112
Claim No.: 30166435427-0001 / BHSI - LI609011506
Date of Loss: 1/19/2016
YCR File: 11176-20160726

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of the Initial Reply Brief of Appellant and the original and one (1) copy of the Proof of Service of same. Please file the originals and return a court-stamped copy of each to me in the enclosed envelope.

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Kathleen B. Barnes
Secretary

Enclosures
cc: Mark A. Mason, Esquire, The Mason Law Firm, P.A.
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